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Jivraj – it's back and this time it's at the European Commission

Craig Tevendale (Herbert Smith Freehills LLP) · Friday, September 28th, 2012 · Herbert Smith Freehills

In June 2010 the Court of Appeal's decision in Jivraj v Hashwani caused dismay in the arbitration community. Does an arbitration agreement which provides criteria for the appointment of arbitrators risk falling foul of the Employment Equality (Religion or Belief) Regulations 2003 (the "Regulations") or other UK anti-discrimination law? The Supreme Court judgment of 27 July 2011 restored certainty, confirming that arbitrators are not "employees" under the Regulations and that the inclusion of certain "discriminatory" criteria for appointment does not breach the Regulations (see here for an earlier blog post on this decision).

That was expected to be the final word on the matter. The Supreme Court refused to refer the point to the ECJ. But now the issue has been revived, in the form of a complaint to the European Commission under article 258 of the Treaty on the Functioning of the European Union ("TFEU").

Mr Hashwani's complaint is hinged upon the Supreme Court's decision not to refer two questions for preliminary ruling by the Court of Justice of the EU ("CJEU"). The complaint avers that this breaches the UK's obligations under article 267(a) TFEU, which provides that where "a question [as to treaty interpretation] is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court". Furthermore, it is said that the Supreme Court failed to adopt the proper interpretation of Council Framework Directive 2000/78/EC.

The complaint requests that the Commission bring infringement proceedings against the UK in the CJEU. Mr Hashwani seeks:-

• a declaration that the UK has breached article 267 by virtue of the Supreme Court's failure to refer questions to the CJEU for preliminary ruling;
• a determination of those questions by the CJEU; and
• a declaration that the UK must take necessary measures to ensure that those determinations are applied in Jivraj v Hashwani.

What impact will Mr Hashwani's complaint have in practice? Certainly, it

(re)introduces a degree of uncertainty as to the enforceability of "discriminatory" arbitration agreements. However, it is unlikely that we will see a return to the pre-Supreme Court practice of advising clients to remove such clauses from their agreements.

First, it will be a long and difficult road for Mr Hashwani. The Commission and the CJEU are not courts of final appeal on the merits. Mr Hashwani must persuade the Commission to exercise its preliminary powers under Article 258 TFEU: "If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union." If the Commission opines that the UK has breached its treaty obligations, and if the UK does not remedy this, the Commission may bring infraction proceedings in the CJEU against the UK under Article 260.

If the CJEU were to find that the UK has indeed breached its treaty obligations, the Commission and CJEU's powers of enforcement would be limited to those available under article 260 TFEU. The CJEU has no power to determine the questions which Mr Hashwani poses by making a preliminary ruling on its own initiative. It is for the national court to refer a question to the CJEU within the context of a live case; not for the parties to use the mechanism as a method of appeal after judgment has been handed down. Under article 260, the CJEU may only require a state to "take the necessary measures to comply with the judgment". Moreover, if a state does not comply, the Commission and the CJEU have no powers of enforcement. At most, the Commission may bring the case before the CJEU once again and the court may impose a lump sum or penalty payment. Although there may be political ramifications to a refusal to "take the necessary measures", the European institutions cannot compel the Supreme Court to re-open the case or to refer any question back to the CJEU.

So much for the limited scope of the remedies available. It is in any event far from clear that the Commission will use its discretion to refer the complaint to the CJEU or, if it did, that the CJEU would find that the UK has breached its treaty obligations.

The Supreme Court handed down a very cogent judgment which explained in clear terms its decision not to make a preliminary reference to the CJEU. Its duty to refer a question of treaty interpretation to the CJEU is subject to the acte clair and acte eclaire exceptions: no reference need be made where the point is sufficiently clear so as not to require interpretation or where the question has already been interpreted by the CJEU. In relation to Mr Hashwani's first question, the Court noted that the issues had been resolved by the CJEU in numerous cases and were considered acte clair. No preliminary reference was therefore required.

Against this, the fact that the Court of Appeal came to a different conclusion on the merits of the case invites the retort that the Regulations cannot be so clear that they do not require interpretation by the CJEU. Yet it is the Supreme Court's prerogative to declare that the lower courts got it wrong – and the fact that the Supreme Court's decision overturns the decision of a lower court does not, of itself, render its

reasoning any less certain.

Mr Hashwani's second question was moot because the Court found that the Regulations did not apply.

