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Beyond words

Treatment of the term 'best endeavours' and its variants shows that English judges and practitioners are interpreting contract language blindly, argues **Kenneth Adams**



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Although English lawyers might find it galling to have an American lawyer say so, how the English legal profession goes about interpreting contracts is, in one important respect, dysfunctional.

In the English legal system, attributing meaning to contract language isn't necessarily a function of the ordinary meaning of that language. Instead, practitioners and, crucially, judges are prone to treating contract language as inscrutable code. That poses a risk of confusion and of irrational outcomes to contract disputes.

One clear example of this dysfunction is treatment of the phrase 'best endeavours' (the English legal system's equivalent of 'best efforts', the phrase used in the United States and Canada) and variants of that phrase. English judges have misguidedly come up with distinctions between different standards of 'endeavours', and English practitioners have been only too happy to play along.

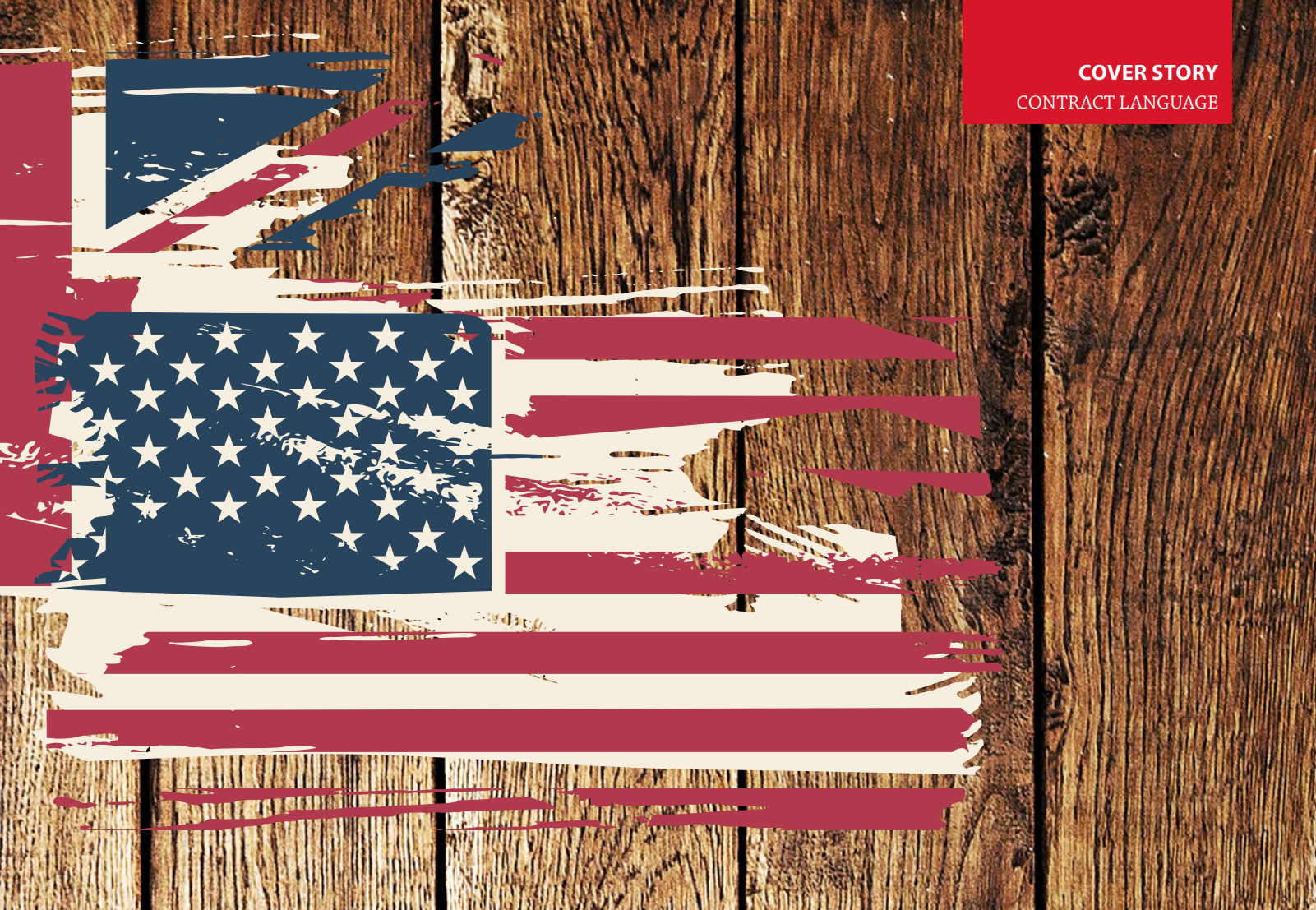
Standard English meaning

When considered from the perspective of standard English, anyone who undertakes to use 'best endeavours' to accomplish a task is simply saying 'I'll try my best', but in a context that requires a measure of formality. What sort of effort is required to accomplish that task is a function of the circumstances and the nature of the task. In other

words, you're expected to do only what is reasonable in the circumstances. In this context, 'best' doesn't convey the meaning 'exceeding all others' any more than it does in expressions such as 'to the best of my knowledge'. Instead, it simply adds a rhetorical flourish.

As regards an undertaking to use 'reasonable endeavours' to accomplish a task, there's no reason to think that it conveys a different meaning. Unlike 'best endeavours', 'reasonable endeavours' doesn't have an idiomatic meaning. Instead, it's a legal construct, presumably in response to the notion that 'best endeavours' conveys the meaning 'exceeding all others', as discussed below.

As for an undertaking to use 'all reasonable endeavours', there's no basis for concluding that adding 'all' changes the meaning, resulting in a standard more exacting than that imposed by just 'reasonable endeavours' but less exacting than that imposed by 'best endeavours'. Instead, in this context too, 'all' serves as rhetorical emphasis – it's used to assure the listener that you appreciate the importance of what's being discussed, much as 'all' is used in the phrase 'with all due respect'. To suggest otherwise is to invite all sorts of confusion. After all, the phrase 'all best endeavours' occurs in contracts, as does 'all best efforts'. If one attributes significance to the 'all' in 'all reasonable endeavours', then it should serve the same function in 'all best endeavours', leading to the



