



Warranties and Indemnities in Environmental & Energy Deals

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Environmental & Energy Deals

- What do we consider E&E deals?
 - Target / Buyer is in energy business (oil&gas, water, nuclear)
 - Target / Buyer is in environmental business – wastewater, air pollution, solar power
 - Also: “ordinary” M&A deals with environmental impact (e.g. transfer of real property)

Environmental & Energy Deals

- Also: “ordinary” M&A with energy law impact (e.g. transfer / re-negotiation of energy contracts after a transaction)
- We will not address:
 - Energy supply contracts
 - Project finance deals

Legal Framework of R&W

Switzerland

- Statutory warranty regime (articles 197 et seq. and 97 et seq. Swiss Code of Obligations): Rescission/reduction/damages
- Waiver of statutory regime and own contractual regime possible (BUT: No exclusion or limitation of warranty obligation in case of fraudulent concealment or gross negligence)

Germany

- Contractual freedom, Sec. 311 German Civil Code
- Own contractual regime
- Exception: Intentional acts are always subject to legal regime

Legal Framework of R&W

Netherlands

- Statutory warranty regime but usually excluded
- Only not possible to exclude in purchase transactions with consumers and not possible to exclude annulment of a transaction in case of fraud

Typical E&E Reps & Warranties

Typical warranties covering environmental issues in M&A transactions:

- Compliance R&W
- Explicit environmental warranties (in particular re soil)
- Financial statements warranty
- No litigation

Typical E&E Reps & Warranties

- Particular focus on compliance with applicable laws

“Except as disclosed in Exhibit XXX, Target is and within the last [three (3)] years prior to the date of this Agreement has been in compliance with (i) the Permits (including, without limitation, any ancillary provisions thereto); (ii) applicable laws; and (iii) orders, decrees or rulings of, or restrictions imposed by, any court or Authority.”



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Typical E&E Reps & Warranties

- No use of hazardous substances etc.:

“There are no hazardous materials present on or in the environment at the properties or at any geologically or hydrologically adjoining property, either temporary or permanent, and deposited or located in any part of the properties or such adjoining property. Neither the Company nor any other Person for whose conduct it is or may be held responsible, has permitted or conducted any hazardous activity conducted with respect to the properties in which the Company has or had an interest.

There are no contaminated sites (*Altlasten*) at any property owned, operated or otherwise used by the Company that could give rise to liability of the Company.”



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Indemnities: Examination Obligations / Notices

- Systematical approach: Warranties may usually not be claimed if a breach was known or could have been known – indemnities required for possibly known breaches
- Environmental due diligence can be part of the overall due diligence process

Indemnities

- CH: Statutory law provides for very short period to examine the object of purchase and deliver notice of claim in case of a breach
- Germany: Statutory examination / notification period usually excluded
- Netherlands: Statutory law provides for extended statutory time limits in case of environmental pollution; environmental pollution can also be treated as a criminal act of the management board or of the target company itself

Limitations

- Particular attention required re environmental issues
- Usually no threshold and no or extended cap for indemnities
- Time Limitation: Usually extended limitations (e.g. 3 / 5 / 10 years)

Risk Mitigation

- Buyer:
 - D/NL: Thorough DD incl. soil examination (Phase I /II).
 - CH: DD to understand hazard; soil examination may trigger unintended remediation requirements
 - Unlimited indemnity clause with part of the purchase price paid on an escrow account (or similar security for potential claims)
- Seller: R&W Insurance?
- Impact on deal structure?
 - Switzerland / Germany / Netherlands

Differences in Share Deals / Asset Deals

- Share Deals
 - All risks assumed by Buyer (i.e. risks remain with Company)
- Asset Deals
 - CH: Seller's liability as status disturber (Zustandsstörer) ends with sale of contaminated site; BUT: Seller's liability as conduct disturber (Verhaltensstörer) remains even after sale of contaminated site.
 - D/NL: Main risks remain with the owner of the soil, including lessee
 - Deal structure usually provides no sufficient protection, external liability can usually not be excluded

Enforcing R&W Breaches

- Arbitration or ordinary courts?
 - Confidentiality
 - E&E Know-how / Professionalism
 - Costs
 - Enforceability

Thank you

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Thank you

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