Baltic M&A Deal Points Study

A Master Thesis submitted for the degree of
"Master of Business Administration"

supervised by
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Vienna, 27 May 2009

Affidavit

I, **Toomas Prangli**, hereby declare

1. that I am the sole author of the present Master Thesis, "**Baltic M&A Deal Points Study**",
   132 pages, bound, and that I have not used any source or tool other than those referenced or any other illicit aid or tool, and
2. that I have not prior to this date submitted this Master Thesis as an examination paper in any form in Austria or abroad.

Vienna, 27 May 2009

Date Signature

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ABBREVIATIONS

This thesis includes the following abbreviations with the shown meaning:

ABA	the American Bar Association (www.abanet.org), the voluntary bar association of lawyers and law students, which is not specific to any jurisdiction in the U.S.;
ABA Canadian Study	"2008 Canadian Private Target Mergers & Acquisitions Deal Points Study", a project of the M&A Market Trends Subcommittee of the Committee on Negotiated Acquisitions of the ABA's Section of Business Law[1]
ABA European Study	"2008 Continental European Private Target Mergers & Acquisitions Deal Points Study", a project of the M&A Market Trends Subcommittee of the Committee on Negotiated Acquisitions of the ABA's Section of Business Law[2];
ABA U.S. Private Equity Study	"2007 Private Equity Buyer/Public Target Mergers & Acquisitions Deal Points Study", a project of the M&A Market Trends Subcommittee of the Committee on Negotiated Acquisitions of the ABA's Section of Business Law[3];
ABA U.S. Private Target Study	"2007 Private Target Mergers & Acquisitions Deal Points Study v2", a project of the M&A Market Trends Subcommittee of the Committee on Negotiated Acquisitions of the ABA's Section of Business Law[4];
ABA U.S. Strategic	"2008 Strategic Buyer/Public Target Mergers &

[1] Available for the ABA members at http://www.abanet.org/dch/committee.cfm?com=CL560003
[2] Available for the ABA members at http://www.abanet.org/dch/committee.cfm?com=CL560003
[3] Available for the ABA members at http://www.abanet.org/dch/committee.cfm?com=CL560003
[4] Available for the ABA members at http://www.abanet.org/dch/committee.cfm?com=CL560003

Buyer Study	Acquisitions Deal Points Study", a project of the M&A Market Trends Subcommittee of the Committee on Negotiated Acquisitions of the ABA's Section of Business Law[5];
EUR	euros, the lawful currency of the member states of the European Union that have adopted the single currency;
M&A	mergers and acquisitions;
U.S.	the United States of America;
USD	the U.S. dollar, the lawful currency of the U.S.

[5] Available for the ABA members at http://www.abanet.org/dch/committee.cfm?com=CL560003

ABSTRACT

The study analyses the M&A transactions completed Estonia, Latvia or Lithuania during 2007-2008. The survey was carried out among the leading Baltic M&A law firms and covers 58 transactions in the region.

The Baltic M&A Deal Points Study acknowledges that each transaction has its own specific risks and the parties act quite differently in ways how they mitigate such risks. The results of the study do not support the proposed hypothesis that there has been significant shift of negotiation position from the beginning of 2007 to the end of 2008. It is suggested that this is due to the time gap in reflection of the market practise in the behaviour of the parties regarding the M&A transaction processes. The study also reveals that the Baltic M&A transactional behaviour is largely similar to the international practise, but lacks behind in sophistication level of certain important deal points.

The survey is unique in the Baltic region and can be used as benchmark for subsequent studies. It provides a valuable insight into the M&A transactional practise in Estonia, Latvia and Lithuania, and the results of the survey can be compared to the future practise in order to determine trends in longer term.

1. INTRODUCTION

Mergers and acquisitions are usually very complicated transactions due to their size, their value, as well as the nature of the object of the purchase – a business conducted as a going concern. Nevertheless, over time a certain approach to executing the M&A agreements has developed and become an internationally accepted standard, including commonly used clauses in the transaction documents. The use of such clauses depends on the particular transaction as well as applicable regulation and culture of the parties, but it also allows comparing practises across different countries.

The parties to M&A transactions – sellers, buyers and sometimes also targeted companies – negotiate the agreement in order to mitigate their risks. A good transaction document is carefully tailored to suit the specific transaction structure, business risks of the target and interests of the parties. However, the analysis of certain frequently used clauses and approaches allows us to draw some conclusions as to what is the common practise of the investors in a particular region; for instance, in the Baltic States.

The study was carried out among leading M&A law firms in the Baltic countries[6]. Substantial part of the transactions were advised by Sorainen, whose M&A team filled about half of the questionnaires. Sorainen's M&A team was natural choice, because as the chair of Sorainen's Baltic-Belarus M&A team, the author could choose a variety of samples to be analysed and avoid confidentiality issues. As the pan-Baltic M&A team, Sorainen is also recognised as the leading M&A legal adviser in the region. In addition to Sorainen, all other major Baltic M&A law firms and alliances participated in the survey: Raidla Leijns & Norcous, LAWIN, TLS Alliance and Borenius Group.

[6] The leading M&A law firms were determined based on their pan-Baltic representation as well as rankings by the internationally recognised legal directories Legal 500 (www.legal500.com), Chambers Global (www.chambersandpartners.com), ILFR1000 (www.iflr1000.com) and PLC Which Lawyer (http://whichlawyer.practicallaw.com).

This Baltic M&A Deal Points Study analyses three main aspects of the M&A transactions competed in Estonia, Latvia and Lithuania during 2007 and 2008.

Firstly, the study aims at finding out how the parties to a transaction have used the M&A transaction processes and clauses to mitigate their risks. Negotiators very often encounter the argument that something (clause, schedule or process) is "standard practise", "normal" or "usual" in the country for similar transactions. The author himself gives no value to such argument, because each transaction – M&A or other – should focus on the specific needs of the parties rather than standard practise. However, the survey intends to find out whether there is any basis for such "common practise" argument and, indeed, what is such practise.

Secondly, there is a common understanding by M&A advisors that the global financial crisis has led to a dramatic shift from the "seller's market" in 2007 to the "buyer's market" in 2008. The "seller's market" can be characterised as a situation where sellers generally enjoy a relatively strong bargaining position due to the lack of attractive target companies, wide availability of acquisition financing with liberal terms and, consequently, many buyers looking to acquire other business or invest in them. In the "buyer's market", on the other hand, the relatively stronger position is held by the buyers who have financial resources to carry out M&A activity in difficult macroeconomic conditions, where access to financing is very limited and many potential target businesses need investments or their owners wish to sell their investment. Thus, this study attempts to find out whether the transaction documents reflect the alleged shift of negotiating positions.

Thirdly, the author intends to draw comparisons between the study results in the Baltic countries and similar surveys done in other regions. Such surveys are quite unique and there are not many conducted. However, the American Bar Association has for several years made similar M&A deal points surveys in the U.S., Canada and also in continental Europe. These studies were carried out by the ABA's Business Law Section, M&A Market Trends Subcommittee of the Committee on Mergers and Acquisitions. The author is grateful to Freek Jonkhart (Co-Chair of European Study) and Renee Alberts of Loyens & Loeff for sharing their experience in the ABA studies. The author had access to the following studies compiled by the ABA's Business Law Section : (i) "2008 Continental European Private Target Mergers &

Acquisitions Deal Points Study" (ABA European Study), (ii) "2008 Canadian Private Target Mergers & Acquisitions Deal Points Study (v1)" (ABA Canadian Study), (iii) "2008 Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study" (ABA U.S. Strategic Buyer Study), (iv) "2007 Private Target Mergers & Acquisitions Deal Points Study v2" (ABA U.S. Private Target Study), and (v) "2007 Private Equity Buyer/Public Target Mergers & Acquisitions Deal Points Study" (ABA U.S. Private Equity Study).

When comparing the ABA studies' results with this M&A Baltic M&A Deal Points research, there are several of important differences that should be considered:

(a) The questionnaires in the surveys are not identical and the author can only compare answers to similar questions analysed in the respective surveys.

(b) The ABA U.S. and Canadian studies analyse publicly available acquisition agreements, whereas the ABA 2008 European Study and this Baltic study analyse transactions which the participating firms advised and reported to the author. Acquisition agreements are not generally publicly available in Europe.

(c) This Baltic study did not set any limitations as to the transaction value of the analysed agreements. On the contrary, the ABA studies disregards transactions under certain thresholds (depending on the study such thresholds have been in the range of USD 5 million to EUR 25million).

(d) The time period covered by the studies is different. This Baltic study analyses transactions that were completed in 2007 and 2008. Conversely, the ABA studies cover deals that have been completed during somewhat earlier periods. For example, the ABA 2008 European Deal Points Study analysed transactions completed during the period 2005-2007, and the ABA 2008 Canadian Study analysed transaction completed during the period 2005-2006.

Despite the above differences, it should still be possible to draw useful comparisons between the Baltic M&A practise and the practise elsewhere in Europe, the U.S. and Canada.

It should be noted that the purpose of this study is to establish the general practise of parties to Baltic M&A transactions with respect to selected deal points, and not to explain in detail the nature of the relevant clauses. However, some background information regarding the specific issues is provided wherever necessary, in addition to the results of the survey.

The study is divided into 6 main parts. Chapter 2 explains the methodology of the study. Chapter 3 describes the transactions included in the survey. It looks at the nature of the target, buyer and seller, as well as the transaction's sales process, value, date of closing and other characteristics. This will help explain certain features of the other deal points. It should be noted that the sample transactions have been chosen for the survey randomly, but with a view to include a variety of different transaction types and values. Therefore, chapter 3 could be considered also as a sample of all M&A transactions that are made in the Baltic markets in the period 2007-2008 and advised by professional advisors.

Chapter 4 looks at price and payment terms. Chapter 5 focuses on representations and warranties that usually form a major part of any acquisition agreement. Chapter 6 explains the closing conditions. Chapter 7 analyses liability and indemnification clauses. Chapter 8 looks at use of typical ancillary covenants like non-competition and non-solicitation undertakings as well as dispute settlement forum.

Each chapter analyses the answers to the chosen questions by explaining the issue, if considered necessary, and providing statistics explaining the use of specific clauses in the acquisition agreements. Whenever helpful, the use of the specific deal point is broken down by categories, e.g. date of the completion of the transaction, nature of the parties, country, etc. Furthermore, comparison may be drawn with the similar deal points studies carried out by the ABA in Europe, the U.S. and Canada.

The paper ends with chapter 9, where the final conclusions are laid out.

2. METHODOLOGY

The survey is unique in the sense that the Baltic M&A market is relatively under-analysed. Not only is this survey, to the author's knowledge, first of the kind in the region, but also to the author's knowledge there are no published statistics regarding transactions focusing primarily on the Baltic M&A market.

Before commencing the survey, the author aimed at analysing 30-50 M&A transactions, but the active participation by all involved law firms gave the opportunity to survey as many as 58 transactions in the region. Given the relatively small size of the markets, this can be considered a very good sample for analysis. As a comparison, the ABA 2008 European Study analysed 73 acquisition agreements in total for the whole Continental Europe, and each of other compared ABA studies analysed 67 to 152 agreements.

Sorainen's Baltic-Belarus M&A team submitted responses regarding 33 acquisition agreements and the other Baltic law firms[7] responded regarding 25 acquisition agreements. Admittedly, some of the transactions may be overlapping as these law firms may have advised different parties to the same transaction. However, due to confidentiality issues, such overlap could not have been avoided. To avoid double count as much as possible, the author asked the other law firms not to include transactions where Sorainen advised one of the parties.

The author also considered approaching M&A advisors (investment banks, financial advisors, private equity houses etc) other than law firms to participate in the survey. However, this was not done for several reasons. Firstly, the questionnaire used for each transaction is lengthy and requires understanding of legal terminology. Most M&A advisors do not have sufficient in-house legal resources to complete the questionnaires, and offering a different questionnaire would have undermined the uniformity of the data. Furthermore, most of the M&A transactions consulted by

[7] The other Baltic law firms included the Estonian law firms Lepik & Luhaäärk LAWIN, Luiga Mody Hääl Borenius, Raidla Leijns & Norcous and Tark & Co; the Latvian law firms Liepa Skopina / Borenius, Klavins & Slaidins LAWIN, Raidla Leijns & Norcous and Loze Grunte & Cers; and the Lithuanian law firms Foigt & partners / Regija Borenius, Lideika, Petrauskas, Valiūnas ir partneriai LAWIN, Raidla Leijns & Norcous and Sutkiene Pilkauskas & Partners.

other M&A advisors are also advised by at least one major Baltic M&A law firm. Therefore, the involvement of financial advisors and private equity houses would not have brought much additional value to this survey.

An important part of the study involved working out a questionnaire that would give sufficient basis for the analysis. The author took as a sample the ABA 2008 European Study's questionnaire, which was modified and adjusted for the purposes of the Baltic M&A Deal Points Study. Approximately 2/3 of the questions were eventually added or modified for the Baltic study purposes. The paper version of the questionnaire is attached as Enclosure 1. In order to facilitate the collection of the data, the online survey tool SurveyShare (www.surveyshare.com) was used. Due to the technological limitations of the software, all sub-questions had to be inserted as a separate question that led to 132 questions for each acquisition agreement surveyed. The software Qlikview 8.5 and Microsoft Excel were used to analyse and chart results.

Although full responses to all questions were encouraged, it was possible for the respondent to omit answering specific questions at his/her discretion. This approach was chosen in order to attract more responses. For example, the respondent might have wanted to omit the Target's industry for confidentiality reasons when there has only been limited amount of transactions in the industry. Also, not all of the questions could be relevant for the specific transaction.

The transactions included in the survey have the following characteristics:

(1) The survey covered only M&A transactions, i.e. acquisition or merger of businesses via share or asset transactions, corporate statutory mergers or in any other way.

(2) Only Baltic transactions were studied, i.e. the M&A transaction involved targets operating in one or more of the Baltic States: Estonia, Latvia and Lithuania.

(3) The transactions were completed in either 2007 or 2008. Transactions signed before 2007 and completed in 2007 could be included in the survey, but transactions signed in 2008 and completed in 2009 were not included.

(4) There were no limitations as to the deal value, nature of the parties or the target or the sales process of the transaction. However, the survey included questions regarding the aforementioned features.

3. OVERVIEW OF THE ANALYSED TRANSACTIONS

3.1. Target

3.1.1. Country of the target

(a) Country of head office of the target

Table 1. Country of Head Office of the Target

Answer	Number of responses
Lithuania	21
Estonia	17
Latvia	10
Austria	1
British Virgin Islands	1
Denmark	1
Finland	1
Germany	1
Malta	1
Norway	1
Spain	1
Other/No response	2
Total	**58**

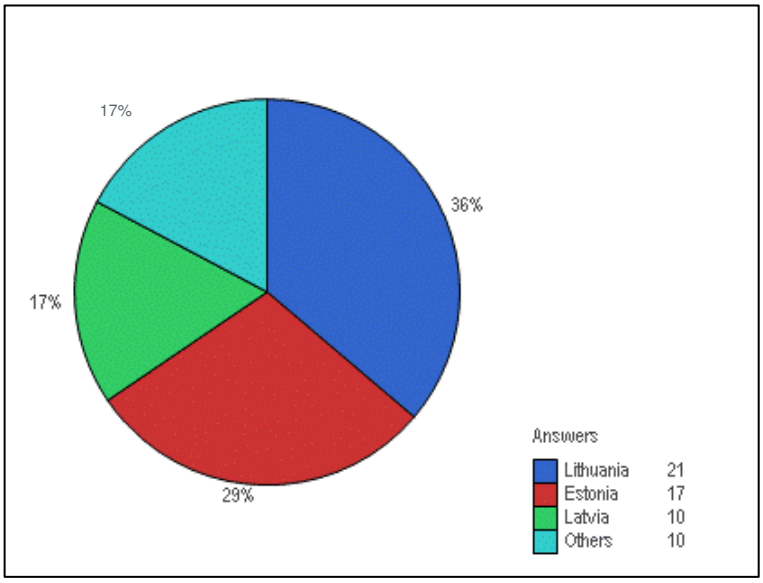

Figure 1. Country of Head Office of the Target

The head office country of the target companies among the sample transactions is primarily one of the Baltic countries. 48 out of 56 responses show that the target's head office has been in the Baltic region, with Lithuania as home country of the target's head office in 21 transactions. In only 8 cases the head office had been abroad. On one hand, this shows that most of the analysed transactions are local and in only few cases the Baltic target is part of an international M&A deal. On the other hand, this does probably mean that the portion of international transactions involving Baltic

companies or assets is very small. The lead advisor in an international transaction has most likely been a foreign law firm and therefore the participating Baltic law firms either did not have access to the final agreement or preferred to include rather local agreements. In the author's opinion, the high proportion of local transactions gives better overview of the local Baltic practises.

(b) Countries of operation of the target

Table 2. Countries of Operation of the Target

Answer	Number of responses
Estonia	16
Lithuania	16
Latvia	9
Estonia/Latvia/Lithuania	8
Latvia/Lithuania	5
Estonia/Latvia	3
Estonia/Lithuania	1
Total	**58**

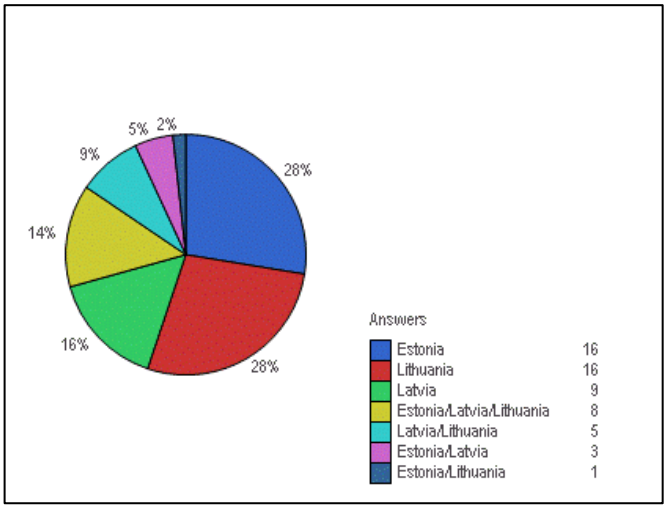

Figure 2. Country of Operation of the Target

The country of operation of the target paints an interesting picture, showing that M&A activity had concentrated mainly in targets operating in only one of the Baltic States, with roughly one third of the targets operating in more than one Baltic country and 14% truly Pan-Baltic. On the other hand, the transactions had been fairly spread, with some more M&A activity in Lithuania and Estonia.

The low proportion of pan-Baltic deals is quite surprising. However, it does not necessarily mean that the target did not have any operations or sales in the other Baltic countries, because the responses were provided for *principal* countries of operations. Nonetheless, these numbers may be showing two somewhat contradictory processes: on the one hand, it may be the case that formerly country specific

businesses are being acquired by strategic players in view of future integrations; on the other hand, it may be that that Pan-Baltic business integration is just not the rule.

The distribution of deals across time is also inconclusive, although it might be pointing in the opposite direction, as the proportion of deals involving a target with operations in only one Baltic State has increased overtime. In either case, if there is such an integration process, in 2007-08 it was far from over. It may me the case that there will be more integration and more cross-border deals in the future.

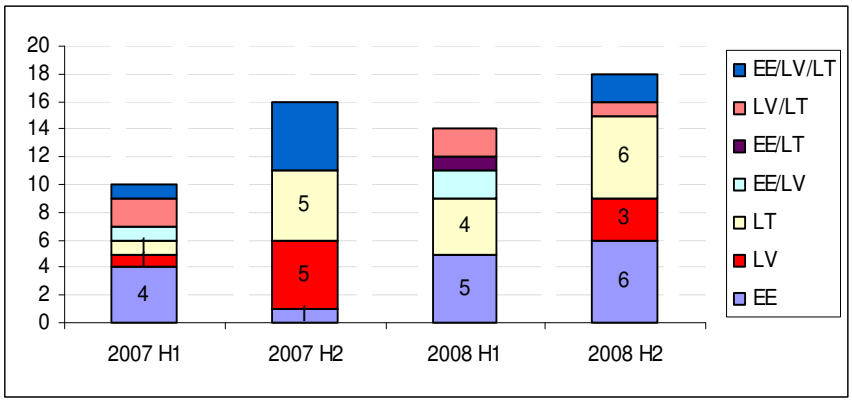

Figure 3. Countries of Operation of Target by Date of Completion

3.1.2. Target as party to the acquisition agreement

M&A transactions are typically concluded between the seller(s) and the buyer(s). However, there may be several reasons why a target is sometimes engaged as a party to the main acquisition agreement. For example, the target may be required to assume certain pre-closing obligations directly towards the seller or give representations and warranties. This may give the seller a choice in case of the claim. However, in case the seller controls the target, the seller is often assuming the obligations on behalf of the target company. We asked then whether or not the target was included as party to the main acquisition agreement.

Table 3. Target is Party in the Acquisition Agreement

Answer	Number of responses
No	47
Yes	8
Other/No response	3
Total	**58**

As seen from above, only in 8 cases the target was engaged as party to the main acquisition agreement. We will see below whether or not such target companies gave representations and warranties to the seller or the buyer.

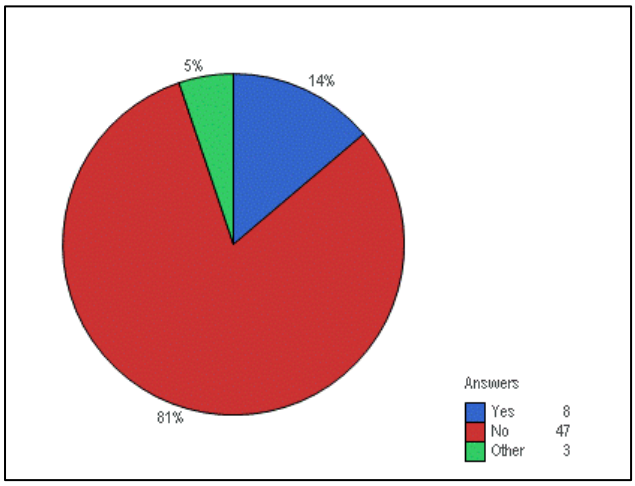

Figure 4. Target is Party in the Acquisition Agreement

3.1.3. Target's industry

Table 4. Target's industry

Answers	Number of responses
Retail / Wholesale	9
Technology (IT, telecom, e-business)	9
Manufacturing	5
Services	5
Construction & Real Estate	4
Pharmaceuticals	4
Media & Entertainment	4
Consumer Products	3
Financial Services	3
Food industry & agriculture	3
Energy and Utilities	3
Logistics and transport	3
Cement sales	2
Tourism and travel	2
Other (including pulpwood export, automotive, insurance; clinical research, document handling)/No response	9
Total	**67**[8]

[8] The respondent could choose several industry areas for the same target and therefore the total number of answers is higher than 58.

The areas of business of the sampled targets are quite widespread, with many companies engaging in several different industries and levels of value chain. However, the industry sectors whose participant companies have been most targeted for M&A activity in the Baltic countries during 2007 and 2008 are IT and retail and wholesale. The Baltic IT sector is relatively active and innovative, and they need foreign direct investment in order to expand their sales internationally. As to the retail and wholesale sector, there has been a notable consolidation among the market players.

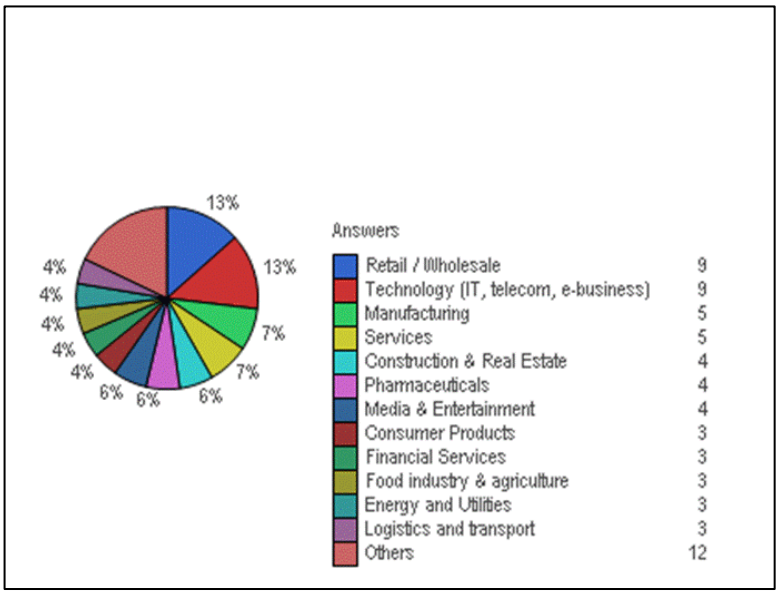

Figure 5. Targets' industries

3.1.4. Listing of the target

As stock exchanges often have rules related to the acquisition of listed companies and in general listed companies are subject to special acquisition dynamics, we asked the respondents to answer whether the targets in the transactions were listed in a stock exchange, either local or foreign.

Table 5. Is the Target listed?

Answer	Number of responses
no	56
yes	2
Total	**58**

Baltic stock exchanges are relatively small and most transactions inevitably happen outside the capital markets. In only 2 out of 58 sampled transactions the targets' shares were publicly traded – on the Tallinn Stock Exchange and on the Vilnius Stock Exchange. In one case the percentage of shares held by the public was approximately 15% and in the other case the public held less than 5% of the shares in the target company.

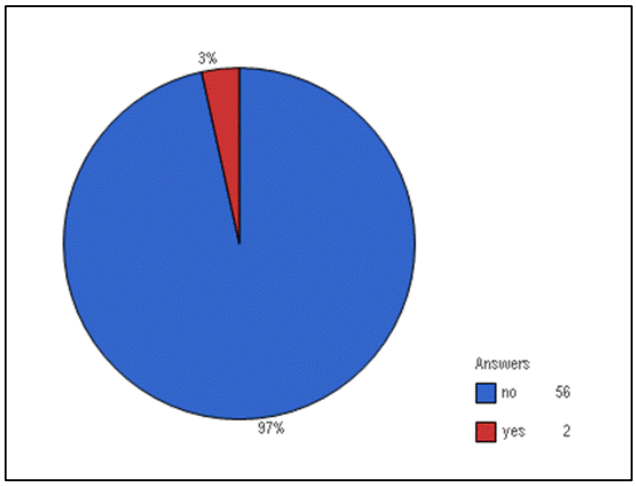

Figure 6. Listing of the Target

3.2. Seller

3.2.1. Country of the seller

We asked the respondents to indicate the country of head office of the sellers, with the following results:

Table 6. Country of Origin of Seller

Answer	Number of responses
Lithuania	16
Estonia	14
Latvia	9
Denmark	2
Finland	2
Cyprus	2
Other (incl. Greece, Iceland, Ireland, Netherlands, Norway, Spain, the US and local partners)	8
No response	5
Total	58

As can be appreciated in the data, the sellers are predominantly local. The sellers can be considered as local in 42 (72%) of the sampled transactions, if we add three local/foreign partnerships classified as "other" to the 39 (67%) where there were local sellers exclusively. Conversely, the sellers can be considered as exclusively foreign investors in 11 cases (19%) or 14 (24%) if the three local/foreign partnerships are added. The foreign sellers are predominantly from EU and EEA member states.

