

Drafting of SHA

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DOCUMENTS PRIOR TO EXECUTION OF
TERM SHEET

1. NON-BINDING INDICATIVE OFFER

- Investment offered
- Investment in form of debt or equity
- Closing of deal- timeline
- If debt - interest
- If equity- when & how made
- Always draft in millions or billions
- Percentage shareholding etc.
- Time period for which period is valid
- Private & Confidential

Term Sheet . . 1

DETAILS OF
PROMOTER

Current
Shareholding
Pattern

Strategic
Investor

Business of
the Company

Re-
organisation,
needed (if
any)

Proposed
Investment &
Structure &
funding terms

Valuation for

Utilization
of funds

Definite
Agreement

Investment
agreement

Shareholder
agreement

Employment
agreement

MAC event
(Material
Adverse
Change event)

Term Sheet .. 2

BOARD OF COMPANY	Day to day meetings	Appointment of Chief Financial Officer	Affirmative voting rights
Remuneration of Directors	Further Funding	Appointment of auditor (sec 139 of CA'13)	Non compete
	Non Solicitation	Lock in	



Term Sheet .. 3

Termination

Condition
precedent (Annexure -B)

Representation
& Warranties

Confidentiality

Cost & Expenses

Governing law

Various Definitive agreement executed post 'Term Sheet'

- Shareholder agreement
- Investment agreement
- Deed of Hypothecation
- Loan agreement
- Employment agreement

Shareholder Agreement

Important Clauses

- Parties to the Suit
 - Definition Clause
 - ❖ Affiliate
 - ❖ Affirmative Voting right
 - ❖ Charter documents
 - ❖ Claim
 - ❖ Confidential
 - ❖ Encumbrances
 - ❖ Key employee
- Effective date

Shareholder Agreement

- Conduct of Shareholders/ company
- Board of Directors (Nominated by Investor)
- Removal
- Appointment of Chief Financial Officer (CFO)
- Board Meeting
 - ❖ Chairperson
 - ❖ Frequency of Board meeting
 - ❖ Notice
 - ❖ Quorum
- Indemnity

Shareholder Agreement

- Affirmative Voting Right (AFR)

Company shall not

- ❖ take action
- ❖ Discuss/ deliberate pass any resolution item listed Schedule 2 without prior written consent of investor

- Process of AFR
- Further Funding
- Lock in
- ROFR (Right of first refusal)

Shareholder Agreement

- Event of default
 - ❖ AFR not followed
 - ❖ Misrepresentation of any Rep or war
- Default Notice
 - ❖ Consequences of Event of default
 - ❖ Call and put option
- Representation & Warranty
- Insolvency & Litigation
- Term & Termination
- Notices

AFR– Important Highlights

- Change in shareholding
- Change in Charter document
- Sale or disposal of asset
- Acquisition
- ESOP
- Loan, Guarantee
- Litigation/ Settlement
- KMP (Hire + Firing)

Differentiation of some key terms while drafting of the Transaction Documents

Call Option	Put Option
<p>In case of any event of default arising out of the actions/inactions of either of the Parties to the Agreement, the non defaulting party may issue a call option notice to the defaulting party calling forth the defaulting party to sell its shares/securities to the non-defaulting party(ies).</p> <p>Call Option gives the buyer the right to buy the shares/securities.</p>	<p>A put option gives the right to sell shares or securities.</p> <p>This option is to enable the party issuing put option to sell its securities and seek an exit route in case that party does not wish to continue its investment any more.</p>

Tag Along

tag-along rights offer the minority shareholders the option to sell but do not mandate an obligation.

Eg: If a shareholder finds a buyer for its shares, another shareholder with tag along rights will be entitled to 'tag along' in the sale.

Tag along clause is dependent on the wish of the minority shareholder and is exercised only if the minority shareholder wants to tag along the majority shareholder while they are selling their shareholding. There is no obligation on the minority shareholder and the majority shareholder cannot force the minority shareholder.

Drag Along

Drag-along rights eliminate the current minority shareholders through the sale of 100% of a company's securities to a potential buyer.

Eg: If a critical mass of shareholders wish to sell the company, drag along rights will allow those shareholders to 'drag' all other shareholders into the sale. (Drag along clauses are sometimes referred to as 'come along' clauses.)

A drag along clause in a shareholders agreement ensures that once a critical mass exists, their plans cannot be derailed by a minority shareholder.

