Yesterday, the Supreme Court allowed the appeal in *Jivraj v Hashwani*, finding that arbitrators are not employees for the purposes of the Employment Equality (Religion or Belief) Regulations 2003. **Nick Gray** and **James Stacey** consider the welcome clarification provided by the Supreme Court decision.

**BACKGROUND**

A joint venture agreement (entered into in 1981) contained an arbitration clause which provided for disputes to be resolved by arbitration in London. It provided that each party would appoint one arbitrator, and that the third arbitrator would be the President of the HH Aga Khan National Council for the UK for the time being. It further provided:

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

When a dispute arose in 2008, one of the parties nominated Sir Anthony Colman as its arbitrator. The other party sought a declaration from court that Sir Anthony’s appointment was invalid as he was not a member of the Ismaili community. In response, the first party argued that the requirement that the arbitrators be members of the Ismaili community, although lawful when made, had been rendered unlawful and void because it contravened the Employment Equality (Religion and Belief) Regulations 2003 (the Regulations), which prohibited an employer from discriminating on grounds of religion in relation to employment at an establishment in Great Britain.

**COURT OF APPEAL DECISION**

The Court of Appeal (CA) handed down its judgment in June 2010. It held that arbitrators were employees for the purposes of the Regulations, and that the requirement that arbitrators be members of the Ismaili community resulted in direct discrimination against arbitrators who were not members of the Ismaili community and was therefore void. The CA further held that the void provision was not severable from the remainder of the arbitration agreement, and hence the arbitration agreement was void in its entirety.

Following the CA’s decision it was widely suggested in the legal press that many arbitration agreements found in commercial contracts were at risk of being challenged and found to be unenforceable. Commentators pointed to the Equality Act 2010, which from October 2010 replaced the Regulations and prohibits discrimination against employees on the grounds of religion, belief and other protected characteristics, including nationality. The
Arbitration Rules published by the ICC, LCIA and other major institutions – incorporated into the arbitration agreements found in many commercial contracts – stipulate that ICC/LCIA appointed arbitrators cannot be the same nationality as the parties. Commentators suggested that such provisions discriminated against arbitrators on the grounds of nationality, and warned that if those discriminatory provisions were not severable from the remainder of an arbitration agreement, the entire arbitration agreement could be unenforceable under the Equality Act.

SUPREME COURT DECISION

The Supreme Court unanimously overturned the CA's finding that arbitrators are the employees of the arbitrating parties. Arbitrators were held to be genuinely self-employed, and therefore outside the scope of the Regulations or Equality Act. As such, the anti-discrimination provisions are not applicable to the selection, engagement or appointment of arbitrators.

The majority of the Supreme Court further held that, on the particular facts of the case before it, if the Regulations had been applicable, the requirement of an Ismaili arbitrator would have been regarded as a genuine occupational requirement, and fallen within the applicable exception to the Regulations.

COMMENT

The decision provides welcome clarification following a year of speculation and uncertainty created by the CA's decision. The Supreme Court’s finding that arbitrators are not employees removes the possibility of challenges to arbitration agreements on the grounds that they are in breach of the Equality Act. As a practical matter, parties no longer need to consider carving out nationality provisions when drafting arbitration agreements.

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