

TIMELINESS LIMITATION OF RIGHT TO CHALLENGE ARBITRATOR: SEARCHING FOR CONSTRUCTIVE AWARENESS

ОБМЕЖЕННЯ СТРОКІВ ДЛЯ ЗАЯВЛЕННЯ ВІДВОДУ АРБІТРУ: В ПОШУКАХ КОНСТРУКТИВНОЇ ОБІЗНАНОСТІ

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The article addresses the issue of determining when a party becomes aware of circumstances that raise doubts about the independence and/or impartiality of an arbitrator. This moment is of significant importance, as it marks the beginning of the period during which the relevant party has the right to challenge the arbitrator.

There are two standards of awareness: actual awareness and constructive awareness.

The standard of actual awareness requires that the party challenging the arbitrator must have actually discovered the grounds for the possible challenge. However, the party is not necessary to search for information about such grounds independently.

It has been argued that the standard of actual knowledge no longer meets today's needs due to three factors: (1) widespread access to the Internet, (2) the popularity of social networks, and (3) the emergence of artificial intelligence.

In contrast, the standard of constructive awareness provides that a party is considered to be aware not only when it has actually discovered the relevant circumstances, but also when it could have learned of them by exercising reasonable due diligence. And the party is obliged to take reasonable measures to search for information about such circumstances.

It has been noted that over the past five years, the standard of constructive awareness has gradually gained recognition in arbitration laws and rules.

It has been established that the UNCITRAL Arbitration Rules of 1976/2010 enshrine the standard of actual knowledge. With reference to relevant arbitration practice, the author refutes the alleged advantages of this standard.

The practice of US and Swiss courts is illustrated, proving that (1) the standard of constructive awareness is relatively more effective in preventing abuse of the right to challenge, (2) a party is obliged to take measures to search for information about conflicts of interest, including on the Internet, but at the same time (3) the mere availability of information about a possible conflict of interest on the Internet does not mean that the party could have found it.

Based on the practice of the European Court of Human Rights, it has been established that Article 6 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms may permit the application of the constructive knowledge standard with respect to publicly available information.

It has been concluded that, given the increasing availability of information, the standard of actual knowledge must give way to the standard of constructive knowledge.

Key words: challenge to an arbitrator, actual knowledge, constructive knowledge, duty to take reasonable steps to search for information.

Статтю присвячено проблемі встановлення моменту, коли сторона стає обізнаною про обставини, які ставлять під сумнів незалежність та/або неупередженість арбітра. Цей момент має істотне значення, оскільки від нього починає перебіг строк, протягом якого відповідна сторона має право заявити відвід арбітру.

Виділяють два стандарти обізнаності: реальна обізнаність та конструктивна обізнаність.

Стандарт реальної обізнаності вимагає, щоб сторона, яка заявляє відвід арбітру, дійсно дізналася про підстави для можливого відводу. При цьому від сторони не вимагається самостійно здійснювати пошук інформації про такі підстави.

Висловлено думку, що стандарт реальної обізнаності перестає відповідати потребам сьогодення з огляду на три фактори: (1) поширення доступу до мережі Інтернет, (2) популярність соціальних мереж, та (3) виникнення штучного інтелекту.

Натомість стандарт конструктивної обізнаності передбачає, що сторона вважається обізнаною не лише тоді, коли вона реально дізналася про відповідні обставини, але ще й тоді, коли вона могла про них дізнатися, застосовуючи розумну обачність. І сторона зобов'язана вживати розумні заходи щодо пошуку інформації про такі обставини.

Відмічено, що за останні п'ять років стандарт конструктивної обізнаності поступово отримує своє визнання в арбітражних законах та правилах.

Встановлено, що Арбітражні правила ЮНСІТРАЛ 1976/2010 років закріплюють стандарт реальної обізнаності. З посиланням на відповідну арбітражну практику автором спростовано обґрунтування переваги цього стандарту.

Проілюстровано практику судів США та Швейцарії, яка доводить, що (1) стандарт конструктивної обізнаності порівняно ефективніше попереджає зловживання правом на заявлення відводу, (2) сторона зобов'язана вживати заходи для пошуку інформації про конфлікт інтересів, в тому числі в мережі Інтернет, але при цьому (3) сама лише доступність інформації про можливий конфлікт інтересів в мережі Інтернет не означає, що сторона могла її знайти.

