M&A DISPUTES REPORT

A Global Perspective

BRG

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Foreword

When it comes to M&A and capital markets, what is exotic today will be plain vanilla before long. In the meanwhile, conditions are ripe for innovation. Over the years, much innovation has been driven by the brokers of capital, including the now well-established private equity sector. The latest iteration can be seen in the popularity of special-purpose acquisition companies (SPACs).

This innovation—specifically new deal structures—is being spurred by abundant capital looking for yield during a period of record transaction activity. This sows the seeds for potential future conflicts between investors and their agents, even in normal times. But, of course, these are far from normal times, as the current boom in M&A is set against the backdrop of a once-in-a-century pandemic. Now, with 2022 just weeks away, we can say with some certainty that the increased volumes of deals and disputes show no signs of abating.

This frames the thinking behind this research report, which follows our inaugural effort from 2020 focused specifically on the Asia–Pacific (APAC) region. The response we received to last year's report was overwhelmingly positive. But, upon completion of the report, it struck us that we should expand our approach for a simple reason: Capital flows globally. Hence this year's global outlook, with the scope expanded to cover Europe, the Middle East and Africa (EMEA) and North America, as well as APAC.

Just like last year, the report is filled with perspectives from some of the world's top lawyers working in M&A, disputes and private equity and some of BRG's leading experts. We tripled the number of those voices this year, with nearly 20 representatives from top law firms lending their commentary.

Providing a cohesive view of the M&A disputes and private equity landscape from the top minds who do the work every day was that important to us. Their commentary, along with a quantitative survey of 225 lawyers, private equity professionals and corporate finance advisors, offers important takeaways, including:

- The sectors most involved in disputes—hospitality & leisure, life sciences and technology—are the same, regardless of region.
- Litigation is especially common in some parts of the world, with regional differences a large factor in cross-border deals.
- The rise in SPACs in M&A appears poised to lead to more disputes.
- Material adverse change (MAC) and material adverse effect (MAE) clauses are popular, though not overwhelmingly popular, ways to guard against post-close disputes.

Many threads of activity lead up to an M&A transaction, including the involvement of intermediaries who structure the deals and are driving innovation. Longer-term currents—including the continued growth of private equity funds that may become as big as the traditional providers of capital they sought to displace—are also at play. In the short term, the boom in M&A inevitably will drive up dispute activity. But the full implications of these trends will be understood only when the markets meet the inevitable bump in the road and abundant liquidity dries up.

The 2021 BRG M&A Disputes report builds on last year's Asia-Pacific-focused research with a global study that adds data and insights from the Europe, Middle East and Africa and North America regions and digs deeper into recurring themes, together with new questions and findings. As our work in this complex area continues to grow, so too does the network of law firm partners, private equity clients and corporate finance professionals that we have consulted as part of this project, together with BRG experts around the world. I hope you will find this publication – and our ongoing research in the area – interesting and useful as we all continue to navigate turbulent waters.

Tri MacDonald
President, BRG

Mustafa Hadi
Managing Director, BRG

November 2021

Executive Summary

A Global Perspective: M&A Deals and Disputes Heading into 2022

Defying early predictions, the global M&A market has remained extremely strong despite COVID-19's economic disruptions and is expected to remain that way into 2022. Simultaneously and relatedly, dealmakers, lawyers and private equity executives think M&A disputes will keep pace with the surging deal market.

That is according to a survey of 225 respondents—consisting of 115 lawyers (private practice and in-house), 80 private equity professionals and 30 corporate finance advisors—who were surveyed as a follow-up to BRG's 2020 M&A Disputes Report. That report focused on the APAC region, where deals and disputes were on the rise and which continues to be a hotspot for deals and disputes. This year's report has been expanded to have a global focus and is informed further by qualitative interviews with more than 15 M&A transaction and disputes lawyers from leading firms around the world.

Simply assuming that more deals lead to more disputes is far from the whole story. There are trend lines to that effect in recent years, to which the complexities of making deals in a pandemic have acted as an accelerant. "As well as rising deal volumes, there are new deal structures, new investment vehicles, advances in technology and rapidly changing economic conditions, all of which have contributed to the number of M&A disputes", said BRG Director Kevin Hagon, who specialises in M&A disputes. Therefore, it is crucial to go deeper and look at the changing nature of the disputes, particularly in certain industries.

"COVID has presented new issues resulting in potential disputes dealing with purchase price adjustments and earnout calculations", said BRG Managing Director Saul Solomon, who specialises in forensic financial investigations, financial and economic analysis in disputes, and valuation of businesses. "You might have a purchase price adjustment provision in a contract that traditionally would have necessitated assessing revenue before and after the transaction and determining whether an adjustment should be made post-completion if certain levels are not met. How do you deal with the impact on revenue and earnings in relation to these agreements, given the devastating impact COVID has had on many sectors?"

Understandably, sectors like hospitality & leisure are dealing with business performance issues that can lead to post-close disputes. However, disputes also are on the rise in technology, life sciences and financial services, according to survey respondents and interviewees. With respect to technology, lawyers interviewed believe that the environment for deals remains highly promising, based on the prevalence of quality targets and strong economic conditions. Alongside these conditions, however, comes the likelihood of a rise in disputes.

Another potentially powerful shift is occurring with MAC, MAE and force majeure clauses. Terms that were once simple boilerplate are getting closer looks, and trends like third-party financial audits are becoming a bigger factor in how deals take shape. Private equity's growing prominence in M&A is another important factor, as is the emergence of SPACs.

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Kevin Hagon,
Director, BRG

About BRG

BRG advises clients on the highest-stakes disputes and investigations as part of our firm's closely integrated global network.

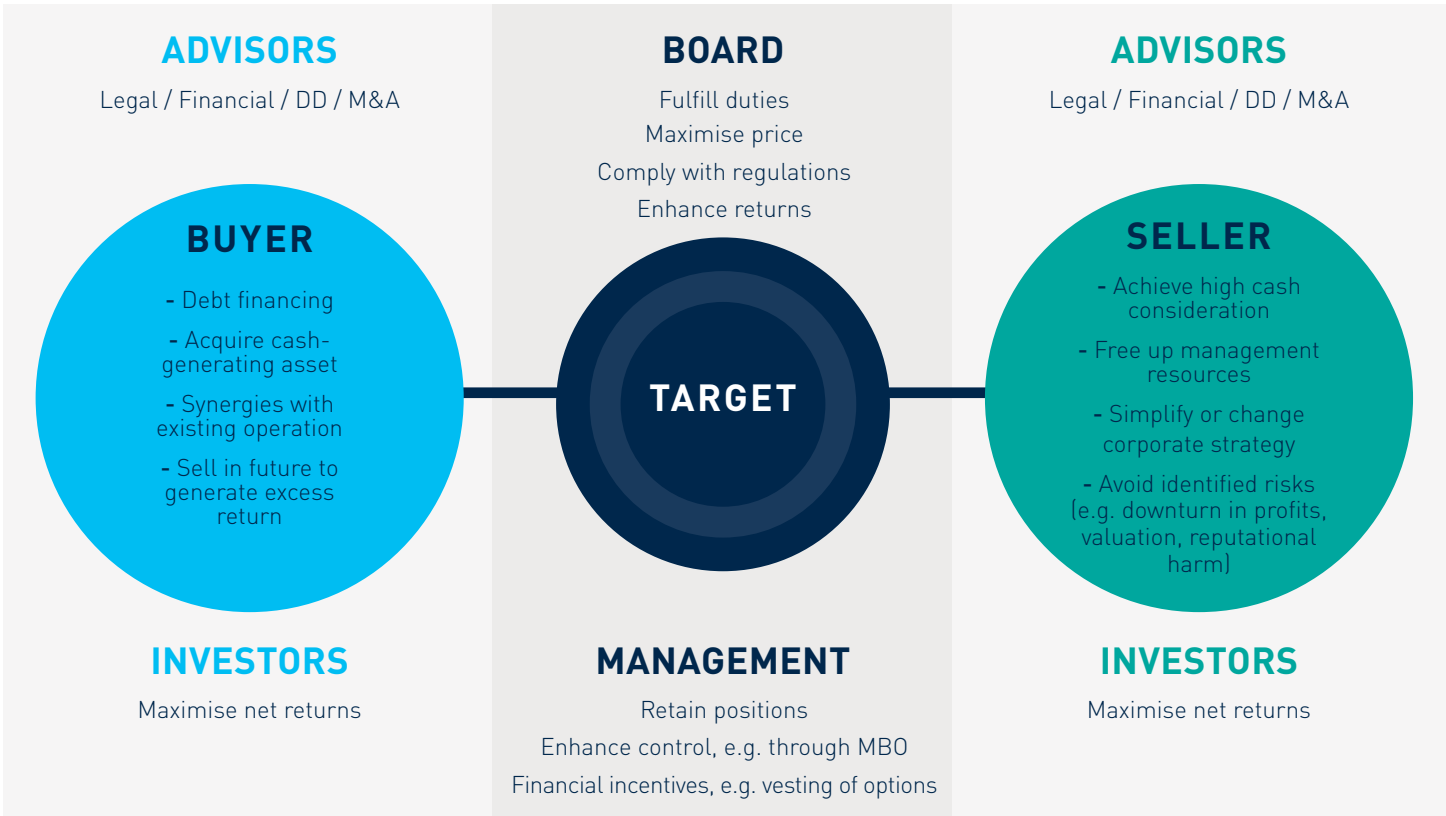
Harnessing expertise in finance, accounting, analytics and technology, and drawing on a depth of industry experience, our teams provide economic consulting services, financial analysis, expert reports and testimony, transaction-related diligence and disputes services, and strategic guidance to businesses, investors and law firms.

