CHAPTER 4
BEST EFFORTS, REASONABLE CARE,
DUE DILIGENCE AND GENERAL
TRADE STANDARDS IN
INTERNATIONAL CONTRACTS

I. INTRODUCTION

When one party to a contract undertakes to perform a given act, the wording of its undertaking is often couched in a variety of terms intended to define the way in which the duty is to be carried out. A distributor, for example, will agree to use “his best efforts” to develop sales of a product; a bank will take “reasonable care” to check the authenticity of a document; a contractor will carry out work “diligently” and “according to industry standards.”

What is the significance of such expressions? Do they merely help to explain the normal content of the obligation, or do they alter its intensity? If so, do they place the person who shoulders the duty in a weaker, or a stronger, position?

These are probing questions, given the great frequency with which expressions of this type appear in all kinds of international contracts. The terrain is fraught with difficulties. On the one hand, a great variety of expressions is used in drafting contracts and, in many cases, seemingly without any great discrimination. On the other hand, many of these expressions may have specific interpretations depending on the law governing the contract, interpretations of which the parties may not necessarily be aware.

The issue is part of the complex problems arising from concepts “of variable scope” found in great numbers in every legal system, such as “good faith,” “equity,” “public order,” “bonnes mœurs” (morals), “public interest,” or the concepts of “normal,” “manifest,” “legitimate,” “serious,” “gross,” “abusive” and many others.

Research, however, must be limited to its terms of reference, and for the purposes of this chapter the Working Group concentrated on four

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major criteria: “best efforts,” “reasonable efforts” (in French, “meilleurs efforts” and “efforts raisonnables”), “due diligence” and references to “general trade (or industry) standards” (in French, “règles de l’art”) in all their varying formulations. The Working Group further limited its study to the ways in which these terms define how an obligation must be performed, its nature and intensity. The word “reasonable,” in particular, is obviously used in many other contexts (e.g., “reasonable” time, “reasonable” indemnity, etc.); these are not considered here, except insofar as they are incidental to the issues at hand.

Some typical examples encountered by the Group will give the reader an insight into the practice of contractual drafting (Section II). The second part of the chapter will analyze that practice and synthesize the main conclusions (Section III); the chapter ends with the usual advice to negotiators (Section IV). The basis is around 150 sample clauses, gleaned from a variety of international contracts.²

II. CONTRACTUAL PRACTICE

“Best efforts,” “reasonable care” and “due diligence” clauses, as well as references to accepted industry standards, tend to appear mainly in certain types of contracts or clauses.

A. Illustrations

1. Types of Contract

a. Distribution Agreements and Sales Promotion

In a distribution agreement, the distributor often undertakes to promote sales of the products concerned. This type of undertaking is one of the main areas in which the parties may decide to refer to the “best efforts” or “reasonable efforts” criterion.

- “The distributor agrees to use its best efforts to sell, promote, market and support the Products and to develop and maintain the reputation and goodwill of... and the Products in the Territory with Distributors’ customers.”
- “During the period of the Permission, the licensee shall use its reasonable endeavours to sell and to increase the sale of the Licensed Products in Benelux...”