INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

AIJA Deal Points Survey:
Market Standards for Share Deals

Corporate Acquisition and M&A Commission

Munich 2016

General Reporters:

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EXECUTIVE SUMMARY

General Findings:

- The Survey and the feedback from the AIJA members very clearly show that AIJA members are highly specialized on M&A.

- 57.67% of the transactions reported had a cross-border element.

- In 36.70% of the reported transactions foreign law firms assisted the AIJA member during the M&A transaction.

- These figures show that M&A work is a great opportunity to use the AIJA network and to cooperate in order to provide advice from the perspective of various jurisdictions.

- It would be very interesting to repeat this Survey in some years in order to see how the M&A market of the AIJA members develops.

Specific findings:

- In Denmark, in 66% of the reported transactions, the parties have agreed to include warranty & indemnity insurance (W&I Insurance) to mitigate the parties' transactional risks. Until recently, W&I Insurance was only rarely used in the Danish market. Germany and the UK also reported a slow rising trend on using W&I Insurance albeit on a lower scale; UK reported that premiums have come down and usually range between 0.9% and 1.5% of the deal value, with an excess of usually 1% of the deal value;

- Auctions are frequently used in Luxembourg, The Netherlands, Poland, France, the Czech Republic, Norway, Sweden, Germany and Japan. However, overall, auctions have only been used in 26.1% of the reported cases;

- Germany and Belgium reported a continuing strong trend towards international M&A standards in terms of processes and documentation even in small cap transactions. Japan has also reported to use standard terms in international M&A practice but somewhat less extensive and detailed;

- Virtual data rooms are clearly becoming more and more standard throughout the jurisdictions covered by our Survey. Due to certain security concerns the trend is somewhat slowing down.

- Local M&A markets become increasingly international with foreign buyers, so cross-border transactions are trending substantially. Especially China ranks 5th in terms of buyer's country of origin with all but 1 target being outside China;

- The results of the Survey revealed that letters of intent are by no means a given in M&A transactions, let alone binding ones. However, letters of intent have been used in 61% of the reported deals, of which 73% granted exclusivity to the bidder. Regionally it can be noted that letters of intent are very frequently used (i.e. in more than 50% of the reported deals) in the European, UK and Canadian markets, typically including an exclusivity clause in favor of the buyer;

- Vendor due diligence is generally very rarely seen (only in 16.84% of the transactions);

- In 89.89% of the transactions a data room was made available to the buyer. When a data room is provided, this is usually done by way of a virtual data room (86.74%) and only very rarely by using a physical data room (13.26%);

- The transactions reported in our Survey have a simultaneous signing and closing (56.61% of the transactions) more often than a separate closing (43.39% of the transactions);

- In the cases where there was a separate closing, a great variety of CPs were used, of which the majority related to bring-down of warranty clauses;

- As expected, the English language is the preferred language (lingua franca) for SPAs. 70.90% of the SPAs were in English;

- In 84.16% of the transactions the buyer received cash only. In 15.84% of the transactions, there was also a non-cash consideration;

- General limitations in time applied to 82% of the transactions, for an average period of 24 months after closing;

- Specific time limitations were also often used in SPAs. Title to shares, capacity and tax appear to be the issues which are most often subject to specific time limitations, with over 30 NRs stating that they used such limitations in their SPAs;

- The longest time limitation applies to representations and warranties on capacity, for an average of 60 months after closing;

- A large majority of the SPAs used individual minimum claim thresholds (116 SPAs) and maximum liability ("cap") (129 SPAs);

- 85% of the SPAs made use of some type of disclosure. A large majority of the SPAs used either full data room disclosure or disclosure schedules and/or letters, and in total 94 SPAs allowed both types of aforementioned disclosure;

- 61.90% of the SPAs contain a non-compete clause, which restrict the seller's business activities after closing. The average duration of the non-competition clauses reported was 35.92 months, i.e. approximately three years;

- 53.38% of the SPAs contained non-solicitation clauses, which prohibit the seller to hire away employees and / or business partners of the target company during a specific period after closing;

- While a foreign legal system was only chosen in 15.34% of the transactions and a foreign forum (i.e. state courts of a foreign country) was only chosen in 4.76% of the transactions. The majority of the SPAs (52.91% of the transactions) provided for an arbitration clause.

- In the Scandinavian countries (Denmark, Norway, Sweden and Finland) as well as in Estonia, Russia and India 100% of the transactions reported chose arbitration.

A. INTRODUCTION

We are delighted to present to you the AIJA Deal Points Survey 2014/2015.

Deal points studies are often used by deal practitioners as a resource for market trends when negotiating acquisition agreements. The studies usually present a statistical breakdown of how key provisions are treated in a sample of publicly or otherwise available M&A contracts. The value of the deal points studies is that they give the practitioner a much better sense of M&A drafting trends than she or he could get by performing own research.

Against this background the M&A Commission has decided to launch an "**AIJA Deal Points Survey**" with the goal to gather and analyze market standards for share deals in various AIJA jurisdictions. The overall objective of the Survey is to gain a better understanding of market trends in share deals from the perspective of AIJA members so that we may share the insights with all interested AIJA members and thus improve our knowledge and general fitness when it comes to negotiating deal terms in share deals.

We are very pleased that this initiative has been completed successfully. We would like to thank all AIJA members involved for all their hard work associated with this Survey!

We do hope that the AIJA Deal Points Survey 2014/2015 proves to be a fruitful and inspiring companion during your upcoming M&A negotiations.

B. METHODOLOGY

The AIJA Deal Points Survey 2014/2015 has been conducted on the basis of the following documents:

- **Questionnaires** that were filled out on a case-by-case basis (i.e. one Questionnaire per reported M&A transaction); and

- **Executive Summaries**, summarizing the findings from the various Questionnaires.

The Questionnaires and the Executive Summaries were drafted by all interested AIJA national reporters ("NRs"), i.e. each NR has filled out Questionnaires and provided an Executive Summary in respect of the information she or he put together in the Questionnaires. In a few instances, there were several NRs in one and the same jurisdiction where each of them filled out Questionnaires and an Executive Summary (independently from each other or in cooperation with each other).

Each NR generally covered 3 to 5 transactions, unless NRs teamed up and provided an Executive Summary in respect of many more Questionnaires. We left it up to the NRs whether they want to join efforts or not.

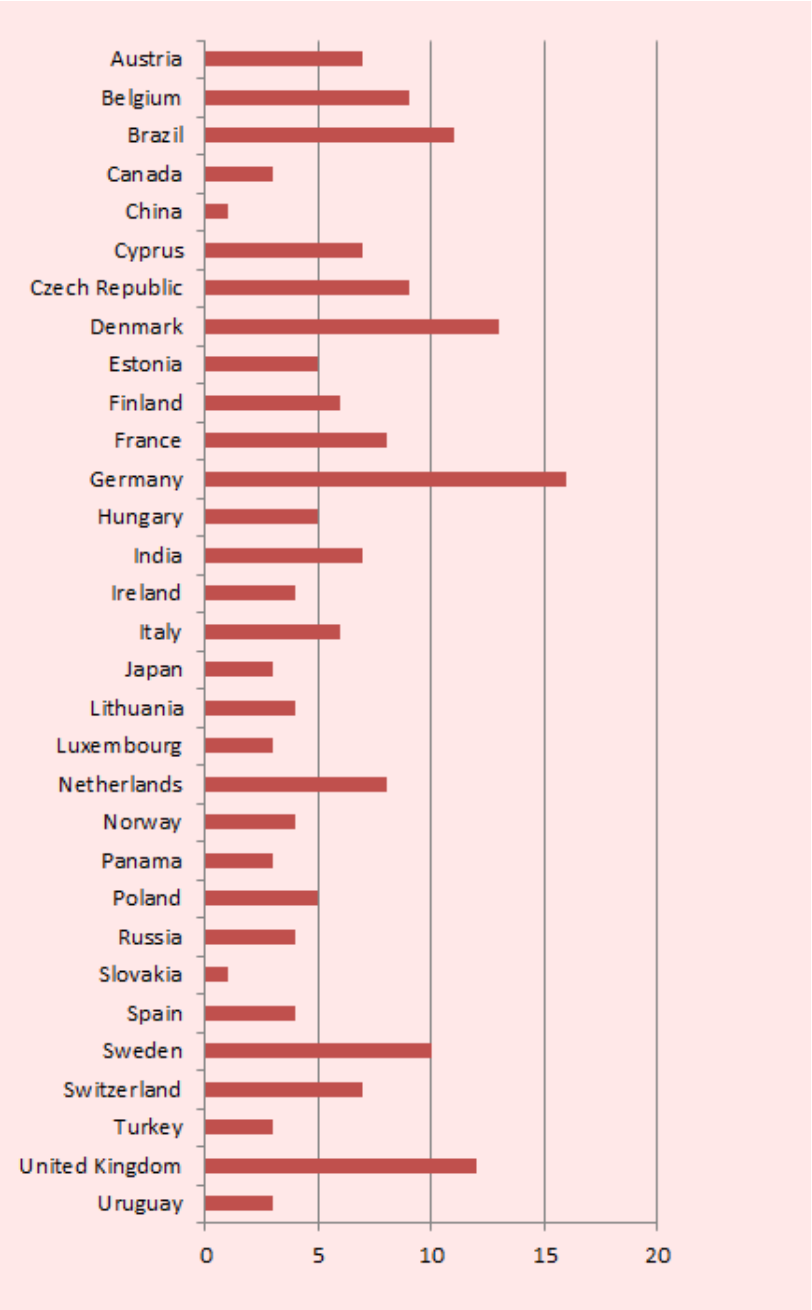
The transactions covered by the NRs had to meet the following criteria:

- Private share deals only (not asset deals);
- Survey was not restricted to certain industries;
- Deal value was at least EUR 1m;
- Closings have taken place after 1 January 2014;
- Deadline for submission was 15 January 2016.

