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Geopolitical conflict, sanctions, commodity price swings and regulatory intervention are disrupting M&A deals between signing and closing. The interim period has rarely been harder to predict.

In that context, the focus of a material adverse effect ("**MAE**") clause should be the allocation of interim risk between the buyer and seller. The clause should identify which events remain for the seller's account, which risks are assumed by the buyer, and which events are sufficiently severe to permit the buyer to refuse completion.

Differentiating "force majeure" from MAE

Force majeure operates in respect of a contract that is already being performed, typically a supply agreement, EPC contract or long-term offtake arrangement. It operates to excuse performance, suspend obligations and, in some cases, permit termination of the underlying contract.

A material adverse effect clause, by contrast, operates between the signing and closing of a transaction agreement. It functions as both a closing condition and a termination right, enabling a buyer to refuse to consummate the transaction where the target's business has suffered a defined level of deterioration.

The two clauses can intersect – for example, a force majeure event under a target's key supply contract may itself trigger an MAE – but they operate in different instruments and under different legal frameworks.

MAE in the Indian context

Indian contract law confers no special statutory status on MAE clauses. An MAE clause is therefore purely a matter of contract, and its operation turns entirely on the language agreed between the parties including the definition of MAE, the carve-outs, any disproportionate-effect carve-back, the materiality threshold, and the consequence attached to the occurrence of an MAE.

An MAE clause is distinct from the doctrine of frustration. The doctrine of frustration under Section 56 of the Indian Contract Act, 1872 ("**ICA**") determines whether performance of a contract has become impossible not whether a transaction has become

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commercially unattractive. Frustration accordingly sets a materially higher bar than the MAE standard, which addresses a different concern: a deterioration in the target's business, value or prospects between signing and closing that falls short of supervening impossibility but is sufficiently severe that a buyer ought not to be held to the agreed price. The Supreme Court in *Energy Watchdog v. Central Electricity Regulatory Commission*[1], held that onerous performance or a rise in input cost does not constitute frustration under Section 56 of the ICA.

The distinction is significant and recent Indian transactions demonstrate that regulatory developments are more likely to be analysed through the lens of a negotiated MAE clause than through the much narrower doctrine of frustration. In its proposed top-up investment in Moonshine Technology Private Limited, Nazara Technologies Limited issued a notice of termination to I3 Interactive Inc. under the share purchase agreement for an additional 0.96% stake in Moonshine. The termination was linked to the enactment of the Promotion and Regulation of Online Gaming Act, 2025, and in its disclosure to the stock exchanges, Nazara stated that "*pursuant to the enactment of the Promotion and Regulation of Online Gaming Act, 2025, which came into effect on August 22, 2025, **a material adverse effect** (as defined in the SPA) has occurred due to the prohibition on online real money gaming, including but not limited to real money poker gaming in India*"[2].

Jurisprudence from Delaware Courts

Delaware jurisprudence offers instructive guidance on how courts have approached recurring questions in MAE disputes: the significance of durational impact, target-specific versus systemic deterioration, the scope of carve-outs, and the relationship between an MAE clause and an ordinary course covenant.

In *re IBP, Inc. Shareholders Litigation*[3], the court held that a buyer must make a "strong showing" to invoke an MAE; the clause operates 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". A "short-term hiccup in earnings" will not suffice.

In *Akorn, Inc. v Fresenius Kabi AG*[4], the court held that a sudden and durationally significant deterioration in the target's business, coupled with systemic regulatory compliance failures, constituted an MAE entitling the buyer to terminate. The court further confirmed that a buyer asserting an MAE faces a "heavy burden" and that the MAE inquiry "focuses on the target as a standalone entity" and "on the value of the seller, not the profitability of the deal to the buyer".

In *AB Stable VIII LLC v MAPS Hotels and Resorts One LLC*[5], the Supreme Court of Delaware held that COVID-19 itself did not trigger the MAE clause because it fell within the carve-out for "natural disasters and calamities", but the seller's pandemic-era operational changes breached the separate ordinary course covenant, entitling the buyer to terminate. The court drew a clear distinction between the two mechanisms, holding: "*an ordinary course covenant and MAE provision serve different purposes. An ordinary course covenant is 'included to reassure the Buyer that the target company*

1 (2017) 14 Supreme Court Cases 80.

