

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed

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MATERIAL ADVERSE CHANGE (MAC) CLAUSES IN INDIAN M&A TRANSACTIONS: JUDICIAL TRENDS AND PRACTICAL CHALLENGES

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Abstract

Material Adverse Change (MAC) clauses, also referred to as Material Adverse Effect (MAE) clauses, occupy a central and contested space in the architecture of Indian mergers and acquisitions (M&A) agreements. These contractual provisions are designed to protect acquirers from unforeseen, significant changes in the target company's financial or operational condition that occur between signing and closing of a transaction. While MAC clauses are extensively used in practice and deeply entrenched in deal documentation, their enforceability under Indian law remains a vexing and unresolved question.

This paper undertakes a systematic legal and corporate analysis of MAC clauses in the Indian M&A context. It examines the statutory framework governing such clauses under the Indian Contract Act, 1872, particularly the doctrine of frustration codified in Section 56, and the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. The paper critically surveys the evolving judicial landscape, tracing key Supreme Court and High Court pronouncements from **Nirma Industries Ltd. v. SEBI (2013)** through to the Delhi High Court's ruling in **Halliburton Offshore Services Inc. v. Vedanta Ltd. (2020)** and beyond, identifying a consistent pattern of courts requiring near-impossibility of performance before MAC clauses can be invoked. The paper also draws comparative insights from the United States (Delaware Chancery Court) and the United Kingdom, offering a perspective on how international jurisprudence could inform the development of Indian law. Finally, the paper offers practical recommendations for drafting robust MAC clauses and advocates for legislative or regulatory clarity to make such provisions commercially meaningful.

Keywords: *Material Adverse Change, MAC Clause, MAE, Indian M&A, Takeover Regulations, Section 56, Frustration, SEBI, Contractual Enforceability*

I. Introduction

Material Adverse Change ("MAC") clauses — sometimes denominated as Material Adverse Effect ("MAE") clauses represent one of the most commercially significant and legally contested provisions in contemporary mergers and acquisitions (M&A) contracts worldwide. In essence, a MAC clause confers upon a party, typically the buyer or acquirer, the contractual right to terminate or withdraw from a transaction if, in the interim period between the signing of an agreement and its financial closing, an event or change occurs that fundamentally and adversely affects the target company's business, financial condition, assets, or prospects.

The significance of these clauses has been thrown into sharp relief by global exogenous shocks, the 2008 financial crisis, the COVID-19 pandemic of 2020, and geopolitical disruptions, each of which tested the limits of contractual risk allocation in M&A transactions. In jurisdictions such as the United States and the United Kingdom, courts have developed sophisticated jurisprudence on the interpretation and enforceability of MAC clauses, crafting nuanced standards of materiality and temporal duration.

India, as one of the fastest-growing M&A markets globally, with deal activity rebounding to US\$109 billion in 2024, a 38 per cent increase from 2023, presents a critical and underexplored arena for examining MAC clause enforceability. Despite their ubiquitous inclusion in Indian M&A documentation, MAC clauses occupy a zone of profound legal uncertainty under Indian law. The absence of direct judicial pronouncements specifically enforcing MAC provisions in non-public acquisition agreements, combined with the Supreme Court of India's restrictive interpretation of the doctrine of frustration under Section 56 of the Indian Contract Act, 1872 ("ICA"), has rendered these clauses of questionable practical utility.

This research paper proceeds as follows. Section II articulates the conceptual framework and distinguishing features of MAC clauses. Section III examines the statutory foundations under Indian law. Section IV undertakes a detailed case-law analysis of Indian judicial trends. Section V draws comparative insights from US and UK jurisprudence. Section VI addresses the corporate and commercial dimensions of MAC clauses in Indian transactions. Section VII identifies practical challenges in enforcement. Section VIII proposes

recommendations. Section IX concludes.

II. Conceptual Framework: Understanding MAC/MAE Clauses

A. Definition and Purpose

A MAC clause, in its simplest articulation, is a contractual provision that *"confers the right in favour of a party to terminate a contract upon occurrence of any event which materially affects or materially changes the circumstances under which the transaction was originally agreed."* These clauses are standard features in M&A agreements, share purchase agreements (SPAs), financing contracts, and securities acquisition agreements, reflecting the economic reality that the period between signing and closing, which may span weeks, months, or even years, is fraught with risk.

The primary commercial rationale behind MAC clauses is threefold: first, they serve as a risk allocation mechanism, assigning to the seller the risk of fundamental deterioration in the target's business during the pre-closing period; second, they protect acquirers against paying an agreed consideration for an asset whose underlying value has been materially and adversely altered; and third, they incentivize sellers and target companies to maintain the operational and financial integrity of the business during the interim period.

