THE PRICE OF BREAKING UP: WHY INDIA NEEDS BREAK-FEE REGULATION IN PUBLIC M&A - LESSONS FROM WARNER BROS.–NETFLIX DEAL

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ABSTRACT

*Break fees and reverse break fees have evolved from mere contractual safeguards into central risk minimisation strategies in contemporary merger and acquisition ("**M&A**") transactions. Sophisticated international deals increasingly deploy these clauses not merely to compensate for sunk costs but also to signal commitment and deter rival bidders. The recent Warner Bros.–Netflix 'Agreement and Plan on Merger', with break-fee clauses running into billions of dollars, exemplifies this shift and raises questions about the limits of deal protection. Using this transaction as a case study and hypothetical stress test, this paper examines how modern break-fee architectures would interact with India's existing legal framework.*

*A comparative review of the United States of America ("**U.S.A./U.S.**"), the United Kingdom("**U.K.**"), and Singaporean models reveals that India sits uneasily between efficiency-driven contractual autonomy and process-centric market protection, fundamentally lacking a unified proportionality standard. India's current regulatory framework governing public M&A transactions neither offers sufficient certainty to transacting parties nor adequately safeguards against anti-competitive considerations.*

Drawing from international comparisons, the paper proposes a calibrated regulatory framework that balances deal protection with market integrity. It recommends introducing regulatory guidance establishing a ceiling of 1% of the transaction value for break-fees, and permitting deviations only upon prior demonstrable justification linked to transaction-specific risks. It also recommends section-wise amendments to advance such an ex-ante disclosure-based approach in public M&A. By establishing a

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coherent framework, the paper contends that India can align its public M&A regime with global best practices while preserving investor confidence, competitive neutrality, and shareholder autonomy.

INTRODUCTION

To ground this analysis, it is essential to define break-fees and reverse break-fees and examine why their contemporary function extends beyond risk minimisation. When companies agree to merge, or one company agrees to acquire another, the transaction usually takes months, and sometimes years, to complete. During this period, both sides incur significant costs in the nature of legal fees, advisory expenses, management time, and opportunity costs from abandoning alternative deals. Despite these investments, a transaction can still fail for reasons beyond the parties' control, such as shareholder opposition, regulatory intervention, or the emergence of a superior competing bid.

To address this risk, parties often agree on a deal termination fee, also called a "Break-fee". A break fee is a pre-agreed amount that one party must pay the other if the transaction fails due to specified reasons, including but not limited to the failure of the responsible party to gain regulatory approvals, which was clearly illustrated in the Netflix-Warner Bros proposed merger.[217] Most commonly, it is payable by the target company if it decides to abandon the agreed deal, for example, by accepting a higher competing offer or withdrawing its board recommendation. The rationale is that if the acquirer has acted in good faith and invested substantial resources, it should not be left uncompensated when the target company changes course. Coates and Subramanian define such clauses as "*a term in an agreement related to an M&A transaction involving a public company target that provides value to the bidder in the event that the transaction is not consummated due to specified conditions.*"[218]

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[217] Shruti Tripathi, *The Impact of the Break Fee Clause in an M&A Transaction* (July 10, 2022), https://ssrn.com/abstract=4158896.

[218] Guhan Subramanian & John C. Coates IV, *A Buy-Side Model of M&A Lockups: Theory and Evidence*, 53 STAN. L. REV. 307 (2000).

A "Reverse Break-fee" operates in the exact opposite direction. Here, the obligation falls on the acquirer. If the buyer is unable to complete the transaction due to certain specified reasons such as failing to secure regulatory approval, financing, or otherwise defaulting on its obligations, it must compensate the target company. Reverse break fees are particularly important in transactions involving regulatory risk, as they reassure the target that it will not bear the costs of the buyer's failure.

