JIVRAJ v. HASHWANI:

ARBITRATOR NATIONALITY AND THE LAW OF UNINTENDED CONSEQUENCES
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Introduction

London is a leading centre for international dispute resolution. At the heart of London’s appeal for many is the sophistication and certainty of English law and the reliability of its courts. Since the enactment of the Arbitration Act in 1996, few issues have caused as much confusion and uncertainty in English arbitration law and practice as the decision of the Court of Appeal in Jivraj v. Hashwani, rendered on 22 June 2010.1 The case has thrown long settled practice and contract drafting into turmoil and left many practitioners wondering if this is a temporary blip, soon to be overturned by the Supreme Court, or a long lasting and important change in the way many arbitral tribunals must be selected from now on. This uncertainty is dangerous for parties, the lawyers representing them and indeed for London and the other centres for arbitration that this affects.

Background

In 1981, Mr Jivraj and Mr Hashwani had entered into a joint venture agreement relating to investment in real estate around the world. The agreement contained an arbitration clause stipulating (amongst other matters) that:

“All arbitrators shall be respected members of the Ismaili community and holders of high office within the community.”

The Shia Ismaili Muslims are a community of ethnically and culturally diverse peoples headed by His Highness Prince Karim Aga Khan (known to many as the “Aga Khan”), their spiritual leader.

In 1988 Mr Jivraj and Mr Hashwani decided to terminate their joint venture and appointed three Ismaili arbitrators to assist in dividing up their assets. However, not all the issues between them were resolved.

In 2008, Mr Hashwani sought to revisit the outstanding issues. He asserted a claim and notified Mr Jivraj that he had appointed Sir Anthony Coleman as his arbitrator. Sir Anthony was not a member of the Ismaili community but Mr Hashwani maintained that this was no longer a requirement. He submitted that the requirement to appoint a member of the Ismaili community had been rendered void by anti-discrimination provisions in employment legislation, specifically the Employment Equality (Religion and Belief) Regulations 2003 (the “Regulations”).

Mr Jivraj took issue with this and the dispute over the requirement to appoint a member of the Ismaili community as arbitrator was presented to the Commercial Court, where Mr Justice David Steel found in favour of Mr Jivraj. Mr Justice Steel held that the relationship between an arbitrator and the parties to an arbitration is not a contract of employment for the purposes of the Regulations.2 Further, even if he was incorrect on that point, Mr Justice Steel considered that this case fell within the exception made in the Regulations for genuine occupational requirements. Mr Hashwani appealed.

**The decision of the Court of Appeal**

The Court of Appeal accepted Mr Hashwani’s argument, finding that arbitrators are “employees” for the purposes of the Regulations because they act under “a contract personally to do any work”. Given that the Regulations sought to promote equality and eliminate unjustified discrimination, the Court of Appeal saw no good reason to adopt a more restricted interpretation of that phrase so as to exclude arbitrators.

As such, selecting an arbitrator on religious grounds would contravene the prohibitions in the Regulations. Since the Court of Appeal found that the provision requiring all arbitrators to be Ismaili could not be severed from the rest of the arbitration agreement, the parties’ entire arbitration agreement was rendered void.

Whilst for many this might appear to be a fairly unusual case, divorced from the mainstream world of commerce, the logic and language of the Court of Appeal’s decision in fact have broad implications

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for arbitration agreements, well beyond attempted restrictions on the religion of arbitrators. The reasoning of the Court of Appeal in this case could be used to catch the innumerable arbitration agreements with provisions (or incorporating arbitration rules with provisions) touching upon the nationality of arbitrators. Such provisions (and indeed, the arbitration agreements of which they form a part) could now be deemed void on the basis that they fall foul of anti-discrimination legislation which is broader than the Regulations and which covers, inter alia, discrimination on the grounds of nationality.

The Equality Act 2010 (the “Equality Act”), which came into effect on 1 October 2010, is a far-reaching statute which consolidates earlier anti-discrimination measures into a single instrument and prohibits discrimination on the basis of nationality. Significantly, the Equality Act has important similarities with the Regulations, including its application to a person that has “a contract personally to do work”. Since the Court of Appeal held that arbitrators fall within a similar definition for the purposes of the Regulations, there is a real risk that they could be deemed to fall within the definition as it appears in the Equality Act. If so, arbitration agreements containing or importing rules on the nationality of arbitrators may be rendered void, with parties having to resort to court proceedings to resolve disputes that they had agreed to arbitrate.

