International Journal of Advanced Engineering Research and Science (IJAERS)
ISSN: 2349-6495(P) | 2456-1908(O)
Vol-8, Issue-3; Mar, 2021
Journal Home Page Available: https://ijaers.com/
Journal DOI: 10.22161/ijaers
Article DOI: https://dx.doi.org/10.22161/ijaers.83.41

The Memorandum of Understanding and the Jural Relation (*Vinculum juris*)

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Received: 03 Dec 2020;

Received in revised form:

20 Feb 2021;

Accepted: 09 Mar 2021;

Available online: 28 Mar 2021

***Keywords*— Memorandum of understanding, preliminary negotiations, preliminary agreement, offer and its acceptance, jural relation (vinculum juris).**

Abstract— *This paper reviews the legal framework of the document named memorandum of understanding, or letter of intent, usually employed in corporate negotiations. The interpretation of said document uses to bring about countless conflicts that are almost invariably referred to the Judiciary Branch for settlement.*

By virtue of the aforementioned, this paper intends to point out the steps to be observed when preparing a memorandum of understanding, or letter of intent. These steps are aimed at providing legal certainty to the parties thereto thus preventing controversies about its legal effects, and litigations between the parties that might potentially entail costs to the state.

I. INTRODUCTION

This paper aims to review the document entitled memorandum of understanding, or letter of intent and the situations where it may give effect to jural relation during the negotiation process. It also reviews how the Brazilian courts have ruled this matter.

Firstly, it will review the legal effects ensuing from the preliminary negotiations during the negotiation process, inherent to the agreements or discussions that usually take place in the initial phase of negotiations. It will also explain if those agreements or discussions are competent to give effect to jural relations between the parties that could be deemed as compulsory.

Thereafter, it analyzes the attributes of a preliminary agreement that is often executed by the negotiating parties following the stage of discussions. The paper shall explain what type of obligations may arise for the parties, and the elements required to characterize them.

Therefore, this paper will review the rules of procedure comprising the proposal and its acceptance, evincing the moment when the jural relation is perfected and may give effect to all the legal consequences ensuing from the establishment of the contractual legal relationship.

Hereupon, it spells out the hallmarks of a memorandum of understanding or letter of intent, and the possibility of framing it into any of the aforementioned rules of procedure as a way to evidence the existence or non-existence of jural relation obligations.

Lastly, it will show how the Brazilian courts have approached and addressed the issues ensuing from controversial understandings by parties in the event of non-compliance with the memorandum of understanding or letter of intent.

II. METHODOLOGY

This research work adopted a methodology of theoretical nature, resorting to legal theories, case laws, bibliographies in general, scientific databases, and laws such as the 2002 Brazilian Civil Code.

The study considered the review of current facts as a way to establish how the memorandum of intent or letter of intent is approached, notably by the law of obligations and the general contract law.

In fact, the memorandum of understanding or letter of intent became very customary in private law negotiations, notably those of corporate nature. Therefore, the proper legal framing is crucial, either directly to give certainty to the interests of the parties, preventing doubts and controversies about its legal effect, or indirectly to satisfy the public interest by preventing litigation between the parties that may entail legal costs to the state.

Ultimately, the paper presents actionable results about the possible interpretation of the memorandum of understanding or letter of intent, based on the Brazilian Civil Code and the Brazilian case law, as a way to fairly solve eventual controversies.

2.1. PRELIMINARY NEGOTIATIONS

Preliminary negotiations are previous understandings, surveys and discussions taking place throughout the negotiations. At this stage, that is not yet contractual, discussions do not give effect to any jural relation between the parties that could be deemed as compulsory. That is to say it is a stage that precedes the conclusion of a contract, as the convergence of intents that gives effect to the contract must follow a specific path before getting to that stage.

