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ENDEAVOURS CLAUSES IN SINGAPORE CONTRACT LAW

Endeavours clauses are a useful mechanism for the imposition of non-absolute (or qualified) contractual obligations. This article examines how the various types of endeavours clauses – in particular, "best endeavours", "all reasonable endeavours" and "reasonable endeavours" clauses – are interpreted. Practical issues relating to the use of endeavours clauses are also considered: these include how parties may deviate from the established standards imposed by endeavours clauses, as well as uncertainty problems that may arise from the use of endeavours clauses, particularly, in agreements to endeavour to agree.

Benjamin **WONG** YongQuan*
LLB (Hons) (National University of Singapore); Advocate and Solicitor (Singapore); Sheridan Fellow, Faculty of Law, National University of Singapore.

I. Introduction

1 Usually, contractual obligations are absolute, in the sense that they strictly require the obligor to achieve a contractually-stipulated outcome.[1] Under an absolute contractual obligation, the obligor must completely and precisely procure the contractually-stipulated outcome. Any failure by the obligor to do so, without lawful excuse, will constitute a breach of contract.

2 However, contracting parties often prefer to impose non-absolute (or qualified) contractual obligations on the obligor. In *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* ("*KS Energy*"), the Court of Appeal provided a clear explanation of the difference between "absolute" and "qualified" contractual obligations:[2]

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1 This article will borrow the terminological framework adopted by the Court of Appeal in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [2]: "(a) a party who is bound by such a clause as an 'obligor'; (b) a party who is to receive the benefit of such a clause as an 'obligee'; and (c) the outcome which the obligor is to exercise 'endeavours' to procure as the 'contractually-stipulated outcome'".

2 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [42].

> A contract will usually impose an obligation on a party to do something. The obligation may be absolute or non-absolute (*ie*, qualified). An example of an absolute obligation in a contract is: Party A shall deliver a pen to me by tomorrow. An example of a non-absolute obligation is: Party A shall use reasonable endeavours to deliver a pen to me by tomorrow. In the latter example, the obligation is qualified by the phrase 'reasonable endeavours'. A party under an absolute obligation undertakes to achieve a result, whereas a party under a non-absolute obligation merely undertakes to *try* to achieve a result in accordance with a particular standard of conduct (*eg*, reasonable endeavours). [emphasis added]

3 There are many reasons why contracting parties might wish to impose qualified contractual obligations. One important reason would be that the obligor is unable or unwilling to guarantee the achievement of the contractually-stipulated outcome. This is likely to happen where the obligor is required to procure the action or approval of some third party, over whose decisions the obligor has little or no control. It may also happen where the contractually-stipulated outcome is too indeterminate or ambitious to be amenable to an absolute obligation.

4 To formulate such qualified contractual obligations, contracting parties frequently use qualifying phrases such as "best endeavours" or "reasonable endeavours". Contractual clauses incorporating such qualifying phrases are referred to as "endeavours clauses". Whatever the reason parties might have for imposing qualified contractual obligations, it is clear that endeavours clauses are a useful mechanism for doing so.

5 Clarity on the use and meaning of endeavours clauses is important in several contexts. First, parties should understand what an endeavours clause entails before including it in their contracts. As will be made clear in the discussion that follows, the choice of phrasing used in an endeavours clause can have dramatic implications on the scope of the obligation imposed on the obligor. Second, during the actual performance of an endeavours obligation, it is useful for the obligor to be aware of what it is (and is not) required to do in light of its current circumstances, as what is demanded of an obligor under an endeavours clause can vary with the situation. Third, when things fall apart, as they tend to do from time to time, and the obligee alleges a breach of an endeavours clause by the obligor, it may be necessary to adjudicate between competing interpretations of what the endeavours clause required the obligor to do. This is not always easy as endeavours clauses impose obligations of a rather indefinite nature.

6 The Singapore courts have, through a series of cases, established guidelines for the interpretation of endeavours clauses. This article now turns to examine the case law to date pertaining to endeavours clauses,

with the view to explaining the Singapore courts' approach to interpreting endeavours clauses.

II. Interpretation of endeavours clauses

A. General principles of contractual interpretation

7 It is established law that "interpretation is the ascertainment of the meaning which the expressions in a document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of the contract".[3] When interpreting a contract, the court's task is to "ascertain, based on all the relevant objective evidence, the intention of the parties at the time they entered into the contract".[4]

8 The Singapore courts have adopted a set of general principles applicable to the interpretation of contracts. Endeavours clauses, like any other contractual clauses, must be interpreted in accordance with these principles which were recently summarised by the Court of Appeal as follows:[5]

> (a) The starting point is that one looks to the text that the parties have used (see *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 at [2]).
>
> (b) At the same time, it is permissible to have regard to the relevant context as long as the relevant contextual points are clear, obvious and known to both parties (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125], [128] and [129]).
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> (c) The reason the court has regard to the relevant context is that it places the court in 'the best possible position to ascertain the parties' objective intentions by interpreting the expressions used by [them] in their proper context' (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [72]).
>
> (d) In general, the meaning ascribed to the terms of the contract must be one which the expressions used by the parties can reasonably bear (see, *eg*, *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [31]).

3 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [33].

4 *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd* [2015] 5 SLR 1187 at [32].

5 *CIFG Special Assets Capital I Ltd v Ong Puay Koon* [2018] 1 SLR 170 at [19].

9 It should be emphasised that the contractual text will always be the "first port of call" in interpreting an endeavours clause.[6] The courts first make reference to the words used to constitute the endeavours clause in question, read in the light of the rest of the contractual text (that is, the internal context);[7] this is followed by reference to the available extrinsic facts (that is, the external context).[8]

B. Specific guidelines for endeavours clauses

10 Given the principles of contractual interpretation summarised above,[9] it may be questioned why it is necessary to consider case law dealing specifically with the interpretation of endeavours clauses. If contracts should always be interpreted by reference to the general principles of interpretation in light of the particular facts of each case, what is the relevance of past precedents to the interpretation of an endeavours clause in a present case?

11 It is true that precedents are usually of limited utility in the interpretation of words and phrases used in contractual documents. This is because the same word or phrase can bear different meanings in different contexts. Thus, in *L Schuler AG v Wickman Machine Tool Sales Ltd*, Lord Morris doubted "whether, save in so far as guidance on principle is found, it is of much value (although it may be of much interest) to consider how courts have interpreted various differing words in various differing contracts".[10]

12 That being said, precedents are of higher value where what is being interpreted is a standard word, phrase or clause frequently used in contracts. In such "standard form" cases, greater weight is placed on prior decisions that illuminate the meaning of the standard words used by the parties. The general principles of interpretation do continue to apply, and context remains relevant, but their influence is structured by the intermediating framework generated by precedent.[11]

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6 *Y.E.S F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd* [2015] 5 SLR 1187 at [32].

7 As stated in *Tiger Airways Pte Ltd v Swissport Singapore Pte Ltd* [2009] 4 SLR(R) 992 at [30], "the courts will construe a contract as a whole document". See also *Travista Development Pte Ltd v Tan Kim Swee Augustine* [2008] 2 SLR(R) 474 at [20].

8 See *HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd* [2015] 3 SLR 885 at [59]–[61] and *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1069 at [49].

9 See para 8 above.

10 *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 256.

