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## Negotiations in international trade contracts, obligations and responsibilities of parties thereto

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### Abstract

Contract negotiation stage is considered as the most important and even the most serious stage, during which preparations are made for the contract subject of negotiations by comprehending all contractual, financial and legal aspects thereof, and through which the rights and obligations of the parties that will arise from the contract are defined, along with the scope of responsibility incurred upon individuals for such obligations.

**Keywords:** negotiations, international trade contracts, contract negotiation, letter of intent, obligations and legal responsibilities, contractual responsibility

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### Introduction

With the development of international trade contracts, necessity has emerged to find a certain mechanism to organize these contracts, since entering into these contracts requires negotiations for their success. Someone summarizes this importance by saying: "If you come across a coherent trade contract, rest assured that there were earnest and complicated negotiations behind it."<sup>[1]</sup> Thus, negotiations are the underpinning beam for integrity of conclusion of international trade contracts. Through negotiations, prolonged and complicated discussions are made aiming at covering all legal and technical requirements of such contracts to be concluded. Building negotiations on a solid basis would surely lead to soundly concluding an international trade contract without having the same exposed to invalidation in the future<sup>[2]</sup>.

### Topic One

#### Characteristics and Stages of Negotiations in International Trade Contracts

This topic is divided into two sections, in the first of which we address the characteristics of negotiations in international trade contracts, then in the second we explore the stages of negotiations in international trade contracts.

### Subject One

#### Characteristics of Negotiations in International Trade Contracts

The Most notable difference between international trade contract and domestic trade contract is that the latter is principally subject to simplicity in conclusion thereof, where concurrence of proposal and acceptance for conclusion thereof would suffice, while the international trade contract, whether traditionally or electronically concluded, requires entering into negotiations before conclusion thereof for the purpose of arranging the matters relating to and sound drafting of the contract.

Negotiations are defined as "a dialogue between concerned parties through which they try to reach an agreement on a set of rules, obligations and rights, with the necessity of having the desire to reach an agreement."<sup>[3]</sup> They are also defined as "a dialogue between potential contracting parties for possible concurrence of wills in relation to the rights and obligations subject of the contract."<sup>[4]</sup> Furthermore, International Chamber of Commerce defined negotiations as "a process through which dialogue and discussion is made between parties, entailing the exchange of ideas and points of view for the purpose of reaching an agreement on a certain interest or with a view to find a solution to an economic, legal, commercial or political problem."<sup>[5]</sup>

Thus, based the above definitions, the most important characteristics of negotiations preceding the conclusion of an international commercial contract can be summarized as follows:

#### 1. Negotiations are subject to general terms of contracts

Negotiations are always held by consent of both negotiating parties without coercion or pressure, as either party enters into negotiations with the other party when on free will and with a real intention to negotiate. This freedom or will is the way capable of determining the effects and obligations arising from concluding the negotiated contract.<sup>[6]</sup>

The principle of freedom of negotiations is further established in Article One of The Principles of International Institute for the Unification of Private Law<sup>[7]</sup> - UNIDROIT, 1994, Rome, which provides for that "The parties

are free to enter into a contract and to determine its content." This principle is also embodied in several international agreements such as Vienna Convention on International Sale of Goods.<sup>[8]</sup>

Negotiating a contract results, upon having the parties thereto exchange the expression of concurrent wills on the subject matter of negotiation, to the creation of the negotiated contract that is governed by the general provisions set forth in the Civil Code.

## **2. Negotiations as a Transitional Interim Stage for Drawing up the Final Contract**

Basic objective of negotiations is to conclude, through discussions and exchange of documents and propositions, the international trade contract that the parties thereto strive to conclude. Subsequently, the terms discussed before concluding the final contract do not per se aim at concluding such contract but rather at preparing and arranging for the same. Thus, there will be the possibility of reaching or failing to reach the agreement, as the parties may succeed in reaching a final agreement and concluding the contract, which also may not happen i.e. not every negotiation would necessarily lead to a final contract, as we can perceive that this goal might not be achieved.<sup>[9]</sup>

If the negotiations are described as introductory and potential, then they are necessarily temporary since they are not the actual end, but rather a preliminary step toward concluding the final contract. Thus, negotiation last for a specific period until reaching an agreement on the key terms and legal elements composing the final contract, immediately upon concluding the latter, the negotiations come to end and are replaced by the final contract.

