

2019

Global M&A Intelligence Report



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Introduction



Welcome to the 2019 DLA Piper M&A Intelligence Report. Last year saw a mixed market for M&A deals; the first for almost a decade to show an overall decline in deal volume. Political instability, concerns over trade wars and a more interventionist approach to M&A by governments and regulators all took their toll on the market. In many ways the most surprising thing is that the market held up so well overall. DLA Piper retained its ranking as number one for global deal volume for the ninth successive year, giving us the best visibility of

any law firm on deal terms and a rich source of data to analyse for this year's report. We have now analysed over 2,000 private M&A deals undertaken since 2015, over 500 of which closed in 2018. Our report draws data from M&A deals globally, allowing us to analyse global, regional and country trends. It also leverages off our position as number one advisor for European buy-outs last year and our third-place ranking globally, which gives us unparalleled insight to the approach that private equity takes compared to trade.

Overall, the data shows what in most cases looks like a strong M&A market. There may have been a little less M&A activity overall, but competition for good assets has remained strong and that has continued to drive a strong seller market. The legal terms under which deals get done show that sellers overall still get a good deal and are able to push deal terms in favour of sellers, particularly using auctions. The data shows some signs of a weakening market and market nervousness, but these concerns remain at the margins.

M&A insurance continues to grow globally, both in terms of the risks that can be covered and the sectors and jurisdictions that underwriters will consider. Costs seem to be stable, with core premiums showing a small decrease but purchasers are increasingly looking for policy bolt-ons, which increase the scope of cover at additional cost. The use of insurance has become common across the market, with all buyer and seller types willing to consider its use. Sellers have been successful in using both a competitive M&A market and a competitive underwriting market to push more risk onto insurers and purchasers, leaving themselves with lower residual risk.

As ever, the statistics come with the warning that there is no such thing as a typical or average deal, but it is always good to know the parameters – **this report allows you to do just that and we hope you enjoy it.**



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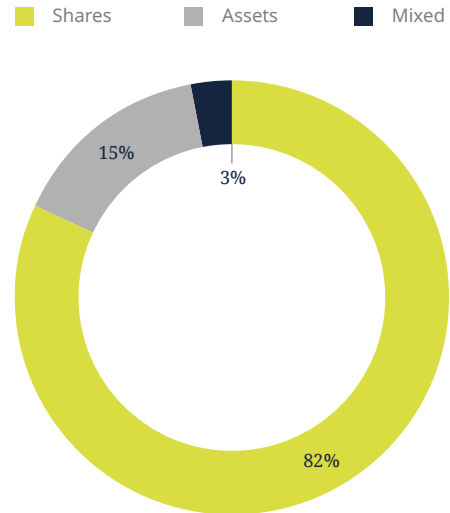
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2. Deal type, process and who wins the auction game?

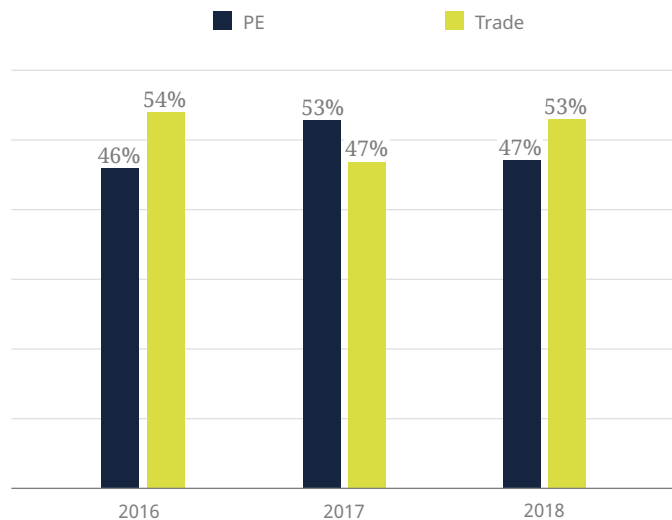
In all regions, share deals remain predominant. In many jurisdictions share deals are more favourable from a tax perspective, so pre-sale reorganisations packaging up assets into newcos for sale are common.



Deal types

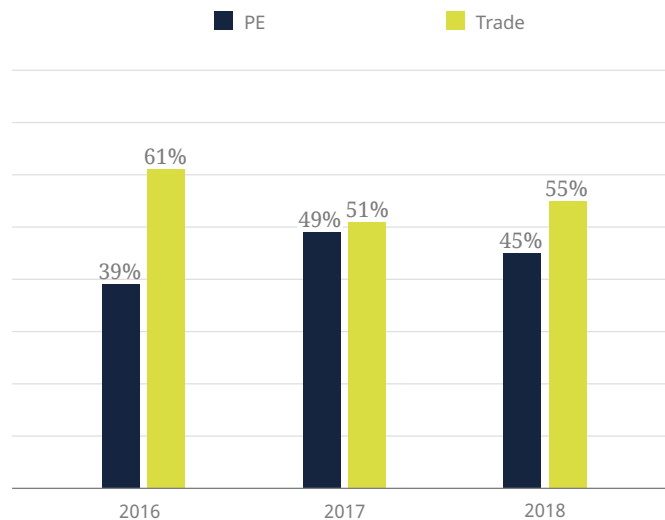


PE v trade sellers: deals > EUR50m



2018 saw a swing towards trade as a buyer class globally. We have seen trade increasingly willing to transact deals on private equity terms utilising locked box structures with buy-side insurance and very limited seller recourse, which may partially explain the swing, but

PE v trade buyers: deals > EUR50m

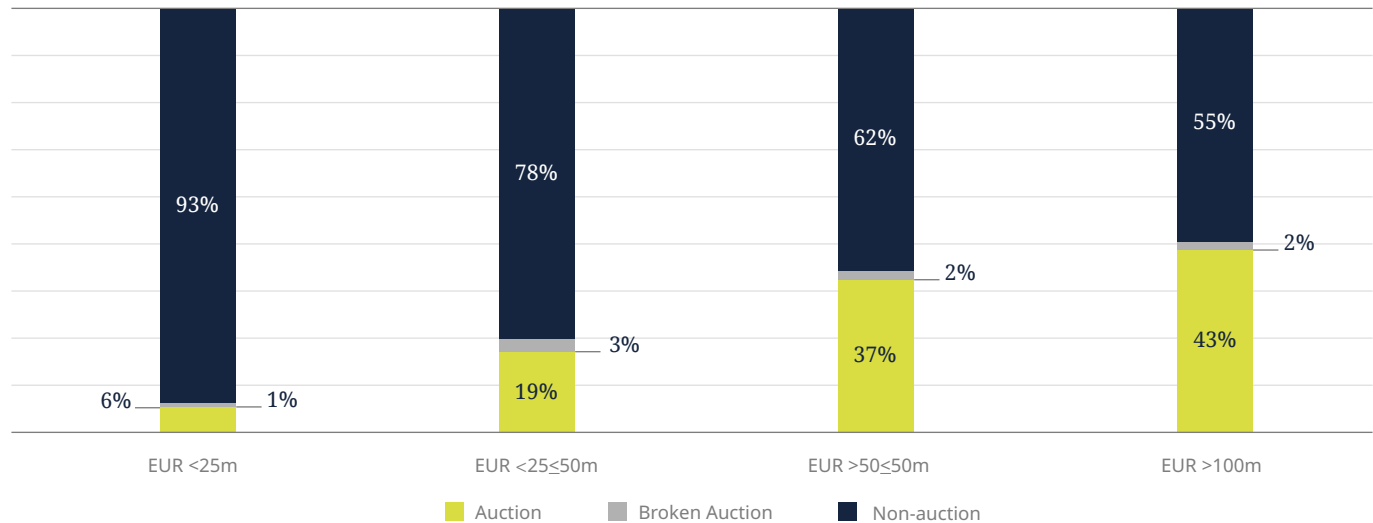


the results are also significantly impacted by trade (especially US and China) buying heavily into Europe – especially the Nordic region. It may also be the case that some private equity activity is overshadowed by caution over Brexit, US/China trade and other global factors.

Overall, we saw a reduction in the use of an auction process in 2018 across all deal sizes. This is perhaps one of the factors which we think demonstrates a slightly softer market than in 2017. However, an auction remains a common feature of mid-large deals (with approximately 40% of EUR50-100 million deals and 45% of deals over EUR100 million opting for an auction process).

The types of sellers opting for auctions remained constant. Private equity sellers continued to opt for an auction in more of their exits (around 40% compared to around 15% of trade and individual sellers), aiming to maximise sale proceeds and achieve the cleanest possible exit (often with the use of insurance).

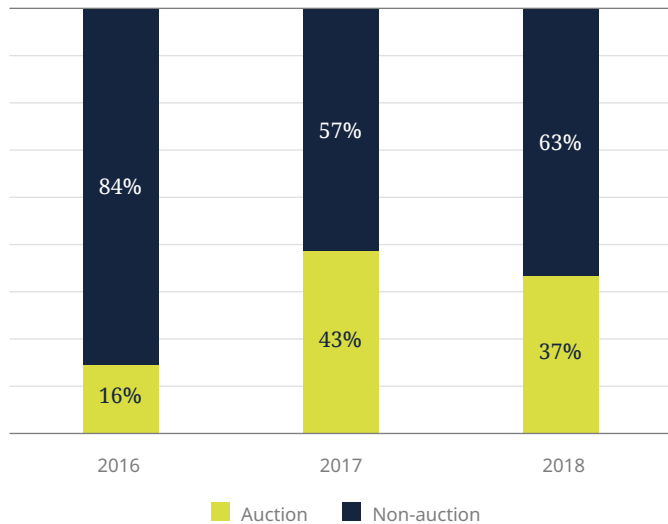
Global: Deal process by deal value (%)



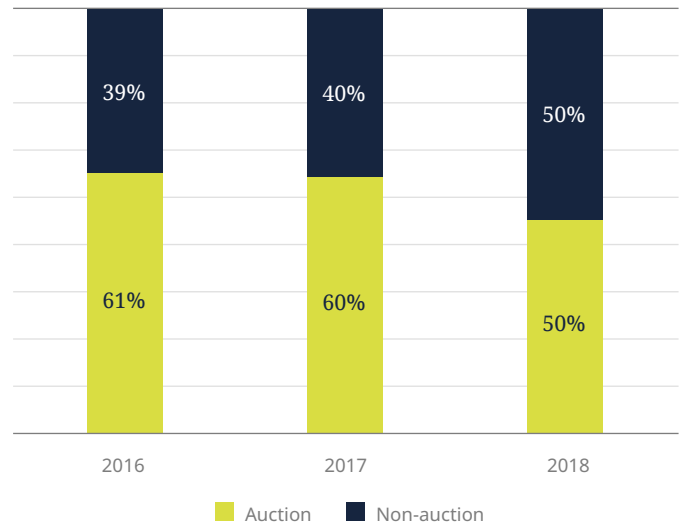
We have seen a slight increase in the success of private equity bidders in auction processes. However, there has been a marked change in approach from trade buyers, who have realised that in order to compete with private equity, they need to be willing to be flexible on deal terms.

Choice of whether to sell by auction or bilateral has remained consistent, with a slight decrease in the use of auctions overall. This is the first time we have seen an overall decline year on year.

