



Reuters/Sergio Moraes

# Legal Aspects of Cross Border Transactions: Trends, Challenges and Opportunities

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## Introduction

**Strong corporate earnings and large company cash balances have driven companies to consider an ever-widening horizon for mergers and acquisitions (M&A) and other business development ventures. By looking overseas, companies can more easily shift operations out of high-cost labor markets, enriching developing regions and finding new opportunities for growth beyond saturated home markets.**

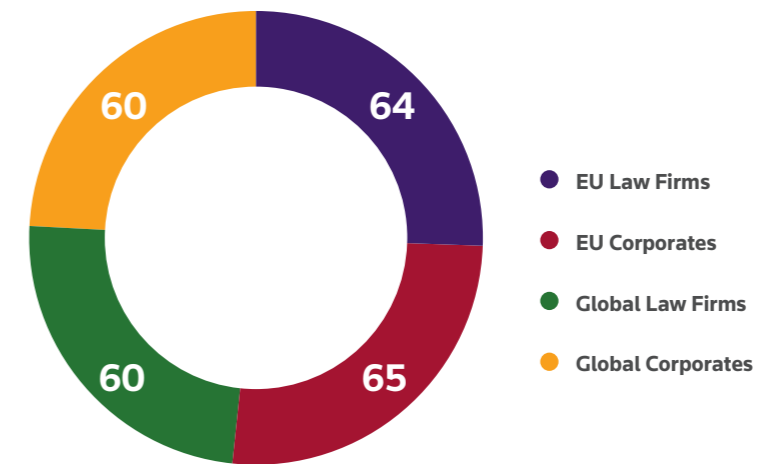
For some, these opportunities are outweighed by the risks. As businesses can find to their cost, not all jurisdictions offer foreign investors the same robust legal protections as they would expect at home. Small wonder, then, that despite increasing recognition of the potential reward, many remain cautious about expanding their cross-border footprint: safer to protect a modest fortune at home than lose a large one overseas.

As the world's leading source of news and information for professional markets, Thomson Reuters carried out a comprehensive survey of cross-border legal practitioners in firms and companies in key economic hubs worldwide to find out:

- Whether, in the current uncertain economic climate, the trend toward more cross-border deals will continue (and the factors holding it back).
- Whether the increasing volume of cross-border work has led to a common vocabulary and standard deal conventions among global legal professionals.
- How firms and companies inform themselves to manage the opportunities and challenges of cross-border work.

## Executive Summary

In Spring 2016, Thomson Reuters surveyed 249 respondents working in a legal function or with legal responsibility in law firms and corporate organizations based in key economic hubs around the world: EU: UK, France and Germany; Outside EU: US, Australia, China, Brazil and Mexico.



Here are the key findings:

### Trend 1: Cross-Border work is attractive and likely to increase in volume

Confidence in cross-border opportunities is high, despite a mixed economic outlook globally. It's likely that cross-border transactions and advisory will be a growing area of work and importance for large law firms and in-house counsel in large businesses.

### Trend 2: Legal complexity is limiting transaction volumes

Cross-border transactions are complex and considered disproportionately challenging and risky by businesses and legal advisors. Lawyers that can advise confidently and demystify these challenges will play a critical leading role in helping their own and/or their clients businesses to grow.

### Trend 3: Deals and drafting are increasingly standardized internationally

There are increasingly widespread and recognized global norms for transaction structuring, drafting language and governing law – these frequently have US and UK origin.

For cross-border practitioners, that provides opportunity to benefit from guidance around market-standard practice, as well as international-standard legal and transactional documentation.

**Trend 4: Reliable sources of information and insight are hard to find but online resources are becoming important**

Lawyers are most likely to get cross-border deals done and provide winning services in this area when they can:

- Master compliance requirements across multiple jurisdictions
- Make optimal use of local counsel advice
- Produce internationally resonant drafting that the parties can engage with easily.

Yet reliable sources of insight are difficult to find. Internal and external networks continue to be the most popular sources of information used by practitioners to inform decision-making on cross-border transactions, followed by directories of legal providers. Online resources such as Practical Law are increasingly valued by practitioners.

