

"Reasonable endeavours" revisited

"Endeavours" clauses, whether described as "*all reasonable endeavours*", "*best endeavours*" or "*reasonable endeavours*", have resisted a fixed definition in case law: their meanings are derived from the context of the relevant contract, rather than from decisions in previous cases. However, recent case law from Singapore and Australia has provided some general guidance on the interpretation of such clauses. **Ben Giaretta** and **Baldev Bhinder** examine these decisions and provide some practical tips for drafting such clauses.

The Australian High Court balances an obligation to use "reasonable endeavours" with the right to take into account commercial considerations

The High Court of Australia recently considered the scope of a "reasonable endeavours" clause in *Electricity Generation Corporation trading as Verve Energy -v- Woodside Energy Ltd & Ors* [2014] HCA 7. The High Court held that the Sellers, under a long-term gas supply agreement, had not breached their obligation to use "reasonable endeavours" to deliver additional gas by taking into account their own commercial considerations. See our full briefing on this case [here](#).

While the decision depended on the specific wording of the relevant clause, the High Court made the following observations about such clauses in general:

- In Australia (unlike in Singapore and England), "reasonable endeavours" and "best endeavours" clauses impose "substantially similar" obligations.
- Such obligations are not absolute or unconditional, and their nature and extent depend on what is reasonable in the circumstances. This can include circumstances that affect the business of the party that is bound by the obligation (the obligor).
- The Australian courts adopt an objective approach when interpreting such clauses. In particular, they consider the language used by the parties, the surrounding circumstances known to the parties, and the commercial purpose or objects to be secured by the contract.

- Some contracts include their own internal standard for what is reasonable; in particular, by express reference to the business of the obligor.

The Singapore Court of Appeal examines "all reasonable endeavours" obligations for the first time

At around the same time as the Australian High Court's decision, the Singapore Court of Appeal issued its judgment in *KS Energy Services Ltd -v- BR Energy (M) Sdn Bhd* [2014] SGHC 16. For the first time in Singapore law, the Court of Appeal examined the phrase "all reasonable endeavours".

The dispute related to whether KS Energy Services Ltd (KSE) had used "all reasonable endeavours" to procure the construction and delivery of an oil rig known as a workover pulling unit (WPU) within the time stipulated under a contract with BR Energy (M) Sdn Bhd (BRE). KSE was unable to deliver the WPU to BRE as a result of delays by the builder of the WPU (the subcontractor of KSE), resulting in a claim by BRE that KSE had failed to use "all reasonable endeavours".

In discussing the various types of "endeavours" clauses, the Court of Appeal held that, under Singapore law:

- "All reasonable endeavours" is different from "reasonable endeavours". A party under a "reasonable endeavours" obligation merely has to act reasonably to procure the contractually stipulated outcome, i.e. "to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all the reasonable courses he can".¹
- For all practical purposes, "all reasonable endeavours" is the same as "best endeavours". Under both, the relevant party has to take "all reasonable steps which a prudent and determined man acting in the interest of the beneficiary of the obligation and anxious to procure the contractually stipulated outcome within the time allowed, would have taken".²

The Court of Appeal also observed that where there is a clause requiring a party to use "all reasonable endeavours":

- That party must "go on using endeavours until the point is reached when all reasonable endeavours have been exhausted".
- It need only do that which has a significant or real prospect of success in procuring the contractually stipulated outcome.
- It is not always required to sacrifice its own commercial interests in satisfaction of its obligations, but it may be required to do so where the nature and terms of the contract indicate that the parties contemplated that it should make such sacrifice.
- It cannot say that it could not have done more to procure the contractually stipulated outcome in cases where, if it had asked the other party, it might have discovered that there were other steps which could reasonably have been taken.
- Once the other party points to certain steps that it could have taken, the burden of proof ordinarily shifts to the party under the obligation to show that it took those steps, that those steps were not reasonably required, or that those steps would have been bound to fail.

On the facts of this case, the Court held that KSE had not breached its obligation to use "all reasonable endeavours". The Court noted that KSE had, in particular, communicated the urgency of the situation to the builder of the WPU, monitored progress in the construction of the WPU and assisted the builder with cashflow problems. In the circumstances, KSE did all that could reasonably have been required of it, while the Court also noted that BRE had not complained about KSE's performance of its obligation during the construction of the WPU.

Drafting tips

Parties that use "endeavours" clauses in their contracts should bear the following in mind:

- "Endeavours" obligations are not absolute: they do not represent a warranty of the contractually stipulated outcome. If the obligation is critical to the contract, it should be drafted as an absolute obligation instead.
- Avoid using "reasonable", "all reasonable" or "best" endeavours interchangeably to represent the same standard. While the Australian courts take the view that such clauses impose similar obligations, the Singapore courts regard "reasonable endeavours" as setting a lower obligation.
- Set out some sensible parameters, specifying what steps a party is required to take to fulfil a qualified obligation. This does not need to be a comprehensive list but should seek to address, for example:
 - (a) Whether a party will be required to incur expenditure to achieve the objective and, if so, whether minimum thresholds or maximum caps should be set.
 - (b) The specific activities a party is expected or not expected to carry out.
 - (c) The length of time the endeavours should be pursued.
 - (d) The extent to which a party is entitled to protect its own interests.
 - (e) Whether there is an industry standard or benchmark that can be referenced.

Notes

- 1 See *Rhodia International Holdings Ltd & Anor -v- Huntsman International LLC* [2007] 1 CLC 59.
- 2 This test comes from *Travista Development Pte Ltd -v- Tan Kim Swee Augustine* [2008] 2 SLR 474.

Further information

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