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PH Insight for News and Analysis of the Latest Developments from the Courts of England and Wales

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PH*lit* is our London litigation know-how blog, where you will find the latest developments on commercial litigation topics delivered in a monthly round-up of the most important topics addressed by the Courts of England and Wales, as well as key regulatory and legislative updates. You can subscribe to this site if you would like our updates sent to you by email as soon as they are posted.

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In this edition…

- We consider a recent decision of the High Court which offers defendant-friendly guidance on when an application for security for costs under CPR 25 will be granted.
- We review the Commercial Court's first decision on the application of section 68(2)(i) of the Arbitration Act 1996, which addresses the issue of serious irregularity where the Tribunal has admitted its own mistake in making an arbitral award.
- We note a High Court decision which provides a timely reminder about the limited role of "*commercial common sense*" in construing contracts where the express terms of the contract do not support such an interpretation.
- We review the landmark Supreme Court ruling in *Merricks v Mastercard* regarding collective actions brought under the Competition Act 1998 regime and the impact this may have on future actions for breaches of competition rules.
- We analyse the Court of Appeal's finding that asymmetric clauses are exclusive jurisdiction clauses for the purposes of the Recast Brussels Regulation but potentially not for the purposes of the 2005 Hague Convention on Choice of Court Agreements.
- We consider a High Court ruling on the jurisdiction under paragraph 18 of the Disclosure Pilot Scheme to order "disclosure of specific documents", which is particularly welcoming given the extension of the Disclosure Pilot Scheme to the end of 2021.
- Finally, we reflect on changes to the ICC Rules, effective from 1 January 2021, and the potential procedural benefits these may have.

Commercial Court offers defendant-friendly guidance on Security for Costs

***Victor Pisante & Others v George Logothetis & Others* [2020] EWHC 3332 (Comm) (judgment available here)**

4 December 2020

- The Commercial Court recently provided defendant-friendly guidance on when security for costs is likely to be granted pursuant to CPR 25.

- The underlying dispute concerned allegations that the defendants fraudulently induced the claimants into making investments in excess of US$14 million in the shipping market. The defendants applied for security for their costs (the "**Application**") on the bases that: (i) the first claimant was not resident in England and Wales; and (ii) the second to fourth claimants were similarly non-resident and there was reason to believe that they would be unable to pay the defendants' costs if ordered to do so.

- The claimants resisted the Application on the principal ground that they collectively held various assets within Europe, which far exceeded the defendants' estimated costs of £1.3 million. However, the Court ordered the claimants to provide security for over 60% of the defendants' estimated costs. In making its judgment, the Court made several notable remarks focusing on the claimants' assets:

  – *Enforcement*: there must be "*real doubt*" as to how, and/or in what timescale, enforcement could take place against a relevant asset. In the present case:

    - there was insufficient evidence put forward by the claimants to give comfort that a house in Athens could be enforced against "*either at all or within a reasonable time*"; and

    - conversely, a bank account was regarded as a "*highly liquid asset*" that could be easily moved so as to avoid enforcement and therefore the Court must be satisfied not only of the present position of enforceable assets but also the likely position at the time of any future costs award.

  – *Liabilities*: given that defendants enforcing a costs award do so as unsecured creditors, the Court needs to be convinced not simply that a claimant has sufficient assets, but that their net asset position is adequate to cover any adverse costs order.

  – *Transparency*: the judgment demonstrates that a lack of frankness or transparency will directly count against a claimant. The Court did not accept that there had "*been full transparency*" from the claimants, in part due to a lack of clarity over the first claimant's liabilities, including a lack of supporting documents.

  – *Foreign domicile*: where a claimant or its assets are domiciled abroad, the Court will take into account the relative ease of enforcement in the particular jurisdiction, having regard to potential obstacles to enforcement and costs. In the present case, it was accepted that tracing assets in the British Virgin Islands would be difficult in view of the lack of publicly available information.

