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Transaction Liability Insurance: Optimising the Risk Allocation in New-age M&A Deals

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In the course of a deal, existing and potential risk items are often identified during the buyer's due diligence exercise. These risk items can range from a potential misrepresentation regarding the financial statements to potential litigation involving the target company for non-compliance with applicable laws. The allocation of such risks can become a sticking-point in negotiations and stall the deal.

Traditional risk allocation measures such as holdback, escrow, post-closing adjustments or parent guarantee are now few and far between in merger and acquisition (M&A) deals. Even the scope of customary representations, warranties and indemnity is continuously shrinking with the inclusion of high materiality and *de minimis* thresholds and a low cap on aggregate liability. This shift is driven by the interplay of several trends such as maturing markets, evolving legal systems, competitive M&A markets where too much money is chasing too few deals, increasing dry powder with investors and increased sensitivity of the sellers towards post-deal liabilities. This evolving trend in the M&A deal landscape is particularly unsettling for financial investors who have a penchant for doing deals on buyer-friendly terms specifically on risk allocation packages. Against this backdrop, transaction liability insurance (which includes warranties and indemnities insurance (also known as representations and warranty insurance), tax liability insurance, environmental liability insurance, litigation buyout insurance and contingent liability insurance) is increasingly finding favour among both buyers and sellers as an alternate risk allocation mechanism offering the primary or sole recourse for transactional risks.

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Over the past three to five years, transaction liability insurance has evolved from a relatively esoteric product into a strategic tool regularly employed in M&A transactions to optimise negotiations and improve the overall outcome of the deal. Today the product is much more widely accepted and understood among M&A practitioners and its use is gaining traction across geographies, industries and asset classes. In most of the current auction sale processes, transaction liability insurance is factored into the structure of deals from the outset. Underwriters and brokers with ample experience and expertise are willing to insure novel risks[1] by stepping outside standard market norms. Brokers and underwriters have recruited M&A specialists (including financial advisers and commercial lawyers) making product and policy negotiation more adaptable to deal requirements and more compatible with deal timelines.

Historically, the 'sweet spot' for transaction liability insurance has been deals with a purchase price exceeding US$50m but massive expansion in insurance markets and the increased risk appetite of insurers are resulting in smaller deals now qualifying for insurance and it is rare to see an uninsurable M&A transaction today. The increasing interest has also been driven by the significant reduction in the cost of obtaining such insurance since it first began being sold.

There is currently a penchant for limited or no recourse deals, driven by the strong desire of sellers to achieve the holy grail of a 'clean exit'. This desire is more prevalent where the seller is an individual and looking to retire, where the seller has chosen to offload the business due to financial stress or where the seller is an investment fund looking to wind up and issue the final distribution to its investors. Transaction liability insurance allows a seller to ensure a clean exit by replacing its financial obligations to stand behind the warranties made by it in the acquisition agreement and earning the entire or majority of sale proceeds without the long-tail exposure to claims or the inefficient lock-up of capital in escrows or holdbacks. For a buyer, transaction liability insurance provides an additional protection if the seller does not have deep enough pockets or if the seller has limited or no liability in the acquisition agreement. Additionally, it enables a buyer to ring-fence known exposures (through a contingent liability insurance) and extend the claim time periods if the seller is offering a low sunset period for warranty claims. In auction sale processes, transaction liability insurance can be a key differentiator in a buyer's bid by reducing the seller's retained liabilities.

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1 For instance, known or potential tax liabilities (including liabilities emanating from benefits claimed under the double taxation avoidance agreements), pending or threatened legal proceedings and any one-off transaction specific liability.

Buyer-side versus seller-side policy

Either a buyer or seller can use transaction liability insurance. Accordingly, a transaction liability insurance can be structured as a buyer-side policy or seller-side policy. A hybrid policy having both the buyer and seller as insured is also possible, although not very common.

