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AGREEMENTS TO NEGOTIATE IN GOOD FAITH

HSBC Institutional Trust Services (Singapore) Ltd v. Toshin Development Singapore Pte Ltd[1]

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I. INTRODUCTION

It has been the position for quite some time in English jurisprudence that an agreement to agree and an agreement to negotiate are invalid and unenforceable. This was the position established in *Walford v. Miles*[2] and *Courtney & Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd*.[3] The rationale for this was that such agreements were too uncertain to be enforceable. This is certainly true for an agreement to agree; one could not accurately predict whether an agreement is possible in every case especially when there may be structural constraints to the factual matrix that make an agreement impossible.

One would have thought that an agreement to negotiate (sometimes with the additional requirement of being "in good faith") would have been less objectionable. After all, one was simply agreeing to enter into the negotiation process without saying that an agreement would eventuate. The reasons for the court's objection to enforcing these agreements are less clear and range from saying that there is no certainty to when the negotiation can and should terminate to stating that the notion of negotiating in good faith was inherently repugnant to the nature of adversarial negotiation.

This position was adopted by the Singapore High Court in *Grossner Jens v. Raffles Holdings Ltd*,[4] *United Artists Singapore Theatres Pte Ltd v. Parkway Properties Pte Ltd*,[5] and *Sundercan Ltd v. Salzman Anthony David*.[6]

For a period of time, these arguments were extended to agreements to mediate, the idea being that mediation was a form of assisted negotiation. Over the years, various attempts were made to distinguish agreements to mediate from agreements to

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1 [2012] 4 S.L.R. 738 (C.A.) [*HSBC Services*].
2 [1992] 2 A.C. 128 (H.L.) [*Walford*].
3 [1975] 1 W.L.R. 297 (C.A.).
4 [2004] 1 S.L.R.(R.) 202.
5 [2003] 1 S.L.R.(R.) 791.
6 [2010] SGHC 92 [*Sundercan*].

negotiate and the English court in *Cable & Wireless plc v. IBM United Kingdom Ltd*[7] put to rest this issue and held that an agreement to mediate was enforceable. This was an important development and reflected the change in philosophy and attitude of the courts towards A.D.R.[8] processes, in particular mediation. Of course, *Cable & Wireless* did not affect the cases relating to agreements to negotiate which remain good law in England.

A recent decision of the Singapore Court of Appeal, *HSBC Institutional Trust Services (Singapore) Ltd v. Toshin Development Singapore Pte Ltd*, has turned this on its head and held that an express clause requiring parties to negotiate in good faith is valid.

II. The Facts and The Decision

The appellant landlord, HSBC Institutional Trust Services (Singapore) Ltd ("HSBC Services") was party to a lease agreement with the respondent tenant Toshin Development Singapore Pte Ltd ("Toshin") for a 20-year lease expiring in June 2013 with an option on Toshin's part to renew the lease for a further 12 years. The first 20-year term was divided into rental terms and was subject to a rent review mechanism which provided the determination of the rent for each new rental term. This was captured in clause 2.4(c) of the lease agreement. This writer does not propose to reproduce clause 2.4(c) in its entirety. It is sufficient to note that the rent review mechanism provides for a three-stage process to determine new rent for each new rental term.

The first stage ("Stage One") requires parties to "in good faith endeavour to agree on the prevailing market rental value" which would then constitute the rental for the new rental term.[9]

The second stage ("Stage Two") provides that where parties fail to reach agreement three months before the commencement of the new rental term, the parties would jointly appoint three international firms of licensed valuers to separately determine the prevailing market rental value of the property. The rent for the new rental term would be determined by averaging out the three valuations.

If the parties are unable to agree on the three firms to be appointed in the second stage, the third stage ("Stage Three") provides for the President of the Singapore Institute of Surveyors and Valuers ("SISV") to nominate the remainder or the entirety of the valuers that the parties have not agreed upon. The rent for the new rental term would be the average of the three independent valuations produced as a result.

Before arrangements had been made to discuss the rent for the new rental period, Toshin independently engaged seven valuers to determine the prevailing market rent of the property as at 8 June 2010 (which was exactly one year before the last rental term of two years was to begin).

