INTENTS AND PURPOSES

Letters of Intent are often cited by various industry factions – shipyards, new build and refit, brokers and charterers, as well as the many other service and product providers – to indicate that the elusive first contract is just around the corner. We ask some of the industry's top lawyers to what extent a Letter of Intent constitutes a binding contract with regard to a superyacht new build.

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GRANT ELDRED, PARTNER,
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Letters of Intent (LOIs) for superyacht new builds are often believed to be moral (rather than legal) commitments only. A mere agreement to negotiate in good faith is generally unenforceable in English law. The absence of legal cases enforcing LOI terms is often cited as evidence that this is the case.

However, negotiations and settlements between yards and buyers are frequently driven and dictated by what the parties believe (or are advised) they have legally committed to (in the LOI or elsewhere). Even if the LOI is not 'as a whole' binding, the parties can have (whether intentionally or not) bound themselves to parts of it. For example, under English law (which may or may not be applicable) if there is (i) offer and unconditional acceptance; (ii) an intention to create legal relations; and (iii) consideration, aspects of the LOI may well be legally binding.

For example, this may include an obligation to negotiate or to build: if there is certainty as to price, and what the builder is building and the buyer is buying, the LOI may be getting dangerously close to a contract. This is likely to be more of an issue with a repeat build than a bespoke new build, but if price and detailed specifications and terms are referred to, the LOI may be more of a commitment than one party intends.

Also, statements made fraudulently or negligently in the LOI may well give rise to a liability for damages in tort even if the LOI is not contractually binding. For example, a yard that does not have the facilities or capacity to build a vessel should not state that it has.

Then there is 'lockout'. While an undertaking to negotiate is not normally binding, an agreement not to negotiate with other third parties for a period of time is often enforceable. This is the element of LOIs that we most regularly seek to enforce on behalf of yards or buyers.

If the parties (or either one of them) want an LOI (or any part of it, e.g. 'lock-out' provisions) to be legally binding, they should say so. Equally, and probably more importantly, if they don't want it to be legally binding, they should also say so. Neither party benefits from the uncertainty of not doing so.

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MARK NEEDHAM, PARTNER,
BARGATE MURRAY

Superyacht build projects involve many technical and practical elements, ranging from the development of the design of the yacht through to supply chain issues and the selection of a whole host of, sometimes, rare materials. This means that the parties can spend quite a bit of time pre-contract focused on discussing and agreeing these issues.

On occasion, the parties come under pressure to commence work or for preparations for the work to begin as soon as possible – usually so that the yacht can be delivered in time for a particular cruising season. When this happens, the parties may still be concluding contractual negotiations. In these circumstances, they may use a Letter of Intent (LOI) to give the shipyard some reassurance relating to payment for work carried out before the contract is signed and to prevent delays to the timetable.

Whether such a LOI would constitute a binding contract for the entire build of a superyacht is unlikely but, ultimately, it is a matter of construction of the relevant LOI. Factors that would tend to suggest it was not intended to constitute a binding contract for the entire build would include: (i) a lack of 'consideration' for the whole build project (i.e. no agreed price and payment milestones); (ii) ambiguity about precisely what the builder is to build or do and by when; (iii) the language used – does the LOI speak of requirements to do certain things by certain dates or is it a more general wish list?; and (iv) whether the LOI makes reference to, or envisages, a shipbuilding contract being entered into. These are, of course, not the only factors to consider but they make a useful starting point.

In any event, great care should be taken to ensure that in submitting what you think is LOI, you are not inadvertently entering into a quasi-contract that you may be bound to honour.

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TONY ALLEN & NAFSIKA CONNOLLY,
HILL DICKINSON

A Letter of Intent (LOI) is usually the first stage in the yacht construction process. It sets out the parties' intention to enter into a building contract and records some of the key terms without fully committing either party to the project.

