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ARBITRATION AGREEMENTS THAT DISCRIMINATE IN THE SELECTION AND APPOINTMENT OF ARBITRATORS

*By Jeff Dasteel*¹

I. INTRODUCTION

In 2010, an English appellate court rocked the world of international arbitration when it declared that a provision in an arbitration agreement restricting the selection of arbitrators to members of a particular religious group violated European Union laws banning discrimination in employment.² While the case of *Jivraj v. Hashwani* was on appeal to the United Kingdom Supreme Court, there was concern in the international arbitration community that more common restrictions on the qualifications of arbitrators related to national origin might also be subject to challenge. In that regard, two major international arbitration rule sets give preference to the appointment of arbitrators who are not of the same national origin as any of the parties.³ These international rule sets may have needed to change, at least when used in England, if *Jivraj v. Hashwani* had withstood appeal to the Supreme Court.

One year later, in July 2011, the world of international arbitration breathed a collective sigh of relief when the Supreme Court overruled the Court of Appeal. The Supreme Court determined that arbitrators were not “employees” as the term was defined in European Union employment laws, and, therefore, the European Union’s ban on employment discrimination on the basis of religious affiliation, national origin, or gender did not apply to the selection and appointment of an arbitrator.⁴

Was that collective sigh of relief warranted? This article discusses (1) whether arbitration agreements that discriminate in the selection and appointment of arbitrators may be prohibited under United States law, and (2) the possible effects of anti-discrimination

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² *Jivraj v. Hashwani*, [2010] EWCA (Civ) 712, [24], [35], [2010] ICR 1435 (Eng.).

³ International Chamber of Commerce [ICC], Arbitration and ADR Rules, art. 13, ¶ 5; International Centre for Dispute Resolution, International Dispute Resolution Procedures, art. 6, ¶ 4.

⁴ *Jivraj v. Hashwani*, [2011] UKSC 40, [23], [43] (appeal taken from Eng.).

laws on the validity and enforceability of those agreements and the arbitration awards resulting from them. This article accepts the premise that arbitrators are not “employees” of the parties as found by the United Kingdom Supreme Court. However, there are anti-discrimination laws in the United States that apply to independent contractors. Indeed, there are anti-discrimination laws in the United States that apply to all manner of contracts regardless of the character of the contracting parties’ relationship. This article concludes that arbitrators may fall within the scope of anti-discrimination laws in the United States raising the risk that arbitration agreements that include discriminatory qualifications may be invalid under the Federal Arbitration Act. Finally, this article explores the possibility that non-domestic arbitration agreements with discriminatory qualifications may also be unenforceable under both the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Chapter 2 of the Federal Arbitration Act, both of which are applicable to non-domestic arbitrations, where a non-domestic arbitration proceeds under United States law or where a party seeks to enforce a foreign arbitral award in the United States.

II. THE DECISIONS OF THE ENGLISH COURT OF APPEAL AND THE UNITED KINGDOM SUPREME COURT IN *JIVRAJ V. HASHWANI*

In *Jivraj v. Hashwani*, the parties to an arbitration agreement stipulated that “[a]ll arbitrators shall be respected members of the Ismaili community and holders of high office within the community.”⁵ The agreement further provided that “[t]he arbitration shall take place in London and the arbitrators’ award shall be final and binding on both parties.”⁶

The underlying dispute in *Jivraj v. Hashwani* concerned a joint venture to make investments in real estate around the world.⁷ It was a secular contract made for a secular purpose and governed by English law.⁸ When a dispute arose between the parties, the claimant initiated arbitration and appointed a well-respected English barrister as its arbitrator, but the barrister was not a member of the Ismaili community as required by the arbitration agreement.⁹

The claimant contended that the religious affiliation requirement within the arbitration agreement violated European Union regulations against employment discrimination on the basis of religious

⁵ *Id.* ¶ 2.

⁶ *Id.*

⁷ *Id.* ¶¶ 2, 3.

⁸ *Id.* ¶ 2.

⁹ *Id.* ¶ 4.

belief.¹⁰ The Court of Appeal determined that an arbitrator is an employee of the parties and that being of a particular religious affiliation was not a genuine occupational requirement for the job.¹¹ Therefore, the subject arbitration clause amounted to a refusal to employ based on religious belief in violation of European Union employment law.¹² The Court also determined that the religious affiliation requirement was central to the arbitration clause and could not be severed from the arbitration agreement.¹³ The Court of Appeal, therefore, declared the whole arbitration agreement invalid and unenforceable.¹⁴

The Supreme Court reversed this decision.¹⁵ The key question was whether arbitrators are “employees,” who are covered by provisions prohibiting employment discrimination, or independent contractors, who are not covered under the European Union anti-discrimination rules.¹⁶ In determining that an arbitrator is not an “employee,” the Court noted, “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.”¹⁷

The Supreme Court, therefore, held that European Union and United Kingdom anti-discrimination regulations do not apply to arbitrators.¹⁸ The UK Supreme Court further stated in dicta that, even if the anti-discrimination regulations did apply, the requirement that the arbitrator be Ismaili was both objectively and subjectively justified as a genuine occupational requirement.¹⁹

The Supreme Court’s ruling in *Jivraj v. Hashwani* confirmed party autonomy to set up arbitration regimes designed to satisfy the interests of the parties, even if those interests result in discrimination in the selection and appointment of arbitrators. The ruling also confirmed that arbitrator qualifications based on national origin, which are allowed under the ICC Rules of Arbitration and the ICDR Rules of Arbitration, do not violate English or European Union anti-discrimina-

¹⁰ *Jivraj v. Hashwani*, [2011] UKSC 40, [23], [43] (appeal taken from Eng.).

¹¹ *Jivraj v. Hashwani*, [2010] EWCA (Civ) 712, [13], [2010] ICR 1435 (Eng.).

¹² *Id.* ¶¶ 27, 30.

¹³ *Id.* ¶ 34.

¹⁴ *Id.* ¶ 35.

¹⁵ *Jivraj v. Hashwani*, [2011] UKSC 40, [70], [74] (appeal taken from Eng.).

¹⁶ *Id.* ¶¶ 15, 23.

¹⁷ *Id.* ¶ 41.

¹⁸ *Id.*

¹⁹ *Id.* ¶¶ 54-59. The concurring opinion, however, casts doubt on this conclusion. Instead, it opines that someone not of the Ismaili community may be schooled in its culture and principles such that he or she could qualify as an arbitrator of disputes between individuals of that community.

tion laws. However, does the same hold true for anti-discrimination laws in the United States?

