OBJECTIVES OF THE OHADAC PRINCIPLES RELATING TO INTERNATIONAL COMMERCIAL CONTRACTS: FORMATION, VALIDITY AND INTERPRETATION

Sixto A. Sánchez Lorenzo

(Professor of Private International Law at the Universidad de Granada)

The unification of Contract Law is essential to provide market confidence and to provide common game rules. Foreseeability and an adequate calculation of costs and risks, both financial and legal, are fundamental in order to invigorate trade and facilitate international transactions. Proof of this is the arduous and costly attempts that are being developed both on a global scale (UNIDROIT Principles) and regional scale (OHADAC, PECL, DCFR). Apart from that, the harmonisation of Contract Law seems not only necessary, but rather convenient.

The improvement in the quality of Contract Law is often faced with a double-sided sword of rigidity in national legal systems. First of all is formal rigidity, fruit of the intrinsic difficulties of legislative procedures, in particular if they must be overcome via the reform of legal systems, such as civil codes, which by their very nature tend to be set in stone. Secondly, is the fact that national laws are constricted by the very view of purely national legal relations, which are in a world of their own and suffer from a lack of consubstantial consideration of the actual requirements of international trade? The peculiarities of international transactions demand different and diverse solutions adapted to this particular area, which are very difficult to be created by a national legislator who has its own local concerns to worry about.

The OHADAC Principles on international commercial contracts are an optional, soft law model. The Preamble of the proposed draft expressly states this in its first three paragraphs, clearly establishing that the Principles are only applicable when chosen by the parties. Said choice may be merely partial and, furthermore, the contractual clauses prevail over the Principles in the event of any dispute between the two, so that said Principles act as general terms and conditions regarding those negotiated individually.

Bearing in mind that the object of the Principles are contracts that are both commercial and international in nature, it is understood that the free will of the parties does not just prove the optional nature and system of the Principles, but also justifies other ends. On one hand, the imperative nature of the Principles is reduced to the minimum expression required by International Public Law criteria. And on the other hand, the principle of free will likewise strengthens the values of legal certainty and foreseeability of the parties in international transactions. The Sword of Damocles does not weigh upon contractual agreements, typical in Civil Law legal systems, by imposing the generic, required obligations of good faith, loyalty or equity. These general clauses, like the abuse of the right, are not considered to be regulating or interpreting principles of a general scope. On the contrary, more objective criteria have been opted for, such as reasonableness or common business sense when establishing the rules of the contract construction. As specified in the commentaries of the Principles (e.g. Article 4.2.1 on contract construction), this absence of general clauses does not mean that, under specific circumstances, certain requirements characteristic of good faith or equity cannot be put into objective terms, but their scope cannot revoke or correct the will of the parties clearly established in the contract. Lastly, the foreseeability and effectiveness of the agreements affects the assignment of the contract and third-party relations, as may be appreciated in Art 5.2.1, which recognises the effects of the provisions in favour of the third party, but severely restricts the rights of the beneficiary of that agreed by the parties.

However, unlike, for example, the explicit purposes set out in the UNIDROIT Principles, the OHADAC Principles are not, at any time, intended to emerge as a Model Law. The goal of Model Laws is to inform or inspire the reform of National Laws, which in fact can arise from the needs and criteria of national legislative policy, as far as contract law is concerned. Such action implies an invasive objective that generates reasonable reservations owing to the consequences it supposes from a cultural perspective. On the contrary, the OHADAC Principles do not aspire to align or standardise the Contract Law of Common and Civil Law legal systems, which remain intact, but rather to provide the contracting parties with a purely optional legal alternative.

Unlike the UNIDROIT Principles or other international harmonisation texts, the OHADAC Principles do pretend to be some sort of *ratio scripta*, a combination of *lex mercatoria*, or of the general principles of international commerce, which, in the case of the UNIDROIT Principles, is postulated as a reasonably applicable law in the absence of a choice of a *lex contractus* by the parties. In actual fact, the action of presenting such texts as a statement of *lex mercatoria* does not pass even the most basic test.

