
COMPARING THE DIFFERENCES BETWEEN MEMORANDUM OF UNDERSTANDING AND MEMORANDUM OF AGREEMENT

by

Siti Nuralis Abd Muis^[i]

Nurul Farzana binti Mohd Amin^[iii]

Nurul Atiqah binti Abd Rahman^[iii]

INTRODUCTION

A Memorandum of Understanding (MOU) is a legal instrument between two or more parties that outlines a common goal. The MOU and the Memorandum of Agreement (MOA) are frequently confused by laypeople, but they are not the same. An MOU is a preliminary document that indicates the parties' intention to collaborate in general before they can finalise the parties' responsibilities in a formal agreement.

An MOU is not usually a legally binding contract and is unenforceable by law unless the clauses in the MOU state otherwise. It is a crucial step for any prosperous partnership to reach.

On the other hand, MOA is a legal instrument between two or more parties for the purpose of specific collaboration, intended to be legally binding and enforceable by law.

An MOU can reduce the risk of parties entering into an MOA. Because trust has already been established, the parties can anticipate each other's expectations.^[1]

ROLE OF CLINICAL RESEARCH MALAYSIA ('CRM') IN REVIEWING MOU FOR MINISTRY OF HEALTH ('MOH') RESEARCH SITES

Clinical Research Malaysia ('CRM') helps review^[2] the MOU for collaborations entered with CRM and if it involves Ministry of Health ('MOH') research sites. CRM will ensure that the review of the MOU complies with all applicable laws and guidelines. CRM will assist in catering to the discussion on the description and scope of the MOU which the parties have agreed on, as well as the agreed-upon roles, responsibilities and contributions of the parties. It is important for parties to negotiate and agree on the terms of the MOU to ensure that the parties' mutual understanding, goals and objectives of the MOU are achieved.

IMPORTANT ELEMENTS FOR MEMORANDUM OF UNDERSTANDING

Parties to the Memorandum of Understanding and Due Diligence

In the MOU, it is imperative that the company name (along with the company number), the national registration identification number of an individual, and their address all be spelt out in an accurate manner. This part is similar to other agreements in which the parties with legal entities must be identified.

Nevertheless, before entering into a contract with one another, the parties in many cases fail to perform the company search or bankruptcy search that is required of them. The aforementioned search is extremely important, particularly for MOUs entered into with companies based in Malaysia or with individuals from Malaysia. The search is being done as part of risk mitigation because it is appropriate to ensure that CRM is collaborating with operational businesses or an individual who has not declared bankruptcy.

But what about non-Malaysian entities? In this scenario, parties would normally conduct third-party due diligence activities. The purpose of conducting third-party due diligence is to protect the organisation's reputation, assets, and interests while at the same time lowering any potential risks that may be present. Gathering information about a third party's background, financial stability, legal and compliance history (including anti-bribery and anti-corruption), business practices, and overall reputation is required by the due diligence guidelines for third parties. It is worth noting that due diligence activities are essential for new companies dealing with CRM. However, the re-assessment shall be done yearly or annually or as the company deems fit.

Purpose of the Memorandum of Understanding

An MOU will always include a clause specifying the objective of the relationship governed by the said legal instrument. It should provide an explanation as to the motivation behind the creation of the MOU. It details how one party will benefit from the collaboration between the other party. The overall intention of the parties is to be laid out to ensure that the parties do not have any intentions that have not been disclosed to one another, which may result in a dispute in the future.

Duties and Responsibilities

This is another essential section of the MOU in which the parties' obligations and responsibilities are spelt out. It is always preferable for the responsibilities and obligations of each party to be listed separately. Additionally, shared responsibilities should be specified. This part must be written with clarity and is often the longest section of the MOU.

Formalisation of Proposed Collaboration

It is advisable for parties to ensure that any proposed collaboration between them will be formalised by a separate written agreement outlining the parties' rights and responsibilities, including any financial obligations.

Any such collaboration shall commence and can only be implemented after the parties' duly authorised representatives have signed the aforementioned written agreement.

Duration, Revision of the Memorandum of Understanding

Once parties have signed an MOU, its duration is typically not perpetual but rather limited to a specific time frame. In the event that a definitive agreement is not reached during the duration of the MOU, the parties would typically revisit and discuss whether it is necessary to renew the MOU after conducting a review to monitor the outcome of the MOU.

Dispute Resolution

As mentioned earlier in the introduction, in contrast to standard contracts, an MOU is not legally enforceable unless the parties expressly provide for it in the document. As a result, a formal method for resolving disputes, such as arbitration and litigation, is typically avoided in the context of an MOU. When conflicts arise, the parties involved should agree that they will resolve the conflict in good faith or amicably through mutual negotiations. In the event that the disagreements are not resolved after the allotted amount of time, they should be brought to the attention of higher officials within the organisation that the parties represent. In any event, if the disagreement is not resolved, the parties may reach an agreement on an alternative method for resolving the disagreements than those specified in this clause should the need arise.

