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ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

CHOICE OF ARBITRATORS: ANY RESTRICTIONS ON THE NATIONALITY OF ARBITRATORS? A CRITICAL ANALYSIS OF THE NURDIN JIVRAJ V SADRUDDIN HASHWANI CASE

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ABSTRACT

The fundamental essence of international arbitration lies in the presence of an arbitral tribunal that is characterized by impartiality, independence, and neutrality. Impartiality and independence of arbitrators are associated with avoiding any direct affiliation or bias towards either party, while neutrality pertains to the arbitrator's nationality. The principal question in Jivraj v Hashwani case is to determine the limits on party autonomy in the selection of arbitrators. In particular, Jivraj v Hashwani case raised the issue of whether a requirement for an arbitrator to be a member of a particular religious community was discriminatory and thus unlawful. As is seen from this case, the English Court of Appeal ruled that including a religious requirement in an arbitration clause is unlawful and renders the clause null and void. The Supreme Court of the United Kingdom overturned the English Court of Appeal's decision and upheld the freedom of parties to specify their arbitrators. Supreme Court decision in Jivraj v Hashwani provided some clarity on issues such as employment, nationality, and retroactivity when contracts were governed by United Kingdom law. This article investigates boundaries of party autonomy in appointing arbitrators.

Keywords : Arbitration, Choice of Arbitrator, Arbitration Agreement, The Nationality of Arbitrators, Arbitration Clause

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HAKEMLERİN SEÇİMİ: HAKEMLERİN UYRUKLARINA İLİŞKİN HERHANGİ BIR KISITLAMA VAR MI? NURDIN JIVRAJ V SADRUDDIN HASHWANI DAVASININ ELEŞTİREL BİR ANALİZİ

Dr. Ayşe Tuğba ÖZKARSLIGİL**

ÖZ

Uluslararası tahkimin temel özü, tarafsızlık, bağımsızlık, ve nötrlük ile karakterize edilen bir tahkim mahkemesinin varlığında yatmaktadır. Hakemlerin tarafsızlığı ve bağımsızlığı, taraflardan herhangi birine karşı herhangi bir doğrudan ilişki veya ön yargıdan kaçınmakla ilişkilendirilirken, nötrlük hakemin uyruğuyla ilgilidir. Jivraj v Hashwani davasında temel soru, hakemlerin seçiminde tarafların özerkliğinin sınırlarını belirlemektir. Özellikle, Jivraj v Hashwani davası, bir hakemin belirli bir dini cemaatin üyesi olma şartının ayrımcılık ve dolayısıyla hukuka uygun olup olmadığı konusunu gündeme getirdi. Bu davada görüldüğü gibi, İngiliz Temyiz Mahkemesi, tahkim şartına dini bir koşul eklenmesinin hukuka aykırı olduğuna ve tahkim şartını hükümsüz kıldığına karar vermiştir. Birleşik Krallık Yüksek Mahkemesi, İngiliz Temyiz Mahkemesi'nin kararını bozarak tarafların hakemlerini seçme özgürlüğüne karar verdi. Yüksek Mahkeme kararı, İngiliz hukukuna tabii sözleşmeler için vatandaşlık, istihdam, ve yasaların geçmişe yürümesi gibi konularda bir miktar netlik sağlamıştır. Bu makale hakem seçiminde tarafların özerkliğini incelemektedir.

Anahtar Kelimeler : Tahkim, Hakem Seçimi, Tahkim Sözleşmesi, Hakemlerin Uyruğu, Tahkim Şartı

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Genişletilmiş Özet

Uluslararası ticarete ilişkin sözleşmelerin hemen hemen tamamına yakınında tahkim kaydına yer verilmektedir ve bu sözleşmeden kaynaklanan uyuşmazlıkların tahkim yoluyla çözülmesi kabul edilmektedir. Tahkimin tercih edilmesinin en önemli nedenlerinden birisi hakemlerin tarafsız, bağımsız ve nötr olmaları gerekliliğidir. Hakemlerin tarafsızlığı ve bağımsızlığı, taraflardan herhangi birine karşı doğrudan bir ilişki veya ön yargıdan kaçınmakla ilişkilendirilirken, nötrlük hakemin uyruğu ile ilgilidir. Uluslararası tahkimde bir hakem heyetinin oluşturulması, tahkimin ilk ve en önemli adımlarından biridir. Her ne kadar taraflar hakemlerini seçmekte özgür olsalar da tahkim yargılaması için bir tahkim mahkemesinin uygun şekilde oluşturulması konusunda önde gelen kurumsal kurallar ve ulusal yasalar ayrıntılı hükümler içermektedir.