In January 2011, the parties entered into discussions to agree on the new rent for the last rental term. No agreement on the rent was reached and the parties proceeded

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7 [2002] 2 All E.R. (Comm.) 1041 (H.C.) [*Cable & Wireless*].

8 While the acronym "A.D.R." has traditionally been taken to refer to Alternative Dispute Resolution, different references have surfaced over the years to include "Appropriate Dispute Resolution" and "Amicable Dispute Resolution": see Joel Lee, "ADR in Singapore" in *ADR in USA, Europe and Asia* [Intersentia, forthcoming in 2013].

9 *HSBC Services*, *supra* note 1 at para. 6.

to Stage Two of the rent review mechanism. Preliminary discussions were had on selecting the three valuation firms and Toshin did not disclose to HSBC Services that it had previously commissioned and received seven valuations.

These seven valuations came to light when one of these valuers, CB Richard Ellis (Pte) Ltd ("CBRE"), informed HSBC Services that it had earlier been appointed by Toshin to conduct a similar rental valuation. When confronted with this, Toshin disagreed that jointly appointing CBRE would give rise to a conflict of interest and took the view that licensed valuers would be independent in determining market rental for the property. Toshin did not, at this point, reveal that it had also engaged six other valuation firms.

HSBC Services responded by asking the SISV whether there were reasonable grounds to exclude CBRE from the rent review process. It also wrote to eight international valuation firms in Singapore, only to discover the valuations commissioned by Toshin. This was also conveyed to the SISV for its views. The SISV responded by saying that firms that had provided valuations before the rent review exercise should be excluded from the rent review exercise.

Needless to say, this did not bode well for the relationship between the parties. HSBC Services was concerned that Toshin's actions put it in a position of advantage for the process of selecting valuers for the rent review exercise. HSBC Services subsequently sent Toshin letters asserting, *inter alia*, that Toshin's actions had rendered the rent review mechanism inoperable and that it was in breach of the lease agreement as it had acted in bad faith.

In a bid to repair the relationship and to move the matter along, Toshin provided HSBC Services with copies of the valuation reports provided by five firms which had been shortlisted by the parties for the rent review exercise. These reports provided the dates and figures for the valuations but redacted confidential information. Toshin also suggested that the parties jointly instruct the three valuation firms that would eventually be appointed to "be independent and fair to both parties" and "shall not be bound by any previous valuations which they have carried out for either party".[10]

HSBC Services was dissatisfied and commenced proceedings seeking a declaration that the rent review mechanism had been rendered inoperable. In the High Court, Lai Siu Chiu J. held that the rent review mechanism had not been rendered inoperable.[11]

First, Lai J. had no concerns about the seven valuers engaged by Toshin being bound by the views expressed in their previous valuations. This was bolstered by the fact that the three valuers in Stage Two would be jointly appointed and instructed. Lai J. also held that even on the application of a lower threshold test of apparent bias, there was no suspicion or likelihood of bias.

Secondly, Lai J. held that since the initial valuations were not relevant to the rent review mechanism and that the three jointly appointed valuers were not bound by any earlier valuations done, Toshin did not gain any unfair advantage. As such, HSBC Service's application was dismissed.

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[10] *Ibid.* at para. 16.

[11] *HSBC Institutional Trust Services (Singapore) Ltd v. Toshin Development Singapore Pte Ltd* [2012] SGHC 8.

On appeal, HSBC Services maintained its argument that the rent review mechanism was rendered inoperable on two grounds. First, that the independence of the valuation firms that might be potentially appointed in Stage Two had their independence compromised. Secondly and in the alternative, that Toshin's actions were in breach of an implied duty of good faith under the lease agreement.

Toshin's response was that there was no actual or apparent bias necessary to challenge any valuation firm's appointment on the facts. Further, it argued that an implied duty of good faith in relation to an agreement to agree was meaningless at law. As such, it maintained that the rent review mechanism remained operable.

The Court of Appeal pointed out that the crux of the matter revolved around whether Toshin's actions in commissioning the seven valuations prior to the commencement of negotiations in Stage One of the rent review mechanism was in breach of the lease agreement and even if it were not, whether Toshin was obliged to disclose those valuations in light of the requirement in clause 2.4(c)(i) for the parties to "in good faith endeavour to agree" on the prevailing market rental for the premises.

