Contingent Liability

→ Distributor Guide
September 2024

This guide is for intermediary reference only:

It does not contain the full terms and conditions of the contract of insurance. Full terms and conditions are within the policy documents; you can request to have a copy of these.

Background

Markel International is a leading provider of Contingent Liability insurance both as a capacity provider to coverholders.

Markel has been insuring TL risks for over 5 years.

By taking the time to understand the activities of our insureds and to subsequently identify the specific exposures faced, we are at the forefront of insuring a variety of diverse risks, many of which are complex.

Product design

Contingent Liability insurance covers specific known non-tax (often legal) risks likely identified in the Buyer's due diligence (DD) or disclosed by the Seller in a merger and acquisition (M&A) transaction. The Buyer is typically the insured. The risk would be excluded under the Warranty & Indemnity (W&I) policy because it's known (with W&I covering unknown risks after DD and disclosure). However, if the risk is low probability (making it insurable) but high severity (the motivation for the purchase), a separate policy just for that risk may be purchased. Contingent Liability policies may also arise outside of M&A transactions if the insured is interested in removing the potential non-tax liability from its balance sheet often as part of restructurings, fund wind-downs, liquidations or payments to shareholders.

Cover is provided on a "claims made" basis, where the policy is designed to respond to claims that are made during the period of insurance.

Limits and retentions are in the aggregate for the period of insurance.

Target market

In general, the target market for our Transactional Liability product are commercial customers who meet the following criteria:

- Have more than 50 employees; and / or
- GBP 10m turnover

The insured under a Contingent Liability policy is often a special purpose vehicle set up by the Buyer for that transaction. As a result, the insured may be a shell company without employees or turnover at the time of purchase. The ultimate owner of the insured though is either a private equity fund or a parent company. In all cases, the insured is advised by a suite of specialists including legal advisors in respect of the specific non-tax risk being insured. We work with sophisticated buyers with sophisticated advisers engaging in corporate M&A for Target Companies valued in the range of $1 million to over $1 billion, which may give rise to the need for Contingent Liability policies. The Buyer's lawyers typically negotiate the Contingent Liability policies as well. There are edge cases where the insured may be an individual because the Buyer does not want to use W&I and instead keeps the Seller directly liable, in which case the Seller may take out a policy and the Seller may be an individual or group of individuals. The Seller / insured will still be heavily advised.

We are able to provide insurance solutions for a broad range of businesses and are happy to consider those that sit outside of these parameters (e.g. smaller operations), however this product is not suitable for:

- Individuals purchasing for non-commercial reasons
- Firms with less than GBP 1m revenue

In respect of Contingent Liability policies in M&A transactions, we are able to insure a broad range of Target Companies (both in terms of geography and sector), the subject of the underlying specific non-tax risk, and also a broad range of insureds as described above. Contingent Liability policies are discretionary purchases. In their absence, the liability is allocated between the Buyer and Seller in a transaction. Perhaps, the Buyer negotiates a price chip, secures an indemnity (promise to pay) in the purchase contract from the Seller for that particular risk or it just wears the risk itself. Buyers have increasingly used Contingent Liability policies in M&A because they have a single, financially strong counterparty who is incentived to pay claims. Sellers like requiring Contingent Liability policies because they do not have to hold a portion of the proceeds of their sale back in escrow for that particular risk and can move on to their next venture without the residual liability.

Scope of cover

Markel International's Contingent Liability policies can be arranged with a number of different extensions to allow other types of transactional liability business protection to be arranged under the same policy.

We tailor all aspects of each policy specifically to the individual risk, ensuring that you have the right cover for your client's exact needs.

We can offer cover for:

- A range of specific non-tax (often legal) risks in jurisdictions typically matching the governing law of the transaction to the policy
- Types of contingent liability risks insured include litigation buyout, competition law or regulatory
- Loss typically includes potential legal liability, costs of defending claims and gross-up subject to the limit
- Policy periods are typically 7 years to align with relevant statute of limitations
- Bespoke policy language tailored to the risk

Product value assessment

Our product value assessment includes the cost to Markel International of providing the product, through the distribution channel which the product is sold, and a review of the product performance and the type and quality of services provided to the end customer.

We take into account the nature of the product and its cover, benefits and any limitations, the price paid by the end customer, together with any services provided. A wide range of factors are considered including historical and expected claims frequencies, declinatures, incurred and projected claims costs, plus scenario analysis including likely economic and climatic trends, along with customer feedback and complaints and any other relevant information.

We also consider how the premium is affected by the commission we pay the placing intermediary together with any fees that we may pay for additional services received.

This also applies where an add-on product (including premium finance) not manufactured by us is sold alongside, or forms a package with the distribution of our products. These may affect the value to the end customer and will need to be taken into your own consideration of value and must be proportionate to the benefits, cost and service provided.

This product may not be suitable for policyholders/risks that fall outside the target market. Please refer to the target market noted above.

Our assessment is that the product is overall suitable for the target market. There are exclusions and indemnity limits that apply and when distributing the product you need to ensure that the needs of individual policyholders are considered and that the policyholder can make an informed decision on whether the product is suitable for them and where applicable discuss individual policyholder requirements that may be outside of the standard exclusions or limits with underwriters.

We have grouped products together for the assessment where they are intended to deliver a similar outcome and the target markets are consistent. If any of our fair value assessments result in an outcome where we believe the product is not offering fair value to the end customers, we will engage with the relevant distribution channels to agree appropriate actions.

Distributor / partner remuneration and costs

- Commission levels agreed prior to placement
- Fee for Service arrangements should they be entered into between both parties
- No additional costs or fees applied, except for local taxes (where applicable)
- Any additional charges within the distribution chain may potentially erode the intended value of our product

Distribution strategy

Our Contingent Liability insurance product has been designed for distribution by insurance intermediaries that hold commercial agreements with us. They must have the appropriate level of understanding about the risks and exposures faced by their customers in the operation of their business.

The distribution strategy is considered appropriate for the target market with customers having the option to purchase these products through a distributor of their choice. These products are considered suitable for advised and non-advised sales, where seen and agreed appropriate by suitably skilled persons.

Conflicts of interest

On the basis that we:

- Have not delegated any claims handling duties to you
- Have not delegated any underwriting authority to you
- Are not remunerating you beyond the flat rate commission or fee for services provided, agreed between parties

We confirm that the product is free from any innate conflict of interest that would compromise you from putting customers interests first.

Distributors / partners responsibilities

You are reminded to assess fair value to your customers where you charge additional fees or where commission rebating takes place. Distributors / partners should consider whether their customers who are purchasing a Markel International product are being charged any additional fees that are not funded by the premium paid. If customers are being charged additional fees by any party in the distribution chain, this could impact the outcome of the fair value assessment.

If a distributor / partner identifies that a product is not providing fair value and this has been caused by the distributor's / partner's distribution arrangements, including its remuneration arrangements, the distributor / partner must immediately inform Markel International for appropriate action to be determined.

Markel International are satisfied that the product offers fair value to its intended Target Market subject to distributors / partners:

- Not charging customers additional amounts over and above the gross premium quoted by us without first determining that they do not have a detrimental effect on the value of the product.
- Ensuring that no duplicate cover exists or is caused by an add-on where that cover is already provided by the policy

Providing feedback

We welcome any feedback from our distributors / partners on the performance of our products. All feedback will be considered in our next product review. Also, if you believe that your staff would benefit from additional training on this product, please contact your representative at Markel International.

MARKEL