MAC clauses are often analogised to force majeure clauses. However, the comparison is imperfect. Force majeure clauses are generally event-specific, listing the circumstances that excuse performance. MAC clauses, by contrast, typically employ broad, standards-based definitions of adverse change, making their interpretation inherently more subjective and litigation-prone. As one analysis notes, the absence of a definite quantitative threshold for assessing "materiality" and the interpretive challenge in determining its contextual meaning make MAC clauses particularly contentious.

B. Structural Components of a MAC Clause

A well-drafted MAC clause in an Indian M&A agreement typically comprises the following structural elements:

- **Definition of MAC/MAE:** A comprehensive definition of what constitutes a Material Adverse Change or Effect, including changes in financial condition, assets, liabilities, business operations, prospects, or results of operations.
- **Carve-Outs and Exclusions:** Events excluded from the definition of MAC, such as general economic downturns, industry-wide changes, acts of war, regulatory changes affecting the industry generally, and changes in applicable law or accounting standards.

- **Allocation of Burden of Proof:** Provisions specifying which party bears the burden of proving or disproving the occurrence of a MAC, typically the acquirer bears the burden of proving MAC while the seller bears the burden of establishing that an exclusion applies.
- **Consequences of MAC:** The rights triggered upon invocation, including termination rights, renegotiation rights, and associated consequences such as break fees or reverse break fees.

C. MAC Clauses as a Double-Edged Sword

MAC clauses are a double-edged sword in M&A transactions. On one hand, they protect an acquirer from adverse or unfavourable events or changes to the target company that may negatively affect the business before closing. On the other hand, a MAC clause can be weaponised by an acquirer attempting to frustrate an M&A agreement by alleging that the circumstances under which the transaction was agreed have materially changed particularly in transactions where the deal economics have shifted against the acquirer due to general market conditions or the acquirer's own strategic recalibration.

This dual character makes MAC clauses a fertile ground for litigation, and the absence of clear judicial guidance in India exacerbates the uncertainty faced by transacting parties.

III. Statutory Basis Under Indian Law

A. The Indian Contract Act, 1872: Section 56 and the Doctrine of Frustration

The primary statutory provision governing the enforceability of MAC clauses in Indian M&A contracts is Section 56 of the Indian Contract Act, 1872 ("ICA"), which codifies the common law doctrine of frustration. Section 56 provides that a contract to do an act which, after the contract is made, becomes impossible or unlawful by reason of some event which the promisor could not prevent becomes void when the act becomes impossible or unlawful.

The doctrine of frustration, as adopted under Section 56, serves as the doctrinal analogue for MAC clauses in the Indian context. When a MAC clause is invoked and contested, Indian courts have consistently applied the lens of Section 56 to assess whether the event complained of rises to the level of rendering contractual performance legally or physically impossible. This has created a formidable threshold that MAC clauses must surmount to be operative in practice.

The landmark Supreme Court case of **Satyabrata Ghose v. Mugneeram Bangur & Co. (AIR (41) 1954 SC 44)** established that the word "impossible" in Section 56 must not be

construed literally. Rather, it encompasses situations where the contract's performance becomes impractical as regards the fundamental object and purpose of the contracting parties. Similarly, the Madras High Court in **R. Narayanan v. Government of Tamil Nadu (W.P.(MD) No. 19596 of 2020)** affirmed that a contract gets frustrated when a contractual obligation becomes impossible to perform because of a radical change in circumstances without either party's fault.

However, the Supreme Court in **Energy Watchdog & Ors. v. Central Electricity Regulatory Commission & Ors. (AIR 2017 SC (SUPP) 43)** significantly narrowed this formulation, holding that the performance of a contract is not discharged merely because it has become onerous for a party due to unforeseen events. Rather, it is imperative to prove that performance has become objectively impossible not merely onerous, commercially disadvantageous, or financially detrimental. This restrictive standard creates a near-impossibility threshold that dramatically limits the circumstances in which a MAC clause can be successfully invoked under Indian law.

B. Provisions Under the Indian Companies Act, 2013

The Companies Act, 2013, does not directly address MAC clauses, but its provisions on compromise, arrangement, and amalgamation under Sections 230 to 240 are relevant to the M&A landscape. Courts adjudicating scheme-based transactions have held that any arrangement must be fair, non-discriminatory, and not against public interest, principles that dovetail with the equitable considerations animating MAC clause disputes.

C. SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

In the domain of public M&A transactions regulated by the Securities and Exchange Board of India ("SEBI"), the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("Takeover Regulations") provide the primary regulatory framework. The Takeover Regulations represent a significant development in the MAC clause landscape, particularly through Regulation 23.

Regulation 23(1) of the Takeover Regulations sets out the circumstances in which an open offer, once made, may be withdrawn. Of particular relevance is Regulation 23(1)(c), introduced in the 2011 Regulations (unlike the erstwhile 1997 Regulations), which permits withdrawal of an open offer where:

any condition stipulated in the agreement for acquisition attracting the obligation to make the open offer is not met for reasons outside the reasonable

control of the acquirer, and such agreement is rescinded, subject to such conditions having been specifically disclosed in the detailed public statement and the letter of offer.

This provision expressly contemplates the inclusion of MAC-type conditions in acquisition agreements, creating a regulatory mechanism for their invocation. However, as discussed in Section IV, the judicial and regulatory interpretation of this provision has not kept pace with its legislative intent, resulting in continued uncertainty regarding MAC clause enforceability.

The SEBI Takeover Regulations also impose a critical procedural requirement: any MAC conditions must be specifically disclosed in the Detailed Public Statement (DPS) and the Letter of Offer (LoO). This requirement imposes a transparency obligation on acquirers seeking to incorporate MAC conditions into public acquisition transactions.

D. Misrepresentation and Fraud Provisions

Sections 17, 18, and 19 of the ICA, dealing with fraud and misrepresentation, are also tangentially relevant to MAC clause disputes. Where a MAC is alleged to have been caused by the seller's fraudulent or negligent misrepresentation regarding the target's financial or operational condition, the aggrieved buyer may have additional remedies beyond mere invocation of the MAC clause, including rescission and damages under Sections 19 and 73 of the ICA.

IV. Judicial Trends in India: A Case-by-Case Analysis

A. The Foundational Trilogy: Nirma, Akshya, and Pramod Jain

1. *Nirma Industries Ltd. v. SEBI ((2013) 8 SCC 20)*

The seminal Indian authority on MAC clauses in the context of public acquisitions is ***Nirma Industries Ltd. v. Securities Exchange Board of India ((2013) 8 SCC 20)***. The facts involved the promoters of Shree Rama Multi Tech Limited (SRMTL), who had borrowed Rs. 48.94 crores from Nirma Industries and pledged equity shares of SRMTL as security. Upon default, Nirma invoked the pledge, triggering a public announcement under the Takeover Regulations, 1997. Thereafter, a special investigative audit revealed that the promoters of SRMTL had perpetrated fraudulent transactions resulting in embezzlement of funds exceeding Rs. 350 crores.

Nirma sought withdrawal of the open offer on the basis that the discovery of fraud constituted a material adverse change to the transaction. The Supreme Court rejected this

contention, holding that withdrawal of an open offer could be permitted only under conditions of impossibility of performance. The Court applied the *eiusdem generis* rule to Regulation 27(1)(d) of the 1997 Takeover Regulations, reading the residuary withdrawal ground in light of the specific grounds enumerated, statutory refusal (legal impossibility) and death of the acquirer (natural impossibility) and concluded that the genus underlying all grounds was "impossibility."

This ruling established the impossibility standard as the governing benchmark for MAC-related withdrawal claims in Indian law, a standard that has proven extremely difficult to satisfy in subsequent litigation.

2. SEBI v. Akshya Infrastructure Pvt. Ltd. (2014 (11) SCC 112)

Following *Nirma Industries*, the Supreme Court in **SEBI v. Akshya Infrastructure Pvt. Ltd. (2014 (11) SCC 112)** addressed whether an unjustifiable delay of 13 months by SEBI in approving a takeover offer — rendering the offer financially unfavourable justified its withdrawal. The Court held that economic difficulty and financial strain do not constitute impossibility. Market fluctuations or unfavourable regulatory delays, even when substantial, do not rise to the threshold required for frustration of a contract under Section 56 of the ICA.

This decision reinforced the principle that mere commercial disadvantage or increased economic burden, however severe, is insufficient to warrant MAC-based withdrawal in Indian public M&A.

3. Pramod Jain & Ors. v. SEBI (AIR 2016 SC (SUPP) 184)

The trilogy was completed in **Pramod Jain & Ors. v. SEBI (AIR 2016 SC (SUPP) 184)**, where the acquirer sought withdrawal of an open offer after a two-year delay by SEBI in granting approval, during which the target company's financial health had materially deteriorated. The Supreme Court maintained its strict interpretive stance, holding that the delay, though prolonged, and the consequent financial deterioration of the target, did not justify withdrawal because they did not render performance impossible.

