RESEARCH: TRENDS & CONCLUSIONS

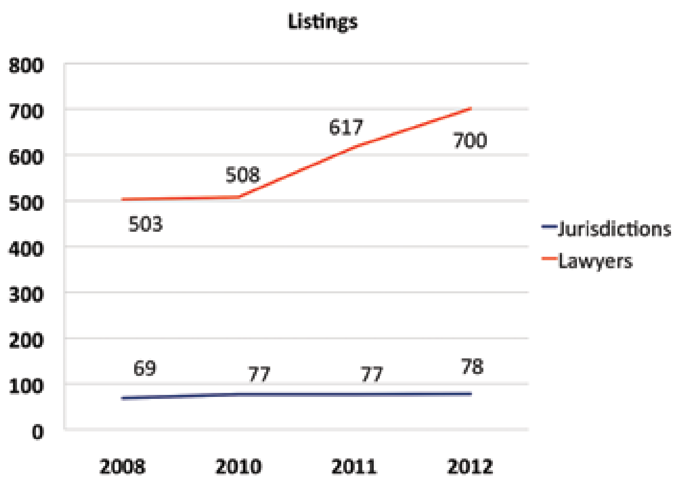
With the benefit of over 15 years of research and thousands of votes from clients and private practitioners, Who's Who Legal takes a closer look at developing trends in the M&A legal marketplace worldwide

GLOBAL M&A ACTIVITY

This year we list 700 top merger and acquisitions lawyers. There has been a sizable increase from last year's edition, which featured 617 (see chart 1). The lawyers selected in this year's guide hail from 78 countries. As was the case last year, the number of jurisdictions remains steady but we see more entries in established finance centres, such as England, New York, California, Canada: a demonstration of the M&A expertise and market confidence in those areas.

Last year we observed that a precarious form of economic recovery was underway, likely to be dominated by China and the USA, and that the M&A legal marketplace had experienced a shift from traditional practice to more distressed deals, restructuring and joint venture-based work.

Our research this year tells an interesting story of general commercial growth but significant disparities in deal flow and volume size between regions. Contributors to the research remarked that improvements to the economic and business conditions appear to be concentrated in specific geographical areas and in some cases, particular industries. But an imbalance in top-quality work between types of M&A deals, financing problems and a depressed M&A market in Europe are the main challenges in the being experienced by lawyers.



According to lawyers we spoke with, there has been an overall increase in M&A activity since the end of 2010, which continued into 2011; however, deal flow dropped in the last quarter. Inbound work became increasingly sparse due to the European sovereign debt crisis and market volatility, and outbound deals increased marginally. Northern and Eastern Europe enjoyed a high-value deals. According to mergermarket, the Nordic countries saw an 87 per cent increase in total M&A value compared to the third quarter of 2010, attributable to media, technology and financial services deals, and high-value activity was seen in Eastern Europe during the same period. Our research suggests that investors are demanding more legal support within the Nordic and Baltic regions: over the past three editions, Linklaters LLP have been well represented in our research and was the leading legal advisers to deals (based on value) in the Russian and CEE area in 2011, and Baltic firm LAWIN features nearly 43 per cent more lawyers in this edition than last year. Freshfields Bruckhaus Deringer leads the way in terms of deals in Europe, having worked on seven out of 10 of the largest deals in Europe between the end of 2010 and the end of 2011.

Over in North America, the biggest trend that has emerged from our research this year is the prevalence of demergers and spin-offs compared to previous years. Many lawyers explained that the underlying market conditions have created an environment in which companies are choosing to focus on streamlining their operations, when four years ago the same companies would have been involved in multibillion-dollar takeovers. Companies such as Cargill, Marathon Oil, Kraft Foods and ConocoPhillips have effectively reduced their asset bases in order to raise capital, reduce debt and refocus on their core services. As one DC-based lawyer put it, "there is simply not enough financing or confidence in the market for mega-deals". This is certainly true: 2010 saw the lowest number of mega-deals since 2004 and this year little has improved. But the few successful mergers and acquisitions there were in the market were spectacular: for example, *Duke Energy/Progress Energy*, worth $25.8 billion, and *Express Scripts/Medco Health Solutions*, worth $33.4 billion.

