**Split signing and completion – completion protections**

This section considers the contractual protections in the acquisition agreement where there is a 'split signing and completion'.

**Introduction**

Where the parties have opted to proceed with a ‘split’ signing and completion, there will be an added layer of complexity both from a commercial and legal point of view. The parties will have to agree and document several key issues in the acquisition agreement including:

1. The **extent** of the conditions precedent and the **timescales** for satisfying them;
2. Who is responsible for ensuring satisfaction of the conditions precedent;
3. What happens if the conditions precedent are **not satisfied;**
4. How the **target’s business should be run** in the period between signing and completion;
5. Who should bear the risk of any **adverse event(s**) that may occur between signing and completion; and
6. Whether the seller will give the warranties in the acquisition agreement at signing only or whether these will be **repeated** at completion.

**The buyer’s position where there is a split signing and completion**

The buyer’s solicitors will have to consider what events might occur to the target in the interim period between signing and completion which could mean that the buyer is no longer buying what it thought it was buying when it signed the acquisition agreement.

Once the acquisition agreement has been signed, the buyer will be committed to the purchase so it will not want the **value of the target to be reduced** or its business or **reputation to be damaged** in any way during the period leading up to the date of completion.

The buyer is also likely to want to be able to terminate the acquisition agreement and pull out of the transaction altogether, if anything does occur before completion which **might materially and adversely** affect the value of the target. As the buyer has little control over the target until completion, the buyer’s solicitors will want to negotiate the appropriate protections in the acquisition agreement.

**The buyer’s contractual requirements**

The buyer will want to negotiate three main provisions in the acquisition agreement to protect its position in the event of a split signing and completion as follows:

* Dealing with any conditions precedent to completion
* Agreeing how the target should be run in the interim
* Ensuring the warranties are still true on completion

We will now consider each of these provisions in turn.

**Conditions precedent**

There will have been a reason why simultaneous signing and completion has not been possible.  The acquisition agreement will need to include a clause dealing with:

* the **conditions precedent** to completion;
* setting out what the conditions precedent are;
* setting a **final date** by which they must be satisfied (a ‘**long stop date’**);and
* setting out which party is responsible for satisfying the conditions precedent and where appropriate, **mutual obligations** on the part of the buyer and the seller to **co-operate** in order to do all things that may be necessary in order to ensure that the conditions precedent are satisfied.

 This clause should also state what will happen if the conditions precedent are not satisfied by the given date. Usually, one or both of the parties will have a right to terminate the acquisition agreement by giving written notice of termination to the other and if that is done, the clause will go on to provide for certain key provisions in the acquisition agreement to survive termination.

**Running the target’s business in the interim period – buyer's consent**

The acquisition agreement will need to include provisions relating to the conduct of the business of the target between the date of the acquisition agreement and completion.  The target may be prohibited from taking certain actions in the interim period without the consent of the buyer. These restrictions may relate to the following activities:

* capital expenditure;
* the disposal of material assets;
* additional borrowing;
* hiring and firing of key employees;
* entry into new material contracts;
* changing existing or terminating material contracts;
* issuing of new shares or options to acquire shares;
* changes in the constitution of any of the companies in the target group; and
* the declaration of dividends or other distributions.

**Running the target’s business in the interim period – seller's undertaking**

The seller may be required to give undertakings to the buyer concerning the conduct of the target's business in the interim period such as undertakings to:

* procure that the target group conducts its business(es) in the ordinary and usual course;
* use its best/reasonable endeavours to maintain the trade connections of the target group;
* inform the buyer if there are any material changes to the business or the financial position of the target group; and
* ensure that adequate insurance policies are maintained covering the assets of the target group.

As with the repetition of warranties (see later in the element) a buyer may want to include termination rights in relation to breach by the seller of the pre-completion undertakings (usually where this has a material adverse effect) but this will be strongly resisted by the seller.

**Running the target’s business in the interim period – limitations**

In requesting consents and undertakings in the interim period the buyer is guarding against a loss in the value of the target prior to completion. However, there are a number of reasons it may be appropriate to limit the extent of control the buyer has in the interim period including:

* under certain competition regimes (including the EU) if the buyer is seen to have taken control or the parties have started to implement integration before the appropriate clearance or consent they risk incurring penalties. This is known as ‘**gun-jumping’**;
* in the UK the CMA has the power to impose an interim enforcement order (**‘IEO’** also known as a **hold separate** order) to prevent pre-emptive actions in certain mergers. Breach of an IEO can result in a fine of up to 5% of turnover;
* the seller and/or target may be subject to regulatory regimes (e.g. FCA and SRA regulated businesses and FA regulated football clubs) which impose limits on the effective control of the buyer before clearance; or
* the seller may want to protect the value of the target in the event the transaction does not complete. For example, the seller may want to limit the sharing of confidential information.