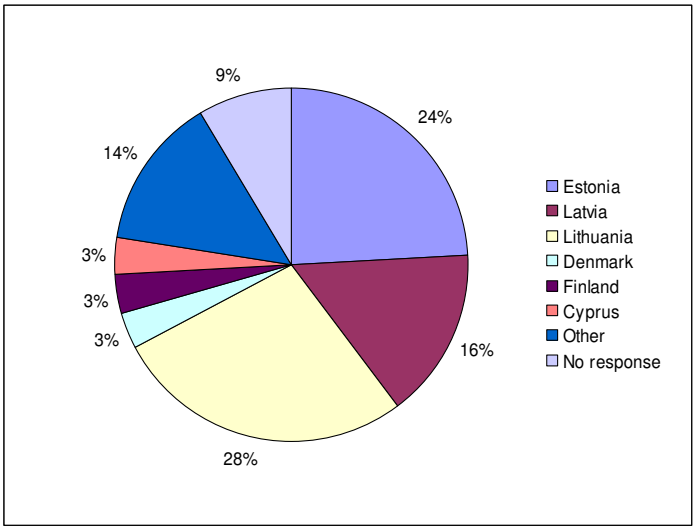

Figure 7. Country of Head Office of the Seller

3.2.2. Nature of the seller

Table 7. Nature of Principal Seller

Answer	Number of responses
Strategic	21
Other/No response	16
More than one principal Seller	13
Financial / Private Equity	8
Total	**58**

The question regarding the nature of the principal seller included also the possibility to specify more than one principal seller. After analysing the answers, the author can attribute 2 of the answers in this choice to private equity and 4 to strategic investors. Therefore the ratio of private equity and strategic sellers in the analysed transactions is 10 to 25. The other sellers include natural persons, families or management of the target company. The nature of the sellers is considered further in analysing the behaviour of the sellers in certain deal points, e.g. chosen sales process or representations and warranties given by the sellers.

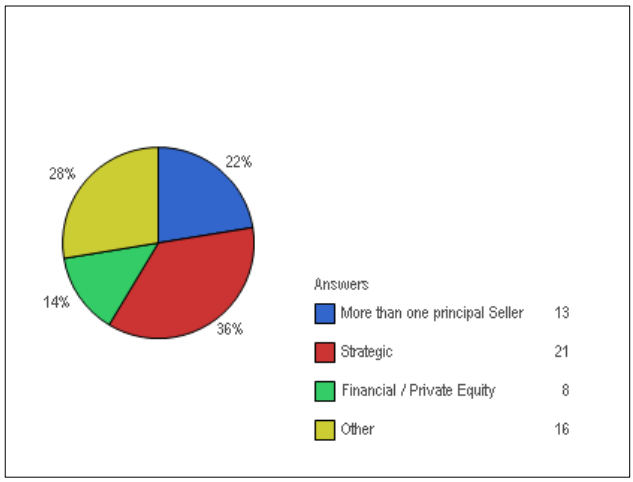

Figure 8. Nature of Principal Seller

3.3. Buyer

3.3.1. Country of the buyer

We asked respondents to tell us the origin of the buyers by indicating the country of head office of the different buyers intervening in the sample transactions. The responses are analysed and summarized in Table 8 and Figure 9 below.

Table 8. Country of Head Office of the Buyer

Answer	Number of responses
Lithuania	9
Germany	7
Estonia	6
Finland	6
Sweden	4
United Kingdom	3
Austria	2
Denmark	2
Norway (incl. w/Estonian partner)	2
Poland	2
Russia	2
United States (incl. w/Russian partner)	2
Other (incl. Cyprus, India, Ireland, Japan, Latvia, Switzerland, Netherlands)	7
No response	4
Total	**58**

The responses offer an interesting picture. As it can be appreciated in Figure 9, the majority of buyers are from outside the Baltic States,

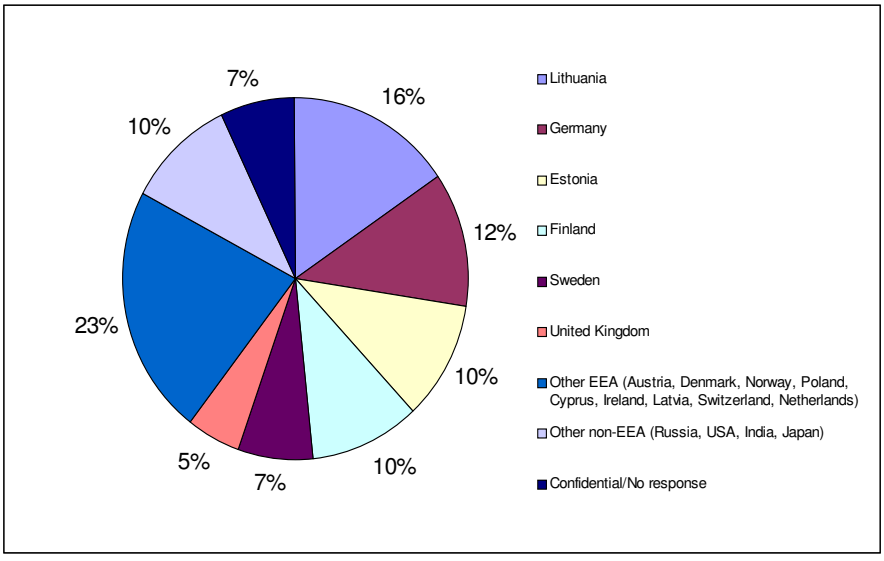

Figure 9. Country of Head Office of the Buyer

with predominance of Germany (12%), Finland (10%), Sweden (7%), the United Kingdom (5%) and other member states of the European Union and the European Economic Area, including Austria, Denmark, Norway and Poland. In total, 55% of the buyers came from the EEA excluding the Baltic States. Nonetheless, the information also shows Lithuania (the biggest single country of buyer head office at 16%) and Estonia as key countries of provenance of buyers (28% of buyers originally from Baltic states). Furthermore, buyers include a wide variety of foreign investors, including particularly Russia (3%), the US (3%) and, interestingly, investors from Asian countries like India and Japan.

3.3.2. Nature of the buyer

The respondents were asked to indicate the nature of the buyer as well, along the lines of the classification used for the sellers. The results are shown in the table below.

Table 9. Nature of the Buyer

Answer	Number of responses
Strategic	43
Financial / Private Equity	12
More than one principal Seller	1
Other/No response	2
Total	**58**

This question included also the possibility of specifying more than one principal buyer, which had one response. After carefully analysing the answers for this deal, the author decided to classify the buyer as a private

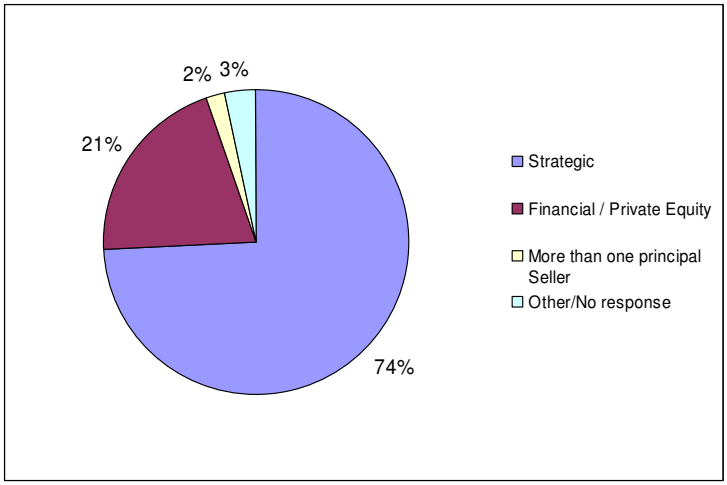

Figure 10. Nature of the Buyer

equity investor. Therefore, the ratio of private equity and strategic buyers in the analysed transactions is 13 to 43. The nature of the buyer is considered further in analysing the behaviour of the buyers in certain deal points, for instance, in the representations and warranties given by the buyers.

3.4. Sales Process

The M&A sales process can be divided into two main categories: negotiated sale and (controlled) auction. A public bid on capital markets can also be considered as the third main M&A process. However, as seen above, the Baltic capital markets are relatively small and takeovers on capital markets are very rare.

In a negotiated sale, the seller typically negotiates with one buyer. The transaction usually begins with discussions at the management level, sometimes induced by an investment banker or M&A advisor. The negotiations are usually carried out on exclusive basis, as agreed in a letter of intent or separate exclusivity agreement.

In a controlled auction, the seller typically gives a mandate to an investment bank or M&A advisor, who solicits bids through a structured process. Such process can be divided into three stages. In the initial stage the potential buyers are shortlisted and approached with a *teaser* describing in brief the target business. Upon expression of interest, the potential buyers will receive limited amount of information regarding the target and are requested to make indicative initial bids. These initial bids are then assessed and some of the bidders are invited to the second stage. In this state, the invited prospective buyers carry out due diligence assessments of the target and submit binding offers, together with a mark-up of the acquisition agreement provided by the seller's advisors. The final negotiation stage is carried out typically on exclusive basis with the best bidder.

Controlled auctions allow sellers to maximise the price through competition between potential buyers as well as allow sellers to exercise greater control. On the other hand, auctions can be quite costly, and are mainly suitable for high value transactions with a number of potential buyers in the market. The choice of the process used to sell a business involves complex legal, financial and behavioural judgments which can impact significantly on the successful outcome of the sales process.

In the Baltic M&A Deal Points Study, the sample transactions involved the choice of sales processes as follows:

Table 10. Nature of the Sales Process

Answer	Number of responses
(Controlled) auction	8
Negotiated sale	48
Private placement	1
Takeover after termination of distribution agreement	1
Takeover bid on capital markets	1
Total	**59**[9]

The sample involved 8 controlled auctions and 48 negotiated sales among the total of 58 transactions. This proportion of auctions (13%) used in Baltic M&A transactions is considerably lower than elsewhere in Europe. According to the ABA 2008 European Study, the controlled auctions were used in 38% of the sample transactions. The reason why auctions are used less in Baltic M&A transactions can be attributed to the general lower deal value. Baltic markets are relatively small and most companies are smaller than their European competitors. Auctions can be costly processes and not feasible for low value transactions.

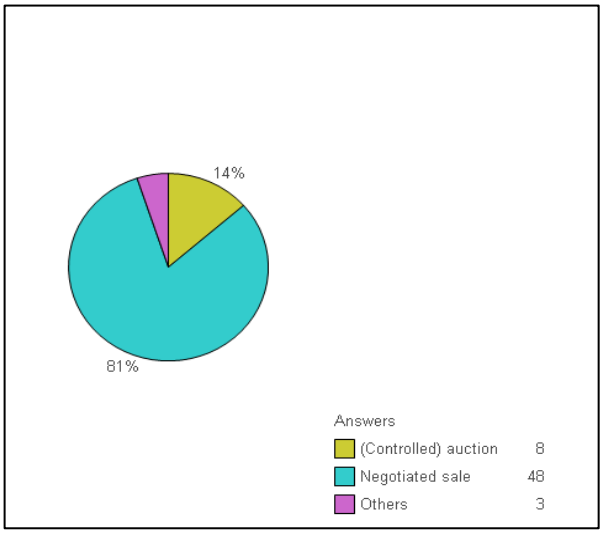

Figure 11. Sales Process

As the sales process is primarily chosen by the seller, it would be interesting to see whether there are any differences between the behaviour of the strategic and financial investors.

[9] The total of 59 results from one of the deals marked both a negotiated sale and a takeover bid.

Table 11. Sales Process Distribution by Nature of the Seller

Answer	Total	Strategic	Several principal Sellers	Financial / Private Equity	Other/ No response
Negotiated sale	48	16	10	7	15
(Controlled) auction	8	3	3	1	1
Takeover bid (in case shares are publicly traded)	1		1[10]		
Private placement	1	1			
Takeover after termination of distribution agreement	1	1			
Total	**59**	21	14	8	16

As seen from above, strategic and financial investors are acting similarly when choosing the M&A sales process.

Moreover, we analysed the responses by transaction value, with the following results:

Table 12. Distribution of Sales Process by Transaction Value

Answers	Totals	up to EUR 1 mio.	EUR 1-5 mio.	EUR 5-25 mio.	EUR 25-50 mio.	EUR 50-100 mio.	over EUR 100 mio.
Negotiated sale	48	6	12	20	3	6	1
(Controlled) auction	8	1	1	4	1		1
Takeover bid (in case shares are publicly traded)	1				1[11]		
Private placement	1				1		
Takeover after termination of distribution agreement	1	1					
Totals	59	8	13	24	6	6	2

Interestingly enough, the distribution of controlled auctions does not appear to have a linear relation with deal size, as it is concentrated in the typical Baltic deal (EUR 5-25 million).

[10] This transaction, where the sellers were several individuals, was marked as both a negotiated sale and a takeover, generating an "additional" response.
[11] Ibidem.

3.5. Form of Transaction

The acquisition can be carried out by purchase of shares or assets of the target company or via other means. The choice of the form and structure of the transaction depends on many factors, including tax considerations, business of the target company, etc. The sample of the current study includes transactions with the following objects:

Table 13. Form of Transaction (assets vs. shares)

Answer	Number of responses
Asset	4
Combination shares and asset	1
Shares	53
Total	**58**

The sample includes 53 share transactions, 4 asset deals and 1 combination of both. The relatively small proportion of asset transactions can be explained by the general succession of liabilities upon transfer of an undertaking (i.e. assets as a going concern) or independent part of it, as foreseen in the law of all three Baltic countries. Therefore, the buyers of Baltic businesses can pick and choose the assets, but cannot generally avoid transfer of liabilities related with the acquired business. This makes less attractive choosing an asset deal as the form of transaction.

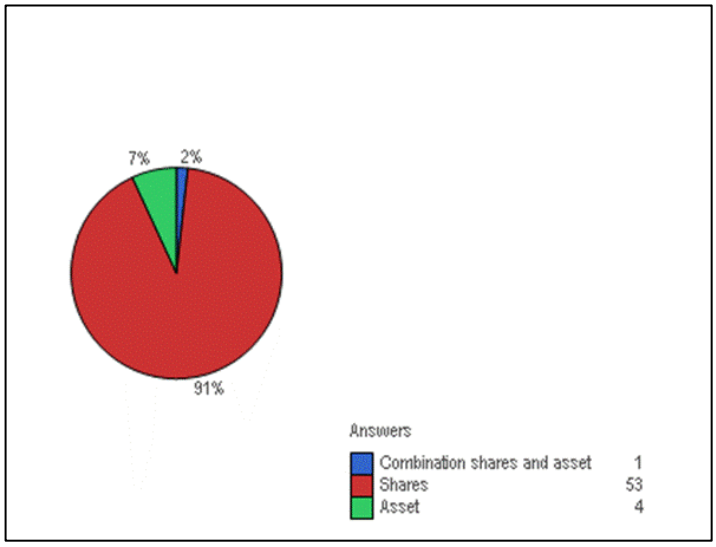

Figure 12. Form of Transaction

3.6. Acquisition Agreement

(a) First Draft

The party who prepares the first draft of the acquisition agreement is usually in a stronger position to structure the transaction documents in the way that suits it the best. However, it is often argued that the buyer should prepare the first draft of the agreement, because it is in the better position to incorporate the due diligence findings and acquisition structure in the transaction documents. The study showed the following answers to the questions as to who prepared the first draft of the main acquisition agreement:

Table 14. Distribution of First Drafting Party by Sales Process

Answer	Number of responses	Negotiated sale	(Controlled) auction	Other
Buyer	37	34	1	3
Seller	19	12	7	
Other	2	2		
% of seller 1st draft	*32.8%*	*25%*	*87.5%*	*0%*
Total	**58**	48	8	3

Interestingly, in one third of the cases, the seller prepared the first draft of the main agreement, with the buyer preparing the first draft in 64% of the cases. This shows that the buyer's "right" to prepare the first draft is far from being written in stone. This is true even in the case of a negotiated sale. In a (controlled) auction, however, the seller's advisors usually prepare the first draft of the acquisition agreement as this process is more controlled by the seller.

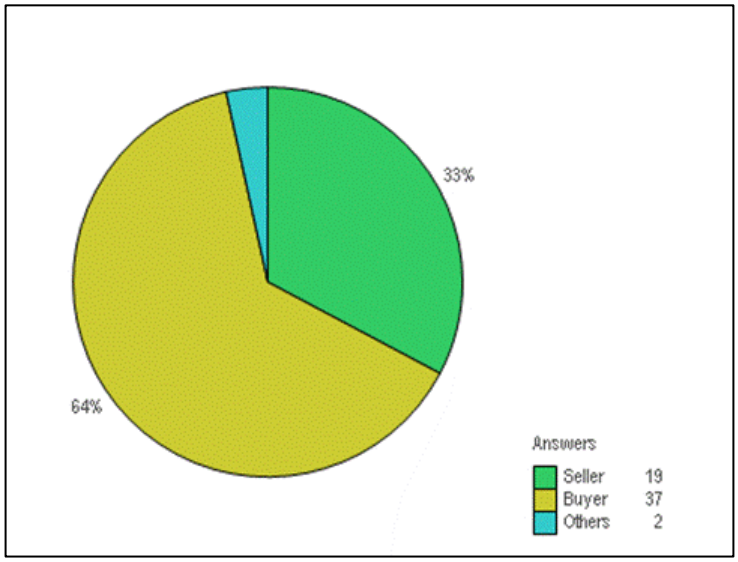

Figure 13. Distribution of First Drafting Party

We also analysed the trend to see whether there were any changes in the practise of the parties regarding the drafting "right" during 2007 and 2008. The results of the analysis can be seen in the following table:

Table 15. Distribution of First Drafting Party by Completion Semester

Answer	Number of responses	2007 H1	2007 H2	2008 H1	2008 H2
Buyer	37	8	9	10	10
Seller	19	2	5	4	8
Other	2		2		
% of seller 1st draft	*32.8%*	*20%*	*31.3%*	*28.6%*	*44,4%*
Total	**58**	10	16	14	18

As can be seen from the above table, there is no significant shift of the practise to the buyer's market, but quite the contrary.

(b) Extension of the Document and Language

M&A transactions are usually complicated and acquisition agreements can be rather lengthy. The extension and complexity of the agreement will depend on the particularities of the transaction. Sometimes the parties prefer a shorter and simpler one. This may be because the target has not been trading for long, the target or acquisition is reasonably straightforward and does not merit a longer form of agreement, or as a commercial matter the transaction does not justify the more detailed protections of the parties. However, in many cases the acquisition agreements can be very long compared to sale and purchase of other objects.

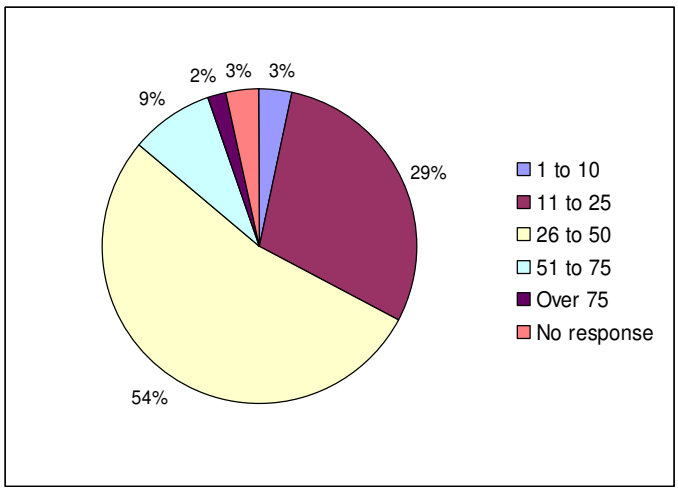

Figure 14. Number of Pages in Main Acquisition Agreement

The survey included a question as to the length of the main acquisition agreement (i.e. number of

pages in body of agreement plus any annexes containing definitions, representations and warranties or indemnification clauses, but excluding other exhibits and ancillary agreements). The answers ranged from 6 to 128 pages, whereas more than half of the agreements (30) were in the range of 25-35 pages. The ABA studies did not include similar question, but it is commonly acknowledged that transactions in Anglo-Saxon jurisdictions (incl. U.S. and Canada) are typically longer than in the Continental Europe where the legal systems provide for more written legislation as a framework for protection of the parties.

The language of the agreement of the sample has divided as follows:

Table 16. Language of the Agreement

Answer	Number of responses
English	42
Lithuanian	4
English-Lithuanian	4
English-Latvian	3
Estonian	2
Other	1
Latvian	1
Russian	1
Total	**58**

In only 8 cases out of 57, the agreement was not concluded or translated into English. It shows that English language is the predominant transaction language in M&A transactions and that at least one of the parties (or its parent company) is of foreign origin.

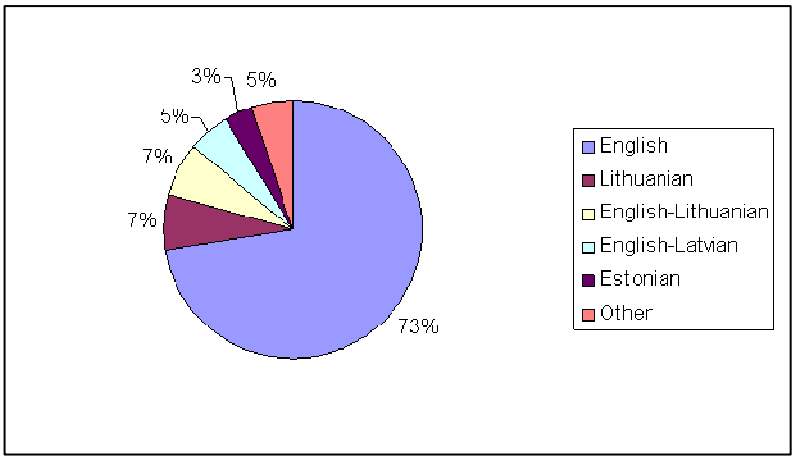

Figure 15. Language of the Agreement

3.7. Governing Law

Although not always, it is usually the case that parties to a transaction can choose the agreements governing law, particularly in the EU context. This allows parties to opt-out of local laws if they are matter for concern, and allows strong or multinational investors to impose the laws of their home jurisdiction or of a well regarded international financial centre (sometimes with the aim of harmonizing internal practice). Despite the choice of law, national laws and regulations relating to certain issues will be relevant, for instance share transfer regulations and tax laws. Therefore, often the law of the country of the target is chosen (sometimes to apply only to a part of the agreement), unless other considerations bear more weight.

In the case of the sample transactions, the agreements were governed by the laws of the following countries:

Table 17. Governing Law of the Agreement

Answer	Number of responses
Estonian law	21
Lithuanian law	20
Latvian law	10
Swedish law	2
Other (incl. English, Danish, German, Maltese and Swiss law)	5
Total	**58**

Interestingly, only 7 out of the 58 agreements stipulated the legislation outside the Baltic region as the governing law. As explained above, this small number can be partly attributed to the fact that the local law firms providing data for the survey where not lead negotiators in the larger

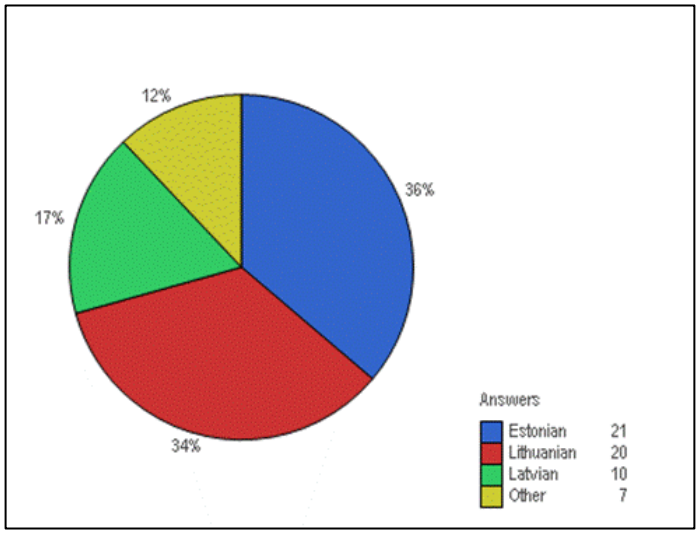

Figure 16. Governing Law of the Agreements

international transactions.

This question plays important role in analysing several deal points in this study. It is assumed that the governing law shows where the lead negotiators' lawyers were based. This allows analysing several questions as to whether there has been any difference in practises in each Baltic country with regard to the specific deal points.

3.8. Date of Closing

The date of closing (completion) is understood as the date when the buyer acquired the shares, assets or otherwise control over the target company.

Table 18. Distribution by Date of Completion

Answer	Number of responses
2007 H1	10
2007 H2	16
2008 H1	14
2008 H2	18
Total	**58**

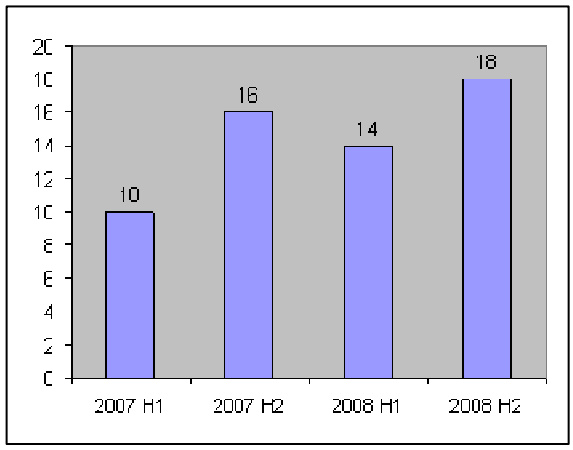

Figure 17. Evolution of Transactions Completed by Semester

The date of closing of the sample agreements is divided relatively evenly throughout the analysed period, although it suggests a rising trend (and so the quantity of deals closed in the second semester of 2008 is 80% higher than in the first semester of 2007, but only 12% higher than in the second semester of 2007).

4. PURCHASE PRICE AND PAYMENT TERMS

The purchase price and how it is to be paid is a central provision of any acquisition agreement, as it sets out the main obligation of the buyer.

4.1. Transaction Value

The transaction value for the purposes of this study means purchase price, including deferred payments and earn-out plus assumed obligations and payments for non-competition or similar covenants.

Table 19. Transactions by Deal Value

Answer	Number of responses
up to EUR 1 million	8
EUR 1-5 million	13
EUR 5-25 million	25
EUR 25-50 million	4
EUR 50-100 million	6
over EUR 100 million	2
Total	**58**

The majority of the transactions have a value of up to EUR 25 million, whereas almost half of the transactions fall in the range of EUR 5 to 25 million. This can, indeed, be considered as a typical size of a Baltic M&A transaction.

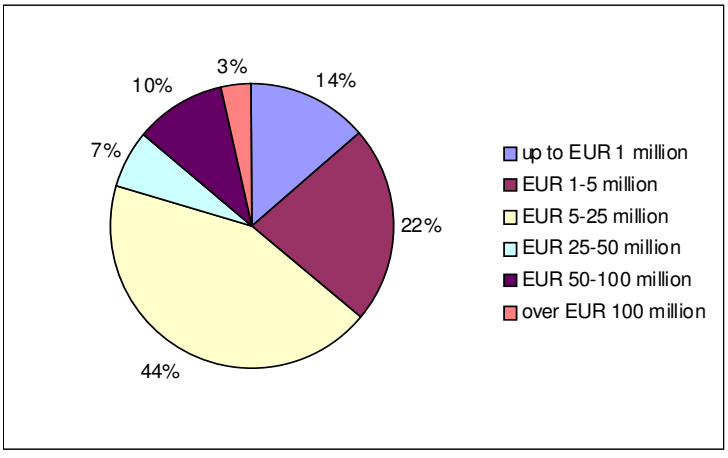

Figure 18. Distribution According to Transaction Value

We analysed also the evolution of the transaction value across time, with the results of Table 20 and Figure 19 below.

