Corporate & Commercial

Minimum purchase obligation qualified by a best efforts clause. Test case in Spain

The case under consideration involved an interpretative problem: whether the distributor's obligation to make minimum purchases of the distributed product is subordinate to another clause requiring the use of best efforts to fulfil that obligation.

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1. Supreme Court Judgment No. 1228/2023 of 14 September

This ruling initially stands out on account of the legal doctrine regarding the possibility of a reserved judgment on liability (Art. 219 of the Spanish Civil Procedure Act) that it corroborates and builds on, a matter which will be addressed in another paper in this series. However, even though its impact is not as significant in terms of the weight of the arguments, the really novel aspect of this judgment is that it is the first Supreme Court judgment to have the opportunity, seized in part, to analyse the scope of a "best efforts" clause in Spanish law.

Iberia Visión Care, S.L. is a Spanish company that owns and manufactures eye care and eye cosmetic products, including Dermeyes and Healthy Colours, specialising in the marketing of optocosmetics. Menicon Holding Europe SAS is a French company engaged in the promotion of optical products. On 9 August 2010, the companies Iberia Visión and Menicon entered into an exclusive distribution agreement, whereby Iberia Visión appointed Menicon as the exclusive distributor in the French territory for sales of the products supplied by Iberia Visión, as set out in the aforementioned agreement, in France. Those products, according to clause [1], were identified in Annex I to the agreement, and were grouped into two categories:

treatment products and make-up products (Dermeyes and Healthy Colours). The agreement contained the usual clauses for an agreement of this type and included a prohibition of competition and an exclusive territory (France) in which the grantor could not operate. Clause 3, under the heading 'Menicon's Obligations', listed some (but not all) of the obligations contained in the agreement as a whole and included one whereby the distributor should "Make its best efforts to buy the Minimum Purchase Quantity established in this Agreement". Clause 8 constituted and quantified a minimum purchase clause binding on the distributor.

The grantor filed a claim seeking an order to make the minimum purchases or, in the alternative, pay the gross operating margin of the product corresponding to the minimum sales committed to in clause 8 of the agreement for each year of total or partial non-compliance, the payment of which would be carried out in the enforcement of the judgment through the procedure for assessing losses established in the Spanish Civil Procedure Act (LEC). At first instance, the court upheld the claim in the alternative, but adjusted the amount claimed, ordering Menicon to pay the gross operating margin of these products corresponding to the minimum sales that should have been acquired from August 2012 to August 2015. The parameters for calculating this pecuniary award would be based on a reference to the products purchased in the years 2010 and 2011 and in accordance with the commercial margins that were generated in those years, with no need for an update given that the products were not really going to be sold and the possibility of profit for Menicon was greatly reduced. The appellate court considered that the lower court had made a correct interpretation of the agreement in concluding that the obligation to purchase a minimum quantity of product annually was an obligation of result, not of means (mere effort to purchase a minimum quantity): "In the present case, it follows from the literal grammatical interpretation resulting from the reading of the agreement that the intention of the contracting parties was none other than the purchase by the defendant of a minimum volume of goods from the claimant for resale in the national territory of the French Republic, as is categorically stated in clause 8 of the agreement in question, so that no hypothetical sales targets were agreed, even if the term 'target' was used to designate resales, but rather agreed on the purchase of certain goods for annual periods, depending on the achievement of the targets set".

Menicon appealed in cassation, arguing that clause 4 of the agreement provided only for an obligation of means.

The Supreme Court's Cassation Division considers that the interpretation by the courts a quo of the agreement at issue is neither manifestly illogical nor contrary to the rule of interpretation contained in the Spanish Civil Code (CC). This is clear on the basis of the following considerations:

a) The first paragraph of clause 8 of the distribution agreement is drafted in clear terms, without any obscurity or ambiguity, which requires it to be interpreted on its own terms.

b) The wording of that contractual provision is not only clear, but particularly emphatic, in two ways: firstly, by unequivocally stating the clause's heading ("Minimum purchase quantity") and, secondly, by highlighting from the start the nature of this obligation as an "essential element of this agreement".

c) The interpretation given by the courts a quo is also consistent with the principle of greatest reciprocity in contracts with mutual consideration (Art. 1289 CC), since the minimum purchase obligation has, at least in part, its correlate in the exclusivity granted to Menicon (in respect of the products and territory agreed).

d) Although clause 3 is entitled "Menicon's Obligations", the obligations set out therein are not the only obligations incumbent on Menicon under the agreement in dispute. Thus:

- in clause 1, Menicon undertakes to purchase the products exclusively from Iberia Vision, and not to purchase others which might compete with the products covered by the agreement in dispute;
- in clause 2, Menicon undertakes not to sell the products outside French territory;
- in clause 5, Menicon undertakes to organise and bear the costs of transport between the point of delivery of the products and its own warehouse, and to place orders for the purchase of the products in writing; and
- in clause 8, Menicon undertakes, as an 'essential element' of the agreement, to purchase "a minimum volume of goods from Iberia Vision for resale in [French] territory each year".

