

Kluwer Arbitration Blog

Jivraj v Hashwani: A Pro-Choice, Corrective Ruling from the Supreme Court

Matthew Gearing (Allen & Overy LLP) · Thursday, September 22nd, 2011

In this post, we will first deal briefly with the facts in the case of *Jivraj v Hashwani* and the findings of the first instance judge and the Court of Appeal, which by now would be very familiar to anyone reading this blog. We will then look at the Supreme Court's judgment ([2011] UKSC 40), in particular its observations on the "genuine occupational requirement" (GOR) issue (discussed below) which robustly support the broad autonomy of the parties inherent in consensual arbitration to appoint decision makers with an understanding of their legal systems, social traditions and commercial background.

The dispute arose out of an arbitration clause in a joint venture agreement which provided for disputes to be resolved by three arbitrators who "shall be respected members of the Ismaili community and holders of high office within the community". Mr Hashwani challenged the validity of this requirement on the basis that it was caught by the anti-discrimination provisions contained in the Employment Equality (Religion and Belief) Regulations 2003 (the Regulations).

At first instance, David Steel J rejected this challenge on the ground that arbitrators were not "employees" within the scope of the Regulations (which defined "employment" as "employment under...a contract personally to do any work"). He held that even if the Regulations did apply, the case fell within the GOR exception in the Regulations which applies in cases where an employer has an ethos based on religion or belief and being of a particular religion is a GOR for the position in question.

The Court of Appeal overturned this decision on the basis that an arbitrator was an employee of the appointing parties, providing services under a "contract personally to do any work". The Court of Appeal also held that the GOR exception could not save the arbitration clause because no particular religious requirements were necessary for the discharge of the function of an English seated tribunal determining the dispute in accordance with English law.

The Supreme Court unanimously overruled the Court of Appeal decision, holding that an arbitrator's role is not "naturally described as one of employment at all" and he is in effect a "quasi-judicial adjudicator". The Court explained that although an arbitrator may provide services on a personal basis he "does not perform those services or earn his fees for and under the direction of the parties"; rather an arbitrator is an "independent provider of services who is not in a relationship of subordination with the parties who receives his services".

Although the Court's conclusion on the first issue that arbitrators are not employees was dispositive of the matter, the majority considered the GOR issue as it had been fully argued (Lord Mance, who delivered a separate judgment concurring with the majority on the employment issue, preferred not to deal with it).

The issue before the Supreme Court was whether the requirement that arbitrators be of a particular religion or belief (and by extension, other cultural or personal characteristics) can constitute a genuine, legitimate and justified requirement. Observing that this was an objective question for the Court, the majority rejected the reasoning of the Court of Appeal that an English law dispute in London under English curial law does not require an Ismaili arbitrator, as "too legalistic and technical". The majority quoted with approval the observations of the first instance judge citing ethos of Ismaili community for dispute resolution contained within the Ismaili community, and observed that an arbitrator of the Ismaili community would bring with him or her an understanding of the parties' conduct and moral and ethical codes which would assure the parties of an acceptable arbitration procedure in which they could have particular confidence.

The Court's decision demonstrates an understanding that, besides the functional component in terms of application of a given national law to the dispute, arbitration has a very significant process-based dimension which is largely left to the discretion of the arbitrators by most national arbitration legislations, major institutional rules and other international codes (such as the UNCITRAL Model Law), subject only to certain safeguards necessary in the public interest. The exercise of this discretion and an arbitrator's approach to the resolution of the dispute are bound to be influenced by a number of characteristics linked to his/her nationality, cultural background, ethos, legal training and experience. Indeed, even if, in fact, an arbitrator is not so influenced, the objective perception of the parties would always be otherwise. This point is well illustrated by the different attitudes and practices of arbitrators from diverse legal, cultural and regional backgrounds, which might manifest themselves in a predisposition towards adversarial or inquisitorial or conciliatory approach, or attitude towards confidentiality, written or oral procedures, disclosure, interpretation of contracts, treatment of witnesses and promotion of settlement etc. For instance, it has been observed that in East Asia and Middle East, social norms and values may have a greater role in shaping resolution of disputes and tendency may be to structure arbitration in a conciliatory fashion, in contrast with the Western approach which generally gives primacy to legal formality, set procedures and written agreements.

In practice, and in light of these considerations, it is a common trend for parties to incorporate requirements in their arbitration agreements which decisively influence the choice of a prospective arbitrator, ranging from nationality and language to expert knowledge or training in a specific industry, legal discipline or applicable law. By upholding the arbitration clause in *Jivraj*, the Supreme Court has acknowledged this practice and thereby strongly endorsed the ethos of consent and choice on which dispute settlement through arbitration is premised.

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(Allen & Overy LLP acted for the International Chamber of Commerce (the ICC) as intervener in the appeal, arguing for the Court of Appeal's ruling to be overturned)

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