Makaleye konu olan dava, Nurdin Jivraj ve Sadruddin Hashwani arasındaki tartışmalı tahkim şartını içeren bir Joint Venture ("ortak girişim") sözleşmesinden kaynaklanmaktadır. Bu sözleşmenin 8. Maddesinde, taraflar arasındaki herhangi bir ihtilafın, İsmaili Cemaatinin saygıdeğer üyeleri ve topluluk içinde yüksek mevkii sahibi olması gereken üç hakem tarafından karara bağlanması gerektiğini belirten bir tahkim şartı bulunmaktadır. Sözleşme aynı zamanda İngiliz yasalarına tabii olacağı kararlaştırılmıştır. Taraflar, Joint Venture sözleşmesini ("JVS") 1988 yılında, sözleşmenin başlangıç tarihinden yedi yıl sonra, feshettiler ve varlıkların paylaşımı konusunda uyuşmazlıkları çözülmesi için, üç İsmaili Cemaat üyesi hakem olarak atandı. Ancak hakem heyeti, taraflar arasındaki tüm sorunları çözemediği için ihtilaf bir süre daha devam etti. Daha sonra, 2008 yılında, Bay Hashwani yeni bir tahkim yargılaması başlatmak için İsmaili Cemaatinin bir üyesi olmayan Sir Anthony Colman'ı hakem olarak atadı. Bay Jivraj, Sir Anthony Colman'ın hakem olarak atanmasının aralarındaki JVS'ne göre geçersiz olduğunu iddia ederek İngiltere Ticaret Mahkemesi'nde dava açtı. Bunun üzerine, Bay Hashwani, JVS'nin çalışanları işleri ile ilgili olarak din ve inanç temelinde ayrımcılığa maruz kalmaktan koruyan İstihdam Eşitliği (Employment Equality) (Religion and Belief) Regulations 2003'ü ("mevzuat") ihlal ettiğini iddia etti. İngiliz Temyiz Mahkemesi, hakemlerin mevzuatın amaçları doğrultusunda işçi/çalışan olduğuna ve hakemlerin İsmaili Cemaatinin üyeleri olma şartının, bu mevzuattaki ayrımcılık yasağına aykırı olduğuna karar verdi. Bu tahkim şartı, maddeden ayrılamaz olduğundan, bütün madde tümüyle geçersiz sayıldı. Birçok tahkim kurumu, Milletlerarası Ticaret Odası gibi, hakemlerin uyruklarına ilişkin kısıtlamaları kabul ettiğinden, mahkemenin kararı uluslararası tahkim dünyasında çok

büyük bir yankı uyandırdı. Çünkü, bu karar, yüzlerce benzer tahkim şartının, bir gecede uygulanamaz hale gelme ihtimaline neden oldu. Fakat, İngiliz Temyiz Mahkemesinin bu kararı, Birleşik Krallık Yüksek Mahkemesi tarafından bozularak, tarafların hakemlerini seçme özgürlükleri olduğuna karar verildi.

Jivraj v Hashwani davası, birçok tahkim anlaşmasının geçerliliği konusundaki şüpheyi ortadan kaldırdığı için önemli bir davadır. Birleşik Krallık Yüksek Mahkemesi'nin İsmaili Cemaati lehine karar vermesi tarafların anlaşma yaparken ki özgürlükleri açısından da önemlidir. Bu mahkeme kararı, taraflara tercihlerine, dini inançlarına, uyruklarına veya etnik kökenlerine göre hakem atama özgürlüğünü destekler niteliktedir. Yüksek Mahkeme kararı, İngiliz Hukukuna tabii sözleşmeler için vatandaşlık, istihdam ve yasaların geçmişe yürümesi gibi konularda bir miktar netlik sağlamıştır. Nitekim bireyler, hukuka aykırı olmadıkça tahkim anlaşması hükümlerinin belirlenmesinde seçme özgürlüğüne sahip olmalıdır ve mahkemeler yasa dışı ayrımcılığa karşı bireylerin din özgürlüğü ve kişisel tercihleri ile kamu yararını dengelemelidir.

