

**OHADAC PRINCIPLES ON INTERNATIONAL
COMMERCIAL CONTRACTS**

2015

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ABBREVIATIONS

ADR	Alternative Dispute Resolutions
CESL	Common European Sales Law included in the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law of 11 October 2011.
CG	Convention on Agency in International Sale of Goods, held in Geneva on 17 February 1983
CISG	United Nation Convention on Contracts for the International Sale of Goods, held in Vienna on 11 April 1980
DCFR	Draft Common Frame of Reference
OHADA	Organization for the Harmonization of Business Law in Africa
OHADAC	Organization for the Harmonization of Business Law in the Caribbean
PECL	Principles of European Contract Law (Principles of the Lando Commission)
UCC	Uniform Commercial Code (USA)
UNIDROIT	International Institute for the Unification of Private Law
UP	UNIDROIT Principles on International Commercial Contracts

INTRODUCTION

1. Background of the OHADAC Principles on International Commercial Contracts

OHADAC (Organization for the Harmonization of Commercial Law in the Caribbean) was created as an institution the main objective of which is the convergence, harmonisation or unification of Commercial Law in the Caribbean countries. It is considered that harmonisation is the best way to facilitate and foster international trade in this regional area and also, in the long term, to join efforts so as to reinforce the region's role within the global market, all the while strengthening economic and political links among Caribbean countries. The Caribbean is a strategic region characterised by a distinctive political diversity, located in a geographic area of great interest for international trade, due to its proximity to major developed economies such as the United States or emerging markets such as Mexico, Colombia and Brazil. However, despite this proximity, even in cases where certain micro-states share the same island (Saint Martin/Sint Maarten), Caribbean States have not succeeded in establishing close communication from a legal or economic point of view. This has proved detrimental to their commercial relationships and closed the door to strategic alliances that could reinforce their common international standing.

The OHADAC Project was created on the occasion of a conference held in Pointe-à-Pitre (Guadeloupe) on 15 May 2007, organised by the Caribbean Community (CARICOM), the Caribbean Chambers of Commerce and Industry and the Pointe-à-Pitre Chamber of Commerce and Industry. Guadeloupe, led an initiative of the French Overseas Departments, with the backing of regional cooperation funds and INTERREG European funds, and consequently played a central role in the implementation of this project. It also defined the participation of other countries through the creation of regional and national chapters of "ACP Legal" associations. These are non-governmental organisations, which are today represented in several Caribbean countries.

In June 2008, a second OHADAC Conference was held in Port-au-Prince to define the priorities for harmonisation. In June 2010, OHADAC was the focus of the Latin-American and Caribbean Congress on International Commercial Arbitration held in Havana, which concluded with the "Declaration of Havana"¹ that formalised the

¹ The text reads as follows: *"Those attending the Latin American and Caribbean Congress of International Commercial Arbitration, Convinced that regional integration processes are a way to advance towards a universal process of globalisation, well balanced and respectful of the*

attempt to promote and advance the harmonisation of commercial law in the Caribbean. In October 2010, there was a training course in the field of commercial and investment arbitration in Panama, which was already aimed at drafting OHADAC Rules on Arbitration.

interests of all States belonging to the international community. Aware that legal harmonisation of commercial law is an effective tool to provide regional trade and greater legal certainty and minimize costs, facilitate trade, national economies development and their progressive integration. Convinced that Latin American and Caribbean countries, due to their geographical environment, need to generate mutual trust and relationships for their common interests through legal harmonisation processes that contribute, through their collaboration, to strengthen the international position of the region in international fora, especially those concerning unification and harmonisation of private international and business laws. Recognizing the importance of regional legal harmonisation experiences such as that represented by the Organization for the Harmonization of Business Law in Africa (OHADA) and other regional integration processes, Considering suitable to promote arbitration in legal trade & investment disputes, as a fundamental pillar of the harmonisation of commercial law in the Caribbean area, DECLARE: 1. To support the promotion of the "Organization for the Harmonization of Business Law in the Caribbean" (OHADAC) project. 2. To convene all Latin American & Caribbean countries, as Guadeloupe, Martinique, Dominica, Guyana, Saint Lucia, Saint Vincent & the Grenadines and others...to join this initiative by bringing together all the necessary elements to greater collaboration in order to harmonize their respective legal business systems. 3. To seek institutional cooperation on this project in those countries whose legal systems have a decisive influence on the formation of the respective national legal systems in Latin America and the Caribbean, as it is the case with Roman-Germanic, French, Spanish, Dutch systems and British Common Law. 4. To express the hope that other countries around Latin America join the OHADAC initiative. 5. To request OHADAC to promote and develop an international commercial arbitration institution. To provide it with modern and efficient regulation that takes into account the most recent contributions of comparative law, to fill gaps and move towards an arbitration that meets autonomy of the parties, respecting the States sovereignty, providing an efficient framework to the arbitrators, and ensuring the order issuance by optimizing the quality of justice, legal certainty and effectiveness of the pronouncements. 6. To promote the Caribbean comparative law studies, with a broad perspective, for a better understanding of our respective legal systems in order to provide legal harmonization business law contents. 7. To submit OHADAC to introduce in its agenda a subject catalogue of substantive laws, which harmonisation is considered desirable to achieve the objectives pertaining to the legal integration, particularly in the areas of commercial contracting, transportation, business registers, corporations, securities and payment methods, industrial property rights, insolvency law and border enforcement procedures of credit. 8. To collaborate with the identified objectives with exemplary and absolute respect for the States sovereignty, the diversity of cultures, values and political concepts in search of sincere cooperation to make possible the harmonization of legislation with the ultimate goal and main common interest to promote progress and economic growth for countries in the region, in addition to improving the living conditions of our Latin American and Caribbean Community peoples".

Within the context of the priorities established by OHADAC, four proposals were eventually considered concerning contract law, company law, private international law and arbitration, each geared towards different strategies. The OHADAC principles of international commercial contracts are aimed at meeting the harmonisation needs raised in the first draft legislative instrument. The work on a project began in October 2013 and was completed in December 2014.

