

# Annulment proceedings – a comparison between Switzerland and the UK

„Challenge of Awards – Dos and Dont’s“ / ASA below 40, 7 May 2009

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## 1. Introduction – Legal Framework and Most Important Differences

### Switzerland:

- Legal Framework
  - Chapter 12 of the Swiss Private International Law Act (PILA)
  - New Swiss Federal Tribunal Act of 2007 (FTA): set-aside application is now made in the framework of an appeal in civil matters and not anymore public/constitutional matters
- Only **one instance for challenge** (Swiss Federal Tribunal)
- Error of law cannot be challenged (only violation of fundamental legal values of public order)
- Foreign parties can **waive** their right to appeal (all grounds or limited grounds, but express waiver)

### England:

- Legal Framework:
  - The Arbitration Act of 1996 (EAA)
  - English Rules of Civil Procedure, Rule 62 (CPR)
  - Rules of the Supreme Court (RSC) Order 73 of 1997
- Challenge can be made **on several instances** (to High Court, Appeals Court and to House of Lords)
- **Error of law** can be challenged with an appeal on point of law under s.69
- Parties can **only waive** their right to **appeal on a point of law** (including implied)

	<i>PILA and FTA</i>	<i>EEA and CPR</i>
Object	Arts. 77(1), 90-94 FTA	ss.2, 67, 68, 69 EEA
Standing, amount	Arts. 74, 76 FTA	s.72(1) EEA; CPR Rule 62
Waiver	Art. 192 PILA	ss. 4(1), 5, 69(1) EEA
Deadline	Art. 47, 48, 100 FTA	s.70(3) EEA; CPR Rule 62.9
Grounds	Art. 192 PILA	ss. 67, 68 and 69 EEA
Briefing & Pleading	Arts. 40, 102 FTA	CPR Rules 62.4, 62.5, 62.6, 62.10, 62.13; RSC Order 73
Remedies	Arts. 77 (and 107) FTA	ss.67(3) and 68(3) EEA
Suspensive effect	Arts. 77, 103 FTA	s. 62(2); CPR Rule 62.8
Costs	Arts. 62, 66, 68 FTA	[...]
Security for costs	Art. 62 FTA	ss.70(6-8) EEA

## 2. Procedural Requirements

### a) *Similar Object of Challenge*

#### **Switzerland**

- Arbitral decision (award) issued in **Switzerland**
- Decision of an **arbitral tribunal**, not of an expert arbitrator or of decision body of a private association (decisions of TAS, however, are arbitral awards)
- Decision in a “**international**” arbitration proceeding (one of the parties of proceeding – not of the contract – must be from a country other than Switzerland)
- Final Decision on Substantive Rights
  - **Final** awards on the merits: challenge under Art. 190(2) PILA
  - **Partial** awards with a decision on part of the dispute and with findings on substantive rights: challenge under Art. 190 (2) PILA
  - **Interlocutory** awards (application of law, liability, jurisdiction, statute of limitation): only challenge under Art. 190(2)(a) and/or (b) PILA

#### **England**

- Arbitral award issued in England by an arbitral tribunal
- **No distinction between “domestic” or “international” arbitration** proceedings (and relevant challenges)
- Final award subject to court review (s.58 EEA: **not clear distinction from procedural decisions**)
  - **No distinction between different forms of award**, just that it is an instrument subject to court review under s. 67, 68 and 69 EEA
  - **Awards on jurisdiction**: special requirement imposing prompt challenge (s.73(2) EEA)

### b) *Similar Standing Requirements*

#### **Switzerland**

- **Participation** in arbitration proceeding (not only parties to contract)
- **Prejudice** as result of award and legal interest in setting aside/variation
- **No minimum amount** in dispute (debate re Art. 74(1) FTA: minimum amount of CHF 30'00030 not applicable in arbitration, particularly TAS arbitration)

## England

- Like in CH, **participation** in arbitral proceeding (not only parties to contract):
  - Third parties joined into arbitration have right to challenge validity of contract, proper constitution of tribunal and jurisdiction (s.72 EEA)
- Like in CH, **no minimum amount** in dispute (but minimum amount at stake may be important for leave for appeal)

### c) *Slightly Different Deadlines*

## Switzerland

- Challenge application is filed with **Swiss Federal Tribunal** (highest court)
- Application:
  - **30 days from notification** of award (notification as per agreement of the parties)
  - **No extension!**
  - No interruption by request for **correction and/or interpretation**
  - Renewed deadline if parties first receive **operative part** and only later reasoning
  - Service/Notice to adverse party and tribunal only a matter of courtesy
- Response: **30 days** from receipt of Application; deadline can be extended for justified reasons

