THE BEST EFFORTS CLAUSES: ANALYSIS OF ANGLO-SAXON JURISPRUDENCE AND INTERPRETATION OF THE CIVIL LAW CLAUSES[1]

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Our contractual language is often accompanied by common law terms. One of the most significant illustrations is the term *best efforts*.

How will a continental judge grasp the concept of common law?[3]

A double exercise is required:

- First is the understanding of the term: what does this term of law mean in English law? It is to this exercise that we proceed by giving the definition of the term (I), giving some examples of application (II) and studying Anglo-Saxon jurisprudence (III).

- The second is its receipt: how will the Belgian lawyer apply this term in a civil law environment (IV), the role of the lawyer being different according to the law applicable to the contract and according to the competent jurisdiction?[4]

Several *hypotheses* may arise. First, Belgian courts may declare themselves competent and apply foreign law. Then the words must be interpreted by the Belgian judges according to foreign law: A judge hearing an application for the application of legal norms under foreign law must investigate and determine the content of this right, to have gathered the necessary information on this subject and to respect the rights of the defense.

Although drafted in identical terms and having a common origin, Articles 1645 of the Belgian and French Civil Code have ceased to constitute the same law and do not contain the same interpretation.[5]

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[3] See. Our article on "L'usage des termes juridiques anglo-saxons dans la vie des affaires" ("The use of Anglo-Saxon legal terms in the life of business"), Mélanges offered to Marcel FONTAINE, Larcier, Brussels, 2003, p. 493.

[4] R. SACCO, "La traduction juridique le point de vue italien" ("Legal translation from the Italian point of view"), Les cahiers de droit, vol. 28, p. 845-859.

[5] Cass. 9 October 1980 and conclusions KRINGS, J.T., 1981, p. 70 and observations R. VANDER ELST.
See. For a recent application of English legal terms by the Court of Cassation of Belgium, Cass., 30 March 2000, Pas., 2000, I, 214. In the application of Article 29.1 of the CMR, of fraud and compares the notion of fraud to that of "wilful misconduct".
The reasons given by the Court can be summarized as follows:
"Article 29 (1) of the CMR Convention provides that 'the carrier shall not be entitled to avail himself of the provisions of this Chapter which exclude or limit his liability or which reverse the onus of proof if the damage is caused by Its fraud or of any fault attributable to it and which, according to the law of the

The Belgian judge may also apply international practices.[6]

Second, Anglo-Saxon jurisdiction may be competent and *Common Law* applicable. Even if this were the case, if the contracts drafted in English were to have their effect on the European continent, the continental judges would still be competent, in particular as regards summary proceedings or for enforcement measures.[7]

Third, Belgian courts may be recognized as competent: in this case the judge must seek the meaning of the Anglo-Saxon terms which are included in the contract by seeking the will of the parties as prescribed by Articles 1156 and the following, of the Civil Code.

Fourth, the international contract can be submitted to arbitration. The arbitrator may decide in accordance with an applicable law but may also decide as an amicable composer, who can then refer to equity. The contract may also refer to uses.

Fifth, whether arbitration or jurisdiction, the applicable law may be a? different from English or Belgian law; for example, German law or Swiss law may be applied to the contract drafted in English and subject to the jurisdiction of the Belgian courts or of an arbitral chamber.

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court seized, shall be deemed to be equivalent to fraud (the authentic English text laying down that if the damage was caused by his wilful misconduct '); or (c) in the case of an offense,
That this treaty rule, which refers partially to national legal concepts, precludes the Belgian judge from examining whether an involuntary fault removes the carrier from the right to invoke a limitation of liability;
Whereas the complaint alleges that the appellate courts have incorrectly interpreted the CMR Convention since, in the judgment under appeal, they exclude the application of Article 29.1 on the ground that the carrier did not commit fraud "within the meaning of a wicked intent to cause injury, whereas the term 'fraud' within the meaning of section 29.1 refers to the notion of` wilful misconduct 'which is directed both at the evil intent to cause damage or loss, Rash intervention without any real intention of harming;
Whereas the Appeals Judges decide that, in respect of a Belgian judge, serious misconduct ca not be assimilated to fraud and, therefore, that judge is only obliged to examine whether fraud is required; They then decide 'that it is not disputed that the carrier did not commit fraud in the present case';
That they do not exclude that intentional fault may be a fault which, in the other legal systems, would correspond to another notion, such as the notion of 'wilful misconduct'; That, without further specifying the concept of 'fraud', they merely point to the need for an intentional element which they believe is lacking;
Whereas, in so far as he pleads breach of the provisions of the CMR Convention, the plea is based on the argument that the Appellate Judges applied a notion of 'fraud' which derogates from the notion of 'wilful misconduct'; That the judgment does not contain a decision of that kind ".

[6] See. Cass., February 18, 1985, Pas., I, 741; . Also Cass., 7 December 1989, Pas., 1, 1990, 436; The judgment states that in the event of a breach of the foreign law invoked in an appeal to the Court of Cassation, the infringed provision or the equivalent source of law, such as the possible precedent (s) from which the rule applied or disputed may be deducted.
See. Also for the taking into account of international usage, Article 7 of the Vienna Convention on Contracts for the International Sale of Goods, and the article we wrote with Professor Fallon, J.T., 1998, p. 17 et seq.

[7] See. Brussels Regulation, 44/2001 of 22 December 2000, J.O.C.E., 16 January 2001, L 12/1. Article 31.

Sixth, and this applies particularly to the clauses of *best efforts* easily translatable by meilleurs efforts in French: what if the contract between a Belgian company and an English company drafted in French and subject to Belgian law contains a clause whereby the debtor undertakes to use its best efforts to fulfill an obligation: should the Belgian judge, in the face of this clause drafted in French, refer to Anglo-Saxon jurisprudence? No obligation can, of course, be imposed on him, but the judge will have a sovereign power of interpretation and may reach the conclusion that the parties wanted, in the circumstances of the case, to use the Anglo-Saxon terminology. This will be the case when all draft contracts have been drafted in English and the clause has simply been translated into the final text. The judge may also find in Anglo-Saxon law a source of inspiration, just as a judge may, in the formulation of his judgment, generally refer to comparative law.

These reflections show the interest of understanding the Anglo-Saxon concepts and their place in the legal system of civil law.

Section I. – Definition

The *best efforts* clause could be defined as:

"*A characteristic stipulation inserted in certain international commercial contracts, by which the debtor undertakes to cares?, measures, maximum diligence, with a view to effectively realizing the finality agreed upon by the creditor*."[8]

Or as a:

"*A service having a certain difficulty, where the achievement of the result cannot be guaranteed absolutely*."[9]

The *best efforts* clause thus fits into the field of notions with "*variable content*."

Section II. – Typology

In order to illustrate the *best efforts* clause, we will cite contracts and clauses identified by the "*international contracts*" working group[10], by Christine

[8] O. CAPITANA, "Les clauses de 'best efforts' dans les contrats conclus par les entreprises roumaines de commerce extérieurs" ('The best efforts clauses in contracts concluded by Romanian foreign trade enterprises"), R.D.A.I., No. S,1988.

[9] M. FONTAINE, "*Best efforts*, reasonable care, due diligence et règles de l'art dans les contrats internationaux", "Best efforts, reasonable care, due diligence and rules of the art in international contracts", R.D.A.I., No. 8, 1988.

[10] Working Group on this subject held meetings in London, Bruges and Azay-le-Ferron in 1986, 1987 and 1988 on the basis of a sample of about 150 clauses extracted from various international contracts, Mr FONTAINE, Prev.

Chappuis' study on *best efforts* clauses[11] as mentioned in English and American jurisprudence.

§ 1. Types of contracts

1. It is undoubtedly in the *obligations of promotion most often included* in **contracts of distribution or licensing** that *best efforts* clauses are most frequently found.