## **3. Negotiations are of International Nature and Require Specialization in their Subject Matter and Extensive Skills**

Execution of domestic contracts is certainly governed by the provisions of the national law, where no foreign law can apply thereto, since the matter is relating to transactions made between parties within specific geographic scope governed by a specific political authority. However, when the contract is an international one, in case of covering a foreign element, whether with respect to conclusion or execution thereof, or to the nationality or domicile of the contracting parties, then such an international contract shall be then governed by the provisions of the private international law, which allows the contracting parties freedom of choice of the applicable law.

Negotiations taking place within the framework of international trade contract between different parties are usually difficult and require more preparation and endurance. The most notable practical difficulties encountering such negotiations are that a party is usually from a country different from that of the other party, the matter that makes him take the onus of travel and time difference of distance. Moreover, the distance and time and place difference pose another problem relating to the difference of cultures and languages; as the contracting parties have to use a single language for facilitating this dialogue and negotiation, or even a party may rely on a translator to enable the other party to understand and comprehend the matters subject of negotiation<sup>[10]</sup>.

Proceeding with the negotiation process on the right course for reaching best results requires having extensive features and skills in the negotiator that assumes that role; therefore, entities and companies pay special attention to the selection of the members of the negotiation delegation in international trade contracts, which is often a multi individual and disciplinary team, as it includes technicians whose duties is to ensure conformity of the presented specifications to the demands of the negotiating parties, in addition to law specialists with the view to fill any loopholes, since a successful negotiation is subject to respecting of set of skills by the negotiator, such as understanding all psychological, environmental, cultural and social aspects of the other negotiator as well as the potentials, negotiation expertise, strengths and weaknesses, ability to cooperate, and persistence thereof.<sup>[11]</sup>

## **4. Negotiation as Potential Process**

Negotiations between parties takes place based on a prior agreement as referred to above thus, and based on the principle of freedom of contract, the parties do not necessarily reach the final result, since the negotiation of a contract entails a possible result that may or may not be accomplished. Hence, not every negotiation would necessarily lead to concluding such a contract,<sup>[12]</sup> and failure of negotiations would not result in holding either party responsible as long as they have bona fide acted.

### **Subject Two**

#### **1. Stages of Negotiations in International Trade Contracts and Their Legal Value**

Negotiations undergo several consecutive stages that vary from contract to another with a view to settle certain technical, financial and legal issues. Every stage results in entering into agreements and understandings aiming at concluding the final contract. Moreover, dividing the negotiation into stages would reveal the extent of success of negotiations through their successive stages. Stages of negotiations are as follows:

#### **2. Stage of Agreement on Negotiation and Commencement of Negotiation Process**

If the negotiation in international trade contracts is considered as a complicated and precarious process, the rule is that such a negotiation is to take place in an automatic and free manner between the negotiating parties. Every party has the unconditional right to refrain and withdraw provided that the same is not to mala fide take place.

In certain occasions, there might be a written agreement before proceeding with negotiation, so that the parties shall be bound by such an agreement on entering into negotiations and respect the agreed upon terms.<sup>[13]</sup> The intention of agreement on negotiation is to determine the general matters of negotiation and testing the waters between the parties as a preliminary step for the next negotiation stages without tackling the partial or technical aspects.

### **3. Stage of Entering Into Negotiation Contract**

After reaching an agreement between the contracting parties to international trade contracts on entering into negotiations, and with a view to avoid problems that may occur during the negotiations, especially in certain types of complex and intricate contracts that require precaution and prudence before concluding the final contract, and which may also require performing studies and diagnosing the needs intended to be negotiated, an agreement is usually made on the method of organizing the stages of negotiations, such as defining the period that studies of certain contractual matters require, as well as the method of testing the suitability of such matters to a party to the negotiations.

### **4. Stage of Reaching the Letter of Intent<sup>[14]</sup>**

Occasionally, stages of negotiations involve the expression by a party of the intent thereof to reach a final agreement on the transaction subject of negotiation, which has the form of a document in writing, and is commonly known as the letter of intent or the letter of understanding.<sup>[15]</sup> The letter of intent has an important role in international economic and commercial transaction, and it may take different forms and the effect thereof may vary according to the objectives and intentions of sought by the parties.

