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The "Transnational Approach" of the ILA Recommendations on Res Judicata and Arbitration

Roger Alford (General Editor) (Notre Dame Law School) · Saturday, July 25th, 2009

I have been reading with interest the ILA's Final Report and Recommendation on *Res Judicata* and Arbitration adopted at the 2006 Toronto conference. Recommendation 2 provides that:

> The conclusive and preclusive effects of arbitral awards in further arbitral proceedings set forth below need not necessarily be governed by national law and may be governed by transnational rules applicable to international commercial arbitration.

I understand the motivation behind this recommendation, but am confused as to how it would be implemented. Because *res judicata* is viewed as procedural, its application depends on the *lex fori*, which means that one panel may adopt a civil law approach in one case and another panel may adopt a common law approach in the next case, expanding or contracting the rule depending on whether the *situs* of the arbitration is New York, London, Paris, or Geneva. The recommendations follow a transnational approach, which appears to represent a mix of common law and civil law traditions.

But if this recommendation is followed, how would it be implemented? The recommendations are "commended" to arbitral tribunals, with a view to facilitate the "preclusive effects of prior arbitral awards." But on what legal basis can a tribunal adopt recommendations that have not been accepted by the parties? Or would these recommendations be reflected in the contract between the parties or as part of the arbitration rules? It would seem that by following a recommendation to take a transnational approach, an arbitral panel would be rejecting the procedural rules of the *lex fori*, which presents its own set of problems.

To give you a concrete example, imagine that an arbitral panel makes a factual determination concluding that Company A wrongfully terminated President B's employment status without just cause and ordered A to pay B lost wages. In a subsequent arbitration between A and B alleging that A subsequently defamed B by wrongfully asserting that B was fired for cause, a panel sitting in Geneva gave preclusive effect to the previous panel's factual findings of wrongful determination. If my understanding is correct, this would be permissible under the ILA Recommendations–which adopts issue preclusion as a transnational norm–but it would not be permissible under Swiss law, which does not accept the doctrine of issue preclusion. In such a scenario, on what basis can an

arbitral tribunal sitting in Geneva follow the recommendation of the ILA and reject the forum's procedural rules?

Roger Alford

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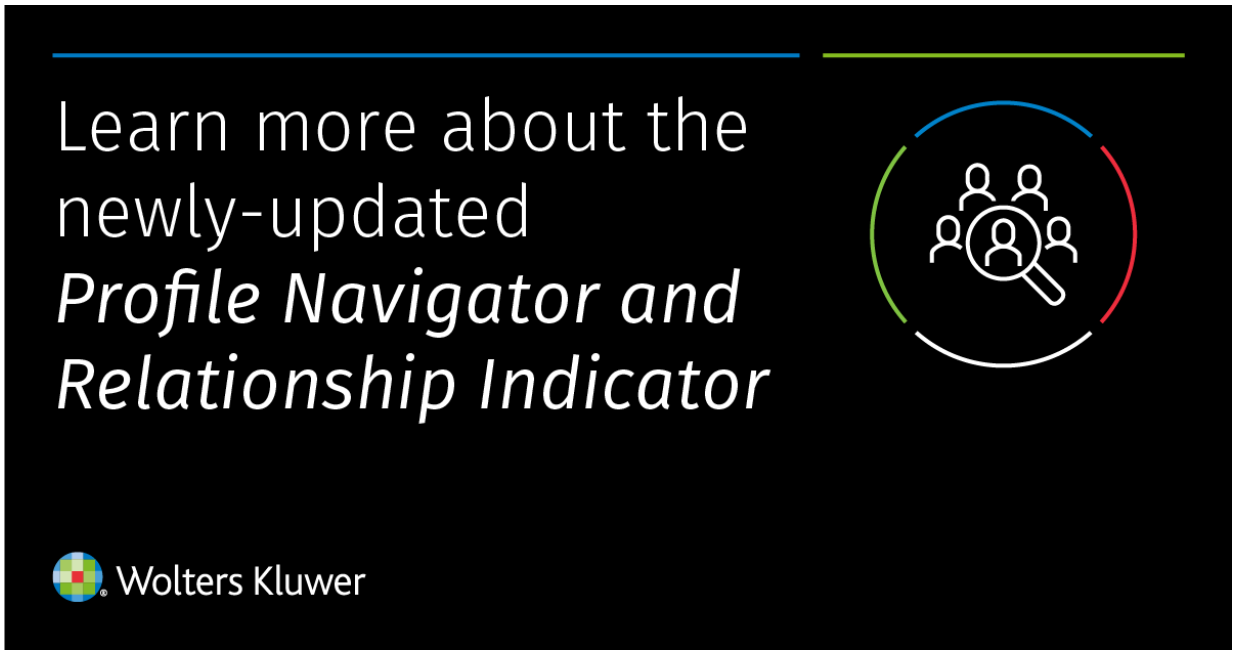

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