# Arbitration in the UAE: End of Year Round-up – From the Penal Sanctioning of Arbitrators to the 2016 DIFC-LCIA Rules of Arbitration (Part 1)

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With the beginning of a new year, it is time for a look at arbitration developments in the UAE that have gone unnoticed (or at least unreported) over the course of 2016. As the readership of this Blog will be aware, the United Arab Emirates (UAE) have developed into one of the most fecund arbitration jurisdictions in the world. Offering a common and a civil choice between the Dubai International Arbitration Centre (DIFC) and the Abu Dhabi Global Market (ADGM), both offshore, on the one hand and mainland or onshore UAE, in particular Dubai and Abu Dhabi, on the other, this is hardly surprising. Needless to say that given the increase in importance of the UAE as a regional arbitration hub, developments there deserve closest scrutiny in order to ensure that arbitral practice and procedure in this still comparatively young jurisdiction evolve on the basis of best international standards (without, of course, losing sight of cultural sensitivities).

One of the most recent developments that has attracted immediate criticism from

within specialist circles is the **amendment of Art. 257 of the UAE Penal Code** to include arbitrators:

"An expert, arbitrator, translator or investigator who is appointed by a judicial or an administrative authority or elected by the parties and who issues a decision or expresses an opinion or submits a report or present a cause or proves an incident in favour of a person or against him contrary to the obligation of fairness and impartiality shall be punished by temporary imprisonment. The aforementioned shall be precluded from performing the duties they were charged with in the future."

In reaction to this amendment, some international law firms have been rumoured to have placed an immediate ban on their arbitration partners to serve arbitrator mandates in the UAE and to have invited any presently serving arbitrator to withdraw from their UAE-seated mandates. This, no doubt, is a precautionary measure to forestall any negative publicity that potential criminal prosecution (whether ultimately meritorious or not) may entail (apart from an obvious desire to avoid litigation in court and the expenses and commitment of executive time this may require). I personally believe that this is an over-reaction. One must not forget that a withdrawal by an arbitrator from a pending mandate without good reason may attract civil liabilities both under various regional institutional rules as well as Art. 207(2) of the UAE Arbitration Chapter and is unlikely to be covered by professional indemnity insurance. This said, it is unlikely that the new amendment will dissuade arbitrators from serving mandates in the UAE. The main reason for this is that on the basis of UAE criminal law, it will be very difficult to prove the underlying bias that gives rise to criminal liability. It is also important to note that the provision has already been in force with respect to court-appointed experts and translators for many years and its implementation to date does not appear to have caused any major concerns. Nonetheless, there is a real danger that Art. 257 as amended might be invoked abusively by unmeritorious parties that are known to make use of guerrilla practices in a local arbitration context. Judging by the UAE courts' mature handling of vexatious civil liability claims brought by such parties before the e.g. Dubai courts to date, arbitrators can rest assured that the UAE judiciary will only entertain the most serious infringements (for the avoidance of doubt, none of the recent civil liability claims for professional negligence before the UAE courts have succeeded, see my previous reporting here: G. Blanke, "The liability of arbitrators

in the UAE: Quod novi sub sole?", Kluwer Arbitration Blog, 28 March 2016, available online). I personally believe that the initial excitement caused by the amendment to the UAE Penal Code will be short-lived and parties with bad intentions – faced with an unreceptive local judiciary – will ultimately desist from pursuing vexatious criminal liability claims against irreproachable arbitrators.
It is important to bear in mind that criminal liability under UAE law requires – for want of a better term – *mens rea* and will therefore only trigger the criminal liability of an arbitrator who knowingly *"issue[s] a decision or expresses an opinion [...] contrary to the duty of fairness and impartiality"* (this requirement remains unaffected by the removal of the word "knowingly" from the original version of Art. 257). This means that an arbitrator's criminal liability will only come into play if it can be established that he or she has favoured one of the parties to the arbitration with the *intention* of providing an unfair advantage, so the bias must be proven to have been intentional (gross professional negligence will likely only attract civil liability). A qualifying advantage can be procedural, such as not having accorded a party a fair hearing, or substantive, such as a finding in favour of a party in violation of the prevailing law on the merits. Any such violations, whether procedural or substantive, must be proven to have been committed by the arbitrator intentionally, i.e. a *genuine* error in applying the law or the *unintentional* conferral of a procedural advantage will not be sufficient.

