



LEGALLY SPEAKING

Mr Harish Salve, QC

In conversation with

Mr John Beechey

30 Apr 2020

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



Madhukeshwar Desai: Good morning, Good Afternoon Ladies and Gentlemen. Thank you for joining us today for the second edition of the MCIA's new series, legally speaking. Through the legally speaking series we have to bring to you, views in conversations from stalwarts at the bar, on the bench and members of the legal community. In our previous edition of legally speaking we had justice Indu Malhotra and sir Bernard Rix engage in conversation. I am happy to report that we had over 300 people join in the zoom call who actively engaged with the speakers. I am confident that we will cross that number for this session. Today we have with us Mr Harish salve QC being interviewed by Mr John Beechey. Mister Beechey, Mr Salve, on behalf of the MCIA community and all those joining our live, we welcome you. I will first introduce both our speakers and then request Mr Beechey to commence the conversation. Post which, participants will be allowed to ask questions which they can submit on the zoom app.

John Beechey: Thank you very much indeed Madhukeshwar. Good Morning, Good Afternoon to all those on the webinar. And if I might just pick up from where you left off, Mr Salve the two cases with which perhaps you are most widely associated internationally are in the field of tax and human rights. And we are here to talk about arbitration and I wonder whether you might as well span the gap as beautifully as that bridge behind you does.

Harish Salve: Yes. Infact, I start by saying the way the gaps are spanned, the tax case with which I am associated, the Vodafone, crossed over into being a bilateral investment treaty arbitration, which we argued last February. So I started as a tax lawyer and a commercial lawyer, tax and commercial law lawyer and had interest in constitutional law over a period of time, drifted more into constitutional law, in my litigation practice in the Indian courts and one of the things which I missed was

the commercial law work because in Indian Courts there was, things are better now, but there was a time when the only commercial work you did was arguing for interlocutory injunctions and you never went beyond that. So, that's the reason why I felt very distant from one of my passions, i.e. commercial law and the only place where one really got to do a trial, as it were, was in an arbitration. So by 2003-2004 after I had been Solicitor General, I had had enough, I had my fill of being in courts. And in India we are in courts 5 days a week 10:30 to 4:00, so you even going into the same building from 1978 to 2004 you need a change, so that's when I started increasing my arbitration practice. I found it gives and over the years, I have realised it gives more time to live off a diary, to regulate your life to do serious work and arbitration is as you know very serious business. It's not, it's no longer a meeting or a discussion, arbitration we do full scale trials just that it's before an arbitral panel so it's absolutely delightful. So that's how I drifted into arbitration, but I have kept my, I keep in touch with my other work.

John Beechey: Some years ago I had the privilege of sitting with Tom Broughton Charles after he had come down from International Court of Justice and I had to get up very early in the morning because the other wing man was Fali Nariman and one of the features of that arbitration at the start was that Fali and I were asking questions all the time and Tom Broughton Charles was sitting mute in the middle and he finally said to us, are you allowed to ask questions like this. Fali and I said, yes, that's what we are here for. And he said well, it's very different in the International Court of Justice. We have to put our questions in advance in writing and then the President will act as a spokesman for the entire bench and off we go. We cured all of that pretty quickly and became quite curious not much discomfiture of the parties. But if I just back a little, at

about that time Fali was making this sort of comments that in India still arbitration is seen very much as a first step on the ladder and thereafter one had a lot of litigation ahead of one, in order to see a case through. What do you think has changed most about the perception of arbitration in India? Speaking as an outsider, one sees examples of the Indian appeal to arbitration seeing the enormous case load, lets get it out of the Courts, let's arbitrate it. And then it goes the other way, it steps come back and somehow the whole process is reined in once more. It seems very stop start and there is no real cohesion to the way which it being taken forward. Am I being unfair? Or do you think..