These three decisions collectively established that the doctrine of impossibility, as interpreted under Section 56 of the ICA, imposes an exceptionally high threshold for MAC clause invocation in Indian M&A, effectively equating MAC with near-total impossibility of performance.

B. Regulatory Interpretation: SEBI in Jyoti Private Limited (WTM/SR/CFD/39/08/2016)

The regulatory dimension of MAC clause interpretation in India was significantly shaped by SEBI's Whole Time Member order in the matter of **Jyoti Private Limited (WTM/SR/CFD/39/08/2016)**. The acquirers sought withdrawal of their open offer under Regulation 23(1)(c) of the 2011 Takeover Regulations on the ground that no change in management and control of the target company was feasible, owing to a pending proceeding before the Board for Industrial and Financial Reconstruction (BIFR) and the target company's status as a sick industrial company.

Despite the acquirers' argument that Regulation 23(1)(c) — which was newly introduced in the 2011 Regulations and not present in the 1997 version represented a broader basis for withdrawal that went beyond impossibility, SEBI held that: *"the provisions of Regulation 23(1) of the Takeover Regulations, 2011, are similar to the provisions of Regulation 27(1) of the Takeover Regulations, 1997... squarely applicable to the provisions of Regulation 23(1) of the Takeover Regulations 2011."*

SEBI accordingly narrowly interpreted Regulation 23(1)(c), denying the withdrawal request on the ground that completion of the open offer process was not impossible. This regulatory stance is particularly significant because it effectively eviscerates the practical utility of Regulation 23(1)(c), the very provision that was introduced to facilitate MAC-based withdrawal in public acquisitions. The reasoning has been cogently criticised: the explicit inclusion of condition-based withdrawal in the 2011 Regulations suggests a legislative intent to broaden grounds beyond impossibility, yet the regulatory and judicial interpretation continues to be anchored in the 1997 framework's impossibility standard.

C. Policy Changes and Regulatory Risk: Gujarat Urja and Coastal Andhra

Two Supreme Court decisions addressing MAC clauses in the infrastructure and energy sector further illuminate the judicial reluctance to enforce MAC claims based on regulatory or policy changes.

In **Gujarat Urja Vikas Nigam Ltd. v. Solar Semiconductor Power Company (India) Pvt. Ltd. (2017 (16) SCC 498)**, the Court held that changes in government policy affecting tariffs and profitability did not frustrate a contract unless explicitly accounted for in the agreement's drafting. This decision underscored the critical importance of drafting MAC clauses with sufficient specificity to encompass regulatory risks in sector-sensitive industries.

Similarly, in **Coastal Andhra Power Ltd. v. Andhra Pradesh Central Power**

Distribution Co. Ltd. (AIR 2019 (NOC 350) 120), the Supreme Court held that increased financial burdens arising from regulatory changes, even when substantial, did not constitute impossibility sufficient to trigger contractual discharge. Economic unviability alone was held not to constitute a MAC.

These decisions firmly establish that regulatory and policy changes even when they fundamentally alter the economics of a deal will not ordinarily satisfy the impossibility threshold required for MAC enforcement in India.

D. COVID-19 and Force Majeure: Halliburton Offshore Services Inc. v. Vedanta Ltd. & Anr. (2020)

The most recent and widely discussed Indian judicial pronouncement on MAC-adjacent issues is the Delhi High Court's decision in **Halliburton Offshore Services Inc. v. Vedanta Ltd. & Anr. (O.M.P. (I) (COMM) & I.A. 3697/2020)**. This case arose in the context of the COVID-19 pandemic, where Halliburton sought to invoke force majeure and frustration to excuse its non-performance of oilfield services contracts.

The Delhi High Court held that although the COVID-19 pandemic was an unprecedented and unforeseen event, it was not sufficient by itself to frustrate the contract on the basis of mere difficulty or financial distress. The Court emphasised that the pandemic's effects must render the specific contractual performance impossible — not merely more challenging, onerous, or expensive. This ruling, though arising in the force majeure context, carries direct implications for MAC clause enforcement, reaffirming the impossibility standard as the governing threshold in Indian courts.

The reluctance of Indian courts to broaden the scope of what constitutes frustration of contract was thereby further demonstrated: even a global pandemic of unprecedented scale did not automatically satisfy the impossibility threshold in India.