2. The territorial framework of the Principles as a determining factor: the “OHADAC” territory

Although it was inspired by the OHADA experience, from the very beginning, the OHADAC Project was mindful of the divergences between the two organisations, which did not allow the mere importation of the strategy followed by primarily French-speaking African countries. In contrast with the basically common tradition of the States that constitute OHADA, right from its early days, the OHADAC Project was confronted with the diversity and heterogeneity of the Caribbean countries.

A significant aspect of the territorial context of the OHADAC Principles on international commercial contracts is the large number of international organisations around the Caribbean. Some countries belong to the Caribbean Community (CARICOM), the CARIFORUM, the Association of Caribbean States (ACS), the Organisation of Eastern Caribbean States (OECS), the Rio Group or the Community of Latin America and Caribbean States. The aim of these organisations, at least in part, is economic integration. Several countries belong to regional organisations that exceed the bounds of the Caribbean, but tend to similar goals in terms of legal harmonisation or economic integration: ALADI, ALBA, OAS (CIDIP), Commonwealth, etc. This plurality of international organisations is similar to the situation that characterised OHADA in Africa, where it did not prevent the successful harmonisation of commercial law through a new specific organisation such as OHADA is. Although OHADAC does not intend, at least in the beginning, to play a role as wide as that of OHADA in Africa, it is aiming to contribute to the same target in the Caribbean. The OHADAC Principles on international commercial contracts are therefore a key element to achieve this goal.

The OHADAC area concerns about thirty independent States and more than forty different territories. There are twelve continental countries, eleven of which are independent States: Colombia, Costa Rica, Guatemala, Honduras, Mexico, Nicaragua, Panama, Venezuela, Suriname, Guyana, and Belize. French Guiana is a French overseas community under French sovereignty. Island countries are more in number and more heterogeneous. On the one hand, there are the independent States: Cuba, Dominican Republic, Haiti, Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint

Vincent and the Grenadines, Saint Lucia, Bahamas, Barbados, Jamaica and Trinidad and Tobago. Then, there is also a set of countries under French sovereignty (the overseas departments of Guadeloupe and Martinique and the overseas communities of Saint Martin and Saint Barthélemy), under British sovereignty (Anguilla, Cayman Islands, Montserrat, Turks and Caicos Islands, British Virgin Islands and Bermuda (which is not part of the Caribbean in the strict sense), under Dutch sovereignty (Bonaire, Sint Eustatius and Saba, which belonged to the former Netherlands Antilles, after the new political status acquired on 10 October 2010). Finally, the special status of Puerto Rico (Commonwealth of Puerto Rico, unincorporated territory of the U.S.A.) must be stressed, as well as the Virgin Islands of the U.S.A. and Curaçao, Aruba and Sint Maarten (autonomous constituent countries of the Netherlands).

In political terms, OHADAC groups together one sixth of the States of the international community and around 260 million inhabitants. The linguistic and cultural heritage of these countries is as diverse as their levels of proximity with their former mother countries. While the Spanish-speaking countries have a wide tradition as independent nations that date back to the 19th century in all cases, many territories of French, English or Dutch tradition still belong to the mother nations or obtained independence during the second half of the 20th century.

The diversity is not only political, but also cultural. OHADAC territories show a large array of languages: Spanish, French, English, Dutch, apart from indigenous tongues, which are particularly common across the continent, and mixed languages (Creole and Papiamentu). Spanish clearly prevails on the continent and even in countries such as Belize, where English is the unique official language, but Spanish is commonly used. However, Dutch (Suriname) and French (French Guiana) are also spoken on the continent. This linguistic diversity, which is not necessarily cultural, gives a glimpse into significant differences in the legal sphere, which are not always self-evident.

Most of the continental and island countries of the Caribbean have legal systems based on civil law while their contract law follows French and Spanish traditions. French law extends its influence beyond its overseas departments and communities (Guadeloupe, Martinique, Saint Martin and Saint Barthélemy). Haitian contract law, which is basically included in its Civil Code, is based on the French civil law model. Dominican Republic, although it is a Spanish-speaking country and was for centuries a Spanish colony, shares these French roots, particularly in the legal field: its Civil code is word for word the same that the French. Likewise, Saint Lucia maintains, only in part, a French legal culture, directly imported from the Civil Code of Quebec. Spanish-speaking continental territories (Colombia, Venezuela, Costa Rica, Guatemala,

Honduras, Nicaragua, Panama and Mexico) have also incorporated the heritage of the Napoleonic Civil Code. It must be stressed that most of these countries, despite their Spanish tradition, achieved independence during the first quarter of the 19th century, that is, long before the enactment of the Spanish Civil Code in 1889. Spanish legal and cultural tradition has obviously been important in these countries. At the same time, the fact that the Spanish Civil Code itself is clearly based on the Napoleonic Code blurs and muddles legal influences that are very frequent. For their part, Cuba and Puerto Rico obtained their independence from Spain in 1898 and in both countries the Spanish Civil Code was in force for decades, even after independence. In the case of Puerto Rico, the influence from USA has also been relevant from a legal point of view, as well as in other common-law countries or in countries like Panama.

Civil law influence is also palpable within the territories (both continental and island) under Dutch sovereignty or tradition, and even exists alongside common law in countries such as Guyana. The former Dutch Civil Code corresponded to the Napoleonic Code and was in force in the Netherlands and its territories until the reform in 1992. The new Dutch Civil Code, inspired by German law, took a new turn (transferred to the Civil Code of the Netherlands Antilles and Aruba) and borrows significantly from the German BGB. Such a change has an impact in the contract law applied in the island countries subject to Dutch law (Bonaire, Sint Eustatius, Saba, Aruba, Curaçao, Sint Maarten) as well as in Suriname, an independent republic since 1975 but which has incorporated the new Dutch Civil Code into its legal system.