11 See Gerard McMeel, *The Construction of Contracts* (Oxford University Press, 3rd Ed, 2017) at para 1.134.

13 More precisely, the Court of Appeal has made it clear that past decisions interpreting a standard phrase can establish a *prima facie* meaning of that standard phrase, which applies by default in future cases. As explained in *KS Energy*:[12]

> [D]ecisions on the meaning and effect of certain commonly-used phrases provide authoritative guidance on the *prima facie* meaning of similar phrases when they are used in documents that are intended to have legal effect. This is especially so because the contracting parties would have taken into account the general law in reaching their agreement. Furthermore, attributing such *prima facie* meanings to similar phrases (*ie*, phrases similar to commonly-used phrases) promotes commercial certainty. Hence, unless there is a contrary and objectively-ascertained intention on the part of the parties, the court will generally assume that in using similar phrases in their contract, the parties intended these phrases to bear their *prima facie* meaning.

14 Endeavours clauses, incorporating standard phrases such as "best endeavours" and "reasonable endeavours", are so commonly used in contracts that they may safely be regarded as a type of standard clause. Thus, past decisions providing guidance on the interpretation of endeavours clauses are relevant to the interpretation of such clauses in a present case. In this regard, the Singapore courts have taken pains to set out specific guidelines for interpreting the meaning of endeavours clauses. These specific guidelines are practically significant because, as mentioned above, they are applicable by default.

15 The courts have laid out guidelines for at least three common variants of endeavours clauses: (a) "best endeavours" clauses; (b) "all reasonable endeavours" clauses; and (c) "reasonable endeavours" clauses. In Singapore, the guidelines for "best endeavours" clauses and "all reasonable endeavours" clauses are fairly well-developed, while there remains some uncertainty with respect to "reasonable endeavours" clauses. This article now turns to examine the guidelines for each variant.

C. Guidelines for interpreting "best endeavours" and "all reasonable endeavours" clauses

16 It is settled law, at least in the Singapore context, that "best endeavours" clauses and "all reasonable endeavours" clauses generally impose the same standards on the obligor.[13] The Court of Appeal in *KS Energy* took the view that there was unlikely to be any practical

12 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [45].

13 See *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [62] and *Lim Sze Eng v Lin Choo Mee* [2019] 1 SLR 414 at [74].

difference between a "best endeavours" obligation and an "all reasonable endeavours" obligation, and that "any attempt to draw a distinction between them would merely be a pointless hair-splitting exercise".[14] It is suggested, in agreement, that the drawing of fine distinctions between the two variants would also detract from the policy of promoting commercial certainty (this policy being one of the reasons for attributing default meanings to "endeavours clauses" in the first place).

(1) Ong Khim Heng Daniel v Leonie Court Pte Ltd

17 One of the earlier authorities on the interpretation of "best endeavours" clauses is the High Court decision of *Ong Khim Heng Daniel v Leonie Court Pte Ltd*[15] ("*Ong Khim Heng Daniel*"). In that case, the plaintiffs were the majority owners of a condominium development that they agreed to sell *en bloc* to the defendant, who paid a deposit for the purchase. The sale was subject to the approval of the Strata Titles Board, since not all of the subsidiary proprietors of the property agreed to the sale. It was expressly provided in the agreement that the plaintiffs were to "make their best endeavours and with all due expedition to apply to and obtain from the Strata Titles Board" approval for the sale of the property;[16] and if the Strata Titles Board did not approve the sale, all moneys paid by the defendant should be refunded. The plaintiffs made an application to the Strata Titles Board, which failed due to certain procedural defects. They made a second application about seven weeks after the rejection of the first application, but before that second application was decided, the defendant brought action seeking a declaration that the agreement had been terminated, and that it was entitled to a full refund of its deposit. At issue in the proceedings before the High Court was, *inter alia*, (a) what the plaintiffs' undertaking to make their "best endeavours" entailed; and (b) whether the plaintiffs had made their "best endeavours".

18 In relation to the interpretation of "best endeavours" clauses, Kan Ting Chiu J laid out a formulation that has since been widely adopted, and elaborated upon, in subsequent Singapore cases:[17]

> A covenant to use best endeavours is not a warranty to produce the desired results. It does not require the covenantor to drop everything and attend to the matter at once; the promise is to use the best endeavours to obtain the result within the agreed time. Nor does it require the covenantor to do everything conceivable; the duty is

14 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [62].
15 [2000] 3 SLR(R) 670.
16 *Ong Khim Heng Daniel v Leonie Court Pte Ltd* [2000] 3 SLR(R) 670 at [6] which cites cl 7A of the agreement of sale and purchase.
17 *Ong Khim Heng Daniel v Leonie Court Pte Ltd* [2000] 3 SLR(R) 670 at [42].

> discharged by doing everything reasonable in good faith with a view to obtaining the required result within the time allowed.

19 Two general observations may be usefully made about this formulation, in relation to reasonableness and good faith.

20 It should first be observed that an obligor's "best endeavours" obligation is ordinarily circumscribed by the notion of reasonableness – the obligor need only do "everything *reasonable*" to achieve the contractually-stipulated outcome, and not "everything *conceivable*". The notion of reasonableness plays a central role in delimiting the bounds of an obligor's "best endeavours" obligation (and this is obviously also true of "reasonable endeavours" obligations). What is reasonable in any particular case is, of course, highly fact-dependent.

21 Second, what is of interest in the *Ong Khim Heng Daniel* formulation is the express incorporation of the notion of good faith. This is consistent with the position taken in the recent English High Court decision in *Astor Management AG v Atalaya Mining plc*[18] ("*Astor Management*"), in which Leggatt J noted that a duty to act in good faith was "subsumed within the express obligation to use all reasonable endeavours".

22 What does "good faith" mean in the context of a contractual endeavours obligation? In *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd*[19] ("*HSBC Institutional Trust Services*"), the Court of Appeal expressed the view that the notion of good faith is "reducible to a core meaning":[20]

> At its core, the concept of good faith encompasses the threshold subjective requirement of acting honestly, as well as the objective requirement of observing accepted commercial standards of fair dealing in the performance of the identified obligations. This encompasses a duty to act fairly, having regard to the legitimate interests of the other party.

23 What constitutes acceptable commercial standards of fair dealing in a particular case will "depend heavily on the commercial nature and purpose of the contract in question".[21]

24 A similar formulation was adopted in *Astor Management*:[22]

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18 [2017] Bus LR 1634 at [98].

19 [2012] 4 SLR 738.

20 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [45].

21 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [49].

> A duty to act in good faith, where it exists, is a modest requirement. It does no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people.

25 What is the practical impact of the element of good faith? In other words, what does the requirement to act honestly, and in line with accepted commercial standards of fair dealing, add to the requirement of doing everything reasonable to achieve the contractually-stipulated outcome? One tentative suggestion is that the element of good faith could prevent the obligor from doing that which would frustrate the achievement of the contractually-stipulated outcome; this is a negative obligation, which sits apart from the positive obligation to make the required endeavours.

26 Returning to the case of *Ong Khim Heng Daniel*, Kan J found that the plaintiffs had not failed to use their best endeavours in their first application. Although the application failed because of a procedural defect, the plaintiffs had been "earnest" in seeking the approval. The plaintiffs had also not failed to use their best endeavours in their second application. Although there was some delay, this could be explained by the plaintiffs' need to comply with certain procedural requirements before making a second application; it was also reasonable for them to seek legal advice before making the application.