Intellectual Property

As for the intellectual property clause, it is typical for it to be as general as possible in the MOU, stating that the background intellectual property shall unquestionably belong to the owner. Any new inventions resulting from the intellectual property must be disclosed. They belong to the parties if invented jointly and the sole inventor if solely invented. Any percentage

or share of intellectual property created as a result of the project or the collaboration will be specified in a separate definitive agreement.

Situations that make MOU a Legally Binding Contract

It is significant to understand that MOU usually contains the “subject to contract” clause, as spelt out in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625. In this case, as the judge explained, the preliminary agreement contains such a clause to symbolise the ongoing negotiation between the parties and they are not intended to be bound by it until a formal and definitive agreement is formed. However, further argument was found in *Ayer Hitam Tin Dredging Malaysia Bhd v. Y C Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133 as the court stated that a “subject to contract” clause does not stop establishing a binding contract.

Further, it is crucial to note that for a preliminary agreement to be legally binding, the elements of certainty of the terms and “meeting of the minds” of the parties must be established before the court as explained in *Syarikat Pertanian Emmal Sdn Bhd v. Tractors Malaysia [1982] Sdn Bhd* [2009] 10 CLJ 714. Further application of this concept can be found in *AHT Properties Sdn Bhd & Ors v. Tan Yee Hee & Ors* [2010] MLJU 1957, where the judge held that a confirmation letter is a legally binding agreement due to the certainty of the terms. In the confirmation letter, the parties spelt out the essential terms for the sale and purchase of shares, as the price and terms of sale have been stated. Furthermore, the fact that one of the shareholders acted upon the terms of the confirmation letter symbolised the intention of the parties to treat the confirmation letter as a valid and legally binding agreement. Another notable discovery is a 1997 case, *Lim Hong Liang & Anor v. Tan Kim Lan & Anor* [1997] 4 CLJ 175. It was contended that the parties’ MOU were legally binding, and Tan Kim Lan had breached the said MOU when he entered negotiations with third parties. The plaintiff’s stance was that the MOU contained clauses on time is of the essence and governing law. The court was of the view that even when the MOU contained such clauses, the fact that the MOU did not have

finalised and expressed terms, altogether with various approvals still needed to be obtained clearly showed the parties' intention not to treat the MOU as a legally binding agreement. The court held that the MOU was insufficient to be considered a valid and binding contract.^[3]

By applying all these legal authorities, the MOU can be a legally binding contract if the parties intend to do so by “meeting of the minds” when negotiating and agreeing to the terms of the MOU. This can happen when the parties have a mutual understanding of the MOU's legality and if any performance could demonstrate the intention to make the MOU a legally binding contract. Moreover, there is a solid reason why the common practice of drafting an MOU is to make it as vague and wide as possible, especially because specific, clear and express terms of the MOU can contribute to the validity of the MOU and form a legally binding contract. The parties to an MOU must take note of this when entering an MOU to ensure that the parties are aware of the legal obligations that arise from the MOU.

Salient Points Why MOA is a Legally Binding Contract and not MOU

The rule of thumb for an MOA to be a legally binding contract is the structure of the MOA itself, which is similar to a contract. For a contract, the general elements are: i) **offer**, where a party make a promise for an action; ii) **acceptance**, when the offer is accepted ambiguously by the other party; iii) **consideration**, which refers to something of value promised in exchange for the action and; iv) **consent**, where the contracting parties have the “meeting of the minds” of the basic substance and terms of the contract. These four elements are also applicable to MOA. In an MOA, the parties usually clearly spell out the obligations and commitments as well as the allocation and management of its risks. Further, it provides express manifestation that the parties are bound by its terms and strict compliance with it, in addition to the statement of intention to form a legally binding contract between the parties. In terms of the language of law, MOAs

generally adapt similar linguistic features as contracts, making them obligatory in nature.

CONCLUSION

In conclusion, an MOU is important as it establishes the mutual objectives and intentions of the parties prior to entering into a fully binding formal agreement and further serves as an instrument to ease, facilitate and allow a smooth working relationship and partnership between the organisation and parties. Meanwhile, an MOA is a formal agreement that details the obligations and commitments of the parties and is legally binding.

[i] [ii] [iii] LLB Hons; Clinical Research Malaysia.

Endnotes:

[1] Sapna Goundan, ‘Memorandum of Understanding Vs Contract: What’s The Difference?’, *Sprint Law* (Web Page, February 2022) <<https://sprintlaw.com.au/articles/mou-vs-contract/>>.

[2] Currently, MOUs are reviewed by the CRM Legal Department without any legal review charges. Once all the parties have negotiated and agreed to the terms and conditions in the MOU, CRM will coordinate the signatory process with the relevant parties. This may involve a signing ceremony, electronic signature or another method mutually agreed upon by the parties.

[3] Cassandra Thomazios and Celinne Teh, ‘Do I Have A Contract? Preliminary Agreements in Acquisitions’, *Mah Weng Kwai & Associates* (Web Page, October 2020) <<https://mahwengkwai.com/do-i-have-a-contract-preliminary-agreements-in-acquisitions/#:~:text=The%20general%20rule%20is%20that,1996%5D%203%20MLJ%20327>>.