# *"A Wretched Hive of Scum and Villainy": Negotiating Deals in International Markets.*

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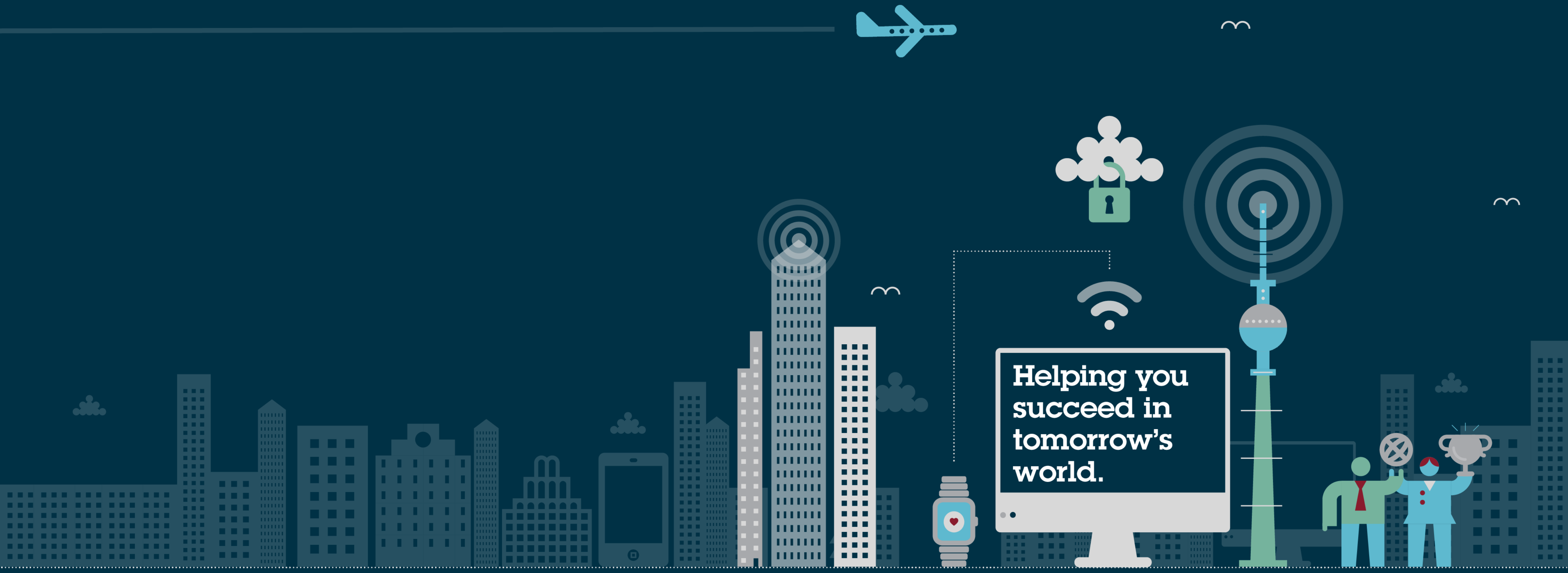


# 01 Due diligence and disclosure

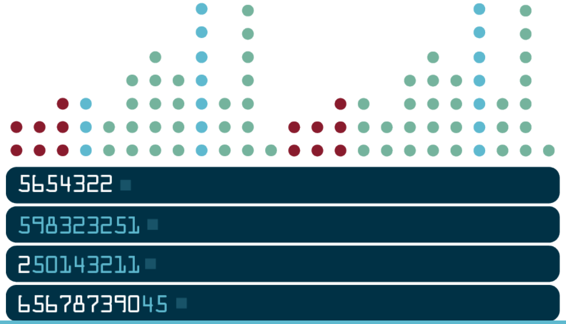
# Due diligence and disclosure

- Record fines and reputational risks – Marriott International fined $123 million in July 2019 for vulnerabilities in Starwood's systems.
- No ‘caveat emptor’ or ‘buyer beware’ concept in the Netherlands.
- Courts in India have held that that a matter has to be expressly brought to the attention of the purchaser, for it to be considered disclosed. Merely providing documents that might bring the purchaser's attention to a matter is insufficient.
- *Eurocopy plc v Teesdale and others [1992] BCLC 1067*
  - Limiting general disclosures to matters in disclosure letter can be effective
  - Courts are reluctant to allow a buyer to claim for matters in their actual knowledge
- *Infiniteland Ltd and John Stewart Aviss v Artisan Contracting Ltd [2005] EWCA Civ 758*
  - Actual knowledge can defeat saving provisions
  - Reference to "actual knowledge" will not be deemed to include constructive or imputed knowledge

# 02 Escrows and recourse against warrantors

# Escrows

- Although, still less common than in the US, European sellers are realising that if structured right, escrow arrangements have their advantages:
  - If the escrow is the only recourse against contractual claims – traditionally recourse against specific known risks giving rise to an indemnity);
  - Where there is a financial sponsor seller, good way for them to economically share burden of warranty risk without giving warranties
- But escrow terms require careful consideration
- Works best where cash consideration covers the escrow amount
  - *Bir Holdings Limited v Mehta [2014] EWHC 3903 (Ch)*
- Restrictions under Indian foreign exchange laws. 25% of the consideration for 18 months in escrow.