A buyer-side policy is purchased by or on behalf of the buyer with the buyer as the insured party and covers a buyer's loss resulting from breach of warranties provided by the seller. In a buyer-side policy, the buyer can make a claim directly under the policy without first making a claim against the seller. A seller-side policy provides coverage to a seller for its liabilities arising out of breach of its warranties provided to the buyer. In a seller-side policy, in the event of a claim for breach of warranty by the buyer, the seller would have to indemnify the buyer first and then claim under the insurance policy.

The key advantages of a buyer-side policy that make it more popular than a seller-side policy are that it covers 'fraud' of the seller as well as safeguarding the buyer against the collectability or solvency risk of an unsecured indemnity provided by a seller (eg, a financially distressed seller, funds with limited life or an individual seller). A seller-side policy is comparatively cheaper than a buyer-side policy.

When transaction liability insurance first became available it was largely purchased by sellers but now it is often the buyer taking out the policy. As per the Global M&A Insurance Index 2018 published by Jardine Lloyd Thompson Group plc, in the years 2016 and 2017, 93 per cent of the transaction liability policies were buyer-side policies and seven per cent of the policies were seller-side policies.

The decision to procure a buyer-side policy is also highly correlated with the seller's negotiating leverage. The more negotiating leverage a seller has, the higher the probability that a buyer-side policy will be procured.

Pricing and coverage

Pricing and coverage of a transaction liability insurance depend upon a number of factors, most prominently industry segment, transaction value, policy limit, deductible (see 'Coverage gaps' below), extent of due diligence by the parties, disclosures of the seller, underwriting review of the insurer, jurisdiction, nature of the acquisition agreement (risk allocation, scope of warranties and indemnity, governing law, UK-style or US-style agreement), existing insurance coverage of the target and claims history.

Transaction liability insurance is generally priced as a percentage of the policy limit to be purchased. A policy can have a policy limit of as little as

2.5 per cent of the enterprise value of the target and can seek to protect as much as 100 per cent of the enterprise value, although a typical range is 10–30 per cent of the enterprise value. The premium for a transaction liability insurance for a straightforward or moderately complicated M&A deal typically ranges from one per cent up to four per cent of the policy limit for a warranties and indemnities insurance and from seven per cent up to ten per cent for a tax liability insurance. If the policy limit is higher (say more than US$25m), the parties have conducted a detailed due diligence and no red flags were identified during the underwriting review, the insured may be able to negotiate the premium down. There tends to be a nominal additional premium cost for policy enhancements such as knowledge and materiality scrape.[2]

Definitions of 'breach', 'loss' and 'claim' in the policy generally mirror the definitions negotiated in the acquisition agreement. Policy also covers costs and expenses reasonably incurred by the insured in defence or contest of a claim and the gross-up of any tax payable in respect of any sum paid to the insured pursuant to insurance.

In addition to the premium, a legal review fee is payable to the insurer towards the expenses incurred by it in the underwriting process, review of transaction documents and negotiation of the policy terms. Further, both the broker and the insurer will require a break fee in the event the policy is not taken by the insured after the signing of their engagement letters. However, in the event the policy is placed, the legal review fee as well as the break fee are waived or deducted from the premium. Additionally, the broker will charge a commission from the insurer on placement of the policy, which ranges from ten per cent to 20 per cent of the premium depending upon the size of the deal and relationship between the insurer, insured and broker.

In addition to the premium and broker commission, taxes (including goods and services tax (GST) and stamp duty) are likely to be payable. Insurance premium taxes will ultimately depend upon the domicile of the insured.