The influence of common law is evident, first of all, in the islands under British sovereignty (Anguilla, Cayman Islands, Montserrat, Turks and Caicos Islands, British Virgin Islands and Bermuda). The same influence exists in independent countries with a colonial past related to the United Kingdom. Under the aegis of common law are independent countries that belong to both the Commonwealth and the OECS (Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint Vincent and the Grenadines and Saint Lucia) or only to the Commonwealth (Bahamas, Barbados, Jamaica, Trinidad and Tobago, Guyana and Belize). Caribbean Commonwealth countries have kept the British court procedural structure. In most of these countries there is a court of first instance (High Court) and a Court of Appeal. The OECS countries (Anguilla, Dominica, Saint Kitts and Nevis, Saint Vincent and the Grenadines and Saint Lucia) have these two instances within a common jurisdiction: the Eastern Caribbean Supreme Court (ECSC), whose headquarters is located in Saint Lucia. The highest court of appeal (or court of last resort) is mainly the Judicial Committee of the Privy Council in England, which has been replaced in some States (Barbados, Belize and Guyana) by

the Caribbean Court of Justice, based in Trinidad and Tobago. There is an ongoing debate in Caribbean legal spheres about the continued jurisdiction of the Privy Council.

Common law applies in the Caribbean islands by virtue of different titles and historical reasons. The method of reception of English common law varied depending on whether the countries were claimed by settlement or by conquest or cession. In the first case (Antigua, Bahamas, Barbados, British Virgin Islands, Montserrat, Saint Kitts and Nevis), the reception of common law was through settlement and no further legal rules were necessary. Conversely, colonies incorporated by conquest or cession generally kept the law in force at the moment of conquest or cession (Belize, Dominica, Guyana, Grenada, Jamaica, Saint Vincent and the Grenadines, Saint Lucia and Trinidad and Tobago), so that incorporation of common law usually required the enactment of specific statutes of reception. However, this distinction of titles is purely indicative, since in actual fact, the history of reception of common law in Caribbean countries is hard to untangle. Thus, for instance, in the British Virgin Islands, the Common Law (Declaration of Application) Act was enacted in 1705, and although equity law was not formally extended until the West Indies Associated States Supreme Court in 1969, it is accepted that such a manifestation of English law was actually applied by Courts long before that date. In practice, application of common law is based on legal rules [e.g. Section 31 Supreme Court of Judicature Act, Ch 117 (Barbados); Section 48 Judicature (Supreme Court) Act (Jamaica); Section 12 (Supreme Court of Judicature Act, Ch 4:201 (Trinidad and Tobago); Section 15 Supreme Court Act, Ch 53 (Bahamas); Civil Law of Guyana Act (Guyana) Ch 6:01] or implemented by proclamation (e.g. Proclamations of 1763 for Dominica, Saint Vincent and the Grenadines or Jamaica) or in constitutional texts. In the case of Jamaica, reception took place, as mentioned above, in different ways, particularly through the establishment of its colonial status in Section 22 of the Statute 1 Geo II Ch 1 of 1728.

In countries under British sovereignty, the special relationship between English law and the colonies implies that the relevance of English statute law is very similar to that of independent countries. In principle, Statutes and Acts of Westminster Parliament generally apply in the colonies when they expressly or clearly establish it (Colonial Laws and Validity Act, 1865), but such an application shows blurred boundaries due to the legal powers of the colonies themselves, a presumption favouring restricted effects of written law to United Kingdom and a principle of non-interference in the law of the Commonwealth countries. This was the pronouncement of the Privy Council in *Al Sabah v Grupo Torras et al* [2005, 2 WLR, 904 (CI)], a case that involved relationships between English statutes and the legal autonomy of the Cayman Islands.

In any case, distinctive characteristics are more pronounced in the countries that not under British sovereignty. Obviously, the evolution of Caribbean systems based on their own requirements and particularities is nowadays at the heart of legal debate. Not only is the appropriateness of maintaining the appeal system through the English Privy Council is often questioned, but also, Caribbean courts emphasise the need for adjusting common law to their own evolution since independence (decision of the Trinidad-Tobago Court of Appeal in *Boodram v AG and Another*, 1994, 47, WIR 459).

It is true that the specific characteristics of Caribbean systems compared to English law are manifested mainly in matters closer to their cultural and ideological roots such as family law (same sex marriages) or public law, than in contract law. However, OHADAC Principles on international commercial contracts could contribute to forging the identity of Caribbean law and also enhance harmony with the common law tradition.

The influence of common law is also present in the increasing significance of US law in some Caribbean systems such as Puerto Rico, the American Virgin Islands or even Panama. Some “Americanisation” of the Caribbean common law has also been pointed out. However, these influences are not often pure. For instance, Puerto Rico shares a marked civil law culture as is the case with small countries such as Saint Lucia or Guyana, which are often considered as mixed or hybrid systems. In Guyana, the civil law culture inherited from Dutch law survives together with the common-law tradition. Their relationships are evident in the *Civil Law of Guyana Act* (Guyana) Ch 6:01, which tries to streamline and adapt the surviving institutions of Roman-Dutch law to common law. The hybrid system of Saint Lucia combines common law elements with French influences, the legal system of Quebec and indigenous institutions within its Civil Code of 1879, adapted to common law in 1956 [*Civil Code (Amendment Ordinance)*], particularly in the field of contract law (Article 917 A). The uniqueness of this hybridisation can be represented by the turning of English consideration into civil law requirement of “causa” [*Velox and Another v Helen Air Corporation & Others*, 1977, 55 WIR 179 (CA)]. The Saint Lucia Civil Code is currently being reformed.

The asymmetry of influences and legal traditions reappears in international sources of contract law, which must also be considered in the framework of a strategy of regional legal harmonisation. The 1980 Vienna Convention on the international sales of goods (CISG) has been ratified by Cuba, Dominican Republic, Honduras and Colombia, as well as by common-law countries such as Saint Vincent and the Grenadines and Guyana. Certainly, United Kingdom is at this moment out of the Convention, but it has been ratified by the USA, France and the Netherlands. The CISG, widely inspired by trade usages, has probably been the main influence of the UNIDROIT Principles on

International Commercial Contracts and it provides a significant starting point in contract law.

