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Pandemic-Era Practical Considerations When Invoking and Interpreting Material Adverse Effect and Change Clauses

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Material adverse event (MAE) and change (MAC) clauses can play an important role in commercial contracts and can be used to apportion risk between the parties. Such clauses may become relevant in circumstances in which it is obvious that a party's financial condition or business has deteriorated, and there are serious doubts as to whether it will recover. However, a party's entitlement to avail itself of the protection afforded by such clauses can be hard to gauge at any one point in time. States of affairs brought about by the SARS-CoV-2 pandemic may involve a particularly complex factual assessment. Indeed, relying on an MAE or MAC provision in order to be relieved from performing contractual obligations, or to exit a contractual relationship, is often a risky and litigious business. In this article, we highlight a few of the most

salient practical considerations that a party may wish to consider prior to invoking an MAE or MAC provision. We also revisit some of the main English case law authorities interpreting such provisions and consider the implications for pandemic-related disputes.

Attorneys in the United States will find awareness of the English law principles on this topic to be of benefit (in addition to United States authorities) when negotiating MAE or MAC clauses, in particular in circumstances where a United States counterparty is contemplating agreeing to, or has accepted, an English governing law and/or jurisdiction clause—which, for example, is not uncommon in cross-border acquisition agreements.

What Should Parties Be Aware of Prior to Engaging MAE or MAC Clauses?

The concept of a material adverse effect or change under English law is not a term of art that has a specific, generally applied meaning. While there may be a common thread running through MAE or MAC provisions, their terms are subject to many variations, and they can appear in diverse contexts. The conceptual framework for analysing the MAE or MAC clause will be different if, for example, the agreement is a finance contract[1] rather than an acquisition agreement.[2] MAE and MAC clauses are

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[1] An important example is the use of material adverse change in loan agreements, which relieves the lender of its continuing obligations in the event of a significant deterioration of the financial position of the borrower. There may be several or various provisions that fit together in such loan agreements. For instance, it is commonly obligatory that a representation as to material adverse change is repeated by the borrower at the time of each drawdown. In addition, a material adverse event or change may be stipulated as an event of default, entitling the lender to accelerate the loan repayment. Sometimes in loan agreements what constitutes a material adverse event or change under the representations and warranties may be expressed in wider terms than under the event of default (or vice versa).

[2] In the context of acquisitions, contractual provisions are often included that allow the purchaser to walk away from the deal prior to closing, upon the occurrence of a material adverse effect or change affecting the target. In such acquisition agreements, the material adverse effect or change provision could appear in the form of a condition to closing, a representation or a warranty.

also sometimes used in long-term relational contracts, such as partnership and joint venture agreements, where additional principles of law and a developing body of jurisprudence may come into play. It is therefore sensible to approach the limited English law authorities that exist (as discussed further below), as well any relevant international authorities, with fact-sensitive caution.

Construing and applying an MAE or MAC clause (whether general, specific, complex or short) to factual circumstances can be a formidably difficult exercise in which there is room for reasonable disagreement on a variety of matters. This includes, *inter alia*, debate as to:

- The proper scope and interpretation of the subject matter of the clause,[3] particularly if the clause refers to commonly used (albeit nebulous) concepts such as an adverse effect or change on the "financial condition," "ordinary business," "operations" or "prospects" of the borrower, target, partnership, venture or insured etc.[4]

- Questions of causation and remoteness. If there is an express exception to the MAE or MAC provision for effects or changes brought about by "pandemics,"

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[3] See further discussion in Rafal Zakrzewski, *Material Adverse Change and Material Adverse Effect Provisions: Construction and Application*, Law and Financial Markets Review, 344 ¶ 346 (2011) ("a change must be a change in something, and an effect must be an effect on something. This something is enumerated in the relevant provision and delimits the scope of its operation").