## England

- Challenge application can be filed before the High Court (usually disputes of more than £200'000) or Central London County Court Business List (Business list judge then takes decision to retain, transfer to other court or to High Court)
- Application:
  - **28-days from** date from (1) **publication of award**; if it is a (2) decision of an arbitral appeal body then from **notification of the appeal decision**
  - New 28-days deadline in case of a request for **correction** of award
  - Deadline can be extended
  - Deadline is only completed if **application and all affidavits** in support have been sworn and filed by the expiry of the deadline
  - Court can order the tribunal to state **reasons of award**
  - Service/Notice to adverse party and tribunal compulsory (including leave to serve foreign parties out of jurisdiction) and notice to tribunal
- Reply: 21 days from acknowledgement of service
- Final Affidavit of Applicant: 7 days after Reply

d) *Different System of Appeal*

**Switzerland**

- **Only one instance:** Swiss Federal Tribunal is only instance for challenge

**England**

- After challenge to High Court, further **appeal** possible to
  - (1) Court of Appeals
  - (2) the House of Lords
- Requirement to obtain leave to appeal from competent court
- Leave for a further appeal on an appeal on point of law requires
  - (1) that question is of general importance
  - (2) that there is a special reason for consideration by the Court of Appeal (**debate:** amount at stake a special reason?)

e) *Different Possibilities to Waive Challenge*

**Switzerland**

- Only **foreign** parties can waive the right to challenge the award under Art. 190 PILA (no seat, residence or place of business in Switzerland) but not the right to a *Révision*
- Waiver must have **explicit and clear** language (“final award” in chosen arbitration rules not sufficient; no implied waiver)
- Waiver can be **limited** to certain grounds under Art. 190(2) PILA
- **Debate:** waiver valid where arbitration was imposed by General Conditions of Contract (TAS arbitration)? Valid waiver by reference to arbitration rules with express waiver (e.g. Art.28(6) ICC or 26() LCIA)?

**England**

- The parties **cannot** waive their rights to challenge the award under s.67 (**substantive jurisdiction**) and s.68 (**serious irregularity**), regardless of nationality or link to England)
- However, the parties (irrespective of nationality or link to England) **can** waive their rights to appeal the award on a **question of law** under s.69
- The waiver of an appeal on a question of law under s.69 can be express or **implied**
  - A provision on **finality of award** in chosen arbitration rules is sufficient (Arts. 28(9) and 26(9) 1999 ICC Arbitration Rules)
  - An agreement on an award **without reasons** is deemed a waiver of appeal on a point of law (s.69(1) EEA)

### Duty to Act Promptly in both Switzerland and England

- **Switzerland:** Jurisprudence on obligation of (joined) parties to address lack of jurisdiction and irregularities promptly
- **Switzerland:** Interlocutory decisions on jurisdiction, applicable law, liability, statute of limitation, etc. have to be challenged immediately under Art. 190(2)(a) and (b) PILA, and cannot be challenged with final award.
- **England:** ss.31(1) and (2), 73(2) EEA: obligation of parties to raise lack of jurisdiction at the outset of the proceedings and to challenge it after the first pertinent ruling (otherwise waiver of this ground)
- **England:** s.73(1) EEA: obligation of third party joined in arbitration to object forthwith to jurisdiction of tribunal (otherwise waiver)

### 3. Grounds for Challenge

#### a) Similarities and Overlap

Grounds under PILA and FTA	Grounds under EEA
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#### Lack of jurisdiction

No jurisdiction	Art. 190(2)(b) PILA	No jurisdiction	s.67 EEA
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#### “Serious irregularity” (grounds are closed)

Incorrect constitution of tribunal	Art. 190(2)(a) PILA	<ul style="list-style-type: none"> <li>• No substantive jurisdiction</li> <li>• Fraud (corruption of arbitrator)</li> <li>• Error of institution in appointment of tribunal</li> </ul>	s.67 EEA s.68(2)(g) EEA s.68(2)(e) EEA
Award <i>infra petita</i>	Art. 190(2)(c) PILA	Failure to deal with all the issues	s.68(2)(d) EEA
Award <i>extra petita</i>	Art. 190(2)(c) PILA	Excess of powers (“other than by exceeding jurisdiction”)	s.68(2)(b) EEA
Violation of due process and right to be heard	Art. 190(2)(d) PILA  [no similar ground]  [no similar ground]	<ul style="list-style-type: none"> <li>• Breach of general duties of tribunal</li> <li>• Excess of powers (other than by exceeding jurisdiction)</li> <li>• Breach of agreed procedures</li> <li>• Irregularity admitted by tribunal</li> </ul>	s.68(2)(a) EEA and s.33 EEA s.68(2)(b) EEA and s.34 EEA s.68(2)(c) EEA s.68(2)(i) EEA
Violation of procedural public policy	Art. 190(e) PILA	[no similar ground]	

