Kluwer Arbitration Blog

The Standard Applicable to Arbitrator Challenges under the MIAC Rules

Manuel Penades (King's College London) · Sunday, May 16th, 2021

In a field as competitive as arbitration, international reputation is earned, not created overnight. In 2021, various judgments of the Spanish Constitutional Court (see here, here and here) have done away with some case law by inferior Madrid courts which favoured an expansive review of awards and compromised the finality of arbitration (see here and here). Spain is back on track.

The creation over a year ago of the Madrid International Arbitration Centre (MIAC) further confirms this direction. Built on decades of experience of three well-established Spanish institutions (the Madrid Court of Arbitration, the Civil and Commercial Court of Arbitration and the Spanish Court of Arbitration), the MIAC consolidates the institutional infrastructure that is required to nourish a fertile arbitration ecosystem. The MIAC has an international mission and seeks to exploit Spain's strategic location as a natural bridge between Europe and Latin America as well as Africa. It offers services in multiple languages (Spanish, English, French and Portuguese) and aims to be considered at par with other leading arbitral institutions worldwide. The involvement of well-known names in MIAC's Appointment Committee, the Committee for the Preliminary Examination of Awards and the International Commission (such as Gabrielle Kaufmann-Kohler, Juan Fernández Armesto, Nigel Blackaby or Eduardo Silva Romero) is testament of its pursuit of excellence.

Yet, it is frequently said that an arbitration is only as good as its arbitrators; and it could be added that an institution is only as good as its arbitrations. It is for that reason that the MIAC Rules on appointment, duties and challenge of arbitrators adhere to the high standards followed by other major institutions and epitomised in the Code of Best Practices in Arbitration (2019) of the Spanish Arbitration Club.

This background is relevant to understand the MIAC's rules on arbitrator challenges.

Lack of Independence and Impartiality – A Flexible Approach

According to article 13.1 MIAC Rules:

> *"Challenges to arbitrators based on a lack of independence, impartiality or any other reason are to be filed with the Centre in a written submission that specifies and*

> *substantiates the facts on which the challenge is based."*

A first reading of article 13.1 MIAC Rules could lead to the conclusion that a challenge in a MIAC arbitration will only succeed if supported by evidence that proves "actual" lack of independence or impartiality. This rigid reading, suggested elsewhere on this Blog, seems misconceived.

This post proposes an interpretation of the standard applicable to the challenge of arbitrators based on the high ethical standards and leading practices that inspire the MIAC's endeavours. Standards and practices which do not support limiting the removal of arbitrators only to "actual" lack of independence and impartiality. Instead, it is generally understood that arbitrators may be disqualified when circumstances exist which give rise to "justifiable doubts" as to the arbitrator's lack of independence and impartiality. Article 12.1 UNCITRAL Model Law and many arbitration rules expressly require this threshold (i.e., article 12.1 UNCITRAL Arbitration Rules, article 10.1 LCIA Rules or rule 14.1 SIAC Rules).

The MIAC Rules Adhere to Leading International Practice

The absence of an express reference to that standard in article 13.1 MIAC Rules does not necessarily mean that evidentiary requirements for the removal of arbitrators depart from, or are higher than, common international practice. Various reasons support this conclusion.

From a comparative point of view, article 14.1 ICC Rules equally omits any reference to the applicable standard to arbitrator challenges:

> "*A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based*."

The ICC Secretariat's Guide confirms that the mere reference to "lack of independence and impartiality" in the relevant provision is neither an oversight nor a decision to raise the standard. Rather, it is a voluntary omission to retain flexibility:

> *"The Rules do not provide any guidance on what is to be understood by independence and impartiality. Nor has the Court adopted internal regulations or guidelines on the application of these concepts. While the Court is aware of the importance of consistency in decision making, its main priority is to reach the most fair and effective solution on a case-by-case basis. In this field as in other fields of procedure, flexibility is essential, especially given the different regions and legal traditions involved in ICC arbitration."*[1)]

Indeed, from a functional point of view, the flexibility built into article 13.1 MIAC Rules permits the consideration of the standard applicable under the law and place of arbitration, and avoids

conflicting with them when they are considered mandatory. In fact, the ICC frequently welcomes that information as part of the submissions made by parties in the context of a challenge under article 14 ICC Rules.[2] Similarly, the stage of the proceedings, the quantity and quality of information disclosed by the arbitrator prior to the challenge and even whether the challenged arbitrator was party appointed or not might also impact the institution's approach to the removal of arbitrators. An adaptable framework like the one found in the ICC and the MIAC rules accommodates such flexibility.

