Working Paper
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FOREIGN LAW IN INDIA: ACCESS AND PROOF

1. The object of this brief paper is to capture perspectives from India, one of the Hague Conference on Private International Law's youngest Members,[1] on access and proof of foreign law in the Indian national context and to supplement international monitoring efforts on this topic.[2] After analyzing the treatment of foreign law in India in Part I, I examine in Part II Indian stakeholders' experiences in accessing foreign law and analyze their suggestions on facilitating access to foreign law, on the basis of a Survey[3] of 49 stakeholders. In Part III, I touch upon Indian stakeholders' opinions on facilitating access to Indian law from abroad. Finally, views of Indian stakeholders on the Hague Conference proposals for possible multilateral cooperation mechanisms in this area can be found summarized below, at paragraphs 55 and 56.

I. TREATMENT OF FOREIGN LAW IN INDIA

A. FOREIGN LAW – FACT OF A PECULIAR KIND

2. In line with the dominant common law tradition, Indian courts treat foreign laws as facts[4]—facts of a peculiar kind.[5] What a foreign law is on a particular point, in general, has to be proved by the parties who argue it.[6] The Indian Civil Procedure Code[7] expects every pleading to contain a concise statement of the material facts relied upon by a party, excluding, however, evidence of the law of which a court would take judicial notice. The rule against pleading law is restricted only to that law which an Indian court is bound to take judicial notice under Section 57 of the Indian Evidence Act (**Evidence Act**), which includes, *inter alia*, all laws in force in the territory of India, all Public Acts passed by the

[1] India became a Member of the Hague Conference on 13 March 2008.
[2] At the 2011 (April 5-7) meeting of the Council on General Affairs and Policy of the Hague Conference, the Council invited the Permanent Bureau to "continue monitoring developments" in this area. The agenda item of "Accessing the content of foreign law and the need for the development of a global instrument in this area" will be re-visited at the 2012 meeting of the Hague Conference Council.
[3] See Annex-I for a copy of this Survey.
[4] *Khatubai v. Mahomed Haji Abu,* AIR 1917 Bom 165; *Hari Shankar Jain v. Sonia Gandhi* [**Hari Shankar Jain**] AIR 2001 SC 3689; *Technip S.A. v. SMS Holdings (Pvt.) Ltd. & Ors.* [**Technip**] (2005) 5 SCC 465.
[5] *Khoday Gangadara Sah v. A. Swaminadha Mudali and Ors.* AIR 1926 Mad 218 [**Khoday**]; *Prakasho v. Singh* 1968 Probate Division LR 250.
[6] Khoday*, Ibid.*
[7] Code of Civil Procedure,1908, O. VI r. 2.

Parliament of United Kingdom and all local and personal Acts directed by the Parliament of the United Kingdom to be judicially noticed.[8] An Indian court under Section 57 cannot take judicial notice of other foreign law. Foreign law should be pleaded like any other fact, if a party wishes to rely on it.

B. PROOF OF FOREIGN LAW IN AN INDIAN COURT

3. Under Indian procedural law, when facts are admitted, they need not be proved[9] and foreign law is no exception to this rule. These admissions could be facts which the parties or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit in writing or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings. However, an Indian court may use its discretion and require foreign law to be proved otherwise notwithstanding such admissions.[10]

4. In all other cases, the burden of proving foreign law to the satisfaction of the court is on the party asserting it.[11] If no evidence is adduced on what the foreign law is, the presumption normally is that it is the same as the Indian law on the point under consideration.[12]

5. The mode of ascertaining foreign law may pose considerable difficulty as lawyers and judges in India would not, ordinarily, be conversant with it. It may be written in a different language, and may embody concepts and notions wholly different from those with which they are familiar.[13]

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[8] The peculiar treatment of the laws of the United Kingdom is dealt with at paragraph 16 of this paper.
[9] Under Section 58, Evidence Act, "No fact need be proved in any proceeding, which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings...." Admission under Section 58 could be express or implied and is not confined to deemed admissions.
[10] Proviso to Section 58, Evidence Act reads: "Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admission."
[11] Evidence Act, s. 103.
[12] *Raghunathji Mulchand v.Varjiwandas Madanjee* (1906)8 Bom LR. 525; *The Parchim*, 1918 AC 157; *Madanlal Sohanlal v. Bhagwandas Agarwalla,* MANU/WB/0304/1971; *Jugolinija Rajia Jugoslavija and Anr. v. Fab Leathers Limited and Anr.* AIR 1985 Cal 193; *Malaysian International Trading Corpn. v. Mega Safe Deposit Vaults (P.) Ltd.* 2006(3) BomCR109; *Great Pacific Navigation (Holdings) Corporation Limited v. M.V. Tongli Yantai, (and her owners and all Ors. persons)* [Notice of Motion No. 196 of 2011 in Admiralty Suit No. 3 of 2011, decided on: July 12, 2011].
[13] Atul M Setalvad, *Conflict of Laws*, Lexis Nexis Butterworths, 2007, p. 89.

ASCERTAINING FOREIGN LAW FROM LAW BOOKS, CASE REPORTS

6. Under Section 38 of the Evidence Act, a foreign statute or case law contained in a book issued under the authority of a foreign government are relevant for the courts to form an opinion of the law of any country.[14] In forming an opinion as to a law of any country, any statement of such law contained in books of that country purporting to be printed or published under the authority of the government of such country or any report of a ruling of foreign courts in a book purporting to be a report of such rulings is relevant.[15] The presumption is that of genuineness of every such book or report.[16]

7. Documents which form acts or records of the acts of public officers, legislative, judicial or executive, of Commonwealth countries or of a foreign country, are given the status of "public documents".[17] Certified copies of such documents may be produced to prove their contents.[18] Acts of the executive governmental branch or the proceedings of the legislature of a foreign country are proved by journals published under their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by recognition of the same in some central Act.[19] Public documents of any other class, such as case law, are proved by production of originals or by a copy certified by its legal keeper, with a certificate under the seal of a notary public, or of an Indian consul or diplomatic agent, that the copy is duly certified by the officer having legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.[20] A rebuttable presumption[21] that such a certified copy is genuine and accurate applies if the document is also certified by the representative of the central government in or for that country that

[14] *Commissioner of Income Tax, Punjab, Jammu and Kashmir and Himachal Pradesh v. R.B. Jodhamal Kuthiala,* [1968] 69 ITR 598(Delhi).
[15] Evidence Act, s. 38.
[16] Evidence Act, s. 84.
[17] Evidence Act, s. 74(1)(iii). The mode of proof of "public documents" and "private documents" differs in India, as in most other countries. Normally, certified copies are produced to prove public documents (with limited exceptions carved out in the Indian Evidence Act) and production of originals is dispensed with. With private documents such as contracts, letters etc., originals are required to be produced (subject, of course, to certain exceptions).
[18] Evidence Act, ss. 76 and 77.
[19] Evidence Act, s. 78(4).
[20] Evidence Act, s. 78(6).
[21] Evidence Act, s. 86.

the manner in which it has been certified is commonly in use in that country for such certification.

8. For example, when a certified copy of the Burma Gazette Extraordinary, attested as a true copy by a seal of the Assistant Judge's Court, Moulmein, was produced before the High Court of Rajasthan to prove the Burma Accrual of Interest (War Time Adjustment) Act, 1947,[22] the Court considering Sections 38 and 45 of the Evidence Act rejected the same on the ground that the party had not produced any satisfactory proof of what the relevant law was in Burma in a manner approved by the Evidence Act. In *P.L.S. Firm through its partner P.L.S. Lakshmanan Chetti v. M.R.M.S. Sulaiman*,[23] the Madras High Court was of the opinion that the law laid down in the Ceylon Civil Procedure Code was of a particularly elaborate nature. The Court felt duty-bound to interpret that Code as best as it could and declined to entertain any outside opinion (however eminent), as to the interpretation of that Code. The Court noted that it should not be expected to and normally does not consider or rely on expert opinion when it can decipher the foreign law on the interpretation of the foreign statute itself.