E. Assessment of the Judicial Trend

The overarching judicial trend in India may be summarised as follows: Indian courts have consistently and narrowly construed the doctrine of frustration under Section 56 of the ICA, requiring proof of legal or natural impossibility before contractual obligations can be discharged. This standard is far more exacting than the standard applied in common law jurisdictions such as the United States and the United Kingdom, where courts assess materiality from a long-term, qualitative, and quantitative perspective without requiring impossibility.

The practical consequence is that MAC clauses, as contractually drafted in Indian M&A

agreements, risk being unenforceable unless the invoked event literally makes performance legally or physically impossible. The burden of proving such impossibility remains extraordinarily high and is rarely met in practice, making it costly and legally uncertain for parties to invoke MAC clauses even where tailor-made and carefully drafted provisions exist.

V. Comparative Analysis: US and UK Jurisprudence

A. Delaware Chancery Court: The US Standard

The United States particularly Delaware, has the most developed MAC clause jurisprudence in the world, with the Delaware Chancery Court having adjudicated numerous high-profile cases involving MAC provision disputes. The US standard is markedly more nuanced and commercially attuned than the Indian impossibility standard.

1. *IBP, Inc. v. Tyson Foods, Inc.* (789 A.2d 14, Del. Ch. 2001)

The foundational US case is **IBP, Inc. v. Tyson Foods, Inc. (789 A.2d 14, Del. Ch. 2001)**. The Delaware Chancery Court held that a "short-term hiccup" in a company's earnings would not qualify as material, and that materiality should be viewed from a long-term perspective. Crucially, the Court established that in a complex, highly-negotiated merger agreement, a MAC clause should be viewed 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. This temporal dimension, requiring adverse effects to be durable rather than transient has become a cornerstone of US MAC jurisprudence.

2. *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.* (965 A.2d 715, Del. Ch. 2008)

In **Hexion Specialty Chemicals, Inc. v. Huntsman Corp. (965 A.2d 715, Del. Ch. 2008)**, the Delaware Chancery Court elaborated the US framework further, holding that deviations from projections made by a seller are not sufficient grounds for MAC invocation unless specific representations or warranties have been given regarding such projections. The Court also clarified that industry-wide carve-outs in MAC definitions cannot be used for the purpose of ascertaining materiality; rather, they operate only after a MAC has been independently established.

3. *Akorn, Inc. v. Fresenius Kabi AG* (2018 WL 4719347)

The landmark case of **Akorn, Inc. v. Fresenius Kabi AG (2018 WL 4719347)** marked the first successful invocation of a MAC clause resulting in deal termination in Delaware's modern history. The Court upheld Fresenius Kabi's termination of its acquisition of Akorn on two grounds: a sustained business performance decline of approximately 25 per cent in revenue over the year following signing, and Akorn's material misrepresentation regarding regulatory

compliance. This case demonstrated that MAC clauses can be successfully enforced, but only where a significant, durable, and company-specific deterioration in business performance not a general market downturn can be established.

The US standard thus requires: (i) a long-term, durationally-significant adverse change; (ii) a change that is company-specific, not industry-wide or macro-economic; (iii) a qualitative and quantitative assessment of materiality; and (iv) a change unknown to the acquirer at the time of signing.

B. United Kingdom: The English Court Standard

English courts have similarly developed principles for MAC clause interpretation, with key decisions in **Grupo Hotelero Urvasco SA v. Carey Value Added SL and Another** ([2013] EWHC 1039 (Comm)) and **Decura IM Investments LLP and Others v. UBS AG, London Branch** ([2015] EWHC 171 (Comm)) establishing principles broadly consistent with the US approach.

English courts have held that the change must be material and should be assessed from a long-term perspective; a heavy burden is placed on the party invoking the MAC clause to prove that MAC has occurred; and MAC cannot be established by reference to circumstances which the invoking party was aware of when entering into the agreement, unless those circumstances have worsened to become materially different in nature.

C. Implications for Indian Law

The contrast between the US/UK approach and the Indian impossibility standard is stark. US and UK courts engage in a contextual, fact-specific, and commercially-grounded assessment of materiality, while Indian courts require proof of impossibility, a far more demanding standard that has proven nearly impossible to satisfy in practice.

As one analysis notes, unless Indian courts take inspiration from the interpretations laid down by courts in the US and UK, the party triggering a MAC clause in India might be required to demonstrate that the change is so material as to strike at the root of the contract, effectively rendering performance impossible and that such change was genuinely unforeseen at the time of contracting.

