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MANY *force majeure* clauses include the proviso that they cannot be used to affect a contract if the relevant obstacle to performance could reasonably be overcome by the parties. In *RTI Ltd. v MUR Shipping BV* [2024] UKSC 18, [2024] 2 W.L.R. 1350, the question was whether such a proviso can require a party to accept an offer of alternative, but equivalent, non-contractual benefits, instead of using the *force majeure* clause.

Arbitrators initially answered "yes, as long as the offer is reasonable", but on appeal to the High Court ([2022] EWHC 467 (Comm), [2022] 2 All E.R. (Comm) 522), Jacobs J. answered with a firm "no". The Court of Appeal again reversed that decision ([2022] EWCA Civ 1406, [2023] 1 All E.R. (Comm) 501), concluding that it depends on the language of the clause, and on the facts, this meant that an offer must be accepted if it causes no detriment to the offeree. The Supreme Court has now turned the ship around once more, agreeing with Jacobs J. that – as a general principle – offers of alternative benefits do not need to be accepted instead of simply engaging a *force majeure* clause.

Under a contract of affreightment signed by MUR and RTI in 2016, MUR's vessels were to be used for RTI's shipping. The loading of each vessel triggered a freight payment to MUR, which was to be made in US dollars. Two years into the contract, RTI's parent company was sanctioned by the US Treasury, making it impossible for RTI make timely payments in dollars. MUR argued that the sanctions therefore constituted a *force majeure* event, such that they could serve a notice under clause 36.1 to suspend the contract until the sanctions were lifted.

RTI sought to reject this notice by reliance on clause 36.3(d), which stated that an event could only constitute *force majeure* if it "cannot be overcome by reasonable endeavors" (at [4]). They offered to make the freight payments to MUR in euros, and cover any additional costs involved in then exchanging that amount into dollars. Their argument was that MUR could therefore have "overcome" the effect of the sanctions by acting reasonably and accepting that offer. MUR, however, rejected it, and insisted that the payment be in dollars, as stipulated in the contract.

The arbitrators dealt with this point briefly, without citation of any authorities (at [11]). They concluded that RTI's offer involved no detriment to MUR; therefore MUR had acted unreasonably and could not rely on clause 36.1. This reasoning is clearly suspect. It presumes that the clause 36.3(d) "reasonable endeavours" proviso is a general obligation to act reasonably under all the circumstances, rather than an obligation to take reasonable steps to achieve a specific goal.

In the High Court, Jacobs J. addressed this criticism directly, concluding that the proviso required *only* reasonable endeavours directed towards

ensuring "performance of that bargain", meaning that MUR could not be obliged to accept alternative benefits (at [131]). Great emphasis was placed on why such an interpretation is normatively desirable (e.g. to protect commercial certainty), but nothing was said about how it relates to the specific language used by the parties.

By contrast, in the Court of Appeal, Males L.J. began with the specific text of clause 36.3(d). He held that the parties had used "broad and non-technical" terminology which had to be interpreted in a "common sense way" (at [56]). In turn, the common-sense understanding of "overcoming" a problem meant completely avoiding its adverse consequences. The arbitrators had already concluded that RTI's proposed solution would have left MUR with no detriment, and therefore, MUR could not serve the *force majeure* notice.

The key disagreement between the High Court and the Court of Appeal, therefore, was ultimately on the question of how to interpret clause 36.3(d). If the contract demands MUR take reasonable endeavours towards the goal of "overcoming" the impact of the sanctions, what does fulfilment that goal actually involve? Does it mean MUR is only obliged to facilitate performance of the strict letter of the contract (here termed the "strict-letter" interpretation), or must they also try to secure achievement of its broader commercial purposes through alternative means (the "general-purpose" interpretation)?

