

Round Table: Mergers & Acquisitions

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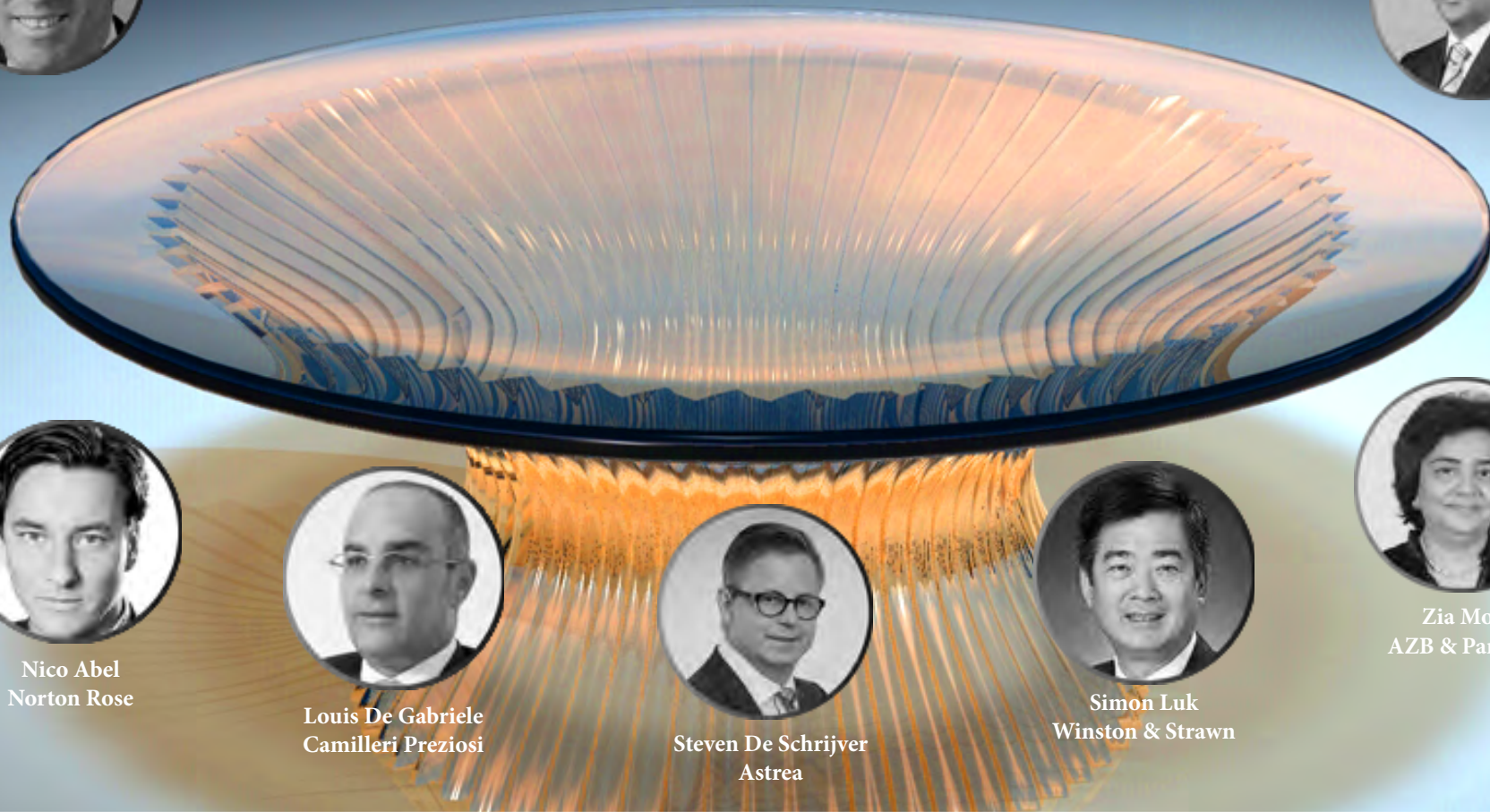
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Scott Eisenberg is the founder and managing partner of IMAP Firm in Detroit; Amherst Partners. He has more than 25 years of experience structuring and negotiating transactions and advising companies on financial matters. His experience includes merger and acquisition transactions, restructuring and turnaround engagements, and a wide variety of management advisory services. Mr. Eisenberg has worked on over 75 investment banking assignments and has advised more than 200 manufacturing, service, financial services and technology companies. Many of his completed transactions involved publicly traded companies. His accolades include being named to Crain's Detroit Business' "40 Under 40" and a finalist for the Ernst & Young Entrepreneur of the Year award in 2007 and 2008. Mr. Eisenberg earned his Bachelor's degree in accounting from the University of Illinois, his MBA in finance from Indiana University and is a CPA.



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Before joining Al Tamimi & Company, Mohamed practiced law in Egypt from 1999 until 2004 with one of the oldest and leading law firms, then in Kuwait with an international law firm from 2004 until 2006.

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Mohamed has been extensively involved in major M&A and IPO deals in the UAE, which are currently his principal areas of practice along with corporate governance and family businesses.

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Having completed his schooling in Australia, Daniel graduated from Oxford University in 2000. He then moved to the United States to join Tyco Electronics Corporation, the world's largest supplier of passive electronic components, where he worked as part of Tyco's in-house M&A team. Upon his return to the UK, Daniel joined Moore Stephens Corporate Finance, where he advised clients on a range of transaction types. He continued his education in his spare time, qualifying as a Chartered Accountant (ACA) in 2004.

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Zia Mody is the Founder and Senior Partner of AZB & Partners and one of India's foremost corporate attorneys. She passed her law degree from the University of Cambridge in 1978 and was enrolled as an Advocate with the Bar Council of Maharashtra & Goa in 1978. She did her LLM from Harvard Law School and was then admitted as a member of the New York State Bar by examination in 1980. Zia worked as a corporate associate at Baker & McKenzie, New York, for five years before moving to India to set up practice, establishing the Chambers of Zia Mody in 1984, which then became AZB & Partners in 2004. The Firm has offices in Mumbai, Delhi, Bangalore and Pune with an integrated team of approximately 225 legal professionals.



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Steven is also recognised as one of the leading commercial IT lawyers in Belgium specialising in new technologies (such as data protection, e-commerce, software licensing, technology transfer, IT-outsourcing, cloud computing, etc.).

Steven holds a law degree from the University of Antwerp (magna cum laude, 1992) and an LLM Degree from University of Virginia School of Law (1993). He received the ILO Client Choice Award 2012 in the General Corporate Category for Belgium. He is fluent in Dutch, French and English and has good notions of German and Spanish.



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Nico Abel is a corporate partner of Norton Rose LLP and heads the corporate practice at the Frankfurt office. He specialises in complex mergers and acquisitions with a particular focus on transactions in regulated industries such as financial institutions and infrastructure. Nico has wide experience of private and public company mergers and acquisitions, leveraged buy-outs, joint ventures, and corporate restructurings and has advised corporates and financial institutions on numerous transactions. His recent experience includes transactions in the financial institutions, energy and utilities, infrastructure and transport sectors.

Since 2007, JUVE, the leading German legal directory, ranks Nico among the Top Ten German M&A lawyers (age 40 and under). He is further mentioned by JUVE as a frequently recommended lawyer in M&A, Corporate and Private Equity. Chambers & Partners rank Nico as a leading lawyer in Private Equity. They quote clients as saying that he "knows how to get to the key point" when negotiating a deal and praise him for his "very commercial and pragmatic approach". According to Legal 500 EMEA, Nico is "very responsive" and "great to work with".

Mergers & Acquisitions

In the first three quarters of 2012, global M&A activity dipped compared to the same period last year. We spoke to leading experts from around the world to find out what methods and strategies are still producing positive results, whether strategic alliances and joint ventures are the new M&A along with discussing what the future entails and much more.

1. How have changes in the law or recent developments affected transactions in your jurisdiction?

Khodeir: In 2008, the changes made to the companies law for the requirement of certain corporate governance actions to be taken on the part of companies which undertake an acquisition, in terms of general meetings approval and consenting to the transactions, had a change to the process of undergoing acquisition transactions. Other than these changes that took place in 2008, there have been no other changes worthy of note which have had an impact on transactional activity in Qatar.

