

Arbitration in Switzerland

The Practitioner's Guide

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Chapter 2
The Swiss Private International Law Statute (Chapter 12)

2. Competent Judicial Authority

Article 191

The award may only be challenged before the Swiss Federal Supreme Court. The proceedings are governed by Article 77 of the Federal Statute on the Swiss Federal Supreme Court of 17 June 2005.

I. Purpose of the Provision

Article 191 PILS provides for a sole state court to hear setting aside motions under Art. 190(2) PILS. 1 Limiting court review of arbitral awards as much as possible in order to foster Switzerland's reputation as a leading international arbitration venue was the intended purpose of the Swiss legislator when adopting chapter 12 of the PILS.¹ The advantage of this unique approach is that the court review procedure is both simple and rapid.² On average, Supreme Court setting aside proceedings last four months only,³ which is unparalleled internationally.⁴

As a consequence, a party intending to challenge the award rendered in an international arbitration 2 having its seat in Switzerland just has “one shot”,⁵ so to speak. By contrast, in numerous other jurisdictions, a party may first challenge the award before a (lower) court of law, with a subsequent option to bring an appeal against that decision before the country's supreme court.⁶ Such two-instance challenge proceedings against arbitral awards add time and costs and thus run counter to the parties' expectations for expeditious final dispute resolution.⁷ Besides, a party may thereby delay the entire process, which was the very reason why the Swiss legislator opted for the one-instance approach.⁸ As a result, the differing Swiss approach has often – and rightly – been praised as very predictable and efficient from a comparative arbitration law perspective.⁹ Moreover, this approach ensures that the judges reviewing international awards are experienced in this area.¹⁰

II. The Solely Competent Swiss Federal Supreme Court

For the sake of completeness, it is worth mentioning that until the end of 2006 the parties (under para. 2 3 of Art. 191 PILS) could designate the court of the canton in which the arbitration had its seat to decide on a setting aside motion.¹¹ In other words, it was open to the parties to replace the jurisdiction of the Swiss Federal Supreme Court through party agreement – an option which in practice hardly ever came into play.¹² The relevant (second) paragraph of Art. 191 PILS was abolished when the Federal Statute on

¹ Bucher, para. 2 at Art. 191; BGE 115 II 288 para. 2a; BGE 130 III 76 para. 4.2, with numerous references to the *travaux préparatoires*.

² Kaufmann-Kohler/Rigozzi, para. 706; Poudret/Besson, para. 772.

³ Dasser, *ASA Bull.* 2010, pp. 90, 99.

⁴ In most arbitration venues, setting aside proceedings generally last several years (see Dasser, *ASA Bull.* 2010, p. 92).

⁵ Blessing, *Chapter Twelve*, para. 562.

⁶ Some jurisdictions even provide for three instances to challenge the award (Berger/Kellerhals, para. 1619, footnote 164; Dasser, *ASA Bull.* 2010, p. 83), though two-instance challenge proceedings are “the most widespread system” (Girsberger/Voser, para. 1043).

⁷ Blessing, *Chapter Twelve*, para. 562.

⁸ See BGE 130 III 76 para. 4.2, with references to the *travaux préparatoires*.

⁹ Kaufmann-Kohler/Rigozzi, para. 706; Berger/Kellerhals, para. 1619.

¹⁰ Blessing, *Chapter Twelve*, para. 562.

¹¹ Berti/Schnyder, *Introduction*, paras. 4–8 at Art. 191; Heini, paras. 19–26 at Art. 191; Bucher, para. 2 at Art. 191.

¹² Blessing, *Chapter Twelve*, para. 562.

the Swiss Federal Supreme Court (BGG) came into force on 1 January 2007.¹³ Since then, the Supreme Court has exclusive jurisdiction over setting aside motions.¹⁴

- 4 The Supreme Court has its seat in Lausanne. The Court, which currently¹⁵ consists of 38 full-time and 19 part-time judges as well as 127 law clerks, renders over 7000 decisions a year,¹⁶ which roughly equals the yearly amount of newly filed appeals.¹⁷ It follows that this is a highly organized and most efficient decision-making apparatus – especially when compared internationally to other jurisdictions.
- 5 Within the Supreme Court, it is invariably for the 1st Civil Section to handle setting aside motions against international arbitral awards.¹⁸ On average, it renders approximately 20 decisions on such motions a year.¹⁹ The 1st Civil Section, amongst others, also deals with commercial contract disputes of all kinds as well as intellectual property, tort and competition law issues.²⁰

III. The Proceedings before the Supreme Court

A. Relevance of Article 77 BGG

- 6 Article 77(1)(a) BGG provides that, “subject to the requirements set forth at Arts. 190 to 192 PILS, the appeal in civil matters may be brought against arbitral awards before Swiss Federal Supreme Court”. As a result, and subject to the requirements under Arts. 190 to 192 PILS, the provisions governing the appeal in civil matters in principle do apply.
- 7 However, Art. 77(2) BGG excludes a whole series of BGG provisions (i.e., Arts. 48(3), Arts. 90–98, Art. 103(2), Art. 105(2), Art. 106(1) as well as Art. 107(2) BGG in so far as this provision entitles the Supreme Court to decide on the merits of the case).²¹ In other words, all these BGG provisions do not apply in setting aside proceedings (aiming at the annulment of an award rendered in an international arbitration having its seat in Switzerland).²²
- 8 As stated, Art. 77(1)(a) BGG expressly reserves the germane provisions of the PILS. In short, the reference to Arts. 190, 191 and 192 PILS means that only the grounds set forth at Art. 190(2) PILS may be invoked, with the Supreme Court being the sole competent authority to hear the challenge (Art. 191 PILS), and always provided the parties have not waived their right to challenge the award (Art. 192 PILS).
- 9 Lastly, Art. 77(3) BGG underscores that the Supreme Court will only hear setting aside grounds that have been put forward along with due reasoning as to why the invoked grounds are justified. The Supreme Court adopts a strict approach in this regard.²³ Moreover, if the arbitral tribunal included two (or more) alternative rationales in the award, both will have to be challenged.²⁴ Should the challenging party fail to challenge both (or all), the Supreme Court will not hear the setting aside motion.²⁵

¹³ BGer. 4A_18/2007 para. 2; BGer. 4A_160/2007 para. 2; BGer. 4A_220/2007 para. 3.1.

¹⁴ Kaufmann-Kohler/Rigozzi, para. 705; Chevalier, para. 237; Bucher, para. 2 at Art. 191.

¹⁵ I.e., in 2013.

¹⁶ In 2012, 7667 decisions were rendered (see: www.bger.ch under “Gerichtsorganisation”/“Publikationen”/“Geschäftsberichte”).

¹⁷ In 2012, 7871 appeals were filed (see: www.bger.ch under “Gerichtsorganisation”/“Publikationen”/“Geschäftsberichte”).

¹⁸ Art. 22 BGG in conj. with Art. 31(1)(g) of the Supreme Court Regulation (“Reglement für das Bundesgericht”).

¹⁹ This, at least, has been the case since 2007 (see Dasser, *ASA Bull.* 2010, p. 84).

²⁰ Art. 22 BGG in conj. with Art. 31 of the Supreme Court Regulation (“Reglement für das Bundesgericht”).

²¹ Cf. Klett, para. 7 at Art. 77.

²² For an overview of all (non-applicable) provisions itemized at Art. 77(2) BGG, cf. Berger/Kellerhals, paras. 1621–1628.

²³ BGE 134 III 186 para. 5; BGE 128 III 50 E. 1c.

²⁴ Von Werdt, para. 735; Berger/Kellerhals, paras. 1590, 1633.

²⁵ BGer. 4P.103/1989 para. 2c; BGer. 4P.275/1992 para. 2.

B. Procedural Preconditions

1. Challengeable Award

a. Definition

Setting aside motions under Arts. 190 and 191 PILS may only be brought against international arbitral awards issued by an arbitral tribunal having its seat in Switzerland. For an arbitration to be international in terms of Art. 176(1) PILS, at least one of the parties to the arbitration must have had its domicile, habitual residence or corporate seat abroad at the time the relevant arbitration agreement was concluded.²⁶ 10

But above all, the challenged decision must be an arbitral award. An award can generally be defined as *a final and binding decision of private (as opposed to state) adjudication of a legal issue in dispute among the parties to the arbitration.*²⁷ 11

Under Supreme Court case law, an award in terms of Art. 189 PILS is a decision of a private adjudication body rendered on the basis of an arbitration agreement (under Art. 178(1) PILS) in a dispute which is both international (as defined at Art. 176(1) PILS) and arbitrable (according to Art. 177(1) PILS), always provided that the adjudication body has its seat in Switzerland and offers sufficient guarantees as to both independence and impartiality (as required by Art. 30(1) of the Swiss Federal Constitution).²⁸ 12

b. Determinations, Decisions and Orders Not Constituting an Award

As stated, the arbitral tribunal is called to adjudicate a controversy on a legal issue through a final and binding award. For this reason, an expert determination (*“Schiedsgutachten”*) is not an arbitral award.²⁹ 13 Nor are decisions of private bodies on the scope and contents of given rules of the game (*“Spielregeln”*).³⁰ Equally, procedural orders (*“prozessleitende Verfügungen”*)³¹ and orders for interim relief (*“vorsorgliche Verfügungen”*)³² of the arbitral tribunal are not awards.³³ 14

c. Irrelevance of the Denomination

The denomination of the aforementioned determinations, orders or decisions as “award” is irrelevant.³⁴ 14 The Supreme Court has repeatedly held that it is not the denomination but the contents which is es-

²⁶ For a comprehensive commentary on this provision, see above Orelli at Art. 176 PILS.

²⁷ Cf. Berger/Kellerhals, para. 1519.

