
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,¹ 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

¹ Cf. Centre National de Logique, *Les notions à contenu variable en droit*, Cl. Perelman & R. Vander Elst (eds.), Brussels, 1984.

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 . . .”

² On these clauses, also see C. Chappuis, *Les clauses de best efforts, reasonable care, due diligence et les règles de l’art dans les contrats internationaux*, *Rev. Dr. Aff. Int.*, 2001, pp. 281–301; D. Philippe, *Les clauses de Best Efforts*, in *Liber amicorum Guy Hoersmans*, Brussels, 2004, pp. 905–942.

In each case, it is clear that a duty has been undertaken, but no explanation is given of its scope, which causes difficulties in interpretation. What is the scope of “best efforts” and “reasonable endeavours” in this context? Is there a difference between the two terms?

What then should one make of the following formula where different criteria are brought together:

“The Licensee shall endeavour in every reasonable and proper way and to the best of his ability to further the sales of the said [machine] containing such patented improvement.”

The model agency contract prepared by the International Chamber of Commerce also bundles criteria:

“The Agent agrees to use *his best endeavours* to promote the sale of the Products in the Territory in accordance with the Principal’s reasonable instructions and shall protect the Principal’s interests *with the diligence of a responsible businessman*.”³

The same model contract resorts to another formula to qualify the agent’s obligation to inform his principal:

“The Agent shall exercise *due diligence* to keep the Principal informed about his activities, market conditions and the state of competition within the Territory. . . .”⁴

The scope of the duty to promote sales of the products is sometimes more specific:

- “SECUNDO shall use its best efforts to promote the sales of CONTRACT PRODUCTS, in particular by providing technical assistance for customers.”
- “Le licencié s’engage à *faire ses meilleurs efforts* pour assurer le développement de son affaire de location de véhicules, sur le Territoire, sous la marque de commerce . . . , de manière à ce que le chiffre d’affaires de son affaire de location de véhicules sous la marque de commerce . . . se développe à un taux au moins égal à celui du marché de location de véhicules dans son ensemble, sur le Territoire.”
- “L’agent s’engage à *faire ses meilleurs efforts* pour promouvoir *de la façon la plus active* la vente des Produits dans le Territoire.

³ I.C.C., Model Agency Contract, 1991, Art. 3.1.

⁴ *Id.*, Art. 9.1.

“Ce faisant, l’Agent s’engage à ses frais à:

- (i) servir la clientèle et gérer ses affaires afin de maintenir et développer l’image de marque attachée aux Produits;
- (ii) solliciter *avec diligence* des commandes de Produits auprès des clients;
- (iii) *mettre en oeuvre tous les moyens* commerciaux et administratifs *nécessaires* (y compris en personnel) pour *assurer* la promotion des Produits et la bonne exécution du présent Contrat;
- (iv) *faire son affaire personnelle* de sa propre organisation, à savoir bureaux, personnel, déplacements, correspondance, etc . . . et à supporter directement toutes les charges y afférentes, en particulier en matière fiscale et sociale.”

The last of these examples is particularly explicit. The first thing to note is that the expression “best efforts” is reinforced by the words “in the most active manner” and that the agent’s duties are set out in detail. The scope of “best efforts” in this example is comparatively wide, although the details provided refer to other criteria that remain subject to interpretation (“diligently,” “to use all necessary methods,” “to take personal responsibility”). To refer to a distinction originated in French law, one could consider this to be reinforced “*obligations de moyens*” or even, in some cases, “*obligations de résultat*.”⁵

The following is an example of a clause providing for a negative requirement:

“The Agent will diligently and faithfully serve the Principal as its Agent and will use his best endeavours to promote the sale of the goods of the Principal within the Area and will not do anything that may prevent such sale or interfere with the development of the Principal’s trade in the Area.”

b. Construction Agreements

How does a building contractor undertake to complete the promised work? Often a contract will require that the work be performed with a given degree of care. For instance:

“The Contractor shall, *with due care and diligence*, design (to the extent provided for by the Contract), execute and complete the Works and remedy any defects therein in accordance with the provisions of the Contract. . . .”

⁵ On these notions, now integrated into the Unidroit Principles, see *infra*, pp. 218–222.

This clause, which appeared in a FIDIC contract,⁶ is very often used in other types of construction agreements; but what does “with due care and diligence” mean?

The following example seems more demanding:

“The contractor shall, commencing within days of the Effective Date of the Contract, proceed with utmost diligence and care in carrying out all of the Services specified as his obligations in the Contract. . . .”

In many cases, the term will be accompanied by a reference to business norms, as in this clause relating to the duties of an engineering consultant:

“The Consulting Engineer shall exercise all reasonable skill, care and diligence in the performance of the Services under the Agreement and shall carry out all his responsibilities in accordance with recognized professional standards.”

A further example deals with the duties of an architect:

“In providing the service to the Client, the Architect shall exercise a reasonable standard of skill and diligence normally expected and accepted by the profession of architecture.”

In French language texts, the corresponding provision will often refer to the “*règles de l’art*,” i.e., to the accepted standards of the trade concerned:

“L’entrepreneur garantit que ses prestations, travaux et montage seront réalisés *selon les règles de l’art*, en conformité sur tous les plans avec les lois, les décrets, les règlements, les prescriptions et normes en vigueur en Tunisie lors de la signature du Marché.”

The examples above define the general duties of contractors or other professionals in the construction industry. Other terms covering conduct are found in connection with more specific obligations.

In the following clauses, relating to the use of materials obtained locally, keeping the peace in the workplace and continuation of work in the event of war, the term “best efforts” is used:

⁶ *Conditions of Contract for Works of Civil Engineering Constructions*, 1987 ed., Part I, General Conditions, Art. 8.1. It will, however, be noted that the corresponding provisions of the most recent set of FIDIC contracts have eliminated this reference to the notion “with due care and diligence” in their description of the Contractor’s obligations (*Conditions of Contract for Construction*, 1st ed., 1999, Art. 4.1; *Conditions of Contract for Plant and Design-Build*, 1st ed., 1999, Art. 4.1; *Conditions of Contract for EPC Turnkey Projects*, 1st ed., 1999, Art. 4.1).

“With respect to any materials, supplies, goods, equipment or services purchased, leased, contracted for or otherwise obtained or required by the Contractor in the performance of the work, the Contractor shall use his best efforts to utilize materials, supplies, goods, equipment or services of Saudi Arabian origin or which may be obtained or acquired from entities organized under the laws of the Kingdom.”

In this case, “best efforts” appears to involve at least several actions, which are defined and capable of proof, such as requests for local tender; on the other hand, if the fact of having contracted elsewhere can be justified by the lack of a given product in the local market, the provision becomes more difficult to construe if the alleged justification is linked to differences in waiting periods, quality, reliability, etc.

“The Contractor shall at all times during the progress of the works take all requisite precautions and use his best endeavours to prevent any riotous or unlawful behaviour by or amongst his workmen, labourers and others employed on, or in connection with, the works, and for the preservation of the peace, protection of all inhabitants, and the security of property on or In the neighbourhood of the site.”

Here, by contrast, the scope of the obligation appears *a priori* less clear. The required steps, to satisfy the obligation to use “best endeavors,” will certainly depend on local circumstances.

“If during the currency of the Contract there shall be an outbreak of war (whether war is declared or not) in any part of the world which whether financially or otherwise materially affects the execution of the Works, the Contractor shall until the Contract is terminated under the provisions in this clause contained use his best endeavours to complete the execution of the Works provided always that the Employer shall be entitled at any time after such outbreak of war to terminate this Contract by giving notice in writing to the Contractor and upon such notice being given this Contract shall terminate but without prejudice to the rights of. . . .”

This is not a *force majeure* clause, which would free the contractor from his obligation in case of war. Here he is required to continue the work, but the “best endeavors” clause in this case reduces the scope of the original obligation in view of the circumstances.

In the next case, pertaining to the preservation of access routes to the site concerned, the duty is to use “every reasonable means”:

“The Contractor shall use every reasonable means to prevent any of the highways or bridges communicating with or on the routes to the Site from being damaged or Injured by any traffic of the Contractor or any of his Subcontractors and in particular shall select routes, choose and use vehicles and restrict and distribute loads that any such extraordinary traffic as will inevitably arise from the moving of plant and material from and to the Site shall be limited as far as reasonably possible and so that no unnecessary damage or injury may be occasioned to such highways and bridges.”

The meaning of “reasonable means” here is clarified by a few examples and the objective to be attained is stated. In such a case, damage is without doubt considered inevitable and the contractor’s duty is limited to doing what is “reasonably possible” in order to avoid all “unnecessary damage.” It should be noted, however, that here again it is a question of “reasonable means” rather than “best endeavors.” Do these two terms differ in scope?

c. Manufacturing of Materials and Parts for Motor Vehicles

In a contract between a car maker and firms producing materials and spare parts, the quality standard is set by references to the current state of science and technology, to safety regulations and certain agreed technical data, as well as to the adoption of a quality management system:

“Der Lieferant hat für seine Lieferungen den Stand von Wissenschaft und Technik, die Sicherheitsvorschriften und die vereinbarten technischen Daten einzuhalten. Er muß ein entsprechendes Qualitätsmanagementsystem (z.B. DIN EN ISO 9000 ff., VDA-Schrift 6.1 o. ä.) einrichten und nachweisen.”

d. Research Agreements

It is only too true that the popular maxim “seek and you shall find” does not apply to the legal obligations of a researcher. A research agreement requires research to be done, but there is no guarantee of its success. One author interprets the researcher’s duty as a “sublimation” of an obligation of best efforts: not only can the results not be guaranteed, but the means cannot be defined and their use cannot be measured.⁷ It is, however, possible to attempt to define the required depth of the research and terms of the “best efforts” type often appear in research agreements.

Below is a clause taken from the standard terms used by the West German Ministry of Defense in its research contracts with the private sector:

⁷ Cl. Renard, *Les contrats de recherche*, in *Aspects juridiques de la recherche scientifique*, Liège and The Hague, 1965, pp. 47–49.

“Der Auftragnehmer kommt seinen Verpflichtungen zur Durchführung der Entwicklungsarbeiten nach, wenn er sich *nach besten Kräften* bemüht, unter Ausnutzung des neuesten Standes von Wissenschaft und Technik und unter Verwertung der eigenen Kenntnisse und Erfahrungen das bestmögliche Ergebnis zu erzielen.”⁸

Here “best effort” is defined by the dual reference of taking into account the most up-to-date scientific development and using the researcher’s own experience.

e. Technical Assistance Agreements

Technical assistance agreements require the provider of the assistance to carry out various duties, the scope of which is often measured by the yardstick of “best efforts” or some similar criterion. The quality of the results obtained does not, in fact, depend exclusively on the provider of the technical assistance; the beneficiary of the assistance must also be able to take advantage of what he has received. This concern is manifest in the following clause:

- “(Le donneur) ne peut cependant se porter garant ni de la productivité du personnel local, ni de la rentabilité de la Brasserie, et une insuffisance de productivité ou de rentabilité ne pourra servir de motif au non-paiement de la rémunération due (au donneur) en vertu du présent contrat, dans la mesure où aucune faute ne peut lui être imputée en application de l’alinéa qui précède.”
- “(Le donneur) s’engage à exercer la mission qui lui est confiée *de manière consciencieuse* et répondra de toute faute que n’aurait pas commise un *professionnel normalement compétent et raisonnable*.

