Role of Effort in Contract Performance: A Comparative Analysis

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The role of a contracting party's efforts—as in working, trying, or exerting—in the performance of a contract is an understudied and undertheorized issue in contract law. Often, parties incorporate various efforts provisions in their contracts by setting benchmark requirements. The duty of best efforts is implied in exclusive agency contracts in order to align the interests of the principal and the agent. How and when best or reasonable efforts are implied across legal systems is one focus of this Article. More broadly, do courts see the level of effort of a party as a factor in determining breach and setting damages in a broader range of contracts? In sum, the Article explores the role of efforts, or a lack thereof, made by the parties as both an express and implied duty of contract law across legal systems. A comparative analysis of Anglo-American, Chinese, Latin American, and French law is undertaken.

I. INTRODUCTION

The underlying rationales of contract law and most of the debates over contract doctrine focus on the principles of freedom of contract versus justice or fairness in the exchange.[1] The dominant principle that

1. P. S. Atiyah, *Contract and Fair Exchange*, 35 U. TORONTO L.J. 1 (1985) (courts use covert means to ensure fairness in the exchange); Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1 (1987) (duty to adjust long-term contracts for fairness reasons); Emily L. Sherwin, *Law and Equity in Contract Enforcement,* 50 MD. L. REV. 253 (1991) (greater awareness of fairness concerns in common law

justifies the essence of contract is freedom—freedom of two parties to create private law through the terms of their contract. However, the reality of bargaining power and informational asymmetries cautions against unfettered freedom of contract.[2] In the end, contract law can best be framed as one that primarily facilitates private transactions by enforcing the terms of contract freely formed, while at the same time, serving to regulate problematic terms that render the bargain unjust. Thus, the positive freedom to create private law through an agreement is restricted by the imposition of terms by governmental or judicial authorities (negative freedom).[3] Cases of negative freedom include cases where courts or regulatory agencies void terms or impose mandatory obligations in a contract.

These countervailing principles have also informed theories of contract interpretation. Freedom of contract supports strict enforcement of contracts based on the plain meaning of their terms (formalism).[4] This approach sees the written contract as sacrosanct where its interpretation is based solely upon the meaning of its words. The rival theory of interpretation asserts that the written word is a starting point, but true meaning requires placing words within the context of their use (contextualism).[5] These approaches have been emphasized to different degrees over the evolution of contract law. The best view is that both approaches have played a role no matter the era of law being studied. The

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contracts); Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the 'Law of Satisfaction'—A Nonunified Theory*, 24 HOFSTRA L. REV. 349, 453 (1995) ("fairness of the exchange has further encroached upon the domain of freedom of contract").

2. Both civil and common law terminology will be used in describing parties to a contract. In common law, the parties are generally sellers and buyers, while in the civil law a party who owes an obligation is a debtor and the party benefiting is the creditor. For example, in a sale of goods transaction, the seller is the debtor by having the obligation to supply the goods and the buyer is the creditor. At the same time, the buyer is a debtor for purposes of making a payment and the seller is the creditor. A debtor is sometimes called an obligor and the creditor is the obligee.

3. For a philosophical analysis of the positive-negative freedom dichotomy *see* Maria Dimova-Cookson, *A New Scheme for Positive and Negative Freedom*, 31 POLITICAL THEORY 508 (2003).

4. Legal formalism or classical contract law held that the formal or plain meaning of words are to be given to those of the contract. Lord Cozens-Hardy describes formalism as the need to disregard the true intentions of the parties in favor of the meaning of the words of the contract: "It is the duty of the court . . . to construe the document according to the ordinary grammatical meaning of the words used therein, and without reference to anything which has previously passed between the parties to the contract." Lovell & Christmas Ltd. v. Wall, (1911) 104 LT 85, 86.

5. Oliver Wendell Holmes Jr. famously advocated the case for contextual meaning by stating that: "A Word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918).

modern view is that, with the increase in the variety and complexity of contracts, evidence external to a written contract should be used to determine the true meaning of the contract. This embrace of contextualism opens other influences on contract law for analysis.

The complexity of contracts show that other principles also play a role, many ancillary to the cores of freedom and contractual justice, in influencing courts' reasoning in determining the adequacy of performance, breach, and damages. For example, the principles of good faith and the role of fault has been a focus of analysis.[6] The good faith principle and its application has produced a deep scholarly literature by civil[7] and common law[8] scholars. It is also a favorite subject for comparative law scholars.[9] This is because the popular view is that one of the major distinctions between the civil and common law traditions is the former's recognition of a general duty of good faith and the latter's rejection of such a duty. However, this is not entirely true since the role of good faith across civil law systems varies[10] and there is a split in Anglo-American contract law, with American law recognizing a general duty of good faith[11] and English law rejecting any good faith obligation.[12]

But formal divergences often mask functional equivalents[13] when comparing legal systems. An example of this is where different legal systems use different concepts or terminology to arrive at the same outcome. The more difficult analysis occurs when the starting point features diametrically different rules that, when applied, somehow result in the same outcome. For example, American law recognizes the principle

6. *See* GOOD FAITH AND FAULT IN CONTRACT LAW (Jack Beatson & Daniel Friedman eds., 1997).

7. *See* Kevin Bork & Manfred Wandt, *'Utmost' Good Faith in German Contract Law*, 109 ZVERSWISS 243 (2020).

8. *See* Daniel Markovits, *Good Faith as Contract's Core Value*, *in* CONTRACT LAW AND LEGAL METHODS (Gregory Klass, George Letsas, & Prince Saprai eds., 2012). Markovits states that: "The common law of contract has long recognized a duty of good faith in performance." *Id.* at 272.

9. *See* Rosalie Jukier, *Good Faith in Contract: Dialogue Between Common Law Canada and Québec*, 1 J. COMMONWEALTH L. 83 (2019).

10. Reinhard Zimmermann & Simon Whittaker, *Good Faith in European Contract Law: Surveying the Legal Landscape*, *in* GOOD FAITH IN EUROPEAN CONTRACT LAW 7 (R. Zimmermann & S. Whittaker eds., 2000).

11. *See* Restatement (Second) of Contracts §205 (1981) (good faith is implied in the performance of contracts); UCC 1-201(20) (definition of good faith).

12. *See* MSC Mediterranean Shipping Company S.A. v. Cottonex Anstalt [2016] EWCA Civ 789 (no overriding principle of good faith under English law).

13. *See* Ralf Michaels, *The Functional Method of Comparative Law in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 339 (Mathias Reimann & Reinhard Zimmermann eds., 2012).

of unconscionability where an overly one-sided term can be voided, while English law rejects such a principle. However, in reading English case law, one finds decisions replete with words like unreasonable, exorbitant, and unconscionable.[14] In sum, contract laws, despite differences in the formal or blackletter rules, often work covertly to reach just outcomes.

A less debated principle in the common law is the role of fault in contract law. The mainstream view is that the fault plays no role in common law contracts.[15] In essence, all material breaches of a contract are the same and courts are not influenced by the fault or negligence of the breaching party. On the surface, this is true, but when digging deeper the fault principle is seen at work elsewhere.[16] For example, the excuse or exemption doctrines (*force majeure*, frustration, and hardship) provide protection to a breaching party when the breach was not its fault. The genuineness of consent can be questioned when one party acts inappropriately in obtaining the consent of the other party. The fault principle is seen at work in numerous contract defenses such as coercion, undue influence, mistake, misrepresentation (negligent or intentional), and unconscionability. In contrast, the fault principle plays a major covert role in civil law contracts.[17]

This Article focuses on a mostly unstudied principle of contract law—the role of a party's efforts in determining performance, breach, and damages. Much like good faith, fault, and unconscionability, the effort exhibited by a party in the performance of a contract is invariably linked to the core rationales of freedom and justice. Like good faith and fault, the role of effort can be seen at work in covert ways. An example is the substantial performance doctrine, where the performing party fails to meet the goal of complete performance (strict compliance), but the party used all expected effort to reach that goal.[18] In the end, in some transactions such as construction contracts, the law recognizes those

14. *See* Vivienne Westwood Ltd. v. Conduit Street Development, [2017] EWHC 350 (Ch) (used terminology of exorbitant and unconscionable).

15. "Contract liability is 'strict,' meaning that the reasons for nonperformance are irrelevant in determining the injured party's rights." Robert Hillman, *The Future of Fault in Contract Law*, 52 DUQUESNE L. REV. 275, 275 (2014). *See also*, Robert E. Scott, *In (Partial) Defense of Strict Liability in Contract*, 107 MICH. L. REV. 1381 (2009) (irrelevancy of fault).

16. *See* Melvin A. Eisenberg, *The Role of Fault in Contract Law* in FOUNDATIONAL PRINCIPLES OF CONTRACT LAW (2018).

17. For a comparative analysis of the strict liability approach in common law versus the fault-based approach in civil law *see* Stefan Grundmann, *The Fault Principle as the Chameleon of Contract Law: A Market Function Approach*, 107 MICH. L. REV. 1583 (2009).

18. *See* discussion *infra* subsection VI.D.1. (the role of efforts in the application of the substantial performance doctrine).

efforts to hold that there has been adequate performance triggering the other party's duty to pay.[19] This Article discusses the role of efforts in contract law in general, focusing on its interrelationships with the principles of breach, liability, fault, good faith, and diligence in civil and common law systems.

In Anglo-American law, performance, or lack thereof, is associated with a standard for breach of contract, such as a material breach, minor breach, nominal breach, and fundamental breach.[20] The relation of efforts to breach impacts the determination of whether there has been adequate performance. As noted above, the most common performance standards are strict performance and substantial performance.[21] However, the subject is more nuanced than it appears. To explore these nuances, this Article analyzes the understudied topic of the role of effort in the performance or nonperformance of contractual obligations. In some contracts, the measurement of performance is difficult. The paradigm example is the exclusive agency contract where a party (principal) enters into a contract with another party (agent) in which the contract is vague as to the second party's contractual duties or obligations. The contract provides that if the agent performs certain tasks, then the principal is obligated to compensate the agent for its efforts. Whether an adequate performance has been rendered by an agent is generally based upon results. If the agent is contracted to purchase certain assets or to obtain endorsements and other opportunities for the principal, then performance is rendered upon entering into contracts on behalf of the principal. But what happens if the agent fails in performing or completing the assigned tasks? Is the agent in breach of contract? The answer is that it depends on whether the agent had made a reasonable and concerted effort to obtain the third-party contracts on behalf of the principal and whether it is an "exclusive" agency contract. This Article examines the meaning of "efforts" in the best or reasonable efforts principle found in agency contracts and, more broadly, across different types of contracts.

In particular, this Article investigates how reasonable or best efforts are defined and applied in contract law across different legal systems. It reviews court cases to determine the factors that are most predictive of judicial decisions on the issue. More broadly, it analyzes the place or role of effort in the general body of contract law. This analysis is akin to

19. It should be noted that the non-breaching party retains the right to make a subsequent claim for breach of warranty.

20. *See* LARRY A. DIMATTEO, PRINCIPLES OF CONTRACT LAW AND THEORY 128-131 (2023).

21. *Id.*

determining the role of fault in contract law. If a party fails to make reasonable efforts, then the breach can be said to have been its fault. Even though the common law shuns such a view, this Article examines if the lack of effort and corresponding concept of fault play a role in determining breach and contractual liability in the common law system, and compares the results with the approach embraced by the civil law.

This Article therefore provides a comparative analysis on the use and meaning of the best efforts doctrine, with the aim of uncovering the more general role of a party's efforts in assessing performance and breach. The civil legal systems chosen for comparison are France, three Latin American legal systems historically inspired by French and Italian law (Chile, Peru, and Argentina), and China, where a new civil code was enacted in 2021, combining civil and common law influences. Part II examines French law, Part III Latin-American law, and Part IV Chinese law. The analysis continues with a review of Anglo-American law in Part V. Each part covers the following areas: (1) the meaning of best or reasonable efforts, as well as the factors used by courts in making such a determination; (2) the relationship of a party's efforts to the courts' determinations of performance and good faith; and (3) the role of efforts in specific types of contracts—agency, sales, real estate, and long-term (relational) contracts. Part VI summarizes the findings of the countries' analyses and determine the commonalities and divergences across these legal systems. The Article concludes that, whether openly or covertly, the effort given in a performance plays an important role in determining breach of contract and excuse across the civil and common laws.

II. FRENCH LAW

This part reviews the general approach of French contract law, implied obligations related to efforts in the performance of contracts, and the role of efforts in *obligations of result* (strict liability) and *obligations of moyens* (breach based on fault).

A. General Architecture of French Contract Law

Rules on performance, breach, and standards for breach are set out by the French Civil Code (FCC) and interpreted and applied by national courts. The FCC, originally enacted in 1804, was subject to a major reform in 2016, which restated the rules on contract law in general (*le droit commun,* or general law of contract), now enshrined in Articles 1110-1231 FCC to align the Civil Code with judicial developments of the

previous two centuries.[22] The reform project updating the text of the Civil Code with modern judicial developments is ongoing with regard to the special rules on particular types of contracts covered by Articles 1582-2068 FCC (*le droit spécial*, or rules devoted to specific types of contracts, such as sale of goods, lease, agency, loans, and so forth).[23]

The FCC contract rules are characterized by their concision and open-ended character. This is exemplified by the foundational norm of the duty of good faith, according to which "[c]ontracts must be negotiated, formed and performed in good faith" in Article 1104(1) FCC.[24] Even after the 2016 reform, the FCC remains full of undefined notions, gaps, and contradictions. The task of determining the meaning of vague notions, filling gaps, and resolving contradictions is left to French judges to clarify. Often inspired by scholarly writings, courts have historically played a major role in shaping contract law rules and doctrines.[25] Moreover, as is typical in the civil law tradition, developments were heavily influenced by Roman and canon law. The French judicial approach is marked by a distinctive activism in the contractual domain.[26] Relying on several implied assumptions inherited from the past, based on notions of good faith, fairness, and equity, the will or intent of the parties has been limited by higher principles aimed at protecting social interests. This has encouraged the belief that judges know better than the parties regarding what is right for them and for society in general. French courts often rewrite and modify agreements in the name of adherence to the good faith principle.[27] This approach matters when courts are determining whether a

22. Ordonnance 2016-131 du 10 Février 2016 Portant Réforme du Droit des Contrats, du Régime Général et de la Preuve des Obligations [Ordinance 2016-131 of February 10, 2016, reforming contract law, the general regime and proof of obligations], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Feb. 10, 2016 (reforming contract law in the FCC). The newly reformed rules apply to disputes arising out of contracts agreed upon after October 1, 2016 (*id.* art. 9); disputes arising out of contracts agreed upon before that date are still governed by the previous version of the FCC. On the main contents of the reform, *see* SOLÈNE ROWAN, THE NEW FRENCH LAW OF CONTRACT 46 (2022); THE REFORM OF FRENCH CONTRACT LAW (Bénédicte Fauvarque-Cosson & Guillaume Wicker eds., 2019).

23. *See* French Ministry of Justice, *Avant-Projet de Réforme du Droit des Contrats Spéciaux* (April 2023), https://www.justice.gouv.fr/actualites/espace-presse/projet-reforme-du-droit-contrats-speciaux.

24. Article 1134(3) FCC); *See* EVA STEINER, FRENCH LAW. A COMPARATIVE APPROACH 228-9 (2nd ed. 2018) (translations are by author).

25. STEINER, *supra* note 24, at 213, 217-8.

26. JAMES GORDLEY, HAO JIANG, & ARTHUR TAYLOR VON MEHREN, AN INTRODUCTION TO THE COMPARATIVE STUDY OF PRIVATE LAW 133-41, 193-8 (2nd ed. 2021); KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 327-33 (Tony Weir transl., 3d ed. 1998).

27. *See* YVAINE BUFFELAN-LANORE & VIRGINIE LARRIBAU-TERNEYRE, DROIT CIVIL. LES OBLIGATIONS 543, 725 (18th ed. 2023).

contract was duly performed and in determining whether obligors (nonperforming parties) made sufficient efforts to perform their obligations.

B. Liability for Breach: Between Fault and Strict Liability

Neither the original nor the current version of the FCC specifies the meaning of performance (which corresponds, in French, to the notion of *éxecution*) or of breach (*inéxecution*, but sometimes called *faute contractuelle,* or contractual fault). Legal scholarship, however, defines the former as "the making of the performance by the debtor of an obligation agreed upon, the act of performing what is due to satisfy the obligee (non-breaching party),"[28] and the latter as "the non-compliance by the debtor of an obligation originating from the contract, be it a nonperformance, defective performance or a delayed performance, which triggers contractual liability."[29]

French law has long debated whether contractual liability is strict in nature or requires fault on the part of the obligor (breaching party).[30] The FCC, both in its original and current versions, contains conflicting provisions in this regard. On the one hand, Articles 1231-1 and 1351 FCC provide that, in case of breach, a party is liable unless the breach is due to *force majeure* (the Anglo-American law equivalent to *force majeure* is the common law doctrine of impossibility of performance), which is a synonym for an unpredictable and unavoidable external force or cause. Since these provisions refer to nonperformance, rather than fault, they do not allow a role for fault in determining contractual liability. On the other hand, Article 1197 FCC states that the party who is bound to hand over something to the other party has the duty to preserve what must be given "with all the diligence of a reasonable person." This Article, dealing with *obligations de donner* (obligations to give) implies that only the lack of reasonable care (fault) may result in liability for breach.

