

DRAFTING A BETTER “BEST EFFORTS” CLAUSE

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Parties often focus on the wrong issue when drafting an “efforts” clause. Typically, the negotiation concerns whether “best efforts”—as opposed to “reasonable efforts”—should be required, with a compromise of “reasonable best efforts” (or some variant) settled upon. But seldom do parties invest much energy in negotiating the issue that really matters: how to measure whether a party has actually exercised “best” or even “reasonable” efforts.

A standard efforts clause in a requirements contract might thus read:

“Supplier agrees to use commercially reasonable best efforts to satisfy the requirements of Buyer for widget x.”

While some states, such as Delaware, hold that “best” requires something more than “reasonable” efforts, many other jurisdictions find the difference in these phrases, in practice, to be purely semantic. A recent decision from the Southern District of New York, for example, explains that, “When interpreting the meaning of a ‘reasonable efforts’ clause, New York courts use the term ‘reasonable efforts’ interchangeably with ‘best efforts.’” *Soroof Trading Dev. Co., Ltd. v. GE Fuel Cell Sys., LLC* (S.D.N.Y. 2012). Similarly, in Massachusetts,

“the ‘best efforts’ standard has been held to be equivalent to that of good faith,” *Triple-A Baseball Club Associates v. Northeastern Baseball, Inc.* (1st Cir. 1987)—an obligation implicit in all contracts and that would appear to impose no greater duty than one created by a “reasonable efforts” clause.

Thus, in many jurisdictions, a “best efforts” clause requires a contract party to do only that which is reasonable under the circumstances in light of the party’s capabilities—the same obligation imposed by a “reasonable efforts” provision.

More fundamentally, while parties often engage in lengthy, but inconsequential negotiations over the type of efforts to be exercised, they often fail to specify just what the party burdened by the clause is supposed to do. To be sure, negotiating benchmarks against which to measure a party’s efforts can be difficult in many circumstances; however, omitting such details can render the entire clause unenforceable.

For example, in Illinois, courts have long held that “best efforts is too indefinite and uncertain to be an enforceable standard.” *Kraftco Corp. v. Kolbus* (Ill. App. Ct. 1971). Likewise,

in New York, courts often refuse to enforce efforts clauses unless either the contract sets forth “objective criteria against which a party’s efforts can be measured,” *Timberline Dev. LLC v. Kronman* (N.Y. App. Div. 2000), or there exists well-developed industry “standards or circumstances [that] impart a reasonable degree of certainty to the meaning of the phrase best efforts.” *Cruz v. FXDirectDealer, LLC* (2d Cir. 2013). Absent such guideposts, clauses requiring one party to exercise a certain degree of effort often fail as too indefinite or vague to be enforced.

Underlying these decisions is judicial reluctance to instruct companies as to how they should allocate their scarce resources, especially when the parties to the contract are themselves better able to specify what they want. How, after all, is a court to determine if a

party bound by an efforts obligation should have staffed one more person on a particular task or invested a little more in plant capacity to meet its (ill-defined) obligations? These courts explain that they will simply not impose their “own conception of what the parties should or might have undertaken.” *Non-Linear Trading Co. v. Braddis Assocs* (NY App. Div. 1998).

The lesson from these authorities is straightforward: parties should consider investing less time in negotiating over the adjective that attaches to an efforts clause, and more time specifying how such efforts are to be measured. Just by way of example, the sample clause from above could be modified as follows:

“Supplier agrees to use reasonable efforts to satisfy the requirements of Buyer for widget x by, among other

things, (i) at all times maintaining staffing and factory capacity sufficient to complete at least 10 widgets per month, (ii) operating the facility 24 hours/day when necessary to meet widget orders from Buyer, (iii) prioritizing Buyer’s orders over the orders of other buyers when a conflict in timely fulfilling widget orders exists, (iv) sub-contracting fulfillment obligations to another approved supplier when necessary, and (v) giving immediate notice to Buyer whenever the foregoing undertakings cannot be met.”

By providing a non-exclusive list of benchmarks for performance in the efforts clause itself, drafters can materially reduce the risk that the clause will be found to be unenforceable, and markedly increase the odds of getting that which they had hoped to secure.

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