PERFORMANCE AND NON-PERFORMANCE OF INTERNATIONAL COMMERCIAL CONTRACTS UNDER THE OHADAC PRINCIPLES

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The purpose of this paper is to discuss the regulation of contract performance and non-performance under Chapters 6 and 7 of the OHADAC Principles, respectively. To start with, I shall briefly address some issues relating to contract performance, following which, I shall discuss the general set of rules for non-performance and the remedies available as a result thereof.

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With reference to performance, it is to be highlighted that, in line with the international texts on Contract Law harmonisation, the Principles recognise the possibility of early performance, so long as it does not prejudice the obligee or undermine its legitimate interests, in which case said obligee may reject it. (Art. 6.1.3).

Likewise, along the same lines of the reference texts (with the exception of the UP), Art. 6.1.6 provides the possibility of performance by a third party with the express or implied consent of the obligor. The solution is, thus, more limited than that of civil law systems, which usually allow payment by a third party without the knowledge of the obligor, and even in cases against its will. Nonetheless, the option is justified as consent is a requirement characteristic of common law systems and results in the legal security and autonomy of will of the parties that have agreed to the Principles.

The Principles establish the importance of total performance in such a way as partial performance shall imply non-performance. However, the criterion is not as strict in that partial performance must be accepted when the obligor lacks a legitimate interest in refusing it (Art. 6.1.5). The solution chosen is in line with the essential rules of a comparative approach of the Caribbean legal systems.

It has been more difficult though to draft the rule concerning the refusal to accept performance from the obligor. The general rule is clear: the party that refuses or

hinders performance of the contract is in breach thereof. With that said, problems arise on controlling the possibility of the obligor discharging itself from its obligation faced with this *mora credendi.* In the majority of civil law systems, tender of payment and/or deposit in place of performance is taken into consideration in these cases. However in Common Law countries, a deposit is only possible if there has been a legal claim filed for it and, furthermore, if the obligation is non-pecuniary, the damage must be mitigated via the withholding or expropriation of property. Consequently, given the existing variety of the comparative analysis, the solution adopted in the Principles is deliberately open. Thus, for non-pecuniary obligations, the obligor must adopt reasonable measures to mitigate the consequences of the obligee, and the option of a deposit may be resorted to, both in these obligations and non-pecuniary obligations if it is a way of performance admitted in accordance with the national law of the place of performance. The rule fits in with a traditional principle of generally accepted private international law and according to which the conditions of performance of obligations are not subject to the law of the contract, but to that of the place of performance.

The second section of Chapter 6 includes a non-exhaustive set of regulations on set-off. The standards proposed are inspired on the comparative approach of the current legal systems, overcoming the gap between the civil law system, in which set-off is of a material nature, and the Common Law system, in which said set-off is strictly procedural.

For the obligations to be set-off under the OHADAC Principles, they must be reciprocal, homogenous (money, or fungibles of the same kind or quality), due and payable or performable, and of a fixed amount, unless the lack of a fixed amount will not affect the interests of the obligor.

In the debate on whether the set-off should be automatic and retroactive, or on the other hand, non-retroactive, the best solution, taking into consideration legal certainty, is for the set-off to be *ex nunc* following the corresponding notification from one party to the other.

However, the most interesting regulations from Chapter 6 are undoubtedly those found in Section 3 on the regulation of the excessive burdensomeness and frustration of the contract.

The rules on “hardship” attempt to regulate the occurrence of unplanned events throughout the performance of the contract that may make the obligation excessively burdensome for one of the contracting parties. Despite not being a recognised norm in a good part of the countries that adhere to the OHADAC, it was deemed necessary to draft a rule on hardship, which is particularly appropriate for successive, long-term international contracts, in addition to those contracts whose performance is postponed for a long time.

According to the Principle proposed in Art. 6.3.1, “hardship” consists in an event beyond the parties’ reasonable control which could not reasonably have been expected to be taken into account at the time of the conclusion of the contract (without the event needing to take place subsequent to said conclusion), and which unbalances the contract obligations (but not rendering the obligations unable to be performed, as in cases of *force majeure*), so long as the alleging party did not assume the risk of the event.

With regards to its effects, excessive burdensomeness entitles the parties to terminate the contract, following compliance with certain conditions to notify and prove the unanticipated event and to take all reasonable measures to limit its effects. In the interest of the parties' freedom to contract, neither the obligation to renegotiate the contract has been considered nor has the legal amendment or review of said contract, as this would lead to legal uncertainty in international commercial transactions. Nonetheless, if the parties so wish, they may include a hardship clause in the contract requiring the renegotiation and/or review of the contract by a third party.

