Legal Briefing

Nurdin Jivraj v Sadruddin Hashwani

[2010] EWCA Civ712, Lord Justice Moore-Bick, Lord Justice Aikens, Sir Richard Buxton

The Facts

The parties entered into a joint venture agreement to invest in real estate property in various parts of the world including Canada. The agreement included an arbitration clause stating that any dispute, difference or question arising between the investors would be referred to arbitration. The arbitration was to take place in London. The parties terminated their venture and the matter was referred to arbitration after some delay. Mr Hashwani appointed Sir Anthony Coleman as arbitrator and asked Mr Jivraj to appoint an arbitrator. There would then have been a third appointment as chairman of the arbitration panel. However, Mr Jivraj considered that Sir Anthony Coleman's appointment was invalid because he did not comply with the terms of the arbitration agreement.

The Issue

The arbitration agreement required that the dispute would be referred to three arbitrators, one to be appointed by each party and the third to be the president of the H.H. Aga Khan National Counsel for the United Kingdom. However, the clause went on to state in its final sentence:

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

Mr Jivraj sought a declaration that the appointment of Sir Anthony Coleman was not valid because he was not a member of the Ismaili community.

The Decision

The issue was whether the agreement (although lawful when it was made) had become unlawful and void because it contravened the Employment Equality (Religion and Belief) Regulations 2003, and the Human Rights Act 1998.

The Regulation arose from an EU Directive concerning discrimination on the grounds of religion or belief, disability, age or sexual orientation. The Regulation was aimed at making void agreements which sought to refuse or deliberately omit to offer employment on the grounds of religion or belief.

The Court of Appeal considered that the arbitration clause restricted the offer of employment as arbitrator purely on religious grounds. It was therefore void.

The second question was whether that final sentence in the arbitration clause could be severed, so leaving the rest of the arbitration clause intact. The Court of Appeal came to the view that if they simply deleted the final sentence then the agreement would be substantially different from that which had been originally intended. As a result, the arbitration clause was void in its entirety

Comment

This is an interesting case because parties from a particular community or religion might wish to have an arbitrator or arbitrators deciding their dispute who also come from that

same community. However, if they are to decide the dispute under English law, then they will have some difficulty in restricting those that could be offered "employment" as arbitrator to decide a dispute.

This case demonstrates that restrictions because of race, religion, belief, disability or sexual orientation will render an arbitration clause void. Such restrictions should therefore be avoided in arbitration clauses, or perhaps the parties might choose to arbitrate outside of the European Union in countries that might allow such restrictions.

Nicholas Gould
September 2010