Being picky

Philippa Charles discusses the recent Supreme Court judgment in Jivraj

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'In *Jivraj* [2011], Mr Hashwani contended that the term in the arbitration agreement, that the arbitrators must be members of the Ismaili community, had become void by virtue of the Employment Equality (Religion or Belief) Regulations 2003.'

The London arbitration community has warmly welcomed the judgment of the Supreme Court in the case of *Nurdin Jivraj v Sadruddin Hashwani* [2011]. The issues in the case and the decision of the Court of Appeal had carried what one advocate described as 'chilling' implications for London as a seat of arbitration. Had the Supreme Court held that arbitrator selection criteria were subject to the requirements of anti-discrimination legislation, many London arbitration agreements may have been held to be invalid in their entirety.

Facts

Mr Hashwani and Mr Jivraj were members of the Ismaili community, part of the Shia branch of Islam. In 1981 they established a joint venture to invest in real estate. Their agreement provided that, if any dispute arose, it would be referred to three arbitrators (acting by a majority) one to be appointed by each party and the third arbitrator to be the president of the HH Aga Khan National Council for the United Kingdom. One term in the arbitration agreement provided that 'all arbitrators shall be respected members of the Ismaili community and holders of high office within the community'.

In 1998, Mr Hashwani and Mr Jivraj decided to terminate their venture and they appointed three members of the Ismaili community to act as a conciliation panel to assist them in the division of the joint venture's assets and liabilities. This initial panel operated until February 1990 and succeeded in directing the division of many of the assets. Certain matters remained unresolved despite further efforts over the period to have the outstanding issues resolved by means of arbitration, or conciliation, by a sole member of the Ismaili community who acted in the matter until 1995 (having issued an initial determination in 1993) but then declared himself defeated. The matters remained in dispute between the parties but no formal proceedings existed between them after 1995.

In July 2008, Mr Hashwani put forward a claim for US$1,412,494 plus compound interest and gave notice to Mr Jivraj of his appointment of Sir Anthony Colman, a retired High Court judge who was not of the Ismaili community, as one of the arbitrators. Mr Jivraj started proceedings seeking a declaration that the appointment of Sir Anthony Colman was invalid. Mr Hashwani applied to the court for an order that Sir Anthony Colman should be appointed by the court as sole arbitrator.

Issues

Mr Hashwani contended that the term in the arbitration agreement, that the arbitrators must be members of the Ismaili community, had become void in 2003 by virtue of the Employment Equality (Religion or Belief) Regulations 2003 (the Regulations) (and, by extension, would be unlawful pursuant to the relevant provisions of the 2010 Equality Act that had replaced the Regulations).

The key issues for determination were therefore:

- whether a term in an arbitration agreement, which provided that all arbitrators must be members of the Ismaili community, related to 'employment' as defined in the Regulations and, if it did, whether it was therefore discriminatory;
- if the term was subject to the Regulations and was discriminatory on the face of it, whether, in the circumstances of the case, the term fell within the 'genuine

occupational requirement' exception in the Regulations; and
- whether, if such a term in an arbitration agreement was void, this made the whole arbitration agreement void.

Earlier decisions

Steel J, at first instance, found that the nature of the relationship between arbitrators and the parties appointing them was not one of employment within the meaning of the Regulations in *Jivraj v Hawshwani* [2009]. The judge analysed the nature of the relationship between the parties and the arbitrators as being different from that of employment, given the absence of control of the parties over the arbtirators' conduct of the case. Therefore, the legislation did not apply and the requirement that the arbitrators should be members of the Ismaili community was valid. Even if arbitrators were 'employees' within the definitions given in the Regulations, Steel J was prepared to find that the requirement in the parties' agreement that the arbitrators be members of the Ismaili community was a 'genuine occupational requirement' and thus that the agreement was valid and non-discriminatory.