Del Rio: On the positive side, Mexican economic stability together with high expectations of new President Enrique Peña Nieto for boosting structural reforms which include labour, tax, energy, among others, have rising interest in Mexico. On the negative side, security issues with drug cartels have made a negative impact on the business environment in Mexico. Nevertheless, direct and indirect foreign investment continues arriving to Mexico.

Gabriele: The Mergers Directive (Directive 2005/56/EC) is being implemented by Subsidiary Legislation 386.12 into Maltese law, providing for the legal framework for cross-border mergers involving companies registered in Malta. The respective legislation is to be amended to create the same conditions for local mergers as are in place for cross border mergers.

A recent strategic alliance between the Malta Stock Exchange and the Irish Stock Exchange leading to the introduction of the European Wholesale Securities Market has introduced a new trading platform for whole-sale fixed-income debt securities. This is a welcome step that could provide an alternative means for raising of funds for acquisitions.

Aripdjanov: I need perhaps to warn the readership that general business and regulatory patterns in Kazakhstan, Uzbekistan, and Kyrgyzstan (not to mention even a smaller economies of Turkmenistan and Tajikistan) differ dramatically from the developed jurisdictions by an excessive intrusion into business affairs, state monopolism of key industries, and tight grasp in regulatory environment. Although laws regulating M&A transactions in these countries have not significantly been changed except for anti-trust rules, we witnessed a general trend of replacement to be a major factor. In times of crisis, private moneys have been replaced by public funds in effort of the Governments to (a) regain control over “fallen angels” by expropriation or nationalisation; (b) save jobs by maintaining businesses in trouble; (c) create new jobs by bolster joint venture arrangements; (d) recover additional funding by renegotiating investment deals; (e) seize the assets by confiscating them for breaches and failures etc. These deals are not conventionally recognised “M&A transaction” by investment bankers, but these are “takeovers” where lawyers are found heavily involved.

Dommelen: Although we had a promising start to the year, we see that the recovery is subdued and will take longer than initially thought. For companies this means that the focus is on improving the core business activities. These efforts will result in divestitures of non core activities creating opportunities for deals. Key trends are the changing regulatory landscape in particularly for the Financial Services Industry and the turbulent market conditions driven by the uncertainty around the fiscal cliff in the US and the continued negative Eurozone data. Further challenges to M&A are the continued efforts of banks de-leveraging their balance sheet pressuring the ability of companies to debt finance acquisitions.

Luk: For PRC inbound M&A, the PRC Government has placed increasing importance in anti-trust regulation which may affect the structure of a transaction. M&A transactions are subject to review by the relevant anti-trust authorities. According to the statistics of MOFCOM, by the third quarter of 2012, more than 400 notifications have been reviewed by the authorities. Most of the notifications were cleared, with over 10 cases cleared subject to conditions. A few pending M&A transactions were prohibited. This anti-trust review regime, to a certain extent, increases the time and difficulties for M&A transactions in China.

Outbound M&A transactions from the PRC are dominated by Chinese state-owned enterprises. The PRC Government has issued new policies to encourage private companies to play a more active role in outbound M&A activities. However, the policies tend to be general and their implications on Chinese outbound M&A activities in the private sector remain to be seen.

Mody: Some of the key recent changes in the Indian laws which have impacted transactions include the following:

i) The enactment and enforcement of a new anti-trust regime for mergers and acquisitions since June 2011 has resulted in active anti-

trust scrutiny of M&A transactions for the first time in India.

ii) New public takeover regulations, effective from end of 2011, have amended the conditions of the earlier regulations pertaining to takeover, and in particular, now allow acquirers to acquire up to 25% of a public listed company (as opposed to 15%) without triggering an open offer (assuming no control is acquired).

iii) A recent judgment of the Supreme Court with respect to foreign arbitration processes and awards has resulted in a reconsideration of the venue for arbitration, as a result of arbitration venues in India are now being considered in several transactions involving cross border M&A transactions.

2. What advantages does a corporation gain by acquiring the services of a mergers & acquisition expert?

Duffy: When a deal is being structured utilising an M&A insurance solution, whether to insure the reps and warranties, a potential tax liability or other contingent liability, it is crucial that the parties seek out experts in the area. An experienced insurance broker as well as an insurance company partner with expertise in M&A, can work closely with deal counsel to tailor solutions to overcome deal hurdles, maximise value to both buyer and seller and expedite closing.

Khodeir: An advantage of acquiring a merger & acquisition expert's advice is that they can design and implement a road map for such transactions whilst undertaking the procedural requirements which need careful understanding of the local practices in Qatar. Without such expert advice, a cooperation will be unable to efficiently conduct its transaction given the progressive nature of the Qatari regime.

The M&A market in the GCC should not be viewed only in terms of the acquisition of public companies. One also needs to take into account acquisitions of privately owned companies, given the value that such privately owned companies contribute to economies.

Schrijver: When acquiring a new business, it is important to consider all important aspects of the transaction. While the acquirer often focuses on the financial and economic side of the deal (value of the business, synergies, ROI, etc.), it is equally important to have an eye for the tax and legal implications of a takeover. That is where tax and legal experts come in. They can help companies to set up the appropriate corporate structure, carry out an in-depth due diligence to identify potential risks and liabilities and provide for a sound purchase agreement with appropriate representations and warranties in order to protect the acquirer against damages resulting from unknown liabilities and third party claims.

Del Rio: Nowadays, transactions are more sophisticated and require the advice of experts for negotiating a good deal. Additionally, corporations will have legal security and certainty with due diligence prepared by experts of each applicable area.

Gabriele: M&A is a highly specialised area, which requires high reactivity over various areas such as corporate, tax, financing and employment law. By hiring an external consultant, a corporation benefits from the experience gathered in a wide range of transactions. At Camilleri Preziosi, all lawyers practise as generalists and have one or two areas of specialisation. This approach ensures a comprehensive view on all transaction matters. Often, the collaboration of in-house teams and external consultants obtain the best results by efficiently sharing operational insights and experience gained from broader technical exposure.

Aripdjanov: In high-risk countries of Central Asia where regulatory perils are not easily perceivable a M&A expert is able to provide not only legal insight and understanding of the target position, but also practical tips and knowledge of business milieu, local intricacies and peculiarities, cultural and historical background that may have quite strong impact on the business. To illustrate, a foreign investor bought cement-producing plants in Uzbekistan on the wave of construction boom, but quite soon realised how this business is vulnerable to financial downturn: demand for cement production declined so did the price for the output. Sound marketing policy led the client to sell cement to neighbouring Tajikistan apparently for the construction of the Roghun Dam in total ignorance of the political tension over the use of water resources between the two states. No wonder that the case of confiscation of investor's assets is now set for arbitration at ICSID.

Domberger: The most important advantage M&A advisers bring to corporates - whether they're advising on an acquisition or a sale - is market insight. This includes advice on valuation (if acquiring, not too high; if selling, not too low) based on experience of and insight into other recent deals in the sector.

It also includes market norms - because they do lots of deals, they can advise a corporation on what's 'on market,' what's normal in the current M&A climate, what you might be able to get away with and what the other side might perceive to be unreasonable. And because a good M&A adviser is experienced on both sides of the table, they can help ensure you're presenting things in a way that is most likely to be accepted.

Luk: M&A experts can assist a potential buyer in evaluating the target company, conducting due diligence, and designing deal structure to maximise the buyer's return and minimise risks. The experts may act as a bridge between the buyer and the seller by providing objective advice and narrowing the differences between the parties, with a view to increasing the chance of success of the transaction. M&A experts can also provide services in the preparation of the transaction documents, and generally oversee the procedures of the transaction.

Mody: From the perspective of an acquirer, the services of a merger and acquisition expert are critical for ensuring that the transaction

is structured in the most efficient manner from a legal, regulatory and tax perspective, and that the rights of the acquirer are protracted on a long term basis taking into account the purpose of the acquisition. Further, the expert also assists in negotiation of the key terms of the transaction. From the perspective of the 'acquired corporation', services of an expert assist in capital raising by monetising such corporation, its assets etc. especially when the 'acquired corporation' is a smaller organisation.

3. In the first three quarters of 2012, global M&A activity has dipped 19.4% compared to the same period last year. Should we be concerned by this slowdown? Is the stock market still healthy?

