

**RUCELLAI&RAFFAELLI**

STUDIO LEGALE

# **INVESTING IN ITALY**

## **INCENTIVES, OPPORTUNITIES AND RISKS OF INVESTING IN INNOVATION IN ITALY**

**Enrico Sisti**

**Antonio Debiasi**

**February 6, 2019**

**RUCELLAI&RAFFAELLI**

STUDIO LEGALE

**MILANO**

**ROMA**

**BOLOGNA**

# Some Facts

- **2018: Italy among top 10 destinations WW for foreign investments** (FDI Confidence Index - AT Kearney)
- **US investments # 1 in term of number of deals (reduced size vs 2015)**
- **Main sectors:**
  - **28% industrial**
  - **16% business services**
  - **12% MTM**
- **Average EV 200M**

# PROs

- 1. Affordable and innovative mid-cap and family owned businesses**
- 2. Top-notch human capital**
- 3. Strong brand («Made in Italy»)**
- 4. High standard of living**

**... however, there are some CONs**

# Next? (Corporate) Venture Capital

## 2 billion stimulus package

1. Tax deductions up to 50% of the amount invested.
2. Tax credits up to 50% of R&D costs incurred through innovative start-ups and SME's.
3. "Patent Box": lighter taxation (-50%) of revenues arising from exploitation of IP.
4. Fixed taxes for attracting residency of HNWI investors and the so called "re-patriation" of brains.

## Some key innovation sectors:

1. Medical robotics and medtech in general;
2. Biotech;
3. Internet of Things;
4. Machine Learning.

# DOING M&A in ITALY

## Ten practical tips

# 1. Regulatory Oversight

- **Antitrust clearance**
- **«Golden Power» rule for strategic areas**
- **Bank of Italy**
- **Consob**
- **Trade Union consultation**

## **2. Deal structuring and successor liability**

### **Acquisition of shares:**

- **Full successor liability**
- **Limited taxation**
- **Quick process**

### **Acquisition of going concern**

- **limited successor liability**
- **Higher taxation**
- **More articulated process**

### **Merger**

- **Full successor liability**
- **Tax neutral**
- **Longest process**

### **3. LOI's and Pre-contract liability**

**Agreements expressly labelled as “non binding” will “not bind “a judge who may consider such document as binding if essential elements are present or if agreement is confirmed by later conduct**

**“Non binding” agreements oblige to negotiate in good faith. Any unjustified withdrawal from negotiation will lead to “pre-contract” liability for costs borne and indemnification for lost chances**



## 4. Conditions Precedent

- Condition precedent vs condition subsequent
- Conditions depending from the will of a party
- The case of “board approval”
- The case of the “satisfactory due diligence”

## 5. Due diligence and disclosure

- **Disclosure in due diligence limits indemnification?**
- **No clear answer. Needs to be addressed in the agreement (disclosure DOES qualify and limit; disclosure DOES NOT qualify and limit; disclosure schedules)**
- **Liabilities disclosed in due diligence are to be covered by special indemnities vs. warranties**

## 6. Price and Earn Out

- **Locked box vs. full NFD/OWC adjustment**
- **Hold-back, escrow, bank guarantee vs. W&I insurance.**
- **Earn out milestones depending on sellers' continuing engagement: taxation and social security risks**

# 7. Reps and warranties

- 8 day forfeiture term and 1 year statute of limitations: gone forever?
- Way clauses are worded is essential.
- “True” obligations (e.g. *no individual can claim an employment relationship*) vs. warranties (e.g. *accounts include adequate reserves*) vs. declarations (e.g. *no litigation threatened*). Each a different regime and consequences.

