Into the Breach: Episode 45: Across the Atlantic: How W&I Insurance Differs from North American RWI
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Welcome to Into the Breach, a reps and warranties policy podcast by Bryan O'Keefe and Gena Usenheimer, partners and co-leaders of the Transactional Underwriting Counsel practice at Seyfarth Shaw, interviewing leaders from the industry and exploring the latest developments, market trends, and news impacting RWI and the transactional risk insurance markets.

Bryan O'Keefe: Hello and welcome to Into the Breach. I am Bryan O'Keefe. I'm joined by my co-host, Gena Usenheimer. How are you this morning, Gena?

Gena Usenheimer: I'm good. How are you doing?

Bryan O'Keefe: I'm doing very well. And we're taping this episode about a week out from the 4th of July and the big celebration that America is getting ready to have. It's a very big story in Washington, D.C. right now because there's all these preparations for big events down here. But I must say it has sort of been overtaken by a preparation that isn't going so well right now at the Reflecting Pool, which seems to be the only subject that people in Washington are now talking about. I don't know if you've been following this controversy, Gena.

Gena Usenheimer: Well, you know, I get my news from Instagram, but I've definitely seen the people in the inflatable dinosaur suits being like, "I'm pro algae, team algae." And then I thought I saw Trump was sending like the National Guard.

Bryan O'Keefe: He was. Well, he's claiming that the pool is failing to work because of vandalism.

Gena Usenheimer: Vandalism.

Bryan O'Keefe: The people were vandalizing the pool and that is why the algae has grown back. So I think it remains to be seen. They arrested somebody, just even as they arrested some person, some canoe—

Gena Usenheimer: In a dinosaur outfit or not in a dinosaur outifft?

Bryan O'Keefe: No, it was just some person. Like he saw the America blue paint or whatever floating on the surface and he just grabbed a piece of it and then the National Guard came and tackled him and arrested him for vandalism. And then Trump posted this thing on his social media thing all about why the vandals are really to blame for the algae blooms.

Gena Usenheimer: Well, that's interesting.

Bryan O'Keefe: I don't know. Well, I hope they get it all sorted out. It would be nice to have the Reflecting Pool looking beautiful for the 4th.

Gena Usenheimer: Yes, for sure.

Bryan O'Keefe: We are all still poring over the Reflecting Pool, even amongst all the controversy. But we will actually look beyond the borders here today again on Into the Breach with another international guest with us.

Gena Usenheimer: Drum roll.

Bryan O'Keefe: So today we are going to Germany and we have with us Markus Rasner, who's a partner at Oppenhoff over there. He's the underwriting counsel, and this is going to be a great episode. It's a subject that we certainly get asked questions about—warranty and indemnity insurance in Europe. And we're really delighted to have you here to talk with us and be on the show, Markus. Thank you. Welcome.

Markus Rasner: Yeah, thank you for having me, Gena and Bryan. I'm really excited to be on your show today.

Bryan O'Keefe: Great. Well, we're really excited to have you, Markus. Yeah, so maybe if you just want to start off talking, Markus, a bit about your own professional background and what you do and how you got involved in being underwriting counsel in Europe, that'd be great.

Markus Rasner: How much time do we have?

Bryan O'Keefe: Oh, well, the whole show is 25 minutes, so.

Markus Rasner: Fair enough. Yeah, as you mentioned, I'm based in Germany out of Frankfurt. I'm a partner with Oppenhoff, which is one of the leading independent firms in the German market with a very long history going back to 1908, really. We are full service and particularly known for our international work. I've been with Oppenhoff for nine years now, almost on the day—1st of July is my anniversary day. I head our private equity practice and I'm also co-head, as you mentioned, of our what we call warranty and indemnity insurance practice.

