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## Brexit, force majeure and material adverse change clauses

Could Brexit allow parties to avoid their contractual obligations? The outcome of the recent dispute between the European Medicines Agency and Canary Wharf suggests that the courts may be reluctant to accept such arguments. But what if the parties have included force majeure or material adverse change clauses in their contracts – could Brexit be sufficient to trigger such provisions?

### The Canary Wharf case

In February 2019, the High Court ruled that the European Medicines Agency (EMA) could not use Brexit (which had resulted in its headquarters needing to be moved to Amsterdam) as a reason for getting out of its lease of office space at Canary Wharf. Among other things, the court ruled that the "common purpose" of the lease had not been frustrated by Brexit; on the contrary, the court took the view that the EMA had assumed the risk of having to leave the premises in circumstances beyond its control and the terms of the lease included a number of mitigants to reflect this. For more detail, see [this briefing](#) from our Real Estate Department.

The *Canary Wharf* case provides some interesting pointers as to how the courts might view force majeure and material adverse change clauses in the context of Brexit.

### Force majeure clauses

As the *Canary Wharf* case demonstrates, the courts are often reluctant to allow frustration to be

invoked, even where the parties have made provision for the occurrence of potential frustrating events in their contract.

As a parallel to this, many commercial contracts contain force majeure clauses, which seek to relieve a party of its obligations upon the occurrence of certain events which are beyond its control. So how likely is it that Brexit or any of its consequences could be a trigger event for a force majeure clause under a commercial contract?

### How the courts approach force majeure clauses

- The courts are generally reluctant to allow a party to be relieved of its obligations and tend to construe force majeure clauses narrowly.
- Standard "boilerplate" force majeure clauses typically contain examples of "trigger events" which have a strong flavour of frustration about them. As the *Canary Wharf* case shows, it may not be easy to persuade a court that Brexit-induced difficulties fall into this category.

- But if a force majeure clause has been drafted with difficulties in mind which clearly correspond to expected Brexit-related problems (such as serious delays/disruption in the supply chain), then the courts are more likely to be receptive to relieving the affected party of its obligations.

## Brexit and force majeure

The key takeaway point here is that whilst a standard force majeure clause may be difficult to rely on in the context of Brexit, a more "aggressive" clause or one that has clearly been drafted with Brexit in mind may well offer genuine scope for a party to avoid its contractual obligations.

Suppliers should therefore consider the difficulties Brexit is most likely to give rise to in their businesses and seek to incorporate express references to them in the force majeure clauses in their customer agreements. Customers, meanwhile, should be alive to the risks of broadening the scope of force majeure clauses in this way, since this could let suppliers "off the hook" as a result of Brexit-related disruption.

## Material adverse change clauses

Material adverse change or "MAC" clauses are rather different beasts from force majeure clauses but represent another type of provision which could result in a party not being held to its contractual obligations. They are less commonly used than force majeure clauses in commercial contracts and differ from force majeure provisions in that the consequence might be something other than a suspension of obligations; for example, they might trigger an immediate right to terminate or a

renegotiation of all or particular aspects of the contract.

The judge in the *Canary Wharf* case found that the EMA *did* suffer a material adverse effect from Brexit. Whilst this wasn't enough for frustration, it suggests that MAC clauses could be another way for parties to seek to mitigate their risks as a result of Brexit. So what are the key considerations when drafting MAC clauses?

## Checklist: Brexit MAC clauses

- **Material Adverse Change:** How specific can you be about the meaning of MAC? For example, is it a cost increase, delays in procuring goods or loss of authorisations?
- **Trigger Events:** If the withdrawal agreement is approved, MAC will probably not follow from Brexit day, but the end of any transition period. Is Brexit/end of transition a MAC event in and of itself? Or should the supplier have to demonstrate that an additional financial or regulatory burden has resulted?
- **What happens next?** Termination in whole or part? Renegotiation of specified provisions? Amendment of terms so that both parties find themselves in a similar commercial position? Or a combination of the above?

## The bigger picture

Finally, bear in mind that well-drafted force majeure or MAC clauses are not the answer to all Brexit-related ills and are certainly no substitute for a properly developed Brexit contingency plan.

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