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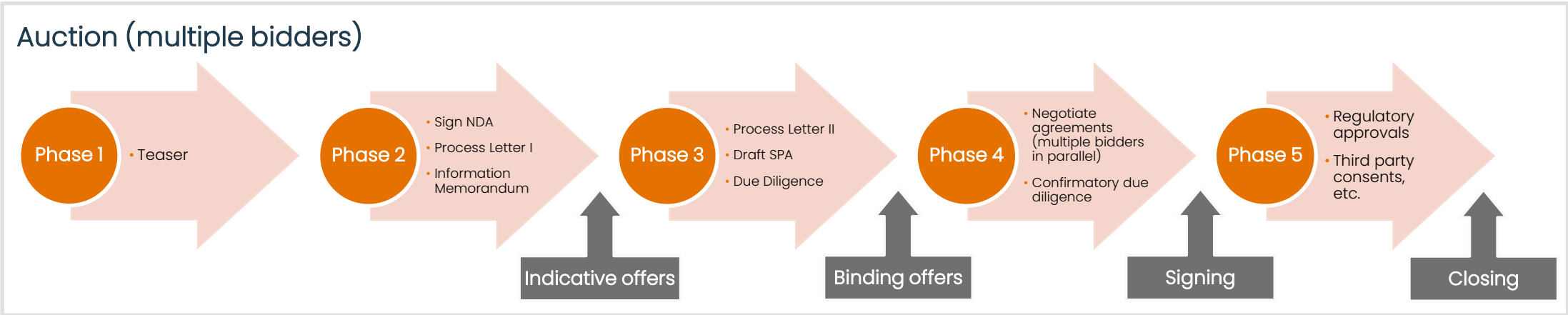
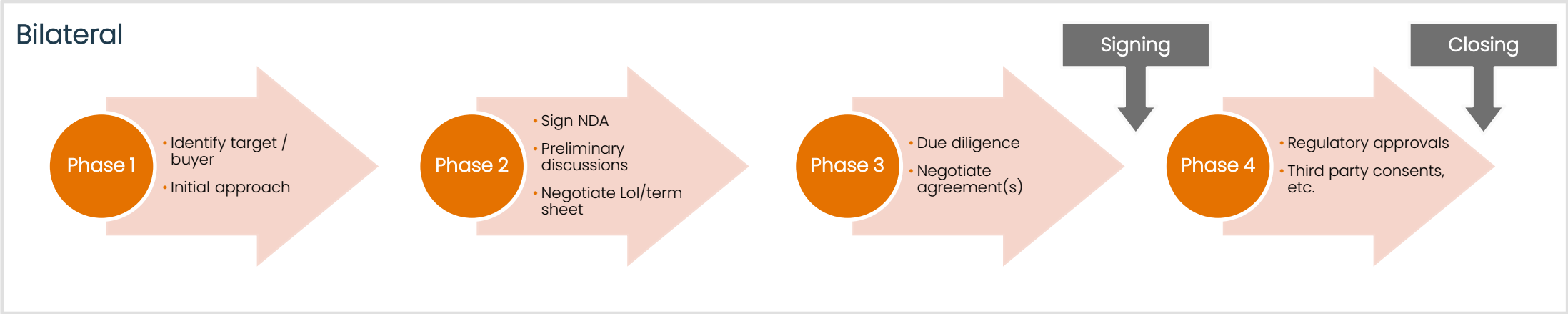
Navigating Auction Processes in M&A

M&A Academy

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Auction vs. Bilateral Process

Timeline



Auction vs. Bilateral Process

Key Differences

Control over process and information flow

- Auction: Seller controls timing, scope of disclosure and access to management
- Bilateral: Buyer generally has greater ability to influence the due diligence scope and pace

Negotiation dynamics

- Auction: Competition influences outcomes (price and legal terms)
- Bilateral: Outcomes are more directly driven by relative bargaining power and strategic fit

Approach to diligence and documentation

- Auction: Often more front-loaded, standardized and seller-driven (e.g. vendor due diligence, draft SPA)
- Bilateral: Typically more iterative and flexible, with greater buyer influence

Path to signing

- Auction: Binding offers are expected to be largely final, with limited scope for subsequent changes
- Bilateral: Generally allows for a longer negotiation phase and greater scope for adjustments

Practical Relevance

- ⊗ In private M&A, we see auction processes more often than one-on-one (bilateral) transactions
- ⊗ The prevalence of auction processes depends, *inter alia*, on deal value (less common in smaller transactions) and industry (generally less common in highly regulated sectors)
- ⊗ This reflects the increasing professionalization of the M&A market and its advisers – key players include (investment) banks, specialized international advisers, Big Four firms, as well as local boutiques and independent advisers
- ⊗ While the structuring and management of the process is primarily led by M&A advisers, successful execution depends to a significant extent on legal counsel
- ⊗ In the later stages of the process, the focus typically shifts from M&A advisers to legal counsel

Auction Processes – Seller's Perspective

Why run an auction? – Selling to the best bidder...

