

Global FINEX - Mergers and Acquisitions
Stapling Warranty & Indemnity
insurance explained

Transaction tool instigated by the Seller-Side

Over 96% of the Warranty and Indemnity (“W&I”) policies that Willis Towers Watson (WTW) placed in 2020 were buyer-side policies. Buyer-side policies are often instigated by a seller who insists that the buyer enters into a W&I buyer-side policy to provide alternative recourse. This process is often referred to as “stapling” W&I insurance to the transaction.

Client challenge

The seller is looking to dispose of an asset which has interest from a number of bidders in a competitive auction process.

- The seller is not prepared to provide residual liability in the event of a breach of warranty under the share purchase agreement, except for limited fundamental warranties in respect of title to shares and capacity.
- Most bidders will require meaningful recourse in order to satisfy their acquisition guidelines set by their board or investment committee.
- A “stapled” buyer-side W&I insurance policy would act as a facilitator to bridge this gap.



Solution summary

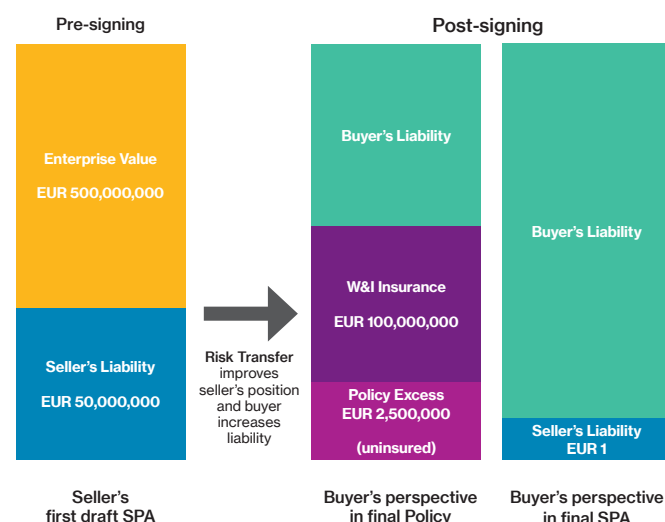
WTW can work with the seller to ensure a smooth process by approaching the W&I insurance market on behalf of the seller. There are two ways that the seller can “staple” W&I insurance to the transaction:

“Hard staple”	“Soft staple” (alternatively referred to as a seller buyer “flip”)
The auction draft Share Purchase Agreement (“SPA”) or Request for Proposal (“RfP”) states that the seller warranty package is only available if a buyer-side W&I policy is obtained.	W&I insurance is not stated as a requirement for bidders in the auction draft SPA or RfP. However, the seller’s liability is usually capped at a nominal amount.
The auction draft SPA, information memorandum, all vendor due diligence reports and data room access is provided to the insurer(s) selected by the seller.	Insurers are typically only provided with the auction draft SPA and information memorandum to obtain non-binding indications.
WTW produces a written non-binding indication report for the seller. This summarises the buyer-side W&I terms received from insurers for the seller.	WTW produces a written non-binding indication report summarising buyer-side W&I terms from insurers. This is made available by the seller to potential bidders in the data room.
Preparation work on the W&I insurance workstream is enabled before any buyer is identified or exclusivity granted.	No further preparation work until preferred bidder selected.
The seller selects the insurer.	The buyer decides if they wish to purchase the W&I policy.
The buyer must purchase/arrange W&I insurance policy.	The buyer selects the insurer (if they decide to purchase a W&I policy).
Pre-underwriting with the insurer(s) on the seller-side (either separate insurers allocated by the seller for separate bidders or ideally “trees” with one insurer for multiple bidders).	No pre-underwriting.
An advanced draft of the bespoke W&I policy wording is made available in the data room to such bidder(s) potentially significantly reducing the timetable to inception.	Only a generic draft W&I policy wording is made available in the data room to potential bidders.
Separate WTW teams are then introduced to the preferred bidder(s) (so-called “flip” to the buy-side).	
In each case WTW places the W&I policy on the buyer-side and the coverage position remains subject to review of the buyer’s due diligence.	

Benefits for the Sell-Side to initiate the W&I insurance process

"Hard staple"	"Soft staple" (alternatively referred to as a seller buyer "flip")
The seller creates a level playing field for all bidders. Each bidder is offered the exact same warranties which are backed up with insurance.	The seller initially has control of the process as bidder(s) are aware that the seller is instigating the insurance process.
The seller keeps control of the scope of the warranties provided for in the SPA and can ensure its interests are properly represented by the insurers.	Avoids a bidder conflicting out insurer(s) from the process as certain insurers can only act for one bidder.
The seller keeps control of the insurance process until a bidder (or bidders) are selected for the final phase.	When the seller hands over the insurance process to the bidder(s) they lose control earlier in the process. This could result in the bidder(s) changing the parameters of the warranties to represent its competing interests.
Minimises potential contingent liabilities on the seller's balance sheet post-closing.	

Using W&I insurance – perspective from the sell-side and buy-side



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WTW global M&A practice

A market leading team of 150+ M&A practitioners, many of whom are qualified in either Corporate Law, Tax and Accountancy principles or insurance, working together to help our clients navigate M&A transactions safely. We draw on the full resources of WTW to bring Sector expertise, analytics, risk evaluation and insurance placement (where required) to each transaction, in other words delivering the firm and focusing on our client's strategic objectives on a deal-by-deal basis.

We help solve complex risk issues, regularly working to tight deal timeframes. Our transaction related advice and insurance knowledge is valued by our clients, who often use this tactically buy-side and sell-side to enable a successful outcome to an acquisition or divestment.

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