The qualifications in the first paragraph invite substantial comment. According to some interpreters, the words “in a conscientious manner” are not very demanding. To say that someone is a “conscientious” worker is certainly not to heap praise upon him. The reference to professional norms may go some way towards altering this impression, although the formulation does not appear to involve any particular stringency. The first paragraph, therefore, seems primarily to serve as an introduction to the second, which is the real nub of the clause.

In the next example, the accent is on the duty to use best efforts to pass on the techniques concerned, a duty considered to be “clear” since the provider’s remuneration is partly linked to the turnover achieved. Does this wording not limit the liability of the party undertaking the duty to the loss

⁸ Cf. Cl. Witz & Th. M. Bopp, Best Efforts, Reasonable Care: considérations de droit allemand, *Rev. Dr. Aff. Int.*, 1988, p. 1036.

of his remuneration? The most explicit confirmation that the best efforts do not in any way amount to a guarantee of success appears in the following example:

“While A cannot guarantee the technical success of the process, he obviously will make the best effort to provide the necessary technology available since A’s compensation for the technology will be partially derived from a percentage of sales of N.C.”

The provision of technical assistance may entail certain specific obligations, for example, the duty to carry out formalities necessary for any staff relocation:

“Le Client fera *toutes les démarches nécessaires ou utiles* et déploiera *tous ses efforts* pour l’obtention en temps opportun de toutes les autorisations nécessaires pour permettre (i) au personnel local d’encadrement de suivre le programme de formation prévu en Europe, et (ii) aux agents de . . . d’effectuer leur mission, y compris non-limitativement l’obtention des visas pour ceux-ci et les membres de leur famille et les permis de travail.”

In a clause such as this, does the undertaking to “use every effort” add to the undertaking to “take all necessary and useful action”?

The following example relates to a different matter. Here, it is the very duty itself to provide technical assistance that is qualified, and not the manner in which the assistance is to be provided:

“*Dans la mesure de ses possibilités*, PRIMO fera également bénéficier SECUNDO de son assistance technique pour les études de parties mécaniques dont les caractéristiques techniques entreraient dans le cadre de l’annexe III.

Les conditions dans lesquelles seraient entreprises ces études et la responsabilité incombant à PRIMO à ce titre seront définies cas par cas d’un commun accord.”

This is close to an undertaking that is purely discretionary (and therefore without legal effect), except insofar as it might be held that a refusal to provide assistance may only flow from objective difficulties and is not entirely at PRIMO’s sole discretion.

The following clause states a similarly weak duty:

“ALPHA’s team will do its best to try to introduce adjustments in the PLANT equipment, for the manufacture of such counts, with

the understanding that such counts having never been manufactured by ALPHA, ALPHA is not in a position to transmit any data and/or information relating to such production.”

f. Trademark and Patent Licence Agreements

As in certain technical assistance agreements, clauses in licence agreements describing the manner in which techniques are to be passed on are sometimes combined with clauses seeking to limit or exempt from liability:

“Whilst the Owner will take all reasonable care in giving the licensee the Owner’s Formulae and Know-How and in laying down the Standards of Quality, the Owner accepts no responsibility in respect thereof or the plant used to manufacture the licensed Products or the production and distribution thereof and all guarantees or warranties (whether statutory express or implied) in connection therewith are hereby excluded and the Owner shall not be liable whether in contract, negligence or otherwise for any injury, damage, loss, costs, claims or expenses of any kind in any way attributable or alleged to be attributable to any of them.”

In this example, the very wide and general nature of the exemption from liability (the validity of which would clearly be questionable under many legal systems) practically nullifies the whole effect of the duty to use “all reasonable care” in passing on the technology.

The same contract confers on each of the parties two specific obligations under the category “best efforts”:

- “The Owner may further require that the Licensee . . . uses its best endeavours to recover any below standard products which have been previously distributed.”
- “The Owner shall throughout the period of the Permission . . . use its best endeavours to ensure that no person to whom permission has been granted outside Benelux for the sale of the Licensed Products shall be permitted to advertise or promote, or otherwise seek customers for, the Licensed Products in Benelux or establish any warehousing, storage facilities or distribution or selling agencies for the Licensed Products in Benelux.”

Insofar as the duty to recover defective products is concerned, it can be considered that, here, the expression “best endeavors” has a very definite scope. There are quite specific actions to be taken under such circumstances, and perhaps even a series of preventive measures that could be taken so that, if necessary, the retrieval procedure could commence

rapidly and efficiently so as to reduce as far as possible its prejudicial effects on the brand image of the product.

The duty to prevent competition between sellers in other territorial areas also involves certain concrete steps, beginning with the inclusion of clauses in the agreements forbidding export outside the area covered by the agreement (subject, of course, to problems with the validity of such undertakings in light of competition law).

g. Satellite Launch Agreements

In contracts under which they undertake to put satellites into orbit, both NASA and the European Space Agency use the concept of “best efforts” to qualify the scope of their obligations.

“All Launch and Associated Services to be furnished by NASA to the User under this Agreement shall be furnished by NASA using its best efforts.”

For such a type of especially risky transport contract, the classical obligation to reach the specific promised result is replaced by an obligation of best efforts.

However, it has been said by a NASA executive that the inclusion of this expression would have a more radical effect, namely of exempting the Agency from all liability:

“The concept of “best efforts” means that NASA and the customer agree that a legal action will not be brought against NASA or its contractors based on an express or implied provision of the LSA for damages or other relief for any delay in the provision of launch services, or for the non-performance or improper performance of launch service.”⁹

This is a surprising conclusion. While in other circumstances,¹⁰ the research group wondered if the effect of the reference to “best efforts” might be to reinforce the impact of the duty, one of the parties to the contract here appears to think that it amounts to an exemption from liability. Obviously a satellite launch is a very risky operation, and it is understandable that a party cannot take upon itself a very strict obligation. However,

⁹ Johan E. O'Brien, *The Structuring of NASA Launch Contracts*, Report to the Colloquium Organized in Paris, on December 5–6, 1985, by the International Chamber of Commerce, p. 5. Cf. also L. Ravillon, *Les télécommunications par satellites—Aspects juridiques*, Paris, Litec, 1997, pp. 209–213.

¹⁰ See for instance *supra*, p. 196, concerning the recall of defective products.

we find such an assimilation between “best efforts” and exemption from liability debatable.¹¹ It is true that the simultaneous presence of certain exemption clauses in NASA contracts creates a further problem of interpretation; the existence of that problem prevented American courts from expressing a clear stand on the scope of the best efforts clause in itself.¹²

Supposing that NASA’s interpretation was upheld, the validity of such an exemption from liability would be questionable under many legal systems, as it renders meaningless the obligations undertaken by the satellite-launching party.¹³

As a consequence of these difficulties, more recent NASA contracts tend to replace the notion of “best efforts” by a reference to “reasonable efforts.”¹⁴ The notion is probably more objective,¹⁵ but ambiguities remain.

h. Letter of Comfort

A letter of comfort is intended to reassure a party, contracting with a subsidiary, of the support that the parent company is prepared to give its subsidiary in the event it encounters difficulties.¹⁶ The letter will often be couched in fairly vague language, since the author will be seeking to avoid formulating precise obligations. Here is a typical example:

“Nous n’avons pas coutume de garantir les crédits accordés à nos filiales.

Cependant, de longue date notre politique est de maintenir notre soutien envers ces compagnies et de nous assurer qu’aucun établissement prêteur n’encourt de perte à la suite des relations d’affaires avec nos filiales quelle qu’en soit la cause. Cette politique sera suivie à titre égard quant à la ligne de crédit que vous accordez à notre filiale.”

¹¹ This opinion is shared by L. Ravillon, *op. cit.*, p. 210.

¹² *Martin Marietta Corp. v. Intelstat*, 991 F.2d 94, 97 (4th Cir. 1993), commented by L. Ravillon, *op. cit.*, pp. 211–212.

¹³ Cf. *infra*, Chapter 7, and especially p. 385.

¹⁴ L. Ravillon, *op. cit.*, pp. 214–215.

¹⁵ Cf. *infra*, pp. 214–217.

¹⁶ Cf. Faculté de Droit de Namur & Feduci, *Les lettres de patronage*, Namur and Paris, 1984; M. De Vita, La jurisprudence en matière de lettres d’intention. Etude analytique, *Gaz. Pal.*, 1987, pp. 667–670 (in spite of its deceptive title, this study deals with letters of comfort); M. Elland-Goldsmith, Comfort Letters in English Law and Practice, *Rev. Dr. Aff. Int.*, 1994, pp. 527–541; cf. also *supra*, Chapter 1, pp. 6–8.

Sometimes, however, a letter of comfort will go further:

“If the Borrower is unable, for any reason, to effect any payment under such agreement when due, we shall use our best efforts in order to have funds available to the Borrower . . . by any appropriate means in amount sufficient to make any such payment.”

Several members of the Working Group were of the opinion that in this case, the words “we shall use our best efforts” could be construed as an expectation of a very specific undertaking, approaching an “obligation to achieve a specific result.” The author of the letter promises that the necessary funds will be made available if necessary. What is involved is a veiled guarantee of the debtor’s obligations, except for the fact that funds will not be passed directly to the creditor but will be supplied to the subsidiary in order to allow it to meet its obligations itself.

Similar comments were made as to the undertaking expressed in the following letter of comfort to “do everything in its power”:

“La Société X, s’il en était besoin, ferait *tout ce qui serait en son pouvoir* pour mettre la Société Y en mesure d’assurer la bonne exécution des engagements pris par elle en ce qui concerne le remboursement des prêts prévus, tant pour le principal que pour le règlement des intérêts et accessoires.”

In the above example, the interpretation of the wording is that the parent company pledges the necessary support to its subsidiary. The impact of the terms “best efforts” and “everything in its power” in this respect would, therefore, be very demanding.

Much case law has appeared on these problems, at least in France, with a variety of interpretations.¹⁷

i. Documentary Credit

The Uniform Customs and Practices for Documentary Credits make a stand against imprecise terminology. Thus, according to Article 46b of the 1993 edition:

“Expressions such as ‘prompt,’ ‘immediately,’ ‘as soon as possible,’ and the like should not be used. If they are used banks will disregard them.”

¹⁷ Cf. the decisions cited by M. De Vita, *id.*, and, more recently, Cass. fr., Oct. 15, 1996, *Dall.*, 1997, J., 330; Paris, June 3 1997, *Dall.*, 1998, J., 5; Cass. fr., Jan. 26, 1999, *Dall.*, 1999, J., 577.

The same rules, though, incorporate such formulae when it comes to the verification obligations placed on bankers:

- “Art. 7 a. A Credit may be advised to a Beneficiary through another Bank (the “Advising Bank”) without engagement on the part of the Advising Bank, but that bank, if it elects to advise the Credit, shall take *reasonable care* to check the apparent authenticity of the Credit which it advises. . . .”
- “Art. 13 a. Banks must examine all documents stipulated in the Credit *with reasonable care*, to ascertain whether or not they appear, on their face, to be in Compliance with the terms and conditions of the Credit. Compliance of the stipulated documents on their face with the terms and conditions of the Credit, shall be determined by international standard banking practice as reflected in these Articles. . . .”

