

Chronicle terminated negotiations - Is the termination of negotiations unacceptable? (part 2)

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1. Introduction

Already in 1957, the Dutch Supreme Court ruled that contract negotiations are governed by the principle of good faith. As a result, parties negotiating the conclusion of a contract must allow their conduct to be determined in part by the legitimate interests of their counterparty.

The legitimate interests of a counterparty may entail that the termination of negotiations is unacceptable in the given circumstances. If a party nonetheless terminates the negotiations it will be obliged to compensate the

damages of its counterparty. As a result, there is a relatively high level of litigation in the Netherlands about terminated negotiations.

In this chronicle, I will discuss judgments by Dutch courts on terminated negotiations, handed down from January 2020 to February 2023.

In the first part of this chronicle, I discussed judgments addressing the question of whether a contract had already been reached when negotiations were terminated. In this second part, I will discuss judgments addressing the question of whether the termination of negotiations was unacceptable. And finally, in the third part, I will discuss judgments addressing the question of whether the terminating party had to reimburse its counterparty's negotiation costs.

2. Is the termination of negotiations unacceptable?

2.1. Introduction

As discussed in the first part of this chronicle, the judgments studied show that the disappointed party's



primary position is often that a contract had already been reached when the negotiations were terminated. In case the court rules that the disappointed party has failed to prove this, the latter often takes the alternative position that the termination of the negotiations was unacceptable.

The starting point is that each of the negotiating parties is free to terminate the negotiations, unless this would be unacceptable on the basis of the other party's legitimate expectation that a contract would be reached or in connection with the other circumstances of the case.

In assessing whether legitimate expectations were created, the extent to which and the manner in which the terminating party contributed to the creation of those expectations on the part of his counterparty and also the legitimate interests of the terminating party should be taken into account. It may also be relevant here whether unforeseen circumstances arose in the course of the negotiations. In the event that the negotiations were continued over a long period of time despite changed circumstances, the decisive factor as regards to the

question whether legitimate expectations were created must be ultimately assessed at the time of the termination of the negotiations. This assessment must be made against the background of the entire course of the negotiations.

The standard to be applied in this assessment is strict, according to the Dutch Supreme Court. As a result, Dutch courts will not easily rule that the termination of the negotiations is unacceptable.

2.2. Legitimate expectations

In a decision dated 15 March 2022, the Amsterdam Court of Appeal ruled that the buyer was entitled to have the legitimate expectation that a purchase contract would be reached at the time the seller terminated the negotiations.

In this case, the buyer and the seller had negotiated for an initial 16-month period about the possibility of permanently establishing a museum in a property already in use by the buyer as living quarters, a studio and a museum, and selling that property to the buyer.

Subsequently, in a period of about a year and a half the parties did not come closer to each other, after which the seller ceased the negotiations and launched a public sale procedure.

The buyer did not resign to this and submitted an offer to the seller outside the public sale procedure. Although the seller rejected that bid, it nevertheless resumed talks with the buyer. In that context, it made the buyer a 'final offer'. The buyer did not accept that offer. However, his response did show a clear intention to buy the property and also a willingness to pay the clean-up costs, provided other conditions were also met. The buyer had also expressly asked the seller to negotiate the sale further.

In light of this state of affairs and the buyer's strong interest in buying the property and preventing eviction, the court held that the seller was not free to terminate the negotiations at that point. As for the buyer's interest, the court took into account that he had lived and worked in the property for years, his family lived there, it housed his entire art collection and the museum and studio were his

source of income. The termination of the negotiations would put the buyer in serious trouble. Especially also because the seller had already terminated the contracts under which the buyer could use of the property as a studio and museum.

The seller's interest in continuing the public sale procedure did not outweigh this. This was a circumstance that the seller had created itself and should remain for its account. Furthermore, the seller had not made it plausible that the property had to be awarded to a third party under the public sale procedure before a certain date. In fact, the seller had re-engaged with the buyer in negotiations just before that date and had itself indicated to the buyer that the award of the property could be stayed. With that decision, according to the court, the seller had come back on its earlier decision to terminate the negotiations.

Given, among other things, the above, the court ruled that the seller's termination of the negotiations at that stage was unacceptable. At that stage, the buyer was

justified in its expectation that a purchase contract on the property would be reached.

2.3. Other circumstances

In a decision dated 16 August 2022, the 's-Hertogenbosch Court of Appeal ruled that "the other circumstances of the case", which could also make the termination of the negotiations unacceptable, are a very limited category of exceptional circumstances.

Circumstances to be taken into account may concern social interests involved in the conclusion of a contract, which interests may entail that no possibility of reaching agreement should be neglected. This may be the case when negotiating a collective bargaining agreement. According to the court, one can also think of the case where negotiations have to take place against the background of a certain, already existing legal relationship, which in principle obliges the parties to negotiate, such as a stipulated obligation to renegotiate the continuation of a long-term contract after the expiry of a certain term or the occurrence of certain circumstances.

The circumstances must therefore be (very) serious, which usually makes a claim that the court orders the terminating party to resume the negotiations (rather than a claim for damages) most obvious.

In view of the above, the Amsterdam Court of Appeal's decision of 15 March 2022 discussed above can also be partly placed in the key of these "other circumstances" in view of the strong interests that the buyer had, according to the court, in being able to continue to use the property as a living space, studio and museum for his entire art collection.

In a decision of 19 October 2021, the Amsterdam Court of Appeal ruled that "other circumstances of the case" can also exist if the terminating party is guilty of unacceptable negotiating behaviour, such as not negotiating seriously, pushing for a break-up, invoking a pretext to break off negotiations, playing off candidates against each other or failing to notify in time that in all likelihood no agreement will be concluded.

“*The termination of negotiations can be unacceptable if the terminating party is guilty of unacceptable negotiating behaviour.*”

3. In conclusion

The starting point is that each of the negotiating parties is free to terminate the negotiations unless this would be unacceptable on the basis of the other party's legitimate expectation that a contract would be reached or in connection with the other circumstances of the case. Therefore, the negotiations and the parties' behaviour must be carefully assessed in detail. The standard to be applied in this assessment is however strict. Therefore, a Dutch court will not easily rule that terminating the negotiations was unacceptable.

If you have any questions about terminated negotiations, please contact René van de Klift.

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