UK SUPREME COURT 27 JULI 2011

ARBITRAGE

Algemeen (arbitrage) – Overeenkomst – Arbiters

Volgens het Supreme Court van het Verenigd Koninkrijk is een arbiter niet te beschouwen als een werknemer van de partijen en moeten (religieuze) vereisten die aan een arbiter in een arbitrageclausule worden opgelegd, niet aan antidiscriminatiewetgeving in arbeidszaken worden getoetst.

Daarmee oordeelt het hoogste rechtscollege anders dan het Court of Appeal van Londen dat met een andersluidend arrest de interesse van de internationale arbitragegemeenschap had gewekt.

ARBITRAGE

Généralités (arbitrage) – Convention – Arbitres

Selon la Cour suprême du Royaume-Uni, un arbitre ne doit pas être considéré comme un employé des parties, et les exigences (religieuses) qui seraient imposées à un arbitre par une clause arbitrale ne doivent par conséquent pas être contrôlées selon la législation anti-discrimination dans les relations de travail.

Ainsi la juridiction suprême a tranché différemment de la cour d'appel de Londres, dont l'arrêt en sens contraire avait suscité l'intérêt de la communauté arbitrale internationale.

Jivraj / Hashwani
Zet.: Lord Phillips (Président), Lord Walker, Lord Mance, Lord Clarke en Lord Dyson
Pl.: M. Brindle, B. Dye en R. Davies, S. Jolly

Introduction[1]

1. On 29 January 1981 Mr Jivraj and Mr Hashwani entered into a joint venture agreement ('the JVA'), containing an arbitration clause which provided that, in the event of a dispute between them which they were unable to resolve, that dispute should be resolved by arbitration before three arbitrators, each of whom should be a respected member of the Ismaili community, of which they were both members. The principal question in this appeal is whether that arbitration agreement became void with effect from 2 December 2003 under the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660) ('the Regulations') on the ground that it constituted an unlawful arrangement to discriminate on grounds of religion when choosing between persons offering personal services.

The JVA

2. 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."

The Ismaili community comprises Shia Imami Ismaili Muslims. It is led by the Aga Khan, whose title is the hereditary title of the Imam of the Ismaili community.

The disputes

(…)

Then, on 31 July 2008, Messrs Zaiwalla & Co, acting on behalf or Mr Hashwani, wrote to Mr Jivraj asserting a claim for 1,412,494 USD, together with interest, compounded quarterly from 1994, making a total of 4,403,817 USD. The letter gave notice that Mr Hashwani had appointed Sir Anthony Colman as an arbitrator under article 8 of the JVA and that, if Mr Jivraj failed to appoint an arbitrator within seven days, steps would be taken to appoint Sir Anthony as sole arbitrator. The letter added that Mr Hashwani did not regard himself as bound by the provision that the arbitrators should be members of the Ismaili community because such a requirement "would now amount to religious discrimination which would violate the Human Rights Act 1998 and therefore must be regarded as void". It is common ground, on the one hand, that Sir Anthony Colman is not a member of the Ismaili community and, on the other hand, that he is a

[1] Het originele arrest telt 34 pagina's en wordt hieronder verkort weergegeven. De volledige versie is te raadplegen op www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0158_Judgment.pdf.

retired judge of the Commercial Court with substantial experience in the resolution of commercial disputes, both as a judge and as an arbitrator.

5. Mr. Jivraj's response to the letter was to start proceedings in the Commercial Court seeking a declaration that the appointment of Sir Anthony was invalid because he is not a member of the Ismaili community. Mr Hashwani subsequently issued an arbitration claim form seeking an order that Sir Anthony be appointed sole arbitrator pursuant to section 18(2) of the Arbitration Act 1996 ('the 1996 Act'). The application was made on the basis that the requirement that the arbitrators be members of the Ismaili community, although lawful when the agreement was made, had been rendered unlawful and was void because it contravened the Regulations.

The Regulations

(...)

7. The Regulations (as amended by section 77(2) of the Equality Act 2006) provide, so far as material, as follows:

"2. Interpretation

(...)

(3) (...) 'employment' means employment under a contract of service or of apprenticeship or a contract personally to do any work, and related expressions shall be construed accordingly;

(...)

6. Applicants and employees

(1) It is unlawful for an employer, in relation to employment by him at an establishment in Great Britain, to discriminate against a person

(a) in the arrangements he makes for the purpose of determining to whom he should offer employment;

(b) in the terms on which he offers that person employment;

(c) by refusing to offer, or deliberately not offering, him employment.

7. Exception for genuine occupational requirement

(...)

(2) This paragraph applies where, having regard to the nature of the employment or the context in which it is carried out

(a) being of a particular religion or belief is a genuine and determining occupational requirement;

(b) it is proportionate to apply that requirement in the particular case; and

(c) either (i) the person to whom that requirement is applied does not meet it, or (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it,

and this paragraph applies whether or not the employer has an ethos based on religion or belief.

