Katowice Court of Appeal order
dated 7 March 2014
Case No. I ACz 121/14

Summary by arbitraz.laszczuk.pl:

In 2013, in an arbitration between one member of an ordinary partnership, G.K., and the other members of the partnership, T.K., M.M. and M.P., seeking an accounting of the partnership's affairs, G.K. applied to the Katowice Regional Court for appointment of a presiding arbitrator in the person of either Prof. W.P. or Dr R.S. The reason for the application was that the arbitrators had not appointed a presiding arbitrator within one month after their own appointment. The respondents argued that the application was groundless or premature because the arbitrators had not had an opportunity to select a presiding arbitrator yet. They objected to both Prof. W.P. and Dr R.S. and proposed Prof. K.Z. instead. Subsequently, before the application was decided by the regional court, the respondents informed the court that the arbitrators appointed by the respondents had selected a presiding arbitrator, in the person of Prof. K.Z., and submitted their statement to this effect to the arbitrator appointed by the applicant, Dr K.W. The court found that by a simple majority of votes, the arbitrators had effectively appointed a presiding arbitrator, and thus it was impermissible to rule on the application, and the court dismissed the proceeding accordingly.

The applicant G.K. filed an interlocutory appeal with the Katowice Court of Appeal. He alleged that the presiding arbitrator had not been effectively appointed because the appointment was conducted in violation of the partnership agreement. The partnership agreement provided that each of the four members of the partnership could appoint one arbitrator, and those arbitrators would appoint the presiding arbitrator. G.K. argued that this should be interpreted to mean that the four arbitrators as a body should appoint the presiding arbitrator, but the arbitrator appointed by G.K., Dr K.W., had not been informed of the meeting to appoint the presiding arbitrator or given an opportunity to propose a candidate. Consequently, out of a five-person panel of arbitrators, four of them had been appointed by the respondents.

The respondents claimed that Dr K.W. was aware of the appointment of the presiding arbitrator. Because the partnership agreement did not specify how the arbitrators should appoint the presiding arbitrator, they could follow any procedure they chose. They did not accept either Prof. W.P. or Dr R.S., and notified Dr K.W. accordingly, but instead voted to appoint Prof. K.Z.

The court of appeal agreed with the regional court that there was no particular procedure provided which the arbitrators should follow in appointing the presiding arbitrator. A meeting of all the arbitrators in person to appoint the presiding arbitrator would be the best practice, but it was understandable that in this case this was not done because there was a conflict between the parties over appointment of the arbitration panel. The court accepted that the arbitrators had effectively appointed the presiding arbitrator by a majority vote of three to one and effectively notified the arbitrator appointed by the applicant.

The court also rejected the applicant's argument that the appointment was invalid because any award issued by a panel where one side of the dispute had effectively appointed four of the five arbitrators would have to violate public policy. This situation followed from the express provisions of the partnership agreement which G.K. had accepted. This issue had already been decided in an earlier case filed with the regional court by the applicant seeking appointment of an arbitrator, arguing contrary to the partnership agreement that a single arbitrator should be appointed by all of the respondents jointly. In that case, the court gave effect to the partnership agreement and denied that application.

The court of appeal held that because the presiding arbitrator had been effectively appointed by the arbitrators, it was impermissible for the state court to appoint the presiding arbitrator. The interlocutory appeal was denied accordingly.

Excerpts from the text of the court's ruling:

1. The regulations of Title III, Part Five, of the Civil Procedure Code, concerning arbitration, clearly adopt the principle of the priority of the mutual intent of the parties as to the composition of the arbitral tribunal and the manner of appointment of the arbitrators and the presiding arbitrator.

2. Appointment of the presiding arbitrator by the arbitrators may occur after the end of the one-month period following their appointment provided in the act, but before consideration of the application by the state court. ...

Because the basis for the Civil Procedure Code regulations concerning arbitration is to award priority to the intent of the parties, it would be groundless, irrational and contrary to a purposive interpretation of these regulations to deny the parties the right to decide for themselves on the composition of the arbitral tribunal solely because a court case is already pending concerning this—prior to issuance of a judicial ruling. The one-month period under Civil Procedure Code Art. 1171 §2 should be regarded as establishing the right of a party to file an application to the state court for appointment of an arbitrator or presiding arbitrator, and not as a preclusive period after which the parties lose the right to decide for themselves on whom to appoint as members of the arbitral tribunal.