

M&A in US – a Danish Approach

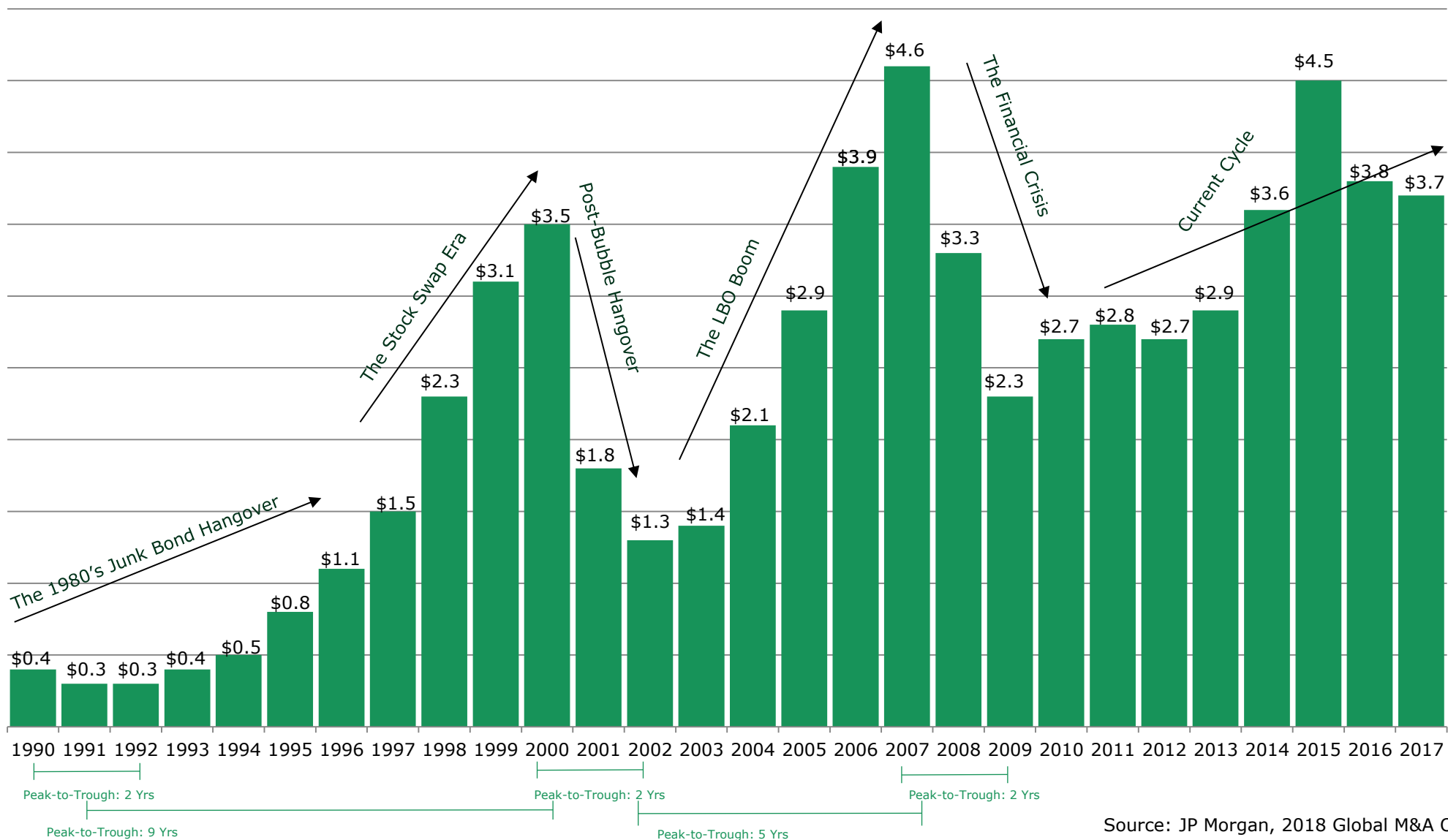
(commerical educational material – may not be relied upon for investment purposes)

6 June 2018

Current Perspective on global M&A

- 2017 and 2018 have been M&A bonanza years despite Brexit, Trumpism and unrest in Southern Europe
- Led by large cross-border and transatlantic transactions
- Large sponsor activity, e.g. Nets and TDC
- US players active in the Danish field, especially trade buyers
- Add-on for financial sponsors
- Not very common to see “DSV-style” mega M&A in the US from Danish buyers

