

Corporate Finance/M&A - Austria

MAC clauses in light of new insolvency regime

Contributed by **BINDER GRÖSSWANG**

September 01 2010

The current financial crisis has focused attention on a purchaser's right to walk away from an M&A transaction or renegotiate the main terms thereof if certain events occur which could affect the target enterprise. Besides granting such rights of withdrawal in case of a material adverse change (MAC) to the target itself, it has become more frequent in M&A deals governed by Austrian law to stipulate contractual escape clauses relating to alterations in the sphere of a contractual party (eg, the opening of an insolvency proceeding).

New insolvency legislation, which came into force on July 1 2010, may affect such clauses relating to insolvencies. Several new provisions regarding various termination rights for the opening of insolvency procedures in respect of one of the contractual parties have been incorporated into Sections 25a and 25b of the newly enacted Insolvency Code.

Section 25b of the code prohibits contractual agreements that grant one of the parties the right to terminate the contract in case of insolvency. This provision has entered into force with retroactive effect - it also applies to contracts concluded before the enactment of the code. (A similar regulation had already been part of the Austrian Composition Statute, but now also applies to insolvency proceedings.) Since the new provision forbids "escape clauses for the case of insolvency" without specifying which insolvency it is referring to, it could *prima facie* be interpreted extensively. As a consequence, MAC clauses that either refer to the insolvency of a contractual party or concern the insolvency of the target enterprise would no longer be effective.

This interpretation must be regarded as overreaching. The new regulation should rather be understood as prohibiting only escape clauses relating to the insolvency of one of the parties to the specific contract into which the provision has been incorporated: As a general rule, subsequent conditions relating to circumstances outside the parties' sphere of influence can validly be stipulated. Section 25b of the code constitutes an exception from the norm. According to general rules of interpretation, exceptions must be interpreted in a narrow sense unless this does not conform to their intention. In the case of Section 25b of the new code, the legislator's explanatory statement even appears to encourage a restrictive interpretation of the rule, which would allow the validity of MAC clauses related to a target's insolvency to be maintained. However, a clause providing a termination right in case of the insolvency of either the vendor or the purchaser will no longer be effective under Austrian law.

In addition to this general prohibition of insolvency-related escape clauses, Section 25a of the code does not allow contracts that are potentially necessary for the continuation of the debtor's business to be terminated during a six-month period following the opening of insolvency proceedings, unless there is a compelling reason to do so. In this context, the mere worsening of the debtor's economic situation is not considered a compelling reason. An exception is granted only if the fulfilment of the contract would be detrimental to the economic situation of the creditor. Even though this provision has been drafted with a view to the Chapter 11 procedure of the US insolvency regime in relation to contracts for the performance of continuing obligations, its wording clearly includes all kinds of contractual agreement. Provided that the termination of the M&A deal endangers the continuation of the seller's or the purchaser's enterprise, Section 25a of the code could therefore influence MAC clauses related to the economic situation of either party, rendering them ineffective.

The exact scope of both provisions in relation to MAC clauses is difficult to evaluate precisely at the moment. Legal uncertainty arising from the new law's vague terminology has already been pointed out as a main area of concern by legal commentators, besides an expected deterioration of Austria's attractiveness as an

Authors

Thomas Schirmer



Markus Uitz



investment destination due to the reduction of creditors' rights. It will be left to the courts to define the new code's effect on insolvency-related MAC clauses.

However, it is already clear that the new legislation brings certain changes to M&A deals governed by Austrian law. In future, parties and negotiators will have to assess with great accuracy the risk of their contractual partner's insolvency, taking into account that MAC clauses which previously protected against such risks by granting a termination right will no longer be effective.

For further information on this topic please contact [Thomas Schirmer](#) or [Markus Uitz](#) at BINDER GRÖSSWANG by telephone (+43 1 534 800), fax (+43 1 534 808) or email (schirmer@bindergroesswang.at or uitz@bindergroesswang.at). The BINDER GRÖSSWANG website can be accessed at www.bindergroesswang.at.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.



Official Online Media Partner to the International Bar Association
An International Online Media Partner to the Association of Corporate Counsel
European Online Media Partner to the European Company Lawyers Association

© Copyright 1997-2010 Globe Business Publishing Ltd