The court broke the problem down into three issues. First, whether the clause requiring parties in "good faith endeavour to agree" was valid. Secondly, if the clause was valid, what the content of the obligation of "good faith" was. Thirdly, whether Toshin was in breach of that obligation.[12]

On the issue of whether a clause requiring parties in "good faith endeavour to agree" was valid, the Court of Appeal held that "there is no good reason why an express agreement between contracting parties that they must negotiate in good faith should not be upheld".[13] In doing so, the court considered three broad matters.

The first matter relates to what this writer terms as the 'conceptual incongruity' argument. Put simply, a duty to negotiate in good faith cannot be upheld because it is diametrically opposed to the inherent adversarial nature of negotiations. This argument was raised by Toshin, who relied upon the House of Lords' decision in *Walford*.[14]

The Court of Appeal noted that the position in *Walford* was accepted in Singapore by *Sundercan*,[15] but also noted that the High Court in *Sundercan* had applied *Walford* without considering jurisprudential developments in other jurisdictions.

The Court of Appeal distinguished the present case from *Walford* by drawing a line between pre-contractual agreements to negotiate (*à la Walford*) and agreements to negotiate within the context of a wider existing contractual framework. In the latter case, the court "hesitate[d] to characterise the position of the Parties as being strictly 'adversarial"' and opined that unlike parties engaged in pre-contractual negotiations, "the Parties [were] not free to simply walk away from the negotiating table for no rhyme or reason."[16] By entering into the lease agreement, the parties had committed to negotiate in good faith the rent for every new rental term.

The court referred to the decision of the Supreme Court of New South Wales in *Aiton Australia Pty Ltd v. Transfield Pty Ltd*[17] (which involved a clause in a building

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12 *HSBC Services*, *supra* note 1 at para. 30.
13 *Ibid*. at para. 40.
14 *Supra* note 2.
15 *Supra* note 6.
16 *HSBC Services, supra* note 1 at para. 37.
17 (1999) 153 F.L.R. 236.

contract requiring parties to negotiate any dispute in good faith before resorting to legal action) and opined that "when, as part of a wider existing contractual framework, there is a clause requiring parties to negotiate… in good faith, such negotiations need not necessarily be adversarial and hostile". Instead, it calls "for a consensual approach to resolve the identified matters as part of the performance of the broader existing agreement." In this context, parties are entitled to consider "their own commercial self-interests so long as their conduct does not involve bad faith."[18]

Closely related to this is the second matter, the 'uncertainty' argument. Put simply, an agreement to negotiate in good faith is unenforceable because it is not sufficiently certain. In Lord Ackner's words, "[t]he reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty."[19] This is in essence a requirement for the formation of a valid contract.

The Court of Appeal, while acknowledging the theoretical correctness of this view, dismissed its applicability to the clause in this case. It opined that even though agreement cannot be guaranteed, parties are obligated to "try as far as reasonably possible to reach an agreement."[20] The court went on to draw a parallel between agreements to negotiate in good faith and agreements to refer a matter to mediation. They also noted the similarity with 'best endeavour' clauses which have been upheld by the High Court[21] and the Court of Appeal.[22]

The third matter that the court referred to was policy and public interest. In upholding the clause to negotiate in good faith, the court opined that such an agreement was not contrary to public policy and that it was in fact in the public interest to support methods of amicably managing and resolving potential disputes.[23] The court went on to opine that clauses to negotiate in good faith "are consistent with [Singapore's] cultural value of promoting consensus whenever possible" and that "*it is in the wider public interest… to promote such an approach towards resolving differences.*"[24]

Having decided that the clause in question was enforceable, the court turned to the issues of what the content of the obligation of good faith was and whether it had been breached. The court's decision can be distilled into a number of propositions. First, the concept of good faith was "reducible to a core meaning" and "encompasses the threshold subjective requirement of acting honestly, as well as the objective requirement of *observing accepted commercial standards of fair dealing*."[25]

Secondly, the content of the obligation is context-dependent and is to be determined by the "commercial nature and purpose of the contract in question."[26] Put another way, what the court will deem as having fulfilled the requirement of good faith will vary from context to context.