Table 20. Distribution by Transaction Value and Time

Answer	Total	2007 H1	2007 H2	2008 H1	2008 H2
up to EUR 1 million	8	1	2	2	3
EUR 1-5 million	13	5	3	2	3
EUR 5-25 million	25	3	7	6	9
EUR 25-50 million	4		3		1
EUR 50-100 million	6	1	1	3	1
over EUR 100 million	2			1	1
Total	58	10	16	14	18

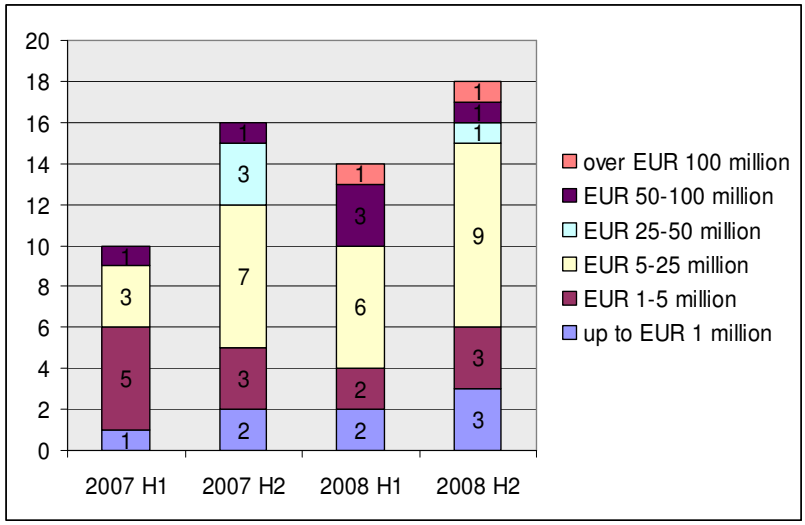

Figure 19. Evolution of Transaction Value by Semester

In this regard, we cannot observe any strong trends. Nonetheless, is it notable that the highest priced deals have occurred during 2008, the year that also has the highest number of typical EUR 5-25 million deals and high-end deals (15 typical and 7 high-end compared to 10 and 5 during 2007). Furthermore, there have been more deals of more than EUR 5 million in the second half of 2008 and the second half of 2007 than in the preceding respective half years: 2007's second half had 7 typical and 4 high-end deals, while 2007 first half had 3 and one respectively; 2008's second half had 9 typical and 3 high-end deals, while 2008 first half had 6 and 4 respectively.

4.2. Form of Consideration

The typical forms of considerations are cash and shares of the buyer or its group companies. The sampled transactions provided for the following forms of consideration:

Table 21. Form of Consideration

Answer	Number of responses
All cash	55
Mixed (shares and cash)	2
Other	1
Total	**58**

Therefore, cash was the predominant payment form among Baltic M&A transactions in 2007 and 2008, with an incidence of 95% of sample transactions, while only 3% of transactions had mixed cash and shares as consideration. This is very similar to the ABA European Study, which featured 96% "all cash" and 4% "mixed" transactions. This is, however, in sharp contrast with the ABA US Private Study, where "all cash" transactions were 65% and "mixed" ones accounted for 30%, and the ABA Canadian Study, with 45% "all cash" and 46% "mixed" transactions.

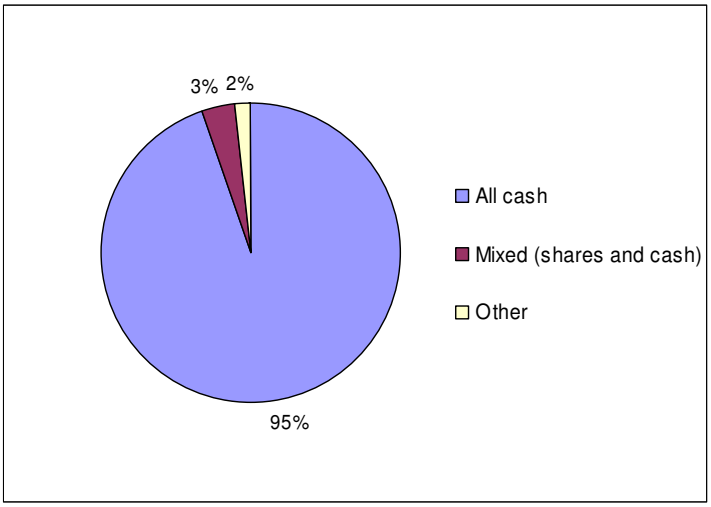

Figure 20. Form of Consideration

4.3. Payment Terms

Purchase price could be paid at closing in full as a lump sum or could be divided in tranches, to compensate for different concepts, and in instalments, to be paid according to the different stages of the transaction.

The basic starting point is that the entire purchase price is paid against the transfer of the shares or assets. This is naturally the most secure option for the seller, who would avoid the credit risk of the buyer in failing to pay the price.

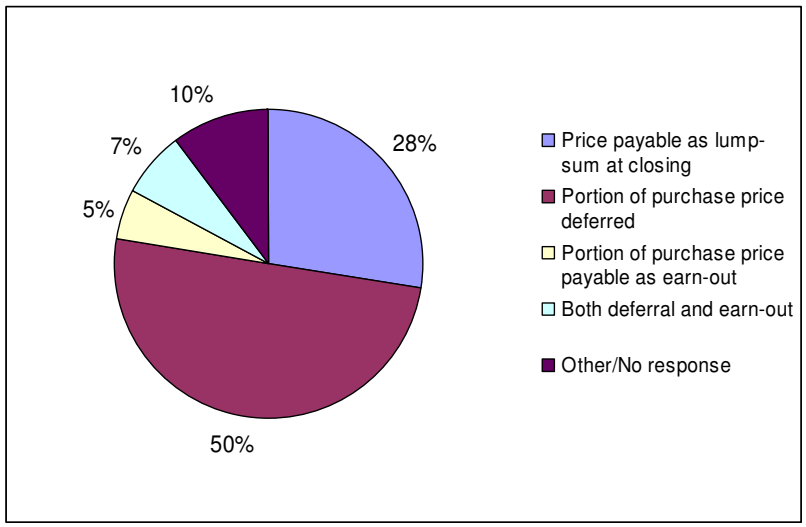

Figure 21. Payment Terms

However, the buyer may wish to defer a part of the payment as a security for undisclosed liabilities or for other reasons. Furthermore, the parties may opt for an *earn out price*, i.e. a method of compensating the seller based on future earnings of the target company. The buyer and the seller may disagree on the value of the business because of different projections about the profit stream. An *earn out* allows the buyer to pay a reasonable price plus a premium when and if the target's cash flow or profit agreed between the parties is realised.

The survey responses were as follows:

Table 22. Payment Terms

Answer	Number of responses
Price payable as lump-sum at closing	16
Portion of purchase price deferred	29
Portion of purchase price payable as earn-out	3
Both deferral and earn-out	4
Other/No response	6
Total	**58**

The answers show that in 16 of the 58 cases (roughly 28%), the purchase price was paid fully at the closing. In most of the cases, 33 out of 58 (about 57%), a part of the purchase price was deferred, 4 of them also including an earn-out. The earn-out method was used quite rarely, in only 7 out of 58 sample transactions (12%); as mentioned, in 4 of those cases (7%) it was combined with a deferral.

The payment terms depending on the nature of the buyer were as follows:

Table 23. Distribution of Payment Terms by Buyer Nature

Answer	Number of responses	Strategic	Financial/ Private Equity	Several principal Buyers	Other/ No response
Price payable as lump-sum at closing	16	14	2		
Portion of purchase price deferred (incl. escrow)	29	21	6	1	1
Portion of purchase price payable as earn out	3	2	1		
Both deferral and earn-out	4	3			1
Other/no response	6	3	3		
Total	**58**	43	12	1	2

The above table shows that strategic buyers tend to be more willing to pay lump sum at closing (32.56%) than financial buyers (16.67%). This asymmetry may be related to the fact that strategic buyers are more focused in changing the target business to realise the synergies with their own prior organization, rather than managing the current target business for financial gain; that leaves less room for deferrals or earn-outs (the latter depending much on the buyer's performance). In spite of that, strategic buyers appear to be marginally more willing (or able) to include earn-out

clauses in the agreements (11.63% vs. 8.33% of financial buyers), either stand-alone or combined with a deferral. Nonetheless, the numbers are sufficiently small to be explained by the higher confidence sellers may have in that strategic buyers will run the target's business well enough to generate good earn-outs.

We also analysed the responses according to the date of closing, with the following results:

Table 24. Distribution of Terms of Payment by Semester of Completion

Answer	Number of responses	2007 H1	2007 H2	2008 H1	2008 H2
Price payable as lump-sum at closing	16	6	4	2	4
Portion of purchase price deferred (incl. escrow)	29	2	8	8	11
Portion of purchase price payable as earn out	3		1	1	1
Both deferral and earn-out	4	2		2	
Other/no response	6		3	1	2
Total	**58**	10	16	14	18

As Table 24 and Figure 22 indicate, there is a somewhat clear trend towards having part of the price deferred (20% in the 1st half of 2007 against 61% in the 2nd half of 2008), and slowly away from the lump sum payment at closing (60% in 1st half of 2007 and 22% in the 2nd half of 2008), although still sizeable.

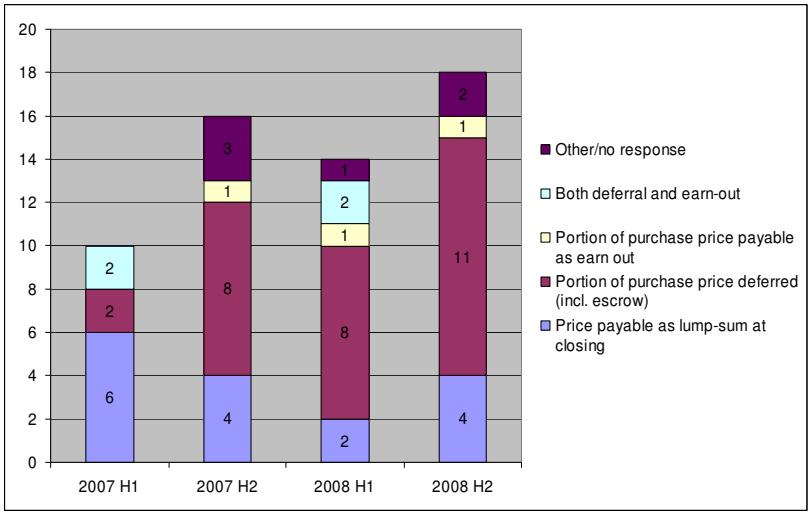

Figure 22. Distribution of Payment Terms by Semester of Completion

We also analysed the distribution of payment terms by transaction value, with the following results:

Table 25. Distribution of Payment Terms by Transaction Value

Answer	Number of responses	Up to EUR 1 mio.	EUR 1-5 mio.	EUR 5-25 mio.	EUR 25-50 mio.	EUR 50-100 mio.	over EUR 100 mio.
Price payable as lump-sum at closing	16	3	5	6		2	
Portion of purchase price deferred (incl. escrow)	29	4	6	14	1	3	1
Portion of purchase price payable as earn out	3	1	1	1			
Both deferral and earn-out	4		1	2		1	
Other/no response	6			2	3		1
Total	**58**	**8**	**13**	**25**	**4**	**6**	**2**

The data show that deferral is the payment term of choice across all deal values, and its incidence tends to increase with the transaction price. Conversely, generally the proportion of lump-sum payment terms decreases as the deal amount increases, even though they are still used even in the largest transactions (2 transactions with a value of EUR 50 to 100 million out of 6). It also shows that stand-alone earn outs are not used in the largest transactions.

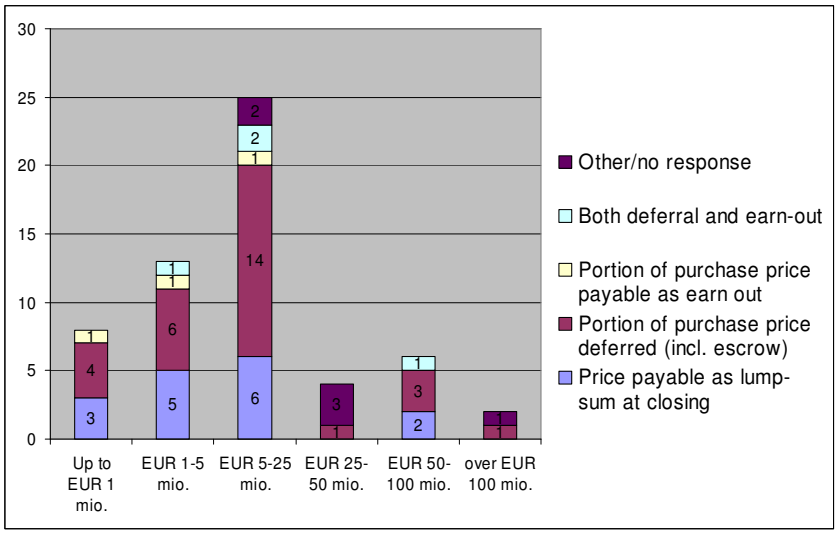

Figure 23. Distribution of Payment Terms by Transaction Value

The survey also included questions as to the proportion of the purchase price deferred or subject o earn out. However, the answers were too diverse to draw any conclusions.

4.4. Closing Adjustment

Two basic items on which the purchase price of an enterprise can be based are the assets owned by the enterprise at a given time, and the potential to earn revenue in the future. The latter will be subject to the sensible appreciation of the buyer (possibly based on the buyer's own projections and models), but the former is less subjective in nature and subject to (audited) accounting. If the purchase price is calculated mainly based on the target's assets, the usual point of reference is the latest audited financial statements; but the situation may have changed significantly from the audited accounts date and the date of closing. Therefore, part of the price is usually adjusted by reference to financial statements prepared as of the closing date to reflect the differences between the two sets of accounts. In other words, because the purchase price is defined as a formula based on the state of the Target's accounts as of the closing, these need to be assessed reliably to be able to say how much is the purchase price. The adjustments will depend on the target's and the transaction's characteristics, but may include adjustment for net indebtedness and net working capital.

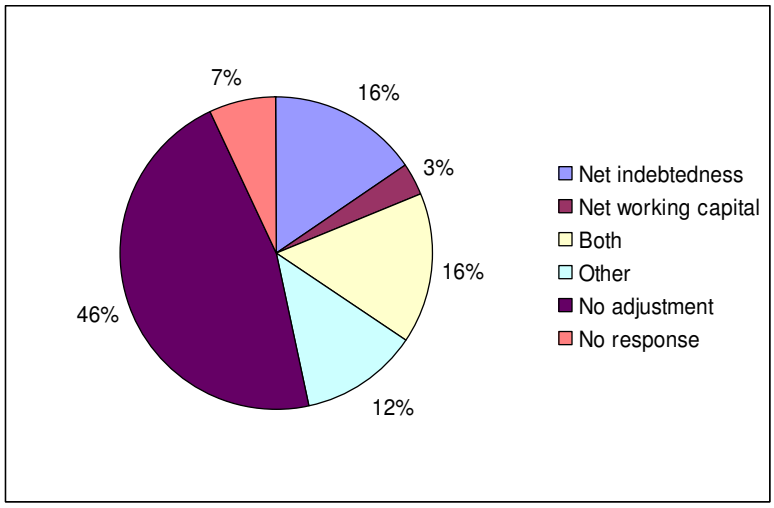

Figure 24. Percentage Distribution of Closing Adjustments

We asked whether there had been any closing adjustments, and if so, whether the price was subject to adjustments for net indebtedness, working capital, or other adjustments. The results are the following:

Table 26. Closing Adjustments

Answer	Number of responses
Net indebtedness	9
Net working capital	2
Both	9
Other	7
No adjustment	27
No response	4
Total	**58**

The responses show, interestingly, that almost half of the transactions (46.55%) have no closing adjustment of the purchase price to reflect changes in the targets financial condition and financial statements. Although the ABA European Study does not have a similar question, this figure contrasts with both the ABA Canadian Study (37%) and the ABA US Private Target Study (32%).

The choice of closing adjustment is also interesting, as it shows a clear majority of transactions with net indebtedness adjustment (31%), either alone (15.52%) or together with working capital adjustment. Conversely, the most popular closing adjustment in the ABA Canadian Study and the ABA US Private Target Study is the working capital adjustment, with 55% and 69% incidence respectively; in the sample transactions it is featured in 19% of the transactions.

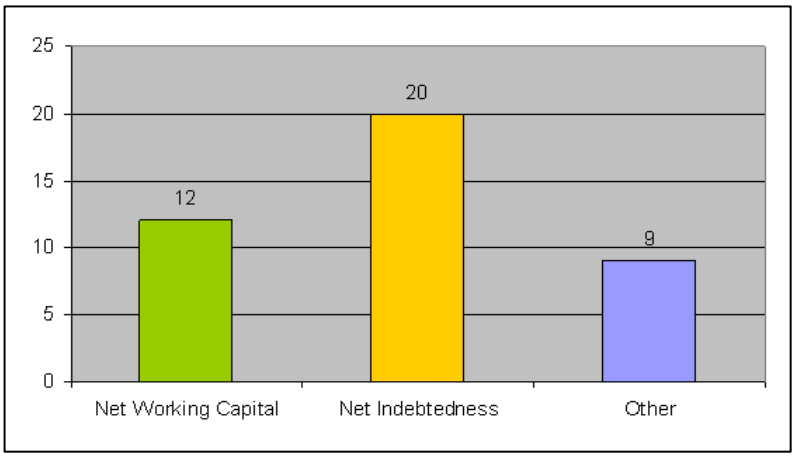

Figure 25. Number of Transactions with Different Closing Adjustments

5. REPRESENTATIONS AND WARRANTIES

5.1. General

Representations and warranties usually form a major part of an acquisition agreement and sometimes cover more than 50% of the main transaction document. This is a very important clause and is likely to be heavily negotiated as it provides the basis of, and remedies for, warranty claims – the buyer's main contractual protection. There are two main reasons why a buyer should seek representations and warranties from a seller:

- to force pre-contract disclosure from the seller, on the basis of which the buyer will be able to adjust its price or, in an extreme case, withdraw from the transaction;
- to provide legal recourse through retrospective price adjustment against the seller for financial compensation after completion if the warranties are breached.

It should be noted that there is an important difference between the Anglo-Saxon jurisdictions and those of the Continental Europe. The Anglo-Saxon jurisdictions offer no or very little extra-contractual protection to the buyer. Therefore, in countries like the UK, Ireland, Canada and the U.S. the buyer will have to heavily rely on the contractual warranties in order to mitigate its risks regarding the undisclosed deficiencies of the purchased business.

In most European countries, the level of statutory protection is generally higher. The *caveat emptor* ("buyer beware") principle, which underlies contract law, applies in general, but in civil law jurisdictions (incl. Estonia, Latvia and Lithuania) the general applicable law provides for safeguards for the most usual or outrageous pitfalls. However, the general protections are seldom satisfactory and are heavily dependant on evidentiary matters. The buyer should therefore ensure so far as possible that it gets what it bargains for. In other words, the purpose of the representations and warranties is to protect the buyer against the risk of liabilities it does not know about,

or is not in position to adequately do so, by shifting the liability for deficiencies resulting from the pre-completion period to the sellers.

5.2. General Qualifications to the Warranties by the Seller

The sellers are sometimes reluctant to give full representations and warranties regarding the business of the target, because this may mean bearing liability also for the risks that are either not known to the buyer or disclosed to the seller who may accept such risk or deficiency.

5.2.1. General Knowledge Qualification

The seller may want to qualify certain representations and warranties with its knowledge. In such case, in order to rely on the breach of warranties, the buyer would need to prove that the seller knew (or should have known) about the wrongfulness of the warranty. In case the seller is in a strong negotiation position, however, the seller may even provide for a general knowledge qualification for all warranties.

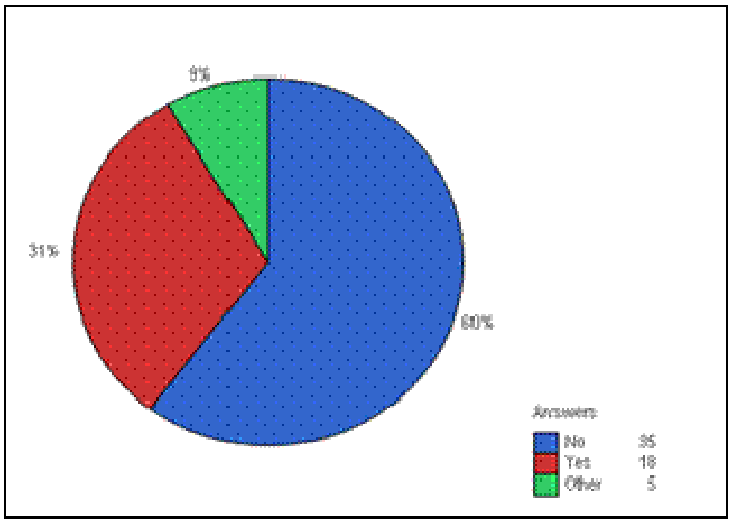

Figure 26. Agreements with General Knowledge Qualification (%)

In answering the question of whether the seller's warranties included a general knowledge qualification, the responses were as follows:

Table 27. Is there a General Knowledge Qualification?

Answer	Number of responses
No	35
Yes	18
No response	5
Total	**58**

It is interesting that in almost one third of the cases, the seller had managed to negotiate a general knowledge qualification for its representations and warranties. Nonetheless, in the majority of cases (60%) this general qualification is not present.

If we break the answers by the date of completion, we obtain the following:

Table 28. Distribution of Knowledge Qualification per Completion Semester

Answer	Number of responses	2007 H1	2007 H2	2008 H1	2008 H2
No	35	8	7	7	13
Yes	18	2	8	6	2
No response	5		1	1	3
Total	**58**	10	15	13	15

Although there are differences between different periods, these do not provide sufficient indication of the general trend. The changes in the market conditions have not affected the seller's position regarding the general knowledge qualification.

It would also be interesting to see whether the nature of the seller affects their behaviour with regarding to this qualification:

Table 29. Distribution of General Knowledge Qualifications by Nature of the Seller

Answer	Number of responses	Strategic	Many principal Sellers	Financial/ Private Equity	Other/ No response
No	35	13	4	6	12
Yes	18	5	7	2	4
No response	5	3	2		
Total	**58**	18	11	8	15

Again, the result is quite interesting as the author would have expected that the financial investors are more careful in giving unqualified warranties to the buyer and therefore accepting potentially unknown risks for the sold business. However, as the above table shows, there is almost no difference between such behaviour between the strategic and financial sellers.

5.2.2. Disclosures

In line with ensuring full disclosure by the seller, it is customary to structure the warranties as far-reaching statements that will be limited or qualified by what the sellers disclose to the buyer in a schedule or letter attached to the acquisition agreement (the disclosure letter). The use of disclosure letter is beneficial to both the seller and the buyer as it (i) sets forth the detailed – otherwise possibly not disclosed – knowledge of the seller, and (ii) typically releases the seller for the liability incurring from the deficiencies listed in the disclosure letter.

It should be noted that the disclosure letter is not the only way to qualify the representations and warranties with respect to the known deficiencies. The other way to do this is providing explicit wording in the respective representations and warranties, e.g. "the Company has all permits and licenses to operate its business, except for the air pollution permit that expired on [date]".

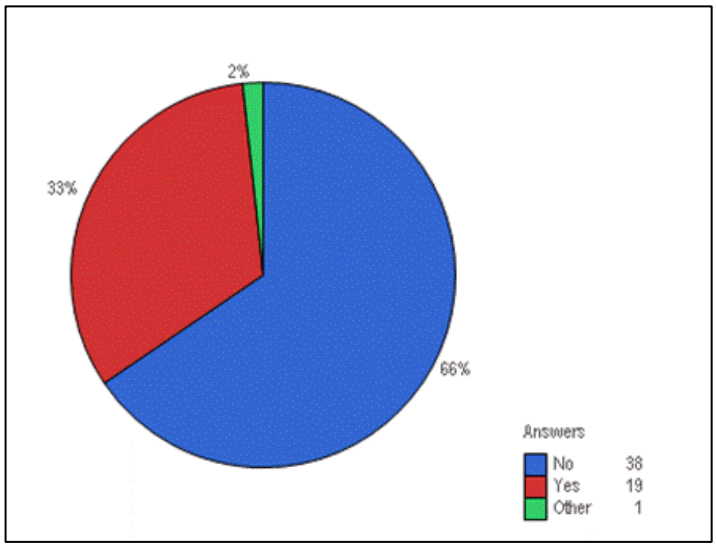

Figure 27. Usage of Disclosure Letters

We asked whether or not the disclosure letter was appended to the acquisition agreement. The answers were the following:

Table 30. Was a Disclosure Letter Appended?

Answer	Number of responses
No	38
Yes	19
No response	1
Total	**58**

In only one third of the cases the disclosure letter was appended to the agreement. It shows that the use of the separate disclosure letter is not yet very common in the Baltic countries. It may also indicate that each representation and warranty is negotiated between the parties one-by-one, and the warranty amended or qualified accordingly.

The author has on numerous occasions encountered the argument by the sellers that whatever has been provided to the buyer in the due diligence procedure, should be considered as an exception to, and general qualification to, the representations and warranties given by the sellers. This is rather uncomfortable for the buyer and its advisors because it reduces the value of the warranties; many factual circumstances and legal risks may be interpreted in different ways or details overlooked in the course of the due diligence.

We asked whether the due diligence disclosures (by reference to data room index or otherwise) were considered as general qualification to the representations and warranties by the seller. The answers were the ones shown in Figure 28 and Table 31:

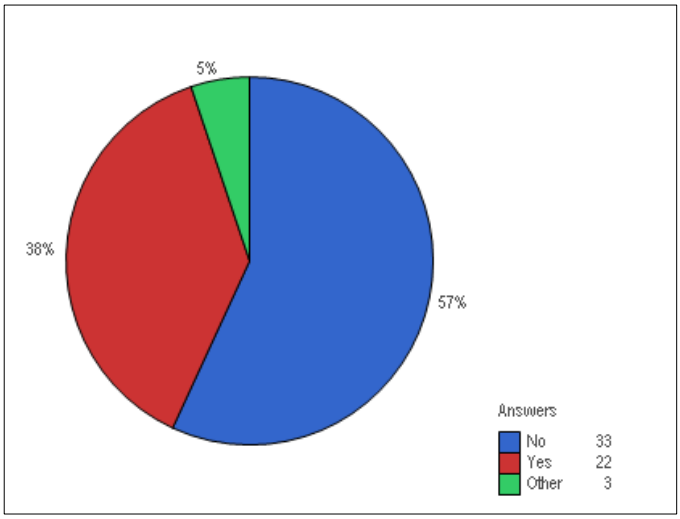

Figure 28. DD Disclosures as General Qualifications

Table 31. Are Due Diligence Disclosures General Qualifications?