Obviously, the lenient and optional nature of harmonised regulations for Contract Law does not ensure its success or effectiveness to reach the sought after goals. One of the keys to success is an open and varied legal ground consisting in formulating Principles that are easily acceptable for the diverse legal systems involved, and culturally neutral if need be. To agree on a text, overcoming the errors and limitations that occurred in the drafting of not just the UNIDROIT Principles, but also those of the PECL and, in particular, the DCFR, is pivotal. The success of these texts in international commercial practise is very limited and contrasts with its enormous academic repercussion or influence as a Model Law for the review of national systems.

Indeed, very few international contracts submit to the UNIDROIT Principles, at least in comparison with the frequency to which English Law or other State legal systems are resorted to. The OHADAC Principles are about strengthening legal certainty and bringing legal systems together so as to facilitate choice and practical effectiveness.

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The sole purpose of the OHADAC is to harmonise the Caribbean Law within the framework of exclusively commercial transactions (B2B), and consequently is closer to the origin of the UNIDROIT Principles, without the obligations of the PECL to draft a Contract Law system that also had to serve consumer contracts. On the other hand, the drift from the DCFR, clearly inspired by the idea of a European Civil Code, emphasises the rupture of communication between the Civil and Common Law legal systems, clearly seen in the form of Book III, dedicated to a category of Obligations, a declaration of war if you will, between English Law and the very PECL.

The OHADAC must keep these experiences in mind in order to avoid making the same mistakes and aim for a text that is useful to commercial operators acting in a diverse legal framework. The Kantian principle that must preside over the drafting of OHADAC

Principles on Caribbean commercial contracts serves to draft a legal text that can likewise be considered useful and reliable for any operator in the Caribbean market, regardless of its legal culture. In short, it is a matter of respecting the principle of maximum consensus, which simultaneously must be guided by a series of principles or guidelines: a) Do not draft standards that may be culturally unacceptable or uncomfortable for a party or judge in a specific legal system; b) Create new measures only insofar as they resolve problems common to all systems, facilitating international commercial traffic security; c) Respect the rule of the minimum common denominator when discrepancies seem insurmountable.

The context of the region covered by the OHADAC requires, then, the abandonment of the legislative techniques imposed from above in favour of more lenient sources. It is befitting to begin *ab initio* with the certitude that one must find insurmountable areas and, to circumvent them, the rules must present the most imaginative formulas. In this sense, the OHADAC Principles must aspire to be more than just a set of legal standards called upon to regulate contracts if so chosen by the parties. They must stretch beyond dispute resolution to the very negotiation of the contract, providing Caribbean operators with an effective guide to render their international contracts more transparent and secure.

The construction of the Principles must first consider texts such as the Vienna Convention of 1980, the UNIDROIT Principles, the PECL or the DCFR, amended in accordance with the consensus imperatives previously mentioned. The standardisation with regards to the already existing international texts must be considered as a value, unless we arrive to the conclusion that, occasionally, they do not adhere to the three guidelines previously expressed regarding their acceptance by operators from all the legal systems involved. The OHADAC Principles will be prevented from overcoming the last hurdle of that acceptable consensus by all of the participants in the Caribbean market, regardless of the legal tradition.

To overcome the inconveniences of this self-imposed limitation, the OHADAC Principles shall, on occasion, become a sort of commercial law guide, proposing rules and common uses, providing model clauses allowing the parties to make up for the legal gaps or limitations through contractual schemes specifically designed for them,

whilst attending to the nature and aim of the contract and its expectations. This contribution - consisting in legal rules, recommendations of conduct and model clauses - constitutes the special distinguishing feature of the OHADAC Principles, the cause of its uniqueness and its essential contribution to comparative harmonisation.