[4] In one of the leading authorities, *Grupo Hotelero Urvasco SA v. Carey Value Added SL (formerly Losan Hotels World Value Added I SL)* [2013] EWHC 1039 (Comm), Blair J. found that "financial condition" established from interim financial information and/or management accounts. The assessment of the borrower's financial condition should normally begin with its financial information at relevant times, and a lender seeking to demonstrate a material adverse change should show an adverse change over the period in question by reference to that information. Notwithstanding this, the enquiry is not necessarily limited to the financial information if there is other compelling evidence. However, in an earlier authority, *Re TR Technology Investment Trust plc* (1988) 4 BCC 244, ¶ 265, Hoffmann J. had doubted whether a MAC in the financial condition of a borrower, which, per the contract, was to be determined by reference to financial statements, could have occurred in circumstances where the company was newly incorporated and no such statements yet existed.

where does one draw the line between causes that relate to SARS-CoV-2 and those that do not? The pandemic currently affects almost every element of our everyday lives. There are an infinite number of ways in which the pandemic could impact a business, directly or indirectly, depending on the industry in question. Should effects or changes attributable to travel restrictions, social distancing measures or lockdowns, changes in markets and consumer choices, or even subsequent recessions be within or without express "pandemic" exceptions? [5]

- The threshold for the "materiality" of the adverse effect or change, which unless defined by reference to objectively verifiable standards in the contract itself (for example, a fixed monetary amount), is subjective and capable of being imbued with different standards. Various pronouncements of a "materiality" threshold have been articulated by the English (and other international) courts over the years. As part of the enquiry, the English court may be expected to look at the consequences of invoking an MAE or MAC provision under the

[5] Questions of this nature have arisen in ongoing parallel proceedings before the English commercial court brought by two groups of selling shareholders, eNett and Optal, against the purchaser of a B2B payments business, WEX, in the matter of Claim Number CL-2020-000287 and CL-2020-000288. At the time of writing, a judgment addressing as preliminary issues a number of questions in relation to the proper construction of the particular MAE clause has been issued by Cockerill J. at first instance in *Travelport & Ors v. WEX Inc* [2020] EWHC 2670 (Comm). Among other issues, the judgment addresses the burden of proof as to establishing certain "carve-outs" contained in the contractual definition of MAE relating to various types of MAEs that are for the purchaser's risk (including a pandemic carve-out, and a separate carve-out for changes in regulatory or political conditions or law), as well as the burden of proof in relation to an exception to the pandemic carve-out (the "carve-out exception"), and the extent to which that pandemic carve-out exception can apply where "effects" that have arisen could be said to simultaneously fall within the carve-out for changes in regulatory or political conditions or law. On this point, Cockerill J. found that, as a matter of language, the carve-out exception does not apply to any such change in cases where the events, changes, developments or effects also fall within the carve-out for changes in regulatory or political conditions or law. In other words, the contract does not permit the purchaser WEX to cherry-pick among various overlapping matters in connection with which an event that may be said to have arisen.

contract, particularly the seriousness of those consequences, in order to decide whether or not the materiality threshold has been met on the facts.[6]

- The inherent difficulty and ambiguity in applying an MAE or MAC clause over time, and of evidencing the likely durational impact of relevant effects or changes, particularly if the clause refers to effects or changes that are "reasonably likely to occur" in the future.[7] Such clauses are difficult to operate in the present context precisely because the parties and, ultimately, the court must grapple with an assessment of unknown and unfolding pandemic-related events and changes.[8]

In addition to issues of construction and disputes of fact, there are various potential procedural pitfalls that could arise. Parties are free to agree (or not to agree) on the inclusion of an MAE or MAC provision and to stipulate on what terms. This may include laying down certain conditions precedent or subsequent to the MAE or MAC clause. The contract could provide that the MAE/MAC must be notified to certain parties within a certain time period. Notification may be required by way of a formal document setting out prescribed information concerning the nature of the MAE/MAC and may need to be addressed to particular persons at specific addresses and/or issued using a contractually stipulated mode of communication (post, facsimile, email, etc.). English contract law is traditionally strict when it comes to interpreting such formal notice requirements. However, pandemic-related considerations may make it harder, or even impossible, for those procedures to be followed to the letter, giving rise to uncertainty in the validity of the notice or forcing parties to rely on the implication of terms. Parties should carefully consider and follow to the letter (as far as practicable), any express contractual notice requirements. Failure to follow the contract may lead to invalid reliance on the MAE or MAC clause, or the expiration of a window of opportunity to invoke the clause.

