



M&A Amid Trade Uncertainty: Negotiation, Drafting and Strategy

CAPITAL MARKETS AND MERGERS
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I. Overview


Shifts in North American and global trade dynamics triggered by the United States' evolving trade policies are raising multifaceted questions for M&A. Trade-related issues can vary widely and impact different targets and transactions in various ways. The task for buyers, sellers and their counsel is whether and how to adjust their negotiation, deal structure and risk allocation strategies amid these relatively novel circumstances.

While we cannot yet meaningfully assess trends in prevailing market practice, we can canvass those deal points that may warrant closer consideration in the context of trade-specific issues, from due diligence to interim period covenants to closing conditions. Nor should it be forgotten that M&A has previously endured numerous other significant macro-economic disruptions, including, in more recent times, the 2008 financial crisis and the Covid-19 pandemic. Many lessons learned in the past carry forward and can provide guidance in navigating trade uncertainty.

With well-advised negotiation, drafting and strategy, risks can be mitigated and opportunities can be seized. Business goes on, and dealmaking continues.



Trade-related issues in M&A can vary widely and impact different targets and transactions in different ways. Lessons learned from previous periods of macro-economic disruption can provide guidance regarding navigating trade-related risks.



2. Valuation and Due Diligence

The relevance and potential risks of trade-related issues will vary from deal to deal. The most prudent and efficient means of conducting due diligence of trade-related matters will therefore be deal-specific. Deciding the appropriate approach may also require consultation with financial and other transaction advisors. For example, as the impacts of tariffs may not appear in historical financial statements, valuation of the target may be more challenging.

Trade-related matters will be of greatest weight where the target business involves supply chains that cross international borders, e.g., consumer goods, industrial manufacturing, pharmaceuticals, chemicals, automotive, oil and gas, and agricultural products. The target's exposure to tariffs can be both direct and indirect. Due diligence should include review of supply chain contracts, compliance with import/export laws, and adequate protocols to ensure continued compliance amid a dynamic trade environment. While due diligence of these matters is relatively standard, trade-related issues may warrant a much deeper dive. For example, greater scrutiny of key supplier and customer relationships that goes beyond contractual notices of dispute or declining purchase order volumes. Additional matters for closer inquiry may include (1) country of origin classifications, (2) inventory levels, and/or (3) potential exposure to retaliatory tariffs.

While other targets may not face direct exposure to tariffs, they may face indirect exposure via the potential for decreased demand because of unusual market conditions resulting from increased tariffs or trade uncertainty generally. Further, tariffs may lead to higher overall costs for the target. A detailed review of customer contracts to address the degree to which these costs can be passed on to customers may be important.¹ Here any prudent legal due diligence will again be highly deal and/or industry-specific, and may again warrant consultation with the buyer's financial or other advisors. Overall, commercial and legal workstreams should be aligned and may require cross-functional coordination both upstream and downstream of the target. Potential examples include building a trade risk matrix and/or valuation simulations that include multiple pricing scenarios.



Deciding the appropriate approach to due diligence will depend on the target's industry and exposure to trade-related risk. Commercial and legal workstreams should be aligned and may require coordination both upstream and downstream of the target.

¹ See Part 3 – Supply Chain Contracts.



3. Supply Chain Contracts



Where the target's business involves cross-border trade, either on the supply or demand side, its related contracts will be of acute importance. As relate to trade, key terms for due diligence include:

- **Financial terms:** Supply chain contracts often expressly address responsibility for import taxes, duties or fees, including direct reference to tariffs (e.g., by stipulating delivery price is inclusive of all taxes and duties). These contracts can also provide for automatic price adjustments tied to specified events. Change in law provisions with financial implications can also be triggered by tariffs. The focus should be on determining which party is obligated to absorb tariff-related costs. To the extent a contract is not clear on who is responsible for increased tariffs and other trade related costs, the parties may want to address this separately in the purchase agreement or an applicable ancillary agreement to limit future disputes.
- **Termination:** Common termination provisions in supply chain contracts include termination (1) for convenience, (2) for cause, and (3) upon the occurrence of specified events. The applicable terms and conditions can vary widely. Termination for convenience may be subject to an express minimum notice period. However, even where no notice period is stipulated, the common law may impose reasonable advance notice. This is a fact-specific inquiry dependant on the particular arrangement, e.g., the parties' business history and/or any established industry practice. Termination for cause or the occurrence of a specified event may require careful consideration of whether tariffs, changing market conditions, and/or the counterparty's response to such developments satisfy the requisite grounds to terminate.