Coverage gaps

Usually, a policy will have some coverage gaps in the form of modified or excluded warranties, general and specific exclusions and *de minimis*, deductible and time limitations. The existence of these coverage gaps is

2 When the warranties given by the seller under the transaction documents are qualified by 'knowledge' or 'materiality' qualifiers, the insurance may cover such warranties absolutely by scraping the 'knowledge' or 'materiality' qualifiers for such warranties. Materiality scrape can be either for determining whether or not breach exists or for determining damage amounts, or for both.

problematic for both the buyer and the seller and is, in the author's view, a fair criticism of the utility of transaction liability insurance. From the buyer's perspective, where the parties have agreed that the transaction liability insurance is the buyer's sole recourse for any claim of breach of warranties provided by the seller, any coverage gap will be the buyer's risk. From a seller's perspective, a coverage gap compromises any clean exit they desired as the buyer will most likely insist for a recourse against the seller for such coverage gaps. Some of the more common coverage gaps are set out below.

General exclusions

General exclusions under a transaction liability insurance include:

- actually known risks or breaches;
- civil and criminal fines;
- consequential, punitive, exemplary or multiplied damages;
- fraud or fraudulent misrepresentation by the insured;
- any transaction structuring related matters; and
- covenants, undertakings or performance obligations.

A warranties and indemnities insurance includes the following additional exclusions:

- purchase price adjustment, working capital adjustment and leakage;
- any estimate, projection or forward-looking statements;
- underfunding of pension, superannuation or other employee benefit schemes;
- transfer pricing issues;
- non-availability of any tax relief or tax losses;
- losses related to sanctioned people or countries, anti-corruption and anti-bribery;
- asbestos and pollution liability;
- any off-balance sheet financing;
- product or service liability;[3]
- condition and adequacy of property, plant and equipment;[4]
- transaction tax (including withholding tax and tax treaty benefits), secondary tax, non-payment of stamp taxes, a risk that is increasingly being addressed through a separate insurance policy; and
- breach of completion warranties between signing and completion.

3 Product or service liability can be covered on an excess basis if the target has adequate product liability insurance in place and there has been adequate due diligence by the buyer on the policies and procedures implemented by the target in connection with the product quality and compliance with safety standards, including historical product recall claims and issues.

4 Coverage for condition and adequacy of property, plant and equipment may be available provided the buyer has undertaken a technical due diligence by a third party expert.

Specific exclusions

Aside from the above-mentioned general exclusions, the insurer may deem it necessary to add transaction-specific exclusions should there be any issues identified in their underwriting review that they consider as potential liability or any matter that is not adequately examined by the buyer or disclosed by the seller. For instance, where inadequate or no due diligence has been conducted on a target group entity, any matters concerning such entity may be excluded from the policy. Similarly, if a warranty is drafted too broadly, the insurer may apply an interpretation to narrow the warranty for policy purposes.

De minimis

Any claim under the policy is subject to a *de minimis* threshold, which is usually 0.1 per cent of the deal value. The policy will usually match the *de minimis* threshold under the acquisition agreement or materiality thresholds applied for due diligence and disclosures. However, it is possible to have no *de minimis* threshold in US-style policies.

Retention/deductible

Further, a transaction liability insurance (other than a tax liability insurance) almost always has a self-insured retention/deductible associated with it. Any loss below the deductible amount will be to the insured's account and is not recoverable under the policy. The size of the retention/deductible can vary from deal to deal based upon the risks involved but is usually in the range of one per cent to three per cent of the deal value. Depending upon the premium, retention can be fixed or tipping (ie, decreases after a certain period of time). For example, if a transaction liability insurance has a retention of US$100 and the insured makes a claim of US$150 after one year from the date of commencement of the policy, then the insurer will pay US$50 (being the amount of claim in excess of the US$100 retention) and the insured bears the first US$100 (as a deductible). In the same scenario if the retention was a tipping retention and to be decreased by, say, 50 per cent annually, then the insurer will pay US$100 (being the amount of claim in excess of the US$50 retention).

Policy period

Transaction liability insurance policies are valid for a definite time period. Usually, coverage for fundamental warranties (title, authority, capacity and

encumbrance) and business tax warranties is available for up to seven years and for residual business and operational warranties it is available for two to three years. The insurer is not liable for any claim unless a notification in respect of that claim has been received by the insurer prior to the relevant expiry period for the insured warranties. A claim notification has to be provided by the insured to the insurer within the time period specified under the policy (which is often within seven to 15 days of the insured becoming aware of a claim or loss) along with sufficient description of the claim and relevant supporting documentation.