Legal scholar, René Demogue, at the beginning of the twentieth century in his famous *Traité des obligations*[31] proposed to divide all obligations into *obligations de résultat* (obligations of result), where a

28. ÈXECUTION, VOCABULAIRE JURIDIQUE (13th ed. 2020).

29. FAUTE CONTRACTUELLE, VOCABULAIRE JURIDIQUE (13th ed. 2020).

30. HUGH BEALE, BÉNÉDICTE FAUVARQUE-COSSON, JACOBIEN RUTGERS, & STEFAN VOGENAUER, CASES, MATERIALS AND TEXT ON CONTRACT LAW 776-7 (3d ed. 2019); RÉMY CABRILLAC, DROIT EUROPÉEN COMPARÉ DES CONTRATS 144-45 (2nd ed. 2016); EUROPEAN CONTRACT LAW: MATERIALS FOR A COMMON FRAME OF REFERENCE: TERMINOLOGY, GUIDING PRINCIPLES & MODEL RULES 213-18 (Bénédicte Fauvarque-Cosson & Denis Mazeaud eds., 2008).

31. René Demogue, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 536-40 (Vol. 5, 1925).

party promises to obtain a certain result, and *obligations de moyens* (obligations of means), where the party promises to use its best efforts in carrying out an activity. At that time, it was widely held that a nonperformance or defective performance of an obligation was not a sufficient basis for contractual liability.[32] A claimant also had to prove that inadequate performance was the fault of the obligor. However, Demogue proposed that, in cases of a less-than-complete performance of an obligation of result, the obligor's fault is presumed by Articles 1231-1 and 1351, while in the obligation of means, fault must be proven under Article 1197.[33] Demogue's reading was soon embraced by other scholars and, most importantly by the courts, beginning with the famous decision of *Mercier*,[34] concerning the liability of doctors.[35] Relying on numerous FCC provisions on specific types of contracts detailing the obligations of the parties, the requirements for liability, and the defenses available to the defaulting party,[36] academics and judges engaged in an exercise of interpreting all contractual obligations as either obligations of result or obligations of means.[37]

The 2016 reform of the FCC has not clearly enshrined the distinction between obligations of result and obligations of means in the text of the Code; it is common understanding that such a distinction, and the ensuing binary nature of liability for breach, are still good law.[38] More particularly, the dominant view is that all contracts require parties to make reasonable efforts to perform, insofar as this is required by the general principle of good faith.[39] Yet, despite the persisting reference to the notion of

32. *Id.*

33. *Id.*

34. Cour de cassation, civile, 20 May 1936, DALLOZ, 1936, 1.88, https://www.revuegeneraledudroit.eu/blog/decisions/cour-de-cassation-civ-20-mai-1936-mercier.

35. EUROPEAN CONTRACT LAW, *supra* note 30, at 214-26.

36. For instance, under article 1792 FCC, a contractor's liability in construction contracts for defects in the construction is strict. Article 1927 FCC on bailment (which under French law is a contract, either gratuitous or onerous) states that "the depositary is bound to use the same diligence in preserving the deposit that he uses in preserving his own property," thus suggesting that the depositary's obligation is of means. According to article 1992(1) FCC, the liability of agents is based on fault.

37. EUROPEAN CONTRACT LAW, *supra* note 30, at 214-26.

38. *See generally*, Thomas Génicon, *Abandoning the Classification of Obligations: What Consequences for Assessing the Effects of the Contract?*, in THE REFORM OF FRENCH CONTRACT LAW, *supra* note 22, at 128-148, at 138-140; BUFFELAN-LANORE & LARRIBAU-TERNEYRE, *supra* note 27, at 543, 1015-1016; for a judicial application of this principle, *see* Cour de cassation, civile, Chambre commerciale, 6 September 2016 (*Afid v. CSD*), ECLI:FR:CCASS:2016:CO00706. *See* discussion *infra* subsection II.D.

39. *See* in particular Article 1104 FCC: "Contracts should be negotiated, entered into and performed in good faith. This rule cannot be excluded or modified by the parties."

contractual fault, it is nowadays well established that most contracts entail obligations of result and that the liability for breaching such obligations is strict liability. The failure to achieve the promised result makes the defaulting party liable, unless the latter proves a *force majeure* event to avoid liability.[40] However, some exceptional contracts give rise to obligations of means. In cases of obligations of means, liability is fault-based and can only be established if the non-defaulting party proves that the defaulting party did not try as hard as a reasonable person would have under the same circumstances. Except for these exceptional contracts (such as agency contracts), the role of efforts in general contract law is as a requirement in some contracts (obligations of means), and a rationale for or against liability for breach in others.[41]

The distinction between the two types of contracts is not always clear. First, scholars and courts agree that there may be shades of grey between the two types of obligations, such as the *obligations de résultat attuénée* (relaxed obligations of result) and *obligations de moyens renforcée* (heightened degree of means or efforts). The distinction between these variations is less clear. In a case of breach of an *obligation de résultat attuénée*, liability in theory is strict, but the defendant may escape liability by proving he was not at fault. Liability for breach of an *obligation de moyens renforcée* is based on fault, yet fault is presumed, so that the defendant can escape liability only by proving that she applied reasonable care.[42]

Second, the same contract may give rise to both obligations of means and obligations of results, depending on how the parties framed their duties and expectations, and especially on how courts interpret the intention of the parties.[43] In every dispute involving a claim for breach,

40. ROWAN, *supra* note 22, at 225-27; Larry A. DiMatteo, Marta Infantino, Jingen Wang, & Paola Monaco, *Once More unto the Breach: A Comparative Analysis of the Meaning of Breach in Contract Law*, 31 TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS 33, 40-1 (2021); BUFFELAN-LANORE & LARRIBAU-TERNEYRE, *supra* note 27, at 64, 725, 1010-1011; CABRILLAC, *supra* note 30, at 163; EUROPEAN CONTRACT LAW, *supra* note 30, at 214-26; ZWEIGERT & KÖTZ, *supra* note 26, at 501-02. Moreover, since the 2016 reform, the defaulting debtor may escape liability also in cases of impracticability; *see* Article 1195 FCC.

41. ROWAN, *supra* note 22, 225-27; DiMatteo et al., *supra* note 40, 40-1; BUFFELAN-LANORE & LARRIBAU-TERNEYRE, *supra* note 27, at 1010-1011; CABRILLAC, *supra* note 30, at 163; EUROPEAN CONTRACT LAW, *supra* note 30, at 214-26; ZWEIGERT & KÖTZ, *supra* note 26, at 501-502.

42. BUFFELAN-LANORE & LARRIBAU-TERNEYRE, *supra* note 27, at 1011; DANIEL MAINGUY, CONTRATS SPÉCIAUX 172-3, 430-31 (13th ed. 2023); BEALE et al., *supra* note 30, at 777.

43. BUFFELAN-LANORE & LARRIBAU-TERNEYRE, *supra* note 27, at 543, 1015-1016; for a judicial application of this principle, *see* Cour de cassation, civile, Chambre commerciale, 6

courts are required to qualify the obligations arising under the contract as either obligations of result or obligations of means before assessing whether or not the obligor duly performed. French courts enjoy considerable discretion in this regard.[44] French judges are not only free to qualify a contractual obligation of result or means independently from the will of the parties, but they also are authorized to create implied obligations in the absence of any clear intention by the parties.

C. Implied Obligations and the Role of Efforts

It is a general principle of French contract law, enshrined in Article 1194 FCC, that parties are bound to perform what they have promised, as well as any additional obligations. These additional obligations are implied by French courts when, as a corollary to the principle of good faith, they interpret contracts in light of not only the will of the parties, but also of recognizing obligations arising out of equity, custom, and law.[45]

Over the years, French courts have constantly expanded the list of such implied obligations. For instance, the contract of carriage of passengers has been understood as giving rise to an obligation of result, requiring the carrier to carry people and their goods to an agreed place. This obligation was expanded in the 1911 case of *Compagnie Générale Transatlantique*,[46] where the court established the *obligation de sécurité* (obligation of safety), according to which carriers impliedly undertake to carry passengers safely to their destinations. This implied obligation is mandatory and cannot be excluded by the terms of a contract.[47] Implied *obligations de sécurité* have subsequently been applied to other types of contracts where there is a risk of personal injury, such as medical contracts and contracts for sporting activities to strengthen the protection of people's health and safety.[48]

Something similar has happened for contracts involving intellectual work (professional services), such as those for medical, legal, and notary services. Contracts for intellectual services give rise to an obligation of

September 2016 (*Afid v. CSD*), ECLI:FR:CCASS:2016:CO00706 (on which *see also infra*, subsection II.D).

44. *See* discussion *supra* subsection II.A.

45. CABRILLAC, *supra* note 30, at 103-11.

46. Cour de cassation, civile, 21 November 1911, DALLOZ PRATIQUE 1913.1.249 (arrêt *Case of Compagnie Générale Transatlantique*), https://www.legifrance.gouv.fr/juri/id/JURITEXT000006953018.

47. BUFFELAN-LANORE & LARRIBAU-TERNEYRE, *supra* note 27, at 543, 725, 1015; STEINER, *supra* note 24, at 213.

48. BUFFELAN-LANORE & LARRIBAU-TERNEYRE, *supra* note 27, at 1013, 1015-1017, 1057; MAINGUY, *supra* note 42, at 590-92.

means of exerting as sufficient efforts as reasonably possible in the performance of the service.[49] French courts have gradually imposed on doctors, lawyers, and notaries an implied and mandatory obligation of result in the form of an *obligation de renseignement* (obligation of information), requiring them to fully inform their clients about the risks underlying their services.[50] The imposition of such an obligation allows courts to subject professionals to greater scrutiny, without undermining their immunity for non-negligent failure to achieve a particular result.[51]

The same trend is noticeable in the field of long-term contracts in which performance is dependent on the cooperation of the other party. This is the case for distribution and dealership agreements. These contracts are understood as creating only obligations of means. Yet, French courts have gradually introduced an implied and mandatory *obligation de coopération* (obligation of cooperation) on both parties, obliging them to do what can be reasonably expected to make the contract work.[52] By imposing a duty to cooperate on parties to distribution and dealership contracts, courts are advancing a principle that parties are not always liable for making bad bargains, while ensuring liability for behaviours and omissions that clearly contribute to the economic failure of the contract.[53]

What the above developments make clear is that the judicial establishment of implied obligation of security, information, and cooperation, ancillary to the original and primary obligations of the parties, has contributed to the general trend, described in subsection II.B, of imposing increasingly strict liability for breach.[54] Given such a trend, efforts matter in the limited cases in which the obligations at stake are

49. EUROPEAN CONTRACT LAW, *supra* note 30, at 221.

50. BUFFELAN-LANORE & LARRIBAU-TERNEYRE, *supra* note 27, at 543, 1014-1015; MAINGUY, *supra* note 42, at 584.

51. *Id.*

52. ROWAN, *supra* note 22, at 39-40; EUROPEAN CONTRACT LAW, *supra* note 30, at 551-57.

53. ROWAN, *supra* note 22, at 39-40; EUROPEAN CONTRACT LAW, *supra* note 30, at 549-50. It should, however, be noted that the duty to cooperate is sometimes framed as an *obligation de moyens*. For instance, when parties enter into an *accord de principe* (agreement in principle), they bind themselves to negotiate the terms of a contract, the conclusion of which, however, remains uncertain. These agreements are thought to give rise to an implied duty of cooperation, which in this case is considered an *obligation de moyens*, cf BUFFELAN-LANORE & LARRIBAU-TERNEYRE, *supra* note 27, at 335; Marta Infantino, Larry A. DiMatteo, Jingen Wang, & Eleni Zervogianni, *Crossing the Abyss: A Comparative Analysis of the Enforceability of Preliminary Agreements*, 37 EMORY INT'L L. REV. 629, 659-60 (2023); PAULA GILIKER, PRE-CONTRACTUAL LIABILITY IN ENGLISH AND FRENCH LAW 52-3 (2002).

54. EUROPEAN CONTRACT LAW, *supra* note 30, at 221.

considered obligations of means. That said, paradoxically, the characteristics of appropriate efforts are embedded in the evolving nature of these implied obligations. Failure to cooperate, failure to inform, and the failure to take adequate safety precautions are specific characterizations of effort.

D. When Efforts Matter: Boundary Line Between Obligations of Result and Obligations of Moyens

As previously noted, under French law, parties are obliged to make best reasonable efforts to perform under any contract, since the best efforts duty is a corollary of the general principle of good faith. Usually, however, proving best efforts is no defense in cases of inadequate performance, because liability for breach is increasingly understood in strict terms. Efforts become important, both as a requirement for and a defense against liability, when the breached obligation is an obligation of means. Therefore, it is important to understand the criteria upon which French courts draw the line between express or implied obligations in contracts of results and of means. There are, however, no clear trends or consistent patterns from French case law in this regard.[55]

In a limited number of instances, the FCC contains rules that are universally interpreted as establishing obligations of means.[56] In other cases, what matters for determining liability is the nature of the obligation that has been breached. As discussed above, contracts for professional services and high-risk activities are more likely to give rise to obligations of means.[57] By contrast, contracts for menial jobs are generally thought to give rise to obligations of result.[58] Obligations of result are also commonly held to arise in contracts which put people's safety at risk, in business-to-consumer contracts, and in contracts where one party undertakes a negative obligation, such as a promise by the seller of a business to not compete with the new owner.[59]

Another important factor, especially in sporting contracts and contracts for services, stems from the active or passive role of the obligor. An owner of a sport facility or a provider of sports services is under an obligation of result to ensure the safety of the infrastructure used in the

55. ROWAN, *supra* note 22, at 225-27.

56. *See* the illustrations provided *supra* note 36.

57. BUFFELAN-LANORE & LARRIBAU-TERNEYRE, *supra* note 27, at 543, 1014-1015; MAINGUY, *supra* note 41, at 584-85.

58. *Id.*

59. ROWAN, *supra* note 22, at 37-38, 226; BUFFELAN-LANORE & LARRIBAU-TERNEYRE, *supra* note 27, at 1014-1015, 1057; MAINGUY, *supra* note 42, at 588-89.

facility, or for the service provided, but is under an obligation of means to adopt measures that are necessary to avoid accidents with third parties.[60]

More often, it is the parties themselves who agree to express clauses clarifying the requirements and standards of liability.[61] For instance, parties often insert a clause obligating themselves to make "*tous les efforts nécessaires*" (all required efforts) to perform. This type of clause transforms the agreement to an obligation of means.[62] The same conclusion applies to best efforts clauses included in transnational contracts written in English; the English expression "best efforts" is understood by French scholars as giving rise to an obligation of means.[63] By contrast, clauses setting targets or quotas are usually considered to give rise to obligations of result. For instance, in contracts for the exclusive distribution of automobiles, it is common for the automobile manufacturer to require the distributor to meet yearly quotas of sale, non-attainment of which allows for immediate termination of the contract.[64] As noted above, French courts retain the power to reinterpret the will of the parties and to void clauses they deem contrary to good faith.

The judicial trend has been to transform clearly agreed upon obligations of means into obligations of result. In *Afid v. CSD*, Afid entered a contract with CSD, a business development consulting firm, whereby the latter agreed to "deploy all means and efforts to carry out the task it was entrusted with," which consisted of performing a series of annual activities detailed in the annex to the agreement.[65] When Afid went bankrupt, the company's liquidator sued CSD for breach. CSD raised the defense that it used reasonable efforts in providing consulting advice.[66]

60. BUFFELAN-LANORE & LARRIBAU-TERNEYRE, *supra* note 27, at 1013, 1015-1017; MAINGUY, *supra* note 42, at 590-92.

61. ROWAN, *supra* note 22, at 226.

62. Cour de cassation, civile, Chambre commerciale, 6 September 2016 (*Afid v. CSD*), ECLI:FR:CCASS:2016:CO00706; Cour de cassation, civile, Chambre commerciale, 9 December 2014 (*CCCP v. SRC*), ECLI:FR:CCASS:2014:CO01079; Cour de cassation, civile, Chambre commerciale, 7 January 2014, 12-17.154 (*Milton v. APL*), ECLI:FR:CCASS:2014:CO00019.

63. Cf. HUGUES KENFACK, DROIT DU COMMERCE INTERNATIONAL 150 (8th ed. 2023); JEAN-MICHEL JACQUET, PHILIPPE DELEBECQUE, & LAURENCE USUNIER, DROIT DU COMMERCE INTERNATIONAL 334 (4th ed. 2021); JEAN-BAPTISTE RACINE & FABRICE SIIRIAINEN, DROIT DU COMMERCE INTERNATIONAL 168-9 (3rd edn.2018); Christine Chappuis, *Best Efforts, Reasonable Care, Due Diligence et Règles de l'Art dans les Contrats Internationaux*, REVUE DE DROIT DES AFFAIRES INTERNATIONALES 281-301 (2002).