²⁸ BGE 119 II 271 para. 3b; BGer. 4A_210/2008 para. 4.2; BGer. 4P.267/2002 para. 2.1; BGer. 5P.427/2000 para. 1b. Just like state court judges, arbitrators must be independent and impartial under Supreme Court case law (cf. BGE 136 III 605 para. 3.2.1; BGE 125 I 389 para. 4a). The Court applies the same standards of independence and impartiality to both courts of law and arbitral tribunals (cf. BGE 135 I 14 para. 2) given that court judgments and arbitral awards have the same legal force (BGE 130 III 125 para. 2).

²⁹ BGE 130 III 125 para. 2.1.2; BGE 117 III 57 para. 4a; BGer. 4A_438/2008 para. 3.2.1; BGer. 4A_254/2011 para. 4.1.

³⁰ BGE 119 II 271 para. 3c; BGer. 4P.105/2006 para. 3.3; BGer. 4P.314/2005 para. 2.1; cf. also Von Werdt, para. 707.

³¹ BGE 136 III 597 para. 4.2; BGE 136 III 200 para. 2.3.1; BGE 128 III 191 para. 4a; BGE 122 III 492 para. 1b/bb; BGer. 4A_210/2008 para. 2.1; BGer. 4A_614/2010 para. 2.1; cf. also Besson, *ASA Bull.* 2007, p. 8. Therefore, a procedural order (wrongly entitled “Interim Award”) on both the stay of the arbitration and the advance on costs is not open to challenge (cf. BGE 136 III 597 paras. 4.2, 5.1).

³² BGE 136 III 200 para. 2.3.1; BGer. 4A_614/2010 para. 2.1.

³³ The same applies to decisions of the arbitral tribunal through which requests for interim measures are rejected (cf. Berger/Kellerhals, para. 1539). The authors advocate that such decision should be open to challenge if the arbitral tribunals finds that it lacks jurisdiction to order interim measures due to a party agreement to that effect (cf. Art. 183(1) PILS) given that such decision touches on the scope of the arbitration agreement and thus the arbitral tribunal’s jurisdiction (cf. Berger/Kellerhals, para. 1540).

³⁴ Cf., e.g., BGE 136 III 597 paras. 4.2, 5.1 (“Interim Award” on the advance on costs and the stay of the arbitration, which, the Court found, was not open to challenge given that it constituted a mere procedural order, and not an award).

sential in this respect, and only decisions constituting awards in terms of Art. 189 PILS are open to challenge.³⁵

- 15 Conversely, a decision designated as “Procedural Order” might qualify as award and thus be open to challenge under Art. 190 PILS.³⁶ For instance, if the arbitral tribunal in a decision titled “procedural order” allows (or dismisses) a party’s request to stay the proceedings but at the same time, and in the same “order”, finds jurisdiction, this will constitute an interim award in terms of Art. 190(3) PILS, which is open to challenge in conjunction with Art. 190(2)(b) PILS.³⁷ The same applies if the arbitral tribunal decides on the (contested) constitution of the arbitral tribunal in a “procedural order”, which mainly deals with the stay of the proceedings. Such an “order” would be challengeable pursuant to Art. 190(3) in conjunction with Art. 190(2)(a) PILS.³⁸

d. Types of Awards

i. Final Awards

- 16 The Supreme Court distinguishes between three types of awards that are open to challenge under Art. 190 PILS: final awards, partial awards and interim awards.³⁹
- 17 According to the Court, a final award is a decision through which the arbitral tribunal *fully or partially grants or dismisses the claim(s), or decides not to admit the claims(s)*, which decision *puts an end to the arbitral proceedings*.⁴⁰ It seems more accurate to not refer to *claim(s)* but to *prayer(s) for relief* in the foregoing definition, as the Supreme Court has held in other decisions.⁴¹
- 18 Even though the term “final award” is not applied in Chapter 12 PILS, it is well established that the term “award” in Arts. 189(1), 190(1) and (2) PILS encompasses any final award.⁴² A final award may be challenged based on any of the grounds mentioned in Art. 190(2) PILS.⁴³ Importantly, the setting aside motion must be filed within 30 days after the entire award (i.e., both the operative part and the rationale) is notified to the parties.⁴⁴

ii. Partial Awards

- 19 By contrast, a partial award only (but also definitely) rules on one or several (yet not all) prayer(s) for relief.⁴⁵ As a result, the decision on the remaining prayer(s) for relief or claim(s) is deferred to a later stage (be it in a subsequent partial award or in the final award).⁴⁶

³⁵ BGE 136 III 597 paras. 4, 5.1; BGE 136 III 200 para. 2.3.3; BGer. 4A_428/2011 para. 1.1; BGer. 4A_614/2010 para. 2.2; BGer. 4A_600/2008 para. 2.3.

³⁶ For a case where a decision titled “Procedural Order No. 4” was considered an award given that the arbitrators, amongst others (i.e., the refusal to stay the proceedings), had – at least impliedly – found jurisdiction, cf. BGer. 4A_210/2008 para. 2.1; concurring BGer. 4A_614/2010 para. 2.1. In the latter case, however, the “*Ordonnance de Procédure*” at issue (rejecting a request to stay the proceedings) was considered a procedural order *stricto sensu*, without the arbitral tribunal having (not even impliedly) rendered any decision as to its jurisdiction (BGer. 4A_614/2010 paras. 2.3.2, 2.4). In BGE 136 III 597 para. 4.2, the Supreme Court reaffirmed that decisions of the arbitral tribunal on the stay of the arbitral proceedings (which in and of themselves constitute procedural orders) may be challenged under Art. 190(3) PILS if the tribunal (besides deciding on the stay) also decided, even if only impliedly, on its jurisdiction.

³⁷ BGE 136 III 597 para. 4.2; BGer. 4A_614/2010 para. 2.1; BGer. 4A_210/2008 para. 2.1.

³⁸ Cf. BGer. 4A_614/2010 para. 2.1; BGer. 4A_210/2008 para. 2.1.

³⁹ BGE 136 III 597 para. 4.1; BGE 136 III 200 para. 2.3.1; BGE 130 III 755 para. 1.2.2; BGer. 4A_428/2011 para. 1.1; see also Kaufmann-Kohler/Rigozzi, paras. 671b–671 d.

⁴⁰ BGE 130 III 76 para. 3.1.1; BGE 136 III 597 para. 4.1; BGE 136 III 200 para. 2.3.1; BGE 106 Ia 229 para. 3a.

⁴¹ See, e.g., BGer. 4A_224/2008 para. 2.3; cf. also BGE 136 III 200 para. 2.3.1.

⁴² Cf. BGE 130 III 76 para. 3.1; see also Berger/Kellerhals, para. 1525.

⁴³ BGE 130 III 755 para. 1.2.2; BGer. 4P.48/2005 para. 2.1.

⁴⁴ See Art. 100(1) BGG; for more detail, see below, paras. 32–43.

⁴⁵ BGE 136 III 200 para. 2.3.1; BGE 128 III 191 para. 4a; BGer. 4P.74/2006 para. 2.1.

⁴⁶ See, e.g., BGer. 4P.74/2006 para. 2.1, where the arbitral tribunal (in a partial award) first decided on a ban to use the opposing party’s know how, but deferred the decision on the damage claims resulting from the purported (previous)

The partial award is final only with regard to the prayer(s) for relief (or claims) it expressly addresses and rules upon. Put differently, it has *res judicata* effect only in this (limited) respect, while a final award has comprehensive *res judicata* effect (i.e., with regard to all decisions included in the operative part of the award).⁴⁷

Though Art. 188 PILS expressly entitles the arbitral tribunal to render partial awards, the provision does not contain a definition of the term.⁴⁸ Just like final awards, partial awards may be challenged based on any of the grounds mentioned in Art. 190(2) PILS.⁴⁹ Equally, the setting aside motion must be filed within 30 days after the entire award is notified to the parties,⁵⁰ failing which the aggrieved party will be deemed to have waived its right to challenge the partial award, with that party no longer being entitled to invoke any grounds against the partial award in a (subsequent) setting aside motion against the final award.⁵¹

iii. Interim Awards

An interim (or preliminary)⁵² award is a decision which touches on a preliminary question and which does not (definitely) rule on a given claim or prayer for relief. It is often stated that interim awards rule upon a *qualitative* aspect of the dispute, but *not* on *quantitative* one (as partial and final awards do).⁵³ For instance, if the arbitral tribunal affirms jurisdiction, it renders an interim award. The same holds true where the tribunal finds that a given claim is not time-barred or that it affirms the liability of a party, without ruling on *quantum*.⁵⁴

Interim awards do not put an end to the arbitration (neither with respect to all nor part of the claims submitted). Rather, they clarify a preliminary question, which relates to a plea aiming at terminating the arbitral proceedings either on procedural grounds (as, e.g., the tribunal's jurisdiction) or on substantive grounds (such as the principle of liability, but not quantum, or a statute of limitations), with such clarification not terminating the arbitral proceedings.⁵⁵ For this reason, interim awards do not have *res judicata* effect, even though they are binding on the arbitral tribunal that rendered the interim award in the further arbitration proceeding.⁵⁶ Nor are interim awards enforceable.⁵⁷ However, if the interim award confirms jurisdiction, it is deemed to be binding on a Swiss state court or an arbitral tribunal subsequently seized with the same dispute.⁵⁸

An interim (or preliminary) award can be challenged only based on the grounds mentioned in Art. 190(2)(a) and (b) PILS.⁵⁹ This is the main difference of interim awards compared with partial and final awards, which are open to challenge on any of the grounds stated in Art. 190(2)(a)-(e) PILS. One

use of the know how to a later stage.

⁴⁷ Cf. Arroyo, *ZPO*, para. 19 at Art. 383; see also BGE 112 Ia 166 para. 3d.

⁴⁸ For a commentary on this provision, cf. Molina on Art. 188 PILS above.

⁴⁹ BGE 130 III 755 para. 1.2.2.

⁵⁰ See Art. 100(1) BGG; for more detail, see below, paras. 32-43.