What is “reasonable care”? The expression dates from the 1962 revision of the Uniform Customs and Practices. Before that, a bank was required to “carefully” examine the documents. Does the change in wording constitute a slight difference in the strictness of the bank’s obligation? Does the word “reasonable” reduce the degree of care required?

j. Counter-Trade Agreements

In a counter-trade contract, the supplier under the principal contract undertakes, by a separate contract, to buy compensation goods for an amount equal to a certain percentage of the value of the principal contract. This undertaking to accept goods in counter-trade may be performed by a third party, but it is binding, as the usual inclusion of a penalty clause confirms.¹⁸

In the following example, however, the counter-trade obligation took on a restricted form:

“Gegenstand dieses Übereinkommens ist der Gegenkauf tschechoslowakischer Ware in Zusammenhang mit dem Hauptvertrag. Firma A wird zum Gegenkauf jedenfalls *ihr Bestes* tun, um ihre Verpflichtungen zu erfüllen, wobei ins Auge gefasst ist, dass die folgenden Punkte von tschechoslowakischer Seite bevorzugt werden:
 “Maschinen und Anlagen von X, Prag,
 “Maschinen und Anlagen von Y, Prag,
 “Andere Maschinen,
 “Andere tschechoslowakische Güter.”

¹⁸ Cf. M. Fontaine, *Aspects juridiques des contrats de compensation*, *D.P.C.I.*, 1981, pp. 179–223.

This seemingly exceptional clause invites a variety of questions. What meaning can one read into the undertaking to “do one’s best” in order to give some substance to the obligation? It should be noted that there is not even a clear statement of the amount of the required counter-trade, which increases the impression that this clause will hardly be enforceable. Could it not be said that the counter-trade obligation has been reduced to such a level that it resembles little more than some kind of brokerage undertaking, where there is a promise to devote “best efforts” to finding purchasers (compare the examples given above concerning sales promotion)?¹⁹

k. Acquisitions of Companies

According to a practice that has developed since the first edition of this book, the expression “due diligence” has come to be used with a particular meaning, in fact, a specific operation. Before acquiring shares in a company, the purchaser or his agents investigate the financial situation of the company at stake. This audit itself has come to be called “due diligence.”

Here is a first example of a clause putting such an operation together:

“Article 4. Diligence of (Company X). As of the Effective Date, Purchaser or Purchaser’s representatives, counselors and officers shall have the right to inspect and examine the books and records pertaining thereto, and they shall have access to (Company X’s) books and records, at all reasonable time during the Term, to the extent necessary for the proper performance of the due diligence and the application of the terms and conditions herein contained . . .”

Originally, “due diligence” was a qualification of the manner in which the purchaser had to run this inspection; the seller thus intended to protect himself against any later claims. But gradually, practitioners started to use the expression to define the investigation itself. One does the “due diligence” of such or such company.

This evolution had to be explained, since, for specialists in acquisitions, the expression “due diligence” means this type of inspection. Such meaning obviously goes outside the scope of the present study, which concerns the different ways in which contract drafters express the force of an obligation.

2. Types of Clauses

a. Duty of Confidentiality²⁰

The duty of confidentiality frequently includes criteria of the “best efforts” kind. Here is a first example:

¹⁹ Cf. Cl. Witz & Th. M. Bopp, *op. cit.*, pp. 1036–1037.

²⁰ Confidentiality clauses are thoroughly examined *infra*, Chapter 5.

“Visitor will use all reasonable efforts to prevent disclosure of any and all of Said Confidential Information furnished directly or indirectly by PRIMO to Visitor.”

There is often a real difficulty in policing the respect for confidentiality clauses and the phrase “all reasonable efforts”; the present case may perhaps suggest a degree of resignation in anticipation of this.

It is, however, possible to be more precise; witness the following clause taken from a licence agreement:

“Licensee shall for a period of ten years from and after the date of each disclosure hereunder, exercise all reasonable efforts to keep (Licensor)’s know-how disclosed In such disclosure secret and confidential. In fulfilling this operation, licensee shall use at least the same standard of care in safeguarding (Licensor)’s know-how from unauthorized disclosure as it uses in safeguarding its own confidential technical information and know-how.”

The reference to the standard of care used by one party in the protection of its own information here enables the scope of “reasonable efforts” to be more clearly defined; it sets up a minimum standard (“at least”). One may still remain skeptical as to the efficacy of such clauses. The expression used allows the parties to reach agreement for now, but there will probably be difficulties later if a conflict arises.

b. “*Porte-For*” and “Good Offices”

- “Si PRIMO ou SECUNDO obtiennent d’un tiers une licence dans le domaine technique du présent accord, elles *s’efforceront* d’obtenir les mêmes droits aux mêmes conditions pour le partenaire du présent accord.”
- “PRIMO s’engage à *faire tout ce qui est en son pouvoir* pour faire procurer à SECUNDO un montant de “x” millions de F pour couvrir une partie des besoins financiers qui seront nécessaires à l’exécution du plan industriel.”
- “A undertakes to make all reasonable endeavours so that none of the companies from either the . . . Group of Companies or from . . . Group of Companies operating at . . . are deprived of their supplies of water, electricity, telephone or telex and it will use its best efforts to cause the necessary agreements for separate supply arrangements in respect of such supplies to the entered into by and between the relevant companies and/or the competent authorities as soon as possible.”

The above are examples of three obligations to obtain undertakings from third parties, where the expressions used (“will endeavor to,” “do everything in its power,” “use its best efforts”) seem to constitute commitments to appropriate means. Satisfactory performance of such undertakings will certainly involve carrying out certain minimum actions, but no guarantee of success is given. Under French law, it would be a question of a promise to use “*bons offices*” (“good offices”) rather than a promise of “*porte-fort*” (an obligation to obtain an undertaking from a third party), where the promisor would normally be under a duty to achieve that result.²¹

The Group pondered the effect of the inclusion in the third clause of both “reasonable endeavors” and “best efforts.” Do they suggest different degrees of duty? Or is it simply a question of the draftsman’s concern to avoid repetition by choosing two expressions considered to be synonymous? Alternatively, should we be led to believe that the author of the clause was simply drafting without giving any particular attention to the terms he was using?

c. *Force Majeure* and Hardship Clauses

Force majeure clauses in international contracts often place a duty on one or both of the parties to attempt to overcome the obstacle concerned in order to allow the performance of the contract to be resumed.²²

Here are two examples:

- “. . . parties shall exercise all due diligence to minimize the extent of the prevention or delay in the performance of the contract generally.”
- “In case of *Unabwendbare Gewalt* (*force majeure*) the parties must make all reasonable efforts to eliminate or overcome the consequences of such an event. In this regard the parties shall work closely together and shall establish a new delivery plan within the limits of their possibilities. The parties are to keep the damages resulting from *Unabwendbare Gewalt* as small as possible and to take whatever measures are necessary in this regard.”

The very nature of certain cases of *force majeure* prevents any absolute formulation of the duty to overcome the obstacle; very often it will not be possible (for example, the item to be delivered has been destroyed and

²¹ Cf. Ph. Malaurie & L. Aynes, *Droit civil. Les obligations*, 10th ed., 1999–2000, No. 683.

²² Cf. *infra*, Chapter 8.

cannot be replaced, or a new regulation, which cannot be discarded, prevents performance of the contract, etc.). The obligation can, therefore, amount only to a duty of best efforts, but it may be expressed in different ways. Is “all due diligence” synonymous with “all reasonable efforts,” or do the two expressions refer to different degrees of requirement? And what of a clause requiring a party to use its “best efforts” in the same circumstances?

A similar situation arises where the contract, on the occurrence of an event of *force majeure*, requires an alternative mode of performance. In the next example, it should be noted that the expression “all necessary steps” is clarified by an illustration of what this might involve:

“The Seller and the Buyer will co-operate in order to obtain government approvals necessary to perform this Contract in any countries requiring such approvals.

“Should for whatsoever reasons these approvals be denied or otherwise not obtained, the party responsible for obtaining such approvals will take all necessary steps to ensure the same result to the other party by changing the manner in which the transaction is consummated in such a way as to avoid the need for the government approval denied or delayed. Such steps may include the designation by the Buyer of a buying entity located outside of the countries where the companies included in the Stock are located.”

“Reasonable efforts” has been replaced by “necessary steps,” and the result is, probably, a higher degree of requirement.

A hardship clause obliges the parties to enter into renegotiations when certain events occur that seriously affect the equilibrium of the contract.²³ Trying to find a new agreement requires mutual cooperation. Such requirement is phrased with a reference to “reasonable endeavors” in the following excerpt from a hardship clause:

“. . . if in the course of this agreement unfairness to either of (the Parties) is anticipated or disclosed then the Parties will use *all reasonable endeavours* to agree upon and thereafter to take such action as may be necessary to remove the cause or causes thereof.”

d. Obligation to Mitigate Losses

In the case of failure to perform a contractual obligation, current trends of the law of contract, greatly influenced by the concept of good faith, impose on the victim of the non-performance, the injured obligee, an obligation to mitigate his losses.²⁴

²³ On such clauses, cf. *infra*, Chapter 9.

²⁴ Cf. B. Hanotiau, Régime juridique et portée de l'obligation de modérer le dom-

Such a duty, where it arises, must be qualified. The reference to “reasonableness” often appears in as the measures to be taken.

“Les parties s’efforceront de réaliser les objectifs qu’elles se sont proposés d’atteindre par le contrat. En particulier, la partie qui souffre de l’inexécution d’une obligation doit prendre toutes les *mesures raisonnables*, pour réduire au minimum le préjudice susceptible d’en résulter. Faute par elle d’agir de la sorte, elle ne peut obtenir de l’autre que la réparation du préjudice qu’elle ne pouvait éviter.”

Provisions of this type appear in some international instruments.²⁵ The Vienna Convention on the International Sales of Goods refers to “such measures as are reasonable under the circumstances” (Article 77: see also Article 86). The measures to be taken must be “reasonable,” but must also take account of the “circumstances,” i.e., of the fact that an obligation is imposed on the injured party itself. “Reasonable,” in this case has a restricted meaning.²⁶ The Unidroit Principles exonerate the obligor in default from indemnifying the harm “. . . to the extent that (it) could have been reduced by the (obligee)’s taking reasonable steps” (Article 7.4.8).²⁷ The same criterium of “reasonableness” appears, here without the additional reference to circumstances. The Comments to this provision state that “it would be unreasonable from the economic standpoint to permit an increase in harm which could have been reduced by the taking of reasonable steps.” A dual reference to “reasonableness”!

B. Observations Concerning Practice

Two main conclusions may be drawn from the illustrations set out above.

1. The expressions used to define the quality of the performance required are varied, but can for the most part be grouped into several categories.

The first category requires the obligor to provide the best he can: “best efforts,” “best endeavors,” “every effort,” “everything in its

mage dans les ordres juridiques nationaux et le droit du commerce international, *I.B.L.J.*, 1987, pp. 393–405; M. Elland-Goldsmith, La “mitigation of damages” en droit anglais, *I.B.L.J.*, 1987, pp. 347–361; Y. Derains, L’obligation de minimiser le dommage dans la jurisprudence arbitrale, *I.B.L.J.*, 1987, pp. 375–382; S. Litvinoff, Damages, Mitigation and Good Faith, 73 *Tulane Law Rev.*, 1999, pp. 1161–1195.

²⁵ Cf. S. Reifegerste & G. Weiszberg, Obligation to Mitigate Loss and the Concept of “Reasonableness” in International Commercial Law,” *I.B.L.J.*, 2004, pp. 181–197.

²⁶ On this provision, cf. C.M. Bianca & M.J. Bonell, *Commentary on the International Sales Law. The 1980 Vienna Sales Convention*, Milan, 1987, pp. 559–567 and pp. 620–624.

²⁷ A similar provision exists in the Principles of European Contract Law (Art. 9:505).

power,” “to the best of its ability,” “to the best of its experience,” “the best it can,” etc.

A second category refers to the criterion of “reasonableness”: “all reasonable efforts,” “all reasonable means,” “reasonable care,” “all reasonably possible efforts,” etc.