64. Cour de Cassation, Chambre commerciale, 16 December 1997 (*Garaga Blandan v. Rover France*), 96-14.515, Inédit.

65. Cour de Cassation, civile, Chambre commerciale, 6 September 2016 (*Afid v. CSD*), ECLI:FR:CCASS:2016:CO00706.

66. *Id.*

The Court of Cassation agreed with CSD that the parties described the main obligation of CSD as an obligation of means. Yet, the Court also emphasised that, under the contract, CSD also had to perform "a certain number of defined tasks of a material character, that had to be realised according to a fixed schedule, thus giving rise to an obligation of result." The failure to perform these tasks in a timely manner were grounds for liability.[67]

Even more telling is the case of *Banchereau v. SFMI*, where Banchereau entered a contract with an express mail service provider, SFMI, for the delivery of a construction bid. SFMI failed to deliver the bid on time, and Banchereau lost the contract. When Banchereau sued SFMI for damages, SFMI raised as a defense that the agreement only obliged it to "make its best efforts to timely deliver the mail" and that the same agreement limited the damages that Banchereau could claim to the price they paid for the service. The Court of Cassation ruled for the plaintiff, finding that the obligation undertaken by SFMI, regardless of what the contract said, was an obligation of result. It reasoned that the purpose of express courier services would be meaningless if not viewed as an obligation of result. Further, the Court held that the limitation clause contained in SFMI's general terms and conditions was invalid because it conflicted with the core obligation (of result) owed by SFMI to Banchereau.[68]

The above analysis of case law shows that French courts often reverse the logic underpinning the distinction between obligations of means and obligations of result. Rather than determining the character of an obligation to apply the correct standard of liability, courts sometimes decide whether a party should be liable, and then determine the obligations to be recognized to justify a fair outcome. This explains why the boundaries between obligations of result and obligations of means, and between *obligations de résultat attuénée* and *obligations de moyens renforcée*, are often blurred. As a result, the determination of a reasonable effort or fault for failing to make such an effort plays a role in determining liability across different types of contracts.

67. Cour de Cassation, civile, Chambre commerciale, 6 September 2016 (*Afid v. CSD*), ECLI:FR:CCASS:2016:CO00706.

68. Cour de Cassation, Chambre commerciale, 9 July 2002, 99-12.554 (*Banchereau v. SFMI*), https://www.legifrance.gouv.fr/juri/id/JURITEXT000007046201.

III. LATIN AMERICAN LAW

This part reviews the law of a sampling of Latin American countries with a focus on the laws of Chile, Peru, and Argentina. It will note the heavy influence of French law, and to a lesser extent, Italian law, on the role of efforts in contract law.

A. Introduction

The legal transplantation[69] of the need to use sufficient efforts from the American best efforts or English best endeavors doctrines into Latin American civil law is complicated. The closest civil law equivalent is the French distinction between *obligations de moyens* (obligations of means) and *obligations de résultat* (obligations of result). The notion of best efforts is similar to the obligations of means. In Latin America, however, except for Argentina, the distinction between obligations of means and of result is not recognized. Latin American jurisdictions, which mostly follow the French Civil Code of 1804,[70] with a few exceptions,[71] have taken different paths on the issue.

It is interesting to note that studies written in English on Latin American law have been growing over the last twenty years. These publications explain Latin American law from a national or international perspective.[72] But the study of legal transplants taken from the common law and transposed into Latin American private law are rare.[73] Because of

69. *See* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974).

70. *See* CARLOS RAMOS NÚÑEZ, EL CÓDIGO NAPOLEÓNICO Y SU RECEPCIÓN EN AMÉRICA LATINA (1997); M C. Mirow, *The Power of Codification in Latin America: Simón Bolívar and the* Code Napoléon, 8 TUL. J. INT'L & COMP. L. 83 (2000); M. C. Mirow, *The Code Napoleón: Buried but Ruling in Latin America*, 33 DENVER J. INT'L L. & POL'Y 179 (2005).

71. In Peru, Bolivia, and Paraguay the Italian Civil Code of 1942 has had a major influence. *See The influence of Italian Civil Law in Latin-America. 80th Anniversary of the Codice Civile of 1942* (Francesca Benatti, Sergio García Long, Mauro Grondona, & Leysser León eds., 2024).

72. *See, e.g.*, Julian Nebreda-Urbaneja & Raymond K. Berg, *Introduction to the Venezuelan Legal System—A Typical Civil Law System of Latin America*, 10 DEPAUL L. REV. 41 (1960); *Legal Culture in the Age of Globalization*. *Latin America and Latin Europe* (Lawrence M. Friedman & Rogelio Pérez-Perdomo eds., 2003); EDGARDO MUÑOZ, *Modern Law of Contracts and Sales in Latin America, Spain and Portugal* (Eleven International Publishing 2010); JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *The Civil Law Tradition. An Introduction to the Legal Systems of Europe and Latin America* (4th ed. 2018); *The Cambridge History of Latin American Law in Global Perspective* (THOMAS DUVE & TAMAR HERZOG eds., 2024).

73. *See, e.g.*, Sergio García Long, *When English Lawyers Say No, Civil Lawyers Say Yes*. *The Intriguing Case of Frustration of Purpose in Comparative Law*, 5 EUR. REV. PRIVATE L. 979 (2023).

this, while there is extensive research in Spanish on obligations of means in Latin America, there is little research on the role of best efforts.[74] The following sections analyze the reception of the French distinction between obligations of means and of result within specific Latin American jurisdictions. It then compares the notion of best efforts found in Anglo-American common law and the role of efforts in obligations of means.

B. Obligations de Moyens and Obligations de Résultat

The subject of obligations of means and of result is quite well known in comparative law. This section examines the distinction in the laws of Chile, Peru, and Argentina.[75] These jurisdictions have been chosen because the subject has been dealt with differently in each of them. It will present different nation-specific analyses to show how the role of efforts in Latin American private law can be framed.

A few things can be said about Latin America law in general: (1) contractual liability is subjective because it requires fault in the breach, (2) the obligor can exonerate itself from liability by claiming an act of God or *force majeure*, (3) service and works contracts are distinguished by virtue of means and result, and (4) special rules exist for performing professional services. These rules are important for understanding obligations of means and the eventual transplant of the best efforts principle.

74. *See* Sergio Garcia Long, *Lo que Importa Es la Intención: La Cláusula de Mejores Esfuerzos (Best Efforts)*. *Apuntes Desde el Derecho Peruano Hacia el Derecho Comparado*, 39 REVISTA DE DERECHO DE LA UNIVERSIDAD CATÓLICA DE LA SANTÍSIMA CONCEPCIÓN 125 (2021); Sergio Garcia Long, *Los Mejores Esfuerzos (Best Efforts) en la Contratación Corporativa y Financiera,* 11 FORSETI 92 (2022).

75. For other countries, *see, e.g.*, Juana Flórez Peláez, *El Incumplimiento Imputable*. *Estudio a Partir de las Obligaciones de Medios y de Resultado,* 41 REVISTA DE DERECHO PRIVADO 21 (2021) (Columbia); Carlos López Fernández, *Obligaciones de Medios y de Resultado*, 18 REVISTA DE LA FACULTAD DE DERECHO 97 (2000) (Uruguay); Ana Laura Villegas Zamora, *Responsabilidad Civil Profesional del Médico*, 70 REVISTA MÉDICA DE COSTA RICA Y CENTRO AMÉRICA 389 (2013) (Costa Rica); Alberto Joaquín Martínez Simón, *De las Obligaciones de Medios y de Resultado* en DOS DISCURSOS ANTAGÓNICOS SOBRE LAS OBLIGACIONES DE MEDIO Y RESULTADO (Alberto Joaquín Martínez Simón & Francisco Segura Riveiro eds., 2021) (Paraguay); Rafael Gutiérrez-Vega, Adriana Cecilia Gallegos-Garza, & Germán Fajardo-Dolci, *El Incumplimiento de las Obligaciones de Medios Diagnósticos y Terapéuticos y su Vinculación con mala Práctica Médica,* 74(4) REVISTA MÉDICA DEL HOSPITAL GENERAL DE MÉXICO 223 (2011) (Mexico).

1. Chile

A claim for a breach of an obligation of means requires proof that a condition of the contract has been breached and that the obligor's fault contributed to the breach of performance.[76] Provisions of the Chilean Civil Code frame the direction taken in making the distinction between obligations of means and of result. First, in obligations of result, the notion of diligence (effort) in the performance of the contract is not considered important, as opposed to obligations of means. In general, diligence is considered a secondary duty that assists in the performance of the contract.[77] Under an obligation of result strict liability is imposed in cases of breach, while diligence is only considered in cases involving a *force majeure* event. The Chilean Supreme Court, in several cases,[78] has considered the role of fault in this type of obligation and decided that the qualification of an obligation as one of means or of result do not affect the defense of excuse. In *Gajardo v. Stevens y Servicio de Salud Talcahuano*,[79] the court noted that in obligations of result, the obligor is allowed to allege *force majeure*, while in obligations of means, the obligor may plead the due diligence and *force majeure* defenses.[80]

Secondly, the characterization of the type of obligation impacts the burden of proving diligence in the performance or a lack thereof. Article 1547(3) of the Chilean Civil Code[81] places the burden of proving diligent

76. For Chilean law on the distinction, *see* On Carlos Pizarro Wilson, *La Culpa como Elemento Constitutivo del Incumplimiento en las Obligaciones de Medio o de Diligencia*, 31 REVISTA DE DERECHO DE LA PONTIFICIA UNIVERSIDAD CATÓLICA DEL VALPARAÍSO 255 (2008); Pablo Letelier Cibié, *La Conveniencia de Restringir las Consecuencias de la Distinción Entre Obligaciones de Medios y Resultado Sobre la Función y Prueba de la Culpa del Deudor*, 29 REVISTA CHILENA DE DERECHO PRIVADO 137 (2017).

77. Hugo A. Cárdenas Villarreal, *La Cobertura Dogmática de la Recepción Jurisprudencial de la Distinción Obligaciones de Medios/Obligaciones de Resultados (Una Aproximación a Través de Casos de Responsabilidad Médica)* in RESPONSABILIDAD MÉDICA (Iñigo de la Maza Gazmuri ed., 2010) 45, 47 (In some contracts, diligence is considered the principal duty, as an "indeterminate obligation of activity.").

78. Vega v. Castillo *(*2009), Supreme Court, March 30, 2009. VLEX identifier number 332708542; Wagemann v. Vidal (2011). Supreme Court, January 28, 2011. VLEX Identifier Number 333052870.

79. Chilean Supreme Court, March 10, 2016, Westlaw Legal Identifier Number CL/JUR/1655/2016.

80. These cases have been reported in Letelier Cibié, *supra* note 72.

81. Article 1547 states that:

> The obligor is liable only for ordinary fault in contracts which by their nature are useful only to the creditor; he is liable for slight fault in contracts made for the reciprocal benefit of the parties; and for the slightest fault in contracts in which the obligor is the only one who benefits. The obligor is not liable for the fortuitous event, unless he is in

effort on the obligor, whatever the type of obligation (means or result). Chilean law has more specific provisions dealing with the burden of proof, such as Article 1671's presumption that the fault of the person in possession of property is presumed to have caused any damages to it.[82] Article 1698 states that the person alleging the extinction of an obligation by performance must prove that to be the case.[83] However, the presumption of fault does not apply to obligations of means or obligations of result when *force majeure* is the only alleged defense. On the other hand, the performance of medical services is governed by the rules of mandate (agency) under Article 2118,[84] while Article 2158 states that: "The principal may not exempt himself from fulfilling these obligations, alleging that the business entrusted to the agent has not been successful, or that it could have been carried out at less cost, unless he proves fault."[85] The debate over the distinction between obligations of means or result is not just a theoretical one since the Chilean Civil Code contains multiple

default (being the fortuitous event of those that would not have damaged the thing owed, if it had been delivered to the creditor), or that the fortuitous event has occurred by his fault. *The proof of the diligence or care is incumbent on the one who should have used it; the proof of the fortuitous event is incumbent on the one who alleges it*. All which, however, is understood without prejudice to the special provisions of the laws, and of the express stipulations of the parties. (Emphasis added).

82. Article 1671 states: "Whenever the thing perishes in the obligor's possession, it is presumed to have been due to his act or fault."

83. Article 1698 states: "It is incumbent on the one who alleges the obligations or their extinction to prove them or their extinction. The proofs consist of public or private instruments, witnesses, presumptions, confession of the party, oath deferred, and personal inspection by the judge."

84. Article 2118 states "The services of professions and careers that involve long studies, or to which is attached the power to represent and bind another person with respect to third parties, *are subject to the rules of the mandate*." (Emphasis added).

85. Article 2158 states that:

The principal is bound

(1) To provide the agent with what is necessary for the performance of the mandate;

(2) to reimburse him for reasonable expenses incurred in the performance of the mandate;

(3) to pay him the stipulated or customary remuneration;

(4) to pay the advances of money with current interest;

(5) to indemnify him for any losses he may have incurred through no fault of his own and by reason of the mandate.

The principal may not exempt himself from fulfilling these obligations, alleging that the business entrusted to the agent has not been successful, or that it could have been carried out at less cost, unless he proves fault.

provisions on the burden of proof, which are not present in other civil codes to be studied below.

2. Peru

The Peruvian civil codes of 1852 and 1936 followed French law until 1984, when the current Civil Code was enacted. The new code in the area of contract law was strongly influenced by Italian law.[86] Article 1314 of the Peruvian Civil Code deals with contractual liability based on fault,[87] while Articles 1315-1317 state that, if *force majeure* occurs, the obligor is excused from performance and the contract is extinguished.[88] Thus, the obligor has two defenses to nonperformance—absence of fault and *force majeure*. Article 1329 provides a presumption of "slight fault" for breach of contract.[89]

The Peruvian Civil Code did not codify the distinction between obligations of means and obligations of result, despite the existence of the presumption of fault in Article 1329.[90] In cross-border or international

86. *See* Felipe Osterling Parodi and Mario Castillo Freyre, *El Tema Fundamental de las Obligaciones de Medios y de Resultados Frente a la Responsabilidad Civil* (2000) 53 DERECHO PUCP 475; Sergio García Long, *Force Majeure in Latin America and the Caribbean: A Legal Cartography for Improvements in National Laws, in* THE INFLUENCE OF ITALIAN CIVIL LAW IN LATIN-AMERICA. 80TH ANNIVERSARY OF THE CODICE CIVILE OF 1942 (Francesca Benatti, Sergio García Long, Mauro Grondona & Leysser León eds., 2024) 145, 164-169.

87. Article 1314 states; "Whoever acts with the ordinary diligence required is not attributable for the non-performance of the obligation or for its partial, late or defective performance."

88. Article 1315 states: "Act of God or *force majeure* is the non-attributable cause, consisting of an extraordinary, unforeseeable and irresistible event, which prevents the performance of the obligation or determines its partial, late or defective performance."

Article 1316 states:

> The obligation is extinguished if the performance is not executed for a cause not attributable to the obligor. If such cause is temporary, the obligor is not liable for the delay as long as it lasts. However, the obligation is extinguished if the cause that determines the non-performance persists until the obligor, according to the title of the obligation or the nature of the performance, can no longer be considered obliged to perform it; or until the obligee justifiably loses interest in its performance or it is no longer useful to him. An obligation which can only be partially performed is also extinguished if it is not useful to the obligee or if the obligee has no justified interest in its partial performance. Otherwise, the obligor is bound to perform it with reduction of the consideration, if any.

Article 1317 states: "The obligor is not liable for damages resulting from the non-performance of the obligation, or from its partial, late or defective performance, due to causes not attributable to him, unless otherwise expressly provided by law or by the title of the obligation."

89. Article 1329 states: "It is presumed that the non-performance of the obligation, or its partial, late or defective performance, is due to slight fault on the part of the obligor."

90. Peruvian Civil Code, art. 1329 (1984) (Peru).

transactions, best efforts clauses are common, as well as other clauses of common law origin.[91] In practice, Peruvian lawyers have adapted to a common law style of contract writing. On the other hand, while Article 1321 states that the obligor is liable for slight fault, inexcusable fault and willful misconduct,[92] Article 1762 excludes liability for slight fault for services of special difficulty.[93] The concept of slight fault is found in Article 1320.[94] This rule is considered to contain an obligation of means.

In an international arbitration,[95] the nature of a best efforts clause has been discussed, specifically as to whether the efforts to be made by the obligor should exceed ordinary diligence. An arbitral tribunal considered whether the efforts would be those required by good faith. Although the tribunal referenced good faith, it instead focused on the common law standard of reasonableness. In sum, Peruvian law has borrowed from the civil law concept of good faith and the common law notion of commercial reasonableness.

3. Argentina

In Argentina, there has been a history of uncertainty over: (1) the different roles of fault in obligations of means as opposed to obligations of result; (2) allocation of the burden of proof; (3) different types of liability (subjective and objective); and (4) available exemptions (defenses). Much of these concerns were resolved with the 2015 enactment of the Argentinian Civil and Commercial Codes, which

91. *See* Pinkas Flint Blanck, *Cláusulas de Origen Anglo-Sajón Usuales en la Contratación Internacional*, 5 FORO JURÍDICO 17 (2006); Sergio Garcia Long, *El Nacimiento y Ascenso de los Civil Lawyers*, 73 THEMIS 271 (2018).

