

Swiss International Arbitral Awards Before the Federal Supreme Court

Statistical Data 1989-2019

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1. Introduction¹

“*There are lies, damned lies, and statistics*” as the saying goes. Statistics do not enjoy a great reputation. For informed advice to a client, however, they still beat the anecdotal war story by far, right? So, we suggest that we still stick with statistics.

More than 15 years ago, I started to collect all decisions of the Swiss Federal Supreme Court rendered in challenge proceedings pursuant to Article 190 of the Swiss Private International Law Act (PILA). As all such challenges of international arbitration awards rendered in Switzerland are within the exclusive jurisdiction of the Federal Court, bypassing cantonal courts, these decisions provide a treasure trove not just on Article 190 PILA and the PILA’s whole 12th Chapter on international arbitration,² but also a

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² Swiss International Law Act of 18 December 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>. [30 December 2020]. Under Article 176(1) PILA in the version in force until end of 2020, an arbitration is international if at least one of the parties to the arbitration agreement had neither domicile nor habitual residence in Switzerland at its execution.

glimpse into the essentially confidential world of arbitration in Switzerland. A glimpse, not more than that – the Federal Court’s decisions are generally anonymized and each file, including the challenged award, remains confidential – but at least a glimpse.

At the time, just a few of the Federal Court’s decisions were published in the official reporter, the Decisions of the Federal Court (DFC).³ Further decisions were at least partially published in the ASA Bulletin by involved ASA members. Since 2000, almost all decisions are, however, made accessible on the Federal Court’s website (www.bger.ch).⁴ Our statistics include all cases from the entry into force of the PILA in 1989 as the Federal Court had kindly granted access to its files and continued to assist in making sure that no decisions are missed. Without this generous support I would not have dared to start on this journey.

To date, a first major paper and four mostly shorter updates, partly with additional topics added, came to fruition.⁵ This paper is, thus, an update of what have become popular reference studies on Swiss arbitration. It is also more than just another update. It is the largest study we have undertaken so far and is based on the assumption that there will be no need for yet another update anytime soon. We are mirroring the broad scope of the first study, but on a much larger data set, while leaving out additional, non-190 topics that we lately included, namely revision proceedings and challenges of domestic

³ Also available online on www.bger.ch. [30 December 2020].

⁴ Referenced as “Federal Court Decision [...]”.

⁵ The first study covered the years 1989, when the PILA entered into force, to 2005. It featured 221 decisions, see 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 that first study followed in 2010, entailed data until the end of June 2009, referenced 289 decisions, and provided for additional statistical analyses, see 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, covered 435 decisions, and referenced data up to the end of 2013, see 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).

The third update covered 502 decisions on challenges up to the end of 2015 and added data on revisions of arbitration awards and challenges of domestic awards, see FELIX DASSER/PIOTR WÓJTOWICZ, *Challenges of Swiss Arbitral Awards – Updated and Extended Statistical Data as of 2015*, 34 ASA Bulletin 2/2016, 280-300: DASSER/WÓJTOWICZ (2016).

The fourth update included additional cases of 2016 and 2017 (a total of 576 decisions on challenges) plus again data on revisions and domestic cases: see FELIX DASSER/PIOTR WÓJTOWICZ, *Challenges of Swiss Arbitral Awards – Updated Statistical Data as of 2017*, 36 ASA Bulletin 2/2018, 276-294: DASSER/WÓJTOWICZ (2018).

awards.⁶ Most previous findings and trends have proven persistent, a few have spectacularly changed. We will revert to that at the end.

We added one new topic, however, a study of the law applicable to the substance of the dispute before the arbitral tribunal, the *lex causae*, in order to complement the various statistical data of arbitral institutions, in particular the ICC, on *leges causae* from a non-institutional vantage point.

The publication of this study coincides with the first major revision of the 12th Chapter of the PILA, which entered into force on 1 January 2021. The revision did not touch on Article 190 PILA and only marginally on the proceedings before the Federal Court – in particular allowing submissions to the Federal Court to be drafted in English instead of in one of the official Swiss national languages. In any case, the revision mostly focused on writing established case law into the statute and making the 12th Chapter easier to read for foreign users, so that the trends identified in this study will unlikely be affected by the revised statute.

The cases covered by the first study of 2007 mostly concerned commercial arbitration. There were only few sports-related cases and practically no ISDS-related cases. In the 2010 study, I first noted the sudden rise of sports-related cases and since then we have distinguished between commercial and sports cases for some of our statistics.⁷ Now, we are introducing a third category, investment-treaty cases (ISDS cases). They are still few in numbers but have become prominent enough to warrant special treatment and bear witness of Switzerland as a fit-for-purpose and sought-after investment arbitration venue.⁸ Accordingly, the Federal Court has rendered 14 decisions until 2019 (*see infra*).⁹

⁶ See, e.g., DASSER/WÓJTOWICZ (2018), *supra* fn. 5, at 284 *et seq.*, and 288 *et seq.*, respectively.

⁷ Almost all sports-related cases are challenges of awards of the Court of Arbitration for Sport (CAS) in Lausanne. In addition, up to 2019 there were decisions relating to six awards of the Basketball Arbitral Tribunal in Geneva, Switzerland (BAT), two in 2012, three in 2018, and one in 2019.

⁸ For an overview of Swiss ISDS cases see MATTHIAS SCHERER, *Mission Impossible? – Challenging Investment Treaty Awards before the Swiss Federal Tribunal*, in: Christoph Müller, Sébastien Besson, Antonio Rigozzi (eds.), *New Developments in International Commercial Arbitration 2020*, Neuchâtel 2020, 27-76; SCHERER (2020).

⁹ See also SCHERER (2020), *supra* fn. 8, at 74-76. His list includes only 12 arbitration cases until 2019 (and two further cases in 2020). These 12 cases led to 14 decisions, though: First, in one ISDS dispute a preliminary decision on the jurisdiction of the arbitral tribunal was challenged to the Federal Court and then later the final award was challenged, too, see Federal Court Decisions 1P.113/2000 of 20 September 2000; and 4P.200/2001 of 1 March 2002, respectively. Second, the Federal Court rendered two separate decisions in two

For purposes of this study, we refer to “non-sports” challenges jointly also as either “commercial” or “other”, which then includes ISDS cases. Exceptionally we distinguish ISDS from commercial cases for purposes of a given analysis and chart. Occasionally, we use the term “other” in its plain meaning, *i.e.*, to indicate a category of cases that differs from the other distinguishable categories. If available decisions are silent on the nature of the dispute, we treat those as “commercial” or exclude them from a given chart. Further, if a statistical analysis requires a case to provide for an information that it fails to do, we do not include that case. For instance, since the underlying awards are not public, cases where the *lex causae* in the underlying arbitration proceedings is known amount to less than 50 % of all decisions rendered; accordingly we rely only on those cases that feature the origin of *lex causae*, which of course makes the pool relied upon smaller.¹⁰

2. The Data Sample

2.1 Number of Decisions

In 31 years, 1989 through 2019, 660 challenges were decided by the Federal Court. Thereof, 497 were decided on the merits (75 %). 90 challenges were not admitted for procedural shortfalls (14 %). A further 73 challenges were withdrawn (11 %) (*see* Chart 1).¹¹

The reasons for inadmissibility are manifold. Challenges declared inadmissible were, among other things, filed too late, or lacked either the required level of pleadings (“to state a claim”),¹² deposit of advance of the costs, or an award susceptible of a challenge.¹³

related ISDS arbitrations that each saw an independent award (Federal Court Decisions 4A_244/2019 of 12 December 2019; and 4A_246/2019 of 12 December 2019).

¹⁰ Finally, we would like to refer the interested reader to a comprehensive compilation of Swiss court decisions on arbitration discussing their relevance for the content of the Swiss *lex arbitri*: CHRISTOPH MÜLLER/SABRINA PEARSON, *Swiss Case Law in International Arbitration*, 3rd ed., Zurich 2019.

¹¹ The relative amount of cases that either were declared inadmissible or were withdrawn has remained stable throughout the past three decades.

¹² The pleadings of a challenge require a certain degree of plausibility and specificity in order to be heard on the merits.

¹³ For instance, four *sports* motions were filed too late, 13 lacked proper motivation, three a deposition of advances of costs, seven cases were not susceptible of a challenge, six settled, and 23 were withdrawn.

In comparison, eight *commercial* motions were filed too late, eight lacked proper



Chart 1: Admissibility of challenges, 660 cases, 1989-2019

Turning to a comparison between each of the three decades 1989-2019 (for purposes of the statistics the first decade entails 11 years), the case numbers in the last decade, 2010 to 2019, when the median amounted to 35 cases per year, tripled compared to the first decade, when the median was 11 per year and doubled compared to the second decade, 2000 to 2009, when the median was 18.

Thus, while there has been a steady trend of rising numbers of cases from the outset, it was particularly the last decade that saw an extraordinary rise in case numbers overall with a record 49 decisions in 2018 (*see* Chart 2).

That trend if any seems to indicate further rising case numbers (*see infra*). Indeed, based on currently available data, 2020 has beaten the median of the last decade even if it will not yield a new record.

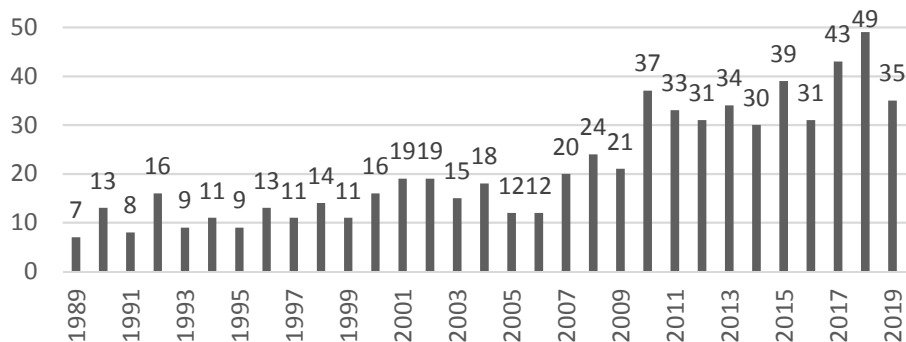


Chart 2: Number of decisions p.a., 660 cases, 1989-2019

The rising numbers are due to a spectacular rise of sports cases. The overall tally since 1989 and until the end of 2019 totals 207 sports-related decisions (31 %) out of total 660 decisions rendered (453 non-sports, 69 %).