9. In contrast, the Division Bench of the Calcutta High Court in *Kumar Jagadish Chandra Sinha v. Commissioner of Income Tax, West Bengal* [24] observed that a publication containing foreign statute or case law cannot be evidence of the "whole law". What the whole law of a foreign country is at a particular point of time cannot, therefore, be proved except by calling an expert, as provided for in Section 45 of the Evidence Act. The Court in this case observed that an official version of the Pakistan Income Tax Act which was the relevant foreign law involved in that case, may, for example, establish that on the date the edition was published, the Act, as set out, was in force in Pakistan, but it will not show whether the Act had been subsequently amended or if it had been in force in the same form on a previous date or that there are no other laws which have modified the Act in its application to certain circumstances or have excluded its operation during a particular period or in respect of certain matters.

[22] *Ramanlal and Anr. v. Ram Gopal,* AIR1954 Raj 135.
[23] AIR 1930 Mad 140.
[24] AIR 1956 Cal 48, [1955] 28 ITR 732(Cal).

10. In cases such as *Mundipharma AG v. Wockhardt Ltd.*[25], even when the law is codified and expert opinion is not strictly necessary, courts have insisted on the opinion of an expert to understand the interpretation of that foreign law in the courts of that country. This leads us to the other and commonly used mode of proof of foreign law – expert opinion or expert evidence.

ASCERTAINING FOREIGN LAW FROM EXPERT OPINION

11. Opinions of experts on foreign law are admitted under Section 45 of the Evidence Act.[26] When a court has to form an opinion upon a point of foreign law, the opinions of persons especially skilled in such foreign law are relevant facts[27] and facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinion of experts.[28]

12. An expert must submit an affidavit, indicating his or her qualification and experience.[29] Such affidavit must state if the law on the subject is codified and must also refer to judicial precedents in support of his or her views. The opinion of the expert must be clear and cogent. Courts have observed[30] that it would be unfeasible to prove foreign law exclusively through affidavits. The opinion of an expert on the subject is normally tested by cross-examination. In *Technip*,[31] which involved application of French commercial law, the Supreme Court did not rely on views expressed by any of the foreign experts on the ground that they were not cross-examined, but rather referred to an admitted text on French law and material on record to decide the proper application of French law.

13. Where an expert states his or her opinion based upon his or her knowledge and practical experience of foreign law, he or she may even refer to foreign courts' decisions or foreign treatises for refreshing his or her memory but in such an

[25] ILR 1991 Delhi 606.
[26] *Aziz Banu v. Muhammad Ibrahim Husain,* (1925) 12 AIR All 720; *Mosque known as Masjid Shahid Ganj and Ors. v. Shiromani Gurdwara Parbandhak Committee and Anr.* AIR 1940 PC 116.
[27] Evidence Act, s.45.
[28] Evidence Act, s.46.
[29] *Supra* note 26.
[30] *Shin Etsu Chemical Co Ltd. v. Aksh Optifibre*, AIR 2005 SC 3766.
[31] *Supra* note 3.

event, the court is at liberty to examine the law, decision or passage in question in order to arrive at its correct meaning.[32]

C. PRIMA FACIE PROOF OF FOREIGN LAW

14. It is a well-recognized rule in jurisprudence that there is a difference in the standard of proof required in establishing foreign law at a hearing for interim relief and at the stage of a final hearing. Even when a question of mere *prima facie* proof of foreign law arises at an interim stage of proceedings and only an affidavit is to be relied upon, Indian courts require that this affidavit be complete in all respects.[33] In *Hari Shankar Jain*,[34] the Supreme Court asked the appellants if they could show the Court *"*any book, authority or publication based whereon we could form an opinion, even *prima facie*, in support of the averments relating to Italian law made in the election petitions*"* [emphasis added]. This indicates in some way that Indian courts could rely on foreign publications, books and authorities (which may not be published under the authority of the government of that country) to form a *prima facie* opinion of the law of a foreign country.

D. HOW DIFFICULTIES IN PROOF OF FOREIGN LAW HAVE INFLUENCED STATUTE INTERPRETATION

15. In *Shin Etsu Chemical Co Ltd. v. Aksh Optifibre*[35], the Supreme Court, in interpreting Section 45 of the (Indian) Arbitration and Conciliation Act, 1996, considered whether under Section 45, the court ought to take a *prima facie* or a conclusive view of the existence of an arbitration agreement. The court observed that the difficulty of having to conclusively prove the applicable foreign law at trial would be obviated by taking a view that only a *prima facie* determination is to be made under Section 45. The difficulty in proof of foreign law was not only acknowledged in this case, but was one of the factors which influenced the interpretation of a statute.

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[32] *Commissioner of Income Tax v. R.B. Jodhamal Kuthiala*, [1968] 69 I.T.R. 598 (Delhi); *Commissioner of Income-tax v. Clive Insurance Co. Ltd.* [1972] 85 ITR 531 (Cal).
[33] *Supra* note 26.
[34] *Supra* note 3.
[35] AIR 2005 SC 3766.

E. PECULIAR TREATMENT OF LAWS OF THE UNITED KINGDOM

16. Once the colonial cord was cut on 15 August 1947, laws of the United Kingdom are as alien (or are considered to be so) to Indian courts as are laws of any other foreign country. However, Indian courts continue to have the power to take judicial notice of all public Acts passed by the Parliament of United Kingdom and all local and personal Acts directed by Parliament of the United Kingdom and proceedings in the Parliament of United Kingdom.[36] The lack of legislative initiative to amend the Evidence Act could result in discrimination, for example, between an Indian party who contracts under English law and an Indian party who contract under other foreign laws. Since there is no requirement to plead or prove English law as a fact to the extent that Indian courts can take judicial notice of the same, parties invoking English law are placed in a better position than those invoking other foreign laws.[37]

II. ACCESS TO FOREIGN LAW IN INDIA AND FACILITATING ACCESS

A. SURVEY – ITS PURPOSE, PRESUMPTIONS

17. Apart from an analysis of the Indian position on proof of foreign law, I felt that a Survey of Indian stakeholders who access foreign law as a part of their practice or work would be beneficial for the potential development by the Hague Conference of international cooperative mechanisms in this area. The Survey Questionnaire is at Annex-I and a compilation of the Survey results is at Annex-II to this paper.