FINANCING AND INDUSTRIES

Although global activity increased between 2010 and 2011, the difference was paltry: lawyers noted that equity financing is less available now than it was a few years ago, due to turbulent markets and unwillingness by companies to issue more equity. The debt crisis has resulted in delayed or abandoned deals where parties cannot agree on valuations (for example the failed sale of All3Media by Permira), which leads to further unpredictability and a lack of confidence in previously safe European enterprises.

The relative success stories of PE financing are centred in North Europe, where economic performance is not as reliant on the decisions of the European Central Bank, therefore investors can plan and predict transactions. In the US there is some financing available for very high-quality deals in the form of private equity and cash financing, particularly for strategic buyers. The problem really lies in the leverage conditions: a number of the contributors expounded on the expensive, less favourable conditions offered by banks due to the current economic environment, which makes deals less attractive or less viable. Lawyers have to be more creative in their financial advice and structuring, so are expected to have global knowledge of markets, regulations and financing on a microeconomic level. Clients demand a more sophisticated and wholesale service and are prepared to source and instruct the very best and the most knowledgeable counsel in that geographical region to ensure deals are pushed though, which mirrors the 12 per cent growth in our total listings.

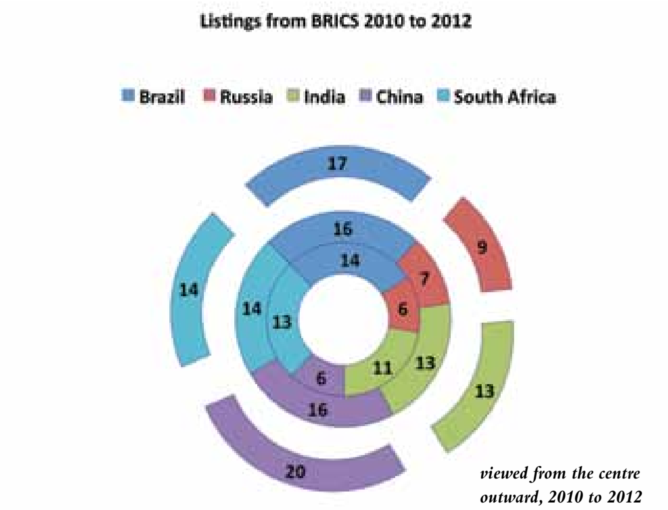
Further, national regulators are taking a harder, protectionist line on proposals where there is a fear that the host county may lose competitiveness. We can see this most keenly in the US: competition and merger regulators are trying to strike a fine balance between encouraging and facilitating high-value deals and guiding against potentially anti-competitive behaviour – for example, the failed AT&T and T-Mobile takeover. The effect is disconcerting, according to lawyers: it creates a loss of momentum in dealmaking, and perhaps dampening confidence, but most importantly, unsuccessful deals create massive losses for the relevant companies. AT&T reported losses of $6.7 billion stemming from the transaction. Many lawyers observed that globalisation means there is little difference between trends affecting domestic deals and foreign deals, most clients are looking for proven experience in doing a certain type of deal and significantly, practitioners who have a good understanding of government regulations and can offer solutions to anti-competition concerns.

From the research it is clear that the busiest industries are financial services, resources, energy, technology and pharmaceuticals. By the end of 2011 natural resources deals accounted for nearly 30 per cent of total global M&A transactions and two of the largest deals last year involved energy companies: Duke Energy and Kinder Morgan. Particularly in the energy, pharmaceutical and resources industries there has been a demand for specialist M&A lawyers who have regulatory knowledge and are equipped to advise on complex, international rules. However the demand for expertise is still dictated by the type of transaction, rather than the industry which it concerns. Client demands are focused on lawyers who can do certain types of deals, arrange the best financing and navigate the most complex rules.

In summary, the outlook for the global M&A bar is going to be variable for the next 18 months or more. The fourth quarter of 2011 showed signs of economic improvement: lawyers said that there is reason to believe that if Europe stabilises and the US controls its debt situation, there is tremendous pent-up demand that could result in a wave of M&A, a "second boom era" in the next five years. But ultimately "financing is not the governor of activity, confidence is", according to a New York-based lawyer. Lawyers expect to see more slow-paced, mid-level deals.