Primarily, I've always acted as a transactional counsel. So I do private equity work, M&A deals. But very early in my career, I got drawn into the warranty and indemnity space, basically two months in as a junior associate. And that was in 2003 already. So I'm a bit of a dinosaur really in that space. We got a call from our affiliated firm at that time in London asking us to support on insurance for reps and warranties. And really nobody really knew what it was about. And as it often happens, they just pass it on to the associates and we had to dig through all that. And that was my very first role as an underwriting counsel. It was only one market at that time, as you can imagine—AIG. And it was basically only one broker who was active in that field, that was Aon. Both these gentlemen are now part of the management at Riskpoint in Europe. So are also still around.

And that's how it got started. And then we did some of these multi-billion transactions where we advised the insurers. It was a very complicated process. We had no underwriting calls at that time. We actually had physical onsite interviews in our boardroom where we challenged the transactional lawyers on how they approached the deal. It's hard to imagine because it's such a long time ago and things were so different then. And yeah, and then the whole industry has evolved and things have evolved. We've stayed involved. And when we moved over to Oppenhoff, we had already a combined experience of 25 years. So we just thought, why not just continuing this? And over the years, we've built a market-leading practice within Oppenhoff and are now working on warranty and indemnity insurance, on tax-specific risks, also litigation buyout—all the things you do. But overall, we have not sort of given up the transactional work.

So if you want to split it, it's possibly 70, 75% is in counseling. And the remainder is on W&I and the reps and warranties.

Gena Usenheimer: Yeah. So I have a question. So in anticipation of our podcast today, I did a little internet sleuthing about you, and your law firm bio says you are Honorary Consul General of the Republic of Singapore in Frankfurt. What does that even mean? And who appointed you this and do you get to go to Singapore all the time, 'cause I really like Singapore.

Markus Rasner: Oh, that's good to hear. And that's confirmed. Yeah. As you can imagine, it has nothing to do with Reps and Warranties insurance. Neither was my role as a lawyer. That's why I was asking how much time do we have? So I spent almost two years of my professional career in Singapore. So I was seconded to Singapore right after Lehman collapsed in 2008. Had a great time there. We, like yourself, we liked it a lot. I consider Singapore as my second home, actually. I've stayed very closely connected with each and every one. And I was approached by the ambassador, by the Singaporean ambassador in Berlin pre-COVID, whether I could imagine to take on this role. I did not hesitate at all, as you can imagine, because it's really an honor and a privilege.

Gena Usenheimer: So what does it involve? Like, are you just sort of like a figurehead? Like do you go to parties or do you have to do actual stuff?

Markus Rasner: Certainly you can go to a lot of parties. If you give up your role as a lawyer, you can do parties all the time. But basically, it's about representing Singapore. It's about helping Singaporeans in Germany on their consular matters. Also on emergency cases. So it involves a strong part on consular services, but you're right, there's also what we would certainly call the fun part. So you get to meet and mingle with all the other people in the consular corps, and I get back to Singapore quite often and also have meetings with officials, ministers, et cetera. So that's, as I said, it's a real privilege. It's a small group of people because Singapore is a small state, as you know. So overall, I think there are 40 people around the globe who have that role.

Bryan O'Keefe: Wow, this is like our first diplomat on. I'm calling you a diplomat now, Markus. And this isn't just a figurehead, this is a true diplomat.

Gena Usenheimer: I also feel like this might be the first diplomat I know, actually.

Bryan O'Keefe: That's actually not true. You do know an ambassador to a country.

Gena Usenheimer: Oh yeah, but he's not an ambassador anymore.

Bryan O'Keefe: This is active diplomat, not like not foreign.

Markus Rasner: We have a ton of general consuls, honorary general consuls for Germany and the US as well. So I'm sure there must be someone next to you somewhere.

Gena Usenheimer: Well, I don't know that. They're not on my podcast, that's for sure.

Bryan O'Keefe: That is a great background and thank you to Gena for finding that very interesting, gem. That's fine. We don't mind thinking up more in the background section for that very interesting discussion.

