ILLINOIS STATE BAR ASSOCIATION

FEBRUARY 2017 VOL 54 NO. 4

The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's comments

BY LEWIS F. MATUSZEWICH

Interest in international and immigration legal issues are widespread and have impact in ways that we do not always anticipate. In a November travel bulletin from Travel Insurance Services, they included the following item, "If you're an international student who wants your family, significant other or friends from your home country to come visit the U.S. during your holiday break, or even if you're not a student and simply

Continued on next page

South Korea violated the Convention to Eliminate Race Discrimination by requiring HIV and drug testing of only non-Korean teachers

BY MARK E. WOJCIK

The International Convention on the Elimination of All Forms of Racial Discrimination ("CERD")[1] entered into effect in 1969. As of October 2016, the treaty has 177 state parties (including the United States, which signed the treaty in 1966 and finally became a party to it in 1994). Article 2 of CERD provides that states "condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races . . . ."[2] To that end, states must not engage in any "practice of racial discrimination against persons, groups of persons or institutions" and ensure that all national and local public authorities "act in conformity with this obligation."[3] States must also review national and local government policies and "amend, rescind or nullify any laws" that create or perpetuate racial discrimination.[4]

Continued on page 3

If you're getting this newsletter by postal mail and would prefer electronic delivery, just send an e-mail to Ann Boucher at aboucher@isba.org

Editor's comments

CONTINUED FROM PAGE 1

want your relatives to visit from another country - you may have many questions: namely what steps do they need to take to ensure they are prepared for an enjoyable trip?"

International and Immigration Law Section Council member, and former Chair of the Section Council, Mark E. Wojcik supplied for this issue, "South Korea Violated the Convention to Eliminate Race Discrimination by Requiring HIV and Drug Testing of Only Non-Korean Teachers." The Illinois State Bar Association's website lists 44 articles by Professor Wojcik that have appeared in various ISBA Section newsletters, with his first article, "The Politics of Political Asylum" having appeared in the December, 2000 issue of *The Globe*.

Michael R. Lied, of the law firm of Howard & Howard Attorneys, PLLC, is the CLE Committee Liaison to the International and Immigration Law Section Council. He often provides articles for *The Globe* concerning labor and employment issues. This issue includes his article, "Office of Special Counsel Provides Discrimination Guidance."

Members of the law firm of Bratschi, Wiederkehr & Buob, Ltd. in Switzerland have provided us frequent articles. In the third issue of *The Globe* for this ISBA year, Florian Jörg's article, "Updates in Swiss Business Law" appeared. Florian arranged for his associate, Lukas Wyss, a Partner and co-head of the Arbitration Practice Group of Bratschi, Wiederkehr & Buob to provide us with his article, "Judicial review of arbitral awards in Switzerland – balancing procedural flexibility and compliance with fundamental procedural rights."

Professor Harry Lepinske, Chairman of the Central Asian Productivity Research Center (CAPRC) has kept the readers of *The Globe* informed of various programs and seminars in the Chicago area. On December 7, 2016, "The Former Soviet Republics: 25 Years Later" included speakers and presentations concerning Azerbajan, Kazakhstan and Uzbekistan. That program was hosted by the Illinois SBDC-International Trade Center at the Industrial Council of Nearwest Chicago, and included both governmental and private sector speakers.

On January 20, 2017, "Focusing on 2016 in Turkey" was be held. The program, organized by the CAPRC, took place at the Conference Center of the Turkish Consul General of Chicago, 455 N. Cityfront Plaza Drive, Chicago, Illinois.

The Consul General of Turkey, Umut Acar and Ms. Esra Dolgan Tulgan, coordinator-advisor for Investment Support and Promotion Agency of Turkey, were the two speakers. For more information on this program, contact CAPRC by email to lepinske@sbcglobal.net or by phone at 708-246-5556.

