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# Glossary of Key M&A and Corporate Terms

4th edition

Glossary



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Glossary  
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## Notes and introductory comments

1. The purpose of this glossary is to provide an overview of terms frequently used in the context of company acquisitions and corporate law activities. The explanations given are general definitions as commonly used. A term may be used differently in a particular situation, since in most cases there is no legally established definition or the definition is established in the course of contract negotiations between the parties. As a result, the information in this glossary cannot replace specific legal advice. Similarly, the glossary does not aim to provide an academic discussion of individual issues.
2. In the context of the definitions, reference is sometimes made to the objective associated with particular options. In these cases the question of whether an option is common and negotiable depends very much on the circumstances of the individual transaction or corporate law activity. The overview provided cannot replace an in-depth analysis of the specific case to establish whether an option is appropriate or not.
3. Most of the terms are derived from legal practice in England and the US. They are increasingly being used in relation to German transactions and applied to German scenarios. For this reason, the terms in the glossary are explained in the context of German law unless express reference is made to a meaning under foreign law. In international transactions, the parties should always ensure that they have the same understanding of the relevant terms.

4. Some English terms are much more common and widespread in German transactions than others. "SPA" is commonly used to refer to a share purchase agreement, for example, while "auction process" is far less normal than the German equivalent. Since such terms are nevertheless used, they are included and explained in the following list. It is important to note that this glossary is not a dictionary, even though most of the terms are English; the primary aim is to explain the meaning of the terms, not to translate them.
  
5. We would like to take this opportunity to express our thanks for the consistently positive feedback and constructive suggestions on the on the first, second and third edition. We have implemented almost all of the comments. Any further comments and suggestions are very welcome. Our contact details can be found at the end of the document

## **ABS**

▶ Asset Backed Securities.

## **Accruals**

Term used in accounting. Accruals are recognised when future revenue or liabilities become known, but before there is any actual exchange of funds. This enables companies to plan their finances with certainty. Accruals overlap with ▶ Provisions in the context of expected liabilities.

## **Acquirer Concept**

Involves application of an acquirer's restructuring plan by the insolvency administrator in the context of insolvency proceedings, which can include dismissing staff.

## **Acquisition**

General term for all methods of acquiring an equity interest.

## **Acquisition Finance**

Financing a corporate acquisition through borrowing; the resulting ▶ Leverage Effect is aimed at generating a higher return on the capital employed (see also ▶ LBO). However, the higher proportion of debt capital also leads to increased risks for the company.

## **Acquisition Group**

Group of companies to be acquired in the course of a transaction (see also ▶ Target Group).

### Acting in Concert

Several parties acting by mutual agreement in relation to a ► Target; acting in concert can lead to voting rights being attributed, with the result that notification thresholds under capital markets law may be triggered. A mandatory offer may also become necessary under the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz – WpÜG*). The question as to whether the parties are acting in concert is complex and often difficult to establish.

### Action List

List in which all the (pending and completed) action items (together with deadlines and persons responsible) are recorded and updated (see also ► Procedure Plan).

### Add-on (Transaction)

Acquisition of further companies or equity interests subsequent to a completed transaction.

### Advisory Board

Body established by a company to provide management with advice; not to be confused with the ► Supervisory Board.

### Affiliate

Affiliated company; in German contracts often defined as an affiliated undertaking within the meaning of sections 15 et seq. of the German Stock Corporation Act (*AktG*).

### Agent

Person acting on behalf of someone else (► Principal).

**Agio**

Additional amount (premium) paid in the context of a capital increase; difference between the nominal value of the share and the contribution payable.

**Alternative Dispute Resolution**

Umbrella term for various types of out-of-court dispute resolution (e.g. ▶ Mediation Clause).

**Amendment**

Change or addition to an existing agreement.

**Amortisation**

Write-downs on intangible assets, such as ▶ Goodwill; different from ▶ Depreciation, which applies to tangible fixed assets.

**Ancillary Agreement**

A further agreement or other arrangement made by the parties that is provided for in the main agreement (or concluded at the same time as the main agreement).

**Angel Investor**

▶ Business Angel.

**Annex**

Appendix to a document, especially to a contract (see also ▶ Attachment; ▶ Exhibit; ▶ Schedule).

**Annual Accounts**

A company's financial statements for the year (see also ▶ Annual Financial Statements).

## Annual Financial Statements

A company's financial statements for the year (see also ▶ Annual Accounts).

## Anti-embarrassment Clause

Provision under which the purchase price is subsequently adjusted upward if the buyer resells at a higher price within a certain period (▶ Non-embarrassment Clause; ▶ Debtor Warranty).

## Anti-dilution

See ▶ Dilution.

## Anti-sandbagging Clause

A provision in a sale and purchase agreement that excludes warranty claims if the recipient of a warranty was aware that a warranty was inaccurate (see ▶ Sandbagging; ▶ Pro-sandbagging Clause).

## APA

▶ Asset Purchase Agreement.

## Arbitration

Process of resolving legal disputes through an arbitral tribunal, rather than through the ordinary (state) courts.

## As-if Clause

Contractual provision via which the parties act "as if" a right or an agreement has already been transferred, even if the consent of a third party (for example a contractual counterparty) is still outstanding. As-if clauses are found particularly frequently in ▶ Asset Deals.

**A****Asset**

Any item of value.

**Asset Backed Securities (ABS)**

According to the definition by the former German Federal Banking Supervisory Authority (*Bundesaufsichtsamt für das Kreditwesen – BAKred*), the term “comprises securities and certificates of indebtedness representing payment claims against a special purpose vehicle established solely for the purposes of the ABStransaction. The payment claims are ‘backed’ by a pool of uncertified receivables (‘assets’) which are transferred to the special purpose vehicle and serve as security, largely for the benefit of the holders of the Asset Backed Securities (‘investors’).”

**Asset Deal**

An asset deal involves acquiring (some or all of) a company’s assets, liabilities and contractual relationships, in other words, assets in the form of rights, claims, property or movable items, along with liabilities. By virtue of the principle of certainty under property law, each particular asset must be individually identified, or at least determinable, in the agreement. Succession applies only in relation to the specified assets; the alternative to an asset deal is a ▶ Share Deal.

**Asset Purchase Agreement (APA)**

Agreement on the purchase and transfer of assets and contractual relationships in the form of an ▶ Asset Deal.

**Associate**

Salaried lawyer.

### **At Arm's Length**

Transactions conducted on standard market terms and comparable with a transaction between unrelated parties.

### **Attachment**

Appendix to a document, especially to a contract (see also

▶ Annex; ▶ Exhibit; ▶ Schedule).

### **Attorney-at-Law**

Lawyer.

### **Attorney-in-Fact**

Representative (see also ▶ Authorised Person).

### **Auction**

Auction procedure; the ▶ Target is sold by way of a ▶ Bidding Process.

### **Auction Process**

▶ Auction.

### **Auction Sale**

▶ Auction.

### **Audit**

Inspection of a company's books and other documents by an independent ▶ Auditor, who may document his conclusions in an opinion (▶ Auditor's Certificate) and/or an audit report.

### **Auditor**

See ▶ Audit.

**A****Auditor's Certificate**

See ▶ Audit.

**Authorised Person**

Authorised representative (see also ▶ Attorney-in-Fact).

## Bad Leaver

A bad leaver is a shareholder who exits the company prematurely (see also ▶ Leaver). A leaver becomes a bad leaver if he leaves for specific reasons defined by contract that relate to the individual person or his conduct. Examples include termination of employment for good cause by the company, resignation without the company having defined an important reason to cover the specific case, or other circumstances stipulated by contract. A bad leaver usually receives a substantially lower severance payment than a ▶ Good Leaver. If the shares held by a leaver are subject to a ▶ Call Option, his shares will be acquired at a lower price. Bad leaver provisions can also be found in management share schemes (see also ▶ Management Participation).

## Bankable Report

A ▶ Due Diligence Report that analyses the company in summary form and contains an overview of the most important findings of ▶ Due Diligence but is not as concise as a ▶ Red Flag Report. However, the terms used are not standardised and in some cases a bankable report also means a very detailed due diligence report (see also ▶ Short Form Report).

## Basis Point

One hundredth of a percentage point (= 0.01%). Accordingly, 250 basis points correspond to an interest rate of 2.5%.

## Basket

Contract clause that prevents the other party from making minor claims; warranty claims can only be asserted if the aggregate of all claims exceeds a certain limit (▶ Threshold). The parties may

also agree that only the amount exceeding the threshold (▶ Deductible; ▶ Excess Only) or the total amount of the claim (▶ First Dollar) can be recovered.

### **Beauty Contest**

Selection process for advisors (investment banks, lawyers, auditors, etc.) in the initial stages of a transaction. They compete for the business in a ▶ Pitch.

### **Benchmark**

Pre-defined reference value used to assess the performance of a company or management team; in transactions, for example, benchmarks can be agreed with regard to specific metrics (e.g. ▶ EBIT; ▶ EBITDA), which are then linked to specific legal consequences.

### **Best Efforts**

Part of a contractual obligation; although the obligated party does not owe any specific contractual fulfilment, often because this is not within its area of control (e.g. approvals from official bodies or the consent of third parties), by agreeing to a best efforts clause the party undertakes to do everything in its power to achieve the desired outcome.

### **Best Efforts Underwriting**

Obligation on the part of a bank (or consortium of banks) to make every effort to sell the securities being issued (e.g. in an ▶ IPO); in ▶ Hard Underwriting, a guarantee to place the securities is provided.

### **Best Knowledge**

Qualification such that in the context of ▶ Reps & Warranties the

contractual party giving the warranties is responsible for the veracity of the warranties only to the best of his knowledge. The contract must define exactly whose knowledge is used as the basis, whether only actual knowledge is applicable or whether (grossly) negligent ignorance is enough to constitute a breach, and also whether the relevant persons have a duty of care to make further enquiries (see also ▶ Knowledge Qualifier).

### **Bible / Bible of Documents**

Set of documents comprising all the agreements and documentation relevant to the transaction (e.g. ▶ SPA including annexes, ▶ Closing Memorandum, powers of attorney, etc.). It is assembled after ▶ Closing (or another significant interim step in the transaction, e.g. ▶ Signing) so that the documents can be easily accessed at a later stage.

### **Bid**

An ▶ Offer to conclude an agreement; if it is non-binding, it is referred to as an ▶ Indicative Bid/Indicative Offer, in contrast to a ▶ Binding Bid.

### **Bidding Process**

▶ Auction.

### **Bid Letter**

Offer letter from an interested party in the context of an auction procedure.

### **Big Four**

The four largest auditing firms in the world (Deloitte, PricewaterhouseCoopers, EY and KPMG). Contracts often require that one of the Big Four firms should conduct the audit of a company's financial statements.

## Binding Bid/Binding Offer

- ▶ Final Bid/Final Offer.

## BJR

- ▶ Business Judgement Rule.

## Blue Chips

1. Shares in major companies listed on an index such as the Dow Jones or Germany's DAX (see also ▶ Large Cap).
2. Customers or clients of exceptional importance.

## Board

In a one-tier (unitary) system, this is the body responsible for both business management and supervision. In a two-tier system, it refers to the body responsible for day-to-day business management of a company, for example the management board of a German *Aktiengesellschaft*.

## Boilerplate

Clauses included as standard in almost every contract (severability clause, requirement for the written form, list of contact persons, etc.). It is not usually necessary to spend a lot of time negotiating boilerplate items.

## Bona Fide

In good faith, as per section 242 of the German Civil Code (*BGB*) (see also ▶ In Good Faith).

## Bond

A type of debt instrument.

## **Breach (of Contract)**

Non-fulfilment or violation of a contractual obligation.

## **Break-up Fee**

Obligation on a negotiating partner to pay what is often a lump-sum amount in the event that the transaction falls through due to reasons for which he is responsible. This deterrent is intended to make the negotiating partner more committed to the transaction. If the deal does collapse, the compensation is used to cover wasted expenditure, especially advisor costs. A break-up fee may be agreed in the ▶ Letter of Intent prior to conclusion of the sale agreement for the eventuality that the transaction falls through. If an agreement is reached (▶ Signing), it may include a break-up fee for failure to complete (▶ Closing).

## **Bridge Financing / Bridge Loan**

Interim financing intended to improve the financial situation of a company (in the short term); bridge financing is commonly used when preparing for an initial public offering (▶ IPO). If the purpose of bridge financing is to improve the equity ratio, a subordinated loan must be used.

## **Bring-down Certificate**

Confirmation by the management of the ▶ Target company to the effect that declarations already made – for example regarding warranties in the ▶ Due Diligence Report or at ▶ Signing – remain valid (e.g. at ▶ Closing).

## **Business Angel**

Person who invests in a company, often in the ▶ Start-up Phase. A business angel – sometimes also referred to as an ▶ Angel Investor – generally does not exert any direct influence on

management of the company. In this respect business angels differ from venture capitalists (▶ Venture Capital Investor) and ▶ Private Equity firms.

### **Business Judgement Rule (BJR)**

Principle under which members of management are not personally liable if, at the time of taking the business decision, they had good reason to believe that they were acting on the basis of adequate information, free from conflicts of interest and for the benefit of the company (see section 93 (1) sentence 2 of the German Stock Corporation Act (*AktG*)). Managers are not held liable if these conditions are satisfied, even if in hindsight the decision proved to be disadvantageous (they therefore benefit from a “safe harbour”). This rule reflects the fact that business decisions invariably involve risk and that management is allowed to exercise judgement in running the business.

