

### What Is an Indemnification Provision?

#### 什么是赔偿条款？

If a seller breaches its obligations to the buyer in an M&A deal, the buyer has the right to bring a breach of contract or other legal claim against the seller. However, broad legal claims do not give buyers or sellers much certainty as to what their risk and exposure will be. As a result acquisition agreements typically include indemnification provisions: the seller agrees to compensate the buyer, and agrees to a specific procedure for doing so, and in exchange receives some limitation on its legal exposure.

在一项并购交易中，如果卖方违背了其对买方的[责任??]，买方有权对卖方提出违反合约或其它方面的诉讼。然而，这种广范的法律权利并不能帮助买方或卖方确定其可能面临的风险。因此，收购协议通常会包含赔偿条款：据此，卖方同意补偿买方，也同意有关的补偿程序，从而作为交换获得对卖方的法律风险的一定限制。

Generally speaking, indemnification provisions provide that the “Indemnitor” (the party providing indemnification) will reimburse the “Indemnitee” (the party receiving indemnification) for losses incurred by the Indemnitee as a result of the Indemnitor’s conduct in connection with the transaction. Both the buyer and seller will often have indemnification obligations, but it is the buyer that faces greater risk exposure and, consequently, will be more focused on obtaining indemnification protection.

一般来说，赔偿条款规定“赔偿方”（提供赔偿的一方）将针对因赔偿方与交易有关的行为而使“受偿方”（接受赔偿的一方）遭受的损失对受偿方进行赔偿。通常买卖双方都有赔偿责任，但买方因为面临了更大的风险，因此，买方更关注于如何获得赔偿保护。

### What Is the Scope of Indemnification?

#### 赔偿的范围是什么？

It is common for the seller to indemnify the buyer for losses arising from some or all of the following occurrences:

- Breaches or inaccuracies in the seller’s representations or warranties;
- Failures by the seller to perform any covenant;
- Pre-closing taxes of the acquired company;
- Excluded liabilities (i.e., liabilities of the target company specifically not assumed by the buyer);
- Employee benefits for employees that did not transfer to the buyer;
- Environmental liabilities;
- Pre-closing product liability claims, etc.

通常卖方就以下（部分或全部）的情形导致的损失对买方进行赔偿：

- 卖方违反了其陈述和保证或其陈述和保证有误；
- 卖方未能履行任何承诺；
- 被收购的公司在交割之前所负担的税务；
- 除外责任（即非由买方所当承担的目标公司的责任）；
- 未转移给买方的员工的福利；
- 与环保相关的责任；
- 交割前所提出的产品责任要求等。

The buyer may indemnify the seller for losses arising from the following:  
Breaches or inaccuracies in the buyer's representations or warranties;  
Failures by the buyer to perform any covenant;  
Liabilities assumed by the buyer; and  
The operation of the acquired business following the closing.

买方可能就以下情形导致的损失对卖方进行赔偿：

买方违反了其陈述和保证或其陈述和保证有误；

买方未能履行任何承诺；

买方负起的责任；以及

交割后被收购业务的运作。

The seller will seek to minimize its exposure by having its representations and warranties terminate soon after the closing. The buyer, on the other hand, will want the seller's representations and warranties to last as long as possible. The usual compromise is for certain representations and warranties to survive for a full accounting cycle after closing plus additional time to identify a claim (e.g., 18 months). It is also common for indemnification for certain matters that cannot be identified quickly—such as environmental contamination or tax matters—to survive for a longer period or until the expiration of the applicable statute of limitations for such matters.

为了将风险最小化，卖方会要求在交割后不久终止其陈述和保证。而另一方面，买方则希望卖方的陈述和保证能持续尽可能长的时间。通常的折衷办法是令某些陈述和保证在交割后的一个完整的会计年度后再加上一段能让对方确认赔偿请求的额外时间内（例如，18个月）保持有效。常见的办法也包括对于某些无法很快确定的事项的赔偿，例如环境污染或税务，使其在更长的期限内或直至对该类事项适用的诉讼时效届满时仍保持有效。

### **Who Is Indemnified?**

#### **谁被赔偿？**

The Indemnitee, whether it is the buyer or seller, should ensure that the indemnification also covers its affiliates, employees and representatives. On the other hand, the Indemnitor will want to clarify that the obligation to indemnify is limited to the party, or parties, executing the purchase agreement.