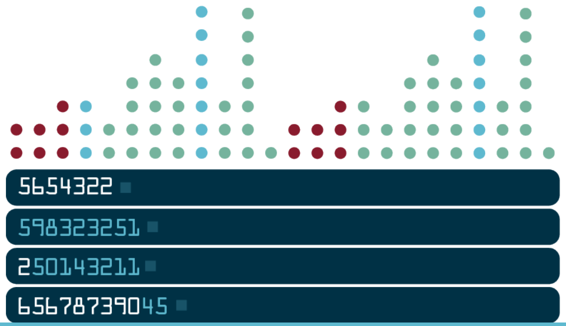



About 30% of OC UK deals in 2018 involved an escrow and 58% of the Dutch deals

# 03 Warranty and indemnity insurance

# Warranty & indemnity insurance

- W&I is increasingly being used in M&A even without private equity involvement. W&I is a new trend and is still not common in India.
- Policies are almost always "buy-side" – buyer is the insured – though premium is often funded in whole or part by the sellers (although in the Netherlands buyers often pay the premium due to the competitive sellers market)
- Sellers are increasingly able to exclude almost all liability for claims (with the amount of first recourse against them set as low as £1)
- Policies are covering a wider range of risk e.g. known tax risks
- 25% of claims in Europe are for tax breaches*



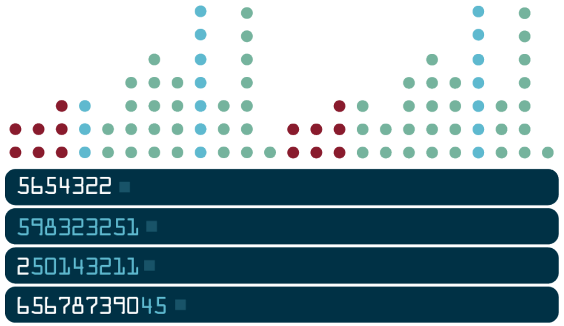
More than 20% of OC UK deals in 2018 involved W&I insurance

*Source: AIG M&A Claims Intelligence 2019

# 04 Consideration adjustments

# Price adjustment mechanisms

- Locked Box as opposed to a post-completion adjustment continues to be popular with private equity sellers but increasingly being used on deals involving owner-managed businesses or strategic acquisitions of all sizes.
- Locked Box increasingly common with US based buyers of European targets.
- Earn outs are also common: about one-third of M&A deals in 2018 involved an earn out. We anticipate that earn outs will increase in use as a way to bridge the gap between seller expectations and purchaser concerns about the impact of wider global and political issues.
- Earn outs are common in India too however, Indian foreign exchange laws do not permit more than 25% of the total purchase consideration to be deferred for more than 18 months.




About 40% of OC UK deals in 2018 involved a Locked Box and 69% of the Dutch deals

# 05 Sector and other trends

# Sector trends


Tech, Media & Comms

- Telecoms deal value in H1 2019 fell 43% compared to H1 2018 though deal volume held steadier (37 (H12019) vs 38 (H1 2018) deals)
- Media deal value in H1 2019 fell 76% compared to H1 2018 and deal volume dropped 22% (114 deals in H12019)
- Technology held steady: (EUR 20,1 bln 486 deals (H12019) vs 486 (H1 2018) deals)
- Competition for high quality assets so PE firms are looking for take privates. Emphasis on business quality. Higher competition, more processes failing (as a result of higher standards set by buyers). Hence, bidders adopting a more aggressive strategy to win or pre-empt auctions
- In B2B Media space buyers are expected to look for media and data supplements to portfolios

Energy and Utilities

- Fewer mega deals as a result of political and geopolitical currents
- National and EU authorities protective as regards foreign ownership of critical infrastructure
- Looking forward a number of high profile deals: EDP's sale of its hydro assets and Dutch energy company ENECO and sale of KKR's renewables vehicle Renvico.

Life Sciences & Healthcare

- Continued heavy-weight deal making in pharma (236 deals; EUR 117,6bln)
- UK & Ireland at top (66% of value) and DACH at 28% (mainly due to Novartis's spin-off of eye care division Alcon)
- Medical care services contributed the greatest number of transactions
- Sector with striking examples for digital transformation (combining data, tech and healthcare)

Financial Services

- Quiet in terms of international deal numbers
- Cross-border transactions require regulatory changes, so focus will be on domestic transactions
- Deal activity mainly relates to insurance transactions and fintech transactions (particularly regtech and insurtech)
- Deal activity resulting from Brexit with various companies offering (secondary) banking and payment services moving HQ to Amsterdam


Retail

- Slower start in 2019
- French targets popular in HY2019 (76 deals), followed by UK & Ireland (65) and DACH (55)
- Focus on "smaller" deals
- Split in either adding "shelf space" (sale of department store Caleria Kaufhof from Hudson Bay; acquisition of French supermarket chain Auchan by Italy's Canola) or investing in Tech (joint venture Marks & Spencer with delivery firm Ocado)
- Going forward, distressed situations will dominate retail M&A (for instance, sale of UK based high end Karen Millen)
- Large consumer goods corporates' portfolio rationalisation through non-core disposals likely to be significant driver for M&A activity (e.g. deleverage and sale of underperforming assets)

# 06 Questions?

# Thank you