### **Business Plan**

Summary of a business proposal, including objectives and strategies. A business plan must be submitted when a company applies for a loan, for example. The scope and type of information in the business plan are specific to each particular case. Factors include the sector, the size of the company and the purpose for which the business plan is used.

### **Buyer**

Purchaser.

### **Buy-out**

Acquisition of a company or an equity stake in the form of a takeover financed by borrowing (▶ LBO) or a takeover by management (▶ MBO).

## Buy-side

Buyer/purchaser side of a transaction.

## CA

- ▶ Confidentiality Agreement.

## Call Option

Option conferring the right (but not the obligation) to buy securities (▶ Underlying) or non-certificated shares in a company at an agreed price (▶ Strike Price ) within a certain period (American call option) or on a specific date (European call option). The call option may be structured *in personam* (i.e. under the law of obligations) or *in rem* (based on a property right). In the case of a call option under the law of obligations, exercise of the option merely gives rise to a claim to receive a transfer of the securities. In a call option based on a property right, the purchaser can bring about transfer of title by means of a unilateral declaration of intent, without further involvement of the seller being required. The opposite of a call option is a ▶ Put Option.

## Cap

Especially with regard to warranty claims, the parties may agree a maximum amount, i.e. a cap. The term is also sometimes used in the sense of an interest rate cap, i.e. an upper limit for a variable interest rate agreed in the context of financing.

## Capacity Opinion

Formal statement regarding the legal capacity of a contracting party and the power of representation held by specific persons acting on the party's behalf.

## Capex

- ▶ Capital Expenditure.

## Capital Expenditure (Capex)

Investment expenses; investment spending.

## Carve-out

Spinning off or separating out parts of a company or ▶ Assets from the ▶ Target or the vendor company. This may be done ahead of the transaction. A carve-out is required if only certain subsidiaries, business segments, sites etc. are being sold. For example, intellectual property rights relating to the target must be separated out if they have previously been held centrally by the vendor company.

## Cash Flow

Inflow of liquid funds (cash) within a reference period of time.

## Cash Free / Debt Free

Method of valuing a company without taking into account debt and cash not required for business operations (▶ Enterprise Value). If this type of valuation is used to determine the purchase price, a ▶ Purchase Price Adjustment mechanism is required. This involves adding the ▶ Target company's cash to the base purchase price and subtracting the financial liabilities in order to establish the ▶ Equity Value. The sale and purchase agreement must include precise details of the items treated as cash and those treated as financial liabilities (often: interest-bearing liabilities). These items are then taken into account in the purchase price adjustment mechanism. As a safeguard against manipulation of cash and debt items, the buyer often requires that the cash free/debt free clause should be accompanied by an adjustment of the target's ▶ (Net) Working Capital.

## Cash Pool

System of cash aggregation and liquidity management for group-internal purposes via a central account, usually held by the parent company. Surplus cash is transferred from individual group companies or payments are made to correct debit positions.

From a legal viewpoint, the payment flows are classified as loans (► Upstream Loans and ► Downstream Loans, respectively). A distinction is made between a “physical” cash pool and a “notional” cash pool. In the latter case, credit and debit balances are offset by the company’s bank without any actual payments being made.

## Catch-all Clause

Clause that contains general wording designed to cover other conceivable cases/circumstances not explicitly provided for in the contract. Clauses of this type are especially appropriate if it is not possible to rule out the existence of other circumstances (e.g. claims to be transferred) in addition to specific known cases and the contract needs to make provision for such matters.

## CEO

- Chief Executive Officer.

## Certain Funds

Bank loans taken out by the buyer to finance the transaction, with an assurance being given on ► Signing the sale and purchase agreement that they can be drawn down. The purchase price is usually due at a later stage, on completion of the transaction (► Closing).

## Certificate of Good (Legal) Standing

Evidence that a company has been properly established and is in effective existence. This type of confirmation is required in particular

for companies based in jurisdictions where there is no register of companies that has the equivalent legal force of the German commercial register. Depending on the jurisdiction to which the company is subject, a certificate of good (legal) standing may be issued by a notary, a lawyer or by an officer of the company (e.g. the company secretary). The specific requirements must be established for the given case.

### **Certified Accounts**

Confirmed and audited financial statements, see ▶ Annual Accounts; ▶ Annual Financial Statements.

### **Certified Public Accountant**

Professional designation of an auditor in the United States (▶ CPA).

### **CFO**

▶ Chief Financial Officer.

### **Chain of Title**

Historically complete proof of share ownership (▶ Shares), in order that the seller's entitlement to transfer the shares can be verified in the course of ▶ Due Diligence. In the case of a private limited company, it is not sufficient merely to be able to trace the complete ownership history via the register of members (i.e. shareholders).

### **Change of Control (CoC)**

Change in the control of a company (see also ▶ Change of Control Clause).

### **Change of Control Clause**

Specifies the legal consequences in the event of a change of control; special rights of termination are often provided for the other party. Contracts that are of crucial importance to the ▶ Target company must therefore be reviewed for Change of Control Clauses in the course of ▶ Due Diligence.

### **Chief Executive Officer (CEO)**

Head of the management board or managing director of a company. The term originates from the one-tier (unitary) system of ▶ Corporate Governance that is widespread in Anglo-American jurisdictions.

### **Chief Financial Officer (CFO)**

Finance director or head of the finance department in a company. The term originates from the one-tier (unitary) system of ▶ Corporate Governance that is widespread in Anglo-American jurisdictions.

### **Chinese Wall**

A barrier created by organisational measures to prevent the exchange of information between different departments of a company, a law firm, etc.; a Chinese wall is required if an investment bank advises two bidders in the context of a ▶ Bidding Process, for example.

### **Class**

The category to which a security belongs, e.g. ordinary shares or non-voting preference shares.

## Clean Team

Formed to allow the exchange of information within a group of individuals covered by special ► NDAs. The team (which often consists solely of advisors) shares information which typically cannot yet be shared between the parties for competition law reasons.

## Closing

Completion of the transaction *in rem*; once all the ► Closing Conditions have been met, title to the ► Shares or ► Assets is transferred to the buyer against payment of the purchase price due; this is preceded by conclusion of the sale and purchase agreement under the law of obligations (*in personam*) (► Signing).

## Closing Actions

Action to be taken on or before the ► Closing Date; typical examples include payment of the purchase price and resignation of the ► Target's board members.

## Closing Conditions

Often referred to as ► Conditions Precedent; conditions defined by contract (often in the form of preconditions, but also sometimes in the sense of genuine conditions precedent as defined in section 158 (1) of the German Civil Code (*BGB*)), which must be satisfied in order for the transaction to be completed (► Closing). Examples include merger control approval, consent of shareholders in the event of ► Restrictions on Share Transferability, discharge of the company's board members and their resignation. Satisfaction of all closing conditions may be recorded in a ► Closing Memorandum.

## Closing Confirmation

► Closing Memorandum.

### **Closing Date**

Date on which the sale and purchase agreement is completed.

### **Closing Deliveries / Closing Deliverables**

Documents exchanged between the parties on ▶ Closing.

### **Closing Dinner**

Celebration to mark the ▶ Closing of a transaction.

### **Closing Memorandum**

Document in which the contracting parties confirm satisfaction of all the conditions for ▶ Closing (▶ Closing Conditions; ▶ Conditions Precedent) (usually) for proof purposes (also called ▶ Closing Confirmation).

### **Club Deal**

In this type of transaction, several companies join forces to conduct a deal collectively (acting on one side of the contract).

### **CoC**

▶ Change of Control.

### **Code of Conduct**

Written standards of behaviour, often defined as part of a company's ▶ Compliance programme.

### **Collateral**

All types of security for loans.

### **Collateralised Debt Obligation**

Securities backed by various types of claims and assets.

## Collateralised Loan Obligation

Securities backed by a pool of company loans.

## Comfort Letter

Also called a ▶ Letter of Comfort, in which (usually) the parent company makes a commitment to provide the ▶ Target with the necessary funding in the event of economic difficulties (binding letter of comfort). In the case of a non-binding letter of comfort, the parent company merely makes an expression of goodwill which has no legal force, although it is normally seen as creating a moral obligation.

## Commercial Due Diligence

Area of ▶ Due Diligence that considers the ▶ Target's business model and its external environment with regard to market, industry and competitors.

## Compliance

Compliance refers to the legally and ethically correct conduct of companies, including management and employees. This was originally mostly a concern for listed companies, but is becoming increasingly important for ▶ SMEs. The purpose of corporate compliance programmes is to ensure that breaches of relevant regulations do not occur, and that if they do, management is informed quickly and comprehensively. Compliance programmes to prevent corruption and violations of competition law are especially important. There is no "one-size-fits-all" approach to compliance. Setting up and implementing a compliance programme should always be based on a company's specific needs (unless special statutory provisions apply). These needs can differ greatly, depending on the company's size, organisational form and sector. The management teams at both company and

group level may be exposed to significant liability risk if they fail to establish a compliance policy.

### **Comply-or-Explain Procedure**

Refers to the recommendations in the ▶ *DCGK* (see also section 161 of the German Stock Corporation Act (*AktG*)); a company can choose not to comply with these recommendations, but must make a corresponding disclosure every year.

### **Conditions Precedent (CP)**

Often used synonymously with ▶ Closing Conditions in sale and purchase agreements; in some cases, the term “condition precedent” is only used for genuine conditions precedent (within the meaning of section 158 (1) of the German Civil Code (*BGB*)) where the corresponding effect occurs when the condition is fulfilled, without any further legal act being required. By contrast, in some cases the fulfilment of a closing condition only gives rise to a requirement under the law of obligations for the relevant party to honour its commitments.

### **Conduct of Business**

How management conducts the business of a company; refers in particular to the way a business is run during a specific period, e.g. between ▶ Signing and ▶ Closing.

### **Conduit**

Financing technique based on ▶ ABS structures; there is no generally accepted definition.

### **Conference Call**

Telephone call involving more than two people; sometimes shortened to telco, telcon, conf call or CC.

### **Confidentiality Agreement (CA)**

Agreement to maintain confidentiality or secrecy, which imposes obligations on both parties (see ▶ NDA).

### **Confidentiality Undertaking**

Unilateral undertaking to treat information received from the other party as confidential.

### **Confirmation of Financing**

Confirmation from a bank that a specified amount is available.

### **Confirmatory Due Diligence**

Final phase of ▶ Due Diligence, usually carried out just prior to ▶ Signing. It provides an opportunity to resolve the remaining outstanding issues or ones that have newly arisen, or to verify assumptions.

### **Consolidated Financial Statements / Consolidated Financial Accounts**

A company's consolidated financial statements.

### **Consortium**

Association of several companies formed to implement a joint project; the collaboration ends once the objective has been reached, or is replaced by a longer-term agreement (e.g. a ▶ Joint Venture).

### **Contractual Trust Arrangement (CTA)**

Structure used for removing pension commitments or pension provisions from the balance sheet (▶ CTA).

## Corporate Governance

Totality of the external and internal management and control mechanisms in a company.

## Corporate Guarantee

Guarantee issued by a parent company or other affiliated company in relation to the obligations of another group company (often a ▶ Special Purpose Vehicle).

## Cost Coverage

Commitment to reimburse the expenses incurred by the other party in connection with the transaction; often combined with an upper limit (▶ Cap).

## Covenant

Obligation in the sense of a side agreement in a contract; in loan agreements, breach of a covenant by the borrower often entitles the lender to terminate the loan agreement.

## CP

▶ Conditions Precedent.

## CPA

▶ Certified Public Accountant.

## Creeping Takeover

Gradual acquisition of a substantial stake in a listed company while avoiding notification requirements under the German Securities Trading Act (*WpHG*) and obligations under the German Securities Acquisition and Takeover Act (*WpÜG*); a notable example was the takeover of Continental AG by the Schaeffler Group (see also ▶ Stakebuilding).

### **Cross-border Merger**

Merger of companies across national boundaries.

### **Crown Jewels Defence**

Defence mechanism against a ▶ Hostile Takeover; to make the ▶ Target as unattractive as possible to the attacker, its most valuable ▶ Assets or equity interests are sold to third parties. Adopting this strategy may considerably weaken the target.

### **CTA**

▶ Contractual Trust Arrangement.

## D

### Damages

Compensation.

## D

### Data Room

Where all the key documents relating to the asset being acquired are made available. This documentation is examined during

▶ Due Diligence. The traditional ▶ Physical Data Room has now mostly been replaced by a ▶ Virtual Data Room.

### Data Room Index

Resembling a table of contents, this index lists all the documents that can be inspected in the ▶ Data Room (arranged by topic or other criteria).

### Data Room Rules

These are the ground rules for using the ▶ Data Room. In the case of a ▶ Physical Data Room, they normally specify the opening hours, the persons authorised to enter the room and the permitted number of queries relating to the documents. They also indicate whether documents may only be inspected or also copied. In a

▶ Virtual Data Room, the print function may be deactivated and it may not be possible to save documents or take screenshots. Since the data room rules are monitored electronically in a virtual data room, supervision is stricter.

### Dawn Raid

Official on-site investigation carried out without warning, e.g. in competition law-related matters or criminal tax proceedings. Many consultancies and law firms offer special training for companies

so that staff are prepared for such situations and can respond appropriately.

### **DCF**

▶ Discounted Cash Flow.

### **DCGK**

▶ German Corporate Governance Code (*Deutscher Corporate Governance Kodex*).

### **DD**

▶ Due Diligence.

### **Deadlock**

Describes an (often lengthy) impasse at shareholder or board level. The parties involved block each other due to having equal shareholdings, vetoes or other special rights. Since it is not possible to form a majority, decision-making breaks down. Mechanisms to resolve a deadlock include a ▶ Texas Shoot Out and ▶ Russian Roulette.

