

Swiss Supreme Court rules that non-participating respondent forfeited right to rely on procedural objections

by *Practical Law Arbitration*, with *Schellenberg Wittmer Ltd*

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In *Decision 4A_359/2025*, the Swiss Supreme Court dismissed Russian energy company Gazprom's application to set aside an ICC award in favour of Ukrainian state-owned gas company Naftogaz. After sending a letter to the ICC in which it disputed the validity of the arbitration clause, Gazprom did not participate in the arbitration. Gazprom challenged the award, arguing that the co-arbitrator nominated by Naftogaz and the presiding arbitrator lacked impartiality. The court dismissed the challenge, ruling that, as Gazprom had failed to challenge the composition of the tribunal during the arbitration, it had forfeited the right to do so now.

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The Swiss Supreme Court has dismissed a challenge brought by Russian energy company Gazprom against an award ordering it to pay \$1.37 billion to Ukrainian state-owned gas company Naftogaz under a contract concerning the transfer of Russian gas through Ukraine. The contract contained an ICC arbitration clause.

Naftogaz initiated arbitration proceedings before the ICC in September 2022. In a letter to the ICC that month, Gazprom disputed the validity of the arbitration agreement and rejected the jurisdiction of any tribunal the ICC might appoint.

In 2023, the ICC appointed a co-arbitrator for Gazprom and confirmed the constitution of the tribunal. Gazprom did not participate in the arbitration. The tribunal affirmed its jurisdiction and ruled in favour of Naftogaz.

Gazprom challenged the award on several grounds, including improper constitution of the tribunal. It alleged that the presiding arbitrator and the co-arbitrator nominated by Naftogaz lacked impartiality because they came from states that Russia had designated as "unfriendly" following Western sanctions imposed after the Russia-Ukraine conflict. In relation to the impartiality of the presiding arbitrator, Gazprom also pointed to connections with one of Naftogaz's counsel and to certain statements and social media reactions regarding the Russia-Ukraine conflict.

Article 182(4) of the Swiss Private International Law Act (PILA) provides that "[a] party that continues with the arbitration proceedings without objecting immediately to a breach of the rules of procedure (...) may not invoke this breach at a later point in the proceedings". Gazprom argued that it did not "continue with the arbitration proceedings" within the meaning of this provision, as it did not participate in the proceedings at all following its September 2022 letter, and that this provision therefore did not apply.

The Swiss Supreme Court rejected this argument. It recalled that the purpose of article 182(4) of the PILA is to ensure that a party does not keep procedural objections that could be raised during the arbitration "in reserve" to challenge an unfavourable award. In this case, the tribunal continued to inform Gazprom of all procedural steps throughout the arbitration, and Gazprom could have raised procedural objections and challenged the arbitrators at any time.

This decision is noteworthy in that it makes clear that article 182(4) of the PILA also applies where a party chooses not to participate in the arbitration proceedings. Therefore, non-participating respondents risk being precluded from challenging the award on due process and improper constitution grounds.

Case: *Decision 4A_359/2025 (Swiss Supreme Court) (15 January 2026)* (German language).

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