

The Paper Chase

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There are a number of reasons why lease documentation can vary significantly from transaction to transaction. Timing of delivery dates, types of financing and the stage of a project's development all influence the form of a deal. But did you know that in some cases, a deal on paper is not a deal at all?

More conservative landlords and some tenants will insist upon executing a full-blown, lengthy, detailed and comprehensive offer to lease, followed by a full-blown lengthy, detailed and comprehensive lease. More liberal landlords, and most other tenants, are content with a short-form letter agreement, followed by a comprehensive lease. But there are always variations on these themes.

The trick is in knowing which "paper" provides you with a binding agreement, and which could lead to an argument that there was no "meeting of the minds", and therefore, no deal.

PAPERING THE DEAL

Here is an overview of some of the more common ways to document your lease deal:

Letter agreement with landlord's form of lease attached

This is one of the most efficient ways to conclude a lease agreement, and, not surprisingly, is a popular choice with both landlords and tenants. It is extremely difficult for a tenant or its solicitor to argue that it was not aware of, and did not agree to, the contents of the landlord's form of lease if that document is attached to the offer.

Letter agreement with "precedent" form of lease attached

This document is another popular choice with parties who have a relationship spanning more than two locations. If the "lease execution" clause is properly drafted to make it clear that certain sections of the lease are to be considered incorporated verbatim, while others are amended by the offer, there is even an argument that the offer might stand on its own and that a further lease document is not required.

Other letter agreements and third party forms

These are generally the shortest letter agreements, and can range from a broker's, agent's, or publisher's pre-printed form to the deals we love to call "cocktail napkins". The irony is that while these short deals appear to many clients to result in agreements being made more quickly, they sometimes lack the essential legal elements of a lease, leaving it to the lawyers to ensure that the deal is actually made at the lease stage. In a letter agreement, almost more than in any other offer, the "lease execution" clause should be carefully drafted to refer to the form of the lease to be signed.

Landlord's detailed form of offer

This document is a very good choice if the offer form is sufficiently detailed (particularly about elements such as landlord's work, tenant's work, insurance, restoration obligations, default, demolition and relocation). If, however, the landlord's form of offer is essentially a letter agreement, then the form of the lease to be signed must be clearly set out.

Non-binding letter of intent

The "why bother?" of the leasing world, the non-binding letter of intent has found favour with certain U.S. retailers. It is often used as both a sword and a shield in lease negotiations, since a tenant who insists that "there is no deal" may be the first to complain that a lease clause "does not conform to the letter of intent". In addition, care must be taken in the drafting of such documents to make it clear that the document is intended to be non-binding because, if it otherwise contains the legal elements of a lease, a court might be disposed to find it binding.

Straight-to-lease documents

This can be one of the more time-consuming lease forms to negotiate. However, this method using a landlord's form can take the guesswork out of the negotiation (compelling the parties to pay attention to every issue and clause), can encourage the lawyers to be creative and succinct (as the negotiations often take place during a "lockdown" in a boardroom for three or four hours), and can discourage "fishing", as few parties are willing to pay lawyers to negotiate when the deal is not "serious". By contrast, using a tenant's form of lease in a straight-to-lease negotiation can actually make for a longer negotiation process, since many tenant's forms were created in the United States, and contain provisions that import poorly into the Canadian market.

A DEAL IS NOT MADE BY PAPER ALONE

What difference does it make which form you choose? In certain cases, it can make the difference between "deal or no deal."

Of the six required elements of a lease, the first five are self-explanatory (parties, premises, commencement date, duration of term, and rent). The sixth requirement (other matters neither intrinsic to the relationship of landlord and tenant nor sufficiently defined by law, but material and required to be agreed) is more elusive. For example, in one Ontario case, the matters of a garbage enclosure were a "sixth requirement", because the tenant, a restaurant, had made it clear these matters were important to it.

In other Ontario cases, Courts have confirmed that an offer that is conditional upon execution of the lease is a "contract to make a contract", and therefore not an agreement. What is perhaps the most surprising to those of us who are used to the back-and-forth of lease documentation is that Ontario courts have also held that in circumstances in which the lease deviates from the offer in a material fashion (such as by including an administration fee that was not in the offer), the other party may be entitled to repudiate the entire deal. And that's not to mention the spectre of "estoppel" or "waiver" by conduct (the proposition that you can actually amend your deal by what you do, not just what is written down).

CALL THE PAPER EXPERTS

So what to do? The good news is that there is no need to navigate these deep waters alone. Whichever form of lease documentation you prefer to use, it's wise to obtain input from a trusted legal advisor experienced in drafting and negotiating all forms of leases (and to involve that person as early in the process as possible) to ensure that the deal you make is the one you expected to make – and moreover, one you can enforce!



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