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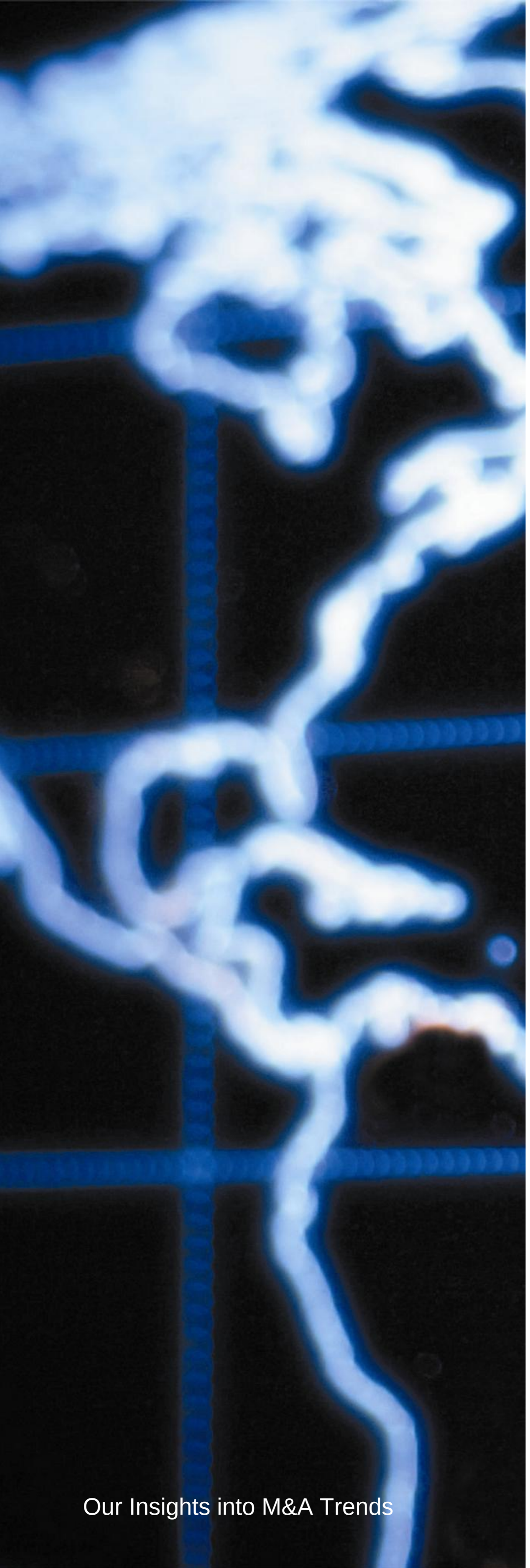
Global M&A

Clifford Chance's position in Mergermarket league tables (First half 2012)

Our Insights into M&A Trends - Global Dynamics

July 2012

CLIFFORD CHANCE



Contents

M&A - The Global Picture

“The M&A decline seen in the latter part of 2011 has continued into the first half of 2012, with global economic slowdown and volatility in the equity and financial markets continuing to impact activity levels. Despite this gloomy picture, one thing is for sure – M&A should be happening. With excess cash on corporate balance sheets and limited prospects for organic growth, businesses across many sectors have the appetite to do deals in order to achieve growth targets.

There is a glimmer of hope that the global M&A market may be recovering. In the period since April, there has been a tentative uptick in activity levels. However whether this uptick is sustainable remains to be seen. Macroeconomic and geo-political factors continue to cause great uncertainty and businesses remain extremely cautious about the future. In addition, across all regions greater scrutiny from shareholders is putting M&A decision-making firmly under the spotlight.

The outlook for the remainder of 2012 is therefore uncertain. We are unlikely to see a sustained recovery in M&A activity until a period of stability emerges. However there are opportunities in many regions and sectors, and compelling deals with strong strategic rationale will still get done. We are also likely to see further spin-offs and de-mergers, as well as joint ventures and other strategic alliances.”

Matthew Layton
Global Head of Corporate
Clifford Chance LLP

Visit our online resource:

The Clifford Chance Global M&A Toolkit
Clarifying the complex world of Global M&A

www.cliffordchance.com/GlobalM&AToolkit

Global activity levels

Decline continues into first half of 2012; Outlook is weak, until confidence returns

Global M&A activity is down 22% in the first half of 2012, compared to the same period last year, with total deal value falling from US$ 1185 bn to US$ 930bn. Compared to the second half of 2011, this represents a 10% decline

However after an extremely slow first quarter of 2012, M&A picked up somewhat between April to June 2012 in all regions, amounting to a 21% increase globally on the first quarter of the year (by value)

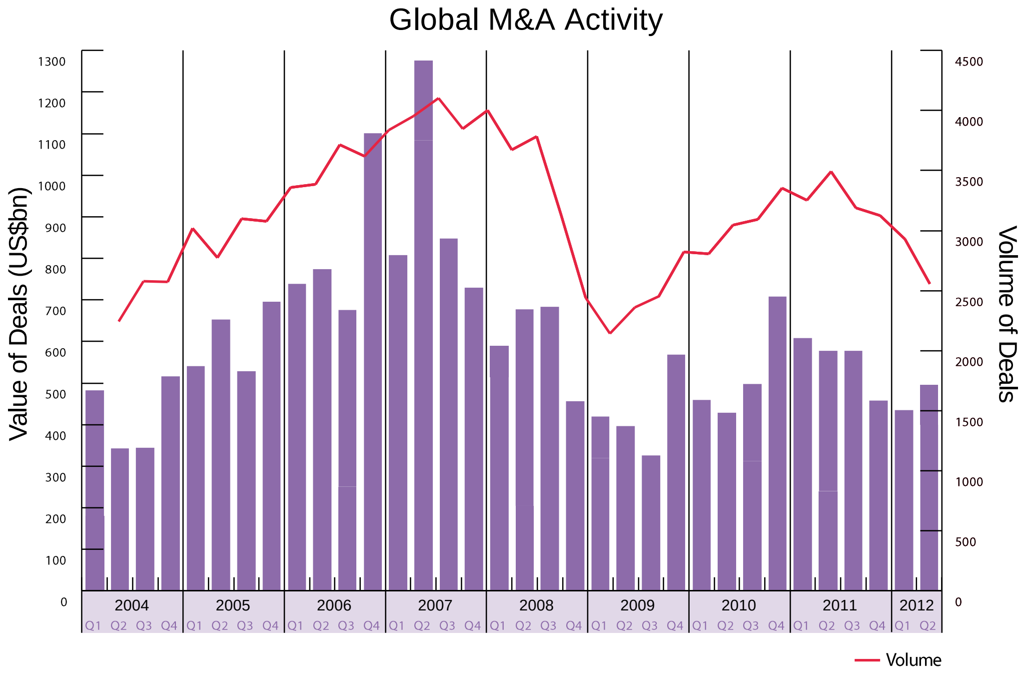
Cross-border M&A continues to comprise a substantial proportion of all M&A activity (43% in year to date). Cross-border M&A between regions increased to 30% of total activity. Outbound M&A from emerging markets saw a dramatic 54% increase on H1 2011 (by value)

M&A transactions continue to be predominantly cash transactions. Cash only deals accounted for 70% of all M&A deals and 78% of cross-border M&A deals (by value)

Energy, Mining and Utilities continue to dominate global M&A activity (value of deals in first half of 2012 = US$ 258 bn) - more than double the aggregate deal value in any other sector

Private equity buy-outs were down by 22% compared to the same period last year as cost and availability of finance continued to challenge the PE model. Buy-outs still account for 12% of global M&A activity

Public M&A was down 19% compared to the second half of 2011. In line with this, hostile/unsolicited deals also decreased, but rose significantly (both by volume and value) in the second quarter of the year