BRICS 2012

In our previous edition we reported on the increase in the number of entrants from the Asia-Pacific region as economies in that region prospered on the back of innovation and booming export trade, and clients demanded a more transnational service. The research has also raised interesting trends about Western law firms' willingness to move into new geographical areas, promulgated by improved trade links. Chart 2 illustrates how the research has grown to reflect the expansion of legal teams and their focus into known growth markets over the past two years.



viewed from the centre outward, 2010 to 2012

Last year, China's outbound M&A was a major force behind the country's financial strength. As can be seen in the chart above, China has seen the biggest leap from six to 10 inclusions. This year, lawyers are seeing fewer inbound deals being completed. The problem is not investment – healthy balance sheets mean cash financing is readily available – the challenge for foreign investors is gaining government approval for projects. The government has implemented a filing process to control the inflow of foreign capital but this process is very slow, and coupled with the valuation disparities in the market, deals are proving difficult to make and execute.

An industry that is generating a lot of work for domestic practitioners is real estate development. Foreign investors seek to acquire new projects, which are facilitated by local lawyers. They expect to see an upswing in inbound M&A activity relating to real estate financing and the number of high-calibre China-based lawyers in our research is expected to increase next year.

Other parts of the Asia-Pacific region are experiencing interest from European and US law firms. The number of South Korean entrants in our research has increased by 50 per cent since our 2010 edition – a testament to the specialist advice that clients are looking for in the region. A number of US firms are creating offices and desks in the country: for example, Cleary Gottlieb Steen & Hamilton LLP and Simpson Thacher & Bartlett LLP are to set up offices in Seoul this year in order to capitalise on sizeable, existing market shares and better cater to their Korean clients. Cleary Gottlieb are looking to expand their domestic client base, capitalising on deals such as advising Kookmin Bank on its stake in KB Financial Group (August 2011) and other finance work, as well as cross-selling litigation, arbitration and competition services. But under a condition of the US-South Korean FTA, which was signed in November 2011, US firms cannot merge or hire local lawyers until 2017.

On the European side, since July 2011 when the EU signed an FTA with the country, UK firms have the option of entering the Korean market: so far only Clifford Chance has announced its intention to open a Seoul office, but with so many lawyers who are already UK and US qualified, it is unknown whether more UK firms will throw their hats into the ring.

Cleary Gottlieb continue to broaden their horizons in emerging markets with the launch of a São Paulo office in August 2011. The objective is to take better advantage of its large Latin American practice and meet the growing demands of the Brazilian market. Brazil-based lawyers are seeing a lot of inbound foreign investment, mainly from US multinational companies, China, South Korea and – perhaps surprisingly – Finland. Lawyers complained that the challenge at the moment is traversing the bureaucracy of the regulators. Late last year Brazil approved a new competition law, due to take effect this year. The law will introduce a pre-merger notification system and new thresholds and penalties in order to consolidate the merger review system. It is anticipated to result in a renewed demand for lawyers who have a good knowledge of the Brazilian competition agency and the new rules. It is unlikely to deter inbound investment but will affect the cost of transactions and influence the types and feasibility of deals in the market, which will create work for many M&A lawyers in the medium term.

Our research reflects the steady pace of M&A growth India has experienced this year. The number of entrants increased from 11 to 13 and this is expected to keep rising as outbound transactions outstripped incoming deals in 2011: lawyers put this down to the favourable private equity financing available for overseas energy, media and consumer projects. India enjoyed 8.2 per cent of total value of deals in the Asia-Pacific area between the first and third quarters of 2011, compared to 10.2 per cent in total volume of deals in 2011, according to mergermarket. These agreements were led by established, domestic firms with international reputations, such as AZB Partners, Desai & Diwanji and Amarchand & Mangaldas & Suresh A Shroff & Co.

