

AVOIDING DISPUTES IN CROSS-BORDER CONTRACTS - SALANS

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The potentially dramatic changes that impact on companies as a result of the financial crisis are leading many to structure commercial agreements in new, more flexible ways.

With the uncertainties of the financial downturn, a clear contractual trend has been to include additional clauses when drafting cross-border agreements that provide parties with ways of exiting agreements without the need to enter formal dispute resolution mechanisms.

José María Buxeda, Managing Partner of Salans' Madrid office, says that one provision seeing a rise in usage is the material adverse change (MAC) clause. These cover instances such as allowing a purchase or backer to pull out of a deal or funding if the target suffers a MAC.

"The economic problems in recent times have shown what can happen where there is a sudden change in the financial conditions in the market," he says. "It can impact on the contractual

obligations and of both parties and potentially lead to disputes."

As such, there has been an uptake in MAC clauses in contracts so that they can be applied in different economic situations across different regions. For example, provisions are being included to allow the price agreed in a contract to fluctuate or a contract to be terminated should there be a MAC in the market. This can be especially important in financing agreements, says Buxeda, otherwise a lender could terminate an agreement early causing problems to a borrower company even if it could not have avoided the occurrence, and has no responsibility at all in respect to it. His firm, he says, is now reviewing many contracts that were drafted years ago without such provisions; MAC clauses were not that prevalent before the crash.

With the rise in cross-border disputes, arbitration clauses too are growing in significance, especially when entering into contracts in emerging markets, he explains. "Companies are wary of entering disputes in courts that do not have the best reputation for the rule of law."