⁵¹ This was confirmed in BGer. 4A_370/2007 para. 2.3.1, which approach had previously been advocated by Besson, *ASA Bull.* 2007, p. 9; Klett, para. 4 at Art. 77; and Berger/Kellerhals, para. 1530; see also Kaufmann-Kohler/Rigozzi, para. 712.

⁵² The distinction between preliminary and interim awards has no practical relevance and both fall within the scope of Art. 190(3) PILS (cf. BGE 130 III 76 para. 3.1.3; see also Berger/Kellerhals, para. 1532; and Arroyo, *ZPO*, para. 21 at Art. 383).

⁵³ See, e.g., BGE 130 III 76 paras. 3.1.2-3.1.3.

⁵⁴ BGE 130 III 76 para. 3.1.3; cf. also Berger/Kellerhals, para. 1531; Arroyo, *ZPO*, para. 20 at Art. 383.

⁵⁵ BGE 130 III 76 para. 3.1.3; BGE 136 III 597 para. 4.1; cf. also BGer. 4P.114/2006 para. 4.2.

⁵⁶ BGE 128 III 191 para. 4a; BGE 122 III 492 para. 1b/bb; Wirth, para. 23 at Art. 188; Arroyo, *ZPO*, para. 24 at Art. 383.

⁵⁷ Patocchi/Jermine, para. 8 at Art. 194; Josi, p. 34.

⁵⁸ See Poudret/Besson, paras. 477, 854.

⁵⁹ BGE 136 III 597 para. 4.1; BGE 130 III 755 para. 1.2.2; BGer. 4A_428/2011 para. 1.1.

important common feature remains, however, in that interim awards must be challenged immediately too (i.e., within the 30-day term mentioned above).⁶⁰

2. Entitlement to Challenge the Award (Standing)

- 25 The Supreme Court examines *ex officio* whether it has jurisdiction, which inevitably includes the challenging party's standing.⁶¹ Under Art. 76(1) BGG, a party requesting the setting aside of an award must be entitled to submit such request. The challenging party must, in other words, have standing. This is the case if (i) the party either participated in the arbitral proceedings or was precluded from such participation;⁶² and (ii) the party has a legal interest that the award be annulled or amended;⁶³ and (iii) the party has a current and personal interest in the annulment.⁶⁴
- 26 The first-mentioned requirement (*participation in the arbitration*) aims at avoiding that third parties take part in the proceedings at the challenge stage.⁶⁵ The second option mentioned in Art. 76(1)(a) BGG constitutes an exception to the aforementioned rule and is of particular importance in sports matters where competitors of an athlete who (supposedly) was doped may not participate in the CAS proceedings involving the athlete.⁶⁶ Even though these competitors are not allowed to put their case before the CAS tribunal, they will in principle have standing before the Supreme Court under Art. 76(1)(a) BGG.⁶⁷
- 27 The second requirement under Art. 76(1)(b) BGG (i.e., a *legal interest*) is met as soon as a party invokes one (or several) ground(s) for challenge under Art. 190(2) PILS.⁶⁸ In the Supreme Court's view, a party has a legal interest worthy of protection that the award not violate the guarantees provided for in Art. 190(2) PILS.⁶⁹
- 28 The third requirement (*current personal interest*) is not mentioned in Art. 76 BGG but is also necessary under long-standing case law.⁷⁰ The award loser will typically have a current personal interest.⁷¹ If this additional requirement is not met, the Supreme Court will not hear the appeal.⁷² An exception to this rule applies where the issue invoked or the query submitted could – under the same or similar circumstances – occur again any time, and the clarification of the issue or query is in the public interest, with such clarification being impossible to render in due time in other (future) cases.⁷³ A further exception applies

⁶⁰ BGE 130 III 66 para. 4.3; BGE 116 II 80 para. 3a; cf. also Klett, para. 4 at Art. 77, advocating that any interim award – even one not ruling on jurisdiction or the tribunal's constitution – must immediately be challenged based on the principle of good faith. Today, this procedural maxim is expressly stated in Art. 92(2) BGG.

⁶¹ BGer. 4A_134/2012 para. 2; BGer. 4A_636/2011 para. 2.3.1; BGer. 4A_566/2009 para. 1.2; cf. also Art. 29(1) BGG; Girsberger/Voser, para. 1116.

⁶² Cf. Art. 76(1)(a) BGG; critical on this requirement Berger/Kellerhals, para. 1631, who argue that a party who did “not participate in the proceedings before the arbitrators and thus is in default [...] may not be deprived of its right to challenge the award”.

⁶³ Cf. Art. 76(1)(b) BGG; BGer. 4A_224/2008 para. 2.5.

⁶⁴ BGer. 4A_134/2012 para. 2.1; Kaufmann-Kohler/Rigozzi, para. 726; Bucher, para. 16 at Art. 191.

⁶⁵ Kaufmann-Kohler/Rigozzi, para. 727.

⁶⁶ Cf. Art. 13(2)(3) of the World Anti-Doping Code.

⁶⁷ Cf. Kaufmann-Kohler/Rigozzi, para. 727.

⁶⁸ Kaufmann-Kohler/Rigozzi, para. 728.

⁶⁹ Cf. BGer. 4A_392/2010 para. 2.2; BGer. 604/2010 para. 1.2; BGer. 4A_220/2007 para. 3.2; BGer. 4P98/2005 para. 1; BGer. 253/2004 para. 1; BGer. 4P295/2004 para. 1; BGE 127 III 279 para. 1b.

⁷⁰ BGer. 4A_134/2012 para. 2.1; BGer. 4A_636/2011 para. 2.3.1; BGer. 4P98/2005 para. 1; BGE 127 III 429 para. 1b; BGE 116 II 721 para. 2b.

⁷¹ The same holds true if the award orders the losing party to pay a certain amount of money (BGer. 4A_220/2007 para. 3.2), or if the award orders a party to do or to refrain from doing something, or imposes a professional or other ban – always provided the temporary ban has not lapsed prior to the filing of the appeal before the Supreme Court or lapses during the setting aside proceedings; cf. BGer. 4A_134/2012 para. 2.1; BGer. 4A_636/2011 para. 2.3.1; BGE 127 III 429 para. 1b).

⁷² See, e.g., BGer. 4A_134/2012 para. 2.1; BGer. 4A_636/2011 para. 2.3.1; BGer. 4A_566/2009 para. 1.2; Bucher, para. 16 at Art. 191.

⁷³ BGer. 4A_134/2012 para. 2.1; BGer. 4A_636/2011 para. 2.3.1; cf. also BGE 137 I 120 para. 2.2; BGE 135 II 430 para. 2.2).

in cases where a ban ordered in the arbitration already expired – so that there is, in principle, no longer any *current* interest on the part of the challenging party⁷⁴ – but the sanction continues to have personal and monetary consequences on that party due to the sanction's severity or its stigmatizing effects.⁷⁵ In general, the Supreme Court adopts a more lenient approach with regard to the requirement of a *current* interest in the setting aside when it comes to sports-related cases.⁷⁶ For instance, even though a ban has expired (before or during the challenge proceedings), the affected athlete may, in the Court's view, still have a current interest in the setting aside of the award which imposed the ban, for a potential recurrence would lead to a prospective ban being more severe.⁷⁷

3. No Exclusion of Chapter 12 PILS (Art. 176 PILS)

As a negative requirement, so to speak, the parties may not have excluded Chapter 12 PILS through an express party agreement. This possibility is open to the parties under Art. 176(2) PILS.⁷⁸ The parties may agree on such exclusion either in the arbitration agreement or in a later agreement in favor of Part 3 of the ZPO, which governs domestic arbitration. Already before the ZPO came into force in January 2011, the parties could expressly exclude Chapter 12 PILS and stipulate the exclusive application of the Concordat. In practice, parties hardly ever availed themselves of this possibility to opt out of Chapter 12 PILS,⁷⁹ and it can reasonably be expected that Art. 176(2) PILS will continue to be of little, if any, practical relevance in the future.

4. No Waiver of the Right to Challenge the Award (Art. 192 PILS)

Under Art. 192(1) PILS, the parties may – be it in the arbitration or a subsequent agreement – expressly waive their right to challenge the award.⁸⁰ Such waiver is only open to the parties if none of them had its domicile or residence in Switzerland at the time the arbitration agreement (or the separate agreement) was concluded.⁸¹ As a consequence, for an award being open to challenge, the parties may not have entered into an agreement excluding all grounds provided at Art. 190(2) PILS. This further (negative) requirement must be met, for the Supreme Court will otherwise not hear the setting aside motion.

It is worth noting that a party having fully waived its right to challenge the award under Art. 192 PILS is precluded from challenging the award on the basis that the arbitrators wrongly extended the scope of the arbitration clause – and thus their jurisdiction – to other contracts not containing such clause (or to a non-signatory).⁸² For this reason, parties are ill-advised to enter into waiver agreements in terms of Art. 192(1) PILS.⁸³

5. Deadline for Filing

a. Start and End of the 30-day Term

Under Art. 100(1) BGG, the motion to set aside must be filed within 30 days after the (entire) award (including both the operative part and the rationale) is notified to the parties.⁸⁴ This statutory deadline

⁷⁴ See, e.g., BGE 127 III 429 para. 1b, where the appeal was not heard for this very reason.

⁷⁵ Cf. BGE 119 II 271 para. 3d; Kaufmann-Kohler/Rigozzi, para. 729a.

⁷⁶ In similar terms: Voser and Truttmann, *PLC Arbitration*, 1 May 2013 (monthly email for April 2013).

⁷⁷ Cf. BGER. 4A_576/2012 para. 2: “Pareil intérêt réside dans le risque auquel s'expose le recourant, qui entend poursuivre sa carrière sportive, d'être puni selon le régime plus sévère de la récidive, si ladite sentence entre en force de chose jugée et qu'il vienne à commettre une autre infraction à l'avenir.” In that case, the two-year ban had expired just two days after the athlete filed the setting aside motion.

⁷⁸ For a comprehensive commentary on this provision, see above Orelli at Art. 176 PILS.

