# ICLG

The International Comparative Legal Guide to:

# Mergers & Acquisitions 2013

**7th Edition**

A practical cross-border insight into mergers and acquisitions

Schulte Roth&Zabel

# The International Comparative Legal Guide to: Mergers & Acquisitions 2013

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# EDITORIAL

Welcome to the seventh edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Five general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 41 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Michael Hatchard of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

*The International Comparative Legal Guide* series is also available online at www.iclg.co.uk


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# Cross-Border PE Buyer/Public Target M&A Deal Study

Schulte Roth & Zabel LLP

Peter Jonathan Halasz

Set forth in this chapter is a presentation of data on how cross-border deals and acquisition agreements differ from purely domestic ones. Schulte Roth & Zabel LLP ("SRZ") regularly conducts domestic deal studies that provide an instructive starting point for analysing cross-border deal data. The SRZ domestic studies cover private equity buyer acquisitions of US public companies with equity values greater than $100 million (to monitor market practice reflected by these high-profile transactions). These studies, together with those conducted by others, have been very helpful in providing guidance to practitioners, clients and academics, among others, in how to understand and better negotiate deals. With this expertise to draw on, and recognising the importance of international M&A activity, this chapter presents some of our findings from a new SRZ deal study of cross-border financial buyer acquisitions, i.e., M&A transactions in which either the buyer or the public-company target is located outside of the US. The empirical approach used in this chapter seeks to identify market practice when deals are done across borders. We compare our key findings for cross-border deals to SRZ's findings for US deals. Our findings below are not intended to be an exhaustive review of all transaction terms in the surveyed transactions — instead, we report only on those matters that we believe would be most interesting and useful to the deal community.

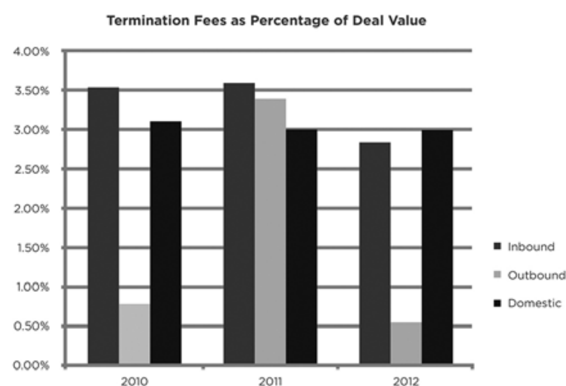
## Data Used

Our observations are based on a review of publicly available information for the surveyed transactions, which accounted for only a portion of M&A activity during the survey period and may not be representative of the broader M&A market. We reviewed selected deal terms of cross-border private equity buyer/public company target merger transactions involving consideration of greater than $100 million in enterprise value. We compared treatment of such deal terms in the 10 inbound deals and 12 outbound deals (where relevant information was available) entered into during the period of 2010 to 2012. This data was subsequently compared against SRZ's US private equity buyer/public company studies of deals entered into over the same time period. During the period from January 2010 through December 2012, there were a total of 10 "inbound" cross-border deals (i.e., acquisition of US public targets by foreign financial sponsors) and 12 "outbound" cross-border deals (i.e., acquisitions of foreign public targets by US financial sponsors) that met our parameters. UK companies were either the lead sponsor or otherwise involved in 60.0% of the inbound transactions surveyed. Canada was involved in 30.0% of deals surveyed. Germany and New Zealand companies were involved in 10.0% of the deals surveyed. For outbound deals, 25.0% of target companies were Dutch, 16.6% of target companies were British, and 16.6% of target companies were Canadian. Swiss, German, Irish, Australian and Chinese companies each made up 7.6% of the target companies surveyed. A list of the deals included in the study are provided in Annex A.

## Inbound vs. Outbound vs. US Domestic Practice

While cross-border deals involving the US and domestic US transactions are similar, certain practices were more common in some of the groups. We expected that the jurisdiction of the target would be more predictive of the terms of the transaction than the home jurisdiction of the buyer. That is, we expected that inbound deals would be similar to domestic US deals, while outbound deals would be somewhat different. As can be seen below, the data confirmed this.