## **8. Limitation of liability in M&A**

**Caps, thresholds, de minimis and time limitations are market standards.**

**Time limitation between 12 and 24 months, with significant exceptions**

**Liability mandatorily cannot be excluded or limited in cases of gross negligence and willful misconduct. This applies to caps and not to thresholds or de minimis or time limitation.**

# 9. Litigation

- **ADR**
- **Specialized sections in Courts with reserved competence on business matters, antitrust, IP rights. Reserved competence to specific courts for litigation involving foreign companies**
- **Arbitration**

# 10. Governance

1. **Different value: shareholders agreement vs. By-laws.**
2. **No Squeeze-out unless listed.**
3. **Limitations on drag-a-long.**
4. **Put-options: invalid if exclude losses.**
5. **Call-options: alternatives to enforcement in Court**

# Take aways

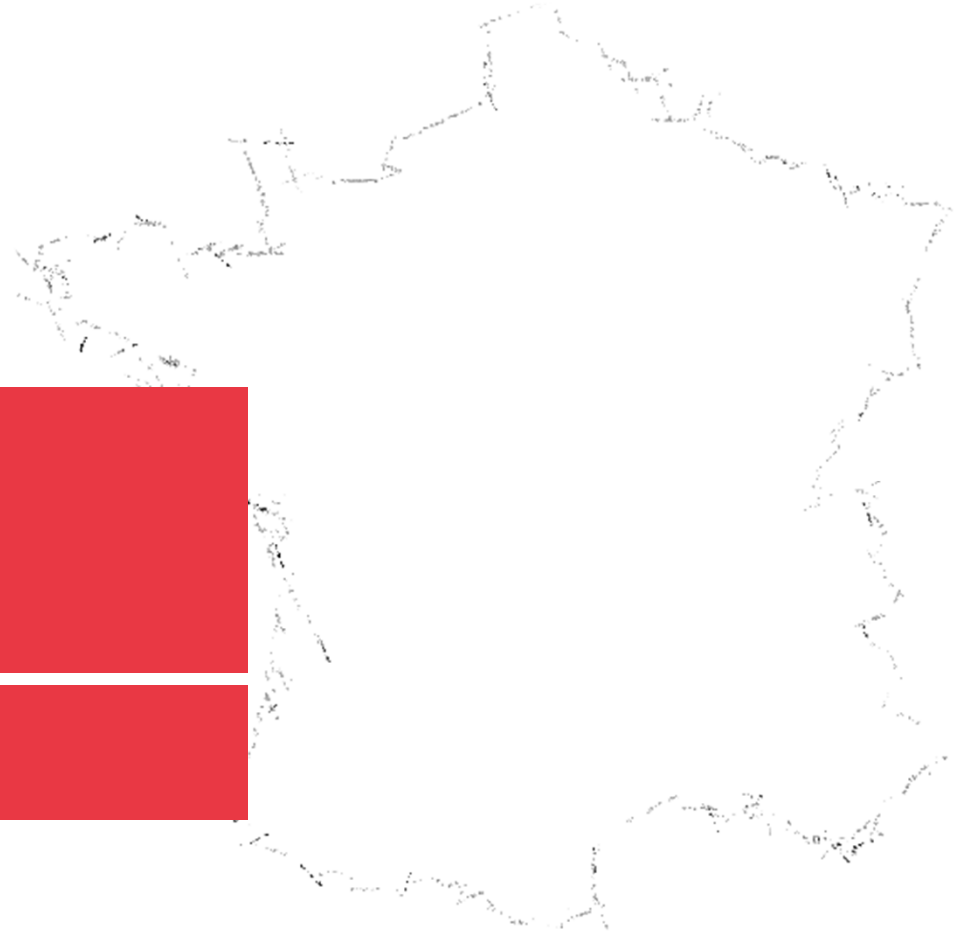
- 1. Italy is a complex market but full of opportunities.**
- 2. Local M&A practice is in the surface similar to international and US practice.**
- 3. However important differences hide in the detail – sharing room with the Devil.**



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# Specific issues of awareness (France)



1. Foreign investments in France – Protection of strategic sectors
2. GDPR – Key points
3. Employment issues: “Macron” ordinances (September 2017)

# Foreign investments in France

## Protection of strategic sectors

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1. Brief overview of the French regime as regards control on foreign investments
2. Extension of the list of business sectors subject to prior authorization from the French State
3. Extension of the persons allowed to submit a request for prior ruling
4. Extension of the administration's powers as regards foreign investment control

