I. INTRODUCTION

1. Practical interest

On 19 November 1985, an American jury in the State of Texas returned a verdict of US$10,530 million. This is the largest civil judgment ever in United States courts. The case involved two oil company giants, Pennzoil and Texaco, which were competing to purchase a third company, Getty Oil. The question was whether the agreement in principle whereby Pennzoil was to purchase a major number of Getty's shares could be found to be a binding contract or perhaps whether Texaco's act constituted a tortious interference with prospective economic relations between Pennzoil and Getty. The Texas jury found actual damages of US$7,530 million and punitive damages of US$3,000 million.[1] The case ended 25 months later when, with a certiorari petition pending before the US Supreme Court, the two companies agreed to a settlement that Texaco would pay Pennzoil $3,000 million in cash to end the dispute.[2]

This case, set out in Chapter 21 by the American reporter, Professor Daniel C. Turack, illustrates the practical importance of the subject of this book. Breaking off negotiations may lead to damages and the question rises whether any liability lies on the party who has broken off the negotiations.

Further evidence of the practical interest of the subject of precontractual liability is furnished by the growing interest, once again illustrated by the American example, in the handling of negotiations. Skills in negotiating are not only necessary for such legal action as corporate mergers or divorce settlements, but also for more traditional practices such as arranging judicial settlements in tort cases.[3] Kindled by best-sellers like Fischer and Uri's *Getting to Yes*,[4] American Law Schools have set up courses dealing with negotiations.[5] European Faculties of Law are following suit.

Not always do negotiations take place. As the Quebec reporter sets out, many contracts arise without prior negotiations. This, according to the Quebec report, 'is so, for instance, when X buys a book at the bookshop

1. In appeal the Texas Court of Appeal remitted US$2,000 million of the punitive damages award.
2. *See* S. Coll, *The Taking of Getty Oil*, 1987; T. Petzinger, Oil & Honor: *The Texaco-Pennzoil Wars*, 1987.
3. *See* Peter H. Schuck, *Agent Orange On Trial/Mass Toxic Disasters in the Courts*, Cambridge Mass./London, 1986.
4. R. Fischer, W. Ury, *Getting to YES: Negotiating Agreement Without Giving In*, Boston 1981. Other such books, especially for lawyers, include: G. Bellow & Moulton, *Lawyering Process: Negotiation* (1981); X. Frascogna, H. Hetherington, *Negotiation Strategy for Lawyers* (1984); G. Nierenberg, *The Complete Negotiator* (1986); G. Williams, *A Lawyer's Handbook for Effective Negotiation and Settlement* (1981).
5. The importance of these skills is illustrated among others by the *Texaco/Pennzoil* case – *see* Robert H. Mnookin, Robert B. Wilson, 'Rational Bargaining And Market Efficiency: Understanding Pennzoil v. Texaco', 75 *Virginia Law Review* 295–334 (1989), with commentaries by Stephen M. Bundy, at 335–365, and by David A. Law, at 367–381.

or gets herself a coffee from a vending machine'.[6] As we shall see later, German and Austrian case law take a different view in this regard, accepting as they do precontractual liability of the bookshop or vending machine proprietor for accidents which happen to prospective customers in the shop premises. However, the point of the Canadian reporter is well taken, since obviously when negotiations do take place, especially if they are complex and protracted, the possibility that something goes wrong is larger than in the absence thereof.[7]

2. Legal interest: civil law countries

It is not a case of broken off negotiations, such as the *Pennzoil* case, which has first established interest in precontractual liability. Rather it was a XIXth century German writer, Rudolf von Ihering, whose celebrated essay on 'Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zu Perfection gelangten Verträgen'[8] made European lawyers aware of the subject. The influence of Von Ihering upon the formation of the concept of precontractual liability is widely acknowledged in the national reports.

The concept has stuck. In Germany, the subject has always remained a textbook and classroom subject. Switzerland, according to the national reporter Dr Franz Schenker, has copied German developments. Turkey in its turn has followed German and Swiss doctrine and practice in this regard. In Austria, after a long time of silence, *culpa in contrahendo* has been the subject of scholarly debate since 1970.[9] In Japanese legal writing, the theory of *culpa in contrahendo* has been discussed since the 1920s.[10] The Netherlands have expressed an interest in precontractual liability, at first mainly from an academic point of view, but during the last decade also because of a number of surprising court decisions. In Czechoslovakia, the study of Roman law contributed to the interest in Von Ihering's ideas.[11]

The concept of *culpa in contrahendo* has also attracted interest in the Romanist branch of civil law countries. The influence there is often traced back to the French commentator of the German Civil Code, Raymond Saleilles[12] – although in an earlier period, the *arrêtiste* Labbé had already referred to Von Ihering in his case notes[13] – and to the Italian lawyer

6. Chapter 17, para. 2.
7. Chapter 17, *ibidem*. As the French reporter points out, negotiations may on the other hand be imposed by law, in order to provide one of the parties with a reflection period.
8. *Iherings Jahrbücher* IV (1861), pp. 1–113 (French translation in O. de Meulenaere (ed.), *Oeuvres choisies*, Paris 1893, I, pp. 1–100).
9. Chapter 3, para. 1.
10. Chapter 13, para. 4 (2).
11. J.Vančura, *Úvod do studia soukromého práva římského* (Introduction to the study of Roman private law), Prague *sine-anno*, p. 87.
12. R. Saleilles, 'De la responsabilité précontractuelle', *Revue trimestrielle de droit civil* 1907, p. 697.
13. Chapter 17, para. 3.

Gabriele Faggella, who both in his writings[14] and as President of the Tribunal of Naples[15] has considerably influenced Italian and French as well as Latin American developments. It was Faggella, who added to Von Jhering's dichotomy of pre-offer and post-offer negotiations the preliminary phase prior to the preparation of the offer. This development is well described in the national report from Venezuela by Professor Luciano Lupini Bianchi (not included in this volume for the reason set out in the preface). In Puerto Rico, The Supreme Court, although not accepting his ideas, has acknowledged Von Jhering as the founding father of the doctrine of precontractual liability.[16] Likewise, the Argentinian national report refers to Von Ihering, and in his footsteps Saleilles and Faggella, as the founding fathers of *culpa in contrahendo*.

Not all civil law jurisdictions have shown an interest in precontractual liability. Quebec[17] and the Scandinavian jurisdictions[18] do not recognise the subject as such.

3. Legal interest: common law countries

As we just saw, the concept of precontractual liability or *culpa in contrahendo* has gained acceptance in most civil law jurisdictions. In common law jurisdictions, this is generally not the case. 'General principles such as *culpa in contrahendo* or *responsabilité précontractuelle* are regarded with great suspicion by English law', is the conclusion of the English report.[19] 'The law of precontractual process in Australia is a complex amalgam of contract (including estoppel), tort, restitution and statute. Generally, the contract texts make no attempt to deal with the topic as a discrete area', writes the Australian national reporter.[20]

This negative attitude usually reflects the position that there is no such thing as a general doctrine of good faith in bargaining under the common law.[21] Although American writers have given the subject quite some attention – I have benefited especially from the article by Professor Allan E. Farnsworth in the *Columbia Law Review*[22] – this has not or not yet influenced doctrine in other common law countries.

