CADWALADER

Bouncing Back

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Congratulations to Bonnie Neuman

By **Steven M. Herman**
Partner | Real Estate

I am excited to congratulate my fellow partner Bonnie Neuman on her expanded role as the new head of our market-leading real estate finance practice.

Bonnie focuses her practice on commercial real estate finance, representing lenders, investors and servicers in domestic and cross-border transactions, including the origination of mortgage and mezzanine loans, loan syndication, loan servicing, securitizations, workouts, restructurings and bankruptcy-related matters. Her experience has involved the financing and securitization (including many SASB securitizations) of virtually every type of commercial real estate, including hotels, office buildings, shopping centers and industrial properties. Bonnie has been recognized by *The Best Lawyers in America*, *Law360* and *Legal Media Group* as one of the nation's leading real estate attorneys, including as a three-time recipient of *Law360*'s "Rising Star" award recognizing top attorneys under 40 years of age.

Bonnie is also a leader in diversity initiatives in the legal and real estate communities, serving as a member of the CREFC Women's Network and as a member of Cadwalader's Women's Leadership Initiative.

Congratulations, Bonnie!

(Don't) Stand By Me: NY Court of Appeals Judge Unravels Confusion Surrounding Doctrine of Standing in Residential Foreclosure Actions


By **Steven M. Herman**
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By **Parker Ihrie**
Associate | Real Estate

In a recent concurring opinion, Judge Rowan D. Wilson sifts through and attempts to clear up some confusion in New York case law surrounding the doctrine of standing in foreclosure actions. The question at issue involves the difference between the doctrine of standing, on the one hand, and whether a plaintiff is a party to contract – an essential element of a foreclosure action – on the other.

The case at issue, *U.S. Bank N.A. v Nelson*, involves a foreclosure action instituted by U.S. Bank, N.A. of a residence owned by the defendants, the Nelsons. In the lower court, the plaintiff provided evidence that it was the holder of the debt at issue, and the defendants offered no argument that such evidence was deficient. The defendants challenged plaintiff's ownership of the debt for the first time upon appeal. The New York Court of Appeals affirmed the lower court's grant of summary judgment in favor of plaintiff, arguing that because the defendants failed to challenge plaintiff's ownership of the debt as an affirmative defense in their answer or pre-answer motions, such defense was unpreserved for the Court of Appeals' review.

Judge Wilson issued a concurring opinion, but his conclusion was based upon an analysis which differed from that of the majority. His opinion was simply that the plaintiff provided evidence that it was the holder of the note, and the defendants did not offer any contrary proof or argument that such evidence was deficient. Judge Wilson explained that this case has nothing to do with the doctrine of standing and at the same time brings to the forefront the conflation of the doctrine of standing. Standing is a requirement that must be satisfied before a court can even hear certain cases, while the failure to state a claim for relief goes to the merits of the case. The opinion goes on to explain in detail that while the decision of the majority is correct, it is correct for the wrong reasons. Judge Wilson explains that the majority's decision is rooted in this misunderstanding of the doctrine of standing – a misunderstanding that has affected New York courts for at least the past decade.

In order to bring a residential foreclosure action in New York, the lender must provide, as an essential element of its claim, evidence that it is the holder of the debt secured by the mortgage at issue. Specifically, under NY CPLR § 3012-B, the legislature requires that the lender produce "the mortgage, security agreement and note or bond underlying the mortgage executed by defendant and all instruments of assignment, if any." This requirement mirrors the doctrine of presentment required in connection with the payment of negotiable instruments. A lender will have failed to establish a claim without the foregoing. Alternatively,

the production of such evidence will constitute *prima facie* evidence that such element has been satisfied, subject to challenge by the defendant borrower.