Termination Fees. Target termination fees in outbound deals are not only rarer than in inbound deals, but, when present, are consistently lower. Target termination fees were found in 70.0% of inbound deals, and their value stayed flat from 2010 to 2011, going from an average of 3.5% to 3.6% of deal value, before dropping to an average of 2.8% in 2012. In outbound deals, termination fees were found in 41.7% of all surveyed deals, with values averaging 2.5% over the three-year period surveyed. In domestic US deals, termination fees remained relatively steady over the period surveyed, around 3.1% to 3.3%.

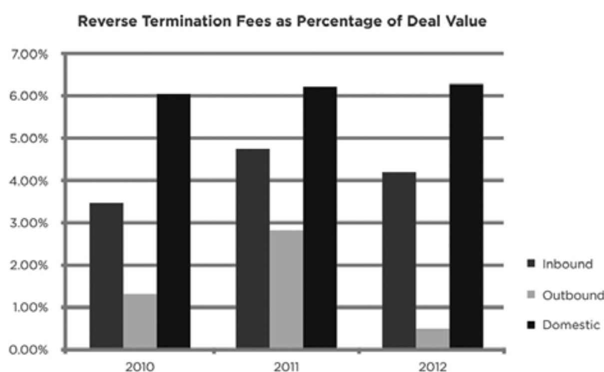



Reverse Termination Fees. Reverse termination fees are far more likely to be found in domestic US deals than in cross-border ones, whether inbound or outbound. Inbound deals tended to follow domestic US practice. Ninety percent of the inbound deals surveyed had a reverse termination fee ("RTF") of some kind. Of those, 77.8% had a single-tier RTF, while the remainder had a two-tiered system in place (with a larger fee payable, for the most part, in the event of willful breach by the buyer, and a smaller fee payable in the event of

buyer's financing failure). The range of these RTFs went from 3.0% to 10.2% of deal value, with a mean of 5.0% and a median of 5.4%.

Outbound deals, as expected, were less likely to follow domestic US practice. Of the deals surveyed, 16.7% had a single-tier reverse termination fee, and none had a two-tiered system. The values ranged from 0.5% to 2.9% of deal value.

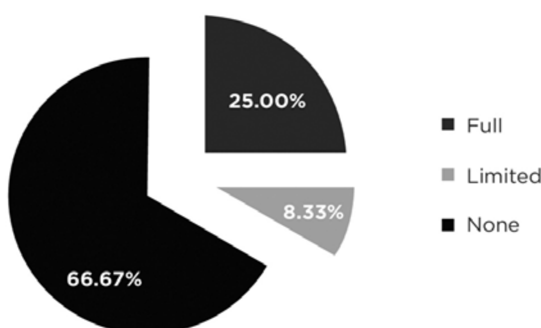
In contrast, 78.9% of domestic US deals employed a RTF, and of that 78.9%, 19.7% (or 15.5% of all US deals surveyed) used a two-tier RTF. For deals with a single-tier RTF, the ranges were 1.1% to 15.2% of deal value, with a mean of 5.8% and a median of 6.0%. For the deals with two-tiered RTFs, the higher-tier fees ranged from 4.3% to 38.0%, with a mean of 10.8% and a median of 7.2%.

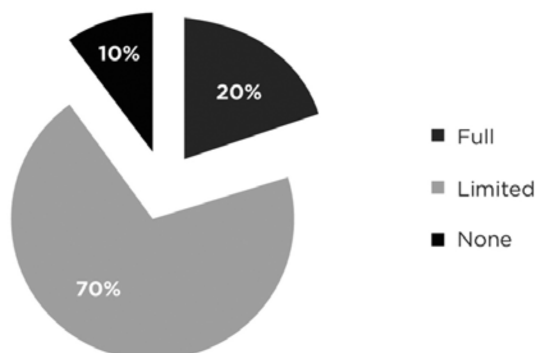



Specific Performance. Inbound deals vary significantly from outbound deals in the approach to specific performance. The approach to specific performance in inbound deals largely mirrors the "limited specific performance" concept now prevalent in US domestic M&A practice, where the target has the right to force the buyer to close only if the buyer's debt financing is available and the buyer's closing conditions are satisfied. Of the inbound deals in our sample, 20.0% granted the target a full specific performance right, 70.0% granted the target a limited specific performance right, and only 10.0% did not grant the target such a right.

In contrast, of the outbound deals, 25.0% granted the target a full specific performance right, 8.3% granted the target a limited specific performance right, and 66.7% did not grant a specific performance right at all.

In the US, 27.8% of deals granted the target a full specific performance right, 56.7% granted the target a limited specific performance right, and 15.6% did not provide for any specific performance right.