Important additional threshold under English law:

- An application under s.68 for “serious irregularity” must also overcome the **extra threshold** that the irregularity “has caused or will cause **substantial injustice** to the applicant”, i.e. a decision is “far removed from what can reasonably be expected” (DAC Report, para.280)
- Mere procedural mishaps will not anymore justify a challenge (*King vs. McKenna* not applicably anymore)

**b) Main Difference**

**Important Error of law**

<b>Grounds under PILA and FTA</b>		<b>Ground under EEA</b>	
<p><u>Violation of substantive public policy</u></p> <ul style="list-style-type: none"> <li>• Mere error of law not sufficient</li> <li>• Decision must go against fundamental legal values of Switzerland shared by other nations</li> <li>• <i>pacta sunt servanda</i>, good faith, fight against corruption, slavery, etc.</li> </ul> <p><u>Due process exception to <i>iura novit curia</i></u></p> <ul style="list-style-type: none"> <li>• Findings on law must be based on a contradictory debate (no surprise for parties)</li> </ul>	<p>Art. 190(e) PILA</p>	<p>s.69(3) EEA</p>	<p>Appeal on a point of law</p> <p>Either by agreement or by <b>leave</b> of court if:</p> <ul style="list-style-type: none"> <li>• Question substantially affects rights of parties</li> <li>• Question was put to tribunal</li> <li>• Decision is “obviously wrong” or at least “open to serious doubt” and of “general public interest” (wrong result, not wrong reasoning!)</li> <li>• If appeal is “just and proper under the circumstances”</li> <li>• Error of <u>English</u> law only (!)</li> </ul> <p>[no <i>iura novit curia</i>]</p> <ul style="list-style-type: none"> <li>• (foreign) law has to be proven by parties as a matter of fact/proof</li> </ul>

However, in both countries very limited importance

- **England:**
  - Appeals on points of law are **very seldom successful** (*London Underground v. Citylink*).
  - An error of law can not be challenged as a “serious irregularity” under s. 68 EEA (*Lesotho Highlands vs. Impregilo*)
  - English courts are vigilant to reject attempts to dress up questions of fact as questions of law (*The Balears*)
- **Switzerland:**
  - Challenge based on violation of substantive public police under Art. 190(2)(e) PILA has **never been successful!** (*Besson, ASA 2007, p.4: ATF 132 III 389: « chances de success extrêmement minces »*)
  - But legal finding can also be attacked if it was not subject to contradictory debate (surprise for parties: exception to principle of *iura novit curia*)

c) *Other, Procedural Grounds*

Grounds under PILA and FTA		Grounds under EEA	
<b>New evidence</b>			
New evidence on merits	<i>Révision</i> (Art. 123 FTA, per analogy)	“Fresh” evidence	<i>Eastcheap vs. N.V. Gebroeders Catz</i>
New evidence on standing	Art. 190 PILA		
<b>Formal deficiencies and institutional problems</b>			
Deficiency in form	Art. 112 TFA  [no right to reasoned award in CH]	<ul style="list-style-type: none"> <li>• Deficiency in form</li> <li>• Ambiguity of award</li> </ul>	s.68(2)(h) EEA  s.68(2)(f) EEA
<b>Crime affecting award</b>			
Violation of public order	Art. 190(e) PILA	Fraud (other than corruption of arbitrator)	s.68(2)(g) EEA (serious irregularity)
Perjury, fraud, corruption affecting award	<i>Révision</i> (Art. 123 TFA, per analogy)		

#### 4. Briefing, Pleading & Duration

##### Switzerland

- Submissions are made in **writing**, and German, French, Italian (**official languages**); **tribunal** is given opportunity (rarely used) to submit comments
- Practice: challenged award/evidence can be submitted in **English** (offer translation!)
- New Rule: **counsel** must be admitted in Switzerland (or “baby-sitted” by Swiss attorney)
- Only **one round** of pleadings.
  - **Second round** only in **exceptional circumstances** (if Response raise important new issues; or if tribunal submits comments)
  - Request for second round must be made **immediately, but only after receipt of Response** and must be **reasoned**
  - **Tribunal** is again given opportunity to submit comments (case known where they did)
- Evidence:
  - Examination of evidence usually limited to **exhibits attached** to submissions
  - Document Production Requests only in very exceptional cases (*nova reperta*)
  - No witness examination, site inspection etc.

