# Overview of the acquisition agreement

This section considers the main provisions in the acquisition agreement relating to a share sale

# Introduction to acquisition agreement

Either during or after completion of the due diligence process the solicitors will produce the first draft of the acquisition agreement (or share purchase agreement or sale and purchase agreement) for negotiation by the parties. On a bilateral sale this is more likely to be the buyer’s solicitors and on an auction sale this is more likely to be the seller’s solicitors. In this section you consider the main provisions of this agreement. In later sections, you will review some of these provisions in more detail.

# Main provisions of the acquisition agreement

The main provisions in an acquisition agreement relating to a share sale will include:

1. **Shares**

A description of the shares in the target to be sold to the buyer.

1. **Consideration**

The price that the buyer is going to pay for the target. It will also be necessary to detail the form that the consideration is going to take, if it is not all going to be paid in cash. You will learn about different forms of consideration in the second half of this knowledge stream.

1. **Conditions precedent**

There may be one or more conditions that must be satisfied before the transaction can be completed. It may, for instance, be necessary to obtain regulatory consent (see Topic 1). There will often be an obligation on one or both parties (depending on the particular conditions) to be proactive in taking actions to ensure that the conditions are satisfied –this can be referred to as using their “reasonable” or “best” endeavours, depending on the agreed standard that is to be applied. Where there are one or more conditions precedent, the provisions in the agreement should also provide for a long stop date for the satisfaction of the conditions and set out what will happen in the event that a condition precedent is not satisfied.

1. **Arrangements for completion**

Completion may occur at the same time as signing of contracts in a corporate transaction. This is referred to as simultaneous signing and completion. However, where one or more conditions precedent need to be satisfied, then then there will need to be a delay between signing and completion. The acquisition agreement will be signed when it is executed by the parties and it will be completed following satisfaction of the conditions precedent.   
The acquisition agreement will set out in detail the matters that need to be dealt with at completion, including the production of stock transfer forms in relation to the shares being bought, the handing over of the target’s statutory books and records and title documents, the discharge of any relevant charges over the shares and/or the target’s assets, the appointment and resignation of directors and the actual payment of the consideration. This section of the acquisition agreement acts as a checklist for the solicitors organising completion in order to ensure that all the necessary steps are taken. You will look at this further in the Completion Topic and workshop.

1. **Pre-completion undertakings (‘gap controls’)**

Where signing and completion do not occur at the same time, the buyer may seek undertakings from the seller to ensure that the business of the target is carried on in the ordinary course and that the value of the target is protected. These undertakings are more significant when the period between signing and completion is long and/or where warranties are not repeated at completion.

1. **Warranties**

Warranties are statements of fact, which the seller makes in relation to specific aspects of the target. The seller warrants that the statements are true at the time the statements are made. If the warranties are subsequently found to be untrue by the buyer, the buyer will have a contractual claim against the seller for breach of warranty (subject to the usual requirements of proving loss, foreseeability and the requirement to mitigate). Warranties are given on signing and may be repeated at completion.

1. **Indemnities**

Indemnities are promises made by the seller to reimburse the buyer for any loss it suffers in connection with a specific liability which may arise in the future. In a share sale, a buyer will almost always expect to see a set of indemnities dealing with any unexpected tax liabilities that arise as a result of the target’s activities prior to completion.

1. **Seller protection provisions**

Seller protection provisions are included in the acquisition agreement in order to limit the seller’s liability for breach of warranty claims. The provisions usually contain an upper limit on any claim for damages that can be brought by the buyer (“cap”) and a lower level below which claims cannot be brought (“de minimis”). The seller protection provisions usually also contain a detailed procedure that must be followed by the buyer in order to bring a claim (including time limits for the notification of claims).

1. **Boilerplate clauses**

These are the general routine clauses found in most types of commercial contracts. Boilerplate clauses deal with the way in which the contract operates and regulate, control and modify the rights and obligations of the parties. They are usually found towards the end of the agreement. Example clauses include entire agreement notice provisions, governing law and jurisdiction, assignment and non-assignment and exclusion of third-party rights.

1. **Entire agreement clause**

This is a boilerplate clause which (if effective) prevents the parties to the agreement from raising claims that statements made during the contract negotiations which were not included in the final agreement (pre-contractual statements) constitute additional terms of the agreement and also seek to prevent a party bringing an action for misrepresentation.

1. **Restrictive covenants**

In the context of a share sale, the purpose of restrictive covenants is to protect the value of the target, by preventing the seller(s) taking certain actions which could be detrimental to the target (for example, setting up a new business in competition with the target’s business) for a period of time post-completion.

# Summary

* In a bilateral share sale, it is most likely to be the buyer’s solicitors who will produce the first draft of the acquisition agreement. In a sale by way of auction it is most likely to be the seller’s solicitors who will produce the first draft.
* The acquisition agreement is heavily negotiated, in particular, the buyer will often want the seller to give extensive and wide-ranging warranties and indemnities. The seller will try to resist this as much as possible.
* In the next section, you will consider the buyer’s and seller’s contractual protections.