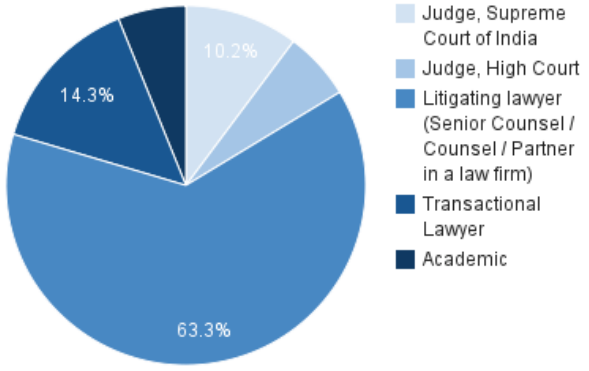
18. The main object of the Survey (designed along the lines of an International Bar Association Arbitration Committee Survey conducted in 2011) was to gather ideas with a view to finding solutions that would in some way facilitate cross-border access to foreign legal information from India and access to Indian law from abroad. Stakeholders were approached and interviewed for the Survey who

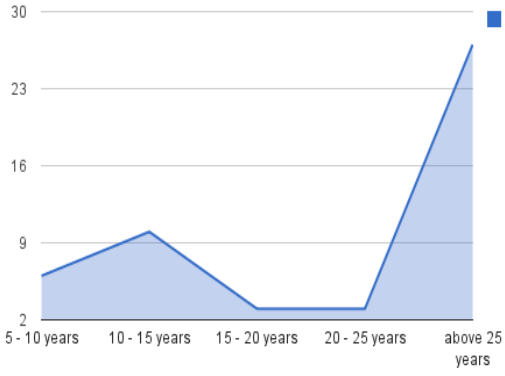
[36] Evidence Act, ss. 56 and 57.
[37] In the author's opinion, this anomaly needs legislative attention. The legislature might consider amending the Evidence Act to permit Indian courts to take judicial notice of laws of countries other than England (which in the author's opinion may not be practical due to a variety of reasons such as the very nature of the Indian judicial system which is mostly adversarial, the difficulty of access of foreign laws and so on) or to delete the reference in the Evidence Act permitting Indian courts to take judicial notice of the laws of United Kingdom.

were presumed to have accessed foreign law as part of their practice or work, given the nature of their work, practice or study.

B. TARGET GROUP

19. Between October 24, 2011 and December 20, 2011, I interviewed 49 Indian stakeholders. The stakeholders included sitting judges of the Supreme Court of India and Bombay High Court; arbitrators who are retired judges from the Supreme Court, Bombay High Court and the Karnataka High Court; litigating lawyers[38] based in New Delhi, Mumbai and Bangalore; transaction lawyers located primarily in New Delhi, Mumbai, Bangalore and in Hyderabad, and a number of academics.





The Survey also assumes that professional experience and ability to provide durable solutions to problems have a high correlation and hence persons with experience of not less than five (5) years were interviewed. 56% of the stakeholders interviewed have more than 25 years of experience and 88% more than 10 years of experience.

C. METHODOLOGY

20. Thirty-three stakeholders (about 65% of the total) were interviewed in person, including all retired and sitting judges and arbitrators. An online Questionnaire

[38] Litigating lawyers include Senior Advocates (equivalent to Queen's Counsel), Counsel or Advocates as well as Solicitors who are partners of law firms.

using Google Docs was also created.[39] 35% of the stakeholders completed the Questionnaire online, with each of whom I had a detailed phone conversation to understand more fully their experiences in accessing foreign law and their suggestions or inputs for facilitating access to foreign law and Indian law.

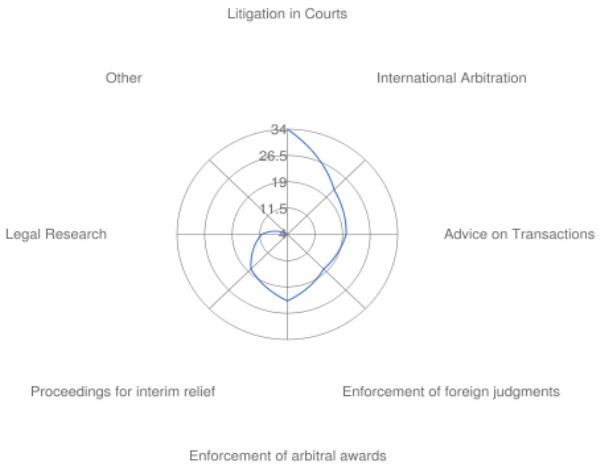
21. The Survey was designed with two objectives in mind – to obtain information and suggestions on: (i) access and facilitating access to foreign law in India; and (ii) access and facilitating access to Indian law from abroad, the results of each of which will be dealt with sequentially.

D. ACCESS TO FOREIGN LAW IN INDIA

22. The phrase 'access to foreign law' was explained to stakeholders as indicating: (i) reliance on foreign law and/or legal information for its legal doctrines and/or propositions and/or principles; (ii) cases involving substantive application of foreign law.

AREAS IN WHICH STAKEHOLDERS DEALT WITH FOREIGN LAW

23. 67% of the stakeholders have accessed foreign law in proceedings in courts and 45% in arbitral proceedings.[40] 41% of the stakeholders have accessed foreign law as a part of their transactional practice. While the Survey was not primarily aimed at academics, I felt that an academic perspective would be helpful. Hence a small percentage (22%) of academics who had accessed foreign law as a part of research were interviewed. Stakeholders have also accessed foreign law in proceedings involving enforcement of arbitral awards (47%), enforcement of judgments (47%) as well as in proceedings for interim

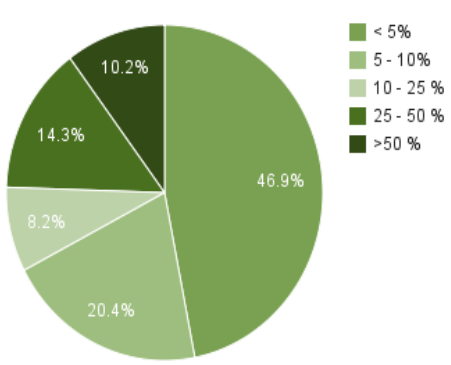


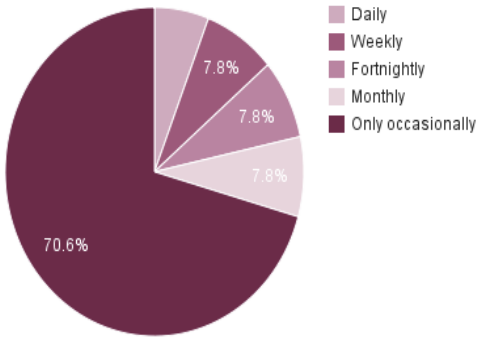
[39] *Supra* note 3. The Online Questionnaire is available at: https://docs.google.com/spreadsheet/viewform?formkey=dGhkMEtPdFlGMkd3QlhYc3RBNVFsUHc6MQ

[40] Since each stakeholder may have accessed foreign law in more areas than one, percentages would not add up to 100.

relief (37%). Four litigating lawyers carved out a separate area, "disputes advisory", that is, matters in which advice on foreign law is sought in relation to imminent disputes, which have not reached arbitration or courts.

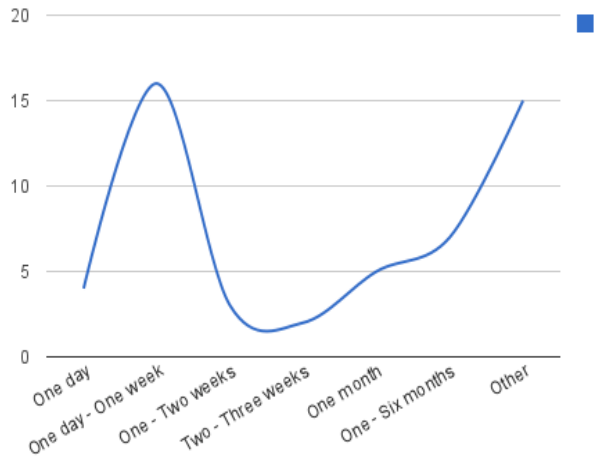
PERCENTAGE OF TRANSNATIONAL LEGAL ISSUES IN PRACTICE:



