

Transaction Risk Insurance: Digression Concerning the U.K. Market

The U.K. market for transaction risk insurance is more mature than the ones in Continental Europe. Transaction risk insurance is widely available for unknown matters (breaches of SPA warranties discovered post completion) and known matters (specific issues identified through due diligence or disclosure).

There are up to ten insurers, amongst other Ace, Ambridge, AWAC, Beazley, Chartis, Chubb, Pembroke and Zurich, who - according to their websites - specialise in this fast growing niche market. Key products are

- Warranties and tax indemnities for unknown risks. Seller and buyer policies are available.
- Tax indemnity insurance for specific tax matters, i.e. tax positions of corporations or tax liability assumed as a result of corporate restructure.
- Litigation solutions/contingent liability: Solutions transferring or capping existing contingent liabilities
- Environmental insurance programs that can be used to deal with a variety of known and unknown environmental issues

Buyer beware: The Swiss domiciled buyer of a foreign insurance policy (i.e. issued on paper of insurers that are not admitted by the Swiss regulator FINMA) may need to know, that such policy is in violation of Swiss regulatory requirements. Having said that, the Swiss Federal Act on Stamp Duties provides that 5% IPT on such policy would be due and the Swiss party is responsible for it.

Provided the U.K.-based insurer is capable to have the U.K.-originating policy issued e.g. by its Swiss branch office, further challenges need to be considered: a Swiss place of jurisdiction and place of arbitration should be agreed upon. Also, Swiss legislation should be taken as the basis. And, while the policy may contain English terms and conditions, Swiss legal terms should expand the English terms and conditions, in order to increase

the clarity for a Swiss policy holder. Many terms are not known in Swiss insurance law and offer room for interpretation. English W&I-insurance contracts for example define the term "loss" in a different way than the German-language W&I-insurance define the term "Schaden" as explained in the context of Germany in 'Warranty & Indemnity Insurance' by Dr. Stefan Steinkühler and René Schnichels in Versicherungspraxis 6/2010. A legal survey of the English terms and conditions may require additional time expenditure due to the differing understanding of coverage.



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Note by the author: This paper should be read in conjunction with the German-language paper "Das M&A-Verhandlungsergebnis mit Risikotransfer optimieren"