Khodeir: Without a doubt the capital market has been slow in the recent years post the global financial turmoil and yet there are signals of potential recovery of 2003 that everyone is wishing for.

Del Rio: Even though the M&A activity has diminished, we still see liquidity in the market. We expect more consolidation between companies. In the case of Mexico, the Mexican stock market is still very small. However, there is still a lot of room to grow. Mexico, together with the rest of Latin America, offers political and economic stability. Structural reforms are expected to also boost the Mexican stock market.

Gabriele: In the midst of the continued global economic crisis or gradual recovery therefrom, Malta's economy and banking sector remain stable. Overall, the equity market has seen a relative consistency in stock prices and investors have not shied away from investments in new listings. The local bond market has witnessed a recent surge in activity as a number of bonds were approaching maturity and fresh issues were made. Besides refinancing with listed bonds, private placements of high yield bonds and hybrid instruments are commonly seen in the market, particularly, in our view, as a result of the stringent requirements of the sinking fund policy applicable to listed bonds. Possibly having recognised that the requirement to set up a sinking fund to amount to 50% of the bonds' aggregate value by the end of their term makes listed bonds less competitive, the Listing Authority recently issued a consultation document on proposed amendments to the listing policies.

Aripdjanov: In peripheral jurisdictions where M&A activity is nearly alive, the stock market has never looked healthy. Kazakhstan is a rather an exception in this case, but most of the "M&A" transactions are carried over through joint venture arrangements. This area of expertise became particularly important with the view of the fact that many investors now prefer to team up and offer joint efforts in developing the business together instead of pulling out scarce cash to acquire the target. This trend has been further developed to offer a "farm-out" instrument for corporate transactions. Likewise, the Governments start resorting to a forced "takeovers". For example, in 2009 Kazakhstani Government nationalised two major commercial banks, BTA and Alliance Bank, to prevent the failure of major financial institutions whose role was central for their massive financial holding structures. Kyrgyz Government has placed certain pressure on investors to renegotiate shares in a gold-mining joint venture Kumtor.

Eisenberg: Global M&A activity has been soft, which is surprising to many M&A professionals. With all of the cash on the sidelines both at corporate acquirers and private equity firms, buyers were well positioned to make acquisitions. That coupled with changing tax laws in the US, most of us anticipated strong M&A activity. The lack of activity comes down to several factors: sellers not being able to get the value they expected, sellers not facing uninspiring reinvestment opportunities and buyers concerns with the global economy (European debt, fiscal cliff, increased global unemployment). The stock market has remained strong through the fall, so we believe that M&A activity will return slowly, but surely. The month of October saw increased M&A activity in the US.

Domberger: Deal volume was down in 2012 compared to 2011, but valuations have held up well, for two key reasons.

Firstly, there is a shortage of high-quality businesses for corporations to acquire and for private equity houses to invest in. This means that a high-quality business can generate real competitive pressure amongst acquirers and investors, and this supports attractively high valuations.

Secondly, there are far fewer 'distressed' transactions than were completed in 2008-9-10 in many sectors (retail is an obvious exception); these deals dragged down average valuations and as they have become less frequent the stats are capturing more 'strategic' M&A at higher valuations.

Dommelen: The latest findings from our IPO Watch Europe survey show that in Europe, after some encouraging signs in the first three months of the year, volatility returned to the markets in the second quarter reflecting the Greek and Spanish bailouts and the downturn in global economic growth, leading to a dramatic slowing down of IPO activity. The weakness of the IPO market reflects not only the tough market conditions but also the number of companies that postponed their IPO plans. Historically, we have always seen the market return to normal, even after the full impact of the financial crisis in 2008.

Luk: The recent global economic recession has contributed to the general slow down of M&A activities as compared to the last few years. How much time is needed for the global M&A activities to pick up will depend on the recovery of the world's major economies, like Europe, the US and China. Despite the global M&A decline, outbound M&A activities by Chinese enterprises still maintained at a strong level. Chinese companies are taking advantage of the buying opportunities, thanks to a strong currency, to acquire technology and resource-oriented businesses in overseas markets on better business terms.

Mody: Although global and domestic uncertainties have impacted mergers and acquisitions in India in 2012, we expect a rise in 2013, especially in cross-border activity. Due to the recent 'investor-friendly' reforms announced by the Indian government, we expect the M&A activity to rise in 2013. These reforms include the liberalisation of foreign investment norms in sectors like retail trading, civil aviation, broadcasting and power-trading exchanges.

4. Companies searching for ways to return value to their shareholders have to look outside the box as traditional M&A strategies are increasingly unavailable. What methods and strategies are currently producing positive results?

Duffy: Negotiating the best possible post-closing indemnification terms is a key priority for both buyers and sellers. A potentially successful strategy is to incorporate Warranty & Indemnity Insurance (also known as Reps & Warranties Insurance) into the deal, rather than relying exclusively on a seller indemnity to address the risk of breaches of seller warranties. Sellers today are negotiating lower indemnity caps and eliminating or reducing escrows, by incorporating a W&I policy into the deal. Sellers are particularly successful in this strategy when they raise it at the very beginning of the negotiations. Buyers, on the other hand, are winning auctions by proactively using W&I insurance to offer indemnity terms attractive to sellers.

Khodeir: Bidders and sellers both need to be realistic about the pricing issues when considering the M&A transactions. There has to be some careful consideration of the offering by both sides in order to be able to conclude such transactions.

The level of warranties that certain investors may require, in some instances, may be difficult to award in light of the nature of how companies are managed in GCC and in Qatar, that differ from the standard forms of representations resulting from different management schemes adopted in other jurisdictions. As such, investors are starting to be more flexible in terms of pricing and their approach to the level of the representations and warranties they require from sellers. Thus there have been some progressive deal structures adopted that offer a compromise to the requirements by both sides. In addition, investors and companies are starting to look into diversifying their pool of investment into new areas such as education, healthcare, and technology. All these factors are hoped to assist in boosting the M&A market in the region.

Del Rio: Although the hostile tender offer by Grupo Mexico to acquire up to 100% of the outstanding shares of Grupo Aeroportuario del Pacifico was withdrawn, this strategy appeared to be an interesting method (which is one of the first hostile tender offers in Mexico) to acquire a company in Mexico.

Gabriele: Besides monitoring transaction cost, restructurings aiming at the optimisation of the group-financing lead to more efficient cost of capital figures. A Maltese financing company is often used to bundle the group financing positions. The benefits of such internal restructurings positively affect the returns for investors. Strategic portfolio management, aimed principally at identifying core business followed by strategic acquisitions in such core business financed with proceeds from divestitures, has also become an important tool to increase returns to shareholders.

Aripdjanov: A number of companies took a conservative approach. Some of our clients have been offering the license or franchise arrangements to test business opportunities and get acquainted with the target before committing to an equity injection. Strategic clients who agreed to relocate some production processes (e.g. assembly, localisation of spare-parts etc.) managed to negotiate direct investment agreements with host Governments to ensure legal protection against changes in laws and taxes during the lifetime of a project.

Eisenberg: Companies have been looking to provide shareholder returns through several activities in addition to acquisitions. Most companies are looking for top line revenue growth through expanding into other geographic markets, especially emerging markets. There has been a real strong push for productivity improvements and cost containment. Many companies downsized during the recession and even though their revenue has rebounded, they have not added staff or capacity so that they can maximise profits. The other thing that companies are taking advantage of is the low interest rate environment. Many companies are lowering their overall cost of capital by issuing long term debt debentures to lock in the low interest rate environment. In the US, there are a lot of companies making a one-time dividend distribution to their shareholders to take advantage of favourable tax treatment.

Dommelen: Investment opportunities, especially of distressed and/or carve-outs businesses of European companies become increasingly attractive. The economic downturn, lack of available funds in the credit markets and continuing market uncertainty will put pressure on business valuations and make these propositions attractive to well capitalised businesses seeking to expand their geographic footprint, in particular Asian investors. In terms of methods or alternative transactions we see seller-financed acquisitions, joint venture arrangements, step-acquisitions (many times involving put / call options) and new LEV financed corporate restructurings.