In the famous American case, *Bloor v. Falstaff*[12], a contract for the sale of a company provided for the payment of part of the sale price on the basis of the future results of the company. (earn out clause)The buyer was to deploy his *best efforts* in selling the products of the company sold:

"*To use its best efforts to promote and maintain a high volume of sales*."[13]

One can also refer to a contract of promotion of artists:

"*The Gallery agrees to use its best efforts to sell the work and… to develop a market for the works of the artist in the exclusive territory*."[14]

Or an exclusive license agreement:

In *Western Geophysical Co. v. Bolt Associates, Inc*.[15]:

"*... To use its best efforts to promote world-wide licensing and use of the licensed apparatus to government and non-profit institutions during the first two years of this Agreement and hereafter, or at such earlier time as Western may elect, to all other possible sublicenses of such apparatus*"(p.4).[16]

Some contracts for wider services also include *best efforts* clauses, for example, a *contract of employment*:

"*Employee shall devote his best efforts and his entire time to the performance of his duties*."

Or a *management contract*:

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[11] C. CHAPPUIS, "Les clauses de best efforts, reasonable care, duc diligence et les règles de l'art dans les contrats internationaux" ("Best efforts, reasonable care, due diligence and best practices in international contracts"), R.D.A.I., No.3 / 4, 2002.
[12] *Bloor v. Falstaff Brewing Corp*., 1979 (601 F. 2d 609, 2nd Cir. 1979).
[13] "Exercise its best efforts to promote and maintain a significant volume of sales."
[14] "The Gallery undertakes to exert its best efforts to sell the entrusted work and ... to develop the market in the exclusive territory of the artist's works."
[15] 1978 (584 F. 2d 1164, ed Cir. 1978).
[16] "... Exercise its best efforts to promote the worldwide license and use of the apparatus licensed by the government and non-profit organizations for a first two-year period and thereafter at the time chosen by Western, grant to any other person possible sub-licenses for these devices."

"*The Company shall provide the Consultant with such information as he may require from time to time to assist the latter in managing the business of the company. The Company shall use its best efforts to assist the Consultant in the proper operation of the Company.*"

2. Contracts relating to the **works contract** (sometimes linked to a contract of sale) also contain such clauses. Let us take the example of a *contract for the delivery of electricity*: *Midland Land Reclamation v. Warren Energy Ltd*[17] refers to a "*best endeavors*" clause that was imposed on both parties:

"*The Council will use its best endeavors during the Contract Period to maintain, develop and operate at its own cost the gas extraction and leachate pumping systems at the Quarry to ensure the extraction of the optimum volumes and qualities of the Gas ...* (Point 83, Clause 4.11)."

"*Warren Energy shall use its best endeavors during the Contract Period to maximize the use of the Gas from the Quarry* (Point 87, clause 4.4)."

Or a *construction contract*:

"*With respect to any materials, supplies, 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 its best efforts to utilize materials, supplies, goods, equipment or services of Saudi Arabian origin.*"

In this clause, the concept of *best efforts* relates to the *incorporation of local supplies* into the realization of equipment by the foreign company.

There is also *a contract for launching satellites*. Thus, in contracts for which they undertake to place satellites in orbit, both NASA and the European Space Agency use the concept of *best efforts* to qualify the scope of their obligation.[18]

3. Letters of sponsorship may also be mentioned:

"*If the borrower is unable, for any reason, to effect any payment under such loan agreement when due, we shall use our best efforts in order to have funds available to the Borrower... in an amount sufficient to make any such payment.*"

4. In general, all **contracts for integrated cooperation** between the parties may be mentioned.

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[17] 20 January 1997.
[18] M. FONTAINE, *op. cit.*, p. 99.

For example, a sponsorship contract:

"*Within the framework of the activities provided for in this contract, the Sponsor and the Skipper each undertake, as far as he is concerned, to do his best to protect the interests of the other party, not to deliberately act in a manner prejudicial to image, interests and way of life of the other party and not to involve directly or indirectly in activities that the other party considers contrary to its image, interests or beliefs*."

The *best efforts* clause may accompany *specific obligations*, for example, in a technical assistance contract, that of carrying out certain formalities necessary for the movement of personnel:

"*The Customer will take all necessary or useful steps and use every effort to obtain at the appropriate time all authorizations necessary to allow the local executive staff to follow the proposed training program in Europe...*"

§ 2. Types of Clauses

In general terms, *best efforts* clauses are found both in the negotiation and conclusion of a contract, and in the performance of the contract.

1. At the **contractual negotiation** stage, the concept of "*best efforts*" is to be found in various contractual stipulations such as the obligation to make best efforts to *obtain an administrative authorization* or to *fulfill the conditions precedent*.

There will also be clauses of *best efforts* that impose a fast pace of negotiation, which reinforce an obligation of confidentiality, or in a commitment of stronghold.

• *Obligation to conduct negotiations at a rapid pace*:

"*Considering the urgency of this project, the contract will be signed as soon as possible after the initial discussion, and every effort will be made to make this possible within 30 days of the beginning of the initial discussions*."

Another example is *Phillips Petroleum Company United Kingdom Ltd. V. Enron Europe Ltd*[19] where the contract had:

"*The Buyer and Seller shall use reasonable endeavors to agree...*
If the seller and the buyer are unable to agree prior to 25th, April 1996... then the Commissioning Date shall be 25th September and the Run-In test shall be conducted from 25th to 28th September 1996."

• *Obligation of confidentiality*:

[19] 1996 EWCA, Civ. 693 (10th October, 1996).

Certain confidentiality obligations refer to *best efforts* criteria.

"*The Purchaser will keep confidential, will procure that its directors and auditors keep confidential, and will use its best endeavors to procure that its other employees keep confidential, all such information made available during the investigation process and will not use such information in the event that the proposed acquisition does not complete*."

Certain clauses remain silent as to the obligation of the debtor to the obligation of confidentiality with regard to employees or third parties, other clauses impose a guarantee or a security obligation on the debtor of the obligation. The best efforts clause therefore lies between the two.

• *Strong commitment*:

"*A undertakes to make all reasonable endeavors so that none of the companies from... 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 be entered into by and between the relevant companies and/or the competent authorities as soon as possible.*"

This commitment alleviates the commitment of a strong carrier since the debtor does not guarantee that the third party will sign but will only deploy its best efforts to this end.

2. The clauses of *best efforts* are also reflected in the clauses governing the **performance of the contract**.

Obligations to promote or fulfill obligations to provide services have already been cited.

The following clause relating to the *obligation to minimize damage* may also be mentioned:

"*The Parties shall endeavor to achieve the objectives which they have set out to achieve by the contract. In particular, the party who suffers from the non-performance of an obligation must take all reasonable measures to minimize the harm likely to result therefrom. If it does not do so, it can only obtain compensation from the other for the damage it could not avoid*."[20]

[20] This type of provision is contained in the Vienna Convention on the International Sale of Goods, which also refers to "such measures as are reasonable under the circumstances". 77; Cf. Also art. 86. The provisions of the Convention are more related to the concept of reasonableness than to the concept of best efforts.

This clause can be found, for example, in clauses of force majeure or *hardship*, which expressly provide for the obligation to minimize the consequences of the disruptive event on performance of the contract.

2. This list is not exhaustive but it shows the frequency of clauses studied in contracts where relations between parties are narrow and where obligations are not easily determinable precisely by contracting (obligations that we can qualify as qualitative).[21]

Section III. - The scope of best endeavors, best efforts clause in English and American Law

There is no *legal definition of the best endeavors clause*. The case law has therefore attempted to determine its scope over the years.

The expression *best efforts*, common in the USA, is synonymous with *best endeavors*, more commonly used in Great Britain.[22]

§ 1. Scope of the best endeavors clause in English law

The evolution of jurisprudence is worth recalling.

1. *Sheffield District Railway Co v. Great Central Railway Co*. gave in 1911[23] a first definition of the *best endeavors* clause.

