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# Trends in M&A Provisions: Alternative Dispute Resolutions Provisions

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In merger and acquisition ("M&A") transactions, the definitive purchase agreement (whether asset purchase agreement, stock purchase agreement, or merger agreement) typically contains representations, warranties, and covenants, along with related indemnification obligations. The purchase agreement may also stipulate certain agreed upon non-judicial means for dealing with claims under the agreement (e.g., arbitration or mediation). These alternative dispute resolution ("ADR") provisions are an important component of a purchase agreement that the parties may utilize prior to seeking redress from the courts or in lieu of judicial proceedings. These provisions also may also tie in to other related provisions within the agreement.

## Negotiating Points for ADR Provisions

ADR provisions in M&A purchase agreements tend to raise the following negotiation issues:

- Whether, as a threshold matter, the purchase agreement should include ADR provisions in lieu of, or prior to, judicial recourse;
- To which form of ADR the parties are willing to agree:
    - Binding arbitration;
    - Mediation; or
    - Mediation first, followed by binding arbitration;
- Whether the arbitrator will be specified as the American Arbitration Association ("AAA"), Judicial Arbitration and Mediation Services ("JAMS"), or another named service provider; and
- How expenses associated with the ADR proceedings are to be allocated between buyer and seller.

## Related Provisions

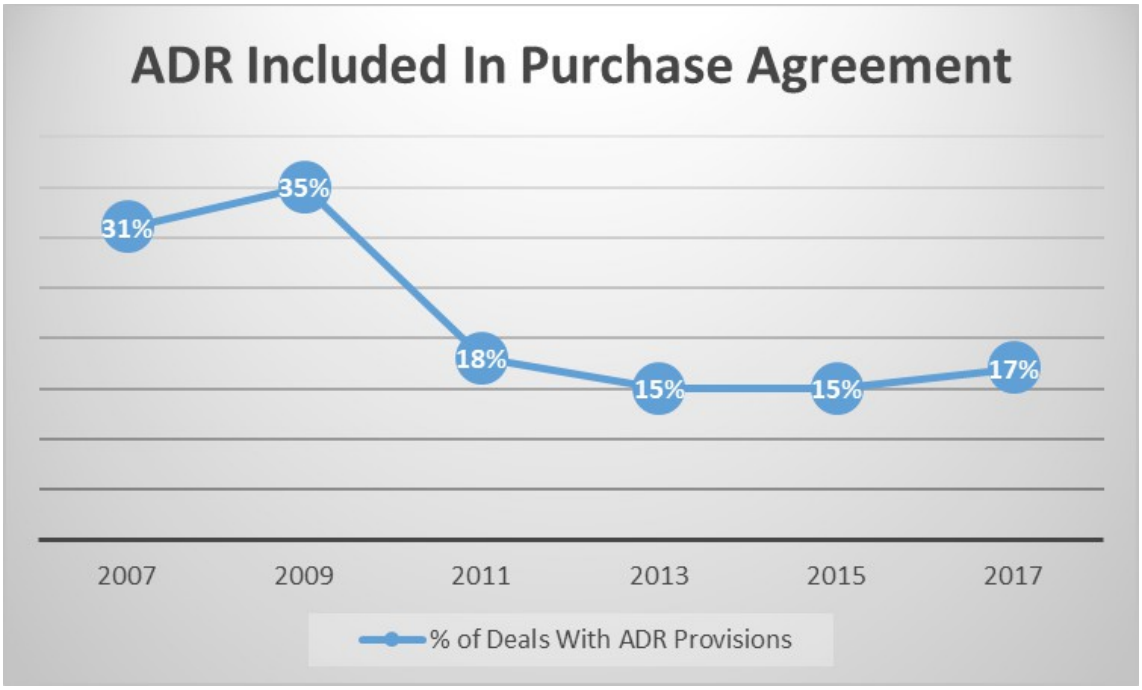
When drafting and negotiating ADR provisions practitioners must pay careful attention to how the ADR provisions will interact with other provisions in the purchase agreement. This is important because ADR provisions are related to at least three other provisions in an M&A agreement: (1) the

