

ALLEN & OVERY

England: Jivraj and Dallah

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Jivraj v Hashwani

Or: The law of unintended consequences

- Joint venture agreement governed by English law
- Arbitration clause: arbitrators must be Ishmaili
- Hashwani sought to appoint a non-Ishmaili
- Hashwani argued that the arbitration clause was contrary to UK employment legislation prohibiting religious discrimination

Jivraj v Hashwani

The relevant legislation

Employment Equality (Religion or Belief) Regulations 2003

- Reg 2(3): ““employment” means employment under a contract of service or of apprenticeship or a contract personally to do any work”
- Reg 6(1): unlawful to discriminate in relation to employment
- Reg 7: exception where “being of a particular religion or belief is a genuine and determining occupational requirement”

Council Directive 2000/78/EC (the “Framework Directive”)

- Art 3: Directive applies in relation to “conditions for access to employment, to self-employment or to occupation,... whatever the branch of activity...”
- Art 2(3) Directive is “without prejudice to measures laid down by national law which, in a democratic society, are necessary... for the protection of the rights and freedoms of others”
- Art 4: exception where “by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement”

Jivraj v Hashwani

The Court of Appeal decision

- Arbitrators are employees under the legislation
- Arbitration clause was discriminatory
- Not a “genuine occupational requirement” that arbitrator should be Ishmaili
- Subject to an appeal to the Supreme Court

Jivraj v Hashwani

Significance

- UK employment legislation prohibiting discrimination on grounds of race drafted in same terms
- Under English law, discrimination on grounds of nationality is a species of discrimination on grounds of race
- If the Jivraj decision is upheld, provisions about nationality of arbitrators in institutional rules will be regarded as discriminatory

Jivraj v Hashwani

Issues: (1) Are arbitrators employees?

1. Is there a contract between the parties and their arbitrator(s)?

2. If so, is it an employment contract?
 - Legislation: “a contract personally to do any work”
 - Construed broadly in case law
 - BUT
 - not employment as we know it
 - bizarre consequences

Jivraj v Hashwani

Issues: (2) is it a genuine occupational requirement that an arbitrator should be (or not be) of a specified nationality ?

- Not directly an issue: Jivraj concerned with religious discrimination

- The argument in favour:
 - Importance of neutrality
 - Importance of parties' ability to shape the adjudicative process

- The argument against:
 - Nationality not a requirement for the 'occupation' of deciding a dispute

- A fact-sensitive question, depending on the case?

Dallah v Government of Pakistan

Or: Vive la différence

- Agreement between Dallah and the Awami Hajj Trust
- Arbitration clause: ICC arbitration in Paris
- Ordinance establishing Trust lapsed, so Trust ceased to exist
- Dallah commenced arbitration against Government

Dallah v Government of Pakistan Proceedings

- Tribunal found Government was a party to the arbitration agreement in the contract between Dallah and the Trust
- Awards in favour of Dallah on jurisdiction, merits and quantum
- Initially no challenge by Government to award in France
- Dallah sought to enforce award in England
- Government resisted enforcement: claimed not to be a party to arbitration agreement

Dallah v Government of Pakistan

The limits of competence-competence

- Should a court applying NYC Art V(1)(a) defer to a tribunal’s determination that it had jurisdiction?
- Dallah argued court should defer:
 - Court should conduct limited review rather than full rehearing
- Supreme Court: court should conduct a full rehearing
 - Art V(1)(a): “furnishes proof” = trial on the evidence
 - “A contract cannot give an arbitral body any power, much less the power to determine its own jurisdiction, if the parties never entered into it”
 - Competence-competence
 - gives tribunal the power to decide whether it has jurisdiction
 - but does not prevent court from fully revisiting tribunal’s decision

Dallah v Government of Pakistan

How the full rehearing was conducted

- Validity of arbitration agreement assessed by reference to French law
- Expert evidence on French law; *Dalico* applied
- Root and branch analysis of tribunal's reasoning and the evidence
- Held that tribunal misapplied French law

Dallah v Government of Pakistan

The discretion to enforce

- NYC Art V: “Recognition and enforcement... may be refused...if...”
- Dallah: discretion should be exercised because Government did not challenge award at seat
- Supreme Court:
 - Discretion existed, but should be exercised only in support of “some recognisable legal principle”
 - Discretion unlikely to be exercised where absence of consent or serious irregularity

Dallah v Pakistan

Further questions

1. Should there be a full rehearing if:
 - (a) Express agreement that tribunal will determine jurisdiction?
 - First Options of Chicago v Caplan (USSC 1995)
 - (b) Enforcement resisted on other Article V grounds?
 - Parsons & Whittemore v RAKTA (US 2nd circuit, 1974)
 - (c) Issue estoppel arising from court decision elsewhere?
 - Yukos Capital v Rosneft (England, June 2011)

2. Should a decision of (a) a court at the seat or (b) an enforcing court have res judicata effect?

Dallah v Pakistan

The French decision compared

- Agreement on the principles?
- Disagreement solely on the application of the principles?

Thank you

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