

Caution when specifying what kind of arbitrator you want

In the recent English case of *Jivraj v Hashwani* the court considered an arbitration clause which required the arbitrators to be "members of the Ismaili community" (an Islamic religious group). It held that the clause was in breach of the UK's legislation prohibiting discrimination on grounds of religious belief in matters of employment, and the arbitration agreement was therefore unenforceable in its entirety.

The case is controversial, particularly because it decides that the appointment of an arbitrator is "employment", and therefore subject to the anti-discrimination legislation which governs employment.

The facts of *Jivraj* – a requirement for arbitrators of a particular religious sect - are unusual. However, it is not unusual to see arbitration clauses which provide that arbitrators (or the chairman of a 3-person panel) must be of a different nationality from the parties. A similar provision is contained in some institutional rules, such as those of the ICC. Under English law, discrimination in employment on grounds of nationality is also unlawful and unenforceable. It follows from *Jivraj* that an arbitration clause which specifies that arbitrators must be (or must not be) of a particular nationality, will be unenforceable, and again the whole arbitration agreement will fail.

Whilst the *Jivraj* decision strictly speaking only applies to arbitrations seated in England, the same logic could also apply in other countries which have an English-derived legal system and similar anti-discrimination legislation, such as Hong Kong. It could also affect arbitration in other European Union countries, since the definition of "employee", the anti-discrimination legislation and the relevant tests for justifications come ultimately from EU legislation. The remainder of this briefing concerns only affected or potentially affected jurisdictions. Arbitrations seated in non-common law, non-EU jurisdictions are not affected by *Jivraj* (for example Japan or Switzerland).

Practical implications

1. Permission to appeal has already been given to the losing party in *Jivraj*, and there is a possibility that the decision will be overturned on appeal, so for the time being only precautionary measures are necessary. We will keep you informed of the outcome of any appeal.

Key Issues

Practical implications

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In the meantime:

2. Examine any arbitration clause which you may be about to agree to see if it contains restrictions on the choice of arbitrators which could be regarded as discriminatory. Restrictions on nationality are by far the most common in international arbitration agreements, but other considerations such as sex, age, race, national origin and disability could also be discriminatory. Some kinds of discrimination (eg age discrimination) can be permissible if there is a good reason for it connected with the work to be done. For instance, a requirement that an arbitrator must have no less than five years' experience in a particular industry may be discriminatory, but could be justified under the legislation as "a proportionate means of achieving a legitimate aim". Other kinds of discrimination (eg nationality discrimination) are forbidden whatever the reason.
3. An arbitration clause which contains discriminatory restrictions on the choice of arbitrators will be unenforceable, and again the whole arbitration agreement will fail. The parties will either have to make a new arbitration agreement (often difficult once a dispute has arisen) or resort to the courts instead, probably reducing the cross-border enforceability of any award.
4. If you are agreeing an arbitration provision incorporating institutional rules (such as the ICC Rules) which provide that arbitrators must be of a different nationality from the parties, be aware that this provision is likely to be unenforceable. In our view only that rule is likely to be affected; the arbitration agreement itself and the rest of the institutional rules should remain unaffected. However, if you wish to take a cautious approach you could, in the arbitration clause, specifically disable the nationality provisions (eg "... shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce save that for the purpose of Article 9.5 of those Rules the [sole arbitrator/ chairman of the arbitral tribunal] may have the same nationality as any party to the agreement ..."). In practice, the removal of the nationality restriction from the Rules is unlikely to make any difference, because arbitral institutions will be aware of the need to ensure that an arbitration under their rules is, and is seen to be, independent of the parties in all respects, including a neutral nationality.

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