Hence, the parties may move on to the drafting, putting down in words some aspects of the contract content they have been agreed on, in order to include them in the contract they will further execute, even if not all aspects are endorsed. Yet, this fact does not engender any jural relation between the parties.

However, the parties must be protected in the stages previous to the legal transaction, considering that expectations and eventual damages are not exclusive to the stages after the establishment of jural relation between the parties. Therefore, the parties bear legal responsibility towards behaving according to the precepts of objective good faith throughout the negotiation process, and not behaving in a malicious or negligent way that could potentially harm the other party.

Any violation to the duties of protection, information and loyalty ensuing from the objective good faith gives effect to the breach of trust between the prospective contracting parties. Any proved fault in the conclusion of a contract (*in contrahendo*) entitles the damaged party to claim compensation for eventual damages suffered.[1]

Although article 422 of the Brazilian Civil Code does not explicitly refer to pre-contractual liability, the objective good faith unquestionably implies implicit obligations during preliminary negotiations and discussions held before the contract conclusion, as well as in the post-contractual stage.

Hence, incompliance with the precepts of objective good faith in this stage, by virtue of a malicious or negligent behavior potentially harmful to either party, gives effect to the duty to compensate all the consequent damages, pursuant to the principle of *neminem ladaere* (general duty of care) provided for in article 5, XXXV of the Brazilian Federal Constitution.

The rule of objective good faith imposes on the parties a subjective obligation that must be complied with throughout the negotiations period, from preliminary negotiations, going through the establishment and performance of legal transactions, to the contract termination.

The pre-contractual liability, also known as *culpa in contrahendo*, is comprised by the overall extra-contractual liability or Aquilian liability, ensured by article 5, XXXV of the Brazilian Federal Constitution, and articles 186, 187 and 927 of the Brazilian Civil Code.

This is the ruling of most of the Brazilian[2] and foreign[3] legal theories. However, some legal theories consider it as contractual liability[4] or even as a separate type of civil liability that would be neither extra-contractual nor contractual liability.[5]

Pre-contractual liability starts when contacts have been started, but the contract has not yet been concluded. The improvident breach at this stage may give effect to the duty to compensate, not for incompliance, since there is no contract, but for breaching the trust, for incompliance with the duties of loyalty, transparency, information and cooperation that rule all the acts of negotiation.[6]

The argument of contractual liability is grounded in the specific duty of good faith that, according to the followers of this school, if breached implies the violation of a compulsory jural relation. The start of preliminary negotiations would give effect to a duty of good faith that imposes on the parties the duty to persist, with diligence, in the trust raised on the other party, and also to protect the interests of the other party. Those interests are exposed to damage during the stage of negotiations.

However, the duty to observe good faith in the stage of negotiations does not mean the establishment of a compulsory relationship between the parties, considering that all overall duties of relationships are fulfilled through behaviors towards those one gets in contact. For example, the traffic rules are translated into specific behaviors that a driver should observe in relation to the others, but do not constitute compulsory relationships.[7]

Likewise, the mere offer to the public demands an objective good faith-based behavior, even in the absence of the offer addressee but, even so, does not give effect to a contractual liability.

As regards the argument that it would be a separate type of liability as it secures the compliance of the accessory duties, Massimo Bianca explains that the private law does not allow the establishment of a third type of civil liability other than the contractual liability and Aquilian liability, i.e., between the violation of a given compulsory relationship and the violation of one of the general obligations that support the relations of life.[8] [9]

The damage to be compensated by virtue of breach of negotiations should consider the existence of effective loss to either party. The analysis should consider the limits of negative interest and of positive interest to reach a conclusion about which of these will be best suited to provide fair compensation.

The compensation of damages on the limits of negative interest corresponds to the interest of the party of not being damaged in the exercise of its freedom to negotiate. Put another way, it is the loss suffered by a party for having uselessly trusted in the conclusion of the contract or in its validity.