## Brief overview of the French regime as regards control on foreign investments – Legal aspects

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### Principle

Foreign investments in **some sectors** that are **considered strategic** require **prior authorisation** from the French Ministry of Economy

### Procedure

The foreign investor must **complete a file** containing information about (i) the investor (name, address, certificate of registration, etc.), (ii) the assets to be acquired (accurate description including, for instance, sales revenue and the results deriving from the assets) and (iii) the investment (total amount of the transaction, payment terms of the purchase price, financial terms of the deal, etc.)

### Timing

Authorisation granted in a **2-month delay** once the filing is deemed complete by the relevant department of the French Ministry of Economy

In the absence of response within such period of time, the authorization is deemed granted by the Ministry

## Brief overview of the French regime as regards control on foreign investments – Historical aspects

Decree establishing a list of 6 protected sectors for foreign investments

“Montebourg” decree extending the protected foreign investment sectors’ list

Decree dated 29 November 2019 further extending the protected foreign investment sectors’ list

2005

2014

2019

PACTE law hardening the sanctions for completion of an investment without receiving prior authorization

Political agreement on a European framework for filtering foreign capital buy-outs and establishing a cooperation mechanism

## Brief overview of the French regime as regards control on foreign investments – Historical aspects

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- First law on foreign investment adopted in 1966
- Decree of 2005 implemented a control regime for foreign investment with the purpose of protecting public order and security
- Montebourg decree dated 14 May 2014 extended the foreign investment control regime
- Today, the foreign investment control is being strengthened and expanded in order to better protect strategic sectors:
  - at a national level, in France:
    - ❖ by a new decree (dated 29 November 2018, entered into force on 1 January 2019)
    - ❖ by the “Action Plan for Business Growth and Transformation” law (“*loi PACTE*”) (voted by the French National Assembly on 10 October 2018 and being submitted to the Senate between 29 January 2019 and 12 February 2019)
  - at a European level, the Parliament, the Council and the Commission have reached a political agreement on 20 November 2018 on the establishment of a European framework for filtering foreign capital buy-outs and establishing a cooperation mechanism

## Extension of the list of business sectors subject to prior authorization from the French State

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**Before 1 January 2019**, a list of 12 business sectors were protected

These sectors relate to:

- public order
- public authority
- public security (including energy, water, telecommunications, transportation, and health sectors)
- interests of national defense

**Since the 29 November 2018 Decree**, new sectors are covered by the authorization procedure:

- spatial operations
- electronic and computer specific systems required for public security purposes
- data-hosting activities
- research and development activities (in cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductors, dual-use goods)



## Extension of the persons allowed to submit a request for prior ruling

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Decree dated 29 November 2019 also extended the category of persons authorized to submit a request for prior ruling to the Minister of Economy in order to determine whether the contemplated transaction falls within the scope of the foreign investment control regime

- Before 1 January 2019

Only the potential investor could file a request for prior ruling

- Since 1 January 2019

The decree also authorizes also the target company to submit such request

## Extension of the administration's powers as regards foreign investment control

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The administration's authority to control foreign investments is increased

As from 1 January 2019, the Ministry of Economy has the power to:

- **order** the investor (possibly under penalty) to file an application for an ex-post facto authorization
- take **precautionary measures** (for instance, temporarily prohibit the free disposal of assets and appointment of agents in a company which did not comply with the foreign investment regime)
- **exercise a control** with respect to the compliance with the conditions/commitments the Ministry may have imposed on the company before allowing the foreign investment

Through the PACTE law, the amount of the **monetary penalties** for completion of the investment without authorization, obtaining authorisation by fraud or for breach of commitments or noncompliance with injunctions will be increased (capped at the highest of: (i) twice the amount of the irregular investment, (ii) 10% of the annual turnover or (iii) €5 million for legal entities / €1 million for natural persons)

# GDPR

## Key points

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1. GDPR – New legal framework
2. Main obligations of a data controller
3. Implementation of GDPR provisions (most recent)