2 *https://www.bseindia.com/xml-data/corpfiling/AttachHis/9b34a20f-54e5-415b-a7a6-990610a1a919.pdf*

3 In Re: IBP (2001).

4 C.A. No. 2018–0300–JTL.

5 C.A. No. 2020-0310.

has not materially changed its business or business practices during the pendency of the transaction. A MAE provision, by contrast, allocates the risk of changes in the target company's valuation".

Together, these cases crystallize the recurring questions that arise in drafting an MAE clause: whether the relevant risk is systemic or target-specific, whether it was known at signing, whether its impact is durationally significant, and whether the risk is better addressed through an MAE clause, an ordinary course covenant, or a specific indemnity.

Key considerations on a MAE clause

Seller-side considerations

The seller's principal objective is closing certainty. The MAE definition should therefore be drafted to narrow the buyer's exit to events that materially and durably affect the target as a whole. A seller-side MAE clause should:

- Define the MAE by reference to the target's business, assets, liabilities, results of operations and financial condition – expressly excluding "prospects".
- Include a robust carve-out list such as general economic, financial, political or market conditions; changes in law or regulatory policy; war, armed conflict, sanctions and embargoes; pandemics and epidemics; acts of God.
- Permit only a narrow "disproportionate effect" carve-back – that is, an exception restoring the buyer's termination right where a broadly-worded carve-out (such as market conditions) would otherwise shield the seller. The carve-back should require that the target's exposure be materially worse than that of comparable businesses in the same sector and geography, *and* that the effect be durationally significant.
- Require quantitative anchoring where possible: a defined percentage drop in revenue or EBITDA, sustained over a defined period, measured against management's base case.

Buyer-side considerations

The buyer's objective is to ensure the MAE definition captures every material risk whose crystallisation would make the transaction economically unjustifiable. A buyer-side MAE clause should typically:

- Capture material adverse effects on business, operations, assets, liabilities, financial condition, material licences and permits, and key contracts, as well as any impairment of the seller's or target's ability to perform its obligations under the transaction documents.
- Resist a blanket carve-out for war, sanctions and commodity prices. Instead, accept those carve-outs only with a robust disproportionate-effect carve-back.
- Include objective, measurable thresholds where feasible: for example, a sustained percentage decline in revenue, EBITDA or gross margin; the loss of a named anchor customer or supplier accounting for more than X% of revenue; the loss of a material licence or permit; or the acceleration of senior debt or breach of financial covenants beyond a stated headroom.

A practical filter for MAE drafting

Each potential MAE trigger should be tested against four questions:

Is the risk systemic or target-specific? The Middle East conflict is systemic; the loss of a target's single largest Middle East offtake contract because that specific counterparty has been sanctioned is target-specific.

Is it known or unknown? A risk that was discussed in management presentations and disclosed in the data room cannot ordinarily be invoked as an MAE, unless, following that disclosure, the seller takes action (or fails to take action) that materially increases, accelerates, or otherwise causes a material deterioration of the disclosed risk or its impact on the target.

Is it temporary or durationally significant? Strait closures, oil price spikes and sanctions designations vary widely in their duration and severity. The clause should require the adverse effect to persist for a defined period before it qualifies as an MAE.

Is termination the right remedy? In most cases, it is not. Long-stop extensions, price adjustments, escrows, holdbacks, specific indemnities, reverse termination fees and completion accounts will achieve the intended protection more precisely than a binary walk right.

Conclusion

The MAE clause is ultimately an expression of how the parties have agreed to allocate interim risk. It should not convert every market movement, sanctions development or regulatory circular into a termination right, nor should it function as an open-ended insurance policy for the buyer. Equally, in a market where regulatory diligence is no longer confirmatory and signing-to-closing periods are lengthening, generic exclusions for economic conditions, changes in law and geopolitical events risk allocating too much uncertainty to the buyer. The drafting exercise must therefore be granular: identify the specific risk, determine which party controls or has priced it, measure the threshold of effect, and specify whether the consequence is a price adjustment, a specific indemnity, closing protection, or a termination right. A well-drafted MAE clause does not predict the next crisis – it decides, in advance, who bears the cost of it.

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