THE NETFLIX- WARNER BROS DEAL AND ITS SIGNIFICANCE IN THE STUDY

The recently reported Netflix's US$ 72 billion proposed acquisition of Warner Bros. Discovery included both of these clauses. Although the deal failed to go through, it provides a relevant case study for our analysis. The transaction was reported to include a reverse break-fee of US$ 5.8 billion (about 8% of the equity value of the transaction). This was Netflix's obligation to pay the amount if the deal failed to go through due to regulatory issues or other conditions, effectively placing the risk of regulatory failure on the acquirer. The transaction was also reported to contain a break-fee of US$ 2.8 billion, protecting Netflix if the target company withdrew from the deal.[219] Moreover, Paramount Skydance's hostile takeover offer (reported at US$ 103 billion in headline valuation) also featured a materially increased reverse break-fee commitment, raised from US$ 2.1 billion to roughly US$ 5 billion, which was payable to Warner Bros if the deal failed to go through.[220]

Beyond compensation, these mechanisms actively influence market behaviour. A well-calibrated break fee encourages commitment and seriousness. An excessive one, however, can alter the incentive structure of the market for corporate control by transforming rival bids into loss-generating strategies, thereby reducing the likelihood

[219] Eric Fournier, *Netflix's $5.8 Billion Breakup Fee for Warner Among Largest Ever*, FORTUNE (Dec. 6, 2025), https://fortune.com/2025/12/06/netflix-5-8-billion-breakup-fee-warner-bros-among-largest-ever/.

[220] *Paramount Raises Breakup Fee in Warner Bros Bid to $5 Billion, Bloomberg News Reports,* REUTERS (Dec. 3, 2025), https://www.reuters.com/business/media-telecom/paramount-raises-breakup-fee-warner-bros-bid-5-billion-bloomberg-news-reports-2025-12-03/.

that shareholders ever encounter a superior offer. Therefore, the most important consideration in regulating break-fees is balancing deal protection with its anti-competitive effects.

This paper proceeds in four parts. After explaining how break fees and reverse break fees function in modern M&A transactions and how they are increasingly used to allocate regulatory and execution risk, the paper first investigates how international jurisdictions approach deal protection regulations, with particular focus on the U.S.A, U.K., and Singaporean regimes. Building on this comparison, the paper examines India's existing legal regulatory framework and shows how the combined operation of contract law and takeover regulation has resulted in an uncertain and fragmented treatment of break-fees in public M&A transactions. Thirdly, the paper applies this framework to a hypothetical Netflix–Warner-style transaction in the Indian context to illustrate the practical difficulties that arise when high-value termination fees are used in public M&A transactions in the country. Finally, the paper argues for the introduction of regulatory guidance and recommends section-wise amendments to ensure that Indian markets remain competitive without compromising on the legitimacy of deal protection mechanisms.

COMPARATIVE INTERNATIONAL REGULATORY FRAMEWORK

The U.S. Model – Contractual Autonomy Oriented Model:

In the U.S., break-up fees are enforceable so long as they represent a reasonable estimate of a party's lost opportunity costs and are not structured to be coercive or preclusive to any party. In *Brazen v Bell Atlantic*, the Delaware Supreme Court upheld a $550 million termination fee, which is approximately 2% of Bell Atlantic's $28 billion equity value, treating it as valid liquidated damages where the parties had expressly so characterised it.[221] Delaware courts have traditionally viewed termination fees in the range of 1–3% of deal value as presumptively reasonable, provided they are

[221] *Brazen v Bell Atlantic Corp*, 695 A.2d 43 (Del. 1997).

proportionate to anticipated costs and do not impermissibly lock up the transaction.[222] The 1–3% benchmark functions less as an empirical measure of loss and more as a judicial proxy for non-coercion, signalling that once a fee exceeds this range, courts begin to suspect that the clause is protecting the deal rather than compensating the bidder.

