M&A PLAYBOOK

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COMMON LAW VS. CIVIL LAW

No. 1

Represantation and Warranties

Representations and warranties are fundamental contractual mechanisms that allocate risk between the parties in mergers and acquisitions transactions. However, the legal nature and consequences of these concepts differ significantly under Common Law and Civil Law systems.

COMMON LAW

In Common Law systems, representations refer to statements of fact made by one party with the intention of inducing the other party to enter into a contract, and their legal significance arises primarily at the pre-contractual stage. A false or misleading representation may give rise to misrepresentation claims, including rescission of the contract and, in certain circumstances, claims for damages founded in tort.

Warranties, by contrast, are contractual undertakings that certain facts are true as at a specified date, the breach of which constitutes a breach of contract and entitles the aggrieved party to contractual remedies, most commonly an award of damages. This strict doctrinal distinction enables the parties, particularly in M&A transactions, to structure with precision the allocation of risk, the available remedies and the limits of liability, and the framework is typically supported by disclosure letters and knowledge qualifiers.

CIVIL LAW

In Civil Law systems, the distinction between representations and warranties is considerably less pronounced and, in many cases, does not exist as a functional matter. Statements made by a party are, as a general rule, assessed within a single and unified contractual framework, and this approach focuses not on drawing a sharp distinction between pre-contractual inducement and contractual undertaking, but rather on whether the relevant statement has been incorporated into the scope of the contractual obligation and whether any inaccuracy gives rise to a breach of contract or pre-contractual liability.

Inaccurate statements are addressed not through standalone misrepresentation doctrines but through the rules governing defects of consent, statutory warranty regimes or provisions relating to non-performance of the contract, and the available remedies are typically limited to termination, price reduction or damages.