Loss mitigation

Transaction liability insurance policies impose an obligation on the insured to take commercially reasonable actions necessary or advisable to mitigate any loss or potential loss. However, any inadvertent failure of the insured to comply with such loss mitigation obligation would not relieve the insurer of its payout obligations under the policy, except to the extent that the insurer is adversely affected thereby.

There are actions that the parties can take to address the above-discussed coverage gaps and maximise the effectiveness of the policy. These include comprehensive due diligence and disclosure processes, a specific indemnity holdback or escrow and valuation adjustments.

UK- versus US-style policy

This is often an overlooked nuance in transaction liability insurance, which can have a significant impact on the premium as well as risk coverage. The notable distinctions between a UK-style policy and a US-style policy are as follows.

Payment of loss on damages versus indemnity basis

In a UK-style policy, loss is paid on a 'damages' basis (except for tax warranties), that is, to put the buyer in the same position it would have been in had the breach of the warranty not occurred. For a successful claim, the buyer must prove that the warranty was breached and due to such breach, the buyer suffered a loss.

In a US-style policy, loss is paid on an 'indemnity' basis for all the covered warranties, that is, on a dollar-for-dollar basis (including costs associated with the claim). All the buyer needs to do is to prove that it has suffered a loss in relation to an indemnified matter.

Loss multiplier exclusions

In a UK-style policy, while consequential losses may not be specifically excluded if expressly covered in the definition of 'loss' under the acquisition agreement, losses based on multiples of earnings or earnings before interest, tax, depreciation and amortisation (EBITDA) are usually excluded.

A US-style policy may consider deletion of specific exclusion of losses based on multiples of earnings or EBITDA and for consequential damages if the acquisition agreement is silent.

De minimis

A UK-style policy will match the *de minimis* threshold under the acquisition agreement or materiality threshold applied for due diligence and disclosures. A US-style policy comes without any *de minimis* threshold.

Materiality scrape

With respect to materiality scrape, insurers tend to follow the provisions of the acquisition agreement. It is less common to see UK-style policies offering materiality scrape either for assessment of a breach or loss. However, a UK-style policy may offer a materiality scrape as a policy enhancement if there is one in the acquisition agreement for a nominal additional premium. In a US-style policy, materiality scrape is usually offered as an inbuilt enhancement without any additional premium.

Warranty spreadsheet

A warranty spreadsheet is an annex to the policy listing down all the warranties from the acquisition agreement and confirming whether each warranty is covered, excluded or covered in an amended form (eg, adding a 'knowledge' or 'materiality' qualifier where it might ordinarily be expected) under the policy.

A UK-style policy will always include a warranty spreadsheet, which will specify the warranties not covered in the policy or covered with a modification. A US-style policy will not include a warranty spreadsheet and any matters not covered are addressed by an exclusion in the policy.

It is apparent that a US-style policy is more buyer-friendly and provides broader coverage.[5] Owing to this reason, the premium for a US-style policy

5 Because of this reason, US-style policies have seen much higher claim volumes than UK-style policies. Source: www.locktoninternational.com/articles/wi-insurance-top-5-trends-2018.

is comparatively higher than a UK-style policy. Depending upon whether the parties prefer a UK-style or US-style policy, the acquisition agreement should be drafted accordingly.

Policy placement process

At the outset, a broker is engaged by the insured to advise on the appropriate insurance structure and strategy in relation to negotiations with the insurer. There are a number of steps involved in procuring a transaction liability insurance as set out below.

