Global Private M&A Guide - Limited External Content - United States of America

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*This content was last reviewed around October 2023.*

# Quick reference guide

## Due diligence, pricing and closing

**Typical due diligence issues**

Due diligence in the US is generally fulsome and, depending on the transaction structure, buyers of businesses in the US can inherit litigation, anti-bribery, environmental, employment and compensation, labor union and other risks upon completion of an acquisition. During the last few years, privacy, anti-bribery, import/export control, information/cyber security and related matters have risen in prominence as due diligence matters as a result of increased regulatory attention to compliance in the US.

**Pricing and payment**

Wire transfer of funds is the typical method for payment in the US. Wire transfers through the SWIFT Code international system are also common.

The US exercises few controls over foreign exchange transactions by US citizens or non-US persons. Generally, no approval from the US Department of Treasury or other finance authority is required to make an investment.

**Signing/closing**

Simultaneous signing of the purchase agreement and closing of the acquisition or merger is common, particularly in straightforward transactions where no antitrust (or other regulatory) approvals are required or where few (if any) third-party consents are necessary.

## Approvals/registrations

Foreign acquisitions of US businesses are assisted by a general absence of exchange controls, government regulation, or licensing of foreign investment or foreign acquisitions in the US. Below are the typical approval requirements.

**Foreign investment restrictions**

The US maintains an open investment policy subject to the President’s authority to block or suspend transactions which he finds threaten national security. The President is assisted in reviewing transactions by the Committee on Foreign Investment in the United States (CFIUS), a multi-agency committee chaired by the Treasury Secretary.

CFIUS regulations require pre-closing filings for certain investments by any foreign person in US businesses developing critical technology, and by foreign state-affiliated investors in US critical technology, critical infrastructure and sensitive personal data businesses. Parties in other transactions may make voluntary filings to CFIUS to secure clearance, thus insulating the transaction from after the fact questioning by the President or CFIUS. There is no time limit on CFIUS reviewing a transaction that has not previously been cleared and the President, assisted by CFIUS, can force a foreign investor to divest itself of an acquisition post-closing if the President finds a risk to national security.

For further information, see the more detailed section on "Foreign investment restrictions".

**Antitrust/merger control**

The US has a mandatory and suspensory merger control regime, provided the filing thresholds are met (the deal must first have a minimum value and the parties must be a minimum size). Under the Hart-Scott-Rodino (HSR) Act, parties to mergers and acquisitions must file premerger notification and wait for agency review. The parties may not close their deal until the waiting period outlined in the HSR Act (30 days) has passed (expired), or the agency has granted early termination of the waiting period. Once the waiting period expires, or is terminated early, the parties are free to close their deal. If the agency has determined that it needs more information to assess the proposed deal, it will send both parties a Second Request. Once the companies have substantially complied with the Second Request, the agency has an additional 30 days to review the materials and take action. If the deal is challenged, the parties may enter into a negotiated consent agreement with the agency that includes remedies or provisions to restore competition, or the agencies may seek to stop the transaction by filing a preliminary injunction in federal court, pending an administrative trial on the merits. For further information, see the more detailed section on "Antitrust/merger control".

**Other Approvals/Registrations**

An acquisition or merger may trigger other regulatory or government approvals. The purchase and sale of securities, including the shares of a corporation and ownership interests in many other entities, are strictly regulated by both federal and state governments. Additionally, the transaction may require the approval of state or federal regulatory agencies overseeing the particular industry in which the target operates (e.g., food, healthcare or telecommunications).

A private merger or acquisition will also likely need corporate approvals that are required by the seller's (and sometimes buyer's) organizational or governance documents and the laws of the states of their incorporation.

A non-US company may issue shares or other securities in the US to finance an acquisition, for example, by exchanging its shares for the shares or assets of the target company. However, the shares or other securities must be issued pursuant to a registration statement filed with the Securities and Exchange Commission (SEC) (containing or incorporating detailed information regarding the issuer's business affairs and financial condition), unless an exemption from registration is available. A commonly used exemption in acquisitions of closely held companies is the private offering exemption - that is, an offering to a limited number of sophisticated investors.

