Global Private M&A Guide - Limited External Content - Hong Kong

Preliminary documents

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

Parties often enter into a letter of intent or term sheet during the initial negotiation process to set out the key terms of the proposed acquisition. They will then conduct further due diligence and negotiations, and the letter of intent or term sheet can then be used to draw up the definitive agreement. Parties can decide whether the letter of intent or term sheet is intended to be binding or nonbinding, but whether it legally compels the parties to conclude the deal on those terms — or even at all — will depend on the circumstances. To avoid disputes, the terms of the letter of intent or term sheet should be clear as to whether it is legally binding or, as is more commonly the case, only some parts are legally binding (e.g., the governing law, confidentiality and exclusivity provisions).

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

**Exclusivity:** Exclusivity provisions usually form part of a term sheet or letter of intent.

**Break fee:** Break fees are not common (but it is common to ask for deposits).

**Confidentiality:** Confidentiality provisions usually form part of a term sheet or letter of intent. Alternatively, a confidentiality agreement governing the exchange of confidential information relating to the transaction is typically entered into.

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

Confidentiality agreements and exclusivity agreements are common separately negotiated agreements. Exclusivity agreements must have adequate consideration or otherwise be entered into as a deed.

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

Generally, there is no duty or obligation on the parties to act in good faith in negotiating a contract - they are entitled to act in their own commercial interests in conducting the pre-contractual negotiations. However, this does not mean that there is no recourse for a party which has suffered a loss when an agreement fails to be signed and completed. For instance, when the parties have entered into an exclusivity agreement whereby one party undertakes not to negotiate with any third party, provided that such agreement is sufficiently certain as to the time and scope, it may be enforceable and binding on that party. Any breach may give rise to contractual remedies (e.g., the loss suffered as a result of the party's action to negotiate with a third party in breach of the agreement). A duty to act in good faith may also be implied if it is necessary to give business efficacy to the contract in an exclusivity agreement depending on the relationship of the parties and how the obligations are worded. In addition, even in the absence of any contractual relationship between the parties, a party may sue the other party for negligent or fraudulent misrepresentation depending on the circumstances of the case and the relationship of the parties (e.g., whether there is any relationship of trust and confidence).

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