



Slaying Uncertainty

Assessing the contribution of insurance to the M&A process

Virtual Round Table Series
M&A Working Group 2018

Slaying Uncertainty

Assessing the contribution of insurance to the M&A process

In the Anglo Saxon legal world, the idea of insuring against warranties and indemnities in an acquisition or divestiture is not new, although its frequent use as an integral part of deal structuring has only become common in recent years.

Thanks to high premiums and few insurance providers, even in the UK and USA, M&A insurance was, for many years, reserved for the bigger deals. It is, however, now moving into the mid-market, as more products become available and premiums fall.

Executives involved in acquisitions are learning to appreciate its usefulness in offering certainty on both the buy-side and sell-side of a transaction, providing a safety net for risks that due diligence may have failed to identify and even for known risks where outcomes cannot be quantified.

The insurance can take many forms, from tax liability insurance designed to cover a potential, but uncertain, claim from a tax authority, to litigation buyout insurance that ring-fences contingent liabilities.

By far the most common form of M&A insurance, though, is Representations and Warranties (R&W) insurance, or Warranty and Indemnity (W&I) insurance, as it is also known. This insurance is designed to cover breaches in representations and warranties that are provided by sellers in a transaction and can be taken out by either buyer or seller for a variety of reasons.

It can be leveraged by sellers (e.g. private equity firms) to allow a clean exit from a sale enabling the PE firm to distribute the proceeds to its members, rather than retaining a portion to meet contingent liabilities down the line. It can also be offered as part of the sale package to provide greater certainty, expand the pool of potential buyers and boost the sale price.

Buyers will often opt for W&I insurance if they are uncomfortable with the quality of the financial backing behind the warranties and indemnities provided by the seller.

Figures from American International Group, Inc., (AIG) show that the global market for M&A insurance tripled between 2013 and 2017, with the number of insurers offering cover increasing from 11 to 33 and the number of policies issued rising from 1,000 in 2013 to 3,100 in 2017.

The UK is one of the most mature markets for M&A insurance where, according to Paragon Insurance Brokers, 28 per cent of M&A deals done in 2017, employed W&I insurance. For North America that figure was 13.6 per cent and in Europe only 12.6 per cent. Given the vast size of the North American M&A market the smaller percentage nevertheless represents nearly half of all policies issued globally. Even in North America, W&I insurance is yet to have a significant impact on the mid-market, where the potential for growth in sale of W&I policies is therefore enormous.

In the UK, there were 758 policies sold in 2017 (25 per cent of the global total). Europe, being a less mature market in terms of use of these products, will be a key frontier for the growth of M&A insurance during the coming years.

Testimony from IR Global's US and German advisors, in the piece you are about to read, suggests that AIG and Paragon's numbers are already outdated. Michael Roberts in Chicago reports that seven of the last 10 deals he did carried R&W insurance, while Urs Breitsprecher in Dusseldorf reports that one fifth (20 per cent) of all German deals now carry R&W insurance.

Our Italian member Lorenzo Bacciardi tells us that 7 per cent of acquisitions valued below 25 million used M&A insurance in 2017, doubling from a year earlier. Our Belgian member Steven De Schrijver says that, while growing, the figure in Belgium is a bit lower still, with between 3 and 5 per cent of transactions using M&A insurance.

Our panel of experts from across Europe and the USA have identified a clear trend for the increased use of M&A insurance in smaller transactions, linked to increasing availability of products, lower premiums and the growing complexity of mid-market deals, many of which have complicating factors such as cross-border elements or technological applications.

R&W insurance offers a way of mitigating the risks associated with indemnification against complex areas such as tax, compliance, intellectual property and environmental risk.

Provided the claims record remains benign, the number of providers high and premium rates low, we expect to see mid-market executives in a variety of different industries make the decision that the cost of M&A insurance premiums is well worth it to ensure a smoother transaction process.



UNITED KINGDOM

Tom Wheeler

Managing Director, IR Global

☎ 44 1675 443396
✉ thomas@irglobal.com

The View from IR

Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.