**75%** agreed that cross-border transactions are increasingly attractive to businesses globally and will grow

**78%** agreed that the growth of cross-border transactions is driven by the internationalization of commerce and may continue to rise irrespective of economic cycles

**Trend 1: Cross-border work is attractive and likely to increase in volume**

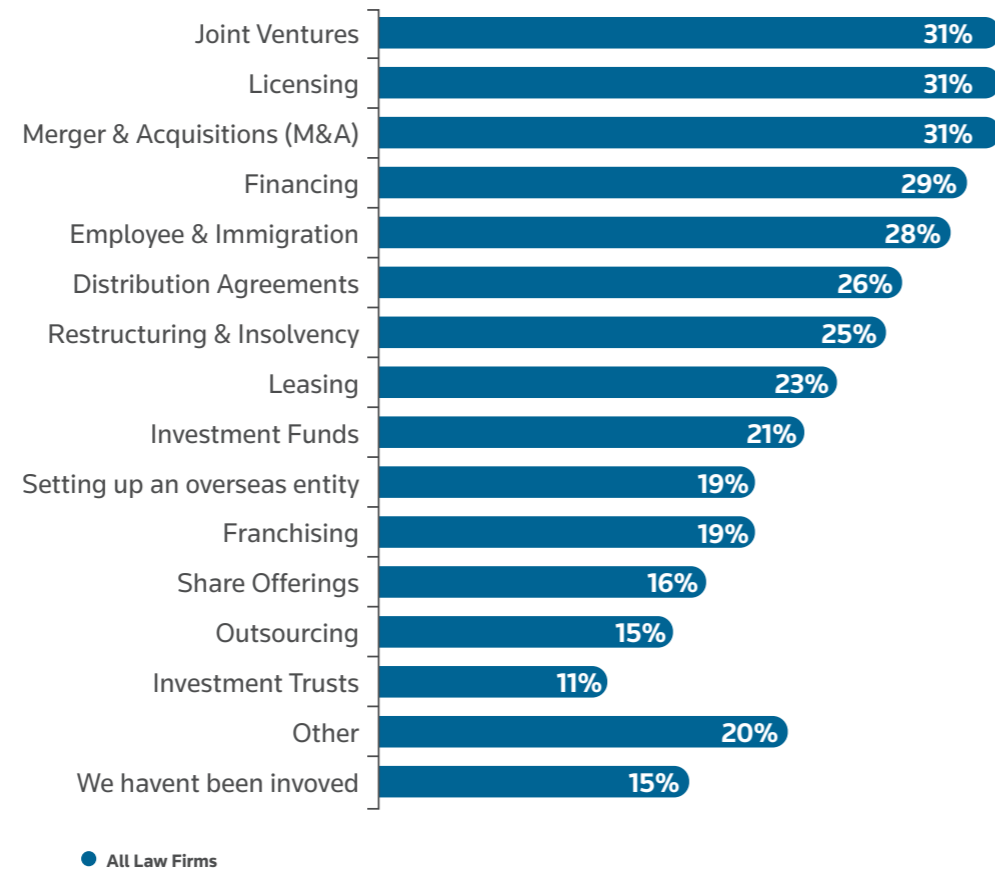
At a time when the global economic power and growth in the world has been shifting away from the traditional players to the likes of China, India, Mexico and Indonesia, it can be no surprise that cross-border transactions have grown. These deals have always been an important driver of a corporate expansion strategy, but now more than ever, they could take center-stage as the new economic powers of the world consolidate their positions.

Our research found that multinational businesses are confident about global opportunities. Cross-border transactions have seen underlying growth for the last ten years despite economic cycles and this looks set to continue.

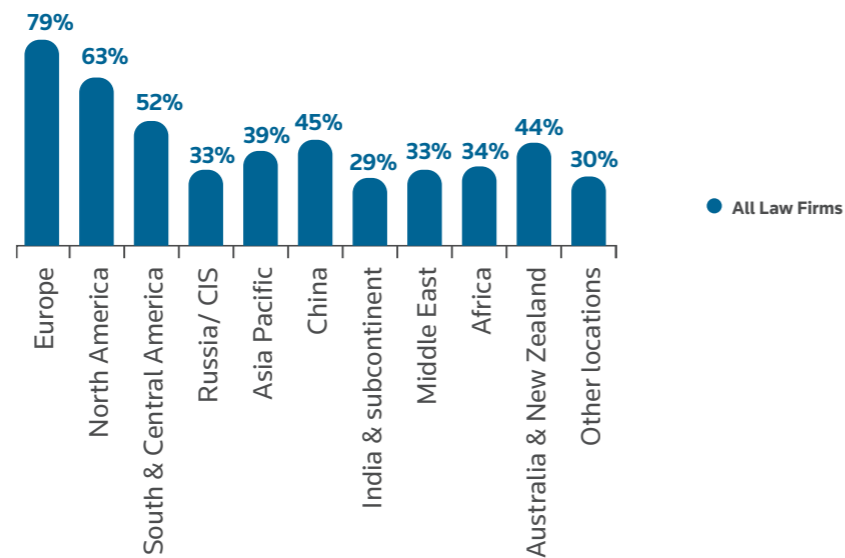
In this survey of nearly 250 respondents working in a legal function or with legal responsibility in law firms and corporate organizations around the world, we found that 75% of all respondents agreed that cross-border transactions are increasingly attractive and will grow, driven by the internationalization of commerce. 63% agreed that their own organization will be involved in an increasing number of cross-border transactions in the future. That is likely to mean increased demand for cross-border legal advisory work for large law firms and in-house counsel in large businesses.