Impartiality must likewise preside over the interpretation of the OHADAC Principles. Despite the provisions being drafted in both impartial and direct language, and that the commentaries form part of the regulations, facilitating their application, it is inevitable that doubts regarding their interpretation will arise. Section V of the Preamble includes a much more modest rule of interpretation in its objectives than those provided in other international texts (*ad ex.* art. 7 CV; art. 1.6 PU; art. 1:106 PECL; art. I-1:102 DCFR; art. 4 CESL). The Principles must be interpreted according to objective criteria, relying, in particular, on the commentaries of each Article or Section, bearing in mind at all times the harmonisation objective of the Principles within a framework of legal cultural diversity, such as is found in the Caribbean. However, the Principles do not purport to be applied, over and above their rules, to issues they do not regulate, unless there is a clear and obvious analogy or similarity. That is why parties are advised to assign, at all times, the domestic law that is able to fill in their gaps. Some of these gaps cannot be filled because it is difficult to obtain a legal rule that reflects a lowest common denominator in the Caribbean region, whilst others are simply caused by the effect specific to the dynamics of international trade.

One of the most characteristic differences between the legal families represented in the Caribbean area is the ability of the interpreter to legally interpret and develop statute law. While such an interpretation easily tends to legal creation through analogy or judicial development in Civil Law systems, the legal methodology of the courts in Common Law seems to favour an interpretation close to the written legal text that leaves the interpreter very little latitude. The OHADAC Principles deem it preferable for the gaps in the Principles to be filled through the application of Domestic law and that mechanisms of integration or application, by analogy, are not imposed and can be considered more flexibly, depending on the jurisdictional or arbitral nature of the dispute and the methodological tendency of the interpreter.

The Principles are not, then, an excluding alternative to the *lex contractus*. They do not necessarily work as the applicable law to the contract, even when the parties have expressly chosen so. When such a choice exists, arbitrators can, on occasion, decide to apply the OHADAC Principles as the true applicable law to the merits, without consideration of any other national legal system. However, this is not available before courts. Indeed, the possibility of considering the OHADAC Principles as the applicable law to the contract could only be argued, and with serious doubts, before Mexican and Venezuelan courts, the only signatories to the Inter-American Specialized Conference on Private International Law (CIDIP V), made in Mexico on 17 March 1994. In other Caribbean countries, the old principle proclaimed in the French *"Messageries Maritimes*" case, upheld by the *Cour de Cassation* on 21 June 1950, seems perfectly applicable, in the sense that the contract must be referred or submitted to the applicable law of a State. English Law follows the same criterion [Musawi v RE International (UK) Ltd. (2007), EWHC, 2981], as indeed does Regulation (EC) No. 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations.

It can thus be understood by the commentaries of Section I of the Preamble that the OHADAC Principles advise to complete the clause determining the applicable law by specifying the National law under which Principles must be integrated.

In fact, the chosen National law does not only serve as a set of default rules to make up for existing gaps, but will presumably play a restrictive function of the OHADAC Principles themselves, which due to their non-national character will not be considered, strictly speaking, as the applicable law of the contract, but rather merely the fruit of the substantive autonomy of the parties. The OHADAC Principles are aware of the restrictive role held by policy or international public policy laws, not just to the Domestic law applicable to the contract, but also the *lex fori*, the law of the country in which the contract was signed, or any other that presents a close tie. This general principle, provided in Section III of the Preamble, translates into, for example, the exclusion of the illegality of the contract (Article 3.3.1), which responds to this general principle.

On the other hand domestic laws, like the UNIDROIT Principles, play an auxiliary role for the application of certain rules, specific to the OHADAC Principles. A good example of this may be seen in the proposed Article 6.1.10 in cases of refusal of performance. This provision considers the possibility of performance, insofar as is permitted, respectively, by the Domestic law of the place of performance. Another good example is the interpretation of the revocability of the offer when the offeree establishes a period of acceptance, in which case the commentary of Article 2.1.5 states that "depending on the legal system applicable to the contract, such a clause may lead to consider the offer as irrevocable or, on the contrary, it is understood that after that time the offer will no longer be accepted."

Lastly, let us remind ourselves that the OHADAC Principles (Section IV of the Preamble) also contain a clause on commercial usages. In any case though, the particular contractual clauses that exclude said commercial usages will prevail, in virtue of the principle of free will. The general submission to the OHADAC Principles must not, however, suppose a radical non-application of such usages; in particular when owing to their general scope or speciality, they are reasonably applicable to the contract in dispute.