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[6] See below discussion of the materiality threshold below. *See also* Decura IM Investments LLP v. UBS AG London Branch [2015] EWHC 171 (Comm).

[7] For further discussion, see Zakrzewski, *supra* note 3 ¶ 347.

[8] See further discussion below. *See also* Grupo Hotelero Urvasco SA v. Carey Value Added SL (formerly Losan Hotels World Value Added I SL) [2013] EWHC 1039 (Comm); Thomas Witter Ltd v. TBP Industries Ltd [1996] 2 All E.R. 573, ¶ 605.

Finally, a flagrantly wrongful or baseless invocation of an MAE or MAC clause in order to excuse one party from performing the contract could, in theory (if there is strong evidence), be construed as a "Material Breach" (assuming the contract contains such concept), or even a renunciation or repudiation of the contract, triggering certain consequences at English common law that may affect how damages are calculated. There could also be reputational consequences in the event of a wrongful invocation of the clause.

A Brief Survey of the Pre-Pandemic English Law Authorities and Main Principles of Law

There is not a huge amount of recent English case law interpreting MAE or MAC provisions in contracts. Whether or not it will be difficult for a party to establish a material adverse effect or change in the context of the SARS-CoV-2 pandemic remains to be seen and tested in light of particular clauses and facts, with at least one proceeding concerning a bespoke acquisition agreement currently before the English courts.[9]

The English Courts Will Give Effect to What the Parties Have Stated in Their Contract

The approach of the English courts in all cases is to give effect to what the parties have stipulated in their contract, applying the established principles for the construction or interpretation of contracts. Those principles were recently summarized by Popplewell J. in *Lukoil Asia Pacific (Pte) Ltd v. Ocean Tankers (Pte) Ltd (The "Ocean Neptune")* and include: (i) the objective nature of the assessment; (ii) the factual matrix or available background; (iii) the "meaning of the language" used by the parties; (iv) the need to have regard to "the contract as a whole;" (v) the significance of the "nature, formality and quality of drafting of the contract;" (vi) what is to be done when there are two possible meanings of the disputed clause; (vii) the unitary and iterative nature

[9] *See* Claim Number CL-2020-000287 and CL-2020-000288; *see also* Travelport & Ors v. WEX Inc [2020] EWHC 2670 (Comm) (discussed at fn. 5 above).

of the process; and (viii) striking the balance between the various, potentially conflicting principles.[10]

By way of illustration, in *Ipsos SA v. Dentsu Aegis Network Ltd*, a strike out application concerning the purported right to terminate a share purchase agreement for breach of a condition that no MAE had occurred between signing and closing, Blair J. approached the construction of the MAE definition by asking, *inter alia*, whether a proposed construction was in accordance with commercial sense, and whether the construction would be productive of commercial uncertainty in the relevant market.[11] MAE was defined in the relevant contract as "an act or omission, or the occurrence of a fact, matter, event or circumstance, affecting the target group of companies giving rise to, or which is likely to give rise to, a material adverse effect on the business, operations, assets, liabilities, financial condition or results of operations of the target group of companies taken as a whole."[12] The purchaser relied on the fact that the seller had failed to disclose certain financial information which had become available to it between signing and completion, and which indicated that the target's sales and gross revenues were materially behind the forecasts issued prior to signing.