III. DO ANTI-DISCRIMINATION LAWS IN THE UNITED STATES APPLY TO INDEPENDENT CONTRACTORS?

It is well established that discrimination in hiring employees is barred in the United States under a slew of federal and state laws, most notably Title VII of the Civil Rights Act of 1964.²⁰ However, it is equally well established that Title VII and the majority of similar laws do not apply to the selection and hiring of independent contractors, who are not considered to be “employees” under state or federal law.²¹ For the same reasons the UK Supreme Court discussed in *Jivraj v. Hashwani*, it is almost certain that courts in the United States would declare that arbitrators are not “employees,” and, therefore, not covered by those laws that restrict themselves to banning discrimination in the selection and hiring of employees.²²

However, that is not the end of the story as it was in *Jivraj v. Hashwani*. The United States has laws that ban discrimination in the hiring of independent contractors or when contracting with any person, no matter how the relationship is characterized. Most notably, Section 1981 of the Civil Rights Act of 1866 bans discrimination on the basis of race or ethnicity when entering into all manner of contracts, including when selecting and hiring independent contractors.²³ Furthermore, the Third Circuit recently confirmed that an independent contractor can bring an action for discrimination under Section 1981.²⁴ Other circuits similarly have found a private remedy for discrimination against independent contractors under Section 1981.²⁵ However, Section 1981 is limited to claims for discrimination based on race or

²⁰ Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (West 2012).

²¹ *E.g.*, *Spirides v. Reinhardt*, 613 F.2d 826, 829 (D.C. Cir. 1979).

²² The United States Equal Employment Opportunity Commission provides a test to determine whether an individual is an “employee” or an “independent contractor” for the purposes of anti-discrimination laws. EEOC COMPLIANCE MANUAL § 2-III, available at <http://www.eeoc.gov/policy/docs/threshold.html#2-III-A-1>. In *Nationwide Mutual Insurance Co. v. Darden*, the Supreme Court construed the question of whether an individual is an employee to turn on “the hiring party’s right to control the manner and means by which the product is accomplished.” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). As the appellate court noted in *Jivraj v. Hashwani*, once appointed, the parties generally do not control the arbitrator’s method and means of carrying out his or her duties. See *Jivraj v. Hashwani*, [2010] EWCA (Civ) 712, [40], [2010] ICR 1435 (Eng.).

²³ The Civil Rights Act of 1866, 42 U.S.C. § 1981 (West 2012).

²⁴ *Brown v. J. Kaz, Inc.*, 581 F.3d 175 (3d Cir. 2009).

²⁵ See *Bains, LLC v. ARCO Prods. Co.*, 405 F.3d 764 (9th Cir. 2005); *Carey v. FedEx Ground Package Syst., Inc.*, 321 F. Supp. 2d 902 (S.D. Ohio 2004); *Danco*,

ethnicity and does not apply to discrimination based on gender, national origin, religion, age, or disability.²⁶

There also are state and municipal laws that ban discrimination when contracting with or hiring independent contractors. Some of these laws are quite expansive, covering many forms of discrimination, including those based on race, ethnicity, gender, national origin, religion, age, and disability. For example, New Jersey appellate courts have found that the state's ban on discrimination in contracting based on race, creed, color, national origin, ancestry, age, and sex applies to contracts that employ independent contractors.²⁷ Like Section 1981, the New Jersey statute appears to apply to any contract.²⁸ Therefore, it does not matter how the contracting party is characterized, whether as an employee or an independent contractor, and it is a violation of New Jersey law to discriminate on the basis of race, ethnicity, gender, religious affiliation, or national origin when contracting with anyone.²⁹

In addition to New Jersey's very broad ban on discrimination, there are other jurisdictions with laws banning discrimination in the hiring of independent contractors. Pennsylvania has a broad anti-discrimination statute that applies to independent contractors who are required to get professional licenses under Pennsylvania law.³⁰ The New York City municipal code also prohibits discrimination in the employment of independent contractors as part of the New York City Human Rights Law.³¹

Inc. v. Wal-Mart Stores, 178 F.3d 8 (1st Cir. 1999); *Zaklama v. Mt. Sinai Med. Ctr.*, 842 F.2d 291 (11th Cir. 1988).

²⁶ See *Zemsky v. City of New York*, 821 F.2d 148, 150 (2d Cir. 1987) ("A plaintiff states a viable cause of action under §§ 1981 or 1982 only by alleging a deprivation of his rights on account of his race, ancestry, or ethnic characteristics."). Some courts have extended § 1981 to include what may be discrimination based on national origin. See Danielle Tarantolo, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 *YALE L.J.* 170, 193 n.139 (2006).

²⁷ See *J.T.'s Tire Serv., Inc. v. United Rentals N. Am.*, 985 A.2d 211 (N.J. Super. Ct. App. Div. 2010); *Perlowski v. Elson T. Killam Assoc.*, 894 A.2d 1251 (N.J. Super. Ct. 2005); *Rubin v. Forest S. Chilton Mem'l Hosp.*, 819 A.2d 22 (N.J. Super. Ct. App. Div. 2003).

²⁸ N.J. STAT. ANN § 10:5-12 (West 2008).

²⁹ *Id.*

³⁰ 43 PA. CONS. STAT. § 955 (2012).

³¹ N.Y.C. ADMIN. CODE tit. 8 §§ 101–131 (2012). Although not free from doubt, as discussed below, § 8-102(5) appears to make the New York City law banning discrimination in employment specifically applicable to independent contractors who are not themselves employers. As a municipal law, its terms do not apply outside New York City, and there is no New York State law of comparable scope applicable to independent contractors.

IV. APPLICATION OF ANTI-DISCRIMINATION STATUTES TO ARBITRATORS

In principle, there is no reason why the federal, state, and municipal laws banning discrimination when contracting with independent contractors should not apply to the selection and appointment of arbitrators. Therefore, Section 1981, within its limits, and state and municipal statutes prohibiting discrimination in the hiring of independent contractors should apply equally to the selection and appointment of arbitrators.³²

The idea that an arbitrator should be treated as an independent contractor is not free from doubt. The concurring opinion in *Jivraj v. Hashwani* adopts noted commentator Gary Born's characterization of the relationship of the arbitrator to the parties as "sui generis."³³ In a world where a party contracting to perform services is either an employee or an independent contractor, it is proposed that an arbitrator is neither fish nor fowl due to the arbitrator's independent adjudicative, quasi-judicial responsibilities.

