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Impartial: Yes. Neutral: Maybe Not

Justin D'Agostino (Herbert Smith Freehills) · Tuesday, September 14th, 2010 · Herbert Smith Freehills

In arbitration, as in other aspects of business life, parties often feel most comfortable when they are (literally) on familiar ground. If things go wrong, a European or American company might understandably prefer arbitration seated in Europe or New York. On the other hand, parties from the PRC, for example, are increasingly, and equally understandably, inclined to resist arbitration outside Asia (and sometimes even mainland China itself).

Parties may therefore find themselves in a tug-of-war between their preferred, compromise and worst-case seats. Which seat is ultimately selected will depend upon how big an issue the seat is for each party, how great a desire they have to get the deal done, and an array of other factors specific to each case.
Of course, other (often related) aspects of the arbitration clause may still be up for negotiation, and may help to make a seat which is otherwise unpalatable to one of the parties more acceptable. One key provision that a party might wish to include, either expressly or through the incorporation of institutional rules, is a nationality requirement – for example, to the effect that a sole arbitrator or the chairman of the arbitral tribunal may not be of the same nationality as any of the parties. Such provisions are frequently sought and accepted, and are commonly to be found in institutional rules, including the ICC Rules (Article 9.5) and LCIA Rules (Article 6.1) and the HKIAC Administered Arbitration Rules (Article 11.2) (although not the new SIAC Rules).

However, both the importance of nationality as a factor and the validity of such a clause limiting nationality in the first place may vary depending upon the seat. It is therefore important not to take a blanket approach to this issue. Markedly different considerations will apply in different parts of the world and depending upon the seat of arbitration.

The position in relation to arbitration clauses with a London seat has arguably been radically changed by the potentially far-reaching recent decision of the English Court of Appeal in Jivraj v. Hashwani [2010] EWCA Civ 712. There, the parties had entered into a joint venture agreement for investment in real estate projects, in which the arbitration clause stipulated that the arbitrators were to be “respected members of the Ismaili community and holders of high office within the community”. When the joint venture agreement was terminated and a dispute arose, Mr Hashwani appointed an arbitrator, Sir Anthony Colman. Mr Jivraj applied to the English Commercial Court for a declaration that the appointment of Sir Anthony was invalid because he was not a member of the Ismaili community. Mr Hashwani, in turn, sought an order to the effect that the requirement that the arbitrators be members of the Ismaili community was unlawful because it contravened religious equality legislation in the United Kingdom.

The relevant regulations prohibited discrimination by an employer against an employee on grounds of religion or belief. The Court of Appeal in England held that arbitrators were employees for the purposes of the regulations and that the requirement that the arbitrators be members of the Ismaili community was therefore discriminatory and unlawful. It rejected an argument that the requirement fell under an exception for "genuine occupational requirements" on the basis that the duty of the arbitrators was to determine the dispute in accordance with English law, which did not require a particular ethos or an understanding of Ismaili principles of morality, justice and fairness (though it acknowledged that it might have been possible to make out such an argument if the tribunal had been empowered to act ex aequo et bono).

The arbitration clause was therefore void. The Court of Appeal also indicated, obiter, that the offending part of the clause was not severable (such that the remainder would survive avoidance) because removing the requirement would render the arbitral process fundamentally different from that originally contemplated by the parties.

Although the case concerned the relatively narrow issue of religious discrimination, it has wider ramifications because the relevant regulations were part of (and consistent with) the wider scheme of UK anti-discrimination law, which includes prohibitions on discrimination on grounds of race, disability, sexual orientation and age. Requiring an arbitrator to hold a qualification which engages any of those issues may be discriminatory and therefore illegal, unless a relevant exception applies. The case therefore has wide ranging effect for parties from all over the world who might choose London as the seat of arbitration.

In particular, discrimination on the grounds of race includes discrimination on the grounds of nationality, and a requirement that an arbitrator should (or should not) hold a particular nationality will therefore arguably be illegal as a matter of English law.

There is therefore a serious risk that an arbitration clause with a London seat which contains such a requirement could be held to be void in its entirety (and, even if this issue was not raised during the arbitration itself, there is a risk that the alleged invalidity of the arbitration clause could be used to found an objection to enforcement later on). Ironically, this could result in a national court in England or elsewhere having jurisdiction over any dispute (unless all of the parties agreed to submit the dispute to arbitration) – a result surely even less consistent with the parties' original wishes!

The upshot is that there is a serious risk – at least until the appeal, which is currently pending, is decided – that a nationality requirement (or, indeed, some other requirement which falls under the scope of UK anti-discrimination law) may be illegal and render the arbitration clause void in its entirety. Where parties negotiate London as an arbitral seat, it is therefore advisable that the arbitration clause should expressly exclude any provision in the chosen institutional rules which would otherwise impose any form of nationality requirement. The same potentially applies in relation to other EU jurisdictions, which are subject to the same EU equality legislation on which the UK equality regime is largely based – although the specific terms of the domestic implementing legislation would have to be considered in each case. The parties should also exercise caution, and seek full legal advice, before imposing any other form of qualification requirement upon the arbitrators.

This development in England (and its as yet untested potential ramifications for other EU jurisdictions) is unlikely to be welcome news to many users of arbitration and may seem somewhat

at odds with one of the fundamental tenets of arbitration: party autonomy. Requirements that an arbitrator should (or should not) hold a particular nationality are commonly used by parties, in particular in Asia, and especially by non-Chinese parties who agree to “onshore” arbitration in mainland China under the auspices of CIETAC or one of the other Chinese arbitration commissions. CIETAC (unless the parties otherwise agree) will tend to appoint a PRC national as chairman or sole arbitrator and its practice differs in this respect from institutions like the ICC and HKIAC which usually seek to appoint a “neutral nationality” person as sole or presiding arbitrator. Non-Chinese parties therefore usually draft their arbitration clause to expressly include a nationality requirement which requires the sole arbitrator or chairman to be of neutral nationality to avoid a local majority being appointed to the tribunal.

In the past, it might have been said as a general rule that it was desirable to have a nationality requirement in most arbitration clauses, unless there were specific and compelling reasons not to do so. Such a statement must now include the important caveat that, if the seat is England, it is essential not to have such a requirement – at least until the appeal in Jivraj v. Hashwani is decided. In the meantime, parties negotiating arbitration clauses where the location of the seat is particularly contentious or likely to change at a late stage in the drafting should proceed with care.

Justin D’Agostino
Partner
Herbert Smith, Hong Kong

Martin Wallace
Legal Manager
Herbert Smith, Hong Kong

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