Bryan O'Keefe: But now maybe we'll move to the heart of the matter here and talking a bit about warranty and indemnity insurance. And, you know, I think what's interesting about it to me is it's similar in concept to reps and warranty insurance, right, that we have in North America. But there are a lot of differences and the process is very different, the pricing looks very different. So maybe if you just want to start off by just explaining that to our guests who may not be as familiar with W&I, maybe they haven't come across it as much, and how this kind of compares to RWI in different areas.

Markus Rasner: Yeah, as you rightly pointed out there, it seems to be quite similar from the starting point, but in detail, there are lots of differences really. So maybe if we start with the markets in Germany, so it's a highly competitive environment right now. So we have like 20 plus markets. And as I mentioned before, from over the last 25 years, we've gone from one to 20 plus, which is a bit of a journey. Right now, I would say we have possibly the broadest cover positions we've ever had at the lowest premiums we've ever had, so that's exciting times for the clients and stressful times for the insurers, I would say. Yeah, and I think very generally speaking, our W&I insurance offers lower pricing, smaller retentions, probably also closer alignment with the insurers on disclosures and exclusions, and also a predominantly written Q&A process, what I understand is still different in the US. So if you look at some of these key points, maybe pricing, that's something where we have much, much cheaper than you guys.

Gena Usenheimer: So what would like an average pricing—

Markus Rasner: Like range?

Gena Usenheimer: Yeah.

Markus Rasner: On a corporate transaction, it's between 0.5 and 1%.

Gena Usenheimer: Wow.

Markus Rasner: Exactly. And honestly speaking, this drives innovation on the broker side because the brokers now really try to push the product, the European product, more into the US direction in order to justify higher rates online. So that's the period we are in right now. It's becoming more and more hybrid, and they try to implement elements which are totally common for you, but which have not been around and available pre-COVID in Europe or in Germany. And one example is, and that's probably from your perspective, one of the craziest points—that we have the data room disclosure concept.

Gena Usenheimer: Yeah. We hear about that all the time. So is it true that everything in the disclosure in the data room is deemed disclosed?

Markus Rasner: That's confirmed.

Gena Usenheimer: That's pretty good.

Markus Rasner: And on top of that, it's also true that the diligence reports that are prepared on the buy side will be considered disclosed.

Gena Usenheimer: Wow. Well, I mean, that's pretty good.

Bryan O'Keefe: That balances it, yeah.

Gena Usenheimer: Yeah, that's great.

Bryan O'Keefe: Because I think sometimes we've seen this where you sometimes have a European buyer, for whatever reason, is using an RWI North American style policy, and then they're getting all these questions about—that we go through our process because our process obviously is not where the disclosure schedules or due diligence reports are being disclosed. It's just what's on the schedules, right? And so just the four corners of the schedules. So obviously there's a lot more back and forth with us. And then they're like, "Well, isn't the data room disclosed?" We're like, "No, that's not how it works in North America." It's very, very different here. Like that's why we have to go through this whole song and dance because that's not the way that it works here. So I think that is a great advantage that you guys have over there when you're representing the insurers.

Markus Rasner: Yeah, but as I mentioned before, that's exactly the point where now the brokers try to innovate in a way that they have introduced the concept, what we call a data room scrape and diligence report scrape. So you can get enhancements under a policy in Europe or in Germany for, I would say, reasonably additional premium so that you can sort of disregard the data room disclosure and/or the diligence report disclosure. And that's something that has come up within the last two, three years, and it's becoming more and more common that it will actually be taken out by our clients. And that's one of these elements I just mentioned earlier, where we are moving into your direction a bit further, but still the pricing is not yet there where you are in the US.

Gena Usenheimer: Right. Sorry, I'm just like shocked.

Bryan O'Keefe: How much is the extra premium that they normally want on to have in scrape, I guess?

Markus Rasner: Well, of course, it depends on the deal, but as a sort of guidance, it's something sometimes even like 10 to 25% AP, which is still reasonable in my view.

Gena Usenheimer: Yeah, that's still pretty—yeah, that's like not, right.

