Oregon State Bar International Law Section

International Law Newsletter

Published by the International Law Section of the Oregon State Bar Fall 2011

In This Issue

Check Out the Section Website:
http://www.osbar-ils.org

From the Chair

By Meredith Weisshaar

It is my privilege to introduce the inaugural issue of the bi-annual International Law Newsletter. The membership of the International Law Section of the Oregon State Bar consists of a diverse group of attorneys with a range of practice areas, including private international law, international alternative dispute resolution, international commercial transactions, immigration law, and a wide variety of associated fields. The section's mission is to enhance the understanding of international legal principals among its members; to educate the members in order to enable them to better serve their clients by conducting periodic legal seminars; to increase the level of professionalism of the international bar; to act as a source of reference for the public at large with respect to international legal matters; and to assist its membership with networking opportunities in order to enable the members to develop their practices. Consistent with this mission statement, the purpose of this Newsletter is to foster the study of international law among the members of the Oregon State Bar and to educate and assist the public at large with international legal matters.

This Newsletter is the result of hard work of members of the Executive Committee of the International Law Section and students and faculty at Lewis & Clark Law School. I would like to thank, in particular, Kelly Harpster of Harpster Law LLC, Merril Keane of Miller Nash LLP and Professor George Foster of Lewis & Clark Law School. Their efforts and vision made this publication possible.

The Executive Committee of the International Law Section would like to know what activities of the section are useful to you. We welcome your comments and suggestions regarding how the International Law Section can return value to its members. For more information about the International Law Section and upcoming events, please visit our website at **http://www.osbar-ils.org**. We also welcome your input regarding our website. If you would like to provide content or suggestions for the website, please email **osb.internationallawsection@gmail.com**.

Long-Awaited New ICC Rules to Be Effective January 1, 2012: Noted Changes

By Jovita Wang and Merril Keane

The International Chamber of Commerce (the "ICC") is one of the leading international arbitration institutions. In September 2011, the ICC issued new arbitration rules, effective for arbitration proceedings commenced after January 1, 2012. The new rules are the much anticipated product of a revision process that began in 2008. Because the ICC's arbitration rules had not been updated since 1998, the new rules update a broad spectrum of practices.

Emergency Relief

The new rules allow parties to seek "urgent interim or conservatory measures" from an appointed temporary emergency arbitrator. See Article 29 and Appendix V. This procedure in many ways reflects other systems and can be used to prevent the dissipation of evidence or assets. Parties can seek this emergency relief even before arbitration has been formally commenced. Emergency arbitrator proceedings must be followed by a request for arbitration within ten days or the emergency proceedings will be terminated.

The new arbitration rules provide that the emergency arbitrator must generally issue his or her decision in the form of an order within 15 days from the date on which the file was transmitted to the arbitrator. Appendix V, Article 6. Once arbitration is commenced, the arbitral tribunal may modify, terminate, or annul the emergency arbitrator's order. The new rules do not prevent parties from seeking urgent interim or conservatory measures from a local court.

As expected, the emergency arbitrator rules come with some limitations. For instance, an emergency arbitrator order is not a final arbitration award, and likely cannot be enforced by national courts under the New York Convention (the international treaty signed by 146 countries recognizing the enforcement of arbitration awards). The application fee for ICC emergency proceedings is US$40,000, which includes administrative expenses and the arbitrator's fees and expenses. The emergency provisions apply only to ICC arbitrations commenced under an arbitration clause or agreement entered into after January 1, 2012.

Multiparty and Consolidation Issues

The new rules address multiparty arbitrations, providing procedures that facilitate the joinder of additional parties and claims between multiple parties or arising out of multiple contracts. See Articles 7-10. For instance, any party may request that an additional party join the arbitration before any of the arbitrators have been confirmed; otherwise, all parties (including the additional party) will need to agree. The new rules provide that a joined party may, jointly with the claimant(s) or respondent(s), nominate an arbitrator. See Article 12. In multiparty arbitrations, any party may make claims against any other party, but any new claims arising after the terms of reference are signed will need to be approved by the tribunal. See Articles 8, 23.

The International Court of Arbitration—the independent arbitration body of the ICC responsible for ensuring application of the ICC's arbitration rules—may, at the request of a party, consolidate pending arbitrations when (1) the parties agree to consolidation; (2) all the claims in the arbitrations are made under the same arbitration agreement; or (3) the claims are made under multiple arbitration agreements, the arbitrations involve the same parties, the disputes arise in connection with the same legal relationship, and the International Court of Arbitration finds the arbitration agreements to be compatible. See Article 10.

