

The enforceability of term sheets: Commercial Division weighs in

Thomas J. Hall and Judith A. Archer, *New York Law Journal* — April 20, 2023

The Commercial Division of the New York Supreme Court has recently had opportunities to consider such claims and have analyzed when, and to what extent, a term sheet is binding and enforceable, write contributors Thomas J. Hall and Judith A. Archer.

Terms sheets are a staple of sophisticated commercial transactions, memorializing the broad terms of a prospective agreement and setting the groundwork for further negotiations. Term sheets can vary widely in form depending on the nature and scope of the transaction. Critically, term sheets can also vary in their enforceability—some being binding, some nonbinding or some combination of the two. When deals run into trouble, or fall apart completely, litigants will often invoke the term sheet to seek damages sounding in breach of contract and other related causes of action. The Commercial Division of the New York Supreme Court has recently had opportunities to consider such claims and have analyzed when, and to what extent, a term sheet is binding and enforceable. Importantly, while a term sheet may have language that expressly states it is nonbinding, the court's analysis will not stop there if other language, facts or circumstances suggest otherwise.

Appellate precedent

While the New York Court of Appeals has not yet expressly addressed the question of the enforceability of term sheets, it has announced important contract law principles applicable to preliminary agreements that inform the lower courts' decisions. In *Kolchins v. Evolution Markets*, 31 N.Y.3d 100 (2018), for example, the Court of Appeals set forth the factors a court must consider when determining whether a binding contract exists versus an unenforceable "mere agreement to agree." In *Kolchins*, the court primarily relied on its decision in *Brown Bros. Electrical Contractors v. Beam Construction*, 41 N.Y.2d 397 (1977), as the "template for deciding a case ... where the issue is 'whether the course of conduct and communications between [the parties have] created a legally enforceable agreement.'" To that end, the court counseled that lower courts must examine the "objective manifestations of the intent" in

Thomas J. Hall and Judith A. Archer are partners with Norton Rose Fulbright US. Associate Joe Hughes assisted with the preparation of this article.

More than 50 locations, including London, Houston, New York, Toronto, Mexico City, Hong Kong, Sydney and Johannesburg.

Attorney advertising

Reprinted with permission from the April 20, 2023 edition of the *New York Law Journal* © 2023 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. www.almreprints.com - 877-257-3382 - reprints@alm.com.

the parties' words and deeds and weigh the totality of the circumstances including how the parties were situated and the "objectives they were striving to attain." In general, the court stated that "while a 'mere agreement to agree, in which a material term is left for future negotiations, is unenforceable' ... the 'terms of a contract [do not] need [to] be fixed with absolute certainty' to give rise to an enforceable agreement."

The Appellate Division has had occasion to specifically address the enforceability of terms sheets. A critical, but not necessarily dispositive, initial question is whether the term sheet itself addresses enforceability. For example, in *Claim Recovery Group v. Markel*, 212 A.D.3d 554 (1st Dep't 2023), the First Department looked at the plain language of the term sheet at issue to find that it "unambiguously" provided that the parties would be bound by its express terms. The court also considered that the term sheet "included all material terms, including identification of the buyer and seller, description of the claims to be sold, and a formula for calculation of the purchase price," and held that the term sheet was enforceable.

By contrast, in *StarVest Partners II v. Emportal*, 101 A.D.3d 610 (1st Dep't 2012), the court looked at the term sheet's language to find it was not enforceable. The court held: "Where a term sheet or other preliminary agreement explicitly requires the execution of a further written agreement before any party is contractually bound, it is unreasonable as a matter of law for a party to rely upon the other party's promises to proceed with the transaction in the absence of that further written agreement."

Applying similar principles in *Keitel v. E*TRADE Finance*, 153 A.D.3d 1181 (1st Dep't 2017), the court considered a more complex situation. There, actor Harvey Keitel sued E*Trade for violating a term sheet addressing his appearance in television commercials. Complicating the analysis, Keitel's agent had written "firm and binding" in the cover email when transmitting the term sheet; later, E*Trade attempted to pay Keitel a "kill fee" to end the relationship.

Notwithstanding these facts, and other circumstantial arguments put forward by Keitel, the court held that, because the term sheet stated that "neither party shall be bound until the parties execute a more formal written agreement," there was no enforceable contract.

This appellate precedent demonstrates that courts will focus their analysis overwhelmingly on any express language related to enforceability before turning to other facts and circumstances. Nevertheless, the Commercial Division's recent decisions on this issue have shown that the analysis is not always a simple exercise and depends heavily on the scope and purpose of the term sheet as well as how different provisions may interact with one another.