The Indian legal framework would greatly benefit from judicial adoption of a nuanced materiality standard that assesses MAC events from a long-term, qualitative, and quantitative perspective, rather than confining enforceability to the narrow impossibility threshold of Section 56.

VI. Corporate and Commercial Perspective

A. MAC Clauses in the Indian Deal Lifecycle

From a corporate and commercial perspective, MAC clauses play a critically important role across all stages of the M&A transaction lifecycle in India. The key stages of any Indian M&A deal pre-signing, signing, post-signing/pre-closing, closing, and post-closing each present distinct risk profiles that MAC clauses are designed to manage.

The post-signing/pre-closing stage is particularly fertile ground for MAC-related disputes in India. This phase, during which parties fulfil conditions precedent to closing, such as obtaining regulatory approvals, executing ancillary agreements, and completing transfer formalities, often involves significant time delays due to the complex Indian regulatory landscape. Disputes relating to MAC clauses frequently arise during this stage, as materially adverse events can occur between signing and the eventual closing date, which may be months or even years later.

B. MAC Clauses and Risk Allocation in Indian SPAs

In practice, MAC clauses in Indian Share Purchase Agreements (SPAs) serve as a crucial risk-allocation mechanism between buyers and sellers. Buyers typically negotiate broad MAC definitions that encompass changes to the target's financial condition, assets, liabilities, operations, and business prospects. Sellers, conversely, negotiate extensive carve-outs that exclude macro-economic conditions, industry-wide changes, and regulatory developments, acts of terrorism or war, and market-wide fluctuations.

The structure of MAC clause negotiations in Indian transactions is heavily influenced by the governing law of the agreement. In cross-border transactions, parties frequently choose English or Singaporean law as the governing law largely to benefit from the more commercially developed MAC jurisprudence of those jurisdictions, while domestic Indian M&A transactions are necessarily governed by Indian law and are consequently subject to the limitations of Section 56's impossibility standard.

C. MAC Clauses and Public Acquisition Transactions

In public M&A transactions regulated by SEBI, MAC clauses face additional procedural and substantive hurdles. Regulation 23(1)(c) of the 2011 Takeover Regulations requires that any MAC-type condition upon which the acquirer may seek to withdraw be specifically disclosed in the Detailed Public Statement and the Letter of Offer. This transparency requirement serves investor protection objectives but also creates significant

disclosure risks for acquirers, as broad MAC conditions may deter target company shareholders and generate regulatory scrutiny.

Moreover, the regulatory interpretation of Regulation 23(1)(c), as evidenced by SEBI's order in Jyoti Private Limited, suggests that even the newly introduced condition-based withdrawal ground is being assimilated into the impossibility framework of the 1997 Takeover Regulations, frustrating the regulatory intent behind its enactment.

D. Due Diligence and MAC Clause Interaction

A critical and often underappreciated corporate dimension of MAC clauses relates to their interaction with the due diligence process. Comprehensive due diligence by the acquirer can significantly influence the scope and enforceability of MAC clauses in two ways: first, information discovered during due diligence about the target's existing risks and challenges may be carved out from the MAC definition, since known risks cannot later form the basis of a MAC claim; and second, the depth and scope of due diligence findings inform the specific indemnities, representations, and warranties that the acquirer negotiates into the SPA, potentially rendering MAC invocation unnecessary if those warranties are breached.

E. Quantitative Thresholds as a Commercial Solution

An innovative commercial approach that has been proposed and which enjoys some traction in practice, is the use of quantitative monetary or financial thresholds as a proxy for materiality in MAC clauses. For instance, an agreement may provide that any event arising in relation to the target's business that reduces its net worth by a specified percentage (e.g., 1% or 5%) will constitute a MAC, entitling the acquirer to terminate the agreement. This type of threshold-based MAC formulation may be more defensible from an acquirer's standpoint, as there is a stronger argument that it represents a necessary condition to close the deal, potentially distancing it from the restrictive impossibility interpretation of Section 56 and bringing it closer to a condition precedent in the contractual architecture.

VII. Practical Challenges in Enforceability

A. The Definitional Problem: Ambiguity of "Materiality"

The most fundamental practical challenge in MAC clause enforcement is the absence of a clear, judicially-established or legislatively-defined standard for "materiality" under Indian law. Unlike US law, where the IBP and Akorn decisions have articulated a long-term, durationally-significant, and company-specific standard, or English law, where courts engage

in contextual materiality assessment, Indian courts have offered no developed framework for evaluating what constitutes a material adverse change short of impossibility.

