

Arbitrators as employees?

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welcome the UKSC decision in *Jivraj v Hashwani*

In the realm of international arbitration, few recent cases have been subject to as much controversy as *Jivraj v Hashwani* [2010] EWCA Civ 712, in which the English Court of Appeal held that an arbitrator was an “employee” for the purpose of UK anti-discrimination legislation. The parties’ arbitration agreement specified that their arbitrators had to be members of a particular religious community. The Court decided that the agreement was void in light of the Employment Equality (Religion and Belief) Regulations 2003 (the Regulations) since it required the parties to discriminate on religious grounds when choosing between persons offering personal services.

In *Jivraj v Hashwani* [2011] UKSC 40, on 27 July 2011, the UK Supreme Court overturned the decision on the basis that an arbitrator was not an employee but rather:

in the category of an independent provider of services who is not in a relationship of subordination with the parties who receive his services (at [40]).

While such a reversal may seem unexceptional, it comes as a welcome relief to arbitrators, legal counsel and others in the international arbitration community. The furore caused by the Court of Appeal decision cannot be underestimated. There were fears that it could damage irreparably the landscape of international commercial arbitration. The Court of Appeal reasoning led to uncertainty regarding the appointment of arbitrators by parties, and in particular whether other existing arbitration agreements would also fall foul of anti-discrimination legislation. The ability to choose arbitrators based on their skill and experience is one of the distinct advantages of dispute resolution through arbitration. The outcome of the Court of Appeal proceedings was widely criticized as it had the potential to restrict the control that parties could exercise when determining the composition of the tribunal, thereby limiting party autonomy.

THE FACTS

On 29 January 1981, Mr Jivraj and Mr Hashwani entered into a joint venture agreement for the purposes of investment in real estate throughout the world. Both parties were members of the Ismaili community, which forms part of the Shia branch of Islam. The agreement provided that in the event of any disputes arising, the matters would be referred to three arbitrators, all of whom had to be “respected members of the Ismaili community and holders of high office within the community”. In the Ismaili community, the role of an arbitrator is traditionally honorific and generally no remuneration is sought or received for these services.

The parties decided to end their enterprise in 1998 and selected three members from the Ismaili community to assist with the division of the joint venture assets. However, a number of matters could not be resolved and remained in

abeyance for several years. In 2008, Mr Hashwani sought to appoint Sir Anthony Colman, who was not an Ismaili, as an arbitrator to determine the outstanding issues. He contended that the requirement to appoint members of the Ismaili community, while valid in 1981, had been rendered void by the Regulations. The Regulations were promulgated under the UK’s obligations under the EU Employment Directive 2000/78, and prohibit employers from discriminating against potential employees. In response, Mr Jivraj submitted that Sir Anthony’s appointment was invalid, as it was contrary to the selection criteria in the arbitration agreement.

COMMERCIAL COURT

At first instance, Steel J held that the appointment of Sir Anthony Colman was invalid (*Jivraj v Hashwani* [2009] EWHC 1364 (Comm)). His Honour relied on other provisions of the Regulations and a number of case authorities including *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121 to hold (at [26]) that it would be “wholly inconsistent” to find that an arbitrator was an employee within the meaning of the Regulations. Drawing an analogy between an arbitrator and a judge, he further held that arbitrators could not be employees as they were “insufficiently directed” (at [28]). Steel J then stated that it would be a bizarre result if the Regulations were to apply in an arbitration setting, given the unique contractual arrangement between the arbitrator and the parties. He noted the significant enthusiasm for dispute resolution within the Ismaili community and the fact that no remuneration was paid. In his opinion, even if arbitrators were employees the parties’ agreement would in any event fall within an exception for situations where having a particular religion is a genuine occupational requirement.

COURT OF APPEAL

The Court of Appeal unanimously reversed the trial judge’s decision. It held that arbitrators were employees for the purpose of the Regulations, as the relationship between an arbitrator and the appointors gave rise to “a contract personally to do work of any kind” as referred to in the definition of “employment”. Examining the broad language of the Employment Directive, the Court stated that its purpose was to prohibit discrimination “wherever it exists in relation to employment and occupation in whatever form” (at [7]).

