Negotiations and the contract from a legal perspective

Manual

Both negotiations and a contract are important components of a collaboration. What is the status of a negotiation and of a contract? Will the costs incurred in the context of a negotiation be reimbursed, even if there is no contract yet? What do 'contractual liability' and 'precontractual liability' mean? Is 'putting something in an e-mail' sufficient, or should everything be on paper? In this manual, we examine the negotiations and the contract from a legal perspective.

Before the contract: negotiating

Negotiations in principle have no binding force and can therefore be broken off. However, if a negotiator does not behave 'carefully', he can make a precontractual mistake. This is called **precontractual liability.** This is a form of extra-contractual liability, since a contract is not yet in place. If there is no contract yet, but one of the contractual partners has already incurred costs, as a negotiating partner you risk having to reimburse these costs if negotiations are terminated without a clear motive. The further you are into the negotiations and the more it seems that you agree with the proposal, the clearer and more careful you need to be if you don't wish to continue negotiating or contracting.

What is a contract?

A **contract or agreement** is formed as soon as a consensus exists (meeting of the minds) between two or more persons with the intention of attaching legal consequences. According to Article 1134 of the Belgian Civil Code, the agreement entered into by the parties is law for them. Thus insofar as they remain within the limits of freedom of contract, they are bound by what they agree to. If they fail to comply with the agreements made, they are contractually liable. The principle of freedom of contract means that you freely determine with whom and about what you conclude contracts, as long as you respect the applicable legislation. Certain rules belong to 'mandatory' law: the may never be deviated from in a contract. This applies, for example, to anti-discrimination legislation. Others have the character of 'non-mandatory' law. These rules apply only if the parties themselves do not agree otherwise (for example: many rules concerning liability).

Negotiating and options

Negotiations often result in options. Also when working with options, whereby only one party commits, it is important that the (future) contract partner is loyal. Mainly demanding options because this offers a lot of room to manoeuvre and allows you to easily get out of commitments, with the risk always resting only on the shoulders of the party providing the option, is not a good basis for a healthy, balanced and sustainable partnership. The option holder must therefore always proceed with sufficient care and respect for the negotiating partner (also important in the light of possible precontractual liability).

Status of e-mail notifications

The legislator added Article 2281 to the Belgian Civil Code in 2000 (Lexicon: Art. 2281 Belgian Civil Code) on **the status of e-mail notifications**. Under this provision, an e-mail notification can be equated with a written notification, even if it does not contain a signature. In this case, the addressee may not have requested the signature, or the addressee did request it and the notifier sent an original signed copy without undue delay. Such notification will then take effect upon receipt of the e-mail by the recipient. A confirmation of receipt is useful. In short, correspondence by e-mail does not have to be inferior to correspondence by letter. The key question is when the recipient received the mail, which is no different than with a normal letter.