Bryan O'Keefe: Well, because everything—let's go, I guess, let's assume that you have a regular policy where the data room's disclosed and the diligence reports are deemed disclosed. So do you even have exclusions? I mean, are exclusions even really necessary without all that? And how does the exclusion process work? Because in North America, we don't have those things and the exclusion process is then the part of the policy that is the most heavily negotiated, I feel like. So I'm just kind of curious as to how the exclusion process works then.

Markus Rasner: No, we still have a number of what we call standard exclusions, which are the same for almost any market. And that's, again, something that is not common in the US because we have all these locked box transactions. So any type of leakage is normally excluded. Then we have these Lloyd's mandated exclusions in terms of sanctions, nuclear risk, asbestos, war and terrorism. We have pension underfunding as a general exclusion, and in most cases, also transfer pricing. So these are—

Gena Usenheimer: But what about deal-specific exclusions? Are you not seeing those somewhat? You probably don't need them as much.

Markus Rasner: Yeah, because of the broad disclosure. So any known and identified risks will be considered excluded anyway. And in some instances where it's sort of unclear whether the diligence report is specific enough, the underwriter will explicitly put this into the policy as a deal-specific exclusion.

Bryan O'Keefe: Yeah, 'cause I mean, we see this like a lot, for example, where there's like a sales tax exposure, let's say it's like big, like a million dollars on a relatively small deal. You know, it's discussed in the tax diligence report, but because the diligence report is not automatically disclosed in the United States, we will then have a specific exclusion for whatever this like sales tax issue might be, right? But if you're having all the reports disclosed anyway, then it's in there. So I guess there just would be less of a need to have deal-specific exclusions like that.

Markus Rasner: True, yeah.

Gena Usenheimer: That's very interesting. So I actually thought that you guys didn't have underwriting calls at all, but then in your little intro, you were mentioning like back when you started, there were no underwriting calls. So how does it work? I thought you were just handling it in writing, but is that not true?

Markus Rasner: Nowadays it's true.

Gena Usenheimer: Now it's true, okay.

Markus Rasner: Yeah, there was a period where we had very lengthy underwriting calls of like three, four hours even. Then in '21, when it was really busy over here as well, everyone realized we do not have that much time to spend on the phone. And then it gradually moved more and more into written underwriting. And nowadays, I would say, even when you look at the NBI reports, the markets have to make a statement whether or not they insist on an underwriting call. And you normally find nobody anymore who's saying, "Yeah, we need this." And only in very few exceptional cases, we jump on a call. So it's actually all in writing now.

Gena Usenheimer: It's a lot less time for you then, right? It goes a lot faster if you do it in writing.

Markus Rasner: Well, yeah, you're right.

Bryan O'Keefe: And, Markus, in coming up with that, how does that work? So is there like a standard agenda that carriers have or is it like something that's very customized that you guys come up with? How does the question—like how many questions did you go through, like all the different specialist areas? Can you maybe talk a little bit more about that? 'Cause this is one that's very, very different than what we do here.

Markus Rasner: And it's, again, as the entire market, it's evolving. So there was a time when we started it, there was what we call the tranche one questions and the tranche two questions. And tranche one was more the general questions on the buyer, the strategic rationale of the deal, what type of key diligence they have engaged. So everything you need to know from a more general point of view. And the tranche two questions were very deal-specific after you had the chance to actually go through all the diligence reports. And over time, the more you dig into the reports, the more questions you have, obviously. And what happened, because the market environment has become more and more competitive, the brokers push the markets to limit the questions. As always, what basically happens is that we get a lot of pushback from the brokers saying too many questions, please reduce it to a more reasonable number. And then there's always a debate, what is reasonable and what not, and also depending on the complexity of the deal. But yeah, Bryan, to your question, there was a sort of a standard catalog that was applied in recent days, but nowadays it's more, much more tailor-made even because everyone wants to accommodate the broker's request not to sort of overpace.

