

AIJA Deal Points Survey - Market Standards for Share Deals (M&A Commission)

Munich 2016 - Executive Summary of Brazil

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Introductory remarks for National Reporters (NRs)

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 doing an 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.

The AIJA Deal Points Survey will be conducted on the basis of the following documents:

- **Questionnaires** in the form as attached hereto as Exhibit 1 to be filled out on a case-by-case basis, i.e. one questionnaire each for each transaction covered;
- **Executive Summaries** in the form as set out hereinafter, with the goal of summarizing the findings from the various questionnaires; and
- **General Report** (to be drafted by the General Reporters) on the basis of the Executive Summaries received from the NRs.

The Questionnaires and the Executive Summaries are to be drafted by all interested NRs, i.e. each NR should fill out Questionnaires and provide an Executive Summary in respect of the information she or he put together in the Questionnaires. It may well be the case (and even desired) that there are several NRs in one and the same jurisdiction where each of them is expected to fill out Questionnaires and an Executive Summary (independently from each other or, if they want, in cooperation with each other). Thus, we are looking to receive numerous Executive Summaries and Questionnaires from NRs even if they are in the same AIJA jurisdiction.

The Questionnaires attached hereto are straight-forward and can be answered within reasonable time. Obviously, the more Questionnaires are filled out, the better the sample for the Executive Summaries will be. However, in order to adopt a reasonable and time-efficient approach, we would expect that each NR covers 3 to 5 transactions, i.e. fills out 3 to 5 Questionnaires and drafts 1 Executive Summary covering the respective Questionnaires, unless NRs team-up and provide an Executive Summary in respect of many more Questionnaires. We leave it up to the NRs whether they want to join efforts or not. NRs with highest number of transactions will win a prize!

The transactions to be covered by the NRs should meet the following criteria:

- Private share deals only (not asset deals)
- Survey is not restricted to certain industries
- Deal value at least EUR 1m
- Closings taken place after 1 January 2014

Please note that the Executive Summaries do not necessitate full sentences everywhere. NRs can e.g. simply insert a number where we ask about the number of transactions which fall into a certain category, or they can provide comments/findings in the form of bullet points.

To sum up, each NR is kindly requested to provide us with a completed Executive Summary together with all copies of the completed Questionnaires (including annexes thereto).

Deadline for submission: 15 January 2016.

1. General Statement

The majority of the deals reported involved the sale of a family business and/or a private equity fund.

One of the deals involved Brazil, France, United States, Mexico and Argentina and had the Brazilian counsel as the leader and coordinator of such transaction. The Brazilian law firm referred two different law firms that are AIJA members to handle this deal in Argentina and Mexico.

2. Summary of Transaction Details

This Executive Summary contemplates related to 11 share deals. The minimum value of the submitted deals was of EUR 3,000,000.00 and the maximum was of EUR 130,000,000.00. The maximum percentage of shares acquired was 100%, the minimum was 87%. The majority of deals reflected herein involved the purchase of the totality of shares.

Industries of reported deals varied, as listed below:

- Industrial / Manufacturing
- Heavy industry / Robotics
- IT / Manufacturing
- Consumer goods / Manufacturing
- Food / Retail
- Certification of electrical and electronic equipment
- Shipping
- Education
- Banking

Brazil was the Buyer's country of origin in 5 of the deals. The Buyers' country of origin was the United States of America in 4 of the deals. One of the Buyers is established in the UK. The remaining Buyer had business in 4 different countries, including Brazil.

As per the Target Companies' origin, 9 have a Brazilian origin, while 1 is from the USA and the last one involved 4 different jurisdictions.

More than half the Targets have more than 200 employees.

9 of the deals did not have a competitive auction organized, while the remaining 2 had a competitive auction.

All of the transactions reported were share deals.

3. Letters of Intent

Only one transaction did not have a letter of intent executed by the parties. 9 of the LOIs granted the prospective Buyer exclusivity on the deal, 7 of which had an exclusivity period longer than 1 month.