The compensation of damages on the limits of the positive interest corresponds to the interest to perform the contract, substantiated in the damage derived from the loss that the party could have prevented (consequential damage), and for the economic benefit the party would obtain if the contract had been performed (lost profit).[10]

The unsubstantiated breach of preliminary negotiations by either party gives effect to the right to compensation within the limits of negative interest[11], i.e., the right to compensation for the damage corresponding to expenses incurred and loss of other favorable opportunities.

On the other hand, as regards loss of opportunity or chance, it should be noted that case laws are somewhat parsimonious in relation to the application of the theory of loss of chance, demanding the Judiciary Branch to tell apart the unlikely from the almost certain, as well as the probability of profit chance loss to establish the applicable compensation.

2.2. THE PRELIMINARY CONTRACT

Preliminary contract is when the parties enter into a first agreement that gives effect to the duty to further conclude a second contract, deemed to be final. This situation arises when the parties are not interested in promptly establishing the contract that will engender the economic-legal effects inherent to the economic operation agreed on. It may happen for several reasons and, therefore, the parties decide to adjourn the production of such effects to a further moment. The preliminary contract essentially aims to enshrine the binding conclusion and/or complementation of the final contract, reason why the particulars of the final contract are a requirement.[12]

The preliminary contract is ruled by the Brazilian legal system. The Brazilian Civil Code prescribes it should comprise all the core requirements of the contract to be concluded, except for the format. When concluded, and in the absence of any repudiation clause, either party may demand the final contract execution.

A preliminary contract is characterized for having at least one of the compulsory categorical elements of the final contract. For example, if the final business is a purchase and sale transaction, the preliminary contract shall at least provide for the thing and the price. It is worth noticing that there is a content gradation of the preliminary contract compared to the final contract. Therefore, one can think of maximum, medium and minimal degree preliminary contracts, depending whether the basic business defines in a greater or lesser degree the terms of the final contract.[13]

A review of article 462 of the Civil Code shows that the Civil Code admits the principle of free form to the preliminary contract. There are no special requirements. Rather, these contracts are integral part of the set of requirements for contracts in general: competence of the parties; legal and attainable subject matter; consent or agreement of intentions. However, the formal requirement deserves special attention. The Brazilian courts have been discussing the theme based on controversial viewpoints, reaching different solutions. Sometimes they demanded the public form, other times waived it; sometimes they sustained that no effect was produced when the aim was to enter into a constitutive or translative contract of actual rights in amounts higher than the legal rate; sometimes recognized the production of effects arguing that the purpose was the provision of a fact (*obligatio faciendi*), substantiated in the performance of the main contract and, as any other contract that gives effect to liabilities of that nature, is not slaved to the form; sometimes distinguished

the effects by virtue of the form. However, the provision of article 462 of the Brazilian Civil Code ceased the debate by expressly admitting the principle of free form for preliminary contracts.[14]

As it is evident, the Brazilian Civil Code established its discipline (arts. 462 to 466 of the Brazilian Civil Code). It is worth mentioning that the rule defined does not comprise the whole situation of negotiation. However, that is not a problem considering that the context involved in each contract type is permeated by specific arrangements.

The reason of preliminary contracts is to ensure the parties the granted introduction, or basic structure of the ruling of their interests regarding a specific subject matter by means of a second contract (final or main contract), the binding duty of conclusion or duty of complementation and conclusion granted in the preliminary contract. This arrangement in two different moments, as a way to satisfy the practical needs to implement the intended operation, justifies the two-stage negotiation procedure, through the use of the sequence of preliminary contract - final contract.[15]

It is thus found that the common denominator in that sequence rests on the creation of bonds that cover the basic structure, or middle part, or the smallest part of a ruling over predefined interests. In the preliminary contract, however, the bond both exists and is valid, but the production of the effects intended by the arrangement will depend on the further complementation of the agreement, while in the final contract, as a rule, the bond exists and is endowed with efficacy.[16]

Under those circumstances, the parties firstly set the core terms for the intended economic operation, creating a jural relation. Next, they establish the final structure of interests by executing the final contract, which comprises all rights and obligations of the parties, as well as the penalties for eventual breach of the contract.

