

Back to the Basics

Bite-sized analysis of frequent issues encountered in transactions

June 07, 2021 | Contributed by **Transactions Practice Group** | HSA Advocates



SPECIFIC INDEMNITY

Bharat Sharma, Partner | Saurya Bhattacharya, Partner

Specific indemnity in a transaction context

Since specific indemnity is often intended to be clear/uncapped protection for the indemnity holder.

Ordinarily, indemnities in an M&A transaction are typically backed by the promoter(s). Specific indemnities are not limited with respect to any of the typical qualifiers on general indemnity:

- Disclosure schedule (often updated at the time of closing if the execution and closing are not on the same date)
- Representations being qualified in terms of knowledge, material, and financial thresholds
- Definition of losses, non-inclusion of indirect damages,
- A *de minimus*, basket and aggregate limitation of liability
- Confining indemnity to undisputed and final losses subject to recovery/recovery through insurance, change in law, mitigation of losses, claim time limits

Recent trends and observations

Few trends for reflection while considering specific indemnity clauses in transaction documents:

- There is sometimes a **difference in liability description** (whether several, joint, or joint and several) depending on indemnifier
- In case of indemnifying party/parties being individual(s) or natural person(s), there is a **consistent trend towards joint and several liability** for obvious imperatives of maintaining liquidity for a potentially significant indemnity claim
- **Escrow holdbacks** are preferred in certain scenarios – where the funds are vide foreign investment, exchange control considerations are vital
- There are also instances, albeit rare, of **security creation over non-transaction assets** to ensure recourse in case of a claim
- Unsurprisingly in some ways, **indemnity insurance**, with its limitations, has not always been a popular choice in Indian transactions

Our view

Eventually the best indemnity structure depends on deal imperatives and which side is able to negotiate more favorable terms for itself. It is relevant to note that an indemnity claim (not being a specific indemnity) may not be subject to qualifications if the claim arises because of fraud, embezzlement, theft, willful misconduct, negligence, or wrongful gain by unlawful means by the indemnifying party – this would depend upon how the indemnity clause is framed.

STAY CONNECTED



www.hsalegal.com



mail@hsalegal.com



HSA Advocates