Network Contracts – some special considerations

1. Introduction

This article deals with the law of contract and the particular characteristics of negotiating contracts in the electronic communications sector. Contract law is a central subject in the study and practice of law in most legal systems whether they be from the common law or the civil law traditions, or indeed mixed[1] systems. The law of contract has played an important role in commercial life since Roman times. More recently the creation of a single European market as well as the emergence of a global economy driven by the growth of electronic commerce transcending national frontiers has led to increasing complexity as well as a growing need for harmonisation of convergence of contract laws around the world. Nevertheless, the fundamental underlying elements of contract law are well understood and well established. Indeed since contracts are the foundation of any system of commerce, knowledge of concepts such as offer and acceptance, *consensus in idem* and freedom of contract is not just the preserve of the legal community. Even those with a rudimentary knowledge of the law of commerce will have a sound grasp of such matters.

2. Contracts for telecoms (electronic communications) services

The market for electronic communications networks and services has assumed an importance unimaginable even a few years ago, with the emergence of globalisation and an increasingly interconnected world. This sector is one of the fastest-growing (and fastest changing parts) of the economy and one of the most significant in any modern market economy. In its most recent analysis the European Union estimates the value of the electronic communications market in Europe at about £250 billion, (about half of the ICT sector overall)[2]. In the UK that market is valued at about £35 billion[3]. The importance of the sector and the characteristics both of the market and of the nature of technology mean that careful attention must be paid to certain key clauses in contracts for electronic communications services or networks. Clauses such as warranties can assume a greater importance than in other industries.

This sector is complex and constantly evolving. It is typified by high barriers to entry (for example finite resources such as access to radio spectrum, or the huge capital costs of deploying network infrastructure. Given these barriers, telecoms markets typically feature a relatively small number of suppliers with the necessary scale and expertise to meet the needs of business customers. In such a scenario, with a complex and fast changing set of products, a limited range of suppliers, and services which are now business critical, the negotiating dynamic at play when discussing contracts is radically different than that which may be found when procuring other goods and services.

Transactions in this environment frequently involve protracted contractual negotiations, often with suppliers seeking to lock in customers for relatively long periods (reflecting their need to recover the significant capital investment which they will have made in developing their products, services and network). Long term lock in is not necessarily unwelcome from the customer's perspective: - given the high value of the services involved and the complexity of both the services and the relationships involved, customers typically do

[1] The legal systems in countries such as Scotland, Israel and South Africa combine elements of both the Common Law and the Roman Law based Civilian systems of law.

[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Progress report on the Single European Electronic Communications Market (15th Report) + ADDS 1 and 2.

[3] BIS: http://www.bis.gov.uk/assets/biscore/business-sectors/docs/i/10-1132-implementing-revised-electronic-communications-framework-consultation.pdf

not wish to go out to procurement more often than every 5 years or so.

Given the crucial role which the services will perform for a business, and the likely duration of the contract, it is important that:

- the supplier agrees to provide effective remedies where the service fails to live up to the promised standards (termination is unlikely to be a realistic option where a replacement cannot easily be put in place), and
- the parties seek in so far as possible, to provide a degree of future proofing (customers will not wish to be left using an obsolete service with no option to upgrade to a newer technology). the parties seek in so far as

With this in mind, rather including unenforceable clauses obliging the parties to reach agreement in new services, purchasers should seek to include rights to request new services coupled with obligations on the provider to develop such services. Such an approach will help to ensure that, in so far as possible, the contract permits the products and services to develop and evolve during the life of the contract.

3. Essentials of contract

At its most basic, a contract is an agreement between two or more parties which is legally enforceable. Contracts should reflect the agreement between the parties and therefore ideally they should be freely negotiated between the parties. Particularly where business critical services are involved, it is important that all parties to a contract understand its terms as well as the rights and responsibilities of all parties under that contract.