Harish Salve: No.No. You are being polite. You are not being unfair. I have rather critic of Indian arbitration. Things are definitely better, but when you say that it's a very relative term of what you mean by better. The problem is, over the decades when we were practicing in late 70s 80s even in the early 90s, I hardly came across any major cases where corporates were involved in arbitration. Arbitration was something which was done, and if you go by sheer numerical load of arbitration, arbitration was something which was done in 70% of the cases between Government departments and contractors. And a very long time ago, even before I took silk I think it was in mid 80s, I was instructed by a Bombay solicitor in an arbitration and I found it very complex involving work in the offshore area of dredging and the arbitrator was the Joint Managing Director of the company on the other side. And I asked my client bluntly how did he ever agree to such an arbitration? It's like one of the two parties being a judge in his own cause. And his answer was very simple, he says, Sir he is not going to hear it, he will appoint some engineer. So I said, that get worse? He said no that gets better. Now the judges know this. So when an award reaches the supreme court in cases like these the judges, if it

is in favour of the contractor, just start smelling the award rather than reading the award, see if everything is ok. So this mindset then sort of becomes the general prevailing mindset in relation to arbitrators. When you see an award you start reading it, you start smelling it, you start touching it instead of a hands off approach. Indian corporates got into arbitration when corporate India reached a stage of maturity, where there were serious disputes inter-corporates and more than that corporate started Indian corporate started signing international contracts outside the institutional realm, like if you were an importer of food grains you went to the institution which did food grain arbitration or if you were chartering vessels you went to the institution which administered those arbitrations and so on , your GAFTA or those kind of arbitrations were going on. But the mainstream commercial arbitration which is the bread and butter of our work came to India, I would say in 90s, mid 90s and that has taken time and that is why 1996 we got the new Act. By 90s there was a clamour saying that this old law is not working because you started now getting serious commercial cases which was a first step in litigation because everybody said, first of all if you don't want a matter to be resolved quickly you first start dilly dallying about the arbitration, then you challenge interim orders of the arbitrator and then you go on and on and that's what Fali possibly mentioned to you. After the award comes the trial court, comes the first appeal comes revision and comes Supreme Court and the chances are the Supreme Court might decide to second guess the award. So it was just one more step in the litigation instead of starting at the trial court you started before the arbitrator and then went up to the courts.

John Beechey: And do you think, there is still a sense internationally, because you see both from the perspective of someone who practices actively in India as well as

internationally, do you still have the sense that there is a sort of chilling effect when it comes to dealing with arbitration in India because what is perceived to be the role, not only of the courts but of the Government, no doubt well-intentioned intervention through parliament to cause there to be effectively a cutoff on the period of time within which an arbitration can run.

Harish Salve: You see, the role of the Government is in two layers. The government has tried it's best to make India a pro-arbitration culture and the Government departments have done their worst to destroy the sanctity of arbitrations. Let me tell you what I mean by this. When the 96 Act came and everybody sort of cracked down and said India needs a new law, mindlessly we copied the UNCITRAL Model, which was meant for international arbitrations, and applied it to domestic arbitrations. The Seval committee, as you know, said you cannot have zero recourse from an award, but that's what we did. Then things started going in the opposite direction. I remember for the first time when this case came up, who was the person challenging the award, ONGC, I was the Solicitor General and when they came to me I told them you don't have a statable case, three arbitrators, eminent judges had heard the matter, it was a case of liquidated damages they had taken the view that these were not punitive. Which court, which international commercial court in UK would touch an award like this? But the Indian Court in Supreme Court when they came for appeal, I told them you don't have hope in hell in this case, why should Supreme Court interfere with this and look at the section, it only says public policy. Where is the public policy in this? Supreme Court granted leave, to my utter shock. All I told them is this is a new Act and they said ok, we will read it and granted leave when it came for hearing they actually won the case. And that's where Supreme Court came up with those strange ideas of when they could interfere with the

award, that was the whole problem and finally they set aside an award like that. If you say that is what the Court is going to do then don't talk of arbitration in India and you will see how government departments run arbitrations. I am doing four big arbitrations against the Government of India and believe me in every case they are asking for adjournment, in every case they are asking for time, in one case from an order of production of documents, the usual Redfern Schedule an appeal was carried to the High Court. The High Court threw it out saying there is no provision in the statute where you can appeal these orders of the tribunal. They went to Supreme Court, the Supreme Court stayed the arbitration for a year, and this is as recent as 2 years back, so the government departments have completely completely destroyed the sanctity of arbitration in India and that is the reason why you see the stop and start attitude. You will see the Courts take a very strong view when it comes to two corporates fighting and it is a very pro arbitration view. Suddenly you will get a wobbler of a judgment diluting the strictness of arbitration because you will see there is a public sector company on one side. So, this has to stop. And judges have to decide that if Government, on a policy level is wanting to make India pro-arbitration then the judges have to be hands off, and even if the Government department comes to them they should point them to the law, which the parliament is making rather than encourage this kind of adventurous route.

