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LEXOLOGY®
Getting The Deal Through

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Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the Dominican Republic, Georgia, New Zealand, South Korea, Thailand and Zambia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Will Pearce and Louis L Goldberg of Davis Polk & Wardwell LLP, for their continued assistance with this volume.

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M&A insurance: boring uncle or cool cousin?

Piers Johansen and Dominic Rose*
Aon M&A and Transaction Solutions

The Spectator, a weekly British magazine on politics, culture and current affairs, once mused that '[t]he insurance industry is the boring uncle of the financial services family' (https://www.spectator.co.uk/article/being-boring-has-shielded-the-insurance-industry-for-far-too-long). And one might, at first, be tempted to conclude that insurance in its classic sense – offering peace of mind, with any financial benefit accruing to the insured only in the event of a successful claim – has no obvious place in the M&A playbook.

However, transposing insurance and related instruments into an M&A context can not only support corporate restructurings, clinch transactions that would otherwise falter and unlock distressed deals: it can also create shareholder value. It's for these reasons, which we expand on further below, that deal-makers and their advisers now routinely include insurance on their agenda, just as much as operational risk managers, albeit for quite different reasons.

Ironically, the successful application in M&A of warranty & indemnity (W&I), tax and related insurance solutions (together, M&A insurance) has also illuminated areas where risk transfer and similar innovations can help drive shareholder value on a standalone (ie, non-deal) basis, for private equity (PE), fund portfolio companies and corporates alike, potentially providing much-needed support where liquidity constraints can otherwise create cash flow pressures on a business, as recently seen at the height of the covid-19 pandemic.

M&A insurance may have enlightened deal-makers about the broader capital efficiency play as a technique for creating value, but the impetus to find other ways of identifying and enhancing returns – coupled with the prominence of technology in almost every business, and the significant balance of corporate value often represented by intangible assets – fuels the need for better qualitative insights into the cyber/personal data security and intellectual property (IP) aspects of a business, as well as, crucially, the related quantitative impact on value. We discuss below how investors are looking to understand and articulate the respective value and potential earnings implications in these areas, both from a deal and a portfolio (ie standalone) perspective, to maximise value opportunities.

W&I insurance: not just getting the deal done, but a capital efficiency play – for PE and corporates alike ...

Back to basics, briefly. W&I insurance was originally structured, some 20 years ago, as a solution for the M&A seller, allowing it to insure its liabilities relating to the warranties and tax indemnity provided to the buyer in the sale and purchase agreement (SPA). PE deal-makers grew to recognise, however, the potential of structuring a W&I solution for the buyer, not least because the buyer's insurable interest – in contrast to the seller's usual level of retained liability – could equal, or exceed, the total enterprise value (EV) of the business to be acquired. This development meant that not only could a buyer obtain an amount of insurance greater than the level of recourse agreed with the seller under the SPA but, as a corollary, the seller could reduce its liability under the SPA without compromising the buyer's protection. *Eureka!*

This realisation that the seller no longer needed to retain the same meaningful liability under the SPA meant that W&I insurance was not only enabling the deal – taking 'gating' items off the table and transferring the risk to the insurance market – but also becoming a capital efficiency play: in exchange for the payment of a one-off premium, the seller could provide warranties to the buyer while capping its liability to a nominal amount, and do away with the conventional holdback, or escrow, of a portion of the sale proceeds as security for any buyer warranty claims. Thus, the optimal exit: minimal liability, maximum return to investors – in full – immediately after completion.

Given their modus operandi and need to deploy capital raised from investors, structuring W&I insurance on this basis initially became prevalent among PE deal-makers, even developing into an auction feature as 'stapled' W&I solutions, pre-arranged by sellers, stimulated competition among buyers. For their part, W&I insurers quickly became accustomed to underwriting W&I insurance on this basis, given improved visibility of the risk gleaned from the interrogative buy-side due diligence reports. Conducive market conditions – the continued availability of cheap debt in the aftermath of the 2008/9 financial crisis and increased amounts of M&A insurance capital entering the market, as insurers hunted for yield in a low interest rate environment – increased competition and drove down premia, enhancing the capital efficiency play still further.

