Neutral Citation Number: **[2020] EWHC 2670 (Comm)**

Case No: CL-2020-000287

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT
QUEEN'S BENCH DIVISION

Royal Courts of Justice,
Rolls Building
Fetter Lane, London,
EC4A 1NL

Date: 12 October 2020

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

(1) TRAVELPORT LIMITED **(2) ANTHONY HYNES** **(3) BRYAN LEWIS** **(4) EDWARD CHANDLER** **(5) PETER GOLBY** **(6) PAT HALL** **(7) TIM LEWIS** **(8) SAM MENDELSOHN** **(9) MARIO NATOLI** **(10) LORI OWENS** **(11) MATT ARTHUR** **(12) ERICA MARTIN** **(13) ROBERT BISHOP**	**Claimants**
- and –	
WEX INC	**Defendant**

AND

Case No: CL-2020-000288

Claimants

Between

(1) MR ADAM RHYS OLDING
and 112 other Claimants
(all detailed in Schedule A to the Re-Amended Particulars of Claim)

- and –

WEX INC **Defendant**

- -
- -

Richard Hill Q.C., Sa'ad Hossain Q.C., Andrew de Mestre Q.C., Sebastian Isaac, Lara Hassell-Hart and Tim Goldfarb (instructed by **Macfarlanes LLP and Herbert Smith Freehills LLP**) for the **Claimants**
Sonia Tolaney Q.C., James MacDonald, Emma Jones and Andrew Lodder (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Defendant**

Hearing dates: 21, 22, 23, 24, 25, 28, 29 September 2020
Draft Judgment sent to parties: 5 October 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Monday 12 October 2020 at 14:00.

Mrs Justice Cockerill :

Introduction

1. This Preliminary Issues trial is an expedited trial. The dispute which is to be decided is one which has been brought into being by the SARS – Cov-2 pandemic ("the Pandemic"). It raises a number of points relating to the proper construction of, and burden of proof in relation to, the definition of Material Adverse Effect ("the MAE Definition") contained in a Share Purchase Agreement ("the SPA") dated 24 January 2020.

2. Under the SPA, the Defendant ("WEX") agreed to purchase 100% of the shares in two companies, eNett International (Jersey) Limited ("eNett") and Optal Limited ("Optal"). The Claimants ("Sellers") are shareholders in eNett and Optal.

3. The value of that transaction is over US$1 billion. The issues are ones which I have accepted are urgent. This is in particular given the fact that the transaction is subject to an "Outside Date" of 25 October 2020, two business days after which (i.e. on 27 October 2020) the Debt Commitment Letter ("DCL") agreed between WEX and the Bank of America (and certain affiliates and other lenders) as a guarantee of WEX's ability to fund and close the acquisition will lapse. There may then be arguments as to the availability of specific performance. While it was WEX's contention that it could fund the transaction without the DCL, I was persuaded that the change in the balance of the parties' deal once this date was past (in particular where liquidated damages were limited to a very small fraction of the deal value) justified expedition of at least the determination of these preliminary issues by this Court.

4. One of the conditions precedent to closing is this: "*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.*"

5. The main issue in both claims is whether a Material Adverse Effect ("MAE") has occurred, or is reasonably expected to occur, such that WEX is not obliged to close the transaction contemplated by the SPA. By the claims, the Sellers seek: (1) a declaration that no MAE has occurred, or is reasonably expected to occur, within the meaning of the SPA; and (2) specific performance of WEX's obligations to close the transaction.

6. The main issues for trial revolve around the fact that the MAE Definition contains a Carve-Out relating to "*conditions resulting from … pandemics*" and then contains a Carve-Out Exception providing that, where an adverse event otherwise falls within the Carve-Out, WEX may invoke the Carve-Out Exception if the event has had "*a disproportionate effect on [the eNett or Optal Groups], taken as a whole, as compared to other participants in the industries in which [they] operate*".

7. The parties in this case agree on very little. They agree a high level outline of the facts, as set out in more detail in Part 1 below. They broadly agreed that the disputes which have arisen between them were suited for an expedited trial. They have agreed the preliminary issues.

8. But when it comes to the central dispute itself – the identification of the relevant industries for the purposes of the MAE Definition - the range of disagreement is stark. Stripped of surplusage, the Sellers say that the relevant industry for comparison is the "travel payments industry", and that WEX's comparison is cast so widely that WEX has not even tried to identify the appropriate comparators. WEX for its part says there is no "travel payments industry", that the Sellers have struggled to define such an industry or to identify its participants, and that the appropriate comparator is the "business to business" ("B2B") payments industry, or the payments industry. Each says, in terms, that the other side's case has been reverse engineered to evade the effect of the MAE Definition. That issue spans a number of the defined issues for trial – on one analysis all of Issues 2 to 5, though I refer below to issues 2-3 as The Main Issues.

9. There are of course other issues between the parties. The main one of these – Issue 11 - concerns the effect of "changes in law". The second - Issue 7 - concerns the question of the reality of the relevant MAE, if WEX is right about the relevant industry. There are also contingent issues (Issues 1 and 10) which relate to the burden of proof. Only one of these (Issue 10) was live. It is an issue which is a pure matter of submission, to which the evidence from the trial has no relevance.

10. The judgment is structured as follows:

a) **Part 1: Narrative**

i. *The Background Facts*

ii. *Procedural History and the Definition of "travel payments industry"*

iii. *The Trial*

b) **Part 2: The Expert issues**

i. *Expert Issue 1*

ii. *Expert Issue 2*

iii. *Expert Issue 3*

c) **Part 3: The Main Issues**

i. *The Relevant Wording*

ii. *Commercial Purpose*

iii. *The Law on MAE Clauses*

iv. *The purpose of the transaction*

v. *Issue 2(2) – is there a TPI (or a travel payment industry)?*

vi. *Other aspects of Factual Matrix*

vii. *Commercial Purpose - conceptual overview*

viii. *Conclusion on construction*

d) **Part 4: The Subsidiary Issues**

i. *Issue 4-5*

ii. *Issue 7*

iii. *Issue 10*

iv. *Issue 11*

e) **Conclusion: Answers to the Preliminary Issues**

Part 1: Narrative

The Background Facts

11. I am grateful to the parties for agreeing a statement of facts and issues to expedite the preparation of this judgment. The factual narrative below is heavily based on that narrative.

12. First however I give a broad backdrop against which this transaction appears. A central question in this case is one of the nature and "recognisability" of an industry. What is not in issue between the parties is that this dispute plays out against the backdrop of two established and recognised industries. The first is the travel industry, which has existed for many years, is an industry of considerable disparity (as any reader will appreciate) and has changed considerably over the period in which it has existed. It encompasses for example business to consumer transactions ("B2C") and B2B transactions between businesses within the industry. In recent years, the advent of widespread internet use has changed it further with the development of online travel agents ("OTAs") – of whom more below.

13. The second industry is the payments industry. Again that is an industry which might well be said to trace its origins back for many years, encompasses a considerable diversity and has been considerably changed of recent years by the advent of online offerings. Which brings us to the eNett and Optal Group.

The eNett Group and Optal Groups

14. The business that became Optal was founded in April 2002 by, *inter alios*, Anthony Hynes (the current CEO of eNett) and Robert Bishop (the current CEO of Optal). The eNett business was initially a wholly owned subsidiary of Optal. However, since 2009, it has been operated as a joint venture with Travelport Limited ("Travelport"). Optal continues to own 23.5% of the voting shares in eNett.

15. The Optal Group's business includes issuing virtual credit card account numbers ("VANs"). VANs comprise a unique card number (such as a 16-digit credit card

number) that functions like a physical credit card and can be used by one business to pay another. VANs can be used for a single transaction, or a group of transactions, with specific limits and purposes. So it can include a tolerance if the exact amount of the payment is not known at the time of the booking (for example to give some flexibility as to additional fees for a car hire booking). A key commercial advantage of VANs is the ability of the provider to rebate some of the Mastercard "interchange" fee because of the lower cost model involved.

16. In order to provide these VANs Optal is regulated by the relevant payments regulators in the UK, a number of US states, Puerto Rico, Hong Kong, Singapore, Ireland and Australia. The licences are generic in the sense they do not identify any particular customer of Optal (and thus permit Optal's services to all of its customers in any vertical it serves). Optal has described itself in its formal company filings, including to its regulators and in its statutory accounts, as a B2B payments company and it has used similar terminology in business plans, for example in the US and Singapore.

17. The reality of its current business is considerably narrower than this might suggest. Optal Group's principal client is eNett, which accounts for about 98% of the Optal Group's revenues and Gross Dollar Volume ("GDV"). Optal is authorised by Mastercard to issue VANs under Mastercard's "Global Wholesale Travel Program" (or "GWTP"), which has established interchange and acquiring fees specifically for transactions from a travel agent to a travel supplier. 91% of eNett and Optal's settled VAN volume in 2019 related to transactions under the GWTP.

18. The remainder of the Optal Group's revenues (approx. 2%) comes from: (i) entities within the Optal Group issuing VANs directly to businesses outside the travel industry, in insurance, education and e-commerce, and (ii), a secure payment platform that enables businesses to use third party commercial credit card lines to pay suppliers who do not accept credit cards ("Invapay").

19. The eNett Group derives the vast majority of its profits from providing B2B payment services to customers who operate in the travel industry. Its main business is distributing VANs to its customers via a technology platform ("the eNett Payments Platform") either individually or via a spreadsheet to batch up payments and request a substantial number of VANs at once. But the business is far more complex than the simple provision of VANs. There is the technology platform which provides and manages the VANs. The VANs are integrated into clients' systems. In order to do that effectively eNett employs people who are travel industry specialists with an intimate understanding of the way that particular client types operate.

20. Through the platform customers can associate a particular VAN with their own internal details to enable detailed tracking, reporting and reconciliation. eNett also packages the information associated with the transactions back to customers in the form of reports – it provides about 3,000 reports every day, giving customers a snapshot of their spending. Changes to the system are constant – eNett has an IT team of around 100 people working to develop and maintain the system. They introduce changes driven by discussions with customers via their account manager, or eNett employees seconded to key clients' businesses.

21. The VANs that eNett distributes to its clients are issued by entities within the Optal Group, though it previously used, and maintains, a relationship with a bank which can

also provide VANs. The VANs which eNett issues via this process can be limited to a particular supplier, to an amount, an amount plus a tolerance or to a particular period.

22. When one of eNett's clients needs to pay a supplier, it makes a request through the eNett Payments Platform, which then provides the client with a VAN to make the payment. VANs used in travel account for over 97% of eNett's revenue, with OTAs making up all of eNett's top 10 customers.

23. The eNett Group also offers three other products to travel intermediaries: a physical credit card (which entities in the Optal Group issue to eNett for eNett to offer to its clients), a legacy product called eNett EFT and a legacy product called "feeNett". Nearly 100% of the business of the eNett Group by revenue and GDV is the provision of their services to businesses engaged in providing travel reservation or other travel-related services.

24. All of the payments that the eNett Group and Optal Group facilitate are B2B payments. They do no B2C business.

25. There is a dispute between the parties as to the extent to which the eNett Group and the Optal Group offer products and services that are particularly suited to customers in the travel industry. That is one of the issues for trial. There is also a related dispute between the parties as to whether there is a "travel payments industry" in which the eNett Group and Optal Group operate. However, what the eNett Group and the Optal Group do as a matter of fact is not in dispute.

26. There is also an issue as to the extent to which Optal has or could have operations outside the market for travel payments. Again this is the subject of detailed consideration below, but the point arises from the uncontroversial fact that since 2016, Optal has attempted to develop a business distributing VANs outside the travel industry, such as in insurance, to an education payments company and to an on-line marketplace. Another Optal Group subsidiary, called "Invapay", provides a secure payment platform that facilitates B2B payments by enabling businesses to use commercial credit card lines to pay suppliers which do not accept credit cards.

27. Optal makes much of these possibilities in its advertisements, but to date the results have not been notable. In 2019 the former represented approximately 0.2% of the Optal Group's GDV, and Invapay was approximately 1.7% of GDV.

WEX's Business

28. WEX was founded in 1983, when it was called Wright Express Corporation. It initially established its presence in the payments industry as a provider of fleet cards, which are charge cards used to manage vehicle-related expenses for businesses with fleets of company vehicles. Since then, WEX has enjoyed considerable year-on-year growth and has extended its payment processing products and services from fleet card customers to a wide range of customers who operate in numerous different industries.

29. WEX now describes itself as a "*financial technology service provider, which provides corporate payments solutions for a wide spectrum of customers globally*". Its customers are all businesses and the majority of its products are used to make B2B payments. WEX's payment products include virtual cards, which WEX provides to

corporate account payables, insurance, media and healthcare clients, as well as clients in the travel industry.

30. WEX organises itself into three segments for operational and reporting purposes: Fleet Solutions; Health and Employee Benefits Solutions; and Travel and Corporate Solutions. The latter segment is divided into three commercial divisions: the Americas Travel Division; the EMEA and APAC Travel Division; and the Corporate Payment Solutions Division. These are not separate legal entities or separate businesses and all provide WEX's B2B processing services and products to a wider range of what are described as "verticals" – that is business areas.

The "Summit" Transaction

31. These proceedings concern a transaction in which WEX agreed to acquire the shares in the parent companies of the eNett Group and Optal Group. During the pitch for the sale of the groups and the subsequent negotiations, the transaction was referred to as "Project Summit" and eNett and Optal together as "Summit".

32. WEX had previously made an indicative offer to acquire both eNett and Optal in 2018. At this point in time, only the Optal Group was for sale and the indicative offer was not taken up.

33. However, in 2019, Optal and Travelport (eNett's principal shareholders) agreed to market Summit for sale. A pitch was prepared in the form of a slideshow presentation, which WEX and other potential acquirers received in August 2019. WEX subsequently expressed an interest in the new proposed sale.

34. Various meetings followed between eNett and Optal personnel and key WEX executives in order to explain, and answer questions about, the Summit businesses, including:

    a) A meeting on 16 September 2019, at which representatives from Optal and eNett took WEX through an Advocacy Presentation.

    b) A meeting in New York on 4 October 2019, at which Optal and eNett management gave a confidential "Management Meeting" presentation.

    c) A meeting between Summit and WEX management on 24 October 2019 in Melbourne at which Summit gave another Management Presentation to WEX.

    d) Meetings on 5 November 2019 in New York.

35. Mr Hynes, Ms Smith and Ms Morris all gave evidence about these meetings and discussions.

36. At a meeting of WEX's Finance Committee on 16 October 2019, the Committee approved WEX's management submitting a non-binding letter of interest. WEX delivered an indicative offer for the acquisition of Optal and eNett the same day.

37. A meeting of WEX's Board of Directors took place on 21 November 2019 with the purpose of providing a status update to the Board of Directors in anticipation of requesting approval for a final bid the following month. At a further meeting of

WEX's Board of Directors on 6 December 2019, the Board authorised WEX's management to submit a binding offer for Summit. A definitive offer for the acquisition of 100% of the share capital of Optal and eNett was sent to eNett's and Optal's advisors on 9 December 2019.

The SPA

38. At a meeting of WEX's Board of Directors on 23 January 2020, the Board approved the SPA.

39. The SPA is dated 24 January 2020 and was entered into by WEX as "Purchaser", the eNett Sellers and Optal Sellers (referred to in the SPA as the "Everest Sellers" and the "Olympus Sellers" respectively) and eNett and Optal (referred to in the SPA as "Everest" and the "Olympus" respectively). Under the SPA, WEX agreed to purchase eNett and Optal for a total consideration of approximately $1.7 billion, consisting of approximately $1.275 billion in cash and approximately 2 million WEX shares.

40. The SPA is governed by English law and is subject to the exclusive jurisdiction of the English Courts. For present purposes I will give only the central provisions, though I will refer to a number of other provisions and references during the course of the discussion on the exercise of construction.

41. The operative provision for WEX to buy eNett and Optal is contained in Section 2.1(a), as follows:

> "Upon the terms and subject to the conditions set forth in this Agreement, at the closing of the transactions contemplated by this Agreement (the "Closing"), each Seller shall sell and deliver to Purchaser, and Purchaser shall purchase and acquire from each Seller the Acquired Shares held by each Seller".

42. The obligations of the parties to effect Closing are subject to the satisfaction or waiver of conditions set out in Art. VIII of the SPA.

43. Section 8.1 of the SPA stipulates conditions to the obligation of each party to close. These are, in summary, that any regulatory approvals for the transaction to go ahead must have been obtained, and that there are no existing injunctions or investigations in respect of the transaction of the type described in Section 8.1(b) of the SPA. This clause has been satisfied.

44. Section 8.2 of the SPA sets out the conditions to WEX's obligation to close the transaction. That section contains various sub-clauses. One of these is Section 8.2(d), which is headed "No Material Adverse Effect" and reads:

> "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."