The Great Central Railway Co. had pledged to deploy its *best efforts* to develop the "traffic" of another company, the Sheffield District Railway Co.

The interpretation given by the Court was that the *best endeavors* clause does not imply that Great Central Railway Co. undertakes to exceed the limits of reason in order to fulfill its obligation:

"*We think 'best endeavours' means what the words say; they do not mean second-best endeavours. They do not mean that the limits of reason must be overstated 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 ...* "

The decision refers in this last sentence to the systematic and complete nature of the performance of the obligation.

2. *Terrell v. Mabie Todd & Co.,* 1952[24] confirms previous jurisprudence and emphasizes the test of *reasonableness*.

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[21] On the presence of best efforts clauses in relational contracts, see. C.J. GOETZ and R. E. SCOTT, Principles of Relational Contracts, Virginia Law Review, 1981, p. 1089 et s.
[22] Cf. C. CHAPPUIS, *op. cit*.
[23] 1911 27 *TLR* 451.
[24] 169, RPC 234, 237, 1952, WN 434.

The plaintiff had granted the defendants a *license to manufacture and sell* pens of a particular design. The defendants had undertaken to use their *reasonable diligence* and *best endeavours* to promote sales.

"*Two licence agreements, relating to inventions and designs made by the Plaintiff, contained clauses requiring the Licensees to use all diligence to promote sales of the inventions and designs, and to use their best endeavours to exploit these*." (p. 1).

The plaintiff alleged that the defendants had breached their obligation to develop sales. The defendants argued that the commercialization of the invention and models were impracticable.

The judge delimited the obligation of *best endeavours* and defined *the standard of reasonableness*:

"*Best endeavours imposes a duty to do what can reasonably be done in the circumstances and the standard of reasonableness is that of a reasonable and prudent board of directors acting properly in the interests of their company*"(p. 5).

The English jurisprudence thus takes into consideration a criterion of abstract behavior (*reasonable and prudent*) of good management.

3. *Pips (Leisure Productions) Ltd. v Walton, 1980*[25] also emphasizes the systematic nature of the efforts that must be made.

Both parties undertook to conclude a sale according to their "best efforts" on a certain date. The purchaser had 28 days, within which time the performance should take place according to his best efforts.

"…*The letter also stated that it is understood that both parties will use their best endeavours to complete the purchase by Monday, December 3, 1979*" (p. 3).

The judge considered that:

"*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 the reasonable persons could do in the circumstances*" (p. 6).

4. *IBM United Kingdom Ltd v. Rockware Glass Limited, 1980*[26], insists on the same criteria and makes an interesting application.

[25] 1980 (43 P&CR 415, 420, 260 EG 601).
[26] *FSR* 335.

An agreement was signed between IBM UK Limited and Rockware Glass Limited to sell land.

The agreement contained a clause requiring IBM UK Limited, the purchaser, to file a *Planning permission* and use its best efforts to obtain it.

"*The purchaser would make an application for the planning permission; the purchaser will use its best endeavours to obtain the planning permission; and the purchaser would not withdraw the said application without the vendor's written consent*."

However, this *permit* was refused by the competent authority and IBM did not appeal to the Minister as permitted by law.

Rockware Glass argued that IBM UK Limited was under an obligation to exhaust all legal remedies for building permits and considered that IBM had not exercised its best efforts to obtain the building permit.

IBM justified its position by the exorbitant economic cost of such a procedure in itself justifying its disengagement.

By not appealing to the appellate authority, did IBM exercise its *best endeavours* to obtain the building permit?

The judge considered:

"*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*."

This decision is interesting because it illustrates what is meant by the completeness and consistency in the performance of the obligation.

5. *Phillips Petroleum Cu Ltd UK v. Enron Europe Ltd* of 10 October 1996, supra, seems to mark an evolution in the rather liberal approach to the notion of *best efforts*.

The parties agreed to agree on the date from which the seller would deliver natural gas to the buyer. The parties could not agree on a date. The Court of Appeal found that the obligation to make best efforts to reach an agreement was an obligation to negotiate and, being too vague, could not be accompanied by a legal sanction if the negotiations failed.[27] The negotiator may, for example, for reasons of financial opportunity, refuse to contract.

[27] p. 18.

Consequently, in the context of an obligation to negotiate, the best efforts clause does not seem to add anything to the intensity of the obligation.

6. *Midland Land Reclamation* v. *Warren Energy Ltd* of January 20, 1997[28], shows the extent of the obligation to technical progress.

Mrs. Christine Chappuis spoke of the special interest of this case, whose "... *domain [is] characterized by an evolutionary situation due to the constant advances in technology ...*"[29]

In this case, it was a contract for the supply of power (electricity) from the owner of a landfill, *The Council*, to a power company, *Warren Energy*, Electricity a gas, methane, escaping from a public dump.

The contract imposed a *best endeavours* obligation on both parties:

"*The Council will use its best endeavours during the Contract period to maintain, develop and operate at its own cost the gas extraction and leachate pumping systems at the Quarry to ensure extraction of the optimum volumes and qualities of the Gas ...*" (Point 83, clause 4.11).
"*Warren Energy shall use its best endeavours during the Contract Period to maximise the use of the Gas available from the Quarry*" (Point 87, clause 4.4).

The electricity company found that the owner of the landfill had breached its obligation to make better efforts in the delivery of the gas.

The legal problem was therefore to determine the legal force of a *best endeavors* clause in a long-term contract (in this case 15 years) whose object is subject to a constant evolution of knowledge.

More specifically, the issue is whether the *best endeavours* obligation is *set at the time* the contract is concluded or whether the measure of that obligation is likely to vary with the *state of science or technology*.

In response, Justice Bowsher stated that "*best endeavors*" should evolve over time and that it would be inconceivable that advances in technology and knowledge should not be taken into account by the debtor in the performance of the contract .

Adopting a dynamic approach, he rejected the argument of the electricity company:

"I reject the submission made on behalf of the defendants that a "best endeavours" obligation is the next best thing to an absolute obligation or a guarantee. I would not go so far as to agree with counsel for the plaintiffs that

[28] *Official Referees' Business*, 20 January 1997.
[29] Cf. Christine CHAPPUIS, *op. prec.*

"best endeavours" must be construed in the light of the art at the time of the contract, but it must at least be construed in the light of the art as it is developed from time to time during the life of the contract. It would be quite wrong to say that in the light of all expert evidence produced at the trial one should use hindsight to judge the "best endeavours" during the course of the contract" (Point 93).

To conclude that:

" *… the best endeavours must relate to the situation and knowledge at any given time. In a 15 year contract, it cannot be right that there shall be no progress related to new techniques and knowledge throughout the contract. Best endeavours must be best endeavours related to what is known at the time combined with an element of reasonableness in deciding what should be done to update an existing system, but without the use of hindsight*" (Point 203).

In addition, the judge sends a reflection to the drafters of international contracts in these terms:

"*The drafting of contracts for that industry is also a new skill, and those who drafted the contract in this case clearly did not foresee some of the difficulties which lay ahead : to say that is not a criticism of them: it is easy to be wise after the event. This case will have lessons for draftsmen of future contracts*" (Point 54).

