Executive Summary

With a more active M&A market, it is no surprise to report that sellers are taking less risk in private M&A sale and purchase agreements. It has been moving in that direction since 2011 as the market has been recovering from the financial crisis, but now we see definite signs which are pro-seller. For instance:

- Liability caps are lower;
- Limitation periods are shorter;
- There are more baskets and *de minimis* provisions in all the European regions (although financial protection in terms of percentage of deal size seems to be getting lower);
- W&I insurance is becoming ever more popular and is a classic seller friendly mechanism providing low liability caps and getting the buyer to take protection for M&A risk through an insurance policy;
- MAC clauses remain relatively rare in Europe thereby ensuring seller deal certainty;
- Locked box mechanisms are becoming more popular and are being used throughout Europe;
- Security for warranty claims in favour of buyers is less frequent over the last two years;
- Non-compete covenants are fewer.

There has been a change in behaviour relating to earn-outs during 2014, particularly in Northern Europe. There are more earn-out deals and a greater conformity about the length of earn-out periods and the basis of earn-outs.

As ever there are regional differences. France still has the lowest liability caps but long warranty periods. CEE sees the most MAC clauses and arbitration is the likely dispute resolution mechanism. The UK remains wedded to *de minimis* and basket provisions although interestingly seller's liability caps in the UK seem to be higher than in other regions. Deals in German-speaking countries seem to occupy the middle ground on most issues as far as risk allocation in Europe is concerned. We continue to see similar trends in all or most of the European regions rather than on an individual basis.

Key conclusions

The key conclusions of the CMS European M&A Study 2015 are as follows:

- **Purchase price adjustments –** the number of deals containing purchase price adjustment mechanism slightly increased in 2014 although the general trend has been generally downward for several years prior to that.
- **Locked box –** there was a significant increase in the number of locked box deals in 2014. In particular, there were significant increases in the use of locked box in Southern Europe and France, where in both regions usage increased by almost 200% compared with 2013, where applicable.
- **Earn-outs –** there was a sea change in 2014. Earn-outs which had generally been running at a rate of 14% of total deals in previous years increased significantly to 19% of 2014 deals, particularly in Northern Europe where its usage was comparable with that in the US (21% compared to 25%).
- **Earn-out period –** there were also significant changes in the duration of earn-out periods with the greatest concentration of earn-outs being for the 12–36 months period. This was the case in 57% of 2014 earn-out deals compared with 48% in 2013.
- **Earn-out basis –** although EBITDA based earn-outs continue to be the most popular, there were more turnover based earn-outs in 2014 than in 2013 (31% compared with 21%) whilst earnings (as opposed to EBITDA) based earn-outs dwindled to a mere 6%.
- ***De minimis* –** the trend for the greater use of *de minimis* provisions continues. They were generally used as a matter of course in virtually all regions during 2014.
- **Baskets –** again there was a greater use of baskets, in 69% of cases, whilst 'first dollar' recovery is now clearly the standard basis of recovery, perhaps even in France. By comparison the US continues to favour the 'excess only' recovery basis.