Endeavours
“best”, “reasonable” or “all reasonable”?

Look at a few commercial contracts, or ancillary relief settlements perhaps, and before long you will find an obligation on one party to use its “best endeavours”, “reasonable endeavours” or, less likely, “all reasonable endeavours” to achieve a specific outcome. Do you know what this entails in practice? “Endeavours” may be defined as “an attempt to achieve a goal”. The big question has always been how far must a party go in that attempt and is there a difference between “best endeavours”, “reasonable endeavours” and “all reasonable endeavours”? While it seems to be agreed that endeavours clauses do not impose an absolute obligation to achieve a particular objective, it is less clear what steps a party must take to satisfy its duties.

In the case of Rhodia International Holdings Ltd v Huntsman International LLC [2007] EWHC 292, the High Court held there is a difference between “reasonable” endeavours and “best” endeavours, with reasonable endeavours being at the lower end of the spectrum. In particular, a reasonable endeavours obligation would not oblige a party to sacrifice its own commercial interests. This judgment confirmed the widely held belief by solicitors that the main difference between the two is the obligation to spend money. However, it is not as straightforward as that, as we explain below.

Best endeavours
The term “best endeavours” has received the greatest amount of consideration by the courts.

Each case turns on its facts but the starting point, as far as any general principles can be established, is that the expression “best endeavours” “means what the words say; they do not mean second-best endeavours” (Sheffield District Railway Co v Great Central Railway Co [1911] 27 TLR 451). This was further refined by the Court of Appeal to require the obligors “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). While this is clearly onerous, it is not an absolute obligation, nor is it “the next best thing to an absolute obligation or a guarantee” (Midland Land Reclamation Ltd v Warren Energy, 1997, unreported).

In practice:
• It is generally accepted that an obligation to use best endeavours may require expenditure on the part of the obligor. Similarly, it may well impose an obligation to litigate or appeal against a decision, though this would not extend to action that was doomed to failure or would be unreasonable in all the circumstances (Malik Co. v Central European Trading Agency Ltd [1974] 2 Lloyd’s Rep. 279).
• It may also be overridden by other duties. In Rackham v Peek Food [1990] BCLC 895, an obligation on the directors of a company to use best endeavours to pass a resolution did not require the directors to give bad advice to the shareholders and continue to recommend the resolution once it ceased to be in the company’s interests.
The recent case of Jet2.com Limited v Blackpool Airport Limited [2012] EWCA Civ 417 saw the Court of Appeal confirm that a party may be required to sacrifice its own financial interests to comply with a best endeavours clause. Jet2.com Limited is a low cost airline (Jet). Blackpool Airport Limited (BAL) runs Blackpool Airport, one of the airports from which Jet operates. The agreement between Jet and BAL required both parties to “use their best endeavours to promote Jet’s low cost services.”

Some years into the arrangement, the airport was running at a loss and BAL refused to open the airport outside its standard hours. Jet claimed that this was in breach of BAL’s obligations. The Court of Appeal upheld the first instance decision that BAL’s obligation to use “best endeavours” extended to opening the airport outside standard hours even if this meant BAL running at a loss. The Court considered the nature of the low-cost airline industry and both parties’ understanding of that industry at the time they entered into the agreement. Importantly, both parties had recognised that Jet would have to operate outside BAL’s standard hours in order for Jet’s business to flourish and the opening hours of the airport were within BAL’s control. Therefore the impact on BAL of having to open longer hours (i.e. making a loss) was inconsequential when considering whether BAL had used its “best endeavours”.

Reasonable endeavours
Reasonable endeavours is a less tangible concept. In order to satisfy a requirement to use “reasonable endeavours”, it is likely to be sufficient for a party to take one of several available options, provided it is a reasonable course of action to take. This will depend on the facts of each case. A reasonable endeavours obligation may not require action to be taken if it would harm financial or commercial interests of the party; a balance should be struck between the requirements of the contract/agreement on one hand and relevant commercial factors on the other hand, such as the costs of the course of action, the chances of achieving the desired result, the obligor’s reputation and its relations with third parties. It may not extend to taking legal action of a doubtful outcome, but that is not to say it would never require any legal action to be brought, as is sometimes suggested.