**Repeating warranties and representations**

The seller will give the warranties at signing when the acquisition agreement is executed.  This might cause concern for the buyer, as those warranties may become **out of date** by the time of completion or, worse, an **intervening event** may occur which would otherwise put the seller in breach of warranty.  Accordingly, the buyer will want:

* the warranties to be given again at completion; and
* the **right to rescind** if there is any breach of warranty in the interim period.

Getting the seller to **repeat the warranties at completion** is an example of risk allocation whereby risk is pushed back to the seller.  This is because:

* The buyer wants to know that the warranties are still true on completion; and
* The buyer is protected from events occurring between signing and completion which give rise to a breach of warranty.

In practice it is often only specific categories of **“fundamental” warranties** that would be repeated on completion, e.g. title and capacity warranties

The seller may also be obliged in the acquisition agreement to **notify the buyer** if any of the warranties and/or representations are breached between signing and completion. The buyer’s solicitors should also consider what rights the buyer should have if there is a breach of warranty during the period between signing and completion. Often, the buyer’s solicitors would advise the buyer to seek a **contractual right to withdraw** from the agreement, if the seller is in breach of any of the warranties before completion (and, typically, that the result is material and adverse for the target), possibly in addition to the right to **claim damages** for any breach. However, whilst it is usual for a buyer to try to negotiate the right to withdraw from the agreement, it is commercially rare to see this right actually exercised because buyers will be very conscious of wasted costs and time already invested in the deal.  A more practical approach is that the buyer will seek to **revise the purchase price** to reflect the impact the breach has on the target. The buyer’s right to withdraw improves its bargaining position in relation to the seller when seeking a reduction in the purchase price.

**The seller’s response to the buyer’s requests**

**Repetition of warranties/representations**

If a seller accepts this, it may seek the right to deliver **an updated disclosure letter** to the buyer on completion in which it can make any disclosures which have arisen during the interim period so that it will not be liable for breach of warranty.

A buyer should resist this because if the seller delivers an updated disclosure letter at completion, the seller will not be liable for breach of warranty in respect of the new disclosures which, in turn, restricts the buyer's remedies in relation to new circumstances over which it has no control.

**Right to withdraw**

A seller will resist a provision giving the buyer the right to withdraw from the deal if there is a breach of warranty. The most a seller will usually accept is a right for the buyer to withdraw if there has been a breach, possibly, restricted to a “material breach” of a warranty leading to a **material adverse change** in the value of the target group.

As ever, the final position reached will depend on the respective bargaining power of the parties.

**Termination rights**

Other than a failure to satisfy a condition precedent (as discussed before). There are three main termination rights that can arise these are:

1. breach of pre-closing undertakings (governing the behaviour between signing and completion);
2. breach of warranty (usually arising from the repetition of warranties); and
3. the occurrence of an event within the definition of a material adverse change or material adverse change (a ‘**MAC’** clause).

It is common for any termination rights in a) and b) above to be limited to material breaches or breaches that give rise to a material adverse change. These will be resisted strongly by the seller but may be agreed.

MAC clauses relating to events are common in the USA but less so in the UK.

**Material adverse change clauses**

MAC clauses allocate risks that neither party can easily quantify or control between signing and completion, and so they are usually heavily negotiated as a result.

In UK practice it is more for the drafting of what will constitute a MAC to be quite general with express carve-outs to be clear what will not give rise to a MAC. These carve-outs often include:

* Macroeconomic issues, industry wide and force majeure risks;
* Changes and risks relating to the announcement or finalisation of the transaction; and
* Risks that have been disclosed in the disclosure letter at signing.

There is a high burden of proof in demonstrating that a MAC has occurred and the circumstances turn on the detail of the facts of the case and in the context of the acquisition agreement as a whole requiring an objective judgement, rather than a range of views.

In the absence of a definition the courts noted in **BM Brazil I Fundo De Investimento Em Participacoes Multistrategia v Sibanye BM Brazil (Pty) Ltd** [2024] EWHC 2566) that material requires something significant or substantial impacting earnings of target over a commercially reasonable period, likely year, not months.

In the Brazil case, when considering the transaction as a whole the coursts noted that a reduction in equity value of at least 20% would be material but that a 10% reduction would likely be too low in the circumstances.

**Summary**

* Where the parties have opted to proceed by way of a split signing and completion because certain conditions have to be satisfied before the transaction can be concluded, the buyer will want to ensure that it is protected against any adverse events or breach of warranty occurring in the interim period which affect the value of the target company.
* Specifically, the buyer will seek to include provisions relating to how the target's business is run in the interim period and for the seller to repeat warranties at completion.
* In turn, the seller may seek the right to deliver an updated disclosure letter that deals with any new matters that arise in the interim period, but this would normally be resisted by the buyer.
* The buyer may seek to include termination rights in particular in relation to breaches of warranty, undertakings or the occurrence of a material adverse change.