PH*lit* comment:

Perhaps of most interest to defendants is the clear guidance that claimants, in addition to demonstrating the existence of enforceable assets, must also satisfy the Court that such assets can be enforced against: (i) easily; (ii) within a reasonable timescale; and (iii) at a point in the future when a costs order is made. The Court made clear that in demonstrating a "reason to believe" that a claimant will be unable to meet a costs order, a defendant is not required to meet the evidential burden of a freezing injunction, including demonstrating a lack of honesty or clear risk of dissipation.

In determining the level of security, the Court noted that - whilst the claimants were under no obligation to provide their own costs schedules - a possible inference in not doing so would be that any comparison would have nullified any criticism that the claimants levied against the defendants' schedules. This, taken together with the judgment as a whole, reminds claimants that they would do well to be as transparent and thorough as possible, both in refuting the substantive merits of a security for costs application and the quantum sought.

Commercial Court allows challenge of an arbitral award for "serious irregularity" where the Tribunal had admitted its mistake in calculating quantum

***Doglemor Trade Ltd and others v Caledor Consulting Ltd and others* [2020] EWHC 3342 (Comm) (judgment available here)**

4 December 2020

- The Commercial Court has considered the challenge of an arbitral award under section 68(2) of the Arbitration Act 1996 (the "**1996 Act**") for serious irregularity, where the Tribunal had admitted its mistake in calculating the quantum of the award.

- The case concerned a call option deed pursuant to which the defendants were allowed to purchase shares in a company associated with the claimants for US$60 million over a two-year period. The relationship between the parties subsequently broke down before the expiration of the two-year period and the defendants commenced arbitration alleging that the call option deed had been repudiated. The claimants accepted the termination of the call option deed, so the only issue for consideration by the Tribunal was the proper valuation of the relevant shares.

- The parties' own valuations of the shares differed greatly - whilst the defendants claimed that they were worth around US$180 million, the claimants argued that they were essentially worthless due to potential tax liabilities of the business. Owing to the stark contrast between the parties' valuations, the Tribunal asked the parties to produce an agreed valuation model with a line-by-line methodology. In applying this model, the Tribunal noted that US$90 million of historic tax liabilities should be deducted from the share value. In error, the Tribunal instead added that figure when calculating the loss.

- The claimants subsequently requested that the Tribunal correct its mistake. However, the Tribunal issued a formal response in which, while conceding to its mistake, it refused to change the quantum of damages as making the corrections sought would value the shares too low and therefore not give effect to the Tribunal's true intentions. The Tribunal also noted that it had not intended to use the agreed valuation model mechanistically, but rather as a sense check for holistic evaluation. The claimants disagreed with the Tribunal's response and issued proceedings under section 68(2)(i) of the 1996 Act.

- The Commercial Court held that the response of the Tribunal was not part of the arbitral award and noted that the Tribunal's mistake fell under the second limb of section 68(2)(i) (i.e. any irregularity "*which is admitted by the tribunal*"). The Court dismissed the defendants' arguments that irregularity in the process was required in order to claim "serious irregularity". Instead, the Court considered that the Tribunal's mistake constituted a serious irregularity and had led to the claimants' suffering a "substantial injustice" because the arbitral award contained a computation mistake which the Tribunal had not noted at the time of making the award. Finally, the court noted that due to an arbitral award being *prima facie* conclusive, only those issues in contention should be remitted to the Tribunal, rather than all issues between the parties.

PH*lit* comment:

This case is noteworthy as it appears to represent the first judicial guidance on the application of the second limb of section 68(2)(i) of the 1996 Act; that is, irregularity "which is admitted by the tribunal". The Court helpfully clarified that to engage this provision, no irregularity in the due process is required. Instead, the tribunal must only admit its own mistake.

The confirmation of the Court that an arbitration award is, however, prima facie conclusive will be welcome by arbitration users, as will the fact that one error will not re-open all of the issues decided by a tribunal.

