

Bird & Bird

International M&A Deal Survey

Market practice for risk allocation - Europe and AsiaPac



March 2023

Foreword

In our survey we analysed over 150 mid-market M&A deals (under \$250m) completed between 2021 and 2022 across Europe and AsiaPac. The results cover the COVID-19 pandemic, increasingly protectionist foreign investment regimes, geopolitical instability and, remarkably, an M&A boom. The results highlight how buyers and sellers allocated risk during such a turbulent period.

A number of trends emerged that reflected the competitive M&A environment. There was a predictable swing to earn-outs, locked box and full data room disclosure and a move away from escrows. By contrast, many core areas saw few changes. However, it is interesting to see the very significant increase in arbitration as a dispute mechanism.

The survey describes the overall picture across Europe and AsiaPac. Whilst there may be variations by country, there is a growing international consistency in the approach to deal making and risk apportionment (although the survey does not include deals in the US where there is a more buyer-friendly approach to risk).

There has been a well publicised drop in M&A activity in the last 6 months. Although geopolitical uncertainties are likely to remain, many observers predict that 2023 will see an increase in valuations for the top 30% of technology companies, particularly for profitable cloud and cyber businesses, and that competition for such assets will remain high. With a predicted return to a more active M&A market in the second half of 2023, we may well see a continuation of the market practice reflected in the survey for the strongest businesses with the remainder left behind in terms of valuation and sellers being asked to accept more buyer-friendly terms.

“We analysed *over 150* mid-market M&A deals (under \$250m) completed *between 2021 and 2022.*”

Foreign direct investment

Risk mitigation

Purchase price structures

Non-compete

Liability caps

Arbitration

Liability thresholds

A tailored M&A approach

The Lawyer European Awards 2022

Team of the Year
European Corporate



“21% of deals had a specific *FDI condition* – distinct from a competition clearance.”

Foreign direct investment

Whilst FDI regulations vary from country to country, governments have blocked or restricted very few deals and those affected have generally been in line with expectations. Nevertheless, there has clearly been a material impact on timetables and costs.

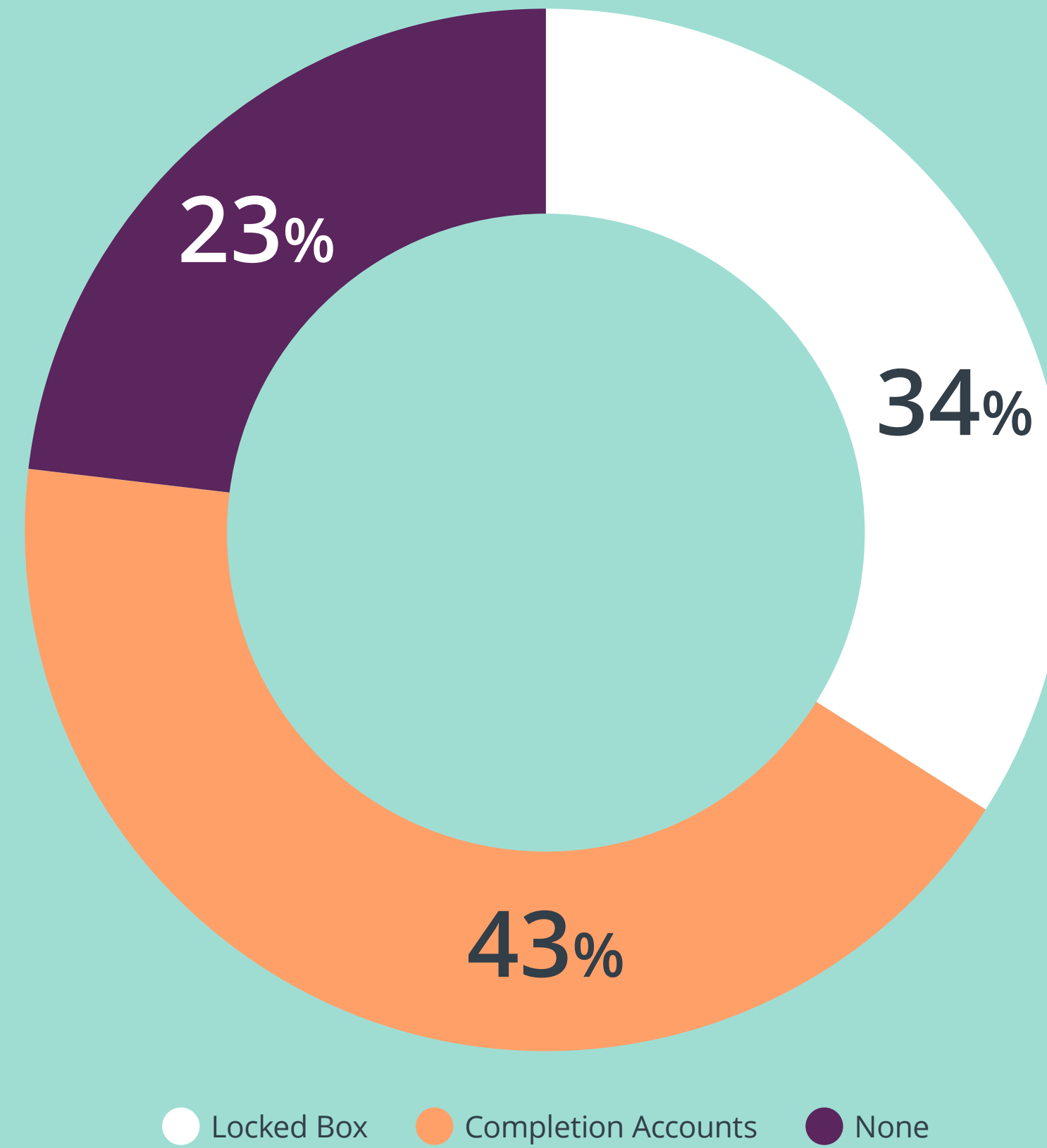
Where deals are signed subject to an FDI approval, there needs to be an allocation of risk and responsibility for the business in the period before completion. In this respect, **36%** of deals enabled the buyer to walk away if there was a **material adverse change** in the business between signing and completion.