The doctrine of standing, however, is a prerequisite of justiciability, which refers to the types of matters a court can adjudicate. As Judge Wilson explains, there are two types of standing: constitutional and prudential. Constitutional standing is based, as one might presume, in the U.S. Constitution. Specifically, case law has evolved to provide that the Case or Controversy Clause of the U.S. Constitution requires satisfaction of three elements in order to show standing: injury in fact, causation and redressability. Judge Wilson states that because the New York Constitution does not have a case or controversy requirement, "the federal constitutional standing doctrine is of little or no relevance."

The Court of Appeals has adopted the rule that prudential standing requires a party to show that its injury falls within the "zone of interests" or concerns that the applicable statute aims to protect against. Judge Wilson explains that standing generally comes into play when parties attempt to enforce public – not private – rights. The U.S. Supreme Court has stated that "[s]tanding is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria." It has also warned that "[t]he distinct concepts [of standing and cause of action] can be difficult to keep separate" and that "the question whether a plaintiff states a claim for relief 'goes to the merits' in the typical case, not the justiciability of a dispute, and conflation of the two concepts can cause confusion." Judge Wilson proffers that standing has been "increasingly misapplied in cases where private rather than public rights are at issue" and that this is such a case that "confuses the legal principle at issue."

Here, the defendants' failure to argue "lack of standing," albeit a misnomer, in the lower court should not have been the basis for the Court of Appeals to affirm the lower court's grant of summary judgment in favor of the plaintiff. True lack of standing would in fact have to be raised as an affirmative defense in the lower court; however, because this argument goes to the merits of the case by attacking an essential element of a breach of contract action, this argument should have been permitted to be raised at any point. The issue for the Nelsons, however, is that U.S. Bank, N.A. was able to provide sufficient evidence that it was the noteholder and the Nelsons were unable to refute it.

Judge Wilson puts it concisely: "Needless to say, when someone purporting to be a party to a contract sues to enforce that contract, no issue of standing is involved. You're either a party to the contract or not."

You Can Run But You Can't Hide: The Corporate Transparency Act

By **Steven M. Herman**
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By **Alessandra LaRocca**
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In December 2020, as part of the larger National Defense Authorization Act, the Corporate Transparency Act (the "Act") was enacted. The Act requires that anonymous shell companies, most notably limited liability companies and partnerships, disclose their ultimate beneficial ownership and control in an effort to combat corruption, money laundering and financing of terrorism, among other things, in the United States.[1]

The Act requires that corporations, partnerships and limited liability companies formed in the United States, or non-U.S. entities registered to do business in the United States, disclose the beneficial ownership of such companies at the time of entity formation to the Financial Crimes Enforcement Network ("FinCEN"), a bureau of the Department of the Treasury that collects and analyzes information about financial transactions in order to combat financial crimes. The Act requires the following information: the beneficial owner's name, address, date of birth, and an identification number, such as a driver's license or passport number. Additionally, if the company is sold or its ownership changes, it is required to update that information with the Department of the Treasury.

Pursuant to the Act, a "beneficial owner" is defined as an individual who, directly or indirectly, either "exercises substantial control over the entity" or "owns or controls not less than 25% of the ownership interests of the entity." However, the phrase "substantial control" is not defined in the Act. The statute specifically excludes the following from the definition of "beneficial owner": (i) minor children if the information of their parent or guardian is reported, (ii) an individual acting as a nominee, intermediary, custodian, or agent, (iii) an employee whose control or economic benefits is derived solely from the employment status of that person, (iv) an individual whose right in interest to such entity is through a right of inheritance, or (v) a creditor of such entity, unless that person exercises substantial control or owns more than 25% of the ownership interests in the reporting company.[2]

The Act applies to limited liability companies, corporations, and other similar entities. The Act provides a list of entities that are exempt from the reports that are required, including banks, insurance companies, investment funds, charities, public companies, broker dealers, public accounting firms, public utilities and pooled investment vehicles that are advised or operated by banks or registered investment advisors. Moreover, if an entity (i) "employs more than twenty employees on a full-time basis," (ii) "filed in the previous year federal income tax returns in the United States demonstrating more than $5,000,000 in gross receipts or sales" (this threshold aggregates subsidiary income and income of parent entities), and (iii) "has an operating presence at a physical office within the United