### **Deal Breaker**

Factor which results in negotiations breaking down if no solution or agreement is found; it is the purpose of ▶ Due Diligence to identify possible deal breakers and highlight solutions for a successful outcome.

### **Debt**

Often defined as all of a company's liabilities, for example ▶ Financial Debt or current liabilities that form part of ▶ Net Working Capital. Since there is no fixed definition of debt, a precise description must be provided in contracts.

### Debt/Equity Swap (DES)

Conversion of ▶ Debt into ▶ Equity; a debt for equity swap occurs in connection with debt rescheduling. Following the amendment of the German Insolvency Ordinance (*Insolvenzordnung – InsO*), it now contains explicit provisions on debt for equity swaps involving German companies.

### Debtor Warrant

▶ Anti-embarrassment Clause.

### Debt Push Down

Tax objective in acquisitions; the aim is for the ▶ Target to service the debt capital; this often involves establishing an ▶ SPV. The SPV uses a combination of limited equity and substantial borrowings to acquire the target company, which is then held as a subsidiary. In a subsequent merger, the SPV is dissolved and the ▶ Debt passes to the target. Debt push down requires careful legal planning, especially with regard to maintenance of capital rules.

### Deductible

Provision in a sale and purchase agreement typically relating to warranty claims which stipulates that if an agreed limit (▶ Threshold) is exceeded, only the excess amount may be claimed (see also ▶ Excess Only). If the total amount of the claim is payable when the threshold is exceeded, this is referred to as the ▶ First Dollar rule. As with the ▶ *De Minimis* provision, this rule is aimed at preventing the parties from making minor claims and thus encourages a more constructive relationship.

### Deed

Legal document used in some common law jurisdictions; agreement that requires a specific form.

## Default

In the narrow sense, a delay in payment; in the broader sense, especially in finance agreements, also other breaches of contract.

## Deferred Compensation

Arrangement under which the consideration does not become due until a later point in time; for example, the seller may be obliged to transfer the entire purchase item but the buyer does not need to pay part of the purchase price until a later date (► Deferred Purchase Price).

## Deferred Purchase Price

Element of the purchase price that does not become due until a later date (see also ► Deferred Compensation).

## Definitions

A list of detailed definitions covering the terms used in the actual text of the contract, as is common practice in English-speaking countries. Alternatively, terms in the contract are emphasised by the use of brackets, e.g.: “The provisions in sections [ • ] are contingent on the condition precedent that the Federal Cartel Office does not disallow execution of this agreement or that it approves execution (hereinafter ‘Merger Control Approval’).” Definitions (especially in contracts written in English) are also identified by being capitalised every time they occur in the rest of the text.

## Delisting

Ending a company’s stock market listing. Opposite of ► IPO (see also ► Going Private).

### **De Minimis**

In a sale and purchase agreement, this refers to the amount below which the buyer cannot assert warranty claims. *De minimis* provisions are aimed at preventing the parties from making minor claims and thus encourage a more constructive relationship. They are generally combined with a ▶ Deductible or ▶ First Dollar rule (see also ▶ Basket).

### **Depreciation**

Write-downs on tangible fixed assets; to be distinguished from ▶ Amortisation, which applies to intangible assets.

### **Dial-in (Details)**

Data for dialling into a ▶ Conference Call.

### **Dilution**

Reduction in the percentage or value of a shareholder's equity interest; dilution occurs when a shareholder chooses not to subscribe for new shares in the context of a capital increase, for example. Following the capital increase, the investor holds a lower percentage shareholding than prior to the capital increase.

### **Disclaimer**

Exclusion of liability for certain matters; for example, a law firm conducting ▶ Legal Due Diligence will exclude liability for tax matters.

### **Disclosure**

Revealing a matter in the context of ▶ Representations & Warranties to which the warranty provided is not intended to apply (see ▶ Disclosure Letter; ▶ Disclosure Schedule; ▶ General Disclosure; ▶ Specific Disclosure).

### **Disclosure Letter**

Document in which the seller lists exceptions and qualifications to its warranties (▶ Representations & Warranties) (see ▶ Disclosure; ▶ General Disclosure; ▶ Specific Disclosure). If a large number of (negative) circumstances are listed in a disclosure letter, this will usually have a negative impact on the purchase price.

### **Disclosure Schedule**

Annex to the sale and purchase agreement in which the seller lists exceptions and qualifications to its warranties (▶ Representations & Warranties) (see also ▶ Disclosure; ▶ Disclosure Letter; ▶ General Disclosure; ▶ Specific Disclosure).

### **Discounted Cash Flow (DCF)**

A company's anticipated future ▶ Cash Flows, discounted to a specific valuation date.

### **Discounted Cash Flow Method**

Method for valuing a company based on anticipated future ▶ Cash Flows (discounted to a specific reference date). Definition of the individual valuation factors to be applied is often the subject of fierce debate.

### **Distressed Debt**

▶ Non-performing Loans.

### **Distressed M&A**

Corporate acquisition involving a company that requires rescue or restructuring, or is insolvent.

### **Divestiture**

Selling an existing investment in a company or in ▶ Assets.

## D&O

Directors and officers of a company.

### D

## D&O (Liability) Insurance

Financial liability insurance which a company can take out for members of the management board, the supervisory board and senior employees; it covers potential claims for compensation against the insured persons. In relation to D&O insurance, section 93 (2) sentence 3 of the German Stock Corporation Act (*AktG*) provides for a deductible of no less than 10% of the damage (per claim) up to at least an amount equal to 1.5 times the fixed annual compensation of the managing board member (upper limit for the aggregate of claims in a year). However, the insurance industry now offers products that enable the risks arising from the deductible to be insured by the relevant persons.

## Document Request List

List used by the buyer to request the documents required for

- ▶ Due Diligence; the seller uses it as a basis for creating and updating the
- ▶ Data Room.

## Double Dip

Sale and purchase agreements typically exclude a so-called double dip. This prevents the buyer from asserting a claim for damages or making use of tax benefits more than once, for example in the form of a compensation or indemnification claim and also via a negative

- ▶ Purchase Price Adjustment.

## Downside (Risk)

Risk of loss on an investment or, more generally, any risk or disadvantage.

### **Downstream Loan**

Loan granted by a parent company to a subsidiary, e.g. in the context of a ▶ Cash Pool. The opposite is an ▶ Upstream Loan.

### **Downstream Merger**

Merger of a parent company into its subsidiary; the opposite is an ▶ Upstream Merger. The merger of two sister companies is a ▶ Sidestep Merger.

### **Draft**

Provisional version of a document, especially a contract.

### **Drag-along Right**

Obligation typically imposed on minority shareholders (e.g. long-standing shareholders) to sell their shares in the ▶ Target if the majority shareholder (in a typical scenario) sells his shares to a third party (see also ▶ Tag-along Right).

### **Draw-down**

Accessing a loan or other payments previously agreed, e.g. in the form of payments into a company's free capital reserve; in addition to drawing down cash, draw-down of services is also possible, e.g. media services.

### **Draw-down Notice**

Notification that the relevant party intends to make use of the agreed funds (e.g. loan, contribution to the free capital reserve).

### **Draw-down Period**

Timeframe within which a borrower may access the agreed loan.

## Dual Listing

A situation where a company's shares are listed on at least two stock exchanges.

## D

## Dual Track Procedure

A parallel process when selling a company; arrangements are made for an ▶ IPO while simultaneously conducting a ▶ Bidding Process. A dual track procedure offers a number of advantages: the chances of an ▶ Exit are greatly increased, the optimum price can be achieved for the shares and the proposed IPO generates time pressure that also has a beneficial impact on the bidding process. However, a dual track procedure is very time-consuming and expensive.

## Due Diligence (DD)

A detailed assessment of the proposed purchase. Typically broken down into ▶ Legal Due Diligence, ▶ Financial Due Diligence, ▶ Tax Due Diligence, ▶ Commercial Due Diligence and ▶ Environmental Due Diligence. Due diligence is usually carried out by the prospective buyer, when it is referred to as ▶ Purchaser Due Diligence. This is partly due to the fact that in Anglo-American jurisdictions the principle of "caveat emptor" (let the buyer beware) traditionally places the onus on the buyer to examine goods before purchase. The individual areas are covered by lawyers, tax advisors, auditors, sector specialists and experts who specialise in these matters. The aim of due diligence is to identify any unknown opportunities and risks and also any ▶ Deal Breakers. The findings of due diligence are recorded in the ▶ Due Diligence Report and influence the negotiations, in particular with regard to the warranties and the purchase price. The downside of due diligence is that information available in the ▶ Data Room is often regarded as known to the buyer. As such, the seller will usually wish to exclude any associated

warranty claims. If the seller carries out due diligence rather than the prospective buyer, it is referred to as ► Vendor Due Diligence. For transactions of a certain size and depending on the importance to the buyer, the latter's management may ultimately be obliged to conduct due diligence. If management decides not to carry out due diligence, officers of the company may be exposed to personal liability risk.

### **Due Diligence Checklist**

List of documents required in preparation for ► Due Diligence and setting up the ► Data Room; in a typical scenario, lawyers send a due diligence checklist for ► Legal Due Diligence to the client ahead of the transaction, so the client can assemble the documents required for the data room.

### **Due Diligence Report**

Report comprising all the key data, findings and recommendations from ► Due Diligence; it presents the results in an accessible way for the buyer's decision-makers and the financing banks. The findings are usually summarised in the form of key statements at the start of the report (► Executive Summary).

### Early Stage Finance

Participation of a ▶ Financial Investor at an early phase of a company's development, but after the ▶ Seed Finance stage. The common feature of both stages is that the success of the company is still very difficult to assess, meaning that investment involves major risks. For this reason, an early stage investor will usually insist on a substantial amount of equity in return for his investment.

### Earn-out

In an earn-out, the buyer agrees to make a variable payment above and beyond the fixed purchase price. This element is calculated as a function of the future performance of the ▶ Target and is dependent on a pre-defined reference metric being reached or exceeded within a certain period of time. Earn-out clauses enable the parties to bridge the gap between divergent purchase price expectations. However, in such a situation the seller continues to bear some of the target's business risk after ▶ Closing without having the same ability to influence its development as in the past. The seller will wish to have contractual safeguards in place in this respect and against the threat of manipulation. This makes it difficult for the buyer to integrate the target into its own operations or to sell the company (or part of it) on, and often gives rise to contentious negotiations. In contrast, a seller holding a ▶ Debtor Warrant participates in any higher proceeds in the event that the firm is sold on to a third party, regardless of the future performance of the target.

**EBIT**

Short for “earnings before interest and taxes”; EBIT (like ▶ EBITA, ▶ EBITDA and ▶ EBT) is a performance metric often used for valuing a business and establishing a purchase price.

**EBITA**

Short for “earnings before interest, taxes and amortisation”; like ▶ EBIT, ▶ EBITDA and ▶ EBT, EBITA is a metric often used for valuing a business and establishing a purchase price.

**EBITDA**

Short for “earnings before interest, taxes, depreciation and amortisation”; like ▶ EBIT, ▶ EBITA and ▶ EBT, EBITDA is a metric often used for valuing a business and establishing a purchase price.

**EBT**

Short for “earnings before taxes”; like ▶ EBIT, ▶ EBITA and ▶ EBITDA, EBT is a metric often used for valuing a business and establishing a purchase price.

**ECL**

▶ Equity Commitment Letter.

**Effective Date**

Date on which a transaction takes economic effect.

**Employee Buy-out**

Transaction in which the workforce of the ▶ Target acquire the shares in the company (see also ▶ MBO and ▶ MBI).

**Engagement Letter**

▶ Letter of Engagement.

### **Enterprise Value**

Value of a company before deducting debt and adding cash; if debt is deducted and cash added, the result is the ▶ Equity Value.

### **Environmental Due Diligence**

Investigation of the ▶ Target with regard to environmental law and technical aspects; typically includes a review of whether any site contamination exists, the local situation and environmental regulations, and the possession of any official permits that may be required.

### **Environmental Indemnity**

Indemnity for environmental risks identified in the course of  
▶ Environmental Due Diligence.

### **Equity**

With reference to a company, equity comprises subscribed capital plus statutory reserves, plus free reserves, plus profits brought forward, minus losses brought forward and plus or minus any profit or loss for the year.

### **Equity Bridge**

Interim financing provided to bridge an equity gap.

### **Equity Commitment**

Binding commitment by a third party to provide a specific amount of equity.

### **Equity Commitment Letter**

Contractual commitment by a company (often a parent company or one that is otherwise affiliated) to provide a (group) company (in many cases a newly established ▶ Special Purpose Vehicle)

with a specific amount of equity. An equity commitment letter often states that the supported entity is able to fulfil its obligations (purchase price payment, investments, or the like) or will be able to do so in the future. The equity commitment letter may be issued either to the supported company or to third parties (sellers or recipients of investments).

### **Equity Financing**

The (purchase) price is financed out of equity (rather than via borrowing).

### **Equity Kicker**

An external capital provider is granted the right to a share in the financed company's equity, in addition to receiving interest on the loan.

### **Equity Sponsor**

Equity provider.

### **Equity Value**

Value of a company after deducting debt and adding cash; if debt is not deducted and cash is not added, the result is the  
▶ Enterprise Value.

### **Escrow Account**

Fiduciary account, lawyer's or notary's escrow account or separate bank account into which a portion of the purchase price is transferred to act as security for potential warranty claims. If part of the purchase price is retained by the buyer for a defined period of time as security, this is referred to as a Holdback.

### **Evergreen Contract**

Contract that is automatically renewed unless it is terminated by a certain date.