NDA and hold harmless letters

Before receiving any information in relation to the transaction, the broker is required to sign a non-disclosure agreement (NDA) with the insured. The insurer is also required to sign an NDA with the insured prior to commencement of the underwriting process. The NDA governs the confidentiality and non-disclosure obligations of the insurer and broker vis-à-vis the information shared by the insured. The insurer may also be required to sign hold harmless letters to gain access to due diligence reports, opinions or memorandum provided by the insured's advisers in connection with the transaction. The adviser who has prepared the due diligence report would be concerned to ensure that they accept no liability or responsibility for disclosure of their due diligence report to the third-party insurer, while their client would also be concerned to ensure that legal professional privilege is retained notwithstanding disclosure of the diligence report to the third-party insurer. While disclosure to a third party always carries with it the risk that legal professional privilege is waived, such risk may be minimised with a carefully worded hold harmless letter, for instance, that the due diligence report is being provided for information purposes only, that the insurer is obligated to keep the information under strict confidence and that the insurer will assert the client's privilege in the material should there be court proceedings.

Expense agreement

Prior to commencement of the underwriting process by the insurer, the insured is required to sign an expense agreement with both the insurer and broker, essentially to record the agreement on the amount of break fee and legal review fee that is payable to the insurer and broker if the policy is not placed (see 'Pricing and coverage' above).

NBIs

Based on the review of transaction material provided by the insured, the broker will prepare a submission to go to the potential insurers that will include important details of the transaction, the advisers to the insured, timing and coverage requirements, and a draft acquisition agreement. After reviewing the broker's submission, those insurers who have an appetite for insuring the potential risks in the transaction will issue non-binding indicative terms (NBIs). NBIs contain preliminary terms of the coverage and pricing and the insurer's view as to insurability or otherwise of the representations and warranties contemplated under the acquisition agreement. Often the insured would insist that the broker procure at least two to three NBIs from potential insurer(s) so that it can do a benchmarking exercise and choose the policy with the most suitable terms. Given that NBIs form the basis of the detailed policy, it is of vital importance that they are carefully negotiated. NBIs are usually expected from the potential insurers within a week following receipt of the submission and supporting documentation from the broker.

Underwriting review

Following consideration of the NBIs, the insured will then instruct the broker to engage an insurer. The insurer will commence the underwriting review process after signing the expense agreement. As part of the underwriting review process, the insurer (and their external legal counsel) will conduct high-level due diligence on the transaction including review of the transaction documentation and due diligence material. Following their review, the insurer will issue a series of questions for the insured to respond to followed by a Q&A session with the insured and its advisers to ascertain the level of their knowledge of the target's business and risks. The findings of the underwriting review process will have a bearing on the key commercial terms of the policy. For instance, if the underwriting review process does not identify any major red flags, the insured can firmly negotiate with the insurer to reduce the premium. Conversely, if the underwriting review process identifies certain red flags that are not adequately covered in the due diligence reports or disclosed in the disclosure letter, the insurer will exclude those red flags from the policy coverage. The underwriting review process may take between one and two weeks to complete. Insured parties who conduct limited due diligence of a target, have a higher materiality threshold or conduct an 'exceptions only' due diligence are more likely to experience greater scrutiny during the underwriting review process.

Finalisation of the policy

Negotiation of the detailed policy terms is the last step in the policy placement process. Insurers use their standard templates for general terms and conditions of the policy. However, key commercial terms are largely based on the NBIs. It is notable that the general terms and conditions of the policy may appear cumbersome to some, particularly those who may not have adequate knowledge and experience about the product, and therefore it is important that the insured should seek help from professional advisers to negotiate the detailed policy terms with the insurer. It is commonplace for the insured's deal counsel not to have the expertise to negotiate the insurance policy. Hence, the insured should keep this in mind while choosing counsel for a transaction wherein transaction liability insurance is contemplated.