On April 28, 2017, a full-day program, "The 2017 Silk Road Conference" will be held at the Illinois Institute of Technology – IIT Kent College of Law Auditorium in Chicago, Illinois. The program is presented by lead sponsor, Global Programs, College of Business, Northern Illinois University, and co-sponsors, the CME Group, Whiteside County Economic Development Department, Silk Way Airlines, and TEDA.

Speakers will cover Azerbajan, China, Kazakhstan, Kyrgyzstan, Macedonia, and Tajikistan. For more information, please email to lepinske@sbcglobal.net or by phone at 708-246-5556.

As always, thank you to all of our contributors.

Lewis F. Matuszewich
Matuszewich & Kelly, LLP
Telephone: (815) 459-3120
(312) 726-8787
Facsimile: (815) 459-3123
Email: lfmatuszewich@mkm-law.com ■

The Globe

Published at least four times per year. Annual subscription rates for ISBA members: $25.

To subscribe, visit www.isba.org or call 217-525-1760.

OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS
Lewis F. Matuszewich
Geeta M. Shah

MANAGING EDITOR / PRODUCTION
Katie Underwood
kunderwood@isba.org

INTERNATIONAL & IMMIGRATION LAW SECTION COUNCIL
Patrick M. Kinnally, Chair
Michelle J. Rozovics, Vice Chair
Shama K. Patari, Secretary
Tejas N. Shah, Ex-Officio

David W. Aubrey
Kenny Bhatt
Juliet E. Boyd
Susan M. Brazas
Cindy G. Buys
Martha Delgado
Philip N. Hablutzel
Alexander W. Konetzki
Kiki M. Mosley
Natalie L. Pesin
Martine Polynice-Jackson
Mark E. Wojcik
Sofia M. Zneimer

Anna P. Krolikowska, Board Liaison
Melissa Burkholder, Staff Liaison
Michael R. Lied, CLE Committee Liaison

South Korea violated the Convention to Eliminate Race Discrimination

CONTINUED FROM PAGE 1

States must "prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group[,] or organization."[5] The obligations under article 2 of CERD require states to investigate their own national and local policies and practices to identify and eliminate racial discrimination.

Article 6 of CERD requires state parties to "assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his [or her] human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."[6] This provision essentially requires that states provide a forum where individuals can seek remedies for any violation of rights guaranteed in the treaty.

A body of independent experts serves as the U.N. Committee on the Elimination of Racial Discrimination monitors implementation of CERD in the various nations that are parties to the treaty.[7] In 2015, this Committee found that South Korea had violated CERD by requiring mandatory HIV/AIDS and drug tests of non-Koreans who taught English in South Korea.[8] The case, *L.G. v. Republic of Korea,* involved a national of New Zealand ("L.G.") who, at the time she filed her petition, had been forced to leave South Korea and was residing in the United States.[9]

L.G. had been employed in an elementary school in the South Korea as a native English-speaking teacher, assisting with foreign language instruction.[10] Shortly after her arrival in South Korea to work in that job, L.G. was required to visit a government hospital where she would be tested for HIV/AIDS and for illegal drug use.[11] These medical tests were not required of her Korean colleagues; only ethnically non-Korean teachers had to be tested. These medical tests were originally a one-time requirement to register as an alien, but provincial and municipal education offices in South Korea had begun to require annual testing of foreign native-speaker teachers as a condition of renewing employment contracts.[12]

L.G. complied with the demand and went to the hospital for the HIV and drug testing, but when she was required to go again the following year she refused to go.[13] "As a matter of principle," she "refused to undergo the required medical tests again, as such tests were of a discriminatory nature and an affront to her dignity."[14] She said she would be "willing to undergo any health check that was also required of her Korean fellow teachers" but that "she would not undergo medical tests required only of foreigners."[15] She believed that "requiring regular mandatory HIV/AIDS and drug testing for foreign native-speaker teachers [amounted] to racial discrimination."[16] Because she refused to go back for testing, L.G.'s teaching contract was not renewed. She could not remain in South Korea without a work visa.[17]