Blair J., dismissing the strike out application in part, found that the *actual* financial performance of the target could in theory constitute an MAE, which could raise difficult questions of scope that would need to be determined at trial against the full factual matrix. However, Blair J. rejected the purchaser's proposition that the mere act of revising the financial forecasts downwards in the period between signing and closing and/or the mere fact that information was received suggesting that a downward forecast would be necessary constituted an "act or omission, or the occurrence of a fact, matter, event or circumstance" within the definition of MAE (which claim, if

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[10] Lukoil Asia Pacific (Pte) Ltd v. Ocean Tankers (Pte) Ltd (The "Ocean Neptune") [2018] EWHC 163 (Comm). Regarding the correct approach to contractual construction, *see also* Bank of Credit and Commerce International SA (in compulsory liquidation) v. (1) Munawar Ali (2) Sultana Runi Khan and others (No. 1) [2001] UKHL 8, ¶ [39]; Arnold v. Britton and others [2015] UKSC 36 ¶ [17]; Wood v. Capita Insurance Services Ltd [2017] AC 1173 ¶ [11]; Financial Conduct Authority v. Arch Insurance (UK) Limited and Others [2020] EWHC 2448 (Comm) at ¶ [64].

[11] Ipsos SA v. Dentsu Aegis Network Ltd (formerly Aegis Group Plc) [2015] EWHC 1726 (Comm).

[12] *Id.*

successful would have obviated the need for a full trial). Blair J. clarified that "[i]t is obviously true to say that things may follow from the revision of the forecast, but this has to do with what underlies the revision, rather than the fact of the revision itself, which is Ipsos's case under this head."[13] In this regard, Blair J was heavily persuaded by the fact that under the contract the seller gave no warranty with respect to the accuracy of any financial forecasts, and accepted that the alternative construction of MAE in this case would effectively treat the financial statements as warranted (which, as well as contrary to commercial sense, would be "productive of uncertainty, which is highly undesirable" in the relevant market).[14]

Assessment of Materiality

One of the leading authorities on the topic of MAC clauses is *Grupo Hotelero Urvasco SA v. Carey Value Added SL*, a first instance decision.[15] Blair J. held that Carey (a Spanish fund that invests in hotels) had been justified in withholding further funds under a loan agreement entered into with Grupo (a Spanish hotel company) for the development of a major hotel on London's Strand, based on circumstances that arose from the bursting of the Spanish property bubble in 2008. Grupo's €100 million claim for loss of profits and loss on the construction of the development failed, and Carey's counterclaim for repayment of the sums advanced succeeded. Carey relied on multiple events of default, among them the occurrence of a MAC in the financial condition of relevant Grupo companies.

Blair J. found that to be material within the broader assessment of materiality, the adverse change must be material in a substantial way to the borrower's ability to perform the transaction in question:

> Unless the adverse change in its financial condition significantly affects the borrower's ability to perform its obligations, and in particular its ability to repay the loan, it is not a material change. I would emphasise the word "significant." Unless the clause is read in this way, a lender may be in a position to suspend the lending

[13] *Ibid.*, ¶ 55.

[14] *Ibid.*, ¶¶ 56–57.

[15] Grupo Hotelero Urvasco SA v. Carey Value Added SL (formerly Losan Hotels World Value Added I SL) [2013] EWHC 1039 (Comm).

> and/or call a default at a time when the borrower's financial condition does not fully justify it, thereby propelling it towards insolvency.[16]

With regard to the temporal nature of the MAC, Blair J. confirmed that: "In order to be material, any change must not merely be temporary." This is consistent with the earlier case *Thomas Witter Ltd v. TBP Industries Ltd*, which concerned a warranty in an acquisition agreement.[17] In circumstances of the pandemic, questions concerning the necessary temporal dimension of any adverse effect or change may be hotly debated. At the time of writing, there is speculation regarding how severe the economic downturn will be and how long the impact on affected industry sectors will last, as well as if and how long it will take some businesses to recover.[18]

The meaning of materiality was revisited again in 2015 in *Decura IM Investments LLP v. UBS AG London Branch*, in the context of an outsourcing agreement, pursuant to which UBS had agreed to acquire from Decura on exclusive terms certain financial products and services necessary for its investment banking business.[19] Decura sought (unsuccessfully) to terminate the arrangement on the basis of a contractual termination event triggered by a cessation of UBS's business that had a material adverse effect on its ability to market the products and services under the agreement. One consequence of triggering the clause was a substantial payment from UBS to Decura under a separate

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[16] *Id.*

[17] Thomas Witter Ltd v. TBP Industries Ltd [1996] 2 All E.R. 573, ¶ 605.