Some percentages in the charts throughout this report may not add to 100 percent due to rounding, or for questions where survey participants had the option to choose multiple responses.

Please also note that our findings in respect of certain jurisdictions need to be analysed in light of the fact that in some instances only few transactions were reported and that, accordingly, the results, on a jurisdictional level as well as on an overall level, may not be entirely statistically relevant or representative.

Based on the foregoing, we have analysed information in respect of 188 M&A transactions, reported by 57 NRs from 31 jurisdictions of which 23 in Europe, 1 in North America, 3 in South America and 4 in Asia:



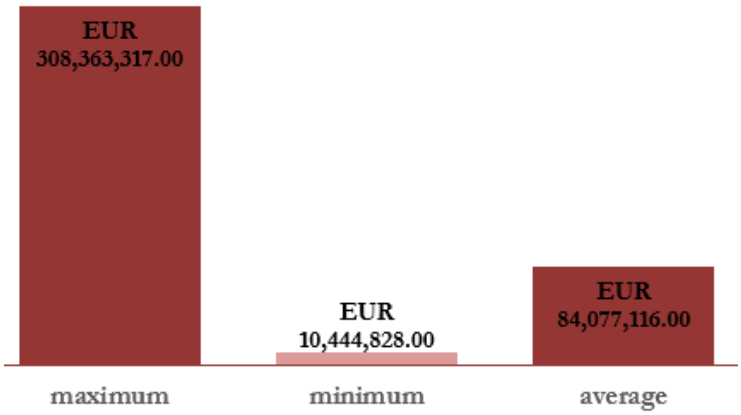
C. DEAL ANALYSIS

I TRANSACTION DETAILS

1 Deal Values

We examined the deal values of the reported transactions. The average deal value of all 188 reported transactions amounts to **EUR 84,077,116**.

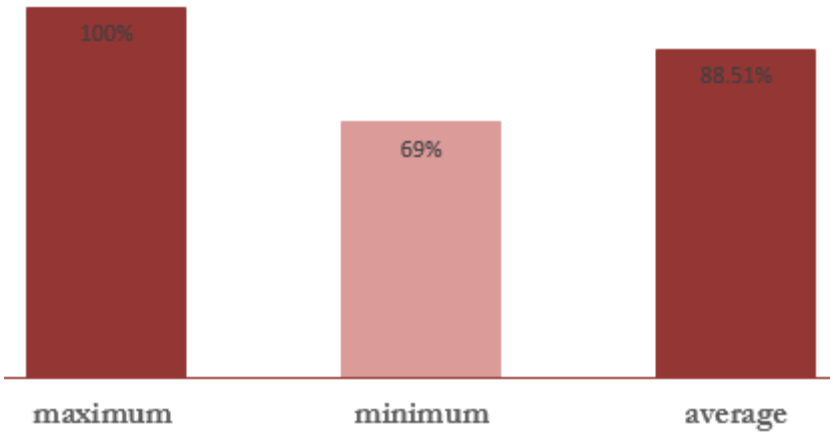
The average maximum deal value amounts to **EUR 308,636,317** and the average minimum deal value across all 188 deals is **EUR 10,444,282**.



2 Percentage of Shares Acquired

The average percentage of shares acquired in all 188 reported transactions is **88.51%**.

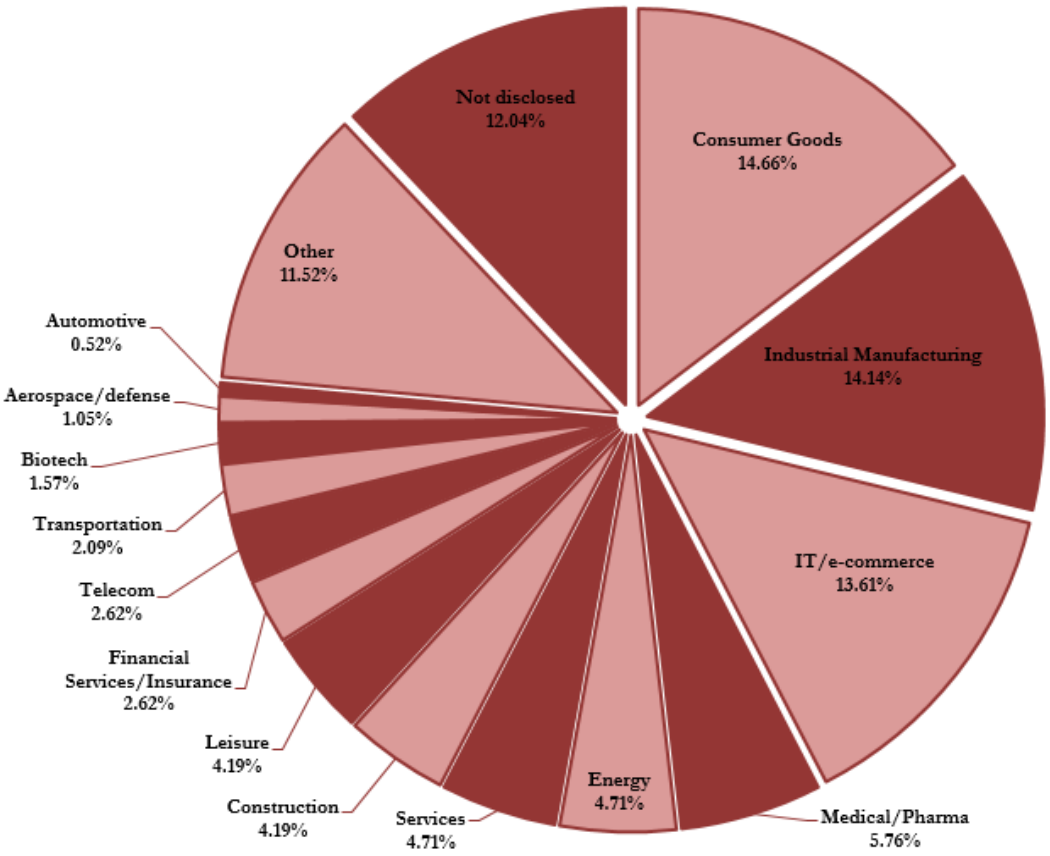
The average maximum percentage of shares acquired amounts to **100 %** and the average minimum percentage of shares acquired across all 188 deals is **69%**.



3 Industry Sectors

Transactions included in the Survey mainly relate to consumer goods (28 deals or 17%), industrial manufacturing (27 deals or 16%) and IT/e-commerce (26 deals or 15%). These three industries cover almost 50% of all reported transactions.

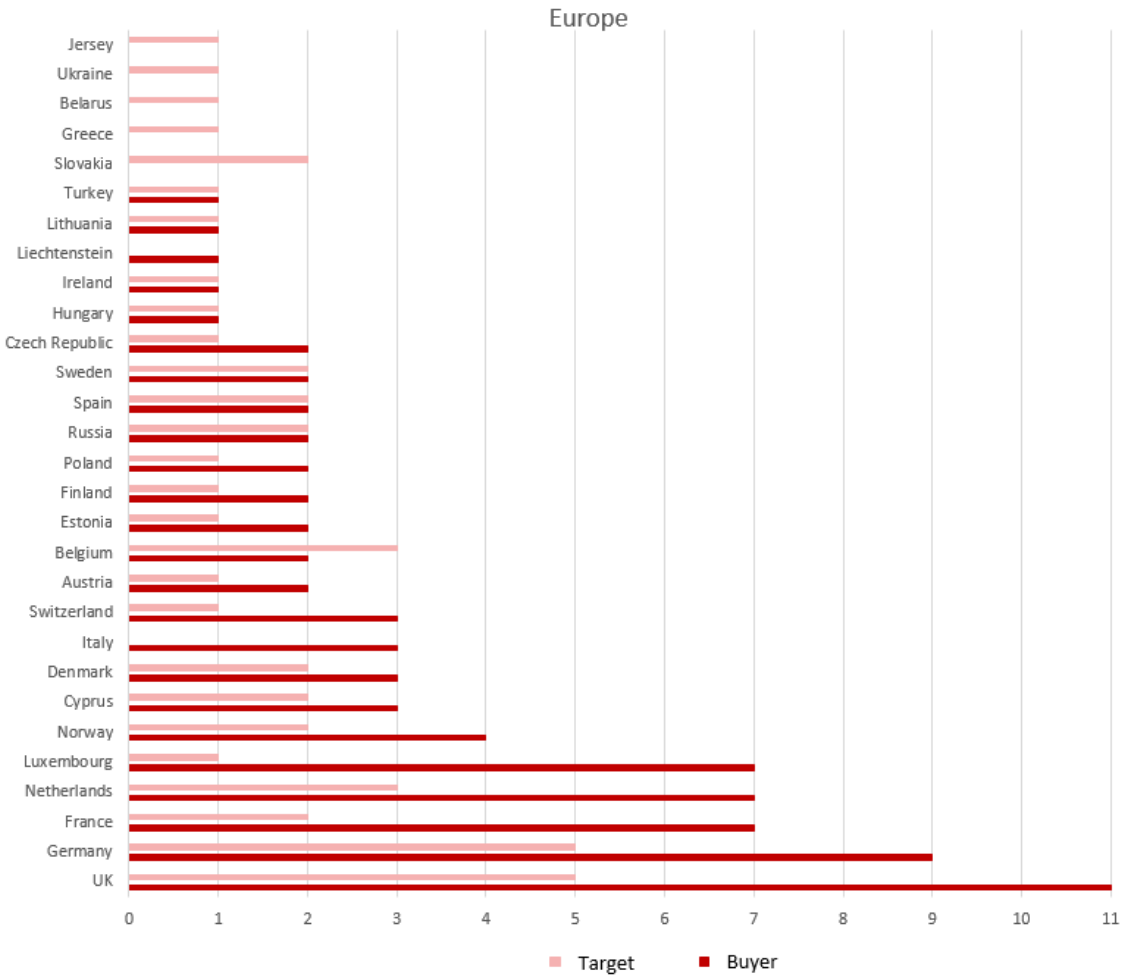
Here is a breakdown:

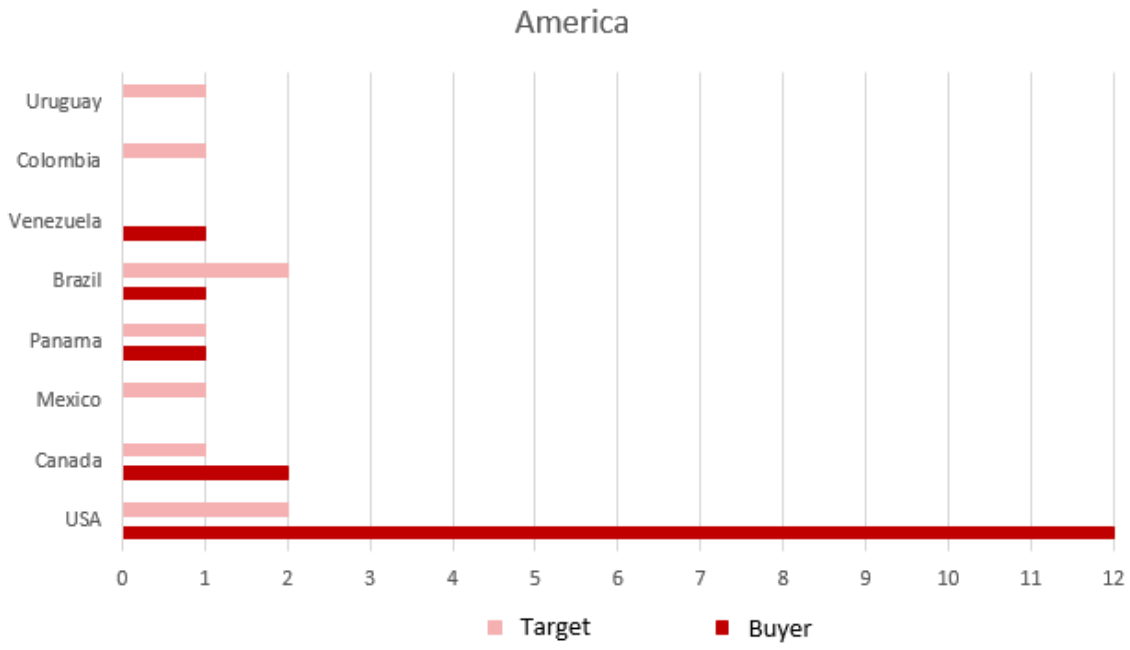


4 Transaction Parties' Countries of Origin

We also examined the countries of origin of both buyers and targets in our Survey.

Based on the results reported to us, we can conclude as follows:

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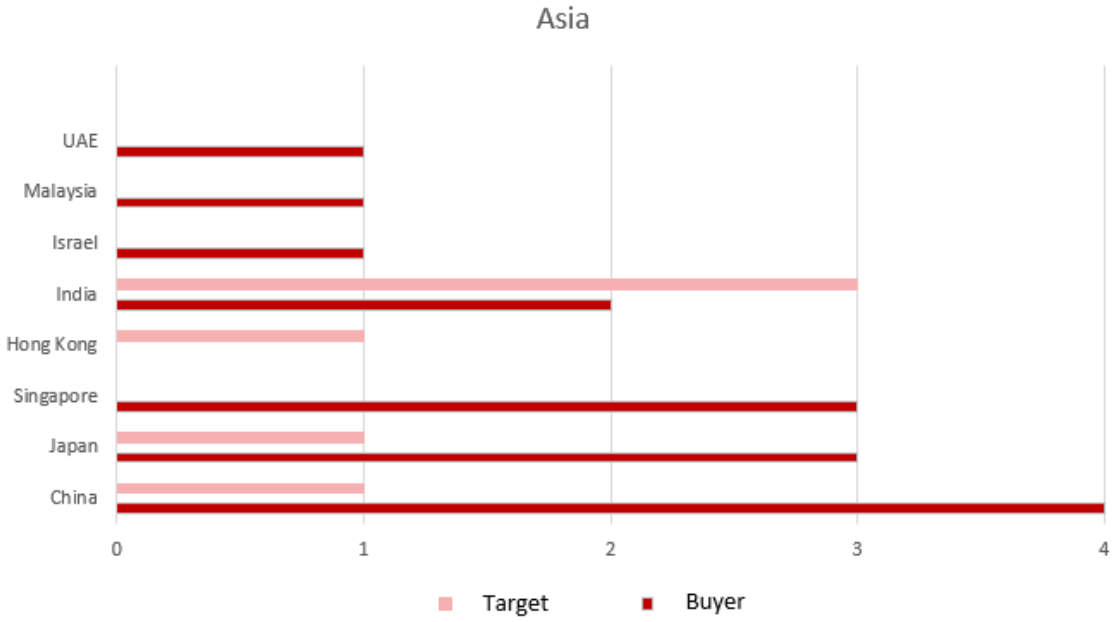
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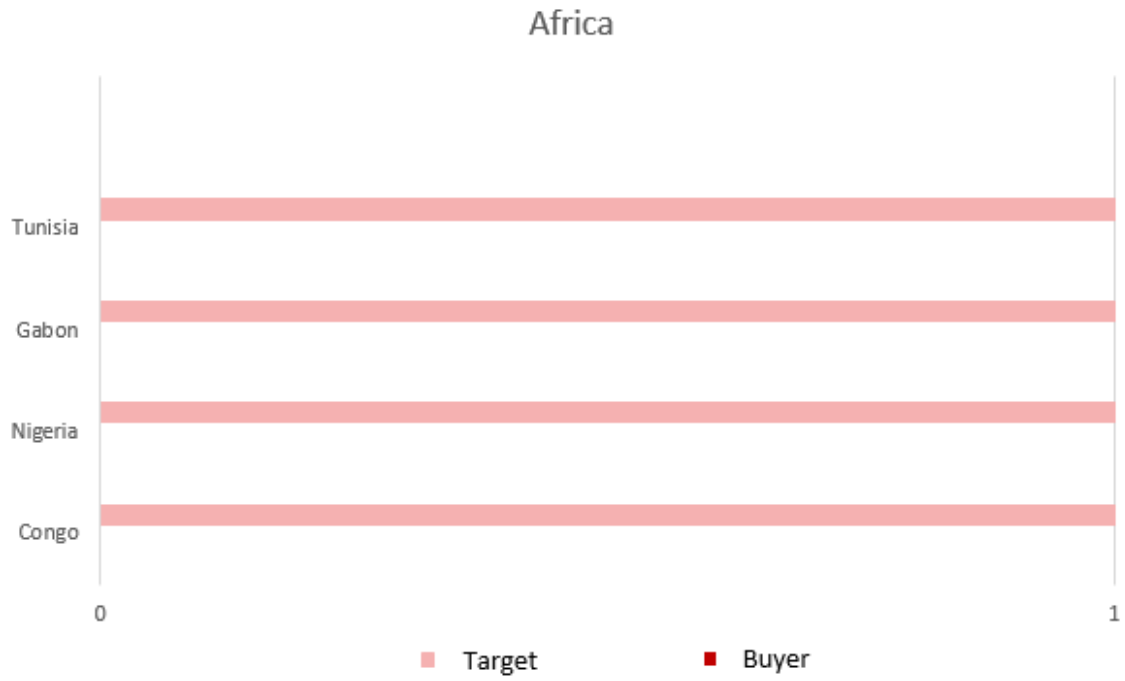
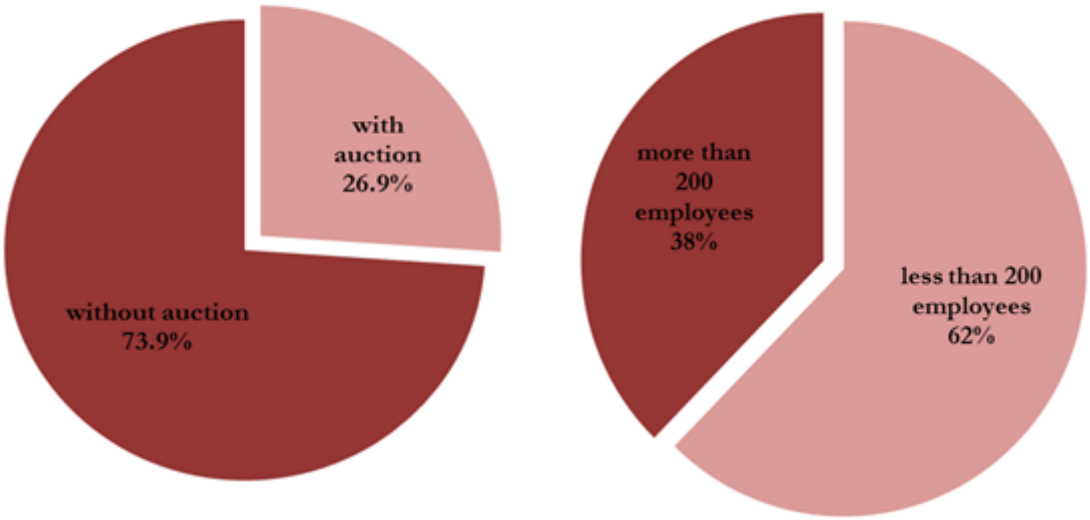


5 Percentage of Deals with Targets >200 Employees

As a part of the Survey we asked how many targets had more than 200 employees on their payroll. The average percentage of deals with such targets amounted to **37.7%**.