This definitional vacuum creates significant transactional uncertainty. Parties drafting MAC clauses in Indian M&A agreements cannot reliably predict whether their MAC provisions will be enforced, no matter how carefully drafted. The practical consequence is that MAC clauses often function more as negotiating leverage during the signing-to-closing period than as genuine legal protections.

B. The Impossibility-MAC Disconnect

A fundamental conceptual mismatch pervades Indian MAC clause law: the doctrine of impossibility under Section 56 of the ICA and the concept of material adverse change are distinct standards addressing different levels of contractual disruption. A MAC event may cause serious, durable, and adverse civil consequences to an acquirer, including substantial diminution in the target's business value without rendering the acquisition transaction legally or physically impossible to complete. The acquirer may still be capable of completing the acquisition, but at a dramatically diminished economic benefit.

Indian courts' equation of MAC with impossibility thus fundamentally misaligns contractual intent with judicial enforcement. As has been observed, parties triggering MAC clauses in India may be required to demonstrate that the change is so material as to be regarded by law as striking at the root of the contract, effectively collapsing the MAC standard into the frustration standard and defeating the independent commercial purpose of MAC provisions.

C. Ambiguity in Regulation 23(1)(c) of the Takeover Regulations

The regulatory interpretation of Regulation 23(1)(c) of the 2011 Takeover Regulations presents an acute practical challenge for acquirers in public M&A. Despite the explicit textual inclusion of condition-based withdrawal under Regulation 23(1)(c), SEBI's order in Jyoti Private Limited applied the impossibility standard from the 1997 Takeover Regulations to the new provision, effectively nullifying the innovation introduced by the 2011 Regulations.

This regulatory position creates a situation where acquirers who have specifically negotiated and disclosed MAC conditions in public offer documents cannot rely on those conditions in the event of their occurrence. SEBI has failed to provide any reasoned explanation for assimilating Regulation 23(1)(c) into the impossibility framework, a lacuna that must be addressed either through fresh regulatory guidance or judicial correction.

D. COVID-19 and Exogenous Shocks: A Stress Test for Indian MAC Clauses

The COVID-19 pandemic served as a practical stress test for MAC clauses globally, and the Indian experience was no exception. Numerous Indian M&A transactions were disrupted or renegotiated in the aftermath of the pandemic, with buyers seeking to invoke MAC clauses to exit transactions that had become commercially unattractive. However, as the Delhi High Court's ruling in *Halliburton v. Vedanta* confirmed, even an unprecedented global pandemic did not satisfy the impossibility threshold required for MAC clause enforcement under Indian law, leaving buyers without effective contractual protection in precisely the scenario that MAC clauses were designed to address.

E. Drafting Challenges

Given the restrictive judicial environment, the drafting of effective MAC clauses in Indian M&A agreements presents formidable challenges. To maximize the prospects of enforcement, acquirers must: (i) identify and enumerate specific events that would constitute a MAC with precision, avoiding boilerplate language; (ii) specify quantitative thresholds where possible; (iii) clearly define who may invoke the MAC clause and the notice and procedural requirements for invocation; (iv) negotiate appropriate carve-outs while ensuring they do not inadvertently exclude the very events against which protection is sought; (v) include express provisions addressing regulatory changes in sector-sensitive industries; and (vi) consider choosing a more favorable governing law in cross-border transactions.

Any ambiguity in a MAC clause may further weaken its enforceability in Indian courts, which tend to construe ambiguous termination provisions narrowly in favour of preserving the contractual relationship.

VIII. Recommendations and the Way Forward

A. Legislative and Regulatory Reform

The most impactful reform would be legislative clarification of the standard applicable to MAC clauses under Indian contract law. The ICA should be amended or a specialised M&A framework statute enacted to codify a materiality standard for contractual MAC provisions that is independent of the impossibility threshold in Section 56. This standard should, at a minimum, recognize that a long-term, durationally-significant, company-specific adverse change in the target's financial condition, assets, or business operations may constitute a MAC entitling the affected party to contractual remedies, even if performance of the transaction has not become legally or physically impossible.

Similarly, SEBI should issue a comprehensive circular or discussion paper clarifying the scope and interpretation of Regulation 23(1)(c) of the 2011 Takeover Regulations, explicitly acknowledging that condition-based withdrawal grounds thereunder are not coextensive with the impossibility standard derived from the 1997 Takeover Regulations. SEBI should also establish a clear procedural framework for MAC-based withdrawal applications, including standards of evidence and timelines for regulatory determination.

