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# REPS & WARRANTIES INSURANCE: A VALUABLE TOOL IN CROSS-BORDER M&A

By Nathan Stortzum, ProQuest, a division of Alliant and Brian Hendry, Paragon International Insurance Brokers, Ltd.



Reps and Warranties insurance is crucial in managing cross-border transactional risk. The continued ease of cross-border investment necessitates a greater consideration within the Reps and Warranties product range and the approach to cross-border placements.

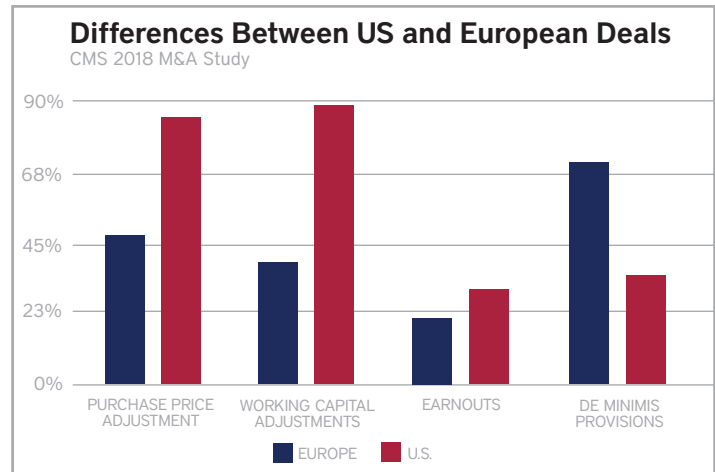
Whether it is a foreign buyer of a U.S. domiciled company, a U.S. buyer of a foreign domiciled company, the purchase of a company with international locations, or some mix of these, understanding the Reps and Warranties insurance process from the outset is critical.

It is vital to recognize that the Reps and Warranties product and underwriting varies from country to country due to differences in foreign laws, the speed of the process, the areas of focus, the number of markets available, and the experience level of those involved. Buyers of Reps and Warranties insurance, with the direction of their broker, should take note of the underwriting approach and due diligence required, along with the legal jurisdiction, specific policy form language, and insurance carriers to approach.

For instance, the process in certain countries can be slower, more cumbersome, and include local market practices that are unusual to the regular U.S. buyer. Further, the expectation for due diligence can often be far greater in certain European countries than in the U.S. One area where this is of major importance is foreign operations and the requirements of non-U.S. insurers. The broker should proactively prepare the client with regard to due diligence requirements when a deal involves foreign operations, especially for U.S. buyers of non-U.S. companies.

U.S. and European/R&W policy language can differ, which can be reflected in the pricing. Additionally, it is crucial to understand the relationship between the legal standards under which the acquisition agreement is governed and the manner in which a Reps and Warranties policy can be applied. Foreign jurisdictions can present different challenges as to the type and/or extent of coverage available. To achieve the broadest coverage, it is essential to approach European insurers early in the process to obtain “enhancements” to the standard European policy.

As the M&A market continues to expand and the use of Reps and Warranties develops, clients need brokers who understand the global marketplace and how it differs by country and region. Currently, the global market sits at more than \$2 billion in capacity with over 33 carriers. The market has expanded rapidly over the past four years. With any Reps and Warranties policy, choosing of the right insurance carrier partner is key, especially in cross-border deals. As brokers, it is crucial to identify which underwriters and insurance carriers have experience not only with cross-border deals, but also with the claims handling side of international exposures. A number of carriers will not consider deals with international exposures and, for those that do, it is on a country-by-country basis with regard to the jurisdictions considered.



Based on the information collected from the CMS European M&A 2018 Study, there is a noticeable difference in the amount of transactions with purchase price adjustments between Europe and the U.S. Working capital adjustments were the most frequently used purchase price adjustments, followed by separate debt and cash adjustments, then earn-outs. The use of a lock box mechanism is far more prevalent in Europe than the U.S., which is a main contributor to the statistics outlined above. As highlighted by the CMS survey, *de minimis* provisions are used far more regularly in Europe than the U.S. Another distinction highlighted between the U.S. and European markets is the use of a MAC (material adverse change) clause, which is seen in 93% of U.S. deals and only 13% of European deals. Additionally, M&A negotiations and contracts between Europe and the U.S. differ, resulting in a different underwriting process, policy form, and often insurance carrier partner depending on the transaction.

Further, European and U.S. deals differ in several other ways. The U.S. typically has lower liability caps backed by cash escrow or retention in the area of 10% of purchase price, while Europe uses cash escrow much less frequently. Deals in Europe involving Reps and Warranty insurance involve negotiation around general disclosure against warranties; however, this is rarely seen in U.S. deals because the use of disclosure schedules related to the purchase agreement is the norm. Additionally, another common element of U.S. deals is the materiality scrape, while Europe rarely sees this provision. This further highlights that expertise in a broker partner is crucial when it comes to any facet of cross-border Reps and Warranties regardless of size and geography.