A third, exempt category for arbitrators is difficult to justify in the context of anti-discrimination laws. Arbitrators are hired to perform a service on behalf of the parties to an arbitration agreement. The arbitrator is under contract to do so and receives payment to perform work within the scope of the arbitration agreement.³⁴ Although a party has no unilateral right to order the arbitrator to decide an issue in a particular manner, the parties have the autonomy to jointly agree to terminate the arbitration process and the arbitrator's services at any time.³⁵ Thus, the parties jointly retain the power to hire and fire the arbitrator. They also can void any arbitrator decision by mutual agreement.³⁶ In other words, the parties jointly retain control over the arbitrator even if each party individually lacks such power due to the

³² The limitations on the scope of 42 U.S.C. § 1981 probably make it of limited practical application to arbitration agreements, as there are very few examples of arbitration agreements that mandate that the arbitrators be of one "race" or "ethnicity" or another. Certainly, none of the major arbitration rule sets base arbitrator appointments on race or ethnicity. It is much more common to see arbitration agreements that restrict arbitrators to a particular religious affiliation or declare a preference regarding national origin (i.e., the arbitrator should not be of the same national origin as any of the parties to the arbitration agreement). As noted above, however, there may be some basis to argue that Section 1981 extends to forms of national origin discrimination (e.g., where national origin and ethnicity are considered to be synonymous).

³³ *Jivraj v. Hashwani*, [2011] UKSC 40, [77] (citing 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1607-09 (2009)).

³⁴ See, e.g., *id.* at [40]-[41].

³⁵ See, e.g., *id.* at [42].

³⁶ See, e.g., *id.*

contractual nature of the arbitration process.³⁷ In the context of contracting, therefore, a third category other than employee or independent contractor does not appear warranted for arbitrators.

The distinctions between “employee,” “independent contractor,” and a “sui generis” arbitrator-party relationship probably do not matter for application of Section 1981 and its New Jersey analogue because those statutes ban discrimination in contracting with any party, no matter how the relationship is characterized.³⁸ There is little doubt that the parties at least have a contractual relationship with the arbitrator either directly or through an administrative body hired by the parties to administer the arbitration. The categorization of the relationship as “sui generis,” however, may carry more force in regards to laws like the New York City Human Rights Law, whose application depends on the characterization of the arbitrator as either an employee or an independent contractor hired to further the employer’s business.

V. QUALIFICATION RESTRICTIONS IN AD HOC ARBITRATION AGREEMENTS

Suppose an ad hoc arbitration agreement³⁹ has a provision similar to that at issue in *Jivraj v. Hashwani*, but it calls for arbitration in New York City under the laws of the United States instead of arbitration in England.⁴⁰ This hypothetical arbitration agreement requires that all arbitrators shall be respected members of a particular religious community and holders of high office within that community. The arbitration’s purpose is to resolve secular disputes arising out of a real estate development agreement between a real estate developer and a construction manager, both of whom are parties to the arbitra-

³⁷ *Id.*

³⁸ The Civil Rights Act of 1866, 42 U.S.C. § 1981 (West 2012); N.J. STAT. ANN § 10:5-12 (West 2008).

³⁹ An “ad hoc” arbitration agreement is an agreement where there is no third party administrator, such as the American Arbitration Association, tasked with administering the selection and appointment of arbitrators. Domestic courts resolve disputes that arise in the selection of arbitrators under ad hoc arbitration agreements. RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION ch. 1, n.c (Tentative Draft No. 2, 2012).

⁴⁰ Had the hypothetical concerned an arbitration agreement under the laws of the state of New Jersey, there could be little dispute that, unless the parties could establish a bona fide occupational requirement, discrimination in the selection and appointment of an arbitrator would violate New Jersey law. Similarly, if the hypothetical arbitration agreement concerned discrimination based on ethnicity or race, the agreement would violate federal law under Section 1981 unless the parties could establish the restriction as a bona fide occupational requirement. See *Jivraj v. Hashwani*, [2010] EWCA (civ) 712, [24], [35].

tion agreement. Would such an agreement violate either United States federal law or New York City's Human Rights Law?

As discussed above, United States federal law banning discrimination in the workplace under Title VII applies only to "employees."⁴¹ Although there may be a dispute as to whether an arbitrator is an independent contractor, there should be little dispute that an arbitrator is not an "employee" of the parties. Accordingly, Title VII's proscription against discrimination on the basis of religion will not apply.⁴² Section 1981 does apply to all manner of contracts including those with arbitrators, but it is limited to discrimination based on race, color, and ethnicity.⁴³ Had the hypothetical arbitration agreement limited arbitrators to "white citizens" there would be little doubt that the arbitration agreement would prima facie violate United States federal law. This hypothetical, however, concerns discrimination on the basis of religion and, therefore, falls outside the scope of Section 1981.

Discrimination on the basis of religion does fall within the scope of the New York City Human Rights Law.⁴⁴ Section 8.107(1) of the New York City Human Rights Law provides that:

It shall be an unlawful discriminatory practice:

(a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.⁴⁵

Whether this proscription extends to arbitrators acting as independent contractors depends on the definition of "employer," "any person," and "employ."

Section 8.102(5) of the New York City Human Rights Act provides that:

For purposes of subdivisions one, two, and three of section 8-107 and section 8-107.1 of this chapter the term "employer" does not include any employer with fewer than four persons in his or her employ. *For purposes of*

⁴¹ See Jivraj, *supra* note 22.

⁴² *Id.*

⁴³ Civil Rights Act of 1964, 42 U.S.C. § 1981(a) (West 2012).

⁴⁴ The scope of the New York City Human Rights Law is such that the hypothetical could consider race, ethnicity, national origin, gender, sexual orientation, age, disability, and other protected classes. N.Y.C., N.Y., ADMIN. CODE § 8.107 (2012).

⁴⁵ *Id.*

this subdivision, natural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers shall be counted as persons in the employ of such employer. ⁴⁶

This section appears to capture within its terms any employer with at least four persons in its employ, including natural persons employed as independent contractors.