Luk: Companies are putting more focus on post-completion integration to maximise synergies generated by M&A transactions. Chinese businessmen now begin to recognise that retention of the existing skilled employees of the target group post-completion is crucial to the continued operational success and development of the combined business. As such, buyers are paying more attention to human resources issues in the M&A process. Attention is given not just to employees at the executive level. Buyers are also making efforts to integrate the broader workforce by way of financial incentives and preservation of corporate culture. A successful integration can assist in maintaining and expanding existing business relationships of the target group with its customers.

5. Are strategic alliances and joint ventures the new M&A?

Khodeir: This statement could be true. Joint ventures are a migration from customary M&A activity to new forms requiring acquisition or merger of companies. The economic implications are the same where two economic entities consolidate their efforts into a business, whether through a joint venture or strategic alliance. It is a fair statement, as we have seen an increasing level of joint ventures and strategic alliance activities over the past two years.

Schrijver: The economic crisis has had an impact on the general approach of companies towards M&A transactions. As potential acquirers have become more prudent, transactions usually take more time and require more flexibility and creativity. The clean cut deal belongs to the past. As a result, joint ventures and strategic alliances have become more interesting, as it allows parties to enter into a relationship of collaboration and to get to know each other before proceeding to a takeover. Another reason why joint ventures and strategic alliances are on the rise is that the entire purchase price does not have to be paid directly, which is an enormous advantage in economically difficult times.

Del Rio: Alliances and joint ventures are an alternative for conquering local markets, especially for companies that do not know the local market. Some also represent business opportunities to expand. Additionally this could reduce costs to the corporations that want to participate in new markets, since they would be entering in to a market already known by local players.

Gabriele: While joint ventures are certainly a dominant trend in M&A, in certain cases cooperation is not the optimal strategic solution. Strategic alliances to reduce development cost, share market access or benefit from economies of scale are increasingly common in many sectors. Nevertheless, I believe that in certain cases, even following commencement of negotiations on potential joint ventures, parties consider shifting their priorities to an outright bid to buy out a competitor.

Aripdjanov: What constitutes an “M&A” deal in Central Asia is now being changed and, for legal community, at least, it represents a vast variety of deals. M&A lawyers find themselves involved in a number of non-conventional forms of economic consolidation, including: (a) establishment of joint ventures and strategic alliances, (b) integration of “independent” licensees or franchisees, (c) nationalisation or any other form of compensatable coerced acquisition by governmental authority, (d) confiscation or any other form of non-compensatable forced take over by the governmental authority.

Domberger: These definitely have their place in a toolbox, but they’ll never completely replace M&A. They offer good ways to share risk and manage exposure, particularly for companies moving in to new activities or territories, or exploiting new technologies in unproven ways. But they don’t provide the complete ownership, and hence control, that an outright acquisition does, and there is often a need to unwind the alliance or buy out the JV in order to achieve this.

Abel: We have in the past 18 months in fact seen an increased number of transactions that were structured as joint ventures. There are various reasons to enter into a joint venture. In some countries, foreign investors are required to team up with a local partner for regulatory reasons. The abundance of available capital in private equity have caused a number of financial sponsors to consider minority investments. And in many cases investors use joint ventures to spread their risk, in particular in project developments. In an uncertain economic environment, in particular the latter reason may have led to an increase of joint venture transactions. I would still expect that the large majority of M&A transactions will continue to be investments by single investors, and that joint ventures will account for a relatively small share of the market.

Dommelen: A recent Global CEO survey conducted by PwC shows that more than 70% of the CEOs rated partnerships as important or critical to their business. Especially, as capital is scarce these days and management is under pressure to achieve growth strategic alliances and JVs are a popular method of expanding businesses. Additionally, we see that technology, economic and demographic change requires a greater collaboration between different industries. Media companies, for example work increasingly together with financial service providers as new forms of monetisation of content change the business models of the future. Also growth strategies in African and Asian markets by European and US companies is often in the form of JVs. However, the experience of partnerships is often mixed. Often, it goes wrong at the start when there was no proper assessment as to why the partnership was selected as the appropriate vehicle, or the wrong partner was selected. But also in the implementation can it go wrong when there is lack of trust. Trust is paramount as there is a constant need to share information and views to move forward but also concerns that this may result in the other partner taking advantage within the partnership or other competing areas.

Luk: Because of increased anti-trust issues and other factors, joint ventures and strategic alliances are receiving a revived interest as alternative structures to traditional M&As. Global alliances are gaining popularity when Chinese companies pursue their international ambitions through trusted and foreign partners, and vice versa, when international corporations seek to gain better access to the domestic market in China, they tend to cooperate with reputable Chinese business partners. These strategic alliances enable different parties to pool together their resources and local expertise which are necessary to enter into foreign markets. In forming joint ventures or strategic alliances, we need to address issues like foreign-ownership controls, securing favourable treatment for foreign investors to become “local players”, and clearance of anti-trust and national security issues, etc. The key factor to the success of any joint venture is to find a trust-worthy and experienced business partner and to maintain a good relationship with such partner.

Mody: One of the most obvious factors for this are the Indian regulations whereby foreign entities are allowed to operate in the Indian market only by way of joint ventures in certain sectors, for instance, insurance, telecom, retail trading etc. Further, since strategic acquisitions are costly, an alternative available to entities that wish to avail of the benefits of M&A is to opt for joint ventures.

6. This year has seen patent acquisition and licensing intensify with battles between Apple Inc and Google Inc in mobile devices and digital content. With intellectual property becoming increasingly important, how would you help identify and strategise the best opportunities to pursue?

Khodeir: Without a doubt technology transactions are the future for the region and will continue to increase. Advising on such transactions requires a level of expertise focused on these practise areas of intellectual property and technology. At Al Tamimi and Company we have a devoted team who are focused on technology, media and telecommunications alongside our intellectual property practice, who are both capable of providing clients with focused solutions for their technology or IP related transactions.

Del Rio: Technology is driving new opportunities. Mexico is involved today in the aerospace industry by developing different clusters, taking advantage of more skilled labour force. This increases the value of such companies involved in these types of activities.

Gabriele: Once the strategic acquisition opportunity has been identified by our clients, we assist in optimising the intellectual property situation of a group for example by bundling patents and trademarks in a Maltese holding company. When negotiating and drafting the transaction documentation, special attention has to be paid to the use of intellectual property and research results obtained by the joint venture. The Maltese legal framework offers various incentives for the holding of patents such as deductions, which might be spread over the life time of a patent of capital nature or exemptions, which apply under certain conditions to royalties received in respect of inventions.

Aripdjanov: In recent years businesses tend not to bring cash, but to combine with a partner “efforts” including IP rights to be contributed by an investor. It limits his exposure with mere grant of an exclusive license for certain processes or products that can be easily suspended or revoked. This is particularly important for strategic alliances and joint ventures where these forms of cooperation cease to exist once the license is revoked.

Domberger: The key is proximity to your strategic goals. Unless you’re a patent troll, there’s no point acquiring patents or other IP merely for its own sake, and in some contexts you might not need to own the technology – a license might be enough.

Decisions on prioritisation need to bring together your operators and your strategic decision-makers: it has to start at the operating level, not in the M&A team, because it’s the guys running the business day to day who are best-placed to identify what IP they need to achieve their objectives.

It’s then up to the M&A or Strategy team to work out if this is something you genuinely need to control, and to prevent others using, or whether you merely need access to it.

Luk: Before investing in a company, it is crucial to assess its financial conditions and asset value. For targets with mostly intangible assets like intellectual properties, IP due diligence will be important in assisting an investor to value the transaction and assessing the risks involved. Strategic IP due diligence usually starts long before a specific term sheet is on the table. During such due diligence, IP legal and other experts will check important information such as legal title, contractual rights and registrations of the various intellectual property rights concerned, to try to uncover potential defects in such rights and properties which may generate risks to the investor. Material legal and technical issues identified in this review process will be evaluated against the goal of the investor and be covered by the financial terms in structuring and pricing the transaction.

7. Developing countries are gaining strength and influence as big corporations are looking to expand in these promising territories. What regions are worth noting for M&A potential? What does an organisation need to be wary of when dealing with cross-border transactions?

Duffy: Negotiating post-closing indemnification terms can be particularly problematic in cross-border transactions. Buyers often have concerns about their ability to collect on an indemnity in an unfamiliar jurisdiction, particularly if there is a dispute with the seller. Sellers, on the other hand, may have reservations about exposing themselves to post-closing claims from a foreign buyer. In either case, transferring a portion of the potential liability to an insurer through a Warranty & Indemnity Insurance can be particularly useful in overcoming these concerns and getting the deal done.

