

# Regulating the Practice of Professions by Foreigners

*by*

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*7 February 2014*



At the outset, may I thank our host venue, the FEU Institute of Law and FEU Makati, represented today by Associate Dean Ronald Chua for all the arrangements prepared in connection with this public lecture. FEU was of course my academic home for 15 years.

Let me also thank Metrobank Foundation led by President Chito Sobrepena for the generous support it provides to the best and brightest Filipinos in various fields so that they may continue to strive for excellence.

Last but certainly the most, let me thank the Foundation for Liberty and Prosperity led by FEU's favorite son, Chief Justice Art Panganiban, for the opportunity to deliver this lecture. It is good that he is here in the flesh so that our JD-MBA students may see him. I have a lament Mr. Chief Justice that I would like to share with you. Our students have always faced an identity crisis being reared by academic parents consisting of DLSU a rich and pedigreed but a generally absentee father, and FEU a caring and "hands on" mother who comes from a more modest

background. While our students probably love their mother more, they still primarily identify themselves with the father. With you in the room today, I hope they realize that their maternal side is as not as modest as they think and somebody they can emulate and be truly proud of.

Let me also acknowledge the presence of former FEU President and former Department of Education Secretary DJ de Jesus who was the culprit in bringing me to FEU in 1997 and a co-conspirator in the creation of our dual degree program.

Let me say hello as well to my beloved JD-MBA students and to my students from the law school at Rockwell who may after this semester, voluntarily or involuntarily choose to join the JD-MBA fold.

I believe that it is only fitting that we deliver this lecture here at FEU Makati since liberty and prosperity are cornerstone values of the JD-MBA program. Indeed, it is truly difficult to appreciate one's freedoms in an environment of want but awkward as well to enjoy the fruits of one's labor amidst an atmosphere of tyranny and oppression. In the JD-MBA program, we coined the slogan, "When we teach law, we mean business." In a similar vein, Chief Justice Panganiban's foundation can proudly proclaim that "when it protects liberty, it promotes prosperity."

The topic I chose for this evening also straddles the complementary concepts of liberty and prosperity. The ability to practice one's profession is not only a way to earn a living, it is also a means by which an individual may seek fulfilment, attain self-actualization and contribute the societal good. Hence, a person's profession encompasses both liberty and property rights which, as my students in Constitutional Law II know, cannot be deprived by the State without due process of law being observed. On the other hand, such rights are not absolute and can be regulated by police power to promote the general welfare. While an alien is also protected by our bill of rights, there are certain privileges that can be withheld by the State provided that the exclusion of such privilege is not unreasonable nor arbitrary.

In preparing this lecture, I was guided by two rules:

First, I wish to conform with a cardinal principle in the teaching methodology of the JD-MBA program which is to endeavour to impart real world experiences and skills as opposed to engaging simply in an academic and theoretical discussion.

Second, I am mindful of the maxim that just like the Sunday sermon, a short lecture has a higher probability of moving the mind while a long lecture has a greater possibility of moving the chair.

The foregoing said, let me now begin.

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Let me preface the discussion by citing five real-world situations involving different professions. The first situation deals with architecture.

1. An international hotel chain is planning to build a 6-star hotel in Fort Bonifacio. It engages a foreign architectural firm based in San Francisco but with a branch in Hong Kong. It also engaged an international Structural engineer, design consultant and quantity surveyor. Teams of foreign professionals visit the project site on a regular basis. It engages a local architectural firm to sign the plans. After the hotel is built, it will be employing several expatriates: general manager, hotel manager, resident manager, chefs, etc.

► **Questions**

1. Can a foreign architectural firm work on a Philippine project without violating the Constitutional prohibition on practice of professions?
2. Does it matter if work is performed by such professionals inside or outside of the Philippines?
3. On the premise that such firms do not have branch offices in the Philippines, are they deemed to be “doing businesses” in the country?
4. Are such international firms obligated to pay Philippine taxes?
5. With respect to employing expat employees, should there be a preference for qualified Filipinos to fill such positions?
6. What approvals and permits are required to employ them?

The second situation involves the accounting profession.

2. A Philippine multi-national company is looking to purchase the operations of its parent in the United States. To complete the purchase it needs accounting and audit advice in respect of the parent’s US’ financial statements and condition.

Mr. X, a US CPA, works as a consultant with a local accounting firm but which is affiliated with a worldwide practice in the Philippines. Philippine multinational would like to engage the services of Mr. X for purposes of providing advice on US accounting matters.