Thus, the potential implications of the Court of Appeal’s decision in Jivraj v. Hashwani for arbitration agreements are considerable. Indeed, that judgment has rightly been at the forefront of advice on arbitration agreements and discussions in the arbitration community since it was rendered on 22 June 2010. At least until the Supreme Court (which has granted permission to appeal the Court of Appeal’s decision) adjudicates on the case, we can expect it to continue to generate particular concern about the practical implications for arbitration agreements and arbitrations. Accordingly, prudent arbitration practitioners are advising their clients on the potential implications of the case for their arbitration agreements, amending the language of arbitration agreements and qualifying legal opinions as appropriate.

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3 Discrimination on the basis of nationality was previously prohibited by the Race Relations Act 1976.
4 Equality Act, Section 83(2)(a). This is similar wording to that in Section 2(3) of the Regulations that was addressed by the Court of Appeal in Jivraj v. Hashwani.
5 There is also a risk that arbitration clauses that restrict arbitrator appointments to those with specific qualifications (e.g., English qualified lawyers) could be deemed indirectly discriminatory (because most English qualified lawyers are British) and therefore rendered void.
6 The Supreme Court has fixed the date for hearing of the appeal in this case for 6 and 7 April 2011.
In light of the justified concerns precipitated by the Court of Appeal’s decision, it is to be hoped that the Supreme Court will act quickly to remove the uncertainty. We consider below in more detail the practical difficulties caused by the decision of the Court of Appeal and explain three of the ways in which courts could avoid the most extreme implications of that decision, namely:

1) the Supreme Court could reverse the Court of Appeal’s decision that arbitrators are employees;

2) courts adjudicating on arbitration agreements with nationality requirements could find that those nationality requirements are an “occupational requirement”, which constitutes a defence to discrimination provisions in the Equality Act; and

3) courts could sever the nationality requirements from the remaining provisions of the arbitration agreements, thereby upholding the parties’ choice of arbitration as their dispute resolution forum.

We then address whether the problems posed by the Court of Appeal’s decision are English, European or global problems, before noting some practical approaches that could be taken to the issue by practitioners while the uncertainty remains.

**The nationality of arbitrators**

Concerns about the implications of the Court of Appeal’s decision are particularly acute in relation to the widespread provisions in arbitration agreements and arbitral rules in relation to the nationality of arbitrators. Some arbitration agreements expressly provide that a sole arbitrator or the chairman of the arbitral tribunal shall not be of the same nationality as one of the parties to the dispute. Many more arbitration agreements import arbitral rules that contain similar restrictions on the nationality of a sole arbitrator or the chairman of the tribunal, including the ICC and the LCIA Rules of Arbitration.

The reason for making provision in relation to nationality is to facilitate the constitution of neutral arbitral tribunals. The neutrality of arbitral tribunals is integral to their function in impartially resolving disputes. As a leading commentator observes:

“Almost all leading institutional rules contain limitations on the nationality of sole and presiding arbitrators (but not on the nationality of co-arbitrators). These limitations are
designed to implement one of the basic objectives of international arbitration, being to provide an internationally-neutral means of resolving disputes between parties from different countries”.7

Whilst the UNCITRAL Rules do not preclude an individual of the same nationality as one of the parties to the arbitration from being the sole arbitrator or the chairman of the tribunal, they highlight the concern that such an arrangement may be inadvisable:

“The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties”.8

The ICC Rules are a little more forthright on this issue and provide that:

“The sole arbitrator or the chairman of the Arbitral Tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that neither of the parties objects within the time limit fixed by the Court, the sole arbitrator or the chairman of the Arbitral Tribunal may be chosen from a country of which any of the parties is a national”.9

Despite the qualification in the second sentence of this provision, the general rule entails a prohibition on a sole arbitrator or chairman of a tribunal being of the same nationality as one of the parties to the arbitration.

