



endeavour to do your best

You may think that exercising your best endeavours in a contract seems like a reasonable request and that it goes without saying – of course we'll try our best.

But a contractual obligation of 'Best Endeavours' could leave you having to pull out all the stops, even if it costs more money and it's not in your commercial interest to do so. Whilst they may only be small changes to the wording, there is a world of difference between 'reasonable endeavours', 'all reasonable endeavours', and 'best endeavours' obligations.

As a starting point, the inclusion of one of these 'endeavours' obligations in your contract allows you to avoid a breach of contract if you can prove that you 'endeavoured'. This allows you to prove you behaved in the manner you should have behaved, but this can be subjective and each case will be viewed on its merits by the courts.

Reasonable Endeavours

Let's start with 'Reasonable Endeavours'.

This is the least onerous of the obligations and requires that you put in a significant amount of effort to get the desired result, but will generally not require you to jeopardise your own commercial interests. Each case will be subject to individual scrutiny and be judged on the facts and background of the contract, but by signing up to this level of endeavours you should not have to expend significant additional monies in order to achieve the objectives.

Best Endeavours

At the other end of the scale is 'Best Endeavours'.

This is the most onerous of the endeavours clauses and requires you not only to put in as much effort as humanly possible but has also been defined as doing what can be reasonably done, stopping only at the point where it would ruin the company.

This is a significant risk for any company to be signing up to, requiring you to act against your own commercial interest if necessary to achieve the required objective. This has been reinforced recently by the courts in *Jet2.com Ltd v Blackpool Airport Ltd* [2011], whereby Blackpool Airport were obliged to continue performing its duties under the contract despite it no longer being commercially viable to do so.

The best endeavours obligation has also been defined by the courts as an obligation to leave no stone unturned. As you can see, on any contract this could lead to significant requirements and significant costs to be incurred. It is essential that any contract is reviewed for best endeavours clauses and ensure it is amended to 'reasonable endeavours'.

All Reasonable Endeavours

There is a third option, often considered as a compromise between the two, which is 'All Reasonable Endeavours'.

On the face of it, this would appear to be no more onerous than 'reasonable endeavours' and just a nicety in the wording. This is not the case.

'All reasonable endeavours' continues to divide opinion and has not produced a settled meaning by

the courts. However, it appears to lean more towards the side of 'Best Endeavours' so should be avoided in the same way.

Particularly given the ambiguous meaning of the 'all reasonable endeavours' obligation, it is important that this term is avoided or at worst, clarified in the contract.

It is good practice with the presence of any endeavours obligation to discuss, clarify and agree what is required to fulfil the obligations - whether this is a cost requirement, a time requirement or any particular actions that you will need to take to achieve the desired result.

Summary

So, next time you receive a contract with an endeavours obligation, you should take the time to review what the obligation is and what it is asking you to do. If it states 'Best' or 'All reasonable' endeavours, negotiate it to be revised to 'Reasonable Endeavours'.

And as the courts have made it clear that there is no single definition of each level of endeavours obligation, if you can get the term clarified and negotiate some boundaries, then this gives you something to work to and a level of risk that you can understand.

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