- **Force majeure:** The key terms of force majeure clauses can vary significantly, including regarding (1) defining events, (2) foreseeability, (3) mitigation efforts, and (4) exclusions. This necessitates a clause-by-clause analysis. The party seeking to avoid performance will generally have to establish both that the clause is triggered by the circumstances and that performance has been significantly impeded. A high standard is often applied and increased expense, even if significant, may be insufficient. Whether a mere reference to “government action” captures a newly imposed tariff may be unclear.



Key terms for due diligence in the target’s supply contracts include (1) termination, (2) force majeure, and (3) which party may be obligated to absorb tariff-related costs. The answer may not always be clear-cut.





4. Representations & Warranties

A prudent approach to negotiating representations and warranties for trade-related matters will depend largely on the due diligence conducted as well as the relative negotiating strength and risk tolerance of the parties involved. The parties can include (1) additional, trade-specific representations, and/or (2) additional language to customary representations (e.g., tax) to address trade-related issues. Which approach is optimal will generally depend on the particular transaction, including (A) the target's potential or actual tariff exposure, and (B) whether the buyer is obtaining representation and warranty insurance (RWI) in connection with the acquisition.

A potential area of focus will be those representations that assure the robustness of the target's financials. Also, should the transaction involve an interim period, the representations will warrant particular attention where the trade landscape evolves between signing and closing. One example is an "absence of changes" representation. This provides that, since a specified date (typically the date of the target's most recent audited financial statements), no material change has occurred in the target's business, operations or financial standing. Another example is the "no undisclosed liabilities" representation. A common formulation here is that the target has no liability except for liabilities reflected in or reserved for in its most recently disclosed financial statements. Both representations typically expressly exclude matters occurring in the target's ordinary course of business. Shifts in the trade landscape during the interim period could therefore raise questions regarding (1) whether updates to such representations are warranted, and/or (2) whether the developments have arisen in the ordinary course.

Other areas of focus will likely include the target's compliance with laws (e.g., import and export regulations), the absence of legal proceedings or notices of dispute (e.g., regarding supply chain contracts), and material contracts (e.g., the absence of termination or renegotiation rights in supplier and customer contracts triggered by any newly imposed tariffs).



M&A parties can negotiate either or both of (1) additional, trade-specific representations, and/or (2) additional language to customary representations (e.g., tax) to address trade-related issues. Which approach is optimal may depend on several factors.





5. Representation & Warranty Insurance (RWI) Policies

Trade uncertainty can increase the complexity of obtaining RWI in private M&A, and raise two potential issues for a buyer. First, demonstrating appropriate trade-related due diligence. Second, negotiating trade-related policy exclusions.

RWI underwriters may require evidence the buyer has factored trade-related risk into its acquisition strategy and valuation, and that this is supported by the buyer's due diligence, e.g., the potential impact (or non-impact) of tariffs on the target's financial performance. Buyers may be questioned regarding how this has been modelled, and the rationale behind the approach taken. Similarly, where the target's business involves international trade, buyers may face scrutiny of their assessment of both the target's supply-side and demand-side exposure. For example, regarding inputs, has the buyer analyzed potential sourcing constraints under different scenarios? Similarly, regarding customers, has the buyer evaluated the target's potential competitive disadvantage to alternative suppliers vis-à-vis international trade policy?

Addressing trade-related policy exclusions, underwriters can adopt different approaches. Some may seek blanket exclusions to tariff-related risk regardless of the target's industry.

Others may take a more nuanced, deal-by-deal approach. RWI providers may also resist or seek to limit exposure to losses directly resulting from tariffs. Buyers should be mindful of overly broad exclusion language that could catch indirect and tangential consequences of tariffs (e.g., "related to or in connection with tariffs"). Buyers should instead seek to keep exclusions as specifically and narrowly drafted as possible (e.g., "resulting directly from an increase in supplier pricing caused by a tariff"). If the buyer is unable to limit tariff-related exclusions, it can consider seeking one or more specific, tariff-related indemnities from the seller.