At the same time, judicial tolerance has not been absolute. In *In re Comverge, Inc. Shareholders Litigation*, the Court of Chancery cautioned that a 5.6% termination fee was "testing the outer limits" of reasonableness, thereby signalling discomfort with fees at the higher end of the spectrum.[223]

However, contemporary deal practice suggests that these outer limits are being progressively redrawn. In transactions characterised by heightened regulatory scrutiny, particularly in technology, media and telecommunications ("**TMT**"), termination fees have increasingly been calibrated to reflect regulatory and execution risk rather than merely to compensate for sunk costs. This is most visible in the growing prevalence of large reverse break fees, which shift antitrust and approval risk squarely onto the acquirer. For instance, Microsoft's acquisition of Activision Blizzard incorporated a reverse break fee of approximately 5% of the deal value[224], reflecting the anticipated difficulty of obtaining regulatory clearance. Similarly, Alphabet's proposed acquisition of Wiz reportedly included a reverse termination fee approaching 10% of the transaction value[225], an unprecedented figure justified by regulatory uncertainty.

The proposed Netflix–Warner Bros. Discovery deal represented the most striking example of this shift. The agreement stipulates a break-fee of approximately $5.8

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[222] Fernán Restrepo & Guhan Subramanian, *The New Look of Deal Protection*, 69 STAN. L. REV. 1013 (2017), https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/04/69-Stan-L-Rev-1013.pdf.
[223] *In re Comverge, Inc. Shareholders Litigation*, Consolidated C.A. No. 7368-VCP, 2014 WL 6686570 (Del. Ch. Nov. 25, 2014),
[224] *Microsoft to Gobble Up Activision in $69 Billion Metaverse Bet*, REUTERS (Jan. 18, 2022), https://www.reuters.com/technology/microsoft-buy-activision-blizzard-deal-687-billion-2022-01-18/.
[225] *Google's $32 Billion Deal for Wiz Accelerated Under Trump, Sources Say*, REUTERS (Mar. 19, 2025), https://www.reuters.com/technology/cybersecurity/googles-32-billion-deal-wiz-accelerated-under-trump-sources-say-2025-03-19/.

billion[226], i.e., approximately 8% of the transaction value, payable by Netflix upon termination, alongside a reverse break-fee of roughly $2.8 billion, i.e. close to 4% of the deal value. While such figures would once have been viewed as facially excessive, they in fact illustrate a broader shift in U.S. M&A jurisprudence: where parties can demonstrate that elevated termination fees are a rational response to extraordinary regulatory and market risks, courts are increasingly willing to uphold them as commercially reasonable rather than coercive.

<u>The U.K. Model – Competitive Integrity Oriented Model:</u>

The U.K. has a more interventionist and process-driven approach to the regulatory framework governing break fees under the City Code on Takeovers and Mergers, administered by the Takeover Panel. Unlike the U.S., where termination fees are assessed ex post for reasonableness, the U.K. regime proceeds on the basis of an ex-ante presumption that such fees distort competitive bidding. Rule 21.2 of the Code therefore prohibits almost all target-paid break fees once an offer is "in contemplation".[227] This reflects the Code's broader anti-frustration principle and its commitment to preserving an open auction for corporate control.

Narrow exceptions are permitted only in limited circumstances, such as where the target company is conducting a formal sale process, where a hostile bid prompts the board to solicit a white-knight offer, or where the target is in serious financial distress. Even within these exceptions, the Code imposes multiple procedural safeguards. Any break fee must be agreed only at the point of a firm offer, certified by the target's financial advisers as being in the best interests of shareholders, and capped at 1% of the offer value.[228] This reflects a deliberate regulatory choice to privilege bidder competition and shareholder choice over deal certainty.

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[226] *Paramount Raises Breakup Fee in Warner Bros Bid to $5 Billion, Bloomberg News Reports*, REUTERS (Dec. 3, 2025), https://www.reuters.com/business/media-telecom/paramount-raises-breakup-fee-warner-bros-bid-5-billion-bloomberg-news-reports-2025-12-03/.
[227] Panel on Takeovers & Mergers, *The City Code on Takeovers and Mergers* r. 21.2 (U.K. Takeover Panel, Nov. 2008), https://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/codeb.pdf.
[228] *Supra* note 220.

