When does an enforceable agreement exist?

Judgment of the Supreme Court of 23 December 2021

In the pharmaceutical sector, it is common for companies to agree and sign preliminary documents containing all or some of the provisions of future contracts (e.g., term-sheets, letters of intent, memoranda of understanding, etc.) prior to executing the final agreements (e.g., licensing and supply, manufacturing, co-development, co-marketing or co-promotion agreements, etc.).

Given that there is no specific regulation governinng these preliminary agreements, they are subject to the general provisions of the Civil Code. However, case law has classified them into two large groups: negotiation documents and precontracts, each with different legal consequences. This judgment is based on and summarises this doctrine in an fairly explanatory way.

Negotiation documents

According to this case-law, negotiation documents are preparatory acts that do not contain the elements that are needed to consider them as being enforceable. The subject matter of the future contract (products or services), the economic conditions (e.g., down-payment, consideration, etc.) and other elements (e.g., exclusivity, duration, territory, etc.) are not specified. Failure to comply with the contents of these negotiation documents may give rise to non-contractual civil liability, in particular if a party acts in bad faith. An action to claim damages on this basis isis subject to a limitation period of 1 year.

Precontracts

By contrast, the Supreme Court states that a precontract is a draft of the final contract, which contains all its basic elements and requirements. At the time of entering into a precontract, the parties may be unwilling or unable to sign the final contract, but they do undertake to cooperate in order to execute it in the future, thus just postponing its completion. Failure to comply with the terms recorded in a precontract may give rise to contractual liability, which is subject to a limitation period of 5 years.

Which is more convenient?

Considering the above, companies may choose the type of preliminary agreement that is most appropriate in each case. If the intention is merely to initiate a dialogue to enter into negotiations on potential areas of interest, without undertaking obligations on specific matters, preliminary negotiation, the purpose of which will be to negotiate a potential collaboration between the parties on one or more issues in good faith may be more appropriate. The more one specifies the details of the future agreement, the more it will resemble a precontract.

If, on the other hand, we are perfectly familiar with the legal transaction we are interested in, but are not in a position to directly conclude the final agreement, we may opt for a precontract. In this case, all the essential elements of the final contract must be clearly recorded (product or service, consideration, territory, duration, etc.).