

WRONGFUL TERMINATION OF NEGOTIATIONS

FROM CASE LAW TO CODIFICATION

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Negotiations play a crucial role in the dynamic process of contract formation. Parties enter into discussions, exchange information, and attempt to reach a mutually acceptable agreement. The principle of freedom of contract is the cornerstone of this legal framework: in principle, parties are free to decide whether, with whom, and under what conditions they wish to conclude a contract.

Yet, not every negotiation results in an agreement. While contractual freedom implies that parties are, in principle, free to initiate and to terminate negotiations, the wrongful termination of negotiations may, under certain circumstances, give rise to legal consequences. With the introduction of Book 5 "Obligations" in the new Civil Code, and in particular Articles 5.14-5.17, the legislator has codified decades of jurisprudential and doctrinal debate.

THE LEGAL FRAMEWORK

1. Article 5.14 CC enshrines the principle of contractual freedom but confirms that it is subject to legal limitations.

2. Article 5.15 CC provides for freedom of negotiation, while also imposing a duty of care in the pre-contractual phase.

3. Article 5.17 CC forms the core of the framework, providing that parties may be held extra-contractually liable for faults committed during negotiations.

4. In cases of wrongful termination, damages generally restore the injured party to the position it would have been in had no negotiations taken place, reflecting the so-called negative contractual interest.

5. In exceptional cases, where there was a legitimate expectation that the contract would indeed be concluded, damages may also include the loss of the expected net benefits of the non-concluded contract.



This codification closes a longstanding debate on the legal basis of culpa in contrahendo and provides a clear statutory foundation .

In practice, this means businesses can no longer assume “walk-away” freedom once negotiations have advanced. For example, in a recent dispute a tech start-up claimed €1.2 million in lost funding when talks collapsed after six months of due diligence.



WHY THIS MATTERS IN PRACTICE

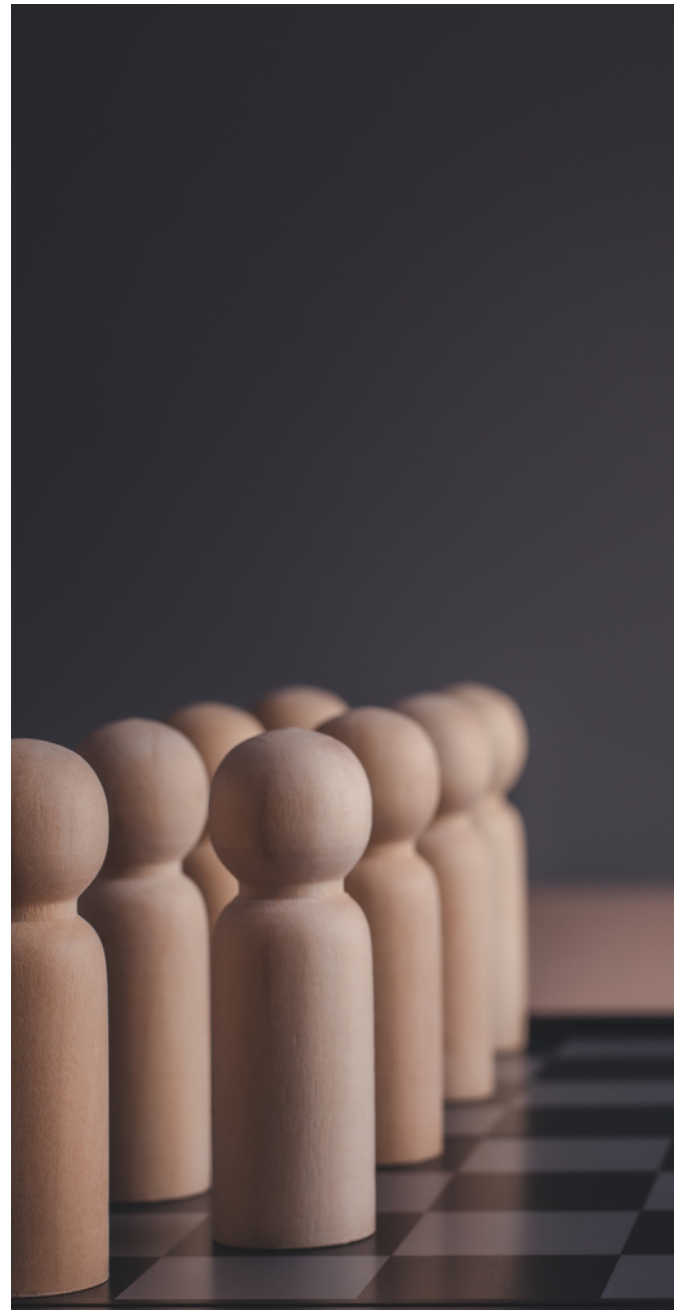
The new framework inevitably carries economic and social implications. On the one hand, the possibility of liability, however nuanced, may create a chilling effect, making parties more hesitant to engage in exploratory talks for fear of potential claims. On the other hand, the statutory recognition of pre-contractual liability strengthens trust, encouraging parties to negotiate in good faith and reducing abusive practices.

