**United Arab Emirates: UAE Penal Code, Article 257: Arbitrators may now face temporary imprisonment for acting contrary to the duty of fairness and impartiality**

Last Updated: 5 December 2016

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**Introduction**

A fundamental principle of arbitration is that the arbitral tribunal acts fairly and impartially in arriving at its award. But should this mean that an arbitrator should be at risk of criminal prosecution and imprisonment? That is the (possible) consequence of a recent change to the UAE Penal Code, a situation we address in this article.

**The duty of fairness and impartiality**

The fundamental principle has become widely recognised and entrenched in legislation and in many institutional arbitration rules. Not only is fairness and impartiality expressly required, but just as importantly a mechanism is provided to identify issues and also address breaches of the fundamental principle. For example:

* The Dubai International Financial Centre's Arbitration Law of 2008 provides in Article 18(1) that a person approached to be an arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence (this is a continuing obligation). Article 19 sets out the challenge procedure.
* The DIFC-LCIA arbitration rules (effective on and after 1 October 2016), provide in Article 5.3 that all arbitrators shall be and remain at all times impartial and independent of the parties, and none shall act as an advocate for or represent any party. Those rules go on to say that potential arbitrators must provide certain information and a written declaration directed at confirming their independence and impartiality (Article 5.4). Article 10 addresses the removal of an arbitrator for, amongst other things, failing to act fairly and impartially.
* The UNCITRAL arbitration rules (as revised 2010), provide in Article 11 that a person approached to be an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. Article 12 provides for a challenge to an arbitrator if circumstances exist that give rise to justifiable doubts as to impartiality or independence.
* In England & Wales, section 1 of the Arbitration Act 1996 specifically states that the aim of arbitration is the fair resolution of disputes by an impartial tribunal. Section 33(1)(a) of that Act provides that the tribunal shall act fairly and impartially between the parties. A breach of section 33 is a serious irregularity and grounds for challenging an award under section 68. Added to the mix is section 24, which permits a court to remove an arbitrator if circumstances exist that give rise to justifiable doubts as to an arbitrator's impartiality.

Pausing here, and showing that such issues of bias do arise even in jurisdictions with sophisticated arbitration laws, the High Court of England & Wales recently considered section 24 of the Arbitration Act 1996 in **Cofely Ltd v. Anthony Bingham and Knowles Limited**1**.** In that case, Mr Justice Hamblen (as he then was) decided that the facts raised the real possibility of apparent bias by the arbitrator; further, that where there is actual or apparent bias, there is also substantial injustice. The arbitrator, Mr Tony Bingham, therefore resigned.

In return for undertaking the socially and commercially important task of acting as an arbitrator, an arbitrator is said to enjoy (qualified) immunity from claims against him or her in a personal capacity. However, any breach of the fundamental principle of fairness and impartiality would expose the arbitrator to the risk of losing that immunity.

This immunity has more recently been provided by legislation (e.g., section 29 of the Arbitration Act 1996, and Article 22 of the DIFC Arbitration Law), and institutional rules (e.g., Article 31 of the DIFC-LCIA arbitration rules, and Article 16 of the UNCITRAL arbitration rules). However, in the UAE, as in a number of other countries, there is no statutory immunity, and it is not unknown for an aggrieved party to bring proceedings against an arbitrator in the arbitrator's personal capacity.

The UAE does not have a modern statute on arbitration; it is known that one is in draft, and enactment is eagerly awaited by the arbitration community. The present legislation, contained principally in Articles 203 to 218 of the UAE Civil Procedure Code, does not expressly address issues of impartiality and fairness. Legislative support for the arbitration process, and in particular legislative measures to support the integrity of the arbitration process, is to be encouraged.

Our experience is that arbitrators in the UAE seek to apply themselves diligently and properly to the task they have accepted. Credible allegations of a lack of fairness or impartiality are rare. The arbitration bodies in the UAE are now firmly established and their reputations are becoming more widely acknowledged. Their arbitration rules, and those of international institutions that are used in the UAE, address the fundamental principle.

For our part, we are not aware of a particular concern that arbitrators in the UAE are not acting fairly and impartially, or a concern that the commonly used institutional rules, or the DIFC Arbitration Law, are failing on this issue. We are not aware of a failure to act with fairness and impartiality attracting criminal sanctions in any of the leading arbitration jurisdictions.

**The amendment of UAE Penal Code, Article 257**

Against that background, the UAE has recently enacted legislation to enforce an arbitrator's obligations of fairness and impartiality, but not in a manner that was expected. The chosen method is by an amendment2 to Article 257 of the UAE's Federal Law No. 3 of 1987 (**Penal Code**).

