TRAVERS SMITH

Jivraj v Hashwani – impact on arbitration agreements

Permission to appeal has recently been granted by the Supreme Court in Jivraj v Hashwani [2010] EWCA Civ 712, a case that has caused concern over whether arbitration agreements which place restrictions on the nationality of arbitrators are valid.

The Court of Appeal decision

In *Jivraj,* the Court of Appeal held (reversing the original decision of the Commercial Court) that arbitrators are "employees" for the purposes of the Employment Equality (Religion or Belief) Regulations 2003 (the "Regulations"), and that the arbitration agreement in question was void on the basis that it violated those Regulations by stipulating that all the arbitrators must be of a particular religious belief.

Impact of the Court of Appeal decision

Whilst, in the commercial sphere, arbitration agreements which prescribe the religious qualifications of arbitrators may not be common, the implications of the case extend beyond its own narrow circumstances by bringing arbitrators within the scope of all UK anti-discrimination legislation.

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As a result, the decision potentially has an impact on arbitration agreements which, either directly or by way of incorporation of institutional arbitration rules (such as the ICC or LCIA Rules), seek to impose certain restrictions on individuals who may be appointed as arbitrators.

One of the more common restrictions to be incorporated in arbitration agreements is that of nationality: the rationale being to ensure that arbitration is an entirely neutral process. For example, by incorporating the Rules of the ICC, the parties automatically agree that the ICC will "consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals" when appointing arbitrators. Similarly, by incorporating the Rules of the LCIA, the parties automatically agree that the LCIA will give consideration to "the nationality, location and languages of the parties" when selecting arbitrators. Given the decision in *Jivraj*, such restrictions may fall foul of the Equality Act 2010 (which has consolidated all UK anti-discrimination legislation) and, if so, may render the entire arbitration agreement unenforceable. That would result in jurisdiction reverting to the relevant courts, which is not what the parties had originally bargained for (and in some cases the applicable jurisdiction may be unclear and/or may not have been what one or both of the parties had wanted).

Although the Equality Act does provide a defence to discrimination on the basis of "occupational requirement" (for example, an acting role may require someone of a particular race to ensure realism), the defence may be difficult to establish in practice. It is difficult to argue that it is a "requirement" that arbitrators be of different nationalities to the parties, given that, in practice, this is arguably more a matter of projection and image rather than born of any real concern of actual impartiality.

"The decision could have an impact on requirements other than nationality…"

The decision could also have an impact on requirements other than nationality, such as restrictions in relation to the nature of qualifications held by the arbitrator. It should be noted, however, that such restrictions would be considered indirect discrimination, the defence to which is easier to meet: the defendant has to prove that the requirements are a proportionate means of achieving a legitimate aim.

What does this mean in practice?

Permission to appeal was granted by the Supreme Court in late November 2010, and it is expected that the appeal will be heard late in 2011. We understand that the ICC and LCIA have both applied to intervene. However, in the meantime, any arbitration clauses which incorporate ICC or LCIA Rules (or indeed any other institutional arbitration rules which include provisions relating to the nationality of arbitrators) run the risk of being found to be discriminatory, and there is a risk that the arbitration clause will not be enforceable. Note, however, that under the Equality Act (which uses slightly different terminology to the Regulations considered in *Jivraj*) a term of a contract is unenforceable "in so far as it constitutes" prohibited treatment under the Act. This suggests that the term is only unenforceable to the extent it deals with the prohibited matter. If that is the correct interpretation, then the rest of the arbitration clause, if decided under the Equality Act, need not be declared unenforceable. Similarly, on this interpretation, if parties incorporate institutional rules which contain provisions which are deemed to be discriminatory, those offending provisions will not be incorporated by dint of their unenforceability, but the remaining rules will be, thereby ensuring that any arbitral process and award is valid.

Existing arbitration clauses

- Where an existing arbitration clause contains no express provisions which could fall foul of *Jivraj*, and ad hoc rather than institutional arbitration is provided for, no amendment will be needed.
- Where an existing arbitration clause does contain express provisions which could fall foul of *Jivraj*, or institutional arbitration is provided for, there is a risk that any arbitration process/award could be in danger of being unwound. However, parties may wish to wait until clarity is given by the Supreme Court's determination of the matter before rushing to amend existing contracts (although if you do have concerns in relation to a particular contract, amendments should be considered).

Drafting new arbitration clauses

- Any arbitration clause which contains express restrictions on the appointment of arbitrators on the basis of nationality (or any other potentially discriminatory restriction) should not be included in an agreement, as it could have the effect of rendering the whole clause unenforceable, thereby undermining the parties' agreement to arbitrate.
- Arbitration clauses which incorporate institutional arbitration rules that provide for the nationality of the parties to be taken into account when appointing arbitrators run the risk, following *Jivraj*, of being held unenforceable. To reduce this risk, it would be sensible to include wording to the effect that the parties agree that the nationality of the arbitrators shall not be taken into account and that any provisions relating to the nationality of an arbitrator shall not apply.

"…any arbitration clauses which incorporate ICC or LCIA Rules…are potentially discriminatory and there is a risk that the arbitration clause will not be enforceable."

How can we help?

This briefing is not intended to provide legal advice, which should be sought in relation to particular matters. If you would like to understand more about the *Jivraj* decision, or need assistance in the drafting of arbitration clauses, please contact Caroline Edwards or your usual contact at the firm.

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