The liability assumed in the preliminary contract stems from the conclusion of the final contract. In the final contract, the parties timely complement the business content upon the conclusion of the final contract.

The very phenomenology of preliminary contracts inherently provides that when the parties execute them, they should provide for the power to further complement the contract. Such complementation should take place through the perfection of residual agreements by the time of conclusion of the final contract, so that this last encompasses the pre-contract, closing the negotiation sequence.[17]

2.3. THE PROPOSAL AND ITS ACCEPTANCE

The jural relation between the parties may also be substantiated through the rules of procedure of the proposal and its acceptance, as provided for in articles 427, 431 and 435 of the Brazilian Civil Code.

The proposal and acceptance of a contract (and, in general, of the statements of intent) in principle may be expressed in any way such as written words, spoken words or even upon a conclusive behavior that needs no word. The only requirement is that the way of expression selected by the presenting party should clearly and properly convey to the addressee the intent to conclude the contract and its intended content.[18]

Moreover, it cannot be disregarded that discussions may approach non-business acts, or actual legal transactions, with an offer (or proposal) aimed at arranging the intended contract. In this sense, the offer would be the second to last act and, being accepted, the contract shall be concluded thus entering into the contractual stage itself. The offer (proposal) is a unilateral legal transaction that does not require an expression of assent, binding the offeror to its terms (article 427 of the Brazilian Civil Code), so that if the offer is followed by acceptance within the due term, with no addition, restriction or amendment, the contract will be concluded (article 431 of the Brazilian Civil Code), completing the preliminary negotiations stage and starting the contractual stage.[19]

Therefore, the acceptance of the proposal may come about during the negotiation process, depending on the existing construed circumstances, since the acceptance may be bound to the offer. Therefore, there is a very thin line between the rules of procedures that can only be asserted through the review of the specific case.

However, if it effectively occurs in the specific case, discussions are ceased and the contractual stage starts upon the effective conclusion of the contract through the consensual consent to execute the contract and the establishment of the subject matter and contract consideration, either ascertained or ascertainable. That is when the offer (or proposal) is fixed with the “binder of the agreement” - the acceptance - concluding the agreement and, thereafter, triggering the contract efficacy. It is worth noticing that the binder of the agreement may be explicit or implicit, or through silence (article 111 of the Brazilian Civil Code). Here the uses, further conclusive behavior and commercial practices are of utmost hermeneutic relevance to properly identify that moment.[20]

Therefore, the existence of the memorandum of understanding and the existence of legal acts practiced by the parties can surely be framed as the existence of a

proposal and its acceptance, pursuant to articles 427, 431 and 435 of the Brazilian Civil Code, which also gives effect to jural relations between the parties.

2.4. THE MEMORANDUM OF UNDERSTANDING OR LETTER OF INTENT

It is natural the gradual construction of the agreement of intents between the parties during the negotiation process. It is built by means of the interaction of the prospective contracting parties in a stage named pre-contractual stage, inherent to the preliminary negotiations. Depending on the circumstances, this stage advances either to the contractual stage through the preliminary contract, or directly to the main contract or final contract.