To limit RWI coverage gaps that could arise from insurers resisting covering losses directly resulting from tariffs, buyers should seek to limit overly broad exclusion language that could catch indirect and tangential consequences of tariffs.

6. “Ordinary Course of Business” Clauses

Trade uncertainty merits closer consideration of interim period covenants in two-step M&A transactions. Fluidity in the trade landscape interacts with “ordinary course of business” clauses on multiple fronts.²

First, the longer the interim period, the greater the possibility the target’s ability to operate within the ordinary course could be tested by an evolving trade landscape. Second, ordinary course covenants are inherently flexible. The clause can therefore be customized for foreseeable trade-related concerns, e.g., bespoke negative and affirmative covenants. Third, these bespoke covenants can be tailored to address matters identified during the buyer’s due diligence, e.g., terminating or amending material contracts, adjusting procurement practice, and/or modifying manufacturing location. Fourth, it is common for acquisition agreements to (1) allow the target to operate outside the ordinary course with the prior consent of the buyer, and (2) for the buyer to be precluded from unreasonably withholding such consent. However, whether it is reasonable or unreasonable for the buyer to withhold its consent amid unusual economic circumstances such as a fluid trade landscape may present challenges.

² For a more detailed discussion, see Fasken, [Tariffs, M&A and “Ordinary Course of Business” Covenants](#) (February 13, 2025).

³ For further discussion of these rulings, see Fasken, [Private M&A in Canada: Transactions and Litigation](#) (LexisNexis, 2024) at §5.02.

The Covid-19 pandemic gave rise to two significant “ordinary course of business” rulings in Ontario.³ These rulings are instructive on several levels in the context of trade uncertainty. This includes (1) what considerations a court might consult in deciding the ordinary course of business, including in extraordinary circumstances, (2) the courts’ approach to “consistent with past practice” qualifiers in ordinary course covenants, and (3) the courts’ approach to buyer consent qualifiers in ordinary course covenants, including when the buyer’s consent might be “deemed”. The rulings also provide insight into what manner of buyer and seller conduct the court may view favourably or unfavourably should a dispute regarding an ordinary course covenant arise during the interim period.



Ordinary course covenants are inherently flexible and can be customized for foreseeable trade-related concerns. The Covid-19 pandemic gave rise to two significant “ordinary course of business” rulings that are instructive in the context of trade uncertainty.

7. “Material Adverse Effect” (MAE) Clauses



MAE clauses are one of the more complicated clauses in M&A and require careful consideration.⁴ As with ordinary course covenants, multiple points regarding their interaction with trade-related risk warrant highlighting.⁵

First, an express exclusion for tariffs may not be necessary. The typical MAE clause, with its core definition of a material adverse effect followed by a series of exclusions or “carve-outs”, generally allocates internal, target-specific risks to the seller and external, macro risks to the buyer. Changes in tariff policy arguably fall into the latter category. In line with the foregoing, two of the most common MAE “carve-outs” are (1) changes in general economic or industry conditions, and (2) changes in law.

A related consideration is whether the MAE definition will include a “disproportionate impact” qualifier. These shift the risk of an external/macro development from the buyer back to the seller where the development has a disproportionate adverse impact on the target relative to a comparator group. If included, a key question is how the comparator group is defined, i.e., more broadly or more narrowly, and caselaw confirms that MAE definitions can include various different approaches. Caselaw also confirms that applying a contractually-defined comparator group to real-world circumstances can be complicated. M&A parties should tackle any disproportionate impact comparator group with tariff-related risks in mind.

⁴ For further discussion of MAE clauses, see Fasken, [Private M&A in Canada: Transactions and Litigation \(LexisNexis, 2024\)](#) at Chapter 4.

⁵ For a more detailed discussion, see Fasken, [Tariffs, M&A and Material Adverse Effect \(MAE\) Clauses \(January 30, 2025\)](#).

Lastly, buyers should appreciate that, unlike in Delaware, at least one Canadian court has retained the requirement that a MAE must arise from an “unknown event”. In an MAE dispute arising from the Covid-19 pandemic, this required the court to distinguish between the parties, at execution of the acquisition agreement weeks before the pandemic was officially declared, being aware of the coronavirus versus them knowing the exact economic consequences on the target the coronavirus would go on to have. A similar complication may arise in any MAE dispute related to a fluid trade landscape: tariffs have been both threatened and imposed, but, depending on the target, their exact ramifications may remain unclear.⁶



Questions to consider regarding the interaction of MAE clauses and trade-related risk include (1) whether to expressly exclude tariffs from an MAE, (2) if so, whether to include a disproportionate impact qualifier, and (3) if so, how to define the applicable comparator group.



