Should discrimination in arbitration be banned?

There have been widespread efforts to improve the diversity of arbitrators in recent years, but there is no legislation expressly prohibiting the appointment of an arbitrator on the basis of a protected characteristic (as defined in section 4 of the Equality Act 2010 (**"the EA 2010"**)). The EA 2010 only applies to certain contexts, e.g., the provision of services, the disposal of premises, employment, partnership, the instruction of barristers. Most self-employed people are not protected.

Many support the absence of any prohibition on discrimination on the basis that it should be for parties to choose the criteria for appointment, and that it is important to them to be able to select on the basis of personal characteristics.

However, the role of an arbitrator is to ensure the fair resolution of a dispute, acting impartially and applying the law, and his or her ability to do that should not depend on his/her nationality, cultural background or other personal qualities. On the contrary, the suggestion that parties can select on the basis of personal characteristics suggests that it is acceptable for arbitrators to bring biases resulting from their cultural background or personal characteristics to an arbitration.

Further, the provision in s1(b) of the Arbitration Act 1996 that the parties should be free to agree how their disputes are resolved is subject to such safeguards as are necessary in the public interest. Parliament has long considered there to be a strong public interest in prohibiting discrimination on the basis of protected characteristics, and that interest might be considered particularly vital in the determination of disputes.

In its first consultation paper, the Law Commission advanced a proposal that would limit a party's ability to challenge an appointment on the basis of a protected characteristic:
(1) The appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's protected characteristic(s); and
(2) Any agreement between the parties in relation to the arbitrator's protected characteristic should be unenforceable,
Unless in the context of that arbitration, requiring the arbitrator to have that protected characteristic is a proportionate means of achieving a legitimate aim."

The proposal seems unlikely to have a significant impact in practice. Arbitration agreements requiring the appointment of an arbitrator of a particular gender, nationality or other protected characteristic other than religion are rare (save to the extent that they require an arbitrator of a different nationality to the parties). Some consultees pointed out that the problem lay not with arbitration agreements but appointments themselves and discriminatory conduct within arbitrations. Meanwhile, faith-based stipulations would be likely to be seen as a proportionate means of achieving a legitimate aim, especially given the broad approach suggested by the Supreme Court in *Jivraj v Hashwani* [2011] UKSC 40. The Supreme Court held that, had the appointment of an arbitrator fallen within the Employment Equality (Religion or Belief) Regulations 2003[1], a provision stipulating a protected characteristic would nonetheless be enforceable as an exception to the general prohibition (reg 7(3)) if having the particular characteristic were a genuine, legitimate and justified requirement. This was in contrast to the narrower test of necessity adopted by the Court of Appeal. The majority of the Supreme Court went on to hold that it was a genuine, legitimate and justified requirement to require the appointment of senior members of the Ismaili Community to arbitrate any dispute arising out of the commercial joint venture agreement, because one of the features of the Ismaili Community was an enthusiasm for non-confrontational dispute resolution within the Ismaili community.

In response to calls from consultees, the Law Commission is now consulting on whether there should be a general prohibition

1. One of the pieces of legislation which implemented the EU Directive establishing a general framework for equal treatment. The different pieces of legislation were consolidated into the EA 2010.

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on discrimination in arbitration, subject potentially to a carve out for appointments of arbitrators with a different nationality to the parties, a feature endorsed by the UNCITRAL Model Law and adopted by the rules of many arbitral institutions.

The Law Commission points out that the key issue is what the remedies for discrimination should be and suggests that the Employment Tribunal should have jurisdiction to deal with any claim for discrimination relating to the appointment or treatment of arbitrators, as it does for other work-related discrimination claims. Discrimination by an arbitrator would be a breach of his/her duty to act fairly and impartially, rendering him/her liable to removal under s24 and rendering any award liable to challenge under s68 as a procedural irregularity.

Bringing a claim against a party in relation to appointments might well be challenging, especially given the confidentiality surrounding arbitrations, but the fact of discrimination being unlawful might cause parties and their advisers to examine their own practice and reasons for appointment. The introduction of equality legislation has brought about widespread changes in behaviour in other areas.

Even if the practical impact of the Law Commission's first proposal were to be limited, it would make a powerful statement about the importance of limiting criteria for appointment of arbitrators to those which relate to competence and eliminating bias. Going further and prohibiting all discrimination would make an even stronger statement about the importance of equality and diversity to both those practising as arbitrators and parties.

Jennifer Haywood