



PRIVATE EQUITY AND M&A

# Special Situation Insurance – Cover for known and contingent risks

## Contingent (Title) Risk Insurance

In merger and acquisition (M&A) transactions buyers and sellers may take a different view of the potential impact of a known risk or a contingent liability. The intention of an insurance policy is to trigger a payment in the event that the contingent event materializes and causes loss to the insured. Contingent risks that might be insurable might be, for example:

- Written Form Requirements
- Boundary encroachment/  
Overhang
- Non-registered burdens or other third party rights or any risk in connection with the valid ownership of the property

### Synopsis of Cover

- Legal risks only, i.e., the facts have to be clear and the parties are only discussing the legal con-

sequences (exception: the facts are unclear for several years and no objection of a third party or notice of an official authority was filed)

- Period: in principle, as long as insured or eligible assignee retains an interest in the property
- The policy can be assigned once, at no cost, to one third-party buyer within ten years of issuance

## Litigation Buy-Out Insurance

Insurance can be used in disputes to ring-fence the issue and provide the target company with certainty as to the cost in the event that the liability crystallizes. Issues may range from contractual disputes to the outcome of a piece of litigation:

- Decision, judgement, decree or other court order by a German court that is enforceable
- Decision of the competent official authority or a third party appeal

## WHO IT'S FOR

- Parties to a transaction who have to handle potential dealbreakers
- Investors in projects (i.e., renewable energy projects)
- Financing banks

## WHAT YOU GET

- Carve-out of known risks with low likelihood of materialization and high potential damage
- More certainty to invest in projects
- Collateral for known risk/  
pending litigation

regarding suspension of a permit (building permission, permission pursuant to BImSchG, or any other permit within project development)

- Pre-litigation phase: for example, product liability issues that have not yet resulted in a lawsuit

#### Synopsis of Cover

- Damages in connection with a pending claim against insured
- To be defined on an individual case basis as described in the Due Diligence or something similar
- In principle legal risks only
- The cost of any adverse ruling
- Defense costs
- Period: until a damage is materialized or excluded by a final and binding decision

#### Interested?

If you are interested in our services, we would be happy to provide you with further information in person. Just get in touch!

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#### Motivations for Special Situation Insurances

- Abstract risk that has a low probability of occurrence but huge potential damage
- Clean exit for seller without any pending liability and/or corresponding escrow account
- Carve-out of material risk and potential dealbreaker
- Insurer's solvency and experience with claims handling (especially when it comes to alternative solutions with third parties or official authorities)

#### Insurers

Insurers who have the expertise and experience in structuring this type of insurance are limited and form a small part of the global insurance market. One of the roles of the team at Marsh is to monitor insurers with a view to opening new markets in this specialist insurance class.

#### WHY MARSH?

The Private Equity and M&A Practice at Marsh GmbH has a specialist transactional risk team that comprises individuals from a variety of professional backgrounds including lawyers licensed to practice in Germany. The team is dedicated to arranging bespoke insurance solutions such as warranty and indemnity insurance and specific policies to ring-fence a particular contingent issue such as tax or litigation.

#### ABOUT MARSH

Marsh is a global leader in insurance broking and risk management. Marsh helps clients succeed by defining, designing, and delivering innovative industry-specific solutions that help them effectively manage risk. Marsh's approximately 30,000 colleagues work together to serve clients in more than 130 countries. Marsh GmbH has approximately 700 employees based in Baden-Baden, Berlin, Detmold, Dusseldorf, Frankfurt, Hamburg, Leipzig, Munich and Stuttgart.

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