The types of cross-border deals vary, but law firm respondents cited Joint Ventures, Licensing and Mergers and Acquisitions (all at 31%) as the three most common cross-border transactions they had worked on. Meanwhile companies selected Employee and Immigration issues (33%) closely followed by Joint Ventures (31%).

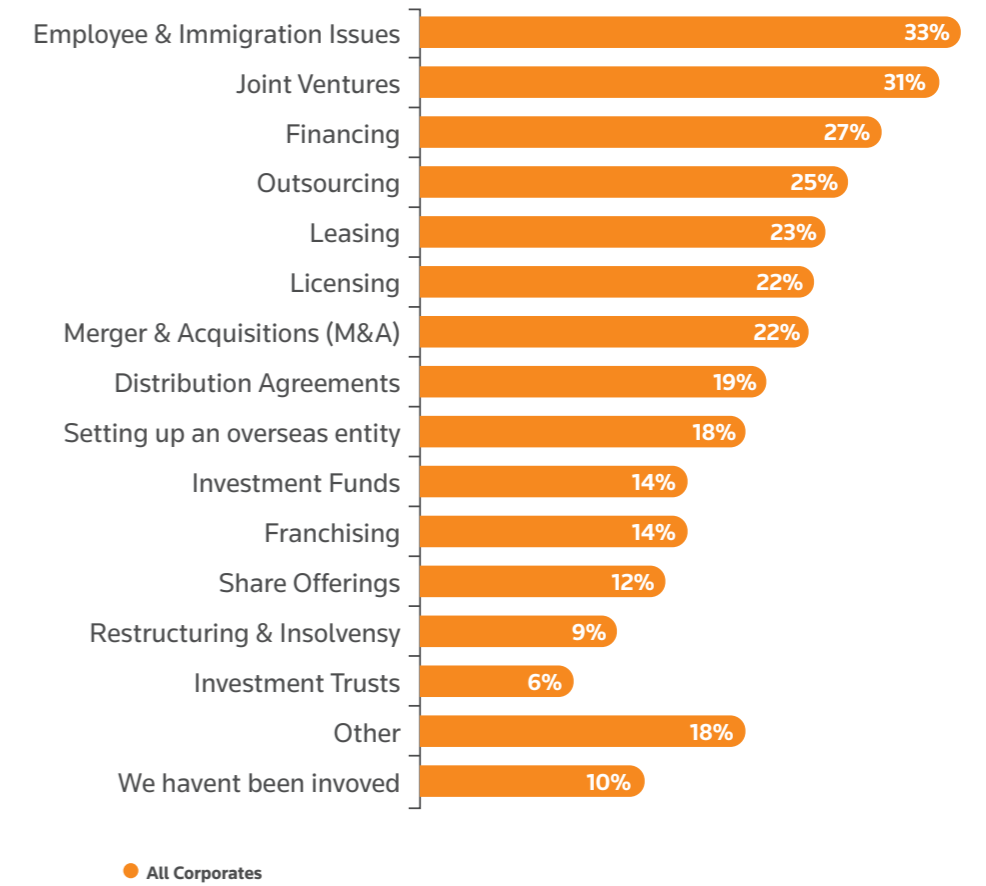
**Figure 1.1:** What types of cross border transactions or matters has your law firm advised on?



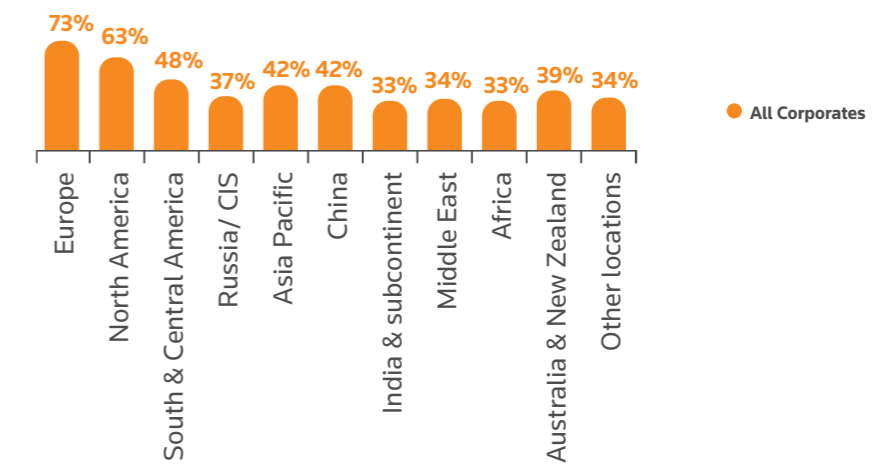
**Figure 1.2:** In which locations has your law firm considered or been involved in advising on cross-border transactions or matters?



