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# Drafting challenges

## Some practical tips, having regard to the basic attitude and approach of Supreme Court judges and law clerks towards challenges

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# Overview

I. Who deals with your challenge anyway?

II. Salient features of the Supreme Court

III. Basic attitude towards appeals in general

IV. Basic attitude towards challenges of arbitral awards in particular

V. How to best draft a challenge

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# I. Who deals with your challenge anyway?

- The President of the 1st Civil Section, i.e. the section in charge of challenges against international awards, **normally** allocates the dossier to a **law clerk** (in some cases also to a judge).
- The law clerk subsequently studies the dossier (i.e. the challenged award, the setting aside application, the statement of the arbitral tribunal, if any, and the opposing party's response).
- The clerk then drafts a **decision proposal** (so-called *Referat*).
- This decision proposal is then **circulated among** the **judges**.
- In case of **unanimity**, the decision proposal is signed and, upon review by the clerk, becomes the **final decision.**

- Should **no unanimity** be reached, a **counter-proposal** will be submitted by the judge dissenting from the law clerk's proposal, whereupon a **hearing** will take place, where each judge will put forth his or her arguments (which arguments have, however, already been submitted to all judges prior to the hearing).

- Based on the outcome of the hearing, the law clerk then drafts the **final decision** (which then again is circulated among the judges for approval).

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# Role and tasks of the law clerks

Originally, the law clerks were to

- assist the Supreme Court judges in drawing up their decision proposals;
- take minutes of the hearings;
- draft the (final) decisions;
- edit the decisions designated to be published.

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# Some figures regarding the caseload

| | 1971 | 2004 |
|---|---|---|
| Judges | **30** | **30** |
| Appeals | **1840** | **4830** |

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# Redefining of the law clerk's role

Since the early 1990s, the law clerk's main duties were redefined to:

- the drafting of decision proposals (so-called *Referate*);
- the reviewing of the (final) Supreme Court decisions (so-called *Redaktionen*).

**Art. 24 BGG**: *"Die GS wirken bei der Instruktion der Fälle und bei der Entscheidfindung mit. Sie haben beratende Stimme. Sie erarbeiten unter der Verantwortung eines Richters Referate und redigieren die Entscheide des Bundesgerichts."*

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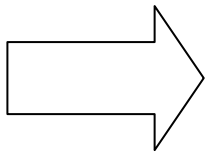
## Consequence

Today, approximately **80% of all decision proposals are drafted by law clerks** and are then circulated for approval among the Supreme Court judges in charge of the case.

Of these decision proposals, some **97% are approved unanimously** so that public hearings are most seldom (cf. also Art. 58 BGG).



Prior to the redefined role of the Court's law clerks being provided for at Art. 24 BGG, the fact that the vast majority of Supreme Court decisions were proposed and drafted by law clerks was published in the *Neue Zürcher Zeitung* by Markus Felber, which triggered a furious reaction of Swiss parliament!

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# II. Salient features of the Supreme Court

- Judicial institution **cut off from the outside world** (even within Lausanne);

- **highly organized** decision-making apparatus;

- **highly efficient and expeditious** decision-rendering apparatus (esp. compared internationally) notwithstanding the heavy caseload;

- open-door approach despite closed doors (within the Court);
- pleasant atmosphere among the law clerks (know-how exchange);
- competitive atmosphere among the judges;
- good relationship law clerks/judges;
- excellent internal database – library.

# III. Basic attitude towards appeals in general

To put it bluntly:

- If possible, **do not hear** the appeal at all.
- If the appeal must be heard partially, **dismiss** it to that extent.
- If it must be heard fully, **dismiss** it to largest possible extent.
- As a last resort (*ultima ratio*), **allow** the appeal.

*Internal justification for this approach:*

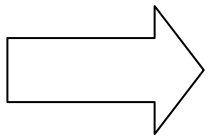
Where two courts of law have already dismissed the claim (respectively the appeal against the first decision), this normally warrants that the case has been judged correctly.

This naturally means that where the two lower courts have issued diverging decisions, the chances to succeed before the Supreme Court are significantly higher.

# IV. Basic attitude towards challenges of arbitral awards in particular

In principle, the same **off-hands approach** is applied *mutatis mutandis* to challenges of arbitral awards as towards appeals against lower court decisions.