There may be a question as to whether an arbitrator as an “independent contractor” is employed “to carry out work in furtherance of an employer’s business enterprise.” In the hypothetical, the arbitrator has been hired to resolve disputes arising out of the conduct of a secular real estate development business. So long as either the real estate developer or the construction manager in the hypothetical employs at least four persons including independent contractors, at least one of the parties to the arbitration agreement should qualify as an “employer.”⁴⁷ Acting as an arbitrator to resolve disputes arising out of an employer’s business enterprise, however, may not be considered “work in furtherance of an employer’s business enterprise.” In the Supreme Court’s analysis in *Jivraj v. Hashwani*, an arbitrator has no partisan interest and, therefore, does not act in the specific interests of either party.⁴⁸ The characterization of the arbitrator’s relationship to the parties as *sui generis* due to the adjudicative, quasi-judicial nature of the position also supports exclusion from the New York City Human Rights Law.

It could also be argued that an arbitrator is no different from, for example, an appraiser hired by buyers and seller, or buyers and lending institutions, to give an independent valuation of property. There is little doubt that the appraiser would be considered an independent contractor hired to further the collective business interests of the parties. The idea that an arbitrator is a special class of independent contractor, which is exempt from the laws relating to all other independent contractors, is a narrow interpretation of what it means to “work in furtherance of an employer’s business enterprise.” Courts that do not believe arbitrators should be beneficiaries of anti-discrimination laws, however, could adopt this idea. On the other hand, it is at least equally as likely that a court would find that arbitration agreements are made for the joint benefit of the parties to the agreement

⁴⁶ N.Y.C., N.Y., ADMIN. CODE § 8.102 (2012).

⁴⁷ The question of whether all persons employed by the employer must be employed within the confines of New York City is unclear, but the administrative code implies that may be the case. See N.Y.C., N.Y., ADMIN. CODE § 8.123 (2012).

⁴⁸ *Jivraj v. Hashwani*, [2011] UKSC 40, [41] (appeal taken from Eng.).

and are, therefore, created in furtherance of the parties' business enterprises.

The final question of coverage under the New York City Human Rights Law is whether the discriminatory arbitrator qualification requirement amounts to a refusal "to *hire or employ* or to bar or to discharge from employment such *person* or to discriminate against such *person* in compensation or in terms, conditions or privileges of employment (emphasis added)."⁴⁹ The use of the term "person" in this section of the Act applies to any "natural person."⁵⁰ The use of the term "hire or employ" customarily refers to "employees"; however, the second clause in Section 8.102(5), as quoted above, indicates a clear intent to include independent contractors within the definition of "employ."⁵¹

One possible interpretation of Section 8.102(5)'s use of the term "employ" to include independent contractors is that the statute's drafters only intended to include independent contractors for two purposes. The first purpose was determining whether a party was an "employer" based on the number of employees and independent contractors employed. The second was to determine employer liability for the acts of an independent contractor employed "to carry out work in furtherance of an employer's business enterprise."⁵² When interpreting the New York Human Rights Law, however, courts are required to give the law

. . . an independent liberal construction analysis in all circumstances, even where state and federal civil rights laws have comparable language. The independent analysis must be targeted to understanding and fulfilling what the statute characterizes as the City [Human Rights Law's] 'uniquely broad and remedial' purposes, which go beyond those of counterpart state or federal civil rights laws. . . . In short, the text and legislative history represent a desire that the City [Human Rights Law] 'meld the broadest vision of social justice with the strongest law enforcement deterrent. [w]hether or not that desire is wise as a matter of legislative policy'⁵³

⁴⁹ N.Y.C., N.Y. ADMIN. CODE § 8-107(1) (2012).

⁵⁰ N.Y.C., N.Y. ADMIN. CODE § 8-102(1) (2012).

⁵¹ N.Y.C., N.Y. ADMIN. CODE § 8-102(5) (2012).

⁵² *Id.*

⁵³ *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 66, 69 (N.Y. App. Div. 2009); see also Craig Gurian, *A Return to Eyes on the Prize: Litigating under the Restored New York City Human Rights Law*, 33 FORDHAM URB. L.J. 255, 288 (2005); Rep. of the Legal Div., Comm. on General Welfare, 1991 Amendments to the N.Y.C. Human Rights Law, available at <http://antibiaslaw.com/sites/default/files/files/LL39CommitteeReport.pdf>; Local Civil Rights Restoration Act of 2005, 2012 N.Y. Legal Advance Serv. (N.Y. Legal Publ'g Corp.) No. 85 (2005) ("It is the sense of the

Accordingly, though not free from doubt, an arbitrator hired by a covered business enterprise to resolve a dispute regarding the conduct of that enterprise may fall within the protections of the New York City Human Rights Law.

Once covered by the New York City Human Rights Law, the question is whether the provision in the hypothetical requiring the arbitrator to be of a particular religious affiliation is a bona fide occupational requirement. The Supreme Court held in *Jivraj v. Hashwani* that the religious requirement in that particular arbitration agreement was a bona fide occupational requirement. It is uncertain whether a court in the United States would arrive at the same result given the strict scrutiny usually applied to discriminatory qualifications.⁵⁴

In the end, there are defenses to applying the New York Human Rights Law to arbitrators including issues of how to apply the definitions under the Law, and whether such restrictions on arbitrators' qualifications are bona fide occupational requirements. There is a substantial risk, however, that a court considering this hypothetical would determine that the religious affiliation requirement included in the arbitration agreement would violate the New York City Human Rights Law.

VI. RESTRICTIONS ON ARBITRATOR QUALIFICATIONS IN AN ADMINISTERED ARBITRATION RULE SET

The above hypothetical concerned an ad hoc arbitration agreement. Suppose the same parties entered into a standard form arbitration agreement calling for the selection and appointment of an arbitrator under the International Chamber of Commerce Rules of Arbitration under the administration of the ICC's International Court of Arbitration. Under those rules, there is a preference for selection of an arbitrator who is not of the same nationality as any of the parties.

Article 13(5) of the ICC Arbitration Rules provides that:

The sole arbitrator or the president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided

Council that New York City's Human Rights Law has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law.”).