States," then such entity is exempt from the reporting requirement under the Act.[3] In addition, "any corporation, limited liability company, or other similar entity of which the ownership interests are owned or controlled by one or more entities" which are otherwise exempt are also exempt from reporting.[4]

The Act is retroactive, applying to both new companies formed after the effective date of the Act was enacted, as well as to existing companies. The Act is not immediately effective since the Treasury Department has one year to issue the regulations detailing how the Act will be implemented. Generally, each company must submit to FinCEN a report that contains the information detailed above. Within one year after the enactment of the Act, the Treasury Department will set up a registry to collect the required information. New companies that are formed after the effective date of the regulations must "at the time of formation or registration, submit to FinCEN a report that contains the information" detailed above. However, existing companies that have been "formed or registered before the effective date of the regulations" must submit a report with the required information "in a timely manner, and not later than two years after the effective date of the regulations." If there is a change with respect to any information that is required to be reported under the Act, such entity must, no later than one year after the date on which there is a change to such information, submit a report with the updated information relating to the change.[5]

Generally, these disclosures will be maintained as confidential and not be made public by FinCEN, with a few limitations to such confidentiality. Such limitations include: (i) upon a request through appropriate protocols from a government agency, (ii) a request made by a "financial institution subject to customer due diligence requirements, with the consent of the reporting company, to facilitate the compliance of the financial institution with customer due diligence requirements under applicable law," and (iii) a request made by a "federal functional regulator or other appropriate regulatory agency."[6]

A violation of the Act provides for civil penalties of up to $500 for each day that a violation has not been remedied and criminal penalties of up to $10,000 and two years' imprisonment for individuals who intentionally submit incorrect or fraudulent beneficial ownership information or who knowingly do not provide comprehensive or updated beneficial ownership information.

As indicated, in addition to the formation of new entities, all existing entities will need to comply with these new regulations. The Act will, in essence, affect thousands of entities. Going forward, financial institutions should consider the need to ensure that the reporting of this information (or exemption therefrom) is added as a checklist item for their transactions, as well as a condition precedent to any permitted transfers.

[1] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6402-6404 (2020).

[2] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6403 (a)(3)(A)(i)-(ii), p. 1219.

[3] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6403 (a)(11)(B)(xix)(I)-(III), pp. 1222-1223.

[4] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6403 (a)(11)(B)(xxii), p. 1223.

[5] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6403 (a)(14)(1)(A)-(D), pp. 1223-1224.

[6] Corporate Transparency Act, H.R. 6395, 116th Cong. §§ 6403 (c)(2)(B)(i)-(iv), pp. 1227-1228.

COVID-19 Update: Governor Cuomo Extends Residential Eviction and Foreclosure Moratorium

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Since declaring a State of Emergency on March 7, 2020 in response to the COVID-19 pandemic, New York Governor Andrew Cuomo has issued a number of Executive Orders providing protections for both commercial and residential tenants and mortgagors. On March 20, 2020, Governor Cuomo issued Executive Order 202.8 prohibiting the enforcement of an eviction of any residential or commercial tenant or a foreclosure of any residential or commercial property for a period of ninety days. Most recently, Executive Order 202.66 extended the residential moratorium through January 1, 2021, and Executive Order 202.81 extended the commercial moratorium through January 31, 2021.

On December 28, 2020, Governor Cuomo signed the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (the "Act"). The Act seeks to provide additional relief to residential tenants and property owners impacted by the COVID-19 pandemic and extends the time periods of the stays granted pursuant to Executive Order 202.66 through May 1, 2021. Although the Act does not address the moratorium on commercial evictions and foreclosures, Governor Cuomo announced on January 8, 2021 that he will propose legislation codifying and extending the moratorium on commercial evictions through May 1, 2021, as well.