Source: Mergermarket H1 Round-up report July 2012

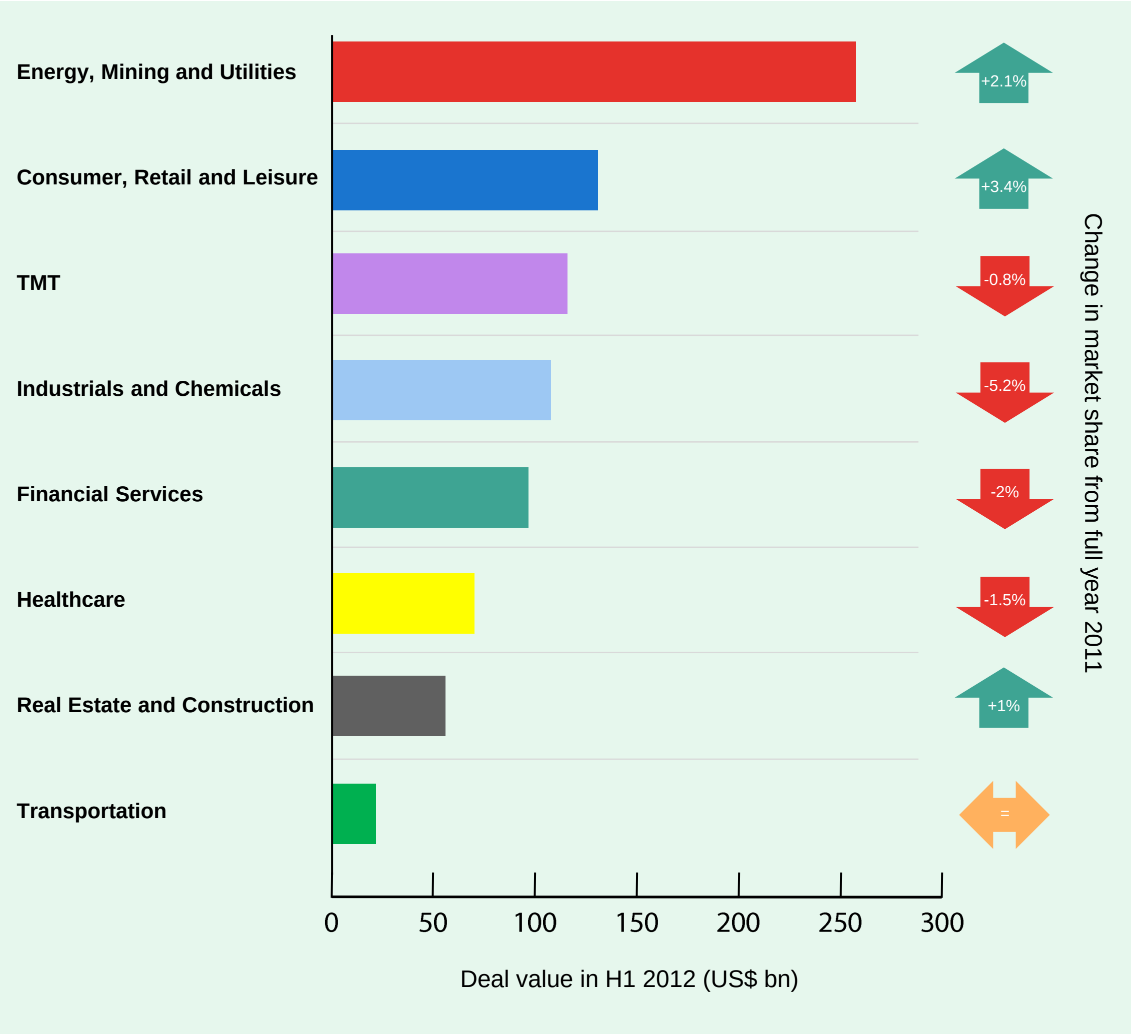
"World economies are in turmoil and this is impacting M&A activity. Markets thrive in a low volatility environment and a period of stability is required for confidence to develop."

Malcolm Sweeting, Senior Partner

Sources: (1) Mergermarket H1 Round-up report July 2012; (2) Data produced by Remark, taken from mergermarket.com

Sector variations

Energy, Mining and Utilities remained the most active sector in the first half of the year. TMT and Industrials and Chemicals also performed well overall, although stark regional variations were evident (eg whilst US Industrials and Chemicals saw a sharp decline, the sector continued to be the most popular in Asia, and also experienced strong inbound and outbound activity in Germany)



Sources: Mergermarket H1 Round-up report July 2012; change in market share uses Mergermarket Full-year Round-up report January 2012

Mining in Australia - Mark Pistilli, M&A Partner (Perth)

"The Australian market still remains incredibly active, especially in coal and iron ore. The story is not so bright outside of these base commodities, and especially for explorers and juniors. The debt markets are difficult to access, which is stressing companies which are in cash burn phases and those mid cap miners who find equity funding harder to access. This may lead to a number of forced disposals and selldowns, and the usual consolidation seen at this stage of the cycle."

TMT in US - Rob Masella, M&A Partner (New York)

"First half M&A activity in the TMT sector reflected the overall decrease in M&A activity generally. However, recently there has been an uptick in activity and discussions across the sector, particularly in technology, as companies seek to diversify product offerings and accelerate growth."

Healthcare in China - Emma Davies, M&A Partner (Shanghai)

"There is no question that the healthcare industry will continue to focus on China given personal incomes and government healthcare spend. We've seen a marked increase in interest by foreign companies looking to break through existing regulatory barriers by partnering with local companies, even where this means ceding control."

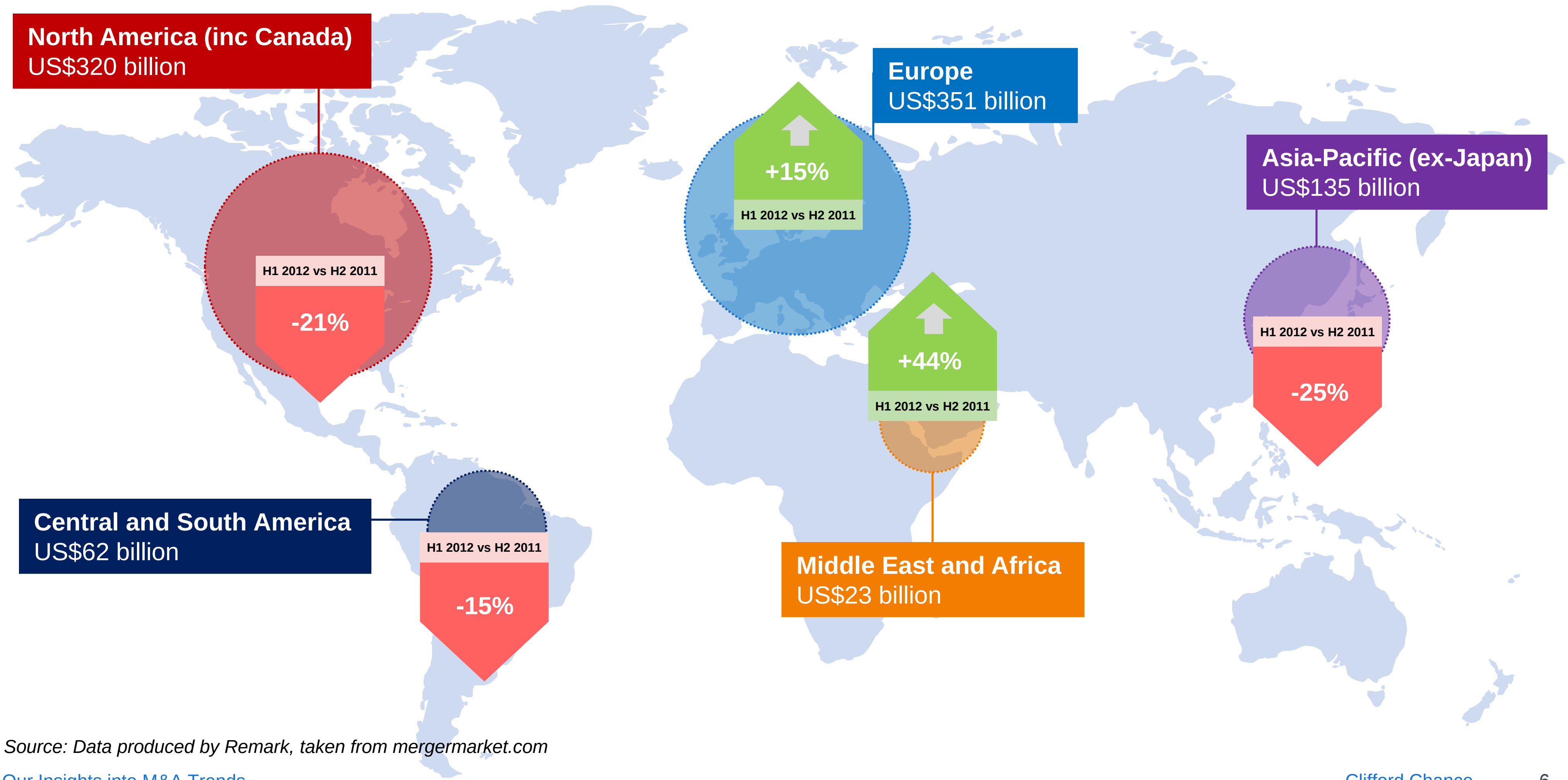
Banking in Spain – J.M Fernández-Daza, Head of M&A (Madrid)

"The Spanish banking sector is undergoing a restructuring process. As a result, we expect the number of mergers, integrations and sales of assets in the sector to increase as financial institutions need to shore up their efficiency, liquidity and solvency."

Regional trends

Heat map shows how global M&A activity is recovering in some, but not all, regions

