Bridging the gap: Managing political and climate-related uncertainties in M&A transactions – The role of MAC clauses

IN AN OVERALL CHALLENGING ENVIRONMENT FOR PRIVATE EQUITY / M&A TRANSACTIONS, MAC CLAUSES CAN BE A USEFUL TOOL TO BRIDGE THE DIFFERING INTERESTS OF THE PARTIES AND TO ALLOCATE EXTERNAL RISKS APPROPRIATELY.

Introduction

The year 2025 has started with devastating wildfires in California, highlighting the growing challenges posed by climate change. These fires follow a difficult 2024, which was marked by severe rainfall in southwestern Germany and in Spain. Meanwhile, global markets remain volatile due to political instability, fuelled by the US presidential election campaign, the collapse of German chancellor Olaf Scholz's coalition government, the ongoing invasion of Ukraine by Russia and rising geopolitical tensions.

These crises emphasise the need for proactive contractual solutions to manage the potential risks arising from such events. One such mechanism is the "material adverse change" (MAC) clause.

Definition and purpose

Originating in Anglo-American law, the MAC clause is a contractual provision designed to allow one party — typically the purchaser — to withdraw from or renegotiate an agreement if "material adverse changes" occur, or, in some cases, even if such changes can *reasonably be expected* to occur. From a legal perspective, global political crises, armed conflicts, and natural catastrophes share a common thread: they are potentially a "material adverse change".

M&A transactions often include a period of time between signing (conclusion of the agreement) and closing (completion of the transaction), which can extend over several weeks or even months. A well-drafted MAC clause tackles

uncertainty by allocating the risk of unfavourable developments that may arise during this period (e.g. changes affecting the target company's valuation) to the seller. These are risks that standard representations and warranties clauses typically do not cover.

Form and implications

MAC clauses can be drafted in various ways. When well-drafted, such clauses can provide greater legal certainty for all parties involved compared to the statutory provisions of German law. The key lies in the careful negotiation and drafting of what constitutes a "material adverse change".

The purchaser generally aims to define "material adverse change" as broadly as possible. However, it is important to note that a MAC clause formulated in very abstract terms carries the risk of ambiguity, misinterpretation, and unnecessary disputes between the parties. In other words, it makes it more difficult to enforce.

Nevertheless, given the limited German case law on the interpretation of such clauses, the courts may rely on the statutory provisions of Section 313 of the German Civil Code (*BGB*) (*Störung der Geschäftsgrundlage*) in the event of a dispute over an abstract MAC clause[1]. This provision typically places the responsibility for accidental deterioration or loss on the seller until the transfer of risk to the purchaser (which generally occurs at closing unless a locked box structure has been agreed).

The primary advantage of opting for an abstract MAC clause over relying solely on the statutory provisions of German law is that it enables the purchaser to directly withdraw from the agreement[2], bypassing the need to first request an amendment as stipulated by law.

In contrast, the seller generally strives to narrow the definition to limit their risk exposure and to create deal certainty. This can be achieved by incorporating "inclusions" (a list of examples of what constitutes a MAC) and/or "carve-outs" (exceptions to the definition of a MAC), as well as materiality thresholds (e.g. specific financial losses or performance metrics). However, the use of "inclusions" carries the risk that events not explicitly listed or not comparable with the examples mentioned might not qualify as a "material adverse change" in the event of a dispute. Therefore, purchasers should be cautious when agreeing to such (conclusive) inclusions.

In the case of transactions covered by non-recourse W&I insurance, MAC clauses might also compensate for certain general exclusions of cover (e.g. in the case of armed conflicts and nuclear and/or environmental catastrophes). Should such exclusions materialise, the purchaser would be left without any recourse against the W&I insurer and the seller.

MAC vs. force majeure

When exploring potential mechanisms to manage risks arising from political and climate-related uncertainties, the term "force majeure" is often considered.

A "force majeure" provision, originating from French civil law, is a mechanism that eliminates liability in the event of unforeseeable and unavoidable catastrophes that prevent the parties from fulfilling their obligations.

Although "force majeure" events are not directly regulated under German statutory law, Section 275 German Civil Code (*BGB*) stipulates that the performance of contractual obligations is excluded to the extent that it becomes impossible for the obligor or any other person to perform those obligations. The obligor may also refuse to perform their contractual obligations if doing so would require unreasonable expense or effort.