На основі практики Європейського суду з прав людини визначено, що стаття 6 Конвенції про захист прав людини і основоположних свобод 1950 року може допускати застосування стандарту конструктивної обізнаності щодо інформації, яка є публічно доступною.

Сформульовано висновок, що з огляду на зростаючу доступність інформації стандарт реальної обізнаності має поступитися стандарту конструктивної обізнаності.

Ключові слова: відвід арбітру, реальна обізнаність, конструктивна обізнаність, обов'язок вживати розумні заходи щодо пошуку інформації.

One of the exigencies of a fair trial is that the deciding body, including international commercial arbitration, is both impartial and independent [1, p. 302]. To ensure observance of this principle, a party to arbitration proceedings is entitled to bring a challenge against an arbitrator, seeking their removal from the position. Julian D. M. Lew, Loukas A. Mistelis and Stefan M. Kröll call the right to challenge, as well as a relevant procedure, “*a built-in insurance to safeguard the arbitration process*” [1, p. 301].

Naturally, the right to challenge an arbitration is subject to specific requirements. One of them is the timeliness limitation. Most arbitration statutes, as well as arbitration rules, require that such a challenge be raised promptly or within a specified time period [2, p. 1576]. Otherwise, a right to challenge shall be waived.

For example, Article 13(2) of the UNCITRAL Model Law on International Commercial Arbitration 1985 provides for a 15-day time limit [3]. The same time limit is envisaged in relevant laws of Bulgaria, Georgia, Hong Kong, Kenya, Singapore, Spain, Sweden, Ukraine and others.

The purpose of the timeliness limitation is to maintain procedural certainty of the arbitral process and to ensure that parties do not use challenges as a tactical tool to delay or disrupt the arbitration process at any suitable moment.

The time limit for challenging an arbitrator starts running upon the following alternative dates: (1) the date of an appointment of a relevant arbitrator, or (2) the date when the challenging party becomes aware of the facts on which the challenge is based.

The first date for bringing the challenge emerges on the stage of the formation of an arbitral tribunal. It depends on a formal notification of the appointment of a respective arbitrator.

The second date for bringing the challenge may occur at any point in time throughout the whole duration of the proceedings up until the date of the award. It depends solely upon the moment when the challenging party becomes aware of facts which may put in question the arbitrator’s impartiality and/or independence. The challenging party’s awareness, therefore, depends on the information it may receive on its own or on a notification from a third party.

Based on the above, it is apparent that the second date raises several questions regarding when a party may be considered aware of relevant information and whether the party is required to seek this information independently.

Standards of Awareness

The author distinguishes two main standards of awareness that are applied in the context of the party’s right to challenge an arbitrator: actual knowledge and constructive knowledge.

The actual knowledge standard requires a challenging party to be genuinely aware of the necessary information that could raise potential conflicts for arbitrators, rather than to be presumed to know it. It secures a party’s right to challenge an arbitrator, unless it can be proven that the party actually discovered relevant facts on a specific date and the applicable time limit has expired.

This standard may be considered traditional, given that it is applied with regard to the state judges and commercial arbitrators in the vast majority of jurisdictions. It benefits a party whose ability to investigate possible conflicts of interest may be limited due to financial, geographical or other reasons. And, most importantly, it prioritises the right of a party to secure that the arbitral tribunal is impartial and independent over the certainty of the proceedings.

For example, Article 13(2) of the UNCITRAL Model Law on International Commercial Arbitration 1985 fixes the actual knowledge standard by setting a time limit of “*fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance*”, which gives rise to justifiable doubts as to an arbitrator’s impartiality or independence [3].

At the same time, the actual awareness standard allows a party to abstain from searching for information that could put in doubt the arbitrator’s impartiality and/or independence.

However, over the several past decades the global society underwent at least three significant changes: (1) spread of the global system of Internet, connecting users all around the world, (2) popularity of online social networks, encouraging people to connect and to share both professional and personal information voluntarily, and (3) emergence of artificial intelligence tools that may process massive volumes of data. In these circumstances, when a party can obtain information on a potential conflict of interest through a quick check via the Internet, it seems unfair that such a party can rightfully abstain from or postpone making a respective investigation until some future moment. As a consequence, the effectiveness of the actual knowledge standard may be called into question.