Our teams are made up of the most highly qualified professionals and senior industry executives who have built, managed and restructured major businesses. Our industry experts have acted as principals and advisors in tens of billions of dollars' worth of M&A transactions, financed mega-infrastructure projects, worked on private equity-backed leveraged buyouts (LBOs) and managed complex structured finance vehicles. We combine analytical thinking and structured presentation with decades of commercial knowledge and experience.

Our Expertise – M&A Disputes

The complex nature of M&A disputes makes them uniquely fertile ground for our approach. In addition to the traditional accounting expert role, we bring a commercial understanding of the transaction and an appreciation of the perspectives of all parties involved. We unpick the commercial drivers and the behaviours of the parties in order to navigate the dispute and decipher the relationship between the complaint and underlying issues. Our industry practitioners bring an intuitive view which is combined with our team's analytical rigour and understanding of the dispute resolution process.

M&A: KEY PLAYERS AND THEIR INTERESTS

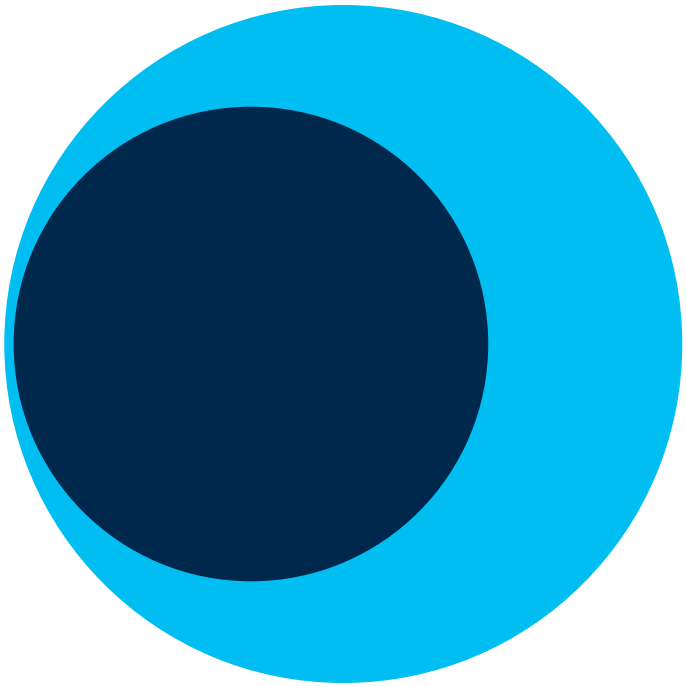


Key Findings

The vast majority of respondents agreed that deals that were started during the pandemic have since been completed, and most practices saw very little slowdown in volume.

70%

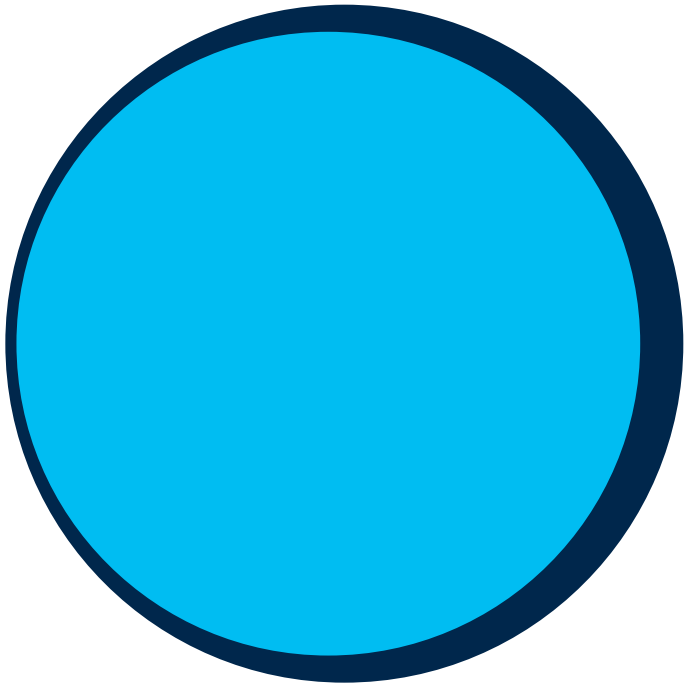
of respondents across all regions say **M&A disputes are up compared with one year ago.**



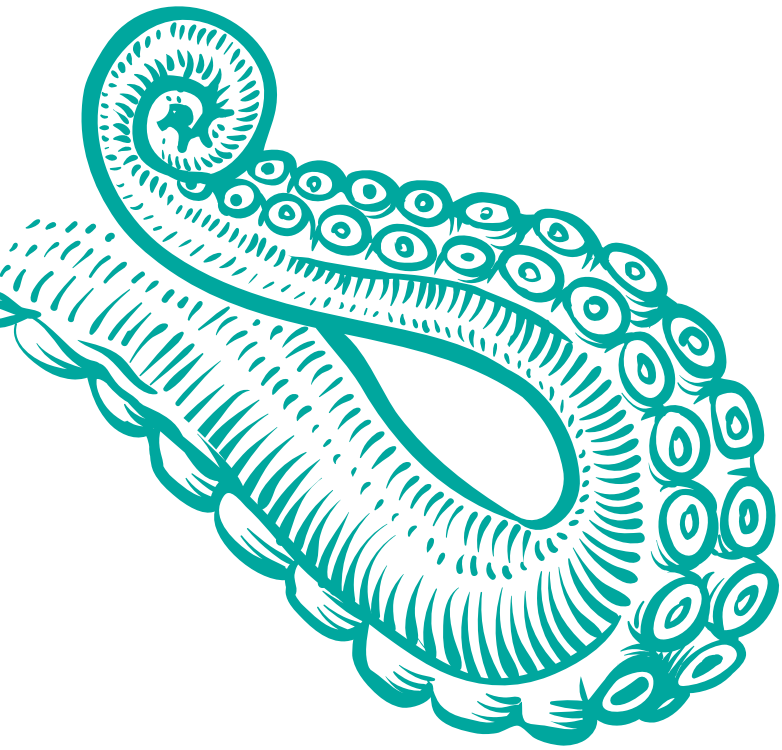
The types of disputes encountered most recently are those you would expect of a distressed market and related to company performance negatively impacted by the pandemic.

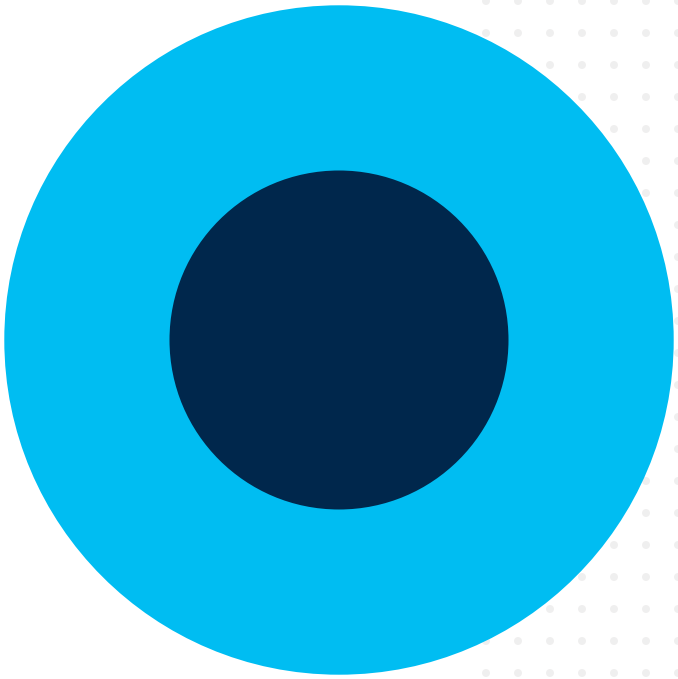
92%

of the respondents who worked on M&A disputes cited **renegotiation of the purchase price by buyers** as occurring very frequently or somewhat often.