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The OHADAC Principles on international commercial contracts are but a general set of rules on international contract regulations. They do not contain regulations on specific contracts. The parties must therefore bear in mind the need to complete the regulation of contracts that are particularly specialised through specific clauses, model contracts, or even, failing this, submitting to a domestic law it deems appropriate or technically developed in order to meet the requirements for the regulation of its obligations.

As previously mentioned, like the UNIDROIT Principles, the OHADAC Principles deal exclusively with commercial contracts, excluding consumer contracts and, in general, contracts entered into for purposes other than professional or commercial ones. Likewise, contracts or business subject to Family, Probate or Donations law do not fall

under the Principles. Nor do the Principles apply to exchange obligations or negotiable instruments.

One of the insoluble problems in the unification of Private Law in Europe has been the vain attempt to unify two very different contractual legal systems. Such hindrance is one of the reasons for the failure of that regional harmonisation process, which focuses more on the harmonisation and unification of Domestic Laws than, in all fairness, the goal of facilitating the system of international business exchanges. The OHADAC Principles more clearly respond to the logic of international commerce with this more coherent logic allowing for more refined rules. Thus, the elimination of cause or consideration as requirements for contract validity (the proposed Article 3.1.1) is not problematic for commercial contracts, particularly if we consider the link of both doctrines with the system for donations and onerous contracts. In the same way, for example, in the event of several obligors, the presumption of joint and several obligations is established (proposed Article 4.4.2) is in keeping with a widespread principle in commercial contract, which nonetheless is substituted by the opposite presumption in lots of legal systems when it does not concern commercial contracts.

A second adjective is to do with the "internationality" of the contracts. This characteristic is related to that said with the aim of the Principles, beyond its possible value as a Model Law. It is based on the fact that international contracts respond to a substantially different logic and scenario to domestic contracts. Efficiency is a predominant factor in the former, whilst singular legislative policy values can prevail over the latter. Likewise, the axiological and cultural limitations operate differently - they are emphasised more in domestic contracts and not as important in international contracts. To put it in more illustrative terms, there is nothing that prevents the requirement of a lawful cause for a valid domestic contract disappearing in international contracts, or a court order regulating the former, whilst the extrajudicial regulates the latter.

The Principles strictly and exclusively deal with the system of contractual obligations. Judicial issues, property issues, issues involving non-contractual obligations, in addition to quasi-contractual issues are beyond the scope of the regulations. Nor is pre-contractual liability contemplated in the scope of the Principles. In the majority of legal

systems, the concept of *culpa in contrahendo* is deserving as an extrajudicial category, as evidenced in Article 1.2 (i) of the Regulation (EC) Num. 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations ("Rome I"), with relation to Article 12 of Regulation (EC) Num. 864/2007, of the European Parliament and of the Council of 11 June 2007 on the Law Applicable to Contractual Obligations ("Rome II"). The interest in excluding these issues is due, in addition to classification, to the diversity in treating said liability among the OHADAC countries' legal systems. Based on the principle of good faith, the penalty for abusive conduct during the negotiation stage is common not just in Civil Law systems, but also in the law of the United States (Sections 1-203 UCC and 205.2 Second Restatement of Contracts). However the English Law approach regarding liability during this stage is based on more stricter criteria - an all or nothing approach - that tends not to recognise obligations required by the principle of good faith throughout the negotiation stage [*Walford v Miles* (1992), WLR 174:16].

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The Principles are organised into 9 Chapters, preceded by an Introduction and a Preamble.

Chapter One, of a purely programmatic nature, provides the general principles on freedom of contract and the binding nature of the contract, in addition to general rules regarding the form and effects of declarations and notices and the computation of time.

Chapter Two, on the formation of the contract, comprises three sections, respectively dealing with the rules on offer and acceptance, the time and place of conclusion of the contract, and representation.

The validity of the contract is the object of Chapter Three, which includes five sections. The first section contains the general rules on validity, freedom of form and initial impossibility. The capacity of the parties and illegality are dealt with in the following two sections. The fourth section contains the so-called "defects of consent" and the fifth section the general regulations on contract avoidance.