The limits of commercial common sense – construing contracts

***Butcher and another v Pike and others* [2020] EWHC 3362 (QB) (judgment available here)**

7 December 2020

- In an application for summary judgment, the High Court was required to consider whether the defendants' construction of the terms of a contract, which relied heavily on "*commercial common sense*", was sufficient to give the defendant a real prospect of defending the claimant's claim for unpaid deferred consideration. The judgment of the Court, although not ground-breaking, provides a useful reminder of the limits of construing a contract in accordance with "*business common sense*" where the express terms of the contract simply do not support such a construction.

- The dispute arose out of a share purchase agreement ("**SPA**") concerning the sale of a commercial lettings agency by the claimant to the defendant. The lettings agency had memberships with "*Rightmove*" and "*Zoopla*", which allowed it to advertise properties for rent via those platforms. The defendant purchaser complained that the claimant had allowed the lettings agency to advertise lettings on behalf of other commercial operators (such that those operators did not have to pay their own annual membership fees), which it alleged breached the terms and conditions of those platforms (the "**Advertising Restriction**").

- The defendants argued that the claimants had informed them of the Advertising Restriction at the time of the sale, but not that the lettings agency was in breach of it. The defendants further alleged that the platforms were now enforcing the Advertising Restriction and that this was having a serious impact on the financial health of the business. As such, the defendants refused to pay the deferred consideration element due under the SPA and the claimants brought proceedings seeking payment. The defendants counterclaimed for breach of warranty in respect of the Advertising Restriction.

- The claimant brought an application for summary judgment under CPR 24. The basis for the application was that the defendants had no real prospect of establishing at trial that the lettings agency was prohibited from placing adverts on behalf of other commercial lettings agents on Rightmove or Zoopla under the terms of its contracts with those respective platforms. As such, the decision of the Court would depend on the contractual interpretation of the terms and conditions governing the letting agency's membership with the platforms.

- Although the Court agreed that it would make commercial sense to have included a restriction akin to the Advertising Restriction in the terms and conditions, where there was no express wording to that effect the Court could not simply read one into the terms. The Court was particularly persuaded by the argument that the platforms could easily have included such a restriction in their terms and conditions but had not done so. As such, the defendants' proposed construction of the terms and conditions could not stand and consequently they had no real prospect of defending the claim; accordingly, the Court granted the claimant's application for summary judgment.

PH*lit* comment:

Although the comments made by the Court on contractual construction will likely be unsurprising to practitioners, the decision provides a useful reminder of the limits of interpreting a contract in a manner that makes good commercial sense where to do so would be incompatible with the express terms. Accordingly, the judgment serves as another reminder to practitioners that poor drafting is not readily rectified by the courts in the process of contractual construction.

UK Supreme Court hands down landmark ruling on "collective proceedings"

***Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent)* UKSC [2020] UKSC 51 (judgment available here)**

11 December 2020

- The Supreme Court has handed down a long-awaited, and highly significant, judgment regarding the correct approach to certification of collective proceedings in competition damages claims.

- Collective proceedings for breaches of competition law were introduced by the Consumer Protection Act 2015 (which amended the UK Competition Act 1998 (the "**Act**")), on the basis that breaches of competition law can give rise to damages claims for a *"very large class of claimants"* and, individually, such claimants might not see litigation as a tenable option given the time and costs involved with recovery.

- Collective actions may be brought under the Act on an "opt-out" basis in the Competition Appeal Tribunal ("**CAT**"). This means that they can be commenced on behalf of an entire class of claimants without those claimants having to individually elect to join the action in order to be considered a member of the class and to share in any damages recovered. This is subject to the right for individuals to 'opt-out' of the class should they so choose.

- Walter Hugh Merricks brought a collective proceedings claim before the CAT on behalf of over 46 million consumers for losses arising out of Mastercard's multilateral interchange fees, which the European Commission ruled to be anti-competitive in 2007. He argued that as a result of Mastercard's breach of competition law, consumers ultimately were required to pay higher prices for goods and services than they would otherwise have done. The losses claimed to have been suffered between 1992 and 2008 amount to a total of £14 billion.

