International Dispute Resolution

August 2011

SUPREME COURT JIVRAJ V HASHWANI DECISION

London

Paris

Rouen

Brussels

Geneva

Piraeus

Dubai

Hong Kong

Shanghai

Singapore

Melbourne

Sydney

Perth

On 27 July 2011, the UK Supreme Court handed down a judgment which clarified concerns raised by the earlier Court of Appeal decision regarding the ability of parties to exclude certain categories of person from appointment as arbitrators. The decision in *Jivraj v Hashwani* [2011] UKSC 40, in fact dealt with discrimination on grounds of belief or religion.

The reason for such a great degree of concern about the Court of Appeal decision was that arbitration agreements often contain restrictions on the nationality of arbitrators; strictly speaking therefore the case should not be an issue, but the concerns arise by analogy. The Court of Appeal decision, in restricting the ability of parties to exclude certain persons from appointment as arbitrators, appeared to threaten this practice. Such restrictions are designed to ensure the neutrality of the arbitrators and therefore the impartiality of the arbitral process, so the Court of Appeal decision appears to be counter-intuitive. Indeed some arbitral bodies, for example the ICC, have provisions which run directly contrary to the Court of Appeal decision, in barring nationals of the parties involved in the arbitration from sitting as arbitrators.

The specific concern that the Court was considering arose from the Employment Equality (Religion or Belief) Regulations 2003 ("the Regulations"), which made unlawful any arrangement to discriminate on grounds of (amongst other things) religion when choosing persons offering personal services.

The parties entered into a joint venture agreement in 1981. This included an arbitration clause which required the resolution of any dispute by reference to three arbitrators, each of whom was to be a respected member of the Ismaili community. The joint venture ended in 1998 and 10 years later there was a dispute regarding the division of the joint venture assets. Mr Hashwani's solicitors claimed he was owed a balance of over US$4 million and gave notice of his intention to appoint a retired Judge of the Commercial Court as Arbitrator

(Sir Anthony Coleman). Sir Anthony was not a member of the Ismaili community. Mr Jivraj commenced proceedings seeking a declaration that this appointment was void because it was in breach of the relevant clause in the arbitration agreement. Mr Haswani sought an order that Sir Anthony Coleman should be appointed as sole Arbitrator.

When the matter first came before the High Court, it found in favour of Mr Jivraj. This was on the basis that arbitrators were not employed and so the Regulations did not apply. The Court of Appeal thought otherwise and reversed the decision. It held that the appointment of an arbitrator involved a contract for the provision of services which constituted *"a contract personally to do any work"* and therefore satisfied the definition of *"employment"* in the Regulations.

The Supreme Court unanimously agreed with the High Court Judge that the arbitrators were not employed within the context of the Regulations. Various case law regarding what amounted to *"employment"* was analysed including some European decisions. It held that there was a clear distinction between those who are employed and those who are *"independent providers of services who are not in a relationship of subordination with the person who receives the services"*. The objective of the relevant EC legislation was to give protection against inequality and discrimination to those who might be vulnerable to exploitation. On the contrary, arbitrators are not in a relationship of insubordination with the parties who appoint them and receive their services.

This decision is one that was only ever applicable by analogy and so perhaps was always only limited cause for concern. Nevertheless, the Supreme Court decision has helped to allay any residual fears amongst the arbitration community that London may have lost some of its appeal as a centre for the resolution of international business disputes.

For more information, please contact Damian Honey, Partner, on +44 (0)20 7264 8354 or damian.honey@hfw.com, or Charles Caney, Associate, on +44 (0)20 7264 8234 or charles.caney@hfw.com, or your usual contact at HFW.

For more information, please also contact:

Steven Paull
London Partner
T: +44 (0)20 7264 8255
steven.paull@hfw.com

Guillaume Brajeux
Paris Partner
T: +33 (0)1 44 94 40 50
guillaume.brajeux@hfw.com

Stéphane Selegny
Rouen Partner
T: +33 (0)1 44 94 40 50
stephane.selegny@hfw.com

Konstantinos Adamantopoulos
Brussels Partner
T: +32 2 535 7861
konstantinos.adamantopoulos@hfw.com

Jeremy Davies
Geneva Partner
T: +41 (0)22 322 4810
jeremy.davies@hfw.com

Dimitri Vassos
Piraeus Partner
T: +30 210 429 3978
dimitri.vassos@hfw.com

Paul Suckling
Dubai Partner
T: +971 4 423 0555
paul.suckling@hfw.com

Nick Longley
Hong Kong Partner
T: +852 3983 7680
nick.longley@hfw.com

Nick Poynder
London Partner
T: +44 (0)20 7264 8211
nicholas.poynder@hfw.com

Simon Davidson
Singapore Partner
T: +65 63 059 522
simon.davidson@hfw.com

Gavin Vallely
Melbourne Partner
T: +61 (0)3 8601 4523
gavin.vallely@hfw.com

Alex Baykitch
Sydney Partner
T: +61 (0)2 9320 4600
alex.baykitch@hfw.com

Julian Sher
Perth Partner
T: +61 (0)8 9422 4701
julian.sher@hfw.com

Lawyers for international commerce hfw.com

HOLMAN FENWICK WILLAN LLP
Friary Court, 65 Crutched Friars
London EC3N 2AE
T: +44 (0)20 7264 8000
F: +44 (0)20 7264 8888