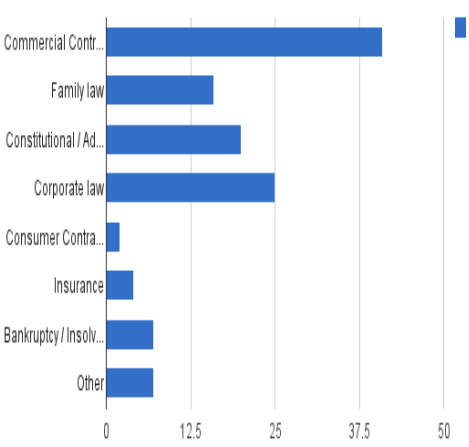


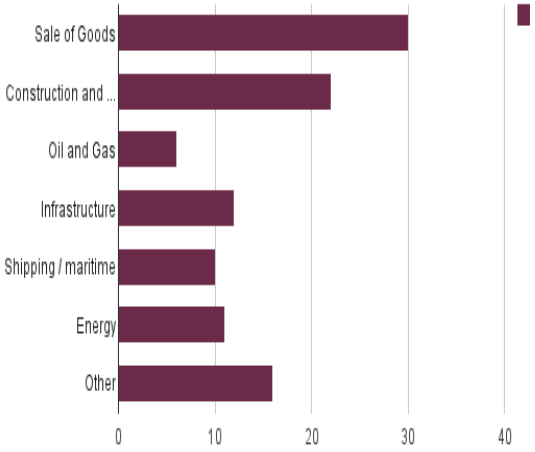
24. Transnational or international legal issues constitute less than 10% of practice for 67.3% of stakeholders and less than 5% of stakeholders' work or practice for approximately 46.9% of stakeholders. For slightly over 10% of stakeholders, foreign law constitutes 50% of their work or practice. Approximately 30% of stakeholders said that they accessed foreign law with a daily to monthly frequency. It was reported that it is most often "only occasionally" that the Indian stakeholders interviewed required an information or input on foreign law.

25. The timeframe within which a stakeholder normally needed information or input on foreign law was between a day to a week. An equal number of stakeholders who checked the option "other" explained during the interviews that normally the time frames for securing access to foreign law are "relaxed".

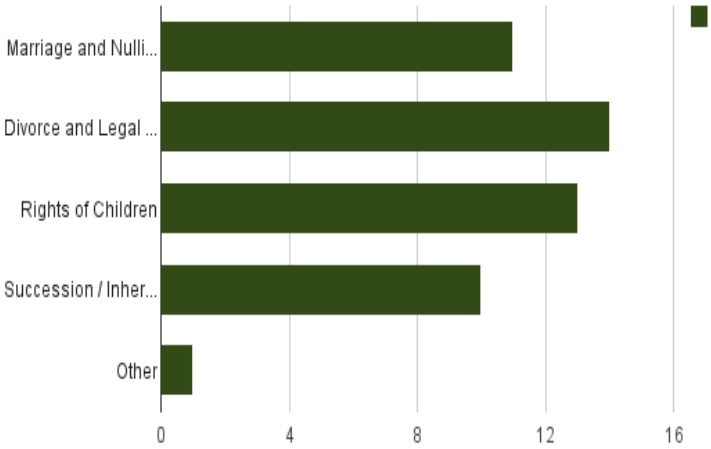


COMMERCIAL LAW - MOST POPULAR AREA OF ACCESS TO FOREIGN LAW





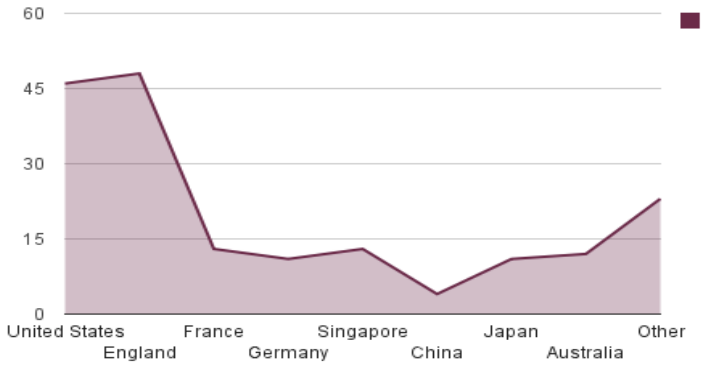
26. Stakeholders interviewed accessed foreign law relating to commercial contracts more frequently than any other area of foreign law. This was followed by access to corporate law, constitutional or administrative law and family law, in that order. Amongst those who have accessed foreign commercial contracts law, law relating to the sale of goods and construction and engineering were the most accessed, followed by other areas such as energy, maritime, infrastructure, oil and gas. Intellectual property laws and banking laws of other countries have also been accessed by stakeholders.



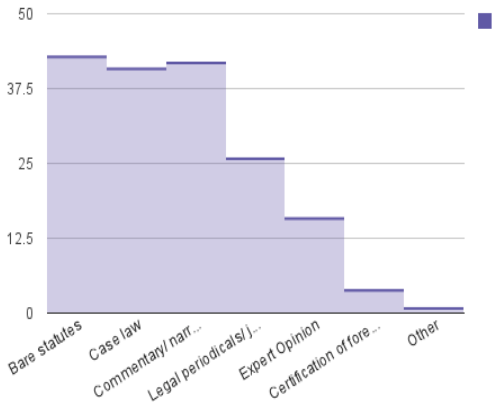
Family law is another area where Indian stakeholders have accessed foreign law, especially laws relating to marriage and nullity of marriages, divorce and legal separations, rights of children, succession and inheritance matters.

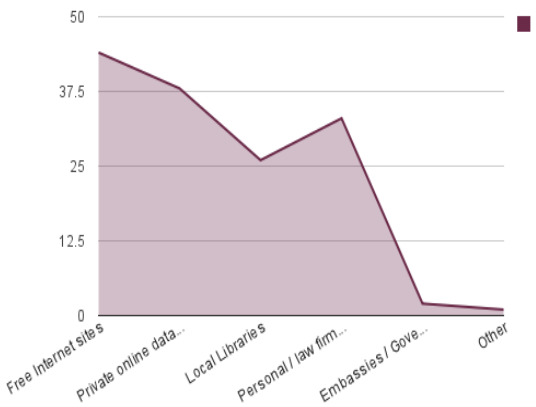
LAWS OF THE UNITED STATES AND OF THE UNITED KINGDOM – MOST FREQUENTLY ACCESSED

27. 98% of stakeholders interviewed had accessed laws of the United Kingdom and 94% the laws of the United States.[41] Laws of civil law countries' such as France or Germany are accessed less frequently than those of common law countries. Most stakeholders expressed the view that the colonial common law background has made it easier to access and opine on English laws compared to those of other foreign countries. Some others highlighted the particular difficulty in accessing and interpreting laws of federal states, especially the United States with its diversity of laws among states.



SOURCES OF FOREIGN LEGAL INFORMATION





28. Stakeholders use a combination of sources to ascertain foreign law and expressed that it was difficult to prioritize or rank them. Hence, ranking of sources was not insisted upon. Copies (or translations) of statutes were accessed by 88% of the stakeholders, copies (or translations) of case law were accessed by more

[41] Since each stakeholder may have accessed laws of more than one country, percentages would not add up to 100.

