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## ‘Best Efforts’ Clauses In Commercial Leases

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In the wake of the global pandemic which caused widespread unforeseen business interruption, “best efforts” clauses in commercial leases have come under scrutiny. While these clauses are often heavily negotiated, they inherently require a degree of interpretation because they speak to the uncertainty of a party’s future performance, which is constrained by variables outside of both parties’ control. For example, a restaurant lease may obligate the tenant to use “commercially reasonable efforts” to increase gross sales if they fall below a threshold, where the landlord is receiving a percentage of those revenues; or the restaurant tenant may be required to use “best efforts” to obtain a liquor license by a date certain as a condition for receiving the benefit of rent forgiveness prior to opening.

Undefined terms of art such as “best efforts” are often utilized in commercial leases, but the interpretation of those terms and the enforceability of the clause, when left to the courts, will turn on how the lease is drafted. This article discusses how New York courts

interpret and enforce these “efforts” clauses.

### Hierarchy of Terms

Three terms of art are most commonly used to qualify a party’s “effort” to perform under a lease: “best efforts,” “reasonable efforts,” and “commercially reasonable efforts.” However, New York courts have not interpreted these terms in a rigid or uniform manner, nor have they placed the terms into any sort of hierarchy based on the extent of effort.

In fact, the U.S. Court of Appeals for the Second Circuit recently observed that the “case law on New York’s commercial reasonability standard is scant” (*Shane Campbell Gallery, Inc. v. Frieze Events, Inc.*, 838 F. App’x 608, 609 [2d Cir. 2020]). Similarly, the Southern District has found that New York case law is unclear as to what constitutes “commercially reasonable efforts” (see *Holland Loader Co. v. FLSMIDTH A/S*, 313 F. Supp. 3d 447, 469 [SDNY 2018]; *Trire Energy Holdings, Inc. v. Innogy Renewables US LLC*, No. 20-CV-5015 (VEC), 2021 WL 3668092, at \*7 [SDNY 2021]).

In *Holland*, the court noted that there “is no settled or universally accepted definition of the term ‘commercially reasonable efforts’... In fact, New York case law interpreting other efforts clauses, including best efforts and reasonable efforts clauses, is anything but a model of clarity” (*id.*).



Similarly, regarding the term “best efforts,” the Appellate Division, Third Department interpreted “best efforts” as requiring a party to use “all reasonable methods” to achieve its goal, thereby blurring any distinction between “best efforts” and “reasonable efforts” (*Kroboth v. Brent*, 215 AD2d 813, 814 [3d Dept. 1995]). In short, practitioners cannot rely solely on a term of art not otherwise expressly defined in a lease to express any specific requirement for a party to perform.

### General Principles Applied to Efforts

Instead, New York courts emphasize the context in which such terms are used. For instance, when a “commercially reasonable efforts” clause is neither defined nor illustrated with examples, the cases interpreting such clauses have generally recognized three principles.

First, courts have interpreted “commercially reasonable efforts” as requiring, at the very least, “some conscious

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exertion to accomplish the agreed goal, but something less than a degree of efforts that jeopardizes a party's business interests" (*Holland*, 313 F. Supp. 3d at 473; see also *3DT Holdings LLC v. Bard Access Sys. Inc.*, No. 17-CV-5463 (LJL), 2022 WL 409082, at \*8 [SDNY 2022] ["The standard does not require [a party] to disregard or act against its own business interests"]). However, as the *3DT Holdings* court explained, "a business which engages in no effort cannot be found to have engaged in commercially reasonable efforts."

Second, a "court's evaluation of a party's compliance with a 'commercially reasonable efforts' requirement does not involve a hindsight comparison of the party's actual conduct to that which could have been undertaken to produce a better result; a court should evaluate only whether the party's actual conduct was sufficient" (*Shane Campbell Gallery, Inc.*, 838 F. App'x at 610 [2d Cir. 2020], citing *Hollander Co.*, 313 F. Supp. 3d at 473). In other words, performance is evaluated in light of the facts and circumstances at the time of performance, and not using 20/20 hindsight.

Third, New York courts generally evaluate a party's performance under a "commercially reasonable efforts" clause objectively, and not based on a party's subjective belief as to contractual requirements (see *MBIA Ins. Corp. v. Patriarch Partners VIII, LLC*, 842 F. Supp. 2d 682, 704 [SDNY 2012]; see also *Lehman Bros. Intl. (Europe) v AG Fin. Prods., Inc.*, 110 NYS3d 218 [Sup. Ct., NY Cty 2018]). Thus, New York courts have held that an efforts clause is unenforceable if it does not contain at least some "objective" criteria to measure a party's efforts (see *Schleifer v. Yellen*, 173 AD3d 624, 625 [1st Dept. 2019]; *Timberline Dev. LLC v. Kronman*, 263 AD2d 175 [1st Dept. 2000]).

However, explicit performance guidelines are not required in the lease

itself; rather, if "external standards or circumstances impart a reasonable degree of certainty to the meaning of the phrase 'best efforts,' the clause can be enforced" (*Maestro W. Chelsea SPE LLC v. Pradera Realty Inc.*, 954 NYS2d 819 [Sup. Ct., NY Cty., 2012]; see also *Errant Gene Therapeutics, LLC v. Sloan-Kettering Inst. for Cancer Rsch.*, 2016 WL 205445, at \*7 [SDNY 2016] [where a best-efforts clause is undefined, "extrinsic circumstances concerning the parties' understanding of [a] term may be considered by the finder of fact"]).

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While these clauses are often heavily negotiated, they inherently require a degree of interpretation because they speak to the uncertainty of a party's future performance, which is constrained by variables outside of both parties' control.

### Minimum Standard Applied to Reasonability

Courts will interpret "efforts" clauses in leases as they would any other contractual provision. The court's "role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract. If that intent is discernible from the plain meaning of the language of the contract, there is no need to look further" (*Evans v. Famous Music Corp.*, 1 NY3d 452, 458 [2004]). Thus, where an efforts clause contains definitions or an objective set of criteria for evaluating a parties' performance, the court will look directly to that definition (see *Vestron, Inc. v. Nat'l Geographic Soc.*, 750 F. Supp. 586, 593 [SDNY 1990]).

Where, however, an efforts clause is undefined, courts have attempted to apply a minimum standard to evaluate performance thereunder in

the context of the party's particular industry. In *Shane Campbell Gallery, Inc. v. Frieze Events, Inc.*, the Southern District explained that "the standard for satisfying commercial reasonability under New York law is a fairly lenient one... [and] it requires at the very least some conscious exertion to accomplish the agreed goal" (441 F Supp 3d 1, 4 [SDNY 2020]).

Other courts have utilized a more generic standard. For instance, in *Soroof Trading Dev. Co. v. GE Fuel Cell Sys., LLC*, the court held that, although New York courts use the term "reasonable efforts" interchangeably with "best efforts," the use of an efforts clause "imposes an obligation to act with good faith in light of one's own capabilities" (842 F Supp 2d 502 [SDNY 2012]).

### Conclusion

Given the varied standards by which best efforts clauses in commercial leases are interpreted, the optimal practice for transactional attorneys drafting such clauses is to utilize (to the greatest extent possible) objective, clearly defined and predictable standards that minimize the possibility of disputes and subsequent litigation. And, to the extent that parties nevertheless find themselves in court over such a clause, litigators should be aware that whatever legal standard the court applies, significant factual inquiry will likely be needed to ascertain whether the clause has (or has not) been satisfied.