CARSTED ROSENBERG

CLIENT BRIEFING

MAC CLAUSES IN LOAN AGREEMENTS UNDER DANISH LAW

BY
DR ANDREAS TAMASAUSKAS
CARSTED ROSENBERG ADVOKATFIRMA

CARSTED
ROSENBERG

MAC CLAUSES IN LOAN AGREEMENTS

A Practical Guide under Danish Law

Dr Andreas Tamasauskas, Partner, Carsted Rosenberg

A material adverse change clause (commonly referred to as a MAC clause, and sometimes as an MAE clause) is a contractual provision that entitles a lender to accelerate a loan, or to refuse further drawdowns, if an event occurs that has a material adverse effect on the borrower or its financial condition. MAC clauses appear in many types of commercial agreements, including share purchase agreements, capital markets transactions and, most commonly, committed loan agreements.

In this guide, the term "MAC clause" is used as a general reference to both Material Adverse Change (MAC) and Material Adverse Effect (MAE) clauses, despite most modern "MAC clauses" being drafted as MAE clauses, which tend to focus on the effect of an event rather than the event itself.

This guide provides a practical overview of how MAC clauses operate in loan agreements, with particular reference to Danish law. It is based on an article by the author first published in the Danish journal Erhvervsjuridisk Tidsskrift (ET.2019.059) and has been updated to reflect subsequent case law developments, including the English High Court decisions in Lombard North Central v European Skyjets (2022) and BM Brazil v Sibanye (2024), as well as the practical experience gained during the COVID-19 pandemic.

1. Why MAC Clauses Exist

In a committed loan agreement, the lender has given up its right to terminate at will. The borrower pays for this commitment (typically through a higher credit margin) and expects the facility to remain available for its full term. This arrangement is often a prerequisite for project finance and other transactions that cannot be unwound at short notice without significant loss.

The lender, in turn, seeks to protect itself against a deterioration in the borrower's creditworthiness through a detailed set of contractual protections: conditions precedent to drawdown, representations and warranties, financial and information covenants, and acceleration clauses (events of default).

However comprehensive these protections may be, they cannot anticipate every development that may affect the credit risk over the life of the loan. The MAC clause fills this gap. It operates as a general clause that entitles the lender to take action if an event occurs that has a material adverse effect on the borrower's ability to perform its obligations.

2. Typical Structure of a MAC Clause

A MAC clause in a loan agreement is most often structured as an event of default (an acceleration clause). A typical formulation reads:

> "*Any event or circumstance occurs which the Lender reasonably believes has or is reasonably likely to have a Material Adverse Effect*."

The clause therefore has three elements: (i) the occurrence of an event or circumstance; (ii) an assessment (subjective or objective) of its impact; and (iii) a material adverse effect on the borrower. Each element warrants separate consideration.

2.1 The Triggering Event

The first element is deliberately broad. If the MAC clause is to serve as a general clause, there should be no restriction on the type of event that may trigger it. Examples include new legislation, changed regulatory conditions, a significant decline in orders, deterioration of the borrower's finances, and material litigation. Whether the event originates with the borrower or is external is, in principle, irrelevant.

One qualification applies. The clause does not cover events that arise solely from the lender's own actions. A change in the lender's credit policy (for example, a decision no longer to finance a particular sector) will not trigger the clause, even if that change indirectly affects the borrower's ability to refinance at maturity. The clause is intended to protect the lender against external events of which it was not aware when the loan was granted, not against consequences of its own decisions.

2.2 Subjective or Objective Assessment

The question of who decides whether the event has a material adverse effect is one of the most frequently negotiated aspects of a MAC clause.

The borrower will typically argue that, having paid for a committed facility, it should not be exposed to what it may perceive as an arbitrary exercise of the lender's discretion. This favours an objective formulation, under which the loan falls due only if an event objectively has a material adverse effect. In the event of a dispute, it would be for a court to determine whether the threshold is met. The difficulty with a purely objective clause is that it exposes the lender to the risk that its termination is later held to have been wrongful, giving rise to a claim for damages.

For this reason, most MAC clauses contain a subjective element. The degree of subjectivity varies depending on the relative bargaining power of the parties. At one end of the spectrum, the clause may

refer to events that "*in the opinion of the Lender (in its sole discretion)"* have a material adverse effect*.* At the other end, the standard is *"in the reasonable opinion of the Lender*."

