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Problems of uncertainty with endeavours clauses

Features

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This article analyses that part of the judgment of Leggatt J in Astor Management AG v Atalaya Mining plc which deals with the enforcement of an "all reasonable endeavours" obligation to reach agreement with a third party. It finds the decision to be robust and commercially pragmatic because of the judge's willingness to give meaning to a contractual clause agreed upon by the parties and his reluctance to second-guess a commercial party on matters of commercial judgment.

KEY POINTS

- Endeavours clauses are useful but give rise to problems of uncertainty.
- A recent decision of Leggatt J illustrates how the courts are reluctant to declare endeavours clauses unenforceable on grounds of uncertainty of object or lack of objective criteria against which to evaluate performance.
- The judgment is to be welcomed because of the judge's willingness to give meaning to a contractual clause agreed upon by the parties and his reluctance to second-guess a commercial party on matters of commercial judgment.

INTRODUCTION

Legal practitioners, and their commercial clients, will be familiar with contractual terms that oblige a party to use "best endeavours", "all reasonable endeavours" or "reasonable endeavours"' to achieve a stated objective, as well as other variations on the same theme, eg "all reasonable but commercially prudent endeavours". Such endeavours clauses mitigate the risk of breach by qualifying the obligor's performance obligation.

There will be no breach if the obligor complies with the endeavours standard even though the objective is not achieved. This makes endeavours clauses particularly useful where the obligor's performance is dependent on matters outside its control, eg where it is reliant upon a third party, or where the obligor is aware of changing circumstances that could impact upon performance.

PROBLEMS OF UNCERTAINTY

Given the common use of endeavours clauses, it may seem perverse to question whether a court would hold such a term to be unenforceable on grounds of uncertainty. In *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417, the Court of Appeal held, by a majority, that a clause in a contract, requiring the defendant airport authority to "use all reasonable endeavours to promote" the claimant airline's services from the defendant's airport, was not too uncertain to be enforced. Significantly, Moore-Bick LJ (at [29]) noted that:

> **'...there is an important difference between a clause whose content is so uncertain that it is incapable of creating a binding obligation and a clause which gives rise to a binding obligation, the precise limits of which are difficult to define in advance, but which can nonetheless be given practical content.'**

Longmore LJ, in his concurring judgment at [69], said that the authorities justified that an obligation to use best endeavours should usually be held to be an enforceable obligation unless:

> **'(i) the object intended to be procured by the endeavours is too vague or elusive to be itself a matter of legal obligation; or (ii) the parties have ... provided no criteria on the basis of which it is possible to assess whether best endeavours have been, or can be used.'**

ASTOR MANAGEMENT AG V ATALAYA MINING PLC

Problems of uncertainty recently arose in *Astor Management AG v Atalaya Mining plc* [2017] EWHC 425 (Comm), which concerned the interpretation of an endeavours clause in a contract by which the defendant buyers purchased the claimant sellers' interest in a dormant copper mine. Payment of most of the consideration was deferred until certain conditions were met, including that the buyers secured senior debt finance in a sum sufficient to restart mining operations. The endeavours clause imposed an obligation on the buyers:

> **'...to use all reasonable endeavours to obtain the Senior Debt Facility ... and to procure the restart of mining activities ... on or before 31 December 2010.'**

The senior debt facility was not obtained by the target date. It was argued by the buyers that the clause was not enforceable both because the object which the party was to achieve by its endeavours was too uncertain, and also because there were no sufficient criteria against which to evaluate whether the party's endeavours had been reasonable or not. Leggatt J rejected both submissions, although he also held that there had been no breach of the endeavours clause by the buyers.

(a) Certainty of object and measure of endeavours

Leggatt J (at [64]) disagreed with Andrews J in *Dany Lines Ltd v Bristol Cars Ltd* [2014] EWHC 817 (QB) at [37] in so far as the judge gave the impression that the requirements of certainty of the object of the endeavours, and sufficient objective criteria by which to evaluate the reasonableness of the endeavours, were difficult to satisfy and would not usually be satisfied where the object of an undertaking to use reasonable endeavours was an agreement with a third party. Leggatt J stressed that the role of the court

in a commercial dispute was to give legal effect to what the parties had agreed, not to throw its hands in the air and refuse to do so because the parties had not made the task easy. He added: 'To hold that a clause is too uncertain to be enforceable is a last resort or, as Lord Denning MR once put it, "a counsel of despair": see *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] 1 QB 933, 943.'