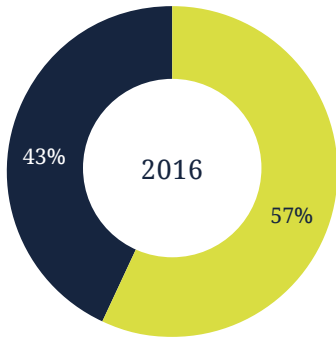
Trade sellers: deal process - deals > EUR50m



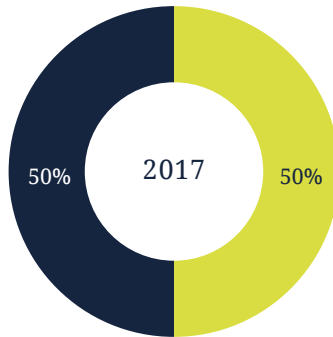
PE sellers: deal process - deals > EUR50m



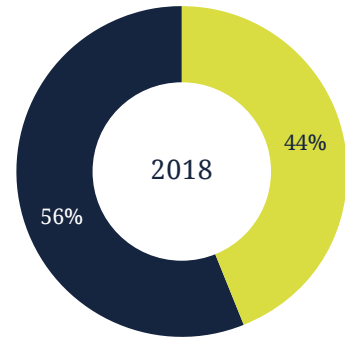
Auctions: Who wins?



■ PE ■ Trade



■ PE ■ Trade



■ PE ■ Trade



3. Auctions: Why?

In addition to maximising price through a competitive process, auctions deliver better deals terms for sellers:

Pricing certainty

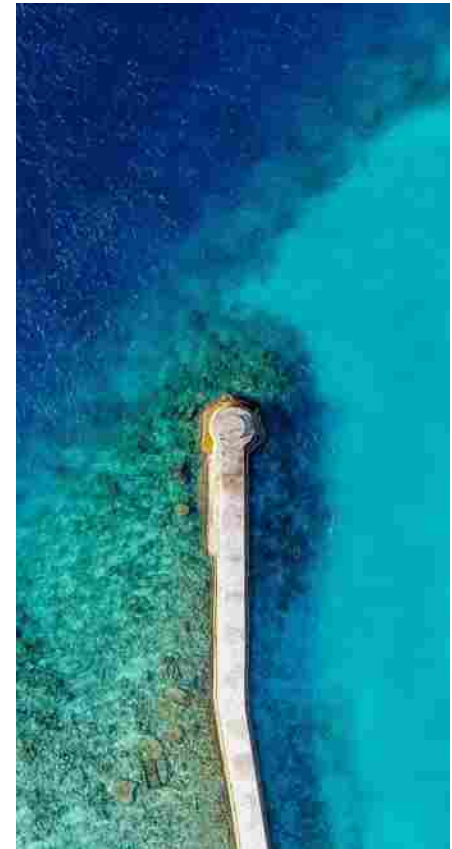
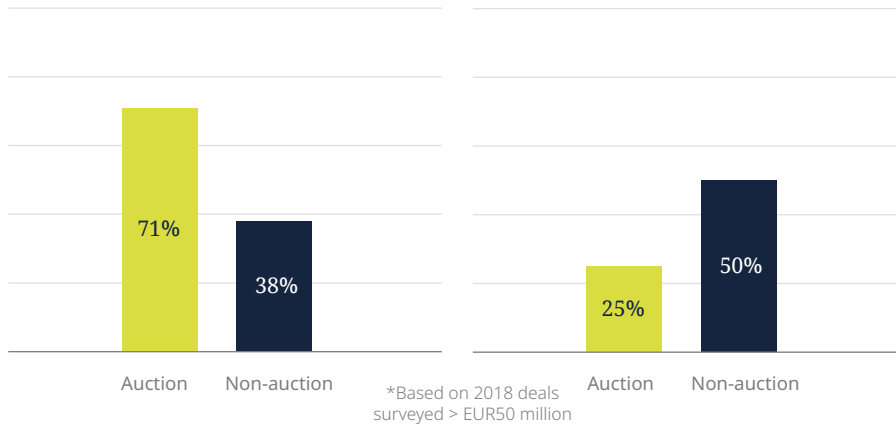
Outside the US, auctions* were twice as likely to result in a locked box pricing mechanism.

Locked box: majority share deals (non-US)*

Reduced ability to “walk” post signing

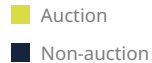
Auctions* were half as likely to contain a material adverse change provision.

MAC*

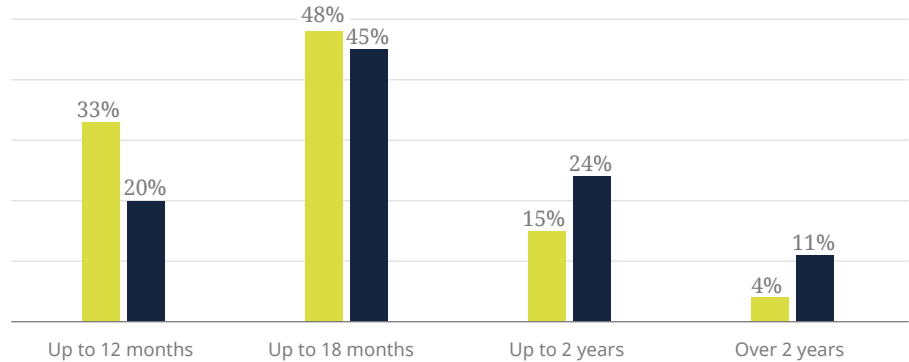


Shorter liability period

Over 80% of auctions had a commercial warranty period of 18 months or less.

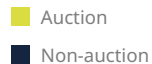


Commercial warranty periods*

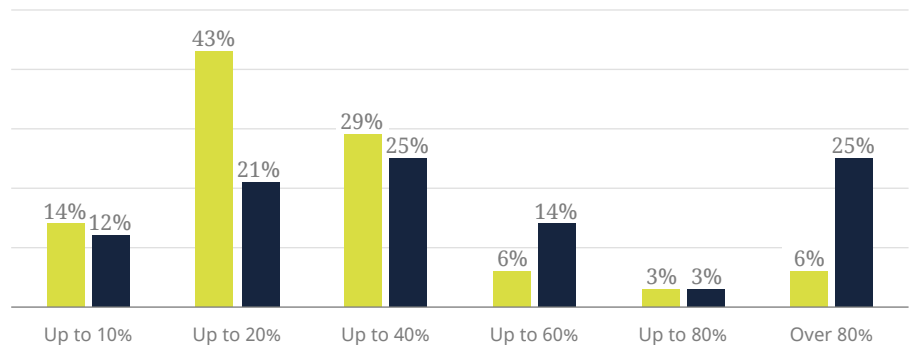


Lower liability cap

Through negotiating strength and/or use of insurance. Over 55% of auctions* had a commercial warranty cap of 20% or less of the price.



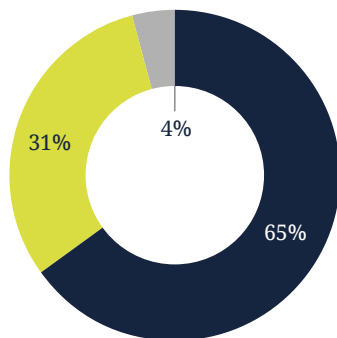
Commercial warranty cap*



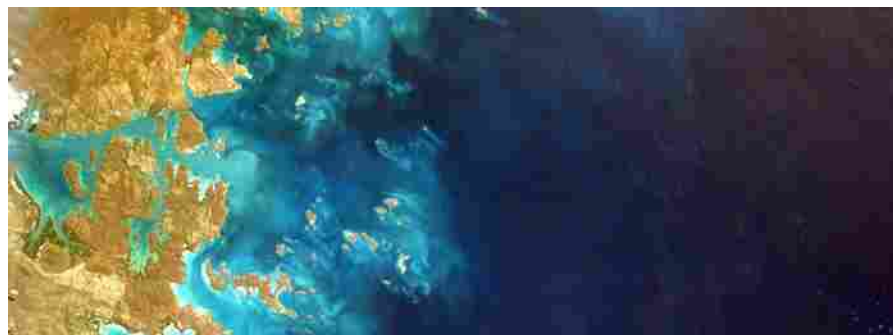
*Based on 2018 deals surveyed > EUR50 million

4. Closing pricing mechanisms: Majority share deals

Pricing mechanisms in majority share deals (non-fixed price)



- Completion Accounts
- Locked box
- Hybrid locked box



Completion accounts continue to be the favoured pricing mechanism globally, heavily influenced by the prevalence of completion accounts in US deals.

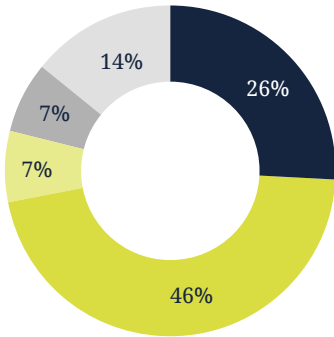
We are seeing greater use of a hybrid locked box – a combination of “completion” accounts to a convenient pre-completion date and a locked box mechanism to cover the short period to completion.

Locked box mechanisms remain pervasive in the European M&A market, particularly in auctions. While we are now seeing locked box mechanisms in around 10% of deals in Asia Pac, the US market remains resistant.

Some fixed-price deals remain, accounting for approximately a quarter of sub EUR25 million deals.

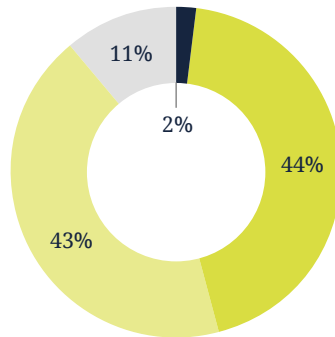
5. Completion accounts: Majority share deals

Europe



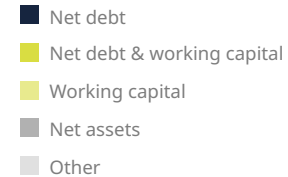
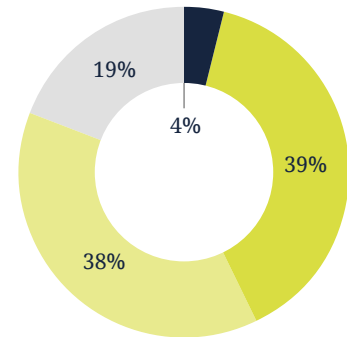
In Europe, a combined net debt and working capital remained the favoured adjustment.

US



In the US and Asia Pac, a combined net debt and working capital and a working capital only adjustment were most common.