After exhausting domestic remedies in South Korea to challenge her dismissal, L.G. filed a complaint with the U.N. Committee to Eliminate Racial Discrimination. She asserted that South Korea's "mandatory HIV/AIDS testing of foreign teachers of English was put in place not because of public health concerns, fears of accidental transmission[,] or public ignorance about the routes of infection, but because of negative beliefs about the moral character of foreign teachers."[18] L.G. alleged that the testing was "a way to stigmatize and to express hostility towards this disliked group of non-ethnic-Korean-foreigners" and was based on judgmental attitudes towards foreign teachers who engaged in "immoral behavior" that put themselves at risk.[19]

The South Korean government answered the complaint by stating that annual medical testing for HIV/AIDS and for drug use was no longer specifically required of foreign teachers as of 2010 a condition of contract renewal.[20] The South Korean government asked the Committee to dismiss her complaint because the government had already discontinued the objectionable policy.[21] L.G. replied that "the mere discontinuance" of the discriminatory policy was "not a complete remedy" for the violations of CERD."[22] She wanted a public apology and financial compensation for losing her job and for "the humiliation and loss of dignity that she was forced to endure as a result of standing up for her rights in the face of the discriminatory treatment that she had suffered."[23] She saw the policy of requiring HIV and drug testing only of non-Korean teachers to be based not on medical necessity but solely on racial stereotypes about the moral behavior of foreigners working in South Korea.

The Committee on the Elimination of Racial Discrimination found that South Korea had failed to investigate L.G's complaint to determine whether racial discrimination was at the root of the requirement to test only non-Korean foreign teachers for HIV/AIDS and for drug use.[24] The government's failure to investigate her complaint was a violation of the Convention to Eliminate Racial Discrimination.[25]

The Committee also found that L.G. had lost her employment in South Korea solely for refusing to be tested for HIV/AIDS and for drugs and that other teachers who were Korean or ethnically Korean were not subject to those medical tests.[26] The Committee observed that mandatory testing for HIV/AIDS was against international medical standards for controlling HIV and was ineffective for public health purposes.[27] The Committee found that the South Korean government did not put forward any reasons to justify testing only foreign teachers and that "the tests for HIV/AIDS and illegal drugs were viewed as a means of checking the values and morality of foreign teachers of English."[28] The Committee thus found that the testing requirement violated CERD.[29]

Having found violations of CERD, the Committee recommended that South Korea grant the teacher adequate compensation for the moral and material damages caused by the discriminatory testing, including compensation for lost wages when she was not allowed to work.[30] The Committee also recommended that South Korea take appropriate measures to review laws and policies enacted at the national and local levels relating to the employment of foreigners and that it abolish any policies or practices that would manifest any xenophobia or stigma.[31] The Committee also asked the South Korean government to give wide publicity to the Committee's opinion that the HIV and drug testing policy was racially discriminatory, including translating the decision into Korean and disseminating copies to prosecutors and judicial bodies in South Korea.[32]

South Korea lost before the Committee even though it had already realized that the practice of requiring annual HIV and drug testing of foreigners was ineffective as a public health measure and could not be explained other than by racial bias against non-Korean foreigners. Stopping the practice of annual testing was important but that alone was not enough to remedy violations of the treaty. The lesson should be an important one for any other country that wants to single out other groups for discriminatory treatment based on their race or national origin. ■

Professor Mark E. Wojcik teaches international law and other subjects at The John Marshall Law School in Chicago. He is a member and former chair of the ISBA Section on Immigration and International Law.

1. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).
2. CERD art. 2(1).
3. CERD art. 2(1)(a).
4. CERD art. 2(1)(c).
5. CERD art. 2(1)(d).
6. CERD art. 6.
7. CERD art. 8. *See* <http://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx>.
8. CERD/C/86/D/51/2012 (12 June 2015).
9. *Id.* at 2, para. 1.
10. *Id.* at 2-3, para. 2.1.
11. *Id.* at 3, para. 2.2.
12. *Id.*
13. *Id.* at 4, para. 2.6.
14. *Id.* at 4, para. 2.7.
15. *Id.*
16. *Id.* at 7, para. 3.1.
17. *Id.* at 11, para. 5.2.
18. *Id.* at 7, para. 3.2.
19. *Id.*
20. *Id.* at 10, para. 4.2.
21. *Id.*
22. *Id.* at 11, para. 5.1
23. *Id.*
24. *Id.* at 13, para. 7.3.
25. *Id.*
26. *Id.* at 14, para. 7.4.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 14, para. 7.5.
31. *Id.*
32. *Id.* at 14-15, para. 7.5.

Office of Special Counsel provides discrimination guidance

BY MICHAEL R. LIED

Bruce A. Morrison, of the Morrison Public Affairs Group, posed several questions regarding whether certain employer practices violated the Immigration and Nationality Act's ("INA's") prohibition against citizenship status discrimination. He asked whether an employer could, consistent with the anti-discrimination provision of the INA, terminate U.S. workers and rely on contract workers with temporary work visas to perform the work previously done by the terminated U.S. workers.

Alberto Ruisanchez of the Office of Special Counsel responded. Ruisanchez stated U.S. citizens and nationals, refugees, asylees, and recent lawful permanent residents are protected from citizenship status discrimination under the INA. The INA grants OSC jurisdiction over citizenship status discrimination claims involving employers with four or more employees.

The elements of a *prima facie* case of citizenship discrimination under 8 U.S.C. § l324b(a)(l)(B) depend on whether the alleged discrimination is an individual act or a pattern or practice of discrimination. The *prima facie* burdens for individual and pattern or practice cases involving intentional discrimination are set forth in *McDonnell Douglas Corporation v. Green,* 411 U.S. 792 (1973), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), respectively. Further, in determining whether a violation has occurred, the Office of the Chief Administrative Hearing Officer ("OCAHO"), the adjudicative body that hears cases arising under the INA's anti-discrimination provision, looks to relevant case law of the federal circuit in which the claim arises.

Morrison also asked whether a violation of the anti-discrimination provision of the INA can be established where an employer replaces a protected employee with a non-protected contract employee provided by a third party company, rather than directly hiring a replacement worker from outside of the protected class. Except in very narrow circumstances, an employer violates the anti-discrimination provision if it terminates workers or hires their replacements because of citizenship or immigration status. This is true regardless of whether the employer takes the discriminatory employment actions itself through direct hiring, or contracts, as a joint employer, with an outside agency to implement its discriminatory staffing plan. Whether an employer has, in fact, violated the anti-discrimination provision through its use of contract workers will depend upon the facts of each case, including (1) whether there is evidence of intentional discrimination in the selection of employees for discharge or rehire, (2) the circumstances surrounding the selection of the third party staffing contractor, and (3) the extent to which the original employer could be considered a joint employer of the contract workers. In addition, nothing prevents the filing of a charge against the contractor for potential citizenship status discrimination, or prevents OSC from independently investigating the contractor for potential discrimination if OSC receives information indicating a possible violation.

Morrison also sought guidance on the issue of discriminatory intent under the anti-discrimination provision. In contrast to several anti-discrimination laws that prohibit neutral policies that impose a disparate impact on a protected class, the INA's anti-discrimination provision only prohibits intentional discrimination. This means that to engage in unlawful citizenship status discrimination, an employer must have acted "because of' citizenship or immigration status. 8 U.S.C. § 1324b(a)(l)(B). It is important to note that intentional discrimination does not require animus or hostility toward the protected class member. Determining whether a party has engaged in intentional discrimination will depend upon the facts of each case. ■

Michael R. Lied, of Howard & Howard Attorneys PLLC in Peoria, Illinois, is a member of the ISBA CLE Committee and serves as Liaison for the CLE Committee to the International and Immigration Law Section Council.