[18] Based on the pleadings in the ongoing English proceedings between eNett/Optal and WEX (see fn. 5 above), there are disputes of both construction and fact concerning the temporal dimension of the clause. While the relevant clause contains no express wording regarding the duration of the MAEs in question, claimants eNett and Optal have argued that the "effects" on the business, condition and results of operations of the target resulting, arising from or in connection with the SARS-CoV-2 pandemic are *likely* to be of *insufficient duration* to be *material* to a reasonable acquirer intending to own the acquired business on a *long-term* basis, and seek to characterize such "effects" on the facts as *transient*. The attempt by the claimants to import into the MAE clause these further principles as a matter of interpretation, and as well as the characterisation of admitted "effects" on the business of the target as transient are all refuted by the defendant, WEX, and fall to be determined in due course as part of the proceedings.

[19] Decura IM Investments LLP v. UBS AG London Branch [2015] EWHC 171 (Comm).

facility agreement. Mr. Justice Burton explained that there is a spectrum of materiality, and that the court will weigh the objective meaning of materiality within the concept of material adverse effect with reference to "the context of the factual matrix of the contract." On this basis, Mr. Justice Burton held that he was entitled to take into account the consequences of the triggering of the notice in that case, which related to termination and compulsory buyout thereafter. He found the epithets "substantial or significant" to be the proper interpretation of material on the facts of that case. Thus, the English court may be expected to look at the consequences of invoking a material adverse effect or change provision under the contract in order to gauge whether or not the materiality threshold has been met on the facts.

For completeness, it is noted that a different standard was espoused by the United Kingdom Takeover Panel hearing an appeal following the (unsuccessfully) attempted withdrawal of a party from an acquisition agreement in the wake of the 9/11 terrorist attacks. In that case, the Panel stated that the test of materiality "requires an adverse change of very considerable significance striking at the heart of the purpose of the transaction in question, analogous. . . to something that would justify frustration of a legal contract."[20]

The very high threshold espoused by the Panel goes further than any of the English court authorities, and there are some difficulties with equating the standard for MAE/MAC clauses with the contract law doctrine of frustration. There have been a number of judicial pronouncements regarding the doctrine of frustration, however, the following statement by Lord Simon in *National Carriers Ltd v. Panalpina (Northern) Ltd* succinctly captures its essence:

> Frustration of a contract takes place where there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to

[20] *See The Takeover Panel Offer By WPP Group Plc ("WPP") For Tempus Group Plc ("Tempus") Panel Statement 2001/15*, ¶ 16 (Nov. 6, 2001).

> hold them to the literal sense of its stipulations in the new circumstances: in such case, the law declares both parties to be discharged from further performance.[21]

The purpose of frustration is thus to deal with supervening events which alter the nature of performance of contractual obligations, and which are outside the reasonable contemplation of the parties at the time the contract was concluded (for which there is accordingly no provision in the contract itself). Frustration at common law is a tool within the equitable discretionary jurisdiction of the court, based on considerations of justice, and is generally considered to apply only in narrow confines. MAE and MAC clauses, on the other hand, are better viewed as mechanisms at the disposal of freely contracting parties that may be adopted in order to *apportion risk* in respect of effects or changes that are sufficiently material under the contract (which threshold of materiality the parties are free to define, or to leave silent for the court to examine within the factual matrix of the contract). To qualify under the clause, the change or effect in question need not alter the nature of the outstanding rights and obligations under the contract and need not be so serious as to make performance unjust. Indeed, where an express provision has been made in the contract itself for the event which has actually occurred, then the contract cannot be treated as frustrated at common law, i.e. the framing of a MAC, MAE or (similarly) a force majeure provision under a contract can supplant the doctrine of frustration. Additionally, absent express wording, it is also arguably irrelevant to an MAE or MAC clause inquiry whether or not the change or effect in question was within the reasonable contemplation of the parties at the date of execution (which is key to a frustration enquiry).[22]

