

# Challenges of Swiss Arbitral Awards Updated Statistical Data as of 2017

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## I. Introduction

Two years have passed since our last empirical study on challenges of arbitral awards rendered in Switzerland was published.<sup>1</sup> In that last study we analysed three different data samples of decisions rendered by the Swiss Federal Supreme Court (the “Federal Court”) under Swiss arbitration laws: Firstly, and following up on earlier studies,<sup>2</sup> challenges of international arbitral awards pursuant to Article 190(2) of the Swiss Private International Law Act (PILA).<sup>3</sup> Secondly, for the first time, requests for revision of international arbitral awards. And thirdly, also for the first time, challenges of domestic arbitral awards pursuant to Article 389 *et seqq.* Swiss Code of Civil Procedure (CCP), which entered into force on January 1, 2011.<sup>4</sup> This update references again all three data pools.<sup>5</sup>

To date, the Federal Court rendered 576 decisions on challenges of international arbitral awards under Article 190(2) PILA (1989 through 2017) (*see* Section II. below).<sup>6</sup> It added an impressive number of 74 decisions within two years only. The Federal Court has exclusive jurisdiction to hear challenges of international arbitral awards rendered by tribunals seated in Switzerland.

Regarding the two other data pools, requests for revisions of international arbitral awards and challenges of domestic arbitral awards, both grew in smaller numbers. Since our last study, the tally for the revisions of international arbitral awards has grown by four, and records 27 decisions from 1992 through 2017 (*see* Section III. below). The Federal Court also has exclusive jurisdiction to decide such requests.

The number of domestic challenges has risen by 27, and tallies 79 decisions from 2011 through 2017 (*see* Section IV. below). The Federal Court is by default the competent authority to review challenges against domestic arbitral awards.<sup>7</sup>

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<sup>1</sup> FELIX DASSER/PIOTR WÓJTOWICZ, Challenges of Swiss Arbitral Awards – Updated and Extended Statistical Data as of 2015, ASA Bulletin, Volume 34, No. 2, 2016, 280-300; DASSER/WÓJTOWICZ (2015).

<sup>2</sup> The first study was published in 2007, covered the years 1989, when the PILA entered into force, to 2005, and entailed 221 decisions (FELIX DASSER, International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis, 25 ASA Bulletin 3/2007, 444-472; DASSER (2007)).

The first update of the first study followed in 2010, recording data until the end of June 2009, and tallying 289 decisions as well as additional statistical analyses (FELIX DASSER, International Arbitration and Setting Aside Proceedings in Switzerland – An Updated Statistical Analysis, 28 ASA Bulletin 1/2010, 82-100; DASSER (2010)).

The second update of 2014 consisted of an update of selected charts, and entailed 435 decisions, covering data up to the end of 2013 (FELIX DASSER/DAVID ROTH, Challenges of Swiss Arbitral Awards – Selected Statistical Data as of 2013, 32 ASA Bulletin 3/2014, 460-466; DASSER/ROTH (2014)).

<sup>3</sup> Swiss International Law Act of December 18, 1987, SR 291. *See* for a non-official translation the Swiss Arbitration Association’s website:

<http://www.arbitration-ch.org/pages/en/arbitration-in-switzerland/index.html>.

<sup>4</sup> Swiss Code of Civil Procedure of December 19, 2008, SR 272.

<sup>5</sup> Reprinted from: FELIX DASSER/PIOTR WÓJTOWICZ, Challenges of Swiss Arbitral Awards – Updated Statistical Data as of 2017, ASA Bulletin, Volume 36, No. 2, 2018, 276-294.

<sup>6</sup> The last study tallied 502 decisions as of 2015.

<sup>7</sup> However, the parties can designate the supreme court of a canton according to Article 390(1) CCP as the competent authority. Our studies do not record those cantonal decisions, because these are available to a limited extent only. To our best knowledge, there are few such decisions, if any. The cantonal supreme courts have also exclusive jurisdiction for revisions of domestic arbitral awards pursuant to Article 356(1) and Article 396 CCP. We do not reference these here because comprehensive data is not available.

## II. Challenges of International Arbitral Awards

### A. Number of Decisions on Challenges

Since 1989, 576 decisions on challenges have been rendered. The past two years set new records in numbers, tallying 31 and 43 decisions in 2016 and 2017, respectively. Thus, the numbers for 2017 almost doubled compared to 2008 or 2009, although the increase is less impressive compared to the average years of the past decade (numbers have already been on the rise, *see* Chart 1).

The recent peaks are due to a high number of decisions on challenges of sports arbitration awards rendered in 2017 (a top number of 21 sports cases per year). High numbers in sports cases have been known for some years, since the outset of that trend in 2010 (*see* Chart 1). In 2010, 20 requests for the setting aside of sports awards were filed, compared to just 11 in 2009. However, the years 2011 through 2016 witnessed a slight decrease in sports cases per year. It was 2017 that broke new ground again. The data does not seem to suggest that the events leading to disqualification of Russian athletes in view of the Summer Olympic Games 2016 substantially contributed to that peak. Indeed, only few cases involved Russian parties in 2017.

The aggregate record for the last decade (2008 through 2017) tallies 145 sports decisions (45%) out of a total of 323 decisions rendered (178 non-sports). The sports awards have been almost exclusively rendered by the Court of Arbitration for Sport in Lausanne, Switzerland (the CAS).<sup>8</sup>

The number of non-sports cases also increased over the last ten years, yet less impressively. Consequently, the overall yearly number of decisions and by implication challenges has remained high since 2010 (*see* Chart 1).<sup>9</sup>

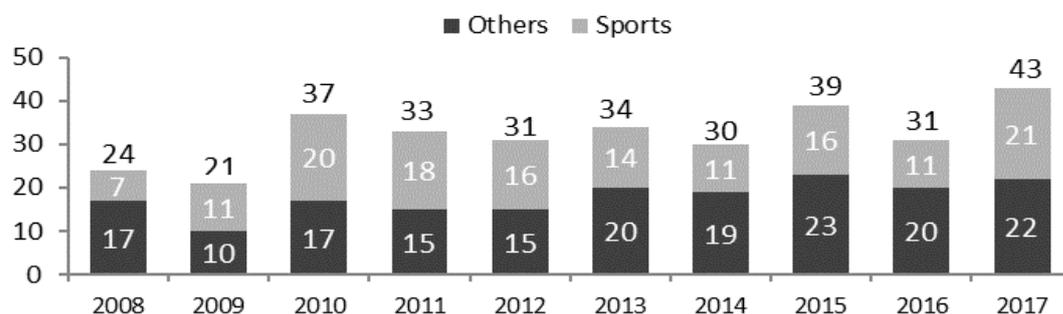


Chart 1: Number of decisions per year, 2008 – 2017

The total of 576 decisions entails 438 cases that were decided on the merits (76%) (1989 through 2017). 78 challenges were dismissed due to lack of admissibility (14%). 60 challenges were dismissed due to withdrawal (10%) (*see* Chart 2).