⁵⁴ EEOC Decision No. 915.003, Directives Transmittal (2008) (providing that “Title VII permits employers to hire and employ employees on the basis of religion if religion is “a bona fide occupational qualification [“BFOQ”] reasonably necessary to the normal operation of that particular business or enterprise. It is well settled that for employers that are not religious organizations and therefore seek to rely on the BFOQ defense to justify a religious preference, the defense is a narrow one and can rarely be successfully invoked.”).

that none of the parties objects within the time limit fixed by the Court, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.⁵⁵

This preference, based on the national origin of the arbitrator, raises the question of whether the ICC's standard arbitrator selection process runs afoul of the New York City Human Rights Law.⁵⁶ The question is not idle because New York City is a major center for arbitration both domestic and international. Indeed, the ICC has a regional office located in New York City and administers cases in that office.⁵⁷

When parties designate a set of rules in their arbitration agreement, they are deemed to incorporate those rules in the arbitration agreement as though fully set forth in the agreement.⁵⁸ In that respect, the restrictions on national origin found in the arbitration rules are deemed to be restrictions imposed by the parties unless the parties provide otherwise. After all, it is customary to allow parties to override certain rules and procedures by agreement so that such rules do not apply to a particular arbitration agreement.⁵⁹

The parties in this hypothetical could mutually agree to countermand the provision in ICC Rule 13(5) by mandating that an arbitrator appointed by the International Court of Arbitration could be of any nationality regardless of the nationalities of the parties. Failure to countermand the national origin qualification in ICC Rule 13(5) is considered adoption of the rule by the parties with the national origin restriction intact.⁶⁰ The International Court of Arbitration acts on behalf of the parties when applying its rules to the selection of an arbitrator.

⁵⁵ International Chamber of Commerce Arbitration & ADR Rules, art. 13, ¶ 5, available at http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_1.

⁵⁶ Although independent contractors are covered under § 1981, because that section is limited to discrimination based on race or ethnicity, the national origin provisions of the ICC Rules would not be covered except in cases where national origin and religious affiliation are considered synonymous. See CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 1981.

⁵⁷ INT'L CHAMBER OF COMMERCE, available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/appointing-authority/contact-us/> (last visited Aug. 20, 2012).

⁵⁸ See, e.g., International Chamber of Commerce Arbitration & ADR Rules, art. 6, ¶¶ 1-2, available at http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_1

⁵⁹ See, e.g., *Jivraj v. Hashwani*, UKSC at [42].

⁶⁰ See International Chamber of Commerce Arbitration & ADR Rules, art.13, ¶ 5.

The proscriptions in the New York City Human Rights Act apply equally to the “employer” and its “agent.”⁶¹

Otherwise assuming coverage under the New York City Human Rights Law, the defense to the national origin requirement must be that it is a bona fide occupational qualification.⁶² The rationale behind the ICC Rule regarding national origin is to preserve the appearance of fairness and lack of bias in international arbitration. Where the parties are of different nationalities there is a greater appearance of neutrality if the sole arbitrator or the chair of a three-person tribunal is not of the same nationality as any one of the parties.

The ICC Rules expressly require that all arbitrators, whether party appointed or not, “must be and remain impartial and independent of the parties involved in the arbitration.”⁶³ At the same time, the ICC Rules do not prohibit party appointed arbitrators, even the sole arbitrator or chair of the tribunal, from being of the same nationality as one or more of the parties.⁶⁴ Even if one party objects to the appointment of a party appointed arbitrator on the ground that he or she is of the same nationality as the appointing party, the ICC Court will not consider that alone as grounds for disqualification.⁶⁵ The International Court of Arbitration must, therefore, believe that an arbitrator of the same nationality as one or more of the parties or their counsel has the capacity, indeed the obligation, to act independently and impartially.

The question then becomes whether the appearance of neutrality gained by ICC Rule 13(5) over the impartiality and independence requirements in ICC Rule 11(1) sufficiently justifies discrimination in the selection and appointment of arbitrators on the basis of national origin. It is unknown how a court would rule on this issue but, as with the hypothetical concerning ad hoc arbitrations, there is, at minimum, a risk that a United States court would not sustain a bona fide occupational qualification defense to the national origin occupational requirement.

VII. RESTRICTIONS ON ARBITRATOR QUALIFICATIONS WHEN USING A ROSTER OF ARBITRATORS

One final tweak to the hypothetical is to have the parties insert a rule set into their arbitration agreement that relies on an administrative body to select arbitrators from its own roster of approved arbitrators. An example of this type of rule set is the International Rules

⁶¹ N.Y.C., N.Y. ADMIN. CODE § 8-107(1) (2012).

⁶² *See, e.g.*, *Jivraj v. Hashwani*, [2011] UKSC 40, [7] (appeal taken from Eng.).

⁶³ International Chamber of Commerce Arbitration & ADR Rules, art. 11, ¶ 1.

⁶⁴ *Id.* at art. 13, ¶ 5.

⁶⁵ *Id.*

and Procedures of the International Center for Dispute Resolution (ICDR), the international arm of the American Arbitration Association.⁶⁶ The ICDR Rules provide that, “[a]t 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,”⁶⁷ and thus insert consideration of an arbitrator’s national origin into the arbitrator appointment equation. This provision would be implemented by having the ICDR prepare a list of potential arbitrators for consideration by the parties, but excluding otherwise qualified candidates from ICDR’s roster of arbitrators who are of the same nationality as a party.

Although generally the same analysis would apply as to the above versions of the hypothetical, the use of an arbitration service to engage in the selection of an arbitrator from its own roster of potential arbitrators presents an additional issue. Does the ICDR constitute an “employment agency” under the New York City Human Rights Law and therefore itself become subject to the anti-discrimination requirements in Section 8.107(1)(b) of the Act concerning employment agencies? An employment agency is defined as “any person undertaking to procure employees or opportunities to work.”⁶⁸ “Person” includes “one or more, natural persons, proprietorships, partnerships, associations, group associations, organizations, governmental bodies or agencies, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.”⁶⁹ The ICDR may be considered an employment agency under the terms of the Act simply by providing a roster of arbitrators for employment by disputants.

Section 107(1)(b) prohibits an employment agency from discriminating when considering applications for its services or when referring applicants to an employer.⁷⁰ Accordingly, assuming jurisdictional and definitional requirements are met, there is a real possibility that restricting the roster of potential arbitrators based on national origin violates the New York City Human Rights Law. As above, there

⁶⁶ As with the ICC Rules, the question regarding ICDR’s rules is not an idle one like the ICC. The ICDR has a regional office in New York City. *See* INT’L CTR. FOR DISPUTE RESOLUTION, *available at* <http://www.adr.org/aaa/faces/oracle/webcenter/portalapp/pages/contactUs> (last visited Aug. 20, 2012).