Therefore, the fact that the latter obligation is not incorporated in clause three does not in any way mean that it is not an obligation incumbent on Menicon, enforceable by the very force of the agreement (Arts. 1091 and 1258 CC).

e) Although there is an obvious difference in the formulation of Menicon's obligation to purchase a minimum quantity of goods between clause 3 and clause 8, this contractual antinomy must be resolved in favour of the regulation contained in clause 8 as it is a specific undertaking exclusively devoted to regulating this obligation, by reinforcing its mandate through a very explicit label ("Minimum purchase quantity") and by defining that obligation as an "essential element" of the agreement, which excludes interpreting the use of the term "objective" in that clause as determining a non-binding and non-legally enforceable content.

f) The ancillary obligations referred to in clause 3, which are clearly of a medial or instrumental nature, are not incompatible with the existence in the agreement, as an essential element, of another distinct obligation of result (purchase of a minimum quantity of goods per year); on the contrary, given that the purpose of the agreement is not only the purchase but also the resale of the product on the French market, it is logical that the proprietor of the trade mark intending to expand its distribution network and achieve penetration of its products on that market should also have an interest in the success of that distribution. The fact that a minimum purchase quantity is agreed does not mean that the maximum possible purchase quantity is renounced, as these are two distinct and complementary objectives; nor does it mean that the manufacturer who owns the trademark has no interest in ensuring that his products, at the end of the contract, also have

the maximum presence and distribution on the French market.

2. Commentary

The interpretation offered by the Supreme Court would be indisputable if clause 3 did not list the minimum purchase obligation among those obligations covered by the best efforts rule. Moreover, the best efforts clause referred exclusively to the minimum purchase obligation. It cannot therefore be said, as the Court does, that the best efforts clause is medial or instrumental to Menicon's other obligations, nor that it contained an obligation of means to increase resale in France as far as possible. It referred to the minimum purchase obligation.

Nor is it decisive that the minimum purchase obligation was an essential term of the contract. It would not cease to be so, even if another clause stated that this obligation was not an obligation of result, but one of efforts or endeavours.

Nor is it that the principle of contractual reciprocity is better preserved by the interpretation adopted, so that the minimum purchase obligation would be the one corresponding to the undertaking of exclusivity which prevented the grantor from operating in France. It is an arbitrary selection among Menicon's obligations to identify one and only one that was specifically in correspondence with the undertaking of exclusivity.

If the wording were of any help at all, it would be precisely to strengthen Menicon's position, because the efforts clause explicitly refers to the minimum purchase obligation, but not to other obligations.

However, an overall consideration persuades us that the interpretation defended by the Supreme Court is the correct one. For the following reason.

An obligation of means/efforts can only be structured on the basis of conduct that is owed in terms of activity, because the result cannot be determined or cannot be ensured even if the obligor of the conduct were to devote itself sacrificially to the objective. The result is beyond the obligor's control of activity and risk. An obligation to perform surgery in accordance with the lex artis cannot be determined in retrospect of the result, because the possible contingencies of failure are not controllable. The obligation to pay a price, to deliver a thing, to purchase a minimum range of goods are determined by the result and are of interest to the obligee only as far as the result is concerned. The result is then in the context of the obligation, not in the context of chance. The obligee cares not whether the obligor uses or not best efforts to pay him 1000 euros.

With a best efforts clause linked to a result-qualified obligation, the obligor would be in a virtually better position than if the obligation were purely of result, a result that can be exempted on the ordinary grounds of force majeure. The obligor who owes best efforts does not "owe up to the limit of force majeure", but up to the extent of his means and talents, which are certainly below the force majeure ceiling. It does not make sense that in an obligation qualified by result, the obligor is released by the application of a lower standard of exoneration than in other obligations of result.

However, it is preferable to give a meaning to the best efforts clause than to deprive it of any meaning. This is the principle of effectiveness imposed by Art. 1284 CC. The Supreme Court does not attempt this coherence, which is possible. Indeed, although redun-

dantly, clause 2 creates an obligation of activity on the obligor, unnecessary when clause 8 has imposed the guarantee of result. One and the other converge, and the obligor, who guarantees the result, also owes the conduct causally provoking that result. Moreover, if the "best efforts" go beyond the conduct required by the force majeure standard, this excess conduct is also owed, diminishing the range of release.

Lastly, the Supreme Court does not stop to distinguish a best efforts clause from an obligation of means clause. Therefore, it does not even attempt to differentiate "best", "reasonable", "commercially reasonable" efforts, as the American legal literature fussily proposes. It is true that the "effort" to differentiate does not seem worthwhile, because in the view of the Delaware courts, which are the ones that matter, all forms "sound the same".