92. Article 1321 states:

> A person who fails to perform his obligations due to willful misconduct, inexcusable fault or slight fault shall be liable for damages. The compensation for the non-performance of the obligation or for its partial, late or defective performance, includes both the consequential damage and the loss of profit, in so far as they are an immediate and direct consequence of such non-performance. If the non-performance or the partial, late or defective performance of the obligation is due to slight fault, the compensation is limited to the damage that could have been foreseen at the time the obligation was contracted.

93. Article 1762 states: "If the performance of services involves solving professional matters or technical problems of special difficulty, the service provider shall not be liable for damages, except in case of willful misconduct or inexcusable fault."

94. Slight fault is defined in article 1320: "A person acts with slight fault who omits that ordinary diligence required by the nature of the obligation and which corresponds to the circumstances of the persons, time and place."

95. Due to confidentiality reasons, I will only explain the legal problem involved, without further reference.

recognized the distinction between obligations of means and obligations of result.[96] Article 774 (concerning obligations to work) states that the content of a service may be to perform an activity or to obtain a result.[97] In addition, Article 1252 considers that a service contract is one where an activity is performed (*moyens*), while a works contract is one where an effective result is promised (*résultat*).[98] This is a common methodology used by scholars to distinguish the two types of contracts and subsequently incorporated into the new Argentinian Code.

There are also specific standards in determining liability. Article 1768 states that the liability of a professional is subjective (capabilities of a particular professional) unless a result has been promised,[99] while Article 1723 states that the liability will be objective (reasonable professional standard) when the obligor owes a result.[100] Finally, Article 1734 indicates that whoever alleges fault or claims an exemption or excuse from liability has the burden of proving it.[101] However, judges possess the discretion to allocate the burden of proof of fault to the party in a better position to provide evidence, under Article 1735 (dynamic

96. *See* Verónica María Laura Glibota Landriel, *La Positivización de las Obligaciones de Medios y de Resultados en el Código Civil y Comercial. Incidencias en el Sistema de Responsabilidad Civil,* 15 REVISTA DE LA FACULTAD DE CIENCIAS ECONÓMICAS 208 (2015); Sandra M. Wierzba, *La Responsabilidad Médica en el Nuevo Código Civil y Comercial de la Nación*, 9 REVISTA DE RESPONSABILIDAD CIVIL Y SEGUROS 5 (2015).

97. Article 774. Rendering of a service. The rendering of a service can consist of:

> (a) in carrying out a certain activity, with the appropriate diligence, independently of its success. The clauses that commit to the good offices, or to apply the best efforts are included in this subsection; (b) in procuring for the obligee a certain specific result, irrespective of its effectiveness; (c) to provide the obligee with the promised effective result. The turnkey clause or product in hand clause is included in this clause.

98. Article 1252 states:

> Qualification of the contract. If there is doubt on the qualification of the contract, it is understood that there is contract of services when the obligation to make consists of making certain independent activity of its effectiveness. It is considered that the contract is of work when an effective, reproducible or susceptible result of delivery is promised. Services rendered in a relationship of dependence are governed by the rules of labor law.

99. Article 1768 states that: "The activity of the liberal professional is subject to the rules of the obligations to make. The responsibility is subjective, except when a concrete result has been committed."

100. Article 1723 states: "Objective responsibility. When of the circumstances of the obligation, or of the agreed upon by the parties, it arises that the obligor must obtain a determined result, its responsibility is objective."

101. Article 1734 states: "Proof of the factors of attribution and of the exonerating circumstances. Except for legal disposition, the burden of the proof of the factors of attribution and of the exonerating circumstances corresponds to the one who alleges them."

burden of proof).[102] In sum, the distinction between obligations of means and of result has been firmly established in the new Argentinian Civil Code.

C. Moyens Versus Efforts

This section analyzes the relationship between a contract of means and the idea of best or reasonable efforts.

1. A Civilian Look at Efforts

Most comparatist lawyers associate the common law's best efforts principle, whether implied in law or by express agreement, with the obligation of means.[103] However, the comparison is not one of equivalence, since there are nuanced differences between best efforts in common law and obligations of means in civil law. In the common law, it is customary to draft a best efforts clause in a contract to relax absolute or strict liability for breach of contract. In the civil law, liability is mostly subjective because it is based on fault. The obligors must perform ordinary diligence in the performance of contracts. In theory, the exercise of diligence is a defense to liability. In a case of breach, the obligor would have to prove an absence of fault.[104] Alternatively, proving due diligence in the performance would satisfy the burden of proving an absence of fault. The duty of diligence only obligates a party to use reasonable efforts without promising a specific result.[105] Therefore, it is incorrect to equate best efforts with the obligations of means without further consideration and reflection. The following sections will discuss how best efforts imposes a higher standard of care than the default standard under the obligations of means, and that best efforts can also apply to obligations of result.

102. Article 1735 states that: "the judge can distribute the burden of the proof of the fault or of having acted with the due diligence, weighing which of the parties are in better situation to contribute it."

103. *See* E. Allan Farnsworth, *On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law,* 46 U. PITT. L. REV. 1, 3 (1984); Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goals*, 32 VICTORIA U. WELLINGTON L. REV. 817, 826 (2001); Erich Schanze, *Best Efforts in the Taxonomy of Obligation—The Case of the EU Vaccine Contracts*, 22 GERMAN L.J. 1133, 1139 (2021).

104. Peruvian Civil Code, art. 1314 (1984) (Peru).

105. *Id.*

2. Is the Best Efforts Principle Equal to *Moyens*?

To understand that the duty of best efforts is not the same as an obligation of *moyens*, one must review how best or reasonable efforts clauses are drafted and interpreted in the common law, where these clauses are intended to modify the common law's principle of strict contractual liability for breach.[106] Common law courts' interpretation of best efforts leans towards the need for extraordinary efforts, while an obligation of means imposes a general standard of care, referred to as "ordinary care" or what a "reasonable person" (formerly, *bonus pater familias*) would have done. The parties could, however, specify the level of diligence, such as referencing industry standards.[107] However, modification of the default rule of diligence is less common in civil law as opposed to common law. In sum, from a comparative perspective, efforts are not identical to *moyens*. It might happen that the efforts in a contract coincide with the *moyens* standard of ordinary care. That said, an express efforts clause may modify the ordinary care of *moyens* to a higher standard.[108]

3. Efforts in *Résultat* Contracts

In obligations of result, a specific result or outcome is promised so that the level of effort is inconsequential since liability is strictly based upon whether the end result was achieved. But this is not always true. For example, an artist who undertakes to paint a portrait cannot define or predict the details of the painting, but can promise best efforts in producing a painting of the highest quality. But delivery of a painting is insufficient since it must be judged to be of the highest quality.

In a franchise agreement, the franchisee will bear a duty to use its best efforts to make the greatest number of sales. The franchisee cannot excuse itself from failing to meet the minimum threshold by pointing out that it used its best efforts. Best efforts refer to making sales above the minimum specified in the contract. Thus, an efforts or endeavors clause does not imply the exclusion of a result; rather, it is a guarantee of a result, but the specific result will be contingent. Consequently, from a

106. *See* Rob Park, *Putting the "Best" in Best Efforts*, 73 U. CHI. L. REV. 705 (2006); Kenneth A. Adams, *Interpreting and Drafting Efforts Provisions: From Unreason to Reason,* 74 BUS. LAWYER 677 (2019).

107. MARCEL FONTAINE & FILIP DE LY, *Best Efforts, Reasonable Care, Due Diligence and General Trade Standards in International Contracts in* DRAFTING INTERNATIONAL CONTRACTS: AN ANALYSIS OF CONTRACT CLAUSES (2009) 187.

108. Garcia Long, *supra* note 70, at 154 (2021).

comparative perspective, just as an efforts clause can modify the level of diligence for *moyens*, it could also qualify the quality or quantity of the outcome in an obligations of result contract.

D. Factors to Determine Efforts in Moyens

As the obligations of means or result are not codified (except in Argentina), there are no specific factors enunciated to verify compliance. Moreover, due to the absence of codification, the case law has focused on the reception of the French distinction, and, as such, has not focused attention on the factors needed to determine compliance.[109] In comparison, different standards of performance are found in common law literature, such as good faith effort, due diligent effort, and highest effort of a fiduciary, and includes subjective and objective factors.[110] For instance, while the fiduciary duty standard obligates the fiduciary-obligor to subordinate its interest in favor of the interest of the beneficiary party, in a joint venture, the standard requires balancing the interest of both parties.

E. Relationship of Efforts to Other Principles

This section examines the relationship of a party's efforts in performance to the principles of good faith and *force majeure*.

1. Duty of Good Faith

In civil and common law, the duty of best efforts is often conflated with the duty of good faith.[111] Theoretically, efforts relate to diligence in performance, while good faith references motive and requires good faith conduct, such as loyalty and cooperation. This means that diligence or efforts will always be present, at differing levels according to the law or the agreement, while good faith may intervene as appropriate to police the misbehavior of a party. Despite their differences, they at times coincide since both reference standards of behavior. But, in some cases, a party may use reasonable efforts and, nonetheless, commit a bad faith act.[112]

In practice, best efforts are indeterminate, so the obligor has a certain freedom to set the course of performance, by choosing between different types of performance to achieve an expected result. In this scenario, good

109. Argentine Civil and Commercial Code, arts. 1723-1731 (2015) (Arg.).

110. *See* Miller, *infra* note 214 and accompanying text.

111. Farnsworth, *supra* note 98, at 7-8; Emily Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?*, 1 UTAH L. REV. 1, 18 (2005).

112. Garcia Long, *supra* note 70, at 142-149 (2021).

faith plays an informative role prohibiting the obligor from acting in an arbitrary manner. Therefore, good faith serves to align the interests of the obligor and obligee when the obligor determines the efforts to be made.

A major difference between the civil and common laws is that the duty of good faith in negotiations does not exist in the common law, although the United States recognizes a good faith obligation in the performance of a contract. In Europe, it is common to find civil codes that require parties to negotiate in good faith,[113] which is an extension of the duty of good faith in the performance of a contract according to Article 1134 of the French *Code Civil* of 1804.[114] The 2016 revision of the *Code Civil* in Article 1104 expressly extends good faith to the negotiations of a contract. This model is accepted in Latin America as well. However, the content of such an obligation raises numerous issues.[115] It opens the possibility of a claim of bad faith every time an agreement is not reached. Furthermore, the existence of a pre-contractual good faith obligation raises the concern of whether pre-contractual liability is different from contractual liability, and whether reliance or expectation damages are recoverable. Finally, how is pre-contractual good faith distinguished from fault in tort? Recourse to the best efforts standard would provide a clearer basis to resolve the above concerns.

2. Force Majeure

Civil codes in Latin America, unlike in Europe, still have old rules on the impossibility of performance linked to "fortuitous events" (acts of God) or *force majeure*.[116] The notion of best efforts becomes important in several scenarios. First, did the obligor use best efforts to overcome the force majeure event such as pursuing alternative means of performance

113. *See* Article 1337 Civil Code of Italy ("The parties, in the conduct of negotiations and in the formation of the contract, must behave in accordance with good faith."); Article 1362 of the Civil Code of Peru ("Contracts must be negotiated, entered into and performed according to the rules of good faith and common intention of the parties."); and Article 961 Civil and Commercial Code of Argentina ("Contracts must be entered into, interpreted and performed in good faith.").

114. Article 1134 states that: "Agreements lawfully entered into take the place of the law for those who have made them. They may be revoked only by mutual consent, or for causes authorized by law. They must be performed in good faith."

115. *See* Sergio Garcia Long, *Towards a Formalistic Approach of Good Faith in Comparative Contract Law*, 35 EUR. BUS. L. REV. (2024).

116. *See* Article 45 Civil Code of Chile ("an unforeseen event that cannot be resisted, such as a shipwreck, an earthquake, the seizure of enemies, acts of authority exercised by a public official"); Article 1272 Civil Code of Venezuela ("an act of God or *force majeure*"); Article 1315 Civil Code of Peru ("Act of God or *force majeure* consisting of an extraordinary, unforeseeable and irresistible event"); Article 1730 Civil and Commercial Code of Argentina ("act of God or *force majeure* that could not be foreseen or, having been foreseen, could not be avoided").

or shipment? Second, did the obligee use its best efforts to mitigate its damages related to the nonperformance? Third, during the management of the *force majeure* event, did the parties agree on a duty to renegotiate? To this end, the parties are obligated to use their best efforts to achieve a mutually beneficial outcome.

IV. CHINESE LAW

This part examines the efforts obligation in Chinese formal law and case law. In Chinese formal law, the term "best efforts" is not widely used and is generally interchangeable with due diligence, reasonable care, or similar expressions. The best efforts obligation covertly influences many areas of contract law, and the obligor's performance or nonperformance of his efforts obligation plays a significant role in Chinese court decisions.

A. Meaning of Best Efforts

"Best efforts" (*Jin Li*) is not a widely used term in Chinese law.[117] In specific contracts in the Chinese Civil Code (CCC), the word "properly" (*Tuo Shan*) is commonly used to describe the obligor-service provider's obligation to the obligee;[118] while in Chinese Company Law, the word "diligence" (*Jin Shen*) is used to describe the director's duty to its company.[119] The word "properly" is similar to terms such as "best efforts," "due diligence," and "due care," as well as to "reasonable efforts."[120] But in general, Chinese law's focus has been on the obligation of due diligence or reasonable care, and has not fashioned a higher

117. *See* Chinese Civil Code (CCC) Article 822 (passenger transport contract, using the word "best efforts" (*Jin Li*)).

118. *See* CCC Articles 432 (pledge contract), 714 (lease contract), 750 (financing lease contract), 784 (work contract), 828 (transport contract), 892 (custody contract), 922 (mandate contract), 942 (property management service contract), 953 (brokerage contract, using the word "properly" (*Tuo Shan*)); Articles 432, 451 (lien), 714, 784, 897 (custody contract), 917 (storage contract, using the word "improperly" (*Bu Shan*)). *See also*, Chinese Maritime Law Article 48 (goods transport contract), using the words "properly" (*Tuo Shan*) and "carefully" (*Jin Shen*)).

119. *See* Chinese Company Law (2024) Article 180 (2).

120. *See* ZHOU JIANGHONG, *Fundamentals of Nominated Contracts* 597 (2023) (where diligence and best efforts are interchangeable); XIE HONGFEI & ZHU GUANGXIN ED., *Commentary on CCC Specific Contracts (vol. IV) 55-59* (2020) (where "properly" and "with due care" are interchangeable); ZHU GUANGXIN, *Study on General Principles of Contract Law 670 (2018)* (where "properly" and "with reasonable care" are interchangeable); Chinese Company Law (2024) Article 180 (2) (where diligence and reasonable care are interchangeable); Yang Jianxin v. Kunming Shiju Real Estate Brokerage Co., Ltd., Kunming Intermediate People's Court (2008) KMWZZ No. 302 [(2008)昆民五终字第302号] (where due care and best efforts are interchangeable).

obligation known as best efforts.[121] However, this may be a moot point if Chinese law progresses along the line of the common law, where best and reasonable efforts are used interchangeably.

Currently, the idea of best efforts is ambiguous and uncertain since it is not defined in the CCC. In specific contracts, like in the intermediary contract, scholars and courts usually define the best efforts obligation to mean that "the intermediary (such as an agent) should try his best to promote the parties who may conclude a contract in the future to reach an agreement, eliminate the different opinions held by the parties, prepare the contract in accordance with the agreement, and overcome the obstacles between the counterparty and the client."[122] In company law, [123] directors owe their company a duty of diligence in "exercising reasonable care in the best interests of the company in performing their duties."[124] In one case, a court defined the director's duty of diligence as "performing his duty in good faith, prudently and reasonably, with the same degree of diligence and care as an ordinary prudent person would expect in the management of their similar personal business affairs."[125] In sum, the notion of best efforts in China is best described as a duty of diligence and care that a reasonable person in the same circumstances would exercise in carrying out the work or performance of a contract.

B. Factors Used to Determine Best Efforts

When determining whether obligors have used best efforts (diligence) to perform their obligations, Chinese courts have considered the following elements, depending on the circumstances of the contract: (a) the nature of the contract and the expectation of the parties,[126] (b) the risks involved in the contract,[127] (c) whether the performance is in

121. *See* Xu Diyu ed., COMMENTARY ON CHINESE CIVIL CODE 866 (2022).

122. *See, e.g.*, Hangzhou Yiju Chenxin Real Estate Brokerage Co., Ltd. v. Chen Yingying, Zhejiang High People's Court (2012) ZSTZ No. 48 [(2012)浙商提字第48号]; WANG LIMING, CONTRACT LAW OF CHINA 454 (2016).

123. Cixi Fusheng Chemical Fiber Co., Ltd. et al. v. Shi Shengping, Cixi Intermediate People's Court (2007) CMECZ No. 519 [(2007)慈民二初字第519号].

124. *See* Chinese Company Law (2024) Article 180 (2).

125. *See, e.g.*, Beijing Miaoding Mineral Water Co., Ltd. v. Wang Dongchun, Beijing Mentougou District People's Court (2009) MMCZ No. 4 [(2009)门民初字第4号]; Hu Fengbin v. China Securities Regulatory Commission, Beijing High People's Court (2018) JXZ No. 6567 [(2018) 京行终6567号].

