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## MEMORANDUM OF UNDERSTANDING (MOU) - THE ONE SIZE FITS ALL DOCUMENT?

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## Background

It is common for parties who are desirous of entering into a business relationship to document their preliminary understanding and intention in a preliminary agreement. One of such preliminary agreements is the “popular by demand” agreement known as a Memorandum of Understanding / MOU. The expectation of most parties, when executing a Memorandum of Understanding and depending on the nature of the business relationship sought to be created, is to eventually record the negotiated and agreed terms in a definitive contractual document.

However, in recent times, the applicability of a Memorandum of Understanding has been extended beyond its primary usage such that the MOU now plays the dual role of the preliminary and definitive agreement for parties. In other words, MOU appears to have become the “One Size Fits All” document that suits all circumstances and facts.

Accordingly, this article seeks to discuss the essential nature and use of a Memorandum of Understanding, as well as explore the risks of its enforceability in commercial transactions.

## The Nature of an MOU

“Black's Law Dictionary<sup>1</sup> equates a Memorandum of Understanding to a Letter of Intent and defines it as:

*“A written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement; a non-committal writing preliminary to a contract”.*

Considering the definition of MOU as contained in the Black's Law Dictionary, the Supreme Court held in **BPS Construction & Engineering Co. Ltd v. Federal Capital Development Authority**<sup>2</sup> that “a Memorandum of Understanding or Letter of Intent, merely sets down in writing what the parties intend will eventually form the basis of a formal contract between them. Thus, taking into consideration the elements of a valid contract, an MOU is merely a representation of the intention of the parties, subject to the execution of a formal agreement”.

Furthermore, in the case of **Star Finance & Property Ltd. & Anor. v. Nigerian Deposit Insurance Corporation**<sup>3</sup>, the Learned Justices of the Court of Appeal described an MOU as a document entered into by contracting parties to declare their intention to contract and to guide them subsequently when they are ready to sign a legally binding contract. According to the Learned Justices, the contents of an MOU serve to fix in memory the desire of the parties which is to serve as the basis for a future formal contract; as it is not the real agreement but a document guiding the future agreement, and its status is something less than a complete contract.”

Having regard to the above, an MOU as implied by its name, is a document which reflects the understanding of the parties; which may not necessarily be the final position of the Parties. By its nature, it is a preliminary document which presupposes a pre-conceived transaction, and can therefore be described as “an agreement to agree” or an “agreement to negotiate”. It is non-committal in nature and the contracting parties will generally not be bound by its terms.

## When is an MOU ideal?

Considering the nature of an MOU, it suffices to say that an MOU is ideal at the preliminary stages of an impending transaction i.e. when the position of the parties is inchoate and the key terms of engagement have not been formalized. Accordingly, it helps the contracting parties to fill in the gap between the handshakes and the signatures. It also outlines the specific roles and responsibilities of the parties to have a clear understanding of their purpose in the agreement. Furthermore, an MOU is ideal at the preliminary stages because it does not on the face of it, create the definitiveness that individuals may want to avoid for certain matters. Thus, it gives room *inter alia* to work out the commercial details to aid the preparation and finalization of the formal agreement. It also serves as an indication of some commitment by the parties to proceed with the transaction.

Following from the above, the question arises as to whether parties who have moved beyond the preliminary stages of negotiation should enter into an MOU for the legalization of their position. In other words, is an MOU the appropriate document to reflect the agreed and final terms of contracting parties?

## MOU as a Definitive Agreement

Despite the nature and primary usage of an MOU, it has evolved (albeit erroneously in our opinion) as the “One Size Fits All” agreement for almost every conceivable transaction. From experience, the MOU has arguably become the most common “agreement” amongst legal practitioners and the most demanded “agreement” by parties generally for the legalization of their position.

This, by itself, may not be an issue, particularly where the actual terms of the MOU with particular reference to the language and the certainty are clear and the parties intend such agreement to be binding. After all, an agreement between two contracting parties which contains all the elements of a contract will be enforceable by the parties irrespective of the name it is so called.

Accordingly, an MOU can serve as a definitive agreement where the parties have moved beyond the preliminary stages of the contract and it is clear from the wording of the MOU that the parties intend it to be the full and final documentation, enforceable by and against them, in accordance with its terms.

However, complexities often arise where an MOU is intended to function as a definitive agreement but does not capture the agreed terms and complete intention of the parties or is made subject to the fulfilment of certain terms and conditions. It has been held that where an MOU is subject to the fulfilment of certain terms and conditions e.g. the signing of a formal document, such MOU is inchoate and not binding until those terms and conditions have been fulfilled and it would be incorrect to say that the terms are to be construed in a mandatory sense<sup>4</sup>. Indeed, where the MOU does not reflect the agreed terms of the parties, it is likely to be ambiguous; and the vaguer such an MOU is, the less likely its worth.

