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ENDEAVOURS OBLIGATIONS:

HOW HARD DO YOU HAVE TO TRY?

CONTRACT DISPUTES PRACTICAL GUIDES ISSUE 5: FEBRUARY 2020

This is the fifth in our series of contract disputes practical guides, designed to provide clients with practical guidance on some key issues that feature in disputes relating to commercial contracts under English law.

Obligations to endeavour to achieve some object are commonly agreed in commercial contracts where the relevant party is not willing to take on an absolute obligation to that effect.

Typical clauses may require the use of “best endeavours”, “reasonable endeavours” or “all reasonable endeavours”, but it is not always clear what these terms require in practice.



James Farrell, Emma Schaafsma and Gavin Williams consider how the typical clauses differ from one another and what they are likely to require in practice, and provide some practical tips for commercial parties.

TOP TIPS TO NAVIGATE ENDEAVOURS OBLIGATIONS:

- DO consider specifying steps that are (or are not) required – eg pursuing legal action/appeals
- DO consider setting out minimum/maximum spend
- DO consider stating for how long the endeavours must continue
- DON'T assume you can always consider your own commercial interests
- DO press for an absolute obligation where a particular action is essential
- DO ensure the object of the endeavours is clearly defined
- DO remember an endeavours obligation may sometimes be implied
- DO remember the status quo may be relevant in assessing performance
- DO record evidence of steps taken to comply, in case of dispute
- DO remember if an obligation isn't softened by "endeavours" wording, it is likely to be an absolute obligation

1. Why an endeavours obligation?

When negotiating a commercial contract, in an ideal world parties would wish to ensure that any obligations taken on by the counterparty were absolute and unqualified. For example, the counterparty might agree to procure that a particular object was achieved, so that any failure to do so would be a breach of contract.

In many situations, however, the counterparty will not be prepared to take on an absolute obligation of this sort. That will typically be the case where it is uncertain whether the object in question can be achieved – either at all or without very significant effort or expenditure. Often, that is because the matter is not within the counterparty's control as it depends on some third party decision maker.

In such cases, commercial parties may agree a lesser form of obligation. The most common forms of wording provide that the relevant party will use "best endeavours", "reasonable endeavours" or "all reasonable endeavours" to achieve the particular aim. In contrast to an absolute obligation, if the aim is not achieved it does not necessarily follow that there has been a breach; that depends whether the endeavours met the required standard.

The problem is that the required standard is not always clear, in part because the authorities do not speak with one voice as to the meaning of these terms, and in part because the precise requirements will vary depending on the contract and the context.

"Although obligations to use 'best', 'reasonable' or 'all reasonable' endeavours are commonly agreed, what these terms require can be surprisingly unclear"



2. Best endeavours

An obligation to use “best endeavours” is generally accepted to require the highest standard of the three most common clauses. Typically, the beneficiary of the relevant obligation will push for “best endeavours”, if an absolute obligation cannot be agreed, whereas the party performing the obligation will prefer “reasonable endeavours”.

A best endeavours obligation is typically interpreted as requiring the relevant party to do all it reasonably can to ensure that the specified result is achieved, including incurring at least some level of expenditure where needed. A test sometimes adopted is to consider the steps that a prudent, determined and reasonable party, acting in its own interests and anxious to achieve that result, would take.

So, although an obligation to use best endeavours requires a high standard, it is still subject to a requirement of reasonableness; it does not require the contracting party to go to any lengths, however unreasonable, to achieve the aim in question. So for example a party would not be required to take steps that have no real prospect of success.

On the other hand, it is not necessarily a defence to say that a particular step would have caused the contracting party to incur financial loss. Whether, and to what extent, a party must sacrifice its own commercial interests to comply with a “best endeavours” obligation is a question that is often asked but, unfortunately, has no clear answer; it depends on the nature and terms of the obligation in question. But it is clear that a party does not have to take steps that would lead to its own certain ruin.

