DUAL SPECIALTY MERGERS & ACQUISITIONS INSURANCE

Warranty & Indemnity Insurance

Indemnifying loss resulting from a breach of warranty or tax deed/covenant in a Sale and Purchase Agreement

About DUAL

The DUAL Group is the world's largest international underwriting agency and Lloyd's largest international coverholder. Established in 1998, DUAL has built a reputation as a specialist underwriting group and the market of choice for intermediaries around the world.

Our success is built on creating and delivering the right products to the right people around the globe. We work hard to understand the needs of our clients' businesses to ensure they receive a consistently outstanding service that is both tailored to their requirements and superior in its delivery.

Warranty & Indemnity ("W&I") Insurance is a tailored insurance product from DUAL Specialty Mergers & Acquisitions Insurance. It covers breaches for unknown risks in representations and warranties given in the sale of a business. Sellers can cover themselves to prevent sale proceeds being tied-up in escrow accounts. Buyers can ensure the warranties have real value, even if the seller is unable to pay a warranty claim arising any time in the future.

The policy, whether seller-side or buyer-side, will indemnify the insured for a loss resulting from a breach of warranty or tax deed/covenant in a Sale and Purchase Agreement (SPA).

A seller-side policy covers the seller for its own innocent misrepresentations; a buyer-side policy covers the buyer against the seller's misrepresentations (innocent or otherwise). The buyer claims directly against the insurance policy and does not have to seek recourse against the seller.

Policy Form
The policy will be tailored in each case to offer broad coverage that matches the representations and warranties in the Sale and Purchase Agreement as closely as possible. Consequently, there will be little difference between what could be claimed against the seller pursuant to the SPA and what the seller (or the buyer as the case may be) can claim against the W&I policy.

Policy Period
The policy term will generally run from signing of the deal for the full survival periods of the warranties and indemnities in the SPA. The period for a buyer-side policy can extend the limitations prescribed in the SPA to meet the buyer's needs for up to seven years and for title warranties for up to ten years.

Retention
The insurer and insured will agree on the retention or excess, which is the uninsured amount of the loss to be borne by the insured. This is generally set at 1% of the value of the transaction. In real estate transactions the retention tends to be lower. It depends on the deal.

Exclusions
Although cover is tailored in each case to match the warranties specific to the transaction, some issues will be excluded on all policies. These will include matters set out in the disclosure letter or due diligence; withholding tax; transfer pricing; leakage, pension under-funding; and, on a seller-side policy, fraud by the seller.

Underwriting Considerations
DUAL Specialty M&A GmbH will consider offering insurance in respect of most mergers and acquisitions (M&A). The limit of liability under the policy will be agreed by the insurer and insured and will be driven by the transaction value. The premium will take into account such factors as the complexity of the transaction, the industry sector and geographical spread of the business as well as the quality of the transaction process and advisers involved. The timescale for obtaining W&I insurance will depend on the stage reached in the transaction, but will usually be available within two weeks from first enquiry.

Limit
Depending on transaction up to $/€50m aggregate.

Premium
Typically, between 1% to 2% of the cover purchased. Our minimum premium amounts to €75k/70 GBP.

Governing Law
Depending on the governing law of the underlying SPA, we are able to offer policies in almost all European countries.

Other M&A Products
DUAL also provides cover for known/discovered risks in the context of an M&A transaction. There are two special products:

Tax Opinion Policy
This policy covers a specific tax risk which was discovered during the due diligence process. If the outcome of this specific tax risk is most likely in the favour of the insured but, because of a tight time scale of the ongoing M&A process, it becomes an issue the policy can overcome this obstacle.

Litigation Buy-out
This policy covers the risk resulting from an ongoing litigation or a potential litigation which is about to start. The outcome of the litigation needs to be most likely in the favour of the insured. Most litigation takes years to come to a final decision by a court. Again, the policy helps to overcome this time issue and enables the M&A process to move forward.

Premium
These special policies are tailor–made and more work-intensive. The pricing for these types of policies is between 5-10% of the acquired limit.

Case Studies

Distinguishing a bid – A private equity institution was one of several bidders for a target in a competitive auction process. The institution took out a buyer-side insurance policy so that it could obtain a competitive advantage against the other bidders by offering an attractive purchase price but only requiring a low warranty cap from the seller. The policy provided the institution with a €30m limit policy above the seller's cap. This had the advantage of giving it sufficient recourse for breach of warranty and the seller greatly reduced exposure in relation to the warranties.

Clean exit – A private equity firm wanted to exit its investment in a technology company at an enterprise value of €500m. The buyer required substantive warranties amounting up to €50m, which the private equity owner was unable to give as it could not take on long-tailed financial liabilities during the divestment phase of its fund's life-cycle. Management of the technology company were prepared to warrant up to €10m (representing 50% of their €20m stake in the technology business). Placing part of the purchase funds into escrow to cover potential warranty claims would prevent a clean exit for the private equity firm and they were not prepared to consider a reduction in the consideration.

The buyer was able to purchase an insurance policy with a limit of €40m to meet the total €50m indemnity requirement. The policy was structured so that the buyer had to first pursue management up to their €10m limit. The SPA therefore provided for a warranty cap of €10m, backed by management's escrow and the private equity seller assumed no additional liability.

For more information on warranty & indemnity insurance or to order a policy, contact a member of our team:

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The DUAL Group is the specialist underwriting arm of the Hyperion Insurance Group, and is focused on underwriting business critical risks. DUAL has become a well established and respected leading underwriter with annual gross written premiums of over £500m and this year employing over 300 people in offices across Europe, Asia Pacific and the Americas.