Chart 2: Admissibility of challenges, 1989 – 2017 (576 cases)

<sup>8</sup> Two awards of the Basketball Arbitral Tribunal (BAT) (Geneva) were challenged in 2012.

<sup>9</sup> “Non-sports” or “other” decisions encompass not only challenges of commercial but also of occasional investment arbitration awards. For instance, in 2017, the Federal Court heard a challenge of an award rendered under a Bilateral Investment Treaty (BIT) (Decision 4A\_157/2017 of December 14, 2017; dismissal).

There are various reasons for inadmissibility. Cases have been declared inadmissible mainly due to either lack of substantiation<sup>10</sup>, late filing of the challenge, non-payment of the advance on costs, or lack of an award susceptible to be challenged.

## B. Success of Challenges

The years 2016 and 2017 witnessed no upheaval in relation to the number of successful challenges. Only three awards were set aside (one in 2016, and two in 2017). Remarkably, however, for the first time in almost a decade not a single challenge in sports arbitration succeeded over a two-year period.

Accordingly, and contrary to the trend witnessed in the past publication,<sup>11</sup> the yearly numbers of successful challenges ceased to rise and has, for the time being, plateaued on a low level (*see* Chart 3).

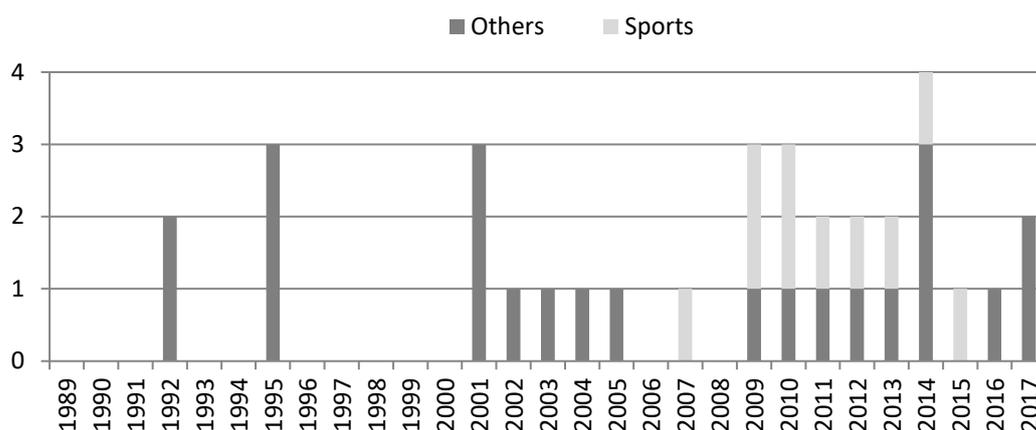


Chart 3: Successful challenges per year, 1989 – 2017

In absolute terms, successful challenges grew more numerous since 1989, basically for two reasons: (1) The number of challenges filed per year has inexorably risen over time. Thus, even a consistently low percentage of reversals leads to increased absolute numbers. (2) For several years, sports arbitration used to record a slightly higher frequency of successful challenges.<sup>12</sup>

However, that difference in frequency (sports to non-sports) is nominal as of 2017 (*see* Chart 4.1 and 4.2). Contrary to recent years,<sup>13</sup> the percentages of successful sports and non-sports challenges have converged. While the success rate for non-sports arbitration cases rose slightly again, but remains still at a low 7.37% (23 out of 312 cases, *see* Chart 4.1),<sup>14</sup> sports awards have been set aside at a rate of 7.94% (10 out of 126 cases, *see* Chart 4.2), a noteworthy drop from the 9.71% just two years ago (10 out of 103 cases).<sup>15</sup>

<sup>10</sup> I.e., the failure of the challenge to meet the standard of a sufficient motivation required to be heard on the merit. For the past decade, challenges declared inadmissible due to lack of substantiation mostly concerned sports cases.

<sup>11</sup> DASSER/WÓJTOWICZ (2015), at 283.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 284.

<sup>14</sup> Up to 2005 the rate was 7%, it then fell to 6.5% by mid-2009, rose to 6.88% by 2013, and up to 7.09% by 2015; *see* DASSER (2007), at 453; DASSER (2010), at 86; DASSER/ROTH (2014), at 462-463), DASSER/WÓJTOWICZ (2015), at 284, respectively.

<sup>15</sup> DASSER/WÓJTOWICZ (2015), at 283-284.

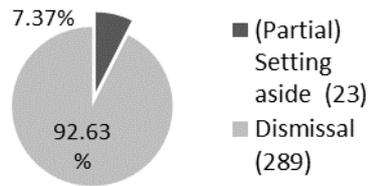


Chart 4.1: Decisions on the merits (non-sports), 1989 – 2017 (312 cases)

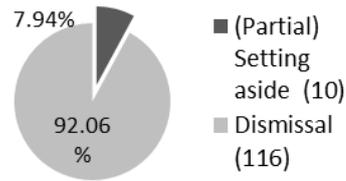


Chart 4.2: Decisions on the merits (sports), 1989 – 2017 (126 cases)

The very first study referenced the “Magic Seven” percent of overall (partial) setting aside.<sup>16</sup> It is still valid as of 2017 (7.53%, *see* Chart 5).