7. Blackpool v. Jet2airline.[30]

The issue which arose between the parties related to flights outside the airport's normal opening hours. For the first 4 years of the contract, Blackpool allowed Jet2 to operate flights in accordance with schedules which included regular arrivals and departures outside the airport's normal opening hours. However, these were uneconomic from the airport's point of view, because the support services they had to provide cost more than the additional income. 4 years into the contract period, Blackpool gave Jet2 a week's notice that no such flights would be permitted in the future.
Both the trial judge and the majority in the Court of Appeal held that Blackpool was obliged to allow out of hours flights, and that its withdrawal of them was a breach of contract.
But they declined to grant a declaration that Blackpool was obliged to allow such flights for the remainder of the contract term, on the ground that whether the obligation to use best endeavors required this depended on the circumstances prevailing at any given time.
Circumstances might change, for example, if it became clear that Jet2 could not operate low cost services from Blackpool profitably whatever flights were permitted. Then it might be that the best endeavors obligation would not

[30] [2012] EWCA Civ 417, 2 April 2012.

require flights outside normal hours. Blackpool advanced two main arguments. The first was that the obligation to use best endeavors was too uncertain to be enforced. There was no criterion by reference to which any particular requirement, whether opening out of hours, or the provision of check-in staff, or the provision of enhanced passenger lounges, did or did not fall within the scope of the obligation.
On this, the Couther Court of Appeal broadly agreed on the principle, which was that an obligation to use best endeavors was enforceable unless either (a) the object intended to e procured by the endeavors was too vague or uncertain to be the subject of a legal obligation or (b) the parties had provided no criteria on the basis of which it was possible to assess whether best endeavors had been used. The members of the Court however disagreed as to the application of the principle. The majority, that is Moore-
Bick and Longmore L.JJ., held that "use best endeavors to
promote" (i.e. advance the interests of) the airline services was sufficiently certain. It meant that Blackpool had to do all that it reasonably could to enable Jet2's business to succeed and grow. They hold that the obligation to use all reasonable endeavors to provide a cost base to facilitate low-cost pricing was too uncertain to be enforced; otherwise the inability to define the precise limits of the obligation in advance, and the difficulty of determining in any given case whether a particular step was within or outside the scope of best endeavors, did not make the provisions void for uncertainty.

§2. Scope of the best efforts clause in American law

A distinction will be made between the express commitment on the one hand and the implicit commitment on the other.

A. Express contractual obligation of "best efforts"

a) *Bloor v. Falstaff*

According to Professor Christine Chappuis, this case represents, "*in a way, the scarecrow of American jurisprudence, the bar of best efforts having been placed relatively high.*"[31]

For Victor P. Goldberg of Columbia Law school, *Bloor v. Falstaff is the standard casebook illustration of how to interpret a "best effort" clause.*"[32]

[31] Cf, C. CHAPPUIS, précité.
[32] Cf. P. GOLDBERG, Columbia law School, "The Enforcement of Contracts and Private Ordering", 20 February 2003.

The facts were that the owners of the Ballantine beers sold to another brewer, Falstaff, the Ballantine brand and the distribution network of the same brand.

The transaction amounted to $ 4 million, and included a royalty of 50 cents per barrel of Ballantine beer for 6 years.

The Falstaff brewery, in fulfillment of its contractual obligation, had undertaken to:

"*to use its best efforts to promote and maintain a high volume of sales*".

But after suffering heavy losses, Falstaff through his new manager, Paul Kalmanovitz, decided to favor his own beer to the detriment of Ballantine.

"*Mr. Kalmanovitz was determined to concentrate on making beer and cutting sales costs. He decreased advertising, with the result that the Ballantine advertising budget shrank from $1 million, to $115,000 a year. In 1975 he closed four of Falstaff's six retail distribution, centers...*" (p. 4).

This policy resulted in the fall in sales of Ballantine beers and sales royalties for Ballantine, but allowed Falstaff to regain lost profitability.

"*Despite the decline in the sale of its own labels as well as Ballantine 's, Falstaff, however, made a substantial financial recovery. In 1976 it had net income of $ 8.7 million, and its working capital had increased from $ 8.6 million to $ 20.2 million*" (p.14).

The result was a trial to determine whether the Falstaff brewery had breached its obligation of *best efforts* by favoring the decline in sales of the Ballantine brand in favor of the Falstaff brand.

To determine whether the "*best efforts*" clause had been violated, Ballantine was then required to prove that Falstaff was only concerned with sales of his label. As a result, Falstaff had to prove that he could do nothing but what he had already done.

Justice Friendly considered that the *best efforts* clause implied the idea that Falstaff had to sell Ballantine beer **even to the detriment** of Falstaff's profits.

"*Although we agree that even this did not require Falstaff to send itself into bankruptcy to promote the sales of Ballantine products, it did prevent the application to them of Kalmanovitz' philosophy of emphasizing profit über alles without fair consideration of the effect on Ballantine volume. It was sufficient to show that Falstaff simply didn't care about Ballantine's volumes*" (p. 7) .

The Court was of the opinion that the obligation of "best efforts" had been violated despite the fact that the licensee, in his marketing efforts, went so far as to sell the product at a greatly deficit price.

The cessation of marketing at certain points of sale, the absence of advertising media were pinned in particular to justify a breach of the obligation of *best efforts*. However, as already pointed out in other decisions, the obligation analyzed did not require Falstaff to be exposed to bankruptcy in order to fulfill its obligations.

Mr. Victor P. Goldberg[33] expressed himself in the following terms:

"*Judge Friendly takes it as axiomatic that the contract required Falstaff to trade off its profits for Ballantine's sales.*"

"*Had the court recognized that the royalty was, in effect, an "earn-out"*[34] *, ancillary to the one-shot sale of some of Ballantine's assets to Falstaff, the outcome would have (or, at least should have) been different*."

According to the author, Falstaff had decided to buy a share of the capital at a certain price and then consider buying the balance later on the basis of the future results of the company.

While Goldberg's argument is interesting because it takes into account a more economic analysis of the present case, it is not clear from the facts that the parties gave little importance to this obligation to develop Ballantine products. The seller had an interest in the greater development of these sales insofar as the sale price to which he benefited in particular depended. The solution would have been different if the selling price had been determined according to the evolution of the seller's overall sales; but such were not the terms of the contract.

b) *Western Geophysical Co. v. Boit Associates, Inc.,* 1978[35]

This decision deals with the interpretation of a *best efforts* clause in a distribution contract.

The "*best efforts*" obligation was considered satisfied despite the fact that no aircraft had been manufactured or sold.

Under an exclusive license agreement, Western was to promote, as best he could, for two years, a firearm, PAR, developed by Bolt:

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[33] Cf. P. GOLDBERG, Columbia law School, "The Enforcement of Contracts and Private Orderings", 20 February 2003, Law and Economic Seminar, prof POLINSKY.

[34] The earn-out is a clause that allows a portion of the transaction price to be indexed to the future results of the company being purchased.

[35] (584 F. 2d 1164, 2nd Cir. 1978).

"*... To use its best efforts to promote world-wide licensing and use of the licensed apparatus to government and non-profit institutions during the first two years of the agreement and hereafter, or at such, earlier time as Western may elect, to all other possible sublicenses of such apparatus*" (p. 4) .

However, Bolt felt that Western had not exerted its best efforts to promote the license for two years.

"*In May, 1966, Bolt sent Western a Notice of Termination which purported to terminate Western's exclusive license as of June 30, 1966. The primary ground asserted for this termination was Western's alleged failure to 'use its best efforts to promote world-wide licensing and use' of the PAR. .... Immediately following the purported termination of Western's exclusive license, Bolt successfully exploited the PAR; Bolt sold, leased and licensed PAR ... In March, 1967', Western brought suit again Bolt ....*" (p. 4 et 5).

Bolt argued that the aircraft was mechanically insufficient and that Western should attempt to improve the mechanical reliability of the aircraft prior to its commercialization.

"*These tests indicated a "noise" problem, denominated a "bubble pulse" effect, which had not been evident from the initial testing*"(p. 8).

The Court found that the efforts invested in the development of the product were sufficient and that the commitment to *best efforts*:

"*… was satisfied by Western's actions during the period in question: Western made a good faith business judgment that the best way to promote ...*" (p. 8).

"*Western did not "sit on its hands" during the period ...; it expended vast sums to develop peripheral equipment and/or solve the 'noise' problem in some other manner*" (p. 8).

B. Implicit obligation of best efforts

a) *Wood. V. Lucy, Lady Duff Gordon*, 1917[36]

The courts have sometimes had to decide whether, in *the absence of an express obligation* to do so in a contract, the performance of "best efforts" stemmed from an *implied obligation*.

