MUMBAI CENTRE FOR INTERNATIONAL ARBITRATION

LEGALLY SPEAKING

Mr Darius Khambata

In conversation with

Mr Adrian Winstanley

07 May 2020

Nmiokka Engineers Pvt Ltd
www.nmiokka.com, info@nmiokka.com
+91 73036 22931

Neeti Sachdeva: We welcome you to the MCIA's new series Legally Speaking. Through the Legally Speaking series, we hope to bring to you, views and conversations from stalwarts at the bar on the bench and members of the legal community. In our previous edition of Legally Speaking, we had Mr Shuva Mandal engage in conversation with Mr Nish Shetty. We saw a large audience actively engaging with the speakers. We have had multiple requests to make these sessions available later, and keeping with demand, we will be releasing the videos from this series soon. Today, we have with us Mr Darius Kahmabata being interviewed by Mr Arian Winstanley. Darius, Adrian on behalf of the MCIA community and all those joining us live, I welcome you. Though both are speakers are well known in the field of arbitration and need no introduction, but it is customary for us to introduce them. I will first introduce both our speakers, and then request Adrian to commence the conversation. Post which participants will be allowed to ask questions that they can submit on the zoom app. Darius Khambata is a Senior Counsel, LL.M. from Harvard, practices before the Bombay High Court and the Supreme Court of India. He has held two distinguished public law offices, he was the Advocate General for Maharashtra and before that he was Additional Solicitor General of India. On his tenure as Advocate General coming to an end in November 2014, the newly
constituted State Cabinet recorded "its highest appreciation of the meritorious and distinguished service" rendered by him. He has appeared in several important constitutional, corporate and commercial matters and in significant and high stakes domestic and international commercial arbitrations. He has written several published papers including on arbitra-

tion. In 2013 he was conferred with the Arya Chanakya Rajya Puraskar for law. We welcome you Darius.

Darius Khambata: Thank you. Thank you Neeti.

Neeti Sachdeva: Adrian, Adrian Winstanley is an English solicitor with over 20 years' experience in international commercial arbitration and mediation acquired in his roles as Registrar and Director General of the LCIA and in his earlier role as a member of the Clifford Chance arbitration team; and is now an independent arbitrator, mediator, and ADR consultant. He has spoken and written extensively on international arbitration. Adrian was awarded the OBE, which is the Order of the British Empire in June 2013 for services to international arbitration. Commercial Dispute Resolution Magazine wrote the following for Adrian and I quote "It would be hard to argue against the proposition that Winstanley is one of the chief architects of the success of London as a centre for international dispute resolution." Adrian is a member of the MCIA Council. We are grateful to Adrian and Darius to join us today for an interesting conversation about different aspects of international arbitration. With these words I hand over to Adrian.

Adrian Winstanley: Neeti thank you very much for your generous introduction. Darius it is a real pleasure to be speaking to you today.

Darius Khambata: Likewise.

Adrian Winstanley: I am most grateful to the colleagues from MCIA for organising this series of webinars during this global lockdown. I hope that you and our MCIA colleagues and all those participating will stay safe and well until the battle against coronavirus is won and it is appropriate, I think, that we start on the question of coronavirus. COVID-19 is the greatest global crisis of this generation, at very least, so my first question, Darius will be much talked of post coronavirus new normal extend to a continuation of the virtual arbitration hearings that have been so rapidly and widely embraced or are in person hearings irreplaceable, at least for larger and more complex arbitrations.