Importantly, the U.K. Takeover Code substitutes break-fee clauses with alternative mechanisms that are designed to stabilise transactions without foreclosing rival bids. These include irrevocable undertakings from significant shareholders, structured auction processes supervised by the Takeover Panel, and a stringent "Put Up or Shut Up" ("**PUSU**") timetable, which forces potential bidders to either make a firm offer or withdraw within a prescribed period.[229] Together, these tools reinforce the Code's philosophy that market discipline and not contractual deterrence should govern takeovers.

While the 1% threshold is frequently described as a guideline rather than a rigid rule, comparative Commonwealth jurisprudences of the U.K. and Singapore suggest that it functions as a powerful normative ceiling on break-fee clauses. Courts in jurisdictions like Australia, influenced by similar policy concerns, have treated the 1% benchmark as a well-accepted standard, with departures attracting heightened scrutiny. For instance, the New South Wales Supreme Court has observed that deviations from the 1% norm invite closer examination of cost justification, proportionality, and shareholder disclosure obligations. Likewise, the Western Australia Supreme Court has upheld a higher break fee of approximately 2.3% only after finding that it was closely linked to transaction risk and did not amount to coercion or anti-competitive foreclosure. [230]

These developments show that even though creative break-fee structures are allowed, jurisdictions that prioritise auction integrity and shareholder interests still view high termination fees with suspicion. Unlike the U.S., where rising regulatory risk has justified progressively higher percentages, the U.K. model and the Singaporean approach treat even modest departures from the 1% threshold as exceptional, requiring compelling evidence that deal protection has not supplanted market competition.

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[229] Panel on Takeovers & Mergers, *The City Code on Takeovers and Mergers* r. 2.6 (U.K. Takeover Panel), https://www.thetakeoverpa nel.org.uk/the-code.
[230] *"Break Fees – A Case for Exceeding the 1% Guideline"*, HERBERT SMITH FREEHILLS KRAMER (Aug. 2025), https://www.hsfkramer.com/insights/2025-08/break-fees-a-case-for-exceeding-the-one-per-cent-guideline.

The Singaporean Model – Heightened Regulatory Scepticism Oriented Model:

In a significant development, Singapore's Securities Industry Council ("**SIC**") has released a consultation paper on 5 May 2025 proposing a fundamental recalibration of the regulatory treatment of break fees.[231] Under the existing Singapore Code on Takeovers and Mergers, although break fees are permitted, they are subject to being capped at 1% and must represent a reasonable estimate of loss.[232] This aligns with other jurisdictions, such as the U.K. and Australia. This framework has traditionally reflected a middle-ground approach, balancing bidder protection with the maintenance of competitive tension.

This consultation paper points to a major shift in policy. The proposal would remove the bright-line 1% cap and replace it with a discretionary approval regime, reflecting the SIC's concern that termination fees, regardless of their size, may deter competing bids, raise barriers to entry, and undermine shareholder choice. If adopted, this would mark a decisive move away from Singapore's traditionally balanced stance and a step towards a regressive model of heightened scrutiny, in which break fees become exceptional rather than routine. While the reforms remain consultative, they signal a regulatory preference for prioritising only contestability in takeovers over providing contractual deal protection to bidders.

A comparative survey of international practices reveals a clear divergence in how jurisdictions conceptualise break fees. The U.S. adopts an efficiency-oriented model, permitting termination fees, including increasingly large reverse break fees, so long as they are proportionate, non-coercive, and responsive to heightened regulatory or execution risk. By contrast, the U.K. and Australia have a more process-centric

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[231] Monetary Auth. of Sing., *Consultation Paper on Revision of the Singapore Code on Take-overs and Mergers* (2025), https://www.mas.gov.sg/-/media/mas-media-library/securities-industry-council/2025-code-consultation/consultation-paper-on-revision-of-the-singapore-code-on-take-overs-and-mergers-(2025).pdf.
[232] *Id.*

mechanism that views break fees as inherently distortive of free competition and permitting them only in narrowly defined circumstances, subject to strict caps and procedural safeguards.