For example, in the case at hand, parties had committed to determine the market rent for the premises. To the court's mind, this required parties to faithfully cooperate

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18 *HSBC Services, supra* note 1 at para. 39.
19 *Walford*, *supra* note 2 at 138.
20 *HSBC Services*, *supra* note 1 at para. 43.
21 *Ong Khim Heng Daniel v. Leonie Court Pte Ltd* [2000] 3 S.L.R.(R.) 670; *Justlogin Pte Ltd v. Oversea-Chinese Banking Corp Ltd* [2004] 1 S.L.R.(R.) 118.
22 *Travista Development Pte Ltd v. Tan Kim Swee Augustine* [2008] 2 S.L.R.(R.) 474.
23 *HSBC Services*, *supra* note 1 at para. 40.
24 *Ibid*. [emphasis in original].
25 *Ibid*. at para. 45 [emphasis in original].
26 *Ibid*. at para. 49.

in pursuit of this common purpose which incorporated "*an obligation during the course of negotiations not to attempt to unfairly profit from the known ignorance of the other*."[27] This dictated the disclosure of all material information, and this included the valuations that had been done by Toshin.[28] Failure to disclose this constituted a breach of its good faith obligation.[29]

It is important to be clear that it was not the commission of the valuations that breached the good faith obligation. The court accepted that the parties may have had legitimate commercial reasons to obtain an interim valuation. Here, in the context of the rent review mechanism, it was the non-disclosure that Toshin had commissioned seven different valuations which breached the good faith obligation.[30]

Thirdly, the court was clear that a breach of the obligation of good faith was remediable by disclosure.[31] If the breach was not remedied, then any agreement reached as a result would be voidable.[32]

Having decided that there was a breach and that the breach had been remedied, the court turned to consider whether Toshin's act of commissioning the seven valuations had rendered the rent review mechanism inoperable. For the purposes of this note, it is sufficient to note that the court opined that the mechanism was still operable as the valuers were still able to render a professional and objective valuation.

Based on these findings, the appeal was dismissed.

III. Commentary

This case certainly moves us into uncharted waters. It is therefore important to ensure conceptual clarity so that the law is sufficiently clear to guide parties and their legal advisors in their commercial and business dealings. In this case, many similar but not identical terms have been used. For ease of discussion, the various distinctions are:

- The *nature* of the obligation: is it an agreement to agree or an agreement to negotiate?
- The *context* of the obligation: is it pre-contractual or part of an existing contractual framework?
- The *content* of the obligation: does it explicitly provide for "good faith" or not? What does this obligation entail?

A. *Nature of the Obligation*

On the *nature* of the obligation, the starting point in *Walford* is that neither an agreement to agree nor an agreement to negotiate is valid. As there can never be a guarantee that a negotiation will result in an agreement, this writer agrees with the position that an agreement to agree is invalid on the basis that it is not sufficiently certain. This

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[27] *Ibid*. at para. 50 [emphasis in original].
[28] *Ibid*. at para. 51.
[29] *Ibid*. at para. 52.
[30] *Ibid*. at para. 53.
[31] *Ibid*. at para. 55.
[32] *Ibid*.

writer has argued elsewhere[33] that agreements to negotiate should be distinguished from agreements to agree in that one can build in sufficient certainty for a court to determine if the agreement has been complied with. For example, an agreement to negotiate can be made certain by specifying a time frame in which the negotiations are to be conducted after which other mechanisms kick in.

This appears to be the position taken by the Court of Appeal in overcoming the 'uncertainty' argument and this analysis is consistent with the relevant clause in this case and it can be argued that this outcome should be limited to clauses which have this certainty built in.