In the absence of a general doctrine of good faith in bargaining, the

14. Gabriele Faggella, 'Dei periodi precontrattuali e della loro vera ed esatta costruzione giuridiche', in: *Studi giuridici in onore di Carlo Fadda*, Napoli 1906, Vol. III, p. 269 ff; Gabriele Faggella, 'Fondamento giuridico della responsabilità in tema di trattative contrattuali', in: *Archivio giuridico Filippo Serafini* 1909, 128 ff.
15. *Monitore del Tribunali* 1910, II, 341–343.
16. 'Producciones Tommy Muñiz, Inc v COPAN', 113 *Puerto Rican Reports* 666 (1982) quoted in Chapter 16, para. 2.
17. Chapter 17, para. 1.
18. Chapters 7 and 18.
19. Chapter 8, para. 5.
20. Chapter 2, para. 1.
21. Chapter 2, *ibidem*; Farnsworth (next footnote), at 221.
22. E. Allan Farnsworth, 'Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations'. 87 *Columbia Law Review* 217–294 (1987).

national reports from common law countries have tended to deal with a number of other questions, which are specific for the common law. The most notable question is whether in the absence of consideration the prospective parties to a contract may be held liable under negligence, estoppel or restitution. This is a question which also is of some importance to civil law jurisdictions, but which from the common law point of view is vital.

The traditional idea of the common law is set out in a number of cases of common law courts referred to in the national reports from the common law countries. This position, however, is subject to change. The reform of the law in this regard has perhaps most visibly set in with the Australian landmark case of *Waltons Stores (Interstate) Ltd* v. *Maher*.[23] Mr and Mrs Maher erected a new building on their property in view of a forthcoming contract for the lease of the property by Walton. For a majority of the Australian High Court, Waltons was estopped from denying that it had promised to complete the contract or that entry into the contract was a mere formality. The importance of this judgment is very large;[24] if followed in other common law jurisdictions, it could in effect circumvent the requirement of consideration. The question may also be rephrased from a different point of view: why should a promise not supported by consideration be enforced.[25]

The common law has generated yet another issue, which is discussed in some national reports. It is the influence of agreements in principle, binders, commitment letters, heads of agreement, letters of comfort, letters of intent, memoranda of understandings and other such devices designed to avoid the uncertainties of the regime of precontractual dealings.[26] Such documents have gained world-wide acceptance. Because of the restraints of length of a general report, this highly interesting matter can only be dealt with very briefly.

4. Spill-over of precontractual liability

There is yet another type of question related to our subject. Whenever a contract is concluded, the question may arise what effect precontractual dealings will have on the interpretation and the extent of the obligations of the parties to that contract. As the Swedish national reporter puts it, there is a 'spill-over' of precontractual liability into the subsequent contract. Although in most jurisdictions the ensuing problems will be considered to be of a contractual nature, this is not the case in all countries reviewed in this

23. (1987) 164 *CLR* 387.
24. *See also* John Phillips and Louis Proksch, 'Waltons Stores (Interstate) Ltd v. Mahler: Implications for the Law of Contract', 19 *Western Australian Law Review* 171, 179: 'In sum, it can be said that the effect of the operation of equitable estoppel in this context is to allow liability for precontractual statements in circumstances in which the established rules of contract law would otherwise preclude their enforcement'.
25. *Ibidem*.
26. Farnsworth, o.c. (*supra* n. 22) at p. 249.

report. In Belgium, for instance, the general rule that in case of conflict between contract and tort, the latter will prevail, has as a consequence that notwithstanding the fact that a contract has been concluded, precontractual liability will still lie in tort.

In other civil law countries, the code provisions on mistake, misrepresentation, fraud, duress, etc. will be invoked once a contract has been entered into.

In common law countries, the situation is no different. The parol evidence rule suggests that precontractual dealings will in general be of no or of little influence. When they are relevant, this like in civil law countries will usually be the case by way of a regime which applies to contract in general. This may either be the common law of for instance misrepresentation or statutory law, as has been enacted in New Zealand and the United Kingdom, which will cover the subject. As in the case of civil law countries, there are exceptions to this spill-over. An example is the English case of *Esso Petroleum* v. *Mardon*, in which the Court of Appeal held a duty of care which existed during the precontractual negotiations to survive the making of the written contract.[27]

Since a discussion of the various rules on misrepresentation and mistake would take up too many pages, this report has rather singled out one question concerning disclosure, which has attracted some attention in the national reports.

5. The economics of contracts

The regulation of rights and duties in a precontractual phase is a phenomenon which may not only be looked at from a strictly legal point of view. No legal phenomenon is any longer certain to escape attention from the Law & Economics school of thought. This has also manifested itself in the area of precontractual liability. As the Canadian reporter argues, from an economic perspective, the case for reform initially looks compelling: it is desirable that contracting parties should have full information, and this can be achieved at minimal cost by requiring all parties to disclose everything they know.[28] However, from an economic point of view, this is not quite correct. A rule requiring disclosure would operate as a disincentive to the acquisition of information.

This has led one writer to suggest a distinction to be made between information which has deliberately been searched for, usually at cost, and information which has been acquired casually. The former type of information might be withheld, the latter not.[29] This seems to support the

27. [1976] 2 *WLR* 583, mentioned by Schoordijk in his book *Onderhandelen te goeder trouw* (1984).
28. Chapter 5, para. 4.
29. Anthony Kronman, 'Mistake, Disclosure, Information, and the Law of Contracts', 7 *Journal of Legal Studies* 1–34 (1978).

traditional English view that there is no general obligation to disclose.[30] Still, a more recent article concludes that precontractual decisions are more complicated than the decisions that are usually analysed in the contract law-and-economics literature.[31]

6. Plan of this report and terminology; jurisdictions covered

The preceding paragraphs lead to the following plan. First, the questions relating to *culpa in contrahendo* will be analysed. In Sub-chapter II (paras. 7–9), the various sources of such liability will be set out. Sub-chapter III (paras. 10–21) will deal with the duties in negotiation which have been laid down in legislation or in case-law. Sub-chapter IV (paras. 22–24) will be concerned with the remedies. Basically, the questionnaire remitted by the general reporter will be followed. One or two exceptions will be made, however. It was found that the question concerning government contracts – with the exception of the Italian and the Japanese reports – did not suscitate much interest in the national reports. This point will therefore be omitted.

In Sub-chapter V (paras. 25–26) some attention will be paid to the two questions mentioned before: the (non-) disclosure and the binding effect of acts or omissions in the absence of a contractual promise. Sub-chapter VI (paras. 27–30) finally will draw some comparative conclusions.

The terminology in the various jurisdictions is not uniform. In some countries the whole area of precontractual liability is referred to as *culpa in contrahendo*. This, however, is not the case in for instance Italy, where the latter expression as in the writings of Ihering is only used to indicate a specific category of pre-contractual liability: failure to disclose the voidness, illegality or similar of a contract to the other party during the negotiation phase. Likewise, Japanese writers employ both *culpa in contrahendo* and other terminology, such as 'good faith during the preparatory stage of the contract' and 'promissory estoppel'.[32]

In this general report, both terms – *culpa in contrahendo* and precontractual liability – will be used as synonyms.