Darius Khambata: Thank you Adrian. Great to be here and hope likewise that everyone is safe and well and stay safe and well. Well we are here whether we like it or not and the world is changed Adrian whether we like it or not. It's up to us as to whether that change is to the good or is entirely negative. And I think this calamity in essence does give us a bit of an opportunity. Now you know in international commercial arbitration, we are very familiar with remote hearings, infact most smaller hearings are remote. You have the one, perhaps if you are lucky, two personal hearings in the lifetime of an arbitration. So, and most of the orders and most of the decisions are all e-decisions across emails because of the simple reason that you have got people scattered all over the world participating and it's simply too expensive and impractical to have them congregate every time you have to decide one or the other matters. So in essence in the world of international commercial arbitration we have a bit of an ad-

vantage, we have been there, done that. So, to that extant it's to the good that we will now have to have more virtual or remote hearings. That said, I entirely agree with you Adrian, I think one cannot eliminate the physical hearing entirely. There is a great value in that and at least for the moment it looks like there will be no physical hearings but one would hope in 6 to 8 months time when some sanity returns to all of this, the physical hearing will be restored to its rightful place, which is just a one part of an arbitration. It should not be all dominating, it should not be all pervasive, just that last final hearing it's, there is a great value in having a face to face contact with the tribunal and for the tribunal to actually see the lawyers he is dealing with and to have that interaction.

Adrian Winstanley: I fully agree with what you are saying Darius, do you think in general that arbitrators, arbitration practitioners and institutions are adequately geared up to take this forward. I mean, people are reacting as they go along how best to deal with the situation and they are being very innovative and creative in that. But do you think by and large there is going to be a transition period where all of the stakeholders have to rethink the way in which they do things or we are pretty much there because we have been obliged to get there very quickly.

Darius Khambata: I think to a certain extent there will have to be rethinking perhaps even reinvention but as I said much of this has already been done by international commercial arbitral institutions, so it's only a matter of extending what

is already part of the system. There will have to be modifications, there will have to be improvements, for example it's usually not the case that you cross examine or take evidence in a virtual hearing, you would usually have a physical hearing for that. So you are now talking about evolving ways of making it work in a remote hearing, it's not difficult if it's a matter of security of the process, there are measures you can take to ensure that the witness is not being tutored, but, and of course that physical eye contact between counsel and witness which is so important as you know in cross examination is lost to some extent. On the other hand there is one huge advantage that I see which is not available if you have a physical hearing, and this is particularly important for lawyers from India, you know Adrian, we in India are steeped in the oral tradition. I think the pendulum perhaps has swung too far in favour of oral arguments in India but that's another debate, but we do like an oral closing and often one finds in the usual form of an international arbitration, when you have one tight hearing in which you have openings, you have evidence and then perhaps a short oral closing. It's not quite enough sometimes in a matter thats fact heavy or evidence heavy and quite obviously there is no space for having a second congregation of everyone just for an oral closing. So more often than not the substantive part of the oral closing is in writing, as we know. But if the hearing is in any case is going to be remote then you have space for saying well we will devote a week for evidence and we will re-congregate a week later perhaps virtually and keep aside a day or perhaps a day or two if necessary for a substantive oral

closing. So there are ways you can actually turn this to your advantage.

Adrian Winstanley: I think that's right again and there is an interesting development this very week where three of the big hearing centres IDRC in London, Maxwell chambers in Singapore and Arbitration Place in Toronto formed, what they call the International Arbitration Centre Alliance. They are looking for others to join, other centres to join this, and I am sure this may be of interest to MCIA, and essentially they are offering what they call a hybrid hearing. So they are saying that for argument sake rather than have everybody who is in an arbitration seated in London rush over to London from around the World, let's have parties who are closer to London come to London in due course all those who can make it. Let's have those that are closer to Singapore be in Singapore, in Canada whatever it may be and in due course to Mumbai and let's link up those centres. So in other words despite the fact that ofcourse centres are in competition, it's a new way of thinking and the other thing that is coming out of this, which is quite striking, ofcourse it is very hard at this moment to find anything silver in the lining of this terrible cloud but one thing is for sure the sky is clearer and I think that the whole environmental and green agenda also has an impact on what we're discussing now. It is a disaster for the airline industry we understand that and the travel industry and so forth but I cannot imagine any more after this experience, in particular, my getting on a plane to go to Washington for a 3 hour meeting and a dinner with somebody and turn around and come back again why would I do that. Why