Under English law, a LOI will form a legally binding contract in so far as it is a written agreement entered into between two parties. However, not all of its terms will be enforceable. Some terms may be expressly stated to be binding, such as a commitment to reserve capacity for a specified period for the intended project, a deposit to be paid to secure the exclusivity, or the duty to keep the terms of the project and the parties' identities confidential.

Other terms may be acknowledged as being 'subject to contract', such as those terms governing the construction of the yacht, which would therefore not be binding. Arguably the most important term of a LOI is the obligation to negotiate the terms of a building contract. English law does not generally recognise as enforceable an 'agreement to agree', on the basis that such a term is too uncertain. However, that may not be the case if the document goes on to make sufficiently clear the parameters within which the negotiations should be conducted.

A LOI remains a useful tool to allow the parties to begin discussions and provide a framework for further negotiations, securing certain enforceable obligations such as confidentiality and allowing other terms to stand merely as non-binding statements of intent. The line between intent and enforceability is, however, a fine one and it is easy for a LOI unintentionally to give rise to fully binding obligations or to have the opposite effect and to be devoid of all value.

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BENJAMIN MALTBY, ASSISTANT

Under English law (British Steel Corporation v Cleveland Bridge), "There can be no hard and fast answer to the question whether a Letter of Intent (LOI) will give rise to a binding agreement: everything must depend on the circumstances of the particular case". So they may have no effect at all, or they can give rise to a claim where a yard begins building without the build contract in place, or they can form a build contract when referring to particular standard terms. Given that LOIs can give rise to so much uncertainty, it is vital for legal advice to be taken before signing, and for the build contract itself to be negotiated and agreed swiftly afterwards. Buyers and yards must be clear what they want the LOI to achieve. If it's just to secure a build slot, then a fully fledged LOI may be unsuitable. Certainly, construction should not begin without the full build contract in place.

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DUNCAN BATESON, PARTNER

The essence of a Letter of Intent (LOI) is to book a build slot/delivery date for a certain size and type of yacht for a period to allow time to negotiate a new-build contract. That should be binding, particularly if secured by a deposit so the buyer knows how it will be applied or returned. The price and other outline terms in the LOI will not be binding legally but will be commercially. For example, if instalment refund bank guarantees are requested later, the cost may well be added to the price. How binding a LOI is depends, of course, on what it says but also on which law applies and which court has jurisdiction. If the parties don't choose then then a court will do it for them. If a LOI without a choice of law is signed at the yard, then it is likely to be governed by the yard's law and court. Conceivably, a LOI could form just a build contract itself, at least for a production or fully designed yacht, as all that is required under English law are the essential terms with a clear intent to bind. All too often, for commercial imperatives, LOIs are quickly agreed without giving thought to this very question.

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ANDREW CHARLIER, PARTNER

The legal status of a Letter of Intent (LOI) was addressed in a recent (non-yachting) English case, Spartafield Limited v Penten Group Limited, which had to decide whether or not there was a binding contract by virtue of the LOI in the absence of a formal contract. The LOI in that case was not expressed as being subject to contract, and the court ruled that on the facts, the LOI was replaced by a contract on standard terms, even though the formal contract had not been signed. In the yachting industry, the parties to a LOI may be inclined to assume that a LOI that is expressed to be subject to contract will not be binding except in relation to those aspects where it is expressly stated that they will be (typically deposit, whether returnable or not; confidentiality/ non-disclosure agreement; law and jurisdiction). However, Spartafield v Penten demonstrates that a poorly drafted LOI can lead to unexpected consequences, and care needs to be taken before a LOI is entered into for a superyacht new-build purchase.

His Honour Judge Lloyd QC, in ERDC Group Ltd v Brunel University [2006] EWHC 687: "Letters of Intent come in all sorts of forms. Some are merely expressions of hope; others are firmer but make it clear that no legal consequences ensue; others presage a contract and may be tantamount to an agreement 'subject to contract'; others are contracts falling short of the full-blown contract that is contemplated; others are in reality that contract in all but name. There can therefore be no prior assumptions ... The phrase 'letter of intent' is not a term of art. Its meaning and effect depend on the circumstances of each case."