

2024

What's Market in Indian Private Equity Deals

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Perspective

We are thrilled to present the second edition of our “What’s Market in Indian Private Equity Deals”. This report delves into the current landscape on definitive agreements, highlighting key trends that shape the future of one of the world’s most exciting markets.

The global private equity (PE) landscape has experienced a recent downturn, with deal-making falling to a ten-year low in 2023. Similarly, PE exits have hit a decade-long nadir, leaving a backlog of unsold investments valued at approximately USD 2.8 trillion. Despite these global headwinds, India continues to be a beacon of optimism for PE investors.

While there may be a short-term dip in overall foreign direct investments (FDI) in India, this can be largely attributed to global monetary policies and rising interest rates. Importantly, India’s PE market has not traditionally relied heavily on leveraged buyouts (LBOs), which mitigates the impact on long-term investments and capital creation.

Interestingly, India emerges as the world’s third most expensive market in terms of valuations. However, investors remain bullish, drawn by the country’s long-term growth potential, robust domestic consumption, strong democratic values, and a predictable tax and regulatory environment.

This edition also explores the growing depth and vibrancy of Indian stock markets, now the 4th largest globally, surpassing Hong Kong. This robust capital market provides much-needed liquidity for financial sponsors, fostering increased PE activity.

ESG (Environmental, Social, and Governance) remains a key driver in investor decisions, with both financial institutions and limited partners (LP) prioritising sustainable practices in their PE investments.

The sectoral distribution of PE investments in India offers another compelling narrative. Funds are actively deployed across diverse industries, reflecting the country’s broad-based growth potential. Notably, manufacturing and export-oriented businesses have attracted significant PE interest.

This edition also acknowledges the growing importance of providing liquidity options for LPs. The emergence of secondary funds and continuation funds plays a crucial role in managing investments and ensuring LPs can access capital when needed.

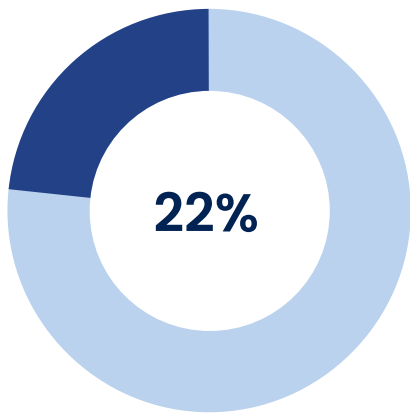
Looking ahead, we are committed to fostering a predictable and market-driven ecosystem for PE investors. This includes focusing on legal documentation that provides real value-add, streamlining processes, and ensuring transparency.

Your valuable feedback is essential to us. Please feel free to share your thoughts and suggestions as we continue to refine and expand this report in future editions. We aim to establish it as a comprehensive resource for navigating the Indian PE landscape.

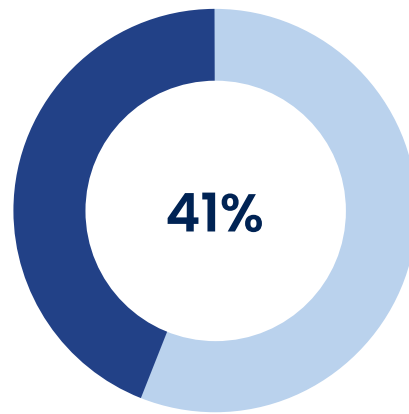
Methodology

This study is based on 280 PE and VC transactions that Khaitan & Co has advised on over the last 30 months. Among sectors, energy, technology, automotive and auto-components, healthcare, financial services and real estate witnessed most deal traction. Other sectors with high volume of deals included industrial goods, retail, media and telecom.

Deal sizes across the spectrum added interesting perspective to this analysis, with deals more than USD 1 Billion comprising 22% of the data set.



Deals over USD 1 Billion



Deals over USD 200 Million

86%

Investment in Minority Stake

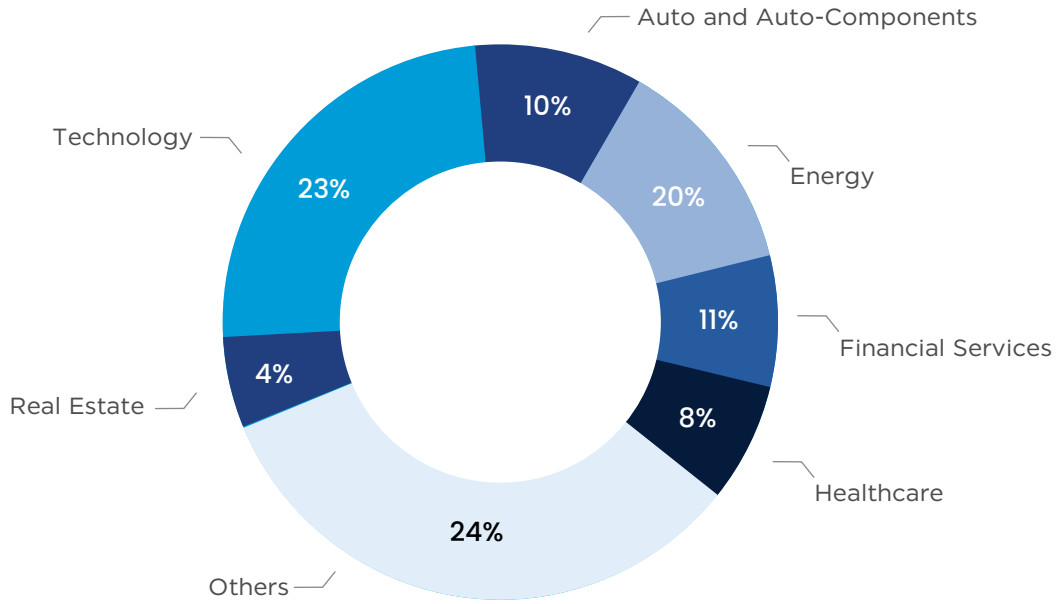


14%

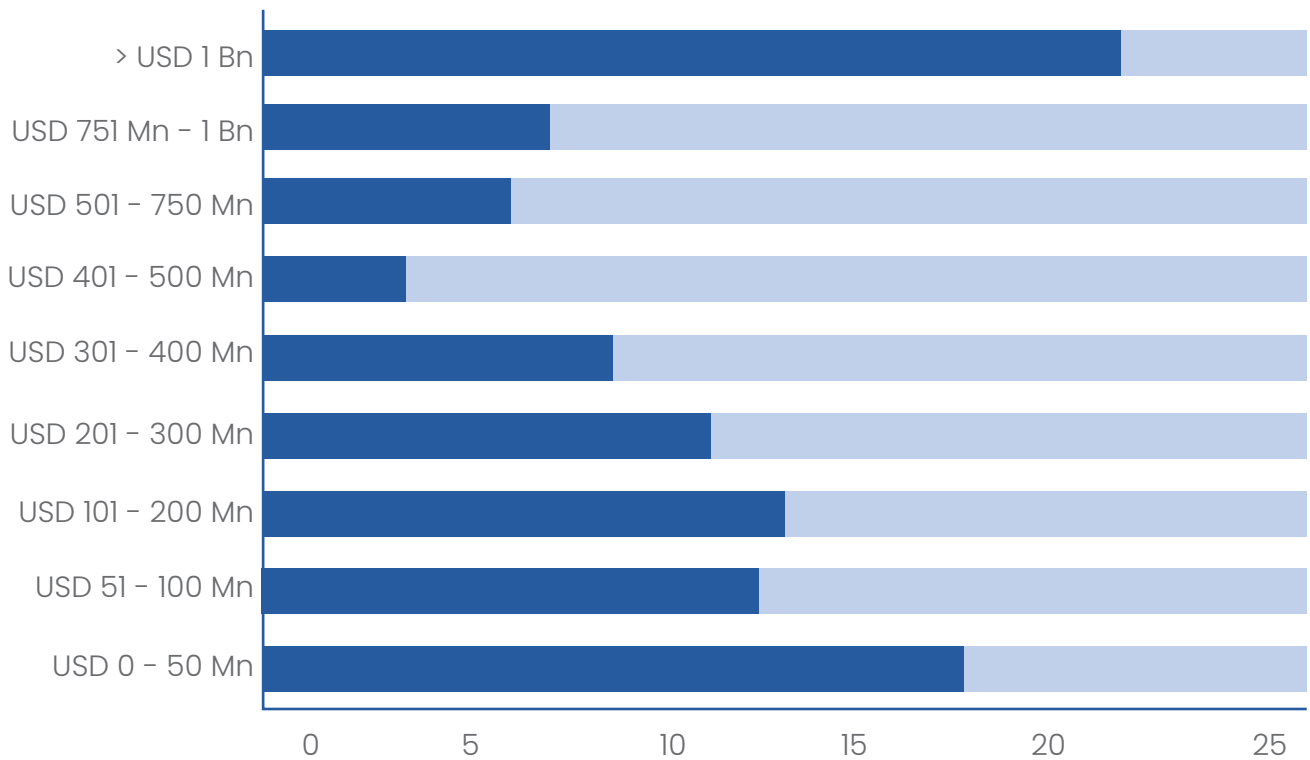
Investment in Majority Stake



Deal Details



Deals by Industry (%)



Deals by Value in USD (%)

Purchase Price Adjustments

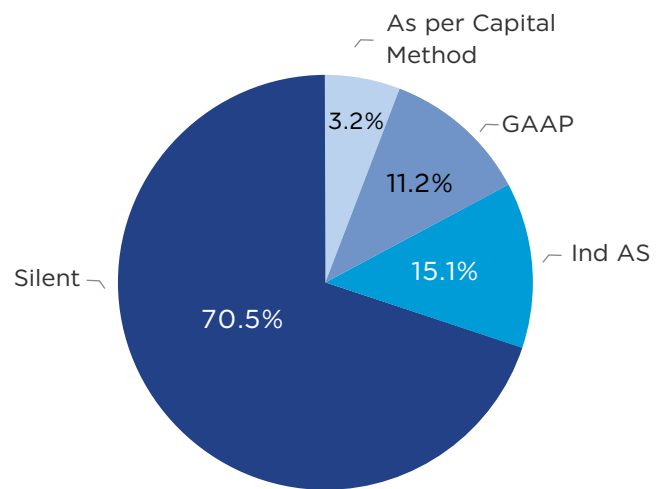
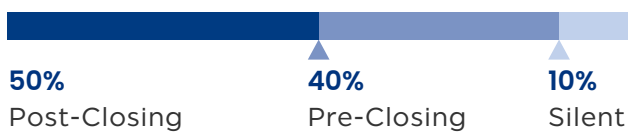
Fewer than 12% of the transactions under review featured adjustments to the purchase price. In terms of timing, 50% of such transactions included provisions for post-closing adjustment, while 40% of the transactions accounted for pre-closing adjustment. Most transactions did not prescribe principles for the method of preparation of accounts, however, around 26% of the transactions contemplated the adoption of Ind AS and GAAP as the accounting principles for preparing the closing accounts.

12%

Purchase Price Adjustments



Purchase Price Adjustments - Timings



Accounting Principles for Preparing Closing Accounts

Locked Box and Permitted Leakages

There has been a consistent rise in transactions involving locked box constructs. Interestingly, only a small number of transactions (approximately 7%) included provisions regarding 'permitted leakages'.

