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**Principles of International Commercial Contracts**  
**Working Group on Long-Term Contracts**

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**Agreements to negotiate in good faith (\*)**

(Draft prepared by Professor Neil Cohen)

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(\*) Cf. Study L – Doc. 127, Issue (c).

### ARTICLE 2.1.15

*(Negotiations in bad faith)*

**(1) A party is free to negotiate and is not liable for failure to reach an agreement.**

**(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.**

**(3) 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.**

#### COMMENT

##### 1. Freedom of negotiation

[...]

##### 2. Liability for negotiating in bad faith

A party's right freely to enter into negotiations and to decide on the terms to be negotiated is, however, not unlimited, and must not conflict with the principle of good faith and fair dealing laid down in Article 1.7. One particular instance of negotiating in bad faith which is expressly indicated in paragraph (3) of this Article is that where a party enters into negotiations or continues to negotiate without any intention of concluding an agreement with the other party. Other instances are where one party has deliberately or by negligence misled the other party as to the nature or terms of the proposed contract, either by actually misrepresenting facts, or by not disclosing facts which, given the nature of the parties and/or the contract, should have been disclosed. As to the duty of confidentiality, see Article 2.1.16.

A party's liability for negotiating in bad faith is limited to the losses caused to the other party (paragraph (2)). In other words, the aggrieved party may recover the expenses incurred in the negotiations and may also be compensated for the lost opportunity to conclude another contract with a third person (so-called reliance or negative interest), but may generally not recover the profit which would have resulted had the original contract been concluded (so-called expectation or positive interest).

~~Only if the parties have expressly agreed on a duty to negotiate in good faith, will all the remedies for breach of contract be available to them, including the remedy of the right to performance.~~

#### Illustrations

1. A learns of B's intention to sell its restaurant. A, who has no intention whatsoever of buying the restaurant, nevertheless enters into lengthy negotiations with B for the sole purpose of preventing B from selling the restaurant to C, a competitor of A's. A, who breaks off negotiations when C has bought another restaurant, is liable to B, ~~who ultimately succeeds in selling the restaurant at a lower price than that offered by C,~~ for B's losses. ~~These losses may include the difference in price and whatever other losses may be established.~~

2. A, who is negotiating with B for the promotion of the purchase of military equipment by the armed forces of B's country, learns that B will not receive the necessary import licence from its own governmental authorities, a pre-requisite for permission to pay B's fees. A does not reveal this fact to B and finally concludes the contract, which, however, cannot be enforced by reason of

the missing ~~licences~~ licence. A is liable to B for the costs incurred after A had learned of the impossibility of obtaining the required licence.

3. A enters into lengthy negotiations for a bank loan from B's branch office. At the last minute the branch office discloses that it had no authority to sign and that its head office has decided not to approve the draft agreement. A, who could in the meantime have obtained the loan from another bank, is entitled to recover the expenses entailed by the negotiations and the profits it would have made during the delay before obtaining the loan from the other bank.

### 3. Agreement to negotiate in good faith

By contrast, if the parties have specifically agreed on a duty to negotiate in good faith, all appropriate remedies for non-performance will be available, including the right to performance (such as by directing the parties to negotiate) and other remedies reflecting the expectation or positive interest (to the extent that the requirements for such remedies can be demonstrated).

An agreed-upon duty to negotiate in good faith means, at the least, a duty to negotiate seriously with an intent to conclude an agreement. Of course, this duty does not displace other duties under the Principles (e.g. Articles 1.8 and 2.1.6). In the case of a complex long-term contract, parties who agree on a duty to negotiate in good faith may wish to further define that duty in light of the nature of the contract and its commercial context. For example, they may set standards of confidentiality, agree on a timetable for the negotiation, etc.

#### Illustration

4. Contractor A and supplier B enter into a pre-bid agreement whereby they undertake to negotiate in good faith for the supply of equipment in the event that A succeeds in becoming prime contractor for a major construction project. A is awarded the construction contract, but after preliminary contacts with B refuses to continue the negotiations. B may request enforcement of the duty to negotiate in good faith.

### 34. Liability for breaking off negotiations in bad faith

[...]

#### ARTICLE 5.1.4

*(Duty to achieve a specific result.*

*Duty of best efforts)*

**(1) To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.**

**(2) To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.**

#### COMMENT

##### 1. Distinction between the duty to achieve a specific result and the duty of best efforts

[...]

## **2. Distinction provides criteria for determining whether a party has performed its obligations**

[...]

## **3. Long-term contracts**

In international contract practice, especially in the context of long-term contracts, when provision is made for parties to work together to resolve issues that may arise, it is common to speak of a duty “to use best efforts” to resolve such issues rather than a duty “to negotiate in good faith.” When the parties to a long-term contract have agreed on such a duty to use best efforts, that duty may amount, for all practical purposes, to a duty to negotiate in good faith (see Article 2.1.15, Comment 3).