

English High Court provides guidance on the “reasonable endeavours” requirement

Introduction

Endeavours clauses, such as the use of “*best endeavours*” (which imposes the highest duty), “*reasonable endeavours*” (a lower duty) or “*all reasonable endeavours*” (somewhere in the middle), are widely used in contractual arrangements. However, a party’s obligations arising from such clauses are often disputed.

In the recent case of *Astor Management AG v Atalaya Mining plc*¹, the English Commercial Court found that an obligation to use “all reasonable endeavours” to obtain a senior debt facility was legally enforceable. In reaching its decision, the court provided some useful guidance on how such endeavours clauses will be assessed by the English courts.

Background

The case involved a contract entered into between Astor Management AG (the “**Claimant**”) and Atalaya Mining PLC (the “**Defendant**”) under which the Defendant purchased the Claimant’s interest in a dormant copper mine. Payment to the Claimant was deferred until various events took place, such as the Defendant securing a senior debt facility.

The relevant clause stated that the Defendant was obliged “...to use *all reasonable endeavours to obtain the Senior Debt Facility with [the Defendant] as borrower and to procure the restart of mining activities in the Project on or before 31 December 2010...*”

A senior debt facility was not obtained by the target date. The Claimant brought proceedings alleging various breaches of contract, including that the Defendant was in breach of its obligation under the contract to use “all reasonable endeavours” to obtain the senior debt facility.

The High Court’s analysis of the “all reasonable endeavours” requirement

Amongst other arguments, the court had to consider:

- a) whether the requirement to use “all reasonable endeavours” to obtain a senior debt facility was a legally enforceable obligation; and
- b) if it was, whether the obligation expired on 31 December 2010 or continued thereafter.

In Leggatt J’s judgment, dated 6 March 2017, he found that an obligation to use “all reasonable endeavours” to obtain a senior debt facility was legally enforceable.

He departed from the approach in *Dany Lions Ltd v Bristol Cars Ltd*², where it was held that a reasonable endeavours obligation was only enforceable if its object was sufficiently certain and there were objective criteria by which to evaluate the attempt to comply with the obligation. Instead, the judge concluded that such clauses were “*deliberately inviting the court to make a value judgment which sets a limit to their freedom of action*”. Whether a party giving the undertaking to use all reasonable endeavours has done so is a question of fact which a court can decide.

Further, Leggatt J held that the obligation did not expire on 31 December 2010, as this was merely a target date. Applying this approach to the facts, the judge found that the Claimant had failed to show that there had been a breach of the obligation to use “all reasonable endeavours” to obtain a senior debt facility.

¹ [2017] EWHC 425 (Comm)

² [2014] EWHC 817 (QB)

Good faith

As a further point of interest, the Claimant also alleged that the Defendant had breached its implied duty to act in good faith (by failing to obtain the senior debt facility). While the judge did not explore the wider question of implied duties of good faith, he noted that there was no need to imply a term requiring the Defendant to act in good faith to obtain senior debt finance, since such requirement was subsumed within the express obligation to use “all reasonable endeavours”.

Conclusions

The *Astor Management* case shows that where the parties have adopted a test of “all reasonable endeavours”, they are inviting the court to make a ‘value judgment’ in the event that compliance with such a clause is disputed. Whether the party who gave the undertaking has ‘endeavoured’ to the level required is a question of fact which can be assessed by the court.

An alternative approach that may assist in avoiding disputes between contracting parties (and circumvent the court being asked to make a ‘value judgment’) is to specify in detail what the level of ‘endeavour’ entails. This could be achieved by including the following categories of terms in the contract:

- a) the steps a party should take to fulfil their obligation;
- b) how often those steps should be taken;
- c) how regularly a party should report on the steps taken;
- d) how long the duty should continue; and
- e) the specific consequences of failing to fulfil the specific obligation.

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