

المسئولية عن قطع مفاوضات العقد دون سبب جدي^(*)

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الخلاصة

يعالج هذا البحث الحالات التي يتم فيها قطع مفاوضات العقد خلافاً لمقتضيات حسن النية، وموقف التشريعات المقارنة من مبدأ التفاوض بحسن نية، سواء التشريعات التي تتبنى هذا المبدأ صراحةً أم ضمناً، وكذلك طبيعة المسئولية عن قطع مفاوضات العقد دون سبب جدي، من حيث الحالات التي تكون فيها هذه المسئولية عقدية أو تقصيرية وفقاً للتشريعات المقارنة.

كما يتناول هذا البحث آثار المسئولية عن قطع مفاوضات العقد دون سبب جدي، من حيث الأحكام المتعلقة بجبر الضرر، والخيرة بين المسئولية العقدية والمسئولية عن الفعل الضار في ظل التشريعات المقارنة.

ABSTRACT

This research tackles the situations in which the termination of the contract negotiations takes place in violation of the good faith and the stance of the comparative law on the principle that implicitly or explicitly adopts negotiation in good faith. The research also deals with the nature of liability as a result of the termination of contract negotiations without a valid reason in terms of both contractual and tortious responsibility under the comparative law.

The research also approaches the consequences of the termination of contract negotiations without a valid reason, such as compensation and the choice between the contractual and tortious responsibility under the comparative law.

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أمين دواس (١٦٧ - ٢٢١)

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المسئولية عن قطع مفاوضات العقد دون سبب جدي

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صفر ١٤٢٩هـ، فبراير ٢٠٠٨م

مجلة جامعة الشارقة للعلوم الشرعية والقانونية المجلد ٥، العدد ١

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المسئولية عن قطع مفاوضات العقد دون سبب جدي

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أمين دواس (١٦٧ - ٢٢١)

¹⁰⁵(Longmore)

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أمين دواس (١٦٧ - ٢٢١)

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المسئولية عن قطع مفاوضات العقد دون سبب جدي

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أمين دواس (١٦٧ - ٢٢١)

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- (85) Article (1337) Italian Codice Civile - Trattative e responsabilità precontrattuale
- (86) "Le parti, nello svolgimento delle trattative e nella formazione del contratto, devono comportarsi secondo buona fede".
- (87) Article 241 BGB - Pflichten aus dem Schuldverhältnis
- (88) "(2) Das Schuldverhältnis kann nach seinem Inhalt jeden Teil zur Rücksicht auf die Rechte, Rechtsgüter und Interessen des anderen Teils verpflichten".
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- (91) "Ein Schuldverhältnis mit Pflichten nach § 241 Abs. 2 entsteht auch durch 1. die Aufnahme von Vertragsverhandlungen, 2. die Anbahnung eines Vertrags, bei welcher der eine Teil im Hinblick auf eine etwaige rechtsgeschäftliche Beziehung dem anderen Teil die Möglichkeit zur Einwirkung auf seine Rechte, Rechtsgüter und Interessen gewährt oder ihm diese anvertraut, oder 3. ähnliche geschäftliche Kontakte".
- (92) Article 2.1.15 UPICC - Negotiations in Bad Faith
- (93) "(1) A party is free to negotiate and is not liable for failure to reach an agreement.
- (94) (2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.
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(103) Lord Bingham in *Interfoto Library Ltd v. Stiletto Ltd* [1988] 2 WLR 615, 620, available on the Internet at: <http://alpha.bailii.org/ew/cases/EWCA/Civ/1987/6.html>: "In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair", "coming clean" or "putting one's cards face upwards on the table". It is in essence a principle of fair and open dealing. English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given".

(104) Lord Ackner in *Walford v. Miles* [1992] 1 All ER 453 at 460:

- (105) "A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of the negotiating parties. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time for any reason. There can thus be no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content", cited in: Goswami, Ibid.
- (106) Klein / Bachechi, Ibid, p. 7. Kucher, Ibid, pp. 22-23. Kessler / Fine, Ibid, p. 408. Furmston / Norisada / Poole, Ibid, p. 271. Colombo, Ibid, p. 92. Farnsworth, Precontractual Liability, Ibid, p. 221.
- (107) Colombo, Ibid, p. 85.
- (108) Schwartz / Scott, Ibid, p. 664. Kucher, Ibid, p. 23. Markesinis, B. and others, The German Law of Contract, A Comparative Treatise, 2nd ed., Oxford and Portland, Oregon, 2006, pp. 97-108.

