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Material Adverse Change (MAC) Clauses and the Jurisdiction of Arbitral Tribunals in Failed M&A Transactions

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ABSTRACT

Material Adverse Change ("MAC") or Material Adverse Effect ("MAE") clauses are the principal contractual device by which acquirers allocate the risk of deterioration in a target company's business during the interim period between signing and closing. The reason for this is that a modern-day merger agreement will always include an arbitration clause and so any dispute regarding the assertion, or the refusal, to assert the MAC clause would raise the preliminary issue of jurisdiction: does the arbitral tribunal have the jurisdiction to rule on whether a MAC has taken place, and if yes, the jurisdiction to rule on its own jurisdiction to do so? This paper will discuss the construction of MAC provisions by the Delaware courts, the jurisdiction framework regarding arbitral competence after a disputed termination, and three common issues - emergency or interim relief, statutory or regulatory override, and the arbitrability of fraud - which determine whether a failed deal is solved via efficient arbitral adjudication or via multi-forum fragmentation. Relying on judicial decisions from Delaware, England, and India, the paper will argue that although the principle of separability provides a strong immunity for the arbitration clause from the collapse of the underlying contract, the effective jurisdiction of the arbitral tribunal is conditional, specific to the facts and fragile at exactly those points where public policy concerns, urgency, and fraud meet.

Keywords: *Material Adverse Change, Jurisdiction, Arbitral Tribunals, Doctrine of Separability, M&A Disputes*

I. INTRODUCTION: MATERIAL ADVERSE CHANGE CLAUSES AND ARBITRAL JURISDICTION IN M&A TRANSACTIONS

There is always a time of vulnerability inherent in any merger agreement. Until the closing of the deal occurs, which can take anywhere from several weeks up to one year if there are

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necessary regulatory approvals, the target firm remains a standalone entity vulnerable to all the usual commercial and regulatory and unfortunate risks.[1]

The MAC clause is the solution to the problem of risk-sharing that the parties negotiate during the deal-making process. "It allocates risk of loss between signing and closing"[2] by giving the buyer a right to walk away from the deal without incurring any additional costs if something happens to the target firm that significantly impairs the value of the deal. Since such escape for the invoking party is essentially cost-free, MAC disputes are notoriously adversarial as the aggrieved seller claims that the buyer is using this mechanism as an excuse for his "buyer's remorse."[3]

Indeed, virtually all such M&A deals provide for the resolution of any further disputes not through litigation but through arbitration; be it either institutional (ICC, SIAC, LCIA) or ad hoc[4]. This produces yet another problem on top of the previous one. While before the tribunal (or court, if the dispute proceeds via litigation rather than arbitration) gets the chance to consider the actual occurrence of MAC, there will come a need to determine if it is actually competent to rule upon the issue and if its jurisdiction is not affected by the very termination based on the alleged breach of MAC.[5] Indeed, when a party resorts to the clause it means that it considers the agreement to be terminated, which implies that the natural course of actions for the other side is to question the legality of such termination and thus bring into question the existence and viability of the very arbitration clause.[6]

This paper argues that while the doctrine of separability provides the narrow answer in the affirmative, it does not solve other jurisdictional issues that follow from this. Emergency interim relief, statutory or regulatory intervention, and allegations of fraud each test the boundary between what a private tribunal may decide and what must be reserved to courts or regulators, and each does so in ways that separability alone cannot resolve.

This paper argues that although arbitral tribunals generally retain jurisdiction through the doctrines of separability and kompetenz-kompetenz, practical limitations arising from

[1] LOU R. KLING, EILEEN T. NUGENT & BRANDON A. VAN DYKE, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 15.02 (2024).
[2] *Akorn, Inc. v. Fresenius Kabi AG*, 2018 Del. Ch. LEXIS 325, at 181–86 (Del. Ch. Oct. 1, 2018), aff'd, 198 A.3d 724 (Del. 2018).
[3] Steven M. Davidoff, *The Failure of Private Equity*, 82 S. CAL. L. REV. 481, 511–18 (2009).
[4] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 87–90 (3d ed. 2021).
[5] *Channel Medsystems, Inc. v. Boston Scientific Corp.*, C.A. No. 2018-0673-AGB, 2019 Del. Ch. LEXIS 308 (Del. Ch. Dec. 18, 2019).
[6] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

regulatory intervention, interim relief, and allegations of fraud frequently restrict the effectiveness of arbitration in failed M&A transactions.

