



# **IP Contracts & Brexit**

Gideon Shirazi

February 2021

# Affected Contracts

- Licensing (and other exploitation)
- Distribution
- Software/product development
- Technology transfer
- NDAs
- R&D agreements
- Joint ventures, franchises, consortiums, etc.

## The Starting Point



**KEEP  
CALM  
IT'S  
BUSINESS  
AS USUAL**

# Changing Overlay

- Resale rights
- Scope of IP rights
- Territories
- Consumer contracts?
- Possible divergence?
- Some interpretation?

# Frustration & Force Majeure



*Canary Wharf v European Medicines Agency*  
[2019] EWHC 335 (Ch)

## The Facts

- 25 year lease entered by EMA into in 2014
- Art 50 TFEU triggered in 2017
- EMA would probably no longer be operating in the UK
- EMA said that this was frustration of contract

## The Law

*“Frustration of a contract takes place where there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances: in such case, the law declares both parties to be discharged from further performance.”*



# The Outcome & Force Majeure



*“Do you believe in Force Majeure?”*



# Exemption Clauses & Brexit Clauses

- What does the clause say?
- “Consequential losses”

# Indirect and Consequential Loss

*Hadley v Baxendale:*

- *“such [losses] as may fairly and reasonably be considered either as arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”*
- *“if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.”*



# Change of Law Clauses

- Is there a change?
- Foreseen vs unforeseen changes
- Adverse change?

# MAC Termination Clauses

- “Material adverse change”
- Adverse: to who?
- Objective
- Fact-dependent



# Arbitration/Jurisdiction

- Brussels Regulation
- Arbitration & NY Convention



Any Questions?

