

UK Supreme Court Confirms Parties' Right to Choose Nationality of Arbitrators

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On 22 June 2010, the Court of Appeal of England and Wales, ruling on *Jivraj v Hashwani* [2010] EWCA Civ 712, [2010] ICR 1435, held that arbitrators are employees for the purposes of UK law. This decision caused considerable controversy in international arbitration circles because it appeared to render a common arbitral practice—prescribing the nationality of arbitrators—illegal under UK anti-discrimination laws. This, in turn, threatened numerous existing arbitration agreements with being void and, more significantly, threatened to erode the effectiveness of London as a seat for international arbitrations.

On 27 July 2011, the UK Supreme Court overruled the Court of Appeal's controversial decision in *Jivraj v Hashwani* [2011] UKSC 40. As a result of this decision, London is certain to remain a popular place to conduct international arbitrations.

Background

The dispute at issue in *Jivraj v Hashwani* stemmed from a Joint Venture Agreement (JVA) entered into in 1981 by two members of the Ismaili community. The JVA's arbitration clause stated that the arbitrators "... shall be respected members of the Ismaili community and holders of high office within the community." In 2008, at the same time that he commenced an arbitration under the JVA, Mr Hashwani claimed that the Ismaili arbitrator provision was void under the 2003 Employment Equality (Religion or Belief) Regulations 2003 (the Regulations)—which prohibit employers from discriminating against employees on the basis of race, religion or other such factors—and sought instead to appoint a non-Ismaili person (former Commercial Court judge, Sir Anthony Coleman) as his arbitrator.

Commercial Court proceedings commenced and the fundamental issue was whether the inclusion of a clause prescribing an arbitrator's religious beliefs (and, by analogy, his or her nationality) would be void under the Regulations. At first instance, the Commercial Court found that an arbitrator was not an employee and, as such, was not covered by the Regulations. The Court of Appeal controversially found otherwise and a further appeal was then heard by the Supreme Court.

The Supreme Court Decision

Employment

The Supreme Court upheld the appeal, finding that an arbitrator is not an employee under the Regulations and thus that the arbitration agreement was not made invalid by reason of them. A key point in the Supreme Court's reasoning was the Regulation's definition of employment as being "employment *under* ... a contract to personally do any work" (authors' emphasis). Lord Clarke said that "it is in my opinion plain that the arbitrators' role is not one of employment under a contract personally to do work... He is rather in the category of an independent provider of services who is not a relationship of subordination with the parties who receive his services." In support of this, Lord Clarke cited the Arbitration Act 1996 and concluded that the arbitrator's powers set out there mean that, once appointed, "the parties effectively have no control over him". The Court also noted similarities in institutional rules, such as the UNCITRAL Model Law, the ICC Rules, and the LCIA Rules.

Additionally, Lord Clarke noted that an arbitrator's role is to impartially resolve a dispute, something anathema to subordination to a party's interests. Lord Clarke thus decided that "there is no basis upon which it could be properly held that the arbitrators agreed to work under the direction of the parties" and that the Regulations did not apply.

Genuine Occupational Requirement

The Court also held that, even had the Regulations applied, the general occupational requirement exception in the Regulations (which allows for the appointment of a person of a particular religious or other belief in certain circumstances) would have been legitimate and justified here. In that context, the Court noted that "one of the more significant and characteristic spirits of the Ismaili sect [is] an enthusiasm for dispute resolution within the Ismaili community", and that "[o]ne of the distinguishing features of arbitration ... is the breadth of discretion left to the parties and the arbitrator to structure the process for resolution of the dispute."

Conclusion

The Supreme Court decision rejects the "legalistic and technical" argument of the Court of Appeal and forms a prudent, pro-arbitration resolution of the issue. One of the key reasons for parties choosing arbitration is their ability to frame the method through which their dispute is resolved, including the ability to prescribe that arbitrators hearing the dispute be of a particular nationality. Ensuring that national and cultural nuances are understood, and that bias in international disputes is avoided, is central to this point. The Supreme Court's decision has confirmed that these arbitral principles of autonomy remain alive and well in England.

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