Gena Usenheimer: But so you do still have the opportunity to ask questions, it's just more deal-specific.

Markus Rasner: Yeah, yeah.

Gena Usenheimer: Yeah, okay. And then what do you think that, or what are you seeing claims activity like? And you're saying that the coverage is really broad. Are you seeing claims for like huge multiples that like we see—like the severity and the frequency—or what do you see?

Markus Rasner: Multiples is a good keyword as well, because it's not covered under the sort of ordinary German policy. That you can claim—

Gena Usenheimer: Multiples are not covered?

Markus Rasner: No, no. It's not part of our damage definition. So we are also—this is again, another point where we are heading towards the US concept. So it definitely was not covered in recent years. And nowadays, it's no longer explicitly excluded, let's put it like this. And actually, we haven't seen too many cases where it was then fought out in court or in arbitration. It's a bit out in the open, I would say. But back to your question, the number of claims notices has gone through the roof as well, I would say. Quite similar pattern than in the US in terms of in which areas the claims are notified. But the feedback we get is that it's still sort of reasonable. And maybe it's more of a sort of fundamental issue that in Germany and possibly also in continental Europe, the history of post-close litigation is not comparable to your system. I know that-

Gena Usenheimer: Yeah. We like to be litigious here, yes.

Markus Rasner: Exactly, exactly. And I think it might take some time that all the people in the market realize, oh, now we got insurance, let's notify a claim and let's start litigation here. So we are probably right now in sort of a transition period where then people get more used to file claims and really go to court or do the arbitration proceedings to fight this through. But it's still reasonable.

Gena Usenheimer: So the severity is probably, I mean, at least with respect to the policies that aren't covering multiples, the severity must be much less.

Markus Rasner: Well, we had some significant claims in the market here on title, for example, some sort of, which were combined with some fraudulent actions even, but these are the outstanding ones everyone is aware of and everyone is talking about. But I think behind the scenery, it's still sort of manageable, I would say, from a market point of view.

Gena Usenheimer: Well, that is good to hear. Well, maybe as you move more towards like a US style RWI policy, you'll get more US style frequency and severity of claims. Won't that be relevant for you?

Markus Rasner: We'll need our litigation team to get more people in, yeah.

Gena Usenheimer: Exactly, exactly. Okay, well, so that is—marks the end of our substantive portion of the podcast. Oh, well, I guess I should ask you, is there anything else that you wanna share about what W&I looks like in Germany?

Markus Rasner: Oh, there are so many things we could talk about, certainly, but maybe one thing that we experience when we act on the buy side for US clients, which is really noteworthy—many people in the US are not aware that in Europe and in Germany, even smaller deals, so low and mid-market transactions can actually be reasonably insured. I think that's not the case in the US yet. So we're talking about transactions with an EV of 10 to 20 million, where most of our US clients don't even think about taking out reps and warranty insurance. But we have in Germany and across Europe, we have specialized markets who are dealing with these sort of lower mid-market transactions and which are very sort of smooth and commercial in their approach. And we would always recommend to also consider reps and warranty insurance for these smaller deals. Maybe that's a good point to mention again.

Gena Usenheimer: Yeah, that is a good point. I think we see deals with those low EVs, like 10 to 20 million, getting insured, but it sounds like it's much more common in Germany. It's certainly not the norm for us. Okay, well, officially, that ends the substantive portion of the podcast. And now we move into the—like a little game we have. So we asked three questions—it's the same three questions. Well, the first two questions are the same, and the last question is the mystery fun question, different for every guest. So our first question is, what do you think are the biggest changes that you think are coming down the pike for RWI or W&I in the next year or so?