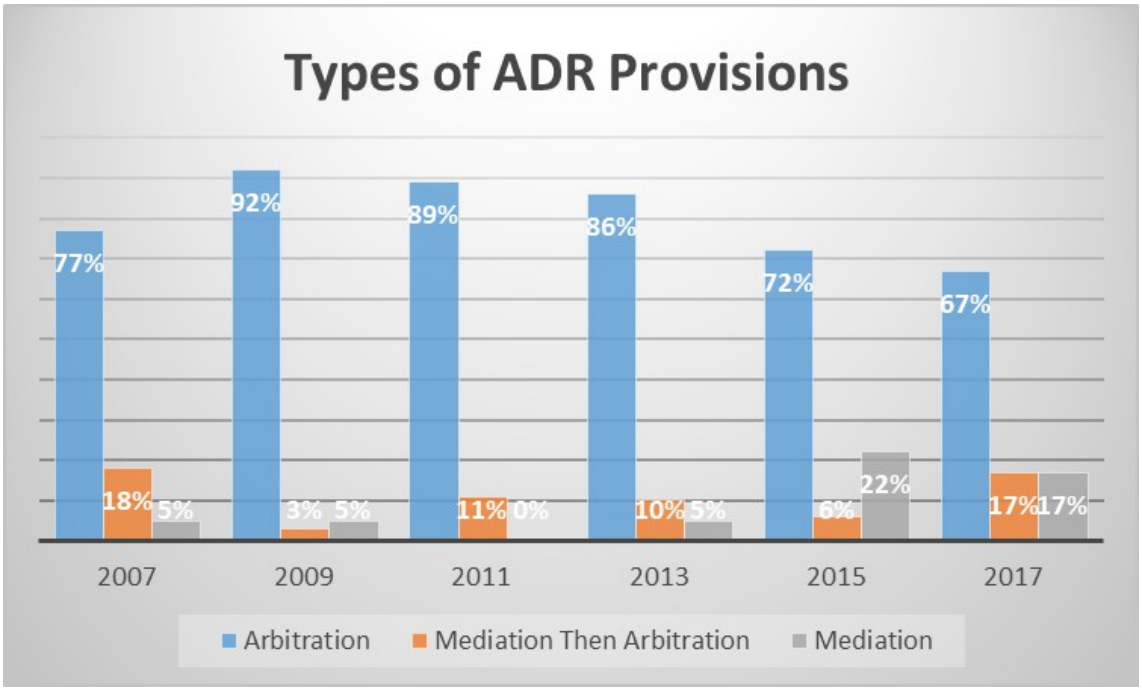
"exclusivity of remedies" provision, which states that the indemnification structure and procedures in the purchase agreement are the sole remedy for claims (subject to limited exceptions such as fraud); (2) provisions allowing for specific performance to prevent breaches of covenants (such as non-competition covenants of the seller); and (3) waiver of jury trial provisions.

