

Talking about ADR with

Anil Xavier



Sarosh Zaiwalla, Founder & Senior Partner, Zaiwalla & Co., London has been involved in over 1,000 international litigations and arbitrations in the fields of Energy, Maritime and Construction either as solicitor, Counsel or Arbitrator. Over his career, Sarosh has acted for clients ranging from the President of India, the Government of the People's

Republic of China (PRC) and the Iranian Government to the Bachchan and Gandhi families in India. In the backdrop of opening up of legal sector in India, Sarosh talks with Anil Xavier, Editor.

AX: *Mr. Sarosh, you were born and raised in Mumbai. Your father was a lawyer in India, but how come you decided to start your law practice in the United Kingdom?*

SZ: My father was an English qualified solicitor who had established Zaiwalla & Co in Mumbai in 1926. Being the youngest son in the family I decided to follow in my father's footsteps. I trained at an English solicitors firm on Fleet Street in London in the late 70s. I faced several obstacles at the time, but managed to overcome these with honest hard work and tenacity. I was strongly advised by many to anglicize my name when I arrived in the UK. However, I resisted this and it has paid off. In fact, retaining my Indian name was an advantage because I later found that many others who had anglicized their names were not respected by the local community.

AX: *Where you the first non-white lawyer to start law practice in London? When did you start your legal practice in the UK?*

SZ: Yes, I was the first Asian to start a solicitors firm in the City of London. I was advised by an eminent International Maritime arbitrator late Cedric Barclay that as an English solicitor of Indian origin I would never progress at an English firm and the best thing to do would be to set up on my own. At the time this was quite an unusual step for someone of Indian origin to take. In 1982 I started my own small law firm - Zaiwalla & Co Solicitors - on Chancery Lane in the heart of the

legal district of the City of London. The then sitting Chief Justice of India, Mr. Justice Chadrachud, formally inaugurated my firm's office in Chancery Lane. I was fortunate enough to have been appointed the Indian High Commission's solicitor, which gave me entry into the remit of International Shipping Arbitration.

AX: *I understand that you had hired Tony Blair as a Barrister in your firm? When was that?*

SZ: I hired Tony Blair in 1983 for a shipping charterparty dispute which was in arbitration between the Government of India and the owners of an ocean going vessel called "La Pintada" I did not find his preparation satisfactory and I had to later remove him from this case. Incidentally the only time Tony Blair's name appears in the law reports is this case and the English High Court judgment is reported in (1983) Lloyds law report at page 38. The issue in the La Pintada case was whether Indian Government was liable to pay compound interest on the late payment of freight and demurrage for the vessels which the government had chartered to carry wheat from U.S.A to the Indian ports. This was a test case for Indian Government and over USD 10 million was at stake for Indian Government. In those years Indian Government was chartering over 300 vessels annually to bring food grains into India. My firm had to take this case right up to the House of Lords to succeed and which was also the first ever success for an Indian case in the House of Lords after India's independence.

AX: *Mr. Sarosh, your law firm specialized in maritime law. But you have represented many governments and big names from India and rest of world in international matters. According to you what in you attracted these big names to you? Can you tell me some of the major names that come to your mind?*

SZ: My firm graduated from initially being a maritime law firm to handling other International cases. Integrity and commitment for client's cases has proved to be the real hallmark for our success. We listen to what a client has to say and then formulate a case strategy that is based on accurate information supplied by client, and the most trusted legal practices. I have been very lucky during my career to have worked on some really interesting and landmark cases.

Amongst the many interesting cases that comes to my mind is our success for Bank Mellat, Iran's largest private bank, a case which we took over mid-stream for a large English firm after the clients had lost and which we successfully fought and won the case in the UK Supreme Court. The Supreme Court held that sanctions placed on Bank Mellat by the UK Government were both unlawful and irrational. The case is a very interesting one in that it raises issues about the dubious nature of 'secret courts', whereby not all parties have access to all the trial information. As well as huge potential costs to the taxpayer, the case has raised serious concerns about the way legal challenges in the British and European Courts are undermining sanctions against Iran. As a consequence of our success in the Supreme Court for Bank Mellat, this Iranian bank is now claiming damages of USD 4 billion in the English Court against the UK government.

Another landmark case was that of Shah versus the banking giant HSBC. We had successfully represented the Claimant Mr. Shah in a USD 330 million case against HSBC, which involved consideration, for the first time by the English Courts, of whether an innocent customer can test in Court a bank's claim that it had suspicions of money laundering which caused it to freeze its

own customer's account. This was a 'landmark judgment', before which banks and law firms 'could act on a hunch about a client's transactions without disclosing the necessary information'. This judgment has far reaching implications for banks, as the Court in this case has for the first time ruled that the banks are now accountable for their conduct in reporting suspicions of money laundering.

AX: *When did you shift your focus from litigation to Alternative Dispute Resolution?*

SZ: I have from the start been primarily involved in International Arbitrations. Over the years I have been involved in over 1200 International Arbitration cases in London and worldwide either as Solicitor, Counsel or Arbitrator. I am regularly appointed by the office of the President of the English Law society to act as Sole Arbitrator for International Arbitration cases where the Arbitration agreement provided the President to appoint Arbitrator.