However, it is interesting to speculate what the court would have done if the clause in question merely stated that "the parties agree to negotiate in good faith the rent for the new rent period" without any specification of when Stage Two of the rent review mechanism would kick in. This writer submits that courts should adopt a practical and robust approach to this and imply a reasonable period of time (appropriate for the context and complexity of the negotiation in question) for the negotiations to be conducted. This would be supported by the court's statement that parties are obligated to "try as far as reasonably possible to reach an agreement."[34]

There is also the question of whether it is necessary for the requirement of "good faith" to be expressed. This writer's view is that where parties agree to negotiate, it should be taken that they have agreed to do so in good faith. Put another way, there is no real need to explicitly state that parties have agreed to negotiate in good faith. Indeed, it would be absurd to say that parties are entitled to negotiate in bad faith, or at the very least in lack of good faith, simply because the clause did not state "good faith". Policy and common sense dictate that no person would or should agree to negotiate in bad faith.

That aside, this writer would have liked to see the Court of Appeal make clear two matters. First, the court could have made explicit the distinction between an agreement to agree and an agreement to negotiate. At the moment, the court seems to have accepted Lord Ackner's position in *Walford* that they are both insufficiently certain. While the court took the position that *Walford* was not applicable, it is not clear why this is so. This is important because on the facts, the clause in question reads like an agreement to agree (which this writer agrees should be invalid). Of course, it is arguable that in this case, even though the clause read like an agreement to agree, it was in reality an agreement to negotiate. It would have been good for the court to make clear that an agreement to negotiate is sufficiently certain to be valid and to give clarity on the circumstances in which this is so.

Secondly, a significant part of Lord Ackner's reasoning in *Walford* is based on the 'conceptual incongruity' argument, *i.e.* because parties to a negotiation are necessarily adversarial, a clause requiring them to negotiate in good faith is nonsense. The Court of Appeal had distinguished the present case by saying that this was an agreement to negotiate in the context of a pre-existing contractual framework (where relationships would not be adversarial) and not a pre-contractual negotiation (where as Lord Ackner suggests, and the Court of Appeal seems to accept, the relationship would be adversarial).

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[33] See Joel Lee, "The Enforceability of Mediation Clauses in Singapore" [1999] Sing. J.L.S. 229 [Lee, "Enforceability"] and, by the same writer, "Mediation Clauses at the Crossroads" [2001] Sing. J.L.S. 81.

[34] *HSBC Services*, *supra* note 1 at para. 43.

While this writer agrees that the court was correct in that in the context of a pre-existing contractual framework, the relationship between the parties is not necessarily adversarial, it is submitted that the 'conceptual incongruity' argument is misguided on two fronts.

First, that parties can be adversarial in the context of a negotiation is not a legal argument against the validity of an agreement to negotiate. Parties can be adversarial in a negotiation and still settle. Anecdotal evidence of decades of eleventh-hour settlements before trial is testimony to this. Further, an adversarial relationship is not mutually exclusive with the requirement of good faith. Lawyers representing clients in court (in the common law context) are by definition in an adversarial relationship. Yet, would anyone disagree that a majority of them were acting in good faith?

Further, there is no guarantee that negotiations in the context of a pre-existing contractual framework will necessarily be non-adversarial. The reverse is also true. Negotiations in a pre-contractual context are not necessarily adversarial. This stems from Lord Ackner's impoverished view of what negotiation is or can be. Both negotiation theory and practice have moved on to encompass collaborative and amicable forms of resolving disputes. The correct issue to have focused on is not whether a negotiation would be adversarial but whether the clause is sufficiently certain for it to be valid.

B. *Context and Content of the Obligation*

On the *context* of the obligation, it is clear from the case that the Court of Appeal's ruling is limited to agreements to negotiate in the context of a pre-existing contractual relationship. As discussed earlier, part of this is based on the assumption that negotiating relationships in these contexts will not be adversarial. If the arguments made above in relation to 'conceptual incongruity' are correct,[35] then the validity of agreements to negotiate (as opposed to agreements to agree) should be equally valid where there is no pre-existing contractual relationship. Put another way, as long as there is no concern about contractual uncertainty, an agreement to negotiate should be taken to be valid.

Of course, this writer appreciates that this might go too far for some. Perhaps an intermediate position might be where there is a pre-existing working relationship where the expectation is that parties have committed to working out a deal and should be expected to "try as far as reasonably possible to reach an agreement."[36] For example, this may occur in circumstances where parties have committed to working out a deal and like many commercial negotiations may drag over a period of time. It is reasonable to expect parties to make good faith efforts to come to a deal. This is even more so if one party has reasonably relied on this expectation. Another example might be that parties might have had a long working relationship over many contracts and while they are not in an existing contractual relationship at the moment, it can be reasonably expected for them to make good faith efforts to negotiate an agreement.