Under the "*sole discretion*" variant, the lender's assessment is challenged only in cases of abuse of rights or where application of the clause would be directly unreasonable within the meaning of section 36 of the Danish Contracts Act (*Aftaleloven*). If the lender is a bank or other financial institution subject to the Danish Financial Business Act (*Lov om finansiel virksomhed*), it must also act on an objective and proper basis consistent with good practice (section 43), but this does not mean that its assessment is improper merely because another bank would have reached a different conclusion.

Under the *reasonable opinion*" variant, the lender must be able to substantiate its assessment. This is particularly so where the borrower has negotiated away the "*sole discretion*" formulation: the parties must be taken to have intended a meaningful restriction on the lender's discretion. That said, the clause still refers to the lender's opinion, and the fact that other lenders might have assessed the situation differently does not, without more, make the lender's view unreasonable. Conversely, if no other lender would have terminated in the same circumstances, the lender must be able to point to specific factors justifying its decision.

2.3 **The Definition of Material Adverse Effect**

The third element requires that the event must have a material adverse effect. In many loan agreements (and in the LMA recommended forms), Material Adverse Effect is a defined term. A typical definition covers three limbs:

(a) "*A material adverse effect on the business, operations, property, condition (financial or otherwise) or prospects of the group taken as a whole.*" This is the broadest limb and is intended to capture anything that, now or in the future, may have a credit impact. Borrowers will often seek to exclude "*prospects*" on the grounds that the concept is too speculative and opens the door to discretionary application.

(b) "*A material adverse effect on the ability of the borrower (or any other obligor) to perform its obligations under the finance documents*." This limb is narrower and more directly tied to the borrower's capacity to service the debt.

(c) "*A material adverse effect on the validity or enforceability of any security, or on the lender's ability to exercise its rights under the finance documents*." This limb is typically less controversial, as it addresses a risk that both parties generally accept should be covered.

On the question of who must be affected, the definition will usually extend beyond the borrower to include guarantors (often grouped under the term "*Obligors*") and, in some cases, other group companies whose financial health indirectly affects the borrower's ability to service the loan.

As to the degree of impact required, the following provides a useful starting point: if the lender would not have granted the facility had the relevant circumstances existed at the time, or would only have done so on significantly different terms (as to margin, maturity or security), the materiality threshold is likely to be met. The question is whether the event has turned the loan into a fundamentally different credit proposition, as opposed to the normal fluctuation in credit quality that any loan portfolio will experience over time.

3. Legal Effects

Where the MAC clause is structured as an event of default, its primary consequence is that the lender may accelerate the loan: it may demand immediate repayment of all outstanding amounts and is released from any obligation to make further advances.

In practice, the acceleration right is the lender's principal source of leverage. It allows the lender to bring the borrower to the negotiating table and to insist on amended terms (increased margin, additional security, tighter covenants) that reflect the changed credit position.

Two further effects follow automatically. First, the borrower's right to make further drawdowns is suspended, as it is a standard condition precedent to drawdown that no event of default has occurred and is continuing. Second, the margin on the loan will typically increase for so long as the event of default subsists, as most loan agreements provide for a default interest rate.

4. MAC Representations and MAC Acceleration Clauses

A MAC clause may operate not only as a standalone event of default, but also through other provisions in the loan agreement. Two applications are particularly common.

4.1 MAC-Qualified Representations

Borrowers frequently give representations and warranties to the lender at the outset of the facility and repeat them at regular intervals (typically on each drawdown date and each interest payment date). These representations cover matters such as corporate status, the validity and binding nature of the loan agreement, the accuracy of financial statements, compliance with laws, and the absence of material litigation.

In practice, many of the more commercial representations (absence of litigation, compliance with laws, validity of licences, no default under other agreements) are qualified by a materiality threshold linked

to the MAC definition. This means that a breach of the representation only constitutes an event of default if the underlying circumstances would, if determined against the borrower, have a material adverse effect. The MAC qualification prevents technical breaches from triggering acceleration.

4.2 The MAC Representation (No Material Adverse Change)

In addition to MAC-qualified representations, the borrower will often give a standalone representation that there has been no material adverse change in its financial condition since the date of the financial statements most recently delivered to the lender (or, in some cases, since the date of the loan agreement).