The correct approach to answering that question is well-established; the court should have asked what meaning the language of the term would convey to a reasonable observer possessing all contextual knowledge shared by the parties (*Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28, [1998] 1 W.L.R. 896, 912). This is what Males L.J. did. Quite remarkably, however, the Supreme Court admonished the Court of Appeal for framing the question in those terms (at [30]). They commented that reasonable endeavours provisos are a "very common feature" of *force majeure* clauses (at [26]), of such importance that they can even be implied (as in *Bulman & Dickson v Fenwick & Co.* [1894] 1 Q.B. 179). Given the general importance of the proviso, it should therefore have the same meaning in clause 36.3(d) as it would have had in any other contract, meaning "no particular significance can be attached" to the language used by the parties (at [29]).

The Supreme Court instead gave four reasons of principle in favour of the strict-letter interpretation, which did not rely on the specific language of clause 36.1. First, the proviso is normally intended to demonstrate that the causal connection between a *force majeure* event and a breach of contract remains unbroken by a party's unreasonable conduct, which requires application of the strict-letter view (at [38]). Second, requiring parties to accept alternative benefits, by adopting the general-purpose interpretation, would undermine their freedom of contract to strictly

define their rights (at [42]). Third, the strict-letter interpretation reflects the general proposition that parties should not be required to forego "valuable contractual rights" without clear words to that effect (at [44]). Fourth, the general-purpose interpretation entails too much commercial uncertainty, by introducing questions of whether proposed alternative benefits entail a "detriment" (at [49]).

The judgment then concludes with a review of the authorities. Those in favour of the strict-letter view were said to "provide strong implicit support", whilst those in favour of the general-purpose view were of "weak" support (at [102]). Notably, the court denied the relevance of the frustration cases, given that "the doctrine of frustration is the default position laid down by law", whilst *force majeure* clauses are intended to be more flexible (at [92]).

It should be accepted that these reasons of principle are, in themselves, relatively orthodox and indisputable. However, the problem with this reasoning is not the strength of those principles; it is the question of their relevance. As an express term, the reasonable endeavours proviso in *RTI v MUR* is binding not because it is normatively desirable, but because it is an expression of the parties' freedom of contract. How that term operates should therefore be determined primarily by reference to the parties' objectively manifested intentions, which involves a central role for the language of the specific clause in question. In choosing between the strict-letter and general-purpose interpretations, analysis should therefore have begun with the specific language of clause 36.3(d), not with generic reasons for why one interpretation would be more sensible than the other.

It is possible that such an analysis would have led to the same result on the facts. The Supreme Court might well have concluded that the use of the word "overcome" in clause 36.3(d) indicated no preference between the strict-letter and general-purpose interpretations. There are indications that this might well have been the court's view (e.g. at [29]). If that were the case, it would be perfectly acceptable to *then* refer to generic arguments of principle and precedent to determine which interpretation was most likely to have been intended. However, this conclusion should only come after explicit analysis of the language actually used, and only on the explicit understanding that it represents the court's best guess at the parties' intentions.

This may, therefore, appear to be a pedantic criticism – but it represents a serious need to re-emphasise the importance of textual analysis. Imagine, for example, that the High Court is now faced with a dispute concerning a reasonable endeavours proviso which requires parties to "overcome *or decrease*" the impact of a *force majeure* event. The scope of this language would be much broader than that used in *RTI v MUR*, suggesting that those hypothetical parties intended a more demanding "reasonable endeavours" obligation to attach to the *force majeure* clause. It might even be suggested that the parties are obliged to take reasonable steps to mitigate the costs that

the *force majeure* clause itself would impose in terminating or suspending the agreement.

Dealing with those arguments would require analysis that is rooted in the specific language of the clause, and the intentions that such language reflects. It is not aided by general observations about the ubiquity and importance of reasonable endeavours provisos. However, by focusing so pointedly on generic arguments of principle, and giving such short shrift to the linguistic analysis of the Court of Appeal, the Supreme Court has sent a potentially dangerous signal that such textual analysis is unimportant when dealing with any reasonable endeavours proviso – or, indeed, any other similarly common type of contract term. If the purpose of a *force majeure* clause is to give parties the flexibility that the law of frustration does not, then this signal is cause for concern.

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