

Warranty & Indemnity Insurance in Sino-Swiss M&A transactions

并购保证保险：也在中瑞并购交易中？

Cross-border M&A transactions are complex and often accompanied by high risks. The demand for risk management from the parties involved has risen. Thus, a new tool to better control the risks involved in cross-border M&A transactions has become more prevalent – the warranty and indemnity (W&I) insurance.

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跨境并购交易十分复杂，往往伴随高风险。交易方对风险管理的需求持续上升。由此，一项更好地控制跨境并购交易风险的新工具变得愈来愈盛行——并购保证保险（“W&I 保险”）。

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In Europe and North America, W&I insurance is well developed. According to a report on the W&I insurance market of Lockton, the world's largest privately held insurance brokerage firm, more than 25% of European corporate deals were using W&I insurance in 2016. Similarly, in the US the overall market penetration for W&I insurance is between 15% and 20%. As the demand for risk management in small transactions has kept growing, since 2017, there have also been insurers providing small cost insurance for SME deals.

In comparison, due to the fragmented and diverse market, the status quo of the use of W&I insurances in Asia Pacific is less homogenous. For example, W&I insurances have been widely used in Australasia, especially in the private equity field. In Hong Kong, Singapore, Japan and Korea, the use of W&I insurance has also grown significantly. The markets in China are maturing, especially under China's go out and one belt one road policies, and as a result the volume of cross-border transactions has been rising sharply. This has resulted in W&I insurance now receiving much more attention in China as a solution to mitigate transaction risks, even though the market is still in an early stage.

What is a W&I insurance?

W&I insurance is a specialist insurance product designed to cover losses from breaches of representations and warranties, or claims for indemnities in an M&A transaction. The insurance protection covers loss or liability arising from unknown or undisclosed matters and provides compensation for financial loss.

There are, in principle, two main kind of W&I insurances: taken out either by the seller (“sell-side policy”) or the buyer (“buy-side policy”). In the case of a sell-side policy, the buyer submits its claims against the seller, who then seeks indemnification from the insurer. Fundamentally, this is a third party liability insurance cover. In the case of a buy-side policy, the buyer submits its claims directly against the insurer. Fundamentally, this is an indemnity insurance cover. In the buy-side policy, the seller is normally not involved in the claim handling, as the recourse by the insurer against the seller is typically excluded, except for damage resulting from the willful misconduct and fraud of the seller. In practice, most policies are taken out as buy-side policies.

Why is a W&I insurance taken out?

Reasons for the seller

1. A clean and faster exit: W&I insurance gives to the seller the possibility of a faster exit from the transaction. Especially private equity funds prefer W&I insurances when they want to sell their investments as they can close the fund faster. Escrow arrangements can often be avoided.
2. Manageable limit on liability: W&I insurance enables sellers to limit their liability for the buyer's warranty losses at a far lower level than a well-advised buyer would typically agree.
3. Smoother negotiations: The comfort of a W&I insurance can speed up the negotiations regarding delicate matters such time and liability limits.

Reasons for the buyer

1. Scope of coverage: Provided warranties are sensibly negotiated,

在欧洲和北美，W&I 保险业务发达。由全球最大的私营保险经纪公司 Lockton 提供的 W&I 保险市场报告，2016 年超过 25% 的欧洲公司交易使用了 W&I 保险。同样，在美国，W&I 保险的整体市场渗透率介于 15% 到 20% 之间。由于小额交易的风险管理需求持续增长，自 2017 年以来，也有保险公司为中小企业交易提供小额成本保险。

相比之下，由于亚太地区 W&I 市场的分散且多样化，该地区使用 W&I 保险的现状并不那么同质化。譬如，在澳大拉西亚地区，W&I 保险已经得到广泛使用，尤其是在私募领域。在香港、新加坡、日本和韩国，W&I 保险的使用也已显著增长。如今中国市场正在走向成熟，特别是在中国“走出去”和“一带一路”政策的影响下，跨境交易量急剧增加。这使得 W&I 保险作为降低交易风险的解决方案在中国受到更多关注，即使其市场仍处于早期阶段。

什么是 W&I 保险？

W&I 保险是一种专业保险产品，旨在弥补违反陈述和保证条款所带来的损失，或并购交易中的赔偿索赔。保险保障因未知或未披露事项而产生的损失或责任，并为经济损失提供补偿。

原则上，有两种主要的 W&I 保险保单：“卖方保单”或“买方保单”。在卖方保单下，买方向卖方提出索赔，然后卖方向保险公司索赔。从根本上说，这是第三方责任险。在买方保单下，买方直接向保险公司提出索赔。从根本上说，这是赔偿保险。在买方保单下，卖方通常不参与索赔处理，并且排除了保险人对卖方的追索权，除非是因卖方的故意不当行为或欺诈造成的损害。实践中，绝大多数的保单是买方保单。