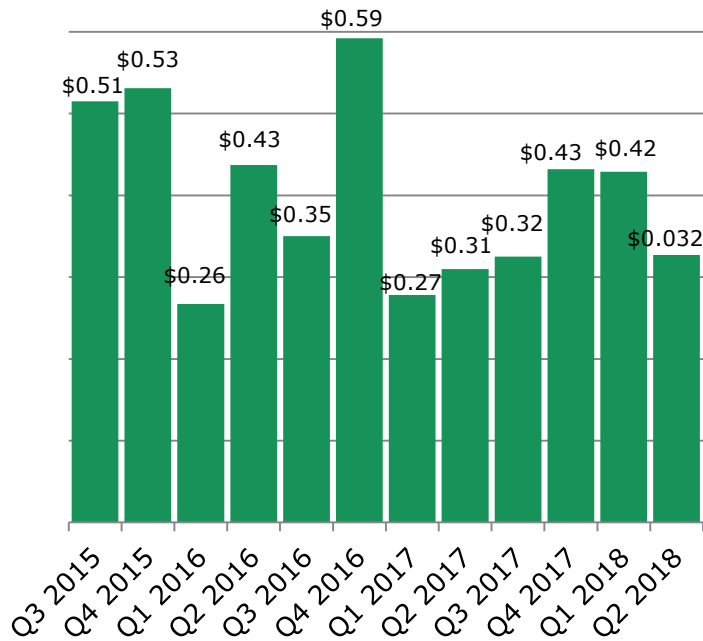
Global Announced M&A Volume Tracking (\$ in Trillions)



Source: JP Morgan, 2018 Global M&A Outlook

2015 Q3 through until Today's Date (\$ in Trillions)

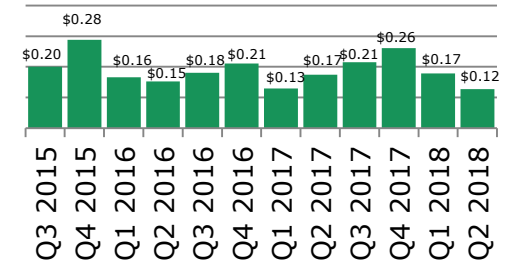
The U.S.



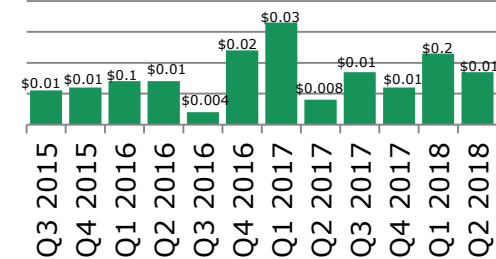
Europe



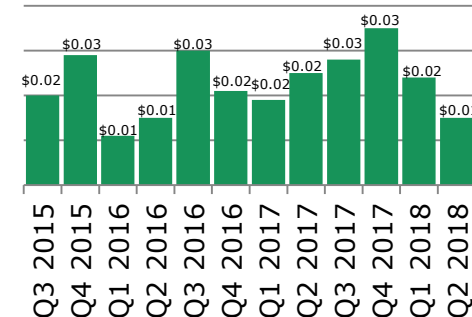
Asia (ex Japan)



Middle East and Africa



Latin America



Source: Citi, Dealogic.

Private company acquisition

- Share purchase agreement, asset purchase agreement or minority stake, joint venture structure

Public company acquisition

- One step (merger, scheme of arrangement, etc.)
 - Friendly only
 - Target board and shareholder approval
- Two step (tender offer)
 - Friendly or hostile
 - Offer made directly to shareholders
 - Second step squeeze out

Share vs. asset acquisition

- Transfer of liabilities
- Tax implications

Key document is private acquisition agreement, but there are various others:

- **NDA**
- Term sheet
- **Disclosure letter/schedule**
- Agreed form documents
 - Director and officer resignation letters
 - Intellectual property agreement
 - Transitional services agreement
 - Escrow agreement/guarantee

Basic SPA Structure

	US	Denmark
Source of Contract Law	<ul style="list-style-type: none"> • State law driven • Case law • UCC • Treatises and other secondary materials 	<ul style="list-style-type: none"> • Civil law • Freedom of contract
Interpretation	<ul style="list-style-type: none"> • Determination of the parties' intent, including review of the history of parties' negotiations • The plain meaning rule 	<ul style="list-style-type: none"> • Determination of the parties' intent, including review of the history of parties' negotiations • The plain meaning rule
Preliminary Agreements	<ul style="list-style-type: none"> • Language indicating the non-binding nature of the contract is key • Parties actions may also be relevant 	<ul style="list-style-type: none"> • Language indicating the non-binding nature of the contract is key • Parties actions not so relevant
Form of Agreement	<ul style="list-style-type: none"> • Oral vs. written 	<ul style="list-style-type: none"> • Oral vs. written vs. implied