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[21] National Carriers Ltd v. Panalpina (Northern) Ltd [1981] 1 AC 675. For the most recent comprehensive statement of the English contract law doctrine of frustration, see *Canary Wharf (BP4) T1 Ltd & Ors v. European Medicines Agency* [2019] EWHC 335 (Ch) ¶ 29, where Mr Justice Marcus Smith explained that there has to be a supervening event that causes, as it were, a break in identity between the contract, as provided for and contemplated at its execution, and its performance in the new circumstances (which high threshold he termed the "radically different" test). Mr Justice Marcus Smith clarified that it is also a requirement of the doctrine that its application cannot safely be performed without the consequences of the decision, one way or the other, being measured against the "demands of justice."

[22] See further discussion of the significance of knowledge of pre-existing circumstances below.

Despite the above debate, in some cases the assessment of materiality will be obvious and straightforward. In *BNP Paribas SA & Ors v. Yukos Oil Company*, for example, a case concerning an application made by a syndicate of banks against the Russian oil company, Yukos, in relation to a claim under a facility agreement worth almost half a billion United States dollars, the court had no difficulty in holding that events had had a material adverse effect on Yukos' ability to repay a loan in circumstances where (i) Yukos had suffered a tax liability worth $3.3 billion and (ii) its assets had been frozen by order of a court.[23]

Knowledge of Pre-Existing Circumstances

A point of contention between the parties in *Grupo* pertained to the effect of pre-existing circumstances or, in other words, the knowledge/state of mind of the lender at the time the agreement was entered into. In this regard, Blair J. was referred to the Delaware Chancery Court case of *In re IBP Inc. v. Tyson Foods Inc*, where it was stated, in the context of a provision in an acquisition agreement, that a MAC provision "is best read as a backstop protecting the acquirer from the occurrence of *unknown* events that substantially threaten the overall earnings potential of the target in a durationally significant manner."[24] On this point, Blair J. appeared to agree (at least superficially) with the United States authority, stating the principle of law that "a lender cannot trigger such a clause on the basis of circumstances of which it was aware at the time of the agreement."[25]

However, it is worth pausing on how Blair applied the facts in *Grupo* to this aspect of the legal analysis, which may bear relevance for parties affected by an ever-evolving SARS-CoV-2 pandemic situation. In *Grupo*, the court accepted that Carey was aware of the existence of a property crisis in Spain, and that Grupo was one of the main property developers in Spain, at the time it entered into the loan agreement in December 2007. It was also acknowledged that Grupo's fragility must have been "obvious" to Carey.[26] However, Blair J. found that there was a limit as to how far Grupo could rely on this point—for, if Carey knew that Grupo was in a hopeless state when

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[23] BNP Paribas SA & Ors v. Yukos Oil Company [2005] EWHC 1321 (Ch).

[24] IBP Inc v. Tyson Foods Inc 789 A2d 14, 65 (Del. Ch. 2001) (emphasis added).

[25] *Grupo*, *supra* note 8 (citing P. Rawlings, *Avoiding the Obligation to Lend*, 2012 J. BUS. L. 89 (2012)).

[26] *Id.*

it entered into the agreement, why would Carey do the deal? In this regard, Blair J. found as follows:

> There is no evidence that [the parties] appreciated the extent to which the property crisis would deepen. There is a suggestion . . . at this time the general consensus was that the market was experiencing a slow depreciation, and that demand would recover albeit slowly in subsequent years. Perhaps both of them were expecting (or hoping for) a soft landing. Unfortunately, the evidence in this case demonstrates that there was to be no soft landing. It was only in 2008 that the full force of the bursting of the property bubble on GU's business became apparent. I am satisfied that neither [party] could have anticipated this, and in my opinion Carey did not assume the risk of it happening.[27]

Blair ultimately concluded that Carey had proved a material adverse change in the financial condition of Grupo in the period between December 2007 and June 2008.