This may sound perfectly obvious, as indeed it should be. Unfortunately when dealing with complex, very technical products or services the basics are often overlooked. The more complex the contract, the more difficult it is to discern the most important elements. It is also frequently the case, especially with complex multi party contracts, that these basic, fundamentally important, positions set out at the start of the negotiation, get eroded over time. Where this happens a purchaser can find that in practice when the contract is in day to day use, one party (usually the seller of the product or service) has been handed a lot more power to control the relationship than one might normally expect to see. One example which regularly features in telecoms contracts is a variation clause which permits the service provider to vary any term of the contract simply by serving notice of the change on the customer. This might be an acceptable risk where the purchaser could quickly and easily switch to an alternative supplier in the event of an unwelcome contract change, but when dealing with a complex and business critical service, ceding this degree of control to a supplier is highly inadvisable. Even where no such unilateral right to vary exists, key provisions such as price or product specification may be contained in separate documents, documents which may be much easier to vary than the main contract. This type of drafting enables the entire nature of the product or service to be fundamentally altered. Regardless of how well negotiated the original contract is, such clauses enable a party to negate during the life of the contract, any concessions made during the contract negotiation phase.

All of this means that the basic, apparently mundane, boiler plate text needs to be carefully considered when negotiating telecoms contracts.

Every contract should have:

- Offer and acceptance;
- Consideration (although this is not required under some legal systems such as the Scottish system); and
- An intention by the parties to create binding legal relations.

'Acceptance' of an offer occurs when there is an unqualified acceptance of all the terms, normally this happens after the parties have engaged in a process of negotiation during

which new terms will have been introduced. The question of whether or not the offer has been accepted has always been a fruitful source of disputes. A contract offer has only been accepted when the acceptance is brought to the attention of the offeror. In cases where the acceptance was went by post the long established rule is that the offer is deemed to be accepted when the acceptance is posted. In a world where the use of email is now standard practice the question is whether the rules designed for the postal world can be applied to email. Arguably the contract could be formed when the email is read or when the acceptance is sent. Either way, unless the parties do not intend to communicate by email it is sound commercial practice to insert specific provisions in the contract which set out whether notices sent by email are accepted and if so, when they are deemed to be received.

Again, this may sound perfectly obvious and of course to any lawyer it should be. But lawyers are not the only ones who deal with the contract and can influence its development and implementation. The telecoms industry is full of technically savvy, highly skilled people who are often more focussed on the technical aspects of service delivery and developing better, more advanced means of meeting the needs of customers. They are less familiar and less interested in the legal niceties of executing a contract or varying its terms once the service is up and running. They are used to communicating quickly by email, instant messaging and other on line systems: they may well be tempted to use these systems to conclude agreements or vary the terms of existing agreements. Indeed they may not see any problem in so doing. Those advising telecoms providers need to be aware of these risks and ensure that the necessary legal formalities are not compromised. The point is best illustrated by an example based on a transaction on which the author recently advised.

> *In this example a contract for an electronic communications service contains a provision that its terms cannot be varied without the express written consent of the parties. A new, additional feature of the service is developed by the service provider, one which will enhance the end users' experience and it is therefore to be welcomed. The new feature is not mandatory but can be ordered on a case by case basis by placing an order on the service provider's on line automated system. Unfortunately the developers who set up the ordering mechanism were unfamiliar with the contract's terms. They developed the system in such a way that orders can only be placed by clicking a dialogue box which says "Click here to accept the amended terms and conditions". Of course this conflicts with the existing contract and creates potential for a great deal of confusion. Even were the service provider to explain that it never intended to vary the terms and that the developers made an innocent mistake, the parties can end up spending months debating how to resolve the problem. The developers may well feel there isn't actually a problem and may be reluctant to make changes, especially where they are a third party contractor rather than being employed in house by the service provider. All of this could have been avoided had checks been made with the lawyers prior to launching the new feature.*

The concept of consideration is simply a requirement that there should be reciprocal obligations on the parties to a contract. In other words both parties must receive something in return for their performance of their obligations under the contract. This is not a strict legal requirement under Scots law for example but in a commercial transaction it is unlikely companies will provide their services without receiving something in return. In common law systems the existence of consideration is a formal legal requirement.