Khodeir: Qatar, Saudi Arabia and the UAE are one of the very promising markets. Libya and Egypt will follow once stability and security position is rectified. Iraq also continues to be one of the very promising markets. Acquisitions of a cross border nature require careful consideration of different legal regimes, which may have authority over requirements and the legal implications. As such, marshalling advisors who are able to advise on all respective jurisdictions, are essential. Our firm has an advantage in such cross border mergers when it involves the six jurisdictions we cover i.e. Qatar, UAE, Kuwait, Saudi Arabia, Jordan and Iraq, as we have at our disposal - teams and regional practices that are able to meet and advise clients on their requirements in these jurisdictions.

In regional jurisdictions where we do not have a presence, we have close alliances with many leading firms, that extends our reach and provides our clients with prompt, efficient and accurate advice in respect of M&A. Timeline for completion of an M&A transaction becomes quite challenging when it involves different regulators. There is a need to synchronise the transaction closing date and ensure a

smooth acquisition is completed. We have a balanced diversity between Common Law and Civil Law lawyers who are able to understand both concepts when it involves other jurisdictions. Even if the target is not located within one of the common law jurisdictions, many clients come from the common law background and they require feedback that is common law legible - given the diverse nature of our lawyers, we can do this for them.

Schrijver: Whereas Africa is still an extremely high-risk region for M&A, due to an inadequate physical and economic infrastructure, political instability and corruption, other regions are seeing an increase in the level of foreign investment. In the Middle East, the trend towards liberalisation in state-owned industries and the reduction of trade barriers is promising. While political risks and organisational cultural differences are certainly a concern, other factors such as infrastructure, currency instability and problems with the intellectual property are less problematic. China, India and South East Asia attract more interest from overseas investors than anywhere else in the world, but while the potential rewards are certainly significant, so too are the risks. More in particular, the region still faces problems with bureaucracy, protectionist sentiment, organisational and cultural differences, intellectual property and environmental liabilities. When engaging in cross-border transactions in such higher-risk areas, it is important to rely on local counsel or experts with a firm knowledge of the business environment and the local cultural and customs.

Del Rio: Due to globalisation, diverse regions of the world are expanding and developing very fast which in our particular case is Latin America (with exception of Venezuela and Argentina due to political matters), offer political and economic stability. Brazil in particular is a growing market together with Mexico, Colombia, Peru and Chile. We have seen increasing M&A transaction among companies in Latin America.

Gabriele: While it can be said that in theory the vast majority of the African continent offers new opportunities with its mining, oil and gas opportunities as well as agricultural target companies, Malta has been seen to focus on its strategic position for investments into Libya, Northern Africa and the Middle East. At present, the lack of political stability and security constitute the main challenges faced by prospective investors. These downsides are, however, counterbalanced by the opportunities of growth, entrance to growing markets and investment incentives that this territory has to offer. What is clear, though, is that apart from careful assessment of the legal and tax implications in each jurisdiction involved in the transaction as is undertaken in any cross-border transaction, additional concerns remain pivotal in the territory.

Aripdjanov: For many outbound investors, undeveloped Africa and Asia attract attention of those who were lucky to retain cash for investments in difficult times. Our clients particularly invested in Tanzania and Pakistan to buy mining assets.

Eisenberg: The emerging economies are leading the world out of a recession for the first time in approximately 100 years. As a result, there is increased M&A activity in the emerging economy countries, both inbound and outbound. China, Brazil and India are the major countries, but there is also growth of activity in Turkey, Mexico and other countries. Buyers need to be aware of the local customs and rules of these countries. There are strict rules on how to repatriate funds from China, employment laws in Mexico require severance payments, intellectual property rights are treated differently across the globe. So buyers need to understand the culture and the customs of the countries they are looking to expand into.

Domberger: We'll continue to see very strong interest in and from China, which we tap in to through our team in Beijing. India is also very important, particularly in sectors such as Industrials, Manufacturing, Energy and Technology. The USA-UK and USA-Europe axes remain some of the most active for M&A, and we don't expect that to decline.

Around half our deals are cross-border, and these deals come with many pitfalls. You really need an experienced adviser who can guide you through them - from the trivial (time differences) to the surprisingly fundamental - the capacity for causing offence by suggesting a working sandwich lunch in the office, instead of a sit-down meal in a restaurant, should not be understated!

Abel: Large German corporates have for many years looked at investing in Eastern Europe, India and Asia Pacific, there in particular China. It is nowadays less for cheap production and more for penetration of attractive markets and capturing a share of future growth opportunities. Also, Africa is attracting more and more investors from those industries that are resource intensive. Interestingly, we have in the recent past seen a sharp increase of investment in the opposite direction, in particular acquisitions by Chinese and Indian investors of German target businesses that either offer interesting technology or that can help the investor to raise its brand recognition. These cross border transactions are often multi-jurisdictional. It can be a challenge to coordinate the legal implications in multiple transactions and it is important that a client appoints a lead transaction counsel to manage and cover the relevant legal risks.

Dommelen: According to a PwC report "Learning from the Next 4 Billion", businesses looking for growth target the "Next 4 Billion" nations which include India, China, Indonesia parts of Africa and Latin America where over 4 billion of the world's 7 billion reside. Traditionally the focus was on the middle and upper middle income tiers. However the next wave will come from the emerging middle which lies just below the middle income segment. Acquiring a business is one way, but very often the only way, for foreign companies to access these markets.

Views from our network show different perspectives on doing deals in emerging countries. In Asia we see strong competition from rival bidders and alternative sources of funds which, in addition to the lack of reliable and precise (market) data, makes a mutual understand-

ing on valuations difficult. For this it is important to structure the approach you take to valuations. But also a proper stakeholder review is crucial when it comes to closing a deal. Companies are often owned by large families who have complex governance and decision making structures. Other issues faced by businesses doing deals in emerging countries are for instance the regulatory environment, government interference preventing deals to complete, the lack of proper IP protection and difficulties to recruit and retain key staff. To be successful, we recommend to conduct your due diligence on the ground and to take a phased approach so you can identify the key issues and then focus on them.

Luk: With the more frequent uses of RMB overseas, offshore RMB are allowed to be used by foreign investors to invest in China, and Chinese companies are now able to invest overseas using RMB. Foreign exchange risks, transaction costs and operational costs in China can be comparatively lowered than in the past. It is expected that more investors may opt to use offshore RMB to carry out M&A transactions in China and worldwide. As for investment opportunities, apart from China, it is expected that the US, Australia and African countries will continue to be attractive as they are rich in natural resources and energy resources. The weakening of the Euro also provides more opportunities for investments in some European companies at bargained prices.

For investments into China, new anti-competition law and national security reviews may present issues to some M&A transactions. The anti-competition controls tend to be rather strict and the national security review process tends to be long. It may affect the timing and costs required for the parties to negotiate and complete a transaction.

Mody: Countries like India, Malaysia, China, Russia and several countries in Africa are emerging markets for M&A activity as far as developing nations are concerned. Some of the major challenges with respect to cross border M&A are:

- (i) For legal reasons, it is not possible to merge companies in different jurisdictions. Therefore, the complexity of structuring such mergers is vastly increased.
- (ii) In India, there is some ambiguity regarding the enforceability of certain typical rights in M&A transactions relating to public companies such as transfer restrictions and call and put options.
- (iii) There is often unwillingness of the target company shareholders to hold foreign domiciled equity of the acquirer.
- (iv) Cultural differences that can affect the timing and pace of the mergers.

8. When representing a business in a takeover, what ranks highest on your due diligence check-sheet?

Duffy: Every deal is different, of course, but we see a lot of deals get sidetracked because of potential tax liabilities identified in the due diligence. These can range from transfer pricing issues to concerns about the tax treatment of prior reorganisations. Buyers should keep in mind that many potential tax liabilities, as well as other types of contingent liabilities, can insured and therefore taken off the table as a deal issue. Indeed, we often see sellers purchase tax insurance in advance of a deal, to ensure that uncertainty over a particular tax position won't become an issue for prospective buyers in due diligence.