In spite entering into a letter of content, the general principle as to the freedom of negotiation without imposing certain restrictions upon the parties remains, and the free will continues to exist. Thus, it is apparent that the letter of intent is of no contractual value and is not binding upon the issuer thereof, but rather is an expression of intent, and therefore is of no legal value. However, tort for the damage arising from breach of the basic duty, i.e. the necessity of observing bona fides at the stage of negotiation.

Furthermore, it is perceivable to have the letter of intent take an obligatory form as if it contained specific obligations or if the phrases thereof entailed an agreement on certain matters; in such a case, we will have a preliminary agreement setting the framework and principles of the negotiation process. UNIDROIT Principles in Paragraphs One and Two of Article 4.2 state that the statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention, and that such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances<sup>[16]</sup>.

### **Stage of Signing with Initial**

Initialing means giving the parties to negotiations, who have reached a preliminary agreement on the terms of contract, the possibility to consult the entities that they represent for assessing the position. Thus, it does not express a complete agreement but upon signing the final contract. Accordingly, signing within initials plays a protective role for the negotiating parties so not to proceed with taking uncalculated positions that cause damages to the company for which the negotiation is made. It further grants the latter extra time for contemplation and consideration before concluding the final contract<sup>[17]</sup>.

## **Topic Two**

### **Obligations and Legal Responsibilities of Parties to Negotiations in International Trade Contracts**

Negotiations is that stages preceding the conclusion of the final contract as already discussed, and is considered as the most important and difficult stage, so that the success or failure of the international trade contract is subject to smoothly and well undergoing the preliminary stages. Therefore, negotiation teams with high competence and excellent performance assume this mission<sup>[18]</sup>.

We have also indicated that the negotiations take place within a scope of free will without the need for an agreement to set a framework for the negotiation process. In such a case, refraining from or cessation of negotiation on a bona fide basis shall not result in any legal effects. Negotiation can also be made within a contractual framework between the negotiating parties to organize the process of negotiation on their free will, where the parties in such a case assume the obligations arising from such an agreement, which we will address in Subject One.

Furthermore, causing damages by a party to the other by breaching the contractual obligations thereof- i.e. the negotiation contract, or by a mala fide action in absence of such a contract, results in holding the defaulting party responsible for the fault thereof who shall be liable for damages by means of compensation or actual execution in spite of the problems that the latter option poses in reality. Scope of legal responsibilities of the parties relating to negotiation in international trade contracts is considered as the most important and controversial matters relating to negotiations, which we will address in this Topic Two.

## Subject One

### Obligations of Parties to Negotiations of International Trade Contracts

The will of the parties preceding the final contract does not principally signify the will to commitment inasmuch as it embodies the possible commitment. Accordingly, commitments and principles to be respected during the negotiation stage are as follows:

#### 1. Bona Fide Obligation

This principle imposes upon the parties positive commitment, honesty and integrity, so that the negotiators are required to deal in an honorable and honest manner avoiding deception. Therefore, the negotiators are required to honor and commit to this principle.

Some international conventions have taken this principle into consideration and defined it, as Paragraph One of Article 7.1 of the International Institute for the Unification of Private Law Principles provides for that "Each party must act in accordance with good faith and fair dealing in international trade." The Vienna Convention on International Sale of Goods also addressed this principle where it emphasized the necessity of observing several basic matters in interpreting this Convention, including the respect of good faith in trade.

The bona fide obligations give rise to several secondary obligations such as the obligation to notification, the obligation to cooperate, where the first requires the negotiating party to notify the other party of all data and information relating to the contract subject of negotiation in order for the contracting parties to act on an informed will basis, in addition to stating all matters considered of importance to present before concluding the final contract, without any abstention or concealment so to render the negotiation transparent; while the second requires the negotiating parties to accurately and clearly define the needs and objectives, where the negotiator may require adequate clarifications in this respect <sup>[19]</sup>.