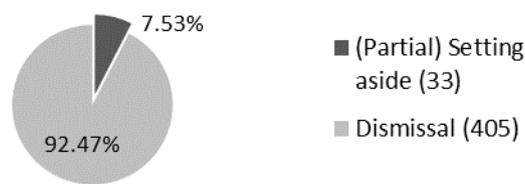


Chart 5: Decisions on the merits (non-sports and sports), 1989 – 2017 (438 cases)

### C. Grounds of Challenge

Challenging the award under the ground of violation of public policy (Article 190(2)(e) PILA) remains popular with parties. However, to date, only two awards have been set aside on that ground. Consequently, the chances to successfully challenge an award based on that ground has fallen since we published our last study to a quite negligible 1.0%. There was also a decrease of successful challenges on most of the other grounds set forth in Article 190(2) PILA: (a) (constitution), (c) (*ultra/infra petita*), and (d) (right to equal treatment/right to be heard). Only the percentage of awards that were set aside on ground (b) (jurisdiction) increased (*see* Chart 6).<sup>17</sup>

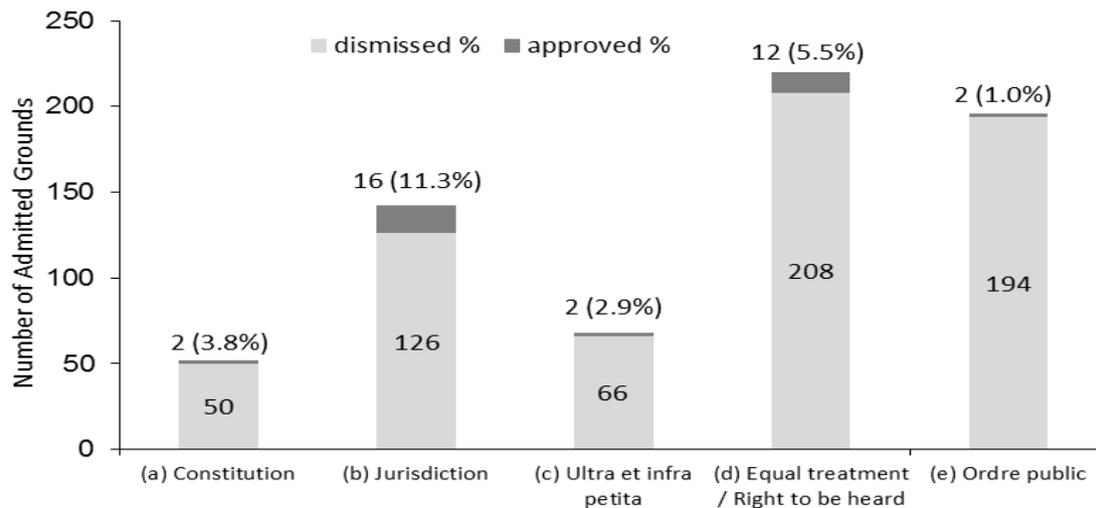


Chart 6: Success of challenges on the grounds of Article 190(2) PILA, 1989 – 2017 (total of 438 decisions on the merits)

<sup>16</sup> DASSER (2007), at 452-453.

<sup>17</sup> The previous success rates were 4.2% for lit. a, 10.7% for lit. b, 3.2%, for lit. c, 5.8% for lit. d, and 1.1% for lit. e, *see* DASSER/WÓJTOWICZ (2015), at 286.

## D. Duration of Proceedings

The duration of proceedings is calculated from the date on which the Federal Court received a challenge.<sup>18</sup>

As referenced in our last study, an earlier tendency towards ever-shorter duration of the proceedings was broken around 2009.<sup>19</sup> In the wake of case law of the European Court of Human Rights,<sup>20</sup> parties increasingly made use of their right to be heard by filing a reply and rejoinder, respectively, thus prolonging the proceedings. Since 2009, the median duration<sup>21</sup> of proceedings on the merits (i.e., not counting cases where the Federal Court found the challenge to be procedurally inadmissible) increased first from an all-time low of four months to five, then to six, and now seems to be settling below six months. The median duration amounts to 161 days for the past ten years (238 decisions on the merits).

For the period of 2013-2017, the median has fallen to 173 days (130 decisions) compared to 185 days for 2011-2015 (124 decisions).<sup>22</sup> That decline is noteworthy given that the last two years witnessed several high-stake arbitration cases involving states, which took the Federal Court slightly longer to decide. Given the one-month period for filing a challenge,<sup>23</sup> parties may still expect an award to be final within about seven months of its issuance. Yet, from the perspective of an individual case, as compared to the median, the duration remains volatile and difficult to predict (*see* Chart 7).

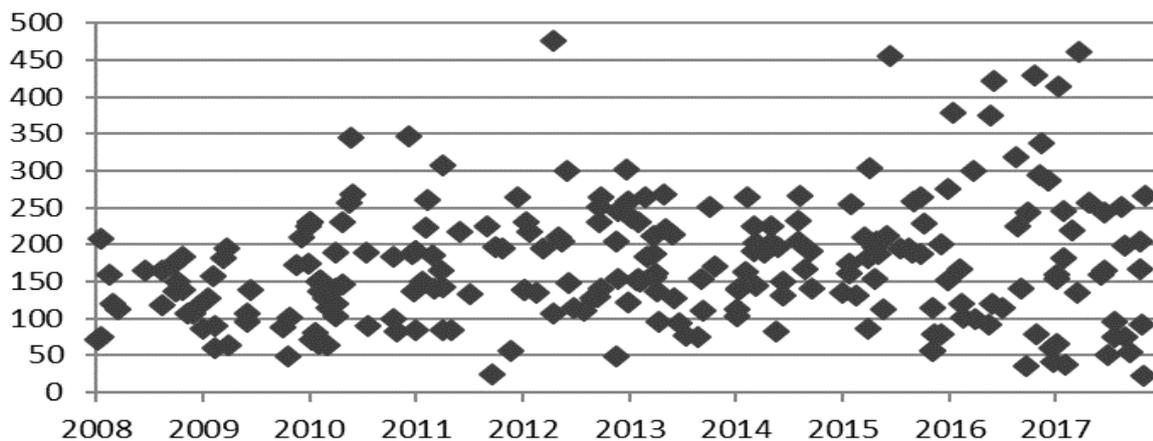


Chart 7: Duration of proceedings on the merits in days

<sup>18</sup> The exact method used to determine the duration remains the following: the date when a challenge has been received by the Federal Court has been taken as a basis. This date has become available for all decisions as of 2009. For earlier decisions or where the date of receipt is otherwise not known, the date of filing has been taken as a basis if indicated in the Federal Court's decision. If this date, too, remains unknown, a rough rule of thumb is used by relying on the date of the award, assuming that service of the award takes five days and that the challenge is filed on the last day of the standard 30-day filing period, thus adding 35 days to the date of the award (*see* DASSER (2007), at 456; DASSER (2010), at 90-91).

