Title:
IV.6.7 - Duty to renegotiate

Content:
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Each party has a good faith obligation to renegotiate the contract if there is a need to adapt the contract to changed circumstances and the continuation of performance can reasonably be expected from the parties.

Commentary:
1 The Principle is derived from the fundamental Principle of good faith. Renegotiation may involve the revision of existing contractual terms or the filling of gaps.

2 In long term contracts, such duties are imposed in revision or renegotiation clauses. Absent such contractual stipulations, good faith may dictate that the parties get together and try to renegotiate their contract. The hardship scenario provides a specific example of such a duty to renegotiate. The duty to renegotiate is one of best efforts. The party must do its best to pursue successful negotiations, but there is no obligation to agree or to achieve certain results.

3 In renegotiating their contract, the parties must always seek to maintain the commercial equivalence of their respective contractual obligations. The idea that the performance obligations of the parties should be commercially equivalent is a general principle of international commercial contract law and must therefore be observed in the renegotiation context. Apart from that, there are a number of guidelines which must be observed by the parties in a renegotiation process:

1. Respecting the remaining provisions of the contract,
2.Having regard to the prior contractual practice between the parties,
3. Making a serious effort to reach agreement,
4. Paying attention to the interests of the other side,
5. Producing information relevant to the adaptation,
6. Showing a sincere willingness to reach a compromise,
7. Maintaining flexibility in the conduct of negotiations,
8. Searching for reasonable and appropriate adjustment solutions,
9. Making concrete and reasonable suggestions for adjustment instead of mere general declarations of willingness,
10. Avoiding rushed adjustment suggestions,
11. Giving appropriate reasons for one’s own adjustment suggestions,
12. Obtaining expert advice in difficult and complex consensus proceedings,
13. Responding promptly to adjustment offers from the other side,
14. Making an effort to maintain the price-performance relationship taking into consideration the parameters regarded as relevant by the parties,
15. Avoiding an unfair advantage or detriment to the other side (“no profit “no loss” principle),
16. Prohibition on creating established facts during negotiations except in emergency situations (ban on “escalation” strategies),
17. Maintaining efforts to reach agreement over an appropriate length of time,
18. Avoiding unnecessary delays in the consensus proceedings.

4 Within a given renegotiation process, none of these obligations claims sole validity. Rather, they are starting points for determining what is required of the parties in each individual case, by examining the nature of the contract and the combined effect of its provisions, and the type of risks realized.

5 The weighing-up of various factors will be subject to the Principle of good faith and in particular the notions of fairness and reasonableness derived from this. Thus, a party will be subject to fewer requirements if the opposite side also makes no moves to support the negotiation process. This follows from the idea of cooperation as a distributor of legal duties, on which most of the above mentioned obligations are based. The idea of an asymmetrical distribution of information also needs to be considered when weighing-up. According to this, the obligation of one party to make its own suggestions during the renegotiation process is proportionately smaller in so far as the other party is in a better position to make
progress towards a solution due to technical conditions or the distribution of risks in the contract. Timing also has a role to play in determining the negotiation obligations of the parties. So the obligation to provide concrete suggestions for a solution needs to be fulfilled to an increasingly higher standard the more the negotiations proceed.

A party's liability for damages arising from a breach of the duty to renegotiate can be assumed only in exceptional cases. Here too, the special legal nature of this duty should be taken into account. Merely not reaching agreement will not in itself constitute a breach of obligation. Instead, this is assumed where the non-agreement is proven to be caused by a gross breach of obligation in bad faith by the other side. This could be the case for example where proceedings are unjustifiably delayed or negotiations are intentionally obstructed or where proposals by one side are obviously rejected for other reasons than normal business judgement. Only under those circumstances can it be assumed that a reasonable person in a comparable situation would have made greater efforts.