

# Judging the arbitrators

Certain changes written into Article 257 of the UAE Penal Code have been a cause of real concern to many people in the industry, says STUART JORDAN\*.

**A**RBITRATION is something that the construction industry in the Gulf region relies on a great deal. It is not just an afterthought for dealing with disputes.

Right at the start, when the participants are deciding on their investments and the risks they are prepared to hold, access to high quality disputes resolution is an essential part of that thinking. There is no point in contracting parties weighing up these decisions and negotiating contracts carefully if they do not have confidence in the process by which their rights and obligations may eventually be decided.

For many participants in construction projects worldwide, access to arbitration is no different from access to funding or to expertise in engineering: it is essential to the process.

Fortunately for us all, the Gulf region is now a sophisticated and relatively mature centre (or series of centres) for commercial arbitration. In the UAE alone, there are several arbitration centres and there are international institutions actively supporting them. The DIFC-LCIA Arbitration Centre, for instance, is a first-of-its-kind collaboration. This and other centres have been a real success story for the UAE,

helping its reputation as a good place to do business – one which is comparable with the other global commercial centres.

Against this background, some changes to the UAE Penal Code late last year were unexpected and have been a cause of real concern to many people in our industry. Those changes, written into Article 257 of the Penal Code, state the following:

“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.”

This looks tough! I doubt that anyone is taking comfort from “temporary”.

The primary concern is the express threat of criminal sanction against arbitrators. It also targets party-appointed experts, and not just authority-appointed experts.

Of course, arbitrators (like everyone else) have never been immune from prosecution if they commit criminal acts such as the taking of bribes. Acting dishonestly (including making dishonest state-



Jordan ... concerns regarding Article 257.

ments) for material gain is a criminal act everywhere, but is breaching of a “duty of neutrality and integrity” wider than this? Neutrality and integrity are necessary attributes of course, but where does “the duty” arise? As a citizen? In the arbitrator’s terms of appointment? The lack of clarity adds to the worry.

What’s worse is that we all have a good idea about how this will change the dynamic in arbitrations. Let’s remember: this process is adversarial. This is an effective way of excavating the issues and it requires the arbitrator to make judgements (procedural as well as on the substance) which go against one or other party. Any of these can provide ammunition to a party for the later contesting of the award.

Losing parties have always taken opportunities to resist enforcement of an award. That often involves allegations that the arbitration was not handled correctly. The common arguments are that good evidence was not admitted (or inadmissible evidence was allowed), submissions ignored, mistakes made on the law and there was general unfairness or failure to follow the tenets of “natural justice”.



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All this is done not to get the arbitrator in trouble but to avoid enforcement of the award. None of these arguments amounts to an allegation of criminally dishonest actions but they might stray into alleging breach of an undefined “duty of neutrality and integrity”. The threat of this outcome is bound to affect the way arbitrations are handled. How long will it be before submissions start to refer to these magic words “neutrality and integrity” in support of an application to admit late evidence?

The new law is also aimed at others involved in the arbitration process. The main targets are expert witnesses. The previous version of Article 257 was aimed only at court-appointed experts. It sanctioned untruthful evidence and knowingly false interpretations. In other jurisdictions, there are special rules for expert witnesses, both authority-appointed and party-appointed. This recognises the special weight given to their evidence and, of course, they must be honest and objective but the reality remains that expert witnesses are often hired because they are known to hold views or support certain methods which will advantage the party hiring them. These views can be chal-



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lenged but should not, I suggest, be considered somehow criminal.

In the medium term, the real concern about the new law is not about the exposure of individual arbitrators or expert witnesses in some future action – it is the real and present threat to the continuing availability of arbitration as a mainstream disputes resolution process in the UAE. Arbitrators and expert witnesses are likely

to be discouraged from taking up appointments where they perceive undue personal risk to their liberty. Arbitrations on UAE projects, and those subject to UAE law, do not need to be held within the UAE, but that would defeat the purpose of having set up the local arbitration centres in the first place.

The ability of the arbitration process to deliver reliable, high-quality outcomes depends on having people being willing to take on these roles. Arbitrators need to be experienced specialists of the highest competence; and this is already a relatively small pool. For the bigger construction disputes, there are not many people who are known to have the requisite credentials and, as a result, they tend to work globally. None of the world’s major arbitration centres could afford to lose access to the best arbitrators.

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**Nato Regional HQ Building, Kuwait.**

System Used: SG-4-56-FF 4-sided structurally glazed curtain wall with external terracotta screens.  
 Consultant: Dar Al Farooqi Engineering Bureau.  
 Façade Contractor: Premier Metal Systems.  
 Main Contractor: Combined Group Contracting.



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