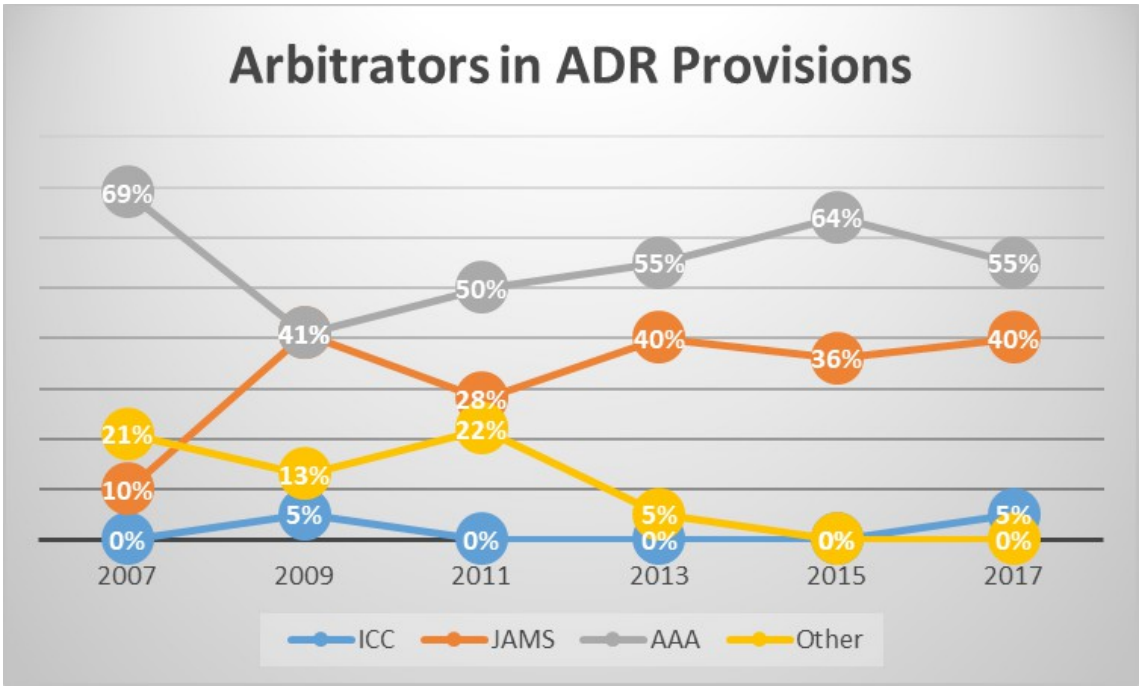
### Trends in ADR Provisions

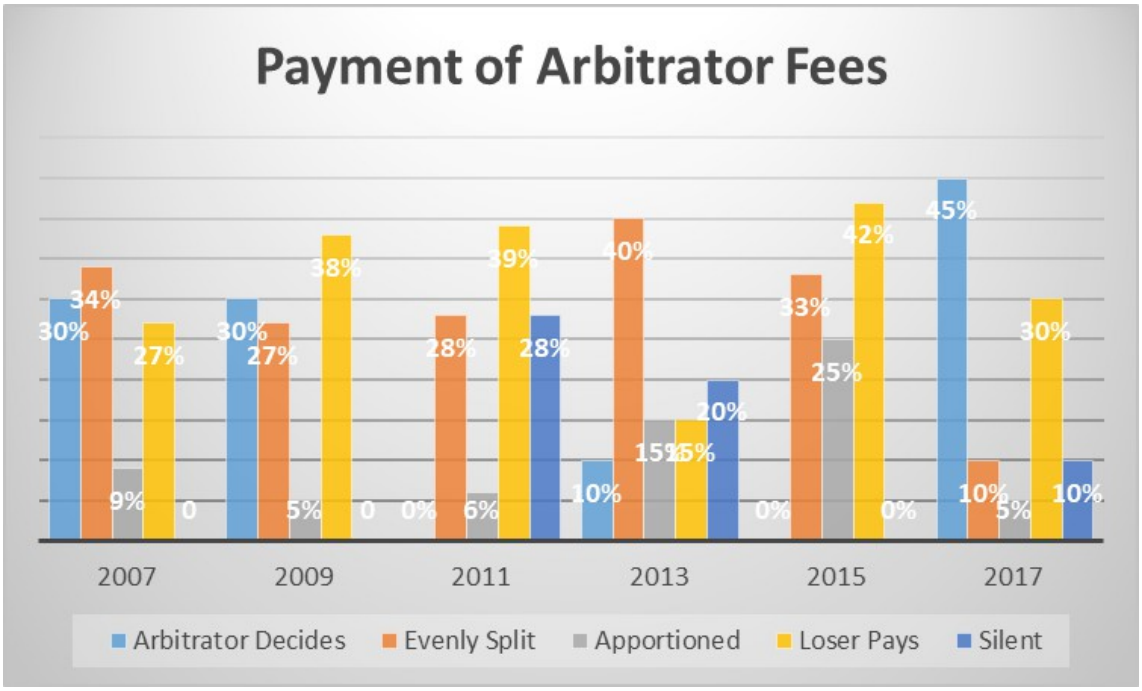
Every other year since 2005 the American Bar Association ("ABA") has released its Private Target Mergers and Acquisitions Deal Point Studies (the "ABA studies"). The ABA studies examine purchase agreements of publicly available transactions involving private companies that occurred in the year prior to each study (and in the case of the 2017 study, including the first half of 2017). These transactions range in size but are generally considered as within the "middle market" for M&A transactions; the average transaction value within the 2017 study was $176.3 million.