The Court of Appeal reversed the first instance decision in *Jivraj v Hashwani (Rev 2)* [2010]. Finding that the definition of employment in the Regulations included 'a contract personally to do any work', the Court of Appeal concluded that it extended to the terms on which arbitrators acted in arbitration matters and that therefore the appointing party was an 'employer' within the meaning of the Regulations. It therefore held that the restriction of eligibility for appointment as an arbitrator to members of the Ismaili community constituted unlawful discrimination on religious grounds. The Court of Appeal further held that being a member of the Ismaili community was not a 'genuine occupational requirement' for the role of arbitrator in the circumstances of the case.

Finally, the Court of Appeal concluded that the incorporation of the requirement that the arbitrators be Ismaili was so fundamental to the arbitration agreement that if that part of the agreement was unlawful, the whole agreement to arbitrate fell away. It was not possible simply to remove the characteristics requirements in relation to the arbitrators without fundamentally changing the nature of the parties' agreement to arbitrate. Therefore, Mr Hashwani's attempt to appoint Sir Anthony Colman as sole arbitrator failed because there was no longer a valid agreement to arbitrate between he parties.

The Court of Appeal concluded that it was not possible to remove the characteristics requirements in relation to the arbitrators without fundamentally changing the nature of the parties' agreement to arbitrate.

Supreme Court judgment

The Supreme Court unanimously restored the first instance decision, finding that arbitrators are exempt from the requirements of anti-discrimination legislation as the relationship between them and the appointing parties is not one of employment.

The court focused on the case law from the European Court of Justice (ECJ), which had considered the definition of 'worker' for the purposes of the EC Treaty and the European Union legislation deriving from the Treaty. The definition was best set forth in the case of *Allonby (Social policy)* [2004], where the ECJ had drawn together principles previously laid down in other cases concerning workers and summarised the position as follows (Allonby at paras 67-68, quoted in the judgment of Lord Clarke in the Supreme Court at para 26):

> there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration... it is clear from that definition that the authors of the Treaty did not intend that the term 'worker' within the meaning of Article 141(1)EC should include independent providers of services who are not in a relationship of subordination with the person who receives the services.

The importance of the 'relationship of subordination' became clear in the context of the wording of the Regulations, since the Regulations provided that 'employment' meant employment under a contract of service or of apprenticeship or a contract personally to do any work. In the view of Lord Clarke, who gave the leading judgment, the Court of Appeal had failed to appreciate the significance of the phrase 'employment under... a contract personally to do any work' which, in his view, required a careful analysis of the nature of the contract. Lord Clarke explained that:

> although the dominant purpose of the contract may be personal work, it may not be personal work under the direction of the other party to the contract.

He continued (judgment of Lord Clarke, paras 40-41:

> it is in my opinion plain that the arbitrator's role is not one of employment under a contract personally to do work. [The arbitrator] 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. He is in no sense in a position of subordination to the parties; rather the contrary. He is in effect a 'quasi-judicial adjudicator'.

The characterisation of the relationship between the parties and the arbitrator(s) is a helpful analysis in general: the existence of a contract between the arbitrator and the parties is inferred from the arbitrator's right to sue the parties for his fees and this aspect of the relationship had given the Court of Appeal considerable trouble. On the facts of the case, there was evidence to suggest that members of the Ismaili community would ordinarily offer their services in dispute resolution matters free of charge, but this is not normally the case in commercial arbitration matters. The mere existence of a right on the part of the arbitrators to recover their fees directly from the parties did not give the relationship between them the necessary characteristics to amount to

a relationship of employment as it is properly understood.

On the question of the 'genuine occupational requirement' exemption in the Regulations, Lord Clarke referred to the principle of party autonomy in the Arbitration Act 1996, pursuant to which the parties are free to agree on how their disputes are to be resolved, subject only to such safeguards as are necessary in the public interest. A majority of the Supreme Court held that even if arbitrators were employees, the genuine occupational requirement exception would apply on the facts of this case, such that it would be not only a genuine but also an objectively legitimate and justified requirement to stipulate that an arbitrator be a member of the Ismaili community.