Historically, intra-regional M&A has been intensive in Russia and Eastern Europe. Lawyers are seeing a lot of banking M&A, such as the consolidation of the First Ukrainian International Bank with Dongorbank in the summer of 2011. Furthermore, lawyers pointed to the shifts in activity: 2011 was quiet compared to the pre-crisis years but the market was more buoyant than in 2010. According to one lawyer, the biggest interest in the region at the moment is agriculture, following the lift on certain restrictions on the purchase of land. Financiers and real estate developers are investing heavily, and the country can expect a large rise in ventures and acquisitions in this sector. The reason for this is an intention to promote the land for renewable energy and utilities, as is also the case in countries like Kazakhstan where Chinese and Russian companies are sourcing assets on which to cultivate natural resource projects. However, a key set back has been the low completion rates and tight deadlines due to more government control on the regulatory side and therefore delays in approval, but according to one Kazakh lawyer, it has not stopped companies becoming more confident, more active and seeking to expand.

In South Africa the new Companies Act was introduced last year, which superseded the previous one that had been in place for 30 years. It is modelled on US, Canadian and UK legislation with the aim to change how companies are set up, improve shareholder relationships and establish a business rescue mechanism similar to that of Chapter 11. Lawyers say this new law has dominated their practice in the past six months as they have been advising clients on new requirements, helping them to amend their constitutions to become aligned with it and providing compliance training and internal reorganisation. They expect this trend to continue into the new year as South Africa experiences more inbound investment; foreign clients, particularly from China, India, Japan and the US, need educating on the nuances of the law and help in acclimatising to the country's growth strategy, mainly in the form of Black Economic Empowerment policies. The market is more active this year than last year, with a combination of mid and big value deals, and the consequence is that the M&A bar is expanding to meet the demands of the growing economy. We see this most clearly with Norton Rose South Africa's ambitious incorporation of Deneys Reitz in June and DLA Cliffe Dekker's expansion of its Africa personnel last year. Firms are strengthening their Africa practices to provide domestic expertise to meet foreign work, and this approach is hoped to continue as the country tries to recreate the fast pace of economic growth it enjoyed in the first quarter of the year.

FIRM ANALYSIS

In chart 3, the presentation of leading firms in our research from 2007 through to 2012 shows slight fluctuations but generally a steady performance from most inclusions and some clear success stories.

As was the case last year, Skadden continues to earn the leading position as most-represented firm in the M&A research on average over the five-year period. Its best year was 2010 when the firm took full advantage of its regulatory strengths as well as its financial institution and enforcement expertise, providing counsel to leading agencies and multinational clients during the aftermath of the economic crisis when traditional M&A experienced a slowdown. Freshfields once again features prominently and has the most inclusions this year with 13 lawyers across five countries. As we reported last year, the strategic positions of the offices of both firms in major financial centres, New York, London, and other key European cities, meant they were well placed to adapt to the changing economic marketplace and shifting legal frameworks.

Further, as well as Freshfields, firms such as White & Case LLP and Allen & Overy LLP have established offices with specialist capital and equity teams throughout the world, principally in Europe, and they continue to expand their global platform into emerging markets, such as the Czech Republic, Russia, Turkey, Hungary and Kazakhstan. In the alternative, Slaughter and May continues to do what it does best in England: "Slaughters is in a league of its own," according to one London-based lawyer. The firm also calls upon its "best friends" network of outstanding local leaders such as Bredin Prat, Hengeler Mueller and Uría & Menéndez to offer a cross-border service to its international clients.

King & Wood has made a significant impact on the research this year with five new inclusions. Unsurprisingly, the call for Chinese expertise is in line with the growth in China-led M&A activity and therefore foreign client demands for a tailored, effective service to traverse the country's complex regulatory policies. This trend is presumed to continue into the new year and work is expected to remain robust although market turbulence may affect the timing and completion of ongoing deals.

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In summary, it has been a good year for US mergers but less so for acquisitions, and global market volatility has resulted in an unexpected level of valuation problems and delayed or abandoned deals. Emerging markets M&A was down in the last quarter of 2011 but is expected to rise this year as more private equity financing becomes available, prompting more deals and strategic buyouts, particularly in the natural resources, infrastructure, technology and real estate sectors. Overall, lawyers do not expect to see a return to the high levels of mega-deals of 2007 for a number of years: market confidence is still low as the market struggles to remain steady enough for deals to be done, and government regulatory bodies are taking a more protectionist and cautious approach to major foreign investments. Looking ahead to the next 18 months, lawyers anticipate a stronger year than 2010 and the latter end of 2011 and remain cautiously optimistic overall.