

Q3 2020 GLOBAL Private Equity UPDATE

Insuring Deals Around the World: Variations of Representations & Warranties Insurance Across the United States, Europe and Asia

The chart below summarizes key provisions of Transactional Insurance across jurisdictions.

	Asia	Europe	U.S.
General Terms & Provisions			
Costs: typical premium (% of policy limit, assuming no excess layers)	1% – 2.0% ¹	0.5% – 1.5% ²	2.5% – 3.5%
Policy limit	Generally able to match liability cap under acquisition agreement (up to liability cap on sell-side policies and can top up beyond liability cap on buy-side policies); typically policies range from 10% to 30% of transaction value and limits of liability available up to approximately US\$1 billion (potentially lower for certain jurisdictions and sectors)	Generally 10% – 50% of enterprise value ('EV') (but can be up to 100% depending on the size of the EV. (For real estate transactions, the risk profile is lower and the % limit taken on average is reduced (between 10 and 15% of EV) in comparison with operational businesses (between 25 and 50%). Where the EV is greater than £1bn, the policy limit on average tends to be closer to 10% of EV. Ultimately the limit taken is down to the risk profile and analysis of the buyer)	Typically 10%-20% of enterprise value is insured (though up to 100% of enterprise value can be insurable through a tower of multiple carriers); up to approximately \$1.5 billion in total limits available (about \$30 million maximum for a single coverage layer)

¹ Pricing varies depending on jurisdiction and sector of the target business, governing law of the acquisition agreement and other factors. For example, in Australia, where the use of these insurance products has been widespread for many years, pricing will generally be on the lower end of this range as compared to the PRC, where such products are still relatively new and the number and amount of policies that can be written are limited. Within Asia (ex-Australia), pricing will also be closer to the lower end of this range for certain jurisdictions such as Hong Kong and Singapore, and for certain sectors such as real estate.

² As with Asia, pricing is entirely dependent on the parameters of the transaction. If it was a set of commercial properties in London it would be as cheap as 0.5%, whereas if it was a pharmaceutical company with operations right across Europe it will be closer to 1.4%. As a rule of thumb, the more operations and the wider the spread of jurisdictions in which the target company operates, the larger the risk and ultimately the premium.

	Asia	Europe	U.S.
Retention/ deductible (% of enterprise value)	Typically 0.5% – 1%, but can be lower	nil – 1% (again, if it's a straightforward real estate transaction the retention will be zero i.e. able to claim from the ground up. Competition in the UK insurance market has meant that insurers are now regularly providing 0.5% of EV as standard with 'tipping' retentions i.e. 0.5% 'tipping' to 0.25%)	Typically 0.75% – 1%; insured typically negotiates for a "drop-down" retention of about 0.5% after 12 months
Tipping retention	Available and becoming more common	Common	Not available
Policy period	Generally able to mirror survival periods in acquisition agreement, with ability to extend to meet buyer requirement; 3 years for general warranties; up to 7 years for tax and fundamental warranties	Standard position is 2 years for general warranties (although several insurers now covering for 3 years for no additional premium) and 7 years for tax and fundamental warranties.	Typically 3 years for general reps and 6 years for fundamental and tax reps (although 6 years for all reps may be available for extra premium)
Losses covered	Generally able to match acquisition agreement definition, including certain types of consequential damages	Bespoke to each deal but intended to be "back-to-back" with the acquisition agreement. Most carriers will offer to synthetically include an indemnity basis of damages for an additional premium (typically 10-15%).	(i) "Back-to-back" with acquisition agreement in "low-indemnity" deal, including vis-à-vis materiality scrape, or (ii) broad, synthetic definition included in policy in "no-indemnity" deal
Claim <i>de minimis</i>	Typically 0.1% of enterprise value, but can be lower ³	0.1% of the EV (insurers will insist this matches the materiality threshold of the buyer's due diligence reports)	Very atypical
Full coverage of seller liability	Yes, able to match policy coverage with scope of seller's claims/indemnity liability under acquisition agreement – no "skin in the game" requirement for seller	Nil recourse structures have become increasingly commonplace and insurers are typically comfortable with such structures as long as there is evidence of an arms' length negotiation of the scope of warranties being sought and a thorough due diligence and disclosure process.	U.S. insurers will cover "no-indemnity" deals (with no seller "skin in the game", except in the case of fraud), but the premium may be higher than in a "low-indemnity" context. Buyer will still need solution to cover insurance retention for fundamental reps (e.g., limited seller liability)
Disclosure	Contents of the data room and due diligence reports typically	Anything deemed disclosed under purchase agreement	Neither diligence reports nor data room contents are

³ This is usually due diligence-driven – insurers can get comfortable with a lower *de minimis* if the due diligence is well conducted, and it would not necessarily result in higher pricing.