Chapter Four refers to the interpretation and content of the contract. The first section contains the general rules on contract interpretation. The second section refers to the content of the contract. The third section characterises the contractual obligations, and the fourth section deals with the plurality of parties (obligees or obligors) within the framework of the contractual relationship.

Chapter Five relates the effects of the contract in two sections, the first of which considers the duration and expiration of the contract, with the second considering its effects on third parties.

The regulation of performance is the subject of Chapter Six. The first section delves into the particular issues relating to performance: time and place of performance, early performance, order of performance, partial performance or performance by a third party, forms and currency of payment, refusal of performance, public licenses and costs of performance. A second section establishes the rules on set-off, with the third and fourth sections dealing with the issue of hardship and contract frustration, respectively.

The regulation of non-performance is the subject of Chapter Six. Its first section contains a series of general provisions on the concept of non-performance, establishes fundamental non-performance, the scope of remedies for non-performance, the withholding of performance and the cure for non-performance, the extension of time for performance, the exemption or liability limitation clauses, and *force majeure*. The subsequent three sections establish the specific rules governing the remedies for non-performance: the right to specific performance, termination and damages.

Chapter Eight deals with amendments arising from the assignment of credits, debts, or the contract as a whole.

The last Chapter establishes the rules on limitation periods.

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To illustrate the scope of the rules contained in the Principles, I shall briefly refer to some of the issues regarding the formation, validity and interpretation of the contract, after which my fellow colleagues will address the remaining issues regulated.

The regime for forming the contract follows the regulations, provided in more detail under comparative Law, relating to the basis of the concurrency of an offer and acceptance by means of the principle of "receipt". The definition of offer (contained in the proposed Article 2.1.2), and in particular, its "precise" nature, aims to avoid rigid definitions through the use of more flexible formulas, which are essentially interpretive and of practice of international trade, steering clear from false disputes.

Disputes are, however, justified in specific cases. The revocability of the offer is one of the issues in which the analysis between the civil and common law systems appears most problematic. In particular, the notion of irrevocability when an acceptance period is established generates quite different results due to the fact that English law follows the general criteria that an offer can be revoked under any circumstances. Steering clear of drastic solutions, the Principles veer towards a solution according to the circumstances of the case, bearing in mind the position of the parties and, in particular their registered office or residence, drawing from a widespread rule of Private International Law, which prevents the establishment of consent when it is unreasonable in accordance with the domestic law of the declaring party.

The determination of a "new offer" (Art. 2.1.8) is likewise a delicate issue in that in Common Law, the acceptance must strictly comply with the offer (the mirror image rule), whilst in Civil Law systems the acceptance only constitutes a counteroffer if it substantially alters the terms of the offer. The solution of the Principles ensures legal certainty by opting for the English model so that any modification of the offer is to be considered as a counteroffer. Although the majority of the harmonisation texts tend towards a more flexible solution, depending on the "substantial" nature of the modification of the offer, an acceptance with non-substantial modifications does not imply the conclusion of the contract unless the original offeror declares its disagreement with undue delay. In practise, this rule also forces the offeree to wait for the offeror's confirmation during a reasonable period of time before commencing the contract performance, so that the costs, in terms of negotiations, are similar to those resulting from the waiting for a definitive acceptance of a counteroffer, which offers more legal certainty.

The aforementioned issue also impacts on the diversity of comparative criteria when it comes to resolving the so-called “battle of forms”. In this case, the proposed Art. 2.1.10 of the Principles opts for a different solution, based on the knock-out formula and does not follow the “last-shot rule”, instead preferring to maintain the contract according to the contractual balance of the parties. Nonetheless, it enables any of the parties to notify the others within a reasonable period of their wish not to bind themselves. At the same time, in order to resolve this issue, the Principles include a model clause that can be incorporated into the terms negotiated individually in the contract to settle the issue in a more conventional way.