Answer	Number of responses
No	33
Yes	22
Other/No response	3
Total	**58**

The above shows that the sellers have managed to negotiate such general warranty qualification in 38% of the cases, but it is far from being a general practise in the Baltic countries. If we break down the responses by date of completion, the proportions would be as follows:

Table 32. Distribution of DD Disclosure Qualification by Closing Semester

Answer	Number of responses	2007 H1	2007 H2	2008 H1	2008 H2
No	33	5	11	4	13
Yes	22	5	4	9	4
Other	3		1	1	1
Total	**58**	10	16	14	18

Again, although over the years there has been a slight reduction in the occasions where the due diligence disclosures would be considered qualifications to the warranties (50% in the 1st semester of 2007 against 22.2% in the 2nd semester of 2008), the strong incidence in the 1st semester of 2008 (64.3%) makes difficult to establish any significant shift of practice in either direction during the 2-year period or predict any strong trends.

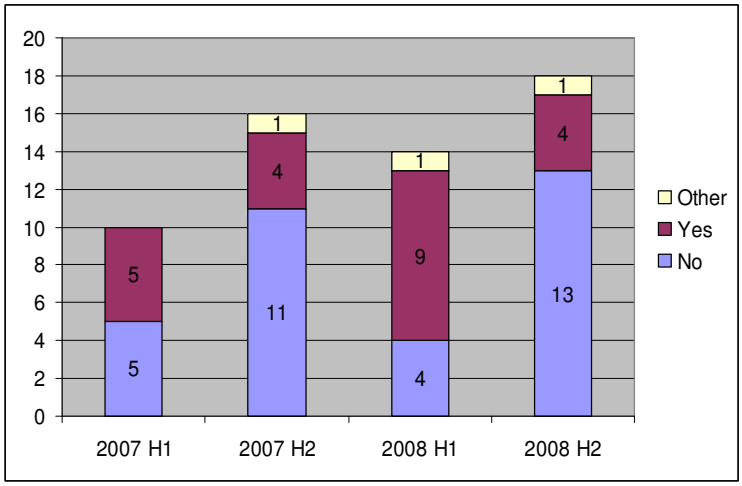

Figure 29. DD Disclosure Qualifications Over Time

If the same responses are analysed by sales processes, the proportions would be as follows:

Table 33. Distribution of DD Disclosures Qualifications by Sales Process

Answer	Number of responses	Negotiated sale	(Controlled) auction	Other
No	33	32		1
Yes	22	15[12]	6	1
Other	3	1	2	
Total	**58**	48	8	2

Interestingly, the above shows that all answers provided regarding transactions carried out via controlled auction were affirmative. Thus, such agreements included a general qualification regarding the information provided in the due diligence procedure. This can be explained by the fact that sellers are usually in a stronger position in negotiating individual deal points when the business is sold via controlled auction. In addition, the due diligence organised in the course of the auction is usually better organised and documented and in such case the buyers are more comfortable in accepting such qualification.

5.2.3. Date of the Warranties

The representations and warranties are obviously given at the time of signing of the acquisition agreement. However, in case there is a time-gap between the signing date and the closing date, the sellers will still be temporarily in control of the target, the situation may have changed, and it may be unclear whether these changes are covered by the warranties. Therefore, the buyer should ensure that the representations and warranties are considered repeated also at the closing date, which is the moment when the transfer of control of the purchased business occurs and should therefore generally be also the cut-off date for all risks associated with the business.

The responses on whether or not the representations and warranties were repeated at the closing date were as shown in Figure 30.

[12] The transaction that was marked as being both a takeover bid and a negotiated sale (see *supra* notes 9 and 10) is here classified as a negotiated sale.

As it can be seen clearly from the chart, the data consistently shows that it is common practise in the Baltic M&A transactions to have the warranties repeated at the closing date. In 46 transactions out of the 58 transactions surveyed (79%) the warranties have been repeated at closing. The ABA Studies generally have higher numbers (e.g. 99%, 98% and 100% for the U.S., Canadian and European Studies respectively), albeit they are difficult to compare as they take the percentage not from all the surveyed deals but from different subsets of them, yielding higher numbers.

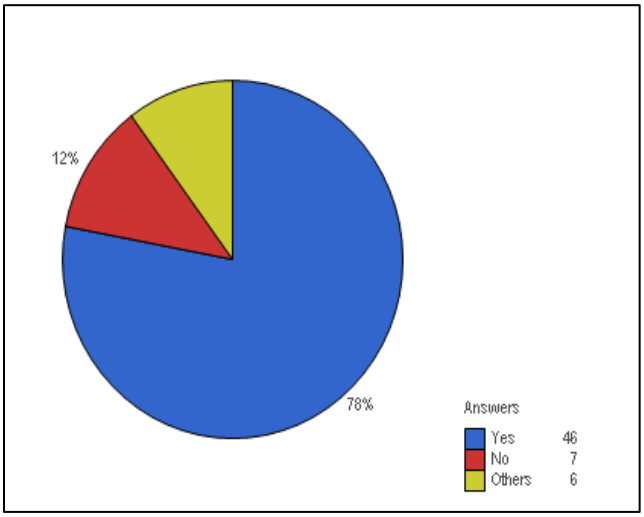

Figure 30. Repetition of Warranties at Closing

5.3. Warranties by the Target

Sometimes the target is engaged as the party to the main acquisition agreement in order to give warranties to the buyer or for other reasons. As seen in chapter 3.1.2, in our sample this was the case in 8 out of 58 analysed transactions. The target's warranties were given as follows:

Table 34. Warranties by the Target

Answer	Number of responses
No	5
Yes	3
Not Applicable	50
Total	**58**

Only in 3 out of 8 cases (38%), the target gave warranties to the buyer when being engaged in the agreement as the party. The author acknowledges that the value of the target's warranties is diminished after the closing in case the buyer already controls the target. However, for the period until the closing, the additional warranties and covenants by the target would widen the buyer's options to enforce its claims.

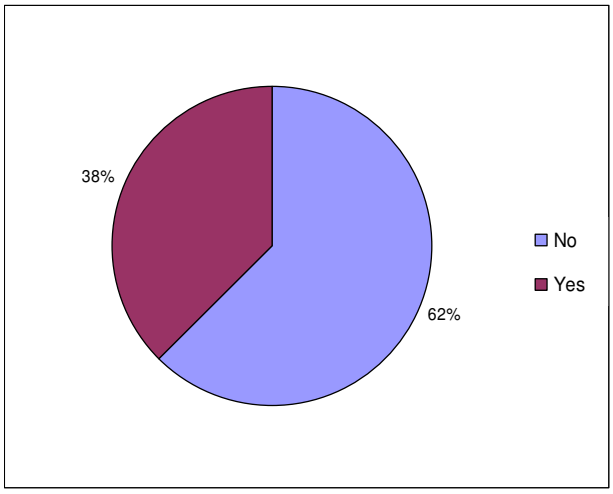

Figure 31. Warranties by the Target

5.4. Specific Warranties

This section analyses the use in the agreements of selected representations and warranties given by the seller and target (if applicable).

5.4.1. Accountings Standards

The representations and warranties regarding financial statements of the target are usually made with reference to the accounting standards that such statements should comply with. Naturally, the financial statements of the target need to comply with the accounting standards generally accepted locally in the target's country (GAAP). However, foreign buyers may sometimes feel more comfortable using International Financial Reporting Standards (IFRS) if they are not familiar with the peculiarities of the local GAAP. Although it did not appear to be a similar question in the ABA Studies, we asked which accounting standards were made reference to in the agreements regarding the target's financial statements. The sample transactions made reference to the following accounting standards:

Table 35. Accounting Standards Used

Answer	Number of responses
Accounting standards generally accepted locally in the Target's country	40
International Financial Reporting Standards (IFRS)	2
Both of the above	3
Others	5
No response	8
Total	**58**

Although the reference to the International Financial Reporting Standards was made in at least five of the analysed transactions (8.6%), in 40 transactions (almost 69%) use the target's local GAAP, either expressly or by default. The predominant rule is, then, that the local GAAP are used as the reference point for the target's financial statements.

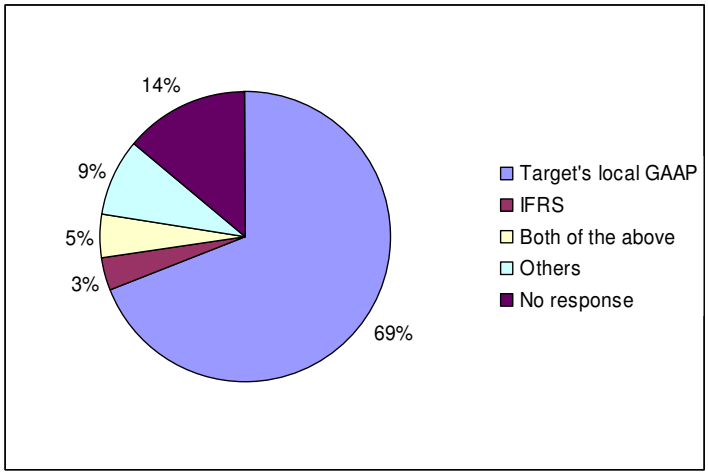

Figure 32. Accounting Standards

5.4.2. "No Undisclosed Liabilities"

(a) Meaning and Incidence

The "no undisclosed liabilities" representation and warranty made by the seller or the target generally means that the target has no liabilities except for those reflected in the financial statements. We asked whether the seller or the target had given such warranty in the agreements, and the combined responses were as follows:

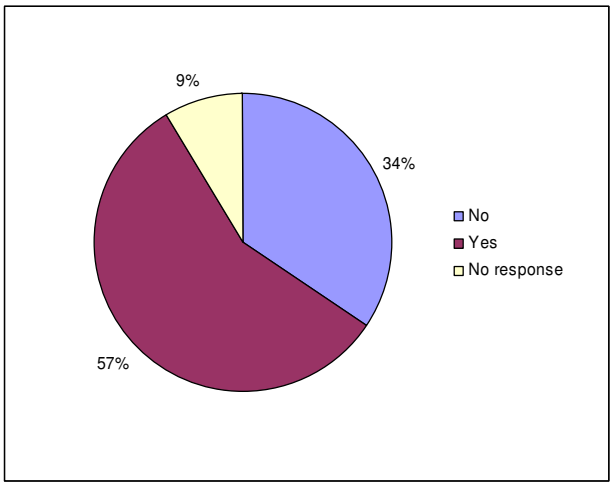

Figure 33. "No undisclosed liability" warranty given by the seller or the targer

Table 36. "No Undisclosed Liabilities" Warranty Given by the Seller or the Target

Answer	Number of responses
No	20
Yes	33
No response	5
Total	**58**

Thus, the "no undisclosed liability" was given in the majority of the cases, either by the seller, the target or both. In 33 cases (almost 57%) the warranty was given. As a comparison, according to the ABA European Study, the "no undisclosed liability" warranty was given in only 45% of cases, whereas according to the ABA Canadian and U.S. studies the warranty was given in as many as 71% and 97% cases respectively. It is notable that only in two cases the target gave this warranty, and only in one of those cases the target was a party to the agreement. In order to avoid inconsistencies, the author has taken into account for the purpose of the analyses that follow in the rest of this section, only the warranties given by the seller, disregarding these two responses.

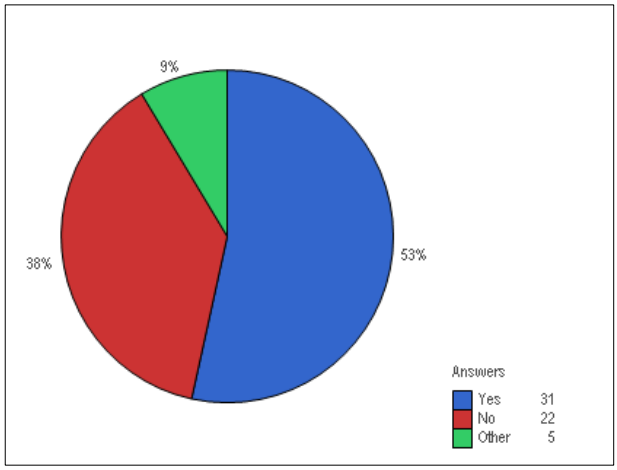

Figure 34. "No undisclosed liability" Warranty Given by the seller

(b) Qualifying Wording

The "no undisclosed liabilities" warranty can worded in different ways in order to best accommodate the agreement between the parties. The commonly made distinction is between "all liabilities" and "GAAP qualified" warranty.

"All liabilities" example:

> *"[Target] has no liability except for liabilities reflected or reserved against in the [financial statements] and current liabilities incurred in the ordinary course of business since [date]"*

"GAAP Qualified example:

> *"[Target] has no liability except liabilities of the type required to be disclosed in the liabilities column of a balance sheet prepared in accordance*

with [GAAP], other than liabilities disclosed in the [financial statements] and liabilities incurred in the ordinary course of business since [date].”

The sample transactions used such warranty as follows:

Table 37. "All liabilities" vs. "GAAP qualified"

Answer	Number of responses
“All liabilities”	24
“GAAP Qualified”	3
Other	1
No response	3
Total	**31**

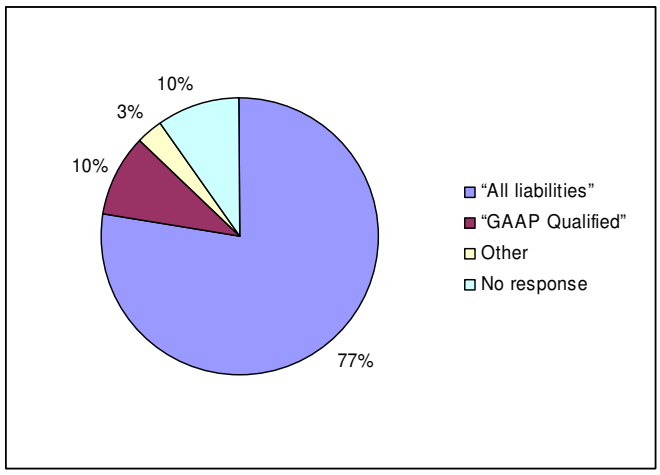

Figure 35. "All liabilities" vs. "GAAP qualified"

The “all liabilities” type of “no undisclosed liabilities” warranty is obviously much stronger than the “GAAP qualified” warranty. However, as seen from the above, the latter has been used in only few cases and mostly the “no undisclosed liabilities” warranty is given with reference to all potential liabilities. As a comparison, according to the ABA U.S. Strategic Buyer study, the “GAAP qualified” warranty was used in 41% of the cases where the “no undisclosed liability” was given.

(c) Qualifying by reference to the seller’s or target’s knowledge

In addition to the General Knowledge Qualification mentioned in section 5.2.1 above, we asked specifically among the transactions featuring a no undisclosed liabilities warranty whether such warranty was qualified by the seller’s knowledge, the target’s knowledge or both. The results are as follows:

Table 38. Is the No Undisclosed Liability Warranty Qualified by Knowledge?

Answer	Number of responses
Yes, the seller's	8
Yes, by the knowledge of both	1
No	22
Total	**31**

As can be seen from the data, in most of the cases where the representation is given there is no qualification as to the seller's or the target's knowledge. This is somewhat in line with the practice in the U.S. and Canada as expressed in the ABA studies, although again the proportion of knowledge qualifications is slightly smaller (7% and 16% of deals with no undisclosed liability warranty, respectively).

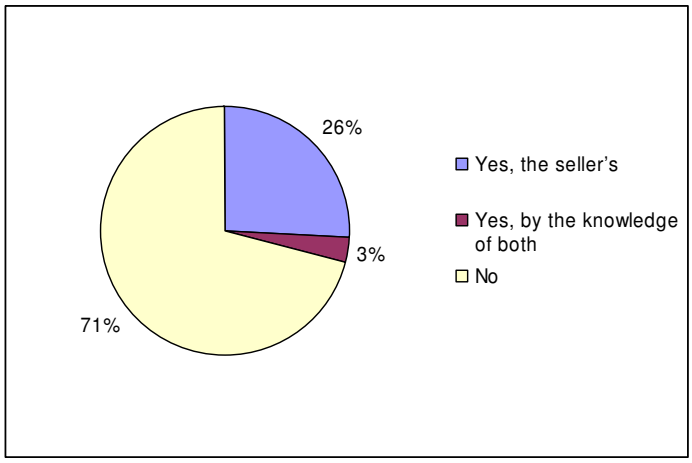

Figure 36. Knowledge Qualification of No Undisclosed Liability Warranty

5.4.3. "Fair Presentation"

(a) Meaning and Incidence

The "fair presentation" representation and warranty is wider than the "no undisclosed liability" and confirms the adequate reflection of the target's financial position in the financial statements. Asked as to whether the seller gave this warranty, the answers were the following:

Table 39. Incidence of "Fair presentation" warranty

Answer	Number of responses
Yes	36
No	16
No response	6
Total	**58**

Again, this warranty can be considered fairly common in the Baltic M&A transactions. This is in line with the results of the ABA studies carried out in Europe, the U.S. and Canada, although in those studies the percentages tend to be much higher (85%, 99% and 99% of the deals with financial reps, respectively).

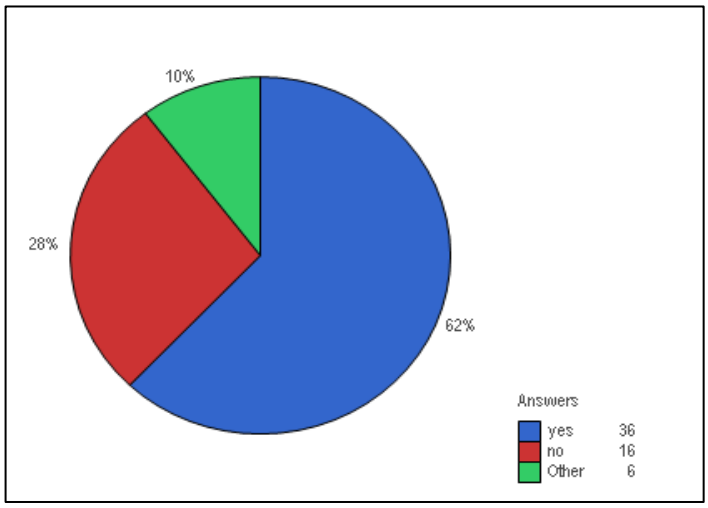

Figure 37. Incidence of "Fair presentation" Warranty

(b) Qualifying by reference to GAAP

Like in the case of the "No undisclosed liabilities" warranty, the "fair presentation" warranty can be absolute or can be qualified by reference to the appropriate GAAP. The following could be an example of a "GAAP qualified" fair presentation warranty:

> *"The [financial statements] fairly present the financial position of the [Target] and its consolidated subsidiaries as of the respective dates thereof and the results of operations and cash flows of the [Target] and its consolidated subsidiaries for the periods covered thereby, all in accordance with [GAAP]."*

Conversely, an example of a "Not GAAP qualified" fair presentation warranty could be the following:

> *"The [financial statements] fairly present the financial position of the [Target] and its consolidated subsidiaries as of the respective dates thereof*

and the results of operations and cash flows of the [Target] and its consolidated subsidiaries for the periods covered thereby."

Using those examples as models, we asked, among the sample transactions that contained the fair presentation warranty, whether such warranty was qualified or not, with the following results:

Table 40. GAAP Qualification Incidence in Fair Presentation Warranties

Answer	Number of responses
GAAP-Qualified	11
Not GAAP-Qualified	21
Other	1
No response	3
Total	**36**

The answers clearly show that the "fair presentation" warranty, as in case of its "no undisclosed liabilities" counterpart, is usually not qualified by reference to GAAP requirements in the Baltic M&A transactions surveys (31% GAAP qualified, 58% not GAAP qualified). This is again somewhat in line with the ABA studies carried out in the U.S. and Canada, although the incidence of GAAP-qualified representations is slightly smaller (24% for the U.S. and 19% for Canada).

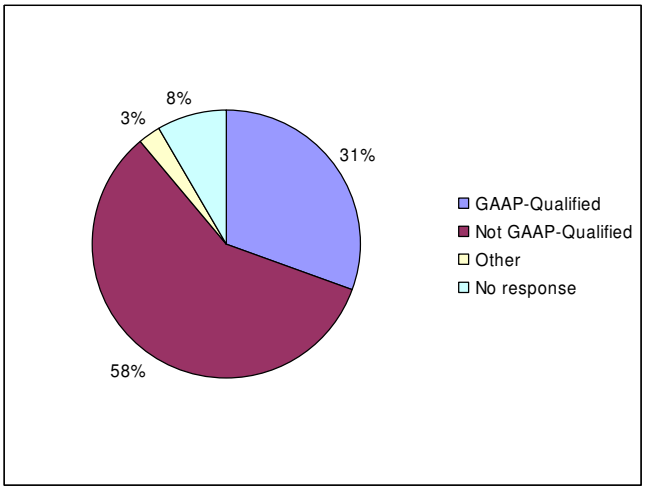

Figure 38. GAAP Qualification Incidence in Fair Presentation Warranties

(c) Qualifying by reference to the seller's or target's knowledge

As in the case of the "no undisclosed liabilities" warranty, we asked specifically among the transactions featuring a fair presentation warranty whether such warranty

was qualified by the seller's knowledge, the target's knowledge or both. The results are as follows:

Table 41. Is the Fair Presentation Warranty Qualified by Knowledge?

Answer	Number of responses
Yes, the seller's	8
Yes, by the knowledge of both	3
No	24
No response	1
Total	**36**

As can be seen from the data, in most of the cases where the fair presentation representation is given there is no specific qualification as to the seller's or the target's knowledge. Nonetheless, the sellers have succeeded in introducing the qualification in a sizeable 30% of cases in which the representation was given. There is no comparable information in the ABA Studies.

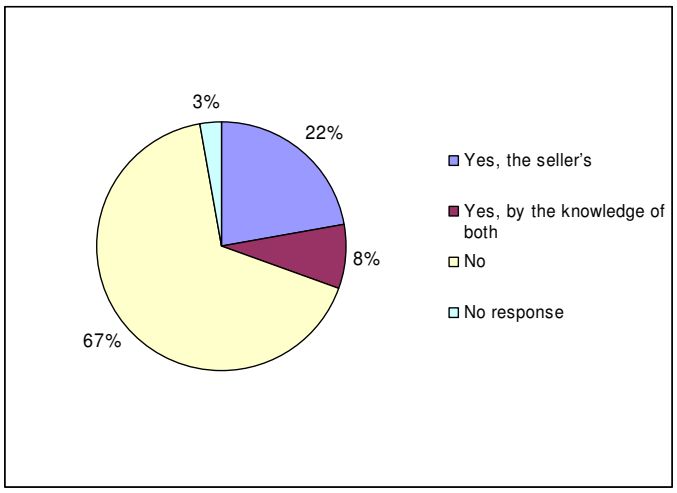

Figure 39. Fair Presentation Warranty Qualification by Knowledge

5.4.4. "Full Disclosure"

(a) Meaning and Incidence

The "Full disclosure" warranty provides additional comfort for the buyer, by warranting that the seller (or the target) has not omitted any material information that would have affected the buyer to enter into the agreement on the agreed terms and conditions. An example of such warranty is as follows:

> *"No representation or warranty made by the [Seller/Target] in the Agreement contains any untrue statement of a material fact or omits to state a material fact necessary to make any such representation or warranty, in light of the circumstances in which it was made, not misleading."*

We asked the respondents to answer whether such a representation had been given in the transaction, with the following responses:

Table 42. Is there a Full Disclosure warranty?

Answer	Number of responses
No	25
Yes	28
No response	5
Total	**58**

The survey shows that such warranty has been used in approximately half of the analysed transactions (48%). This coincides with the ABA European Study, both figures slightly smaller than the ABA U.S. Private Target Study, which reports an incidence of 62% for the warranty.

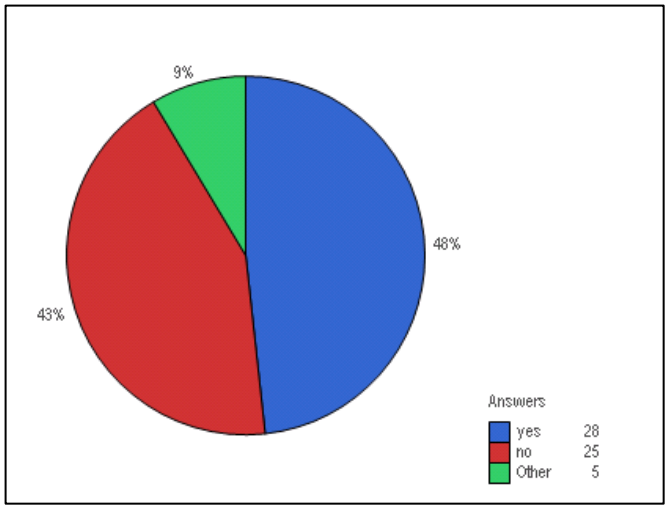

Figure 40. Incidence of Full Disclosure Warranty

Conversely, the transactions included in the ABA U.S. Private Equity, which focuses in "public" (wide shareholding) targets, have such a warranty in only 1% of the cases.

(b) Qualifying by reference to the seller's or target's knowledge

As in the case of the other warranties, we asked the respondents to answer whether, from among the transactions featuring a full disclosure warranty, such warranty was qualified by the seller's knowledge. The results are as follows:

Table 43. Is the Full Disclosure Warranty Qualified by Knowledge?

Answer	Number of responses
Yes	13
No	14
No response	1
Total	**28**

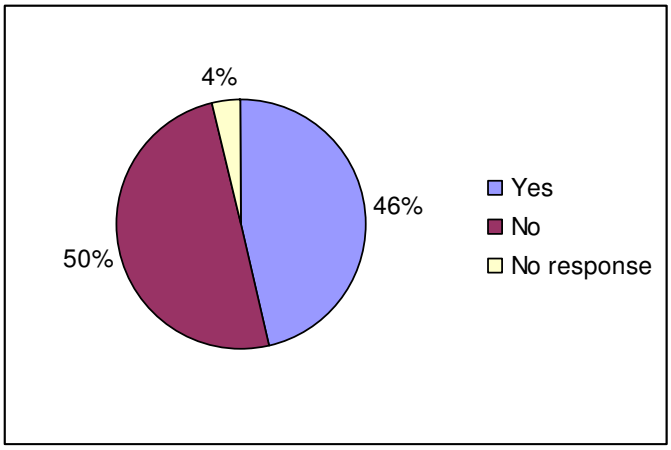

Figure 41. Qualification of Full Disclosure Warranty by Knowledge

As in the case of other warranties, in a majority of the cases where the full disclosure representation is given there is no specific qualification as to the seller's knowledge. Nonetheless, the incidence of the unqualified warranty is quite low, just 50%, while the sellers have managed to introduce the knowledge qualification in 46% of the cases. This contrasts sharply with the situation in the ABA U.S. Private Target Study, where the knowledge qualification reaches only 26% of the deals where the warranty is given.

