

M&A: Pre-contractual obligations



Understanding pre-contractual obligations when negotiating multi jurisdictional agreements is essential to ensure that your deal is a commercial success.

This table provides an overview of issues to consider when conducting negotiations and when drafting confidentiality agreements, exclusivity agreements and heads of terms across a range of jurisdictions.

Pre-contractual obligations comparative table

Issues	Europe								Middle East		Asia		
	Belgium	France	Germany	Italy	Netherlands	Spain	Luxembourg	UK	UAE	Qatar (excluding QFC)	Hong Kong	People's Republic of China	Japan
Are negotiations subject to a duty of good faith?	✓	✓	✓	✓	✓	✓	✓	✗ but an implied duty of rationality should be expressly excluded	✓ in cases where a contract is formed and legally binding	✓ in cases where a contract is formed and legally binding	✗	✓	There is not an express provision, but one can be implied
Can negotiations be terminated unilaterally?	✓ provided there is no breach of the good faith duty	✓ provided that it does not breach the duty of good faith	✓ but this may result in damage claims in circumstances that constitute a breach of good faith duty	✓ provided termination does not occur in circumstances that constitute a breach of good faith duty	Depends on how advanced negotiations are	✓	✓ provided that it does not breach the duty of good faith	✓	✓	✓	✓	✓ before a binding agreement is reached and as long as the termination is not in bad faith	✓
Are there implied confidentiality obligations?	✓	✗	✓	✗	✗	✓ with respect to specific types of information, but it is also common practice to enter into a confidentiality agreement	✗ although confidentiality obligations are embedded in the duty of good faith	✗	✗	✓	✗	✓	✗
Is an exclusivity undertaking legally binding?	✓ provided it is a lock out and limited in time	✓ "lock in" and "lock out" but it must be subject to a time limit	✓	✓	✓ subject to the overriding principles of reasonableness and fairness.	✓ where lock out period is specified	✓ "lock in" and "lock out" but it must be subject to a time limit	✓ where lock out period is specified	✓ if part of a valid contract	✓ if part of a valid contract	✓ "lock out" for a specified period	✓ unless otherwise agreed	✓ if part of a contract
Are heads of agreement legally binding?	✓ if there is an agreement on the essential elements of the contract and it is not explicitly stated that it is nonbinding	✗ unless they are precise and detailed enough	Only if certain preconditions are met and if clearly agreed	✓ unless carefully worded to state document is not legally binding	✓ unless carefully worded to state that document is not legally binding	✓	✗ unless it appears from the terms of the heads of agreement that the intention of the parties was to make them legally binding	In general ✗	Possibly, although the parties may expressly stipulate this either way	Possibly, although the parties may expressly stipulate this either way	In general ✗ Some provisions (eg confidentiality /"lock out") can be binding, but this requires specific wording to that effect	✓ unless otherwise agreed.	✓
Are break fees legally binding?	✓ if construed as an indemnity for losses and not as a mere penalty	✓ although French courts may increase or decrease the amount of a break fee when such an amount is unrelated to the damages incurred	✓ unless the break fee is inappropriately high	✓ on the occurrence of specified events	✓	✓ if is clearly agreed. If not, compensation may be claimed under general legal dispositions as indemnification, if the negotiations were unjustifiably broken	✓	✓ on the occurrence of specified events (other than breach of contract)	✓ if part of a valid contract	✓ if part of a valid contract	✓ unless it constitutes a penalty	✓ unless otherwise agreed; but enforceability may be an issue if the break fees are to be deemed by court as overly incommensurate to the de facto losses suffered by the non breaching party	✓ if part of a contract

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