45. It is this condition that gives rise to the present dispute. WEX alleges that there has been, or is reasonably expected to be, an MAE and that it is accordingly not obliged to

effect Closing. The Sellers' position is that there has not been any MAE (and that there is no event, change, development, state of facts or effect that has occurred that would reasonably be expected to have an MAE), and that therefore the condition in Section 8.2(d) is satisfied.

46. "Material Adverse Effect" is defined on page 17 of the SPA. The clause is set out below with line breaks added to the original for ease of reading:

> ""Material Adverse Effect" means any event, change, development, state of facts or effect that, individually or in the aggregate,
>
> (x) has had and continues to have a material adverse effect on the business, condition (financial or otherwise) or results of operations of Everest and its Subsidiaries, taken as a whole, or of Olympus and its Subsidiaries, taken as a whole, or
>
> (y) would prevent or materially delay the consummation of the transactions contemplated by this Agreement;
>
> provided, that, solely for purposes of clause (x), no such event, change, development, state of facts or effect resulting, arising from or in connection with any of the following matters shall be deemed, either alone or in combination, to constitute or contribute to, or be taken into account in determining whether there has been or will be, a Material Adverse Effect:
>
> (a) the general conditions and trends in the industries or businesses in which Everest, Olympus or any of their respective Subsidiaries operates, including competition in any of the geographic or product areas in which Everest, Olympus or any of their respective Subsidiaries operates and seasonal fluctuations;
>
> (b) general economic conditions, financial conditions or capital market conditions (including interest rates, exchange rates and credit markets);
>
> (c) conditions resulting from the commencement, occurrence, continuation or intensification of any act of civil unrest, war (whether or not declared), terrorism or sabotage (including cyberattack), armed hostilities, military attacks or declaration of national emergency;
>
> (d) changes (or proposed changes) in Tax, regulatory or political conditions (including as a result of the negotiations or outcome with respect to Brexit) or Law, IFRS EU or IRFS IASB (or, in each case, any authoritative interpretations thereof or the enforcement thereof);

> (e) conditions resulting from any natural or manmade disasters, hurricanes, floods, tornados, pandemics, tsunamis, earthquakes, acts of God or other weather-related or natural conditions;
>
> (f) any action taken by any Seller or by Everest or Olympus, or any Seller's or Everest's or Olympus's failure to take any action, in each case, that is required to be taken, or not taken, by this Agreement, or any action taken, or the failure to take any action, in each case that is required to be taken, or not taken, by applicable Law;
>
> (g) the failure of Everest, Olympus or any of their respective Subsidiaries to meet any projections, forecasts or budgets for any period (provided, that the underlying causes thereof, to the extent not otherwise excluded by this definition, may be taken into account in determining whether a Material Adverse Effect has occurred; provided, further, that this clause (g) shall not be construed as implying that Everest or Olympus is making any representation or warranty hereunder with respect to any projections, forecasts or budgets);
>
> (h) any action taken, or the failure to take action, or such other changes or events, in each case, to which Purchaser has consented in writing or the failure to take actions due to Purchaser's failure to consent thereto, to the extent such consent is required to be given pursuant to the terms of this Agreement, following the request of Everest or Olympus; or
>
> (i) the execution, announcement, pendency or consummation of this Agreement or the transactions contemplated hereby, or the identity of Purchaser;
>
> provided, further, that any event, change, development or effect referred to in clause (a), (b), (c) or (e) may be taken into account in determining whether there has been a Material Adverse Effect to the extent, and solely to the extent, such event, change, development, state of facts or effect has a disproportionate effect on Everest and its Subsidiaries, taken as a whole, or on Olympus and its Subsidiaries, taken as a whole, as compared to other participants in the industries in which Everest, Olympus or their respective Subsidiaries operate."

The parties have referred to sub-paragraphs (a) to (i) of this definition as the "Carve-Outs" and the second proviso as the "Carve-Out Exception".

47. The preliminary issues are focused on the construction of this definition, and on which party bears the burden of proving that this definition is (or particular elements within the definition are) satisfied or not.

The Announcement of the Summit Acquisition – and Subsequent Events

48. The transaction was announced to the market the day the SPA was signed, 24 January 2020. Each of WEX, eNett and Optal issued a press release. WEX also held an "M&A Call" for analysts and investors, which involved a presentation and a Q&A session.

49. Following the announcement the parties' lawyers prepared a joint document for discussions with the Federal Trade Commission ("FTC"). That "Talking Points" document was designed to cover the competition aspects of the deal, and dealt with geographical focus, complementarity and competitive nature of the "B2B Payments Segment".

50. The worldwide events surrounding the Pandemic are well-known and do not need to be rehearsed at length for the purposes of this preliminary issues trial.

51. A new type of coronavirus was identified on 7 January 2020. On 30 January 2020, the Director-General of the World Health Organisation (the "WHO") declared the outbreak a public health emergency of international concern. By 11 March 2020, the WHO classified the outbreak of SARS-CoV-2 as a pandemic. The response of governments around the world has varied. Many governments and authorities have imposed restrictions intended to stop or slow the transmission of the virus. These restrictions have taken different forms, but in some cases have included restrictions on travel within and between countries, so-called "lock-down" restrictions, quarantine requirements and bans on certain types of business and social activity.

52. There has been a global decrease in travel and therefore payments to and from companies within the travel industry. That has resulted in a decrease in the GDV of the eNett and Optal Groups. The Sellers accept that this impact has been adverse to the eNett and Optal Groups, although there are issues between the parties as to whether the effects are "material" for the purposes of the definition of MAE, and as to the extent to which the adverse effects are the result of the Pandemic itself or the restrictions imposed in response. These issues of fact are not among the preliminary issues.

WEX's Notice of an MAE

53. On 30 April 2020, WEX's CEO, Ms Smith, telephoned eNett's CEO, Mr Hynes, to inform him of WEX's view that an MAE had occurred and that WEX was not obliged to close the transaction contemplated by the SPA.

54. That telephone call was followed by a letter from WEX dated 4 May 2020 entitled "*Project Summit – Notice of Material Adverse Effect*". In the letter, WEX stated that there had been an MAE within the meaning of the SPA due to "*conditions resulting from the SARS-CoV-2 pandemic,*" that the condition to Closing in Section 8.2(d) of the SPA was therefore not met, and that WEX was not obliged to close the transaction contemplated by the SPA.

55. There followed correspondence between the parties in which the Sellers disputed the existence of an MAE.

56. On 11 May 2020, the eNett and Optal Sellers issued claims for a declaration that there has been no MAE and for specific performance under the SPA.

57. Following the commencement of the proceedings, the parties continued to take steps to enable the transaction to close in the event that the issues in the litigation are determined in the Sellers' favour.

58. By 30 August 2020 (and accordingly, by the time of this trial of the preliminary issues), all conditions to Closing under the SPA were satisfied, subject only to the question of the existence of an MAE.

Procedural History and the Definition of "travel payments industry"

59. As noted above, the Sellers issued the claims on 11 May 2020. On 2 June 2020, I ordered that the two claims be case managed and tried together on the same occasion. I also granted permission for the Sellers to renew their applications for an expedited trial of one or more issues in the claims.

60. Following a hearing on 25 June 2020, I ordered that certain issues were to be tried as preliminary issues on an expedited basis, listed for 6-7 days beginning on 21 September 2020. Those issues are attached at Appendix 1 to this judgment.

61. The issues primarily concern the definition of MAE in the SPA. However, they are defined by reference to the pleaded case. In particular the Sellers' case is that they participate in an industry called the "travel payments industry". That has been defined by them as follows in Responses to a Request for Further Information:

> "6. The travel payments industry is the industry of providers of products and services to facilitate business to business payments to participants in the travel industry.
>
> 7. A participant in the travel payments industry is to be identified by the fact that it provides business-to-business payment products and/or services that are particularly suited to meet the payment needs of participants in the travel industry and supplied to such participants."

62. That definition of travel payments industry is referred to in this judgment as the "TPI". I will also refer to the "travel payments industry", which is the potential industry concerned with travel payments which may exist but which is differently circumscribed than the one posited by the TPI definition. In addition, as the word "industry" itself is in issue, there will be frequent reference to the travel payments market, space or vertical.

The Trial

63. The trial has been heard over seven court days as a "hybrid" hearing. The opening and closing submissions have been heard in a physical courtroom, with "core" teams present, and the remaining legal and client teams linked to that courtroom. The evidence has been heard fully virtually with sitting hours adjusted to provide some limited accommodation to the time zones of the witnesses participating (from Australia and the US).

64. Those witnesses were as follows. For the Sellers the principal witness was Mr Anthony Hynes, the Chief Executive Officer of eNett. Also called was Mr Alex Mills, the Chief Operating Officer of Optal. Mr Cameron Oreo, the Head of Global Solutions for eNett was tendered but not cross-examined. Mr Robert Bishop, the Managing Director of Optal Limited, was not called.

65. For WEX the principal witness was Ms Melissa Smith the Chief Executive Officer and Chair of WEX. Also called were Ms Nicola Morris, WEX's Chief Corporate Development Officer and Mr Joel (Jay) Dearborn, WEX's President of Corporate Payments.

66. I do bear in mind that while giving evidence is never a pleasant experience for a witness, giving evidence remotely via video link to a very different time zone is a materially more difficult one. I have borne this in mind whilst assessing the witness evidence and I am grateful to the witnesses for making themselves available at very early or late hours. I also bear in mind that in a case such as this where relatively narrow factual disputes overlap to some extent with questions of opinion witnesses' evidence can at times be slightly distorted by the process of trial preparation.

67. My broad conclusions on the witness evidence are as follows; the detailed facets of that evidence are addressed in relation to the specific issues below. I am entirely satisfied that within the constraints which I have outlined above all of them were doing their best to assist the Court:

a) Mr Hynes' witness statement diverged regrettably in places from the contents which are to be expected of a factual witness. In a number of places he expressed his views about the issues which are a matter for the Court – such as whether there is a travel payments industry. In cross- examination he was a careful witness, scrupulous to provide context where he was concerned that a question oversimplified the facts. He was however realistic in accepting points where his position was not sustainable. I entirely accept that he was an honest witness doing his best to assist the Court.

b) Mr Mills gave evidence briefly. The ambit of witness evidence he was able to give (as opposed to introducing documents) was very limited, largely confined to his evidence as to the close collaboration between Optal and eNett, to the extent that they were "*joined at the hip*" and the limited ambitions of the Optal non-travel offering.

c) Ms Smith's statement read as one which tried to downplay the attractions of the travel market as a reason for the transaction. However, in evidence she was a clear helpful witness who provided some valuable explanations and was frank about the attractions of the travel payments business which eNett and Optal brought with them.

d) Ms Morris was a clear polite witness. Her witness statement was also perhaps strategically slanted towards the other reasons for the acquisition, but her oral evidence gave a very balanced and clear picture of her factual knowledge. She was at times defensive in terms of questions of characterisation, however I unhesitatingly accept that she was doing her best to assist the Court.

e) Mr Dearborn was a frank and businesslike witness.

68. I mention also Mr Bishop who played something of the role of the ghost at the feast. He was a natural witness, to the extent that witness evidence was relevant. It was suggested for WEX that he was not called because his evidence would not entirely have cohered with Mr Hynes's emphasis on both eNett and Optal as participants in a travel payments market. That may be the case. It is fairly apparent and was Ms Smith's and Ms Morris's evidence that Mr Bishop saw Optal as having a future which extended beyond the travel business and that he actively wished to expand the brand into new markets. However, I considered that I had ample witness evidence as to these aspects and was not troubled by his absence.

69. There was also expert evidence on both sides. That expert evidence was on the defined issues which were as follows:

a) In relation to Issue 2(2), to what extent do each of Optal, eNett and their subsidiaries provide B2B payment products and/or services that are particularly suited to meet the payment needs of participants in the travel industry?

b) In relation to Issue 3-4 who are the participants operating in:

i. The "travel payments industry" as defined by the Sellers in Response 7 to their Response to Request for Further Information dated 12 June 2020;

ii. The "*payments industry and/or B2B payments industry*"?

c) In relation to Issue 4, it is practicable to:

i. Compare the effect of events, changes, developments, states of facts or effects on the eNett Group (as a whole) or the Optal Group (as a whole) against the effect on that part of the business(es) of the other participants identified under Issue 3(1) that participate in the "travel payments industry"?

ii. Compare the effect of events, changes, developments, states of facts or effects on the eNett Group (as a whole) or the Optal Group (as a whole) against the effect on other participants in the "*payments industry and/or B2B payments industry*" identified under Issue 3(2)?

70. The experts were:

a) For the Sellers, Mr Pascal Burg, a payments industry specialist with much experience of travel payments and Dr Mike Cragg, formerly a professor of Economics at (*inter alia)* Columbia University and now Chairman of an economics consulting group.

b) For WEX, Mr Gary Davies, a Fellow of the Institute of Chartered Accountants and specialist in financial and economic analysis of companies and industries and Mr Patrick Moran, a payments industry specialist who was formerly employed by Travelport's predecessor.

71. So far as concerns the expert evidence my broad conclusions were that all of the experts were doing their best to assist the Court from their naturally differing perspectives. My impression was that all of them had found the issues involved somewhat difficult to confine. Again my detailed conclusions on the expert issues are embedded within the issues below.

72. I will add one further matter relating to the trial. As will be apparent this was a major and highly contentious piece of litigation, prepared by both sides under extreme time pressure, including over the summer holiday period. At the start of the litigation the parties did not distinguish themselves in their co-operation. However, from the time when this expedited trial was ordered and throughout the trial the parties have worked together in an admirable fashion to ensure that the case was properly prepared for trial. They have also produced arguments, both written and oral, of the highest standard. I have very much appreciated the work which has gone into achieving that and I thank them for it.

Part 2: The Expert Issues

73. I am interpolating the expert issues rather unconventionally at this point. This is because although the expert issues were formulated on the basis that they were issues which would inform the process of construction, as matters have transpired the detailed and interesting expert evidence was in considerable measure agreed not to be of key utility.

74. It has therefore seemed best to me to set out the expert issues and my conclusions on them, and then the relevant portions of the expert evidence can be read in in passing at the points where it does feed in to the analysis.

75. Once again I am grateful to the parties for their sensible co-operation in producing the following agreed summary of the disputes on the expert evidence (and for their exemplary directed reading list, in accordance with paragraph H2.31 of the Commercial Court Guide).

Expert Issue 1

76. The first issue was: to what extent do each of Optal, eNett and their subsidiaries provide B2B payment products and/or services that are particularly suited to meet the payment needs of participants in the travel industry?

77. The dispute on this focussed primarily on the Sellers' case as explained by Mr Hynes and Mr Burg, that particular features which were particularly suited to travel industry participants include automation, speed, volume, acceptance, information flow and security. They explained that it is the combination and significance of these needs that gives rise to special requirements not found elsewhere. The specialism and particular features of the products and services offered by the Summit business to the travel industry are complex, and were spoken to by Mr Hynes and Mr Oreo.

78. WEX's case on this issue was that the "particular payment needs" of the travel industry identified by Mr Hynes are not specific to customers within the travel industry, nor was the particular combination of those requirements significantly more important in the travel industry than in any other industry. In particular, product and

client specialisation are matters of degree and do not demarcate the participants in one industry from the participants in another. WEX contended that the set of eight needs identified by Mr Burg was not specific to customers within the travel industry. In particular the virtual cards issued by Optal and distributed by eNett are well suited for clients in many other industries.

79. To the extent that this issue matters, I largely accept the evidence of the Sellers as regards services as combined with products, whereas if one views the question through the prism of products (which is in my judgment appropriate for Optal), the balance falls on WEX's side.

80. This is all to do with the combination of products and services which eNett provided and Optal's role in that. Starting with Optal, Optal was essentially the provider of VANs. VANs are a product and I am satisfied on the evidence that they are not a product which is "particularly suited" to the travel industry, though they have proved very useful there. Optal offers virtual cards for use both in the travel industry and outside of it.

81. As Mr Moran explained, the card issuance function that Optal performs is inherently generalisable in that issuers "*can easily move to other industries without ... necessarily any customisation*". Optal has consistently presented its VANs as being suitable for other verticals – it described its products as being suitable for "*virtually any business*". As I have noted above, Optal's licences were not limited to travel business.

82. Of course the VANs themselves are not a "*one size fits all*" option, even as they come from Optal. Mr Burg in his evidence clearly broke down the three layers within the product – the number, the standard features and the customisation. Mr Mills gave evidence about the cooperation and collaboration which took place between eNett and Optal, in order to develop a number of the customised developments that Optal has made specifically for eNett and the particular needs of its customers in the travel industry.

83. One factor which was said by the Sellers to pull heavily against the conclusion which I have reached was the vestigial nature of Optal's non-travel business (2%). Plainly this was in fact and at the relevant time a small portion of the actual business. It was Mr Mills' evidence that Optal was "*targeting non-travel with our generic vanilla platform*" and that that sort of offering was never going to fuel the kind of growth seen in the travel industry.