### **Ex Ante**

Before the event; as seen prior to the occurrence of a certain event.

### **Excess Only**

▶ Deductible.

### **Exclusivity Agreement**

The seller agrees to negotiate solely with a single prospective buyer for a specified period and to provide (additional) information exclusively to that party. A fixed contractual penalty is often agreed for the event that the exclusivity agreement is breached. The penalty is intended as compensation for the costs incurred by the prospective buyer.

### **Execution Copy**

Final version of an agreement for ▶ Signing.

### **Executive Summary**

Key statements from an opinion or ▶ Due Diligence Report to provide decision-makers with a quick overview of the document and its findings.

### **Exhibit**

Appendix to a document, especially to a contract (see also ▶ Annex; ▶ Attachment; ▶ Schedule).

## **Exit**

Withdrawal of an investor through sale of his stake; possible exit methods include an ▶ IPO or ▶ Trade Sale.

## **Exit Waterfall**

Provision according to which the proceeds of an ▶ Exit are distributed in a certain order; an exit waterfall often involves a tiered arrangement which is intended to ensure that investors in particular have priority in getting back the funding they provided (see also ▶ Waterfall).

## **Ex Nunc**

From now on; from a certain event in the future.

## **Expert Call**

Telephone call between the advisors to the parties, possibly also involving specialists from the companies. The purpose is to clarify detailed queries that have arisen in the course of a transaction or ▶ Due Diligence. An expert call is often more efficient than a written ▶ Q&A Process, since questions can be posed and answered directly. The disadvantage of this method is the lower evidential weight of verbal statements.

## **Ex Post**

After the event; as seen after the occurrence of a certain event.

## **Ex Tunc**

From the outset, also with retroactive effect.

## Facility

Credit (line).

## Fact Book

Description of a company used to provide information to potential investors, e.g. prior to an ▶ IPO, corporate action or ▶ M&A process. A fact book may include both general and specific corporate information, financial metrics, market analysis and descriptions of existing investment potential.

## Factoring

As defined in section 1 (1a) no. 9 of the German Banking Act (KWG), the ongoing purchase of receivables on the basis of standard agreements (with or without recourse) by financial services institutions.

## Fair Disclosure

Describes the way in which a matter must be disclosed to the buyer in order that it can be deemed to be known, e.g. ensuring that documents in the data room are named and arranged correctly. Since the concept comes from Anglo-American law, particular emphasis should be placed on including a precise definition in the contract.

## Fairness Opinion

Report by an independent expert as to whether the provisions negotiated by the parties (in particular the purchase price) are fair from a financial point of view; this enables the boards of the contracting parties to protect themselves in law and document the fact that they entered into the transaction on appropriate terms.

A fairness opinion can also help to dispel any concerns felt by shareholders if their willingness to sell is crucial to the transaction.

### **Family Office**

A platform used for managing private wealth via a family-owned entity or external service provider.

### **FCPA (Clause)**

Foreign Corrupt Practices Act of 1977; a US law for combating corruption. An FCPA clause may include a warranty to the effect that the provisions of the FCPA have not been breached, for example, or that no such breach is known. Declarations of this nature are often part of a group-wide ▶ Compliance programme.

### **Fee Letter**

Fee agreement; often in connection with instructing ▶ M&A advisors.

### **Fiduciary Out**

If the management board of a listed company has undertaken to recommend that shareholders accept an acquisition offer, a fiduciary out clause allows the board to walk away if a third party submits an offer that is better for the shareholders or if circumstances subsequently become known that have a positive impact on the value of the company (▶ Gold in the Backyard), depending on the exact drafting of the clause. Fiduciary out provisions are often accompanied by a ▶ No-shop Clause and/or ▶ No-talk Clause.

### **Final Bid / Final Offer**

Particularly in the context of an ▶ Auction Process, bidders submit an offer to reach the next round of negotiations. The seller uses this to decide which bidder(s) to move forward with. The final bid is not usually structured as a legally binding offer, even though the name implies this. Apart from other considerations, in many cases the (notarial) form requirements are not met (see also ▶ Binding Bid/Binding Offer).

### **Financial Covenants**

Commitment given by the borrower to the lender that the borrower will comply with certain financial metrics stipulated in the loan agreement. Breaching these metrics often gives rise to a right of cancellation on the part of the lender.

### **Financial Debt**

▶ Debt incurred in financing a company.

### **Financial Due Diligence**

Assessment of key valuation parameters and identification of financial risks in the ▶ Target's business, usually carried out by auditors; the focus is normally on earnings, ▶ Cash Flow, liquidity and capital adequacy.

### **Financial Investor**

Unlike a ▶ Strategic Investor, financial investors engage in transactions primarily for investment purposes. They aim to make a capital gain from a subsequent ▶ Exit, typically within a few years. Financial investors are often private equity funds, ▶ Hedge Funds, venture capital funds or banks.

## Financial Statements

Annual or interim financial statements published by a company.

## Financing Out

This type of provision enables the buyer to withdraw from the contract if it fails to secure the funding needed to pay the purchase price.

## Finding

Identification of a risk in the course of ▶ Due Diligence.

## Firm Commitment Underwriting

▶ Hard Underwriting.

## First Demand Guarantee

Guarantee whereby the objection that a guaranteed claim is not legally due does not exclude an obligation to pay; the objection is not dealt with until after payment, in a claim for damages. A

▶ Standby Letter of Credit is comparable in terms of function (see also ▶ Guarantee on First Demand).

## First Dollar / First Euro

Provision in a sale and purchase agreement typically relating to warranty claims which stipulates that if an agreed ▶ Threshold is exceeded the whole amount may be claimed, i.e. not only the amount above the threshold. If only the claim that exceeds the threshold is payable, the term ▶ Deductible is used. As with a

▶ *De Minimis* provision, this rule is aimed at preventing the parties from making minor claims and thus encourages a more constructive relationship (see also ▶ Basket).

### **Fixed Assets**

Tangible fixed assets, e.g. property, plant and equipment (see also section 266 (2) A. II. 1.–4. of the *HGB* (German Commercial Code)). Care is needed in the context of contractual definitions of the term, since “fixed assets” do not necessarily coincide with German “*Sachanlagen*” as per the *HGB*.

### **Framework Agreement**

Master agreement containing general provisions which are intended to apply to more than one individual agreement. This type of agreement also defines a structure for the individual steps in the transaction and links them accordingly.

### **Free Float**

Shares held by small shareholders.

### **Front Running**

Front running refers to a situation where a securities trading firm executes an order on its own behalf shortly before carrying out a client order (see also ► *Scalping*).

## GAAP

Short for “generally accepted accounting principles”.

## General Disclosure

Principle according to which the buyer’s knowledge in relation to all documents and information contained in the ▶ Data Room (or otherwise disclosed) is assumed. In many cases, (only) the ▶ Data Room Index is included in an appendix to the sale and purchase agreement for this purpose. The specific circumstances that limit the seller’s representations (▶ Specific Disclosure) are not mentioned. In this scenario, the buyer bears the risk – which is dependent on data quantity and quality – of having overlooked something during

- ▶ Due Diligence. The buyer can reduce this risk by agreeing
- ▶ Fair Disclosure with the seller.

## General Partner

A partner in a ▶ Limited Partnership. The general partner has unlimited liability.

## German Corporate Governance Code (DCGK)

According to the commission responsible (*Regierungskommission Deutscher Corporate Governance Kodex*) ([www.corporate-governance-code.de](http://www.corporate-governance-code.de)), the purpose of the Code is to make German regulations on corporate management and supervision transparent to German and international investors, with the aim of boosting trust in the way German companies are run. The ▶ DCGK consists of three types of provisions. Firstly, the DCGK refers to statutory regulations that companies are already obliged to comply with. Secondly, the Code sets out recommendations, to which the

- ▶ Comply-or-Explain Procedure applies. These recommendations

are identified by the use of the word “shall”. The *DCGK* also includes suggestions; no disclosure is required if these suggestions are not followed, i.e. the comply-or-explain procedure does not apply. Suggestions are identified by the use of the words “should” and “may”.

## Giveaway

G

Negotiating position that a party is willing to give up during negotiations, e.g. because it expects that the other side will be willing to compromise on another point in return.

## Go-along Obligation

▶ Drag-along Right.

## GoB

Refers to the principles of proper accounting (*Grundsätze ordnungsmäßiger Buchführung*) in accordance with the German Commercial Code (*HGB*) (see also ▶ GAAP); the *GoB* are often referred to and defined as “German GAAP” in English language contracts.

## Going Concern Principle

Principle used in company valuations. It assumes that the business will be continued and values the company on that basis; this assumption no longer applies if there is a risk of insolvency.

## Going Private

See ▶ Delisting; going private is often preceded by a ▶ Squeeze-out.

## Going Public

Stock market flotation of a company (▶ IPO).

### **Golden Handshake**

Severance payment made to a party to a contract, generally a senior manager or ▶ Key Employee, if the contract is terminated prematurely (see also ▶ Golden Parachute).

### **Golden Parachute**

Contractual provisions in which a senior manager (or ▶ Key Employee) is promised what is usually a substantial severance payment in the event that the employment contract is terminated (under certain conditions) (see also ▶ Golden Handshake).

### **Gold in the Backyard**

Term describing a situation where factors subsequently become known that substantially increase the value of a company, such that the management board can make use of its ▶ Fiduciary Out right and is no longer required to recommend that shareholders accept a bid.

### **Good-faith Talks**

Escalation level in the context of a ▶ Multi-tiered Clause for alternative dispute resolution. It requires the parties to discuss the disputed issues in a spirit of compromise.

### **Good Leaver**

A ▶ Leaver who (usually) leaves the company or management team for reasons for which he is not responsible (e.g. death, long-term incapacity). Other circumstances may also be defined by contract as good leaver cases. A good leaver generally receives a higher severance payment than a ▶ Bad Leaver or, if the shares held by a good leaver are subject to a ▶ Call Option, is entitled to a higher purchase price than a bad leaver.

## **Goodwill**

An intangible asset that represents a value over and above the physical assets of a business. A company's reputation and standing in the market are typical factors that contribute to its goodwill. Goodwill may be included when calculating the purchase price.

## **G**

## **Go-shop Clause**

A go-shop clause can be used in a ▶ Sale and Purchase Agreement enables the ▶ Target to look around for a better deal (for a limited period). In such a case, the ▶ Target has the right to withdraw from the contract, often in exchange for a ▶ Break-up Fee.

## **Governing Law**

The law applicable to a contract, usually specified in a choice of law clause. Examples include German law, the law of England and Wales, and the law of the American state of Delaware.

## **Gross-up Clause**

Under a gross-up clause, a payor must pay an additional amount to a payee to ensure that the payee receives and retains the same amount that it would have received had no tax been withheld from, or otherwise been due as a result of, the payment.

## **Guarantee on First Demand**

See ▶ First Demand Guarantee.

## **Guarantor**

Surety provider.

### **Hard Underwriting**

When a bank or consortium of banks undertakes to make every effort to sell the securities being issued (e.g. in an ▶ IPO), and explicitly commits itself to place the securities (unlike ▶ Best Efforts Underwriting).

### **Headhunter**

Recruitment agent who finds suitable candidates for vacant positions (often executive roles) in return for commission.

### **Heads of Agreement / Heads of Terms**

▶ Term Sheet.

### **Hedge Agreement**

Hedge contract with the ▶ Hedge Counterparty, who assumes the risk to be hedged.

### **Hedge Counterparty**

Party to a ▶ Hedge Agreement who assumes the risk to be hedged.

### **Hedge Fund**

Investment fund that makes highly speculative investments, often involving heavy use of borrowed capital (▶ Leverage Effect); the connection with the term “hedging” is merely historical and does not refer to the actual nature of the investments.

### **Hedging**

Transaction designed to limit specific risks, e.g. currency fluctuation or price volatility in commodities.

## Hell and High Water Clause

In a clause of this type, the buyer agrees to pay the purchase price irrespective of whether certain risks defined in the contract occur or whether the contract can be completed (e.g. lack of merger control approval, completion is legally or physically impossible). Accordingly, the buyer bears the full economic consequences of these risks.

## H

### Hindsight Bias

Tendency to assume with hindsight (possibly incorrectly) that the occurrence of an event could have been predicted.

### Hive-down

Restructuring method in which a new company is established to acquire specific shares or assets (by means of transfer or spin-off) of the company to be restructured. The latter can use the proceeds to (partially) pay down its debt. The investor then acquires the new company without the existing group structures, risks and financing of the original company.

### HoldCo

▶ Holding Company.

### Hold Harmless Clause

Contractual provision requiring one of the parties to indemnify the other party in respect of specific risks, e.g. claims for compensation (see ▶ Indemnification).

## **Holding Company**

Parent company of one or more companies. Its object is to hold and manage the stakes in the investee companies; in some cases, holding companies are also operationally active. The abbreviation ▶ HoldCo is used in draft contracts.

## **Hostile Takeover**

A takeover that is not welcomed by the ▶ Target, which often rejects the takeover (see also ▶ Unfriendly Takeover).

## **HR**

▶ Human Resources.

## **Human Resources (HR)**

Generic name for department dealing with employee and personnel matters.

## IAS

- ▶ International Accounting Standards.

## ICC Arbitration

Arbitration proceedings based on the arbitration rules defined by the International Chamber of Commerce (ICC).

## IFRS

- ▶ International Financial Reporting Standards.

## Inbound

When assessing transactions or M&A market activities, “inbound” refers to transactions involving a foreign buyer. The opposite of inbound is ▶ Outbound.