INTRODUCTION

Commercial arbitration primarily uses International Law, meaning that participants generally have different cultures and legal arrangements. Since parties have different nationalities, one party usually does not rely on the legal system of the adverse party. Therefore, appointing a third arbitrator from a different country with a different nationality is important and necessary to ensure the neutrality of the arbitration tribunal[1]. However, it is possible to appoint an arbitrator with the same nationality as one of the parties. From this point of view, there is always a risk that an arbitrator, who shares the same nationality with one of the parties, could approach the issue from that one party's perspective. Since "arbitrators in international disputes must be independent and impartial" [2], this situation can cause several problems. As Tirado and Thomas put, "[p]arties to international arbitration often desire that sole arbitrator or chairman be a national from a neutral country to reassure the participants of the arbitrator's neutrality"[3]. *Nurdin Jivraj v Sadruddin Hashwani*[4] *("Jivraj v Hashwani")* case raised the issue of whether a requirement for an arbitrator to be a member of a particular religious community was discriminatory and thus unlawful. In this respect, the principal question in *Jivraj v Hashwani* case is whether the parties are indeed free to choose their own arbitrator. As is seen from *Jivraj v Hashwani* case, the United Kingdom's ("UK") Supreme Court upheld the freedom of parties to specify their arbitrators[5]. According to the UK Supreme Court's decision in *Jivraj v Hashwani*, some important points should be mentioned regarding impartiality: 1) The decision removes uncertainty about whether the arbitrators are employees; 2) if they are employees, then the matter of nationality of arbitrators and thus anti-discrimination provision of an arbitration clause is key; 3) issue of severability of an arbitration clause.

This article critically analyses the following issues: (i) the judgments of the courts, facts, and decisions in *Jivraj v Hashwani* as a case study; (ii) the implements of the case, accordingly, whether the arbitrators are employees, in this case, whether the requirement for all arbitrators

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[1] Sarosh Zaiwalla, 'Are Arbitrators not human? Are they from Mars? Why Should Arbitrators Be A Separate Species?' (2011) 28 Journal of International Arbitration 273, 282

[2] William W. Park, 'Arbitrator Integrity: The Transient and the Permanent' (2009) 46 San Diego Law Review 629, 639

[3] Joe Tirado and James Thomas, 'Jivraj v Hashwani? Discrimination Law Applied to the Appointment of Arbitrator' (2011) 16 IBA Arbitration News 72

[4] *Nurdin Jivraj v Sadruddin Hashwani [2010] EWCA Civ 712*

[5]Maurice Kenton, 'UK: Freedom to Choose' (*Mondaq,* 16 August 2011) <https://www.mondaq.com/uk/arbitration-dispute-resolution/142068/freedom-to-choose> accessed 13 March 2023

to be members of the Ismaili community was applicable for the purpose of a genuine occupational requirement, and then nationality of the arbitrators, and the severability and retroactivity doctrine of arbitration clause; and (iii) the validity of the arbitration provisions.

I. PROCEDURAL HISTORY

A. COMMERCIAL COURT (FIRST INSTANCE)

1. Facts

On 29 January 1981, two businessmen, Nurdin Jivraj and Sadruddin Hashwani, entered into a joint venture which invested in real property around the world. They concluded a written joint venture agreement ("the JVA"). Article 8 of their agreement contained an arbitration clause stating, "in the event of any dispute between them, that dispute should be determined by three arbitrators, all of whom were required to be respected members of the Ismaili community and holders of high office within the community"[6]. The Ismaili community is a part of the Shia branch of Islam and the leaders of this community are the Aga Khan. The arbitration clause also specified that the third arbitrator would be the President of the Aga Khan National Council for the United Kingdom. Article 9 of their agreement contains that "it is expressly governed by English law"[7].

In 2008, Mr. Jivraj and Mr. Hashwani had a dispute under the JVA. The JVA provided for arbitration in the event of any disputes and accordingly Mr. Hashwani appointed Sir Anthony Colman as his arbitrator under Article 8, informed Mr. Jivraj, and gave him seven days to appoint his own arbitrator. However, Mr. Jivraj appealed to the Commercial Court arguing that Sir Antony was an inappropriate arbitrator because he was not a member of the

[6] Judgment Given On 27 July 2011 Heard on 6 and 7 April 2011, <https://www.supremecourt.uk/cases/docs/uksc-2010-0170-judgment.pdf> accessed 13 March 2023 The JVA was established to make investments in real estate around the world. By article 9 it is expressly governed by English law. Article 8 provides, so far as material, as follows:

"(1) If any dispute difference or question shall at any time hereafter arise between the investors with respect to the construction of this agreement or concerning anything herein contained or arising out of this agreement or as to the rights liabilities or duties of the investors or either of them or arising out of (without limitation) any of the businesses or activities of the joint venture herein agreed the same (subject to sub-clause 8(5) below) shall be referred to three arbitrators (acting by a majority) one to be appointed by each party and the third arbitrator to be the President of the HH Aga Khan National Council for the United Kingdom for the time being. All arbitrators shall be respected members of the Ismaili community and holders of high office within the community.

(2) "The arbitration shall take place in London and the arbitrators' award shall be final and binding on both parties."

