GAR Global Arbitration Review

Mind the gap: England and Switzerland compared as seats for ISDS cases

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An event co-hosted by the Swiss Arbitration Association (ASA) and WilmerHale examined the comparative advantages of England and Switzerland as seats for investment treaty arbitration. **Rory McLeod** *of WilmerHale in London reports.*

The event, which took place at WilmerHale's London offices on 14 May, was titled "Mind the Gap (in Review Standards): England vs Switzerland as Seats for Investment Treaty Arbitration".

Michele Potestà, arbitrator and partner at LKK Arbitration in Geneva and a member of the ASA Board, began by outlining some of the key tenets of the set-aside procedure in Switzerland, including deliberately narrow grounds of review; short written proceedings; and strict rules for the introduction of evidence that was not put before the arbitral tribunal.

Another key attraction of the Swiss regime is that there is only a single instance of review: the Swiss Federal Supreme Court is the sole authority that can set aside an international arbitral award, creating high levels of certainty for parties choosing Switzerland as their seat. Potestà also noted that, while perhaps only a symbolic development (because judgments will still be rendered in one of the Swiss official languages), the fact that parties can file submissions in English has created further international interest in Switzerland as an arbitral seat. And finally, the Swiss Federal Supreme Court provides a remedy that does not exist in the United Kingdom: revision of arbitral awards.

Potestà concluded by noting that very few awards are successfully set aside in Switzerland. The success rate is only 7%, with a majority of those relating to the very specific world of sports arbitration.

The keynote was then delivered by **Dame Elizabeth Gloster**, former vice-president of the Civil Division of the Court of Appeal of England and Wales and now full-time international arbitrator at One Essex Court. She outlined three key factors that all parties should consider when deciding their seat, noting that this decision is often taken by transactional lawyers rather than disputes lawyers.

First, parties should consider whether the courts of the proposed seat are arbitration-friendly. Gloster noted that some national courts consistently seek to set aside or refuse enforcement of New York Convention awards. In contrast, it is exceptionally difficult to set aside awards in the English courts. She referred to the recent High Court **judgment** in favour of the former majority shareholders of Yukos against Russia, where **Mr Justice Bright** noted that the New York Convention and its implementing provisions "are inherently pro-enforcement … they can be relied on by sinners, no less than by saints." There are, of course, true exceptions to the rule where resisting enforcement of a New York Convention award is successful and merited. This could be seen in the 2023 *P&ID v Nigeria* decision, where **Mr Justice Robin Knowles** set aside an award on the basis of fraud in the conduct of the arbitration.

Second, parties should consider the available grounds for setting aside an award and their scope. Under the English Arbitration Act 1996 (as amended in 2025), these grounds are narrow and the English courts interpret them restrictively: they are wary of opening the floodgates to extensive award challenges. By ways of example:

- Section 30 explicitly gives the tribunal competence to determine its own substantive jurisdiction.
- Section 45 gives a party the apparent ability to apply to the English courts to determine a preliminary point of law, but this option is in practice very limited because it requires the agreement of the other party/parties or the permission of the tribunal.

- Section 67 provides limited grounds to challenge an award on the basis of lack of substantive jurisdiction. However, there are strict limitations on the introduction of new evidence that was not heard by the tribunal (section 67(3C)). Further, the court must not exercise its power to set aside an award unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration (section 67(3A)). As a result, the courts generally remit matters to the tribunal rather than setting aside the award.
- Section 68 (serious irregularity), section 69 (point of law) and section 103 (refusal of recognition or enforcement) all provide avenues to challenge or resist enforcement of an award, but they again are extremely limited in their application.

Third, once the court accepts to review an award, what is its approach to jurisdictional challenges and how does it approach issues such as fraud, public policy and the introduction of fresh evidence? Gloster noted that the English courts adopt a particularly cautious approach when considering whether enforcement of an award would be contrary to public policy. She gave examples of recent decisions where the Privy Council (*Betamax v State Trading Corporation*) and High Court (*Yukos*) emphasised that the existence of illegality in itself was not sufficient to set aside an award. There must be something more: as **Mr Justice Tomlinson** held in *Gater Assets v Nak Naftogaz Ukrainiy* (2008), "nothing short of reprehensible or unconscionable conduct will suffice to invest the court with a discretion to consider denying to the award recognition or enforcement."

Gloster also noted the considerable evidential challenges faced by an award debtor when arguing fraud, as recently restated by Bright J in *Yukos*: if the allegation was (or could have been) put before the tribunal in the underlying arbitration, the award debtor is estopped from raising it again at the enforcement phase; and if there was fraud in the conduct of the arbitration, there is no estoppel issue but there is nonetheless a high threshold to show that the fraud materially impacted the outcome of the arbitration.

English and Swiss perspectives

A panel moderated by **Nadja Al Kanawati** (now of King & Spalding) discussed English and Swiss perspectives. The English side was represented by barristers **Salim Moollan KC** of Brick Court Chambers and **Cameron Miles** of 3VB, while the Swiss side was represented by **Hanno Wehland**, counsel and arbitrator at Wehland Arbitration, and **Anya George**, partner at Schellenberg Wittmer and ASA board member.

First, the panel discussed the treatment in each jurisdiction of what law governs the parties' arbitration agreement.