Yet this off-hands approach is **even stronger in cases where the jurisdiction of the arbitral tribunal is not challenged** (or challenged in vain), for the Supreme Court then adopts an extremely restrictive approach when assessing either of the grounds provided for at Art. 190 PILS. It is not the function of the Supreme Court to supervise the case handling and decision-making of arbitral tribunals!



Unsurprisingly, the statistics reveal that challenging an arbitral award for want of jurisdiction is most likely to succeed (as compared with the other grounds of Art. 190 PILS; e.g., it is almost five times more likely to succeed than a challenge on the ground that the right to be heard was violated).

Cf. Felix Dasser, *International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis*, ASA Bull. 2007, p. 455)

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# Case law perfectly reflects this off-hands approach

cf. 4P.23/2006 of 27 March 2006

- Arbitrators may undertake a so-called **anticipated assessment of evidence** (*"antizipierte Beweiswürdigung"*), that is decline the taking of further evidence if they have already formed a firm opinion with respect to the point in question and the proffered evidence is deemed to be unfit to alter this opinion.

cf. BGE 130 III 35; 4A_400/2008 of 9 February 2009

- Arbitrators may, as a rule, **apply the law *sua sponte / ex officio***, without there being any need to afford the parties an opportunity to comment on the point of law not advanced by either of them (*jura novit arbiter/jura novit curia*) - an exception only being made if the parties could not reasonably have foreseen that the legal provision or principle not invoked would be relevant for the decision.

cf. BGE 134 III 260; BGE 131 III 173

- A party having waived its right to challenge the award under Art. **192 PILS** is precluded from challenging the award on the basis that the arbitrators wrongly extended the scope of the arbitration clause (and thus their jurisdiction) to other contracts not containing such clause or to a non-signatory.

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# V. How to best draft a challenge

***"Everyone does it differently, and everyone does it better, of course!"***

Alexander Filli, former President of the Basel-City Bar

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# Some general tips may prove helpful anyhow

Given the Court‘s off-hands approach, the following should enhance the chances to succeed:

- In general, **the easier you make it for the law clerk to follow your line of argument, the more likely it is that he** or she **will adopt a positive attitude towards your case**; conversely, the more difficult you make the law clerk’s life, the more disinclined he or she will be to concur with your argument.

- In particular, you should **ensure that your line of argument and** the ***theory of your case*** **are both consistent and well-structured** (especially in fifty-fifty cases, this may end up being of critical importance!).

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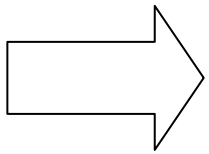
# The following should be avoided:

- **Avoid the shotgun approach**, and **go for the hitman approach!**



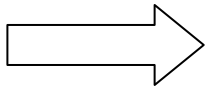
As a rule, **focus on one setting aside ground only** (except if you have very good reasons to believe that another of the grounds provided at Art. 190(2) PILS may be legitimately raised as well).

In particular, **do not invoke a violation of public policy** *(ordre public)* in addition to the other setting aside ground(s) advanced, **unless and until you have very good grounds to believe that this is justified** (which in view of the Court's case law on public policy violations will seldom, if ever, be the case).

- **If several setting aside grounds** are invoked, it is of paramount importance to treat them separately and **not mix them up**. The different grounds **need to be clearly separated** (ideally, under separate headings).

- In other words, the **law clerk must at all times exactly know what violation of which setting aside ground** provided for at Art. 190(2) PILS the **challenging party is asserting**. In addition, it must **precisely be indicated what conduct of the arbitrators or which decision / order constitutes a violation** of the right to be heard, or the equal treatment principle, etc.

**As soon as the law clerk gets the impression that the challenging party** (or rather its attorney) **is attempting to cause confusion, the challenge will lose much of its persuasiveness.**



cf. Art. 42(1) and (2) BGG:
*"Rechtsschriften […] haben die Begehren, deren Begründung mit Angabe der Beweismittel und die Unterschrift zu enthalten.*

*In der **Begründung** ist **in gedrängter Form** darzulegen, **inwiefern** der angefochtene Akt **Recht verletzt** […]."*

- **As a rule, avoid altering or questioning the factual findings of the arbitral tribunal.**

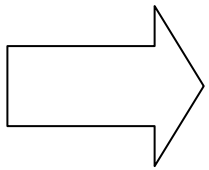
  Under Art. 77(2) in conj. with Art. 105(2) BGG, the factual findings of the arbitral tribunal cannot be challenged in setting aside proceedings (subject to the facts having been established by the arbitral tribunal in violation of one of the grounds provided at Art. 190(2) PILS, or new facts *["Noven"]* exceptionally being taken into consideration).

  cf. Supreme Court decision 4A_424/2008 of 22 January 2009, cons. 2.3 (with reference to BGE/ATF 133 III 139, cons. 5)

- **Avoid using overly strong language and exclamation marks** (the Court is to be persuaded through legal arguments – the more objective the tone and phrasing, the better).

