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# The Standard of Independence and Impartiality under the Madrid International Arbitration Center Rules and the Spanish Arbitration Law: An Apparent Conflict

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Enforcing standards on the independence and impartiality of arbitrators requires provisions allowing parties to challenge arbitrators. Traditionally, in jurisdictions that have based their provisions on the UNCITRAL Model Law on International Commercial Arbitration (but not only these), such provisions have allowed parties to challenge arbitrators where they have 'justifiable doubts' as to the arbitrator's impartiality or independence (see for example Article 10(1) of the UNCITRAL Arbitration Rules, Article 10.1 of the LCIA Arbitration Rules, and Section 1036 of the German Code of Civil Procedure) A provision in the Arbitration Rules of the recently established Madrid International Arbitration Center ('MIAC'), however, departs from this wording, allowing for challenges based on a "lack" of independence or impartiality. This is in apparent conflict with the wording of the Spanish Law on Arbitration, and the UNCITRAL Model Law and may cause problems with the enforcement of the new provision.

**The Conflicting Provisions**

The MIAC is an arbitral institution established in January 2020. Article 13(1) of its Arbitration Rules, regulating challenges to arbitrators, appears to be based on Article 15(1) Model Arbitral Rules of the Spanish Club of Arbitration (2019) and establishes that:

> 'challenges to arbitrators on grounds of lack of independence, impartiality or any other reasons are to be filed with the Centre in a written submission (…)'.

These two provisions have departed from the wording of Article 17(3) of the Spanish Law on Arbitration (2003), which itself is very similar to Article 12(2) of the UN Commission on International Trade Law ('UNCITRAL') Model Law on International Commercial Arbitration (1985), that states:

> '[a]n arbitrator may be challenged **only** if circumstances exist that give rise to justifiable doubts as to his impartiality or independence (…)' [*emphasis added*].

Therefore, the standard established by Article 17(3) allows arbitrators to be challenged not only where they display evident partiality, but also where circumstances exist that give rise to 'justifiable doubts' about their impartiality. Additionally, the rule is more encompassing and, therefore, more rigorous than a mere 'appearance test', because 'justifiable doubts' about an arbitrator's independence or impartiality can exist even without an appearance of dependence or partiality.

**The Origins of Article 12(2) of the UNCITRAL Model Law**

Tracing the origin of the standard of independence and impartiality enshrined in Article 12(2) of the UNCITRAL Model Law clearly demonstrates that the use of the words 'justifiable doubts' is not random. Its immediate precedent is Article 7(i) of the UN Economic Commission for Europe (UN/ECE) Arbitration Rules for Certain Categories of Perishable Agricultural Products (1979), which established that: 'An arbitrator may be challenged if any circumstances exists which may cast doubt on his impartiality or independence (…)'. In turn, the precedent of this Article 7(i) was the well-known Article 10(1) of the UNCITRAL Arbitration Rules (1976), that stated: 'any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrators impartiality or independence'.

The rule can be traced back even further to: (i) Article III of the ECAFE Arbitration Rules, published by the Centre for Commercial Arbitration of the UN Economic Commission for Asia and the Far East in 1966; and (ii) Article 6 of the UN/ECE Arbitration Rules, prepared by an Ad hoc Working Party on Arbitration of the Committee on the Development of Trade, UN Economic Commission for Europe in 1963, that prescribes:

> 'Either party may challenge an arbitrator… where any circumstance exists capable of casting justifiable doubts on his impartiality or independence.'

The connection between the UNCITRAL Rules and UN/ECE Rules of 1963 is documented, amongst other places, in paragraph 85 of the Report of the UNCITRAL on the work of its sixth session (Geneva, 2-13 April 1973) (A/9017).

Digging deeper, we find that Article 6 of the UN/ECE Rules was not an original piece of work by the UN, but rather was directly inspired by the Draft of a Uniform Law on Arbitration in respect of International Relations of Private Law prepared by the International Institute for the Unification of Private Law ('UNIDROIT') between 1934 and 1954. This connection was recognized by Ambassador Schurmann in his Opening Speech for the UN Conference on International Commercial Arbitration (20 May 1958) (page 3, paragraph 7). The initial drafts of this UNIDROIT Uniform Law already contained a standard that was essentially identical to that contained in Article 17(3) of the Spanish Law on Arbitration. See for example, Article 12 of the Preliminary Draft of an International Law on Arbitration of UNIDROIT (New Redaction) (U.D.P 1935, Etude III, Arbitrage, Doc. 20) or Article 12 of the so-called 'Rome Draft' (U.P.L 1940 – Draft III[1]).

The first expression of the standard can be traced back to 1930, when a twenty-five year old professor at the University of Grenoble, René David, wrote his fundamental 'Rapport sur l'arbitrage conventionnel en droit privé. Etude de droit comparé' (1932) on behalf of UNIDROIT.

On pages 70 and 71 of this 'Rapport' the author outlined the general clause that remains today in Article 12(2) of the UNCITRAL Model Law:

> 'The arbitrator may have a personal interest in the dispute, even only indirect; he can be the parent or ally of one of the parties; he can be his friend, or on the contrary his enemy; he may have already known the litigation or have already given advice on it; he can be the employee; or the presumptive heir, or the creditor of one of the parties: in all these cases and in any other **circumstance which makes the arbitrator's impartiality or independence doubtful, the arbitrator may be challenged** (emphasis added, translation by authors).

