

It's All in the Details: Why Precision Matters in Commercial Real Estate Agreements

Drafting commercial real estate agreements is a comprehensive process. However, when drafting these complex agreements, it is important to pay attention to certain material provisions such as: the quality of title to be conveyed at closing; default provisions; and dispute resolution mechanisms, among several others.

By Alexander A. Salinas and Fabian I. Garcia | December 22, 2022

Thoughtfulness and precision are key when preparing commercial real estate agreements. The more effort that is front loaded into the drafting of an agreement, the more you mitigate the risks of litigating a preventable issue that could cost your client hundreds of thousands of dollars—or more. Drafting commercial real estate agreements is a comprehensive process. However, when drafting these complex agreements, it is important to pay attention to certain material provisions such as: the quality of title to be conveyed at closing; default provisions; and dispute resolution mechanisms, among several others.

Commercial real estate agreements generally set forth the quality of title that a seller is required to convey at closing, which is typically “good, insurable and marketable.” Most agreements contain language allowing buyers to examine the title for a set period of time and specifying whether the seller must cure any defects identified by the buyer. Precise language is important to a seller because failure to convey the quality of title required under the agreement or to cure certain title defects may trigger a default. On the other hand, precise language with respect to title is important for buyers as they will base their diligence efforts on not only the quality of title that the parties negotiate, but also the various periods of time provided in the agreement, in the title provisions, for the “inspection period.”

Like most agreements, commercial real estate agreements will set forth the consequences of actions, or inactions, of each party. If a default provision uses ambiguous language, it is likely that your client may not know if their conduct constitutes a default increasing exposure to litigation risk. This is especially true for sellers since commercial real estate agreements place the vast majority of contractual obligations on them. In the event of a default, you could reduce your client’s potential exposure by including clear language placing a limit on damages or restricting the types of damages that the other side can seek.

If litigation is inevitable, dispute resolution provisions are one of the most important provisions in commercial real estate agreements. Drafting attorneys should consult with their clients regarding procedures for resolving disputes. For example, are the added costs of mandatory pre-suit mediation outweighed by the potential benefit of an early settlement? Or should the parties’ dispute be resolved in the judicial system or arbitration? The pros and cons to each of these should be explained to your client. Attorneys should also pay special attention in drafting arbitration provisions and address issues concerning the location, rules of arbitration, number of arbitrators and any potential appellate rights.

Provisions dealing with attorney fees and costs may sometimes be overlooked, yet their importance is significant. An agreement allowing a prevailing party to recover its attorney fees and costs from the nonprevailing party may encourage settlement of lawsuits. On the other hand, an agreement lacking a fee-shifting provision may favor parties with deeper pockets as these provisions might dissuade their opponents from commencing litigation. Therefore, using precise language in the drafting of these provisions can assist your client in assessing their litigation risk.

The importance of precise drafting is clear, but how is that achieved? Our experience has shown us that the following practices can play a tremendous role. First, transactional and litigation attorneys should work closely together to pinpoint any provisions in the agreement that could be ambiguous or subject to interpretation. Second, throughout negotiations, drafting attorneys should take detailed notes and obtain written confirmation from the client ensuring the material provisions in the agreement accurately reflect the deal and all negotiated matters. This will save you time and your client money. Third, do not shy away from definitions; clarity is key and practitioners sometimes fail to specify exactly what a term or concept in an agreement is meant to signify. The difference between something good and something great is attention to detail.

Alexander A. Salinas is a partner and Fabian I. Garcia is an associate with TA PLLC, a full-service business law firm. Salinas leads the firm's litigation practice and may be reached at asalinas@tapllc.com. Garcia focuses his practice on general corporate and real estate transactions and may be reached at fgarcia@tapllc.com.