MCNAIR CHAMBERS

INTERNATIONAL COMMERCIAL LAWYERS

IS AN ARBITRATOR AN EMPLOYEE? NOT SO SAYS THE UK SUPREME COURT

Jivraj v Hashwani [2011] UKSC 40

Abstract

The UK Supreme Court has this July handed down a decision which promotes legal certainty and clarifies the employment status of arbitrators – they are not employees of any party. Requirements as to an arbitrator's religion do not amount to discrimination and would in any case be a genuine occupational requirement.

The Facts

The Court of Appeal last year reviewed a decision by Steel J in the High Court concerning an arbitration in a joint venture agreement. The agreement was created between two members of the Ismaili community in 1981. The agreement's arbitration clause stated that any dispute, difference or question arising between the investors would be referred to arbitration in London and that the arbitrators had to be "respected members of the Ismaili community and holders of high office within the community". In 1988 the parties decided to part company and commenced division of the assets. A dispute arose, and after lengthy attempts at mediation in 1993-1995, Mr Hashwani in 2008 moved for arbitration and appointed the retired judge Sir Anthony Colman, who was not a member of the Imaili community.

Mr Hashwani considered the requirement of the religious adherence of the arbitrator as void in the light of the Human Rights Act. Mr Jivraj sought a declaration that the appointment of Sir Anthony was invalid.

Steel J held that the arbitration agreement was valid, that the arbitrator was not an employee and therefore not subject to the anti-discrimination legislation and that thus the religious requirement remained in force. This decision was overturned by the Court of Appeal.

The Issues

The question faced by the Supreme Court was whether the agreement was invalid due to the Employment Equality (Religion and Belief) Regulations 2003 which the agreement pre-dated. This question led to two issues. Firstly, whether the arbitrator could be considered an employee under the Regulation which prohibited discrimination based on belief. Secondly, if he was an employee, whether the agreement fell within the Regulation's exception for genuine occupational requirement.

The Supreme Court found (1) unanimously that an arbitrator is not an employee, was not in a relationship of subordination and was an independent provider of services outside of the definition of a worker laid down by the case law of the European Court of Justice; and (2) by a majority that the requirement would have fallen within the Regulation's exception for genuine occupational requirement as an arbitrator's adherence to a particular religion or belief can be relevant to the manner in which disputes are resolved.

Comment

In a few cases, some parties tend to view their appointed arbitrators as hired guns or allies which are rallied to their cause. This decision re-emphasises that an arbitrator is a quasi-judicial adjudicator whose duty is not to act in the particular interests of either party. An arbitrator does not work under the direction of a party but is in fact independent and is subject to a duty to act fairly and impartially.

This decision also relieves fears that England would no longer be a reliable and desirable location for arbitration because of the Court of Appeal decision. Many arbitration centres, such as the ICC[1], UNCITRAL[2], LICA[3] and the Hong Kong International Arbitration Centre[4] routinely prescribe provisions which require arbitrators to be of certain nationality or age or experience. Under the Court of Appeal's ruling in which an arbitrator was an employee, such requirements of nationality, age or experience suffered from questionable legality as they might amount to employment discrimination under the Race Relations Act 1976 or the Employment Equality (Age) Regulations 2006, which closely mirror the Employment Equality (Religion and Belief) Regulations 2003 (all now subsumed under the Equality Act 2010).

The potential impact on the *lex arbitri* – the law of arbitration in England – which the Supreme Court has averted cannot be overstated.

Prior to this ruling, arbitration agreements requiring religious- or nationality-based requirements may have lost their validity and countries outside of Europe might have refused enforcement of an award given by a non-religious arbitration tribunal in England where such religious membership was required. This decision reaffirms the viability of London as a seat for arbitration unencumbered by stringent judicial intervention and strengthens legal certainty for commercial disputes.

Finally, the Supreme Court explicitly abstained from commenting on the issue of severability. It is conceivable that the Court of Appeal's decision, which was also Steel J's decision, that an entire arbitration clause is invalid if requirements of an arbitrator should be in violation of a European Regulation might still be good law outside of employment arguments. However this is likely to prove an extremely narrow if not evanescent ground for a claim against a party's choice of arbitrator.

[1] Article 9(5),

http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf

[2] Article 6 (7)

http://www.hkiac.org/documents/Arbitration/Arbitration%20Rules/pre-arb-rules-revised.pdf

[3] Article 6.1,

http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article6

[4] Article 11.2

http://www.hkiac.org/show_content.php?article_id=376#11

3rd October 2011