Purchase price structures

42% of deals used an earn-out structure, reflecting the high valuation expectations from sellers.

Locked box arrangements made up 34% of all deals.

Locked box or completion accounts adjustment?



42%

had *earn-outs*

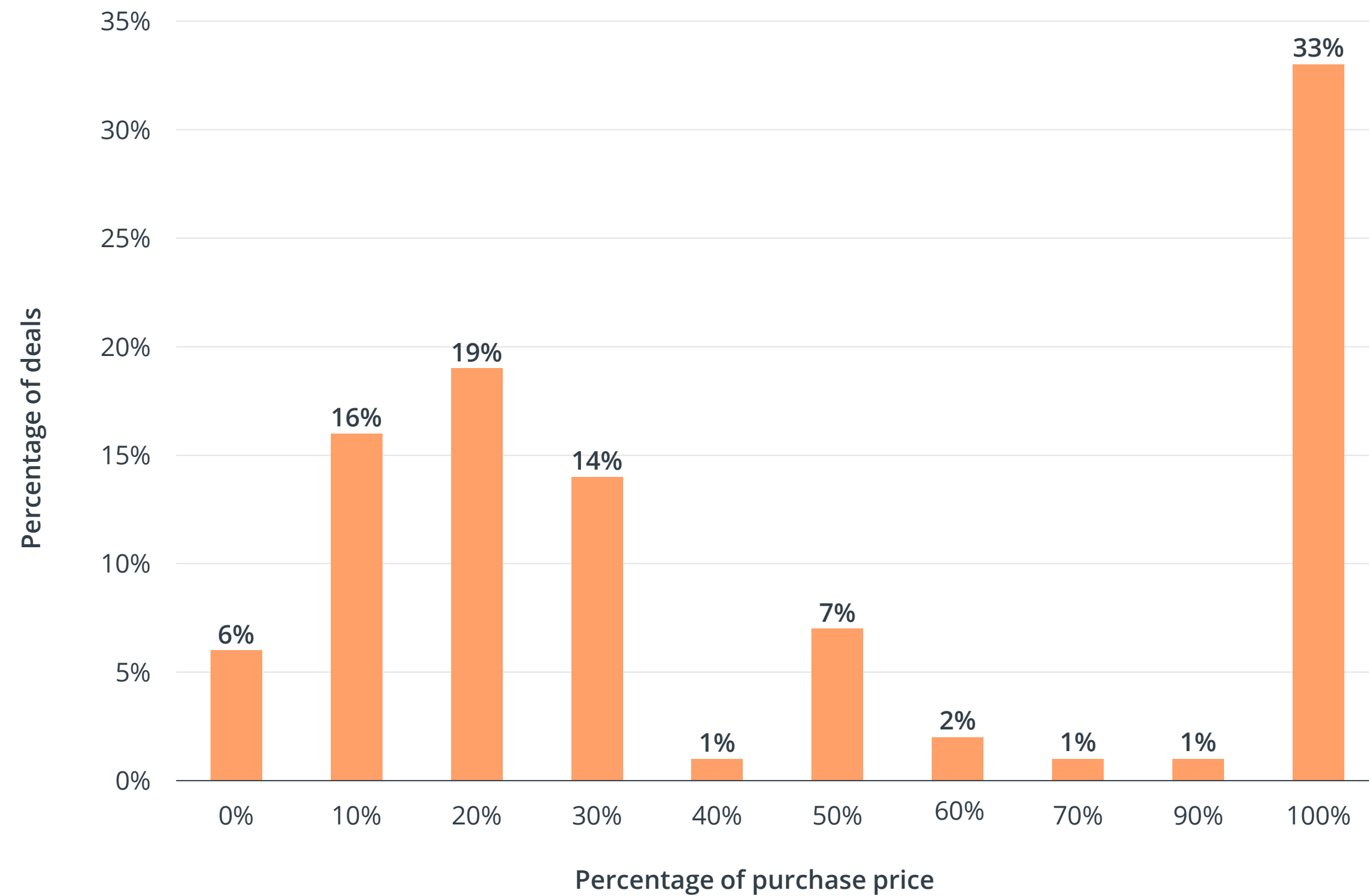
34%

had *locked box*

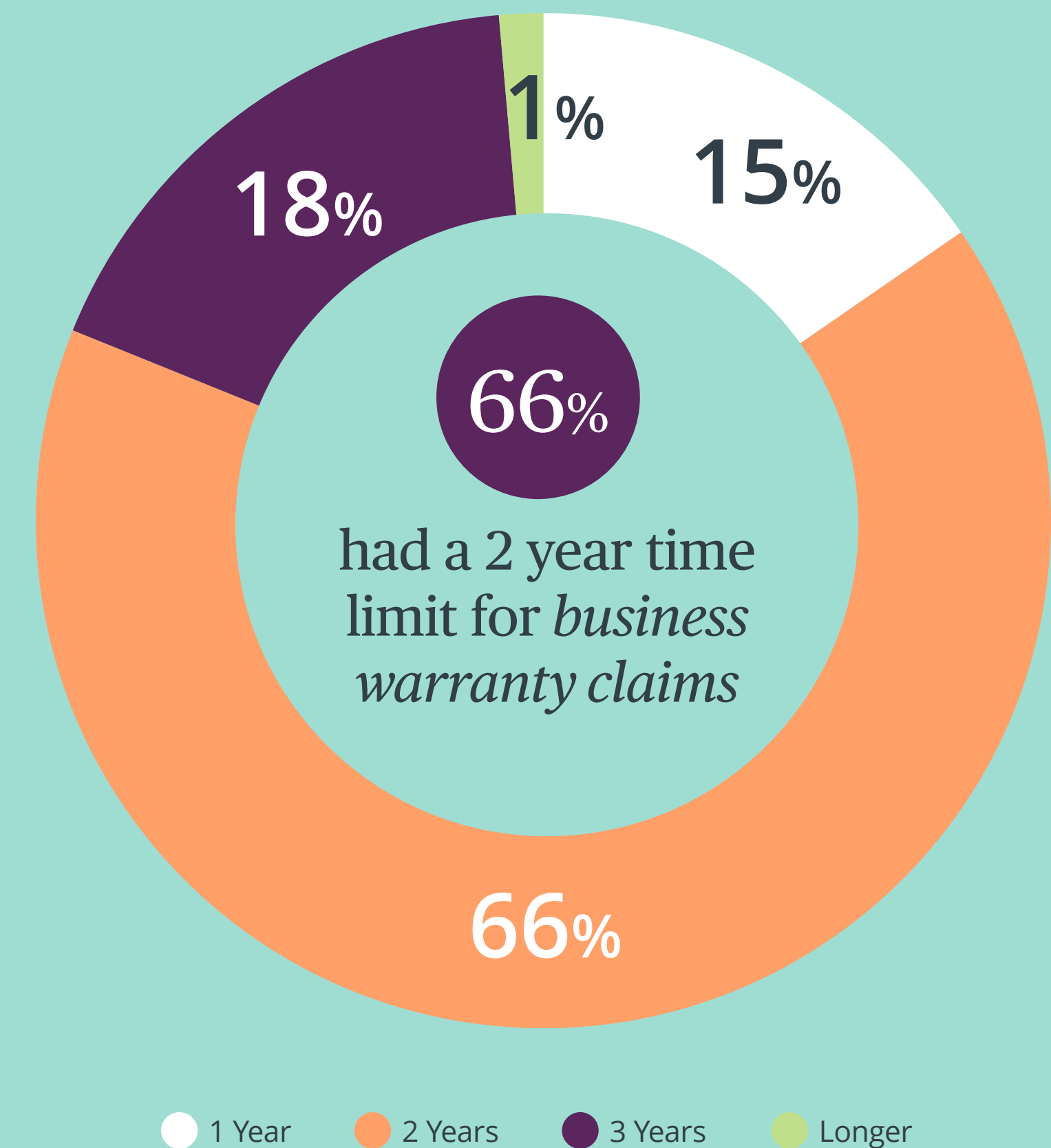
Liability caps

Limits on warranty liability have changed very little, if at all. In the mid-market at least, and certainly below **£50m**, a cap of **100%** of the purchase price is quite common.