The Act provides that any eviction proceeding pending on December 28, 2020, or commenced within thirty days thereof, will be stayed for at least sixty days. If there is no pending eviction proceeding, and a landlord wants to pursue an eviction, the landlord must provide a form (the "Hardship Declaration") to the tenant, which gives notice to the tenant that if (a) the tenant is experiencing financial hardship due to COVID-19 or (b) moving would pose a significant health risk because of a high-risk household member, then the tenant cannot be evicted until at least May 1, 2021 for nonpayment of rent or for holding over. The landlord also must provide the tenant a mailing address and e-mail address to which the tenant can return the Hardship Declaration. If the tenant completes, signs and delivers the Hardship Declaration to the landlord indicating that one of the foregoing circumstances is applicable, and specifying which circumstance is applicable, then the tenant cannot be evicted until at least May 1, 2021. A court cannot accept a filing for an eviction proceeding unless the landlord files (i) an affidavit of service demonstrating the manner in which the landlord served a copy of the Hardship Declaration on the tenant, and (ii) an affidavit attesting that either (a) at the time of filing, the landlord did not receive a Hardship Declaration from the tenant, or (b) the tenant returned a Hardship Declaration, but the tenant is persistently and unreasonably engaging in behavior that substantially infringes on the use and enjoyment of other tenants or causes a substantial safety hazard to others. In either case, the protection from eviction would not apply to the tenant.

The Act provides a similar moratorium on foreclosure proceedings until May 1, 2021 for mortgages relating to residential real property, provided that the owner or mortgagor requesting relief is a natural person who owns ten or fewer dwelling units (which may be in more than one property or building as long as the total aggregate number of ten or fewer units includes the primary residence of such natural person requesting relief and the remaining units are rental units). Additionally, if a real property owner submits a Hardship Declaration to any entity or person that conducts tax foreclosures or tax lien sales, then such submission will act as a temporary stay on tax foreclosure actions and tax lien sales until May 1, 2021. While the stay is in effect, no other action or proceeding may be commenced to recover any part of the delinquent taxes.

The Act also prohibits credit discrimination against residential real property owners as a result of such owner being granted a stay of mortgage foreclosure proceedings, tax foreclosure proceedings or tax lien sales, or as a result of such owner filing a Hardship Declaration with a lender. The prohibition extends to negative credit reporting, and both prohibitions will expire May 1, 2021. Finally, the Act requires local governments to extend the Senior Citizen's Homeowner Exemption and Disabled Homeowner Exemption from the 2020 assessments to the 2021 assessments. The local assessor must make available renewal applications for eligible recipients, and the local government may adopt laws or resolutions that include procedures that govern the filing of renewal applications.

COVID-19 Update: Can't Lose What You Never Had: New York State Court Rejects Argument That a Pledge of the Equity Interests in an Entity That Owns Real Property Requires Foreclosure under RPAPL Article 13