⁶ M&A parties can presumably draft around this “unknown event” requirement if mutually agreed.

8. Closing Conditions

Closing conditions, and closing risk, always receive close attention in M&A. Trade-related issues may sharpen this focus.

Regarding customary closing conditions, one question will be the standard applied to the closing condition addressing the accuracy of the seller's representations, i.e., in all respects, in all material respects, or in all respects except as would not amount to an MAE. Issues for consideration relating to trade include how tariffs have (or have not) been addressed in the MAE clause, e.g., whether tariff-related risks have been expressly carved-out and, if so, whether a disproportionate impact exclusion to this carve-out has been added. The parties can also consider any potential "back door" MAE via the combined effect of an "absence of changes" seller representation coupled with an "accuracy of representation" closing bring down.

Similar issues may arise regarding the customary closing condition addressing the seller's compliance with its interim period covenants. The vast majority (94%) of these closing conditions in the most recent American Bar Association (ABA) Canadian Private Target M&A Deal Points Study (the ABA Study) included a materiality qualifier.⁷ The ABA Study also features a new data point regarding how these materiality qualifiers are applied, with 89% of deals applying the qualifier to all interim period covenants taken as a whole, 5% of deals applying the qualifier to each and every covenant, and 6% of deals applying the qualifier to some but not all covenants. This illustrates the ability of M&A parties to take a bespoke approach in the closing condition to interim period covenants (whether negative or affirmative) tailored toward trade-related operational matters.

⁷ See the ABA Study at page 99.

Regarding less customary closing conditions, the ABA Study evidences the possibility of “special closing conditions”.⁸ Numerous approaches in relation to tariffs are possible. A less complicated example would be the absence of tariffs regarding a particular product, industry, and/or import or export jurisdiction. Alternatively, the parties could apply a cap (e.g. 5%) on tariffs on a particular product, industry, and/or import or export jurisdiction. More complicated would be thresholds regarding the adverse impact of tariffs on the target’s business (e.g., using a financial metric such as revenue or net income). However, this approach may be susceptible to quantification disputes.



Trade-related issues may result in a greater frequency of bespoke or special closing conditions, and numerous different approaches are possible.



⁸ See the ABA Study at page 101 addressing closing conditions tied to the target’s business performance and where 9% of deals in the study’s sample included a closing condition tied to the target’s financial performance and 3% of deals included a closing condition tied to an operational metric. This is another new data point in the study.

9. Earnouts, Holdbacks and Escrows

Additional contractual mechanisms available to allocate trade-related risk include earnouts, holdbacks and escrows. For example, these could apply should (1) the potential adverse impact on the target of a tariff threatened or imposed prior to signing be indeterminable, or (2) a new tariff be threatened or imposed during the interim period.

- **Earnouts:** A carefully constructed earnout can be a win for both the buyer and seller, and FASKEN has published a detailed guide to earnout negotiation, drafting and strategy.⁹ As earnouts are often structured around EBITDA, they can, for example, be repurposed to hedge against any negative impacts on the target's EBITDA post-closing. Careful analysis is required as to how various components of EBITDA and related definitions may be impacted by tariffs and other trade-related issues. Other considerations should include ensuring alignment among the parties regarding applicable accounting standards and metrics, e.g., whether tariff-related costs are classified as ordinary or extraordinary expenses.

- **Holdbacks / Escrows:** In a holdback a portion of the purchase price is held back and only paid to the seller upon the achievement of specific milestones or the resolution of certain contingencies. Typically, a buyer does not need to set aside funds to account for a holdback. Escrows are less appealing to buyers than a holdback as a portion of the purchase price is held in escrow with a third party and only released to the sellers once milestones are met or contingencies are resolved. This provides security to the sellers that funds are at hand and not subject to the credit risk of the buyer. Either of these mechanisms can be tailored for tariff-related risk.



