

The Revision of Article 257 of the Penal Code: A Problem also for Party-Appointed Experts?

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As we have seen in the last few months, the international arbitration community has expressed its understandable concerns and criticisms in relation to the revision of Article 257, especially as regards its implications for arbitrators in the UAE.

What may have gone unnoticed, however, are the implications of the revision to Article 257 for party-appointed experts in arbitration proceedings. This may be because it is assumed that prior to its revision, Article 257 applied to all experts. This is not so. The former version of Article 257 applied only to court-appointed experts.

Article 257 previously stated that “[t]he expert, who, appointed by the judicial authority in a civil or criminal proceeding, asserts a fact that is contrary to the truth or gives knowingly a false interpretation thereof, shall be punishable by confinement for a minimum period of one year.” In its revised form, Article 257 now stipulates that “anyone who [...] submits a report [...] 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 expert] [...] selected by the parties, shall be punished by temporary imprisonment”.

Hence, party-appointed experts in arbitration proceedings may be held criminally liable for any alleged failure to comply with the duty of neutrality and integrity stipulated in the revised Article 257. This is problematic. Generally, parties appoint experts to submit reports in order to support their claims. Thus, the recent revision to Article 257 may expose party-appointed experts more readily to criminal charges, since an obstructive party may claim that the payment by a party to that expert necessarily implies that the expert’s report will be biased in favor of that party.

Indeed, it may be argued that prima facie the payment by any party to its appointed expert in an arbitral proceeding would give rise to that expert issuing a “report [...] in favor of or against a person, in contravention of the requirements of the duty of neutrality and integrity,” since party-appointed expert reports tend to favor the position of their party and contradict the position of the other party. The fact that an expert is appointed and remunerated by a party does not necessarily mean that the expert lacks independence, but the retainer of an expert may give rise to a presumption that the resulting report would contravene Article 257, which obviously would be an unintended consequence of the revision.

Moreover, the scope of the expert’s duties has been extended from not “assert[ing] a fact that is contrary to the truth or giv[ing] knowingly a false interpretation” to not contravening the “the duty of neutrality and integrity” of the expert. UAE law does not define what “integrity” and “neutrality” actually mean. The absence of a definition in the UAE law thus may make it easier for an expert to be wrongly accused of acting of bias in preparing a report for the party that appointed him, even where the expert conscientiously endeavoured to exercise independence in preparing his report. The revision of Article 257, thus, may be abused as an additional ground to disrupt the proceedings. This would also be regrettable.

If the recent revision of Article 257 is to be modified, as urged by the international arbitration community, it is respectfully submitted that not only should arbitrators be excluded from its scope, but also party-appointed experts.

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