Similarly, the LCIA Rules provide that:

“Where the parties are of different nationalities, a sole arbitrator or chairman of the Arbitral Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed nominee all agree in writing otherwise”.10

Needless to say, having as a sole arbitrator or the chairman of a tribunal an individual of a different nationality to the parties is neither necessary nor sufficient for the impartiality or independence of the tribunal. Sharing the nationality of one of the parties does not, of course, mean that an arbitrator will be disposed in their favour. Conversely, having an arbitrator of a different nationality is no guarantee that he or she will be either independent or impartial. Furthermore, there is some basis for arguing

8 UNCITRAL Rules (as revised in 2010), Art. 6(7).
9 ICC Rules, Art. 9(5).
10 LCIA Rules, Art. 6(1). See also ICSID Convention, Art. 38 and 39.
that the nationality of an arbitrator ought not to be relevant to a determination of his or her suitability.

As a leading commentary on international arbitration observes:

“In an ideal world, the country in which the arbitrator was born, or the passport carried, should be irrelevant. The qualifications, experience, and integrity of the arbitrator should be the essential criteria”.11

Indeed, the UNCITRAL Model Law provides that

“No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties”.12

Nevertheless, despite the understandable aspiration that this provision reflects, the prevailing practice in international commercial arbitration is for sole and presiding arbitrators to be of a different nationality to the parties. This reflects the important dictum that “Not only must Justice be done; it must also be seen to be done”.13 In particular, the requirement that arbitrators should be impartial14 entails both that they are not biased and that they do not appear to be biased. Whilst the mere fact that a sole or presiding arbitrator shares the nationality of one of the parties will generally be insufficient to give rise to a perception of bias, such an arrangement entails some risk. Since international commercial arbitration often involves parties of different cultures and legal traditions, an arbitrator who shares the same national culture and legal tradition as one party, but not the other, may be more inclined to see things from the former party’s perspective. That situation is often the aspiration of a party selecting a party-nominated arbitrator but, where the arbitrator is to be the sole or presiding arbitrator (and may therefore have the decisive influence on the outcome of a case), this can easily give rise to a perception of bias, even if unwarranted. As such, the common and often best practice, reflected in the ICC and LCIA Rules, is to avoid such an outcome. The prevalence of this practice is based on its utility in helping to foster the constitution of neutral arbitral tribunals. Parties to arbitration accordingly benefit from this practice, given their interest in having neutral tribunals adjudicate on their respective disputes. Nationality requirements may therefore add legitimacy to the arbitral process and ensuing award, and reduce the risk of a challenge to such award based on a lack of arbitrator impartiality.

12 UNCITRAL Model Law, Art. 11(1).
14 See, for example, LCIA Rules, Art. 5(2) and UNCITRAL Model Law, Art. 12(2).
Despite these sound reasons for arbitrator nationality requirements, following the Court of Appeal’s decision in *Jivraj v. Hashwani*, there is a risk that they (and the arbitration agreements of which they form a part) could be deemed void on the basis that they contravene the Equality Act. This outcome may be avoided if the Supreme Court were to find, for example, that arbitrators do not fall within the ambit of the Regulations because they are not employees (within the meaning of that legislation). Such a finding would then give considerable comfort that arbitrators are not employees for the purposes of the Equality Act, in light of the similar terminology employed by the Regulations and the Equality Act in relation to the definition of employment.

**Are arbitrators employees?**

In the Commercial Court, Mr Justice Steel examined the question of whether the relationship between an arbitrator and the parties to the arbitration was a contract of employment for the purposes of the Regulations. In answering this question in the negative, Mr Justice Steel focussed on the nature of arbitral appointments, the role of an arbitrator and the degree (or rather lack thereof) of control that parties to an arbitration have over their arbitrator(s). He cited, with approval, the point made in a leading commentary that:

> “... the appointment of an arbitrator is not like appointing an accountant, architect or lawyer. Indeed, it is not like anything else. We hope that the courts will recognise this, and will not try to force the relationship between the arbitrator and the parties into an uncongenial theoretical framework, but will proceed directly to a consideration of what rights and duties ought, in the public interest, to be regarded as attaching to the status of the arbitrator”.