John Beechey: You think the things will change once, in times like this one hesitates to talk in terms of the effective of those disinfected, do you think that things will improve in the private sector as indeed the MCIA has been doing. Do you think their arrival on the scene, the apparent desire to take up their services will cause something of a shift and one will begin to see an arbitral tribunal in India being composed other than the retired members of the judiciary?

Harish Salve: See again, the biggest offender in this is the Government of India. First of all, the arrival of international institutions insures one thing, the judges feel a lot more comfortable dealing with an award which comes out of an institutionalised arbitration knowing that there would be a certain rigour which would have been applied to the conduct of the proceedings including overseeing the award. So yes, to that extent it adds to the credibility of the arbitration process. But the composition of the arbitral tribunal for decades we have had judges being appointed as arbitrators and I must say so publicly I have seen cases where judges are appointed by the Government, the same judges are appointed over and over and over again, which is completely contrary to the spirit of the arbitration the independent procedures, the independent standards which now we have. So again you have Parliament which amended and put your entire IBA, the red, blue, green into the statute. I don't think any other country has done this putting it in the statute. And on the other hand you have the Government of India departments appointing the same person over and over again. So again there is this cleavage between the policy and their actions and till this changes and many times to corporates, one can explain that look your arbitrator has to be robust, he must be up to speed. International arbitrators when they come to hearing are full of the facts. You are supposed to read your papers, you are supposed to read the skeleton and you are supposed to be upfront in the game. And retired judges are, we have seen are not many times that familiar with commercial law, that familiar with what's going on in the arbitration world to be at that stage. I am not saying I am not generalising but some of them are definitely not aware and in that situation what you are actually happening is, what happens, and I have tried explaining it to clients having worked on both sides of the fence as an advocate as well as as an arbitrator, the third

person falls off the wagon when nobody is listening to him. The other two arbitrators go through the motions of the hearing the third arbitrator but if you are not on the same page you will, at best he will give you a dissenting award, doesn't get you anywhere. So its more important to have an intelligent arbitrator so that you have the degree of fairness and complete representation. It's happening more in the private sector where people have started to understand. The other problem is, I must confess, John, is that we as Barristers, as Indian lawyers we don't accept appointment as arbitrators.

John Beechey: I was about to ask you exactly that question.

Harish Salve: Yeah. Because you make much more money in advocacy than you do in sitting as an arbitrator. And specially the kind of practice Indian lawyers are used to. So in one sense even the reservoir, even the pool available for appointment then gets narrowed so you naturally have a shift towards retired judges, so this has been one of the structural problems. I see it going away. I see more and more specially younger lawyers taking up small arbitrations as arbitrators and I think over a period of time this will change for the better.

John Beechey: I think there is internationally a sense that, we have seen the real makings of a generational shift which one point was simply not really a factor because the field was very small and the movement was actually quite slow but now there is really a drive and it upsets the purest if we talk of the business of international arbitration, but that what it is.

Harish Salve: Thats what it is.

John Beechey: No longer an academic discipline in itself its generally an international business. I think it's only a matter

of time before one sees even if I may call it as conservative a jurisdiction as India the arrival of institutions like MCIA, the input of people like you and others who would actually be prepared to fly the flag a little, would gradually make a bit of a difference. It's going to take a while.

Harish Salve: It does. I must tell you there are lot of younger judges who are now getting appointed in the, specially in the Commercial Courts like Delhi High Court for example, Bombay High Court and lot of younger judges who are there are very pro arbitration and very good. The problem still is the Supreme Court and I must say so bluntly, the Supreme Court has by and large been pro arbitration but again there are sometimes the Court gives very mixed messages. I believe recently in some hearing, the Court said we will reconsider the BALCO judgement on seat. Now you can't go revisiting, it is now settled in, everybody understands it, that's the way the system works. Just because somebody feels or maybe it becomes too harsh on Indian public sector companies or it takes away too much from Indian jurisdiction because people don't want India as a seat, you want to change that law. You must understand people don't want India as a seat because of what the judges do in Court. We always advise clients never agree to India, agree to any other place other than India because in India you run a risk if you get the wrong judge it is again the first step in a long litigation.