► **Questions**

1. Is Mr. X allowed to practice a profession in the Philippines?
2. If so, what approvals and permits must he obtain?
3. Is it legally allowed for a partnership of Philippine accountants to become a member firm of a world-wide accounting practice?

Let me now discuss issues relating to the medical profession.

3. Senator X has been travelling to Germany on a regular basis to receive stem cell treatments in Dr. G's clinic. Seeing the positive results on his physical demeanor, his classmates have become envious of him.

To help them and at the same time save on costs, he suggests to Dr. G that he visit the Philippines and perform the treatments on 10 of his friends. The latter books 10 rooms at a local five-star hotel. The group shares in the travel and accommodation expenses of Dr. G in Manila. Dr. G now visits Manila every quarter to perform such services.

► **Questions**

1. Is Doctor G legally allowed to perform such treatments in the Philippines?
2. Does he need to obtain any permits or approvals?
3. Does Doctor G need to pay any taxes in the Philippines for the income he receives?

My fourth and fifth situations deal with the legal profession. Let us first discuss “fly-in/fly-out” foreign lawyers who provide legal advice on foreign law.

4. A Hong Kong-based energy developer, is building a \$1.2 billion power plant in Sual, Pangasinan. Financing for the project will be provided by a consortium of export credit agencies such as IFC and JEXIM and international commercial banks. The loan documents will be governed by New York law. HK developer engages the services of an international law firm, with offices in New York and Hong Kong whose lawyers regularly travel to Manila to negotiate the loan and security contracts.

▶ **Questions**

1. Are such “fly in, fly out” lawyers allowed to practice their profession in the Philippines?
2. Do they need to seek any permits or approvals to work in the Philippines?
3. For work done onshore, should they pay any income taxes in the Philippines?

Finally, let me briefly dwell on legal and accounting backroom offices.

5. Two International law firms with world-wide offices have opened legal and accounting process outsourcing (LAPO) centers in the Philippines. These LAPOs provide legal research, accounting, conflicts check and other backroom support for the world-wide offices of these firms. Located at buildings in Makati and The Fort, respectively, they employ thousands of Filipinos including lawyers and accountants. The work of the latter is being supervised by a team of expatriate professionals.

▶ **Questions**

1. Are these LAPOs engaging in the practice of a profession?

2. Do they need to secure any approvals from any board, commission or court?
3. Would it matter if these LAPOs were providing services to outside (as opposed to in-house) clients?

Through these various example, I proffer the following observations and take aways.

- Foreigners are actually practicing their professions in the Philippines
- Most of these foreign professionals pay little (it not actually evade) Philippine taxes
- As will be shown later, regulations vary among the various professions with the legal profession as the least regulated

Let us now discuss the relevant laws and jurisprudence on the topic at hand. The pertinent portion of Article XII, section 14 of the 1987 Constitution provides that:

- *“xxx.. The practice of all professions in the Philippines shall be limited to Filipino citizens save in cases prescribed by law”*

Query if the term “professions” refer to Philippine professions?

In support of this constitutional directive, several statutes were enacted. Section 7 of the Professional Regulatory Commission (“PRC”) Modernization Act of 2000 provides that *“upon recommendation of the concerned Professional Regulatory Board (PRB), the PRC may approve registration of a foreigner provided that the requirements for registration in the foreign country are substantially the same as those required by laws of the Philippines and that the laws of such foreign country allow citizens of the Philippines to practice the profession on the same basis and grant the same privileges as those enjoyed by citizens of such foreign state”*. For its part, the “labor market test” in the Labor Code permits *“non-resident aliens to be admitted to the Philippines for the supply of service after*

*a determination of non-availability of a person in the Philippines who is competent, able and willing at the time of application to perform the services for which the alien is desired ”. Apparently 12,000 permits to foreign workers were issued in 2012 and that DOLE implements the test in a liberal manner.*

Insofar as architectural services are concerned, Section 28 of R.A. 9266 (the “Architectural Act of 2004”) provides that *“Foreign nationals who perform professional services as architects shall secure a special/temporary permit from the Board subject to approval of the Commission.*

*Moreover, the law requires reciprocal treatment – “That he/she is a citizen or subject of a country which specifically permits Filipino professionals to practice his or her profession within their territorial limits, on the same basis as the subjects or citizens of such foreign state or country”*

For those in the medical profession, a relatively old law, R.A. 2382 or the Medical Act of 1959 governs. Section 9 states:

- *“a citizen of any foreign country who has submitted evidence, confirmed by the Department of Foreign Affairs, showing that his country’s existing laws permit citizens of the Philippines to practice medicine under the same rules and regulations governing citizens thereof .*