Warranty cap



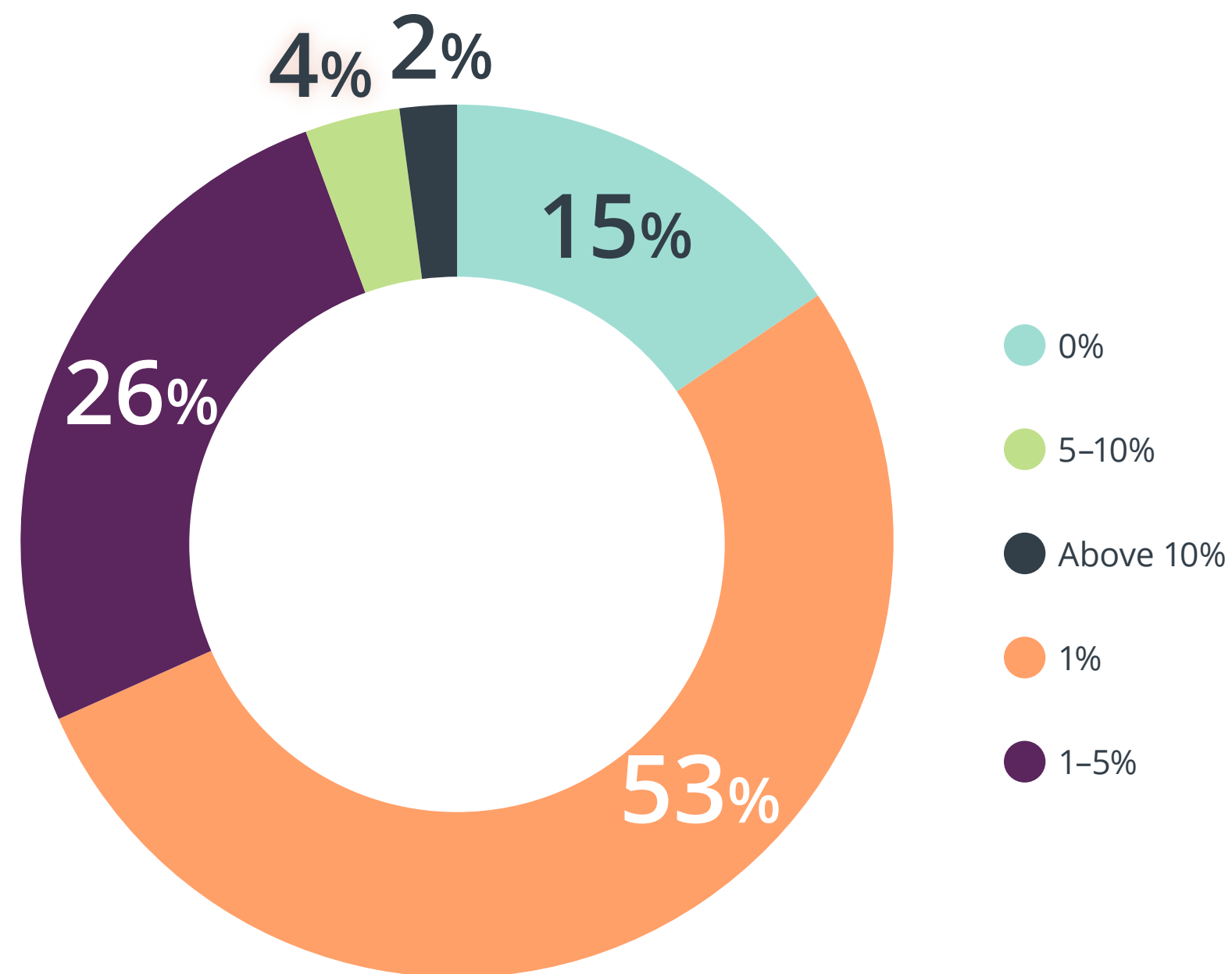
Time limits for business warranty claims