⁶⁷ INTERNATIONAL CENTER FOR DISPUTE RESOLUTION, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, art. 6, ¶ 4 (June 1, 2009), *available at* http://www.adr.org/aaa/faces/aoe/icdr/i_search/i_rule/i_rule_detail?doc=ADRSTG_002008&_afLoop=386827565043905&_afWindowMode=0&_afWindowId=14wxizc1jy_263#%40%3F_afWindowId%3D14wxizc1jy_263%26_afLoop%3D386827565043905%26doc%3DADRSTG_002008%26_afWindowMode%3D0%26_adf.ctrl-state%3D14wxizc1jy_319.

⁶⁸ N.Y.C., N.Y. ADMIN. CODE §8-102(2) (2012).

⁶⁹ *Id.* § 8-102(1).

⁷⁰ *Id.* § 8-107(1)(b).

is then a question of whether national origin is a bona fide occupational consideration for arbitrators acting under the ICDR Rules.

VIII. VALIDITY OF ARBITRATION AGREEMENTS THAT VIOLATE U.S. ANTI-DISCRIMINATION LAWS

The above hypotheticals make two points. First, it is very possible that arbitrators are protected from discrimination in their selection and appointment by state and federal laws to the extent those statutes apply to independent contractors. Second, administrative bodies handling the selection and appointment of arbitrators may also be subject to laws prohibiting discrimination in the selection and appointment of arbitrators. These two conclusions, however, do not completely define the scope of risk associated with application of the anti-discrimination laws to arbitration agreements. Arbitration agreements that run afoul of anti-discrimination laws may be invalid and unenforceable under applicable law.

A. *Domestic Arbitration Agreements*

The Federal Arbitration Act governs the recognition and enforcement of arbitration agreements in the United States.⁷¹ Chapter 1 of the Federal Arbitration Act concerns domestic arbitrations.⁷² It mandates the recognition and enforcement of arbitration agreements “save upon such grounds as exist at law or in equity for the revocation of any contract.”⁷³ The United States Supreme Court has interpreted this clause to mean that an arbitration agreement might be unenforceable if the provisions of the agreement violate state or federal laws that are generally applicable to contracts rather than laws specific to arbitration agreements.⁷⁴ Such laws would include those that prohibit discrimination in the making of contracts with independent contractors.⁷⁵ Accordingly, it is likely that the subject agreement to arbitrate would not be enforceable under the Federal Arbitration Act (FAA), at least as originally written by the parties, if a court found that an arbitration agreement violated the laws prohibiting discrimination against independent contractors.

If a court determines that an arbitration agreement violates laws banning discrimination in the selection and appointment of arbi-

⁷¹ See *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011) (citing *Preston v. Ferrer*, 522 U.S. 346, 353 (2008) (stating that the provisions of the Federal Arbitration Act preempt state laws that act as obstacles to the purposes of the Act)).

⁷² See 9 U.S.C. §§ 1-16.

⁷³ *Id.* § 2.

⁷⁴ *AT&T Mobility, LLC*, 131 S. Ct. at 1746.

⁷⁵ *Id.*

trators, it faces the choice of whether to void the arbitration agreement as a whole or to uphold the agreement and remove the offending clause.⁷⁶ Thus, if an arbitrator qualification violates state or federal anti-discrimination laws, a court might opt to use its powers to appoint an arbitrator under Section 5 of the FAA and “blue pencil” the offending clause.⁷⁷ The decision whether to blue-pencil an arbitration agreement is generally made by a case-by-case inquiry as to whether the offending provision is essential to the purposes of the agreement to arbitrate.

B. Non-Domestic Arbitration Agreements Subject to the Laws of the United States

So far the hypotheticals in this article have assumed that the arbitration agreements were subject to United States laws applicable to domestic arbitrations. Now change the facts of the hypothetical so that it qualifies as a “non-domestic” arbitration agreement where the parties have agreed that the seat of the arbitration shall be in New York City.

Chapter 2 of the Federal Arbitration Act concerns the recognition and enforcement of non-domestic arbitrations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁷⁸ FAA Chapter 2, Section 208 provides, “Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.”⁷⁹ Accordingly, the provisions of FAA Chapter 1 relating to domestic arbitrations also apply to non-domestic arbitrations under certain circumstances.⁸⁰

Under Article V, Section 1(e) of the New York Convention, the country where arbitration takes place, or under whose laws arbitration is conducted, has supervisory authority over the conduct of the arbitration.⁸¹ Thus, non-domestic arbitrations held in the United States fall under the provisions applicable to domestic arbitrations under the Federal Arbitration Act for the purposes of vacating or enforcing arbitration awards under FAA Chapter 1.⁸²

⁷⁶ See, e.g., *Rent-a-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010).

⁷⁷ See 9 U.S.C. § 5.

⁷⁸ See 9 U.S.C. §§ 201-08.

⁷⁹ 9 U.S.C. § 208.

⁸⁰ *Id.*

⁸¹ See Convention on the Recognition & Enforcement of Foreign Arbitral Awards, art. 5, § 1(e), 330 U.N.T.S. 38 (June 7, 1959) [hereinafter New York Convention].

⁸² See *Yusuf Ahmed Alghanim & Sons, W.L.L., v. Toys “R” Us, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997).

The New York Convention further provides that an arbitration award may not be enforced if the “agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.”⁸³ Therefore, if an arbitration agreement is invalid under United States law but is still subject to the laws of the United States, then an arbitration award arising out of such an agreement may also be unenforceable in the United States or in another country. Therefore, Section 2 of the Federal Arbitration Act regarding the validity of domestic arbitration agreements applies equally to non-domestic arbitration agreements where the seat is in the United States or where the arbitration agreement is governed by United States law.⁸⁴

As with domestic arbitrations, it is unknown how a court would rule on this hypothetical with regard to application of a municipal law like the New York City Human Rights Law. However, if a court were to determine that the facts in the hypothetical violated the New York City Human Rights Law and, therefore, made the arbitration agreement unenforceable as written, that same conclusion likely would apply equally to domestic arbitrations and non-domestic arbitrations where the seat of the arbitration is in New York City.⁸⁵

C. Enforcement of Non-Domestic Arbitration Awards Made Outside the United States

Finally, modify the hypothetical to consider the possible outcome for an arbitration agreement substantially identical to the one in *Jivraj v. Hashwani*. That is, the arbitration agreement concerns a secular, commercial dispute requiring that all arbitrators be members of a particular religion and that the arbitration take place in England. What would happen if one of the parties to that arbitration attempted to enforce the arbitration award in the United States? Could a United States court rely on an applicable anti-discrimination statute at the forum of enforcement to refuse to enforce the award?