⁷⁹ Ehrat, *Introduction*, para. 37 at Art. 37; Blessing, *Schiedsgerichtsrecht*, p. 29.

⁸⁰ For a comprehensive commentary on this provision, see below Baizeau at Art. 192 PILS.

⁸¹ Klett, para. 4 at Art. 77; cf. also BGE 134 III 260 para. 3.2.1.

⁸² Cf. BGE 134 III 260 para. 3.2.4; BGE 131 III 173 para. 4.2.3.1.

⁸³ Cf. Jermini/Arroyo, *ASA Bull.* 2009, pp. 112-113.

⁸⁴ Amstutz/Arnold, para. 8 at Art. 44; Art. 190(3) PILS expressly mentions this start of the term regarding the challenge of interim awards. However, this principle applies by virtue of Art. 100(1) BGG to the challenge of any award (cf.

cannot be extended⁸⁵ and applies to any kind of award open to challenge under Art. 190 PILS (i.e., interim, partial and final awards).⁸⁶

- 33 The day on which the award is notified must not be considered when it comes to computing the 30-day term.⁸⁷ In other words, the term starts to run the day after the award was notified (be this a weekday, holiday or workday). As to the date of notification, this is the day on which the award is served on the parties or their legal representatives. In international arbitrations, parties normally are legally represented. As a result, the date of service of the award on the legal representatives will be the relevant date, while a later (separate and additional) service on the parties is irrelevant.⁸⁸
- 34 If the 30-day term ends on a Saturday, Sunday or a public holiday⁸⁹, the deadline lapses on the next working day.⁹⁰ It is worth stressing that the aforementioned rule only applies to the end of the 30-day term. It has no impact whatsoever on the start of the term, which invariably is the day following the date of service. For example, if the award is served on a party on a Friday, the term will start on the following day (i.e., Saturday). Likewise, if the award is served on a Saturday, the term will begin to run the next day (i.e., Sunday). The same applies if the award is served on a day preceding a (federal or cantonal) holiday.⁹¹
- 35 However, the 30-day term is suspended (i.e., stands still if it already started, or does not start to run) during the following periods: from the seventh day before Easter until the seventh day after Easter, from 15 July until 15 August as well as from 18 December until 2 January.⁹² As a result, these periods, if applicable, prolong the term for filing the motion to set aside. In case the award is served during such a period (e.g., on 22 December), the 30-day term for filing the motion starts on the day following the end of said period (i.e., on 3 January in the afore-stated example).⁹³
- 36 It cannot be overstated that the 30-day term is only prolonged during the aforementioned statutory periods, and a motion filed belatedly will – subject to an exceptional reinstatement of the deadline in terms of Art. 50 BGG⁹⁴ – not be heard.⁹⁵ In particular, a request for correction of the award will not have any impact on the 30-day term for filing the setting aside motion.⁹⁶

Klett, para. 4 at Art. 77 BGG; cf. also BGer. 4A_582/2009 para. 2.1.2).

⁸⁵ Art. 47(1) BGG (see also BGer. 4A_604/2010 para. 1.3; BGer. 4A_636/2011 para. 2.2.1). By contrast, the deadline set by the Supreme Court for filing an answer to the setting aside motion may be extended upon a reasoned request under Art. 47(2) BGG. The extension request must be filed within the deadline, i.e., at the latest on the day the deadline lapses (Amstutz/Arnold, para. 6 at Art. 47).

⁸⁶ Cf. Klett, para. 4 at Art. 77.

⁸⁷ Art. 44(1) in conj. with Art. 77(1) BGG.

⁸⁸ Amstutz/Arnold, para. 12 at Art. 44.

⁸⁹ I.e., a holiday under Swiss federal or cantonal law. As far as cantonal law is concerned, the law of the canton in which the party intending to file a setting aside motion (or its legal representative) has its seat or domicile is to be considered (Art. 45(2) BGG).

⁹⁰ Art. 45(1) in conj. with Art. 77(1) BGG.

⁹¹ Amstutz/Arnold, para. 17 at Art. 44; BGE 127 I 31 para. 2b; BGer. 1C_85/2010 para. 1.4.2.

⁹² Art. 46(1) in conj. with Art. 77(1) BGG.

⁹³ Art. 46(1) in conj. with Art. 77(1) BGG; Amstutz/Arnold, para. 18 at Art. 44; para. 5 at Art. 46.

⁹⁴ Under Art. 50(1) BGG, if a party (or its legal representative) has – through no fault of its own – been deterred from acting within the deadline, the (missed) deadline will be reinstated if the party, within 30 days from the date on which the impediment has ceased, files a request for reinstatement and carries out the neglected action (e.g., the filing of the setting aside motion; as to the requirements established by case law in this regard, cf. Amstutz/Arnold, paras. 3-14 at Art. 50).

⁹⁵ Kaufmann-Kohler/Rigozzi, para. 733a.

⁹⁶ BGE 131 III 164 para. 1.2.4.

Since the award need not indicate the 30-day term,⁹⁷ the deadline should especially be kept in mind by parties from abroad.⁹⁸ Given that in most international arbitrations having their seat in Switzerland all parties involved are from abroad,⁹⁹ this cannot be stressed enough. 37

b. Service of the Award

i. Addressee(s)

In any event, it is sufficient to serve the award on the parties (or their representatives, as the case may be) at the relevant addresses. By contrast, it is not necessary that the addressees (i.e., the parties or their representatives) actually take note of or personally receive the award. Under Swiss law, it is sufficient – but also essential – for the 30-day term to start that the award enters into the sphere of control of the addressee (i.e., typically the mailbox or post-office box) thus enabling the addressee to take note of the award.¹⁰⁰ 38

ii. Notification of the Entire Award in Writing

Subject to the rare cases where parties waive the writing requirement,¹⁰¹ the entire¹⁰² award must be notified to the parties in writing.¹⁰³ If only the operative part (i.e., the decision of the arbitrators) but not the rationale (i.e., the reasoning) is notified, the 30-day term does not start until the rationale is notified to the parties in writing,¹⁰⁴ unless the parties have dispensed the arbitrators from giving reasons.¹⁰⁵ The same applies if the rationale (without the operative part) is first notified to the parties. Here too, the time period will only begin when both the rationale and the operative part are notified in writing.¹⁰⁶ 39

True, the arbitral tribunal may notify its final decision to the parties orally (e.g., at the end of the hearing) since the writing requirement of Art. 189(2) PILS does not preclude arbitrators from so proceeding.¹⁰⁷ 40 However, such oral notification of the award will normally¹⁰⁸ not cause the 30-day term to start, as only the notification of the entire¹⁰⁹ award in writing triggers this effect.¹¹⁰

iii. Means of Service

Given that the PILS does not contain a rule as to how an award must be notified and Art. 112 BGG is mute in this regard, the way in which the arbitral tribunal is to serve the award on the parties is primarily left to party autonomy (i.e., determined either by the arbitration agreement or the arbitration rules that 41

⁹⁷ Kaufmann-Kohler/Rigozzi, para. 733, footnote 523 (with reference to Berger).

⁹⁸ Berger/Kellerhals, para. 1632, footnote 179; see also BGer. 4A_258/2008 para. 2.

⁹⁹ Dasser, *ASA Bull.* 2010, pp. 89-99.

¹⁰⁰ Amstutz/Arnold, para. 10 at Art. 44; BGE 122 III 316 para. 4b; BGE 122 I 139 para. 1; BGer. 4A_525/2009 para. 7.1.

¹⁰¹ Pursuant to Art. 189(1) PILS, the form of the award is left to party autonomy. As a result, the parties may dispense the arbitrators from the duty of issuing the award in writing (Berger/Kellerhals, para. 1356; Wirth, para. 6 at Art. 189, rightly stressing at para. 31 that such waiver is most seldom in practice).

¹⁰² Cf. Art. 100(1) BGG; see also BGer. 4A_604/2010 para. 1.3 (“notification de l’expédition complète”) and BGer. 4A_636/2011 para. 2.2.1 (“Eröffnung der vollständigen Ausfertigung”).

¹⁰³ Art. 189(2) PILS.

¹⁰⁴ Kaufmann-Kohler/Rigozzi, para. 732; Berger/Kellerhals, para. 1382.

¹⁰⁵ Under Art. 189(1) PILS, the parties may dispense the arbitral tribunal from providing a rationale and thus waive the requirement of the award stating the reasons on which it is based (Wirth, para. 6 at Art. 189; Blessing, *Chapter Twelve*, para. 554; Berger/Kellerhals, paras. 1359-1360).

¹⁰⁶ BGE 134 I 159 para. 1.4.

¹⁰⁷ Ehrenzeller, para. 5 at Art. 112.

¹⁰⁸ I.e., with the exception of the above-mentioned (rare) case of the parties having waived the writing requirement, which under Art. 189(1) PILS is permissible (Wirth, para. 6 at Art. 189; Berger/Kellerhals, para. 1356).

¹⁰⁹ Again, this is subject the parties having dispensed the arbitrators from giving reasons, in which case the notification of only the award’s operative part would cause the 30-day term to start (Berger/Kellerhals, para. 1382; Wirth, para. 74 at Art. 189).