18.3%

Transactions with Locked Box Construct



7%

Transactions with Locked Box Construct with Permitted Leakages



Earnout

Earnouts remain exceedingly uncommon in transactions.

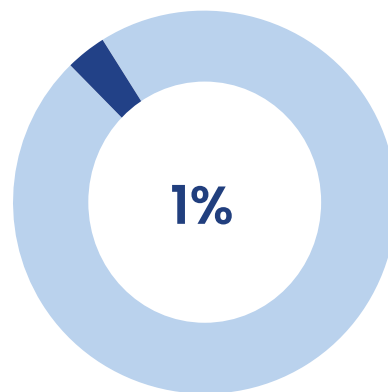
3%

Transactions with Earnouts



Break Fee and Reverse Break Fee

Only 1% of the transactions involved break fee and reverse break fee constructs. This is largely congruent with the approach adopted in light of enforceability challenges in India for break fee and reverse break fee provisions.



Deals that provided for Break Fee and Reverse Break Fee

Holdback and Escrow Arrangements

Most transactions continued to provide upfront payment of the entire purchase consideration, and only a handful of transactions contemplated escrow and consideration holdback arrangements. For cross-border transactions, the Indian exchange control regulations prescribe conditions on escrow arrangements and deferred consideration which seemed to be the key reason behind the limited use of such constructs.

4.6%

Deals with Escrow Arrangements



3.2%

Deals with Holdback Arrangements



Interim Conduct | Between Signing and Closing

Out of the deals under review, 64% included standards to safeguard business interests during the period between signing and closing. A considerable portion of deals included 'ordinary course of business standard' as a part of standstill covenants.

64%

Deals with Interim Conduct Covenants



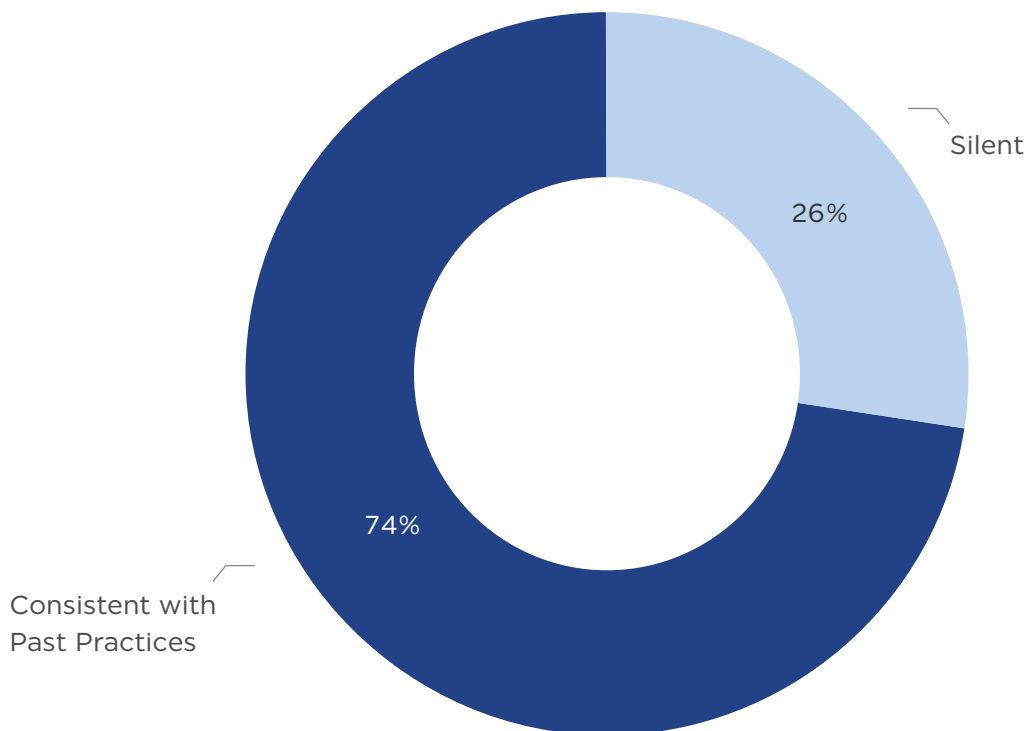
74%

Deals with Ordinary Course of Business Standard Covenants



Standard of Conduct

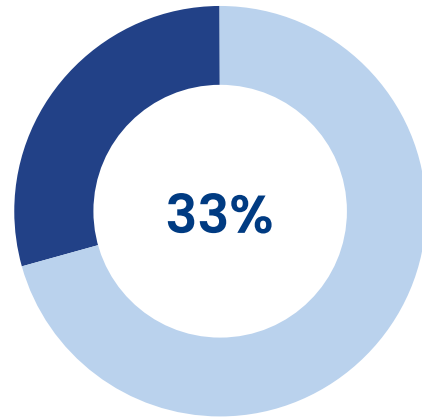
Being 'consistent with past practices' was the most prevalent standard of conduct during the interim period, while 26% of the deals were silent in this regard.



Standard of Conduct

Affirmative Consent Matters

Interestingly, a comparatively smaller proportion of definitive agreements (33% of the deals under review) linked standstill covenants to affirmative voting matters. This outcome might have been influenced in light of the increased concerns of affirmative matters being perceived as 'gun jumping' under antitrust laws.



Deals with Standstill Covenants with Affirmative Consent Matters

No Shop & No Talk

43%

Existence of 'No Shop' Provision

46%

Existence of 'No Talk' Provision

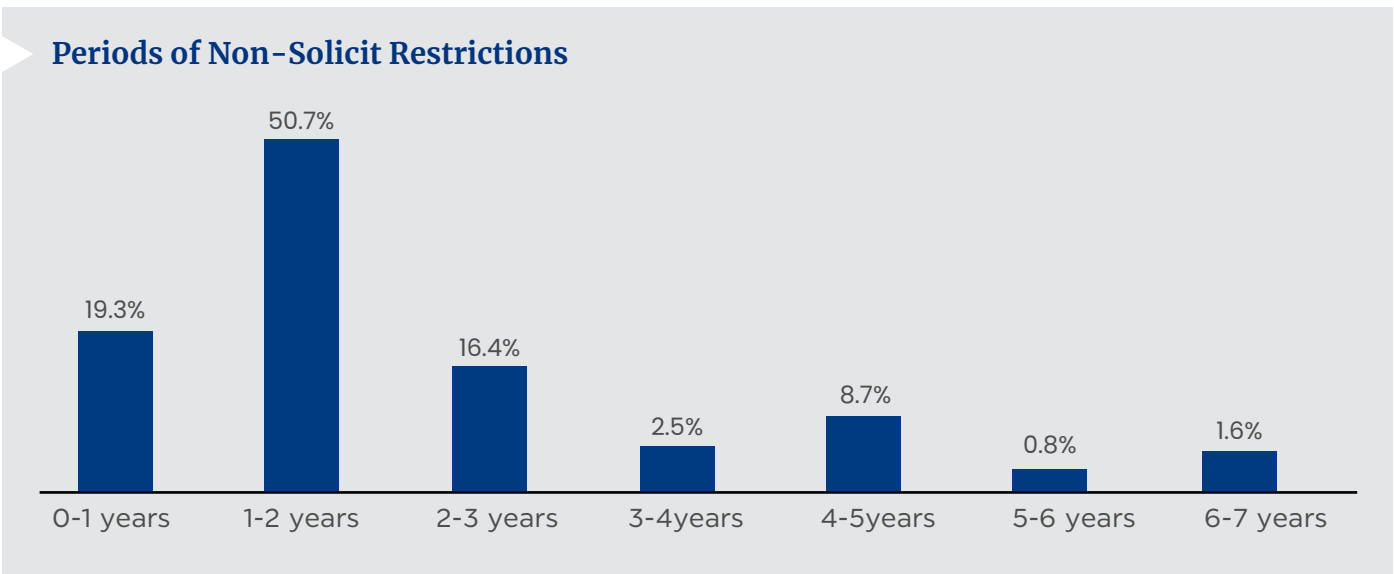




Non-Solicit and Non-Compete

Non-Solicit

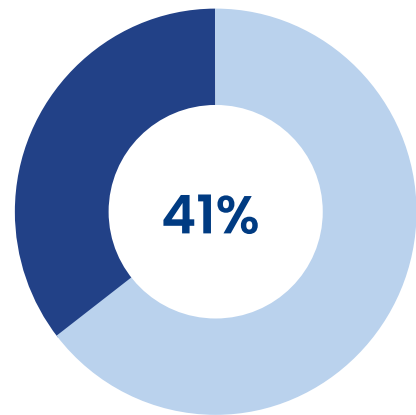
Non-solicit provisions on employees and customers were more common as compared to non-compete provisions. Further, approximately 70% of transactions contemplated non-solicitation restriction for a period ranging from 1 to 2 years.



Non-Compete

A significant portion of the transactions (41%) included non-compete restrictions.

Majority of non-compete provisions are associated with either employment or sale of goodwill. In terms of timeline, the non-compete provisions in most cases ranged from a period of 2 years (42%) to 5 years (7%).



Deals with Non-Compete Restrictions

Authority, Capacity and Title Warranties, and Indemnities

Data reaffirmed the requirement of buyers to seek, and the readiness of sellers to provide representations and warranties on their authority to contract and title to securities.

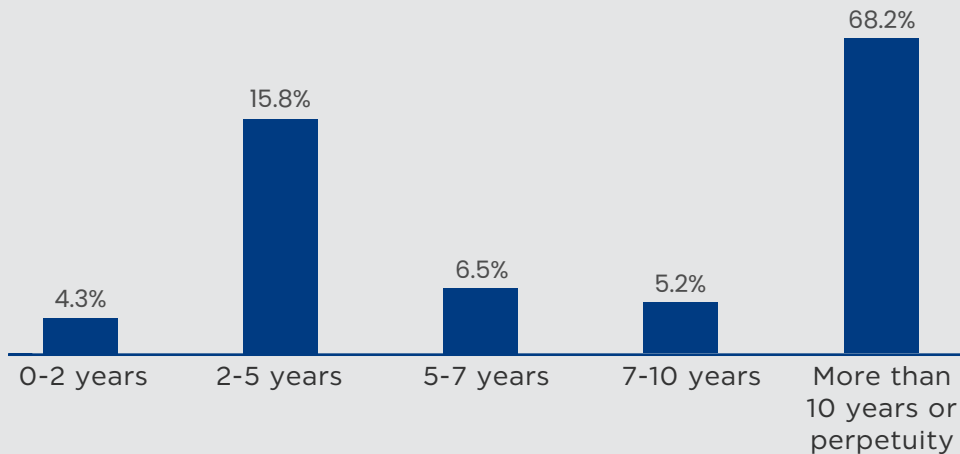
94%

Deals with Warranty and Indemnity on Authority, Capacity and Title

Survival Period

Survival period for indemnity claims for authority, capacity and title warranties exhibited diverse trends, with the most common range being beyond 10 years (68%). Similarly, survival periods of 2 to 5 years featured in 16% of the transactions. Only 7% and 5% of the transactions included durations of 5 to 7 years and 7 to 10 years, respectively. This spread reflected the varied risk tolerances and negotiation dynamics present in different agreements, highlighting the absence of a single 'one-size-fits-all' approach.

