

# Attorney General's Advisory: A Ban on MoUs with Government?

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## Background

On 5 July 2024 the Attorney General of Uganda published an advisory (the "Advisory") on the execution of memoranda of understanding (MoUs) with the Government, including ministries, departments, agencies and local governments (collectively "MDA/LGs").

The Advisory states that it is illegal for MDA/LGs to enter into certain MoUs without seeking the AG's legal advice. It also cautions against MDA/LGs executing certain types of MoUs, the details of which are discussed below.

### The position under Ugandan law

Under the 1995 Constitution of the Republic of Uganda, the Attorney General is the principal legal adviser of the Government. The Constitution prohibits Government from entering into agreements without the legal advice of the Attorney General, unless Parliament or the Attorney General has exempted a certain category of contracts from this requirement. To this end, the Attorney General issued the Constitution (Exemption of Particular Contracts from Attorney General's Legal Advice) Instrument (which was amended in 2014) that excludes agreements involving amounts of up to UGX. 200 million (approx. US\$ 54,000) from requiring the Attorney General's clearance.

Accordingly, all agreements or contracts entered into by the Government, or in respect of which the Government has an interest, with a value over UGX. 200 million require the Attorney General's prior advice and approval if such agreement or contract is to have any binding effect on or against Government. This is intended to protect Government from entering into contracts without legal advice, which may in turn be detrimental to the country.

Typically, any private party or individual contracting with the Government in this category of contract is best advised to require that a legal opinion or letter of legal clearance is issued by either the Attorney General or the Solicitor General (the law allows the Solicitor General to perform the role and exercise the powers of the Attorney General).

### Does this requirement apply to MoUs?

MoUs entered into by the Government, or in respect of which Government has an interest, require the legal advice of the Attorney General if the MoU is a contract or agreement with a value over UGX. 200 million. In other words, it is intended that Government be bound by that MoU.

There is a common misconception that MoUs are always non-binding and do not constitute agreements or contracts. This is not correct – the title “MoU” is just a label. Whether an MoU is a binding contract or not depends on how the document is worded.

Before signing any form of agreement – including an MoU, or by whatever other name called – parties are advised ensure that it is clear on the face of the document whether it is legally binding or not. For a contract to come into existence, all component parts of contract formation under Ugandan law must be present. This means there must be an offer and acceptance, consideration and there must be an intention to create legal relations.

### **How does the Advisory affect MoUs?**

The Advisory cautions against MDA/LGs executing certain types of MoUs without first obtaining the advice of and clearance by the Attorney General.

The stated purpose of the Advisory is to ensure the proper implementation of Uganda’s public procurement laws. It guides that MoUs are best suited for non-commercial arrangements between States, State agencies, etc, for general cooperation in any areas of mutual interest. It lists various types of MoUs which are acceptable, including where there is a specific provision of the law which requires signing of an MoU, where there is a clear legal or policy reason to sign an MoU, where an MoU is required as a prerequisite to financing, or where the President has determined that entering into the MoU is of strategic interest to Uganda.

The Attorney General’s caution against certain types of MoUs is not limited to MoUs with a value over UGX. 200 million in accordance with Ugandan law, as discussed above. In fact, the Advisory concludes that any MoU entered into without the prior approval or advice of the Attorney General ‘shall be null and void.’ This appears to conflict with the Attorney General’s statutory exemption that excludes agreements involving amounts of up to UGX. 200 million from requiring the Attorney General’s clearance.

Following the Advisory, the Attorney General is likely to advise MDA/LGs against signing any MoUs unless they fall within the exceptions noted above. We also expect that MDA/LGs will be hesitant to enter into MoUs without seeking the Attorney General’s legal advice, even if the MoU is expressed

as not legally binding and even if the MoU has no value or a value less than the legal threshold of UGX. 200 million. The Advisory seeks to assert the Attorney General’s statutory role as principal legal advisor to Government and all its agencies and, as such, prohibit the signing of any form of agreement or MoU whether binding or not without first obtaining that office’s legal advice.