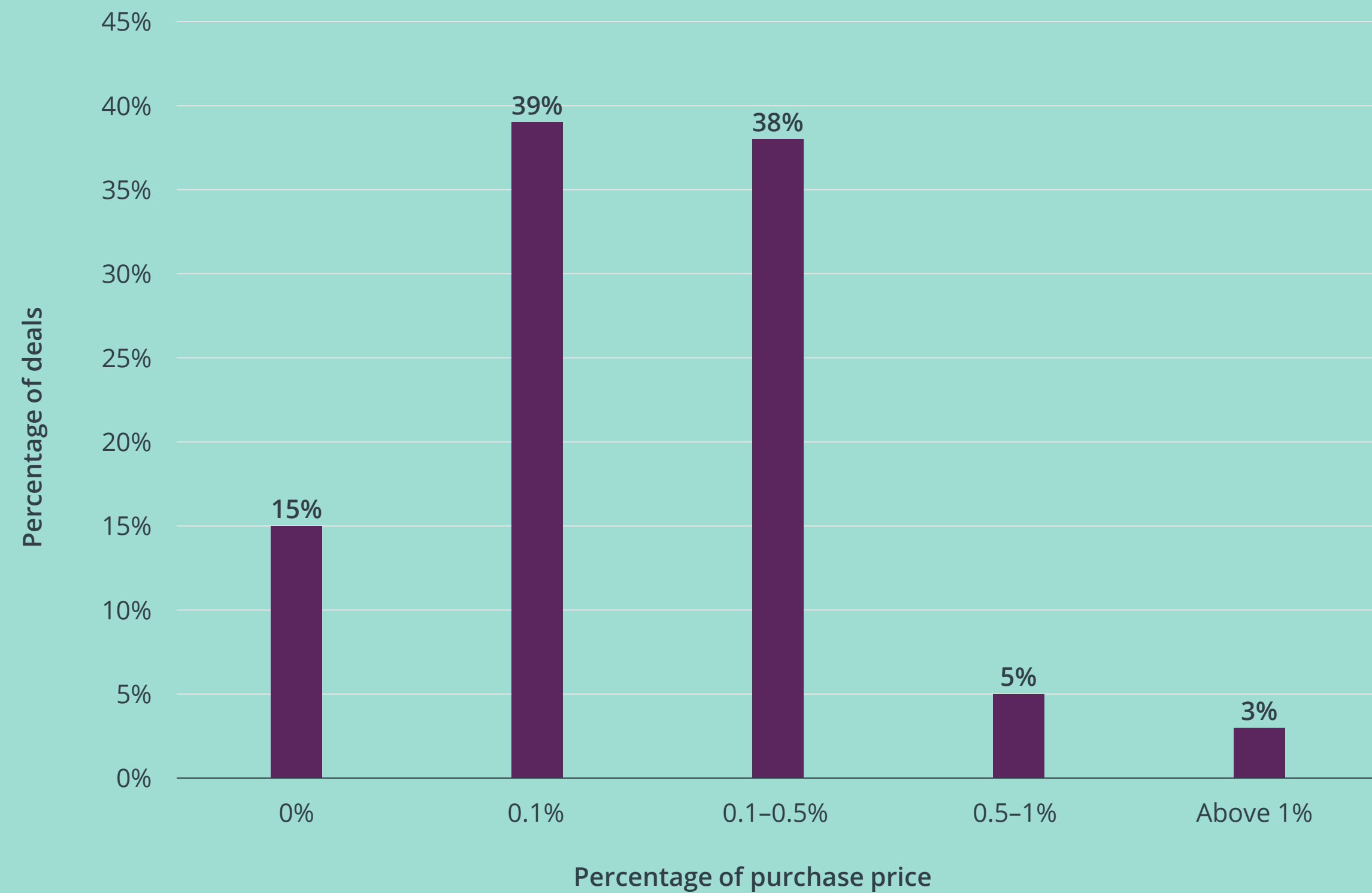
Liability thresholds

There seems to be little appetite to deviate from the normal statutory period for tax claims although **9%** of deals had a claims limit of 4 years. Similarly, less than **1% (0.74%)** of deals had IP warranties which were longer than the business warranties.

Basket threshold



De minimis



Risk mitigation

Insurance

Buy-side W&I insurance was used in **21%** of deals with minimal/no-recourse to sellers increasingly common.