Asia Pac

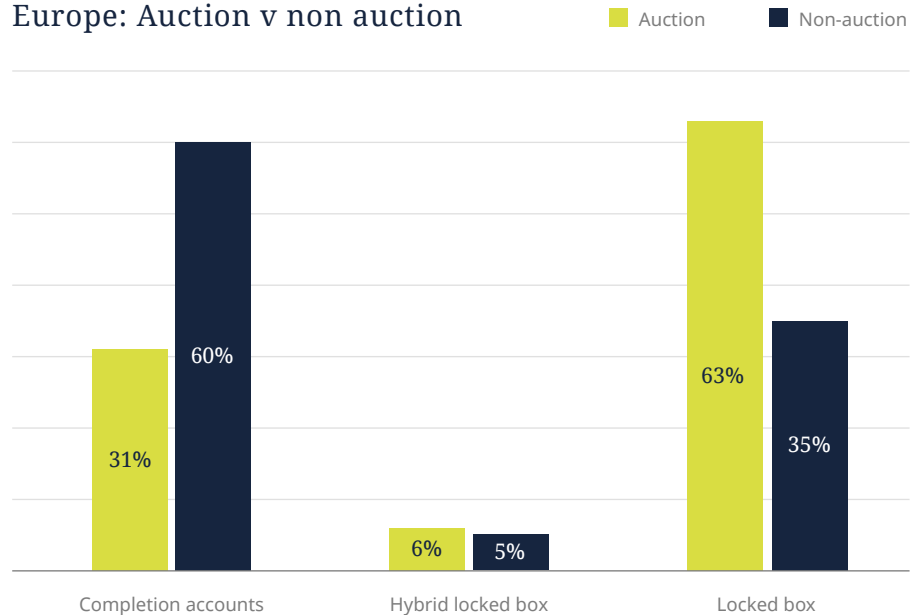


6. Locked box in Europe: Majority share deals

In Europe, a locked box mechanism was seen in the majority of auction deals – it offers sellers price certainty and enables direct comparison of bids (as they are made on the same financial basis).

Over one-third of non-auction deals had a locked box mechanism, with increased familiarity and acceptance by trade buyers.

Europe: Auction v non auction





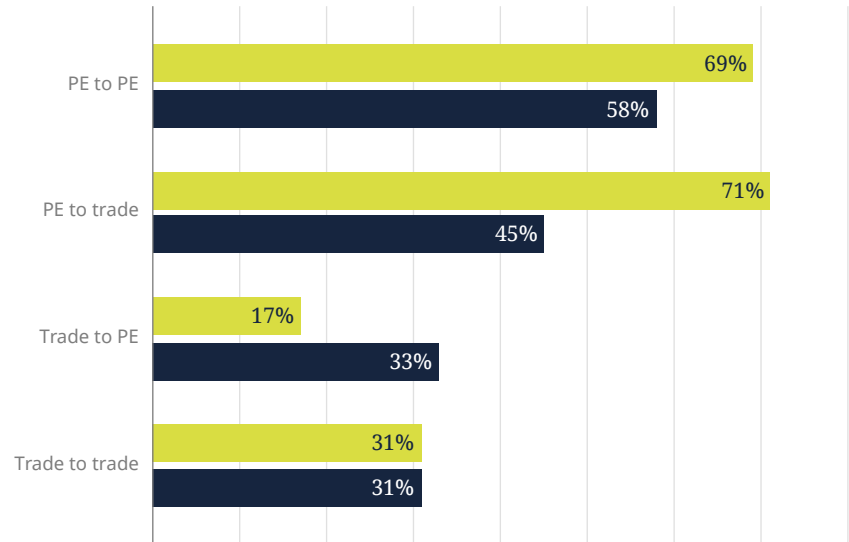
European locked box

■ 2017 ■ 2018

Use of locked box is slightly down on last year. It may be that locked box has peaked but that is, in our view, more likely to be a result of some increased caution in the market – sellers are less able to dictate terms.

There is some significant variation across jurisdictions in Europe on the popularity of locked box, largely linked to the strength of local M&A markets and the penetration of international players in the local market.

The majority of trade sellers continued to use completion accounts – there does not seem to be a common reason for this other than familiarity and market practice.



7. Earn-outs

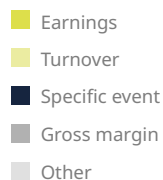
28% of deals surveyed contained an earn-out, a slight increase from last year, perhaps another indication of a softening market globally.

Earn-outs continued to be most commonly based on earnings, with turnover being an alternative to avoid restrictions on post-acquisition integration into the buyer's group as a result of seller protections being conceded in the SPA.

Earn-outs remained across a range of sectors, but particularly in early stage deals. We most commonly saw earn-outs in the Technology, Life Sciences, Insurance and Healthcare sectors.

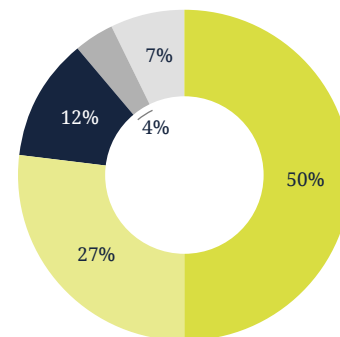
Earn-outs were most common in sub EUR25 million deals (at 35%), although around 20% of deals over EUR50 million contained an earn-out. This is because individual

Earn-out criteria



sellers are less likely in larger deals and more mature (and therefore higher value) businesses tend to be less dependent on a small number of key individuals (although there are some notable exceptions).

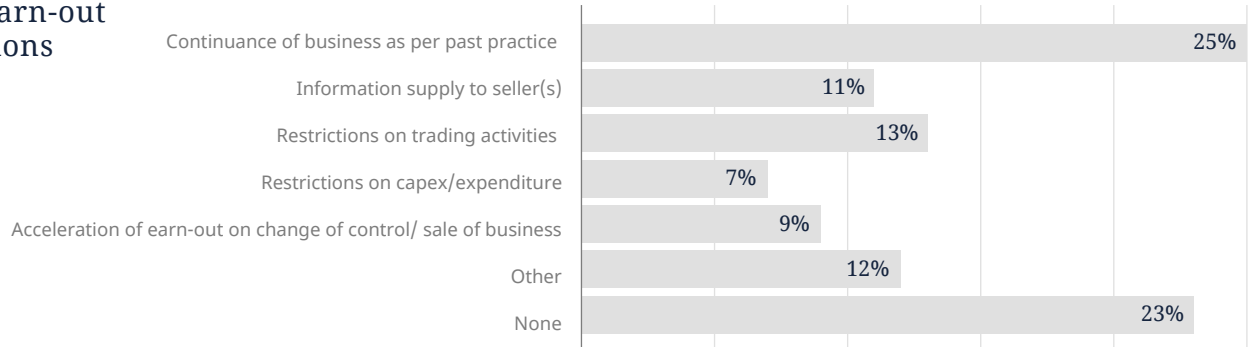
Sellers generally seek a range of earn-out protections which range from broad statements of intent to specific restrictions or obligations placed on the buyer. This continues to be a contentious area heavily negotiated between buyers and sellers; however, it does seem to be influenced by the significance of the earn-out in relation to the



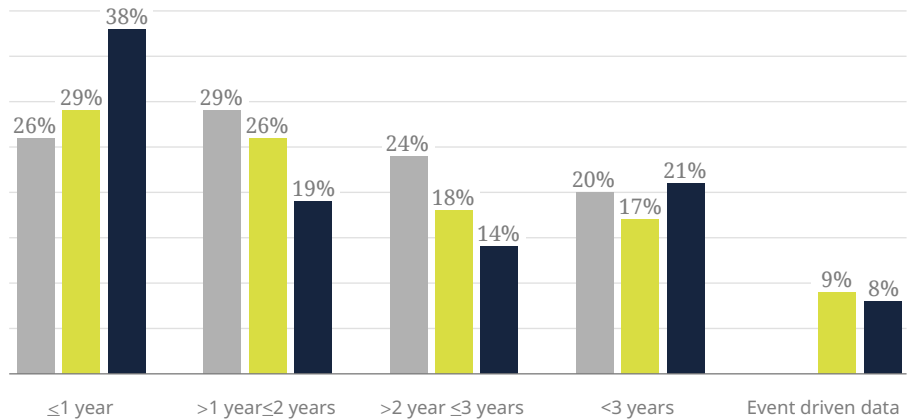
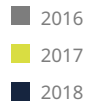
overall deal consideration and the relationship between the parties. Interestingly, 23% of deals had no specific restrictions on buyers during the earn-out period.

We continued to see a move towards shorter earn-out periods, with periods of up to one year being prevalent globally, but particularly in Europe and Australasia. Nevertheless, we continued to see some earn-out periods exceeding three years, especially in early stage businesses where the continued long-term involvement of founders is key to the realisation of value.

Seller earn-out protections



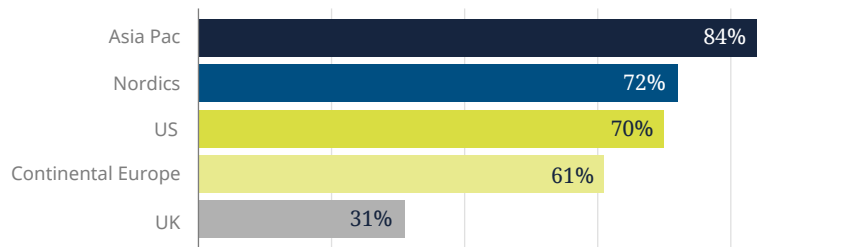
Earn-out periods



8. Conditional deals and common conditions

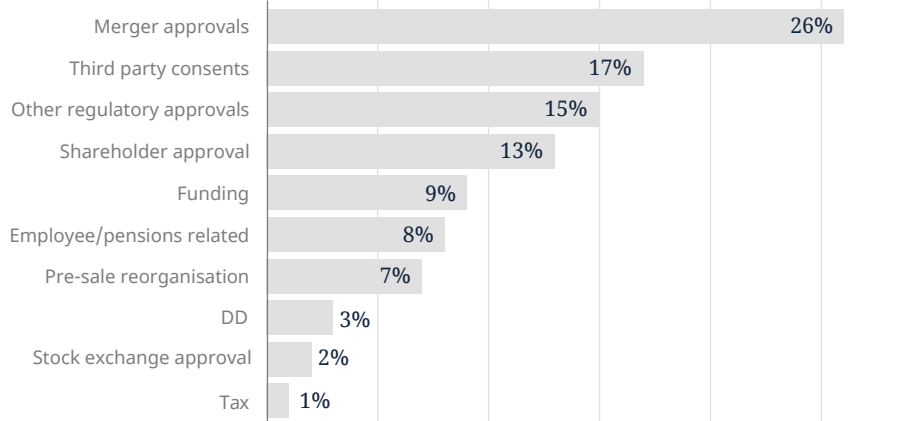
Conditionality: by region

The majority of deals in Asia Pac, the Nordics, the US and Continental Europe were conditional. The UK remains an outlier with less than a third of UK deals surveyed being conditional.



Common conditions

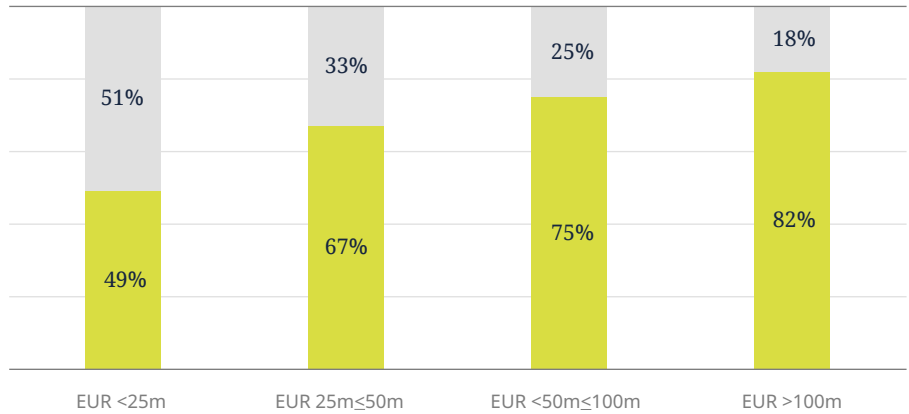
Merger control/anti-trust, other regulatory approvals, third-party consents and shareholder approvals were the most common conditions, with some regional differences.