Last but not least, Art. 6.3.2 considers the same right of termination whenever the unanticipated and circumstance beyond the control of the parties leads to the frustration of the purpose or aim of the contract.

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Chapter 7 of the OHADAC Principles provides the rules regarding non-performance of the contract and the remedies that shape contractual liability, which are of the utmost importance in the Law of Contracts of any legal system.

Non-performance is included in the Principles in accordance with two fundamental characteristics: its unitary nature and its objective nature. With regards to the former, there is non-performance when one of the parties does not carry out its contractual obligations. The objective or neutral nature meanwhile, supposes the existence of non-performance, regardless of the cause, wherein the obligor has failed to carry out its contractual obligations (in other words, irrespective of fault). Although *force majeure* renders inoperative certain remedies (specifically that of indemnification), it constitutes a case of non-performance because the obligee's right has been infringed, even if the infringement was justified.

Force majeure is provided for in Art 7.1.8, including the conditions generally required in OHADAC territory systems for a contract party to justify a breach of contract:

- Firstly, it must prove the existence of an event alien to its responsibility and beyond its control, and whose risk it has not assumed, and which could not be reasonably expected or taken into consideration at the moment of the conclusion of the contract, and which makes impossible the performance of its obligations;
- Secondly, it must be an event which could not be reasonably expected or taken into consideration at the moment of the conclusion of the contract (as in the hardship rule);
- Finally, the event must make the performance of the obligation impossible.

As previously said, these elements together render the remedy of indemnification inoperative. In addition to this, they also terminate the contract *ipso jure* from the time in which the affected party notifies the other of the event. Despite the termination *ipso facto* not being consubstantial to *force majeure* in every legal system, the Principles have preferred to opt for it and have nonetheless provided the other party with the right to uphold the contract, provided they so declare within a reasonable period of time.

Art. 7.1.5 of the Principles considers the right of the obligor to cure any non-performance. This is something that is not expressly regulated in all OHADAC legal systems. However it is not completely foreign to them and is appropriate in trade

relations in order to preserve the contract and mitigate any damages caused by non-performance. Nonetheless, the right is not unlimited and the obligee may refuse the cure if it has a legitimate interest in doing so.

The option for a unitary concept of non-performance allows the Principles to present a harmonious set of remedies formed of the following rights: Withholding performance (Art. 7.1.4); right to specific performance (Section 2); Contract termination (Section 3); and Damages (Section 4). The starting point for the application of all these remedies is the non-performance by one of the contracting parties. Thus, in some cases, these remedies are available only under specific conditions. So, for example, to directly resort to termination, fundamental non-performance must exist in accordance with Art. 7.1.2.

The remedies for non-performance may be cumulated if they are not incompatible with each other [art. 7.1.3 (2)]. In particular, the remedy of damages is compatible with specific performance and termination of the contract (Arts. 7.3.5 and 7.4.1). Furthermore, the OHADAC Principles provide for the *ius variandi* between remedies so long as said *ius variandi* was not exercised out of time and did not prejudice the obligor. Specifically, it allows the obligee to change from its right to specific performance to that of contract termination if it has not adequately obtained satisfaction of its right [art. 7.1.3 (3)].

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Art. 7.1.4 of the Principles provides the right to withhold performance, borne out of the legal remedy of *exceptio non adimpleti contractus,* and which is recognised in one way or another in all of the OHADAC territories. It is a defensive solution, typical of reciprocal obligations that allow it to legally deny the performance of the obligation it was bound to provide, as long as the other party has not performed or will refuse to perform its obligation.

The provision regulates the remedy, distinguishing it according to whether the obligee must perform after or at the same time as the obligor (Paragraph 1 and 2), with the last paragraph also allowing the withholding when faced with anticipatory repudiation. This is a much less drastic measure than that of termination, the aim of which is to

encourage the obligor to perform its contractual undertakings. For the affected party to benefit from this remedy, fundamental non-performance is not required. Rather, the logical scope of the right to withhold the performance shall be limited to that when an infringement to a party's rights has occurred, but the performance continues to be in the interests of the obligee, otherwise said obligee will resort to the termination of the contract.