II. Material adverse change clauses: Legal framework and commercial function

A. The standard of materiality

The state of Delaware, which has the Court of Chancery handling most major disputes involving mergers between public companies, has set a very high bar for a party trying to show that a MAC exists. According to In re IBP, Inc. Shareholders Litigation [7], the Court of Chancery ruled that the test for a MAC must be based on "the longer-term perspective of a reasonable acquiror" and not just a "short-term hiccup in earnings". This must be a material adverse effect on the "earning power of the target company over a commercially reasonable time period", not just one bad quarter.[8] In IBP, the court compelled Tyson Foods to complete its merger of IBP despite a dramatic-earnings drop due to weather and an accounting scandal involving one of the IBP subsidiaries since the parties had specifically allocated that risk to Tyson in their merger contract.

However, for nearly two decades following IBP, there were no cases in which the courts of Delaware allowed the buyer to rely on a MAC clause. This was not true in *Akorn, Inc. v. Fresenius Kabi AG*[9], in which Vice Chancellor Laster opined that Akorn's dramatic reduction in profits due to double-digit reductions in revenue, operating profit, and earnings per share year-on-year in sequential quarters along with widespread, concealed violations of the law together constituted a Material Adverse Effect. Most importantly, the court held that the loss suffered by Akorn was both qualitative as well as quantitative, in that Akorn had gone from a self-characterization of being an FDA-compliant company to a "company in persistent, serious violation of the FDA laws without easy correction."

B. Forward-looking versus historical MACs

A MAC clause usually works on both levels, as it excludes closing if the target company "has suffered" a material adverse effect (the historical approach), or alternatively if the relevant representation or event "would reasonably be expected to result in" such an effect (the prospective approach). The key point here is that, using the second approach, the buyer will be

[7] *In re IBP, Inc. Shareholders Litigation*, 789 A.2d 14, 68–69 (Del. Ch. 2001).
[8] Kling, Nugent & Van Dyke, *supra* note 1, at § 15.03.
[9] *Akorn*, 2018 Del. Ch. LEXIS 325, at 216–20.

able to terminate the deal even if the adverse effect is reasonably foreseeable (as happened in Akorn itself in connection with Akorn's non-compliance with regulations).

C. Carve-outs and systemic risk

MAC clause negotiations almost always exempt broad, non-firm-specific risks such as general economic or industry conditions, acts of war, terrorist activities, natural catastrophes, and legal changes on the ground that they were not risks that any individual acquirer had sought to indemnify itself from. Such exceptions almost invariably include a "disproportionate effect" clause providing that where the systemically-related event impacts the firm disproportionately more than its competitors, it will qualify for the MAC exemption.[10]

The degree of specificity (or lack thereof) with which these exceptions are written is usually the most important single factor in determining whether a dispute can be settled through negotiations or will go to arbitration in the first place; according to Gilson and Schwartz's moral-hazard account of MAC drafting, vague exceptions are not a mistake but intentional policy.

III. Jurisdictional foundations of arbitration in failed M&A transactions

A. The doctrine of separability

According to the principle of separability or severability, an arbitration clause constitutes an independent agreement from the main agreement or contract, so that the invalidity, termination or setting aside of the main contract does not ipso jure lead to the invalidity of the arbitration clause.

The principle was developed in American jurisprudence by the case of Prima Paint Corp. v. Flood & Conklin Manufacturing Co.[11], further refined in *Buckeye Check Cashing, Inc. v. Cardegna*[12] and now recognized in Indian law via Section 16 of the Arbitration and Conciliation Act, 1996[13] and the landmark judgment in *A. Ayyasamy v. A. Paramasivam*[14], where it was clearly stated by the invocation of Buckeye, that "the arbitration agreement between the parties stands distinct from the contract in which it is contained" and that "the invalidity of the main agreement does not ipso jure result in the invalidity of the arbitration agreement."

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[10] Ronald J. Gilson & Alan Schwartz, *Understanding MACs: Moral Hazard in Acquisitions*, 21 J.L. ECON. & ORG. 330, 339–44 (2005).

[11] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402–04 (1967).

[12] *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006).

[13] Arbitration and Conciliation Act, No. 26 of 1996, § 16 (India).