**Figure 1.3:** What types of cross border transactions or matters has your company been involved in?



**Figure 1.4:** In which locations has your company considered or been involved in cross-border transactions or matters?



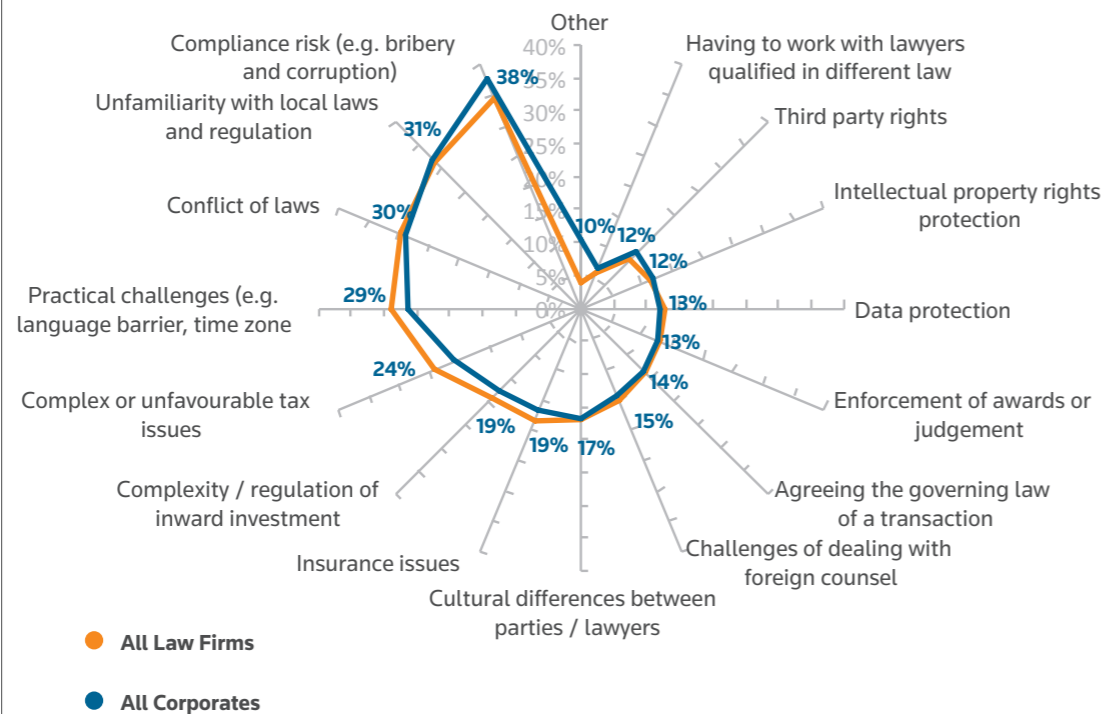
**83%** considered the legal risk higher in cross border deals than in domestic deals

## Trend 2: Legal complexity is limiting transaction volumes

Like any opportunity, there are associated risks. Our research suggests that cross border transactions are complex and considered hugely challenging by organizations. 81% of law firm respondents and 84% of corporates considered the legal risk higher in cross border deals than in domestic deals. The challenges are many and varied, but led by compliance risk.

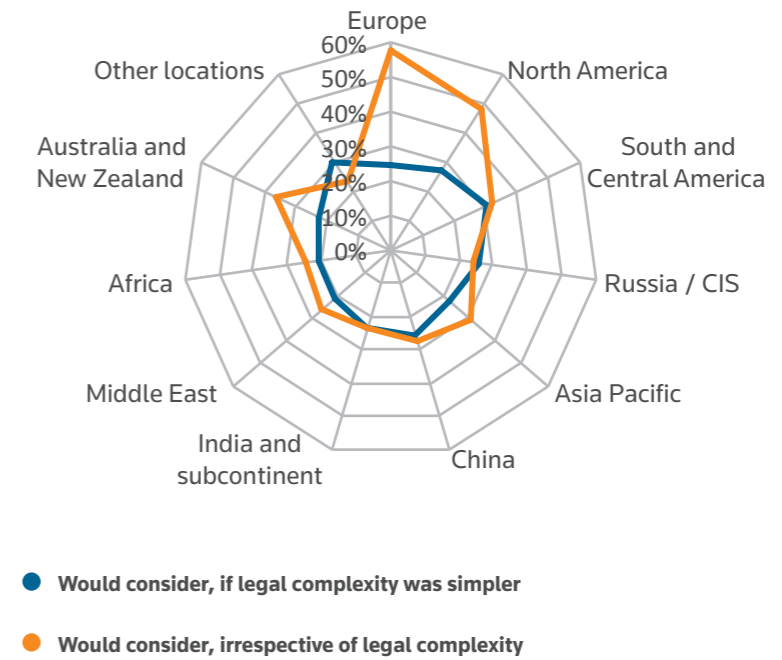
For law firms and legal departments, the risk and complexity of cross-border transactions means the most trusted and confident cross-border lawyers will be in high demand.

