



# Managing Sellers' Liability: Insurance Options



PROVIDING **CERTAINTY**

# Managing Sellers' Liability: Insurance Options

Private equity, infrastructure funds, corporates, founders and management teams often disagree on the level of contractual liability the sell-side should assume. There are a number of insurance solutions available to resolve these often difficult negotiations and enable the sell-side to achieve a significant reduction in their exposures.

## Structures

HWF's extensive experience allows us to advise clients on the merits of each solution set out in this note and to advise on the best approach and strategy to be followed. Each solution would then be tailored to the specific requirements of the deal.

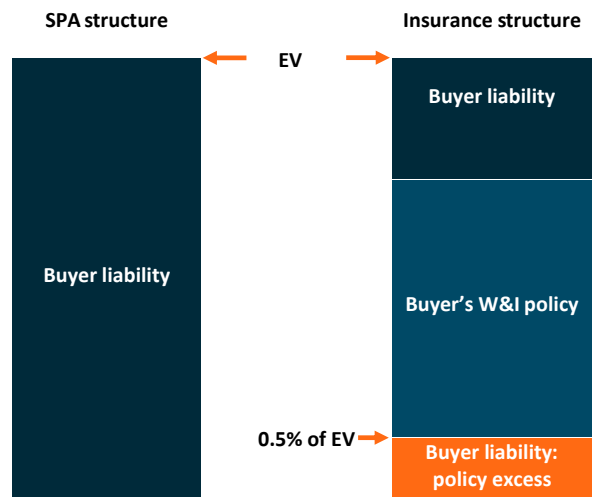
### Option 1: Zero or limited contractual liability

**Policy type:** top-up buyer's warranty & indemnity ("W&I") insurance.

**Liability structure:** seller provides a small contractual liability cap in the SPA (often as low as £/€//\$1) and the buyer gains its protection via a buyer's W&I insurance.

**Key benefits to a seller:** with no liability above their small cap, sellers have certainty of their post completion exposure in order to distribute proceeds.

**When to use:** best used in a competitive auction or if a seller is unwilling or unable to give a significant cap i.e. a financial investor or trust.



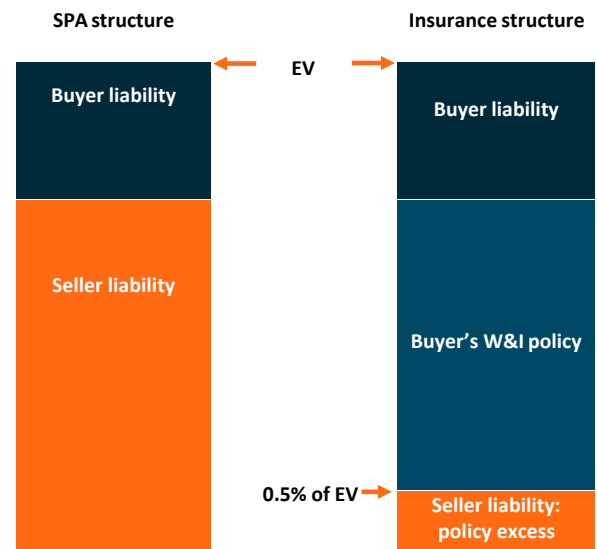
### Option 2: Insurance first recourse

**Policy type:** parallel buyer's W&I insurance.

**Liability structure:** seller provides a larger liability cap under the SPA and a buyer's W&I policy protects the buyer as first recourse.

**Key benefits to a seller:** while the seller accepts a significant cap, the SPA should provide that a claim must be brought against the policy first. The seller will only be liable to the extent the loss is excluded under the insurance policy or if they have been fraudulent (as the insurer will be entitled to subrogate for fraud).

**When to use:** owner managed business sales or MBOs where a buyer requires the management or founders to have "skin in the game".



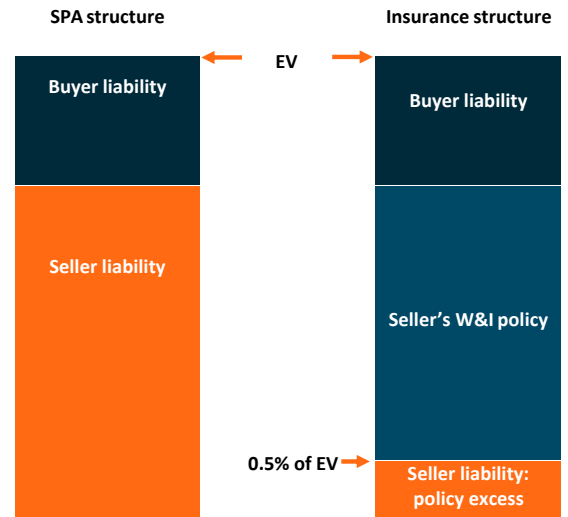
## Option 3: Backing up a liability cap

**Policy type:** seller's W&I policy.

**Liability structure:** seller provides a more significant liability cap under the SPA and purchases a seller's W&I policy providing cover for a successful claim against them by the buyer.

**Key benefits to a seller:** seller is in control of the process, negotiates its coverage position and has alignment of interests with the insurers in the defence of a claim.

**When to use:** the policy can be used in parallel with retentions, holdbacks or escrows (or where a buyer is not willing to take out insurance) to give the seller greater financial certainty.



### Key points:

- Provides sellers with certainty of the sale proceeds. Certain structures can remove the need for an escrow or retention.
- Reduces the likelihood of difficult negotiations.
- The seller can tactically explore each option in turn with the buyer.
- Works well where the limits to be insured are in excess of 10% of the total deal value and over £5m.
- The earlier we are involved, the more value the insurance will add to a transaction.
- Given premium rates, insurance is seen as a cost effective way to cut through this difficult topic and transfer the risk.

## About us

**HWF is a specialist independent M&A insurance broker and advisor led by senior professionals with extensive experience in M&A transactions.**

The team works with many leading legal and financial advisors and provides services to private equity, infrastructure funds, corporates, management teams, real estate firms and banks.

The team have over 100 years of combined experience in this market and have advised on over 2,000 global M&A deals, with values ranging from £5m - £10bn.

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