

# Chronicle terminated negotiations - Compensation for negotiation costs? (part 3)

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## 1. Introduction

Already in 1957, the Dutch Supreme Court ruled that contract negotiations are governed by the principle of good faith. As a result, parties negotiating the conclusion of a contract must allow their conduct to be determined in part by the legitimate interests of their counterparty.

The legitimate interests of a counterparty may entail that the termination of negotiations is unacceptable in the given circumstances. If a party nonetheless terminates the negotiations it will be obliged to compensate the

damages of its counterparty. As a result, there is a relatively high level of litigation in the Netherlands about terminated negotiations.

In this chronicle, I will discuss judgments by Dutch courts on terminated negotiations, handed down from January 2020 to February 2023.

In the first part of this chronicle, I discussed judgments addressing the question of whether a contract had already been reached when negotiations were terminated. In the second part, I discussed judgments addressing the question of whether the termination of the negotiations was unacceptable. Finally, in this third and final part, I will discuss judgments addressing the question of whether the terminating party has to reimburse its counterparty's negotiation costs.

## 2. Reimbursement of negotiation costs?

### 2.1. Introduction

If the disappointed party cannot prove that the termination of the negotiations was unacceptable, the



judgements studied show that the disappointed party then often takes the more alternative position that the terminating party is then obliged to reimburse its negotiation costs.

As a starting point, each party must in principle bear its own negotiation costs. However, the Dutch Supreme Court has ruled that in special circumstances the terminating party may still be obliged to reimburse its counterparty's negotiation costs. Even in the situation where the counterparty could not have the legitimate expectation that a contract would be reached at the time the negotiations were terminated.

### *2.2 Reimbursement of negotiation costs*

In a judgment dated 6 September 2022, the Amsterdam Court of Appeal ruled that a buyer had to reimburse the sellers' negotiation costs, despite the fact that the buyer was allowed to terminate the negotiations based on a condition of completion.

In this case, the negotiations on the acquisition of a

company had taken quite some time and had reached an advanced stage. Several drafts of the share purchase agreement had already been exchanged and discussed, the notarial deeds for the purpose of transferring the shares were in preparation and signature was expected shortly. Subsequently, the buyer had unexpectedly terminated the negotiations. In particular, the buyer's decision was based on an internal - external to the sellers - consideration, namely the fact that the buyer had entered into and concluded a cooperation agreement with a third party for exactly the same work performed by the sellers' company. The buyer had not informed the sellers about this.

In the light of these circumstances (lengthy negotiations, considerable costs incurred, unexpected termination for reasons mainly outside the sellers' control), the buyer was not allowed, according to the court, to terminate the negotiations without reimbursing the costs incurred by the sellers. Here, according to the court, special weight was attached to the fact that during the negotiations with the sellers, the buyer had also entered into discussions with

a third party about the above-mentioned cooperation. Despite the fact that these discussions did not violate the exclusivity agreement with the sellers, the court blames the buyer for this and notes that this weighs heavily in the circumstances justifying an obligation to pay compensation to the seller.

### *2.3 Arrangements on reimbursement of negotiation costs*

Parties are free to shape the negotiation phase by making arrangements. To that end, parties can also make agreements on the compensation of negotiation costs in case the negotiations are terminated prematurely. For example, in a letter of intent concluded at the start of the negotiations. Such a letter of intent may also stipulate that no negotiation costs need to be reimbursed at all if the negotiations are terminated prematurely by one of the parties for whatever reason.

In the above-mentioned judgment of 6 September 2022, the Amsterdam Court of Appeal ruled that the arrangements made by the parties on the reimbursement of negotiation costs in a letter of intent and an exclusivity

agreement did not preclude the buyer's obligation to reimburse the seller's negotiation costs. The reason for this, according to the court, was that the arrangements made did not cover the situation where negotiations were prematurely terminated by the buyer.

This judgment makes it clear that parties must properly identify all possible situations if they want to make arrangements in advance on the compensation for negotiation costs in a letter of intent.

### 3. In conclusion

As a starting points, each party has to bear its own costs in the negotiation phase. However, the Dutch Supreme Court has ruled that in special circumstances the terminating party may still be obliged to reimburse its counterparty's negotiation costs. Parties are free to agree otherwise. In that case, however, it is important to do so in good time and in terms that cannot be misunderstood. And preferably in writing in, for instance, a letter of intent to avoid misunderstandings later on.

**If you have any questions about terminated negotiations, please contact René van de Klift.**

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