Warsaw Court of Appeal judgment
dated 23 August 2012
Case nos. I ACa 46/11 and I ACa 578/12

Summary by arbitraz.laszczuk.pl:

In November 2002, State Enterprise P. entered into a FIDIC construction contract, as the employer, with a consortium of contractors, including (as identified more fully in another published decision in this case) the Polish company B. SA and branches of two foreign companies, the joint-stock company F. (known in Poland as F. SA Branch in Poland) and the limited-liability company E. (subsequently becoming a professional partnership, known in Poland as E. SLP PP Branch in Poland), as the contractor. The contract included a clause calling for arbitration before the Court of Arbitration at the Polish Chamber of Commerce. At the same time, the consortium members entered into a consortium agreement and a joint-venture agreement governing the relations among them.

The consortium provided performance security in the form of a bank guarantee issued for companies B. and F. In 2007, the employer drew on the bank guarantee, without specifying the grounds, and retained PLN 41 million.

The consortium members commenced arbitration against the employer seeking an award jointly in the amount of over PLN 54 million for the employer's unjustified drawing of the bank guarantee. The employer counterclaimed for damages allegedly resulting from improper or late performance of the contract.

The employer objected to the jurisdiction of the arbitration court on the grounds that the arbitration clause was made conditional on submission of certain documents by the contractor and was signed by an unauthorized person. In 2008, the arbitral tribunal issued a ruling upholding its own jurisdiction. The employer did not apply to the state court for immediate review of that ruling, but held it back for later assertion as one of the grounds for setting aside the eventual award.

In 2009 the arbitral tribunal issued a partial award granting the claimants' claim in full on the grounds that the employer had not complied with the contractual conditions

for drawing on the bank guarantee. The arbitration continued on the employer's counterclaims.

The employer filed a petition to set aside the partial award. In 2010, the Warsaw Regional Court dismissed the proceedings against the two branches of foreign enterprises, holding that as branches they did not have legal capacity to be sue or be sued, and consequently also dismissed the petition to set aside the award as against them, but in the case against the Polish contractor set aside the partial arbitration award in its entirety.

Pursuant to an interlocutory appeal by the foreign branches, the Warsaw Court of Appeal issued an order in 2011 setting aside the order of the regional court dismissing the proceedings with respect to the foreign branches, holding that the parties to the proceedings were the foreign enterprises as such, acting through their Polish branches. On remand from that appeal, the regional court issued a judgment in 2012 setting aside the partial award also with respect to the two branches of foreign enterprises.

The Polish contractor filed an appeal against the 2010 judgment setting aside the award as against it, and the foreign branches filed an appeal against the 2012 judgment setting aside the award as against them.

The Warsaw Court of Appeal considered the two appeals together. The court found that the joint award in favour of the members of the consortium would not be permitted if the case were brought in state court, but because it was based on a rule (Civil Code Art. 379 §1) which the parties could agree to modify, the rule was not so fundamental that its violation by the arbitral tribunal justified setting aside the award. The award was capable of performance because the employer could voluntarily pay the award and allow the claimants to decide how to allocate the funds among themselves, or could pay the award into court to be divided. The tribunal did not violate public policy by ruling first on the claim to repay the amount improperly drawn on the bank guarantee and withholding consideration of the employer's counterclaim. As the employer had never articulated a proper basis for drawing on the bank guarantee, the draw was clearly injurious to the consortium members (even E. SLP, which was not directly injured because it was not a party to the bank guaranty issued for the other consortium members). Restoring the status quo from prior to the unwarranted draw on the bank guarantee was not inconsistent with the possibility

of the arbitral tribunal issuing a subsequent award in favour of the employer under its counterclaim.

The court also held that the employer's failure to seek review by the state court of the interim order by the arbitral tribunal upholding its jurisdiction barred the employer from asserting the alleged invalidity of the arbitration agreement as grounds for setting aside the award. Whether to issue a separate order on jurisdiction was within the discretion of the arbitral tribunal, but if it does issue a separate order on jurisdiction, the respondent must follow the procedure for seeking immediate judicial review of that order or waives its objection to the jurisdiction of the arbitral tribunal. Otherwise the respondent could indulge in sandbagging by tactically withholding the objection to the jurisdiction ruling until an award is issued, to see which party prevails in the arbitration. In any event, it was apparent to the court that the arbitration agreement was valid.

The court amended the judgments of the Warsaw Regional Court accordingly and denied the petition to set aside the partial arbitration award.