<sup>19</sup> DASSER/WÓJTOWICZ (2015), at 286-287.

<sup>20</sup> *See* ECHR, *Joos vs. Switzerland*, Case 43245/07, Judgment of November 15, 2012, §§ 30-32 and the Federal Court's compliance policy: [http://www.bger.ch/emrk\\_text\\_d.pdf](http://www.bger.ch/emrk_text_d.pdf) (in German) or [http://www.bger.ch/fr/emrk\\_text\\_d.pdf](http://www.bger.ch/fr/emrk_text_d.pdf) (in French).

<sup>21</sup> For an explanation of the median, *see* DASSER (2007), 449 n.12.

<sup>22</sup> DASSER/WÓJTOWICZ (2015), at 287.

<sup>23</sup> Article 100(1) Swiss Federal Act on the Federal Court of June 17, 2005 (Swiss Federal Court Act), SR 173.110.

## E. Participation of Foreign Parties

Switzerland remains a prime neutral ground for dispute resolution between foreign parties by means of arbitration; i.e., non-Swiss parties that at the time of the conclusion of the arbitration agreement had neither their domicile nor their habitual residence in Switzerland.<sup>24</sup> The percentage of cases in which only foreign parties were involved has risen in the past decade reaching 71% as of 2015. As of 2017, it remains at a still high 69%.<sup>25</sup> In 327 out of the 472 cases with identifiable nationalities, all parties were foreign (*see* Chart 8). This percentage appears to be quite stable, being identical to the percentage calculated in the first study of 2007.<sup>26</sup>

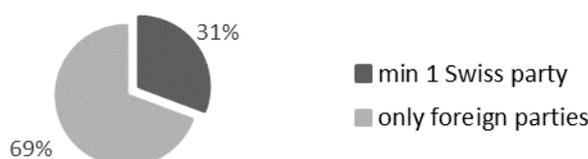


Chart 8: Origin of the parties, 1989 – 2017  
(472 cases)

## F. Conclusion

While the numbers of challenges brought before the Federal Court per year has constantly been increasing and has peaked at 43 decisions in 2017, our data testifies to the very arbitration-friendly and efficient approach by the Swiss judiciary. The percentage of successful challenges in non-sports arbitration remains stable at around 7%. As of 2017, the data for sports arbitration, too, suggest a chance of around 7% of an award being set aside. With regard to individual grounds for successful challenges, there is a certain, maybe random, shift towards ground (b) (jurisdiction) of Article 190(2) PILA.

The median duration of the procedure before the Federal Court settled at roughly six months. The median duration from the issuance of an award to the final determination of a challenge by the Federal Court is slightly longer than it was a decade ago. Yet, it is still short: seven months. It is important to note that the median hides a considerable range of individual duration, though.

In sum, the Federal Court gives a high degree of deference to arbitral tribunals, with impressive efficiency, while remaining vigilant to violations of bedrock principles of international arbitration.

## III. Revision of International Arbitral Awards

### A. Number of Requests

In our last study, and for the first time, we published data on revisions of international arbitral awards.<sup>27</sup> While the PILA is silent with regard to requests for revisions, the Federal Court filled this gap in 1992, holding that a request for revision of an arbitral award is admissible and had to be addressed to the Federal Court as the competent instance.<sup>28</sup> A revision may be requested on two grounds: (i) the award was affected by criminal offence, or (ii) pre-existing material facts or decisive evidence have been discovered since the award.<sup>29</sup>

<sup>24</sup> Cf. Article 176(1) PILA; *see* DASSER (2007), at 446 and 460-461.

<sup>25</sup> *See* DASSER/WÓJTOWICZ (2015), at 287-288.

<sup>26</sup> *See* DASSER (2007), at 460-461.

<sup>27</sup> *See* DASSER/WÓJTOWICZ (2015), at 288.

<sup>28</sup> *Id.* at 289; Decision BGE 118 (1992) II 199.

<sup>29</sup> Decision BGE 134 (2008) III 286.

As referenced in our last study, numbers of requests and, thus, of decisions remain low.<sup>30</sup> In the meantime, an additional 4 decisions were issued (two in 2016, and two in 2017), bringing the tally to 27<sup>31</sup> (see Chart 9).

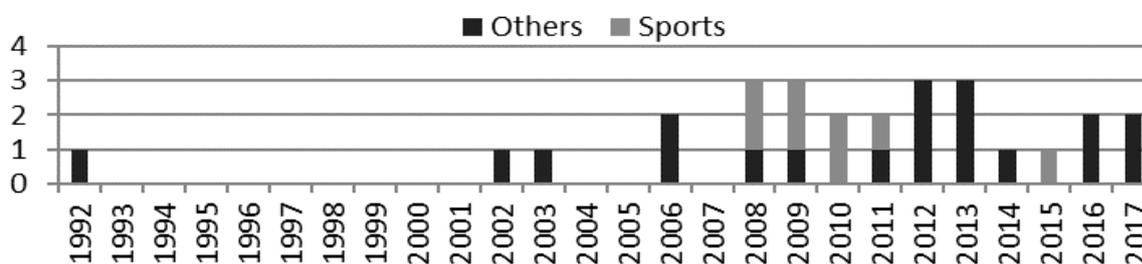


Chart 9: Number of decisions per year, 1992 – 2017  
(27 cases)

The percentage of admissible requests (i.e., requests decided on the merits) remains similar to the one for challenges, 74% as compared to 76% for challenges (see Charts 10 and 2, respectively).