It is important to note that we have begun to shade into the *content* of the obligation. It has been submitted that agreements to negotiate are, subject to requirements of

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[35] See Part A above.

[36] *Ibid.*

contractual certainty, enforceable and the content of the obligation is a variable one taking into account, *inter alia*, the nature of the relationship, whether working or contractual. Of course, it must be correct to say that the content of what good faith entails is context-dependent. This is especially where the court explicitly opines that there is both an objective and subjective element to good faith.

In this case, disclosure is part of acting in good faith. Non-disclosure breaches that obligation. It is important to highlight that the proposition is not that in every case, full disclosure is part of the obligation of acting in good faith. It is in *this case*, *with its particular context and circumstances*, that disclosure is required. In some other case, disclosure *per se* is not part of the good faith obligation. This is important because nothing in good *collaborative* negotiating practice dictates that full disclosure be made. Often, negotiators are expected, as part of their preparation, to explore their walk-away alternatives and standards of legitimacy by which to measure the viability of their agreement. In this case, it could be said that Toshin was doing exactly this. Divorced from the context of this case, it would be onerous to say that Toshin was obligated to reveal the data it had gathered. However, put in the context of the rent review mechanism, non-disclosure became significant.

Of course, this writer acknowledges that while this sounds great, in practice, it is a bit more murky. Practitioners eschew uncertainty and this case certainly creates uncertainty in terms of what the content of good faith entails. If the content of good faith is determined on a case-by-case basis, *i.e.* contextual, then it is very hard for business people and practitioners to predict what behaviour is acceptable and what is proscribed. Further, it will be hard to know when parties may legitimately withdraw from negotiations in their own self-interest. At one level this is unavoidable. However, it is submitted that the beauty of the common law is its flexibility to formulate tests that can meet the myriad of permutations that could occur. Moving forward, what is important is for the court to provide more guidance in terms of determining what good faith behaviour is. A workable measure of good faith is being explored in a separate piece.

C. *Other Relevant Issues*

Apart from these observations about the nature, context and content of the obligation, it is useful to make a number of other points.

First, the Court of Appeal opined that it was in the public interest for agreements to negotiate in good faith to be upheld. This writer agrees. It is also interesting to note that the court also opined that that upholding such clauses was "consistent with [Singapore's] cultural value of promoting consensus whenever possible."[37] It is submitted that this detracts from the overall value of the proposition. While it is not inaccurate to say that the cultural value of harmony among the collective is a strong theme that underlies Asian and Singapore culture,[38] this might lead some who are less interested in consensus to limit the proposition to cultural peculiarities. This writer submits that this should be a universal priority. Where possible, amicable

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[37] *Ibid.* at para 40.

[38] See Joel Lee & Teh Hwee Hwee, "Asian Culture—A Definitional Challenge" in Joel Lee & Teh Hwee Hwee, eds., *An Asian Perspective on Mediation* (Singapore: Academy Publishing, 2009) 43.

forms of dispute resolution and management should be resorted to for no other reason than it would make the world a better place.

Secondly, in coming to its decision to uphold an agreement to negotiate in good faith, the court, in a throwaway line, opined that "[i]n principle, there is no difference between an agreement to negotiate in good faith and an agreement to submit a dispute to mediation."[39] In the jurisprudence and writing related to the validity and enforcement of mediation clauses, arguments against enforcement have in part been based on the invalidity and unenforceability of agreements to negotiate.[40] It is therefore interesting that the court here used an agreement to mediate to bolster the position to uphold an agreement to negotiate. This is significant because it dispels any doubt, at least in the court's mind, that a mediation clause is valid. This in turn signifies how much mediation, as a form of dispute resolution, has become part of the Singapore legal system.

