Focus BUSINESS LAW

With 'efforts' provisions, reasonable is better than best

Kenneth Adams

If accomplishing a given contract goal isn't entirely within a party's control, the parties might agree to make that obligation subject to an efforts standard. One finds in contracts a host of efforts standards, with best efforts and reasonable efforts being the basic alternatives. What do those two terms mean?

In addressing that question, Canadian judges and practitioners are prone to invoke the leading Canadian case on the meaning of the phrase "best efforts," namely the opinion of Justice Jacqueline Dorgan of the Supreme Court of British Columbia in *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.* [1994] B.C.J. No. 493.

For example, in *Diamond Robinson Building Ltd. v. Conn (c.o.b. Ubiquity Wellness Centre)* 2010 B.C.J. No. 94, another justice of the Supreme Court of British Columbia said, "It is now well established in law that a party who contracts to use their 'best efforts' faces a more onerous obligation than a person who contracts to use 'reasonable efforts.'" He went on to cite *Atmospheric Diving Systems*, saying that in the case the justice "concisely summarizes the law on the meaning of 'best efforts.'"

In a September 3, 2013 post on McCarthy Tétrault's Canadian M&A Perspectives blog, the authors cite *Atmospheric Diving Systems* as standing for the proposition that "best efforts holds the party to a higher standard," and they go on to describe the distinction between best efforts and reasonable efforts as "stark."

But it so happens that the analysis in *Atmospheric Diving Systems* is poppycock. Judges and practitioners should give it a wide berth instead of tugging their forelocks.

Here are the first two points of the court's seven-point digest of the relevant case law:

1."Best efforts" imposes a higher obligation than a "reasonable effort."

2."Best efforts" means taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving no stone unturned.

So a best-efforts obligation represents a more onerous standard than does reasonable efforts — but to comply with that obligation, all that's required is that you act reasonably. The court's first two points are incompatible, so the ostensible distinction collapses. It brings to mind video footage of old tower blocks gently imploding.

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If you search through the rubble, you find other oddities. Why combine good faith and reasonableness? And although Justice Dorgan's "leaving no stone unturned" maxim is catchy, a vague metaphor does nothing to elucidate the vague "best efforts."

That the rationale offered in *Atmospheric Diving Systems* fails so spectacularly should come as no surprise, as any attempt to distinguish between best efforts and reasonable efforts is doomed to incoherence. As a matter of idiom, "I'll use best efforts" simply means "I'll try my best." There's nothing to suggest that in trying one's best one need do anything other than act as a reasonable person would in the circumstances. It's only the hopelessly literal-minded, or those grappling for an advantage in litigation, who could suggest otherwise, presumably ignoring context and fastening on the dictionary definition of best — "exceeding all others."

Furthermore, suggesting to a contract party that for it to comply with a best-efforts obligation it might not be enough for it to act reasonably is to suggest that it might have to act unreasonably — a preposterous notion. That party would be entitled to wonder just how unreasonably it would have to act to comply with that obligation.

It should come as no surprise, therefore, that courts in the U.S. and Australia have declined to recognize a distinction between best efforts and reasonable efforts. Ultimately, this is a matter of semantics, and there's nothing about English usage in Canada that could explain why Canadian courts have opted for a different interpretation.

It should come as cold comfort that with head-scratching opinions such as *UBH (Mechanical Services) Ltd. v. Standard Life Assurance Co.*, T.L.R., Nov. 13, 1986 (Q.B.), English courts have endorsed a distinction between the two phrases — English courts have shown an unhealthy predilection for treating contract language as inscrutable code. But the opinion of the English Court of Appeal in *Jet2.com Ltd. v. Blackpool Airport Ltd.*, [2012] EWCA Civ 417, suggests that even English courts might now be more inclined to approach this issue rationally.

Ultimately, *Atmospheric Diving Systems* should be irrelevant to contract drafters. To avoid the confusion that goes with best efforts, use only reasonable efforts. More than that is required to structure a clear "efforts" provision, but it's a good start.

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