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UAE's Federal Arbitration Law – Another Missed Opportunity?

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On May 3rd, the President of the United Arab Emirates (UAE) signed Federal Law No. 6 of 2018 ('Law') – the nation's first federal arbitration legislation. According to the Federal National Council, this law has been formulated with the objective of maintaining and encouraging inflow of investments, and to comply with the UAE Vision 2021. This is the UAE's third attempt at instituting such a law since acceding to the New York Convention in 2006 and is said to be modeled on the UNCITRAL Model Law on International Commercial Arbitration.

Unlike the previous outings in 2008 and 2013, the law repeals all the provisions of the UAE Civil Procedures Law that had so far governed arbitration in the UAE. However, one aspect of the previous arbitration regime remains, quite conspicuously, unaddressed: Art. 257 of the UAE Penal Code ('Code'). This provision imposes criminal liability on an arbitrator deemed to have issued a decision contrary to the *duty of fairness and unbiasedness*. Punishment under Art. 257 is temporary imprisonment which, as per Art. 68 of the Code, can be anywhere from three to fifteen years.

The Preamble to the Law lists the Code as one of thirteen laws studied before its issuing. This may be interpreted as a reference to Art. 257 as it is the only relevant provision in the Code. Despite this, Art. 60 of the Law, while discussing the legal effect of provisions in conflict with the Law, repeals only the Civil Procedures Law.

Art. 257 – Content, Effects and Application

Art. 257, in its current form, came into effect in 2016, following Federal Law No. 7 of 2016. The pre-amendment Art. 257 imposed criminal liability on court-appointed experts and translators alone. The amendment widened Art. 257 to include arbitrators and experts appointed by judicial or administrative authorities as well as those appointed by the parties themselves.

Aside from a prohibition on undertaking similar responsibilities in the future which remains common to both versions of Art. 257, punishment under the original version was confinement for a minimum period of one year and temporary imprisonment only in criminal cases. The amended version however, directly sentences the individual to temporary imprisonment.

Under the Code, temporary imprisonment has several adverse implications. Art. 28 of the Code notes that temporary imprisonment is imposed only in felony crimes. As a more serious category of offenses, the branding of having committed a felony could have a far more deleterious effect on an arbitrator's future appointments than a fine or disqualification. Art. 78 of the Code further provides

for removal from office of a punishee who is commissioned with a public service. Art. 113 of the Code entitles the Judge to prohibit the punishee from residing in specified places for the period of imprisonment. Any of these associated effects would be especially troubling for non-resident arbitrators.

The scope of Art. 257 is also problematic. The duty of 'fairness and unbiasedness' is not defined under the Code or the Civil Procedures Law. Art. 257 could therefore be extended to include any type of action. For example, under Sec. 33(1)(b) of the English Arbitration Act, an unnecessarily protracted or expensive arbitration could also be interpreted as the tribunal's failure to ensure a 'fair' means of resolution.

Art. 257 is also likely to create confusion in arbitration governed by other rules. For example, General Standard 4 of the IBA Guidelines on Conflicts of Interest in International Arbitration ('Guidelines') allows the parties to appoint an arbitrator whose impartiality is doubted if the parties agree with full knowledge of the alleged impartiality. Thus, in case of arbitrations commenced in the UAE which apply the Guidelines, the arbitrator risks punishment under Art. 257 for reasons known to the parties despite their consent at the time of appointment. Similarly, Art. 22 of the DIFC Arbitration Rules and Art. 24 of the DIAC Statute Rules require proof of intention before holding an arbitrator liable for any act or omission. This is in direct conflict with Art. 257's blanket approach.

International Approach

Internationally, it is uncommon to subject arbitrators to criminal liability. Accordingly, there is very less commentary on the subject. Countries that currently impose penal liability include Germany (German Penal Code, Arts. 331, 332), China (Criminal Law of the People's Republic of China, Art. 339A), Spain (Spanish Criminal Code, Arts. 419-423) and Argentina (Argentine Penal Code, Art. 269). Switzerland (Art. 315 and 316 of the Swiss Penal Code) and Norway (Art. 114 of the Norwegian Penal Code) had similar provisions but these were repealed in 2000 and 2003 respectively.

It is crucial to note that in these countries as well, criminal sanctions apply only in specific instances such as bribery, money laundering or illegal negotiations. China is the only one of the abovementioned states to have opened up criminal liability to cases of "perversion of law and fact" and has, as can be expected, been subject to repeated condemnation as noted here.

Even in these countries, the punishment is not as severe. The maximum sentence out of these countries is in Germany: 10 years for accepting a bribe for performing an unlawful act. Most of these countries also provide differing scales of punishment depending on the gravity of the offense and, in some cases, provides the option of paying a fine in lieu of imprisonment.

Decoding the Legislative Intent

The imposition of criminal liability on an arbitrator does not find any justification under Shari'a or in the civil law countries upon whose laws UAE laws have been modelled. The Medjella, the first civil codification of Islamic Law, provides that in case of flagrant injustice or unfair hearing, the parties' remedy is to set aside the award. Shari'a provides simply for the challenge of an arbitrator before the award is rendered. Similarly, France recognizes only civil liability. Egypt and Jordan also follow suit.

A Practical Conclusion

Since its introduction, no reported case has been brought against any arbitrator under Art. 257. Furthermore, as can be observed from here and here, the courts in UAE require a high standard of proof in case of complaints of impartiality against a judge or arbitrator. Thus far, it is safe to say, Art. 257 has therefore been of very little utility. However, it has caused significant unease in the international arbitration community leading to a reduced preference of the use of UAE law to govern arbitrations. The retention of Art. 257 would therefore significantly undermine the success of the Law and counteract the UAE's attempts to align the nation's arbitration law with international standards.

After weighing the pros and cons, the most reasonable conclusion is that Art. 257 must be repealed. The Law, under Art. 14, specifically provides for the challenge of an arbitrator in cases of justifiable doubts as to their impartiality or independence or qualifications rendering Art. 257 unnecessary. As the Law has already been issued, the best alternative now remains to amend the Law so as to include Art. 257 within the ambit of Art. 60 as well. Alternatively and more effectively, to repeal Art. 257, insofar as it deals with arbitrators, entirely.

Further commentary on the UAE arbitration law can be found here.

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