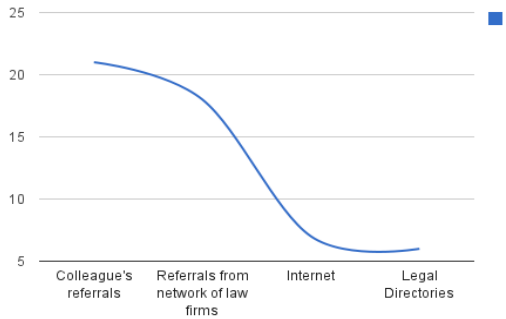
than 84% and commentaries or a narrative description of the law in a particular subject area, including citations to and/ or descriptions of relevant laws, statutes and cases were accessed by more 86% of the stakeholders.[42] Foreign legal periodicals and journals were accessed by 53% of the stakeholders while around 33% of stakeholders had sought expert information or input on foreign law. While none of the stakeholders had sought a certification on the state of the foreign law applied to the facts by the applicable foreign judicial authority, some of the stakeholders (mostly transactional lawyers) informed the author during the interview that they had sought opinions from foreign regulatory authorities. Some stakeholders asked their clients to approach embassies directly to seek input in relation to procedures of a foreign country.

29. Further, free Internet sites (official or government or institutional or academic websites, such as WorldLII for access to legislation or case law, etc.) seem to be the most popular source of foreign law. This was followed by access to private online databases (such as Westlaw, LexisNexis etc.) and access to local libraries or law firms' or the lawyer's personal collection.

30. Several partners (litigation or transactional) of law firms informed me that they normally consult foreign counsel for legal advice rather than completing their own research on the current status of foreign law. This, in their opinion, brought authenticity to the opinion or advice given to their clients.

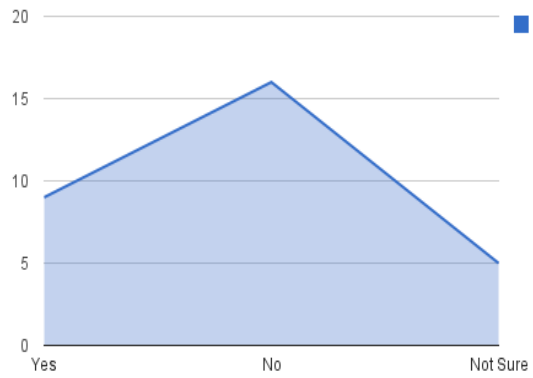
EXPERIENCE WITH FOREIGN EXPERTS

31. Not all stakeholders have had an occasion to lead foreign expert evidence in Indian courts but most have sought an opinion or legal information on foreign law from a foreign legal practitioner or academic. Of the stakeholders who have sought such legal information, 72% of them have located the expert through colleague referrals and 62% through referrals from networks of law firms

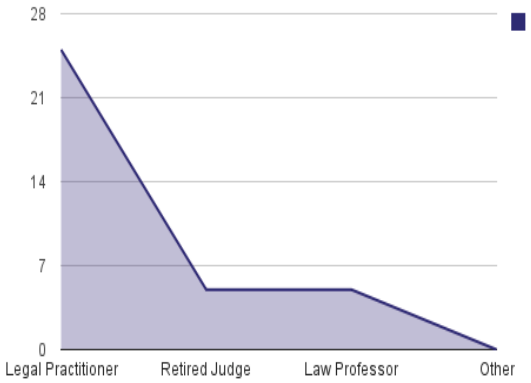


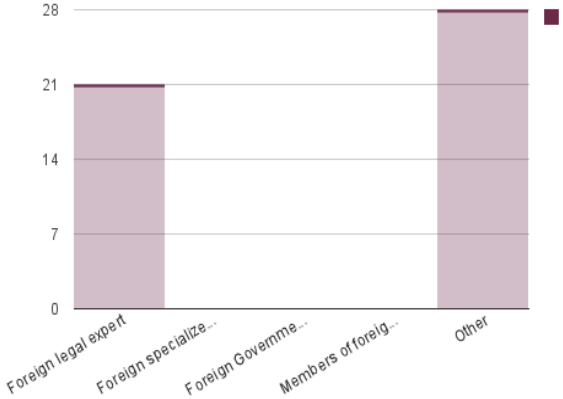
[42] Since each stakeholder may have accessed variety of sources of foreign law, percentages would not add up to 100.

of which they or their firm is a member, or from the law firms they interact with. Very few Indian stakeholders seem to rely on the Internet or legal directories to locate foreign experts.



32. Out of 30 stakeholders who answered the question whether hiring an expert on foreign law was difficult, about half of those interviewed felt it was not. The expense of hiring an expert seemed to be the greatest concern of the stakeholders. Some stakeholders were of the opinion that it was the client's burden to locate a foreign expert and they normally expect the client to locate a foreign expert himself.

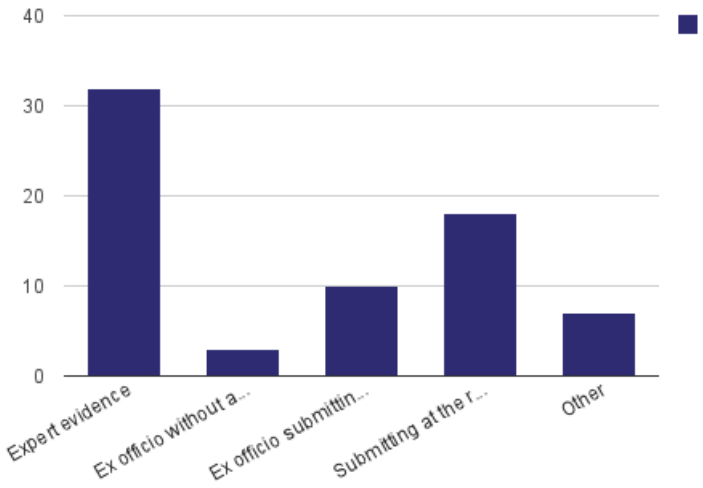




33. Most Indian stakeholders have approached legal experts in foreign countries for specific specialist advice. The most preferred legal experts are legal practitioners such as Queen's Counsel or Senior Advocates or partners of law firms, followed by retired judges and law professors. Some stakeholders expressed that while it is easy to locate top-tier law firms, locating mid-level law firms to cater to a client's financial needs was reported as rather difficult.

BEST PRACTICE INDIAN COURTS SHOULD ADOPT TO ASCERTAIN FOREIGN LAW

34. 65% of the stakeholders supported the existing system in India of, *inter alia* leading expert evidence to ascertain foreign law.[43] The system of leading expert evidence, besides being a widely followed practice, was felt by stakeholders to have inherent advantages, namely that the expert could be cross-examined and suggesting that this method would be less expensive compared to a system of referral of a question of foreign law to a foreign court.



35. However, in scholarship and case law in other jurisdictions,[44] one of the most prominent de-merits noted of expert evidence is that experts are more often than not partisan. If the system of expert evidence is retained, it may be more efficacious if the court appointed a neutral foreign law expert who could then be cross-examined by the parties. Costs of such experts could be borne by the losing party or shared equally between the parties, in consonance with the applicable rules relating to costs.

36. 37% of the stakeholders were in favour of submitting, at the request of a party (or parties), a request for ascertaining the state of the foreign law applied to facts by the applicable foreign judicial authority under a bilateral or multilateral treaty. The stakeholders were informed about such existing arrangements including the Memorandum of Understanding between the New South Wales Supreme Court

[43] Since each stakeholder may have recommended more than one mode of ascertaining foreign law, percentages in this section would not add up to 100.
[44] For example, see the recent United States of America federal court case of *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624 (7th Cir. 2010).

and the Singapore Supreme Court[45] as well as with the Chief Judge of the State of New York[46]. 20% of the stakeholders were not only conceptually in favour of this but felt that such reference could be submitted to the foreign court *ex-officio* and the request of the parties may not be necessary. Bearing in mind the adversarial nature of the Indian legal system which leans heavily on parties to establish foreign law, the majority was not in favour of ascertaining foreign law *ex-officio* without any expert assistance (i.e., by the judge's own research with or without assistance from a specialized institute, university, specialized government department, etc.), but 6% supported this.

