

Setting Aside in ‘key’ European Jurisdictions: recent trends

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Why???

Which seat to chose:

**Delocalised arbitration v. Judicial
control**

or

**Arbitral autonomy: the final resort
with judicial safeguard?**

The 'key' European jurisdictions



France
Belgium
Netherlands
England in short
with a touch of Swiss

Key provisions

Grounds: successes and trends?

**Extras: the waivers, restraints and
public policy**

France

Book IV Nouveau Code de Procedure Civile 1981 (“CPC”)

Section 1502 CPC (statutory)

An appeal against the decision, which grants recognition or enforcement, will be available only in the following cases (limitative):

1. If the arbitrator has ruled upon the matter without an arbitration agreement or based on a void and lapsed agreement;
2. If the arbitration tribunal has been unlawfully constituted or the sole arbitrator has been unlawfully designated;
3. If the arbitrator has ruled upon the matter contrary to the assignment given to him;
4. If the adversarial principle has not been respected (estoppel);
5. If the recognition or enforcement is contrary to public international order.

Extras: the waivers, restraints and public policy

- ❖ Waiver: parties can neither expand nor waive all or part of the statutory grounds;
- ❖ Review on the merits/restraint: control of jurisdiction by the Courts is total. Exception to absence of control on the merits, incl. a restrictive control of public policy;
- ❖ Public policy: only set aside if the solution reached is manifestly contrary to international public policy.

‘Peculiarities’

- **Truly international delocalised awards with its implications for the waiver;**
- **New grounds of 1502 CPC delimit judicial intervention for international delocalised awards;**
- **Recent trend: no setting aside in case of misinterpretation of the evidence, purported distortion of the parties’ pleadings or purported lack of reasoning;**
- **Arbitration agreement remains effective after setting aside.**

Belgium

Part IV Code Judiciaire Belge 1985 (“CJB”)

Section 1704 CJB (statutory)

1. The arbitral award may only be contested before the Civil Court through an application for setting it aside, and it may be set aside solely for a cause mentioned in this Section (limitative).

2. The arbitral award may be set aside:

- a. If the decision is contrary to public policy;
- b. If the dispute was not arbitrable;
- c. If no valid arbitration agreement exists (estoppel);
- d. If the Arbitral Tribunal has exceeded its jurisdiction or its powers (estoppel);
- e. If the Arbitral Tribunal omitted to decide on one or more issues of the dispute, and if such issues cannot be separated from the issues on which it did decide;

Belgium

Part IV Code Judiciaire Belge 1985 (“CJB”)

Section 1704 CJB (statutory) cont’d

- f. If the award has been rendered by an arbitral tribunal that was irregularly appointed (estoppel);
- g. If the parties were not given the opportunity to present their case and their arguments, or if any other imperative rule of the arbitral proceedings has been violated, provided such a violation of the rules had a bearing on the decision;
- h. If the formalities prescribed in Section 1701, paragraph 4, have not been fulfilled (signature by the arbitrators);
- i. If the award is not reasoned;
- j. If the award contains provisions that contradict themselves.

Belgium

Part IV Code Judiciaire Belge 1985 (“CJB”)

Section 1704 CJB (statutory) cont’d

3.The award may also be set aside:

- a. If it was obtained by fraud;
- b. If it is based on evidence that is found to be false by a final Court decision, or on evidence that is acknowledged to be false;
- c. If, since the award was rendered, a document or other evidence were found that would have had a decisive influence on the award, and that has been held back by the other party.

Extras: the waivers, restraints and public policy

❖ Waiver: parties with no link in Belgium are offered to opt out by express agreement, including grounds for public policy or due process;

❖ Review on the merits/restraint: full review in case of violation of public policy, real control. Otherwise absence of control on the merits. Trend case law: majority rejected;

❖ Public policy: international public policy applies, more restrictive than Belgian public policy. Latest trend shows that this is the successful ground in Belgium.