(2) Travista Development Pte Ltd v Tam Kim Swee Augustine

27 In the subsequent case of *Travista Development Pte Ltd v Tam Kim Swee Augustine*[23] ("*Travista*"), the Court of Appeal had the opportunity to elaborate upon the interpretation of "best endeavours" clauses. Here, the appellant entered into an agreement to purchase property from the respondents, for redevelopment. The agreement provided that the appellant should use its "best endeavours" to obtain a qualifying certificate ("QC") for the purchase. The appellant accordingly applied for the QC. The application was approved, subject to the appellant obtaining a guarantee to secure its compliance with certain terms. The appellant eventually obtained the requisite guarantee, but took more than three months to do so. At issue before the Court of Appeal was whether the appellant had used its "best endeavours" to obtain the QC.

22 *Astor Management AG v Atalaya Mining plc* [2017] Bus LR 1634 at [98].
23 [2008] 2 SLR(R) 474.

28 As summarised in the later decision of *KS Energy*, the Court of Appeal in *Travista* laid down the following propositions in relation to "best endeavours" clauses:[24]

> (a) The obligor has a duty to do everything reasonable in good faith with a view to procuring the contractually-stipulated outcome within the time allowed. This involves taking all those reasonable steps which a prudent and determined man, acting in the interests of *the obligee* … and anxious to procure the contractually-stipulated outcome within the available time, would have taken.
>
> (b) The test for determining whether a 'best endeavours' obligation has been fulfilled is an objective test.
>
> (c) In fulfilling its obligation, the obligor can take into account its own interests.
>
> (d) A 'best endeavours' obligation is not a warranty to procure the contractually-stipulated outcome.
>
> (e) The amount or extent of 'endeavours' required of the obligor is determined with reference to the available time for procuring the contractually-stipulated outcome; the obligor is not required to drop everything and attend to the matter at once.
>
> (f) Where breach of a 'best endeavours' obligation is alleged, a fact-intensive inquiry will have to be carried out.
>
> [emphasis in original]

29 The Court of Appeal took the view that the appellant had not used its "best endeavours" to obtain the QC. On the facts, while the appellants did approach banks for the requisite guarantee, the appellant did not seek the guarantee separately from the financing of the project. Had it done so, the guarantee could have been obtained more quickly. The appellant's decision to couple its request for a guarantee with its request for financing had delayed the obtaining of the QC. By failing to apply separately for a guarantee, the appellant had "not even attempted to use its best endeavours".[25]

30 Another important point of interest in this case is how the burden of proof was shifted to the appellant, to prove that it was not in breach of its "best endeavours" obligation. Here, the appellant had advanced the argument that the respondent had not provided sufficient evidence to show that the banks would have issued the guarantee more

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24 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [47]; *Travista Development Pte Ltd v Tam Kim Swee Augustine* [2008] 2 SLR(R) 474 at [22]. Note the affirmation of the formulation set out in *Ong Khim Heng Daniel v Leonie Court Pte Ltd* [2000] 3 SLR(R) 670 at [42].

25 *Travista Development Pte Ltd v Tam Kim Swee Augustine* [2008] 2 SLR(R) 474 at [27].

quickly had the appellants applied for the guarantee separately. This argument was rejected. Not only was it "a matter of common sense" that coupling the guarantee with overall financing slowed the process of obtaining the guarantee, but also:[26]

> … the burden was not on the respondents to show that the banks would not have agreed to provide financing in the form of the Guarantee separately from overall financing for the Project. It was for the appellant to demonstrate this, and it could not do so because it never applied for the Guarantee separately from the other credit facilities needed for the Project.

31 The burden of proof was thus shifted onto the appellant, requiring the appellant to prove that it was not required to separately apply for the guarantee because doing so would have been futile. This shifting of the burden of proof onto the obligor, in the event of disputes over whether a particular endeavour should have been made, was affirmed in the subsequent case of *KS Energy*, to which this article now turns.

(3) KS Energy Services Ltd v BR Energy (M) Sdn Bhd

32 In *KS Energy*, the respondent had been awarded a contract to provide a workover pulling unit ("WPU") to Petronas Carigali Sdn Bhd ("PCSB"). The respondent entered into a joint venture agreement ("JVA") with the appellant, forming a joint venture company. The JVA provided that the appellant would use "all reasonable endeavours" to procure the construction and delivery of the WPU within a stipulated time. The appellant then contracted a rig builder ("Oderco") to build the WPU. Oderco, however, was unable to construct the WPU in time, despite several deadline extensions granted by PCSB, and despite the appellant's efforts to expedite the construction. PCSB ultimately terminated its contract with the respondent. The respondent brought action against the appellant, alleging that the appellant had failed to use "all reasonable endeavours" to procure the construction and delivery of the WPU within the stipulated time frame.

33 In its decision, Court of Appeal first affirmed the guidelines previously set out in *Travista* on the interpretation of "best endeavours" clauses, and took the view that "all reasonable endeavours" clauses should be similarly interpreted.[27] Further, after an extensive analysis of the authorities, the Court of Appeal set out the following additional

26 *Travista Development Pte Ltd v Tam Kim Swee Augustine* [2008] 2 SLR(R) 474 at [27].

27 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [46]–[47], [62] and [94].

guidelines applicable to the interpretation of "best endeavours" and "all reasonable endeavours" clauses:[28]

> (a) Such clauses require the obligor 'to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted' (see [*Yewbelle Ltd v London Green Developments Ltd, Knightsbridge Green Ltd* [2007] 1 EGLR 137 ("*Yewbelle (HC)*")] at [123] and [*Yewbelle Ltd v London Green Developments Ltd, Knightsbridge Green Ltd* [2007] 2 EGLR 152 ("*Yewbelle (CA)*")]), or 'to do all that it reasonably could' (see [*Jet2.com Ltd v Blackpool Airport Ltd* [2012] 1 CLC 605 ("*Jet2 (CA)*")] at [31]).
>
> (b) The obligor need only do that which has a significant (see [*A P Stephen v Scottish Boatowners Mutual Insurance Association (The Talisman)* [1989] 1 Lloyd's Rep 535]) or real prospect of success (see *Yewbelle (HC)* and *Yewbelle (CA)*) in procuring the contractually-stipulated outcome.
>
> (c) If there is an insuperable obstacle to procuring the contractually-stipulated outcome, the obligor is not required to do anything more to overcome other problems which also stood in the way of procuring that outcome but which might have been resolved (see *Yewbelle (CA)*).
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> (d) The obligor is not always required to sacrifice its own commercial interests in satisfaction of its obligations (see [*CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch)]), but it may be required to do so where the nature and terms of the contract indicate that it is in the parties' contemplation that the obligor should make such sacrifice (see *Jet2 (CA)*).
>
> (e) An obligor cannot just sit back and say that it could not reasonably have done more to procure the contractually-stipulated outcome in cases where, if it had asked the obligee, it might have discovered that there were other steps which could reasonably have been taken (see *EDI Central Ltd v National Car Parks Ltd* [2011] SLT 75 ("*EDI*")).
>
> (f) Once the obligee points to certain steps which the obligor could have taken to procure the contractually-stipulated outcome, the burden ordinarily shifts to the obligor to show that it took those steps, or that those steps were not reasonably required, or that those steps would have been bound to fail (see *EDI*).

