

ORDER RESTORED: UK SUPREME COURT CONFIRMS  
ENFORCEABILITY OF NATIONALITY AND OTHER ARBITRATOR  
QUALIFICATION REQUIREMENTS IN *JIVRAJ* APPEAL

28 July 2010

To Our Clients and Friends:

One of the great benefits of international arbitration is the ability to obtain an enforceable decision from a neutral tribunal. The rules of the leading arbitral institutions generally require that the presiding arbitrator have a different nationality to that of the parties to the dispute for precisely that reason. Arbitration also allows the parties to select the tribunal most suited to hearing their particular dispute and to prescribe arbitrator qualifications in their arbitration agreements. Commonly, such criteria focus on the arbitrator's admission to the bar of a particular jurisdiction, but not infrequently the parties prescribe a nationality requirement and even religious criteria.

Last year's controversial UK Court of Appeal decision in *Jivraj v Hashwani* threatened to undermine this valuable feature of the arbitral process. The Court had found that arbitrators were employees for the purposes of the Employment Equality (Religion or Belief) Regulations 2003 (the "Regulations"), and further, that a requirement in an arbitration clause that an arbitrator be a member of a particular religious community did not constitute a "genuine occupational requirement" within the meaning of the Regulations. As a result, the entire arbitration agreement was rendered invalid and unenforceable. This decision had the wide-ranging implication of rendering potentially invalid any institutional rule or arbitration clause which applied nationality as a criterion for the selection or exclusion of potential arbitrators.

Yesterday's Supreme Court decision confirms that party autonomy prevails. Reversing the Court of Appeal's findings, the Supreme Court held that the Regulations do not apply to arbitrators because they are not "employees." The Supreme Court also decided that a requirement that an arbitrator be a member of a particular religious community could be a justified and legitimate "genuine occupational requirement," acknowledging that one of the distinguishing features of arbitration is the broad discretion afforded to parties and tribunals to tailor the arbitral process to meet the particular circumstances of any given dispute.

Key takeaways from the *Jivraj* decision:

- Arbitrator qualification requirements, including nationality criterion, are fully enforceable under English law.
- Nationality provisions in the arbitration rules of the leading arbitral institutions are similarly enforceable and require no modification.

\* \* \*

Please feel free to contact any of the undersigned if you have any questions.

Lord (Peter) Goldsmith Q.C.  
+44 20 7786 3007  
phgoldsmith@debevoise.com

Sophie Lamb  
+44 20 7786 3040  
slamb@debevoise.com

Karolos Seeger  
+44 20 7786 9042  
kseeger@debevoise.com