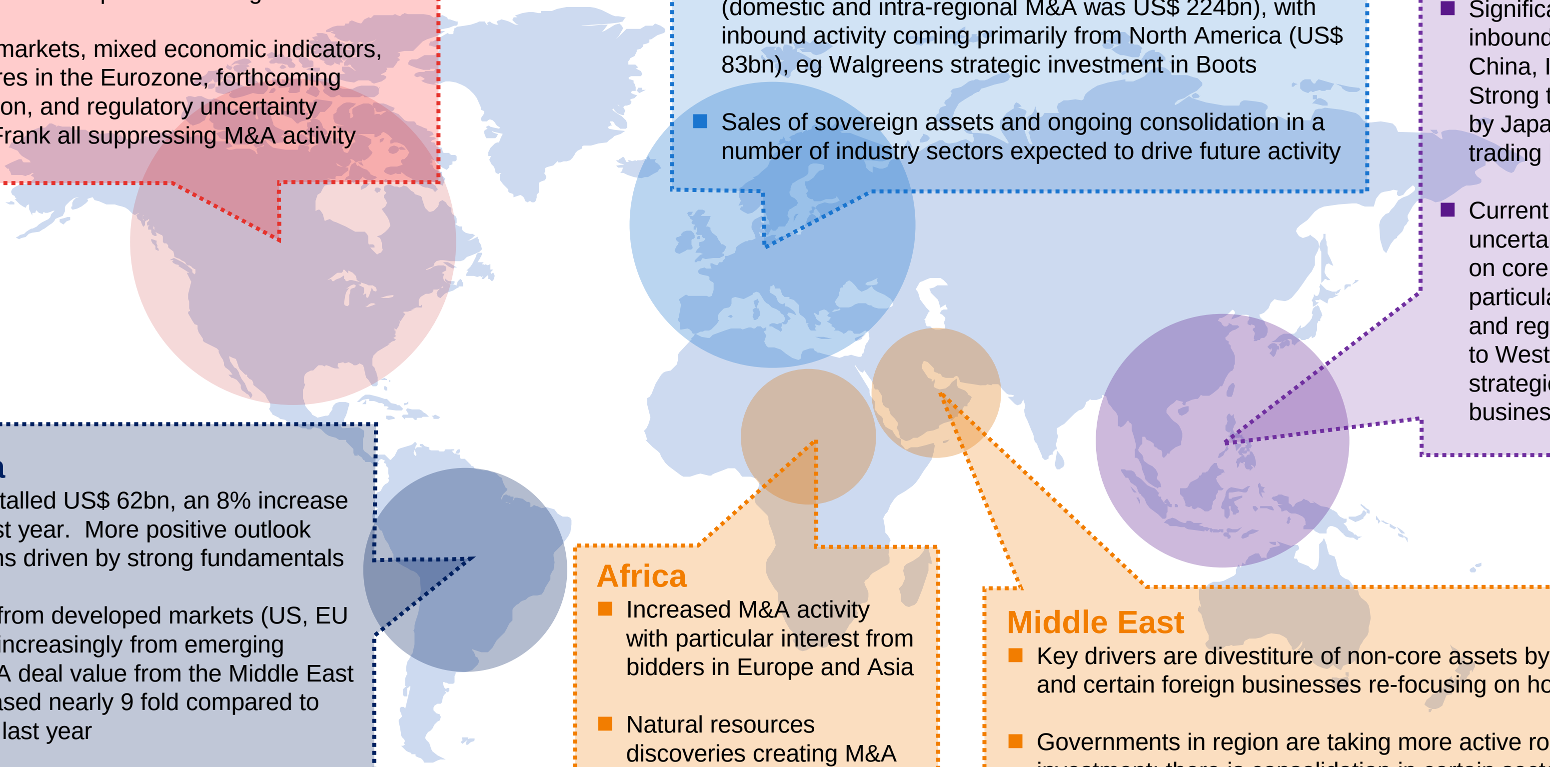
Our heat map shows value of H1 2012 announced transactions by Target geography, with comparison against H2 2011. European activity in first half of 2012 was boosted by Glencore's US$ 53 billion bid for Xstrata - without which activity in Europe for H1 2012 would have been flat as compared to the second half of 2011. The decline in US M&A has been steeper than the H1 2012 numbers suggest as North American activity includes Canadian M&A, which performed well in the period



Source: Data produced by Remark, taken from mergermarket.com

Regional trends

Key impacts in different regions



North America

- Deal value down 34% on H1 2011 – the lowest half-year total (US$ 320bn) since 2003
- Good fundamentals continue (high corporate cash balances, low interest rates, under-invested PE funds, limited opportunities for organic growth), On sell-side, many sponsor-backed companies needing to exit
- However volatile markets, mixed economic indicators, continued pressures in the Eurozone, forthcoming Presidential election, and regulatory uncertainty relating to Dodd-Frank all suppressing M&A activity

Europe

- Stark regional variations evident, with activity in Germany and the UK remaining strong, Activity in Spain fell, but as the gap between vendor's and buyer's valuations has narrowed, deal flow is expected to increase in coming months
- European targets acquired primarily by European bidders (domestic and intra-regional M&A was US$ 224bn), with inbound activity coming primarily from North America (US$ 83bn), eg Walgreens strategic investment in Boots
- Sales of sovereign assets and ongoing consolidation in a number of industry sectors expected to drive future activity

Asia Pacific

- M&A market is cautious and activity has slowed over the past 6 months – but Asia Pacific's share of global M&A has continued to rise. There is particular focus on public M&A opportunities (including PIPE transactions) given current market volatility, and financial institution M&A
- Significant interest in Australian inbound M&A particularly from China, India and SE Asia. Strong trend for outbound M&A by Japanese corporates and trading houses
- Current macroeconomic uncertainty has renewed focus on core business operations. In particular, low appetite for risk and regulatory change has led to Western financial institutions strategically repositioning their businesses

Latin America

- H1 2012 M&A totalled US$ 62bn, an 8% increase on this period last year. More positive outlook than other regions driven by strong fundamentals
- Inbound activity from developed markets (US, EU and Japan) and increasingly from emerging economies. M&A deal value from the Middle East and Africa increased nearly 9 fold compared to the same period last year
- Outbound activity largely driven by Latin blue chips looking to establish themselves as truly global players
- Intra-LatAm M&A an increasing trend, driven by companies in Mexico, Brazil and Colombia

Africa

- Increased M&A activity with particular interest from bidders in Europe and Asia
- Natural resources discoveries creating M&A hot spots (e.g. gas in Mozambique)
- Hot sectors include energy, mining & utilities; financial services; telecoms and consumer

Middle East

- Key drivers are divestiture of non-core assets by regional conglomerates, and certain foreign businesses re-focusing on home markets
- Governments in region are taking more active role in encouraging inward investment; there is consolidation in certain sectors (eg real estate /financial services); recently-concluded government-backed restructurings are now moving into the asset divestiture phase
- Regional political instability (eg Syria, and unresolved issues in Egypt and Libya), together with global economic challenges are dampening regional expansion by strong local companies

Sources: (1) Mergermarket H1 Round-up report, July 2012; (2) Data produced by Remark, taken from mergermarket.com

"In terms of M&A hotspots, the emerging markets continue to be a key focus for our clients looking for growth. Africa, Latin America, the Middle East, together with the growing markets of Asia-Pacific, all saw relatively strong inbound activity in the first half of 2012, and represented an increasing proportion of total global activity.

Opportunities are also emerging in Europe, as quality assets are coming onto the market at competitive valuations. Sellers, including distressed sellers or those seeking to limit their exposure in the Eurozone, are disposing of non-core assets in the region, and we are also seeing a first wave of sovereign divestments in Southern Europe. Targets with prime brands and technology are in demand. Inbound M&A activity into Europe is coming primarily from strategic buyers in North America, and also from Asia-Pacific."

Patrick Sarch, M&A Partner (London)

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Key drivers and challenges for M&A in 2012

Key drivers...

Cash on balance sheets
in North America and Europe / cash-rich SWFs
and conglomerates in Asia and Middle East

Cheap debt
continues to be available to high-credit borrowers

Drive for higher returns
by accessing emerging, growth markets

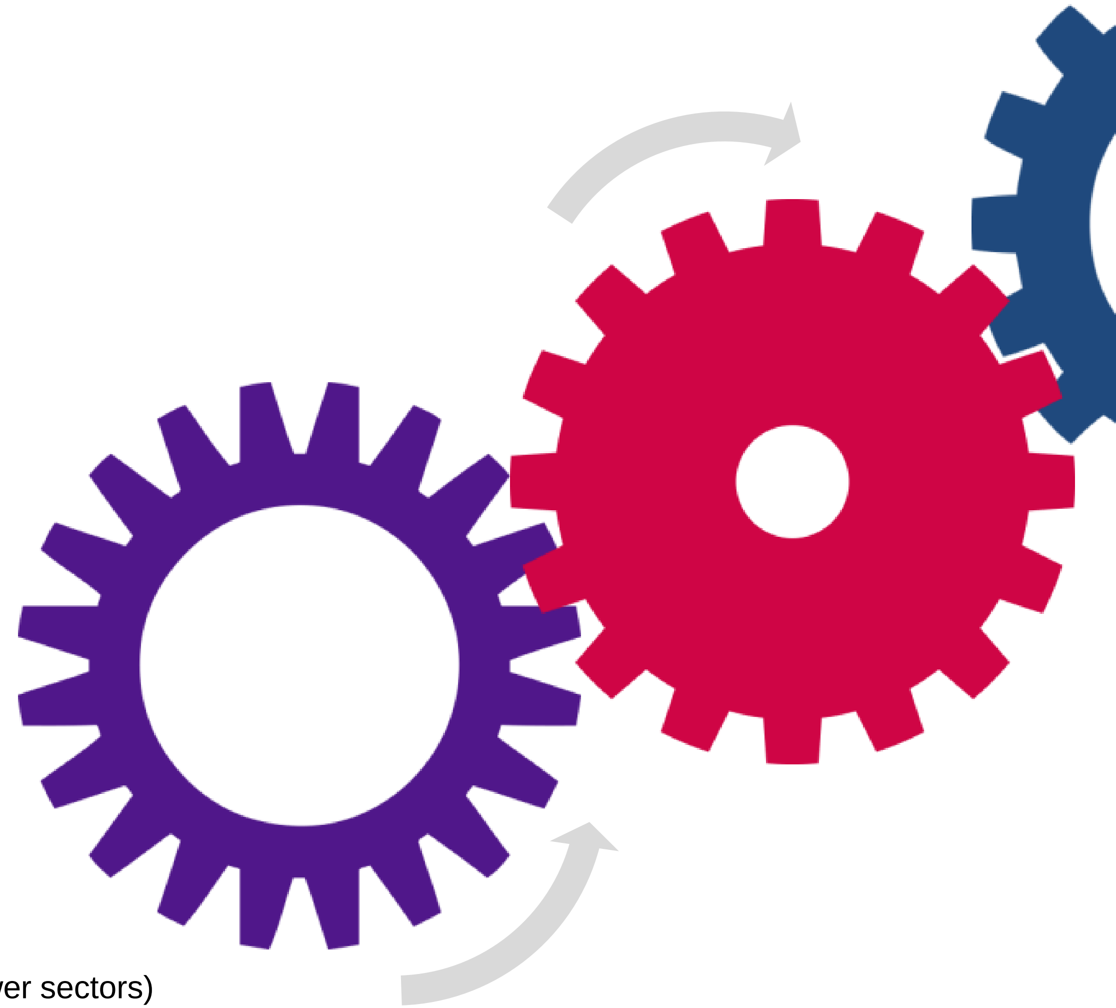
Ongoing fight for energy
and natural resources assets

