

# Kluwer Arbitration Blog

## Why the Belgium Supreme Court Reversed First Set Aside Decision of an Investment Treaty Award

Werner Eyskens (Crowell & Moring) and Lauren Rasking (A&O Shearman) · Friday, May 17th, 2024

The Brussels first instance court [attracted significant attention in 2022](#) by deciding to set aside an [UNCITRAL award](#) regarding a claim brought against the Republic of Poland under the [US-Poland bilateral investment treaty](#) (“US-Poland BIT”). This was the first time we had seen a Belgian court set aside an investment treaty award. The first instance court decided in its [18 February 2022 ruling](#) that the arbitral tribunal had violated Belgian international public policy in finding that Poland failed to guarantee a fair and equitable treatment (“FET”) to an investor because the Polish Supreme Court denied justice through its arbitrary and discriminatory decision. On [12 April 2024](#), the Belgian Supreme Court reversed this decision.

### Factual Background

In 2006, a US investor, Manchester Securities Corp. (“MSC”), acquired bonds issued by a Polish real estate developer to finance residential building projects in Krakow. The bonds were secured by mortgages. The developer also contracted other secured loans with Polish state banks. However, the real estate developer failed to meet its repayment obligations and went bankrupt in 2009. Trouble started when MSC tried to enforce a judgment of the regional tribunal of Krakow ordering the developer to pay MSC the outstanding debt by enforcing its mortgages.

Ultimately, the 2012 Polish Supreme Court rejected the validity of MSC’s mortgage, because it conflicts with the principle of “social co-existence” and because MSC – being aware of the economic risks of the real estate project – behaved dishonestly and could not be allowed to benefit from its mortgage entitlements.

In response, MSC brought a claim to invalidate the mortgage on another property held by a Polish bank involved in the real estate project. Although MSC relied on the same arguments as upheld in the 2012 Polish Supreme Court decision, MSC’s claim was found inadmissible.

While the Polish Supreme Court decided in 2012 that the enforcement of MSC’s mortgage for one apartment violated the principles of social co-existence, it decided in 2014 that MSC’s enforcement of the mortgage for another apartment did not violate these principles.

In short, the Polish Supreme Court decisions on the validity and enforcement of the mortgages on various properties of the real estate project have led to very different conclusions.

In 2015, MSC brought arbitration proceedings against Poland under the US-Poland BIT. On 7 December 2018, the arbitral tribunal decided that MSC was denied justice by the Polish Supreme Court and that Poland had breached the FET clause and must pay damages of about 10 million euros and interest. As the seat of the arbitration was Brussels, Poland brought set aside proceedings in the Brussels first instance court in March 2019.

### **Brussels First Instance Court Set Aside Investment Treaty Award**

The [first instance court](#) focused on Poland's argument that the arbitral tribunal had acted as an appeal court to the Polish Supreme Court, which is contrary to Belgian international public policy and which, under [article 1717, §3, b\), ii\) of the Belgian Judicial Code](#), constitutes a ground for setting aside an award.

The first instance court stated that a set aside judge must control the application by the arbitrator of the public policy laws (B. Hanotiau and O. Caprasse, "L'annulation des sentences arbitrales", *J.T.*, 2004, p. 419, § 41) and that the restrictive interpretation of set aside grounds under the *favor arbitrandum* principle does not prevent the effective control of the effect of an award on international public policy. This led the first instance court to consider that it could verify whether the arbitral tribunal could reasonably consider that there had been a denial of justice by the Polish courts.

The first instance court decided that the arbitral tribunal had acted as an appellate court to the Polish Supreme Court and that the award wrongly concluded that the Polish Supreme Court had denied justice by adopting a discriminatory attitude towards MSC. In particular, the first instance court noted that the arbitral tribunal (i) had not established a structural breakdown of the Polish judiciary system or fraudulent behavior or bad faith by the Polish Supreme Court, (ii) could not make findings of discrimination by the Polish court system, in the absence of a binding precedents system and (iii) had exceeded its marginal appreciation by examining the Polish Supreme Court's interpretation of the principles of social co-existence. As a consequence, the first instance court found that the arbitral award breaches the Belgian international public policy and it set aside the award.

### **Belgian Supreme Court Annuls Decision of Brussels First Instance Court**

MSC challenged the decision to set aside the award before the Belgian Supreme Court, which decided on [12 April 2024](#) to reverse the 18 February 2022 decision of the Brussels first instance court.

The Supreme Court focused on MSC's argument on the test to be applied by the set aside judge under [article 1717, §3 \(b\)\(ii\) of the Belgian Judicial Code](#). The Supreme Court clarified that a judge may set aside an arbitral award if it is contrary to (international) public policy. However, this does not mean that the set aside judge may re-examine the merits of the dispute ("*le litige*") in light of the public policy rules that the arbitral tribunal applied. The set-aside judge is (only) allowed to verify whether the award ("*la sentence*") itself contradicts public policy. As a consequence, the Supreme Court reversed the set aside decision of the Brussels first instance court and referred the matter to another first instance court in order to be re-tried.

The Supreme Court's clarification of the possibility for the court of first instance to set aside an arbitral award that is contrary to public policy is not new. The Belgian Supreme Court merely repeats its guidance provided in its judgment dated 28 November 2014 (*Cass.*, 28 November 2014, C.12.0517.N, §6). This is noteworthy, as the Brussels first instance court referred to the 28 November 2014 ruling to establish that, even though the Supreme Court did not expressly impose a minimalist approach and marginal review, it does invite the set aside judge to be cautious in its review in light of the principle of *favor arbitrandum*.

Although the Brussels first instance court acknowledged the guidance of the Supreme Court, commentators questioned if the court had correctly applied this guidance and did not exceed the limits of its competence by assessing if the decision of the Polish Supreme Court constituted a denial of justice.

In its 12 April 2024 decision, the Belgian Supreme Court has now concluded that the Brussels court of first instance indeed did not correctly apply article 1717, §3 (b)(ii) of the Belgian Judicial Code, as it failed to examine the effects of the arbitral award on public policy when it decided that:

“the arbitral tribunal could not reasonably have considered that, in its Wierzbowa judgment, the Supreme Court [of Poland] had adopted a manifestly discriminatory attitude towards [the claimant], making Poland liable for a denial of justice committed by its highest court”.

Although some commentators (notably counsel of Poland) have warned that the Belgian Supreme Court introduced a novel test of public policy that risks causing difficulties in Belgian arbitration law, the reference of the Belgian Supreme Court to *the effects* of the arbitral award on public policy seems in line with earlier guidance on the limitation of review by the set aside judge of the compliance with public policy of the award itself, rather than of the (re-)assessment of the merits of the dispute decided in such award.

It had previously been observed that international due process and public policy rules concern procedural guarantees and remedies against unfair proceedings, but in this case the Brussels first instance court had inverted this principle by finding that the award breaches Belgian international public policy because the arbitral tribunal had wrongfully considered that the *Polish proceedings* were unfair. The Brussels first instance court in the set aside proceedings did indeed not consider whether the arbitral tribunal had failed to guarantee due process, but it rather examined whether the arbitral tribunal had properly verified whether the Polish courts had guaranteed due process.

This question is now, under Belgian law, confirmed: A set aside judge must, when it verifies whether due process and public policy rules were breached, consider the award, and not other proceedings which were the grounds for claims which are upheld in an award.

The court of first instance in Liège has been tasked to decide on the claim to set aside the investment treaty award in line with the Belgian Supreme Court ruling.

*This contribution does not express the views of the firm of the authors or any of its clients.*

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