	Asia	Europe	U.S.
	deemed disclosed against reps and warranties, and therefore not covered by the policy	arrangement (i.e. data room and general disclosure letter). To the extent that the data room is not deemed disclosed under the purchase agreement, most insurers will mirror this for policy purposes for no additional premium. If an insurer is required to dis-apply the data room 'synthetically', an additional premium will apply (10-15%). Save for one insurer, diligence reports will be deemed disclosed but most insurers will, subject to review of the diligence, offer to remove this requirement on the condition that the deal team members confirm that they have read and understood the contents of the due diligence reports and are not aware of any breach of warranty.	deemed disclosed. Policy references reps and warranties in the transaction agreement and insurer may propose deeming additional matters disclosed.
Tax indemnity (for pre-closing tax liabilities)	Generally able to include in coverage, subject to retention/deductible; does not increase premium; for certain known tax issues separate tax insurance may be available (depending on jurisdiction)	Generally able to include in coverage, subject to retention/deductible. Most insurers will offer a synthetic tax covenant with a nil cap liability for an additional premium (10-15%).	Generally able to include in coverage, subject to retention/deductible and carve-outs for accrued/reserved and disclosed taxes; generally does not materially increase premium
Exclusions and Partial/Qualified Coverage of Representations and Warranties⁴			
Known breaches	Breaches actually known (by buyer in buy-side policy and seller in sell-side policy) at time of policy commencement (including matters disclosed in transaction documents, disclosure letter and diligence reports)	Matters of which the insured has actual knowledge and would give rise to a claim under the warranties at signing and completion	Breaches of which any "deal team member" (limited group of people) has actual knowledge prior to inception (typically signing) and closing
Covenants	Breaches of covenants typically excluded	Exclusion for breaches of covenants	Exclusion for breaches of covenants (though losses from such breaches may erode retention in some policies)

⁴ Partial or qualified coverage of warranties (and the exclusion of many warranties from coverage entirely) is the norm in Asia and Europe and policies in such jurisdictions typically include schedules listing out each warranty and identifying whether it is partially or fully covered or excluded. Partial/qualified coverage of reps is less a formalized part of the process (e.g., no schedule of reps) and more often successfully resisted by insureds in the U.S. market, although carriers regularly pare back "above-market" buyer-favorable reps on a case-by-case basis. The items covered in this section of the table are not exhaustive.

	Asia	Europe	U.S.
Post-closing adjustments	Any post-closing adjustments to purchase price are excluded from coverage	Any post-closing adjustments to purchase price are excluded from coverage	Any post-closing adjustments to purchase price are excluded from coverage
Prohibited coverage	Civil/criminal fines or penalties prohibited by law to be insured	Fines and penalties where insurance is contrary to public policy; tax “avoidance”	Punitive or exemplary damages and criminal or civil fines or penalties, with certain exceptions; related defense costs <i>not</i> excluded
Multiplied damages	Typically not excluded	Normally excluded	Excluded in low-indemnity deal unless acquisition agreement is silent as to availability of such damages
Secondary tax liabilities	Tax liabilities that are primarily liabilities of parties that are not members of target group or that are not referable to income/profits of target group; taxes on indirect transfers (e.g., Circular 698/Bulletin 7 in the PRC) also excluded	Secondary tax liabilities excluded	Typically covered, unless a specific issue has been identified (e.g., prior membership in another consolidated group)
Transfer pricing	Application of transfer pricing legislation, or inability of target group to substantiate transfer pricing policy to tax authority	Application of transfer pricing legislation, or inability of target group to substantiate transfer pricing policy to tax authority excluded	Transfer pricing matters typically excluded in transactions in which target company has material international operations
Net operating losses	Availability of NOLs typically excluded	Amount, availability or existence of NOLs or other tax attributes typically excluded. Depending on the facts a separate contingent tax policy can be arranged.	Amount, availability or existence of NOLs or other tax attributes typically excluded, depending on facts
Pension/social security underfunding	Funding deficits and other liabilities imposed by regulators excluded	Funding deficits and other liabilities imposed by pension regulators excluded	Monetary amount by which any unfunded or underfunded benefit plans are unfunded/underfunded typically excluded
Financial forecasts	Estimates, projections, forward looking statements or financial forecasts excluded	Forward looking statements excluded	Forward looking statements excluded
Specified environmental matters	Specifically identified environmental matters excluded	All environmental claims excluded	Asbestos or Polychlorinated Biphenyls excluded; other environmental matters only excluded on case-by-case basis

