

PRESS RELEASE

18 May 2011

The Crucial Importance of Understanding the Understanding **Memoranda of Understanding : UK vs Italian Law**

A Memorandum of Understanding or letter of intent is usually defined as an agreement between two parties in the form of a legal document that expresses the willingness of both parties to do business or enter into a merger. It indicates that a partnership, a merger or an acquisition between companies is being considered seriously and that both the parties wish to have further discussions before entering into a contractual agreement.

The Memorandum is aimed at promoting good standards of cooperation between the parties, indicating an intended common line of action and setting out a framework to facilitate liaison on areas of mutual interest. It also clarifies respective roles and responsibilities and outlines mechanisms in place to promote effective liaison relationships.

Although a Memorandum of Understanding does not necessarily imply a legal commitment and lacks the binding power of a contract, it is a more formal choice to a gentlemen's agreement, which relies upon the honour of the parties for its fulfilment, and is not enforceable.

The question of whether such documents are in fact legally binding on the parties under English or Italian Law can only be answered by looking at its content in more detail.

The fact that the parties to the future agreement often are of different nationalities makes it impossible to provide a general answer without giving a brief overview of the legal position under civil law and common law.

Pre-contractual responsibility in civil and common law systems

Italian law does not recognise legal structures in the course of the negotiations preliminary to a contract which can be totally assimilated to the Memorandum of Understanding as defined by Common law; what normally happens is that the parties sign a preliminary contract whereby they assume the obligation to complete the transaction at a later date; this document is a binding contract in its own right and its breach gives rise to contractual liability.

Under English law on the other hand, these type of documents are considered non binding unless they include the material terms of the agreement. For the purposes of clarity, it is usual to introduce phrases such as "subject to contract" as the definition of a document as memorandum or letter of intent will not necessarily guarantee its non binding nature.

Italian law also provides that the simple use of the term letter of intent is not sufficient to prevent the document from creating legal obligations. Article 1337 of the Italian Civil Code regulates pre-contractual responsibility and affords that in all preliminary stages of the transaction the parties must act in good faith and cannot withdraw arbitrarily or unjustly from the transaction. The duties of information, clarity and confidentiality are also part of pre-contractual responsibility and may give rise to the obligation to pay damages if breached.

This concept is interpreted differently in common law legal systems, where it is subordinated to the necessity of protecting the freedom of contract, although it is increasingly common to find liability during the

pre-contractual stages and documents have to be drafted with care to avoid this result.

Coming back to Italian law then it is possible that a letter of intent or memorandum of understanding will give rise to liability to damages and will be considered legally binding in respect of the main duties comprised in the concept of good faith, such as information, clarity and confidentiality. Provided the letter of intent does not contain all the agreed principles and material terms of the contract, and can therefore be properly defined as pre-contractual letter of intent, the above are the only obligations arising from the document under Italian law.

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Gabriele Giambone is the Managing Partner of Giambone Law LLP. Graduated from the University of Palermo with a First Class “cum laude” degree, he continued his studies at the University of Aberdeen in Scotland. He worked in the Corporate department of the Royal Bank of Scotland in London prior to founding Giambone Law LLP in 2005. Gabriele specialises in advising private and commercial clients on issues of cross-border litigation; he practices in all areas of corporate and commercial law, particularly real estate, financial services, media and entertainment. Gabriele represents claimants and defendants in all jurisdictions of civil and commercial courts and often appears at mediation and arbitration hearings.

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