5.4.5. Standards of Knowledge

As shown above, warranties are general statements that can be qualified for several criteria. One of them is the awareness of the person giving the warranty (be it the seller or the target) that the warranty statement is true and correct. In such cases, the buyer will need to show the knowledge of the seller to establish a breach of warranties. But "knowledge" as such is a vague concept: for instance, it may refer to things that the seller actually knew ("actual knowledge") or things that she should have known ("constructive knowledge"), with varying intensity of care (e.g. after a cursory review, after investigating, after thoroughly investigating, and so on), at a certain point in time (with the additional vagueness of when would that point be). Furthermore, if the seller is a company or other legal entity, then the "knowledge of the seller" may refer to one or more of the natural persons managing or working for the seller, introducing the additional vagueness of whose knowledge it should be. Therefore, in some instances where warranties are qualified by knowledge, certain "knowledge standards" are introduced to flesh out the meaning of the knowledge qualification and avoid future disputes.

The respondents were thus asked to answer whether the transaction agreements had some definition of "knowledge", and if so, whether such definition relied on an "actual" or a "constructive" standard. The answers were as follows:

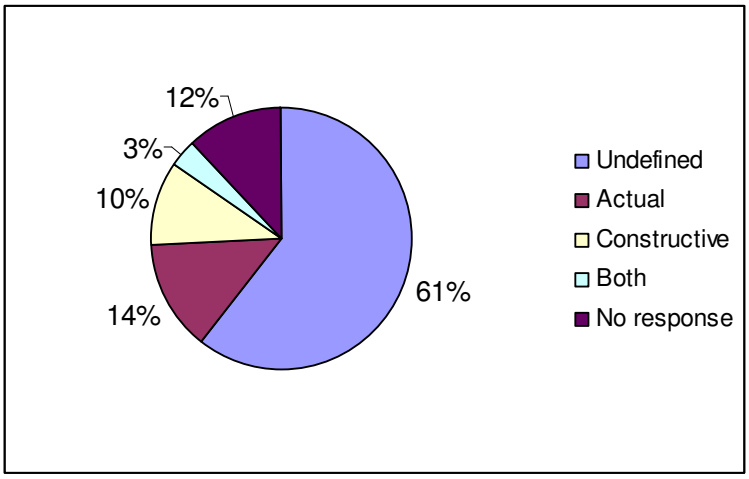

Figure 42. Incidence of knowledge definition

Table 44. Is there a definition of knowledge?

Answer	Number of responses
Undefined	35
Actual	8
Constructive	6
Both	2
No response	7
Total	**58**

The answers show that in most cases (61%), "knowledge" is left undefined, and when it is not, the most usual standard is "actual knowledge". In other words, the interpretation of the concept of the seller's knowledge is left usually to the dispute resolution stage.

6. CLOSING CONDITIONS

6.1. General Remarks

The parties usually try to perform the agreement, i.e. transfer of shares or assets against the purchase price, as soon as possible. However, it is not uncommon that the closing of the transaction is subject to additional preconditions that need to be fulfilled by the parties or to approvals that need to be obtained (most commonly, a concentration permit granted by the relevant competition authorities). We asked if the closing occurred subsequent to signature of the acquisition agreement:

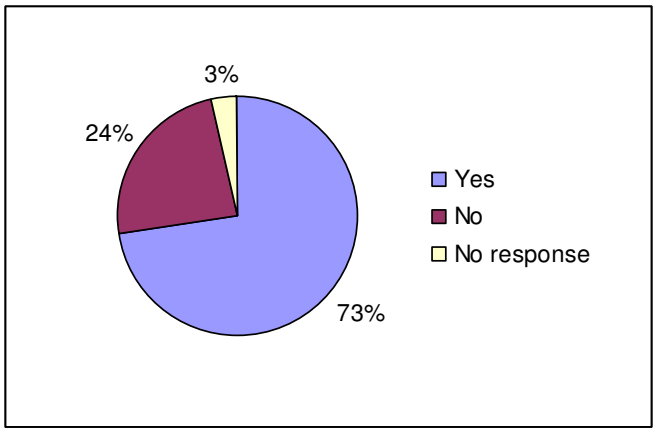

Figure 43. Closing subsequent to the signature

Table 45. Did closing occur subsequent to the signature?

Answer	Number of responses
Yes	42
No	14
No response	2
Total	**58**

As seen from the above, it is indeed rather uncommon for the signing and closing to occur simultaneously. As we can see below, the answer does not depend on the value of the transaction:

Table 46. Distribution of subsequent closing occurence by semester

Answer	Number of responses	up to EUR 1 mio.	EUR 1-5 mio.	EUR 5-25 mio.	EUR 25-50 mio.	EUR 50-100 mio.	over EUR 100 mio.
Yes	42	6	12	16	3	4	1
No	14	2	1	8	1	2	
No response	2			1			1
Total	**58**	8	13	25	4	6	2

In the following sections we analysed some of the frequently used conditions to the closing.

6.2. Accuracy of Representations and Warranties

In case there is a time gap between signing and closing the transaction, the parties may lose interest to closing the transaction when it is discovered meanwhile that some of the representations and warranties are wrong. We asked whether the accuracy of representations and warranties was precondition to the closing, with these results:

Table 47. Closing subject to representation accuracy condition

Answer	Number of responses
Yes	33
No	10
No response	15
Total	**58**

In the majority of the cases the accuracy of warranties was explicitly stipulated as a condition precedent to the closing. The ABA European Study shows, however, that this may not be the case elsewhere in Continental Europe: the "accuracy" was condition to closing only in 28% of the cases.

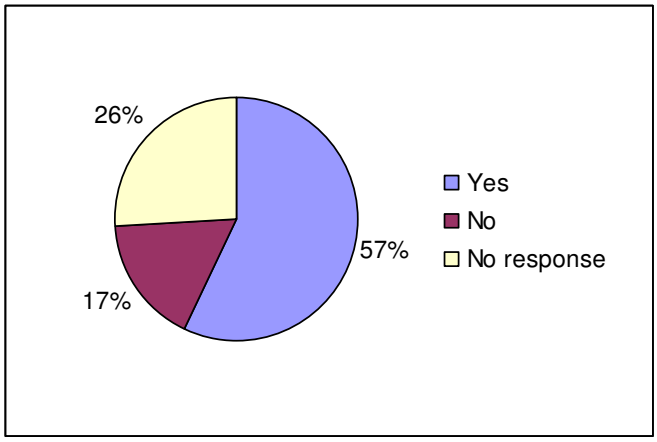

Figure 44. Closing subject to representation accuracy condition

Such condition may be considered problematic mainly in case any inaccuracy in warranties gives the buyer the right to refuse to close. We asked whether, among the cases presenting a representation accuracy condition, the "accuracy" was qualified by materiality (e.g. the warranties must be accurate in "all material respects"), and the answers were the following:

Table 48. Accuracy condition qualification by materiality

Answer	Number of responses
Yes – "Material only" (must be accurate "in all material respects")	23
No (i.e. must be accurate in all respects)	10
Total	**33**

The data show that in most cases where the condition of accuracy of representation was present, such condition was qualified by materiality (70%); while in 30% of the cases the condition was unqualified.

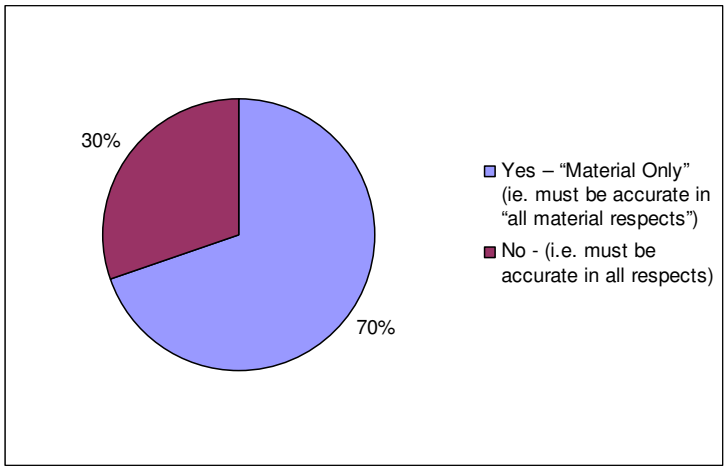

Figure 45. Accuracy condition qualification for materiality

6.3. MAC/MAE Condition

The condition of "(no) material adverse change" (MAC) – also known as material adverse event or effect (MAE) – enables the buyer to refuse to complete the transaction if the target suffers such change. The rationale for such a clause is that it constitutes a means to protect the buyer from major changes that make the target less attractive as a purchase. Large transactions often require a long period of time between the execution of the agreement and the completion of the transaction. During this period, the target continues to function pending the completion of the merger and is subject to the normal risks of its business, the economy or acts beyond its control.

MAC/MAE clauses play an especially important role in the rapid changes in the economic environment as experienced globally in the years of 2008 and the beginning of 2009.

An example of the definition of MAC:

> *"[…] means a [non-disclosed] material adverse effect on the condition (financial or otherwise] of the business, assets, liabilities or results of operations or prospects of the [Target]"*

We asked whether or not the MAC/MAE condition was included as the condition permitting the right to withdraw by the buyer:

Table 49. There is a MAC/MAE clause allowing the buyer to "walk"

Answer	Number of responses
Yes, may be invoked by Buyer	25
No	20
No response	13
Total	**58**

Bypassed responses aside, a MAC clause was used in more than half of the transactions. Compared to the ABA European Study this is considerably high proportion, as in the rest of Europe MAC clauses were used only in 29% of the cases. According to the ABA U.S. and Canadian studies, on the other hand, the use of MAC clause is even more common in these countries: 98% and 67% respectively.

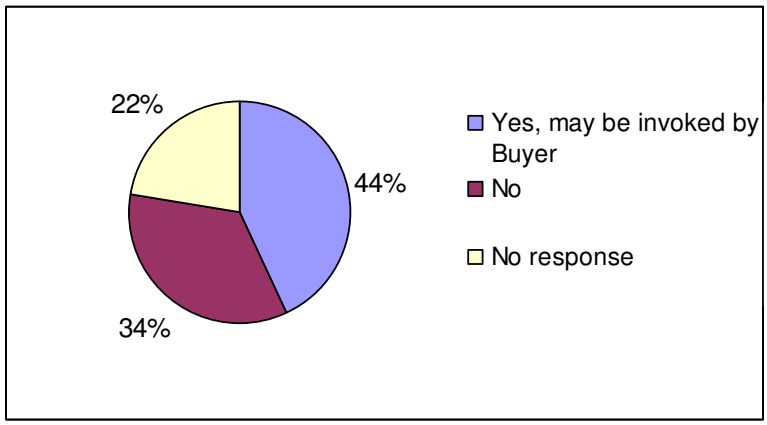

Figure 46. Incidence of MAC/MAE condition and "walk rights"

When looking more deeply into in the meaning of the MAC clause, we asked whether among the transactions having a MAC term it included (i) future business prospects, (ii) the ability of seller/target to perform its obligations under the acquisition agreement, and (iii) the ability of the buyer to own and operate the acquired business.

Table 50. Does the MAC/MAE term include future business prospects?

Answer	Number of responses
No	15
Yes	9
No response	1
Total	**25**

Interestingly, more than half (60%) of the MAC/MAE clauses did not include future business prospects.

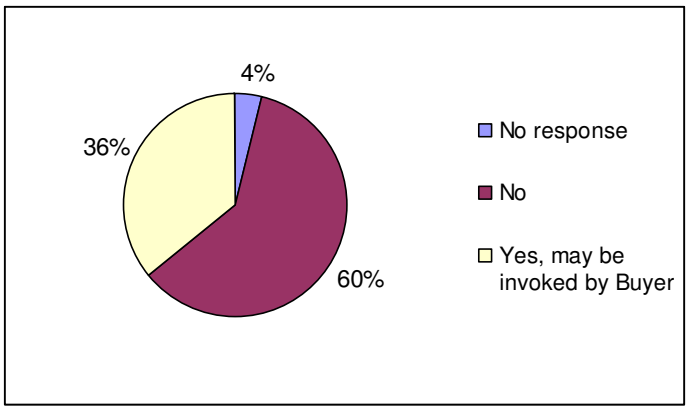

Figure 47. Does the MAC/MAE term include future business prospects?

Table 51. Does the MAC/MAE term include the ability of the seller or target to perform its obligations under the acquisition agreement?

Answer	Number of responses
No	15
Yes	7
No response	3
Total	**25**

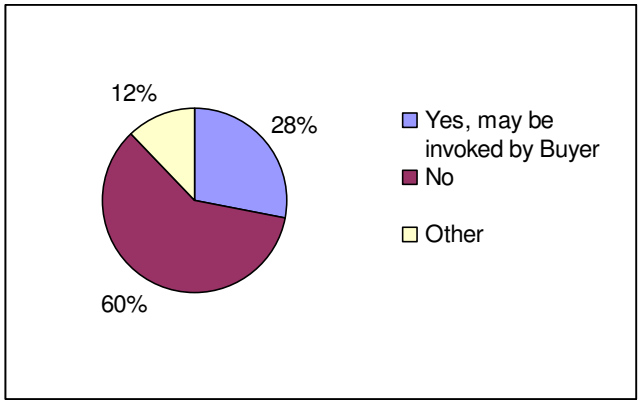

Figure 48. Inclusion in MAC/MAE of seller/target ability to perform the agreement

As in the previous case, 60% of the agreements that contain a MAC/MAE term fail to include the ability of the seller/target to perform its obligations under the acquisition agreement.

Table 52. Does the MAC/MAE term include the ability of the buyer to own and operate the acquired business?

Answer	Number of responses
No	15
Yes	7
No response	3
Total	**25**

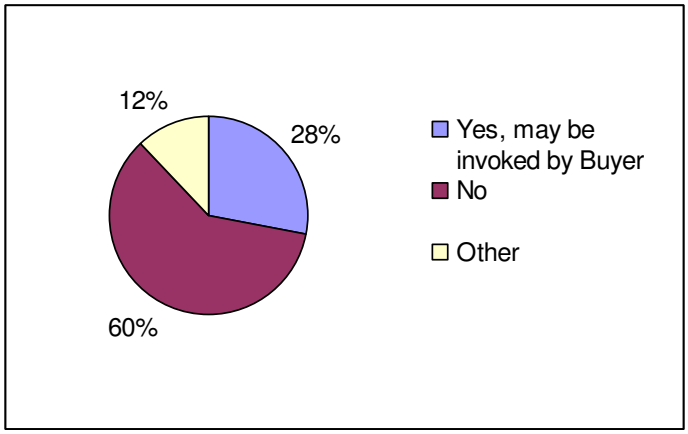

Figure 49. Inclusion in MAC/MAE of buyer ability to own and operate the acquired business

Again, a very significant portion (60%) of the agreements containing a MAC/MAE term does not include in its formulation the ability of the buyer to own and operate the acquired business.

It should be noted also that in 10 out of 25 agreements (40%) with MAC/MAE term, the answers were not affirmative in any of the three MAC/MAE specifications, while the rest included at least one of them.

Based on the above, we can conclude that although MAC/MAE clauses are used rather often in the Baltic countries, their meaning is usually quite limited.

6.4. Competition Clearance

Under the EU and national laws, certain M&A transactions need to be notified to the relevant competition authorities for clearance. The competition authority may then

(i) clear the transaction,

(ii) run out of time to prohibit,

(iii) prohibit the transaction or

(iv) oblige the parties (mainly the buyer) to do, or refrain from doing, something to protect competition in the market or markets involved (which may include divestitures, spin offs, sale of premises or undertakings), potentially affecting the transaction in a very significant way.

Thus, transactions subject to competition clearance, normally determined by certain turnover or market share thresholds in the relevant markets, will have to provide for the notification of the proper authorities and the waiting period until clearance is reached or denied. In the Baltic States, the law is quite uniform: the general rule is that the competition authority has one month to review the transaction, but within that period it can decide to take up to four months for supplementary investigations (three months in the case of Lithuania).

We asked whether the surveyed transaction was subject to approval by competition authorities, with the following results:

Table 53. Was the transaction subject to competition clearance?

Answer	Number of responses
No	36
Yes, EU Commission	1
Yes, National competition authorities	20
Yes, Ukrainian competition authority	1
Total	**58**

The responses show that merger clearances were required in as many as 22 cases (38%), most of them handled by the national competition authorities (20 cases, 91% of transactions subject to merger clearance, 34% overall),

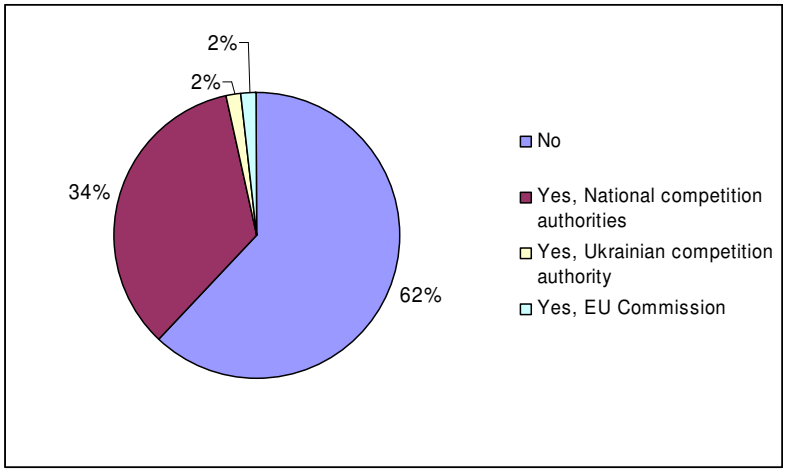

Figure 50. Incidence of Competition Merger Clearance

but in most transactions such clearance was not necessary. There is no comparable data in the ABA Studies to make comparisons and determine whether such number is relatively high or low. We thus analysed the number against the transaction value, with the following results:

Table 54. Distribution of transactions subject to competition clearance by deal value

Answers	Number of responses	up to EUR 1 mio.	EUR 1-5 mio.	EUR 5-25 mio.	EUR 25-50 mio.	EUR 50-100 mio.	over EUR 100 mio.
No	36	6	10	14	2	4	
Yes, National competition authorities	20	2	3	11	1	2	1
Yes, Ukrainian competition authority	1				1		
Yes, EU Commission	1						1
Total	**58**	8	13	25	4	6	2

The data show that although in general merger notification requirements increase as the transaction value increases, there is no conclusive trend. For instance, although all

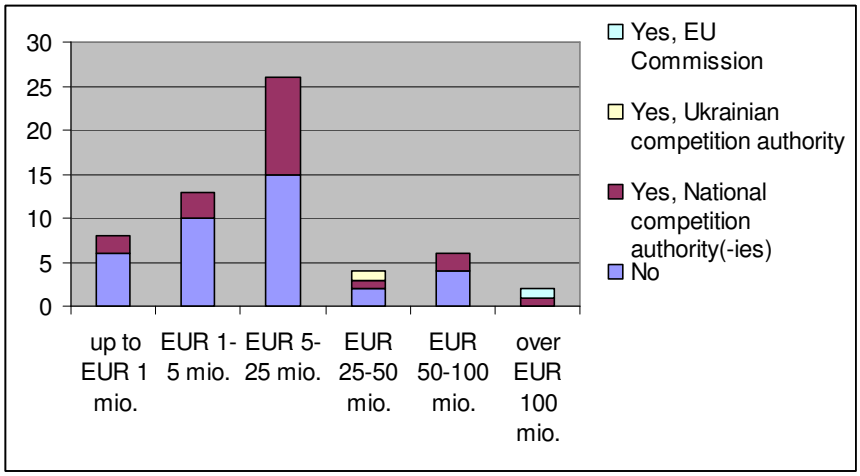

Figure 51. Distribution of transactions subject to competition clearance by deal value

transactions valued over EUR 100 were subject to merger clearance, 4 out of the 6 (66%) transactions with value between EUR 50 million and EUR 100 million were not. By the same token, 2 out of 8 transactions with value lower than EUR 1 million were also subject to merger clearance. This may be related to the high proportion of foreign parties among buyers in the surveyed transactions. We analysed the data against the country of head office of the buyer, with these results:

Table 55. Distribution of Competition Merger Clearance by Buyer's Country of Head Office

Answers	Number of responses	Estonia	Latvia	Lithuania	EEA non Baltic	Non-EEA	No response
No	36	3		3	24	4	2
Yes, National competition authorities	20	3	1	6	7	1	2
Yes, Ukrainian competition authority	1					1	
Yes, EU Commission	1				1		
Total	**58**	6	1	9	32	6	4

The data suggest that competition law merger clearance instances are more concentrated in when the buyer is from the Baltic States. These transactions are more likely to be mergers between competitors than the ones featuring a foreign buyer, which may relate more to foreign investors gaining a foothold in the region.

6.5. Long-stop date

Many agreements include a time limit for the fulfilling of the conditions precedent; if it lapses the parties are not obliged to close the transaction, i.e. they can abandon it (in the jargon "walk" or "walk out"). In some agreements, a penalty is set forth in case the conditions precedent are not fulfilled as of the long-stop date because of the fault of one of the parties. The long stop date should reflect the parties' mutual expectation as to the reasonable time to fulfil the conditions. We thus asked whether the agreement included a *long-stop date* for the conditions precedent (allowing the party/parties to walk in case not fulfilled within the period), and further, how long the period to fulfil the conditions had been. The answers were the following:

Table 56. Long-stop dates

Answer	Number of responses
No	23
Yes, up to 2 months	24
Yes, 2-5 months	6
Yes, over 5 months	3
No response	2
Total	**58**

The data show that a majority of the agreements have a specific long stop date (57%), and that among those, the most usual time term for fulfilling the conditions precedent was less than two months (72% of cases with long-stop date, 41% overall). Nonetheless, almost an equal number of

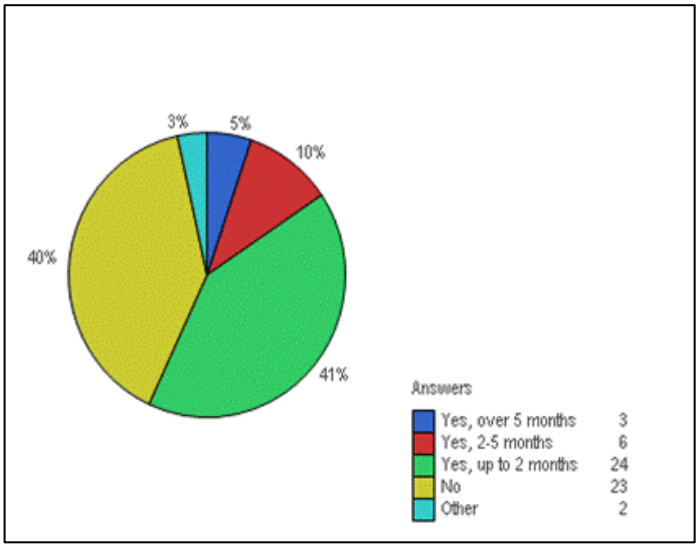

Figure 52. Long-stop dates

cases do not have a long-stop date (23 cases, 39.7%). Interestingly, the ABA studies do not have similar statistics and no comparison could be made.

Additionally, we asked, in case of agreements including a long-stop date for the conditions precedent, whether the failure of the Party to fulfil such conditions would entitle the other Party to penalties or similar consequences. The answers were the following:

Table 57. Is there a penalty for failure to fulfil the conditions precedent?

Answer	Number of responses
No	21
Yes, Buyer is entitled to penalty in case of seller/target failure	8
Yes, Seller is entitled to penalty in case of buyer failure	2
No response	2
Total	**33**

From the responses is clear that penalties are not used in a majority of cases where a long-stop date is set. Only around 30% of transactions with long-stop date (17% overall) set forth penalties; in 8 cases for the buyer (24% of long-stop date bearing deals, 14% overall) and in two cases for the seller (6% of long-stop date bearing deals, 3% overall).

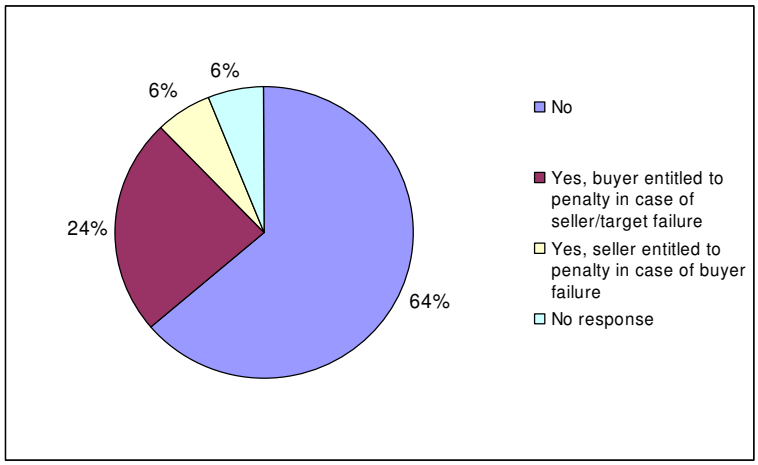

Figure 53. Penalty for non-fulfilment of conditions precedent in deals with long-stop date

7. LIABILITY AND INDEMNIFICATION

7.1. General

The buyer is obviously interested in carefully drafting the liability section to ensure the enforceability of claims against the seller in case of breach of warranties or covenants. However, as the representations and warranties are mostly in the interest of the buyer, many clauses regarding liability regulation are insisted by the sellers. This is because the general statutory liability is often considered as too wide and unsuitable for the M&A transactions.

Often, the party giving the warranties (i.e. mostly the seller) wishes to ensure that its liability in respect of any claim brought against them is limited in at least the following respects:

- as to the amount that can be claimed;
- as to the period of time within which claims must be brought;
- as regards matters that have been disclosed to the buyer or of which the buyer is deemed to have knowledge.

The main purposes of the limitations are, for the seller, to:

- exclude the possibility of being troubled by vexatious or speculative claims;
- ensure that the Buyer is bound to observe rigorously its duty to mitigate its loss;
- be the last resort when the liability ought properly to be borne by another party, and
- have a reasonable opportunity to defend claims once liability has been established, among others.

7.2. Survival Period of Warranties

The statutory limitation period, i.e. the time limit for claiming asserting liability, in the Baltic countries is generally 3 years from the breach, although it could be shorter or longer depending on the circumstances and the subject matter (for example in Estonia, the limitation for tax matters can run for up to 7 years). This may sometimes be considered too long a period in complicated transactions from the risk management point of the party. Ideally for the buyer, there should be no deadline as to when it can assert a breach of the seller or the time should cover all the relevant statute of limitations terms. Particularly, claims related to taxations should remain in force for as long as relevant tax authorities may make decisions affecting the target.

From the seller's point of view, however, the claims should be presented by the buyer as soon as possible or not at all. Therefore, the seller wishes to negotiate the end of its liability period as short as possible.