In other words, a document which is made subject to the execution of an agreement at a later date, is merely a preliminary move in negotiations which may or may not lead to a formal contract. In **UBA Ltd V Tejumola & Sons Ltd**<sup>5</sup>, Oba-seki, JSC explained that “where a contract is subject to the happening of a contingency, that contract only becomes en-

<sup>1</sup>Ninth Edition

<sup>2</sup>SC. 293/2011

<sup>3</sup>(2012) LPELR - 8394 C.A.

<sup>4</sup>BPS Construction & Engineering Co. Ltd v. Federal Capital Development Authority (Supra)

<sup>5</sup>(1988) 2 NWLR (PT. 79) 662 at 688

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forceable provided the event has occurred or the contingency has happened." Where the wording of the MOU is such that records the terms which the parties intend will eventually form the basis of a formal contract between them, it cannot be expressed to be binding on the parties.

Bindingness and Enforceability of a Memorandum of Understanding

As discussed above, an MOU by its primary nature and usage is non-binding. However, in cases where the MOU contains the elements of a valid contract, the MOU will fall within the exceptional circumstance wherein a Court will find that commitment has been made between the parties, notwithstanding its general nature, and it will be held to be binding and enforceable<sup>6</sup>.

Iguh JSC, in the case of **Alfotrin Ltd. V AG Federation & Ors**<sup>7</sup> stated that for a contract to be enforceable, "there must be a concluded bargain which has settled all essential conditions that are necessary to be settled and leaves no vital term or condition unsettled".

In the case of **BPS Construction & Engineering Co. Ltd v. Federal Capital Development Authority (Supra)**, the Appellant and Respondent had executed an MOU for the provision of infrastructural facilities at designated locations. The MOU was made subject to signing a formal agreement by the parties, which was contemplated to occur within 14 days of the execution of the MOU. However, and before the execution of a formal agreement by the parties, the Appellant had incurred costs for the execution of the project based on the reliance on the promises, assurances and representations of the Respondent that a formal agreement will be executed in line with the MOU.

In determining if the MOU represented a binding and enforceable contract between the parties, the Supreme Court differentiated what constitutes a valid contract in contrast to an invitation to treat, and held that for a contract to be binding, it must contain the basic elements of offer, acceptance, consideration and capacity to contract or intention to create legal relationship, as opposed to an invitation to treat which is not an offer that can be accepted to lead to a contract.

Furthermore, Adekeye JSC in the case of **BILANTE INTERNATIONAL LTD. V. NIGERIA DEPOSIT INSURANCE CORPORATION**<sup>8</sup> stated that "It is trite that before any contract or agreement can be said to have come into existence in law, there must be an unmistakable and precise offer and unconditional acceptance of the terms mutually agreed upon by the parties thereto. In other words, the parties to the agreement must be in consensus ad idem as regards the terms and conditions freely and voluntarily agreed upon by them".

Following from the above, it is clear that a Memorandum of Understanding is generally non-binding and unenforceable. However, the courts will enforce a Memorandum of Understanding that contains all the requirements of a valid contract i.e. offer, acceptance, consideration and intention of the parties to be legally bound. Furthermore, in deciding its enforceability, the court will take into consideration, the intention of the parties which will be interpreted from the terms of the MOU and the conduct of the parties after its execution.

Conclusion

Although there are legal distinctions between a definitive Agreement (by whatever name so called) and a Memorandum of Understanding, there may be no legal or practical difference if they are written with similar language. The key is to focus on whether the parties intend to be legally bound by the terms of the agreement and if so drafted, a legally enforceable contract would have been created regardless of whether or not it is called a Memorandum of Understanding.

However, considering the ambiguity that abound the bindingness and enforceability of an MOU, it becomes almost difficult to rationalize the unguided widespread resort to an MOU by lawyers, where specific, time tested agreements would be more apt to capture the agreed, final and definitive position of the Parties.

Finally, contracting parties should seek legal advice and be wary of rushing to execute MOUs particularly at the definitive stage of a transaction, going to bed only to be awakened at an ungodly hour, by the harsh knock precipitated by the hollowness of the almighty MOU.

<sup>6</sup>Supra  
<sup>7</sup>(1996) 9 NWLR (PT. 475) 634 at 656  
<sup>8</sup>(2011) LPELR-SC.177/1996



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