"Go-shop" Provisions. These were exclusively found in inbound deals. Over the three-year period we surveyed, "go-shop" provisions were included in 17.4% of the cross-border deals — all of them inbound. The periods ranged from 30.0 to 41.0 days, with a mean of 35.3 days, and a median of 35.0 days.

In the US deals surveyed, 37.8% had "go-shop" provisions, ranging from 21.0 days to 75.0 days, with a mean period of 39.9 days, and a median of 40.0 days.

Fiduciary-outs. The survey shows that there is some difference in practice regarding the treatment of fiduciary duties between inbound, outbound and domestic US practice. For inbound deals, 40.0% allowed for a "fiduciary-out" where there was an "intervening event" and 30.0% allowed for a general "fiduciary-out" when the directors felt it was necessary to comply with their fiduciary obligations under the applicable law. For outbound deals, the focus was far more on superior proposals. Forty-one percent of outbound deals allowed for a "fiduciary-out" when the target received a superior proposal, and only 25.0% granted a general "fiduciary-out" to the board. "Intervening event" language did not appear in the outbound transactions surveyed.

In US domestic practice, 27.8% allowed for a general "fiduciary-out", while 44.4% required an "intervening event", and only 8.9% allowed a change of recommendation only upon receipt of a superior proposal.

Match/Rematch Rights. There is a difference between inbound deals and outbound deals in the use of matching or re-matching rights (i.e., buyer's rights to "sweeten" the terms of the acquisition agreement to match or re-match the terms of a superior proposal received by the target). Seventy percent of inbound deal agreements expressly mentioned match dates (with a mean time of 3.9 days and a median of 4.0 days), and 60.0% expressly mentioned re-match dates (with a mean time of 2.8 days and a median time of 2.5 days). In contrast, only 41.7% of outbound deals expressly mentioned matching dates (with a mean time of 5.6 days and a median of 5.0 days), and only 16.7% of outbound deals had explicitly mentioned re-match dates (with both a mean and median time of 6.0 days).

In US domestic practice, matching rights were far more widespread, with 96.7% of similar US deals surveyed offering matching rights (with a mean time of 3.8 days and a median of 4.0 days). For re-match rights, 91.1% of US agreements surveyed offered re-match rights (with a mean time of 2.5 days and a median time of 2.8 days).

Deal Protection Generally. As expected, more recent advances in US deal protection mechanisms were widespread when the target of a cross-border transaction was in the US, but less so for non-US

targets. While the percentage of deals offering a full specific performance right was about equal among inbound and outbound deals, inbound and domestic deals were seen to be more likely to offer a limited specific performance right than outbound ones. Domestic deals were far more likely to use a reverse termination fee than international deals, and domestic RTFs tended to be set at a higher percentage of equity value than international ones. Moreover, domestic deals are also more likely to employ a two-stage RTF. Domestic deals were more likely to employ a "go-shop" provision than international deals, and domestic ranges tended to be wider as well. The mean and median lengths of each of the "go-shop" provisions did not differ greatly between the datasets.

## Cross-Border Practice

Deal Structure and Pricing. Overall, 59.1% of the deals surveyed relied on a tender offer followed by a back-end merger, whereas 40.9% were structured as a one step merger. Interestingly, most of these tender offers were found as part of the outbound deals. Overall, 75.0% of outbound deals used a tender offer to acquire their targets, whereas only 40.0% of inbound deals did the same, with 60.0% opting instead for a merger. In contrast, all of the inbound deals surveyed in 2012 used a single step merger, while 83.3% of outbound deals in 2012 used a tender offer.

US domestic deal structures were largely the same as the inbound cross-border practice, with 80.0% of similar domestic deals during the same time period structured as reverse triangular mergers and only 20.0% as tender offers.

Inbound deals tended to command a higher stock premium upon the merger announcement than outbound deals. Over the deals surveyed, the average stock price premium one day after announcement was 19.9%. The median increase over the same period was 21.0%. The one-month premium statistics were similar, with an average of 22.4% and a median of 22.6%.

This contrasts with outbound deals where the average one-day premium was 11.3%, with a median one-day premium of 6.6%. One month after the announcement, these deals had an average one-month premium of 13.8% and a median one-month premium of 8.2%.