84. But the 98% figure has a lot to do with what eNett brought to the outwards facing offering; Optal was not marketing its VANs directly. eNett had fuelled that business, but there is no reason to believe that a similar job could not be done (perhaps with less startling success, but still with real results) in relation to other areas of business. Certainly there was clear evidence that Optal (like WEX itself) can or does adapt its virtual card offering to meet the needs of non-travel customers. I was taken to pitches to potential customers such as Admiral, Bupa and RSA which highlighted particular features tailored to the needs of those entities. Optal therefore provides a product which is currently a great success in the travel space, but is not "uniquely" or even "particularly" suited to that market.

85. When one turns to eNett's business the position is simple. The main business which eNett operates is a technology platform which provides and manages the VANs to customers in the travel industry, which are used by them to pay their suppliers (primarily, hotels and airlines), and which are integrated into a variety of travel specific systems by a highly customised and specialised offering. The products and services offered by eNett and Optal have been developed in collaboration with each other and with clients in order to service the needs of eNett's travel intermediary clients.

86. There was no real attempt to challenge the proposition that the product/service bundle which eNett provides to its customers was highly customised. This was dealt with in the unchallenged evidence of Mr Oreo and parts of Mr Burg's evidence which were likewise unchallenged. Mr Dearborn accepted that customisation (or "tailoring") was also at the heart of WEX's own travel offering.

87. Some of the particular concerns of customers included: the large number of suppliers, a high volume of low value transactions, frequent changes to transactions previously placed (changes to dates, upgrades, refunds, etc.), a high proportion of cross-border transactions, high levels of fraud and counter-party risk, the need for real-time confirmations, thin operating margins, complex distribution channels (such as airline GDSs), complex information exchange, a high degree of intermediation and the existence of particular industry standards.

88. Having said this – and this is a point to which I will return below – I do accept that although one could identify features such as those identified by Mr Hynes, Mr Oreo and Mr Burg as being business critical to the notable success of the travel offering, a number of these would to a greater or lesser extent have potential relevance to other business areas. That may not be fully developed at the moment, but there is scope to rebalance or customise features so as to suit other industries.

89. There may be examples, such as the "minibar" issue (the ability of hotels to force through transactions after check out) where really are unique (though it appears that that functionality was at bottom compounded out of components which are more or less generic); there are some, such as fraud prevention, which may be far greater issues in travel than in many other markets. But fraud prevention is a real issue in other markets. Further there are many other features such as speed, the ability to be issued in different currencies rather than relying on Mastercard exchange rates, and so forth, which plainly could find utility in different markets.

90. The result is that the offering is "particularly suited", but the "particularly suited" nature of the offering is not in the existence of what Mr Burg described as "the third layer", *per se*; it is in the particular combination and details of the elements of "the third layer". It is in the details and balance of customisation, and not in customisation itself or the features involved in customisation.

91. In short therefore eNett's offering was indeed when looked at as an overall portfolio, "particularly" suited to the travel business, but it was not, in the features which went to make up this offering, "uniquely" suited to the travel business.

Expert Issue 2

92. The second expert issue related to the identification of the participants in the posited markets.

93. On this issue it was the Sellers' case that, as Mr Burg describes in his evidence, there is a value chain for card-based payment methods in travel payments, and there are essentially four broad categories of participant within this ecosystem which serve to link the payer (which will be the traveller or the travel intermediary) to the merchant (which is the supplier of the travel services e.g. the airline or hotel): (1) the payment network; (2) the card issuer/programme manager; (3) the merchant acquirer; and (4) the payment service provider. eNett and Optal fall into the second of these categories.

94. Mr Burg's evidence was that participants in the TPI are those businesses operating in the travel payments value chain that provide products and services which are particularly suitable for the payment needs of the travel industry. He identified companies with products which are particularly or partially suited to the payment needs of the travel industry. These were principally eNett's and Optal's direct competitors operating in the same card issuer/programme manager category of the value chain. They are: (i) AirPlus; (ii) Amadeus with its B2B Wallet; (iii) eNett/Optal; (iv) IATA through its EasyPay product which it has developed with Edenred; (v) Ixaris; (vi) Sabre (through its partnerships with Ixaris and WEX); and (vii) WEX (in its travel payments business); and (viii) American Express' vPayment business.

95. The bottom line however as the evidence emerged was that there was a degree of opacity about who these participants were. The Sellers' own case had not been consistent. Their original pleaded case identified four entities as the principal participants: "WEX Travel", Amadeus, Ixaris, and AirPlus. This was a group of VAN providers. The Reply conceded that there were more principal participants but did not identify them. Mr Hynes added Amex to the original list in his statement. It is now said that the participants in that industry "*include all businesses that offer particularly suited or customised products and services to facilitate B2B travel payments*" – though that approach is not really consistent with the previous emphasis on participants who operate through provision of VANs. Mr Burg tended to accept that some or all of his partly suited entities were participants in the TPI.

96. In closing the Sellers stated that the following other participants in other parts of the value chain had customised or tailored products and services for travel and that this was not an exhaustive list: (i) the travel payment business of the payment networks - Discover, Mastercard, Visa and UATP, (ii) the travel payment businesses of acquirers – Adyen, Bambora, Elavon, EMS and Worldpay, (iii) payment gateway 3C Payment, and (iv) hotel commission payment solution provider Onyx CentreSource.

97. Where the evidence rested therefore was that there was a wider group, which provided products which were "*particularly suited*"/"*customised*"/"*tailored*" to the needs of the B2B participants in the travel industry.

98. Starting with the initial selection, which was based on direct competitors with similar product bases, I do not accept the submission that it is unlikely ever to be necessary to look beyond eNett and Optal's direct competitors – the "paradigm participants" in the TPI – to conduct the comparison required by the Carve-Out Exception, because the effect of an event on participants generally can be identified by extrapolating from that sub-group. That simply cannot be right if, as now seems to be accepted, the

population of any industry ranges beyond the direct competitors; there is no reason to suppose that those would be equally affected.

99. As for those other participants, it was for example obviously unrealistic (on any analysis) to exclude IATA, which has a customised payment service which dominates the market, described by Mr Hynes as the "*largest travel payments player by some distance*". While it does not compete with eNett in the sense of offering the same sort of product/service bundle, its customer base is part of what eNett and WEX would regard as "addressable volume" (i.e. customers they would like to, and could conceivably obtain). And indeed Mr Hynes in his oral evidence plainly saw eNett and Optal as being in competition with IATA.

100. Mr Burg was not quite clear as to whether IATA fell into the "particularly suited" or "not fully suited" category. The difference appeared to me to relate to whether one focussed on the similarity to the eNett offering in terms of bespoke customisation or whether one focussed on the crossover in addressable volume. But on any analysis the interrelationship with the pleaded case was uncomfortable.

101. There was then the question of conventional payments products; with VANs occupying just 3% of the total volume of travel industry payments in 2019, their exclusion even from the TPI and certainly from any wider travel payments industry seemed counterintuitive. Mr Dearborn described them as the "most formidable competition". It also seemed that a number of these providers might offer a "customised" solution albeit one which was outside the "customised+VANs" core pool which the Sellers saw as eNett and Optal's primary competition.

102. Mr Burg's evidence on these providers, such as US Bank and Barclays, was similarly ambivalent, though acknowledging that they did compete. There was certainly a possibility in his view that Citi fell into the "partly suited" list.

103. WEX in closing produced an analysis of Mr Hynes's and Mr Burg's evidence which identified a total of 37 companies that one or other of them has accepted are part of a "travel payments industry" in one part or other of the value chain. While that analysis was based on taking references to a "travel payments industry" rather than necessarily the TPI as defined, it is indicative of the problems involved. Adding to the lack of clarity, WEX contended that the TPI would include the participants identified by Mr Davies in Appendix GD-1.8 of his first report.

104. There was also the question of the rapidly changing complexion of the market – eNett's tax filing for 2018 provided a list of competitors who had "*dropped off the radar*" in the intervening period. Mr Burg and Ms Morris both spoke of the area as one where the landscape changed constantly.

105. Overall, with the range of products and services in play, the rapid changes involved and the obvious competitive drive to produce something suited to or customised for clients in order to win business, which in turn was driving changes in the wider paradigms, I found it hard to see how a meaningful pool could be assembled via the test which was pleaded, or indeed the reworked test of "customisation" which Mr Burg sought to apply as a more transparent and less confusing test.

106. Ultimately it was conceded for the Sellers in closing that "*it is neither realistic nor necessary for the Court to identify every single participant (no matter how marginal), and to do so would be to impose a technical constraint on a non-technical expression"* particularly in a "*vibrant and developing industry*".

107. I therefore conclude that it is not possible to identify all the participants in the TPI as defined. It is plainly a developing area. The core group of participants originally identified did not capture all those who should be regarded as falling within the pleaded definition of TPI. At least IATA and Citi should be added to that list. The evidence indicated that the number and type of other participants is very unclear given the opacity of the criteria provided.

108. There is also a question about who the participants would be if the "travel payments industry" was not to be defined in quite the way which the Sellers urged. On this the evidence suggested that the relevant pool (which would not be confined to those offering a similar products/services bundle) would include at least WEX, AirPlus, Amadeus, Ixaris, Amex, IATA, Barclaycard, Citibank, ABSA, Bank of Montreal, BNP Paribas, US Bank, CSI GlobalVCard, Conferma, Sabre and, prior to its insolvency, Wirecard. Based on the companies which Mr Hynes and Mr Burg separately accepted as being part of a "travel payments industry" the pool would be considerably wider – somewhere in the region of 37 participants. A number of those participants also appeared on Mr Davies' list at Appendix GD-1.8 of his first report.

109. The question then becomes whether matters become any clearer if one seeks to identify the participants in the "*B2B payments industry and/or payments industry*". Here it was common ground that it would be impractical to identify all the participants in what are large and diverse industries. As the Sellers noted, it is impossible to identify the members of those industries, and neither WEX nor its experts have sought to do so. There are more than 66,000 banks worldwide, and 11,000 members of SWIFT.

110. There was no real challenge to the evidence of Mr Davies that without being exhaustive participants in those industries included those listed at Appendix GD-1.7 (B2B payments industry) and GD-1.5 (Payments industry) of his first report. However these lists are not necessarily representative lists.

Expert Issue 3

111. On this issue the Sellers' case was that the comparison was workable if the industry involved was the TPI, but unworkable, indeed manifestly so, if the industry involved was the B2B payments industry, or the payments industry.

112. On the TPI comparison the Sellers contended via the evidence of Dr Cragg that travel payments business revenues have a direct relationship with GDV, and GDV is therefore the key measure of their overall revenue, and their overall performance. Since the transactions that comprise GDV arise, in the main, from flights and hotel bookings, transaction volumes on a monthly (or weekly) basis are widely available from a variety of sources, including from travel specific third party data sources, and also from government sources (such as those identifying airline passenger numbers). These are sources of data that those within or analysing the performance of the travel industry (and the travel payments industry) have regard to. They provide a real-time

and granular view of performance that cannot be provided by annual or quarterly financial results. It is therefore a straightforward matter – and a commonplace exercise – to use such data to give an accurate and timely picture of GDV in the travel payments industry and, in turn, to provide a ready benchmark against which to judge how eNett and Optal are performing, comparatively, to others in the travel payments industry.

113. The Sellers argued that by contrast no practical comparison can be made if the relevant industry is the "*B2B payments industry and/or payments industry*". The size and diversity of these industries gives rise to two particular issues. First, it requires the use of a lengthy and convoluted process by which the universe of payments companies (68,000+) is whittled down to a much smaller set to be used for the comparison but without any suggestion that the MAE Definition contemplated such a process. Second, whether the comparison is done against the universe of payment companies or a sub-set, the breadth of the industry means that the effect on some participants (to the extent able to be identified) is not predictive of the effect on others.

114. The case advanced by WEX was that insofar as the "travel payments industry" is concerned, Mr Davies's view is that it is not practicable to compare the effects of events, changes, developments, states of fact or effects on the eNett Group (as a whole) and the Optal Group (as a whole) against the effect on other participants in the "travel payments industry". It pointed to the fact that often comparison would have to be with non-reporting products or business sectors within larger companies as with WEX Travel, IATA BSP, Amex vPayment and so forth. While Mr Burg suggested that an 80/20 distinction could be used to identify whether the non-travel part of the participants' business could be ignored, the basis for this division was unclear, and it was also unclear how that would apply – and which participants would remain, particularly when a number of the "main" participants are in fact small parts of much larger businesses.

115. WEX contended that Dr Cragg's attempt to avoid this issue by using "proxies" to attempt a comparison between the alleged participants in the "travel payments industry" was misplaced and does not provide a reliable (and therefore practicable) method of comparison. WEX contended that Dr Cragg's analysis was flawed: in particular that it was circular, based on unsound assumptions, and did not enable any comparison of the likely effect of the pandemic on the financial condition of a company.

116. WEX submitted that a practicable comparison of adverse effect can be made by reference to participants in the payments industry which include those 41 payments companies primarily participating in the payments industry identified by Mr Davies in his first report. Other participants in the B2B payments industry include those 27 identified by Mr Davies as companies primarily participating in the B2B payments industry, or participating in it with their other operations in the payments industry. This approach, it said, involves using a standard industry classification as a starting point and cross-checking and supplementing the results against public information and available documentation.

117. WEX submitted that a comparison of the effects of events, changes, developments, states of fact or effects on the eNett Group (as a whole) and the Optal Group (as a

whole) against the effect on other participants in the payments industry and B2B payments industry is practicable and straight-forward. This is because public payments companies such as Mastercard provide extensive reports and disclosures about the impact of events on their business. The public companies Mr Davies has identified within the payments and B2B payments industries all provide detailed and timely financial reporting, forecasts and other regulatory and voluntary disclosures. This information allows a robust and reliable comparison to be made of the effect of relevant adverse events (such as the Pandemic) on participants.

118. At the end of the day, despite the careful attention and ingenuity brought to bear on this point, I was not much assisted by the expert evidence. In my judgment it is necessary to consider practicability from two perspectives – the first being the practicability of making some (necessarily interim and somewhat imprecise) assessment for the purposes of deciding whether to exercise the MAE clause. Practicability at this level is relevant to the exercise of construction, because it may be taken that it is unlikely that the parties objectively intended to produce a clause which could not be sensibly exercised in a relatively compressed space of time.

119. There is then the question of practicability for a final determination at trial. The evidence as to practicability issues at this level is unlikely to be helpful unless impracticability is readily discernible – or that material was available to the parties at the time of the SPA (a question which has not really been addressed).

120. Taking first the interim assessment of proportionality for a hypothetical TPI/travel payments industry, I was persuaded that a version of Dr Cragg's approach by reference to readily obtainable GDVs would offer a feasible means of at least ascertaining for the purposes of exercising the MAE clause prospectively whether WEX was likely to be right that there was a significant effect and disproportionality.

121. It was clear that non-financial data about underlying metrics in the travel industry is widely used by firms for benchmarking purposes and this approach is also taken by analysts. There is a fairly good supply of reasonably granular, prompt, non-financial data. Airline data disclosing price and volume by region, route and class is available (e.g. Bloomberg, MIDT, and TSA). Hotel data by price and volume is available (e.g. Yipit). Both are available monthly, weekly or even daily.

122. Plainly there are issues about extrapolation. Mr Davies raised a number of points about customers, interchange and rebate, divergence from forecasts, and the air/hotel mix as well as a portfolio of other financial events. Many of these appeared to have some force. In consequence I concluded that the results of the exercise cannot be said to be precise.

123. However the overall thrust of Dr Cragg's evidence appeared sound: non-financial data about travel volumes is a proxy for industry performance overall because of the performance drivers and economic models of the businesses. eNett/Optal and their competitors derive revenue from interchange, and variable costs from rebates. Interchange and rebates comprise a proportion of GDV. Those are the variables that drive profit, because fixed costs will not change in the period under consideration. Further GDV is likely to have a good correlation to travel volumes because most TPI/"travel payment industry" participants gain revenue and incur variable costs from processed travel transactions in a similar way.

124. Similarly, when one looks at the preliminary determination of the position as regards the B2B payments industry, I am persuaded that an attempt can well be made to identify a representative or near representative pool based on participants for whom data, such as analyst reports, can be obtained within the time constraints.

125. Again, points which were put to Mr Davies as to lack of consistency in his approach, and imprecisions which might well result from a given approach, seemed largely to be well made. But that does not detract from the overall point that there are means of performing a sampling exercise, using a pool of participants for whom interim data is available, which can give the parties a sufficient indication for the purposes of the exercise of the MAE clause. The use of Standard & Poor Global Industry Classification Standard ("GICS") classifications and company descriptions may be a daunting one, but Mr Davies' evidence, which explained a variety of possibilities, demonstrates that it can be performed. Mistakes may be made and adjustments made to the approach at the later substantive stage. But the exercise is not impracticable – as is perhaps not surprising given the ability of the parties to compare the values of other participants when considering the value to be assigned to this transaction.