‘Peculiarities’

- **Latest trend towards arbitral autonomy: full waiver;**
- **Trend for waiver: not many exclusion agreements in practice;**
- **Due process is not often a successful ground since it is for the party that invokes the violation of due process to establish the reality of this violation;**
- **Great majority of recourses against award rejected;**
- **Consequence: new arbitration.**

The Netherlands

Book IV Netherlands Arbitration Act 1986 (“NAA”)

Section 1065 NAA (statutory)

1. Setting aside of the award can take place only on one or more of the following grounds (limitative):

- a. Absence of a valid arbitration agreement (estoppel);
- b. The arbitral tribunal was constituted in violation of the rules applicable thereto (estoppel);
- c. The arbitral tribunal has not complied with its mandate (estoppel);
- d. The award is not signed or does not contain reasons in accordance with the provisions of article 1057;
- e. The award, or the manner in which it was made, violates public policy or good morals.

Extras: the waivers, restraints and public policy

- ❖ Waiver: under no circumstance possible, however through the backdoor: estoppel;
- ❖ Review on the merits/restraint: full review in case of violation of due process: no restraint. Otherwise absence of control on the merits. Latest trend in case law: 90 % restraint;
- ❖ Public policy: Dutch public policy.

‘Peculiarities’

- **Lack of reasoning in practice common ground for setting aside: in light of latest case law, chances of success reduced to almost zero;**
- **General lack of success: great majority of recourses against award rejected. Lower Courts tend to follow the latest SC decisions in which restraint is the most important feature;**
- **No full control for public policy except for due process;**
- **Consequence: revival jurisdiction Court.**

England in short

The waivers, restraints and public policy

- ❖ Waiver: written agreement for exclusion of a point of law under Section 69;
- ❖ Review on the merits/restraint: review on the merits in case of public policy/fraud;
- ❖ Public policy: fraud/serious irregularities. Procedural public policy no ground.

‘Peculiarities’

- **Recent trend in case law shows that correcting misconduct will not serve as an excuse for backdoor judicial tampering with the merits of an arbitration or disregard waiver by the parties;**
- **Remission;**
- **Serious irregularity has caused or will cause substantial injustice to the applicant;**
- **Appeal on points of law are very seldom successful.**

With a final touch of Swiss

- **Waiver: explicit agreement if no party is a Swiss resident or has a Swiss permanent establishment, opt-out possibility;**
- **No challenge based on violation of substantive public policy has ever been successful;**
- **Remanded to tribunal for reconsideration.**

France	Belgium	NL	England	Swiss
1. Lack valid arb. agr.	1. Not arbitrable/lack valid arb. agr.	1. Lack valid arb. agr.	1. No jurisdiction.	1. No jurisdiction.
2. Unlawful constitution tribunal.	2. Irregular appointment tribunal.	2. Unlawful constitution tribunal.	2. Incorrect constitution tribunal.	2. Irregular composition tribunal.
3. Violation mandate.	3. Violation mandate.	3. Violation mandate.	3. Violation mandate.	3. Violation mandate.
4. Violation due process.	4. Violation due process.	4. Violation due process.	4. Serious irregularity conduct proceedings.	4. Violation due process/right to be heard.
5. Violation public policy.	5. Public policy/fraud/false or lacking evidence.	5. Violation public policy.	5. Violation public policy (not procedural)/fraud	5. Violation public policy/fraud.
	6. Lack Signature/reasoning/contradictory provisions.	6. Lack Signature/reasoning.	6. Questions on law/deficiency in form.	6. Deficiency in form.

	France	Belgium	NL	England	Swiss
Waiver	No.	Yes: non Belgians, incl. public policy/due process.	No.	No: except for questions of law.	Yes: explicit agreement, non Swiss.
Review on the merits	Jurisdiction: yes.	Public policy: yes.	Due process: yes.	Public policy: yes.	Due process/public policy: yes.
Public Policy	International public policy.	International public policy.	Dutch public policy.	Serious irregularity needs to cause substantial injustice.	Fundamental legal values of Swiss shared by other nations.
Successes and trends	Judicial control delimited.	Arbitral autonomy. Public policy successful ground unlike due process.	General restraint by courts unless clear violation due process.	Review on the merits difficult.	Public policy never successful.

The 'key' European jurisdictions