[7] Ibid

Ismaili Community. Mr. Hashwani, the other party, argued that this requirement was discriminatory and thus unlawful under the UK's Equality Act 2010.[8]

2. The decision of the Commercial Court

Mr. Hashwani's argument during this appeal was that this clause in the agreement requiring the arbitrator to be a member of the Ismaili community was invalid for several reasons. First, the anti-discrimination provisions contained in the Employment Equity (Regulation and Belief) Regulations 2003 (now incorporated into the Equality Act 2010) (the "Regulations"); second, the Human Rights Act 1998[9], or the public policy at common law[10]. Justice David Steel J rejected Hashwani's argument and held that the clause did not contain unlawful discrimination for any of these reasons, and that arbitration agreements were not employment contracts and arbitrators were not employees under the Regulations[11]. Therefore, the Regulations did not apply and the requirement for the arbitrator to be a member of the Ismaili community was valid. Even if arbitrators were "employees" for the purposes of the legislation, Justice Steel was prepared to find that the requirement that the arbitrators be members of the Ismaili community was a genuine occupational requirement ("GOR")[12]. Justice Steel also held that, if this clause were invalid, then the whole arbitration clause would be void. Mr. Hashwani appealed this decision.

B. THE COURT OF APPEAL

1. Facts

The Court of Appeal accepted Mr. Hashwani's assertions that (i) the issues of whether the arbitrators were employees, (ii) whether the requirement for all arbitrators to be members of the Ismaili community was applicable for the purpose of a genuine occupational requirement and (iii) whether the whole arbitration agreements were void[13].

2. Decision of the Court of Appeal

[8] UK Equality Act 2010, s 9(1)(b)
[9] Human Right Act 1998, art.14
[10] *Jivraj v Hashwani* (n 4) para 5
[11] *Jivraj v Hashwani* (n 4) para 14; Laurence Rabinowitz, 'Arbitration and Equality: Jivraj v Hashwani' (2011) 12 Business Law International 119,126
[12] *Jivraj v Hashwani* (n 4) para 14, 15, 16
[13] *Jivraj v Hashwani* (n 4) para 15-17

In July 2010, the English Court of Appeal held that "an arbitrator was an employee" who works under the contract "to do any work" under the Regulations[14]. There are five important points determined by the Court of Appeal. Firstly, an arbitration agreement cannot indicate that a specific religion clause for arbitrators. Being a member of the Ismaili community was not a GOR for the job. Secondly, the GOR exception could not save the arbitration clause. Third, an arbitrator is an employee of the parties. Fourth, if arbitration agreements contain a religion clause for the arbitrators, the whole arbitration clause would be void. Importantly, both the Commercial Court and Court of Appeal agreed that if the arbitration clause is unlawful in terms of religious requirements, then the whole agreement will be void.

C. UK SUPREME COURT

1. Facts

The case eventually made its way to the UK Supreme Court, which was requested to consider whether the requirement for the arbitrator to be a member of the Ismaili branch of Shia Islam was discriminatory under the Equality Act 2010. In this respect, the issues are whether the arbitrator was an employee within the meaning of the Regulations, and thus whether the arbitration provision was valid.

2. Decision of the Supreme Court

The Supreme Court held that the relationship between the parties and the arbitrator is not akin to the relationship between an employer and an employee[15] hence arbitrators are not subject to the discrimination law. In addition, the Supreme Court decision upheld the general principle of the Arbitration Act of 1996 that "parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary for the public interest"[16].

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[14] *Jivraj v Hashwani* (n 4) para 17

[15] *Jivraj v Hashwani* (n 4) para 40 Relationship between the parties and arbitrators not a contract of the employment, Supreme Court held that "although he renders personal services which he cannot delegate, he does not perform those services or earn his fees for and under the direction of the parties... He is rather in the category of an independent provider of services who is not in a relationship of subordination with the parties who receive his services... The arbitrator is in critical respects independent of the parties. His functions and duties require him to rise above the partisan interests of the parties and not to act in, or so as to further, the particular interests of either party... He is in no sense in a position of subordination to the parties; rather the contrary."

[16] Arbitration Act 1996, 1 General Principles (b)

II. IMPLICATIONS

A. WHAT IS AN EMPLOYEE? ARE ARBITRATORS EMPLOYEES?

1. Are Arbitrators not Human? Are They from Mars[17]?

This question was important because if arbitrators would be considered as employees, then they could be subject to the discrimination law of employees. Since a contract exists between the arbitrators and the parties, this relationship seems like arbitrators are employees of the parties.

If there is such an "employment" contract, it would be one in which[18]:

1. the "employer" cannot give instructions as to how the "employee" is to work or what outcome he is achieve[19];
2. the "employer" cannot remove the "employee" without an order of the court[20];
3. the employee is immune from suit[21];
4. the "employee" owes a duty to act fairly and equally to all his "employers"[22].