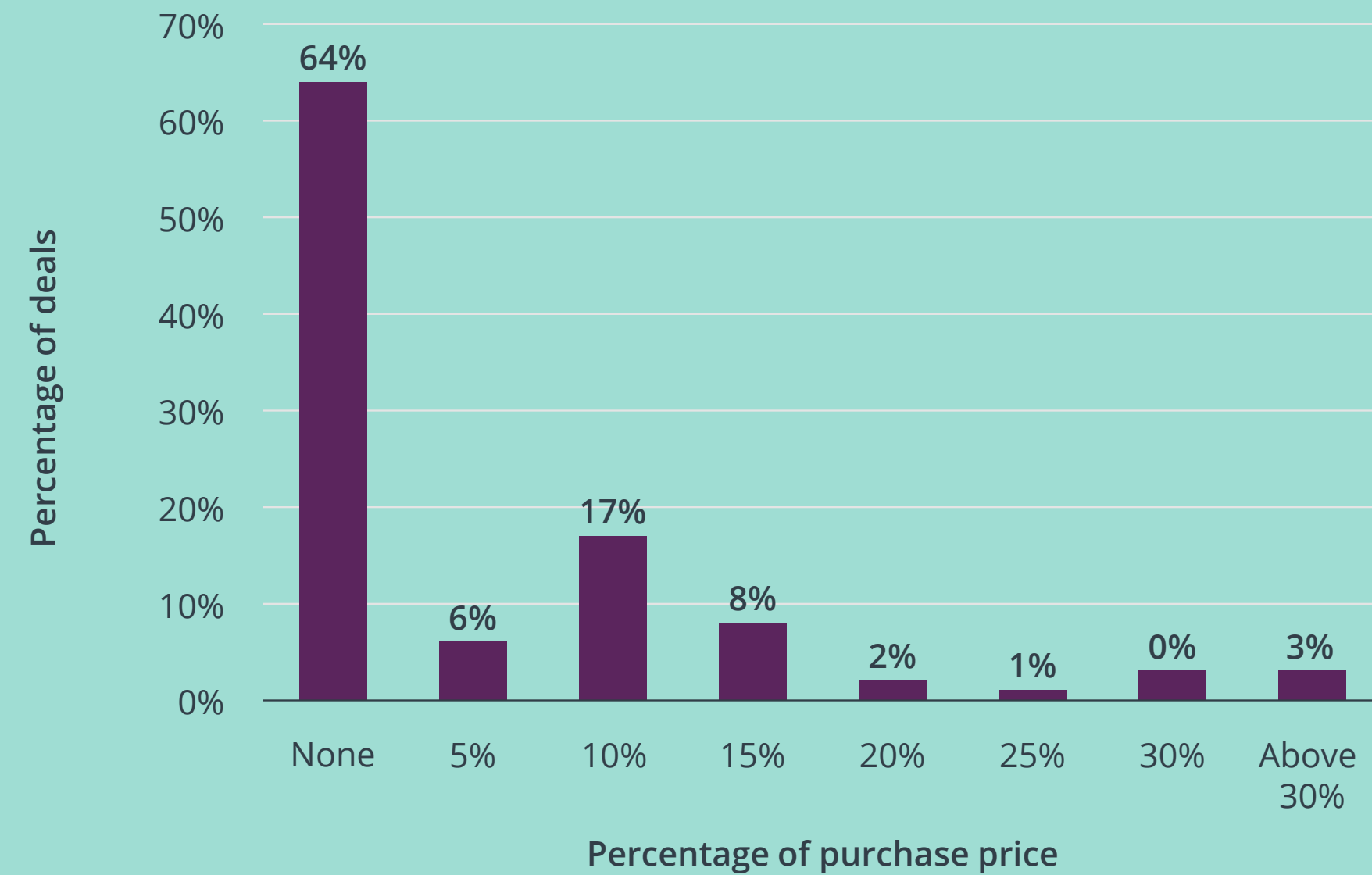
Disclosure

61% of deals saw the buyer accept full disclosure of the data room, of which **19%** of deals were competitive sale auctions.

Escrow

36% of deals had warranty escrow or retention arrangements.