More than region, the key differentiator in terms of M&A activity and likelihood for disputes appears to be sector, but cross-border dynamics certainly play a role.

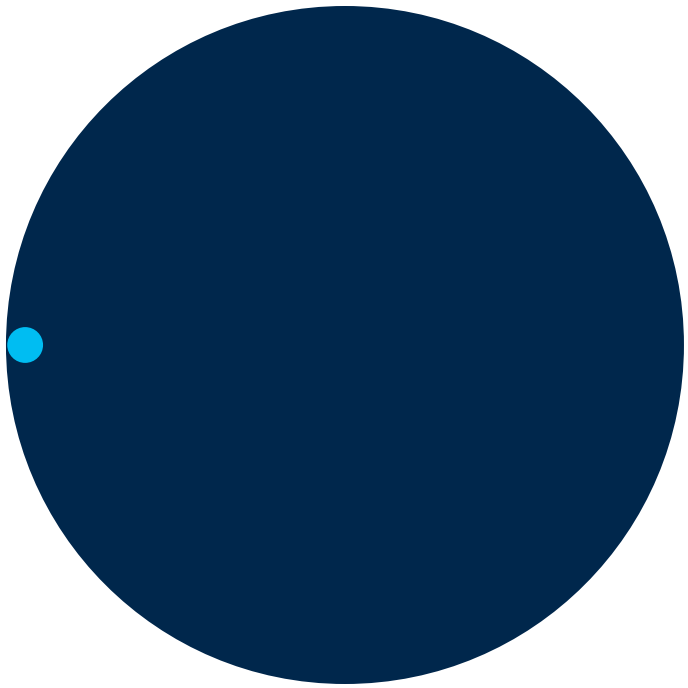




2:1

Hospitality & leisure, healthcare and technology were the top cited areas for disputes, outpacing such sectors as telecom and retail by a margin of 2:1.

There are mixed feelings among survey respondents about the effectiveness of MAC/MAE clauses, with about half indicating they are the best contractual tool to guard against post-closing disputes.



4%

said the inclusion of these clauses was **"not an ideal option"**.

Increased numbers of private equity deals are continuing to change the landscape of M&A, specifically in relation to how disputes arise and are litigated. Most corporate finance lawyers and dispute litigators said that private equity firms were involved in the disputes they worked on over the last year.

Full Findings: BRG M&A Disputes Report 2021

M&A activity continues to rise, with number of disputes to follow.

Mergers and acquisitions are taking place at a feverish pace around the globe. According to the Financial Times, there were $500 billion in transactions globally in August 2021, nearly twice as much as occurred in the preceding August.

The market data lines up with the impressions of the vast majority of the survey respondents who reported that, while most deals took longer to complete during the pandemic, the backlog had cleared as of August 2021. More than four out of five (82 percent) agree that deals that had been put on hold as a result of the pandemic had since been completed. Most respondents also agreed that opportunistic M&A deals, or counter-cyclical deals that take advantage of pandemic conditions, picked up during the pandemic.

With increasing volume, swelling dispute totals are a natural outcome, according to survey respondents and many of the financial experts interviewed. "It will simply follow the trend of M&A: there may be more disputes, but that's a function of the M&A market in the last few years", noted one London-based disputes lawyer.

But there is more to it than more-deals-equals-more-disputes. Sophie Lamb QC, partner in the International Arbitration Practice at Latham & Watkins in London, said, "Trading patterns are changing. In addition, pricing is still a little volatile, and this is a very acquisitive market (lots of opportunities), with lots of quick deals to be done—all of which are indicators that dispute activity will be on a gradually increasing trajectory".

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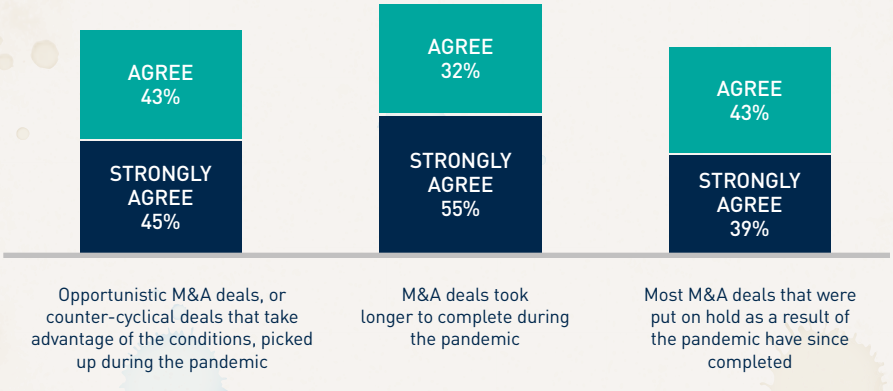
Sophie Lamb QC
Partner, Latham & Watkins, London

Q. PLEASE INDICATE THE EXTENT TO WHICH YOU AGREE WITH THESE STATEMENTS:

FIGURE 1. M&A DEAL STATUS DURING PANDEMIC



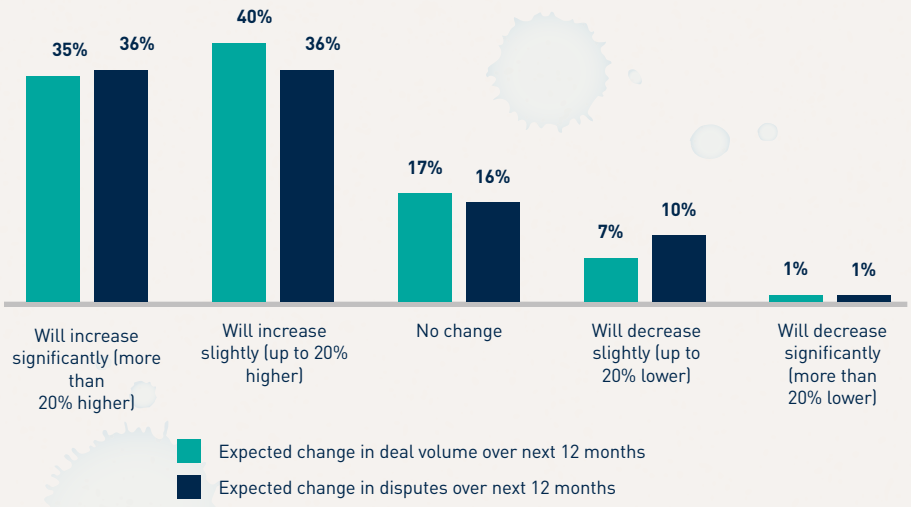
Edward Poulton, a partner with Baker McKenzie's Arbitration Practice Group in London, agreed. After a small pause in deals at the outset of the pandemic, most have been completed—and those that were not finished have been replaced by others seen as more opportunistic. He also expects strong activity going forward.

"Many companies are sitting on a lot of cash, and while there are some areas that are very distressed, such as hotels, travel and aviation, there are lots where there is a good deal of cash sitting there", he said.

Q. HOW DO YOU EXPECT THE NUMBER OF M&A DEALS (DEAL VOLUME) TO CHANGE OVER THE NEXT 12 MONTHS?

Q. HOW DO YOU EXPECT THE NUMBER OF M&A DISPUTES TO CHANGE OVER THE NEXT 12 MONTHS?

FIGURE 2. EXPECTED CHANGES OVER NEXT 12 MONTHS



COVID has presented new issues resulting in potential disputes dealing with purchase price adjustments and earnout calculations... How do you deal with the impact on revenue and earnings in relation to these agreements, given the devastating impact COVID has had on many sectors?

Saul Solomon
Managing Director, BRG

The pandemic created more business uncertainty and, therefore, heightened risk of disputes.

The nature of disputes, the sectors represented and the types of players involved have shifted in reaction to the uncertain economic environment stemming from the pandemic. Put simply, the pandemic created conditions that spurred deals (at least in some sectors, notably technology) and that also led to more disputes.

"Tech-sector M&A is important to continued platform innovation", said David Teece, BRG's executive chairman. "Much of this activity is different from industrial-era M&A and requires new understandings and new modalities of oversight. Disputes will always be with us, as there is considerable complexity around valuation. Antitrust issues also abound on the M&A front".

Many interview respondents cited the uncertain business climate and resulting disputes—like attempted purchase price adjustment and earnouts. On the latter, one contributor noted many earnout-related disputes, which makes sense. "In a distressed market, you tend to find that people cut corners, or the businesses that go under and get bought tend to have those problems", he said.

