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# Arbitration agreements and anti-discrimination laws

## Supreme Court allays concerns

The Supreme Court has unanimously overturned the Court of Appeal's decision in *Jivraj v Hashwani*, deciding that UK anti-discrimination laws do not apply to the appointment of arbitrators (*[2011] UKSC 40*).

The ruling, which will be well-received by users of international arbitration, dispels concerns raised by the Court of Appeal over the validity and enforceability in England and Wales of arbitration agreements that impose restrictions on the nationality of arbitrators. The effect is to reaffirm London's position as a pre-eminent venue for international arbitration.

### The issue

There is a widespread and long-established consensus and practice in international arbitration that an individual who shares the nationality of any of the parties to arbitral proceedings should not be eligible for appointment as the sole or presiding member of the arbitral tribunal. This practice is adopted in commonly-used sets of arbitration rules, such as those of the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC). However, its legality was called into question by the Court of Appeal in *Jivraj*.

### Background

*Jivraj* related to a £1.5 million dispute over a joint venture. The relevant arbitration agreement provided for ad hoc arbitration in London by three arbitrators and stipulated that all three arbitrators should be "respected members of the Ismaili community and holders of high office within the community". Ismailism is a branch of the Shia denomination of Islam and is headed by the Aga Khan.

When Mr Hashwani launched a claim against his former business partner, Mr Jivraj, he applied to the High Court to have Sir Anthony Colman appointed as an arbitrator. Mr Jivraj applied for a declaration that the appointment was invalid, as Sir Anthony was not a member of the Ismaili community. The High Court held that the parties' arbitration agreement was valid and enforceable, and that the appointment of Sir Anthony breached its terms. Mr Hashwani appealed.

### Court of Appeal decision

Mr Hashwani argued that requiring all three arbitrators to be members of the Ismaili community contravened the Employment Equality (Religion or

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Belief) Regulations 2003 (*SI 2003/1660*) (2003 Regulations). The 2003 Regulations (which were repealed on 1 October 2010 by the Equality Act 2010 (2010 Act)):

- Defined employment as "employment under…a contract personally to do any work".
- Made it unlawful for an employer to discriminate, on grounds of religion or belief, in the arrangements that the employer makes for the purpose of determining to whom it should offer employment; or to refuse to, or deliberately not, offer employment on grounds of religion or belief (*Article 6*).
- Provided that a term of a contract was void where it contravened Article 6.

The Court of Appeal held that since an arbitrator contracts to do work personally, the provision of his services fell within the definition of employment. Accordingly, the party appointing an arbitrator or contracting to obtain his services was an employer within the meaning of the 2003 Regulations.

As a result, the requirement in the arbitration agreement in *Jivraj* that the parties refuse, or deliberately omit, to offer employment as arbitrator to any person who was not a member of the Ismaili community contravened the 2003 Regulations. The Court of Appeal held that this requirement was an integral part of the arbitration agreement and could not be severed, so the entire arbitration agreement was void.

## Impact of the Court of Appeal decision

As the Court of Appeal expressly recognised, its decision that the relationship with an arbitrator was one of employment as defined in the 2003 Regulations was potentially of wide significance. This is because substantially the same definition of employment is used in the 2010 Act, which prohibits discrimination on a variety of grounds (including nationality) and provides that a term of a contract is unenforceable where it contravenes such prohibitions.

Following the Court of Appeal decision, there were real concerns as to whether an arbitration agreement containing an arbitrator nationality restriction (including one incorporating institutional rules such as those of the LCIA and the ICC) would contravene the 2010 Act, possibly leading to the entire arbitration agreement being struck down. Fearing such an outcome, many users of international arbitration amended their standard arbitration clauses to remove any arbitrator nationality restrictions.

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### Supreme Court decision

Such was the importance of the appeal that the LCIA and the ICC intervened in order to explain the negative effects (including the potential impact on London as a seat of arbitration) that were likely to result if the Court of Appeal's decision were upheld.

The Supreme Court considered the essential question to be whether an arbitrator performs services for and under the direction of another person for remuneration or, on the other hand, whether an arbitrator is an independent service provider who is not in a relationship of subordination with the person receiving the services.

The court held that an arbitrator's role is not one of employment under a contract personally to do work, as he does not perform services under the direction of the parties. An arbitrator is, in critical respects, independent of the parties: he is required to be impartial. An arbitrator is in no way in a position of subordination to the parties; rather the contrary. The Supreme Court therefore unanimously overturned the Court of Appeal's decision and held that while an arbitrator provides services under a contract, the nature of the relationship between parties to arbitral proceedings and arbitrators is not one of employment.

A majority of the Supreme Court also decided that, even if the relationship between parties and arbitrators was one of employment such that the 2003 Regulations applied, the arbitration agreement in *Jivraj* would have fallen within the exception in Article 7 of the 2003 Regulations, which allows employers to specify an employee's religion or belief if it is a genuine occupational requirement.

### A welcome result

The Supreme Court's decision means that parties to arbitration agreements incorporating arbitrator nationality restrictions can rest assured that such agreements will not fall foul of UK anti-discrimination legislation. The validity of arbitration agreements contained in many existing commercial contracts is no longer in question, and parties negotiating arbitration clauses in the future will not have to go to the trouble of excluding provisions (including those in institutional rules such as the LCIA and the ICC) that require the sole or presiding arbitrator to be of a different nationality to the parties.

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