HOWARD & HOWARD ATTORNEYS PLLC
One Technology Plaza, Suite 600
211 Fulton Street
Peoria, Illinois 61602
Telephone: 309-672-1483
Facsimile: 309-672-1568
mlied@howardandhoward.com

Judicial review of arbitral awards in Switzerland: Balancing procedural flexibility and compliance with fundamental procedural rights

BY LUKAS WYSS

Party autonomy in procedural proceedings – a foundation of arbitration

Most arbitration rules, such as the Swiss Rules, the ICC Rules, the LCIA Rules, the DIS Rules etc. do not regulate the arbitral proceeding in detail. International rules dealing with procedural matters, such as the IBA Rules on the Taking of Evidence in International Arbitration of 29 May 2010, have no legal binding unless the parties have agreed otherwise, which is rarely the case. Chapter 12 of the Swiss Private International Law Act (PILA) does not contain specific or detailed (default) rules regarding arbitral procedures.

Therefore, under Swiss law, parties enjoy extensive autonomy to choose and determine the arbitral procedure and to tailor the procedural rules to their needs. Parties can choose the law governing the substance of the dispute, the seat of arbitration, the arbitration institution (if one is used) and rules as well as the arbitrator(s), and also take a range of other decisions that shape the jurisdictional scope and the proceeding of the arbitration. Such choices often result in important legal and tactical advantages. Among others, the choice of the applicable law, of the seat of the arbitration (which determines, e.g., the legal regime applicable for setting aside or injunctive relief proceedings), the choice of the arbitral institution (and thus of its arbitration rules), the person of the arbitrator, confidentiality, and timing issues in the shaping of the procedure are key elements to influence the course, and most probably also the outcome, of an arbitration.

Under Swiss law, arbitral tribunals enjoy much discretion in shaping the arbitral procedure as well. Absent a party consent as to the procedure, the arbitral tribunal has the power to decide on procedural matters (article 182(2) PILA). Despite the extensive autonomy of the parties and arbitral tribunals having their seat in Switzerland, the principles of equal treatment of the parties and the right to be heard (article 182(3) of the PILA) must be observed.

Limitation of judicial review as a key asset of arbitration

A further key asset of arbitration for many businesses is the limited grounds for challenging an award. The grounds for annulment are very restrictive. Article 190(2)(a) – (e) PILA provides that an award can only be challenged based on the following five grounds:

- improper appointment of the sole arbitrator or improper constitution of the arbitral tribunal (including the appointment of an arbitrator who is not independent);
- erroneous acceptance or denial of jurisdiction by the arbitral tribunal;
- failure to decide all claims brought by the parties or decisions on matters beyond the claims submitted to the arbitral tribunal (infra/ultra petita);
- violation of the principle of equal treatment of the parties or the right to be heard; or
- non-compliance of the award with substantive or procedural public policy.

The fact that the award may be arbitrary does not qualify as a reason for annulment under Article 190 PILA. This does not only emphasize the restrictive approach of judicial review of international arbitral awards by the Swiss Federal Tribunal, but also shows the importance of the choice of the arbitrators, the procedural rules by the parties and the conduct of the arbitral proceeding.

Protection of due process under Swiss law

Procedural flexibility and discretion for the stakeholders is only one side of the coin: It is imperative for parties that their fundamental rights in an arbitral proceeding are respected and that all parties and the arbitral tribunal play by commonly accepted and foreseeable rules.

In this article, we explore how Swiss law protects the parties in arbitral proceedings seated in Switzerland in terms of due process.