II. No contract ensues: sources of liability

7. Legislation

A number of jurisdictions has adopted legislation with regard to precontractual liability. Greece, Italy (1942), Israel (1973) and Yugoslavia (1978)

30. Barry Nicholas, 'The Pre-contractual Obligation to Disclose Information', in: Donald Harris and Denis Tallon (eds.), *Contract Law Today/Anglo-French Comparisons*, Oxford 1989, p. 166, 187.
31. Richard Craswell, 'Precontractual investigation as an optimal precaution problem', 17 *Journal of Legal Studies* 401–436 (1988), at 427. *See also* J.L. Coleman, D.D. Heckathorn, S.M. Maser, 'A bargaining theory approach to default provisions and disclosure rules in contract law', 12 *Harvard Journal of Law & Public Policy* 639–709 (1989).
32. Chapter 13, para. 1.

have enacted statutes on negotiations; Argentina and The Netherlands are considering or have considered introducing such legislation. On the international level, the Lando Commission has proposed a similar provision.

Article 1337 of the Italian *Codice civile* of 1942 reads as follows:

> *Trattative e responsabilità precontrattuale. – Le parti, nello svolgimento delle trattative e nella formazione del contratto, devono comportarsi secondo buona fede.*

(Negotiations and precontractual liability. – The parties, in the conduct of negotiations and the formation of the contract, shall conduct themselves according to good faith.)

A similar provision, Art. 197, has been enacted in Greece, which, however, adds custom as a source of precontractual rights and duties.

These provisions have probably influenced the work of the Lando Commission, as described in Chapter 7. The 6th consolidated draft Principles of International Commercial Contracts contain the general provision that 'the formation (...) of a contract shall be in accordance with the principles of good faith and fair dealing' (Art. 1.5). In accordance with this general rule, Art. 2.14 provides:

> (1) A party is free to negotiate and is not liable for failure to reach an agreement.
> (2) However, a party who has negotiated or broken off negotiations in bad faith is liable for the losses caused to the other party.
> (3) It is bad faith, in particular, for a party to enter into or continue negotiations knowing that he is not able or willing to make an agreement with the other party.

Article 30 of the Yugoslav Law of Contract, 1978, reads in translation:

> 1. The negotiations preceding the formation of a contract shall not be binding and either party may break them off at will.
> 2. However, any party which has engaged in negotiations without intending to form a contract shall be liable for any damage resulting from the conduct of negotiations.
> 3. The party which has engaged in negotiations with the intention to enter into a contract and then has abandoned such intention without a justified reason, causing damage to the other party in the process, shall also be liable for damage.
> 4. Unless otherwise agreed upon, each party shall bear its own costs incurred in making preparations for forming a contract, while joint costs shall be shared equally.

In Israel, Section 12 of the Contracts (General Part) Law, 1973 reads:

(a) In negotiating a contract, a person shall act in customary manner and in good faith.
(b) A party who does not act in customary manner and in good faith shall be liable to pay compensation to the other party for the damage caused to him in consequence of the negotiations or the making of the contract, and the provisions of Sections 10, 13 and 14 of the Contracts (Remedies for Breach of Contract) Law, 5731–1970, shall apply *mutatis mutandis*.

Another jurisdiction having specific legislation concerning precontractual dealings is Peru (Art. 1362 *Código civil*).

More countries are yet to come. In Argentina, the draft 'Ley de Unificación de la Legislación Civil y Comercial de la Nación' (1987) provides as follows:

Art. 1158 *Durante las tratativas preliminares, y aunque no se haya formulado una oferta, las partes están obligadas a comportarse de buena fe para no frustrarlas injustamente.*

(During the preliminary negotiations, and as long as an offer has not been formulated, the parties shall be obliged to act in good faith so as not to frustrate such negotiations unfairly.)

Art. 1159 *En caso de incumplirse la obligación establecida en el artículo anterior se deberá resarcir a la parte frustrada el daño al interés negativo.*

(In case of non-fulfilment of the obligation laid down in the previous article damages amounting to the negative interest shall be accorded to the frustrated party.)

According to the Argentinian national report, these two provisions can be traced to Art. 1198 of the 1968 Código Civil, the general good faith provision.

In the New Dutch Civil Code, a new provision on negotiating in good faith was struck out by Parliament, not because Parliament was against liability, but rather since it believed development of the law should proceed for a longer period before being codified.[33]

In those countries which have not enacted specific provisions on *culpa in contrahendo*, the customary general principles of good faith, tort, *negotiorum gestio*, restitution, etc. must be fallen back upon. Some Civil Codes offer more specific provisions which are based on the concept of precontractual liability. The national reports offer the following examples:

33. Chapter 14, para. 2.

- The ward who misleads the other party to believe that he has legal capacity to conclude a contract, is liable for the damage caused by this misleading act (Swiss and Turkish *ZGB* Art. 411 para. 2).
- A party who declares a contract not binding because he acted under a material error at the conclusion of the contract, shall compensate the other party for the damage suffered, if the error is attributable to his own negligence (Swiss and Turkish *OR* Art. 26).
- A party who has entered into a contract under threat or wilful deceit, is entitled to damages (Swiss and Turkish *OR* Art. 31 para. 3).
- If damages arise as a result of the invalidity of a legal act, there exists liability for damages under the provisions of this code when the other party knew or should know about the invalidity and did not give notice thereof (Italian Civil Code Art. 1338; Greek Civil Code Art. 198; Czechoslovak Civil Code Art. 42; the Czechoslovak Economic Code and Code of International Trade have similar provisions).
- The principal who after termination of the power did not require his agent to return a written power of attorney, shall be liable to a third party who in good faith has relied on such document (Swiss and Turkish *OR* Art. 36 para. 2).
- A person who has acted as an agent without having been authorized to do so, shall be liable for damage, if the contract is not subsequently approved by the pretended principal (German *BGB* para. 179, Italy Art. 1398, Swiss and Turkish *OR* Art. 39).

The Czechoslovak Civil Code provides that the parties shall do their utmost to eliminate anything in the regulation of contractual relations, which may be conducive to the origin of disputes. In its preamble, the Code states explicitly that the non-fulfilment of this obligation can influence the consideration of the liability of indemnity.

The Italian report in this regard also refers to Articles 1892/1893 concerning the insuree's fraudulent or negligent failure to disclose. More in general, several national reports mention special fiduciary relationships, such as insurance, which may be considered to be *uberrimae fidei*. Such contracts will not be dealt with in this report.

8. Case law

In the absence of specific provisions on precontractual liability, the courts have developed liability on the basis of general provisions or precedents. The most important provisions or precedents are the following:

a. Tort

The prevailing attitude of civil law courts has been to base precontractual liability on the general tort provision of the Civil Code. This at least is the case in the Civil Law countries which have been influenced by French law. In the Civil Law countries with a significant German influence, this is

different for the very reason that contractual liability often offers more to the other party.

On the basis of Art. 1382 French (= Belgian and Luxembourg) *Code civil*, Art. 6:182 Dutch *Burgerlijk Wetboek* (Art. 1401 in the old Code), Art. 1802 Civil Code of Puerto Rico, it has been held that negotiating unfairly constitutes a fault, obliging such party to make reparation. A case decided by the Belgian *Cour de cassation* for instance holds that:

> 'Whereas, in truth, the person who, by a culpable behaviour when the contract was being concluded, caused the other party a damage, is bound to compensate for it; that, however, the ground of the resulting action is not the contractual relationship but the fault of the interested party.'[34]

In several jurisdictions, unfair precontractual dealings are more specifically regarded as an abuse of right. The development of this doctrine is described in the very interesting report by Professor Legrand from Quebec. According to him, the theory owes much to the work of the French author Josserand in the first quarter of this century.[35] The theory of abuse of right has also been followed by the courts of some civil law countries. Thus, in *Producciones Tommy Muñiz Inc* v. COPAN, the Puerto Rican Supreme Court held that:

> 'It could be argued, however, that the unjustified breach of agreements is nothing more than the exercise of a right, inasmuch as the parties are completely free to bind themselves or to stop the negotiations (...).
>
> This notwithstanding, we know that the exercise of a right is not devoid of liability when it is carried out in an abusive manner'.[36]

b. Breach of contract

Unlike the French Civil Code and its progeny, German law does not have a general principle of non-contractual liability. Von Jhering therefore had to resort to an ingenious construction: an implied contract between the parties, with the object of conduct of negotiations in good faith.