“A ‘best endeavours’ obligation requires a high standard and should not be taken on lightly”



In *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417 the Court of Appeal held that a defendant airport operator had breached an obligation, in a 15-year contract, to use best endeavours to promote the claimant airline's low-cost services from the airport (see this [post](#) on our Litigation Notes blog).

For four years the defendant accepted the claimant's flight schedules which included regular departures and arrivals outside normal opening hours. It then gave seven days' notice that it would no longer do so. The court held that the best endeavours obligation obliged the defendant to do all it reasonably could to enable the claimant's business to succeed and grow. This extended to accommodating flights outside normal hours.

The court rejected the defendant's submission that it did not have to operate outside normal hours if that would cause it financial loss. Whether, and to what extent, a party can have regard to its own commercial interests depends on the nature and terms of the contract. Here, the ability to operate outside normal hours was essential to the claimant's business and therefore fundamental to the agreement. The parties were therefore unlikely to have contemplated that the defendant could restrict operations to normal hours simply because it would otherwise incur a loss. It might be different if the claimant could never expect to operate profitably from the airport; the defendant would not have to incur further losses in promoting a failing business.

3. Reasonable endeavours

An obligation to use "reasonable endeavours" is generally accepted to be the least demanding of the three common clauses. It is likely to be favoured by the party who will be required to perform the relevant obligation, whereas the beneficiary of the clause will prefer "best" or, failing that, "all reasonable" endeavours, assuming an absolute obligation cannot be agreed.

Unlike an obligation to use best or all reasonable endeavours, an obligation to use reasonable endeavours is likely to be interpreted as requiring the relevant party to take a reasonable course of action to achieve the particular aim, rather than having to continue until all reasonable courses have been exhausted. Another distinction is that, whilst some level of expenditure may be expected, an obligation to use reasonable endeavours apparently does not require a party to sacrifice its own commercial interests, whereas the other obligations may in some circumstances. Essentially, it involves a balancing act between contractual obligations and commercial considerations.

As the phrase suggests, the extent of the obligation is limited by what is reasonable. Where it is said that a defendant should have taken a particular (further) step to satisfy the obligation, whether that step would have made any difference to the result will always be a relevant factor in deciding whether the endeavours used were reasonable. So, for example, a party would not be required to commence hopeless litigation against a third party.

In *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm) (see [post](#)) the Commercial Court considered a clause in a business sale agreement which required the parties to use reasonable endeavours to obtain third party consent to the novation of an energy supply contract.

The purchaser took over performance of the contract pending novation but, when third party consent had not been obtained by the agreed date, it ceased to perform the relevant obligations. The third party brought proceedings against the seller for non-payment of invoices totalling close to £15 million. The seller, in turn, brought proceedings against the purchaser alleging a failure to use reasonable endeavours.

The judge said there was some debate as to whether “reasonable endeavours” were to be equated with “best endeavours”. Insofar as it

was necessary to decide the point, he held that a reasonable endeavours obligation was “less stringent” than a best endeavours obligation. In his view, an obligation to use reasonable endeavours “probably” only required a party to take one reasonable course of action to achieve a particular aim, whereas an obligation to use best endeavours “probably” required taking all the reasonable courses available.

Here, however, as part of the relevant clause, the contract specifically required the purchaser to provide a direct covenant (such as a parent company guarantee) if reasonably required by the third party. The purchaser had failed to provide such a covenant, when it was clear that the third party required some form of security or comfort. It was therefore in breach, regardless of whether it had otherwise exercised reasonable endeavours.

“A ‘reasonable endeavours’ obligation is at the lowest end of the spectrum, but that does not mean it has no teeth. A failure to take reasonable steps will be a breach and may result in liability”

4. All reasonable endeavours

An obligation to use “all reasonable endeavours” is arguably the most difficult to pin down of the three common terms. In a number of cases, either the parties have agreed that “best” and “all reasonable” endeavours meant the same thing (eg in *Jet2.com*, referred to above) or the court has doubted that there is any difference between the two (eg in *Rhodia*, also referred to above). The traditional view, however, is that the term is a middle position somewhere between “best” and “reasonable” endeavours. And it is often treated that way in practice, where one party is pushing for best endeavours and the other for reasonable endeavours. An obligation to use “all reasonable” endeavours may be settled on as an attempt to compromise between the two.