The purpose of this representation is to capture a gradual deterioration in the borrower's financial position before it manifests as an actual payment default or covenant breach. It is typically repeated on each drawdown date and each interest payment date, so that a false representation triggers an event of default (misrepresentation).

A MAC representation and a MAC acceleration clause serve related but distinct functions. The MAC representation is narrower in scope (it typically addresses only "*financial condition*") and is triggered only when the representation is made or repeated (so that there may be a time lag between the deterioration and the default). The MAC acceleration clause is broader (covering business, operations, prospects and security as well as financial condition) and takes effect, in principle, from the moment the relevant event occurs. Because each addresses a different risk, neither is a full substitute for the other, and a well-drafted loan agreement will typically include both.

5. Where No MAC Clause Exists

If a committed loan agreement does not contain a MAC clause, the lender's options are more limited. Danish law offers three potential avenues, each of which carries significant practical difficulty.

First, the lender may argue that the event gives rise to an anticipated breach, so that the borrower is expected, with near certainty, to default on its obligations (for example, to breach financial covenants at the next testing date). This argument is available in principle, but in practice it carries a high litigation risk and is of limited utility where the loan agreement already provides for suspension of drawdowns upon the occurrence of a potential event of default.

Second, the lender may argue that a fundamental assumption underlying the loan has failed. Under Danish law, this requires that the assumption was a determining factor in the lender's decision to grant the loan, that this was apparent to the borrower, and that it is appropriate to place the risk of the failed assumption on the borrower. In practice, the circumstances that might constitute a failed assumption (typically, misleading or incorrect information) will usually be addressed more directly through the borrower's representations and warranties.

Third, the lender may seek to set aside the loan agreement in whole or in part under section 36 of the Danish Contracts Act (*Aftaleloven*), on the ground that enforcing the agreement would be unreasonable. The threshold for relief under section 36 is high, and the fact that the lender chose not to include a MAC clause may itself weigh against the claim, as the lender can be taken to have accepted the risk.

6. Guidance from Case Law

Reported case law on the interpretation of MAC clauses in loan agreements remains very limited, both in Denmark and internationally. There is still no reported Danish decision directly interpreting a MAC clause in a loan agreement. This is partly because disputes involving MAC clauses tend to be settled out of court, and partly because lenders rarely rely on a MAC clause alone (preferring to invoke it alongside more specific events of default such as payment defaults or covenant breaches). The following English decisions set out below are, however, instructive in a Danish context.

6.1 BNP Paribas v. Yukos Oil Co. [2005] EWHC 1321 (Ch.)

A banking syndicate had provided financing to Yukos Oil Company. The loan agreement contained a MAC acceleration clause with a purely subjective standard ("*in the opinion of an Instructing Group*"). Following the arrest of Yukos's CEO, a threatened revocation of its oil extraction licence, a credit rating downgrade and a USD 3.3 billion tax assessment accompanied by the freezing of the company's assets, the banks declared the loan in default.

The court upheld the banks' position on a summary judgment basis, finding it unlikely that Yukos could show the banks' assessment to be unreasonable. The decision confirms that, where the MAC clause is of the purely subjective variety, the burden falls on the borrower to demonstrate that the lender's exercise of discretion was improper. In a clear case, the court will decline to allow the borrower further review of the question.

6.2 Grupo Hotelero Urvasco v. Carey Value Added [2013] EWHC 1039 (Comm)

This decision provides the most detailed judicial analysis of a MAC clause in a loan agreement to date. The loan agreement contained a MAC representation ("*no material adverse change in its financial condition*") but no standalone MAC acceleration clause.

On the scope of "*financial condition*", the court held that the concept should be interpreted narrowly and determined primarily by reference to the borrower's financial statements. The court rejected the lender's argument for a broader interpretation that would encompass assets, liabilities, cash flow, liquidity and the impact of market conditions. The narrow reading was supported by the absence of any

reference to "*business*" or "*prospects*" in the clause and by the inclusion of the words "*consolidated if applicable*", which implied an accounting-based assessment.

On materiality, the court held that a deterioration in financial condition is material only if it significantly impairs the borrower's ability to perform its obligations under the loan agreement, in particular the obligation to repay. The court emphasised the importance of the materiality threshold as a safeguard against abuse.