Previously, Article 257 was directed only at court-appointed experts and translators, but its ambit has been extended to include arbitrators (as well as 'investigators'). As amended, one translation from the authoritative Arabic text reads:

"An expert, **arbitrator** or translator or investigator who is appointed by a judicial or an **administrative authority** or **elected by the parties**, and who knowingly issue a decision or expresses an opinion or submits a report or presents a cause or proves an incident, in favour of a person or against him, **contrary to the duty of fairness and unbiasedness**, shall be punished by temporary imprisonment3. The aforementioned categories shall be precluded from performing the duties they were charged with in the future.

Provisions of Article (255) of this Law4 shall apply thereto." [emphasis added]

Article 257 thus now extends to an arbitrator, and in particular to an arbitrator:

1. appointed by the court;
2. appointed by an "administrative authority". Does that include, for example, the DIFC-LCIA or DIAC? In our view, it is quite likely to do so; and
3. "elected by the parties". We assume this means those appointed by the parties or a third party acting on behalf of the parties.

Article 257 relies upon the existence of a duty of fairness and impartiality. However, it does not state the source of that duty. This gives rise to a number of questions - does Article 257 itself create such a duty? Does such a duty arise as a general principle of the law of the UAE? Or does it only arise if the arbitration rules set out such a duty or, say, the DIFC Arbitration Law applies? And will the criminal court be called upon to review and examine the merits of the procedure adopted in an arbitration or the arbitration award itself?

The attitude of the police in the seven Emirates comprising the UAE, or the various prosecuting authorities, or the courts, to allegations of an offence against the amended Article 257, is not yet known.

The definitive judicial interpretation of Article 257 by the courts in the UAE will be keenly awaited, but that court process, as with court processes in most jurisdictions, will take time to map out the contours of the new Article 257, not the least given that the UAE is a civil jurisdiction, with a number of separate court systems in various Emirates.

As in most jurisdictions, parties cannot contract out of criminal liability, and so the immunity clauses in legislation and arbitration rules will not protect an arbitrator accused of a crime. In any event, an immunity provision would be most unlikely to provide a defence where the arbitrator has knowingly acted unfairly or has been biased5. But what if the arbitrator was unwittingly guilty of acting unfairly or of bias?

It also remains to be seen how (potential) arbitrators will react to this legislative move, which will be important for the future of arbitration in the UAE. There is already some anecdotal evidence that some arbitrators are now more reluctant to accept, or even continue with, an appointment as an arbitrator in the UAE. Arbitrators will also be concerned that their professional indemnity insurance may not respond to a claim where the insured arbitrator is prosecuted for an alleged "crime".

**Conclusion**

As a general principle, it is right that an arbitrator who acts unfairly or who is biased should not be an arbitrator. Such action can cause immense and unwarranted harm to an innocent party and damage the reputation of arbitration as a means for resolving disputes.

Further, such a person should not be allowed to profit from their misconduct; there should be adverse consequences for it. In most cases the removal of the arbitrator will be the appropriate penalty, as will removal from panels of potential arbitrators held by institutions. A term of temporary imprisonment, following a public prosecution, should (to put it no higher) be an exceedingly rare response.

Given that it is not unknown for a (disgruntled) party to bring civil proceedings against an arbitrator, we would hope that the concerned authorities will be vigilant so as to prevent Article 257 from being used as a weapon to intimidate arbitrators, or re-litigate the dispute. We would hope that prosecutions, if any, are very rare, and only then in extreme cases.

We welcome legislative support for the arbitral process that reflects international practice; the introduction of an updated general UAE law on arbitration would be much welcomed and, with that, if not sooner, the application of Article 257 of the Penal Code looked at afresh.

**Footnotes**

1. [2016] EWHC 240 (Comm). Mr Justice Hamblen now sits in the Court of Appeal.

2. Federal Decree-Law No. 7 of 2016 made on 18 September 2016, which also amends a number of provisions of the Penal Code. The amendment became effective on 29 October 2016.

3. Article 68 of the UAE's Penal Code provides that temporary imprisonment is imprisonment for no fewer than 3 years nor more 15 years.

4. Article 255 of the Penal Code concerns two exemptions where witnesses will be exempt from punishment.

5. Parties cannot agree anything that is contrary to the Penal Code; such an agreement will be null and void. Article 1 of the Penal Code provides, "The Code (law) attached hereto shall apply to all crimes and punishments, and any text contradicting its provisions shall become null and void."