Khodeir: The typical risks that we highlight from the legal point of view is licensing requirements, potentially threatening litigation, corporate governance, insurance and the like standard to all requirements of a successful business. The legal risks associated with the business could have major implications on whether or not to proceed with the deal. Not to mention the intellectual property assets evaluation, in terms of legal title, particularly with businesses that have a great attributable value to IP assets.

Schrijver: Where the focus of a due diligence investigation should lie largely depends on the industry in which the target is active. When acquiring a petrochemical company, the importance of a sound environmental due diligence cannot be overestimated. The takeover of a pharmaceutical or biomedical company, on the other hand, will require an in-depth intellectual property due diligence. With respect to target companies with a large headcount in Belgium, a significant part of the due diligence effort focuses on employment and works council issues. In general, the review of customer and supplier contracts and of real estate, whether owned or leased, is always important.

Del Rio: Anti-trust, corporate and tax matters. Environmental and foreign trade matters are also gaining an important role.

Gabriele: At an initial stage we verify the valuation principles and check for necessary regulatory approvals or notifications. When assessing the liabilities of a potential target, we pay special attention to the contractual liabilities, contingent liabilities, claims, litigation and potential tax exposures. On the asset side we assess the property and rental situation as well as the patent and license status. Furthermore, the corporate finance structure of the target has to be analysed carefully and a post-acquisition financing strategy needs to be carefully mapped out. Employment matters also have to be carefully assessed and monitored throughout the process as further elaborated in question 9.

Aripdjanov: Assessment of public and administrative risks takes the central place. It mainly covers licensing, land use, subsoil use, taxation, environmental, and compliance issues.

Abel: Legal risks - including risks that may have a significant impact of the value of the target business or even be a show stopper - may from time to time be found in every relevant legal area, and it really depends on the business of the target company. Having said that, regulatory and compliance are areas which increasingly rank high on the agenda of a legal due diligence. This may, for example, include

anti-competitive behaviour or bribery. Non-compliance in these areas may eventually lead to harsh fines and threaten the existence of a business, and it is therefore important to identify any risk in these areas beforehand.

Dommelen: Obviously, it starts with a financial and operational review of the company's business plan in the context of the market conditions and the competition. Such a review should help companies to formulate the strategic rationale of the deal and to understand the main business drivers, as well as the key areas of upside opportunity to deliver deal value from transactions. But equally important is the development of a combined business plan including synergy cases and a high level integration plan. Especially when it comes to finance the acquisition we see that banks require such plan to evaluate the proposition.

Luk: In any M&A transaction, examination of the target's shareholding structure and title (including encumbrances), which form the very subject matter of the takeover, is at the top of the due diligence list. Since many takeovers involve public companies, regulatory compliance issues will be another important area for due diligence. For example, in China, most of the business activities of a Chinese company are required to be approved by or registered with the local, provincial or national government. A due diligence review is needed to find out whether a Chinese company has circumvented such approval or registration requirements. It is important for a buyer to ascertain the potential risks and liabilities which it may assume after taking over the target, and to seek appropriate protection and compensation when the transaction is negotiated. Further, particular care should be given to a review of any potential bribery issues relating to the target, in view of the increasing investigations and enforcements of anti-corruption laws by the Chinese or foreign governments. It is important to identify any past violations and suspicious redflags.

Mody: Typically, the issues which would rank highest on DD check-sheets would be potential liabilities on account of either litigation or regulatory violations. It would be equally important to ensure that from the point of business perspective, the legal rights relating to business contracts for assets vest clearly with the target. Further, issues relating to related party transactions also assume high importance. Priorities in a due diligence may also change as per the reasons for acquiring the target. For instance, if the primary reason is to get access to a new product, the highest priority will be to ensure that the product is near completion. If the primary reason is to acquire intellectual property rights of the target, the priority will be whether the target rightfully owns the IP and there are no pending litigations in relation to such IP.

9. Human Resources can be something of a minefield. Employee retention and personal injury are but two potential nightmares. How can you minimise risk and how important is it to get your employers liability insurance spot on?

Duffy: M&A deals can affect a company's workforce in the form of reductions in force. Companies are vulnerable to allegations of age, gender or race discrimination when layoffs are conducted improperly. For instance, in the US the Older Worker Benefit Protection Act (OWBPA), an amendment to the ADEA, applies to employees age 40 or older. The OWBPA has strict requirements even when a severance agreement and release is obtained from the over 40 worker. Employers often don't take the time to comply with the duties outlined by the OWBPA and this leads to liability. The importance of rounding out your insurance portfolio with Employment Practices Liability Insurance should not be overlooked

Khodeir: Firms need to have human resource experts recruited to provide them with technical advice on the best modes of developing their HR assets. In addition, proper employment law advice is required for corporations to understand their rights supported by designing HR policies that are employee friendly and not just intending to favour the company vis-à-vis its employees. Though not a legal issue, it is known that employees willing and wanting to be a part of an organisation are far more productive than employees who are afraid or have no option other than to stay in the organisation or leave it.

Del Rio: Companies in Mexico are required to have prevention programs. Also, in accordance with Social Security Law, employers are required to register their employees in accordance with risks involved in performing their duties, which also help reduce risks. Nevertheless, Mexico is gaining preference for manufacturing opportunities since it has very skillful people together with cheaper costs.

Gabriele: One of the most important factors for employee retention is the way in which disclosure of the details relative to a transaction is made and the timing thereof. In case of personnel cutback, the content of compensation and early retirement schemes has to be disclosed at an early stage, in order to avoid losing valuable personnel as a result of uncertainties and in order to ensure compliance with the Transfer of Business Regulations (Subsidiary Legislation 452.85) and the Employee Involvement Regulations (Subsidiary Legislation 452.103). On a day to day basis, in light of the increasingly litigious culture that sees corporations faced with health and safety as well as employee liability concerns, the importance of securing appropriate insurance cover cannot be understated.

Luk: Buyers should identify which employees they want to retain early in the M&A process. Ideally, these key employees should be asked to sign retention agreements either during the due diligence or the negotiation stage. Financial incentives in the form of retention bonus can be used. However, it is critical for buyers to understand that retention agreements and financial incentives cannot guarantee genuine trust and loyalty. Rather, after completion, the buyer should demonstrate to employees that it will "do good" for its employees, such as providing more learning and promotion opportunities and offering more managerial support. In addition, the buyer should convey its visions for the combined entity and how the transaction is beneficial to its employees. As for employer liability insurance, buyers should be aware that failure to adequately insure liabilities may result in insurers voiding a claim and this may wipe out the perceived value of a transaction.

Mody: Conducting a thorough due diligence is vital to ensure that no employment related liabilities of the target company are taken on by the acquirer, since corporate balance sheets may not provide sufficient data. In many cases, depending upon the nature of the business of the target (for instance if the target is a manufacturer and therefore, labour intensive) a separate human resources due diligence may be undertaken. One of the ways of minimising such risks is to obtain indemnities from the target for any claims by employees faced by the acquirer, as the successor employer of the target, with respect to the period prior to the acquisition/ merger.

10. What is the best way to finance an acquisition if a business does not have enough capital?

Khodeir: There is no best way to finance. There are different forms of financing that are: debt financing, banks or debt instruments or equity financing through strategic investors or capital increases. Each cooperation encounters different cycles and depending on the phases that it goes through the appropriate financing scheme would be identified.

Schrijver: If a business suffers from a lack of capital, there are a few other ways to finance an acquisition. First, there is a possibility to negotiate an earn-out with the seller, whereby a portion of the purchase price is paid after the closing, contingent in whole or in part on the target company's financial performance over a specified period of time. Earn-outs are typically based on the projections that the seller prepares as part of the sale and/or due diligence process and are structured as a percentage of a mutually agreed upon financial metric, most often revenue, gross profit or EBITDA. Second, a leveraged buy-out or an owner's buy-out offer the possibility to offer the seller shares in the new holding company. Third, buyers are increasingly asking sellers to finance a portion of the purchase price as a means of bridging the value gap. Seller notes are typically paid over a specified period of time at a pre-negotiated interest rate, with payments due monthly, quarterly, semi-annually, etc. Finally, the Belgian Code of Companies also allows the target company to finance the acquisition of its shares by a third party, provided certain conditions are met. In particular, the terms and conditions of the loan granted to the acquirer must be at arm's length and the funds used to finance the transaction must be taken from the distributable profits or reserves of the target.