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In the Principles' regulation on specific performance, a compromise has been reached allowing the bridging of the existing gap between Common Law and Civil Law systems. As a general rule, the remedy is granted in cases non-performance of all sorts of obligations, whatever their object may be (Art. 7.2.1), although due respect of the Common Law systems has been taken into consideration regarding the performance of non-monetary obligations (Art. 7.2.2). With this, the Principles seek to acknowledge the advantages of the remedy of specific performance, which responds to the binding force of the contract and is the most appropriate for the complete satisfaction of the obligee. However, it is also accepted that this right must have its limits.

The first two exceptions to the right to specific performance are common to all OHADAC legal systems: the physical or legal impossibility of performance and, in cases in which the performance is of an exclusively personal character of the obligor. The following two limitations are linked to Common Law and are based on the unreasonableness of the action: where performance demands unreasonable efforts or expenses for the obligor or, where the obligee may be satisfied in a more reasonable way. The last exception, also coming from Common Law, imposes an indirect limitation to the right of specific performance based on timely execution. Thus, the affected party loses the right if it does not demand specific performance within a reasonable time from it has known or should have known of the non-performance.

Specific performance encompasses the remedying or correction of a performance, when said performance is not in accordance with that contracted [Art. 7.2.1 (2), cases of defective or partial performance].

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The right to termination of the contract is regulated in the OHADAC Principles and is similar to those of international texts, combing the requirements for fundamental breach non-performance and the German "*Nachfrist*" technique. This solution, although not being included in some national legal systems, is not completely foreign to them.

Thus, Art. 7.3.1 grants the unsatisfied party the right to terminate the contract upon the occurrence of any non-performance (including defective or late performance), but under different procedures depending on whether or not the non-performance is fundamental. When there is a fundamental non-performance as provided in Art. 7.1.2, or in a clause established by the contracting parties, the affected obligee may terminate the contract without needing to grant an additional period, which in these cases would be pointless. However, if performance is still possible and useful to the obligee (non-performance that does not result fundamental either due to late or defective performance), said obligee cannot resort to the remedy of termination without providing the obligor with a reasonable additional period to make good on its obligor. After the expiration of the extension of time provided for in Art. 7.1.6 of the Principles to no success, the obligee may terminate the contract.

Despite the foregoing, the provision introduces a correction to avoid an opportunistic party using the termination remedy to escape a bad deal, alleging non-performance that is of no great importance. As a result, it provides that a party may only resort to termination when the consequences of the non-performance are minor.

With regards to the exercise of the right to terminate, the Principles propose an extrajudicial termination system requiring the non-performing party to notify the other party (Art 7.3.3). This is in accord with Comparative Law and presents noticeable advantages from a practical perspective regarding the judicial termination that dominates Civil Law legal systems. Not only is it a more flexible, efficient and less expensive model, but it also eliminates the uncertainty that hovers over the contract throughout the duration of legal proceedings, favouring the speed of traffic. This doesn't mean that the party can free itself from its contract obligations as it wishes given that the requirements for the termination may be contested by the other party, leaving the possibility of litigation or arbitration open in the event of a dispute.

The determination of an additional period must be accompanied by an invitation to perform. For this reason, in the event of termination following the expiration of the additional period, the obligee will normally issue to notifications to the other party, the first setting the new period of grace and the other stating its termination. However, the obligee is permitted, in one sole notification, to grant the new period and state that if the obligor fails to perform within said period, the contract shall be automatically terminated on the expiration thereof [Art. 7.1.6(4) and Art. 7.3.3(2) OHADAC Principles].

With regards to the effects of the termination, the effects of the discharge shall not be retroactive: the termination only discharges the parties from their future obligations and does not affect the performed obligations or those due and payable before the end of the contract, nor does it affect any clauses that do not directly concern the object of the provisions [Art. 7.3.4 (1) y (2)].

As for restitution of the termination, limited retroactivity has been opted for, looking only to the settlement of any existing dispute between the parties as a consequence of the non-performance. In the rule suggested by the Principles, the termination marks the birth of a legal obligation of restitution of the supplies received by the parties. Consequently, the party who has paid a sum of money in advance and has not received the due performance, may recover said sum. In non-monetary cases, the contracting party that delivers a good to the other, without receiving consideration, may also recover it. However, in this final case, if the recovery *in natura* of the delivered goods is impossible the restitution will be done by means of equivalent measures. This is also the case when the restitution is unreasonable due to excessive difficulty or at a disproportionate cost [art. 7.3.4 (3)].

Lastly, to eliminate the ownership status of the obligor of the restitution, an intermediate treatment has been opted for between the owner in good faith and the owner in bad faith. Thus, it must return, either *in natura* or by taking equivalent measures, the fruits and benefits received from the goods, but not what it ought to have received. Furthermore, it has the right to be paid the expenses that might have been incurred for the storage of the goods [Art. 7.3.4 (4)].