An interesting example is given in the *Decision on the Respondent’s Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuna as Co-Arbitrator*, rendered on 30 September 2013 in *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. The Republic of India*, where the claimant stated that the actual knowledge standard was “*unworkable and risky*” [4]. According to the claimant, this standard allowed a party’s legal counsel to refrain from informing their client “*of circumstances giving rise to justifiable doubt at any stage in the proceeding, permitting a party to present a challenge without regard to the egregiousness of counsel’s strategic maneuver*” [4].

Being opposite to the actual knowledge standard, the constructive knowledge standard is a legal fiction, according to which a party is presumed to be aware of relevant facts that it should have known by exercising reasonable care or diligence.

Under the constructive knowledge standard, a party is put under a duty to exercise reasonable care with regard to accessible information that could shed light on the arbitrator’s bias or non-independence. This duty is frequently referred to as the duty to investigate, the duty of curiosity, the duty of reasonable care, and/or the duty of due diligence. And the date when the party should have obtained relevant information triggers the running of the applicable time limit for bringing a challenge against an arbitrator.

Unlike the actual knowledge standard, the constructive knowledge standard prevents the party from intentionally abstaining from searching for information that could prove a conflict of interest. At the same time, it significantly complicates the task of an appointing authority/decision-maker – the task is to establish whether a challenging party could/should have become aware of the arbitrator’s alleged conflict of interest, taking into account all the circumstances of the case, including the degree of accessibility of relevant information.

To assess the peculiarities of application of the constructive awareness standard, further reference is made to selected practices.

Standard of constructive knowledge in arbitration laws and rules

The standard of constructive knowledge is rarely used, but it is getting more and more recognition in arbitration laws and rules. A few examples are given below.

In 2021, Article 180a(1) was introduced in the Swiss Private International Law Act, setting a default rule that the request for a challenge of an arbitrator shall be served “*within 30 days of the requesting party becoming aware, or exercising due diligence ought to have become aware, of the ground for challenge*” [5].

In 2022, the new version of ICSID Arbitration Rules entered into force, where Article 22.1(a-ii) provided that a party may bring a challenge against the arbitrator within 21 days after “*the date on which the party proposing the disqualification first knew or first should have known of the facts on which the proposal is based*” [6]. Likewise, the 7th edition of SIAC

Arbitration Rules fixes a similar rule in Article 27.1(b) with an added reasonableness requirement – “*should have reasonably been known*” [7].

Notably, on 25 May 2024, IBA Council approved the new version of Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines”), where the General Standard 4(a) was updated to include the parties’ duty to conduct a “*reasonable enquiry*” into facts and circumstances that could raise potential conflicts for arbitrators [8]. According to relevant Commentary, this update “*reflects case law in some jurisdictions, holding that parties are expected to show some level of ‘curiosity’ when conducting their due diligence on arbitrators*” [9]. It also specifically clarified that “*simple enquiry across media publications and social networks may satisfy*” the reasonable enquiry requirement [9].

UNCITRAL Arbitration Rules

Article 11(1) of UNCITRAL Arbitration Rules 1976 and Article 13(1) of UNCITRAL Arbitration Rules 2010 both provide that a party may bring a challenge after relevant circumstances “*became known*” to that party [10, 11]. According to the commentary by David D. Caron and Lee Caplan, this provision embodies the actual knowledge standard; otherwise, it would include the phrase “*should have known*” or “*ought to have known*” [12, p. 398].

It is notable that in 2008, the Working Group on revision of UNCITRAL Arbitration Rules 1976 considered employing the constructive awareness standard, but eventually rejected it for the following reasons [13]:

- 1) it would put the appointing authority, deciding on a challenge, “*in the situation where it had to determine whether the challenging party ought to have known the grounds for challenge at an earlier stage of the procedure, a determination that would suppose inquiries that might be impractical for the appointing authority to perform*”;

- 2) parties may feel compelled to bring challenges prematurely, in order “*to avoid foreclosure effect of the provision*”;

- 3) it may lead to inconsistencies with other provisions of the Rules, “*for instance, article 30 on waiver to object, which was based on a concept of actual knowledge*”.

In the author’s view, the above arguments, though having certain merits, are unconvincing for the following reasons:

- (1) whereas the constructive awareness standard facilitates certainty in arbitration proceedings and ensures procedural equality of the parties, it should justify the alleged “*situation*” in which an appointing authority is placed;

- (2) the risk of provoking parties to bring challenges “*prematurely*” is counterbalanced by decreasing the risk of an abuse of a right to challenge an arbitrator;

- (3) there is no issue with incorporating the constructive awareness standard into other provisions of the Rules, including Article 30 thereof.

