Unfair arbitration clause declared invalid

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Mass contracts are usually drafted favourably only for the stronger party in the contractual relationship. This particularly pertains to dispute resolution (eg, its method or place). In its October 27 2016 judgment,(1) the Supreme Court ruled strongly in favour of the weaker parties in a contract and found that an arbitration clause in the contract between a Polish franchisee and a Dutch franchisor that opted for New York (where the seat of the Dutch company's parent company was located) as the place of arbitration was invalid, as it was grossly unfair to the Polish party.

Facts

On January 28 2008 a Dutch franchisor and a Polish franchisee entered into a franchise agreement. The parties chose the law of Lichtenstein as the applicable law. The agreement also contained an arbitration clause stating that arbitration was to be held in New York.

A dispute subsequently emerged between the parties and the Dutch franchisor obtained a default arbitration award on July 8 2011, which, among other things, ordered the Polish franchisee to pay certain amounts to its counterparty.

The franchisor moved to recognise and enforce the award in Poland. In its May 14 2015 decision, the regional court dismissed the motion. The court of appeals reversed the decision and granted the recognition and enforcement in its July 27 2015 decision. The court found that there were no obstacles to grant the motion under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

Supreme Court decision

The Supreme Court repealed the court of appeals decision, dismissed the appeal against the regional court's May 14 2015 decision and denied the motion for the recognition and enforcement in a final and binding manner.

The Supreme Court found that that the recognition and enforcement should be refused under Article V(1)(a) of the New York Convention, as the arbitration agreement was invalid under the law to which the parties had subjected it.

The court found that if the parties chose the applicable law regarding the main agreement, they implicitly extended this application to the arbitration agreement. Consequently, it invoked Section 879(3) of the Austrian Civil Code (applicable in Lichtenstein), under which a contract clause contained in general terms and conditions or contract forms which does not refer to the main performance of the parties but – in light of all the circumstances of the case – is grossly unfair for one of the parties, is null and void.

The Supreme Court subsequently referred to German case law, which had already dealt with the problem of the validity of arbitration agreements that prescribed New York as the place of arbitration in contracts concluded by a franchisor with a European franchisee. The courts applied

Section 879(3) and found that such an agreement is invalid. These decisions were based on the fact that the franchisee's access to justice is limited by such an agreement. Arbitration in New York would be time consuming and costly for the European franchisee, but very convenient for the franchisor, whose parent company was located in the United States.

The Supreme Court concurred that the arbitration agreement was invalid, which constituted the reason for denying the motion for recognition and enforcement of the arbitral award under Article V (1)(a) of the New York Convention. It also added that access to justice for Polish citizens in the United States is further limited by the requirement to apply for a visa.

The court also underlined that under Article 1215(3) of the Code of Civil Procedure, each court of appeals decision on the enforcement or recognition of a foreign arbitral award is subject to a cassation complaint to the Supreme Court; general prerequisites for filing such a means of appeal (eg, that the amount in dispute is over PLN50,000) do not apply.

Comment

The Supreme Court decision deserves some positive and negative comments. The fact that the Supreme Court properly applied foreign law without hesitation and discussed foreign case law is a sign that as regards arbitration, the Polish court system is mature and well adjusted to international standards.

Conversely, the decision underlines a clear sentiment of protectionism towards weaker parties in a contractual relationship. This does not mean that the decision was wrong *per se*. This sort of rationale should definitely be the basis for all decisions involving consumers. However, in business-to-business transactions, the courts should be more moderate and carefully evaluate whether the contractual equilibrium is indeed disturbed by an arbitration agreement. This should be assessed on a case-by-case basis and the decision in question should not be treated as a basis for establishing rules of a general nature.

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Endnotes

(1) File ref V CSK 66/16, available in Polish here.