Title:
IV.6.8 - (Re-) Negotiation agreement / clause (pactum de negotiando)

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(a) Under an agreement or contract clause requiring the parties to (re-) negotiate in good faith, both parties are legally obliged to cooperate in the (re-) negotiation process in an efficient manner, i.e. in a manner aimed at successfully negotiating a solution. This requires above all earnest efforts, flexibility and a willingness to consider the needs and interests of the other party. Principle No. IV.8.1 (c) applies accordingly.

(b) Such agreements/clauses impose an obligation on the parties to make best possible efforts to reach an agreement within the framework of (a) above. They do not, however, require the parties to actually reach an agreement unless otherwise provided for in the agreement/clause.

(c) If the renegotiation of the contract relates to the adaptation of the price to be paid by one party for the performance of the other party, then - unless otherwise agreed by the parties - the result of the renegotiation process must reflect the initial economic equilibrium between the price and the value of the other party’s performance at the time of conclusion of the contract or at the time of the conclusion of the price agreement resulting from the last renegotiation process.

Commentary:
1 See for a list of guidelines which must be respected by the parties in a contractual renegotiation process Trans-Lex Commentary to Principle IV.6.7, Para. 3.

2 Subsection (c) relates to situations in which the parties have agreed to adapt the price to changed circumstances by bilateral negotiations. In such scenarios the parties’ agreement on the adapted price which results from these negotiations must reflect the initial economic equilibrium between the price and the value of the other party’s performance at the time of conclusion of the contract or at the time of the conclusion of the price agreement resulting from the last renegotiation process. However, the parties are free to agree in their renegotiation clause or in a subsequent agreement that the new price shall be fixed solely according to the market conditions prevailing at the moment of the price fixing, i.e. without regard to the initial equilibrium between the price and the value of the other party’s performance. If the parties have not provided a clear indication as to whether they intended to agree on price adaptation (in which case the initial equilibrium must be observed) or price fixing (in which case the initial equilibrium must not be observed), their will must be determined by application of the general Principles of contract interpretation.