受偿方，不论是买方还是卖方，都应确保赔偿的对象也包括其关联方、雇员和代表。而另一方面，赔偿方会想要限制其赔偿的责任仅限于签署购买协议的一方或各方。

In an asset deal, following the closing, the seller may end up as a shell entity with no resources. The buyer in this situation will therefore want to make the seller's parent entity or controlling stockholder joint and severally liable for indemnification.

在一项资产交易中，卖方可能在交割完成后成为一个没有资源的空壳公司。在这种情况下，买方将会希望卖方的母公司或控股股东承担连带赔偿责任。

In a stock deal, the stockholders of the target company will indemnify the buyer. Public company deals generally do not provide for indemnification because it would be impractical to impose the indemnification obligation on a large number of public stockholders.

在一项股票交易中，目标公司的股东将对买方进行赔偿。但上市公司在此类交易中通常不规定赔偿事项，因为要使大量的上市公司的股东承担赔偿责任是不切实际的。

### **Limitations on Indemnification**

#### **赔偿的限制**

There are several ways that an Indemnitor may seek to limit the extent of its indemnification obligations. Most important is to have both parties agree that the indemnification rights are the only rights of compensation for the buyer, unless the seller committed fraud or acted in bad faith.

赔偿方有几种方法对其赔偿责任的范围进行限制。最重要的一点是使双方都同意赔偿权是买方唯一的求偿权，除非卖方有欺诈或恶意行为。

Indemnification obligations are typically limited to a maximum amount, or "cap." The size of the cap will depend on the size of the deal, the bargaining power of the parties, and whether any outstanding concerns were raised during the due diligence process. Caps in large deals can often be 10% of the purchase price, but in smaller deals it is not uncommon to cap liability at 50% or more of the purchase price.

赔偿责任的额度通常都有一最大限额（即“上限”）。该上限的额度取决于交易的规模、各方的谈判实力以及在尽职调查过程中是否出现了重要的关注事项。大宗交易中的上限通常会收购价格的10%，但在较小规模的交易中上限责任达到收购价格的50%或以上并不罕见。

Another common means of limiting indemnification is by setting threshold amounts that must be met before the indemnification obligation is triggered. For example, the indemnification clause may provide that the Indemnitor is not obligated to indemnify for any single claim with a value of less than \$10,000. In addition to the foregoing "de minimis" limitation, there is often a requirement that the Indemnitor's obligation does not kick in unless the Indemnitee has aggregate claims totaling at least a certain amount, say \$50,000. This is known as a "basket" if the Indemnitor is obligated to pay the full \$50,000 plus any additional losses, or a "deductible" if the Indemnitor's liability only covers amounts in excess of the \$50,000. The amount of the basket/deductible is often around 1% of the purchase price.

Finally, the Indemnitor may also try to exclude all incidental, consequential, punitive, indirect and other damages.

另一个限制赔偿的范围的常见方法是设置一个引发赔偿责任所必须达到的金额。例如，赔偿条款可以规定赔偿方没有责任赔偿任何价值低于一万美元的单项索赔。除了前述“最低”限制外，若受偿方合计的索赔没有达到一定的金额，赔偿方通常也不负有赔偿义务，比如五万美元。如果赔偿方有责任偿付包括五万美元在内和其他任何额外的损失，该种情况被称作“一揽子赔偿”；或如果赔偿方的责任仅包括超过五万美元的部分，则被称作“减扣赔偿”。一揽子或减扣赔偿的金额通常为收购价格的1%左右。

最后，赔偿方还可以尝试排除所有偶然的、间接的、惩罚性的、非直接接的和其它的损害赔偿。

## **Making a Claim**

### **索赔**

When drafting an indemnification provision, it is important to be clear regarding the process to be followed when making a claim. A typical indemnification clause will set forth requirements for giving notice of a claim or electing to assume the defense of a claim. Be aware of the required timing for such notices, as missing a notice deadline may impact your party's rights or obligations.