On certainty of object, Leggatt J (at [67]) said:

> **'it should almost always be possible to give sensible content to an undertaking to use reasonable endeavours (or "all reasonable endeavours" or "best endeavours") to enter into an agreement with a third party. There is no problem of uncertainty of object, as there is no inherent difficulty in telling whether an agreement with a third party has been made.'**

On evaluation of endeavours to bring about the object, Leggatt J acknowledged that sometimes it could be hard to prove an absence of endeavours, or of best endeavours, but observed that the difficulty of proving a breach of a contractual obligation was an everyday occurrence and not a reason to hold that there was no obligation. He continued (at [67]):

> **'Any complaint about lack of objective criteria could only be directed to the task of judging whether the endeavours used were "reasonable", or whether there were other steps which it was reasonable to take so that it cannot be said that "all reasonable endeavours" have been used. Where the parties have adopted a test of "reasonableness", however, it seems to me that they are deliberately inviting the court to make a value judgment which sets a limit to their freedom of action.'**

Leggatt J (at [70]) said that he was not persuaded (by a statement made by Andrews J in *Dany Lions* at [26]) that a "clear and meaningful" distinction was to be drawn between: (a) cases in which the object of the reasonable endeavours was a clearly defined object (eg permission to import certain goods, or the acquisition of a grant, or of another form of finance) which could only be achieved by obtaining the consent of, or even entering into a contract with, a third party (where there is said to be sufficient certainty about the object of the endeavours); and (b) cases in which the object of the endeavours was the future agreement itself (where problems of uncertainty arise). Leggatt J accepted that the present case fell into category (a), since the object of the endeavours was to obtain a particular form of finance, but he saw no reason to make the distinction in the first place:

> **'... since contracting is an essentially instrumental activity: that is, entering into a contract with someone is never an end in itself but always a means of achieving some further object or purpose. Even if a wide area of discretion is left open, that object or purpose provides a standard by which to judge the reasonableness of a party's endeavour'.**

Leggatt J (at [71]) did not accept that in the present case there were no objective criteria by which the reasonableness of endeavours to obtain senior debt finance could be judged. He agreed that a court would be very slow to second-guess a commercial party on matters of commercial judgment. For that reason, he said it might in many circumstances be extremely difficult or impossible to show, for example, that a party ought reasonably to have pursued a negotiation with a particular lender, or accepted a given offer, or proposed a lower rate of interest. But it was important to remember that the burden of proof is on the party alleging failure to comply with the endeavours clause. The judge said that where the criticism involved a matter of fine judgment, it might be impossible to establish a breach; in other cases, the absence of reasonable endeavours might be obvious. Leggatt J (at [72]) had "no hesitation" in concluding that the endeavours clause in this case was enforceable.

(b) Duration of endeavours obligation

Leggatt J then had to decide whether the buyers' obligation to use all reasonable endeavours to obtain the senior debt facility expired on 31 December 2010 or continued thereafter. This was important because in

May/June 2015 the buyers raised funds from their shareholders as equity which allowed the mine to reopen in July 2015. The claimant sellers argued that had all reasonable endeavours been used by the buyers that funding would have been provided as a senior debt facility (hence triggering payment of the deferred consideration). The judge held that the endeavours obligation did not end on 31 December 2010. The date was a target and not a cut-off for the obligation. Leggatt J (at [75]) thought it:

> **'unreasonable (absent some special factor) to regard failure to achieve the objective by the given date as a reason for releasing the party which has been given the undertaking from any further performance.'**

The buyers argued that they would not have agreed to go on indefinitely using reasonable endeavours to obtain finance, with no limit to the expense they could incur. Leggatt J (at [78]) said that the buyers had mistaken the nature of the obligation:

> **'An obligation to continue using all reasonable endeavours does not require unlimited expenditure because the amount of the costs which have been and are being incurred in maintaining the project is a relevant factor in deciding what, if any, further steps are reasonable.'**

Leggatt J (at [81]) interpreted the endeavours clause 'to require [the buyers] ... to use all reasonable endeavours to obtain the Senior Debt Facility ... on or before 31

December 2010 provided that is practicable and, if not, as soon as practicable thereafter'.

(c) Had there been a breach of the endeavours clause?