With regard to the last decade, sports cases have almost closed ranks with non-sports cases in term of numbers of decisions rendered a year (*see*

motivation, 11 lacked a deposition of advances of costs, 9 cases were not susceptible of a challenge, 12 settled, and 32 were withdrawn.

Chart 3, total 362 decisions). Five calendar years even saw more decisions issued in sports cases than commercial ones (ISDS excluded). The aggregate record for that decade tallies 166 sports decisions (46 %) compared with 187 non-sports (52 %), having stabilized at around 50 % over the last decade after the momentous rise in the 2000s (*see* Charts 3 and 4). Further, also ISDS cases have seen a considerable rise in numbers in recent years: nine cases (2 %), compared to a total 14 known ISDS cases since 1989 (*see* Chart 3).¹⁴

Looking into the future for a prediction on overall growth of cases, the trend based on further statistical models suggests an increase of approx. 5 % or one case per year – of course, subject to continuing high fluctuations and the uncertainties of any prediction.

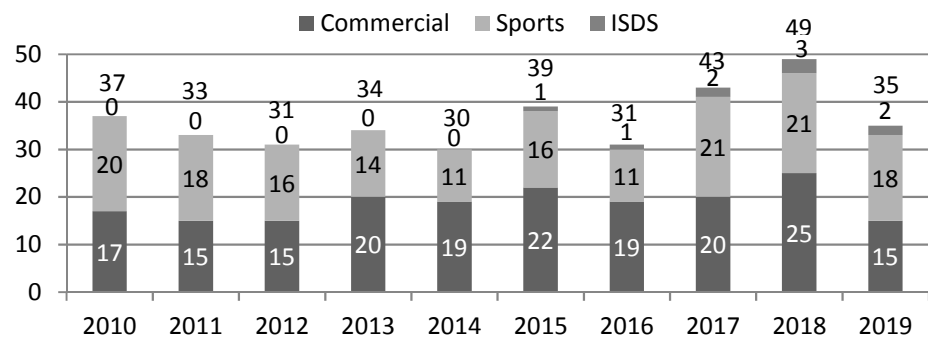


Chart 3: Number of decisions p.a., 362 decisions, 2010-2019

When examining the data, the picture of the overall growth for the past two decades becomes further conclusive (538 cases). Since only few sports cases were issued not by CAS (*e.g.*, BAT, *see supra*), data indicates that CAS-related challenges have been the main propeller of increasing overall case numbers a year. CAS cases saw an increase from one decision in 2000 to 17 in 2019 – with several higher peaks throughout the last decade (*see* Chart 4, 197 cases).¹⁵ Conversely, non-CAS cases¹⁶ have been increasing at a slower pace since 2000, despite a unique peak in 2018 (*see* Chart 5, 341 cases).

Considering the last two decades, data references a proportion of sports cases to non-sports cases that has flattened out at around 48 %. In other words, every other decision issued by the Federal Court is likely to

¹⁴ *See* SCHERER (2020), *supra* fn. 8, at 74-76.

¹⁵ DASSER/WÓJTOWICZ (2018), *supra* fn. 5, at 277. The years 1989 to 1999 saw just two CAS cases: Federal Court Decision 4P. 217/1992 of 15 March 1993 (dismissal); Federal Court Decision 2nd Civil Chamber of 31 March 1999 (dismissal).

¹⁶ Including BAT cases.

be sports-related. This reflects the growing importance of CAS as a global provider of international sports arbitration services. It can be expected that current trends related to CAS cases will not come to a halt. Quite to the contrary, challenging CAS awards to the Federal Court, and even to the European Court of Human Rights under Article 6(1) of the European Convention on Human Rights, seems to have gained traction in prominent sports arbitration disputes where a large interest of the public is present and reputational interests of the parties at risk.¹⁷ Accordingly, the referenced trend of high numbers of CAS cases is likely to continue, thereby further contributing to the high numbers of cases overall, even though the spectacular increase between 2006 and 2010 has mostly levelled off since.

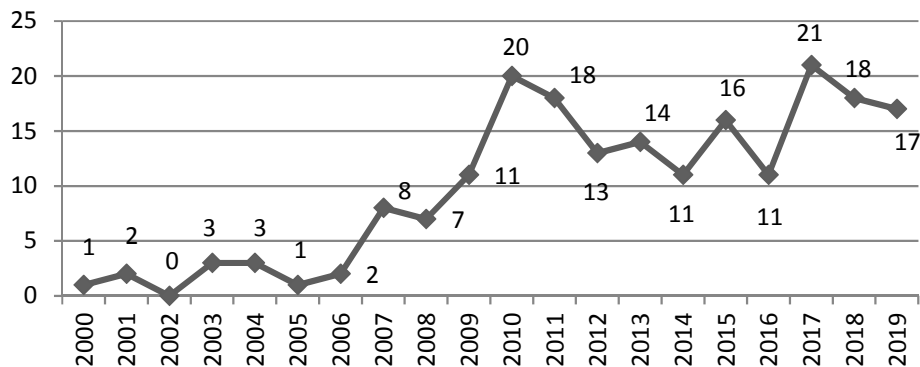


Chart 4: CAS challenges p.a., 197 cases, 2000-2019

¹⁷ See, e.g., *Caster Semenya v. International Association of Athletics Federations IAAF, and Athletics South African ASA*, Federal Court Decision 4A_248/2019 of 25 August 2020; and the athlete's announcement to take the case to the European Court of Human Rights, e.g., <https://www.reuters.com/article/us-athletics-semenya-idUSKBN27X1G8>. [30 December 2020]. See also ECHR, *Mutu and Pechstein v. Switzerland*, Case 40575/10 and 67474/10, Judgement of 2 October 2018 (see also, PIOTR WOJTOWICZ, *You Will Be Heard: The European Court of Human Rights Clarifies the Arbitration Right to a Public Hearing*, *Alternatives to the High Cost of Litigation*, 37(2) 2019, 27-32; and PIOTR WOJTOWICZ, *A Protocol for Being Heard: Invoking a New Right for an Open Arbitration Hearing in Europe*, *Alternatives to the High Cost of Litigation*, 37(3) 2019, 39-41).

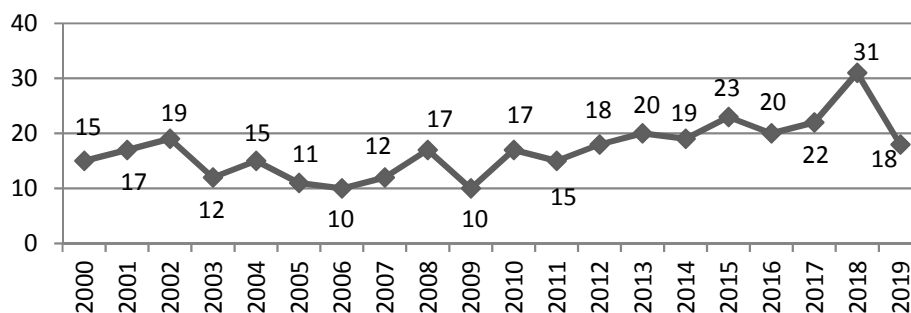


Chart 5: Non-CAS challenges p.a., 341 cases, 2000-2019

2.2 Nature of Awards Moved against

85.5 % of the motions were decided by the Federal Court under Article 190(2) PILA, *i.e.*, the challenges were directed against final¹⁸ awards (*see* Chart 6).¹⁹

In 14.5 % of the cases, however, the Federal Court scrutinized motions pending arbitration – under an exception to the rule that only final awards can be challenged. Under the exception of Article 190(3) PILA, parties may move immediately against independently issued decisions on jurisdiction, or assert irregularities in the composition of the panel. Moreover, parties must do so or will forfeit that right.²⁰

Those decisions challenged under Article 190(3) PILA are “positive” decisions since the tribunal will declare itself either competent or deem that there is no error in its composition, thus, the arbitration will not cease but

¹⁸ According to the case law of the Federal Court, for purposes of that provision, a final award is also one that disposes of a claim only partially yet in a final manner; *see* DFC 130 (2004) III 76; and 130 (2004) III 755.

¹⁹ 4.5 % of those 85.5 % were procedural “interim” awards that were deemed final for purposes of Article 190(2) PILA for they terminated the arbitration and, accordingly, were not awards in the sense of Article 190(3) PILA, *see infra* at 3.2. Such are most importantly negative awards on jurisdiction, *see* DFC 136 (2010) III 597. It is not always evident, however, for what reasons the original arbitration was terminated, in particular with regard to motions that were deemed inadmissible by the Federal Court, where information provided is typically scarce. Moreover, a challenge might have been directed against an award that was rendered on the merits against some respondents while with regard to other respondents the tribunal might have declined jurisdiction. If a challenge is directed only against the partial “terminating” part of that final award, it falls either way under the ambit of a final award while in other circumstances or depending on the party affected by the award one could further debate whether to deem the object of a challenge “final” or “interim”, *see* Federal Court Decision 4A_636/2018 of 24 September 2019.

²⁰ DFC 140 (2014) III 477; 130 (2004) III 76, *cons.* 3.2.1; and 134 (2008) III 565.

continue. Conversely, decisions denying jurisdiction or stating error in composition terminate the arbitration and are final awards under Article 190(2) PILA.²¹

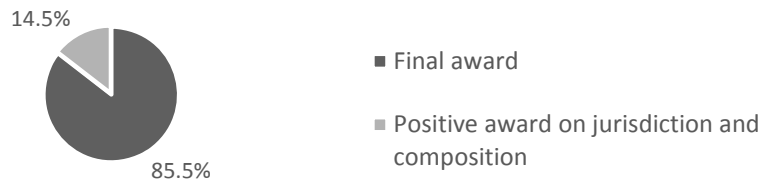


Chart 6: Nature of the award, Article 190(2) and (3) PILA, 660 cases, 1989-2019

3. Federal Court Proceedings

3.1 Chances of Success

The number of decisions quashing an international award tallies 38 (out of 660 since 1989) (*see* Chart 7).

