



The sliding scale of “endeavours” obligations

By **Lisa Rix** - April 2017

Often in contracts or settlement agreements, instead of providing that a party must achieve a particular outcome, we allow that party to simply try to achieve the outcome. However, this has given rise to the difficulty in establishing how hard the obligor should be trying. A sliding scale of “endeavours” clauses has developed as a result:

Absolute obligation to achieve an outcome

Best Endeavours:

- This requires a party “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”.
- It is likely to require expenditure on behalf of the obligor (but not ruinously so) or impose an obligation to litigate.

All Reasonable Endeavours:

- This is commonly adopted as a compromise between best and reasonable endeavours (although it has been argued to be the same as best endeavours).
- It may require expenditure. It may or may not require the obligor to sacrifice its commercial interests.

Reasonable Endeavours:



- An obligor should adopt and pursue one reasonable course of action in order to achieve the desired result, but does not need to sacrifice its own commercial interests (such as the obligor's relations with third parties, its reputation, and the cost of that course of action) and should take into account the likelihood of success.
- The course of action need not be exhaustive of every course available to the obligor.

“Commercially reasonable endeavours” and “reasonable commercial endeavours” – these are often used to try and soften a reasonable endeavours obligation. However, there is little precedent to support this interpretation, and it can be argued that a reasonable endeavours obligation already involves considering all relevant commercial factors.

You may be thinking that these are all pretty vague, with significant overlap between each of the terms. What’s more, the guidelines on these “endeavours” standards is made even less helpful as the true meaning is always fact and context specific.

In order to avoid the uncertainty that comes with using these “endeavours” terms, here is some practical advice:

When drafting contracts, rather than using an endeavours clause, set out the specific steps an obligor should take to try and achieve the outcome, considering:

- Whether the obligor is required to incur costs, and how much these costs should be;
- How long the obligor should try to achieve the outcome for;
- Whether the obligor is expected to take legal action in trying to achieve the outcome;
- To what extent the obligor can protect its own interests;
- Whether there are specific steps which the obligor need not take

As an obligor, record evidence of the steps you have taken in order to try and achieve outcomes under any “endeavours” obligations, and keep the other party informed of any difficulties which arise.

As an obligor, ensure that you have made some effort to achieve the outcome. In the majority of cases, the argument between the parties is mostly to do with whether the obligor has taken any meaningful steps to achieve the outcome at all, rather than the nuances in the differing level of obligations.