On page 71 of his 'Rapport', David acknowledged that Article 5(5) of the Swedish Law of Arbitrators ('Lag [1929:145] om skiljemän') was the inspiration for his provision:

> 'Undoubtedly the best legislative method is contained in the Swedish Law (Article 5,5º) which, after listing various circumstances always allowing a party to challenge an arbitrator, includes -in a general formula- that the challenge is possible for any reason making the arbitrator's impartiality suspect (translation by authors).'

For the sake of clarity, Article 5(5) of the Swedish Law of Arbitrators, dated 14 June 1929, established:

> 'An arbitrator may be challenged: (…) 5. If any special circumstance exists, which is apt to diminish confidence in his impartiality (…) (translation by the authors, from French, page 233 of René David's Rapport).'

**Possible Legal Difficulties when Applying the Standard of the MIAC**

As shown above, the evolution of the standard on the independence and impartiality of arbitrators from the Swedish Law of Arbitrators (1929) to the Spanish Law on Arbitration (2003) indicates that the standard expressed in the latter is not capricious or by chance, rather the result of the work of the UNICITRAL and UNIDROIT. The evolution also demonstrates that the key to the general clause that is Article 12(2) of the UNCITRAL Model Law, lies in 'justifiable doubts', not in appearances; That is equivalent to establishing the rule 'in dubio pro separatione' in a very deliberate way. Article 17(3) of the Spanish Law in Arbitration, itself based on the UNCITRAL Model Law, should be interpreted in the same way.

Article 17(3) of the Spanish Law on Arbitration also establishes a rule that cannot be waived by agreement of the parties. Whilst the legislator left a large margin of discretion to the parties throughout this law, this particular provision is expressed in unequivocal terms, stating:

> ‘An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties.’

Article 13(1) of the new MIAC Arbitration Rules departs from the longstanding tradition behind this standard by requiring a “lack” of independence or impartiality in order for parties to be able to challenge an arbitrator, instead of “justifiable doubts”. Although Article 13(1) also refers to challenges for ‘any other reasons’, this generic expression could refer to the ‘qualifications agreed by the parties’. The provision does not adequately specify the standard to be applied, which on the one hand is too rigid (‘lack of independence or impartiality’) and on the other, too indeterminate (‘any other reason’).

The difference between this rule and that established by Article 17(3) of the Spanish Law on Arbitration could lead to legal difficulties. In proceedings for the annulment of an arbitral award where one of the parties invokes the MIAC Rules, the judge will need to decide whether the agreement between the parties in the form of Article 13(1) of the MIAC Arbitration Rules can override Article 17.3 of the Spanish Law on Arbitration.

In our opinion, given the non-waivable character of the rights established under Article 17(3) of the Spanish Law on Arbitration, Article 13(1) of the MIAC Arbitration Rules cannot override Article 17.3 of the Spanish Law on Arbitration.

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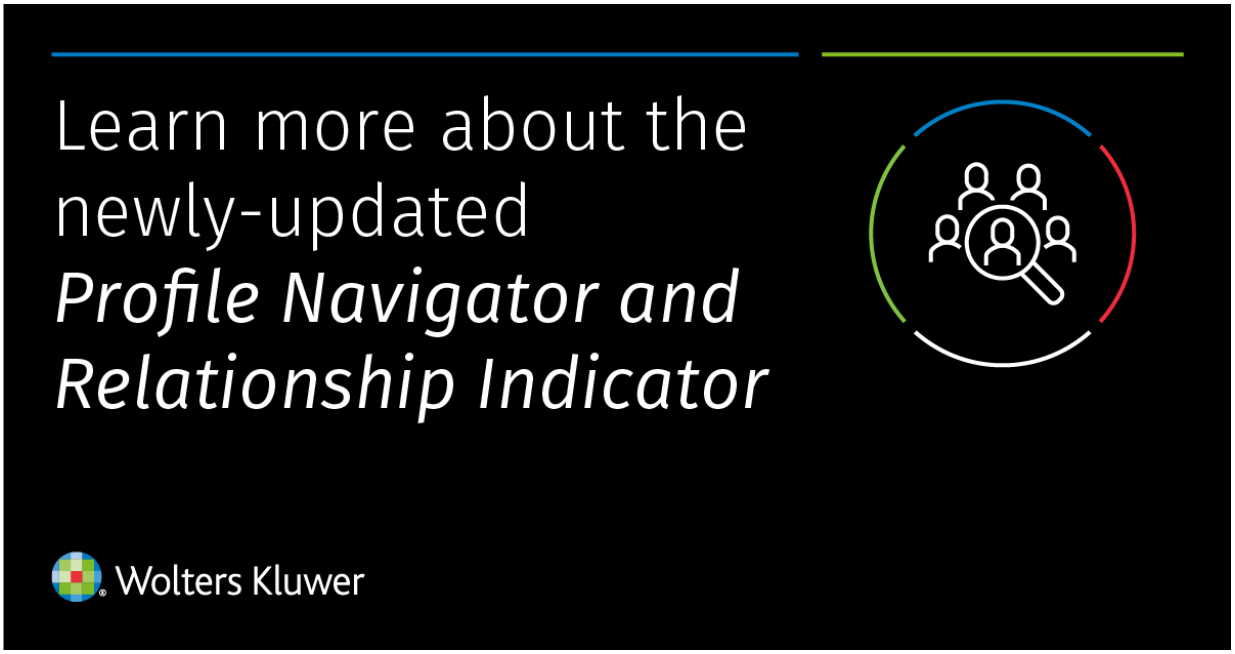


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