126. I should specifically note here that it was a theme of the Sellers' argument that a comparison with the B2B or payments industry renders the Carve-Out nugatory because the disproportionality comparison becomes a comparison with the global economy. I am not persuaded that this is correct even for the payments industry. It is certainly a false point for the B2B payments industry which is a small subset of the larger industry.

127. At the latter stage it appeared ultimately to be common ground that some form of representative pool would have to be selected, based on expert evidence. It was also common ground that this could be done. Although the Sellers' original formulation of their case on TPI suggested an exclusive group, as the case developed it became clear that it was accepted that a comparison would realistically be not with all participants, but a sub-set of that group. As Dr Cragg said:

> " I think that you could have taken the payment industry structure, broadly speaking …, and taken … meaningful groupings of different types of firms within that overall structure to try to have a representative sample that would be stratified by the groupings that you've identified as being, …, important."

128. The problems of availability of information would largely disappear with the emergence of annual financial statements. Extra time would permit obtaining better information for private companies. Some issues would be simplified by starting from a defined point as to the relevant industry. It seemed very possible that liaison between the experts at an earlier stage than usual might well assist in dealing with such questions as catering for the balancing of core and marginal participants and the impact of the volume of business of different types of participant (for example the banks and the Mastercard/Visa issue).

129. Nonetheless the cross-examination of the experts persuaded me both that this exercise was likely to be complex and that it was unlikely that the parties would at the time of concluding the SPA have appreciated its complexities. WEX had performed a

valuation of eNett and Optal by reference to values of competitors in the B2B Payments industry, but of course this was a different exercise – and not performed under the face of opposition as doubtless any assessment of proportionality would be.

Part 3: The Main Issues

Introduction

130. There was no issue between the parties as to the correct approach to construction. It was common ground that the "*primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage*": *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, at [39]; and see also *Arnold v Britton and others* [2015] UKSC 36 at [17]. However, much in focus was the balance described in *Wood v Capita Insurance Services Ltd* [2017] AC 1173at [11]:

> "It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

131. The issue was as to the emphasis placed on the different stages in the iterative process. WEX placed heavy emphasis on the wording of the clause, and relied on commercial purpose as an accessory to that argument. For WEX it was important to bear in mind that in this case, the SPA was a long, highly detailed contract drawn up by experienced solicitors acting for sophisticated parties. Accordingly, it urged me to conclude that the contractual language used has particular relevance, and carries the most weight, in the iterative construction process: *National Bank of Kazakhstan & Anor v Bank of New York Mellon SA/NV London Branch* [2018] 2 CLC 103 (CA), Hamblen LJ at [39]-[40]; *Arnold v Britton,* Lord Neuberger PSC at [17]-[18]; *Wood v Capita,* Lord Hodge JSC at [11], [13]. WEX urged me, by reference to [64] of *Financial Conduct Authority v Arch Insurance (UK) Limited and Others* [2020] EWHC 2448 (Comm) (citing *Arnold v Britton* [64]) not to be overpersuaded by the retrospective charms of commercial purpose arguments.

132. The Sellers' argument rested heavily on what it said was the commercial purpose underlying the clause, as deduced from the US authorities, the evidence as to the purpose of the acquisition and the expert evidence; and while issue was certainly taken with WEX's approach to the wording, it is fair to say that it was broadly contended that these other factors effectively drove the construction of the clause.

133. One further point with which I should deal is the question of whether any specific burden rests as a matter of law on WEX in invoking the MAE clause. The Sellers submitted that one notable characteristic of MAE clauses, identifiable from the US cases, and the references to them in the English courts, is their narrow construction against the party seeking to rely on an MAE, and the high burden on any party seeking to invoke an MAE clause. WEX submitted that there are no special rules of

construction for MAE clauses, which are to be determined in accordance with ordinary principles of contractual construction.

134. In the end the difference between the parties on this issue was more apparent than real and the argument for a special rule was rightly not pursued in reply by the Sellers. The Sellers did not rely on any special principle applicable to MAE clauses as a matter of English Law, or on any binding dictum from the authorities. Nor did they submit that MAE clauses fall to be construed *contra proferentem*.

135. The question for me therefore is one to be conducted on the usual principles of contractual construction.

136. Given the focus on commercial purpose, and in the light of the range of evidence adduced, one topic which is not insignificant is which of the evidence is legally admissible as factual matrix evidence.

137. The parties were *ad idem* that there is no conceptual limit to what can be regarded as relevant background bearing on the parties' objective understanding of the terms to which they have agreed, which (as is well known from *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, per Lord Hoffman at page 913) may include "*absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man*". However the background information must be material as was said by Aikens J at [25] in *G Absalom v TCRU Limited* [2005] EWHC 1090 (Comm), "*a reasonable man would have regarded as relevant in order to comprehend how the document should be understood*" and which "*was reasonably available to both parties at the time*".

138. The Sellers also relied on *Merthyr (South Wales) Limited v Merthyr Tydfil County Borough Council* [2019] EWCA Civ 526 per Leggatt LJ at [50]-[55] as establishing that this includes material identifying the "*genesis and aim of the transaction.*" That was actually a case dealing with admissibility of prior negotiations, which is not what is in issue here. However the line which is maintained there between evidence to identify the "*genesis and aim of the transaction*" (permissible) and relying on such evidence to show what one of the parties intended (impermissible) must surely be equally applicable here.

139. Further, it must be borne in mind that material cannot be knowledge or intention known only to one of a number of participants, otherwise the same contract might have different meanings as regards different participants: *Kingscroft Insurance Company Limited and Others v The Nissan Fire & Marine Insurance Company Limited (No 2)* [2000] 1 All E.R. (Comm) 272.

The Relevant Wording

140. The MAE Definition is reproduced in its original structure (material parts only) earlier in the judgment. From this it can be seen that the clause effectively has three layers: the definition, the Carve-Outs and the Carve-Out Exceptions.

141. So MAE is defined in the SPA as:

> "any event, change, development, state of facts or effect that, individually or in the aggregate,
>
> (x) has had and continues to have a material adverse effect on the business, condition (financial or otherwise) or results of operations of [the eNett Group], taken as a whole, or of [the Optal Group], taken as a whole…or
>
> (y) would prevent or materially delay the consummation of the transactions contemplated by this Agreement".

142. The next stage is the Carve-Out, which lists the types of MAEs that are for WEX's risk.

143. The Carve-Out comprises, firstly, a *proviso* to sub-clause (x) above in the following terms:

> "…provided that, solely for purposes of clause (x), no such event, change, development, state of facts or effect resulting, arising from or in connection with any of the following matters shall be deemed, either alone or in combination, to constitute or contribute to, or be taken into account in determining whether there has been or will be, a Material Adverse Effect:
>
> a) the general conditions and trends in the industries or businesses in which [eNett], [Optal] or any of their respective Subsidiaries operates, including competition in any of the geographic or product areas in which [eNett], [Optal] or any of their respective Subsidiaries operates …
>
> b) general economic conditions, financial conditions or capital market conditions (including interest rates, exchange rates and credit markets);
>
> c) conditions resulting from the commencement, occurrence, continuation or intensification of any act of civil unrest, war (whether or not declared), terrorism or sabotage (including cyberattack), armed hostilities, military attacks or declaration of national emergency;
>
> d) changes (or proposed changes) in Tax, regulatory or political conditions (including as a result of the negotiations or outcome with respect to Brexit) or Law, IFRS EU or IFRS IASB (or, in each case, any authoritative interpretations thereof or the enforcement thereof);
>
> e) conditions resulting from any natural or manmade disasters, hurricanes, floods, tornados, pandemics,

> tsunamis, earthquakes, acts of God or other weather-related or natural conditions…"

144. There is then the exception to this Carve-Out:

> "provided, further that any event, change, development or effect referred to in clause (a), (b), (c) or (e) may be taken into account in determining whether there has been a Material Adverse Effect to the extent, and solely to the extent, such event, change, development, state of facts or effect has a disproportionate effect on [the eNett Group], taken as a whole, or on [the Optal Group], taken as a whole, as compared to participants in the industries in which [eNett], [Optal] or their respective Subsidiaries operate."

145. For present purposes all of this complicated structure produces this result: that 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, such conditions fall within the Carve-Out Exception.

146. The debate between the parties really focusses almost entirely on the Carve-Out Exception. -The parties agree that the Carve-Out provisions cover external and systemic risks. The question is what level of generality remains by the time one progresses into the Carve-Out Exception (in relation to which it is common ground that the burden of proof is on WEX).

The argument on the wording – Construction Stage 1

147. The parties' arguments on the actual wording can be summarised thus:

    a. WEX contends that the ordinary and natural meaning of the words favours its construction in particular by reference to the comparison to "industries" rather than any other term, the non-use of "businesses" in this context and the difficulties of the repeated phrase "as a whole" for the Sellers' approach.

    b. The Sellers contend that the evidence supported TPI as the natural and ordinary meaning of the wording in this context, in particular by reference to the need for a comparison and supported by what they suggest are problems with WEX's approach when it comes to "industries" in the plural.

148. At this preliminary stage, as a matter of pure analysis of the wording, I find the arguments of WEX the more compelling. While the wording is probably largely taken from a pro forma (in that the US cases and articles reveal that exceptions in something very like these terms are relatively common – see further below), this is nonetheless a major and heavily negotiated contract where I must assume that all wording has been carefully scrutinised by lawyers and is used wittingly and advisedly.

149. On this basis one can see that the parties have chosen a wording which involves a comparison to other participants in the relevant "industries". The initial point is that in a sense this helps no-one: the parties could have but did not specify what industries

they meant. It may well be that one result of this case is that future drafters will do differently.

150. But leaving that point to one side, two points arise from the choice of the word. The first is that they have chosen "industries" as the comparator, not “markets” or “sectors”, or indeed “competitors” or an identified pool. The second is that they have chosen the plural, rather than the singular. I will deal with the first point here and revert to the second point.

151. The words “markets” or “sectors”, or “competitors” are all possibilities which suggest a comparison designed to result in disproportion being triggered by firm specific issues only.

152. 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. In advised or careful use it tends to connote scale and a high level of generality. Thus it is used to cover such areas as the steel industry, the automobile industry or the IT industry. Though it is capable of being used also to cover these other terms, where industry is used for the latter possibilities, it tends to be an informal use. While the Sellers deprecated the use of the word “shorthand”, and probably rightly so, “industries” certainly resonates with me as used casually or informally to cover groupings which would not formally qualify as industries.

153. This is reflected in the factual evidence to which I come below. It is used as an imprecise equivalent – and not always by any means in the TPI sense. So while it is true, as the Sellers contended, that most people in the relevant markets would understand the term “travel payments industry” and it would not be misleading to them in the context in which it was used, that is some considerable distance from saying that “industries” here would be understood as meaning TPI (as defined). At best one can say that the use of the word does not preclude a later conclusion (informed by other arguments) that “industries” could cover a TPI or “travel payment industry”.

154. This initial view also found resonance in the expert evidence. As Dr Cragg's evidence made clear, at least in his specialism, industry has a different, broader meaning than market or sector.

> “A. I would say when you look at -- when I see the word “industry” versus “market” being used in an economics paper, for instance, the author typically is taking industry to mean a -- you know, a catch-all phrase for many entities that might be involved in a supply chain and a market is more specific narrowing of that. That's in an economics paper. Obviously in the common vernacular it's -- as I say, I think it's used interchangeably…
>
> … the concept of “industry” is not well defined, but it is looking at a broader -- I think it's looking at a broader definition.”

155. Given that this is a formal contract, where words matter, the use of "industries" would seem more likely to be a formal, precise use than an informal, imprecise use.

156. That approach to "industry" also gains some support from the wording of the SPA. Within it are references to "the private equity industry", "securities industry professionals" and the "banking industry". While, as Mr Hill Q.C. pointed out , there is also a reference at Art. IV, Section 4.16(h)(ii), to a Payment Card Industry Data Security Standard in the context of Optal's warranties, that is not a use of the word "industry" by the parties.

157. Still further support for this approach is in my judgment gained by looking at the treatment of the word "businesses" – which is also used in the SPA. Clause (a) of the Carve-Out refers to "industries", "businesses" and "geographic and product areas". On its face that distinguishes between businesses and industries and indicates that businesses is a more specific term than industries. One would certainly expect "industries" in the later part of the same definition to bear the same meaning as it bears here.

158. Mr Hill submitted that this was a false distinction and that the two words were here used as equivalents. Given the reference to "geographic and product areas" however, this seemed unconvincing. If industries and businesses were equivalent, with geographic and product areas being of a different character one would expect the drafting: "*industries/businesses and geographic and product areas*".

159. I should add however that I was not attracted by the submission for WEX that further weight is added to this point by the references in the SPA to the *"[eNett] Business" and "[Optal] Business*", which are then used in the SPA (e.g. Art III, Sections. 3.10(a), 3.11; Art. IX, Sections 4.10(a), 4.11). That is an entirely different context where there could be no relevant comparison.

160. Then there is the use of the words "taken as a whole". For the Sellers the conjunction of the separate provisions for each company "as a whole" and their definition of industry presents a difficulty, because it is unrealistic to say that Optal operates within the TPI, or indeed any version of the "travel payments industry". To make this drafting work the Sellers either have to persuade me that Optal is within the TPI (which I reject) or they have to elide the two businesses, which flies in the face of the wording. Even so the "as a whole wording remains strained if the Sellers' construction on Issue 4 is correct, because there is an oddity about comparing eNett/Optal "as a whole" with its competitors TPI businesses. WEX's approach works better. What this on its face (and against the background of the evidence as to participants' businesses) indicates is that the comparison might span more than one sector of business. Unless this is aimed at different sectors of a B2B payments business (as would be the case on WEX's approach), it is hard to see what the point of the wording "as a whole" is. Of course eNett and Optal in fact at the time had almost no other business, but the same wording is used in the Purchaser MAE clause – and in that context taking WEX's business "as a whole" would certainly encompass looking at more than one sector.

161. In terms of construction the Sellers' major point was that the words "disproportionate effect" make it clear that the comparator group (the "participants in the industries") must be sufficiently similar that they will ordinarily be proportionately affected. This

is a point which has a specious attraction, largely because it provides a relatively simple example of how the clause might work. However, in reality this is an approach to construction which is infected with the assumption of the purpose of the clause which is the point of the argument on commercial purpose. As a matter of language I do not accept that the mere fact of comparison necessarily suggests a comparison to very similar companies, or that comparators should necessarily be expected to be affected consistently (though it might do if, for example, there was authority establishing that this is what this portion of an MAE does – a point dealt with below).

162. I have found more attractive the Sellers' next point, which was that the use of "industries" in the plural suggests that the two aspects of Summit's business (i.e. the travel payments business and non-travel payments business) were in different industries. The Sellers say that if the intended meaning of "industry" is so wide as to encompass the whole of the business of both the eNett Group and Optal Group, then there would only be one, single, "industry" within the scope of the Carve-Out Exception. That would be the case for both the "B2B payments industry" and *a fortiori* for the "payments industry". This was said to be supported by WEX's reliance on this as covering (in the context of the Purchaser MAE) the different sectors of WEX's business – though in opening WEX actually contended that such an approach was unworkable and a reason against the Sellers' construction. The alternative, to say that "industries" is there to cover the fact that two companies are in focus, can logically not be right because the word "industries" is also used in the Purchaser MAE clause.

163. WEX's response to this problem was what the Sellers termed the "Russian Dolls" anomaly – that they were forced to identify as the second industry one which was either a subset of the first, or one of which it was itself a subset. This is of course a possible approach, but it appears an uncomfortable fit. This is not least because on the wording of the clause an MAE could be declared from a disproportionality in any of the industries identified, enabling a degree of "result shopping".

164. However ultimately I am not persuaded that the "industries" puzzle is a significant issue. It is perfectly possible that the parties may have put "industries" in one version of the MAE clause to cover the fact that two different companies were in focus. It is perfectly possible that "industries" is there to cover off the possibility that, looked at from this "industry" perspective, one or more of the three companies (eNett, Optal and WEX) involved might argue that they were part not just of the B2B payments industry, but (say) the travel industry or the healthcare industry. Over-precautionary drafting is hardly unknown in heavily lawyered documents. Certainly, I do not find it a roadblock or a significant counterbalance to the points made thus far.

165. I should for completeness add that WEX also argued that the Carve-Out Exception is intended on its face to be (and, as a term in a heavily negotiated contract, should be assumed to be) a meaningful exception, which would militate against the Sellers' construction which would be triggered in a vanishingly small category of cases. Ultimately I consider that this is probably right, but having heard full argument on this point I do not place much weight on it. It must be right that the Carve-Out Exception is intended to have a field of operation. Thus if it could be established that it never operated on the Sellers' construction that is a factor which would certainly have some real weight. However the fact that the field of operation is small is not

problematic – as an exception to an exception based on a disproportionality analysis that is probably to be expected. The field of operation in this case does however appear to be very small indeed, as explained further below. This is a point which does give pause for thought.