BELGIUM

Steven De Schrijver

Partner, Astrea

☎ 32 2 215 97 58
✉ sds@astrealaw.be

Steven de Schrijver is a partner in Astrea's corporate and M&A department. He has 25 years' experience of advising Belgian and foreign companies on mergers and acquisitions, with a strong focus and unique experience in technology-related transactions. He offers maximum availability and responsiveness while maintaining a personalised and business-orientated approach. He serves a principally international clientele with an outstanding price proposition and the added value of a personalised service. Whatever the issue is, Steven's priority is to provide his clients with pragmatic solutions which enable them to achieve their strategic business goals. His goal is always to provide legible and practical advice.

Steven has also been involved in several national and cross-border transactions in the IT, media and telecom sectors.

Steven is the Belgian member of EuroITCounsel. He is also a board member of ITechLaw and IFCLA. In 2012, 2014 and 2017, he was awarded the Global Information Technology Lawyer of the Year award by Who's Who Legal, and in 2012 he received the ILO Client Choice Award in the corporate law category for Belgium.



GERMANY

Urs Breitsprecher

Partner, AQUAN

☎ 49 211 97 26 54 10
✉ breitsprecher@AQUAN.com

Urs is managing partner at AQUAN Rechtsanwalte, forming the business after 15 years of legal practice in Dusseldorf.

He has more than a decade of experience working on complex M&A transactions, and, due to his dual qualification as a German lawyer (Rechtsanwalt) and English Solicitor, he is specialised in cross-border deals. He also has considerable expertise of company and group restructurings, and their tax consequences as well as in insolvency matters.

Among his domestic and international clients are family-owned businesses, private equity firms, and family offices. He also advises foreign companies on inbound investments into Germany. He became a Certified M&A advisor in Chicago in 2016.

Urs is married and the father of two children. In his spare time, he likes to cook, surf and scuba dive. He plays golf when time allows it, and also visits the opera. Urs is an active member of the WWF (World Wide Fund for Nature).



ITALY

Lorenzo Bacciardi

Partner, Bacciardi and Partners

☎ 39 07213 71139
✉ lorenzo@bacciardistudiolegale.it

Lorenzo Bacciardi heads the Cross Borders Corporate Law Department at Bacciardi and Partners, specialising predominantly in mergers and acquisitions, joint ventures, real estate law, international assignment of employees, strategic international tax planning, law of trusts as well as will and estate planning.

He is particularly experienced in corporate and tax issues related to outbound investments made by Italian clients abroad and to inbound investments made by foreign clients in Italy.

Lorenzo has been a guest speaker in a number of important seminars and conferences both in Italy and overseas, presenting on his areas of expertise. In November 2010, he was elected Chairman of the Eurojuris International Business Group, an office he held until October 2014.

Lorenzo holds a Master of Laws (LL.M.) in International Corporate Transactions and International Taxation from the Temple University James E. Beasley School of Law in Philadelphia, USA.



ENGLAND

Simon Rous

Partner, Ashfords LLP

☎ 44 207 544 2448
✉ s.rous@ashfords.co.uk

Simon Rous is a partner in Ashfords LLP and head of the firm's London office. He is a trusted adviser to public companies, start-up businesses, non-UK companies and venture capital investors. Simon specialises in mergers, acquisitions and disposals, joint ventures, MBIs/MBOs, venture capital and shareholding structures.

He has particular experience in international and cross-border deals and advises inward investors on doing business in the UK. He is author of numerous articles including the maintained article in PLC "Structuring and managing cross-border private acquisitions."

Simon's home life is divided between London and England's Westcountry.



USA – ILLINOIS

Michael Roberts

Partner, Roberts McGivney
Zagotta LLC

📞 312 251 2295

✉ mroberts@rmczlaw.com

Michael S. Roberts has extensive experience in corporate transactions, mergers and acquisitions, private equity and venture capital financing transactions, on both a national and international level. He has successfully negotiated completions in India, Asia, South America, Europe, Australia and Africa.

Michael is a frequent guest speaker on topics involving corporate transactions and mergers and acquisitions, and was a contributing author to the book titled “Middle Market M&A: Handbook for Investment Banking and Business Consulting” published by Wiley Finance.

He is a principal and founder of Roberts McGivney Zagotta LLC and is also a Certified Public Accountant.



NETHERLANDS

Paul Bavelaar

Managing Partner, Bavelaar
Attorneys at Law

📞 31 20 320 1234

✉ paul.bavelaar@bavelaar.nl

In cooperation with Bart Sujecki of Bavelaar, Attorneys at Law.

