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# English Court Rules on MAE Clauses

## Case Highlights Similarities and Differences in How English and U.S. Courts Construe "Material Adverse Effect" Clauses

### SUMMARY

In *BM Brazil & Ors v Sibanye BM Brazil & Anor* [2024] EWHC 2566 (Comm), the English Commercial Court decided a buyer was not entitled to rely on a material adverse effect ("MAE") condition to terminate an M&A transaction, extensively citing U.S. case law and commentary.

### FACTUAL BACKGROUND

- In October 2021 a SPV controlled by Sibanye Stillwater Limited agreed, in two separate SPAs, to buy two Brazilian mines from affiliates of funds advised by Appian Capital Advisory LLP.
- Completion was conditional on no MAE occurring, with a MAE defined, in a form common to U.S. law governed SPAs, as "any change, event or effect that individually or in the aggregate is or would reasonably be expected to be material and adverse to the business, financial condition, results of operations, the properties, assets, liabilities or operations of the Group Companies, taken as a whole […]".
- Two weeks after signing, a "geotechnical event" (the "Event") occurred at one of the mines, involving the displacement of a part of the slope at the pit crest and resulting in cracks further along the slope. A remedial "pushback" was commenced to remove displaced rock mass.
- The defendants purported to terminate the SPAs on the basis that the Event constituted a MAE. The claimants alleged wrongful repudiation of the SPAs and in May 2022 initiated proceedings.
- Further issues at the mine were subsequently identified, including cracks behind the east slope pit crest which pre-dated the Event. In addition, the remedial pushback contributed to a separate instability affecting a portion of the slope in the mine's east wall (the "bullnose incident").
- Accounting for the Event's direct impacts and the bullnose incident, the claimants calculated a value reduction of about $21 million (or 3.45%). Accounting for a redesign of the pit and remediation of the entire east wall, the defendants calculated a reduction of $244−286 million (or 40−47%).

### KEY POINTS FROM THE COURT'S DECISION

- There is no special rule in English law that MAE clauses are to be narrowly construed or that the party relying on such a clause bears a "heavy burden".
- The judge cited the English Commercial Court's earlier recognition in *Travelport v WEX Inc* of the comparative "dearth of relevant English authority" on MAE clauses and of the "better developed

body of case law in the US, notably Delaware". Accordingly, alongside English authorities, he considered U.S. case law and commentary in interpreting the MAE condition.

- There is a line between the "change, event or effect" itself on the one hand and "revelatory occurrences" on the other – i.e., pre-existing issues or problems that could have been identified irrespective of the occurrence of the event.
- Consistent with previous English authorities and U.S. cases including *Akorn Inc v Fresenius Kabi AG*, whether a change "would reasonably be expected to be material and adverse" was an objective rather than a subjective test. The Court rejected the defendants' argument that reasonable people might hold a range of views, emphasising that the word "would" requires a "yes or no" answer.
- The Court agreed with *Akorn* that a mere risk that a matter may turn out to be material cannot be enough. Because the words "would" (rather than "could") and "expected" (rather than "apprehended") were used, "would reasonably be expected" meant "more likely than not". If wrong on this, the judge agreed with *Akorn* that there must still be "some showing that there is a basis in law and in fact for the serious adverse consequences prophesised by the party claiming the MAE".
- The Court agreed with the Delaware courts' finding in *IBP Inc. Shareholders Litigation* that a "material" effect would affect the company's earnings power "over a commercially reasonable period […] years rather than months", and decided in line with English authorities that it means "significant or substantial" rather than "more than *de minimis*".
- Consistent with *Akorn* and the subsequent U.S. case of *Snow Phipps Group LLC v KCake Acquisition Inc*, the Court found no bright line test for materiality. Instead, the transaction's size, the nature of the assets (including their susceptibility to geotechnical events), the sales process' length and the SPAs' complexity all militated against setting the bar too low. The Court considered that a 20% or more reduction in equity value would be material and that 15% or more might well be material.
- The Court calculated the financial loss actually and subsequently sustained by reason of the Event, the bullnose incident and their remediation as some $20 million (well below 5% of the $525 million mine purchase price), ignoring the problems in the east wall that were merely "revealed" by the Event. Accordingly, the Court found that no MAE had occurred and the defendants were liable.
- The judge disagreed with *Frontier Oil Corp. v Holly Corporation*, and some subsequent U.S. cases, that the question of whether a particular "problem" would have a MAE has "both qualitative and quantitative aspects". Instead, he preferred the view expressed by Professor Robert T Miller in 'A New Theory of Material Adverse Effects', *The Business Lawyer*, vol 76 (Summer 2021), that any event that passes the quantitative test will pass the qualitative one and that any event that fails the quantitative tests will fail the qualitative one.

## PRACTICAL TAKEAWAYS

- Counterparties may reach very different conclusions as to the sorts of events that may contribute to a MAE and whether a MAE condition has been engaged, meaning that the parties are more likely to end up in litigation where a U.S. style MAE clause is used.
- Litigation may produce an unexpected outcome. A buyer that has identified a particular potential concern in respect of which it wants a termination right will likely be better off providing for this expressly rather than relying on a broad MAE clause. Similarly – given the courts do not apply any bright line "materiality" test – a buyer with a clear conception of what would amount to an unacceptable diminution in the target's value might consider including an express, stand-alone EBITDA (or other financial metric) closing condition in the SPA. This can cut both ways, though.
- Given that a MAE involves the occurrence of some new event between signing and closing and, as determined by the Court in *Sibanye*, excludes "revelatory occurrences", MAE conditions are not a substitute for robust due diligence.
- This is unlikely to be the last we will see of "general" MAE conditions in English law-governed transactions. At the very least they may give buyers protection against matters which could not be diligenced or foreseen and which come to light, and the possibility of price leverage, even if they do not guarantee the right to withdraw from what may have become a bad deal. However, *Sibanye* may also give sellers additional arguments for pushing back against such conditions.

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