Moore-Bick LJ stated that the precise nature of the relationship between the arbitrator and the parties was irrelevant when determining whether the religious requirement breached the Regulations. The Court cited *K/S Norjarl v Hyundai Heavy Industries Co Ltd* [1992] QB 863, [1991] 1 Lloyd’s Rep 524, a case concerning the arbitrator’s ability to seek commitment fees from the parties after appointment. In *Norjarl*, Browne-Wilkinson V-C examined the unique relationship between an arbitrator and the parties in some depth,

and described the initial agreement between the parties to arbitrate as a bilateral contract. Upon acceptance of appointment, the arbitrator becomes a party to the agreement, creating a trilateral contract. Browne-Wilkinson V-C added that an arbitrator also assumed a quasi-judicial relationship with the parties, in light of his or her essential role in adjudicating their dispute. In *Jivraj* however the Court of Appeal emphasised the contractual aspect of the relationship, suggesting that the quasi-judicial status of an arbitrator was only at issue once the contract had been entered into. Thus, the trial judge had erred by taking into account the nature of the arbitrator's position. In the final analysis, the Court said (at [16]) that the appointment of an arbitrator:

... is no different from instructing a solicitor to deal with a particular piece of legal business, such as drafting a will, or consulting a doctor about a particular ailment, or an accountant about a tax return. Since an arbitrator (or any professional person) contracts to do work personally, the provision of his services falls within the definition of 'employment' and it follows that his appointor must be an employer within the meaning of [the Regulations].

This directly contradicted the view expressed by Mustill and Boyd in their seminal text, that the appointment of an arbitrator "is not like appointing an accountant, architect or lawyer. Indeed it is not like anything else at all" (Mustill and Boyd *Commercial Arbitration* (Butterworths, 1989) at 223). English law governed the underlying contract. The Court held that members of any religious community could apply English law and thus the requirement that the arbitrators had to be Ismaili did not fall within the exception of a genuine occupational requirement. Given the purpose of the anti-discrimination legislation it is hardly surprising that this exception was construed narrowly (see Tevendale, "*Jivraj v Hashwani* — Arbitrators Are Not Employees for the Purposes of Employment Equality" (29 July 2011) <http://kluerarbitrationblog.com/blog>). Yet, the Court went on to note (at [29]) that:

[i]f 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 recognised within that community.

The Court of Appeal held that while the arbitration term could be struck out from the contract, by doing so the agreement would be rendered substantially different from what the parties had originally intended. Therefore, the requirement could not be severed from the arbitration agreement and the entire contract was void. In a surprisingly short judgment comprising only 34 paragraphs, the Court of Appeal rejected the widely held notion that arbitrators are in a special relationship *vis à vis* the parties, even if the exact nature of the relationship has never been fully understood.

FEARED IMPACT

The uncertainty created by the Court of Appeal's decision was described as "dangerous for parties" (Clifford and Haeri "*Jivraj v Hashwani*: Arbitrator Nationality and the Law of Unintended Consequences" (2011) Latham & Watkins website, www.lw.com) and led to questions being asked about the future attractiveness of England as a major seat of international arbitration. There were concerns that innumerable arbitration agreements that specified particular qualities desired

in the arbitrator, such as nationality, might be caught by the new Equality Act 2010 (UK). This would have had wide-reaching consequences for the rules of arbitration institutions, which often stipulate that the sole or presiding arbitrator should have a different nationality from those of the parties.

Indeed, most institutional bodies have provisions in their rules which provide that the arbitrator shall be a national of a neutral third country (eg the International Chamber of Commerce (ICC) Rules, art 9.5 and the London Court of International Arbitration (LCIA) Rules, art 6.1). The UNCITRAL Arbitration Rules set out that the appointing authority should take into account the "advisability" of appointing an arbitrator of a nationality other than the nationalities of the parties (art 6.4).

Arguably, the Court of Appeal decision could also have had profound ramifications in the way that the duties and status of an arbitrator are characterised, with flow-on consequences for arbitral immunity. By limiting their analysis to the contractual aspect of the relationship, the Court of Appeal distanced itself from the notion that an arbitrator's position straddles both an appointment under a *sui generis* contract and a quasi-judicial role. This represented a shift from Browne-Wilkinson V-C's opinion in *Norjarl*, where his Lordship said that it was impossible to "divorce the contractual and status considerations: in truth the arbitrator's rights and duties flow from the conjunction of these two elements (at 884).