While this obligation is less stringent than that of best endeavours, it is not ineffectual. Coupled with a clear objective, it is capable of constituting an enforceable obligation that may not always be easy to satisfy.

All reasonable endeavours
The third commonly used term, often adopted as a compromise between best and reasonable endeavours, is “all reasonable endeavours”. This is probably the least developed of these clauses and as such, its scope is not clear. It has been argued that it has the same or similar meaning as best endeavours.

In Baring Securities v DG Durham Group [1993] EGCS 192, Barings was obliged to use all reasonable endeavours to secure its landlord’s consent to an assignment of a lease and to procure one of its subsidiaries to provide security, if necessary. This obligation was found to require Barings to “do its best” to secure that consent in light of its other contractual obligations. However, it did not require Barings to get its parent to provide the guarantee in place of the subsidiary.

In Yewbelle Ltd v London Green Developments Ltd [2007] EWCA Civ 475, the Court of Appeal broadly agreed that while an all reasonable endeavours obligation might oblige Yewbelle to inform London Green of the third party land problem that had arisen, it did not require Yewbelle to lay out significant funds to resolve it.

Other variants
There are other similar clauses. For example, the terms “commercially reasonable endeavours” and “reasonable commercial endeavours” are used to try and limit a reasonable endeavours obligation. However, there is little precedent to support this interpretation and it is not clear that the courts would differentiate between the terms, given that a reasonable endeavours obligation already involves considering all relevant commercial factors.

Similarly, the term “utmost endeavours” is sometimes seen as an extended version of a best endeavours clause. Again, there is little precedent on its use in commercial contracts.

If a modification to one of the more common endeavours clauses is required, it may be more fruitful to consider what the parties should actually do in practice, rather than relying on wordplay.
Uncertain objectives

The final factor to consider is the certainty of the underlying objective. It is clear that if a lack of certainty makes the underlying objective unenforceable, an obligation to endeavour to achieve that result will also fail. Similarly, the combination of a less stringent endeavours provision (such as reasonable endeavours) with a poorly defined objective may lead to a very weak obligation.

Claims experience

To put this in context, we now look at some claims that have arisen due to the use of endeavours clauses:

Matrimonial – ancillary relief settlements often involve endeavours clauses, as there is no certainty at the time that a specific outcome can be achieved. The party accepting such an obligation from the other party must be advised that an endeavours clause is no guarantee that the intended outcome will necessarily be achieved. Clients should have full knowledge of all potential outcomes before they sign the consent order. An attendance note should record the advice given and ideally the advice should be followed up in a letter to the client.

Claim – the parties agreed that the husband would pay the wife a lump sum in return for the transfer of her share of the former matrimonial home. The wife made it clear to the insured that she did not want to be held responsible for any of the husband’s considerable debts. The insured drafted the consent order requiring the husband to use best endeavours to secure the wife’s release from the mortgage on the house. The bank refused to release the wife due to the husband’s debts and the wife brought a claim against the insured saying she would have insisted the house be sold if she had realised there was a risk she would not be released from mortgage. The fee-earner felt sure she had advised the client of the risk but there was no attendance note to this effect or a follow up letter of advice.

Commercial contracts – endeavours clauses should not be used in place of proper due diligence. Use the experience in your firm to fully advise the client on all aspects of the transaction. If you don’t have the experience within the firm, seek it from outside. It’s better for your client, and ultimately for you and your insurance premium in the long run.

Claim – a couple sold their house to a developer with an additional £50,000 payable if the developer obtained planning consent for seven two-bed units. The clients instructed the insured that they wanted the developer to make just one application and to use its best endeavours to obtain the consent. Despite these specific instructions, the partner at the firm advised his clients that he knew his “craft” and an obligation to submit an application with “all due expedition” was sufficient. The partner also advised that there was no need to limit the developer to making only one application. The developer submitted two applications, one for seven two-bed units, which was refused, and another for five two-bed units and a three-bed maisonette, which was granted. The developer refused to pay the additional £50,000 and a negligence claim against the insured was made (and settled!).