Nils Eliasson, a partner in the International Arbitration practice with Shearman & Sterling in Hong Kong, said that a couple of the post-closing disputes he has been involved in concern earnouts, and "It is fair to say that the target company's performance was impacted by COVID, and that led to disputes over the purchase price—in one case, even a claw-back mechanism".

Daniel Allen, a partner at Mori Hamada & Matsumoto in Tokyo, also cited price adjustments as pandemic effects: "[A type of dispute] I am seeing over the past couple of years is straight price adjustment disputes. In times of economic instability, this is an unsurprising cause of disputes". Other interviewees agreed, noting that in the market conditions brought on by COVID, there may have been a desire to recoup value at the back end of deals.

In contrast, Jonathan Moses, co-chair of the Litigation Department at Wachtell, Lipton, Rosen & Katz in New York, said, "When asset prices are rising, there is less to fight about on the intraparty side". The real question is "what will happen when the music stops", agreed BRG's Mustafa Hadi.

Tech sector M&A is important to continued platform innovation. Much of this activity is different from industrial era M&A and requires new understandings and new modalities of oversight. Disputes will always be with us as there is considerable complexity around valuation. Antitrust issues also abound on the M&A front.

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Executive Chairman,
BRG

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Nils Eliasson
Partner, Shearman & Sterling, New York

A slightly different perspective is that pricing is not necessarily the catalyst in disputes involving valuations. "It is more the mechanism that usually leads parties to embark on a sort of long-term negotiation", said Sheila Ahuja, an International Arbitration partner in Allen & Overy's Singapore office. Disputes lawyers involved in UK deals noted that the locked-box mechanism has provided some relief on the price adjustment issue. But they said completion accounts are a common option globally, even though this mechanism has not proven to completely reconcile pricing disputes. "The completion or closing accounts mechanism is the dominant pricing mechanism in the US, but because each party has the contractual right to present its valuation proposal, there is always a difference, and there ends up being a back and forth", said Naveed Anwar, a Corporate partner with Simpson Thacher & Bartlett in Palo Alto.

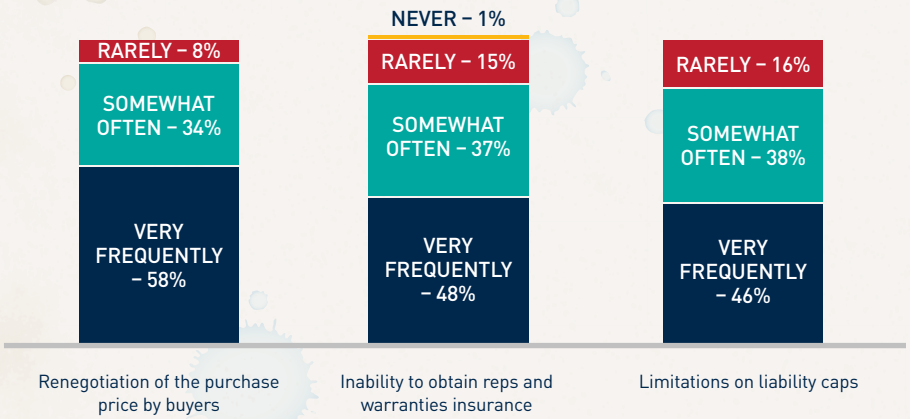
These assessments were backed in aggregate by survey respondents who cited renegotiation of the purchase price as being the most frequent cause of disputes in M&A transactions with which they were personally familiar. Also of note is the sellers' inability to obtain reps and warranties insurance (as well as limitation of liability caps), which nearly half of respondents said happened very frequently.

When asset prices are rising, there is less to fight about on the intraparty side.

Jonathan Moses,
Partner, Wachtell, Lipton, Rosen & Katz, New York

Q. WITH WHAT FREQUENCY ARE YOU SEEING THE FOLLOWING TAKE PLACE IN M&A TRANSACTIONS:

FIGURE 3. OCCURENCE IN M&A TRANSACTIONS



Across regions, the sectors most often involved in disputes are similar.

The technology sector is leading the way when it comes to M&A activity. In the first half of 2021, tech represented 21 percent of all deal volume, up from 16 percent last year. The year-to-year gain, and the current slice of the M&A pie that tech represents, is the largest it has been since the dot-com boom and bust of 2000. Clearly, the pandemic's acceleration of the digital transformations of businesses—which increasingly rely on integrating and buying technology solutions—is at play.

"We are in the type of environment that is driven by technology", said David Edgar, a partner at K&L Gates who focuses on corporate and transactional work. "There is a lot of capital and a lot of competition for good targets".

Relatedly, tech trailed only hospitality & leisure and life sciences as sectors that respondents said experienced more disputes in the past year, and these top three sectors were consistent across all three regions surveyed. "The tech space has become the centre of our universe in many ways, including in disputes", said Allen & Overy's Sheila Ahuja.

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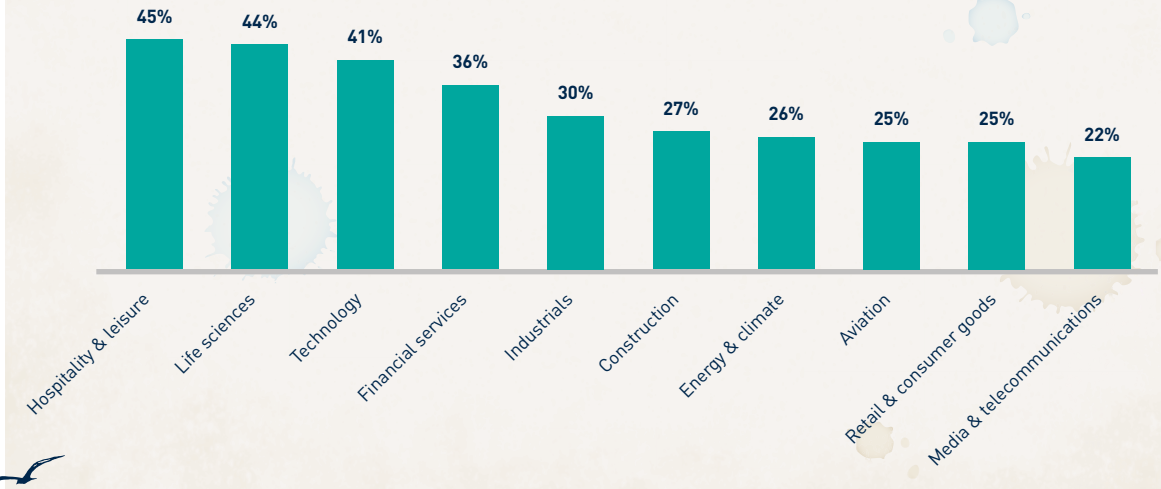
Sheila Ahuja
Partner, Allen & Overy, Singapore

Most survey respondents agreed that the increased volume in tech deals stemming from the pandemic also was responsible for the uptick in disputes. But not everyone is convinced—with 40 percent of North American survey respondents and 39 percent in EMEA pointing to disputes arising from higher deal volumes, which they saw as unrelated to COVID-19.

Q. BASED ON YOUR OBSERVATIONS, WHICH OF THE FOLLOWING SECTORS HAVE EXPERIENCED AN INCREASE IN DISPUTE ACTIVITY OVER THE PAST YEAR? PLEASE SELECT ALL THAT APPLY:

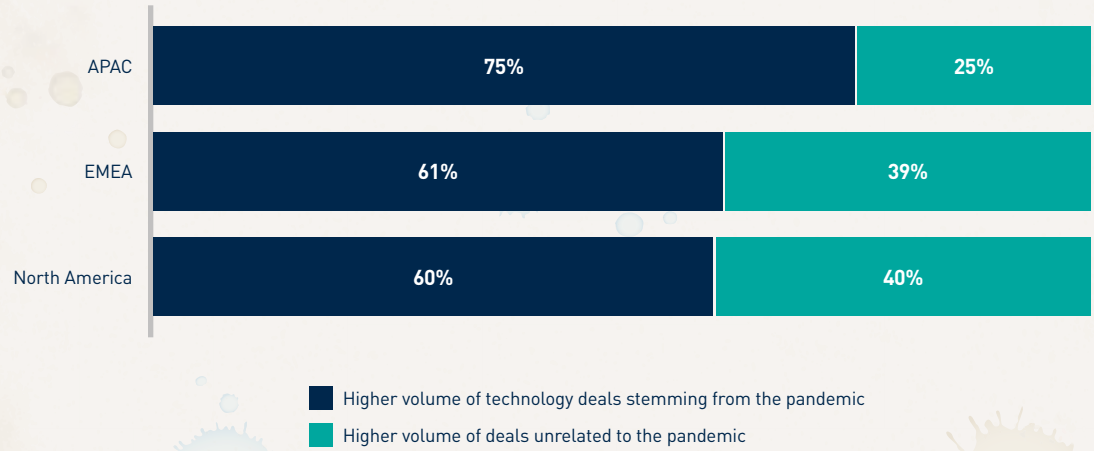
FIGURE 4. SECTORS EXPERIENCING UPTICK IN DISPUTES OVER PAST YEAR



"M&A disputes involving tech companies and intellectual property deals are also having an uptick, but that increase might not be related to the pandemic", said Nils Eliasson of Shearman & Sterling. "There has been a lot of activity in tech. There is a lot of money in the tech sector, and that is possibly just where we are in the economic cycle".

