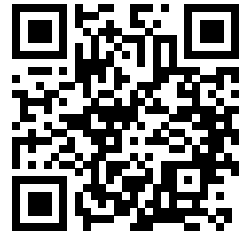


Title:

IV.8.1 - Principle of pre-contractual liability



Content:

No. IV.8.1 - Principle of pre-contractual liability

(a) A party is free to negotiate a contract and is not liable for failure to reach agreement with the other side.

(b) A party who breaks off contract-negotiations in bad faith is liable for the losses caused to the other party ("*culpa in contrahendo*").

(c) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party while leaving the other party under the justified assumption that a contract would be concluded. The same applies if a party insists on contract terms so clearly unreasonable that they could not have been advanced with any expectation of acceptance, provided that there is some demonstrable advantage to be gained for that party by avoiding the contemplated transaction.

Commentary:

1 Unless the parties have agreed otherwise, e.g. in a [renegotiation clause](#), the fundamental Principle of [freedom of contract](#) includes a party's right to say "no", i.e. to reject a party's offer or to break off negotiations at any time. However, even the Principle of party autonomy must be balanced with the overriding Principle of [good faith](#). Subsection (c) lists two cases in which breaking off of negotiations is against good faith and may make that party liable for losses incurred by the other side because of the breaking off of the negotiations.

2 In the first scenario, the party breaking off the negotiations has signaled to the other side before or during the negotiations that the contract will be concluded. This marks the "point of no return" after which the party may not simply say "no" and quit the negotiation table. The text requires that the expectation of the other side that the contract will be concluded is "justified". This requires an objective test, applying the standard of [reasonableness](#). The question must be asked whether it was reasonable for the one party under the circumstances of the case and taking into account the conduct and statements of the other side to assume that the contract will be concluded, i.e. to rely in the conduct of the other side.

3 In the second scenario, one party played a game with the other side, misusing the negotiations in order to gain some advantage other than the advantage expected from the potential contract, without revealing that intention to the other side. There are two important qualifications for this test to be met. First, the contract terms suggested by that party must be "clearly" unreasonable. This means much more than that the suggested contract terms favor the party who suggests them. Rather, they must be obviously unreasonable from an objective perspective. Secondly, the advantage that the party wants to gain by breaking off the negotiations must be "demonstrable", i.e. can be easily proven.