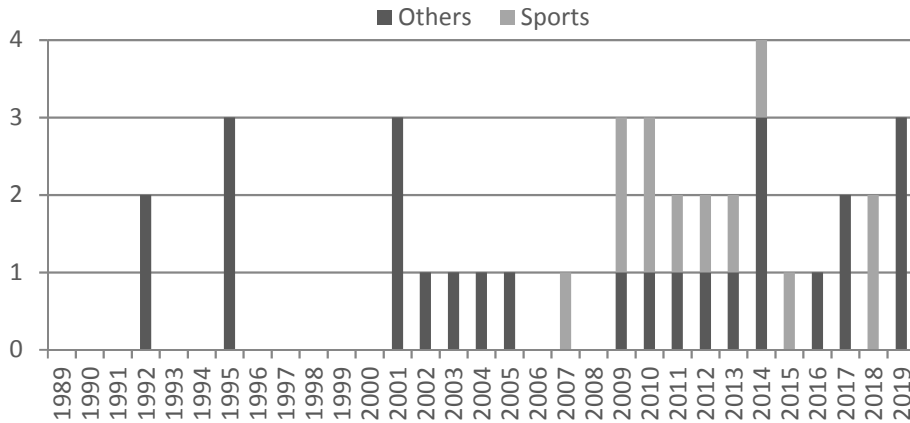


Chart 7: Successful challenges p.a., 38 cases, 1989-2019

The chances to set aside an international arbitration award under Article 190 PILA amount to 7.65 % (based on challenges reviewed on the merits since 1989, *see* Chart 8).

²¹ DFC 130 (2004) III 76, *cons.* 3.1.1; and 134 (2008) III 565.

The prospects of successfully challenging either a sports or a non-sports arbitration award are quite alike. Considering all decisions on the merits since 1989, the difference remains nominal.²² The success rate for non-sports cases amounts to 7.56 % (26 out of 344 cases), sports awards have been set aside at a rate of 7.84 % (12 out of 153 cases).



Chart 8: Decisions on the merits, 497 cases, 1989-2019

Each time we took a sample under our previous studies, the success rate revolved around the Magic Seven.²³ As said, that number is still valid for the total numbers since 1989. However, the past decade saw a small rise in chances to set aside an international award that may or may not indicate a trend. The general chances of success for that period amount to 8.33 % (see Chart 9).

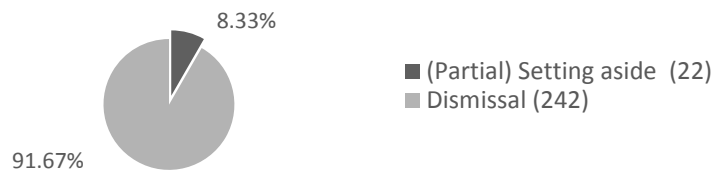


Chart 9: Decisions on the merits, 264 cases, 2010-2019

3.2 Grounds

Article 190(2) (a)-(e) PILA provides for the grounds under which an international award can be set aside. The provision reads:²⁴

“The award can be set aside:

- a. *if the appointment of an arbitrator was incorrect or if the constitution of the arbitral tribunal was incorrect;*

²² DASSER/WÓJTOWICZ (2018), *supra* fn. 5, at 280.

²³ Up to 2005 the rate was 7 %, it then fell to 6.5 % by mid-2009, rose to 7.55 % by 2013, rose again to 7.79 % by 2015, and fell to 7.53 % by 2017; *see* DASSER (2007), *supra* fn. 5, at 453; DASSER (2010), *supra* fn. 5, at 86; DASSER/ROTH (2014), *supra* fn. 5, at 463-464, DASSER/WÓJTOWICZ (2016), *supra* fn. 5, at 285, DASSER/WÓJTOWICZ (2018), *supra* fn. 5, at 280, respectively.

²⁴ DASSER (2007), *supra* fn. 5, at 446.

- b. *if the arbitral tribunal has wrongfully assumed or refused jurisdiction;*
- c. *if the arbitral tribunal has ruled on points in dispute which were not submitted or if it has not decided on filed requests;*
- d. *if it has violated the principle of equal treatment of the parties or their right to be heard;*
- e. *if the decision violates public policy.”*

Under Article 190(2) PILA, only final awards can be challenged (*see supra*). Article 190(3) PILA grants the right to challenge also an “interim” decision but only on either ground (a) or (b), that is because of an incorrect constitution of the tribunal or of a lack of jurisdiction thereof, respectively (*see supra*).

Challenges under the grounds (a) and (b) are reviewed with unfettered powers with regard to violations of law by the Federal Court.²⁵ Conversely, the scope of review under the grounds (c)-(e) is restricted to that canon. The review of facts is generally barred but for some exceptions.²⁶

The data sample used to determine how often which individual ground was invoked tallies 497 decisions on the merits. The Federal Court scrutinizes a challenge under those five grounds only if it was not declared inadmissible for procedural reasons. Since each challenge carries typically more than one ground, the number of grounds invoked is higher than that of corresponding challenges (943 vs. 497, *see* Chart 10).

The most popular ground invoked – in absolute numbers – is ground (d), violations of the right to equal treatment/right to be heard (315). Ground (e), public-policy infringements, follows closely (271). Ground (b), wrong decisions on jurisdiction was invoked less often but still in considerable numbers (192). Finally, ground (c), *ultra vel infra petita* requests, and ground (a), wrong composition of the tribunal, were invoked much less often (97 and 68 times, respectively).²⁷

²⁵ DFC 140 (2014) III 477; and 134 (2008) III 565.

²⁶ DFC 140 (2014) III 477; and 140 (2014) III 16.

²⁷ Further distinguishing between sports and non-sports cases, the numbers for each ground are as follows: (a) 18 and 50, (b) 48 and 144, (c) 24 and 73, (d) 97 and 218, (e) 90 and 181. Thus, grounds (d) and (e) are quite popular in sports challenges contrasted to grounds (a) to (c) and if juxtaposed to non-sports numbers.

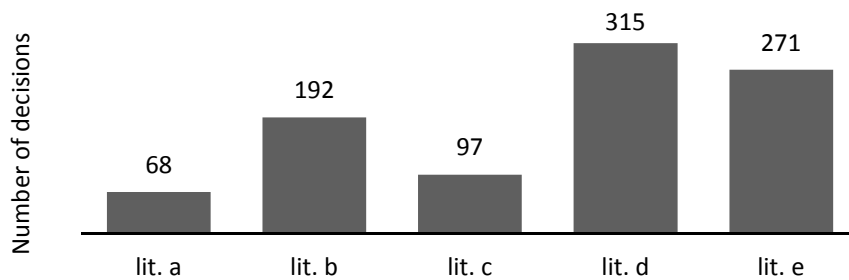


Chart 10: Grounds invoked pursuant to Article 190(2) PILA, 943 times invoked, 497 decisions, 1989-2019

The majority of the parties moving to set aside an award invoke more than only one ground. Yet as already referenced under the study of 2007,²⁸ data suggests that chances of success do not increase the more grounds are invoked. If any trend can be learned – due to the small sample of submissions under four or five grounds –, success seems even slightly more likely if only one ground is pleaded (10%). Conversely, invoking additional grounds rather decreases chances of success, albeit slightly while any inference is fraught with caution (see Chart 11). The general trend seems also to indicate that chances of success for each category of numbers of grounds have been converging over time.²⁹

Number of grounds invoked	Cases	Successful (absolute numbers)	Successful (%)
1	201	20	10%
2	184	11	6%
3	79	5	6%
4	28	2	7%
5	5	0	0%
Total	497	38	>7%

Chart 11: Number of grounds invoked per challenge, 497 cases, 1989-2019

Not every ground invoked by the claimant is necessarily scrutinized. The Federal Court may deem it inadmissible or not sufficiently reasoned or

²⁸ DASSER (2007), *supra* fn. 5, at 454.

²⁹ *Id.* at 455.

may have quashed the award already under a different ground. Accordingly, the next Chart 12 presents the chances of success of a given ground that was actually scrutinized on its merits by the Federal Court (763 reviewed, thereof 39³⁰ approved and 724 dismissed).³¹ The subsequent Chart 12, thus, does not match Chart 10, the latter evidencing all grounds invoked. The data sample for Chart 12 is smaller than for Chart 10.

Challenging the award under the ground (e), violation of public policy, has been popular with challengers since 1989 (*see already supra*, Chart 10). Yet, to date, and despite the fact that the Federal Court heard that ground 220 times, only two awards have been set aside under that ground.³² Accordingly, chances of success under it amount to only 0.9 % (*see* Chart 12) or actually 0 % for non-sports cases.

Parties represented by counsel arguably know about the slim chances of success at least since the Federal Court noted in 2006 that triumph under that ground was a “*chose rarissime*”, an extremely rare thing.³³ It seems almost that challengers combine that ground with others to the effect of a *ceterum censo*, thus, not because they deem the award stained only or primarily under that rationale.³⁴

Parties pleaded ground (d), the right to equal treatment/right to be heard, even more often. To date, that ground has been successful 14 times out of 257. Thus, chances to set aside successfully an award under that ground are tangible and amount to 5.4 %.³⁵

The percentage for ground (c), *ultra et infra petita*, amounts to 3.9 %. That ground was successful three times out of 76.

Challenges based on ground (b), jurisdiction, are the most propitious as they led to 19 victories (out of 155 challenges), a 12.3 % success rate, still small but at least not negligible.³⁶

³⁰ 38 decisions were quashed but 39 grounds admitted. In other words, one decision saw two grounds admitted, *see* Federal Court Decision 4P.20/1991 of 28 April 1992 (partly published as DFC 118 (1992) II 193).

³¹ Data suggests that sports and commercial cases share in similar success rates for grounds (b), (c), and (e), while grounds (a) and (c) were not admitted under any sports proceeding.

³² DFC 138 (2012) III 322 (*Francelino da Silva Matuzalem v. FIFA*); and 136 (2010) III 345 (*Club Atlético de Madrid SAD v. Sport Lisboa E Benfica - Futebol SAD, and FIFA*).

³³ DFC 132 (2006) III 389, *cons.* 2.1.

³⁴ *See* DASSER (2007), *supra* fn. 5, at 456.