166. It follows that the preliminary consideration of the wording – the first iteration of the process of construction – suggests that WEX has the better of the argument on construction.

Commercial Purpose

167. In essence it was the Sellers' case that commercial purpose was critical in this case. They contended that construction had to be grounded in a sense of the intended purpose of the clause and that the enquiry had to be to ascertain what – objectively speaking – was the purpose of the provision, and what comparison would be meaningful, practicable, and commercially reasonable to these parties as a condition to the obligation to close.

168. The answer to this enquiry was, they contended, to isolate "firm specific risks". In other words, the purpose of the MAE clause was to isolate the risk relating to these companies only from those which pertained to the industry or sector or, to use the term often used at trial, "vertical".

169. The role of the MAE clause was therefore to identify a set of businesses which are meaningful comparators to the Summit business, and whose performance collectively would be likely to be affected in a similar way and to a similar extent by the "exogenous" risks that WEX bought into, so that the comparison isolates firm-specific risks (that may give rise to an MAE) from systemic risks (which may not).

170. WEX placed less stress on the commercial purpose, but contended that the Sellers were wrong about the commercial purpose in any event. It contended that while the purpose of the clause might be described as making a distinction between endogenous and exogenous risks, endogenous did not necessarily correlate with "firm-specific" and what was within the ambit of the clause was risk which pertained to the sector in which the Sellers predominantly operated. WEX was paying a price not just for the broad potential of the business, but for the existing travel business. So if that was affected the logic of the price disappeared.

171. The argument as to commercial purpose was multi-layered.

The Law on MAE Clauses

172. Of the English cases which have considered similar clauses, most are concerned with MAC or MAE clauses in banking transactions, rather than in share purchase agreements. That is the case, for example, in *BNP Paribas v Yukos Oil Company* [2005] EWHC 1321 (Ch.) (Evans-Lombe J) and *Grupo Hotelero Urvasco v Carey Value Added* [2013] EWHC 1039 (Comm) (Blair J).

173. There is one judgment of Blair J regarding an MAE clause in a SPA. That is *Ipsos SA v Dentsu Aegis Network Limited* [2015] EWHC 1726 (Comm). However neither party suggested that any relevant principles were to be drawn from that case.

174. The only English case which was urged on me as having any relevance at all was *Urvasco*. That case has the following points of interest:

a) At [335] the judge notes that the Delaware Chancery Court is the leading forum for corporate merger litigation, and that as at 2010 Professor Schwarz in an article in the UCLA Law Review stated that there was no consistent interpretation of MAC clauses, and that the Delaware court had never found an MAC to have occurred;

b) At [339] he considered the range of possible drafting options in MAC clauses, and that in practice the terms of the clause are likely to receive attention in the course of negotiations;

c) At [360] he cited *IBP Inc v Tyson Foods Inc* 789 A2d 14 (Del Ch 2001) 65, where the Delaware Court of Chancery construed the "material adverse effect" clause in the relevant agreement "*... as 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*".

d) At [364] he concluded as follows, in what must be taken as the leading statement of principle in the English authorities:

> "In summary, authority supports the following conclusions. The interpretation of a "material adverse change" clause depends on the terms of the clause construed according to well established principles. In the present case, the clause is in simple form, the borrower representing that there has been no material adverse change in its financial condition since the date of the loan agreement. Under such terms, the assessment of the financial condition of the borrower should normally begin with its financial information at the relevant times, and a lender seeking to demonstrate a MAC should show an adverse change over the period in question by reference to that information. However the enquiry is not necessarily limited to the financial information if there is other compelling evidence. The adverse change will be material if it significantly affects the borrower's ability to repay the loan in question. However, a lender cannot trigger such a clause on the basis of circumstances of which it was aware at the time of the agreement. Finally, it is up to the lender to prove the breach"

175. As will be readily apparent, even this case sheds little light on the present issues. Accordingly, the Sellers placed reliance on the better developed body of case law in the US, notably in Delaware, noting that some English law cases (including *Urvasco*) have drawn on those authorities in interpreting MAE provisions.

176. WEX resisted recourse to the US authorities. Ms Tolaney Q.C. argued that there was plenty of English authority and that, contrary to the Sellers' submissions, the cases

were not admissible as factual matrix or under the Practice Direction. I have not been at all attracted by that submission. There is a dearth of relevant English authority. While I would agree that the cases are not admissible as factual matrix, this is just the kind of situation where a review of the authorities from a foreign court is called for. Those authorities will obviously not be binding or formally persuasive, but to ignore the thinking of the leading forum for the consideration of these clauses, a forum which is both sophisticated and a common law jurisdiction, would plainly be imprudent – as well as discourteous to that court. The same goes for the academic learning which is often cited in the Delaware Court.

177. The principal case to which I was referred was *Akorn Inc. v Fresenius Kabi AG*, No. 2018-0300-JTL, 2018 WL 4719347 (Del. Ch. October 1, 2018). That case, a judgment of Vice-Chancellor Travis Laster, cites a wealth of academic learning. In particular frequent reference is made to Robert T. Miller, *The Economics of Deal Risk: Allocating Risk Through MAC Clauses in Business Combination Agreements*, 50 Wm. & Mary L. Rev. 2007, 2012 (2009) ("Miller 1") and Andrew A. Schwartz, *A "Standard Clause Analysis" of the Frustration Doctrine and the Material Adverse Change Clause*, 57 UCLA L. Rev. 789, 820 (2010). I was supplied with copies of both these articles by the parties.

178. I have myself made a quick review of the US articles since *Akorn* and have been assisted also by Robert T Miller's very recent *"Material Adverse Effect Clauses and the COVID-19 Pandemic"* University of Iowa Legal Studies Research Paper Number 2020-21 ("Miller 2").

179. Before turning to the facts of *Akorn* and the Court's decision in that case, it is worth reproducing some extracts from the judgment which round up the learning of academics considering these clauses in the US. These passages are taken from pages 119-122 of the judgment:

> "In any M&A transaction, a significant deterioration in the selling company's business between signing and closing may threaten the fundamentals of the deal. "Merger agreements typically address this problem through complex and highly-negotiated 'material adverse change' or 'MAC' clauses, which provide that, if a party has suffered a MAC within the meaning of the agreement, the counterparty can costlessly cancel the deal.
>
> Despite the attention that contracting parties give to these provisions, MAE clauses typically do not define what is "material." Commentators have argued that parties find it efficient to leave the term undefined because the resulting uncertainty generates productive opportunities for renegotiation …
>
> Rather than devoting resources to defining more specific tests for materiality, the current practice is for parties to negotiate exceptions and exclusions from exceptions that allocate categories of MAE risk. "*The typical MAE clause allocates general market or industry risk to the buyer, and company-*

> *specific risks to the seller.*"[Fn531] From a drafting perspective, the MAE provision accomplishes this by placing the general risk of an MAE on the seller, then using exceptions to reallocate specific categories of risk to the buyer. Exclusions from the exceptions therefore return risks to the seller. A standard exclusion from the buyer's acceptance of general market or industry risk returns the risk to the seller when the seller's business is uniquely affected. To accomplish the reallocation, the relevant exceptions are "*qualified by a concept of disproportionate effect.*" "*For example, a buyer might revise the carve-out relating to industry conditions to exclude changes that disproportionately affect the target as compared to other companies in the industries in which such target operates.*""

180. The judgment goes on to break down four categories of risk. At one end lie systemic or systematic risks which are risks *"beyond the control of all parties (even though one or both parties may be able to take steps to cushion the effects of such risks) and . . . will generally affect firms beyond the parties to the transaction"*. At the other end lie business risks, namely those *"arising from the ordinary operations of the party's business (other than systematic risks), and over such risks the party itself usually has significant control."* Of these risks actually arising from the ordinary business operations of the party are the most obvious kind. Between these, and irrelevant for present purposes, are Indicator risks and Agreement risks.

181. It is also worth reproducing footnote 531 to the judgment which summarises the learning on the industry/company specific dichotomy identified in the earlier quotation:

> "Zhou, *supra*, at 173; *accord* Choi & Triantis, *supra*, at 867 ("The principal purpose of carve outs from the definition of material adverse events or changes seems to be to remove systemic or industry risk from the MAC condition, as well as risks that are known by both parties at the time of the agreement."). "A possible rationale" for this allocation "*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.*" Davidoff & Baiardi, *supra*, at 15; see also Gilson & Schwartz, *supra*, at 339 (arguing that "*an efficient acquisition agreement will impose endogenous risk on the seller and exogenous risk on the buyer*"). As with any general statement, exceptions exist, and "*different agreements will select different exogenous risks to shift to the counterparty, and in stock-for-stock and cash-and-stock deals, parties may shift different exogenous risks to each other.*" Miller, *supra*, at 2070."

182. This footnote is the origin of the "exogenous/endogenous" distinction which was front and centre of the Sellers' submissions on construction. I also note in passing here that the earlier reference to renegotiation and the role of MAE clauses in triggering it, is supported by citations from several articles.

183. Turning to the facts, in *Akorn,* the court addressed an MAE clause with a similar structure to the one in this case, in that it had a carve-out and a carve-out exception. The latter was similar but not identical to the one in this case, being expressed thus:

> "provided further, however, that any effect, change, event or occurrence referred to in clause (A) or clauses (B)(3) or (4) may be taken into account in determining whether there has been, or would reasonably be expected to be, a Material Adverse Effect to the extent such effect, change, event or occurrence has a disproportionate adverse affect [sic] on the Company and its Subsidiaries, taken as a whole, as compared to other participants in the industry in which the Company and its Subsidiaries operate…"

184. As the Vice-Chancellor noted:

> "Consistent with standard practice in the M&A industry, the plain language of the Merger Agreement's definition of a Material Adverse Effect generally allocates the risk of endogenous, business-specific events to Akorn [the seller] and exogenous, systematic risks to Fresenius [the buyer]."

185. The facts of the case were that Fresenius, a German medical products company, agreed to acquire Akorn, an American generics pharmaceuticals company, for a price of US$5 billion. Between signing the deal and closing, Akorn's business suffered a precipitous and sustained decline. Revenues declined 29%, 29%, 34% and 27%, respectively, and operating income declined 84%, 89%, 292% and 134%, respectively, in each case compared to the same quarter in the prior year. A whistleblower tipped Fresenius off to what later transpired to be shortcomings in Akorn's regulatory compliance. Fresenius declared an MAE, and was upheld by the court – the first time the Delaware Court had found an MAE to exist.

186. The similarities between *Akorn* and this case must not be overstated. Much in focus in the judgment was the concept of materiality. Aside from that, the question turned on the categorisation of the risks. Were they, as Akorn suggested, "industry headwinds" known to Fresenius which had affected the generic pharmaceutical industry since 2013; or were they, as Fresenius contended, business risks allocated to Akorn?

187. The judge concluded at p. 145 that they were the latter:

> "The primary driver of Akorn's dismal performance was unexpected new market entrants who competed with Akorn's three top products—ephedrine, clobetasol, and lidocaine. Akorn also unexpectedly lost a key contract to sell progesterone. These were problems specific to Akorn based on its product mix. Although Akorn has tried to transform its business-specific problems into "industry headwinds" by describing them at a greater level of generality, the problems were endogenous risks specific to Akorn's business."

188. The Sellers placed weight on the fact that in concluding that Akorn had experienced a disproportionate effect relative to its industry peer group, the Vice Chancellor observed that Akorn was "*a specialty generic pharmaceuticals company,*" and compared Akorn to its competitors in the generic pharmaceutical industry, rather than to the entire pharmaceutical industry. However this was a false point.

189. In *Akorn* there was no issue about what the industry was. It was common ground that the relevant industry for the purposes of that clause was the generic pharmaceutical business. It may be right that there is such a thing as a generic pharmaceutical "industry", or it may be wrong; the point is that no-one argued about it. That agreement cannot therefore really assist my consideration here of whether there is a TPI (or indeed a travel payments industry). What that case leaves hanging, and this case potentially directly engages, is what I identified in argument as the potential gap between industry wide risks and firm specific risks.

190. Another point which is worth noting on the facts is that in analysing the question of disproportionality the exercise which was performed involved Akorn's performance against the performance of the industry peers selected by J.P. Morgan, Akorn's financial advisor, when preparing its fairness opinion for the purposes of the sale.

The purpose of the transaction

191. This was one of the Sellers' two "flagship" points. It is however one which must be handled with some care. WEX contended that evidence of the parties' intentions was not admissible as factual matrix evidence. I accept that argument. However, as noted above, the purpose of an agreement is capable of being factual matrix evidence. The distinction is between the subjective and the objective.

192. I therefore consider the question of the evidence as to the purpose of the deal on that basis. This involves a consideration of some evidence of the parties' intentions, but solely with a view to evaluating the objective purpose of the deal.

193. There was much evidence about what WEX was buying when they looked to purchase eNett and Optal – was it purchasing a travel business or a payments business? Unsurprisingly the Sellers made much play of the fact that WEX's own announcement of the acquisition in an investor presentation dated 24 January 2020 described the transaction as a "*[c]ompelling strategic acquisition that strengthens its position in the Travel Payments Industry*". The accompanying Investor Call Script (the product of a number of drafting iterations prior to approval by Ms Smith) stated, amongst other things that:

> "this combination creates the foremost B2B payments leader in the global travel marketplace…
>
> Importantly, this transaction combines leaders in the travel payment industry with highly complementary geographic footprints."

194. It refers to the combination "*enhancing our leadership in the travel market*" and that the "*transaction combines well-respected leaders in the travel payment space with highly complementary geographic footprint.*" Very similar statements were made both

in the Investor Presentation and in the Press Release of the same date – "leadership" and "travel market" were the buzzwords.

195. Alongside these statements were others referring to the travel payments business or space and to extending WEX's suite of global travel offerings. The statements made at this point were reminiscent of statements made at the time of the earlier ineffective negotiations where the rationale for the proposed transaction was said to be that "*WEX is enthusiastic to acquire the Optal/eNett Group to significantly enhance its existing travel payments platform*" leading to a "*combined growth strategy in travel payments*".

196. Similarly at the meetings prior to the SPA there was considerable focus on the travel payments business. A Confidential Information Presentation contained an industry overview which was concerned only with travel. It also identified a series of growth drivers, which all related to the travel industry other than a final driver relating to possible "vertical expansion" in the future. A Management Meeting presentation looked at Summit's current and addressable market by reference to travel only. By side letters to the SPA the parties also entered into certain restrictive covenants for some of the senior management which restricted them from participation in travel payments businesses but not other B2B businesses.

197. WEX's board minutes also discussed the proposed acquisition very much with a focus on the travel business, concluding on 23 January 2020: "*Based on the evaluation of Optal and eNett, WEX management has concluded that the targets enhance WEX's travel offering through geographical expansion and additional product features, and the transaction will be accretive to WEX's earnings*"

198. The WEX witness statements plainly, in my judgment, "slanted" this story, making practically no reference to this narrative. Their oral evidence was far more realistic, accepting that WEX wanted to target travel payments to diversify from an overweight position in other payments businesses and that Optal's non-travel businesses were not sufficiently material to form part of WEX's integration planning for the Summit business.

199. This more realistic approach was also apparent in the case put for WEX in opening, where it was accepted that *"WEX regarded the acquisition [of eNett and Optal] as providing it with an opportunity to enhance its client-base in the travel industry"* and that there is *"no doubt about what the principal nature of eNett or Optal's business is – or that WEX wanted to acquire that business."*

200. There was also considerable evidence that however much eNett and Optal were technically separate businesses, operating and reporting separately and with different ownership and treated separately by the SPA, the rationale for buying both was a single one, reflecting the fact that their businesses were enmeshed and complementary assets: *"We regarded the companies as providing two parts of one value chain, one business process"*, as Ms Morris put it. For all WEX's attempts to deride the description of the two companies as "*joined at the hip*", for all the contractual structure which maintained their separateness, they were heavily tied also by contracts, and the reality of the business as operated at the time (as opposed to in the past or in the possible future) was that they worked closely and extensively together.

201. Further, WEX's own plan following the acquisition of the eNett Group and Optal Group was that the whole of the travel related business of both eNett and Optal would be integrated with WEX Travel as a single travel payments business. This was confirmed in a presentation to the WEX Board on 6 December 2019 and in oral evidence.

202. I therefore accept that the travel element was a critical part of what Mr Hill referred to as "the deal thesis", and WEX's witness statements, and to a limited extent the evidence of Ms Smith unrealistically understated the value of that part of the equation.

203. However, the Sellers' characterisation of this deal as just a purchase of a travel payments business was itself an oversimplification in the opposite direction. While I entirely accept that WEX was very keen to buy the Sellers' business from a travel specific perspective and that that was a, and probably the single most significant, driver for the deal, that is not all of the story. There was explicit reference to the fact that Summit was "*well-positioned to expand in other high-growth verticals.*" There was a geographical synergy. Plainly some of the interest in the individuals who were sought to be obtained as part of the deal was to do with their travel market expertise.

