Global Private M&A Guide - Limited External Content - Malaysia

Preliminary documents

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

# Is it customary to prepare a letter of intent or term sheet and, if so, to what extent are they binding on both parties?

It is not uncommon for parties to enter into a term sheet or a letter of intent to set out the commercial terms of the transaction. Such terms are not typically binding, but parties will often provide for certain binding terms, e.g., confidentiality and exclusivity.

# Does a term sheet, in this context, customarily include provisions on exclusivity, break fee or confidentiality?

**Exclusivity**: Exclusivity provisions are commonly included in term sheets/letters of intent.

**Break fee**: Break fees are not common provisions in term sheets/letters of intent. In Malaysia, deposits are more common, that is, the seller will request that the buyer pay a deposit at the time of the execution of the transaction as part of the purchase price. It is rare for the seller to ask for the payment of a break fee.

**Confidentiality**: Confidentiality provisions are commonly included in term sheets/letters of intent.

# Are exclusivity, break fee and confidentiality provisions supplemented with separately negotiated agreements?

Once the term sheet has been signed and the parties progress to a definitive agreement, the agreement will usually have a confidentiality clause. The definitive agreement will not usually have an exclusivity clause because it is not necessary, as the agreement represents a binding legal commitment to conclude the transaction based on the terms of the agreement. Break fee clauses are not common in Malaysia.

# Is there a duty or obligation to negotiate in good faith?

There is no general duty or obligation to act in good faith unless provided for in the term sheet or letter of intent (which is uncommon). Similarly, it is uncommon for parties to agree, in a term sheet or letter of intent, on "break fees" payable in the event that the sale and purchase agreement is not entered into. However, if a party breaches any of the binding terms under the term sheet or letter of intent, the party will be liable for breach of contract. However, it is customary for a seller to ask for a deposit of up to 10% of the purchase price to be paid by the buyer upon the execution of the purchase agreement, which may be forfeited by the seller if the transaction is not completed due to the nonperformance of the buyer's obligations.

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