India – Law Firms

Kelley Drye's Bridge To India

The Editor interviews ***Shabbir S. Wakhariya****, Partner, Kelley Drye & Warren LLP.*

Editor: Mr. Wakhariya, would you tell our readers something about your background?

Wakhariya: I am an Indian national. During law school in India, I joined a firm in Mumbai – then called Bombay – where my father was a senior partner. I had always wanted to pursue a masters program abroad, and I was fortunate to be accepted by Duke University School of Law for the fall of 1990. It proved to be one of the best experiences of my life.

Editor: How did you come to Kelley Drye?

Wakhariya: I joined Kelley Drye at the beginning of 1992. I was looking to return to India when I happened to meet the head of the India practice at Kelley Drye, Talat Ansari. Talat indicated that the firm needed someone for six months who had had experience practicing in Mumbai. He worked hard to convince me that it would be a mistake to return immediately to India. That was 15 years ago. In 1999 I was made a partner.

Editor: Please tell us about your practice. How has it evolved over the course of your career?

Wakhariya: Historically, an Indian lawyer was primarily a litigator, and clients sought him out only in connection with a dispute. For transactional work, the client went principally to a chartered accountant, the primary concern being to structure the transaction for tax efficiency.

Beginning in the early '90s – with "project finance" becoming the favored term in Indian business parlance – Indian lawyers quickly learned to draft and negotiate a variety of agreements. Today, they are as specialized as any group of lawyers in the world.

Editor: In light of the fact that you finished your education at Duke in 1991, your career almost precisely parallels the opening up of the Indian economy to global trade. Would you share with us your impressions of what the last 15 years has meant to India?

Wakhariya: The past 15 years has seen an astonishing transition in India. When the process began, every industry in the country was heavily regulated and there was virtually no foreign investment. No one could have imagined then how quickly and how extensively the economy would liberalize. Since 1991 most foreign investment has entered the country under an automatic route – with few limitations and a minimal post-investment requirement to report to the Reserve Bank of India. Even the defense industry is open to up to 24 percent investment by non-Indians.

Keep in mind that during this 15-year period there have been two major changes of government. Liberalization was begun by an Indian Congress Party government, and when the Bharatiya Janata Party – with a very different political ideology – took over, the process still continued on track. This represents, I believe, a general consensus among the entire spectrum of the country's political leadership that the Indian economy must continue to liberalize if it is to stay relevant in the global arena.

Shabbir S. Wakhariya

What we have seen in the first 15 years will only increase exponentially over the next 15.

Editor: Would you give us an overview of India as an investment destination?

Wakhariya: In the 1970s India clamped down on foreign investment, and over the ensuing 20 years of economic isolation a number of Indian enterprises built strong local brands. During the early '90s there was some fear that liberalization would result in Western companies driving them out of business. That did not happen. Today, mature Indian companies welcome the competition that foreign investment represents – they recognize that competition makes them more efficient and more profitable – and joint ventures with foreign partners are increasingly popular.

While opening up the economy to foreign investment, the government acted to protect domestic enterprises, through a regulation known as Press Note 18, which prevented a foreign joint venture partner from carrying on *any* activity on its own, or with another partner in the same or a similar field, without the written consent of the original Indian partner. This policy was misused to some degree. Many domestic partners refused to give their consent without a substantial payment.

In January of 2005, the government announced that it desired to do away with Press Note 18 altogether. Predictably, there were objections, and the compromise that resulted permitted the Press Note 18 policy to continue to apply to existing joint ventures, but only with respect to the *same* business, meaning the identical business. The new arrangement also provided that joint ventures entered into *after* January of 2005 would be solely on an arms length basis, without restrictions.

For a very long time, Indian enterprises have been family affairs. That is changing. During the past 15 years many businesses have reoriented themselves to best practices, including bringing in professional management. While the family might continue to be represented on the board of directors, in many cases it has been disassociated from the day-to-day running of the business.