Mr Justice Steel held that an appointment of an arbitrator “can usually, at least in part, flow from contractual considerations”. However, he went on to highlight unusual features of the contract (if that is what it is), such as the immunity of the arbitrators from suit, the duty of the arbitrators to act fairly and equally as between the parties and the fact that neither party can remove the arbitrator without order of the Court. He then went on to find that:

> “Even if the role or status of an arbitrator can be classified as akin to that of an ‘independent’ contractor, the ‘employer’ cannot give instructions as to how he is to work or what outcome he is to achieve. In short, the arbitrator is indeed entirely independent and has no client. Indeed it is only then that he can he [sic] act impartially. The closest analogy to

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the role of an arbitrator is that of a judge. He is empowered to make decisions about the parties’ rights and duties: he is required to act fairly and impartially between the parties: he is exposed to challenge against his decisions to the extent provided by statute: he is immune from personal liability for his mistakes”.  

This is a cogent analysis of the nature of the relationship between arbitrators and parties to an arbitration (albeit that, when parties to an arbitration are agreed as to a matter, the arbitrator’s scope for manoeuvre is rather limited). Jurisprudence (on which Mr Justice Steel relied) finding that judges and magistrates are not “employed” because they are insufficiently directed supports the view that arbitrators are not employees. In most situations, the parties must follow the arbitrator’s directions rather than the other way around.

However, the Court of Appeal adopted an expansive interpretation of the Regulations, based in part on the “broad policy objective” of Council Directive 2000/78/EC (which established a general framework for equal treatment in employment and occupation in the EU), finding that the Regulations applied to arbitrators. In doing so, the Court of Appeal held that arbitration was, in some respects, “no different from instructing a solicitor to deal with a particular piece of legal business, such as drafting a will”. It is submitted that this analogy is fairly weak. A solicitor drafting a will is required to follow the instructions of the client to a far greater degree than an arbitrator is required to follow the instructions of the parties when conducting an arbitration or drafting an award.

It is therefore possible that the Supreme Court will overturn the Court of Appeal’s decision that arbitrators are employees. This could entail recognition of the unique nature of the relationship between arbitrators and parties to an arbitration which, it is submitted, should not be shoe-horned into the paradigm of a solicitor-client relationship.

**Are nationality requirements an occupational requirement?**

The Equality Act provides an exception to discrimination provisions for occupational requirements if the application of a requirement is a “proportionate means of achieving a legitimate end”. In Jivraj v. Hashwani, the Court of Appeal rejected the applicability of a similar “genuine occupation requirement” in the Regulations (which had been accepted by the Commercial Court). The Court of

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Appeal held that the arbitrators’ function under the arbitration clause was to determine the dispute between the parties in accordance with the principles of English law. That required some knowledge of English law, including the Arbitration Act 1996, and an ability to “conduct proceedings fairly in accordance with the rules of natural justice”. However, it did not call for any particular ethos and membership of the Ismaili community was not necessary for the discharge of the arbitrators’ functions.

Might other courts find that nationality requirements for arbitrators are occupational requirements, excepting those requirements from discrimination provisions in the Equality Act? This is a possibility but by no means assured. The constitution and functioning of neutral arbitral tribunals, which is the aim of nationality requirements, is a legitimate end. However, it is more doubtful whether the use of nationality requirements is a proportionate means of attaining the desired outcome of neutral tribunals, since it cannot be presumed that an arbitrator who shares the nationality of one of the parties will be biased in their favour. Perhaps a better argument is that the occupational requirement applies on the basis that parties require the perception of neutrality (partly borne of arbitrators not sharing their nationality) in choosing arbitration.

**Is the severance of nationality requirements from arbitration agreements an option?**

The Commercial Court and the Court of Appeal in Jivraj v. Hashwani both agreed that striking out the parties’ stipulation that the arbitrators be Ismaili would render that particular arbitration agreement substantially different from what had been originally intended. Accordingly, they agreed that the arbitration agreement in that case “stands or falls as a whole” such that, if the requirement that arbitrators be Ismaili were void, the remainder of the arbitration agreement could not stand. Thus, the Court of Appeal held that the arbitration agreement was void in its entirety.