More in general, the construction of a *pactum de contrahendo* is often used by legal scholars in civil law countries in order to consider parties bound. Not always will this be a fiction: as we shall see in para. 9 below, the prospective parties to a contract sometimes do reach agreement as to their negotiation procedure. In some countries, the courts are also soon prepared to find an agreement. In French law for instance, precontractual agreements are easily considered as being of a contractual nature.[37]

34. *Cour de cassation* 10 December 1981, *Pasicrisie* 1982, I, 494; *Arr. Cass.* 1982, 502, as quoted in Chapter 4, para. 2.
35. Chapter 17, para. 4 under a.
36. Cited in Chapter 16, para. 2.
37. Chapter 9, para. 5. The same applies to Venezuela, according to the national Venezuelan report, para. III.A.5.

The difference between liability under tort and liability for breach of contract, is rapidly diminishing in many jurisdictions. Most jurisdictions do still make the distinction. Under Swiss and Turkish law, the question whether it is a liability in contract or in tort is said to be relevant for the purposes of:

(i) prescription;
(ii) liability for auxiliary persons (*Erfüllungsgehilfe*);
(iii) burden of proof.[38]

One area where the distinction between liability in contract and in tort still may be of interest, is that of private international law. This is a highly interesting aspect[39] which, however, would warrant a separate research project and which will therefore not be pursued in this volume.

c. Estoppel

In the absence of a general duty of bargaining in good faith, the courts of common law countries have sometimes resorted to the principle of estoppel. What this is, will be set out later. Traditionally, common law courts have only adhered to estoppel when it is invoked by way of defence. This restriction has been overcome in the Australian landmark case of *Waltons Stores (Interstate) Ltd* v. *Maher*.[40] Mr and Mrs Maher had erected a new building on their property in view of a forthcoming contract for the lease of the property by Walton. For a majority of the Australian High Court, Waltons was estopped from denying that it had promised to complete the contract or that entry into the contract was a mere formality. The importance of this judgment is very large; if followed in other common law jurisdictions, it could in effect circumvent the requirement of consideration.

d. Restitution/Unjust enrichment

The law of restitution, or unjust enrichment, can provide a further possible remedy for a case where expense has been incurred in the expectation that a contract will eventuate, and this expectation proves to be unfounded.[41]

If liability is based on unjust enrichment, claimant must be able to show that its services resulted in an actual benefit to the defendant.[42]

A general observation concerning case law may be appropriate in this place. A number of national reports are very dogmatic, without recourse to case law. This may reflect the pre-occupation of the jurisdiction concerned

38. Chapters 19 and 20. It should be added that differences between liability in contract and in tort also may be discerned with regard to the assessment of damages.
39. During the discussion in Montreal, H.U. Jessurun d'Oliveira pointed out the importance of negotiations in entering into international employment contracts. As to private international law aspects of precontractual liability, *see* J.E.J.Th. Deelen, *I.p.r. en de afgebroken onderhandelingen*, Deventer 1984, and Egbert P. Degner, 'Kollisionsrechtliche Anknüpfung der Geschäftsführung ohne Auftrag des Bereicherungsrechts und der culpa in contrahendo', *Recht der Internationalen Wirtschaft* 1983, 825 ff.
40. (1987) 164 CLR 387.
41. Chapter 15, para. 7.
42. Farnsworth, o.c. (*supra* n. 22) at 223.

with legal scholarship rather than case law as a source of law. It may also be caused by a lack of cases (as is the case in the Yugoslav national report). Some writers have proposed to remedy this lack of cases by borrowing from adjoining areas of the law, such as the law of collective labour relations.[43] Others seek their cases in foreign countries.[44] It is the latter approach, to which comparative exercises such as this one may contribute.

9. Contracts and trade practices and usages

As was mentioned in the 'Introduction', the question whether or not in the absence of a contractual promise nonetheless obligations may exist, is now of fundamental importance in some common law jurisdictions. However, let us not forget that the question has also been much discussed in civil law countries. The principle that parties may unilaterally bind themselves to an offer before a contract has arisen is now, with one exception,[45] accepted in all civil law jurisdictions reviewed in this general report, but this has not always been the case and neither has it always been easy to find a doctrinal basis for the binding effect.

Precontractual duties are not something which only the courts or the legislature may regulate. The prospective parties to a contract may do so themselves. This now happens in all jurisdictions covered in this volume. In Sweden for instance such agreements are common when the negotiations concern major or complicated transactions.[46]

Often a distinction is made between 'agreements with open terms' and 'agreements to negotiate', as Farnsworth has called them.[47] A preliminary agreement with open terms sets out most of the terms of the deal, the parties agree to be bound by these terms, and they undertake to continue negotiating on other matters.[48] This often happens when managers turn over the negotiations to lawyers. An agreement to negotiate involves a commitment by one or both parties to do something such as buy, sell, or lend in the future.[49]

So far, I have assumed that negotiations are taking place for the first time. In practice, the parties may have a long-standing relation. This, of course, may also influence their rights and duties. Such cases, as well as the whole

43. Farnsworth, o.c. (*supra* n. 22) at p. 270.
44. *See* for instance Schoordijk (1984).
45. The one exception is Quebec, where according to the national reporter, Chapter 17, para. 4 under b., an offer can be withdrawn at any time, on the assumption that the offer does not hold the offeror to an obligation to let the offer stand for a reasonable period of time, since 'the unilateral will cannot operate as a source of obligations'. Perhaps it is the influence of the common law requirement of consideration which has influenced Quebec law in this regard. As the rapporteur himself argues, it is time that this old-fashioned idea be given up.
46. Chapter 18, para. 1.
47. Farnsworth (*supra* n. 22), at 250.
48. Farnsworth (*supra*, n. 22), *ibidem*.
49. Farnsworth (*supra*, n. 22), *ibidem*.

area of pre-contracts like options or *promesses de vente*, will not be dealt with in this report.

Not only do parties themselves design rules for their negotiations, their organisations also engage in such activities. In many trades and professions, professional organisations lay down codes of practice, etc. An example in construction law, mentioned in the Dutch report,[50] are the Dutch Uniform Rules for Tendering. Another Dutch example, this time taken from the general reporter's own experience, is the Code of Practice of Dutch Real Estate Brokers, which does not allow members of the organisation to engage in parallel negotiations. Company mergers are also often the subject of codes which cover the matter of precontractual dealings.

III. No contract ensues: duties in negotiation

10. Concrete areas of application

Most jurisdictions which have 'discovered' precontractual liability as a specific subject require negotiating partners to behave in good faith. As the Israeli reporter observes, this principle is not intended to dictate certain modes of behaviour, but rather to negate certain behaviour.[51] Likewise, the Dutch[52] and the Swiss[53] reports argue that by its very nature the subject is vague and elusive. Nonetheless, some conclusions may be drawn from the case law set out in the national reports. First, a number of circumstances to be taken into account can be listed (*see* para. 11). Second, several phases in the precontractual process may be discerned (paras. 12–21).