In the above matter, "*Judge Cardozo discovered the "consideration" of the right to receive royalties in an exclusive fashion representation, with implicit commitment to use reasonable efforts to make the operation profitable*."[37]

[36] 222 N.Y 88, 118 N.E. 214 (1917).
[37] Cf. M. FONTAINE, *op. cit.*

Lucy, Lady Duff-Gordon had entrusted the distribution of her haute couture clothing to Wood. Thereafter, she made sales in the territory where Wood operated; Wood opposed it in court; the defendant argued that she was not bound by an obligation to guarantee the exclusive right to sell her haute couture clothing to the plaintiff because, in her view, Wood had not accepted any obligation in return. There was therefore no contract, because of the lack of *consideration*.

The New York Court of Appeal rejected this reasoning because the plaintiff was implicitly required to promote the sale of clothing.

"*The defendant insists … that it lacks the elements of a contract. [Lucy] says that the plaintiff does not bind himself to anything. It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's endorsements and market her designs. We think, however, that such a promise is fairly to be implied*" (p.1).

The judge sought the true intent of the parties to determine the plaintiff's commitment.

"*… in determining the intention of the parties, the promise has a value. It helps to enforce the conclusion that the plaintiff had some duties. His promise to pay the defendant one-half of the profits and revenues resulting from the exclusive agency and to render accounts monthly was a promise to use reasonable efforts to bring profits and revenues into existence*."

Let us add two more observations. In the first place, the case concerns the notion of *reasonable efforts*, very close to the notion of *best efforts* and often assimilated[38], but these notions, which, as we shall endeavor to show in the following chapter, must be well distinguished. Second, the notion of reasonable efforts must, in the view of the Court, and we subscribe to that view, be implied in an exclusive distribution contract, since exclusivity requires countervailing efforts.

b) *PRC Realty System v. National Association of Realtors* (NAR)[39]

In 1986, NAR received a non-exclusive license to use real estate software from PRC and pledged its best efforts to promote the works published by PRC. That being so, for the works, the parties were not bound by an exclusivity clause. In 1987, NAR launched its own collection of books that competed with PRC.

The court devoted some interesting paragraphs to the definition of the *best efforts* obligation. It considered that the *best efforts* clause did not promote the

[38] M. FONTAINTE, *loc. cit.*
[39] 13 May 1991, n°91-1125, Nos 91-1143 (4tc Circuit 4, 1992).

business of two separate and competitive entities[40]: "*Such direct competition is the very antithesis of best efforts*."

c) *Zilg v. Prentice-Hall, Inc.,* 1983[41]

In this case the Court wondered whether the publisher had given the book a *reasonable chance of gaining commercial success* in deciding whether best efforts had been made.

Gérard Colby Zilg wrote a biography about the DuPont family, "Behind the Nylon Curtain", about the importance of this family in American affairs.

Prentice-Hall, a publishing house had obtained the exclusive rights to determine the draw, the sale price, the style of publication and all aspects of the promotion:

"*The PUBLISHER shall have the right: (1) to publish the work in such style as it deems best suited to the sale of the work; (2) to fix or alter the prices at which the work shall be sold; (3) to determine the method and means of advertising, publicizing, and selling the work ...* "

At trial, Judge Brieant found that the publishing house had failed to perform its implicit *best efforts* obligation.

"*As to* P-H, Judge Brieant *found that the publishing contract required the publisher to 'exercise its discretion in good faith in planning its promotion of the Book, and in revising its plans*.' This obligation required that Prentice-Hall use 'its best efforts ... to promote the Book fully and fairly.' He held that P-H *breached this obligation because it had no 'sound' or 'valid' business reason for reducing the first printing by 5,000 volumes and the advertising budget by $9,500*..." (p. 6).

The Court found that the evidence of contractual breach could be directed in two ways:

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[40] The "best efforts" obligation of NAR was the primary if not sole consideration for the granting of the license to use and sublicense the system. What NAR has done, under the guise of "enhancing" the system licensed to it, is to "add on" to that system, create an off-line system for the sale and promotion of Book Plus, and go into direct competition with PRC.
Such direct competition is the very antithesis of best efforts. Read as a whole, it is apparent that the intention of the parties was that NAR would sell to its members its RCS/MLS on-line system and, as part of the package, attempt to sell the Multi-List MLS book publishing system. The only practical " exception to this scenario would be if NAR was specifically requested by a member to place the book with another vendor. That NAR misapprehended or chose to ignore the impact of its "best efforts" obligation is evidenced by its agreement with Realtron to use its, NAR's, best efforts for that entity. Indeed the "best efforts" clause in the Realtron agreement seems to be copied from that in Paragraph 8(a). The court rejects the interpretation of Paragraph 8(a) which imposes on NAR the obligation to do no more than present a quote to Multi-List and get a price if the member Board desired such a price.

[41] 466 U.S. 938, 2nd Cir. 1983.

"*First, he might demonstrate that the initial printing and promotional efforts were so inadequate as not to give the book a reasonable chance to catch on with the reading public. Second he might show that even greater printing and promotional efforts were not undertaken for reasons other than a good faith business judgment*" (p. 9).

The Court of Appeal held that, in the absence of an explicit *best efforts* clause, the publisher had *adequately* fulfilled its obligations by providing an adequate initial effort and then considerably reducing its efforts on the basis of *poor business prospects*.

"*P-H's promotional efforts were adequate; notwithstanding the reduction of the first printing and the initial advertising budget. Indeed, those reductions, coming on the heels of BOMC's decision not to distribute the book appear to be a rational reaction to that news*" (p. 6).

§3. Attempt to summarize

We must recognize the difficulty of defining a precise definition of the obligation of *best efforts*.

We shall begin with a study of case law (A), then of doctrine (B), to conclude with a distinction between *reasonable cure and best efforts* (C).

A. The evolution of Anglo-Saxon jurisprudence on the interpretation of best efforts clauses

a) *English jurisprudence*

In *Sheffield District Railway Co v. Great Central Railway Co*. of 1911, the judge interprets the *best endeavors* clause literally and indicates that *best endeavors* means exactly what the words say and does not mean *second best endeavours*. The debtor must carry out the obligation in a complete and systematic manner (*leave no stone unturned*).

In the case of *Terrell v. Mabie Todd & Co*., 1952 as in *Pipa (Leisure Productions) Ltd. v. Walton*, 1980, the judge circumscribes the obligation to what can be done by a reasonable person placed in the same circumstances and defines the *reasonableness* test as what would "*a reasonable and prudent board of directors acting properly in the Interest of the company do*."

The judge in *Midland Land Reclamation v. Warren Energy Ltd* (of 20 January 1997), emphasizes that *best endeavors* should evolve over time and that it would be inconceivable that *advances in technology and knowledge* would not be taken into account by the debtor in the performance of the contract.

In the matter of *Phillips Petroleum Company United Kingdom Ltd. V. Enron Europe Ltd* of 1996, the mention of *best efforts* was judged fairly liberally for the debtor of the obligation. Indeed, *the best efforts to negotiate an agreement or negotiate an agreement* seem to constitute similar obligations insofar as the obligation to conclude a contract is not, under English law, liable to legal constraint.

b) *United States jurisprudence*

It should be noted that obligations of *best efforts* may, without being explicit in the contract, be implicitly inferred by the judge, as in *Wood* or *Zilg*.

The *reasonableness* criterion is present as in English law. Similarly, the debtor must not ruin himself in order to perform the obligation, but in the distribution of a product the debtor *cannot favor the development of his own product in relation to the product for which he has subscribed an obligation of best efforts*.

Jurisprudence also refers to the criterion of *good faith* or *sound business* in assessing the fulfillment of the *best efforts* obligation, as in *Western Geophysical*.

