

Cerno

Distinguish; determine; resolve.

Date 23 October 2012

Welcome

Welcome to this newsletter from Cerno, a consultancy providing dispute resolution advice and services to the construction, engineering, industrial and maritime industries and related professions such as lawyers, architects and engineers.

The purpose of Cerno's newsletters is to provide information on matters of general interest and updates on latest the developments in the field of dispute resolution and related case law. This issue reviews the interpretation given to 'reasonable endeavours' and 'best endeavours' performance obligations in different legal jurisdictions.

Is doing what is reasonable actually good enough?

Contracts regularly include clauses which oblige parties to use their 'best endeavours' or 'reasonable endeavours' to reach a contractual objective; but what does employing one's best efforts or best endeavours mean? Further, is it any different from making a reasonable endeavour, or employing all reasonable endeavours?

For many years there has been debate over the meaning of such terms. There is no exact legal definition, but in everyday language 'reasonable' does not mean the same as 'best'. In terms of the level of implementation required on the party exerting the effort to achieve the contractual objective whether there is a difference in the level of performance required depends upon the legal jurisdiction and laws governing the contract and it may extend to sacrificing one's own commercial interests.

Endeavours clauses do not amount to an absolute obligation but depending upon where you are and your contract there is a difference between doing what is reasonable and doing your best.

A simple understanding of difference between 'reasonable' and 'best' breaks down on analysis of U.S. case law. Many U.S. courts have found no meaningful distinction between the various efforts standards, unless the parties specify or both standards are used in the same contract.

In Australia the current trend is towards erosion of common law distinction between best endeavours and reasonable endeavours, with a conclusion from case law that whilst the two are not the same the distinction between the two may be minor. The test to be applied is to measure the contractual obligation having regard to the contract as a whole and the factual context in which the best endeavours are to apply.

Australian Courts will consider the qualifications, abilities and responsibilities of the person obliged to exert the performance. A party may take into account its own commercial interests and third party interests where it is not reasonable to give priority to other party's interests. The performing party is required to do no more than what is reasonable in the circumstances to carry out the objective; it is not required to breach its own contract, or the general law. Further, if the Party

could have done more but didn't, it won't be in breach if making the extra efforts would not have made any material difference to the outcome.

In English law it has been held historically that the obligation to use 'best endeavours' does not allow the performing party to employ only second best endeavours; and that no stone should be left unturned. Using one's 'best endeavours' means taking all reasonable steps that a prudent and determined man acting in his own interest would take. Further, the obligation to use reasonable endeavours requires party to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted.

A party cannot escape a performance obligation by arguing that compliance would be unprofitable.

In the recent case of **Jet2.com Limited v Blackpool Airport Limited** (2012) the English Court of Appeal held that an airport operator's obligation to use best endeavours in promoting an airline's low-cost services gave rise to an obligation to operate outside normal operating hours, as this was essential to the airline's business model. The airport could not escape this obligation on the basis that to comply would be unprofitable.

Their Lordships found that an obligation to use best endeavours requires party to do all it reasonably can to meet the obligation. To what extent this requires the party to disregard its own commercial interests will depend on the nature of the terms of the contract. However where it becomes clear that the party relying upon the obligation could never expect to achieve the objective, the party exerting the obligation does not have to incur further losses in seeking to promote the objective.

Conclusions

Endeavour clauses do not amount to an absolute obligation; nonetheless the requirement to perform using 'best endeavours' is still an onerous obligation and can require a party to do all that is prudent and reasonable in the circumstances?

Notwithstanding that in English law the terms 'best' and 'reasonable' are given their denotative meaning, the requirement to use one's 'reasonable endeavours' does not necessarily create a lower level obligation requiring only minimum effort.

The position in English law presently is that the performance obligation depends on nature of the terms of the objective in question. Where a particular matter is fundamental to the agreement it will be difficult to argue that the relevant obligation is subject to consideration of the performing party's own commercial interests. Further, the more control a party has over the result, the more difficult it is to argue that the obligation is limited by consideration of its own commercial interests.

The lesson to be learned from this is, therefore, that the drafting of endeavours clauses should be approached with care. Parties should give careful consideration as to how they perform the agreement in practice and, as far as is possible, endeavours clauses should specify what measures should be taken, and when,

CIArb News

*News for members of
the Chartered Institute
of Arbitrators in Trinidad
& Tobago*

The Trinidad & Tobago branch of the Chartered Institute of Arbitrators (CIArb) is a branch of the regional, Caribbean Chapter and is looking to host regular meetings for its members; however it needs one or more venues.

If anyone can provide a suitable meeting place preferably with light refreshment facilities, to accommodate up to 50 persons, please contact Cerno.

Anyone interested in joining the CIArb can obtain information directly from the Institute (www.ciarb.org) or by writing to info@cerno.org.

Upcoming Events

It is intended that Cerno's newsletters will include details of local happenings and events of interest. Anyone wishing to have details of an event considered for inclusion here should write to info@cerno.org and provide relevant details.

22-23 & 26-27 November 2012: Hyatt Regency, Trinidad: "The Practical Use of the 1999 FIDIC Conditions of Contract for EPC Turnkey Projects & Comparison with the Plant & Design Build Contract " & "The Practical Use of the 2008 Conditions of Contract for Design Build and Operate Projects." For details and registration e-mail to jccfidic2@gmail.com.

Contact Information

Cerno can be contacted by e-mail to info@cerno.org.

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