11. Circumstances to be taken into account

According to the Dutch report, decisive elements will be, first and foremost, the circumstances of the case, and more in particular the justified reliance created by acts of the other party.[54] Likewise, the Japanese national report mentions the following circumstances, which should be taken into account:
(a) *Type of transaction*: If the object of the contract is very expensive, courts may be reluctant to recognise the conclusion of a contract without any written document.
(b) *Progression of negotiations*: In a Japanese case involving a written agreement which only had to be signed, it was held 'When the preparations of the contract have reached this stage, it is proper to impose on the other party the duty not to fall short of the expectations of the one party and to make efforts to faithfully conclude the contract'.[55]

50. Chapter 14, para. 3.
51. Chapter 13, para. 3.
52. Chapter 14, para. 3.
53. Chapter 19, para. 3 under b.
54. Chapter 14, para. 3.
55. Chapter 13, para. 3 under c. (ii).

(c) *Preparatory work*: If partial performance is tacitly permitted, this may lead to liability. Similarly, earlier commitments and contractual relations may also be relevant.
(d) *Initiative in negotiations*: In itself this is not relevant; however, assuming a positive attitude thereby inducing the other party to expect the conclusion of a contract, may be relevant.
(e) *Cause of frustration*: The Japanese reporter recognises four classes – cases in which legal requirements for valid performance are for some reason not fulfilled, cases in which economic circumstances have changed so much that the transaction has become unattractive, cases in which during negotiations a more attractive trading partner appears, and cases where important matters which have been pending since the start of the negotiations could not be arranged after all.
(f) *Oral agreement and interim document*: If parties intend to have a formal written document or a contract by notarial deed, Japanese courts tend to presume that they have agreed to finalise the contract and therefore do not admit enforcement without such formal contract.
There is some discussion in the national reports whether the fact that one of the negotiating parties is a professional and the other not may be taken into account. The Quebec report strongly supports the view that this is an important fact to be considered.[56]

Apart from these general circumstances, several areas of application of the good faith principle – set out below – may be discerned.

12. No contractual intent

Entering into negotiations without any intention of making a contract, conducting negotiations without intending to ultimately conclude them with a contract and making a contract without intending to execute it or with the knowledge that the contract will be breached – any of these may constitute a breach of Section 12 of the Israeli General Contracts Law[57] and Article 30 of the Yugoslav Law of Contract. Likewise, the Italian reporter mentions that there lies a duty not to begin negotiation unless there exists a serious will to negotiate.[58] Under Swiss law, a party must therefore inform the other party if it has abandoned the idea of concluding a contract.[59]

An example is *Heyer Products Co* v. *United States*,[60] in which the US Court of Claims held that a disappointed bidder on a Government contract was entitled to recover the expenses he had incurred in preparing his bid whenever he could show that 'bids were not invited in good faith, but as

56. Chapter 17, para. 4 under a.
57. Chapter 11, para. 4 under e., where it is argued that such conduct may be the result of various motives, such as a desire to gain time, to neutralise the other party, to prevent competition by the other party or to ascertain existing market conditions.
58. Chapter 12, para. 5 under c.
59. Chapter 19, para. 3 under c.
60. 140 *F Supp* 409 (Ct.Cl. 1956).

a pretense to conceal the purpose to let the contract to some favored bidder ...'. Like Red Owl, to be discussed in para. 14 below, this case has not had much influence.[61]

13. Parallel negotiations

Conducting parallel negotiations will generally not amount to lack of good faith in negotiations,[62] unless – as the Israeli national reporter[63] suggests – parties to the negotiations were led by the other party to believe that no parallel negotiations would take place.

An extreme example of this is the Dutch case of *Plas* v. *Valburg*.[64] A construction firm tendered for the building of a municipal swimming pool in the small town of Valburg. Its proposal came out best – there was no official tendering – and the mayor and his aldermen agreed to the plans, which were within the budget available. Their decision still had to get approval from the city council, when a member of the council took the initiative for an alternative tender by another company, at a lower price. The latter plan was thereupon accepted by the town council, and Plas was set aside. His claim for damages led to a landmark decision of the Dutch supreme court, in which damages for the expectation interest (*lucrum cessans*) were awarded for the first time.

14. Conducting negotiations

Raising new and unreasonable demands during negotiations, rejecting reasonable offers put forward by the other party, revoking offers previously made, extending negotiations *sine die* by continual modification of the initial position, requesting further benefits or imposing new obligations on the other party, presenting oneself under false name or title – all of these can amount to a lack of good faith in negotiations according to the Israeli and Italian national rapporteurs.[65]

An example of this kind of case was offered by the Wisconsin Supreme Court in *Hoffman* v. *Red Owl Stores Inc.*[66] The Court allowed recovery against a party who walked away from contract negotiations after inducing the other party to rely on the prospect that a contract would materialise.

61. Robert S. Summers, '"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code', 54 *Virginia Law Review* 195, at 222 (1968).
62. Although the Italian national report appears to indicate that this may in itself constitute a violation of Art. 1337 *Codice civile*, the general idea is that parallel negotiations are fully allowed – *see* for instance Cour d'appel de Liège 20 October 1989, *Revue de droit commercial belge* 1990, 521, (note Xavier Dieux): 'The freedom of contract implies the right to enter either into parallel negotiations or to negotiate successively'.
63. Chapter 11, para. 4 under a.
64. *Hoge Raad* 18 June 1982, *Nederlandse Jurisprudentie* 1983, 723, discussed in Chapter 14, para. 3.
65. Chapter 11 under b; Chapter 12, para. 5.
66. 26 *Wis2d* 683, 133 *NW2d* 267 (1965).

Red Owl had represented to the plaintiff that he would establish plaintiff as a franchise operator of a Red Owl grocery store. Plaintiff would have to perform certain conditions and contribute US$18,000. The plaintiff met all conditions. He sold his bakery, bought and operated a small grocery store for a time to gain experience, secured an option to buy certain land for the proposed supermarket and rented a home close to the site. Red Owl then insisted that plaintiff should invest US$34,000 instead of US$18,000. The Court granted plaintiff relief on the theory of promissory estoppel. The court did not grant recovery of the lost profits, but only for the expenditures and losses which Plaintiff incurred.[67]

This interesting case, however, has not lived up to its promises.[68]

15. Reneging earlier commitments

Disputing points already agreed upon, according to the Italian national report, may violate Art. 1337 *Codice civile*.

One such earlier commitment may be a *letter of intent*. Although a letter of intent does not create any contractual obligations, it will oblige both parties to observe greater truth and openness in their negotiations than they would otherwise have shown.[69]

An earlier commitment may also be embodied in a firm offer. It is now well established that a firm offer binds the offeror. The binding effect of an offer has placed courts and legal writers for great problems, and in one instance still does. In civil law countries, the binding effect of an offer has been difficult to construe in the absence of a contract.[70] As we have seen in para. 9, in at least one civil law jurisdiction this problem – perhaps due to its exposure to the common law of the surrounding jurisdictions – has not yet been solved.

16. No power of attorney

Under Swiss law, there is a breach if a negotiating party does not have the legal capacity to conclude the envisaged contract, if it inaccurately pretends to have the power to conclude the contract on behalf of a third party, or if it does not inform the other party that the power of attorney to conclude the contract has been withdrawn.[71] Farnsworth [72] offers the following example.