*A foreign physician and health-related profession can only practice his/her profession in the Philippines with a Special Permit from the Professional Regulation Commission”.*

The accounting profession is probably the most advanced (and liberal) in respect of allowing foreign accounts to practice their craft in the country. Section 34 of R.A. 9292 (“Philippine Accounting Act of 2004”) provides that:

- *“citizens of foreign countries may be allowed to practice accountancy in the Philippines in accordance with the provision of existing laws, international treaty obligations including mutual recognition agreement entered into by the Philippine government with other countries”*

Regulations in respect of the practice of law are unclear. Instead of Congress it is the Supreme Court which is constitutionally mandated under Article VIII, Section 5(5) to promulgate rules on the practice of law and admission to the bar. In this regard, Rule 138 of the Rules of Court states that only Filipino citizens may be admitted to the Philippine bar and therefore “practice law.” Moreover, the celebrated case of Cayetano v. Monsod provided for a liberal, expansive definition of the practice of law. A portion of the decision states:

- *“... any activity, in or out of court, which requires the application of law, legal procedure, knowledge, training and experience. ‘To engage in the practice of law is to perform those acts which are characteristics of the profession. Generally, to practice law is to give notice or render any kind of service, which device or service requires the use in any degree of legal knowledge or skill.’”*

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Aside from (and sometimes despite) these statutory directives, we have entered into international treaties that point to an unmistakable trend towards a progressive liberalization of trade in services. The General Agreement on Trade in Services (GATS) under the World Trade Organization (WTO) provides for the creation of Working Parties to facilitate the forging of bilateral/multilateral agreements with regard to the cross boarder practice of professions. The Working Party for the accounting sector has already issued guidelines for mutual recognition agreements and arrangements.

Closer to our own backyard, we need to also align with the ASEAN vision of a single market where goods, investment, capital, skilled labor and services freely flow. In this regard, the ASEAN Framework on Trade in Services seeks to eliminate trade restrictions in services and promote efficiency and competition. The Philippines has entered into mutual recognition agreements on engineering services (December 2005) nursing services, (December 2006), architecture (November 2007), land surveying (November 2007), medical practice (February 2009), dental practice (February 2009) and accountancy (February 2009).

Moreover, the experience of our neighbours shows that opening up the practice of professions to foreigners increases the inflow of foreign investments and enlarges the need for domestic professional services. Aside from investments, the benefits to the host community are substantial. New jobs are created and additional taxes paid.

There is also the added benefit of technology and know-how transfer to Filipino professionals and staff.

In conclusion, we have to be cognizant that people are our number one export. Over 10 million overseas Filipinos remitted more than US\$ 26 billion in 2012 while approximately US\$ 16 billion was generated by the business process outsourcing industry which primarily services clients abroad.

With regard to the legal profession, the reality is that many Filipino lawyers are able to practice in other jurisdictions. Many of the top international law firms such as Allen & Overy, White & Case, Milbank, Latham Watkins, DLA Piper, Sidley, Cleary Gottlieb, Kelvin Chia., etc employ Filipinos. If other countries have allowed our professionals to work, why don't we reciprocate the gesture by allowing them to work in ours?

Truly, technology has been a game changer and the reality is that it is no longer a question of if but more of how and when will our professions be liberalized and opened up to foreigners. As stated earlier, many "fly-in and fly-out" lawyers are able

to work in the country “under the radar screen.” If we can’t stop them, we might as well regulate them.

In this regard, the liberalization of Asian legal markets has occurred in varying degrees. The following countries have permitted the practice of foreign lawyers by enacting the following statutes:

- Thailand- Lawyers Act (1985)
- Japan- Galben Law (1986)
- Hong Kong- Overseas Lawyers Rules (1994)
- Indonesia- Decree No. M11-HT.04.02 of 2004
- Vietnam- Law on Lawyers of 2007
- Singapore- Legal Profession Act (International Services) 2008
- Korea- Foreign Legal Consultant Act (2009)
- Malaysia- Legal Profession Act (2012)

In the Philippines, my four centavo recommendation is to allow foreign lawyers to practice in the Philippines subject to four conditions.

1. their practice will only be allowed to practice foreign or international law
2. their practice will be limited to “solicitor” work (i.e., documentation and counselling) as opposed to “barrister” work (advocacy in court)
3. Provided for reciprocity - their home countries should allow Filipino lawyers to practice in their jurisdictions; and
4. They should follow a code of professional responsibility for transactional lawyers that will be drafted by the Supreme Court together with the Integrated Bar.