
FROM SIGNING TO CLOSING: SPECIFIC PERFORMANCE IN M&A TRANSACTIONS

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ABSTRACT

Mergers and acquisitions are fundamentally built upon contractual certainty. Modern acquisition transactions involve complex negotiations, extensive due diligence exercises, carefully structured risk allocation mechanisms, and detailed contractual documentation. Despite this sophistication, disputes frequently arise between signing and closing stages of a transaction. Buyers often attempt to walk away from deals citing adverse business developments, regulatory failures, or valuation concerns, while sellers also refuse to consummate transactions after market conditions change in their favour.

In such situations, the most commercially significant legal question becomes whether courts or arbitral tribunals have the authority to compel parties to complete the transaction instead of merely awarding monetary damages. This remedy, known as specific performance, has acquired renewed significance in India following the enactment of the Specific Relief (Amendment) Act, 2018.

The 2018 amendment fundamentally altered India's contractual enforcement landscape by transforming specific performance from an exceptional discretionary remedy into a general rule for commercial contracts. This shift has substantial implications for M&A transactions, where damages are often inadequate because things like strategic acquisitions, control rights, confidential synergies, and market positioning cannot easily be quantified in monetary terms.

This article examines the evolving concept surrounding specific performance in Indian M&A agreements, the impact of the 2018 amendment, the role of Material Adverse Change (MAC) clauses, the interplay with arbitration, and the practical implications for transactional drafting and deal structuring.

THE COMMERCIAL IMPORTANCE OF SPECIFIC PERFORMANCE IN M&A TRANSACTIONS

M&A transactions differ substantially from ordinary commercial contracts. Acquisition agreements frequently involve transfer of control, strategic assets, intellectual property, voting rights, management participation, regulatory approvals, and long-term commercial synergies. In such cases, damages may not adequately compensate the aggrieved party. For instance, where an acquirer seeks to obtain strategic control over a target company operating in a specialised sector, monetary compensation may fail to substitute the commercial value of the acquisition itself.

This commercial reality is one of the key reasons why parties now commonly include express “specific performance clauses” in Share Purchase Agreements (SPAs), Share Subscription Agreements (SSAs), and Shareholders’ Agreements (SHAs). These clauses are intended to maintain deal certainty and prevent either party from backing out of the transaction unfairly after signing but before closing. The increasing prominence of specific performance in global M&A jurisprudence is also reflected in Delaware courts, particularly in disputes involving MAC clauses and buyer walkaways.

EVOLUTION OF SPECIFIC PERFORMANCE UNDER INDIAN LAW

Prior to the 2018 amendment, courts exercised broad discretion while granting specific performance. Under section 10 of the unamended Act, damages were treated as the primary remedy and specific performance rather as an exceptional equitable relief. Plaintiffs were generally required to demonstrate that monetary compensation was inadequate or incapable of precise calculation.

The Specific Relief (Amendment) Act, 2018 significantly altered this position. The amended Section 10 now provides that specific performance “shall” be enforced subject to limited statutory exceptions. Consequently, courts no longer possess restrictive discretion to deny specific performance bases on mere availability of theoretical damages and compensation. The legislative intent behind the amendment was to strengthen contractual enforcement and improve India’s business environment. Alongside, the amendment also introduced concept such as substituted performance, expert assistance provisions, special treatment for infrastructure contracts and stricter timelines for adjudication.

For M&A transactions, this shift is commercially significant because acquisition agreements increasingly require certainty of enforcement rather than post breach compensation.

NATURE OF M&A AGREEMENTS, CONDITIONS PRECEDENT, MAC CLAUSES AND THE GROWING ROLE OF SPECIFIC PERFORMANCE

Mergers and acquisitions are not completed immediately upon execution of the transaction documents.

Unlike ordinary commercial contracts, M&A transactions generally operate through two distinct stages - signing and closing. At the signing stage, parties execute definitive agreements such as SPAs, SSAs, or SHAs, recording the commercial terms of the transaction, including valuation, representations and warranties, indemnities, closing conditions, and post-closing obligations. However, the actual transfer of shares, consideration, management, and control typically takes place only at the closing stage, after fulfilment of various contractual and regulatory requirements.

