Berkshire Hathaway Specialty Insurance

Contingent Liability Insurance: A Vital Tool in the M&A Insurance Toolkit

By: Steven Harwood, *Head of Transactional Liability Insurance, Asia Middle East* | April 2022

*As companies engage in mergers and acquisitions, disagreements relating to potential liabilities can arise. These are often dealt with as specific indemnities under the transaction document. However, in certain cases the parties are unable to agree which side should hold the potential liability and, depending on the quantum of the particular issue, these can be "deal breakers". **Steven Harwood**, Head of Transactional Liability Insurance, BHSI Asia Middle East, discusses how Contingent Liability Insurance is being deployed to overcome some of these challenges and keep deals on track.*

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What is Contingent Liability Insurance?

Steven Harwood ("SH"): As its name suggests, Contingent Liability Insurance provides coverage for contingent liabilities, which are potential liabilities based on the uncertain outcome of identified issues. They are liabilities that are "known" at the time the transaction signs, (therefore excluded under a general disclosure regime and a W&I insurance policy) but not quantified or quantifiable. In the context of M&A, Contingent Liability Insurance allows an insurer to step in, accept the uncertain risk and allow the parties to the transaction to move forward with deal execution.

In what specific situations is this coverage typically deployed?

SH: There are many potential circumstances. Among the most common is when there is an ongoing or pending litigation which is potentially so onerous as to pose difficulties for the parties to the transaction to agree a fair price for the target business.

How can contingent liability insurance benefit all parties in a transaction?

SH: Contingent Liability Insurance brings certainty to known risks in a transaction by ring-fencing the specific issue and essentially removing it from the ambit of deal negotiation. Unlike the unquantifiable contingent liability, once the particular issue has been diligenced and underwritten by the insurance company, the cost of the insurance is "known" and so can be priced into the transaction consideration. As a result, a potential roadblock to the transaction can be avoided.

How does contingent liability insurance fit with other transactional liability solutions?

SH: Contingent Liability Insurance is one of the trio of insurance products utilized to manage transaction-related risks and support timely deal closure. By enabling parties to manage complex known risks, contingent liability cover complements Warranty & Indemnity Insurance, which is more widely known in Asia. The third product, Tax Liability Insurance, brings certainty to exposures that could potentially arise from accounting or tax treatments applied to the target of a transaction.

How would you describe the market for contingent liability insurance in Asia?

SH: There is a growing awareness of the existence of this product in Asia, and interest is being shown by transactional liability insurance brokers and M&A lawyers. However, few local carriers currently have the experience and flexibility to underwrite these complex risks.

What is an example of a specific contingent liability solution BHSI has underwritten?

SH: We recently completed underwriting the primary position relating to a company in liquidation. There was an existing claim against the assets of the company and the buyer (our customer), was concerned that the liquidation would be stalled by the ongoing litigation.

Working with the customer and the broker closely, we were able to tailor a coverage for this particular 'litigation buyout' to enable the broker to build a large insurance tower. Essentially, we diligenced the strength of the claim in the existing litigation and agreed to pay out in the event that it was ultimately successful; this enabled the liquidator to release the assets of the company without any potential liabilities remaining.

How is BHSI well-qualified to underwrite this coverage?

SH: BHSI has a dedicated transactional liability team in every region in which we operate. Our underwriters have deep expertise and extensive experience. We are major players in the Contingent Liability Insurance market in the US and are rolling out this expertise across other regions as we expand our transactional liability footprint.

In addition, as part of the Berkshire Hathaway Group we have the backing of an exceptional balance sheet that is unencumbered by reinsurance or reliance on third party capital providers - all of which is extremely important in the contingent liability insurance market. The flexibility borne of independence from third-party capital provider restrictions is essential when it comes to considering highly bespoke positions on complex contingent liabilities. For example, we were able to propose coverage with a 20-year term for a recent case we underwrote; no other carrier in the market could come close.

For more information on BHSI's Transactional Liability Insurance solutions, contact Steven Harwood, Head of Transactional Liability, Asia, at steven.harwood@bhspecialty.com.