Recent studies have shown that only a tiny minority of appealed cases are set aside. It does not come as a surprise that not all grounds are equally popular among petitioners. A study of 2010 showed that the right to be heard (article 190(2)(d) PILA) was most often invoked, closely followed by public policy (article 190(2)(e) PILA). Over the last few years, the picture has not significantly changed. Jurisdictional issues are still third in line, followed by ultra/infra petita griefs and flaws in the constitution of the tribunal.

More interesting than the mere number of challenges per ground is the relative chance of success of each ground for appeal. Whereas the most popular ground for a challenge since 2005, public policy, has only been successful twice, approximately 9.4% of all arbitral awards challenged before the Swiss Federal Tribunal on jurisdictional grounds (whereof many in sports arbitration), 5.5% on the right of equal treatment or the right to be heard, 3.6% regarding ultra/infra petita, 2.2% on grounds of unlawful constitution of the arbitral tribunal, and 1.3% for violation of the right to be heard were set aside by the Swiss supreme court. Leaving aside sports

arbitration, from 1989 to 2013, the average success rate of appeals for commercial arbitration was 6.88%. This means that the Swiss Federal Court is very reluctant to intervene with arbitral awards, or to put it the other way round: parties must get it the first time right, namely in the arbitration, and not in the appeal.

The following brief overview of recent case law gives a flavor of the standard of review applied by the Swiss Federal Tribunal in terms of procedural discretion and the assessment of evidence:

- In a decision of 20 August 2014, the Swiss Supreme Court decided on the FIDIC Conditions of Contract and the jurisdiction of an arbitral tribunal to hear a dispute. The court found that the FIDIC dispute adjudication procedure is, in principle, mandatory and therefore a condition precedent to arbitration. A party may only refuse to go through the process if insisting on it would amount to an abuse of rights because it appears futile to an efficient resolution of the dispute, or where there has been inordinate delay in appointing the dispute adjudication board (DAB) by the other party (FTD 4A_124/2014). This decision shows that unless they have agreed otherwise on an ad hoc-basis, the parties must follow the rules for the resolution of disputes they have agreed upon.
- Arbitral tribunals are entitled to refuse to allow certain questions a party wants to put to the opposing party's expert. The tribunal may do so where it anticipates that the additional evidence obtained by further questioning could not affect their findings, or if the evidence in question is irrelevant or unsuitable to prove the facts in question (FTD 4A_544/2014). Thus, dilatory tactics by parties can be – unexpectedly – severely punished.
- A violation of a party's right to be heard cannot be easily proven because under the Swiss Federal Tribunal's case law, even if a tribunal did not expressly mention the relevant provision related to the interpretation of contracts under Swiss law, in case it has actually addressed the petitioner's position on that issue and implicitly applied the relevant principles under Swiss law, the right to be heard is not violated (FTD 4A_486/2014).
- Also, in FTD 4A_636/2014 the Swiss Federal Tribunal confirmed an arbitral award regarding a penalty clause, the court found that instead of simply denying the other party's position, the petitioner should have submitted its own evidence to support its own position. Therefore, parties may be required to submit counter-evidence; a simple objection against factual allegations made by the other side might not suffice if the arbitral tribunal considers the allegations of claimant as proven.
- The Swiss Federal Tribunal suggested in another decision, without formally deciding on the issue, that the right to be heard was not violated where, pursuant to agreed procedural rules, a party could not call a witness for examination where the other party had waived their right to cross-examination (FTD 4A_199/2014).
- Furthermore, an arbitral tribunal may rely on facts which no party had argued without infringing the parties' right to be heard if they are on the file (FTD 4A_305/2013 of 2 October 2013).
- In view of the fact that the weighing of evidence cannot be challenged before the Swiss Federal Tribunal, these decisions emphasize the discretion arbitral tribunals seated in Switzerland enjoy in hearing evidence offered by a party.
- Contrary to the Swiss Civil Procedure Act (CPA), under the PILA, arbitrariness of an arbitral tribunal in assessing and weighing the evidence cannot be challenged. In its decision of 30 September 2014, the Swiss Federal Tribunal rejected an application to have a domestic arbitral award set aside on grounds of arbitrariness. It confirmed that under Swiss law, an award is only considered to be arbitrary from a factual point of view where an arbitral tribunal's findings are manifestly contradicted by the case's evidentiary record. By contrast, an arbitral tribunal's evaluation or assessment of specific evidence does not qualify as arbitrary. The Swiss Supreme Court also confirmed that only a clear violation of the law can amount to arbitrariness (see FTD 4A_274/2014, and FTD 4A_112/2014).
- In this context, it is noteworthy that the PILA permits parties to an international arbitration to opt-out and submit the procedure to the Swiss CPA, which governs domestic arbitration, allowing for the "arbitrariness" challenge.
- In another decision of 23 July 2014, the Swiss Federal Tribunal accepted an application to have a domestic arbitral award set aside on grounds of arbitrariness, finding that the sole arbitrator, in awarding interest on damages, had grossly misapplied Swiss law on default interest by granting interest for periods of time during which the relevant amounts had not yet become due (FTD 4A_117/2014).