³⁵ Compared to 5.5. % as of 2017, *see* DASSER/WÓJTOWICZ (2018), *supra* fn. 5, at 281.

³⁶ Compared to 11.3 % as of 2017, *id.*

The least often heard ground has been ground (a), deficient constitution of the tribunal (heard 55 times). It has been the least successful in absolute numbers for it was granted only once (1.8 %).³⁷

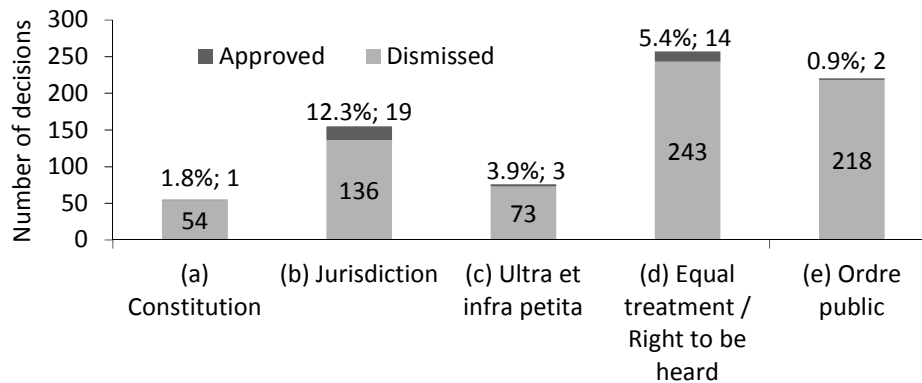


Chart 12: Success of a ground if heard, 497 decisions, 1989-2019

3.3 Duration

The next data sample concerns the time the Federal Court needs to decide on a challenge. The sample the following analyses rely on entails only those challenges that were reviewed on the merits to the exclusion of those deemed inadmissible or withdrawn.³⁸

To determine duration, the date on which the Federal Court received an application and the date of the issuance of a decision are taken into account.³⁹

³⁷ After reviewing the data, we decided to move to ground (b), *i.e.*, jurisdiction, the DFC 140 (2014) III 75; approval. Initially, that ground was featured under ground (a), *i.e.*, irregular composition, as pleaded by the challenger. However, the Federal Court ruled that since at issue was the issuance of an award *functus officio*, the challenge should be reviewed under ground (b). In its aftermath, that ruling has been deemed controlling for similar issues related to *functus officio*. Accordingly, we decided to mirror that development and to amend the data analysis. This led to a reduction of the success rate from 3.8 % to 1.8 % *see* DASSER/WÓJTOWICZ (2018), *supra* fn. 5, at 281.

³⁸ If cases were included that were, *e.g.*, dismissed for lack of payment of the advance or withdrawn by the claimant at an early stage, the median duration would be reduced. At the same time, that would not provide useful information for parties.

³⁹ The exact method used to determine the duration remains as follows: 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

To this duration, typically one month needs to be added for the statutory filing period of 30 days for challenges from the service of the award.⁴⁰

During the first two decades under the PILA, the median⁴¹ duration for setting aside proceedings was declining: from a reasonable less than six to an amazingly low four months.⁴² That trend towards ever-shorter duration was broken, however, at the end of the second decade.⁴³ Accordingly, the third decade saw a median of six months (183 days). The duration for all three decades registers at a tad more than five months (160 days).

While it is difficult to conclusively identify the reasons for that rising trend, the following causes are likely to have contributed:

First, parties were granted the right to a second round of submissions (reply and joinder) as a matter of law in late 2012.⁴⁴ Before, parties could exercise that right only in exceptional circumstances.⁴⁵ A second exchange takes a few weeks.

Second, the past decade saw a number of highly complex cases, including politically fraught ISDS disputes that took longer to decide than average (*see* Charts 13.1 and 13.2, where two related cases are displayed as one point for they were issued at the same day and had the same duration).⁴⁶

Finally, the rising number of challenges might also have contributed to a certain backlog.

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), *supra* fn. 5, at 456; DASSER (2010), *supra* fn. 5, at 90-91.

⁴⁰ Article 100 Swiss Federal Court Act (of 17 June 2005, SR 173.110). This filing period is stayed during the Federal Court recesses in winter, over Easter, and in summer (Article 46 Swiss Federal Court Act), but cannot otherwise be prolonged. This comparative shortness contributes to the efficiency of the Swiss challenge proceedings.

⁴¹ The median is the number that divides the higher half of a sample from the lower half, as compared to the average or mean, which is the sum of all items in a sample divided by the number of items. The median is usually more informative as the average may be disproportionately influenced by a few outliers.

⁴² *See* DASSER (2010), *supra* fn. 5, at 90-91.

⁴³ DASSER/WÓJTOWICZ (2016), *supra* fn. 5, at 286-287.

⁴⁴ *See* DASSER/ROTH (2014), *supra* fn. 5, at 465; ECHR, *Joos vs. Switzerland*, Case 43245/07, Judgment of 15 November 2012, §§ 30-32, and the Federal Court's compliance policy: https://www.bger.ch/files/live/sites/bger/files/pdf/de/emrk_text_d.pdf (in German). [30 December 2020].

⁴⁵ *See* DFC 138 (2012) I 154; and 133 (2007) I 98.

⁴⁶ *See supra* fn. 9. For the ISDS cases, *see also* SCHERER (2020), *supra* fn. 8, at 74-76.

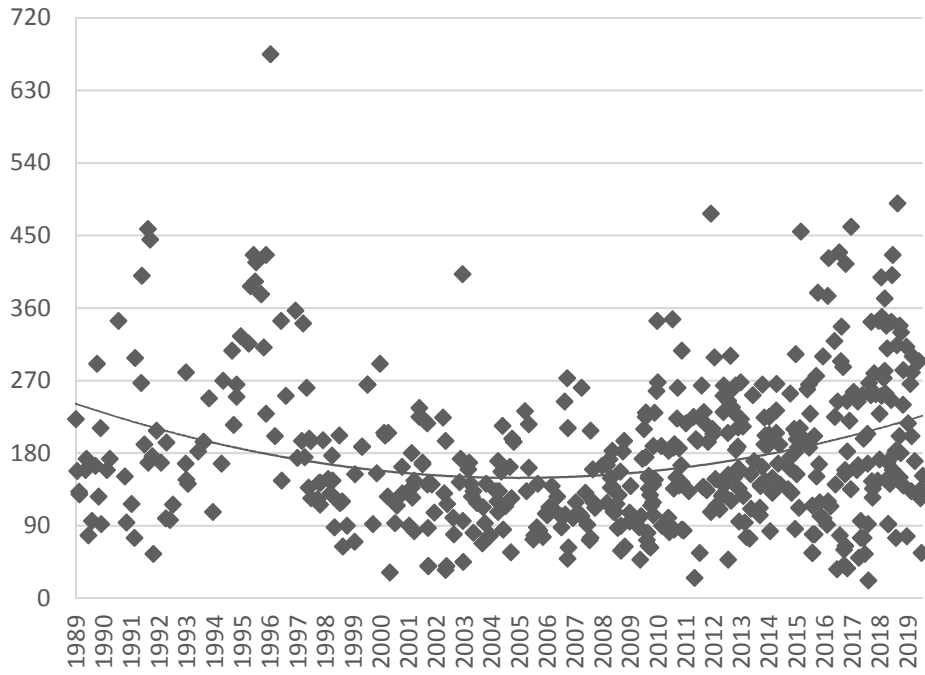


Chart 13.1: Duration of proceedings on the merits in days (polynomial trend of average), 497 cases, 1989-2019

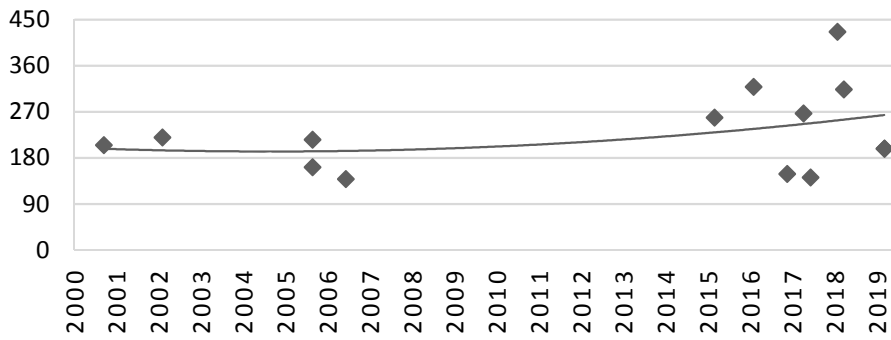


Chart 13.2: Duration in ISDS-related cases (polynomial trend of average), 14 cases, 1989-2019

Despite substantial variances, the vast majority of cases on the merits (70.6 %) has been reviewed within 209 days or less than seven months, with a few outliers (less than 5 %) taking more than one year (*see* Chart 14).

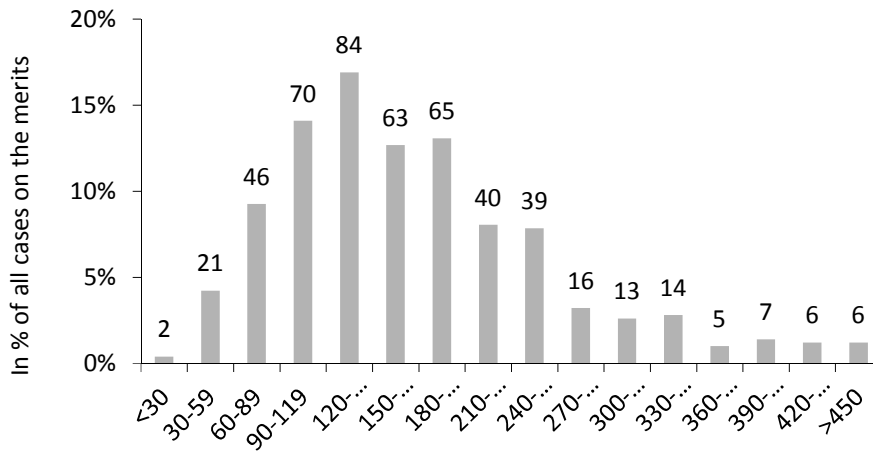


Chart 14: Duration (in days) of proceedings on the merits, 497 cases, 1989-2019

Does it take longer for the Federal Court to uphold a challenge than to dismiss it? The answer is yes, but only about a month: the median is 190 days as compared for 160 days for all cases (*see* Chart 15). Given the spread in duration for successful and unsuccessful cases, a party cannot infer from a longer than usual wait that her challenge will be successful.