A third category covers the concept of diligence: “with due diligence,” “in a diligent manner,” “with utmost diligence and care,” etc.

A fourth category covers the recognized standards of the industry concerned: “*selon les règles de l’art*,” “in accordance with recognized professional standards,” “in accordance with good engineering practice,” “*entsprechend dem Stand von Wissenschaft und Technik*,” etc. These criteria are sometimes used in combination: “in every reasonable and proper way and to the best of his ability,” “all reasonable skill, care and diligence,” “with the diligence of a responsible businessman,” etc.

2. The above examples are taken from contracts and clauses which, at first sight, appear varied. Among the duties defined by the relevant terms are in particular:
 - promotion of sales of a product in a defined market;
 - performance of construction works;
 - use of materials obtained locally;
 - ensuring good labor relations in the workplace;
 - continuation of work in the event of war;
 - carrying on research;
 - supply of technical assistance;
 - carrying out steps to obtain governmental authorizations;
 - withdrawal of defective products;
 - prevention of use of competing technology by third parties;
 - satellite launches;
 - guarantees of solvency of a subsidiary;
 - verification of conformity of documents;
 - purchase of counter-trade products;
 - protection of the confidential nature of certain information;
 - obtaining various commitments from third parties;
 - overcoming obstacles to performance of contractual obligations;
 - choosing and implementing measures aimed at restoring the equilibrium of the contract;
 - mitigating the damages flowing from a breach of contract.

Besides their variety, these duties, for the most part, share a common feature in that they all involve a degree of difficulty so that there can be no absolute guarantee that the desired result will be achieved. Sales may be developed, but to what extent? Work may be carried out, but doubtless it

will not be perfect. Research may be pursued, but it may never bear fruit. Attempts may be made to recall defective products, but it may be impossible to retrieve all of them. A substantial risk will remain that the satellite launch will fail, and so on. The party undertaking the duty thus cannot commit itself too strictly, but the contract will try to define a minimum degree of diligence with which it must comply: its “best efforts,” “reasonable care,” “due diligence,” the “accepted standards of the relevant industry.”

The list above, however, includes some anomalies. Some of the obligations listed do not involve the same degree of difficulty of performance as others. It is possible to pledge an absolute undertaking to guarantee the solvency of a subsidiary. The same applies to the purchase of counter-trade goods. We commented above that in spite of its formulation, the undertaking would have to be interpreted strictly (letter of comfort), or we pointed out the unusual nature of the obligation (counter-trade).

As to these anomalies, each of which demonstrates an attempt by one of the parties to restrict the normal scope of its obligation, the terms we have studied are not used in connection with undertakings that are generally capable of absolute performance (save where an outside exempting cause intervenes, such as *force majeure*, in the legal system recognizing this). Thus, one does not find clauses whereby one of the parties undertakes only to use “its best efforts” or “all reasonable care” to pay a price, royalties or rent, to hand over an item that has been sold, to transport goods or to return borrowed, hired or bailed property.

This study relates to undertakings whose successful performance cannot be ensured in advance. If no absolute promise of performance can be given, the expressions are used to define, to a greater or lesser degree, the intensity of the relevant party’s obligation. It now remains to analyze these expressions.

III. ANALYSIS, ATTEMPT AT SYNTHESIS

A. Critical Analysis

Four main groups of terms are used to define the quality of an obligation: “best efforts,” “reasonable efforts,” “due diligence” and the relevant, accepted “trade” or “industry standards” (*règles de l’art*), with the many possible variations.

1. “Best Endeavours” and “Best Efforts”—English and American Interpretations

“*Meilleurs efforts*” and “*beste Kräfte*” appear in contracts in French and in German, but the expression “best efforts” seems to have originated in England or the United States. In both countries, a variety of judicial pro-

nouncements have been delivered in relation to the concept, the tendency being to prefer “best endeavors” in the England and “best efforts” in the United States.²⁸

(a) Turning to English law,²⁹ the courts have sometimes been puzzled by the terms “best endeavors”; thus Goff J. said:

“I ask myself, could anything be less specific or more uncertain? There is absolutely no criterion by which ‘best endeavours’ and practicability are to be judged.”³⁰

The same uncertainty appeared in another judgment:

“Perhaps the words ‘best endeavors’ in a statute or contract mean something different from doing all that can reasonably be expected —although I cannot think what the difference might be.”³¹

In general, however, the courts have tried to clarify the meaning to be given to the expression. The leading authority dates from 1911, and resulted from a case in which a railway company had undertaken to use its “best endeavors” to develop the business of another company. The judgment states:

“We think ‘best endeavours’ means what the words say; they do not mean second-best endeavours. We quite agree with the argument of Mr Balfour Browne that they cannot be construed to mean that the Great Central must give half or any specific proportion of its trade to the Sheffield District. They do not mean that the Great Central must so conduct its business as to offend its traders and drive them to competing routes. They do not mean that the limits of reason must be overstepped with regard to the cost of the service: but short of these qualifications the words mean that the Great Central Company must, broadly speaking, leave no stone unturned to develop traffic on the Sheffield District line.”³²

Another contract contained a clause requiring a purchaser to use his “best endeavors” to obtain planning permission. Buckley L.J. said:

²⁸ Compare the Romanian arbitral cases based on the former C.M.E.A. conditions, commented by O. Capatina, La clause “best efforts” dans les contrats conclus par les entreprises roumaines de commerce extérieur, *R.D.A.I.*, 1988, pp. 1044–1046.

²⁹ Part of the cases which will be mentioned are also commented by M.D. Varcococks, Best Endeavours, *The Law Society’s Gazette*, 1986, pp. 1992–1993.

³⁰ *Bower v. Bantam Investments Ltd*, (1972) 3 All E.R. 349, 355.

³¹ *Oversea Buyers Ltd v. Granadex SA*, (1980) 2 Lloyd’s Rep. 608.

³² *Sheffield District Railway Co v. Great Central Railway Co*, (1911) 27 TLR 451.

“I can feel no doubt that, in the absence of any context indicating to the contrary, this should be understood to mean that the purchaser is to do all he reasonably can to ensure that the planning permission is granted. If it were refused by the Local Planning Authority, and if an appeal to the Secretary of State would have a reasonable chance of success, it could not, in my opinion, be said that he had ‘used his best endeavours’ to obtain the planning permission if he failed to appeal . . . I cannot find . . . any context which satisfies me that the words ‘use its best endeavours to obtain consent’ could be construed otherwise than in accordance with what I take to be their clear, primary and natural meaning.”³³

A more precise formula appeared in a case where “best endeavors” were to be used in order to complete an acquisition by a certain date:

“‘Best endeavours’ are something less than efforts which go beyond the bounds of reason, but are considerably more than casual and intermittent activities. There must at least be the doing of all that reasonable persons reasonably could do in the circumstances.”³⁴

Although some of these stances may be criticized as seeking to explain an uncertain concept by reference to another equally uncertain terms, the general attitude of the courts seems to be to give a particularly strict meaning to the undertaking to use one’s best efforts: “‘best endeavors’ do not mean second-best endeavors.”³⁵

More recently, the House of Lords has recognized the legally binding character of an undertaking to use one’s “best endeavors,” at the same time as the House denied such character to an agreement to negotiate “in good faith.”³⁶ The Court of Appeal has confirmed this position concerning “best endeavors.”³⁷

³³ *IBM United Kingdom Ltd v. Rockware Glass Ltd*, (1980) FSR 335.

³⁴ *Pips (Leisure Productions) Ltd v. Wallon*, (1980) 43 P & CR 415.

³⁵ However, an undertaking to exert one’s “best endeavors” cannot be absolute; it must sometimes yield to other concerns. Thus, in a case where shares were to be transferred, the assignee company and its banks had undertaken to use their best endeavors to obtain the shareholders’ approval. At that moment came a draft legislative modification which would have made the operation prejudicial to the assignee company. This company and its banks then made sure that the shareholders would not grant their approval. The tribunal admitted such conduct under the circumstances, in spite of the “best endeavors” clause (*Rackam v. Perk Food Ltd*, BCLC 1990).

³⁶ *Walford v. Miles* (1992) 2 AC 128.

³⁷ *Pitt v. PHH Asset Management Ltd* (1994) 1 WLR 327. We thank Professor M.P. Furmston, who drew our attention to the last two cases cited.

(b) American case law has also produced some interpretations of the twin concept of “best efforts.”³⁸

The Falstaff brewery had promised “to use its best efforts to promote and maintain a high volume of sales” of the products of the Ballantine brewery, having acquired a large number of Ballantine’s assets and agreed to pay royalties on the sales achieved. Later, however, having suffered losses in connection with this activity, Falstaff decided to promote its own beer in preference to that of Ballantine, the result of which was that sales of the latter fell and, in consequence, so did the royalties.

The court held that Falstaff had breached its undertaking:

“Although the best efforts clause did not require Falstaff to spend itself into bankruptcy to promote . . . Ballantine . . . it did prevent the application . . . of (a) philosophy of emphasizing profit über alles without fair consideration of the effect on Ballantine volume. [Ballantine] was not obliged to show just what steps Falstaff could reasonably have taken to maintain a high volume for Ballantine products. It was sufficient to show that Falstaff simply didn’t care about Ballantine’s volume. . . . The burden then shifted to Falstaff to prove there was nothing significant it could have done to promote Ballantine’s sales that would not have been financially disastrous.”³⁹

One may note, in particular, from this judgment the court’s interesting idea of allocating the burden of proof.

In other cases, the American courts have not had to interpret express “best efforts” clauses, but have found implied undertakings to use best efforts, and have also sought to define the concept.

The starting point is the decision in *Wood v. Lucy, Lady Duff Gordon*,⁴⁰ where Judge Cardozo found consideration for a right to demand royalties in the context of an exclusive agency agreement for fashion items, by virtue of an implied undertaking to use “reasonable” efforts to make the operation profitable. Later decisions have confirmed this interpretation by using, without distinction, the expressions “best efforts” and “reasonable efforts,” which were considered to be interchangeable.⁴¹

³⁸ Cf. also *supra*, pp. 197–198, about the particular case of satellite launching contracts.

³⁹ *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609 (2d Cir. 1979).

⁴⁰ 222 N.Y. 88, 118 N.E. 214 (1917).

⁴¹ Cf. *IILM Corp. v. General Foods Corp.*, 365 F.2d 77 (3d Cir. 1966); Lawrence S. Long, Best Efforts as Diligence Insurance: in Defense of “Profit Über Alles,” 86 *Col. Law Rev.* (1986), p. 1728 and note 6.

A group of Catholic priests sold a manufacturer the exclusive rights to manufacture and distribute records of an opera that they had written, "Virgin." The contract required the manufacturer to spend \$50,000 on promoting the work unless, "in the manufacturer's sole judgment, such promotion would cease to be effective and profitable." The promoter invoked this clause to justify ending all promotional activity. The court held that, in spite of the terms of the provision, the decision was not at the promoter's complete discretion. The promoter had assumed an implied obligation to use his "best efforts" to ensure the promotion of "Virgin," and the onus was on him to prove that he had not failed in this.⁴²

In another case, an American judge took a less rigorous view of the words "best efforts." A Mr. Zilg had written a Marxist-inspired biography of the Du Pont family (*Du Pont: Behind the Nylon Curtain*), and Prentice-Hall had obtained exclusive rights to decide on the printing, sale price, style of publication and all aspects of its promotion. Following the extremely negative reaction of a book club, Prentice-Hall greatly reduced the print run and the publicity budget. In this case, the court held that in the absence of an express "best efforts" clause, the editor had adequately fulfilled his obligations by initially exerting appropriate efforts and then reducing them substantially on the basis of poor commercial prospects. In this case, the onus of proof of breach of the contract fell on the plaintiff, Zilg.⁴³

The cases prompted some interesting commentaries in legal literature. Lawrence S. Long formulated three possible meanings of the term "best efforts": the most demanding placed on the party undertaking the obligation a "fiduciary duty" requiring it to subordinate its own interest to that of the party to whom it owed the duty. None of the decisions cited above supports this interpretation. At the other extreme, the interpretation referred to by the author as "diligence insurance" meant that the interests of the party undertaking the obligation was of primary importance; this party would bear no risk of liability except where its lack of effort went so far as to prejudice its own interests. This was the Zilg interpretation, where the publisher was not liable when it justified its cessation of efforts by claiming that it had little hope of making a profit. A midway position would require the interests of both of the parties to be taken into account, as in the Falstaff/Ballantine case or that of the religious opera. Long argued in favor of the "diligence insurance" interpretation, which he believed was the most effective in economic matters.⁴⁴

⁴² *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918 (2d Cir. 1977).