### **Does this requirement extend to parastatals and local governments?**

An interesting question arises over whether the requirement for the Attorney General’s legal advice extends to parastatals and local governments. Parastatals are corporate bodies set up by an Act of Parliament, while the local government system is based on the “district as a unit” and may include district councils, subcounty councils, city councils, city division councils, municipal councils, municipal division councils and town councils, depending on the location (district, city, municipality or town).

The Constitutional Court of Uganda, in *Nsimbe Holdings V Attorney General and Another, Constitutional Petition Number 2 of 2006*, ruled that this requirement applies to agreements in which the Government has an interest or to which the Government is a party. In this case, the Court found that since the Government had an interest in the National Social Security Fund (NSSF), the Attorney General’s legal advice was required for all agreements entered into by NSSF involving amounts over UGX. 200 million.

The legal position is unclear with regard to local governments. The High Court has delivered two contradictory judgments on whether the Attorney General’s legal advice is required when contracting with local governments.

In *Equator Touring Services Limited v Kampala City Council (HCCS No. 763 of 2007)*, the High Court ruled that a contract entered into by the Kampala City Council, a local government, was illegal for want of the Attorney General’s legal advice.

Subsequently, the same High Court judge ruled in *Engineer Investments Ltd v Attorney General & Kampala Capital City Authority (HCCS 331 of 2012)* that the “government” to which the law applies is the central government. His rationale was that local governments are corporate entities, which manage their own resources and services, and the central government neither controls nor has a legal interest

in them. The requirement for the Attorney General's legal advice was found not to apply. Curiously, the judge did not address his earlier decision in *Equator Touring Services Limited v Kampala City Council* (HCCS No. 763 of 2007).

Until a higher court pronounces itself on whether local governments are required to obtain the Attorney General's legal advice under Ugandan law, it is advisable that entities contracting with local governments insist on the Attorney General's legal advice before signing if the agreement has a value over UGX. 200 million.

### **What does this mean for existing MoUs?**

The Advisory does not address how existing MoUs are to be treated, especially if clearance by the Attorney General was not obtained prior to its signing. An existing MoU with Government or in which Government has an interest should be reviewed to determine whether it is a legally binding contract and if that MoU has a value over UGX. 200 million, there is a risk that it will be considered null and void, but this can only be determined on a case-by-case basis upon being reviewed by legal advisors.

### **How will the Advisory affect business going forward?**

Private parties are advised to familiarise themselves with the law as laid out in statutes, as well as regulations of the different government agencies, departments or organizations that govern how binding contracts and MoUs should be entered into. Often times, in addition to the constitutional and statutory requirements, there are internal requirements or policies that are specific to each government department or organization or agency. For example if the MoU or contract or agreement involves a loan or guarantor to or by government, a parliamentary resolution approving such a loan or guarantor is required.

Where an MDA/LG proposes an MoU or agreement in respect of a particular project, even if the MoU or agreement is expressed as not legally binding, the private party is advised to insist on having prior approval from the Office of the Attorney General obtained if the project is or will be subject to public procurement laws, and meets the threshold that requires Attorney General's clearance.

Private parties should always be careful about what they sign and seek legal advice before doing so. While seeking legal advice might cost you, it can protect you from legal risks and reputational damage that arises from years of dispute resolution. Below are some of the precautions that can be taken to protect oneself when contracting with Government:

- Including a statement that the terms are not binding until a definitive written agreement is negotiated, settled and executed by the parties.
- Including "For Discussion Purposes Only" at the top of documents until all terms of the agreement are settled between the parties.
- Refrain from performing your obligations until the written agreement is finalized and executed.
- With respect to any documents signed by MDA/LGs, obtain a legal opinion with respect to capacity and authority to enter into the document, and the enforceability of such document, as a condition for the effectiveness of the document.

### **Further reading**

[Dentons – Deal or no deal? A concise guide to negotiating contracts while minimizing the risk of disputes](#)

*Published by Dentons Toronto, this guide contains helpful "Dos and Don'ts" which our clients in Uganda will find helpful when negotiating contracts. It was prepared following the recent decision in Canada in which the Court held that one party had entered into a binding contract by responding to a text message with a thumb's up emoji.*

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