III. No contract ensues: duties in negotiation

17. Illegal demands

An interesting question is whether the mere fact of raising an illegal demand amounts to lack of good faith. With regard to Israel, the national reporter argues that this cannot in itself amount to lack of good faith. Her argument is based on the ground that the good faith requirement is an internal requirement of consideration for the interest of the other party, whereas the requirement of legality is an external requirement.\(^{75}\)

18. Breaking off negotiations

Parties are generally accorded the right to retire from negotiations. However, the more advanced the negotiations and the nearer the parties are to the contractual realm, the more defined and clearer should be the reasons required for justifying the retirement.\(^{76}\)

Under French case law, breaking off negotiations whereas the other party could reasonably expect the contract to be concluded, will be considered to be at variance with good faith\(^{77}\), as is a refusal to renew a contract when the other party could reasonably rely on a promise to renew.\(^{78}\)

In \textit{Producciones Tommy Muniz Inc v. COPAN}, the defendant "did not adduce a well-founded reason to abruptly interrupt the negotiations". The Supreme Court of Puerto Rico found that "the interruption of the negotiations was unjustified and (...) the defendant's conduct (...) not only breached the good faith imposed by precontractual relations, but (...) also abused its right to withdraw from the negotiations".\(^{79}\)

A particular problem may arise when a contract mandatorily must be concluded in a particular form, such as a sales contract concerning real estate requiring a deed by a notary public. The situation may arise that all the elements of the contract have been agreed upon and only the formal act of the conclusion of the contract remains outstanding. If one party nevertheless refuses to conclude the contract formally, it may under Swiss law be held liable for \textit{culpa in contrahendo} if the withdrawing party had created a reasonable belief that the contract would be concluded formally (Chapter 19, para. 3 under c.).

\(^{75}\)Chapter 11 under f.

\(^{76}\)Chapter 11, para. 4 under d; Italian national report, para. 5 (g).


Referring Principles:

IV.8.1 - Principle of pre-contractual liability