



MINTZ

To Bind or Not to Bind: LOIs, MOUs, NDAs and PNLs... OMG!

Danny Guggenheim
Michael D. Soejoto

October 26, 2021

Presenters



DANNY GUGGENHEIM

Member, Real Estate Practice

Los Angeles

DBGuggenheim@mintz.com // +1.424.259.4013

- Accomplished commercial real estate attorney who focuses his practice on traditional real estate matters, such as acquisitions, dispositions, and financings.
- His practice also encompasses complex investment structuring involving joint ventures, preferred equity, participations, syndications, co-investments, parallel vehicles, private REITs, and discretionary funds.
- Serves as a lecturer in law at USC's Gould School of Law, where he teaches the real estate joint ventures course and regularly guest lectures for the real estate transactions and finance course.
- Frequently speaks about commercial real estate topics in webinars and at conferences and contributes articles to real estate and legal



MICHAEL D. SOEJOTO

Member, Real Estate Practice

Los Angeles

MDSoejoto@mintz.com // +1.424.259.4014

- Focuses on joint ventures, funds and other partnerships and strategic relationships related to the ownership and operation of commercial real estate.
- Has extensive experience negotiating and drafting complex joint venture arrangements (including single asset, portfolio and programmatic joint ventures) for all types of commercial real estate, including office, retail, mixed-used, hotel, and multi and single family home projects.
- Advises principals and sponsors on the structuring of general partner vehicles and management companies.
- Represents institutional investors, including private equity funds, hedge funds and real estate investment trusts (REITs), as well as owners, developers and sponsors.

Program Overview

Program Overview

This program will focus on the documentation that is utilized when transactional counterparties are wanting to negotiate or share information without committing to a deal or altering the status quo, in particular term sheets (aka LOIs and MOUs), confidentiality agreements (aka NDAs), and pre-negotiation letters (aka PNLs). It will cover the typical provisions and things to consider when reviewing and negotiating these documents, as well as suggestions for ways in which in-house counsel can tailor forms and utilize riders to create and efficiently manage this work flow.

Commonly Used Terms

Commonly Used Terms

- Term Sheet
- Letter of Intent (LOI)
- Memorandum of Understanding (MOU)
- Confidentiality Agreement
- Non-Disclosure Agreement (NDA)
- Access Agreement
- Pre-Negotiation Letter (PNL)
- Pre-Workout Agreement

Commonly Used Formats

Commonly Used Formats

- Term Sheets
 - List of material terms only (signed or unsigned)
 - Letter format (signed)
 - Cover letter (signed) with exhibits tied to material deal documents
- Confidentiality Agreements
 - “Click-Through”
 - Deemed acceptance
 - Letter format (signed)
 - Agreement (signed)
- Pre-Negotiation Letters
 - Letter format (signed)
 - Agreement (signed)

Purposes of Term Sheets

Purposes of Term Sheets

- Prompt a discussion to formulate deal variables and structures
- Overview of material terms
- Fully negotiate hot button issues
- Make introductions (in bids/RFPs), and test compatibility
- Create framework for mutual commitment of time, efforts and costs
- Allocate responsibility for drafting and other pre-closing tasks
- If using form sets, opportunity to introduce exact language from forms
- Practice Pointer: Cover letter (binding) with schedule of deal terms (non-binding) can allow acquisitions teams to chase deals more efficiently, by clearly delineating what can (cover letter) and cannot (schedule) be modified without approval of counsel.

The background consists of a series of overlapping triangles in various shades of teal and blue, creating a geometric pattern.

LOIs - “To Bind or Not to Bind”

LOIs - “To bind or not to bind”

- Benefits
- Risks
- Common terms that are binding in otherwise “non-binding” term sheets
 - Confidentiality (Deal Terms and Shared Information)
 - Exclusivity
 - Cooperation / Joint Pursuit
 - Sharing (or Advancing) of Costs and Deposits
 - Underwriting Fees and Expense Deposits
 - Broker Indemnification
 - Misc. (Governing Law, Attorneys’ Fees, Equitable Relief, Counterparts)
 - And don’t forget – the “this LOI is Non-Binding” provision!

Common Concepts in NDAs

Common Concepts in NDAs

- Limited Use and Disclosure of Info
- No Contact with Third Parties or Government
- Return or Destroy upon Termination, and Share any New Reports
- No Commitment to Make a Deal or Obligation to Negotiate
- Non-Circumvention (Opportunity / Contacts)
- Non-Solicitation (Employees / Investors)
- Access to Real Property for Inspections, and Liability Insurance
- Exclusivity
- Broker Indemnification
- Misc. (Governing Law, Attorneys' Fees, Equitable Relief, etc)

Common Concepts in NDAs (continued)

- Exceptions and Exclusions
 - Scope of Confidential Information (not already known, etc)
 - Permitted Disclosures (affiliates, lenders, etc – but who is on the hook?)
 - Routine Diligence Inquiries
 - Retention of Copies for Compliance, in Backup Archives, etc
 - Limited Survival Period
 - Limitations on Damages
- Practice Pointer: A form of rider or addendum that can be attached to any counterparty's form of NDA can allow acquisitions teams to chase deals more efficiently, by limiting negotiations (and the need to involve counsel) to changes to the form of rider or addendum.

Common Concepts in PNLs

Common Concepts in PNLs

- The Basics
 - No binding obligations or waivers unless in a definitive written agreement
 - Nothing is admissible as evidence, and everything is confidential
 - Reaffirmation of obligations (including guarantors)
- Optional
 - Acknowledgment of existing default
 - General release (or limited release for claims arising from discussions)
 - Indemnification for claims, and expense deposit
- Practice Pointer: “Less is [often] more” with PNLs, because quickly moving past the formality of a PNL can help the parties preserve trust in difficult circumstances, and build momentum towards a deal and definitive documentation.

Questions?



MINTZ

Subscribe to our [Real Estate Blog](https://www.mintz.com/realestateconstructioninfrastructureviewpoints) for updates and more information:
<https://www.mintz.com/realestateconstructioninfrastructureviewpoints>

THANK YOU