Singapore's proposed reforms underscore a regulatory preference for preserving contestability in public takeovers, even at the expense of bidder protection. These approaches suggest that while break-fees are a standard tool worldwide, their approval relies heavily on whether a specific jurisdiction values efficiency and risk allocation, or shareholder choice and auction integrity. This divergence has important implications for jurisdictions such as India, which continue to grapple with the appropriate balance between deal certainty and market competition in takeover regulation.

INDIAN REGULATORY FRAMEWORK

In India, neither the Companies Act, 2013[233] nor the Securities and Exchange Board of India ("**SEBI**") Takeover Regulations[234] expressly provide for break-fees or reverse break-fees, so their enforceability arises indirectly under the general provisions of the Indian Contract Act 1872[235]. Unlike the U.S.'s judiciary-driven reasonableness framework or the U.K.'s rule-based prohibitions, the Indian approach remains fragmented and largely reactive, with courts and regulators addressing break fees on a case-by-case basis rather than through an articulated policy framework. The regulatory silence is particularly significant, as the SEBI Takeover Regulation's objective is to ensure transparency, fairness, and equality amongst shareholders and to allow for a competitive market for corporate control. This regulatory vacuum can be effectively addressed by refining existing frameworks to strike a balance between the SEBI Takeover Regulations, the SEBI (Listing Obligations and Disclosure Requirement) Regulations, 2015 ("**LODR**"), and the Indian Contract Act, 1872. Recommendations to improve these provisions are discussed in detail towards the end of the paper.

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[233] Companies Act, 2013.
[234] Securities & Exchange Board of India (Substantial Acquisition of Shares & Takeovers) Regulations, 2011.
[235] Indian Contract Act, 1872.

Regulatory Framework Governing Private M&A:

In private M&A transactions, break fees are frequently negotiated to protect acquirers against sunk costs arising from exclusivity arrangements or failed conditions precedent, such as financing or shareholder approvals. Their enforceability, however, depends primarily on Section 74 of the Contract Act, which permits the award of "reasonable compensation not exceeding the amount so named" in the event of breach. The Supreme Court in *ONGC v. Saw Pipes Ltd.* (2003) clarified that a stipulated sum may be enforced even in the absence of proof of actual loss, provided it represents a 'genuine pre-estimate of damages' and is 'not penal in nature'.[236] Where the stipulated amount is found to be excessive or unconscionable, courts retain discretion to scale it down to a reasonable level.

This compensatory orientation is reinforced by Sections 55[237] and 75[238] of the Contract Act, which preserves the right to compensation upon delayed performance or lawful rescission due to breach. Read together, these provisions indicate that Indian contract law does not prohibit termination-linked payments per se, but rather restricts their operation to a remedial rather than a deterrent or coercive function. Applied to break-fee and reverse-break-fee clauses, this suggests that such arrangements are legally permissible in principle, provided they can be justified ex ante as a reasonable estimate of the anticipated loss arising from the failure of the transaction.