67. It was pointed out in the discussion in Montreal by Professor Whitmore Grey that American courts have tended to go rather far in allowing recovery of the expectation interest, since precontractual liability is treated in the Restatement on Contract, not the Restatement on Tort.
68. Farnsworth (*supra* n. 22), at 238. It is interesting to learn from the English national report, that under English law the plaintiff in the Red Owl case would not be successful – Chapter 8, para. 2 under f.
69. Chapter 7, para. 11; Chapter 12, para. 5 under b.
70. French legal writing is extensively discussed in the Venezuelan national report, B.1.b.
71. Chapter 19, para. 3 under c.
72. Farnsworth, o.c. (*supra* n. 22), at 235.

In *Escophon AG* v. *Bank in Langenthal*, the head office of a bank had allowed one of its branch offices to negotiate over a period of months with a prospective borrower. At the last moment, when a final text of the proposal had been prepared by the bank and been sent to the prospective borrower for signature, the bank disclosed that head office approval was required and was refused. The *Bundesgericht* held that the prospective borrower could recover reliance damages.[73]

A similar case is mentioned in the English national report. In *Box* v. *Midland Bank Ltd*, plaintiff, who sought a sizeable loan from his bank, was told that the approval of his regional head office would be necessary. Plaintiff was led to believe that this was a formality and in the meantime he was allowed an overdraft. Following the subsequent refusal of the loan application by the regional head office, the plaintiff claimed and recovered £5,000 of the eventual overdraft which he ran up, as the manager was in breach of his duty of care not to mislead the plaintiff about the likelihood of the overdraft being granted.[74]

17. Illegal demands

An interesting question is whether the mere fact of raising an illegal demand amounts to lack of good faith. With regard to Israel, the national reporter argues that this cannot in itself amount to lack of good faith. Her argument is based on the ground that the good faith requirement is an internal requirement of consideration for the interest of the other party, whereas the requirement of legality is an external requirement.[75]

18. Breaking off negotiations

Parties are generally accorded the right to retire from negotiations. However, the more advanced the negotiations and the nearer the parties are to the contractual realm, the more defined and clearer should be the reasons required for justifying the retirement.[76]

Under French case law, breaking off negotiations whereas the other party could reasonably expect the contract to be concluded, will be considered to be at variance with good faith,[77] as is a refusal to renew a contract when the other party could reasonably rely on a promise to renew.[78]

In *Producciones Tommy Muñiz Inc* v. *COPAN*, the defendant 'did not adduce a well-founded reason to abruptly interrupt the negotiations'. The Supreme Court of Puerto Rico found that 'the interruption of the negotiations was unjustified and (...) the defendant's conduct (...) not only

73. 105 *BGE* II, 75 (1979).
74. [1979] 2 *Lloyds Rep* 391, mentioned in Chapter 8, para. 3 under a.
75. Chapter 11 under f.
76. Chapter 11, para. 4 under d; Italian national report, para. 5 (g).
77. Cass. com. 20 March 1972, Bull. civ. IV nr 93; JCP 1973, 17 543 (note J. Schmidt); *Revue trimestrielle de droit civil* 1972, 722 (G. Durry).
78. Cass. com 9 February 1981, *Dalloz* 1982, p. 6 (note J. Schmidt).

breached the good faith imposed by precontractual relations, but (. . .) also abused its right to withdraw from the negotiations'.[79]

A particular problem may arise when a contract mandatorily must be concluded in a particular form, such as a sales contract concerning real estate requiring a deed by a notary public. The situation may arise that all the elements of the contract have been agreed upon and only the formal act of the conclusion of the contract remains outstanding. If one party nevertheless refuses to conclude the contract formally, it may under Swiss law be held liable for *culpa in contrahendo* if the withdrawing party had created a reasonable belief that the contract would be concluded formally (Chapter 19, para. 3 under c.).

19. Equality

It is generally accepted that private parties are under no obligation to accord equal treatment to participants in private tenders.[80] This may be different when one of the parties concerned is a government or government agency. A question not mentioned in the national reports is whether some private enterprises, for instance those with a public function (or 'common carriers') are not under a similar obligation to treat all prospective customers equally.

20. General duty of safety

When a prospective customer is about to buy goods in a department store, does the proprietor of the store owe such customer a duty of safety? There will be very few jurisdictions, where, depending upon the circumstances of the case, such duty of safety is denied. What does divide jurisdictions, however, is the basis of the duty of safety. German and Austrian courts have applied the doctrine of *culpa in contrahendo* to this category of cases. Swiss and Turkish courts, if the case would arise, would do likewise. In other jurisdictions there is no evidence that this has been done.

The first case discussed under this heading by the German reporter does not perhaps raise objections. A woman had entered a department store in order to buy a linoleum floor-cover. When the employee with whom she discussed the matter tried to pull out the roll in which the woman was interested, due to his negligence two other rolls fell and injured the woman and her daughter. The *Reichsgericht* held the store liable on the basis of a precontractual relationship between the prospective buyer and the department store.[81] Under German contract law, an employer is liable for the negligent acts of his employee in the course of the negotiations (para. 278 *BGB*).

Why did the court not base the liability on tort? As the German reporter sets out, this is not possible under German law because of the restrictions

79. Cited in Chapter 16, para. 2.
80. Chapter 11, para. 4 under g.
81. Reichsgericht 7 December 1911, *RGZ* 78, 239.

concerning the law of torts, para. 831 *BGB* not affording victims the same protection. Although the outcome of this case may still be regarded as equitable, more recent cases of the *Bundesgerichtshof* demonstrate the drawbacks of this construction. A department store was held liable on the basis of *culpa in contrahendo* when a visitor slipped on a banana skin and fractured a leg, even though the visitor had not yet entered into contractual negotiations when the accident happened.[82]

Contract rules really seem to be stretched too far in the case of the vegetable leaf. A 14-year old girl accompanied her mother on a visit to a small self-service store. While the mother, having selected her shopping, stood at the till, the daughter went to the packing counter to help her mother pack the goods. Here she allegedly slipped on a vegetable leaf and suffered an injury which necessitated lengthy treatment. Perhaps an action in tort would have been possible in this case, but by the time the store was sued, the short period of prescription of tort actions of para. 852 *BGB* had run out. As the German reporter observes, the court applied a bold combination of *culpa in contrahendo* and extending the contractual protection to third parties (*Vertrag mit Schutzwirkung für Dritte*) and awarded the girl damages on a contractual basis. In contract, para. 195 *BGB* gives a longer period of prescription.[83]

The German case law was at first not followed in Austria, but in two decisions rendered in 1978, the *Oberste Gerichtshof* abandoned its earlier approach and based the department store's liability on *culpa in contrahendo*. According to these decisions, it is sufficient for the victim to show that he might have become a customer. As the Austrian report dryly observes, this would leave a policeman or a postman entering the store unprotected. The most outrageous case, according to the Austrian report, is a 1979 case. A tourist fell on an icy spot on a sidewalk of a restaurant in an alpine skiing resort. Since under Austrian law, in the absence of gross negligence, no action under tort is available *vis-à-vis* the restaurant owner, the victim resorted to *culpa in contrahendo*. According to the *Oberste Gerichtshof* the question whether or not the owner is liable is dependent upon the question whether or not he had the intention of entering the restaurant.[84]

The Austrian, German and Swiss reports all argue that this stretches precontractual liability too far and that recourse should be had to general tort liability instead.[85] As is apparent from some national reports, liability in such cases does lie in tort. Thus, the French reporter discusses a case in which a delivery man was injured while spontaneously helping the client to move a piece of furniture.[86]

82. *Neue Juristische Wochenschrift* 1962, 31.
83. *BGHZ* 66, 51.
84. *Oberste Gerichtshof* 12 September 1979, EvBl 1980/83, mentioned in Chapter 3, para. 5.
85. Chapter 3, para. 6; Chapter 10, para. 2; Chapter 19, para. 3 under c.
86. Cass. civ. 2, 15 February 1984, *Bull.civ.* II, Nr. 29, *Revue trimestrielle de droit civil* 1985, 389 (Huet), discussed in Chapter 9, para. 3 under a.