## Employment

The employment implications of share sales and asset sales should remain top of mind for US employers in an M&A transaction as they structure and carry out the deal.

**Acquisition/disposal of shares**

In general, under federal employment laws in the US, if a transaction involves a transfer or exchange of shares (or other equity interests) of the target business, there is no transfer of employees but simply a change in the ownership of the employer providing the buyer with inherited rights, duties and liabilities previously owed by (or to) the employees of the target company. The buyer also steps into the shoes of the seller with regard to a union or existing collective bargaining agreements (CBAs). “Change in control” provisions may be present in employment contracts and may trigger termination or payment rights (usually on behalf of executive or senior-management level employees). Though these rules will generally apply in a reverse triangular merger, in a forward triangular merger where there is a change of the employing entity, employees transfer to the buyer through a more complicated (and likely time-consuming) termination and rehire process akin to a transaction involving the sale of assets.

**Acquisition/disposal of assets**

If a transaction involves the sale or transfer of the assets and liabilities of a business, an asset buyer is not obligated to offer employment to the employees of the seller, unless the terms of the deal as negotiated by the parties require it. Instead, the buyer can choose certain employees to receive offers of employment based on the buyer’s needs. If there is an intention to transfer employees, the employees must be terminated by the seller and accept an offer of employment with the buyer. To the extent this does not happen, the employees will remain with the seller and the seller must decide whether to retain or terminate such employees.  As such, sellers often insist that the buyer offers employment to the in-scope business employees as part of the transaction, not only to secure employment for its employees but also to help the seller avoid potential claims and termination costs, and the administrative burden of conducting a reduction in force.

**Other considerations**

Additional considerations include whether the buyer is a “successor” employer for purposes of recognizing the union, whether the Worker Adjustment and Retraining Notification Act of 1988 (WARN Act) is triggered by the employee transfers, whether a buyer is able to take credit for the wages paid by the seller to its employees during the calendar year for purposes of meeting the wage base with respect to Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax Act (FUTA) taxes, and whether new or amended visa petitions need to be filed and/or approved.

## Tax

The US taxes the worldwide income of US persons. US persons are US citizens and US green card holders (regardless of where they currently reside), residents of the US, a corporation or partnership formed in the US and certain estates and trusts with connections to other US persons. For further information, see the more detailed section on “Agreeing to the acquisition agreement → Stamp duty and tax”.

**OECD's Two Pillar Solution**

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has put forward a so-called Two-Pillar Solution to address the tax challenges arising from the digitalization of the economy. Pillar Two is intended to introduce a global minimum effective rate of tax of 15% for large businesses in each jurisdiction where they operate and will lead to fundamental changes in the international tax system. It is currently being implemented in a large number of jurisdictions.

Groups will need to consider how the Pillar Two rules could impact on the life cycle of M&A transactions from the pre-acquisition phase (including transaction planning (such as the choice of acquisition structure and financing) and due diligence of the target group), the acquisition phase (such as contractual risk allocation around Pillar Two) to the post-acquisition phase and the impact of Pillar Two on any post-acquisition integration.

## Post-acquisition integration

For information on post-acquisition integration matters, please see our [Post-acquisition Integration Handbook](https://www.bakermckenzie.com/en/insight/publications/resources/post-acquisition-integration-2023).

# Common deal structures

## What are the key private M&A deal structures?

**Key deal structures**

A buyer can acquire a private company through a purchase of equity, a purchase of substantially all of its assets or a state law merger or consolidation. The best method to use in any particular transaction depends on a number of factors, such as commercial considerations, tax considerations, third-party and corporate consents, and deal process and timing.

One method of acquiring a private company is through a purchase of equity (for a target that is a Corporation, that equity will be stock). In an equity purchase, the buyer will purchase the target company's equity from the selling equity holders. Most commonly, the buyer will purchase the target company's equity with cash, but the buyer may also exchange a portion of its equity with the equity of the target company's equity holders to effectuate the acquisition. Although less common than all-cash or equity-for-equity acquisitions, a buyer may also use a combination of cash and equity to acquire the target company.