CORNET VINCENT SEGUREL

EU General Data Protection Regulation ('GDPR') came into force on 25 May 2018

*What do you need to know ?*

- **Extraterritorial reach of the GDPR**

**Article 3 of GDPR** – “*This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union”, where European data subject are targeted by the controller or the processor”*

- **Accountability principle**

No longer prior formality to be filed with an Authority of Privacy in order to be compliant with GDPR

Controllers and processors have to document and be able to demonstrate that they are compliant (e.g. : *record of processing activities, process of obtaining consent, information of data subject, technical and organisational security measures, personal data retention period*)

- **Cross border data transfers**

Have to be subject to appropriate safeguards ( e.g. : Binding Corporate Rules, agreement compliant with standard adopted by European Commission). NB : compliance with GDPR will necessitate extra caution when establishing and running a data room

- **GDPR fines**

Under article 83 of the GDPR : Fines of up to €10 million or 2 % of a firm's global turnover (whichever is greater) / Fines of up to €20 million or 4 % of a firm's global turnover (whichever is greater)

## GDPR – Main obligations of a data controller

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### Controller Obligations

- Implement appropriate and sufficient technical and organisational security measures and be able to demonstrate it (e.g, internal policies, employees training, processors' audits)
- Maintain relevant documentation (e.g. record of data processing, cross border data transfer agreement, processor agreement ...)
- Comply with « data protection by design and by default » principle (minimisation of data collection, data pseudonymisation or encryption)
- Perform a Data Protection Impact Assessment
- Appoint, where necessary, a DPO

### Controller also have to respect the Data Subject Rights

- Collect data with consent of data subject or be able to demonstrate the legitim interest of the controller or be able to demonstrate that data are necessary to perform the agreement signed by the data subject. Under GDPR the data subject has the right to withdraw his consent
- The data subject also has the right to be informed, right to access and to limit data processed and the right to be forgotten

## Implementation of GDPR provisions (most recent)

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- **On 21 January 2019, the French privacy authority (CNIL) imposed a penalty of 50 million euros on GOOGLE LLC** under the GDPR for lack of transparency in the information provided to the users. The consent of users collected by Google is not compliant with GDPR (unspecific for a dedicated purpose / general consent)

This decision is the first ruled under the GDPR provisions

This penalty represents over 0,05 % of Google's global turn over

On 24 January, Google announced that the CNIL penalty will be appealed

The French Council of State (Conseil d'Etat) will be competent to rule this appeal

- **On 26 December 2018, CNIL imposed a penalty of 250,000 euros on BOUYGUES TELECOM** for failing to adequately protect B&You customer data
- **On 19 December 2018, CNIL imposed a penalty of 400,000 euros on UBER** for failing to sufficiently secure the data of users of its VTC service

# Employment issues

## “Macron” ordinances (September 2017)

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1. Damages for unfair dismissal are capped
2. Company-level collective agreements prevail over industry-wide collective agreements
3. Economic redundancies: scope of analysis of the economic grounds and redeployment obligation

## Damages for unfair dismissal are capped

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### Before the Macron ordinances

- Damages were awarded by the Judge depending on the prejudice suffered by the dismissed employee.
- No cap in damages awarded and very different amounts of damages across courts.

### Since the Macron ordinances

- A legal scale sets a cap in damages awarded by the Judge:
  - The Judge still awards damages depending on the prejudice suffered by the employee but shall not exceed the legal cap;
  - The maximum amount depends on the length of service of the employee;
  - The maximum amount ranges between 1 month of salary for employees with less than 1 year of service to 20 months of salary for employees with 30 years of service and beyond;
- **Warning!** *Some first instance labor courts refuses to apply the legal scale on damages, considering that the latter does not comply with international conventions in force in France (International Labor Organization Convention n° 158, European Social Charter).*



## Company-level collective agreements prevail over industry-wide collective agreements

### Before the Macron ordinances

- As a matter of principle, collective agreements entered into at the industry-wide level prevails over collective agreements entered into at the company level.