Counsel for Mr Hashwani had argued that the application of the relevant 'genuine occupational requirement' exception should be interpreted very narrowly and as a matter of necessity. He submitted that there was no 'necessity' in having an English law, London seat arbitration heard and determined by members of the Ismaili community, and that any English-qualified lawyer would be as well placed as the members of the Ismaili community to make findings under English law. The Supreme Court was not persuaded that the test was one of necessity. The question was whether, in all the circumstances, the provision that all the arbitrators should be respected members of the Ismaili community was objectively legitimate and justified, and the majority found that it was, as part of the English Arbitration Act's recognition of and support for the principle of party autonomy in the structuring of the process for the resolution of their disputes. There were particular features of the Ismaili community's commitment to dispute resolution, deriving in part from aspects of their religious belief, which therefore amounted to 'an ethos based on religion' for the purposes of the Regulations, which was a legitimate and justified requirement for the resolution of disputes between these parties.

Both the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) had been given permission to intervene in the Supreme Court hearing because their respective rules of arbitration provide that, in cases where parties of different nationalities are in dispute, the chairman or sole arbitrator should be of a different nationality than the parties. This provision would fall foul of the Equality Act 2010 were it to be held that arbitrators were employees within the meaning of that legislation. Given the Court of Appeal's conclusion that such provisions could not be severed from the overall agreement to arbitrate without fundamentally changing the nature of the parties' agreement, the case raised the possibility that agreements to arbitrate pursuant to those rules would, if governed by English law, be invalidated.

In light of the court's conclusions on the first two issues, it was unnecessary to consider the severability point. As the Supreme Court concluded that the nature of the relationship between arbitrators and the appointing parties is not one of employment, it is unlikely that the issue of severability could arise separately in a future case. Therefore, the validity of agreements to arbitrate, which incorporate institutional rules such as those of the ICC or LCIA and, implicitly, incorporate a restriction on the nationality of the sole arbitrator or chairman where the parties are of different nationalities, is upheld by this decision.

Arbitrators are exempt from the requirements of anti-discrimination legislation as the relationship between them and the appointing parties is not one of employment.

Conclusion

This judgment, which strongly affirms the principle of party autonomy in arbitration, and the legitimacy of contracting parties' desire to select tribunals having particular characteristics (such as neutral nationality), is a commercially sensible response to the issues raised.

The Supreme Court's careful analysis of the nature of the relationship between arbitrators and parties is a helpful one that recognises the essential difference between the subordinate nature of an employment relationship, and the quasi-judicial activities of an arbitrator who is truly self-employed but entitled to remuneration for the provision of his services. In particular, the majority affirmation of such provisions as comprising a 'genuine occupational requirement' for the role of arbitrator supports a general willingness on the part of the English courts to allow parties to select their tribunals on the bases that appear to be most appropriate to the likely disputes that may arise between them. That such characteristics do not have to meet a test of 'necessity' demonstrates the court's recognition that the process by which parties arrive at the agreement of terms on which to resolve their disputes incorporates many factors and that the balance of those factors is as important to the parties as the choice of dispute resolution mechanism.

From the perspective of users of London arbitration as a preferred method for resolution of their disputes, the strong line taken by the UK Supreme Court is of considerable comfort as it indicates that an issue of this type should not be raised in future even where the basis of selection between potential arbitral candidates is not based on religious belief but on other parameters, such as nationality. The willingness of the Supreme Court to address the wider implications of the particular facts arising in this case was a helpful approach to avoid similar disputes arising in the future on parallel issues: the Supreme Court's decision was intended to be read more broadly and to provide certainty in respect of the general interaction between agreements to arbitrate and the anti-discrimination legislation. The decision supports and gives certainty to parties that their autonomy in the entry into agreements to arbitrate, and the selection of arbitrators, will be upheld in English law. ■

Allonby (Social policy)
[2004] EUECJ C-256/01
Jivraj v Hawshwani
[2009] EWHC 1364 (Comm)
Jivraj v Hashwani (Rev 2)
[2010] EWCA Civ 712
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[2011] UKSC 40