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Possible reinforcement of the negative effect of the "competence-competence" principle in Swiss legislation

Georg von Segesser (von Segesser Law Offices) · Friday, February 5th, 2010

The Swiss Parliament is currently contemplating a reinforcement of the negative effect of the "competence-competence" principle in the Swiss legislation. According to a parliamentary initiative, a Swiss court that is seized on the merits and faced with a plea of lack of jurisdiction based on the existence of a valid arbitration agreement should review such arbitration agreement only on a prima facie basis. Unlike today, the initiative provides that this should be the case regardless of the seat of arbitration. After a positive vote from the first chamber of the Swiss Parliament, the initiative will now come before the second chamber.

Article 7 of the Private International Law Act (PILA) states that if the parties have entered into an arbitration agreement, a Swiss court must decline jurisdiction unless, among other reasons, the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed. Article 7 of the PILA only applies where the seat of the arbitration is in Switzerland. In this case, the Swiss Federal Supreme Court has held consistently that a Swiss court shall limit its review of the validity of the arbitration agreement to a prima facie examination. In accordance with the principle of negative "competence-competence", this leaves it to the arbitral tribunal to make the first full review of the validity of the arbitration agreement.
By contrast, if the seat of the arbitration is outside Switzerland, Article II (3) NYC applies and a Swiss court uses its full powers to review the validity of the arbitration agreement (see, for instance, Swiss Federal Supreme Court, 29 April 1996, ATF 122 III 139 at 142, reason 2b).
The parliamentary initiative intends to do away with this distinction between arbitrations seated in- or outside Switzerland. It proposes to insert a second paragraph into Article 7 of the PILA that reads: "In international matters, and regardless of the seat of arbitration, the Swiss court before which the action is brought only renders a decision once the arbitral tribunal has decided on its own jurisdiction, unless a prima facie examination shows that there is no arbitration agreement between the parties." While this provision does not change the current state of law in cases where the seat of the arbitration is in Switzerland, it limits the Swiss courts' powers in case of a seat of arbitration outside Switzerland.
Article II (3) NYC does not provide whether the national court can examine the validity of the arbitration agreement with full powers of review or whether it is restricted to a prima facie examination. This depends on the extent to which the national law of the forum recognizes the negative effect of the "competence-competence" principle. There are still considerable differences from one country to another. The newly proposed Article 7 (2) PILA shall clarify this question under Swiss law.

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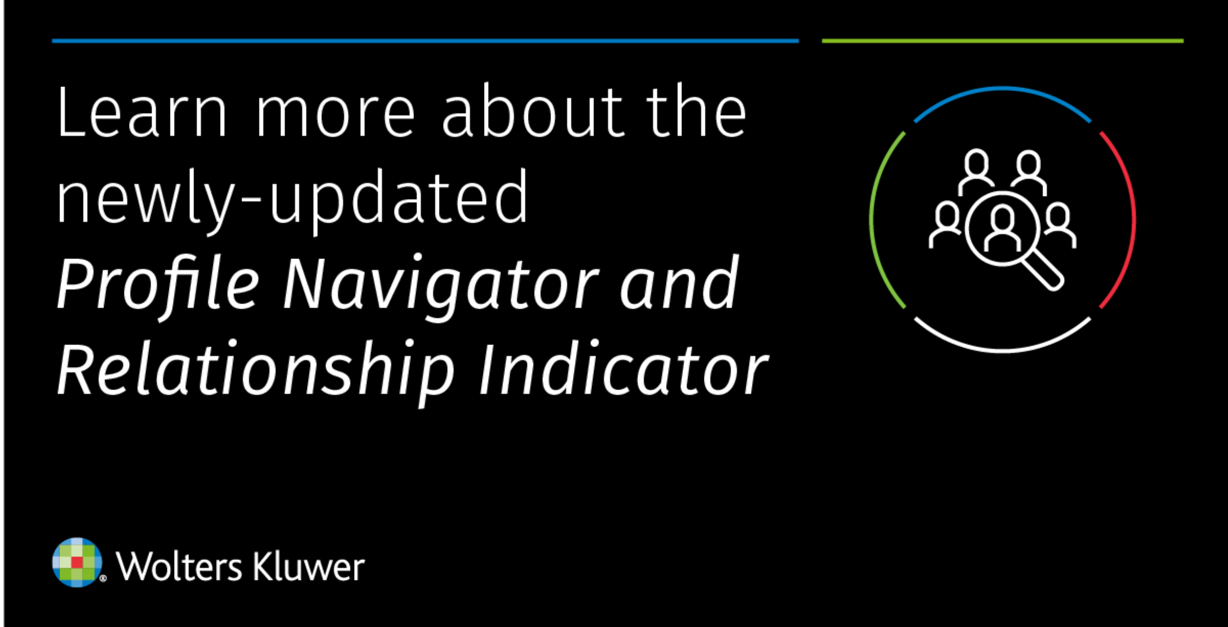

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