### Since the Macron ordinances

- As a matter of principle, collective agreements entered into at the company level prevails over collective agreements entered into at the industry-wide level.
  - *Except for some public orders rules for which the industry-wide level still prevails (e.g. minimum remuneration, classification, complementary welfare, equality between men and women at work, etc).*
- **Consequences:** a company can enter into a collective agreement less favorable than the industry-wide collective agreement.
- **Goal:** foster the flexibility of French employment law, by negotiating collective agreements tailored to the specificities of each company.

## Economic redundancies: scope of analysis of the economic grounds and redeployment obligation

### Before the Macron ordinances

- If the company targeted by the dismissals belonged to a Group:
  - The economics grounds for dismissal (economic difficulties, necessity to safeguard the competitiveness, etc.) were to be assessed at the level of the worldwide group companies operating in the same sector of business;
  - If requested by the employee, the employer had to seek redeployment positions in the whole Group, worldwide.

### Since the Macron ordinances

- If the company targeted by the dismissals belongs to a Group:
  - The economics grounds for dismissal are to be assessed at the level of the group companies located in France and operating in the same sector of business;
  - If requested by the employee, the employer has to seek redeployment positions in the Group companies located in France.

CORNET VINCENT SEGUREL

Our firm

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## CORNET VINCENT SEGUREL – The firm

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- Cornet Vincent Ségurel, founded in Nantes in 1972, has become one of the top independent full-service French firms, practicing in all areas of business law and public law, offering both advisory and litigation services
- With offices in Paris, Nantes, Rennes, Lille, Bordeaux and Lyon, Cornet Vincent Ségurel today has over 180 lawyers
- Our values: focus on clients and the quality of the client relationship, accessibility, innovation, dynamism and responsiveness, professionalism and transparency
- Competitive fee structure



## CORNET VINCENT SEGUREL – In brief

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**180  
ATTORNEYS**



**REVENUE:  
€30M**



**12  
PRACTICES AREAS**



**CERTIFICATION  
ISO 9001 : 2008**



**6 OFFICES**



Alexis Marchand  
Partner

After having worked at Slaughter and May, Bredin Prat and DLA Piper, Alexis Marchand joined the corporate department of the Paris office of Cornet Vincent Ségurel as a partner in September 2013

Alexis practices principally in the area of mergers and acquisitions (negotiation and preparation of contracts, guarantees and other security documents, shareholder agreements), in company law (mergers, partial contributions of assets and other group restructuring techniques) and in business law (in particular sales of going concern commercial law, etc.)

He has been involved in a number of acquisitions, sales and business combinations for French and international clients which he assists in their business developments by providing pragmatic solutions to the legal issues with which they are confronted

## ▪ **Qualifications**

Degrees in law, management and English at Universities of Paris X-Nanterre, Paris I-Panthéon Sorbonne and Paris IX-Dauphine

LL.M. in Corporate Law of New-York University

## ▪ **Admission**

Paris

## ▪ **Contact**

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Adrien Debré

Partner

Adrien was called to the Bar in 2001 and began working at international firm Herbert Smith, in the Paris and London offices. He then joined the Paris office of international firm DLA Piper, where he became counsel, prior to joining Cornet Vincent Ségurel as a partner in the corporate department of the Paris office in 2013

Adrien holds a master of business degree from HEC in Paris and is a graduate from the Institut d'Etudes Politiques of Paris

Adrien works principally on mergers and acquisitions (involving both publicly-traded and privately-held companies) as well as restructuring transactions or joint ventures

He has significant experience in company law and securities law, in particular in respect of cross-border acquisitions on behalf of French and foreign companies

## ▪ **Qualifications**

Master of business degree from HEC in Paris and is a graduate from the Institut d'Etudes Politiques of Paris

## ▪ **Admission**

Paris (2001)

## ▪ **Contact**

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# Field | Seymour | Parkes

## THE UK AS AN INTERNATIONAL BUSINESS INCUBATOR: TECHNICAL SUMMARY

### Corporation Tax Rate/Patent Box

- Current rate: 19%.
- Rate from 1 April 2020: 17%.
- Patent box (profits derived from products incorporating patents): 10%.