For a time, many corporate sellers eschewed W&I insurance as a solution for the buyer in the belief that their balance sheet was robust enough to cover the liability of an undiscovered warranty breach without needing to pay for insurance, motivated differently – of course – to PE in terms of deal philosophy and culture, as well as capital management requirements, and more accustomed to perceiving insurance as a pure risk management mechanism. But corporate sellers, too, have increasingly come to realise that such a passive approach to managing deal risk is not capital-efficient: for the reasons outlined above, W&I insurance behaves differently to most classes of operational insurance, where a financial benefit accrues to the insured only in the event of a successful claim. Moreover, many corporate sellers have now had their share of W&I experience on the buyside – when presented with a W&I solution by sellers as a fait accompli – and, in turn, adapted their sell-side approach accordingly.

Similarly, corporate buyers increasingly recognise the strategic benefits of a W&I solution, particularly the recourse offered against an independent, well-capitalised, insurer that is motivated to settle claims, which also – helpfully – removes the risk that relationships with

warrantors, whether these be retained target management or perhaps a continued trading partner, are jeopardised if a breach of warranty claim is to be pursued.

Improved efficiencies in the W&I placement process – supporting both competitive tension in auctions to the benefit of sellers as well as pre-emptive tactics for bidders – and conceptual developments such as 'synthetic' W&I policies (providing recourse for the buyer in relation to warranties baked directly in the policy, rather than being provided by the seller under an SPA) which can, for instance, play a pivotal part in facilitating distressed asset sales by administrators, illustrate just how far-removed W&I insurance is from its operational cousin. Rather than a 'sleep easy' option, W&I insurance's raison d'être is both securing the deal and optimising capital allocation; any payment of a future claim under the W&I insurance policy only improves the deal economics still further.

... adopting principles that can be applied both on a standalone and deal basis to support liquidity

While the financial benefits of M&A insurance are underpinned by arbitraging the cost of insurance against the opportunity cost of capital that would otherwise be restricted in the deal, surety and credit solutions can also enhance capital efficiency and help support liquidity in both an operating company and a deal context.

Structured credit solutions, such as a 'credit wrap' on a business's receivables, can help PE operating partners and corporate treasurers optimise their working capital by facilitating and enhancing access to alternative, more competitive, sources of funding thanks to the covenant represented by highly rated insurance capital backing their revenue stream. Equally, investors can improve cash conversion cycle and credit risk management with credit diligence insights – proactive debtor and counterparty-profiling – that complement (but are not included as part of) a typical financial due diligence scope. Developing the credit insights and structuring these solutions as part of ongoing treasury management or deal strategy can provide much-needed cash flow support, especially where the business cycle becomes subject to liquidity constraints, as seen during the covid-19 pandemic.

Moreover, the same structured credit principles can be applied back to M&A to help optimise deal terms, with surety and credit insurance solutions providing options for structuring deferred consideration arrangements and other contractual demands for security. These can effectively extend payment terms and improve liquidity – to the benefit of the buyer – while also back-stopping with highly-rated insurance capital the buyer's covenant to pay future amounts – to the benefit of the seller – in an analogous capital efficiency play, where the cost of insurance capital compares favourably with the corporate cost of capital or alternative bank financing.

Lessons learned from the tax and contingent risk insurance market and the rise to new challenges

And yet W&I insurance is not a panacea, and will incorporate exclusions from cover, one of the most significant being matters known to the insured. This is because the purpose of a W&I policy is to cover the insured for losses arising from breaches of warranty/claims under the tax indemnity which, notwithstanding the due diligence/disclosure process carried out, only come to light post-signing/completion. The W&I insurer's rationale, and usual approach, is that matters identified in the due diligence/disclosure process are instead more appropriately managed either through a price chip or by way of a specific indemnity in the SPA.

But what of items identified in the due diligence or disclosure process, which by dint of being known matters would ordinarily be excluded from cover under a traditional W&I policy? Sometimes a matter is identified at the eleventh hour that, though considered to be low risk, is of such potential magnitude that the seller and buyer are unable to agree an acceptable allocation of risk.

