

Changes to UAE Penal Code may Scare Arbitrators away and International Businesses with them

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The ICC UAE national committee has been active in promoting and training arbitrators, and the Chartered Institute of Arbitrators' branch in Dubai has grown to become the fourth largest worldwide and been extremely successful in training and developing arbitrators both in the UAE and the region.

It is no exaggeration to say that the UAE is the region's hub for arbitration and is taking its place among the acknowledged centres worldwide.

All of this is now under threat. International and UAE arbitrators have expressed their deepest concern about the amendment made by Federal Decree Law No. 7 of 2016 to Federal Penal Code No. 3 of 1987, which has recently come into force.

Article 257 of the Penal Code now reads as follows:

"Anyone who issues a decision, expresses an opinion, submits a report, presents a case or proves an incident in favour 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 [ie 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."
[emphasis added]

Arbitrators and legal practitioners have responded to this article with alarm. They perceive it as a severe setback to the development of arbitration in the UAE and the progress it has made towards positioning itself as a global arbitration hub.

A number of arbitrators hearing cases seated in the UAE have already resigned from tribunals and expressed their reluctance to accept appointments in future cases (the law applies to all the emirates, including the Dubai International Financial Centre and Abu Dhabi Global Market freezones).

The arbitrators' concerns are simple: that they may be exposed to vexatious criminal proceedings under article 257.

It is true that in the past there have been parties who, having lost in arbitration, have taken the aggressive step of filing criminal proceedings against arbitrators in the UAE under various pretexts. However, before the recent amendment to article 257, there were no specific grounds to pursue criminal proceedings against an arbitrator who had rendered a decision based on their understanding of the case and the presentations made by each party.

All the cases that have been brought have been closed by UAE prosecutors on the basis that there was no case to answer. Had they proceeded to court, those accused would have found a judicial system very supportive of arbitration and arbitrators.

While I believe prosecutors and the courts will maintain the same attitude to arbitrators and arbitration in general, the new article 257 makes the landscape in the UAE appear very different. 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.

While arbitrators all over the world are obliged to act with neutrality and with integrity, virtually no other country has a provision like article 257, which could lead to arbitrators being jailed as criminals if they are shown to have acted unfairly or with bias. It is almost unheard of for arbitrators to be subjected to criminal proceedings for determining a case unless, of course, there is compelling evidence of fraud or bribery, which, worldwide, is incredibly rare.

In such cases, the UAE Penal Code provides relief to affected parties without the necessity of invoking article 257.

No doubt the changes to article 257 were well intentioned – no one disputes that arbitrators should not act unfairly or with bias. There are, however, two significant problems with it: the language is vague, and the mere possibility of criminal complaints being filed (even if they are subsequently dismissed) is enough to scare arbitrators away.

As regards to the language of the article, there is no pre-existing definition of the words “neutrality” and “integrity” in UAE criminal law and they would seem to have a wide subjective meaning. The words are commonly seen in laws and rules relating to arbitration and in the IBA Guidelines on Conflicts of Interest in International Arbitration, a soft law instrument.

However, to make a failure to show these characteristics 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. Since the definition of the crime is subjective and elastic, it is probable that, in most instances, police or prosecutors would feel obliged to start an investigation, most likely resulting in the suspension of the ongoing arbitration or any enforcement action.

Also noteworthy is that article 257 does not require evidence of positive intention of wrongdoing by the arbitrator – which I believe must have been an error of omission on the part of the draftsman. Compare this with article 22 of the Dubai International Financial Centre’s arbitration law, which states:

“No arbitrator, employee or agent of an arbitrator, arbitral institution, officer of an arbitral institution or appointing authority shall be liable to any person for any act or omission in connection with an arbitration unless they are shown to have caused damage by conscious and deliberate wrongdoing. This article does not affect any liability incurred by an arbitrator by reason of his resigning.” [emphasis added]

One can only imagine the stress and uncertainty arbitrators would suffer while battling to respond to a possibly vexatious allegation of bias that could lead to a three to 15 year jail sentence. Not only would they be subject to criminal investigation, they could also have their passport confiscated. And the mere fact that they were subject to a criminal investigation, however spurious or misconceived, could cause lasting damage to their reputation.

While UAE prosecutors and police are highly qualified and trained and unlikely to pursue a complaint that is not well founded, the mere prospect of arbitrators being subject to investigation is unacceptable to the arbitration community. The risks and consequential hassle – and the pressure it would place on arbitrators – are just too great.

As mentioned, this is why article 257 is already causing some arbitrators to resign from their

appointments, refuse appointments, or insist that the seat of the arbitration be moved somewhere less risky.

For those considering resigning I have a further warning. Arbitrators in the UAE and elsewhere are viewed as judges, nominated by both parties to determine their dispute based on the procedures and law agreed by the parties and applying their best judgement to the case. They should not relinquish this role without first carefully considering their duty to act fairly, in the interests of justice and to avoid unnecessary expense and delay for the parties (which will inevitably occur upon resignation).

Moreover, their concern about the risk of prosecution under article 257 must be balanced against the risk of being held liable for compensation under article 207(2) of the UAE Federal Code of Civil Procedures. Under this article, parties to an arbitration can claim compensation from an arbitrator who resigns without a valid reason and in this context, the UAE courts would be unlikely to hold that the amendment to the penal code constituted a valid reason.

To sum up, article 257 means that the UAE can no longer be considered a desirable place to conduct arbitration and fewer and fewer arbitrators will agree to take up appointments here. Without a viable and effective arbitration system, international companies will feel less comfortable doing business and may go elsewhere. It seems that whoever drafted the amendments to the article – with the best of intentions – did not fully consider its consequences and the grave effect it may have on the UAE arbitration market.

In light of all this, 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. It is within the federal government's power to change the law to cure this problem and to restore the UAE to its rightful place among the top-ranking arbitral centres worldwide. In the strongest possible terms, we politely request them to do so.

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