



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

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

**Munich 2016**

### **Executive Summary of India**

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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

- Out of the three deals, the most significant was the transaction in the leisure industry. At present, there is a lot of consolidation taking place in this industry especially in relation to investments in multiplexes. The transaction is also significant as a filing was required to be made before the Competition Commission of India.

## 2. Summary of Transaction Details

- Number of deals reported: 3
- Maximum, minimum and median deal value of deals reported
  - i. Maximum deal value: EUR 244,520,548
  - ii. Minimum deal value: EUR 11,505,481
  - iii. Median deal value: EUR 97,260,274
- Maximum, minimum and median percentage of shares acquired in deals reported
  - i. Maximum percentage of shares acquired: 100%
  - ii. Minimum percentage of shares acquired: 49%
- General information on relevant industries of reported deals

Two transactions were in the leisure industry. One of the transaction also involved transfer of real estate. The other transaction was in the energy sector.
- General information on Buyers' and Targets' countries of origin

100% of the target companies were Indian. Two buyer companies were Indian and one was based in Singapore.
- Percentage of deals with targets below/above 200 employees

in two out of three transactions, the target company had lesser than 200 employees.
- Percentage of deals with/without auction

100% of the deals were without an auction.
- General information on the nature of the transactions

Two transactions were 100% acquisition of shares whereas one transaction was a joint venture with 49% investment.

## 3. Letters of Intent

Out of three, in two transactions LoIs were not signed. A LoI was signed in one transaction wherein exclusivity was awarded. This exclusivity was for a period of more than one month. This exclusivity had a binding character.

## 4. Due Diligence

- Percentage of transactions with/without vendor due diligence  
In one transaction a vendor due diligence was performed whereas in two transactions vendor due diligence was not performed.
- Where a vendor due diligence was performed, percentage of cases where the report was/was not disclosed to the Buyer.  
In the case where vendor due diligence was performed, the report was disclosed to the buyer.
- Percentage of transactions with/without data room.  
100% transactions with data room.
- Percentage of transactions with virtual data rooms vs. percentage with physical data rooms
- 100% virtual data room.
- Information on who managed/organized the data room  
Seller managed the data room.
- Information on whether formalized Q&A procedure was followed and whether right to print/copy was granted  
Formalised Q&A procedure was followed and right to print/ make copies was granted.

## 5. Purchase Agreement

- Transaction
  - o Percentage of transactions with simultaneous closings vs. non-simultaneous closings  
Only one out of three transactions had simultaneous signing and closing.
  - o Information on languages of purchase agreements  
All agreements were in English language.
- Purchase Price
  - o Information on forms of consideration  
In 100% of the transactions the form of consideration was cash.

- Information on purchase price determination (percentage of deals without price adjustments, including information on use of locked-box, vs. percentage of deals with closing accounts)

Two transactions were determined with price adjustment and one transaction without price adjustment.

- Information on payment mechanics (full payment vs. instalments with earn outs, retention by buyer etc.)

In one transaction, the full payment was made on closing. In the other transaction, the payment of Purchase Price included refinancing of existing debt in the target company and repayment of promoter debt. The last transaction involved payment of the Purchase price by a combination of cash payout and takeover of debt.

- Information on financing, i.e. use of equity vs. debt (bank, bonds, vendor loans)

In two transactions, financing was by combination of debt and equity and the other transaction was solely by equity.

- MAC clause

- Percentage of deals with/without MAC clause

100% of the transaction documents included a MAC clause.

- Where used, information on MAC clause form, definition and materiality threshold

100% of the MAC clause had the form of a condition precedent (right to walk away). Two of those transactions defined the MAC clause. None of the transactions had a materiality threshold.

- Reps & Warranties

- Percentage of deals with/without reps&warranties

100% of the transactions had representations and warranties.

- Percentage of deals with/without standard reps&warranties

100% of the transactions had standard representation and warranties.

- Information on length and on repetition of reps&warranties as per closing

The length of the representation and warranties in 100% of the transactions was extensive. In all transactions, the representations were repeated on closing.

- Percentage of deals with/without specific indemnifications and nature thereof

Two transactions did not have specific indemnifications. In one transaction there were specific indemnifications such as stamp duty and registration costs on real property agreements.

- Information on tax warranties vs. tax indemnities

100% of the transactions involved both tax indemnities and tax warranties.

- Limitation of liability

- Information on time limitations in general (percentage of months)

Out of three transactions, two transactions provided for limitation of liability on time. One transaction provided for limitation of 24 months whereas the other transaction provided for a limitation of 36 months.