On the merits, the Supreme Court recognised that the role of an arbitrator is 'different'. And it is. An arbitrator is not an employee and not a self-employed person: the role is of an "independent provider of services" who is "in effect a 'quasi-judicial adjudicator'". The parties do not control the arbitrator, once appointed; on the contrary, it is the arbitrator who runs the procedure and imposes his or her rulings, listening to the parties but independent of them.

Unless and until the UK acts upon an opinion of the Commission or a declaration of the CJEU, the Supreme Court judgment remains a binding precedent. It is not easy to see a scenario in which that will change.

The complaint may, however, prompt further debate upon discriminatory criteria in arbitration agreements. At first glance the Supreme Court decision clashes with values which the EU – and indeed the UK – hold dear. It permits discrimination on the grounds of religion in the appointment of an arbitrator.

Or, on another view, it promotes party autonomy in arbitration.
The legislation and the Supreme Court judgment recognise that there is a distinction between "acceptable" and "unacceptable" discrimination through the "genuine occupational requirement" exception. Such safety valves ensure that equality legislation does not have a negative impact beyond the intended scope of protection.

Regardless of the outcome of Hashwani's complaint, party autonomy may come to be limited through other routes: see, for example, the draft Mediation and Arbitration Services (Equality) Bill. This draft private members bill, introduced to the House of Lords by Baroness Cox, aims to address the issue of gender discrimination in arbitration. The bill would amend the Equality Act 2010 to prohibit any term of an arbitration agreement or process which discriminates on the grounds of sex. Women continue to be under-represented on arbitral tribunals: 11% of partners in the GAR top ten international arbitration teams are women, but only 5% and 6% of all arbitrators appointed in ICSID and commercial arbitrations, respectively, are women.

The final (?) chapter in the Jivraj saga will take some time to be written, but in the meantime the discrimination vs. party autonomy argument will continue to be aired in other fora.

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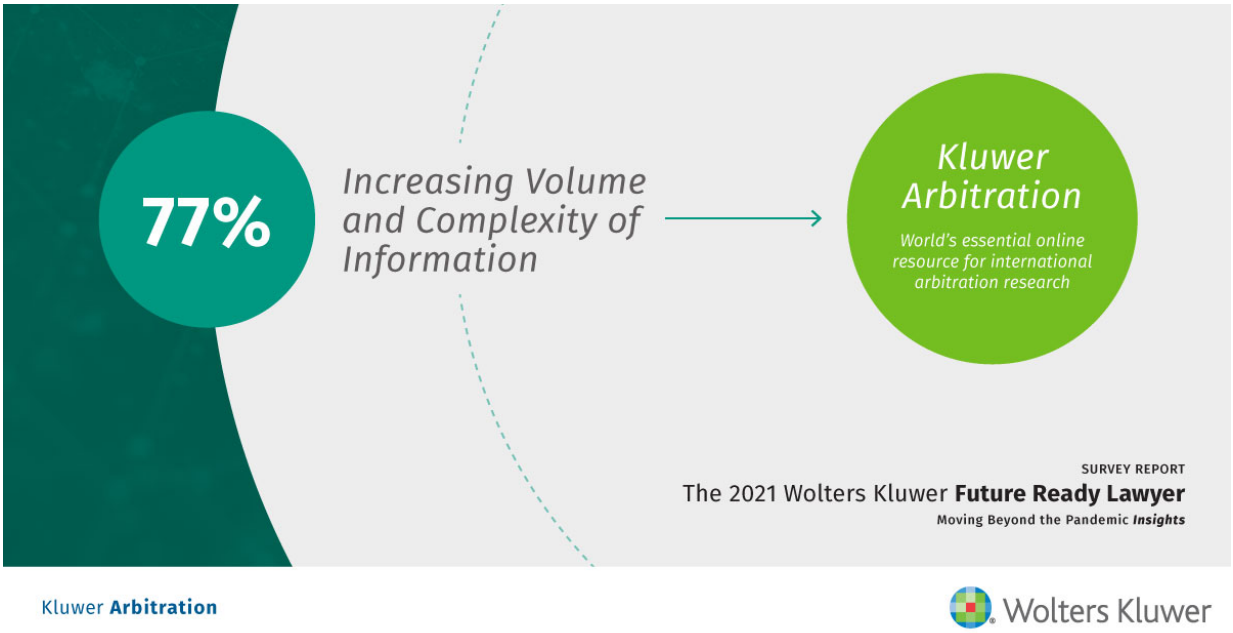

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