(3) This paragraph applies where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out

(a) being of a particular religion or belief is a genuine occupational requirement for the job;

(b) it is proportionate to apply that requirement in the particular case; and

(c) either (i) the person to whom that requirement is applied does not meet it, or (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that persons meets it."

(…)

First instance

(…)

The judge held (i) that the term did not constitute unlawful discrimination on any of those bases and, specifically, that arbitrators were not 'employed' within the meaning of the Regulations; (ii) that if, nonetheless, appointment of arbitrators fell within the scope of the Regulations, it was demonstrated that one of the more significant characteristics of the Ismaili sect was an enthusiasm for dispute resolution within the Ismaili community, that this was an 'ethos based on religion' within the meaning of the Regulations and that the requirement for the arbitrators to be members of the Ismaili community constituted a genuine occupational requirement which it was proportionate to apply within regulation 7(3); and (iii) that, if that was also wrong, the requirement was not severable from the arbitration provision as a whole, so that the whole arbitration clause would be void.

The Court of Appeal

(…)

The Court of Appeal reached a different conclusion from the judge on the principal points. It held that the appointment of an arbitrator involved a contract for the provision of services which constituted 'a contract personally to do any work', and therefore satisfied the definition of 'employment' in regulation 2(3). It followed that the appointor was an 'employer' within the meaning of regulation 6(1) and that the restriction of eligibility for appointment as an arbitrator to members of the Ismaili community constituted unlawful discrimination on religious grounds, both in making "arrangements… for the purpose of determining to whom he should offer employment" contrary to regulation 6(1)(a), and by "refusing to offer, or deliberately not offering" employment contrary to regulation 6(1)(c). The Court of Appeal further held that being a member of the Ismaili community was not "a genuine occupational requirement for the job" within the meaning of the exception in regulation 7(3). It is submitted on behalf or Mr Jivraj that both those conclusions were wrong.

(...)

Employment

(...)

23. It is common ground, at any rate in this class of case, that there is a contract between the parties and the arbitrator or arbitrators appointed under a contract and that his or their services are rendered pursuant to that contract. It is not suggested that such a contract provides for 'employment under a contract of service or of apprenticeship'. The question is whether it provides for 'employment under… a contract personally to do any work'. There is in my opinion some significance in the fact that the definition does not simply refer to a contract to do work but to 'employment under' such a contract. I would answer the question in the negative on the ground that the role of an arbitrator is not naturally described as one of employment at all. I appreciate that there is an element of circularity in that approach but the definition is of 'employment' and this approach is consistent with the decided cases.

(…)

41. The arbitrator is in critical respect 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. As the International Chamber of Commerce ('the ICC') puts it, he must determine how to resolve their competing interests. He is in no sense in a position of subordination to the parties; rather the contrary. He is in effect a 'quasi-judicial adjudicator': *K/s Norjarl A/S / Hyundai Heavy Industries Co Ltd* [1992] QB 863, 885.

(…)

43. The Regulations themselves include provisions which would be wholly inappropriate as between the parties and the arbitrator or arbitrators. For example, regulation 22(1) provides:

"Anything done by a person in the course of his employment shall be treated for the purposes of these Regulations as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval."

It is evident that such a provision could not apply to an arbitrator.

(…)

Further, in so far as dominant purpose is relevant, I would hold that the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.

(...)

50. For these reasons I prefer the conclusion of the judge to that of the Court of Appeal. I agree with the judge that the Regulations are not applicable to the selection, engagement or appointment of arbitrators. It follows that I would hold that no part of clause 8 of the JVA is invalid by reason of the Regulations and would allow the appeal on this ground.

(…)

Noot

Stating the obvious? Een arbiter is geen werknemer!

Marijn De Ruysscher[2]

I. HET ARREST

A. Feiten

1. Op 29 januari 1981 sloten de heren Jivraj en Hashwani een joint venture voor vastgoedinvesteringen. De toepassing van Engels recht werd gekozen en er werd voor een arbitrageclausule geopteerd. Daarin stond dat elke partij een arbiter mocht aanduiden en de voorzitter van het arbitraal college moest de voorzitter zijn van de "HH Aga Khan National Council for the United Kingdom". Er werd uitdrukkelijk bepaald dat alle arbiters gerespecteerde leden van de Ismailische gemeenschap[3] moesten zijn en een belangrijke functie daarin moesten uitoefenen.

Toen uiteindelijk enkele geschillen waren ontstaan die niet minnelijk konden worden opgelost, richtte dhr. Hashwani op 31 juli 2008 een verzoek tot arbitrage aan dhr. Jivraj en duidde daarbij Sir Anthony Colman als arbiter aan. Dhr. Hashwani gaf daarbij aan dat hij zich niet gebonden voelde door de vereiste uit de arbitrageclausule dat de arbiters uit de Ismailische gemeenschap moesten komen, omdat deze ver-

2. Advocaat te Brussel.
3. Het Ismailisme is een strekking binnen het sjiisme, een ideologische stroming binnen de islam (http://en.wikipedia.org/wiki/Ismailism).