Excerpts from the text of the court's ruling:

1. Review of an arbitration award by the state court cannot turn into a full consideration of the merits of the dispute submitted to arbitration for resolution. Nonetheless, the obligation to examine whether the challenged award violates fundamental principles of the legal order usually cannot be conducted properly without the state court's reference to the case file. Sticking only to the wording of the arbitration award itself would render such review illusory.

2. Unlike the state court, the arbitration court is not bound to apply the law strictly, even if the parties have not authorized it to resolve the dispute under principles of equity. The only limitation on the arbitration court in this respect is the fundamental principles of the legal order (for example the principle of the compensatory nature of liability in damages and the principle of protection of property rights). Not every violation of substantive law by an arbitration court, nor every erroneous interpretation or improper application or failure to apply a legal norm may be held to be a violation of fundamental principles of the legal order.

3. The rule expressed in Civil Code Art. 379 §1 of the separateness of performance is not one of the rules whose violation would conflict with the foundations of the legal order of the Republic of Poland. It suffices to point out that the parties to the agreement may exclude this rule by providing for solidarity among the creditors (Civil Code Art. 369 in connection with Art. 367 §1).

4. An objection of the lack of jurisdiction of the arbitration court is subject to preclusion if it is not asserted within the time indicated in Civil Procedure Code Art. 1180 §2. In that case, a petition to set aside the arbitration award can no longer effectively rely on the basis set forth in Civil Procedure Code Art. 1206 §1(1). In the event of assertion of the objection of lack of jurisdiction, the arbitration court may rule on its own jurisdiction in a separate order, but that is left to its discretion. If the arbitration court is convinced of the existence of a valid arbitration agreement, it may also consider the case on the merits without first issuing an order concerning the asserted objections to its jurisdiction. In the latter case, it is obvious that a party may base its petition to set aside the arbitration award on the allegation of violation of Civil Procedure Code Art. 1206 §1(1), because it did not previously have any possibility of presenting this objection to the state court for its review. It is different in the case of issuance by the arbitration court of an order overruling the objection of its lack of jurisdiction. Then the parties may seek a ruling by the state court within 14 days after service of the order on them. The judicial proceedings in this respect are at two instances (Civil Procedure Code Art. 1180 §3).

5. A party which has exhausted the procedure specified in Civil Procedure Code Art. 1180 §3 cannot later, in a petition to set aside the award, again assert the objection of the absence of an arbitration agreement or its invalidity or ineffectiveness. This conclusion may be drawn from Civil Procedure Code Art. 365 §1 in connection with Art. 1207 §2 or in connection with Art. 13 §2. ... Referring the order of the arbitration court to the court of first instance, and then the party's failure to file an interlocutory appeal against an order against it, also closes the path to reassertion of the objection of the lack of jurisdiction of the arbitration court on the grounds indicated in Civil Procedure Code

Art. 1206 §1(1). There are no grounds for distinguishing the litigation stance of a party which exhausted the recourse to both instances and a party which did not file an interlocutory appeal against the order of the court of first instance, and in consequence the order obtained finality. In both cases the legally final orders are binding on the parties and the courts pursuant to Civil Procedure Code Art. 365 §1.

6. A party that sought a ruling on jurisdiction pursuant to Civil Procedure Code Art. 1180 §3 and obtained an unfavourable order from the state court cannot assert the same objections under Civil Procedure Code Art. 1206 §1(1), regardless of whether the state court ruled at one or both instances.

7. The law essentially equalizes—in terms of legal consequences—the failure to assert the objection of lack of jurisdiction of the arbitration court within the time indicated in Civil Procedure Code Art. 1180 §2 with the respondent's inclination (consent) to consideration of the case by the arbitration court. An interpretation accepting the preclusion specified in Art. 1180 §2 but at the same time permitting non-recourse to the procedure for judicial review set forth in Art. 1180 §3 and accepting the possibility of not disputing the jurisdictional order of the arbitration court until the petition to set aside the award would be an inconsistent interpretation and largely eliminate the benefits for both parties to the arbitration proceeding flowing from the 2005 amendment to the Civil Procedure Code.

8. In its review, the state court cannot re-evaluate the evidence to determine whether it would have made the same factual findings as those presented in the arbitration award under review. Disputing the arbitration award in this respect would be possibly only if the defects founds were so fundamental that they would qualify as a violation of fundamental principles of civil procedure. Evaluation of the award in terms of the fundamental principles of substantive law must not be turned into appellate review.