126. *See, e.g.*, Zhou Hongyuan v. Agricultural Bank of China, Shanghai Branch, Shanghai No. 1 Intermediate People's Court (2010) HYZML(S)ZZ No. 152) [(2010)沪一中民六(商)终字第152号] (dispute concerning savings deposit contract).

127. *See, e.g.*, Wu Ruichang v. Jiangsu People's Hospital, Nanjing Intermediate People's Court (2004) NMYZZ No. 721 [(2004)宁民一终字第721号] (involving a dispute concerning a

conformity with any statutory or other binding legal rules, or professional standards applicable to the contract,[128] (d) whether the performance is rendered by a professional,[129] (e) whether the performance is rendered gratuitously or for a price[130] and the amount of any price,[131] (f) the time available for the performance of the contract,[132] and (g) relevant trade customs in the particular business area or economic sector.[133] All these factors are considered from the perspective of the objective reasonable person in the same circumstances and nature as the obligor. The courts do not consider the obligor's subjective elements (e.g. financial difficulty or lack of skill) when determining whether it used best or reasonable efforts.[134] However, when the obligor declares that he possesses a higher standard of care and skill, liability may be based on fault for failing to meet that level of care and skill.[135]

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contract for medical treatment); *Y*ang Zhiqiang v. Agricultural Bank of China, Kunming Shangzhuang Subbranch, Yunnan High People's Court (2015) YGMZZZ No. 64 [(2015)云高民再终字第64号] (involving a dispute concerning a savings deposit contract).

128. *See, e.g.*, Interim Measures for the Standard Operation of the Board of Directors of a Central Enterprise in the Pilot Program on Board of Directors [GZFGG (2009) No. 45] Article 63; Measures for the Administration of the Provision of Securities Legal Services by Law Firms [ZJHL (2023) No. 233]; Chinese Company Law (2024) Articles 178, 179, 180 (2), 226, 232, 238.

129. *See, e.g.*, Chen Gang v. Shanghai Yongyi Lawyers Firm, Shanghai No. 2 Intermediate People's Court (2009) HEZMY(M)Z No. 1804 [(2009)沪二中民一（民）终字第1804号] (a dispute concerning a legal services contract); Rao Fang v. Xinquan Heye (Jinan) Private Equity Fund Management Co., Ltd. et al, Beijing Financial Court (2024) J74MZ No. 394 [(2023)京74民终394号] (a dispute concerning fund management); Yao Tiejun et al. v. Hangzhou Huabang Real Estate Agency Co., Ltd., Dongxinyuan Branch, Hangzhou Xiacheng District People's Court (2015) HXSCZ No. 143 [(2015)杭下商初字第143号] (a dispute concerning a real estate sales contract).

130. *See, e.g.*, Li Benqiong v. Guanghan Zhujiang Village Bank Co., Ltd., Supreme People's Court (2016) ZGFMZ No. 303 [(2016)最高法民再303号] (a dispute concerning a mandate contract).

131. Foshan Shujian Adhesive Products Co., Ltd. v. Pan Lian et al., Foshan Sanshui District People's Court (2023) Y0607MC No. 872 [(2023)粤0607民初872号] (In this case concerning a dispute over a real estate transaction service contract and an agency fee is as high as RMB 8 million, the court held that the purpose of the plaintiff's payment of a high intermediary fee to the defendant was for the defendant to facilitate the signing of the contract and the smooth transfer of the land to the plaintiff.).

132. *See, e.g.*, Wei v. Zhang, Xuzhou Economic & Technological Development Zone People's Court (2022) S0391MC No. 1105 [(2022)苏0391民初1105号].

133. *See, e.g.*, Xiamen Dongli Real Estate Marketing Planning Co., Ltd. v. Zhu Jiamin, Xiamen Jimei District People's Court (2015) JMCZ No. 2569 [(2015)集民初字第2569号].

134. *See, e.g.*, Hu Fengbin v. China Securities Regulatory Commission, Beijing High People's Court (2018) JXZ No. 6567 [(2018) 京行终6567号] (The court dismissed the independent director's claim that he did not have a professional background in financial accounting.).

135. ZHOU JIANGHONG, SERVICE CONTRACTS IN A CIVIL CODE 338 (2023).

C. Relationship of Efforts to Other Principles

This section examines the relationship of efforts with the duty of good faith and in the determination of breach of contract.

1. Good Faith Obligation

Good faith is expressed but is no better defined than best efforts in the CCC.[136] Good faith is described differently in different contexts.[137] Generally it can be viewed vaguely as either honesty in belief, or faithfulness to duty in balancing the interests of the parties to the transaction.[138] It can broadly be construed as excluding activities that are deemed to be acts of bad faith,[139] such as maliciously engaging in negotiations, concealing material facts, providing false information in the conclusion of the contract, improperly using or disclosing the other party's trade secrets or confidential information obtained during the negotiations, refusing to cooperate whenever necessary and possible, or willfully rendering defective performance.[140]

In the CCC, there is an implied obligation in all contracts that both parties shall perform their obligations in good faith.[141] In some few contracts, the parties are also obligated to use best efforts in providing services.[142] Since "best efforts" are understood by Chinese courts to mean acting in a due diligent manner,[143] a best efforts obligation is more onerous than the obligation of good faith. The good faith obligation essentially embraces a minimum standard of commercial practice or ethics; it generally does not require the obligor to act altruistically on behalf of the obligee.[144] The obligor, when performing his best efforts obligation, needs

136. *See* Civil Code of the People's Republic of China（2020）(China) (中华人民共和国法典) art. 7

137. WANG, *supra* note 114, at 15-16; CCC Articles 500, 501 and 509.

138. LING BING, *Contract Law in China* 52-54 (2002).

139. *See* Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982).

140. *See* Civil Code of the People's Republic of China（2020）(China) (中华人民共和国民法典) art. 500, 501, 509

141. *See* Civil Code of the People's Republic of China（2020）(China) (中华人民共和国民法典) art.7

142. *See* Civil Code of the People's Republic of China（2020）(China) (中华人民共和国民法典) art. 897

143. ZHOU, *supra* note 112, at 597.

144. *See, e.g.*, CCC Articles 500, 501, 509. LING, *supra* note 130, at 53: The principle of good faith requires a "proper balancing of conflicting interest" between the parties *inter se* and between the parties and the public (emphasis added).

to take reasonable steps to achieve the expected outcome.[145] For instance, in an agency contract, in addition to reporting the contract information to his client, the agent is required to use best efforts to persuade the parties to reach an agreement.[146]

Although the best efforts obligation is more onerous than the duty of good faith, good faith has been used to imply a best efforts obligation.[147] And when determining whether a party has breached its best efforts obligation, regard is to be had, among other things, to the principle of good faith.[148] A party's act in bad faith is *per se* a sufficient indicator of its failure to have used its best efforts.[149] Therefore, in specific contract disputes, if it is proved that the obligor has acted in bad faith, liability can attach for breach of its best efforts obligation.[150] The case of *Li Siwen v. Beijing Lianjia Land Real Estate Brokerage Co., Ltd*. involved a dispute over a real estate sales contract in which the court held that, "to determine whether an intermediary has fulfilled his obligation of best efforts, it should be interpreted in accordance with the contents of the intermediary contract and the principle of good faith."[151] The key issue was whether the intermediary deliberately concealed important facts or provided false information to the principal.[152] If so, the agent would be liable either for a breach of the duty of good faith or a failure to use best efforts.

2. Relationship to Breach

CCC Article 577 provides for contractual liability "where a party fails to perform his contractual obligation or where his performance of the contractual obligation does not conform to the agreement."[153] From this provision, it can be seen that the CCC has adopted the principle of strict liability whereby breach is the only constituent element in assessing

145. WANG, *supra* note 114, at 454.

146. ZHOU, *supra* note 112, at 597; CUI JIANYUAN, Contract Law (4th ed.) 685 (2021).

147. ZHOU, *supra* note 112, at 597; CUI, *supra* note 138, at 685; WANG, *supra* note 114, at 454.

148. *Civil Code Leading Group of the Supreme People's Court, Understanding & Application of CCC Contracts* 2359, 2713 (2020).

149. WANG, *supra* note 114, at 454.

150. Li Siwen v. Beijing Lianjia Land Real Estate Brokerage Co., Ltd., Beijing No. 2 Intermediate People's Court (2023) J02MZ No. 3605 [(2023)京02民终3605号].

151. *Id.*

152. *Id. See also*, Wei v. Zhang, Xuzhou Economic & Technological Development Zone People's Court (2022) S0391MC No. 1105 [(2022)苏0391民初1105号].

153. Code of the People's Republic of China (中华人民共和国民法典) art. 577.

contractual liability.[154] Under this principle, breaching parties are liable for their breach even if they used best efforts,[155] unless the failure of performance was due to a *force majeure* event.[156] In specific contracts, the CCC requires parties to use their best efforts in performing on the contract.[157] In these contracts, if the breaching party fails to use its best efforts, it is liable as a matter of fault.[158]

In a custody or warehousing contract, CCC Article 897 provides that, if the custodian fails to properly take care of the deposited article, it shall be liable for damages to the article.[159] However, if the custody contract is gratuitous, the custodian shall not be liable unless the losses are due to an intentional act or gross negligence.[160] Similarly, in a mandate contract, CCC Article 929 provides that, if the agent fails to handle the affairs with best efforts, it shall be liable for the principal's losses; however, if the mandate contract is gratuitous, the agent shall not be liable unless the losses are caused by an intentional act or gross negligence.[161]

It is important to note that, although the CCC adopts the principle of strict liability for breach, it allows the courts the discretion to vary damages if a party used best efforts or failed to do so.[162] For example, if a party breaches a contract in bad faith, it is barred from requesting a reduction of liquidated damages, even if the liquidated damages are

154. HUANG HUI ed., Commentary on CCC Contracts 292 (2020); XU, *supra* note 113, at 866; LING, *supra* note 130, at 382.

155. LING, *supra* note 130, at 403. *See also*, Qingdao Guangming Corporation v. Tsingtao Brewery Co., Ltd., Supreme People's Court (2004) MEZZ No. 125 [(2004)民二终字第125号].

156. *See* Civil Code of the People's Republic of China（2020）(China) (中华人民共和国法典) art. 180, 590.

157. *See* Civil Code of the People's Republic of China（2020）(China) (中华人民共和国法典) art. 784, 824, 897.

158. LING, *supra* note 130, at 404; ZHU, *supra* note 112, at 669; XIE & ZHU, *supra* note 112, at 249; Cixi Fusheng Chemical Fiber Co., Ltd. et al. v. Shi Shengping, Cixi Intermediate People's Court (2007) CMECZ No. 519 [(2007)慈民二初字第519号]. *See also*, CUI, *supra* note 138, at 356-57; YANG DAIXIONG ED., POCKET COMMENTARY ON CHINESE CIVIL CODE 528-29 (2022); Hangzhou Group Management Network Technology Co., Ltd. and Pactera Technology Co., Ltd., Supreme People's Court (2020) ZGFZMZ No. 1143 [(2020)最高法知民终1143号] (involving a software development contract); Changchun Taiheng Housing Development Co., Ltd. v. Changchun Municipal Bureau of Planning and Natural Resources, Supreme People's Court (2019) ZGFMZ No. 246 [(2019)最高法民再246号] (involving a contract for the transfer of land use rights). Both cases held that fault was the decisive element for the assessment of damages.

159. *See* Civil Code of the People's Republic of China（2020）(China) (中华人民共和国法典) art. 897; Yang Yong v. Chen Yankun & Fan Chengfei, Guangzhou Baiyun District People's Court (2020) Y0111MC No. 8927 [(2020)粤0111民初8927号].

160. *Id.*

161. *See* Civil Code of the People's Republic of China（2020）(China) (中华人民共和国法典) art. 929; WANG, *supra* note 114, at 443-44.

162. *See* LING, *supra* note 130, at 404-05.

excessive compared to the actual losses.[163] In the case of willful breach or bad faith act, an earnest money deposit can be forfeited under CCC Article 587.[164] Also, the non-breaching party must use reasonable efforts to mitigate damages or suffer a reduction in recoverable damages.[165] Punitive damages may also be awarded in cases where a seller deliberately provides defective goods or services to a consumer-buyer,[166] where a tourism service fails to perform the contract with deliberate care,[167] and where a contract refuses to pay the contractor, who may recover their attorneys' fees.[168]

D. Use in Types of Contracts

This section reviews how the best efforts obligation is applied by Chinese courts in specific contracts.

1. Mandate Contracts

In mandate or agency contracts, the agents shall undertake the obligation to use their best efforts to handle the principals' affairs.[169] If the agents fail to use best efforts, they are considered at fault for the principals' losses.[170] In the case of *Li Benqiong* v. *Guanghan Zhujiang*

163. CCC Article 585, Interpretation by the Supreme People's Court of Several Issues Concerning the Application of Part I General Provisions of Book III Contracts of the Chinese Civil Code (Judicial Interpretation [2023] No. 13, hereinafter "Judicial Interpretation on Contracts") Article 65. *See also*, Guiding Case No. 166 of the Supreme People's Court: Beijing Longchang Weiye Trading Co., Ltd. v. Beijing Urban Construction Heavy Industries Co., Ltd., Beijing No. 2 Intermediate People's Court (2017) J02MZ No. 8676 [(2017)京02民终8676号].

164. *See* Civil Code of the People's Republic of China（2020）(China) (中华人民共和国法典) art. 587.

165. *See* Civil Code of the People's Republic of China（2020）(China) (中华人民共和国法典) art. 591.

166. *See* Chinese Law on Protection of Consumers' Rights & Interests (2013) Article 55; Guiding Case No. 17 of the Supreme People's Court: Zhang Li v. Beijing Heli Huatong Auto Service Co., Ltd., SPC Gazette, Issue 5, 2014. *See also*, Chinese Food Safety Law (2021) Article 148.

167. *See* Chinese Tourism Law (2018) Article 70.

168. *See* Wan Xuecai v. Qinghai Huayu Construction Engineering Company et al., Supreme People's Court (2021) ZGFMS No. 2923 [(2021) 最高法民申2923号]. Note that as to attorneys' fees, China has adopted the American rule, unless otherwise is provided by law or agreed to by the parties.

169. *See* Civil Code of the People's Republic of China （2020） (China) (中华人民共和国法典) art. 929.

170. *See, e.g.*, Cixi Fusheng Chemical Fiber Co., Ltd. et al. v. Shi Shengping, Cixi Intermediate People's Court (2007) CMECZ No. 519 [(2007)慈民二初字第519号].

Village Bank,[171] Li planned to lend RMB 3 million Yuan to a third party. However, since natural persons are not allowed to be registered as land mortgagees, Li entered into a mandate contract with Zhujiang Bank, authorizing the latter to lend the money to the third party, and to be registered as the land mortgagee. When the third party failed to repay the loan, Li was unable to exercise ordinary creditor's rights due to the false registration of the mortgage. In addition, the mortgage contract entered into between Zhujiang Bank and the third party explicitly stipulated that the third party should buy insurance for the land upon the request of Zhujiang Bank, but the Bank failed to do so. Li brought a claim against Zhujiang Bank for Li's losses.[172]

The court held that, as an agent, Zhujiang Bank failed to comply with its duty of care in the registration of land mortgage and in not procuring collateral insurance.[173] If the Bank had completed the registration in accordance with the regulations and requested the third party to buy collateral insurance, it would have discovered the falsity of the mortgage in a timely manner and attempted to recover the balance of the loan. Since the Bank failed to prove that it had performed its duties properly, it was deemed to be at fault and was liable for damages to Li.[174] Note here that under Chinese law the agent has the duty of proving it was not at fault in performing its duties. This again shows the correlation between insufficient effort and liability for breach.

2. Sale of Goods

In sale of goods contracts, both the seller's and buyer's obligations are presumed to be absolute and, therefore, the of use their best efforts is not a defense in cases of breach.[175] The failure to achieve a specific result constitutes breach and the breaching party is liable for damages.[176] However the breaching party's failure to use best efforts does play a role in the calculation of damages.[177]

171. Li Benqiong v. Guanghan Zhujiang Village Bank, Supreme People's Court (2016) ZGFMZ No. 303 [(2016)最高法民再303号].

172. *Id.*

173. *Id.*

174. *Id.*

175. *See* Civil Code of the People's Republic of China （2020） (China) (中华人民共和国法典) art. 598, 626.

176. *See* Civil Code of the People's Republic of China （2020） (China) (中华人民共和国法典) art.591.

177. Guizhou Dengfeng Energy Group Co., Ltd. v. Guizhou Tiantai Coal Chemical Co., *Ltd.,* et al., Supreme People's Court (2018) ZGFMZ No. 164 [(2018)最高法民再164号].

