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English Supreme Court Champions Party Autonomy in Arbitration

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The often-cited list of advantages of arbitration includes economy, speed, procedural flexibility, the ability to choose arbitrators, the neutrality of the process and cross border enforcement of awards. While parties with experience of international arbitration might doubt some of these claims, the ability to choose your own arbitrator and rely on the neutrality of the process are unquestionably among the most important and popular attributes of arbitration that inspire confidence in its users.

In a seminal decision very recently published in the case of *Jivraj v Hashwani [2011] UKSC 40*, the English Supreme Court (formerly the House of Lords) dismissed a challenge to the parties' hitherto undoubted right to determine the composition of their arbitral tribunal, and reaffirmed its support for the "*breadth of discretion left to the parties and the arbitrator to structure the process for resolution of*" their disputes in arbitration.

Background

The case arose from a lengthy dispute between two former partners, who in 1981 entered an agreement which contained an arbitration clause stating that any disputes between them would be resolved by an arbitral tribunal comprising of "*respected members of the Ismaili community and holders of high office within the community*". However, in 2008 Hashwani, one of the parties to the contract, sought through his lawyers to appoint a respected retired English Judge who was not a member of the Ismaili community. That party claimed that the provision requiring the arbitrators to be members of the Ismaili community was void under the Employment Equality (Religion or Belief) Regulations 2003 (the "Regulations"), because it constituted unlawful discrimination on the grounds of religion in respect of the employment of arbitrators.

If this argument was correct, the consequences for the practice of international arbitration in England and across Europe could have been far reaching. In particular, arbitration clauses incorporating institutional arbitration rules (such as the ICC or LCIA) stipulating that a sole arbitrator, or chairman of a tribunal, should not have the same nationality as any of the parties to the arbitration, could have been rendered void. This could have resulted in a crisis of confidence in international arbitration, because parties want to ensure the neutrality of the process and because they want the right to appoint arbitrators who possess the right cultural and legal background for their case.

Hashwani's argument was rejected by the English High Court in the first instance, but then somewhat surprisingly accepted by the Court of Appeal. The Supreme Court has, however, put any concerns to rest. In a unanimous judgment it has overturned the Court of Appeal's decision.

Arbitrators are not employees for the purposes of employment equality law

The Supreme Court decided that the appointment of an arbitrator does not constitute "employment" for the purposes of the Regulations and, therefore, that the requirements of the Regulations do not apply to the selection or appointment of arbitrators. The Court held that a distinction must be drawn between typical employees and those who are independent providers of services and not in a relationship of subordination with the recipient of the services provided.

The Court emphasised that the role of the arbitrator and the duties he must perform, as set out in the Arbitration Act 1996, are inherently inconsistent with an employment relationship. An arbitrator must be independent of the parties and must not act so as to further the interest of a particular party. He is not subordinate to the parties, rather the opposite - the parties are required to comply with the arbitrator's orders, procedural or otherwise.

The Supreme Court went on to say that, even if the Regulations did apply, the arbitration agreement would not be invalid because it would fall within an exception to the Regulation that allows employers to discriminate where there is a genuine occupational requirement.

The Court decided the exception would apply because in this case it was a genuine, legitimate and justified requirement to stipulate that an arbitrator be of a particular religious faith. It emphasised that one of the distinguishing features of international arbitration is the broad discretion enjoyed by the parties and the arbitrator to structure the process for resolution of the dispute, as reflected in section 1 of the Arbitration Act, and recognised that the stipulation that an arbitrator be of a particular religion could be relevant in this regard.

London's position as a pre-eminent venue for arbitration confirmed

The decision of the Supreme Court will invariably be met with a sigh of relief. It means that a magnitude of existing arbitration agreements containing nationality restrictions remain valid, as do institutional arbitration rules requiring national neutrality of their arbitrators.

The decision is a further sign of the English courts' supportive approach to arbitration, recognising as it does that party autonomy is essential to the arbitration process and, in particular, that it is important to those engaged in arbitration to have their dispute determined by a neutral tribunal in which they have confidence.

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