Accordingly, **62.3%** of the reported deals relate to smaller or mid-sized companies with less than 200 employees.



6 Percentage of Deals with Auction

We examined how many M&A transactions have been structured by organizing an auction among interested bidders.

From the deals reported in this Survey, **26.1%** used an auction.

Clearly, our Survey shows that auctions are not (yet) the prevalent way of structuring M&A transactions. However, there are strong regional differences. As can been seen from the list below, auctions are a quite frequently seen in Europe as well as in Japan:

- Luxembourg (100%);
- Japan (100%);
- The Netherlands (87.5%);
- Poland (80%);
- France (75%);
- Czech Republic (56%);
- Norway (50%);
- Sweden (50%);
- Germany (43.75%).

7 Percentage of Transactions with a Cross-border Element

57.67% of the transactions reported had a cross-border element, which shows that AIJA members very much advise on international M&A transactions. In 36.70% of the transactions, foreign law firms assisted the AIJA member during the M&A transaction. These figures show that M&A work is a great opportunity to use the AIJA network and to cooperate in order to provide advice from the perspective of various jurisdictions. 2 of the 188 transactions were even referred to the NR by another AIJA member. M&A transactions are definitely a great opportunity for the cooperation between AIJA members.

II LETTER OF INTENT

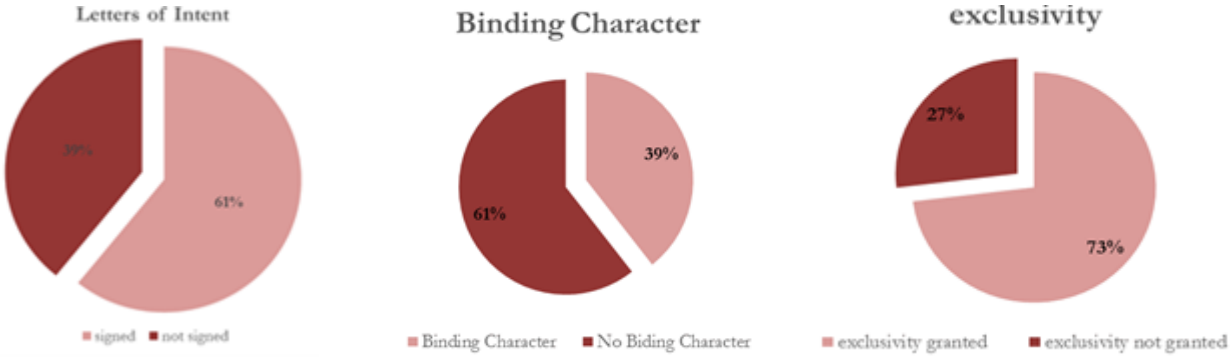
Most M&A transactions start on the basis of a letter of intent, memorandum of understanding, term sheet or similar instrument. The purpose of such documents is to provide a preliminary outline of a proposed M&A deal by sketching out fundamental terms before expending resources on negotiating definitive agreements. A letter of intent can facilitate discussions with third parties such as debt and equity financing providers and it can also allow preliminary discussions with antitrust and other regulators. The likely most important aspect, however, is that a letter of intent creates a certain "deal momentum".

For the purposes of our Survey, we examined not only the percentage of deals where a letter of intent (or similar instrument) was used but also the percentage of deals where exclusivity was granted to the bidder and where the letter of intent was drafted in a binding way.

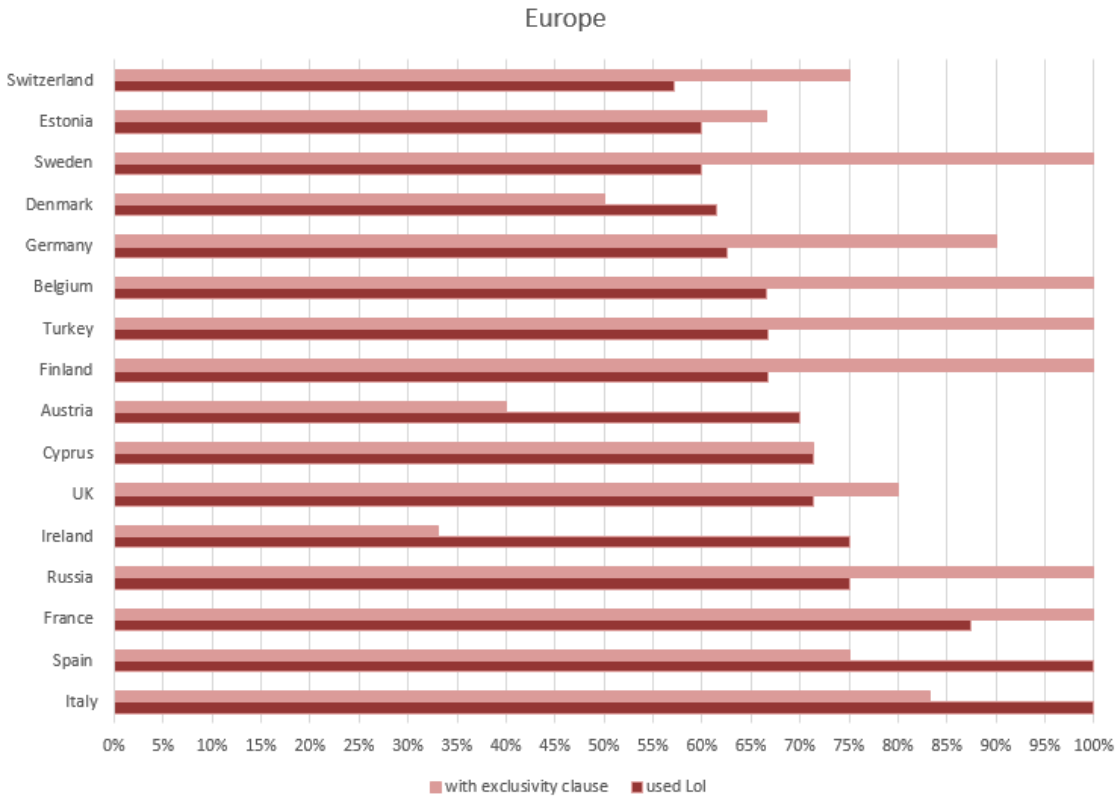
The results of the Survey revealed that in **60.08%** of all reported deals, a letter of intent (or similar instrument) was signed.

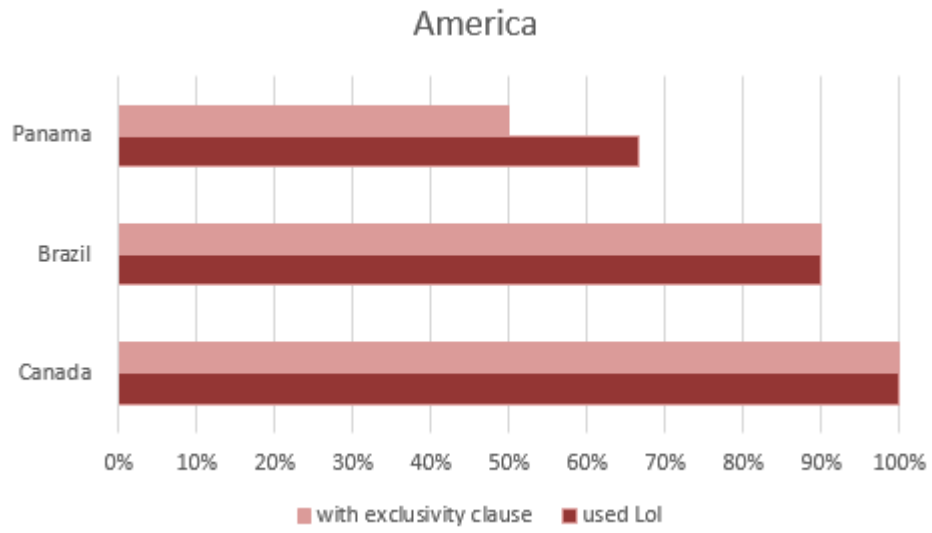
In **73.05%** of these cases, the letter of intent granted exclusivity to the bidder for a certain period of time. Accordingly, in these cases no auction was organised. The high percentage of cases where exclusivity was granted shows that sellers, who are not prone to exclusivity, rarely succeed in avoiding it.

