

GIVING 110 PERCENT

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Professional athletes often use the cliché “giving 110 per cent” to describe the level of effort they exert during a sporting event. This cliché typically refers to an athlete’s maximum, no-holds-barred effort: the level of effort that is expected by team owners, coaches, teammates, fans and, likely, the athlete himself or herself.

Commercial agreements typically use three phrases to describe the obligated level of effort: “best efforts,” “reasonable efforts” and “commercially reasonable efforts”. Although the phrase “give 110 percent” is not used in commercial agreements, parties to commercial agreements sometimes unwittingly obligate themselves to a very high intensity of effort, as they do not understand that these phrases have specific legal meanings.

BEST EFFORTS

“Best efforts” is the most onerous standard that a party commits to in fulfilling its obligations in a commercial agreement. The legal meaning of “best efforts” is summarized by Justice Dorgan of the British Columbia Supreme Court in the case of *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.*, (1994), 89 B.C.L.R. (2d) 356 at paras. 77-79 (which was considered by Justice Kent of our Court of Queen’s Bench in *Amonson v Martin Goldstein Professional Corp.* (1995), 27 Alta. L.R. (3d) 78):

1. “Best efforts” means taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving no stone unturned.
2. “Best efforts” includes doing everything known to be usual, necessary and proper for insuring the success of the endeavour.
3. The meaning of “best efforts” is, however, not boundless. It must be approached in the light of the particular contract, the parties to it and the contract’s overall purpose as reflected in its language.

Importantly, where the parties use the term “best efforts” in a contract, the courts will conclude that something more onerous than “reasonable efforts” was intended.

REASONABLE EFFORTS

“Reasonable efforts” is typically juxtaposed against the meaning of “best efforts”: it is often described as something less than “best efforts.” In *Armstrong v. Langley (Township)* (1997), 42 M.P.L.R. (2d) 34 at para. 34, Justice Stromberg-Stein of the British Columbia Supreme Court states “[r]easonable efforts does not mean best efforts which imports a higher obligation on persons to accomplish the required task.” The Ontario Superior Court of Justice in *Logic 2000 Inc. v. CNC Global Ltd.*, 2002 CarswellOnt 1412, a decision affirmed by the Ontario Court of Appeal, determined that “reasonable efforts” included taking “all reasonable and measured” steps. “Reasonable efforts” as a result is less demanding than best efforts and does not require the obligated party to leave “no stone unturned.”

COMMERCIALLY REASONABLE EFFORTS

“Commercially reasonable efforts” does not have a lengthy history of judicial consideration. In the Alberta Court of Appeal case *Atcor Ltd. v. Continental Energy Marketing Ltd.* [1996] 6 W.W.R. 274 at paras. 11 and 17, “commercially reasonable efforts” were considered in the context of a *force majeure* clause that released the parties from their obligations where the event rendered performance of the agreement commercially unreasonable. Justice Kerans, writing for the Court, held that to be commercially unreasonable the event must render performance “commercially unfeasible” or “commercially impracticable or unreasonable.” While it seems logical that “commercially reasonable efforts” are less onerous than “best efforts,” it remains to be judicially determined if such standard is more or less onerous than “reasonable efforts.” Therefore, where a commercial agreement uses “commercially reasonable efforts,” one would be wise to define the term within the agreement to ensure both parties understand and agree to the standard.

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Whatever the qualifiers used to determine the level of effort applied to the completion of obligations within a commercial agreement, it is clear that the choice of wording must be carefully considered. Without careful thought, a party to a commercial agreement may inadvertently commit to an intensity of effort akin to the professional athlete's "110 percent": which is a level of effort that, to my knowledge, has never been judicially considered.

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