Insight: International Arbitration

27 July 2011

Jivraj v. Hashwani – England's highest court supports autonomy and flexibility in arbitration

Last year, the English Court of Appeal's decision in *Jivraj v Hashwani* [1] sparked widespread concern among many in the arbitration community that "nationality" provisions in arbitration clauses (including those in the ICC and LCIA Rules, incorporated by reference into countless contracts) might be void under English law, in relation to appointments made in the UK. The UK Supreme Court has today removed this concern, by confirming that arbitrators are not "employees" within the meaning of UK and EU discrimination legislation.[2] The decision will be welcomed by practitioners and users of arbitration, and will assist London's position as a leading seat of choice for international arbitration.

Background

Mr. Hashwani and Mr. Jivraj entered into a joint venture agreement in 1981 to invest in real estate, with an arbitration clause providing that disputes would be referred to three arbitrators, each of whom must be "… *respected members of the Ismaili community and holders of high office within the community*".

A dispute arose, and Mr. Hashwani proposed a former High Court Judge as an arbitrator, who was not of the Ismaili community. Mr. Hashwani argued that he was entitled to do so because the "Ismaili community" requirement in the arbitration agreement, although valid in 1981, became void in 2003 by virtue of certain employment regulations, on the basis of religious discrimination.[3] Mr. Jivraj disagreed, but argued that if this were so, the entire arbitration agreement would become void and fall away, leaving the parties to litigate their dispute in the state courts.

At first instance, Steel J. found that arbitrators were not employees within the meaning of the discrimination legislation and, therefore, the regulations did not apply.[4]

However, in 2010 the Court of Appeal reversed this decision, ruling instead that the provision requiring arbitrators to be members of a specified religion was unlawful and void. The Court of Appeal decided that arbitrators were employees for the purposes of the Regulations because, whatever the precise nature of the relationship between parties and arbitrator, it amounts to a contract under which the arbitrator must personally do work. The Court of Appeal also found that since the provisions for the appointment of the arbitrators were unlawfully discriminatory, this meant that the arbitration agreement had failed entirely. Unless they managed to agree otherwise, the parties' dispute would have to be litigated publicly in the state courts.

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1 [2010] Bus LR 1683; [2010] EWCA Civ 712.

2 [2011] UKSC 40.

3 Employment Equality (Religion or Belief) Regulations 2003, which apply in the UK.

4 [2009] 1 CLC 962; [2009] EWHC 1264 (Comm).

The wider problem

The Court of Appeal's decision generated much discussion and criticism in the arbitration community. If arbitrators were "employees" for the purposes of discrimination legislation, there was a perceived risk that parties could not include provisions about nationality of their arbitrators.

Arbitration agreements commonly include nationality requirements, either expressly or by incorporating rules such as the ICC, LCIA or UNCITRAL rules. Such clauses usually provide that the sole arbitrator or chairman shall be of a nationality other than that of the parties' (e.g. ICC Rules of Arbitration Article 9(5); LCIA Rules Article 6.1).

For many international users of arbitration, such nationality requirements provide significant comfort that there will be a neutral process. The Court of Appeal's decision could have meant that not just the nationality provision, but even the whole of the parties' agreement to arbitrate containing such a stipulation, could be invalid under English law. The parties would be left to litigate their disputes openly in the courts of whichever country happened to have jurisdiction – precisely the outcome which the parties had bargained to avoid by agreeing to arbitrate.

The Supreme Court decision

The UK Supreme Court unanimously decided today that arbitrators are *not* employees for this purpose, and hence that the discrimination legislation does *not* apply to their appointment. Lord Clarke, with whom all of the other Justices agreed, said:

> *"Although an arbitrator may be providing services for the purposes of VAT and he of course receives fees for his work, and although he renders personal services which he cannot delegate, he does not perform those services or earn his fees for and under the direction of the parties … The arbitrator is in critical respects independent of the parties. His functions and duties require him to rise above the partisan interests of the parties and not to act in, or so as to further, the particular interests of either party … He is in no sense in a position of subordination to the parties; rather the contrary."*

This disposes of the problem. If arbitrators are not employees for this purpose, then imposing religious or nationality restrictions is not unlawful discrimination for the purposes of the legislation. The validity of existing arbitration agreements/rules referring to nationality (called into question by the Court of Appeal's decision) is now secure.

Maintaining flexibility in London-seated arbitration

Although not necessary in view of the court's principal finding, Lord Clarke, with whom three other Justices of the Supreme Court agreed, additionally went on to consider whether a religious requirement could be a "*genuine occupational requirement*". Genuine occupational requirements are exceptions to the prohibitions in discrimination legislation.

The Court of Appeal had taken a narrow view of this question. They said that, since the arbitrators' function was to determine the dispute in accordance with the principles of English law, that function required "*some knowledge of the law itself … and an ability to conduct the proceedings fairly in accordance with the rules of natural justice, but it does not call for any particular ethos.*"

Four members of the Supreme Court disagreed (and the other did not express a view). Lord Clarke said that the argument that:

> *"… an English law dispute in London under English curial law does not require an Ismaili arbitrator takes a very narrow view of the function of arbitration proceedings. This characterisation reduces arbitration to no more than the application of a given national law to a dispute."*

Lord Clarke rejected this narrow view. He continued:

> *"One of the distinguishing features of arbitration that sets it apart from proceedings in national courts is the breadth of discretion left to the parties and the arbitrator to structure the process for resolution of the dispute. This is reflected in section 1 of the [Arbitration Act] 1996 which provides that: 'the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest'. The stipulation that an arbitrator be of a particular religion or belief can be relevant to this aspect of arbitration."*

Lord Clarke quoted the ICC's submission as to the raison d'être of arbitration, and emphasised that under the English Arbitration Act 1996:

> *"… the arbitrators have complete power over all procedural and evidential matters, including how far the proceedings should be oral or in writing, whether or not to apply the strict rules of evidence, whether the proceedings should be wholly or partly adversarial or whether and to what extent they should make their own inquiries. They are the sole judges of the evidence, including the assessment of the probabilities and resolving issues of credibility."*

Lord Clarke criticised the Court of Appeal's decision as being too "*legalistic and technical*", noting, "*The parties could properly regard arbitration before three Ismailis as likely to involve a procedure in which the parties could have confidence and as likely to lead to conclusions of fact in which they could have particular confidence.*"

The Supreme Court has therefore re-emphasised the flexibility, freedom and autonomy granted to parties who choose to arbitrate in England. Arbitration is not a rigid, private version of state court litigation where knowledge of law is the only relevant requirement for an arbitrator, but can (and should) be a flexible process tailored to the needs and preferences of individual parties.

The recent survey on Choices in International Arbitration by the School of International Arbitration at Queen Mary University of London, sponsored by White & Case, showed that London is the most-chosen seat for international arbitrations. This decision is likely to bolster London's position as a leading global centre for international arbitration.

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