In a dispute relating to a coal supply contract, the seller breached the contract due to its inability to perform.[178] The Supreme People's Court held that the seller was not liable because the buyer was aware of the seller's inability to perform when entering the contract.[179] The Court further stated that the buyer, as a professional energy company, should have exercised professional judgment and performed due diligence in assessing the output capacity of the seller's new coal mine. Knowing that the seller did not have the capability to continually supply the large quantities required under the contract, the buyer failed to perform its duty of care in accordance with the principle of prudence. Furthermore, the buyer failed to use reasonable efforts to mitigate its losses related to the reduced supply of coal.[180]

3. Sale of Real Estate

Sales of real estate normally occur through the use of real estate intermediary service companies. Real estate agents are expected to use best efforts in fulfilling their duties as agents.[181] In the case of *Li Yandong v. Shanghai Hanyu Property Consultancy Co.*,[182] Li hired Hanyu Real Estate to act as its real estate agent. The house in dispute was jointly owned, with the seller owning a one-sixth share.[183] When selling the house to the buyer, the seller provided a notarial certificate stating that the other five joint owners of the house had authorized the seller to sell their shares. [184] This notarial certificate was later proven to be forged. However, the forgery was discoverable because the date of birth of one of the joint owners was inconsistent with the date stated in that owner's identification card. After paying the down payment, the buyer found out that the seller had already sold the house to a third party. It brought a claim against Hanyu to recover the loss of the down payment.[185]

The court held that, as a company specializing in intermediary services, Hanyu failed its duty of care by not reviewing and verifying the

178. *Id.*

179. *Id.*

180. *Id.*

181. *See* Xinjiang Chengyang Wanda Second-hand Housing Brokerage Co., Ltd. v. Ablimiti Abuliz, Urumqi Intermediate People's Court (2022) X01MZ No. 3096 [(2022)新01民终3096号]; Guangzhou Haojie Real Estate Consulting Co., Ltd. v. Ye Mao et al., Guangzhou Intermediate People's Court (2014) SZFMWZZ No. 1402 [(2014)穗中法民五终字第1402号].

182. *See* Li Yandong v. Shanghai Hanyu Property Consultancy Co., Ltd., Shanghai No. 2 Intermediate People's Court, SPC Gazette, Issue 2, 2015.

183. *Id.*

184. *Id.*

185. *Id.*

authenticity of the identity of the sellers, as well as their credit and financial information. Furthermore, Hanyu assigned an employee who was not a qualified broker and who subsequently failed to verify the ownership of the house in dispute, ensure the down payment was placed in escrow, and review the notarial certificate. The court held the real estate firm liable due to its failure to exercise the necessary duty of care.[186]

4. Long-Term and Relational Contracts

In long-term and relational contracts, like mandate contracts between directors and their companies,[187] the directors have a duty to use best efforts in meeting their obligations to their companies.[188] In *Hu Fengbin v. China Securities Regulatory Commission*,[189] Hu, as an independent director of the Jiadian Co., Ltd., voted in favor of a board resolution certifying the annual report as truthful, accurate, and complete when it proved to be false. Hu claimed that he had fulfilled his duty of diligence given his lack of financial accounting expertise and therefore relied on the false audit conclusions of the certified public accountants.[190]

The court held that independent directors should be able to understand the basic principles of corporate governance, the legal framework for the operation of listed companies, the specific rules of information disclosure and supervision—including an awareness of internal control and risk prevention—the ability to read and understand financial reports, and the operating conditions of the company.[191] In sum, they are required to use independent judgment in their roles as independent directors and thereby must possess a professional background and the requisite expertise to exercise a duty of diligence in the management of a public company.

The court added that although Hu did not have a professional background in financial accounting, he could have carefully studied the financial accounting reports, made inquiries, and provided evidence to

186. *Id. See also*, Li Ping v. Zhongyuan Real Estate Agency, Nanjing Intermediate People's Court (2015) NMZZ No. 4352 [(2015)宁民终字第4352号].

187. Cixi Fusheng Chemical Fiber Co., Ltd. et al. v. Shi Shengping, Cixi Intermediate People's Court (2007) CMECZ No. 519 [(2007)慈民二初字第519号]. However, noted that in China, the agent's duty in the exclusive commercial agency contract is generally absolute. *See, e.g.*, Shanghai Feilei Technology Co., Ltd. v. Fuji Medical Equipment (Shanghai) Co., Ltd., Supreme People's Court (2018) ZGFMZ No. 82 [(2018) 最高法民再82号]).

188. Hu Fengbin v. China Securities Regulatory Commission, Beijing High People's Court (2018) JXZ No. 6567 [(2018) 京行终6567号].

189. *Id.*

190. *Id.*

191. *Id.*

prove the process of his careful review.[192] Although Hu advocated that the CPA's unqualified audit could be relied upon, such reliance should be based on the performance of the duty of diligence. In addition, the performance of the duty of diligence of independent directors includes taking the initiative to investigate and obtain the information required for decision-making, actively inquiring to reach independent judgments. The court held that Hu failed to perform his best efforts obligation.[193]

Similarly, in franchise contracts, franchisees and franchisors have a duty of best efforts to each other. In *Beijing Taibiao International Digital v. Chen Weigang case*,[194] Chen signed a franchise agreement with Taibiao International, which stipulated that Taibiao authorized Chen to be the regional franchisee of Master Hu's nonstick cookware products. According to the agreement, Taibiao was required to advertise the products. Subsequently, the products' quality were criticized by media outlets, subject to numerous consumer complaints, investigated, and seized by the government. The manufacturer publicly announced that it had stopped the sales of the products, and Taibiao stopped advertising the products and failed to try to rehabilitate the brand's reputation.[195] The court rejected Taibiao's defense that it had used its best efforts in performing under the contract.

In another scenario, best efforts cannot overcome an express contract provision that sets benchmarks for sales by the franchisee. For example, the franchise contract may provide that the franchisee must meet certain sales quotas.[196] Failure to do so is a breach of contract, whether or not the franchisee used its best efforts.[197]

V. ANGLO-AMERICAN LAW

The duty of best efforts is found in American law and the duty of best endeavors is found in English law. Both concepts have had a similar evolution in the two legal systems. This part's analysis is based upon the relative equivalency of both terms and uses the term "best efforts" as a surrogate for both. It will explain that the terms best and reasonable efforts

192. *Id.*

193. *Id.*

194. Beijing Taibiao International Digital Technology Co., Ltd. v. Chen Weigang, Beijing No. 1 Intermediate People's Court (2008) YZMZZ No. 7244 [(2008)一中民终字第7244号].

195. *Id.*

196. *See, e.g.*, Qingdao Guangming Corporation and Tsingtao Brewery Co., Ltd., Supreme People's Court (2004) MEZZ No. 125 [(2004)民二终字第125号].

197. *See, e.g.*, Liu Xianwen v. Guangzhou Bing'an Eagle Ceramics Co., Ltd., Guangzhou Intermediate People's Court (2005) HZFMEZ No. 429 [(2005)穗中法民二终字第429号].

have merged, and that the courts have used subjective and objective approaches to their application in particular cases.

A. Setting the Stage: Implication of Obligations

Anglo-American law has struggled to define the duty of best or reasonable efforts. The implied duty of best efforts was set as the standard for exclusive agency contracts in the seminal case of *Wood v. Lucy, Lady-Duff Gordon*[198] in 1917. Lucy was a world famous fashion designer who revolutionized the fashion industry by making reasonable cost versions of her designs. Wood was given the exclusive right to market her line of clothing and seek endorsement contracts on her behalf, or as Justice Cardozo phrased it: "She was to have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff."[199] Unfortunately for Lucy, Wood was distracted with other clients and failed to procure many contracts on her behalf. Cardozo concluded that "unless he gave his efforts, she could never get anything."[200]

The rule at the time of the *Lady-Duff Gordon* decision was that such agreements were aleatory or illusory contracts. Illusory contracts were unenforceable due to a lack of consideration. Wood's duties were not specified in the agreement of the contract. Therefore, the only expressed obligation in the contract was Lucy's duty to pay Wood in the event he obtained endorsement contracts. Since there was no reciprocal consideration (obligation) on Wood's part to try to obtain such endorsements, the contract was invalid.[201] Cardozo could have maintained the rule, voiding the contract and relieving Lucy of any further liability. Instead, he looked at the subjective intent of the parties and the type of agency agreement (exclusive) and salvaged the contract by implying a duty of best efforts on Wood, filling in the gap of a lack of consideration on his part.[202]

Cardozo's maneuver in *Lucy, Lady-Duff Gordon* symbolized a larger movement in the interpretation of contracts in American common

198. Wood v. Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917).

199. *Id.* at 91.

200. *Id.*

201. Beijing Taibiao International Digital Technology Co., Ltd. v. Chen Weigang, Beijing No. 1 Intermediate People's Court (2008) YZMZZ No. 7244 [(2008)一中民终字第7244号].

202. *Id.*

law.[203] The minority decision had provided an answer based on legal formalism that courts were prohibited from adding words or implying obligations into a contract.[204] The dissent's view was that the job of the judge was limited to the interpretation of the words in the written contact. In this case, the words were lacking and, therefore, there was no contract to enforce.[205] Cardozo, by contrast, took a contextualist approach in constructing the implied duty of best efforts. He looked outside of the particular contract and focused on the nature of exclusive contracts. At that point, he reasoned that the parties to such contracts must not have intended that one of them was free not to perform, and instead it was expected that the agent (Wood) would make customary efforts based upon what agents in that profession would generally do when performing on behalf of clients.

This shift from a formalist to contextualist interpretation not only made the *Lady-Duff Gordon* contract enforceable, but it also allowed judges to use their discretion as to the level of efforts expected in other types of contracts. Cardozo's epic adages in *Lady-Duff Gordon* still ring true today. First, he stated that the law had "outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal."[206] In sum, courts needed to use what the English call "business common sense"[207] in the interpretation and enforcement of contracts. Second, he made it clear that the world was not one of formally articulated contracts, that often "a promise may be lacking, and yet the whole writing may be 'instinct with an obligation, imperfectly expressed.'"[208] Thus, instinct is the basis for the court implying an obligation that was assumed by the parties and simply neglected in the written contract. The substance of that obligation can be fabricated based on the context of the specific type of contract. The context of the contract, such as trade usage, can be used to imply terms into the contract.

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203. LARRY A. DIMATTEO, *The Enduring Legacy of* Wood v. Lucy, Lady Duff-Gordon*: Cardozo, Anti-Formalism, and the Fiction of Non- Interventionism*, 28 PACE U. L. REV. 315 (2007).

204. *Id.*

205. *Id.*

206. DIMATTEO, *supra* note 203.

207. Referring to the English law principle used in the interpretation of contracts which holds that when there are two plausible interpretations of a contract term the court should choose the one that makes the most common sense for business. *See* Nord Naphtha Limited v. New Steam Trading AG [2021] EWCA Civ 1829 (in which efforts were taken to avoid an interpretation that would "offend business common sense and ordinary common sense")*;* Rainy Sky SA & Orsd v. Kookmin Bank [2011] UKSC 50 (noting a preference for "the construction which is consistent with business common sense").

208. *Id.*, partially quoting McCall Co. v. Wright, 133 A.D. 62, 117 N. Y. Supp. 775 (1909).

B. Meaning of Best or Reasonable Efforts

What type of language do courts use in applying the best efforts principle? Is there a difference between best efforts, reasonable best efforts, commercially reasonable efforts, and good faith efforts? The term reasonable efforts is often used in various legal contexts and its interpretation can depend on the specific circumstances. In the context of trade secrets, reasonable efforts refer to the heightened measures a trade secret owner takes to protect the secrecy of their information. This could include having employees sign confidentiality agreements, restricting access to the secret, and password-protecting secrets stored on computers.

Contracts, no matter how detailed, often do not adequately define what the threshold is for adequate performance. Many contracts simply order generic tasks to be performed—e.g., paint a house with two coats of Sherwin-Williams durable paint. In the former case, the contract is unlikely to state much about how the house is to be prepared (cleaned, scraped, primed) before the paint is applied. It does not state the method of application, whether it should be hand-brushed or sprayed. In fact, the preparation of a house with old and deteriorating paint is the more time-consuming task and an important part of the repainting job. Types and levels of preparation vary and are left to the general discretion of the painting contractor. What is considered an adequate performance will depend on the effort of work performed during the preparation phase. This begs the question of what effort of preparation should be expected, which begs the question of what level of effort should be implied by a court? This section focuses on the meaning of best efforts implied in certain types of contracts, but also recognizes that the effort of parties in the performance of any contract is a covert factor in the determination of adequacy of performance.

It is important to note that express best efforts clauses are common in many types of contracts, so the courts must not only determine when best efforts should be implied into a contract, but must also interpret the meaning of best effort clauses, which will vary given the type and context of the specific contract. It should also be realized that there are numerous contract clauses under various names that attempt to delineate the efforts expected of one or both of the parties. In some cases, an objective standard may be used—what would reasonable businesspersons in this industry have done in performing on the contract?—and in other cases, courts have used a subjective standard—what should this particular businessperson have done given the resources available to her?

American case law has been inconsistent in defining what best or reasonable efforts means, often wavering between subjective and objective standards.[209] The American Uniform Commercial Code codifies that, in certain exclusive contracts, a party is under an implied obligation to use best efforts whether in the sale or marketing of goods.[210] Over time the standard has been applied in other contexts and has been used interchangeably with the term of reasonable efforts. From an academic perspective it has been argued that best efforts is a subjective standard and reasonable efforts is an objective one. Under this theory, the best efforts standard looks at the particular characteristics of the performing party to determine if it used all of its resources in attempting to perform on the contract. The reasonable efforts standard is objective because it does not focus on the particular characteristics of the party in the case but asks how a reasonable businessperson would have acted or performed given the facts of the case.

The use of the subjective-objective dichotomy in this case of best efforts is not very helpful, since both subjective and objective factors are used in determining whether the duty had been met. Justice Cardozo, despite using the term best efforts, placed the case in a broader objective context of exclusive agency contracts as a whole. In such contracts, the principal is wholly dependent on the agent to produce outcomes (procure endorsement deals) that would benefit the principal. Thus, the question becomes, what would a reasonably prudent agent have done in representing *Lucy, Lady Duff-Gordon*? What activities would such an agent undertake? This was then compared to the subjective factors in the case in which Wood failed to take any meaningful steps to procure endorsement contracts on behalf of Duff-Gordon. There is no recognizable difference between the decisions involving the two standards. In sum, best efforts means reasonable efforts.

A controversial doctrine in the common law is willful breach.[211] It is controversial because it would be an exception to the principle that breach

209. *See* NCNB Nat'l Bank of N.C. v. Bridgewater Steam Power Co., 740 F. Supp. 1140 (W.D.N.C. 1990) (featuring a subjective approach); LeMond Cycling, Inc. v. PTI Holding, Inc., No. Civ. 03-5441, 2005 WL 102969 (D. Minn. Jan. 14, 2005) (featuring a subjective-objective approach).

210. U.C.C. § 2-306 (2009).

211. The principle is generally disfavored. *See* English Law Commission, "Pecuniary Restitution for Breach of Contract," Working Paper No. 65 (1975) 34 ("we doubt whether the terminology of 'wilful and deliberate' breach is appropriate for English law"). Then again, although rejecting a general principle of wilful breach, the Law Commission notes that willfulness can be used as a factor in assessing damages: Courts "should have a discretion to disallow a claim

and remedies are based on faultless paradigm. Unlike the civil law which considers the fault of party as a core concept, the common law is a strict liability regime,[212] where fault plays no role. However, some breaches are considered so egregious, especially those that are acts of bad faith, that the breaching party should be punished through the assessment of exemplary or punitive damages. A party that makes no effort to perform in any way, coupled with representations that they will deliver on time, is an example of willful breach. Thus, the lack of effort, even in cases where best efforts is not implied, would be a factor in determining the type of breach and in assessing damages.

It should be noted that, in the common law, damages are compensatory in nature and not punitive.[213] However, courts have discretion to adjust remedies in a way that conforms to the just compensation principle, while covertly treating the willful breacher differently than other breaching parties. For example, in a partially performed contract, a court may give the non-breaching party restitution damages for the value conferred to the breaching party, while denying such damages for the value bestowed by the breaching party. E. Allan Farnsworth notes that: "Some courts have denied restitution to the party in breach on the ground that the breach was 'willful,' rather than negligent."[214] The Second Restatement provides a hypothetical of a party who intentionally furnishes services or erects a building that does not conform to the requirements of the contract. The Second Restatement notes that the willfulness of the breach meant the party could not claim damages for partial performance.[215]

American law in the second part of the last century created the tort of bad faith to avoid the prohibition in contract law against awarding punitive damages. Thus, if an insurance company fails to pay a claim in a timely manner, the insured party may bring a claim under the tort of bad faith based on the company's willful breach of the insurance contract. The party may ask for compensatory damages (the amount of the insurance

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by the party in breach where it would be appropriate having regard to his conduct in all the circumstances of the case." *Id.* at 38.

212. *See* Hillman, *Future of Fault*, *supra* note 15; Scott, *Defense of Strict Liability*, *supra* note 15.

213. This is why penalty clauses, unlike the civil law, are considered unenforceable in the common law.

214. E. Allan Farnsworth, *Farnsworth on Contracts*, Sec. 8.14, 506-507 (3d ed., 2004). The Cf § 374 Restatement states that willfulness does not bar the willful breacher from collecting restitution damages. But again, it can be a factor in whether to award such damages or not.

215. Restatement (Second) of Contracts § 374(1) (1981).

policy) and additional punitive damages to punish the insurance company's dalliance.[216]

C. Application of the Best Efforts Standard

The implied duty of best efforts was codified in UCC §2-306(2), which states that "either the seller or buyer for exclusive dealing imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale."[217] More interesting is Comment 5 to §2-306 which states that an "exclusive agent is required . . . to use reasonable effort and due diligence in the expansion of the market or the promotion of the product." Thus, the mandatory language of the section uses best efforts, while the commentary uses reasonable efforts. This shows that the two standards are used interchangeably. The use of the undefined term of due diligence in Comment 5 aligns the duty with the civil notion of diligent effort.[218] All of this begs the question of what factors have courts used in the application of the doctrine.

