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MAC / MAE CLAUSES | Travelport Limited and others v WEX Inc. – MAE and MAC in a Post Pandemic World

In this update we discuss the decision of the English High Court on a number of preliminary issues in the case of *Travelport Limited and others v WEX Inc*[1] which was handed down earlier this week.

The dispute concerns the issue of whether or not the occurrence of the global COVID-19 pandemic engaged the material adverse effect ("MAE") provisions in an SPA in the context of a US$1.7 billion transaction, and therefore whether the purchaser under the SPA is entitled to back out of the deal.

In advance of determining whether or not the purchaser was entitled to do so, it was necessary for the court to consider (as a preliminary issue) the basis against which the two target companies' financial condition should be measured, in order to assess whether or not they had suffered a MAE. In resolving this, the Court drew on academic commentary and case law from both the English and Delaware Courts and gave valuable guidance regarding the starting point for interpreting MAE and material adverse change ("MAC") provisions in the context of COVID-19.

Background

WEX Inc. (the "Defendant") entered into an SPA, pursuant to which it was to acquire the entire share capital of eNett International (Jersey) Limited ("eNett") and Optal Limited ("Optal") (both travel payment providers) for a total consideration of approximately US$1.7 billion from the selling shareholders (the "Claimants").

The SPA was entered into on 24 January 2020 and the parties then proceeded towards closing of the transactions contemplated by the SPA.

Section 8.2 of the SPA set out the "Conditions to Purchaser's Obligation to Close". Section 8.2(d) in particular stated:

"Since the date of this Agreement there shall not have been any Material Adverse Effect and no event, change, development, state of facts or effect shall have occurred that would reasonably be expected to have a Material Adverse Effect".

The term "Material Adverse Effect" was defined in the SPA in a relatively complicated structure, consisting of: (i) the definition of MAE; (ii) the "carve-outs"; and (iii) the exceptions to the "carve-outs" – a structure which is commonly used in US agreements. The effect of the clause was that the Defendant could assert that eNett or Optal had been subject to a MAE if conditions resulting from the pandemic cause a disproportionate effect on either of the eNett or Optal Groups, each taken as a whole, as compared to other participants in the *industries* in which either of eNett or Optal (or their respective subsidiaries) operate.

On 4 May 2020, the Defendant sent a letter to the Claimants to give notice that there had been a MAE within the definition of the SPA due to *"conditions resulting from the SARS-CoV-2 pandemic"* – and as a result the condition to closing in Section 8.2(d) of the SPA had not been met. Consequently the Defendant was not obliged to effect the transaction as contemplated by the SPA.

The Claimants denied that there had been a MAE and issued proceedings against the Defendant, seeking declarations that:

1. No MAE had occurred within the meaning of the SPA;
2. Nothing had occurred which negatives the condition provided for in Section 8.2(d) of the SPA.

The Claimants' position was that eNett's and Optal's financial condition should be measured against the travel payment industry, whereas the Defendant's position was that it should be measured against the broader payments market.

This was a fundamental issue because the answer to the question of whether or not the pandemic had caused eNett and Optal to suffer disproportionately (as compared against its industry competitors) was likely to be very different depending on whether one measured their performance against the (narrow) travel payment industry, or the (far broader) payments industry.

The preliminary issues hearing took place last month before Mrs Justice Cockerill and judgment was handed down earlier this week.

Judgment

In her judgment, Cockerill J. held that the court should consider eNett and Optal's financial condition against the broader payments market when assessing whether eNett and Optal had been subject to a MAE, and held that there was no "travel payments industry" against which to assess the impact of the pandemic on the companies.

In reaching this decision, Cockerill J. considered how the MAE clause should be interpreted and the cases where MAE and MAC clauses had been considered. In particular, the judge noted that the leading English authority on this point was that of *Grupo Hotelero Urvasco v Carey Value Added*[2] –

where this firm acted for the Defendant.