A buyer can also acquire a private company through a purchase of assets. In an asset acquisition, the buyer will purchase all or a portion of the target company's assets and/or liabilities directly from the target company in exchange for cash or equity consideration. If all of the target company's assets are acquired, the target company is frequently liquidated simultaneously.

Equity consideration is less common than cash consideration in an equity or asset acquisition because it carries additional risks. Such risks include the possibility that the value of the buyer's equity may fluctuate between signing and closing, or that the equity may not be freely tradable. All state laws provide for the merger of corporations and most states now provide for the merger of limited liability companies and other entities (including mergers of different forms of entity). In a statutory merger, two entities are joined by operation of law, with all assets and liabilities becoming the property of the surviving entity (or a new entity) solely by filing a certificate of merger. Normally, one entity disappears and the other continues as the successor to both lines of business. The principal advantage of a merger is that it typically only requires a majority consent from the target company's equity holders for the buyer to obtain all of the target company's equity (although dissenting equity holders may have the right to obtain an appraisal of their equity and recover the appraised value in lieu of the amount offered to them in the merger). In a merger, the transfer of assets and the exchange of the target corporation's equity are automatic. No separate transfer documents are required. Additionally, valuable permits, contracts, etc., are easier to transfer in a merger than in an asset sale.

**Auction processes**

Auctions are typically used when multiple buyers are interested in the target company. The auction structure tends to favor the seller because it allows the seller to control the sales process. Sellers will ordinarily disclose information about the target in a favorable light and distribute a seller-favorable draft purchase agreement to potential buyers. Auctions also have the potential to generate a higher purchase price because the structure is designed to reach more buyers and maximize competition among them. However, there are also potential pitfalls for sellers. Auctions are costly and time-consuming and carry an increased risk that potential buyers will leak transaction information or use the disclosure process to glean competitive information about the seller or target company. That is why it is extremely important in an auction process (even more so than in single-buyer situations) for a seller to require each bidder to execute a confidentiality or non-disclosure agreement at the beginning of the deal process before the seller discloses any proprietary information.

**Letters of intent**

The parties to an acquisition transaction usually sign a letter of intent (sometimes also referred to as a memorandum of understanding or a term sheet) as a first step in the process. The letter of intent is usually non-binding and outlines the proposed key terms of agreement between the parties. It is used as a starting point for negotiating the definitive acquisition agreement of the transaction.

## Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

In the US, there are several types of entities used for business purposes, including corporations, limited liability companies and various forms of partnerships. The most common entities that tend to be acquired are corporations and limited liability companies.

## What are the different types of limited liability companies?

The laws of all states in the US provide for the organization of limited liability companies (LLCs). LLCs have become a popular structure for privately held businesses in the US. An LLC offers the flexibility to describe the entire relationship of the parties by contract, while still limiting the liability of each of the members to their investment in the company. The owners of an LLC are its members, who are analogous to a corporation's stockholders. No minimum or maximum applies to the number of members (i.e., one member is acceptable). The members typically enter into a limited liability company operating agreement (or LLC agreement), which governs the operation of the LLC, including the members' contractual rights, obligations and restrictions relating to their membership interests in the company. The members may generally select any management structure they desire. They may operate the company directly or may appoint officers or managers to conduct the daily affairs of the LLC. The ownership interests of the members in an LLC are known as membership interests or membership units. There are no limitations on the transferability of ownership interests under statute; however, members may provide for restrictions in the LLC agreement. For US tax purposes, an LLC with more than one owner can be treated as a partnership, or 'pass-through' entity, which generally avoids taxation at the entity level and passes the company's profits and losses through to the members. As such, an LLC can be very advantageous to a non-US buyer.

## Is there a restriction on shareholder numbers?

There is no restriction on the number of shareholders or members that a Corporation or LLC, respectively, can have, but a Corporation must have at least one shareholder and an LLC must have at least one member.