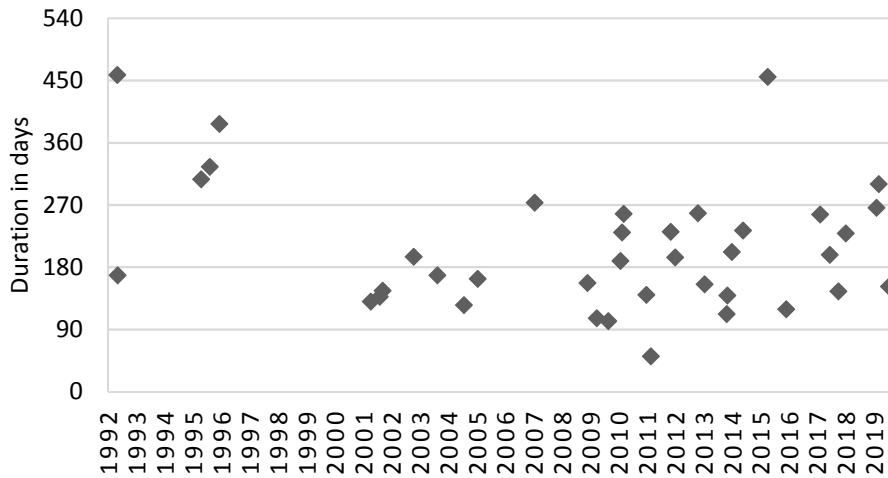


Chart 15: Duration of successful proceedings, 1989-2019

A further interesting data sample on duration is the length of proceedings in function of grounds invoked (1989-2019). Data suggests that invoking either one, or two, or three grounds has little impact on the length of proceedings since those take approx. five months (the median is 153, or 160, or 149 days, respectively). However, invoking four or five grounds seems to prolong proceedings since the corresponding median amounts to over six months (189 or 194 days, respectively, *see* Chart 16).⁴⁷

In view of the similar chances of success irrespective of the number of grounds invoked (if more than one, *supra*), a party interested in a swift decision might chose to plead her motion under her best one to three grounds.

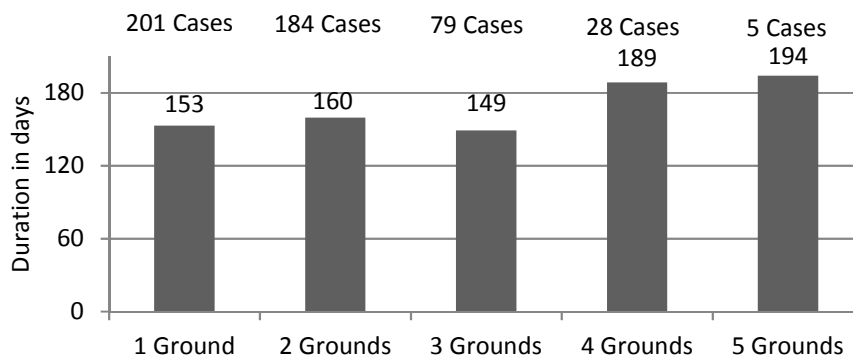


Chart 16: Median duration in relation to the number of grounds invoked, incl. indicated number of cases per duration, 497 cases, 1989-2019

Finally, does the value in dispute affect the duration of the proceedings? That was not the case at all under the first study of 2007 although higher values often lead to longer and more complex submissions.⁴⁸ The “No” of 2007 may need to be slightly qualified, albeit only for very high values above approx. CHF 300 million, where the median is 194 days (and the average is 241 days) as compared to the overall median of 160 days. The absolute number of those cases is very low (*i.e.*, thirteen) and the variance still substantial, however, rendering any predictions in an individual case difficult (*see* Chart 17; 318 cases on the merits where duration and value are known; with regard to the said thirteen high value cases, it must be noted that two related cases saw the exact same value, thus, both are displayed as one point under Chart 17).

⁴⁷ That general trend is valid for sports and commercial proceedings while data suggests that differences are smaller in sports cases.

⁴⁸ *See* DASSER (2007), *supra* fn. 5, at 459.

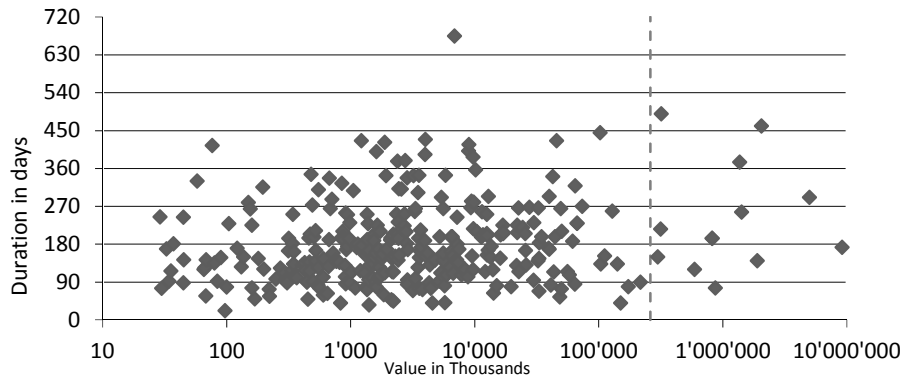


Chart 17: Duration of proceedings and value in litigation (logarithmic scale, vertical line below CHF 300 million), 318 cases on the merits, 1989-2019

3.4 Value and Costs

The amount in dispute may vary quite considerably in setting-aside proceedings before the Federal Court. On the one end of the spectrum, sports-related disputes of only nominal financial value and commercial cases of lower value occur (31 cases, or 8.6 %, of less than CHF 100,000 in value out of a sample of 360 cases where the amount in dispute is known, *see* Chart 18).⁴⁹

Conversely, data evidences large commercial and ISDS arbitrations over several billion Swiss francs (9 cases, or 2.5 %, of at least CHF 1 billion).

Most cases, however, amount to a value in dispute of between CHF 1 million and 50 million (202 cases, or 56 %). The median since 1989 has amounted to roughly CHF 2.3 million.

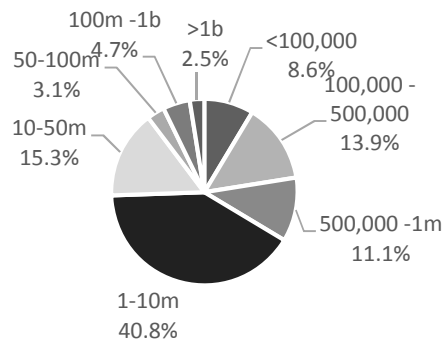


Chart 18: Amount in dispute, CHF, 360 cases, 1989-2019

⁴⁹ That sample includes challenges deemed inadmissible.

In setting-aside proceedings, costs are first of all based on the value in dispute. Costs comprise, first, court costs that must be borne by the losing party and, second, party costs to which the winning party is generally entitled to.

Article 65 Swiss Federal Court Act governs court costs.⁵⁰ Under that provision, costs are capped at CHF 100,000. However, if circumstances so justify – namely the complexity of the case – the amount can be doubled and raised up to CHF 200,000.

The Federal Court applies similar mechanics with regard to costs of the parties. The compensation for lawyer's fees is based on the value in dispute under the applicable tariff of the Federal Court – again an objective approach is being taken.⁵¹ Conversely, the amount of time and costs spent is not controlling. Accordingly, the rationale of the rules is not to compensate all costs born. In other words, a party prevailing still bears costs risks, although this risk is limited given the short deadlines, the limitation to two exchanges of rather concise briefs⁵² and the absence of oral pleadings or evidentiary hearings.

Unlike court costs, compensation for lawyer's fees is not capped. If the value in dispute is greater than CHF 5 million, the compensation ranges from CHF 20,000 to 1 % of that amount. Typically, the amount granted is somewhat higher than that for court costs.⁵³

For most cases, *i.e.*, 58 %, combined costs of proceedings oscillate between CHF 10,000 and 100,000 (*see* Chart 19). Since 1989, the median has amounted to CHF 22,000 (or roughly CHF 55,000 on average). That amount corresponds with the referenced tariffs of the Federal Court.

As a very rough rule of thumb, at the outset of the proceedings parties may expect combined costs for 1-2 % of the value in dispute (*but see* the median numbers for each amount of dispute, Chart 20).

⁵⁰ That provision is further explained by a tariff regulation of the Federal Court, *i.e.*, Tarif für die Gerichtsgebühren im Verfahren vor dem Bundesgericht [Tariff for Court Fees in Proceedings before the Federal Court] of 31 March 2006, SR 173.110.210.1.

⁵¹ Reglement über die Parteientschädigung und die Entschädigung für die amtliche Vertretung im Verfahren vor dem Bundesgericht [Regulations on the Compensation of Parties and the Compensation for Official Representation in Proceedings before the Federal Supreme Court] of 31 March 2006, SR 173.110.210.3.

⁵² There is an old saying among Swiss lawyers: if you need 20 pages to explain why a decision is arbitrary, it is not. Similarly, challenge briefs should be short and to the point.

⁵³ For instance, in 40 cases, court costs were at least CHF 100,000, while in 57 cases, party compensation amounted to at least that amount.

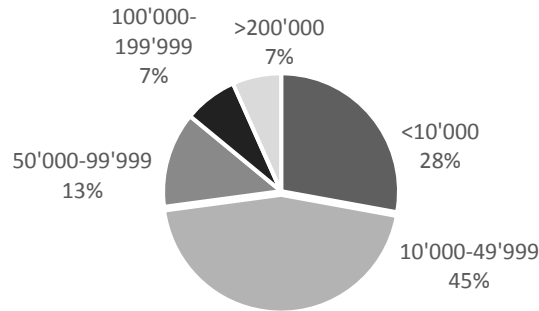


Chart 19: Combined costs of setting-aside proceedings for losing parties, court costs and parties' compensation, CHF, 656 cases, 1989-2019

Contrasting data regarding the median costs as a percentage of the amount at issue with the study of 2010, the similarities for higher amounts are striking.⁵⁴ In other words, any other trend aside, costs in function of value remain a bedrock of Article 190 proceedings. Accordingly, parties will still get an idea what median costs (court costs and compensation for legal fees) in relation to the value in dispute to expect in the case of a defeat (*see* Chart 20).