34 The Court of Appeal found that the appellant had not breached the "all reasonable endeavours" obligation in the JVA, overturning the High Court's findings. The appellant had behaved as a "prudent and determined company" acting in the respondent's interests and "anxious to procure the contractually-stipulated outcome within the time

28 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [93].

allowed".[29] The endeavours made by the appellant included persistently pushing Oderco to expedite the construction of the WPU, deploying representatives to Oderco's yard to monitor construction, paying Oderco's suppliers directly, airfreighting critical equipment to Oderco's yard, and loaning Oderco funds to deal with its financial difficulties.

35 A point of interest in *KS Energy* stems from the observation made by the Court of Appeal that there is a "critical distinction" between (a) cases where the obligation is to "use all reasonable endeavours to have a third party do a thing" (that is, "third-party-action" cases); and (b) cases where the obligation is to "use all reasonable endeavours to do that thing on one's own" (that is, "obligor-action" cases).[30] The Court of Appeal noted that the respondent and the High Court had omitted to draw that distinction. A question arises here as to what the relevance of this distinction may be. Yip and Goh have suggested that "a slightly higher obligation might be *prima facie* required" in obligor-action cases (because the success of the obligor is more likely to be outside of the obligor's control in third-party-action cases); however, as the authors rightly point out, the "two scenarios may not always be so different as to justify a difference in treatment"; and in either scenario, the extent to which an obligor has control over the outcome must ultimately depend on the precise facts of each case.[31]

36 Another possible approach to this distinction is to focus on the *third party*: simply put, in third-party-action cases, the characteristics of the third party must guide the assessment of the endeavours that the obligor must take – this is what distinguishes third-party-action cases from obligor-action cases. As illustrated by *KS Energy*, the nature of the third party in question may be determinative of the obligor's role, which may be facilitative, persuasive, or coercive.

37 A second point of interest in *KS Energy* be noted. This relates to the situation where the obligor is faced with conflicting methods of achieving the contractually-stipulated outcome. In this case, there were two conflicting strategies the appellant could have taken with respect to Oderco: the measured approach (which it took); or the more hardline approach (proposed by the respondent). The High Court had taken the view that the appellant was bound to take the hardline approach against Oderco, in order to induce it to construct the WPU more quickly; the

29 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [136].

30 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [137].

31 Yip Man & Goh Yihan, "Default Standards for Non-Absolute Obligations Clauses?" [2014] LMCLQ 320 at 326. See also Jessica Young, "An Endeavour to Understand "Endeavours" Undertakings" (2014) 44 HKLJ 95 at 113; Goh Yihan, Lee Pey Woan & Tham Chee Ho, "Contract Law" (2014) 15 SAL Ann Rev 217 at 235.

Court of Appeal, in contrast, considered that the appellant was entitled to adopt the more measured approach it had taken, noting that:[32]

> … an obligor may have to choose between different reasonable courses of action, and in so choosing, will have to exercise its judgment to determine which would be the most efficacious in the circumstances. The obligor is not to be faulted for making a choice that was only revealed to be ineffective after the fact.

38 Thus, if an obligor of a "best endeavours" or "all reasonable endeavours" obligation is presented with a range of conflicting courses of action, and the obligor selects the course of action which it believes to be the most effective in achieving the contractually-stipulated outcome, it will not be in breach even if it later becomes apparent that the selected course of action was ineffective. This is, perhaps, because it may be assumed that parties imposing endeavours obligations do not ordinarily intend or expect the obligor to operate with the benefit of perfect hindsight; instead, the intention is for the obligor to make its best efforts in the (limited) light of its circumstances at the material time.

39 By virtue of the travails of the courts in *Ong Khim Heng Daniel*, *Travista* and *KS Energy* (among other decisions), a clear set of guidelines exists to aid in the interpretation of "best endeavours" and "all reasonable endeavours" clauses. These guidelines are an invaluable tool for the drafting of qualified contractual obligations.

40 It may be observed that "best endeavours" and "all reasonable endeavours" clauses impose obligations that can be fairly onerous (requiring, as they do, the obligor to exhaust all reasonable means of achieving the contractually-stipulated outcome). In some situations, parties may wish to impose endeavours obligations that are less onerous. In such cases, "reasonable endeavours" clauses may be a possible alternative, and it is to this variant that this article now turns.

D. Guidelines for interpreting "reasonable endeavours" clauses

41 While substantial guidance has been provided on the interpretation of "best endeavours" and "all reasonable endeavours" clauses, much less has been said on how "reasonable endeavours" clauses are to be read. It is, however, possible to draw a number of conclusions based on judicial findings in Singapore and elsewhere.

32 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [131].

(1) Lower standard than "best endeavours" and "all reasonable endeavours"

42 There is support for the proposition that "reasonable endeavours" clauses impose a lower standard of conduct than "best endeavours" and "all reasonable endeavours" clauses. In *obiter dicta*, the Court of Appeal in *KS Energy* opined that an "all reasonable endeavours" obligation (and by extension, a "best endeavours" obligation) is ordinarily more onerous than a "reasonable endeavours" obligation.[33]

43 In the UK, it is also clear that "reasonable endeavours" clauses impose an appreciably lower standard than "best endeavours" or "all reasonable endeavours" clauses.[34] It has been said that "reasonable endeavours" clauses exist at the "lowest end of the spectrum" of effort;[35] it is "less burdensome than the other formulations".[36] In relation to "best endeavours" clauses, Flaux QC in *Rhodia International Holdings Ltd v Huntsman International LLC*[37] ("*Rhodia*") held that "as a matter of language and business common sense", one would conclude that a 'reasonable endeavours' clause required less of the obligor than a 'best endeavours' clause".[38] Similarly, in relation to "all reasonable endeavours" clauses, in *EDI Central Ltd v National Car Parks Ltd*, Lord Glennie accepted that "all reasonable endeavours" impose a more onerous obligation than "reasonable endeavours".[39]

44 The position in Australia remains ambiguous. In *Electricity Generation Corp v Woodside Energy Ltd*, the High Court of Australia interpreted a "reasonable endeavours" clause in a gas supply agreement. In that case, argument proceeded on the basis that the expressions "reasonable endeavours" and "best endeavours" imposed "substantially similar obligations".[40] This was cited in *Wang v Kaymet Corp Pty Ltd*, where the New South Wales Supreme Court expressed doubt that "there is any distinction of substance to be drawn between these expressions".[41]

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33 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [63].

34 See *UBH (Mechanical Services) Ltd v Standard Life Assurance Co* The Times (13 November 1986). The Court of Appeal in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [55] declined to follow this case, but only on the point of "all reasonable endeavours" being an intermediate position between "best endeavours" and "reasonable endeavours".

35 *Jolley v Carmel Ltd* [2000] 2 EGLR 154 at [159].

36 *Mactaggart & Mickel Homes Ltd v Charles Andrew Moore* [2010] CSOH 130 at [63].

37 [2007] 1 CLC 59.

38 *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] 1 CLC 59 at [33].

39 *EDI Central Ltd v National Car Parks Ltd* [2011] SLT 75 at [20].

40 *Electricity Generation Corp v Woodside Energy Ltd* [2014] HCA 7 at [40].

41 *Wang v Kaymet Corp Pty Ltd* [2015] NSWSC 1459 at [43].