## What are the key features of a share sale and purchase?

The acquisition of shares or membership interests is generally simpler than asset acquisitions, especially if there are only a few equity holders and all are willing to sell. Where equity interests are acquired, all assets remain in the target company and few transfer documents are required. Retaining assets such as licenses, permits and franchises avoids the difficulties of obtaining consent from the issuing government agencies. Additionally, unlike in asset acquisitions, third-party consents for the assignment of important contracts and leases will generally not be required, unless they contain change of control clauses. In a share acquisition, the target company will usually retain its tax attributes, both favorable and unfavorable, assuming that the business of the company continues. There are, however, limitations on the future use of some attributes, such as net operating losses and tax credits. Additionally, the buyer retains the seller's tax basis in the target company's assets, even if the buyer paid a higher purchase price for the business, unless the seller consents to certain tax elections that permit recharacterizing the acquisition of the target as an acquisition of the assets of the target for US tax purposes only, which often become commercially negotiated deal points.

## What are the key features of an asset sale and purchase?

In an asset acquisition, the buyer or its subsidiary acquires specific assets and liabilities of the target company. This may comprise 'substantially all' of the target's assets or only a division or line of business. The seller retains those assets and liabilities not acquired by the buyer. An asset acquisition is more complex than a share acquisition because each asset must be transferred. Clear identification of the specific assets to be transferred and the specific liabilities to be assumed by the buyer (as well as the specific assets and liabilities retained by the seller) is critical in an asset acquisition. An asset acquisition will generally trigger 'anti-assignment' clauses in the target's key contracts, licenses and permits, necessitating third-party consents for the transfer of certain valuable assets of the seller. If assets are acquired, the buyer's tax basis in the assets may be increased to reflect the actual purchase price (i.e., the so-called "basis step-up"). However, favorable tax attributes of the target corporation will often be lost in an asset acquisition.

# Preliminary documents

## Is it customary to prepare a letter of intent or term sheet and, if so, to what extent are they binding on both parties?

The parties may sign a letter of intent setting out the principal points upon which they have reached tentative agreement. This is typically signed by the parties following initial due diligence (but prior to completion of a more fulsome diligence review) and prior to negotiation of the definitive transaction agreement. The level of detail and format for a letter of intent can vary from deal to deal.

The letter of intent is useful in identifying important issues between the parties early in the process, before they have invested substantial time and money. Its disadvantages are that it may delay the preparation and signing of a definitive contract. Except for certain matters, such as confidentiality, 'standstill' and the like, a letter of intent is typically not legally binding between the parties, but, if not drafted carefully, it could inadvertently create binding commitments.

A US party will be reluctant to make important changes to the terms set out in the letter of intent absent a significant change in the target or in the circumstances of the transaction. A letter of intent may also provide a basis for legal liabilities if one of the parties fails to negotiate the definitive agreement in good faith. Furthermore, the letter of intent may address significant matters, such as limitations on the liability of the seller, but the letter typically will not include representations and warranties of the parties. A non-US buyer should carefully consider and review all material terms contained in the letter of intent with legal counsel before signing it.

## Does a term sheet, in this context, customarily include provisions on exclusivity, break fee or confidentiality?

**Exclusivity:** It is very common to include exclusivity provisions in a letter of intent.

**Break fee:** It is not common to include break fees in a letter of intent, as they are rarely included in private M&A transactions.

**Confidentiality:** Legally binding confidentiality provisions are some of the key terms in a letter of intent. They are often set forth in a separate confidentiality agreement and referenced in the term sheet.

## Are exclusivity, break fee and confidentiality provisions supplemented with separately negotiated agreements?

In the US, it is common for the buyer and seller to enter into preliminary agreements before negotiating the acquisition agreement.

In a private deal, the letter of intent often contains a strict exclusivity provision, or "no-shop" covenant, that prohibits the seller from soliciting, encouraging or negotiating offers from third parties. A no-shop covenant will also encompass restraints on sharing non-public information with parties other than the buyer and put an obligation on the seller to ensure that none of its agents engage in third-party negotiations. An exclusivity agreement will commonly span the period of 30-60 days after the parties sign the letter of intent, but the length of time may vary.