37. Stakeholders who supported the initiative of making a reference to a foreign court to ascertain the law felt that this system would increase efficiency, be cost-effective and preempt chances of misapplication of foreign law by obtaining an authoritative judgment or an opinion from the foreign court. One Senior Advocate was in favour of the foreign court giving its 'opinion' (as opposed to a judgment) on the question of law without any arguments before itself to minimize any delay and expenses. Some stakeholders were not in favour of such judgment or opinion of a foreign court being binding on an Indian court, but believed that an Indian court should have an option to reject such judgment or opinion on certain narrow grounds, which could be carved out in the bilateral or multilateral treaty. Another Senior Advocate felt that a reference is inappropriate when a party hails from the same jurisdiction due to apprehension of real or apparent bias. It is the author's suggestion (accepted by several stakeholders) that if India were to enter into such reciprocal arrangements by way of a bilateral or a multilateral treaty (ies), the Supreme Court of India could delegate sitting judge(s) or appoint retired judges of the Supreme Court to answer such questions from a foreign court.

38. Those quite skeptical about the idea of referring the question of law to the foreign court, raised several questions – Which court of the foreign country would the matter be referred to? Would the proceedings before the foreign court be

[45] Available at: http://www.ipc.nsw.gov.au/practice_notes/nswsc_pc.nsf/6a64691105a54031ca256880000c25d7/33cfadb586532d46ca25779e00171f9a?OpenDocument (last accessed: February 9, 2012).
[46] Available at: http://www.ipc.nsw.gov.au/practice_notes/nswsc_pc.nsf/6a64691105a54031ca256880000c25d7/7480f2fa23a0ae8dca2577ff00127763?OpenDocument (last accessed: February 9, 2012).

adversarial in nature? Would the judgment of the foreign court be binding on an Indian court? Would the judgment of the foreign court be binding on its courts in subsequent domestic proceedings? Would it be appropriate to make a reference even in cases where mixed questions of fact and foreign law are involved? When a reference is made to a foreign court, there could be three instances: (i) where foreign authorities are well developed on the question of law referred to; (ii) there is no direct case law or foreign authority on the point of law and/or the authorities are not fully developed and/or when there is a difference of opinion on the question of law between co-ordinate courts of that country; (iii) foreign law is not developed on the question of law. In the first case, the foreign court's role is fairly simple. However, in the latter two scenarios, the foreign court would be deciding without the complete factual conspectus before itself on what it would decide if such a matter were to come up before itself. In such cases, a question would be whether the judgment or opinion of the foreign court is binding only on the parties who sought the judgment or opinion, and not binding on persons other than on parties. If it were the Indian court answering a reference from a foreign court, the question would be whether such judgment or opinion would be the law declared by the Supreme Court under Article 141[47] of the Constitution of India and therefore binding in cases where such question(s) of law may arise in the future? This is of concern since the foreign court or the Indian court, as the case may be, may not have had the benefit of detailed facts before it since it would not be trying the whole *lis* between the parties.

39. Stakeholders who did not support the idea of reference to a foreign court also felt that such arrangements would have to be reciprocal, but dockets of Indian courts are overflowing and it may not be appropriate for Indian courts to be burdened with foreign references at this stage since an Indian court may not be in a position to comply with timelines, if any were fixed under reciprocal arrangements. A parallel apprehension was whether foreign courts would have the time and resources to answer an Indian or another foreign court's reference. The length of the proceedings in a foreign court and the cost factor were two serious concerns expressed. Some stakeholders felt that if the proceedings

[47] Article 141, Constitution of India: *"Law declared by Supreme Court to be binding on all courts The law declared by the Supreme Court shall be binding on all courts within the territory of India."*

before a foreign court are indeed adversarial, costs of hiring an expert may be lesser than reference to a foreign court. Some parties, especially individuals, might not have the necessary resources to access the foreign courts or engage foreign counsel. Some others felt that tossing parties around from one country to another and back is a cumbersome procedure, especially if parties would have to appoint lawyers in foreign courts.

SHOULD LAWYERS FROM ONE COUNTRY BE PERMITTED TO MAKE SUBMISSIONS ON LAW OF THAT COUNTRY IN COURT OF ANOTHER COUNTRY?

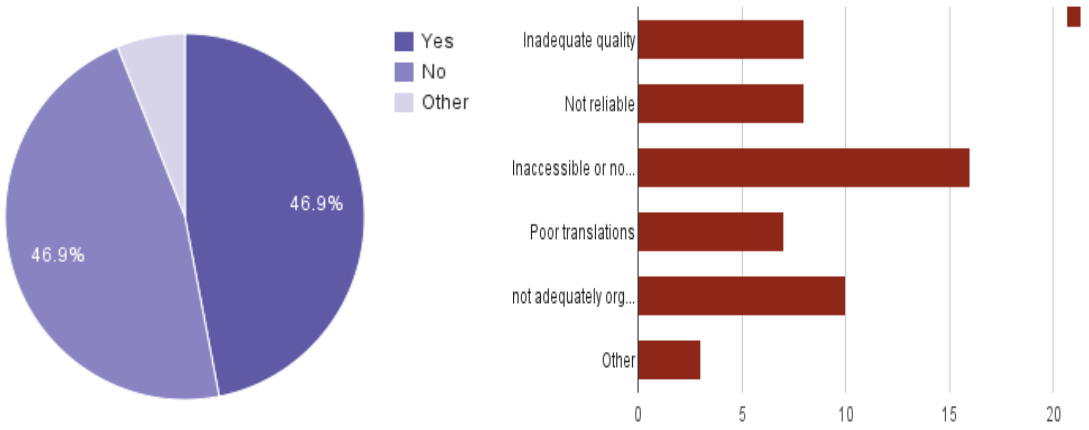
40. A retired judge of the Supreme Court suggested that foreign lawyers be permitted to argue in Indian courts for the limited purpose of assisting Indian courts in matters involving a question of foreign law. This would do away with expert evidence and the rigors of cross-examination. Cumbersome processes of discovery and inspection on what is essentially law of a foreign country, albeit still considered 'peculiar facts,' could be avoided. While several stakeholders endorsed this, several others expressed apprehensions about entry of foreign lawyers or law firms into India, albeit for such limited purposes. In India, this would require an amendment to the Evidence Act and ancillary amendments to other statutes since the treatment of foreign law would have to change, that is, foreign law would have to be treated as a "peculiar law" rather than a "peculiar fact".

41. In the author's opinion, reference of a question of law to the foreign court is in principle a superior approach to ascertain foreign law. However, if such a systemic change is not possible, a more efficacious approach would be to expressly permit judicial research of foreign law[48] with the potential assistance of foreign lawyers (who may be permitted to argue in that country on foreign law)

[48] In the United States, following the enactment of Rule 44.1 of the Federal Rules of Civil Procedure in 1966 and other state procedural reforms in the 1960s, many American courts may now engage in their own research on foreign law and may wish to even consider any relevant material not presented by parties. The Committee Note in 1966, when Rule 44.1 was adopted, explains that a court "may engage in its own research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail." As another example of this approach, in Germany, the task of ascertaining foreign law is that of the court, which it ascertains mostly through independent research.

and/or assistance of parties in the form of submissions of case law, legislation, etc.