John Beechey: Yes. It is notable that the biggest single constituent among the users of the SIAC centre in Singapore tend to be from India.

Harish Salve: Yes. Because they feel so much more comfortable there.

John Beechey: I was going to ask you this, it's a long time ago now, but my last visit to the Delhi High Court caused me to be astonished by the sheer quantity of papers scattered around. We are now in an absolutely extraordinary period where as I said to you just before we went on air there is sort of motherhood and apple pie style pronouncement from a number of international institutions telling us we should all go remote and do things whenever possible by remote link and that will have to be the case I suppose for so long as social distancing remains in place. But do you think this may form any sort of catalyst for real change in the way people say, stop step back and take a view about how they might conduct major trials and major arbitrations in India. Do you think there will be a move to embrace new technology to try and move away from old paper based system and I say that because in some respect places like Bangalore are real drivers of progress in this field and it seems to me this might be an opportunity really where India could take a lead as opposed to following long behind.

Harish Salve: In fact Indian Courts and some of the Courts in Delhi High Court for example some of the judges who feel comfortable dealing with this and the numbers are growing by the day have what are called E-Courts. Now in Delhi High Court whatever you file you have to file electronically in addition to paper and my nephew is a judge so one day he showed me and it comes to them in the evening if you are willing to work that way, it comes to you on a pen-drive and you plug it into your laptop which has a software which is a dedicated software. Your papers are all there you click on a case number and the case opens you have your pleadings on one side your documents on the other side. It's beautifully paginated and in Court rooms they have big screens with the facility to write on the screens and so the judges and now following that tool to a very large extent and including those screens are connected to the internet system

so if the judge wants to check up a judgement or you want to cite a judgement he sees it in the soft copy and some of the judges have gone to the extent they put a big screen so when you are arguing a case and a Judge says have you checked that judgement and you say I will check it, he says wait I will show it to you on the screen and he puts it on the screen and says read para so and so what you're saying is wrong. So some of the judges have really taken this forward and I think the next logical step for them and specially when you have limitations on this kind of physical appearances is to hear cases on the net. And I have sitting here argued case in the Delhi High Court, I plan to argue one more in 3 days time through WebEx. If this becomes effective then at least some cases, speaking for myself, I do not favour trials being done remotely, I don't know maybe we people are too old in the tooth to accommodate that. But when I am cross examining a witness, I want him in the room and you know why. Cross examining a witness when he is sitting in front of you versus cross examining a witness who is on a video link, the fellow on the video link feels he has got away with it. So I always, speaking for myself I don't think at least the witness action can be done on video. Secondly, in our form of advocacy where you as an arbitrator you would be asking questions, as a lawyer, if the arbitrator is sitting quietly I will be very worried not knowing where they are going. This kind of an exchange is always most efficient face-to-face where you get the body language of the presiding whether is a judge or an arbitrator. Can you duplicate that on the E-system? I don't know. I am not sufficiently technically skilled but trials definitely cannot go on to this system. But there are some hearings and this is the other thing which I have been discussing with colleagues with younger colleagues in the Delhi High Court for example and even in the Supreme Court Judges saying you people have to now insist on skeletal coming in advance, hearing, reading those skeletal, asking for a reading list and

then going into the Court. You will save so much time. Today what is happening in India and I say so, point a finger at myself also with the Indian practice is the whole case management system is so faulty you don't know when a case is going to come up, the cases come up suddenly so you are rushing from Court to Court, a Senior QC is doing multiple, a Silk is doing multiple cases in a day. How can you do justice to that kind of work. So you are sort of pulling yourself by your bootstrap's as you go along. If you have the discipline of doing a skeletal, circulating judgements in advance, reading list advance, it also reading involved by the Silk who is going to be conducting the case. So that change has to come and until that change comes we will never achieve that degree of proficiency in case disposal. But then that's again asking for a bit. So in the present situation the judges are doing very little work but I noticed they are at least, for me I think that's a positive, they are getting used to receiving submissions in advance, getting a short argument for half an hour on a video screen and doing the rest on paper.