Agreement Intro

	US	UK	Denmark
Parties	<ul style="list-style-type: none"> Financial viability of the counterparty <ul style="list-style-type: none"> Parent guarantee Escrow arrangement Financial maintenance covenant Joint/several liability (piercing the veil) 		<ul style="list-style-type: none"> Same as US No piercing of corporate veil as a starting point
Whereas Clauses	<ul style="list-style-type: none"> The story: setting the scene, assist in interpretation <ul style="list-style-type: none"> Who is involved? Why are we here? What are we selling? 		<ul style="list-style-type: none"> Ordinarily not required by "anglofied" drafting style more common



Consideration

	US	Denmark
Purchase/Sale Provisions	<ul style="list-style-type: none"> • Agreement to sell and purchase the shares • No title covenants implied by law 	<ul style="list-style-type: none"> • Agreement to sell and purchase the shares • Full defective title guarantee by reference
Consideration	<ul style="list-style-type: none"> • Type of consideration – cash vs. shares/property • Timing of payment <ul style="list-style-type: none"> - Earn-out arrangements - Escrow arrangement 	<ul style="list-style-type: none"> • Cash vs. share swap • Financial assistance prohibition • Lock box arrangement (mostly) • Timing is the same as in US
Consideration – Pre-Closing Protection	<ul style="list-style-type: none"> • Working capital adjustment • Net liabilities adjustment 	<ul style="list-style-type: none"> • Locked-box • Closing accounts (NWC adjustment and net debt/liabilities adjustment)
Break Fees	<ul style="list-style-type: none"> • Typically range 1-3% of purchase price • No concept of financial assistance 	<ul style="list-style-type: none"> • Not typically • When relevant 1-5% of purchase price

Conditions Precedent

	US	Denmark
Conditions Precedent	<ul style="list-style-type: none"> • Regulatory approval • No injunction/change of law • Absence of a MAC • Accuracy of reps & warranties • Compliance with covenants 	<ul style="list-style-type: none"> • Regulatory approval • Accuracy of warranties • Absence of a MAC • Counterparty to have complied with all conditions under the agreement prior to closing
Regulatory Approval Obligation	<ul style="list-style-type: none"> • Rests with the buyer • Hell or high water • Quantification of "acceptable" regulatory conditions • Reverse break-up fee 	<ul style="list-style-type: none"> • Rests with the buyer • No qualification of "acceptable" regulatory conditions • No break-up fee

Material adverse Change

	US	Denmark
Conditions Precedent	<ul style="list-style-type: none"> • Inclusion of projections/forecasts is hotly negotiated • Carve-outs are key <ul style="list-style-type: none"> • Announcement of the deal • Changes in economy/industry • Changes in law (sanctions?) • Action taken at the request of buyer • Decline in stock price • Failure to meet projections 	<ul style="list-style-type: none"> • Essential negotiation point, but not common in competitive in private M&A
Regulatory Approval Obligation	<ul style="list-style-type: none"> • Common • Typically a condition to closing and/or qualification to reps & warranties 	<ul style="list-style-type: none"> • Common when required, however typically only merger control (or FSA approval in financial institution deals) • Condition to closing

- Limitation on operation of business
- Non-ordinary course activity
- Material expenditures
- Dividends
- Other significant transactions/decisions

Representations, Warranties & Indemnities

- *Two purposes:* provide a contractual remedy and force disclosure
- *Warranty:* a statement in a contract that a particular fact or state of affairs exists or is true
- *Representation:* a statement of fact, which is relied upon by the receiving party and induces him to enter into a contract.
- *Indemnity:* a contractual promise to indemnify/reimburse another for a specified type of loss or liability
- *Damages:*
 - Warranties & Representations – loss must be proven
 - Representations – may lead to contract rescission
 - Indemnity – compensated on a dollar-for-dollar basis
 - No “reflection issues (loss may not reduce value of shares purchased)