Turning to the issue of breach, Leggatt J (at [82]), applying the approach taken by the majority of the Court of Appeal in *Jet2.com v BAL* (a "best endeavours" case), said that the question whether, and if so to what extent, a person who has undertaken to use "all reasonable" endeavours can have regard to his own financial interests 'depends on the nature and terms of the contract in question'. He recognised that it was in the buyers' financial interest to fund the restart of the mining operation without obtaining a senior debt facility which would have triggered payment of deferred consideration to the claimant sellers. But such self-interest 'cannot in itself be a legitimate reason for them to prefer another form of finance'. However, Leggatt J said it did not follow that financial considerations were irrelevant and that the buyers were required to obtain a senior debt facility at any cost. He said that it could not reasonably have been contemplated that the buyers should have to enter into a senior debt facility if to do so would make the mining project commercially unviable. The judge added that this would also have defeated the contractual purpose as the buyers would not have been able to pay the deferred consideration if they became insolvent.

The judge (at [84]) held -- crucially, given the way the sellers presented their case -- that the evidence did not show that money later raised from shareholders in the form of equity in May/June 2015 (which was used to reopen the mine) could, had all reasonable endeavours been used, have been obtained in the form of senior debt facilities provided by one or more of the shareholders.

In these circumstances, Leggatt J (at [96]) held that the defendant buyers had not been in breach of their obligation to use all reasonable endeavours to raise senior debt finance.

(d) The relationship between obligations of "good faith" and "all reasonable endeavours"

Leggatt J (at [99]) held that there was no need or scope to imply a term requiring the buyers to act in good faith to obtain senior debt finance as such a requirement was subsumed within the express obligation to use all reasonable endeavours. Interestingly, he said (at [98]) that a duty to act in good faith ('a modest require-

ment' which reflected the expectation that one contracting party would act honestly towards the other, and not conduct itself in a way calculated to frustrate the commercial purpose of the contract or which was commercially unacceptable) was 'a lesser duty than the positive obligation to use all reasonable endeavours to achieve a specified result which the contract in this case imposed'.

ANALYSIS

Several comments can be made about that part of Leggatt J's judgment dealing with the "all reasonable endeavours" clause.

First, the judge took a robust and commercially pragmatic approach to the enforcement of endeavours clauses where the object is a future agreement with a third party. This is to be welcomed. It is no less certain than an undertaking to use such endeavours to obtain consent from a third party, which may be granted outright or on terms. It is worth noting, as Lord Justice Lewison does in his book, *The Interpretation of Contracts* (6th edn, 2015, p 486, n 249), that the court in *Dany Lions* does not appear to have been referred to the decision of the Court of Appeal in *Lambert v HTV Cymru (Wales) Ltd* [1998] FSR 874, where Morritt LJ (at 881) made the point that an obligation to use all reasonable endeavours to procure a contract with a third party is not too uncertain to be enforceable just because there is a variety of possible forms the contract could take, since the obligation may be satisfied by a contract in any of those forms. Leggatt J referred to this omission and made the point (at [69]) that the fact that there may have been many forms of senior debt facility did not make the object of the endeavours insufficiently certain or provide a reason to excuse the buyers from making any efforts at all to obtain any form of senior debt finance. It is submitted that Leggatt J's pragmatic approach to this issue reflects the general principle that 'the courts should strive to give some meaning to contractual clauses agreed by the parties if it is at all possible to do so', particularly where the contract has been partly performed (*Associated British Ports v Tata Steel UK Ltd* [2017] EWHC 694 (Ch) at [26]-[35], Rose J).

It may be possible to distinguish between an unenforceable bare agreement to use best or reasonable endeavours to agree or negotiate the terms of the main contract, and an enforceable endeavours clause bolted onto a subsisting main contract, so long as the main contract contains objective criteria (or objective machinery) by which the obligation to use those endeavours to agree can be assessed by a third party in the event of a dispute (see, analogously, the *dicta* of Longmore LJ in *Petromec Inc v Petroleo Brasileiro SA Petrobas* [2005] EWCA Civ 891 at [115]-[121], where there was an express obligation to negotiate in good faith). The former may be said to be concerned with contract formation and the latter with contract performance. Astor reinforces this distinction because there the endeavours clause was embedded in an existing contract; in other words, it was about performance and not formation. *Dicta* of Lord Ackner in *Walford v Miles* [1992] 2 AC 128, 138 suggests that an agreement to use best endeavours to agree or negotiate is enforceable, unlike a bare agreement to agree (which 'lacks the necessary certainty'), but it has been said by many that the presence of an endeavours clause does not change anything (eg by Millett LJ in *Little v Courage Ltd* (1995) 70 P & CR 469, 476). However, on Leggatt J's reasoning, if endeavours clauses are underpinned by the concept of "reasonableness", and the object or purpose of the endeavours provides a standard (or objective criteria) by which to

evaluate the reasonableness of the obligor's endeavours, then the clause should not be unenforceable for uncertainty. Lord Ackner may have been right all along.

