



DISPUTE RESOLUTION BULLETIN

The consequences of using “all reasonable endeavours” clauses – a Singapore High Court decision

An obligation to use “all reasonable endeavours” is regularly included in commercial contracts, particularly in the context of oil and gas and construction contracts. But what does it mean? Parties should be aware of the potential consequences of including this kind of obligation in their agreements.

The use of non-absolute obligations, such as those to exercise “reasonable endeavours”, “all reasonable endeavours” or “best endeavours” has given rise to a considerable amount of litigation. There have been a number of decisions, particularly in England, addressing the differences between them. Broadly, the English courts have found that “reasonable endeavours” imposes the lowest burden and “best endeavours” the greatest burden, with “all reasonable endeavours” sitting somewhere between the two. The Singapore High Court’s decision in *BR Energy (M) Sdn Bhd (BRE) v KS Energy Services Ltd (KSE)* (20 March 2013) has provided a useful commentary on the Singapore courts’ approach to endeavours clauses.

BRE and KSE entered into a joint venture agreement (JVA) under which KSE was to procure the construction and delivery of a type of rig known as a Workover Pulling Unit (WPU). KSE was not obliged to construct the WPU itself. Instead, the JVA provided that KSE would “*use all reasonable endeavours to procure [that] the WPU is constructed and ready for delivery ... within six months after the Charter Agreement is executed.*”

KSE contracted with a third party, Oderco, to construct the WPU. In the event, there were significant delays and a completed WPU was never delivered to BRE. BRE sued KSE for breach of the JVA in the Singapore High Court.

Commenting on the nature of non-absolute obligations generally, the Court held that under a non-absolute obligation, a party is only agreeing to try to achieve the result stipulated, whereas under an absolute obligation, the party is agreeing to achieve that result.

Some previous authorities had equated an “all reasonable endeavours” obligation to a “best endeavours” obligation. The Court commented

that whether these standards should be treated as identical is determined on a case-by-case basis. In this case, in light of the circumstances in which the various contractual arrangements for the construction, delivery and supply of the WPU were made (all of which imposed very tight deadlines), the obligation to use “all reasonable endeavours” was as onerous as a “best endeavours” obligation. KSE had to take all reasonable steps in good faith which “*a prudent and determined company, acting in its own commercial interests and anxious to obtain the required result within the time allowed, would have taken*”.

On that basis, the Court found that KSE had failed to exercise all reasonable endeavours. It took the following factors into account:

- i) KSE mismanaged the Oderco contract.
- ii) KSE had been content to confine its efforts to sending emails and telephone calls chasing Oderco until such time as the project became irremediably delayed.
- iii) KSE failed to provide adequate onsite supervision.
- iv) KSE took Oderco’s progress reports at face value and did not notice glaring inconsistencies.
- v) KSE failed to realise that milestone payments, indicating that progress was being made, had not been triggered.

The Singapore Court’s approach appears broadly similar to that of the English courts. The Singaporean approach is arguably slightly more relaxed since some English authorities have suggested that exercising “best endeavours” may require a party to sacrifice its commercial interests, albeit not so as to result in a company’s ruin.

This case demonstrates well that the question as to whether a party has satisfied a non-absolute obligation and the differences between “reasonable endeavours”, “all reasonable endeavours” and “best endeavours” are not straightforward and are in fact sensitive. Determining whether a particular standard has been met, especially in the context of a construction contract, can involve detailed examination of extensive correspondence and documentation. This will inevitably be a lengthy and costly exercise.

Parties considering the use of an endeavours clause in their agreements, whether governed by English or Singapore law, should think carefully before doing so. The best approach is to identify, with as much clarity as possible, the role of the obligor, the objective to be achieved and the extent of their responsibility to achieve it.

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Mediation: a cautionary tale

Mediation and other forms of negotiated settlement are consensual by nature and can involve a considerable investment of time and energy by key players from the parties in a dispute. It is particularly important for parties to keep in mind general contractual principles throughout, so as to avoid the risk of finding that their settlement is unenforceable or incomplete. Oral agreements or basic settlement term sheets should be formalised and documented into a legally binding contract promptly after any successful mediation or other settlement negotiation. A failure to observe the basic contractual rules and to keep wider legal issues in mind can lead to disappointment and costly litigation.

Do we have a contract?

The same rules apply to settlement agreements as would apply to any other commercial contract. The parties must reach a clear and certain agreement on all material points before they will be bound. Additionally, the parties should have regard to any formalities that may apply, for example where real property is involved.

Negotiations conducted “subject to contract” will generally not be binding until the parties have lifted subjects and finalised the terms. The same applies to “without prejudice” negotiations. In addition, “without prejudice” negotiations cannot normally be put before the court, so that seeking to enforce an agreement reached without an open exchange to rely upon can prove very difficult.

In recent years, we have seen that specific issues can arise where negotiations are impacted by international sanctions regimes. There can be difficulties in making agreements with sanctioned entities and in effecting payments

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from sanctioned countries, even if the settlement agreement itself is acceptable within the sanctions regime.

A recent decision

In a recent Court of Appeal decision, *Mr David Frost v Wake Smith and Tofields Solicitors* (19 June 2013), a client brought proceedings against his lawyer for failure to put in place an immediately binding settlement agreement following a mediation. The decision is of general interest as a reminder about conducting and documenting settlement negotiations.

The dispute concerned, amongst other things, the ownership of real property. An agreement in principle was reached in mediation. At least one of the parties left believing this agreement to be binding on both parties. It was not. As the Court of Appeal commented, *"much remained to be done, discussed*



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and agreed before this agreement in principle could mature into an enforceable contract". The terms were uncertain and incomplete and did not meet the formalities required for transactions involving real property.

The eventual result was that a second mediation had to take place and a further, much more detailed contract was drafted and agreed. The delay, loss of goodwill and additional costs incurred may well have been avoided if the parties had been aware that they had to reach agreement on all substantive points and observe the proper formalities, before their settlement would be complete and enforceable.

The Court of Appeal expressed the view that *"Mediation has proved a flexible and immensely valuable process of dispute resolution."*

Parties should be aware of the consequences of that flexibility before they embark upon the process. Given that mediations generally require a considerable investment of time, money and energy, documenting the agreement at the end can be

an unappealing prospect, even in commercial disputes. However, it should be done wherever possible. When mediating or conducting other negotiations, it can be helpful to ask lawyers to draft a framework agreement in advance and to be on standby to finalise the terms at short notice.

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