204. I accept the evidence of WEX's witnesses that a part of their business was making use of innovations and techniques across a wider range of markets, and that they were excited about the potential of the Sellers' business to provide value in that wider range of markets. The story of WEX (outlined above) is one of diversifying markets and cross fertilisation of product and technique. Summit offered fertile ground for this aspect of WEX's business model. As Ms Smith put it as regards their own offering "*there's a lot of functionality that we have been able to pull into other areas*". That conclusion was echoed by Mr Moran.

205. I found the evidence of Ms Morris, WEX's Chief Corporate Development Officer, who was the person responsible for seeking out such opportunities, entirely persuasive on this. She vividly conveyed her enthusiasm for the potential of the business. Or as Ms Smith put it:

> "at a strategic level when we're considering assets, we're looking at asset categories of does it provide scale, does it increase your geographic mix and does it product extend for us. And what we liked about this was it actually hit on all three, we were really excited about that. It's rare for us to find something that hits across all three of those categories."

206. That opportunity for product extension is reflected in the factual and expert evidence which demonstrated that nearly all the companies in the travel payments market that provide VANs operate in more than one vertical.

207. So far as the factual evidence was concerned there was much debate as to whether WEX's travel business was a business, and who were the key competitors for eNett, Optal and WEX's travel business. Again there was force in the evidence of both sides. In a very real sense WEX's treatment of the travel portion of the business as a part of the broad business of WEX was artificial. Plainly WEX (as well as eNett) invested in travel industry expertise to help them understand and meet customers' needs. Plainly there were specific issues which were more acute in relation to travel payments.

Plainly other markets are not identical and might well have different informational requirements or regulatory requirements. However learning one market and understanding what clients wanted, might prompt an offering to a client who had not yet developed its ideas of what it wanted – some markets' take up of technological solutions moves in advance of others. Different markets are not all unique, as Ms Smith put it.

208. WEX's case, which I broadly accept, was that WEX Travel was not a business but a business segment, and while it had a leadership in a particular market this was part of a much broader offering.

209. The conclusion to which I come in relation to the objective purpose of the transaction was that this was not a deal with a single purpose. What would have appeared to an informed observer was a deal which was primarily about the Summit travel business, but which offered WEX some attractive synergies and potential for development. The present, predominant and known value was in travel; but the acquisition carried with it future value in other markets.

Issue 2(2) – is there a TPI, (or a travel payments industry)?

210. Before embarking upon this part of the enquiry I should note that this is a question which is capable of being relevant to the exercise of construction, but is not determinative. It was effectively common ground, and to the extent it was not I conclude that, the question which faces me is not binary, in one sense. If there is a travel payments industry that does not exclude the conclusion that the relevant industry is the B2B payments industry, or the conclusion that both industries are covered by the clause. This is because if there is a travel payments industry it is one which is a subset of the B2B payments industry, or at least has a very considerable overlap with the B2B payments industry. eNett or Optal might be described as operating in a number of industries at a higher or lower level of abstraction, including, for example, the travel payments industry, the IT services industry, the financial technology (or "*fintech*") industry, the B2B payments industry, or the payments industry.

211. Further the relevant question for me is the correct construction of the MAE Definition. That depends upon what objectively the parties meant when they referred to *"the industries in which eNett, Optal or their respective subsidiaries operate"*. The fact that there may not be a TPI as defined or even a travel payments industry with some different boundary or definition does not mean that the parties did not (objectively) intend to refer to that market or that sector.

212. The Sellers said that the existence of such an industry was demonstrated by the facts (also the main planks of their factual matrix case) (1) that the parties to the SPA recognised its existence; (2) that others, whether analysts, commentators, payment companies or travel suppliers recognised its existence; (3) that travel payments are more than simply part and parcel of B2B payments but have their own recognised ecosystem; and (4) that the needs of participants in the travel industry are such that there is a distinct set of businesses offering products which are particularly suited to those needs. This last point has of course been dealt with above.

213. These points need to be evaluated against the Sellers' definition of the TPI for which they contend. That is: *"The travel payments industry is the industry of providers of products and services to facilitate business to business payments to participants in the travel industry"*. I should note here that I am not minded to give any weight to the arguments as to the genesis of this definition, or its supposed contradictory nature. The absence of an original definition in the Particulars of Claim derives from the purist line which the Sellers originally took to the pleading of the case, which in normal circumstances they would have been perfectly entitled to do; I effectively forced them to plead a positive case as the price of expedition. As to the supposed contradictions, I am satisfied that Responses 6 and 7 read together sufficiently clearly.

214. When this exercise is performed, I conclude that there is no TPI as defined. A starting point is that the definition adopted by the Sellers is one which seems to have materialised for the purposes of the litigation. Neither Mr Hynes, nor Mr Burg or Dr Cragg referred to an external definition or explained where the definition came from. There were no documents put forward, other than this Response, which contained this definition.

215. There were certainly references by both parties to the phrase "travel payments industry". For example, some of the party statements to which I was referred by the Sellers were:

a) An eNett presentation dated December 2015 which referred to a "*travel payments industry growth opportunity*".

b) An article by Mr Hynes dated June 2017 talking of "*our journey to shake up the travel payments industry*".

c) An article by Jim Pratt, WEX Senior Vice President Global Sales and Marketing dated 1 March 2017: "*As the U.S. travel payments industry continues to advance, emerging geographies are taking a slightly different approach.*"

d) The invitation of July 2017, to the "*WEX Travel Lead User Group meeting*" at which over two days "*a diverse group of travel industry experts*" would "*share their unique perspectives that will shape the future of the travel payments industry*".

e) Travelport Press Release dated 10 December 2018: "*Frank Baker, Co-Founder of Siris Capital, added ... 'Travelport is redefining the travel payments industry through eNett, a disruptive and fast-growing leader in secure, virtual travel payments.... '*"

f) The WEX M&A Call Transcript dated 24 January 2020, statement of Ms Smith: "*this transaction combines leaders in the travel payment industry with highly complementary geographic footprints.*"

g) The WEX Investor Presentation dated 24 January 2020: "*Compelling strategic acquisition that adds capabilities and scale to Wex and strengthens its position in the Travel Payments industry*".

h) An article by Anant Patel, the Vice President of WEX's EMEA and APAC corporate payments division dated 24 June 2020: "*At a time where circumstances are often uncertain and irrational, such as in the travel payments industry…*"

i) An interview with Greg Sassone, WEX's Senior Vice President for Business and Partner Growth, dated 10 July 2020: "*we have you know for… probably twenty years now have had a really big focus on the travel payments industry kind of as a vertical right so we work with all of the large online travel agencies and help embed payment where they have to pay their suppliers. That's a segment industry where we've been very focused.*"

j) The LinkedIn page of Jim Pratt: "*Jim had the privilege of assembling diverse minds and cutting edge technologies to revolutionize the travel payments industry.*"

216. The evidence of Ms Morris and Ms Smith also realistically accepted that the phrase or term "travel payments industry" was well understood (at least as a shorthand), that it was used and was not misleading. Mr Hill put it to Ms Smith that her use of the phrase was a "fair and reasonable" description of where eNett and Optal operated. Ms Smith accepted this was so, albeit with qualifications.

217. However at the same time, none of the witnesses on either side said that the term was a standard term. Neither Mr Hynes nor Mr Burg claimed to have used the term in the TPI sense in the past. Mr Hynes accepted that it was not certain that the Singaporean regulator would understand the term.

218. I was also referred to a variety of third party statements using this term including references by Amadeus and Ixaris, and references on news or company websites, as well as references by four analysts over a period of six years. There were no regular analyst references to the TPI or travel payments industry in the analyst reports.

219. Taking all of these references (party and third party) together, I did not find this argument persuasive. There are two points to note. The first is that none of these references bear any signs of being used as references to the TPI as defined – and some of them, such as the 24 January announcement also have references to eNett and Optal operating as B2B providers.

220. The second is that I conclude from the relative paucity of the number of references (and some of the ones given above were probably not technically admissible as factual matrix) that the term "travel payments industry" is itself not one which is in day to day or established use. This is in contrast to the terms B2B payments industry and payments industry, for the latter of which Mr Moran traced thousands of references. It is, as WEX submitted, a natural shorthand used on some occasions. Other similar phrases were used which did not include the word industry, such as "travel space", "travel market" or "travel payments". Bearing in mind the expert evidence on the breadth of types of participants in the travel payments market, there is nothing in these references which advances the case in the Sellers' favour on this point in relation to the specific case they run (TPI as defined).

221. There is also other material to which the Sellers referred as the "ecosystem". On this I was not particularly impressed by the evidence. Mr Burg referred to publications such as the "*Airline Payments Handbook*" the extracted reviews of which contain two references to the term "travel payment", the reference to what he described as a website devoted to business travel payment industry news by AirPlus, but which in fact appeared to be a paper by Airplus, a reference to the term "travel payments industry" by Amadeus in a presentation at an investor day and some other similar articles published on websites by individual providers. Broadly speaking all of these tended to be ones which looked at issues from the perspective of travel or from the perspective of payments. None were specifically about a travel payments industry. Although Mr Burg referred to travel payments industry newsletters in his report, it transpired that there were no such newsletters. On reflection Mr Burg considered that news relating to travel payments would be more likely to be found in a broader payment industry newsletter – which does exist.

222. As for trade events and conferences, on examination the high water mark proved to be an annual "*Airline and Travel Payments Summit*" organised by Airline Information, whose main focus appeared to be airlines, rather than the OTAs who are the predominant customers of eNett and its competitors. The other events named were still less relevant; such as a "payment track" at a hotel network's conference or an airline symposium.

223. I also sought information about awards. Mr Moran in his evidence referred to two possible award events at which eNett or Optal might feature. Both of these were travel awards ceremonies. Mr Burg in his written evidence referred to the Australian Federation of Travel Agents awards as demonstrating eNett and Optal's expertise in the travel industry and travel payments and orally to the Airline Travel Payments Summit and the IATA Award Financial Symposium. Both of these facts are consistent with travel payments being a sector or vertical, or incipient industry, operating perhaps within more than one other industries (travel and payments), but not an actual industry in its own right.

224. This is entirely consistent with the conclusion reached above on the fourth point on which the Sellers placed emphasis (see paragraph 212 above) – the market of those providing customised products.

225. One further point which has struck me as being sound, though it is a point of little weight, is that there is a question to be asked about whether the parties would have intended to create a comparison with a subset of the B2B payments industry which was so specialised, because if this were to be regarded as an industry it would follow that every single customer segment would itself fall to be regarded as an industry (a point made by Mr Moran in his oral evidence). That is of course possible, but seems on balance unlikely.

226. WEX drew my attention to other points such as the absence of a regulator or the absence of a GICS classification for the TPI (or travel payments industry). These points are consistent with the conclusion I reach when I look at the material relied on by the Sellers, but I place no reliance on them. The existence of a regulator would certainly assist a conclusion that the TPI was an industry, but I have no information which would enable me to conclude that its absence is indicative in the other

direction. Similarly with the GICS classifications. Its presence would help the Sellers, but its absence does not actively hinder them.

227. It follows that the conclusion to which I come on the subject of the existence of a TPI or a travel payments industry is this:

   a) I conclude that there is no TPI as defined;

   b) I conclude that the evidence base is also insufficient to establish the existence of a broader "travel payments industry";

   c) I conclude that the term "travel payments industry" is one which is used informally, but that its meaning may vary contextually. This reflects the conclusion to which I have come above as to the existence of a market in travel payments products and services and the much broader spectrum of entities operating in different portions of that market;

   d) I also conclude that this market is a dynamic one which is far from being fully developed.

228. As a result it is not possible that the reference in the SPA to "industry" could have as a natural and ordinary meaning TPI as defined or even "travel payments industry".

229. It is possible, because of the broader market and the fact that there is some currency of the phrase, that reference to "industry" might in a sufficiently compelling case as to other facets of commercial purpose and factual matrix be a reference to the travel payments market. However looking at the use of the phrase in the evidence, I consider that given the relative paucity and imprecision of the references located, that is unlikely to have been the case in a document of the SPA's character. A very compelling case on commercial purpose and factual matrix would have to be made.

Other aspects of Factual Matrix

230. WEX relied upon eight factors in support of its case on factual matrix, namely that:

   a. There is an established and widely recognised payments industry (and an established subset of that, the B2B payments industry);

   b. Both eNett and Optal operate in the payments and B2B payments industries;

   c. Each corporate Group is a payments company. Each respectively provides B2B payments products which facilitate the making of payments by companies to other companies;

   d. Because they provide payments services, the eNett Group and the Optal Group are regulated as payments companies by payments regulation;

   e. Optal invariably describes itself in its formal company filings, including to its regulators and in its statutory accounts, as a B2B payments company. The statutory filings (also available to both parties) also describe eNett as a B2B payments company;

f. Both companies consistently described themselves as B2B payments companies in their sales pitches and client presentation materials together with, importantly, in materials provided to potential purchasers including WEX;

g. In their contemporaneous documents, WEX, Optal and eNett identified each other and other companies from a wide range of players in the payments and B2B payments industry as peers, competitors or comparable companies. Those identified include: the payments companies Amex, Mastercard, Ixaris, Fleetcor, AirPlus, Amadeus, Wirecard, CSI and various commercial banks, most commonly Barclays, BNP Paribas, Citi and US Bank.

h. The parties' lawyers (shortly after the sale of Optal and eNett to WEX) jointly described eNett and Optal in the FTC document, as participants in the B2B payments industry. This was the agreed basis on which the parties decided to describe their activities to the US FTC. This identified all of the above companies (save for Mastercard, Fleetcor and BNP Paribas) as "*Competitors with virtual offering currently active in the travel vertical*". Other B2B payments companies were identified as capable of repositioning an existing virtual offering to focus on travel or having the ability to develop a virtual offering.

231. Those points were not disputed by the Sellers as admissible matrix evidence, albeit subject to a rider that these were facts shooting at the wrong target, in that they focussed on what no-one disputed, namely that eNett and Optal were in the B2B payments industry.

232. I pause here to note that it must be a relevant part of the factual matrix when it comes to the process of construction that decisions have to be taken on material adverse effect and disproportionality in a relatively circumscribed timeframe – the parties have to be in a position to know all of the things involved by the date for closing. This was not contentious – indeed as appears above part of the argument on the expert issues proceeded on the basis that certain approaches were impracticable precisely because of the time constraint issues.

233. Overall to this point I do not consider that the factual matrix aspects of the commercial purpose argument provide any assistance to the Sellers.

Commercial purpose – conceptual overview

234. One then turns to examine the question of whether a commercial purpose can be discerned from the very nature of the clause which assists the Sellers.

235. Looking first at the question of risk allocation as a conceptual concept there are very clear arguments in favour of the approach which the Sellers advocate, which resonate with what was said in *Akorn*.

236. If MAE clauses allocate firm-specific risks to the sellers what they do is to allocate to a seller the risks to the business that eventuate because of the way the target business is or has been conducted, including in response to events that affect the industry in which the company operates generally. That makes sense because they are concerned

with the operation of the target business itself, and so are within the sellers' control until the sale is consummated (i.e. during the period between signing and closing). Plainly these are risks it is reasonable to expect the sellers to avoid or mitigate until closing occurs.

237. In that respect, one can see force in the Sellers' argument that this approach sits alongside other contractual control mechanisms of such risk, for example the giving of warranties and representations by the sellers about the state of the target's business, and covenants to conduct business in a particular way between the making and closing of an agreement. On this approach such warranties, representations and covenants represent the primary contractual means of safeguarding against business risk and the MAE operates as a "back-stop" allocation of business risk.

238. In this regard the Sellers referred me to Sections 3 and 4 of the SPA which contain the Sellers' warranties, which are "company specific" warranties. For example eNett warranted as follows:

a) Section 3.1(a): "*[eNett] is duly qualified, registered or licensed as a foreign corporation to do business, and is in good standing, in each jurisdiction where the character of the properties and/or assets owned, leased or operated by it or the nature of its business makes such qualification, registration or licensing necessary…*"

b) Section 3.1(b): "*Section 3.1(b) of the [eNett] Disclosure Schedule contains a complete and accurate list, as of the date of this Agreement, of each Subsidiary of [eNett]…*"

c) Section 3.5(a): "*Each of [eNett] and its Subsidiaries is in possession of all material Regulatory Licenses…*"

d) Section 3.7: "*Except as and to the extent set forth in the unaudited consolidated balance sheet of [eNett] and its Subsidiaries as of September 30, 2019, including any notes thereto (the "Everest Balance Sheet"), neither [eNett] nor any of its Subsidiaries has any Liabilities of a nature required by IFRS IASB to be disclosed…*"

e) Section 3.11: "*[eNett] and its Subsidiaries have good and marketable title to, or other valid right to use, free and clear of any Liens (other than Permitted Liens), all of the material assets, property and rights that it owns.*"

239. The Sellers also pointed to Section 3.10 which provides (a similar provision in respect of Optal appears at Section 4.10 of the SPA):

> "Since September 30, 2019 through the date of this Agreement:
>
> (a) the [eNett] Business has been conducted in all material respects in the ordinary course of business;
>
> (b) there has not been a Material Adverse Effect; and
>
> (c) neither [eNett] nor any of its Subsidiaries has taken any action that, if taken during the period from the date of this

> Agreement through the Closing Date without Purchaser's consent, would constitute a breach of Section 7.1(b)(i), Section 7.1(b)(ii), Section 7.1(b)(iv), Section 7.1(b)(v), Section 7.1(b)(vi), Section 7.1(b)(vii), Section 7.1(b)(viii), Section 7.1(b)(ix), Section 7.1(b)(x), Section 7.1(b)(xi), Section 7.1(b)(xii), Section 7.1(b)(xiii), or, solely as it relates to the foregoing subsections of Section 7.1(b), Section 7.1(b)(xv)."