The analysis of data from the most recent six ABA studies illustrates the extent to which the four ADR-related negotiating concepts described above—whether ADR provisions are included; the form of ADR agreed to; whether a specific arbitrator is identified; and how arbitration expenses are allocated—are covered in private company M&A purchase agreements.




Types of ADR Provisions
77%
18%
5%
92%
3%
5%
89%
11%
0%
86%
10%
5%
72%
6%
22%
67%
17%
17%
2007
2009
2011
2013
2015
2017
Arbitration
Mediation Then Arbitration
Mediation


Arbitrators in ADR Provisions
69%
41%
50%
55%
64%
55%
10%
40%
28%
36%
40%
21%
13%
22%
5%
0%
0%
0%
0%
5%
0%
0%
0%
2007
2009
2011
2013
2015
2017
ICC
JAMS
AAA
Other




**Conclusion**

Overall, ADR provisions are becoming less prevalent in private company M&A transactions. As reflected in the ABA studies, their use has declined over the past several years from a high of 35% in the 2009 ABA study (reporting on transactions in 2008) to a low of 15% in the 2013 and 2015 ABA studies (reporting on transactions in 2012 and 2014 respectively). Of those purchase agreements with an ADR requirement, binding arbitration is still the method of choice (included in 67% of the ADR provisions in the 2017 study). However, the degree of preference has been slowly declining since 2009 when the use of binding arbitration peaked at 92%. When an ADR provision names a specific arbitration body, the AAA is the most frequently named (55% of reviewed transactions from the 2017 study that included an ADR provision). Finally, the allocation of arbitration expenses continues to fluctuate over time —whether evenly split, paid by the loser, or allocated amongst the parties.

[i] Daniel Avery is a Director, and Lauren Wilson an associate, in the Business Law Group at Goulston & Storrs, in Boston, Massachusetts. Mr. Avery is a member of the ABA's working group which published the 2017 ABA private company M&A deal points study. This article is based on, and updates, the article of the same name co-authored by Mr. Avery and John Mariano published in Bloomberg Mergers & Acquisitions Law Report, 18 MALR 1470 10/05/15. This article is one of a series of over 20 articles co-authored by Mr. Avery looking at trends in private company M&A deal points. The series is currently being updated to reflect the 2017 ABA private company study and will be published throughout 2018. The articles can be found on Goulston & Storrs' "What's Market" web page at https://www.goulstonstorrs.com/whats-market/ and on Bloomberg Law at https://www.bloomberglaw.com/page/infocus_dealpoints.

[ii] Note that within this article we use the terms "seller" and "company" in the context of a stock purchase transaction – the "seller" would be the selling shareholder(s) making the representations and warranties in the M&A purchase agreement, and the "company" would be the company being acquired. In an asset purchase transaction, the "seller" would be the target company itself but for consistency we are using "seller" and "company" in a stock purchase setting.

[iii] A 2014 Business Lawyer article examined fraud exceptions to the exclusivity of remedies provision and related concepts. *See* West, *That Pesky Little Thing Called Fraud: An Examination of Buyer's Insistence Upon (and Sellers' Too Ready Acceptance of) Undefined "Fraud Carve-Outs" in Acquisition Agreements*, The Business Lawyer, Vol. 69, Aug. 2014.

[iv] *See* Daniel Avery & Lauren Wilson, *Trends in M&A Provisions: Indemnification as an Exclusive Remedy*, Bloomberg Law, Mar. 2018; Daniel Avery & Daniel Brody, *Trends in M&A Provisions: Waiver of Jury Trials*, Bloomberg Law, Mar. 2018 [INSERT LINK]. These articles are reprinted on Goulston & Storrs' "What's Market" web page at https://www.goulstonstorrs.com/whats-market/ and on Bloomberg Law at https://www.bloomberglaw.com/page/infocus_dealpoints.

[v] This article examines ADR provisions in private company M&A transactions as reflected in the past five ABA studies. This article does not address the provisions in other types of transactions or in public-to-public M&A transactions. The 2005 ABA study did not look at ADR provisions. Accordingly, this article reviews the relevant information in the 2017, 2015, 2013, 2011, 2009 and 2007 ABA studies.

[HA1]See first chart above in BLAW version

[HA2]See second chart above in BLAW version

[HA3]See third chart above in BLAW version

[HA4]See fourth chart above in BLAW version