4. Terms of contract

The precise terms of contracts will vary but the following conditions ought to be considered essential in any contract:-

- Definitions and Interpretations – any particular terms which the parties wish to define should be expressly set out in a definitions section. This can be particularly useful in contracts for technical services where acronyms and abbreviations are prevalent, but more mundane matters can also be clarified here, for example whether "day" means every day or is restricted to working days, and whether or not public holidays are included (and when contacting in multiple jurisdictions, which holidays are relevant). It can also be particularly useful to refer out to agreed standards laid down by industry bodies such as the NICC or ITU.
- Payment- the price to be paid and the dates when payment falls due should be clearly stipulated. It is also important to provide for situations where payment is not made and to set out the consequences including any interest rate which will be applied to late payments.
- A product or service description: exactly what is the purchaser entitled to receive and what rights does the supplier have to vary the product or service?
- Contract duration and review: When does the contract begin and end? Do the parties have any right to review the contract? Are there any options to renew the contract when it reaches the end of its life? Or does it continue for example on an annual rolling basis unless one of the parties serves notice that they wish to bring the relationship to an end? After the initial term has expired can the contract be terminated at any time by serving notice or only each year on the anniversary of the expiry of the initial term?
- Limitation of liability – This is often a keenly negotiated area since both parties are seeking to restrict their exposure to the other in the event that things do not go to plan. Statute law does intervene here by that forbidding exclusion of liability in certain circumstances.
- Termination provisions – sometimes things will be so bad that one of the parties will wish to be able to bring the contract to an end prematurely, perhaps due to non performance or sub standard performance by the other party. It is vital to specify the rules around when this can and cannot happen.
- Warranties – as we shall see shortly, in practice outright termination of the contract may not be a viable option, in which case purchasers of service should seek to negotiate an effective set of warranties over and above the usual service levels. Service level guarantees are designed to ensure that the other party meets their obligations but if this is not successful, warranties give a contractual right to sue for damages if there is a breach of the warranty.
- Indemnity – Indemnity clauses are closely related to warranties. They are a specified obligation to provide compensation for some defined loss or damage. They provide an immediate right to compensation in certain specified circumstances so parties need to give very careful consideration to the granting of indemnities.
- Force Majeure – this provides for circumstances where performance of the contract is impossible through no fault of either party.
- Confidentiality and Intellectual Property Rights – it is vital to ensure that the parties and their sub contractors keep sensitive information confidential and

that the ownership of any intellectual property is clarified

3.1 Implied Terms

As well as the terms which the parties include in their contract, others may be incorporated by law, or by usage or custom. For example The Sale of Goods Act and the Sale of Goods and Services Act incorporate terms into all contracts for the sale of goods and services. (e.g. an obligation to provide goods of a satisfactory quality which are fit for the consumer's purpose or perform the services with reasonable skill and care.) Some implied terms, such as the provisions of the Late Payment of Commercial Debts (Interest) Act 1998 cannot easily be dis-applied.

3.2 Warranties

Where a party fails to perform its obligations to the satisfaction of the other, the most fundamental remedy available is for the aggrieved party to resile from the contract on the basis of a material breach (for example non or unsatisfactory performance). But in a relationship which the parties may have spent many months negotiating the nature of the product or service, and drafting mutually agreeable contracts, such an option may be neither practical nor attractive. The purchaser is unlikely to be able to procure a replacement product or service without causing major disruption to its business, and therefore, to its customers.

For this reason it is common practice to negotiate a general set of comprehensive warranties coupled with detailed Service Level Agreements and Service Level Guarantees (i.e. compensation which will be payable should the service provider fail to meet the agreed standards). The service levels are there to try to ensure in so far as possible that the service provider meets its obligations and the warranties are included ultimately to provide the purchaser a right to sue for breach of the warranty. It is vital to remember that where you include both SLAs and Warranties, that at common law, an SLA with liquidated damages will bar a warranty claim since the payment under the SLA will exhaust the claimant's rights. This can be specifically overridden in the contract and care should be taken in drafting the contract that provision is made for this. Far too often parties to electronic communications contracts pay too little attention to this area in the rush to conclude the contract and get on with the urgent business of getting the service up and running. Further down the line when plans have gone awry they find that there is no effective remedy short of terminating the contract – typically that is not a realistic option and so the purchaser is left in a weak position with little leverage over the supplier.

Service Level Agreements (SLAs) and Service Level Guarantees (SLGs) are an important means both to secure compensation for sub standard service and also to provide an incentive to service provider not to deliver sun standard service in the first place. Many failures in performance will, of themselves, be too minor to justify pursuing by means of traditional breach of contract claims and yet each failure produces a detrimental impact on individual customers or end user of the service. SLAs and SLGs ensure that such apparently minor breaches do trigger compensation payments, so long as they are paid proactively and do not involve a complex or bureaucratic claims process they can be very effective.