Legal diversity in the Caribbean region therefore constitutes a challenge, well-known in the sphere of contract law unification in Europe and worldwide. The acid test will be the achievement of a legal text equally acceptable to common and civil law cultures.

3. Goals of OHADAC Principles

OHADAC Principles on International Commercial Contracts obey a soft law model. Soft harmonisation implies drafting rules and regulations that are not directly imposed on the States involved, but offered as a kind of recommendation or model law that both States and individuals can freely incorporate into their legal systems or relationships. Such a soft character has the advantage of allowing a more finished, sophisticated and less politically conditioned drafting of rules and proposals for harmonisation. Soft law rules can become hard law through their unilateral adoption by OHADAC States, but also if OHADAC progress toward to a more institutional organisation. The European Union is using this strategy for the harmonisation of contract law and private law. A soft strategy can be immediately implemented. If results are positive, this will lead to the moving on to more ambitious approach in the near future.

Unlike attempts for international harmonisation of contract law through a soft law approach, some recent theories put forward in the field of legal harmonisation, even in the most economically integrated regions such as the European Union, have pointed out the convenience of diversity in national laws in order to promote competitiveness of legal systems. Given that the field of international trade is characterised by autonomy of will, parties should be informed enough to choose the court or the law most suited to their needs.² This is a significant approach in the process of

² According to the European Commission itself, “[I]n many cases the market creates problems of public concern, but it also develops its own solutions. The effectiveness of the market in responding to different social values and to public opinion should not be underestimated. As a result of competitive behaviour, many of the problems created by the market may be solved automatically by the pressure exercised by the interest groups involved (consumers, NGOs, enterprises. Public authorities can enhance this coincidence of self-interest and public interest” (Communication to the Council and the European Parliament on European Contract Law, OJ 2001/C 255/01, 49). This understanding is translated into option I (no Community action), supported in the answers to this Communication presented by the British government, the London Investment Banking Association, the European Publishers Council, The International Chamber of Commerce and a wide array of traders, especially in the spheres of sea transport and telecommunication.

harmonisation of European Private Law. It deals with what some have defined as “the efficiency of diversity”.

This approach is very debatable, especially when it deals with private law, less susceptible than public law to the need for competitiveness. Competition between public legal systems could perhaps be efficient for individuals (tax incentives, attractiveness of company law, etc.), but by definition, competition between legal systems turns out to be impossible in contract law when two oppose each other. This is because there will always be different legal systems that benefit each party, so that an agreed law would inevitably lead to a misrepresentation by the better-informed party and would present a risk to legal certainty in general. Moreover, this competition reflects a deep contradiction from the viewpoint of economics and the law itself. Given that one of the main arguments in favour of unification is rooted in such an approach, particularly insofar as diversity between legal systems results in external costs of information and distortion of competition conditions, which harmonisation will internalise or eliminate.

However, practical reality rather than theory provides the definitive criticism. Even with a lot of imagination, it is impossible to conceive that parties to international contracts are fully familiar with the various national contract laws, gambling on the most competitive system and perhaps even considering the many possibilities of *dépeçage*, where the different parts of the contract are governed by different laws. Even if this scenario is conceivable, one has to analyse the real cost, for the average merchant, of storing and updating of this information. Common practice shows that in international trade each party usually insists in applying its own law, ignoring absolutely the scope and contents of the rules and legal systems of the other party's country. That is why there are often very serious delays in negotiations and contracts can be frustrated. To avoid this deadlock during negotiations, a compromise has to be found when two parties ask that different competing national legal systems be applied. To reach an acceptable agreement, the legal system finally chosen must be known by and appropriate for all parties, which is why usual solution is the election of the legal system of a third-party State. The OHADAC Principles seek to provide a neutral legal system that facilitates negotiations and guarantees legal certainty for the parties.

The unification of contract law is therefore necessary to reinforce the legal certainty of the market and to establish common rules for all players. Predictability and accurate calculation of both economic and legal costs and risks are essential to boost and facilitate international trade. The arduous and costly attempts implemented both at

the international (UNIDROIT) and regional (OHADA, PECL, DCFR) levels are proof of this. It is well-known that choosing to apply English law or of the law of the stronger negotiating party usually helps to break the deadlock over the law to be applied. Nevertheless, the submission of a contract to a national legal system, whatever it may be, does not mean that the best solution has been found. The harmonisation of contract law can reduce the negotiation and drafting costs of international contracts, by providing simpler legal rules, reliable translations and foreseeable regimes for all parties.

Moreover, legal harmonisation does not only appear necessary, it is also relevant. The improvement of contract law quality often comes up against the rigidity of national legal systems on two levels. There is first a formal rigidity due to difficulties inherent to the law-making process, especially when there is the reform of legal instruments such as civil codes, which have a natural tendency to ossification. Secondly, national laws are constricted by their own understanding of domestic legal relationships that constitutes their material sphere of application, and they suffer from an inherent lack of consideration of the needs of international trade. The specific characteristics of international business require solutions adapted to this special, different and heterogeneous sphere that will hardly be satisfied by the options of a national law-maker absorbed by local concerns. An effective global law cannot be based on local law. The harmonisation of contract law in an international geographic area is therefore an opportunity to be seized. It offers a chance to create a high-tech contract law based on the potentiality of comparative method in its most subversive interpretation. For this approach to be successful, the lawmakers must take some postulates into account, know the limitations and overcome them with imaginative alternatives.

The flexible and optional character of a harmonised contract law does not guarantee its success or its effectiveness in achieving the intended goals. One of the keys to success in an area characterised by remarkable legal diversity lies in the formulation of principles that are easily acceptable for the various legal cultures concerned. To obtain a law that is accepted by all, it is essential to avoid the limitations and mistakes made in the UNIDROIT Principles, PECL and especially in the DCFR. The scope of those texts is rather limited, in contrast with the significant impact on academia and their influence as Model Laws on the reform of domestic laws.