B. Judicial Adoption of a Materiality Standard

Absent legislative intervention, the Supreme Court of India should take an early opportunity to revisit and refine the MAC clause standard in a dedicated M&A dispute context. The Court should draw upon the well-developed jurisprudence of US and UK courts to articulate a contextual, long-term, qualitative, and quantitative materiality standard that is cognizant of commercial realities and respects the distinct purpose of MAC provisions in M&A agreements. A departure from the blanket equation of MAC with impossibility would bring Indian M&A law into alignment with global best practices and reduce transactional uncertainty.

C. Drafting Best Practices for Practitioners

Pending legislative and judicial reform, corporate counsel and transaction attorneys in India should adopt the following drafting best practices for MAC clauses:

- 1. Avoid Boilerplate:** Do not use standard boilerplate MAC language. Each MAC clause should be tailor-drafted to reflect the specific risks, industry, and transaction structure involved.
- 2. Enumerate Specific Events:** Identify and enumerate the specific events, conditions, and thresholds that will constitute a MAC, including sector-specific regulatory risks, pending litigation, customer concentration risks, and management continuity.
- 3. Quantitative Thresholds:** Where possible, include monetary or financial thresholds (e.g., a reduction in net worth or EBITDA by a specified percentage) as an objective measure of materiality.
- 4. Carve-Out Specificity:** Negotiate carve-outs with precision, ensuring that systemic risks (general economic downturns, market-wide regulatory changes) are excluded while company-specific risks are retained within the MAC definition.
- 5. Governing Law:** In cross-border transactions, consider selecting English or Singaporean law as the governing law to benefit from the more commercially developed MAC jurisprudence of those jurisdictions.

6. **Dispute Resolution:** Include multi-tiered arbitration clauses with a favorable seat of arbitration (Singapore or London), where MAC clause disputes can be adjudicated under a more commercially sophisticated legal framework.
7. **Break Fees:** Consider supplementing MAC provisions with break fee and reverse break fee arrangements, providing a more certain financial remedy in the event of transaction failure whether or not the MAC clause itself can be successfully invoked.

D. Industry Advocacy

Industry bodies such as the Confederation of Indian Industry (CII), the Federation of Indian Chambers of Commerce and Industry (FICCI), and the Indian Venture and Alternate Capital Association (IVCA) should engage with SEBI, the Ministry of Corporate Affairs, and the Law Commission of India to advocate for a legislative and regulatory framework that provides certainty and commercial viability to MAC clauses in Indian M&A transactions.

IX. Conclusion

Material Adverse Change clauses occupy an anomalous position in Indian M&A law: they are ubiquitous in contractual practice yet of highly uncertain enforceability. The collision between the commercial rationale of MAC clauses, protecting acquirers from unforeseen, material deteriorations in target company value during the pre-closing period and the restrictive impossibility standard imposed by Section 56 of the Indian Contract Act creates a fundamental disconnect between transactional intent and legal reality.

The judicial trajectory in India, traced through *Nirma Industries*, *Akshya Infrastructure*, *Pramod Jain*, and *Halliburton v. Vedanta*, reveals a consistent pattern of courts setting an exceptionally high impossibility threshold for MAC-related contractual discharge. SEBI's regulatory interpretation of Regulation 23(1)(c) of the 2011 Takeover Regulations has compounded this uncertainty by assimilating the new condition-based withdrawal ground into the old impossibility framework, defeating the legislative purpose of the 2011 reform.

In contrast, the mature jurisprudence of US Delaware courts and English courts demonstrates that a contextual, long-term, qualitative-and-quantitative materiality standard is both legally coherent and commercially viable. Indian courts should draw inspiration from this comparative experience to craft a MAC clause doctrine appropriate to India's rapidly evolving M&A market.

For M&A practitioners in India, the immediate imperative is to draft MAC clauses with greater specificity, incorporating quantitative thresholds, enumerating specific triggering events, and carefully calibrating carve-outs to the transaction's particular risk profile. In appropriate transactions, the selection of a more favorable governing law and arbitration seat can provide meaningful protection. Simultaneously, legislative and regulatory reform, either through amendment of the ICA or SEBI's issuance of clear guidance under Regulation 23(1)(c) is essential to align India's M&A legal framework with global standards and the commercial expectations of transacting parties.

As India's M&A market continues its robust growth trajectory, the legal infrastructure supporting it must evolve in tandem. MAC clauses, properly understood and enforced, are an essential instrument of commercial risk management. The time has come for India to develop a mature, commercially coherent, and predictable MAC clause jurisprudence.

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