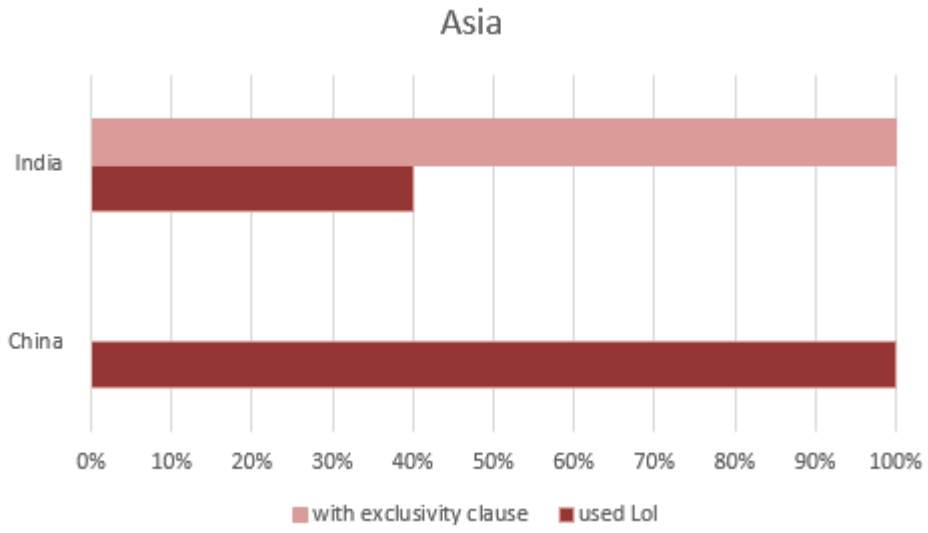
However, in only **39.41%** of the cases was the letter of intent stated to be **binding in nature**. It should be noted, however, that many letters of intents contain certain provisions which are meant to be binding (such as the exclusivity clause). In our Survey we aimed at finding out which letters of intents were binding also with respect to the commercial cornestones and the percentage of 39.41% relates to such cases. This means that in most cases a letter of intent is still not binding.



Regionally it can be noted that letters of intent are frequently used (i.e. in more than 50% of the reported deals) in the following markets, typically including an exclusivity clause in favor of the buyer:







III DUE DILIGENCE

1 Buyer Due Diligence

M&A transactions usually require that the buyer carries out a due diligence, i.e. a careful review of the potential target, prior to the negotiations of the SPA. In particular, a due diligence is carried out in order to evaluate the target and to find out potential risks, which are relevant to the value of the target. Such due diligence is usually carried out from a legal, tax and financial perspective. The advisors of the buyer document the findings in a due diligence report, on which basis the buyer decides whether or not it wishes to acquire the shares in the target, which purchase price is an appropriate consideration for the transfer of the shares and in order to be able to negotiate the terms and conditions of the SPA. Unless the target is very well known to the buyer (e.g. in a potential management buy out scenario), the buyer will always carry out a due diligence. In many jurisdictions, the buyer has a (professional) duty to investigate, because of which it is expected to perform a due diligence. If the buyer does not perform said due diligence, (managing) directors may be held liable in court.

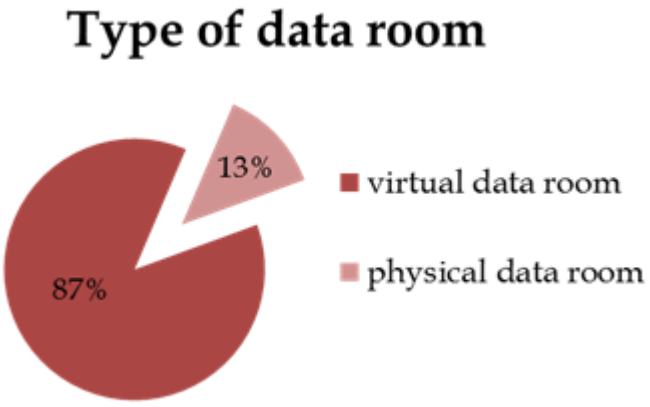
2 Vendor Due Diligence

In some transactions, the vendor carries out a vendor due diligence. For example, this can be the case prior to organising an auction in order to be able to provide all of the bidders with a vendor due diligence report and with the same amount of information. Furthermore, this can be very helpful for the vendor in order to avoid that some risks are discovered by the potential buyer before they are even known to the vendor. As a result of such vendor due diligence, the vendor is also able to mitigate or remedy some of the risks prior to

engaging in a M&A process. We have examined in our Survey that in **16.84**% of the transactions a vendor due diligence was performed. Furthermore, we found that in the event that a vendor due diligence is performed, the respective due diligence report is only rarely (in 25.99% of the transaction) made available to the buyer. The conclusion is that the vendor due diligence is mostly made in order to allow the vendor to mitigate and / or remedy some of the risks prior to the M&A process.

3 Data Room

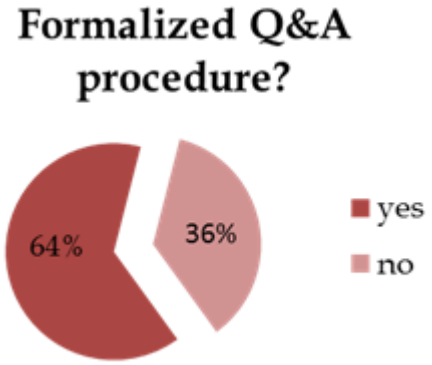
In order to allow the advisors of the vendor or the buyer to review all of the relevant documents and information, the target company usually sets up a data room, in which all of such documents and information are stored. The access to the data rooms is strictly secured in order to protect the confidentiality of the documents and information. In **89.89**% of the transactions a data room was made available to the buyer. The documents and information are either provided by way of printed information and are thus physically accessible ("physical data room") or are provided in electronical form by way of a database, which can be accessed by using the internet ("virtual data room"). A physical data room is rarely used (13.26% vs. 86.74%), e.g. in transactions where the buyer decides to review very few documents. This might be the case in a management buy-out or when the purchase price is rather low.

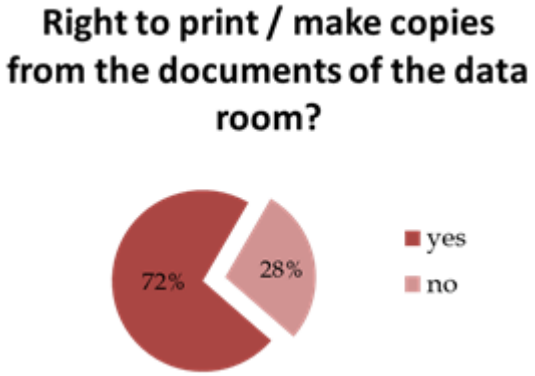


Most data rooms are organised and managed by data room providers (e.g. Intralinks, Merrill etc.). However, there is a substantial amount of transactions where due diligence is either performed without using a data room or where other actors take care of the data room.

Data room was organised and managed by	Percentage
Law Firm	22.22
Investment Banker	13.19
Seller	29.17
Data Room Provider (e.g. Intralinks, Merrill etc.)	30.56
Other (e.g. financial advisors, commercial advisors)	4.86

We have determined that mostly,when a data room was provided, a formalized Q&A procedure was used, where the buyer and its team provided the questions and the seller and its team provided answers through such formalized procedure. The seller usually allows the buyer and its team to print and make copies from documents of the data room, which facilitates the legal review of the documents. In some transactions, such right is only provided on specific request from the buyer and only on a case by case basis.





IV PURCHASE AGREEMENT

1 Transaction

a. Simultaneous Signing and Closing

We examined in our Survey how often the signing of the SPA itself ("Signing") and the completion of the transfer ("Closing") occurred on the same date. A separate Closing is

required, when a merger filing is required after Signing, when some additional contracts need to be concluded and / or terminated before the parties are willing to complete the transfer of shares or when other conditions need to be satisfied first. The AIJA members have more ofen a simultaneous Signing and Closing (56.61% of the transactions) than a separate Closing.

b. Language of purchase agreement:

The result of the Survey, that the English language is the preferred language (lingua franca) for SPAs, is not surprising: **70.90**% of the share purchase agreements were in English. In particular, the English language was used in transactions with a cross-border element (see above I.7.) (57.67% of the transactions).

2 Purchase Price

a. Payment

In **84.16**% of the transactions the buyer received cash only. In **15.84%** of the transactions, there was also a non-cash consideration: for example shares in the target company were provided to the seller.

b. Price adjustment

A large number of transactions (46.58%) did not include any price adjustment mechanism. 28,57% of these transactions, were using a locked box mechanism[1].

The remaining number of transactions (53.42%) used a price adjustment clauses resulting in a price adjustment on the basis of the financial situation of the target company on the closing date. For this purpose closing accounts are established after completion of the transaction on the basis of a procedure, set out in detail in the SPA.

The Survey shows that in approximately 45% of the transactions the purchase price is paid in full on closing. It is less often that the parties decide to pay parts of the purchase price later (e.g. after the warranty period expired) or by way of earn out or vendor loan. Furthermore, only in about 22% of the transactions a escrow bank account, on which part of the purchase price is blocked temporarily was used. Escrow bank accounts are usually used as a security for potential claims of the buyer on the basis of warranties.

[1] A locked box mechanism means that the parties agree on a fixed equity price calculated using a historical balance sheet / historical financial accounts of the target prepared before the date of signing of the SPA. The price is usually determined as a debt and cash free price, minus historical debt, plus cash, and adjusted for the working capital surplus or shortfall at that same historical time. In addition, it is contractually agreed that there cannot be any cash flowing out of the company (the locked box) in the form of the payment of dividends or management fees. Thus, the economic risk and benefits of the business pass to the buyer as from the date of the locked box reference accounts.

Payment of the Purchase Price	Percentage of transactions (rounded)[2]
Deals with full payment on closing	44%
Deals with earn out	24%
Deals with retention by buyer	11%
Deals with escrow	22%
Deals with vendor loan	4%

c. Financing

A buyer is not always fully transparant on how the financing is secured. Therefore, the financing remains undisclosed in about 31% of the transactions. From the transactions where we received information on the financing, it appears that most transactions (38%), were financed by equity.