The most common, but by no means only, area in which such matters arise is tax, and this form of contingent risk insurance has become a commonly used solution, both in an M&A deal context and on a standalone basis, such as in corporate reorganisations. Tax liability insurance can help a company reduce or eliminate its exposure to an identified risk of a loss arising from a successful challenge by a tax authority to the expected tax treatment of a proposed or historic transaction. There has been a steady, significant increase in the placement of tax insurance policies in recent years, with enquiries from most jurisdictions in Europe, North America and, increasingly, many in the Asia Pacific and Middle East & North Africa regions. To meet this demand, an increasing number of insurers employ specialists to underwrite this type of cover, with insurance limits for an individual risk ranging from $1 million to $1.5 billion.

Historically, tax insurance has focused on low probability, high impact, risks resulting from historic or proposed transactions that involve uncertainty in the interpretation of applicable rules. As the desire for improved deal certainty continues to drive demand, solutions are being structured to manage legal and tax exposures arising from solvent and insolvent liquidations, distressed sales and financial restructurings. By applying the same 'known risks' principles, the insurance market responds to risks beyond the deal, such as balance sheet optimisation, litigation and other innovative approaches. Examples of these include:

- **UK furlough scheme**. Under the Coronavirus Job Retention Scheme, the UK government announced relief available to UK employers to cover up to 80 per cent. of the wages of employees whom they continued to pay but who would otherwise have been made redundant as a result of the covid-19 pandemic. The concern for certain employers was that, given uncertainties in the scheme's eligibility requirements and the fact that HMRC would subsequently audit claims, users of the scheme could for a period of up to 12-18 months thereafter remain liable to repay funds claimed in good faith on the grounds of employee ineligibility.

  We approached certain tax insurers who responded to the challenge by developing a policy to cover the loss arising from funds advanced under the furlough scheme and subsequently reclaimed by HMRC following a future audit on the grounds of ineligibility. It should be noted that each case will turn on its own merits when it comes to insurability.
- **Tax risks in the context of pre-sale restructurings**. Commonly, loss arising from pre-sale restructurings is excluded from cover under a W&I insurance policy, but specific tax insurance policies can be used to protect the buyer from tax risks arising in a pre-sale debt restructuring.

  We recently advised a client that was acquiring a multinational business where the due diligence had identified a number of potential tax exposures relating to a complex set of pre-sale debt restructuring steps. To protect the buyer, we arranged a tax insurance policy pre-completion that guaranteed that these steps would not trigger a corporate income tax liability and covered the buyer against any interest, penalties and associated defence costs arising if the matter were subsequently challenged by the relevant tax authority.
- **Releasing escrowed cash provided as security**. Transferring a contingent risk to the insurance market can release funds that are committed to secure a specific obligation, thereby improving, for instance, liquidity and the acceleration of returns to investors. An illustration of this involved a client disposing of shares in an asset in a separate jurisdiction, where the capital gains tax rules imposed a charge on such disposal given the seller was a non-resident of that jurisdiction, such charge to be collected by way of a withholding tax on the purchase price payment.

The seller had been advised that various exemptions should apply to reduce this liability, including double tax treaties and, under the SPA, the buyer was permitted to calculate and withhold an amount of capital gains tax and pay it to the relevant tax authority. The seller undertook to indemnify the buyer in respect of any additional tax liability claimed by the authority above the withheld amount, which indemnity was supported by substantial funds held in escrow for 10 years to match the statutory limitation period.

To improve the seller's position by releasing the escrowed funds without compromising the buyer's protection, we arranged a tax insurance solution to protect the buyer by transferring to the insurance market the risk of a higher tax amount being claimed by the authority. By giving the buyer recourse in the event this risk crystallised, the funds in escrow could be released to the seller seven years earlier than anticipated.

Aside from tax, transferring litigation risk can protect a business from catastrophic judgements as well as preserve the benefit of a favourable judgement to facilitate balance sheet optimisation. It can even support a successful M&A deal, a recent example of which involved the sale by a PE firm of the final investment in a fund prior to the expiry of its investment horizon. Given the nature of the asset, the one likely buyer was a risk-averse corporate; to complicate matters, a customer had launched legal proceedings against the business being sold claiming contractual damages in an amount that was material relative to its EV, a move that two sets of the PE seller's counsel had opined amounted to a spurious 'hold-up' attempt. Armed with this analysis, Aon's M&A insurance broking team structured a transfer to the insurance market of the risk that the claimant would succeed against the target company at trial, which the client could present to the buyer as a solution at the appropriate stage of negotiations – not only keeping the deal itself on track but also maximising the immediately available sale proceeds, without the need for any price chip or escrow. Given the fund's imminent liquidation, both these factors were of particular significance to the client's returns calculations from the disposal.