Q. WHICH OF THESE FACTORS DO YOU BELIEVE TO BE MOST RESPONSIBLE FOR AN UPTICK IN M&A DISPUTE ACTIVITY IN THE TECHNOLOGY SECTOR OVER THE PAST YEAR?

FIGURE 5. FACTORS MORE RESPONSIBLE FOR UPTICKS IN M&A DISPUTES IN TECHNOLOGY SECTOR



"Transactions involving technology assets often offer significant value gains", said BRG Managing Director Daniel Ryan, who heads the firm's London office and has more than 25 years of experience in valuing businesses, shares and intellectual property assets in both contentious and non-contentious matters. "But as might be expected, there also are commensurate increases in the level of risk, which can lead to disappointment and ultimately disputes from disgruntled purchasers".

Hospitality & leisure also are seeing more deals and disputes, but for different reasons. Struggles for companies in those sectors are leading to opportunistic acquisitions, distressed asset sales and, therefore, more problematic disputes. "If you happened to have signed a deal in travel and tourism, it was simply a dramatic time period", a US-based disputes lawyer said. "For airlines, those deals were simply not going through; they could not be held together. The buyer might have been insolvent by the time of closing".

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Daniel Ryan
Managing Director,
BRG

The nature of cross-border transactions reveals regional complexities. But some countries are more litigious than others.

In the survey, investors, transaction lawyers, disputes lawyers and corporate finance advisors were asked which regions would drive M&A transactions, disputes or both over the next 12 months. North American respondents were likely to say their own markets, APAC or even Latin America would be the top drivers, while APAC respondents chose Europe and North America. European respondents chose their own markets and the others fairly equally. The fragmentation in the results may suggest a sort of blame game, market rivalries or perhaps selective perception.

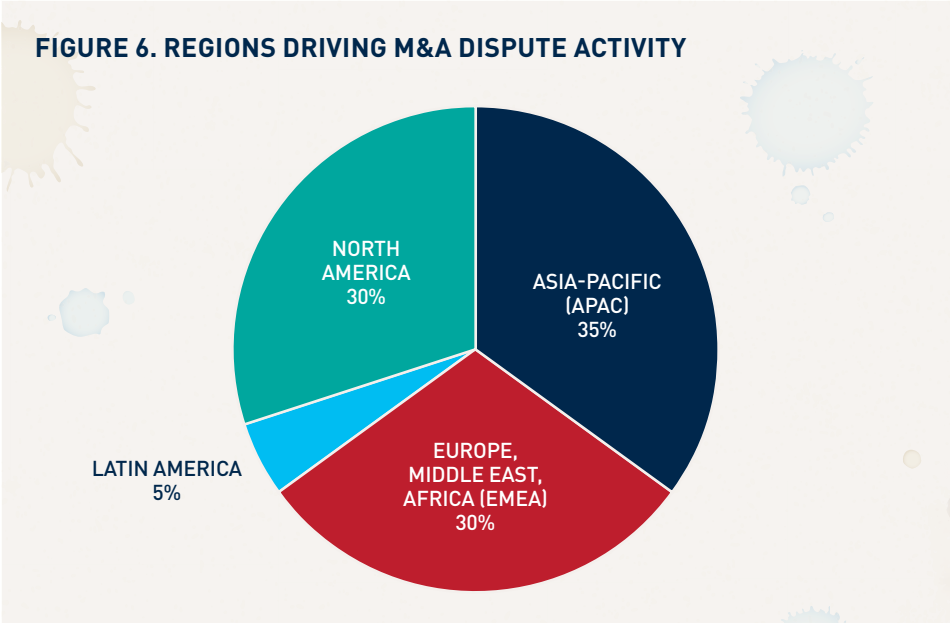
EMEA, North America and APAC were, of course, hit by COVID at different times, leading to different business reactions—including concerning the degree and length of shutdowns. Even before the pandemic, the complexity of cross-border deals made them ripe for disputes. "Nearly all of the disputes we see are cross-border", said Allen & Overy's Sheila Ahuja. She continued, "There are a lot of jurisdictions triggered when a deal goes wrong". Chris Bushell, a dispute resolution partner at Herbert Smith Freehills in London, agreed: "Nothing I have seen for quite a long time has been purely domestic".

Digging deeper into cross-border issues with interviewees, it is clear that there are certain markets where disputes were more common over the past 12 months and where lawyers expect higher rates of disputes to occur in the future. Several interviewees called out China, South Korea and the US as historically more litigious.

A few interviewees mentioned more litigation in India. Daniel Allen of Mori Hamada & Matsumoto said, "There used to be a problem in using arbitration in India. The courts would interfere. The courts are overworked, so things moved slowly. But that has changed, to a degree. The Indian courts have taken a more pro-arbitration stance, and that has led to an opening up of the market, where we can participate in those disputes".

Q. *[ASKED TO THOSE WHO SELECTED EITHER "INCREASE" OPTION IN THE PREVIOUS QUESTION]* WHICH REGION DO YOU EXPECT WILL PREDOMINANTLY DRIVE THIS INCREASE IN M&A DISPUTE ACTIVITY?

FIGURE 6. REGIONS DRIVING M&A DISPUTE ACTIVITY



Differing views on MAC/MAE clauses and effectiveness show a changing landscape.

While it wasn't an overwhelming total among survey respondents, about half said MAC/MAE clauses are the best contractual tool to guard against post-closing disputes. Nearly all dispute litigators said they were either essential or important to consider situationally. Just 4 percent said inclusion of these clauses was "not an ideal option". These findings align with our report last year, in which we noted that MAC clauses were being featured more prominently—and would likely continue to be given the proliferation of pandemic-related disputes.

This year's survey respondents and expert interviews suggest that more attention is being paid to specific terms of clauses as opposed to overreliance and standard boilerplate language. Recent cases in the US and Europe have challenged the notion that, unless otherwise specified, the pandemic or future pandemic-related incidents would be covered under such clauses. In fact, force majeure may be out of scope at this point, with interviewees (in findings similar to those from the 2020 report) noting that if COVID-19 was not the very definition of an "act of God", then what would be?

"I am not sure that they're actually all that useful or relevant for people getting out of deals in the end", said Chris Bushell of Herbert Smith Freehills, but "I think it's fair to say that people have looked at them a bit more closely, and people have been looking at whether more detailed language or additional language goes in, particularly around force majeure, specifically referencing pandemics and this sort of thing as an event".

Mark Johnson, a partner in Debevoise & Plimpton's Hong Kong office and a member of the firm's International Dispute Resolution Group, added: "It's going to come down to how the force majeure clause is drafted, and there will obviously be debates around whether or not a particular aspect of the pandemic has triggered that force majeure clause. I would expect that sophisticated M&A players are tightening up their drafting of force majeure clauses in light of the complex issues thrown up by the pandemic".

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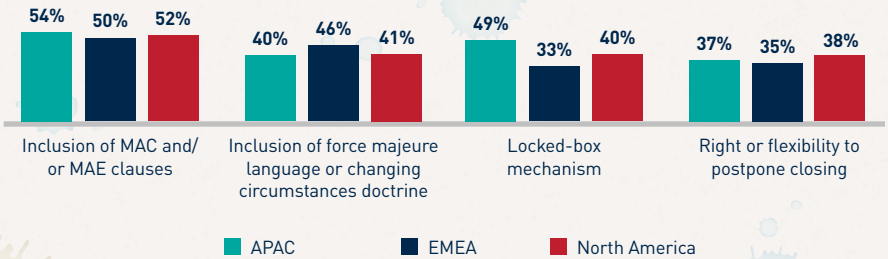
Mark Johnson
Partner, Debevoise & Plimpton, Hong Kong

Q. IN REFLECTING ON SOME OF THE LESSONS LEARNT OVER THE COURSE OF THE PANDEMIC, WHICH OF THE FOLLOWING CONTRACT MECHANISMS ARE THE BEST WAY(S) FOR BUYERS TO GUARD AGAINST FUTURE M&A DISPUTES?

