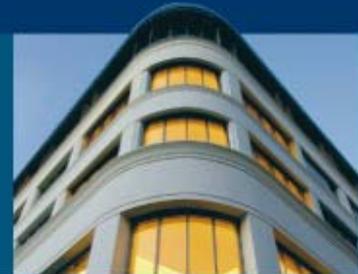


# Annulment proceedings – a comparison between Switzerland and the UK

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LALIVE

# Introduction – Legal framework and most important differences

- **Switzerland:** PILA, FTA
  - One instance only (Swiss Federal Tribunal)
  - No review of law/merits (or only very indirectly via violation of public policy or due process rights)
  - Foreign parties can waive right of appeal
- **England:** EEA, CPR, RSC Order 73
  - Three possible instances (High Court, Appeals Court, House of Lords)
  - Review of English law (appeal on a point of law, s.69 EEA)
  - Parties can only waive appeal on point of law

# Procedural Requirements

- **Similar object of challenge**
- **Similar standing requirements**
- **Slightly different deadlines and application requirements**
  - Switzerland: 30 days, no extension
  - England: 28 days, extension possible
- **Different numbers of instances for Challenge**
  - Switzerland: one instance only (Swiss Federal Tribunal)
  - England: three instances (High Court, Court of Appeals, House of Lords)
- **Differences in Waiver of Challenge**
  - Switzerland: only foreign parties can waive, waiver has to be express, regarding all or limited grounds
  - England: only regarding appeal on point of law, express and implied

# Grounds for challenge

## Switzerland (Art. 190 PILA)

- Lack of jurisdiction
  - Incorrect constitution of tribunal
  - Award *infra/ultra petita*
  - Violation of due process
  - Violation of procedural public policy
  - Violation of substantive public policy
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- New evidence and crime affecting award (*Révision*)

## England

- Lack of jurisdiction (s.67 EEA)
- Serious irregularity (s.68 EEA)
  - Failure to comply with general duties of due process
  - Excess of power (not jurisdiction)
  - Breach of agreed procedure
  - Award *infra petita*
  - Excess of powers of institution
  - Ambiguity of award
  - Fraud affecting award
  - Deficiency of form
  - Irregularity admitted by tribunal.
- Error of English law (s.69 EEA)

# Briefing, Pleading & Duration

## ■ Switzerland

- In writing, German/French/Italian, tribunal can submit comments
- Swiss counsel or “baby-sitting” by Swiss counsel
- Rule is one round of pleadings; no oral proceedings, rarely public deliberations
- Duration of appeal procedure: on average 5 months

## ■ England

- In writing (Affidavits, “skeleton arguments”), English, Affidavits from tribunal possible
- English counsel (Barrister, Solicitor Advocate with permission to appear)
- “One-and-a-half” rounds (rebuttal affidavit by applicant), oral but private hearing (however, proceedings for leave in writing; appeal on point of law is public)
- Duration of appeal procedure: can be much longer than in Switzerland (because of 3 instances and leave proceedings) but recently also only 3 months

# Remedies

## ■ Switzerland

- Rule: award can be upheld, annulled and is remitted to the tribunal for reformulation/reconsideration (*effet cassatoire*)
- Only in extraordinary circumstances is there no remission (lack of jurisdiction, lack of independence/bias of tribunal)
- No stay of arbitration or enforcement, and if so, only in very exceptional cases (TAS arbitrations), if it can be shown that the challenge has good chances of success and that there is a danger of irreparable harm

## ■ England

- Award can be upheld, remanded to tribunal (ordinary remedy) or varied and set aside (extraordinary remedy)
- Remission is the rule in case of serious irregularity or error of English law, unless inappropriate or not useful (“award cannot be saved”)
- No remission in case of lack of jurisdiction or bias
- No stay of arbitration in case of challenge of jurisdiction

# Procedural Questions

## ■ Similar Scope of Review

- Review is limited to submissions made by the parties and facts as established by tribunal
- Review of fresh evidence only in exceptional circumstances (relevance, relating to facts prior to award, evidence impossible to obtain prior to award)

## ■ Costs and Security for Costs

- Switzerland: (advance) court costs up to CHF 100'000; request for security for costs possible if applicant is insolvent or without domicile in Switzerland
- England: small filing fee; court fees depend on court; request for security for costs possible but foreign domicile of applicant cannot be basis

# Selected Bibliography

- Hans Peter Walter, Praktische Probleme der staatsrechtlichen Beschwerde gegen internationale Schiedsentscheide (Art. 190 IPRG, ASA Bull. 2001, 2-20)
  - Bernard Corboz, Le recours au Tribunal fédéral en matière d'arbitrage international, SJ 2002, 1-32
  - Cesare Jermini, Die Anfechtung der Schiedssprüche im internationalen Privatrecht (1997)
  - Sébastien Besson, Le recours contre la Sentence Arbitrale Internationale selon la Nouvelle LTF (Aspects Procéduraux), ASA Bull. 2007, 2-35
- 
- Report on Arbitration Bill 1996 and Supplementary Report on the Arbitration Act 1996 of the Departmental Advisory Committee (DAC Report I and DAC Report II)
  - Anthony Diamond & V.V.Veeder, The New English Arbitration Act 1996, Challenging an English Award before the English Court, The American Review of International Arbitration, Vol. 8 (1997)
  - Russel on Arbitration (1997), 8-074-109
  - Bruce Harris, Rowan Planterose, Jonathan Tecks, The Arbitration Act 1996: A Commentary (2003)

# Thank you!

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