Survival Period for Authority, Capacity and Title Warranties



Monetary Cap

A substantial proportion (68%) of the transactions capped the monetary liability to 100% of deal value for breach of authority, capacity and title warranties.

68%

Deals that have Monetary Caps of 100% of Deal Value

ABAC and AML Warranties, and Indemnities

80% of the definitive agreements incorporated specific warranty and indemnity coverage for ABAC and AML matters. This demonstrated the strong rising preference of financial sponsors to seek robust warranties on these topics.

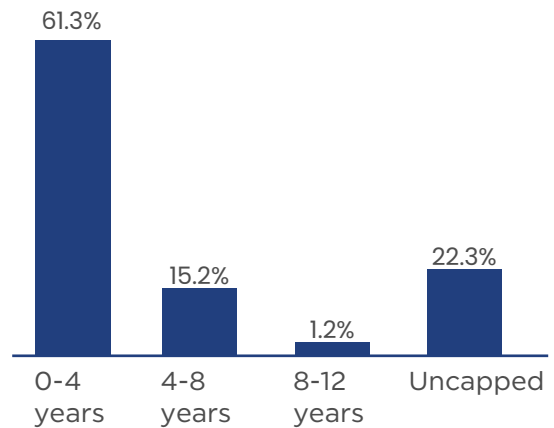
80%

Deals that have Specific Warranties and Indemnities on ABAC and AML



Survival Period

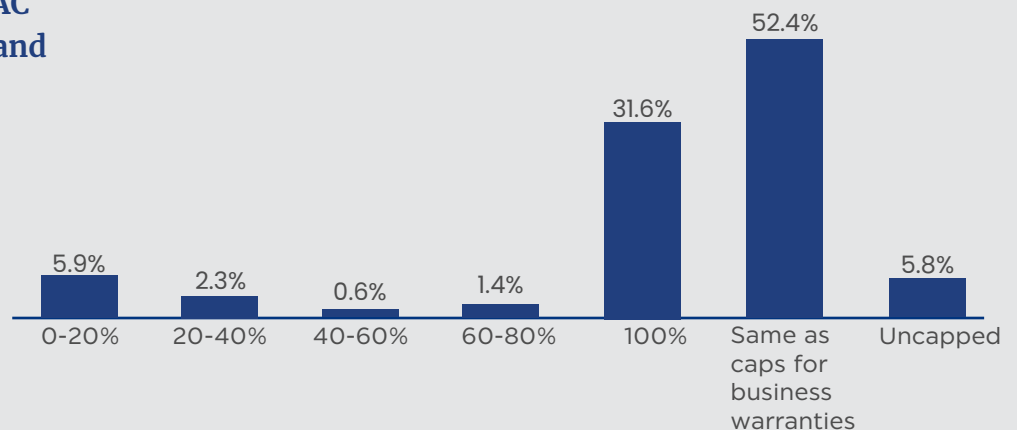
As anticipated, ABAC and AML warranties had longer survival periods as compared to business / operational warranties. 61% of the deals had survival period of up to 4 years and 22% of the deals provided for uncapped survival periods.



Monetary Cap

Approximately 32% transactions under review had a monetary cap equal to the purchase consideration. In 52% transactions, ABAC and AML warranties were treated at par with 'business warranties', while approximately 6% transactions had uncapped liability.

Monetary Caps on ABAC and AML Warranties and Indemnities



Business Warranties

69% transactions included warranties on business and operational matters.

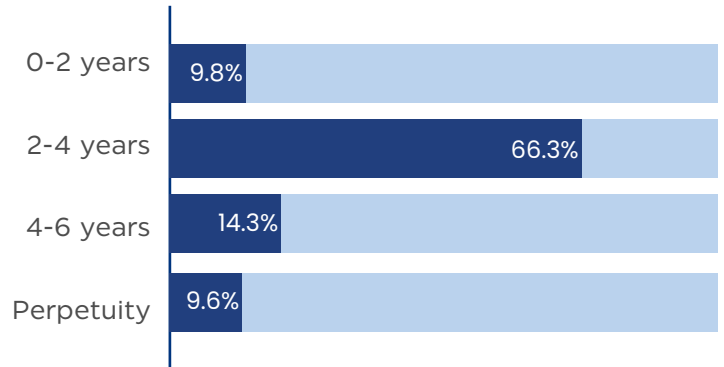
69%

Deals included Business Warranties and Indemnities



Survival Period

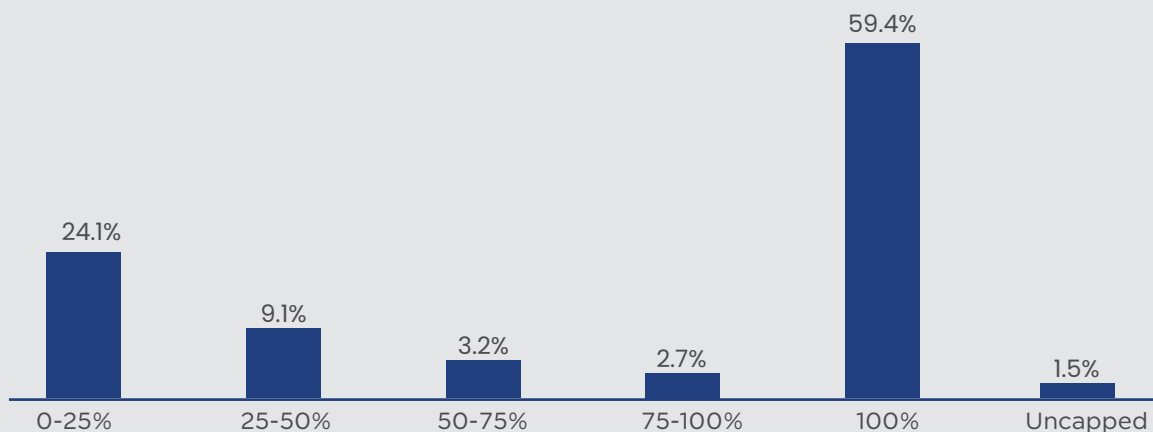
76% transactions had coverage of up to 4 years from closing date (with 66% deals featuring 2 to 4 years and 10% deals featuring 0 to 2 years) as claim period.



Monetary Cap

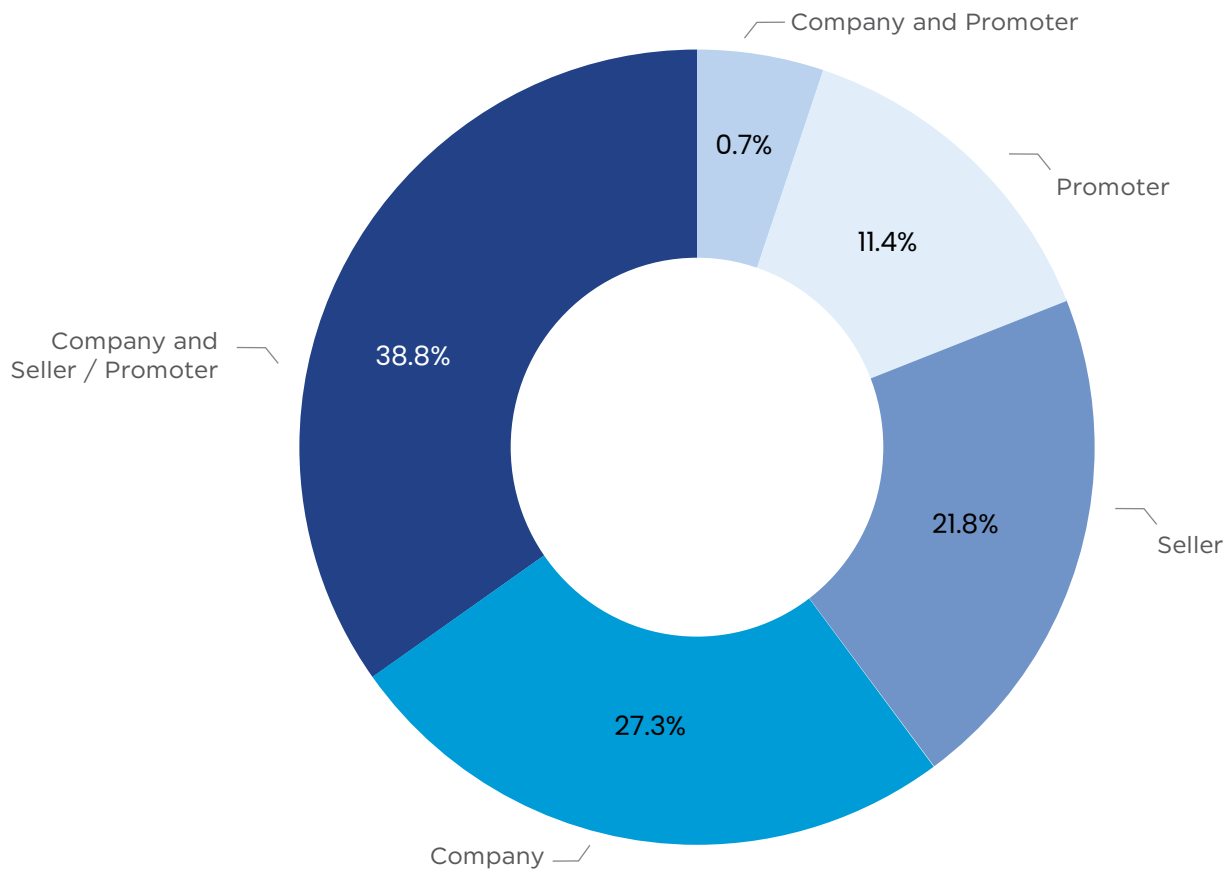
Notably, a significant number of the transactions (59%) linked the monetary cap for business warranties to 100% of purchase consideration, while 33% transactions reflected up to 50% of purchase consideration.

Monetary Caps for Business Warranties and Indemnities



Business Warrantor

While the entity that extended warranty depended on deal construct, and in particular, shareholding and management representation; in most cases, warranties were provided by company and seller jointly.



Provider of Business Warranties



Target Tax Warranties and Indemnities

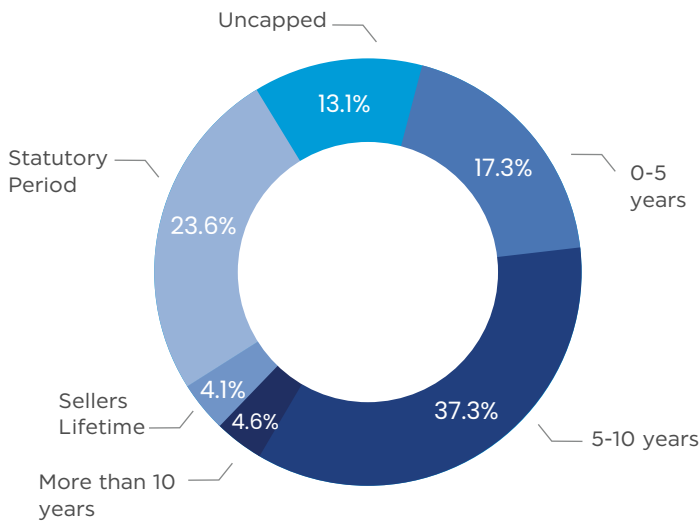
A substantial proportion of deals (88%) had target tax warranties and associated indemnities.