AX: *I have heard that you had represented an arbitration matter, which was the highest-ever amount awarded by the Permanent Court of Arbitration at The Hague. Can you tell me more about that?*

SZ: I was recently consulted by the Russian Federation in respect of an award given by the Permanent Court of Arbitration at The Hague against Russian Government of EUR 50 billion in favor of the previous Yukos shareholders. The Russian came to me to suggest what they called "out of box" ideas on challenging this Award in the Dutch Court.

AX: *Now the Government of India is planning to open up the legal sector and foreign law firms are eagerly waiting to open up their offices in India. Do you think this is a good step?*

SZ: Yes, I welcome this news. I feel that for a long time the Indian legal sector was quite insular and inward looking, and monopolized by a few long established firms who work on old imperialist model. This rigid structure did not help the legal industry in India, as it made it quite closed off from the global legal market, and this in turn affected the free flow of business, labor and intellectual capital into the country. Opening up the legal profession to overseas firm will open up the upper strata of the legal profession the young Indian talented lawyers.

AX: *It is often said it takes a lot of money to get justice. Will the entry of foreign law firms escalate the cost of justice?*

SZ: This is an incorrect perception. It is well known that the upper strata cream of lawyers in India often charge more as their legal fees than lawyers overseas. They are the ones who most fear entry of overseas firm because of competition they will have to meet which in turn will cause them to reduce their fees. Competition is always good and brings out the best for local Indian clients and the legal fees they have to pay. We are now living in a global world and entry of foreign law firm will be very positive for India in two respects – firstly it will allow Indian lawyers an opportunity to place an Indian footprint on international legal system which I believe is needed; secondly, overseas law firms will be introducing a higher internationally accepted standard into Indian legal system.

AX: *The global arbitration community often says arbitration is different in India and rest of the world. To overcome this criticism the Arbitration Act is being amended based on the*

recommendation of the Law Commission of India, do you think just by amending the law, the arbitration process and culture in India can be improved or is there anything further that we need to do for improving it?

SZ: Change in the law is a step in the right direction. A society needs to be driven by the law and, in turn, needs to be enshrined in law – this is the only way that it can and will be adhered to. However, the real problem for India to focus is on the international perception of the low standing quality of International Arbitration which has seats in India. This perception whether true or not needs to be recognized and steps be taken to effectively cure this perception. The strength of the chain is its weakest link. Even if one arbitrator is found to be lacking integrity it reflects on the whole arbitration community. The effective way to deal with this is for the arbitration community in India to ensure by self-regulation rules and practice that an Arbitrator against whom there is a shadow of diminishing integrity is routed out from the system. Another criticism which one hears from time to time is the monopoly of the retired Judges to act as arbitrators. The Judges then conduct the arbitration as per the Court process which causes lengthy delay. This also needs to be cured.

AX: *Being a member of the International Court of Arbitration of the ICC Paris and also a CEDR Accredited Mediator, what are your views in creating professionalism in the ADR (Arbitration Dispute Resolution) sector in India?*

SZ: It was a great experience to represent India on the International Court of Arbitration of the ICC, Paris. One of the noticeable factors when the draft awards came to the Court for approval was the number of dissenting decisions from the Arbitrator appointed by a party from a developing country. A dissenting opinion of one Arbitrator has no value in so far as enforcement by the Court of award is concerned. The lesson I learned from this is that very often Indian parties appoint a retired Indian Judge as an Arbitrator who is not able to communicate effectively with his two other Co-Arbitrators. This causes a prejudice to his appointers. I personally had this experience when I was sitting as a Co-Arbitrator in London with a retired Chief Justice of India and the third Arbitrator who was a retired Chief Justice of the European Court of Justice. The Indian Chief Justice had a complete breakdown of communication with the Chairman of the Tribunal and stopped talking with the Chairman. This would not have happened if care was taken to ensure that the Arbitrator appointed by the Indian party has the ability to ensure that during deliberation after the hearing that his Indian appointer's case is fully considered by his Co-Arbitrators.

AX: *Do you think the dispute resolution evolution has travelled from litigation to arbitration and from there to mediation? Is this because justice is rendered effectively in mediation or because it is the natural cultural evolution that when people get empowered they would like to take charge of decision making rather than delegating it to a third party to impose the decision on them?*

SZ: Mediation is now a growing trend in both Court litigation and arbitration. However for the mediation to take place, both parties must agree. Statistics show that where there is a mediation before a qualified CEDR (Center for Effective Dispute Resolution) 90% of cases are settled during mediation and the majority of the remaining 10% are settled by the end of the following year and very few go to trial. A qualified mediator will conduct a mediation in such a way that he/she will get both parties thinking on the merits of resolving the dispute without giving any advice to either party on the merits of their case. So mediation is to be welcomed.

AX: *How do you rate the efforts of the Indian Institute of Arbitration & Mediation (IIAM) in creating efforts to promote institutional arbitration and mediation in India and also certify mediators in India to global standards under the norms of the International Mediation Institute (IMI), The Hague?*

SZ: If I am to be frank, IIAM's efforts as yet to have an effect on the change of prejudicial perception of alternative dispute resolution system in India. But IIAM must not give up and I am sure in due course they will succeed in bringing about a very high international standard to promote institution arbitration and mediation in India and to certify mediators in India of global standards.