[14] *A. Ayyasamy v. A. Paramasivam*, (2016) 10 S.C.C. 386.

In application to an M&A deal gone wrong, what this implies for the matter at hand is that, although an M&A buyer may unilaterally terminate the agreement via a MAC provision, even if inappropriately so, that alone will not render the tribunal unable to arbitrate the seller's complaint about such termination.[15] This is due to the fact that the arbitration clause survives the termination of the main agreement, allowing the tribunal to rule on the legality of that termination. Otherwise, one could just argue bad-faith cessation of the underlying agreement to circumvent arbitration.

B. Kompetenz-Kompetenz

While separability deals with the question of the survival of a provision of an arbitration agreement even if some other parts of the agreement are declared void, another important doctrine in relation to international commercial arbitration is that of kompetenz-kompetenz, meaning competence to determine one's own competence, or the tribunal's ability to rule on issues such as whether there is a nullity or voidness of the arbitration agreement. This doctrine finds its expression in international arbitration laws under the provisions of Article 16(1) of the UNCITRAL Model Law[16], and in domestic arbitration laws as well in the form of Section 16(1) of India's Arbitration and Conciliation Act, 1996[17]. In US common law, this doctrine has been affirmed by the decision of the case of First Options of Chicago, Inc. v. Kaplan [18], which ruled that questions relating to arbitrability are normally decided by the court and not by the arbitral tribunals unless parties to arbitration agree explicitly, by clear and unmistakable evidence, to refer such issues to the tribunal.

Where a MAC termination is challenged on the ground that the underlying merger agreement was procured by fraud and is therefore void ab initio, kompetenz-kompetenz permits, but as discussed in Section 3.3 below, does not always guarantee, the tribunal to rule on that threshold validity question itself, in the first instance, subject to subsequent curial review.[19]

C. Overlapping and nested dispute-resolution clauses

Dispute resolution mechanisms in M&A agreements may combine several methods for settling disputes under one agreement, including using an independent accounting firm or an expert to solve purely mechanical disputes related to the working capital adjustment or purchase price

[15] Born, *supra* note 4, at 1046–55.
[16] UNCITRAL Model Law on International Commercial Arbitration art. 16(1) (1985), with amendments adopted in 2006.
[17] Arbitration and Conciliation Act, No. 26 of 1996, § 16(1) (India).
[18] *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943–45 (1995).
[19] Born, *supra* note 4, at 1091–1105.

adjustment and an arbitration clause for disputes related to the breach of representations and warranties and the existence of MAC.[20]

Therefore, the tribunal needs to identify whether the dispute is governed by either of these two clauses before analyzing its substance. In case it is difficult to draw the line between a dispute over accounting issues and a legal dispute regarding materiality, such a combination may become a battlefield by itself, like in the earnings dispute example from IBP.

IV. Jurisdictional challenges in failed M&A transactions

A. Flashpoint 1: Interim and emergency relief

Once a MAC clause is triggered, the buyer normally seeks to get out while the seller would seek to force a closing based on specific performance. Final arbitral awards may sometimes take months or years to be issued; it is therefore more and more common for both institutional rules and national arbitration acts to have provisions allowing for the appointment of emergency arbitrators who can grant interim orders even without the constitution of a tribunal.

Such conflict between national courts and emergency arbitrators was particularly evident in the judgment of the Indian Supreme Court in Amazon.com NV Investment Holdings LLC v. Future Retail Ltd.[21], where the dispute arose from a competing-transaction clause rather than a MAC clause yet the interest of the parties and the structure of their arguments were exactly the same: an emergency arbitrator appointed pursuant to the SIAC Rules[22] prevented Future Retail from going ahead with a competing transaction and the issue was whether such decision could be enforced in India.[23]

While this ruling addresses, to some extent, the problem of a party being able to avoid a temporary measure on the ground that there is no provision for emergency arbitration under the Indian law, the issue is still rather vague in the case of foreign-seated emergency awards, as they do not come under Section 17[24] at all, and can only be enforced either directly by approaching the domestic courts for interim measures in support of foreign arbitration or by way of the mechanism provided under the New York Convention.