B. The criteria of appreciation of a clause of best efforts in American doctrine

The *best efforts* clause has been the subject of numerous doctrinal comments by American lawyers and professors attempting to define the elements of application of this particularly complex concept.

In an article devoted to relational contracts, Professors Goetz and Scott conduct an economic study of relational contracts or integrated contracts.[42] The authors emphasize that the distributor who assumes an obligation of *best efforts* in the promotion and sale of the products of a company must act in the interest of both parties, thus becoming a *joint maximizer*.[43]

Perhaps in some contracts, such as the distribution of products in a territory, each party has an interest in the distributor doing its best to sell the largest quantity possible.

However, in some cases conflicting interests will be present, as in *Bloor*, where the judge criticized *Falstaff* for placing his interests above those of the product marketed by *Bloor*.

Sometimes the obligation of *best efforts* will not maximize the interests of both. Let us remember the case of *IBM v. Rockware* cited above, where the judge criticized IBM for failing to make the necessary remedies after being denied a

[42] C.J. COETZ & R.E. SCOTT, Princip1es of relational contracts, Virginia Law Review, 1981, p. 1089 and s.
[43] *Ibid.,* p. 1119.

building permit. IBM had no interest in claiming this building permit, but its *best effort* obligation undoubtedly compelled it to do more than its own interest or even common sense required.

In other words, the obligation of *best efforts* is to render more intense and systematic the obligation of one party in favor of the other party and will not always make a maximum common profit.

It is true that in the IBM case it was doubtless not a relational contract in which the interests of the two parties were in some way integrated but a contract based on distinctly different services.

Finally, it is right that the aforementioned authors insist on the desirability, where possible, of better quantification or precision of the obligation of *best efforts*, for example, in terms of distribution contracts, sales quotas or distribution methods (promotions, attendance at fairs etc ...). This would reduce the uncertainties associated with the interpretation of the *best efforts* clause.

Lawrence S. Long[44], commenting on the *Zilg* jurisprudence - where, it should be recalled, a publisher who, in the absence of an explicit *best efforts* clause, had fulfilled his obligation of *best efforts* providing initially an adequate initial promotional effort and subsequently reducing this effort on the basis of poor business prospects - provides us with three distinct approaches:

• The concept of *fiduciary duty*: "*fiduciary duty*" implies the idea that the debtor is obliged to subordinate his personal interest to that of his creditor.[45]

The satisfaction of an obligation of *best efforts* according to this concept requires the debtor to go so far as to sacrifice everything to the interest of the creditor.

• The concept of *diligence insurance*: the debtor of the *best efforts* clause does not engage his contractual responsibility for breach of the obligation of "*best efforts*" when the lack of effort goes so far as to harm himself.
In *Zilg*, the judge did not engage the contractual liability of the publisher because the publisher made an initial effort and justified the cessation of his efforts by the absence of hope of profit.
The requirement to satisfy a *best efforts* clause according to this conception thus stops at the limit of the debtor's own interest.

• An "*intermediate position*" requiring both the interests of the debtor and the creditor to be taken into account in the *best efforts* clause and characterized by the search for satisfaction between the two parties.
This view was adopted in the *Falstaff* case where the judge finally took into account the interests of both parties.

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[44] Lawrence S. LONG, *op. préc.*
[45] Definition not adopted by the case-law, cf. aff Falstaff p. 13.

If the intermediate position is that which best espouses the notion of *best efforts*, it causes a great deal of uncertainty on the part of the parties and the author argues for a notion close to the notion adopted in the *Zilg* case which minimizes this uncertainty.
Moreover, the author attaches to the criterion of *joint maximization* developed by Goetz and Scott. He wisely emphasizes the indeterminacy of the test. Indeed, the distributor will not be able to know the volume which makes it possible to reach the common maximization since each of the parties cannot know the costs of the other. In order to remedy this obstacle, it would be appropriate, in our opinion, to work on open books, under a more integrated contract than the traditional distribution contract. Goetz and Scott were aware of this uncertainty insofar as they proposed reciprocal adjustments and specifically cited the franchise agreement.[46]
Proceeding from the same desire for conceptualization and on the basis of an analysis of American jurisprudence, Professor Farnsworth proposes two criteria for assessing the *best efforts* clause[47]:

• The first criterion refers to the conduct which the debtor and the creditor would have adopted if they had been brought together in one and the same person.[48] This criterion is adequate in the context of a distribution contract, for example.

• The second criterion is to place a third party in the debtor's situation and ask what the efforts of that third party would have been. This criterion is appropriate for the assessment of the specific qualities required of professionals; it is not in relation to the debtor who has no professional knowledge but rather in relation to another professional that the proper performance of the obligation must be assessed. Best efforts will be assessed "*by reference to the reasonable care and competence generally expected of practitioners*."[49] The author also dwells on the joint maximization theory developed by Goetz and Scott that would make it possible to find an application where no prior criterion of behavior can be defined.[50]

C. Obligation of best efforts and obligation of reasonable care

The discussions of the Working Group on International Contracts resulted in a distinction being made between the terms "*reasonable efforts*" and "*best efforts*."[51]

Without wishing to generalize, it is accepted that *reasonable* seems to introduce a more objective criterion of appreciation by referring to what has

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[46] *Op. cit.,* p. 1109.
[47] E.A. FARNSWORTH, on trying to keep one's promises, the duty of best efforts in contract law, Universtiy of Pittsburgh law review, 1984. p. 1 et s.
[48] E.A. FARNSWORTH, *op. cit*., p. 8.
[49] M. FONTAINE, *op. cit.*
[50] E.A. FANNSWORTH, *op. cit.,* p. 12.
[51] Cf. M, FONTAINE, *op. cit*

to be "done in such circumstances"[52], whereas "*best efforts*" will be judged on "*capacity of the debtor himself*"[53], making the criterion of appreciation of the clause more subjective.

The *best efforts* clause thus stipulates an obligation according to the capacity of the debtor of the clause.

The use of a possessive pronoun in the wording of the clause marks a personalization of the best efforts and therefore its subjective character:

"*... The purchaser will use his best endeavours to obtain ...*"[54]

"*... To use its best efforts to promote and maintain a high volume of sales ...*"[55],

which distinguishes itself from clauses imposing an obligation that refers to all reasonable efforts that evoke a more objective obligation ("*all reasonable efforts*").

However, it should be noted that the American judge does not always distinguish between *reasonable efforts* and *best efforts* and that the two terms are considered interchangeable.[56]

Similarly, English courts use the test of what is "*reasonable*" to determine the extent of a duty of better effort:

"***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 the reasonable persons could do in the circumstances***".[57]

It follows from what has just been said that the constant concern of continental judges to conceptualize and delimit legal categories is not always that of *common law* judges.

D. Damage

We have hitherto paid little attention to the damage which would result from the violation of a *best efforts* clause; a subject that we cannot address given the limited nature of this study. Given the uncertain and "*qualitative*" nature of the obligation, it will be all the more difficult to establish precisely the damage

[52] Cf. M. FONTAINE, *op. préc.*
[53] Cf. M. FONTAINE, *op. préc.*
[54] Cf. p. 9.
[55] Cf. p. 2
[56] Cf. Lawrence S. LONG, "Best efforts as Dilligence Insurance in Defense of 'Profit Über Alles',, 86 Col. Law Ber (1986), p. 1728 et la note 6.
[57] Cf. p. 9.

in causal relation to the obligation. For example, in the event of a distributor's failure to fulfill the promotion obligation, how would it be possible to determine the turnover that could have been achieved if the promotion had been carried out in certain parts of the territory granted to the distributor?

In *Bloor*, the judge awarded damages deducted from the conduct of comparable brands marketed by integrated companies.[58]
Often the judge will assess the damage ex aequo et bono.

Section IV. - Integration of best efforts in continental law

§ 1. - Obligation of means and result

A. Reminder of rules in Belgian law

Traditionally, doctrine and jurisprudence distinguish the obligation of means from the obligation of result as to the content and extent of the obligation.