Break fee provisions are not commonly included in a letter of intent and are more common in public M&A deals. To the extent that they are included in a private M&A transaction, they will be negotiated into the definitive acquisition agreement.

The potential buyer of a business and the target company and/or sellers generally enter into a confidentiality or non-disclosure agreement prior to the commencement of due diligence. This is usually the first agreement signed by the parties in a potential transaction. Confidentiality agreements are often unilateral, imposing confidentiality obligations on the buyer with respect to the information provided by, or on behalf of, the target. However, a buyer will generally seek to make such obligations mutual if the target is also going to perform due diligence on the buyer (e.g., in a stock-for-stock acquisition).

## Is there a duty or obligation to negotiate in good faith?

In the US, a letter of intent is generally non-binding (except as set forth in specific provisions, such as those related to exclusivity and confidentiality) and, as such, does not provide a basis for liability in the event the parties do not ultimately sign a purchase agreement with respect to the non-binding provisions.

The implied duty of good faith is likewise very limited at the preliminary negotiation stage, and generally does not apply until the parties sign a purchase agreement. There is a limited duty of good faith and fair dealing that applies when the definitive purchase agreement is signed.

# Agreeing to the acquisition agreement → Purchase price

## Is a purchase price adjustment common?

Frequency/market practice: Fairly common; it is rare for a private acquisition to not include a purchase price adjustment.

## What type of purchase price adjustment is common (e.g., debt-free, cash-free)?

Frequency/market practice: Cash free/debt free and working capital are the most common metrics on which purchase price adjustments are based. An adjustment based upon a target's net asset value is unusual.

## Is there a collar on the purchase price adjustment?

Frequency/market practice: Rarely.

## Who usually prepares the closing balance sheet (where applicable)?

Frequency/market practice: The buyer usually prepares the closing balance sheet.

## Is the balance sheet audited (where applicable)?

Frequency/market practice: Rarely; historical balance sheets for completed fiscal years are often audited. Interim balance sheets are typically unaudited.

## Is an earn-out common?

Frequency/market practice: Generally, earn-outs are included infrequently. However, earn-outs appear in a majority of life sciences transactions.

## Is a deposit common?

Frequency/market practice: Rarely.

## Is an escrow common?

Frequency/market practice: Very common.

## Is a break fee common?

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Conditions precedent

## Express Material Adverse Event (MAE) closing condition?

Frequency/market practice: Very common. It is rare for a private merger agreement to not contain an MAE closing condition.

## Is the MAE general or specific?

Frequency/market practice: The MAE definition is usually general and forward-looking, and generally includes specific carve-outs of events or circumstances that would not constitute an MAE, such as any change in law, acts of God, or changes that are generally applicable to the industries or markets in which the target company operates.

## Is the MAE quantified?

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Covenants

## Is a noncompete common?

Frequency/market practice: Fairly common. However, enforceability of non-competes is a question of state law and varies from state-to-state. Recently, a number of states, plus the Federal Trade Commission, have proposed legislation restricting the use of non-competes, so the use of non-compete provisions may be impacted depending on whether these regulations become final and in what form (although some states' and the FTC's proposed regulations include an exception for the sale of a business).

## Is it common to use waterfall or blue pencil methods to interpret contractual provisions?

Frequency/market practice: Blue-pencilling provisions are commonly included in a severability clause in the agreement. Most states permit courts to modify non-competes. Some states allow modification only if the agreement contains a severability clause. A non-compete of a three-to-five-year duration is typically enforceable in the M&A context, although this practice might change depending on whether or not the proposed restrictions on non-compete provisions (discussed above) become effective.

## Are nonsolicitation provisions (of employees) common?

Frequency/market practice: Fairly common. A buyer will typically require a seller to agree to refrain from soliciting any current or former employee of the target company for a specified period of time post-closing (the meaning of former employee is typically agreed between the parties).