	Asia	Europe	U.S.
FCPA, anti-bribery and other similar laws and related investigations and proceedings	Typically excluded	Coverage is now dependent on the jurisdiction of the operations. Typically such matters will be covered for the UK, US, Canada and parts of Europe. Higher risk jurisdictions will be excluded as standard.	Typically excluded, depending on context (e.g., FCPA and similar laws for target companies with international operations in high-risk jurisdictions)
Seller fraud	Excluded in sell-side policies (i.e., losses relating to seller's own fraud not covered), but insured in buy-side policy may recover from insurer if a breach involving seller fraud, and insurer may subrogate against seller after making payment to insured	Excluded in sell-side policies, but insured in buy-side policy may recover from insurer if a breach involving seller fraud, and insurer may subrogate against seller after making payment to insured	Excluded in sell-side policies, but insured in buy-side policy may recover from insurer for a breach involving seller fraud, and insurer may subrogate against seller after making payment to insured
Product liability matters	Risks that would usually be covered by a product liability insurance policy typically excluded	Market specific, but error and omission type claims typically excluded	Product liability, warranty and recall, as well as personal injury may be excluded (clean claims history and reserve for product liability on balance sheet may allow for coverage from certain carriers)
Partial/qualified coverage of "10b-5" and other reps	Coverage for "true, accurate and complete" data room and disclosure materials is available from most insurers; disclosure schedule is typically carved out	N/A	Insurers will typically not cover a 10b-5 rep as they may view it as an overbroad catch-all; insurers generally will not cover solvency reps or reps regarding the collectability of accounts receivable
Other Matters			
Subrogation (buy-side policy)	Yes, but limited to claims of fraud and willful concealment made against seller (in some cases limited to fraud only)	Insurers forgo right to subrogate against sellers under buy-side policies, except in the case of fraud	Insurers waive right to subrogate against sellers under buy-side policies except in case of fraud and insureds typically negotiate to limit insurer from subrogating against insureds or their affiliates and counsel, or (to some extent) customers, clients or suppliers of such parties
Tax treatment of insurance proceeds (in particular, tax)	Varies by jurisdiction	Varies by jurisdiction	Likely taxable in case of a buy-side policy, as not treated as purchase price adjustment (unlike indemnity)



	Asia	Europe	U.S.
treatment with respect to buyer)			payment); if insured is the entity suffering the loss or is part of a consolidated group with such entity, tax treatment may be mitigated by offsetting deduction arising from underlying loss (although no deduction for U.S. federal income tax losses), and some insurers may offer a tax gross-up for additional premium
Separate insurance coverage for known matters (e.g., litigation, tax, environmental and other)	Coverage for new known breaches may be available, depending on facts; separate coverage for other known matters may also be available, again depending on facts (tax insurance is a growing product)	Known breaches excluded under policy; separate coverage available, depending on facts. Given the downturn in M&A in Europe during the Covid pandemic the more innovative insurers are now covering 'known' breaches that may ordinarily have fallen out of scope previously. As long as there is a legal analysis on the 'known risk' they will look to provide coverage. Pricing will depend on the likelihood of crystallization of the risk but rates typically start at 2%.	Known breaches (and often, known issues, even if not breaches) excluded under policy; separate coverage may be available, depending on facts

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If you would like more information about the contents of this issue, or about Weil's Private Equity practice, please contact your relationship partner at Weil, or one of the authors below:

Editors:

Marco Compagnoni (London)	View Bio	marco.compagnoni@weil.com	+44 20 7903 1547
Kevin J. Sullivan (Boston)	View Bio	kevin.sullivan@weil.com	+1 617 772 8348
Doug Warner (New York)	View Bio	doug.warner@weil.com	+1 212 310 8751

Contributing Authors:

James Feng (Hong Kong)	View Bio	james.feng@weil.com	+852 3476 9126
Ariel Fliman (New York)	View Bio	ariel.fliman@weil.com	+1 212 310 8781
Max Oppenheimer (London)	View Bio	max.oppenheimer@weil.com	+44 20 7903 1132