Paul Bavelaar was admitted to the Dutch bar in 1993. From 1993 to 2000 he worked as an attorney-at-law with Stibbe law firm. Since then he has been a partner at KPMG law and managing partner at Van Mens & Wisselink in Amsterdam, before setting up his own law firm, Bavelaar Attorneys.

Paul advises Dutch and foreign clients on a variety of subjects within the fields of company law, corporate law and real estate law. He has assisted clients in numerous company takeover transactions, mergers, restructurings and real estate transactions. As a result, he has also been involved in many negotiations, frequently involving the drafting and/ or review of contracts.

Paul has gained a profound knowledge of the law and a keen sense of business, which enables him to understand his clients' needs. Furthermore, he has represented a significant number of German real estate funds with investments in Dutch real estate.

What are the major reasons that buyers and sellers might take out M&A Insurance in your jurisdiction in your experience?

USA – Michael Roberts (MR) Representations and Warranties (R&W) insurance¹ is very popular in US M&A transactions; it was used in approximately half of the last 10 deals I did.

Both buyers and sellers have reasons for getting this insurance, because it helps to solve one of the biggest issues in any transaction, and that is who stands behind the indemnification for breaches of representations and warranties. Insurance gives a buyer more confidence and the seller has less risk in the deal, so it benefits both buyers and sellers. What you are negotiating is who pays for it, and I've had transactions where it has been paid for by either side, or the costs have been split.

It is a very efficient way to get a transaction done in the US and I expect to see it in the majority of my deals now.

Germany – Urs Breitsprecher (UB) In Germany it is not so well established, but it is being used more and more. Statistics show that last year around one fifth of all M&A transactions in Germany had Warranty and Indemnity (W&I) insurance¹. It is mainly used on bigger deals, because fees are quite high, usually 2 per cent of transaction value with a minimum of 50,000 euros. This means that insurance doesn't currently make sense on any deal below 5 million euros.

It becomes very useful in cross-border deals where trust is a bigger issue. Insuring the deal risk means the buyer doesn't have to worry about getting paid, or set up escrow accounts to withhold

part of the price as a guarantee. For the seller, it also means a clean exit, as the insurance indemnifies against all the representations and warranties. The seller can spend all the money received on the sale for new investments, which is particularly useful for private equity sellers.

Belgium – Steven De Schrijver (SDS) In Belgium we see three main forms of M&A insurance; warranties and indemnities (W&I) insurance, tax liability insurance and litigation buyout insurance.

W&I insurance covers breaches in representations and warranties given as part of the sale of a business. Sellers can cover themselves to prevent sales proceeds being tied up in escrow accounts or other guarantee mechanisms.

Buyers can ensure the warranties have real value, even if the seller is unable to pay a warranty claim which arises in the future. It enables the buyer to obtain (additional) protection from an insurance company (rather than from the seller).

It can be useful to foresee tax liability insurance that can reduce or eliminate a loss arising from a challenge by the tax authorities of a taxpayer's tax treatment of a transaction or investment.

A taxpayer maybe able to proceed with a transaction or investment while there is uncertainty in the application of tax laws, or when he does not have enough time to obtain a tax ruling in advance.

Litigation buyout insurance ring-fences contingent liabilities and legacy management issues in a company that need to be transferred in case of an acquisition.

UK – Simon Rous (SR) Our UK clients regularly take out insurance for both known and unknown risk in M&A transactions. I started to use it on selected deals in 1999, when the concept was already well understood.

Unknown risks, such as warranty breaches, are generally covered by W&I insurance, while known risks can be issues such as tax liabilities, contingent litigation, or regulatory and environmental issues in possible need of resolution.

From a buyer's perspective, taking insurance can supplement and extend any existing warranty protection, or help to distinguish and enhance their bid position. It may also protect ongoing management relationships, bolster their entry into unfamiliar jurisdictions or industries or ease concern over the seller's financial covenant strength. It also a best practice approach in the UK from a corporate governance and risk management angle to at least consider W&I insurance.

On the sell-side, it is worth taking insurance if you are unwilling or unable to provide financial recourse or if you require a clean exit from the deal. Insurance offers the possibility of early distribution of proceeds, a possible removal of the requirement for an escrow account and maximisation of the transaction value due to a meaningful warranty cap.

