Supreme Court clarifies contractual penalties for energy consumers

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Background

According to the Supreme Court's verdict of 17 January 2020 (Case IV CSK 579/17), imposing a contractual penalty on energy consumers due to the early termination of a contract for energy supply is prohibited.

As indicated by the Supreme Court in the substantiation to its verdict, Article 4j Section 3a of the Energy Law (Act of 10 April 1997 (*Journal of Laws* of 2019, Item 755, as amended)) is not a special provision in relation to Article 483(1) of the Civil Code (Act of 23 April 1964) (*Journal of Laws* of 2019, Item 1145, as amended), which provides for the possibility to stipulate in a contract that damage resulting from the non-performance or from the improper performance of a non-pecuniary obligation will be redressed by the payment of a specified amount (ie, a contractual penalty).

The above ruling was made in a case concerning the payment of a claim by Spółka Akcyjna, which is a power supplier from Gdańsk, against Przedsiębiorstwo Produkcyjno-Handlowe L spółka z ograniczoną odpowiedzialnością, which was an electricity consumer.

The supplier claimed payment of over Zl60,000 as a contractual penalty for the termination of an electricity supply agreement before the expiration of the term for which the agreement was concluded, for reasons attributable to the recipient. The contract had been agreed for three years. According to the available information, the energy customer had ceased to pay for the electricity consumed approximately in the middle of the contract period, so the supplier terminated the contract.**(1)**

In its action, the supplier indicated that the possibility of imposing a contractual penalty on an energy customer is based on Article 4j Section 3a of the Energy Law. In turn, the defendant's attorney argued that the Energy Law does not provide for contractual penalties in energy supply contracts. Moreover, it was claimed that the power company already had an advantage and that the additional imposition of a contractual penalty by the power company on customers would lead to a market inbalance.

The Supreme Court agreed with the defendant's attorney.**(2)**

Existing regulations and case law

Specific regulations concerning a customer's right to terminate an agreement under which an energy company supplies energy (the sale of electricity or a comprehensive agreement) are contained in Article 4j of the Energy Law, Sections 3 and 3a of which regulate a final energy customer's right to terminate (comprehensive) sale contracts, as well as the possibility of imposing contractual penalties (fees) on that account.

It is generally accepted that the provisions of the sale or comprehensive contract which provide for an obligation for end users to pay additional fees or compensation (including, for example, a contractual penalty or fee) in the event of termination by that customer**(3)** are incompatible with Article 4j Section 3 of the Energy Law,**(4)** which regulates the possibility for end users to terminate a contract for an indefinite period. End customers must pay for only the energy consumed and energy transmission services provided. Therefore, a contract concluded for an indefinite period cannot be subject to penalties in the event of termination by the end user.

However, in practice and under the Energy Law, the approach to fixed-term contracts is different. Pursuant to Article 4j Section 3a of the Energy Law, an end user may terminate a contract concluded for a fixed period, under which the energy company supplies that customer with gaseous fuels or energy, without incurring costs and compensation other than those arising from the contract's content, by submitting a written statement to the energy company.

When interpreting Article 4j(3a) of the Energy Law, *a contrario* in relation to Article 4j Section 3 of the Energy Law, it has hitherto been generally accepted that a contract concluded for a fixed period may stipulate that an end user who terminates that contract before the expiry of the period for which it was concluded will be required to bear certain costs or pay damages specified in the contract. The admissibility of such a solution has also been confirmed by the previous rulings.

For example, in the District Court Gdańsk-Południe (1st Civil Division) judgment of 4 September 2015 (I C 1360/15), the court indicated that Article 4j Section 3 of the Energy Law (currently Article 4j Section 3a of the Energy Law) can be regarded as authorisation to introduce penalties only in case of the termination of a contract, including a contract concluded for a fixed period by a recipient itself.

Therefore, while the possibility of imposing a contractual penalty on a recipient for an early termination of a contract for a fixed period was generally considered acceptable, the court stressed that the contractual penalty (ie, fee) in the amount equal or similar to the amount of bills that a recipient would have to pay by the end of the contract term may be considered null and void due to the violation of the principle of freedom of contract and contrary to the provision of Article 4j Section 3a of the Energy Law,**(5)** particularly if this penalty would be imposed on the end user who is a consumer.

It has also been argued that the provision in the contract of the obligation to pay a certain amount (ie, a fine or fee) in case the contract is terminated by one of the parties should not be qualified as a contractual penalty within the meaning of Article 483 of the Civil Code (as also indicated by the Supreme Court in its justification). It was emphasised that the termination by one of the parties to the contract should be understood as the exercise of the rights vested in that party of a legal shaping nature, while the contractual penalty within the meaning of Article 483 of the Civil Code is reserved for the non-performance or undue performance of a contract. This means that the penalty, which was reserved in the case of termination of the contract, is not a contractual penalty within the meaning of the Civil Code (because there is no performance or improper

performance of the contract by one of the parties). Article 353(1) of the Civil Code was indicated as the source of admissibility for reserving a contractual penalty (ie, fee) for the termination of a contract (ie, freedom of the parties in shaping the legal relationship).**(6)**

Comment

The latest Supreme Court ruling seems to change the current interpretation of the legal provisions on the possibility of imposing a contractual penalty on acceptance in the case of early termination of a contract which was concluded for a fixed period.

Arguably, the Supreme Court's position is not fully consistent with the Energy Law, particularly Article 4j Section 3a which indicates that an end user may terminate a contract concluded for a fixed period, under which the energy company supplies that customer with gaseous fuels or energy, without incurring costs and damages other than those arising from the contract's content, by submitting a written statement to the energy company.

However, the exact content of the reasoning is not yet known (only oral reasons for the decision are known). Moreover, in the case analysed by the Supreme Court, it was the power company, not the energy consumer, that terminated the concluded agreement, which seems to be important from the point of view of the ruling. It is clear from Article 4j Section 3a of the Energy Law that additional costs and damages may be incurred by energy customers only if they (and not the power company) terminate the contract. If the Supreme Court holds that since it was the power company that terminated the energy customer's contract despite the fact that it was the energy customer's fault, and it will still be possible to impose a contractual penalty if the customer itself terminates the contract concluded for a fixed period before its expiration date, its latest ruling seems to be correct.

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Endnotes

(1) See here

(2) *Ibid.*

(3) P [in] M Kuliński (ed) *Prawo energetyczne. Komentarz [Energy Law Commentary]*, Warsaw 2017, commentary to Article 4j, note 4.

(4) In accordance with Article 4j Section 3 of the Energy Law, a final customer may terminate a contract concluded for an indefinite period under which the energy company supplies that customer with gaseous fuels or energy at no cost by making a written declaration to the energy company. The customer who terminates the contract must pay for the gaseous fuel or energy taken and the services of transmission or distribution of gaseous fuel or energy provided.

(5) *Ibid.*

(6) For example, Supreme Court judgment of 20 October 2006, IV CSK 178/06, OSNC 2007/7-8/118 and Supreme Court judgment of 17 December 2008, I CSK 240/08, LEX 484667.

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