John Beechey: I think we all going to have to learn some new techniques as this goes on because this is not gonna go away anytime soon.

Harish Salve: It's not going soon.

John Beechey: I am conscious that lot of people are watching this and may be that we ought to allow them some time for questions before the session comes to an end. So perhaps I might hand back to the Mumbai Centre to see whether they want to comperere the questions and throw them out to one or other of us.

Neeti Sachdeva: Thank You, Mr Beechey and Mr Salve for this interesting and engaging conversation. I must say we didn't even realise how we have reached at least the end of the conversation

and into the question answer session. Many thanks on behalf of the MCIA for joining. We have had many questions pouring in from the beginning of this conversation started and people were waiting to get an opportunity. What we have done that is, we have picked few questions and the first question that I have is to Mr Salve and this is from none other than but our MCIA Council member, Mr Nakul Diwan, who has asked me to ask this question to you Mr Salve. Given what India has experienced with White Industries Case and Vodafone and all what is your experience been on Investment Treaty Arbitrations?

Harish Salve: Well Investment Treaty Arbitrations involving India have been nothing short of a nightmare. And I must tell you this, India signed Investment treaties and when it came to treaties being enforced against them they suddenly realised they are a Sovereign country who can't be dictated to by arbitral tribunal. Nobody told them that there is a whole jurisprudence of bilateral investment treaties there is a whole jurisprudence which has come out of ICSID. And this mindset you have to get rid of this mindset even if you want to sign an investment treaty. It takes forever to get the Government of India to agree to arbitrators, it takes forever to get them to move, they take all sorts of jurisdictional objections and some of the things which we have seen play out I don't want to comment on the three cases which I have conducted, but some of the comments which you see coming out from the Government, some of the approaches they take, the stand they take extremely unreasonable positions. They will not agree to, right from fighting over dates and adjournments for everything they want more time. So it's a very unprofessional way in which Government of India approaches its International treaty obligations. So for me its been, and then suddenly post Vodafone in that emotional moment they decided to say we will not have any more BITs and they came out with the Model BIT. It came up for discussion in the UK, and I

was, one of my friends who is on the UK side of the Indo UK business Council told me that his Indian counterpart came who also is a dear friend and a client from Delhi, who was sent by the Government of India that you go and talk to the business Council and that business Council in that business Council meeting when my friend who told me can you brief me on some of the points under the Indian treaty. Well I said it is wrong beginning to end. The Model treaty you might as well not sign one. And when he told them where are the dispute resolution mechanism he says Indian Courts. How can you have domestic Court deciding International disputes. He says don't even talk about it. Don't even talk about it. Unacceptable, not negotiable. So they said ok we will come back and I was informally advising them I said well if it is not negotiable then you want to sign a treaty which is a piece of waste paper do it. Then basically, it's what else is it, it is like Government of India saying I promise you, I will be very good. That they promise you even without a treaty. Why do you need a treaty for that. So this is the mindset which has pervaded throughout and you can see by the Model treaty which India has been giving out as to what really they feel about treaties and treaty arbitrations.

Neeti Sachdeva: Thank you very much Mr Salve. Mr Beechey we have a question from the audience for you. They want to know you have had an experience of Indian Counsel appearing before you for many years now. Have you seen any difference in Counsels in the last 10 years?

John Beechey: I think I got the general drift, you are asking me about the way in which Indian advocates have presented their cases in front of me. What that it?

Madhukeshwar Desai: Mr Beechey, that's correct that was the gist of the question.