would one do that? So I think from the point of view of environment and green issues then I think there is a real potential to exploit this in the businesses as a whole not simply in dispute resolution. So this I think maybe a positive change once we emerge from this terribly dark tunnel. But let's just ask another question, before we move on from the coronavirus do you think that the huge economic impact of coronavirus will give rise to a surge in litigation and arbitration in the same way that we saw after 2008-2009 global economic meltdown or do you think the lessons learnt from the earlier crisis will see an increase demand for swifter, more cost effective, less contentious ways of resolving disputes. I remember very well because I was at the LCIA still and after that terrible meltdown the institutions were doing wonderful work and we had a tremendous doubling of the cases that came in. But there was a sense also that some parties felt they were throwing good money after bad. Everybody was chasing debts that they will probably not recover and they were saying why are we going through the whole process of full blown arbitrations, 18 months or something of that kind. There needs to be a creative way of thinking and on the back of that, I think, came what we see now frequently which is the demand for swifter processes, more cost-effective processes rather than having things drag on, so that's a slightly long-winded question but you get the point is there to be a surge you think on the back of it. If there is are we ready to reach that with cost effective and swift solutions?

Darius Khambata: Thanks Adrian, you obviously took in a large gulp of air with this clean fresh air that we all are now breathing to ask that question.

Adrian Winstanley: Now I need a glass of water to oil my throat.

Darius Khambata: And perhaps something stronger after I give you the answer. The answer is that I think there is going to be much less money in the system after this crisis. This is actually far worse than 2008 because 2008 was a downturn, 2020 is actually a stoppage. So there is going to be more disputes but also a greater eagerness to learn from the lessons of the past and to have cheaper ways of resolving them. Now at certain level in some countries that might work in favour of arbitration, I think in India it certainly will, but internationally where arbitration is actually more expensive than going to court, I think we're going to have a demand for at least two things. You are going to have many more people choosing fastrack options that institutions provide and that's again to the good and you gonna have a lot of Arb-Med-Arb because people are going to want to settle their disputes rather than going through a full fledged arbitration. So, I think, yes lessons should be and probably will be learnt we will have shorter, swifter mechanisms in arbitrations but we need a lot more of it I think.

Adrian Winstanley: Yes it is one of those, I suppose any situation however grim it may seem on the economic front, in this case on the health front ofcourse, seems to fuel more

work for the lawyers. It is one of the grim realities when times are easy and when times are good and everything is plain sailing, the lawyers are less busy and when things are bad then the lawyers are more busy and its not that is necessary that they rub their hands with the prospect is just the reality of the global economy although for another time we might consider whether the whole concept of globalisation which we have become so familiar is going to be stalled by this particular pandemic. You see in particular for example President Trump now openly attacking China accusing it of responsibility for this and it's hard to see that at the end of this there won't be serious repercussions in terms of trade barriers and so forth but that's perhaps for another time. I would now like to look at, if I may Darius, at the question of India as an international arbitration hub, India had for decades been regarded by the international businesses and legal communities as a risky venue as a seat for international arbitration, as a consequence both of the jurisprudence in the field and going back in the history Bhatia, Venture Global, BALCO, Reliance industries and so forth and importantly seemingly extreme reluctance to cast off ad-hocism in favour of administered institutional arbitration. Speaking of the establishment of the Arbitration Council of India, ACI, before the passage of the Arbitration Conciliation Amendment Act 2019. Lord Goldsmith, who everybody is familiar with I think, the former UK Attorney-General expressed a view that the proposed changes to the Indian Arbitration law would setback India's progress in the arbitration arena by a generation saying that the idea that a government appointed body should regulate arbitration and arbitrators is anathema to

the idea of free and autonomous arbitrations. Lord Goldsmith and others have also raised concerns that new act effectively disqualifies foreign registered lawyers from acting as arbitrators in India seated arbitration. So in your view has the 2019 Act helped or hindered India in its efforts to establish itself as a viable international arbitration hub. I suppose the bigger question really is generally is India making the sort of progress in this way that you would wish to see, is there a course to be optimistic about India's place in this field?

