

Good News for London Arbitration: UK Supreme Court Removes Uncertainty Regarding Stipulations as to Nationality of Arbitrators Under English Law

Jivraj v Hashwani [2011] UKSC 40

Uncertainty regarding the validity under English law of arbitration agreements containing stipulations such as the nationality or religion of arbitrators ended today with the decision of the UK Supreme Court in the case of *Jivraj v Hashwani*. The decision holds that arbitrators are not 'employees' in the relevant context, and therefore are not subject to UK anti-discrimination legislation which would render such stipulations unlawful.

This judgment reversed the earlier Court of Appeal decision in the case, which had raised the spectre that arbitration agreements including these requirements, or even agreements incorporating institutional rules such as the LCIA or ICC Rules, which include provisions on arbitrator nationality, would be held void under English law.

This decision is welcome, not only because it dispels considerable uncertainty hanging over many existing arbitration agreements, but also protects party autonomy in selecting arbitrators most suitable to the resolution of their potential disputes.

Factual Background

This case concerned a dispute between Mr. Jivraj and Mr. Hashwani, two Ismaili partners in a joint venture agreement. The agreement, entered into in 1981, submitted disputes to arbitration before a tribunal composed of "*respected members of the Ismaili community and holders of high office within the community.*" The Ismaili community comprises Shia Imami Ismaili Muslims and is led by the Aga Khan.

Mr. Hashwani later argued that this requirement was void because it was contrary to the Employment Equality (Religion or Belief) Regulations 2003 (the "Regulations"), which prohibit discrimination against employees or potential employees on grounds of religion and belief when choosing between persons offering personal services, except where such requirement relates to a "*genuine occupational requirement for the job*".

On June 22, 2010, the Court of Appeal held that the agreement to appoint Ismaili arbitrators violated the Regulations. In the circumstances, this violation rendered void not only the requirement as to the identity of the arbitrators, but the entire agreement to arbitrate.

The Decision of the Supreme Court

The Supreme Court reversed the decision of the Court of Appeal, holding unanimously that arbitrators were not 'employees' within the scope of the Regulations, and that the requirement was valid.

The Supreme Court looked to the case law of the European Court of Justice to determine whether arbitrators were 'employed' by the parties. The test was whether arbitrators were (a) independent providers of services who were not in a relationship of subordination with the person receiving the services, or (b) persons performing services for and under the direction of another person in return for which they received remuneration.

The court found that arbitrators were "*in no sense in a position of subordination to the parties; rather the contrary.*" The functions and duties of an arbitrator required him or her not to act in the particular interests of either party. In addition, the dominant purpose of the contract was the impartial resolution of the dispute, and although a contract between parties and arbitrators would be a contract for provision of personal services, those services were not under the direction of the parties.

The Court also noted that the Regulations themselves contained provisions which would be inappropriate if parties and arbitrators were held to be in an 'employment' relationship. For example, Regulation 22(1) provides that anything done by an employee in the course of his employment shall be treated for the purposes of the Regulations as done by the employer as well as him. The court found it evident that such a provision could not apply to an arbitrator.

As the Court found that arbitrators were not 'employed', the issue of whether the stipulation was a "*genuine occupational requirement for the job*", and therefore outside the scope of the Regulations, did not arise. However, the Court noted that, if it had been an issue, the requirement would have been legitimate and justified, as the parties could properly regard arbitration before three Ismailis as likely to involve a procedure and lead to conclusions of fact in which they could have confidence.

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