The definition of employment in section 83 of the Equality Act of 2010 is:

"employment under a contract of employment, a contract of apprenticeship or a contract personally to do work"[23]

At first instance, the Commercial Court held that the relationship between the parties and the arbitrator was not a contract of employment. Justice Steel determined that arbitrators' role was akin to that of a judge in dispute resolution. However, a judge does not have a contract with the parties[24]. Justice Steel emphasized the nature of arbitral appointment, and the role of arbitrators. "Appointment of an arbitrator is not like appointing an accountant, architect or lawyer. Indeed, it is not like anything else"[25].

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[17] Zaiwalla (n 1) 273

[18] Paul Cowan, 'Are Arbitrators Employees?' (*Kluwer Arbitration Blog,* 25 May 2011) < https://arbitrationblog.kluwerarbitration.com/author/paulcowan/ > accessed 13 March 2023

[19] Ibid

[20] Ibid

[21] Ibid

[22] Ibid

[23] Equality Act 2010 (s) 83

[24] Matthew Gearing, 'Jivraj v Hashwani: A Pro-Choice, Corrective Ruling from the Supreme Court', *(Kluwer Arbitration Blog,* 22 September 2011) < https://arbitrationblog.kluwerarbitration.com/2011/09/22/jivraj-v-hashwani-a-pro-choice-corrective-ruling-from-the-supreme-court/ > accessed 13 March 2023

[25] Michael J. Mustill and Stewart C. Boyd, *Commercial Arbitration*, (2nd edn., LexisNexis Butterworths 1989) 223

The Court of Appeal looked at differently and stated that "the precise nature of the relationship between the arbitrator and the parties to dispute is irrelevant"[26]. Furthermore, according to the Court of Appeal appointing an arbitrator is "no different from instructing a solicitor to deal with a particular piece of legal business, such as drafting a will, consulting a doctor about a particular ailment or an accountant about a tax return"[27]. There was a contract "personally to do any work" between the parties and the arbitrators and thus arbitrators are employees under the regulations. The Court of Appeal followed a case's opinion which is the *Advocate General Madura v Firma Feryan NV*[28].

The Supreme Court held that an arbitrator's role is not "naturally described as one of the employments at all"[29]. While Supreme Court was deciding on definition of the employee, the court focused on the case law from the European Court of Justice which had considered the definition of "worker" for the purposes of the EC Treaty, and the European Union legislation deriving from the Treaty[30]. The definition was best set forth in the case of *Allenby v Accrington and Rossendale College*[31] which stated that "there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration… it is clear from that definition that the authors of the Treaty did not intent that the term "worker" within the meaning of Article 141(1) EC should include independent providers of services who are not in a relationship of subordination with the person who received the services"[32].

The issue of whether the nature of the relationship between the arbitrators and the parties was a contractual one[33]. "The English Court has said that it has found it impossible to divorce

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[26] *Jivraj v Hashwani* (n 4)

[27] Ibid para 16

[28] *Advocate General Maduro in Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* (case C-54/07) [2008] I.C.R. 1390; Zaiwalla, (n 1) "The Advocate General's opinion in that case was that the directive must be understood in the framework of a wider policy to foster conditions for a socially inclusive labour market and to ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin. The EU Directive principles to combat discrimination towards any providers of services on the basis of race, sex, religion or any of the other grounds covered by the Directive*".*

[29] *Jivraj v Hashwani* (2011) UKSC 40 (27 July 2011) Judgment, para 23

[30] Ms Philippa Charles and Micheal D. Regan, 'UK Supreme Court Exempts Arbitrator Selection Criteria from Anti-Discrimination Legislation'*, (Lexology,* July 2011) < https://www.lexology.com/library/detail.aspx?g=94bfebd6-4d77-4561-884a-23b3f1345b91 > accessed 14 March 2023

[31] *Allenby v Accrington and Rossendale College,* Case C-256/01

[32] Charles and Regan (n 30)

[33] Michael J. Mustill and Stewart C. Boyd, ibid 25, They focused on the contractual analysis and noted: "it seems legitimate to regard the office of arbitrator as involving some degree of permanent status: and this prompts the

the contractual and status considerations and that: in truth the arbitrator's rights and duties flow from the conjunction of those two elements"[34].

I agree with the Supreme Court's decision. In my view, arbitrators cannot be called as an employee. Parties do not have a right to control over arbitrators and their decisions. Although, there is a contract between the parties and the arbitrators, it is a sui-generis contract and thus the relationship between them is a sui-generis.