Conditional deals by value

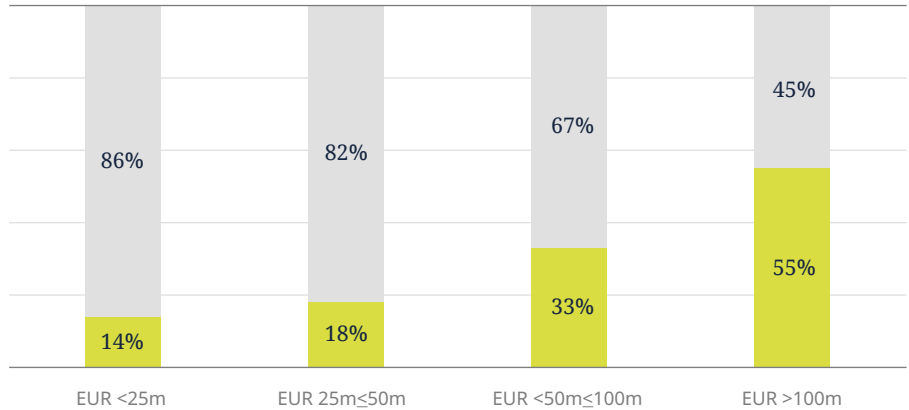
Overall, conditionality increases with deal size, principally driven by the increased probability that a merger clearance will be required.

- Yes
- No



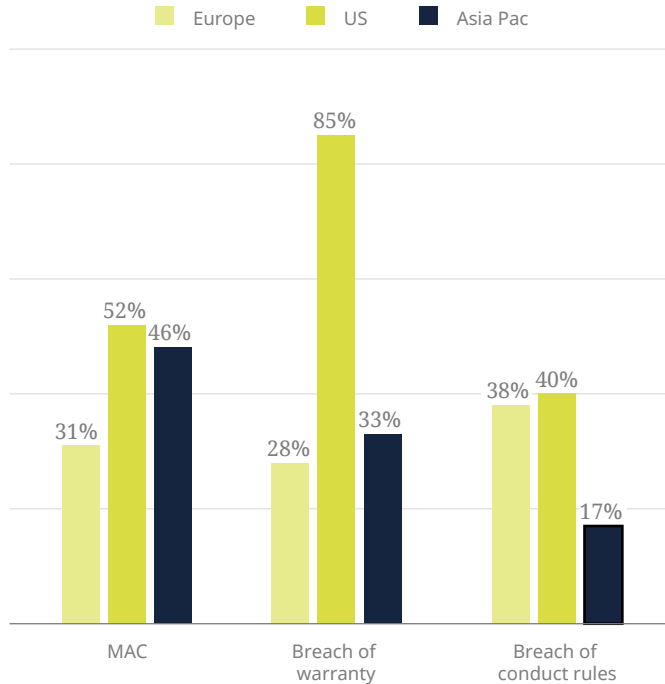
% of deals with merger control

- Yes
- No



9. Protections between signing and closing

Gap termination by region



Managing and allocating risks relating to the target business in the gap between signing and closing is one of the most complex issues in private M&A.

Typical gap protections in all regions include:

- conduct rules for the target between signing and closing; and
- a buyer's right not to close if there has been a material breach of warranties (given at signing and, if repeated or "brought down," closing), a material adverse change (MAC) or material breach of the conduct rules.





9.1 Material adverse change: MAC

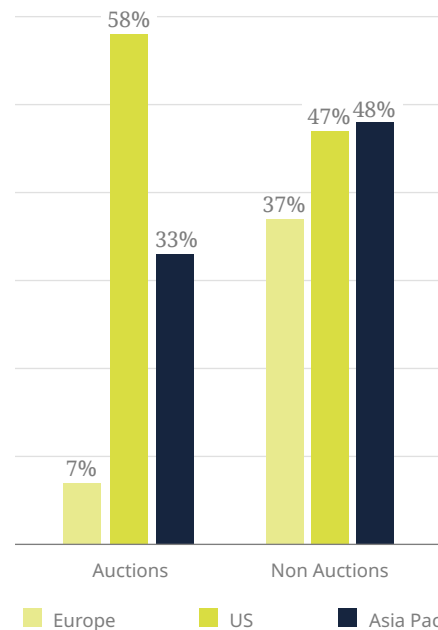
MAC is a standard element of all US and Asian US style deals – it is either addressed as a formal MAC condition or by a “back-door MAC” (i.e. repetition or “bring down” of the warranty that there has been no MAC since the last audited accounts date, with MAC being forward-looking including prospects).

By contrast, MAC was seen in less than a third of European deals surveyed and was seldom seen in auctions.

We saw an increase in MAC in Australasian deals, largely driven by regulatory conditions requiring longer periods between signing and closing.

In the US, a MAC provision is regarded as standard market practice, thus an auction has limited impact.

MAC by deal process



9.2 Repetition or “bring down” of warranties

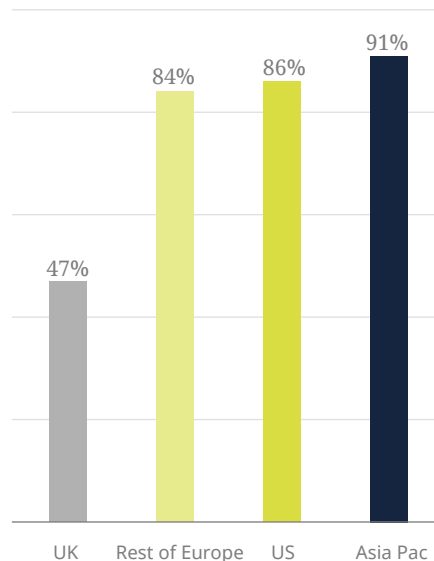
In conditional deals with a gap between signing and closing, commercial warranties were repeated (or “brought down”) in over 80% of the deals surveyed in Continental Europe, the US and Asia Pac.

By contrast, in UK deals warranties were repeated in less than 50% of deals, evidencing the more seller-friendly market and the UK’s aversion to conditional deals.

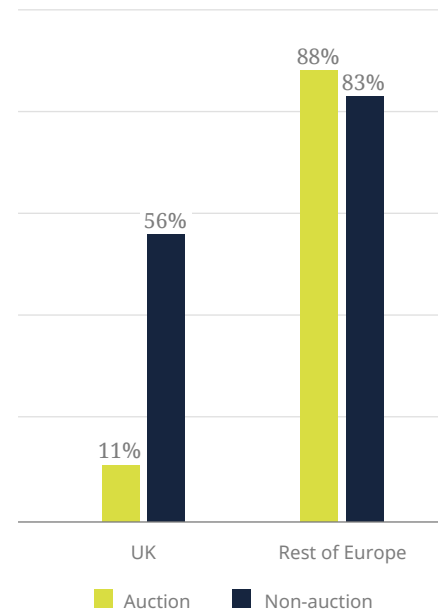
In the UK, deal process had a significant impact on whether commercial warranties were repeated – they were repeated in over 50% of non-auction deals compared to around 10% of auction deals.

Elsewhere, deal process did not have any material impact on repetition, but auctions tended to result in greater materiality qualifiers on repeated warranties.

Repetition of warranties

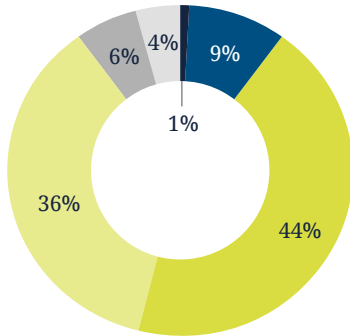


Europe: Repetition of warranties



10. Commercial warranties: Time limits

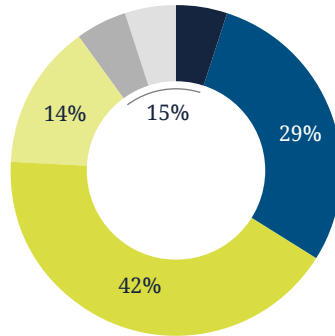
Europe



In all regions, deals typically had a time limit for commercial warranty claims of two years or less, the most common being 18 months or less.

Auctions continued to drive shorter time limits, with 75% of auction deals having a period of 18 months or less compared to around half of non-auction deals.

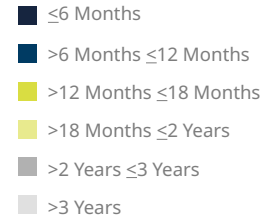
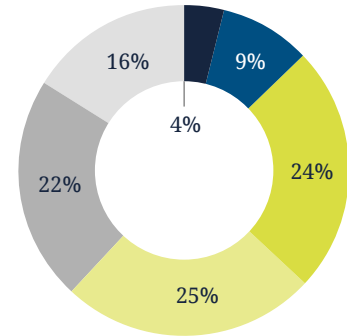
US



Asia Pac continued to see slightly longer time periods than elsewhere.

Longer time limits were negotiated for some categories of commercial warranties, dictated by relevant local laws and risk exposure in those jurisdictions. Employment and environmental were the most common.

Asia Pac

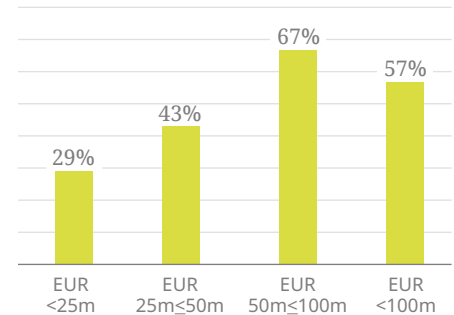


11. Commercial warranties: Financial cap (as % of price) (excluding buy-side insured deals)

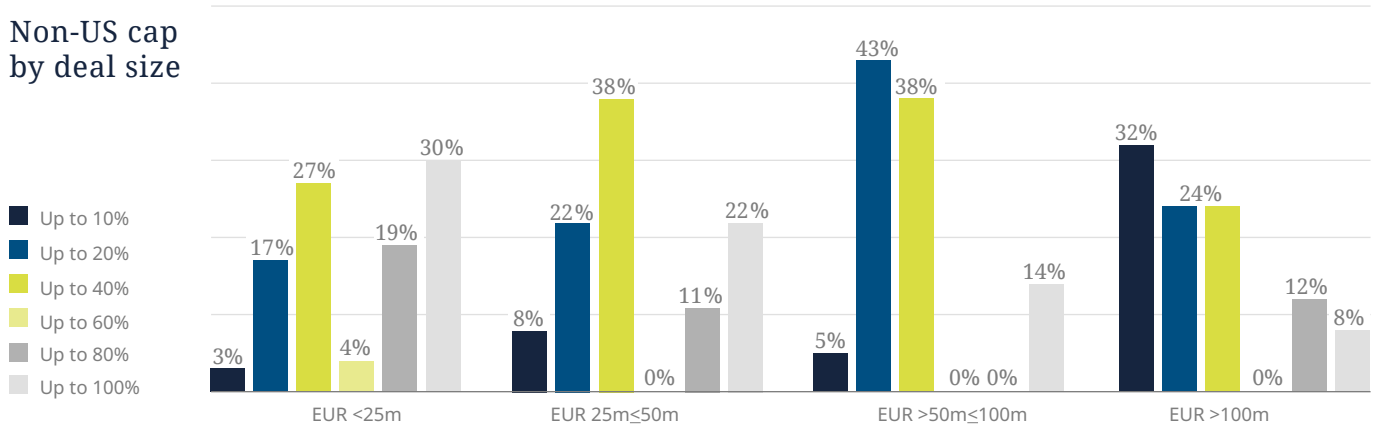
Caps in the US market are typically 20% or less of the price, with caps at 10% or less increasing with deal size (accounting for the majority of deals over EUR50 million).