⁴³ *Zilg v. Prentice-Hall*, 717 F.2d 671 (2d Cir. 1983), *cert. denied*, 466 U.S. 938 (1984).

⁴⁴ Lawrence S. Long, *op. cit.*, pp. 1728–1740.

Farnsworth showed that the level of the duty imposed by the words “best efforts” can increase according to different criteria, which he drew from American case law.⁴⁵

One possibility is for the party owing the duty and the party to whom the duty is owed to be considered as one. The question is then one of degree of care that such a person ought reasonably to have exercised in the given situation. This interpretation might, in particular, be sufficient to determine the level of effort required from an agent.

On the other hand, it may not be possible to consider the two parties as one, if the party undertaking the duty has been chosen by virtue of its special abilities, for example, a barrister or an architect. In such cases, “best efforts” are to be interpreted by reference to the reasonable care and level of competence that one would normally expect from a professional in that field.

Various difficulties arise when the two have opposing interests. Thus, a publisher who undertakes to use his best efforts to promote work whose prospects of success are slim, the author being paid by a commission on sales, would fall into this category. If we look to the reasonable behavior of a professional in a given field, we must accept that a publisher should be able to stop promoting a book, placing its own interests first (this is the Zilg reasoning mentioned above, after the initial promotional activity had failed). Another possibility in this case would be to return to the first interpretation and to consider the parties as one in order to take as the object of the “best efforts” the volume of sales that would maximize the combined profit of the partners.

Goetz and Scott are of this opinion in a remarkable study where they sought to identify the elements that characterize “relational contracts,” i.e., contracts that bind the parties into a given relationship for a certain duration, the full evolution of which cannot be foreseen at the start.⁴⁶

⁴⁵ E.A. Farnsworth, On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law, 46 *Univ. of Pittsburgh Law Rev.* (1984), pp. 9–13; cf. also E.A. Farnsworth, *Contracts*, 2nd ed., vol. II, 1998, pp. 381–388.

⁴⁶ Cf. J. Goetz & R.E. Scott, Principles of Relational Contracts, 67 *Virginia Law Rev.* (1981), pp. 1089–1150. On this approach of contracts, also see I.R. Macneil, The Many Futures of Contracts, 47 *Southern Calif. Law Rev.* (1974), pp. 691–816; I. R. Macneil, Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law, 72 *Northwestern Univ. Law Rev.* (1978), pp. 854–905; D. Campbell, The Social Theory of Relational Contract: Macneil as the Modern Proudhon, 18 *Int. J. of the Sociology of Law* (1990), pp. 75–95; A. Schwartz, Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies, 92 *The J. of Legal Studies* (1992), pp. 271–318; N. Nassar, *Sanctity of Contracts Revisited—A Study in the Theory and Practice of Long-Term International Commercial Transactions*, Martinus Nijhoff, 1995, 297 pp.; J. Oechsler, Wille und Vertrauen im privaten Austauschvertrag—Die Rezeption des

The allocation of risks cannot be dealt with in a precise manner at the time when the contract is concluded, so the contract will contain certain fairly indeterminate provisions. The level of obligations required may therefore be defined by the standard of “best efforts.”⁴⁷

However, the authors were concerned with the uncertainty of this term. They wrote:

“Perhaps the most poorly understood class of relational contracts is that involving agreement wherein one party explicitly, or even implicitly, undertakes the contractual duty of using its “best efforts” to carry on an activity beneficial to the other. . . . The precise legal meaning to be attached to a best efforts requirement is not at all clear.”⁴⁸

By reference to a graphical analysis setting out the curves of marginal costs and marginal revenue,⁴⁹ Goetz and Scott suggested that the concept of “best efforts” amounted, for the distributor whom they were using as an illustration, to an obligation to achieve a volume, which could be gauged from the graph, where the combined profits of the two parties were maximized. This would be a plausible interpretation of the will of the majority of the parties to contracts, and a solution that complied with the demands of distributive justice.

Certainly, the authors continued, one could not expect a party undertaking a “best efforts” obligation to try to achieve this level of duty if it did not have adequate information as to its partner’s accounts. Besides, enforcing such a requirement would entail strict policing procedures. We should not allow these reservations to make us lose sight of the effective extra-judicial role that the inclusion of such a duty can play, particularly in the field of commercial ethics:

Theorie des Relational Contract im deutschen Vertragsrecht in rechtsvergleichender Kritik, *RabelsZ. für ausl. und intern. Privatrecht*, 1996, pp. 91–124.

⁴⁷ In the words of N. Nassar, “Under the relational model, the goal of contract law is not limited to ensure enforceability, certainty and delimiting rights and duties. Rather, it is more concerned with establishing the boundaries and aims of the institution or practice of contracting. Contract law is there to provide for the continuity of relationships through resolution of conflicts and correcting for market changes and failures that may arise during the course of performance. Solutions adopted under contract law primarily should be concerned with furthering all the different interests involved. This is usually attainable through the articulation of legal standards which, contrary to technical rules, are inherently flexible. Fairness and good faith, defined in reference to best efforts, become the backbone of contract law through which mutual trust between the contracting parties is promoted” (N. Nassar, *op. cit.*, p. 24).

⁴⁸ Ch. J. Goetz & R.E. Scott, *op. cit.*, p. 1111.

⁴⁹ *Id.*, p. 1113.

“Notwithstanding practical difficulties of securing legal enforcement, therefore, a contractual provision also has value simply as a communication of understanding between the parties as to their mutual rights and duties. Hence, the inclusion of a best efforts term may, at a minimum, serve as signal alerting good faith bargainers that the proposed contractual relationship is one in which special concerns are to be considered.”⁵⁰

The concept of “best efforts” has thus been the subject of various comments in the United States. The courts’ approach has been guarded both as to the scope of the concept as well to evidential concerns flowing from it. At least three recent studies have analyzed the case law and suggested different interpretations. There is no unanimity but the analysis has been greatly refined: in one case, a graphic representation of the concept of “best efforts” has even been proposed.

2. “Reasonable” in Common Law and Civil Law

“Reasonableness is indeed, we might all admit, a good thing in itself, even if, like moderation, good only within reason and in moderation. What is less clear, and certainly less easily agreed or settled, is what actually it is reasonable to do, to say, to conclude or to doubt in a given context.”⁵¹

The concept of “reasonableness” is, however, widely used in law, particularly in common law,⁵² although it is not unknown in certain civil law systems.⁵³ In some cases, the author of the legal rule (be it legislator or draftsman of a contract) will use the term “reasonable” to qualify a concept to unburden himself of the necessity of formulating a precise rule and leaving the resolution of any ensuing litigation to the ulterior interpretation by the courts, on this general criterion. In other cases, the court itself may take the initiative to determine what is reasonable when giving the motives for its decision (“it seems reasonable to believe”).⁵⁴

⁵⁰ *Id.*, p. 1117.

⁵¹ N. Mac Cormick, On Reasonableness, in *Les notions à contenu variable en droit*, Brussels, 1984, p. 131.

⁵² Cf. G. Tixier, La règle de “reasonableness” dans la jurisprudence anglo-américaine, *Rev. Dr. Publ. Sc. Pol.*, 1956, pp. 276–298; V. Amar & Ph. R. Kimbrough, Esprit de géométrie, esprit de finesse, ou l’acception du mot “raisonnable” dans les contrats de droit privé américain, *D.P.C.I.*, 1983, pp. 43–56.

⁵³ Cf. R. Legros, L’invitation au raisonnable, *Rev. Rég. Dr.*, 1976, pp. 5–13; Ch. Perelman, Le raisonnable et le déraisonnable en droit, *Arch. Phil. Dr.*, 1976, pp. 35–42; G. Khairallah, Le “raisonnable” en droit privé français—Développements récents, *Rev. Trim. Dr. Civ.*, 1984, pp. 439–467. Compare the German concept of “Zumutbarkeit,” referred to by Cl. Witz & Th. M. Bopp, *op. cit.*, pp. 1030, 1033.

⁵⁴ J.A. Salmon, Le concept de raisonnable en droit international privé, *Mélanges Reuter*, pp. 449–451.

Legislators frequently use the term. To cite but a few significant examples, in the United States, the Uniform Commercial Code refers to the concept of “reasonableness” in numerous provisions (see, for example, Sections 1-204, 2-305 and 2-309). The English Unfair Contract Terms Act 1977 also makes many such references (see in particular Articles 1(1), 2(2), 3(2), 4(1), 6(3), 7(3), etc.), and then goes on to devote a whole schedule to the definition of the term.⁵⁵ The 1980 Vienna Convention on International Sales of Goods includes innumerable references to the concept of “reasonableness” (see in particular Articles 8, 18, 25, 33, 34, 37, 38, 39, 43, 44, 46, 48, 49, 65, 72, 75, 77, 79, 86, 87 and 88). The definition of a defective product in the European Directive of July 25, 1985 refers to the “the use to which it could reasonably be expected that the product would be put” (Article 6). The Unidroit Principles of International Commercial Contracts also make extensive use of the “reasonable” standard (cf. Articles 1.8, 2.20, 3.5, 3.9, 4.1, 4.2, 5.2, 5.3, 5.4, 5.6, 5.7, 5.8, 6.1.1, 6.1.16, 6.1.17, 6.2.2, 6.2.3, 7.1.5, 7.1.6, 7.1.7, 7.2.2, 7.3.1, 7.3.2, 7.3.4, 7.3.6, 7.4.4, 7.4.5, 7.4.6, 7.4.8, 8.4 and 9.1.12). The same can be said about the Principles of European Contract Law.

The draftsmen of international contracts are no different. Besides numerous references to the word “reasonable” to define periods of time, events of justification, evidence required, etc., which are not within the scope of this study, the term frequently appears in relation to the mode of performance of obligations. We cited above many examples of the use of the words “reasonable care,” “reasonable efforts,” etc.

What does the word “reasonable” mean? Doubtless, it is necessary to distinguish between “reasonable” and “rational.” “Reasonable” in the present context, does not mean “logical”; it does not mean conforming to “reason” in the philosophical sense, but conforming to “reason” in the practical sense—to common sense, to generally accepted value judgments.⁵⁶ This “practical reason” applies in situations where the standard of behavior required depends on taking into consideration and pondering a number of factors, the different circumstances capable of influencing the decision to be taken.⁵⁷ Thus, a carrier required to take “reasonable care” of goods must investigate methods of preservation and packaging such goods, how fragile they are, the transport risks that threaten them, etc.⁵⁸

⁵⁵ *Schedule 2: Guidelines for application of Reasonableness Test.*

⁵⁶ J.A. Salmon, *op. cit.*, pp. 447–448; compare G. Khairallah, *op. cit.*, pp. 456–460.