¹¹⁰ Amstutz/Arnold, para. 4 at Art. 100; Berger/Kellerhals, para. 1382; Wirth, para. 74 at Art. 189; Besson, *ASA Bull.* 2007, p. 13 (rightly advocating the application of Art. 112(2) BGG by analogy); see also Ehrenzeller, para. 5 at Art. 112.

the parties have chosen).¹¹¹ But given that numerous arbitration rules are either mute¹¹² on the matter or very broad,¹¹³ it will normally be for the arbitral tribunal to choose the adequate means of service.¹¹⁴

- 42 If the applicable arbitration rules are mute, the arbitral tribunal will generally establish at the outset of the arbitration the means of communication in the terms of reference (or specific procedural rules) in consultation and agreement with the parties. A standard agreement is that notifications may be made by delivery against receipt, registered post, courier, email or any other means of telecommunication that provides a record of the sending.¹¹⁵ If it is agreed that notifications of both the parties and the arbitral tribunal may be made through electronic means (such as email), it is advisable that a pertinent protocol be available (e.g., cryptography, electronic signature, acknowledgment of receipt).¹¹⁶
- 43 Importantly, the Supreme Court has held that the notification of the award by fax is insufficient to make the 30-day term start, with only the notification by (regular or registered) mail triggering that effect.¹¹⁷

6. Place and Means of Filing

- 44 Under Art. 48(1) BGG, the appeal against the challenged award must (by or on the last day of the 30-day term) either be submitted (i) directly to the Supreme Court, (ii) to a Swiss post office (addressed to the Supreme Court), or (iii) to a Swiss diplomatic or consular office abroad.¹¹⁸
- 45 If the appeal is handed over to a (non-Swiss) post office abroad, the 30-day term will only be met if the appeal is (i) remitted to the Swiss post by the last day of said term, or if (ii) the Supreme Court has received the appeal by then.¹¹⁹ An exception applies with regard to the Liechtenstein post, with the filing in Liechtenstein having the same effect as if it had been made in Switzerland.¹²⁰ Yet this is the only exception to the aforementioned rule and thus does not apply to any other (non-Swiss) post service abroad.¹²¹
- 46 In other words, submitting the appeal to a non-Swiss (or non-Liechtenstein) post office will only be sufficient to meet the deadline if the appeal reaches the Swiss post (or the Supreme Court) by the last day of said term. It should also be stressed that faxing the appeal directly to the Supreme Court on the last day will not be sufficient to meet the deadline.¹²²
- 47 Finally, according to Art. 48(2) BGG, the appeal may be submitted electronically (i.e., by means of email).¹²³ The deadline is met if receipt is confirmed prior to the lapse of the 30-day term by one of the two internet platforms through which the email must be sent to the Supreme Court.¹²⁴ A party intending to file the appeal on the very last day of that term would be ill-advised to do so electronically because if the relevant¹²⁵ internet platform (to which the email with the attached appeal is sent) fails – for whatever

¹¹¹ BGer. 4A_582/2009 para. 2.1.2; BGer. 4P.273/1999 para. 5a.

¹¹² E.g., the Swiss Rules of International Arbitration are silent on this point (see Gilliéron/Pittet, para. 7 at Art. 2).

¹¹³ E.g., R 31 of the CAS Rules provides that, “arbitration awards, orders, and other decisions made by the CAS and the Panel shall be notified by any means permitting proof of receipt”.

¹¹⁴ BGer. 4P.273/1999 para. 5a.

¹¹⁵ Art. 3(2) ICC Rules (2012) have adopted this approach.

¹¹⁶ Gilliéron/Pittet, para. 8 at Art. 2.

¹¹⁷ Cf. BGer. 4A_636/2011 para. 2.2.1 (“[...] ist für die Auslösung der Beschwerdefrist gegen Entscheide des TAS nicht die Eröffnung per Fax, sondern die Eröffnung per Post massgebend”); BGer. 4A_604/2010 para. 1.3 (“[...] la notification par fax d’une sentence du TAS en matière d’arbitrage international ne fait pas courir le délai de l’art. 100 al. 1 LTF”); in same terms already BGer. 4A_392/2010 para. 2.3.2.

¹¹⁸ For more detail on Art. 48(1) BGG, cf. Amstutz/Arnold, paras. 4-12 at Art. 48.

¹¹⁹ Cf. BGE 125 V 65 para. 1; BGE 92 II 215 (pp. 215-216).

¹²⁰ BGer. 2C_754/2008 para. 2.3; BGer. 4A_258/2008 para. 2.

¹²¹ Cf. Bucher, para. 7 at Art. 191; BGer. 2C_754/2008 para. 2.3; BGer. 4A_258/2008 para. 2.

¹²² Cf. BGE 121 II 252 para. 4; BGer. 4A_392/2010 para. 2.3.1; BGer. 4A_258/2008 para. 2.

¹²³ I.e., addressed to the Court’s chancellery <kanzlei@bger.ch> and sent through either <www.incamail.com> or <www.privashpere.com>.

¹²⁴ Art. 48(2) BGG; for a detailed commentary on Art. 48(2) BGG, cf. Amstutz/Arnold, paras. 13-20 at Art. 48.

¹²⁵ Only the two mentioned platforms may be used (i.e., <www.incamail.ch> or <www.privaspere.com>). The platform will send a confirmation receipt, with the date on that receipt being the date on which the appeal was filed. By contrast,

(technical) reason – to confirm receipt, the party will have missed the deadline.¹²⁶ The Supreme Court cannot be held liable for the malfunctioning of the internet platform(s).¹²⁷ For this reason, the safest way (still) is to hand it over to a Swiss post office and send it to the Court by registered mail.

7. Grounds for Challenge

Pursuant to Art. 190(2) PILS, an arbitral award may only be challenged on the basis of one of the exhaustively listed grounds.¹²⁸ The sole grounds which may be invoked are (i) the improper constitution of the tribunal, or the improper appointment of the sole arbitrator (para. 2(a)); (ii) wrong findings of the arbitral tribunal on jurisdiction (para. 2(b)); (iii) the award going *ultra petita* or being *infra petita* (para. 2(c)); the violation of either the principle of equality of the parties or their right to be heard (para. 2(d)); a violation of public policy (para. 2(e)).¹²⁹

Court review of arbitral awards is thus limited, with the most significant advantage being that the procedure is both simple and speedy.¹³⁰ In fact, Supreme Court setting aside proceedings on average last four months only,¹³¹ which is unparalleled internationally.¹³²

C. Handling of the Setting Aside Motion within the Court

As stated, it is for the 1st Civil Section of the Supreme Court to handle and decide on motions against international arbitral awards rendered in arbitrations having their seat in Switzerland.¹³³

Upon receipt of the setting aside motion, the advance payment from the applicant party, the opposing party's reply and the statement of the arbitral tribunal, if any,¹³⁴ the president of the 1st Civil Section normally¹³⁵ allocates the dossier to a law clerk.¹³⁶ The law clerk subsequently studies the dossier (i.e., the challenged award, the setting aside motion, the statement of the arbitral tribunal, if any, and the opposing party's reply to the setting aside motion) and then drafts a decision proposal.¹³⁷

The law clerk's decision proposal is then circulated for comments, review and approval among the (three or five) judges involved. In case of unanimity, the decision proposal is signed and, upon review by the

an email sent directly to the Supreme Court (including the appeal) – without using one of the two platforms – will not suffice to meet the deadline.

¹²⁶ Unless, of course, the party subsequently hands the hard copy over to the Swiss post office (cf. Amstutz/Arnold, para. 19 at Art. 48).

¹²⁷ Amstutz/Arnold, para. 19 at Art. 48.

¹²⁸ Cf. BGer. 4A_54/2012 para. 1.6; BGer. 4A_232/2012 para. 2.2; BGE 134 III 186 para. 5; BGE 128 III 50 para. 1a; BGE 127 III 279 para. 1a; BGE 119 II 380 para. 3c; see also Bucher, para. 40 at Art. 190; Berger/Kellerhals, para. 1542.

¹²⁹ For a commentary on Art. 190 PILS, including the limitation relating to the challenge of interim awards under Art. 190(3) PILS, see above.

¹³⁰ Kaufmann-Kohler/Rigozzi, para. 706; Poudret/Besson, para. 772; BGE 119 II 380 para. 3c: “*Le législateur a intentionnellement limité, à l’art. 190 al. 2 LDIP, les griefs qui peuvent être invoqués [...] afin de réduire les possibilités de ralentir la procédure et afin d’augmenter l’efficacité de la juridiction arbitrale [...]*”; see also BGE 115 II 288 para. 2b.

¹³¹ Dasser, ASA Bull. 2010, pp. 90, 99.

¹³² By contrast, in most arbitration venues, setting aside proceedings generally last several years (see Dasser, ASA Bull. 2010, p. 92).

¹³³ Art. 22 BGG in conj. with Art. 31(1)(g) of the Supreme Court Regulation (“*Reglement für das Bundesgericht*”).

¹³⁴ The Supreme Court always invites the arbitral tribunal that rendered the challenged award to submit a statement in response to the setting aside motion (Bucher, para. 27 at Art. 191). The response, if any, is usually submitted by the chairman on behalf of the arbitral tribunal (Arroyo, ASA Bull. 2008, p. 454, footnote 115). Wise arbitrators generally refrain from submitting any comments, let alone new arguments supporting the reasons given in the award. As a rule, they simply refer to the award itself.

¹³⁵ In some cases, the dossier is allocated directly to a judge, though this is rare.

¹³⁶ Art. 24(1) and (2) BGG expressly provide that the law clerks take part in the decision finding process, with their main duties consisting in drafting decision proposals (“*Referate*”) and reviewing the Court’s (final) decisions (“*Redaktionen*”).

¹³⁷ I.e., the so-called “*Referat*”.

clerk, becomes the final decision.¹³⁸ Should, however, no unanimity be reached, a counter-proposal will be submitted by the judge dissenting from the decision proposal, whereupon a (public) hearing will take place¹³⁹ at which each judge will put forth the arguments in favor or against the dissenter’s counter-proposal, with the resulting majority determining whether the setting aside motion is to be allowed or not.¹⁴⁰ Admittedly, such hearing hardly ever takes place given that the vast majority of Supreme Court decisions are made unanimously.¹⁴¹ Moreover, the president of the First Civil Section rarely exercises the right to summon a hearing.¹⁴² In addition, the Court usually rejects party requests asking for a public hearing.¹⁴³

- 53 As a result, setting aside proceedings are usually documents-only procedures, which normally comprise only one exchange of written submissions¹⁴⁴ (i.e., the filing of the setting aside motion and the opposing party’s answer to it as well as the arbitral tribunal’s statement, if any).¹⁴⁵ In other words, the opposing party (and the arbitral tribunal) can only reply to the setting aside motion once.¹⁴⁶ Art. 102(3) BGG expressly provides that a further exchange of submissions will – as a rule – not take place.¹⁴⁷
- 54 If both a request for revision¹⁴⁸ and a setting aside motion against the same award are filed simultaneously, the Supreme Court will normally first address the setting aside motion.¹⁴⁹

IV. Effects of the Supreme Court Decision

- 55 As a rule, an appeal under Art. 77(1) BGG in conj. with Art. 190(2) PILS has a purely “cassatory” (abolishing) effect in that the challenged award will be annulled in case the Supreme Court finds that the award is flawed in terms of Art. 190(2) PILS.¹⁵⁰ The setting aside of the award, and the remand to the arbitral tribunal for a new decision, is the usual consequence in case of a successful challenge.¹⁵¹ The Supreme Court may, in other words, generally not decide on the merits of the case afresh but can only

¹³⁸ Art. 58(2) BGG.

