What Should You Agree To?
INTRODUCTION

• The terms *best efforts* and *reasonable efforts* (and other variants), are widely used in contracts.

• Depending on your client’s position in the business deal, you may need to consider the implications of any of these terms.
INTRODUCTION

• Lease negotiations certainly incorporate terms such as *best efforts*, *reasonable efforts*, *commercially reasonable efforts*, and other “efforts” variants.

• The meaning of these terms is not always understood.

• A lack of understanding will, at times, result in unrealistic expectations.
BEST EFFORTS
In 1994, the Supreme Court of British Columbia, in Atmospheric Diving Systems Inc. v. International Hard Suits Inc., considered the meaning of best efforts.

The Court concluded the term best efforts imposes a higher obligation than reasonable efforts or reasonable commercial efforts.

Essentially, the term best efforts has become synonymous with the standard of “leaving no stone unturned”.

BEST EFFORTS

• If an agreement states *best efforts* are required, a court’s decision as to whether those best efforts were met, turns largely on the facts of each case.

• At times the plaintiff will claim the defendant failed to live up to its obligation to use its *best efforts*. 
BEST EFFORTS

• Over time the courts have interpreted the term *best efforts*, including:
  • Imposing a higher obligation than a “reasonable effort”;
  • Taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving no stone unturned;
  • Doing everything known to be usual, necessary and proper for ensuring the success of the endeavour.
BEST EFFORTS

• In interpreting the meaning of *best efforts* each contract is regarded in its particular context;

• If the defendant asserts inevitable failure, the defendant has the onus of showing such failure was, in fact, inevitable;

• Evidence that the defendant, acting diligently, could have satisfied the *best efforts* test, is evidence that the defendant did not use its best efforts.
IMPLIRED BEST EFFORTS

• It is implied there exists a promise on the part of each party to do all that is necessary to secure performance of the contract.

• Even without express language courts are inclined to apply best efforts obligations on parties fulfilling conditions under agreements.
LIMITATIONS ON “BEST EFFORTS”

- Courts have been inconsistent regarding limitations on the meaning of best efforts.
- The party subject to the best efforts obligation may give reasonable consideration to its own economic interests.
- Some case law suggests that while best efforts require “first class efforts”, they do not require the party making them to sacrifice its own economic interest.
LIMITATIONS ON “BEST EFFORTS”

• On the other hand, case law also suggests that financial disadvantage does not excuse performance under a best efforts standard.

• The Court noted a reasonable middle ground in considering the best efforts duty stating:

  “[the duty does not require] the party to sacrifice itself totally to the economic interests of the party to whom the duty is owed, although the interests of the other party must predominate.”
COMMERCIAL REASONABLE EFFORTS
In interpreting *reasonable commercial efforts* courts have determined there exists a distinction between the term *reasonable commercial efforts* and *best efforts*. Courts have found that although a contract may state all *reasonable commercial efforts* must be undertaken, uncertainty can also make it *commercially unreasonable* to proceed. Where the approval of the application is very remote and a reasonable business person could see that pursuing the application would almost certainly be unsuccessful, the party does not have to take the application through to refusal under the standard of *commercially reasonable efforts*. 
REASONABLE EFFORTS

- Courts have defined the term “reasonable” to mean, using sound judgment, exercising a sensible view.
  - The test of reasonableness assesses what other reasonable persons would have done in the same circumstances.

- Canadian case law makes it clear that reasonable efforts would be a less onerous standard than best efforts, but the differences between commercially reasonable efforts and reasonable efforts are not clear.
IMPLIED “REASONABLE EFFORTS”

• Courts will imply reasonable efforts in the same manner as they imply best efforts.

• Drafters must remember that where a standard of reasonable efforts (or commercially reasonable efforts) is intended, the standard should be explicitly expressed in the agreement to prevent a court from applying the higher best efforts standard.
REASONABLE BEST EFFORTS
• Courts have not addressed whether the addition of the word “reasonable” has any semantic impact on the best efforts obligation.

• Arguably best efforts already incorporates an element of “reasonableness” by definition as the Court in Atmospheric Diving defined best efforts to mean:

  “taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving no stone unturned.”
The Courts have considered that, from the perspective of a promissor under a *best efforts* obligation, the express inclusion of the word “reasonable” certainly cannot hurt and such an express condition could be interpreted as evidencing an intention to ease the full force of the onerous *best efforts* standard.
• Overall, there is no clear guidance when considering the meaning of *reasonable best efforts* or *best reasonable efforts*, and each case will be decided on the facts.
CONCLUSIONS
CONCLUSIONS

• Determining whether a party has made sufficient efforts under a particular standard will not always be a certain process and will be fact dependent.

• Be aware of best efforts obligations when negotiating a lease or contract.
CONCLUSIONS

• Ensure that the obligation imposed is what the parties intend and expect.

• Consider whether to expressly state, or have the parties imply, what efforts’ standard the parties will be subject to.
CONCLUSIONS

Consider the Scale from most onerous to least onerous:

Best Efforts
↓
Reasonable Best Efforts
↓
Reasonable Efforts
↓
Commercially Reasonable Efforts
Lloyd F. Cornett, Partner
Real Estate Practice Group Leader
416.865.7757
lcornett@airdberlis.com

181 Bay Street, Suite 1800
www.airdberlis.com