

No More Penal Sanctioning of Arbitrators and Party-Appointed Experts in the UAE

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With 2018 drawing to a close, the UAE legislature has ushered in a long-awaited amendment to Art. 257 of the UAE Penal Code (see Decree issuing Federal Law No. (24) of 2018 amending certain provisions of the Federal Law no. (3) of 1987 issuing the Penal Code). Readers of Kluwer Blog will remember that that Article was last amended in 2016 to make arbitrators and party-appointed experts criminally liable for an expression of bias over the course of an arbitration process in violation of the prevailing principles of impartiality and fairness (see my previous reporting at Kluwer Blog).

My openly-held view at the time was that the potential effects of this Article should not be overstated and would, in any event, remain limited given in particular that criminal liability under UAE law requires *mens rea* and would therefore only be engaged provided that it could be shown that an arbitrator *knowingly* expressed bias. This means that an arbitrator's criminal liability could only come into play if it was established that he or she had favoured one of the parties to the arbitration with the *intention* of providing an unfair advantage, so the bias had to be proven to have been intentional. As I explained at the time, a qualifying advantage could 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, would require proof 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 would not have been sufficient. Corresponding requirements apply to the application of Art. 257 to party-appointed experts although party-appointed experts could have arguably got into the crossfire of Art. 257 more readily given their role in providing one-sided expertise in support of one of the arbitrating parties only.

Even though it would have been difficult in practice to disqualify an arbitrator or a party-appointed expert in reliance on Art. 257, the Article risked being invoked abusively by unmeritorious parties that are known to make use of guerrilla practices in a local arbitration context. The newly amended Art. 257 provides verbatim 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 punishment shall be temporary imprisonment if the mentioned individuals were assigned to mandate in relation to a felony.

The mentioned individuals shall be prohibited from undertaking the assignments commissioned to them another time, [...].”

As is evident from the wording above, the most recent amendment to Art. 257 excises the reference to arbitrators and party-appointed experts and ensures that going forward, it will no longer apply to these two categories of professionals. This is not only a relief for the locally-active arbitration profession that frequently doubles as arbitrator in UAE-seated arbitrations and experts appointed by parties in arbitral UAE-seated proceedings, but also sends a strong signal to the international arbitration community that the UAE remains a preferential seat of arbitration in the region. The most recent amendment of Art. 257 arrives timely on the heels of the new UAE Federal Arbitration Law (see UAE Federal Law No. 6 of 2018 and my previous reporting at <http://arbitrationblog.kluwerarbitration.com/2018/06/06/uae-federal-arbitration-law>

-adopted-long-last-well-ends-well/), which entered into force with effect from June this year, but missed an opportunity to rectify the anomaly introduced by the 2016 amendment of Art. 257.

It is encouraging to see that the UAE legislature has taken to heart the criticism that was levelled at the 2016 amendment since its publication and took note of the anomaly that the amendment created and the risks it placed on the perception of the UAE as a mature and safe seat of arbitration in the Middle East. The prompt reaction of the UAE legislature to undo the 2016 amendment to reflect best international standards and practice will no doubt be welcomed by both the local and international arbitration profession as an indicator of the UAE's commitment to serving users of arbitration as an investor-friendly and arbitration-experienced seat.