Therefore, the fact that parties may be on notice of facts ultimately giving rise to a material adverse effect or change may be insufficient to nullify reliance on an MAE or MAC provision (subject, of course, to express wording regarding foreseeability); although there is no consensus among commentators on this point at present. This may be of particular relevance to parties which concluded contracts early on in the SARS-CoV-2 pandemic, before its virulence, as well as before the social and economic repercussions began to unfold and be understood.

Indeed, in the earlier case of *Levison v. Farin*, the English court positively affirmed, in the context of an acquisition agreement, that the buyers were able to rely on a MAC clause pursuant to which the sellers warranted that "there shall have been no material adverse change in the overall net asset value of the [target] company," despite the fact that the buyers had been informed by the sellers in advance of the circumstances that had caused a fall in the target's net asset value.[28] Gibson J. simply stated that the relevant principle "deals with a materially adverse change; not with cause of such changes."[29] On this interpretation (in contrast to the Delaware decision in *Tyson Foods*), English law MAE and MAC clauses are not dealing with "unforeseen" or

[27] *Id.*

[28] Levison v. Farin [1978] 2 All ER 1149.

[29] *Id.*

"unforeseeable" changes at all, but simply with what the clause says on its label: material adverse effects or changes.

Final Note on Drafting MAE and MAC Clauses

It is not within the scope of this article to provide detailed practical advice for practitioners and parties with regard to the drafting of MAE and MAC clauses. If possible, it is usually worth engaging a litigation specialist to examine the proposed definition of an MAE or MAC clause that is to be governed by English law. Employing a litigation specialist will be particularly beneficial if the MAE or MAC is based on a boilerplate containing complex carve-outs and carve-out exceptions (as is common in the United States and increasingly in the United Kingdom). Moreover, a litigation specialist will be most helpful due to the potential contractual consequences, fact sensitivity, and tendency of such provisions to provide fertile ground for disputes. Some of the key areas to focus on include:

- How the subject matter of the MAE or MAC is defined, including any commonly adopted expressions such as "financial condition," etc., for which case law guidance exists.
- The materiality threshold—for example, could "materiality" usefully be defined by reference to objective or empirical factors, which would make the assessment less subjective? Or is it more desirable to leave the materiality threshold flexible and open to a spectrum of interpretations within the factual matrix of the contract?
- The clear treatment of any temporal elements of the clause, especially if the clause refers to MAEs or MACs that may occur in the future (which concept affords flexibility, but also some uncertainty of interpretation).
- The scope and interaction of any caveats to the MAE or MAC provision. In particular, whether or not the parties intend for certain possibilities that are within their reasonable contemplation at the time the contract is concluded to be specifically captured or excluded by the clause, and, if so, to what extent and under what conditions. If it is proposed to exclude from the scope of an MAE or MAC provision effects or changes brought about by pandemics generally, or the SARS-CoV-2 pandemic specifically, should there be any express limit or exception to this? As we have all experienced, the consequences of the SARS-CoV-2 pandemic have been heterogeneous and far reaching, prompting complex changes in social, commercial, political and legal affairs—

> the parties thus may wish to carefully allocate risk associated with pandemic-related effects or changes, lest a pandemic caveat unexpectedly be interpreted to denude the entire MAE or MAC provision of meaningful coverage.

The latter could be pivotal in the context of contracts entered into while the pandemic is ongoing. In reality, however, MAE and MAC clauses are often the fruit of commercial compromise, with elements added and subtracted by both sides up until the last minute. Nonetheless, if the overall practical workability of the clause is left uncertain, this can drastically increase the length and cost of litigation, leaving numerous contractual and factual arguments up for grabs and much that is malleable in the hands of the court as ultimate arbiter.

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