RECENT WEIL REPRESENTATIONS

Advent International Acquisition of Aareon \$304,651,000 Pending	Advent International Culligan's acquisition AQUAVENTURE HOLDINGS \$1,100,000,000 March 2020	Advent International BioDuro's acquisition Sundia Undisclosed September 2020	Advent International Cobham Limited's sale of COBHAM Undisclosed September 2020	Advent International Sovos Brands acquisition of SOVOS BRANDS Undisclosed Pending	American Securities Acquisition of AMERICAN SECURITIES \$825,000,000 Pending	Apax Partners Acquisition of odigo Undisclosed Pending
Apax Partners Stake acquisition of CRYSTAL Undisclosed Pending	Aquiline Capital Partners Acquisition of ontelius Undisclosed January 2020	Ardian Santé Cie Group's acquisition of APOSAN sicher.gut.versorgt. Undisclosed Pending	Ardian Consortium's stake acquisition of INWIT June 2020 Pending	Aterian Investment Partners Pioneer's acquisition of PIONEER Undisclosed February 2020	Berkshire Partners Acquisition of CrossFit Undisclosed August 2020	bd-capital Acquisition of SYMPROVE Undisclosed July 2020
Berkshire Partners Acquisition of VET STRATEGY Undisclosed July 2020	The Blackstone Group Stake acquisition of WYOMING Undisclosed October 2020	The Blackstone Group Sale of vivint.Solar \$3,200,000,000 Pending	Brookfield Asset Management Stake acquisition of OAKTREE \$4,800,000,000 September 2019	Centerbridge Partners KIK Custom Products' sale of KIK Personal Care business Undisclosed August 2020	Cornell Capital KDC/ONE's acquisition of KDC/ONE Undisclosed April 2020	Cornell Capital Merger of kdc/one Undisclosed January 2020
CPP Investments Majority acquisition of lytx Undisclosed January 2020	CPP Investments Investment round in WYOMING \$2,250,000,000 March 2020	CPP Investments Merger of Ultimate KRONOS \$22,000,000,000 April 2020	CPP Investments Consortium's sale REFINITIV REFINITIV \$27,000,000,000 Pending	CVC Capital Partners Sale of ELSAN Undisclosed Pending	EQT Infrastructure Sale of SYNAGRO Undisclosed Pending	Eurazeo Patrimoine C2S' sale of C2S Undisclosed Pending
Genstar Capital Acquisition of ORION Undisclosed September 2020	Genstar Capital Sale of PALOMAR Undisclosed May 2020	Genstar Capital Sale of PRETIUM Undisclosed January 2020	GI Partners Acquisition of vast \$535,000,000 Pending	Gores Holdings III, Inc. Business combination with PAE \$1,550,000,000 February 2020	Gores Holdings IV, Inc. Business combination with UWM \$3,400,000,000 Pending	Gores Metropolis, Inc. Merger with LUMINAR \$3,400,000,000 Pending
Guidepost Growth Equity Sale of SENIORLINK \$400,000,000 Pending	HgCapital LLP Sale of The Citation Group Undisclosed August 2020	HLD Associés Stake acquisition of Technical Services Group Undisclosed Pending	HLD Europe Take-private of mva \$200,416,000 Pending	J.C. Flowers Jefferson's acquisition of Canastream Holdings Ltd. Undisclosed March 2020	Kainos Capital Olde Thompson's acquisition of Olde Thompson's Undisclosed July 2020	Lee Equity Partners Stake acquisition of SIMPLICITY GROUP Undisclosed Pending
Mudrick Capital's SPAC Acquisition of HYCROFT \$537,000,000 May 2020	Oak Hill Capital Partners Sale of TriPlus Undisclosed September 2020	OMERS Oxford Properties Group capital raise of Lineage \$1,600,000,000 September 2020	Palero Capital Acquisition of SANIMED Undisclosed March 2020	Providence Equity PIPE investment in OUTFRONT \$400,000,000 April 2020	Providence Equity Sale of Global Education Undisclosed April 2020	Providence Equity Take-private of MASMOVIL \$3,300,000,000 Pending
Providence Equity Sale of ZeniMax \$7,500,000 Pending	Providence Strategic Growth Stake acquisition of Jobcase Undisclosed July 2020	Providence Strategic Growth Investment in Wagepoint Undisclosed September 2020	Providence Strategic Growth Imaweb/ IDF Group's acquisition of TMS Undisclosed September 2020	Providence Strategic Growth ThreatConnect's acquisition of NEHEMIAH SECURITY Undisclosed August 2020	Snow Phipps Group Sale of Kele Undisclosed February 2020	Snow Phipps Group Brook & Whittle's acquisition of Brook & Whittle Undisclosed June 2020
Sumeru Equity Partners Acquisition of socialchorus \$100,000,000 July 2020	Susquehanna Growth Equity and Accel Partners Sale of Xebialabs Undisclosed January 2020	TCV Sale of Silver Peak \$925,000,000 Pending	Thomas H. Lee Partners Stake sale of JUVARE Undisclosed July 2020	Thompson Street Capital Growth investment Thompson Street Capital Undisclosed February 2020	TPG Global Investment in TRUMID \$200,000,000 July 2020	Voodoo Stake sale of Voodoo Undisclosed Pending

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BY THE NUMBERS

5

Years

1k+

Deals

More Than

\$700B

In Total Deal
Value

Over

300

Sponsors

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Tier 1

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