In individually negotiated contracts, parties can theoretically include "force majeure" provisions, provided that they do not constitute unconscionable clauses or violate the principle of good faith. However, enforcing a "force majeure" provision in an M&A transaction can be particularly challenging. Political and climate-related uncertainties do not typically render it impossible for the parties to

[1] Kuntz DStR 2009, 377 (381)

[2] Ibid (381)

fulfil their contractual obligations arising from the purchase agreement in the M&A transaction (this is different in the case of supply agreements, where such circumstances are more commonly applicable), making the application of "force majeure" in this context difficult to prove.

MAC clauses (in contrast to force majeure clauses) offer greater benefits in M&A transactions, as they cover situations where transactions become less desirable to the purchaser from an economic perspective (such as when the earnings potential of the target company is dramatically reduced). As a result, when parties in M&A transactions are looking to manage risks from events outside their control, they often do so via MAC clauses rather than "force majeure" provisions.

Conclusion

MAC clauses, which have only rarely been observed in M&A transactions under German law in recent years, may, in times of political and climate-related uncertainty, become a useful tool and contractual mechanism for managing risks. These clauses require precise language with clear definitions to avoid ambiguities that could lead to disputes or problems with enforceability.

While force majeure provisions address situations where fulfilling contractual obligations becomes impossible, MAC clauses allow for withdrawal or renegotiation due to material adverse changes, making them more advantageous in the context of M&A transactions.

Legal support

At GSK Stockmann, we are committed to advancing your corporate interests. GSK Stockmann's Corporate (/M&A) team has extensive experience in supporting the full range of private equity and M&A transactions from domestic and cross-border acquisitions and sales, mergers of medium-sized and larger national and international companies through to listed corporations. When you work with GSK Stockmann lawyers, you have experienced advisors at your side to develop tailor-made strategies and solutions based on extensive corporate M&A expertise and to support you in all legal issues and at all stages of your transaction up to and beyond its successful completion. Please do not hesitate to contact us!

Clara López Hernando
Lawyer (Germany) I Abogada (Spain)
Berlin
clara.lopezhernando@gsk.de

GSK
STOCKMANN

Disclaimer
This client briefing exclusively contains general information which is not suitable to be used in the specific circumstances of a certain situation. It is not the purpose of the client briefing to serve as the basis of a commercial or other decision of whatever nature. The client briefing does not qualify as advice or a binding offer to provide advice or information and it is not suitable as a substitute for personal advice. Any decision taken on the basis of the content of this client briefing or of parts thereof is at the exclusive risk of the user.

GSK Stockmann as well as the partners and employees mentioned in this client briefing do not give any guarantee nor do GSK Stockmann or any of its partners or employees assume any liability for whatever reason regarding the content of this client briefing. For that reason, we recommend you to request personal advice.

www.gsk.de

GSK Stockmann
Rechtsanwälte Steuerberater Partnerschaftsgesellschaft mbB

BERLIN
Mohrenstrasse 42
10117 Berlin
T +49 30 203907 - 0
F +49 30 203907 - 44
berlin@gsk.de

HEIDELBERG
Europaplatz 3
69115 Heidelberg
T +49 6221 4566 - 0
F +49 6221 4566 - 44
heidelberg@gsk.de

FRANKFURT/M.
Bockenheimer Landstr. 24
60323 Frankfurt am Main
T +49 69 710003 - 0
F +49 69 710003 - 144
frankfurt@gsk.de

MUNICH
Karl-Scharnagl-Ring 8
80539 Munich
T +49 89 288174 - 0
F +49 89 288174 - 44
muenchen@gsk.de

HAMBURG
Neuer Wall 69
20354 Hamburg
T +49 40 369703-0
F +49 40 369703-44
hamburg@gsk.de

LUXEMBOURG
GSK Stockmann SA
44, Avenue John F. Kennedy
L - 1855 Luxembourg
T +352 271802 - 00
F +352 271802 - 11
luxembourg@gsk-lux.com

LONDON
GSK Stockmann International
Rechtsanwaltsgesellschaft mbH,
London branch
Queens House, 8-9 Queen Street
London EC4N 1SP
United Kingdom
T +44 20 4512687-0
london@gsk-uk.com

Registered office: Munich
Munich Local Court
HRB 281930
Managing directors:
Dr. Mark Butt, York-Alexander
von Massenbach

YOUR PERSPECTIVE.
GSK.DE | GSK-LUX.COM