21. Confidential information

The national reports provide several illustrations of the duty not to disclose or use confidential information.[87] An example of a breach of confidence is provided by the English case of *Seager* v. *Copydex Ltd.*[88] Plaintiff, who had invented a type of carpetgrip, sought to persuade defendants to market it. However, negotiations broke down. Subsequently, the defendants unconsciously made use of the idea which plaintiff had given to them in confidence. Plaintiff was awarded damages on the basis of reasonable compensation for breach of confidence.[89] French[90] and Italian[91] law likewise recognise the duty of secrecy regarding confidential, personal or proprietary matters concerning the other party.

It should be remarked that the duty to observe such secrecy occasionally is not based on a duty to negotiate fairly, but rather on copyright law, *negotiorum gestio*, unjust enrichment, etc.

IV. No contract ensues: remedies

22. Compensation or restitution

Wherever the duty to negotiate fairly is recognised, the payment of compensation is the usual remedy. This is the case in Section 12 of Israel's General Contracts Law and in the case law of most jurisdictions concerned. However, when the remedy is based on unjust enrichment, it will be usually restitution which will be ordered.

23. Reliance interest and expectation interest

It is generally agreed that in case an acties lies, negative damages – or the reliance interest – can be claimed. Their aim is *restitution in integrum*, putting the injured party back in the same position it occupied at the eve of the negotiations. More questionable is whether positive damages – the expectation interest – may also be claimed. According to the Israeli reporter, this is not the case in Israel.[92] The same applies to Italy.[93]

The one Yugoslav case concerning the breaking off of negotiations with-

87. *See* for instance Chapter 9, para. 3 under b.
88. [1969] 2 *All ER* 718, mentioned in Chapter 8, para. 3 under c.
89. [1969] 2 *All ER* 718.
90. Chapter 9, para. 3 under b.
91. Chapter 12, para. 5 under h.
92. Chapter 11, para. 6. The report points out that this view is not held by the Israel Supreme Court.
93. Chapter 12, para. 6.

out good cause only resulted in compensation of the negative interest. Lost profits were not awarded.[94]

However, in the Dutch landmark case *Plas* v. *Valburg*, the *Hoge Raad* made a distinction between three stages in the negotiating process: (i) in an initial stage the parties are free to break off negotiations, without any obligation to compensate the other party; (ii) in a continuing stage, a party may be free to break off negotiations, however, under the obligation to compensate the other party for expenses incurred; (iii) in a final stage a party is not allowed to break off negotiations and violation of this obligation may give rise to compensation of the other party's expenses and also, if appropriate, the profits that would have been made by that party.[95]

As the Dutch national report sets out, the distinction between reliance interest and expectation interest has the danger of oversimplification. The Dutch reporter mentions the example of cases where a court is willing to award reliance interests *and* damages for lost opportunities.[96]

In the French law of torts, the loss of an opportunity (*perte d'une chance*) may be compensated if the plaintiff shows a reasonable probability as to the realisation of the *chance*, as the French reporter puts it.[97] She goes on to discuss two further requirements for compensation in tort: causation and the requirement that the damage has not as yet been compensated. Under the latter heading will fall the denial of recovery of the cost of estimates for professionals, as these are usually covered by the general expenditures of the firm.[98] The question of causation is rarely discussed in precontractual liability, but it may be of crucial importance as the Belgian[99] and French [100] national reports submit.

An interesting feature of Turkish law, as set out by the Turkish national reporter during the discussion in Montreal, consists in the allowance of damages for immaterial damages in cases of broken off negotiations for an international employment contract.

24. Specific performance

May parties be forced to go on with negotiations? It is denied by most jurisdictions (France,[101] Israel,[102] Italy[103]). Japan and The Netherlands seem to be in the forefront, however. The Japanese national report mentions that

94. Chapter 22, para. 5.
95. Chapter 14, para. 3.
96. Chapter 14, para. 4.
97. Chapter 9, para. 3 under a.
98. *Ibidem*. An exception is made for the honoraria of architects for their drafts, however.
99. Chapter 4, para. 13.
100. Chapter 9, para. 3 under c.
101. Chapter 9, para. 7.
102. Chapter 11, para. 6.
103. Chapter 12, para. 6.

in some cases 'a duty to negotiate faithfully towards a conclusion of contract' has been imposed.[104] In 1987, the Amsterdam Court of Appeal in effect ordered the refusing party to continue negotiations leading to a contract concerning the movie rights to the book *The Seer* by the famous Dutch author Vestdijk.[105]

Forcing the parties concerned to continue negotiating is the *ultimum remedium*. The courts have so far refused, in the case of wrongful breach of negotiations, to sanction this by a compulsory conclusion of the contract. the French national report puts it: 'In the area of contracts, the Fren judge may not substitute his own will to the parties' one'.[106]

V. A CONTRACT ENSUES

25. General

Once a contract has ensued, precontractual dealings may still be relevant for the interpretation of the contract, for an answer to the question whether or not the contract may be rescinded because of misrepresentation, duress and undue influence, mistake, etc. A full treatment of the subjects mentioned would make this report into a textbook of comparative contract law and must therefore be omitted.

As was mentioned in the 'Introduction', there is one topic for which I will make an exception. It is the subject of disclosure which provides us with an interesting question.

In most jurisdictions, once a contract has ensued, there is no longer any need for the instrument of precontractual liability. This, however, is different in Belgium and France, where a liability in tort takes precedence over liability in contract. In these jurisdictions, the precontractual liability, which lies in tort, therefore remains relevant after a contract has ensued.

26. Disclosure

All national reports mention that non-disclosure of facts during negotiations may lead to liability. The duty to act in good faith includes the duty to disclose material facts to the other party during negotiations. The extent of the obligation depends on the particular case. The type of contract, the way in which the negotiations are handled, as well as the intentions and the knowledge of the parties must be taken into consideration. As the Swiss reporter observes, the duty of information is generally not large if the other party is experienced in the subject matter of the contract, or if the parties involved know one another and their business (Chapter 19, para. 3 under

104. Chapter 13, para. 3 under b.
105. Chapter 14, para. 3.
106. Chapter 9, para. 4.

d.). The obligation is usually considered to be large when the other party is not familiar with the contract, if the parties do not know each other, or if a close personal relationship is to be set up by the contract.