SUFFICIENCY OF RESOURCES TO ACCESS FOREIGN LAW



42. Stakeholders' perception of the sufficiency of resources to access foreign law was equally divided with 46.9% of the stakeholders contented with the resources available and 46.9% perceiving otherwise. Only a small percentage (7%) of the stakeholders were either unsure or did not express an opinion on the sufficiency of foreign law resources. A minority of stakeholders felt "access" was not really an issue since most foreign laws or legal information is available online. The practical difficulty is how one can rely or accept a particular version of foreign law as accurate. Of the stakeholders (46.9%) who felt that sufficient resources were not available, accessibility of information was the concern for 70%, followed by 43% of stakeholders unhappy about the lack of adequate organization of foreign legal information. An almost equal number of stakeholders (35%) complained of inadequate quality and non-reliability of information. A significant percentage (30%) complained of poor translations. To address these concerns each stakeholder was asked for ideas on how to facilitate better access to foreign law.

FACILITATING ACCESS TO FOREIGN LAW

43. Most stakeholders during the course of their interview felt that a specific or specialist legal query on foreign law could not be addressed merely by an Indian lawyer trying to grapple with a foreign textbook or commentary or an online resource, but would require individual application, and that an opinion from a

foreign lawyer or an expert would be the best resource. They recommended that Bar Councils or institutions who regulate activities of lawyers in each country (illustratively, the Bar Council of India) could maintain a list of experts on different areas of law.

44. A suggestion that found an almost unanimous approval amongst stakeholders was creating a database of legal resources and restatements of laws of each country. Additionally, the creation of a comprehensive website of laws of each country and how to interpret them. Each country should have an official site of all enactments, notifications etc. which should be constantly updated. Ensuring free availability of bare acts or statutes (including translations where necessary) would facilitate preliminary research before seeking the assistance of a foreign qualified professional, if necessary. The same should be indexed well to ensure easy access. Stakeholders were informed of the World Legal Information Institute (< www.worldlii.org >), a free global search engine, which provides access to the laws of more than 123 jurisdictions. Its Indian counterpart, <www.liiofindia.org>, launched officially in 2011. Stakeholders, while commending this initiative, added that they would only trust government sources or government approved or endorsed sources, which could be directly produced before courts of a foreign country.

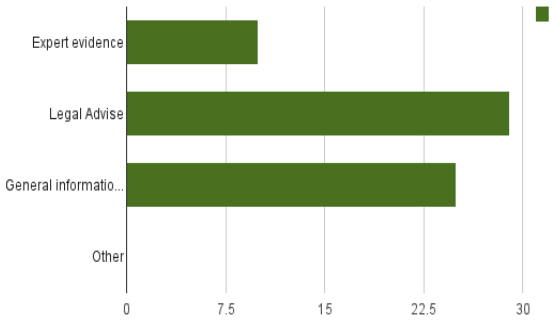
45. Some stakeholders mooted the idea, if feasible, of setting up an international institution, independent or under the auspices of international bodies such as the Hague Conference or United Nations Commission on International Trade Law (UNCITRAL), which would be a repository of legal knowledge.

46. Several stakeholders raised concerns about the expense involved for Indian practitioners and academics in procuring foreign publications, books and online databases and felt access of foreign law could be facilitated if it would be made available at relatively affordable prices. Inter-university library networking for the exchange of journals, websites etc., and faculty exchanges, guest lectures especially from professors of civil law countries would also contribute to facilitating access to foreign law.

47. One stakeholder who is a sitting judge suggested extensive co-operative mechanisms between judiciaries, such as exchanges between members of the judiciaries of different countries. This would not only help understand the laws and mind-sets of judges in different countries, but would also help to clear any misconceptions about the laws of other countries. Similarly, embassy to embassy exchanges and ministry to ministry exchanges would help facilitate access and understanding of foreign law.

III. ACCESS TO INDIAN LAW ABROAD

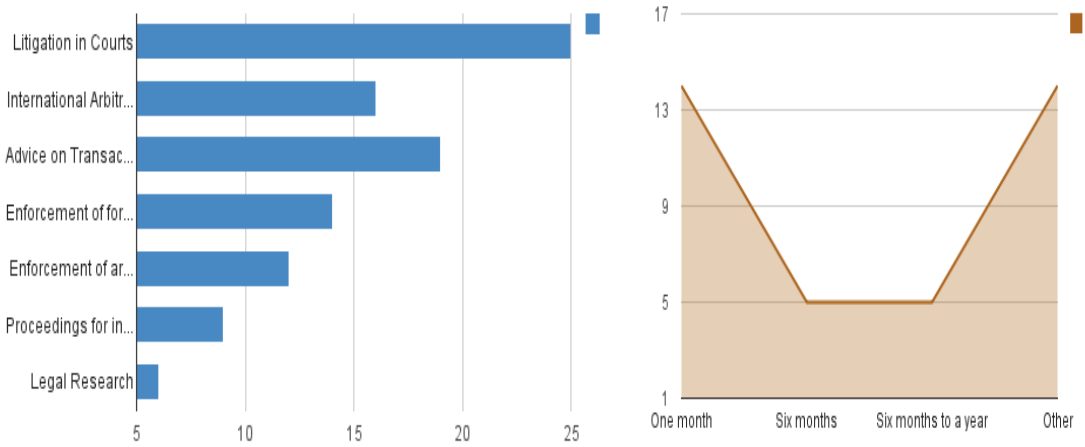
48. Indian stakeholders may not be the best target group to assess the accessibility of Indian laws from abroad, as foreign stakeholders requiring access to Indian law are better placed to answer this query. However, Indian stakeholders did provide their insight into this and their views are encapsulated below.



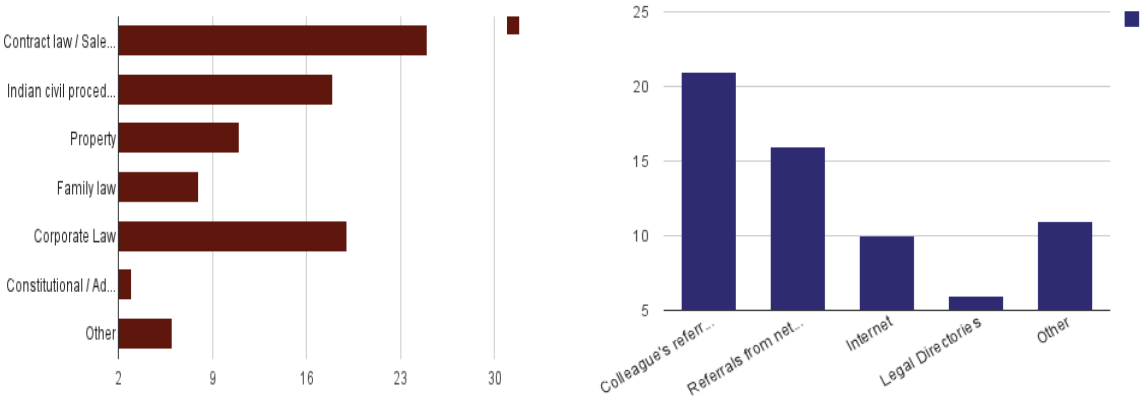
49. Most stakeholders,[49] 73.5%, have given some form of an input on Indian law in transnational proceedings or transactions.[50] The input has mostly been legal advice (91%) or general information (78%) on Indian law. 31% of the stakeholders has given expert evidence in foreign or transnational proceedings.

50. The input or advice or information on Indian law has mostly been given in relation to litigation in foreign courts (71%), followed by advice on transactions (54%) and international arbitration (46%). [51]

[49] This question was inapplicable to sitting Judges of the Supreme Court and Bombay High Court interviewed.
[50] Since each stakeholder may have recommended more than one mode to ascertain foreign law, percentages in this section would not add up to 100.
[51] Since each stakeholder may have given an input on Indian law on more matters than one, percentages in this section would not add up to 100.