¹³⁹ Art. 58(1)(b) BGG.

¹⁴⁰ It is worth stressing that this is not a hearing in the sense that the parties (or their attorneys) can plead their case before the Court. Nor are witnesses heard or is evidence taken in setting aside proceedings before the Supreme Court (Berger/Kellerhals, para 1619), subject to the Court exceptionally deciding to do so on its own motion in cases where it admits new facts (Art. 55 BGG; Berger/Kellerhals, para 1645). The judges simply have a debate and exchange of arguments during a hearing which the parties, their attorneys and the press can attend. In this sense, it is a “public” hearing in terms of Art. 59(1) BGG, and at the end of the deliberations, each judge votes for the dismissal or approval of the setting aside motion.

¹⁴¹ When a hearing is exceptionally held, the law clerk, based on the outcome of the hearing, drafts the final decision, which then again is circulated among the judges for comments and review.

¹⁴² By virtue of Art. 57 BGG, the president may summon an oral hearing even where there is unanimity (Art. 58(1)(a) BGG), which hearing is public (Art. 59(1) BGG).

¹⁴³ The Supreme Court either gives no reasons for the rejection or simply states that the holding of such hearing is not appropriate (BGer. 4A_612/2009 para. 4.2: “nicht angezeigt”; in same terms: BGer. 4A_320/2009 para. 2). Critical on this practice: Bucher, para. 35 at Art. 191.

¹⁴⁴ Cf. Bucher, para. 30 at Art. 191; Klett, para. 3a at Art. 77.

¹⁴⁵ As mentioned, the arbitral tribunal which rendered the challenged award is always invited to submit a statement in response to the setting aside motion (cf. Bucher, para. 27 at Art. 191).

¹⁴⁶ Meyer, para. 19 at Art. 102.

¹⁴⁷ On the circumstances justifying an exceptional second exchange, cf. Meyer, paras. 20-23 at Art. 102; cf. also Bucher, para. 30 at Art. 191.

¹⁴⁸ For an all-encompassing annotation on the revision awards, including the germane Supreme Court case law, cf. Stirnimann at Chapter 11 below.

¹⁴⁹ BGE 129 III 727 para. 1; for further details on the questions arising with such parallel submissions, cf. Bucher, para. 62 at Art. 191.

¹⁵⁰ BGE 136 III 605 para. 3.3.4; BGE 128 III 50 para. 1b; BGE 127 III 279 para. 1b; BGE 117 II 94 para. 4; BGer. 4A_627/2011 para. 2.3; BGer. 4A_640/2010 para. 2.2; BGer. 4A_456/2009 para.2.4; BGer. 4A_320/2009 para. 1.2; BGer. 4A_428/2008 para. 2.4; BGer. 4A_224/2008 para. 2.4.

¹⁵¹ Cf. Art. 77(2) BGG which excludes Art. 107(2) BGG (see also Klett, para. 7 at Art. 77).

set aside the award in question.¹⁵² An exception to the aforementioned rule concerns challenges under Art. 190(2)(b) PILS, where the Supreme Court may find that the arbitral tribunal has¹⁵³ (or lacks) jurisdiction.¹⁵⁴ A further exception applies if an irregular composition of the arbitral tribunal under Art. 190(2)(a) PILS is (rightly) invoked, in which case the Supreme Court may directly order the removal of the challenged arbitrator.¹⁵⁵

As a result, a party may not demand from the Supreme Court a higher amount of money than the arbitral tribunal awarded in the challenged award. Equally, the challenging party may neither request the granting of a declaratory relief that the arbitral tribunal dismissed nor the dismissal of a granted relief, as the case may be. Nor may a party request a higher compensation for its attorney and other costs before the Supreme Court.¹⁵⁶ The prayers for relief submitted to the Supreme Court should therefore be drafted in line with these established principles,¹⁵⁷ failing which they will be inadmissible.¹⁵⁸ Generally, the prayers for relief may only request the setting aside of the award and the remand to the arbitral tribunal for a new decision. However, where a jurisdictional flaw is invoked, a prayer for relief demanding the Court's (affirmative or negative) determination on the arbitral tribunal's jurisdiction may (additionally) be submitted.¹⁵⁹ The same holds true with regard to a prayer for relief requesting the removal of an arbitrator pursuant to Art. 190(2)(a) PILS.¹⁶⁰

If the Supreme Court sets aside the award, it will be for the same arbitral tribunal that rendered the first (annulled) award to decide the case anew and render a further award, unless there was a successful challenge under Art. 190(2)(a) PILS or where the (or a) originally appointed arbitrator(s) no longer are (is) available.¹⁶¹ At any rate, the tribunal must take into account the reasons given by the Supreme Court when deciding the dispute again,¹⁶² and the tribunal's (second) award will naturally be open to challenge again.¹⁶³

By contrast, if the Supreme Court rejects the challenge (or declares it inadmissible) – which applies to approximately 97 % of all challenges –¹⁶⁴ the arbitral award will (continue to) have *res judicata* effects¹⁶⁵

¹⁵² Cf. Bucher, para. 52 at Art. 191; Kaufmann-Kohler/Rigozzi, para. 778; Berger/Kellerhals, para. 1652; Girsberger/Voser, 2012, para. 1066.

¹⁵³ This power of the Supreme Court includes the right to determine that a party (or several parties) that was (were) not allowed to take part in the arbitral proceedings based on a (wrong) decision of the arbitral tribunal be admitted as parties to the arbitration (cf. BGer. 4A_376/2008 para. 9).

¹⁵⁴ BGE 136 III 605 para. 3.3.4; BGE 128 III 50 para. 1b; BGE 127 III 279 para. 1b; BGE 117 II 94 para. 4; BGer. 4A_627/2011 para. 2.3; BGer. 4A_640/2010 para. 2.2; BGer. 4A_456/2009 para. 2.4; BGer. 4A_320/2009 para. 1.2; BGer. 4A_428/2008 para. 2.4; BGer. 4A_224/2008 para. 2.4; BGer. 4A_376/2008 paras. 3.1 and 9.

¹⁵⁵ See BGE 136 III 605 para. 3.3.4, stressing that this exception is justified for the sake of legal certainty and procedural efficiency, and with reference to previous decisions where this question had been left open (BGer. 4A_539/2008 para. 2.2; BGer. 4A_210/2008 para. 2.2; BGer. 4P.196/2003 para. 2.2), while the Court had affirmed this possibility in an earlier 2003 *obiter dictum* (BGer. 4P.263/2002 para. 3.2); BGE 136 III 605 has been confirmed in BGer. 4A_54/2012 para. 1.4; BGer. 4A_110/2012 para. 1.

¹⁵⁶ See, e.g., BGer. 4A_320/2009 para. 1.2.

¹⁵⁷ As a matter of course, reasoning in support of the prayers for relief must also be submitted to establish why the challenged award is to be set aside (cf. Art. 42(2) BGG in conj. with Art. 77(3) BGG); as to further formal requirements, cf. Bucher, paras. 11-20 at Art. 191; Berger/Kellerhals, para. 1630; Klett, paras. 8-13 at Art. 77; Girsberger/Voser, para. 1059.

¹⁵⁸ See, e.g., BGer. 4P.269/2003 para. 1.2; BGer. 4P.93/2004 para. 1.1; cf. also Kaufmann-Kohler/Rigozzi, para. 778.

¹⁵⁹ Berger/Kellerhals, para. 1653.

¹⁶⁰ BGE 136 III 605 para. 3.3.4; BGer. 4A_54/2012 para. 1.4; BGer. 4A_110/2012 para. 1.

¹⁶¹ Girsberger/Voser, para. 1066; Kaufmann-Kohler/Rigozzi, para. 778a, footnote 567; Berger/Kellerhals, para. 1654; Poudret/Besson, paras. 835, 837.

¹⁶² See BGE 112 Ia 166 para. 3e; BGer. 4A_54/2012 para. 2.2.3; see also BGer. 4A_628/2011 para. 3.2.1; BGer. 4A_288/2008 para. 3.2.1; BGer. 4P.35/2001 para. 1a.

¹⁶³ Bucher, para. 57 at Art. 191; Kaufmann-Kohler/Rigozzi, para. 778a.

¹⁶⁴ Cf. Dasser, *ASA Bull.* 2010, pp. 85, 99.