In more complex economic operations, the parties usually execute, prior to the contract, documents that certify their intention to seek the consensus required for contracting. These documents are named memorandum of understanding or letters of intent, and precede the definition of the core elements of the contract (notably price or compensation). As such, these documents are not binding, and serve only to confirm the mutual commitment of the parties towards negotiating in good faith in support to the contract conclusion. Their main function is to enable the negotiating parties to get the required internal approvals to move the discussions forward. Therefore, these documents are often found in the stage of preliminary negotiations inherent to the pre-contractual stage.[21]

However, if the parties define the core elements of the future contract (consent, subject matter and price), the parties will no longer be in the preliminary negotiation stage. Rather, they will take on the effective liability of concluding the contract in the future. Neverthless, if the document was named memorandum of understanding, letter of intent or any similar name, the parties will have taken the binding liability and the document will be construed by the laws as a preliminary contract.[22]

Likewise, the jural relation following the execution of the memorandum of understanding or letter of intent may be characterized by the rules of procedures of the proposal and its acceptance. That is so because, considering the momentum implied by the negotiation process, the parties may move from the preliminary negotiations stage towards establishing the jural relation by means of conclusive behavior. This way, the discussions stage is concluded, and the stage of building the contract upon mutual consent commences, outlining the contract subject matter and price, either ascertained or ascertainable. That is when the offer is fixed with the binder of the agreement triggering the contract efficacy, being that the further conclusive behavior, uses and commercial practices are of utmost hermeneutic relevance to properly understand that moment.

Article 113 of the Brazilian Civil Code suggests that the agreement should be construed according to good faith and local uses. In addition to the ethical guidelines to be followed in the negotiation process, it should also observe the further conclusive behavior, and the market commercial practices. This rule is oriented to the parties and the law enforcer. This provision is aimed both at the individual practices of the parties and at social practices known as uses of the process (uses of the banking industry, or of any other sector of the economy).[23]

This provision was amended by the Law on Economic Freedom (Law 13.874/2019) that added paragraph 1, subsections I, II, III, IV and V, and paragraph 2[24] , in order to establish in the interpretation of the legal transaction the behavior after the business conclusion. It also aims at the market uses, customs and practices regarding the type of businesses, and the objective good faith. The interpretation should be more beneficial to the party that did not draft the document. In other words, in the event of ambiguity, vagueness or inconsistency in the contract clauses, these should be construed in a way less favorable to the party that drafted them.

The statements of intent may be expressed in several ways, being the main one that of language. There is no doubt that in most cases the legal transactions are concluded by uttering the words or putting them on the records. The word, however, is only one of the possible signals used by men to communicate with each other. It should not be disregarded that the intent to conclude a legal transaction may be expressed through other types of signals, like when it is not expressed, but implicitly and operatively results from the attitude and activity of the subject, i.e., through their conclusive behavior.

These changes are of utmost relevance for the analysis by the law enforcer in the specific case, notably in corporate relationships, by virtue of their unique logic that hinders the interpreter from using the same technique as that used for civil relationships. Civil relationships are more of formalistic nature, while in corporate relationships the contract system is faster and more flexible, permeated by the freedom of forms, except if otherwise provided for in specific laws, for observing the principles of private autonomy and objective good faith in which the uses of processes, the further conclusive behavior and the commercial practices performed in the specific case are crucial to ascertain the existence of jural relation to the memorandum of understanding or letter of intent.

Therefore, in order to prevent discrepant interpretations by the parties as regards the legal effects of

the memorandum of understanding or letter of intent, the document should describe the legal effects intended by it.

The parties may include in the memorandum of understanding or letter of intent that they want to assign it the effects of the preliminary contract, as a way to undoubtedly give rise to the effects inherent to that kind of contract. Otherwise, the parties may also assign the existence of legal bond to the whole document, or only to one or more clauses therein.

III. RESULTS AND DISCUSSIONS

The study approaches the path taken by the Brazilian justice to solve issues engendered by the incompliance or discrepant interpretation by the parties regarding the legal effects of the memorandum of understanding or letter of intent.

The Brazilian Highest Justice Court understands that the memorandum of understanding, depending on the circumstances of negotiation, holds the nature of preliminary contract. This understanding is ratified in the decision issued on the special appeal number 1.222.399-SP, reported by the Minister Lázaro Guimarães (Justice Official Gazette dated 08/08/2018) confirming the sentence issued by the São Paulo State Justice Court.