The scope of an arbitrator's immunity from suit by the parties varies between jurisdictions. In New Zealand, s 13 of the Arbitration Act 1996 provides that an arbitrator is not liable "for negligence in respect of anything done or omitted to be done in the capacity of an arbitrator". The immunity does not extend, for example, to breaches of contract, fraud, or acts of bad faith. By contrast, s 29 of the (UK) Arbitration Act 1996 grants immunity against all claims for acts or omissions in the discharge of the arbitrator's functions as an arbitrator, unless it can be shown that the arbitrator was acting in bad faith. Characterising the relationship between the parties and their arbitrator as primarily contractual would have the result that fewer acts or omissions by the arbitrator would be immunized by s 13.

SUPREME COURT

Both Mr Jivraj and Mr Hashwani appealed to the UK Supreme Court on various issues arising out of the Court of Appeal's decision. Given the wide-reaching implications of this case on international arbitration, the Supreme Court allowed the ICC and the LCIA to participate as interveners in the appeal. His Highness Prince Aga Khan Shia Imami Ismaili of the International Conciliation and Arbitration Board also appeared as an intervener. The Supreme Court unanimously allowed the appeal on the basis that an arbitrator was not an employee under a contract of employment, in essence because the role of an arbitrator is not naturally described as one of employment under a contract personally to do work.

The LCIA and the ICC argued that an arbitrator is not an employee as she or he is not in a position of subordination to the parties and lacks the economic dependence of an employee. Lord Clarke SCJ, who delivered the lead judgment, agreed. He noted that it was common ground that an arbitrator's services were rendered pursuant to a contract with the parties. However, significant weight had to be given to the fact

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that the definition in the Regulations did not call simply for a contract to provide services, but for “employment under” such a contract. Referring to the leading European Court of Justice case *Allonby v Accrington and Rossendale College* [2004] ICR 1328, Lord Clarke SCJ determined that while the dominant purpose of a contract is relevant in arriving at the correct conclusion on a particular set of facts, it is not conclusive. His Lordship then went on to describe the role of an arbitrator in the following terms (at [40]–[41]):

If the approach in *Allonby* is applied to a contract between the parties to an arbitration and the arbitrator (or arbitrators), it is in my opinion plain that the arbitrators' role is not one of employment under a contract personally to do work. Although an arbitrator may be providing services for the purposes of VAT and he of course receives fees for his work, and although he renders personal services which he cannot delegate, he does not perform those services or earn his fees for and under the direction of the parties as contemplated in ... *Allonby*. He is rather in the category of an independent provider of services who is not in a relationship of subordination with the parties who receive his services ...

The arbitrator is in critical respects independent of the parties. His functions and duties require him to rise above the partisan interests of the parties and not to act in, or so as to further, the particular interests of either party. As the International Chamber of Commerce (“the ICC”) puts it, he must determine how to resolve their competing interests. He is in no sense in a position of subordination to the parties; rather the contrary. He is in effect a “quasi-judicial adjudicator”: [*K/S Norjarl* at 885].

The Supreme Court also considered whether the requirement for a particular religion would have fallen within the exception of a genuine occupational requirement. This point did not fall for resolution as the whole agreement fell out of the scope of the Regulations. Lord Mance SCJ differed from the majority, stating (at [79]) that “[t]o ask how the exception permitted by regulation 7(3) and art 4(2) of the Directive might apply, when by definition it cannot, may risk giving a slightly false impression about the scope of exception in situations where it is potentially applicable”.

Nonetheless, the majority accepted the submissions by the ICC, which emphasised the fact that unlike courts, arbitration allows parties to determine the composition of the tribunal. The “raison d'être of arbitration” is that it allows parties to make these determinations about who the appropriate decision makers may be, based on sufficient knowledge and sensitivity to the “the parties' positions, cultures or perspectives” (at [61]). Lord Clarke SCJ held that the provision that all arbitrators had to be respected members of the Ismaili community was legitimate and justified (at [70]).

CONCLUSION

The legal nature of the engagement of an arbitrator determines the nature and scope of the arbitrator's duties yet the topic has received little judicial attention. This decision makes it clear that arbitrators are not employees for the purposes of anti-discrimination legislation. The Court affirmed the hybrid roles of an arbitrator. This is likely to be influential in New Zealand if a similar situation arises. The relationship between arbitrators and the parties is unique, and respects the parties' autonomy in choosing their decision makers. The potential problems caused by the Court of Appeal's judgment have now also evaporated. □