Thirdly, it is important to point out that the court had limited its query to whether an agreement to negotiate is valid and should be upheld as opposed to whether it should be enforced. It stated clearly that it was "not being asked to determine whether it can compel the Parties to negotiate… in good faith"[41] and that the Singapore courts "should not be overly concerned about the inability of the law to compel parties to negotiate in good faith".[42]

Of course, this begs the question of "what if the court was asked to enforce (as opposed to declare the validity) of an agreement to negotiate?" The typical scenario would be where two parties have earlier agreed to an agreement to negotiate (this discussion will be equally applicable to agreements to mediate as well as multi-tiered dispute resolution clauses) and when a dispute arises, one party chooses to proceed directly to court proceedings and refuses to participate in the agreed process for dispute resolution.

It is clear from the case that the court has no issues with upholding an agreement to negotiate and to determine if a party was in breach of its good faith obligation as long as parties have engaged in negotiations. However, the statements of the court about enforcing such clauses seems to imply that they may not intervene if one party chooses not to engage in negotiation despite the existence of an agreement to negotiate.

This implication is troubling and seems at odds with the court's views that "[t]he choice made by contracting parties… on how they would like to resolve potential differences between them should be respected"[43] and that "'negotiate in good faith' agreements do serve a useful commercial purpose in seeking to promote consensus and conciliation in lieu of adversarial dispute resolution… [which] are values that our legal system should promote."[44] If there is no mechanism for compliance, then one party can ignore an agreement to negotiate with impunity, leaving the other party with no real remedy.

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39 *HSBC Services*, *supra* note 1, at para. 43.
40 Lee "Enforceability", *supra* note 33.
41 *HSBC Services*, *supra* note 1 at para. 44.
42 *Ibid.* at para. 45.
43 *Ibid.* [emphasis omitted].
44 *Ibid*.

It is submitted that if the Singapore courts are prepared to uphold the validity of an agreement to negotiate, they should take the further step of providing the means to enforce such agreements. Enforcement does not have to be in the positive form of compelling parties to engage in the process but to simply be willing to stay proceedings until the agreed dispute resolution processes have run its course. This is no different from the court staying proceedings based on 'foreign jurisdiction' clauses. It does not compel parties to sue in the agreed forum but will choose not to exercise its jurisdiction so as to not sanction a breach.

This writer has explored elsewhere the issues relating to and the desirability of enforcement *vis-à-vis* agreements to mediate and does not propose to reproduce those arguments here.[45] It is sufficient to note that it is important to send a clear message that the court will hold parties to their freely negotiated dispute resolution mechanisms and will not sanction a breach of that agreement.

To be fair, enforcement was not the issue before the Court of Appeal and if it had been, the court may well have chosen to enforce an agreement to negotiate.

Fourthly, one of the issues that plague mediators is whether parties are engaged in mediation in good faith. This is especially important where Order 59 of the *Rules of Court*[46] provide for cost sanctions dependent on parties' behaviour *vis-à-vis*, *inter alia*, mediation. It is trite to say that any developments with regards to the content of good faith can only help mediators in this regard.

The final point relates to private international law. This was not considered by the Court of Appeal but it would be foolish to ignore its importance in the context of the increasing number of cross-border transactions. It is conceivable that there could be a contract between international parties with a clause that provides for an agreement to negotiate in good faith that is governed by the law of a country which is different from Singapore. On these parameters, if the law of that country does not enforce an agreement to negotiate in good faith, then there is no question. It would be trickier if the contract was governed by Singapore law but was sued upon in another country. On the assumption that that country adopts a similar private international law to Singapore, then theoretically, the agreement to negotiate should be enforceable subject to the public policy of that country.

IV. Conclusion

An overly legalistic and outdated approach has been adopted for too long when it comes to the question of the validity and enforceability of agreements to negotiate and agreements to mediate. This has put the law out of sync with practical and commercial considerations as well as developments in negotiation thinking and practice. It is also out of pace with the growth of the A.D.R. movements around the world.

This is an outstanding step taken by the Court of Appeal and, it is submitted, a step in the correct direction. While there is still much uncertainty surrounding this area, this decision opens up areas that hitherto have not been available for real consideration. It remains to be seen what developments the flapping of this case's butterfly wings will bring about.

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[45] *Supra* note 33.

[46] Cap. 322, R. 5, 2006 Rev. Ed. Sing.