## Incentive

A bonus or reward linked to a specific achievement or outcome. It can consist of a cash payment, benefit in kind or a service.

## Indemnification / Indemnity

The party providing an indemnity agrees to protect the beneficiary financially against certain liabilities (e.g. resulting from taxes or environmental risks). Indemnities are often agreed for matters that pre-date the transaction, but where the problem typically only comes to light later (e.g. clean-up operations to deal with contaminated sites). The level of indemnification provided in a contract is often unlimited.

### **Indicative Bid / Indicative Offer**

The first, non-binding offer made by an interested party for a ▶ Target in the course of an ▶ Auction Process.

### **Information Covenants**

Requirement to inform the other party to the contract about certain facts on a regular basis.

### **Information Memorandum**

A document prepared by the M&A advisors, the investment bank or the seller itself (often at the start of an ▶ Auction Process) and containing information about the ▶ Target which is more extensive than that in the ▶ Teaser. It is intended as an (additional) aid to help potential buyers decide whether to continue participating in the bidding process.

### **In Good Faith**

“Duty to perform according to the requirements of good faith”, section 242 of the German Civil Code (see also ▶ Bona Fide).

### **In-house (Legal) Counsel**

Corporate counsel; lawyer employed by a company.

### **Initial Public Offering (IPO)**

Stock market flotation, i.e. procuring admission to public trading of a security on a stock exchange for the first time.

### **Institutional Investor**

This type of investor has large amounts to invest (especially compared with private investors); typical examples include banks, funds and investment companies. Institutional investors often invest other people’s money as well as their own.

## Intangible Assets

Such assets include software, patents, trademarks, copyrights, licenses, and customer and supplier relationships (see also section 266 (2) A. I. 1.–3., *HGB* (German Commercial Code)). ▶ IFRS require internally generated intangible assets to be capitalised. Under *HGB* rules, there was a ban on capitalisation of internally generated intangible assets until 2009. For financial years starting from 2010, the *HGB* provides the option of capitalising these assets on the commercial balance sheet (but not on the tax balance sheet).

## Intellectual Property (IP)

Intellectual property rights, e.g. to patents, trademarks or works protected by copyright.

## Intercreditor Agreement

Agreement between various creditors (e.g. shareholders or sellers who have provided loans and banks) which regulates the creditors' relationships to each other and the ranking of their claims against the borrower.

## Interest Margin

Percentage added to the lender's refinancing rate (see also ▶ Margin).

## Internal Rate of Return (IRR)

The ▶ IRR is the interest rate at which the net present value of an investment is zero. The net present value of an investment is determined by comparing the initial cost of the investment with the total cash flows to the investor, discounted over the term of the investment. In this calculation, the IRR corresponds to the interest rate at which the returns to the investor must be discounted in order that their net present value corresponds to

the initial investment, meaning that the net present value of the entire investment is zero.

### **International Accounting Standards (IAS)**

Until 2001, this was the name of the standards for worldwide harmonisation of financial reporting and accounting, now issued as ▶ International Financial Reporting Standards.

### **International Financial Reporting Standards (IFRS)**

International financial reporting requirements for companies. Their purpose is to facilitate the preparation of internationally comparable annual and consolidated financial statements; they are published in English by the International Accounting Standards Board (IASB).

### **International Securities Identification Number (ISIN)**

Combination of digits and letters used to identify securities (▶ ISIN).

### ***Invitatio ad Offerendum***

Invitation to treat, i.e. to make an offer.

### **IP**

▶ Intellectual Property.

### **IPO**

▶ Initial Public Offering.

### **IRR**

▶ Internal Rate of Return.

### **ISIN**

▶ International Securities Identification Number.

**Issuer**

Entity that issues securities.

### Joint and Several Liability

Defined in section 421 of the *BGB* (German Civil Code); the obligee (creditor) can demand full performance from each of the obligors (joint and several debtors). In their external relationships, all joint and several debtors are liable for the full amount. In the context of their internal relationship, a joint and several debtor who satisfies a claim can demand adjustment of advancements from the other joint and several debtors (duty to adjust advancements, section 426, *BGB*).

### Joint Venture (JV)

Company owned jointly by at least two companies that cooperate in a certain field via the joint venture. The joint venture company itself is legally independent. The joint venture partners often hold equal shares in the joint venture. In such cases it is important to provide for dispute resolution mechanisms in the joint venture agreement (see also ▶ Call Option; ▶ Put Option; ▶ Russian Roulette; ▶ Texas Shoot Out).

### JV

- ▶ Joint Venture.

## K

### **Key Employee**

Employee who is of particular importance to the company.

### **Key Performance Indicator (KPI)**

A defined measure, often of a financial nature, which is used to determine whether targets have been met (for example in the context of ▶ Management Participation).

### **Kick-back**

Partial refund of an amount paid to a third party, representing a kind of commission, or any kind of facilitation payment; arrangements of this type often pose problems from a legal viewpoint.

### **Kick-off**

Launch event at the start of a transaction. Kick-off calls by phone are sometimes arranged instead of a physical kick-off meeting.

### **Knowledge Qualifier**

Warranties are limited to actual knowledge, rather than applying to the objective facts (see also ▶ Best Knowledge).

### **KPI**

▶ Key Performance Indicator.

## Large Cap

1. Transactions with a deal value exceeding EUR 500 million (Thomson Reuters). This is not a fixed size, however; other thresholds are also used in this context (see also ▶ Small Cap; ▶ Mid Cap).
2. “Large Cap” can also refer to companies with a particularly high market capitalisation.

## LBO

- ▶ Leveraged Buy-out.

## Leakage

Outflow of cash after the effective date agreed under a ▶ Locked Box mechanism; unless this is ▶ Permitted Leakage, the seller must make up the amount involved.

## Leaver

Shareholders and/or managers who leave a firm prematurely; leaver provisions are often included in agreements on management share schemes, with participation being tied to continuation of employment with the company. The specific leaver status (▶ Good Leaver, ▶ Bad Leaver) is associated with certain legal consequences, usually regarding the size of severance payments and the possibility of exercising a ▶ Put Option or ▶ Call Option.

## Legal Due Diligence

This involves examining a company’s legal relationships and risks. The circumstances of the particular case determine the focus of analysis. As a minimum, legal due diligence generally covers corporate law issues, in particular the ▶ Chain of Title in the case

of a ▶ Share Deal. It very often includes an examination of aspects relating to employment law, competition law, real estate and environmental law. It may also cover intellectual property rights and contracts with customers and suppliers (e.g. with regard to any ▶ Change of Control Clause).

### **Legal Opinion**

Opinion prepared by a law firm in relation to a specific legal issue.

### **Letter of Comfort**

▶ Comfort Letter.

### **Letter of Credit**

Documentary credit; a directly enforceable, conditional payment guarantee issued by a bank. The bank commits to making the relevant payment if it is presented with documentation that is “letter of credit-compliant” (i.e. in due form) (see also ▶ Standby Letter of Credit).

### **Letter of Engagement**

Agreement between client and advisor (e.g. a law firm) covering in particular the scope of the work to be carried out, the fee and liability aspects.

### **Letter of Intent (Loi)**

A document (usually drafted without legally binding effect) in which the parties identify the key points of the deal and express their willingness to conduct further negotiations. A letter of intent can also include binding elements (for example in relation to confidentiality or exclusivity) (see also ▶ MoU and ▶ Preliminary Draft).

### **Level Playing Field**

Equal information, no information imbalance; ▶ Vendor Due Diligence can be used to eliminate the information imbalance that exists between buyer and seller.

### **Leveraged Buy-out (LBO)**

Acquisition of a company using a large amount of debt capital; the collateral for the loans is provided by the ▶ Target itself, in part or in full.

### **Leverage Effect**

This usually refers to a situation in which a company's high debt-to-equity ratio means that the return on equity can considerably exceed the return on investment; however, the risk is also greater.

### **Liabilities**

Collective term for obligations and risks of all kinds.

### **Liability Cap**

Limit on liability, often agreed in connection with warranties (▶ Representations & Warranties) and frequently based on a specific percentage of the purchase price. Different liability caps may apply to breaches of different types of warranties (taxes, environment, ▶ Title). If no liability cap is agreed, liability for breach of warranty is unlimited under German law.

### **License-in**

Refers to obtaining licences from third parties for use within a company.

### **License-out**

Refers to the granting of licences to third parties.

## Lien

A security interest over a movable or immovable object; examples include a pledge or mortgage.

## Limitation Language

Wording that imposes limitations on the payment obligation in connection with collateral security; commonly used with regard to upstream collateral (provided by a subsidiary for the parent company's liabilities) in order to protect the subsidiary's share capital. Also refers to limitations in a share or asset purchase agreement on the seller's liability for breach.

## Limited Liability Company

Companies with limited liability exist in many different jurisdictions; the German variant is a *Gesellschaft mit beschränkter Haftung*, or *GmbH*. While limited liability is a shared feature of such companies, they can differ significantly in other respects, depending on the jurisdiction.

## Limited Partner

A partner in a ▶ Limited Partnership whose liability is limited to the extent of his ownership share. Limited partners are found in many jurisdictions, but their exact status can differ significantly from country to country.

## Limited Partnership

A limited partnership comprises partners with unlimited personal liability (▶ General Partner) and with limited liability (▶ Limited Partner). Limited partnerships are found in many jurisdictions, but can differ significantly from country to country.

### **Liquidation Preference (Right)**

First right to the proceeds of an Exit by way of liquidation. This mechanism may be used to ensure that a specific investor gets back the full amount of his investment before Pro Rata distributions are made to other shareholders.

### **Listing**

Admission of a security to stock market trading.

### **Locked Box**

Mechanism for establishing the purchase price; the price is usually based on the most recently available audited financial statements (and in particular is not adjusted at a later date (► Cash Free/ Debt Free)). No cash may be taken out of the company (► Leakage) until the transaction has been completed, apart from defined exceptions (► Permitted Leakage), e.g. payments in the normal course of business to cover wages, taxes, etc. The buyer's interest in ensuring that no cash is extracted is addressed through ► Non-leakage Provisions. The locked box model is favoured by ► Financial Investors when selling and necessitates thorough ► Financial Due Diligence.

### **Lock-up (Period)**

Holding period during which shares may not be sold; often used to tie management or key investors to the company for a specified period with the aim of boosting investor confidence.

### **Lol**

► Letter of Intent.

### **Long List**

List of all potential buyers for a company. Usually compiled by M&A advisors or an investment bank as part of an ▶ Auction Process, based on general information.

### **Long-stop Date**

Date defined by contract as the latest point in time at which the acquisition can be completed. All the conditions for completion must be satisfied by this date, otherwise the parties can withdraw from the deal. The purpose of agreeing a long-stop date is to unmake a contract which is not completed.

### **Loss Carried Forward**

Accounting technique that applies a loss from a previous year to profits in a subsequent year.

### **Ltd.**

▶ Private Company Limited by Shares.

### **LuxCo**

Common term/abbreviation for a company established under Luxembourg law. A company of this type is often included in the transaction structure for tax reasons.

## **M&A**

▶ Mergers and Acquisitions.

## **MAC**

See ▶ MAC Clause.

## **MAC Clause**

Provision that makes it possible to withdraw from a deal or reduce the purchase price in the event of a material adverse change (MAC) between ▶ Signing and ▶ Closing. MAC clauses can relate to the situation of the ▶ Target itself or to general economic circumstances. The scope and extent of MAC clauses are often the subject of intense negotiation.

## **Management Accounts**

Financial statements prepared periodically for management. Unlike ▶ Annual Financial Statements, they are neither audited nor adopted.

## **Management Board**

Comprises a company's most senior executives in the Anglo-American (unitary) system of ▶ Corporate Governance. In an international context, care must be taken to ensure a shared understanding of the material meaning of the term.

## **Management Buy-in (MBI)**

The acquisition of a majority holding in a company by an (external) management team.

### **Management Buy-out (MBO)**

The acquisition by management of a majority of the capital in a company from the existing owner. If the acquisition involves not just the management of the company but the (entire) workforce, it is referred to as an ▶ Employee Buy-out.

### **Management (Equity) Participation (MEP)**

Refers to management share schemes; programmes of this type provide management with an opportunity for (direct or indirect) participation in the company. Participation may be through granting of shares under corporate law (i.e. *in rem*), or purely *in personam* (i.e. under the law of obligations), e.g. by way of ▶ Phantom Stocks. The ability to take part in these programmes further incentivises management to boost the value of the company and commits them to the success of the business. These schemes can be extended beyond management level in the form of employee share schemes.

M

### **Management Guarantees**

Guarantees provided personally by management rather than by the seller.

### **Management Interview**

This provides an opportunity for potential buyers to obtain more information or clarification about the ▶ Target by putting questions to management or other employees. The specific form of a management interview depends on the circumstances of the individual transaction. The formal requirements also vary.

### **Management Presentation**

Presentation that often takes place after the submission of  
▶ Indicative Bids/Indicative Offer. Management provides

interested parties with further information about the ▶ Target, supplementing the information in the ▶ Teaser and ▶ Information Memorandum and adding more detail.

### **Margin**

Percentage added by a bank to the base interest rate (see also ▶ Interest Margin).

### **Mark-up**

Indication of changes in a revised version of a document; word-processing software usually enables changes to be highlighted in colour such that other users can easily identify them.

### **Master Agreement**

Main or ▶ Framework Agreement which sets out the key contractual arrangements that apply in separate contracts to be made in future.

M

### **Matching Stock Programme**

Part of remuneration (usually of management) granted in shares when specific ▶ Milestones are met. The shares are often subject to a ▶ Lock-up.