FIGURE 7. BEST CONTRACT MECHANISMS TO GUARD AGAINST DISPUTES



Interviewees cited the pandemic as the inspiration for a proliferation of carve-outs now seen in deal terms around the globe. "Now we see in those ordinary course covenants some specific carve-outs where the seller can respond to an event like the pandemic, similar to the MACs or MAEs", said David Edgar of K&L Gates. Simon Rootsey, a partner with Akin Gump in London, was one of several other lawyers who agreed on the new value of carve-outs as a defence against ongoing pandemic conditions and any similar events in the future: "At the end of 2020, following a significant litigation on MACs in the UK courts being finally determined, it put a healthy new reemphasis on exclusions and carve-outs from a MAC and how these exclusions operate in practice".

And as 2021 drew to a close, the pandemic's sprawling aftereffects showed no signs of abating. "The widespread disruption of supply chains and the impact of government workplace restrictions during COVID have highlighted the need to be very specific about the risks and possible events that each party is attempting to address under these deal terms", said BRG Managing Director Andrew Webb.

The widespread disruption of supply chains and the impact of government workplace restrictions during COVID have highlighted the need to be very specific about the risks and possible events that each party is attempting to address under these deal terms.

Andrew Webb
Managing Director,
BRG

A burgeoning interest in SPACs as an M&A deal tool brings a high risk of disputes.

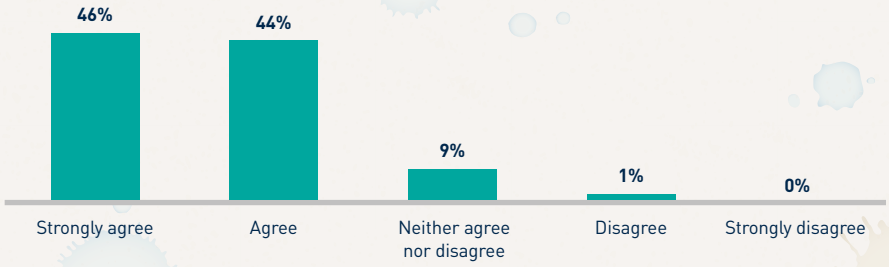
SPACs were all the rage in late 2020 and early 2021. The US Securities and Exchange Commission (SEC) cracked down on them beginning in April 2021, which led to fewer new SPAC listings over the summer. Elsewhere, however, "London, Frankfurt, Amsterdam, Hong Kong and Singapore all have vied for a share of the market by courting sponsors and in many cases adopting listing-friendly regulation in hopes of increasing local issuance", noted BRG Managing Director Terence Mark, who is based in Tokyo and New York. Interviewees, speaking after the SEC crackdown, said that we are still in the early days when it comes to whether SPACs are leading to M&A disputes, but private equity's embrace of them could result in litigious situations moving forward.

London, Frankfurt, Amsterdam, Hong Kong and Singapore have all vied for a share of the market by courting sponsors and in many cases adopting listing friendly regulation in hopes of increasing local issuance.

Terence Mark
Managing Director, BRG

Q *[ASKED TO PRIVATE EQUITY INVESTORS]* SPECIAL PURPOSE ACQUISITION COMPANIES (SPACS) PROVIDE INCREASED FLEXIBILITY IN M&A TRANSACTIONS.

FIGURE 8. SPECIAL PURPOSE ACQUISITION COMPANIES (SPACs) PROVIDE INCREASED FLEXIBILITY IN M&A TRANSACTIONS



"The motivation behind SPACs is to expand sponsors' options for raising capital to invest. They also give private equity another exit route", said B.C. Yoon, co-chair of Kim & Chang's International Arbitration & Cross-Border Litigation Practice in Seoul. "But the disconnect between raising capital and the eventual investment could lead to problems".

Most EMEA and APAC interviewees had little experience when it came to SPACs. North America has proven to be the SPAC epicentre so far, they said, and this is supported by verbatim commentary in our survey, where private equity investors referred to SPACs as "another tool in the deal toolbox" and "a smart M&A tactic". But the regional picture is changing. According to Kevin Hagon, "BRG is starting to see SPAC disputes coming through outside of North America, particularly where our valuation expertise is needed to assess the loss arising from a failed SPAC M&A deal".

US interviewees acknowledged significant risk. "The general theme behind SPACs is uncertainty", explained a lawyer based in Washington, D.C. "The purpose of the structures is to create sort of a time lag between the investor handing over the cash and the investment taking the form of a company that [the investor] can actually get behind. So you're putting a great deal of trust in your sponsors. When they disappoint you, you might find that litigation or arbitration see appropriate response".

"There are many rules tied to them, and there are often incentives tied to the sponsors of the SPAC", said Ryan McLeod, a partner with Wachtell, Lipton, Rose & Katz in New York. "All of that brings potential for conflict. I don't think we have (yet) started to see the type of litigation that will come out of SPACs".

But do SPACs actually lead to higher return on investment? Luke Sobota, a partner with Three Crowns LLP in Washington, D.C., was not sure, and he cautioned that the fiduciary duties of the sponsors could come under the microscope. "SPACs compete with private equity and other corporations for assets. The vehicle itself does not ensure a return on investment, so SPACs seem likely to disappoint at least some investors". That disappointment could contribute to disputes, with investors feeling that they were not properly protected, Sobota said. "This may change, but at present, there is often no detailed investment strategy and little clarity around the fiduciary responsibilities of the sponsors".

Harry Burnett, a partner who focuses on international commercial and investor-state arbitration for King & Spalding in New York, said the SPAC structure offers a lot of opportunities—and a potential increase in litigation. "Common SPAC disputes involve shareholder suits in federal courts, including fraud allegations under Rule 10B-5 of the Securities Exchange Act and misrepresentations in proxy statements and shareholder suits in the Delaware Court of Chancery for, among other things, breach of fiduciary duty against sponsors and shareholders".

> ***The entire fairness rather than business judgment rule is also gaining some prominence based on plaintiffs arguing that SPAC founders and directors are completely conflicted...***

Harry Burnett
Partner, King & Spalding, New York

"The entire fairness standard rather than deferential business judgement rule also is gaining some prominence based on plaintiffs arguing that SPAC founders and directors are completely conflicted which may result in shifting the burden to the corporation", Burnett said. "That is a tough standard requiring a judicial determination whether a transaction is fair to both process and price. But plaintiffs are surviving motions to dismiss. We're also seeing emerging risks of litigation opposing the SPAC merger itself, where the SPAC minority owners sue to stop the merger, and by seeking an injunction based on state law claims or breach of contract. I think these are going to proliferate as more plaintiffs' firms chase these types of transactions".

Growing private equity involvement creates different sticking points and concerns.

Private equity is heavily involved in disputes on both the buyer and seller sides, with survey respondents citing its involvement in more than two-thirds of transactions. But the corporate finance lawyers and corporate finance advisors surveyed largely agreed that private equity involvement in M&A increases the chances of post-closing disputes. Additionally, nearly 70 percent of disputes and litigation lawyers surveyed said private equity is involved in disputes on the buyer and seller sides. And interviewees noted that reps and warranties insurance was a particular sticking point in deals involving private equity.

"There is a lot of activity overall in private equity, because a ton of capital needs to be deployed", said David Edgar of K&L Gates. "There is so much private equity involvement that they are having an impact on terms. We see that buyers are having difficulties negotiating robust indemnification packages, and instead are relying on insurance".

Ed Poulton of Baker McKenzie echoed this message: "It's not new, but private equity generally refuses to provide warranties and indemnities, which is fuelling the market for warranty and indemnity insurance".

The shift to reps and warranties insurance, in part nudged by private equity and startup tech deals, can streamline the negotiation process by having a third-party insurer underwrite the costs of unknown risks, which can speed up deals. That acceleration is the potentially good news. But the factors causing the insurance market to skyrocket also appear to be driving cost increases simultaneously.

None of that replaces tried and tested due diligence methods; all of our experts and private equity investors surveyed agreed this was the best way to protect deals against disputes. One survey respondent said, "Most post-closing disputes were avoided by our firm through a combination of careful and thorough due diligence by the buyer, full disclosure of all known issues and risks by the seller and well-thought-out resolutions to contested issues that are carefully reflected in the acquisition agreement".

Q WHICH PERCENTAGE RANGE BEST REPRESENTS THE PROPORTION OF DISPUTES IN WHICH PRIVATE EQUITY PARTICIPANTS ARE INVOLVED ON THE BUYER SIDE?

Q WHICH PERCENTAGE RANGE BEST REPRESENTS THE PROPORTION OF DISPUTES IN WHICH PRIVATE EQUITY PARTICIPANTS ARE INVOLVED ON THE SELLER SIDE?