- In order for a collective action to advance to trial, the CAT must "certify" the action by granting a Collective Proceedings Order ("**CPO**"). Under the Act, the CAT may make a CPO only where: (i) it considers that the person who has brought the proceedings is a person who could be authorised to act as the class representative in accordance with section 47B(8) of the Act; and (ii) it is satisfied that the claims are eligible for inclusion in collective proceedings, which means that the claims must all raise common issues of fact or law and are suitable to be brought on a collective basis.

- The CAT refused certification of Mr Merricks' proceedings on the following principal grounds: (i) the claims were not suitable for an aggregate award of damages; and (ii) Mr Merricks' proposal for distributing any aggregate award did not satisfy the common law principle concerning the compensatory nature of damages. Mr Merricks appealed the CAT's decision to the Court of Appeal, which overturned the decision of the CAT. Mastercard then appealed to the Supreme Court.

- The Supreme Court (largely agreeing with the assessment of the Court of Appeal) dismissed, by majority, Mastercard's appeal and held that the CAT made five errors of law in deciding that the case was not suitable for a CPO. Of particular note, Lord Briggs remarked that the CAT:

    - had erred in treating the suitability of aggregate damages as a statutory hurdle rather than merely one issue within a multi-factorial assessment;

    - was wrong in its focus on the compensatory nature of damages, in circumstances where the Act *"radically alters the established common law principle"* by removing the ordinary requirement for an individual assessment of damages;

    - afforded undue weight to perceived forensic difficulties in quantifying damages; and

    - failed to consider whether individual proceedings were a viable alternative, *"which they plainly were not".*

- The overall tenor of the Supreme Court's decision was that the CAT was applying the Act too strictly, and the case will now revert back to the CAT to undertake a fresh hearing of the CPO application and to render a reconsidered decision as to certification. If the case is certified by the CAT, it will be the first certified since the introduction of collective proceedings in 2015.

PH*lit* comment:

The judgment of the Supreme Court is striking for the purposive approach adopted to convey the "spirit" of collective proceedings, which the Court stated as being to "facilitate rather than impede" the vindication of rights arising from an infringement of competition law. This will undoubtedly be welcomed by prospective class action claimants in competition claims.

The approach taken by the majority of the Supreme Court, and the clarification provided concerning the appropriate test to be applied in certification proceedings, is likely to encourage more collective actions before the English Courts.

Time will tell as to whether the positive step for Mr Merricks in this "gargantuan class action" does diminish the efficacy of the certification safeguard, as forewarned by the dissenting judges, Lord Sales and Lord Leggatt, who disagreed that the CAT had made any error of law, in particular with regard to the suitability of aggregate damages.

Court of Appeal finds asymmetric clauses are exclusive jurisdiction clauses for purposes of recast Brussels Regulation

***Etihad Airways PJSC v Lucas Flöther* [2020] EWCA Civ 1707 (judgment available here)**

18 December 2020

- The Court of Appeal has unanimously held that an asymmetric jurisdiction clause was an exclusive jurisdiction clause for the purposes of Article 31(2) of the Recast Brussels Regulation (the "**Regulation**"). This is the first time that the appellate courts have considered this point and clarification is welcome (if not exactly timely, given the end of the Brexit transition period on 31 December 2020).

- Under the Regulation, where proceedings involving the same cause of action and between the same parties are brought in the courts of different member states, any court other than the court first seised must stay its proceedings until the jurisdiction of the court first seised is established. However, under Article 31(2) of the Regulation, where there is an exclusive jurisdiction agreement in favour of the second seised court, the order of priority is reversed, and the first seised court must stay its proceedings unless and until the chosen court declares that it has no jurisdiction under the agreement.