Elsewhere, deal size drove the level of cap. Outside the US, small deals commonly see caps at 100% of the price, while mid-large size deals often see caps of 40% or less.

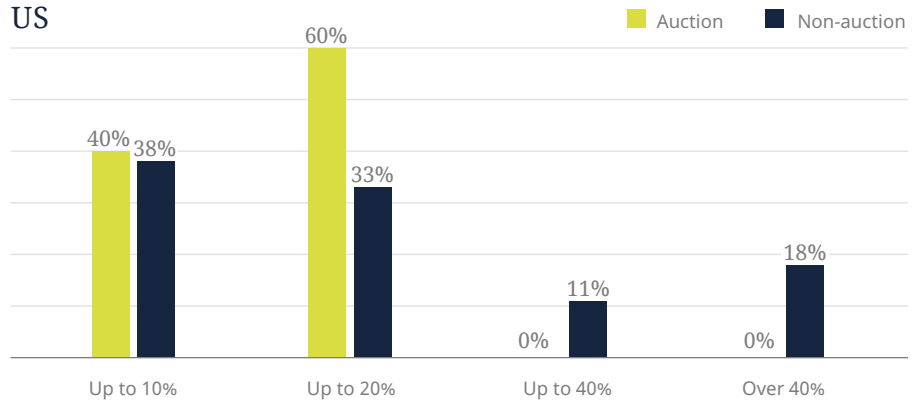
% US deals with cap of <10%



Non-US cap by deal size

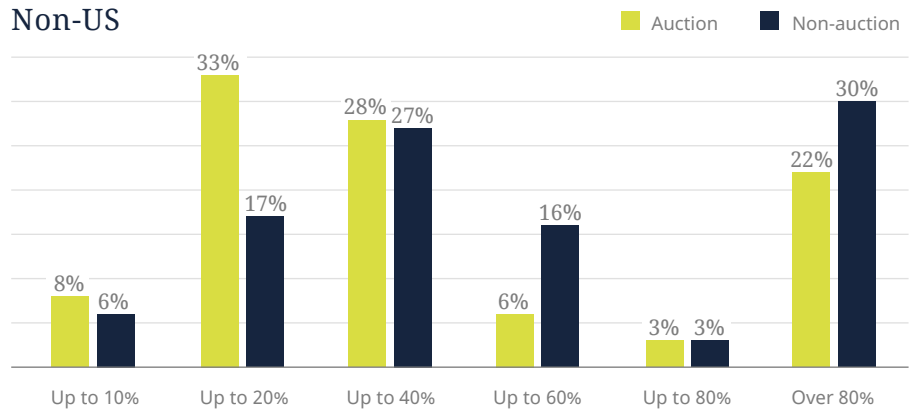


Auction processes drove lower caps – typically 20% or less in the US and less than 40% outside the US.

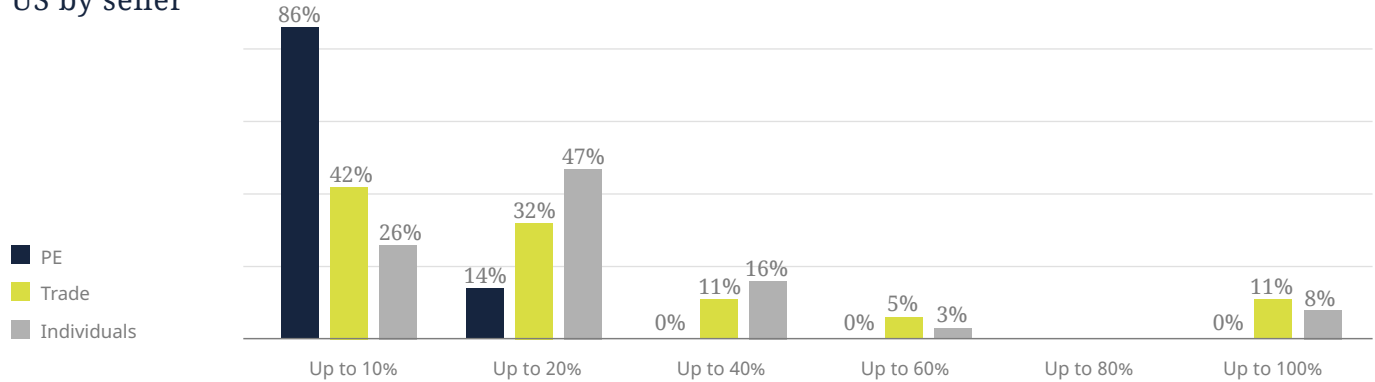


The nature of the seller had a material impact on commercial warranty caps in uninsured deals.

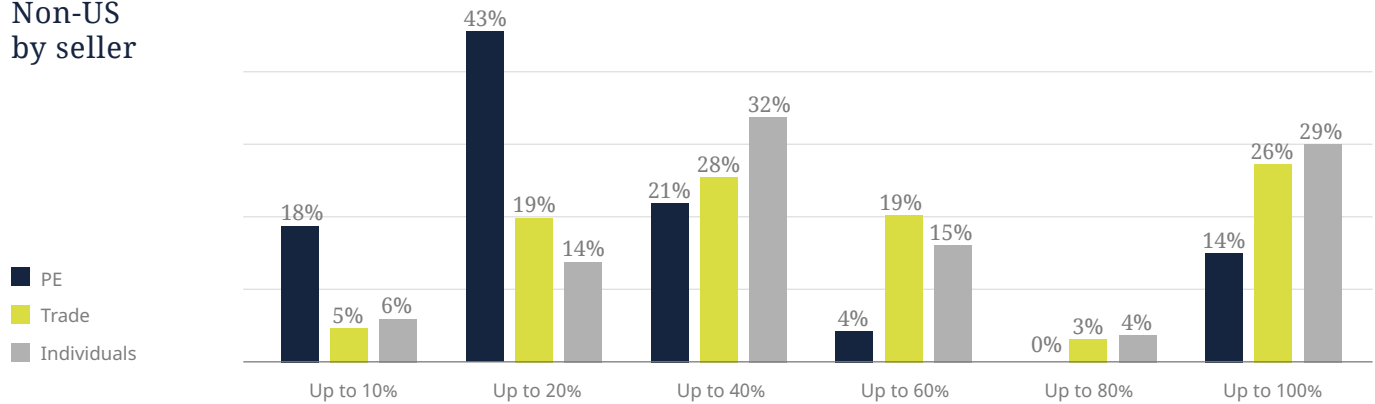
Globally, private equity achieved lower caps on uninsured deals than other sellers, driven by the reluctance of private equity sellers to give commercial warranties (resulting in the management sellers bearing the liability for commercial warranties).



US by seller

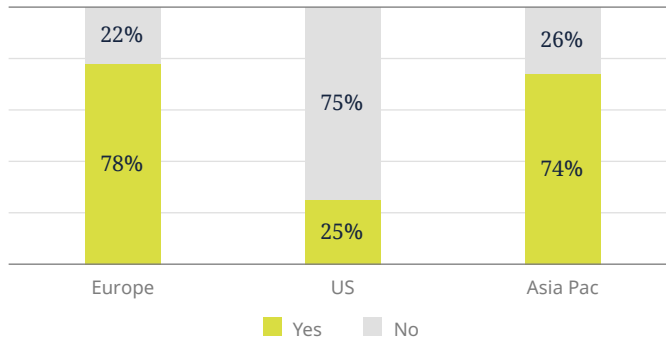


Non-US by seller



12. Small claims exclusion *or de minimis*

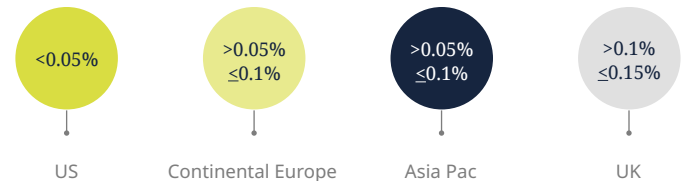
Small claims exclusion



When commercial warranties are being given, it is common in many jurisdictions to have a small claims exclusion or *de minimis* – claims below a specified amount which are ignored completely or which are ignored in meeting any claims threshold or “basket.”

It is standard market practice in most European jurisdictions (particularly in the UK, Belgium, Germany and the Nordics but less so in France and eastern and southern Europe), Australasia and, now,

Common small claims amount (% of price)



Asia. A small claims exclusion was included in over three-quarters of the deals surveyed in those regions, and more commonly in auction processes. By contrast, it was seen in less than a quarter of US deals surveyed (with deal process having no significant impact).

Globally, small claims exclusions typically ranged from 0.05% to 0.4% of the price – primarily driven by deal size, with larger deals seeing the small claims exclusion set as a lower percentage of the price.

13. Claims threshold or “basket” (excluding buy-side insured deals)

When commercial warranties are given, it is standard market practice in all regions to have a claims threshold or “basket” – an amount which claims must exceed before they can be brought against the sellers. Over 85% of all deals without buy-side insurance had a claims threshold or basket. (Note in buy-side insured deals, thresholds will be linked to the insurance cover and deductible.)

Globally, a trigger or “first dollar basket” was seen in three-quarters of deals compared to a quarter for one set as an excess.

A trigger continued to be the overwhelming choice in Asia Pac and Europe (other than France). In the US, claims thresholds remained fairly evenly split between a trigger and an excess.

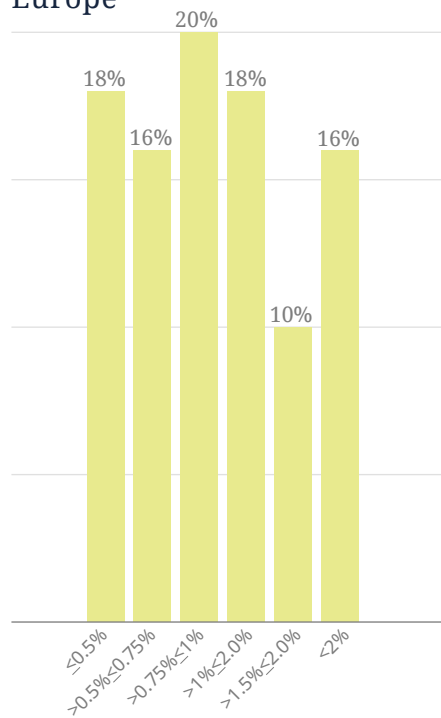
Setting the threshold as an excess drove lower thresholds.

