Travelport v WEX [2020] EWHC 2670

1. This preliminary issues trial involved the construction of a Material Adverse Effect (MAE) clause in an SPA where the MAE was the Covid-19 pandemic. WEX had agreed to purchase 100% of the shares in eNett and Optal ("the Sellers") for $1.7 billion. Optal provides VANs – virtual account numbers - through which businesses pay each other. Its principal client is eNett, accounting for 98% of its revenue, which in turn derives the vast majority of its profits from customers who operate in the travel industry. Together they formed the Summit business being purchased.

2. One of the conditions for closing the transaction was that there had not been an MAE. The preliminary issues focused particularly on the MAE clause. The structure of that clause was as follows:

    a. There was a definition of an MAE;
    b. There was a 'Carve-Out' for events over which the Sellers had no control and would therefore not be an MAE. One such risk was pandemics;
    c. Finally, and crucially for this case, there was a 'Carve-Out Exception' applicable where the Carve-Out event had a disproportionate effect on the Summit businesses as compared to other participants in their industries. If there had been such a disproportionate effect, an MAE *had* occurred.

3. The construction of the Carve-Out Exception depended on the 'industry' in which Summit was operating. The Sellers' position was that the 'industry' in which Summit operated was the Travel Payments Industry (TPI) (which was likely to have been uniquely affected by COVID-19) whereas the Defendant claimed it should be measured against the wider B2B payments industry (which was not likely to have been uniquely affected). Accordingly, if the Sellers were right, Summit had been no more affected than other TPI businesses by the pandemic and the Carve-Out Exception did not apply. If WEX were right, Summit was more affected than other B2B payment companies and the Carve-Out Exception did apply.

4. The crucial question of construction was what *'industries'* was referring to in the Carve-Out Exception. WEX placed heavy emphasis on the wording of the clause, whereas the Sellers' argument rested heavily on the commercial purpose.

5. On the actual wording, two points arise from the parties' use of the word 'industries' as the comparator in the Carve-Out Exception. First, it was industries and not 'markets' or 'sectors' or an identified pool. Industry is a broader word, capturing a group of participants in a broad sphere of commercial activity. Further, while the word is also used casually or informally such that most people in the relevant markets would understand the term 'travel payments industry', that would not be the same as saying 'industries' here would be understood as meaning TPI.

6. Second, the plural rather than the singular was used. The Sellers argued that this suggested that the two aspects of Summit's business, the travel payments and non-travel payments business, were in different industries. If the word was wide enough

to cover both then it would be one, single, industry. However, Cockerill J ultimately concluded that industries could equally reflect that two different companies were in focus and to head off arguments that they were not just part of the B2B payments industry, but the travel or healthcare industry (for instance). Ultimately: '*Over-precautionary drafting is hardly unknown in heavily lawyered documents. Certainly, I do not find it a roadblock or a significant counterbalance'* to the natural breadth of the term.

7. Nor, in the end, was the commercial purpose of any particular help to the Sellers. Cockerill J provided a review of the law on MAE clauses, in particular the English decision of *Grupo Hotelero Urvasco v Carey Value Added* [2013] EWHC 1039 (Comm) (Blair J). However, noting the dearth of English authorities, Cockerill J reviewed some of the US commentary and case law, in particular *Akorn Inc. v Fresenius Kabi AG*, No. 2018-0300-JTL, 2018 WL 4719347 (Del. Ch. October 1, 2018). She concluded that that case provided no direct answer to the '*gap between industry wide and firm specific risks'*.

8. Cockerill J therefore asked what the objective purpose of the transaction was and concluded it was neither solely access to the travel payments business nor simply to expand its B2B payments offering. It fell somewhere between the two parties' submissions. The purpose of the transaction was to gain access to the Summit travel business but also to unlock potential synergies and future value in other markets. Accordingly, in the commercial context there was no specific TPI in established or day to day use which WEX were buying into. It is a dynamic market and the term 'travel payments industry' varies contextually. The term was at most a natural shorthand but, bearing in mind the breadth of types of participants in the travel payments market, there was no industry as the sellers sought to define it. The natural reading of the Carve-Out Exception in the context was that industries meant the B2B payments industry, which was readily definable.

9. Accordingly, WEX had the better of the construction arguments. It was the natural interpretation of the words, and a hypothetical third party would have considered that there was no TPI as opposed to the B2B payments industry. Accordingly, Summit should be compared to the B2B payments market.