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By **Molly Lovedale**
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During the COVID-19 pandemic, New York State courts have granted a number of preliminary injunctions enjoining UCC foreclosures for a period of time. For example, in *D2 Mark LLC vs. Orei VI Investments LLC* and *Shelbourne BRF LLC, Shelbourne 677 LLC v. SR 677 BWAY LLC*, the courts found that elements of the UCC foreclosures were not commercially reasonable as a result of the pandemic and temporarily prevented the UCC foreclosures.[1] However, not all borrowers have had the same success with preliminary injunctions. In *893 4th Avenue Lofts LLC vs. 5AIF Nutmeg, LLC*, 893 4th Avenue Lofts LLC was the borrower (the "Borrower") under a loan secured by a pledge of its equity interests and the Borrower defaulted on its payment obligations under such loan. 5AIF Nutmeg, LLC, 5AIF Maple 2, LLC and 5 Arch Funding Corp. (collectively, the "Lender") sought to exercise their rights under the loan documents and to conduct a UCC sale. The Borrower and Michael Uhr, who signed the pledge and security agreement pledging the interests in the Borrower as collateral for the loan (collectively, the "Plaintiff"), sought to enjoin Lender from proceeding with the UCC sale. The Plaintiff argued that, because the sale affects land, the security agreement covered real property and, therefore, the UCC sale violated § 9-604 of the Uniform Commercial Code and the Lender was required to foreclose under Article 13 of the Real Property Actions and Proceedings Law.[2] Section 9-604 of the New York UCC states, in part, that "[i]f a security agreement covers both personal and real property, a secured party may proceed . . . as to both the personal property and the real property in accordance with the rights with respect to real property. . . ."[3] The Court rejected the Plaintiff's argument, noting that "[t]here is really no authority supporting the argument that ownership in an entity that owns property is considered an interest in real property" and went on to cite cases and sources which demonstrated that "foreclosing upon an interest in an entity that owns property does not implicate the real property itself. . . ."[4] Therefore, because the case did not involve a foreclosure of real property, the Court denied the motion seeking an injunction and allowed the Lender to re-schedule the UCC foreclosure sale.[5]

The New York State courts have demonstrated some sympathy towards borrowers and the struggles they have faced during the COVID-19 pandemic, as evidenced in the rulings relating to The Mark Hotel and the *Shelbourne* case, and lenders should continue to exercise caution in proceeding with UCC foreclosures in the State of New York while the pandemic continues. However, lenders should take comfort in the Court's ruling, which correctly upheld the status quo as it relates to UCC sales

and shows that the courts are unwilling to entertain arguments that contradict settled law and practice even during a pandemic.

[1] *See* Cadwalader's memorandum on The Mark Hotel UCC foreclosure, which is available at https://www.cadwalader.com/resources/clients-friends-memos/the-mark-hotel-borrower-granted-injunction-delaying-mezzanine-lenders-foreclosure-sale, and Cadwalader's memorandum on the Shelbourne UCC Foreclosure, which is available at https://www.cadwalader.com/resources/clients-friends-memos/new-york-state-supreme-court-temporarily-halts-ucc-foreclosure-of-mezzanine-loan.

[2] *893 4th Avenue Lofts LLC v. 5AIF Nutmeg, LLC*, Index No. 511942/2020 (N.Y. Sup. Ct., November 25, 2020).

[3] *See* U.C.C. § 9-604(a).

[4] *893 4th Avenue Lofts LLC*, 511942/2020 at 2-3.

[5] *Id*. at 5.

English Courts Consider Material Adverse Effect Clause Invoked by the Effects of the COVID-19 Pandemic

By **William Lo**
Associate | Real Estate

In the recent case of *Travelport Ltd v Wex Inc [2020] EWHC 2670 (Comm)* (the "Travelport Case"), the High Courts of England considered the construction of a material adverse effect clause ("MAE Clause") in which a party sought to invoke the provision as a result of the effects of the COVID-19 pandemic. Given the prevalence and importance of MAE Clauses in many commercial contracts such as facility agreements and acquisition agreements, we explore in this article the issues that the UK Courts considered when determining the construction of this MAE Clause in the context of a global pandemic.

MAE Clauses

An MAE Clause aims to give parties to a contract a way out of their contractual obligations if an event that causes a material adverse change or effect occurs. A key part to a MAE Clause is the definition of what constitutes a material adverse change, as this will be the trigger in which a party then becomes entitled to exercise its rights under it.

Whilst this core principle and objective is consistent to all MAE Clauses, the specific form and content of an MAE Clause can vary depending on the nature and circumstances of a transaction and the practices of the relevant jurisdiction. For instance, in the context of a lending transaction, it is often used as a catch-all clause to allow lenders to call a default if there is a material adverse change to the borrower's position or circumstances. In the Travelport Case, the MAE Clause was used in the context of the acquisition of a target business, with the aim to give the purchaser the right to walk away from the acquisition if there is a material adverse change in the target company or its assets during the time between exchange and completion.