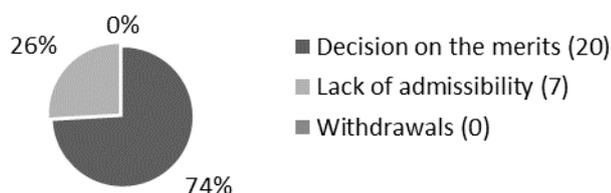


Chart 10: Admissibility of requests, 1992 – 2017  
(27 cases)

We are not aware of any decisions rendered as regards the revision of *domestic* arbitration awards. However, it is not the Federal Court but the cantonal courts that are exclusively competent to hear revisions (Article 356(1) CCP). Parties occasionally still file requests with the Federal Court, which declares them non-admissible (without prejudice).<sup>32</sup>

## B. Success of Requests

Three out of the 20 requests for revision that were admitted have been successful as of 2017: in 2006,<sup>33</sup> in 2009,<sup>34</sup> and in 2016<sup>35</sup> (see Chart 11), none of them sports-related.

<sup>30</sup> See DASSER/WÓJTOWICZ (2015), at 289.

<sup>31</sup> As already referenced in DASSER/WÓJTOWICZ (2015), at 154 n.23, our data on revisions (as opposed to challenges, where the data includes all unpublished decisions) records publicly made available decisions and might potentially miss out on some non-published decisions issued prior to the year 2007 (particularly 1992 through 2000). The Federal Court started publishing all of its decisions on the internet only from January 1, 2007 onwards, whereas throughout 2000-2007 most but not all decisions were published. Conversely, only few decisions rendered before 2000 were published or made publicly accessible (see DASSER (2007), at 448-449).

<sup>32</sup> There were two such cases in 2016 and 2017: Decision 4F\_5/2016-4F\_7/2016 of May 30, 2016, and Decision 4A\_393/2017-4F\_21/2017 of September 21, 2017.

<sup>33</sup> Decision 4P.102/2006 of August 29, 2006.

<sup>34</sup> Decision 4A\_596/2008 of October 6, 2009.

<sup>35</sup> Decision 4A\_412/2016 of November 21, 2016.

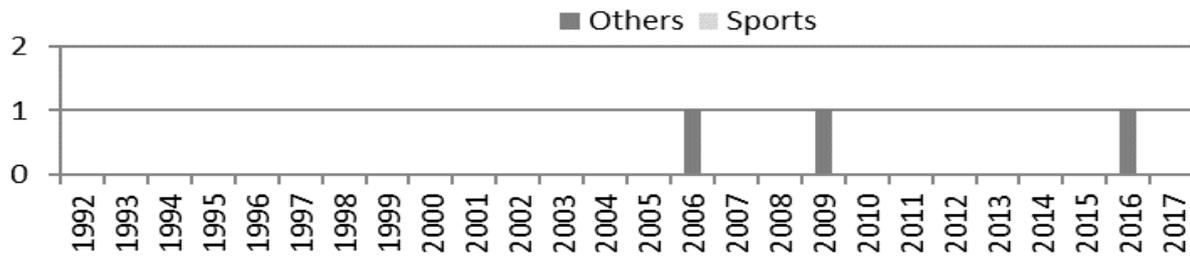


Chart 11: Successful challenges per year, 1992 – 2017

Overall, the percentage of successful requests for revision has risen to 15% (compared to 11.76% as of 2015)<sup>36</sup> (see Chart 12). Because the total sample of decisions remains low, any predictions are fraught with insecurity. Yet, the available data suggests a deference of the Federal Court to arbitral awards similar to challenges pursuant to Article 190 PILA.

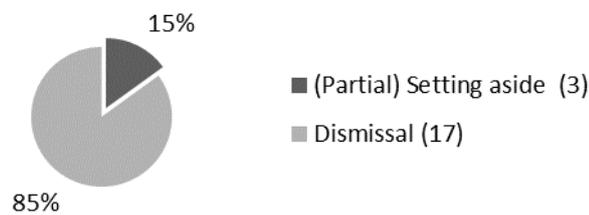


Chart 12: Decisions on the merits, 1992 – 2017 (20 cases)

### C. Grounds for Revision

For this analysis we only considered the instances where a ground has been validly invoked, i.e. excluding requests that were held to be inadmissible.<sup>37</sup> This sample consists of 18 cases. So far, the ground of a criminal offence was only invoked twice, both times successfully. Conversely, regarding the ground of newly discovered facts or evidence, only one out of 16 requests was successful (6.3%, see Chart 13).

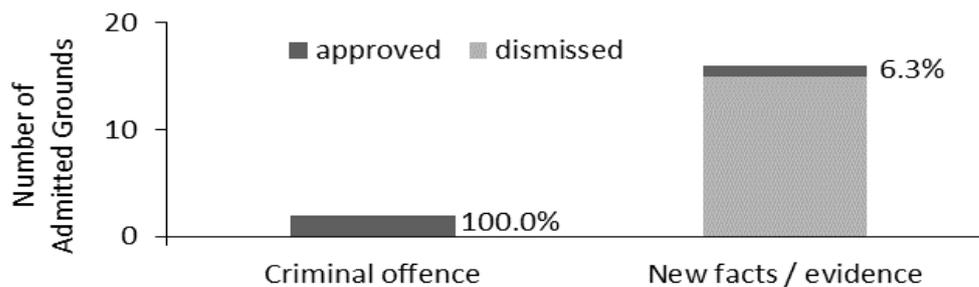


Chart 13: Success of revision, 1992 – 2017 (18 cases)

### D. Duration of Proceedings

At 151 days, the median duration of the 20 merits decisions on revision is slightly shorter than the one for challenges. Again, the median hides considerable variation for individual cases (see Chart 14).

<sup>36</sup> DASSER/WÓJTOWICZ (2015), at 291.

<sup>37</sup> The distinction is not always very clear, though.

