A Singapore Development: Agreements to Negotiate in Good Faith

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I would like to focus this blog entry on a recent development of Singapore relating to agreements to agree/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 an agreement to agree or an agreement to negotiate was unenforceable. As the risk of simplification, the thinking behind this position was that such agreements were too uncertain to be enforceable. While the writer can and has gone into the reasons elsewhere why agreements to negotiate should 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 sufficient to note 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 valid 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) had a 3-stage rental review mechanism where parties would "in good faith endeavor to agree" on the rental of the premises for each rental term. A failure to agree at this first stage would see the parties appointing three international firms of licensed valuers to determine the market rental (stage two). If parties could not agree on the three firms in stage two, 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 when, before negotiations for the next rental term was to begin, the tenant engaged 7 valuation firms 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. No 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 subsequently sharing with the landlord the valuations it had commissioned, the landlord commenced proceedings, claiming that the rent review mechanism was no longer operable as the independence of the valuers had been compromised and as 7 out of 8 available valuers had already been engaged, the tenant had gained an unfair advantage.

The High Court held that the rent review process remained operable and that the valuation firms appointed under stage two were not professionally bound by previous valuations done. The Court of Appeal affirmed 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 observing accepted commercial 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 court held that by initially not disclosing the valuations at the start of negotiations, the tenant was not acting in good faith. If not remedied, this would have rendered any agreement voidable. In this case, the breach 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 is certainly a radical step for the Singapore Court of Appeal to have taken. The writer approves as it does encourage the consensual and amicable resolution of disputes. It also seeks to set the norms for what is acceptable and unacceptable negotiating behaviour.

Secondly, while a technical distinction could have been made between an agreement to agree (which the writer submits should remain unenforceable for uncertainty) and an agreement to negotiate (which is not necessarily uncertain), it is submitted that the clause in this case was in actuality an agreement to negotiate and as such correctly enforceable.

Thirdly, it is interesting to note that the court seemed to justify its approach based, in part, on Singapore's culture. While it is arguably true that Singapore, like many Asian cultures, values harmony and consensus (and this is not limited to Asian cultures), this decision should not be based just on this policy. It is submitted that even on a technical legalistic approach, this decision is justifiable and can cross cultural contexts.

Fourthly, the court's views of what constitutes good faith can be considered onerous. For example, it is commonplace in negotiations for parties to withhold information while not actually crossing the threshold into lying and misrepresentation. While the court acknowledges that parties in negotiations can in good faith have regard to their own commercial self-interests, it is certainly not clear at this point which actions will tip a party into the realm of bad faith.

Finally, the Court of Appeal had commented that there was no difference between an agreement to negotiate and an agreement to mediate. This must surely be correct. But if this is the case, then parties to a mediation are similarly bound by the requirements of good faith.

In conclusion, while this entry has largely not directly discussed mediation, it is clear that this case greatly impacts on parties' actions in mediation. Further, it also raises the question of mediators' ability to detect behaviour which is in lack of good faith or in bad faith (is there a difference?) and what obligations a mediator might have when such behaviour is detected. It should be interesting to see how this area develops. As the chinese curse/saying goes, "may we live in interesting times". These are interesting times indeed.