Representations, Warranties & Indemnities

	US	Denmark
Warranties vs. Representations & Warranties	<ul style="list-style-type: none"> • Representations & warranties are typically given 	<ul style="list-style-type: none"> • No distinction between representation and warranties, often just referred to as warranties
Scope	<ul style="list-style-type: none"> • Fundamental: existence; title; authority; ownership of assets; non-violation • Accounts: accuracy of accounts; absence of undisclosed liabilities; internal controls; financing; inventory; accounts receivable/payable • Operational: material contracts; environmental; intellectual property; labour; insurance; compliance with law; absence of litigation; real estate; personal property; anti-corruption • Tax 	<ul style="list-style-type: none"> • Same as US, however warranties often contain broad wording to comprise more matters • Transfer Pricing documentation and trade on arms length basis • Collectability of receivables • Pension schemes and defined contribution schemes are not an issue in DK
Qualifications & Disclosure	<ul style="list-style-type: none"> • Disclosure schedule • Typically, a specific disclosure is required • Disclosure of the entire data room is unusual 	<ul style="list-style-type: none"> • Disclosure of all material in the data room • Qualified by the Buyer's (and its representatives) knowledge and knowledge that the Buyer ought to have had • Qualified by public records and other public information • Disclosure schedule/letter is uncommon

Representations, Warranties & Indemnities

	US	Denmark
Reps/Warranties Bring down	<ul style="list-style-type: none">• Typically, brought down at closing and become conditions precedent to closing• Condition precedent is usually qualified by a MAC	<ul style="list-style-type: none">• Declaration of no breach
Indemnities	<ul style="list-style-type: none">• Cover all representations and warranties	<ul style="list-style-type: none">• Specific indemnities in order to handle known matters



“I offer a full warranty. If it ever stops, just call me. I’ll tell you what time it is.”

Contract Breach

	US	Denmark
Damages	<ul style="list-style-type: none"> • Claims are typically made under the indemnity provision • General breach of contract damages are also available 	<ul style="list-style-type: none"> • Claims are made under the indemnity provision • All other remedies are usually excluded, including rescission
Breach – Specific Performance	<ul style="list-style-type: none"> • Usually, for breach of a condition and only where \$\$ cannot compensate 	<ul style="list-style-type: none"> • Usually, for breach of a condition and only where DKK cannot compensate
Rescission	<ul style="list-style-type: none"> • If fraud and both parties can be returned to status quo 	<ul style="list-style-type: none"> • If fraud and both parties can be returned to status quo (ordinarily not possible)
Injunctive Relief	<ul style="list-style-type: none"> • For a breach of covenant 	<ul style="list-style-type: none"> • For a breach of covenant
Punitive Damages	<ul style="list-style-type: none"> • Not available 	<ul style="list-style-type: none"> • Not available unless agreed to (customary)

Monetary Limitations on Liability

	US	Denmark
	Thresholds highly dependent on fact pattern and negotiating positions	
Basket	<ul style="list-style-type: none"> • Tipping/non-tipping • 0.5%-2% of purchase price 	<ul style="list-style-type: none"> • Tipping/non-tipping • 1% of purchase price
De Minimis	<ul style="list-style-type: none"> • 0.1% of purchase price 	<ul style="list-style-type: none"> • 0.1% of purchase price
Cap – Fundamental Warranties	<ul style="list-style-type: none"> • Purchase price 	<ul style="list-style-type: none"> • Purchase price
Cap – Covenants	<ul style="list-style-type: none"> • Purchase price 	<ul style="list-style-type: none"> • Purchase price
Cap – Select Warranties	<ul style="list-style-type: none"> • 50% of purchase price* 	<ul style="list-style-type: none"> • Will often be handled as fundamental warranty
Cap – All Other Warranties	<ul style="list-style-type: none"> • 15-25% of purchase price 	<ul style="list-style-type: none"> • 20-30% of purchase price
Carve-outs	<ul style="list-style-type: none"> • Fraud 	<ul style="list-style-type: none"> • Fraud or willful misconduct

The Limitations on Liability

	US	Denmark
	Time limits are highly fact specific	
Statute of Limitations	<ul style="list-style-type: none"> • 6 years* 	<ul style="list-style-type: none"> • 3 years/absolute 10 years (absolute 30 years for environmental)
Fundamental Warranties	<ul style="list-style-type: none"> • Unlimited/statute of limitations 	<ul style="list-style-type: none"> • Unlimited/statute of limitations
Select Warranties	<ul style="list-style-type: none"> • Expiration of the relevant statute of limitations** 	<ul style="list-style-type: none"> • Expiration of the relevant statute of limitations**
All Other Warranties	<ul style="list-style-type: none"> • 1-2 years 	<ul style="list-style-type: none"> • 1-1.5 years
Covenants	<ul style="list-style-type: none"> • Unlimited/statute of limitations 	<ul style="list-style-type: none"> • 2-3 years re. competition • 6 months on non-solicitation re. employees and customers