Another argument against the constructive awareness standard was raised in the *Decision on the Challenge to Mr. J. Christopher Thomas, QC*, rendered on 14 October 2009, in *Vito G. Gallo v. Government of Canada*. The appointing authority, Mr Nassib G. Ziade, was sceptical about the respondent’s attempt to refer to the constructive awareness for the reason that “[a]llowing the Respondent to invoke evidence of constructive knowledge (even if reasonably proved) would relieve the arbitrator of the continuing duty to disclose” [14].

However, the abovementioned argument has been disproven by the abovementioned IBA Guidelines, which put the duty to perform “*reasonable enquiries*” on the parties to the proceedings and on an arbitrator (General Standard 7(b and d)) [8].

Importantly, in the same decision Mr. Nassib G. Ziade explained the allocation of burden of proof regarding the compliance with timeliness limitation as follows: “*While the Claimant as the party raising the challenge must show that justifiable doubts exist as to the arbitrator’s impartiality or independence, the burden of proving that the Claimant*

knew of relevant circumstances more than fifteen days prior to bringing the challenge falls upon the Respondent” [14]. Whereas in the majority of possible scenarios the claimant would be the only entity possessing accurate information and/or evidence on the date of actual awareness of an alleged conflict of interest, it is almost impossible for the respondent to discharge its burden of proof. As a consequence, the whole purpose of the timeliness limitation is set at naught.

Instead, under the constructive awareness standard, the respondent is only required to prove that the claimant could have accessed relevant information had they performed reasonable due diligence. Discharging this kind of burden becomes possible.

Interestingly, there is an example when the appointing authority deviated from a rigid application of the actual awareness standard. Reference is made to the *Decision on Challenges to Arbitrators Professor Kaj Hober and Professor Jan Paulsson*, rendered on 6 October 2024 by the appointing authority, Mr Hugo Hans Siblesz, in *Valeri Belokon v. The Kyrgyz Republic*. With regard to the challenge against Professor Kaj Hober, the appointing authority decided that “[t]he Respondent having provided no information as to when it became aware of the relevant circumstances, I can only assume that these circumstances became known to the Respondent around the time when information regarding them became publicly available” [15]. In effect, this assumption is typical for the constructive awareness standard.

Practice of U.S. Courts

A landmark decision on the issue of applicable awareness standard was made in 2004 by the US Court of Appeals, Ninth Circuit, in the case of *Fidelity Federal Bank, FSB v. Durga Ma Corporation*.

In the case above, during the formation of an arbitral tribunal, Fidelity Federal Bank, FSB (“Fidelity”) was put on notice that one of the arbitrators, Mr Alton Leib, might have connections with Durga MA Corporation and/or its attorneys [16]. However, Fidelity refrained from requesting Mr Lieb to make a disclosure. After the award on merits was rendered in favour of Durga Ma Corporation (“Durga”), the latter served a request for attorney’s fees and costs and disclosed the attorney’s time record, evidencing their ex parte communications with Mr Lieb. Following Fidelity’s request, Mr Lieb disclosed that he had previously had personal and business relations with the attorneys of Durga. As a consequence, Fidelity served a motion to vacate the arbitral award before the District Court. The District Court denied the motion, so Fidelity brought the matter before the Court of Appeals.

The Court of Appeals applied the constructive awareness standard and held that Fidelity waived its right to seek vacatur of the arbitration award, because “*Fidelity had constructive notice of the arbitrator’s potential connections to the Durga Ma attorneys but did not object to the arbitrator’s appointment [...] until after an interim award was entered in favor of Durga Ma*” [16].

When arriving at its decision, the Court of Appeals established and studied the practice of US federal courts, some of which applied the actual awareness standard, whereas others applied the constructive awareness standard. The Court concluded as follows [16]:

- (1) establishing the party’s waiver of its right to challenge an arbitrator based on the constructive awareness standard “*is the better approach in light of our policy favouring the finality of arbitration awards*”, and

- (2) placing the parties under a duty to obtain disclosure statements from arbitrators that could have potential conflicts of interest “*is consistent with our policy favouring the finality of arbitration awards*” and “*favouring arbitration as a speedy and cost-effective means of resolving disputes*”.