## Are nonsolicitation provisions (of customers) common?

Frequency/market practice: Fairly common. A buyer will typically require a seller to agree not to solicit the target's customers, or cause any of the target's customers to stop doing business with the target company, for a specified period of time post-closing.

## Are seller restrictions usually imposed on the target business between signing the purchase agreement and closing?

Frequency/market practice: Very common; a seller typically agrees to conduct the target business in "the ordinary course" between signing and closing. It is also very common for a seller to agree to negative covenants to refrain from engaging in certain corporate law and operational matters, including engaging in major financial transactions or entering into material contracts, between signing and closing.

## Is there broad access to books, records and management between signing and closing?

Frequency/market practice: Fairly common. Broad access is generally given to buyers, although the target may seek to limit access to specified members of the management team and may require access restrictions so as not to interfere with the seller's and target company's business.

## Is it common to update warranty disclosure or notify of possible breach?

Frequency/market practice: Rarely/fairly common. Although the ability to update disclosure schedules is uncommon (agreements are typically silent on the matter), it is fairly common for an agreement to require the seller to notify the buyer of a possible breach of a representation or warranty of the seller. In the case of a material breach of a representation or warranty of the seller, the buyer will typically have a right to terminate the transaction.

# Agreeing to the acquisition agreement → Representations and warranties

## Materiality in representations — how is it quantified (e.g., by a USD amount)?

Frequency/market practice: Very common. Materiality qualifiers are commonly seen but are rarely quantified (other than specific warranties, e.g., contract value).

## How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?

Frequency/market practice: Knowledge qualifiers are primarily based on constructive knowledge (after due inquiry), although an actual knowledge standard is sometimes used. Knowledge is commonly limited to a list of persons or group of persons (typically, specific officers or directors of the target company) specified in the transaction document.

## Is a warranty that there is no materially misleading/omitted information common?

Frequency/market practice: Rarely. It is uncommon for a seller to make a representation that none of the target's representations or warranties made in the acquisition agreement or disclosure schedules contain any materially misleading or omitted statement.

## Is disclosure of the data room common?

Frequency/market practice: Rarely. Disclosure of the data room is not a common practice in the US.

# Agreeing to the acquisition agreement → Repetition of representations and warranties

## Is it common to repeat warranties at closing?

Frequency/market practice: Repeating or "bringing-down" representations at closing is very common..

## Is it common to repeat warranties at all times between signing and closing?

Frequency/market practice: Representations and warranties are almost never repeated at all times between signing and closing.

## Is a bring-down certificate at closing common?

Frequency/market practice: Bring-down certificates at closing are common.

## What is the applicable repetition standard, e.g., true in all material respects or Material Adverse Effect?

Frequency/market practice: Both the accurate 'in all material respects' standard and the Material Adverse Effect standard are common. There are often carve-outs for fundamental representations which must be true 'in all respects'.

## Is double materiality common (a materiality qualification in bring-down at closing and in representation(s))?

Frequency/market practice: Rarely. Double materiality is usually avoided.

# Agreeing to the acquisition agreement → Limitations on liability

## What is the common cap amount (as a percentage of purchase price)?

Frequency/market practice: A cap can range from 1%-100% of the purchase price. The average cap amount has declined over the years due to the increased use of representations and warranties insurance. This is because caps are generally higher in deals without representations and warranties insurance than in deals that include representations and warranties insurance.

## Does the cap (and other liability limitations) apply to the whole agreement or just warranties (or particular terms)?

Frequency/market practice: Caps commonly apply to indemnification obligations in the whole agreement (although breach of seller's/target's covenants are often carved out of the cap). Other limitations on liabilities (e.g., baskets) commonly apply only to the representations and warranties. Specific representations and warranties (particularly fundamental representations and warranties) or other items in the agreement (such as special indemnities) may have different cap amounts.

## What are the common exceptions to the cap?

Frequency/market practice: Fraud is usually excluded from the cap. Certain fundamental representations and warranties (e.g., authority, capitalization, title to assets/equity and due organization) are also commonly excluded. Tax and specific areas of concern are often excluded, or may have specific higher caps. Breaches of seller's/target's covenants and the brokers'/finders' fee representation are also often carved out of the cap.