It seems clear that the party required to perform the obligation must continue making efforts to achieve the relevant objective until all reasonable courses of action have been exhausted. But given that a party is required to take all reasonable steps, this may seem pretty close to a best endeavours obligation – which is why it can be difficult to distinguish the two.

However, there may be a distinction in terms of the extent to which a party is required to sacrifice its own commercial interests. Whereas an obligation to use best endeavours may well require a party to prejudice its own commercial position (eg by incurring a loss), that may be less likely with an obligation to use all reasonable endeavours. The position is not clear, however (see section 5 below).

“Agreeing to use ‘all reasonable endeavours’ may be seen as a compromise, but whether it is in fact a lesser standard than ‘best endeavours’ is far from clear”

Yewbelle Ltd v London Green Developments [2007] EWCA Civ 475 concerned a contract for the sale of a development site. The seller was required to use all reasonable endeavours to secure a completed section 106 agreement with the local council, substantially in the form of the draft then in existence.

Two problems emerged in relation to the section 106 agreement: the council's additional demands relating to a library on the site; and the discovery that part of the site belonged to a third party. The seller told the buyer that it would not be possible to procure the section 106 agreement in the required form. It invited the buyer to complete without it, failing which it would treat the contract as at an end.

The High Court held that the seller had failed to use all reasonable endeavours. The Court of Appeal reversed that decision, though it agreed with the judge as to the appropriate legal test. The seller was not required to sacrifice its own commercial interests, but it was required to go on using reasonable endeavours until all reasonable endeavours had been exhausted.

On the facts, the judge was entitled to find that the seller had not used all reasonable endeavours to resolve the library issue. However, the third party land issue presented an insuperable obstacle to the seller obtaining the section 106 agreement in the required form. The failure to use all reasonable endeavours to overcome the other obstacle was therefore irrelevant.

5. Own commercial interests

As discussed above, one matter which may distinguish the various clauses is the extent to which a party is required to sacrifice its own commercial interests. There is, however, no clear scale of self-sacrifice against which the different clauses can be plotted.

Even with a best endeavours obligation, it is not clear that a party will **always** be required to take steps that prejudice its interests. As stated in *Jet2.com*, referred to above, it depends on the nature and terms of the obligation. In that case, the conclusion that the defendant was required to incur financial loss appears to have been influenced by the fact that the steps in question were essential to the claimant's business. With a less fundamental aspect, the court might have reached a different conclusion.

It does appear to be accepted that an obligation to use reasonable endeavours will not require a party to sacrifice its own commercial interests. But the position is less clear for an obligation to use all reasonable endeavours. In *Yewbelle*, referred to above, the court found there was no such requirement, but it is not clear whether that was meant as a general statement about any obligation to use all reasonable endeavours. And in *CPC* (see box to the right), the court said such an obligation would "not always require" a party to sacrifice its commercial interests.

Given the uncertainty, parties may wish to include additional wording to make it clearer that they are entitled to have regard to their own commercial interests – as in *CPC*, where the requirement was to use all reasonable "but commercially prudent" endeavours.

CPC Group Limited v Qatari Diar Real Estate Investment Company [2010] EWHC 1535 (Ch) concerned a joint venture for a project to develop the former Chelsea Barracks site in London. The parties' agreement required the defendant to use "all reasonable but commercially prudent endeavours" to enable the achievement of certain threshold events and payment dates.

Following intervention by the Prince of Wales, who expressed his dislike for the design, the defendant withdrew the planning application to redevelop the site. That effectively delayed one of the payment dates under the agreement. The claimant brought proceedings alleging (among other things) a breach of the defendant's obligation to use all reasonable but commercially prudent endeavours. The High Court found there was no breach.