#### 2. Confidentiality Obligation

The other obligation is to maintain the confidentiality, which is often relating to the technical and technological aspects that require special protection from disclosure or use. We often find the same in technology transfer contracts since the negotiations on this contract are intricate and ramified in some occasions, and hard and complicated in other occasions, where many details are discussed during those negotiations and the other party is given access to several private confidential details and matters when the know-how of the technology is not patented.

Practical problems that may be posed in this respect include that when the buyer has the intent to familiarize himself with all technical aspects of the technology subject of negotiation in order to ensure the feasibility thereof and be assured that the consideration or the price to be paid is a fair price; while the seller attempts to maintain technology that he has with the highest level of confidentiality for the fear of becoming known to third parties and then, as he believes, control over utilization thereof would be lost. In this case, the seller often requires the buyer to sign an undertaking not to disclose the technological secrets to which he will have access during the negotiation stage <sup>[20]</sup>.

#### 3. Obligation to Commence Negotiations

This principle means proceeding with negotiations and starting the discussion and the exchange of proposition relating to the contract that the parties intend to conclude in the future. Both parties often agree on a scheduled date for starting the negotiations. This obligation may be assumed by one of the parties in which case it shall be bound to invite the other party to commence the negotiation by scheduling a date for commencement of the negotiations <sup>[21]</sup>.

#### 4. Obligation not to Cease the Negotiations

Other obligations of the negotiating parties in international trade contracts include the obligation not to cease the negotiations, i.e. each party shall have to continue the negotiation throughout all stages required for the negotiation rounds. The objective of stipulating for this obligation is to avoid tampering and manipulations that may occur during the stage of negotiation and to provide the minimum extent of earnestness. It is true that the general rule implies that negotiations are to take place in a free and unrestricted manner where either party may abstain from and cease the negotiations if the interest thereof so required on a bona fide basis, yet the obligation not to cease or withdraw from negotiations as meant here is not to mala fide do so with a view to cause damages to others <sup>[22]</sup>.

## Subject Two

### Legal Responsibilities of the Parties to Negotiations

Every negotiator has the freedom to cease or abstain from negotiation whenever desired, yet this freedom should not be in conflict with the dear need of the parties to feel secure, which feeling makes every negotiator proceed enter into negotiation while assured and has no fear of deception by the other party <sup>[23]</sup>.

Therefore, it is necessary to establish the rules of civil responsibility to guarantee effective legal protection to the negotiator and ensure a fair compensation thereto in case of sustaining damages as a result of the other negotiator's breach of obligations. Since the negotiations are the stage preceding the conclusion of the final contract, the responsibility is contractual in case of concluding the negotiated contract, or in tort in case of having no contract to negotiate.

### **1. Contractual Responsibility Arising from Negotiations in International Trade Contracts**

If the parties to negotiation manage during the stage of negotiation to conclude a contract with a view to organize the negotiation process, the stage of negotiation would have taken place by free will of the parties, and there will be an obligation to negotiate derived from the binding effect of the contracts entered into between the parties <sup>[24]</sup>. Negotiations have to take place in good faith, with the commitment not to cease the negotiation and to maintain confidentiality, in addition to other obligations the breach of which gives rise to the contractual responsibility of the party responsible for the breach. In applying the general rules regulating the provisions on contractual responsibility, the latter arises when three key elements exist; i.e. commission of a mistake, violation of an obligation that results in a damage, and the existence of a causality between the mistake and the damage, i.e. had it not been for the mistake, the damage would have occurred <sup>[25]</sup>.

### **2. Tort Resulting from Negotiations in International Trader Contracts**

As a general principle, negotiation in international trade contracts takes place within a free and automatic framework where the negotiating parties have no need for any contractual framework. Thus, if a party causes damages to the other in absence of an agreement regulating the negotiations, aforementioned requirements of the contractual responsibility cannot be applied for the simple reason of absence of a contract on negotiation. Hence, the affected party has no way to claim damages but through the rules of tort, since the source of responsibility here is breach of a general obligation imposed upon everyone that required individual to be cautious and prudent in order to avoid causing damages to others.