Judge Friendly, in the seminal case of *Bloor v. Falstaff Brewing Corp.*,[219] notes that the application of best efforts has varied. He observed "that under New York law a best efforts clause imposes an obligation to act with good faith in light of one's own capabilities," while other courts use "the average prudent comparable [businessperson]."[220] Some courts hold that different clauses require different levels of performance, while others hold that all efforts clauses obligate parties to the same level of action. In *NCNB Nat'l Bank of N.C. v. Bridgewater Steam Power Co.*, the court used a subjective approach by focusing on the party's specific abilities, resources, and whether they were used to the utmost in the performance of the contract.[221] In comparison, the court in *LeMond Cycling, Inc. v. PTI Holding, Inc.*,[222] used an objective approach by determining whether the efforts of the party met the standard of

216. Farnsworth, *supra* note 214, Cf. Restatement (Second) of Contracts § 374 (1981).

217. U.C.C. § 2-306(2).

218. *See* discussion *in* subsections III.B.1., III.C.1-4., IV.A. & IV.D.1.

219. Bloor v. Falstaff Brewing Corp., 454 F. Supp. 258 (S.D.N.Y. 1978).

220. 601 F.2d at 613 n.7, quoting Arnold Productions, Inc. v. Favorite Films Corp., 176 F. Supp. 862, 866 (S.D.N.Y. 1959). *See also*, Victor P. Goldberg, *Great Contracts Cases: In Search of Best Efforts: Reinterpreting* Bloor v. Falstaff, 44 ST. LOUIS U. L.J. 1465, 1465 (2000) (noting that efforts can only be defined contextually).

221. NCNB Nat'l Bank of N.C. v. Bridgewater Steam Power, 740 F. Supp. 1140 (W.D.N.C. 1990).

222. Jesberg v. Baxter Healthcare Corp., Civ. No. 97-1062 (PAM/RLE), at [pin cite] (D. Minn. Jan. 30, 2006).

commercially reasonable efforts. In *Automated Irrigation Controls, LLC v. Watt Stopper, Inc.*,[223] the court asserted that "it is settled law that the court will imply a duty on the part of an exclusive licensee to exploit the subject matter of the license with due diligence, where such a covenant is essential to give meaning and effect to the contract as a whole."[224] Again, the use of the phrase due diligence is comparable to the importance of diligence found in the civil law.[225]

The basis for the court's intervention can be justified under two rationales. The first rationale is the court needs to intervene, as a matter of contractual justice, to prevent harm to a party that is solely reliant on the efforts of the other party. The second rationale is the court is simply enforcing the intent of the parties. This intent is not expressed, but is an "'instinct with an obligation, imperfectly expressed.'"[226] In sum, the parties both made a tacit assumption that the exclusive right to sell or market meant the use of best or reasonable efforts. The court in *Vacuum Concrete Corp. of Am. v. Am. Mach. & Foundry Co.*,[227] in summarizing the case law post-*Lucy, Lady Duff-Gordon*, states that in requiring best efforts, "the court is merely enforcing an obligation which the parties overlooked expressing in their contract or which they considered unnecessary to be expressed."[228]

1. Exclusivity and Other Types of Contracts

The element of exclusivity is the linchpin that courts use to imply and interpret the duty of best efforts. But this is not a narrow set of contracts. Since the 1917 case of *Lucy, Lady Duff-Gordon*, new types of contracts have evolved and relational contract theory[229] has exposed the special character of long-term contracts. Thus, some notion of exclusivity is found in the sale of goods, including exclusive agency and

223. Automated Irrigation Controls, LLC v. Watt Stopper, Inc., 407 F. Supp. 3d 274 (S.D.N.Y. 2019).

224. *Id.* at 288.

225. *Wood v. Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917).

226. *See Li Yandong v. Shanghai Hanyu Property Consultancy Co., Ltd., Shanghai No. 2 Intermediate People's* Court, SPC GAZETTE, Issue 2, 2015.

227. Vacuum Concrete Corp. v. Am. Mach. & Foundry Co., 321 F. Supp. 771 (S.D.N.Y. 1971).

228. *Id.* at 773.

229. Relational contract theory suggests that the express terms of a relational contract act as an outline, while implied terms and understandings determine the conduct of the parties. *See*, Ian Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW U. L. REV. 854 (1978); David Campbell, *Good Faith and the Ubiquity of the 'Relational' Contract*, 77 MODERN L. REV. 475 (2014).

distributorship contracts, sale of real estate (exclusive agents), franchise contracts (exclusive territory), commercial leasing (percentage leases), contracts for research and development, publishing contracts (duty of publisher to promote sales), sale of businesses (previous owner receiving percentage of profits or royalties from new owner), and merger and acquisition agreements.[230]

A major area of expansion where efforts of the parties are implied has been the proliferation of long-term and relational contracts, including long-term supply and service contracts, joint venture contracts, research and development contracts, and global alliances. Baker and Choi noted that:

> In long-term contractual relationships, the [alignment of interests] is often done through the adoption of open-ended standards, such as best efforts, reasonable efforts, or commercially reasonable efforts. One important benefit of using such an open-ended standard is that the parties can rely on the dispute resolution system to generate additional information about the seller's conduct and more effectively deter seller misconduct.[231]

Given the global supply chain and the expanding nature of global alliances and strategic contracting,[232] the comparative analysis presented in this Article takes on greater importance. The principle of best efforts has become general international private law in order to support trans-border contracting.

2. Express Performance Standards

The previous section underscored the relevancy of best efforts to a wide array of contracts. Its importance is reflected in that many domestic and international contracts incorporate a best efforts clause. The use of these clauses lightens the burden on courts to rationalize the implication of such a duty but does little in determining the meaning of the clause. Thus, it is important that national jurisprudence on the subject be aligned to harmonize international contracting law.

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230. "In mergers and acquisitions contexts, where the parties expect some delay until closing, the agreements will typically require the respective parties to put in best efforts, or commercially reasonable efforts, in abiding by various covenants, such as preserving good relations with suppliers, employees, and customers, and securing shareholder and regulatory approval." Scott Baker and Albert Choi, *Contract's Role in Relational Contract*, 101 VA. L. REV. 559, 579-580 (2015).

231. *Id.* at 602.

232. *See* LARRY A. DIMATTEO, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L.J.727 (2010).

Detailed or customized best efforts clauses that reflect the characteristics of the contract transaction and the parties provide more predictive outcomes across legal systems. A best efforts clause that provides its own meaning based on benchmarks relating to what constitutes best efforts, such as the minimum amount to be spent on advertising or sale benchmarks, brings greater certainty to the parties' interpretations of best efforts. Unfortunately, such clauses are often written in general and vague terms, leaving the courts with a choice.[233] They can simply void the clause for vagueness,[234] or construct a meaning for the clause. In the latter case, courts tend to require an exacting standard to measure the performance of the party subject to such a clause.[235] In the end, given the importance of these contracts to the world economy, the latter choice is the better one. The alternative in some cases would be the awkward voiding of a vague clause, followed by an implication of a duty of best efforts to provide justice in cases involving a shirking party, and in determining which of the parties is the one in breach. The enforcement of vague best effort clauses serves the reasonable expectations of both parties.

D. Role of Efforts in General Contract Law

The level of effort exerted by a party influences different areas of contract. In the area of contract formation, the ordinary rule is the offeror can revoke its offer at any time before acceptance by the offeree. However, some courts have held that, in an offer related to the formation of an exclusive agency contract, the right of revocation continues beyond a verbal or oral acceptance and until the agent actually begins to use reasonable efforts. In essence, the exclusivity of the contract transforms the transaction from a bilateral contract (exchange of promises) to a unilateral contract (acceptance by conduct or performance).[236] The court in *Braniff v. Baier* held that, "if an agent processes in good faith to comply by spending time and effort, these acts amount to an acceptance," whether or not the agent formally accepted the principal's offer.[237] One can also

233. "Parties may agree to use specific levels of effort when satisfying their responsibilities [such as best efforts clauses] but the agreements rarely delineate the exact parameters of performance that will satisfy the requirement." Zachary Miller, *Best Efforts? Differing Judicial Interpretations of a Familiar Term*, 48 ARIZ. L. REV. 615, 615 (2006).

234. Kraftco Corp. v. Kolbus, 274 N.E.2d 153 (Ill. App. Ct. 1971).

235. Bloor v. Falstaff Brewing Corp., 454 F. Supp. 258, 267 (S.D.N.Y. 1978) (to the extent of its total capabilities).

236. Harris v. McPherson, 155 A. 723 (Conn. 1922).

237. Nieschburg v. Nothern, 165 P. 857 (Kan. 1917).

make a plausible argument that, in some cases, the offer to make someone an exclusive agent may convert a generally revocable offer into an irrevocable one. This would occur in cases where the prospective agent would need to perform due diligence and expend funds to determine if it is in a position to perform a best efforts contract. It would be unjust for the offeror to revoke while the offeree is expending money and effort before accepting.[238]

The implication of duties or implied terms in a contract has long been a part of contract law. The implied duty of best efforts in exclusive agency contracts is an example of a more specific implied term linked to a particular type of contract. Other implied terms or principles are broader in application and are used in specific contexts. An example is the common law's substantial performance doctrine, which is used, at the court's discretion, when the full or strict compliance standard works an unjust result.[239] Its most common use is in construction contracts where the construction of a completely compliant building is an impossibility due to the many different components and physical conditions that exist in such construction. Thus, the withholding of a sizeable final payment for minor defects not affecting the habitability of a home or building would be unfair. In such a case, the contractor has used its best efforts in performing the contract. The substantial performance doctrine requires the buyer to make the final payment and then seek redress for minor defects through a claim of breach of warranty.

Other implied terms act as policing mechanisms for bad behavior and can be applied to all types of contracts. In American law, the duty of good faith is an example of such a generally applicable doctrine.[240] History has shown that the recognition of implied duties in one type of contract often migrate to other areas of contract law. The duty of best efforts has been captured in many types of contracts besides those of exclusive agency. This has led to the creation of a body of jurisprudence applicable to the term, whether expressed or implied. The prime example of the migration of an implied principle from one type of contract to others is seen in the impact of the American Uniform Commercial Code (UCC)

238. Of course, if the offeror does revoke there may be a claim for promissory estoppel to collect the money expended. *See* Second Restatement §90. This cause of action is found in American common law but not in English common law.

239. Again, it was Justice Cardozo who crafted the substantial performance doctrine in the 1922 case of *Jacob & Youngs v. Kent*, 129 N.E. 889 (1921).

240. At the present, English law continues to reject a general duty of good faith implied in law. Although, other common law countries such as Australia and Canada have begun to recognize good faith as an implied duty. More recently, an English court implied good faith as a matter of fact (particular to the specific case in issue) but not as a duty in law that applied to all contracts.

on the common law of contracts. A number of principles incorporated into Article 1 (General Provisions) and Article 2 (Sale of Goods) were not found in the existing common law.[241] These new principles subsequently transformed the common law of contracts. The duty of good faith, encouragement of contextual interpretation, and the principle of unconscionability found in Articles 1 and 2 were applied by analogy to other types of contracts and changed American common law. Thus, it can be stated that the duty of good faith is implied into all contracts, the use of reasonable efforts is expected in most contracts, contextual factors influence the interpretation of formal written contracts, and that contracts and contract terms may be voided if too one-sided, especially in consumer contracts. These changes in the American law of contracts have led to a divergence in American and English common laws. For example, English law continues to reject a general implied duty of good faith and the principle of unconscionability.

For purposes of this Article, the more interesting issue is how these implied duties and principles interact with one another. Do the efforts put forward by a contractor play a role in determining whether it has met the threshold of substantial performance? Does the use of reasonable efforts impact a court's decision of whether a party acted in good faith? Alternatively stated, can good faith performance be achieved if a party fails to use reasonable efforts? Good faith is also interpreted as requiring a certain level of cooperation between the parties in furtherance of the common enterprise. What level of effort is needed to show that a party had fulfilled its duty to cooperate?

1. Role of Efforts in Determining Breach of Contract

Does the lack of best or reasonable efforts automatically equate to breach of contract? As noted previously, unlike in the civil law, the reason or cause for a breach is not considered important in claims for breach of contract in the common law. Put simply, a breach is a breach no matter whose fault was the cause. Thus, whether a party used reasonable efforts or not is not important in determining breach or in assessing damages. But does the duty of best efforts impact other collateral obligations in a contract? The court in *Advanced Water Technologies (AWT) v. Amiad U.S.A.*[242] addresses the issue of whether a breach of a core obligation (failure to pay) matters if the party made reasonable efforts required to obtain another contractual right? The case involved an exclusive

241. U.C.C. (AM. L. INST. & UNIF. L. COMM'N 2023).

242. Advanced Water Techs. v. Amiad U.S.A., Inc., 457 F. Supp. 3d 313 (S.D.N.Y. 2020).

distributorship for certain water filtration products. The contract provided a licensee-agent an automatic right of renewal provided that it met an annual sales quota of $50,000. Thus, reasonable efforts to sell the manufacturer's products were fixed to a given number of sales.

At one point, AWT was in arrears in its payments leading to Amiad's termination of the contract. The issue in the case was whether lateness of payment affected the right to renew. The court noted that the "continuing and responsible efforts provision was a condition precedent to automatic renewal, not an independent duty that subjected AWT to liability for damages in the event of noncompliance."[243] So AWT's failure to use reasonable efforts was not a breach of contract but merely resulted in its losing the right to renew. What made it worse was that AWT used its exclusivity rights not as an opportunity to sell Amiad's products but instead to sell the products of a competitor. The Court noted that merely selling competing products does not necessarily mean that a party had breached a best efforts obligation.[244] But, in this case, AWT used the exclusivity clause to minimize the sale of Amiad's products while increasing the sales of a competitor's product. Thus, by tying efforts to a renewal provision, Amiad created a prisoner's dilemma such as was the case in *Lucy, Lady Duff Gordon*.

The court seized on the language in the renewal clause that AWT was obligated to make "continuing and reasonable efforts"[245] to maintain its right of renewal but did not apply to the year prior to renewal. This meant the failure to use reasonable efforts was not a ground for a breach of contract. Thus, AWT was able to shirk its responsibility to sell Amiad's products for a year since the lack of reasonable efforts was ground for nonrenewal but not for the termination of the contract. The court also pointed to other language which stated that the parties would "cooperate on efforts to sell Amiad's products."[246] But the court held that this was not a mandatory obligation that would support a claim of breach. In the end, the court held that there was no need to imply a reasonable efforts obligation during the year the contract was in place since Amiad had amended its complaint alleging that AWC breached the implied duty of

243. *Id.* at 319.

244. *Id.* at 322, citing Joyce Beverages of New York v. Royal Crown Cola Co., 555 F. Supp. 271, 275, 277 ("a best efforts clause is nor per se breached by a mere undertaking of a competitive product line;" however, the court concluded that the engagement in a second distribution agreement was "factually and legally inconsistent with the best efforts obligation").

245. *Id.* at 316.

246. *Id.*

good faith by actively working against Amiad's interest during the period of exclusivity.

Covertly, the efforts of a party are often considered in the application of other contract doctrines such as the substantial performance, duty of cooperation, termination of contract and in the enforceability of satisfaction clauses. As discussed above, the substantial performance doctrine holds that if a party substantially performed and the other party's reasonable expectations have been met, then there is no breach of contract. A court would likely consider whether the performing party had used best efforts in making the substantial performance assessment. If the party failed to use best efforts and that failure prevented the party from achieving a more complete performance, a court may determine that the party in fact breached the contract under the rationale that the other party's reasonable expectations were not met (by implying an expectation of best efforts) or as an act of bad faith breach.

The idea of comparative negligence or fault is found in the civil but not the common law.[247] Nonetheless, the American duty of good faith and the English law's determination of breach presupposes a duty to cooperate in cases where such a duty is implied in the contract. If a party's performance is dependent on the cooperation of the other party, such as in the case when a buyer is expected to provide specifications for a product to be manufactured by the seller, then failure to cooperate would be a breach of contract. This poses two questions for the present inquiry: Are the efforts of a party a key factor in determining whether they failed to cooperate and does the failure to cooperate diminish the other party's duty to use best efforts? The most plausible answer is that the efforts of both parties should be considered when reaching a decision as to breach.