¹⁶⁵ On these effects, cf. Berty/Schnyder, paras. 9-10 at Art. 190; see also Berger/Kellerhals, para. 1498.

and will (definitely)¹⁶⁶ become final.¹⁶⁷ Where no challenge against the award is filed, the definite (i.e., absolute) finality of the award hinges on the lapse of the 30-day term.¹⁶⁸ Before that lapse, the award's finality is not absolute since it is contingent upon no challenge being filed in time so that the finality, put differently, is only a conditional and not an absolute one.¹⁶⁹

- 59 Notwithstanding the foregoing distinction, it must be stressed that the award is final as from its notification under Art. 190(1) PILS and is thus enforceable at law.¹⁷⁰ Given that the filing of a setting aside motion does not *per se* have any suspensive effect,¹⁷¹ the award will continue to be enforceable despite such filing.¹⁷² An exception only applies if the Supreme Court, upon express application of the party challenging the award, grants such suspensive effect.¹⁷³ This is an exacting (triple)¹⁷⁴ test and the Supreme Court only exceptionally¹⁷⁵ allows such applications.¹⁷⁶ Above all, the applicant must not only show that the (monetary)¹⁷⁷ award causes severe and irreparable harm¹⁷⁸ but also that the challenge is most likely well-founded.¹⁷⁹ In other words, the application will be rejected if the challenge against the (monetary or non-monetary) award *prima facie* seems to be doomed to failure.¹⁸⁰

V. The Drafting of Setting Aside Motions

A. Basic Attitude of the Supreme Court towards Setting Aside Motions

1. Hands-off Approach

- 60 In general, the basic attitude of the Supreme Court towards appeals against lower state court decisions in litigation proceedings is quite reserved.¹⁸¹ The internal justification for this (negative) approach is that where two courts of law have already dismissed the claim,¹⁸² this normally warrants that the case has

¹⁶⁶ Before the decision of the Supreme Court, the finality of the award as from its notification under Art. 190(1) PILS is conditional upon the dismissal of the challenge. Unless and until the challenge is dismissed by the Supreme Court, the award's finality is thus not absolute but subject to the dismissal. If the challenge is successful, the (conditional) finality of the award will lapse (cf. Berti/Schnyder, para. 8 at Art. 190).

¹⁶⁷ Girsberger/Voser, para. 1066; Berti/Schnyder, paras. 8-10 at Art. 190.

¹⁶⁸ Berti/Schnyder, para. 8 at Art. 190.

¹⁶⁹ Cf. Berti/Schnyder, para. 8 at Art. 190, who speak of a relative (conditional) finality in this context.

¹⁷⁰ Girsberger/Voser, para. 1062; Jermini/Bernardoni, pp. 79-80; for a commentary on Art. 190(1) PILS, cf. above, paras. 8-11 at Art. 190.

¹⁷¹ By virtue of Art. 77(2) BGG, Art. 103(2) BGG is not applicable to challenges of arbitral awards.

¹⁷² Cf. Berger/Kellerhals, paras. 1495-1496.

¹⁷³ Art. 103(3) BGG is not excluded by Art. 77(2) BGG so that the Supreme Court may, but need not, order the suspensive effect; see also Jermini/Bernardoni, pp. 81-82; Berger/Kellerhals, para. 1495; Kaufmann-Kohler/Rigozzi, para. 780; Girsberger/Voser, para. 1062.

¹⁷⁴ On this triple test, see Kaufmann-Kohler/Rigozzi, para. 781, with reference to an unpublished Order of 12 June 2007 (mentioned in BGer. 4A_204/2007 para. 1.1); on this Order, see also Berger/Kellerhals, para. 1629 a.

¹⁷⁵ For a comprehensive overview of the Court's (restrictive) case law, see Jermini/Bernardoni, pp. 83-96, who conclude that the Court recently has (statistically) allowed more applications than in the past, though the Court continues to stress that it will grant suspensive effect to a challenge in exceptional cases only (Jermini/Bernardoni, p. 95).

¹⁷⁶ Cf. Klett, para. 7 at Art. 77; Kaufmann-Kohler/Rigozzi, para. 781; Jermini/Bernardoni, p. 95; Berger/Kellerhals, para. 1496.

¹⁷⁷ As to the prerequisites in case of non-monetary awards (especially in sports disputes), cf. Jermini/Bernardoni, p. 89.

¹⁷⁸ For more detail on this prerequisite, cf. Jermini/Bernardoni, pp. 87-89.

¹⁷⁹ Cf. Kaufmann-Kohler/Rigozzi, para. 781; Berger/Kellerhals, para. 1629 a.

¹⁸⁰ Cf. Jermini/Bernardoni, p. 89, with reference to an Order of 26 January 2010 (mentioned in BGer. 4A_612/2009 para. D), where the Supreme Court held: "[...] dass die nun vorgenommene vorläufige Würdigung der [...] erhobenen, zulässigen Rügen (vgl. dazu Art. 77 Abs. 3 BGG und Art. 190 Abs. 2 IPRG) zum Ergebnis führt, dass die Beschwerde voraussichtlich erfolglos bleiben wird."

¹⁸¹ Poudret/Besson, para. 772.

¹⁸² Including the second court's dismissal of the appeal against the first court decision.

been judged correctly.¹⁸³ The Supreme Court, in principle, adopts the same hands-off approach when it comes to awards rendered in international arbitrations.

Yet this hands-off approach is even stronger in cases where the jurisdiction of the arbitral tribunal is not challenged at all or challenged in vain, for the Supreme Court then adopts an extremely restrictive approach when assessing any of the grounds provided for in Art. 190(2) PILS. It is also sometimes suggested that the ever-increasing case and workload¹⁸⁴ of the (already overburdened)¹⁸⁵ Court is an additional reason for this restrictive approach.¹⁸⁶ Be that as it may, the Court's self-conception is, and always has been, that it is not the Supreme Court's function to supervise the case handling and decision-making of arbitral tribunals, always provided they had jurisdiction. As a result, and unsurprisingly, challenging an arbitral award for want of jurisdiction – statistically – is most likely to succeed.¹⁸⁷

2. Case Law and Statistics both Reflect the Court's Restrictive Approach

The aforementioned hands-off approach is perfectly reflected in a whole series of decisions. For instance, under Supreme Court case law, arbitrators may undertake a so-called anticipated assessment of evidence (*"antizipierte Beweiswürdigung"*), that is decline the taking of further evidence if they have already formed a firm opinion with respect to the point in question and the proffered evidence is deemed to be unfit to alter this opinion.¹⁸⁸ Further, arbitrators may by virtue of *jura novit curia* – as a rule – apply the law *sua sponte* (i.e., *ex officio*), without there being any need to afford the parties an opportunity to comment on the point of law not put forward by either of them.¹⁸⁹ Also, a party having waived its right to challenge the award under Art. 192 PILS is precluded from challenging the award on the basis that the arbitrators wrongly extended the scope of the arbitration clause – and thus their jurisdiction – to other contracts not containing such clause (or to a non-signatory).¹⁹⁰

Statistically, only about 7 % of all setting aside motions are allowed.¹⁹¹ In other words, approximately 93 % of the motions are dismissed on average, which speaks for itself and corroborates the Court's aforementioned hands-off approach in reviewing arbitral awards.

B. Practical Advice on Drafting Setting Aside Motions

1. Introductory Remarks

The advice given below is based on the author's practical experience as a law clerk with the Supreme Court.¹⁹² The numerous (practical) tips make no claim to be complete, right or constantly valid. Rather, they should only serve as guidelines to parties intending to challenge an arbitral award in Switzerland.

¹⁸³ This naturally means that where the two lower courts have issued diverging decisions, the chances to succeed before the Supreme Court are significantly higher.

¹⁸⁴ In 1971, some 1840 appeals were lodged, in 2004, 4830 and in 2011, 7419 appeals (see: www.bger.ch under "Gerichtsorganisation"/"Publikationen"/"Geschäftsberichte"). This amounts to an increase of 400 % in the last 40 years. Admittedly, the number of law clerks also increased significantly in the last decades (127 law clerks in 2011).

¹⁸⁵ Poudret/Besson, para. 772.

¹⁸⁶ Kaufmann-Kohler/Rigozzi, para. 707.

¹⁸⁷ As compared with invoking any of the other setting aside grounds of Art. 190(2) PILS; see Dasser, *ASA Bull.* 2010, pp. 87-88.

¹⁸⁸ BGE 130 II 425 para. 2.1; BGE 4P.23/2006 para. 3.1.

¹⁸⁹ An exception only applies if the parties could not reasonably have foreseen that the legal provision or principle not invoked would be relevant for the decision (BGE 130 III 35 para. 5; BGE 4A_400/2008 para. 3.1; BGE 4A_10/2010 para. 2.1).

¹⁹⁰ BGE 134 III 260 para. 3.2.4; BGE 131 III 173 para. 4.2.3; on this case law, see Jermini/Arroyo, *ASA Bull.* 2009, pp. 103-113.

¹⁹¹ Dasser, *ASA Bull.* 2010, pp. 85, 99.

¹⁹² The author, Manuel Arroyo, was a law clerk at the 1st Civil Section of the Supreme Court from 2004 to 2007. In that capacity, he was involved in 126 Supreme Court decisions, mainly concerning commercial contract disputes and challenges of arbitral awards. As mentioned, challenges against international awards rendered in Switzerland are invariably handled by the Court's 1st Civil Section.

Nor can the advice, by definition, be taken as a guarantee for success. The following tips simply reflect the author’s view on what should be avoided and what should be sought after. Each party will have to determine – on a case-by-case basis – whether or not to follow a given advice in setting aside proceedings.

2. *Dos and Don’ts*

- 65 Given the Court’s extremely restrictive approach, adhering to the subsequent recommendations should enhance the chances in succeeding in setting aside proceedings:

a. *General Rule*

- 66 In general, the easier it is made for the law clerk or judge to follow the applicant party’s line of argument, the more likely it is that they will adopt a positive attitude towards the setting aside motion. Conversely, the more difficult their task is made, the more disinclined they will be to concur with the applicant’s arguments. In particular, it must be ensured that the line of argument is both consistent and well-structured.

b. *Reasoning*

- 67 The law clerk or judge must at all times know exactly what violation of which setting aside ground provided for at Art. 190(2) PILS is invoked.¹⁹³ Voicing general and abstract (i.e., non-specific) criticism of the award is both insufficient and inadmissible.¹⁹⁴ For instance, it must precisely be indicated what conduct of the arbitrators or which decision constitutes a violation of the right to be heard in terms of Art. 190(2)(d) PILS.¹⁹⁵ As soon as the law clerk (or judge) gets the impression that the applicant party (or its attorney) is attempting to cause confusion, the setting aside motion will inevitably lose much of its persuasiveness.
- 68 Where several setting aside grounds are invoked, it is of critical importance to treat them separately and not mix them up. The different grounds need to be clearly separated – ideally, under separate headings.
- 69 Where the challenged award contains several (separate) rationales, all must be challenged. If, for example, the arbitral tribunal included two alternative rationales for finding jurisdiction, both will have to be challenged.¹⁹⁶ Otherwise, the Supreme Court will refuse to consider the setting aside motion.¹⁹⁷

c. *Tone and Language*

- 70 The Court is to be persuaded through legal arguments, and the more objective the tone and phrasing of the legal submission, the better. As a consequence, overly strong language and exclamation marks should not be applied. Equally, pretentious or schoolmasterly language should be avoided.¹⁹⁸

¹⁹³ Heini, para. 7 at Art. 191; see BGE 134 III 186 para. 5.