However, due to the fact that "*there is a dearth of relevant English authority*" on MAE/MAC clauses, the judge also considered in detail the more developed body of US decisions (particularly from the Delaware Court) concerning MAE/MAC clauses. In that regard, Cockerill J. noted that:

"whilst they were not binding or formally persuasive…to ignore the thinking of the leading forum for the consideration of these clauses…would plainly be imprudent – as well as discourteous to that court".

In particular, the US decisions and authorities cited by the judge highlighted the importance of establishing where risk is intended to sit in the context of an M&A transaction, and the judge referred extensively to the Delaware Court's decision in *Akorn Inc. v Fresenius Kabi AG*[3], where a MAC clause was relied upon in the context of the purchase of a US pharmaceuticals company.

Cockerill J. went on to consider the "*purpose of the transaction*", and the issue of whether the Defendant had contracted to purchase a travel business or a payments business. Ultimately, the judge held that it was an "*oversimplification*" to characterise the deal as "*just a purchase of a travel payments business*" and stated that:

"the objective purpose of the transaction was that this was not a deal with a single purpose…the present, predominant and known value was in travel; but the acquisition carried with it future value in other markets".

Cockerill J. also highlighted the fact that in the SPA the parties had chosen to *"peg disproportionately to a comparison with 'industries'"* and that the Claimants had failed to establish that there was a specific "travel payments industry", against which the performance of eNett and Optal could be assessed. The judge noted that the parties had chosen specifically to use the word "*industries*" in the MAE clause, whereas they could have used a narrower term, such as "*markets*", "*sectors*" or "*competitors*". By contrast, the judge held, "*industry is a broader word; in its natural and ordinary meaning one would see it as capturing a group of participants in a broad sphere of economic activity*".

Consequently, when determining whether or not the Defendant was entitled to rely on the MAE clause, it was necessary to assess eNett's and Optal's condition against the broader payments industry.

Comment

This decision highlights the difficulties and complexities which often arise when parties seek to rely on MAE or MAC clauses as a means of discharging themselves from their contractual obligations.

In particular, where a party is seeking to assert that another party has been the subject of a MAE or MAC, it is important to determine the reference point against which that effect/change should be measured. In the present case (and as is common in SPAs generally), the MAE clause did not stipulate how the MAE should be measured (other than be reference to competitors within the "*industry*"). This resulted in it being necessary to determine (as a preliminary issue) the true meaning of the term "*industry*", in advance of the court ultimately determining whether or not the Defendant could rely on the MAE clause.

More generally, this judgment provides useful guidance on how MAE/MAC clauses will be interpreted by the court. The judge cited various academic texts to highlight the fact that the general rationale for risk allocation within MAE clauses is that the seller should not have to bear general and possibly undiversifiable risk that it cannot control and the buyer would likely be subject to no matter its investment. This is frequently done by allocating the general risk of a MAE/MAC to the Seller and then reallocating specific risks to the buyer by means of exceptions. As a consequence, and as demonstrated in this judgment, a textual interpretation of the relevant exceptions will ultimately be a key factor in determining which risks are allocated to which parties.

This case also puts into sharp focus the importance that can attach to particular terms used in contracts, and the fact that the parties used the broader term "*industry*" in the SPA (rather than (for example) the narrower term *"market"*) has had a significant bearing on the interpretation of the MAE clause. Notwithstanding this, the judge accepted (in relation to the use of the term "*industry*") that "*in a sense this helps no-one*", without the specific industries contemplated by the clause being expressly identified in the contract.

Although practically it will not possible to check that every conceivable commercial eventuality is addressed in the contract, this case is a further reminder that when negotiating contracts parties should carefully consider the words used and test their possible competing meanings and to the extent there is any ambiguity, consider whether and how that can be addressed within the contract, to seek to avoid the uncertainties inherent in a dispute of this nature.

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[1] [2020] EWHC 2670 (Comm)

[2] [2013] EWHC 1039 (Comm)

[3] No. 2018-0300-JTL, 2018 WL 4719347 (Del. Ch. October 1, 2018)