On the more positive side, the Dubai Courts have issued a number of rulings that confirm some fundamental principles of arbitration under the UAE Arbitration Chapter and the positive approach taken by the Dubai Courts to the enforcement of foreign arbitral awards. As regards the former, in Case No. 199/2014 (see ruling of the Dubai Court of Cassation of 21st August 2016), the Dubai Court of Cassation confirmed **the *res judicata* effect of an award**. According to the Court, an award becomes finally binding upon the parties to the arbitration upon its issuance. This even holds true where new evidence or material facts come to light *ex post*. As a consequence of the *res judicata* effect of an award, the underlying arbitration agreement will also usually be considered exhausted. The potential subsequent nullification of the award will not change this position. This essentially confirms the existing *acquis* on the effect of *res judicata* under the UAE Arbitration Chapter (see in particular G. Blanke, *Commentary on the UAE Arbitration*, Sweet & Maxwell, 2016, at para. II-148). As regards the latter, the Dubai Courts (see Case No. 693/2015, ruling of the Dubai Court of Cassation) have affirmed that on the question of which law applies to **the determination of capacity issues in**

**relation to the underlying arbitration agreement** within the international enforcement context the law at the seat will prevail. In the Dubai Court of Cassation's reasoning, this is in keeping with the requirements of Art. V(1)(a) of the 1958 New York Convention (on the recognition and enforcement of foreign arbitral awards). This is a welcome development in that it will remove any uncertainties on the properly applicable law (which would otherwise be the law of incorporation of the individual signatory party).

Turning to the DIFC, the DIFC-LCIA Arbitration Centre, the DIFC-based sister organization of the London Court of International Arbitration (LCIA), has adopted a revised set of arbitration rules, the **2016 DIFC-LCIA Rules**. These entered into effect on 1st October 2016 and apply to all new arbitration proceedings commenced in a DIFC-LCIA forum from that date. The 2016 version of the Rules is very closely modeled on the 2014 LCIA Arbitration Rules, which have been in effect since 1st October 2014 and have so far proven uncontroversial in practice since their entry into force. The principal changes introduced by the 2016 version of the Rules are largely cosmetic and leave the overall operating system of the DIFC-LCIA Rules intact. These changes, one senses, have been adopted in order to enhance the overall efficiency and integrity of arbitrations conducted under the auspices of the DIFC-LCIA. Other changes, however, are more conceptual in nature and have most probably been adopted in an attempt to modernize the rules in order to bring them into line with other leading sets of international arbitration rules, such as those of the ICC International Court of Arbitration, the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HIAK), all (potentially) strong competitors in the region. Yet a third category of changes appears to aim at underlining the distinctive character of the DIFC-LCIA Rules and at giving them a competitive edge over other competing sets of international rules. To give a flavor of their quality and incisiveness, it is worth emphasizing the following changes:

- ***The tribunal's availability*** – Taking guidance from the 2012 revision of the ICC Rules, the revised DIFC-LCIA Rules introduce into the appointment process the notion of the tribunal's availability. Pursuant to Art. 5.4 of the revised Rules, a nominated candidate must sign a declaration stating whether he/she is *"ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration"*. Further, pursuant to Art. 10.2 of the revised Rules, an

arbitrator may be revoked if he/she *"does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry".* No doubt, these provisions read together will promote the efficient conduct of the arbitration process.

- ***Appointment of an emergency arbitrator*** – Taking guidance from the ICC Rules, the SIAC and the HIAC Rules, a new Art. 9B provides for the appointment of an emergency arbitrator *"in a case of emergency"* at any time before the constitution of the tribunal.
- ***Consolidation*** – The revised Rules provide for more elaborate mechanisms of consolidation, both at the hands of the tribunal and the LCIA Court.
- ***Appointment and conduct of legal representatives*** – The most innovative and possibly controversial provisions of the revised Rules are those relating to the appointment and conduct of legal representatives in DIFC-LCIA arbitration. It is questionable to what extent it is sensible to confer upon a tribunal such policing powers; there is a reasoned concern that being entrusted with the policing and sanctioning of the conduct of the parties' legal representatives, the tribunal's focus on determining the merits may be diluted and ultimately jeopardise the procedural efficiency of the arbitration.

… to be continued…