In contrast, the Supreme Court of the Australian Capital Territories stated in *Stepping Stones Child Care Centre (ACT) Pty Ltd v Early Learning Services Ltd* that an obligation to use "reasonable endeavours" is not as onerous as one to use "best endeavours" or "all reasonable endeavours".[42]

45 All that said, the weight of authority appears to lean in favour of the view that "reasonable endeavours" obligations are not as onerous as "best endeavours" and "all reasonable endeavours" obligations. In the author's view, this position makes sense (at least in the Singapore context) as the language of a mere "reasonable endeavours" clause would not normally express an intention of the parties to subscribe to the high standards imposed by "best endeavours" and "all reasonable endeavours" clauses following *Travista* and *KS Energy* – in particular, that the obligor should exhaust all reasonable measures.[43]

(2) Shared elements with "best endeavours" and "all reasonable endeavours"

46 While the onerousness of a "reasonable endeavours" clause is significantly lower than that of a "best endeavours" or "all reasonable endeavours" clause, the difference between them is probably one of degree rather than in kind. A "reasonable endeavours" clause requires the obligor to make some reasonable endeavours, while a "best endeavours" or "all reasonable endeavours" clause requires the obligor to make all of them. The practical implication of this is that many of the guidelines that have been developed by the Singapore courts in relation to "best endeavours" and "all reasonable endeavours" clauses apply in equal measure to "reasonable endeavours" clauses.

47 To begin with, points (b), (d), (e) and (f) from the Court of Appeal's guidelines in *Travista*[44] clearly should apply with equal force to "reasonable endeavours" clauses. It is patent that a "reasonable endeavours" obligation does not require the obligor to procure the contractually-stipulated outcome, but only to make reasonable efforts to do so. An objective approach should be adopted when determining whether an obligor has satisfied a "reasonable endeavours" obligation; all the surrounding facts will have to be considered, and these include

42 *Stepping Stones Child Care Centre (ACT) Pty Ltd v Early Learning Services Ltd* [2013] ACTSC 173 at [283].

43 For a contrary view, see Tan Tian Yi, "The Interpretation of Endeavours Clauses" (2015) 27 SAcLJ 250 at 255, where it is suggested that the distinction between "reasonable endeavours" clauses and "best endeavours"/"all reasonable endeavours" clauses also be erased.

44 As restated in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [47], and reproduced at para 33 above.

the time available to the obligor.[45] Likewise, point (c) from *Travista* should also apply to "reasonable endeavours" clauses: if the obligor of a "best endeavours" or "all reasonable endeavours" clause need not disregard its own interests in fulfilling its obligation, then *a fortiori*, neither should an obligor under a "reasonable endeavours" clause.[46]

48 Points (b) and (c) from the guidelines in *KS Energy* should also apply to "reasonable endeavours" clauses.[47] Just as for "best endeavours" and "all reasonable endeavours" clauses, the obligor of a "reasonable endeavours" clause need not do that which is futile to achieve the contractually-stipulated outcome, as it would be entirely reasonable for the obligor not to waste its resources for no gain. If a particular course of action would have been useless or would have made no difference to the outcome, it is not unreasonable for the obligor not to undertake that course of action.[48]

49 One point of potential uncertainty is the extent to which point (a) of *Travista* applies to "reasonable endeavours" clauses.[49] To be precise, it is not clear whether a "reasonable endeavours" clause also subsumes a requirement of good faith. Must the obligor of a "reasonable endeavours" clause act in good faith in the performance of its endeavours obligation? One might take the view that it would be incoherent to demand good faith performance for "all reasonable endeavours" clauses but not for "reasonable endeavours" clauses. In any case, it is suggested that a "reasonable endeavours" clause *in effect* requires the obligor to perform in good faith. An obligor acting in bad faith would likely be in breach of a "reasonable endeavours" obligation – it is difficult to see how it could be reasonable for the obligor to act dishonestly or violate "accepted commercial standards of fair dealing".[50]

(3) Standard of conduct for "reasonable endeavours"

50 What is the appropriate standard of conduct required of an obligor to a "reasonable endeavours" clause? The Court of Appeal in

45 See also *Minerva (Wandsworth) Ltd v Greenland Ram (London) Ltd* [2017] EWHC 1457 (Ch) at [255].

46 See also *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] 1 CLC 59 at [35] and *Mactaggart & Mickel Homes Ltd v Charles Andrew Moore* [2010] CSOH 130 at [63].

47 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [93].

48 *Mactaggart & Mickel Homes Ltd v Charles Andrew Moore* [2010] CSOH 130 at [64].

49 As restated in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [47].

50 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [45].

KS Energy again provided valuable guidance on this point, albeit in *obiter dicta*:[51]

> A 'reasonable endeavours' obligation is also not subject to the standard laid down in *Travista*… at [22]) of 'all those reasonable steps which a prudent and determined man, acting in [the obligee's] interests and anxious to [procure the contractually-stipulated outcome within the available time], would have taken'. An obligor under a 'reasonable endeavours' obligation merely has to act reasonably to procure the contractually-stipulated outcome, and we do not find it helpful to define the applicable standard any further than that. Such an obligor may well (depending on the circumstances) have to take steps which the prudent and determined man posited in the *Travista* test would take, but it need not necessarily do so as long as whatever it does to procure the contractually-stipulated outcome is reasonable.

51 Thus, where the clause is a "reasonable endeavours" clause, the standard of conduct imposed on the obligor is simply to act reasonably towards securing the contractually-stipulated outcome. A similar view is taken in the UK, where recent cases have supported the proposition that, in determining whether an obligor has fulfilled a "reasonable endeavours" obligation, the question is "what would a reasonable and prudent person acting properly in their own commercial interests and applying their minds to their contractual obligation have done" to secure the contractually-stipulated outcome.[52]

52 Instead of exhausting all reasonable measures to procure the contractually-stipulated outcome, it is suggested that what the obligor of a "reasonable endeavours" obligation must do is to strike a balance between the contractual obligation on the one hand, and competing considerations on the other. To add, if the balance struck is one that may reasonably be said to be within the contemplation of the parties at the time of the contract, the obligor should be regarded as having fulfilled its obligation. For example, in *UBH (Mechanical Services) Ltd v Standard Life Assurance Co*, Rougier J contemplated a balancing exercise whereby the obligor was "obliged to put in one scale the weight of their contractual obligation" to the obligee, and in the other scale, they were "entitled to place all relevant commercial considerations", such as its relationships with its tenants and its reputation as a landlord.[53]

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51 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [63].

52 See *Minerva (Wandsworth) Ltd v Greenland Ram (London) Limited* [2017] EWHC 1457 (Ch) at [255] and *Seadrill Ghana Operations Limited v Tullow Ghana Limited* [2018] EWHC 1640 (Comm) at [86].

53 *UBH (Mechanical Services) Ltd v Standard Life Assurance Co* The Times (13 November 1986).

(4) Sufficiency of one reasonable course of action

53 One possible point of difficulty should be addressed. This point relates to the notion that the obligor of a "reasonable endeavours" clause might only need to undertake one reasonable course of action to fulfil its obligation under that clause.

54 The point has been made (albeit not unreservedly) by the courts in the UK and Singapore. In *Rhodia*, Flaux QC suggested the view that "[a]n obligation to use reasonable endeavours to achieve the aim probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all the reasonable courses he can".[54] A similar suggestion was made by V K Rajah JA in *KS Energy*, that a "reasonable endeavours" clause "might require the obligor to take one reasonable course of action, and not all of them".[55]

55 It is suggested that these statements should not be read as setting out an absolute position that the obligor need only take one reasonable course of action at achieving the contractually-stipulated outcome. The problem with such a position is that it may conflict with the general standard of conduct (that is, that the obligor must act reasonably to procure the contractually-stipulated outcome), as a reasonable person in the shoes of the obligor may well have made more than that one reasonable attempt. The better reading of these statements is that one reasonable course of action may or may not be sufficient, depending on the circumstances.

