

Anticipated revision to Article 257 of the UAE Penal Code

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Arbitrators have an overarching duty to act fairly and impartially. This is a fundamental aspect of arbitration that arises out of one of the key advantages of the arbitration process, that is, the parties' abilities to select the tribunal or arbitrator.

This duty is commonly enshrined in arbitration laws and institution rules. For example, Article 9.1 of the DIAC Arbitration Rules 2007 provides, "*All arbitrators conducting arbitration under these Rules shall be and remain impartial and independent of the parties; and shall not act as advocates for any party in the arbitration.*" Where doubt exists as to the arbitrator's ability to act impartially, the relevant rules or arbitration laws usually set out a procedure for parties to challenge the appointment of such an arbitrator. Continuing with DIAC as an example, Articles 13.3 and 13.4 of the DIAC Rules set out a process for parties to challenge the appointment of an arbitrator in circumstances that give rise to justifiable doubts as to the arbitrator's impartiality and independence.

In October 2016 the UAE legislative took this duty a step further and criminalised an arbitrator's failure to act objectively. The original wording of Article 257 of the UAE Penal Code imposed criminal sanctions against court appointed experts who acted in a biased and/or prejudicial manner. This provision has been in existence for almost 30 years and has rarely been invoked. The purview of this provision was

amended by Federal Decree No.7 of 2016 which extended the provision to impose criminal sanctions against arbitrators and/ or experts selected by parties in case of bias. Such that, an arbitrator and/ or expert found in violation of Article 257 would be subject to imprisonment for a period of between 3 to 15 years.

The amended Article 257 reads as follows:

“Any person who, while acting in the capacity of an arbitrator, expert, translator or investigator appointed by an administrative or judicial authority or elected by the parties, issues a decision, gives an opinion, presents a report or a case or establishes a fact in favour or against a person, contrary to the duty of objectivity and integrity, shall be punished by temporary imprisonment. The above individuals shall be prohibited from undertaking the assignments commissioned to them again and the provisions of Article 255 of this Law shall apply to them.”

The above amendment understandably led to considerable concern and criticism within the international arbitration community. Arbitrators began to withdraw and refuse appointments as there was a concern that uncooperative respondents would use the threat of criminal sanctions to disrupt arbitration proceedings. This was particularly true with sole arbitrator appointments where arguably it could be comparatively easier to establish bias than against members of tribunals. It is not uncommon for respondents to bring vexatious claims to the extent of filing civil cases against arbitrators who refuse to resign in the face of challenges. Now with possible criminal sanctions, it is not surprising that many refused to partake in the process. However, in practice, we are yet to see a party file criminal proceedings against an arbitrator and/ or a party appointed expert for failure to act objectively. Nonetheless, and for obvious reasons, the provision remains a cause for concern.

In practice, it is unusual for criminal proceedings to be initiated against an arbitrator for failing to act impartially; criminal sanctions are usually imposed against arbitrators in cases of fraud and/ or bribery. Further in the wider international arbitration community such as in the UK, in the event of justifiable doubt as to an arbitrator’s impartiality a party can make an application to the court under section 24 of the Arbitration Act 1996 to remove an arbitrator.

The present arbitration law of the UAE is captured in Articles 203-218 of the UAE Civil Procedure Code, and does not expressly address the issue of impartiality and fairness. However, Article 207 (4) of the UAE Civil Procedure Code allows parties to

challenge appointments for the same reasons that judges may be refused to hear cases. Article 114 of the UAE Civil Procedure Code, sets out circumstances when a judge may be prevented from hearing a case such as for example if the judge is the husband of one of the litigants or a relative or son-in law. By all means Article 114 does not appear to provide an exhaustive list. Therefore, there nonetheless appears to be a void in the existing legislation in this area. It is speculated that the revision to Article 257 was an attempt at closing this void. However, as mentioned above, imposing criminal liability against arbitrators appears more counterintuitive than beneficial. A possible way of closing the gap could be for the issue of impartiality and fairness to be addressed, in harmony with international arbitration best practices, in the much anticipated UAE draft arbitration law.

During the ADGM/ICC conference last year it was suggested that Article 257 may be partially repealed to remove criminal sanctions against arbitrators and/ or experts with such an amendment coming into effect before the end 2017. Thus far nothing further has been said on the subject. Undoubtedly, starting the new year with an amendment to Article 257 will be welcomed by the international arbitration community as many practitioners would be put to ease in accepting arbitrator appointments.