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Warsaw Court of Appeal Defines Rules for Arbitral Tribunals in Matters Involving State Aid

Wojciech Sadowski (Queritius) · Sunday, August 9th, 2020

In its judgment of 26 November 2019 (I ACa 457/18), the Warsaw Court of Appeal gave its view on the duties of arbitrators and counsel in cases involving state aid. In a well-argued decision, the Court reversed the decision of the lower court and annulled an award rendered by a prominent international tribunal on the grounds of public policy, namely, the failure to give effect to Articles 107 and 108(3) TFEU. It is a precedent-setting ruling with implications reaching far beyond Polish borders, which merits broad review and discussion.

Background

The original dispute concerned the validity of an annex to a concession agreement that purported to compensate the concessionaire ("**AWSA**") for the loss of revenue resulting from a change in law. The Minister representing the Polish State Treasury as a party to the concession agreement argued that it had been deceived by AWSA into signing the annex on the basis of outdated assumptions, which led to reportedly excessive compensation of the concessionaire. The arbitral tribunal dealt with the contract law aspect of the dispute and upheld the validity of the annex. The Minister challenged the award to the Circuit Court in Warsaw. A broader account of the dispute is given in the Decision of the European Commission and the judgment of the General Court of the EU, referred to below.

EU's Position: AWSA Received State Aid

In parallel, on 31 August 2012, the Polish government notified the European Commission of a measure consisting of a grant of financial compensation to AWSA. On 25 August 2017, the Commission adopted Decision (EU) 2018/556 ("**Decision**") which ordered Poland to recover from AWSA some EUR 223 million with interest as state aid which was both incompatible with the internal market (under Article 108(3) TFEU), and unlawful under Art. 108(3) TFUE. The European Commission explained in the Decision that reliance on the outdated assumptions led to overcompensation of AWSA, which constituted incompatible state aid (para. 139 of the Decision). AWSA appealed the Decision to the General Court of the EU, but on 26 October 2019, the General Court dismissed AWSA's challenge (T-778/17 Autostrada Wielkopolska). The matter is now

pending before the Court of Justice of the EU (Case C-933/19 P).

Warsaw Court of Appeal Sets a Precedent

On 26 January 2018, the Circuit Court in Warsaw dismissed the action for the annulment of the award. The Minister appealed the judgment to the Warsaw Court of Appeal. The European Commission intervened in the appeal proceedings. Referring to C-168/05 Mostazza Claro and C-126/97 Eco Swiss, the Warsaw Court of Appeal observed that EU competition law (including state aid) constitutes a part of the public order that must be considered by national courts on review of arbitral awards. The Court then noted that the EU rules on state aid should be applied in coherence with domestic legal order and that such coherence cannot only be limited to ensuring recoverability of incompatible, or unlawful state aid. Such coherence would also be at risk if two inconsistent decisions, i.e. the Decision and the award, in which the arbitral tribunal failed to apply Article 108(3) of the TFEU, were permitted to co-exist.

The Court of Appeal dismissed the argument that the arbitral tribunal could not have been tasked with an obligation to assess compatibility of the measure with internal market under Article 107 TFEU, because it is a matter reserved for the European Commission. The Court of Appeal distinguished between the assessment under Article 107 TFEU and the problem of whether the state aid in question had at all been notified pursuant to Article 108 TFEU. It concluded that the measure in the AWSA case was not notified, and that in the absence of actual proof of such notification, the arbitral tribunal could not conclude otherwise. Therefore, the arbitral tribunal should have regarded the state aid in question to be unlawful, even without any argument from a party, since any unnotified state aid is automatically unlawful under Art. 108(3) TFEU. In such a case, the Court of Appeal declared, all competent bodies should draw appropriate legal consequences, including an order to recover unlawful state aid, if it had been paid.

The Court of Appeal addressed the argument that annulment of the award on this basis would imply a revision of the merits of the award. The Court agreed in principle that such a review should not take place but asserted that where an arbitral tribunal failed at all to appreciate EU competition rules, an intervention from a state court could be justified. The Warsaw Court of Appeal then reverted to examine the impact on the award of the Decision, which declared the aid as incompatible with internal market under Art. 107 TFEU, and decided national courts were required to give effect to the Decision.

Therefore, in addition to criticizing the arbitral tribunal for having disregarded Article 108(3) TFEU, the Court of Appeal also concluded that when a measure in question is regarded by the Commission as state aid incompatible with internal market under Art. 107 TFEU, and its recovery is required from the Member State, its courts cannot tolerate an earlier arbitral award confirming the entitlement of the private party to receive such aid.

Important Lessons to be Drawn from the Decision of the Warsaw Court of Appeal

The judgment of the Warsaw Court of Appeal provokes several comments. It reiterates the importance of EU rules on state aid and warns that arbitration practitioners should not ignore their implications. The weight attached by the Court of Justice of the EU and the European Commission

to state aid rules is notorious. Already back in 2007, enforcement of EU state aid rules prompted the CJEU to disregard the principle of *res iudicata* in domestic civil court proceedings (C-119/05 Lucchini). Therefore, it is only somewhat controversial that the need to ensure the application of EU rules on state aid could be invoked by national courts to justify annulment or even review of the merits of an arbitral award.

