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A Call to Arms: Education to Prevent the Harsh Reality of Guerrilla Tactics in the Face of the UAE's Recent Law on Possible Criminal Sanctions for Arbitrators

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When implemented and understood properly by all players involved, international commercial arbitration should run like a well-oiled machine. Jurisdictions such as France, the United Kingdom, Sweden and Switzerland understand this – from the legislature, to the courts, to the practitioners and parties involved. Many other jurisdictions, such as the United States, Singapore and Hong Kong also understand the importance that international commercial arbitration has on the global stage and have implemented legislation and education towards that understanding, albeit with minor hiccups along the way. All is well, for the most part.

When international commercial arbitration runs smoothly, the sticky-bandit respondent should not be able to place sticks in the spokes of the wheels of this machine – as my professor used to say. Such is often referred to as guerilla tactics. Although the respondent may try – and indeed it does, and does, and does again – the principles of international commercial arbitration and due process should manifest themselves and snap the respondent's hope of overturning the machine from its rightful path to justice.

This ideal world of international commercial arbitration exists in a vacuum; and, honestly, this is what makes international commercial arbitration so interesting and exciting to many of us. We readily enjoy the open discussions, the debates and theory of international commercial arbitration. We oddly enough enjoy the unsettling ground that this body of law rests upon. It is why we read the blogs with open interest, attend the conferences with attentive ears, and steadied the course and fought the battles to call this our career.

Of course, we all want to create a world that better understands the principles that international commercial arbitration rests upon – however, the journey on the path to that utopia is what brings us joy. It is our hope, as practitioners, that we can create a world that finally understands our quirks – our passion, understanding and dedication to international commercial arbitration. It is why we write, it is why we lobby and it is why we press forward and take the time to make others understand how important international arbitration is to our social order as it exists today.

As champions of international arbitration and pioneers on this journey, I ask you to take heed to the challenge now faced in the UAE and how it very surely strikes mightily upon the fabric of international arbitration. This is a call to arms. Federal Decree Law No. 7 of 2016, an amendment to the Federal Penal Code No. 3 of 1987, provides that Article 257 of the Penal Code now reads:

*Anyone who issues a decision, expresses an opinion, submits a report, presents a case or proves an incident in favor of or against a person, in contravention of the requirements of the duty of neutrality and integrity, **while acting in his capacity as an arbitrator**, expert, translator or fact finder appointed by an administrative or judicial authority or selected by the parties, shall be punished by temporary imprisonment [i.e., 3 – 15 years].*

The aforesaid categories of persons shall be barred assuming once again the responsibilities with which they were tasked in the first instance, and shall be subject to the provisions of Article 255 of this law." *See* Michael Black QC, *Arbitrators to Face Jail in UAE* (29 Nov. 16) (noting that translation supplied by Hasan Arab, Co-Head of Litigation, Al Tamimi & Co.).

This law is true cause for concern. As Michael Black, QC put it "*There is concern that this criminal jurisdiction will be abused, with disgruntled parties making unsubstantiated criminal complaints against arbitrators, prompting unwarranted criminal investigations*." Id. And as Essam Al Tamimi put it "*Arbitrators including myself and the legal community in general are concerned at the prospect of vexatious criminal complaints or threats of such complaints against tribunal members sitting in the UAE*." Essam Al Tamimi, *Don't scare business away, Al Tamimi warns UAE* (06 Dec. 16).

It is deeply troubling and entirely unsatisfying to realize that an arbitrator may face criminal sanctions for attempting to uphold its duty and acting as an arbiter of justice. Even allegations which have little to no factual support, may very well wind up in the hands of a court who does not fully appreciate the subtleties of international arbitration – I admit my skepticism, but note that one UAE court recently decided that England was not a signatory to the New York Convention.

Mr. Al Tamimi goes on to warn that "*a prosecutable offence for arbitrators will create vast scope for losing parties or parties wishing to derail an arbitration to bring or threaten criminal action*." Id. No doubt, losing parties will make these attempts. And herein lies one of my greatest concerns – the combination fatality: UAE law stipulates that arbitrations seated within the UAE require all members of the arbitral tribunal to be physically present in the UAE to sign the award. If an arbitrator does not sign the award within the UAE, the award is at risk of being annulled.

Now, here is the harsh reality: a respondent could file or threaten to file a criminal complaint in the UAE and prevent the arbitrator(s) from obviously wanting to enter the UAE's jurisdiction, thereby preventing the award from being signed by all arbitrators within the UAE. Instead of sticks, the respondent has literally placed an entire log fortress in front of the machine. The sad, sad truth is that this is a tactic at the respondent's disposal.

In the face of the respondent's devilish attempt at derailing the arbitration, do the arbitrators risk not having all members present in the UAE under the limited exceptions to this law? Will the courts understand the games that the respondent has played? Does the arbitrator take the risk and enter the UAE in order to provide justice to the claimant; or does the arbitrator stay clear of the UAE to avoid being possibly sent to jail? How does the local bar in which the arbitrator is a member of consider such allegations and/or the arbitrator's refusal to enter the UAE and face such allegations? Tough questions, among many more, that certainly deserve attention by all of us.

So what is the call to arms, what should we do? Should we simply abandon the UAE as a hub for international commercial arbitration? Should we give up and seek to counsel parties to avoid arbitration at all costs in the UAE? Should we pack up, caravan out and search for higher ground?

No. We should educate. It is our duty as members of this profession to educate and bring light to such dark corners. I am pleased to hear Mr. Al Tamimi note that "*a number of arbitrators and legal practitioners from the UAE, backed by renowned international arbitrators and institutions, have made a plea to the UAE Cabinet of Ministers to review article 257 with a view to swiftly amending or repealing it.*" Id. I suggest that we follow their lead and write, write and write some more. I suggest that we continue to present ourselves as voices of reason, not from the mountain top, but from the land of those who may not understand our perspective. Let us not forget, international arbitration is a very complex subject with subtleties that many of us do not fully understand. It is these same subtleties that nevertheless attract us to this body of law. We must therefore educate if we are to repeal this law. But we educate to furthermore prevent similar laws from taking root. Justice is simply not served otherwise. This is after all the journey that we enjoy.

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