Financing of the transaction by buyer	Percentage of transactions (rounded)[3]
Equity	38%
Combination of equity and debt	25%
Bank debt	8%
Bonds	1%
Vendor loan	4%
Unkown	31%

3 Representations & Warranties / Specific Indemnities

a. Preliminary Remarks

(i) Representations & Warranties

Representations and warranties are the core of every SPA. In essence, they are statements about the business, assets or shares that are being purchased and the liabilities that are being acquired or assumed. Should the buyer later discover that a representation or warranty was not true, this could give rise to a claim for breach of contract entitling the buyer to damages.

[2] Sum of percentages exceed 100%, since some transactions might provide for a combination of payment mechanisms (e.g. earn out of a certain sum and retention of another certain sum).

[3] Sum of percentages exceed 100%, since some transactions might provide for a combination of certain financing means (e.g. equity and vendor loan).

Representations and warranties are often qualified in whole or in part by materiality, material adverse effect, and actual or deemed knowledge standards. Representations and warranties also may be limited to a certain set of information provided to a party, for example, to the documents provided in a data room, or to the documents set forth on the disclosure schedules to the transaction agreement.

While both the buyer and seller will make representations and warranties, the seller's representations will be more extensive and normally will cover the entire business being sold. Some sellers are successful in selling their assets "as is," in which case the representations and warranties will be more limited.

(ii) Specific Indemnities

In contrast to representations and warranties, indemnities are undertaken by the seller to reimburse losses of the buyer if specific events occur. While the representations and warranties are meant to protect the buyer from losses arising out of circumstances not known by either the seller or the buyer at the time of closing the deal, specific indemnities aim at addressing certain circumstances that the buyer has identified in its due diligence exercise. Generally, such known circumstances entail a substantial risk for the target company when they would materialise. However, when, if, how and at which cost this will happen remains uncertain. In such a case, the buyer may ask for a specific indemnity. Such indemnities are an undertaking by the seller that he or she will indemnify the buyer for any costs arising out of or as a result of certain specified circumstances.

The distinction between a warranty and an indemnity may be significant as the amount of damages recovered by a buyer under a warranty claim may differ from the amount of compensation which would have been recoverable by the buyer had the same matter been covered by an indemnity, as usually different limitations of liability will apply.

In our Survey, we have asked the NRs to analyse how widespread representations & warranties are and how they are structured. We also examined the use, nature and structure of specific indemnities.

b. Results

(i) Prevalence of Representations and Warranties in General

Not surprisingly, almost all reported deals were made by including a section on representations and warranties: The percentage of reported deals is 99.01%. Needless to say, representations and warranties are an essential and almost undeniable feature of SPAs.

(ii) Standardisation of Representations and Warranties

We were also interested to learn, whether the representations and warranties used in the reported deals are or seem to be very much in line with representations and warranties used in other deals, i.e. whether standard representations and warranties have been used or not.

Pursuant to the input received from our NRs, in **86.16**% of the deals the representation and warranties were considered standard. Obviously, a respective assessment by a NR may be highly subjective and a NR based in one jurisdiction may look at this question differently than a NR in another jurisdiction. However, the high percentage nonetheless shows at least a certain tendency that the content of repesentations and warranties is, or is perceived to be, largely standardised these days.

(iii) Repetition of Representations and Warranties on the Closing Date

Another question we examined relates to the question of wheher representations and warranties are repeated on the the date of closing (where the signing and closing do not occur on the same day). Our Survey shows that in **77.52**% of the reported transactions, representations and warranties were repeated on the closing. Looked at it from this perspective, one can argue that repetition of representations and warranties is very widespread throughout the AIJA jurisdictions.

(iv) Prevalence of Specific Indemnities

In contrast to representations and warranties, specific indemnities are not as widespread. Based on the results of our Survey, specific indemnities were included in 54.54% of the reported deals.

It is interesting to note that a combination of a tax indemnity (and tax warranties) have been included in 68.17% of the deals which contained specific indemnities. 26.71% of the reported deals contained only tax warranties (but no specific tax indemnity) and only 9.89% of the reported deals contained only a tax indemnity (but no tax warranties).

Based on the results one can argue that specific indemnities are a frequently used element in M&A transactions and where they are used, the contain in most cases a tax indemnity.

4 Limitation of Liability

Pursuant to the representations and warranties discussed hereabove, we examined whether or not certain limitations applied to the seller's indemnification obligations resulting from a breach of the representations and warranties, in particular time limitations and limitations of the amount of the indemnification obligation.

a. Limitations in time

The obligation to indemnify the buyer for breaches of representations and warranties is frequently limited in time. This limitation may be done generally, applying to breaches of all representations and warranties, and/or specifically, relating to specific representations and warranties.

The survey data illustrated that general limitations in time applied to a significant majority of the transactions (**82%**), for an average period of 24 months after closing.

Regarding specific limitations in time, we focused on limitations of liability relating to representations and warranties on the following subjects:

- Title to shares;
- Capacity;
- Accounts;
- Tax;
- Social security;
- Labour;
- Environment;
- Criminal matters.

Out of the aforementioned subjects, (i) title to shares, (ii) capacity and (iii) tax appear to be the ones which are most often subject to specific time limitations, with over 30 NRs stating that they have made use of such limitations in their reported deals.

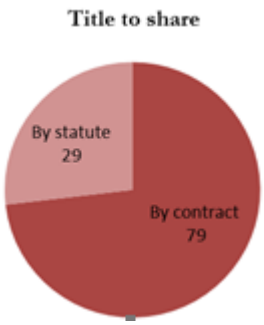
The longest time limitation applies to representations and warranties on title to shares and capacity, namely for an average of 57 months and 60 months after closing, respectively.

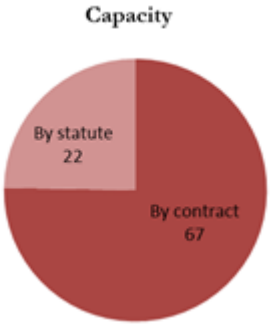
Matter	No. of NRs who applied specific time limitations (out of 35[4])	No. of deals with specific time limitation (out of a total of 164[5] deals)
Title to shares	30	108 (65.85%)
Capacity	30	89 (54.27%)
Accounts	17	49 (29.88%)
Tax	33	120 (73.17%)
Social Security	23	69 (42.07%)
Labour	17	44 (26.83%)
Environment	17	45 (27.44%)
Criminal matters	14	27 (16.46%)

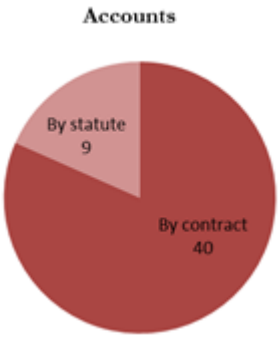
[4] Please note that only 35 out of 38 NRs included information on the matter.

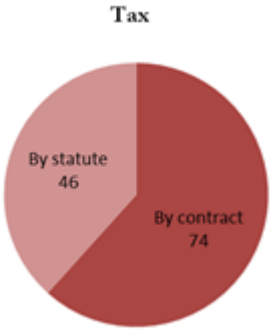
[5] Please note that 24 deals were disregarded as they did not include any details on the matters concerned.

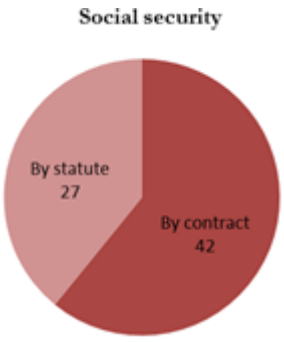
Specific limitations in time may be set forth by law (statute of limitations) or may be agreed upon between parties (contractual). Our Survey has shown that between 20-40% of these limitations of liability are provided through legal statutes of limitations, which means that most of the time limitations are contractual.

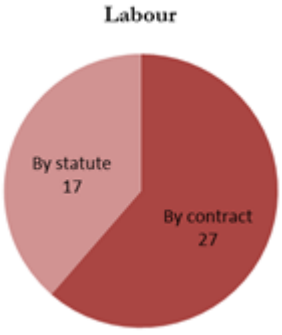


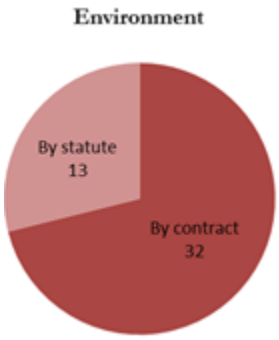


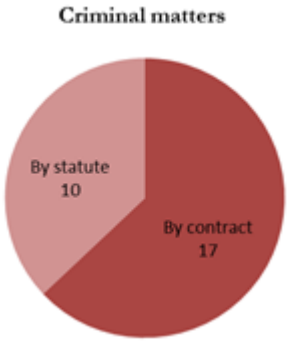












The average number of months of contractual time limitations for claims varies greatly per subject.

Subject	Average no. of months
Title to shares	57.57
Capacity	60.37
Accounts	27.62
Tax	41.66
Social security	30.71
Labor	24.27
Environment	41.67
Criminal matters	31.19

b. Limitations of the amount of the indemnification obligation

In addition to limitations in time which limit when the buyer may file damage claims, parties can also agree to limit the amount of the seller's indemnification obligation under the representations and warranties.

We looked into (i) the use of financial thresholds which must be met in order for the buyer to be able to file an admissible damage claim ("*de minimis* thresholds"), more specifically individual claim amounts and aggregate minimum claim amounts ("basket") and (ii) the maximum liability exposure of the seller ("cap").

