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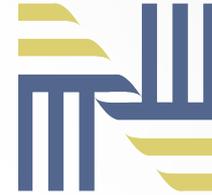
**UNDERSTANDING LETTERS OF INTENT –  
TOWARDS BETTER MERGERS &  
ACQUISITIONS**

*By Chike Obimma*

## *Nature and Benefits of Letters of Intent*

A letter of intent (LOI) is a preliminary document usually prepared by a purchaser, in which the intention of the parties and the proposed course of action towards the negotiation and completion of a deal is captured and jointly executed.<sup>1</sup> It may also be called a ‘Heads of Agreement’, or a ‘Memorandum of Understanding’. The purpose is to identify deal parameters, agree on them and chart the way forward for the negotiation of material terms and completion. It is in our view, a framework document to guide parties in negotiating and completing a deal.

From a purchaser’s perspective, the LOI is important because it gives some assurance that negotiations will proceed and where the LOI contains an exclusivity clause, there is further assurance that the vendor will not shop the deal around to other potential buyers during the exclusivity period. Even where the LOI contains a ‘go shop’ provision, the Purchaser can rely on the assurance of receiving a breakup fee in the event that the deal is shopped to another buyer. Thus, the purchaser has comfort to expend resources on due diligence (DD) and the drafting of a purchase agreement.<sup>2</sup> For the vendor, a LOI shows some form of seriousness on the part of the purchaser to proceed with the deal<sup>3</sup> especially where the LOI contains a break fee clause.

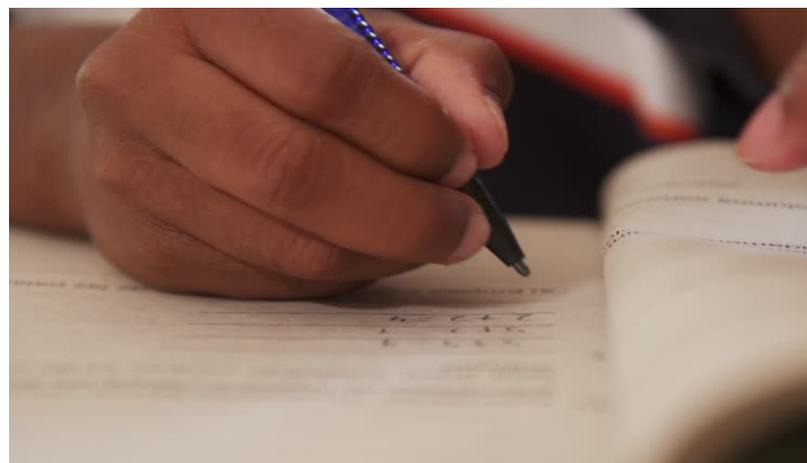


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Sometimes, in a bid to get the preliminary terms right, parties dwell on negotiating the LOI thereby elongating the transaction time and sometimes even terminating the deal before negotiation commences.<sup>4</sup> So, LOI may not be beneficial to a purchaser when there are competing bids (like in an auction). In a recent transaction that a colleague advised on in Africa, parties dwelt so much on the LOI that the deal was terminated before negotiation commenced. The flip side to this is that a LOI may show parties, at an early stage, the deal breakers in the impending deal and therefore save the cost of proceeding to negotiation and DD.

### *Is a LOI binding?*

Whether a LOI is binding or not will depend on the governing law and jurisdiction of the transaction. To ensure that a LOI does not become a binding document but a mere agreement to guide the negotiation of a definitive agreement, parties have sought to label the LOI with the heading “*without prejudice and subject to contract*”. In civil law jurisdictions such as France, a letter of intent is generally not binding save for the confidentiality, exclusivity and break fee clauses. However, there is generally a strong moral obligation not to deviate from the terms of the LOI subsequently.<sup>5</sup> This makes it (morally) binding.



In UK and other common law jurisdictions including Nigeria, a LOI is generally not binding but may be construed as binding depending on the circumstances of each case. This will very much depend on the manner of drafting the LOI and the conduct of parties. It is immaterial whether the LOI is stated to be “without prejudice – subject to contract” because the Court will make a wholesome interpretation of facts to ascertain whether a valid contract is established. In so doing, the terms of a valid contract (offer, acceptance, consideration, intention to create legal relations and certainty of terms) are relevant and will be ascertained from the general circumstances of each particular case to determine whether parties intended to be bound by the LOI notwithstanding the terms of the LOI.<sup>6</sup> The Courts have also held that even where the LOI is stated to be ‘subject to contract’, parties may by their conduct, unequivocally waive the ‘subject to contract’ term.<sup>7</sup> The LOI should therefore be drafted in such manner that on an objective (reasonable man) interpretation by the court, it does not show any intention by parties to be bound. Essentially, the ‘meeting-of-the-minds’ element of a valid contract should be intentionally withheld in the LOI. This underscores the need for a knowledgeable and skillful transaction solicitor.

#### ***Insufficiency of the ‘No Intention Clause’***

To ensure that a LOI is not construed as binding, lawyers have devised a sort of ‘no intention’ clause in which they state in very explicit terms that the LOI is not intended to be binding save for the confidentiality clause, the exclusivity clause and the break fee clause. We are of the opinion that the a ‘no intention’ clause is a good remedy albeit an insufficient one. A lawyer drafting a LOI should take care to draft every single clause in such manner that shows an intention not to be bound, rather than draft the clauses in certain and binding terms and thereafter rely on a ‘no intention’ clause as the magic wand to make it non-binding. It should be clear from the language of the document that there is a purposive intention to withhold the ‘intention to be bound’ element of the contract. For instance, the offer could be termed an indicative offer while the price is reflected as an indicative price to be confirmed after DD.



Also, any consideration to be paid for exclusivity should be stated to apply solely for the exclusivity period and does not amount to payment towards the deal.

#### ***Conclusion***

A LOI is capable of presenting difficulty for parties in varying degrees, all of which emanate from the way it is drafted. The rules around construction of LOI are not clear-cut. Therefore, getting it right requires finesse and art-like drafting in order to carefully cover the basics while remaining non-committal as in a binding contract.

#### ***About Niccom LLP***

At Niccom LLP, we advise on Mergers and Acquisitions, and we understand the intricacies of deal structuring. We are happy to advise you on structuring and initiating that deal through a LOI, or the effect of breaking off negotiations initiated by a LOI.

We are a full-service firm comprising of young and innovative legal minds. We provide legal and compliance services to clients cutting across different sectors and backgrounds. We operate out of Lagos, Nigeria, but have represented clients in transactions across West and East Africa as well as the Middle East.

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## References

<sup>1</sup> N. Von Bismark, Slaughter and May; *Corporate Acquisitions and Mergers (United Kingdom)*.

<sup>2</sup> Jean Feriancek, *What Did You Agree to in Your Letter of Intent? (Insights, Edited by David S. May)*. Accessed from Heinonline on 27 April 2020.

<sup>3</sup> Ibid.

<sup>4</sup> Von Bismark (n1)

<sup>5</sup> Bignon Lebray (Neil Robertson), *France, Negotiated M&A Guide, Corporate and M&A Law Committee*, 5. Accessed from <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=8105C641-A088-4C5F-8C92-D8668EE10F2F>> on 27 April 2020.

<sup>6</sup> See *RTS Flexible Systems Ltd v. Molkerei Alois Müller* (2010) UKSC 14

<sup>7</sup> Ibid



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