- ⊗ How to identify the "best bidder"?
 - Broad market outreach – "spray and pray"?
 - Tailored auction with a limited, pre-selected bidder group
 - Selection based on defined bidder criteria (e.g. industry expertise, prior exposure to the target, regulatory considerations, etc.)
 - What if the seller opts against an auction? (*Note: no statutory obligation of seller / seller's board of directors to run an auction*)

- ⊗ The optimal approach is highly deal-specific and depends on the nature of the target and the seller's objectives

- ⊗ Downsides of a broad market outreach?
 - Increased time and cost burden
 - Greater publicity and reduced confidentiality, risk of information leaks
 - Risk of a "broken auction" (see "MIA – Missing in Auction" by Mergermarket)

- ⊗ Illustration: NDA structuring considerations in the context of a broad market outreach

Auction Processes – Seller's Perspective

...on the best possible terms

- ⊗ Creating and maintaining competition among bidders – where are the (legal) limits? (*Note: the Swiss rules on auctions pursuant to art. 229 et seq. CO are not applicable*)
- ⊗ In addition to headline price: deal certainty as a key driver
 - Sellers not only go for the highest price but the most convincing offer as a whole
 - Elements: Financing certainty, regulatory risk allocation, conditionality, credibility and track record of the bidder
- ⊗ Ensuring comparability of bids:
 - Clear requirements as to the content of non-binding and binding offers (*to what extent is a "binding offer" truly binding under Swiss law?*)
 - Sell-side draft share purchase agreement (*which choice of governing law?*)
 - Typically, no sell-side draft shareholders' agreement (in case of reinvestment) or new employment agreements, as these are highly bidder-specific

Auction Processes – Seller's Perspective

Selected Topics

- ⊗ Timing and maintaining process momentum
 - Managing deadlines effectively
 - Aligning the process timeline with market windows (and holiday periods?)
 - Use of "firm-up offers" as an intermediate step in case of broad auctions with high demand

- ⊗ Vendor due diligence / fact books

- ⊗ "Hard staple" and "soft staple"
 - Financing
 - W&I Insurance

Auction Processes – Buyer's Perspective

- ⊗ While auctions are attractive from a seller's perspective, they are generally less appealing to buyers (*noting that many market participants act on both the buy-side and sell-side*)

- ⊗ Key concerns for bidders:
 - Significant cost exposure combined with low deal certainty for any individual bidder
 - Risk of being used as a stalking horse in the process
 - Risk of buyer's remorse in the case of a successful bid

- ⊗ Bidders are familiar with auction dynamics – how can they respond?
 - Seeking exclusivity (signing exclusivity vs. negotiation exclusivity)
 - Cost cover arrangements
 - "Testing" the process
 - Establishing a direct line of communication with the seller or target management
 - Other specific angle?

Auction Processes – Buyer's Perspective

- ⊗ Pre-emptive bids
 - Strategy: short-cutting the auction process
 - Typically effective only if the offer clearly stands out in both timing and substance
 - Requires increased appetite, both in due diligence and in contractual terms
- ⊗ Staggered approach
 - Strategy: minimizing cost exposure
 - Limited engagement in the early phases of the process
 - Often unsuccessful, as level of engagement is typically visible to the sell-side (e.g. data room activity)
 - If successful, requires playing catch-up

How Bids Are Evaluated – and What Wins

- ⊠ Sellers not only go for the highest price – bids are assessed on a multi-dimensional basis
- ⊠ Evaluation criteria:
 - Price / valuation
 - Deal certainty (financing, regulatory risk, conditionality)
 - Execution credibility (track record, internal approvals, advisors)
 - Transaction complexity and timing
- ⊠ What this means for bidders:
 - Competitive bids combine price, certainty and credibility
 - Differentiation is often achieved beyond valuation
 - Legal positioning is part of the commercial strategy, not a downstream exercise

Key Takeaways



"Auction" is not a single concept

Outcomes depend on how the process is run and how bidders are selected – but most crucially still on the target

Broader outreach can increase competition – but also execution risk

Confidentiality, market perception and the risk of a "broken auction" need to be actively managed

There are no "free options" for bidders

Strategies such as pre-emptive bids, exclusivity requests or limited engagement always involve trade-offs

Visibility matters in auctions

Bidder behavior (e.g. data room activity, responsiveness, interaction in Q&A and expert sessions) is closely monitored and influences seller perception

For in-house counsel: success depends on managing the process

On the sell-side, early preparation and disciplined process execution are key

On the buy-side, aligning stakeholders and risk appetite is critical to support a credible bid

Questions / Discussion