Warranty escrow/retention



61%

of deals allowed
full data room disclosure
against the warranties

36%

had *warranty escrows*
or retentions

21%

used buy-side
W&I insurance

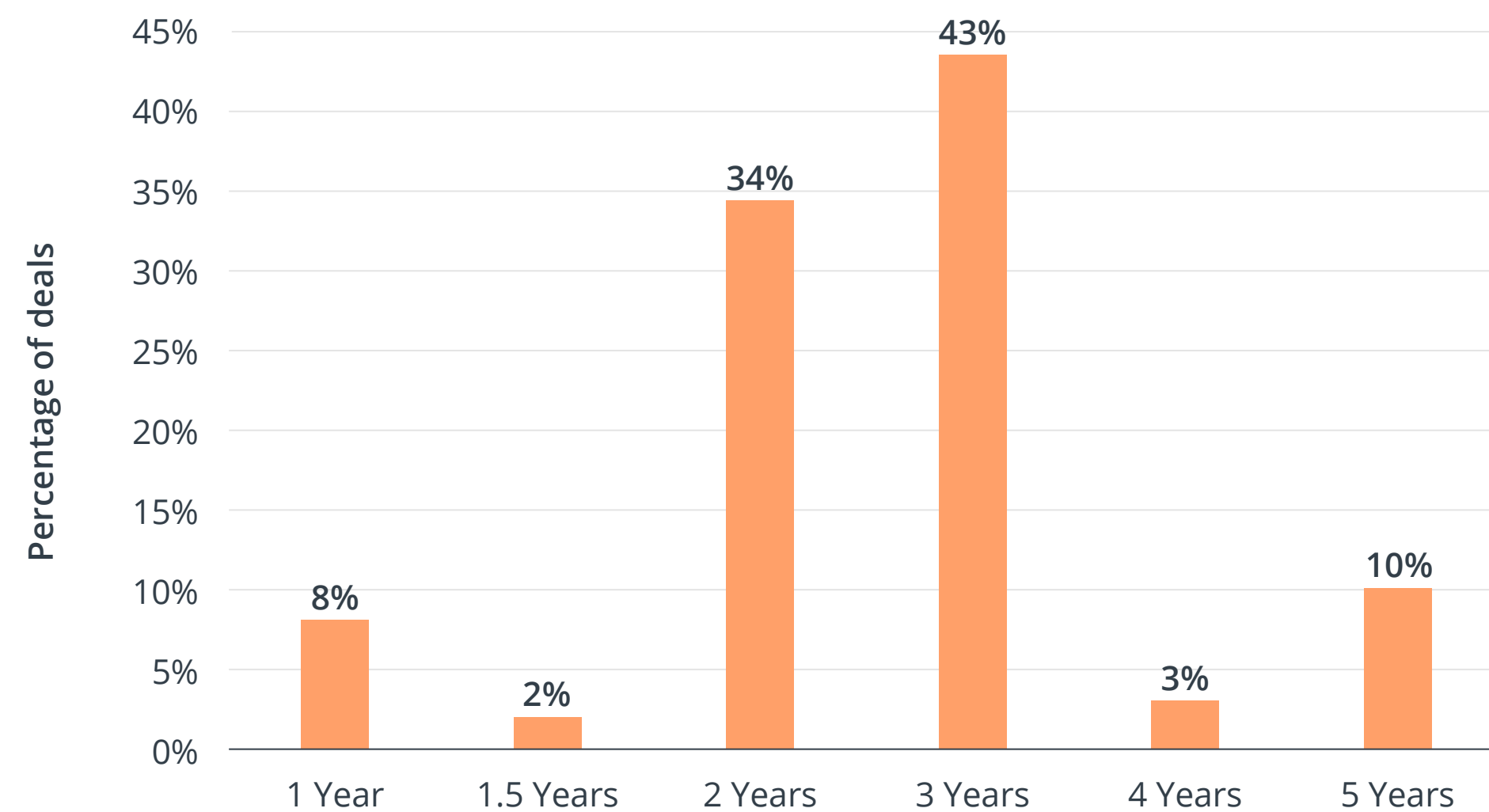
33%

had a cap of
100% of the
purchase price

Non-compete