E. Applicability of guidelines to implied endeavours clauses

56 As an aside, it is useful to consider the extent to which the interpretive guidelines apply to *implied* endeavours clauses.

57 Endeavours clauses may be implied in fact in a contract.[56] A notable local example is the Court of Appeal decision of *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd*,[57] in which there was found to be an implied term that the appellant would use reasonable endeavours to obtain approvals from the authorities for the sale of a piece of property. In that case, the Court of Appeal noted that "the courts will usually

54 *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] 1 CLC 59 at [33].

55 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [63].

56 The three-step process of implication of terms in fact was set out by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 19 at [101].

57 [2015] 3 SLR 695.

imply an obligation to use reasonable endeavours to obtain the consent of the third party in a case where the contract is subject to the consent of a third party".[58]

58 Recent cases have made it clear that the guidelines on the interpretation of express endeavours clauses laid out in *Travista* and *KS Energy* are equally applicable in the context of implied endeavours clauses. In other words, where a "best endeavours" or "all reasonable endeavours" clause is implied in a contract, the meaning of that clause is established by reference to these interpretive guidelines. It is suggested that the same may be said, *mutatis mutandis*, to the situation where a "reasonable endeavours" clause is implied.

59 One example of the use of the interpretive guidelines in the context of implied endeavours clauses would be the Court of Appeal case of *Lim Sze Eng v Lin Choo Mee*,[59] which is discussed in more detail below.[60] In a similar fashion, the High Court in *Almega Investments Pte Ltd v Chiang Sing Jeong*[61] applied the guidelines in *KS Energy* to determine whether the defendant had breached an implied term to use all reasonable endeavours to procure the approval of a third party.

III. Observations on use of endeavours clauses

60 On a practical note, two points may be made on the use of endeavours clauses in contracts. These points relate to (a) how parties may deviate from the established standards imposed by endeavours clauses; and (b) problems with uncertainty that may arise when using endeavours clauses.

A. Deviation from established standards

61 Parties seeking to calibrate their qualified contractual obligations may choose between the different established standards that the courts have set out, using a "best endeavours" and "all reasonable endeavours" clause for a more onerous obligation, and a "reasonable endeavours" clause for a less onerous obligation. However, parties may also wish to exercise more fine-grained control over their contractual obligations. For example, parties may desire an intermediate position: to impose a stricter obligation than what would normally be imposed by a "reasonable endeavours" clause, while not insisting that the obligor

58 *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695 at [43].
59 [2019] 1 SLR 414.
60 See paras 66–67 below.
61 [2017] SGHC 196 at [62].

exhaust all measures to achieve the contractual objective. The question that arises in such situations is how parties can best deviate from the established standards.

62 One possibility would be for parties to attempt to modify the established standard itself, by modifying the phrasing of a "best endeavours", "all reasonable endeavours" or "reasonable endeavours" clause. For example, in *CPC Group Ltd v Qatari Diar Real Estate Investment Co*[62] ("*CPC Group*"), the obligee sold shares in a company to the obligor, who was required to use "all reasonable but commercially prudent endeavours" to enable the achievement of certain threshold events for the payment of deferred consideration for those shares.[63]

63 It is possible for such phrasing-modification to have a material effect on the obligation that an endeavours clause imposes. In *CPC Group*, the modification "but commercially prudent" provided the court with an indication that the obligor was "not to be required to sacrifice its commercial interest".[64] This is significant because, as mentioned above, the obligor of an "all reasonable endeavours" clause may be required to sacrifice its own interests; and whether such a sacrifice is required depends on whether the nature and terms of the contract indicated that the parties contemplated such a sacrifice.[65]

64 That being said, a note of caution ought to be sounded against the imaginative use of phrasing-modification to adjust endeavours clauses. While tweaking the wording of the qualifier in an endeavours clause may appear to be an elegant means of calibrating the obligation imposed, the effects of such modifications in the particular case are inherently uncertain due to their broad and general nature. It is difficult to predict in advance how the phrasing-modification will affect the court's interpretation of an endeavours clause.

65 Furthermore, there appears to be some resistance against recognising variations of the established standards by means of phrasing-modification. In *KS Energy*, the Court of Appeal noted in *obiter dicta* that the guidelines set out in *Travista* (and presumably those in *KS Energy* itself) "should ordinarily apply even if the parties use a variation of the phrase 'all reasonable endeavours' or 'best endeavours' (as the case may be)".[66] This resistance is understandable in light of the

62 [2010] EWHC 1535 (Ch).
63 *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch) at [18].
64 *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch) at [252].
65 See *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [93(d)].
66 KS Energy Services Ltd v BR Energy (M) Sdn Bhd [2014] 2 SLR 905 at [62].

policy behind the development of the interpretive guidelines, namely, to promote commercial certainty in relation to the use of endeavours clauses. The recognition of a potentially infinite variety of finer gradations would detract from that policy goal.

66 A recent case exemplifies how the courts may gravitate towards the established standards despite the non-standard phrasing of an endeavours clause. The case of *Lim Sze Eng v Lin Choo Mee* involved an implied term that the parties should "take reasonable endeavours and/or do all that may be necessary" to give effect to a settlement agreement.[67] The settlement agreement here entitled the respondent to receive money in lieu of his shares in certain companies, but the value of the respondent's shares could only be determined after the sale price of a shop unit, owned by one of the companies, had been determined. The respondent alleged that the appellant had breached the implied term by refusing to lower the auction reserve price of the shop unit to below $2.1m.

67 What did the phrase "take reasonable endeavours and/or do all that may be necessary" mean? One possibility was for the implied term here to be read as a "reasonable endeavours" clause, modified by the added phrase "and/or do all that may be necessary". Instead, however, the Court of Appeal took the view that since the term specifically required the parties to "do all that may be necessary" to implement the settlement agreement, the term simply imposed upon the parties an obligation to "take all reasonable endeavours or take their best endeavours" to sell the shop unit. The Court of Appeal proceeded to apply the guidelines set out in *Travista* and *KS Energy*, and found that the appellant had indeed breached the implied term.

68 Rather than rolling the metaphorical dice by modifying the phrasing of an endeavours clause, the better approach for parties wishing to "finely calibrate their obligations" under endeavours clauses would be to "do so by expressly defining the obligations under each clause, or by carving out obligations that would otherwise be imposed by the clause in question".[68] In other words, instead of attempting to change the whole standard of conduct imposed by an endeavours clause by phrasing-modification, parties may wish instead to adopt a standard endeavours clause and specify its scope.[69] This would be a less

67 *Lim Sze Eng v Lin Choo Mee* [2019] 1 SLR 414 at [23].
68 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [95].
69 Other authors have made similar recommendations: see Yip Man & Goh Yihan, "Default Standards for Non-Absolute Obligations Clauses?" [2014] LMCLQ 320 at 325 and 327 and Goh Yihan, Lee Pey Woan & Tham Chee Ho, "Contract Law" (2014) 15 SAL Ann Rev 217 at 235.

ambiguous, and more effective, way for parties to shape the obligations imposed by an endeavours clause.[70]

B. Uncertainty in endeavours clauses

69 An area of concern in relation to the use of endeavours clauses is the possibility that the agreement may be too uncertain to be enforceable. This is because of the relatively indefinite nature of the obligation imposed by an endeavours clause. Unlike an absolute contractual obligation which requires the obligor to achieve a definite result, an endeavours obligation requires the obligor to perform one or more actions (from a potentially wide range of actions) towards the contractually-stipulated outcome. It may not always be clear what actions the obligor is obliged to take in a particular case.