(i) *De minimis* thresholds

Almost all NRs[6] stated using individual minimum claim and aggregate minimum claim thresholds in their reported deals.

Individual minimum claim thresholds

The NRs from China were unique in stating not to have used individual minimum claim thresholds in any of their reported deals, and the NRs from Uruguay stated the same with regard to aggregate minimum claim thresholds.

Individual minimum claim thresholds were found in **116** of the reported deals, whereas 119 of the reported deals included aggregate minimum claim thresholds.

As could be expected, the Survey shows that there is a significant difference in the amount of the individual minimum claim thresholds depending on the size of the deal. In general, it can be concluded that for deals with individual minimum claim thresholds, an average of minimum **0.30%** of the purchase price must be claimed in damages per individual damage claim. Given the vast majority of Category I deals, the total average percentage of the purchase price is relatively high.

	Total	Category I[7]	Category II[8]	Category III[9]
Average % of purchase price	0.30%	0.38%	0.14%	0.09%

Aggregate minimum claim thresholds

It can be concluded that an inverse correlation exists between the size of a deal and the aggregate minimum claim amount. However, this result was obtained by excluding one Category III deal from NRs in Sweden, as the aggregate minimum claim amount thereof (17%) was an extreme outlier which would have influenced the average percentage in such a way that it was no longer representative for the average related to other reported deals.

	Total	Category I	Category II	Category III
Average % of purchase price	1.68%	2.30%	0.87%	0.63%

De minimis thresholds may be set up as deductibles. Pure thresholds solely require that they are met in order for damage claim(s) to be paid in its/their entirety (as from EUR 1),

[6] 33 out of 34 NRs stated using some form of *de minimis* threshold. The numbers under section b. are based on a total of 163 deals, since 25 deals, from a total of 4 NRs, were disregarded as they did not include any details on the matter concerned.

[7] Category I deals are deals with a value between EUR 1 million and EUR 10 million.

[8] Category II deals are deals with a value between EUR 10 million and EUR 50 million.

[9] Category III deals are deals with a value above EUR 50 million.

whereas with deductibles, only the amount of the damage claim(s) in excess of said deductible is payable. Out of the deals containing *de minimis* thresholds, 16% were set up as deductibles.

(ii) Maximum liability ("cap")

All NRs with the exception of those from Uruguay reported using maximum liability limitations in their reported deals.

A total of **129** deals included such limitation of liability for an average of **47.68%** of the purchase price.

	Total	Category I	Category II	Category III
Average % of purchase price	47.68%	58.03%	44.31%	35.08%

Once again an inverse correlation can be seen, this time between the maximum percentage of the purchase price at stake for damages resulting from breach of representations and warranties, and the size of the deal.

c. Carve-outs

Carve-outs may be used to exclude certain specific indemnification obligations from (general) liability limitations, and are often used for essential matters in an agreement, such as tax, ownership rights and environment. Out of all 188 reported deals, **77** contained such carve-outs.

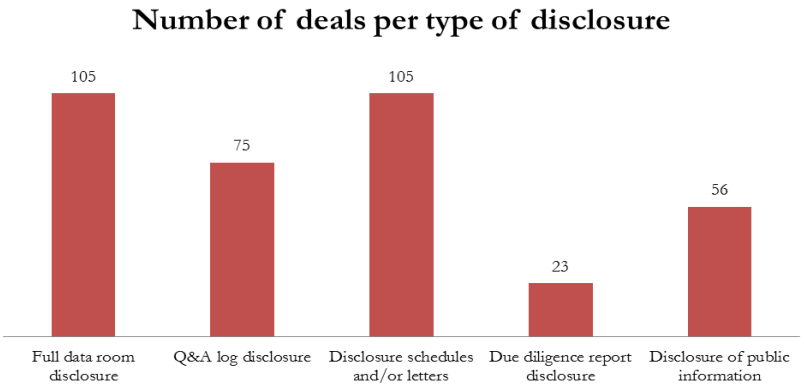
5 Disclosure

Disclosure allows for a different type of limitation of the seller's liability, in the sense that the buyer can in this case no longer claim damages for certain disclosed facts. The risk is then assumed by the buyer, since the parties adjusted the scope of the representations and warranties by agreeing that certain issues will not be covered by the seller's representations and warranties.

The Survey illustrated that disclosure can generally only be given against representations and warranties, not against specific indemnities. Only 15% of the reported deals did not allow any form of disclosure.

There are various ways in which disclosure may be given, including:

- Full data room disclosure;
- Q&A log disclosure;
- Disclosure schedules and/or letters;
- Due diligence report disclosure;
- Disclosure of public information.



A large majority of the reported deals made use of either full data room disclosure or

disclosure schedules and/or letters, and in total 94 deals allowed both types of aforementioned disclosure.

Due diligence report disclosure appears to be the least frequently allowed type of disclosure, with only 23 out of 126 deals making use thereof.

In certain cases an update of the given disclosures was allowed between signing and closing. Although 22 NRs confirmed that updates of disclosure were allowed before closing, they stated that such update was allowed in only an average of 39% of their reported deals.

V CONDITIONS PRECEDENT

1 General

We examined whether transactions were concluded and finalised immediately upon signing of an agreement, or whether they were subject to conditions precedent. This report focused on the presence of the following specific conditions precedent in agreements:

- Merger filings;
- Third-party consents;
- Certain funds clause;
- Bring-down of warranties;
- MAC clause;
- Seller's legal opinion;
- Retention of key employees.

Condition Precedent	No. of NRs who included the condition precedent	No. of deals which included the condition precedent
Merger filings	22	43 out of 188 (22.87%)
Third-party consents	31	71 out of 188 (37.77 %)
Certain funds clause	15	24 out of 188 (12.77%)
Bring-down of warranties	31	73 out of 188 (38.83%)
MAC clause	30	70 out of 188 (37.23%)
Seller's legal opinion	10	21 out of 188 (11.17%)
Retention of key employees	19	27 out of 188 (14.36%)

2 Merger Filings

Deals may be subject to prior clearance by the relevant competition/anti-trust authorities before they may be completed. Depending on the (seriousness of the) risk that the specific transaction may reduce competition, competition/anti-trust authorities may only clear the said transaction subject to certain conditions, or even prohibit it all together.

As could be expected, it was established that there is a positive correlation between the average value of deals and the likelihood of merger filing-related conditions precedent being present in an agreement.

The average deal value in deals containing such condition precedent is EUR 82.65 million.

Only Russia and Estonia reported including merger filing-related conditions precedent in agreements with deal values as low as EUR 1 million.

Out of the **22** NRs who confirmed using merger control conditions precedent, 12 were from Member States of the European Union.

3 Third-party Consents

Third-party consent is often required in agreements to which the target company is a party, including those with finance providers, suppliers, as well as customers. Parties often negotiate such condition precedent for agreements which are deemed important for the business going forward.

Common third-party consent conditions precedent include (i) banking consent, (ii) change of control clauses[10] and (iii) consent of the board of directors or other shareholders.

Third-party consent conditions precedent appear to be common practice in most reporting countries, regardless of the size of the deal.

The only NRs who stated not having included third-party consent in their reported deals were from Austria, Hungary, Panama, Russia, Spain and Uruguay.

4 Certain Funds Clause

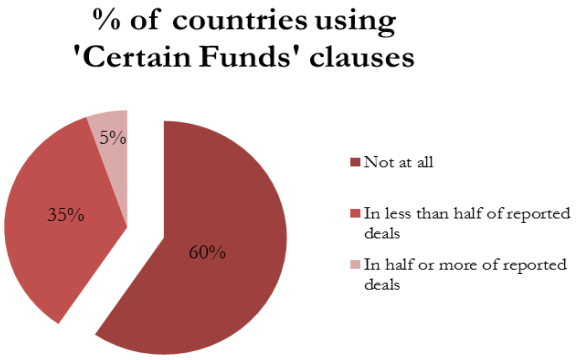
"Certain Funds" clauses are typically used by European private equity institutions to establish a certain degree of deal certainty, more specifically, to ensure that cash

[10] Change of control clauses provide enhanced protection to a party in an agreement if and when the controlling shareholder of the other party changes. Often, the protected party will have the right to terminate the agreement.

consideration (if any) can be offered in full, and that all reasonable measures have been taken in order to ensure other types of consideration.

The practice was derived from European credit agreements required to apply similar provisions set forth in the United Kingdom's City Code on Takeovers and Mergers[11].

Although around **40%** of the NRs which reported on the matter stated to have included "Certain Funds" clauses in their reported on deals, it was clear that only a small number of deals per NR actually included the clause.



Oddly enough, even though the practice originated in deals related to entities located in the United Kingdom, no deals were reported by NRs from the United Kingdom in which "Certain Funds" clauses were included.