We asked whether or not the acquisition agreement specified the general period of survival:

Table 58. Explicit General Survival Period for Warranties

Answer	Number of responses
Yes	38
No (by default, until statute of limitations expiry)	16
No response	4
Total	**58**

Indeed, in 65.5% of the cases the contract defined a general limitation period for assertion of claims. In 28% of the cases, however, the contract was silent on the matter, thus leaving the statutory limitation period prevail. As a

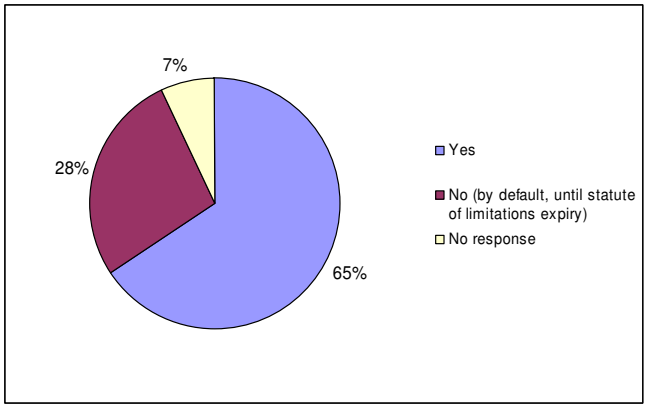

Figure 54. Explicit Survival Period for Warranties

comparison, according to the ABA's European Study the contract was silent on the issue only in 11% of the cases. When the answers are divided country-by-country, we can see that Latvian practise is in line with the rest of Continental Europe, whereas the transactions negotiated under Lithuanian transactions tend to leave the limitation period undefined more often:

Table 59. Distribution of Explicit Survival Periods by Governing Law

Answer	Number of responses	Other	Estonian	Latvian	Lithuanian
No	16	2	6	1	7
Yes	38	4	15	8	11
No response	4	1		1	2
Total	**58**	7	21	10	20

In case the limitation period is defined, the answers vary from a couple of days to 4 years. The responses are as follows:

As can be seen from Figure 55 in this section, the most commonly used terms are 12 and 24 months, with 16% of cases each, and 18 months (12 % incidence). This pattern somewhat echoes the findings by the ABA in the rest of the Europe, although in that survey the concentration in the 12 to 18 months and the 18 to 24 month brackets was slightly higher (41% and 21% respectively). In the ABA U.S. Private Target Study, the most popular survival periods were 18 months and 12 months, with 34% and 26% incidence respectively. Meanwhile, the Canadian Study presented the 24 month as the most popular, with 37% incidence, followed by 12 and 18 months, both with 19%.

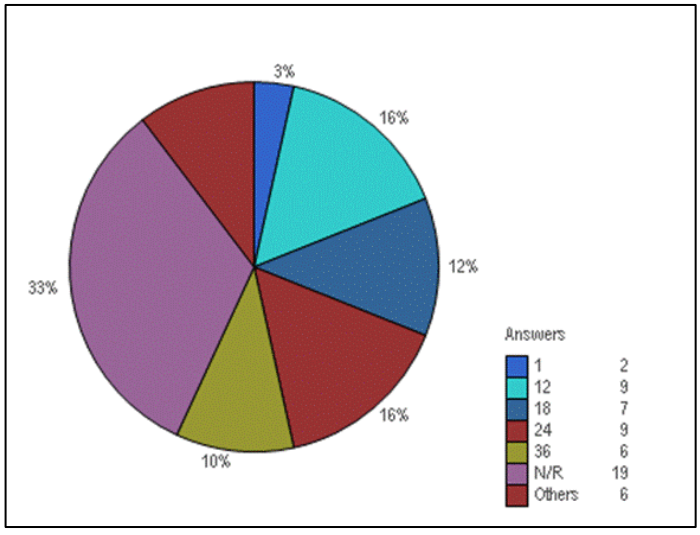

Figure 55. Survival Periods

The general limitation period may not always be suitable for all types of claims. We asked whether the acquisition agreement was sophisticated enough to provide for carveouts to general limitation period:

Table 60. Are there carveouts to time limitations and survival of representations subject to carveout?

Answer	Number of responses
Yes	20
No	29
No response	9
Total	**58**

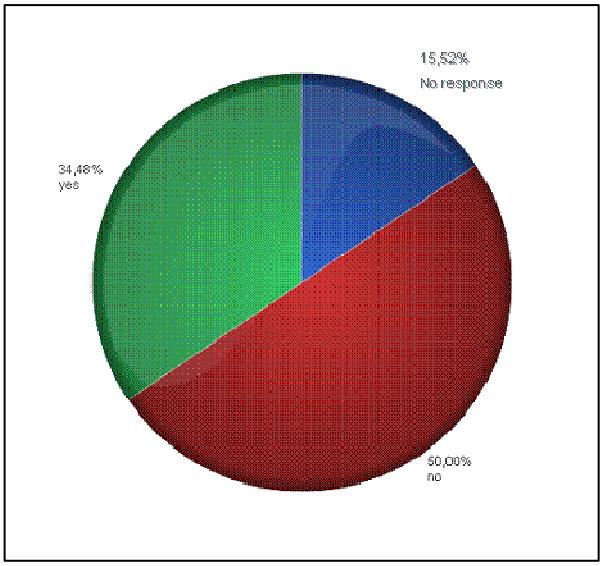

Figure 56. Carveouts to time limitations

As can be seen, in 34% of the cases, the agreement provided for specific limitation periods regarding certain matters. However, if we consider that 28% of the agreements did not define any limitation period, the proportion of carveouts to the general contractual limitation period is much higher.

The survey looked at common exceptions to the general limitation period among the affirmative responses to the previous question. The results are in Figure 57. The buyer may not accept the limitation to assert claims against the seller who has breached the agreement intentionally (i.e. in case of fraud). In only 30% of cases with limitations (less than 10% of the cases overall), a specific carveout was provided for intentional breach (fraud). This is lower than in the rest of the Europe (33%) or in the U.S. according to the ABA studies. Nevertheless, it should be

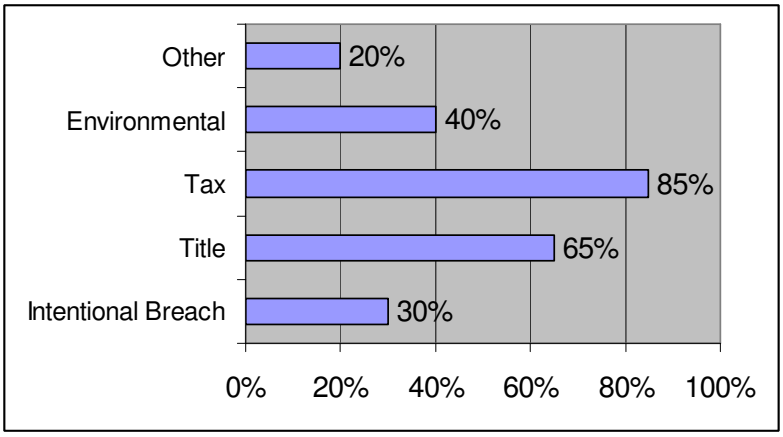

Figure 57. Specific time limitation carveouts

considered that all Baltic countries provide for mandatory norms in case of fraud that override the contractually agreed limitation period.

The title warranties are also considered so essential that sometimes they do not justify the short limitation period. Among the analysed transactions that presented carveouts, 65% (28% overall) provided for longer or indefinite limitation period for title warranties. Again this is lower than in the ABA European Study, which has a 70% figure. A similar story can be found of taxes and environmental issues, which could generate vast and far-reaching liabilities, normally with very long limitation periods in the law. There are carveouts for tax matters in 85% of the transactions presenting survival carveouts, while in the rest of Europe the figure is 92%; environmental carveouts reach 40% of transactions with carveouts, the figure in the ABA European Study is 37%.

7.3. Monetary Limitations

In line with what was expressed above, it is usual to limit liabilities arising from the agreement by their amount, either by putting limitations on the minimum or maximum amount of each claim or overall limitations. The intention is, again, for the seller to protect the price being paid, prevent vexatious or speculative claims from being brought and promote risk and loss mitigation by the buyer.

7.3.1. Baskets and Thresholds

A usual limitation consists of putting a threshold on the minimum amount of claims that the buyer may bring against the seller, so that "too small" claims cannot be used against the seller. The idea is that such claims are generally not worth the cost, the buyer would probably not pursue them if the seller was not in the line for paying such costs and may have been tolerated by the buyer if disclosed. A related idea is that of the "basket" limitation, which is a threshold for the aggregate amount of all claims intended to be brought against the seller.

In the survey we asked whether the agreements had any thresholds or baskets, with the results in Figure 58. As shown, more than 60% of transactions had a threshold or basket. The figure is significantly lower than in the rest of Europe, where the incidence of baskets is 78%. Meanwhile, the figure is 97% for the US and 66% for Canada.

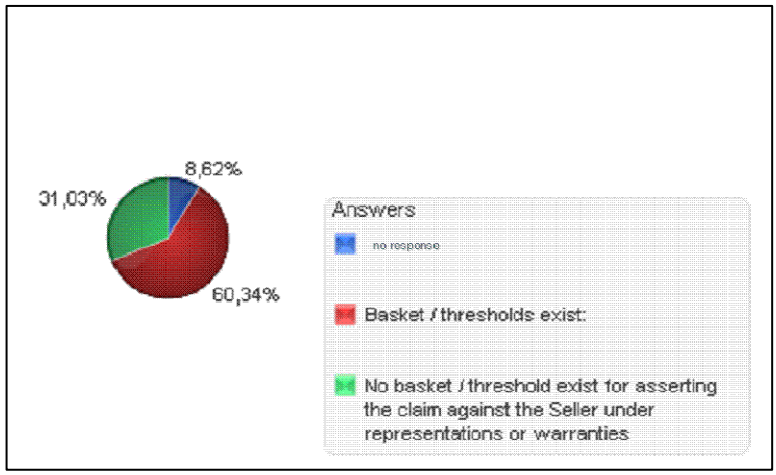

Figure 58. Incidence of Thresholds or Baskets

We further analysed the responses by the semester of closing, the governing law and the deal value, with the following results:

Table 61. Basket/Threshold Occurence Distribution by Semester of Closing

Answer	Number of responses	2007 H1	2007 H2	2008 H1	2008 H2
No response	5		1		4
No basket / threshold exists	18	3	6	5	4
Basket / thresholds exist	35	7	9	9	10
Total	**58**	10	16	14	18

The incidence of baskets and thresholds as liability limitation devices starts at 70% in the first semester of 2007, to then hover around 60% (56% in 2007 H2, 64% in 2008H1 and 55% in 2008H2). Although there is some small reduction over time, it is difficult to determine any strong trends.

Table 62. Basket/Threshold Occurence Distribution by Governing Law

Answer	Number of responses	Other	Estonian	Latvian	Lithuanian
No response	5	1	1		3
No basket / threshold exists	18	2	8	7	1
Basket / thresholds exist	35	4	12	9	10
Total	**58**	7	21	16	14

We can see that while in the transactions governed by Estonian law the incidence of thresholds or baskets is of 57% and in transactions governed by Latvian law the incidence is of 47%, the incidence under Lithuanian law is 71%, closer to the European standard.

Table 63. Basket/Threshold Occurence Distribution by Transaction Value

Answer	Number of responses	up to EUR 1 mio.	EUR 1-5 mio.	EUR 5-25 mio.	EUR 25-50 mio.	EUR 50-100 mio.	over EUR 100 mio.
No response	5			4			1
No basket / threshold exists	18	6	4	5	1	2	
Basket / thresholds exist	35	2	9	16	3	4	1
Total	**58**	8	13	25	4	6	2

The data show that the usage of thresholds or baskets has an incidence of 25% in the smallest surveyed transactions, but the proportion quickly increases to 69% for deals of up to EUR 5 million, 64% for the typical Baltic deal of EUR 5 to 25 million, and averages 67% for deals above EUR 25 million. This would appear consistent with the idea that sellers have more room to negotiate limitations the larger the purchase price.

7.3.2. Overall Cap or Ceiling

Usually the parties put an overall cap to the recovery of aggregate claims under the warranties and other liabilities under the agreement. Although the amount is often equal to the purchase price, in some cases such as controlled auctions or very large transactions, sellers may have enough bargaining power to negotiate it down.

We asked whether the agreements in the surveyed transactions established such overall cap or ceiling determining a maximum amount for the seller's liability. The results are shown in Figure 59. The data determines that 2/3 of all surveyed deals included a limitation of liability for the seller. Interestingly, the figure is 10% higher than the incidence of the other monetary liability limitation device (i.e. the "basket"), but it is also still far from the practise in the rest of Europe (where the incidence of overall caps reaches 93% of surveyed deals), and the US practice (99%). On the other hand, it is higher than the Canadian practise, where caps are present in 56% of surveyed deals.

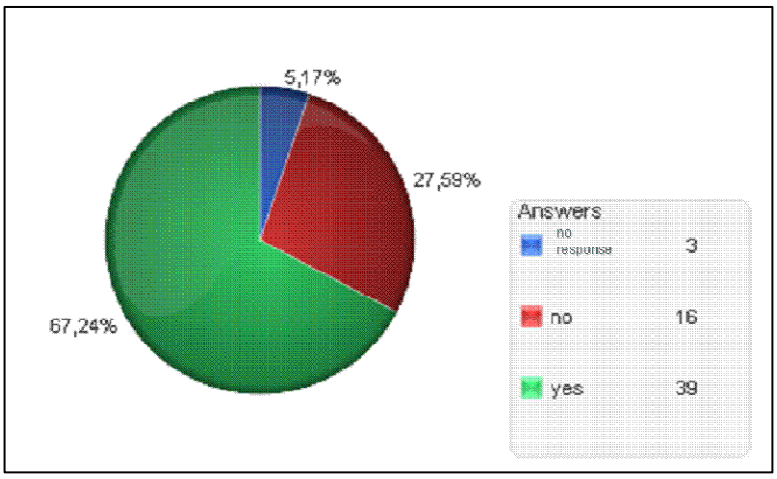

Figure 59. Incidence of Overal Cap or Ceiling

As regards the extent of the cap, we asked whether it was equal to the purchase price or, if lower, how did the cap compared with such purchase price; and the respondents provided the following data:

Table 64. Amount of the Cap/Ceiling as Percentage of the Purchase Price

Answer	Number of responses
100% of purchase price	15
75-100% of purchase price	2
50-75% of purchase price	6
25-50% of purchase price	4
Other	9
No response	22
Total	**58**

As it can be seen from Table 64, Figure 61, and Figure 60, the most usual situation is that the value for the cap or ceiling is equal to the purchase price, with an incidence of 39% of the transactions that had a liability ceiling (26% overall). This is followed by the band of 50 to 75% of the purchase price, with an incidence of 15% of transactions with cap (10% overall), which together with the deals placed within the 75 to 100% band would yield an incidence of 20% of deals with cap (14% overall) for the band with ceilings of between 50% and 100% of the purchase price. As a comparison, the ABA European Study reports a considerably

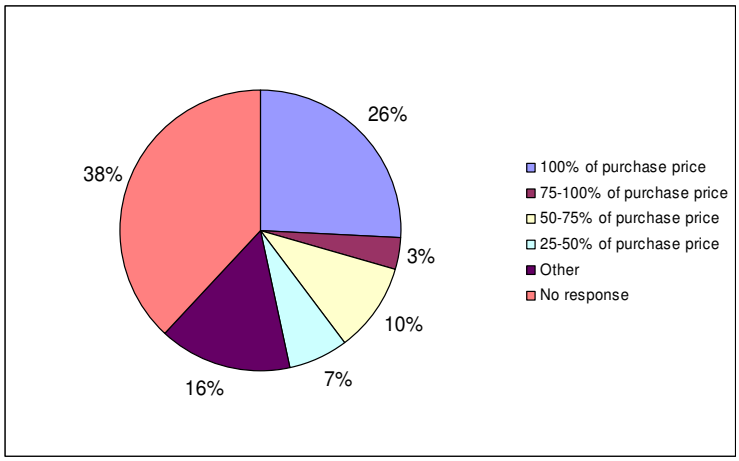

Figure 61. Cap as % of Purchase Price, All Transactions

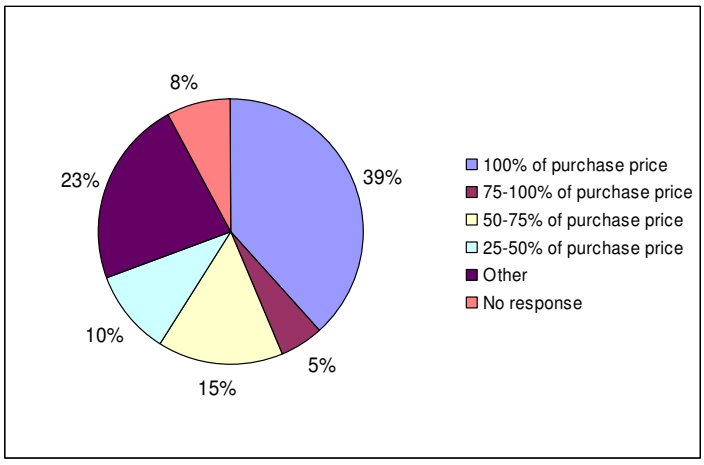

Figure 60. Cap as % of Purchase Price, Transactions with Cap

lower incidence of 18% for the group with caps equal to the purchase price and 4% for the 50 to 100% band, and the ABA US Private Target Study reports only 9% of deals with cap equal to the purchase price and 5% for deals with a cap higher than 50% of the purchase price; but the ABA Canadian Study reports 52% of deals with cap equal to the purchase price and 17% of deals with cap higher than 50% of the price.

We also analysed the incidence of caps by date of completion, deal value and nature of the seller:

Table 65. Evolution of Caps/Ceilings by Semester of Completion

Answer	Number of responses	2007 H1	2007 H2	2008 H1	2008 H2
Yes	39	7	12	10	10
No	16	3	4	4	5
No response	3				3
Total	**58**	10	16	14	18

The incidence of caps as liability limitation devices starts at 70% in the first semester of 2007, to then climb to 75% in 2007 H2, come back to 71% in 2008H1 and goes down to 55% in 2008H2. Although there is some reduction in the last semester, it is again difficult to determine whether there is a shift to the buyer's market.

Table 66. Distribution of Caps/Ceilings by Transaction Value

Answer	Number of responses	up to EUR 1 mio.	EUR 1-5 mio.	EUR 5-25 mio.	EUR 25-50 mio.	EUR 50-100 mio.	over EUR 100 mio.
Yes	39	4	8	20	2	4	1
No	16	4	5	3	2	2	
No response	3			2	1		
Total	**58**	8	13	25	5	6	1

Caps/ceilings have an incidence of 50% in the transactions of up to EUR 1 million, with the proportion increasing to 61% for deals of up to EUR 5 million, 80% for the typical Baltic deal of EUR 5 to 25 million, and averages 58% for deals above EUR 25 million. As in the case of the baskets, this is in principle consistent with the idea that sellers have more room to negotiate limitations the larger the purchase price.

Table 67. Distribution of Caps/Ceilings by Nature of the Seller

Answer	Number of responses	Strategic	Financial / Private Equity	Several principal Sellers	Other	No response
Yes	39	12	4	10	12	1
No	16	8	4	1	3	
No response	3	1		2		
Total	**58**	21	8	13	15	1

The table suggest that there is no significant difference as regards introducing liability caps between strategic and financial sellers, with the former being able to include a cap in 57% of the cases, while the latter succeeded in a similar 50% of the cases.

As in the case of other limitations, in matters with high potential of generating large liabilities for the company or difficult to assess during the due diligence (e.g. dealing with taxes and the environment), or that entail fraud, a cap would be problematic or voided by general law. Therefore, buyers that accept introducing an overall cap try to introduce carveouts to it. We thus asked whether the transactions with cap had carveouts, with the answers shown in Figure 63. These answers are interesting in that a quite sizeable 44% of the transactions with cap did not have any carveouts. That is

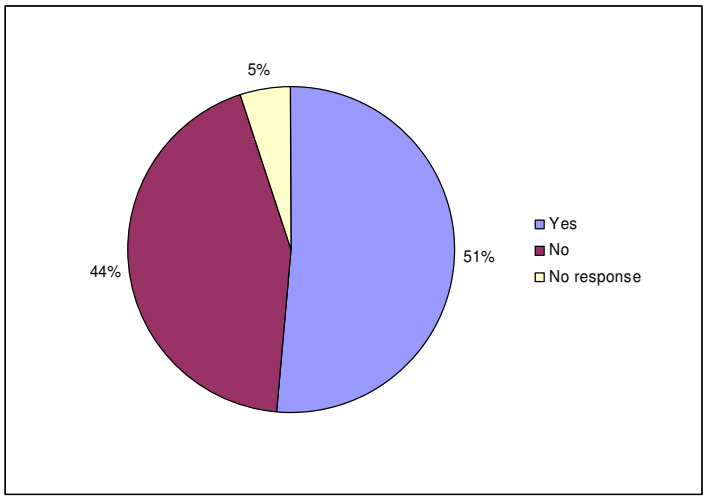

Figure 63. Incidence of Carveouts Among Transactions with Cap

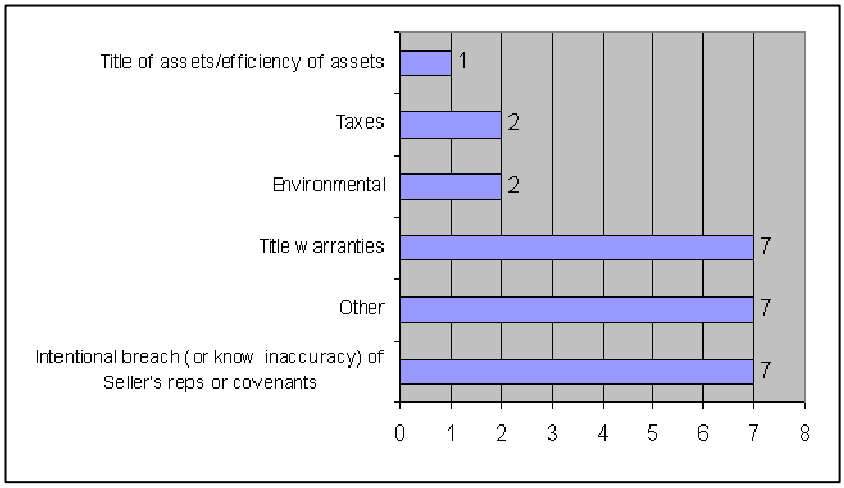

Figure 62. Carveouts to the Cap/Ceiling (number of transactions)

a sharp contrast with the rest of Europe, where only 21% of transactions with cap had no carveouts.

Additionally, we asked the matters covered by the carveouts, with the results presented in Figure 62. The most usual carveouts are the ones in case of intentional breach of warranties and for breach of title warranties, both present in 7 out of 20 transactions with cap and carveout (35%); taxes and environmental issues constitute a carveout to the cap in 10% of the transactions with cap and carveout.

7.4. Remedies

Another way of limiting the liability of the seller arising from the transaction is to provide for the remedies provided in the contract to be the only remedies available for any liabilities related to the transaction. We asked the respondents to indicate whether the remedies stated in the transaction agreements were the exclusive remedies of the buyer in case of breach, with the results shown in Figure 64. As for comparison, the figures in case of the European Study are the following: 25% of agreements are silent, 19% provide for the remedies to be non exclusive, 16% provide for the remedies to be exclusive only for breach of warranties, and 40% provide for the remedies to be exclusive for any breach.

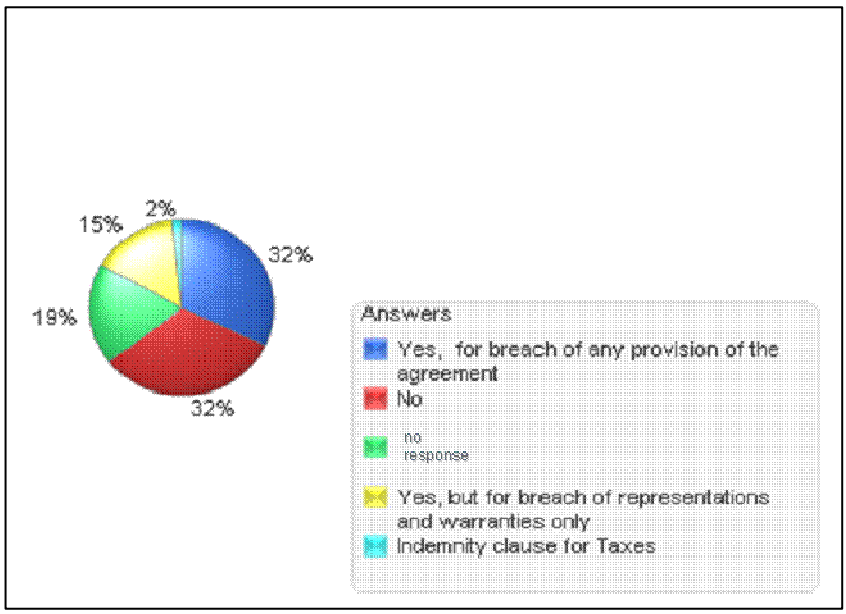

Figure 64. Are the remedies stated in the agreement the exclusive remedies of the buyer in case of breach?

7.5. Third Party Claims

Sometimes, the seller may expect to take sole or joint defence of third party claims against the target after the completion, or to be consulted by the buyer in case the buyer manages such defence, particularly if the third party claims appear before the escrow is released to the seller and the buyer has a right to set-off any amounts paid for third party claims settlements. The seller may fear that the buyer or the target (now controlled by it) may be too generous with the escrow and decide to settle too many claims instead of defending against them. On the other hand, buyers will not want the seller to be too harsh dealing with third parties where the target business or reputation may be harmed.

We asked whether the agreement contained a clause dealing with the defense against third party claims that give rise to a warranty claim and if so, who controlled such defense. The results are summarized in Figure 65. Almost half of the agreements (48%) contain a regulation on the defense of third party claims, from which 43% give control to the buyer, 39% give control to the seller, and 18% set joint control.

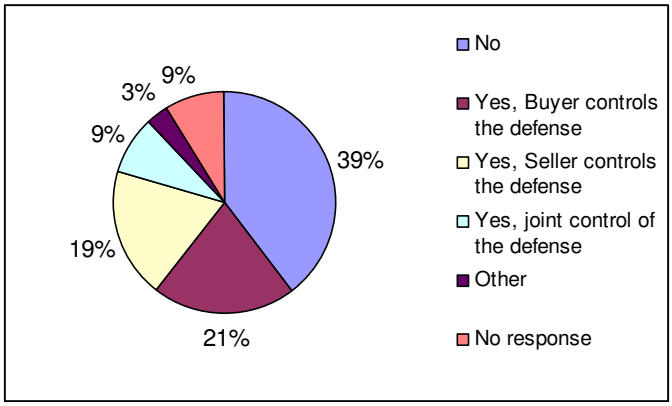

Figure 65. Regulation of Defense of Third Party Claims in the Transaction Agreement

One of the features of the third party defense clause is the time limit for the buyer to notify the claim to the seller for the warranty to be valid. The rationale for the provision is that third party claims are normally time-sensitive, and the delay in

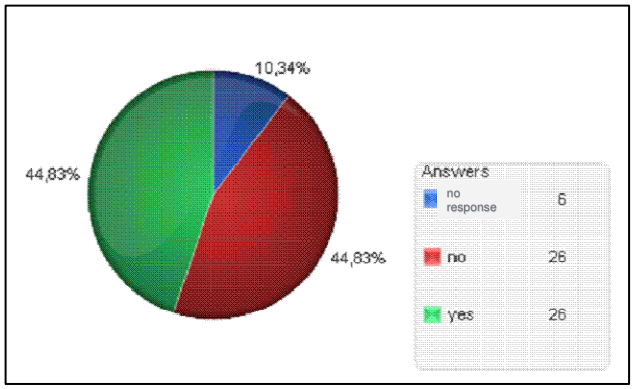

Figure 66. Is there a time limit for the buyer to notify the seller of a third party claim?

building up the defense may harm the chances that such defense could be successful. Thus, it gives incentives to the buyer to notify the seller immediately and allow for a prompt and proper defense of the claim. We then asked whether the agreement prescribed a time limit for the buyer to inform the seller about a third party claim, with the results shown in Figure 66. The responses are equally divided between a 45% that establish such time limit, and 45% that do not have the limitation (10% did not answer to this question.