The period between signing and closing is often the most commercially sensitive phase of an acquisition transaction. During this interim period, business conditions may change significantly, regulatory approvals may face delays, financing arrangements may collapse, or one of the parties may attempt to renegotiate or exit the transaction altogether. Consequently, modern M&A agreements contain detailed contractual mechanisms governing termination rights, pre-closing covenants, force majeure provisions, dispute resolution procedures, and conditions precedent, all of which are designed to allocate transactional risk between the parties.

Conditions precedent constitutes one of the most critical aspects of acquisition agreements because they determine whether the parties are legally obligated to consummate the transaction. Such conditions commonly include approval from the Competition Commission of India (CCI), compliance with FEMA regulations, SEBI approvals in listed company transactions, lender consents, satisfactory due diligence findings, and absence of material litigation or adverse developments affecting the target company. Until these conditions are either fulfilled or waived, parties are generally not required to proceed with closing.

However, disputes frequently arise regarding whether these conditions were genuinely

incapable of fulfilment or whether one party deliberately obstructed compliance in order to avoid an economically disadvantageous transaction. Indian courts increasingly examine whether parties acted in good faith while attempting to satisfy contractual obligations, particularly where agreements impose 'reasonable efforts' or 'best efforts' obligations requiring parties to actively pursue regulatory approvals and fulfil closing conditions. In high value transactions, courts closely scrutinise whether the alleged nonfulfilment of condition precedent is merely a pretext for escaping contractual obligations.

Closely connected to this issue is the growing significance of Material Adverse Change (MAC) clauses in modern M&A transactions. MAC clauses permit buyers to terminate acquisition agreements if the target business suffers a substantial deterioration before closing. These clauses became particularly prominent following the landmark Delaware decision in *Akorn, Inc. v. Fresenius Kabi AG*, where the Delaware Court permitted the buyer to terminate a merger agreement after concluding that the target company had experienced a material adverse effect arising from significant financial and regulatory deterioration. However, the Delaware court emphasised that MAC clauses impose a particularly high burden on buyers. The deterioration must be durationally significant, and ordinary commercial fluctuations or temporary market changes are insufficient to justify termination of the transaction.

In the Indian context, courts are likely to adopt a cautious approach while interpreting MAC clauses. Indian M&A transactions often involve substantial reliance interests, long negotiation periods, and significant commercial expectations. Further, following the Specific Relief (Amendment) Act, 2018, Indian law increasingly favours enforcement of commercial contracts over avoidance. Consequently, buyers attempting to invoke MAC clauses under Indian law may face considerable evidentiary burdens in demonstrating that the alleged adverse event genuinely undermines the commercial foundation of the transaction.

It is within this broader framework that specific performance assumes critical importance in modern M&A disputes. Since acquisition agreements frequently involve strategic control rights, confidential business opportunities, and long-term commercial synergies, monetary damages may not adequately compensate the aggrieved party if the transaction collapses. Parties therefore increasingly incorporate express specific performance clauses within SPAs, SSAs, and SHAs to preserve deal certainty and prevent opportunistic breaches between signing and closing. These clauses allow parties to seek judicial or arbitral orders compelling

completion of the transaction where all contractual conditions have been satisfied but one party nevertheless attempts to avoid closing. Accordingly, the interplay between signing obligations, conditions precedent, MAC clauses, and specific performance reflect a broader evolution in Indian transactional jurisprudence towards strengthening contractual certainty, protecting commercial expectations, and ensuring stability in high-value acquisition transactions.

CHALLENGES TO SPECIFIC PERFORMANCE IN M&A TRANSACTIONS

Despite the growing preference for enforcing commercial contracts under Indian law, specific performance in M&A transactions is not without limitations. One of the most significant challenges arises from the concept of “determinable contracts” under Section 14 of the Specific Relief Act, 1963, which provides that contracts that are “determinable in nature” cannot ordinarily be specifically enforced.