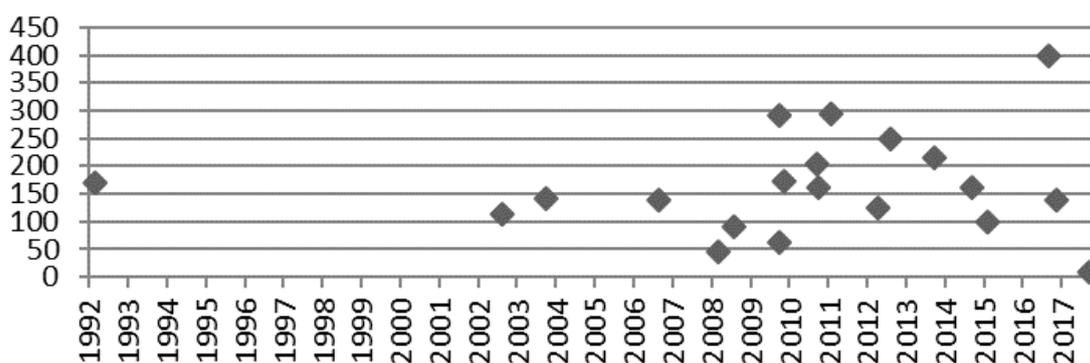


Chart 14: Duration of proceedings on the merits over time, 1992 – 2017

## E. Conclusion

There are still only few requests for revision of international arbitration, rendering predictions difficult. Still, it seems to be safe to say that requests for revision due to subsequently uncovered evidence are very likely to fail if no criminal behaviour is involved. Further, regarding the rate of procedural admissibility and the duration of proceedings, the data echoes the data on challenges, suggesting similar trends.

## IV. Challenges of Domestic Arbitral Awards

### A. General Principles and Number of Challenges

Under Article 389 of the Swiss Code of Civil Procedure (the CCP), parties can challenge domestic arbitral awards.<sup>38</sup>

By default, only the Federal Court is competent to hear such challenges (Article 389 CCP). However, and contrary to international arbitration, the parties may designate the competent cantonal court of the canton where the arbitral tribunal has its seat to hear the case (Article 390 CCP). Once designated, the cantonal court has exclusive powers to hear the case and its decision is final; there is no recourse to the Federal Court. Our study does not record any such decisions of the cantonal courts.<sup>39</sup>

Since our last study two years ago, where we presented the data on domestic challenges for the first time, the number of decisions in domestic arbitration has remained lower than in international arbitration.<sup>40</sup> The last two years witnessed 27 new domestic decisions (compared to 74 in international arbitration). Since 2011, 79 decisions have been rendered in total, out of which 59 were on the merits (*see* Chart 15).

<sup>38</sup> The CCP came into force on January 1, 2011. The CCP replaced the previous cantonal codes of civil procedure and, with its Third Part on arbitration (Articles 353 *et seqq.*), the former cantonal Concordat on Arbitration that governed domestic arbitration.

<sup>39</sup> For one of the few cantonal cases, *see* Superior Court of Berne, ZK 15 528 of August 12, 2016, CAN 2017/12, 31.

<sup>40</sup> DASSER/WÓJTOWICZ (2015), at 293.

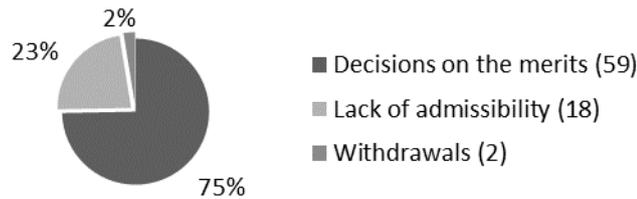


Chart 15: Admissibility of challenges, 2011 – 2017  
(79 cases)

Given the relatively low number in domestic arbitration, trends may not have fully settled yet. Still, some trends seem to be evolving.

The vast majority of cases concerns commercial disputes. In addition, there are several employment-related cases (14 cases or 18%), while sports-related challenges are rare (5 cases or 6%) (see Chart 16). The employment cases evidence the importance of arbitration in Swiss (collective) employment law.<sup>41</sup>

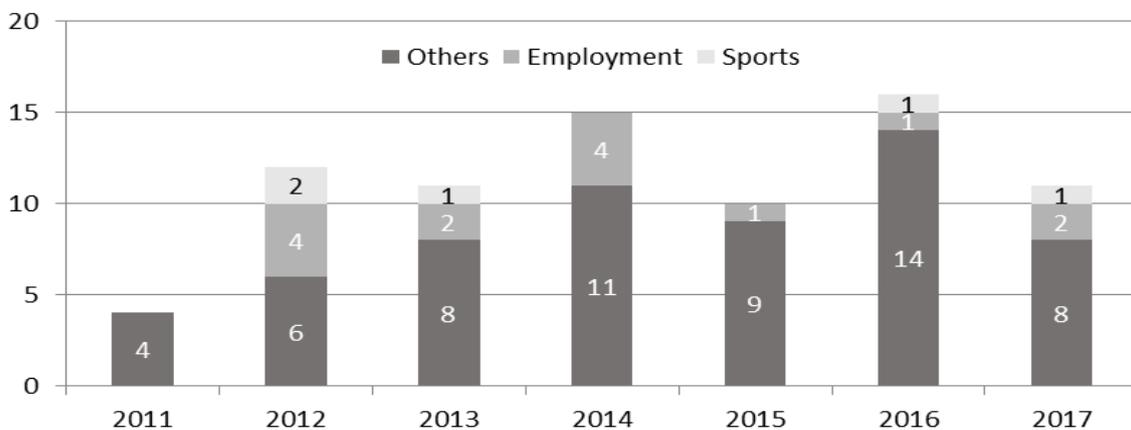


Chart 16: Number of decisions per year, 2011 – 2017  
(79 cases)

## B. Success of Challenges

As of 2017, the data indicates a rate of success of 19% on the merits (compared to 20% as of 2015).<sup>42</sup> 11 out of 59 challenges were successful (see Chart 17). No additional challenges of sports or employment awards were successful in the past two years, while two commercial decisions were successful in 2016, and one in 2017 (see Chart 18).

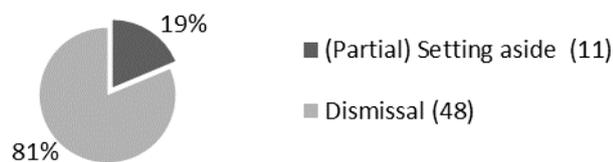


Chart 17: Decisions on the merits, 2011 – 2017  
(59 cases)

<sup>41</sup> Cf. PIOTR WÓJTOWICZ, Labour Law and ADR in Switzerland – Selected Topics. Mediation, Arbitration and Collective Employment Contracts, Arbitrability of Labour Law Claims, in: Themis Polska Nova 2015 / nr 1 (8), 209-222, 214-216.