Consolidation of core business
leading to divestments and spin-offs of non-core assets

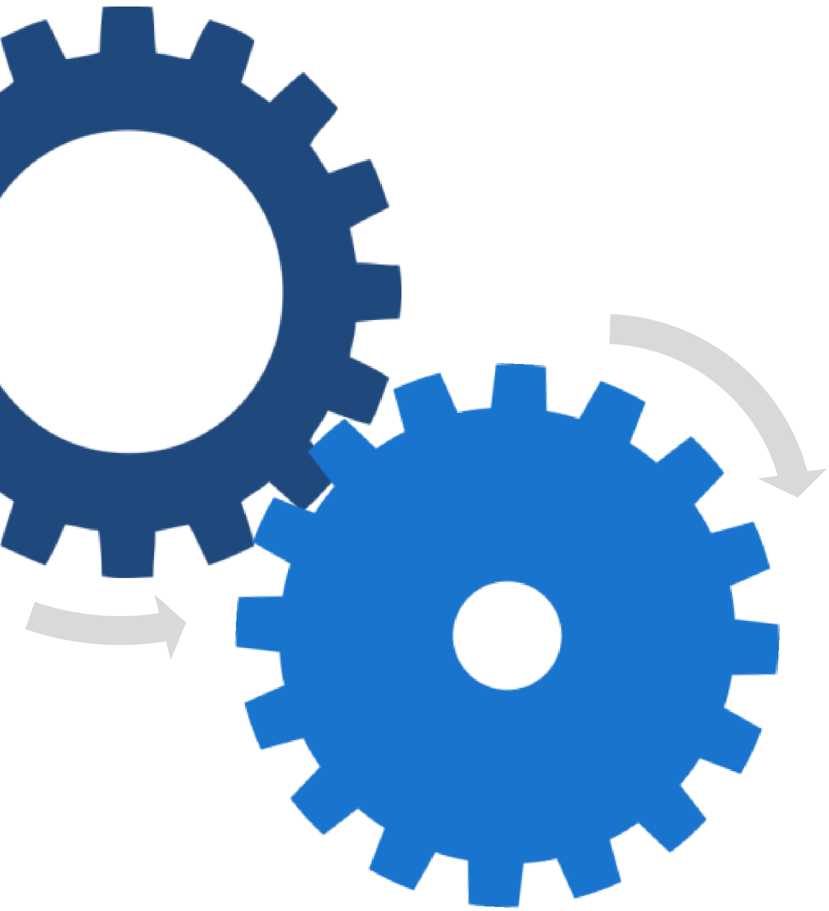
High-growth market bidders
accessing technology and brands in developed countries

Opportunism
as quality assets come onto the market through privatisations
and divestments by distressed sellers, particularly in Europe

Regulatory change
leading to unbundling / divestments (e.g. financial institutions and power sectors)



...and challenges for M&A activity in 2012



Continuing non-resolution of the Eurozone crisis
and fears of Euro break-up/bank failure persist

Economic slowdown
recession forecast in West; economic slowdown in China and India

Availability of finance and volatile market conditions
in the equity, debt and financial markets

Unknown impact of political environment
including instability in the Middle East and North Africa

Leadership change in 2012
US election, leadership transition in China; impact of recent changes in France, Egypt, Mexico

Sovereign measures to protect natural resources
and other protectionist measures

Shareholder pressure and activism
an increasing influence on M&A activity

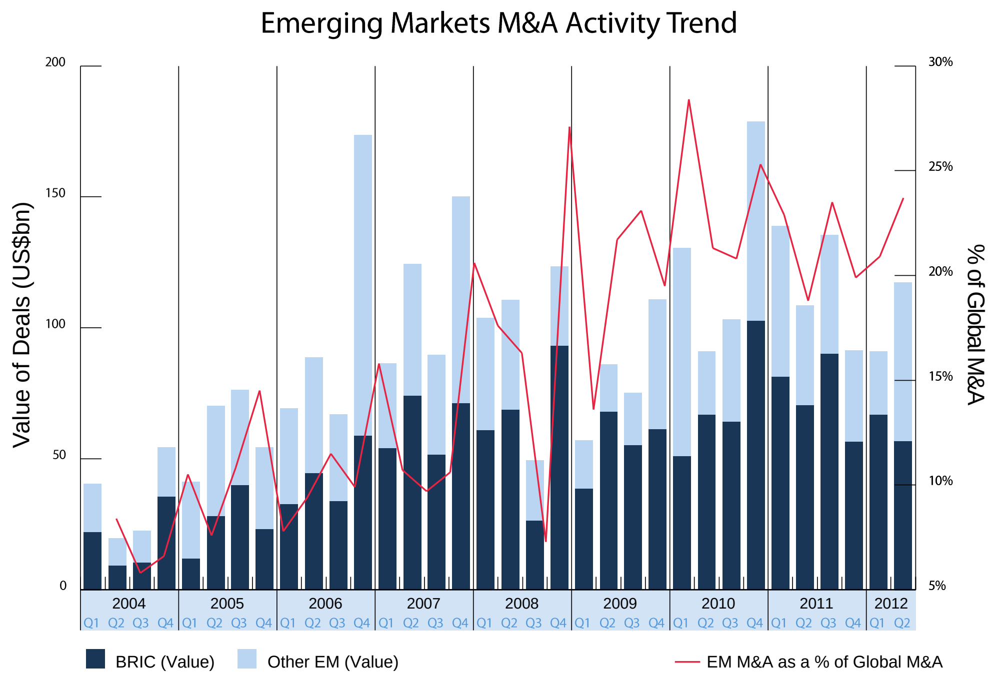
Increasing complexity of antitrust environment
now over 100 merger control regimes across the globe

Growth markets: Continuing to create M&A opportunities

The potential for greater returns offered by the emerging, high-growth markets is forcing many businesses searching for growth to focus their M&A strategies on these markets. Successfully exploiting the opportunities presented in these regions requires an appreciation of the risks, understanding of local culture and practices, and a flexible strategy

"With growth in Europe and the US continuing to be impacted by macroeconomic and political uncertainty, we are helping an increasing number of our clients navigate the challenges associated with accessing the opportunities presented by the growth markets."

Kem Ihenacho, M&A Partner and Co-head of Africa Practice



- 56% of large companies are focusing M&A strategy on emerging and high-growth markets*
- Growth markets M&A activity in H1 2012 worth US$ 208 bn – relative contribution of BRICs reduced as investors focus on new markets
- Investors include large corporates developing global footprint and seeking higher returns - also financial investors from developed markets. Inbound investment from other emerging markets is a continuing trend
- Increased risks for new entrants include political uncertainty, cultural differences, language barriers, developing regulatory environments; Sometimes opaque decision-making processes, increased corruption risk and lack of legal protections afforded by local laws to outside investors
- Partnership/joint ventures structures – often used to tackle cultural and political risks, and comply with restrictions on outside investment; Investments often made through jurisdictions providing bilateral investment treaty protection
- Exposure to growth markets often secured through acquisitions of companies headquartered in developed markets which have operations in growth markets (eg Glencore/Xstrata)

*In our recent survey *Cross-border M&A: Perspectives on a changing world* when asked to choose the key focus of their current growth strategy, 56% of respondents selected emerging, high-growth markets, as opposed to domestic or developed markets (both 22%)

Spotlight on Latin America

The first half of 2012 saw US$62 billion of Latin American M&A. With LatAm M&A consistently representing more than 5% of global M&A activity, we explore some of the key trends in the region

Brazil continues to dominate LatAm M&A; Colombia is seen by many as the gateway into LatAm; also Chile, Mexico and Peru becoming increasingly significant markets

Strategic global corporates dominate largest deals; private equity interest also strong

Increasing intra-regional M&A by major LatAm companies

Outbound M&A driven by LatAm blue chips looking to establish themselves as truly global players

Upward pricing pressure on private company valuations, particularly in Brazil - with too much capital chasing too few deals

Hot sectors include energy, mining, utilities, consumer goods and retail and industrials and chemicals

Evolving merger control environment - new suspensory regimes introduced in Brazil and Ecuador; changes on agenda in Peru and Paraguay

Joint venture structures popular for inbound M&A to benefit from local experience and expertise and local contacts

Increasing appetite from local institutions to provide acquisition finance

Divestments of non-core assets in region by European businesses particularly in FIG sector

Importance of managing expropriation risk reinforced by recent nationalisation of majority of Repsol's stake in YPF and Red Eléctrica's business in Bolivia

M&A in the renewables sector set to grow as countries eg Brazil, Mexico and Peru introduce (or in process of introducing) incentives, tax breaks and sponsored development funds

Eurozone uncertainty

Contingency planning by companies

As European leaders head from one summit to another, a collapse of the Eurozone has been kept at bay, but the uncertainty besetting the region continues, including fears that a large Eurozone member state may need a full scale financial assistance programme or that a Eurozone member state may default, or even depart from the Eurozone

Corporates are planning for possible emergency scenarios. Large multinationals have led the way, but increasingly other corporates are also taking practical steps to alleviate the risk that such a scenario might pose to their business

Commercial behaviours

- *Tightening payment periods on trade debtors*
- *Reducing size of orders and volume of inventory*
- *Identify currency mismatches between revenue/costs*

Financing

- Currency hedging: reviewing or implementing strategy
- Review of banking relationships, terms of financing and counterparty risk
- Finessing cash sweeping strategies

Contract review

- Review of key business contracts for risky counterparties
- Renegotiation of contracts considered at risk
- Amendment of standard terms - place of performance, currency obligations and governing law/jurisdiction

Clifford Chance has a market-leading dedicated sovereign debt restructuring and advisory practice which has been continually active for more than 30 years. Since June 2010 Clifford Chance has been acting for the European Financial Stability Facility, a key institution in the Eurozone's response to the crisis

"The Eurozone is continuing to develop policy measures on an unprecedented scale to address the crisis but many clients are nevertheless undertaking prudent contingency planning in case of further escalation in light of continuing market volatility and uncertainty."

