INTRODUCTORY STATEMENT - Translation - Marcel FONTAINE  Professor, Université Catholique de Louvain, Louvain-La-Neuve; Director, Centre de droit des obligations, Louvain-La-Neuve; Member of the Council, ICC Institute of International Business Law and Practice

For two days we are going to reflect together on the problems concerning the formation of contracts and pre-contractual liability. - The topic is not new. In recent years it has been the subject of numerous publications and various seminars. In each case these have emphasized its importance and the current interest in it: These developments are justified by the breadth of the phenomenon of negotiations in the present practice of international contracts. We are far from the contracts of instantaneous formation of classic theory. Actual negotiations can take months or years and one suspects that this period cannot pass in a legal vacuum.

The approach of the present symposium is ambitious. Our program intends to confront two matters in the hope that the confrontations will generate a better understanding of the phenomenon in question and, perhaps, will generate some new ideas.

1. The first matter to be confronted is that of the judicial systems. The various systems of law effectively offer great variety on the problems of contract formation, legal approach of negotiations and the possible liability related to those negotiations. In those countries where the law of contracts is codified, there are scarcely any texts on those problems except sometimes concerning the offer and acceptance. Therefore, general principles must be applied, but different countries apply these principles differently. The problems in question are not even clearly understood by the law: This situation is all the more marked in countries where the law is not codified. Similar situations are noticed in these countries, as well as some reticence at the introduction of legal constraints at the pre-contractual stage.

These differences create great uncertainty. Participants in international negotiations are in danger of poorly appreciating the legal consequences of their behaviour, as well as of agreements that can be concluded during discussions.

We are going to start by searching for some national solutions in order to discover and confront different ways of tackling these problems of contracts in gestation.

After a general comparative introduction by Professor Farnworth, a roundtable discussion will bring together specialists from a few countries Chosen to offer a diversified sample of legal systems. Professors Dreyer for Switzerland and Oke for Germany, Mr. Hamza for Egypt, and Professors Schmidt for France and Goode for England will participate in it. With the report of Professor Rigaux, we will also tackle the problems of the law applicable to incidents which can mark this pre-contractual phase. These problems are of burning interest precisely because of the diversity of solutions offered by different legal systems. Finally, thanks to the lecture of Professor Bonell, we will examine the manner in which these
questions can be answered by the Vienna Convention on the international sales of goods. The hope is formulated that this first confrontation will result in a better understanding of the Problem and will highlight not only the common points but also the most significant differences among the systems considered.

2. With the second matter to be confronted, we will strive to compare the current state of national laws to that of practice.

It is well known that the law is often late in relation to the facts. Proof of this is found in the area of international contracts where the practice is very dynamic, where it is constantly meeting new challenges and where it is constantly inventing original formulae to meet them. Sometimes these formulae are very distant from the traditional solutions offered by the applicable law and in general they are much more elaborate.

In the study of national laws we will probably notice that certain laws have some basic approach to meet the phenomenon of negotiating but this approach is often limited to a few principles. Thus, for example, the phenomenon of letters of intent and other preparatory agreements goes largely unnoticed. It is ignored by all the classical literature. It is only in the recent past that some authors have reserved a small place for it: As for court decisions, they are still rare even though here and there one can already find one or two notable cases.

This is why we wanted to have the first session, devoted to confronting national laws, followed by a second confrontation where the principles defined in the first would be put to the test of practice.

This second confrontation itself will start from two different but complementary approaches. On the one hand we will examine the practical experiences of negotiation in four characteristic but very different sectors: construction, buying and selling of companies, the petroleum industry and technology transfers. On the other hand, we will study a few cases some of which have already received wide attention and others which are taken from the personal experience of the participants.

These two approaches are intimately interrelated; they will not be as distinct as they appear on the program. Thus by already creating certain regroupings, in the construction sector, we will hear testimony from the actual practice of Mr. Goudsmit, followed by a lecture by Mr. Jones on the specific problems related to bid bonds. In the petroleum sector, Mr. David will present the very particular characteristics of different types of negotiations. Three lectures will be devoted to the transfer of technology. Professor Huet, Mrs. Toubol and Professor Hertig will present the theoretical foundations, followed by the particulars of confidentiality agreements, a problem which is the most characteristic of the sector. Company acquisitions will give rise to an occasion for Mr. Baum to deliver an account of his experience and some cases which have already occurred, before Professor Draetta comments on two matters related to the judicial effects of agreements in principle tied to acquisitions of participation. Finally Mr. Derains will give an account of the arbitration experience concerning the interpretive value of negotiations.

These two complementary approaches should enlighten us in a very concrete manner on the current practice of contract formation and on a few examples of the litigation which has arisen, in order to highlight the problems created by insufficient legal regulation and to suggest, perhaps, the precautions which must be taken during negotiations.

That, ladies and gentlemen, is what we propose to you. Such is the spirit of our program. Our eminent speakers, coming from the most diverse perspectives of teaching and practice, are going to offer their reflections to you. We are counting greatly on your reactions during the discussions, that is to say your questions, your objections and your personal experiences. Together, during the course of these two days, we can learn a great deal about the formation of contracts and precontractual liability.

Referring Principles:

IV.8.1 - Principle of pre-contractual liability