B. Flashpoint 2: Public policy and statutory authorities

Where a jurisdiction requires prior approval of particular classes of corporate transactions by statute or regulation (such as open offers under securities law, competition/antitrust approvals,

[20] Kling, Nugent & Van Dyke, *supra* note 1, at §§ 18.01–18.03.
[21] *Amazon.com NV Inv. Holdings LLC v. Future Retail Ltd.*, (2022) 1 S.C.C. 209.
[22] Singapore International Arbitration Centre, SIAC Arbitration Rules r. 12, sch. 1 (7th ed. 2025).
[23] Born, *supra* note 4, at 2694–2708.
[24] Arbitration and Conciliation Act, No. 26 of 1996, § 17 (India).

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or approvals for particular sectors), the powers of a tribunal to adjudicate any question relating to the frustration and termination of such transactions may be constrained or ousted by the inherent, non-derogable power of the regulator to make a determination on the same question. In Nirma Industries Ltd. v. SEBI[25], the acquirer was trying to withdraw the open offer made under Indian Takeover Regulations when it discovered that there was substantial fraud committed by the target's promoters, claiming that such offer had become commercially impossible of performance.

The Securities and Exchange Board of India denied the withdrawal, and the Supreme Court of India upheld the rejection of withdrawal of the offer, ruling that the residuary discretionary power of the regulator to grant the withdrawal must be understood ejusdem generis with respect to the narrow category of cases of legal impossibility, which includes refusal of statutory approval or death of sole acquirer.[26]

It is also a useful example of a structural principle, in that where the withdrawal of an open offer is something reserved to the statutory regulator and not something to be determined according to the rules of contract, then an arbitral tribunal being asked to determine the status of the very same transaction will have to apply the statutory regulator's test for open-offer withdrawal rather than the ordinary rules regarding MAC or frustration.

C. Flashpoint 3: The arbitrability of fraud and misrepresentation

When there is a case of MAC arising on account of the seller's fraudulent concealment or representation regarding the financial position of the target company, as alleged by Fresenius regarding the regulatory filings made by Akorn[27], then another issue which emerges is whether the arbitral tribunal shall have jurisdiction to entertain such allegations or whether its criminal nature renders the dispute non-arbitrable.

In India, this issue has been dealt with by applying a case-by-case, two-pronged approach as set out in A.Ayyasamy v. A.Paramasivam[28], which differs from the stricter approach taken in *N. Radhakrishnan v. Maestro Engineers*[29], where allegations of fraud were considered to be non-arbitrable per se. Under the Ayyasamy judgment, "simple allegations of fraud" relating to the internal affairs of the contracting parties would still be arbitrable, while "serious allegations of

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[25] *Nirma Indus. Ltd. v. Sec. & Exch. Bd. of India*, (2013) 8 S.C.C. 20.
[26] Id.
[27] *Akorn*, 2018 Del. Ch. LEXIS 325.
[28] *Ayyasamy*, (2016) 10 S.C.C. 386.
[29] *N. Radhakrishnan v. Maestro Engineers*, (2010) 1 S.C.C. 72.

fraud which make a virtual case of criminal offense" or "fraud on the arbitration agreement" are not.

In a later case, *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.*[30], however, the Supreme Court clarified this rule by inquiring as to whether the fraud vitiates the arbitration agreement, or, alternatively, if it has consequences extending to the outside world, a rule more appropriate in the context of accounting-fraud disputes that usually lead to MAC claims. In the context of M&A transactions, what this means is that where one party claims a material adverse effect based on accounting fraud, the other party cannot take it for granted that the matter will be heard entirely before the agreed upon arbitral tribunal; instead, when the seller's fraudulent behavior is also criminal in nature, some or all of the claims might end up in court despite the agreement to arbitrate.

V. Comparative judicial approaches to MAC clauses and arbitral jurisdiction

A. The Delaware/U.S. Approach

The textual methodology applied by the Delaware Court of Chancery is highly fact-focused, business-oriented and places emphasis on contractual stability to an unusually large extent. Both IBP[31] and Akorn[32] decisions demonstrate that the burden of proof in relation to the threshold required under a MAC is exceptionally high and consists in showing a structural decline rather than a temporary downturn in the situation of a buyer resorting to the MAC provision.[33]

The approach used can be easily transferred to an arbitral setting due to its text-oriented nature and the high relevance of Delaware MAC case law cited before arbitral tribunals as persuasive authority.

