

## Strelia M&A Series

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### Conditions Subsequent - Underestimated Dealbreakers

In these times of uncertainty, parties are increasingly stipulating more conditions in transaction documentation. Conditions subsequent have the opposite effect of conditions precedent. In M&A, both types of conditions are impactful, yet they are different by nature. Because of their far-reaching consequences, conditions subsequent are rare in share purchase agreements, and their impact is sometimes underestimated. In this M&A Series, we will examine the preconditions as well as the far-reaching consequences of conditions subsequent in share purchase agreements (SPAs).

#### *Required Preconditions*

A condition subsequent is an event, if it occurs, annuls one party's obligation under the SPA and restores the situation of the parties as if no obligation had existed.

A condition subsequent must relate to a future and uncertain event, and this event must be incidental and external. Incidental means that the condition cannot relate to the elements required for the formation of a valid undertaking. A director of a company should indeed not sign a contract that is conditional on the approval of it by the board of directors of the same company. External means that the condition must lie outside the contractual obligations or undertakings of the parties. A non-external condition is a clause that states that the seller will sell the shares under the condition that the purchaser determines the price of those shares. For the same reason, a breach of contract cannot constitute a condition subsequent. This distinguishes the condition subsequent from an express termination clause. These preconditions also apply *mutatis mutandis* to condition precedents, which are usually included in SPAs.

To determine whether a condition qualifies as a condition precedent or subsequent, a judge will rely on not only the denomination in the SPA but also the intention of the parties to the SPA when assessing it in the event of dispute. A MAC-clause could feature either as a condition precedent or as a condition subsequent in an SPA. As the consequences vary significantly, parties should consider this carefully when drafting these clauses.

#### *Far-reaching Consequences*

Unlike conditions precedent, conditions subsequent in an SPA do not suspend the obligations that a party to the SPA has undertaken. The fulfillment of a condition subsequent in an SPA results automatically in the retroactive rescission of the SPA by operation of law—or, more precisely, rescission of the obligations undertaken under the conditions subsequent—with no further action being required from the parties. This implies that all payments or any performance of an obligation under the SPA must be restituted preferably in kind and, if impossible, in an equivalent value. The seller is thus deemed to have always remained the owner of the shares and, subject to the general rules protecting third parties acting in good faith, the dispositions made by the buyer before the condition subsequent is fulfilled will be annulled. Doctrine accepts that the buyer may keep the dividends.

Given the challenge in putting these legal consequences into practice in a complex deal environment, using conditions subsequent in an SPA must be carefully considered and reserved for very specific and exceptional cases. In addition, parties should: (i) describe meticulously what the condition is, (ii) define which party pays for any related costs, (iii) limit the timespan of the condition to avoid further uncertainty, and (iv) state explicitly which provisions of the SPA are not impacted by fulfillment of the condition. Last but not least, because the retroactive effect is supplementary in nature, parties can exclude in the SPA the retroactive effect of the fulfillment of the condition subsequent.



**Gisèle Rosselle**  
Partner

[gisele.rosselle@strelia.com](mailto:gisele.rosselle@strelia.com)



**Cédéric Devroey**  
Associate

[cederic.devroey@strelia.com](mailto:cederic.devroey@strelia.com)



**Marie-Elisabeth Dubois**  
Associate

[marie-elisabeth.dubois@strelia.com](mailto:marie-elisabeth.dubois@strelia.com)