Real Estate – the sale of land to developers is another area where solicitors can get caught out, particularly in relation to overage payment provisions (i.e. where land is sold but with a further sum becoming payable to the vendor if the purchaser/developer obtains planning consent). Developers will avoid paying overage if they can. It is important overage provisions avoid restrictions on the consent that will trigger the payment and that the developer is obliged to submit a proper application reasonably quickly and to actively pursue it. Is payment due on grant of the consent or its implementation? Is the developer obliged to appeal against a refusal? How long does the requirement to pay overage last?

Make sure that what is in the contract is understood and agreed by your client and avoid devising your own wording – if an endeavours obligation is all you are going to get, insist on “best” and advise your client of the risk.

Claim – the insured acted for a client on the purchase of a bar business. The property was leasehold with 15 years of the term left to run. The corporate fee-earner dealing with the transaction accepted a best endeavours obligation from the seller to obtain the landlord’s consent for the assignment of the lease to the buyer, rather than insisting on an absolute obligation to obtain the consent. When the fee-earner got a copy of the lease he didn’t ask any of his property colleagues to check it for him and he failed to spot that a third party was also the tenant (the seller’s former business partner who, it later transpired, was out of the country and untraceable). The purchase went ahead without the assignment of the lease being completed. After 18 months of it still not having been completed, the client instructed new solicitors to bring an action against the landlord for withholding consent. Luckily for the buyer, the landlord had been accepting rent from the buyer and was thereby estopped from claiming breach of lease by assigning without consent. Accordingly, the landlord eventually agreed to grant the buyer a new lease. A claim was brought against the insured for the cost of the litigation against the landlord.
Practical steps

In many commercial arrangements, one or both parties will be unwilling to give an absolute commitment to a particular objective as it may be unclear how onerous it will be in practice or because it is dependent on matters beyond their control. Endeavours clauses in all flavours and varieties will therefore continue to be a common feature of these agreements.

To give some practical advice, we have put together the following list of matters it is essential to bear in mind.

10 points to be aware of before agreeing an endeavours clause

1. Never assume “best”, “reasonable” or any of the other variations have a clear legal meaning – if an endeavours clause must be used, try to stick to “best” or “reasonable.”
2. Remember that the meaning of an endeavours clause will always be dictated by the facts of the case and the terms of the contract in question – what may be reasonable in one context may not be reasonable in another.
3. What an endeavours clause will require in any particular case depends on the other provisions of the agreement as well as the surrounding commercial context.
4. While the clause must be interpreted as at the time the contract is formed, its satisfaction will be assessed based on the facts at the time performance falls due, no matter how unusual or unexpected they are.
5. Using an endeavours clause can lead to problems if the parties later disagree about what steps the performing party was required to take – consider setting out exactly what steps the performing party must take to fulfil its obligations (but leave room for additional steps by using wording like “including but not limited to”), such as:
   • Whether the obligor should have to bear any costs or make any expenditure and, if so, how much (set a limit if you can).
   • The period for which the obligor should pursue that objective.
   • Whether the obligor must take legal action or appeal to achieve the objective.
   • Specific activities that the obligor is or is not expected to carry out.
6. It is important the obligor takes steps to comply with the obligations in practice and that evidence of these steps is recorded. In the majority of disputes, the debate is not over the nuances in the differing level of obligation imposed by such clauses but rather whether any real endeavours were made at all.
7. If a particular outcome is essential, ask for a guarantee rather than an endeavours obligation.
8. Avoid uncertainty – if parties contract to use endeavours to achieve a certain outcome, it must be possible to identify that outcome with sufficient certainty.
9. Clients should have full knowledge of all potential outcomes/risks before they sign. An attendance note should record the advice given and ideally the advice should be followed up in a letter to the client.
10. Use the experience in your firm to fully advise the client on all aspects of the transaction. If you don’t have the experience in-house, seek it from outside – better in the long run for both your client and you (and your insurance premium).