Del Rio: LBO's are the customary method to finance the acquisition by a business with not enough capital. Finding a JV partner or a private equity partner may also be a way to finance such acquisition.

Gabriele: The financing structure very much depends on a case by case analysis of the financing needs, the cost of capital and the market standing of a potential acquirer and its target. While some acquisitions follow a traditional approach of a mix of plain vanilla and mezzanine loans, the private placement or public offer of high yield bonds is gaining prominence in the market particularly in the case of small and medium size operations which in the current economic climate are not apt to bear the relatively high cost and compliance requirements of market listings.

Aripdjanov: In our experience many investors turn to project finance to be lent by a large financial institution, including mainly multilaterals, Exims and development funds. These institutions utilise governmental funds to foster development and maintain the export potential of economies. Rarely do business resort to loans of commercial banks or raise funds at the stock market. Here again Kazakhstan can be easily singled out with the Governmental program of People's IPO that schedules a number of wealthy national companies for equity funding at the stock market.

Eisenberg: The best way to finance an acquisition is different for different companies. As this recession reminded us, there is a downside to relying on too much debt. A buyer has to figure out the optimal capital structure for a business. If there is very consistent cash flow, the company can carry more debt. If there are higher capital expenditures or higher working capital requirements for growth, the debt levels should be more moderate. A buyer should model out several capital structures to see the impact. While most buyers are thinking about protecting the down side when they model out a potential acquisition, they also need to think about planning for success as well.

Domberger: The honest answer is that it depends, as different forms of finance have different characteristics and will be more or less appropriate for specific deals, companies, and/or sectors.

For example, bank debt is relatively cheap, particularly if it can be secured on assets (property, debtors, stocks etc.). But it needs to be serviced in cash each quarter, both interest and principal.

Equity, in contrast, is much more expensive, but you don't have to pay cash out of the business each quarter to service it – it only gets paid out at exit.

This means there's a trade-off between cost of finance and cash flow impact; there are lots of hybrids or variants between these two which can help find the optimal combination for a specific situation.

Dommelen: Businesses that do not have access to regular ways to finance the acquisition may tap into new trends of non bank funding from, for instance, insurance companies, sovereign wealth funds and private investors. These non bank funders may be complementary to the traditional credit providers or can be the alternative financing source.

Luk: There are a number of alternatives to financing an acquisition depending on the circumstances and an investor's objectives. Leveraged buyout is one popular option where financing of the purchase price is largely provided by borrowing from banks with liens over the assets of the target group. For outbound M&A activities of Chinese state-owned enterprises, it is common for a large portion of the purchase price be financed by "M&A loans" by state-owned banks. For companies which may encounter difficulties in obtaining bank loans, private equity funds or venture capital are also common sources of finance. For example, in 2012, with the financing of CITIC Private Equity Funds, Sany Group, a prominent construction machinery manufacture in China successfully acquired Putzmeister, one of the largest German manufacturers of concrete pumps.

11. If your time and resources are limited, how can virtual data room (VDR) help reduce costs and facilitate M&A activity?

Khodeir: Virtual data rooms are the more efficient forms if documents are properly arranged within the rooms. They would save time and efforts required to review and analyse documentation. It has been an increasingly usable form in the past five years.

Schrijver: The main advantage of a VDR is that it allows flexibility. Not only is there no more need for time-consuming journeys from and to the data room, the review of documents (either on-screen or after printing) can be carried out at any time, which increases efficiency and reduces costs. Another advantage is that it becomes possible to involve the most skilled and experienced attorneys in each practice area, even for the review of one or two documents, without needlessly adding to the overall cost of the due diligence. For a VDR to be efficient, however, it is important that the seller is prepared to invest in a decent IT infrastructure and assistance.

Del Rio: Virtual Data Rooms have diverse impacts since they could be really helpful at the moment of carrying out a due diligence avoiding travelling costs. But they also have a negative impact because in most of the cases they do not contain all the necessary documentation to be reviewed or printing options are not available and it could take too long to review the documentation.

Gabriele: A VDR is a very welcome tool to reduce transaction costs as it facilitates access to due diligence data independently from the physical location of a bidder and its consulting team. We realised significant economies are realised on travel time and expenses. Equal access amongst bidders can be facilitated in a more efficient manner. As several bidders and consulting teams can access the VDR at the same time, a bid may accommodate more bidders. Obviously, confidentiality has to be safeguarded and technical risks such as hacking into a VDR have to be mitigated. Notwithstanding the above, while a VDR can save travel time, travelling to attend a negotiation in person rather than over the phone is in most cases well invested time.

Aripdjanov: It is an observed trend in recent M&A activity that helps minimise costs and time for the associated involved in review of the documents uploaded onto VDR. However, this is not a predominant practice yet, unfortunately. In some cases, management of target companies was concerned about unrestricted access to their internal documentation, in other cases, targets were not sophisticated enough to gather information sought even in a conventional data room.

Abel: Virtual data rooms are absolute market standard today and physical data rooms have virtually disappeared. The advantages are mostly on the sell side as a virtual data room provides the seller with a lot of insight into the activity of a bidder. There is also an important legal impact if a buyer is excluded from making a claim under representations and warranties if it had or could have had knowledge of a relevant issue, because with a virtual data room a seller can see which information has been reviewed by a bidder. I see fewer advantages on the buy side. It is certainly more cumbersome in a virtual data room to read or flip through a document, but at least it saves the effort of travelling and that can be an important factor for saving costs and time.

Luk: A virtual data room, VDR, makes available thousands of pages of documents for review by multiple parties in an orderly manner. Especially in cross-border M&A transactions, it saves the buyer's and its advisers' trouble of having to travel a long distance to carry out physical inspection of the information. A VDR is usually accessible anytime, anywhere, which helps eliminate time-zone differences and enhances the efficiency of the due diligence process. The seller can keep track of who have viewed which document and when they viewed it. A VDR may also provide different potential buyers access at the same time, allowing the seller to leverage different bidders' interests and drive the value of the transaction to its maximum by competition.

Mody: From the seller's point of view, VDRs lead to increased number of bidders and improve accessibility geographically. They do away with the need to supervise and host viewers. From the buyer's perspective, VDRs are open 24/7 and information can be accessed anytime and anywhere. VDRs save travel time and cost.

12. Valuating a business is as much an art as it is a science. How do you even begin calculating the overall sum?

Khodeir: As a legal advisor we do not calculate any sums and do not deal with figures fortunately in that respect. However the legal risks and concerns that we may raise do have an impact on the premium and pricing that the financial advisor sets and there are usually phases of reaching the final pricing starting from the indicative price range that financial team tries to come up with at beginning of the transaction up to the final price of the transaction.

Del Rio: First of all you have to identify the contingencies of the company, which could be loans and securities, tax issues and incompliance's. The aforementioned issues could vary overall sum in a significant way.

Aripdjanov: Being a transactional lawyer on the ground with relevant expertise gives us possibility to observe how other transactions are structured, evaluated and assessed. Conventional evaluation methods are not evenly distributed across the industries though. You can at least weigh the business as compared with other deals.

Eisenberg: Valuing a business requires an understanding of the historical performance of a business as well as its growth potential. It also requires an understanding of the competitive landscape and the market valuations of the industry. Typically we look at three to four valuation methodologies: 1.) the discounted cash flow of the business, 2.) comparable public companies multiples after making the requisite adjustments, 3.) multiples for transactions in the industry, and 4.) a valuation based on a leveraged buyout analysis. We take the results under the various methodologies and triangulate towards a value range. Every so often we see a company where the market comps become skewed because the public companies in that sector are trading at irrational prices. In those circumstances we advise our clients that the values may not be sustainable, so timing becomes very important.

Dommelen: It all begins with the understanding of the business plan and the strategy management wants to pursue with the business.

Luk: The starting point in calculating the value of a business is generated by a review of the target's balance sheets and income statements. However, after carefully reviewing these financial statements, a buyer should look into the target's history and the way it operates, because it is helpful to know how the business was started, how its mission has changed since its establishment, what past events have shaped the target's current form and why it is now being sold. In conducting the valuation, the buyer should find out not only the target's own market information, including its market share and competitive advantages, but also the strengths and weaknesses of its competitors. Besides the tangible assets that are reflected on the financial statements, a buyer can try to evaluate some intangible assets such as technologies held by the target and the value of its key employees.