**Figure 2.1:** Which aspects of cross-border transactions would discourage your company or firm from engaging in this area?



**44%** of law firms and **41%** of corporates had turned down the opportunity to advise on /take forward a cross-border deal due to the level of complexity in the legal and regulatory aspects

**Figure 2.2:** Looking to the future, in which locations would your company or law firm consider or look to be involved in cross border transactions or matters, irrespective of the legal complexity of doing so?



Sometimes the challenge can be deemed to be too great. We asked respondents where in the world they would consider doing a deal. 31% said South America, the highest percentage for one of the more emerging emerging economies, but only if the legal environment was simpler.

Our research also found that 44% of law firms had turned down the opportunity to advise on a cross-border deal due to the level of complexity in the legal and regulatory aspects. When we asked EU-based law firms about whether their organisations had turned down the opportunity to advise on a cross-border deal due to the level of complexity in the legal and regulatory environment, 52% agreed that they had. That figure was slightly reduced among firms based outside of the EU at 37%, but even so, this was a surprising number.

Companies too showed themselves to be conservative, with 37% of EU-based corporates and 45% of corporates based outside of the EU agreeing that they too had turned down a cross-border transaction for this reason.

### Why has your organisation turned down cross border deals in the past, in relation to legal and regulatory issues?

"In some countries the state is too powerful and has a big influence on legal matters. The risk is not worth taking."

"Uncertainty created by lack of assurances on legal matters."

"Deficiency in the law of the country."

"We were capable of dealing with the US issues, but did not have reliable counsel to advise on the foreign law issues."

40% of law firms outside of the EU identified the challenge of not being able to find suitable local counsel to work with as one of the most common reasons why deals broke down

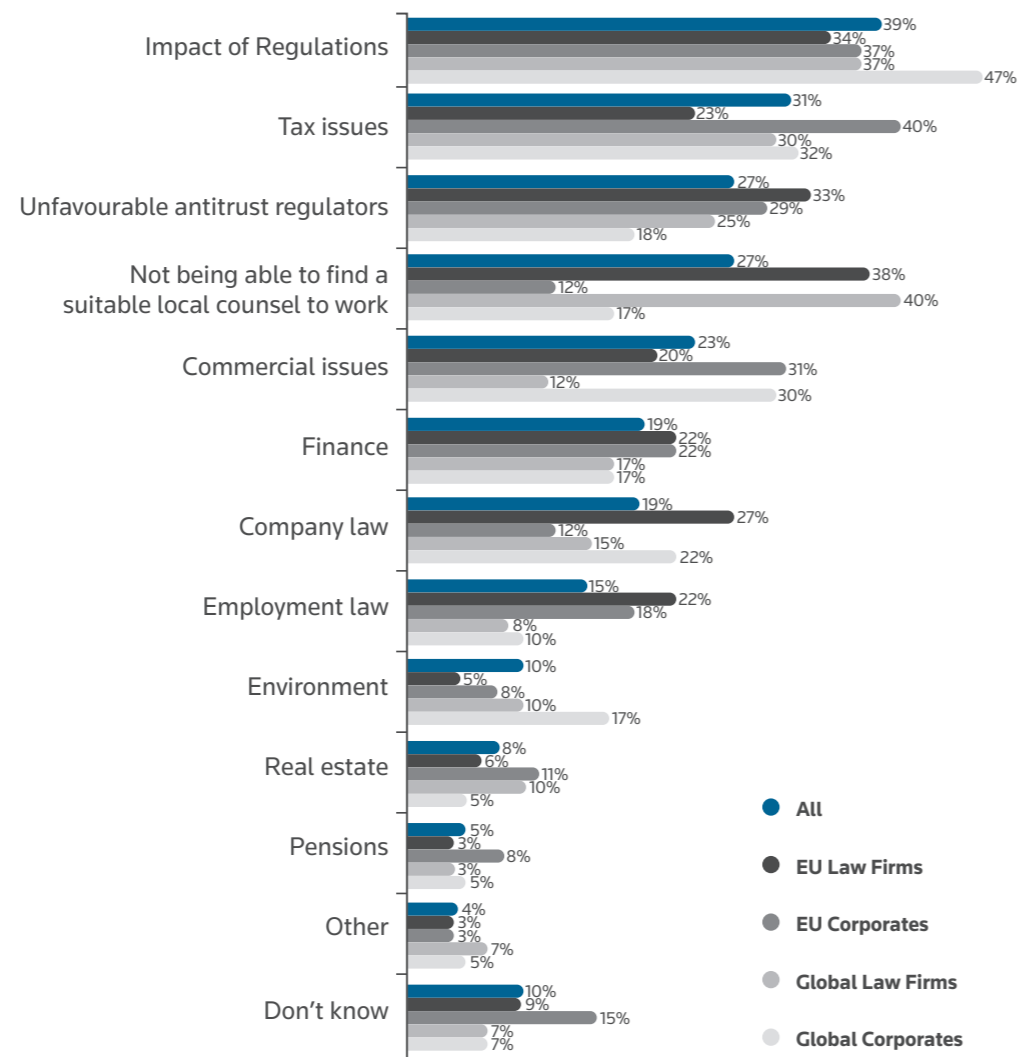
38% of companies highlighted compliance risk (such as bribery and corruption) as the aspect most holding them back from cross border deals