⁵⁷ N. Mac Cormick, *op. cit.*, p. 136. *Schedule 2*, attached to the English *Unfair Contract Terms Act*, gives a list of different factors to consider in order to determine the reasonableness of a contractual clause.

⁵⁸ G. Khairallah, *op. cit.*, p. 464.

The person who takes good decisions is the “reasonable man,” similar without doubt to the French “*bon père de famille*,” a concept derived from the venerable “*bonus paterfamilias*.”⁵⁹ The way in which a contracting party behaves and the interpretation of the concept of “reasonable care” or “reasonable efforts” is measured by reference to the actions of this reasonable man.

We have, however, still not given any definitions. How do you define the use of “practical reason”; how do you give a judicious evaluation of the different factors present? It is possible to list the typical actions of the “reasonable man,”⁶⁰ yet it is almost impossible to define him without being tautologous.

Reference is often made to behavior that is usual in the circumstances, “reasonable” being very closely connected to what is generally accepted in a given social context.⁶¹ The requirement can be reinforced by the addition of references to the behavior of an “experienced” or “prudent” person, having concern for the interest of all the parties.⁶² This, however,

⁵⁹ Cf. S. David-Constant, *Le bon père de famille et l’an 2000*, *Journ. Trib.* (Brussels), 1982, pp. 152–153.

⁶⁰ This can be done with humour, as in the following description: “(The *Reasonable Man*) is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or bound; who neither star-gazes nor is lost in meditation when approaching trap-doors or the margin of a dock; who records in every case upon the counterfoils of cheques such ample details as are desirable, scrupulously substitutes the word “Order” for the word “Bearer,” crosses the instrument “a/c Payee only,” and registers the package in which it is despatched; who never mounts a moving omnibus, and does not alight from any car while the train is in motion; who investigates exhaustively the bona fides of every mendicant before distributing alms, and will inform himself of the history and habits of a dog before administering a caress; who believes no gossip, nor repeats it, without firm basis for believing it to be true; who never drives his ball till those in front of him have definitely vacated the putting-green which is his own objective; who never from one year’s end to another makes an excessive demand upon his wife, his neighbours, his servants, his ox, or his ass; who in the way of business looks only for that narrow margin of profit which twelve men such as himself would reckon to be “fair,” and contemplates his fellow-merchants, their agents, and their goods, with that degree of suspicion and distrust which the law deems admirable; who never swears, gambles, or loses his temper; who uses nothing except in moderation, and even while he flogs his child is meditating only on the golden mean. Devoid, in short, of any human weakness, with not one single saving vice, sans prejudice, procrastination, ill nature, avarice, and absence of mind, as careful for his own safety as he is for that of others, this excellent but odious character stands like a monument in our Courts of Justice, vainly appealing to his fellow-citizens to order their lives after his own example” (A.P. Herbert, *Uncommon Law*, pp. 3–4). The author goes on to point out that in all case law, “there is no single mention of a reasonable woman” (*id.*, p. 5).

⁶¹ G. Tixier, *op. cit.*, pp. 282–283.

⁶² Cf. *Stanolind Oil and Gas Corp. v. Sellers*, USCA, 1949, 174 F.2d 948, cited by V. Amar & Ph. R. Kimbrough, *op. cit.*, p. 52.

remains a circular definition: what is a “prudent” person? “Reasonable” does not mean “heroic”; it is not a question of sacrificing everything on the altar of duty. Although a certain degree of strictness is expected of this “reasonable man,” how is that degree to be established?

The Working Group spent a considerable amount of discussion time trying to define the concept of “reasonable” diligence. Although we could not come up with any completely convincing definition, a way of distinguishing between the two expressions “reasonable efforts” and “best efforts” has been suggested. It seems that “reasonable efforts” may be more objective. It refers to what will generally be considered necessary to be done in similar circumstances. “Best efforts,” on the other hand, will be interpreted by reference to the abilities of the person undertaking the duty itself, which makes this latter term more subjective.⁶³ In fact, the wording of clauses refers, on the one hand, to “all reasonable efforts” or “all reasonable means,” and, on the other hand, when speaking of the person who owes the duty, to “its best efforts.” Sometimes the two criteria seem complementary: the formulation “in every reasonable and proper way and to the best of its ability,” far from being redundant, would combine both concepts, requiring of the person under the duty both that it do its best and that it conform to generally expected norms of behavior.

However, all generalizations are dangerous. Furthermore, we must remember that civil lawyers care in defining concepts and setting the boundaries of categories is far from being shared by common lawyers. In American case law, “reasonable efforts” and “best efforts” are considered to be interchangeable;⁶⁴ and for an English judge, “best endeavors” are “all that reasonable persons reasonably could do.”⁶⁵

Finally, “reasonable” seems, in certain cases, to have a mitigating effect on terms to which it is applied. It is no longer a question of referring to what the reasonable man would generally do, but of accepting that, in view of the circumstances, one cannot ask too much of the party undertaking the duty. Such was the interpretation given above by the Working Group to the “reasonable efforts” required to safeguard confidential information (given the great difficulty of preventing leaks), and to the “reasonable measures” required for mitigating losses (bearing in mind that, after all, it is the other party in such cases that is in breach). This is an important shade of difference, given that even the reasonable man himself might, to some small degree, be a little less vigilant in certain circumstances while nevertheless remaining true to character.

⁶³ See a similar opinion in Cl. Witz & Th. M. Bopp, *op. cit.*

⁶⁴ Cf. *supra*, pp. 210–214.

⁶⁵ Cf. *supra*, p. 209.

3. "Due Diligence," "All Diligence," Obligations to Appropriate Means

(a) The term "due diligence" is very frequently used in contracts alongside "best efforts" and "reasonable care" to qualify the type of performance expected of the person under the duty. An agent must "diligently" seek orders from his clients, a contractor must carry out the work "with due care and diligence," or "with reasonable skill, care and diligence," the parties must exercise "all due diligence" to mitigate the effects of an event of *force majeure*.

Here again, any attempt at definition runs into serious difficulties. It is impossible to define such concepts precisely, which are used for the very reason that it is not possible to be more precise, if not to avoid being more precise.

"Diligence," in French as in English, appears to imply no more than "efforts."⁶⁶ It is the fact of trying to do something. It may also suggest an element of speed ("to be diligent"). What is most important, however, is probably the definition of the degree of "diligence" required. When it must be "reasonable," we are thrown back to the earlier discussions of "reasonable efforts." When it is stated to be "due" diligence, it seems that the meaning of this expression is similar. "Due" means what we expect: is that not the behavior of the "reasonable man"? In another case described above, a contractor undertook to supply his services "with utmost diligence and care"; here the requirement was specifically reinforced: the "reasonable man" must make greater efforts than those that would normally be expected of him. Above all, however, we note that in every case, the formulations are abstract: they refer to the standard of care generally expected and not to that of the particular party under the duty. It is not asked to use "his diligence," as it was required to use "his best efforts." In the applications found by the Working Group, the term "diligence" was used with reference to a general standard of behavior, like the criterion of "reasonableness" examined above.⁶⁷

We would therefore put "due diligence" with "reasonable efforts" in the category of abstract standards, in contrast with the more subjective connotations of "best efforts." Here again, however, care must be taken. We must not be overly systematic where reality is very fluid.

(b) For lawyers in the French system or certain similar systems, an obligation of "diligence" evokes the concept of an "undertaking to appro-

⁶⁶ The same can probably be said about terms like "care" ou "*soins*."

⁶⁷ Compare, formerly, Section 67–D, 2° the CMEA General conditions of supply: "The care generally taken in relationships of a given kind shall be taken into consideration as a criterion for determining fault" (cf. also Section 67–E, 3°) (O. Capatina, *op. cit.*, pp. 1044–1046).

appropriate means” (*obligation de moyens*). Above, in the commentaries that accompany the illustrations of contractual practice, several references were made to the distinction between such undertakings and “undertakings to achieve a promised result” (*obligations de résultat*). For some it is tempting to try and amalgamate several of the formulae examined above with these two types of duty.

The distinction is constantly used by lawyers in the French tradition.⁶⁸ It is based on the idea that in certain cases, a party will undertake to achieve a given result (a classic example would be the carrier who promises that goods will be delivered), whereas in other cases, a party will undertake only to act as a “good family man” with a view to achieving the result, but does not guarantee it (a classic example of this would be the doctor who undertakes to treat a patient, not to cure him). The distinction is of great practical interest. If the result is not achieved, a party who accepts an undertaking to achieve a specific result is, *prima facie*, in default, and the onus will be on it to try to establish justification, whereas in the case of an undertaking to appropriate means it will not be the party undertaking the obligation, but the party benefitting from it, who will bear the burden of proving that adequate means were not used with the degree of diligence required. The distinction relates, therefore, both to the scope of the duty and to the burden of proof in the case of default.

The characterization of a given obligation as an undertaking to appropriate means or to achieve a specific result will depend on various factors. Its wording may be decisive. When a party promises in absolute terms to do something, subject only to the possibility of establishing an outside ground of justification in the event that it fails, this reveals an “*obligation de résultat*.” On the other hand, an “*obligation de moyens*” will arise where a party undertakes “to use all diligence” in carrying out the duty promised. Where the wording of the contract is uncertain, it will be for the court to decide, by reference primarily to the degree of risk that threatens the success of the service promised. If it is a question of an obligation that normally ends in a positive result (for example, an undertaking to pay a price or deliver goods), the court will doubtless classify it as an undertaking to achieve a specific result. If performance would normally involve difficulties of a type such that success cannot be guaranteed (for example, defending a client in an action at law or bringing round a company with financial difficulties), it will be considered to be an undertaking to appropriate means.⁶⁹

⁶⁸ Conceived by Demogue, (*Traité des obligations*, V, Paris, 1948, No. 1237), it permitted to solve a long-lasting controversy about the respective scopes of Articles 1137 and 1147 of the Civil Code. Cf. J. Frossard, *La distinction des obligations de moyens et des obligations de résultat*, Paris, 1965; G. Viney & P. Joirdain, *Traité de droit civil*, vol. IV, *Les Obligations, La responsabilité, conditions*, Paris, 2nd ed., 1998, pp. 440–544.

⁶⁹ A thorough discussion of these problems under French law is found in G. Viney, *op. cit.*, pp. 641–651.

The two categories of obligations to appropriate means and undertakings to achieve a specific result are not sufficient to cover all of the situations that may arise. Beyond undertakings to achieve a specific result, legal literature has also defined a class of “guarantee obligations” (*obligations de garantie*), where the party accepting the obligation gives an absolute undertaking, without reserving any right later to set up a ground of justification.⁷⁰ On the other hand, freedom of contracts permits many other formulations, restricted or extended undertakings to appropriate means, undertakings to achieve a specific result similarly relaxed or reinforced, etc. Legislators themselves make use of shades of difference. The “good family man” is referred to in Article 1137 of the Napoleonic Code (relating to the safekeeping of objects), the text that was the basis for the development of the concept of obligations to appropriate means. The “good family man” similarly appears, *inter alia*, in Articles 1374 (relating to unauthorized management of another’s affairs), 1728 (use of objects on hire) and 1880 (safekeeping of objects on loan). Article 1137, paragraph 2, however, states that “the scope of this duty will be greater or smaller under different contracts,” and Article 1927, for example (keeping of objects on deposit), replaces the criterion of the “standard of care of the good family man” with that of the “same standard of care as (the bailee) would use in keeping his own property.” Here, the normally objective nature of the undertaking as to appropriate means becomes slightly more subjective.⁷¹

Obligations to appropriate means and obligations to achieve a specific result, therefore, constitute no more than two basic categories. Nevertheless, lawyers in the French tradition very often refer to these two categories for the purpose of analysis.