The novelty in the AWSA case consists in that the Court of Appeal *de facto* extended onto arbitral tribunals the obligations defined in the *Commission notice on the enforcement of State aid law by national courts*). This is a controversial proposition. *Firstly*, the obligation of national courts to enforce EU rules on state aid stems from the principle of loyal co-operation, which extends onto all organs of Member States. Arbitral tribunals, however, are not organs of Member States, and they are not even considered to be a part of the EU judicial system (C-284/16 Achmea, para. 58; 102/81 Nordsee, paras. 12-14). Therefore, the rationale for extending a similar duty on arbitral tribunals seems flawed. *Secondly*, arbitral tribunals do not have the necessary tools that national courts have. They cannot refer to the CJEU questions related to the interpretation of EU state aid rules under Article 267 TFEU, or seek information and/or assistance from the European Commission pursuant to Article 29 of Regulation 1589/2015 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification).

Facing the Issue of State Aid Upfront

Overall, the Warsaw Court of Appeal was right that unnotified state aid is automatically unlawful under Art. 108 TFEU, and that an arbitral tribunal ignoring this provision may expose its award to the risk of annulment. If the measure is later investigated by the European Commission which orders recovery of state aid, this compounds the legal risk even further. If so, the parties and counsel in arbitral proceedings may need to consider this issue upfront. If appropriate, they may need to furnish evidence of the notification of state aid to the European Commission, or take other necessary steps, such as request a stay.

In the case arbitral tribunals were to be put on an equal footing with national courts, however, EU law would not encourage them to stay the proceedings until the European Commission completes its investigation (C-39/94 SFEI and others, para. 53). Therefore, they may be required to consider, whether applicable procedural law allows them to seek assistance from national courts, in order to either refer questions to the CJEU or seek assistance of the European Commission.

Conclusion

All the foregoing implies that the initiation of an arbitration versus a public party with unresolved state aid issues may currently trigger significant legal risks that even the most skilled and qualified arbitral tribunal may be unable to discharge on its own, and which may surface many years after the final award was rendered. This requires debate on the reconciliation of the requirements that may exist under EU law with regard to arbitrators, and the natural limitations of commercial arbitration.

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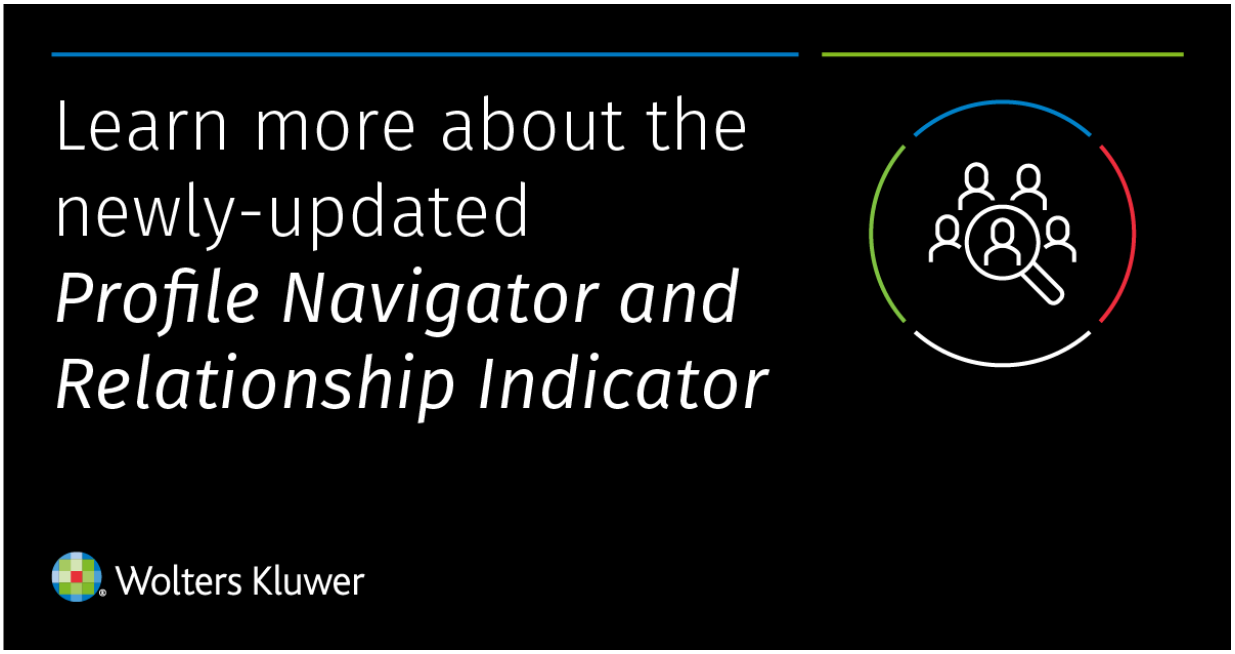

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