From the impressive work carried on preparing the UNIDROIT Principles, there is no doubt that the same process to find a European Contract Law has produced a remarkable legal and doctrinal effort, able to provide regulations much improved and more attractive than the old and often confusing domestic laws. There is a legitimate

interest that the results of this enormous comparative work be useful in regenerating national private laws. The choice of adaptation present in the reform of the German BGB in 2002 has been followed by other domestic legal systems and today, European contract law both positive and *in statu nascendi* is a mandatory reference in all reform or codification projects of national laws.

However, very few international contracts are governed by UNIDROIT Principles, at least in comparison with the frequent submission to English Law or other domestic laws. It must be expected for the DCFR to be as little used as PECL as governing law. In practice, their rules have barely achieved the profile of “narrative rules”, used by judges and arbitrators to support their decisions with an erudite or *ad abundantiam* quotation, but rarely as direct grounds for a decision that opposes national laws or a particularly novel solution that fills in a gap. On the other hand, the approach that presents these rules as an expression of the *lex mercatoria* does not meet the most basic criterion. Arbitration practice shows in many cases a reasonable recourse to some rules of the UNIDROIT Principles, which in fact reflect and abridge rules and principles commonly accepted in international trade. Most of the arbitration awards that apply UNIDROIT Principles seek to construct and integrate the CISG, generally in a very reasonable manner. However, the ability of these rules as an exclusive basis of a determinant legal argument is doubtful, especially when they contradict other relevant domestic laws; and, above all, an application en bloc of these rules as governing law of the contract becomes hazardous when it is well-known that some of these rules are interventionist, novel and ignorant of the liberal tradition of international commercial arbitration. Therefore, the assertion, for instance, in *ICC Award No. 7110/1995* (*Bull. CCI*, 1992/2, pp. 39-54), justifying the application of UNIDROIT Principles as bearer of neutral general principles that reflect an international consensus, cannot be generally accepted without an accurate process of analysis of considered legal questions, comparing the proposed solution in UNIDROIT Principles with its origin in relation with the most representative legal systems and the current legal practice. Likewise, in a prudent sense, the *ICC Award No. 11526/2003* states that UNIDROIT Principles do not necessarily imply a reflection of generalised trade usages³ and the *ICC Award 11926/2003* defends that UNIDROIT Principles must be contrasted with the domestic law that would presumably be applied in the absence of choice of law or that has a

³ <http://www.unilex.info/case.cfm?pid=2&do=case&id=1416&step=Abstract>

close connection with the contract, in order not to introduce rules that could not be foreseen by the parties⁴.

In some authors' opinion, the reason for the low competitiveness of international texts drafted as a more efficient alternative to a simple choice of domestic law by parties is the scant number of traders who participated in the drafting of Principles and other harmonisation texts. However, such a circumstance does not sufficiently explain the lack of acceptance and resonance of legal systems that are manifestly more technically developed than any domestic law. UNIDROIT Principles, no matter how optional in the whole and how compatible with contract clauses and trade usages they are, are soft with regard to their effects, especially due to the optional nature of their rules, but are definitively not soft regarding their form. Although it not complete, the subjects covered in these Principles are intended to be completed and rounded up through a legal body that could be compared with a domestic legal system. Under this process, the UNIDROIT Principles must take sides and opt for a concrete model of regulation. Sometimes, such a decision has opted in crucial matters for the civil law model, which advocates for substantive justice rather than legal certainty, to the detriment of the alternative provided by English law. In other words, UNIDROIT Principles have preferred definition to respecting the rule of the highest consensus and have courageously opted for some solutions that in certain cases may not be the safest or most accepted in international trade.

The PECL have maybe been more compliant with and influenced by such a consensus, but in many aspects they provide the same solutions as those included in UNIDROIT Principles, with an additional inconvenience: they aim to create a general system of contract law valid both for commercial contracts (*B2B*) and consumer contracts (*B2C*). The European backdrop to this text tones down the criticism, but the consistency of such an option is hardly acceptable, at least if the main goal of harmonisation is to contribute to improvement of international trade.

The OHADAC Principles have a single objective: harmonise the law of Caribbean countries within the exclusive framework of international commercial contracts (*B2B*). They are therefore closer to UNIDROIT Principles and are not hampered by the limitations suffered by the PECL, whereby the same rules had to be extended to consumer contracts. Furthermore, the drift of DCFR, openly inspired by the idea of a European Civil Code, emphasised the break in the dialogue between civil and common laws demonstrated, for instance, in Book III, which is devoted to the category of

⁴ <http://www.unilex.info/case.cfm?pid=2&do=case&id=1405&step=Abstract>

“Obligations”, which is a sort declaration of war against English Law and the PECL themselves.

OHADAC must take these experiences into account to avoid the same mistakes and to produce a text relevant for traders who operate in a heterogeneous scenario. The Kantian principle that must orient the drafting of OHADAC Principles on International Commercial Contracts consists in preparing a text that could be considered equally useful and reliable by all traders within the Caribbean market regardless of their legal culture. In short, it deals with the need to respect a high consensus, which must be conducted by a set of boundaries that must not be crossed: i) avoiding rules that could be culturally unacceptable or not comfortable for a party or a judge of a legal family; ii) creating new rules only insofar as they can solve concerns common to all legal systems, thus facilitating international commercial trade and commercial certainty; iii) observing the rule of lowest common denominator when differences are insurmountable.

The context of the region covered by OHADAC requires, thus, not only giving up the legal techniques imposed from above and favouring soft sources. It must also be assumed right from the beginning that there are certain to be irreducible questions, for which imaginative solution will have to be found. In this sense, OHADAC Principles must try to be more than a set of legal rules that will govern a contract when chosen by the parties. They must extend their functions, over and above the settlement of disputes, to the negotiation of the contract proper, providing Caribbean traders with an effective guide to make international contracts more transparent and safer.