However, another court adjudicating on the consequences of a finding that a nationality requirement in an arbitration agreement contravened the Equality Act need not adopt the same approach as the courts in Jivraj v. Hashwani. Rather, it could approach the nationality requirement (particularly if it is imported via reference to arbitral rules) as incidental to the parties’ choice of arbitration. The court could thus sever the nationality requirement and deem it void or unenforceable while affirming the parties’ choice of arbitration. This may well be the result in many cases if the matter were raised at

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the outset of the arbitration. However, the situation may be more problematic if the issue is addressed at a later stage, for example when an award is being enforced.

**Is the Court of Appeal’s decision an English, European or global problem**

It is not safe to assume that the implications of the Court of Appeal’s decision in *Jivraj v. Hashwani* on nationality requirements are an exclusively English problem. The implications could be European or even global.

The Equality Act is part of English law. It will therefore apply to an agreement governed by English law, wherever an arbitration is to take place. It is also likely to apply where the seat of the arbitration is in England, regardless of the governing law of the agreement.

Also, the Regulations were passed to give effect to Council Directive 2000/78/EC, which established a general framework for equal treatment in employment. The Court of Appeal decision in *Jivraj v. Hashwani* might therefore indicate how courts across the European Union, applying different laws, could view arbitration clauses which purport to allow arbitrators to be selected or precluded from acting on the basis of their nationality.

In light of European law anti-discrimination provisions, the European Court of Justice could ultimately determine whether arbitrators are employees. If the European Court of Justice were to hold that arbitrators are employees, all European Union Member States would be obliged to apply European law anti-discrimination provisions to arbitrators.

Many States outside the European Union also have anti-discrimination laws regarding employment. If arbitrators are considered employees in those jurisdictions, anti-discrimination provisions regarding nationality could apply, which may have an effect on implicated arbitration agreements.

In addition, wherever the arbitration takes place and whatever the approach of the arbitrators and the courts of the seat of arbitration, there is always the potential for this issue to arise at the enforcement stage in a State where the problem is a live one.

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21 Certain sections of the Equality Act are also part of the laws of Scotland and Northern Ireland.

22 See, e.g., McCormick v. Fasken Martineau Dumoulin 2010 BCHRT 347 in which the British Columbia Human Rights Tribunal held that an equity partner in a law firm could be considered an “employee” under Canadian law given his firm’s exertion of control over him.
Practical approaches to the issue

Each arbitration agreement and circumstance should be addressed on its own merit and it would be imprudent to make overly general prescriptions. Nevertheless, for the time being it is advisable to consider whether to avoid express stipulations as to nationality requirements (other than confirming there are none), and to disapply (or not incorporate) any requirement in adopted arbitration rules (such as those of the ICC or LCIA) to take account of the nationality of the potential arbitrator(s). This can either be done by reference to the specific provisions (e.g., Article 6 of the LCIA Rules) or by a general exclusion (which can then remove any residual concerns over other provisions, such as Article 5(5) of the LCIA Rules). Express stipulation could also be made that the arbitrator(s) be selected without regard to their nationality.

Parties may also wish to consider whether to go further and to seek to vary existing arbitration agreements by agreement before the issue arises and one side or the other has a vested interest in a valid or an invalid arbitration provision (although at this stage, if there is no apparent urgency, some may wish to wait and see what the Supreme Court decides first).

Those drafting legal opinions for clients in relation to agreements with arbitration agreements containing or importing nationality requirements should also consider whether to address the risk that those arbitration agreements and/or resulting awards may not be recognised or upheld by courts if the arbitration agreement is deemed inconsistent with relevant legislation, such as the Equality Act.

Conclusion

*Jivraj v. Hashwani* raises very interesting issues of principle and practice. In particular, is the widespread use of provisions relating to the nationality of arbitrators really necessary or are other protections regarding impartiality sufficient? Should the benefits of equality prevail over any residual benefits in any event?

The main problem at present is uncertainty. The Court of Appeal’s decision has left many arbitration practitioners wondering whether this is a temporary blip or whether the standard approaches to appointing arbitral tribunals need to be revisited and some of the most commonly used arbitration rules revised. The decision of the Supreme Court is eagerly anticipated. It is to be hoped that clear and
decisive action will be taken to eliminate the present concerns and reinforce the certainty which has been at the heart of the success of English law and London as a centre for international arbitration.

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