The key commercial terms of the policy (ie, policy limit, premium, *de minimis*, deductible, insured warranties, policy period, broker's commission, etc) are mentioned in a schedule at the beginning of the policy. Other general terms and conditions of the policy include:

- conditions precedent for policy commencement, which include completion of the transaction as per the acquisition agreement, payment of the premium, no claim declaration[6] by the key members of the insured's deal team and delivery to the insurer of a set of CD-ROMs or DVDs containing the entire contents of the due diligence data room;
- definition of 'loss' and broad principles for calculation of 'loss';
- list of exclusions;
- process for making a claim under the policy including notification of the claim, contents of the claim notification and consequences of delay in claim notification;
- process for defence, negotiation and settlement of claims and reimbursement of defence costs;
- obligations of the insured such as maintenance of records relating to the transaction, loss mitigation and maintenance of other insurance policies as generally applicable for the operations of its business;
- subrogation or assignment rights of the insurer after payout under the policy wherein the insurer may require the insured to procure that the insurer is subrogated to or that the insured has assigned to it the insured's rights of recovery against any third party arising out of or relating to such payout;
- restriction on amendment or assignment of the acquisition agreement without prior consent of the insurer; and
- governing law and dispute resolution process, which is often the same as the acquisition agreement.

6 Declaration provided by the key members of the insured's deal team that they are not aware of any breach of insured warranties or any claim pertaining to the insured risks.

Given the number of steps involved in the policy placement process, the minimum amount of time required to place a transaction liability insurance policy for a moderately complex transaction with a mid-size data room could be two to four weeks, provided that transaction documents, due diligence reports, disclosure letters and a well-organised data room is available to the insurer from the outset. Generally, the policy placement process (as discussed above) runs in parallel with the transaction negotiation process so that the policy can be placed simultaneously with the closing of the underlying transaction.[7] This also helps to dovetail the policy with the acquisition agreement and vice versa. In order to achieve this objective, the insured and insurer complete the formalities (ie, NDA and expense agreement) and have an agreed NBI as soon as the negotiation on the underlying transaction begins and the parties decide to go for a transaction liability insurance. Once the due diligence report(s) and a near-final draft of the acquisition agreement are ready, the insured invites the insurer for an underwriting review, which is often completed in one week's time. The timeframe for finalisation of the detailed policy terms depends upon the timeframe between the signing and closing of the underlying transaction or, in transactions with simultaneous signing and closing, the timeframe between the completion of the underwriting review and the signing of the acquisition agreement.

Challenges of transaction liability insurance

Risk of moral hazard

It is often seen that the parties looking at the transaction liability insurance option treat it as a substitute for an arm's-length negotiation between the buyer and seller on the scope and quality of the warranties, disclosures and due diligence that would have taken place if the insurance was absent. Particularly, if the transaction liability insurance is the sole recourse for the buyer for any inaccuracy or breach of any warranty and the seller has no skin in the game, the seller is not incentivised to negotiate the warranties and thus more likely to agree to buyer-favourable provisions. Likewise, the buyer may narrow the focus of the due diligence and disclosure exercise because insurance is on the table to cover all potential risks.

In deals where sellers have strong negotiating leverage, they use that to minimise their post-exit liability exposure by both insisting that buyers purchase transaction liability insurance and obtaining favourable terms related to any seller liabilities not covered by the insurance. In exchange,

7 Although placed at the time of closing of the transaction, the policy is generally effective from the date of signing of the acquisition agreement.

the deal parties seem to be willing to collaborate and agree on terms that increase the exposure for the insurer.

This approach is a cause of concern for the insurers who need to make a judgment call on the coverage and pricing of the policy based on the scope and quality of the warranties, disclosures and due diligence. Indications that the due diligence or disclosure process has been skipped or over-rushed could lead to a high premium, lowering the scope of the coverage or denial of a policy entirely. One thing insurers are doing to mitigate their risk is hiring former M&A attorneys as insurance underwriters to combat the dynamics mentioned above and to stay on guard for unusual or overly buyer-friendly provisions in the acquisition agreement.