For executives, the financial risk is tangible: damages can range from reimbursing modest due diligence costs (tens of thousands of euros) to multi-million euro awards for lost opportunities.

PRACTICAL GUIDANCE FOR BUSINESSES & INVESTORS

Use Preliminary Agreements

- Beyond classic tools like exclusivity clauses or break fees, practice often employs Lols, NDAs, and MoUs.
- These not only clarify the negotiation process but may also establish a contractual liability basis alongside the extra-contractual rules of Book 5.
- Example: A retail chain avoided litigation when an MoU explicitly provided that each side bore its own €25,000 due diligence costs if talks collapsed.



Draft Clear Exit Provisions

- Specify conditions under which negotiations may be terminated.
- Agree in advance on cost allocations (e.g., due diligence expenses) should talks collapse.
- Fictional case: An investor terminated after three months. Because the exit clause allocated €40,000 costs to the seller, the dispute ended quickly, no lawsuit followed.



Manage Legitimate Expectations

- The more advanced and concrete negotiations become, the less freedom there is to walk away.
- Avoid creating false certainty; document all communications and intentions.
- Example: Courts have awarded damages in the millions where “encouraging emails” created a legitimate expectation of closing.

Plan Ahead

- Include provisions on negotiation duration, termination grounds, and possible compensation in preliminary agreements.
- Incorporate negotiation liability into transaction planning, governance, and risk assessments.
- A simple internal timeline or flowchart can help identify when liability risks peak: typically once exclusivity or concrete term sheets are on the table.

EXECUTIVE ONE-PAGER

Before negotiations

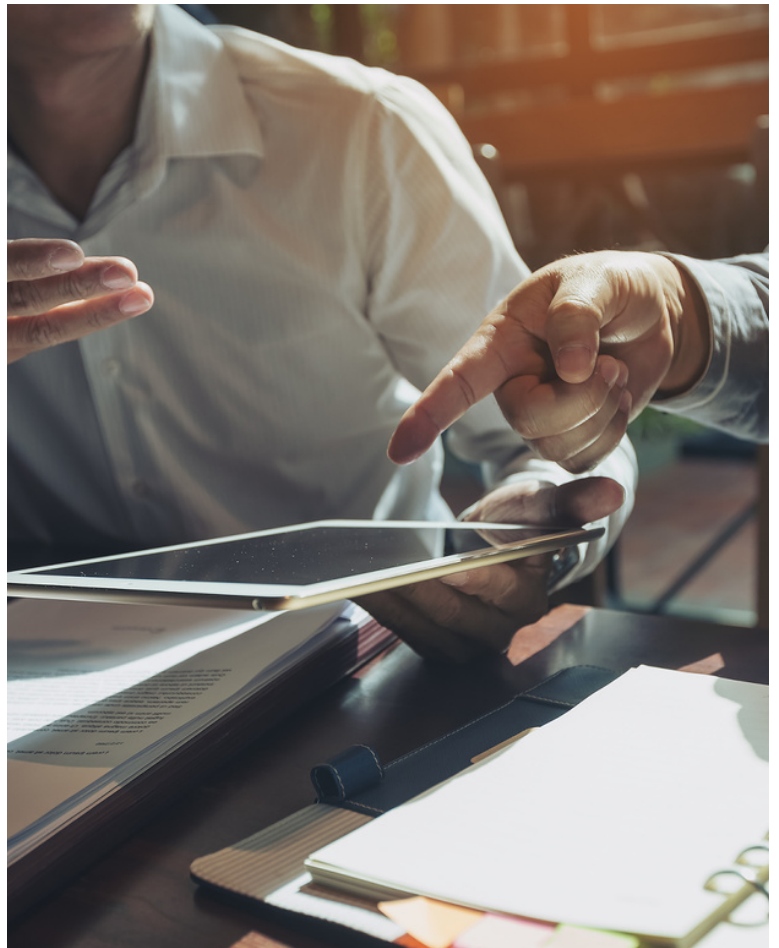
- Conclude NDA/Lol/MoU, set duration, allocate costs.
- Estimate potential sunk costs (legal, financial, technical): these often run into tens of thousands of euros.

During negotiations

- Manage expectations, keep documentation, and clarify exclusivity or fees.
- Every unclear statement may later translate into damages claims

When exiting

- Provide reasons, reimburse agreed costs, and evaluate litigation risk.
- Clear communication and pre-agreed exit clauses reduce reputational damage and protect investor confidence.



FINAL WORD

Through its codification in Book 5, the framework for assessing wrongful termination of negotiations has never been more transparent. Nevertheless, whether a termination is wrongful remains a question of fact, to be evaluated on a case-by-case basis.

The message for businesses is straightforward: terminate talks carelessly, and liability may follow. By adopting preventive measures such as pre-contracts, exit clauses and cost-sharing provisions, companies can preserve both their freedom to negotiate and their legal security.

Our contracts and corporate team can assist in drafting negotiation frameworks, pre-contracts, and risk management protocols tailored to your sector.



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