- In practice, **NO oral pleading** and very **seldom public deliberations** between the judges
- Duration: maximum **5 months** (also because there is only one level of appeal)

## England

- Submission in writing (English), including **Application** Form together with **Affidavits**, followed by complete sets of indexed and paginated documents, chronology, written “skeleton argument”
- **English counsel** compulsory (Barrister or Solicitor Advocate with permission to appear)
- **“One-and-a-half” rounds** of written pleadings
  - Application and Reply with affidavits
  - Final Affidavit by Applicant
  - Tribunal has also right to submit an affidavit; or has right to request *ex parte* to be made a respondent
- Proceedings to obtain leave (including for appeal on point of law): **in writing** only; decision on leave is without reasoning
- Principal challenge proceedings: **Oral hearing**
  - Rule: privately in Chambers
  - Exception: appeal on point of law is in public
- Duration:
  - **Definitely much longer** than in CH because of (1) possibilities of up to two appeals and (2) length of separate procedures to obtain leave for appeal
  - But recently cases where **only 3 months** (Vivendi)

## 5. Remedies

### Switzerland

- Rule: Award can be (1) **upheld** or (2) **annulled** (partial annulment is exception) and will **normally** be (3) **remanded to tribunal for reconsideration** according to and within the scope of the instructions of the Federal Tribunal (*effet cassatoire*)
- No remission to tribunal (extraordinary):
  - In decisions on lack of jurisdiction: No remission possible
  - **Debate**: no remission in decisions on bias/non-independence of arbitrators?
- **No automatic suspensive effect of challenge**
  - Challenge of award has no suspensive effect on continuation of arbitral proceedings (partial or interlocutory award) or enforceability of award (final award)
  - Conditions (1) chances of success of challenge; (2) irreparable harm
  - Very rarely granted (TAS arbitration: balance of interests)

## England

- Rule: Award can be:
  - upheld
  - remission to tribunal for reconsideration (**ordinary remedy**; fresh award due within 3 months)
  - varied or set aside (**extraordinary remedy**)
- **No remission to tribunal (extraordinary)**:
  - In decisions on **jurisdiction**: NO remission to tribunal
  - In decisions on serious irregularity and appeals on point of law: remission unless deemed **inappropriate** or not useful (award cannot be “saved”)
- **No automatic suspensive effect** of Challenge
  - Challenge of award for lack of jurisdiction has no suspensive effect on continuation of arbitral proceedings or enforceability of award; the tribunal can make a “further award” (s.67(2) EEA)
- If challenge fails: award is *res iudicata* (both as to matters decided as well as to matters that could have raised as grounds for a challenge); enforcement in England will be a matter of form

## 6. Procedural questions

### a) *Scope of Review*

## Switzerland

- **Scope** of the challenge is defined by the allegations and prayers of the applicant (*Instruktionsmaxime*)
  - Applicant should challenge all findings of tribunal and not just one
  - Federal Tribunal will not rule on prayers that have not been made
- Federal Tribunal has freedom to apply the law (*iura novit curia*), but has due process obligations (**no legal theory that surprises parties**)
- Rule: **No review of facts**; the decision is based on facts as established by the tribunal (parties can refer to all arbitration exhibits even if not in award)
- Exceptions:
  - Review of facts if facts were established in **violation of due process or public order** (i.e. against Art. 190(2) PILA)
  - **New facts and evidence** can be submitted if:
    - (1) facts are **pertinent** and occurred **prior to award**
    - (3) facts **after award** only if necessary to prove prejudice/standing
  - **Révision**: based on new evidence relating to pre-existing facts (*nova reperta*) if it was **impossible** to retrieve and submit during proceedings
  - **Debate**: submission of a (1) subsequent judgment; (2) expert opinions with new legal argument?

## England

- Review is based on the evidence submitted to tribunal and the facts as established by tribunal
- Law has to be proven by parties, in particular foreign law (no principle of *iura novit curia*)
- Fresh Evidence:
  - **Debate**: remission of the award to the tribunal (which is *functus officio*?)
  - **Application under s.68(2)(g) or (i) EEA** (fraud or admitted irregularity) provided:
    - (1) fresh evidence did not exist or could not be obtained before publication of award
    - (2) evidence would have had substantial effect on decision of tribunal
    - (3) there is fault on the part of the tribunal or the other party

### *b) Costs and Security for Costs*

## Switzerland

- Court costs (taken prior to proceeding as advance on costs) are fixed according to amount in dispute and conduct of parties and financial situation of parties, but maximum CHF 100'000 (only in exceptional cases up to CHF 200'000; in TAS arbitrations far lower)
- Loser pays the other party's costs
- **Security for court and legal costs** (*cautio iudicatum solvi*) possible if other party is foreign or insolvent; application has to be done prior to submission of Response (!)

## England

- Filing fee for application is £400; court costs vary by court
- **Security for costs**: Court can require applicant to provide security for court and legal costs of other party: s.70(6) EEA
  - Court may also order that any money payable under the award shall be brought into court pending the determination of the application
  - Court may also make grant of leave to appeal subject to a security for cost
- However, **residence or domicile outside of UK IS NOT A BASIS** for security for costs (s.70(6) EEA)