Darius Khambata: Well let me start very generally Adrian with my answer to that, I have been saying for years now that India is a classic case of lost victories, there is really no reason why India shouldn't take its rightful place at the table of international arbitration. We have about 150 years of common law, Indian made common law which is recorded in the form of judgements of courts along with that comes a huge body of very skilful and trained and competent commercial lawyers who are adept not only in commercial laws but in matters of evidence and trial. You have, by and large we have had a very independent and innovative judiciary and that's a very important facet of this whole game from whichever way you look at it. That's something we need to preserve. And of course you have now increasingly better infrastructure you have cheap skilled labour so you have all the factors that would make for a good arbitration venue, apart from the fact that English has always been the lingua franco of dispute resolution in India. There is no reason why India has lagged behind. But it has. Let's be honest. And I think the succes-

sive governments have been trying their best to remedy this situation by first having an Act such as 1996 Act, which is the UNCITRAL Model law really and then amending it dramatically in 2015 and rather less so in 2019. 2019 amendments really are in two parts, the small bits and pieces that have already got done and there are some amendments or rather shall I call them proposed amendments which are yet not notified by the government and they do not come into force as law unless they are notified. Now amongst those are the two things that you mentioned, the Arbitration Council of India and the qualifications for arbitrators and let me go one by one. Arbitration Council of India, is it really necessary? In India we love regulators, we love councils, we love commissions so grant us that. And at least on the statute book it seems like a policy making body, the question I really have is it's very easy with a short amendment to convert what appears to be a policy making body into a regulatory one and that's the danger. And I am not sure you really need a policy making council when you can have the government itself set its policy by way of law. The Arbitration Council comes as a, with a full fledged CEO and a board and all the other paraphernalia that you would normally associate with an institution. So is it an attempt to find some kind of a super arbitral institution for India given the fact that you mentioned that for some reason institutionalised arbitration is anathema to most Indian participants and lawyers, most of it is adhoc. There are better ways ofcourse to encourage institutional arbitration than this. And I think on balance I am not in favour of the Arbitration Council of India, I don't think you need councils to start grading institutions, the market will

grade them after all arbitration is ultimately party autonomy, isn't it. If the parties chose an institution well then that's the best one for them they don't need grading. So I think that is also unnecessary. Accreditation of arbitrators that's the next point you raised. Do you really need accreditation? Do you really need to be told, well you can go this person because he is accredited but you can't go to that person, though, you may have utmost faith and confidence in him because he is not accredited and then you impose qualifications on arbitrators and apart from the fact with utmost respect that the Eighth Schedule is not very well drafted. It's actually it doesn't make sense because you require effectively it is slanted in favour of qualified professionals whether they be architects or accountants which again is the antithesis of your being able to choose your arbitrator and it seems to think that an advocate of 10 years standing is good enough and there are advocates and advocates. Some with nine years standing may be even better but the Eighth Schedule says you cannot appoint him and then again that advocate has to have knowledge of all sorts of laws. I am not sure any of us have that sort of knowledge, it is just not Indian Constitutional law, it's all sorts of law, there is contract, labour, the law of torts, customary laws it's the works and very few Indian lawyers could hand on heart say that they have a good working knowledge or that they are conversant with all these branches of laws. Apart from the fact, as you rightly put it, immediately and in one fell swoop eliminates any foreign lawyer or any foreign individual from acting as an arbitrator because he is not going to have this knowledge or qualification. It's sometime said this provision does not apply to

foreign arbitrations because it's in Part I but you must remember that Part I applies also to international commercial arbitrations seated in India and I thought that the endeavour has been to encourage those rather than discourage them. Now in one fell swoop if you notify the qualifications you are not going to have any non Indian able to act as an arbitrator in India and that would be a very negative feature that would be a backward step and I think and I hope I am right I think the government has realised this because they faced a lot of criticism, starting with Lord Goldsmith and all of us spoke publicly about this and they might have pulled back because they still haven't notified the section.