- Information on specific time limitations (number of months) such as title to shares, capacity, accounts etc.

i. In one transaction, there was no time limitation in relation to title to shares. The liability was indefinitely. The limitation in time in relation to capacity was 36 months; in relation to accounts was 20 months; in relation to taxes was based on the legal statute of limitations; in relation to environment was 36 months; in relation to criminal was 36 months and in relation to property was 60 months.

ii. In the other transaction, limitation in relation to accounts was 24 months; in relation to tax was based on the legal statute of limitations; in relation to social security was 24 months; in relation to labour was 24 months; in relation to environment and criminal was 24 months.

- Information on individual minimum claim amounts (amount in EUR vs. percentage of purchase price) and the use of deductibles

- Individual minimum claim amount was EUR 68,474 in one transaction and EUR 13,699 in the other transaction.

- Information on liability caps (amount in EUR vs. percentage of purchase price)

Maximum liability cap was included in one transaction which was 100% of the purchase price.

- Information on carve-outs

Only one transaction had specific indemnity carve outs. The carve out was in relation to indirect, notional or consequential losses, such as loss of profit, business, opportunity, goodwill, etc.

- Disclosures

- Percentage of deals with/without disclosures and information on percentage of deals with disclosures against warranties only vs. warranties and specific indemnities

One transaction included disclosures against warranties and specific indemnities. The other transaction included disclosures against warranties. The third transaction did not provide for disclosures.

- Percentage of deals with/without
  - full data room disclosure  
no disclosure: 100%
  - Q&A log  
Disclosed: 50%
  - Disclosure letters/schedules  
100%
  - Disclosure of due diligence report  
Not disclosed: 100%
  - Public information disclosed  
Not disclosed: 100%
  - Update between signing/closing  
Updated between signing and closing: 100%

## 6. Conditions Precedent

- Percentage of deals with/without merger filings as CP and information on percentage of jurisdictions  
Merger filing was required in only one out of three transactions.
- Percentage of deals with/without third party consents as CP  
Third party consents were required in only one transaction.
- Percentage of deals with/without certain funds clause as CP  
Only one transaction required the buyer to obtain bank financing.
- Percentage of deals with/without the bring-down of warranties as CP  
With bring down of warranties: 100%
- Percentage of deals with/without MAC clause as CP  
With MAC clause as CP: 100%
- Percentage of deals with/without seller's legal opinions as CP



Without seller's counsels legal opinion as CP: 100%

- Percentage of deals with/without retention of key employees as CP  
Only one transaction required retention of key employees as CP.

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

- Percentage of deals with/without non-compete clauses and information on duration and the use of liquidated damages clauses  
Only one transaction provided for non-compete clause for a period of 60 months but did not provide for damages.
- Percentage of deals with/without non-solicit clauses and information on duration and the use of liquidated damages clauses  
Two transaction provided for non-solicitation clauses. Only one of those transactions provided for a duration of up to 36 months but none of the transactions provided for any liquidated damages.
- Percentage of deals with/without non-disparagement covenants  
Only one transaction provided for a non-disparagement clause.
- Percentage of deals with/without non-embarrassment covenants  
No transaction provided for a non-embarrassment covenant.
- Percentage of deals with/without blue pencil clauses  
None of the transactions provided for a blue pencil clause.

## **8. Governing law & Jurisdiction**

- Percentage of deals with/without choice of law clauses and information on jurisdictions chosen  
All three transactions provided for the choice of law to be Indian laws.
- Percentage of deals with/without jurisdiction clauses  
Only one transaction provided for a jurisdiction clause.
- Information on jurisdictions chosen  
The jurisdiction of the courts at Delhi was chosen between the parties.
- Information on arbitration clauses (applicable rules, number of arbitrators, language)

- i. Arbitration by rules of the Singapore International Arbitration Centre. The number of arbitrators was required to be three and the arbitration is required to be conducted in English language.
  - ii. The other two transactions provided for arbitration to be held in accordance with the Arbitration & Conciliation Act, 1996 in India by appointment of three arbitrators in the English language.
- Percentage of deals with/without prior mediation obligation  
Only one transaction provided for mandatory preliminary mediation effort.
- Percentage of deals with/without initiation of formal litigation procedures and information on the grounds (purchase price, reps&warranties or indemnities, other aspects)]  
Without initiation of formal litigation procedures: 100%

## 9. General Information

- Percentage of deals with/without cross-border element  
Only one transaction was a cross border transaction.
- Names of involved law firms  
The other law firms involved were Nishith Desai Associates – India and M.T. Miskita 7Co., Advocates & Solicitors – India.
- Information on whether referrals were made by other AIJA members  
None of the referrals were made by AIJA members.

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