FIGURE 9. PE IS HEAVILY INVOLVED IN DISPUTES THAT TRANSPIRE

66% of disputes involve PE on the buyer side

69% of disputes involve PE on the seller side

Conclusion

If you want a real-world way to think about how to get to the bottom of individual M&A disputes, think about when you hear a rattle coming from your car's left front wheel and head to see a mechanic. One mechanic might remove the wheel and tell you the axle is the problem. Another might disassemble the entire car, lay it out on the ground and tell you that yes, the axle is the problem—but the real cause is a bad structural connection to the rest of the vehicle.

That second approach, built around understanding the fundamental issues at play and the root causes behind disputes, is crucial in a moment with increasingly complex M&A deals. The findings in this report make that incredibly plain—and show why a multidisciplinary approach focused on understanding fundamentals has never been more important.

Mustafa Hadi
Managing Director,
BRG

November 2021

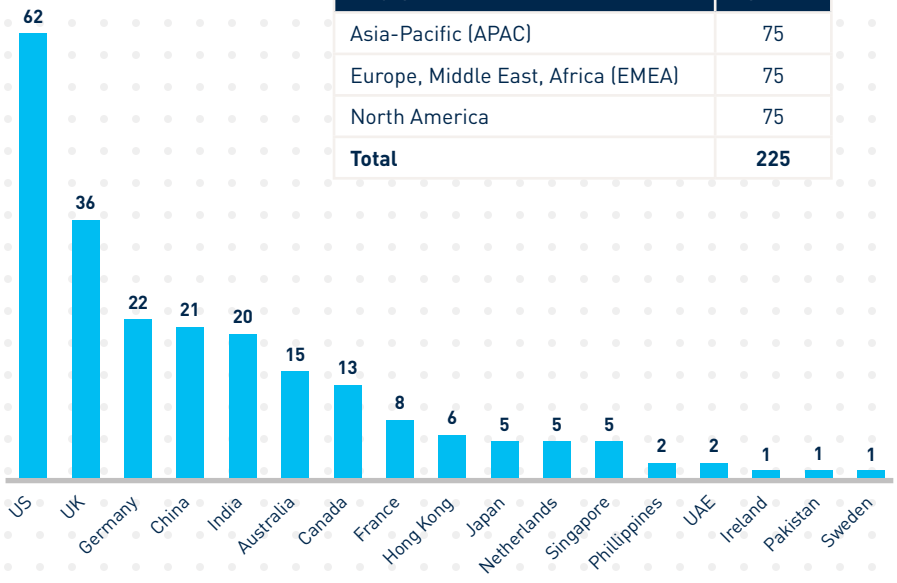
Methodology

The research detailed in this report built upon findings uncovered in an APAC-specific initiative completed in Q4 2020. The initiative consisted of qualitative and quantitative research phases.

From May to August 2021, PR agency Greentarget interviewed 17 BRG clients in Hong Kong, Japan, Singapore, South Korea, the UK and US. Interviewees worked on M&A transactions and/or disputes and litigation arising from M&A transactions. We have included quotes from some of these interviews in this report. A full list of contributors is included on page 33.

In August 2021, BRG distributed a survey to M&A deal lawyers, disputes lawyers, corporate finance advisors and private equity investors across the world. A total of 225 respondents completed the survey, consisting of 115 lawyers (private practice or in-house), 80 private equity professionals and 30 corporate finance advisors. The panel was split evenly in terms of geographic representation, with 75 respondents each based in APAC, EMEA and North America. Full demographic breakdowns are included in Figures 10 to 15:

FIGURE 10. RESPONDENT LOCATIONS



REGION	NUMBER
Asia-Pacific (APAC)	75
Europe, Middle East, Africa (EMEA)	75
North America	75
Total	**225**

FIGURE 11. REGIONS OF OPERATION

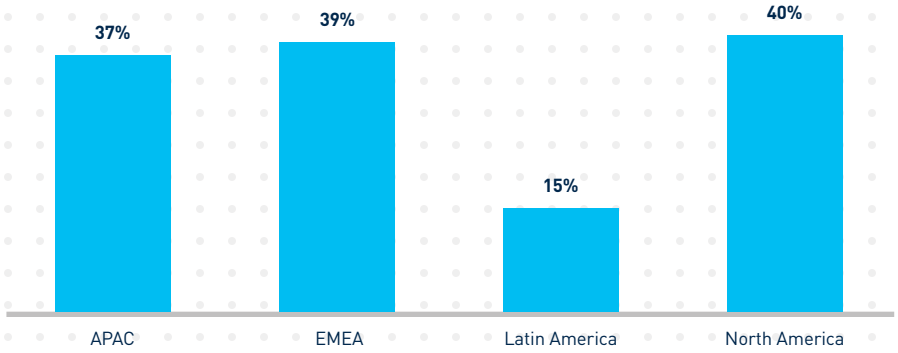


FIGURE 12. PROFESSION

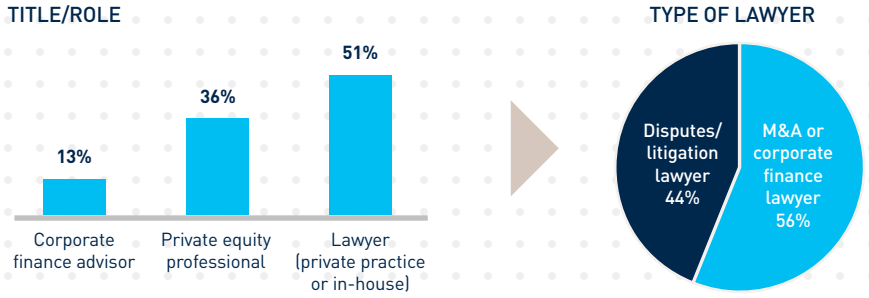


FIGURE 13. NUMBER OF EMPLOYEES

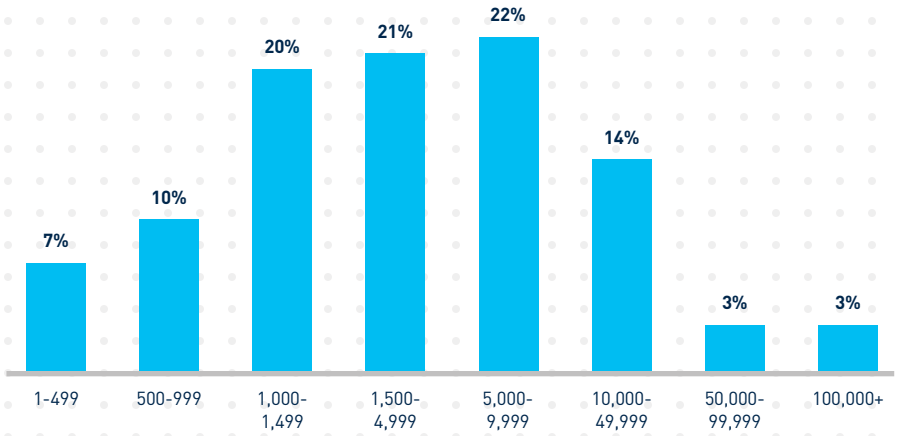


FIGURE 14. LAW FIRMS' ESTIMATED 2020 REVENUES

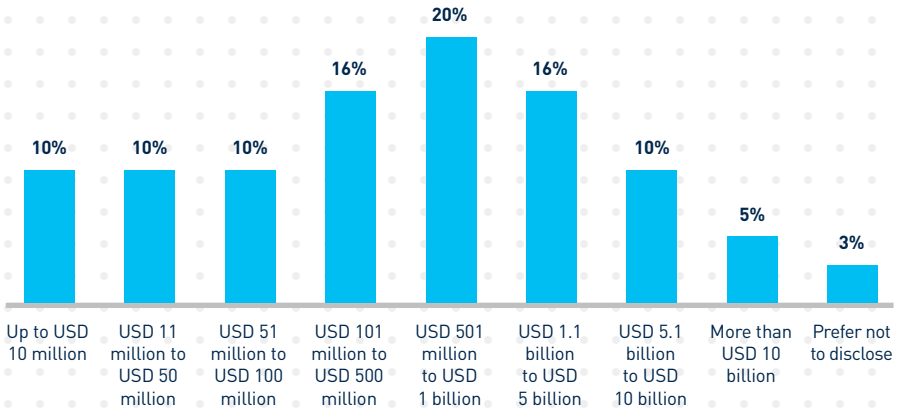
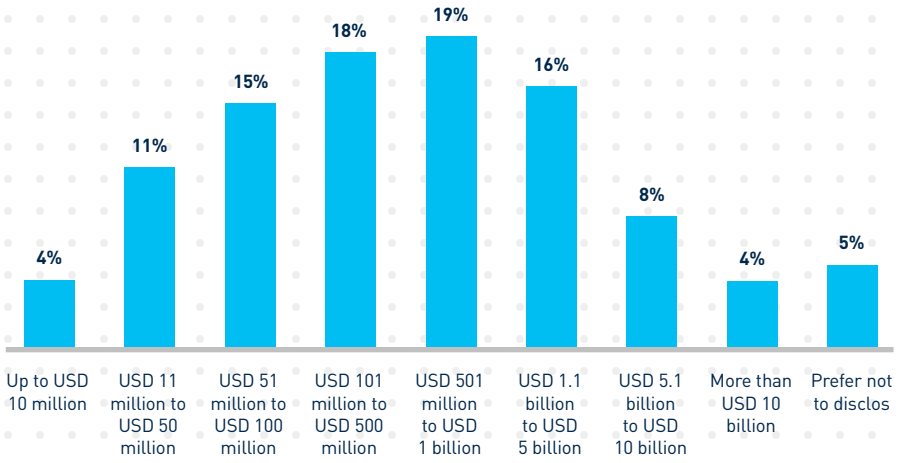