The top 20 enterprises in India have implemented change in a variety of ways. They are now competing globally, and in recent years they have begun to acquire businesses overseas. *That* is a major breakthrough.

Editor: Are certain domestic industries off limits for foreign investment?

Wakhariya: India does not permit general retail trading. In the 1950s we adopted policies to promote the development of manufacturing. There was a general distrust of the introduction of foreign investment for the purpose of retail trading, which does not benefit the country, only the foreign investor. By requiring the foreign investor to make an investment of capital in India, however, employment is encouraged as well as expertise and skills. For example, a Louis Vuitton or a Mercedes-Benz brand cannot set up retail shops and showrooms in India, *but* they are welcome to establish manufacturing facilities for the purpose of producing their products for sale in the country.

Every country places limitations on foreign ownership of its defense industry, and India is no exception. Some foreign investment is permitted in the defense industry, however. That may increase once India and the U.S. ratify the historic agreement on civilian nuclear cooperation negotiated last March. Because the U.S. plays such a dominant role in the development of international business policies, any country which is a preferred partner of the U.S. – and the nuclear cooperation agreement accomplishes this – will see its international trade much enhanced.

Editor: If I am general counsel of a foreign enterprise, what should I look out for – what are the pitfalls – in starting up operations in India?

Wakhariya: There is still a wide gap between what the law says and how it is interpreted by the bureaucracy. There is a level of discretion with the bureaucracy that often defeats the good intentions of the government. That is why it is essential to retain a lawyer with experience representing clients *within* India. Such experience is necessary if a foreign general counsel is to have any chance to overcome a variety of bureaucratic obstacles.

Nevertheless, the Indian law is codified and predictable – and in this India may differ from China – and the judiciary is, on the whole, fair, objective and independent. The Indian Supreme Court will strike down a government action that is contrary to due process.

Editor: India has been a destination for offshore business process outsourcing and call centers for at least the past ten years.

Wakhariya: Some years ago India realized that it had an extremely valuable resource in the hundreds of thousands of highly trained English-speaking graduates its universities turned out each year. Indian wage and salary standards were very competitive compared with the rest of the world, and the combination of all of these things made the country an attractive destination for foreign companies seeking to show their shareholders a higher return. A foreign enterprise could hire Indians to provide, at a fraction of the cost, the same output that would obtain in Europe or the U.S.

Things are changing, however. In order to attract the best employees, Indian business outsourcing and call center enterprises have begun to adopt best practices to encourage greater productivity. Salaries have increased, and the differential between an Indian and a U.S. salary is narrowing. At some point, the reason that India became such an attractive destination for business process outsourcing in the first place is not going to be relevant. No doubt, there will be some other magnet for foreign investment.

Editor: Please tell us about the services that you and your colleagues in Mumbai provide to Kelley Drye's inward-bound clients.

Wakhariya: Most of these incoming clients are referrals from Kelley Drye, but we are also represent clients referred from other U.S. firms. That, I believe is a testimonial to the reputation we have built over the years with U.S. firms and U.S. general counsel.

Our services are diverse, but they often include advice on structuring a transaction, the incorporation process, the regulatory environment, and so on. We advise on tax planning, and we have particular expertise in the correlation between the Indian and U.S. tax regimes.

Editor: What about outward-bound clients? What kinds of representation do you undertake for Indian clients moving into the global marketplace?

Wakhariya: Historically, Kelley Drye has had a longstanding relationship with Indian enterprises, particularly with respect to litigation matters. That continues, and we participate from the Mumbai end of that representation.

As India has grown in capital strength and begun looking for overseas acquisition opportunities, we work with our Kelley Drye colleagues in New York, Washington, DC, Brussels and elsewhere in a variety of areas, including securities law, banking, labor and employment, M&A and regulation.

Our practice flows in both directions, and the future has never looked brighter.

Please email the interviewee at swakhariya@kelleydrye.com with questions about this interview.