MAE Clauses are common features in many commercial contracts, particularly in facility agreements and acquisition agreements. That said, they are rarely invoked due to the high burden of proof that they carry in order to demonstrate that a material adverse change did indeed occur within the meaning of the provision. As such, there is actually very little in English case law on MAE Clauses to give guidance on the matter, and the Travelport Case is a rare opportunity to explore the Courts' analysis.

Travelport Case – Background

In January 2020, a share purchase agreement (the "SPA") was entered into between the defendant (the "Purchaser") and the claimant (the "Seller") in which the Purchaser agreed to acquire the entire issued share capital of two companies, eNett International (Jersey) Limited ("eNett") and Optal Limited ("Optal") for a total consideration of approximately US$1.7 billion. eNett's main business was in

providing B2B payment services to customers operating in the travel industry. eNett was Optal's key client (accounting for approximately 98% of its total revenues).

Completion of the SPA was conditional upon the satisfaction of certain conditions, including the following:

"*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.*"

Material Adverse Effect ("MAE") was defined as follows:

"*. . . any event, change development, state of facts or effect that, individually or in aggregate: . . . (x) has had and continues to have a material adverse effect on business, condition (financial or otherwise) or results of operations of [eNett] . . . or [Optal]. . . .*"

The MAE definition also included a number of express carve-outs such that certain matters or events would not constitute an MAE, which included the following: (i) Conditions resulting from pandemics (the "Pandemic Carve-Out"), and (ii) changes/proposed changes in Tax, regulatory or political conditions (including in respect of Brexit) or law (the "Change in Law Carve-Out").

An important proviso, however, stated that the Pandemic Carve-Out would *not* be applicable if there is a disproportionate effect on eNett or Optal taken as a whole, as compared to other participants in the *"industries"* in which eNett and Optal operate (the "Carve-Out Exception"). The Change in Law Carve-Out was not subject to this proviso.

Following the exchange of the SPA, the global spread of COVID-19 continued to worsen and by 11 March 2020, the World Health Organisation classified the outbreak as a pandemic. With many authorities imposing restrictions and lockdown, a dramatic global decrease in travel ensued, and thus payments between companies within the travel industry decreased, impacting on the revenues of eNett and Optal.

On 4 May 2020, the Purchaser served a letter to the Seller notifying them that pursuant to the terms of the SPA, an MAE had occurred as a result of the COVID-19 pandemic. As a result, it was no longer obliged to complete the acquisition under the terms of the SPA. The Seller disputed this and, amongst other claims, sought to bring proceedings for specific performance of the Purchaser's obligation to complete the acquisition under the terms of the SPA, together with a declaration that no MAE had occurred under the SPA.

It is worth noting that after proceedings were commenced, the parties did continue to take the necessary steps to complete the transaction, and by 30 August 2020 all conditions precedent to closing had been satisfied, subject only to the question of the existence of an MAE. However, the Courts nonetheless tried as preliminary issues certain key points that were still in dispute, including the following regarding the construction of the MAE Clause:

- (i) For the purposes of the Carve-Out Exception, what was the industry in which eNett and Optal operated in? The Seller argued that the relevant

comparable would be the narrower payments industry in the travel sector (being the industry of providers of products and services to facilitate B2B payments to participants in the travel industry). Conversely, the Purchaser argued that there was no such industry, and that the more appropriate comparable would be the much broader and general B2B payments industry or payments industry as a whole.

- (ii) Do the effects of the changes in regulatory or political conditions or law (such as the travel bans, closure of businesses and lockdown restrictions) fall only within the Change in Law Carve-Out (and thus the Carve-Out Exception does not apply) regardless of whether they arose from or are connected with the Pandemic Carve-Out which was subject to the proviso of the Carve-Out Exception, as the Seller contended?