88%

Deals sought Warranties and Indemnity on Corresponding Tax



Survival Cap



Survival Period for Tax Warranties

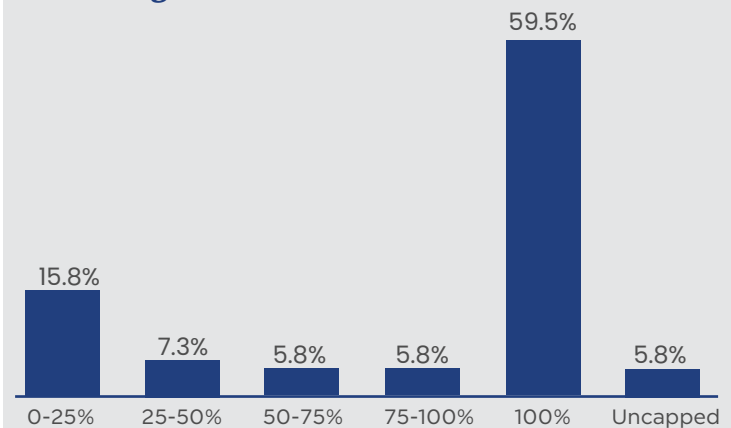
A duration of 5-10 years appeared to be the most 'market' in terms of survival period for tax warranties (37%), followed by 24% transactions linking the time period to statutory period and in a peculiar trend, 4% deals linked the liability to the lifetime of seller. 13% transactions kept the survivability uncapped and 5% transactions provided for more than 10 years of survival period.

Monetary Cap

100% of consideration was the most common cap for target tax warranties in 60% transactions, followed by 25% of consideration as cap in 16% transactions.

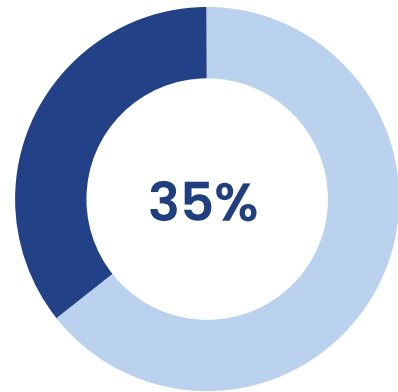
Only 6% transactions kept such liability uncapped.

Monetary Caps for Indemnity Claims on Target Tax Warranties



Full Disclosure Representation

Majority of the transactions (65%) did not include a full disclosure representation. Full disclosure representation is a key anti-fraud representation that focuses on preventing materially misleading disclosure or omission to the investor / buyer and is akin to '10b-5' representation seen in the US market.



Deals included a Full Disclosure Representation

Knowledge Qualifier | Full Disclosure Representation

Interestingly, among the data set of full disclosure representations, only 26% of such representations were qualified by knowledge.

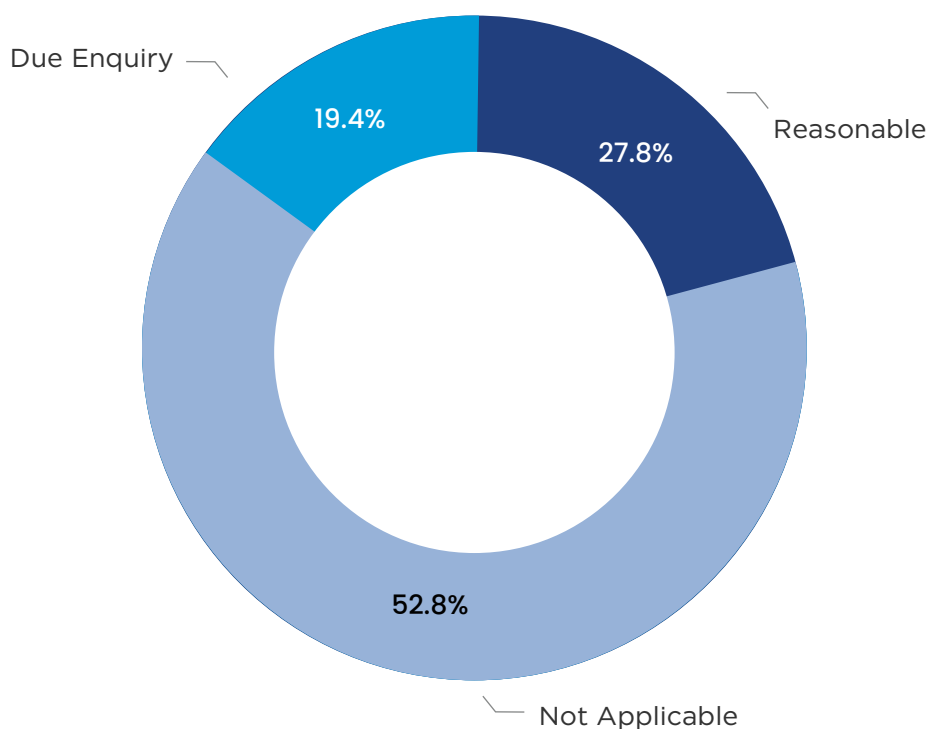


Universe of Knowledge

The 'actual' knowledge standard surpassed the 'constructive' knowledge (i.e. knowledge which a party is presumed to possess), with 41% of the deals adopting the former.



Out of the agreements that included the concept of constructive knowledge, only 19% of the deals conditioned knowledge on facts that should have been discovered after 'due enquiry'.

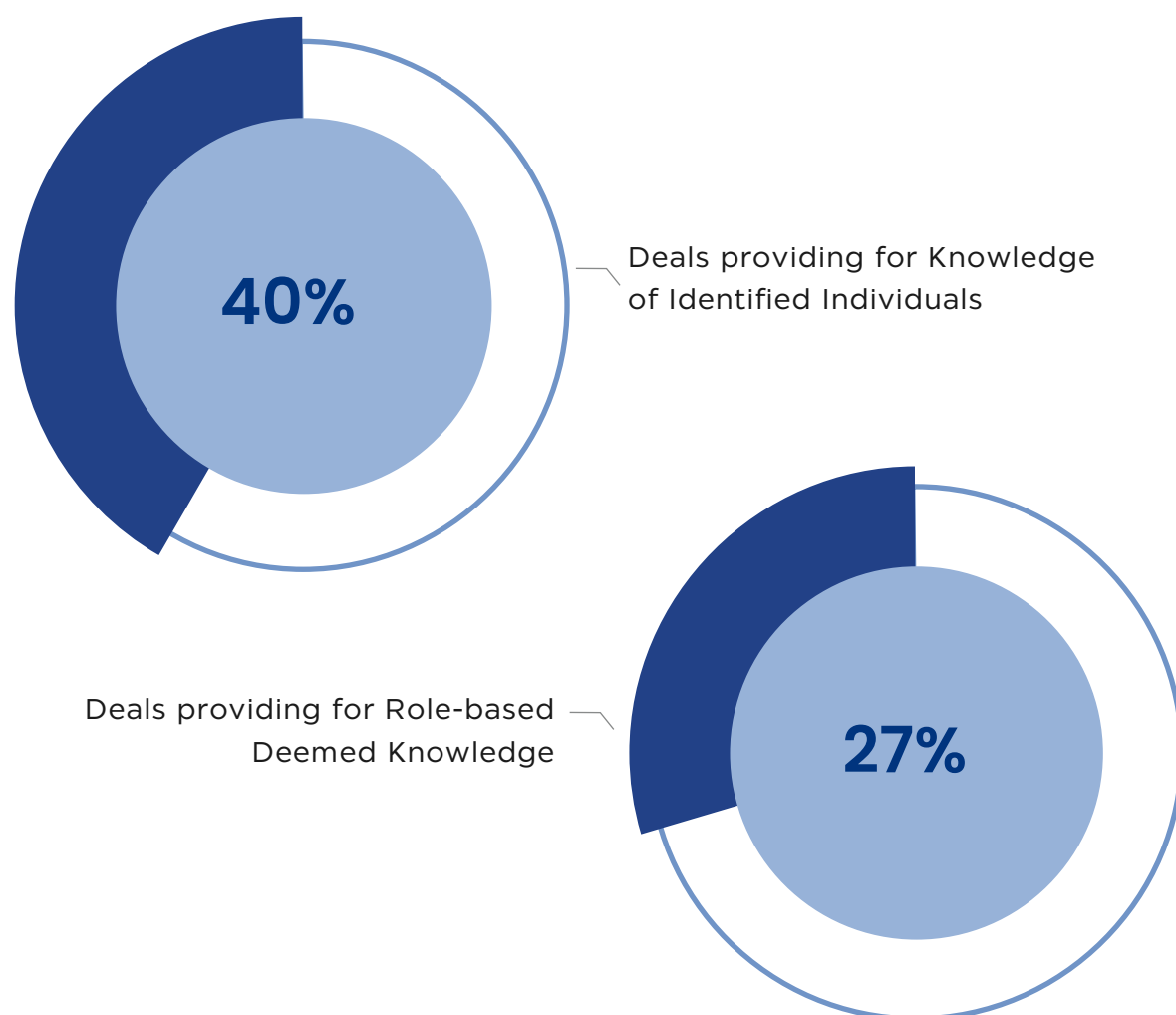


Universe of Knowledge

A significant number of deals (40%) did limit knowledge to one or more specifically identified persons.

Similarly, a majority of definitive agreements (27%) did include role based deemed knowledge.

The study discovered a common theme of omitting reference to specific individuals who are most likely to possess knowledge of relevant facts.



Indemnity for Breach of Covenant

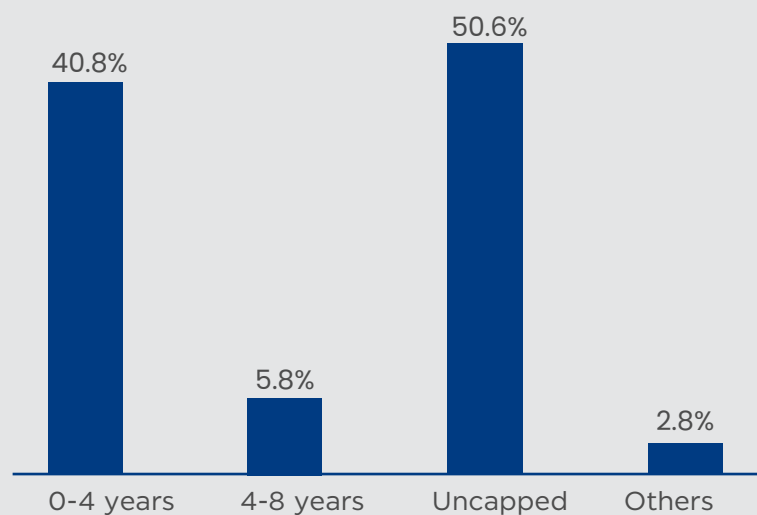
For breach of covenants, indemnity was provided in almost two-third of the transactions but based on our study, such indemnity was typically for key identified covenants.