John Beechey: Vey well. One of the very early cases involving Indian practitioners was in fact a case in which I was sitting in Delhi and ever since I've done 4 or 5 major arbitrations, where Indian counsels have been involved. One of the most arresting features of that case was that the tribunal comprised of a very senior Indian advocate at one end of the table, I was on the other wing and in the middle was the Australian, Former Solicitor General of Australia. And already among the tribunal you have three different ways of speaking English and three different traditions of presenting cases in courts. In front of us, was an absolute delightful and very able, quite young Indian senior advocate and on the other side a New York lawyer who remarkably for that species was very vain and very polished and not prepared to go in like a terrier at the very first opportunity. So we had a very measured presentation from the American side and then we waited to hear what the Respondent had to say, and pat came about the most aggressive, pointed, ad hominem attack I've ever heard from a man who had previously been one of the most marked gentleman you could have hope to meet on the screen and we had to stop. We actually had to stop. And it then took me to the sides of the chair. I think what you are saying here is a simple difference in the approach. If you go into the Delhi High Court on a busy day the style of advocacy you will hear there is something which will cause an English plush judge to blench, he certainly wouldn't put up with it. And you begin to realise that even within this, it's crazy to call it a small world, a common law world, there are so many different ways of presenting a case and once we have made the points for both sides, the American didn't feel it was being singled out was something particularly nasty, they actually got on extraordinarily well and it worked but it was quite amazing to see this very immediate and very direct culture clash between the two sides. I have to say that since then, the most recent

case I have been involved with Indian counsels on both sides and there was just a question of getting used to the slanging action, letting them get on with it. But again it worked because they knew exactly what they were doing they knew the culture the background and it didn't stop the underlying quality of the argument, it was very good on both sides, there is no two ways about that. But it is quite remarkable and it is not limited to advocates coming from common law tradition, you see this when civil law get going as well, they are completely different ways of doing it, depending entirely on the practice. But I mean, Harish is much better at this, than I am, you see this sort of thing in action, but for me it was a real eye opener, something to watch an explosion in front of us.

Neeti sachdeva: Thank you very much Mr Beechey. I hope I'm audible now. One last question to you before we come to the close of this interview series is that a lot of people are asking me, how both of you actually manage your time so well? You are busy counsel, you sit as an arbitrator, you travel through jurisdictions and then you are able to take out time do this webinars and interview series as well so any tips on time management for our audience.

John Beechey: What time management at the moment is rather imposed, because in 40 years I have never stayed at one place for so long. And to that extent it's a feature of what we are going through but generally speaking and I suspect Harish would have exactly the same reaction one ends up spinning plates very fast indeed and just hopes that they don't start crashing down all together. It is a matter really being quiet disciplined with diary. In my case these days I don't appear as Counsel anymore no doubt to the relief of an arbitral tribunal, but I do set as an arbitrator in an awful lot of cases and it really is a question of having a very small and dedicated team behind one

and an ability to be shepherded but equally to make sure that you are on top of the stuff as it comes up and it is not easy. But I have a feeling that Harish Salve would be rather better in managing his time than I am.

Harish Salve: Well John as you very rightly said it's always a question of spinning plates. I thought when I had withdrawn from day to day Supreme Court practice I thought I would be able to live out of a diary. Definitely doing arbitration work and practicing in the UK is a lot more regimental, having said that with my kind of luck I accepted the brief in the Vodafone Arbitration in 2012, the Jadhav incident happened in 2017. The hearing before the International Court of Justice on merits in the Jadhav case and the Vodafone BIT arbitration were back to back. The dates were going to clash. Fortunately, the arbitral tribunal, when the Government of India who instructed me in Jadhav was opposing the dates, a week after Jadhav for Vodafone, a week before Jadhav for Vodafone, the Arbitral Tribunal came down hard and said Mr Salve has far more important public duties appearing for you in the ICJ, so we will not listen to you and fix the cases one week apart. So in two weeks, I did possibly two of the most difficult and important cases of my life. So yes we are sort of always worried about the plates crashing but to Indian colleagues all I will say is you have to resist the temptation of piling too much on your plate. Take only that much which you can do well.

Neeti Sachdeva: Thank you Mr Beechey, Mr Salve. It was lovely to have you on this series I would like to thank on behalf of MCIA. We have the next series which is coming on, where we have a General Counsel joining us on Monday, 4th of May. We will have Nish Shetty interviewing Mr Shuva Mandal from Tata Sons. Thank you once again Mr Salve, Mr Beechey for all your support

and we look forward to having you back with as sometime soon.
Thank you.

Harish Salve: Sure. Bye.

John Beechey: Pleasure. Thank you very much indeed. Bye.