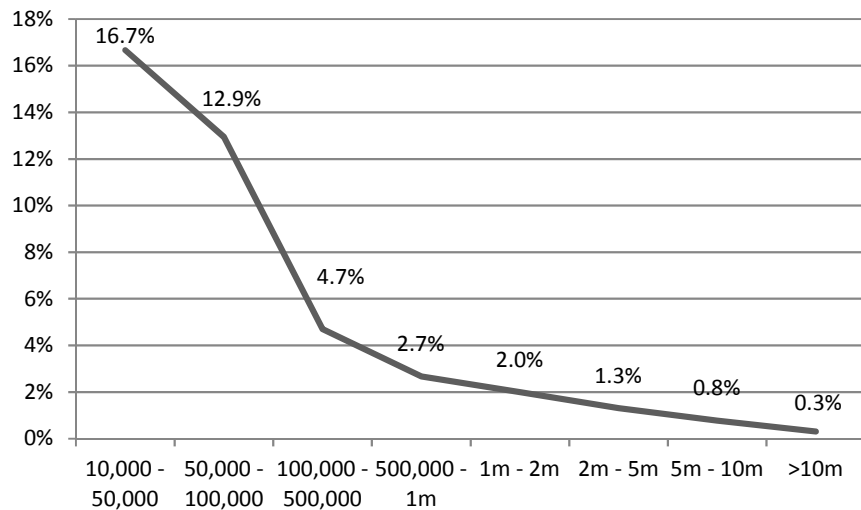


Chart 20: Median costs (court fees and compensation for legal fees) in percentage of amount in dispute, CHF (logarithmic scale), 318 cases on the merits, 1989-2019

⁵⁴ See DASSER (2010), *supra* fn. 5, at 93.

However, looking at 299 cases on the merits of a value of at least CHF 100,000, data evidences a variation under costs decisions (*see* Chart 21) – despite said proportionate cost-value medians (*supra*).⁵⁵ For instance, in the bandwidth of CHF 10-50,000 the actual cost decisions variate between 5 % and 52 % of the value in dispute and in the bandwidth of CHF 1-2 million, between 0.4 % and 4 % (*see* Chart 21).

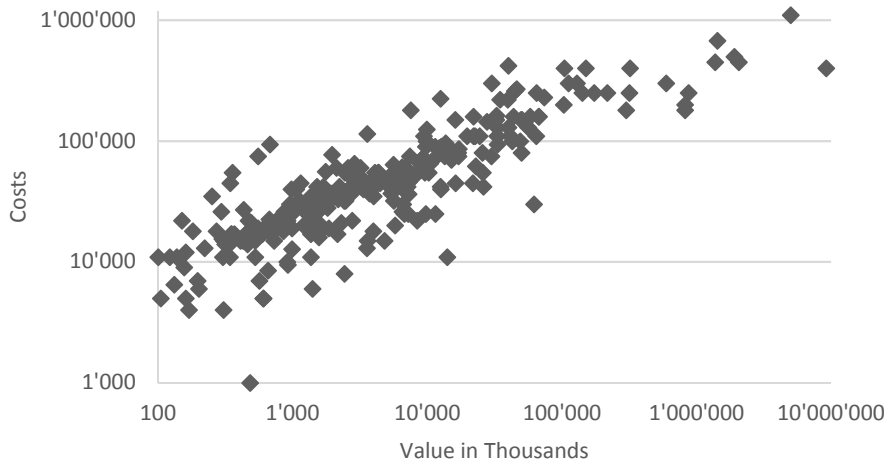


Chart 21: Costs in relation to value (logarithmic scale), 299 cases on the merits, 1989-2019

Yet, but for outliers, that variation remains within a certain range. In 80 % of the cases, the bandwidth for the various segments remains within the following limits:

- CHF 10-50,000: between 6 % and 41 %
- CHF 50-100,000: between 4 % and 23 %
- CHF 100-500,000: between 3 % and 10 %
- CHF 500,000-1 million: between 1 % and 3 %
- CHF 1-2 million: between 1 % and 3 %
- CHF 2-5 million: between 0.6 % and 2 %
- CHF 5-10 million: between 0.4 % and 1 %
- CHF >10 million: between 0.05 % and 0.7 %

⁵⁵ Only further 25 decisions reference a value lower than CHF 100,000. They failed to make the cut for purposes of chart simplicity. In a further 173 decisions, the value in dispute is unknown.

4. Glimpses into the Swiss Arbitration Market

4.1 Participation of Foreign Parties

Throughout the past three decades, Switzerland has been a sought-after international arbitration venue for foreign parties. Data evidences that in 69 % of cases all parties were foreign while only in 31 % of challenge proceedings Swiss parties participated (based on 530 cases where the origin of the parties is known, *see* Chart 22). The general trend has remained stable throughout the past decades.⁵⁶



Chart 22: Origin of the parties, 530 cases, 1989-2019

Commercial cases show a significantly lower participation of Swiss parties (76 % foreign to 24 % Swiss, *see* Chart 23.1, 324 cases, where the applicable rules have been known) than sports cases (54 % foreign to 46 % Swiss, *see* Chart 23.2, 153 cases).

Rising numbers of sports cases in the past two decades could thus not alter the overall numbers of high foreign participation. Accordingly, commercial cases have seen a rise in foreign parties' participation, setting off any rise of the sports numbers.

In other words, for the past few years, international commercial arbitrations conducted in Switzerland have been more international than ever in the past three decades.

Moreover, also the percentage of Swiss parties' participation in sports arbitrations would be lower if international sports federations seated in Switzerland were not deemed "Swiss" for purposes of the statistic. Since their work and structures reach well beyond Swiss borders, they are as much Swiss as they are international. For instance in 2019, nine out of 14 sports-related challenges saw the participation of an international federation having its seat in Switzerland. In other words, but for the federations, also sports arbitration on the Federal Court's docket is first and foremost non-Swiss.

⁵⁶ The first decade saw a participation of only foreign parties of 70 %, the numbers for the second decade amounted to 67 %, and the last decade witnessed 69 % of only foreign involvement. *See* DASSER (2007), *supra* fn. 5, at 461.

Thus, data evidences that Switzerland is sought after by parties not because a party to the arbitration is Swiss but because non-Swiss parties chose to rely on the Swiss arbitration venue (and its laws, *see infra*).



Chart 23.1: Participation of Swiss parties over time (non-sports), 324 cases, 1989-2019

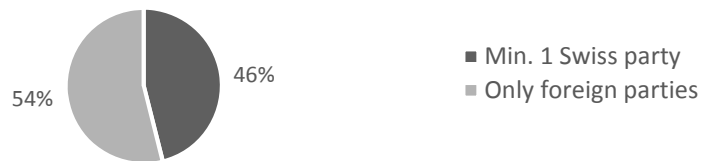


Chart 23.2: Participation of Swiss parties, incl. international Federations seated in Switzerland, over time (sports), 153 cases, 1989-2019

4.2 Multi-party Proceedings

The past decade has seen further rising numbers in multi-party arbitrations, a trend already spotted in the very first study of 2007.⁵⁷ One third of all challenges involved three or more parties (based on 660 cases, *see* Chart 24). CAS arbitrations, where multi-party proceedings amount for a 40 % of the cases, contributed to that rise in view of rising CAS challenges. Accordingly, numbers for commercial arbitration orbit 30 % – a still remarkable number.

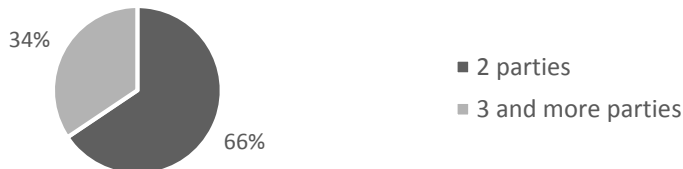


Chart 24: Number of Parties Involved in Proceedings, 660 cases, 1989-2019

⁵⁷ See DASSER (2007), *supra* fn. 5, at 463.

4.3 Place and Rules of Arbitration

The initial “tale of two cities” is no more.⁵⁸ Lausanne has firmly established itself as a third centre of international arbitration in Switzerland due to the CAS having its place in that city (*see* Chart 25).

For commercial arbitration, however, Geneva and Zurich remain the most chosen venues. Throughout the past three decades, parties have relied on either Geneva or Zurich and only to a much lesser degree on further places, be it Basle, Lugano, or Berne, to name a few.

Within the two major venues, preference was given to Geneva, one of the most renowned venues of global arbitration (*see* Chart 26).⁵⁹

Domestic rankings to that end are, however, of lesser legal importance, as any Swiss arbitration is governed by a uniform legal framework and all awards rendered in Switzerland may only be challenged with the Federal Court. International arbitration proceedings conducted in Switzerland are, therefore, first and foremost Swiss and to only a marginal degree cantonal or local.

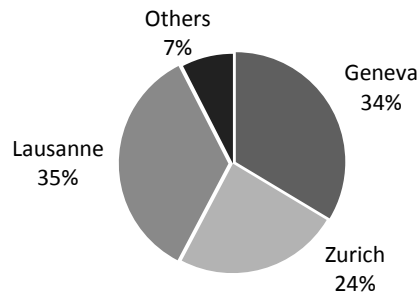


Chart 25: Place of arbitration, 610 cases, 1989-2019

⁵⁸ *Id.*

⁵⁹ *Id.* at 464.