Insurance claims and payouts

Despite the current accelerated interest in transaction liability insurance, very limited information is available in the public domain regarding sustainability of the product, as well as consistency and predictability of claims. Among the leading global insurance organisations, AIG has been publishing annual reports on global M&A claims for the last three years. As per the AIG Global M&A Claims Study 2018[8] (the 'AIG Study') (which analyses more than 400 claims during the period 2011 and 2016 spanning AIG policies covering approximately 2,000 deals, worth over US$700bn in deal value), claims are likely to be a constant feature of transaction liability insurance going forward. The AIG Study reflects a claims notification in one-in-five (19.4 per cent) of AIG's warranty and indemnity insurance policies. Statistics in the AIG Study show that big-ticket-sized deals (over US$1bn) have the highest claims frequency (24 per cent) and the size of claims in smaller deals (between US$500m and US$1bn) is increasing. Globally, the more prevalent claim notifications are with respect to breach of warranties related to financial statements, compliance with laws, tax and material contracts. The AIG Study highlights a new trend whereby the majority of claim notifications are being made within six to 12 months after policy inception.[9]

Increased claims frequency and payouts demonstrate the expanding knowledge of the product and how it works. If the insured is heavily relying on the transaction liability insurance for coverage against any potential risks, due consideration should be given to the insurer's experience in the

8 'M&A Insurance – The new normal?' www.aig.com/content/dam/aig/america-canada/us/documents/insights/aig-manda-claimsintelligence-2018-w-and-i.pdf.

9 Overall, 33 per cent of claim notifications are made within the first six months after policy inception and 26 per cent of claim notifications are made within six to 12 months after policy inception.

handling of claims and financial strength. In order for a transaction liability insurance to provide a meaningful cover, the insured should have a clear understanding of how the losses will be calculated, how the claims will be handled by the insurer and the timescales involved in resolving a claim.

Many insurers now have dedicated claims professionals and tie-ups with law firms and experts to offer high-quality claims solutions, thus making the claims process relatively simple and streamlined.

Market volatility

Soaring demand for the product and fierce competition among insurers to get into the market are leading to very unpalatable consequences, including low premiums and, in some cases, underwriting processes that do not do justice to the complexity of the risk. This trend towards a soft market is particularly hazardous if the risk assessment for underwriting is further simplified and the buyer's due diligence is not conducted properly. Another challenge is that owing to massive expansion of the market, insurers are finding it extremely difficult to find qualified resources for complex risk assessments. With the increasing trend of claims and payouts (see 'Insurance claims and payouts' above), one major cause of concern is how the insurers will manage this dynamic to keep the market sustainable in the long term. It is critical that the market finds a sustainable way of earning higher premium volumes over time and minimising the high volatility of the losses.

Final thoughts

In the past five years, transaction liability insurance has gained acceptance in the M&A community as a crucial tool to de-risk transactions and not merely as 'sleep at night insurance'. Given its utility to respond to a wide range of issues that arise from transactions, transaction liability insurance is helping the parties to negotiate better deals and execute transactions quickly. It provides significant comfort to deal-makers that if something does go wrong with the business, adequate coverage is there to protect the investment. It is apparent that there is no uniform approach to determine whether to procure a transaction liability insurance as every deal will have inherent nuances and uniqueness. However, with more insurers writing transaction liability insurance, there are solutions available whatever the underlying deal structure, jurisdiction or dynamic. Given that insurance coverage for almost all known risks is generally not available under a transaction liability insurance, the trick really is to assess the perceived risks one wants to cover under the policy and whether it is worth going out of pocket upfront to get a

coverage for such risks. Having said that, it may still be useful in deals where the seller is not willing to offer appropriate risk coverage for whatever reason. As with any product, the cheapest policy will not necessarily be the best option. Buyers and sellers should look for the most appropriate coverage for the anticipated risks and should consider in detail the ability of the insurer to honour the claims and the overall cost of the policy. It is important for both buyer and seller to understand why transaction liability insurance is taken out, how it works, how due diligence can impact policy coverage, the general role that transaction liability insurance can play in a transaction and how they may stand to benefit from securing a policy.