However, the absence of statutory guidance specific to mergers and acquisitions has resulted in inconsistent judicial treatment, with courts applying Section 74 of the Indian Contract Act[239] in a largely contextual and discretionary manner. This judicial discretion is clearly demonstrated in *Kailash Nath Associates v. Delhi Development Authority*, where the Supreme Court reiterated that courts must analyse the rational nexus between the

[236] OIL & NATURAL GAS CORP. LTD V. SAW PIPES LTD., (2003) 5 SCC 705 (INDIA).
[237] Indian Contract Act, 1872, § 74.
[238] *Id.*, § 75.
[239] *Id.*, § 74

breach and the stipulated sum under Section 74.[240] This ruling, in turn, reinforced the principle established in *Fateh Chand v. Balkishan Das* that the judiciary retains ultimate oversight over pre-estimated damages [241]

This lack of predictable benchmarks, such as proportionality thresholds or deal-value caps, creates uncertainty for parties seeking to calibrate break fees as legitimate risk-allocation tools rather than penalties. Consequently, Indian law has yet to fully accommodate the contemporary understanding of break fees as mechanisms for pricing regulatory and execution risk in order to strike a fine balance between contractual freedom and market efficiency.

Regulatory Framework Governing Public M&A:

In public M&A transactions, the use of break fees is significantly more constrained. While the general principles of the Indian Contract Act, 1872 continue to apply to public M&A transactions, their application in the takeover context is qualified by an additional regulatory framework by SEBI and the Companies Act, 2013.

SEBI scrutinises such arrangements during its review of the Draft Letter of Offer ("**DLOF**") under Regulation 16 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("**SAST Regulations**")[242] and may object where termination payments are perceived to prejudice shareholder interests or deter competing bids. In addition, payments to non-resident parties, including reverse break fees payable by foreign acquirers, may require prior approval under the RBI's foreign exchange regulatory framework. These layers of regulatory oversight operate in the absence of express statutory authorisation, effectively discouraging the routine use of break fees in public takeovers.

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[240] KAILASH NATH ASSOCS. V. DELHI DEV. AUTH., (2015) 4 S.C.C. 136 (INDIA).
[241] Fateh Chand v. Balkishan Das, A.I.R. 1963 S.C. 1405 (India).
[242] Securities & Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Regulation 16.

Further, under Section 67 of the Companies Act, 2013[243], public companies are restricted from providing financial assistance in relation to the acquisition of their own shares. While break fees are not automatically caught by this prohibition, their structuring in public transactions must avoid characterisation as indirect financial assistance, thereby adding to compliance risk. The combined effect of contractual uncertainty and regulatory discretion has rendered break fees rare in Indian public M&A practice.

The tension between contractual freedom and shareholder protection is a pressing issue in India's regulatory uncertainty regarding break fees. Provisions like section 74 read with *ONGC v Saw Pipes* allow commercial parties to be determinants of their own risk allocation as long as it is a true pre-estimate of their loss. This compensatory mechanism carries particular force in cross-border transactions, wherein international parties bring in legitimate expectations of deal certainty, and the absence of a prevalent break fee may deter foreign investors.

In public M&A transactions, the shareholder base is typically fragmented, and their interests may diverge significantly from those of the boards of directors, who are the ones effectively negotiating the break-fee arrangements. This misalignment raises an important concern: even where a target break fee is commercially justifiable, it functions in practice as a financial burden on any competing bidder, who must factor in the additional cost into the pricing of their own offer. The net effect is a narrowing of the competitive bidding landscape, and by extension, a curtailment of shareholder choices, which sits uneasily with the very objectives that SEBI's takeover framework seeks to advance.

The tension is acute in India due to the absence of an ex-ante mechanism to mediate this. SEBI's discretionary review under Regulation 16 partially fills up this gap, but it works without any published proportionality standards, allowing the board to negotiate

[243] Companies Act, 2013, § 67.

with a free hand without the requirement of shareholder disclosure or regulatory pre-clearance.

Recent transactions that illustrate this cautious approach. The aborted 2024 Zee–Sony merger, [244] that is speculated to have had a $90–100 million termination fee by Zee; which triggered intense disputes until both parties settled and dropped their claims. Similarly, in the failed 2013 Taqa–Jaypee deal[245], a ₹54 crore reverse break fee was triggered when the Abu Dhabi consortium walked away. Notably, neither transaction provided authoritative judicial guidance on permissible break-fee thresholds, reinforcing reliance on negotiated outcomes rather than legislative clarity.