B. The English law approach

In England, courts and tribunals applying English law usually concentrate exclusively on the actual wording of the MAC clause and refrain from implying any conditions into a MAC clause, interpreting it as a comprehensive allocation of risks between the parties.[34] This commercial and textual approach has made the use of MAC clauses in English law predictably somewhat more difficult for buyers to rely upon, and English Commonwealth courts[35], such as those in Australia,

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[30] *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.*, (2021) 4 S.C.C. 713.
[31] *In re IBP*, 789 A.2d 14.
[32] *Akorn*, 198 A.3d at 725.
[33] Kling, Nugent & Van Dyke, *supra* note 1, at § 15.03.
[34] *Grupo Hotelero Urvasco SA v. Carey Value Added SL*, [2013] EWHC (Comm) 1039, [2013] Bus. L.R. D45.

have explicitly referred to the Delaware case law of Akorn and others in the absence of directly relevant precedents.

C. The Indian law approach

Under Indian jurisprudence, there exists a relatively high threshold when considering claims for excuse of performance due to changes in circumstances. According to the decision in Energy Watchdog v. Central Electricity Regulatory Commission[36], the Supreme Court of India ruled that an increase in the price of imported coal, which made the contracts between the electricity producers and other parties substantially more difficult to carry out, but still feasible, did not constitute frustration under Section 56 of the Indian Contract Act, 1872[37], especially when the very terms of the contract included a force majeure provision and the parties themselves accepted the risk of variation in their prices of inputs.

This principle was reiterated by the same Court in its previous decision in *Satyabrata Ghose v. Mugneeram Bangur & Co.*[38], namely, that discharge of a contract takes place only if the basic ground on which the parties agreed on entering into the contract has been destroyed – not only because of increased difficulty of execution or additional expenses. Considering that, along with Nirma Industries case, Indian jurisprudence shows the persistent institutional approach towards construing Section 56 of the statute narrowly.

While Delaware prioritises commercial certainty through a restrictive interpretation of MAC clauses, English law focuses on contractual drafting, whereas Indian jurisprudence remains influenced by statutory principles of frustration and public policy. Consequently, arbitral tribunals operating under these legal systems exercise substantially different degrees of jurisdictional autonomy.

The comparative discussion above demonstrates that although Delaware, English, and Indian jurisprudence pursue the common objective of preserving transactional certainty, they differ significantly in their treatment of MAC clauses and arbitral jurisdiction. Table 1 summarises these distinctions.

Issue	Delaware (U.S.)	England	India
MAC threshold	Exceptionally high; requires durationally significant adverse effect	Strictly based on contractual wording	High threshold influenced by Section 56 and judicial restraint

[35] PAUL L. DAVIES, SARAH WORTHINGTON & CHRISTOPHER HARE, GOWER: PRINCIPLES OF MODERN COMPANY LAW (11th ed. 2021).
[36] *Energy Watchdog v. Cent. Elec. Regul. Comm'n*, (2017) 14 S.C.C. 80.
[37] Indian Contract Act, No. 9 of 1872, § 56.
[38] *Satyabrata Ghose v. Mugneeram Bangur & Co.*, 1954 SCR 310.

Issue	Delaware (U.S.)	England	India
Interpretation of MAC clauses	Contextual and commercially oriented	Textual interpretation with minimal implied terms	Contractual interpretation subject to statutory principles
Arbitral jurisdiction	Strong recognition of separability and party autonomy	Strong support for arbitration agreements	Strong statutory recognition under the Arbitration and Conciliation Act
Fraud and arbitrability	Generally arbitrable unless public law concerns arise	Mostly arbitrable	Distinction between simple and serious fraud; courts may retain jurisdiction
Emergency relief	Institutional emergency arbitration widely recognised	Readily available under institutional rules	Evolving jurisprudence; Amazon v. Future Retail strengthened enforceability
Overall approach	Favours contractual certainty	Favours contractual drafting	Balances contractual autonomy with public policy and regulatory oversight

Table 1: Summary of the comparative study between the American, British and Indian jurisprudence in the treatment of MAC clauses and arbitrability

VI. Recent developments (2024–2026): Evolving approaches to MAC clauses and arbitration

Nevertheless, the jurisprudential background surrounding MAC clauses and arbitral jurisdiction is still undergoing considerable development from 2024 to 2026. While the essential principles underpinning MAC clauses themselves have not changed significantly over time, recent innovations in institutional and judicial practice have further reinforced the effectiveness of arbitration in resolving disputes related to M&A transactions.[39]