13. When you are representing an organisation that is selling a business in a merger & acquisition, how do you ensure they get the best deal?

Khodeir: When representing a seller we ensure that they properly arrange the documentations that are relevant into the data room. They understand the realistic risks that encounter their business to be able to explain to them properly to the potential bidders and ensure they do not provide undue representations and warranties depending on the level of diligence the bidder will conduct. These will be some key parameters we would support such clients with from a legal point of view to ensure that their liability is not exposed beyond what is necessary.

Schrijver: When there are several potential acquirers for the business, the best possible deal can probably be obtained by playing the different candidates out against each other. In such case, the acquirer is also in a much stronger bargaining position.

When there is only one candidate, it is important to have a good view on the potential liabilities of the target company. Sometimes, it is better to sell at a slightly lower price, but with limited representations and warranties and capped indemnification obligations, than at a higher price but with virtually unlimited liability towards the purchaser.

Del Rio: In order to acquire the best deal on behalf of an organisation, we have always recommended to have the company in order and updated, since being in that perspective will permit to negotiate a higher purchase price.

Gabriele: Any prospective seller should carry out a pre-due diligence exercise in which he puts himself into a potential buyer's position. Not only will this exercise help in identifying issues which could reasonably be expected to be raised by prospective buyers, but it will also enable the seller to pre-empt concerns that may be raised by the prospective buyer and give rise to significant delays and additional costs in completing the deal. The seller will be in control of the process and information flow rather than having to react to potential buyers' findings and potentially be placed on the defence in negotiations. Another aspect is strict confidentiality in the bid process.

Aripdjanov: Since we as attorneys are involved in transactions that occur domestically, we may introduce a selling client to other players on local market to get a sense about the value of assets and business they hold. In fact, meeting with local businessmen has always been appreciated as compared with investment bankers or consultants.

Eisenberg: When we represent a company in a sale process, our objective is to get the best possible deal for our client. While that typically means the highest price, which is not always the most critical factor. Obviously the terms of a transaction are very important in addition to price. But there can be other important factors as well. One client wanted to be on his boat six months after closing. So any buyer that wanted him to stay longer was not particularly appealing. We had another client who pursued a lower upfront price with an earn-out that provided a greater price potential because they were very confident of hitting the earn-out targets, which they did. Our job is to take a company to market and get alternatives on the table for the owner so that we can ultimately get the right solution for our client.

Domberger: The key is to know the acquirers intimately, and to know the specific reasons each one has for making this acquisition. You have to present the specific benefits each purchaser stands to gain. Real sector insight and purchaser knowledge is key here. It sounds trite, but beauty really is in the eye of the beholder, and it's not uncommon to have a highest offer which is three or four times the lowest

offer. With such a potential distribution of valuations, you have to be sure you're reaching out to the most likely and credible purchasers, who have the most to gain from an acquisition.

Abel: Part of a good deal is certainly to manage legal risk smartly and to provide for transaction documentation that meets all market standards. Apart from that, it is key to maintain competition and to keep more than one bidder in the race. To facilitate that, it can be of great benefit for a seller to provide vendor due diligence reports to bidders, as it will allow several bidders to make offers on comparable levels of information. Bidders will usually be keen to obtain exclusivity in the negotiations, but it may often add value to reject exclusivity and rather provide limited cost cover to bidders and incentivise them to continue in the process without exclusivity.

Dommelen: Vital to a successful divestment to drive deal value is the structuring of the deal process to create a competitive action process and the preparation of an in depth plan on the historical performance of the business to provide comfort to potential buyers on the value of the business. Buyers want to understand the historic performance to form a view on the future cash generating capacity of the business.

Luk: It will be great if there are a number of potential buyers for the target company. This means the selling process can be conducted as an auction where the seller can leverage multiple buyers' interests and encourage competitors to increase the value of the transaction. The seller, of course, hopes to get the highest price for its sale. However, the seller also needs to have a thorough understanding of its strengths and weaknesses, and the applicability or limitations of those strengths and weaknesses under different valuation models. Such understanding can prevent a clash or deadlock in negotiating the purchase price, and helps to find a win-win solution for both the buyer and the seller. If the purpose of the seller in an M&A transaction is to bring in a strategic investor into its business, we need to make sure that the final investor is the right person who can bring value to the long-term growth of the business.

14. What key trends do you expect to see over the coming year? And in an ideal world what would you like to see implemented or changed?

Duffy: I expect that we'll continue to see increased use of Warranty & Indemnity and Tax Insurance, as these "deal facilitation" insurance products enter the mainstream in more parts of the world. This will be particularly true on cross-border transactions, where the insurance can be especially helpful. If M&A activity levels picks up, as many are predicting, we will also see more buyers use W&I insurance strategically, to "sweeten their bids" and help win deals in competitive situations.

Khodeir: We are hoping to see more M&A activity between public companies or between public companies acquiring private companies and an appetite from investors to take a bit more risk, rather than trying to achieve the ideal solution. This will open up more opportunities which will utilise existing opportunities and will improve overall performance of the market.

We would also like to see a realistic approach in respect of regulatory requirements by investors not trying to adopt regulatory schemes that are not workable locally. This will support everyone in implementing successful transactions in Qatar.

Del Rio: We consider that M&A will continue to take place all around the world because companies are looking forward consolidation. Nevertheless, we see a trend towards strategic alliances between multinational companies in order to facilitate their transactions and reduce their costs.

Gabriele: We see an increased trend towards privately raised funds in the form of debt instruments for the purpose of financing acquisitions. Equity investments, which have been decreasing over the last year, could potentially experience a gradual increase as liquidity reserves might carefully be invested in the course of 2013 into conservative investments that the corporation is already active in and familiar with. This trend could be enforced by strategic portfolio management decisions, and we could see some interesting investment opportunities especially since sellers are prepared to accept lower bids. Finally, we do expect a surge in intra-group restructuring activities as well as increased strategic alliances aimed at enhancing competitiveness in what remains a challenging economic scenario.

Aripdjanov: I would expect to see further decline in conventional M&A deals and ongoing development of new strategies including for example "farm-out" arrangements, joint ventures coupled with integration ties and commitments, strategic alliances and joint marketing schemes. General trends are expected to be in form of replacement of short equity investments by long-term debt instruments, increase of "micro-sales" of tiny or small targets, and substitution of private moneys by public or quasi-public funds. On the other hand, we also expect national Governments to start getting rid of the assets nationalised, confiscated or bought-out earlier by way of IPO, privatisation, tenders or through private transactions. These would be massive deals.

Eisenberg: One of the key trends we expect to see this year is a continued globalisation path. Many larger companies have completed the process of repairing their balance sheets and shedding underperforming divisions over the past couple of years. With strong cash reserves, these companies are looking for growth opportunities. Due to the relative soft economic growth in the developed economies, companies are looking to expand their presence in the emerging markets. This can be accomplished through organic growth and through acquisitions. We anticipate that this trend will continue for the foreseeable future.

Dommelen: The ongoing macroeconomic and financial uncertainty make predictions over the next year difficult. The environment is very volatile which continue to undermine stability necessary to create a steady flow of large deals. We expect that trends started over the last quarters of the year will continue such as consortium deals by private equity buyers, minority stakeholder transactions and a growing

number of IP transactions. In an ideal world, geopolitical uncertainties are quickly and effectively taking care by policy makers... but that may be a bit too ideal.

Luk: There may be an upward trend in China's outbound M&A activities, which will be largely driven by China's increasing demand for new technologies, natural resources and market expansion opportunities. With Chinese government's encouragement to private Chinese companies to conduct outbound M&A activities, private equity will play a more active role in financing these transactions. The use of offshore RMB can bring more investments in and out of China.

As most of the current laws and regulations relating to PRC outbound investment, such as anti-trust law, national security review and policies of private companies' cross-border M&A transactions tend to be rather vague and general. It would be helpful if the government can provide more clarification and guidance on the relevant regulatory and approval processes and requirements. More defined regulations will provide transparency and certainty to investors which will in turn encourage more investments and M&A transactions.