FIGURE 15. PE FIRMS' ESTIMATED 2020 AUM



Contributors

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Sheila Ahuja is a partner in Allen & Overy's Global Arbitration group based in Singapore and the Joint Chair of the firm's India Group. She has advised on a wide range of arbitration matters, both commercial arbitrations and investor-state arbitrations, as well as arbitration-related court matters. Ms. Ahuja has particular experience of energy and infrastructure disputes, disputes arising from joint ventures and distributorship arrangements, and disputes relating to complex financial products. She is a Solicitor Advocate with Higher Rights of Audience before the Senior Courts of England & Wales and the Courts of Hong Kong and is qualified to appear before the Singapore International Commercial Court.

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Daniel Allen is an international arbitration specialist, recognised for his leadership in the Japanese market by Chambers and Partners, Who's Who Legal, and The Legal 500. He is an experienced advocate and has represented both companies and states in all types of disputes, including international commercial arbitrations, investor-state disputes and construction matters. Mr. Allen has represented clients in arbitrations under the ICSID, UNCITRAL, ICC, SIAC, and JCAA rules, among others. In addition to his work as counsel, he accepts appointments as arbitrator and is a member of the JCAA Panel of Arbitrators.

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Nils Eliasson is a partner in Shearman & Sterling's International Arbitration practice. He acts as counsel or arbitrator in commercial and investment treaty disputes conducted under the auspices of the HKIAC, ICC, SIAC, LCIA, CIETAC, VIAC, DIS and the SCC, as well as in ad hoc proceedings under the UNCITRAL arbitration rules. Mr. Eliasson's experience includes disputes related to joint ventures, mergers and acquisitions, energy, oil and gas, infrastructure, construction, engineering, licence disputes, telecommunications and real estate. He also has handled investment treaty arbitrations under various bilateral investment treaties and the Energy Charter Treaty.

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Mark Johnson is a partner in Debevoise & Plimpton's Hong Kong office and a member of the firm's International Dispute Resolution Group. His practice focuses on commercial litigation, international arbitration and white collar/regulatory defence matters, particularly in the financial services sector. Mr. Johnson joined Debevoise in March 2015. Prior to joining the firm, Mr. Johnson was a partner at a leading international firm in Hong Kong, where for over 25 years he advised clients on a range of dispute resolution and white-collar crime matters in Hong Kong and most of the major financial centres in Asia.

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Chris Bushell has significant experience of acting for clients with commercial disputes across various sectors and geographies, with particular focus on disputes work involving banks and financial buyers. His experience includes advising on complex contractual disputes, class actions, shareholder and joint venture disputes, partnership and LLP disputes, economic torts, fraud and conspiracy, asset tracing, professional negligence, insolvency disputes, employment-related disputes and privacy and defamation issues. Mr. Bushell is president of the London Solicitors Litigation Association (LSLA), which has over 3,000 members and helps to shape civil justice reform and promote best practice in litigation.

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Sophie Lamb QC is a partner in the London office of Latham & Watkins and a member of the firm's Litigation and Trial Department. She is in The Legal 500 Hall of Fame; described as "one of the pre-eminent arbitration lawyers of her generation", she is a recognised leader in the field of investment and commercial arbitration and an accomplished advocate. She counsels corporate, financial and sovereign entities on their most sensitive and topical international disputes and challenges. Ms. Lamb is a member of the UK Policy Committee of the ICC, the world's largest business and trade organisation. She also has served as global co-chair of the firm's International Arbitration practice.

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Ed Poulton is the managing partner of Baker McKenzie's London office and chairs its Global International Arbitration Practice Group. A key name in the arbitration community, Mr. Poulton sits as an arbitrator in ICC and LCIA arbitrations and is the consulting editor of a seminal text on the arbitration of M&A disputes. Mr. Poulton also has extensive experience of investment treaty arbitration.

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Simon Rootsey Partner, Akin Gump, London

Simon Rootsey works with private equity firms, infrastructure investors and corporates on complex cross-border M&A (both public and private) and private equity transactions across a broad range of sectors and in multiple regions. He frequently represents clients in the energy (especially downstream and midstream), infrastructure and healthcare/life sciences sectors where he has particularly deep experience. Mr. Rootsey regularly works with clients on transactions across Africa (where he has worked on deals covering over 30 African jurisdictions), Latin America and transatlantic take-private transactions or other transactions where US clients are investing (often for the first time) in Europe.

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Naveed Anwar is a Corporate partner based in the Simpson Thacher's Palo Alto office. His practice focuses on mergers and acquisitions, where he represents public and private companies and private equity firms in a variety of domestic and cross-border transactions. He has experience in a broad range of transactions, including acquisitions, dispositions, carve-outs, leveraged buyouts, de-SPAC transactions, recapitalisations, venture financings, joint ventures and other complex transactions across a wide variety of sectors. Recently named a 2021 "West Trailblazer" by The American Lawyer, Mr. Anwar also was recognised as a 2019 Law360 "Rising Star" in Private Equity and included in Daily Journal's "Top 40 Under 40" in California in 2018.

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Harry Burnett focuses on international commercial and investor-state arbitration matters, along with general domestic and international litigation. A partner in King & Spalding's International Arbitration practice, Mr. Burnett represents clients in a broad array of international disputes and frequently serves as an arbitrator in international disputes. With more than 25 years of litigation and arbitration experience, he represents clients in arbitration of international commercial disputes under rules of the ICC, ICDR, JAMS International and CPR International Institute for Conflict Prevention & Resolution, and in investor-state arbitrations under the rules of the ICSID, UNCITRAL and ICC related to claims under bilateral investment treaties, the ECT, multilateral investment instruments and local investment laws.

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David Edgar provides strategic corporate and transactional advice on a domestic and international basis. His practice focuses on advising public and private companies, boards of directors, special committees and senior management in connection with mergers and acquisitions, capital markets transactions, activist planning and defence, and corporate governance matters. Mr. Edgar's transactional experience includes domestic and international mergers and acquisitions, leveraged buyouts, "going private" transactions, LLCs and partnerships, corporate restructurings and recapitalisations, and venture capital and private equity financings, restructurings and exits.

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Ryan A. McLeod is a partner in Wachtell, Lipton, Rosen & Katz's Litigation Department. His practice focuses on representing corporations and directors in litigation involving mergers and acquisitions, proxy contests, corporate governance disputes and class and derivative actions involving allegations of breach of fiduciary duty. Mr. McLeod is also a lecturer in law at Columbia Law School, guest lectures on corporate litigation and governance at schools throughout the United States and is admitted to practice in New York and Delaware.

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Luke Sobota is a founding partner of Three Crowns and managing partner of the firm's Washington, D.C., office. He represents private and sovereign clients in some of their largest and most important commercial, investor-state and interstate arbitrations. His practice experience spans the financial, technology and energy technology sectors. Mr. Sobota also has 20 years of experience litigating international issues in US courts. He is a lecturer on law at Harvard Law School and regularly writes and speaks about issues of international law and arbitration. Mr. Sobota's publications include the second edition of Judge Stephen Schwebel's I*nternational Arbitration: Three Salient Principles* (Cambridge, 2020), and *General Principles of Law and International Due Process* (Oxford, 2017).

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Mr. Webb is a former Rothschild investment banker with over 25 years of experience in advising governments, private companies and joint ventures on strategy, fundraisings, debt financings, mergers, acquisitions, disposals and restructurings with a combined deal value in excess of $25 billion.

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Berkeley Research Group, LLC (BRG) is a global consulting firm that helps leading organisations advance in three key areas: disputes and investigations, corporate finance, and performance improvement and advisory. Headquartered in California with offices around the world, we are an integrated group of experts, industry leaders, academics, data scientists and professionals working across borders and disciplines. We harness our collective expertise to deliver the inspired insights and practical strategies our clients need to stay ahead of what's next.

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