Survival Period

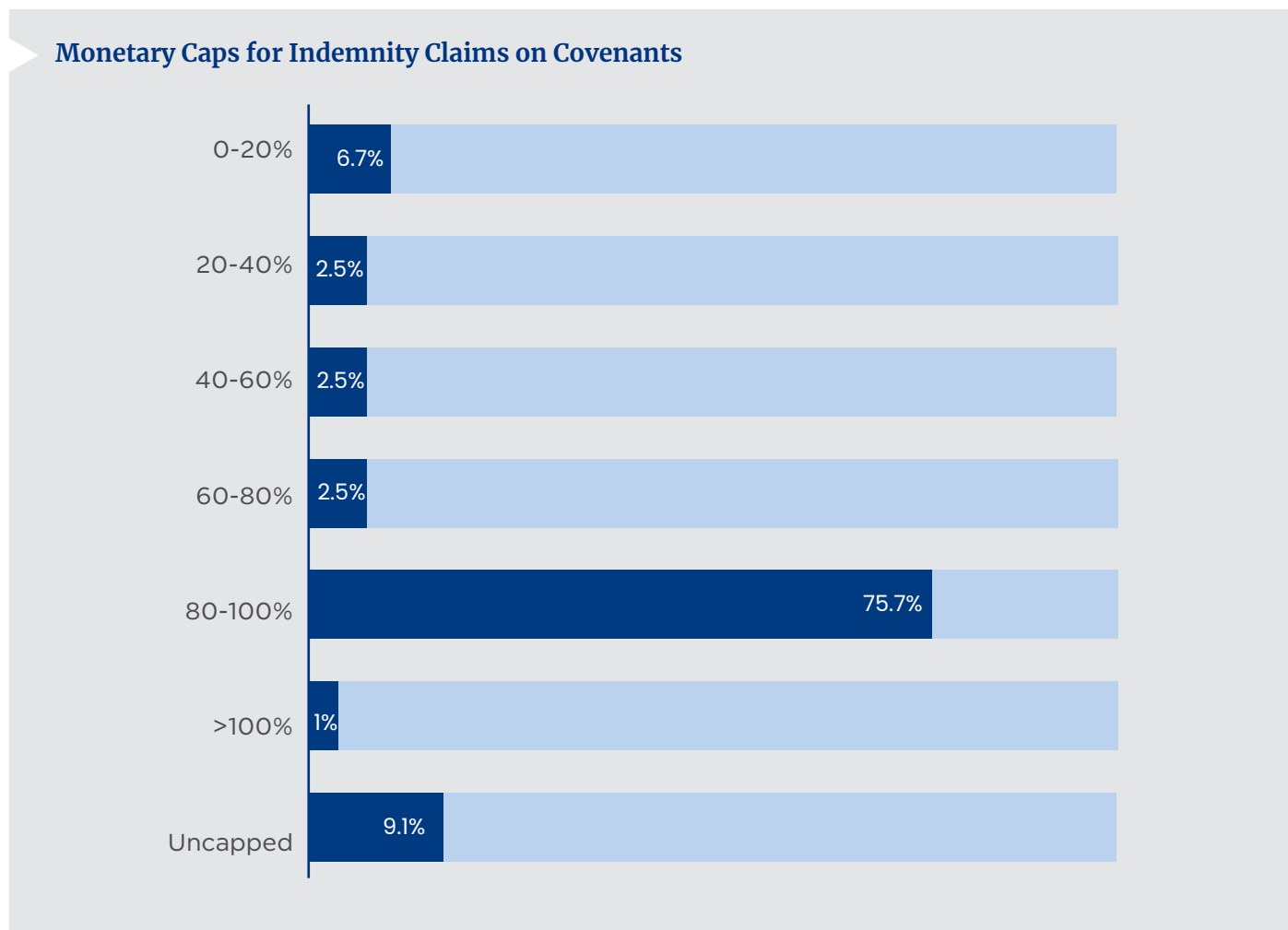
Indemnity for covenants in majority of the reviewed transactions had an uncapped claim period (51%), followed by 0 to 4 years for 41% transactions and 4 to 8 years for 6% transactions.

Survival Period for Indemnity Claims on Covenants



Monetary Cap

76% transactions provided 80% to 100% of the deal value as monetary caps for breach of covenants, with liability in a handful of transactions either being uncapped or capped at, 20% of the consideration or less.



Indemnity as Sole Monetary Remedy

Remarkably, there was a near balance between transactions that expressly recognised indemnity as the sole monetary remedy (52%) versus those that did not include this provision (48%).

52%

Deals that included Indemnity as the Sole Monetary Remedy



Universe of 'Indemnified Persons'

While investors / buyers are typically included as indemnified parties, it is 'market' to also have affiliates, directors, agents / representatives and employees within the universe of indemnified parties.

69%

Deals with Affiliates as Indemnified Party



Deals with Target / Subsidiaries as Indemnified Party

Deals with Agents as Indemnified Party

Deals with Employees as Indemnified Party

Deals with Directors as Indemnified Party

81%

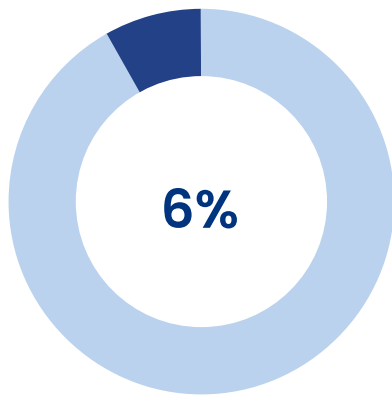
72%

46%

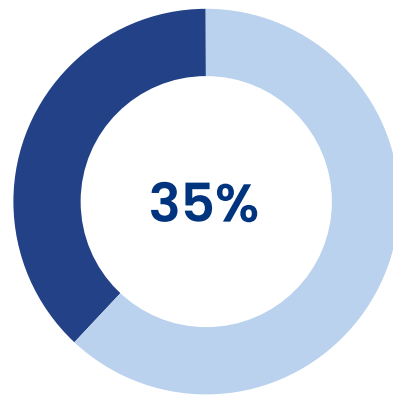
14%

Pro-Sandbagging and Anti-Sandbagging

Seller or target, in a 'pro-sandbagging' provision, acknowledges that investor's pre-closing knowledge will not affect the investor's ability to bring a claim post-closing, whereas in an 'anti-sandbagging' provision, an investor cannot bring legal action against seller or target if there is a breach of warranty that the investor was aware of pre-closing.



Deals with Anti-Sandbagging Clause

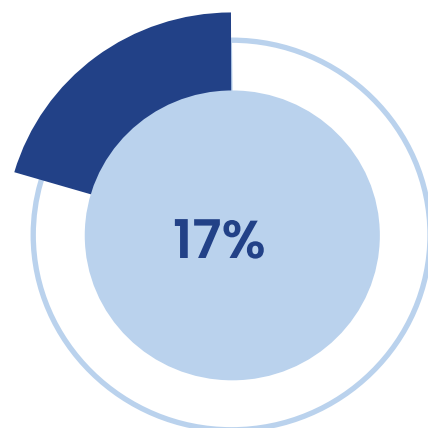


Deals with Pro-Sandbagging Clause

The study revealed that 'pro-sandbagging' provisions are more 'market', as 35% transactions provided for 'pro-sandbagging' provisions, while only 6% deals provided for 'anti-sandbagging' provisions.

Materiality Scrape

A materiality scrape provision ensures no double materiality in cases where the indemnification obligations of a party are subject to basket / de-minimis thresholds. It allows the indemnified party the right to exclude materiality, material adverse effect, or other similar qualifications contained in the representations and warranties for indemnification purposes. Interestingly, only 17% of the transactions reviewed provided for a materiality scrape provision.



Definitive Agreements included Materiality Scrape

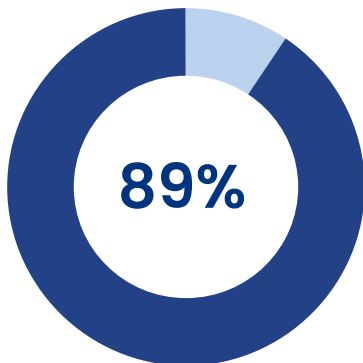
Disclosures

Data Room as General Disclosure

In a significant portion of deals (91%), the buyers did not accept data room as a general disclosure. But we observed that buyers seem to be more amenable to accepting data room as general disclosure for high quality assets or in transactions involving an auction process (although usually with a 'fairly disclosed' standard).



DD Reports

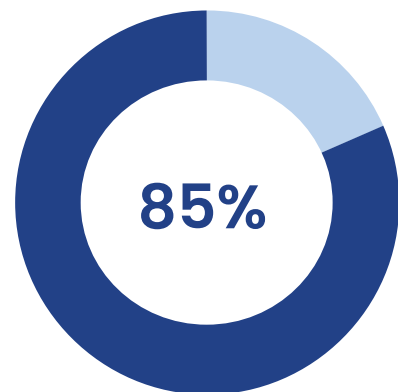


Deals that did not accept General Disclosure of DD Reports

In a sizable number of the transactions (89%), due diligence, whether undertaken by vendors or by investors, was not accepted as a general disclosure.

Public Records

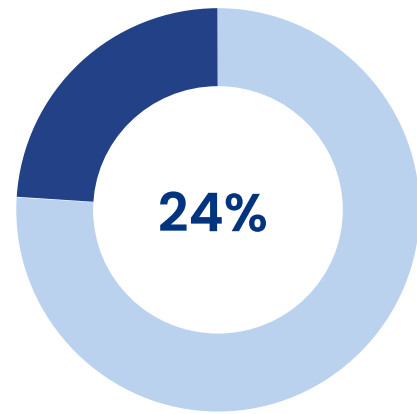
A substantial portion of the deals (85%) did not recognise information in the public domain (including public searches, whether on the Ministry of Company Affairs, the Registrar of Sub-Assurance, stock exchanges or otherwise), as a standard of general disclosure.



Deals that did not accept General Disclosure of Publicly Available Information

Accounts

In contrast to other forms of general disclosures, audited accounts were accepted as general disclosures in 24% of the transactions under review.



Deals that accepted General Disclosure of Accounts

Updated Disclosure Letter



Approximately half of the transactions under review featured the ability of the target / seller / promoter to update the disclosure letter prior to / at closing. This is interesting as inability in this regard poses legal risk for sellers and/or target in case where the time gap between signing and closing is significant.

Interim Matters Update



Deals with Updated Disclosure Letter only for Matters between Execution Date and Closing Date

Fundamental Warranties Update



Deals without Update for Fundamental Warranties in the Updated Disclosure Letter

Disagreement on Updated Disclosure Letter

Only 40% of the deals under review provided the buyer / investor the right to walk away if disclosures made in updated disclosure letter were not acceptable to the buyer / investor.

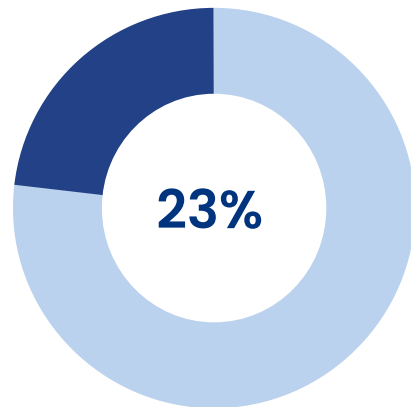
40%

Deals express ability to terminate if Updated Disclosures are unacceptable



Ability to Close with Specific Indemnity

If disclosures are not agreeable under Updated Disclosure Letter, a handful of transactions (23%) provided an ability to the target / seller / promoter to force the buyer / investor to proceed with closing by offering specific indemnities.



