Contracts: Precontractual Phase

Doing business in the Netherlands includes concluding contracts. The Dutch approach with regard to the precontractual phase is different from many other countries. At what stage can you still end negotiations without having to pay compensation?

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About the author:
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The precontractual phase
The conclusion of a contract is often preceded by negotiations. Dutch case law on the precontractual phase differs from that of many other countries. The Netherlands Supreme Court distinguishes three stages of the precontractual phase:

1. During the first stage, parties may break off negotiations without any legal consequences. The party breaking off the negotiations will not have to pay a break-up fee.
2. During the second stage, breaking off negotiations will lead to the obligation to compensate the costs incurred by the party who did not break off the negotiations.
3. During the third stage, breaking off negotiations will lead to the obligation to compensate the costs and can even lead to the obligation to compensate lost revenue. Breaking off negotiations at this stage is deemed to be an infringement of the principle of reasonableness and fairness.
Furthermore, it is important to note that a court may order the party that broke off negotiations to restart the negotiations to try to obtain an agreement.

During the negotiating process, parties can agree on the meaning of their behaviour and statements. They can, for example, include reservations in the contract such as “subject to board approval”. Parties can even determine a break-up fee.

According to Dutch law, a letter of intent or a memorandum of understanding can be considered a binding contract. Case law established by the Dutch Supreme Court indicates that the “title” of the contract is not decisive.

**More information**

Would you like to know more about contracts in the Netherlands or are you confronted with legal issues from breach of contract?

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