

## To lie or not to lie... that is negotiation

There are two wide categories of negotiation strategies. One is competitive, one is cooperative and each provide ample opportunities for less-than-forthright disclosure. Although negotiation largely takes place outside the public's eye, that may not necessarily mean that "there is *broad* terrain in which negotiators may lie, omit to state, or mislead by conduct". Such conduct illustrates the temptations faced by negotiators to maximise returns and I shall study whether there are barriers to less-than-forthright-conduct mainly in the context of Hong Kong law and society at large.

In both England and Hong Kong, good faith in negotiations and fair dealing have traditionally played a limited role, at least in contract law. This underlying basis gives rise to the "broad terrain", or "temptation" lamented by J. Murray, A. Rau and E. Sherman. Lord Ackner in *Walford v Miles* acknowledged that parties in contractual negotiations were often in opposite positions and thought that negotiations in good faith was "repugnant" to that adversarial concept.<sup>1</sup> The only fetter, perhaps, that contract law specifically imposes upon negotiators is that misrepresentations must be avoided. Misrepresentation of a material fact constituting a term of a later contract can render that contract voidable and the injured party can seek restitution *in integrum*. Misrepresentation can be made by conduct or even non-conduct.<sup>2</sup> Contracts *uberrimae fidei* require full disclosure of all material facts.<sup>3</sup> Legislation also mandates that certain information be made available to various parties, for example, foodstuff ingredients.<sup>4</sup> Aside from these general feters, however, negotiations are *caveat emptor* and contract negotiators are free to puff, hide and exaggerate their 'terms'

---

<sup>1</sup> *Walford v Miles* [1992] 2 WLR 174 at 181 referred to by H Brown and A Marriott, "Dispute Resolution Outline" from *ADR Principles and Practice*, pp.88-107

<sup>2</sup> See, e.g. *Horsfall v Thomas* [1862] 1 H&C 90

<sup>3</sup> See e.g. *Lambert v Co-Operative Insurance Society* [1975]

<sup>4</sup> See also the Film Censorship Ordinance, requiring disclosure of the Government's classification notices

within wide bounds. Even with the 'protection' of contract law and consumer protection legislation, for it to be effective, negotiators need to be aware of its provisions, the misrepresentation needs to be proved in the courts, and the parties must be willing to spend the time and money to seek remedies. Outside the law of contract and fiduciary duties, the terrain is even broader for deceitful conduct.

The limits of the law are but one fetter on how negotiators exercise their ethical discretions. Lawyers in Hong Kong, for one, are bound to a code of practice. Under principle 13.01, a solicitor who acts in a way which is fraudulent, deceitful or otherwise contrary to his position as a solicitor, is subject to disciplinary sanctions. Similar provisions accord for barristers under principle 6(b) of the Bar Society's Code of Conduct. A lawyer is well advised to stray away from deliberately deceitful negotiations. Other professional organizations have similar provisions against deceitful conduct. However, it must be remembered that there are many persons not associated with any regulated entity and they may find their conduct unfettered by any disciplinary sanction.

Despite the existence of these professional codes of conduct, most of what negotiators say are said privately and cannot be verified with an independent source. The likelihood of one getting caught breaching these rules is slim. If the benefits to be reaped from less-than-forthright conduct are high, more professionals will run the negligible risk of being caught and violate ethical standards to achieve greater returns. The stakes are high for the honest negotiator who forfeits a significant advantage for his client to others who do not follow the rules.

Fortunately, business sense is a factor that cuts down on negotiators' scope for less-than-forthright conduct in the business world. Where parties

intend to deal with each other for more than once, a healthy working relationship is preferred. This is common sense, but can be proved mathematically by game theory.<sup>5</sup> Deception in its various (perhaps more serious) forms is discouraged because parties want to cultivate a relationship of trust where they can do business / deal with each other more easily. Research and local Hong Kong experience shows that parties value reputation and deal with 'trusted' partners more frequently and such deals are larger in terms of monetary value.<sup>6</sup> This is particularly visible amongst property developers and construction contractors as well as banks and businesses.<sup>7</sup> Forthright negotiations can reduce the potential for future disputes. Working relationships may encourage mutually acceptable outcomes to be negotiated and in so doing, persuade negotiators to be more forthright in their discussions to come up with a more workable solution that is sustainable for a longer period of time. This can be illustrated by a wages negotiation between human resources and a member of staff. The long-term relationship discourages deceptive conduct because the likelihood of being discovered is greater, and fostering a better relationship through full and frank disclosure may help the employee, who in turn helps the company make profit.

More recently, institutionalised databases of reputation information have surfaced to inform the public how prospective parties to a negotiation are likely to act.<sup>8</sup> Prudent persons who 'shop around' for business partners would tend to avoid those who are reputed to be devious in their profit-making schemes. These would seem to encourage more forthright conduct.

---

<sup>5</sup> Peter C. Cramton and J. Gregory Dees, "Promoting Honesty In Negotiation: An Exercise In Practical Ethics", (1993) 3 *Business Ethics Quarterly* 4.

<sup>6</sup> From conversations with a vice-president at Morgan Stanley, Hong Kong office

<sup>7</sup> In complex transactions, e.g. an IPO, deceitful negotiations run a greater risk of being discovered and thus ruin the reputations of the people involved. Industry practice also has certain expectations of negotiator conduct. E.g. the initial 'teaser' stages of an IPO present information to make prospective investors interested. Teasers do not contain full disclosure of company liabilities. In the later stages, however, a one-sided interpretation of the liabilities are released to investors and they can make whatever assumptions they want about the information. Parties to complex transactions are usually more forthright because both sides have experts to provide sound advice.

