I would like to focus this entry on a recent development of Singapore relating to agreements to negotiate in good faith and some of the practical consequences that can arise from this case.

In the English common law, the traditional position has been that agreements to agree or agreements to negotiate was unenforceable. As the risk of opportunism, the limiting notion to this position was that such agreements were too uncertain to be enforceable. While the common law has gone into the rationale wherein why agreements to negotiate should not be treated differently from agreements to agree and that a case can be made for the former types of agreement to be enforceable, the writer does not propose to go into that here. It is suffice to state that the English common law position was readily accepted in Singapore and other common law jurisdictions.

This context makes the recent decision by the Singapore Court of Appeal, HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd [2012] SGCA 48 all the more fascinating and radical. This case essentially turned the English line of cases on its head and held that an express clause requiring parties to negotiate in good faith is solid and enforceable.

Without going deeply into the facts of the case, the parties were landlord and tenant and the lease agreement divided into rental terms but it also had a rent review mechanism wherein parties would “in good faith endeavor to agree” on the rental of the premises at the commencement of each rental term. A failure to agree at this stage would see the parties appointing three international firms of consent valuers to determine the market rental. If parties could not agree on the three firms in stage one, stage three provided for the President of the Singapore Institute of Surveyors and Valuers to appoint the valuers to determine the market rental. Problems arose, before negotiations for the next rental term began in London, the tenant engaged 7 valuers to conduct a valuation of the prevailing market rental. When negotiations commenced under stage one of the rent review mechanism, these valuations were not disclosed. An agreement was reached and the process moved on to stage two. When the landlord discovered about the prior valuations, it refused to proceed with the rent review process. Despite the tenant’s subsequently withdrawing the landlord from the valuations it failed to commission, the landlord commenced proceedings, claiming that the end result negotiations was in bad faith because the independence of the valuers had been compromised and at first the outcome cannot have been based on the landlords consent.

The High Court’s decision. In addition, the Court of Appeal held that the clause requiring parties to “in good faith endeavor to agree” was not void for uncertainty and was consistent with Singapore’s cultural and public interest to promote consensus.

What constitutes the concept of good faith? The Court of Appeal opined that it encompassed the subjective requirement of acting honestly and the objective requirement of avoiding accepted common law standards of fair dealing in the performance of identified obligations. The latter requirement included a duty to act fairly having regard to the legitimate interests of the other party and a duty not to unfairly profit from the known ignorance of the counterpart.

The High Court held that by not disclosing the valuations at the call of negotiations, the landlord was not acting in good faith. If not remedied, this would result in any agreement voidable. In this case, the landlord was subsequently remedied by the tenant’s disclosure of the valuations.

The writer does not propose to go into a detailed analysis of this case. Instead, it is proposed to briefly outline some observations about this case.

First, to the writer’s mind, this case certainly a radical step for the Singapore Court of Appeal to have taken. The writer is certainly not convinced that the English position on agreements to negotiate in good faith is necessarily correct. If you consider that this is a case where an agreement to negotiate in good faith is solid and enforceable, it is a precedent that may set a new trend in Singapore and other common law jurisdictions if not otherwise so

Secondly, a technical distinction could have been made between an agreement to agree versus the writer submits should remain unenforceable for uncertainty and an agreement to negotiate which is not necessarily uncertain. It is submitted that this case was in actuality an agreement to negotiate and not an agreement to agree.

Thirdly, it is interesting to see that the case centered on whether its approach bore any particular relevance to Singapore’s culture. While Singapore is a multi-ethnic society, values harmony and consensus (and this is not limited to Asian cultures), this decision should not be based upon policy. It is sufficiently that even in a theoretical approach, this decision is profound and can cross cultural contexts.

Fourthly, the court’s course of what constituted good faith can be considered sincere. For example, it is commonplace in negotiation for parties to meet international valuers and not actually discuss the theoreticalities of the valuations and, if certain set out in prior agreement, such a party can be widely interpreted as being in good faith.

Finally, the Court of Appeal held that there was no difference between an agreement to negotiate and an agreement to agree. The writer cannot be convinced. But if this is the case, then parties to a mediation are only treating by the requirements of good faith.

In conclusion, while this entry has largely not directly discussed mediation, it is clear that this case can greatly impact on future actions in mediation. Further, it also raises the question of voluntary matters and an express binding belief which is in the good faith of the court in its form. A different and an obligation a mediator might have when such behaviour is submitted. If it should refer to send how this analysis develops. As the choice court-processing, "how many are used in recording forms". These are interesting times indeed.