Auctions resulted in lower claims thresholds (as a percentage of the price), as they were typically coupled with lower financial caps than in non-auction deals.

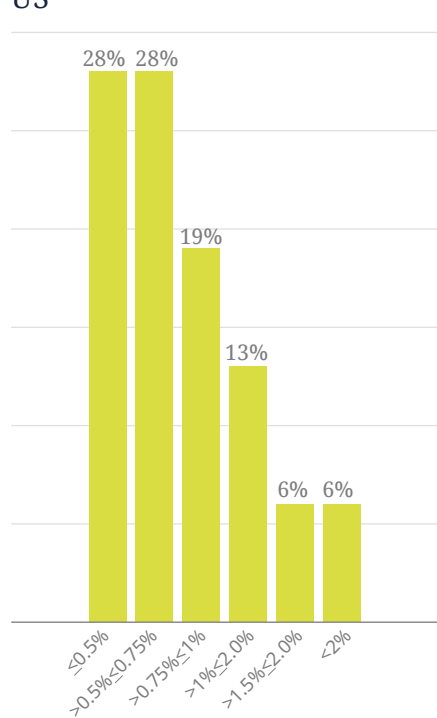


Thresholds (% of price) (excluding buy-side W&I)

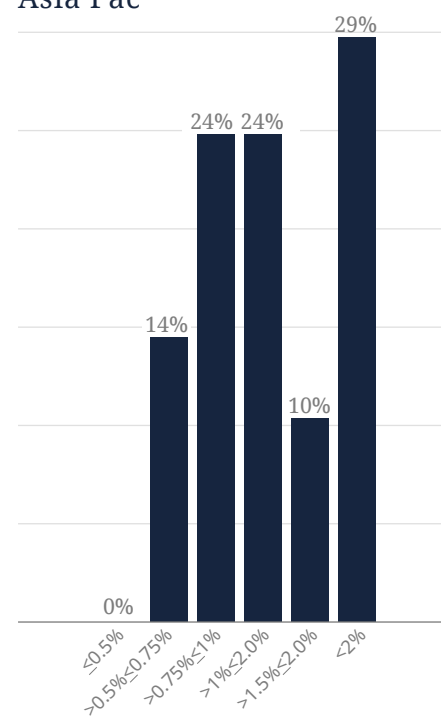
Europe

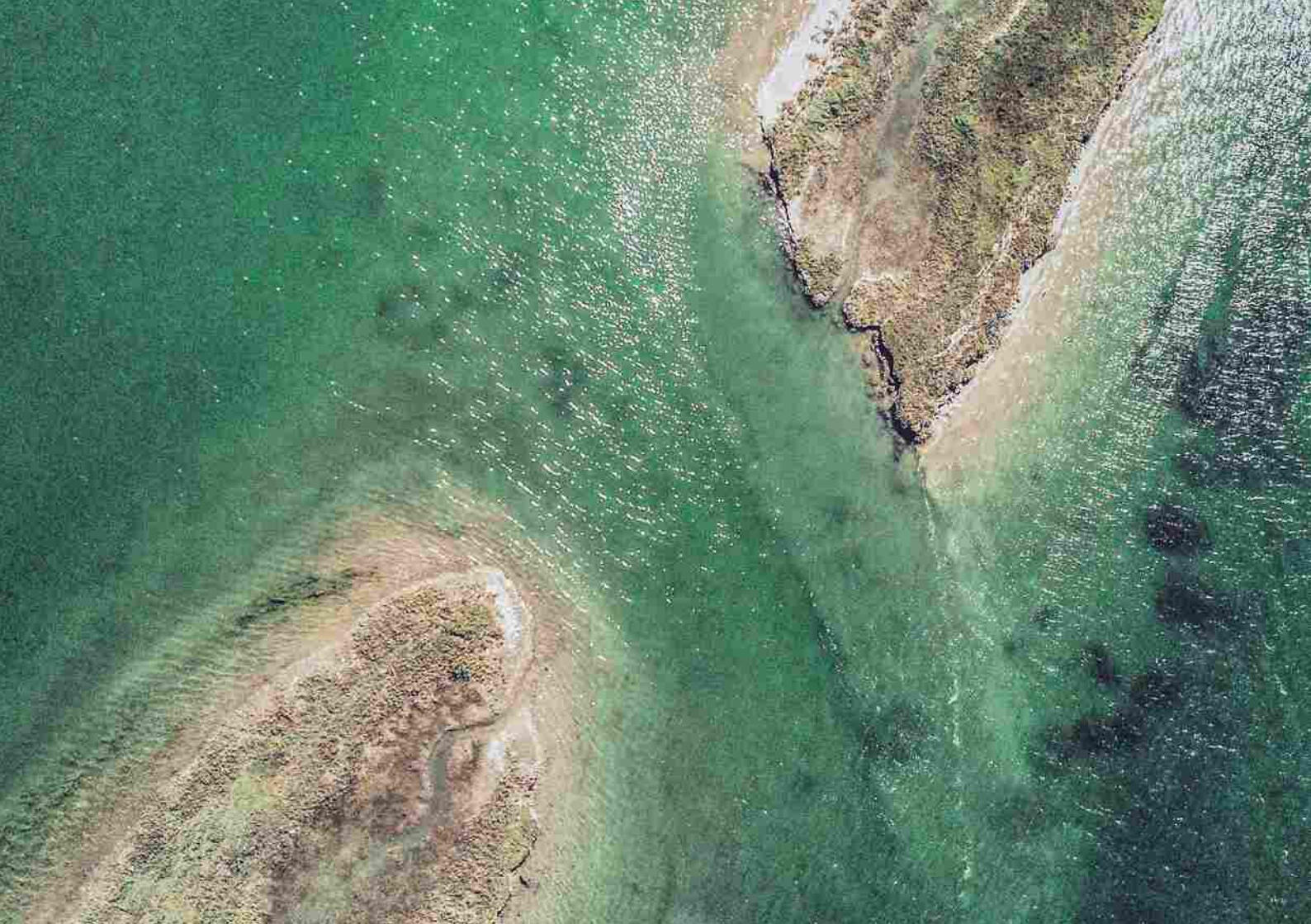


US



Asia Pac



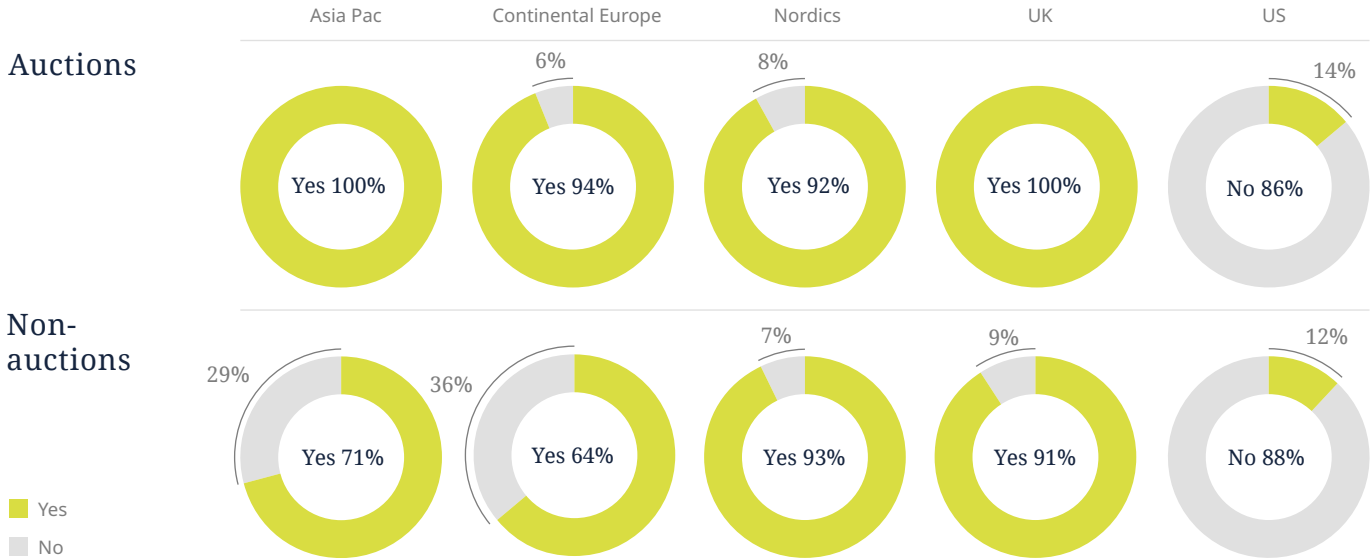


14. Approach to disclosure

While general disclosure of the data room materially impacts on the risk profile for the buyer, it is now common practice in Europe and Australasia and the market standard in their auction processes.

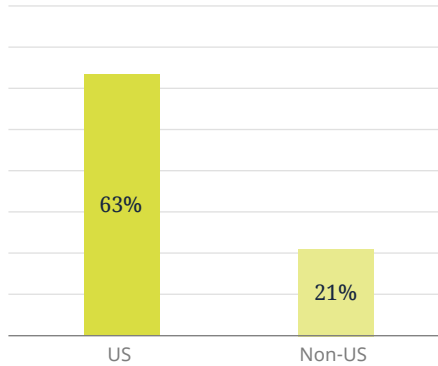
We are seeing it increasingly in Asia, primarily in auctions. However, the US standard approach is for specific disclosure only – general data room disclosure was only seen in 11% of US deals surveyed, and deal process had limited impact.

Data room generally disclosed?

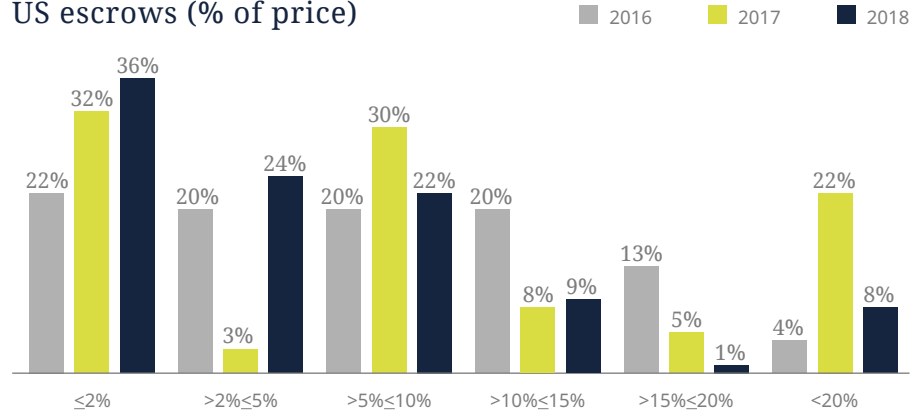


15. Security at closing for buyers' claims

Deals with security



US escrows (% of price)



In the US, security for claims by way of escrow or holdback remains standard practice, seen in over 60% of the deals surveyed. This is typically given to secure all claims under the agreement, completion accounts price adjustments and specific indemnities for a period of up to 12 months. The increasing use of buy side insurance is having an impact - we have seen decreasing escrows in US insured deals, which is driving down escrows more generally (over a third having an escrow of 2% or less of the purchase price), plus an increasing number of insured deals with no escrow at all.

