

Jivraj v. Hashwani - Are Arbitrators Employees?

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One of the key issues that now awaits the decision of the U.K. Supreme Court in *Jivraj v. Hashwani* is whether there is a contract between the parties and the arbitrators, such that the arbitrators may be considered “employees” of the parties (and thereby subject to the law prohibiting discrimination by employers)?

If there is such an “employment” contract, this would be one in which:

- the “employer” cannot give instructions as to how the “employee” is to work or what outcome he is to achieve;
- the “employer” cannot remove the “employee” without an order of the Court;
- the “employee” is immune from suit; and
- the “employee” owes a duty to act fairly and equally to all his “employers”.

According to Mustill & Boyd, the appointment of an arbitrator “is not like appointing an accountant, architect or lawyer”. In fact, “it is not like anything else”.

At first instance, the English Commercial Court appears to have taken this view. In his 26 June 2009 judgment in *Jivraj v. Hashwani*, Mr. Justice Steel stated that the closest analogy to the role of an arbitrator is that of a judge. However, a judge does not have a contract with the parties. Where do arbitrators fit in? Do they operate in unique legal circumstances?

The Court of Appeal took a different view: in its decision of 22 June 2010, it held that there is a contract between the parties and the arbitrators, and agreed that “the precise nature of the relationship between the arbitrator and the parties to the dispute is irrelevant”.

Further, the Court of Appeal stated that appointing an arbitrator is “no different from instructing a solicitor to deal with a particular piece of legal business, such as drafting a will, consulting a doctor about a particular ailment or an accountant about a tax return”.

Following the considerable debate which ensued in the arbitration community after the Court of Appeal’s decision, we now eagerly await the decision of the U.K. Supreme Court, which heard the appeal on 6 and 7 April 2011. Much anticipation surrounds the decision. The fact that both the LCIA and the ICC acted as interveners demonstrates the degree of importance that the arbitration community gives to this case.

At issue in *Jivraj v. Hashwani* is whether a term in an arbitration agreement providing that all arbitrators shall have a particular religious belief is discriminatory under employment regulations (the Employment Equality (Religion or Belief) Regulations 2003). The regulations would apply if the arbitrators were considered employees of the parties, although an exception is provided in the regulations if the religion or belief is found to be a genuine occupational requirement. In this case, the parties had stipulated in their arbitration agreement that all three arbitrators shall be respected members of the Ismaili community (part of the Shia branch of Islam). One of the parties, Mr. Hashwani, tried to appoint an arbitrator who was not of the Ismaili faith, and Mr. Jivraj objected.

Whereas Mr. Justice Steel found, at first instance, that the relationship between the parties and the arbitrator is not a contract of employment for the purposes of the employment regulations, the Court of Appeal found that arbitrators are employees under the regulations because they act under “a contract personally to do any work”. Consequently, the Court of Appeal held that the term in the parties’ arbitration agreement was unlawful. It also rejected the argument that the term was a genuine occupational requirement.

Significantly, both the Commercial Court and the Court of Appeal agreed that if the religious requirement in the arbitration agreement is unlawful, then not only this term, but the whole of the parties’ agreement to arbitrate, will be void.

The ongoing debate within the arbitration community, ever since the Court of Appeal’s decision, has not focused primarily on religious belief stipulations in arbitration agreements, but rather on nationality requirements – whether arbitration agreements providing for the nationality of arbitrators could also be found void by English courts (or by other countries’ courts applying English law), on the basis that too they are discriminatory under English equality legislation (namely under the Equality Act 2010). Whereas it is unusual for an arbitration agreement to require that arbitrators have a particular religion or belief, it is very common for parties to provide for the nationality of arbitrators – either expressly or through the incorporation of institutional rules, including the ICC, LCIA and UNCITRAL rules (e.g. in order to support the arbitrator’s perceived neutrality).

Since the Court of Appeal issued its decision, many legal advisers have decided to revisit the advice they have given their clients on arbitration clauses. Some have advised their clients to err on the side of caution and disapply the nationality restrictions in institutional rules.

Although the validity of nationality stipulations is certainly an important issue, the U.K. Supreme Court may also wish to address one of the wider implications in this case, turning on the nature of the relationship between the parties and the arbitral tribunal. Much has already been written on the status of arbitrators: for example, one of the leading commentaries, Redfern and Hunter on International Arbitration, suggests the position of the arbitrator may be considered to be governed by contract, or by status. Under the former school of thought, favoured in civil law jurisdictions, the arbitrator is appointed by, or on behalf of, the parties to the arbitration to perform a service for a fee (interestingly, we should note here that the tradition of dispute resolution within the Ismaili community is apparently such that no remuneration is sought or accepted by the arbitrator). By contrast, the “status” school of thought recognizes that arbitrators perform judicial or quasi-judicial functions.

Pending the outcome of the U.K. Supreme Court decision, arbitration practitioners can hope that the Court will provide certainty and clarity with respect to the effect, if any, of English anti-discrimination regulations and legislation on the appointment of arbitrators. But it will also be most interesting to see whether the Court will take the opportunity to discuss and define the precise nature of the relationship between the parties and arbitrators under English law. The decision of the Supreme Court has the potential to confirm, or re-define, the fundamental legal status of arbitrators. The answer to

this question is not merely theoretical – it may have a significant impact on the status of English law, and of London, in international commercial arbitration.

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