In particular, the introduction of the 2025 SIAC Arbitration Rules[40] has provided for additional possibilities of obtaining emergency arbitrator orders, more expeditious procedures in general, and specifically made it possible to utilize technological means for case management in high-stakes commercial disputes. This trend is especially important in M&A transactions, where parties often seek interim relief to maintain the status quo before concluding or terminating the transaction.[41] Indian courts have shown a parallel willingness to keep complex, multi-party M&A-related disputes within arbitration rather than sending them back to litigation: in ASF Buildtech Private Limited v. Shapoorji Pallonji and Company Private Limited[42], the Supreme

[39] Born, *supra* note 4, at 1027–1108; Kling, Nugent & Van Dyke, *supra* note 1, at § 15.03.
[40] SIAC Arbitration Rules r. 12, sch. 1 (7th ed. 2025).
[41] *Amazon.com*, (2022) 1 S.C.C. 209; Born, *supra* note 4, at 2694–2708.
[42] *ASF Buildtech Pvt. Ltd. v. Shapoorji Pallonji & Co. Pvt. Ltd.*, 2025 INSC 616.

Court of India held that an arbitral tribunal may, on its own motion, implead a non-signatory group company where the facts support the Group of Companies doctrine, removing the need for a separate court application before the tribunal can proceed against the full corporate structure involved in the transaction. The possibility of quick establishment of arbitral tribunal and procedural flexibility help to prevent the possibility of making contractual remedy useless due to lengthy arbitral procedure.

In the international context, the courts of several countries supportive of arbitration have once again demonstrated their commitment to the rules of separability and kompetenz-kompetenz[43]. This tendency indicates a larger trend in favor of allowing arbitral tribunals to determine their jurisdiction prior to any judicial review process, which allows to preserve party autonomy and prevent any procedure fragmentation.[44]

Recent developments in mergers and acquisitions have also shown an evident tendency in the drafting of material adverse change clauses. With the numerous cases following the pandemic situation and its outcome in the Akorn v. Fresenius[45] case, practitioners started specifying particular financial indicators, regulatory compliance requirements, cyberattacks, and supply chain problems. Instead of using vague material adverse change provisions, modern acquisition agreements tend to list particular carve-outs and situations involving a disproportionate effect on the company's performance.[46]

In general, all these changes suggest that future developments in M&A arbitration will involve improvement in drafting and development of institutional arbitral system, but not increasing judicial involvement.[47] This growing tendency in relation to MAC provisions will help to solve jurisdictional disputes and enhance predictability of the arbitral results.

VII. Conclusion

The Material Adverse Change clauses still represent one of the most critical contractual devices used to allocate business risk between the signature and closure stage of merger and acquisition transactions. At the same time, arbitration represents the preferred mode of dispute settlement due to confidentiality, flexibility, expertise, and neutrality. The doctrines of separability and

[43] UNCITRAL Model Law on International Commercial Arbitration art. 16(1) (1985), with amendments adopted in 2006; Born, *supra* note 4, at 1046–1105.
[44] *Prima Paint*, 388 U.S. 395; *Buckeye*, 546 U.S. 440; *Ayyasamy*, (2016) 10 S.C.C. 386.
[45] *Akorn*, 198 A.3d at 725.
[46] Gilson & Schwartz, *supra* note 10, at 339–44.
[47] Born, *supra* note 4, at 1091–1105; SIAC Arbitration Rules (7th ed. 2025).

kompetenz-kompetenz ensure that arbitral tribunals maintain their jurisdiction even when the transaction has been terminated after the invocation of the MAC clause.[48]

At the same time, this research shows that merely the exercise of jurisdiction is not sufficient for an efficient mode of dispute resolution. Such elements as emergency relief, governmental intervention, fraud, and public policy considerations continue to constrain the exercise of arbitral power. It means that not only legal doctrine, but also the interaction of the contractual drafting, institutional arbitration rules, and mandatory regulatory framework can play an important role in the dispute resolution process.[49]

In terms of comparative law, Delaware case law focuses on commercial certainty through very strict construction of the MAC clauses, English law concentrates on the language of the contract agreed upon by the sophisticated parties, and the Indian jurisprudence takes a more cautious attitude toward the issue.