This approach is further facilitated by the inclusion of "other reasons" in the text of article 13.1 MIAC Rules (along the lines of "or otherwise" in article 14.1 ICC Rules). While some might find this formulation too indeterminate, the catch-all clause affords parties the possibility to obtain protection of their due process rights when circumstances exist that might sit uncomfortably with a limited reference to the arbitrators' duty to remain independent and impartial throughout the arbitration.[3] For instance, this could include an alleged violation of the obligation to disclose important circumstances relating to the arbitrator's impartiality and independence, as required by article 10.3 MIAC Rules.[4] Precisely because the evidentiary value of a failure to disclose in the context of an alleged lack of independence and impartiality remains a controversial question (see, for instance, the judgment of the UKSC in *Halliburton v Chubb*, paras. 117-118), the absence of a rigid standard in article 13.1 MIAC Rules, combined with the reference to "other reasons", allows the MIAC to calibrate the test in light of the circumstances.

In addition, one would imagine that, in giving specific content to the rules on challenges, the MIAC will frequently resort to the standards set by the IBA Guidelines on Conflicts of Interests. While not binding on the Centre and applicable to disclosure rather than challenge, the Guidelines offer valuable assistance in any scenario where the impartiality and independence of arbitrators are doubted. Practice under leading arbitration rules such as the ICC, SCC or UNCITRAL confirms the frequent reliance on the IBA Guidelines[5] and there is nothing to doubt that the MIAC will act any differently.

It is precisely for these common practices that previous comparative studies have concluded that reported disqualification decisions made under arbitration rules which do not clearly spell out the threshold applicable to arbitrator challenges, such as the ICC, are in line with decisions under the UNCITRAL and SCC Arbitration Rules, which explicitly stipulate a justifiable doubts threshold,[6] so that "challenges based on comparable circumstances are not adjudicated more strictly across the board when a justifiable doubts threshold is applied".[7]

Finally, the fact that the standard of "justifiable doubts" is expressly referred to in the context of the arbitrators' duty to disclose (article 10.2 MIAC Rules) vis-à-vis the less precise terminology in article 13 is not conclusive that a higher standard is applicable to challenge applications. The distinction is motivated by the willingness of the institution to adopt the most appropriate decision in each case.[8] To that end, a precautionary standard is applied to the duty to disclose so that parties, co-arbitrators and the institution are informed about all the relevant circumstances that can potentially compromise the arbitrators' independence and impartiality, thereby avoiding the potentially high costs and significant delays associated with challenges. The rule on removal of arbitrators, in contrast, voluntarily omits the standard so that the appropriate decision, in more or less precautionary terms, can be adopted depending on the circumstances.

Conclusion

In conclusion, the MIAC Rules do not establish a higher evidentiary threshold for the successful challenge of arbitrators than the rules of other leading institutions. Nowhere can it be found that the ethos of the MIAC, and those in command thereof, would be satisfied with anything less than complete independence and absolute impartiality. The adaptable framework of the MIAC Rules permits the application of a justifiable or reasonable doubts test when the circumstances so require and is the most effective solution to earn the confidence of MIAC's users and to contribute toward the legitimacy of arbitration.

References

?1 *The Secretariat's Guide to ICC Arbitration*, 2012, para. 3-373.

?2 *The Secretariat's Guide to ICC Arbitration*, 2012, para. 3-560.

?3 This is also achieved through the addition in article 10.1 MIAC Rules of the requirement that arbitrators, besides remining impartial and independent, "cannot maintain any personal, professional or commercial relationship with the parties".

?4 The same applies in ICC Rules. See Herman Verbist, Erik Schäfer, et al., *ICC Arbitration in Practice*, 2nd edition, Kluwer Law International, 2015, p. 90.

?5 Karel Daele, *Challenge and Disqualification of Arbitrators in International Arbitration*, Kluwer Law International, 2012, paras. 5.100-105; and Catherine Rogers, *Ethics in International Arbitration*, para. 2.86. For the specific case of the ICC, see *The Secretariat's Guide to ICC Arbitration*, 2012, para. 3-374.

?6 Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions*, Brill, 2017, p. 143.

?7 Maria Nicole Cleis, *The Independence and Impartiality of ICSID Arbitrators: Current Case Law, Alternative Approaches, and Improvement Suggestions*, Brill, 2017, p. 185.

?8 The Prologue of the IBA Guidelines on Conflicts of Interest in International Arbitration, p. iii, recognises expressly that "the standard for disclosure differs from the standard for challenge".

This entry was posted on Sunday, May 16th, 2021 at 8:43 am and is filed under Arbitration Institutions and Rules, Arbitrator Challenges, MIAC, Spain
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.