1 Representations and Warranties (R&W) and Warranty and Indemnity (W&I) Insurance are the same thing.



Lorenzo Bacciardi pictured at the 2018 IR 'On the Road' Conference in Toronto

Italy – Lorenzo Bacciardi (LB) M&A Insurance has taken a while to be adopted in Italy, primarily because it is a practice that comes from common law. As a civil law country, it took a while to be adopted in Italy, but statistics show that the use of W&I insurance cover is increasing quite substantially both in domestic and in cross-border transactions. In 2017, there were almost double the number of transactions that relied on the use of this kind of insurance, as compared to the year before.

In the past, we have mainly been involved in transactions that explored the possibility of insuring the seller with this kind of insurance, but we often found that it was prohibitively expensive, compared to the overall value of the transaction. Recently we were discussing a premium that was

in the region of 250-300,000 Euros, which was considered too high by our client.

Notwithstanding that, premium prices have been dropping, and the confidence in this legal solution has increased. We see this more and more and we always consult with the client and suggest they consider taking insurance cover in their transactions. Most of the time, we see insurance cover being taken on because the seller does not want to compromise on price or have a sum set aside in escrow. A contingent liability on the price, that may be claimed back by the buyer at a later date, is unsettling, so the insurance indemnity works well in terms of maximising the transaction value and the outcome for the seller.

The Netherlands – Bart Sujecki (BS) I haven't had experience of insurance in any M&A transactions I have undertaken. My research does however show it is increasing in The Netherlands.

The idea behind such insurance is generally to maximise uplift in value and we have found that it plays an important role for those investing in start-ups in The Netherlands. The lower the value of the transaction, the less investment is being made into the deal, so the amount of due diligence undertaken is also lower. In such cases, the partners will take out insurance, rather than pay for more analysis.

Warranties and indemnities insurance is highly tailored in The Netherlands. We have insurance that covers the seller only, and other insurance that only covers the buyer. The reason people don't

use them so much yet, is that they are quite expensive. Another thing might be a lack of knowledge that such insurance exists.

The Netherlands – Paul Bavelaar (PB)
It does seem that it's a bigger issue in transactions with an American buyer and seller. I haven't yet seen a transaction between two European parties where insurance was discussed.

Germany – UB It's becoming more and more relevant in Europe. The first example I looked up was 10 years ago, in a big deal by BASF worth 170 million euros. It started with the bigger transactions, but is moving into the mid-market now that fees are falling. In the BASF deal it was an English insurer who covered the deal, which was complicated, but now there are lots of international insurers offering German products, so it is becoming more mainstream.

As we said earlier, one fifth of German transactions have it. Everyone is saying it is used more and more and this is also my experience, since we discuss the possibility of insurance quite often. In many cases it is not taken though, because only unknown risks are covered.

USA – MR I think it is correct to say insurance is more prevalent in deals where there is a US buyer. Right now I am representing a company in Australia which is being bought by a US public company. My client in Australia was not familiar with R&W insurance, but we are using it in this transaction because of the sophistication of the buyer and the size of the law firm they are using (one of the largest in the US) who use R&W insurance a lot. This familiarity meant insurance was easy to implement. If those weren't the parties, I'm not sure it would have been used.

Italy – LB In Europe, we have not seen as much of this practice yet as we see in the UK or the US. It does also depend on the type and size of the deal you get involved in.

For example, a deal between 20-30 million euros in value becomes a deal that should seriously consider such an option. In lower mid-cap transactions, you don't see insurance at all, but if you start working on upper mid-cap transactions then, even in Italy, you see that we are almost aligned to UK and US professionals in terms of technicality, analysis and process.

Netherlands – BS I looked up a report from ING which shows that most W&I insurance is taken for deals in the mid-sized segment of the market, around 100 million euros in value; more than on deals above 500 million euros. It's only up to a certain size that parties undertake such insurance, due to the fact that the deal is not big enough to spend significant amounts on the due diligence required to eliminate risk. They want to cover the risk by using insurance instead.

Germany – UB My insurance agent believes that any deal above five million euros is worth insuring (five million is the threshold for their involvement).

In cross-border transactions where trust is harder to gain, we often see insurance used. We had a real estate transaction recently with environmental issues that benefited from insurance.

