IV.6.5 - Best efforts undertakings

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If a party promises its "best efforts" in the performance of its contractual duties, that party owes to the promisee all efforts which can be expected from a reasonable party of the same kind in the same circumstances, taking into account the particular nature of the contract and the interests of the parties.

Commentary:

1. Best endeavors or best efforts clauses are frequently used in international contracts either to determine the degree of performance owed by one side for the fulfillment of an ancillary duty such as the procurement of a clearance from antitrust or other official authorities or even to weaken the standard of duty for the debtor's main obligation due to the uncertainties existing at the moment of contract conclusion with respect to the success or performance owed by that party. The best efforts principle is a borderline case which one may be tempted to categorize as a legal rule rather than as a general principle of law. However, like the principle of good faith and fair dealing, the best efforts principle comes close to a behavioral standard for the performance of any contract, provided that parties have included a best efforts clause into their contract.

2. Due to its generic nature, the Principle of best efforts reflects the fact that general principles of law constitute "rules of optimal application" which means that they may be complied within varying degrees, depending on the circumstances of the individual case. "Best efforts" or "best endeavors" clauses have their origin in English and US common law. English courts have made it very clear that a debtor under a best efforts or best endeavors clause does not owe a low but a reasonable standard of care and diligence in the performance of his duties. Thus, an English court has held that a best endeavors undertaking in a contract does "not mean that the limits of reason must be overstepped" but that the words mean that [the debtor] must, "broadly speaking, leave no stone unturned" (Sheffield District Railway Company v. Great Central Railway Company, [1911] 27 T.L.R. 451, 452). In Midland Land Reclamation Limited and Leicestershire County Council v. Warren Energy Limited of 1997, the court held that the debtor's obligation under such a clause is "to do what can reasonably be done in the circumstances".

3. It follows from these considerations of the English courts that if a party promises its "best efforts" or "best endeavors" in the performance of its contractual duties, that party owes to the promisee all efforts which can be expected from a reasonable party of the same kind in the same circumstances, taking into account the particular nature of the contract and the intentions and interests of the parties. If the party is a professional, he or she will have to live up to the standards of his or her profession or trade.