BANKING ON CORPORATE

BY NEILL MAY

The unenforceability of 'agreements to agree'

There is so much that is annoying, and simply not enough time to complain about it all. That does not mean I don't make a good faith effort to complain about as many of those annoyances as time, and the patience of others, permit. I think of it as a service, where the complaints become "insights." E-mail etiquette is a metaphorical gold mine for annoyances. For example, it is difficult to understand why a group of 40-odd recipients on an e-mail trail needs to know one individual "will respond soon." Context also affects annoyances. For example, words mispronounced once are bothersome, but repetition of the mispronunciation ranges from annoying to hilarious.

Lawyers are far from immune. The space limits of this column are an impediment here. Some obvious examples are (I assume) lawyers telling clients what the lawyers are not doing for them, the frequent compulsion to comment on documents that really work as they are, and, the real impetus here, lawyers' seemingly universal ability to generate an endless stream of questions. The aggravation from endless questions actually has me convinced that Socrates did not in fact commit suicide, but was taken out because after a while the Socratic method motivated Plato, Aristotle, and pals to whip up a hemlock smoothie.

The issue of infinite questions leaps to mind in considering the recent Delaware Supreme Court decision in the dispute between SIGA Technologies Inc. and PharmAthene Inc., which addressed the question of whether a duty to negotiate in good faith is enforceable. For corporate lawyers, who routinely draft documents (like letters of intent) that are expressed to be non-binding, include in legal documents covenants to negotiate or agree in good faith, and more generally find themselves engaged in commercial negotiations, the decision is cautionary.

The relationship between Siga and PharmAthene started when Siga was seeking funding for the development of a promising antiviral drug. Negotiations between the parties resulted in a term sheet for a proposed licensing arrangement, signed by neither party and clearly stating it was non-binding. The negotiations changed course, and the parties entered into a merger agreement. PharmAthene made a bridge loan to Siga to fund the development of the drug as the merger discussions continued. The loan agreement stated the parties would negotiate in good faith a license deal if the merger did not proceed, and attached the term sheet. The merger did not happen. The twist is the prospects for Siga's drug greatly improved, making the terms in the term sheet far less appealing to Siga. When the parties set about negotiating the licence, in the wake of the termination of the merger agreement, Siga proposed terms significantly different from those in the term sheet. PharmAthene objected and, when attempts to negotiate were unsuccessful, sued.

The Delaware Supreme Court affirmed the trial court's conclusion that Siga was liable for a breach of the duty to negotiate in good faith, because Siga's proposal of significantly improved terms, and its unwillingness to negotiate on the basis of the detailed terms in the term sheet, constituted "bad faith."

The questions of whether there is a duty to negotiate in good faith, and if there is such an obligation whether it is enforceable, are difficult. This is where all of those (perhaps annoying) questions arise. For example, is a covenant to negotiate in good faith too uncertain to have binding force? Can a court objectively assess good faith in the context of negotiations? Is such a duty consistent with the nature of bargaining? All difficult questions, certainly, and not the end of the story. If there is such a duty, what are the damages? Is the jilted party entitled to the bargain it thought it had obtained (this was the conclusion of the appellate court in *Siga*, though the quantification of damages was left to the trial court), and does the court fill in the details left unresolved by the parties? Does the creation of such a remedy provide insurance for strategic negotiators, giving them a second kick through the courts if negotiations fail?

Hearing no answers from you, I will offer one of my own: it depends (this answer is another source of annoyance about lawyers). Not many people would take the position that there is a duty to negotiate in good faith without an express contractual commitment to do so. But where there are contractual obligations, a commercial relationship, many terms are fleshed out, and there is reliance it gets murkier. The additional reality is when one party acts in an apparently strategic manner, it likely has some impact on a court's perspective. There is jurisprudence in this country to support the view that an agreement to agree on a specific term, such as the "market rate" for an input at a given time, can be enforceable.

The bottom line is counsel cannot afford to be completely sanguine about the unenforceability of "agreements to agree." As for my own complaining, I choose to take comfort in the words of the great prophet, Joe Walsh (ex of the Eagles): "I can't complain, but sometimes I still do." CL

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