In the author’s view, the Court’s conclusions suggest that the constructive awareness standard is perceived as more effective in preventing parties from abusing their rights to

challenge arbitrators to delay proceedings or even set aside the award.

The the author's interpretation is reinforced by the U.S. Court of Appeals for the Third Circuit in *Goldman Sachs & Co v. Athena Venture Partners*, which treated the constructive awareness standard favourably because it "encourages parties to conduct adequate due diligence prior to issuance of the award" and it allows a party to challenge an arbitrator "when it had no way of discovering the arbitrator's bias beforehand" [17].

Practice of Swiss Courts

The standard of constructive awareness has been embodied in the Swiss arbitration law and court practice. The most widely known decision on this issue is *WADA v. Sun Yang and FINA*, rendered by the Swiss Supreme Court on 22 December 2020. In that case, among other things, the Court was asked to decide on the scope of the challenging party's duty of curiosity with regard to information on the arbitrator's alleged bias, that was discovered by the challenging party after the completion of the arbitration proceedings [18]. Conclusions of the Court may be briefly summarised as follows [18].

(1) the contours of the duty of curiosity are difficult to define and depend on the circumstances of each particular case;

(2) the parties are indeed required to carry out investigations regarding potential conflicts of interest, particularly on the Internet;

(3) at the same time, the parties cannot be expected to carry out a systematic and thorough examination of all sources relating to a particular arbitrator;

(4) while the data on freely accessible websites can be easily accessed, this does not mean that such information is always easily identifiable;

(5) the mere fact that certain information is freely available on the Internet does not necessarily mean that the challenging party, which was unaware of it despite its investigation, failed to comply with its duty of curiosity.

Interestingly, the above conclusions of the Court may be reversed in the future, when investigations on the Internet are conducted with artificial intelligence tools.

Practice of the European Court of Human Rights

The potential application of the constructive awareness standard was evaluated by the European Court of Human Rights ("ECHR") in *BEG S.p.A. v. Italy*.

The case emerged out of the arbitration proceedings, held under the auspices of the Arbitration Chamber of the Rome Chamber of Commerce, where one of the arbitrators, Mr N. I., had had professional ties with the party – Enelpower [19]. The legal representative of the other party – BEG S.p.A.

("BEG") – discovered this fact accidentally (while talking with third parties during a conference) a few days before the release of the arbitral award. BEG brought a challenge against Mr N. I., which was dismissed due to an alleged breach of the timeliness limitation. Later, Italian courts refused to set aside the award, concluding, among other things, that it was pretty unlikely that BEG had not been aware of the professional activities of Mr N. I.

The ECHR found Italy to be in breach of the right to a fair trial under Article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("European Convention"). In particular, the Court found that decisions of Italian courts were "based on a presumption of knowledge which does not rest on any concrete evidence to the effect that the applicant was in fact aware of the professional activities of N.I.". As a consequence, the Court concluded that no facts were demonstrated "from which it could infer the unequivocal waiver of the requirement of impartiality in respect of the arbitrator" [19].

Although the ECHR was critical of establishing a presumption of awareness in the absence of any concrete evidence, its position cannot be extended to situations where information regarding a potential conflict of interest is publicly available and/or freely accessible on the Internet. The Court were not asked about the effect of a party's breach of its duty of curiosity on the compliance with timeliness limitations related to the right to challenge an arbitrator. Therefore, the author is of the view that Article 6.1 of the European Convention retains the space for a rightful application of the constructive awareness standard.

Conclusion

Based on the above, the standard of constructive awareness is relatively more efficient in both ensuring the right to challenge an arbitrator and ensuring the certainty and predictability of the arbitration proceedings. It prevents the challenging party from abusing its relevant right and lowers the standard of proof for the opposing party regarding the date of the challenging party's awareness.

Therefore, in the author's view, the standard of constructive awareness should gradually replace the standard of actual awareness in arbitration laws, rules and practice.

At the same time, the standard of constructive awareness must not operate as a blanket presumption. To be compatible with the European Convention, it must be based on evidence, taking into account all relevant circumstances of each particular case. In particular, the very accessibility of information on the Internet cannot be taken as sole proof that a challenging party should have known it or that it had failed to perform its duty of due diligence properly.

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