Deborah Zandstra, Partner and Head of Sovereign Debt Focus Group

Eurozone uncertainty

Impact on M&A transactions

Volatility and uncertainty in the Eurozone is continuing to influence M&A activity. Across the globe, uncertainty in the Eurozone is contributing to the general lack of confidence and slowing of activity. In Europe itself the picture is mixed, with Germany and the UK being the strongest regions for M&A activity. Levels of activity in other areas such as Spain have been significantly impacted

Transactions involving a European target made up 38% of global deal value in the first half of 2012. This shows that amid the crisis European opportunities are opening up. However the continued uncertainty is causing acquirers to generally move more quickly to secure the right strategic deal, and parties are paying careful attention to contractual and structural considerations in order to minimise transaction risk

Valuation and financing

- Inherent uncertainties over valuations
- Sellers insisting on certain funds
- Buyers contemplating contingent consideration/earn-outs

Contractual provisions in transaction documents

- Currency payment obligations should cater for Euro exit scenario
- Acquisition financing agreements need to address ongoing exposure

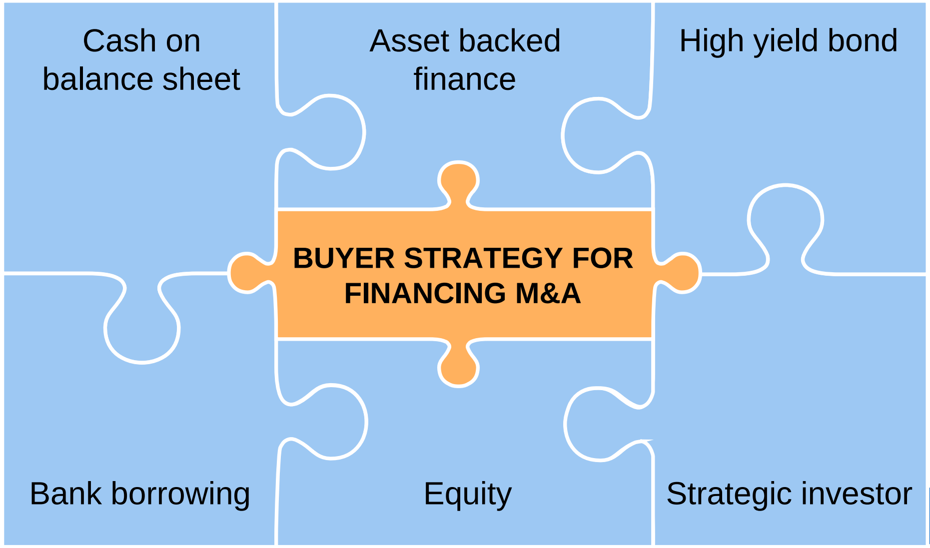
Completion

- As short a gap as practical between signing and completion
- Increased focus on MAC and force majeure clauses
- Conditionality may relate to risks identified in key businesses or regions of operation

Focus on due diligence

- Business exposure to counterparties based in countries at risk of needing a financial assistance programme or exiting the Euro and economic slowdown in context of austerity measures
- Place of performance of contracts; governing law and exclusive jurisdiction of foreign courts
- Euro exit may be credit event under CDS contracts
- Mismatches in back to back contracts and assets/liabilities
- Key business contracts: ability to perform obligations and in face of redenomination risk
- Target's exposure to sovereign debt and debt of European banks heavily exposed to sovereign debt
- Target's business dealings with public sector in countries at risk, or reliance on current fiscal regimes
- Implications for cash flows of exchange controls being imposed

Financing M&A in the current economic environment



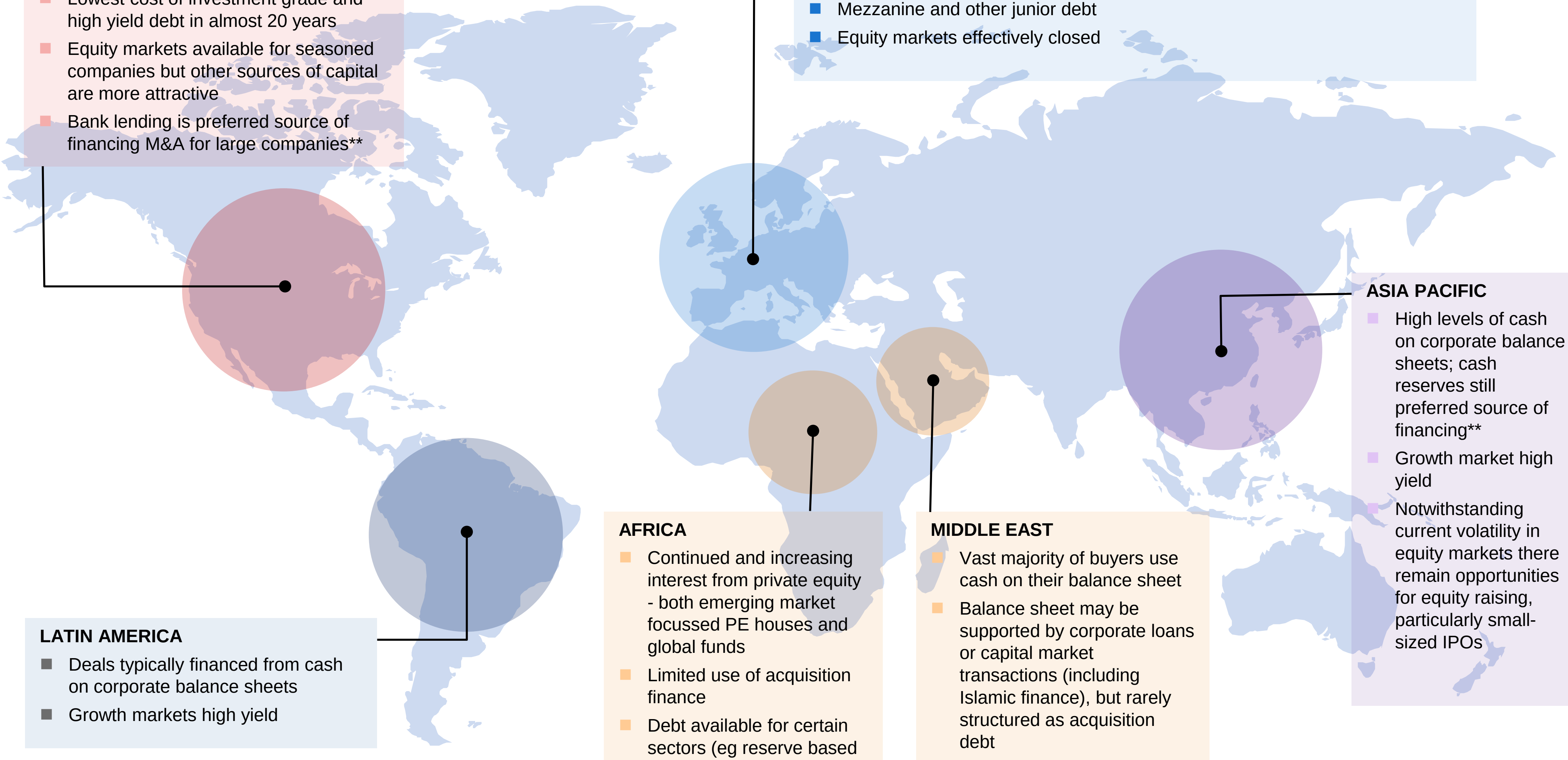
30% of large companies remain concerned about availability of financing for their M&A activity in the next 2 years. Ever-increasing capital requirements on financial institutions, together with the continuing uncertainty in the Eurozone and the global economic slowdown are impacting liquidity. In 2012 brief windows of opportunity to access liquidity have presented themselves - so buyers need to be flexible to access markets and products when these windows are open*

"High yield markets continue to act as an important source of acquisition finance. The North American market is the deepest and most mature, but the European and Asian markets are growing up fast."