Efficient Case Management

To conduct arbitration efficiently and cost-effectively, a tribunal must conduct a mandatory case-management conference at the outset. See Article 24 and Appendix IV. The conference covers procedural measures that may be adopted, including case-management techniques, and also includes establishment of the procedural timetable for the arbitration. The new rules give arbitrators more latitude in controlling the parties by allowing arbitrators to award costs in response to the parties' behavior, including whether each party "has conducted the arbitration in an expeditious and cost-effective manner." See Article 37. In setting the arbitrator's fees, the International Court of Arbitration may also take into account an arbitrator's "efficiency" and "the rapidity of the proceedings." See Appendix III, Article 2.

Jurisdictional Questions

Under the new rules, jurisdictional issues regarding the existence, validity, or scope of the arbitration agreement will generally be determined by the arbitral tribunal, although jurisdictional challenges may still be referred to the International Court of Arbitration. See Article 6. This allows arbitrators to decide on jurisdiction, in contrast to the 1998 rules under which the International Court of Arbitration had been required to determine jurisdiction.

Confidentiality

While the new rules do not provide that proceedings are automatically confidential, under the new rules persons not involved in the arbitration will not be admitted to the hearings unless the parties and the arbitral tribunal approve. See Article 26. Additionally, the arbitral tribunal is empowered, upon the request of any party, to make orders on the confidentiality of the proceedings, including taking measures to protect trade secrets and confidential information. See Article 22.

Arbitrator Disclosure Obligations

In addition to maintaining independence, the new rules expressly require the arbitrator to be impartial. See Article 11. The arbitrators must sign a statement of availability, impartiality and independence before appointment or confirmation, and must disclose any potential facts or circumstances that might cause the parties to question the arbitrator's impartiality or independence.

Although questions still remain, it is hoped that these new rules will aid in making arbitration more cost-effective and efficient for all parties involved. For more information and to see a copy of the rules, go to: **http://www.iccwbo.org/ICCDRSRules/**.

Jovita T. Wang and Merril Keane are attorneys at Miller Nash LLP, in the firm's international practice group.

The International Law Newsletter is published two times per year by the International Law Section of the Oregon State Bar, with offices located at 16037 S.W. Upper Boones Ferry Road, Tigard, Oregon 97224; mailing address: Post Office Box 231935, Tigard, Oregon 97281; 503-620-0222.

Layout and technical assistance provided by the Information Design & Technology Center at the Oregon State Bar.

Foreigners to Participate Under New PRC Social Insurance Law—But Questions Remain

By Merril Keane

On October 28, 2010, the National People's Congress of the People's Republic of China (the "PRC") promulgated a new Social Insurance Law, which entered into force on July 1, 2011. PRC social insurance is generally divided into five categories: pension, medical insurance, injury insurance, unemployment insurance, and maternity insurance. Article 97 of the Social Insurance Law vaguely states that foreigners in the PRC are supposed to participate in PRC social insurance in accordance with the Social Insurance Law. But much uncertainty has surrounded this provision.

The Ministry of Human Resources and Social Security of the PRC issued Interim Measures on Participation in Social Insurance by Foreigners Working in China, effective October 15, 2011 (the "Interim Measures"). The Interim Measures follow upon draft regulations and, like the earlier draft regulations, extend participation in the PRC's social insurance system to foreigners working in China. Under the Interim Measures, a "foreigner working in China" is any foreign (non-Chinese) national who has obtained work authorization, a foreign expert authorization, a foreign journalist authorization, or similar work authorization and residence permit. The Interim Measures state that even employees who are employed by an overseas entity and seconded to the PRC are expected to participate in social insurance, although the Interim Measures only specifically refer to secondment arrangements involving branch or representative offices. The Interim Measures do not address Hong Kong, Macau, or Taiwan nationals, although local agencies may have existing rules addressing these populations, and some believe that rules similar to the Interim Measures will apply.

Generally, under the Interim Measures, foreigners should be enrolled in Chinese social insurance within 30 days of applying for their work papers (e.g., employment permit, foreign expert certificate, foreign journalist permit). The Interim Measures provide for information sharing between agencies processing foreign workers' work authorizations and local social insurance agencies. Foreign workers are eligible to receive PRC social insurance benefits, and the Interim Measures provide that foreign workers who leave the PRC prior to reaching the age of eligibility can keep their accounts and continue to accrue benefits upon their return.