Second, it is submitted that Leggatt J's reference to a court being invited "to make a value judgment" does no more than acknowledge that the court is the arbiter of what is reasonable (as in *Mana v Fleming* [2007] NZCA 324). In exercising its judgment, a court will be 'very slow to second-guess a commercial party on matters of commercial judgment' and the obligee is unlikely to prove breach of an endeavours clause where the criticism of what the obligor has, or has not, done 'involves a matter of fine judgment'. Keeping the courts out of matters of fine commercial judgment is to be welcomed.

Third, the underlying standard of reasonableness sets a limit to clauses that require the obligor to use "reasonable", "all reasonable" or "best" endeavours (the latter probably being indistinguishable from "all reasonable" endeavours: see *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [54]-[62],

where the Singapore Court of Appeal reviewed the key English cases). What is reasonable will vary from case to case. Nevertheless, there seems little doubt that where the parties have agreed on a qualified endeavours obligation, as opposed to an absolute obligation, they do not intend the obligor to ruin itself financially to achieve the objective, particularly where, in *Astor* itself, it would have resulted in the buyers being unable to pay the deferred consideration. This is a commercially sensible construction of the agreement. The difficulty, however, is to know what level of effort is required short of acting in a commercially ruinous manner. The answer can only be found through construction of the clause in issue against the background of the other terms of the contract and the surrounding circumstances of the transaction. Context is vital. Previous case law interpreting an endeavours clause can only provide rebuttable presumptions as to its meaning (R Calnan, Principles of Contractual Interpretation, 2nd edn, 2017, at 5.48), it cannot be assumed always to mean the same thing in different contexts (see *Jet2.com Ltd v Blackpool Airport Ltd* [2011] EWHC 1529 (Comm) at [46], HHJ Mackie QC).

Fourth, Leggatt J has provided us with an indication of part of the contents of an "all reasonable endeavours" (and probably also a "best endeavours") obligation, namely a requirement to 'act honestly towards the other party and ... not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people'. That alone is not enough. Leggatt J stressed that the *positive* obligation to use all reasonable endeavours to achieve a specified result requires something more than mere honesty and absence of commercially unacceptable behaviour. But he does not specify what more is required. Unless the parties have specified in detail what such an endeavours obligation does, or does not, require (something that many practitioners recommend), it is submitted that, analogously with a "best endeavours" obligation, the obligor must 'take all those steps in their power which are capable of producing the desired result ... being steps which a prudent, determined and reasonable [man], acting in [the obligee's] interests and desiring to achieve that result, would take' (*IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335, 343, 349), and that this may require subordination of its own commercial interests (*Jet2.com v BAL* [2014] EWCA Civ 417 at [32] and [70]). However, the obligor need only do that which has a "significant" or "real" prospect of success (*Yewbelle v London Green Development Ltd* [2007] EWCA Civ 475 at [32]).

Fifth, and finally, Leggatt J (at [75]) said that an undertaking to use all reasonable endeavours was different from an unqualified undertaking in that failure to achieve the relevant objective by the specified date did not "by itself " mean that there was a breach. That must be right as we are judging whether the obligor has exercised all reasonable endeavours and not whether it has achieved the objective. Where the obligation to exercise all reasonable endeavours stays open after the date of stipulated performance (a question of interpretation), it will be limited by what remains reasonable, and changing circumstances after the stipulated date may make what the obligor does or does not do more or less reasonable. If the parties want the endeavours obligation to stop by a certain date, then they should make express provision for that in their contract. The endeavours obligation will also end where all reasonable endeavours have been exhausted (*Yewbelle Ltd v London Green Development Ltd* [2006] EWHC 3166 (Ch) at [123]), or where there are insuperable difficulties in obtaining the stated objective even though other difficulties are capable of being surmounted (*Yewbelle* on appeal, above, at [103]).

CONCLUSION

In *Astor* the object of the endeavours clause was to reach agreement with a third party, but there seems no good reason to declare unenforceable such an obligation where the object is to reach agreement with the other contracting party. If the object of the endeavours is clearly identified, and the obligation is underpinned by the concept of reasonableness, then a court should not shy away from enforcement. But why stop there? It is time for a thorough review, and reform, of the law relating to agreements to agree and negotiate in general.

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Further Reading:

- Reasonable endeavours: how far do you have to go? [2008] 7 JIBFL 338.

- Is an "all reasonable endeavours" obligation best? [2010] 10 JIBFL 602.
- LexisPSL: Banking & Finance Practice note: Reasonable and best endeavours.

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