Markus Rasner: Yeah, as a loyal listener to your podcast, I'm pretty aware of these questions. I think it's really a tough one right now. If we had this conversation a couple of years ago, I think there would be some obvious talking points. But with the current market environment, the cover positions I just mentioned at maximum, it was low premiums—I think we won't move any further in that direction. And then on top of it, all the uncertainties in the geopolitical arena. So it's really hard to predict what's going to happen. Actually, I would already be quite happy—and maybe it's wishful thinking—if we don't see too many changes within the next 12 months. But also I have given up hope that sort of a consolidation will take place on the premiums. So that's what everybody's talking about over here. When do the premiums go up again, become more reasonable, more sustainable? I don't think we will see that either. So my forecast for the next 12 months is we will sort of navigate in the sort of same area and without any major changes.

Gena Usenheimer: That's pretty good.

Bryan O'Keefe: Sometimes it changes that there's no change, right? So good, good. All right, so as a loyal listener of the podcast, the second question that you're probably familiar with—so what's a piece of career advice you would give to somebody, especially being such a grizzled veteran here, Markus? What's a piece of career advice you would give to somebody who's maybe interested in working in this space?

Markus Rasner: Well, that's also a good one. As private practice people, I think you would also agree that it's possibly advisable to start in private practice doing some M&A transactions, and once you sort of fully digested the M&A processes, then you could think about moving over to one of the insurers. I think my advice would be, and in that respect, it has never been easier to actually access the community. We have so many different networks across Europe, really, across Germany. We have a dedicated FEMA network, even in Frankfurt, for people in the reps and warranty industry. Just connect to any of these people, meet and mingle and get an idea of what this is all about. It's more transparent than ever. So 10 years ago, I think it was very hard to get a sense of what this is all about and what people do in the industry. And I think now you have a good chance to make contact and to talk to people and to get your own idea of what this is all about.

Bryan O'Keefe: Good, all right, so Markus, the last question we have—I will admit, this is actually a bit of a repeat, but because you're from a different country, we will get a very different answer. We had Sarah Jocelyn, who is also an underwriting counsel in Canada, on, and we had asked her the question, in Canada, what is a different, unique, cool tourist attraction to do if you happen to be in Canada one day? So we'll ask you the same question in Germany. Nothing obvious, like not the Berlin Wall remnants or whatever, right? Like what is something that you wouldn't think of to go to if you happen to be in Germany one day that people should go do?

Markus Rasner: Okay, wow, yeah. One day, touching down in Frankfurt possibly. So the Oktoberfest will be out, but I'm sure you would love to go there as well. So possibly if you're in wine—and the best Rieslings are actually grown 30 minutes away from Frankfurt. We could stop by that region.

Gena Usenheimer: We casually swing by. Okay.

Markus Rasner: Yeah. Okay. So we have famous—even the sweet wines, the sweet Rieslings—are grown there with some very reputable wineries. So this would be maybe the first stop. And then to make it a bit more exciting, we can move on to—I'm not sure whether you're familiar—the Nürburgring. Maybe you've heard of this. It's the Formula One, the former Formula One race course in Germany. And we could spend the afternoon on the Formula One race course, and then in the evening, head back with the German railway to the airport.

Gena Usenheimer: Wow, that was pretty good.

Markus Rasner: And now that I think about it, maybe we do it the other way around because being on the racecourse with some Riesling before might not be the best idea.

Bryan O’Keefe: Well, that's good. It's like not just a single place. You just gave us a whole itinerary. That is excellent. For our listeners who want a day trip there, that sounds like a great—

Gena Usenheimer: A day trip, a day trip to Germany.

Markus Rasner: But it's exactly doable within one day. And I've done it with some folks from Singapore before.

Gena Usenheimer Right, of course.

Bryan O’Keefe: Good, great. Well, thank you so much, Markus, for being on. This was a great podcast and a really timely topic. And we're just—thanks for spending some time with us today. We know that you've been a loyal listener. We've discussed that before. So thank you so much for all of your support of our show. We really appreciate it.

Markus Rasner: Yeah, thank you for having me. And yeah, indeed, I'm looking forward to many more episodes here.

Bryan O'Keefe: Thank you, Markus.

Markus Rasner: Great, thank you. Bye-bye.

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