Fabio Diminich, High Yield Partner (London)

	Bank debt	High yield bonds
Benefits for borrowers	■ Greater prepayment flexibility ■ Shorter financing timeframe ■ Ease of documentation ■ Ability to achieve lower pricing through repricing should the market get better ■ Certainty of funding	■ Avoids maintenance covenants ■ Longer tenor ■ No required amortisation ■ Lock in interest rates ■ Broad investor base and ease of future tap issuances ■ Potentially unsecured
Considerations for borrowers	■ Requires maintenance financial covenants ■ Shorter tenor ■ Debt amortisation ■ More restrictive terms ■ Market capacity limitations ■ Variable interest rate	■ Limited prepayment flexibility ■ Requires ratings ■ Requires public financial disclosure (transactional and ongoing) ■ Potentially longer financing timeframe ■ Market volatility

*In our recent survey *Cross-border M&A: Perspectives on a changing world* 30% of respondents identified availability of financing as a Top 3 financing risk/barrier to their cross-border M&A activity in the next 2 years. ** Respondents were asked to identify their preferred source of financing M&A in the current market.



US

- Significant levels of cash on corporate balance sheets, but lack of confidence
- Lowest cost of investment grade and high yield debt in almost 20 years
- Equity markets available for seasoned companies but other sources of capital are more attractive
- Bank lending is preferred source of financing M&A for large companies**

WESTERN EUROPE

- Cash-rich corporates, but lack of confidence means cash not being unlocked
- Leveraged finance - only freely available for investment grade borrowers buying quality assets; others have difficulty borrowing at attractive rates
- High Yield market subject to volatility
- Mezzanine and other junior debt
- Equity markets effectively closed

ASIA PACIFIC

- High levels of cash on corporate balance sheets; cash reserves still preferred source of financing**
- Growth market high yield
- Notwithstanding current volatility in equity markets there remain opportunities for equity raising, particularly small-sized IPOs

LATIN AMERICA

- Deals typically financed from cash on corporate balance sheets
- Growth markets high yield

AFRICA

- Continued and increasing interest from private equity - both emerging market focussed PE houses and global funds
- Limited use of acquisition finance
- Debt available for certain sectors (eg reserve based facilities for appropriate oil & gas deals)

MIDDLE EAST

- Vast majority of buyers use cash on their balance sheet
- Balance sheet may be supported by corporate loans or capital market transactions (including Islamic finance), but rarely structured as acquisition debt
- Strategic investors are also commonly used for larger transactions

3

Managing risks in global M&A

Navigating antitrust risk

A number of high profile deals have been blocked by antitrust regulators on both sides of the Atlantic over the past 6 months: the European Commission prohibited the proposed NYSE Euronext / Deutsche Börse merger and AT&T withdrew its proposed bid for T-Mobile in the US in the face of regulatory opposition. However, these high profile deals are not reflective of current trends - intervention rates have remained broadly flat in many jurisdictions. What is changing is the complexity of antitrust risk

Key risks for corporates

- **Proliferation of merger regimes and new regulations coming into force -** imposing significant financial / time costs in terms of merger planning
- **Different standards and different fact patterns -** new regimes do not always apply the same tests as more mature regimes. As more countries (e.g. India, China) develop merger control regimes, the likelihood of divergences increase. Fact patterns also differ - leading to different results (e.g. Mitsubishi Rayon / Lucite cleared unconditionally in EU / US, subject to remedies in China)
- **Procedures unclear** – new regimes are still finalising and confirming procedures and the application of their own rules
- **Protectionism -** foreign purchasers are often treated differently in merger control reviews / subject to foreign investment clearance processes. This is a particular risk in defence, technology and infrastructure sectors
- **Theories of challenge -** there has been an uptick in interventions in deals that are vertical in nature (supplier/customer), especially in technology and media deals

"Protectionism is manifesting itself in increasingly diverse and subtle ways, ranging from outright prohibitions of foreign ownership of rural land to the discriminatory application of antitrust rules. While cross-border M&A is fundamentally global, local considerations are key to navigating such risks."

Oliver Bretz, Antitrust Partner (Paris and Brussels)

Our recent webinar on "Navigating M&A deals in the complex world of merger control" is available through the Clifford Chance Global M&A Toolkit www.cliffordchance.com/GlobalM&AToolkit

Strategic considerations

Preparation and consistency

- Ensure a consistent story across jurisdictions
- Prepare early - regimes may request pre-notification (e.g. EU) and/or more economic /data intensive input

Timing

- Have a timing strategy (e.g. consider if beneficial to file in one jurisdiction first or do parallel review)
- Be disciplined on timing and deadlines

Wider context

- Understand how countries may exercise sovereignty over deals
- More regimes are taking non-competition factors into account (e.g. via 'public interest' and 'national security' tests)
- Engage public/government relations teams where necessary

A deal that is conditional on antitrust clearance effectively leaves antitrust risk with the seller because if the approval is not obtained the deal falls away. In the current economic environment we are seeing a range of innovative contractual and structural solutions that mitigate antitrust risk or shift it to the buyer

Risk shifting mechanisms	Impact on antitrust risk	Deal examples
Unconditional closing	Shifts all risk to buyer, as transaction must close regardless of whether conditions obtained; not usually possible in jurisdictions that enforce standstill obligations	Ryanair / Aer Lingus minority stake Stericylcle, Inc / Ecowaste
Hell or high water	Shifts risk to buyer, as buyer is required to use its best efforts to obtain clearances, including offering divestments and remedies; risk of outright ban by authorities remains	First Niagara / HSBC
Reverse break fee	Buyer compensates seller if deal does not close by long stop date as result of antitrust issues. Break fee / compensation may be capped by national regulation	AT&T / T-Mobile IAG / British Midland Limited
Take or pay	Shifts financial risk to the buyer as buyer pays seller full price for the target, even if clearances not obtained by the longstop date	EMI / Universal
Warehousing / backstop arrangement	Buyer involves third parties, but risk ultimately rests with buyer. A "warehousing" third party (e.g. bank) buys target first and then sells it on to buyer. A “backstop” third party commits to buying the target from the seller if deal is blocked	Lagardère / VUP (warehousing) Liberty Global / KBW (backstop)
Consortium bid / Joint venture	Target assets are divided among the consortium, such that no individual acquisition raises antitrust risks. Seller exposed to risk that an authority identifies unanticipated concerns. Alternatively, consortium JV is structured so that no party triggers filing requirements	RBS, Fortis & Santander / ABN Amro
Up-front buyer	Third party acquires from the buyer those target assets that raise antitrust risks for the buyer. Authority may require this before allowing the deal to close. Alternatively, buyer may arrange this in advance to address anticipated concerns. Seller may still be exposed to risk that authority identifies unanticipated concerns	Princes / Premier Foods Agilent / Varian

Addressing increasing resource nationalism

The 15% fall in Repsol's share price following announcement that its stake in YPF was to be nationalised was telling. Recent high-profile government intervention in Argentina, Bolivia and Mongolia has reinforced international investors' focus on the risks of resource nationalism

Contractual provisions, informed deal structuring and active management of political risk can help to mitigate the risks:

INVESTOR STRATEGY FOR MINIMISING POTENTIAL RISKS/LOSSES

Contractual provisions

- Understand strengths and weaknesses of typical governing law/jurisdiction clauses
- Consider bespoke stabilisation clauses
- Effectiveness of contractual provisions dependent on ability to enforce in practice

Political Risk Insurance

- Private insurers, export credit agencies and the World Bank's insurer MIGA provide insurance against specific political risks
- Insurance should be tailored to the investment in question and the particular risks to which it is exposed
- Insured must recognise conditionality of cover – obligations and procedures to be complied with if value of protection to be realised

Bilateral Investment Treaties ("BITs")

- Enables investor to refer disputes to international arbitration pursuant to international law in neutral venue rather than local proceedings against host State pursuant to local law in local courts
- Can provide financial compensation in event of expropriation or other measures taken by host State
- Awards widely enforceable in many jurisdictions due to international conventions
- Availability and effectiveness of protection varies – consider when structuring deal

'Soft and commercial measures'

- Positive relations with host States can give investors greater scope for negotiating terms of any new requirements affecting their investment
- Early engagement with local authorities and local stakeholders at the beginning of a project should be encouraged
- Actively promoting local skills, education and employment can help local stakeholder support
- Having a strong local partner or a multilateral agency (such as the IFC) can offer some political "cover"

Navigating the "shareholder spring"

Shareholder activism has been on the rise. This year, we have seen it manifest itself in a series of protest votes – dubbed the "Shareholder spring" - over executive remuneration, particularly in the UK and the US. Rebellion over executive pay appears to be contagious – having been generally well-received by the media and the public, confidence amongst shareholders is fuelled, and we are seeing increasing numbers of protest votes against what are perceived as "fat cat" packages