### **Material Adverse Change**

▶ MAC Clause.

### **Materiality Threshold**

Limit below which certain events are ignored. This may apply in the preparation of a ▶ Due Diligence Report, for example, where the intention is to restrict the report to matters of real importance for the company. The degree of importance is usually defined by reference to a specific amount of money.

## **MBI**

- ▶ Management Buy-in.

## **MBO**

- ▶ Management Buy-out.

## **Mediation Clause**

In this type of clause, the parties agree to deal with disputes using out-of-court mediation before engaging in arbitration or litigation.

## **Memorandum of Understanding (MoU)**

Declaration of intent by the parties, which is non-binding from a legal viewpoint (see ▶ Letter of Intent; ▶ Preliminary Draft;

- ▶ Heads of Agreement/Heads of Terms; ▶ Term Sheet); some elements (for example in relation to confidentiality or exclusivity) are nevertheless usually formulated as legally binding.

**M**

## **MEP**

- ▶ Management (Equity) Participation.

## **Merger**

Amalgamation of companies in the broader sense.

## **Merger Control**

Reviewing mergers and acquisitions under antitrust/competition law. Whether merger control applies depends on the individual case and in particular on the turnover of the companies involved. A transaction subject to merger control proceedings may face considerable delays; this is one reason why ▶ Signing and ▶ Closing often occur at different times.

## Merger (Control) Clearance

Merger control approval from the competition authorities (see also ▶ Merger Control). Depending on the country in which the transaction must be notified, it is important to be aware that closing before approval is obtained may be prohibited or attract a penalty (e.g. in Germany). Breaching such a prohibition can render the transfer of ownership invalid (under civil law) and result in large fines.

## Mergers and Acquisitions (M&A)

Refers to the activity of purchasing or combining companies.

## Mezzanine Financing

A type of financing involving a mix of debt and equity; mezzanine financing arrangements can vary widely.

## Mid Cap

1. Transactions with a deal value of between roughly EUR 50 million and EUR 500 million (Thomson Reuters). This is not a fixed size, however; other thresholds are also used in this context (see also ▶ Large Cap; ▶ Small Cap).
2. “Mid Cap” can also refer to companies with a medium market capitalisation.

## Mid-market

Refers to the middle market segment. In terms of company size, it roughly corresponds to the German “*Mittelstand*” (SMEs), but there is no generally accepted definition. SMEs are sometimes defined as having up to 500 employees and turnover of up to EUR 50 million. In other cases, the thresholds are set much higher, especially in the context of deal sizes (Thomson Reuters: up to EUR 500 million, see ▶ Mid Cap).

## **Milestones**

Pre-defined targets or target values to be reached by a company or management; in transactions, for example, milestones may be agreed with regard to specific metrics (e.g. ▶ EBIT; ▶ EBITDA), which are then linked to specific legal consequences.

## **Misrepresentation**

Providing false or misleading information.

## **Most Favoured Nation Provision**

Contract provision in which a seller (or licensor) agrees to give the buyer (or licensee) the best terms it makes available to any other buyer (or licensee).

## **M**

### **MoU**

▶ Memorandum of Understanding.

### **Multiple-based Valuation**

Company valuation based on (country and sector-specific) multiples of key metrics (e.g. sales, ▶ EBIT, ▶ EBITDA).

### **Multi-seller Conduit**

▶ ABS structure involving multiple originators (see also ▶ Conduit).

### **Multi-tiered Clause**

Multi-level approach to alternative dispute resolution with several escalation stages.

## **NDA**

▶ Non-disclosure Agreement.

## **Negotiated Sale**

In a negotiated sale, the buyer and seller negotiate exclusively with each other, unlike in an ▶ Auction Sale.

## **Net Assets**

The net assets of a company are calculated by deducting liabilities and provisions from total assets.

## **Net Debt/Cash Free**

▶ Cash Free/Debt Free.

## **Net Equity**

A company's reported equity capital (see section 266 (3) A. of the *HGB* (German Commercial Code)).

## **Net Working Capital**

Net current assets.

## **NewCo**

Common term for a new entity established as part of and for the purposes of a transaction. Often an ▶ SPV and ▶ Shelf Company.

## **Non-compete Clause**

Prohibition on competition; various legal restrictions must be borne in mind when drafting such a prohibition.

## **Non-disclosure Agreement (NDA)**

A contract by which the parties agree to treat negotiations (including the fact that the negotiations are taking place), their content, outcome and the documents made available as confidential. They undertake to keep confidential information secret and not to make it accessible to third parties or place it in the public domain. The agreement sometimes also stipulates how documents are to be treated after negotiations have ended (typically they are returned or destroyed; see also ▶ Confidentiality Agreement). Sanctions are often agreed for breaching the obligations arising from a non-disclosure agreement.

## **Non-embarrassment Clause**

▶ Anti-embarrassment Clause

## **Non-leakage Provisions**

**N**

Provisions in the context of a ▶ Locked Box mechanism which are intended to prevent the outflow of cash between the effective date (the date used as the basis for establishing the purchase price) and ▶ Closing.

## **Non-performing Loans**

Loans where the borrower is in default, i.e. failing to meet his repayment commitments, or where the lender can terminate the loan agreement for good cause (see also ▶ Distressed Debt).

## **Non-reliance Letter**

Exclusion of liability, such that no liability is accepted in respect of third parties for statements made in a ▶ Due Diligence Report or other report (e.g. if the report is forwarded by the client to other parties). This is due to the substantial liability risk that would otherwise be incurred, which would make it considerably more

expensive to prepare a due diligence report or other kind of report.

### **Non-solicitation Clause**

Employee poaching ban; i.e. one party agrees not to (actively) recruit (specific) employees (e.g. ▶ Key Employees) from another party (for a certain period of time).

### **No-shop Clause**

1. Agreement between buyer and seller which prohibits the seller from subsequently soliciting offers from other potential buyers. A no-shop clause generally applies for a finite period only.
2. Provision in the context of a ▶ Fiduciary Out, stipulating that the management board may not actively solicit other offers which are more favourable for the shareholders. Less restrictive than a ▶ No-talk Clause.

### **No-talk Clause**

1. Contractual provision regarding a duty to maintain secrecy (see also ▶ Non-disclosure Agreement (NDA) and ▶ Confidentiality Agreement).
2. Provision in the context of a ▶ Fiduciary Out which prohibits the management board from talking to other parties about submitting offers. More restrictive than a ▶ No-shop Clause.

## O

### **OEM**

▶ Original Equipment Manufacturer.

### **OES**

▶ Original Equipment Supplier.

### **Offer**

▶ Bid.

### **Officer's Certificate**

Declaration made by company officers (CEOs, management board) in the course of a transaction in relation to the accuracy of warranties at a specified point in time, e.g. the ▶ Closing Date. Declarations of this kind should be qualified with regard to knowledge where appropriate (▶ Knowledge Qualifier; ▶ Best Knowledge).

### **One-stop Shop**

In competition law, this refers to the principle that the European Commission has exclusive jurisdiction over ▶ Merger Control once proceedings have been opened; accordingly, the jurisdiction of national competition authorities is excluded.

### **Open Issue**

A matter that the parties have not yet fully negotiated, or a disputed item.

### **Open Issues List**

Summary and comparison of the matters the parties have not yet fully negotiated or which are contentious (▶ Open Issue). This list

is used to prepare for further negotiations to enable the issues to be dealt with as efficiently as possible.

### **Ordinary Course of Business**

Refers to a company's normal business operations; particularly risky or exceptional actions are excluded. To protect the buyer, an ▶ SPA sometimes requires the seller to obtain the buyer's consent for any transactions between ▶ Signing and ▶ Closing that fall outside the ordinary course of business.

### **Original Equipment Manufacturer (OEM)**

Manufacturer (e.g. Apple Inc.) whose products (e.g. the iPhone) incorporate components made wholly or partly by an ▶ Original Equipment Supplier (OES) (e.g. Foxconn).

### **Original Equipment Supplier (OES)**

Component manufacturer (e.g. Foxconn) whose components are bought by an ▶ Original Equipment Manufacturer (OEM) (e.g. Apple Inc.) and incorporated into the OEM's products (e.g. the iPhone). The OES may also have used components sourced from other suppliers (2nd tier/3rd tier suppliers).

### **Outbound**

When assessing transactions or M&A market activities, "outbound" refers to transactions in which a domestic buyer acquires an equity interest in a foreign company. The opposite of outbound is ▶ Inbound.

### Payment in Kind (PIK)

1. With this type of clause in a loan agreement, interest is not paid on an ongoing basis but added instead to the principal as compound interest and paid at the end of the term. Substantially higher interest is usually payable on PIK loans due to the greater risk.
2. In a more general sense, “payment in kind” means that provision is made for non-monetary consideration.

### PE

- ▶ Private Equity.

### Peer Group

A group that is similar or comparable, allowing it to serve as a reference point. A peer group comparison is sometimes used when valuing a company. Looking at competitors in the same market or the same industry enables conclusions to be drawn about the company’s current value and future prospects.

### Penalty Clause

Provision for imposing contractual penalties; when agreeing penalties of this nature, particular attention must be paid to the law governing the contract – depending on the jurisdiction, contractual penalties must meet special requirements in order to be effective, or are wholly ineffective.

### Perimeter

Refers to the subject of a transaction or other activity, e.g. a group of companies involved in restructuring or an ▶ IPO.

### Permitted Leakage

Provision in the context of a ▶ Locked Box mechanism whereby an outflow of cash is permitted in relation to certain items and events between the effective date for establishing the purchase price and ▶ Closing (see also ▶ Leakage).

### Phantom Stocks

Participation in a company based on the law of obligations, e.g. in the context of ▶ Management Participation.

### Physical Data Room

A ▶ Data Room as commonly used until a few years ago. A physical data room consists of office space in which all the documents required for ▶ Due Diligence are assembled and made available for inspection. In some cases, both a ▶ Virtual Data Room and a physical data room are used, with highly sensitive information only being made available in the physical data room. The disadvantage of a physical data room is that it requires a lot of resources. Only a limited number of people can access it at any given time, the room is not available for other uses, it requires constant supervision, and the process of assessing the information in a physical data room is generally less efficient. Physical data rooms are increasingly being replaced by virtual data rooms.

### PIK

▶ Payment in Kind.

### Pitch

Presentation in which advisors (e.g. lawyers, M&A advisors, investment banks or auditors) compete to work on an upcoming transaction, usually in a ▶ Beauty Contest.

## **Plain Vanilla**

Expression used to describe the simplest or most basic version of something.

## **PLC**

▶ Public Limited Company.

## **Pledge**

A form of security (see also ▶ Share Pledge).

## **PLTA**

▶ Profit and Loss Transfer Agreement.

## **PMI**

▶ Post-merger Integration.

## **PMO**

▶ Project Management Office.

## **P**

## **PoA**

▶ Power of Attorney.

## **Poison Pill**

Refers to measures intended to make a company unattractive when faced with the prospect of a ▶ Hostile Takeover (see also ▶ Shark Repellent).

## **Post-acquisition Due Diligence**

▶ Post-closing Due Diligence.

### **Post-closing Due Diligence**

Review of the company by the buyer after completion of the transaction; the buyer typically now has access to all the information and is able to verify the details previously provided. If discrepancies are found, this may give rise to warranty or indemnity claims. Sometimes also referred to as ▶ Post-acquisition Due Diligence.

### **Post-M&A**

Phase following completion of the transaction (▶ Closing); see also ▶ Post-merger Integration.

### **Post-merger Integration (PMI)**

After a company has been acquired, the focus of post-merger integration is on ensuring that business operations are properly coordinated and synergies generated. This can involve many different areas of the company (e.g. IT, ▶ HR, contracts with customers and suppliers, public presence). How these tasks are handled is central to the success or failure of the transaction. Shortcomings in this phase can also expose management to liability risks.

### **Post-money**

Value of a company after a round of financing; the opposite is ▶ Pre-money.

### **Power of Attorney (PoA)**

Legal authorisation that allows a person to act on someone else's behalf.

### **PPP**

▶ Public Private Partnership.

## Preamble

Section at the start of an agreement which outlines the background to the transaction and the intentions of the parties. The content of the preamble is of major importance in interpreting the provisions in the agreement.

## Pre-emptive Right, Pre-emption Right

Similar to a ▶ Right of First Refusal; the beneficiary of this arrangement can step into an agreement made between the seller and a third party on the same terms as the prospective buyer. Arrangements of this type are common where the intention is to exclude outside shareholders, e.g. in the case of a ▶ Joint Venture.

## Preference Rights

Priority rights in relation to dividends or the proceeds of liquidation (see also ▶ Liquidation Preference).

## P

## Preferred Bidder

An ▶ Auction Process involves several potential buyers. Since a seller is typically not able to conduct intensive negotiations with all the interested parties at the same time, in most cases it will select what appears to be the most attractive proposal from among the indicative bids (▶ Indicative Bid/Indicative Offer) submitted by the prospective buyers and negotiate primarily with this party, the preferred bidder. Focusing (provisionally) on a single preferred bidder is one way of reducing the management workload associated with multiple bids.

## Preliminary Draft

See ▶ Heads of Agreement/Heads of Terms ▶ Lol ▶ MoU

### **Pre-money**

Value of a company before a round of financing; the opposite is ▶ Post-money.

### **Principal**

Person on whose behalf an ▶ Agent acts.

### **Private Company Limited by Shares (Ltd.)**

Corporate form in the UK (and other countries), comparable with the German "*GmbH*" in terms of function. The abbreviation "Ltd." is commonly used.