<sup>8</sup> See, e.g. <http://www.bbb.org/>

Where public negotiations are conducted, the scope for deception is somewhat reduced, especially with a free and active press and academia. Take, for example, the United States in its negotiations with African states regarding its WTO obligations and cotton subsidies. USA would be seen as a cunning bully if it tried to deceive the African states as to the extent of its subsidies given to American farmers.<sup>9</sup> This is because the information is provided freely by the mass media. The same cannot be said about North Korea's "nuclear bargaining" because without a free press, no one really knows whether N. Korea has true nuclear weapons capable of threatening overseas countries. The international negotiating table which is diplomacy can be scaled down to individuals. Where one side's information is more freely available, all else equal, that side would be at a disadvantage as it cannot rely on deception of fact as much as its partner.

The above has been a discussion of bi-partite negotiations without the assistance of a third party as would be the case in mediation or facilitated negotiations. In negotiations where the parties are assisted by a neutral third party, often with relevant experience in the matters discussed, more forthright conduct is usually observed. This is because the facilitator has the experience to 'see through' deceptive tactics and has a duty to ensure that negotiations proceed fairly. Family disputes are an example where mediators and facilitators (judges) restrict the scope for deceptive conduct.<sup>10</sup> For example, the husband who hides his true financial position may risk having the settlement varied when his offshore trust is discovered. The construction industry also uses experienced third party mediators extensively. Disputes often see experts brought in to decide on issues

---

<sup>9</sup> This is an international and obvious example. The same restrictions would have been placed on the Financial Secretary of Hong Kong, Henry Tang, when he negotiated for a wider tax base in the form of a sales tax in 2006.

<sup>10</sup> J. Hu, S. Wong, M. Wong, The Emotional and Financial Cost of Matrimonial Litigation: Towards Reform, 2006

of fact. It can be easily seen how third parties restrict the scope for devious negotiators to go about their routine.<sup>11</sup>

Finally, one must realise that different societies tend towards different negotiation strategies. One may find differences in negotiations tactics employed by communal societies that stress harmony and continuing relationships compared to societies that values individualism.<sup>12</sup> Negotiating in China is very different from negotiating in the USA, for example. Cultural roots often dictate what a negotiator will say and how he will say it, at least within the same culture. Apart from social acceptance, culture also shapes a negotiator's values and attitudes. The social acceptability of less-than-forthright conduct will regulate the actions of the negotiator where he acts. His ethical tendencies will also be affected by the prevalent culture in his upbringing. For illustration, a negotiator with a Chinese cultural background would deal more fairly with people whom he knows than an American negotiator in a similar context and a male negotiator may have more reservations about revealing his private background than a female negotiator.<sup>13</sup>

But all that said, even if the terrain is a sweeping plain for less-than-forthright conduct, it might not be a bad thing, for businesses can have their own code of ethics not acceptable outside of business.<sup>14</sup> Around 600bc, early in human history, Anacharsis wrote: "the market is the place set apart where men may deceive one another." It seems that in commercial transactions, deception of varying degree is the prevailing norm. The investment banker may say that his client's bad debts are negligible whereas he may think they could be substantial;

---

<sup>11</sup> See, e.g. engineer decisions and mediations being used in the Hong Kong International Airport Project, M. Wilson, "Hong Kong's New Airport and the Resolution of Disputes", (1995) HKLJ 363 at 366

<sup>12</sup> C. Rivers, *Lying, Cheating Foreigners!! Negotiation Ethics Across Cultures*, Paper submitted to the 18<sup>th</sup> Annual Conference of the International Association for Conflict Management, Seville, Spain June 12-15, 2005

<sup>13</sup> H. Brown and A. Marriott, "Dispute Resolution Outline" from *ADR Principles and Practice*, p.99

<sup>14</sup> Peter C. Cramton and J. Gregory Dees, "Promoting Honesty In Negotiation: An Exercise In Practical Ethics", (1993) 3 *Business Ethics Quarterly* 4.

vegetable sellers in Central Market start off with inflated selling prices and lament that they have reached “cost price” after the buyer shaves off a dollar or two; the buyer laments that he has no more money in his purse... situations such as these are commonplace all over the world, be it a Turkish bazaar or an American investment bank. Businessmen will lie, omit to state, or mislead by conduct to get a better deal, and for the same profit motives, businessmen may cooperate to try to concoct win-win situations and avoid harming their reputation. What they do is up to them and there is scant reason to prevent these well-informed autonomous individuals who run the risks of business from making their own strategic decisions. What may not be desirable, is where less-informed individuals are negotiating with a more powerful force than themselves. In such scenarios, the law, and perhaps free markets are providing a fairer playing field for negotiations.

A negotiating table for lying, omitting to state and misleading by conduct is probably one where information does not flow freely and lacks institutions that lay down guidelines for permissible conduct or provide sanctions for deceptive conduct. Many negotiations today, however, are closely scrutinised and the fact of globalisation and that businesses are connected increases the incentive for negotiators to be forthright in their actions. The presence of a third party facilitator or mediator in structured negotiations also reduces the scope for less-than-forthright conduct.