- In the present case, the dispute arose out of a comfort letter provided by Etihad to Air Berlin before entry into a facility agreement. Although the comfort letter itself did not contain a jurisdiction clause, the facility agreement contained an asymmetric jurisdiction clause, in that it gave the English courts exclusive jurisdiction over claims brought by Air Berlin, but allowed Etihad a choice of where to sue. The insolvency administrator of Air Berlin brought proceedings relating to the comfort letter in Germany and Etihad sought declaratory relief in the English courts, which included a declaration that the claims brought by Air Berlin in Germany were subject to the exclusive jurisdiction of the English courts. Air Berlin argued that because the jurisdiction clause was asymmetric, it was not covered by the exception set out in Article 31(2) of the Regulation and so priority should be given to the German proceedings that were first in time.

- In a unanimous decision, the Court of Appeal held that an asymmetric jurisdiction clause was an exclusive jurisdiction clause for the purposes of the Regulation. In addition, the Court also considered the position under the 2005 Hague Convention on Choice of Court Agreements (the "**Hague Convention**"), referring to the obiter views of the High Court that there were good reasons for concluding that the rules relating to exclusive jurisdiction clauses under that Convention would also encompass asymmetric clauses.

- Although the Court of Appeal did not decide the point as it was not necessary for it to do so, it commented that there were strong indications that the Hague Convention should be interpreted differently, given the legislative history of the document and commentary from the framers of the Hague Convention made at the time of its enactment. The Court did not consider there to be any inconsistency in interpreting the Hague Convention differently to the Regulation, given that the two instruments were intended to have a mutually exclusive scope.

PH*lit* comment:

Although this decision is only directly relevant to proceedings brought before the end of the Brexit transition period (i.e., 31 December 2020) when the Regulation ceased to apply in the UK, it is nevertheless noteworthy for the Court's comments concerning whether an asymmetric clause is an exclusive jurisdiction clause for the purposes of the Hague Convention (which will continue to apply to proceedings between the UK and EU).

It was the view of the Court of Appeal that there were strong reasons to consider that the definition of exclusive jurisdiction agreements in the Hague Convention was not intended to encompass asymmetric jurisdiction clauses. While such view was expressed obiter and therefore does not create binding precedent, it is persuasive and, particularly where expressed by the Court of Appeal following submissions by counsel, gives an indication of how the courts of England and Wales would decide the point.

It remains to be seen how an EU court would interpret the relevant provision of the Hague Convention when proceedings are first seised before them. However, it does appear that EU states will not have an obligation under the rules of the Hague Convention to recognise jurisdiction or enforce judgments of English Courts made in relation to contracts containing asymmetric jurisdiction clauses. Instead, each case would depend on the local law in the jurisdiction in question.

High Court clarifies the jurisdiction to order "disclosure of specific documents" pursuant to paragraph 18 of the Disclosure Pilot Scheme

***The Commissioners for Her Majesty's Revenue & Customs v IGE USA Investments Limited and Others* [2020] EWHC 1716 (Ch) (judgment available here)**

31 December 2020

- The High Court has clarified the extent of the Court's jurisdiction to order "disclosure of specific documents" pursuant to paragraph 18 of Practice Direction 51U ("**PD 51U**"), which sets out the Disclosure Pilot Scheme. Paragraph 18 states as follows:

  > "*The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue of Disclosure.*"

- The parties in this case had entered into various settlement agreements in 2005 concerning tax liabilities of the defendants. In 2018, HMRC purported to rescind these agreements on the basis of misrepresentation and/or material non-disclosure and issued proceedings to recover around £650 million. Almost a year later, HMRC sought to amend its pleadings to allege fraud (the "**Amendment Application**"), relying on the referral of matters to its fraud investigation team and certain documents produced by that team (the "**Documents**"). At the CMC, Extended Disclosure in the form of Model D was ordered and the parties were required to agree a List of Issues for Disclosure; which they subsequently failed to do. The defendants then applied for access to the Documents under paragraph 18 of PD 51U on the basis that they would only consent to the Amendment Application if the new claim of fraud "had a real prospect of success" (the "**Request for Documents Application**").

