English High Court Considers "Material Adverse Effect" in *BM Brazil & Ors v Sibanye BM Brazil & Anor* [2024] EWHC 2566 (Comm) ("*Sibanye*")[1]

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BACKGROUND

The English High Court considered whether the purchaser under two interconnected sale and purchase agreements relating to two mines in Brazil (the "SPAs") was entitled to terminate the SPAs on the basis that a geotechnical event (the "GE") at one of the mines between signing and completion triggered a "Material Adverse Effect" ("MAE", or sometimes referred to as material adverse change "MAC") clause.

Around two weeks after the SPAs were signed, a GE occurred at one of the mines. The purchaser relied on the MAE clause and attempted to terminate the SPAs and be released from its obligations under the SPAs to complete the purchase of the mines.

COURT'S ANALYSIS

The Court analysed the existing MAE case law and the interpretation of such clauses operating as conditions to completion. MAE clauses are more commonly seen in U.S.-law-governed acquisition agreements than English-law-governed acquisition agreements. Customarily (albeit with many exceptions, including owing to the location and respective bargaining power of the parties and the context of the transaction as a whole), under English-law-governed acquisition agreements, a purchaser is usually required to complete even if an MAE occurs between signing and completion. As a result, there is considerably more U.S. case law on the interpretation of these clauses, which the Court considered in its analysis of the English-law position. As such, the *Sibanye* judgment provides useful insight into how the English courts will construe MAE clauses going forward.

[1] https://www.bailii.org/ew/cases/EWHC/Comm/2024/2566.pdf.

The judge's decision considered the specific language of the MAE clause in the context of the SPAs as a whole and identified three issues of construction:

- **Whether "revelatory events" could be included in the assessment of whether an MAE occurred**. The defendants submitted that the GE revealed wider pre-existing problems in the mine (making the GE a so called "revelatory event") and attempted to include such additional matters as MAE events alongside the GE itself. The judge decided that the MAE clause focuses on changes, events or effects occurring *after* the SPAs were signed and as such concluded that the GE itself must be material and adverse rather than being a conduit to revealing other pre-existing conditions, even if such conditions would not have been revealed but for the GE.

- **Assessment of what "would reasonably be expected to be material and adverse"**. Looking at how the MAE was defined in the SPAs, the Court considered that the analysis required an objective assessment from the perspective of a reasonable person in the position of the parties as at the date notice of the MAE is given.

- **The materiality threshold for triggering MAE clauses**. As MAE clauses are less common in English-law-governed acquisition agreements, there is a lack of relevant English precedent on MAE clauses operating as conditions to completion (recent English cases *Travelport Ltd v WEX Inc* [2020] EWHC 2670[2] and *Finsbury Food Group PLC v Axis Corporate Capital UK Ltd* [2023] EWHC 1559[3] ("*Finsbury*") considered MAE but not specifically in the context of a condition to completion).

Although not binding precedent, the Court looked to U.S. authorities in assessing materiality under the clause and considered the following points: (i) the MAE should be material when viewed from the longer-term perspective of a reasonable purchaser; (ii) an MAE can have qualitative and quantitative aspects; and (iii) a reduction of the target's value of more than 20% is likely to be material, though there is no fixed percentage threshold.

The Court could have chosen to look closer to home for further non-binding precedents. The United Kingdom's Panel on Takeovers and Mergers, the regulatory body that supervises and regulates takeovers under the Takeover Code (the "Takeover Panel"), considered whether an offeror should be able to rely on an MAE condition in

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[2] https://www.oeclaw.co.uk/images/uploads/judgments/Olding_v_WEX_final_for_approval_and_hand_down_12.10_Sealed_.pdf.

[3] https://knyvet.bailii.org/ew/cases/EWHC/Comm/2023/1559.html.

the context of takeover offers in 2001 and 2020. Rule 13.5 of the Takeover Code[4] sets out the test that the Takeover Panel applies where an offeror seeks to invoke a condition: the circumstances need to be of material significance to the offeror in the context of the offer. Practice Statement No. 5[5] confirms that the standard is judged by reference to the facts of the case at the time that the relevant circumstances arise.

During the offer for Tempus Group plc by WPP Group plc ("WPP") in 2001, the Takeover Panel refused to allow WPP to invoke a MAE condition to lapse its offer following the 11 September 2001 terrorist attacks in New York. The Takeover Panel stated that in the case of an MAE, whether the test is satisfied will depend on the offeror demonstrating that the relevant circumstances are of "very considerable significance striking at the heart of the purpose of the transaction" and impact the longer-term prospects of the target company not just short-term profitability. In March 2020, Brigadier Acquisition Company Limited ("Brigadier") announced a firm intention to make a cash offer under Rule 2.7 of the Takeover Code. The offer was subject to MAE conditions that were drafted broadly without expressly mentioning the Covid-19 pandemic. In April 2020, Brigadier sought a ruling from the Takeover Panel that it could invoke the MAE conditions to lapse its offer. The Takeover Panel ruled that Brigadier had not established that the circumstances that gave rise to its right to invoke an MAE condition were of material significance to it in the context of its offer, and therefore, Brigadier was not permitted to lapse its offer.

In *Sibanye*, it was the Judge's view that "material" should be defined as significant or substantial, that it would not include everything that is more than *de minimis* and that it would need to be assessed over a commercially reasonable period, which would be years rather than months.

Evidencing that each case turns on its own facts and the drafting of the particular MAE clause in question, the judge in *Finsbury* considered that a 10% reduction in group sales was material, whereas in *Sibanye*, the judge considered that a 10% reduction would likely be too low to be material, a 15% reduction might well be material and a 20% reduction would likely be material. Applying this to the valuation of the impact of the GE, the judge concluded that the impact of the GE fell significantly below the level of 10% (which in any event the judge thought was too low a level to amount to a material effect).

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4 https://code.thetakeoverpanel.org.uk/tp/rules/rule-13/rule-13-5.html#:~:text=An%20offeror%20may%20only%20invoke,which%20appropriately%20reflects%20this%20requirement.

5 https://code.thetakeoverpanel.org.uk/tp/ps/ps-5.html.

A further hearing is to be held in November 2025 to determine the damages (if any) to which the seller may be entitled resulting from the purchaser's breach of the SPAs in seeking to wrongfully terminate them.

TAKEAWAYS

Sibanye is welcome reassurance on how general MAE clauses are to be approached in English-law-governed transactions but falls short on providing clear guidance for purchasers and sellers by not providing fixed meanings. *Sibanye* evidences the importance the Court gives to context and surrounding evidence, meaning future litigation of this nature could be unpredictable. Conversely, this case shows that establishing the occurrence of an MAE under English law is not an easy route to release a purchaser from its obligation to complete a transaction and therefore provides a layer of deal certainty. This is consistent with the Takeover Panel's rulings to date, leaving an offeror to face significant hurdles if attempting to invoke an MAE condition to lapse an offer made under the Takeover Code.

As part of future deal negotiations, purchasers and sellers may wish to (i) consider defining the occurrence of a MAE in acquisition agreements by reference to a fixed monetary threshold or percentage of revenue, profit or some other financial metric and (ii) structure contractual warranties and other provisions carefully to ensure as little as possible is left open to interpretation.

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