TRAVERS SMITH

Jivraj v Hashwani – Supreme Court decision

On 27 July 2011 judgment was handed down by the Supreme Court in the case of Jivraj v Hashwani [2011] UKSC 40, a decision eagerly awaited ever since the surprising findings of the Court of Appeal in June 2010 which meant that many arbitration clauses containing restrictions on the nationality of arbitrators were potentially void. The unanimous judgment will come as a relief to many, as it overturns the decision of the Court of Appeal and confirms that such restrictions are not void, as arbitrators are not covered by anti-discrimination law.

"The arbitrator is in critical respects independent of the parties…he is in no sense in a position of subordination…"

The Court of Appeal decision and its impact

As we reported in December (click here to view this briefing), the Court of Appeal (reversing the original decision of the Commercial Court) held that arbitrators were "employees" for the purposes of the Employment Equality (Religion or Belief) Regulations 2003 (the "Regulations"), on the basis that they were employed under "a contract personally to do any work" (the definition within the Regulations). Since the arbitration agreement under consideration violated those Regulations by stipulating that all arbitrators had to be of a particular religious belief, the Court of Appeal held it to be void.

Although the case was decided on very specific facts, the Court of Appeal's ruling caused considerable consternation within the international arbitration community in effectively bringing arbitrators within the scope of anti-discrimination legislation (now the Equality Act 2010, which consolidates all anti-discrimination legislation in Great Britain). The majority of international institutional arbitration rules (including those of the LCIA and ICC) impose a restriction on the nationality of individuals who may be appointed as arbitrators, the rationale being to ensure that arbitration is an entirely neutral process. The effect of the Court of Appeal's decision was that arbitration agreements which either incorporate the relevant institutional rules or which expressly impose restrictions on individuals who may be appointed as arbitrators under the agreement, may have been rendered unenforceable, with the result that jurisdiction would revert to the relevant courts (which was not what the parties had originally bargained for, given their original agreement to submit disputes to arbitration).

Permission to appeal the decision was granted, and the appeal itself was heard by the Supreme Court in April on an expedited basis. The importance of the decision was highlighted further by the intervention of both the ICC and the LCIA.

"…the role of an arbitrator…is not naturally described as one of employment at all."

The decision of the Supreme Court

The primary issue before the Supreme Court was whether arbitrators were "employees" for the purposes of anti-discrimination legislation. Lord Clarke, giving the leading judgment, held that arbitrators were not employees, so allowing the appeal. Although he accepted that there was a contract between the parties and the arbitrator, he thought it plain that the arbitrators' role was not one of "employment under a contract personally to do any work": the role simply could not be described as one of employment as the definition required.

In reaching this decision, Lord Clarke highlighted the key distinction (drawn from European cases) between a person performing services for and under the direction of another person in return for remuneration (i.e. an individual who is employed), and an independent provider of services who is not in a relationship of subordination with the person receiving the services (i.e. an individual who is not employed). Since arbitrators do not perform services or earn fees for and under the direction of the parties, and are instead independent providers of services (very much not in a relationship of subordination), it must be the case that they are in the category of those individuals who are not employed. Lord Clarke emphasised the independent and impartial nature of arbitrators, whose role it is to "*rise above the partisan interests of the parties*", and indicated that by virtue of such a brief, they simply could not be viewed as employees.

Interestingly, the majority also stated, *obiter*, that even if arbitrators were deemed to be employees for the purposes of anti-discrimination legislation, the religion restriction could be regarded as a genuine occupational requirement - on the basis that the arbitrators' religious beliefs would be of assistance in resolving the dispute and ensure the parties' confidence in the procedure - and therefore the restriction would not, in any event, breach anti-discrimination law.

"One of the distinguishing features of arbitration…is the breadth of discretion left to the parties and the arbitrator…"

Practical implications

The decision of the Supreme Court puts an end to the uncertainty that had arisen as a result of the findings of the Court of Appeal, in establishing that English anti-discrimination law will not apply in the context of the appointment of arbitrators. Parties to arbitration agreements can now be sure that the inclusion of restrictions such as those of nationality (whether directly or by incorporation of relevant institutional rules) will not render the agreement unenforceable and result in jurisdiction reverting to the courts.

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 area of arbitration or more generally in dispute resolution, please contact Caroline Edwards or your usual contact at the firm.

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