Judging from the national reports, an issue arises as to the question whether or not facts which the other party could have discovered on his own should be disclosed, when such discovery is required by the nature of the transaction and the circumstances of the case. The question is answered in the affirmative by the Israeli reporter;[107] likewise, under French law, Ghestin has observed a tendency to develop an obligation of disclosure, especially in relations between laymen and professionals, now often supported by – civil or even criminal – legislation.[108] The question is answered in the negative in England[109] and by the Swiss reporter.[110]

In Austria a distinction is made between violation of the duty to inform about legal obstacles for a valid conclusion of the contract and violation of the duty to inform about the object of the intended contract. The former category is dealt with by para. 878 *ABGB*. It requires a prospective employer of a migrant worker to procure a working permit, when he promised that the employment would cause no problems.[111] The more important second category is not dealt with in the *ABGB*.

VI. Conclusions

27. Contract or tort

In Belgium, France and Venezuela, precontractual liability will generally lie in tort. But in many jurisdictions there no longer exists a marked distinction between tort and contract. In Czechoslovakia and under the new Dutch Civil Code liability for damages is considered irrespective of the fact whether there was a contractual obligation or not. Some Japanese cases have also taken this view; other cases, however, rely on tort, a preliminary contract or quasi-contract.[112]

In other jurisdictions, the situation is still confused. In Italy, the authors are divided.[113] In Switzerland, the Supreme Court first supported the tort theory, then the contract theory, whereas at present according to the Swiss

107. Chapter 11, para. 4 under c.
108. Jacques Ghestin, 'The Precontractual Obligation to Disclose Information', in: Donald Harris and Denis Tallon (eds.), *Contract Law Today/Anglo-French Comparisons*, Oxford 1989, p. 151, 153.
109. Barry Nicholas, 'The Pre-contractual Obligation to Disclose Information', in: Donald Harris and Denis Tallon (eds.), *Contract Law Today/Anglo-French Comparisons*, Oxford 1989, p. 166, 177.
110. Chapter 19, para. 3 under d.
111. *Oberste Gerichtshof* 28 November 1978, *DRdA* 1979, 390, mentioned in Chapter 3, para. 4 under a.
112. Chapter 13, para. 5. under c.
113. Chapter 12, para. 3 c.

report it no longer takes a theoretical approach[114] and according to the Turkish report, the Swiss court applies a quasi-contractual theory.[115]

The reports also show that keeping a marked distinction between the rules pertaining to contract and tort may result in 'contract shopping', as the Austrian report calls it.[116] Instead, as the German and Swiss reports argue, general tort liability should rather get rid of its fetters. Why, as the German rapporteur argues,[117] this should not be extended to independent contractors is not clear. As the Dutch example[118] shows, liability in tort may well be extended to independent contractors.

28. Binding force of promises

The area of precontractual dealings now has become a major testing ground for the common law doctrine of consideration. Once equitable remedies are allowed where a promise was not supported by consideration, the question rises why the requirement of consideration should be maintained anyway. This, it is admitted, is a purely civil law point of view.

From a common law point of view the question will be phrased in different words: 'The recent piecemeal developments in the field of tort, promissory estoppel and quasi-contract all raise the fundamental question of why a promise not supported by consideration ought to be enforced', as the New Zealand reporter observes.[119] And he concludes: 'So far the question has not been squarely addressed'.[120]

29. Contract and relation

In all legal systems, the existence of an agreement is the fundamental characteristic of a contract. It is the French reporter who reminds us of this finding of Schlesinger in his celebrated book on Formation of Contracts.[121] However, we may not forget that, as the Japanese national report puts it, contract must be considered 'as part of an accumulated social relationship, not as an isolated fact, because human and social relationships formed the background to the legal dispute around the transaction before the contract was made and they will continue to exist and accumulate after its performance'.[122]

A Western observer has noticed that: 'The fundamental Japanese

114. Chapter 19, para. 4 under c.
115. Chapter 20, para. 4 under a.
116. Chapter 3, para. 4.
117. Chapter 10, para. 2.
118. Article 171 Book 6 New Civil Code.
119. Chapter 15, para. 8.
120. *Ibidem*.
121. R.B. Schlesinger (ed.), *Formation of Contract/A Study on the Common Core of Legal Systems*, Dobbs Ferry/ London 1968.
122. Chapter 13, para. 5 under c.

approach to contracts is to emphasize the relationship being created, instead of the document being drawn up. The traditional attitude toward the written document has been that it is only a tangible acknowledgment of the existence of a relationship between two or more parties rather than a precise instrument that establishes and defines the relationship'.[123]

This idea is no longer confined to Japanese law. In the United States the relation model has been advocated by I. Macneil.[124] His ideas have been well received in Holland, judging from the following quotation from a recent thesis:

'A new category is being developed, the category of a legal relation. On the one hand it is more abstract than the classical concept of contract, but on the other hand it is far more open to the particular circumstances of each case'.[125] The author concludes that 'at present contract is very much alive. It is, however, just one of the many ways in which the law models legal relations'.[126]

This, however, should not deceive us. Farnsworth has pointed out that existing contract doctrines, imaginitively applied, are both all that are needed and all that are desirable to deal with precontractual dealings.[127] I would underwrite this opinion, with two caveats, first, that rather than existing contract doctrines, doctrines of the law of obligations should be mentioned, and second, that codification or restatement of the existing case law may well be worthwile.

30. The legal families

What the national reports finally make clear, and this may be of some interest from a comparative point of view, is that the traditional division of jurisdictions in legal families retains its value. The easiest way to read the national reports actually is to group them together under the familiar headings of civil law and common law (Australia, Canada, England, New Zealand, USA) and then to make a further distinction within the civil law family

123. Robert M. March, *The Japanese Negotiator/Subtlety and Strategy Beyond Western Logic*, Tokyo/New York (Kodansha) 1988, pp. 111–112.

124. *See* his publications 'The Many Futures of Contracts', 47 *Southern California Law Review* 691–816 (1974); Restatement (Second) of Contracts and Presentation (no spelling error, *EH*), 60 *Virginia Law Review* 589–610 (1974); 'Contract: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law', 72 *Northwestern University Law Review* 854–905 (1978); The New Social Contract (1980); 'Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "rich Classificatory Apparatus"', 75 *Northwestern University Law Review* 1018–1063 (1981); 'Efficient Breach of Contract: Circles in the Sky', 68 *Virginia Law Review* 947–969 (1982); 'Values in Contract: Internal and External', 78 *Northwestern University Law Review* 340–418 (1983); 'Relational Contract: What We Do and Do Not Know', 1985 *Wisconsin Law Review* 483–525.

125. J.H.M. van Erp. *Contract als rechtsbetrekking/Een rechtsvergelijkende studie*, thesis Tilburg, Zwolle (W.E.J. Tjeenk Willink) 1990, p. 320.

126. Van Erp, *ibidem*.

127. Farnsworth o.c. (*supra* n. 22), at 285.

between the French-oriented (Argentina, Belgium, France, Italy, Puerto Rico, Quebec, Venezuela) and the German-oriented (Austria, Germany, Switzerland, Turkey) jurisdictions, with the Netherlands in the course of changing from a French-oriented to a German-oriented jurisdiction. On the fringe of the civil law family are the relatives from Eastern Europe (Czechoslovakia, Yugoslavia), Scandinavia (Denmark, Sweden) and Asia (Israel, Japan).

This is not to say that comparisons should be restricted to jurisdictions within one legal family. Rather, if one other point emanates from this report, it is the usefulness of analysing the various cases which have been reported in the national reports. Dealing with precontractual liability remains a question of weighing the various arguments. Comparative law here has a valuable role to play.