Adrian Winstanley: Without being impertinent as an outsider I have been so frustrated over the years you know the effort that I put personally and the LCIA put into the establishment of LCIA India and the passionate believe on my part and of colleagues at that time that the potential of India was simply not being realised in this field and very little has changed and all that effort that went in trying to as you know and when I left the LCIA, quite quickly they decided that they would not continue to invest and I am obviously extremely pleased that MCIA, as Neeti remarked at that time just moving one letter of the alphabet LCIA became MCIA was established but you know at the moment I am not sure I can see if ACI is to accredit institutions including MCIA that would necessarily encourage the sort of lets say confidence in Indian institutional arbitration that is so desperately needed to realise that potential whether further regulations as you say and establishment of another regulatory body that

looks like a full-blown institution of some kind, simply to the outside world says well here is another roadblock on the path to India becoming recognised as an international hub because frankly Darius you know people it just isn't a problem we are talking about difficulties in continue resuming in physical hearing for arguments sake but there isn't any problem if somebody arbitrated India related disputes in Singapore as they do very frequently but it seems such a waste of the potential of the resources of India that this should be happening. So I suppose again as an outsider my hope is that we may see lets say this move rescinded in due course, if you are saying to me that is in prospect that may be quite a relief if you think it may be reconsidered.

Darius Khambata: It might be. But I mean this is pure conjecture on my part obviously I have no information on this but the fact that it hasn’t yet been notified is a good sign.

Adrian Winstanley: Let me turn if I may quickly, to the question on the enforcement of foreign arbitral awards and public policy in India and I raise this because the Supreme Court of India as you very well know of course rendered two seemingly contradictory judgements, very recently, in Vijay Karia against Prysmian Cavi, if I have pronounced that right and just a couple of months later in NAFED against Allemanta respectively. In the Karia case the court enforced the foreign arbitral award very narrowly interpreting public policy provisions. In NAFED they appear to have done exactly the opposite. Just a couple of quotes for the benefit of the participants. In Karia, the Supreme Court held and I quote “the im-

portant point to be considered is that the foreign award must be read as a whole, fairly, and without nit-picking. If read as a whole, the said award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counter-claims of the parties, enforcement must follow". So enforcement of a foreign award could not be denied merely because it was in contravention of Indian law. In NAFED on the other hand, the court appears to have dealt deeply into the merits of the case which one would argue before the arbitral tribunal alone concluding that enforcement shall be refused as being against the fundamental public policy of India on the basis that the award accepted the supply of goods contrary to the export policy of India. Now at first reading to see those two decisions one hot on the hill of the other with apparently entirely different interpretations and certainly application of weight to the decisions of the courts one is confused. Can you un-confuse us Darius.

Darius Khambata: I can't promise to succeed in doing that Adrian but let me try, let me have a shot. And let me start by saying overarching submission I think the judgement in NAFED was unfortunate. I also think it's wrong as a matter of law but I will come to that little later. In India, you know India was one of the first countries to ratify the New York Convention, we took an active part in it's drafting and in 1961 we had our Foreign Awards Recognition and Enforcement Act, Section 7 to be of which had the public policy ground as one of the rare grounds on which a foreign award would not be enforced and for the next 30 years or so we actually had a fairly good record of enforcing foreign awards and the law