<sup>42</sup> See DASSER/WÓJTOWICZ (2015), at 295.

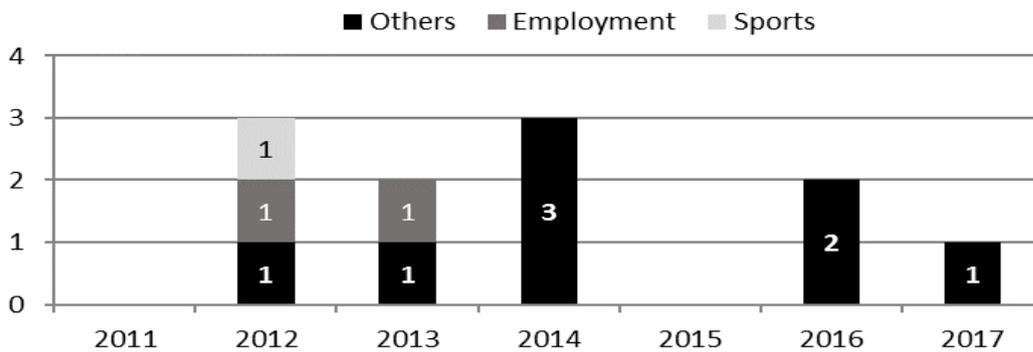


Chart 18: Successful challenges per year, 2011 – 2017

The data thus indicates a historic chance of success of a challenge of 17.8% for commercial and a strikingly similar 18.2% for employment matters<sup>43</sup> (see Charts 19.1 and 19.2). On their own, the number of employment cases is too low to allow predictions. Yet in light of the similar rate of success in commercial cases, a similar trend might at least be assumed. No serious predictions appear possible for sports arbitration given the marginal number of such cases (one successful out of three admitted challenges).

To date, numbers seem to indicate that the success rate of challenges in domestic arbitration might double or even triple the rate in international arbitration (see Chart 17 and Chart 5, respectively).

The main reason for the higher numbers of reversals in domestic arbitration compared to international arbitration lies primarily in Article 393(e) CCP (arbitrariness of an award). The Federal Court can review the arbitral tribunal's decision on merits under the test of arbitrariness which is far broader than the very narrow test of public policy pursuant to Article 190(2)(e) PILA for international cases. Consequently, challenges based on arbitrariness are successful in 20% of the cases (see Chart 20, compared to a mere 1% for challenges based on public policy in international cases, see Chart 6).

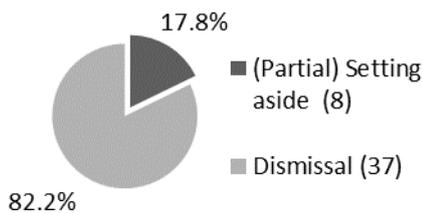


Chart 19.1: Decisions on the merits (commercial), 2011 – 2017 (45 cases)

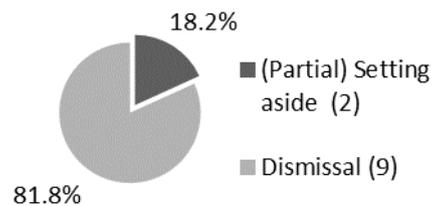


Chart 19.2: Decisions on the merits (employment), 2011 – 2017 (11 cases)

### C. Grounds of Challenge

Under Article 393(a)-(f) CCP, a domestic arbitral award may be challenged only on the following grounds: (a) the single arbitrator was appointed or the arbitral tribunal composed in an irregular manner; (b) the arbitral tribunal wrongly declared itself to have or not to have jurisdiction; (c) the arbitral tribunal decided issues that were not submitted to it or failed to decide on a prayer for relief; (d) the principles of equal treatment of the parties or the right to be heard were violated; (e) the award is arbitrary in its result because it is based on findings that are obviously contrary to the facts as stated in the case files or

<sup>43</sup> As of 2015, the chances of success were 17% (5 of 30 commercial cases), and 22%, (2 of 9 employment cases); see DASSER/WÓJTOWICZ (2015), at 297.

because it constitutes an obvious violation of law or equity; (f) the costs and compensation fixed by the arbitral tribunal are obviously excessive.<sup>44</sup>

As of 2017, not a single challenge on grounds (a) or (c) was successful, while ground (f) (excessive fees and costs) has not even been invoked yet. Conversely, the chances of a challenge based on ground (b) (jurisdiction) and (e) (arbitrariness) remain high, although they have decreased since 2015<sup>45</sup> (as of 2017, 2 out of 9, and 7 out of 35, respectively). For the first time, ground (d) (equal treatment/right to be heard) has been invoked successfully, in 2016 and again in 2017 (2 out of a total of 16). (See Chart 20).

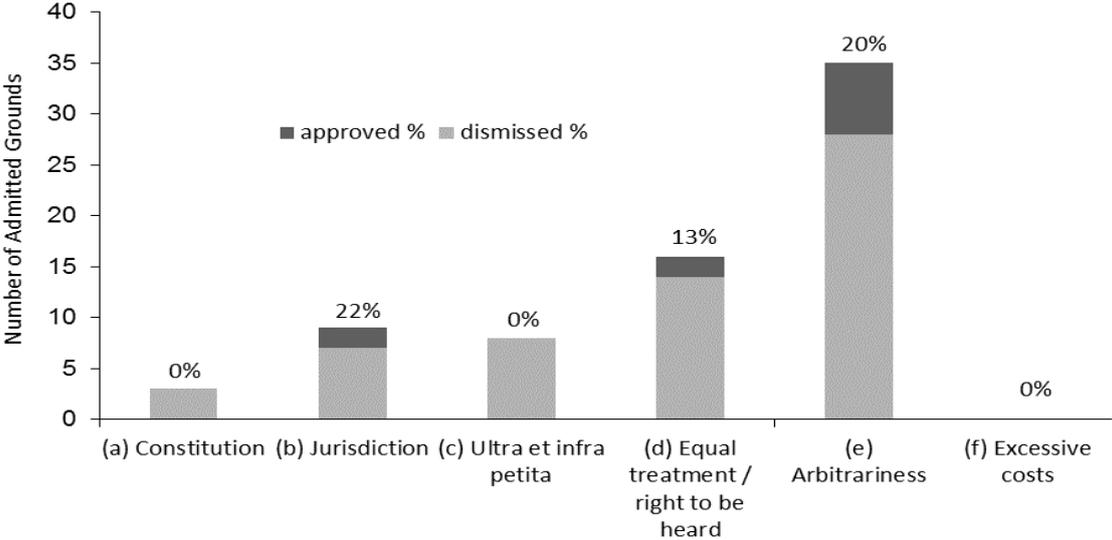


Chart 20: Success of challenges on the grounds of Article 393(a)-(f) CCP, 2011 – 2017