Referring to the Court of Appeal's decision in *Yewbelle*, the judge expressed the view that an obligation to use all reasonable endeavours "does not always require the obligor to sacrifice his commercial interests". In this case, the matter was clearer because of the additional reference to "commercially prudent" endeavours. It was accepted that those words provided a "brake" on the lengths to which the defendant had to go in using all reasonable endeavours. The clause did not require the defendant to ignore its own commercial interests.

"The extent to which the various formulations may require self-sacrifice is not always clear. Where a party wants to ensure it can have regard to its own commercial interests, additional wording is advisable"



6. Specified steps

Where a clause specifies that certain steps must be taken as part of an endeavours obligation, the relevant party will be in breach unless it actually takes those steps. That is regardless of whether those steps would otherwise have been required to satisfy the obligation, and regardless of whether they might involve sacrificing the party's own commercial interests.

The same is true in reverse: where a clause specifies steps that are not required, for example as part of a best endeavours clause, that will qualify the more general wording.

In *Rhodia*, referred to above, the court found a party had failed to use reasonable endeavours because it failed to take specific steps identified in the clause. The clause in question required the use of reasonable endeavours to obtain third party consent to the novation of an energy supply contract. The clause went on to say that, if the third party so reasonably required, the purchaser (or its parent company or a subsidiary with sufficient standing and net worth) would enter into a direct covenant with the third party to perform and observe the contract.

The court took the view that, apart from this aspect, the purchaser had exercised reasonable endeavours. However, the failure to provide a parent company guarantee or other direct covenant, when it was clear that some such security was required by the third party, meant the purchaser was in breach of the clause.

Conversely, in *Bristol Rovers (1883) Ltd v Sainsbury's Supermarkets Ltd* [2016] EWCA Civ 160 (see [post](#)) the Court of Appeal held that a party was not in breach of an obligation to use "all reasonable endeavours" to procure the grant of planning permission.

The obligation in question was subject to a qualification regarding the circumstances in which the party had to pursue an appeal, ie only where planning counsel advised the prospects of success were 60% or greater. As no such advice had been received, there was no obligation to pursue the appeal. Therefore there was no breach of the "all reasonable endeavours" obligation.

"Where possible, add certainty by setting out steps that will, or will not, be required to meet the obligation."

7. Relevance of status quo?

There is some indication in the case law that how parties have performed the agreement might have some relevance in setting the expectations for their future performance under an endeavours obligation. This is a somewhat controversial view, as how a contract is actually performed should not, in theory, be relevant to its interpretation.

Given the uncertainty, parties should give careful consideration to how they perform an agreement in practice, to ensure they are not setting an unrealistically high standard and potentially creating a rod for their own back.

In *Jet2.com*, referred to above, the fact that the defendant airport operator had accepted flights scheduled outside normal hours for the first four years of the contract was taken into account by one of the Court of Appeal judges in finding there had been a failure to use best endeavours to promote the claimant's business.

In Lord Justice Longmore's view, the fact that "out of normal hours" use of the airport had been permitted for four years formed part of the criteria by which the use of best endeavours could be assessed. He said:

".. the status quo will always be an essential matter to be considered. ... Once performance had begun, the party who proposed to change the status quo should have to justify that change of stance."

Lord Justice Lewison disagreed that the status quo was relevant, commenting that this came close to using the parties' subsequent conduct in order to interpret the contract.

8. Implied obligations

In some circumstances, an endeavours obligation may be implied into a contract, even though there is no express obligation to that effect. The obvious example is where a contract is conditional on some occurrence. The court may, depending on the circumstances, imply an obligation that one or other party (or perhaps both) will endeavour to ensure that the condition is fulfilled.

"If entering into a conditional contract, it is worth spelling out whether or not any party must endeavour to ensure the condition is fulfilled, and if so to what standard."

In *Ryanair Ltd v SR Technics Ireland Ltd* [2007] EWHC 3089 (QB), the parties agreed a 15-year contract for the provision of aircraft maintenance services at Dublin Airport. A side letter provided that the defendant would license hangar space to the claimant, subject to landlord consent.