Deals moving to Closing basis
Specific Indemnity



Other Limitations and Exclusions

Basket

55%

Deals with Basket for Indemnification Claims



Slightly more than half of the transactions under review included a basket for indemnification claims. This is revealing as baskets provide significant protection to sellers / target.

De-Minimis

Similar to our findings on 'basket', approximately 52% transactions included the concept of de-minimis.

52%

Deals with Presence of De-Minimis for Indemnification Claims

Tipping or Deductible

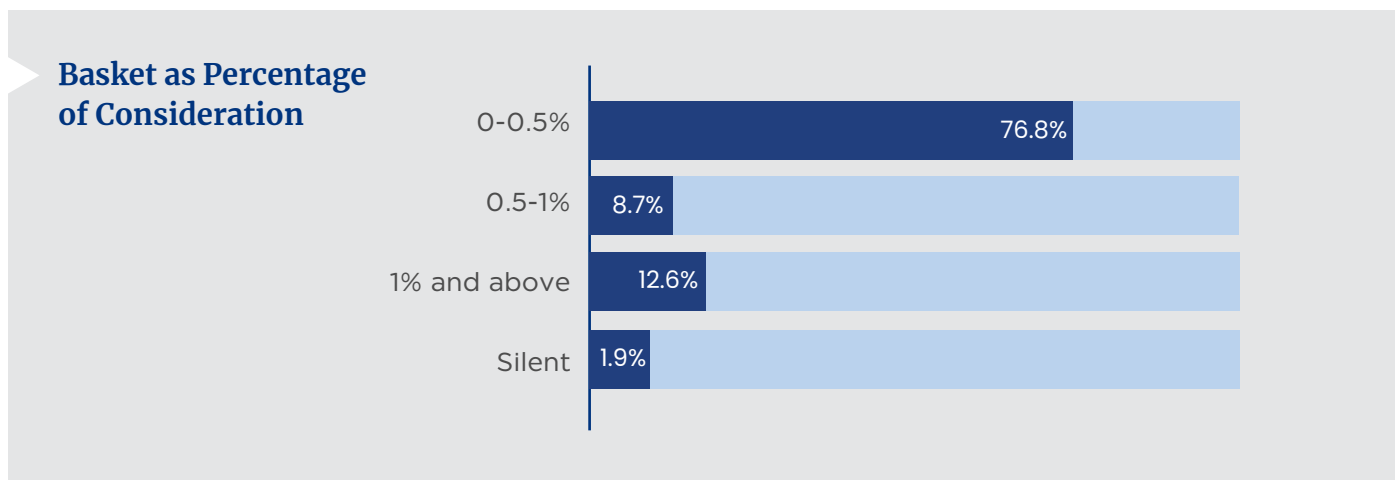
100%

Basket - Tipping

Interestingly, all the transactions, which included basket construct under review incorporated the construct of tipping basket. In a 'deductible' basket, only claims that exceed agreed amount are submitted, whereas in a 'tipping' basket, first dollar can be claimed once aggregate basket exceeds the agreed amount.

Basket Threshold

Interestingly, the basket thresholds for indemnity claims exhibited diverse trends. The thresholds varied from up to 0.5% of the consideration to even beyond 1% in certain circumstances.



Surprisingly, out of the data set reviewed, de-minimis threshold was at 2.6% of the purchase consideration, as opposed to the general market trend of 0.1%.

2.6%

De-minimis



Fraud Exclusion

Almost three-fourth of the transactions excluded fraud from all limitations of liability. Standard of 'fraud' is high and burden to prove rests on the party making a claim.

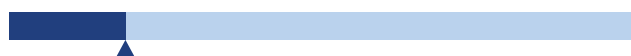
75%

Deals excluded Fraud from All Limitations

Diminution in Value

17%

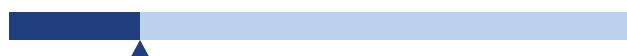
Deals with Diminution in Value as a Specific Element in Definition of 'Loss'



Consequential Loss

18%

Deals with Consequential Loss Expressly Covered in Definition of 'Loss'



Gross-Up for Tax

Around 61% of transactions incorporated provisions for grossing-up to account for tax that may be attracted on any indemnity payments.

61%

Deals with Tax Gross-Up

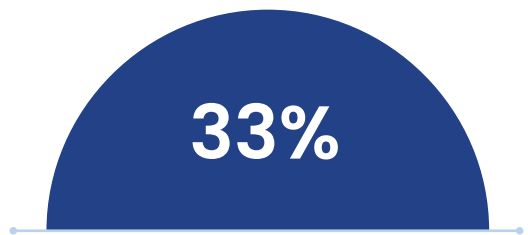


Gross-Up for Shareholding

Among the definitive agreements in which indemnity pay-outs could be made by target, only 33% transactions provided gross-up for investor's / purchaser's shareholding.

33%

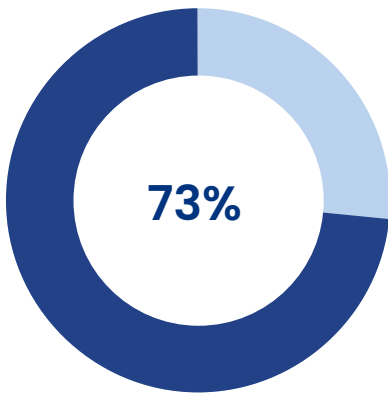
Deals with Shareholding Gross-Up



Material Adverse Change

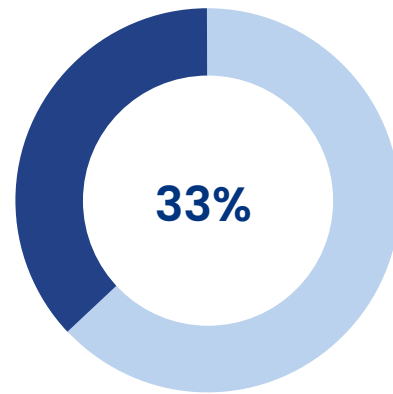
MAC provisions continue to find their way into a significant number of Indian investment transactions. There is no significant Indian judgment that has tested the ability of a party to walk-away from a definitive agreement on grounds of MAC. Objective thresholds, as one of the limbs to determine MAC, continue to be rare (at 13%).

MAC



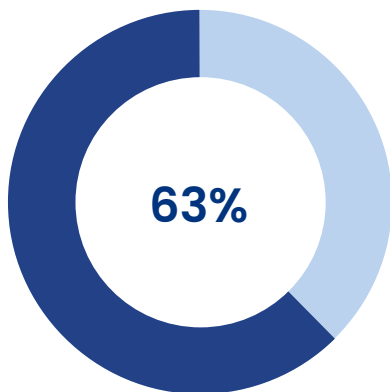
Deals providing for no MAC as a Warranty and/or Closing Condition

'Prospect' in MAC Definition



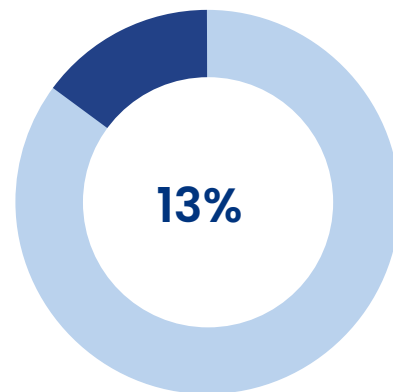
Deals with 'Prospect' as a Specific Element in Definition of 'MAC'

Forward Looking Language



Deals providing for Forward Looking Language in Definition of MAC

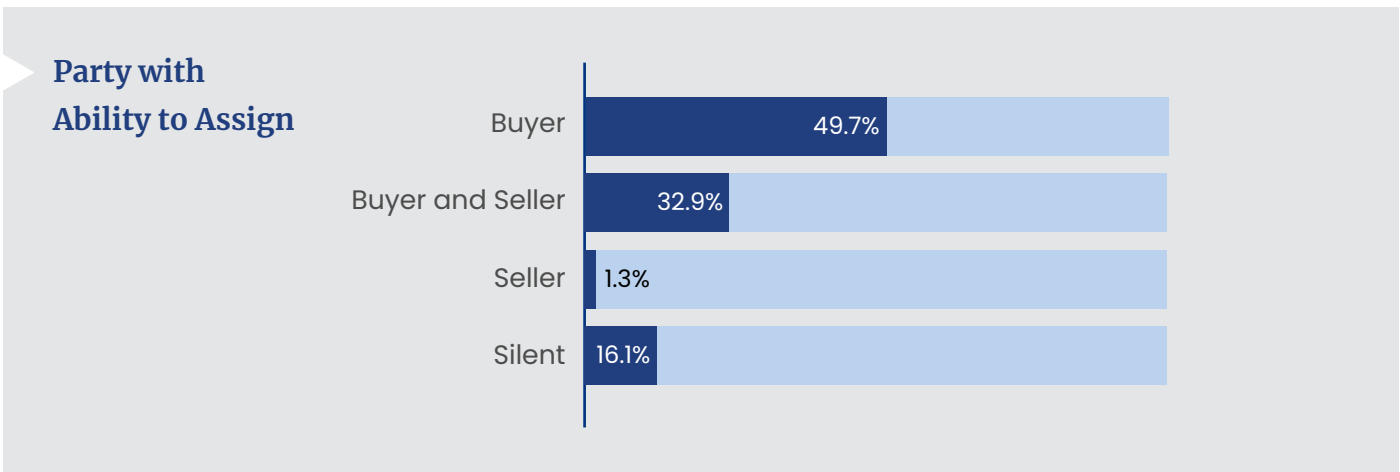
Objective Threshold



Deals providing for Objective Threshold in MAC Determination

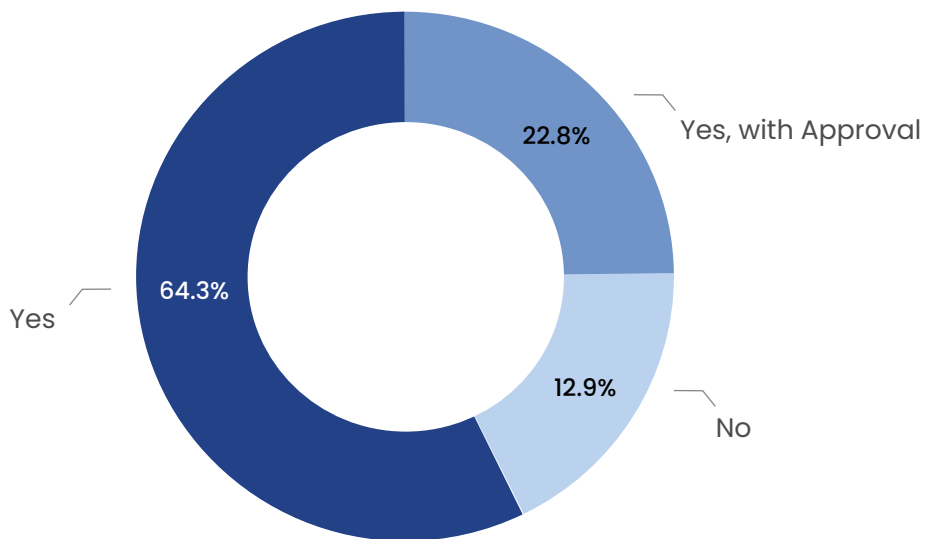
Universe of Assignment

For a large portion of the transactions (50%), only the buyer had the ability to assign rights under definitive agreements, followed by ability of assignment available to both buyer and seller (33%).