regarding that was all summarised and put together in one master full judgement in the Renusagar case in 1994. Where you had your two or three basic principles and they were that the fundamental policy of law was fundamental policy of Indian law, no doubt but it was what we call the narrow view of public policy, not the wider view. There are two views within the Indian domestic law system. Secondly, it also said and this is very important that the merits of an award could never be impeached. Thirdly, it said that there was a vast difference between a contravention of law or breach of law on the one hand and a violation of the fundamental policy of law or public policy of India on the other and the first one was not really automatically second and in that case there was a breach of the provisions of the Foreign Exchange Regulation Act, (FERA) and the courts said well it might be a violation but it's certainly not there is no constitute of breach of the public policy of Indian law and then that judgement defined the three pins on which the law has really ever since preceded in India which is that the public policy of India consists of three things, fundamental policy of Indian law, justice and morality and the interest of India. Let's get the third one out of the way immediately, the interest of India is now longer a part of the policy of Indian law, the 2015 amendment to the 1996 Act make that very clear. This judgement was given under the 1961 Act. In 1996 we adopted the UNCITRAL Model and the New York Convention almost verbatim. Infact the Convention is a Schedule to the Act. Section 48 which is the enforcing Article V of the New York Convention really sets out the New York Convention grounds and thereafter most judgments followed the Renusagar principles even

under the 1996 Act because the provisions were really the same. And we have a whole series of judgements including Shri Lal Mahal and ofcourse you have mentioned the latest one, which is Vijay Karia's case. Vijay Karia and Renusagar were 3 judge bench decisions of the Supreme Court, as you know our Supreme Court does not sit a bunk, it sits in benches and judgements of a larger bench will overrule judgements of a smaller size bench even sub silentio but both Renusagar and most of the judgments after that were either two or three judges as is Vijay Karia. Now here comes suddenly Allemanta just a few weeks ago, 2 weeks ago I think which is actually been long in the pipeline, it's a 1989 foreign award and I just wonder why it has taken so long to come up and it was a challenge under the Foreign Awards Act of 1961, so that's damaged limitation, point number one. It's not under the 96 Act at all, certainly not under the 1996 Act as amended in 2015, so it can be completely distinguished on that ground and I don't expect that you will have other such matters or too many of them at least in the pipeline. The second point is that I am not sure how it fits in. The judgement in NAFED Allemanta was also three judges, so the judgement in Renusagar completely bound this bench, being a co-ordinate bench, they couldn't have taken a different view of the law. So they actually recited the law as laid down in Renusagar and much of the judgement is a recounting of law and there is just one paragraph of where they put it all together by saying well we what they did in the first part of judgement was to delve headlong into the merits of the award, they said look at clause 14, it's a force majeure clause, this is not a frustration case at all under Section 56, it is a Section 32

case, contract stands terminated, there were export control orders and being a canalizing agency NAFED could never have exported this quantity without the express permission of the Government of India indeed the Government rejected their application. Accepting all of that, it would still amount to a breach of law, a breach of the export control order but then in one sentence without any reasoning the court says hence there is a breach of the public policy of India and they ignore the law in Renusagar which says every breach of law is not a breach of public policy, there is no reasoning in this judgement which shows how this breach of law constitutes a breach of public policy and I think that's the acaresiel, so I am not sure even under the 1961 Act that this law this judgement can be relied upon to say anything other than what Renusagar has said. And Renusagar is fairly clear, so I would hope the effect of this is very very limited.

Adrian Winstanley: Thank you very much Darius. So it's an aberration. I am very conscious of the time and I think we need to turn although we had other topic we want to discuss to some of the questions that have been coming in, which I see now on my screen, which I hope is not blocking anybody. Let me take them, not one at a time, let me pick some out. This is a question Darius, what role can be played by young lawyers in the process of effective dispute resolution in the future, I rather like that question because for many many years there has been a view that there is this elite, this body of very experienced arbitrators and lawyers who some how monopolise arbitration. I have never subscribed to that. I will turn it over to you in a moment but my initial reaction

is that the young lawyers have an extremely important role to play in improving and maintaining the process of arbitration, the quality of arbitration and I would encourage all young lawyers to consider this branch of the law and going back a little to the question of the accreditation many many years ago Jan Paulson remarked that the making of a good arbitrator is the process of gradual accretion and I like that notion you start young as a bag carrier, you may be do some advocacy in due course you will find yourself in a position where parties are confident of appointing you but in truth some of the finest young arbitrators around these days are below or in their early 40s, so the short answer I think is what could young lawyers do, they can do a lot, they need to embrace arbitration and in so far as India is concerned I think they need to pursue those kind of avenues we have been discussing and that is helping India in due course to become a recognised hub, without all the frailties that currently beset it but Darius what is your view of the role of young lawyers in arbitration.