### Research and Development Reliefs/Credits

- SME relief: 230% of qualifying expenditure as a deduction in calculating profit before tax.
- Large companies: research and development expenditure credit, tax credit of 11% of qualifying research and development expenditure.

### Capital Allowances (Tax Allowances for Asset Depreciation)

- Annual investment allowance (AIA): full deduction on assets acquired in any 12 month period.
- AIA increasing to £1m from January 2019.
- First year allowances (generally available on energy water saving purchases): deduct full cost of asset from profits before tax (does not count towards AIA).
- Standard writing down allowance: 18% year on year.
- Long life asset writing down allowance: 6% year on year.

### Dividend Exemption/Substantial shareholding Exemption (SSE)

- No UK corporation tax on dividends received from subsidiaries (UK or non-UK) provided there is control by the UK parent.
- SSE exempts gain on a company's disposal of shares from UK corporation tax if it is a trading company holding at least 10% of the shares.

### Enterprise Investment Scheme (EIS)

UK tax incentive to attract UK tax resident investment.

- Investors can defer capital gains tax due on assets disposed of in the three years prior to investment. Deferral is until such time as the investor realises their reinvestment in the EIS company.
- Investment in EIS shares is a qualifying asset for business property relief purposes which takes the asset value out of the UK inheritance tax bracket.
- Some invested in EIS shares can be claimed as a deduction against individual income tax liability at a rate of 30%.
- Any gain on the disposal of the EIS shares is free from UK tax.

### UK Government Grant Incentives

Grant funding innovation competition funding calls: <https://apply-for-innovation-funding.service.gov.uk/competition>.

### Key contact

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# BUYER BE AWARE

Pitfalls in respect to Belgian transaction documents

February 6, 2019

KATRIEN VORLAT

Partner Monard Law





## TABLE OF CONTENTS

- Agreement subject to conditions
- Force majeure
- Break-up fees

# AGREEMENT SUBJECT TO CONDITIONS

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## > What is a condition

Future and uncertain event

## > Types of conditions

- › *Condition precedent* (“**CP**”): the execution of the obligation is suspended until the future uncertain event has been realized.
- › *Condition subsequent* (“**CS**”): the continuing existence of the obligation is contingent on a future uncertain event

# AGREEMENT SUBJECT TO CONDITIONS

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## > Legal validity

- > **Purely discretionary condition** is null and void and most case law considers the agreement to be null and void if essential condition in the transaction
- > Satisfaction of the condition is purely within the discretion of the party committed to its completion

≠ **Simple discretionary condition** where realization of the condition is not solely in the power of the obligor but also depends on additional factors

≠ **Combined condition** where the realization of the condition is not solely contingent on the will of the obligor but also of a third party

# AGREEMENT SUBJECT TO CONDITIONS

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- › Legal consequences:
  - › No retroactivity when condition is satisfied
  - › When condition is pending:
    - Condition precedent
      - obligor has momentarily no obligation
      - obligee may take conservatory measures
    - Conditions subsequent
      - both obligor and obligee must perform their respective obligations under the contract

# AGREEMENT SUBJECT TO CONDITIONS

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- › Material adverse change:

In case between signing [or other date] and closing something occurs that upsets the economics of the transaction (i.e. material adverse change), there is a possibility to walk out without incurring any liability.