为何需要 W&I 保险？

卖方的理由

1. 干净、快捷的退出：W&I 保险为卖方提供了更快退出交易的可能性。特别是私募股权基金在想要出售投资时更喜欢 W&I 保险，因为他们可以更快地交割基金。此时托管协议通常可以被避免。
2. 可控的责任限制：W&I 保险使卖方能够将其对买方保证损失的责任限制在一个远低于理智买家通常会同意的水平。
3. 更顺畅的谈判：W&I 保险可以加快对一些微妙的事项的谈判速度，譬如有关时间和责任限制等事项。

买方的理由

1. 承保范围：只要是合理磋商的保证条款，买方通常可以在 W&I 保险下获得广泛的保障。
2. 承包期限：W&I 保险可能比卖方提供更长久的承保期限。

- a buyer will ordinarily obtain a broad and extensive warranty coverage under the W&I insurance.
2. Duration of coverage: The W&I insurance may offer a longer coverage than the seller would.
3. Deciding point in an auction: Often an auction seller only considers those buyers who offer to conclude a W&I insurance and bear the respective costs.
4. Reduce risk of an insolvent seller: Warranties are only as good as the liquidity of the person giving them. Hence, claiming under a policy eliminates the risk associated with a seller's solvency.

Does a W&I insurance make the due diligence process redundant?

The insurance does not cover the risks that could and should have been identified by a prudent insured. Concluding a buy-side W&I insurance does not release a buyer from making a thorough due diligence on the target. On the contrary: The insurance only covers representations and warranties on matters that have been verified by the buyer in the due diligence process. If the insurer believes that the insured's due diligence report is not comprehensive and specific enough on a particular matter, the coverage will be excluded or limited.

What is the typical process to conclude a buy-side W&I insurance policy?

The buyer retains the support of an insurance broker, which usually obtains 3 to 5 insurer non-binding indications ("NBI"), which set out the basic outlines of the coverage and insurance fees. Based on these NBI, the buyer selects one insurer to start the underwriting ("UW") process. During the UW process, the insurer conducts the risk assessment predominantly based on the due diligence reports of the buyer's advisors and documentation on the target company provided in the virtual data room. After the successful conclusion of the UW process, the insurer issues to the buyer a draft policy for the W&I insurance, which can normally be negotiated to a certain extend.

Conclusion

W&I insurance plays an increasingly important role in controlling the risks in M&A transactions. Whether a policy can be successfully issued greatly depends on the process of the transaction negotiations and the documentation produced by the buyer and seller. The transaction parties must take into account that with the insurer a further party is involved in the M&A process, which needs to be coordinated with accordingly. As Chinese parties are becoming more accustomed to W&I insurance, we also expect to encounter them more often in the future in Sino-Swiss M&A transactions.

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3. 拍卖时的决定因素：通常拍卖卖方只考虑那些提出签订 W&I 保险且承担相应费用的买家。
4. 降低破产卖方的风险：保证依赖于提供保证一方的偿付能力。因此，依照保单提出索赔可以消除与卖方偿付能力相关的风险。

W&I 保险是否可以豁免尽职调查？

保险从不对一个谨慎的被保险人能够并且应当识别的风险负责。缔结一份买方 W&I 保险并不能豁免买方对目标进行尽职调查。相反，保险仅对买方在尽职调查中已经核实的事项的陈述与保证条款进行承保。如果保险公司认为被保险人对特定事项的尽职调查报告不够全面和具体，那么承保范围将会被限制甚至是被排除。

缔结买方 W&I 保单的典型流程？

买方雇佣保险经纪人，保险经纪人通常会获得 3 至 5 家保险公司的非约束性报价 ("NBI")，其中列出了承保范围和保险费的基本概要。基于 NBI，买方选择一家保险公司开始承保流程。在承保流程进行中，保险公司主要根据买方顾问的尽职调查报告和虚拟数据室里提供的关于目标公司的文档进行风险评估。在承保流程顺利完成后，保险公司向买方发出 W&I 保险的初步保单，并通常可以在一定程度上再进行协商。

结束语

W&I 保险在控制并购交易风险方面扮演着日益重要的角色。是否能够成功出具保单，很大程度上取决于交易谈判的过程以及买卖双方制作的文件。交易方必须考虑到，保险公司将作为一方参与到并购流程中，需要与之相协调。随着中国交易方对 W&I 保险愈来愈熟悉，我们期待着在未来的中瑞并购交易活动中，W&I 保险能够被更频繁地使用。



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