Following this line, the choice of OHADAC Principles must be considered in any case as a useful means of establishing a system of rules that will complete contract clauses, maintaining, in case of contradiction, the prevalence of contract clauses. Secondly, such a choice must not become a mistaken manifestation of the integrity of contract law, since there will inevitably be shortcomings, as well plurality of interpretations, which will be a more difficult issue. In this sense, OHADAC Principles must not prevent the parties from establishing a benchmark legal system that will offset both legal and interpretative gaps, as proposed in the commentaries to the Preamble.

On another note, the draft of OHADAC Principles must take into account texts such as CISG, UNIDROIT Principles, PECL and DCFR, adapted to the principles of consensus mentioned above. The uniformity of the OHADAC Principles with existing international texts will be considered as a value, unless in concrete cases it turns out that these texts sometimes do not meet the three conditions set out above in relation with the acceptability by traders of the different cultures involved. The OHADAC Principles will

stop at the last boundary of that acceptable consensus for all participants in Caribbean market, irrespective of their legal culture.

To overcome the obstacles arising from this voluntary restraint, the OHADAC Principles will sometimes become legal and business guide of sorts, proposing common rules and usages and providing standard clauses that will make up for gaps or legal limitations through contractual regimes especially designed by the parties according to the nature and the object of the contracts and their own expectations. This integrated supply of rules, conduct recommendations and standard clauses are the distinctive traits of the OHADAC Principles and the reasons for their uniqueness and essential contribution to comparative legal harmonisation.

4. Scope of material application of the OHADAC Principles

On one hand, the OHADAC Principles on International Commercial Contracts are limited to a general legal regime of international contract law. There are no rules on specific contracts, which means that parties should assess whether or not they need to complete the regulation of particularly specialised contracts with specific clauses, standard contracts or even through a subsidiary submission to a national law that they consider especially suitable or technically developed to regulate their obligations.

On the other hand, the OHADAC Principles are limited to contractual obligations in the strict sense. Questions related to procedure, property, torts, as well as quasi contracts are not considered. Pre-contractual obligations are also not included in the scope of application of the OHADAC Principles. In many legal systems, the so-called *culpa in contrahendo* deserves a tort or non-contractual characterisation, as evidenced by Article 1.2 i) of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I") itself. The relevance of excluding this last matter is due, besides a question of characterisation, to its divergent treatment in the legal systems represented in the OHADAC territory. On the ground of good faith principle, the sanction of abusive conduct during negotiations is a commonplace in civil law systems as well as in USA law (Sections 1-203 UCC and 205 of the *Restatement (Second) on Contracts*). However, the approach of English law is based on a more rigid principle ("all or nothing approach") that usually does not recognise good faith obligations during negotiations (*Walford v Miles*, 1992, WLR, 174:16).

OHADAC Principles apply exclusively to commercial contracts, excluding consumer contracts and any contract with no professional or commercial object. Therefore, contracts related to family law and succession law and gifts are not considered. Finally,

OHADAC Principles are not useful in obligations related with bills of exchange and other negotiable instruments.

5. Participants in the drafting of OHADAC Principles

Preparation of the Draft of OHADAC Principles was entrusted by ACP Legal to a research team composed entirely by experts in comparative contract law.

The following experts participated in the debate and writing of the original Draft, under the direction of Dr. Sixto Sánchez Lorenzo, Professor of the Faculty of Law of the University of Granada (Spain):

Dr. Ángel Espiniella Menéndez, Professor of the Faculty of Law of the University of Oviedo (Spain).

Dr. Fernando Esteban de la Rosa, Professor of the Faculty of Law of the University of Granada (Spain).

Dr. Rosa García Pérez, Professor of the Faculty of Law of the University of Granada (Spain).

Dr. Pilar Jiménez Blanco, Professor of the Faculty of Law of the University of Oviedo (Spain).

Dr. Ángeles Lara Aguado, Professor of the Faculty of Law of the University of Granada (Spain).

LL. M. Rosa Miquel Sala, Assistant in the Faculty of Law of the University Bayreuth (Germany).

Dr. Patricia Orejudo Prieto de los Mozos, Professor of the Faculty of Law of the Complutense University of Madrid (Spain).

Dr. Francisco Pertíñez Vílchez, Professor of the Faculty of Law of the University of Granada (Spain).

Dr. María Luisa Palazón Garrido, Professor of the Faculty of Law of the University of Granada (Spain).

Dr. Ricardo Rueda Valdivia, Professor of the Faculty of Law of the University of Granada (Spain).

Dr. Carmen Ruis Sutil, Professor of the Faculty of Law of the University of Granada (Spain).

Dr. Carmen Vaquero López, Professor of the Faculty of Law of the University of Valladolid (Spain).

Besides the aforementioned persons, the following experts of the Henri Capitant Association have participated in the revision and final draft of the OHADAC Principles:

Dr. Denis Mazeaud, Professor of the Faculty of Law of the University of Paris II (Panthéon-Assas).

Dr. Phillipe Dupichot, Professor of the Faculty of Law of the University of Paris I (Panthéon-Sorbonne).

Dr. Cyril Grimaldi, Professor of the Faculty of Law of the University of Paris XIII.

PREAMBLE

- I. The OHADAC Principles on International Commercial Contracts will be applied, in whole or in part, when the parties have so agreed.**
- II. Unless otherwise stated, the rules included in these Principles may be excluded or modified by the parties. Contractual clauses that are contrary to these Principles will prevail.**
- III. These Principles do not prevent the application of overriding mandatory rules or international public policy rules of national or international origin, which are applicable according to Private International Law rules.**
- IV. These Principles do not prevent the application of commercial usages in international trade.**
- V. These Principles will be uniformly interpreted in accordance with their international scope.**

COMMENT

1. OHADAC Principles as the law applicable to contract

The main goal of the OHADAC Principles on International Commercial contracts is to provide traders, individuals and companies established in the Caribbean with a useful tool for regulating their international contracts that will facilitate legal certainty in their mutual contracts and in those with third parties.