### Why are cross-border deals breaking down?

Unsurprisingly, the impact of regulation came out as one of the key reasons, particularly among companies based outside of the EU, where 47% highlighted this as the biggest issue. This was slightly ahead of the average which was 39% for all of those questioned. Tax was cited by 40% of companies based inside of the EU as their biggest issue, 9% more than the average response at 31%.

Equally as important was the inability to find suitable local counsel to work with. Here, 40% of law firms based outside of the EU complained this was the biggest cause of cross-border deals breaking down, and indeed, this was closely followed by 38% of EU-based law firms who also agreed this was a major problem. Interestingly, the response levels on this particular point were much lower from companies, with only 12% of EU-based companies and 17% of companies based outside of the EU agreeing with this.

Figure 2.3: For which reasons would you expect a cross border deal to typically break down?



The research suggests that there are a small number of particularly important challenges that will consistently provide the key to successful advice and transactions globally. It follows then, that practitioners are most likely to get deals done and provide winning services in this field when they can:

- Master compliance requirements across multiple jurisdictions
- Make optimal use of local counsel advice
- Produce internationally resonant drafting that the parties can engage with easily.

72% of respondents thought that a common or standard approach to drafting language and terms is increasingly being adopted in cross-border deals.

### Trend 3: Deals and drafting are becoming increasingly standardized around the world

One way companies and law firms have tried to reduce the risk involved in doing a cross-border transaction has been by agreeing the governing law of a deal. But what motivates those involved in choosing the governing law? Preferences around presiding court in the event of litigation was the most common answer (55%), with respondents also commonly considering predictability, judicial independence and enforcement. Interestingly, where the parties are domiciled figured further down the list of priorities with only 48% of all respondents citing this as a key factor.