In principle, the application of the law by an arbitral tribunal seated in Switzerland cannot be challenged before the Swiss Federal Tribunal. Swiss law does not know the "materially flawed" standard of English law. In FTD 4A_108/2009, the supreme Swiss court reminded the applicant that in an international arbitration held in Switzerland, there is no constitutional requirement that the parties be heard on the legal consequences to be drawn from the evidence on the file. It is only when the arbitral tribunal intends to rely on legal grounds which none of the parties argued and that they could not have reasonably expected that a violation of the right to be heard may be affirmed. Thus, the principle iura novit curia finds its limits in the violation of due process as far as arbitrations held in Switzerland are concerned.

Conclusions

The limited standard of review of arbitral awards by the Swiss Federal Tribunal adds to the efficiency of arbitration both in terms of costs and time, provided the following points are respected:

- International arbitration proceedings mostly involve stakeholders from

THE GLOBE
ILLINOIS BAR CENTER
SPRINGFIELD, ILLINOIS 62701-1779
FEBRUARY 2017
VOL. 54 NO. 4

Judicial review of arbitral awards in Switzerland

CONTINUED FROM PAGE 7

different cultural and legal backgrounds, which means that the expectations about the "right" procedure may vary strongly. Choosing institutional arbitration adds a layer of procedural security to arbitral proceedings. In particular when the parties agree on ICC arbitration, the scrutiny procedure of the ICC helps to avoid procedural irregularities and materially flawed decisions. This is all the more important if the parties, and therefore most likely the arbitrators, have different cultural and legal backgrounds.

- Detailed procedural rules agreed upon by the parties and the arbitral tribunal add to the security of the parties in terms of procedural submissions and applications. The challenge in this regard is to strike a balance between flexibility of the proceeding and procedural security for the parties. Furthermore, in domestic arbitration, the parties may challenge arbitral awards for arbitrariness.
- The wide procedural discretion of arbitral tribunals urge arbitration users to play it safe: Procedural applications, including the submission of evidence (expert reports etc.), should be made in a non-equivocal and timely manner and in a form usual in international arbitration. Again, the challenge consists in protecting its rights on the one side, and avoiding a procedural "overkill" on the other side.

If these principles are applied, Swiss law not only provides for efficient arbitration, but also sufficiently protects parties arbitrating in Switzerland in terms of due process. ■

Luka Wyss is a Partner with Bratschi Wiederkehr & Buob Ltd., which is one of Switzerland's leading law firms with over 75 attorneys in six major business centers of Switzerland. Our experienced attorneys advise and represent national and international enterprises as well as private individuals and the public sector in all areas of commercial law, tax law as well as public law and notarial matters. He may be reached by phone at +41 58 258 16 00 or by email at Lukas.wyss@bratschi-law.ch.