The survey did not show any significant shift with **2-3 years** being the most common periods.

Non-compete periods



3 years

43%

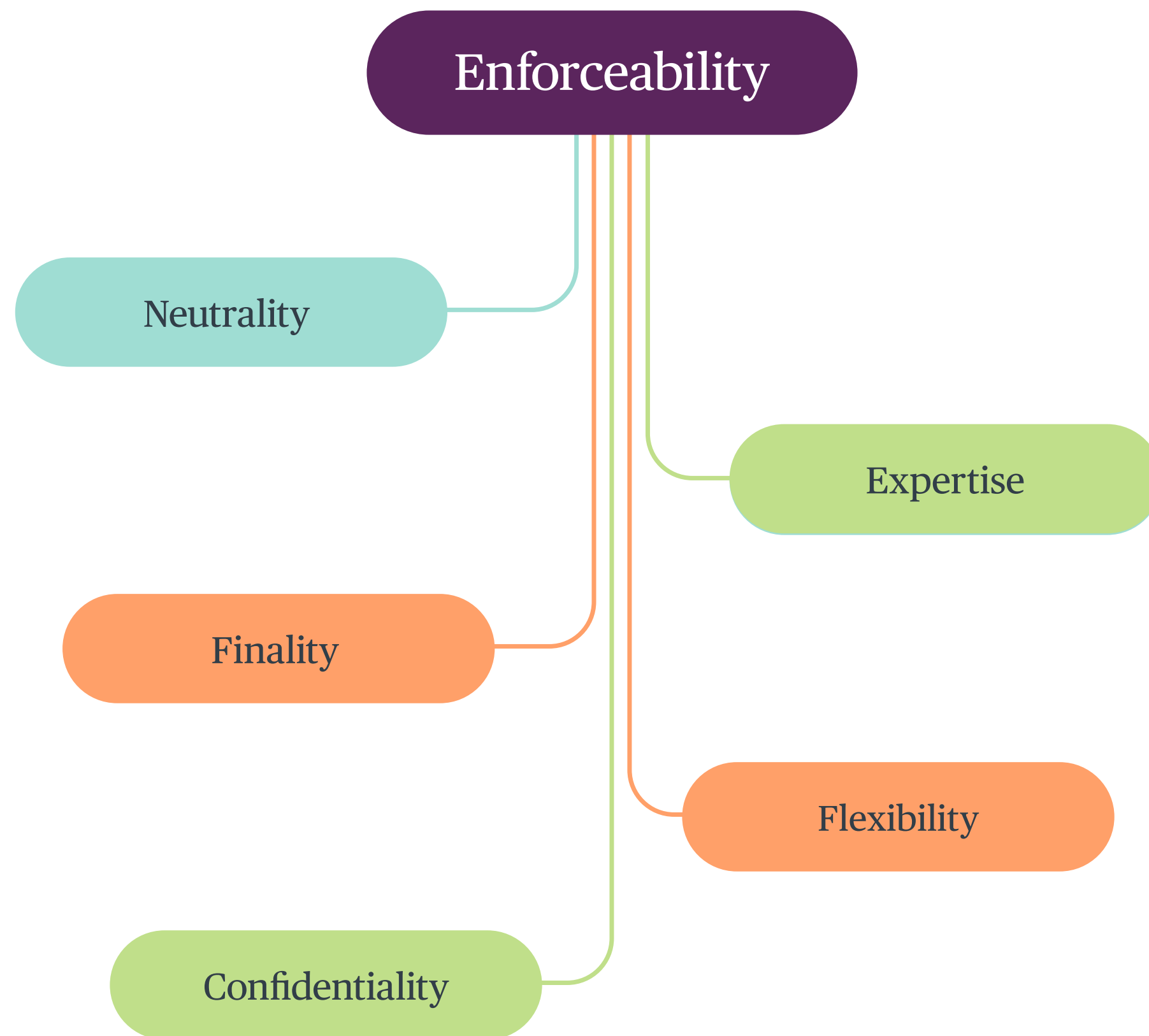
was the
most common
non-compete period

21%

had an
FDI condition

Arbitration

Why choose arbitration?



“Arbitration was the chosen dispute mechanism in 41% of deals.”