A carefully constructed earnout can be a win for both the buyer and seller. Considerations may include ensuring alignment among the parties regarding applicable accounting standards and metrics, e.g., whether tariff-related costs are classified as ordinary or extraordinary expenses.

⁹ See Fasken, [Earnouts in Private M&A: Negotiation, Drafting and Strategy \(April 2025\)](#).

10. Trade in Services and Looking Forward



The focus of tariffs to date has largely been on trade in goods, as opposed to services. However, much of the policy shift in the United States goes beyond trade in goods. Certain executive orders issued by the new U.S. administration anticipate the possibility of other trade-related measures involving intangibles and services. These potential risks could have a broader impact on deal dynamics and uncertainty given that trade in services and intangibles eclipse the scope of trade in goods. Buyers and sellers should be mindful of such potential developments going forward as part of due diligence and in negotiating transaction documentation. M&A parties will also want to closely monitor developments around the upcoming renegotiation of the Canada-U.S.-Mexico Trade Agreement (CUSMA).



Given the unpredictability of the policies of the new U.S. administration to date, M&A negotiation, strategy and execution will need to continue to remain informed, nimble and adaptive.

11. Key Practical and Strategic Takeaways

To summarize, key areas of focus for buyers and sellers engaging in M&A potentially impacted by trade uncertainty include the following:

- **Deal Drivers and Due Diligence:** Buyers should focus on the drivers of the acquisition and the related direct and indirect touchpoints with trade issues. Due diligence should be informed by these areas of focus, as should the resulting representations and warranties and other protections sought from the seller related to trade. Negotiation strategy will be key. Sellers should anticipate the foregoing and be prepared to address same, including to keep deal momentum on track. For example, where the target's business could involve passing tariff costs on to customers, the buyer may expect the seller to have analyzed the potential impact of surcharges on existing supply chain contracts and market competitiveness.
- **Bridging Valuation Gaps:** Should trade-related matters be significant enough to be the source of (or contribute to) a meaningful valuation gap, the parties should explore all deal tools available to resolve the point. For example, a carefully constructed earnout can be a win for both the buyer and seller, but an informed and purposeful approach is key. Buyers and sellers often have different preferences regarding financial earnout triggers. Other matters for discussion include (1) applicable accounting principles and assumptions, (2) whether a graduated earnout formula or caps will apply to earnout amounts, (3) the information rights of the seller, (4) any positive or negative covenants of the buyer post-closing, and (5) expert dispute resolution. For our more detailed guidance, see [Earnouts in Private M&A: Negotiation, Drafting and Strategy](#). In addition to earnouts, parties can consider holdbacks and/or escrows as a means for bridging a valuation gap.

- **Getting to Closing:** Where the transaction involves an interim period, key negotiation points for trade-related concerns may include (1) the seller's interim period covenants, and (2) the buyer's closing conditions. Negative and affirmative seller covenants are inherently flexible and so customizable for foreseeable trade-related concerns. The push and pull will be over the level of operating constraints the buyer requests and the seller is willing to grant. The parties can agree to allow the seller to operate outside these boundaries with the buyer's prior consent, not to be unreasonably withheld. This mechanism promotes dialogue between the parties towards a mutually acceptable path forward. Closing conditions are another opportunity for a bespoke approach. Standard closing conditions such as those regarding the seller's representations and warranties, compliance with interim period covenants and the absence of an MAE will provide protection regarding trade-related risk to the extent those clauses address same. More tailored possibilities include a condition requiring the absence of tariffs regarding a particular product, industry and/or import or export jurisdiction.



Trade-related matters can vary widely and impact different targets and transactions in different ways. The task for M&A parties is whether and how to adjust their negotiation, deal structure and risk allocation strategies amid these relatively novel circumstances.



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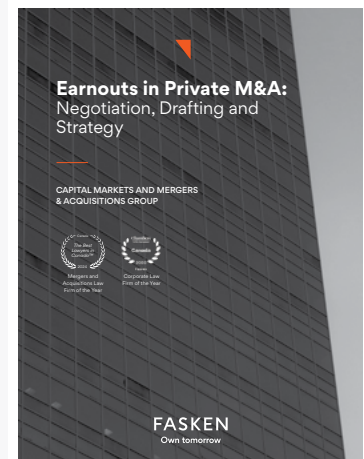
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