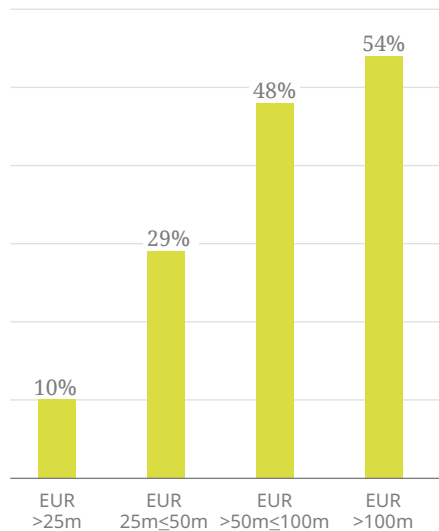
Elsewhere, security is negotiated on a deal-by-deal basis and is driven by the nature and extent of claims being secured and the financial standing, location and negotiating strengths of the parties. Security was provided in less than a quarter of non-US deals surveyed. When provided, the security was for less than 10% of the price in the 65% of non-US deals surveyed. The majority of non-US deals with security had a security period of 24 months or less.

16. Deal insurance

The number of deals incorporating an insurance product – typically buy-side insurance – continued to increase and it is now a common feature of mid-large private M&A transactions in many jurisdictions.

Insurance is now available in more jurisdictions, the type of cover that can be obtained is more extensive and policy terms and conditions continue to be more favourable for the insured.

% of deals with buy-side insurance

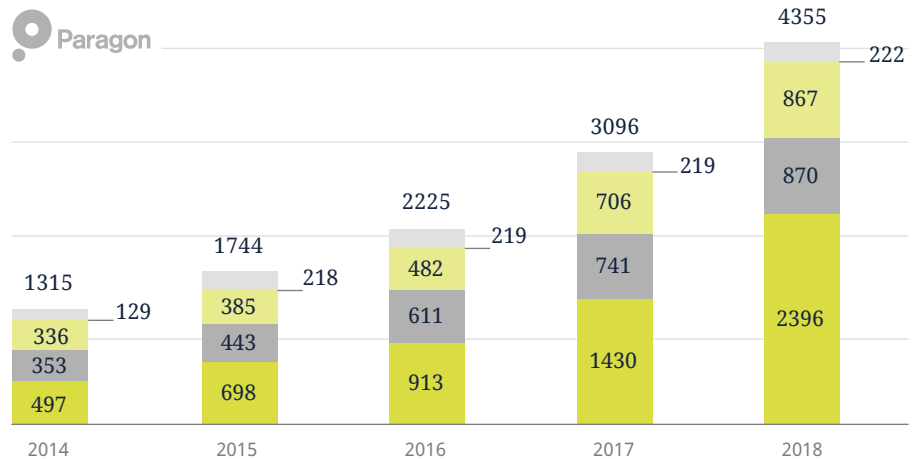


Transactions utilising M&A Insurance in the last 5 years*

*Based on underwriters who responded to Paragon survey



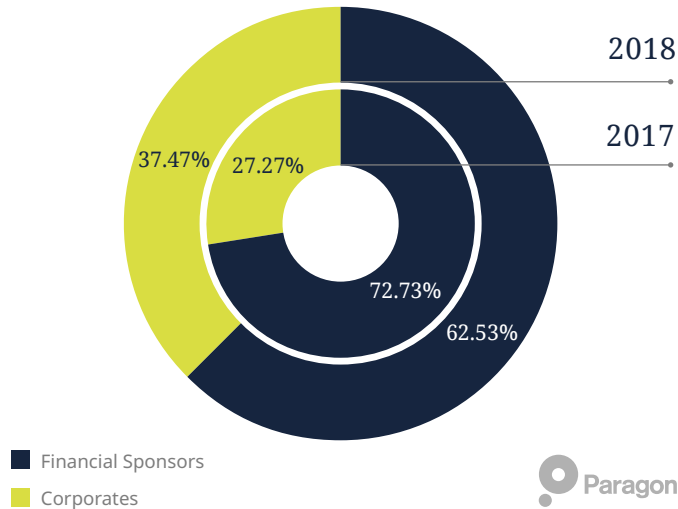
■ North America ■ Europe
■ UK ■ RoW





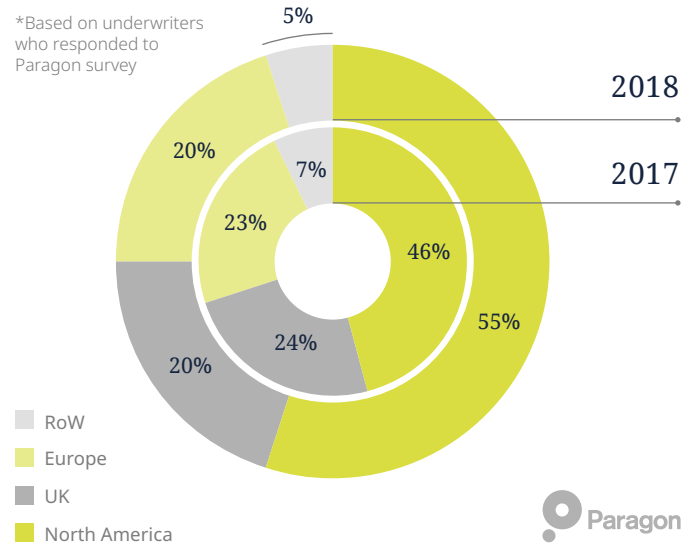
Financial sponsors v corporates*

*Based on underwriters who responded to Paragon survey



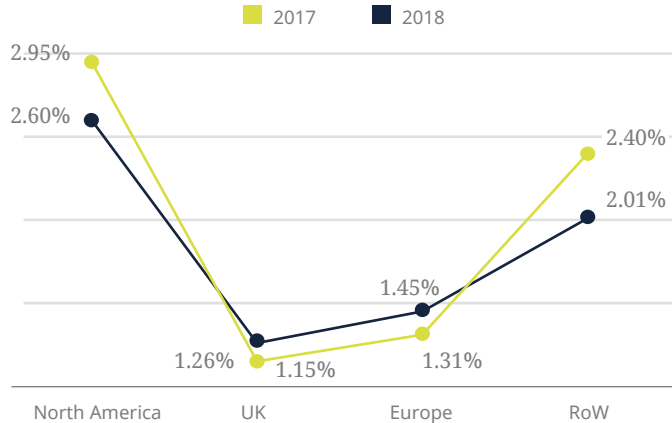
Global distribution of M&A insurance - 2018 v 2017*

*Based on underwriters who responded to Paragon survey



Average rate on line for operational businesses — 2018 v 2017*

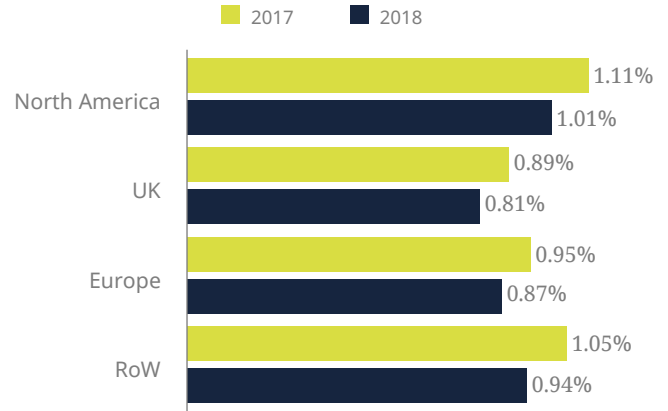
*Based on underwriters who responded to Paragon survey



Premiums remain competitive and have even reduced in some parts of Europe, partly due to reduced costs of policy enhancements (such as non-disclosure of data rooms, indemnity damages and some US-style provisions such as materiality scrapes).

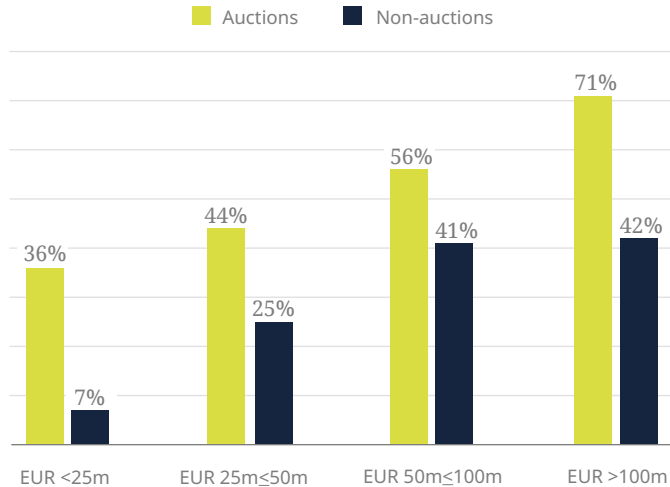
Average retention for operational businesses — 2018 v 2017*

*Based on underwriters who responded to Paragon survey



Deductibles or retentions have come down significantly in recent years, as the market has become more accustomed to the product but seem to have reached a level at which they have stabilised, although the overall trend is still downwards. Buyers (particularly trade), while they have become more accustomed to the product (and are willing to use it), often insist sellers retain some liability. That said, zero seller recourse structures remain common.

% of deals with buy-side insurance: By deal process

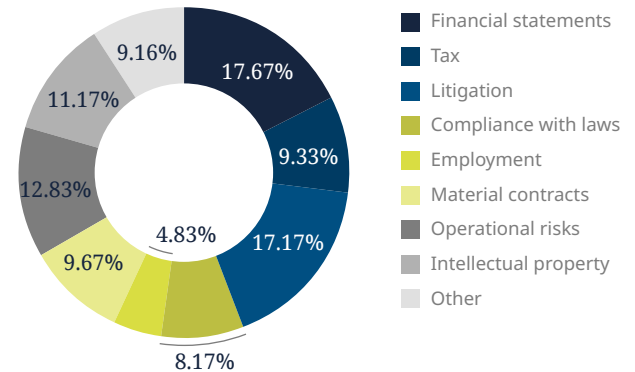


Auction deals using a pre-arranged “stapled” policy are now common market practice, and increase with deal size (seen in over 70% of auction deals over EUR100 million).

Claims continue to be a hot topic, with an increasing percentage of policies seeing some kind of notification. This may be driven at least in part by lower deductibles/retentions and extended policy scope

Claim notifications received in 2018*

*Based on underwriters who responded to Paragon survey



with some areas, particularly tax, seeing significant growth in the number of policies written and the scope of risks covered.

Predictably, the broad warranties around financial statements and legal compliance continue to be the ones on which most claims are notified. For understandable commercial reasons, insurers continue to be very protective of detailed data on claims and amounts actually paid.