Each locality will likely have ultimate responsibility for implementing participation by foreign workers in the PRC's social insurance program. Therefore, it is important for companies that have non-Chinese workers in the PRC to familiarize themselves with the local rules to ensure compliance.

For example, the Beijing authorities issued the Notice on Operational Issues Regarding Foreigners Working in this City Participating in Social Insurance, effective October 15, 2011 (the "Beijing Notice"), which provides that foreigners, including those who have been seconded to Beijing, must be enrolled in social insurance within 30 days from applying for their work papers. The Beijing Notice sets forth the relevant software and documents needed to enroll a foreign worker in PRC social insurance.

Many other jurisdictions have yet to issue guidance, and some jurisdictions appear to be relying on past guidance until further notice.

In many cases, the cost of participation will be the same for foreigners as it is for local Chinese employees, but cost will vary according to locality. The cost is borne by both the employer and the employee. For example, for 2011 in Shanghai the following rates apply:

	Pension	Medical Insurance	Unemployment Insurance	Maternity Insurance	Injury Insurance
Employee	8%	2%	1%	-	-
Employer	22%	12%	1.7%	0.8%	0.5%

Generally, bilateral social security agreements between countries provide for avoidance of double social security taxation. Such agreements are also known as "totalization agreements." Currently, the PRC has entered into only two totalization agreements: one with South Korea and one with Germany. The United States does not have a totalization agreement with the PRC.

It appears likely that the new Social Insurance Law will motivate new countries to enter into totalization agreements with the PRC.

Merril Keane is an attorney at Miller Nash LLP, in the firm's international practice group. She speaks and reads Chinese, and works on a variety of transactions and issues involving China.

Upcoming Events

Portland International Film Festival

The Oregon State Bar's International Law Section is among the many sponsors of the NW Film Center's Portland International Film Festival in February 2012. The ILS is proud to support the PIFF, and we are seeking the support of Oregon law firms and attorneys in connection with our sponsorship of the festival. If your firm is interesting in making a financial contribution to enable our sponsorship, please contact us at **osb.internationallawsection@gmail.com**. We will provide you with additional information about sponsorship upon request.

During the course of the PIFF, the ILS will be hosting a social event. We will invite all ILS members, as well as attorneys affiliated with sponsoring law firms, to attend this event. Look for that invitation in your email in-box in early 2012!

Information about the PIFF is available at: **http://www.nwfilm.org/festivals/piff**.

Philip C. Jessup International Moot Court — Call for Judges

Jessup Super Regionals March 2-4, 2012, at Lewis & Clark Law School

Hosted by the International Law Students Association (ILSA), Jessup is the world's largest moot court competition, with participants from over 500 law schools in more than 80 countries. The Competition is a simulation of a fictional dispute between countries before the International Court of Justice. Teams prepare oral and written pleadings arguing both the applicant and respondent positions of the case.

The Philip C. Jessup International Moot Court Competition has already commenced, and the authors are hard at work on this year's problem. The 2012 Jessup Problem involves a dispute between two states over the destruction of a cultural site of great importance and the important question of who gets to represent a state internationally in the immediate aftermath of a coup d'etat. It also involves international responsibility for the use of force by one state while taking part in a regional operation to bring about democracy.

The U.S. component of the Jessup Moot Court consists of approximately 144 U.S. law schools competing in six Super Regional Competitions throughout the U.S. The winner and runner-up in each Super Regional advance to the International Rounds in Washington D.C. Lewis & Clark Law School will serve as host of the Pacific Super Regional, which is scheduled for March 2-4, 2012. Twenty-four law schools from throughout the Western United States will be attending for three days of exhilarating and exhausting competition.

The Super Regional is a wonderful opportunity for members of the bar with a general interest in international law to participate as judges, meet students, and earn free CLE credit. Any attorney interested in judging should contact Dagmar Butte at db@pbl.net. For more information, see: http://ilsa.org/jessuphome and http://law.lclark.edu/departments/global_law/jessup_moot_court/.

Call for International Law Articles

The International Law Section of the Oregon State Bar is always looking for articles and other content of interest to include in the Newsletter.

If you are interested in having your article, case summary, news brief, or other internationally-oriented content published in the Newsletter, or if you have ideas about content that you would like to see in the Newsletter, please email us at **osb.internationallawsection@gmail.com**.