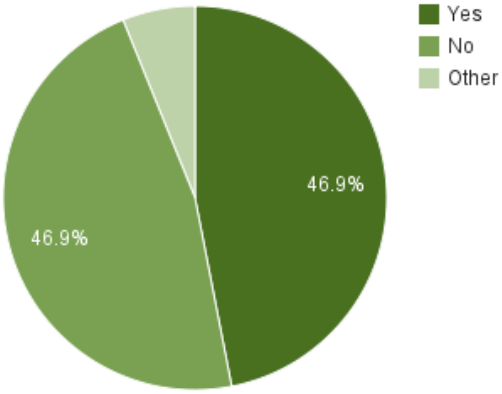
51. Such inputs appear to be sought by foreign lawyers frequently and mostly every one to six months.

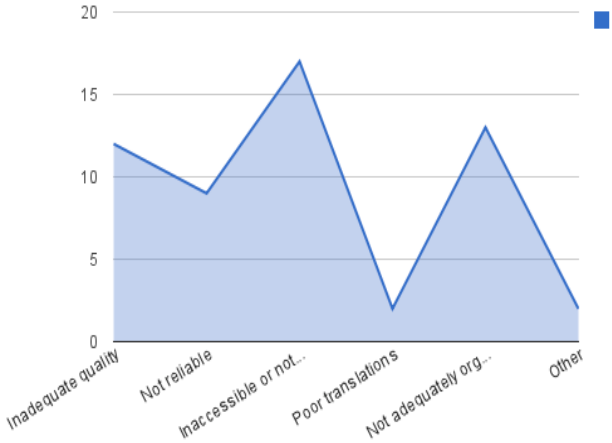


52. Inputs sought for, seem to be primarily on contracts and sale of goods laws (76%), Indian civil procedure and practice (55%) and corporate law (58%). Other areas in which an Indian lawyers' expertise is most sought are property law (33%), family law (24%), and constitutional law (9%).

53. It appears that referrals, i.e. colleague's referrals or referrals from a network of law firms with which firms interact with, are the most relied upon methods to access an Indian stakeholder or expert for input on foreign law. Considerable numbers of Indian lawyers appear to have been located through websites such as Legal 500, Who's Who Legal, Chambers and Partners and legal directories.

PERCEPTION OF SUFFICIENCY OF ACCESS TO INDIAN LAW BY FOREIGN PARTIES

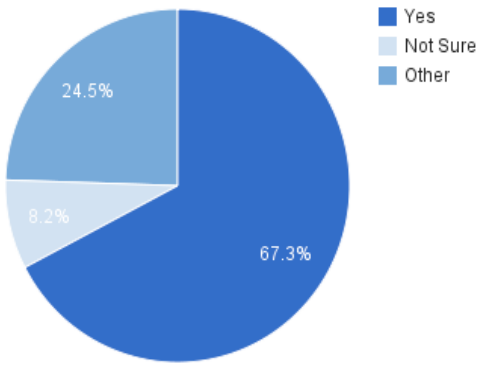




54. As in the case of foreign law, the opinion of stakeholders about sufficiency of Indian legal resources to foreign lawyers is divided with 46.9% of the stakeholders believing that foreign lawyers have sufficient access to Indian legal resources with an equal number feeling otherwise. Lack of accessibility (or inadequate accessibility), non-reliability and inadequate quality of information were the main concern for Indian lawyers who believed that foreign lawyers would also face the same impediments as they faced when accessing non-Indian law.

HAGUE CONFERENCE'S GLOBAL CONVENTION ON FACILITATING ACCESS TO FOREIGN LAW

55. "A strong, good start" was Indian stakeholders' general reaction when they were given information about the Hague Conference's initiative to potentially draft a global Convention facilitating access to foreign law.[52] 67.3% of Indian stakeholders unconditionally supported the Hague Conference's initiative. While no stakeholder rejected the Hague Conference's initiative, 24.3% of them supported the initiative partly, and 8% expressed that they were not sure. As discussed in paragraph 43 above, while most of the stakeholders appreciated the



[52] Available at: http://www.hcch.net/upload/wop/genaff_pd11b2009e.pdf (last accessed: February 9, 2012)

Hague Conference's initiatives in liaising with global free legal information providers such as WorldLII, they supported the other parts of the Hague Conference's initiative of judicial and administrative co-operation and maintaining a database of experts, given that such work would be practically feasible.

56. According to some, to maintain a list of experts, the "criteria" to identify the list of experts would be most important and they questioned what the "criteria" would be to maintain such a list. Some others felt that bodies like the International Bar Association (IBA), International Chamber of Commerce (ICC) and other such specialized institutes could be best placed to assist in maintaining a body of experts, thereby endorsing the Hague Conference's proposed initiative of collaborating with such organizations. Others suggested that the Bar Council of India could maintain a list of Indian experts and others countered that the Bar Council is an elected body and should not be entrusted with this task. Even if a global database of experts were maintained, quality checks and periodic reviews would be imperative, stakeholders noted.

STEPS TO FACILITATE ACCESS TO INDIAN LAW ABROAD

57. To facilitate access to Indian law abroad, stakeholders felt that each Indian governmental ministry should be enjoined to maintain an online database of all bare acts, rules and notifications. Authorities, which issue notifications under a statute or regulation, should also organize the information with a remark as to whether the notification is repealed or superseded or amended or is of limited applicability. Another suggestion was to assemble an "Indian legal resource compendium" which could be drafted to help foreign lawyers with information on the Indian legal framework, on basic laws and including a guide to accessing or researching Indian laws. They suggested that restatements on specific areas of Indian law would be a very helpful resource for foreign lawyers.

58. Setting up an institution or creating a network of Indian experts who could respond to queries from foreign parties or lawyers or foreign courts was another idea forthcoming from stakeholders. The expert body could have persons specialized in various areas of law and each panel giving out an expert opinion on Indian law could be composed of practitioners and a few academics with

specializations in relevant areas of law. However, one stakeholder strongly opposed setting up such an Indian specialized institute since he believed that it would have people who are not "in the thick" of the regular practice of law.

59. Presently, the rules of the Bar Council of India do not permit law firms or lawyers to advertise or put up legal information online. This, some stakeholders believed, was a deterrent to access Indian lawyers or law from abroad and that permitting law firms to advertise and put up information online would facilitate access to Indian lawyers and consequently Indian law.

60. One stakeholder suggested that the Ministry of Law and Justice could set up an autonomous department, which could be a repository of experts in different branches of law, with their full credentials listed. Procedures of selecting experts could be laid down. Any question of foreign law maybe routed through the Ministry. There would be important questions of confidentiality involved which would need to be carefully addressed.

CONCLUSION

61. India currently treats foreign law as a question of fact of a peculiar kind, proven in most cases by expert evidence or books and reports published under the authority of the foreign government. The Indian pulse, from the results of this Survey, is clearly in favour of the Hague Conference's initiative of a global Convention on facilitating access to foreign law.

62. Indian stakeholders were quite receptive to a systemic change by making reference on questions of foreign law to a foreign court. By treating foreign law as a "peculiar law" as opposed to as "peculiar fact" and permitting foreign lawyers to argue in Indian courts when questions of that foreign law arise may also be a simpler and more efficacious solution to the current practice of expert testimony.

63. To facilitate access to foreign law as well as to Indian law, official, free online databases and restatements of law would be a good starting point. With initiatives such as co-operation between judiciaries of different countries and a

comprehensive database of experts on different areas of law with periodic checks and reviews, the process of facilitating access to foreign law in India and to Indian law abroad would gather further momentum.