The Rapporteur Minister of the Highest Justice Court for the aforementioned appeal properly presented a summary of the trial at the São Paulo State Justice Court to better understand the specific case, explaining that the memorandum of understanding fits into the category of preliminary contract, and the rebuttal should not be allowed in the negotiation procedures by virtue of the aphorism *nemo potest venire contra factum proprium*, i.e., the party shall not act out of character, by assuring that:

(i) thorough and detailed discussions were held in the form of "memorandum of understanding";

(ii) the memorandums have nature of preliminary contract as they antecede the conclusion of contracts between the Bracce Bank and the Foundation, consisted of the Services Contract (pages 348/ 353) and the Bank Credit Bill Release Attachement (pages 3534/ 357), both dated July 04, 2015, through which the Bank Credit Bill was endorsed to the appellant therein;

(iii) the memorandum, of binding effect, is substantiated as preliminary contract;

(iv) according to the Bylaws, the president of the Foundation is entitled to formalize alone the operation with the other party, and,

(v) the application of the theory of prohibition to act out of character, with incidence of the aphorism *"nemo potest venire contra factum proprium*".

In order to contribute with the study regarding the possibility of framing the memorandum of understanding into the category of preliminary contract, it is worth mentioning that the Brazilian justice courts also support the case laws in that sense.

The State of São Paulo Justice Court, in the trial of the civil appeal number 1090938-64.2013.8.26.0100 reported by the Judge Correia Lima (Justice Official Gazette dated Oct/06/2016), filed against the sentence issued for the dismissal of the writ of execution due to missing enforcement order to support it, filed by the purchasing company. The Court understood that the memorandum of understanding has nature of a preliminary contract. In the specific case, the purchasing company undertook to purchase from the sellers the farms listed in the memorandum of understanding until April 30, 2012, under the penalty of losing the down payment of 5 million reais in the event of unsubstantiated withdrawal. The sellers issued a promissory note on behalf of the purchasing company as guarantee of reimbursement of the down payment received as payment of the properties' purchase price, in the event of unsubstantiated withdraw or unintentional breach of the obligations set forth in the memorandum of understanding by the sellers.

That Justice Court understood that the sellers had genuine expectations that the transaction would be concluded, and accepted assigning part of the land for free, for the purchasing company to plant and harvest a soybean crop, and guaranteed exclusive rights of negotiation to the purchasing company for a term much longer than the initial term, and did not explore the farms for nearly two years, by virtue of that negotiation. It was found that the purchasing company either never had real interest in purchasing the farms or lost that interest, acted against the conclusion of the business, consistently opposing conditions and obstacles that derailed the negotiation, clearly aiming to boost the withdrawal of the sellers to prevent the incidence of the premisse of unsubstantiated withdrawal. Therefore, the purchasing company clearly violated the principle of objective good faith, as it frustrated the reliance of the sellers on the continuity of the relation.

Thus, the aforementioned Justice Court understood that the memorandum of understanding characterizes a preliminary contract. As such, the purchasing company was legally bound to act in good faith, and to conclude the property purchase and sale contract, i.e., the court understood that there was a jural

relation, and unsubstantiated withdrawal of the transaction by fault of the purchasing company. Therefore, the purchasing company is not entitled to foreclose the promissory note issued by the sellers, which could only be foreclosed in the event of withdrawal from the transaction or incompliance with the obligations provided for in the memorandum of understanding by the sellers.

The State of Espirito Santo Justice Court, in the trial of the appeal number 24151349339 reported by Judge Fernando Estevam Bravin Ruy (Justice Official Gazette of October 25, 2019) understood that, although the parties had named the instrument as memorandum of understanding, by virtue of the outcomes of the negotiation and understanding towards the establishment of a technical-commercial partnership, the parties decided to endow the instrument with effects of contract. Therefore, there was an unchallengeable characterization of a compulsory relation between the parties that engendered the jural relation, by virtue of explicit manifestation of the autonomy of will of both parties, which ensures the stability of contracts.