- Given that the Request for Documents Application would impact the Amendment Application, the former was heard first. The judge at first instance rejected the Request for Documents Application on the basis that he did not have jurisdiction to make an order under paragraph 18 of PD 51U where the documents in question did not relate to, or fall within, the categories of documents relevant to the List of Issues for Disclosure. In the present case, the parties had not yet fully agreed the List of Issues for Disclosure and, in

any event, fraud was not identified as an issue in the proceedings as it had not yet been argued in the pleadings – which was of course the reason for the Amendment Application.

- Due to the paucity of case law on paragraph 18 of PD 51U, the High Court allowed an appeal of its decision. On appeal, the judge analysed paragraph 18 in great detail and accepted the defendants' arguments that the judge at first instance had wrongly treated Issues for Disclosure as being confined to the issues that can be identified within the statements of case and had wrongly conflated the concepts of "Issues for Disclosure" (as defined by paragraph 7.3 of PD 51U) and "List of Issues for Disclosure".

- The judge considered that: (i) on a careful reading of paragraphs 18 and 7.3 of PD 51U, (with paragraph 7.3 defining "Issues for Disclosure"); and (ii) with reference to the judgment of Chancellor Vos in *McParland & Partners Ltd v Whitehead* [2020] EWHC 298 (Ch) (in which Chancellor Vos elaborated that paragraph 7.3 includes all *"key issues in dispute"*), an order may be made under paragraph 18 where:

    - The order is for a variation of an order for Extended Disclosure. Accordingly, there needs to be an order for Extended Disclosure already in place; and

    - The disclosure sought relates to a particular Issue for Disclosure which, pursuant to paragraph 7.3 of PD 51U are "*key issues in dispute*" which "*will need to be determined by the court…in order for there to be a fair resolution of the proceedings*", i.e. it is not necessary for the issue to be identifiable from the pleadings, instead it is enough that the issue is something that will need to be determined by the court for the fair resolution of the proceedings as a whole. This is therefore distinct from the List of Issues for Disclosure, which identifies issues arising from the pleadings.

- Given the potential importance of the alleged fraud claim and the amount of money in issue between the parties, as well as the fact that HMRC had already collated the Documents (meaning that the Request for Documents Application was reasonable and proportionate), the High Court granted the Request for Documents Application.

PH*lit* comment:

Since the Disclosure Pilot Scheme came into force on 1 January 2019, there has been relatively little guidance on its provisions from case law. Particularly given the Scheme has now been extended to the end of 2021, this useful judgment, provides helpful clarification of the Court's jurisdiction under paragraph 18 of PD 51U, on which there does not appear to have been any prior judicial guidance. In addition, the judgment helpfully clarifies the distinction between "List of Issues for Disclosure" and "Issues for Disclosure"; namely that the former is only concerned with issues that are identifiable on the face of the pleadings, and the latter encompassing all issues in dispute between the parties that need to be resolved for a fair resolution of the proceedings.

New ICC Rules enter into force on 1 January 2021

International Court of Arbitration of the International Chamber of Commerce Rules (2021) available here

- In early December 2020, the International Court of Arbitration of the International Chamber of Commerce (the "**ICC Court**") formally launched revised ICC Rules (the "**2021 ICC Rules**"), which are applicable to arbitrations filed from 1 January 2021. The amended rules replace the 2017 edition of the rules (the "**2017 ICC Rules**") and are intended to reflect recent changes in arbitral practice and take further steps towards efficiency and transparency, whilst maintaining party autonomy.