Commercial Division application

In a brief decision arising from a transaction involving the production of podcasts, *Words Matter Media v. Cafe Studios*, No. 65629/2020, 2021 WL 4696923 (N.Y. Co. Oct. 6, 2021), Justice Andrew J. Borrok of the New York County Commercial Division declined to dismiss a case despite the defendant's argument that the term sheet was expressly nonbinding. Upon review of the term sheet, the court found that, while the preamble explicitly stated that the term sheet at issue was not binding, there was a subsequent paragraph that did appear to be binding. The court found that "the term sheet, as drafted, appears to reflect a deal as to the allocation of costs, expenses, production and revenue sharing that was intended to be binding during the option period. It does not appear that this was merely an agreement to agree ... "

On the other hand, in *King Penguin Opportunity Fund III v. Spectrum Group Management*, No. 154084/2018, 2019 WL 2902134 (N.Y. Co. July 5, 2019), aff'd, 187 A.D.3d 698 (1st Dep't 2020), Justice Andrea Masley of the New York County Commercial Division dismissed all counts of fraudulent inducement, negligent misrepresentation, promissory estoppel and breach of good faith and fair dealing arising from a term sheet in a commercial real estate loan transaction. The court held that the term sheet explicitly provided that it was "for discussion purposes only and does not constitute a binding commitment to provide credit." This provision, according to the court, precluded any argument that the plaintiff could have justifiable reliance sufficient to sustain fraud, misrepresentation, or estoppel claims—and also precluded the claim for breach of the covenant of good faith and fair dealing as there was no enforceable agreement.

Most recently, Justice Robert R. Reed confronted the question of whether a term sheet is enforceable in *SPG Capital Partners v. Cascade 553*, No. 652457/2017, 2023 WL 126127 (N.Y. Co. Jan. 6, 2023). That case involved a dispute over a term sheet, signed by each party, wherein SPG was to provide a mortgage loan to Cascade for a real estate development project in Brooklyn. The term sheet stated that SPG would provide a \$110 million mortgage loan and that Cascade would provide a \$200,000 good faith deposit. The term sheet also included an exclusivity provision that prohibited Cascade, or its affiliates, from obtaining financing from another lender. If Cascade violated that exclusivity provision, then SPG was entitled to a break-up fee equaling 2% of the total loan amount. Subsequently, Cascade claimed that SPG failed to timely provide the loan and, thus, Cascade needed to secure financing from another party. This led to SPG suing Cascade for violating the exclusivity provision. In response, Cascade countersued for return of the deposit. Both parties then moved for summary judgment.

The court held that the term sheet as a whole was unenforceable, relying primarily on the express language describing the nonbinding nature of the document. Cascade argued that both parties understood the entire document to be nonbinding, citing language in the term sheet that explicitly stated it was “for discussion purposes only” and not “an offer, agreement, or commitment to lead or borrow.” Cascade also argued that the terms were too indefinite to form an enforceable agreement considering that they contemplated that “the Lender might extend credit” subject to satisfactory completion of a review by the lender “in its sole discretion.” In response, SPG argued that all material terms were in the term sheet and that the term sheet was “preliminary only in form” and that its due diligence commitment weighed in favor of finding an enforceable contract. In the alternative, SPG also argued that the exclusivity provision was independently enforceable.

The court rejected all of SPG’s arguments. The court cited the following factors in determining whether a preliminary agreement, before the execution of another formal instrument, can be binding: “1) whether there has been an express reservation of the right not to be bound in the absence of a final writing; 2) whether there has been partial performance of the alleged contract; 3) whether all of the terms of the

alleged contract have been agreed upon; and 4) whether the agreement at issue is the type of contract that is usually committed to a final writing.” In this case, the court focused on the fact that “the document repeatedly emphasizes its nonbinding nature.” The court held that when a “term sheet is expressly conditioned on the completion of the lender’s due diligence, further satisfactory negotiation by the parties, and the acceptance of the loan documents, the document is not binding.”

Next, the court considered whether the term sheet’s exclusivity provision alone was separately enforceable. The court noted that courts have partially enforced term sheets “where the parties agree that an exclusivity provision shall survive the term sheet and is binding regardless of the binding nature of the term sheet.” The term sheet in this instance also included in the same section a breakup fee along with rights to a portion of the deposit attributable to actual expenses. On the other hand, the court held that there was still “no statement that renders the provision enforceable notwithstanding the nonbinding nature of the term sheet.” Additionally, the court found that because almost all of the term sheet’s obligations fell upon Cascade, SPG did not have sufficient mutuality of obligation to enforce the provision. The court agreed with Cascade that “the caselaw makes it clear that a clear expression of intent, along with mutuality of obligation, must exist before a clause such as the one at hand is independently enforceable.”

Ultimately, the court ruled in favor of Cascade, denying SPG any break-up fee and directing it to return the deposit less any due diligence expenses.

Conclusion

Whether or not a term sheet is binding and enforceable is a question that will continue to arise given the varied form and purposes of such documents. The Commercial Division has demonstrated that disclaimers stating that a term sheet is nonbinding are powerful but not necessarily dispositive where other conditions and provisions are at issue. Notably, even where it found a term sheet as a whole to be unenforceable, a court may still find individual provisions in it to be enforceable. Counsel on both sides of a transaction in New York should think carefully about how all aspects of a term sheet reflect the parties’ intent to be bound in light of these cases.



Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 3500 lawyers and other legal staff based in Europe, the United States, Canada, Latin America, Asia, Australia, Africa and the Middle East.

Law around the world

nortonrosefulbright.com

Norton Rose Fulbright Verein, a Swiss verein, helps coordinate the activities of Norton Rose Fulbright members but does not itself provide legal services to clients. Norton Rose Fulbright has offices in more than 50 cities worldwide, including London, Houston, New York, Toronto, Mexico City, Hong Kong, Sydney and Johannesburg. For more information, see nortonrosefulbright.com/legal-notices. The purpose of this communication is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.

© Norton Rose Fulbright US LLP. Extracts may be copied provided their source is acknowledged.
US_51866 – 05/23