* New York statute of limitations for contractual claims

** Typically applies to potential liabilities with a longer potential gestation period or of greater potential financial significance (e.g., tax and environmental)

Other Limitations on Liability

	US	UK	Denmark
Mitigation	<ul style="list-style-type: none"> No obligation to mitigate, but avoidable losses are deducted 	<ul style="list-style-type: none"> Obligation to take reasonable steps to mitigate avoidable losses Not required for indemnity claims 	<ul style="list-style-type: none"> Obligation to mitigate
Buyer Knowledge	<ul style="list-style-type: none"> Buyer may sue for a breach of warranty even with knowledge of its falsity Pro-sandbagging clauses are customary 	<ul style="list-style-type: none"> Knowledge of a breach may preclude a claim Anti-sandbagging clauses are common 	<ul style="list-style-type: none"> Knowledge of breach will remove possibility to claim damages
Insurance/Third Party Recovery	<ul style="list-style-type: none"> Deducted from damages Obligation to pursue is negotiated 	<ul style="list-style-type: none"> Deducted from damages Obligation to pursue is customary 	<ul style="list-style-type: none"> Deducted from damages Obligation to pursue is customary
Contingent Liabilities	<ul style="list-style-type: none"> Recoverable under the indemnity obligation 	<ul style="list-style-type: none"> Not recoverable until materialize 	<ul style="list-style-type: none"> Not recoverable until materialize
Entire Agreement Clause	<ul style="list-style-type: none"> Excludes extraneous information Limits types of damages that may be sought (cannot exclude fraudulent misrepresentation) 		<ul style="list-style-type: none"> Same as in the US and UK

Consequential Damages

US: damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made

- Does the loss follow from the breach in the ordinary course of events?
- If not, did the party in breach have reason to know the special circumstances?

UK: the following damages are recoverable

- Direct loss: damages that arise naturally (i.e., flows from the breach)
- Consequential damages: damages as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach

Denmark: Both direct and indirect damages (including consequential damages) are recoverable

- However, only to the extent causality and predictability between the damaging action (or omission) and the loss incurred can be established
- Courts are reluctant to compensate in full for indirect damages, often an estimated amount of damages is rewarded to the claimant

Closing/Post-Closing

	US	UK	Denmark
Post-Closing Undertakings	<ul style="list-style-type: none"> • Non-compete • Non-solicit • Must be reasonable in scope and duration and geographical limits • Equitable remedies are available 		<ul style="list-style-type: none"> • Non-compete • Non-solicit • Must be reasonable in duration
Closing Matters	<ul style="list-style-type: none"> • Share transfer logistics • Resignation of directors and officers <ul style="list-style-type: none"> • Waiver of claims against the target/buyer • Waiver of claims against directors and officers • Delivery of corporate documents and materials • Closing resolutions by the target and key subsidiaries • Use of escrow arrangements 		<ul style="list-style-type: none"> • Payment of purchase price • Delivery of asset/shares free of third party rights • Resignation of officers and directors and waiver of claims • Breach of warranties between signing and closing

Other Matters

	US	UK	Denmark
Efforts	<ul style="list-style-type: none"> • Best efforts vs. reasonable efforts • Acting diligently and in good faith 	<ul style="list-style-type: none"> • Best endeavours vs. reasonable endeavours • Difference between pursuing a reasonable course and all reasonable courses 	<ul style="list-style-type: none"> • Best efforts vs. reasonable efforts • Acting diligently and in good faith
Agreement to Agree	<ul style="list-style-type: none"> • Legally binding and enforceable (i.e., agreement to negotiate in good faith) 	<ul style="list-style-type: none"> • Prima facie not legally binding and unenforceable 	<ul style="list-style-type: none"> • Not applicable
Implied Duty of Good Faith	<ul style="list-style-type: none"> • Applicable to every contract • Honesty in fact and commercial reasonableness • Does not override express terms of agreement 	<ul style="list-style-type: none"> • Does not exist 	<ul style="list-style-type: none"> • As in US
Third Party Beneficiaries	<ul style="list-style-type: none"> • No rights, unless expressly provided in the agreement 	<ul style="list-style-type: none"> • Rights of Third Parties Act gives third parties a right to enforce a term of contract • Typically excluded in the SPA 	<ul style="list-style-type: none"> • No rights, unless expressly provided in the agreement

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