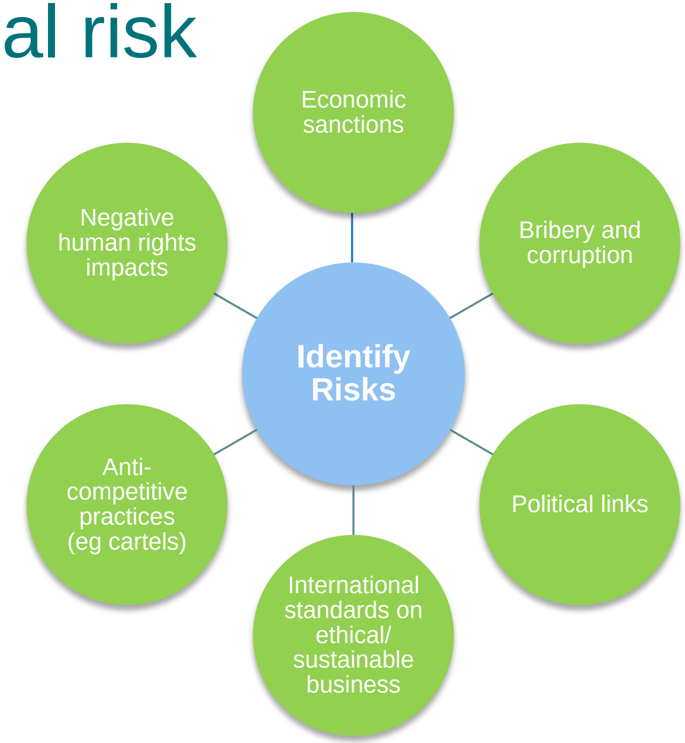
The Glencore/Xstrata merger is a prime example of how these rebellions can impact on M&A deals. After significant shareholder backlash over proposed retention payments of US$280 million, there was speculation that the entire "mega-merger" was on the brink of collapse. It appears that Glencore was ultimately left with little choice but to postpone the shareholder vote on the deal, which it did in July, so that the terms of the retention payments could be toned down

Recent examples of shareholder rebellions over executive pay		
Citigroup (April)	Rejection of bank's plan to pay its CEO US$15 m in the year its share price dropped by 44%	Scare only. No resignations resulted
AstraZeneca (April)	Although not voted down, significant resistance from shareholders at the AGM	CEO, David Brennan, resigned
Barclays (April)	Nearly a third of shareholders protested against the bank's pay policies on an advisory vote – including the £17 million package for its then CEO, Bob Diamond	No resignations resulted from pay protest (Bob Diamond later resigned for other reasons)
Aviva (May)	54% of voting shareholders voted against the remuneration report	Report voted down. CEO, Andy Moss, resigned
Chesapeake Energy (June)	Intense shareholder pressure and rejection of 2 directors and executive compensation plan. Two major shareholders get 4 seats on 9 person board	CEO stripped of Chairmanship. Two directors resigned
WPP (June)	60% of voting shareholders voted against the remuneration report, protesting about the rewards being offered to CEO, Martin Sorrell	Report voted down. No resignations ensued

"Shareholder activism is becoming more of a catalyst for M&A and management turmoil. In most cases, dialogue is a company's best defence – open communication with shareholders is critical, preferably well before any contest for corporate control becomes an issue – as well as being able to demonstrate that the company has corporate governance best practices and a strategy known to all investors"

Brian Hoffmann, Co-head of Corporate, Americas

Increased focus on integrity and political risk



Where M&A strategies are focused on opportunities in emerging markets, thorough due-diligence on political and non-commercial risks is critical

Investors in emerging markets are increasingly focused on ethical integrity and political due diligence. Nasty surprises can erode deal economics, lead to fines and disciplinary actions by regulators, reputational damage or liability for legacy issues. Acquirers need to look beyond the target company they are purchasing, to the 3rd parties the target has dealings with – as the practices of intermediaries, JV partners, suppliers and distributors can lead to potential liability or reputational damage for the acquirer

Integrity Due Diligence – 5 TOP TIPS	
1	Early and thorough integrity due diligence on target (anti-corruption policies, human rights record, compliance history, political links etc)
2	Red flag diligence on practices and policies of 3rd parties (JV partners, distributers, suppliers, fixers/introducers)
3	Robust warranties and indemnities relating to historical compliance; use of 3rd party compliance certificates as condition to the transaction
4	Post acquisition planning – dedicated task force to follow-up problem areas
5	Plan up-front for integrating your compliance approach with target's approach

"Controlling third-party risk is challenging enough when your company has engaged the intermediary directly, but when acquiring a company that uses a broad variety of third parties, the risk is particularly acute.

The risk may be a necessary one in emerging markets, by law or custom, in order to make introductions, provide language and cultural interpretations, and facilitate relationship building - but it should not be ignored. Full transparency and mitigation measures should be in place before the acquisition"

Wendy Wysong, Litigation Partner (Hong Kong)

Our recent webinar on "Managing Risks in Global M&A" is available through the Clifford Chance Global M&A Toolkit at **www.cliffordchance.com/GlobalM&AToolkit**

Focus: human rights due diligence

In the M&A context, human rights due diligence to identify adverse impacts of a target's business activities is advisable, particularly where the target operates in high risk environments, such as conflict zones or in countries with poor human rights records. Human rights risks may also be particularly acute in extractive, agricultural and labour-intensive industries

The risks of not doing human rights due diligence

- Exposure to potential claims in relation to legacy human rights issues
- Disputes with vendor relating to allocation of liability for ongoing impacts, or impacts caused prior to closing
- Inherit difficult relationship with stakeholders such as local communities
- Damage to reputation and relationships with customers, shareholders or investors
- Unforeseen costs of remedial actions, including establishing proper risk and impact management processes

Red flags

- Target operates in a conflict-affected country
- Recent allegations of human rights abuses involving the target or relating to the target's operations
- Allegations of human rights abuses involving the target's suppliers or business partners
- Target operates in countries with poor human rights records
- Nature of target's operations creates potential for negative human rights impacts or disputes with local communities

Due diligence checklist

- What are the actual and potential human rights impacts of the target's operations?
- Does the target have a human rights policy?
- How are human rights risks managed by the target?
- How have complaints been dealt with?
- Are there unresolved allegations of adverse impacts or abuse?

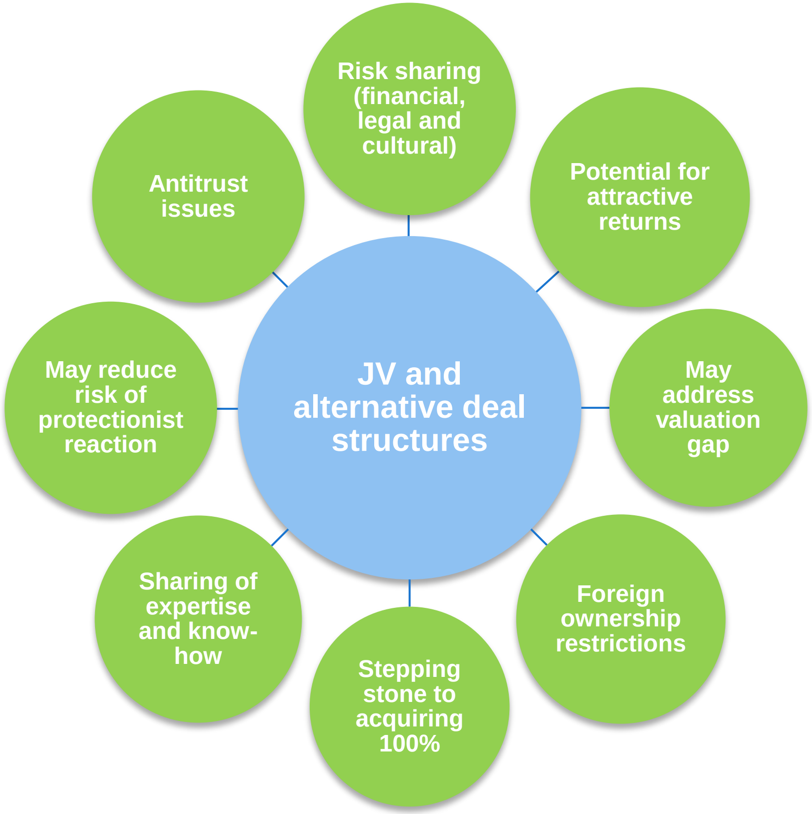
Managing risk

- Who will be liable for historic impacts or claims?
- Are warranties and indemnities drafted broadly enough to include human rights claims?
- Can arrangements be put in place to minimise the risk of impact/abuse going forward?
- Can the deal be made conditional upon resolution of existing claims or disputes with local communities and other stakeholders?
- Do the human rights concerns make the deal too risky?

Increasing use of JV / alternative deal structures

Large companies say that joint ventures and partnership with strategic investors are their organisation's favoured deal structures, ahead of traditional M&A*. This is a notable shift in how deals around the globe are being structured

M&A participants use joint ventures as a way of mitigating risk and tackling restrictions on foreign investment, particularly when pursuing M&A opportunities in emerging markets, against the backdrop of an increasingly opaque and complex legal, regulatory and political landscape



Joint venture structure are not, however, free from risk, as demonstrated in the recent high profile dispute in relation to BP-TNK, the Russian joint venture in which BP hold a 50% interest

Know your partner	→	Extensive due diligence required
Clear delineation of roles and decision making	→	Detailed contractual framework required
Can be unstable	→	Contractual framework must address how disputes to be dealt with
What happens next?	→	Critical to agree exit mechanism at the outset

"The agreed term or potential exit mechanism is key. You will have a contractual joint venture or a strategic partnership agreement and within these will be an exact provision. But, as with marriage, you tend not to go into these planning for a divorce."

