

Religious Requirement for Arbitrators to Be Decided by *Jivraj Appeal*

By Paul B. Klaas and Nick Burkill

On April 6-7, 2011, the UK Supreme Court is scheduled to hear the appeal of a case involving a religious qualification for arbitrators.

In *Jivraj v. Hashwani*,¹ the English Court of Appeal held that a religious qualification in an arbitration clause is illegal and voids the clause. There is widespread concern that this decision, if upheld, would not only invalidate requirements relating to religion in England, it would also cast doubt on nationality and perhaps other requirements for arbitrators in English law contracts and throughout Europe.

Nurdin Jivraj and Sadruddin Hashwani entered into a joint venture in 1981 to invest in real estate. Their agreement contained an arbitration clause requiring all arbitrators to be “respected members of the Ismaili community and holders of high office within the community.” When the parties decided to terminate their agreement, they were unable to resolve their differences. Mr. Hashwani sought to appoint an arbitrator who was not Ismaili (a branch of Shia Islam). Jivraj started proceedings in the English Commercial Court, seeking a declaration that the appointment of a non-Ismaili arbitrator was invalid. Hashwani asserted in response that the religious limitation in the arbitration clause was a violation of the Employment Equality (Religion and Belief) Regulations 2003 (now incorporated in the Equality Act 2010), which forbid discrimination on the basis of religion or belief, unless “being of a particular religion or belief is a genuine occupational requirement for the job.” Although the Employment Equality Regulations did not exist in 1981, when the arbitration clause was written, the parties

did not dispute that the arbitration clause is now subject to them.

Court of Appeal Decision

The English Court of Appeal ruled that these regulations apply to the appointment of an arbitrator. It reasoned, “[S]ince an arbitrator (or any professional person) contracts to do work personally, the provision of services falls within the definition of ‘employment,’ and it follows that his appointor must be an employer....” The Court of Appeal emphatically disagreed with the English Commer-

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cial Court’s view of an arbitrator as more similar to a judge than an employee.

The court went on to rule that the requirement that arbitrators be members of the Ismaili community was not within the “genuine occupational requirement” exemption. It stated:

If the arbitration clause had empowered the tribunal to act *ex aequo et bono* it might have been possible to show that only an Ismaili could be expected to apply the moral principles and understanding of justice and fairness that are generally recognized within the community as applicable between its members, but the arbitrators’ function under [the arbitration clause] is to determine the dispute in accordance with the principles of English law.

Since English law applied, the Court of Appeal said the arbitrator would need “some knowledge of the law” and “an ability to conduct the proceedings fairly in accordance with the rules of natural justice.” But what was not needed, it said, was “any particular ethos.” It ruled that membership in the Ismaili community was “clearly not necessary for the discharge of the arbitrators’ functions.” Because the religious requirement was “an integral part of the agreement to arbitrate,” the court held that the entire arbitration clause was unenforceable.

Implications

The Court of Appeal recognized that its decision “has a far wider significance than the present case” due to the fact that the term “employment” is defined identically, or nearly identically, in all English legislation forbidding discrimination, including Section 9(1)(b) of the Equality Act 2010, which prohibits discrimination based on “nationality and national origins.”

Many arbitration clauses in international commercial agreements contain nationality requirements and those that do not routinely incorporate institutional arbitration rules with nationality considerations or requirements. For example, Article 6(4) of the International Arbitration Rules of the International Centre for Dispute Resolution (ICDR, the international arm of the American Arbitration Association) permits the ICDR, in selecting “suitable arbitrators,” to “appoint nationals of a country other than that of any of the parties.” At least this rule is permissive. By contrast, Article 9(1) of the ICC (International Chamber of Commerce)

Rules of Arbitration is mandatory: “In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator’s nationality....” Article 6 of the Arbitration Rules of the LCIA (London Court of International Arbitration) is prescriptive: “Where the parties are of different nationalities, a sole arbitrator or chairman of the Arbitral Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed appointee all agree in writing otherwise.”

Does the decision by the English Court of Appeals, if upheld, put at risk all arbitration clauses that specify nationality or that incorporate rules

that specify nationality? There has been considerable disagreement in the English and European arbitration literature as to whether the implications would be wide or narrow, but there seems to be agreement that the implications of the UK Supreme Court decision are uncertain.

The ICC and the LCIA have both intervened as *amici curiae*, to express the arbitration community’s concerns. Some major English law firms are advising clients that incorporate institutional arbitration rules in their arbitration agreements to exclude the application of any provisions relating to the nationality of an arbitrator.² Others are advising clients to “consid-

er amending their arbitration agreements to delete any expressly discriminatory provisions and to disapply any relevant [institutional] rules.”³

The UK Supreme Court’s decision could be announced by the end of 2011. Until then, the concern and uncertainty about nationality requirements continue. ■

Endnotes

¹ [2010] EWCA Civ 712.

² See, e.g., “UK—*Jivraj v Hasbwan*: Amendments Needed to Arbitration Clauses,” *Linklaters’ Technology, Media & Tech. News* (Oct. 13, 2010).

³ See A. Welsh & A. Pullen, “*Jivraj v Hasbwan*: Is the Sky Falling In?” in *Practical Law Co.* (October 2010), at www.practicallaw.com/9-503-6650.