STRESS-TESTING INDIAN LAW: THE NETFLIX - WARNER BROS. DEAL IN AN INDIAN CONTEXT

Consider a hypothetical scenario in which an Indian listed company is proposed to be acquired by a global technology platform under terms comparable to the reported Netflix–Warner Bros. Discovery transaction. The agreement provides for reverse break-fees of approximately 8% of transaction value, payable by the acquirer upon regulatory failure, alongside target-paid break-fees of roughly 4% in the event of deal abandonment.

Under the Indian regulatory framework, such an arrangement would immediately encounter multiple layers of scrutiny. In a public takeover, SEBI would examine the termination fee provisions at the DLOF stage to assess whether they prejudice shareholder interests or deter competing bids.[246] A target-paid break fee of this magnitude would likely raise regulatory concerns, as it imposes a substantial financial

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[244] *"Zee Seeks Termination Fee of $90 Million from Sony for Calling Off $10 Billion Deal"*, ECONOMIC TIMES (May 23, 2024), https://economictimes.indiatimes.com/industry/media/entertainment/media/zee-asks-sonys-culver-max-and-bepl-to-pay-90-million-as-termination-fee-for-ending-10-billion-deal/articleshow/110370466.cms.

[245] P.R. Sanjai, *"Taqa's Jaypee Deal Is Off, so Why Is No One Sad?"*, MINT (July 25, 2014), https://www.livemint.com/Companies/z8GsI7KawUWQSS6D4eKoPI/Taqa-pulls-out-of-deal-to-buy-two-Jaypee-hydropower-plants.html.

[246] Securities & Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Regulation 16(1).

disincentive on shareholders considering alternative offers, potentially undermining the competitive neutrality of the takeover process.

The reverse break fee, while conceptually designed to allocate regulatory risk to the acquirer, would face a different but equally uncertain assessment. From a contractual perspective, enforcement would depend on whether the stipulated sum could be justified as a reasonable pre-estimate of loss under Section 74 of the Indian Contract Act[247]. However, Indian courts have historically evaluated reasonableness through a compensatory lens, rather than as a pricing mechanism for regulatory failure. As a result, an ex-post challenge could expose the clause to judicial reduction, even where both parties knowingly agreed to a high-risk allocation at the outset.

Additional complications would arise from regulatory and corporate law constraints. Payment of a reverse break fee by a foreign acquirer would likely require scrutiny under the Reserve Bank of India's foreign exchange framework. Simultaneously, concerns could arise under Section 67 of the Companies Act, 2013 if the target-paid break fee were perceived as indirect financial assistance in connection with the acquisition of its own shares[248]. In the absence of explicit statutory guidance, the permissibility of such arrangements would hinge on discretionary assessments by regulators rather than on predictable legal standards.

The most significant consequence of this hypothetical, however, lies not in outright prohibition but in uncertainty. Faced with overlapping regulatory approvals, potential post-deal litigation under Section 74, and the absence of clear proportionality thresholds, parties may either abandon the use of termination fees altogether or dilute them to levels insufficient to meaningfully allocate risk. In effect, the Indian framework would struggle to accommodate a transaction where termination fees function as core risk-pricing instruments rather than incidental deal protections.

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[247] India Contract Act, 1872, § 74.
[248] Companies Act, 2013, § 67.

LESSONS FOR INDIA AND RECOMMENDATIONS

This hypothetical illustrates that the challenge for Indian law is not hostility toward break fees, but the lack of structured criteria to distinguish legitimate risk allocation from coercive deal protection. While a Netflix-style reverse break fee may be commercially rational in a transaction characterised by intense regulatory scrutiny, India's current framework evaluates such clauses through fragmented doctrinal lenses like contractual compensation, takeover neutrality, foreign exchange control, and corporate finance restrictions without a unifying proportionality standard. The resulting uncertainty risks discouraging efficient transactions while failing to decisively prevent anti-competitive outcomes.