conclusion that there are four different standards of 'endeavours'. Such a notion is divorced from any rational semantic analysis of English usage.

So as a matter of standard English usage, all four variants – 'best endeavours', 'all best endeavours', 'reasonable endeavours', 'all reasonable endeavours' – mean the same thing.

Law firm analysis

English firms have made a mess of this, for example in a 2014 analysis by members of the London office of the global firm Norton Rose Fulbright.

The core distinction it offers is: "[Best endeavours] requires the party to take all reasonable courses of action to achieve the desired result." By contrast, "An obligation to use reasonable endeavours is less onerous. The party is required to take just one reasonable course of action to achieve the desired result."

But if several actions are required to achieve a result, it's hard to imagine a standard that imposes an obligation to take just one of those actions. The corollary is that if you can achieve a result by taking one action, it's hard to imagine why one would be required to take more than that action to achieve that result. Furthermore, there's no trace of this distinction in English usage.

The analysis goes on to assert that adding 'all' to 'reasonable endeavours' 'is likely' to impose an

obligation broadly comparable to 'best endeavours'. That conclusion, too, has no basis in how people actually write and speak.

Norton Rose Fulbright's analysis is hardly anomalous. A 2012 analysis by Collyer Bristow states that: "Case law indicates that there is a spectrum of endeavours obligations, with 'best endeavours' representing the most stringent obligation, 'all reasonable endeavours' probably occupying some sort of centre ground and 'reasonable endeavours' being the least stringent."

A 2011 analysis by Wragge Lawrence Graham & Co covered the same ground, stating, among other things, that 'all reasonable endeavours' "has been viewed as a middle ground between best and reasonable endeavours."

Case law

The obvious response to any critique of these three analyses, and others like them, is that they reflect English case law.

And that they do. In *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm), Judge Julian Flaux proclaimed that, "As a matter of language and business common sense, untrammelled by authority, one would surely conclude" that 'best endeavours' and 'reasonable endeavours' do not mean the same thing. He went on to offer the distinction between all reasonable courses of action and one



How the English legal profession goes about interpreting contracts is dysfunctional

reasonable course of action that Norton Rose Fulbright parroted.