### **Private Equity (PE)**

Equity provided privately, i.e. not via the stock exchange; many investment companies specialise in private equity. A private equity investor often takes a majority stake in a company, enabling him to influence operational management. By contrast, a ▶ Venture Capital Investor usually invests in firms that are still at an early stage of development. It is not uncommon for a private equity investor to aim to hold a stake for three to five years until ▶ Exit.

### **Private Limited Company**

▶ Private Company Limited by Shares.

### **Procedure Plan**

Plan in which all the transaction steps (together with the associated documents, deadlines and persons responsible) are listed in chronological order to ensure an orderly transaction process and smooth implementation. It is advisable to prepare a procedure plan before the transaction gets under way, especially in the case of complex scenarios.

## **Process Letter**

Document which is prepared at the start of a transaction; it is especially important in an ▶ Auction Process due to the structured rounds of negotiation that interested parties need to go through. A process letter provides details of the process and timeframe and is sent to prospective buyers and their advisors. In other words, the document lays down the ground rules for everyone in advance. In addition to deadlines for submitting bids, it also includes the timeframes for carrying out ▶ Due Diligence, ▶ Expert Calls, the ▶ Q&A Process and other process details.

## **Profit and Loss Transfer Agreement (PLTA)**

Agreement between two companies, often as part of a combined control and profit transfer agreement. In this type of affiliation agreement the dependent company must transfer all its profits to the controlling company. In return, the controlling company is required to bear all the losses made by the dependent company. It is important to scrutinise affiliation agreements very closely, especially from a tax viewpoint.

P

## **Project Management Office**

Organisational entity within a company responsible for creating, implementing and developing the project management system, e.g. in the context of ▶ Post-merger Integration.

## **Pro Rata**

Proportional; corresponding to the respective stake held in the company.

## **Pro-sandbagging Clause**

Provision in a sale and purchase agreement stipulating that the recipient of a warranty may rely on it even if he was aware that it

was incorrect at the time it was given. In such cases, the impact of information asymmetry, e.g. as a result of ▶ Due Diligence, can be particularly significant (see ▶ Anti-sandbagging Clause; ▶ Sandbagging).

### Provisions

1. Stipulations, requirements or clauses in a contract.
2. "Provisions" is also a term used in accounting. Provisions must be recognised if an outflow of economic resources is expected in the future. Unlike ▶ Accruals, the timing and the amount of the future liabilities are uncertain (see IAS 37).

### Public Limited Company (PLC)

Corporate form in the UK, comparable with the German "AG" (*Aktiengesellschaft*) in terms of function. The abbreviation "PLC" is commonly used.

### Public Private Partnership (PPP)

Involvement of private companies in delivering public facilities and services, especially infrastructure projects; it is important to consider the public law aspects in such scenarios. PPPs can take many different forms.

### Punitive Damages

A concept derived from US law which enables a victim in a civil case to be awarded compensation that exceeds the actual loss sustained. No punitive damages are granted under German law.

### Purchase Price Adjustment

The assumed position at the time of the agreement is verified after ▶ Closing, with the result that the price can be adjusted upwards or downwards if the actual position turns out to be

worse or better than the assumed position. The parties agree in the contract on specific mechanisms for making the adjustment, for example ▶ Cash Free/Debt Free.

### **Purchaser Due Diligence**

▶ Due Diligence carried out by the buyer, which is the norm in most cases.

### **Put Option**

Option conferring the right (but not the obligation) to sell securities (▶ Underlying) within a certain period (American put option) or on a specific date (European put option). The put option may be structured *in personam* (i.e. under the law of obligations) or *in rem* (based on a property right). In the case of a put option under the law of obligations, exercise of the option merely creates an obligation on another party to accept the transfer of the securities. In a put option based on a property right, the option holder can bring about transfer of title by means of a unilateral declaration of intent, without further involvement of the other party being required. The opposite of a put option is a ▶ Call Option.

P

## Q&A

Questions and answers (see also ▶ Q&A Process).

### Q&A Process

This gives buyers the opportunity to obtain further information by asking questions arising from the documents made available for ▶ Due Diligence. Depending on the structure of the transaction, the Q&A process may be highly formalised. Particularly in an ▶ Auction Process, questions may need to be submitted via a ▶ Q&A Tool, with restrictions on the number of questions each bidder may ask and specific times set for submitting them.

### Q&A Tool

In conjunction with a ▶ Virtual Data Room, a Q&A tool is sometimes used to manage and formalise the ▶ Q&A Process. Applications are made available on the relevant Internet platforms that enable questions to be asked (e.g. relating to individual documents in the ▶ Data Room). In order to organise ▶ Due Diligence efficiently, it is usually advisable to formalise the Q&A process. A Q&A tool supports this objective.

## R

### Recitals

Statement of the background to a contract or agreement. Recitals include disclosures about existing contractual relationships and details of the parties.

### Red Flag Due Diligence

In red flag due diligence, only aspects that are crucial to the transaction are examined. The resulting ▶ Red Flag Report summarises the findings, with some sections possibly just comprising bullet points. It typically focuses on the main risks and may even be restricted to ▶ Deal Breakers.

### Red Flag Report

▶ Red Flag Due Diligence.

### Reference Deed

Notarial deed prepared by the notary prior to the actual appointment for notarisation. Reference is made to it in the (main) deed. This reduces the time required by the parties for notarisation. Otherwise the parties would need to be present to hear the content of the reference deed read out during the actual appointment.

### Reliance Letter

Written statement by the author of a ▶ Due Diligence Report to a third party (to whom the client wishes to forward the report, for example) accepting liability to the third party for the content of the report. Since the liability involved can be considerable, the issuing of a reliance letter is the exception rather than the rule.

## Remedies

1. Legal recourse, also claims for compensation (in which case the term “remedies for damages” is often used).
2. Remedial measures in the context of ▶ Merger Control, intended to secure approval for the merger, such as the sale of a business unit.

## Reorganisation

Refers to the transfer of ▶ Shares in a company within a corporate group, such that the company then has a new parent. Can also refer to the transfer of ▶ Assets within a corporate group.

## Representations & Warranties

- ▶ Warranties.

## Reps & Warranties

- ▶ Representations & Warranties.

## Request for Information (RFI)

Request to bidders or advisors to submit offers relating to a possible corporate acquisition or opportunity to work on a matter (see ▶ Pitch).

## Request for Proposal (RFP)

- ▶ Request for Information (RFI).

## Restrictions on Share Transferability

In some cases, there are restrictions on the transferability of shares in a company. Transferability can be made dependent on the approval of the company or the co-shareholders, for example.

## **Restrictive Covenant**

Agreement between the parties to refrain from certain actions.

## **Restructuring**

Restructuring of a company or corporate group.

## **Retainer**

1. ▶ Letter of Engagement.
2. Advance payment.

## **Return on Investment (RoI)**

Total return on capital; return on all capital employed (equity and debt).

## **Reverse Break-up Fee**

The reverse equivalent of a ▶ Break-up Fee. If, for example, a break-up fee is agreed such that it is payable by the seller if the negotiations fail due to actions for which the seller is responsible, the reverse break-up fee involves a payment by the buyer if failure of the negotiations is attributable to the buyer.

## **R**

### **RFI**

- ▶ Request for Information.

### **RFP**

- ▶ Request for Proposal.

## **Right of First Refusal**

The grantor of a right of first refusal must offer to sell his shares to the other party before selling them to a third party. The beneficiary of the right then has the option of concluding the agreement with the seller on the same terms as those negotiated

with the third party. Rights of first refusal are often agreed in cases where the original shareholders wish to avoid being confronted with external shareholders. In the context of transactions, any rights of first refusal and associated requirement to offer shares to existing shareholders can lead to considerable delays due to the time periods involved. A ▶ Call Option works in a similar fashion. A right of first refusal differs from a ▶ Pre-emptive Right in that the grantee does not adhere to an existing contract with a third party; rather, the grantee enters into a separate contract (if exercised).

### Roadshow

Series of presentations, e.g. made by management to banks and investors.

### RoI

▶ Return on Investment.

### Roll-over

1. The seller invests part of the purchase price in an equity stake in the acquiring company (reinvestment).
2. Form of lending in which the interest is fixed in advance for a defined period (e.g. three months). At the end of this period the interest rate is adjusted in accordance with a reference rate.

### Russian Roulette

A type of dispute resolution mechanism used in a ▶ Joint Venture; closely related to a ▶ Texas Shoot Out. A Russian roulette mechanism makes it possible to force termination of the joint venture, either by one party accepting an offer from the other party to acquire its shares or by the other party transferring its own shares on the same terms to the party seeking to end the venture. Several variants of Russian roulette are possible in practice.

### **Sale and Leaseback**

An arrangement in which a company sells an asset, e.g. a building, machine or patent, and receives a purchase price which may considerably exceed the balance sheet value due to the latter having been written down. The asset is then leased back by the company. A sale and leaseback transaction enables a company to leverage hidden reserves and gain fast access to cash.

### **Sale and Purchase Agreement**

Contract used in an ▶ Asset Deal or ▶ Share Deal.

### **Sandbagging**

Principle under which the recipient of a warranty may rely on it (and base a claim on the warranty) even if he was aware at the time the warranty was given that it was incorrect (see ▶ Pro-sandbagging Clause; ▶ Anti-sandbagging Clause).

### **Scalping**

Scalping involves purchasing a particular security and then recommending it as a buy. After increased demand has driven up the market price, the “scalper” sells the security at a profit.

### **Schedule**

Appendix to a document (see also ▶ Annex, ▶ Attachment and ▶ Exhibit).

### **Scope of Work**

Description of the extent of the work and checks to be conducted, agreed between advisor and client before starting. In the case of

a ▶ Due Diligence Report, for example, they agree on the areas of the company to be covered by ▶ Due Diligence.

### Secondary Buy-out

Refers to the sale of a majority stake in a company by a  
▶ Financial Investor to another financial investor.

### Seed Finance

Funding provided by an investor during the initial stage of a company's development. Seed finance incurs relatively high risks since it is usually not yet clear how successful the business will be. Accordingly, investors will hedge the risk through higher interest rates or mechanisms such as ▶ Liquidation Preference Rights or other ▶ Preference Rights.

### Seller

▶ Vendor.

### Seller's Note

▶ Vendor Loan.

### Sell-out

Right held – under certain circumstances – by the shareholders of a ▶ Target after a takeover bid or mandatory offer. Shareholders who initially did not take up the offer can accept it within three months after the end of the acceptance period if the offeror is entitled to file an application pursuant to section 39a of the German Securities Acquisition and Takeover Act (*WpÜG*) (i.e. for a ▶ Squeeze-out under takeover law), see section 39c sentence 1, *WpÜG*.

## Service Level Agreement (SLA)

A type of service contract. The client and external service provider agree the exact services to be provided, together with quality standards and pricing.

## Share

Ownership stake in a company, which need not necessarily be a joint-stock company. Stakes in partnerships are likewise referred to as “shares”, but often also as an “interest”.

## Share Deal

Transaction in which shares in a company are sold (unlike an ▶ Asset Deal); this changes the ownership of the company, but the legal relationships of the ▶ Target remain unaffected. Special attention must be paid in such deals to provisions relating to ▶ Change of Control.

## Shareholder

Stockholder or equity holder in a company or “holder of ▶ Shares”.

## Shareholders' Agreement

Document containing contractual arrangements not included in the articles of association. It is not subject to the formal requirements which apply to articles of association (although it should be noted that agreeing a ▶ Call Option or ▶ Put Option may trigger a formal requirement). Shareholders' agreements do not need to be made public, unlike articles of association, making it possible to include provisions that are intended to be confidential.

## Share Pledge

Pledging of a company's shares.

## Share Purchase Agreement (SPA)

Agreement via which shares in a company are sold – and in many cases also assigned (possibly subject to conditions precedent) (see also ▶ Share Deal).

## Shark Repellent

Defensive measures taken against a company planning a ▶ Hostile Takeover. There are various options for making the acquisition more difficult or unattractive (see also ▶ Poison Pill).

## Shelf Company

Shelf companies are held in readiness by commercial providers and cover several different corporate forms, such as an English limited company, European SE or German AG. This makes it possible to acquire a company that has already been entered in the commercial register, thus saving time. Since the providers charge a fee for making a shelf company available, setting up a new company oneself can deliver a saving if enough time is available. It should be noted when activating a shelf company that the registries may need to be informed in accordance with local law in order to avoid liability risk.

## Shell Company

Company which has been operational in the past, but has ceased operations for whatever reason without being liquidated or removed from the commercial register. At a later point in time it may be resurrected as a new business. As with a ▶ Shelf Company, the registries may need to be informed that the shell is active again. Since a shell company has been operational in the past and may have residual ▶ Liabilities, using one involves greater liability risk than use of a ▶ Shelf Company.

## Short Form Report

A type of ▶ Due Diligence Report which is sometimes also referred to as a ▶ Bankable Report. However, the terms used are not standardised. A short form report is more detailed than a ▶ Red Flag Report.

## Short List

List of potential buyers in an ▶ Auction Process, compiled on the basis of responses and expressions of interest triggered by the ▶ Teaser. The ▶ Information Memorandum is sent to this list of potential buyers, but usually only after an ▶ NDA has been signed.

## Show Stopper

▶ Deal Breaker.

## Side Letter

Document containing ancillary agreements that the parties do not wish to include in the main agreement, often through a desire to avoid the exposure arising from publication in the commercial register. Also, some agreements may only affect certain parties to a transaction. Agreements made in side letters are not without potential problems, however, since they can affect the impact or interpretation of the main agreement. They may even render it null and void (e.g. due to breaching a formal requirement).