Belgium – SDS Going back to W&I insurance, we find that passive shareholders, including ultimate controlling shareholders, warrantors, or mere financial shareholders who are not involved in the day-to-day management of the target sometimes use seller-side W&I insurances to cover their liabilities. For example, in the case of a private equity firm faced with a secondary buy-out, a clean exit without limiting the set of warranties offered to a prospective buyer would be possible with W&I insurance.

It can also be particularly interesting for a closed-end real investment fund that wishes to distribute the proceeds of a sale without having to retain part of the

purchase price against potential claims by the purchaser) or sellers who require (the entire amount of) the proceeds to pay back existing debts.

Buyer-side W&I policies are actually more common in Belgian M&A transactions though, as they offer advantages to both the seller and the buyer.

Buyer-side W&I insurances are also sometimes used in competitive private auction processes. In order to gain a competitive advantage, a bidder may offer the seller an opportunity to lower or eliminate its liability under the warranties to be given in the SPA. This may distinguish the bid from competing bids as an effective insurance policy will enable the bidder to seek less indemnification from the seller under the SPA.

Another situation in which buyer-side W&I insurances are used is in obtaining cover under the warranties in the SPA for a longer duration than the seller is willing to accept.

I was involved in negotiations between a North American technology fund and a Belgian software company. The shareholders were partly management and partly financial investors. The financial investors did not want to accept the normal IP indemnities that the North American technology fund would normally require (e.g. cap, duration, escrow). The parties negotiated for two years and buyer-side W&I insurance was ultimately the solution to broker a deal.

SESSION TWO - CLAIMS EXPERIENCE

What is your experience of the most common insurance claims on historic deals, or transactions where insurance would have helped the M&A process? Examples please.

England – SR As we have already seen in the data from Paragon, the UK was responsible for 25 per cent of the global M&A insurance policies taken out in 2017. This translates to insurance being present on 28 per cent of all M&A deals transacted.

In the UK, W&I insurance costs between 0.6 – 1.5 per cent of total enterprise value and is generally most expensive in financial services. The data suggests that insurance is slightly more expensive in Europe, at anywhere between 0.8 per cent and 2 per cent of enterprise value, depending on location and sector.

Claims data from AIG collected between 2011 – 2015 shows that 47 per cent of pay outs fell between USD100,000 – USD1 million, while another 47 per cent of pay outs fell into the USD1 million – USD10 million range. Only 7 per cent of pay outs exceeded USD10 million, with an average of USD22 million.

In our experience, claims are most frequently made for financial statement irregularities (over 20 per cent), while compliance, material contract disputes, tax liabilities and environmental issues are also frequent contributors to claim actions (over 15 per cent of claims for each).

In terms of timings, over 75 per cent of claims made by clients are notified to insurers within the first 18 months of a deal closing. We see more chance of a claim being made on the sell-side (29 per cent of policies) as opposed to the buy-side (18 per cent), and we have

noticed that claims against insurance policies in M&A transactions are also slowly increasing.

Germany – UB In the recent real estate deal I just mentioned, there was environmental issue because no one knew if there was something in the soil. The seller didn't want to give guarantees, but the buyer wanted guarantees for the issue. We took the insurance to allow the buyer to buy without concern.

We also see tax issues being insured or questions regarding titles to shares. In a lot of discussions, we realise that the parties would like to insure known risk, but this is not possible since only unknown risk is insured in Germany.

USA – MR Insurance has become very popular in the last couple of years, but I would only see instances of its use if clients were making indemnity claims, which I haven't yet.

What I can say is that almost every single transaction I have been involved in would have benefited from R&W insurance. As long as someone is willing to pay for the premium, it solves a huge number of problems.

Clients always have questions such as where is the indemnity coming from? How is it backed up and is there going to be an escrow? Or is there personal liability?

My experience is that every transaction benefits, except if it is too small to support the R&W insurance. I recommend it to my clients as long as the economics work, because it solves issues quickly.

In the Australian transaction, I raised it at the letter of intent stage, and the buyer agreed. It smoothed the indemnification process.

Germany – UB We see a fair amount of litigation after M&A in Germany. AIG have just confirmed that 19 per cent of all M&A insurance gets claimed against, and the claim values are getting higher and higher. The most notorious case is that of a Japanese company which bought a mid-sized German company and is now claiming 270 million euros for damages.

Germany is seeing more litigation after an M&A transaction, and we often get asked to look at possible negligence to see if there could be a claim.