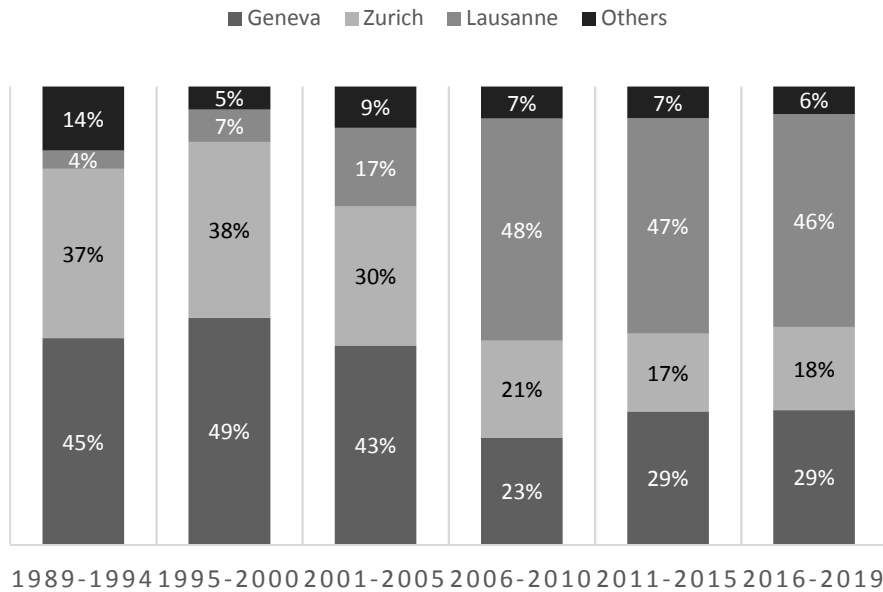


Chart 26: Place of arbitration over time, 610 cases, 1989-2019

Switzerland has always been home to many arbitration institutions providing their arbitration services globally. Most decisions rendered by the Federal Court relate, however, to the International Chamber of Commerce (ICC) and CAS (38 % and 33 %, respectively, out of 593 cases, *see* Chart 27). 12 % of decisions related to awards rendered under the Swiss Rules. Switzerland is also a prime venue for *ad hoc* international arbitrations, reflected in 10 % of cases, often conducted under the UNCITRAL Arbitration Rules.

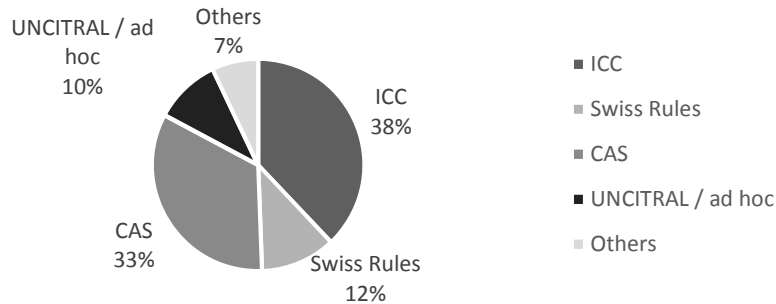


Chart 27: Rules of arbitration, 593 cases, 1989-2019

Those percentages of cases decided by the Federal Court regarding the ICC, CAS, and the Swiss Rules are intriguing. If we contrast numbers of arbitrations conducted at those three selected arbitration institutions for 2004-2016, a period where data is available for either,⁶⁰ with the data of the Federal Court the picture referenced under Chart 27, *supra*, changes: a higher percentage of ICC cases was taken to the Federal Court (115 out of 1,205 or 10 %) than of either CAS (135 out of 4,481 or 3 %), or the Swiss Rules (41 out of 1,006 or 4 %) (*see* Chart 28).

In other words, ICC and Swiss Rules arbitrations are more alike in total case numbers than the Federal Court caseload for each of them seem to suggest (*contrast* Chart 27 with Chart 28). Accordingly, data suggests that *ceteris paribus* an ICC award is at least twice as likely to be challenged than a Swiss Rules award.



Chart 28: Percentage and number of decisions reviewed by the Federal Court in relation to all cases by arbitration institutions, aggregated 2004-2016

That comparison is an approximation because the data samples do not perfectly match. The analysis contrasts numbers of new cases at each institution for a given year with the number of new cases before the Federal Court for the very same year. However, an award pending at the institution must be first rendered, then challenged, and finally decided by the Federal

⁶⁰ See the statistics for each arbitration institution:
https://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2016_.pdf;
<https://iccwbo.org/publication/icc-dispute-resolution-statistics/>;
<https://www.swissarbitration.org/Zahlen-und-Fakten>. [30 December 2020].

Court. Thus, an arbitration case initiated one year might end up at the Federal court only in the following year or even later. Still, since aggregated data of 13 years are used and yearly numbers of cases under both samples follow stable trends, the analysis serves its purpose.

Data further references that the Swiss Rules were chosen in 61 % of arbitrations by only foreign parties (a similar inference can be made from data available from that institution).⁶¹ That number is even higher for ICC arbitrations: 85 % (see Chart 29). In other words, as a rule, parties to ICC arbitrations on the docket of the Federal Court are not Swiss.

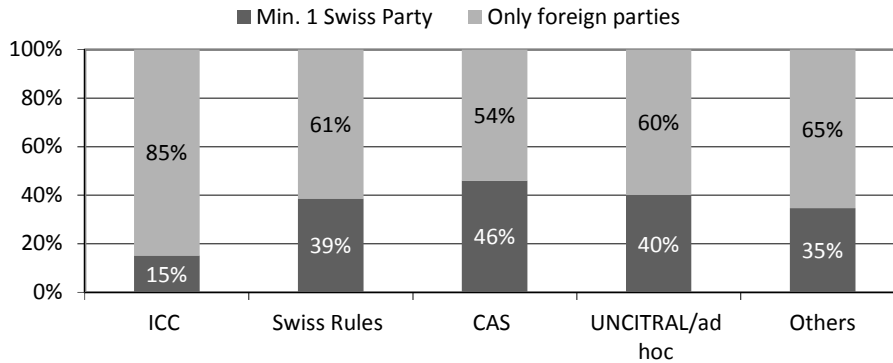


Chart 29: Participation of Swiss and foreign parties in function of rules of arbitration, 477 cases, 1989-2019

In function of time, the answer to the question of how often parties chose what rules seems to provide for volatile results (see Chart 30). That can be contributed mainly to the rise of CAS cases. However, as said, those percentages are fraught with caution as they reflect the cases pending at the Federal Court only and not the pie of all arbitrations actually conducted in Switzerland (see Chart 28, *supra*).

Further, non-ICC and non-Swiss Rules cases (ISDS, among others, see *supra*) reference a rise in variety on the highest Swiss court's docket as of recently.

Besides a further rise of UNCITRAL and other *ad hoc* cases (tallying 60 cases out of 660 since 1989), our data show various other rules (41 cases, while in 67 cases the rules remain unknown). Among those rules and institutions are: London Court of International Arbitration (LCIA); World Intellectual Property Organization (WIPO); JSM Permanent Court of

⁶¹ <https://www.swissarbitration.org/Zahlen-und-Fakten>. [30 December 2020].

Arbitration; Rules of Arbitration of the United Nations Economic Commission for Europe; BAT.

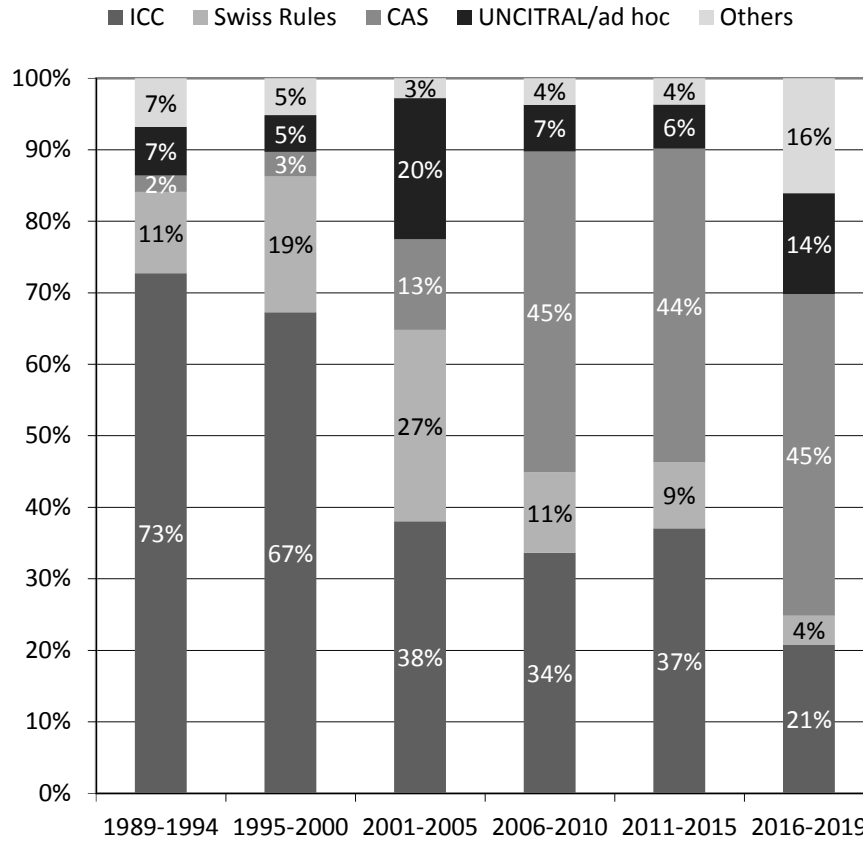


Chart 30: Rules of arbitration over time, 593 cases, 1989-2019

5. *Lex Causae*

With regard to the law governing the substance of the dispute, the *lex causae*, the decisions of the Federal Court often lack information. The available sample, therefore, consists of only 263 cases. The limited sample should not substantially affect the results, though, since the *lex causae* is rarely relevant for the challenge and its inclusion in or omission of the Federal Court's decision therefore unlikely to be systematically skewed.

The available data evidences that parties prefer to exercise their right of choice and typically do not leave that choice to the arbitral tribunals. Accordingly, 87 % of the challenges evidence an express choice of the law applicable on the merits by the parties. Only in 13 % of the cases, arbitral tribunals chose the law for the parties failed to do so (out of 263 cases where the choice made by either parties or arbitral tribunals is known, *see* Chart 31).