SLAs and SLGs do not simply relate to the final product or service itself, but also to the "back office" systems which enable orders to be placed or repairs and maintenance to be arranged. Communications providers need to ensure that they secure suitable SLAs in relation to systems performance – e.g. around response time to queries, system availability etc to ensure they can order, provision and maintain the services from their wholesale supplier. End user customers expect their communications provider to provide responses to queries regarding service, availability, repairs etc, so CPs have to be able to rely on their network provider to make these things available in a timely fashion.

Service levels should be "SMART", i.e. Specific, Measurable, Achievable, Realistic and should specify a Timeframe.

While SLAs and SLGs are normally used in relation to the day to day performance under the contract warranties are there to provide a remedy when things have gone much more seriously awry (so long as the contract stipulates that warranties are additional to a right to claim under the SLA). In such cases the customer may wish to have the option to sue for damages for breach of the warranty and should have ensured that the contract includes not only SLA provisions but expressly includes the additional right to claim under the warranties.

It is vital to understand what the service is intended to do, and how it will do it in order to tailor the warranties accordingly. Without an understanding of the fundamental characteristics of the service the warranties may not provide an effective remedy to the purchaser should the service provider breach the contract. The warranties should be as specific as possible, for example a purchaser might seek a warranty "that the service will comply with all relevant specifications and descriptions including without limitation those referred to at [Y]". By referring out to a detailed specification the purchaser can ensure that the seller cannot hide behind vague product descriptions which may fall short on actual detail about what will be delivered.

3.3 Limitation of Liability

So much for the purchaser of goods or services, but what of the supplier faced with a customer demanding these comprehensive SLAs and warranties? One way in which suppliers will seek to limit the impact of warranties and SLAs (in addition to resisting their introduction) is by means of the imitation of liability clause.

This has been a contentious area in the telecoms industry for a number of years now, particularly in relation to wholesale contracts between telecoms providers, where the choice of supplier is often limited (ultimately there is a relatively small number of networks which can offer nationwide coverage) and therefore the balance of bargaining power can be particularly one sided. Suppliers in such circumstances normally seek to exclude all liability other than what they are obliged by law to accept. So, for example, clauses which exclude a supplier's liability for the negligence of its own staff are relatively common.

There have been developments in case law in this area, and the courts have increasingly adopted a stance which means that exclusion of liability clauses may be more vulnerable to being struck out than had previously been thought. Suppliers therefore need to consider carefully what they exclude, and in particular consider the risks in excluding liability for direct losses and damage.

One leading example of this recently is the case of GB Gas Holdings Ltd (Centrica) v Accenture (UK) Ltd & ors [2010] EWCA Civ 912. The Centrica case shows that the Courts can be prepared to intervene and give a different interpretation to exclusion clauses than that which suppliers might hope for.

In this case which concerned the supply of a customer billing system by Accenture to Centrica, the High Court took a comparatively harsh (from the supplier's perspective) view of what was a direct loss and what was indirect and this was upheld by the Court of Appeal.

The billing system provided to Centrica performed very badly with numerous problems disrupting Centrica's business. As a result Centrica had to deal with an increased number of customer complaints, had to pay compensation to customers and also lost a significant number of customers who transferred to other suppliers as a result of the problems caused by the IT system. Centrica claimed for breach of several warranties in the contract.

The contract (which was freely negotiated by parties with reasonably balanced bargaining power) contained fairly standard exclusion terms. The clause in question read as follows:-

16.2 Consequential Loss

Subject to clause 16.7 or as otherwise expressly provided in this agreement, in no event shall either party be liable whether in contract, tort (including negligence) or otherwise, in respect of any of the following losses or damages:

16.2.1 loss of profits or of contracts arising directly or indirectly;

16.2.2 loss of business or of revenues arising directly or indirectly;

16.2.3 any losses, damages, costs or expenses whatsoever, to the extent that these are indirect or consequential or punitive;

save that this clause 16.2 shall not apply in the event that either party terminates this agreement other than in accordance with clause 21.'