**D. Duration of Proceedings**

The median duration of challenge proceedings before the Federal Court in domestic arbitration has been rising steadily since 2011 and, as of 2017, amounts to 145 days (for 59 decisions on the merits).<sup>46</sup> It remains shorter than in international arbitration (see Chart 21 and Chart 7, respectively). Thus, taking into account the 30-day period for the filing of a challenge, parties may expect a domestic award to be final in less than six months after its issuance. The variance in duration is very high, though, with two decisions rendered in 2017 taking an exceedingly long time.<sup>47</sup> (See Chart 21).

<sup>44</sup> DASSER/WÓJTOWICZ (2015), at 297.  
<sup>45</sup> As of 2015, 2 out of 4 cases, 50%, and 6 out of 25 cases, 24%, respectively. *Id.*  
<sup>46</sup> While in the first three years since 2011 the median amounted to roughly 4 months, it has then risen to roughly five for the years 2014 and 2015.  
<sup>47</sup> Decision 4A\_587/2015 of February 15, 2017 (476 days) concerned an employment matter. Decision 4A\_621/2015 of March 28, 2017 (501 days) concerned a commercial case. It was actually an international dispute. However, the parties had chosen to opt out of the 12<sup>th</sup> Chapter PILA and into the Third Part of the CCP (as provided for in Article 176(2) PILA).

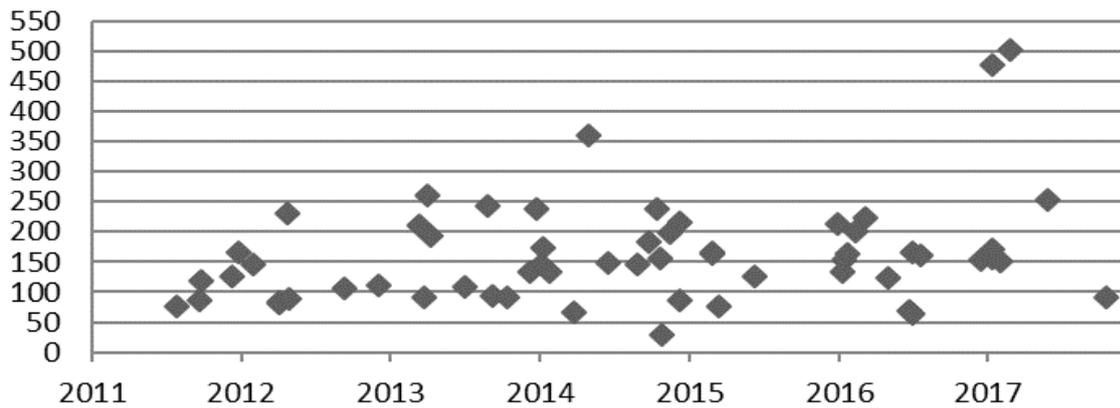


Chart 21: Duration of Proceedings on the merits in days

## E. Conclusion

It is still early days for any empirical study on domestic arbitration under the CPC. The still rather low number of cases limits the usefulness for advising parties. Still, it is evident that domestic awards are much easier to challenge on the merits due to the relatively broad ground of arbitrariness, which is unavailable in international cases under the PILA. Reassuringly, there have been no challenges based on allegedly excessive arbitration fees so far, in spite of the often-heard complaint about costs of arbitration.

Overall, apart from the challenges based on arbitrariness, challenges of domestic awards share most features with international cases, suggesting it may not matter that much whether a case turns out to be international or domestic under Swiss law. The current gentle reform of Swiss arbitration will align international and domestic arbitration even more, without compromising in any way the extremely liberal approach of the PILA.<sup>48</sup>

<sup>48</sup> See <https://www.ejpd.admin.ch/ejpd/de/home/aktuell/news/2017/2017-01-11.html>. The Federal Council's bill to Parliament is scheduled for late summer 2018.

Felix DASSER, Piotr WÓJTOWICZ, *Challenges of Swiss Arbitral Awards. Updated Statistical Data as of 2017*

### **Summary**

This article updates and extends previously published statistical data of challenges of international arbitral awards under Article 190(2) PILA (current database: 1989 through 2017). Additionally, it updates and extends data on requests for the revision of international arbitral awards (1989 through 2017) and challenges of domestic arbitral awards pursuant to Article 389 *et seq.* CCP (2011 through 2017).

Under Article 190(2) PILA, 74 decisions have been rendered in 2016 and 2017. The tally of challenges amounts to 576 decisions. The percentage of successful challenges in non-sports (mainly commercial) arbitration remains at around 7%. The data now also suggest a chance of approx. 7% for sports arbitration. The median duration of the procedure before the Federal Court is roughly 6 months, while it has been slightly declining again for the past two years.

Since 1992, the Federal Court has published 27 decisions on requests for *revision of international awards*. Thus far, three requests have been successful. The duration is a tad shorter than the one of challenges.

Finally, 79 decisions in *domestic arbitration* under Article 393(a)-(f) CCP have been issued to date. 18% of the decisions concerned employment matters. The chance of success of a challenge amounts to 19%. That fairly high number is largely due to successful challenges based on arbitrariness, a ground for challenge that is only available in domestic arbitration proceedings. As of 2017, the median duration of domestic setting aside proceedings amounts to roughly 5 months.