## Is a deductible or basket common?

Frequency/market practice: Very common. Baskets in the US can be structured either as deductibles or tipping baskets. In a deal with a deductible, the indemnifying party is only liable for losses over a stated amount. If the parties agree to a tipping basket, the indemnifying party is liable for the total amount of losses once they exceed a specified threshold.

## Is a de minimis common?

Frequency/market practice: Very common.

## How long does seller liability survive?

Frequency/market practice: A general survival of 12-24 months is common.

## Are there any common carve-outs from limitation on seller liability (e.g., fraud, tax, key warranties)?

Frequency/market practice: It is common to carve out fraud. In addition, tax, employee benefits and environmental matters are commonly carved out and often survive until the expiration of the applicable statute of limitations. Other representations and warranties often carved out include authority, no conflict, capitalization, due organization, title of assets/equity and brokers'/finders' fees.

## Is warranty insurance common?

Frequency/market practice: Fairly common. While representations and warranties insurance was previously used primarily in the private equity space, it has been increasingly and widely adopted among strategic buyers as well As demand for representations and warranties insurance and the number of insurers has increased over the years, insurers have been more willing to offer representations and warranties insurance for alternative deal structures, such as carve-outs and public-to-private transactions, for example.

# Agreeing to the acquisition agreement → Set-offs against claims

## Is a set-off against claims for tax benefits common?

Frequency/market practice: Fairly common in stock acquisitions, but less so in other types of acquisitions.

## Is a set-off against claims for insurance proceeds common?

Frequency/market practice: Very common.

## Is a set-off against claims for third-party recoveries common?

Frequency/market practice: Fairly common.

# Agreeing to the acquisition agreement → Damages, knowledge

## Is there an obligation to mitigate damages?

Frequency/market practice: Fairly common. Although a buyer typically has a duty to mitigate damages under the common laws of some states (e.g., New York and Delaware), an acquisition agreement may contain an express requirement that the buyer mitigate its damages. Those agreements with an express duty to mitigate damages may require a buyer to mitigate damages 'to the extent required by law' or through an efforts standard (e.g., by taking all reasonable steps to mitigate damages).

## Is there an exclusion of consequential damages?

Frequency/market practice: While it is somewhat common to expressly exclude consequential damages, most agreements remain silent on the issue, particularly if the transaction uses representations and warranties insurance.

## Are provisions that there is no liability if the buyer has knowledge common, or does buyer knowledge have no effect?

Frequency/market practice: Rarely. It is not common to include such so-called 'anti-sandbagging' provisions (although it is more common for agreements to include "pro-sandbagging" provisions that allow liability if the buyer has knowledge). The majority of the time, however, agreements are silent on this point. Claims under a representations and warranties policy for matters of which the buyer had prior knowledge are likely to be excluded from coverage. In a 2022 case, *Arwood v AW Site Services LLC*, the Delaware Chancery Court affirmed that Delaware is a pro-sandbagging state, holding that unless the parties specifically preclude sandbagging in the agreement, the default Delaware position is that the buyer is entitled to indemnification for breaches of the seller’s representations and warranties even if the buyer knew pre-closing that the representations were not true.

# Agreeing to the acquisition agreement → Dispute resolution

## Does local law allow for a choice of governing law?

Frequency/market practice: Yes.

## What is the common governing law?

Frequency/market practice: Parties often choose the laws of Delaware or New York.

## Is litigation or arbitration more common? If arbitration, where?

Frequency/market practice: Litigation is more common, but in the small number of deals that do include arbitration, the parties will typically choose to arbitrate with the American Arbitration Association or through Judicial Arbitration & Mediation Services.

# Agreeing to the acquisition agreement → Stamp duty and tax

## If stamp duty is payable, is it normally shared?

Frequency/market practice: There is no stamp duty in the US.

## Is a separate tax covenant/indemnity or tax deed common?

Frequency/market practice: It is fairly common to have a specific tax covenant/indemnity included in the purchase agreement.

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