- The overall aim of the revisions is to bring the ICC rules up to date in a fast moving arbitral landscape (particularly given the rapid changes mandated by navigating the COVID-19 pandemic) and to give the ICC Court and individual tribunals increased powers to decide on procedural matters. The most significant changes to be aware of can be summarised as follows:

    - The 2017 ICC Rules allowed tribunals to consolidate two or more pending ICC arbitrations where the disputes related to the same arbitration agreement. This created room for uncertainty as to whether disputes arising out of different (but related) contracts with identical arbitration agreements could be consolidated. The 2021 ICC Rules address this uncertainty by amending the consolidation provision to make clear that this is permissible and, in addition, by adding further scope for consolidation in circumstances where "*the claims in the arbitrations are not made under the same arbitration agreement or agreements, but the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.*"

    - The 2017 ICC Rules permitted the joinder of additional parties to proceedings, but only with the consent of all other parties and before the tribunal had been constituted. The 2021 ICC Rules now allow for joinder after confirmation or appointment of the tribunal in certain limited circumstances. In addition, it is now open to the tribunal to join a third party (upon an existing party's request) even where there is no universal consent to do so.

    - New Article 26 of the 2021 ICC Rules provides for the use of virtual hearings by allowing tribunals to order an in-person or virtual hearing. That said, the tribunal must take into account the views of the parties on this issue, as well as the relevant facts and circumstances of the case. It is anticipated that even in a post-pandemic landscape this provision will remain popular as a method to reduce the time and cost of arbitral proceedings, though no doubt there will remain some proceedings that are simply unsuitable for a virtual hearing.

    - In addition, the 2021 ICC Rules herald a shift away from paper filings by removing the presumption of paper filings and instead providing under Article 3(1) that all submissions, notifications and communications shall be sent electronically.

    - In an effort to avoid conflicts of interest between parties' representatives and the tribunal, Article 17 allows the tribunal to: (i) limit changes to party representation; (ii) decline a proposed change in counsel; or (iii) limit a new counsel's involvement in the proceedings, where such change (particularly where it is tactically motivated) has the potential to cause a conflict.

    - In a further effort to increase transparency and avoid potential conflicts of interest, the 2021 ICC Rules include a requirement that parties disclose certain third party funding agreements. The new Article 11(7) requires the parties to communicate promptly to the arbitral tribunal, the other parties and the ICC Secretariat the identity of "*any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration*".

- The 2021 ICC Rules give the ICC Court a discretion in "*exceptional circumstances*" to deviate from the provisions of the arbitration agreement which specify how the tribunal should be constituted, and instead appoint the entire tribunal itself, in circumstances where the application of those provisions would give rise to unequal treatment between the parties. While the aim of the provision is to avoid challenges to final awards based on procedural unfairness, a potential limitation on a party's autonomy to choose its own arbitrator is likely to be a cause of much debate.

- Other notable amendments include: (i) a positive duty on arbitrators to ensure effective case management; (ii) provision for a party to request an additional award for claims raised during the proceedings but left unaddressed by the original award; (iii) greater focus on settlement as a case management tool (including by reference to the ICC Mediation Rules); and (iv) the raising of the financial threshold for opt-out of expedited arbitrations from USD 2 million to USD 3 million.

PH*lit* comment:

The main purpose of the 2021 ICC Rules is to promote greater efficiency and transparency in ICC arbitrations. Many of the changes will reflect existing arbitral practice and procedure, particularly those relating to more pro-active case management, electronic filing and virtual hearings, which have become a necessity in the wake of the COVID-19 pandemic but will likely survive into a post-pandemic landscape.

Other changes are likely to prove more controversial, as the 2021 ICC Rules try to strike a balance between efficient procedure and preservation of flexibility and party autonomy. A number of the revisions, including the ability for the ICC Court to appoint the entire tribunal and for the tribunal to limit changes in party representation, do not appear to sit easily with party autonomy and will likely attract some debate as the new rules are put into practice. However, it remains to be seen whether these particular points, however controversial, will be utilised much by tribunals or otherwise have a real impact on the experience of the majority of ICC users.

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