2. Genuine Occupational Requirement

One of the issues in *Jivraj v Hashwani* is whether an arbitration agreement including a statement that all arbitrators must have a particular religious belief is discriminatory under employment regulations. The Equality Act 2010 section 9(1)(b) prohibits discrimination based on "nationality and national origins"[35]. The regulations would apply if the arbitrators were considered employees of the parties. An exception is provided in the regulations if the religion or belief is found to be a genuine occupational requirement[36]. The question is whether the arbitrators are employees that had already concluded. Supreme Court held that arbitrators are not employees within the meaning of the regulations[37]. However, even if they were employees, then the GOP would apply in this case. Thus, it is not important whether the genuine occupational requirement exception applies. However, it had argued in front of the court. Court deliberated that whether the appointment of a religious arbitrator could be considered to be a GOP. The Regulations prohibit religion discrimination in employment which provides that, "being of a particular religion or belief is a genuine and determining occupational requirement"[38]. Being Ismaili is not a genuine occupational requirement in this case.

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idea that status alone is all that is needed by way of theoretical underpinning for the mutual rights of the arbitrator and the parties. The Court would simply assert, essentially on grounds of public policy, that certain rights and duties are conferred on the arbitrator by the very fact of his having assumed that office."

[34] Matthew Gearing and Angeline Welsh, 'The Relationship Between Arbitrators And Parties: Is The Pure Status Theory Dead And Buried' (*Kluwer Law International,* 17 June 2011) < https://arbitrationblog.kluwerarbitration.com/2011/06/17/the-relationship-between-arbitrators-and-parties-is-the-pure-status-theory-dead-and-buried/ > accessed 14 March 2023

[35] UK Equality Act 2010, s 9(1)(b)

[36] Cowan (n 18)

[37] *Nurdin Jivraj v Sadruddin Hashwani* (n 4)

[38] The Employment Equality (Religion or Belief) Regulations 2003, Exception for Genuine Occupational Requirement 7 (2) (b)

The Regulations implemented the EU Council Directive 2000/78/EC of 27 November 2000[39], which stated that general framework for the purpose of discrimination as regard employment and occupation, not only on the ground of religion or belief, but also disability, age and sexual orientation[40]. The EU Council Directive applies equally to not only the UK, it applies to all the EU countries[41]. This directive is very broad and practically, if arbitrators were employees, many restrictions would apply.

B. THE NATIONALITY OF ARBITRATORS

1. "Restrictions on The Nationality of Arbitrators - Is This Discrimination"[42]?

The Jivraj v Hashwani case has been criticized for creating a loophole for discrimination in the appointment of arbitrators. There is a suitable explanation for the arbitrator's nationality for the arbitration setting "[I]t is because of its supposed implications: by an instinctive reaction, parties will generally assume without much further thought that a prospective arbitrator is likely, or even bound, to share his country's ideology and common values, if any"[43]. The nationality of arbitrators is controversial subject. Some argued that arbitrators with the same nationality as the one party might not be impartial, and others said that arbitrators with the same nationality of the parties provide that parties can trust in the process[44].

Many international commercial arbitration agreements contain nationality requirements. Some arbitration agreements contain that an arbitrator or the chairman of the arbitral tribunal should be a different nationality of the parties to the dispute. Institutional arbitration rules and national law contain limitations on the nationality of sole arbitrators[45].

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[39] EU Council Directive 2000/78/EC of 27 November 2000

[40] Ibid

[41] Ibid

[42] Kate Knox and Rachael Cooper, 'Restrictions on The Nationality of Arbitrators - Is This Discrimination', (*International Arbitration Newsletter,* 2010)

[43] Pierre Lalive, 'On the Neutrality of the Arbitrator and of the Place of Arbitration' (1984) *Swiss Essays on International* 23

[44] Loukas A. Mistelis, *Concise International Arbitration* (2nd edn, Kluwer Law International 2015) 97

[45] Gary B. Born, *International Commercial Arbitration Volume II International Arbitral Procedures* (vol 2 Kluwer Law International, 2014) 1440

2. Institutional Arbitration Rules of Nationality

As noted above, almost all institutional rules contain provisions on the nationality of an arbitrator that sole arbitrators, or the chair in a panel of three, must have a different nationality from the parties. It is necessary for the neutrality of arbitration. Further, arbitrators should be impartial and independent.

The United Nations Commission on International Trade Law ("UNCITRAL") Rules[46] Article 6(7) provide that:

"*The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties".*

UNCITRAL rules state that the nationality of the arbitrator "shall consider" different from the parties' nationality. The rules use the word "consider" which means it is not mandatory but instructive. Therefore, parties could appoint an arbitrator who is of the same nationality with the parties.