Whereas the conduct of the negotiating party caused damages to the other negotiating party, the former shall be held accountable for the consequences of the conduct thereof, as in the case of cessation of free negotiation or abstention there from, where such a cessation or withdrawal, even if permitted to the negotiating party and does not give rise to any responsibility as the individuals are more capable of weighing their own interest and accordingly acting, but when such a cessation or abstention results in damages to the other party and is mala fide, then the party responsible for the same shall be held responsible and liable for damages in accordance with the rules of tort <sup>[26]</sup>. Cases of unjustified cessation of negotiations include:

1. Unexpected cancellation of negotiation by a unilateral decision after reaching an advance stage in negotiation and after using great effort, time and considerable expenses.
2. When the party that ceased the negotiation has deliberately left the other party in a state of ambiguity and uncertainty as to the destination of the negotiations, and failure to inform the latter of the intent to cease the negotiation on time <sup>[27]</sup>.

Thus, we find that the responsibility in the negotiations of international trade contracts are not of a similar degree, as there is a contractual responsibility (having a negotiation contract in place) and tort (absence of a negotiation contract and existence of bad faith). The contractual responsibility is evidently more protective to the negotiating parties in the international trade contracts for several considerations; first, contractual responsibility is easy to establish for both parties and a breach cannot be addressed but through a provision on obligation, unlike tort that encourage the lack of earnestness in negotiation, the matter that results in having the rights of the negotiators forfeited. Second, adopting the principle of tort at the negotiation stage usually repel individual from entering into negotiations as they already aware that they are subject to the rules of tort and liable for compensation of all damages, even those unexpected. Which makes it even more difficult for them that they can be held accountable at any moment even if the cessation of negotiation automatically and bone fide takes place. Third, tort, in spite of the protection extended to affected negotiator thereunder by stipulating generous compensations thereto, which is a positive thing that encourages confidence and motivates people to conclude more international trade contracts, yet the real state of affairs reveals that there are many difficulties in substantiation that the negotiator would encounter, especially with the absence of a contract, and therefore the obligations of the parties are not accurately defined. Furthermore, proving the mala fide of the other negotiator is unfeasible in many occasions <sup>[28]</sup>.

### **Conclusion**

We have addressed through two topics the characteristics of international trade contracts, the obligations of the parties to the negotiation and the legal responsibilities arising from breaching these obligations by either party. In the light of this paper, we have reached the following findings and recommendations:

### **Findings**

1. Negotiations of international trade contracts are distinguished from the domestic contract negotiations by several characteristics, the most important of which is that they are governed in terms of provisions to the general rules of contracts despite their international nature and that they are a preliminary advanced stage for the final contract.
2. The most distinctive feature of the international trade contracts is that the parties have the freedom to refrain from the same at any time, the matter that gives the parties freedom to negotiate having no fear of any responsibility.

3. Negotiations are not a single stage or process, but rather a series of a consecutive stages with every stage entailing contracts and documents, so that each party can establish the essence of the contract on which negotiation is made, and to elect whether or not to conclude the contract.
4. There is a set of obligations imposed upon the parties to negotiations, the most notable of which are the bona fide obligation throughout all stages and actions of the negotiation process, the obligation to confidentiality, and the obligation to continue the negotiation and not cancel or cease the same in prejudiced and unjustified manner.
5. Due to the ramification of business of companies in the filed of international trade and the potential multiple contracting with a party, the emergence of mixed contractual responsibility and tort is conceivable.

### Recommendations

1. Companies at entering into negotiations on international trade contracts are required to execute an adequate contractual instrument that covers the stages and term of negotiation, schedule of negotiation process, in addition to the obligations of the parties and the responsibility for violation thereof.
2. Companies are required to execute and make available tools, instruments and memoranda at every stages of negotiation, such as letters of intent, nondisclosure and confidentiality agreements, etc.
3. Generally, the subject of contractual negotiations is to be given priority by the legislative branch for creating provisions regulating the same, whether relating to domestic or foreign contracts, in the light of risks of facing giant foreign companies and technology transfer companies in order to provide an adequate scope of protection to national business, business people and institutions.

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8. The Convention on Contracts for the International Sale of Goods was drafted by the United Nations Commission on International Trade Law and signed in Vienna in 1980. The Convention is occasionally referred to as the Vienna Convention, and entered into force as multipartite convention on January 1<sup>st</sup>, 1988.
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26. Mansour, *ibid*, 68.
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