Affiliates

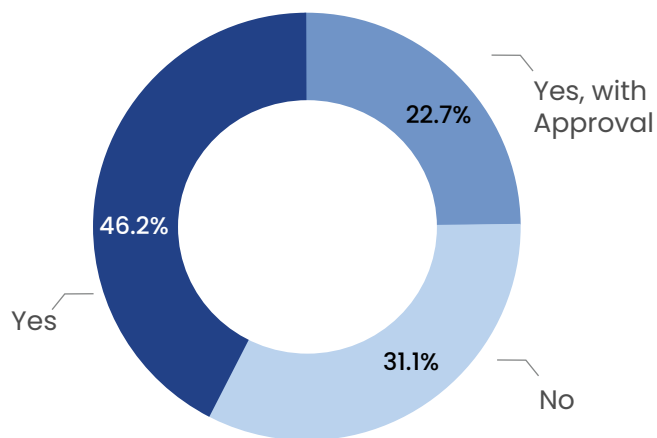
Majority (64%) of the definitive agreements included the Investor's / Buyer's ability to assign to its affiliates without approval, and a few (23%) with approval. That said, 13% of transactions did not allow for assignment to affiliates.



Investor's / Buyer's Ability to Assign to its Affiliates

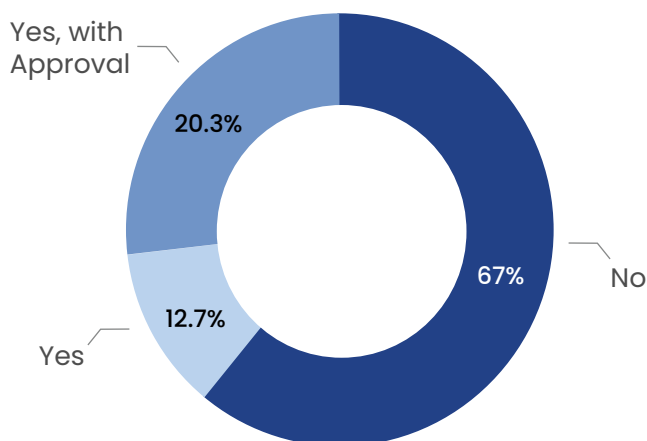
Transfer to Affiliates

Approximately half of the deals under review (46%) provided for right of the buyer to freely assign its rights under the agreements to its affiliates holding securities. 23% transactions required approval for such assignment.



Permissibility to Assign to Affiliates holding Securities

Financing Sources



Assignment to Financing Sources

A substantial portion of the deals under review (67%) were silent on assignment of rights by the investor / buyer to financing sources. Only a handful of agreements (13%) gave flexibility to an investor to assign definitive agreements and rights under them to its financing sources, while 20% agreements required specific approval from other parties.

Confidentiality Inclusion

75% of transactions included sharing of confidential information with affiliates, directors, partners, and employees.

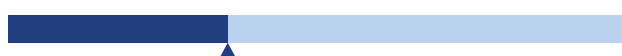
75%

Confidentiality Inclusion - Affiliates



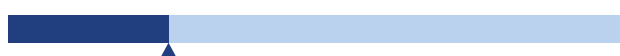
42%

Confidentiality Inclusion - Finance Sources



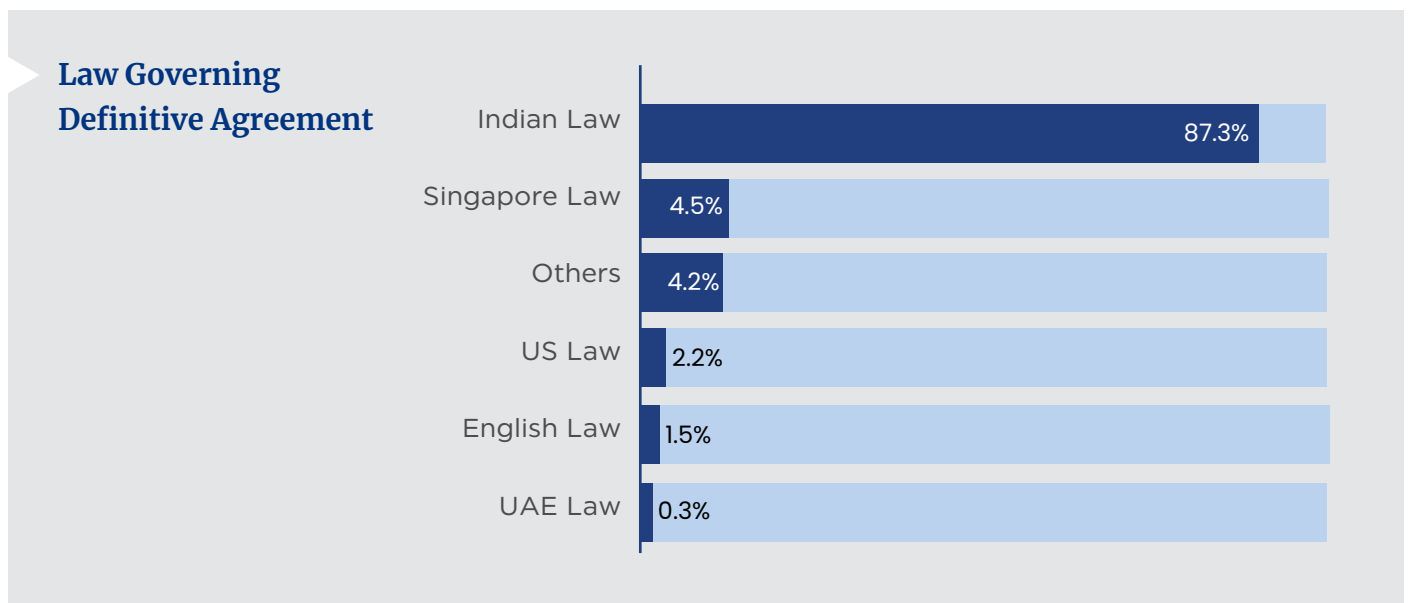
32%

Confidentiality Inclusion - Future Buyer



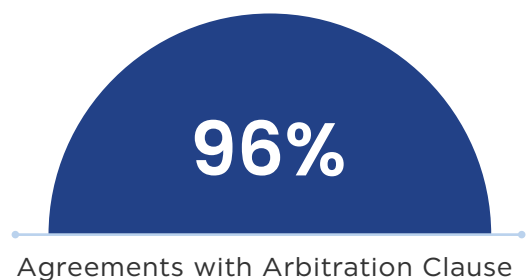
Governing Law and Arbitration

Expectedly, Indian law was the most common law governing definitive agreements (87%). Singapore law stood second at 5%, and English and the US laws collectively governed approximately 4% of definitive agreements.



Dispute Resolution by Arbitration

In nearly all transactions (96%), disputes arising between parties of the agreement were directed to arbitration (rather than being subject to jurisdiction of courts and tribunals). This underscores the prevailing preference for arbitration over traditional court litigation.



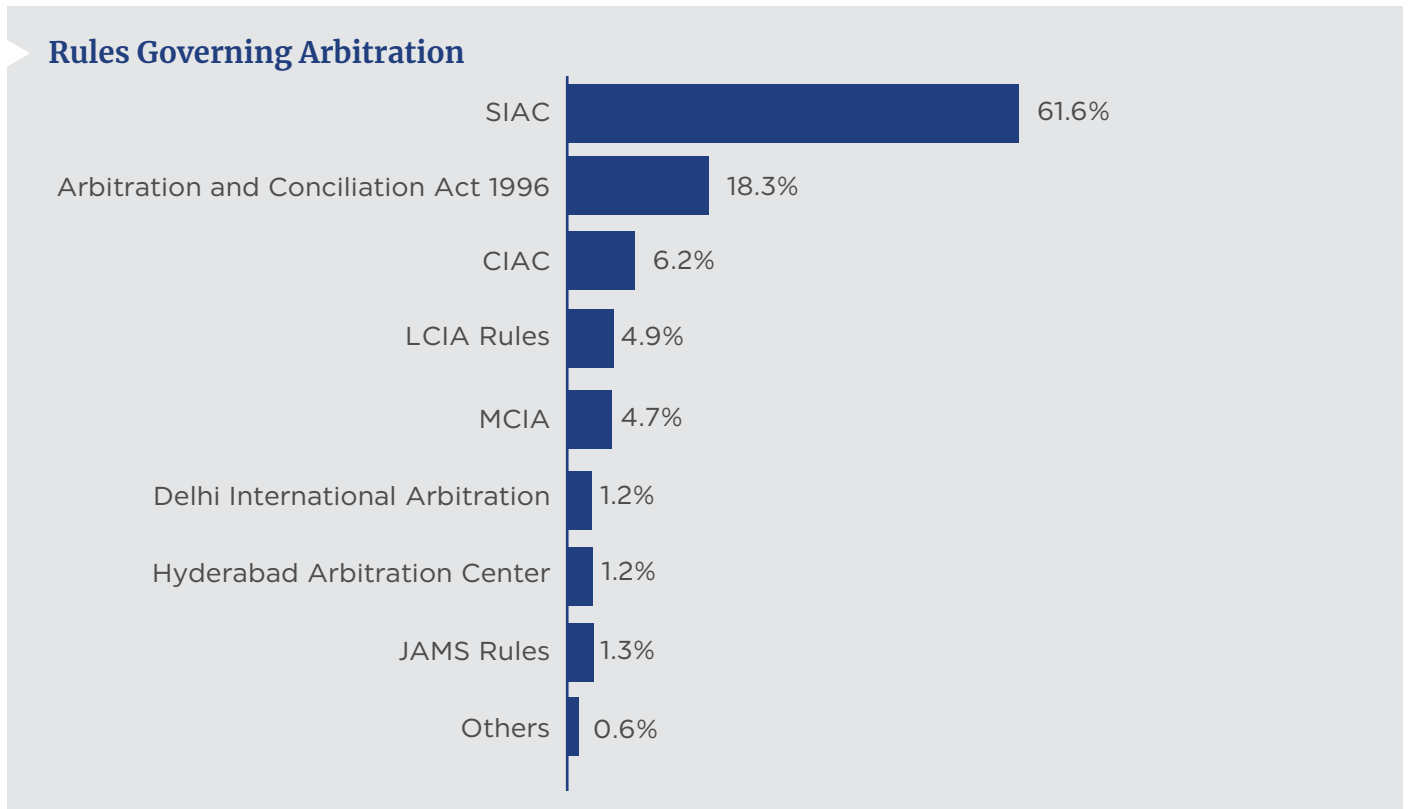
Arbitrator

In majority of transactions (72%), disputes were featured to be resolved by a tribunal of arbitrators (rather than a single arbitrator).