The defendant accepted that it was under an implied obligation to use its best endeavours to seek the landlord's consent. The High Court found that the defendant was in breach, as it had delayed unduly in approaching the landlord, failed to pursue the question with the expected level of diligence, and indeed went out of its way to facilitate the landlord's refusal (as it was by that point negotiating to hand back the hangar space to the landlord for a substantial sum).

9. Certainty of object

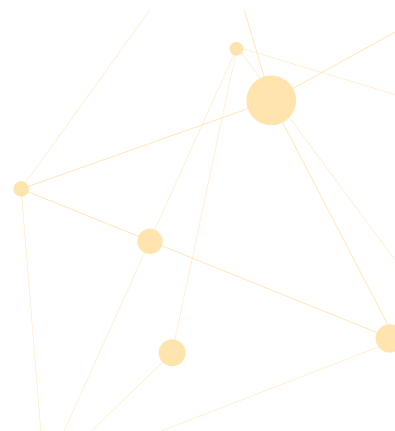
It is sometimes argued that an endeavours obligation is unenforceable because it is too uncertain to give rise to a binding obligation. It is clear that, in itself, an obligation to use best, reasonable, or all reasonable endeavours is not too uncertain to be enforced – and of course this briefing contains various examples of cases in which such obligations have been enforced.

However, where the object of the endeavours cannot be ascertained with sufficient certainty, so that it is not clear what the parties must endeavor to achieve, there will not be a binding obligation. The same may also be true where there are no sufficient criteria by which the court can assess the endeavours undertaken against the required standard. For a more general discussion of when an agreement may be too uncertain to be enforced, see [issue 1 of this series](#) of contract disputes practical guides, section 5 “Terms incomplete or uncertain”.

A situation that sometimes causes difficulties is where there is an obligation to endeavor to reach agreement with a third party, on unspecified terms. Such an obligation may in some circumstances be found to be unenforceable as a mere “agreement to agree”. Different judges have taken different approaches to the question of how difficult or otherwise it is to satisfy the court that such an obligation is sufficiently certain to be enforceable. To avoid scope for debate, it is advisable to ensure, insofar as possible, that there are objective criteria by which the relevant endeavours can be judged.

In *Jet2.com*, referred to above, the defendant argued that the obligation to use best endeavours to promote the claimant’s business was too uncertain in its content to be enforceable.

The majority of the Court of Appeal rejected that argument. Lord Justice Moore-Bick said there was an important difference between: (a) a clause that was too uncertain to give rise to a binding obligation; and (b) a clause that gave rise to a binding obligation, the precise limits of which were difficult to define in advance, but which could nonetheless be given practical content. In the majority view, the defendant’s obligation was of the latter type. Lord Justice Lewison dissented on this point.



In *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 817 (QB), Andrews J held that an obligation in a settlement agreement to use reasonable endeavours to enter into a third party contract (for the restoration of a classic car) was too uncertain to be enforced.

Although the extent of the works was set out in the settlement agreement, there was no mention of the terms of the contract that was to be entered into with the third party restorer, such as the price, and there were no objective criteria by which the court could evaluate whether it was reasonable or unreasonable to agree to any particular terms on offer.

Andrews J commented that it was likely to be an “exceptional” case in which an obligation to endeavour to reach an agreement with a third party was found to be enforceable.

Conversely, in *Astor Management AG v Atalaya Mining Plc* [2017] EWHC 425 (Comm) (see post), Leggatt J upheld a contractual term requiring a party to use “all reasonable endeavours” to obtain a senior debt facility, rejecting arguments that the clause was too uncertain to be enforceable.

Leggatt J said he could not agree with the observations of Andrews J in *Dany Lions* insofar as they gave the impression that the requirements of certainty of object and sufficient objective criteria are difficult to satisfy, and will not usually be satisfied where the object of an undertaking to use reasonable endeavours is an agreement with a third party.

In Leggatt J’s view, far from being “exceptional”, it should “almost always be possible to give sensible content to an undertaking to use reasonable endeavours (or ‘all reasonable endeavours’ or ‘best endeavours’) to enter into an agreement with a third party”.



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