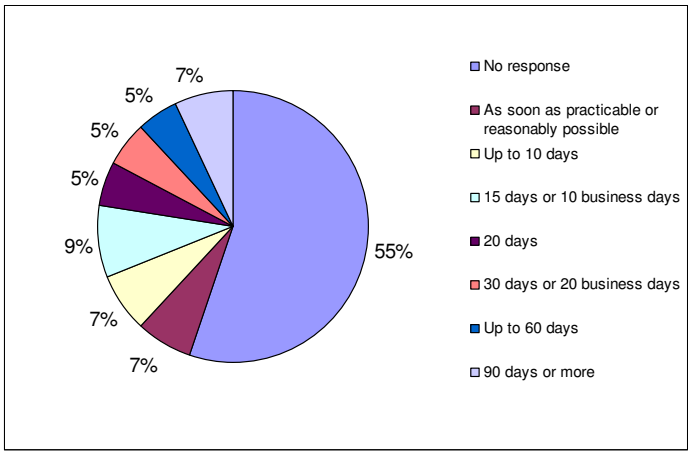

Figure 67. Length of the Time Limit to Notify of the Third Party Claim

We also asked the respondents to indicate the length of the time limit in days. Figure 67 shows the quite varied answers, ranging from less than 10 days to 90 days or more.

7.6. Sandbagging

It may happen that the seller gives a warranty that the buyer knows is not true, or otherwise the buyer concludes the contract already knowing that the seller is in breach. In this kind of cases, therefore, the "bad faith" of the seller in giving the false warranty or being in breach from the outset is counterbalanced by the buyer's "bad faith" in somehow co-causing the seller's breach by concluding the contract. In other words, it may appear to be unfair that the buyer loads up its claim under the warranties with issues that the buyer already knew and could take into account before entering into the contract (in the jargon "sandbagging" its claims). The buyer's prior knowledge of a warranty breach would normally greatly limit (or directly eliminate) the buyer's chances of recovering losses under the particular warranty, although the final outcome will be often unclear and heavily dependant on evidence.

To prevent these uncertainties, the parties may regulate in the agreement how the remedies for breach of warranties will be affected by the buyer's knowledge. Agreements may establish an *anti-sandbagging clause* (i.e., an express limitation on the buyer's remedies based on the buyer's pre-existing knowledge of an inaccuracy or breach), a *pro-sandbagging clause* (i.e. no limitation on the buyer's remedies based on the buyer's pre-existing knowledge of an inaccuracy or breach), or remain silent on the issue of sandbagging (so that the general law provisions are applied).

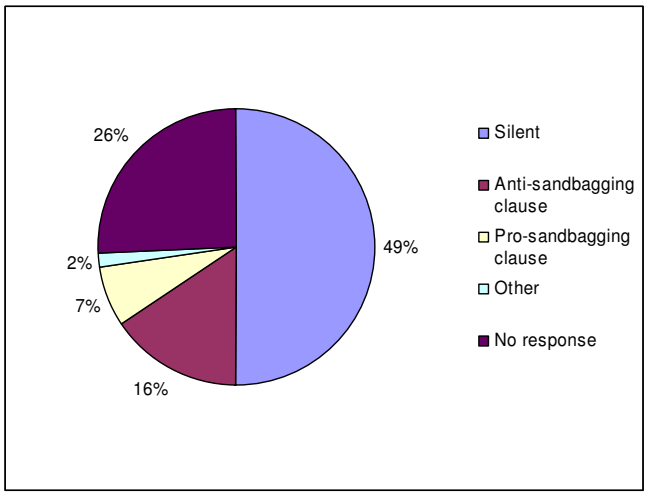

Figure 68. Sandbagging

We requested that the respondents indicate the agreement provisions regarding sandbagging. The results are summarized in Table 68 and Figure 68.

Table 68. Sandbagging

Answer	Number of responses
Silent	29
Anti-sandbagging clause	9
Pro-sandbagging clause	4
Other	1
No response	15
Total	**58**

Half of the surveyed transaction agreements were silent on sandbagging, while 16% had anti-sandbagging provisions and 7% had pro-sandbagging provisions. As a comparison, the figure for agreements silent on sandbagging was a slightly lower 37% in the ABA European Study and 41% in the US, while the figures on anti-sandbagging and pro-sandbagging in Europe were, respectively, a sizeable 48% and a moderate 12%. The proportion in the US was quite the reverse, with 9% anti-sandbagging clause incidence and 50% of agreements being pro-sandbagging.

We also analysed the distribution of responses by semester of completion and transaction value, with the following results

Table 69. Evolution of Sandbagging Provisions by Closing Semester

Answer	Number of responses	2007 H1	2007 H2	2008 H1	2008 H2
Silent	29	5	7	8	9
Anti-sandbagging clause	9	1	2	5	1
Pro-sandbagging clause	4	1	1		2
Other	1				1
No Response	15	3	6	1	5
Total	**58**	10	16	14	18

The incidence of agreements being silent on sandbagging starts at 50% in the first semester of 2007, down to 44% in 2007 H2, come back up to 57% in 2008H1 and goes down to 50% in 2008 H2. Although there are some variations, the incidence is quite steady in hovering around half of the agreements. Conversely, the incidence of agreements with anti-sandbagging clauses is much more unstable, as it starts at 10% in the first semester of 2007, up to 12.5% in 2007 H2, jumps up to 37% in 2008H1

and goes down to 6% in 2008 H2. is some reduction in the last semester, it is again difficult to determine whether there is a shift to the buyer's market.

Table 70. Distribution of Sandbagging Clauses by Transaction Value

Answer	Number of responses	up to EUR 1 mio.	EUR 1-5 mio.	EUR 5-25 mio.	EUR 25-50 mio.	EUR 50-100 mio.	over EUR 100 mio.
Silent	29	5	5	13	2	3	1
Anti-sandbagging clause	9	1	1	6		1	
Pro-sandbagging clause	4		3	1			
Other	1	1					
No Response	15	1	4	5	2	2	1
Total	**58**	8	13	25	4	6	2

The incidence of agreements being silent on sandbagging is 62.5% for the transactions of up to EUR 1 million, goes down to 38% for deals of up to EUR 5 million, increases to 52% for transactions of EUR 5 to 25 million, and averages 50% for deals above EUR 25 million. Anti-sandbagging clauses tend to be concentrated in the typical Baltic transaction of EUR 5-25 million, with an incidence of 25%, up from 12.5% for deals up to EUR 1 million and 8% for deals of less than EUR 5 million. It is in this bracket where the pro-sandbagging deals concentrate, with an incidence of 23%.

7.7. Security

In an M&A transaction a variety of financial and credit risks could be present and the parties will have to deal with in the agreement. For example, the seller could be facing the credit risk of the buyer, who may receive the shares in the target and then fail to pay the price. Conversely, the buyer could be facing the credit risk of the seller, who may the price in full and later fail to perform its obligations under the agreement (delivering the shares and all other rights, paying indemnities/damages under the warranties, not competing, etc.). As in any bargain, the object and the consideration can be negotiated and modified to deal with these problems, or certain security can be put in place to have funds available to meet the necessary liabilities.

7.7.1. Escrow

One way of balancing both the seller's and the buyer's credit risks is to establish that the buyer will pay the purchase price upon completion, but a part of the price will not be paid directly to the seller but to a third party (normally a bank) in escrow. If there is any warranty claim against the seller within a certain time, the amount in escrow will then go to pay the claim; if no claims arise within the period, the money is paid to the seller.

The respondents were asked whether the agreements provided for an escrow arrangement to secure the sellers obligations. The answers are summarized in Figure 69. Escrows were used in a little more than one third of the surveyed

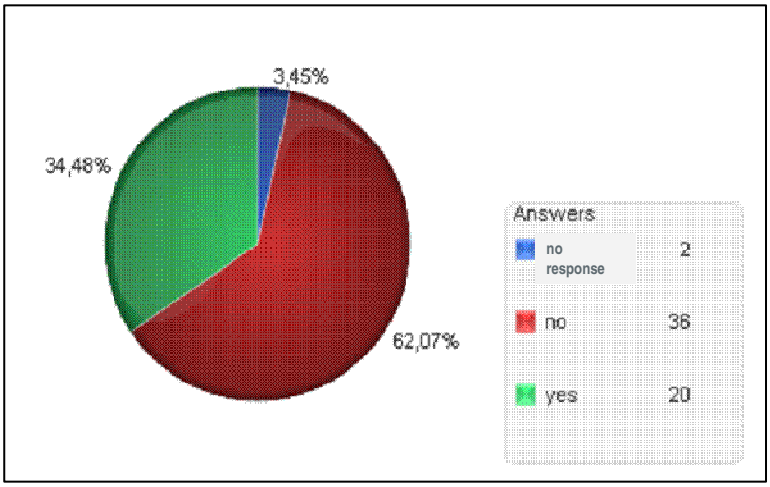

Figure 69. Does the agreement provide for an escrow arrangement to secure the seller's obligations?

transactions (34.5%). This is slightly higher than the European figure (23%, 24% together with deferred payments or "holdbacks") and the Canadian one (escrow/holdbacks in 29% of deals with survival provisions), but lower than the figure in the US (escrow/holdbacks in 87% of deals with survival provisions).

We analysed the incidence of escrows across time and deal value, with the following results:

Table 71. Evolution of Escrow Usage by Completion Semester

Answer	Number of responses	2007 H1	2007 H2	2008 H1	2008 H2
No	36	8	10	9	9
Yes	20	2	6	5	7
No response	2				2
Total	**58**	10	16	14	18

The incidence of escrow usage starts at 20% in the first semester of 2007, then goes up to 37.5% in 2007 H2, down to 35.7% in 2008 H1 and climbs up again to 38.9% in 2008 H2. In general the data suggest a small increase in usage over time.

Table 72. Distribution of Escrow Usage by Transaction Value

Answer	Number of responses	up to EUR 1 mio.	EUR 1-5 mio.	EUR 5-25 mio.	EUR 25-50 mio.	EUR 50-100 mio.	over EUR 100 mio.
No	36	8	8	15	3	2	
Yes	20		5	9	1	4	1
No response	2			1			1
Total	**58**	8	13	25	4	6	2

Although escrow arrangements are not used at all for transactions of up to EUR 1 million, such arrangements are featured in 38% of the transactions with value of EUR 1 to 5 million, in 36% of the transactions with value of EUR 5 to 25 million, 25% of transactions with value of EUR 25 to 50 million, and in 62.5% of deals valued in more than EUR 50 million. This suggests that escrows arrangements are more likely to be used the bigger the transactions are. It may be the case that in smaller transactions the part of the price that could be put in escrow is insufficient to provide an adequate security.

We also got data of the amount of the escrow accounts among the 20 deals that reported presenting this arrangement. The information, presented in Figure 70, shows that the typical escrow amount varies between below EUR 1 million up to EUR 5 million. Escrow amounts of EUR 5 million and over constitute 20% of the escrow amounts, half of them with values of EUR 10 million and over.

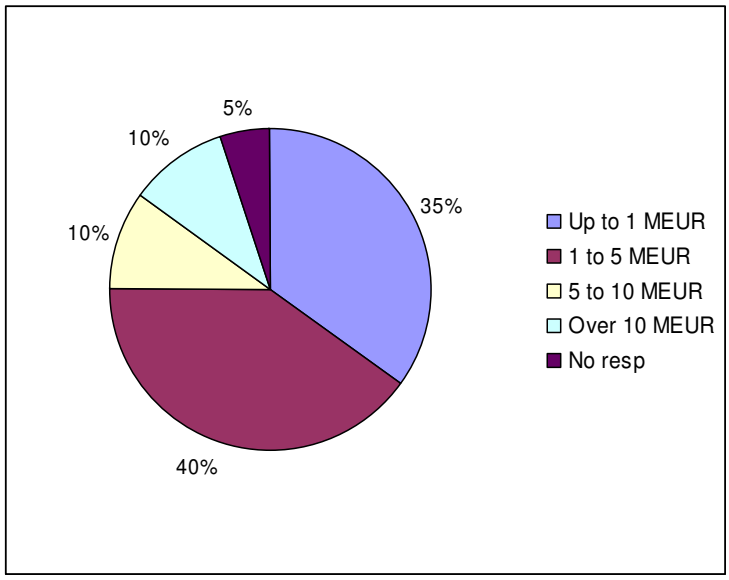

Figure 70. Amounts in Escrow Accounts

Respondents were also asked whether the escrow provided exclusive source of indemnifications for losses under the agreement. The results are summarized in Figure 71. In 65% of the cases where the escrow account was used, it provided non-exclusive source of indemnification, while the exclusivity was only established for 15% of the transactions with escrow account. For comparison, in Canada 84% of escrows/holdbacks are non-exclusive source of indemnification, while in the U.S. such figure is 51%, with 32% escrows/holdbacks providing exclusive indemnification.

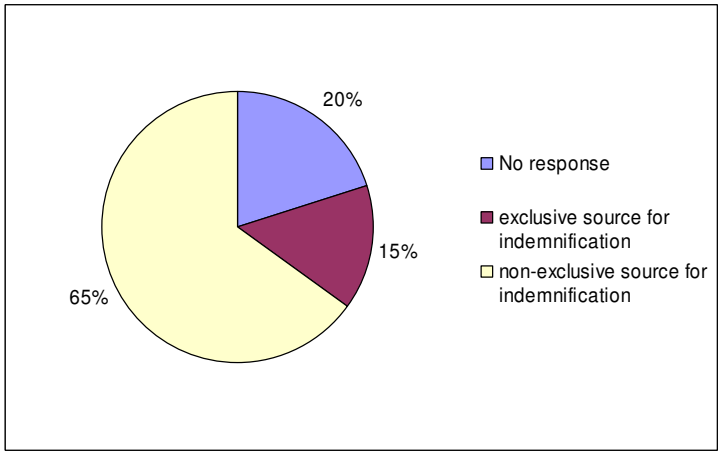

Figure 71. Escrow as Exclusive or Non-Exclusive Source of Indemnification.

7.7.2. Bank guarantee

Another possible arrangement for securing the seller's obligations is the provision of a third party guarantee, normally from a bank. The respondents were asked to indicate whether bank guarantees had been provided for in the agreements, with the answers summarized in Figure 72. The data show that bank guarantees are used in around 9% of the cases. This is in line with the European practice, which reports bank guarantees being used in 8% of the transactions.

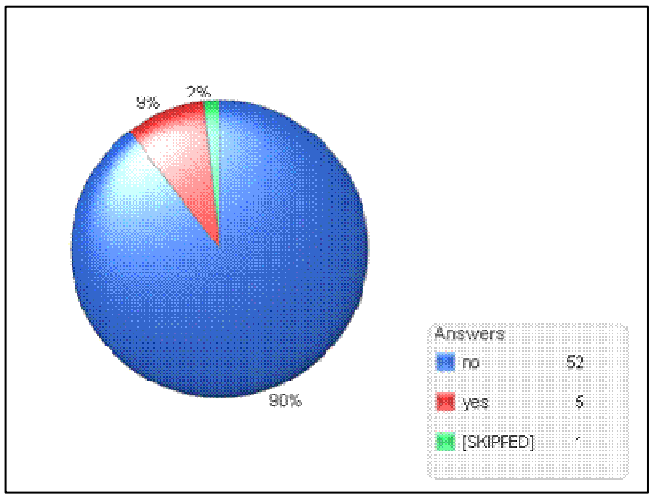

Figure 72. Bank Guarantee

7.7.3. Representations & Warranties Indemnification Insurance

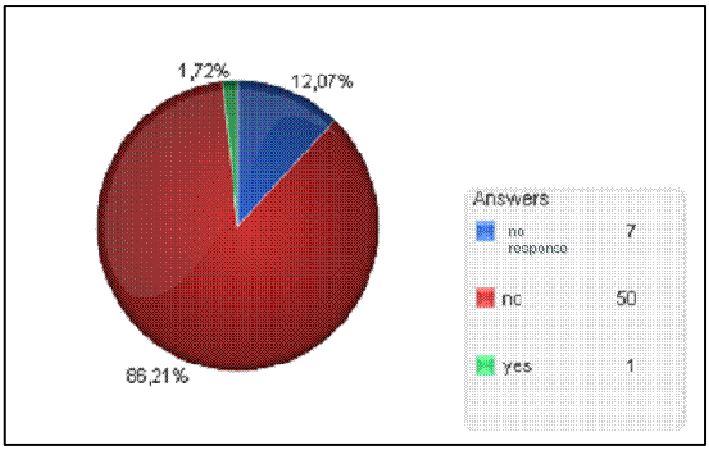

Figure 73. R&W Indemnification Insurance

Another form of securing the sellers obligations under the agreement is to provide for insurance. We asked whether there was an insurance policy written in connection with breach of representation and warranties or other indemnification or similar obligations. Te results, shown in Figure 73, establish that representations & warranties indemnification insurance has only been used once in the surveyed transactions (1.7% of cases).

7.7.4. Other security

Finally, we asked the respondents to indicate if any other security arrangement had been used. The responses are summarized in Figure 74, which shows that 19% of the transactions have made use of other security arrangements. Among these arrangements, the most used were personal guarantees or sureties of the seller's shareholders or parent companies, and pledge of shares. For comparison, the figure is 7% in the ABA European Study.

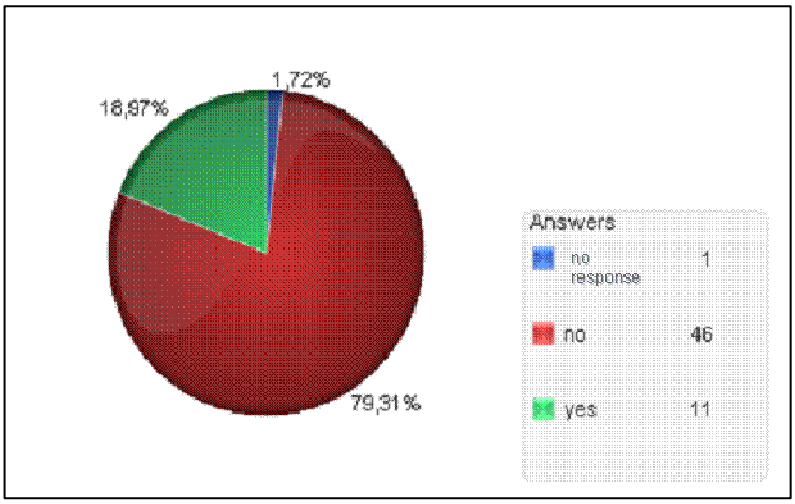

Figure 74. Is there any other security arrangement?

8. OTHER COVENANTS AND DISPUTE RESOLUTION

8.1. Other Covenants: Non Competition and Non-Solicitation

In many cases the sellers (and in case they are legal persons, their shareholders) are required not to compete with the target for a certain time after the ownership of the shares has been passed from the sellers to the buyer. These "Non-competition" and "Non-solicitation" covenants are entered into to the effect that the sellers, who are likely to know a lot about the target and its businesses, will not, during a certain period after completion, carry on any other competing business, or solicit business, entice customers, suppliers or employees from the buyer, or use any intellectual property.

We asked the respondents to indicate whether the agreements contained any non-competition obligations for the seller. The results, summarized in Figure 75, show that almost 64% of the transactions included non-competitions of the seller. Interestingly enough, the sellers have managed to avoid committing to the non-competition obligation in a sizeable 34.5% of the cases. In the rest of Europe, for example, the proportion is of 25%.

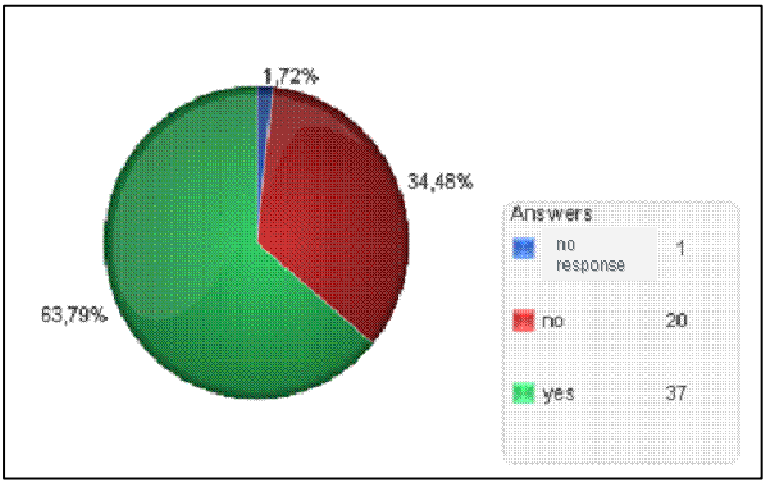

Figure 75. Non-Competition Obligation of the Seller

In general, both in the common law and in the civil law, unnecessary or unreasonable restrictions to the ability of a person to engage in business and earn a living will not be valid. Restrictions may also contravene local competition law provisions and Article 81 of the EC Treaty (prohibition against anti-competitive agreements and

practices). If an acquisition requires merger approval under local or EC law, restrictive covenants may be cleared with the transaction as "ancillary restrictions", broadly, if they are directly related and necessary to the deal. Under EC merger rules, where a transfer includes both goodwill and know-how, a non-compete clause will be justified for a period of up to three years, but the period for goodwill remains at up to two years. Longer durations may still be justified in a limited range of circumstances, for example, where it can be shown that customer loyalty to the seller will persist for more than two years, or for more than three years where the scope or nature of the know-how transferred justifies an additional period of protection.

We thus enquired about the length of the non-competition obligation, with the results shown in Figure 76. The extent was, in the vast majority of cases (70%), of three years, on the upper limit of what it might be enforceable. Surprisingly, in 13% of the cases the restriction was longer (in one case for 20 years).

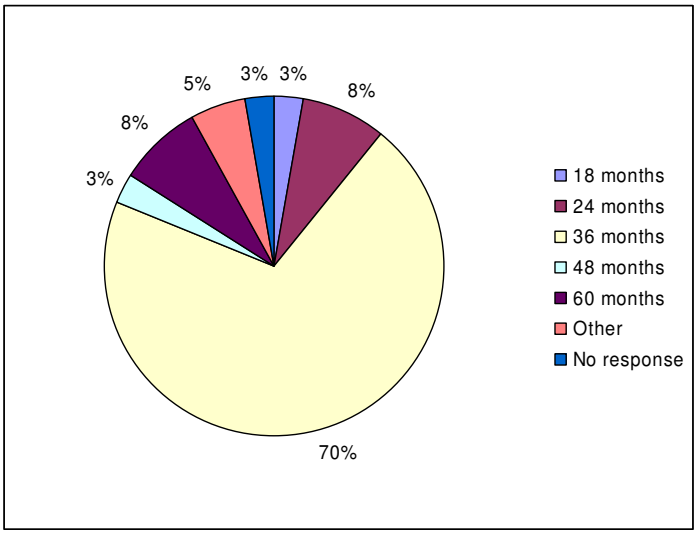

Figure 76. Extent of Non-Competition Obligation

We asked the respondents to indicate whether the agreements contained any non-solicitation obligations for the seller. The results, summarized in Figure 77, show that 55% of the transactions featured a non-solicitation obligation of the seller.

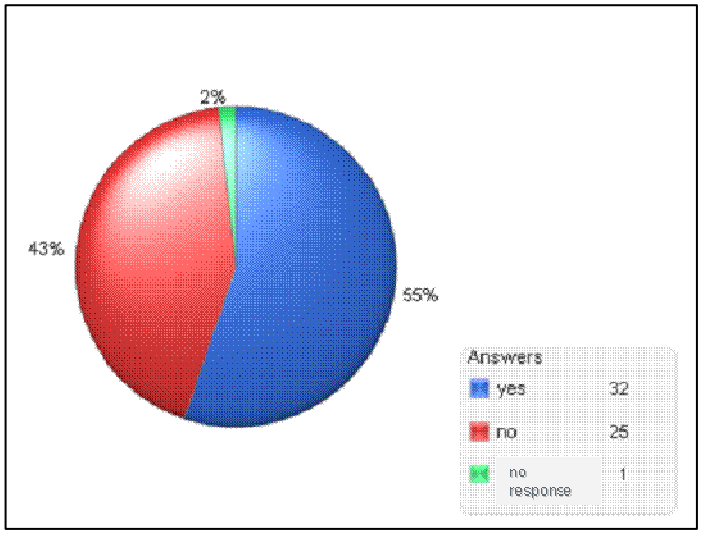

Figure 77. Non-solicitation Obligation of the Seller

This is in line with the practice in the rest of Europe, the ABA European Study reports 59% of the agreements including a non-solicitation obligation.

We also requested the indication of the length of the non-solicitation obligation, with the results shown in Figure 78. Like in the case of the non-competition obligations, the majority of non-solicitation obligations have a length of 3 years.

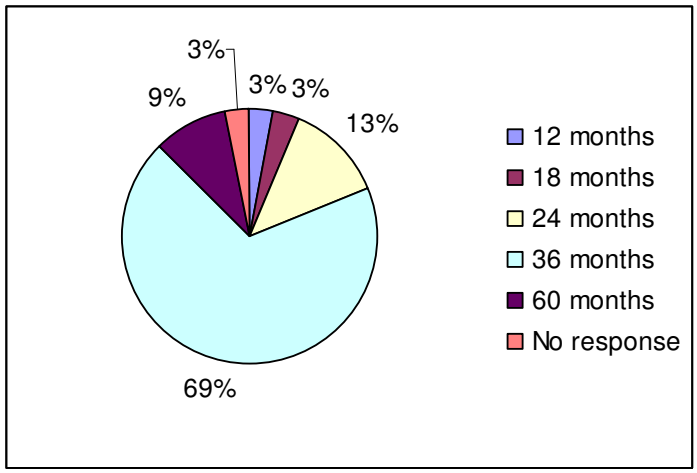

Figure 78. Extent of Non-Solicitation Obligation

8.2. Dispute Resolution Forum

The main types of dispute settlement forum are courts and arbitration, whereas the latter option is usually regarded as more suitable for commercial disputes involving higher stakes. The responses show that arbitration is clearly preferred dispute settlement forum in the Baltic M&A transactions:

Table 73. Dispute Settlement Mechanism

Answer	Number of responses
Arbitration	46
Courts	11
Undefined	1
Total	**58**

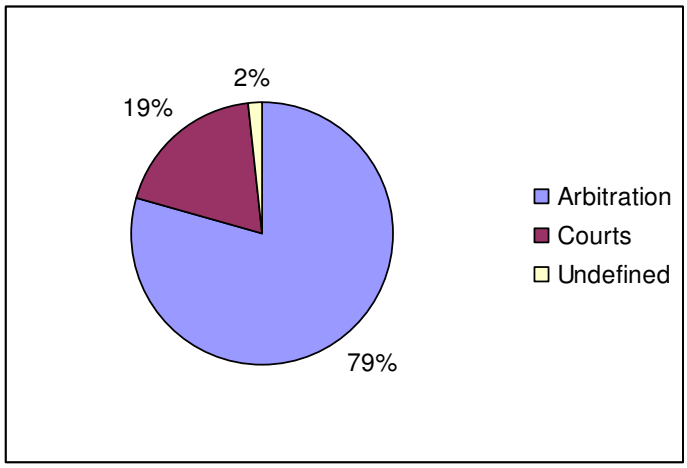

Figure 79. Dispute Resolution Mechanism

Nearly 80% of the analysed transactions stipulate arbitration as the dispute settlement mechanism. This is similar to elsewhere in Europe. According to the ABA European Study, arbitration is used in 71% of the analysed transactions. However, according to the ABA studies carried out in the U.S. and Canada, the figure in those countries is as low as 29%.