Therefore, break-fees and reverse break-fees are no longer obscure contractual provisions. They are central to how contemporary mergers allocate risk, manage uncertainty, and influence competition. By learning from international best practices like U.S. and U.K. models, and adopting a clearer and more structured regulatory approach, India can ensure that the price of breaking up the deal is fair, transparent, and consistent with the broader goals of market efficiency and investor protection. What India requires is a calibrated middle path between deal protection and anti-competitive risks through structured regulatory frameworks, namely:

- First, India should adopt a regulatory guidance establishing a default **ceiling of 1%** of the transaction value for break-fees and reverse break-fees in M&A. This will be consistent with comparative Commonwealth practice. Such a threshold would not operate as a rigid cap, but merely as a normative safe harbour signalling presumptive non-coercion in such transactions.

- Second, termination fees exceeding this default threshold should be permitted, however, only along with a **reasoned justification**, demonstrating that the fee represents a proportionate and bona fide estimate of anticipated costs or regulatory risk. This justification requirement would shift the analytical focus from ex post litigation under Section 74 of the Contract Act to ex ante disclosure and scrutiny, reducing enforcement uncertainty while preserving contractual flexibility in transactions characterised by exceptional complexity or regulatory exposure.

- Third, extraordinary break fee arrangements, especially in public or cross-border M&A, should be subject to **prior regulatory review** by SEBI and, where applicable, by RBI. Such a review would operate as a risk-screening mechanism, ensuring that termination fees do not distort shareholder decision-making or deter rival bids. This approach builds upon existing regulatory practices without requiring wholesale legislative reform.

One practical way to advance this ex-ante disclosure-based approach in public M&A is through targeted clarifications within SEBI's takeover and listing regulations. Regulation 26(9) of the SAST Regulations places a duty on the board of directors of the target company to promptly inform an acquirer of any competing offers received[249]. However, the regulation is silent on the scope of information that must be shared. This provision should therefore be supplemented with regulatory guidance requiring directors to disclose not only the existence of competing bids, but also any break-fee or reverse break-fee arrangements entered with the initial acquirer, along with their likely implications. Such disclosure would allow rival bidders to assess, at an early stage, whether deal-protection clauses materially affect the feasibility of submitting a competing offer.

Moreover, Regulation 16 of the SAST Regulations, which governs the contents of the draft letter of offer[250], should expressly require disclosure of all break-fee arrangements. Given that such fees can influence both the probability of competing bids and the economic outcome of the takeover, their disclosure is necessary for shareholders to make an informed decision. Classifying break-fees as material contractual terms for risk

[249] Securities & Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Regulation 26(9).
[250] Securities & Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Regulation 16.

management, rather than incidental commercial details, would more accurately reflect their impact on takeovers.

Lastly, broader market transparency can be ensured through the continuous disclosure framework under Regulation 4(2)(e) SEBI LODR Regulations, which emphasises the timely and adequate disclosure of material information.[251] When read together with Regulation 30 and Part A of Schedule III, the provision provides a suitable basis for requiring listed companies to disclose break-fee and reverse break-fee clauses to stock exchanges as 'material events'.[252] An explicit clarification to this effect would reduce information asymmetry and allow market participants to assess whether such arrangements could influence price discovery or shareholder value.

These disclosure-oriented measures would shift regulatory scrutiny away from an uncertain post-facto challenge to a more predictable ex-ante framework. Such a model will ensure that Indian markets remain competitive without compromising on the legitimacy of deal-protection mechanisms. It will also provide much-needed legal clarity to both domestic and foreign investors. As global regulators increasingly scrutinise deal protection mechanisms, India's ability to articulate a coherent framework for pricing the 'cost of breaking up' will be critical in maintaining both market competitiveness and transactional credibility.

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[251] Securities & Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Regulation 4(2)(e).
[252] *Id.*, Regulation 30.