Chart 31: Choice of lex causae by parties and tribunals, 263 cases, 1989-2019

Further data suggests that parties selecting Switzerland for their arbitration tend to rely on Swiss law as the *lex causae* – or *vice versa*, parties that opt for Swiss law chose the Swiss venue. In other words, there seems to be a positive correlation between the choice of law and of forum. In 71 % of the challenges, Swiss law governed the dispute, while in 29 % another *lex causae* was applicable (181 and 72, respectively, 253 known cases, *see* Chart 32).



Chart 32: Origin of lex causae, 253 cases, 1989-2019

Data further reveals that in more than half of the cases where Swiss law governed the dispute on the merits (55 % out of 181 known cases), no Swiss parties participated in the arbitration. Only in 29 % of the decisions, a Swiss party participated while in 16 % of the cases the origin remains unknown (*see* Chart 33). In other words, in two out of three cases where the origin of the parties is known all parties were non-Swiss, but Swiss law applied – most likely because it had been chosen by the parties themselves (*see supra* Chart 31).⁶²

⁶² According to Article 187(1) PILA, in the absence of a choice of law by the parties, the arbitral tribunal decides the case according to the rules of law with which the case has the closest connection – which is unlikely to be Swiss law if no party is Swiss.



Chart 33: Origin of parties – Swiss law as *lex causae*, 181 cases, 1989-2019

Taking the origin of the parties in function of all laws governing the substance of the arbitration into consideration (253 cases), the picture is even more international. In 62 % of cases, only foreign parties participated while 25 % of proceedings saw also Swiss parties. In 13 % of the cases, the origin of the parties is unknown (*see* Chart 34.1).

With regard to ISDS proceedings where applicable treaties and laws differ, in all 14 cases where the origin of the parties was known all parties were foreign (*see* Chart 34.2). In ISDS cases conducted in Switzerland, the venue was arguably chosen also for the neutrality of it.⁶³ In other words, foreign parties choose the Swiss venue also if Swiss law is not governing the substance of their dispute.



Chart 34.1: Origin of parties – any *lex causae*, 253 cases, 1989-2019



Chart 34.2: Origin of parties in ISDS proceedings, 14 cases, 1989-2019

With regard to foreign *leges causae*, the picture is strikingly diverse. The data pool references 31 different national laws that governed the

⁶³ For an overview of the parties involved and the treaties applicable, *see* SCHERER (2020), *supra* fn. 8, at 74-76.

arbitrations decided by the Federal Court (out of a sample of 70 known cases, see Chart 35.1). Because less than one in three cases references the origin of the *lex causae*, those numbers might indicate a trend while not revealing the full picture.

Algeria	3	Germany	5	Poland	2
Austria	1	Guinea	1	Portugal	1
Belgium	2	Hungary	2	Qatar	1
Bulgaria	2	Iran	2	Slovenia	1
Cameroon	1	Ireland	1	Spain	1
Croatia	1	Italy	9	The Netherlands	2
Czech Rep.	2	Lebanon	1	Turkey	4
Cuba	1	Libya	3	USA	3
Delaware	1	Liechtenstein	1	Yugoslavia	1
England	7	Luxembourg	1		
France	6	Nigeria	1		

*Chart 35.1: Origin of foreign lex causae,
70 cases, 1989-2019*

It is interesting that there are rather fewer clusters than might have been expected. Italian law with 9 out of 70 cases (13 %) and English law with 7 out of 70 (10 %) stand out, but not much so. The French and German laws follow closely behind. Otherwise, the applicable laws are spread widely. Given that only a small segment of arbitration cases ever reach the Federal Court and most of the Federal Court's decisions do not indicate the *lex causae*, it may be safely assumed that many more *leges causae* find their way into Swiss arbitration proceedings.

Several cases that were reviewed by the Federal Court featured decisions rendered *ex aequo et bono* or by the arbitral tribunal acting as *amiabile compositeur* (see Chart 35.2, 12 cases, "*Amiable compositeur*").⁶⁴ Further couple of cases provided for the application of two different national laws, while yet another bundle witnessed the explicit joint application of national law and *ex aequo et bono* or *amiabile composition* (see Chart 35.2, seven and five cases, respectively, totaling 12 cases, "*Multiple choice*").

⁶⁴ Pursuant to Article 187(2) PILA, "*the parties may authorize the arbitral tribunal to decide ex aequo et bono*", which also includes *amiabile composition*.

Moreover, data references also non-national laws. However, our data sample references only two cases where indeed only non-national legal standards to the exclusion of national laws governed the dispute (*i.e.*, UNIDROIT Principles).⁶⁵ This finding contrasts with a wide-spread assumption that non-national legal standards, including the UNIDROIT Principles and the *lex mercatoria*, are frequently chosen. It is, however, fully in line with other empirical research.⁶⁶



Chart 35.2: National v. non-national law, 279 cases, 1989-2019

In sum, *first*, there is a strong correlation between Swiss venue and Swiss *lex causae*. Correlation is not causation, however. Even if there is causation it is not clear which way: do parties choose Swiss law due to Swiss venue or the other way around or are Swiss law and Swiss venue perceived as a package from the outset?

Second, when the *lex causae* is not Swiss law, *i.e.*, in close to a third of all cases in our sample, it can be basically any law or set of rules of law or even non-law (such as *amiable composition*). It is indeed not so uncommon to have the laws of a common law jurisdiction applied by a Swiss tribunal – which then may at least partly consist of common law arbitrators.

6. Conclusions

Congratulations! You made it through 33 pages of dry statistics! But then again, like any good Champagne, statistics need to be dry, right? Of course, if you are like many readers (including us) you probably started

⁶⁵ Federal Court Decisions 4P.167/2002 of 11 November 2002; and 4A_360/2011 of 31 January 2012. It may be noted that a well-known decision that mentioned the *lex mercatoria* concerned a case where the *lex mercatoria* was only used to construe Lebanese law: DFC 129 (2003) III 727, *cons.* 5.3.2: “(...) *s’est référée notamment au droit libanais de l’arbitration internationale, qu’il a interprété à la lumière de la lex mercatoria.*” [“(…) referred in particular to the Lebanese law of international arbitration, which it interpreted in the light of *lex mercatoria*.”].

⁶⁶ See FELIX DASSER, “Soft Law” in *International Commercial Arbitration*, Recueil des cours Vol. 402, 2019, 385, at 452-491.

reading right here with the conclusions, but that does not work that way, sorry. There is no shortcut in statistics. Go to the first page!

Ok, welcome back again. Fifteen years of empirical work have yielded a lot of data and a lot of real or perceived trends. What has changed since our first major studies of 2007 and 2010 and what has remained constant? What predictions can we dare taking today? And what does it all say about the state of arbitration in Switzerland?

What has changed? First of all, the number of cases has dramatically increased since the first study. The first 17 years yielded 221 decisions, the next 14 years yielded double that number (439). Another obvious change is the emergence of challenges against sports-related awards, almost exclusively from the CAS, and, consequently, the emergence of Lausanne, the seat of the CAS, as the most important venue in our data pool, pushing Geneva and Zurich to second and third places, respectively. In the past, there had also been numerous sport arbitrations, but few awards had been challenged. This has definitely changed. In addition, we are seeing more and more ISDS cases.

What has remained the same? The most famous constant in our studies is the Magic Seven – a low 7 % chance of succeeding with a challenge. There is some oscillation around that number, the percentage was shortly lower, it is now a bit higher, but the message remains the same: the Federal Court does not like to second-guess Swiss arbitral tribunals, particularly not on public-policy grounds, where the success rate for commercial cases is 0 (zero) % in spite of umpteenth attempts. Neither does the Federal Court like to sit on its cases: while it does take a bit longer than in the past to decide challenges, with the median having moved up from five months to six it is still extraordinarily fast. All other data of the Federal Court proceedings essentially remain the same. As for the parties, they are still overwhelmingly non-Swiss, with a Swiss party being involved in only one out of three cases.

What will the future bring? Trends are what they always are: reliable until they change. Having said that, our studies showed mostly quite clear and constant trends. There is no reason to expect sudden reversals. The efficient and arbitration-friendly case management by the Federal Court has proven so constant that we assume no substantial changes over the next years. We continue to expect an increasing caseload albeit at a more reduced rate as the main driver of the recent increase, challenges of CAS awards, seem to be losing steam. We also expect a further increase of ISDS cases over the next few years, while the long-term prospects are dicey in light of the current global pushback by states against ISDS in general.

What is the state of arbitration in Switzerland? This study shed a spotlight on only a very small part of the Swiss arbitration scenery. Any conclusions we are trying to draw from our data to the whole have to be taken with a good pinch of salt or maybe a teaspoon full. With that *caveat*, the state of Swiss arbitration looks good. Switzerland is obviously still or even increasingly perceived as a neutral and trusted venue for the resolution of commercial, sports as well as investment disputes – a unique position in this world. One reason for this enduring success, and probably not the least one, is the efficient, speedy, no-nonsensical, and arbitration-friendly resolution of challenges of awards by the Federal Court as sole instance – again a unique feature that serves international trade well. Finally, our new study showed that there is a link between Swiss venue and Swiss substantive law also in disputes between non-Swiss parties indicating that both Swiss *lex arbitri* and Swiss *lex causae* are attractive and often combined propositions for international business.

Felix DASSER, Piotr WÓJTOWICZ, *Swiss International Arbitral Awards Before the Federal Supreme Court. Statistical Data 1989-2019*

Summary

The article presents statistical data derived from Swiss Federal Supreme Court proceedings pursuant to Article 190(2) PILA (challenges of international arbitral awards rendered in Switzerland). It is the 6th edition of the first statistical study published in 2007 and the most comprehensive one with regard to numbers of cases analysed. It also covers additional aspects, among other things, ISDS cases and the law governing the substance of the arbitration dispute, the *lex causae*.

The sample consists of 660 decisions rendered by the Federal Court from 1989 and up until the end of 2019. The tally of commercial cases is the largest and amounts to almost two third. Almost one third, however, are sports-related proceedings where parties but for a few exceptions moved against CAS awards. The smallest tally refers to ISDS, *i.e.*, 14 cases.

Data evidences a 7 % chance of successfully setting aside of an award once the hurdle of admissibility is cleared. In other words, 93 % of the challenges are dismissed on the merits. Most cases are decided on the merits within 7 months. About 70 % of cases do not know the participation of a Swiss party while about the same amount of proceedings is governed by Swiss *lex causae*.