The London Court of International Arbitration ("LCIA") Rules[47] of the Article 6(1) provide that:

"*Where the parties are of different nationalities, a sole arbitrator or chairman of the Arbitral Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed nominee all agree in writing otherwise".*

The LCIA rules say that the arbitrator may not have the same nationality with the parties unless the parties agree in writing.

The International Chamber of Commerce ("ICC") Rules[48] of Arbitration of the Article 9(5) provide that:

"*The sole arbitrator or the chairman of the Arbitral Tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that neither*

[46] UNCITRAL Arbitration Rules 2010, Designating and Appointing Authorities

[47] The London Court of International Arbitration Rules, Nationality of Arbitrators and Parties

[48] The International Chamber of Commerce Rules, Appointment and Confirmation of the Arbitrators

of the parties objects within the time limit fixed by the Court, the sole arbitrator or the chairman of the Arbitral Tribunal may be chosen from a country of which any of the parties is a national."

The ICC rules provide that except in "suitable circumstances" and no party objects, a sole arbitrator and the chair of a tribunal shall not be from a country of any of the parties. Thus, it is possible for a party to waive an objection to having a sole arbitrator or chair of the tribunal who shares the nationality of a party in a proper case[49]. The ICC rules also say that parties can appoint their arbitrator in limited time, if they fail, then neutral arbitrators are appointed by the ICC court. Moreover, appointing an arbitrator is subject to confirmation by the court. ICC rules Article 9(1) states that:

"T*he Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with these Rules."*[50]

The UNCITRAL Model Law on International Commercial Arbitration[51] Article 11(1) provides that:

"*No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties"*

The International Arbitration Rules of the International Centre for Dispute Resolution ("ICDR")[52] of the Article 6(4) provide that:

"In making such appointments, the administrator, after inviting consultation with the parties, shall endeavor to select suitable arbitrators. At the request of any party or on its own initiative, the administrator may appoint nationals of a country other than that of any of the parties".

The ICDR rules say that parties may appoint arbitrators which is the nationality different from the parties. This rules' language is permissive, not mandatory.

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[49] Omar E. Garcia- Bolivar, 'Comparing Arbitrator Standards of Conduct in International Commercial, Trade and Investment Disputes' (Nov 2005-Jan 2006) Dispute Resolution Journal 76, 80

[50] ICC rules, Article 9(1)

[51] The UNCITRAL Model Law on International Commercial Arbitration, Appointment of Arbitrators

[52] The International Arbitration Rules of the International Centre for Dispute Resolution, Appointment of Arbitrators

The International Centre for Settlement of Investment Disputes ("ICSID")[53] of the Article 39 provide that:

"The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties."

According to the ICSID, the majority of arbitrators must not be the same nationality of the parties. Article 39 does not exclude national arbitrators, and it only states that they must not form the majority of the tribunal.

The American Arbitration Association ("AAA") International Rules[54] of Rule 16 provide that:

"Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules".

The World intellectual Property Organization ("WIPO")[55] Arbitration Rules of the Article 20 provide that:

(a) An agreement of the parties concerning the nationality of arbitrators shall be respected.

(b) If the parties have not agreed on the nationality of the sole or presiding arbitrator, such arbitrator shall, in the absence of special circumstances such as the need to appoint a person having particular qualifications, be a national of a country other than the countries of the parties.

In sum, parties may agree on the arbitrators' nationality. They are free to choose an arbitrator whose nationality is the same as either or both parties'. Although many Institutional Arbitration rules provide nationality restrictions, which require the arbitrators' nationality to differ from both parties', there are some exceptions. Some Institutional rules provide exceptions

[53] The International Centre for Settlement of Investment Disputes, Section 2 Constitution of the Tribunal
[54] The American Arbitration Association International Rules, Nationality of Arbitrator
[55] The World intellectual Property Organization Arbitration Rules, Nationality of Arbitrators

such as “suitable circumstances” (“ICC”) or “special circumstances such as the need to appoint a person having particular qualifications” (“WIPO”) or unless otherwise agreed by the parties (UNCITRAL Model Law). Practitioners and parties must decide whether arbitrators should be of different nationality than those of the parties for the transparency of the arbitration process. Some arbitral rules have no rule for the nationality of the arbitrator e.g., the China International Economic and Trade Arbitration Commission (“CIETAC”), the Swiss Rules of International Arbitration[56].

C. SEVERABILITY OF THE ARBITRATION CLAUSE

The severability clause means that each part of a contract is independent and capable of surviving even if a court finds a different part of the contract unenforceable[57]. In other words, if an agreement contains an invalid clause, its arbitration clause never came into force and it is invalid as a whole.[58] In *Jivraj v Hashwani*, the Commercial Court and the Court of Appeals applied the doctrine of severance to the arbitration agreement and thereby invalidated it. The courts' invalidation meant that if the requirement that arbitrators be Ismaili were void, then the rest of the arbitration agreement could not stand and was thereby also void. Thus, under these courts' interpretation, the arbitration agreement was made to “stand or fall as a whole.”