Italy – LB Insurance helps generally across all transactions because it really simplifies the negotiations of contract terms with the counterpart. It is a facilitation tool that eases the negotiation process, and we have used it to cover potential negligence in reporting on financial contracts or compliance breaches.

It is commonly used where the parties represent and warrant that the contract terms have always been complied with, and this is of key importance for the continuation of the business that is being bought.

Tax liability is a recurrent point in a transaction, where the use of W&I insurance cover may be of help in reaching common agreement between the seller and the buyer. In particular, the buyer always requests that tax liabilities be actionable vis-à-vis the seller until the date on



Simon Rous pictured at the 2018 IR 'On the Road' Conference in Toronto

which the overall statute of limitations for such tax liabilities finally expires, in compliance with the Italian applicable legislation.

Conversely, the seller often offers to the buyer the comfort of W&I insurance cover as a bargain for exchange, in order to replace the ordinary statute of limitations with the shorter contractual term after which the buyer is prevented from claiming tax liability vis-à-vis the seller. Usual practice, to this end, is for the seller to attempt negotiating a two year reduced contractual term, compared to the five or six-year statute of limitations provided for by Italian applicable laws.

The use of W&I insurance cover, however, faces some limitations under Italian laws. In fact, there is a peculiarity of the Italian legal system under which contingent liability arising from the valuation processes on company assets, or capital losses arising from the same valuation process, cannot be covered by M&A insurance. In addition, although tax contingent liabilities may be covered by W&I insurance, indemnification from penalties or sanctions arising from tax liabilities are not covered.

Finally, Italian laws state that claims resulting from the misconduct or gross negligence of the insured party cannot be covered, meaning the insurance company will refuse to process the claim.

Netherlands – BS I agree with Michael that every party can benefit from M&A insurance. If we look at the Dutch situation, it can facilitate the negotiations within such a deal. A lot of discussion can be avoided when certain deal breakers no longer exist because the risk is covered by insurance. The other thing is that traditional forms of security, such as bank guarantees, are not needed, and the cost savings made from this might actually be higher than the cost of the insurance.

Most insurance applies to warrants and indemnities, but tax is also important. Everything is tailored, so you cannot just say that insurance covers a certain amount, it's all about contacting your insurance company to tailor the cover before entering into negotiations.

Netherlands – PB We asked some colleagues for their experience with M&A insurance. They have not yet seen a claim, so we cannot say much more about it just yet.

Belgium – SDS I would say the same. As M&A insurance is relatively new in Belgium I have not seen many insurance claims yet. Most claims are simply paid out and do not end up in court.

Germany – UB In Germany we have seen a couple of claims published under German law.

Italy – LB When the insurance backs up the liability of the seller, the buyer takes benefit from the strength and financial solidity of the insurance company, which becomes his debtor should contingent liability arise. The seller, conversely, is inclined to provide an insurance cover in order to comfortably walk away from the closing table, particularly if the same sells the entire business, without fearing future reduction of the proceeds received as a result of the closing of the transaction.

When insurance cover is put in place, the seller will always try to negotiate down the overall maximum cap of his liability, leaving the remaining part in the hands of the insurance cover. That induces the buyer to claim through litigation any liability that is connected with the deal.

SESSION THREE - MARKET DEVELOPMENTS

How is the M&A insurance market developing in your jurisdiction? Do you expect growth and, if so, what are the implications for deal making?

USA – MR What has occurred in the US is what you might have expected. A few years ago it wouldn't have made sense to bring in R&W insurance for a deal under USD 25 million in enterprise value. Now though, due to more competition, the pricing is better and you also have insurance providers that are participating in the smaller transactions. You now have R&W insurance down to USD 5 million, which wasn't the case a few years ago.

The ability to use it in transactions has become greater and greater because of availability and pricing. Anyone that uses it once will understand the benefit, and it will be introduced into more transactions.

Germany – UB We will see it more often in the future. M&A insurance is already very well developed in the US, and they have certain standards that we don't in Europe. If you work with an insurance company, you have to follow their rules in the due diligence process, so it will raise the standards of mid-market deals and will help the whole transaction process in Germany.

The price will also be more compatible, and there will be more insurance solutions in the future. It is also easier to claim damages from an insurance company than from a counterparty. The insurance companies give you certain standards, which you have to follow to get insurance coverage.