240. WEX however points out that there is no reason to assume that the MAE clause is designed as a backstop in this way. The MAE clause in its submission should rather be seen as a separate protection, directed to a different risk. With complex warranties there is no need for a further backstop to firm specific risks. Rather the MAE clause operates to assign risk in a different way – namely to allocate exactly how much of the systemic risk each party is to bear in the period prior to Closing. This is a commercial allocation, and there is no reason to confine it to business-specific risks – particularly as Ms Tolaney noted in closing, when one has no idea how a particular balance has been arrived at in the process of negotiation (which party ceded advantage here to gain advantage there).

241. There is force in both of these arguments and no way of ascertaining internally which is correct. The Sellers' textual argument that the arrangement of Section 3.10 supports their approach to the division of risk because it appears as if the clause sees these warranties as being of the same sort (i.e. business-specific), may be right; but it might equally reflect Section 3.10 rounding up "readiness" issues into one place by reference to an order logical to that clause (status quo, external effects, internal effects).

242. The Sellers also argue that there is a harmony in their approach in that WEX sought to buy a travel payments business and it makes sense for the MAE clause to place the risk associated with that business on them, rather than having the MAE calibrated to a wider type of business. The Sellers say that it is incoherent to suggest that eNett and Optal were to be treated as general payments businesses, but only for the purpose of one element of the contractual risk allocation under the SPA (i.e. the MAE clause), and only for the period between execution of the SPA and Closing. While I see that harmony viewed from the subjective perspective, it is a less powerful point when one considers the objective purpose of the business. Nor is the point necessarily a good one in any event; as Ms Tolaney pointed out, there may be good reasons for a party buying into a particular business segment to wish the risk of that segment to be on the counterparty right up until the price is paid.

243. The main problem with the Sellers' argument however is that it is predicated on something which is not on the authorities established – namely that MAE clauses do seek to leave with the seller only "company-specific" risks. This comes back to the gap which I identified above as to where the market fits in to the analysis. Is the line of risk allocation created by the Carve-Out Exception to be drawn company/market or is it company (likely also market)/industry?

244. While the former is what was effectively said in the body of the judgment in *Akorn* that was not a live issue there, as I have noted; and it is not quite what the commentators say. As noted above Miller 1 at 2070 says in terms: *"different agreements will select different exogenous risks to shift to the counterparty"*.

245. That is essentially WEX's point, also made by Jeffrey Manns & Robert Anderson IV, The Merger Agreement Myth, 98 Cornell L. Rev. 1143, 1153 (2013): *"The MAC/MAE Clause gives teeth to the closing conditions in specifying what type of events would entitle the acquiring company to call the deal off if events occur between signing and closing that make the deal less advantageous than expected."*.

246. Miller 2, writing on issues that may arise in the light of the Pandemic, speaks rather of *"some control group, such as companies operating in the same industry as the seller"*. He also says this:

> "Disproportionality Exclusions are rarely specific about the control group and typically refer only to companies operating in the same industries or companies operating in both the same industries and same geographical regions as the seller. Hence, if a court has to apply a Disproportionality Exclusion, it will have to determine which companies are to be included in the control group. Needless to say, litigation-driven expert testimony from the parties is not likely to be very helpful to the court in determining which companies belong in the control group. Perhaps for this reason, in *Akorn v. Fresenius* the Court of Chancery looked to the sets of companies the parties' investment bankers used, at the time they were rendering their fairness opinions prior to signing, in the comparable companies analyses."

247. It seems clear to me from the commentators that whatever the Sellers may say, there is no clear authority or rationale in favour of the company/market comparison as opposed to the company (market)/industry one. And I do here bear in mind the comment also made in *Akorn* about the ambivalence of MAE clauses providing fuel for renegotiation. As in many cases of complex heavily lawyered documents (another example which springs readily to mind is that of demand guarantees) subjective intent on each side may well be different and the parties are left with an ambivalent compromise offering scope for renegotiation and from which – failing renegotiation - the judge has to fashion an objective intent which was never subjectively shared by the parties.

248. Once one gets to this point it is possible to revisit the question of commercial purpose with an open mind. There may be, but there need not be, such a close equivalence between the control group and the company as to produce the result that only company-specific events will trigger disproportionality and the final part of establishing an MAE. If there is a control group of this sort and it can fairly be described by the term used in the contract a court may well regard that as a helpful indicator.

249. Here however I do not have that indicator. As I have concluded above, there is no TPI and nor is there a readily discernible group which could populate that control group based on the TPI description. That provides at least an indication against the Sellers' approach, because it seems implausible that the parties intended by the use of the word "industry" to refer to something that has no accepted definition or recognised existence or that they intended a comparison with such a thing. Further were any such group to be constructed my conclusions above suggest that it would not provide that

tightly focussed comparison, because the pool is not composed of companies so similar to the Sellers that only company-specific issues would result in disproportion.

250. Nor is there a "travel payments industry" as such which itself could readily provide that control group – and if it did the variance from company-specific disproportion would be still greater. As for the travel payments market/vertical/space, that is sufficiently disparately populated that one could not say that it provided that functional starting point which Mr Hill urged – the expectation that all participants would be similarly affected by systemic events. This can be seen by considering some of the players in the wider travel payments space.

251. Effectively therefore the construct which drives the Sellers' approach to commercial purpose is lacking. I conclude that the Sellers' construction cannot be reached via the commercial purpose route. (I also doubt even if the TPI existed that this level of evidence would take the argument to the point where commercial purpose can properly trump indications in favour of the text.) The result, reached by this process of iteration, is that WEX's construction is to be preferred.

252. I should add that I was initially minded to consider that there was considerable help to be gained by what one might term the "*proof of the pudding*" approach to the argument. As WEX noted, it becomes quite hard to envisage any situation in which the MAE clause will respond if the Sellers are right. In opening Mr Hill hypothesised two scenarios where the clause might be activated.

> " where there is this pandemic, and management essentially run the company, idiosyncratically, in a way which increases the adverse effect of the pandemic in a way that's not suffered by other companies, and examples might be the way it deals with staff, if it lays people off, the approach to furloughing; those are just as an example, or it could be the effect on the company of Covid itself, the effect on management or staff of the illness, all of these are idiosyncratic firm-specific events which are covered…"

253. That was met by WEX with the response that aside from issues relating to comparison – and indeed causation that risk was specifically covered by the terms of the SPA in that management could not take that sort of "idiosyncratic" action without WEX's approval. The second was said to be so idiosyncratic as to be absurd and not the kind of risk which anyone would cater for. WEX's point is that the MAE clause has to have a greater scope of operation. Further arguments on this line were deployed in closing; but none offered a clear route for either party.

254. The Sellers' main response was a counterblow, namely that if WEX's construction was correct it would trigger the operation of the Carve-Out Exception too often, and essentially randomly and there would be no meaningfully correlated "effect" from an event.

255. Ultimately I came to the view that this line of argument did not assist much one way or the other. The clause says what it says, and if bearing in mind the relevant steps and considerations it were to produce a result that when construed objectively it leaves a vanishingly small area for the Carve-Out Exception to operate, that is a far

from impossible objective intention. Similarly if the parties (whether wittingly or not) choose a control group which will produce a disproportionate result in a fairly wide range of circumstances – for example when an entire vertical is affected – that is equally a far from impossible objective intention.

256. There is a second "*proof of the pudding*" argument – that is as to the workability of the exercise to be performed. This is a ground which interrelates closely with Issues 3-5. For the reasons I have given earlier I am not persuaded that the argument is one of much assistance. It is predicated on the argument that one of the comparison exercises is unworkable – and I conclude that they are both, in broad terms, workable.

Conclusion on construction

257. It therefore follows that I conclude that WEX's construction is correct. The conclusion derives from a consideration of all the layers of the analysis. The wording alone favours this. The parties chose to peg disproportionality to a comparison with "industries". There is no TPI as defined, nor an established set of participants in that sphere of operations or the wider travel payments market. A relevant industry, which both the parties accept eNett and Optal operated in, is the B2B payments industry. That is supported by a good deal of "outward facing" documentation. One can safely conclude that any hypothetical third party in the position of the parties would consider this to be the case.

258. There is no authority mandating any particular view of the comparison to be performed and in the absence of a TPI no relevant industry which could give rise to the tight and specific comparison contended for in practice.

259. The transaction combined a purchase of an established specialist in the travel "vertical" with products and services which had or had the capacity to have value in a range of other B2B verticals. One cannot say that the comparisons on either approach to construction would be unworkable, still less that they must be taken to have been known to the parties to be unworkable.

260. I note also that my conclusion to some extent mirrors the approach taken in *Akorn* (albeit there by consent) in that it reflects the parties' own approach when dealing with the relevant competition regulator as well as some of the references in other parts of the SPA.

261. Had I not reached this conclusion (for instance had I been persuaded that the correct line for an MAE was "company-specific") I would not have found that the reference to "industries" was a reference to the TPI. I would rather have been minded to hold that the relevant control group was the wider travel payments market, with the consequence that the control group would not have been limited as the Sellers suggested, but encompassed all those operating in that vertical. It seems likely that a similar result would emerge from that comparison.

Part 4: The Subsidiary Issues

Issue 4-5

262. These issues are ones where the conclusion is largely driven by the conclusion on construction. The Sellers' closing note put it this way in relation to Issue 4: "*Once it is concluded that "industries" ..., refers to the travel payments industry, there can be no basis for suggesting that if a comparison is made to other participants in the travel payments industry, the comparison ought to be made to the whole company identified as operating in the travel payments industry (including its businesses outside of the travel payments industry), rather than solely to its business in that industry.*"

263. While there remained a certain amount to say about how that approach chimed with a comparison to eNett and Optal "as a whole", I would have found for the Sellers on this if it had arisen. But once the question of construction is determined in the other direction there is no question of the comparison outlined. I have not been asked the equivalent question as to how the determination is to be made if (as I have found) the relevant industry is the B2B payments industry. No detailed submissions were addressed to this point. I will simply say that the conclusion on Issue 4 is to some extent driven by the evidence on the nature of the putative "travel payments industry". Given the different factual backdrop it would not necessarily follow that the answer to this question would be the same as the answer for the "travel payments industry" specific question.

264. As for Issue 5, this also does not arise on the basis of the conclusion I have reached above, which is that there is one relevant industry for the purposes of the comparison and I do not regard it as necessary to pursue the hypothetical outcome.

Issue 7

265. Issue 7 raises the question of whether the Carve-Out Exception applies to MAEs that are reasonably expected to occur in the future. This is a short point of construction relating to Art. VIII, Section 8.2(d) of the SPA and was the subject of virtually no oral argument before me. Given the conclusions which I have reached on the Main Issues, the point is probably moot.

266. The relevant provision provides that it is a condition to WEX's obligation to close the transaction that "*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*".

267. The Sellers contend that, when considering whether an event, change etc would "*reasonably be expected to have a Material Adverse Effect*", the Carve-Out Exception does not apply. The Sellers rely on the fact that the Carve-Out Exception refers to whether there "*has been a Material Adverse Effect*", and not to whether there "*has been or will be a Material Adverse Effect*", i.e. it is retrospective, not prospective.

268. The basis for the argument is a textual one while the Carve-Out includes "or will be" there are no words which apply the Carve-Out Exception to future events, and in particular to the second limb of Section 8.2(d), which applies where it is alleged that an event, change, development, state of facts or effect has occurred that would reasonably be expected (i.e. in the future) to have a Material Adverse Effect.

269. WEX contends that the Sellers' construction takes an "*absurdly literalist approach to the contractual wording*" and has no sound commercial rationale.

270. WEX points to the fact that Section 8.2(d) of the SPA refers twice in the same sentence to a "Material Adverse Effect", i.e. a material adverse effect as defined in the MAE Definition. It does so first at the beginning of the sentence, in the context of whether there has "*been*" a "Material Adverse Effect", and, second, towards the end of the sentence, in the context of whether there has been an event (etc) that would "*reasonably be expected*" to have a "Material Adverse Event". The point of the provision is that it can be invoked whether the MAE has occurred, or is reasonably expected to occur.

271. It contends that "Material Adverse Event" must mean the same thing both times it is referred to in Section 8.2(d), not least as it is being referred to twice in the same sentence, and both times it is given the same defined meaning, namely, that set out in the MAE Definition. The MAE Definition incorporates the Carve-Out Exception. Therefore, each time that a Material Adverse Effect is referred to in Section 8.2(d), it must incorporate the Carve-Out Exception.

272. WEX says that the Sellers' approach ignores the fact the parties made it plain in Section 8.2(d) and in the introductory language of the MAE Definition ("*has been or will be, a Material Adverse Effect*") that they intended the MAE Definition to apply prospectively in its entirety.

273. To conclude otherwise would result in an MAE being defined differently depending on whether an MAE had occurred or was reasonably expected to occur. There is no obvious or sensible reason why the parties would have intended this result. Given that the parties evidently anticipated that it would be possible to determine whether an event was reasonably expected to have a material adverse effect on the business of the eNett or the Optal Groups, it is hard to see why it would not be possible to do the same (i.e. predict the likely effect of the event) for other participants in the industries in which eNett and Optal operate so as to enable the relevant comparison to be made.

274. These are cleverly constructed arguments, but they fly in the face of clear wording in a contract which elsewhere WEX urges me to take very literally. It may on the face of it seem a little strange that having provided for a forward looking component to the MAE Definition, that forward looking element disappears only at the stage of the Carve-Out Exception; but that is what the clause clearly does. It cannot be said that there is no commercial rationale for this approach. The difficulties of making a disproportionality assessment (which includes making an assessment of the extent of the disproportionality) on the basis of actual facts are considerable enough, as the expert evidence in this case has demonstrated. It seems perfectly credible, and consistent with the risk allocation scheme involved in this part of the SPA, that the parties should say that this exercise is not possible for future events.

275. Since it cannot be said that commercial rationale is lacking to the extent that something must have gone wrong with the drafting, the words of the clause must in my judgment be honoured.

Issue 10

276. Issue 10 is the question of which party bears the burden of establishing to what extent any effect falls within or outwith the Carve-Out.

277. The Sellers contend that Carve-Out (d) on its true construction forms part of the general definition of an MAE because the general definition of an MAE includes establishing that the cause of the adverse effect is of the specified kind. It is therefore a matter on which WEX bears the burden of proof because it (and the other sub-clauses) operate to define or delineate the scope of the MAE which WEX needs to establish.

278. They have referred me to the *Ipsos* case where Blair J indicated obiter that he thought this approach would probably be correct, and also to *Levison v Farin* [1978] 2 All ER 1149, where the relevant provision included that "*there will have been no material adverse change in the overall value of the net assets of the company on the basis of a valuation adopted in the balance sheet allowing for normal trade fluctuations*". Gibson J agreed with the defendant buyers' acceptance that as part of their burden to show a material adverse change, they also needed to show that the changes were not caused by the trade fluctuations for which allowances needed to be made.

279. This is a point where argument is plainly possible. However I prefer the view (as did the Vice-Chancellor in *Akorn*) that, consistently with the position in insurance and the general position as to parties bearing the burden of the issues which they assert, the burden in relation to the Carve-Outs is on the Sellers.

Issue 11

280. The main Subsidiary Issue is Issue 11, which concerns the relationship between the Carve-Outs within the MAE Definition. It is an issue of pure construction not involving any evidence.

281. The point concerns the restrictions which have emerged in the light of the Pandemic on both domestic and international travel, together with other restrictions that make travel less attractive, such as those requiring quarantines, the closure of businesses and restriction of leisure activities. These restrictions and conditions have been pleaded by the Sellers as the Travel Restrictions, Lockdown Restrictions, Quarantine Restrictions and Business Restrictions (together, the "Restrictions"). On their face and without taking into account the pandemic section of the Carve-Out these would appear to be changes in "*regulatory or political conditions or ... Law*" within sub-section (d) of the Carve-Out.

