

# BACK TO THE BASICS

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## TRANSACTIONS PRACTICE GROUP



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## Representations and warranties: Impact assessment

Representations and warranties are used synonymously in corporate transactions and are often inter-linked in drafting and remedies as well. However, there are differences between the two. In this note, we look at some of the fundamentals that should be borne and considered in mind about representations and warranties, while making a deal.

- Representations are considered fundamental to a transaction while warranties are incidental or collateral to a transaction. Therefore, remedies under law for the two are different as well – the former allows for repudiation while the latter allows for monetary relief.
- Indemnity protection for an investor against breach of representations and warranties by the investee/existing shareholders/promoters is practically a trade-off between the two sides – avoid easy repudiation of the deal set off against indemnity assurance instead of a more protracted damages claim.
- Representations and warranties are of two key kinds – fundamental and business/operational. The fundamental ones pertain to matters that form the bedrock of deal making such as due incorporation, authority to sign, capacity to perform and clear title to the assets that are subject matter of the transaction (such as shares/securities).
- Business/operational representations and warranties provide a health check on the underlying business entity that is part of the deal. This includes matters relating to finance, taxes, tangible and intangible property, employment, insurance, litigation and, of course, operational permits and licenses.
- The above is also the domain in which due diligence is carried out. Therefore, business representations and warranties have broad and 'standard' clauses as well as specific clauses that are by way of addressal of issues that may have been identified during the due diligence.



**Some of the aspects that we recommend for consideration when negotiating representations and warranties in a deal are:**

- **The appropriateness of knowledge and materiality qualifiers in any specific clause.**
- **The cumulative effect (redundancy or efficacy, depending on which side you are on) of such qualifiers along with the de-minimis threshold that is likely to be in an indemnity clause.**
- **Whether indemnity against breach of representations and warranties is actually a sole remedy under the transaction or a non-exclusive remedy.**
- **Whether the indemnity is provided by the investee company or existing shareholders/promoters.**

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