The provisions of Federal Arbitration Act Chapter 2 apply when determining whether a court will enforce the award since it is an arbitration award issued outside the United States. Under FAA Chapter 2, Section 207,

⁸³ Convention on the Recognition & Enforcement of Foreign Arbitral Awards, *supra* note 81, at art. 5, § 1(a).

⁸⁴ See *Yusef Ahment Alghanim & Sons, W.L.L.*, 126 F.3d at 19.

⁸⁵ Federal arbitration law as implemented in the Federal Arbitration Act does not preempt state or local law unless the state or local law acts to obstruct the purposes of the FAA. Although the case law on this issue distinguishes between federal and state law, the same rule applies to a potential conflict between federal and municipal law. See *AT&T Mobility, LLC*, *supra* note 71.

The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.⁸⁶

The grounds specified in the Convention are considered the exclusive grounds on which a court may refuse to confirm a foreign arbitral award covered by Chapter 2 of the Federal Arbitration Act.⁸⁷ Accordingly, the question is whether there are any grounds under the New York Convention to refuse enforcement of the hypothetical award.

All New York Convention grounds for refusal to enforce a foreign arbitral award appear in Article V. First, it is clear that Article V.1(a) does not apply. That provision permits refusal to enforce an arbitration agreement where:

said [arbitration] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.⁸⁸

Under the hypothetical, although the arbitration agreement might be invalid had it been made in New York City, the arbitration agreement would be valid under the laws where it was made. Based on the outcome of *Jivraj v. Hashwani*, the hypothetical arbitration agreement is valid in England where the award was made and under whose law the arbitration agreement was made.

New York Convention Article V.1(d), concerning the composition of the arbitral tribunal, also does not apply to this hypothetical. That provision provides that recognition and enforcement may be refused where:

The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.⁸⁹

In the hypothetical, the arbitral tribunal's composition is in accordance with the arbitration agreement, and that agreement is in accord with the laws of England, where the hypothetical arbitration took

⁸⁶ 9 U.S.C. § 207 (West 2012).

⁸⁷ See *Yusuf Ahmed Alghanim & Sons, supra* note 82; *Int'l Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera, Indus. y Comercial*, 745 F. Supp. 172, 181-82 (S.D.N.Y. 1990); *Int'l Trading & Indus. Inv. Co. v. Dyncorp Aero. Tech.*, 763 F. Supp. 2d 12, 19-20 (D.C. Cir. 2011).

⁸⁸ New York Convention, *supra* note 81, at art. V, § 1(d).

⁸⁹ *Id.*

place. None of the other grounds under Article V.1 of the New York Convention apply to this hypothetical.

The only further potential ground for refusal to enforce the hypothetical arbitration award is found in Article V.2(b):

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

* * * (b) The recognition or enforcement of the award would be contrary to the public policy of that country.⁹⁰

The question for Article V.2(b), therefore, is whether an arbitration agreement that is legal where made but that violates anti-discrimination laws in the United States can be enforced in the United States, or whether it is barred as a matter of public policy.

The public policy exception is narrowly construed.⁹¹ In *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, the United States Court of Appeals for the Second Circuit held that the public-policy defense should be narrowly construed lest it become a "major loophole in the [New York] Convention's mechanism for enforcement."⁹² Therefore, "[e]nforcement of foreign arbitral awards may be denied . . . only where enforcement would violate the forum state's most basic notions of morality and justice."⁹³

The public policy "must be well defined and dominant."⁹⁴ Furthermore, the public-policy defense "must be construed in light of the overriding purpose of the [New York] Convention, which is 'to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.'"⁹⁵

A party urging a court to refuse enforcement under the public policy exception would have to argue that the enforcement of an arbitral award violates public policy because the manner of selecting the arbitrators would violate United States anti-discrimination laws and

⁹⁰ *Id.* at art. V, §2.

⁹¹ See *Europcar Italia, S.P.A v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998); *M & C Corp. v. Erwin Behr GMBH & Co., KG*, 87 F.3d 844, 851 (6th Cir. 1996); *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 973 (2d Cir. 1974).

⁹² *Parsons & Whittemore Overseas Co.*, 508 F.2d at 974.

⁹³ *Id.*

⁹⁴ *Northrop Corp. v. Triad Int'l Mktg. S.A.*, 811 F.2d 1265, 1271 (9th Cir. 1987) (quoting *W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983)).

⁹⁵ *Waterside Ocean Navigation Co. v. Int'l Navigation Ltd.*, 737 F.2d 150, 152 (2d Cir. 1984) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)).

that such laws constitute the most basic notions of morality and justice.⁹⁶ This argument would also depend, however, on whether a procedural issue, rather than the substance of the award itself, is sufficient to qualify as a violation of public policy under the New York Convention, an issue that is not free from doubt.

The public-policy defense to enforcement of a non-domestic arbitral award is rarely successful in U.S. Courts.⁹⁷ Nonetheless, several courts have suggested that the public policy ground might be available where the makeup and constitution of the arbitral tribunal is in question.⁹⁸ In *Transmarine Seaways Corp. v. Marc Rich & Co.*, the court stated that,

Under Article V(2)(b) [of the New York Convention], enforcement of an award may be denied if contrary to this country's public policy. The Supreme Court's elucidation of arbitral propriety in *Commonwealth Coatings* [393 U.S. 145 (1968)] is a declaration of public policy. If [the arbitrator's] presence on the panel offended the principles declared in that case and its progeny, the award will not be enforced.⁹⁹

Transmarine Seaways concerned a non-domestic arbitration held in New York City, where the court could have applied FAA Chapter 1 grounds to determine whether to enforce the award because the arbitration was under the supervision of an United States domestic court. The court, however, applied New York Convention Article V(2)(b)'s public policy grounds.¹⁰⁰ The court found no bias and did not refuse to enforce the award on that ground.¹⁰¹ Significantly though, at least one court believed that the appointment and selection of an arbitrator in violation of *Commonwealth Coatings*, discussed below, could be a

⁹⁶ See *Parsons & Whittemore Overseas Co.*, *supra* note 92, at 974.