Italy – LB In my opinion, insurance cover in M&A transactions will surely grow significantly during the next three to five years. We have statistics at the moment that are based on 2016/17 and we have seen a great increase in coverage. We can report that 7 per cent of acquisitions valued below 25 million used M&A insurance in 2017, doubling from a year earlier.

This figure increases proportionally with the deal value, since the higher the deal value, the higher the frequency of insurance cover is.

This tool will greatly develop in the future, as it takes away from the negotiation deal breakers and other critical issues that may prevent the parties from closing the deal.

Netherlands – BS I think that M&A insurance will get more and more popular. I assume that the different participants in the transaction process will get more knowledge of the products available, and the prices will decrease as it becomes more popular. Knowing the German mentality as compared to the Dutch mentality, it could be that these products are not as popular in The Netherlands because we are more risk-orientated. Despite this, I would still say that the popularity of insurance will increase and be more accessible for mid-sized and small deals.

Netherlands – PB The Netherlands will follow the international lead. The Dutch do a lot of trade with Germany, but they look to trends in the US and will follow their lead on this.

England – SR We would anticipate the global market for insurance will grow significantly over the next five years and with it the amount of insured deals in the UK.

The data from Paragon Insurance Brokers shows that the number of insurers offering cover on a global basis, tripled from 11 in 2013 to 33 in 2017, this is in response to an average insured deal value of USD1.8 billion in 2017, compared with USD450 million in 2013.

We would expect these figures to be reflected in the UK, but with a much wider range of deal sizes active in the insurance market.

Belgium – SDS The use of W&I insurance is still exceptional in Belgian M&A practice (3 to 5 per cent of transactions using M&A insurance). However, the focus on risk management and the growing use of warranty & indemnity insurance in other European countries, may cause it to be used more frequently in Belgium than has been the case until now.

W&I insurance will not replace negotiations between a seller and buyer about representations and warranties, specific indemnities and indemnification, but may, in certain cases, offer an effective tool in finding a solution for all parties involved.

The use of W&I insurance will, however, have an impact on the negotiation process itself. Insurance companies will want to make their own risk assessments, by reading due diligence reports or requesting advice from advisers on certain topics, which may have a (limited) impact on timing.

When considering the use of W&I insurance, parties involved should, therefore, contact the insurance company early on in the process and provide them with a realistic set of representations and warranties / specific indemnities for which they request coverage.

The use of W&I insurance implies a number of additional commercial and technical questions which will have to be dealt with during the negotiating and drafting stages of the sale and purchase agreement. This includes, for example, the (possible) impact of the insurance premium on the price, and the applicable law (the same law should apply to the insurance policy and the sale and purchase agreement).

Other questions include the legal subrogation right of the insurer and the tax treatment of any insurance payment received by the purchaser and the related possible impact on tax gross-up clauses.



Paul Bavelaar pictured at the 2018 DealMakers Conference in Lisbon

Contacts

UK HEAD OFFICE

IR Global
The Piggery
Woodhouse Farm
Catherine de Barnes Lane
Catherine de Barnes B92 0DJ
Telephone: +44 (0)1675 443396

www.irglobal.com
info@irglobal.com

KEY CONTACTS

Tom Wheeler
Founder
tom@irglobal.com

Rachel Finch
Channel Sales Manager
rachel@irglobal.com

Nick Yates
Editor
nick@irglobal.com

CONTRIBUTORS

Simon Rous (SR)
Ashfords LLP – England
irglobal.com/advisor/simon-rous

Urs Breitsprecher (UB)
AQUAN Rechtsanwälte – Germany
irglobal.com/advisor/urs-breitsprecher-new

Steven De Schrijver (SDS)
Astrea – Belgium
irglobal.com/advisor/steven-de-schrijver

Lorenzo Bacciardi (LB)
Bacciardi and Partners – Italy
irglobal.com/advisor/lorenzo-bacciardi

Michael Roberts (MR)
Roberts McGivney Zagotta LLC – USA
irglobal.com/advisor/michael-roberts

Paul Bavelaar (PB)
Bavelaar Attorneys at Law – Netherlands
irglobal.com/advisor/paul-bavelaar

Bart Sujecki (BS)
Bavelaar Attorneys at Law – Netherlands
<http://www.bavelaar.nl/en/>