(1) Uncertainty in endeavours clauses, generally

70 It is trite that an agreement must be certain for it to constitute a valid contract.[71] The agreement cannot be too uncertain to be effectively enforced, but must be "sufficiently definite to enable the court to give it a practical meaning", and the terms of the agreement must be "so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain".[72] There is, however, a policy of giving effect to contracts wherever possible, rather than striking them down;[73] the court will construe contracts "fairly and broadly without being too astute or subtle in finding defects".[74]

71 When is an endeavours clause too uncertain to be enforceable? Here, regard may be had to the English High Court decision of *Dany Lions Ltd v Bristol Cars Ltd*, in which it was expressed that:[75]

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70 However, it has been noted that there may be "cost implications" for contracting parties as negotiations will necessarily be prolonged: Jessica Young, "An Endeavour to Understand "Endeavours" Undertakings" (2014) 44 HKLJ 95 at 112.

71 *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [47]; *G Scammell and Nephew, Ltd v HC and JG Ouston* [1941] AC 251 at 254–255.

72 *G Scammell and Nephew, Ltd v HC and JG Ouston* [1941] AC 251 at 268–269, cited in *T2 Networks Pte Ltd v Nasioncom Sdn Bhd* [2008] 2 SLR(R) 1 at [44].

73 *Rudhra Minerals Pte Ltd v MRI Trading Pte Ltd* [2013] 4 SLR 1023 at [32]; *Gardner Smith (SE Asia) Pte Ltd v Jee Woo Trading Pte Ltd* [1998] 1 SLR(R) 950 at [10]; *Climax Manufacturing Co Ltd v Colles Paragon Converters (S) Pte Ltd* [1998] 3 SLR(R) 540 at [26].

74 *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503 at 514, cited in *Brader Daniel John v Commerzbank AG* [2014] 2 SLR 81 at [82].

75 *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 817 (QB) at [17].

> In general, an obligation to use reasonable endeavours (or best endeavours) to achieve a particular object is not in itself regarded as too uncertain to be enforceable, provided that the object of the endeavours can be ascertained with sufficient certainty, and there are sufficient objective criteria by which the performance of the 'endeavours' obligation can be evaluated.

72 The two requirements of (a) certainty of object and (b) sufficient objective criteria were said to apply "across the board, whatever the object" of the endeavours obligation.[76] It is submitted that these two requirements provide a useful framework on which to test whether an endeavours clause is sufficiently certain to be enforceable.

(2) Uncertainty in agreements to endeavour to agree

73 Certainty problems may arise in particular when the object of the endeavours obligation is to come to an agreement. The enforceability of agreements to agree, in general, is a fraught issue that cannot be comprehensively addressed here.[77] This article will only provide a brief treatment, by viewing agreements to agree from the perspective of endeavours obligations.

74 The English courts have regularly declined to enforce agreements to endeavour to agree, for lack of certainty.[78] The orthodox view in this regard was set out in the leading House of Lords decision in *Walford v Miles*, wherein Lord Ackner held, in relation to a duty to negotiate in good faith, that the concept of such a duty was "inherently repugnant to the adversarial position of the parties when involved in negotiations".[79] The nature of negotiations is that the negotiating parties pursue their own interests, always using the threat of withdrawal as a means by which to induce the counterparty to offer better terms; and it is not possible for a court to determine when a negotiating party is entitled to withdraw. Thus, a duty to negotiate in good faith is "unworkable in practice as it is inherently inconsistent with the position of a negotiating party".[80]

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76 *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 817 (QB) at [37].

77 For academic commentary on this issue, see Andrew Phang Boon Leong & Goh Yihan, "Offer and Acceptance" in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Singapore: Academy Publishing, 2012) ch 3, at paras 3.159–3.165; Patrick Neill, "A Key to Lock-out Agreements?" (1992) 108 LQR 405 and Henry Hoskins, "Contractual Obligations to Negotiate in Good Faith: Faithfulness to the Agreed Common Purpose" (2014) 130 LQR 131.

78 See, *eg*, *London and Regional Investments Ltd v TBI plc* [2002] EWCA Civ 355; *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2006] EWHC 1341 (TCC); and *Morris v Swanton Care & Community Ltd* [2018] EWCA Civ 2763.

79 *Walford v Miles* [1992] 2 AC 128 at 138.

80 *Walford v Miles* [1992] 2 AC 128 at 138.

75 As explained in *Phillips Petroleum Co (UK) Ltd v Enron (Europe) Ltd*, the difficulty faced by a court in enforcing an agreement to endeavour to agree is the lack of objective criteria by which the court can assess the adequacy of a negotiating party's endeavours:[81]

> [T]he unwillingness of the courts to give binding force to an obligation to use 'reasonable endeavours' to agree seems to me to be sensibly based on the difficulty of policing such an obligation, in the sense of drawing the line between what is to be regarded as reasonable or unreasonable in an area where the parties may legitimately have differing views or interests, but have not provided for any criteria on the basis of which a third party can assess or adjudicate the matter in the event of a dispute.

76 Similarly, in *Dany Lions Ltd v Bristol Cars Ltd*, the English High Court took the view that, in the case where the object of an endeavours obligation was a future agreement with the counterparty, such an endeavours obligation would always be uncertain because even if the first requirement of certainty of object were met, the second requirement of sufficient objective criteria would not be met – in other words, there would never be sufficient objective criteria by which to evaluate the performance of the obligor(s).[82]

77 This apparent orthodoxy is, however, circumscribed in at least two major respects. First, there is authority that an agreement to endeavour to agree with a *third party* is enforceable. In the English High Court decision in *Astor Management*, Leggatt J found that a clause requiring the defendants to use "all reasonable endeavours" to obtain a debt facility was enforceable, even though this required the defendants to come to an agreement with third-party lenders. In their defence, the defendants had referred to an observation made in *Dany Lions Ltd v Bristol Cars Ltd* that such agreements to endeavour to negotiate with third parties would only be sufficiently certain in exceptional cases; however, Leggatt J disagreed with this observation:[83]

> I cannot agree with the observations quoted from the *Dany Lions* case in so far as they give the impression that the requirements of certainty of object and sufficient objective criteria are difficult to satisfy and will not usually be satisfied where the object of an undertaking to use reasonable endeavours is an agreement with a third party. The role of the court in a commercial dispute is to give legal effect to what the parties have agreed, not to throw its hands in the air and refuse to do so because the parties have not made its task easy. To hold that a clause is too uncertain to be enforceable is a last resort or, as Lord

81 *Phillips Petroleum Co (UK) Ltd v Enron (Europe) Ltd* [1997] CLC 329 at 343, cited in *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 817 (QB) at [21].

82 *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 817 (QB) at [37].

83 *Astor Management AG v Atalaya Mining plc* [2017] Bus LR 1634 at [64].

> Denning MR once put it, 'a counsel of despair': see *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] 2 All ER 842 at 846, [1976] 1 QB 933 at 943.