In *Hiscox Syndicates Ltd v Pinnacle Ltd* [2008] EWHC 145 (Ch), Judge David Hodge managed to conclude that ‘all reasonable endeavours’ “is more onerous than an obligation simply to use ‘reasonable endeavours’, and is approaching an obligation to use ‘best endeavours.’”

But English case law on ‘best endeavours’ and its variants is the result of a misbegotten literal-mindedness that strips idioms of their everyday meaning and breaks them down into their individual components, to be considered in isolation. The result is bungled contract interpretation.

If ‘best endeavours’ represents a more exacting standard than does ‘reasonable endeavours’, then anyone under an obligation to use best endeavours would be at risk of having to act more than reasonably – in other words, unreasonably – to comply with that obligation. As a matter of contract law, that’s an untenable proposition. Furthermore, one would have no basis for determining at what point a ‘best endeavours’ obligation had been complied with – just how unreasonably would one have to act to meet that standard? So as a matter of not only idiom but also contract law, the notion that ‘best endeavours’ is more demanding than ‘reasonable endeavours’ doesn’t work.

By contrast, US courts have overwhelmingly held that all ‘efforts’ provisions mean the same thing – ‘reasonable efforts’. There’s no basis for attributing to differences in language the way the two systems interpret differently what are, as a matter of semantics, equivalent phrases. Instead, while US court opinions are grounded in the everyday meaning of ‘efforts’ provisions, English courts strip ‘endeavours’ provisions of their everyday meaning and, in effect, treat them as code.

Case law response

Given English case law on ‘endeavours’ provisions, it’s up to English practitioners to ensure rational treatment of endeavours provisions. However, they’ve demonstrated no appetite for that task. Instead of seeking to neutralise the proclivity of English judges to engage in sterile ‘endeavours’ hairsplitting, English practitioners appear to embrace it.

They’re also willing to ignore anything that might complicate matters. For example, the Norton Rose Fulbright analysis makes no mention of *Jet2.com Limited v Blackpool Airport Limited* [2012] EWCA Civ 417, an opinion that conspicuously lacks any suggestion that different ‘endeavours’ phrases convey different meanings,

and the Collyer Bristow analysis mischaracterises it.

Embracing this approach to ‘endeavours’ case law requires ignoring the powers and responsibilities that come with drafting or reviewing contracts. The goal should be to express the deal as the parties understand it, and drafters aren’t required to indulge in whatever nonsense courts happen to offer up. Specifically, it would be best to use only ‘reasonable endeavours’ in contracts – it conveys the idiomatic meaning of ‘endeavours’ without posing the risk of having the idiomatic meaning hijacked by a court inclined to indulge in misbegotten hairsplitting.

Furthermore, there’s more to ‘endeavours’ provisions than whether you use ‘best’, ‘reasonable’, or some other variant. Specifically, you have the opportunity to express a standard for measuring performance. In doing so, you can incorporate whatever level of onerousness you wish.

Broader significance

What’s particularly troubling about how English judges and practitioners treat ‘endeavours’ provisions is that it’s not an isolated example.

For instance, exactly the same dynamic is on display with respect to the phrase ‘represents and warrants’ and its variants. US courts attribute no particular significance to it, beyond recognising that it’s used to introduce statements of fact. By contrast, English courts have endorsed the notion that the verb you use to introduce statements of fact acts as code, with implications for remedies – see *Man Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm) at paragraph 32. Many English practitioners appear wedded to that notion, although it would be clearer and simpler to address remedies directly.

English courts have said that in interpreting contract language, they aim to determine what a reasonable person familiar with the background facts as known to the parties would have understood the parties to have meant, for example as in *Sirius International Insurance Company v FAI General Insurance Limited* [2004] UKHL 54, at paragraph 18.

But that is not the approach on display in case law regarding ‘endeavours’ provisions and the phrase ‘represents and warrants’. Those examples happen to have come to this author’s attention. With a bit of digging, one might well uncover other examples.

So despite their avowed approach, English judges are prone to treating contract language as code, and English practitioners are willing to indulge them. The blind are following the blind. It makes for a toxic combination, one that increases the risk of confusion and dispute. **SJ**



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