On the question of change, the court held that a lender cannot invoke a MAC clause in respect of circumstances that already existed when the loan was granted, as the lender must be taken to have accepted those circumstances. A MAC clause can be triggered only where circumstances deteriorate to such an extent that they change in character. The deterioration must also be of a permanent (rather than temporary) nature.

The decision underlines three practical points: that MAC clauses will be construed narrowly and by close reference to their text; that their practical application is difficult; and that a MAC representation is best supplemented by a standalone MAC acceleration clause to avoid the need to prove that the representation was made or repeated at a specific point in time.

6.3 **Lombard North Central v. European Skyjets [2022] EWHC 728 (QB)**

This case concerned the termination and enforcement of a secured aircraft loan. While the primary issues were waiver of defaults and the effectiveness of "*no waiver*" clauses, the court also considered a MAC-based event of default. The MAC clause in question was of the "in the opinion of the Lender" type. The court found that the lender had genuinely considered the borrower's financial health to be materially worsening and that the business was cash-flow insolvent. The court noted that given the wording of the clause it was not necessary for the material adverse change to have had an objective adverse effect. The lender's genuine assessment was sufficient.

The decision reinforces the *Yukos* approach in the loan context: where a MAC clause is subjectively worded, the lender's honest belief is the relevant standard. It also provides a practical reminder that lenders must take care with their broader conduct when dealing with a distressed borrower. The court held that the lender's behaviour in giving additional time and accepting late payments amounted to a waiver of certain past defaults, notwithstanding "*no waiver*" provisions in the loan agreement and express reservations of rights in correspondence.

6.4 **BM Brazil v. Sibanye [2024] EWHC 2566 (Comm)**

Although this case concerned share purchase agreements rather than a loan agreement, the English Commercial Court's analysis of the MAE definition is directly relevant to finance documentation. The dispute arose from the USD 1.2 billion acquisition of two Brazilian mines. After signing, a geotechnical

event occurred at one of the mines. The buyer sought to terminate the SPAs, arguing that the event constituted a Material Adverse Effect.

The court held that it did not. Three aspects of the judgment are of particular interest for loan documentation. First, the court confirmed that an MAE/MAC definition focuses on changes, events or effects that occur after the agreement is signed. An event that merely reveals a pre-existing condition does not, without more, trigger the clause; the event itself must be material and adverse. Second, the court emphasised that "*material*" means significant or substantial, and that the assessment must take into account the transaction as a whole, not just the affected asset in isolation. Third, the court extensively cited US case law, signalling a degree of convergence between English and US approaches to the interpretation of MAC/MAE clauses.

For lenders, the practical implication is clear: it may be difficult to argue that a MAC clause has been triggered where the borrower can demonstrate that it remains able to comply with its overall financial obligations, even if there have been adverse changes to aspects of its financial position or business operations.

7. COVID-19: Lessons for MAC Clauses

The COVID-19 pandemic, beginning in early 2020, prompted immediate attention to MAC clauses across the finance and M&A markets. With entire sectors of the economy shut down by government order, the question of whether the pandemic could trigger MAC clauses in loan agreements was both urgent and commercially significant.

In practice, the pandemic did not generate significant reported case law on MAC clauses in the lending context. Most disputes were resolved commercially, through forbearance agreements, covenant waivers and amended facility terms. This outcome is consistent with the general reluctance of lenders to rely on MAC clauses in isolation, and with the established case law requirement (from *Grupo Hotelero*) that any deterioration must be of a permanent rather than temporary nature. In the early stages of the pandemic, when the duration and severity of the economic impact were highly uncertain, few lenders would have been confident that the permanence requirement was met.

The pandemic did, however, influence drafting practice. In the M&A context, MAC definitions increasingly include express carve-outs for pandemics, epidemics and public health emergencies (sometimes specifically naming COVID-19). In lending documentation, MAC definitions do not typically contain carve-outs of this kind, since the lender’s focus is on the borrower’s specific credit risk rather than on systemic market conditions. Nevertheless, the pandemic experience has sharpened attention to the boundary between systemic or market-wide events (which a MAC clause is generally not intended to capture) and borrower-specific deterioration (which it is).

