



WHAT YOU NEED TO UNDERSTAND ABOUT MEMORANDUMS OF UNDERSTANDING

Cherie Gopie

MOUs vs Contracts

Generally, the key difference between a contract and a memorandum of understanding is in fact, enforceability. Contracts are created when two or more parties intend to create a legally enforceable agreement. Parties enter into contracts after an offer has been accepted, with consideration. Parties to contracts are legally obligated to comply with the terms and conditions of the agreement. If a term or condition of a contract is breached, parties will face legal consequences.

MOUs typically are not enforceable. However, if the content of the MOU is exactly like a contract in language and intent, then a court is likely to rule that it is in fact a contract with legally enforceable rights and obligations, no matter what title might appear on the front page. In another instance, although MOUs are not binding, they may include provisions that are, such as privacy or nondisclosure agreements. If either party violates such provisions, they may be held liable.

There are standards for determining whether an MOU might be binding. A judge reviewing one would look for four key elements that normally define a contract: an **offer**, **acceptance** of the offer, an **intention** to be legally bound, and **consideration** (the benefits that each party bargains for as part of a contract).

In the context of commercial contracts, the intention to create legal relations is presumed. This presumption can be rebutted by the party asserting a lack of intention. Whilst an intention on the part of the parties to an agreement to create legal relations is necessary before that agreement will be enforceable, such an intention will usually be inferred from the presence of consideration. This is not always the case and in order to determine the intention of the parties, a Court will look at the objective conduct of the parties, it will have regard to the relevant circumstances and, where it is in a commercial context, the Court will review the alleged agreement for business sense. But even where agreement between the parties is itself lacking on certain issues, the actions and words of the parties may be used to show the parties' intention that agreement on those issues was not a prerequisite to the conclusion of a legally binding agreement.

Memorandums of Understanding - or 'MOUs' - have been in the public domain recently with the now withdrawn Sandals Beach Resort project. Some of the project's detractors have referenced terms of the MOU arguing that they were commercially disadvantageous to Trinidad and Tobago's interest whilst its supporters have insisted that a MOU is not a legally binding document. To clarify, a MOU is generally not intended to be legally enforceable in a court of law. However, in certain circumstances, an MOU or some of its terms can be legally enforceable. Moreover, given the nature of an MOU, though not legally binding, it can be an important indicator as to the intent of the parties entering a formal binding contract.

What is an MOU?

An MOU is a document used to articulate an agreement between two or more parties. In commercial negotiations, parties usually use a memorandum of understanding to outline their expectations and responsibilities as they work together towards a common objective. MOU's vary in length and complexity. The document can be less formal than contracts, and typically include fewer details but is likely to identify the contracting parties, detail the scope and objectives of the agreement, summarise the essential terms of the agreement and be signed by the parties. A memorandum of understanding usually precedes a more detailed contract or agreement, after a process of negotiations and due diligence. MOU's can be very helpful as a tool for facilitating effective collaboration in order to achieve a specific outcome and help to solidify partnership.

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A COMPANY MEDICAL HOW HEALTHY IS YOUR COMPANY?

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For many persons, scheduling an annual medical has become a ritual. Similarly, checking the health of your company (be it an operating company, a non-operating holding company or one of a group of companies) should be regularly scheduled on your calendar. In place of tests for blood pressure, sugar levels and cholesterol levels (the list goes on), highlighted below are some of the recommended tests to verify the health (aka good standing or compliance) of your company:

COMPANY FILINGS

Starting with the low-hanging fruit makes any task a bit less daunting. Each company incorporated in Trinidad and Tobago under the Companies Act is required to comply with certain filing requirements prescribed in that Act. It is advisable to create a folder or file for your company in which copies of all filed documents for the company are stored.

The most common filings made under the Companies Act include the filing of a notice with the Registrar General's Department any time that there is a change in: (1) the directors of a company; (2) the secretary of a company; and (3) the registered office of the company. The timeframe for filing these notices are 30 days from the date of the change, except in the case of a notice of change of registered office which must be filed within 15 days of the change. In addition, all companies must file an annual return with the Registrar General's Department within 30 days of the anniversary date of the company's date of incorporation, continuance or amalgamation (whichever is the later). There are other filings that are required in circumstances where specific events relating to a company occurs, including: a change in the articles of a company; the granting of certain legal charges over the property of a company; and the appointment of a receiver or liquidator in respect of a company.