So as well as excluding indirect losses generally, this clause sought specifically to exclude all direct and indirect loss of profits, contracts, business and revenue.

In determining whether losses were direct or indirect, the High Court had applied the rule originally set out in Hadley & Another v Baxendale [1854] [1854] EWHC Exch J70. The rule states that those that arise naturally are considered to be direct losses, whereas losses which can be said to have been within the reasonable contemplation of the parties are considered to be indirect losses.

The High Court held that all of the following were direct losses: extra gas distribution charges (resulting from an error in the system which over estimated the gas used), ex gratia compensation paid out to customers, additional borrowing costs (Centrica had to borrow to cover the sums which the system failed to bill customers), extra debt recover charges (incurred in chasing debts which had not in fact really been due), additional stationary and correspondence costs in dealing with unhappy customers.

Centrica also illustrates the fact that a series of small failures or breaches can have cumulative effect. The contract stated that once Centrica had provided notice to Accenture of any 'fundamental' defect in the system, Accenture was obliged to take reasonable steps to fix the problem. Accenture argued that no single 'fundamental' breach had occurred and they could not therefore be liable. The High Court held that a series of smaller breaches could amount in aggregate to a 'fundamental' breach.

Clearly the circumstances in Centrica were particular to that case but the case does indicate that suppliers cannot always rely on generic exclusions being upheld by the Courts. If suppliers envisage that specific types of loss may arise as a result of a breach of contract it would be more prudent to specifically exclude such losses or perhaps limit them by means of a separate cap on liability. In the telecoms industry wide ranging exclusion clauses of the type seen in Centrica are often included in suppliers' standard terms. Even where the parties engage in negotiation of terms, concessions by suppliers can be rare particularly since they are all too aware that there is a limited range of alternative supplier to whom purchasers might turn.

In Centrica there was no question of inequality of bargaining power between the parties and therefore no consideration of the Unfair Contract Terms Act 1977 (UCTA) but this additional factor could be relevant in the telecoms industry where large operators rely on standard terms and conditions.

Consideration of the reasonableness of an exclusion clause and the 1977 Act was examined in Lobster Group v Heidelberg [2008] EWHC 413 (TCC). In this case the High Court considered the reasonableness of exclusion clauses contained in a series of standard terms governing hire of a printing press. The 1977 Act provides that in order to be valid and enforceable, a term which seeks to exclude or restrict liability for breach of contract is enforceable only to the extent that the exclusion or restriction satisfies the reasonableness test (so long as the other party is a consumer or is using the supplier's written standard contract terms). In determining what is fair and reasonable the courts will have regard to the

circumstances which were, or ought reasonably to have been, known to the parties when the contract was made.

In Lobster the court considered whether a number of exclusion clauses included in certain agreements relating to the hire of a printing press were enforceable and reasonable under the 1977 Act.

Lobster Group (Lobster) entered into a Finance Agreement with Close Asset Finance (Close) for a printing press. Lobster also signed a Warranty Agreement and a Service Agreement with Heidelberg Graphic Equipment Limited (Heidelberg), the manufacturer of the printing press. Lobster claimed damages for defects in the printing press. It was accepted that the printing press was defective but Close and Heidelberg sought to rely on a number of exclusion clauses within the agreements. All three agreements contained exclusion clauses. The judge upheld some of the exclusion clauses, but ruled that many were unreasonable.

Firstly in relation to the Hire Agreement, the court ruled that Close's attempt to exclude the implied term of satisfactory quality under section 9(2) of the Supply of Goods and Services Act 1982 fell short of the reasonableness test under UCTA, as the Warranty Agreement provided no effective remedy if the press failed to perform due to sub standard components.

The court held that exclusion of consequential losses was reasonable because these were losses that Lobster could have insured against, but exclusion of all loss or damage directly caused by the unsatisfactory quality of the press was not reasonable.

As regards the Warranty Agreement with Heidelberg, the court held that since the parties were all involved in the printing industry they had sufficient knowledge that made it reasonable for Heidelberg to limit their liability to remedying defects. However their exclusion of liability for direct loss was unfair because it left Lobster with no remedy if Heidelberg did not in fact rectify a defect.