The obligation of means implies on the part of the debtor that he undertakes to make every effort to attain a given result.

The debtor has undertaken to act diligently and in good faith with a view to the fulfillment of his obligation.
The creditor is therefore responsible for establishing:

- the existence of the obligation;
- non-fulfillment of this obligation;
- the fact that the debtor committed a fault, that is, he did not behave like a.[59]

The obligation of result is the obligation under which the debtor is bound by a precise and non-random result in the minds of the parties.

The debtor has undertaken to obtain such a specific result, so that the creditor, who would invoke the non-fulfillment of such an obligation, may limit himself on the level of proof to establish:
- the existence of the obligation;
- the fact that the promised result has not been reached.[60]

The debtor of the obligation may, however, be released if he establishes the existence of an extraneous foreign cause or that he did not commit any negligence

[58] *Op. cit.* p. 277-281. C. GOETZ & R. SCOTT, *op. cit*., p. 1123 et s.
[59] Cass., 26 February1962, Pas., 1962, I, 723 et note.
[60] Cass., 10 December 1953, Pas., 1954, I, 290.

Without this category being clearly defined and classified, the **obligation of guarantee** can also be mentioned. This type of obligation is not found in all authors, some of whom are limited to the average / result distinction.

If he is obliged to do so, the debtor is liable in all circumstances, without even being able to invoke force majeure.

In the extreme case of liability systems, one can cite as an example of a guarantee obligation, the obligation to guarantee the seller's hidden defects.[61]

In order to determine the **nature of the obligation assumed** by the debtor, Professor Van Ommeslaghe proposed the following method:

- First of all, it is necessary to refer to the *intention of the parties*.[62] [63]

- Failing that, it must be *ascertained* whether the *obligation involves a hazard*. If the result to be achieved is random, the obligation is an obligation of means. If the result to be achieved is not random, the obligation is of result. However, it is also necessary to distinguish the hazard, which is an uncertain event that is important enough to prevent the debtor from carrying out his obligation, from the simple imponderable minor who maintains a presumption of liability in the event of non-performance.

However, the distinction between means and result / guarantee does not reflect the multiplicity of obligations of a different nature that can be met in practice. It is perfectly possible, and even frequent, to find legal or conventional obligations intermediate or exceeding these categories. Contractual freedom makes it possible to envisage all sorts of possible scenarios.

- At first sight it might be considered that the *civil law concept of obligation of means* could, to a certain extent, be reflected in the notion of *best efforts* or *reasonable endeavors*.

Under a contract where a *best efforts* or *best endeavors* obligation is contemplated, the English or American judge will have to determine whether the *debtor of the best efforts clause has performed the contractually foreseen result*.

The decisions previously considered, focused on limiting the scope of *best efforts* clauses to what a *reasonable person would deploy in the same circumstances,* not imposing on the debtor such a clause to *jeopardize his own interests* and does not constitute an *absolute guarantee*.

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[61] In this regard, see D. PHILIPPE, "Les clauses relatives à, la garantie des vices cachés " ("The clauses relating to the guarantee of hidden defects"), R.G.D.C., 1996, 173.
[62] Cass., 3 May 1984, Pas., 1984, I, 1081.
[63] Cf. note No. 71.

We are therefore of the opinion that a *best efforts* clause is not the equivalent of an obligation of means, but rather aims at clarifying the scope of an obligation of means or an obligation of result:

• In a *contractual framework of obligation of means*, the *best efforts* clause will *reinforce the obligations assumed by the debtor* of the clause by the complete and systematic nature of the steps that must be taken by the debtor in the performance of its obligation.

• On the contrary, in a *contractual framework of obligation of result*, a contract of sale, for example whose fulfillment of obligations is perfect, where the result is known in advance, the introduction of a *best efforts* clause will have the effect of weakening the scope of the obligation.[64]

B. The principles of UNIDROIT

The distinction between the obligations of means and result is widely accepted in continental law and this approach is confirmed by the UNIDROIT principles, which propose a set of rules applicable to international contracts.

A study of the provisions of Articles 5.1.4[65] and 5.1.5a[66] of the UNIDROIT principles on International Commercial Contracts allows us to link the obligation of means to the obligation of *best efforts*.

Article 5.1.4 defines these types of obligations on the French model and the English translation of the title according to the UNIDROIT principles is as follows:

"ARTICLE 5.1.4
(*Duty to achieve a specific result*

[64] C. CHAPPUIS, op. cit. "In comparison with a typical promise of result, such a clause weakens the obligation contracted by giving it a lower intensity. Thus, failure to deliver a Bentley within a certain period of time does not necessarily constitute a breach of contract if sellers have only committed to "use their best endeavors to secure delivery of the goods on the estimated delivery dates". It is not, in fact, an 'absolute' obligation which is infringed merely by the expiry of the period of delivery."

[65] "Article 5.1.4 *(Duty to achieve a specific result. Duty of best efforts)*

(1) To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.
(2) To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances."
The principles were published in 1994 by UNIDROIT, Rome.

[66] "Article. 5.1.5 (*Determination of kind of duty involved)*
"In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or a duty to achieve a specific result, regard shall be had, among other factors, to
(a) the way in which the obligation is expressed in the contract;
(b) the contractual price and other terms of the contract;
(c) the degree of risk normally involved in achieving the expected result;
(d) the ability of the other party to influence the performance of the obligation."

Duty of best efforts)."

The commentary to art. 5.1.4 sheds light on this distinction. Thus for the commentators of the UNIDROIT principles:
"The degree of diligence required of a party in the performance of an obligation varies considerably depending upon the nature of the obligation incurred. Sometimes a party is bound only by a duty of best efforts. That party must then exert the efforts that a reasonable person of the same kind would exert in the same circumstances, but does not guarantee the achievement of a specific result. In other cases, however, the obligation is more onerous and such a specific result is promised.
The distinction between a "*duty to achieve a specific result*" and a "*duty of best efforts*" corresponds to two frequent and typical degrees of severity in the assumption of a contractual obligation, although it does not encompass all possible situations."

It is accepted that Article 5.1.4 gives criteria for assessing the correct performance of an obligation according to which a party to a contract is held in the performance of a contractual obligation to an obligation of result or means.

In the context of an obligation of result, a party is bound to achieve the promised result, failure to do so constitutes in itself a faulty non-performance (except in the case of force majeure).

On the other hand, the non-fulfillment of an obligation of means must lead to a less severe judgment of the judges or arbitrators, based on the comparison with *the efforts that a reasonable person of the same quality placed in the same situation would have deployed*.

An illustration from the comments of the UNIDROIT principles clarifies this:
"B promises to be diligent in order to develop sales of the product 'in the area covered by the contract, with no minimum quantity requirement. This provision creates an obligation of means; it requires B to take all measures that a reasonable person in the same situation (nature of product, market characteristics, importance and experience of the company, presence of competitors, etc.) would take to promote sales (advertising, to customers, adequate service, etc.). B does not promise to sell a certain number of coins in the year but commits to do whatever one can expect from acting as a reasonable person."

This example comes very close to English jurisprudence on *best efforts* in distribution contracts.

Article 5.1.5 a) indicates that the manner in which the obligation is drafted in a contract constitutes the first criterion for distinguishing between the two types of obligations.

The commentary to this provision exemplifies the contractor who undertakes that "*the work will be completed*" by a certain date, as opposed to the one who undertakes to "*try to complete the work*" before that date and retains an obligation of result in the first case, of means, in the second.

If the contract specifies that the debtor should perform according to his "*best efforts*" or will do everything in his power, he defines the obligation of the debtor as an obligation of means.

For our part, we believe that the assimilation of the obligation of *best efforts* to the obligation of means is not always appropriate. While it is true that the holder of a duty of due process must act diligently, we are of the opinion that the *best effort* obligation requires the debtor to *carry out his obligation systematically* and requires him to have explored all the necessary avenues in the performance thereof.