Efforts of the parties are likely a factor in the termination of long-term and relational contracts, such as commercial agency, franchise, distribution, and installment contracts. Should the termination of such contracts be more fully scrutinized for fairness under contract law? That is, even if the contract provides a right to terminate should the court intervene when a given termination works an injustice? The duty of good faith in the common law countries where it exists[248] would allow a court to recognize a bad faith termination. In making that determination, a factor

247. French Civil Code, art. 1240 (Fr.).

248. Some form of a duty of good faith is found in the United States, as discussed here, as well as in Australia, Canada, and, to a lesser extent, Malaysia. For Australia, *see* Bhasin v. Hrynew 2024 SCC 71 [2024] (Supreme Court of Australia; for Canada, *see* C.M. Callow Inc. v. Zollinger, 2020 SSC 45 (Supreme Court of Canada); for Malaysia see Lai Fee & Anor v. Wong Yu Vee & Ors [2023] 3 MLJ 503.

that is considered is the investment and efforts made by the agent, franchisee, distributor, and seller in performing under the contract. Statutory law has intervened in the area of franchising requiring the franchisor to provide adequate notice of termination allowing the franchisee more time to recoup their costs and benefit from their efforts in building the franchise operation.[249]

Installment contracts involve the delivery of multiple shipments of goods or services. Even though each installment is drafted as a separate contract, the law considers the installments as part of a single contract.[250] The core issue is whether a breach of one installment (late delivery or delivery of defective goods) allows for the termination of the entire contract. The efforts of the breaching party in prior installments, in curing the defective installment, and assurance as to future installments are considered in determining whether the receiving party has a limited right to reject the defective installment or a right to terminate the entire contract. UCC §2-612 limits the right of termination to cases where the defective installment "substantially impairs the value of the whole contract." This is the case in a small number of installment contracts. Otherwise, the efforts of the breaching party can prevent termination of the entire contract. Section 2-612(2) provides that if the breaching party "gives adequate assurance" that it will cure the deficiency then the buyer must accept the installment and the contract is preserved.[251]

2. Efforts Relationship to Contract Doctrine

Efforts can relate to performance obligations within the contract or obligations collateral to the contract. The clause may address a party's general obligation to complete a transaction or to perform a specific function, such as obtaining the regulatory approval or financing required to consummate the deal. These specific functions or conditions precedent are considered collateral obligations. In such cases, courts may ask whether the party used its best efforts to obtain the required approval or financing, even when the best efforts duty does not apply to the main

249. *See, e.g.*, Cal. Bus. & Prof. Code Div. 8, ch. 5.5. Article 3 of the state requires that termination can only be for cause and that the franchisor must give sixty days' notice to cure any deficiencies.

250. UCC. §2-612(1): "An installment contract is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause that 'each delivery is a separate contract.'" https://www.law.cornell.edu/ucc/2/2-106.

251. It should be noted that even if the installment is not curable the contract cannot be terminated unless the defect in a single installment substantially impairs the contract as a whole. The buyer's only right is to reject the installment when it is not curable.

contract. Efforts clauses have been interpreted differently by various courts and, consequently, may entail different requirements in different jurisdictions. If an efforts clause does not provide objective criteria a court may not enforce it due to vagueness. Regardless of the context in which it is used, the ultimate success of the contract and the parties' ability to reap the full benefits of their bargain will often be based upon each party's diligent and *good faith* adherence to the designated efforts standard.

As noted in the previous section, a major change in American common law occurred with the enactment of the duty of good faith in the UCC. Section 1-304 states that: "Every contract or duty within the UCC imposes an obligation of good faith in its performance and enforcement." This recognition was then incorporated into the *Restatement (Second) of Contracts*, which states that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[252] Section 2-103(1)(b) defines good faith in the case of a merchant as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."[253]

The duty of best efforts as discussed above is codified in Section 2-306(2) of the UCC. That section on exclusive agency contracts also references requirement and output contracts. Since the Industrial Age, requirement and output contracts had long been treated differently than regular sales contracts. An exception to the consideration doctrine was carved out to make such contracts enforceable. In requirements contracts the buyer has an exclusive right to set the amount of goods to be purchased, while in output contracts, the seller has the right to set the amount of goods to be sold. Since these rights can be construed to allow either party to set an amount of zero, they are considered to be illusory and unenforceable because one of the parties is not truly bound by the agreement. Common law courts rescued these agreements by implying that the parties had a duty to select a reasonable quantity to buy or sell. Section 2-306(1) states that such a quantity is an amount that "may occur in good faith except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded." What is a reasonable quantity is partly a function of the efforts of the seller or buyer, thus a reasonable quantity above or below previous installments or years due to additional efforts would be allowable.

252. Restatement Second, § 205.

253. *Id.*

The question remains whether the duty of best efforts is merely a duplication of what would be required under the duty of good faith. The court in *Grossman v. Lowell*[254] held that a best efforts clause required an additional obligation beyond the implicit duty of good faith. But this begs the question: What is the relationship between best efforts and good faith? If the objective approach is applied, the notion of good faith is beside the point since the key factor is what is considered best efforts in a particular business or industry and not whether failing to meet those standards is an act of bad faith. It is understandable to see how some courts have conflated the two duties. But the more plausible interpretation is that best efforts is a higher or rigorous standard than good faith.[255] Simply because a party underperforms does not equate to an act of bad faith. While good faith is defined as acting in an honest and fair manner,[256] best efforts is premised upon the standard of diligence or due diligence. Best efforts may also be based on the subjective characteristics of the parties,[257] while good faith is an objective determination. It is also important to note this, given factual scenarios support findings of the lack of best efforts and acts of bad faith. For example, a party fails to use its best efforts because it intentionally wants to harm the other party. Factually, it has breached the duty of best efforts and at the same time commits a bad faith act. If it fails to meet the threshold of best efforts due to more general business reasons that would not be an act of bad faith. Also to be noted is the duty of good faith is implied in all contracts, while best efforts are implied in some contracts. Finally, it is important to note that while an implied duty of good faith is rejected under English common law the duty of best efforts is accepted.[258]

254. Grossman v. Melinda Lowell, 703 F. Supp. 282 (S.D.N.Y. 1989).

255. *See* discussion *supra* Section E good faith and best efforts both incorporate an element of fault.

256. UCC 1-201(20): "honesty in fact and the observance of reasonable commercial standards of fair dealing."

257. *See* Bloor v. Flagstaff, *supra* note 216. Judge Friendly states that "a best efforts clause imposes an obligation to act with good faith *in light of one's own capabilities*." 601 F.2d 613, n. 7.

258. The equivalent phrase in English law to the American term best efforts is "best endeavors." *See* Sheffield Dist. Ry. Co. v. Great Cent. Ry. Co. (1911) 27 TLR 451; Terrell v. Mabie Todd & Co. Ltd. (1952) 69 RPC 234; Pips (Leisure Prods.) Ltd. v. Walton (1981) EGD 100; Rhodia Int'l Holdings Ltd. & Rhodia UK Ltd. v. Huntsman Int'l LLC (2007) EWHC 292 (Comm).

VI. FINDINGS

The above analysis shows that the use of best or reasonable efforts in the performance of contracts is a principle of the civil and common laws. The different legal terminologies shroud the inherent commonality of the systems' response to the efforts, or lack of efforts, of a breaching party. The major divergence, at least in theory, is the common law is less concerned with efforts because of its view that breach is a matter of strict liability. The reason for a breach, whether a breaching party exhibited best efforts or not, is said to be immaterial to liability. The civil law takes a closer look at whether the breach was the fault of the breaching party or not. If the party was not at fault, then it may not be liable for breach in certain cases.

But this distinction is not monolithic, since in the common law fault also plays a role in determining liability, and in the civil law the strict liability standard is often applied. In the common law, if a party has assumed an obligation to use best or reasonable efforts, then failure to do so makes breach a matter of the party's own fault. In American law, failure to use reasonable efforts, especially if tied to a motive of harming the other party, is considered a breach of the fault-based duty of good faith.[259] In the civil law, parties often assume obligations to use best or reasonable efforts to limit their own liability. By adding a best or reasonable effort obligation to the contract, parties clarify that their non-willful lack of performance may not entail a breach of contract if they did their best to perform.[260] The notion of best or reasonable efforts seems to be used in both directions (basis for a claim and a defense from liability). In contracts which require the parties to use best efforts to perform their obligations, providing best efforts can work as a defense to liability, as in the case of the civil law.[261] In contrast, contract liability in China is generally strict, as in the common law, where the notion of best efforts is more generally resorted to in order to punish a willful breach.[262]

This leads to the next question posed by this Article involving the meaning of best efforts across legal systems. In common law jurisdictions, the use of best efforts clauses are common.[263] As previously

259. *See* discussion *supra* subsections V.C-D.

260. *See* discussion *supra* subsections II.D and II.E. (France) and subsections III.B-D (Latin America).

261. *See* discussion *supra* subsection IV.D.

262. *Id.*

263. *See* Cameron Ross & Sam White, *Recent Judicial Consideration of Endeavours Clauses in Australia and Singapore*, 9 CONSTR. L. INT'L 9 (2014); Tian Yi Tan, *The Interpretation*

noted, such clauses modify the common law's principle of strict liability for breach bringing it closer to the civil law's concept of an obligation *de moyens,* or of means. In determining the meaning of such obligations, common law courts have varied in their interpretations. In *Sheffield District Railway v. Great Central Railway*,[264] an English court stated that best endeavors requires "leav[ing] no stone unturned." This standard requires extraordinary efforts, even those that are against the interest of the performing party. In *Coady v. Toyota*,[265] an American court disputed such a strict standard in applying best efforts: "Best efforts is implicitly qualified by a reasonableness test—it cannot mean everything possible under the sun."[266] It stated the mainstream approach that rejects the need to do everything within a party's capabilities (subjective approach), including financial ruin, in favor of an objective approach of what is considered best efforts in a particular business or industry.

Across the different legal systems, we find the same evolutionary debate of whether the meaning of best efforts is to be determined subjectively or objectively. Is the best efforts determination limited to an objective analysis (industry standard for specific type of contract) or a subjective standard (no matter the industry standard, what were the subjective expectations of the particular parties)? The former standard substitutes the actual party to the contract and replaces it with a third-party reasonable businessperson. It asks what efforts a reasonable person in that particular business or industry would have done in the place of the actual party to the contract. The subjective standard focuses on the actual parties and asks, given a party's capabilities, did it use its best efforts? It seems that all the legal systems surveyed here have wavered on the standard for determining the meaning of best efforts, with some courts using one or another, or both approaches.[267] Ultimately, the approach to meaning is dependent on the particular contractual relationship and other context-specific facts.

The core importance to understanding the role of efforts in contract law is its relationship to breach. The traditional common law view is that the use of best efforts is not a defense for breach of contract, that damages are premised on strict liability for breach—not on reaching a specific

of Endeavours Clauses, 27 SINGAPORE ACADEMY L.J. 250 (2015); Michael Greatrex, *The Pursuit of Certainty: A New Approach to Best Endeavours Clauses*, 25 AUCKLAND U. L. REV. 155 (2019).

264. Sheffield Dist. Ry., *supra* 258, at 451.

265. Coady Corp. v. Toyota Motor Distribs., Inc., 361 F.3d 50 (1st Cir. 2004).

266. *Id.* at 59.

267. *See* discussion *supra* subsection II.D (France), III.D (Latin America), IV.B (China), V.C (United States).

result. Although, the common law does make an exception when the subject matter of the contract inherently requires the use of best efforts such as in exclusive agency. In such cases if the performing party meets its duty of best efforts, it is not liable if it fails to obtain the expected result.[268] By contrast, French law and, partially, Latin American law, distinguish two types of contractual obligations: an obligation to achieve a specific result versus an obligation merely to use the appropriate means to achieve a specific result. In the latter type of contract, the failure to achieve an expected result is not a breach of contract, provided that the nonperforming party used its best efforts to perform. This is why best efforts is often raised as a defense by the nonperforming party so as to avoid liability for breach of contract.[269] As previously discussed,[270] Chinese law stands somewhere in the middle. In most contracts, the standard for contract liability is strict. However, the notion of reasonable or best efforts becomes relevant in some cases. It can be relevant if the Chinese Civil Code or the good faith principle provides so, because the parties included a best efforts clause in their agreement, because one of the parties acted maliciously, or because the negligence of the non-breaching party (in violation of its duty of reasonable efforts) contributed to the harm caused by the breach.

The differences between civil and common law are not as large as the above suggests. Much of the divergence is linked to the use of different terminology: Where the common law uses efforts or best efforts, the civil law uses the standard of diligence or the overarching notion of good faith. The question then becomes whether an obligation of means, (*de moyens*) under French law, is a functional equivalent to the Anglo-American concept of best efforts or best endeavors. The answer is that the terms are close in meaning since they ultimately relate to the type and context of a given contract. For example, in French law, the obligation of means is typically associated with distribution and dealership agreements.

An important ancillary issue is how the duty of best efforts relates to the more general duty of good faith. In American law, the failure to use reasonable efforts may support a finding of bad faith breach. But the two obligations are not equivalent. The duty of good faith is implied in all contracts, while the duty of best efforts is only implied into some contracts. In the case of lack of effort, the reason or motive for such effort is the basis for a bad faith breach, such as an intent to hurt the other party by not performing. However, failure to use best efforts may not be due to

268. *See* discussion *supra* subsectionV.D.1.

269. *See* discussion *supra* subsections II.D and II.E. (France) and III.B-D (Latin America).

270. *See supra* notes 157-168.

a bad faith motive but instead to general business or financial issues. So, the lack of best efforts may not be a bad faith act, but the party could still be in breach of the duty of best efforts.

French courts tend to conflate best efforts with reasonable and good faith efforts in requiring a party to do whatever is necessary to satisfy the reasonable expectations of the other party.[271] In determining the quality of the party's effort to meet reasonable expectations, French courts use subjective and objective evidence such as, the conduct and declarations of the parties, statements and relationships with third parties, and objective empirical data about sales and performance in a particular industry.[272]

Latin American law, as represented by the laws of Argentina, Chile, and Peru, borrows heavily from European civil law countries in recognizing the distinction between obligations of means and result (*résultat*).[273] However, the civil codes of Latin America, whether influenced by the civil codes of France, Spain, or Italy, contain their own provisions and differences on performance and breach of contract versus their European counterparts. The distinction is made more complicated since common law clauses such as best efforts or endeavors are commonly employed in Latin American contracts. In view of this, doubts arise as to how to interpret these clauses according to the relevant civil code. The first impression is that best efforts or endeavors are equivalent to *moyens*. However, a more detailed analysis shows that the concept of efforts has a broader meaning in Latin American legal systems.

The Chinese Civil Code adopted the principle of strict liability akin to the common law. But in specific contracts, especially in those providing services and in long-term or relational contracts, the performing parties are required to use their best efforts when performing. In these contracts, efforts play a significant role in deciding whether a party is liable for damages. Although the principle of good faith is the basis for implying a best efforts obligation, the due diligence and care related to best efforts is more onerous than what is required under the duty of good faith. In deciding if the best efforts standard has been met, again, the Chinese courts review the same elements found in the other legal systems,

271. Cour de cassation, civile, Chambre commerciale, 6 September 2016 (*Afid v. CSD*), ECLI:FR:CCASS:2016:CO00706; Cour de cassation, civile, Chambre commerciale, 9 December 2014 (CCCP v. SRC), ECLI:FR:CCASS:2014:CO01079; Cour de cassation, civile, Chambre commerciale, 7 January 2014, 12-17.154 (Milton v. APL), ECLI:FR:CCASS:2014:CO00019.

272. *Id.*

273. It should be noted that this distinction does not exist in European black-letter codes, but rather in scholarly and judicial interpretations. *See* discussion *supra* subsection III.A.

such as the nature of the contract, the expectation of the parties, a party's profession, and price, along with statutory rules, trade usage and business customs. The courts have imposed heavier liabilities on parties for failure to use best efforts. In sum, the efforts obligation covertly influences multiple areas of Chinese contract law and court decisions.[274]

VII. CONCLUSION

The scope of the best efforts duty, whether express or implied, is uncertain. Its use in exclusive agency contracts is understood across civil and common law systems. But a better view would see the duty of best or reasonable efforts as more broadly applied over a range of contract types. Since there is a general recognition of the implied duty of best efforts in exclusive dealings and, as noted above, best efforts clauses are found in all sorts of commercial agreements, the duty of best or reasonable efforts should be understood as a general principle of contract law.

The use of a comparative analysis of the civil and common laws to highlight the existence of an efforts obligation is the first step to understanding their essential commonality while appreciating their nuances in interpreting and applying such a duty. The above analysis shows that the contours of the efforts obligation are blurred and overlap with neighboring doctrines, such as those of good faith, diligence, *obligations de moyens*, and substantial performance. The comparative survey in this Article also shows that courts in all legal systems resort to the notion of best efforts as a flexible tool to either stretch the boundaries of liability when needed or to exempt the nonperforming party from liability when such liability would be too harsh.

This Article also demonstrates that the distinction between the strict liability approach to breach of contract in the common law and the civil law's use of the fault principle in determining breach is overblown. On the one hand, the duty of best efforts in the common law, and the duty of good faith in American law, are essentially based upon the principle of fault. The fault of one party shirking their responsibilities or acting in an inappropriate manner has resulted in a modification of the common law's stand that fault is not a factor in claims for breach of contract. On the other hand, the civil law legal systems that officially recognize the role of fault in contract law possess numerous exceptions that are akin to strict liability for breach in the common law. This is shown in the French-inspired distinction between *obligations de moyens* (fault-based) and *obligations de résultat* (strict liability). Thus, greater caution should be undertaken

274. *See* discussion *supra* subsection IV.C.

before adhering to conventional dogmas, such as under Anglo-American contract law where the intentionality behind a breach and the fault of the breaching party are irrelevant. Our survey demonstrates that actual case outcomes are hard to reconcile with the formal statement of general legal principles.