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Return of The MAC? A Recent Ruling in the English Courts and Whether the COVID-19 Pandemic Could See More U.K. Transactions that Include U.S.-Style MAC Protections

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The onset of the COVID-19 pandemic caused a hive of activity amongst lawyers tasked with assessing whether existing contractual arrangements were capable, or at risk, of being terminated as a result of the impact of coronavirus.

That analysis focussed principally on whether existing force majeure or material adverse change ("MAC") provisions might be triggered as a result of the pandemic and, to a lesser extent, whether the English law doctrine of frustration might apply.

For obvious reasons, there has been very little guidance on how these provisions might be interpreted by the English courts in the context of COVID-19.

However, a recent case regarding the interpretation of a MAC provision has shed some light on the issue and has also served as a reminder as to the importance of accurate drafting.

This has raised the question as to whether the use of MAC provisions, which are prevalent in U.S. transactions, might become more common in the U.K. as market uncertainties deriving from the pandemic continue to develop. Even before the pandemic, we were seeing an increasing number of MAC provisions in U.K. deals involving U.S. buyers.

The Travelport *case*

The recent preliminary ruling in the English High Court in the case of *Travelport v WEX*[1] concerned the drafting of a MAC clause in relation to the $1.7 billion purchase of Optal Ltd and eNett International Ltd, providers of payment services in the travel industry. The purchaser, Wex Inc., sought to rely on a Material Adverse Effect provision in the share purchase agreement as a result of the impact of coronavirus on the target businesses.

This preliminary ruling on proceedings brought by the sellers for specific performance is the first of its kind in English courts to analyse whether the impact of COVID-19 could trigger a MAC provision under a share purchase agreement.

The drafting of the MAC clause was three-tiered following a structure that is common in US agreements. It included: (i) a general definition of "Material Adverse Effect"; (ii) carve-outs to such definition, including the existence of a pandemic; and (iii) the exclusions to these carve-outs—specifically, an exclusion to the pandemic carve-out applied if the targets were "disproportionately

affected" by the pandemic when compared to the industries in which they operate. This exception under the third limb would effectively mean that a pandemic would be classed as a Material Adverse Effect under the agreement if the "disproportion effect" test could be satisfied.

The purchaser had argued that it should not be required to complete the purchase, as the COVID-19 pandemic was particularly damaging to the targets and, therefore, triggered the Material Adverse Effect provision. The specific question for the court was whether the targets had been *disproportionately* affected within their specific industry, a much higher bar which also leaves the concept of "industry" open to interpretation. Travelport Ltd and others, the sellers of the targets, claimed that the targets operated in the travel payments industry, whereas the purchaser argued that it was the broader payments industry that applied. This was the key issue for the court to determine.

The outcome

Judge Cockerill supported the purchaser's interpretation and held that the targets' financial position should be measured against the "broader payments industry" in order to determine whether the impact of the pandemic on such entities had been disproportionate. This was because the court determined that the broader payments industry was the natural meaning of the term "industry" in this scenario. The court did not decide whether the impact on the targets was disproportionate in the context of the broader industry, as this will form part of the full trial.

Interestingly, the court also analysed the burden of proof and found that: (i) in relation to establishing the scope of a carve-out (the second limb of the Material Adverse Effect clause) the burden rested on the sellers; and (ii) in relation to the scope of the exceptions to such carve-out (the third limb of the Material Adverse Effect clause), the burden rested on the purchaser. In English law, the burden of proof test is on the balance of the probabilities.

Why does this matter?

The *Travelport* case reinforces the need for clear and precise drafting. The language used, especially in relation to specific events or examples, should be unambiguous to avoid, to the extent possible, being left open to interpretation. In this case, the term "industry" was used without any further clarification or detail and was, therefore, capable of being construed both narrowly and widely.

In addition, it is notable that, in reaching her decision, Judge Cockerill drew upon a U.S. authority from the Delaware court, given the "dearth of relevant English authority" on MAC provisions. In an uncertain market, query whether we will see more demand for U.S.-style MAC provisions by purchasers nervous about the economic outlook.

If we do see a return of the MAC in the U.K. market, a challenge for purchasers going forward will be the burden of proof in enforcing pandemic-related MAC provisions. A change in circumstances of a target due to coronavirus is likely foreseeable and may, in some cases, be predictable. In that context, the accuracy of the drafting of the particular circumstances in which a material change or effect will be deemed to have occurred will be paramount.

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[1] *Travelport Limited and others v WEX Inc.* [2020] EWHC 2670 (Comm)