Ad hoc arbitration rules were used in only one case, and the parties relied on institutional arbitration rules in the other cases. Local arbitration rules were relied upon in most of the 45

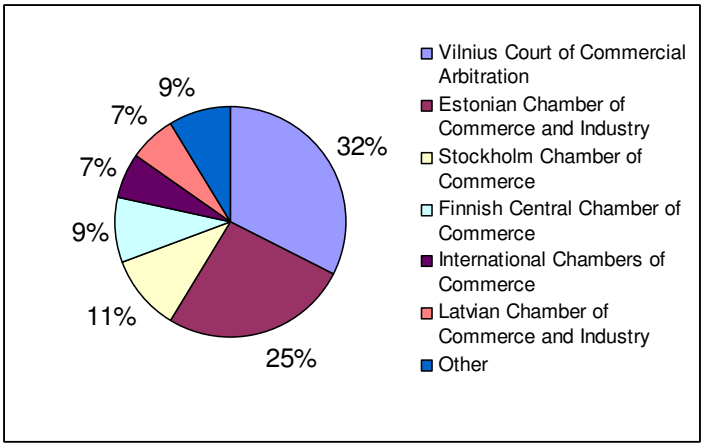

Figure 80. Rules of Arbitration

institutional arbitration clauses. However, the parties chose the Arbitration Institute of the Stockholm Chamber of Commerce in 5 cases, the Finnish Central Chamber of Commerce arbitration rules in 4 cases and the international arbitration court of the ICC (International Chamber of Commerce) in 3 cases.

We analysed the 11 remissions to courts by governing law and transaction value. The results are shown in Table 74 and Table 75.

Table 74. Distribution of Court Venue by Governing Law

Answer	Number of responses	Other	Estonian	Latvian	Lithuanian
Target's head office	5		3	2	
Seller's head office	2			1	1
According to Latvian law	1			1	
According to the Lithuanian law	2				2
Country where the holding company is registered (Malta)	1	1			
Total	**11**	1	3	4	3

Table 75. Distribution of Court Venue by Transaction Value

Answer	Number of responses	up to EUR 1 mio.	EUR 1-5 mio.	EUR 5-25 mio.	EUR 25-50 mio.	EUR 50-100 mio.	over EUR 100 mio.
Target's head office	5		1	3		1	
Seller's head office	2		1	1			
according to Latvian law	1		1				
According to the Lithuanian law	2	1		1			
Country where the holding company is registered (Malta)	1	1					
Total	**11**	2	3	5	0	1	0

9. CONCLUSION

The Baltic M&A Deal Points Study was the first of the kind that was carried out in relation to Estonian, Latvian and Lithuanian M&A transactions. One of the major successes of the study was a comprehensive sample: as many as 58 transactions in the region were surveyed and these were distributed evenly across the two years of 2007-2008.

The study gives a fairly good overview of the type and size of M&A transactions that were completed in the Baltic countries in 2007 and 2008. Based on this, it can be concluded that the average transaction size in the market ranged between EUR 5-25 million. During the studied years, private equity houses and financial investors were still reasonably active in the Baltic and they represented approximately one third of the parties. Surprisingly, only 1/3 of the transactions can be considered pan-Baltic, i.e. the transactions involving the targets operating in more than one Baltic country. Furthermore, only 12% of the agreements stipulated the legislation outside the Baltic region as the governing law. This small number of international transactions involving Baltic countries can be partly attributed to the fact that the local law firms providing data for the survey where not lead negotiators in the larger international transactions.

The first stated purpose of the study was to find out how the parties to a transaction have used the M&A transaction clauses to mitigate their risks. Not contrary to the author's expectations, the survey revealed that there is no such thing as "usual" M&A transaction. Each transaction has its own specific risks and the parties act quite differently in ways how they mitigate such risks.

Interestingly, there have not been major differences on how financial investors and strategic investors act on the M&A market. For example, they act similarly in choosing the sales process or qualifying the representations and warranties. One important difference is, however, in the payment terms made by the financial and strategic buyers. The strategic buyers tend to be more willing to pay lump sum at closing and the financial buyers choose more eagerly earn-out or other deferred

payment methods. This asymmetry may be related to the fact that strategic buyers tend to realise synergies between the target and their own organization, and therefore restructure the purchased business as soon as possible after the closing.

The second aim of the study was to find out whether the transaction documents reflect the alleged shift of negotiating positions of the parties from the beginning of 2007 (the "sellers' market") to the end of 2008 (the "buyers' market"). The results of the survey do not support such hypothesis. For example, there was no significant shift regarding general knowledge qualification to the warranties, deferral of purchase price and as to which party prepares the first draft of transaction documents. This shows the time gap in the reflection of the market practise in the behaviour of the parties regarding M&A transaction processes.

Finally, the study compared the survey results with similar surveys in the continental Europe, U.S. and Canada. In broad terms, Baltic M&A transactions follow the international practise. There are, of course, several exceptions in certain deal points. For example, due to lack of liquid stock markets, the consideration is paid almost always in cash in Baltic countries, whereas in U.S. and elsewhere in Europe a significant proportion of the consideration is paid in shares.

Underneath the general use of deal points, there is a notable difference in the level of sophistication of using some of the clauses. The best example is the use of material adverse change (MAC) clauses. The Baltic transactions included MAC clauses significantly more than elsewhere in continental Europe. However, the level of complexity of such MAC clauses was lower than those used in Europe and U.S.

As a final remark, the author notes that one of the main values of the study can be its use as a benchmark for future studies. As the first study of the kind in the region, it provides a valuable insight in the M&A transactional practise in Estonia, Latvia and Lithuania. Hopefully there will be carried out similar studies for the future periods and the results of the survey can be compared to the future practise in order to determine trends in longer term.

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ENCLOSURE 1
The Baltic M&A Deal Points Study

QUESTIONNAIRE

Baltic M&A Deal Points Study

Executive MBA Mergers & Acquisitions 2008/2009 Master's Thesis survey by Toomas Prangli
Supervisor: Stefan Artner

Have you ever wondered what "market practice" means in Baltic M&A transactions? Have you ever faced the argument that "this is normal" or "this is usual" in the course of negotiations? Now is your chance to contribute in the Baltic M&A Deal Points Study. Naturally, all transactions are specific, but the study aims to generalise on how certain transaction features are used in the Baltics and thereafter compare the results to similar studies in Europe and elsewhere. The Baltic M&A Deal Points Study will also show whether there has been any significant changes in the transaction practises in 2007, when the Baltic M&A market was still considered to be a "seller's market", and in 2008, when the market shifted to a "buyer's market".

This questionnaire is based on the template developed by the American Bar Association (the **ABA**) used for a similar European studies carried out regarding the market practice in Europe by the M&A Market Trends sub-committee of the Committee on Negotiated Acquisitions, ABA section of Business Law (2008 study co-chairs J. Freek K. Jonkhart and Reid Feldman). The below questionnaire has been modified and adapted for the Executive MBA Mergers & Acquisitions (Vienna University of Technology and the University of Vienna) master's thesis purposes.

This questionnaire will provide data for analysis of acquisition agreements involving targets in Estonia, Latvia or Lithuania, acquired in transactions completed in 2007 or 2008. For each agreement a separate questionnaire should be filled in (in either electronic or hard copy form).

Data provided in this questionnaire will be used for comparative analysis of transaction features. Individual questionnaire responses will not be published. Full responses to all questions are encouraged but responses to specific questions can of course be omitted, for example if responses would entail disclosure of confidential information or unwanted identification of the transaction (e.g. Target's industry could be omitted when there has only been limited amount of transactions in the industry). Some questions are designed to allow for multiple responses (e.g. section 1.1 third sub-question).

Please fill in and submit the questionnaires by **15 January 2009**. Your cooperation will be very much appreciated and the results will be shared with those who have contributed to the study.

Should you have any questions, concerns or comments, please contact Toomas Prangli (toomas.prangli@sorainen.ee, tel +372 56 455 595).

Thank you in advance!

Toomas Prangli

1. Basic Information

1.1 Target

1 ➢ Name (optional for non-Sorainen lawyers) _____

2 ➢ Country of head office _____

3 ➢ Principle country(ies) of operations _____

_____

4 ➢ In which Baltic countries did the Target operate at the time of closing of the transaction?

- ☐ Estonia
- ☐ Latvia
- ☐ Lithuania

5 ➢ Is Target party to the main acquisition agreement ☐ Yes ☐ No

1.2 Target's industry

6

- ☐ Automotive
- ☐ Consumer Products
- ☐ Energy and Utilities
- ☐ Financial Services
- ☐ Hotels & restaurants
- ☐ Logistics and transport
- ☐ Food industry & agriculture
- ☐ Industrial Equipment
- ☐ Manufacturing
- ☐ Pharmaceuticals
- ☐ Retail / Wholesale
- ☐ Services
- ☐ Construction & Real Estate
- ☐ Media & Entertainment
- ☐ Technology (IT, telecom, e-business)
- ☐ Other (specify): _____

_____

1.3 Are shares of Target publicly traded?

7, 8 ☐ Yes Percentage of shares held by the public ____ %

9 Traded at (principal stock exchange) _____

☐ No

1.4 Seller

10 ➢ Name principal Seller (optional for non-Sorainen lawyers) _____

11 ➢ Country of head office _____

1.5 Nature of principal Seller

12 ☐ Strategic

☐ Financial / Private Equity

14 ☐ Other (specify; i.e. family-controlled): _____

13 ☐ More than one principal Seller (specify): _____

_____

1.6 Buyer

15 ➢ Name (optional for non-Sorainen lawyers) _____

16 ➢ Country of head office (of the group) _____

1.7 Nature of Buyer (disregard special purpose holding company used for acquisition purposes):

17 ☐ Strategic

☐ Financial / Private Equity

19 ☐ Other (specify): _____

18 ☐ More than one Buyer (specify): _____

1.8 Sales process:

20 ☐ (Controlled) auction

☐ Negotiated sale

☐ Takeover bid (in case shares are publicly traded)

☐ Privatization

☐ Other (specify): _____

1.9 Form of transaction

21 ☐ Shares

☐ Asset

☐ Combination shares and asset

1.10 Transaction value

(purchase price including deferred payments and earn-out plus assumed obligations and non-competition or similar payments)

22 ☐ up to EUR 1 million ☐ EUR 1-5 million

☐ EUR 5-25 million ☐ EUR 25-50 million

☐ EUR 50-100 million ☐ over EUR 100 million

1.11 Form of consideration / purchase price

23 ☐ All cash

☐ All shares

☐ Mixed (shares and cash)

1.12 Payment terms

24 ☐ Price payable as lump-sum at closing

25 ☐ Portion of purchase price deferred (incl. escrow) Percentage of purchase price deferred: [ ]

Period of deferral: ___ months

26 ☐ Portion of purchase price payable as earn out — Percentage of purchase price determined at earn-out: [ ] Period of earn out: ___ months

☐ Other payment terms (Specify): _____

1.13 Price adjustment at closing

27 ☐ No adjustment at closing

☐ Closing adjustment:

- ☐ Net indebtedness
- ☐ Net working capital
- ☐ Other (specify): _____

28 ☐ In case of price adjustment at closing:

- ☐ Closing accounts are prepared by (for approval of the other party):
  - ☐ Seller
  - ☐ Buyer
  - ☐ Other (specify) _____
- ☐ No closing accounts are prepared

1.14 Which party prepared the first draft of the main acquisition agreement?

29 ☐ Seller

☐ Buyer

☐ Other (specify): _____

1.15 Length of the main acquisition agreement
30 *(number of pages in body of agreement plus any annexes containing definitions, representations and warranties or indemnification clauses, but excluding other exhibits and ancillary agreements)*: Pages: [ ]

1.16 Governing law
31 _____

1.17 Dispute-resolution mechanism
32,33, 34 35

☐ Courts in place of

- ☐ Target's head office
- ☐ Seller's head office
- ☐ Buyer's head office
- ☐ Other (specify): _____

☐ Arbitration: _____

- ☐ Under institutional rules of: _____
- ☐ *Ad hoc*

☐ Undefined

1.18 Language of agreement _____
36

1.10 Date of closing
37

☐ 2007 H1 ☐ 2007 H2

☐ 2008 H1 ☐ 2008 H2

1.19 Additional comments _____
38

_____

2. Representations and Warranties

Please indicate if the following representations and warranties were included in the acquisition agreement:

2.1 General qualifications to the representations and warranties given by the Seller

39 2.1.1 Do the Seller's warranties include general Knowledge Qualification?

- ☐ Yes
- ☐ No

40 2.1.2 Is a Disclosure Letter appended to the Agreement?

- ☐ Yes
- ☐ No

41 2.1.3 Are due diligence disclosures (by reference to data room index or otherwise) considered as general qualification to the representations and warranties?

- ☐ Yes
- ☐ No

42 2.1.4 Are the representations and warranties generally considered repeated at the Closing Date?

- ☐ Yes
- ☐ No
- ☐ Yes, with major exceptions (explain): _____

2.2 General qualifications to the representations and warranties given by the Target (if party to the Agreement)

43 ☐ Not applicable

If Target gave warranties, please answer 2.2.1 – 2.2.4:

44 2.2.1 Do the Target's warranties include general Knowledge Qualification?

- ☐ Yes
- ☐ No

45 2.2.2 Is a Disclosure Letter appended to the Agreement?

- ☐ Yes
- ☐ No

46 2.2.3 Are due diligence disclosures (by reference to data room index or otherwise) considered as general qualification to the representations and warranties?

- ☐ Yes
- ☐ No

47 2.2.4 Are the representations and warranties generally considered repeated at the Closing Date?

- ☐ Yes
- ☐ No
- ☐ Yes, with major exceptions (explain): _____

2.3 Title warranties

48 2.3.1 Are title warranties (i.e. warranties as to the title and encumbrances of the sales object (shares or assets)) given by Seller?

- ☐ Yes
- ☐ No

2.4 "No Undisclosed Liabilities"

49

In the following sections, "GAAP" is used as a reference to any of the agreed accounting standards. Please indicate which accounting standards are used in the warranties given by the Seller or Target as a reference to the Target's financial statements:

- ☐ Accounting standards generally accepted locally in the Target's country
- ☐ International Financial Reporting Standards (IFRS)
- ☐ Both of the above
- ☐ Other (specify) _____

50 2.4.1 Is a "un-disclosed liabilities" representation given by Seller?

- ☐ Yes
- ☐ No

51 Is a "un-disclosed liabilities" representation given by Target (if a party to the Agreement)?

- ☐ Yes
- ☐ No

52 2.4.2 If so, which of the following best describes the representation?

- ☐ "All liabilities".
  Example: "[Target] has no liability except for liabilities reflected or reserved against in the [financial statements] and current liabilities incurred in the ordinary course of business since _____ [date]."
- ☐ "GAAP Qualified".
  Example: " [Target] has no liability except liabilities **of the type required to be disclosed in the liabilities column of a balance sheet prepared in accordance with [GAAP**], other than liabilities disclosed in the [financial statements] and liabilities incurred in the ordinary course of business since _____ [date]."
- ☐ Other (specify)
  _____
  _____

53 2.4.3 Is Seller's/Target's representation qualified by reference to Seller's/Target's "knowledge"?

- ☐ Yes ☐ Seller ☐ Target ☐ Both
- ☐ No

54 2.4.4 Other comments relating to this representation _____

2.5 "Fair Presentation"

55 2.5.1 Is a "fair presentation" representation given by Seller?

☐ Yes

☐ No

56 Is a "fair presentation" representation given by Target (if a party to the Agreement)?

☐ Yes

☐ No

57 2.5.2 If so, which of the following best describes the representation?

☐ "GAAP-Qualified"
Example: "The [financial statements] fairly present the financial position of the Target and its consolidated subsidiaries as of the respective dates thereof and the results of operations and cash flows of the Target and its consolidated subsidiaries for the periods covered thereby, **all in accordance with [GAAP - generally accepted accounting principles]**."

☐ "Not GAAP-Qualified"
Example: "The [financial statements] fairly present the financial position of the Target and its consolidated subsidiaries as of the respective dates thereof and the results of operations and cash flows of the Target and its consolidated subsidiaries for the periods covered thereby. **The [financial statements] have been prepared in accordance with GAAP applied on a consistent basis throughout the periods covered**."

☐ Other (specify)

_____

_____

58 2.5.3 Is Seller's/Target's representation qualified by reference to Seller's/Target's "knowledge"?

☐ Yes ☐ Seller ☐ Target ☐ Both

☐ No

59 2.5.4 Other comments relating to this representation _____

2.6 "Full Disclosure"

60 ➢ Is a "full disclosure" representation or undertaking given by Seller?

☐ Yes

☐ No

61 Is a "full disclosure" representation or undertaking by Target (if a party to the Agreement)?

☐ Yes

☐ No

62 If so, which of the following best describes the representation?

☐ "Representation" (limited to representations and warranties in the agreement)
Example: "no representation or warranty made by the [Seller/Target] in the Agreement contains any untrue statement of a material fact or omits to state a material fact necessary to make any such representation or warranty, in light of the circumstances in which it was made, not misleading."

☐ Other (specify, i.e. "all information given in the negotiations is true and accurate and not misleading" or 'Seller does not know of material information that has not been disclosed")
_____

_____

63 ➢ Is Seller's representation Knowledge Qualified?

☐ Yes

☐ No

64 ➢ Is a "full disclosure" representation or undertaking given by the Buyer?

☐ Yes

☐ No

65 ➢ Other comments relating to this representation _____

2.7 Standards of "knowledge" and investigation

66 Definition of "Knowledge"

(i) ☐ Undefined

67 (ii) ☐ Actual
Investigation requirement
- ☐ Unspecified
- ☐ Express no-obligation to investigate (i.e. actual knowledge without investigation)
- ☐ reasonable investigation
- ☐ diligent / due investigation

68 (iii) ☐ Constructive (includes knowledge of "knowledge groups")
Investigation requirement
- ☐ Unspecified
- ☐ Express no-obligation to investigate (i.e. actual knowledge without investigation)
- ☐ reasonable investigation
- ☐ diligent / due investigation

69 (iv) ☐ Knowledge Group used?

70 ☐ Specified individuals (what positions?) _____
☐ Senior management/executive officers as a group
☐ Others (specify) _____

2.8 Additional comments regarding representations and warranties (including description of other notable representations or warranties)

71

_____

_____

_____

3. Closing conditions

72 **3.1 Did closing occur subsequent to signature of the acquisition agreement?**

☐ Yes

☐ No

73 ➢ If closing occurred subsequent to signature, was closing subject to the following conditions?

➢ Accuracy of representations

☐ Yes

☐ No

74 **3.2 Is "accuracy" qualified by materiality? (e.g., an inaccuracy which would have a Material Adverse Effect ("MAE") on Target)**

☐ No - (i.e. must be accurate in all respects)

☐ Yes – "Material Only" (ie. must be accurate in "all material respects")

75 **3.3 The condition can be invoked (and closing cancelled as a consequence) by**

☐ Buyer

☐ Seller

3.4 MAC/MAE condition

76 3.4.1 Does the agreement include a condition permitting the right to walk in case of Material Adverse Change ("MAC") or MAE ("Since the date of the Agreement there has not been any Target Material Adverse Change")?

☐ Yes, may be invoked by

☐ Buyer

☐ Seller

☐ No

If condition is included:

77 3.4.2 Does the MAC/MAE term include

➢ Future business prospects

☐ Yes, may be invoked by

☐ Buyer

☐ Seller

☐ No

78 ➢ Ability of Seller/Target to perform its obligations under the acquisition agreement

☐ Yes, may be invoked by

☐ Buyer

☐ Seller

☐ No

79 ➢ Ability of Buyer to own and operate the acquired business

☐ Yes, may be invoked by

☐ Buyer

☐ Seller

☐ No

80,81 3.4.3 Is a value threshold quantified?

☐ Yes Appr. _____ % of purchase price

☐ No

82 **3.5 Was the transaction subject to approval by competition authorities?**

☐ No

☐ Yes:

☐ National competition authority(-ies)

☐ EU Commission

☐ Other: (specify)_____

83 **3.6 Did the agreement include a long-stop date for the conditions precedent (allowing the party/parties to walk in case not fulfilled within the period)?**

☐ No

☐ Yes:

☐ up to 2 months

☐ 2-5 months

☐ over 5 months

84 If yes, did the failure of the Party to fulfil the condition precedent entitle the other Party to penalties or similar consequences:

☐ No

☐ Yes:

85 ☐ Buyer is entitled to penalty in case of failure by the Seller/Target

➢ Amount: ___% of purchase price

86 ☐ Seller is entitled to penalty in case of failure by the Buyer

➢ Amount: ___% of purchase price

4. Liability and Indemnification

4.1 Are Damages/Losses a defined term?

87

- ☐ No
- ☐ Yes by reference to damages calculated under applicable law
- ☐ Yes as the amount necessary to put Target in a position that would have existed if the breach had not occurred
- ☐ Yes as a decrease in value of Target's shares
- ☐ Yes other
  - ➢ specify: _____
- ☐ Yes exclusion of:
  - ☐ indirect loss / lost profit
  - ☐ other (specify): _____

4.2 Survival of representations / time to assert claims

88, 4.2.1 General period of survival expressly defined

89

- ☐ Yes Period _____ months
- ☐ No (i.e. by default, survival until expiration of statute of limitations)

90 4.2.2 Are there carveouts to time limitations and survival of representations subject to carveout:

- ☐ No
- ☐ Yes

If yes, are there carveouts for:

91 (a) Intentional breach (or inaccuracy known by Seller) of Seller's representations or covenants

- ☐ Indefinite
- ☐ Statute of limitations
- ☐ Specified period: _____ months

92 (b) Title warranties

- ☐ Indefinite
- ☐ Statute of limitations
- ☐ Specified period: _____ months

93 (c) Taxes

- ☐ Indefinite
- ☐ Statute of limitations
- ☐ Specified period: _____ months

94 (d) Environmental

- ☐ Indefinite
- ☐ Statute of limitations
- ☐ Specified period: _____ months

95, 96 (e) Other (specify): _____

- ☐ Indefinite
- ☐ Statute of limitations
- ☐ Specified period: _____ months

4.3 Monetary limitations

97 4.3.1 Baskets / thresholds

- ☐ No basket / threshold exist for asserting the claim against the Seller under representations or warranties
- ☐ Basket / thresholds exist:

(a) Basket type and amount

- ☐ Basket is deductible (i.e. only amount in excess of basket amount can be recovered)
  - 98 ☐ Deductible per claim amount: _____
  - 99 ☐ Deductible for all claims amount: _____
- ☐ Basket is a threshold (i.e. if basket is exceeded, the entire amount of the loss can be recovered)
  - 100 ☐ Threshold per claim (i.e. amount below which the claim is considered de minimis and not taken into account) amount: _____
  - 101 ☐ Threshold for all claims amount: _____
- 102 ☐ Combination deductible + threshold
  - ➢ explain: _____

103 (b) If there are separate baskets (operating as deductibles per-claims or overall thresholds) for certain types of claims, please so indicate below:

- ☐ No
- ☐ Yes
  - 104 ➢ specify basket type and amount: _____

4.3.2 Caps / ceiling / limitation on liability / maximum amount

105 ➢ Is there a cap / ceiling on Seller's liability

106

- ☐ No

☐ Yes ___% of purchase price

107 4.3.3 Are there carveouts to cap / ceiling / limitation on liability / maximum amount
108
109

☐ No

☐ Yes
If yes, are there carveouts for:

(a) ☐ Intentional breach (or inaccuracy known by Seller) of Seller's representations or covenants

(b) ☐ Title warranties

➢ specify: _____

(c) ☐ Taxes

➢ specify: _____

(d) ☐ Title of assets/sufficiency of assets

➢ specify: _____

(e) ☐ Rep on accounts receivable

➢ specify: _____

(g) ☐ Environmental

➢ specify: _____

(h) ☐ Other

➢ specify: _____

4.4 Remedies

110 4.4.1 Are the remedies stated in the agreement the exclusive remedies of the Buyer in case of breach?

☐ Yes, for breach of any provision of the agreement

☐ Yes, but for breach of representations and warranties only

☐ No

➢ comments: _____

111 4.4.2 Carveouts to exclusive remedy clause

☐ Intentional breach

☐ Other

➢ explain: _____

4.5 Third party claims

4.5.1 Defense against third-party claims

112 ➢ Does the agreement contain a clause dealing with the defense against third party claims that give rise to a warranty claim?

☐ No

- ☐ Yes, Seller controls the defense
- ☐ Yes, Buyer controls the defense
- ☐ Yes, joint control of the defense
- ☐ Other
  - ➢ explain: _____

4.5.2 Time limit for informing about the third party claim

113 ➢ Does the agreement contain a time limit for the Buyer to inform the Seller
114 about the third party claims that give rise to a warranty claim?

- ☐ No
- ☐ Yes, _____ days

4.6 Sandbagging

115 ➢ Does the agreement contain a

- ☐ Anti-sandbagging clause (i.e. express limitation on Buyer's remedies based on Buyer's pre-existing knowledge of an inaccuracy or breach)
- ☐ Pro-sandbagging clause (i.e. no limitation on Buyer's remedies based on Buyer's pre-existing knowledge of an inaccuracy or breach)
- ☐ Other provision relating to sandbagging
  - ➢ explain: _____
- ☐ Silent

4.7 Security

116 4.7.1 Does the agreement provide for an escrow arrangement to secure Seller's obligations?

- ☐ Yes
  - 117 ➢ amount: _____
  - 118 ➢ held by: _____
- ☐ No

119 If yes, does the escrow arrangement provide a(n)

- ☐ non-exclusive source for indemnification
- ☐ exclusive source for indemnification

120 4.7.2 Does the agreement provide for the issuance of a bank guarantee to secure Seller's obligations?

- ☐ Yes
  - 121 ➢ amount: _____
  - 122 ➢ issued by: _____
- ☐ No

123 4.7.3 Is there another security arrangement?

124 ☐ Yes

- ☐ Parent company's guarantee / surety
- ☐ Other (specify): _____

☐ No

4.8 R&W indemnification insurance

125 4.8.1 Was an insurance policy written in connection with breach of representation and warranties or other indemnification or similar obligations

☐ Yes

126 ➢ describe: _____

☐ No

5. Covenants

Does the agreement contain the following covenants

131 **5.1 Non-competition obligation of Seller**

☐ Yes

132 ➢ duration: _____

☐ No

129 **5.2 Non-sollicitation obligation of Seller**

☐ Yes

130 ➢ duration: _____

☐ No

128 **5.3 Other notable covenants**

➢ please describe

_____

_____

_____

6. Other exceptional features of the agreement

127 **Please describe any exceptional features of this agreement which you think are noteworthy:**

_____

_____

_____

Contact data:
(to be used in case clarification is required for the study purposes)

Name: _____
E-mail: _____
Phone: _____