



What do “best endeavours” and “reasonable endeavours” mean?

Introduction

“Best endeavours” and “reasonable endeavours”, are phrases used in intellectual property licenses from time to time. So are the not dissimilar “best efforts” and “reasonable efforts” phrases.

There are many circumstances in an IP contract where a “best” or “reasonable”, “endeavours” or “efforts” provision might be employed, such as obligations upon a licensee to:

- commercialise intellectual property
- take intellectual property to a market ready state of development
- maximise sales of products, or
- protect the intellectual property.

What do “best endeavours” and “reasonable endeavours” actually mean? What is their legal effect? What is the extent of the obligations that they impose? What is the difference between the two standards of the obligation? How useful are these phrases?

The terms are not meaningless

The vagueness of the terms might suggest that they are meaningless, nothing more than “comfort” provisions, inadequate to impose legally enforceable obligations, and inadequate to create legal liabilities if not complied with.

The terms do appear vague. But they can have a legally enforceable meaning. For example, an obligation upon a licensee “to use best endeavours to protect the intellectual property” has been held to go so far as to create a legally binding obligation upon the licensee to commence or defend litigation to protect the intellectual property, extending as far as to appeal if the litigation is unsuccessful and there are grounds to consider that an appeal has prospects of success.

Best Endeavours

At one time the courts placed a heavy burden when there was an obligation upon a party to use its best endeavours. The extent of the obligation was considered as going so far as to “leave no stone unturned”, no matter how onerous, and disregarding economic and commercial considerations. “Best endeavours means what it says - it does not mean second best endeavours” a court once remarked.

Over the years the standard has been lowered. The obligation to use best endeavours is now measured by a test of reasonableness, requiring “all that a reasonable person could do in the circumstances”, or requiring all that “could reasonably be expected... having regard to the circumstances”.

No longer is it necessary to “leave no stone unturned”. Rather, the test of reasonableness requires that all considerations be taken into account in judging whether non-compliance is a breach leading to legal liabilities.

For example, commercial and financial considerations may be taken into account and weighed up so as to relieve a person from the obligation completely.

Reasonable endeavours

Reasonable endeavours has been held to require “appreciably less than best endeavours”, but at least a minimal effort. It is therefore less onerous than best endeavours requiring all that “could reasonably be expected... having regard to the circumstances”.

Consistently, the courts have remarked that the reasonable endeavours obligation is of a lower standard, and less onerous than the higher best endeavours obligation. The courts have also remarked that a reasonable endeavours obligation is subject to the same commercial and financial considerations that might operate to relieve a person from the obligation.

IP Advisory Services

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- Skills development for better IP management and IP commercialisation
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 - intermediate
 - advanced
 - master class.

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Legally valid, but useful?

The best endeavours and reasonable endeavours obligations are therefore quite legally valid. But, both being subject to:

1. considerations of reasonableness; and
2. commercial and financial considerations

which might operate to relieve a person from the obligation to comply, it might fairly be asked whether the phrases are useful.

The vagueness and uncertainty of whether there is or will be legal accountability creates uncertainty over the use of either phrase.

This means that a licensor that intends to benefit from a licensee’s best endeavours or reasonable endeavours obligation cannot confidently assess whether it has any recourse if it has the view that the licensee has not performed adequately. Will it be entitled to damages? If so, to what extent? Would any damages adequately compensate the licensor for the licensee’s breach?

Nor can the licensee assess its obligation to perform its obligation, or its legal exposure if it doesn’t.

It also means that there will be uncertainty whether a licensor can terminate a license for what it regards as a breach of a best endeavours obligation.

For example, a license may contain an obligation upon a licensee to use its best endeavours to maximise the sales of a product. This is critical to a licensor as the licensor’s royalties are dependent on sales. A licensee’s sales of the product may be modest. The licensee may have inadequately marketed, or may not be making adequate efforts in specific markets. The licensor may wish to terminate the license for inadequate performance. Can the licensor do so?

The licensor will face a number of challenges: what standard of performance is required by “best endeavours”; what commercial or financial consideration impact? What quantity of sales does “maximise sales” actually require?

A licensor may attempt to terminate for breach of the best endeavours obligation. The licensee may commence proceedings that the purported termination is invalid. Those proceedings may take years to resolve. During that time the licensor is not able to license another licensee.

In these circumstances, a licensor is not well served by a best endeavours obligation. The licensor would have been better served by obligations requiring specifically stated minimum quantities of products to have been sold in specific markets or regions, with specific provisions dealing with the consequences of failing to achieve those minimum sales.

Conclusion

So how useful is a best endeavours or reasonable endeavours obligation?

While they may be useful when expressing a non-binding statement of intention, they are not adequate to create obligations that are intended to have clear legal consequences such as damages, or rights of termination.

Where that is sought, it is prudent to more precisely frame the obligations that are intended to give rise to damages or rights of termination.