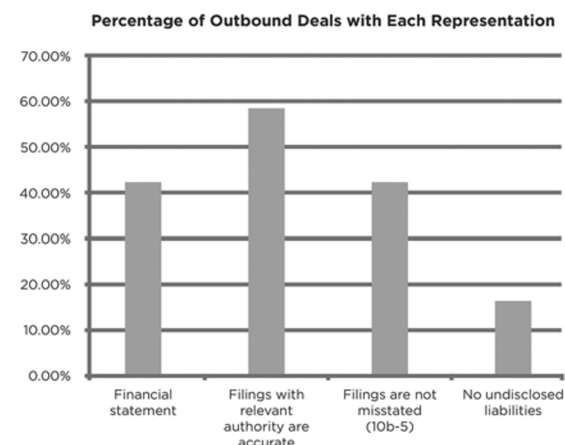
This appears to be consistent with, if somewhat lower, than the premiums in comparable US domestic transactions. In the domestic deals surveyed, there was an average one-day premium of 27.0%, with a median of 23.6%. The average one-month premium was 30.6%, with a median of 29.0%. The reason that monthly premiums are higher than the one-day premiums in the domestic context, while relatively consistent in the cross-border context, may be due to the added complexity of such deals and the longer timeframe to completion, varying levels of competition, differences in arbitrage activity, or other factors that were not examined in this study [see Endnote 1].

Local Entities. All of the outbound deals, and 90.0% of inbound ones, employed an acquisition vehicle formed in the country of the target and used that entity to effect the transaction.

Representations and Warranties. In domestic US transactions, public deals tend to have fewer representations compared to private company target deals. This stems from the lack of survival of representations and the lack of seller indemnity. Additionally, because of extensive SEC disclosure requirements for US public companies, buyers of US public companies tend to feel that representations are less needed than for private company targets. Therefore, one might expect that buyers of public targets in other jurisdictions might require a more extensive set of representations. On the other hand, buyers of targets in certain civil law jurisdictions may feel less need to include representations that might exist as a matter of law, without the need to include them in the acquisition agreement. (An example of this sort of representation is the so-called 10b-5 representation, which in the US is available as a matter of law, but for various reasons is often included in US acquisition agreements nonetheless.)

The representations and warranties that do exist in US public target deals often include a representation covering the target's public filings, a financial statement representation, and a "no undisclosed liabilities" representation (the details and distribution of different forms of these representations are covered in many of the existing US deal studies).

All inbound deals in our study contained these three representations and the 10b-5 representation. Outbound deals over the same time period, however, were sharply different. As the target company countries range over both common and civil law countries, 41.7% of all outbound deals surveyed provided a financial statement representation, 58.3% of outbound deals surveyed provided that information filed with the relevant securities authority was accurate, 41.7% of outbound deals surveyed provided a 10b-5 or similar representations and only 16.7% of outbound deals surveyed contained a representation that there were no undisclosed liabilities.




Attorney Fee Division. The survey did not support the idea that cross-border deals are more likely to discuss the division of attorneys' fees upfront. Of the deals surveyed, only 10.0% of the inbound deals, and 8.3% of the outbound deals surveyed outlined a division of attorneys' fees.

Alternative Conflict Resolution. The survey also did not show any rise in the use of alternative mechanisms for dispute resolution, such as arbitration, mediation, or any other solution involving submitting a dispute to a body other than a court. Of the deals surveyed, only 10.0% of inbound deals made use of such a clause, and none of the outbound deals surveyed allowed for such a mechanism, instead relaying any disputes to courts.

For inbound deals, the choice of venue was invariably Delaware, even when the target company was incorporated in another state. One notable exception made the distinction between general contractual disputes arising out of the acquisition agreement, which were to be resolved in Delaware courts (applying Delaware law), and disputes arising out of the exercise of the fiduciary duties by the target's board regarding dissenting shareholders, which were to be resolved in Kentucky, where the target was organised (applying Kentucky law) [see Endnote 2].

Outbound deals generally followed the same trend, with 91.7% requiring any dispute to be submitted to a court in the jurisdiction

where either the target was organised (66.7%) or the country where the target's stock was listed (25.0%). Only 8.3% of deals required disputes to be submitted to a court where the buyer entity's sponsor was domiciled.