A number of reforms may be suggested going forward. First, parties should strive to draft MAC provisions with greater clarity using objectively measurable financial criteria, operational parameters, and carve-outs.[50] Second, better statutory recognition and cross-jurisdictional enforcement of emergency arbitration awards would greatly strengthen the practicality of the arbitration system during the interim period prior to the signing-closing interval.[51] Third, a narrow construction of non-arbitrability in cases of fraud needs to be preserved, leaving commercial disputes for resolution through the arbitral process except where there are legitimate public policy reasons compelling judicial review.[52] Fourth, harmonisation between national rules of arbitration and international best practices as to the separability and kompetenz kompetenz would benefit investors from multiple jurisdictions and prevent costly multi-forum litigation.

In summary, arbitration in failed M&As cannot thrive solely through expansion of its scope of jurisdiction but will need to rely on better drafting practices, increased efficiency and judicial support for party autonomy. The MAC provision, backed by the modern arbitration system, is the best way to reconcile certainty of transactions with the fairness of the business.

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[48] *Prima Paint*, 388 U.S. 395; UNCITRAL Model Law on International Commercial Arbitration art. 16(1) (1985), with amendments adopted in 2006; Arbitration and Conciliation Act, No. 26 of 1996, § 16 (India).
[49] *Amazon.com*, (2022) 1 S.C.C. 209; *Nirma Indus.*, (2013) 8 S.C.C. 20; *Avitel*, (2021) 4 S.C.C. 713.
[50] Kling, Nugent & Van Dyke, *supra* note 1, at §§ 15.03–15.05.
[51] SIAC Arbitration Rules (7th ed. 2025); *Amazon.com*, (2022) 1 S.C.C. 209.
[52] *Avitel*, (2021) 4 S.C.C. 713; *Ayyasamy*, (2016) 10 S.C.C. 386.

VIII. Bibliography

Cases

1. Ayyasamy v. A. Paramasivam, (2016) 10 S.C.C. 386.
2. *Akorn, Inc. v. Fresenius Kabi AG*, 198 A.3d 724 (Del. 2018).
3. *Amazon.com NV Inv. Holdings LLC v. Future Retail Ltd.*, (2022) 1 S.C.C. 209.
4. *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.*, (2021) 4 S.C.C. 713.
5. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).
6. *Channel Medsystems, Inc. v. Boston Scientific Corp.*, C.A. No. 2018-0673-AGB, 2019 Del. Ch. LEXIS 308 (Del. Ch. Dec. 18, 2019).
7. *Energy Watchdog v. Cent. Elec. Regul. Comm'n*, (2017) 14 S.C.C. 80.
8. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).
9. *Grupo Hotelero Urvasco SA v. Carey Value Added SL*, [2013] EWHC (Comm) 1039, [2013] Bus. L.R. D45.
10. *In re IBP, Inc. Shareholders Litigation*, 789 A.2d 14 (Del. Ch. 2001).
11. *Nirma Indus. Ltd. v. Sec. & Exch. Bd. of India*, (2013) 8 S.C.C. 20.
12. *N. Radhakrishnan v. Maestro Engineers*, (2010) 1 S.C.C. 72.
13. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).
14. *Satyabrata Ghose v. Mugneeram Bangur & Co.*, 1954 SCR 310.

Statutes

15. Arbitration and Conciliation Act, No. 26 of 1996 (India).
16. Indian Contract Act, No. 9 of 1872 (India).

International Instruments & Institutional Rules

17. SIAC Arbitration Rules (7th ed. 2025).
18. UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments adopted in 2006.

Books

19. Gary B. Born, International Commercial Arbitration (3d ed. 2021).

20. LOU R. KLING, EILEEN T. NUGENT & BRANDON A. VAN DYKE, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS (2024).

21. PAUL L. DAVIES, SARAH WORTHINGTON & CHRISTOPHER HARE, GOWER: PRINCIPLES OF MODERN COMPANY LAW (11th ed. 2021).

Journal Articles

22. Ronald J. Gilson & Alan Schwartz, *Understanding MACs: Moral Hazard in Acquisitions* 21 J.L. ECON. & ORG. 330 (2005).

23. Steven M. Davidoff, *The Failure of Private Equity*, 82 S. CAL. L. REV. 481 (2009).

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