



EUROPE

Poland: How far can an arbitral tribunal go if they consider the contract inequitable?

BY ALICJA SZCZESNIAK AND ALEKSANDRA ZANOWSKA - JANUARY 22, 2018 - 6 MINS READ



According to the Polish Supreme Court – very far, as it allowed an arbitral award to modify the key provision of a contract on the basis of equity principles.

The questions that arose before the Polish Supreme Court in recent setting aside proceedings^[1] concerned the issue of modifying the remuneration agreed in a contract between two professional parties on the basis of the principles of equity. The Supreme Court had to answer the question of whether public policy of Poland requires arbitral tribunals to uphold contracts irrespective of any circumstances, or whether arbitral tribunals may abandon this obligation if they view the contract as inequitable.

The Award

This question arose in connection with arbitration proceedings concerning a dispute between a football agent (C.K.) and a Polish football club (L.P.). The dispute arose when the club refused to pay the football agent the remuneration for the transfer of one of its players (R.L.) to a German football club during the lifetime of the player's contract with the club. The football agent's remuneration was set as 12% of the price the club received for the transfer of the player, but the football agent did not receive the agreed remuneration. The dispute was brought before the Arbitration Court of the Polish Football Association ("**PFA Arbitration Court**"). The football agent based his claim on the contract, while the club argued that the claim constituted an abuse of contractual rights (the general principles of equity), which is impermissible under Polish law.

The three arbitrators hearing the case found for the claimant. However, in the rehearing of the case^[2] the five arbitrators agreed that due to the principle of equity expressed in Polish law^[3], the remuneration should be decreased to reflect common practice. The Tribunal stated that the requirements of equity in the contract had not been met, as the remuneration for the football agent would be higher than 30% of what the player himself obtained during the transfer. As a result, in the final award the remuneration for the football agent was decreased by more than half.

The setting aside proceedings

The claimant filed a motion to set the final arbitral award aside. The claimant argued that the award violated public policy, as it was against the principles of freedom of contracts and of protection of property rights, as well as the principle that contracts have to be adhered to (*pacta sunt servanda*). The Regional Court hearing the motion in the first instance stated that the award had thoroughly analyzed the circumstances of the claim. The Court observed that the conclusions of the Tribunal were based on this thorough analysis and were well justified. As a consequence, the Regional Court decided that there was no violation of public policy and dismissed the motion. This decision was upheld in the appeal by the Appellate Court.

The claimant filed a cassation appeal against the Appellate Court's decision, claiming violation of the principles of equity expressed in Article 5 of the Polish Civil Code due to its too broad interpretation. However, the Supreme Court dismissed the cassation appeal.

The Supreme Court's reasoning

The Supreme Court held that the first issue to examine in cases where the judgement is rendered based on the principles of equity is whether the Tribunal rendering the award was authorized to do so. The Supreme Court noticed that based on the Rules of the PFA Arbitration Court the Tribunal was authorized to apply the general principles of equity if the circumstances required such a ruling. The Supreme Court stated that an authorization of this kind was sufficient to conclude that the parties had explicitly agreed to the Tribunal applying the rules of equity. Nevertheless, the Supreme Court concluded that what the Tribunal had in fact applied were not the general principles of equity provided for in the Rules of the PFA Arbitration Court, but rather Article 5 of the Polish Civil Code that refers to the concept of the principles of social coexistence.

The Supreme Court noticed that given the specific character of Article 5 of the Polish Civil Code, which allows for the limitation of the rights of a party, a defective application of this principle may amount to a violation of public policy. However, the violation can be found only if the application of this principle is not justified in the circumstances of the case. Additionally, the violation in the application would have to be excessive and fundamental.

The Supreme Court found that in the circumstances of the case, the remuneration of the football agent would be excessively high when compared to the remuneration of the football player. The Supreme Court considered that it was the player's talent, hard work and dedication which accounted for the high price of the transfer. This price was also the consequence of the club's actions in creating favorable conditions for the transfer. These circumstances were crucial for the Supreme Court, as the agent represented both the player and the club in their mutual relations. As a result, the award rendered by the Tribunal, in view of the Supreme Court, did not violate public policy.

Significance

The decision of the Polish Supreme Court is significant on two levels. On the one hand, it confirms that the Supreme Court observes the limited jurisdiction it has in setting aside proceedings. It confirms that only fundamental and excessive violations of the basic principles may result in the setting aside of an award. On the other hand, the Supreme Court allowed an arbitral tribunal to interfere with a valid contract and substantially change one of the contract's key provisions (the remuneration), which was express and unequivocal. Allowing such profound interference in a contractual relationship by the arbitration court tribunal may raise some questions.

Although in specific circumstances such interference for the sake of equity might be considered justified, the obligation of adhering to contracts should be attentively observed. Authorizing the arbitral tribunal to apply principles of equity should not mean that the tribunal may freely alter parties' rights under a valid contract consensually concluded between professionals, if no extraordinary circumstances occur.

[1] Judgement of the Polish Supreme Court of 28 March 2017, case file no. II CSK 444/16, available in Polish at: <http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/II%20CSK%20444-16-1.pdf>

[2] Proceedings under the Rules of the PFA Arbitration Court allow a party to file a motion for the rehearing of a case. If such a motion is filed, it is heard by a panel consisting of five arbitrators. The award rendered by the panel of five is final.

[3] Article 5 of the Polish Civil Code, which provides that *one cannot exercise one's right in a manner contradictory to its social and economic purpose or the principles of social coexistence. Such act or omission on the part of the person entitled shall not be considered the exercise of that right and shall not be protected.*

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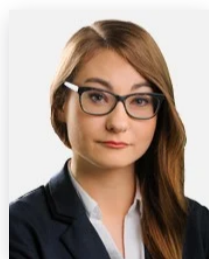
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