The majority of the LOIs had a binding character, solely related to certain clauses, such as: confidentiality, exclusivity, governing law and jurisdiction.

4. Due Diligence

Vendor due diligence was performed in 3 of the transactions. In 2 of them the report was made available to the Buyer.

All transactions had data rooms, 3 of which were physical and 8 were virtual. They were managed by the Seller in 7 of the cases. Lawyers organized 4 of the data rooms, being 2 of them jointly with Sellers. The other data rooms were organized by specialized companies. All of the transactions had a formalized Q&A procedure. 10 deals had a right to copy granted to the parties.

5. Purchase Agreement

- Transaction

8 of the transactions had simultaneous signing and closing.

6 purchase agreements were drafted in the English language and the others were drafted in Portuguese.

- Purchase Price

100% of the purchase prices were fully paid in cash. Except for 3 transactions, all the others had price adjustments.

In regards to the payment of the purchase price, 3 deals had the full payment on closing. The majority of the deals reported had payment in installments, some with retention and some with escrow accounts. 1 of them had the payment in installments (post-closing) conditioned to a payout event.

3 transactions involved financing.

- MAC clause

9 deals had a MAC clause with definition. Most of the MAC clauses were a “back-door MAC” and 3 of them established a threshold.

- Reps & Warranties

All the deals had an extensive list of reps and warranties, except for 1 that had a limited list. 3 transactions had specific indemnifications for specific liabilities (tax, labor and regulatory). The majority of the deals had tax warranties and indemnities.

- Limitation of Liability

The deals had an average limitation of liability in time of 60 months. The majority of the deals did not stipulate specific limitations, except for certain deals where there were specific limitations for tax, labor, criminal and environment, or observed the legal statute of limitations.

The deals that had individual minimum claim amounts had an average of EUR 9,000. The average aggregate minimum claim of the deals that had such provision was of EUR 180,000.

5 deals had maximum liability cap, which varied from 20% to 100% of the purchase price. The majority of the deals did not establish carve outs for specific indemnifications.

- Disclosures

3 of the deals had a disclosure obligation in relation to specific warranties only, and 6 of them had a disclosure obligation in relation to warranties and indemnities. 7 of the deals had full data room disclosure, and all of those deals had a Q&A log disclosed. All of the deals had disclosure letters and schedules but only 1 deal had the due diligence report disclosed. 4 deals had public information disclosed. Finally, 4 deals had a disclosure update between signing and closing.

6. Conditions Precedent

Only 3 of the analyzed deals required a merger filing. One of the filings was done in both Brazil and Argentina. 8 of the deals did not require third party consent. None of the deals had the obtainment of funds as a condition precedent. When it comes to the bring-down of warranties, 7 of the deals had it as a CP. In relation to a MAC clause as CP, 7 of the deals had it. None of the deals required a legal opinion from the sellers' counsel. Only one of the deals had the retention of key employees as a CP.

7. Non-Competition/Non-Solicitation/Restrictive Covenants

9 of the deals had no-compete clauses, the duration of which was either 36 or 60 months. Also, 9 of the deals had non-solicitation covenants, which duration was either 36 or 60 months. 4 of the deals had non-disparagement covenants. None of the deals had a non-embarrassment covenant. 3 deals had a blue pencil clause.

8. Governing law & Jurisdiction

All the deals had the Brazilian laws as their governing law. All of the deals had an arbitration clause, with 3 arbitrators, and 6 of them chose English language. 4 of the transactions have chosen the jurisdiction of the courts of the city of São Paulo, SP, but solely for provisional and urgent measures. 7 of the deals required a prior mediation before starting the arbitration proceeding. None of the parties of the deals reported initiated formal litigation procedures.

9. General Information

5 of the deals were cross-border transactions. None of the deals had referrals made by other AIJA members.

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