

M&A Contracts

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M&A contracts are special purchase agreements with companies as a special object of purchase. Companies are very complex, their economic value is largely based on future expectations, and mergers and acquisitions often have cross-border implications. Almost invariably, they are of great economic importance. Contract law does not suffice for the resulting challenges since it primarily regulates mass transactions. For decades, legal counsel have therefore developed their own, more sophisticated concepts which rely heavily on standards from U.S. practice. German M&A contracts therefore contain numerous *private legal transplants*.

Legal scholarship has paid scant attention to the living law of M&A contracts and instead has focused on non-mandatory provisions of contract law, which play no role in practice. M&A contracts do however raise some fundamental questions: If contract drafting is meant to avoid any reliance on non-mandatory law and contracts are so strongly characterized by *private legal transplants*, how does contract law fulfill its support function? What limits does private law impose on transactional practice even though the rationale of many mandatory rules does not apply to M&A contracts? And what framework does corporate law provide for transactional practice?

With these questions in mind, this study focuses on four major topics relating to M&A contracts. Its first part elaborates on the characteristics and peculiarities of M&A contracts and the specific framework in which these contracts are negotiated. The parties regularly engage in a highly standardized process and bind themselves to an array of provisions even before striking a deal. Both negotiations and drafting are heavily influenced by U.S. M&A practice. The purchase agreements are lengthy, detailed, and complex. In addition, a high degree of standardization and a modular structure can be observed. Finally, it is worth examining the legal advisors themselves, as their methods explain many peculiarities of company purchase agreements.

The second part of this study is devoted to private law's support function and methodology. Given such comprehensive contractual arrangements, the primary focus is on interpreting the contract in a way that duly accounts for these arrangements' special features. This includes not only English as the contractual language but also the peculiar systematics, the economic background of the transaction, the extraordinarily rich documentation of the negotiations and the U.S. origins of numerous clauses. Despite the enormous length and attention to detail, M&A contracts do not resolve all future disputes. In some cases, even economically quite significant aspects of the deal are addressed only in an abstract, vague manner – for example, the legal consequences of a breach of warranty or a broken promise of exclusivity in the *letter of intent*. In these cases, interpreting the contract cannot stop at the wording of the document.

The legal system, while it supports the parties in drafting and executing the contracts, also restricts their autonomy. The third part of this study focuses on these limitations. The first important limit to contractual freedom in the acquisition of a company is judicial review of general terms and conditions. It is implicit from the case law of the German Federal Court of Justice that large parts of M&A contracts qualify as general terms and conditions. The other important limit consists in mandatory liability for intentional behavior, which is of great practical relevance for M&A deals due to a body of case law on attribution of knowledge in organizations such as companies.

The fourth part of this study focuses on company decision-makers. Companies are most often bought and sold by other companies, which is why the corporate law framework merits attention. For example, numerous studies have found that companies on the purchasing end of a transaction bear a high risk of failure. This risk stems from bounded rational and selfish behavior of their managers. Target companies on the other hand have no interest in the transaction; however, the parties to the M&A contract often depend on their cooperation. The expectations are often in conflict with the legal requirements of stock corporation law. In order to better understand M&A practice and bolster the factual basis for this study, a survey of transactional lawyers was conducted. The empirical study provides unprecedented insight into the world of corporate acquisitions. The fifth section reports on the survey's methodology and results. A summary of the main findings and a conclusion follow in the final section.