It is therefore important to be familiar with the filing obligations under the Companies Act to ensure compliance, particularly as penalties accrue in respect of the late filing of many of these documents.

PUBLIC OR REGULATED COMPANIES

In addition to filings with the Registrar General's Department under the Companies Act, public companies or companies regulated by other legislation (such as the Financial Institutions Act; the Insurance Act or the Securities Act) have additional regular filings and disclosure obligations. These filings include interim and annual financial statements; annual reports; credit exposure and related-party transaction reports; material change reports and trading reports.

Some of these reports are required to be submitted at the same time each year while others may arise only in circumstances where certain events occur. The late filing of these reports will often result in fines or other penalties being imposed by the respective regulators and, as such, keeping track of these filings is critical.

Public or regulated companies should therefore consider creating a schedule of all filing obligations and the timeframes within which the filing must be made. Ideally, where a company has access to scheduling or calendaring software, consider scheduling all known filing obligations at the beginning of each year along with reminders or alarms in advance of the deadline to ensure that those filing obligations are met. Copies of all documents filed with regulators (and all correspondence with regulators) should be maintained on a file kept by the company for filings and correspondence with each regulator. A public or regulated company should regularly verify that all requisite filings have been submitted and copies retained by the company.

COVENANTS, UNDERTAKINGS AND OTHER AGREEMENTS

In the course of business, an operating company is likely to enter into contractual arrangements from time to time. Often, such contractual arrangements would include certain agreements (commonly referred to as covenants or undertakings) by each party to take (or refrain from taking) certain actions. Where such covenants require a company to carry out certain steps or obligations, it is important that the company keeps track of such provisions to avoid finding itself in breach of its commitments, particularly as a breach of one contract may also trigger breaches in other contracts of the company.

Depending on the nature of the covenants, there are different ways in which a company may decide to keep track of them. However, if a company is regularly contracting with other parties, keeping track of many different covenants with different obligations and timelines can become a burden. While there no doubt is an 'app for that' or software tailored specifically for keeping track of tasks, the cost of software can in itself become a burden that outweighs the benefit. A company that is regularly entering into contractual arrangements may alternatively consider creating a table or schedule in which it lists all of the company's contractual obligations with a note as to the contract under which such obligation arises and the timeframe applicable to the obligation. A company can then regularly test itself against such obligations 'at a glance' without needing to turn to each contract.

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However, where the subject-matter of the agreement is related to business affairs, the parties may, by using clear words, show that their intention is to make the transaction binding in honour only, and not in law; and the courts will give effect to the expressed intention.

Why use MOUs?

In today's fast-paced business environment, the MOU provides a simple but effective format to enter into a general agreement prior to finalizing a more detailed contract or agreement with a party. Ultimately, what is useful to understand is that an MOU is generally not intended to be legally binding but, in some circumstances, it can be. Furthermore, in the circumstances where the terms of an MOU are not legally binding, the terms, in any event, can be an important clue of the parties' intended common plan of action.

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TAX

A company incorporated in Trinidad and Tobago (even if not an operating company) should seek to ensure that its tax filings are properly maintained so as to avoid any challenges in the future. In order to do so the company should obtain a Board of Inland Revenue (BIR) number and file tax returns annually, even where it is a nil return. As to the taxes payable by a company and the tax rates that apply, specific tax advice should be obtained, depending on the nature of the operations of the company.

A periodic 'tax health check' is also recommended to ensure that the company is in fact compliant in all tax areas (including Value Added Tax; Income Tax (PAYE); Corporation Tax (Quarterly Instalments); Property Tax (when in effect) and national Insurance) as severe penalties are imposed for non-compliance with the statutory obligations.

From a practical standpoint, for all companies incorporated in Trinidad and Tobago a tax file or folder should be maintained in which all filed tax returns in respect of that company are stored. At a minimum, you should ensure that the filed tax returns for a company's preceding six (6) financial years are maintained on file, and for longer periods where tax objections or appeals are in progress.

In practice, lawyers are often asked to assist a company at a time when something 'out of the ordinary' is happening. Be it a sale of the company, a dispute with a regulator, counterparty to a contract or even the BIR, the most critical things that a lawyer will require to assist the company are the company's records. A company with more up to date and complete records will often increase its chances of obtaining a positive (and less costly) outcome or result in those circumstances. While it might not always be practical to hire an employee or engage lawyers or consultants to regularly maintain or keep track of a company's filing or other obligations, the simple tips and tools set out above should put a company on the right track to good health, or at least, to remaining in good standing.

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