

Enforcement of award set aside at seat must be refused (Cantonal Court, Switzerland)

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

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In *Decision KSK 21 9*, the Cantonal Court of Grisons (Switzerland) held that enforcement of an arbitral award set aside at the seat of arbitration must be denied under the New York Convention. The Cantonal Court found that, save in highly exceptional circumstances, the enforcement courts do not have the power to review a foreign court decision setting aside the award.

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In a recently published German-language appellate decision, the Cantonal Court of Grisons (Switzerland) held that courts must refuse enforcement of an award that has been set aside at the seat of arbitration.

The case concerned an arbitral award rendered in Russia in 2016, that ordered the respondent to pay CHF241 million to the claimant. The Russian courts set aside the arbitral award while enforcement proceedings were pending before the lower court of Grisons in Switzerland. The question arose whether this Russian setting-aside decision precluded the Swiss enforcement court from granting enforcement.

Pursuant to article V(1)(e) of the New York Convention (NYC), recognition and enforcement of an award "may be refused" if "[the] award [...] has been set aside [...] by a competent authority of the country in which, or under the law of which, that award was made". The question as to whether courts at the place of enforcement have discretion to refuse enforcement of an award that has been set aside at the seat is a recurring and much-debated question under the NYC.

The lower court considered that it did not have discretion in this regard and was essentially bound by the Russian setting-aside decision. On appeal, the Cantonal Court of Grisons confirmed this outcome. Referring to legal commentary on the NYC and the need for legal certainty, the Cantonal Court found that enforcement courts have no power to review the setting-aside decision, save in exceptional circumstances such as a flagrant abuse of rights by the state authorities at the seat of arbitration. The Cantonal Court found that no such circumstances had been properly alleged in this case and consequently denied enforcement of the award. This decision was not appealed to the Swiss Supreme Court.

This is the first (published) decision of a Swiss court dealing in detail with the issue of whether an award set aside at the seat can be enforced in Switzerland. Although it is not binding on other Swiss courts, it may nonetheless serve as guidance on this issue in the future, especially given that the Cantonal Court went to great lengths to analyse both Swiss and international legal authorities on the issue.

Case: [Decision KSK 21 9 \(Cantonal Court of Grisons\) \(25 May 2022\)](#).

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