What Does An “All Reasonable Endeavours” Clause Require You To Do?

Introduction

In contractual relationships, while parties may have the commercial expectation of good faith, there is as yet no general equivalent legal requirement. In order to regulate parties’ obligations, “reasonable endeavours” or “best endeavours” clauses have become an increasingly common feature of contracts in Singapore. However, such “endeavours” clauses are far from certain, and questions remain as to what exactly parties are required to do under these provisions.

“Endeavours” clauses, despite the frequency of their contractual occurrence, are not often considered before the Courts. In *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] SGCA 16, the Singapore Court of Appeal had the opportunity to clarify the content of “endeavours” clauses.

The case involved a provision which required the Appellant to use “all reasonable endeavours” to procure an oil rig by a certain date. Although the Appellant failed to procure the oil rig in time, the Court held that the “all reasonable endeavours” clause had not been breached, as the Appellant had in fact taken all reasonable steps that could be expected of it in getting the third party to complete construction of the oil rig.

Importantly, in reaching this decision, the Court of Appeal examined the existing case law on the topic and laid out the applicable test for determining whether an “endeavours” clause has been fulfilled, as well as the guidelines and principles that parties should observe when working under an “endeavours” clause.

Brief Facts

The Appellant and Respondent had entered into a Joint Venture Agreement (“JVA”) to procure an oil rig for supply to the main contractor. A third party rig builder (“Oderco”) had been nominated to construct the oil rig. Under Clause 6.2 of the JVA, the Appellant was required to use “all reasonable endeavours” to procure the oil rig, and to make the rig available for delivery within a certain time.

Despite numerous extensions, Oderco failed to complete the rig before the specified deadlines. Even after the agreement with the main contractor for the provision of the oil rig fell through, the Appellant and Respondent continued with construction works. Eventually, the Appellant terminated the agreement with Oderco and moved the partially-completed rig to its own yard.
However, the relationship between the Appellant and Respondent soured, and each alleged the other to be in breach of the JVA. In particular, the Respondent alleged that the Appellant had breached Clause 6.2 by failing to use “all reasonable endeavours”.

Holding of the Court of Appeal

At the High Court, it was found that the Appellant was in breach of Clause 6.2 by failing to use “all reasonable endeavours” to procure the construction and delivery of the oil rig by the given deadline. However, the Court of Appeal reversed the decision of the High Court, holding that Clause 6.2 had not been breached.

Applicable Test for “Endeavours” Clauses

The most common forms of “endeavours” clauses require the obligor to use “reasonable endeavours”, “all reasonable endeavours”, or “best endeavours” to achieve a certain outcome. In assessing their relative standards, the Court held that, of the three, “reasonable endeavours” clauses are the least onerous as they only require taking one reasonable course of action. On the other hand, “all reasonable endeavours” clauses and “best endeavours” clauses would have an equivalent standard.

The applicable test for “best endeavours” clauses, and thus “all reasonable endeavours” clauses, was laid out by the Court of Appeal in *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2002] 4 SLR(R) 474:

(i) The obligor has to do everything reasonable in good faith with a view to procuring the contractually-stipulated outcome within the time allowed. This involves taking all those reasonable steps which a prudent and determined man, acting in the interests of the obligee, would have taken.

(ii) Nonetheless, the obligor is entitled to take into account its own interests, and is not required to drop everything and attend to the matter at once; the contractually-stipulated time must be considered.

(iii) Such a clause is not a warranty to procure the contractually-stipulated outcome.

(iv) The test is objective, but determination of breach is a fact-sensitive enquiry.

In this case, the Court of Appeal also endorsed the following guidelines regarding the operation and extent of “all reasonable endeavours” and “best endeavours” clauses:

(i) The obligor must try until all reasonable endeavours have been exhausted, but need only do that which has a significant or real prospect of success.

(ii) If there is an insuperable obstacle, the obligor need not attempt to overcome other problems which are capable of resolution.

(iii) The obligor need not always sacrifice its own interests, but may be required to where the terms of the contract suggest it is in the parties’ contemplation.
(iv) An obligor cannot sit back and say it has done all it can in situations where, if it had asked the obligee, it might have discovered other reasonable steps. The obligor must then show these steps had been taken, or were not reasonably required, or were bound to fail.

Clause 6.2

The Court of Appeal applied the above guidelines to the facts of the case at hand, and reached the conclusion that the Appellant had exercised all reasonable endeavours to procure the oil rig.

The High Court had agreed with the Respondent’s submission that the Appellant should have taken a more hardline approach with Oderco, such as by deploying onsite supervision from the outset, threatening to employ a different rig builder, or taking over operations. However, the Court of Appeal recognized that an obligor will often have to exercise judgment and choose between different reasonable courses of action, and thus cannot be faulted for an option which only proves ineffective after the fact.

Here, the Appellant had attempted to pressure Oderco, and had then deployed representatives to monitor construction. The Appellant had also tried to alleviate Oderco’s cash-flow problems by paying Oderco’s suppliers and providing vital equipment and loans. Eventually, the Appellant took over construction of the rig itself.

The Court of Appeal held that the Appellant had thus performed its obligations as a prudent and determined company acting in the Respondent’s interests and anxious to procure the contractually-stipulated outcome within the time allowed. As such, there was no breach of Clause 6.2.

Concluding Words

This decision provides a measure of guidance for contracting parties operating under an “endeavours” clause. As such provisions are relatively common, parties should be aware of exactly what they are obliged to do, and the extent to which they are required to go to fulfill the contractually-stipulated objective. Parties should select the form of “endeavours” clauses most suitable for them; if they are unlikely to be able to achieve the higher standards of “best endeavours” or “all reasonable endeavours”, they may consider using “reasonable endeavours” or other permutations. The judgment leaves the door open for drafting “endeavours” clauses pitched at a less onerous level, for example, “reasonable endeavours within our discretion”, or specifying the time frame or financial limits within which reasonable endeavours may fall. Such added detail may remove a degree of uncertainty that “endeavours” clauses often carry.
Notably, the requirements under “endeavours” clauses are not strict as they often involve parties or contingencies outside of the obligor’s control. Under the applicable principles, it may be seen that parties have some space to maneuver within their obligations. Obligors may exercise their discretion in choosing the measures they take, and may balance their own interests and those of the obligee, as long as they observe the guidelines provided in the judgment above.

It should also be observed that the content of “endeavours” clauses may be influenced by the context of the underlying contract. Thus, when drafting and entering into such agreements, parties should be aware of how the other terms may affect their obligations.

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