

2. Duty of good faith

Two different approaches



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Each party has a general duty to conduct negotiations in good faith & fair dealing.

Art. 1104 French Civil Code

Contracts must be negotiated, formed and performed in good faith. This provision is a matter of public policy.

Section 1-203 of the UCC provides, “Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.” Good faith is defined at Section 2-103(j) as “honesty in fact and the observance of reasonable commercial standards of fair dealing.”

There is no general duty to be honest in the negotiations. Negotiations are adversarial in nature.

« It would defeat the essence of negotiation and hobble the marketplace to extend a duty of care to the conduct of negotiations, and to label's a party's failure to disclose its bottom line, its motives or its final position as negligent.(...) To impose a duty in this circumstances of this appeal could interject tort law as after-the-fact insurance against failures to act with due diligence or to hedge the risk of failed negotiations through the pursuit of alternative strategies or opportunities».

Supreme Court of Canada

Caveat emptor, buyer beware!