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## W&I Insurance in UK Corporate Real Estate Transactions

While the rise of warranty & indemnity (W&I) insurance in the United Kingdom (UK) has often been seen as a remedy to some key underlying issues on corporate real estate transactions involving special purpose vehicles (SPV), for the unaware, it can create unintended problems. This *GT Advisory* examines some common problems that can arise with W&I insurance in corporate real estate transactions in the UK and important aspects to consider when choosing and negotiating a W&I insurance policy.

### £1 cap

Many sellers are happy to agree to W&I insurance on the basis that their liability under the sale and purchase agreement (SPA) will be capped at £1. While this can be loosely addressed in the heads of terms, the negotiation can turn sour when it comes to whether the £1 cap covers the title warranties, true-up obligations, or pre-completion undertakings (if there is a split exchange and completion). Most buyers will insist that the £1 cap only covers the warranties and tax covenant, thereby mirroring the W&I insurance. Resolving this issue at an early stage by specifying in the heads of terms that the £1 cap is absolute may help ensure that the selling SPV can be wound up following completion (if desired).

### Known Risks

It is the job and responsibility of lawyers and accountants to flag the potential risks associated with a transaction; however, W&I insurance policies often state that any risks within the buyer's contemplation (which can be deemed to include the knowledge of advisors and their reports) are excluded from the W&I insurance Policy. This can be particularly contentious in corporate real estate transactions in terms of risks associated with tax residency (for offshore SPVs) and investment vs. trading risks. It is important for the buyer to identify these risks early in the transaction, prior to a preferred W&I Insurance provider being selected, as many underwriters may be willing to accept risks of this nature if they have been priced into their original quote.

## **Seller Contribution**

The extent to which the seller contributes to the cost of the W&I insurance policy is often a point for heavy negotiation at the outset. Usually, the proportion of the seller's contribution will depend on the reasons behind the W&I insurance (*e.g.*, is this required because the seller is demanding a clean break or because the buyer is not satisfied with the seller's covenant?) and can range from the cost being for the full account of the seller to the full account of the buyer. If the W&I insurance policy is a buy-side policy, the buyer will ultimately control the amount of premium payable (particularly if they request full coverage for title warranties); in this event, the seller may wish to negotiate a cap on the amount of their contribution at the heads of terms stage.

## **Exclusions**

Most W&I insurance policies will start by seeking to exclude liability for environmental risks, transfer pricing, and tax residency risks (as a minimum); however, it is not always apparent from the quote provided which exclusions will apply. If there is a concern over certain specific risks, the parties can request that it is covered prior to making the decision. The terms of the W&I insurance policy are typically weighted in favour of the insurer, but the policy is always negotiable and insurers are often willing to consider reasonable amendments.

## **Limitations**

While certain seller limitations are standard in any SPA, the W&I insurance policy will contain its own limitations. When the SPA and W&I insurance policy contain the same limitations, it can create a double hurdle. To help avoid creating a double hurdle, the parties can focus on key limitations and those that are not already contained in the W&I Insurance Policy when drafting the SPA (this can include double recovery, seller mitigation, completion accounts, and post completion events, among others).

For more information on choosing or negotiating a W&I insurance policy or heads of terms for a corporate real estate transaction involving an SPV, consult with counsel or contact your Greenberg Traurig attorney.

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