Finally in relation to the Service Agreement between Lobster and Heidelberg, the exclusions were reasonable insofar as they limited liability to the aggregate of payments received from Lobster. However, it was not reasonable to exclude increased costs or expenses where, for example, Heidelberg failed to rectify defects.

While the outcome of this decision may not have gone entirely Lobster's way, it does limit the effect of certain exclusion clauses and provides a much more favourable attitude towards the customer. Parties should be aware it will generally not be considered reasonable to exclude the implied term of satisfactory quality, and a party cannot provide for repair or replacement to be the only remedy if goods are not of satisfactory quality. Customers must be able to claim for any losses incurred in the event the supplier fails to repair or replace the equipment.

3.4 Future Proofing in telecoms contracts

As explained above, the electronic communications industry is fast moving but also involves significant capital investment which in turn results in major purchasing decisions happening on a much longer cycle than the technology development cycle. Today's cutting edge communications service may be completely obsolete and overtaken by a superior technology before the contract term has expired. Purchasers should therefore do what they can to build in a degree of future proofing when the contract is being drafted. Parties are often tempted to include clauses that apparently bind them to reach agreement on new services at some unspecified point in the future. Traditionally such agreements to agree have been rejected out of hand by the courts as being unenforceable.

There have been developments on this front in Scotland in the last 12 months which indicate that the Scottish courts are increasingly inclined to take a pragmatic and commercial approach. Rather than simply rejecting agreements because they fall into the class of agreements to agree, the Court of Session held in R&D

Construction Group Limited v Hallam Land Management Limited [2009] CSOH 128 that unless there is a reason for not giving effect to such an agreement then the court should find it enforceable. In Hallam the case failed on its merits, since a price [for the purchase of land] had not been agreed. But in its judgement the Court of Session made clear that the contract would otherwise have been enforceable. The judges held that the price was not uncertain simply because the price was not known at the time of the agreement, if a mechanism exists providing for a certain price in the future. It remains to be seen whether this approach will be followed, particularly in England, but it illustrates the importance of ensuring that contractual agreements are tightly drafted to provide as much certainty as possible. If provision is to be made for agreement on new services at some future date then this must be set out clearly and with a sufficiently objective mechanism to allow the parties or perhaps ultimately the courts to ascertain what was intended.

But rather than rely on the courts following the approach adopted in Hallam, and risk being left with an unenforceable agreement to agree, parties seeking to build in a degree of future proofing ought to build in a system of contract review, and in particular one which allows the purchaser to require the supplier to use reasonable endeavours to develop new products (or more likely evolutionary variants of the current products). Using this type of approach, developments either in technology or in the market which change the commercial basis of the original agreement (for example superseding the technology used) might trigger a review. By requiring the supplier to develop new products, the supplier is contractually bound and the purchaser has a means to exert leverage to secure a more up to date product set.

Clearly it is difficult to forecast future developments with 100% accuracy, but technology trends will be known and developments may be anticipated. The more detail that can be set out the better. This is especially true on issues such as pricing of new products. This might be done by benchmarking (either with reference to other suppliers or perhaps international comparisons), by referring to regulated pricing if available. Parties would also be well advised to provide a dispute resolution mechanism to resolve issued should terms for new products not be agreed.

3.5 Reasonable v Best Endeavours

When negotiating contracts, discussions around the extent of a supplier' liability often involve heated discussion as to whether the supplier should be obliged to use "reasonable endeavours", "best endeavours" or even "all reasonable endeavours".

Regardless of which form of words is used the phrases all seek to qualify the extent of a party's obligations. Until relatively recently the precise meaning, and relative strength, of the various phrases has been something of a grey area.

The terms "reasonable endeavours" and "all reasonable endeavours" were the subject of judicial interpretation in 2007[4] and more recently in June 2001 in the case of CPC Group v Qatari Diar [2010] EWHC 1535 (Ch)

Qatari Diar Real Estate Investment Company (Q) and CPC Group Limited (CPC) entered into a joint venture to redevelop the site of the former Chelsea Barracks in London. They entered into a sale and purchase agreement, which obliged Q to "use all reasonable but commercially prudent endeavours to enable the achievement of the various threshold events and Payment Dates".