Decision – (i) Meaning of "Industry"

The Courts favoured the Purchaser's position, finding that they operated in the broader B2B payments industry for the purposes of the Carve-Out Exception. The Courts noted that as a matter of pure analysis of the word "*industries*," the Purchaser's construction was preferred, highlighting that the SPA was clearly a heavily negotiated contract where it must be assumed that all wording had to have been carefully scrutinised by lawyers and that words were used wittingly and advisedly.

The Courts further explained that the parties had specifically chosen the word "*industries*" as the comparator, as opposed to other words such as "*markets*" or "*sectors*" or "*competitors*," which would denote more business/company specific parameters. "*Industry*," however, is by its natural and ordinary meaning a broader word in which it captures a group of participants in a wide sphere of economic activity.

As such, the Courts held that the Carve-Out Exception could be engaged; of course, this remained subject to the fact that the Purchaser would indeed have to demonstrate that eNett and Optal had been disproportionately affected by the COVID-19 pandemic when compared against other businesses in the wider B2B payments industry.

Decision – (ii) Changes in Law or Regulatory/Political Conditions Is Just a Change in Law Carve-Out?

The Courts agreed with the Seller's construction, concluding that the effects of the changes in Law Carve-Out had to be considered in isolation, and thus the Carve-Out Exception did not apply irrespective of whether the events, changes, developments or effects also fell within the Pandemic Carve-Out.

The Courts explained that as a matter of language, whether an event was excluded by the Change in Law Carve-Out from being taken into account would depend only on whether that event resulted, arose from or in connection with any of the matters within the Change in Law Carve-Out.

The Court further explained that the fact that the Carve-Out Exception applied only to certain carve-outs and not to others must have meant that the parties did not intend that the Carve-Out Exception should qualify the effects of the other non-

specified Carve-Outs (being the Change in Law Carve-Out). If the Purchaser's argued construction was correct, then that would mean that it could potentially pick and choose among various overlapping effects in connection with an event that may have arisen, which the Courts said could not be the commercial intention.

With this said, the Courts did acknowledge that the Seller's construction had its shortcomings. For instance, if the parties did intend that if certain effects resulting from conditions within the Pandemic Carve-Out are to be excluded from the Change in Law Carve-Out insofar as they also fell within such Change in Law Carve-Out, then it would be equally arguable that this would require the express removal of such effects (like the travel bans, lockdowns and other restrictions that resulted from the pandemic), which the Courts noted would likely require expert assistance, and even so would be difficult to achieve.

Concluding Thoughts

As noted previously, MAE Clauses are a very common feature in many commercial contracts such as facility agreements and acquisition agreements. Despite the fact that we in the industry acknowledge that MAE Clauses are seldom engaged, a lot of time and effort is nonetheless spent negotiating and refining them. As such, the Travelport Case is a useful reminder of why we do so, given how the Courts view an MAE Clause with such scrutiny and assumption of precision by the parties and their lawyers in order to agree and conclude the drafting. Needless to say, the Travelport Case also provides some interesting commentary on the notion that a lack of specificity or a degree of ambiguity in drafting may equally serve a potentially desired purpose of incentivising parties to come together to discuss and renegotiate as a worthy alternative to incurring costs and risking the uncertainty that comes with litigation.

Recent Transactions

Here is a rundown of some of Cadwalader's recent work on behalf of our clients.

Recent transactions include:

- Representation of the lender in the $232 million financing of a portfolio of 14 data storage and information management properties located in five states.
- Representation of the lender in five separate mortgage loans in the aggregate amount of $274.4 million secured by five individual mixed-use properties (including various retail facilities, Class A office space, and a 108-room hotel) located in Utah, Idaho and Washington.
- Representation of the lender in connection with a $457.6 million mortgage loan to finance the acquisition of 2+U (also known as the Qualtrics Tower) in Seattle, Washington.
- Representation of the lenders in a $404.2 million term and construction loan for the reconfiguration of a prominent headquarters building in Boston, Massachusetts.