Nigel Wellings, M&A Partner (Dubai)

*In our recent survey *Cross-border M&A: Perspectives on a changing world* joint ventures and partnerships were highlighted by respondents as their preferred M&A structures, rather than structuring as a traditional full acquisition/disposal

4

Spotlights from around the globe

Spotlights from around the globe

Update on Australian M&A

The Australian economy continues to grow modestly, although the pace of activity has varied significantly across industries. The corporate and M&A market is cautious given world economic conditions and activity seems to have slowed significantly over the past 6 months

Whilst the mining sector remains strong, there are signs of slowing down as evidenced by a general decline in commodity prices and delay in capital expenditure programmes (eg recent announcements by BHP)

Interest rates were lowered in May 2012 by 50 basis points to 3.75%, and then again in June 2012 to 3.50%. The Australian $ remains strong, although with increasing volatility. Australia remains at almost full employment

Significant interest evident in inbound M&A particularly in the mining, resources and agribusiness sectors and particularly from China, India and SE Asia

Oil and Gas in Nigeria

The Oil Majors have played a central role in the Nigerian oil and gas sector since its inception. However significant changes are afoot in the industry which are likely to change the landscape significantly over the next few years, driven by a number of factors:

Regulatory and fiscal uncertainty will remain until adoption of the long awaited changes anticipated by the Petroleum Industry Bill. The Bill looks to replace all existing oil and gas laws and regulations in Nigeria. The timetable for its adoption and its final contents remain uncertain. A Local Content Development Act has come into force which looks to develop and sustain the local ownership, management and content across the oil and gas industry, from exploration and production through to advisory roles on financial transactions. These factors, coupled with continuing security concerns in the Niger Delta and competing demands for expenditure in other oil fields in Africa and beyond are creating opportunities for indigenous oil companies through divestment of oil fields by the majors. Shell is in the process of finalising the sale of various on shore fields and sales by other majors are anticipated to follow.

This creates very significant opportunities for local oil and gas companies with the relevant technical expertise in house or through partnerships with other companies. In many cases these companies are looking to raise debt and equity finance for the acquisition and development of the fields from international sources. A number of these companies are also partnering with international service providers and independents to exploit these assets.

German market remains active

In Germany investors are continuing to pursue conservative investment strategies, opting for security over high yield investments.

One of the busiest industries was the Energy sector, with a large number of investments and landmark transactions in the past few months. Industrials, Automotive and Chemicals also generally remain very active. In the Financial Institutions sector there have been a number of restructurings in particular the restructuring of the so-called *Landesbanken*

US Trends under the spotlight

Greater judicial scrutiny of all parties involved in a transaction

- Management – (J. Crew, El Paso, Delphi)
- Financial advisors – (El Paso, Southern Peru, Del Monte)
- Board – defence tactics (Airgas)
- Special committees and controlling shareholders (Southern Peru)
- Hostile bidders – compliance with confidentiality agreements (Martin Marietta/Vulcan)

Resurgence of spin-offs

- Favourable market reaction to spin-offs
- Shareholder activism
- Debt available at historically low rates
- Less than robust valuations
- Focus on core or growth business
- More tax efficient and lower execution risk

Shareholder influence on M&A

- M&A litigation for over 90% deals over $100 million. Few result in damage awards; many result in additional disclosures; some result in changes to deal protection mechanisms
- Companies are dismantling takeover defences in response to shareholder pressure (poison pills and staggered boards)

Consumer Goods and Retail M&A thrives in Middle East

The CG&R sector has been one of the most resilient in the region over the past few years, especially in those countries focused on boosting non-oil revenues, and the sector is expected to show significant growth in the forseeable future. Fundamental drivers include growing affluence, a rise in tourism, large expatriate populations, favourable demographic factors and large-scale infrastructure development.

However, local rules restricting foreign ownership of shares and land have led to a range of different business models, primarily either:

- brand licensing/distribution/franchising arrangements; or
- joint venture arrangements with local partners (where, generally speaking, foreign parties are prevented from owning more than 49 % of the company).

We expect to see:

- foreign brands and companies continuing to enter the market and/or expand (eg recently announced regional expansion plans by Geant, Tesco and WH Smith);
- overseas companies that have been active in the market through a distribution arrangement moving to joint venture models with their local partners (eg Tiffany's recently announced joint venture with Damas Jewellery in the UAE); and
- strong local companies positioning themselves as regional players either through M&A or strategic partnerships with global players (eg Mannai Corporation's acquisition of a significant stake in Axiom Limited and bid for Damas Jewellery, and Aujan Industries' joint venture with The Coca-Cola Corporation).

Spotlights from around the globe

CEE looks forward to significant infrastructure investment from China

In April Chinese premier Wen Jiabao met with 16 CEE heads of government eager to be a part of China's strategic approach to investment in the region. China's investment in the CEE region has grown 28 per cent a year from $4.3bn in 2001 to $52.9bn last year

A $10bn special credit line was announced for joint investment projects in the region's infrastructure and technology sector, and a target of nearly doubling China-CEE trade to €100bn by 2015

Shortly after China's deputy premier Li Keqiang also visited the region, in Moscow, signing 27 deals worth $15bn with companies including Rusal and Gazprombank, and in Hungary, seven more, including a $1bn credit line for projects including a (Chinese-built) rail link to Budapest airport. It is not yet certain how quickly China is ready to move beyond its preferred initial investment model of bidding for state infrastructure projects, but there are signs that it is ready for both broader direct investment and corporate takeovers across the region

Privatisations on the table in Spain

The Spanish government is about to launch a new privatisation plan, which will give rise to attractive opportunities for both Spanish and international investors. Although the details of plan have not been disclosed yet, the government is committed to select assets that could be more strategic to investors and offer better returns in the mid and long-term. The plan is expected to generate around €20 to €30bn in income.

Spotlight on South-East Asia

- High level of interest from North Asian companies, specifically trading houses and corporates from Japan and Korea and state-owned enterprises from China. Interest in various countries in South East Asia; Indonesia in particular but also Malaysia and the Philippines. There is also a degree of interest from Indian investors, particularly into Indonesia and Australia
- Energy is the name of the game and, more widely, natural resources as countries need to secure the resources for energy generation. In addition, the financial services sector continues to be attractive and we have seen sustained interest in investment in banks by both international and regional banks. The large market for domestic consumption in countries such as Indonesia is also attractive with a fair amount of interest from the MNCs and other companies
- Rise in protectionism, for example in Indonesia. Indonesian elections scheduled for 2014 may be influencing policy in this direction and in May the Central Bank announced plans to cap individual investors' ownership of banks at 40 per cent. The regulations are yet to be clearly defined but such pronouncements can dampen investor interest

Japan is looking offshore for opportunities and growth

Despite the uncertainty of the global economy especially in the Eurozone, we still see a strong and continuous trend for outbound M&A by Japanese corporate and trading houses. Popular targets are situated in developing countries, especially in Southeast Asia, but we also see steady interest in more developed markets (e.g. Australia, Western Europe, UK and US). Whilst there is a general acceptance from shareholders that Japanese corporates must look offshore for opportunities and growth, there have been recent signs that shareholders are demanding greater accountability of management in respect of their outbound investments (e.g. appropriateness of the valuation and how synergies can be enjoyed)

4 out of 5 major Japanese trading houses recently recorded their highest ever profits in the fiscal year ended in March 2012. Japanese trading houses are conscious, however, to their over-exposure to the natural resources sector, and are actively looking to diversify their portfolios – e.g. recent acquisition by Marubeni of Gavilon, a major grain trader

79% of Companies focusing on Core Business

Divestment of non-core assets is a trend identified by Clifford Chance's recent survey, Cross-border M&A : Perspectives on a changing world. In the first quarter of 2012, a global survey of business leaders carried out by the Economist Intelligence Unit on behalf of Clifford Chance identified that 79% of the global organisations surveyed were seeking to achieve growth by focusing on their core business activities.

2012 is proving to be the year of the spin-off, with various household name corporations taking steps to divest major business units in this way. High profile examples include News Corporation, which announced the separation of its newspaper and book publishing business in June 2012, amidst ongoing investigations surrounding the activities of its UK tabloids.

Other examples of divestments of non core assets include Pfizer's US $11.9bn disposal of its infant nutrition business to Nestle, and the sale by Statoil of its retail division with a view to focusing on upstream assets.

This phenomenon takes place in the context of corporates seeking to maximise shareholder value, including by raising cash for dividends and share buy back programmes.

Sell-offs in Italy to tackle the sovereign debt crisis

One way of giving new impetus to the Italian stock market – currently an underused tool - is to complete the privatisation process. The Italian State holds stakes in oil and gas and electricity sectors, those assets being equivalent to about 2% of national debt

In order to pave the way for the independent ownership of the national gas transmission network in Italy, at the end of May the Prime Minister approved the decree implementing the so-called Unbundling Directive. A few days later ENI signed a preliminary binding agreement for the sale of an initial portion of its stake of approximately 30% of SNAM's share capital to Cassa Depositi e Prestiti; It is then expected to sell an additional 25% - whose market value is in the range of aabout EUR 3 billion

At the same time a program to sell off State-owned real estate assets has been launched, to reduce exposure to non-core businesses and to raise liquidity

Global M&A Toolkit

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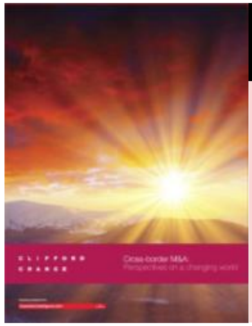

Cross-border M&A: Perspectives on a changing world

Clifford Chance's **Cross-border M&A: Perspectives on a changing world** is a major multi-regional survey into how large companies view the opportunities and risks to cross-border M&A. It reveals that emerging, high-growth markets are the key focus for future growth and that companies are looking to navigate integration and deal execution risk through use of alternative deal structures
Available through the Global M&A Toolkit at **www.cliffordchance.com/GlobalM&AToolkit**

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