Moreover, the OHADAC Principles seek to be easily applicable by arbitrators as well as by the domestic courts of the various Caribbean countries. In this sense, they provide solutions for the convergence between the national systems involved and based on a comparative analysis. They do not therefore incorporate any rule that directly distorts any legal culture represented in the Caribbean.

Therefore, the OHADAC Principles, unlike any other non-national contract legal systems, such as the UNIDROIT Principles on international commercial contracts (Preamble) or PECL (Article 1:101), do not intend to represent or entail a body of general principles of law and in no way be an expression of the presumed or hypothetical *lex mercatoria*. Application of the OHADAC Principles is therefore only suitable when parties have expressly submitted their contract to the OHADAC Principles or they have unequivocally incorporated them as the applicable law (paragraph I of the Preamble). In other case, judges and arbitrators should determine the applicable law to contract according to private international rules in force in their respective legal systems or arbitration rules applicable in the case.

Consequently, when parties have established an arbitral solution for possible controversies derived from the contract, a simple clause submitting the contract to the OHADAC Principles is advised, as follows:

“Parties agree to submit this contract to [or “This contract is governed by”] the OHADAC Principles on International Commercial Contracts”

The OHADAC Principles are, thus, a basically optional regulation. Such an option must derive from an unequivocal agreement of the parties. When such a choice exists, arbitrators sometimes can 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 merits could only be argued, and with serious doubts, before Mexican and Venezuelan courts, insofar as only these two States have ratified the Inter-American Convention on the law applicable to international contracts (CIDIP V), made in Mexico on 17 March 1994. In other Caribbean countries the old principle proclaimed in the decision in the French case *“Messageries Maritimes”*, upheld by the *Cour de Cassation* on 21 June 1950, remains in force, so that any contract must be referred or submitted to the applicable law of a State. The same criterion governs under English Law [*Musawi v RE International (UK) Ltd.* (2007), EWHC, 2981] and under the Regulation (EC) No. 593/2008, of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

In short, when controversies that may arise between the parties are submitted to national courts, it is advised to complete the choice of the OHADAC Principles clause with a subsidiary determination of the national law under which Principles must be integrated. In fact, the chosen national law does not only work 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 as the result of substantive party autonomy incorporated by reference. Such a clause ought to be as follows:

“Parties agree to submit this contract to [or ‘This contract is governed by’] the OHADAC Principles on International Commercial Contracts. Failing these Principles, the contract will be submitted to [or ‘governed by’] the law of State X”.

2. Partial choice of the OHADAC Principles on International Commercial Contracts

Due to the optional nature of the OHADAC Principles and the fact that the Principles are considered as a non-national legal system, parties can agree to incorporate only a part of the Principles, exclude a chapter or some rules.

Dépeçage is a common practice in comparative private international law systems. The partial choice of the OHADAC Principles does not exactly comply with this concept of private international law. Although the OHADAC Principles may be partially incorporated in the contract as an integral part of the contracts agreed between parties, the parties must be aware, particularly in jurisdictional controversies, that to replace the portion of the Principles that have been excluded, they should provide for the direct and full application of contractual clauses and, especially, of the national applicable law in accordance with of rules of private international law. The clause offering a double choice is all the more recommended in this case.

3. Prevalence of contract clauses

On principle, the OHADAC Principles are not mandatory rules. Therefore, parties can exclude a part of the Principles as well as introduce into the contract exclusions and modifications of specific rules. These modifications and exclusions may be express or implied. In particular, rules in Principles that contradict contract clauses will be

considered as void or modified, regardless of whether they have been individually negotiated or included in standard terms or forms incorporated to the contract.

Judges and arbitrators will give priority to contract clauses if they imply nullity or modification of the rules included in the OHADAC Principles, regardless of whether the parties have stated this in these terms. Commentaries to these Principles occasionally offer examples of contract clauses to modify the proposed rule in the Principles. The contents of the Principles are often restricted to minimum or common rules, than can be amended and adapted through clauses closer to national idiosyncrasies or to specific needs of the parties. In short, the general principle included in paragraph II of the Preamble [also in Articles 6 CISG; 1.5 U.P.; 1:102 (2) PECL; II-1:102 (2) DCFR; and 1.2 CESL] means that a generic submission to the OHADAC Principles cannot be interpreted in such a manner as to void the contract clauses established by the parties.

The only exception to this rule is when the Principles exceptionally and mandatorily set out rules declared either expressly or implicitly because it is considered inherent to the rule. For example, the reserve concerning the application of national, international and supranational rules on contract illegality (Article 3.3.1) is inherently mandatory, which means that they cannot be excluded by the parties. For international public policy reasons, these rules can be excluded neither by the parties nor by the Principles. Furthermore, some rules that guarantee a free contractual will, such as those that govern the nullity of the contract for reasons of fraud, duress or undue influence (Articles 3.4.6, 3.4.7, 3.4.8 and 3.4.9) or as those limiting abusive exemption clauses, liquidated damages or modification of limitation periods [Articles 7.1.7, 7.4.7 (2), 9.2 (2) and (3), 9.4 (2) and 9.6 (3)], would contradict most basic arguments in favour of contract morality and international public policy. For these reasons, such rules cannot be excluded from the application of the OHADAC Principles and contract clauses contrary to these rules will be considered as void or unenforceable.

The mandatory nature of some rules does not prevent parties from excluding them expressly, even en bloc, by virtue of clauses of governance by the OHADAC Principles. Then, parties may choose the OHADAC Principles and exclude Section 4 of Chapter 3 relating to defects of consent, which is largely mandatory. In this case, a partial choice of the OHADAC Principles is effective and defects of consent will be governed by the applicable law determined by private international law rules

However, when the parties are generally bound to the OHADAC Principles, it implies that parties accept the exceptional and mandatory nature of certain rules, so that clauses contrary to those rules will be deemed to be void. On this point, submission of parties to the OHADAC Principles must be interpreted as resulting from precautions

taken by the parties or the advantages derived from subjecting their contract to a self-supervision by excluding contract clauses that could be contrary to the mandatory rules of the OHADAC Principles, the reasonableness and comparative acceptance is beyond all doubt.

