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

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Executive Summary of United Kingdom

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1. General Statement

Warranty and indemnity insurance is becoming an increasingly popular option. It has become the norm where the seller is a private equity (or similar) fund as the seller has to have a clean exit with no recourse from the buyer to the sale proceeds. However, we are also seeing other types of buyer favour warranty and indemnity insurance, as it potentially allows them to offer better terms to the seller. Premiums have come down and are in the range of 0.9% to 1.5% of the deal value, with an excess of usually 1% of the deal value.

Earn outs are becoming less common due to the complexities involved and the difficulty of hitting earn-out targets. Such targets are normally linked to profitability which may drop due to factors outside the seller's control or be difficult to measure where the target's business has merged with the buyer's existing business.

We are seeing an increasing number of real estate transactions structured as corporate acquisitions, due to the saving of stamp duty (4% compared to 0.5% in respect of a share acquisition).

2. Summary of Transaction Details

- 4 deals reported
- Deal value range: £82m to £250m. Median deal value: £138m
- Each deal acquired 100% of the issued share capital of the target
- The deals related to the real estate and tech sectors
- The buyers were from USA, Holland and UK. The targets were from Holland and UK
- All of the deals involved targets with less than 200 employees
- None of the deals had an auction process
- 3 of the deals were acquisitions involving a single corporate seller. 1 deal involved over 100 individual shareholders, structured as a private M&A transaction

3. Letters of Intent

- 75% of the deals had a signed LoI
- 2 out of 3 contained an exclusivity clause, with each period being less than 1 month
- Only exclusivity, confidentiality and governing law clauses were binding

4. Due Diligence

- 25% of the deals had vendor due diligence

- Each vendor due diligence report was made available to the buyer
- All of the deals had a virtual data room
- 75% of the deals used the seller's lawyers to manage the data room. 25% of the deals used the seller's investment bank.
- 75% of the deals had a formal Q&A procedure and all of them had the right to print/copy

5. Purchase Agreement

- Transaction
    - 50% of the deals had simultaneous exchange and completion and 50% of the deals had split exchange and completion
    - All of the agreements were written in English
- Purchase Price
    - The consideration was cash only for each deal, subject to a price adjustment based on completion accounts prepared post-completion
    - 25% had full payment on closing; 50% had payment in installments with a portion held in escrow; and 25% had payment in installments with a mix of an earn out and retention by the buyer
    - 25% of the deals were funded by equity; 25% were funded by debt and equity and the financing of the remaining 50% was unknown
- MAC clause
    - 50% of the deals had a MAC clause, which formed a condition precedent. The MAC clause was defined in each case, and 1 of the definitions set out a materiality threshold (2.5% of the deal value)
- Reps & Warranties
    - All deals had extensive reps & warranties, which were in standard form
    - Where the deal had split exchange and completion, the reps & warranties were repeated on closing. The seller was allowed to make disclosures in each case
    - 50% of the deals had specific indemnities (which were the deals that had split exchange and completion) other than relating to tax. The indemnities related to claims in respect of specific agreements, an employee bonus scheme and failure to acquire shares through the drag along provisions in the target's articles
    - All of the deals had tax warranties and tax indemnities
- Limitation of liability

- 50% of the deals had a limitation period on general warranties of 12 months; 25% had 18 months and 25% had 24 months
- 25% of the deals had a limitation period on tax warranties of 6 years; and 25% had a limitation of 7 years in respect of tax warranties
- 25% of the deals had a limitation period of 6 years for title and capacity warranties
- 75% of the deals involved warranty and indemnity insurance
- 25% of the deals did not have a minimum individual claim amount; the remaining 75% of the deals had minimum individual claim thresholds of £50,000 (0.03% of the deal value), £15,000 (0.02%) and £10,000 (0.004%)
- 25% of the deals did not have a minimum aggregate claim amount; the remaining 75% of the deals had minimum aggregate claim thresholds of £500,000 (0.3% of the deal value), £60,000 (0.8%) and £500,000 (0.2%)
- 75% of the deals had a maximum liability cap of £1 (these were the warranty and insurance backed deals). 25% of the deals had a liability cap of £19m (representing 23% of the deal value)
- 25% of the deals had a carve out for all indemnity claims

- Disclosures
  - All of the deals had disclosures against the warranties only
  - 75% of the deals had full disclosure of the data room, and allowed public information to be disclosed
  - 50% of the deals had disclosure of the Q&A log
  - All of the deals had disclosure of the disclosure schedule and letter
  - Where the deal had a vendor due diligence report, this was deemed to be disclosed.
  - Where the deal had split exchange and completion, disclosures were allowed between signing and closing

6. Conditions Precedent

- None of the deals required merger filings or were subject to certain funds as a CP
- 25% of the deals required third party consents and the bring-down of warranties as a CP
- 50% of the deals had a MAC clause as a CP
- 50% of the deals had a seller's legal opinion as a CP, covering corporate status and capacity

- 25% of the deals had retention of key employees as a CP

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

- 75% of the deals did not have a non-competition, non-solicitation or non-disparagement clause.
- 25% of the deals had a non-competition and non-solicitation clause for a 36 month period., a Blue Pencil clause but no liquidated damages clause
- 25% of the deals had a non-disparagement clause
- All of the deals did not have a non-embarrassment clause

8. Governing law & Jurisdiction

- All of the deals were governed by English law and were subject to the English courts
- None of the deals had an arbitration clause
- None of the deals have initiated formal litigation procedures

9. General Information

- 75% of the deals had a cross-border element
- The deals involved the following firms: (i) Nabarro LLP, (ii) King Wood & Mallesons, (iii) Reynolds Porter Chamberlain, (iv) Baker, Donelson, Bearman, Caldwell & Berkowitz, (v) Loyens & Loeff, (vi) CMS Cameron McKenna (vii) CMS Derks Star Busmann, (viii) Jones Day, (ix) Houtoff Baruma and (x) Mourant Ozannes

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