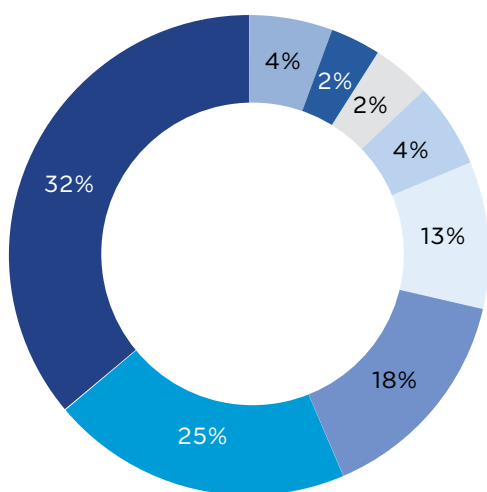


Arbitration

SIAC continued to remain as the preferred institution for administration of arbitration with around 62% of the transaction under review providing for SIAC administered arbitration.

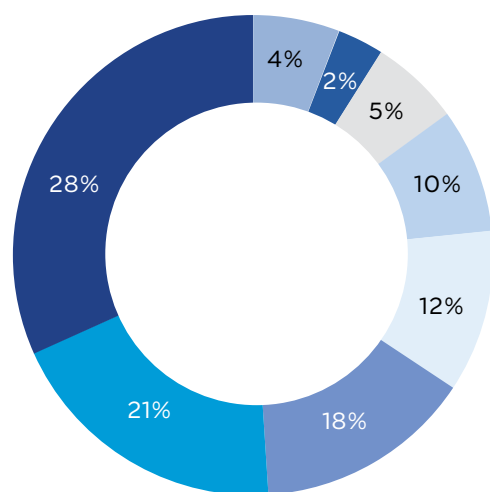


Arbitration Venue



Preferred Arbitration Venue

Arbitration Seat



Preferred Arbitration Seat

■ Singapore
 ■ Bengaluru
 ■ Mumbai
 ■ New Delhi
 ■ London
 ■ Ahmedabad
 ■ Chennai
 ■ Others

Warranty and Indemnity Insurance

Deals where Buyers subscribed to the Policy

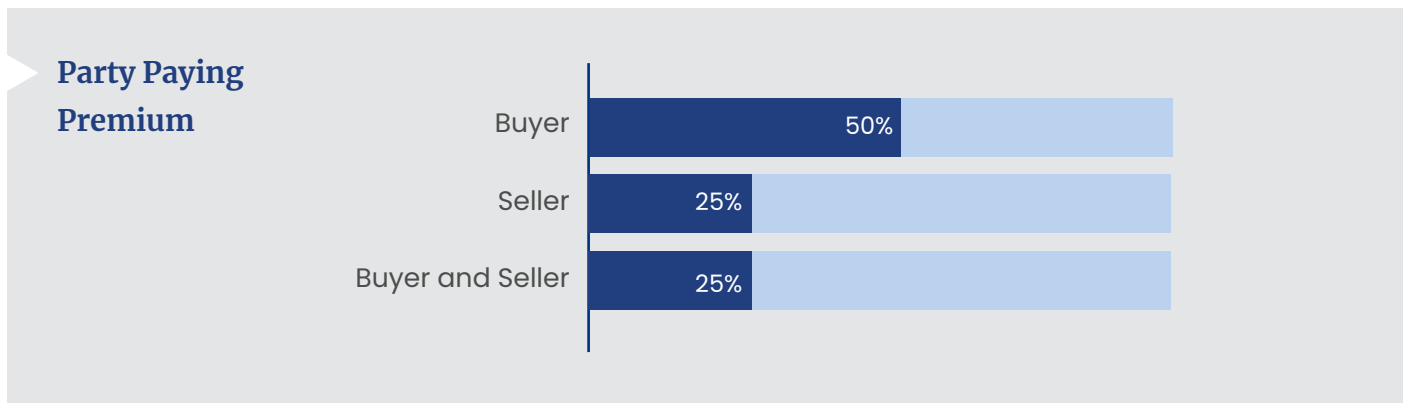
All policies for the transactions under review were buy-side policies (100%), considering the benefits such policies have over a sell-side policy. Sell-buy flip was used in 33% transactions under review.

100%

Deals had Buy-side Policies

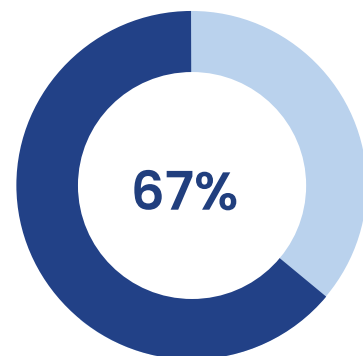
Premium Payer

Premium on W&I policy was paid by buyer in 50% cases, while the seller paid the premium in 25% transactions under review. Premium on W&I policy was shared by buyer and seller in 25% transactions.



Timing of Policy Subscription

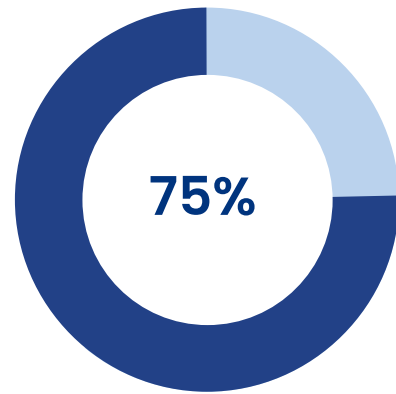
In majority of the transactions under review, NBI was broadly agreed prior to execution of definitive agreements where W&I policy was subscribed as a condition to closing (67%). In 33% situations, W&I policy was subscribed to post completion.



Deals had Policy Subscription Prior to Completion

Coverage

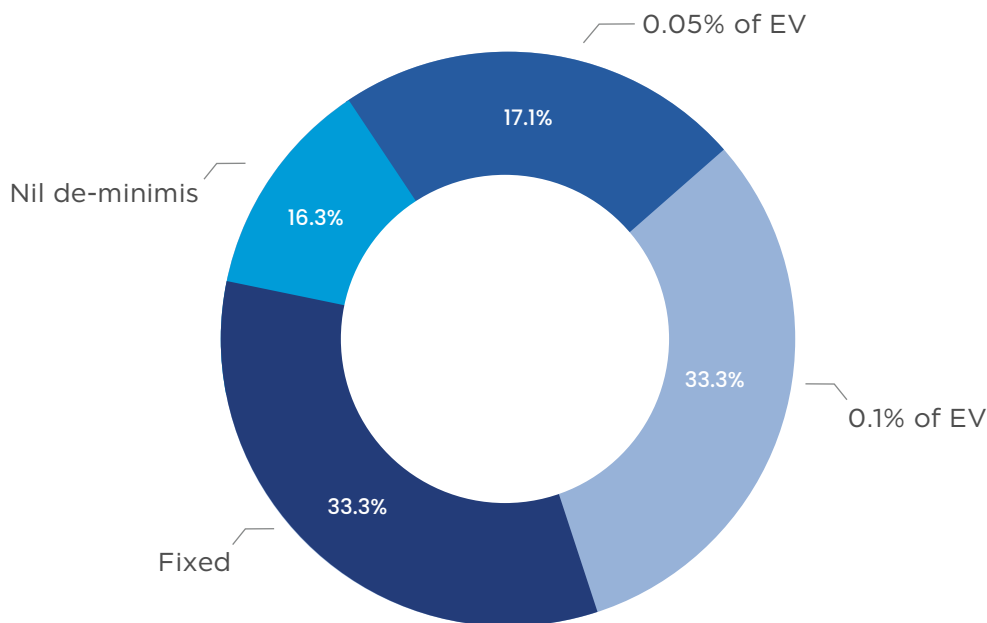
W&I insurance in almost 75% transactions was taken for fundamental warranties, target tax warranties and business warranties, while in 25% transactions, W&I insurance was taken for only fundamental warranties.



Deals that had W&I Insurance for Fundamental Warranties, Tax Warranties and Business Warranties

De-Minimis for W&I Insurance

0.1% of enterprise value was the most common de-minimis for W&I insurance, followed by 0.05% of enterprise value in 17% transactions.



Retention

A significant portion of the transactions under review had 1% of EV as retention.

72%

Deals with 1% of EV as Retention



Nil De-Minimis for Title Warranties

53% of transactions under review had nil de-minimis for title warranties.

53%

Deals with Nil De-Minimis for Title and Capacity Warranties



Nil Retention for Title Warranties

36% of the transactions under review had nil retention solely with respect to title warranties.

36%

Deals with Nil Retention for Title Warranties



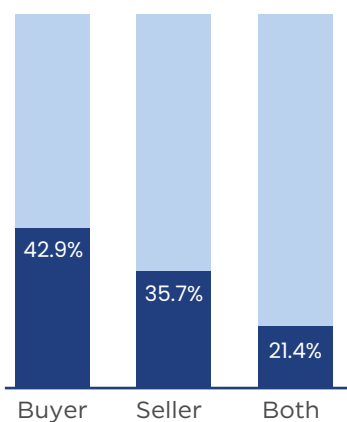
Standard Exclusions

Standard exclusions across W&I policies included punitive damages, pollution, purchase price adjustment mechanisms, projections and forward-looking statements, issues known to buyer, statutory labour welfare contribution underfunding, secondary tax liabilities and transfer pricing.

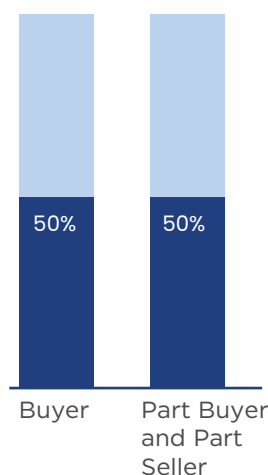
Common deal-specific exclusions included non-payment of stamp duty, anti-bribery and corruption, cyber breach and data loss, exposure to Russia / Ukraine / Belarus, product liability, professional liability and condition of assets.

Tax Insurance

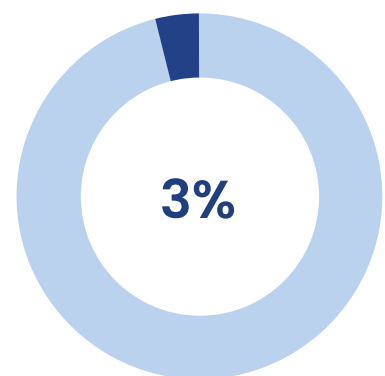
Insurance policies for tax were rare and were only featured in 3% of the transactions. In cases involving tax insurance, buy-side tax insurance policies were more prevalent (43%). In 57% of transactions, either the buyer solely or the buyer and seller jointly, agreed to bear the insurance premium.



Who Obtains Tax Insurance



Cost of Tax Insurance



Tax Insurance

Glossary

TERMS	DEFINITION
ABAC	Anti-bribery and anti-corruption
AML	Anti-money laundering
CIAC	Construction Industry Arbitration Centre
Closing	Completion of actions for consummation of a transaction
DD Report	Due Diligence Report
EV	Enterprise Value
English Law	Laws applicable to the United Kingdom
GAAP	Generally Accepted Accounting Principals
Ind AS	Indian Accounting Standards
Indian Law	Laws applicable to the Republic of India
LCIA	London Court of International Arbitration
MAC	Material adverse change
MCIA	Mumbai Centre for International Arbitration
NBI	Non-binding indication report
SIAC	Singapore International Arbitration Centre
USD	United States Dollar
W&I	Warranty and indemnity

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