Darius Khambata: I think Adrian you have pretty much spelt it out. You know, we know this as, oh the older lawyers of arbitration or indeed of litigation, are frankly only as good as elite as your last case. One slip and the whole world knows about it, we operate in a goldfish bowl. So I think there is huge opportunity for younger lawyers to come up now and strike out and I think one of the ways they can do it specially in India is by voluntarily adopting the best International practices even when you are participate in a domestic arbitration, don't get schizophrenic and treat it dif-

ferently. Approach it as you would in international arbitration and by that you know, I think, most of you know what I mean it means emphasis on the written word, ensure your written submissions are sharp, focused, to the point fairly detailed of course, make sure you don't ramble, make sure your pleadings are focused make sure you meet the point against you rather than trying to duck it or obfuscate it and I think if you do all this and be timely in your approach at all stages, if you do all of this, I think you can teach all of us a lesson or two and I think by process of osmosis you can actually be the game changers, so I think there in fact huge potential for younger lawyers today in India.

Adrian Winstanley: Darius, that's very helpful and we are very much on the same page, you and I and again conscious of time and seeing of an awful lot of questions, let me pick a couple of others. This is a question for you Darius and it goes as follows: Does India's current stance on foreign direct investment and investment arbitration wears well or ill for it's efforts to attract foreign investment at this critical time in the global economy, obviously we are thinking here first of all about going right back to White Industries and then the Model BIT of India and on the FDI front of course a year ago, the opening up of the investment pretty much automatically to countries bordering India and suddenly a few months ago a complete reversal of that, the fear is presumably particularly in respect of China that there would be some sort of aggressive takers in Indian companies in this economic crisis so how do you feel India is placed at this

important time as far as investment is concerned and confidence in resolving disputes arising from that investment.

Darius Khambata: Its an excellent and topical question and there are sort of several responses to this. The overarching responses that ultimately it does have to be a matter of the economic policy of the Government. And we can only suggest and recommend but ultimately the call is theirs. I would think that a foreign investor is very, usually very concerned about protecting its investment. He wants recourse to a good, quick, justice delivery system and you have to got to give that to him otherwise he is not going to bring in money it's as simple as that. The 2003 Model BIT was therefore a capital importing model, which had all the usual clauses that allowed or invited the entry of capital. 2015 the New Model which is really a knee jerk reaction to White Industries is not, it knocks out most of the clauses particularly the notorious Most Favoured Nation clause which White Industries used to some advantage. White Industries and that's a topic of a whole lecture in itself shouldn't be a ghost that continues to haunt us. There are two views on that award and one view is that the tribunal there reached out into the India Kuwait BIT to pick out the Most Favoured Nation clause, not the Most Favoured Nation they actually picked out the Best Assurance of claims clause from there which was not present in the Australia India BIT and they got it into the India Australia India BIT via the Most Favoured Nation clause. Whether you can do that or not is a matter where the jury is still out, you can make your model BIT leaner, you can make it more specific but I don't think it has to pen on the other extreme of dis-

couraging foreign investment that's one. But two, and this is a very important point, India has never been a party to ICSID so every BIT award is an award under the rules of the institution chosen, and it has to be enforced in India as a foreign award. Now some things happened in the last year or two, which needs to be addressed. There are two single judge decisions of the Delhi High Court which have held that BIT awards being an investor state would not qualify as commercial disputes under the New York Convention and as you know India has added a caveat to its ratification and accession to the New York Convention, which is to say it is only in respect to commercial disputes. Now of course this was said in the context of an application for an anti arbitration injunction which was then not granted against the BIT arbitration but if that principle is extrapolated and applied to the enforcement of the award, then you might have a major problem because BIT awards could be resisted in India on the ground they are not enforceable under our Arbitration Act under Section 48 because they are not commercial in nature and then that would leave a foreign investor nowhere because he will have to file a suit which is impossible, so I think this needs to be looked at and I think statutorily we need to make an amendment fairly quickly to clarify that the word commercial will be all encompassing. Infact the Supreme Court years ago again in 1994 in the Boeing case had said that the word term commercial must be given a very wide meaning and any practice of International trade or anything that has become common in international trade must be accepted as commercial and Adrian you would agree with me that bilateral investment treaty arbitrations have become very common in international trade so