282. There was (at least on the list of issues) a question about whether two sub-headings within the Carve-Out could be triggered at all. That issue is no longer live. So to the extent it matters, I conclude that Issue 11(1) is not necessary to decide, but if it is, then it would fall to be answered in the negative: an effect can, in principle, result from matters falling within more than one clause of the Carve-Out.

283. The real issue in dispute between the parties is, in so far as the worldwide collapse in travel on which WEX relies at least arose in connection with changes of regulatory or political conditions or Law, whether it matters if it also resulted or arose from or in connection with the conditions resulting from the pandemic within Carve-Out (e).

284. The Sellers contend that to the extent that the Restrictions constitute changes in regulatory or political conditions or Law and thus fall within clause (d) of the Carve-Out, they do not fall within the Carve-Out Exception.

285. WEX's case is that events giving rise to a material adverse effect may be taken into account if they are within the Carve-Out Exception, even if also within Carve-Out (d) to which the Carve-Out Exception does not apply.

286. It is worth here revisiting the relevant portions of the MAE Definition.

> ""Material Adverse Effect" means …
>
> … any event, change, development, state of facts or effect [1] that, individually or in the aggregate
>
> …(x) has had and continues to have a material adverse effect [2] on the business, condition (financial or otherwise) or results of operations of [the eNett Group or the Optal Group] …
>
> … provided, that, solely for purposes of clause (x), no such event, change, development, state of facts or effect [3]
>
> … resulting, arising from or in connection with any of the following matters [4]
>
> … shall be deemed, either alone or in combination, to constitute or contribute to, or be taken into account in determining whether there has been or will be, a Material Adverse Effect [5]:
>
> [Carve-Outs (a) to (g)] [6]"

287. The Sellers submit that the way the Carve-Outs work within the MAE Definition thus requires the following approach:

    a) The identification of an "*event, change, development state of facts or effect*" (referred to only as an "event" below for convenience) (Phrase [1]) that "*has had and continues to have a material adverse effect*" (Phrase [2]).

    b) Then, asking whether "such event" (Phrase [3]) results or arises "*from or in connection with any of the following matters*" (Phrase [4]), namely Carve-Outs (a) to (g) (Phrase [6]).

    c) If the event identified in Phrase 1 does arise in connection with any of the matters listed in (a) to (g), then it may not "be taken into account" (Phrase [5]).

288. The issue was seen very differently by the parties. The Sellers viewed it as requiring a focus on whether, in so far as the worldwide collapse in travel arose from or in connection with the Restrictions and the Restrictions are themselves "*conditions resulting from ... a pandemic*" within Carve-Out (e), that means that the worldwide collapse in travel did not arise from or in connection with changes in "*regulatory or*

political conditions or ... Law" within Carve-Out (d). The Sellers' position is that the answer is "no".

289. WEX took a more impressionistic view of the clause, essentially asking whether it should be construed as intending it to be possible for multiple heads of the Carve-Out to be actively triggered at the same time.

290. Ultimately while, in the circumstances of this case, that impressionistic argument has attractions, in that standing back it is difficult to regard the events of the last six months as being the result of changes in political or regulatory conditions or Law rather than as resulting from the Pandemic, I nonetheless conclude that the Sellers' argument must be preferred.

291. WEX criticised the Sellers' argument as contradicting the approach which they took on the Main Issue; in fact very much the same could be said for WEX's argument in this area, which fought shy of the contractual wording, in contrast to the approach taken on the Main Issues.

292. As a matter of language I agree with the Sellers that whether a relevant event is excluded by Carve-Out (d) from being taken into account depends on (and only on) whether that event "*resulted, arose from or in connection with any of*" the "matters" within Carve-Out (d) and that if it does, then there is no basis, and no contractual mechanism, to negate that conclusion merely because those changes in Law (etc) are also caused by the pandemic or are among the "*conditions resulting from…pandemics*" within Carve-Out (e).

293. The matter seems to be made clear by the terms of Carve-Out (g), which reads as follows:

> "(g) the failure of Everest, Olympus or any of their respective Subsidiaries to meet any projections, forecasts or budgets for any period (provided, that the underlying causes thereof, to the extent not otherwise excluded by this definition, may be taken into account in determining whether a Material Adverse Effect has occurred […])"

294. The *proviso* in (g) contemplates that: "*the failure… to meet any projections [etc…]*" is a matter within Carve-Out (g) (otherwise, there would be no need for the proviso); that failure has an underlying cause; and the underlying cause could itself be a matter excluded by another Carve-Out (otherwise there would be no need for the exception to the proviso: "*to the extent not otherwise excluded by this [MAE] definition"*).

295. Two points arise from this:

a) First, the terms of Carve-Out (g) expressly contemplate that matters within (g) might have underlying causes that are events arising from or in connection with matters within the scope of another Carve-Out (a situation that appears impossible on WEX's construction).

b) Secondly, the *proviso* specific to Carve-Out (g) is the only place where the parties have agreed to qualify a Carve-Out by reference to other non-excluded

causes. It would seem to follow that in all other circumstances, underlying causes are of no relevance to whether a Carve-Out is engaged and whether an event may be taken into account.

296. WEX's case also faces difficulties when one considers the parties' clear bargain that the Carve-Out Exception should apply only to certain Carve-Outs (namely (a), (b), (c) or (e)). This approach must mean that they intended to qualify the exclusionary effect only of those specified provisos. They did not intend that the Carve-Out Exception should qualify the effects of the other non-specified Carve-Outs. Any other approach than that advocated by the Sellers would undo the distinction between qualified and unqualified Carve-Outs.

297. WEX's construction has the result that it can essentially cherry-pick among various overlapping matters in connection with which an event may be said to have arisen. Given the very broad nature of Carve-Outs (a), (b), (c) and (e), this undermines the bargain that the Carve-Out Exception should not apply to Carve-Outs (d) and (f) to (i).

298. The fact that changes in Law may be an obvious consequence of a pandemic, is not to the point. There is obvious scope for similar overlaps elsewhere in relation to matters within the Carve-Outs that are subject to the Carve-Out Exception. And yet the parties chose not to include changes in regulatory or political conditions or Law within the Carve-Out Exception, even though it was obvious that such changes might result from matters within the Carve-Outs (a), (b), (c) and (e). This suggests that the parties did not intend the Carve-Out Exception to apply to such changes at all.

299. There is also a serious issue (not addressed in argument) as to how WEX's argument interplays with Carve-Out (h). Under Carve-Out (h) there is an absolute carve-out of events arising from or in connection with actions that WEX has consented to in writing. On WEX's argument if there were a national emergency falling within Carve-Out (c), during which eNett and Optal took certain steps with the approval of WEX and the result was that eNett and Optal are affected disproportionately, that approval is irrelevant, because WEX can still say that everything arose originally in connection with the national emergency, and the disproportionate effect may therefore still be taken into account.

300. I was not attracted by WEX's textual arguments. The first of these was that the Carve-Out Exception states in terms that any event, change, development or effect referred to in clauses (a), (b), (c) or (e) may be taken into account in determining whether there has been an MAE. It is said that the use of the word "*any*" shows that the parties plainly intended any effect referred to in clauses (a), (b), (c) or (e) to be included in the Carve-Out Exception, regardless of whether it also fell within clause (d).

301. However as the Sellers pointed out the MAE Definition words also include the word any in the phrase "*resulting, arising from or in connection with any of the [Carve-Outs]*". This would indicate that in so far as the event arising in connection with matters within Carve-Out (d), it may not be taken into account regardless of whether or not it also falls within Carve-Out (e).

302. The second such argument was that the Carve-Out Exception is introduced with the words "*provided, further, that…*" and that the parties thus intended and provided that

the Carve-Out would operate subject to the Carve-Out Exception. This seems to me to place far too much weight on the phrase which is equally apt simply to qualify the Carve-Out where the Carve-Out Exception does operate.

303. The Sellers' construction thus gives better effect to the parties' bargain: if and in so far as the worldwide collapse in travel "*arise[s] from or in connection with*" a change in "*regulatory or political conditions ... or Law*", then that collapse in travel may not be "*taken into account in determining whether there has been or will be, a Material Adverse Effect*". It does not then matter whether the same collapse in travel also arose in connection with other Carve-Outs or not, or whether its effects are disproportionate or not. The Sellers' construction accordingly makes much the better commercial sense of the clause, as well as fitting squarely within its language.

304. The fact that WEX's approach chimes with the instinctive way in which the Sellers thought of the matter is nothing to the point. As I have noted on the facts of the present case that is a very understandable reaction. But the process of construction has to take account of the wider possibilities. What if the reaction of a particular government to the Pandemic had been extreme or unreasonable (a variation of the "idiosyncratic management" argument considered above)? Then it would be much less attractive to regard the cause as the Pandemic and one would be driven to an exercise of trying to work out which of the two overall causes should trump the other.

305. The difficulties of this process were, as the Sellers noted, considered by Tomlinson J in *The Silver Cloud* [2004] Lloyd's Rep IR 217, which concerned insurance claims made following the 9/11 terrorist attacks under (among others) a policy covering loss *"resulting from a State Department Advisory or similar warning regarding ... terrorist activities, whether actual or threatened..."*. The insurers argued that a part of Silversea's claim was uninsured because it was in respect of losses resulting directly from terrorist activities rather than directly from the US government warnings that followed. The judge found that Silversea's business was severely and prejudicially impacted by (i) the reaction of travellers worldwide, but particularly Americans, to the events of 11 September and (ii) the warnings which followed as to the likelihood of further attacks, i.e. both by the warnings and by the attacks.

306. In a passage at [67]-[68] Tomlinson J outlined the practical difficulties of the type of exercise WEX's construction would require in that case. Although on very different facts, it resonates:

> "It is simply impossible to divorce anxiety derived from the attacks themselves from anxiety derived from the stark warnings issued in the immediate aftermath thereof. In relative terms very few people will have had any knowledge of the attacks apart from what they learned of them from media reporting ... Dr Gibbs for the purpose of his analysis treated media attention to, by which in context he meant coverage of, the attacks as part and parcel of the attacks themselves. In assessing causal impact he lumped in media coverage of the warnings with the warnings themselves. He accepted that it would have been a difficult assignment to consider 9/11 divorced from the media coverage of 9/11 - "tricky empirically but not [logically] impossible." However I think that the logic

> which compelled that conclusion similarly compels the conclusion that it is impossible to divorce the effect of the warnings from the effect of the events which they so swiftly followed. Furthermore I am not sure that I understood Dr Gibbs' reference to difficulty of an empirical nature since he did not base his conclusions upon the results of experimental studies, other than in the most general sense ... I am also I am afraid unable to regard the attribution of relative causal effect in percentage terms as anything other than arbitrary."

307. The bottom line is that there is no basis in the wording of the clause to conclude that the parties objectively intended that if two Carve-Outs were engaged they would have to work out which should prevail to the exclusion of the others. As the Sellers submitted this would be a complex, difficult and (as *Silver Cloud* tells us) unsatisfactory exercise involving arbitrary value judgments that would be difficult for a Court, and unworkable for commercial parties in the middle of a live transaction.

308. I asked the parties whether *FCA v Arch* had any impact on the argument, particularly in this regard. The answer was that it does not, and indeed in that case the approach taken to causation meant that as noted at [534] of that judgment the Divisional Court did not have to engage in any detail with *Silver Cloud*.

309. That is not to say, of course that the Sellers' argument is without its own difficulties on the workability front. To the extent that it requires any effects resulting from conditions within clause (e) (or clause (c), as the case may be) to be excluded insofar as they also fall within clause (d) this would involve stripping out the effect of the Restrictions on each of the Optal and eNett Groups from the effect of other conditions resulting from the Pandemic. That itself is likely to require expert assistance. There are concerns about whether even so it would be possible to conduct this exercise on any principled basis, particularly by the time one took into effect the distinctions between law and guidance. And here too there are concerns when one considers the need to do this at the time of declaring an MAE, as would surely be necessary.

310. To an extent therefore the workability arguments cancel themselves out; this is an area where the learning as to the use of MAE clauses as a trigger for renegotiation seems particularly apt.

Conclusion: Answers to the Preliminary Issues

311. In the circumstances I answer the preliminary issues as follows:

a) Issue 1: WEX bears the burden of proving whether and to what extent any effect within sub-section (e) of the Carve-Outs falls within the scope of the Carve-Out Exception.

b) Issue 2: The Optal and eNett Groups (and on any basis, the Optal Group) operate in the payments industry and the B2B payments industry. For the purpose of the definition of the MAE clause the relevant industry is the B2B payments industry. There is no TPI as defined, nor is there a "travel payments industry" as opposed to a travel payments market/vertical/space.

c) Issue 3:

i. All the industries posited are vibrant and relatively fast moving. The B2B payments industry and the payments industry are also industries with very many participants. It is neither realistic nor necessary for the Court to identify every single participant in any of these industries. The following conclusions are preliminary conclusions based on the evidence available at the time of this trial.

ii. Were there a TPI as defined it would include the participants identified by the Sellers in their pleading, plus (at least) IATA and Citi.

iii. Were there a "travel payments industry" it would include at least the participants identified by Mr Davies in Appendix GD-1.8 of his first report who also appear in Appendix 1 to WEX's closing.

iv. Participants in the B2B payments industry include those identified by Mr Davies in Appendix GD-1.7 of his first report.

v. Participants in the payments industry include those identified by Mr Davies in Appendix GD-1.5 of his first report.

d) Issue 4: There is no "travel payments industry" and it is not an industry contemplated by the SPA, but if there was, the appropriate comparison would be between the effect of an MAE on each of the eNett and Optal Groups, taken as a whole, and its effect on the business of the relevant comparators which operate in the "travel payments industry".

e) Issue 5: This issue does not arise.

f) Issue 7: When determining whether an event, change, development, state of facts or effect is "reasonably ... expected" to have a Material Adverse Effect within Section 8.2(d) of the SPA, the Carve-Out Exception is not applicable.

g) Issue 10: Insofar as Issue 10 is relevant in the light of the answer to Issue 11, the burden of proof is on the Sellers to establish whether and to what extent an effect falls within clause (d) of the Carve-Out.

h) Issue 11: The Carve-Out Exception does not apply irrespective of whether the events, changes, developments or effects also fall within sub-section (d) of the Carve-Outs.

APPENDIX 1 - THE PRELIMINARY ISSUES

(1) **Issue 1**: Which party bears the burden of proof in respect of the question of whether and to what extent any effect within sub-section (e) of the Carve-Outs falls within the scope of the Carve-Out Exception?

(2) **Issue 2**: For the purposes of the definition of Material Adverse Effect, what is the industry or what are the industries in which each of eNett, Optal or their respective Subsidiaries (as defined in the SPA) operate? This involves the following sub-issues:

(1) Do eNett, Optal or their respective subsidiaries operate in:

(a) The "*travel payments industry*"; and/or

(b) The "*payments industry and/or B2B payments industry*"?

(2) Is there a "*travel payments industry*" and, if so, are participants in that industry to be identified by the fact that they provide business-to-business payment products and/or services that are particularly suited to meet the payment needs of participants in the travel industry and supplied to such participants?

(3) **Issue 3**: Without prejudice to the parties' positions as to the relevance or materiality of any enquiry on this issue or the appropriate extent of any enquiry, who are the other participants in each of the industries in which Optal, eNett or their respective subsidiaries operate? This involves the following sub-issues:

(1) If the answer to Issue 2(1) is the "*travel payments industry*", who are the other participants in that industry?

(2) If the answer to Issue 2(1) above is "*the payments industry and/or the B2B payments industry*", who are the other participants in those industries?

(4) **Issue 4**: If and insofar as eNett, Optal or their respective Subsidiaries operate in the "*travel payments industry*", are they to be compared to the business(es) of a person identified in answer to Issue 3(1) which operate(s) in the "*travel payments industry*", or all the business(es) of such person (including any businesses operating outside the "travel payments industry")?

(5) **Issue 5**: If and insofar as the eNett Group or the Optal Group operates in more than one industry, how is the comparison between participants in those industries and the eNett Group, taken as a whole, or the Optal Group, taken as a whole, to be conducted?

(6) **Issue 7**: When determining whether an event, change, development, state of facts or effect is "*reasonably ... expected*" to have a Material Adverse Effect within clause 8.2(d) of the SPA, is the Carve-Out Exception applicable?

(7) **Issue 10**: Which party bears the burden of proof in respect of the question of whether and to what extent any effect falls within or outwith sub-section (d) of the Carve-Outs?

(8) **Issue 11**: Insofar as any alleged change in regulatory or political conditions or Law (as defined in the SPA) (or, in each case, any authoritative interpretations thereof or the enforcement thereof) was itself caused by, arose from or in connection with the SARS-CoV-2 pandemic or the conditions resulting therefrom:

(1) Will the effect fall only within sub-section (e) of the Carve-Outs, and not within sub-section (d) of the Carve-Outs; or

(2) Does the Carve-Out Exception apply irrespective of whether the events, changes, developments or effects also fall within sub-section (d) of the Carve-Outs?