



WHAT YOU NEED TO UNDERSTAND ABOUT MEMORANDUMS OF UNDERSTANDING

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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Memorandums of Understanding - or 'MOUs' - have been in the public domain recently with the now withdrawn Sandals Beach Resort project.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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