

BELGIUM & EU

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“PUBLIC POLICY” IN BELGIAN AND EU LAW

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1. BELGIUM

1. The Belgian Supreme Court has consistently defined public policy as follows:

*"Is of public policy only what touches upon the essential interests of the State or of the community or sets, in private law, the legal basis on which rests the society's economic or moral order."*¹ (Free translation).

2. The Supreme Court defines international public policy as:

*"A law belongs to international public policy only if, by its provisions, the legislator intended to consecrate a principle that it considers as essential for the moral, political or economic order established in Belgium and which, for this reason, must necessarily exclude the application in Belgium of any contrary or different rule from a foreign law, even where such rule should apply by virtue of ordinary rules of conflict of laws."*² (Free translation).

3. Regarding the notion of public policy applied in the context of international arbitration, it is worth mentioning a judgment of the Court of First Instance of Brussels of 30 March 2011, in which the Court denied enforcement of an award rendered in California (in a dispute between a California corporation and a Belgian national) because of a complete lack of reasons in the award. While lack of reasons is not a ground for refusal of enforcement under Article V of the New York Convention, the Brussels Court held that it did constitute a violation of Belgian international public policy, and namely of the obligation to motivate judgments which is included in the right to a fair trial protected by Article 6 of the European Convention for Human Rights (ECHR). The Court held in particular that:

"Without it being necessary to determine whether Article 6 ECHR is applicable, as such, to arbitrators, it suffices to ascertain that the Belgian judiciary must in any case

¹ Cass., 9 December 1948, *Pas.*, I, p. 699 ; 15 March 1968, *Pas.*, I, p. 894 ; 10 November 1978, *Pas.*, 1979, I, 309 ; 28 September 1979, *Pas.*, 1980, I, p. 131. See more recently *Cass.*, 29 April 2011, RGDC 2012/6, p. 276.

² Cass. 18 June 2007, *Pas.*, 2007, I, p. 1237.

respect the requirements of fair trial and therefore cannot provide its assistance in the violation thereof by allowing the enforcement of an arbitral award, even foreign, that ignores such requirements."³ (Free translation)

For that reason, the Court found that the recognition and enforcement of the Californian award would be contrary to Belgian public policy, and denied the exequatur under Article V.2 (b) of the New York Convention. While the Court did not give any definition of (international) public policy, its judgment is an indication that the right to a fair trial, including the obligation to give reasons to an arbitral award, belongs to the Belgian international public policy.

2. EU Law

4. While not applicable to arbitration, the Brussels I Regulation⁴, and its legal predecessor the 1968 Brussels Convention⁵, on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, make contravening of public policy a ground for refusing the recognition (and hence enforcement) of judgments rendered in another Member State.
5. Article 27.1 of the Brussels Convention and Article 34.1 of the Brussels I Regulation provide that "*A judgment shall not be recognized (...) if such recognition is [manifestly⁶] contrary to public policy in the [Member⁷] State where recognition is sought.*" The Brussels I Regulation was replaced, as of 10 January 2015, by the Brussels I Regulation (recast)⁸, of which Article 45.1 reads:

1. On the application of any interested party, the recognition of a judgment shall be refused:
(a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed.

³ First Instance Brussels, 30 March 2011, *R.D.C.* 2012, 186. No appeal was filed against this judgment.

⁴ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

⁵ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

⁶ Adverb found in the Brussels I Regulation only.

⁷ Adjective found in the Brussels I Regulation only.

⁸ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Recast")

6. In *Krombach*⁹, and confirmed more recently in *inter alia Gambazzi*,¹⁰ the European Court of Justice (ECJ) held that the scope of public policy is, in principle, individually determined by each EU Member State. In this connection, the ECJ first noted that it is not for it to define the content of the public policy of a Member State. Nonetheless, the ECJ went on to stress that the notion should be interpreted restrictively and clarified that it is nonetheless required to review the limits within which the courts of a Member State may rely on public policy to refuse recognition:

“21. So far as Article 27 of the [Brussels] Convention is concerned, the Court has held that this provision must be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention (...). With regard, more specifically, to recourse to the public policy clause in Article 27, point 1, of the Convention, the Court has made it clear that such recourse is to be had only in exceptional cases.

22. It follows that, while the Contracting States in principle remain free, by virtue of the proviso in Article 27, point 1, of the Convention, to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter for interpretation of the Convention.

23. Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State.”

7. In other words, while the content of public policy is in essence determined by each EU Member State, European Law sets certain standards and limits to the applicability of such nationally defined notion in an EU context. In this connection, the ECJ held in *Krombach*, and confirmed *inter alia* in *Maxicar*¹¹, that:

“Recourse to the public-policy clause in Article 27, point 1, of the [Brussels] Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of

⁹ ECJ, 28 March 2000, Case C-7/98 *Krombach/Bamberski*, ECR I-1935 (¶¶18-28).

¹⁰ ECJ, 2 April 2007, Case C-394/07, *Gambazzi/DaimlerChrysler*, ECR I- 2563.

¹¹ ECJ, 11 May 2000, Case C-38/98, *Renault v. Maxicar*, ECR 2000, p. I-2973.

the State in which enforcement is sought or of a right recognized as being fundamental within that legal order.”