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“Best endeavours” vs “reasonable endeavours”: Not two sides of the same coin

It is a regular feature of commercial contracts to include endeavour clauses to impose an obligation on a party to *attempt* to do something. Unlike an absolute obligation, which requires an obligor to actually carry out the objective, for example, deliver cargo by 31 December 2020, an endeavours obligation will require the obligor to use its “best” or “reasonable” endeavours to perform their obligation.

If, under an endeavours obligation, the obligor fails to achieve the objective, the obligor will not be in breach if it has complied with the required endeavours standard i.e. if it has used its “best” or “reasonable” endeavours to achieve the objective, depending on the wording of the clause.

This makes endeavours clauses particularly useful where the obligor’s performance is dependent on matters outside its control, for example, where it is reliant upon a third party, or where the obligor is aware of changing circumstances that could impact upon performance.

However, care needs to be given when agreeing on the standard of the obligation, as there is a substantial difference in the way that “best” and “reasonable” endeavours or efforts are treated.

Where are 'endeavours' obligations used?

Endeavours obligations are most commonly used in the following types of contracts/agreements:

- Sales contracts: obligations are usually imposed on the agent or licensee to use best endeavours to market and sell a product.
- Supply contracts: goods and services agreements often include some form of endeavours terminology, for example SHIPMAN 98 requires the manager to use “*best endeavours to provide the Management Services as agents for and on behalf of the Owners in accordance with sound ship management practice*”.

- Third party consent obligations: the terminology may be used to obtain a third party’s consent; for example, the consent of Customs officials for clearance.

“Best endeavours” / “Best efforts”

Authorities have confirmed that a “best efforts” or “best endeavours” obligation is more onerous than a “reasonable endeavours” obligation. The party entering into such an obligation must do more than their second best. Simply going through the motions will not be sufficient.

The Courts have said that the term “best endeavours” requires the obligor “*to take all those steps in their power which are capable of producing the desired results ... being steps which a prudent, determined and reasonable [obligee], acting in his own interests and desiring to achieve that result, would take.*” (**IBM United Kingdom Ltd v Rockware Glass Ltd [1980] FSR 335**). In other words, the obligor must put himself in the shoes of the reasonable obligee and take all commercially practicable action (having regard to costs and degree of difficulty).

In practical terms, a best endeavours obligation may require expenditure on behalf of the obligor. The Courts have said that the fact that a party has agreed to use his best endeavours/efforts means that he may well be put to some financial cost, therefore financial cost cannot be used as a reason to not perform his obligation. In *Jet2.com v Blackpool Airport Ltd*, Blackpool Airport and Jet2.com entered into a contract requiring the parties to “co-

operate together and use their best endeavours to promote Jet2.com's low cost services from [Blackpool Airport]". Jet2.com sued Blackpool Airport for breach of contract because of Blackpool Airport's refusal to allow Jet2.com's flights to arrive and depart from Blackpool Airport beyond its published opening hours. The Court decided that Blackpool Airport was obligated to open outside of its normal operating hours, despite the fact it incurred a loss in doing so (**Jet2.com v Blackpool Airport Ltd [2012] EWCA Civ 417**).

However, depending on the nature and terms of the contract in question, the obligor may have some regard for its own commercial interests and certainly would not need to take action resulting in "*the certain ruin of the Company or [...] the utter disregard for the interests of shareholders.*" the (**Terrell v Mabie Todd and Co Ltd [1952] 69 RPC 234**).

Terrell v Mabie Todd & Co Ltd concerned a licence of a patent for fountain pens and ink bottles, with a requirement on one party to make their best endeavours to promote the sale of as many fountain pens as reasonably possible. It was held that the obligation would not require the directors to carry on the manufacture and attempted sale to the certain ruin of the company, but before that extreme position could be reached, there would arise questions as to the amount of money to be spent on the production and on advertisement. The company was required to do what they could reasonably do in the circumstances and the standard was that of a reasonable and prudent board acting properly in the interests of their company and applying their minds to their contractual obligations to exploit the inventions. The obligation therefore requires a party to incur costs in performing its obligations, but can take into consideration its own financial situation. It is likely that a Court would therefore consider that a company with greater resources would have to do more to satisfy a "best endeavours" obligation, than one with less.

Notwithstanding the fact that the authorities do provide a safety net to avoid ruin of an obligor, the burden is still set high and an obligor can expect to incur costs or suffer losses in the general course of discharging their obligation.

"Reasonable endeavours"

A "reasonable endeavours" obligation is the least onerous type of endeavours clause.

Crucially, the obligor is not normally required to sacrifice its own commercial interests and may be entitled to consider the impact on their own profitability (**P&O Property Holdings Ltd v Norwich Union Life Insurance Society [1993] EGCS 69**). This is the most significant differentiator from a "best endeavours" obligation.

The Courts have said that the term "reasonable endeavours" probably only requires the obligor to take only one reasonable course of action (obiter, **Rhodia v Huntsman [2007] EWHC 292 (Comm), [2007] 2 All ER (Comm) 577**).

Which type of endeavours clause should I agree to?

Whilst it largely depends on the context, during contract negotiations, an obligor should generally push for a "reasonable endeavours" obligation, whereas the party who is the beneficiary of the obligation should seek to agree a "best endeavours" obligation, as it is in that party's interest for the obligor to achieve the obligation.

However, consideration should be given to the importance of the obligation in question so as not to unnecessarily create sticking points during the contract negotiations. If the obligation is not particularly important in the circumstances, a "reasonable endeavours" obligation should be agreeable to both parties in most cases.

How to achieve certainty

There will always be an element of uncertainty as to what is being agreed to when using endeavours clauses. In order to alleviate this uncertainty, in some cases, it may be possible to clearly set out in the contract steps that the obligor must take in order to satisfy their obligation, rather than simply relying on an endeavours clause. These steps could include a cap on how much money the obligor is required to spend in pursuit of their obligation; the period for which the obligor must pursue the obligation; and whether or not the obligor is required to take legal action in pursuit of the obligation.

Finally, an obligor should keep a record of its actions/efforts in attempting to fulfil its obligations, which will be helpful should a dispute arise.

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