How far does this French “tradition” extend? Certainly to Belgium, where these concepts are in constant use;⁷² but they are also applied in other jurisdictions such as the Netherlands,⁷³ Italy,⁷⁴ Quebec⁷⁵ and Romania.⁷⁶

⁷⁰ Cf. B. Gross, *La notion d'obligation de garantie dans le droit des contrats*, Paris, 1964; J.L. Fagnart, *Les obligations de garantie*, *Mélanges Bagniel*, Brussels, 1976, pp. 233–262.

⁷¹ Cf. H. De Page, *Traité élémentaire de droit civil belge*, V, 2nd ed., Brussels, 1975, No. 198 (but compare Article 1928, where the bailee’s liability is reinforced in certain cases).

⁷² Cf. H. De Page, *op. cit.*, II, 3rd ed., Brussels, 1964, No. 596; P. Van Ommeslaghe, *Les obligations. Examen de jurisprudence 1974–1982*, *Rev. Crit. Jur. B.*, 1986, pp. 215–217.

⁷³ J.D.A. Den Tonkelaar, *Resultaatsverbintenissen en inspanningsverbintenissen*, Zwolle, 1982; A.S. Hartkamp, *Verbintenissenrecht*, I, 8th ed., Zwolle, 1988, No. 184.

⁷⁴ L. Mengoni, *Obbligazioni “di risultati” e obbligazioni “di mezzi”*, *Riv. Dir. Comm.*, 1954, pp. 185–209, 280–320, 365–396.

⁷⁵ Cf. P.A. Crepeau, *L'intensité de l'obligation juridique ou des obligations de diligence, de résultat et de garantie*, Centre de recherche en droit privé et comparé du Québec, 1989, 232 pp.

⁷⁶ E.A. Barasch, I. Filip & O. Capatina, *Considérations sur la classification des oblig-*

In some other civil law countries, the concepts of obligations to appropriate means and obligations to achieve a specific result are scarcely recognized. Under German law, they are not generally used, although a similar approach takes place with the comparison in the Civil Code (BGB) between the *Dienstvertrag* (service contract) (Sections 611–630) and the *Werkvertrag* (work contract) (Sections 631–651); in the first type of contract, a party undertakes to perform services, whereas in the second, the undertaking is to perform a definite type of work.⁷⁷ In their excellent introduction to comparative law, the German authors Zweigert and Kötz refer to the French distinction, but they appear to treat it as an isolated development.⁷⁸

In common law, one would expect such concepts to be formally rejected. Is not contractual liability objective, free of any idea of fault, whereas in the case of an obligation to appropriate means, fault must be proved and in the case of an undertaking to achieve a specific result it will be presumed? In theory, Anglo-American law treats all contractual obligations as guarantees, non-performance of which will, of itself, amount to a breach of contract giving rise to liability for damages.⁷⁹

Nevertheless, aside from all attempts to impose too rigid a set of rules to govern contractual liability, does not the distinction between obligations to appropriate means and obligations to achieve a specific result correspond to real-life experience, where certain undertakings involve too great a degree of difficulty and uncertainty to be the subject of unconditional undertakings promising success? In the common law countries as elsewhere, when it is not realistic to give a more strict undertaking, the party undertaking an obligation promises no more than to use “every diligence,” or its “best efforts.” Professor Farnsworth himself, who specifically compared the American law concept of “best efforts” to the French system of obligations to appropriate means, wrote that:

“our common law counterpart of the French obligation to appropriate means is, of course, the duty of best efforts.”⁸⁰

The distinction between *obligations de moyens* and *obligations de résultat* has recently gained a significant international consecration with its inclusion in the Unidroit Principles. Article 5.4 makes an explicit distinction between a *duty to achieve a specific result* and a *duty of best efforts*. In the latter

ations civiles en obligations de résultat et en obligations de moyens (in Romanian), *Studii si cercetari juridice*, 1971, pp. 583–590; O. Capatina, *op. cit.*, pp. 1049–1050.

⁷⁷ Cf. Cl. Witz & Th. M. Bopp, *op. cit.*, p. 1035.

⁷⁸ K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, trad. T. Weir, 3rd ed., Oxford, 1998, pp. 501–502.

⁷⁹ *Id.*, p. 503.

⁸⁰ E.A. Farnsworth, *op. cit.*, p. 4.

case, the obligor “is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.” The very interesting Article 5.5 then attempts, for the first time in a codification, to define criteria to distinguish between those two types of obligations: such criteria are largely inspired by case law that had developed on the subject in France and in Belgium.⁸¹

The considerations above cannot lead to an over-simplified analysis. “Best efforts,” “reasonable care” and “due diligence,” as emphasized above, often refer to the performance of obligations whose success is not guaranteed, and in this respect they, in fact, contain elements of obligations to appropriate means. On the one hand, the distinction between *obligations de moyens* and *obligations de résultat* provides only two basic formulae that are capable of numerous variations and shades of difference. Furthermore, our investigation of contractual practice has shown that the phrases studied are used in a great variety of contexts, sometimes giving rise to other interpretations. We have also tried to distinguish subjective expressions of the “best efforts” type from objective ones of the “reasonable care” and “due diligence” type. Any amalgamations of the various expressions should, therefore, be approached with great caution.⁸²

Nevertheless, the comparison cannot be avoided and the idea of obligations to appropriate means makes it easier to understand the concepts that are the subject of this study.⁸³

4. References to Business Norms

The quality of the performance expected is sometimes characterized by reference to business norms.⁸⁴ An engineering consultant will undertake to provide his services “in accordance with recognized professional standards”; an architect will undertake to exercise a “reasonable standard of skill and diligence normally expected and accepted by the profession of architecture”; a contractor will undertake to carry out work according to “accepted industry standards”; the supplier of technical assistance will be responsible for any error that “a reasonable professional person with a nor-

⁸¹ In French law, cf. G. Viney & P. Jourdain, *Traité de la responsabilité civile. Les conditions de la responsabilité*, Paris, 2nd ed., 1998, No. 536–555; in Belgian law, S. Stijns, P. Wery & D. Van Gerven, *Chronique de jurisprudence. Les obligations: les sources (1985–1995)*, *Journ. Trib.* (Brussels), 1996, pp. 723–724.

⁸² In Romanian law, the notion of *best efforts* is analysed as referring to a reinforced obligation as to appropriate means (cf. O. Capatina, *op. cit.*, pp. 1048–1050).

⁸³ Comp. J.M. Mousseron, *Technique contractuelle*, Paris, 2nd ed., 1999, No. 1085–1086.

⁸⁴ On the legal aspects of norms in general, cf. Commission Droit et vie des affaires de la Faculté de droit de Liège, *Le droit des normes professionnelles et techniques*, Brussels, Bruylant, 1985; A. Penneau, *Règles de l'art et normes techniques*, Paris, L.G.D.J., 1989.

mal degree of competence” would not have made.⁸⁵ Several examples have been given above.

These criteria seem to be more precise than previous ones, since they refer to requirements peculiar to the professional field in which the party undertaking them is involved.⁸⁶ It is no longer a question of the “reasonable man” but of a professional person qualified in the area in question. True, some of the formulae cited above do combine different terms, including “diligence” and “reasonable.” Nevertheless, the particular factor that characterizes these clauses is the reference to professional qualification.

Obviously, it is expected that a professional person will act in a professional manner; that is why his services are engaged. A professional person is not an amateur; he can call on technical education, experience, adequately trained staff and the requisite information. If he undertakes to render a service in his professional capacity, clearly he must use these resources in carrying out his undertaking. No other meaning can be attributed to the requirement that he perform his duties “in accordance with recognized professional standards.”

Expressions such as these are more precise, since their meaning can be established in a relatively objective way. Thus, the accepted industry standards that a contractor must meet can be found in the specialized literature, the standards set up by different organizations, the conditions of the contract for works, the building regulations, etc.⁸⁷ An example has been given of an explicit reference to such norms imposed on suppliers of materials and spare parts for motor vehicles.⁸⁸ In the event of litigation, it is obviously easier to determine the way in which a professional, qualified in the area concerned, ought to have acted than to decide merely how a “good family man” would have behaved.

There is, however, no radical difference. In considering the behavior of a “good family man,” a “diligent man” or a “reasonable man,” we cannot

⁸⁵ On such references to professional standards in German law, cf. Cl. Witz & Th. M. Bopp, *op. cit.*, pp. 1031, 1034, 1038, 1040.

⁸⁶ It will be noticed that in the four examples just given, only one refers explicitly to the obligor’s specific profession (the architect). There seems to be no doubt, however, that the “professional standards” applicable to the engineering consultant are those of its trade.

⁸⁷ Cf. M.A. Flamme, *Agréer les entreprises ou agréer et contrôler les produits?*, *L’entreprise et le droit*, 1981, p. 320; cf. also A. Penneau, *La notion de règles de l’art dans le domaine de la construction*, *Rev. Dr. Immob.*, 1988, pp. 407–417; M.A. Flamme & Ph. Flamme, *Le contrat d’entreprise, Quinze ans de jurisprudence (1975–1990)*, Brussels, 1991, pp. 42–43, 146.

⁸⁸ Cf. *supra*, p. 193.

stay resolutely on the fence. This imaginary figure is often put in the same situation as the party undertaking the duty,⁸⁹ which renders it similar to the professional person. Still, the expression does not possess the same demanding character.

A reference to business norms is not always in and of itself sufficiently precise when activities of varying technical levels are found in a given field. Are the “accepted industry standards” the same for a small contractor in the construction industry as for a company that undertakes to build a vast industrial complex? Obviously not. Certainly, the reference to these accepted industry standards will imply that it is a question of standards adapted to the particular type of work. However, for any particular job, the person commissioning the work can call on a more or less specialized contractor; if he chooses a less experienced company, which may offer a more attractive price, should the “professional standards” of the more qualified competitors still apply?

Such questions are highly relevant in the context of international contracts. If the “accepted industry standards” consist of all the standards applied in the industry concerned, they will nevertheless not be the same in every country. Take the case of a French businessman who undertakes to carry out building works in Indonesia according to “accepted industry standards”; are the rules to be applied those relating to the French, or to the Indonesian construction industry? The question is important in a technical context and also perhaps in a legal context, if the legal regime governing warranties is held to be part of the “accepted industry standards.” Some members of the Working Group thought that there would be an unacceptable difference in the treatment of businessmen from different countries if each was required only to conform to its national standards, which might be more or less exacting; others, however, emphasized that the client, in choosing the contractor, weighs up carefully the level of technical expertise and the nature of the warranty that it could provide.

The conclusion to be drawn from the above is that a reference to professional standards is worth clarifying when there is a difference between the qualifications of the party undertaking the duty and the standards that the other party wishes to apply to the undertaking, or when there may be some doubt because of differences in standards from one area to another.⁹⁰

⁸⁹ H. De Page, *Traité élémentaire de droit civil belge*, II, 3rd ed., Brussels, 1964, No. 588; G. Viney, *op. cit.*, No. 462, 530.

⁹⁰ Considering the rapidity of technical progress, it is sometimes advisable to be precise about the moment at which the industry standards applicable to the promised performance are to be determined. May the obligor be satisfied with performing in conformity with the standards existing when the contract was concluded, or must performance be adapted to technical progress occurred since then? On these questions, cf. Cl. Witz & Th. M. Bopp, *op. cit.*, pp. 1039–1040.