- **Avoid pretentious or schoolmasterly language**.

NB:
**Yet** this does not mean that **you may** not **advance your arguments in a resolute and determined manner.**



At the same time, the **constant usage of expressions such as *"in clear violation of the right to be heard"*, *"patently inconsistent with the equal treatment principle"*, *"obvious infringement of public policy"* signals insecurity** and may end up undermining the overall persuasiveness of your case.

*General guideline to be followed:*

It is often said that a good legal submission is drafted in a way that the material passages could, in principle, be taken *tel quel* and pasted into a court decision.

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# Some examples taken from actual submissions

- ***"It is absolutely incomprehensible how opposing counsel*** *(or the arbitral tribunal)* ***can seriously purport that [...]."*** ("Es ist schlichtweg unerfindlich wie der Gegenanwalt (bzw. das Schiedsgericht) allen Ernstes behaupten kann, dass […]").

- ***"In evident ignorance of the law, the arbitral tribunal held that […]."*** ("In offensichtlicher Unkenntnis der Rechtslage hielt das Schiedsgericht fest, dass [...].")

- ***"The line of argument adopted by opposing counsel reflects his enormous ignorance of the most basic legal principles."*** ("Die Argumentation des Herrn Gegenanwalts widerspiegelt seine enorme Unkenntnis elementarster Rechtsprinzipien.")

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# The same can just as well be said as follows:

- ***"This argument overlooks that [...]."***
  ("Bei dieser Argumentation wird übersehen, dass [...].")

- ***"Yet in so reasoning, the tribunal failed to appreciate that [...]."*** ("Indessen verkannte das Schiedsgericht bei dieser Begründung, dass [...].")

- ***"This reasoning of the opposing party*** *(of the arbitral tribunal)* ***is not convincing on the following grounds [...]."***
  ("Diese Begründung der Gegenpartei (bzw. des Schiedsgerichts) vermag aus folgenden Gründen nicht zu überzeugen [...].")

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# Repetitions should be kept to a minimum

- For instance, if one continuously states that the opposing party‘s procedural conduct constitutes a violation of the principle of good faith, the law clerk will get the impression that the drafter of the submission is not so sure himself; otherwise, he would not need to repeat the same allegation time and again.

- Moreover, at the latest by the fourth time the same argument is advanced, the law clerk will no longer be impressed by it – any reader would so react.

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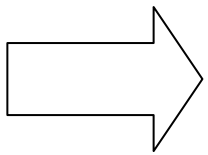
# Never attack opposing counsel or the arbitrators

- If you've got the facts on your side, you argue the facts.
- If you've got the law on your side, you argue the law.
- If you have neither of them on your side, you attack opposing counsel or the arbitrators, as the case may be.



Attacking opposing counsel or the arbitral tribunal will thus be taken as a **sign of weakness** by the law clerk or judge assessing your submission.

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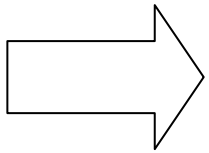
# Particulars of the written submission (challenge)

- **Table of contents?**

- **Summary?**

- **Ideal length?**



As a rule of thumb, the written submission demanding the setting aside of an arbitral award should generally **not** comprise **more than 20 pages**. Try to be as succinct as possible.

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# Guiding principle: Good writing is rewriting!

- **“Sorry this letter is so long, but I didn’t have time to write a shorter one.”**
- **“Had I had more time, I would have written less.”**

(disputed origin of the above quotes:
Cicero, Goehte, Schiller, Lessing, Twain)

**Clients often times do not understand that it takes more time to draw up a concise submission** than a long one, while in-house counsel normally do realize this (at least those with litigation experience).

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Thank you for your attention!

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