

# Selection of arbitrators not subject to anti-discrimination laws

The UK Supreme Court has overturned the decision of the Court of Appeal in *Jivraj v Hashwani*. The Court of Appeal had decided that arbitrators were employees of the parties for the purposes of the Employee Equality (Religion and Belief) Regulations 2003 (the "Regulations", now replaced by the Equality Act 2010) and that a requirement that an arbitrator be a member of the Ismaili community was discriminatory and unenforceable. Extrapolating that principle, it was feared that the requirements in arbitral rules of various institutions (including the LCIA and ICC rules) that a sole arbitrator or chairperson not be the same nationality as any of the parties was discriminatory and unenforceable. The Supreme Court has decided that UK anti-discrimination law does not apply because arbitrators are not employees.

*Jivraj v Hashwani* [2011] UKSC 40 concerned an arbitration agreement between two Shia Imami Ismaili Muslims (Ismailis) that provided for disputes to be resolved in London by three arbitrators who were to be "respected members of the Ismaili community".

One of the parties sought to appoint a non-Ismaili arbitrator. That was challenged by the other party.

## *Is an arbitrator an employee?*

Whether an arbitrator was subject to the Regulations, which prohibited discrimination on grounds of religion, turned on whether an arbitrator was an employee.

Mr Justice David Steel, at first instance, held that arbitrators were not employees for the purposes of the Regulations. The Court of Appeal reached the opposite conclusion, based on the wide definition of employment as being "employment under ... a contract personally to do any work". The Court of Appeal also concluded that any provision that required an arbitrator/employee to be or not to be of a certain religion was unenforceable. Moreover, the Court of Appeal held that the Ismaili requirement in the arbitration clause in question could not be severed and struck down the whole agreement to arbitrate.

This decision greatly surprised the arbitral community and sent shock-waves through the arbitral institutions, which considered whether they should change their nationality rules under emergency powers. Many parties aware of this decision amended their arbitration clauses to provide that any nationality requirement in the chosen institutional rules did not apply, thereby seeking to avoid the risk that the whole arbitration agreement would be held unenforceable, in England or, worse, in countries that might be friendly to respondents.

The Court of Appeal's decision also caused parties and institutions to prefer arbitration seats other than England.

The Supreme Court has, however, held that an arbitrator is not a person employed under a contract personally to do work within the meaning of the Regulations. Arbitrators are independent providers of services. Arbitrators are not in a relationship of subordination, nor do they perform arbitral services for

## Key Issues

- Parties may stipulate that arbitrators must have a neutral nationality.
- Parties belonging to faith-based communities may stipulate that the arbitrators must be a member of that community.

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and under the direction of the parties. On the contrary, it is the parties that act pursuant to the directions of the arbitrators.

The Supreme Court emphasised the independent nature of the arbitrators as well as their duty to act fairly and impartially in adopting procedures suitable to achieve a fair means for determining the dispute.

That is not to say that parties are now free to discriminate in drafting qualifications for arbitrators in a way that society would find repugnant. As was stated at the hearing, the court would use its inherent jurisdiction to strike down any such clause as being contrary to public policy.

### ***Faith community membership is a Genuine Occupational Requirement***

An exception to the prohibition contained in the Regulations is where the prescribed characteristic is a "genuine occupational requirement" (GOR).

The Court of Appeal had decided that being Ismaili was not a GOR, because the governing law was not the norms of the Ismaili community, which might be said to necessitate the arbitrator being an Ismaili, but English law, for which many arbitrators were well-qualified.

The Supreme Court did not agree and found the Court of Appeal's approach to be "too legalistic and technical". The test was not one of necessity but whether the requirement was "genuine, legitimate and justified". The Supreme Court recognised that the confidence that the parties were likely to have in an arbitral procedure that was conducted within their own religious community made a requirement that the arbitrators be Ismaili legitimate and justified.

### ***European dimension***

The Regulations were based on the EC Council Framework Directive 2000/78/EC of 27 November 2000. The Supreme Court concluded, however, there was no basis for a reference to the Court of Justice because they regarded the principles they had applied as being well established.

### ***Consequences***

Common sense has been restored:

- Parties should have confidence in choosing England as the seat of the arbitration.
- Parties need not amend their arbitration agreements such as to opt out of any nationality provisions in their chosen institutional rules.
- The arbitral institutions need not amend their nationality provisions.
- Members of faith-based communities may stipulate that arbitrators also be members of that community, even when the applicable law is a national legal system.

**Clifford Chance LLP acted for His Highness Prince Aga Khan Shia Imami Ismaili International Conciliation and Arbitration Board, which intervened in the appeal to the Supreme Court.**

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