there is no reason why they shouldn't be treated as commercial but that’s an area we need to look at.

Adrian Winstanley: Absolutely, Darius. They say the time flies when you are enjoying yourself and I am afraid to say that we are within a minute or two of having to conclude here. Let me throw in one final question which we might just answer quite quickly so that we can wrap it up in good time. And it is this, is it time to mandatorily institutionalise arbitrations in India. So there is a nice loaded question.

Darius Khambata: That’s a loaded question. I am going to answer with one of my favourite quotations from a US federal circuit Court decision in Ahmad Baravati’s case which described party autonomy which is the linchpin of arbitration as being so wide that parties could choose any procedure to resolve the dispute even trial by combat or more doubtfully a decision by a panel of three monkeys and that's the heart of arbitration party autonomy. The moment you start imposing things on that, such as institutionalised arbitration you are undermining in a manner of speaking party autonomy. So I don't think it should be mandatory but there are many ways in which it could be encouraged both in the statute as well as infrastructurally. I mean look at the MCIA, what an excellent setup it has got in Bombay, I did an arbitration there recently, if you had more centres like that, more people would want to go to institutional arbitration, when they saw it work as well as the MCIA work, so I think it's a matter of again of the marketplace, not mandatory.

Darius Khambata: It is absolutely right and of course your illustration of MCIA shows perfectly that institutions could administer various levels of involvement if you like, they could provide hearing facilities and catering facilities and court reporting facilities without necessarily their rules being applied. Very light touch to all the way to a fully administered arbitration and again coming back to what may be the new normal I think we have to look what institutions are doing, what they are offering is, running a whole range light touch light weight through to full administration and I think offering everything and they certainly do. Now I think Darius, unless I am mistaken, our time is up but perhaps our hosts will step in at this time and tell us whether that is the case.

Madhukeshwar Desai: Thank you Mr Khambata, thank you Mr Winstanley, for joining us today on the fourth edition of Legally Speaking. We got an interesting perspective on arbitration, BITs, of course the coronavirus and what the new normal would look like post this. Some of the more interesting ones that I found, I have to say Mr Khambata is the three monkeys and the combat example that you gave, heard it before but it never gets old.

Adrian Winstanley: Of course resolving it by combat is difficult when you are having to exercise social distancing.

Darius Khambata: That's right and you need someone like Adrian on your side if you want to win.

Madhukeshwar Desai: I think we could probably take a class in jousting post this to maintain both. Thank you so much for that. I would like to thank our audience for joining and engaging with us. I would like to remind everyone that on 11 May we have Mr Nicholas Peacock, Partner, Herbert Smith in Conversation with Mr Naveen Raju, General Counsel at Mahindra and Mahindra. Please do join us. I know both of you, Mr Khambata, Mr Winstanley are extremely busy despite COIVD-19 outbreak and I would like to thank you on behalf of MCIA and all those joining us for sparing your time.

Darius Khambata: May I just thank all of you, Adrian, Madhukeshwar and Neeti and all the participants for an excellent session. I truly enjoyed it. Thank you so much.

Adrian Winstanley: I would absolutely echo that. It has been a great pleasure talking to all and its very encouraging to see these exchanges taking place in a very positive way despite the clouds that hang over us. So thank you very much to everybody. It has been thoroughly enjoyable. Stay well.

Darius Khambata: Thank you. Take care everyone. Bye.