Cybersecurity in M&A – running to keep up

Media reports of cyber attacks affecting prominent brands such as Wonga, TalkTalk, Tesco and British Airways are not uncommon and particularly in focus given the General Data Protection Regulation, which came into effect across European Union member states in May 2018. Indeed, after Marriott Hotels had discovered a legacy personal data breach following its acquisition of Starwood Hotels, in 2019 the UK's Information Commissioner made explicit reference to the accountability of organisations for the personal data they hold and the standards of diligence expected in corporate transactions. Unsurprisingly, investors are increasingly focused on the cybersecurity aspects of their M&A deals, focusing not only on the technical aspects and potential balance sheet impact, but also on reputational considerations.

Earlier this year, our M&A team provided cybersecurity diligence for clients acquiring businesses across a range of sectors, including real estate, finance, accounting services, transport, education, software and manufacturing, and which were headquartered in jurisdictions ranging from the US, UK, Denmark and Germany to Singapore and New Zealand. We found that sophisticated deal-makers look to de-risk cybersecurity in their M&A deals by analysing the target from a technical perspective in three dimensions: (1) its footprint within the hacking community, (2) its investment in security defences, and (3) its inherent exposure to a cyber attack.

We also found that threat intelligence and security investment provide a perspective on probability, while cyber attack simulations help quantify impact. Our work on these deals identified an average of 30 leaked credentials per target, often including both usernames and plaintext passwords. Notably, one diligence exercise identified that the particular target's internet-facing computers – accessed solely via publicly available information – uncovered live video camera management portals that were accessible to anyone through a standard web browser.

Our experience indicates that cybersecurity exposure in a typical business aligns with the quantum of personally identifiable and sensitive information stored, as well as the reliability of corporate IT architecture in functioning appropriately. From the deal sample referred to above, the average inherent cybersecurity exposure was estimated to be £14 million per business, based on an average annual revenue of £127 million per business.

While residual risk varies from business to business, a clear appreciation and understanding of cyber risk – from a technical and business impact perspective – offers investors significant value creation opportunities, regardless of the maturity of a target's cybersecurity strategy, and enables cybersecurity to be factored into the financial modelling that drives valuation and, ultimately, the bid proposal. This is augmented by pre-/post-close cybersecurity risk management through W&I insurance, Day 1-100 transformation initiatives, leaked credential controls, cyber impact analyses, penetration testing and more. Indeed, it is the post-close or PE portfolio work where the benefits of a more harmonised approach can be of particular value in providing visibility and demonstrating robust and consistent controls, for management and investors.

Cybersecurity in M&A has come a long way and evolved rapidly, even since 2019 when typical pre-deal cybersecurity assessments extended merely to a scan of the target's internet-facing computers. We now see, for instance, infrastructure investors conducting cybersecurity reviews on port terminals, data centres and other deals involving critical infrastructure assets. Further back in 2018 and before, cybersecurity was either overlooked altogether or consigned to an integrated general IT review. Where dedicated cybersecurity assessments were performed, these were typically initiated based on the misconception that only software businesses warranted the effort and were performed from an inside-out approach – reviewing internal policies, procedures and technology – rather than from the perspective of a threat actor.

The development of dedicated threat intelligence per se and commitments to cybersecurity as a standalone deal assessment have gained pace as global cyber events in recent years illustrate the extent to which unauthorised access to computer systems and loss of personal data can cause business damage and reputational harm. After all, ultimately the only business properly immune to cyber attack is one that is off-grid, unconnected to the internet.

Our sense is that investors will remain focused on cybersecurity in M&A and we anticipate key priorities for creating or preserving business value will include greater penetration of the hacking community, a reimagining of the boundaries between intrusive and non-intrusive computer scanning and cyber impact simulations that combine data breach and system unavailability in a single event.

Value through the IP looking-glass

Over the past four decades, the pace of technological change has resulted in a tectonic shift in the contribution to overall business value from tangible to intangible assets, evident from the proportion of total market value across the top five companies in the S&P 500 that comprises intangible assets: in 2018, 85 per cent of their market value was in the form of intangible assets, compared to 32 per cent in 1985. This rotational value transfer explains why IP and intellectual asset management are increasingly important in M&A transactions, as investors look to capitalise on value creation opportunities generated by this trend.