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Let us now consider Chapter Three on the validity of the contract. The idea of the contract as a mere consensus, which requires no more than the existence of offer and acceptance to be considered valid, is of worthy note. The contract, thus, is defined by its strictly consensual nature (Article 3.1.1) with cause or consideration being unnecessary. Obviously, the validity of the contract can be affected by an objective condition, such as the lawfulness of its object, but this issue is not regulated by the Principles but rather by domestic, international or supranational International Public Order standards, as already stated.

Consequently, consent is the key for the validity of the contract, the avoidance of which uses a non-judicial model, much in the common law style, of notification (proposed Article 3.5.1). One of the most significant contributions of the Principles is perhaps its preference of a common regulation of various models of defects of consent, which are extremely different in comparative law, not only with regards to their definition but also, and above all, their consequences for the non-existence, nullity or avoidance of the contract.

This preference aims to include cases of non-existence or absolute nullity of the contract that prevent the existence of consent from being established, such as absolute violence, simulation or mutual mistake. Initial impossibility is not included in this list. The development of the technique and legal trends advise against considering initial impossibility of the object as a reason to render the contract null and void. It

could be done if said impossibility was due to an error, and in fact the English and American systems make use of this via the principles of *res extincta* and *res sua*. 3.1.3, linking initial impossibility to subsequent impossibility, such as *force majeure*, being indifferent to whether the hindering event or the impossibility is subsequent or, simply, occurs at the point of entering the agreement without the knowledge of the parties.

Clarifying some of these difficult concepts such as the ones I have highlighted, the definition of the defects of consent, which provide the affected party with the right to avoid the contract, are more easily understood. Thus, the concept of error is found under the English Law concepts of common mistake, unilateral mistake and innocent or negligent misrepresentation. The English and American doctrines of fraud and fraudulent misrepresentation are included in the civil law concept of fraud and fraudulent misrepresentation. The English and American concept of duress is included in the Principles' concept of threat, which excludes, as previously mentioned, absolute violence. Last but not least, undue influence is included as a more specific doctrine, translated for civil law systems as an "abuse of trust or dependence".

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Many more difficulties arise in finding common rules on the interpretation of the contract in Chapter Four. Seemingly, the Civil Law model, based on a subjective interpretation according to the true intention of the parties is in almost direct contrast with the objective interpretation employed in Common Law systems, determined by the parole evidence rule and the wording of the contract. However, the analysis of case law revealed new possibilities for unification, especially owing to the English law tendency towards a contextual interpretation in a wider sense, and the very international texts tending towards a less subjective interpretation of the contract, focusing more on object reasonableness.

The formula used to overcome the limitations of other texts, clearly prone to the civil law model, consists in starting from the initial principle of *in claris non fit interpretatio*, so that when the terms and conditions of the contract are clear, these will prevail (proposed Art. 4.1.1), otherwise a general rule based on an objective model will apply

to interpret the contract in a reasonable manner within the context of the contract (Art. 4.1.2).

Nonetheless, this position on an objective model of interpretation is regulated in consideration of the criteria to be borne in mind in order to induce a reasonable interpretation from the context. Consequently, evidence showing the true wishes of the parties, known by both and even negotiable elements, and the subsequent conduct of the parties are worthy entries amongst these criteria, which involves making the rule likewise feasible for civil law systems. Logically, objective details are also to be considered, such as the commercial usages, the object of the contract or even common business sense, in addition to other specific interpretation norms contained in the same section. Indeed, good faith can be included in these criteria, even in British courts, which in recent times have sometimes included good faith as an interpretive element. However, due to the difficulties entailed in both its accuracy and reservations, it does not form part of the common law legal system.

As a matter of fact, good faith does not appear either in the rule on the construction or resolution of gaps in the contract in the second section of Chapter Four (Art. 4.2.1), where an objective criterion is likewise opted for, meeting the reasonable demands of international commerce for an objective criterion covering contractual gaps, closer to the English criteria of implied-in-fact terms than the Continental model of good faith.

These are some of the signs of how the OHADAC Principles have been drafted with the utmost care, seeking to find a balance, however uneasy it may be, between legal certainty and the respect of cultural diversity.