S

## Sidestep Merger

See ▶ Downstream Merger.

## Signing

Date on which the contractual documents are signed. This gives rise to the requirement under the law of obligations to complete

(► Closing) the transaction provided any ► Conditions Precedent are satisfied or waived.

### **Sign-off**

Approval of a finalised document, e.g. for signing or certification.

### **Site Visit**

Visit to the business site(s) operated by the ► Target. This enables a potential buyer to get a better idea of the company and its operations. Site visits often form part of ► Due Diligence.

### **Skin in the Game**

Refers to a person being exposed to financial risk, e.g. in the form of potential losses or endangering their invested capital.

### **SLA**

► Service Level Agreement.

### **Small Cap**

1. Transactions with a deal size of up to around EUR 50 million (Thomson Reuters). This is not a fixed size, however; other thresholds are also used in this context (see also ► Mid Cap; ► Large Cap).
2. “Small Cap” may also refer to companies with low market capitalisation.

### **Small and Medium-sized Enterprises**

See ► SME.

## **SME**

Small and medium-sized enterprises. The definition used by the Commission of the European Union requires an enterprise to have fewer than 250 employees, turnover not exceeding EUR 50 million or a balance sheet total not exceeding EUR 43 million in order to be recognised as an SME. In addition, no more than 25% of the shares in the enterprise may be held by shareholders who do not fit this definition. The criteria used by the specialist German institution that conducts research into SMEs (IfM Bonn) are that the firm has fewer than 500 employees and turnover not exceeding EUR 50 million. The *HGB* (German Commercial Code) distinguishes between small, medium-sized and large corporations, using slightly different criteria (see section 267, *HGB*).

## **Sovereign Wealth Fund (SWF)**

State-owned fund; investment funds that invest on behalf of a country and are funded by the country.

## **SPA**

▶ Share Purchase Agreement.

## **Special Purpose Vehicle (SPV)**

Entity set up and used exclusively for a specific purpose, usually in connection with a corporate or banking transaction; often involves a ▶ Shelf Company.

## **Specific Disclosure**

This requires the seller to disclose all the circumstances that qualify its ▶ Representations & Warranties in respect of each individual warranty, in the form of annexes to the sale and purchase agreement (▶ Disclosure Schedule) or in a separate document (▶ Disclosure Letter). This is advantageous to the buyer. Despite

prior ▶ Due Diligence, only the matters specifically disclosed are regarded as known to the buyer and excluded from warranty claims. A seller will therefore aim to negotiate ▶ General Disclosure of at least some information.

### **Specific Performance**

A remedy granted by a court to an important party to a contract under which the contract-breaker is forced to perform its obligations under the contract (e.g. to deliver an asset). The concept is a feature of English law, which allows the court to grant this remedy in certain circumstances instead of awarding damages. There is no need for a legal structure of this kind in German law because compensation is not restricted to monetary payments.

### **Spin Off**

Refers to taking an existing division or line of business and turning it into a separate company. Also called “hiving off” or “divesting”.

### **SPV**

▶ Special Purpose Vehicle.

### **Squeeze-out**

Compulsory buy-out of minority shareholders in a public limited company by a majority shareholder who owns at least 95% of the shares; in addition to a squeeze-out under company law as per sections 327a–327f of the German Stock Corporation Act (*AktG*), the provisions of sections 39a–39c of the German Securities Acquisition and Takeover Act (*WpÜG*) offer the option of a squeeze-out under takeover law. Shareholders forced out of the company in this way can demand cash compensation.

## Stakebuilding

Process whereby an interested party acquires shares in the ▶ Target on the stock market. See also ▶ Creeping Takeover.

## Stakeholders

Groups that have an economic or other interest in the future development of a company involved in a transaction. Typical stakeholders include employees (who have an interest in keeping their jobs, for example), customers (concerned about quality, for example), suppliers and ▶ Shareholders. The term also includes the state and the community (e.g. political parties, associations, churches, media, trade unions).

## Standby Letter of Credit

Special form of a ▶ Letter of Credit that serves as a bank guarantee (see also ▶ First Demand Guarantee).

## Stapled Finance

Before signing the ▶ SPA, the seller negotiates with banks in order to be able to provide the potential buyer with a ready-made financing package. The seller's aim is to reduce the risk of financing problems and pre-empt any request from the buyer for a

▶ Financing Out clause.

## Start-up

A newly established business, usually without much capital and consequently often in search of support from ▶ Business Angels;

▶ Seed Finance providers or ▶ Venture Capital Investors.

## Status Call

▶ Conference Call held at regular intervals (usually weekly) between the seller or buyer and their advisors to discuss the current status of the transaction process.

## Strategic Investor

A strategic investor undertakes a transaction in pursuit of his own business objectives. The aim is to combine the ▶ Target with an existing business, e.g. using it to generate synergies or open up new fields of business; he differs in this regard from a ▶ Financial Investor.

## Strike Price

Exercise price, or basis price, especially with reference to options and other derivatives.

## Supervisory Board

A body that holds executive management to account. The term is derived from the Anglo-American (unitary) system of ▶ Corporate Governance. In international transactions, care must be taken to ensure a shared understanding of the meaning of the term.

## Sweet Equity

Provision sometimes found in management share schemes which enables management to receive ▶ Shares without having to provide shareholder loans in proportion. This reduces the amount of capital committed by management compared with a ▶ Private Equity investor.

## SWF

▶ Sovereign Wealth Fund.

### **Syndicated Loan**

Loan granted by at least two financial institutions to a borrower; it may or may not be apparent to the borrower that more than one bank is involved. Syndicated loans enable banks to avoid “cluster risk”.

### **Tag-along Right**

Right typically held by a minority shareholder to insist that his shares are bought on the same terms when shares are sold by the majority shareholder; sometimes a minimum threshold applies before the right is triggered.

### **Take-along Agreement**

▶ Tag-along Right.

### **Takeover**

Acquisition of another company.

### **Tangible Assets**

▶ Fixed Assets.

### **Target**

Company whose shares (▶ Share Deal) or business operations (▶ Asset Deal) are to be acquired and transferred (in whole or in part) in the course of a transaction.

### **Target Group**

Group of companies to be acquired in the course of a transaction (see also ▶ Target).

### **Tax Due Diligence**

Examination of a company's tax situation during ▶ Due Diligence.

### **Tax Haven**

Territory with low tax rates.

## **Tax Indemnity**

Agreement under which one party agrees to pay another party the amount of any taxes incurred in connection with a transaction or otherwise economically attributable to one or the other party.

## **Teaser**

Brief anonymous description of the ▶ Target sent to potential buyers; if the recipients of the teaser express an interest in the transaction, they are put on the ▶ Short List.

## **Term Sheet**

Summary of the key points of the agreement between the parties. The points included in the term sheet are subsequently incorporated into the contract. Term sheets can be binding or non-binding in whole or in part.

## **Texas Shoot Out**

A type of dispute resolution mechanism used in a ▶ Joint Venture; closely related to ▶ Russian Roulette. A Texas Shoot Out likewise results in termination of the joint venture.

## **Threshold**

Limit which has specific consequences when reached or exceeded (see also ▶ Materiality Threshold).

## **Title**

Right of ownership (see ▶ Chain of Title).

## **Title Reference**

Details of the parties involved at the start of a document or judgment.

### **Tombstone**

“Trophy” distributed to those involved in a transaction as a memento after completion, often by the investment bank or M&A advisor.

### **Track Record**

List of transactions, business deals or instructions handled which documents the experience of an advisor in relation to a particular activity, sector or area of expertise.

### **Trade Sale**

Private sale of shares in a company to a single buyer, i.e. not via the stock market (e.g. by means of an ▶ IPO).

### **Transitional Services Agreement (TSA)**

Agreement between the companies involved in a transaction stipulating that existing services provided within the seller’s corporate group will continue to be provided to the ▶ Target for a transitional period following completion of the transaction.

### **Triggering Event**

An event which has specific legal consequences.

### **True and Fair View**

Principle according to which financial statements must present a true and fair view of the entity’s assets, liabilities, financial position and profit or loss (see also section 264 (2) of the German Commercial Code (*HGB*)).

## **True Sale**

A “genuine” sale of receivables (see also ▶ Asset Backed Securities; ▶ Factoring) which is not re-characterised as a loan for legal purposes; i.e. a transaction that can be classified both commercially and legally as a purchase.

## **TSA**

▶ Transitional Services Agreement.

### **Underlying**

Underlying asset on which a derivative is based.

### **Undertaking**

Contractual obligation.

### **Unfriendly Takeover**

- ▶ Hostile Takeover.

### **Upside (Potential)**

Potential increase in value of an investment; more generally any advantage or benefit.

### **Upstream Loan**

Loan granted by a subsidiary to the parent company, e.g. in the context of a ▶ Cash Pool. An upstream loan is more problematic in legal terms than a ▶ Downstream Loan.

### **Upstream Merger**

Merger of a subsidiary into its parent company; the opposite is a ▶ Downstream Merger. The merger of two sister companies is a ▶ Sidestep Merger.

### **Upstream Security**

Loan collateral provided by a subsidiary to the parent company; legal restrictions must be observed in such situations.

### **US GAAP**

- ▶ GAAP.

## V

### **VDD**

▶ Vendor Due Diligence.

### **VDR**

▶ Virtual Data Room.

### **Vendor**

▶ Seller.

### **Vendor Due Diligence (VDD)**

Due diligence carried out on a company by the seller or by advisors acting on its behalf. This enables the seller to remedy any problems before the actual transaction, typically leading to a higher purchase price. Vendor due diligence helps to avoid the information imbalance that can arise when the buyer conducts ▶ Purchaser Due Diligence and sometimes the buyer ends up knowing more about the ▶ Target than the seller. This is particularly likely to be the case when selling a subsidiary or where the vendor is a ▶ Financial Investor. Vendor due diligence may be appropriate ahead of an ▶ Auction Process, for example. The vendor due diligence report can be made available to potential buyers, who will usually seek to negotiate the issuance of a ▶ Reliance Letter. Since this type of letter is only rarely issued, the potential buyers will often wish to carry out their own ▶ Due Diligence.

## V

### **Vendor Loan**

Loan granted by the seller to the buyer of a company in order to help finance the transaction; the purpose of a vendor loan may be to tie in the seller beyond ▶ Closing due to the default risk.

### **Venture Capital Investor**

A venture capitalist provides a ▶ Start-up (or other company at an early stage of its development) with debt capital or equity capital. A venture capital investor usually exercises a degree of control over how the start-up is run. In this respect, he differs from a ▶ Business Angel or ▶ Angel Investor.

### **Vesting**

Vesting is the process by which rights become non-forfeitable; examples include entitlements under a management share scheme.

### **Virtual Data Room (VDR)**

Data room that provides the parties engaged in due diligence with the required documents on a special secure Internet platform. The advantage over a ▶ Physical Data Room is that more than one party or user can view the documents at the same time. It is also possible to compile extensive statistics on ▶ Data Room usage and the data accessed. The security settings can be adapted to the needs of the particular transaction; different user groups can be assigned different levels of authorisation.

## W

### Waiver

A party's surrender of a known right or failure to insist on performance of an obligation.

### Warranties

In general a promise or a guarantee by one party (e.g. the seller) that specific facts with regard to the ▶ Target are true and accurate. In the event the warranty becomes untrue or inaccurate, the other party (e.g. the buyer) has remedies in the form of compensation claims against the promising party (e.g. the seller).

### Warranty & Indemnity Insurance

Insurance usually taken out by the buyer (when it is commonly referred to as "buyer-side W&I insurance"). It covers the buyer against factors and risks of which it is unaware and which may reduce the value of the investment. In some cases, W&I insurance may also cover the buyer against known risks resulting from the acquisition of a company.

### Waterfall

Order in which proceeds are distributed. Priority may be given to repaying debt, for example, followed by a specific group of shareholders and then the remaining shareholders (see also ▶ Exit Waterfall).

## W

### Whereas Clauses

▶ Preamble.

## White Knight

Person or company that comes to the aid of a company facing a ▶ Hostile Takeover and makes a competing bid for the ▶ Target. Seeking out a white knight is intended to safeguard the interests of the target company.

## W&I Insurance

▶ Warranty & Indemnity Insurance.

## Windfall Profit

Unforeseen, fortuitous or incidental profit.

## Working Capital

Broadly speaking, a company's current assets (e.g. cash, stock, trade receivables) less its current liabilities (e.g. trade payables). A detailed definition must be included in the contract in each individual case.

## Wrap-up

Summary or review of negotiations, a meeting or a ▶ Conference Call either at the end of discussions or by phone at a later date.

## Wrong-pocket Clause

Provision in a sale and purchase agreement that remedies incorrect allocation of assets in an ▶ Asset Deal. This applies in particular if only part of an existing company is being sold. By virtue of the principle of certainty under property law, each particular asset of the business being sold must be individually identified, or at least determinable, in the agreement. This is often not possible for each item at signing. There is thus a risk of the parties realising after closing that software or receivables, for example, were inadvertently sold along with the main asset despite the fact that they form

part of the business remaining with the seller (or vice versa). The relevant item was thus placed in the “wrong pocket” or remained there. A ▶ Wrong-pocket Clause obliges the relevant party to do everything in its power to return the misallocated asset after closing (obligation on the part of the buyer) or to transfer it (obligation on the part of the seller, see also ▶ Catch-all Clause), usually without any payment. Unlike a catch-all clause, a wrong-pocket clause is a reciprocal arrangement.

**“Zebra Partnership”**

A kind of hybrid partnership used in Germany for asset management purposes which includes partners whose stake is held in business assets.



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