IP-rich companies can be technology companies or businesses where most of the value is attributable to their brands and trademarks; the luxury goods industry is an obvious case in point. Less 'glamorous' manufacturing entities, however, may also derive significant value from decades of proprietary know-how or trade secrets, for whom IP strategies and management/protection are equally relevant.

In terms of corporate or M&A strategy, our advice to clients and their advisers is that IP analytics can play a key role at the deal-planning stage by identifying and qualifying potential acquisition targets to help ensure they have appropriate IP for the acquiring business. A buyer wishing to assess the strength and vitality of a target's IP should consider its quality, uniqueness, barriers to entry it provides, coverage of current and future products as well as its governance and controls, while being alive to the fact that the buyer's own IP risk vis-à-vis third-party liability can increase post-acquisition.

Once a suitable target is identified at the deal stage, well informed investors look to assess the IP to be acquired more deeply and quantify its contribution to the value of the acquiring business. This will include evaluating the competitive IP landscape, the quality of the target's IP compared to key competitors, its potential to generate additional revenue through licensing into adjacent markets and the target's IP management maturity level for registered IP (trade secrets, as well as patents and trademarks). These insights are quite distinct from, and complementary to, standard legal IP due diligence, which focuses on confirming ownership and status (validity, expiry, existence of charges etc.) of, or relating to, a target's IP.

Recently, we advised a buyer looking to acquire a SaaS technology company specialising in providing procurement optimisation services, and the results of our business IP diligence identified that a significant amount of the target's value was in IP, particularly trade secrets (know-how, comprising specialised data embedded in software). Before proceeding any further, our client needed to assess how well the target's trade secrets were protected and sought our potential risk and mitigation recommendations. We reviewed the target's trade secret governance (TSG) by carrying out the following key steps:

- ranking the importance of the target's trade secret categories (customer list, supplier list, database of anonymised clients' expenditure data, product technology/software, proprietary process know-how, clients spending patterns and procurement cost data);
- assessing the target's TSG maturity with regard to the processes to identify, document and catalogue its trade secrets and the measures (people, IT, security, external parties, theft detection) adopted to protect their trade secrets; and
- identifying potential areas of risk and recommendations for mitigation based on the importance of the trade secret categories and the TSG maturity.

Our further analysis provided sufficient comfort to the buyer that the target's management and governance of its trade secrets was appropriately aligned for its size of business and our recommendations for improvement during its growth path enabled the client to proceed with the deal, in the knowledge that this was consistent with its own IP strategy.

From a sell-side perspective, a successful offering of an IP-rich business for sale via a trade sale, an IPO or a carve-out from a large corporate, in particular, will require the seller and its advisers to be able to position the business so that the extent of its IP is fully reflected in, and helps maximise, its EV. This, in turn, requires the IP story to be articulated in business and financial terms that investors fully recognise and the strength and uniqueness of the business's IP to be demonstrated, relative to the broader patent landscape.

Clients, and particularly their financial advisers, have recognised the role that Aon's advanced proprietary IP analytics can play in this type of sale process, generating the necessary IP intelligence – in the form of 'Quality of IP' reports that describe and quantify the IP – to facilitate and support these investor discussions, helping to maximise the IP value contribution to overall EV.

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Conclusion

Investors continue to find innovative applications for insurance capital as new and varied challenges present themselves and solutions are forged in the crucible of necessity. Far from insurance being a supposed 'dull relation', its combination of adaptability and capital efficiency provides a winning formula for value creation – well beyond the deal itself – into an asset's operating phase and can provide support in the form of enhanced liquidity, for example, against the broader rigours of the business and economic environment.

And yet, while applying insurance in M&A and portfolio contexts can be key contributors to this objective, there is an unquestionable opportunity to realise further value in the ethereal areas of cybersecurity and intellectual property.

Developing the specialist technical and business-oriented insights, supported by quantified metrics, for these workstreams enables investors to make better-informed assessments in pursuit of capturing maximum value from an investment: upon acquisition, through its holding phase and, where appropriate, to disposal.

Or you could call it, to paraphrase *Toy Story*'s Buzz Lightyear, 'getting the deal through … and beyond!'

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