In one example given above, the necessary clarification was provided: the “accepted industry standards” were to be interpreted according to the standards in force in Tunisia, the place of performance; but such clarification is often lacking.

B. Attempt at Synthesis

The nature of the subject makes it difficult to reach very systematic conclusions. Some guidelines may be stated, but subject to numerous qualifications.

Take the case in which the draftsmen of the contract seek to state adequately an obligation that one of the parties is prepared to undertake. It is to be a relatively complicated obligation; the party undertaking it cannot promise perfect results.

In what way is that party to work? Efforts can be more or less intensive and the draftsmen will seek to state the degree of effort required. On this occasion, the dialectic of negotiations will oppose the beneficiary of the obligation, trying to express exacting requirements, and the party undertaking the obligation, concerned about not being placed under too strict a duty. The formula adopted will be governed by the negotiating skills and bargaining power of each—assuming that each is really aware of the impact of the choice of words.

1. Basic Criteria

(a) One way is to look at the degree of effort of which the party undertaking the obligation is capable. It may be required to do its best or to use its best efforts. The party benefiting from the duty knows its partner and expects it to use all its abilities in its service. This subjective criterion implies, in particular, that less is required of a small enterprise retained to perform a job than of a highly specialized partner. The party undertaking the duty agrees to use its abilities to their best effect to carry out the promised work. It is, however, still an exacting requirement: the party undertaking the duty must use its best efforts.

One may further wonder, whether what is required are the best efforts of which that party is capable or those that it uses to carry on its own business. Certain clauses use the latter criterion. Sometimes it constitutes a concession, where the intention is not to require a level of duty greater than that which the party concerned would use on its own account⁹¹; but it is often used to increase the duty, based on the observation that that party takes great care in its own affairs.

⁹¹ In this line, perhaps, cf. Article 1927 of the Napoleonic Civil Code (cf. *supra*, p. 220), with regard to keeping of objects in deposit.

(b) A different formulation takes account of what is normally expected of a party undertaking an obligation of this type, who performs its obligation properly: “due diligence,” “reasonable efforts” or, following the old Roman formula, the care of the “*bonus pater familias*.” The term takes a turn for the abstract; it is no longer a question of referring to the competence of the contracting party itself; it is required to act in the manner generally expected of a diligent person in the same circumstances. This approach is, in itself, neither more nor less demanding than the previous one, rather it moves onto a different plane. “Normal behavior” is a sort of average, difficult for a party lacking in resources to achieve but well within the capacity of a sophisticated party.

(c) The third possibility is to refer to normal professional standards. The party undertaking the duty is required to exercise the degree of competence expected of a specialist in its field. The duty must be performed in accordance with “accepted industry standards,” in the manner of a “reasonable professional person of a normal degree of competence.” At first sight, this approach is midway between the two set out above—the general standards of the diligent and reasonable man and the standards of the contracting party itself. In fact what is really involved is a more precise version of the abstract approach. The “reasonable man” here becomes the “reasonable professional man.” As we said earlier, the difference is only in the degree of precision given, since whether behavior is “reasonable” is determined by placing the “abstract” man in the same circumstances as the party under the duty, i.e., in his professional role.

2. *Shades of Meaning*

These few considerations show the main types of criteria that may be used to define the expected quality of a contracting party’s obligations. Caution is required, however, when, in any particular case, the contractual terms have to be interpreted.

(a) An investigation of the actual circumstances in which a clause was inserted in the contract can lead to different conclusions.

- It is manifestly true that some of the expressions examined above are not always used by the draftsmen in contracts in full knowledge of the consequences of their choice of terminology. Negotiators do not always think twice before undertaking in “a reasonable manner.” Such terms sound reassuring and inoffensive. Some of the members of the Working Group suggested that their inclusion in a contract would appear to give it a “friendly” or “convivial” air. In such circumstances, it would be quite preposterous, in interpreting such a clause, to try and discover the will of the parties.

- In other cases, the choice of terminology is the result of the negotiators' inability to agree on more precise wording to express the obligation undertaken. A solution is found in the adoption of supposedly vague wording (for example, "with care," "its best . . ."), which, when litigation later ensues, simply postpones the difficulty. Here again, if the basis for interpreting the term is to be the will of the parties, it will not be found by examining the meaning of the words.
- Sometimes, on the contrary, great consideration is given to the choice of phraseology but, in the mind of one of the parties at least, the words chosen mean something different from what one would expect on the basis of the interpretation set out above. The typical case is where a "best efforts" clause is used by a space agency to express a purported exemption from liability. Interpretation of such situations is very delicate; it will depend on knowing whether the other party was informed that this was the meaning intended and whether that party agreed with it, and will further depend on principles governing interpretation in general (see below). Moreover, the validity of such an exemption clause may be questionable.
- In another situation, wording is chosen without anything appearing to give it a meaning different from that set out above, but it relates to a duty in the performance of which a different degree of care is usually expected. Thus, a parent company may undertake to use its "best efforts" to ensure that its subsidiary is in a position to meet its obligations. An interpretation based on the nature and object of this duty might lead one to attribute a greater degree of severity to this expression than the wording actually implies. In this case, a letter of comfort, the Working Group thought that the "best efforts" amounted to an undertaking to achieve a specific result by the parent company. Such interpretation is, of course, open to question.
- A given term may sometimes have a particular meaning; in one situation described above, "reasonable" has been interpreted to mean "mitigating" or "reducing" the intensity of the obligation.
- Finally it should be recalled that these various expressions are often used in combination.

(b) On the other hand, in this area more than in any other, one must always bear in mind the specific features of the different legal systems and the principles that govern the interpretation of contracts.

- There are opposing views concerning the grounds for contractual liability. Under common law, a contractual obligation is, in theory, absolute; under civil law, liability for breach will, in principle, only

arise on the basis of fault. The various clauses studied above require an examination of the conduct that has led to the disgruntlement of the party benefitting from the undertaking. They fit easily into the civil law structure, but under common law, in spite of the frequency with which they occur, they alter the normal system of liability.

- Whatever may be the general philosophy of its particular system of liability, each legal system may have its default solutions dealing with the degree of burden normally attached to such or such an obligation. In the absence of any qualification in the contract, rules exist everywhere (specific or based on general principles) for establishing the liability of a contractor in the construction industry, a licensor, a party involved in launching satellites. Every qualification used in the agreement must thus be interpreted by reference to the system that would apply in its absence.
- The interpretation of contracts under certain systems of law relies principally on finding the will of the parties. Particularly noteworthy in this context are Article 1156 of the French Civil Code and Article 1362 of the Italian Civil Code. Another tendency is to give preference to the expressed will of the parties as opposed to their actual will. German law, in this respect, falls between these two approaches. Under English law, although the matter is debated less than on the Continent, the expressed will of the parties is paramount: a clause whose meaning is clear does not need to be interpreted in accordance to the outside elements.⁹² This was clearly illustrated in two statements by English judges, already cited above:
 - “We think ‘best endeavours’ means what the words say . . .”;
 - “I cannot find . . . any context which satisfies me that the words “use its best endeavours to obtain consent” could be construed otherwise than in accordance with what I take to be their clear, primary and natural meaning.”

These opposite approaches will clearly have a profound influence on the interpretation of the different expressions being considered, according to the applicable law. A legal system, which gives preference to the expressed will of the parties, will give the expression concerned a more literal meaning than a system of law that seeks to discover the actual will of the parties, beyond the language of their agreement.

- However, in practice, it seems that the English and American courts do not draw a distinction between “best efforts” and “reasonable efforts,” whereas a literal interpretation might justify different meanings similar to those suggested above.

⁹² Cf. also *supra*, pp. 89 and 105–119; K. Zweigert & H. Kötz, *op. cit.*, II, pp. 406–409; C. Del Marmol & L. Matray, L’importance et l’interprétation du contrat, *Rev. Dr. Int. Dr. Comp.*, 1980, pp. 158–208.

- Several of the expressions discussed here are rarely used in certain legal systems (for example, “best efforts” in French law, in spite of the extent to which the expression has in practice come to be used in contracts), whereas they may be in common use in other legal systems where they have been examined in case law and in theoretical commentaries (for example, “best endeavors” and “best efforts” in English and American case law, and in American literature). The common lawyers’ immoderate tendency to use the term “reasonable,” which for them is really a familiar concept, is well known, whereas on the Continent, the term is used much less extensively. Besides, a given formulation may prompt certain lawyers instinctively to look to distinctions peculiar to their own legal systems (for example, obligations to appropriate means and to achieve a specific result for lawyers trained in French law or a similar system), whereas, *a priori*, the words may mean nothing under the other contracting party’s legal system. Such situations may lead to misunderstandings: a clause that is vague or harmless for one party may be enormously significant for the other.
- The concept of “best efforts,” in particular, has been greatly refined in American law, with the aid of economic analysis. Several levels of requirements have been suggested in order to clarify the exact meaning of the words; first, extending as far as interests of the party itself undertaking the obligation (the “diligence insurance” referred to above—a very restrictive interpretation); second, seeking the optimum combined level of satisfaction for both parties; and finally, requiring that the party concerned go so far as to sacrifice everything to the interests of the beneficiary of the duty (the “fiduciary duty” mentioned above).

IV. ADVICE TO NEGOTIATORS

The inclusion in a contract of a “best efforts,” “reasonable efforts,” “due diligence” “accepted industry standards” or similar kind of clause should not be taken lightly, in spite of the reassuring appearance of most expressions of this type. Various pieces of advice and warnings are prompted by the explanations above. The most important ones are:

1. Each of these terms, to varying degrees, acts to limit the extent of the duty undertaken by a given party to the contract, by comparison with an unconditional undertaking to carry out a totally satisfactory service. The interests of the beneficiary of such a duty are better served by a clause free of any qualification of this type. However, where complete success of an action cannot be guaranteed, the inclusion of such terminology becomes inevitable.
2. In the first place, before suggesting any wording, it is advisable to ascertain the standards by which the actions of the party con-

cerned will be measured: the usual behavior of the contracting party, how the party acts on its best days, how a professional of average competence in the area concerned, or a professional highly qualified in that area, would act; or there again, the general standard of a reasonable and careful man. The terminology must be chosen by reference to the desired level of requirement, whereas, too often, it is only later that the meaning of an expression chosen lightly is called into question.

3. The most precisely drafted clause prevents the most difficulties. In this respect, a reference to professional standards seems preferable to more general references (e.g., “reasonable efforts,” “due diligence,” etc.). Where necessary, the level of professional competence expected should be stated, if there are several different levels in the field concerned. It is often a useful technique to clarify by the use of a few examples the type of behavior expected of the party undertaking the duty. A couple of illustrations are set out above.
4. It is important not to lose sight of the law applicable to the contract. The impact of a clause will vary according to the system of liability applicable under that law. Moreover, certain formulations have developed meaning under certain legal systems: negotiators obviously need to be aware of such meanings before selecting a clause, as seen above. The negotiators must also pay attention to the principles that will govern the interpretation of their chosen clause if difficulties arise.

Reference to expressions of “best efforts,” “due diligence,” “reasonable care” or “accepted industry standards” types, so frequent in international contracts, illustrates the dilemma between the impossibility for a contracting party to undertake certain obligations in absolute terms and the need to define the degree of requirement that the performance by the party undertaking the obligation must nevertheless fulfill. The drafting of such clauses is a delicate matter; no formula can ensure complete security. The above discussion will hopefully be of assistance in drafting the most appropriate contractual provisions with more lucidity. It is then up to the negotiators to use their best efforts!