5 Bring-down of Warranties

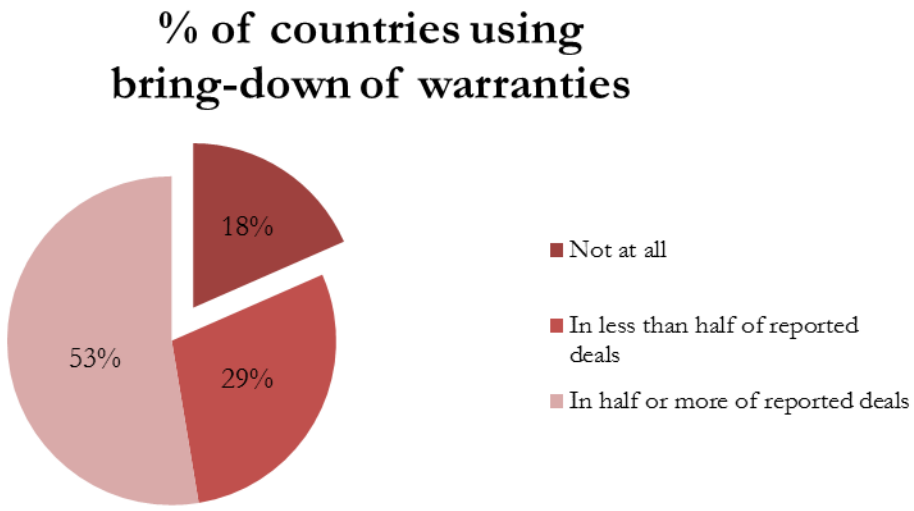
Warranties are made as of a particular moment in time. That moment in time can be the signing date of the contract, the closing date of the transaction or any other date provided for in the contract. Warranties that are deemed to be repeated on a later date are referred to as being brought down. The purpose of using such bring-down as a condition precedent is to provide the buyer with the right to not complete the transaction if the seller's representations and warranties are not accurate on either of those dates. It implies an extra incentive for the seller to make sure that the quality of the transferred business remains as it was at the signing date by leaving any deterioration for the risk and account of the seller.

Often, parties will negotiate a condition precedent which provides that the seller's representations and warranties are accurate both when made and at the date of closing of the deal.

[11] The City Code on Takeovers and Mergers mirrors the European Union's Takeover Directive 2004/25/EC to a large extent, and applies to takeovers of entities whose registered office is located in the United Kingdom and whose securities are traded on an exchange in the United Kingdom.

Bringing down warranties seems to be a rather established practice with most NRs which reported on the matter.

Out of the **31** NRs which confirmed using such condition precedent, 20 NRs stated having included some form of bring-down of warranties condition precedent in half or more of their reported deals.



6 Material Adverse Change ("MAC") Clause

MAC clauses provide that the buyer may refuse to complete the concerned deal if and when the target undergoes certain material changes, as specified in the agreement. Such clauses aim at protecting the buyer against material changes which adversely affect the target, therefore rendering the deal less attractive for said party.

In recent years, the material adverse changes which lie at the basis of MAC clauses have often been inspired by the global financial crisis, including discussions regarding possible exits by Greece ("Grexit") and Britain ("Brexit"), and the (negative) financial effects resulting therefrom.

MAC clauses seem to be common practice among a large majority of the NRs, with 30 out of 38 stating that they have made use of the clause in at least one reported deal. Those 30 NRs included the clause, on average, in about 43% of their reported deals.

Many NRs stated using defined MAC clauses as a condition precedent, as well as backdoor MAC clauses[12].

7 Seller's Legal Opinion

Legal opinions in M&A transactions state whether or not the author thereof believes that certain matters, documents or (parts of the) transaction(s) are valid and enforceable in specific jurisdictions, and are in accordance with the laws and regulations of said jurisdiction. Typically such legal opinions are issued with respect to the seller's and/or buyer's capacity to enter into the transaction.

Legal opinions emitted by the seller are rarely requested, as was confirmed by our Survey data. Only **10** NRs out of 38 stated using seller's legal opinions as a condition precedent, for only a mere total of 21 of their reported deals.

This result appears to be more than logical from a practical perspective as legal opinions can be rather costly.

8 Retention of Key Employees

Key employees are often retained in mergers and acquisitions in order to maintain or increase high levels of performance within the target company. In cases where the retention of talent is crucial, it is often negotiated that such retention forms a condition precedent to completion of the deal.

However, although retention of key employees may be vital for the success of a deal, only **19** NRs stated having included the retention of key employees in deals as a condition precedent. Within the 108 reported deals from the aforementioned NRs, an average of 25% contained a retention of key employees clause.

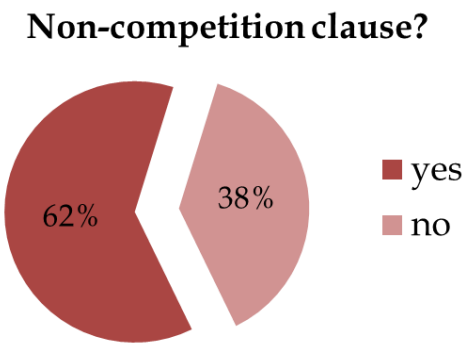
[12] The bring-down of the warranties is often used as a backdoor MAC, allowing a party to back out of a deal insofar as the representations and warranties which were made by the representing party are, or have become, inaccurate. Often the representing party will negotiate that such clause is subject to the materiality standard, namely that all representations and warranties which were made are accurate *in all material aspects*.

VI NON-COMPETITION / NON-SOLICITATION & RESTRICTIVE COVENANTS

1 Non-competition clauses

In respect of the acquisition of companies on the basis of a transfer of shares, it is necessary to include an explicit non-compete clause in order to protect the target company's business against competing activities of the seller after the closing.

61.90% of the purchase agreements contain a non-compete covenant, which restrict the seller's business activities after closing.



The duration of the non-compete clause is in practice most of the times between two and three years. In some countries (Belgium, Canada, Cyprus, Germany, Hungary, India, Norway, Panama, Poland, Sweden, Switzerland, U.K.), a duration of up to four and five years was reported and in two exceptional transactions (one in Germany and one in Panama) the duration was even 10 years as from Closing. The average duration of the non-competition clauses reported was 35.92 months, i.e. approximately three years.

In practice, it is very difficult to actually state and prove a damage, which the buyer incurred, in the event of any potential seller's breach. In order to increase the efficiency, it is in the buyer's best interest to provide for liquidated damages in the event of a breach. Such clauses allow the buyer to claim payment of a lump sum in the event of a breach. **28.41 %** of the purchase agreements contained such liquidated damage clauses.

2 Non-Solicitation clauses

53.38% of the purchase agreements contained non-solicitation clauses, which prohibit the seller to hire away employees and / or business partners of the target company during a specific period after closing.

3 Further Restrictive Covenants

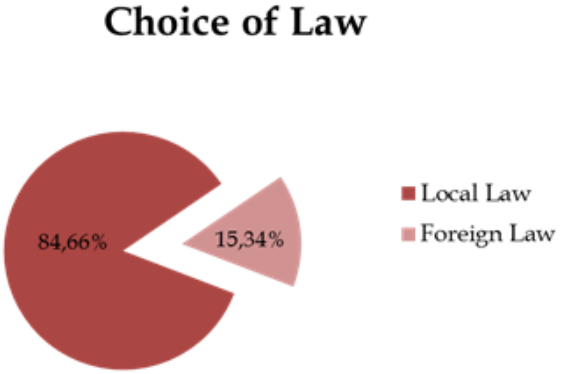
There are numerous additional restrictive covenants, which the parties may add in order to protect the implementation of the transactions. We have examined the following clauses:

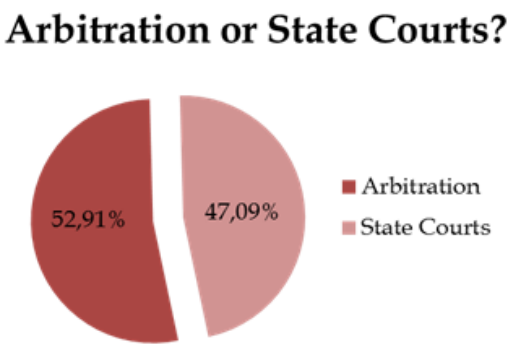
- 14.19 % of the purchase agreements contained clauses, which restrict the parties from taking any action that negatively impacts an organization, its reputation, products, services, management or employees after Closing (Non-disparagement clause).

- 2.39% of the purchase agreements contained clauses, which require the purchase price to be recalculated and subject to an upwards adjustment in the event that the buyer sells on, at a higher price, the sale shares (or other assets) within a specified period following completion of the original transaction (on-sale or non-embarrassment clause).

VII GOVERNING LAW & JURISDICTION

Given the fact that a majority of the transaction has a cross-border element (please see above I.7.), it very interesting to analyze the clauses regarding the choice of law and the place of jurisdiction. While a foreign law was only chosen in **15.34%** of the transactions and a foreign forum (i.e. state courts of a foreign country) was only chosen in **4.76%** of the transactions, the majority of the purchase agreements (**52.91%** of the transactions) provided for an arbitration clause. Arbitration clauses are chosen for a variety of reasons: The parties might be of the opinion that M&A litigation should rather be decided by arbitrators, who are chosen by the parties, in order to ensure that they have a broad commercial expertise with regard to M&A, which judges of state courts most of the times cannot have. The parties of the M&A transaction might prefer that the arbitration is confidential in contrast to the proceedings of state courts. Furthermore, arbitration can also be a good compromise when one of the parties is not located in the respective country.





The Survey revealed that in the Scandinavian countries (Denmark, Norway, Sweden and Finland) as well as in Estonia, Russia and India 100% of the transactions reported chose arbitration. It will be interesting to discuss the reasons of such choice with the NRs of these countries.

VII FINAL REMARK

The Survey and the feedback from the AIJA members very clearly show that AIJA members are highly specialized on M&A. Furthermore, we have learnt that AIJA members are advising on a very large number of transactions every year and these transactions very often have a cross-border element. There is a great potential for cooperation between AIJA members when it comes to such cross-border transactions. It would be very interesting to repeat this Survey in some years in order to see how the M&A market of the AIJA members develops.