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- (110) Goswami, Ibid.
- (111) Schwartz / Scott, Ibid, p. 668. Kottenhagen, Ibid, pp. 68-70. Farnsworth, in: Bonell / Bonell, Ibid, p. 177. Farnsworth, Duties of Good Faith, Ibid, p. 57. Rrink, Ibid, p. 38. Kessler / Fine, Ibid, p. 420. Friedl, Ibid, pp. 162 ff. Furmston / Norisada / Poole, Ibid, p. 292 ff. Novoa, Ibid, pp. 588-589. Goderre, Ibid, pp. 266, 2 0.
- (112) Kucher, Ibid, p. 31 ff.
- (113) Lord Hope of Craighead in Regina v. Immigration Officer at Prague Airport, [2004] UKHL 55, available on the Internet at: <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041209/roma-1.htm>: "There are differences between the legal systems as to how extensive and how powerful the penetration of

the (good faith) principle has been. They range from systems in the civilian tradition where as a guideline for contractual behaviour the principle is expressly recognised and acted upon, to those of the common law where a general obligation to conform to good faith is not recognised. ... The preferred approach in England is to avoid any commitment to over-arching principle, in favour of piecemeal solutions in response to demonstrated problems of unfairness".

- (114) Lord Justice Longmore in *Petromec Inc Ors v Petroleo Brasileiro SA Petrobras Ors* [2005] EWCA Civ 891 (15 July 2005), available on the Internet at: <http://alpha.bailii.org/ew/cases/EWCA/Civ/2005/891.html>: "The authority chiefly relied on by Mr Hancock in support of blanket unenforceability was the decision of the House of Lords in *Walford v Miles*, which (of course) binds us for what it decides. The main distinction between that case and this was that in that case there was no concluded agreement at all since everything was "subject to contract"; there was, moreover, no express agreement to negotiate in good faith. ... That shows the difference from the present case. ... It is not irrelevant that it is an express obligation which is part of a complex agreement It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered. I would only say that I do not consider that ...the express obligation to negotiate ... is completely without legal substance".
- (115) Goswami, *Ibid*.
- (116) Goswami, *Ibid*.
- (117) Goswami, *Ibid*.
- (118) Farnsworth, *Precontractual Liability*, *Ibid*, p. 249. Schwartz / Scott, *Ibid*, p. 664. Klein / Bachechi, *Ibid*, p. 7. Goderre, *Ibid*, p. 2 .
Novoa, *Ibid*, p. 599.

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- (120) Ben-Shahar, *Ibid*, p. 1857.

- (121) Farnsworth, *Precontractual Liability*, *Ibid*, p. 250. Brink, *Ibid*, p. 40. Klein / Bachechi, *Ibid*, p. 8.

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Naniwadekar, Ibid, p. 7. Klein / Bachechi, Ibid, p. 9. Novoa, Ibid, p. 599. Goderre, Ibid, p. 271.

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(Furmston / Norisada / Poole, Ibid, pp. 271, 281 ff., 304 ff.)

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- (126) Kucher, Ibid, p. 15.
- (127) Tetley, Ibid, pp. 38, 39. Blessing, M., Das neue internationale Schiedsgerichtsrecht der Schweiz – Ein Fortschritt ode ein Ruecktritt?, in: Boeckstiegel (ed.), Die internationale Schiedsgerichtsbarkeit in der Schweiz (II), Cologne, Berlin, Bonn, Munich 1989, p. 68. Hartkamp, A., The Unidroit Principles for International Commercial Contracts and the United Nations Convention on Contracts for the International Sale of Goods, in: Boele-Woelki / Hondius / Steenhoff (eds.), Comparability and Evaluation, Dordrecht, Boston, London, 1994, p. 87.
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