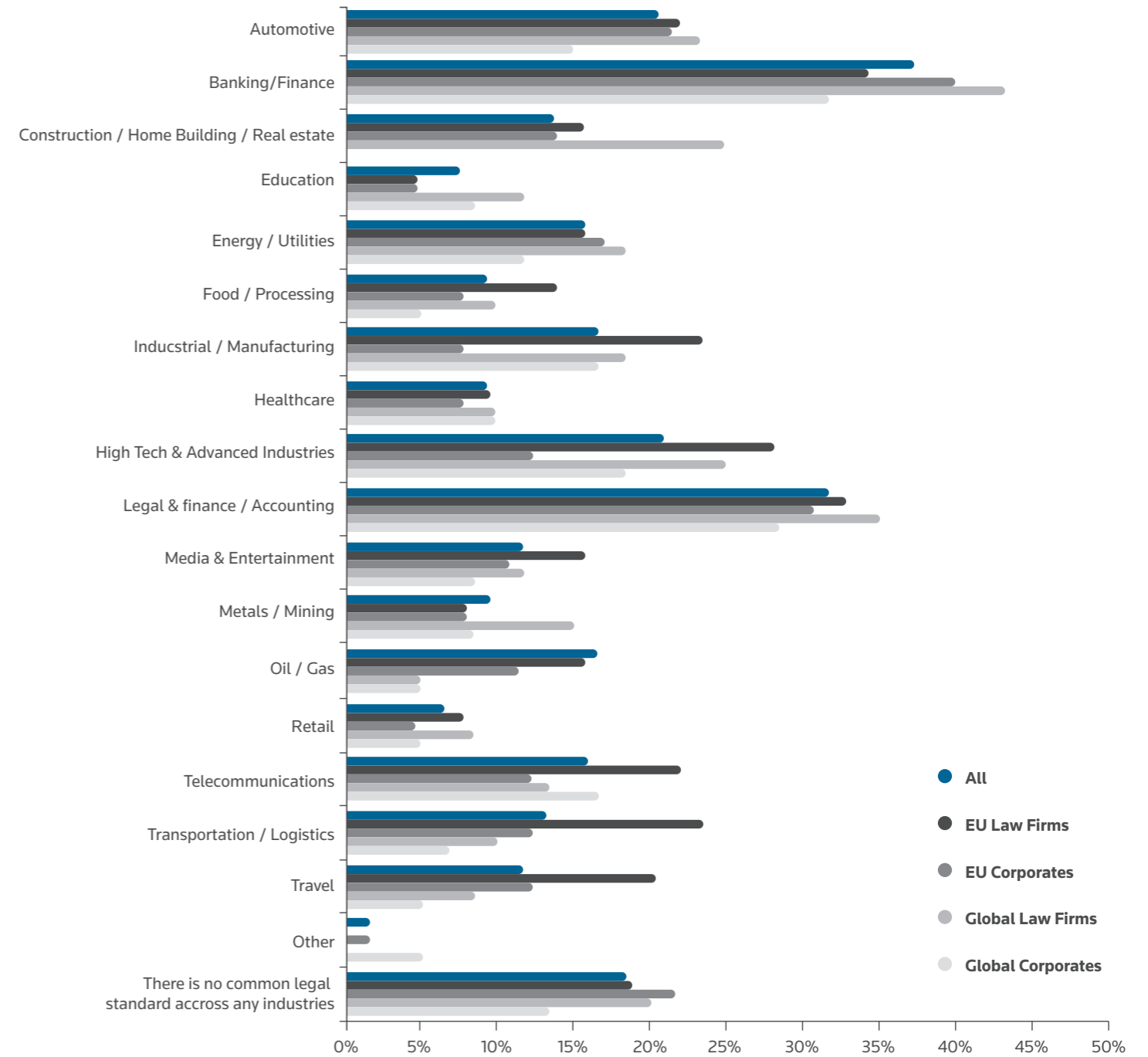
While agreeing on governing law was clearly of major importance in getting a deal across the line – 83% of respondents said agreement on this was critical to any cross-border deal taking place – companies and their advisers also saw a rise in commonality of drafting language as another means to reducing risk.

Although common standards around the world are some way off, this new development in the legal landscape may help ensure fewer deals fall apart along the way.

When asked the question, 72% of all respondents agreed that a common or standard approach to drafting language and terms was increasingly being adopted in cross-border deals.

Among companies outside of the EU the response was more marked, with 77% agreeing to this statement. Of those within the EU the result was slightly more mixed, with EU law firms at 73% and EU-based corporates at 66%. When we specifically asked the question about the types of industries where this is emerging we found that many industries are starting to see a common standard – some more so than others (figure 3.1).

Figure 3.1: In which industries have you seen a common standard terms of agreement or contract language developing for use in cross border deals?