⁹⁷ See Andrew M. Campbell, *Refusal to Enforce Foreign Arbitration Awards on Public Policy Grounds*, 144 A.L.R. FED. 481 (2005). However, there have been rare cases where the public policy exception was partially successful. See *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063, 1069 (N.D. Ga. 1980) (portion of French interest rate in international arbitration award not enforced because it violated Georgia public policy: "[A] foreign law will not be enforced if it is penal only and relates to the punishing of public wrongs as contradistinguished from the redressing of private injuries.").

⁹⁸ *Brandeis Intsel Ltd. v. Calabrian Chemicals Corp.*, 656 F. Supp. 160, 169 (S.D.N.Y. 1987) ("I accept that the propriety of the makeup of an arbitration panel sufficiently implicates public policy to fall within article V(2)(b) of the convention. . . ."); *Transmarine Seaways Corp. v. Marc Rich & Co.*, 480 F. Supp. 352, 357 (S.D.N.Y. 1979).

⁹⁹ *Transmarine Seaways Corp.*, 480 F. Supp. at 357.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 358.

basis for a public policy refusal to enforce an award under Article V(2)(b) of the New York Convention.¹⁰²

In *Commonwealth Coatings v. Continental Casualty Co.*, the United States Supreme Court held that an arbitration award must be vacated where the arbitrator had the appearance of bias based on his failure to disclose a close business relationship with one of the parties.¹⁰³ The Court held:

This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased, but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.¹⁰⁴

Although *Commonwealth Coatings* was a domestic arbitration case, based on the international arbitration cases referred to above, at least some courts will apply the principles of *Commonwealth Coatings* and refuse to enforce foreign arbitral awards on the basis of the public policy exception when the respondent establishes arbitrator bias or the appearance of bias.

There are no published U.S. cases where discrimination in the makeup of the arbitral tribunal was asserted as the basis for refusing to enforce the arbitration award on public policy grounds,¹⁰⁵ but laws banning discrimination are no less important than the public policy

¹⁰² *Id.* at 357.

¹⁰³ *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 147 (1968).

¹⁰⁴ *Id.* at 150.

¹⁰⁵ One U.S. case that raises the issue of discrimination in connection with the enforcement of an international arbitration award is *Karen Maritime Ltd. v. Omar International Inc.*, in which the respondent argued that confirmation of a non-domestic arbitration award would violate public policy and, therefore, should be refused under Article V(2)(b) of the New York Convention because the underlying contract between the parties violated U.S. public policy. In that case, a charter agreement entered into by the parties included a requirement that the contracted vessel “is not Israeli owned or controlled, and will not call at Israeli ports.” The respondent contended that the contract on which the award was based violated anti-boycott laws and anti-discrimination laws. With respect to the anti-discrimination laws (notably, § 1981 of the Civil Rights Act), the court held that this ground did not apply because “[t]he charter party’s objectionable language . . . applies to individuals outside the jurisdiction of the United States.” The court found the anti-boycott ground to be a much closer question, but ultimately ruled that the basis for the arbitration award had nothing to do with the anti-boycott laws and, in any event, the respondent had unclean hands. *Karen Maritime Ltd. v. Omar Int’l Inc.*, 322 F. Supp. 2d 224, 225, 228-30 (E.D.N.Y. 2004).

banning arbitrator bias. Indeed, selecting an arbitrator based on race, ethnicity, national origin, gender or other protected class very well may violate the principles of *Commonwealth Coatings* and constitute the appearance of bias.¹⁰⁶

There is no doubt that federal and state laws banning discrimination are a clear statement of public policy.¹⁰⁷ Indeed, the New York City Human Rights Law (used in the above hypothetical) declares:

[T]here is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences, including those based on race, color, creed, age, national origin, alienage or citizenship status, [or] gender. . . .¹⁰⁸

It is yet to be seen whether a court will refuse to enforce a foreign arbitral award where the selection and appointment of the arbitrator was done in a manner that violates the anti-discrimination policies at the place of enforcement, but existing case law suggests that such a risk exists.

XII. CONCLUSION

From time-to-time, parties to arbitration agreements insert qualifications for arbitrators that would violate federal, state, or municipal laws in the United States that bar discrimination when contracting with any persons, including independent contractors. It is possible that such discriminatory arbitration agreements made in United States jurisdictions where such discrimination is prohibited as a matter of public policy would be declared completely or partially invalid unless the proponents of the discriminatory qualification could establish a bona fide occupational qualification.

This also holds true for non-domestic arbitrations where the parties have selected United States law to govern their arbitration agreement and the seat of the arbitration is in the United States. For arbitration agreements whose seat is outside the United States and

¹⁰⁶ It would be difficult to attribute actual bias to the appointed arbitrator on the basis of discrimination in the selection and appointment process to which the selected arbitrator is not a party. *See* *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 645 (6th Cir. 2005) (quoting *Consolidation Coal Co. v. Local 1643, United Mine Workers of Am.*, 48 F.3d 125, 129 (4th Cir. 1995)) (alleging partiality of an arbitrator must be direct, definite, and capable of demonstration to vacate an arbitration award).

¹⁰⁷ *See, e.g.*, Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961); *Burks v. Poppy Constr. Co.*, 57 Cal. 2d 463, 471 (1962).

¹⁰⁸ N.Y.C., N.Y. ADMIN. CODE § 8-101 (2011).

where the arbitration agreement's discriminatory aspects are legal but violate the anti-discrimination laws of the place of enforcement, it is possible that a United States court would refuse to enforce such an award on public policy grounds. For example, a United States court might find an arbitration agreement prohibiting the appointment of "non-white" arbitrators repugnant to United States public policy and, on that basis, refuse enforcement of the arbitration agreement and any resulting award.

What does this mean for the legacy of *Jivraj v. Hashwani*? Due to the narrow grounds on which the public policy exception to enforcement of foreign arbitral awards historically has been permitted in the United States, one would expect there to be a great deal of difficulty in opposing enforcement of a foreign arbitral award even where the non-domestic arbitration agreement would violate U.S. anti-discrimination laws on the selection and appointment of arbitrators had the agreement been made in the United States. Where the parties' arbitration agreement has selected a location in the United States where anti-discrimination laws apply to arbitrators, however, there is a risk that the arbitration agreement, or the arbitrator selection provisions, will be declared invalid. As a practical matter, arbitration agreements that incorporate rule sets that provide preferences based on national origin may be declared invalid in places like New York City and New Jersey unless the parties to such agreements disavow the institutional restrictions on national origin, something generally permitted by the major rule sets.