Arbitration awards benefit from worldwide enforcement under treaty in over 160 countries – there is no equivalent for court judgments.



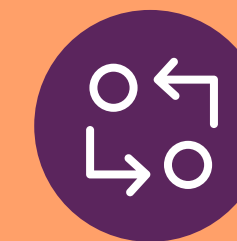
Enforcement advantages – based on the 1958 New York Convention (168 states globally are signatories).



Confidentiality – arbitration and the consequent awards are generally confidential to the parties.



Neutrality – not tied to the home jurisdiction of either party.



Flexibility & expertise – the ability to select expert decision-makers and decide the process.

Our Offices



“Bird & Bird *“work is absolutely top notch”*, said one interviewee, who adds: *“I particularly appreciate their ability to coordinate work across a variety of jurisdictions.”*”

Chambers Global, 2022

A Tailored M&A Approach

We understand how legal issues can impact the full strategic picture of your business. Our fresh and creative approach is coupled with expert industry knowledge, allowing us to spot opportunities and help minimise risks to your business.

Our network of international offices facilitates cross-border M&A, particularly across Europe, AsiaPac, and the Middle East and, in conjunction with Bird & Bird Plus, most other regions of the world in which our clients operate or seek to do business.

Our focus is on mid-market transactions in sectors we understand and in countries where we have full-service expertise.

We combine contract savvy with a crucial understanding of the IP, regulatory and wider market considerations. We won't just do the deal for you but will also focus on pre-and post-transaction integration aspects such as planning and post-merger integration. Relationship building is important, and we would look to do this with you beyond the initial deal. We represent both buyers and sellers of businesses, from large multinationals to SMEs, handling deals that are structured as:

- private acquisitions and disposals
- mergers
- public takeovers
- schemes of arrangement
- competitive auctions

Agile approach to M&A

M&A transactions can be complex, risky, and take a long time to complete. We provide an agile service and cost predictability and ensure that deals are undertaken as efficiently as possible through identifying commonly occurring hurdles. We are commercial in our approach to M&A, recognising those areas that are critical to clients. We will fight for the points that matter, but will always recognise that getting deals done may be a priority rather than “winning” every small point.

Sector Specific M&A - risk, regulation and compliance

Increasing regulation and compliance is a key concern to clients executing M&A deals, so the due diligence on a deal will be critical. Our team members know and understand your business and the potential risks that come with acquisitions across multiple jurisdictions. We have a strong reputation acting for clients with a particular sector focus, including tech and comms, energy and utilities, life sciences and media, entertainment and sport.

In the public company arena, our team has a deep understanding of the regulatory framework which requires a very different approach to that applied in private transactions.

Innovative Technology

Building on our focus on technology, and our experience of cost-effective project management, we have recently developed the innovative cloud-based Due Diligence Tool. This enables the global capture of information consistently through a secure platform and allows clients’ team members to generate reports according to their preferences

(e.g. red flag reports, full reports, or country and/or function-specific reports), as well as direct contact with the due diligence team.

Using listed paper as consideration

Backed by the strength of our capital markets practice, we are very experienced in advising in circumstances where a client is seeking to use its listed paper as consideration or is seeking to access capital markets for its funding requirements. There are competing bidders for a public company target. Again, the conduct of parties involved in such situations is highly regulated.

International reach

We are well-versed in complex multi-jurisdictional transactions, with Bird & Bird having 31 offices across Europe, the Middle East, Asia-Pacific, North Africa and North America. The market for M&A deals has become increasingly international and we are well placed to advise clients on all the international aspects of transactions.

Overall, our clients benefit from more than just plain vanilla legal advice. Advice is backed up by global specialists with exceptional experience in key industry sectors. We make connections and introduce contacts, as well as advise on the deals themselves.

We understand our client’s growth strategy across corporate finance and have strong working relationships with other professional advisers engaged in helping to support clients through their transactional experiences, including accountants, financial advisers and corporate brokers.

We take ownership and are accountable for the role we play, including project management and delivery of the deal on time and to budget.

“Their breadth of *expertise* is *fantastic*, and they cover virtually all new bases for us as a business.”

Legal 500 UK, 2023

Members of our International Corporate group Steering Committee



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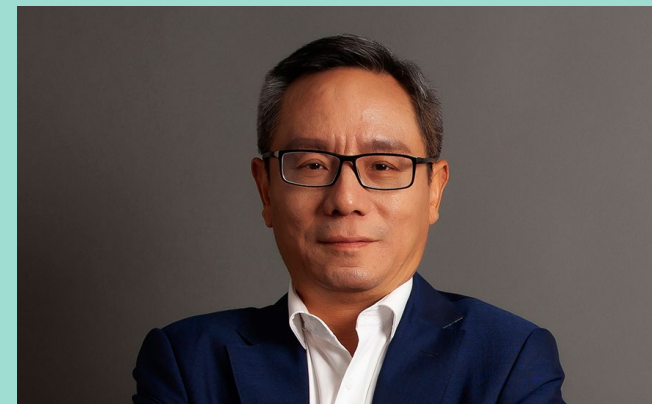


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