In England and Wales, the Supreme Court judgment in *Enka v Chubb* held that, absent an express or implied choice by the parties, the governing law of the contract would also govern the arbitration agreement. This created significant issues. Parties may have elected for a foreign law to govern the contract (for good reasons), but chosen London-seated arbitration, hoping that the mandatory *and non-mandatory* provisions of the English Arbitration Act would apply. However, they suddenly found their arbitration agreement interpreted in line with another, possibly less arbitration-friendly, law. The 2025 amendments to the Arbitration Act now reverse the *Enka v Chubb* position, so that in the absence of agreement by the parties, the law governing the seat will apply to the arbitration agreement (section 6A). However, this rule does not apply to standing offers to arbitrate by states in investment treaties (as well as in foreign investment laws). This is because investment treaties, and the scope of a state's consent to arbitrate, are generally governed by international law. They are not governed by the seat of any particular jurisdiction (which is often, especially in non-ICSID cases, selected by the parties after arbitration is commenced).

In contrast, the issue has caused no meaningful disruption in Switzerland. The Swiss Private International Law Act (article 178) provides that an arbitration agreement is valid if it conforms either to the law chosen by the parties; the law governing the subject-matter of the dispute, in particular the law governing the main contract; or Swiss law. As a result, Swiss law provides considerable certainty and predictability on issues concerning the validity of the arbitration agreement and adopts a *favor validitatis* approach.

Second, the panel discussed how their respective domestic courts address issues of international law, in particular when considering jurisdictional challenges to arbitral awards.

The panel agreed that it was difficult to challenge investment treaty awards in both the English and Swiss courts. Only one set-aside application has succeeded before the Swiss Federal Supreme Court in treaty-based proceedings (in *Clorox v Venezuela*), whereas only two applications under section 67 of the Arbitration Act (lack of jurisdiction) have succeeded in the English courts. Interestingly, all three successful applications were brought by investors rather than states.

Both the English and Swiss courts are willing to engage in detail with the substance of questions of international law relating to the tribunal's jurisdiction, and carry out their own analysis of the treaty's requirements without pre-conceived notions of what constitutes a protected investor or investment. The panel noted that the English courts' analysis tends to be lengthier than that of the Swiss Federal Supreme Court, with proceedings tending to be slower as a result. In addition, where the English courts disagree with the tribunal's legal analysis, they will generally remit the issue to the tribunal for reconsideration; whereas if the Swiss Federal Supreme Court is convinced that the tribunal's legal analysis on the question of jurisdiction is wrong, that is sufficient to set aside the award (the matter will still be sent back to the tribunal for a new decision on jurisdiction unless the court has all the elements to render a decision itself).

The panel also noted strong similarities between the English and Swiss courts' approach to new evidence. In both jurisdictions, the court is bound by the tribunal's findings of facts, and there are only very limited gateways to introduce new evidence.

Speakers noted some interesting procedural differences between the two jurisdictions. In the English courts, a party seeking annulment applies to a single judge at first instance; that judge can then grant or deny permission to appeal their decision to the Court of Appeal. English judges may have different levels of familiarity with investment arbitration. On the other hand, applications in Switzerland are always directly heard by the First Division of the Federal Supreme Court sitting as a panel of either 3 or 5 judges who have a high degree of familiarity and expertise with arbitration matters and issue consistent case law.

Additionally, the Swiss Federal Supreme Court may consider that a decision expressly or implicitly confirming the jurisdiction of the tribunal constitutes an "award", even if it was not described as such by the tribunal. As a result, where a procedural order contains a final decision on jurisdiction is not promptly challenged by a party, that party may be considered to have waived their right to challenge.

Third, the panel discussed both jurisdictions' approach to alleged illegality and fraud.

Where a treaty contains an explicit legality requirement in the investment definition, the Swiss court will treat this as a jurisdictional issue subject to full judicial review. If it is not explicit, or included in another part of the treaty, the court is more likely to treat the issue as pertaining to the merits. In any event, the court remains bound by the findings of fact in the award and may only re-examine them if there was a breach of due process or violation of public policy in relation to the establishment of the facts by the tribunal.

The English courts also apply a stringent approach to allegations of fraud at the set-aside or enforcement stage. First, they distinguish between an award arising out of a contract to do something illegal (which is unenforceable); and a contract that was procured illegally (which generally remains enforceable). With regard to an illegally procured contract, the courts will generally take a strict pro-enforcement approach and hold that the illegal conduct does not violate public policy. The courts will, however, be willing to re-examine facts in detail if the award is the result of *procedural fraud* that impacted the outcome of the arbitration. This attitude could be seen in the 2023 judgment in *P&ID v Nigeria*, where Knowles J undertook a detailed analysis of the underlying facts to determine that the award was tainted by fraud and, ultimately, set the award aside.

The panel also noted a recent line of case law in Switzerland in which state award debtors have applied to revise an award, relying on criminal convictions obtained after the award was issued. A strict approach has been taken. For new evidence to be admissible in revision, it must have existed at the time the award was rendered; the party could not reasonably have discovered it and put it forward; and it must have been capable of having a direct impact on the outcome of the arbitration. The Federal Supreme Court has confirmed that confessions and convictions obtained after issuance of the award do not meet the first of these requirements.

Fourth, the panel discussed the extent to which the irregular constitution of an arbitral tribunal can give rise to a successful challenge. In its 2025 ***Libya v Gargour*** decision, the Swiss Federal Supreme Court allowed the secretary-general of the Permanent Court of Arbitration to constitute an arbitral tribunal under the Organisation of Islamic Cooperation investment agreement after the designated appointing authority failed to act. The Federal Supreme Court agreed with the investors that the most-favoured nation provision in that treaty was broad enough to import procedural mechanisms available to other investors under the UNCITRAL arbitration rules. The Supreme Court reached the opposite conclusion to the Paris Court of Appeal in a **2021 decision**; how the English courts would decide the issue remains to be seen.