In June 2009, after the intervention of Prince Charles in the debate about the redevelopment, Q withdrew their planning application to redevelop the site thereby delaying one of the payment dates. The Court was asked to determine *inter alia* whether withdrawing the planning application was a breach of the obligation to "use all reasonable but commercially prudent endeavours".

[4] Rhodia International Holdings Limited v Huntsman International LLC [2007] (EWHC 292) and Yewbelle Limited v London Green Developments Limited [2007] (EWCA Civ 475).

The Court rejected the submission that the withdrawal was in breach of the obligation and having reviewed Yewbelle Limited v London Green Developments [2007] he held that:-

1) "all reasonable but commercially prudent endeavours" was not equivalent to an obligation to use "best endeavours"
2) An obligation to use "all reasonable endeavours" does not always require the obligor to sacrifice his commercial interests.

It now seems clear that the legal position is as follows:-

"Reasonable Endeavours"

This does not require a party under the obligation to do something which would disadvantage themselves, except that where the contract specifies what steps have to be taken, they must be taken even where that involves a party sacrificing their own commercial interests.

It also requires a party to take only one reasonable course in a given situation to achieve the desired outcome, but not all possible courses of action.

"Reasonable endeavours" is usually defined by means of reference to what an ordinary competent person might do in the same circumstances.

"Best Endeavours"

This is a more onerous obligation (though it is still qualified rather than absolute). The standard of reasonableness is that of a reasonable and prudent Board of Directors acting properly in the interests of their company and in applying their minds to their contractual obligations."[5]

When faced with a best endeavours obligation a party should probably exhaust all reasonable courses of action which could be taken in the situation to achieve the desired outcome.

"All Reasonable Endeavours"

This remains the most difficult of terms to define with any degree of certainty. In CPC Group v Qatari Diar the court held that "all reasonable endeavours" does not necessarily equate to "best endeavours". Although both may require a party to pursue all possible courses until they have all been exhausted, the difference lies in the fact that the obligation to use "all reasonable endeavours" does not always require the obligor to sacrifice his commercial interests. However the precise definition of what is meant by "all reasonable endeavours" very much depends on the particular context in which it falls to be considered.

What can be said is that the meaning of the various terms has become more settled and they do provide useful contractual shorthand for a particular level of qualified obligations. However, the best approach to drafting would be to set out specifically in the contract itself:

- Exactly what each party is required to do (or refrain from doing). If it is not possible to specify exactly what is to be done then a non exhaustive list should be included using words such as "[all] reasonable endeavours including, but limited to X, Y and Z"
- Whether the party concerned should incur any costs (and what limits are there on such costs)
- For how long does the party bound by the obligation have to keep pursuing the objective
- Specify any particular activities which are excluded from the obligation.

[5] Terrell V Mabie Todd & Co. Ltd (1952) 69 RPC 234

5. Conclusions

The electronic communications market is a very significant one. In value terms it has been estimated as being worth some £250 billion per annum across the EU or £35 billion in the UK. Electronic communications services have become so embedded, so crucial to modern business, that it is hard to imagine doing business without them. It therefore goes without saying that it is imperative for anyone buying such services, either as an end user at the retail level, or as a communications provider at the wholesale level, to ensure that the contractual terms are fit for purpose.

In the rush to deliver or to procure advanced communications services the basic requirements of contract and the formalities of execution and variation of agreements should not be overlooked, to do otherwise risks unnecessary complications further down the line. Purchasers should seek to ensure that their supplier has provided both an effective SLA regime to encourage good performance on a day to day basis, and a set of warranties which can be claimed in addition to any liquidated damages due under the system of SLAs.

Finally, the fact that communications contracts tend to tie customers in for periods of up to five years means that technological developments can overtake the services provided. To avoid being left with outdated technology, customers should work with their suppliers and try to anticipate likely developments and find a way to provide a degree of future proofing in contracts. They should not accept a vague agreement to agree. Despite encouraging signs from some courts that they will adopt a pragmatic, commercial approach to such agreements, the norm remains that these will not be enforceable. Purchasers should seek to bind suppliers to develop new services or at least provide a mechanism for review and upgrading of the services provided. While this has obvious benefits for the purchaser of services, it should also in the best interests of suppliers, the more they work with their customers to meet their needs, the longer they are likely to retain their business.

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