The State of Espirito Santo Justice Court, in the trial of the appeal number 1.602.842-9 reported by Judge Robson Marques Cury (Justice Official Gazette of June 28, 2017) held the same opinion. It ascertained that the memorandum of understanding for the leasing of equipment to develop port activities signed by the parties has nature of preliminary contract, being competent to give rise to the duty to execute the main contract.

In this specific case, the plaintiff company filed a suit claiming the effects of the non-executed final contract, and the trial court and the respective Justice Court understood that the plaintiff company was only entitled to claim the execution of the main contract, defining that the memorandum of understanding fits into the category of preliminary contract. As such, the plaintiff company should have first filed a suit regarding the duty of doing, aiming at the execution of the final contract, and further obtain the effects of that final contract.

The State of Goias Justice Court, in the trial of the interlocutory appeal number 5375332-85.2020.8.09.0000 reported by Judge Marcus da Costa Ferreira (Justice Official Gazette dated Oct/ 14/ 2020) understood that the memorandum of understanding executed by the parties characterized the jural relation both for its rules of procedure of preliminary contract, and for the rules of procedure of the proposal and its acceptance, due to the further conclusive behavior of the parties.

The respective Court of Justice alleged bilaterality of the memorandum of understanding elaborated by the parties, which contained all the elements of the contract to be further executed such as consent of parties, the thing and the price, in full compliance with the provisions of article 462 of the Brazilian Civil Code. The Court asserted the unchallengeable characterization of preliminary contract embodied in the memorandum of understanding, complemented by the letter VDL dated April 17, 2020, and the letter VDR 171-20, which gave rise to the preliminary contract by virtue of explicit manifestation of will of the parties.

The Court added that the documentary evidence proved the bilaterality in the drafting of such documents, and that Mercedes-Benz authorized the transfer of concession when the transaction between the parties was concluded, by means of execution of the termination contract with the defendant company and new concession with the plaintiff company. Therefore, the memorandum of understanding, added by the manifestation of the defendant companies regarding the sale of the concession, and by Mercedes-Benz authorizing the transaction, represents bilateral documentation competent to give effect to the jural relation between the parties, as well as by virtue of an outcome of the negotiation through the submission of the final draft proposed and accepted by the parties, which also gives effect to jural relation pursuant to the rules of procedures of the proposal and its acceptance.

IV. CONCLUSION

Considering the customary use of memorandum of understanding or letters of intent in private law negotiations, notably in those of corporate nature, it is advisable to properly complete its content, mainly the legal frame description, in order to provide certainty to the interests of the parties, preventing doubts and controversies about its legal effects and to indirectly satisfy the public interest, by preventing litigations between the parties that could potentially engender law costs to the state.

It is observed that, if the parties define the core elements of the future contract (consent, subject matter and price), they will no longer be in the preliminary negotiations stage. Rather, they will take on the effective liability of concluding the contract in the future. Nervertheless, if the document was named memorandum of understanding or letter of intent, the parties will have taken the binding liability and the document will be construed by the laws as a preliminary contract.

The jural relation following the execution of the memorandum of understanding or letter of intent may also be characterized by the rules of procedures of the proposal and its acceptance. That is so because, considering the momentum implied by the negotiation process, the parties

may move from the preliminary negotiations stage towards establishing the jural relation by means of conclusive behavior. This way, the discussion stage is concluded, and starts the stage of building the contract upon mutual consent, and outlining the contract subject matter and price, either ascertained or ascertainable.

Hence, to prevent discrepant interpretations by the parties regarding the memorandum of understanding or letter of intent, the parties should describe on the document the effects of its characterization as preliminary contract, as a way to indisputably give rise to the effects of that kind of contract, or the assignment of contractual efficacy to the entire document or only to one of more clauses therein.

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