

The relationship between arbitrators and parties: is the pure status theory dead and buried?

Kluwer Arbitration Blog

June 17, 2011

Matthew Gearing (Allen & Overy LLP)

Please refer to this post as: Matthew Gearing, 'The relationship between arbitrators and parties: is the pure status theory dead and buried?', Kluwer Arbitration Blog, June 17 2011, <http://arbitrationblog.kluwerarbitration.com/2011/06/17/the-relationship-between-arbitrators-and-parties-is-the-pure-status-theory-dead-and-buried/>

There was no shortage of coverage of the recent English Supreme Court case *Jivraj v Hashwani*, the case concerning whether an arbitration clause was contrary to anti-discrimination legislation applicable to employees. But there was one issue which received little attention before the Supreme Court - whether or not the nature of the relationship between the arbitrators and the parties was a contractual one.

This issue was relevant to the appeal because the anti-discrimination legislation in place included in its definition of "Employment" the words "*a contract personally to do work*". One obvious way of escaping the legislation would be if there is no contract in place between the arbitrators and parties in the first place. Both the Commercial Court and the Court of Appeal were willing to find that there was a contract in place without resolving the academic debate surrounding this issue. Also none of the parties before the Supreme Court were willing to delve into the issue.

In their 1989 second edition of *Commercial Arbitration* Mustill and Boyd were the main proponents of the argument that the nature of the relationship between the arbitrator and the parties could derive from the arbitrator's status. They identified some key problems with the alternative contractual analysis. For example, how did the contractual analysis fit with the powers of the court in relation to *removal of an arbitrator*? That the parties may jointly agree to the removal may be consistent with the termination of a contract, but an application may also be made by one party to a national court in certain circumstances. Some of these circumstances may be categorised as instances of repudiatory breach of contract by the arbitrator (i.e. failure to conduct the arbitration proceedings properly) but even then there may be limitations such as an additional requirement that the action, or inaction, of the arbitrator causes substantial injustice. Some of the other circumstances which justify removal may not so readily fit into a contractual analogy. For example justifiable doubts as to the impartiality of the arbitrator do not necessarily equate with the arbitrator being in breach. What about the arbitrator's obligation to act fairly? Mustill and Boyd pointed out that although the parties benefit from this obligation, it is more of a general obligation to act in accordance with public policy concerns. Often this obligation will be provided for in the national law. The broader nature of this obligation may be said to take it outside the realms of a private contractual duty. Also what about the limited liability of the arbitrator who often has immunity from suit in a similar way to a judge? This is an uncomfortable restriction on the ability of the parties to sue the arbitrator in accordance with the usual remedies which would be available to them under contractual theory.

Mustill and Boyd's answer to these difficulties with the contractual analysis was that the nature of the relationship between arbitrator and parties could be derived solely from the status of the arbitrator. They noted: "*it seems legitimate to regard the office of arbitrator as involving some degree of permanent status: and this prompts the idea that status alone is all that is needed by way of theoretical underpinning for the mutual rights of the arbitrator and the parties. The Court would simply assert, essentially on grounds of public policy, that certain rights and duties are conferred on the arbitrator by the very fact of his having assumed that office.*"

However, the pure status theory has since been broadly rejected by most commentators (even Mustill and Boyd accepted that there was scope for consensual terms alongside status). The trouble is that contractual theory neatly explains the finer details of the relationship. An arbitrator may be entitled to reasonable fees under national laws, but often there is an agreed rate of remuneration. The arbitrator will also generally be bound to conduct the arbitration in accordance with the parties' agreement (although this may be limited by national law provisions providing that the arbitrator must adopt procedures suitable to the circumstances of the case). The parties may also jointly agree to remove an arbitrator. These issues are best accommodated by contractual theory. At a broader level it is also not hard to support a contractual analysis as underlying the relationship. When an arbitrator accepts an appointment he or she agrees to resolve the dispute between the parties and the parties in turn agree to remunerate the arbitrator for this.

Is there any room left for the pure status theory? It may be possible for the relationship between an arbitrator and the parties to be governed solely by the national law, without recourse to contractual theory. For example, under the English Arbitration Act the arbitrator has a statutory duty under section 33 to provide a fair resolution of the matters falling to be determined and the parties are under a statutory obligation to comply with the arbitrator's directions under section 40. An arbitrator can also enforce his right to remuneration under section 28.

The trouble is that it will be rare that an arbitration proceeds without any agreement which is capable of contractual analysis. Even the English Arbitration Act expressly defaults to the parties' agreement in certain circumstances. For example, the parties may agree to restrict the powers of the arbitrators under section 38 and may agree procedural and evidential matters under section 34. Arbitrations will generally incorporate institutional rules which form the basis of an agreement about certain procedural and other issues. Even an ad hoc arbitration will proceed on the basis of the parties' agreement.

However, it is equally rare that the relationship between the arbitrator and parties is solely capable of a private contractual analysis for the reasons already suggested by Mustill and Boyd. It is no surprise therefore that many jurisdictions have interpreted the relationship as a hybrid one. The English Court has said that it has found it impossible to divorce the contractual and status considerations and that: "*in truth the arbitrator's rights and duties flow from the conjunction of those two elements.*" Many jurisdictions have adopted this approach, recognising that there is a contract in place but that it is a sui generis contract - a contract which is overlaid with a special adjudicatory function which is public in nature. Research conducted in May 2006 by an ICC working committee involving representatives from over 20 countries concluded that the majority view was that arbitrators and parties are seen to be bound by a 'special contract'.

While there may be a broad acceptance of the contractual theory, there are many more competing theories relating to how precisely the relationship between the arbitrator and parties work. Is it an agency agreement or an agreement for the provision of services? Both analyses have been said to ignore the adjudicative role of the arbitrator. Does the arbitrator become a party to the original arbitration agreement between the parties or is there a new and separate agreement which arises when the arbitrator is appointed? Is the contractual analysis affected by the introduction of an

institution into the equation? Views differ but it does seem that the pure status theory is dead and buried. It was certainly not a viable escape route out of the anti-discrimination legislation in *Jivraj*.

Matthew Gearing and Angeline Welsh, Allen & Overy