D. RETROACTIVITY DOCTRINE - CAN LAWS APPLY RETROACTIVITY?

In *Jivraj v Hashwani*, Mr. Hashwani argued that the arbitration agreement's requirement for arbitrators to be members of the Ismaili community had become void in 2003 by virtue of the Regulations. Mr. Hashwani said that this provision of the arbitration agreement was a violation of the Regulations, and Human rights act and thus the regulations should apply retroactively. The Court rejected this request. The reason is the Regulations did not exist in 1981, when JVA's arbitration clause was written. At that time, the parties did not dispute this issue, and after the Regulations cannot retroactively affect it because of the retroactivity doctrine.

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[56] Ilhyung Lee, ‘Practice and Predicament: The Nationality of the International Arbitrator (With Survey Results)’ (2007) 31 *Fordham International Law Journal* 603

[57] Van Lindberg, *Intellectual Property and Open Source: A Practical Guide to Protecting Code* (O’Reilly Media Inc., 2008) 144

[58] W. Michael Reisman, et. al., *International Commercial Arbitration Cases, Materials and Notes on the Resolution of the International Business Disputes* (1st edn, Foundation Press 1997) 665,666

Following the Supreme Court decision, any further appeal about nationality or religion and belief in an agreement governed by English Law could be a breach of the Regulations. Hence, the Regulations could have a retroactive effect on many agreements drafted before 2003, so such agreements should be checked for compliance[59].

III. VALIDITY OF THE NATIONALITY PROVISION IN THE CONTEXT OF JIVRAJ

Parties generally include provisions in their agreements from arbitral institutional rules such as the ICC or LCIA for the expertise and neutrality they offer. Parties believe that the provisions are necessary to prevent bias[60]. These institutional rules generally provide that arbitrators may not have the same nationality as either party. Indeed, it is recommendable. In *Jivraj* there were not ICC- or LCIA- type clauses. *Jivraj* also could affect gender or experience discriminations. For instance, an arbitration clause could contain a provision requiring arbitrators to be someone with no fewer than five-years' experience or all arbitrators must be male. Therefore, courts may no longer consider these provisions "occupational requirements"[61].

CONCLUSION

Jivraj v Hashwani case is significant as it has removed the shadow of doubt about the validity of many arbitration agreements. The Supreme Court's decision in favor of the Ismaili tribunal is also important for the freedom of the parties when they make an agreement. The UK Supreme Court decision supports and gives the parties the freedom to appoint an arbitrator based on their preferences, religious beliefs, nationality, or ethnic background. Surprisingly, however, holding may be at odds with the English law. Indeed, individuals should have the right to freedom of choice in determining their arbitration agreement provisions, unless it is unlawful. Courts should balance individuals' freedom of religion and personal preferences with public interest against unlawful discrimination.

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[59] Herbert Smith Freehills, '*Court of Appeal Holds Religious Criteria for Appointment of Arbitrators Unlawful' (Herbert, Smith, Freehills Arbitration Notes,* 23 June 2010) < https://hsfnotes.com/arbitration/2010/06/23/court-of-appeal-holds-religious-criteria-for-appointment-of-arbitrators-unlawful/ > accessed 17 March 2023

[60] Joe Tirado and James Thomas, 'Jivraj v Hashwani-Discrimination Law Applied to The Appointment of Arbitrators*'* (2011) 16 IBA Arbitration News 72

[61] Ibid

The decision has been seen as potentially allowing parties to exclude arbitrators on the basis of their religion, race or gender. This is particularly problematic as arbitrators play a critical role in resolving disputes and should be selected on the basis of their expertise and impartiality rather than their personal characteristics. This is a crucial issue and significant problem for the rest of Europe. Because the issue of whether arbitrators are employees has already been decided, this does not mean the same problem would not arise in another European Union (EU) country. Commentators argue that this decision has wider implications, which affect not only the agreements governed by English law, but also the contract governed by any state in the EU.

Supreme Court decision in *Jivraj v Hashwani* provided some clarity on issues such as employment, nationality, retroactivity, and severance when contracts were governed by UK law. Nevertheless, the same issues may arise in any other jurisdiction and the outcome is highly unpredictable and depends on a specific legal regime. For instance, arbitrators might be found to be employees and all restrictions apply to them accordingly in France; however, the Turkish court may give the opposite interpretation. From that perspective, drafters should be aware of and implement enforceable mechanisms in agreements to avoid doubt.

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