International arbitration: a city on edge

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Contractors who work internationally may have noticed that their lawyers have been rather jittery over the last 12 months about arbitration agreements. A decision of the Court of Appeal in June 2010 started something of a panic amongst lawyers, and even more of a panic amongst arbitrators. Calm has just been restored by the Supreme Court (we used to call it the House of Lords).

Most contracts between parties from more than one country contain an arbitration clause. Typically, the clause will require three arbitrators, one from each party's own country and a third from somewhere different. That arrangement has always been considered eminently respectable and fair. At least it was until the case of Jivraj v Hashwani reached the Court of Appeal.

The dispute was all about a joint venture for investment in international property developments. The arbitration agreement stated that all the arbitrators were to be "respected members of the Ismaili community and holders of high office within the community". If a dispute developed, each party was to appoint an arbitrator and the two appointees would appoint the third. A dispute did develop and Mr Hashwani appointed Sir Anthony Colman to be one of the arbitrators.

Sir Anthony Colman is a former judge of the Commercial Court and a well known arbitrator. He is highly respected member of several communities, especially commercial and legal ones, but Ismali he isn't. Mr Jivraj went to court to have the appointment revoked because he didn't qualify. Mr Hashwani said that the restriction was effectively discrimination and so that part of the arbitration clause should be ignored, allowing him to appoint anyone he liked.

The Court of Appeal shocked the arbitration world by deciding that the appointment of an arbitrator was a contract of employment. To restrict such employment on the basis of religion offended the Equality (Religion and Belief) Regulations 2003, and as a result the whole arbitration agreement was rendered void. There was no effective arbitration agreement at all.

If this problem was restricted to disputes in the Ismali community it is unlikely that it would have attracted a huge amount of attention. But the potential consequences were much wider than that. If arbitrators really were employees it would not be possible to specify either religion or nationality. So in a contract for the construction

of a road in Nigeria between an Australian mining company and a Chinese contractor it would no longer be possible to require one Australian arbitrator, one Chinese, and one something else. Any contract already in existence that did that (which for example most FIDIC contracts do) would now have no workable arbitration agreement and parties to a dispute might end up in court in Nigeria, China, Australia or somewhere else completely.

That is what the Court of Appeal seemed to be saying, but the courts of other countries didn't see it that way. There was no suggestion that the courts of France or Germany would come to the same conclusion. This was a major incentive to agree that the courts of somewhere, anywhere, other than England should govern the arbitration. Parisian lawyers would not disagree.

Over recent years London has established itself as one of the most respected and popular venues for international disputes. Parties to contracts with no UK connection at all bring their disputes to London because of the very high regard that they have for English lawyers, arbitrators and legal system. This decision put that business and the foreign exchange that it earns in serious jeopardy. It was a huge potential loss to London lawyers and UK taxpayers. Hence the panic.

There was a hurricane of sighs of relief when the Supreme Court's decision was published. Arbitrators are not employees, it decided. They provide a service to the parties and they are paid for that service, but they do not act under the control of the parties. They are not under an obligation to act in the best interest of either party, but instead to work to achieve the impartial resolution of the dispute. They occupy a status of some authority over the parties, not the other way round, and can only be removed in exceptional circumstances. As they are not employees the regulations do not apply.

And so it is back to normal. Italian contractors working in Russia will not want their disputes resolved there and the Russians will not want to go to Milan. London has been the ideal compromise, and now can continue to attract the work.