- › Walk out right without any penalty (break the deal)
- › Renegotiate price and/or terms and conditions

# AGREEMENT SUBJECT TO CONDITIONS

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- › Validity of MAC under Belgian law?
    - › Based on the principle of contractual freedom
    - › Conditions:
      - (i) consent
      - (ii) authority to contract
      - (iii) a specific object ("*objet certain*")
      - (iv) lawful cause ("*cause licite*")
- Careful drafting required to avoid a pure discretionary condition

# FORCE MAJEURE

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## › **Definition (Art. 1147-1148 C.C.)**

Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome its consequences

- Unanticipated or uncontrollable event or circumstance making performance of the obligations impossible



# FORCE MAJEURE

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## > **Conditions**

Impossibility for the obligor to perform but which cannot be attributed to any kind of fault of the obligor

- › Impossibility to perform
- › No fault of obligor
- › Unforeseeable and inevitable event or occurrence

## > **Consequences**

- › Temporary impossibility: suspension of the obligation
- › Permanent impossibility: released from the obligation without payment of penalty

# FORCE MAJEURE

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## › Distinction with MAC Clause

The objective of a MAC is not to determine whether the external fact or circumstance was absolutely unforeseeable and impossible to overcome, but to know whether the event will render the transaction less profitable.

# FORCE MAJEURE

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## › Distinction with hardship clause (“*théorie d’imprévision*”)

Abnormal and unforeseen circumstances not resulting from the fault of one of the parties, but which could not reasonably be foreseen by the parties at the time of the execution of the contract, making the completion of the obligation by one of the parties not impossible, but substantially more difficult or onerous. The judge has the authority to either terminate the contract or to amend it to the changed circumstances.

- Not accepted in Belgium, but tempered in case law.  
New Company Code would introduce hardship clauses in Belgian law.

# BREAK-UP FEES

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## > **Definition**

Break-up fee is an undertaking of a party to the other party to make a payment in the event the transaction fails to happen.

## > **Rationale**

- > Deal protection
- > Recover costs
- > Incentive to comply

## > **Amount**

- > Fixed amount or fixed percentage

# BREAK-UP FEES

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## > **Origin**

- › Often negotiated in early stages of transaction
- › Less common in Belgium, especially in private transactions
- › Often linked to conditions precedent e.g. clearance by Competition Authorities

## > **Legal validity**

- › No specific legislation
- › No specific case law

## > **Possible legal issues to consider**

- › Not to be construed as a penalty clause (Article 1226 C.C.)
- › Pass corporate benefit test
- › No unlawful financial assistance
- › Misuse of company assets?

# KATRIEN VORLAT

Katrien Vorlat specializes in corporate and securities law. Her practice focuses on mergers, acquisitions and corporate reorganizations. She is frequently retained to advise on the setting up, reorganization or liquidation of business ventures in Belgium. Katrien has negotiated and structured a wide variety of M&A transactions, joint ventures and investment schemes, in particular in the bank and insurance sector, and in the life sciences, distribution and technology industries. She also has a wide range of expertise in investments and buyouts by venture capital corporations and private equity funds. Katrien represents a number of insurance companies, biotech and IT companies as well as various institutional venture capital investment firms and private equity funds in Belgium, Europe and the US.

## Education, career and qualifications

- Graduate from the law faculty of the Katholieke Universiteit Leuven (1990)
- Master of Laws (LL.M.) from Yale Law School (1992)
- Law degree from the Faculty of Comparative Law of Strasbourg

## Memberships

- Co-Chair of the subcommittee international PE/VC of the American Bar Association (ABA)
- Member of the International Bar Association (IBA)
- Independent member of the Advisory Board of Bank Degroof Petercam Asset Management
- Member of CanCham Belux and Canadian Club of Belgium

## Languages

- Dutch, English, French, German



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Monard Law is a leading, independent business law firm in Belgium with over 28 years of experience. We are a renowned, full-service firm with approximately 90 multi-lingual lawyers.

We act on a wide variety of matters including M&A, finance, tax, HR, dispute resolution, IP/IT, commercial contracts, white collar crime, real estate, public procurement, life sciences, environment, competition etc. Interdisciplinary teams of sector specialists provide integrated, hands-on and effective legal advice.

Our clients range from local and multinational corporations and funds to public authorities to which we offer comprehensive legal support. Our clientele can rely on our in-depth expertise and long-standing experience. As a trusted advisor we try to see things from a client's perspective and bring innovative solutions, legal insight and strategic recommendations.

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MONARD LAW

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