在起草赔偿条款时，写明索赔时应遵循的程序是很重要的。一项典型的赔偿条款会列明发出索赔通知的方式或如何选择对索赔进行抗辩的要求。各方应注意对该类通知要求的时限，因为错过通知的最后期限可能对该方的权利和义务产生影响。

## **Third-Party Claims**

### **第三方索赔**

If the claim for indemnity is based on a third-party lawsuit, the seller may have more motive than the buyer to ensure the lawsuit is managed effectively. Moreover, indemnification provisions usually include that the Indemnitor will “defend” and “hold harmless” the Indemnitee against such third-party claims.

如果索赔是基于有关第三方的诉讼，则卖方可能比买方更希望确保该诉讼处于有效的控制状态。此外，赔偿条款通常规定赔偿方将针对该第三方索赔进行“抗辩”并使受偿方“免受损害”。

As a result, in most indemnification provisions the Indemnitor agrees to take over the litigation defense of a third-party claim brought against the Indemnitee. This is typically a permissive right on the part of the Indemnitor, meaning that the Indemnitor may choose to take over the defense but is not required to do so. Such provisions usually state that if the Indemnitor does not assume the defense, the Indemnitee may proceed with defending the claim in good faith and the Indemnitor will be obligated to reimburse the amount of any judgment plus the costs of the litigation. In the event that the Indemnitor assumes the defense, the parties should consider whether the Indemnitee will retain approval rights over the selection of counsel and the decision to settle, and whether the Indemnitee will have the option to take back control of the litigation at a later point in time.

因此，在多数赔偿条款中，赔偿方同意接手一个第三方对受偿方提起的索赔的抗辩。通常对于赔偿方而言，这是一项许可性权利，意即赔偿方可选择但并非被要求进行抗辩。该类条款通常规定，如果赔偿方不选择抗辩，则受偿方可善意继续进行抗辩，并且赔偿方有义务补偿任何判决的金额以及诉讼费用。如果赔偿方进行抗辩，则各方应考虑受偿方将是否保留对选择律师以及决定和解事项的批准权、以及受偿方将是否可以选择在稍后阶段重新取得对诉讼的控制权。

## **Escrow Accounts**

### **代管帐户**

In some deals, the buyer does not have sufficient comfort that the seller will be able to meet its indemnification obligations. This is particularly the case when buying from a single purpose company, as in the case of private equity sellers, or when buying from individual shareholders. In such cases, buyers often demand that a portion of the purchase price be paid into a separate account which can be used to indemnify the buyer after closing. These escrow accounts expire at some time after closing, and the escrowed amount is paid to the seller. However, if the buyer makes a claim against the seller, the buyer can be paid from the escrow account.

在一些交易中，买方并没有足够的把握确定卖方将能够履行其赔偿责任，尤其是在对一家“单一目的”公司购买时（例如买方是私募或是个人股东）。在该类情况下，买方通常要求将收购价格的一部分金额存入一个单独的账户，该账户可用来在交割后对买方进行赔偿。该类代管帐户在交割结束后的某一时间内到期，之后代管的金额将支付给卖方。但是，如果买方向卖方提出索赔，买方可从代管帐户中获得支付。

## **Conclusion**

### **结论**

A well-drafted indemnification provision can be a very helpful component of a purchase agreement. The indemnification provision should work in conjunction with the other parts of the agreement, such as the representations and warranties section and the disclosure schedules. However, making a successful claim under an indemnification provision can be difficult and time consuming. For this reason, it is important to conduct a thorough due diligence review before entering into an agreement to disclose as many issues as possible.

一条完善的赔偿条款可成为购买协议中非常有用的一部分。赔偿条款应与协议的其他部分，例如陈述和保证条款以及披露函，一起发挥作用。然而，依据一项赔偿条款成功提出索赔可能会非常困难并且耗时。因此，在签订合同前进行一次彻底的尽职审查以披露尽可能多的问题是非常重要的。