I. INTRODUCTION

Before its conclusion, a future contract may produce particular legal effects. The negotiations that precede the parties’ agreement may give rise to obligations and, by engaging in those negotiations, potential partners may lose part of their freedom of action and may have to comply with certain behavioral standards.

This is true, in particular, when the contract relates to a complex and wide-reaching operation, for which the negotiations or the performance may take months or even years and will require the cooperation of several enterprises. Consider, for example, complex mergers and acquisition contracts, agreements relating to the turn-key construction of a factory or to integrated production of civil or military aircraft, the exploration or extraction of natural resources, long-term supply contracts for primary materials or the transfer, exchange or joint implementation of new technology.

The legal structure covering such operations is necessarily very intricate. Sometimes there are a number of inter-dependent contracts with numerous and often complex clauses seeking to join provisions that are essentially “technical” with others more specifically “legal.”

The negotiations of such contracts are long and difficult. Between the initial definition of the common objectives and the signing of the final agreements, there is a slow work process: preliminary studies, obtaining the necessary assistance from third parties (e.g., financing and insurance), applying for governmental permits that will eventually be required and ultimately refining the details relative to the various aspects of the agreement between the parties (e.g., specifications, periods for completion and delivery, determination of prices, clauses providing for variations and supervening events, guarantees of performance, arbitration). Such negotiations and the various stages involved, may take years. Not infrequently, the discussions continue after the start of performance of the contract, when the urgency of the project drives the parties to proceed with operations before the contractual documents are fully completed.

During the prolonged gestation of their agreements, the negotiators often feel the need to create a series of preparatory documents. At the start, such documents set out the purpose and scope of the discussions to
come, and they spell out procedural aspects. As the discussions proceed, their results are recorded. Certain basic agreements may be accepted, while specific details remain to be determined.

Sometimes, such documents are intended to inform third parties whose involvement is sought. At other times, it is such third parties who, upon the request of one of the principal parties, provide written assurance of their eventual involvement, so that this may be known to the other principal party.

Any such preparatory documents are frequently titled letter of intent or memorandum of understanding, though many other expressions are used (protocol, letter of understanding, agreement in principle, heads of agreement, etc.). The frequency of their use in practice has led to the common use of their abbreviations such as “L/I” (letter of intent), “MoU” (memorandum of understanding) or LoU (letter of understanding). This chapter will investigate the legal effect of such documents and offer advice to potential drafters.

For this purpose, the expression “letter of intent” will generally be used hereinafter to designate any kind of pre-contractual document by which one or both parties intend to organize the negotiations and execution of the contract. The notion of “letter of intent” has the advantage of reflect-

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1 A document will be established in most cases for evidentiary purposes, but one can also consider purely verbal expressions of intent.