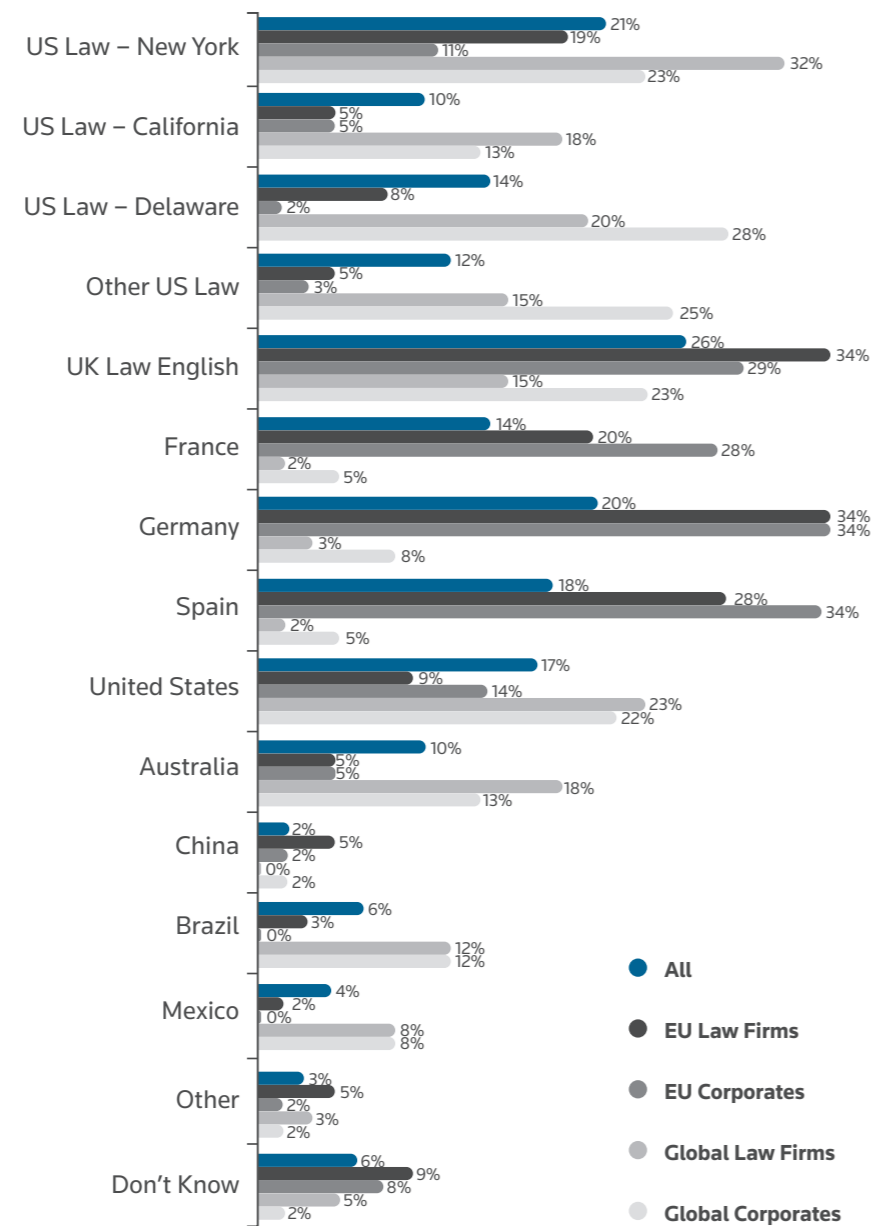


US/UK based drafting language is dominant in cross-border deals, with 65% of all respondents reporting that it was used regardless of where the deal was being done

This phenomenon is not just taking place around drafting, but around the whole process. More than two-thirds of respondents (67%) agreed that a common or standard approach is emerging to manage the deal process, structuring and due diligence involved in cross-border deals.

Unsurprisingly, perhaps, it is US and UK drafting language that are emerging as the pre-eminent drivers of documentation, regardless of where deals are based. When asked the question directly, 65% of all respondents agreed with this, rising to 73% among company respondents based outside of the EU. While slightly lower numbers agreed, more than half of all respondents (59%) also cited US or UK governing law as the preferred choice in cross-border deals, again regardless of where the deal was based.

**Figure 3.2:** What would be your preference for the governing laws in a cross-border deal?



### Trend 4: Reliable sources of information and insight are hard to find, but online resources are becoming important.

Aside from profession-wide moves to simplify and therefore reduce risk in doing cross-border deals, companies and their legal advisers said that they also seek guidance from sources they know and trust to help them navigate the difficult issues.

Lawyers are most likely to get deals done and provide winning services in this area when they can:

- Master compliance requirements across multiple jurisdictions
- Make optimal use of local counsel advice
- Produce internationally-understood drafting

Yet our research showed that reliable sources of information and insight are hard to find and most practitioners relied on personal networks. More than half of our respondents (51%) said they used colleagues or their external network to inform decisions, 39% agreed they used directories of legal service providers and other consultants and a further 37% used online information databases from legal publishers.

More than half of respondents (56%) had used an online resource tool such as Practical Law, and of this group, nearly all (99%) had found it helpful.

## Conclusion

One thing is clear: with demand for cross-border legal advisory work likely to grow, lawyers that can advise confidently and demystify these challenges will play a critical leading role in helping their own and/or their clients' businesses to grow.

With the advent of standardization, comes the opportunity to benefit from standard market practice and efficiency tools. Deals will be done faster and with less risk, where lawyers can access guidance around market-standard practice and documentation that resonates in the context of international business and is understood, recognizable and trusted by all parties.

## About Thomson Reuters Practical Law

Practical Law is an online legal information and know-how service. It gives legal professionals a better starting point, by providing the answers and guidance needed to practise more efficiently, improve client service and add more value. Practical Law provides access to UK, US and multi-jurisdictional legal guidance and standard document templates for common transactions – all from one trusted advisor.

In this survey, more than half of respondents (56%) said they had used an online resource tool such as Practical Law. Of this group, nearly all (99%) found it helpful.

### Methodology

This research was conducted online with 249 respondents working in a legal function/ legal responsibility in law firms and corporate organisations across the globe, broken down as follows:

- EU law firms (UK, France, Germany, Spain): 64
- EU corporate organisations (UK, France, Germany, Spain): 65
- Global law firms: (USA, Australia, China, Brazil, Mexico): 60
- Global corporate organisations: (USA, Australia, China, Brazil, Mexico): 60

Please note that the standard convention for rounding has been applied and consequently some totals do not add up to 100%.

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