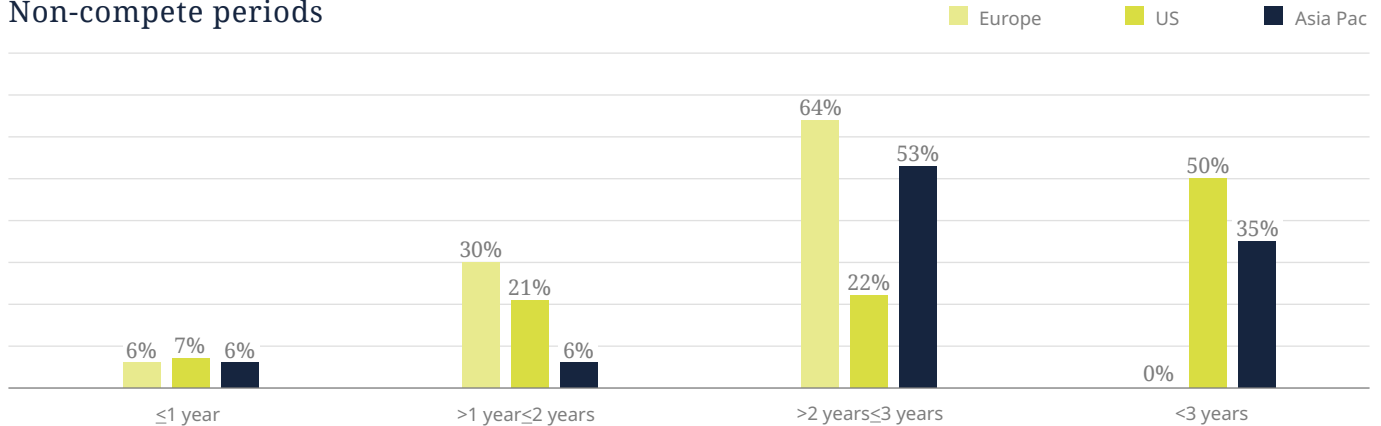
About Paragon M&A

The Paragon M&A team supports all parties involved in an M&A transaction. We have developed a strong reputation for providing trusted advice and delivering effective M&A insurance solutions.

We have been assisted by Paragon M&A with some helpful insights into the market for M&A insurance. The accredited statistics are taken from their 2018 Mergers & Acquisitions (M&A) & Tax Insurance Global Review and are reproduced with the kind permission of Paragon M&A.

17. Restrictive covenants

Non-compete periods



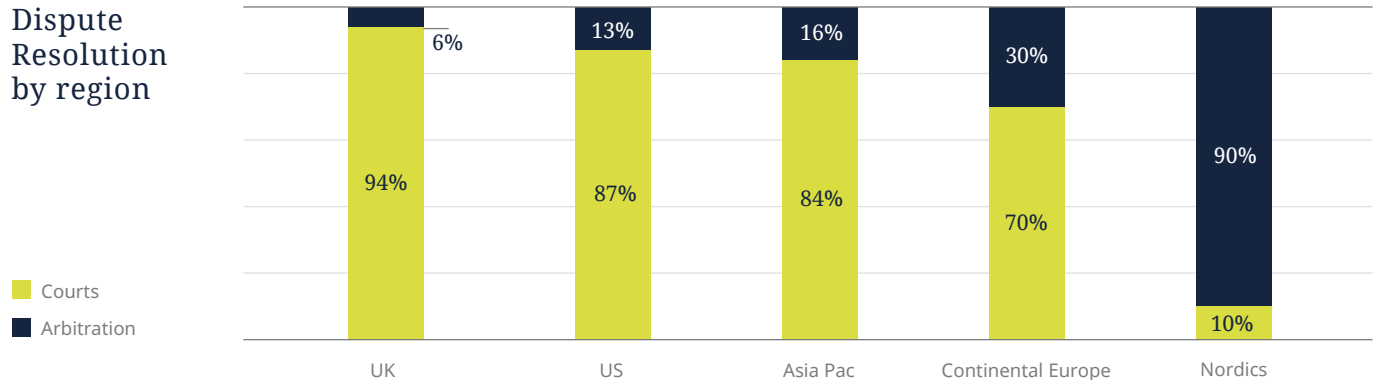
Globally, we saw restrictive covenants in approximately 70% of deals surveyed, principally driven by the type of seller. Private equity sellers resist giving covenants and trade sellers will not do so when they have businesses involved in similar activities to the target business.

Typically, restrictive covenants were a general non-compete combined with a non-solicitation of people, customers and/or suppliers (depending on the nature of the target business), with similar restricted periods for both non-compete and non-solicitation.

Time periods varied across regions, principally driven by enforceability issues in the relevant jurisdictions. Deal process had a limited impact.

In Europe, Australasia and Asia (unless US law governed) the most common restricted period was two-three years. In the US and Asia (when US law governed), this was more than three years.

18. Dispute resolution



The courts remained the prime forum for disputes in the UK (despite the prospect of Brexit), the US and Australasia. Arbitration continued to be widely used in the Nordics. It is also common in parts of Continental Europe (such as Italy, Germany,

Hungary, Romania, Russia and Ukraine) and Asia. Arbitration is used when it provides a speedier and more suitable method of dealing with complex M&A disputes than the local courts or when arbitral awards are easier to enforce in the relevant jurisdiction.





About DLA Piper: Global leader in M&A

Having acted on more global M&A deals than any other law firm in the last nine years, we have the experience to execute some of the most complex multi-jurisdictional deals. Our clients benefit from our timely, pragmatic and commercial approach to problem-solving that adds value to their businesses and enables transactions to come to a successful conclusion for all parties.

Global reach

Supported by over 1,000 corporate lawyers globally, we carefully select teams for each specific transaction. This allows us to handle all aspects of complex domestic and cross-border M&A transactions.

With local lawyers on the ground, we have the ability to flag potential pitfalls in each country, advise on cultural differences and nuances, offer vital local advice in such areas as employment and competition law and manage even the most demanding multi-jurisdictional due diligence exercise.

M&A and Private Equity deal count 2018 (Mergermarket)



Global M&A



European M&A



European private equity buyouts



UK M&A



France M&A



Nordics M&A



Russia M&A



Middle East and Africa combined

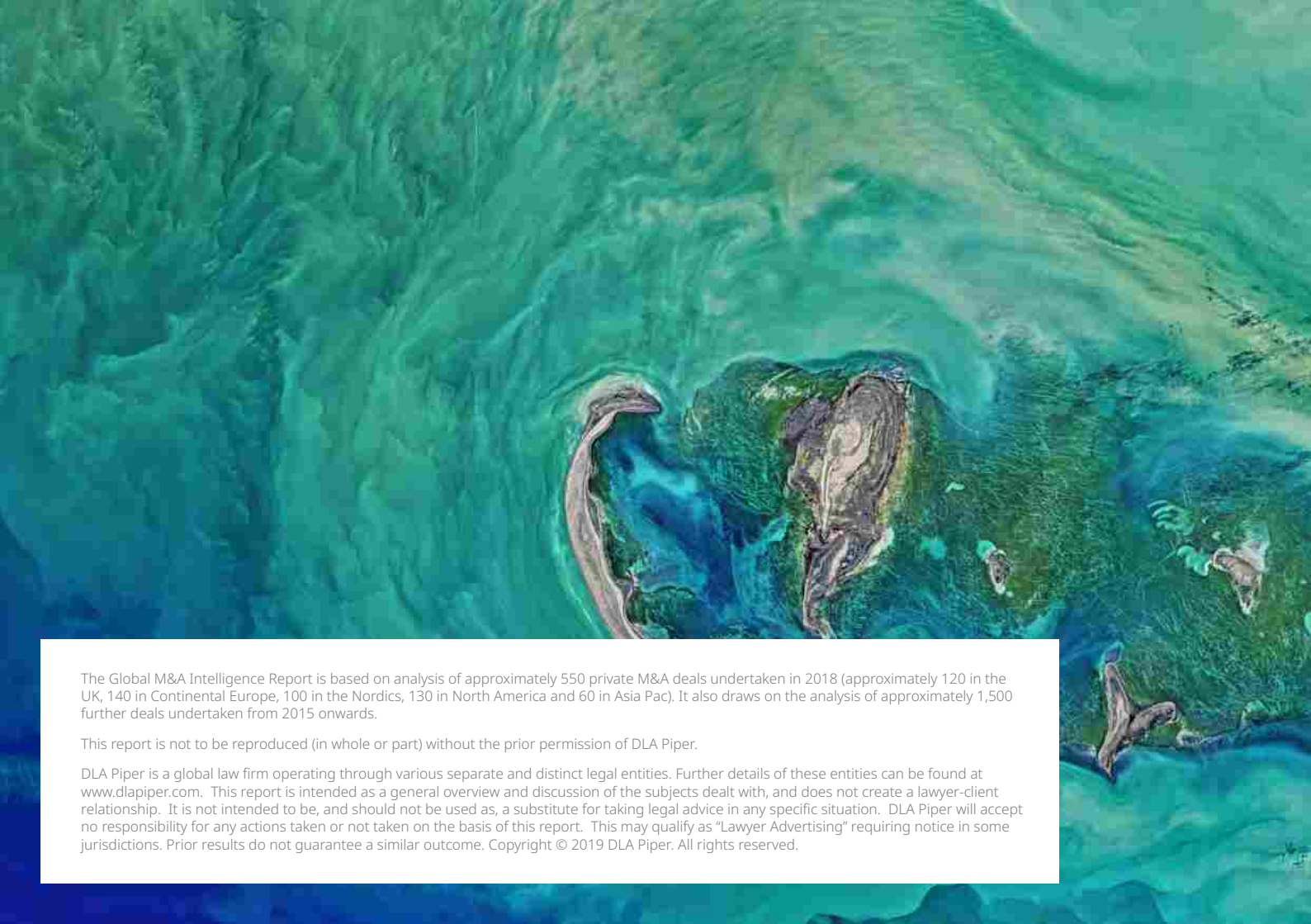
Supporting your needs

- All our lawyers are aligned to industry sectors. We understand the internal and external pressures that our clients face throughout a transaction and the industry-specific issues critical to the success of a deal.
- We guide our clients through every stage of a deal – from due diligence and structuring, to negotiation and preparation of deal documents, to post-transaction transition and post-merger integration.
- M&A activities unavoidably affect other areas of law, such as employment, pensions, tax, intellectual property, real estate, environmental, financial services regulation and corporate governance. Our deal teams include practitioners from these and other areas of law to address all aspects of a deal.

Compare M&A regimes in an instant

- If you are looking to be better informed about M&A transactions, see our online **Global Comparative Guide to Private Company M&A**. This tool covers 13 key topics relevant to planning and executing an M&A transaction in over 40 jurisdictions. It gives you a helpful overview of issues you may encounter when undertaking a transaction in any country in which you do business or plan to do business in the future.
- To register for access, contact your usual DLA Piper contact or visit: <https://www.dlapiperintelligence.com/globalma/>



An aerial photograph of a tropical coastline. The water is a vibrant turquoise color, with white foam from waves crashing against the shore. The land is covered in dense, lush green vegetation. In the foreground, there are several large, dark, gnarled tree trunks or branches protruding from the water. The overall scene is bright and scenic, typical of a tropical beach destination.

The Global M&A Intelligence Report is based on analysis of approximately 550 private M&A deals undertaken in 2018 (approximately 120 in the UK, 140 in Continental Europe, 100 in the Nordics, 130 in North America and 60 in Asia Pac). It also draws on the analysis of approximately 1,500 further deals undertaken from 2015 onwards.

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