78 Leggatt J then held that the two requirements in *Dany Lions Ltd v Bristol Cars Ltd* (of certainty of object and sufficient objective criteria) would almost always be met by an agreement to endeavour to agree with a third party:[84]

> Far from being 'exceptional', I would say that it should almost always be possible to give sensible content to an undertaking to use reasonable endeavours (or 'all reasonable endeavours' or 'best endeavours') to enter into an agreement with a third party. There is no problem of uncertainty of object, as there is no inherent difficulty in telling whether an agreement with a third party has been made. Whether the party who gave the undertaking has endeavoured to make such an agreement (or used its best endeavours to do so) is a question of fact which a court can perfectly well decide. It may sometimes be hard to prove an absence of endeavours, or of best endeavours, but difficulty of proving a breach of a contractual obligation is an everyday occurrence and not a reason to hold that there is no obligation. Any complaint about lack of objective criteria could only be directed to the task of judging whether the endeavours used were 'reasonable', or whether there were other steps which [were deemed] reasonable to take so that it cannot be said that 'all reasonable endeavours' have been used. Where the parties have adopted a test of 'reasonableness', however, it seems to me that they are deliberately inviting the court to make a value judgment which sets a limit to their freedom of action.

79 Leggatt J found that the endeavours clause in the instant case was enforceable. First, the object of the endeavours was sufficiently certain. Even though the debt facility to be procured could potentially take many different forms, the obligation would be satisfied if the debt facility took any of those forms. Second, there were also sufficient objective criteria by which the court could evaluate the sufficiency of the defendants' endeavours. Here, the court would be "very slow to second guess a commercial party on matters of commercial judgment", and although this would make it very difficult to establish that the obligor had breached its obligation, this difficulty does not mean that "there is no obligation at all or that the obligation has no sensible content";[85] it simply means that a breach of an obligation to negotiate will, in practice, only be established in cases of egregious failure on the part of the obligor.

84 *Astor Management AG v Atalaya Mining plc* [2017] Bus LR 1634 at [67].
85 *Astor Management AG v Atalaya Mining plc* [2017] Bus LR 1634 at [71].

80 It may be observed that Leggatt J's strategy in *Astor Management* was essentially to resolve potential uncertainties in favour of the obligor. It is submitted that this approach is a principled one, because it conforms to the general policy of giving effect to contracts whenever possible, while being as consistent as possible with the proposition that negotiating parties are generally entitled to pursue their own interests during negotiations.

81 Here, it may be queried whether there is any relevant difference between an undertaking to make endeavours to enter into an agreement with a third party, and an undertaking to make endeavours to enter into an agreement with the counterparty. Why is the latter less certain than the former? The identity of the person with whom the obligor is obliged to endeavour to agree with – whether it be the counterparty or a third party – has no bearing on the certainty of the object of the endeavours, or the objective criteria with which to assess the obligor's endeavours. Furthermore, there appears to be no reason why a negotiation with the counterparty is necessarily more adversarial in nature than a negotiation with a third party. This difficulty may be resolved by extending Leggatt J's approach to cover all agreements to endeavour to agree, regardless of whom the obligor is obliged to negotiate with.

82 The second respect in which the orthodox position is circumscribed arises from the distinction between pre-contractual negotiations and negotiations within a pre-existing contractual framework; an agreement to endeavour to negotiate in the latter context is less likely to be void for uncertainty. Authority for this view is found in the Court of Appeal decision in *HSBC Institutional Trust Services*, in which the court held that an express obligation to make a good faith endeavour to agree could be enforced. This involved a clause in a lease agreement requiring the parties to "in good faith endeavour to agree on the prevailing market rental value" of the leased premises when conducting a rent review exercise, failing which the parties would have recourse to the mechanism of independent valuation to determine the rent. The Court of Appeal found that such a clause was enforceable:[86]

> In our view, notwithstanding Lord Ackner's statement in *Walford* … that '[a] duty to negotiate in good faith is … unworkable in practice', that case does *not* have the effect of invalidating an express term in a contract which employs the language of good faith … As a preliminary observation, we are of the view that a valid distinction can be drawn between the pre-contractual negotiations in *Walford* and the 'negotiations' between the Parties under the Rent Review Exercise in the present case. [emphasis in original]

86 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [37].

83 In this case, the endeavours to agree were to take place within the context of a pre-existing contractual framework. The parties were "not free to simply walk away from the negotiating table for no rhyme or reason"; instead, they had bound themselves by their lease agreement to conduct a rent review exercise for rental terms subsequent to the first, wherein the new rent would eventually be determined, if not by agreement, then by the mechanism of external valuation.[87] The court considered that such negotiations "need not necessarily be adversarial and hostile, but call, instead, for a consensual approach to resolve the identified matters as part of the performance of the broader existing agreement".[88]

84 It is submitted that the distinction between pre-contractual negotiations and negotiations within a pre-existing contractual framework is highly relevant in determining whether an agreement to endeavour to agree is enforceable, but it should not be taken as a strict rule. In other words, it should not entirely preclude the enforceability of an obligation to negotiate in a pre-contractual setting. In this regard, it is significant to note that in *Mohd Nizam B Ismail v Comptroller of Income Tax*,[89] the High Court appeared open to the notion that an obligation to negotiate could be enforceable, even in the absence of a pre-existing contractual framework. In that case, the High Court accepted that *HSBC Institutional Trust Services* "stands for the general proposition that an enforceable agreement does arise from a clause that obliges parties to negotiate in good faith".[90]

85 From the preceding analysis, one consolidated way forward may be proposed: the starting point should be the general policy that the court will, as far as possible, give effect to contracts, rather than striking them down for uncertainty. Whether an agreement to endeavour to agree is enforceable will depend on whether the two criteria in *Dany Lions Ltd v Bristol Cars Ltd* (certainty of object and sufficient objective criteria) are met, and the strategy used in *Astor Management* may be adopted to, effectively, address uncertainty problems. The two criteria

87 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [37].

88 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [38].

89 [2014] SGHCR 3.

90 *Mohd Nizam B Ismail v Comptroller of Income Tax* [2014] SGHCR 3 at [33]. Other arguments may be made for weakening the distinction between pre-contractual agreements to negotiate and agreements to negotiate in a pre-existing contractual framework. One view is that in both cases a new agreement is formed as the outcome of successful negotiation, so if the latter type of agreement to negotiate is enforceable, then the former type should also be enforceable (credit must be given to the anonymous referee for this point). See also Joel Lee, "Agreements to Negotiate in Good Faith" [2013] SingJLS 212 at 218–219.

will likely be met in cases where the agreement to endeavour to agree operates within a pre-existing contractual framework, although it may also be possible to enforce an agreement to endeavour to agree outside of a pre-existing contractual framework.

IV. Conclusion

86 Endeavours clauses are a common feature of modern contracts. They are an invaluable tool in the arsenal of a drafter, to introduce necessary flexibilities into contractual relationships. They may also be implied by the courts to supplement deficiencies in contractual text.

87 Endeavours clauses inevitably introduce some degree of uncertainty into contractual relationships; this is because of the indefinite nature of the obligations imposed by endeavours clauses. This uncertainty has been greatly mitigated by the laudable efforts made by the courts in Singapore to clarify the interpretation of endeavours clauses, through the recognition of guidelines for the interpretation of such clauses. This article has sought to explain and develop further these guidelines, and facilitate the effective use of endeavours clauses.