The rule is completed by granting the right to termination in the event of a fundamental anticipatory repudiation and a lack of reasonable assurance of performance (Art. 7.3.2).

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Section 4 addresses the remedy of damages, an issue that has a fundamental, practical alignment amongst the various Caribbean legal systems.

In accordance with the adoption of an objective non-performance provision, the remedy rules have ignored the fault of the obligor in breach to grant the affected party the right to damages. Consequently, the latter shall be appropriate, so long as the non-performance is not justified due to *force majeure* (Art. 7.1.8), or is covered by an exemption or limited liability clause (Art. 7.1.7).

Furthermore, the proposed rule eliminates the requirement for constitution in default for the right to damages to take effect. Despite the fact that a large number of Caribbean legal systems regulate the liability to pay damages due to late performance required from the obligor, the choice of the Principles is based on financial reasons, in addition to being quicker and more certain, all three of which are important in commercial relations, not to mention the fact that lateness goes against Common Law principles.

The calculation of damages focuses on the principle of full compensation. In the interest of this, it provides that damages shall include consequential damages and loss of profits and, if appropriate, financial damages or damages for pain and suffering, so long as these may be established with a reasonable degree of certainty [art. 7.4.1 (2), (3) y (4)].

Normally, the most appropriate measure to respond to this principle is considered to be the compensability of the positive interest or of performance, which is thus established by the majority of legal systems. However, in some instances, it may be difficult to calculate and attribute, which is why the Principles have opted not to regulate on it, preferring a more open rule that allows the affected party (or the judge or arbitrator) to calculate the damages in line with the circumstances.

More precisely, to facilitate the calculation of damages following the termination of a contract, the Principles positively embody rules of specific calculation (based on a substitute transaction has been made) and abstract calculation (based on the market value). These calculation methods are only expressly included in some Caribbean and International legal systems. These rules are of a mere evidential nature under the OHADAC Principles. They attempt to lighten the burden of proof that rests on the obligee at the time of calculating the damages, and not to limit the amount of the damages, given that the affected party can have resort to other additional damages (Art 7.4.5).

In dealing with late payment of financial obligations, Art. 7.4.6 grants the affected party the right to the interests agreed to in the contract from the time payment is due. This right to interest is not, in reality, damages; hence, the general rules on this remedy will not be applied to it. The interest is the product or fruit of the money, for which reason the non-performing party is obliged to make its payment even though the non-performance is justified, with no proof of damages being required. The affected party may also claim additional damages, so long as they are compensable according to the Principles.

As for the scope of the damages, Art. 7.4.2 of the Principles provides the rule of remoteness, establishing the distribution of risks for the consequences of non-performance of the contract based on the intent itself. Accordingly, the rule refers to both parties (not just the party to pay damages) and matches the foresight, or foreseeability, of the damage to the time the contract was entered into. In this way, the non-performing party shall be liable for the damages that are a probable consequence of its non-performance according to the ordinary course of events, and have been provided as covered risks in the contract or were reasonably foreseeable according to the circumstances that were taken into account at the time of concluding the contract of their own free will.

Two limitations to the right to damages are considered: the duty to mitigate the damage (Art 7.4.3) and contributory negligence (Art. 7.4.4). Both are limits that can be related to causality: the obligor must only to be liable for the damages it has

effectively caused, and not for the damages that are due to the victim's own conduct, facilitating or aggravating the damages.

The mitigation of damages constitutes a fundamental principle of Contract Law in Civil Law legal systems, and although not expressly mentioned in Caribbean Civil Code, the rule can be based on contractual good faith. The duty to mitigate assumes that the affected party has no right to the damages that it could (and should) have avoided or reduced adopting reasonable measures in accordance with the circumstances.

The second limit on the other hand results in the exclusion or reduction of the liability, depending on the degree of intervention of the injured party's conduct in the non-performance or in the causation of the damage. Its development in Contract Law has been greater in Civil Law countries given that the solid case-law development of the doctrine of mitigation in Common Law systems allows the majority of cases to be resolved satisfactorily.

Last but not least, it was deemed appropriate to regulate the penalty clauses in the Principles (Art. 7.4.7), allowing anticipated liquidation or prior estimation of damages, and not the so-called “cumulative penalty”, which would clash with Common Law legal systems. Nonetheless, it necessarily penalises the moderating power of the agreed damages, in order to control unreasonable and manifestly abusive stipulations.