

Short Notes on:

WARRANTIES AND INDEMNITIES AS AN INTEGRAL PART OF YOUR MERGER AND ACQUISITION AGREEMENT

Introduction

Ensuring that the appropriate due diligence and warranties disclosures have been duly completed, takes you that much closer to closing the deal. The warranties by the seller ensures that the purchaser has contractual protection in the event of misrepresentation.

It is important to note that a share purchase agreement (share sale) will contain significantly more warranties than a sale of business as a going concern (asset sale). In a sale of business as a going concern, less warranties are required as the purchaser expressly agrees to assume certain liabilities.

Types of warranties

By including the warranties in the sale agreements, the seller warrants that they have disclosed all that is necessary to the purchaser, and the purchaser shall not be blindsided by any act or claim that may arise in the future. Examples of warranties that are included in sale agreements are:

- All contractual agreements entered into between the seller and a third party;
- All employee agreements inclusive of all details regarding each employment history including but not limited to accrued leave, remuneration, and deductions;
- Any current or pending dispute proceedings and or litigation that has been or will be instituted;
- All tangible and intangible assets; and
- A general warranty disclosure that the seller has disclosed all the relevant information to the buyer.

A share purchase agreement will contain further warranties such as:

- Tax warranties;
- Audited financial statements;
- The valid issue of unencumbered shares;
- All legal documents and frameworks;
- All registers of the shares and securities of the company; and
- A warranty disclosure that provides for any liabilities that have not yet been disclosed.

In a share purchase agreement, warranties will include reference to foreign laws where applicable. It will also contain the regulatory approvals that are required under law, such as from the Competition Commission and Takeover Regulation Panel *where applicable*.

Should the seller breach a warranty that has been contained in the agreement, it will effectively be a breach of the agreement itself. Thus, the purchaser will be entitled to a claim for damages and or to cancel the agreement.

Conclusion

Warranties in your contractual agreements are important to ensure that the purchaser is protected from misrepresentation, as well as protection for the seller should the purchaser claim to have not known something that would materially affect the agreement, when the seller has in fact disclosed this warranty. Mergers and acquisitions is overall a stressful transaction for all parties concerned. Ensuring that you are appropriately covered in all aspects is what alleviates the stressful nature and helps secure the deal!

Contact an expert at SchoemanLaw for any of your contractual needs today.