¹⁹⁴ Von Werdt, paras. 734–735. In the Supreme Court’s language, such general and abstract criticism is referred to as “*critique de nature appellatoire*” (BGE 119 II 380 para. 3b) and “*appellatorische Kritik*” (BGer. 4A_428/2010 par. 1.2; BGE 125 I 492 para. 1b); cf. also Berger/Kellerhals, para. 1633.

¹⁹⁵ Indeed, under Art. 42(2) BGG, any legal submission filed with the Supreme Court must contain a reasoning in support of the prayers for relief, which reasoning must establish why the challenged decision is in violation of the law. Art. 77(3) BGG further stresses that the Supreme Court will only hear grounds that have been put forward along with a reasoning as to why the invoked grounds justify the setting aside of the challenged award.

¹⁹⁶ Berger/Kellerhals, paras. 1590, 1633.

¹⁹⁷ BGer. 4A_392/2008 para. 2.5.1; BGer. 4P.278/2005 para. 1.2.2; BGer. 4P.62/2004 para. 2.1; BGer. 4P.103/1989 para. 2c; BGer. 4P.275/1992 para. 2; cf. also von Werdt, para. 735.

¹⁹⁸ The following (translated) passages are taken from legal submissions made at the time the author was a law clerk with the Supreme Court: “It is absolutely incomprehensible how opposing counsel (or the arbitral tribunal) can seriously purport that (...).”; “In evident ignorance of the law, the arbitral tribunal held that (...).”; “The line of argument submitted by opposing counsel reflects his enormous ignorance of the most basic legal principles.” The same can just as well be argued in the following (moderate but clear) terms: “This argument overlooks that (...).”; “Yet in so reasoning, the tribunal failed to appreciate that (...).”; “This reasoning of the opposing party (or the arbitral tribunal) is inconsistent on the following grounds (...).”

Yet the above advice is not supposed to mean that one may not advance the arguments supporting the motion in a resolute and determined manner. However, the constant usage of expressions such as “in clear violation of the right to be heard”, “patently inconsistent with the equal treatment principle”, “obvious infringement of public policy” signals insecurity, and this type of language may end up undermining the overall persuasiveness of the applicant’s case. 71

Likewise, attacking opposing counsel or the arbitral tribunal will be taken as a sign of weakness by the law clerk (or judge) assessing the setting aside motion.¹⁹⁹ For this reason, the applicant party should refrain from attacking either opposing counsel or the arbitrators. The Supreme Court will not appreciate this and might even mention the disapproval in the decision.²⁰⁰ 72

d. Repetitions

As a rule, repetitions should be kept to a minimum. For instance, if one continuously states that the opposing party’s procedural conduct constitutes a violation of a given principle, the law clerk (or judge) dealing with the motion will get the impression that the drafter of the submission is not so sure himself. Were it otherwise, he would not need to repeat the same allegation time and again – unless, of course, the opposing party actually did commit several violations. 73

e. Factual Findings of the Arbitral Tribunal

Altering or questioning the factual findings of the arbitral tribunal should be avoided. Under Art. 77(2) in conj. with Art. 105(2) BGG, the factual findings of the arbitral tribunal cannot be challenged in setting aside proceedings – subject to the facts having been established by the arbitral tribunal in violation of one of the grounds provided at Art. 190(2) PILS, or new facts (so-called “*Noven*”) exceptionally being taken into consideration.²⁰¹ 74

Any attempt to alter the facts set forth in the challenged award will lead to the setting aside motion becoming less persuasive from the law clerk’s or judge’s point of view. 75

f. Number of Setting Aside Grounds

It is generally advisable to focus on one setting aside ground only,²⁰² except where one has very good reasons to believe that another ground provided at Art. 190(2) PILS may be legitimately raised as well. At any rate, invoking four or five grounds under Art. 190(2) PILS will cause the law clerk or judge in charge to believe – from the outset²⁰³ – that the motion is likely to be meritless. Unsurprisingly, statistics show that all setting aside motions alleging four or five grounds²⁰⁴ were, so far, invariably dismissed, while invoking just one ground has by far the highest (i.e., a 13 %) success rate.²⁰⁵ 76

As a result, less is more (or even best) when it comes to setting aside grounds. The only benefit of advancing a whole series of grounds is that the proceedings before the Supreme Court will naturally last longer, which for parties intending to delay the issuance of a final decision may serve as an incentive.²⁰⁶ 77

¹⁹⁹ As the legal saying goes, “if you’ve got the facts on your side, you argue the facts. If you’ve got the law on your side, you argue the law. If you have neither of them on your side, you attack opposing counsel” (or the arbitrators, as the case may be).

²⁰⁰ See BGer. 4A_600/2008 para. 4.2.1.3, where a party alleged before the Supreme Court that CAS as arbitral institution had taken a decision “*dans un mouvement d’humeur manifeste*” and further contended that it was a “*victime de la mauvaise foi d’une institution arbitrale*” (i.e., a victim of the bad faith of an arbitral institution), which language the Court disapproved: “*Semblable grief, inutilement blessant dans sa formulation, ne résiste pas à l’examen.*”

²⁰¹ See BGer. 4A_579/2010 para. 2.1; BGer. 4A_424/2008 para. 2.3; BGE 133 III 139 para. 5; BGE 129 III 727 para. 5.2.2.

²⁰² In simplified terms, one should avoid the shotgun approach and instead go for the rifle approach.

²⁰³ Since a setting aside motion, as any legal submission, normally contains a table of contents, the judge or clerk when skimming over that table will already learn at the beginning how many grounds the applicant party is invoking.

²⁰⁴ I.e., 24 motions between 1989 and 2009 (see Dasser, *ASA Bull.* 2010, p. 89).

²⁰⁵ Dasser, *ASA Bull.* 2010, p. 89.

²⁰⁶ Dasser, *ASA Bull.* 2010, pp. 88-89.

g. *Invoking Public Policy Violations*

- 78 Above all, one should not invoke a violation of public policy in addition to the other setting aside ground(s) advanced, unless one has very good grounds to believe that this is justified, which given the Court’s case law on public policy violations will seldom, if ever, be the case. Here too, the law clerk or judge dealing with the motion will, from the start,²⁰⁷ be inclined to believe that the motion is likely to be without merit. Statistics, in fact, reveal that no setting aside motion was ever approved until 2012²⁰⁸ based on an alleged violation of *substantive* public policy (i.e., in the 23 years following the coming into force of the PILS in 1989).²⁰⁹ There was just one more recent 2010 case, where the infringement of the *res judicata* principle, which is part of *procedural* public policy, led to the setting aside of the award.²¹⁰
- 79 Interestingly, and despite the devastating statistics, public policy in terms of Art. 190(2)(e) PILS is the most often advanced ground in setting aside proceedings.²¹¹ The reason for this is a very a simple one since this is – in the losing party’s view – the only way to try to reopen the merits of the case. Such attempts, however, are flatly rejected by the Supreme Court given that the review of the award on the merits is limited to examining whether the award is compatible with (substantive) public policy.²¹²

h. *Length of the Motion*

- 80 Is there an ideal length for a setting aside motion? As a rule of thumb, the written legal submission demanding the setting aside of an arbitral award should generally not comprise more than 20 pages. In any case, one should attempt to be as succinct as possible. Put simply, if it cannot be shown on 20 pages that a given conduct or decision of the arbitrators violated a party’s right under Art. 190(2) PILS, it is difficult to see how this could be achieved on further 15 to 20 pages. Needless to state that the length of the submission will also depend on the number of grounds advanced. As mentioned, statistically less is best since advancing one ground only is most likely to prove successful.²¹³
- 81 The guiding principle is that good writing is rewriting. Given the rather short 30-day deadline, time constraints might however render difficult an in-depth reviewing and redrafting. Experience shows that it does, indeed, take more time to draw up a concise submission than a long one.²¹⁴

²⁰⁷ I.e., as soon as the judge or clerk skims over the table of contents at the beginning of the motion, which normally lists the setting aside grounds the applicant is advancing.

²⁰⁸ For a detailed summary of this 27 March 2012 decision (BGE 138 III 322), cf. above commentary on Art. 190 PILS, paras. 219-232.

²⁰⁹ Dasser, *ASA Bull.* 2010, p. 88.

²¹⁰ See BGE 136 III 345 para. 2.2, which decision was issued only after Dasser’s publication of the 2010 statistical analysis referred to above.

²¹¹ See Dasser, *ASA Bull.* 2010, pp. 87-88.

²¹² BGE 121 III 331 para. 3a; BGE 120 II 155 para. 6a; BGE 116 II 634 para. 4; BGer. 4A_414/2010 para. 2.1; BGer. 4A_260/2009 para. 3.1.

²¹³ Dasser, *ASA Bull.* 2010, p. 89.

²¹⁴ As the saying goes: “Had I had more time, I would have written less.”; “Sorry this letter is so long, but I didn’t have time to write a shorter one.” The origin of these quotes is disputed, with Cicero, Goethe, Schiller, Lessing and Twain being named as (presumed) authors.