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CMS presents pan-European study

CMS European M&A Survey 2009: Significant shift of risk in M&A agreements from buyers to sellers

Frankfurt am Main – The CMS organisation, a leading European provider of legal and tax services, has presented the results of the *CMS European M&A Survey 2009*. Based on rigorous analysis of data compiled from some 500 M&A agreements completed in Europe and handled by CMS law firms in 2007-2008, the survey reflects a shift towards greater risk adversity on the part of buyers. It also reveals that buyers are increasingly able to transfer a range of transaction risks onto the seller during the negotiation process.

The study is the first of its kind to be conducted in Europe, with CMS analysing and categorising individual contract clauses (“deal points”) to gain unique insights and provide an overview of the latest trends in M&A contract design – before and after the credit crunch. The results are therefore of great practical benefit to companies.

The results can be regarded as authoritative, since CMS is the leading M&A law firm in Europe – particularly in terms of the number of transactions. The organisation thus has access to an unrivalled wealth of M&A agreements across national jurisdictions.

CMS launched the pan-European survey after CMS Hasche Sigle had systematically examined each of its M&A agreements between the start of 2007 and mid-2008 – the first German law firm to do so. Published in autumn 2008, the results for the German market

CMS Hasche Sigle is one of the leading commercial law firms. More than 600 lawyers serve their clients in nine major German commercial centres as well as in Belgrade, Brussels, Moscow and Shanghai. CMS is the organisation of independent European law and tax firms of choice for organisations based in, or looking to move into, Europe. CMS provides a deep local understanding of legal, tax and business issues and delivers client-focused services through a joint strategy executed locally across 28 jurisdictions with 54 offices in Western and Central Europe and beyond. CMS was established in 1999 and today comprises nine CMS firms, employing over 2,400 lawyers and is headquartered in Frankfurt, Germany. The members of CMS are in association with The Levant Lawyers with offices in Beirut, Abu Dhabi, Dubai and Kuwait.

CMS offices and associated offices: **Amsterdam, Berlin, Brussels, London, Madrid, Paris, Rome, Vienna, Zurich**, Aberdeen, Algiers, Antwerp, Arnhem, Beijing, Belgrade, Bratislava, Bristol, Bucharest, Budapest, Buenos Aires, Casablanca, Cologne, Dresden, Duesseldorf, Edinburgh, Frankfurt, Hamburg, Kyiv, Leipzig, Ljubljana, Lyon, Marbella, Milan, Montevideo, Moscow, Munich, New York, Prague, Sao Paulo, Sarajevo, Seville, Shanghai, Sofia, Strasbourg, Stuttgart, Utrecht, Warsaw and Zagreb.

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attracted considerable interest in boardrooms across the country. The driving force behind the national study was Dr Thomas Meyding, head of the international CMS Corporate practice group and partner at CMS Hasche Sigle, who also led the first pan-European CMS M&A survey.

“As expected, the economic downturn is having a significant impact on the terms of M&A transactions in Europe,” said Meyding. “Not only are we witnessing a reduction in valuations and pricing, we’re also seeing sale agreements shifting risk increasingly away from buyers and onto sellers.”

CMS assembled a high-calibre, cross-border team to evaluate and categorise the key contract clauses from 494 transactions, thus providing clients in particular with valuable insights into the M&A situation across Europe.

Key findings of the CMS European M&A Survey 2009:

- A rise in the popularity of “earn-outs” (where the final purchase price depends on the future performance of the target business) as a purchase price adjustment mechanism, with earn-out provisions nearly doubling in the second half of 2008 compared to the first half.
- A rise in Material Adverse Changes (MAC) clauses (a right to rescind a transaction in the case of a material negative event), which were used almost twice as often in the second half of 2008 as in the first half.
- An increase in seller’s liability caps, which climbed during 2007 and 2008.
- Longer time periods for general warranties, as well a greater prevalence of equity capital warranties, over the survey period.

“It all points to a shift from a sellers’ to a buyers’ market,” says Meyding. “The specifics of the survey will be extremely useful for both buyers and sellers considering M&A

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transactions in the current climate – our data suggests that buyers will become even more risk adverse as the year progresses.”

Breaking down the data by regions within Europe highlights the following trends:

- Purchase price adjustment mechanisms are most commonly used in the UK.
- Less common use of escrow (or similar) accounts in German-speaking countries, but heavy use of these accounts in France.
- Arbitration is the main dispute resolution process in Central & Eastern Europe.

The survey also compared trends in Europe against similar data from the USA and Canada, revealing significant cultural and regulatory differences. Among other things, there is notably more use of Material Adverse Change clauses in the US than in Europe.

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