For borrowers and lenders alike, the principal lesson from the pandemic period is that a MAC clause is not a substitute for well-drafted, specific covenants and events of default. Where a borrower's financial position deteriorates as a result of a pandemic or comparable external shock, the lender will almost always be better served by relying on more operational triggers (financial covenant breaches, payment defaults, misrepresentations in financial statements) than on the MAC clause alone.

8. Practical Considerations

For Lenders

A MAC clause is a tool of last resort. Lenders are generally reluctant to invoke a MAC clause in isolation, and for good reason: the materiality threshold is high, the evidentiary burden is significant, and the litigation risk is real. In practice, lenders will almost always seek to rely on more specific events of default (payment defaults, covenant breaches, misrepresentations) alongside any MAC-based claim.

Where a MAC clause is the lender's primary ground for acceleration, it should document its assessment carefully. This is especially important where the standard is "*reasonable opinion*" rather than "*sole discretion*". The lender should be able to show that the event has fundamentally changed the credit profile of the transaction and that the decision to accelerate was taken on a proper and informed basis.

Lenders should also be mindful of the lessons from *Lombard v Skyjets*: conduct in dealing with a distressed borrower (giving additional time, accepting late payments, charging and accepting late-payment fees) may amount to a waiver of defaults, regardless of "*no waiver*" clauses or reservation-of-rights language. Where a lender intends to preserve its right to invoke a MAC clause, its actions must be consistent with that intention.

The inclusion of both a MAC acceleration clause and a MAC representation provides the lender with complementary protections. The acceleration clause offers broader scope and more immediate effect. The representation provides a more operational trigger that is linked to the borrower's periodic confirmations.

For Borrowers

A borrower's principal objective will be to limit the scope for discretionary application of the MAC clause. Key negotiating points include: insisting on the "*reasonable opinion*" standard rather than "*sole discretion*"; excluding "*prospects*" from the definition of Material Adverse Effect; requiring that the assessment relate to the group as a whole rather than to individual entities; and ensuring that the MAC-qualified representations are appropriately calibrated.

A borrower that wishes to challenge a MAC-based acceleration will face a significant burden of proof. It must show either that the lender's assessment was not credit-related (in a broad sense) or that the

lender acted in a manner radically different from how other lenders would have acted in comparable circumstances. Both are difficult to establish, particularly because each loan arrangement has its own characteristics and the comparison is with a hypothetical scenario. However, as the *BM Brazil* decision illustrates, a borrower that can demonstrate continued ability to meet its overall financial obligations will be well placed to argue that the materiality threshold has not been met.

This guide is based on an article first published in *Erhvervsjuridisk Tidsskrift* (ET.2019.059) and has been updated to reflect developments to early 2026. This guide is for general information only and does not constitute legal advice. For advice on a specific transaction, please contact the author.

Contact
Dr Andreas Tamasauskas
Partner, Carsted Rosenberg Advokatfirma
ata@carstedrosenberg.com
www.carstedrosenberg.com

Date March 2026

CONTACTS

For more information, please contact:

Dr. Andreas Tamasauskas at
ata@carstedrosenberg.com
T: +45 31 88 13 25

Michael Carsted Rosenberg at
mcr@carstedrosenberg.com
T: +41 79 901 3713

Carsted Rosenberg Advokatfirma

Bredgade 3
DK-1260 Copenhagen K
Denmark

Kaiserstrasse 10 am Kaiserplatz
D-60311 Frankfurt am Main
Germany

Kägiswilerstrasse 17
CH-6060 Sarnen
Switzerland

E: info@carstedrosenberg.com
W: www.carstedrosenberg.com

Carsted Rosenberg is an international law firm based in Frankfurt and Copenhagen that specialises in cross-border banking & finance, capital markets, mergers & acquisitions and corporate and commercial matters. Our clients rely on us for pragmatic advice and transactional excellence. Uniquely we can advise our clients on both Danish and English law.

At Carsted Rosenberg we pride ourselves on combining the highest global standards with local expertise. Accordingly, we work closely with the leading international law firms and financial institutions to provide a multi-jurisdictional transaction team as their dedicated local counsel for Denmark. We are used to working in multi-practice, multi-jurisdictional teams combining our local counsel skills with our partner firm's international network to deliver the best possible results for our clients.