The Drag along clause requires the minority shareholders to sell their shares to the majority shareholders who are selling their securities to a prospective buyer. The majority

Representations & Warranties (R&W)

Representation is a statement of fact pertains to the existing or past event based conditions, situation, factual matrix involved in the transaction.

This is in the nature of assurance, intimation and information of the other party.

Warranty is an assurance based on existing events stating that the existing factual matrix will be ensured to persist while the transaction is alive.

Indemnity Clause

The term 'indemnity' in its widest sense means recompense for any loss or liability incurred by any person.

Eg: In M&A transactions, an indemnity is provided against breach of R&W (ie, the promisors undertake to save the promisee from liabilities arising by reason of any breach of R&W).

SAMPLE CLAUSE FOR REPRESENTATION AND WARRANTIES

REPRESENTATION AND WARRANTIES

Capacity and Authority

- to the extent it is a corporation, partnership or other entity:
- it is duly established and validly exists under the laws of the place of its incorporation or formation; and
- the execution, delivery and performance by it of this Agreement complies with its constituent documents;
- all necessary authorisations, permits and Consents for the execution, delivery and performance by him, her or it of this Agreement have been obtained;
- this Agreement:
- constitutes legal, valid and binding obligations on and of him, her or it, enforceable in accordance with its terms; and/or
- does not constitute a breach of any Applicable Law, nor require any Consent or approval from, or filing or notification to, any Governmental Authority; and/or
- does not breach or cause or result in default under any agreement or other arrangement by which he, she or it is bound;and/or
- he, she or it has full power and capacity to own assets and to enter into and perform the obligations incumbent upon him, her or it under this Agreement;
- the execution, delivery and performance by such Party of this Agreement will not violate, conflict with or result in a default (or any event which, with notice or lapse of time or both, would constitute a default) under, or give rise to any right of termination, cancellation or acceleration under, any documents, contracts, licenses, permissions, Consents, registrations, agreements or any other instruments to which such Party is a party or which are applicable to it or under which the Party receives any benefit, whether or not the Party is a party thereto.

SAMPLE CLAUSE FOR REPRESENTATION AND WARRANTIES

- Insolvency and Litigation
 - he, she or it is not:
 - subject to or suffering a Liquidation Event; or
 - a party to any litigation, arbitration, mediation, conciliation or administrative proceeding which is taking place whose outcome is reasonably likely to have a material adverse effect on its ability to perform its obligations under this Agreement.
 - Other
 - in entering into and performing this Agreement, he she or it is acting in his, her or its personal capacity and not in the capacity as trustee of any trust, partner of a limited partnership or as agent for any other person; and
 - each Person who executes this Agreement on his, her or its behalf as an authorised signatory or under a power of attorney is duly authorised to do so.
- Covenants
 - Each Party shall:
 - at all times use or exercise their voting rights (as members of the Company) to observe the terms of, and to fulfil and perform their obligations undertakings, covenants and agreements under, the Transaction Documents; and
 - generally do all things within their power which are necessary or desirable to give effect to this Agreement and to fulfil and perform their obligations undertakings, covenants and agreements hereunder in accordance with the terms hereof and for the purpose of giving the other Parties the full benefit of the provisions of the Transaction Documents.

SAMPLE INDEMNITY CLAUSE

- INDEMNITY

- Each Party agrees to indemnify, defend and hold harmless each other Party and their respective Directors and employees from and against any and all loss (including without limitation legal costs, fees and expenses) suffered and/or incurred, by any of them based upon or arising out of or relating to:
 - any breach by it of any warranty provided by it under this Agreement; and
 - non-performance or breach of any covenant or undertaking provided under this Agreement.

INVESTMENT AGREEMENT

- Definition
- MAC event
- First tranche – CP
 - ❖ Milestone board
 - ❖ Second tranche
- Non-compete + Non-solicitation
- EOD
- Representation & Warranties
- Third party claim

DEED OF HYPOTHECATION

- Definition
- Representation and Warranties
- Charge
- Repayment
- Pre Payment
- Hypothecation
- Event of Default
- Lien and Set-off

LOAN AGREEMENT

- Definition
- Types of Loan Agreement
- Interest rate Fluctuation
- Definition of Default
- Disbursement Clause
- Force Majeure
- Representation and Warranties
- Indemnification
- Assignment
- Terms and Termination

EMPLOYMENT AGREEMENT

- Definition
- Compensation
- Equity Grants
- Scope of Employment
- Term and Termination
- Confidentiality Restrictions
- Non Compete
- Non Solicitation
- Employee Benefits

THANK YOU

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