This creates a complex issue in the context of acquisition agreements because most M&A contracts contain negotiated exit mechanisms such as termination clauses, long-stop dates, walkaway rights, and other contractual provisions allowing parties to terminate the transaction under specified circumstances. In disputes relating to failed acquisitions, defendants frequently argue that such agreements are inherently terminable and therefore incapable of specific enforcement.

Indian courts have, in certain cases, adopted a broad interpretation of determinable contracts, making this one of the most contested issues in specific performance litigation. However, modern commercial jurisprudence increasingly recognises that there is an important distinction between contracts that are freely terminable at will and contracts that merely contain limited, negotiated termination rights triggered by specific events or contractual breaches. In sophisticated M&A transactions, termination provisions are often carefully structured risk-allocation mechanisms rather than unrestricted exit options. Merely because an agreement contains a termination clause or a long-stop date should not automatically render it determinable in nature. Courts and arbitral tribunals are therefore increasingly required to examine the true commercial structure of the transaction, the intention of the parties, and whether the termination rights were genuinely exercised in accordance with the agreement.

The issue assumes even greater significance after the Specific Relief (Amendment) Act, 2018, which strengthened the enforceability of commercial contracts and shifted Indian law towards

a more pro-enforcement approach. As a result, courts today are more likely to balance contractual certainty and commercial fairness instead of mechanically refusing specific performance merely because the agreement contains negotiated exit provisions.

Accordingly, the question of whether an M&A agreement is truly “determinable” remains one of the most important and evolving aspects of specific performance jurisprudence in India.

PRACTICAL DRAFTING LESSONS FOR TRANSACTION LAWYERS

Transaction lawyers today are far more conscious of the possibility that courts or arbitral tribunals may compel parties to complete a transaction rather than merely award damages for breach. As a result, drafting has become increasingly focused on preserving deal certainty while minimising future litigation risks.

Modern SPAs and related transaction documents now commonly include express specific performance clauses, detailed definitions of Material Adverse Change MAC, carefully structured termination rights, “reasonable efforts” obligations, reverse break fee provisions, and exclusive remedy clauses. These provisions are intended to reduce ambiguity and clearly allocate commercial risks between the parties during the period between signing and closing.

Particular attention is also given to the drafting of conditions precedent, regulatory approval obligations, and exit mechanisms. Transaction lawyers increasingly seek to avoid vague language that may later create disputes regarding whether a party genuinely attempted to fulfil contractual obligations or improperly sought to avoid the transaction. Consequently, acquisition agreements now frequently include mandatory cooperation obligations, restrictions on unilateral termination, and even “hell or high water” clauses requiring parties to take all necessary steps to secure regulatory approvals.

Careful drafting has become especially important in the context of MAC clauses and termination provisions, as broadly worded or poorly structured clauses may expose parties to substantial litigation and evidentiary disputes. In many respects, Indian transactional drafting practices have also been influenced by Delaware M&A jurisprudence, particularly in relation to deal certainty, buyer walkaways, and negotiated risk allocation. This growing reliance on internationally recognised drafting standards reflects the increasingly global and sophisticated nature of modern M&A practice in India.

CONCLUSION

The growing importance of specific performance in Indian M&A transactions reflects a broader shift towards strengthening contractual certainty in commercial dealings. Following the Specific Relief (Amendment) Act, 2018, Indian law has increasingly favoured enforcement of acquisition agreements, particularly where strategic business interests and control rights cannot be adequately compensated through damages alone. At the same time, issues relating to MAC clauses, conditions precedent, termination rights, and arbitral enforcement continue to make transactional disputes more complex and commercially sensitive. As Indian M&A practice becomes increasingly sophisticated and globally influenced, especially by Delaware-style transactional frameworks, careful drafting and clear risk allocation have become just as important as commercial negotiation itself. Ultimately, the effectiveness of an acquisition agreement today depends not only on the deal that parties negotiate, but also on how well that deal can withstand legal and commercial challenges between signing and closing.