Let us remember the *Sheffield Railways* ruling, which in 1911 had clearly insisted on the essential characteristics of the obligation: *no second best endeavours*, but *leave no stone unturned*. The judgment in IBM also shows that all the means must be applied, in particular in respect of the actions to be brought against a decision which has refused a building permit: failure to bring the action would probably not have been a fault, obligation of *best efforts* had not been prescribed by the contract.

C. Burden of proof and best efforts

Is the burden of proof partly reversed as regards the obligation of *best efforts*?

Assuming that the debtor must take all the necessary steps to fulfill the obligation, it could be argued that it would sometimes be sufficient for the creditor to show that only one of those (for example, not to make an appeal, not to have visited all the shopping centers of a country if it is obliged to use its best efforts to promote products in that country) so that the debtor is liable. And it will then be for the latter to demonstrate that the failure to take that measure is not at fault.

However, according to the case-law analyzed, it can be seen that the judge often assesses in a comprehensive manner whether the debtor behaved as a loyal debtor without necessarily taking stock of all the measures which he would have normally had to take.

It can be concluded that if the judge comes to the conclusion that the debtor has not taken one or more measures necessary to comply with the commitment of *best efforts*, for example in the development of the product, it

will be for the debtor to demonstrate that it has done the systematic and complete steps in the fulfillment of its obligation to be exempt from liability.[67]

§ 2. Exemption and best efforts clause

An obligation of result or guarantee may be alleviated or even transformed into an obligation of means.

Satellite launch contracts often contain a clause, known as better efforts in the outcome of the satellite's orbit. There was a exemption for the performance of the launch agency.[68]

It should be remembered that exemption clauses are invalid in particular when they clear the obligation of its substance.[69]

If the judge were to find that the result is inscribed at the very heart of the obligation (this would not, in our view, be the case for the satellite launching agency's obligation, but it could be for more obligations defined as, for example, the obligation to issue postal mail when a surcharge is paid in order for the post to arrive within a specified period)[70], the addition of *best efforts* would be considered invalid since it would distort the obligation by transforming it into an obligation of means.

§ 3. Best efforts and good faith

Good faith is an open standard. It introduces a moral element into the law of obligations and its content may vary according to the values to which the persons who are called upon to translate, define or apply the concept are attached. Some insist on its approach to rectitude of behavior, others on the requirements of loyalty and collaboration it requires.

Good faith ensures that the contract meets the reciprocal expectations of the contracting parties. It requires collaboration and loyalty in achieving the objectives set by the parties.[71]

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[67] See. Also in a similar orientation, O. CAPATINA, *op. cit*., P. 1048.

[68] See. M. FONTAINE & F. DE LY, *Droit des contrats internationaux (Law of International Contracts)*, 2003, p. 221 and s.

[69] See. B. DUBUISSON, Les clauses limitatives ou exonératoires de responsabilité ou de garantie en droit belge, in *Les clauses applicables en cas d'inexécution des obligations contractuelles* (*The Limitations or Exemptions of Liability or Guarantee under Belgian Law, The clauses applicable in case of non-performance of contractual obligations, under the direction of*) P. WERY, The Charter, 2001, not. P. 63.

[70] The Prior stamps in Belgium. See. Case of *Chronopost*, Cass. Com 22 October 1996 (SA *Banchereau* v. *Sté Chronopost*), rejection of a limitation of liability clause contradicting the service contract given; D., 1997, Jur., P. 121 and SERIAL notes.

[71] See. S. DAVID CONSTANT, La bonne foi ; une mer sans rivage, in *La bonne foi* (Good faith; A sea without shore, in Good faith), Editions du Jeune Barreau de Liège, 1977, p. 651; J. F ROMAIN, Good faith, Bruylant, 2000; D. PHILIPPE "La bonne foi dans le formation du contrat" ("Good faith in the formation of the contract"), Louisiana Days of the association Capitant, 1992, p. 61 and s.

The obligation of *best efforts* is linked to the notion of good faith. Both concepts are subject to a subjective assessment, taking into account the specific circumstances of the case and the debtor's situation of the obligation, as well as the qualitative nature of the situation. To be convinced of this, we look at the *Western Geophysical* case, where the Court of Appeal stated: "*the standard by which the District Court determined whether "best efforts" had been employed, "active exploitation in good faith" was also proper.*"[72]

Professor Farnsworth, however, distinguishes between these two obligations under American law: "*Good faith is a standard that has honesty and fairness at its core and that is imposed on every party to a contract. Best efforts is a standard that has diligence as its essence and is imposed only on those contracting parties that have undertaken such performance*."[73]

Professor Farnsworth's comment also applies in civil law. It may, however, be stressed that the obligation of good faith is wider in Belgian law than in Anglo-Saxon law in particular since, alongside fairness and honesty, it also presupposes an obligation of cooperation and respect of the legitimate expectations of the other party.

These last elements are no strangers to the notion of *best efforts*, especially in relational contracts. Indeed, the bonds are very strongly integrated with each other - one thinks of the joint venture contract or the outsourcing contract[74] - and doing its best efforts will often assume better to meet the interests of the other party. Thus, in the *Bloor* case, the
violation of the *best efforts* clause resulted from the failure to take sufficient account of the interests of the other party.

§ 4. The economy of the best efforts clause

It is common ground that the clause cannot oblige its debtor to ruin himself. Moreover, it cannot make its profit before the respect of its obligation and the respect of the clause may require of them financial sacrifices.

Goetz and Scott rightly point out that in relational contracts, joint maximization of profit must be a criterion for determining the *best efforts* obligation, but the performance of the *best efforts* clause will not, in each case, maximize because the clause aims, in principle, to increase, often to the detriment of the person who has subscribed to it, the intensity of an obligation in favor of the creditor of the obligation.

Conclusions

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[72] P. 8.
[73] *op. cit.,* P. 8.
[74] See. On the outsourcing contract, Center for the Law of Obligations*, Legal aspects of the outsourcing contract*, 2003, and on the joint venture contract, our article "Le contrat de joint venture », in *Le droit des affaires en évolution*, *Recherche et développement d'un produit*" ("The joint venture contract"), in Business Law in Evolution , Research and development of a product, AIME, Bruylant, Kluwer, 2000, pp. 1 and s.

The teaching of Anglo-Saxon doctrine and jurisprudence has made it possible to better understand the *best efforts* clause, particularly in its definition, its economic aspects and, above all, its jurisprudential applications.

Recent English decisions indicate a certain "*dilution*" of the *best efforts* obligation. The judges point out that in important contracts, the drafters have or should be familiar with the scope of the terms used, and by inserting the words *best efforts*, the drafters were or had to be aware that the obligation remained rather vague. The breach of the obligation was therefore more difficult to establish than if the obligation had been determined precisely.

Thus, in the obligation to promote the distributor, it is possible to plan a commitment of *best efforts* but one could also specify the sales quotas that must reach the distributor under penalty of resolution of the distribution contract.

For example, in the *Falstaff* case, the *best efforts* clause could have been more effective with a numerical objective. In the *Midland* case, in the case of a primary obligation, it would have been more prudent to fix a few figures defining at least gas production thresholds that should have been reached.

This being said, the *best efforts* clause remains in our view all its relevance. Indeed, as we have shown, it constitutes an obligation of enhanced means, which obliges the debtor to make *every* effort to fulfill his obligation. The quality of the performance must be above average. In the *IBM* case, *best efforts* should have encouraged field proponents to bring an action, while in *PRC Realty*, *best efforts* in the promotion did not allow the exercise of a competitive activity.

The increased diligence required to fulfill this obligation will, in our view, be a positive element in the philosophy and effectiveness of the contract. The obligation of *best efforts* will naturally be appropriate to the qualitative obligations included in relational contracts.