Timespan of Deals and Termination Dates. Inbound deals, over the period studied, had a mean duration from the beginning of the acquisition process to a signing date of 10.7 months, although the duration varied considerably. The mean time for drop-dead dates tended to be longer for inbound deals than for outbound deals, with a mean length of 5.0 months from signing for inbound deals, and 3.5 months for outbound deals. This may be due to the fact that most of the outbound deals surveyed were tender offers, with relatively shorter deal timeframes and a more definitive point at which the deal's viability would be certain.

Material Adverse Effect Clauses. The survey shows that for inbound and outbound deals alike, the use of material adverse effect ("MAE") clauses requiring that the target suffer no materially adverse changes is near universal. Of the deals surveyed, all of the inbound deals featured such a clause, as did 91.7% of the outbound deals.

Financing Outs. Also consistent with recent domestic US practice, the inclusion of a financing closing condition is rare both in inbound and outbound deals. None of the outbound deals included a financing condition, and 80.0% of the inbound deals followed suit.

## Endnotes

1 This calculation excludes the Carlyle Group/Duff & Phelps Merger, which was announced on December 31, 2012.

2 See Onex's acquisition of Res-Care.

## Acknowledgment

The author would like to acknowledge the assistance in the preparation of this chapter of Pavel Shaitanoff, an associate in the Business Transactions Group and David White, J.D., awaiting admission, in the Business Transactions Group.

## Annex A

**List of Deals Surveyed**

| **Outbound Deals** | | | |
|---|---|---|---|
| **Target Company** | **Acquiring Companies** | **Announcement Date** | **Total Transaction Value** |
| Douglas Holding AG | Advent International Corporation | 10/15/2012 | $1,984,000,000 |
| Mediq NV | Advent International Corporation | 9/24/2012 | $1,435,000,000 |
| Focus Media Holding Ltd. | The Carlyle Group LP;<br>China Everbright Ltd.;<br>CITIC Capital Partners;<br>CDH Investments;<br>FountainVest Partners | 8/13/2012 | $3,688,000,000 |
| Kewill plc | Francisco Partners Management LLC | 5/2/2012 | $157,000,000 |
| Misys plc | Vista Equity Partners | 2/20/2012 | $2,141,000,000 |
| MOSAID Technologies Inc. | Sterling Partners | 10/27/2011 | $571,000,000 |
| Absolute Private Equity Ltd. | HarbourVest Partners LLC;<br>HarbourVest Global Private Equity Ltd. (LSE:HVPE) | 4/26/2011 | $806,000,000 |
| Pareto Corporation | The Riverside Company | 1/24/2011 | $129,000,000 |
| Trintech Group plc | Spectrum Equity Investors | 12/31/2010 | $125,000,000 |
| SMARTRAC NV | One Equity Partners LLC | 8/30/2010 | $405,000,000 |
| Brit Insurance Holdings NV | Apollo Global Management LLC;<br>CVC Capital Partners Ltd. | 6/1/2010 | $1,558,000,000 |
| Healthscope Ltd. | TPG Capital LP;<br>The Carlyle Group LP (NasdaqGS:CG) | 5/14/2010 | $2,308,000,000 |

| **Inbound Deals** | | | |
|---|---|---|---|
| **Target Company** | **Acquiring Companies** | **Announcement Date** | **Total Transaction Value** |
| Ancestry.com Inc. | Permira Advisers Ltd.;<br>Permira Investments Limited;<br>Spectrum Equity Investors | 10/22/2012 | $1,412,000,000 |
| Peet's Coffee & Tea Inc. | JAB Holdings BV (Majority);<br>BDT Capital Partners LLC (Minority) | 7/23/2012 | $1,001,000,000 |
| Renaissance Learning | Permira Advisers Ltd. | 8/16/2011 | $485,000,000 |
| Kinetic Concepts Inc. | Apax Partners LLP;<br>Canada Pension Plan Investment Board;<br>Public Sector Pension Investment Board | 7/13/2011 | $5,009,000,000 |
| Epicor Software Corp. | Apax Partners LLP | 4/4/2011 | $802,000,000 |
| Activant Solutions Inc. | Apax Partners LLP | 4/4/2011 | $890,000,000 |
| UCI International Inc. | Rank Group Ltd. | 11/29/2010 | $980,000,000 |
| Bumble Bee Foods LLC | Lion Capital LLP | 11/4/2010 | $980,000,000 |
| Res-Care Inc. | Onex | 8/14/2010 | $390,000,000 |
| BSN Sports Inc. | ONCAP | 3/15/2010 | $170,000,000 |

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