

UAE as Friendly Hub for Arbitration Again

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As a development in the arbitration scene and as a bid to attract investment, the UAE modified article 257 of its Penal Code so as to exclude arbitrators from its coverage (Federal Code No. 24 of 2018).

The old version of article 257 of the UAE Penal Code (as had been introduced by Federal Code No. 7 of 2016) read as follows:

Any person who issues a decision, gives an opinion, submits a report, addresses a case or proves an incident for the benefit or against a person, failing to maintain the requirements of integrity and impartiality, in his capacity as an arbitrator, expert, translator or investigator, appointed by administrative or judicial authority or selected by parties, shall be sentenced to temporary imprisonment. Said subjects shall be banned from being re-assigned to such tasks, and shall be subject to the provisions of Article 255 of the present Law.

It was unclear *for what* purpose this provision had been introduced. After all, every profession listed in the provision has its own law that governs its members' behaviour and conduct. With respect to arbitrators, the arbitration law would have appeared to be the ordinary place for determining requirements of impartiality and any connected sanctions (cf. article 10.4 of Federal Law No. 6 of 2018 on Arbitration). Criminal law on the other hand would normally determine different types of crimes such as murder, establish criminal procedures, and define applicable punishments. It was unique for the UAE that it addressed the conduct of the members of specific professions such as arbitrators, expert witnesses and translators in the UAE Penal Code, subjecting certain actions of these professionals to prison terms. This was unprecedented.

Although, as far as the author knows, there are no reported cases in the UAE whereby an arbitrator was subject to proceedings under the old Article 257 of the UAE Penal code, many arbitrators were naturally hesitant to arbitrate disputes in the UAE fearing possible retaliations from losing parties. That such fears were not unfounded is shown by a recent case from another Middle Eastern country where arbitrators were criminally prosecuted (Abdullah bin Khalid v Société d'Entreprise et de Gestion). Under the old Article 257 of the UAE Penal Code, either party to an arbitration could claim that the arbitrator in question had not maintained the requirements of "integrity and impartiality". These terms were not defined by the UAE Penal Code. Is the term "integrity" the same as "impartiality" or is there a difference? The terms were ambiguous. As the UAE Penal Code did not define their meaning, the terms remained open-ended and could have led to frivolous criminal complaints. Moreover, the consequences determined in the law were harsh. Any arbitrator found guilty of violating the standards of "integrity and impartiality" could be sentenced to jail, a penalty

reserved for felonies (article 28 of the UAE Penal Code).

Even without this provision there were and are several options available if the impartiality of an arbitrator is in doubt or in fact violated. The arbitrator can be challenged and the arbitration award can be set aside (articles 14.1 and 53.1 (f) of Federal Law No. 6 of 2018 on Arbitration). The arbitrator could also be subject to civil liability. Finally, criminal liability could arise in flagrant cases such as bribery.

Fortunately, the UAE legislator has now acted to address the above concerns by amending article 257 of the UAE Penal Code to read as follows:

Any person who, while acting in the capacity of an expert, translator or investigator appointed by a judicial authority in a civil or criminal case, or appointed by an administrative authority, confirms a matter contrary to what is true and misrepresents that matter while knowing the truth about it, shall be sentenced to imprisonment for a minimum term of a year and a maximum term of five years.

The new version of article 257 UAE Penal Code deletes arbitrators from its coverage altogether, leaving only experts, translators and investigators in its coverage. In addition, the new article 257 of the UAE Penal Code deleted any reference to “integrity and impartiality”. Instead, it describes the penalised behaviour as the act of “...confirm[ing] a matter contrary to what is true and misrepresent[ing] that matter while knowing the truth about it”. This language appears to limit the provision’s application to acts of intentional deceit or fraud. In contrast, the wording of the old article 257 UAE Penal Code could have also penalised a lack of impartiality resulting from an innocent mistake or other unintentional behaviour. It also opened the possibility of criminal liability in case an arbitrator judged whether there was a violation of integrity or impartiality differently than the criminal judges hearing a case. These risks are now mitigated by the new wording of article 257 UAE Penal Code.

In conclusion, the exclusion of arbitrators from the scope of article 257 of the UAE Penal Code and the precise definition of the panelised acts are a welcome step in the right direction to maintain the UAE as a friendly hub for arbitration and foster international confidence in UAE seated arbitration. It allows practitioners and arbitrators to breathe at ease and act in a more predictable environment, knowing that criminal liability under article 257 of the UAE Penal Code is out of question.