4. Compatibility of the OHADAC Principles with international mandatory rules

Closely related to the principle set out in paragraph II of the Preamble, paragraph III states the compatibility of the OHADAC Principles with the need (or relevance) to apply and take into account national and international overriding mandatory rules (including those of supranational scope) or international public policy rules.

It is very commonplace in international contract law that parties are unable to prevent the application of overriding mandatory rules of national, international or supranational origin, in force in the country of the forum (*lex fori*) or even in a third-party State with a close connection to the contract, especially in the State where agreed obligations must be performed. This principle of private international law, well known in comparative law and more and more usual in the arbitration field (apart from the *lex fori* in some cases), is set out in Article 9 of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, in force in the United Kingdom, France and the Netherlands, as well as in Article 11 of the Mexico Convention in force in Mexico and Venezuela.

A choice of the OHADAC Principles cannot lead to or prevent the application by the judge or arbitrator of the above-mentioned rules if they deem that they are applicable in the case in point. A similar rule is found in Article 1.4 U.P. and in Article 1:103 PECL.

5. Prevalence of trade usages

The OHADAC Principles are a generic regulation of international commercial contracts that aims to provide legal certainty and uniformity to the legal regime of international contracts concluded in the Caribbean region. In the same way that the specific rules contained in contract clauses have prevalence over these Principles, Paragraph IV of the Preamble specifies the prevalence of international trade usages. This notion is not confined to general international trade usages, but also includes, particularly, specific usages generally accepted in a given branch of international trade, and specific usages established by the parties in their commercial relationships.

Choosing that the contract is subject to the OHADAC Principles must not lead to the presumption of inapplicability or voidness of trade usages. Trade usages in civil law have an interpretative as well as a normative scope, as expressly stated in many laws [e.g. Articles 1.023 of the Costa Rican Civil Code and 436 of the Costa Rican

Commercial Code; 1.135 and 1.160 of the Dominican and French Civil Code; 926 of the Haitian Civil Code; 6:248 (6.5.3.1.) of the Dutch and Surinam Civil Code; 546 of the Honduran Civil Code; 1.796 of the Mexican Civil Code; 2.480 of the Nicaraguan Civil Code; 1.109 of the Panamanian Civil Code; 1.210 of the Puerto Rican Civil Code; 1160 of the Venezuelan Civil Code], and confirmed in drafts such as the Draft Project of Reform of the Law on Obligations prepared by the French Ministry of Justice in 2013 (Article 103). Likewise, trade usages are recognised in English law by statutes (Sections 14 and 55.1 Sale of Goods Act of 1979; Section 55 Sale of Goods Act Ch 393 of Antigua and Barbuda; Section 55 Sale of Goods Act, Ch 15.18 of Montserrat; Section 55 Sale of Goods Act, Ch 337 of Bahamas; Section 55 Sale of Goods Act (Ch 83:30) of Trinidad and Tobago; Section 56 Sale of Goods Act (Ch 261) of Belize; Section 54 Sale of Goods Act of 1895 of Jamaica) and by common law, as well as in the USA [Sections 219-223 Restatement (Second) on Contracts and Sections 1.303 c) and 1.205 UCC]. English courts recognise the normative character of trade usages on the ground of the theory of implied terms, in particular by custom, to the extent to which they are clear and evident, even regardless of their consideration or factual predictability by the parties [*Comptoir d'Achat et de Vente Belge SA v Luis de Ridder Ltd*, 1949, AC, 293; *Henry Kendall & Sons v Lillico & Sons Ltd*, 1969, 2 AC 31 (HL)]. However, it is obvious that parties' practices and particular usages play a more modest role, insofar as subjective context has less significance than objective context in the interpretative tradition of common law.

Likewise, Article 9 CISG affirms the binding character of usages voluntarily established by the parties, as well as of normative and objective usages generally observed in the international trade involved. The same scope derives from Articles 1.9 U.P., 1:105 PECL, II-1:104 DCFR and 67 CESL.

The wording of Paragraph IV of the Preamble is deliberately open. Judges and arbitrators will consider in each case the existence of a trade usage between the parties, according to concurrent evidence. Likewise, they will consider signs and expert declarations to conclude the existence of a branch or general usage, the legal enforceability of which will depend on its regular accomplishment, the degree of its knowledge in international commerce and the particular situation of the parties.

In many cases, trade usages are collected by organisations such as the International Chamber of Commerce and reveal a uniform commercial practice in different branches, such as international sales, payments, letters of credit, demand guarantees, etc. This standardisation is also evident in the development of standard contracts and policies prepared, aside from the ICC, by organisations such as GADTA and FOSFA in

the branch of commodities; FIDIC and ORGALIME in the branch of engineering; ISDA in financial contracts; BIMCO, GENCON, BALTIME, GENWAYBILL, MULTIDOC95, CONGENBILL and FIATA in transportation, etc.

6. Interpretation of the OHADAC Principles

The interpretation rule included in Paragraph V of the Preamble is deliberately much more modest than similar rules in other international texts (e.g. Articles 7 CISG; 1.6 UP; 1:106 PECL; I-1:102 DCFR; 4 CESL).

The various language versions of the Principles have been drafted using clear words and language that is as plain as possible. They aim at maintaining substantive comparative neutrality, as well as the greatest possible grammatical neutrality. Consequently, even if some expressions can be characteristic of a given legal family, they must be understood with the same neutrality that drives these Principles, in accordance with their objective of harmonisation.

In view of this, the Principles must be interpreted according to objective criteria, relying, in particular, on the commentaries to each Article or Section and without straying from objective of harmonisation of the Principles within a framework of legal cultural diversity, such as is found in the Caribbean.

In this sense, it is desirable that both judges and arbitrators be able to take into account the application of these Principles in cases issued by arbitral tribunals and national courts, for which purpose OHADAC will implement information and data bases on the application of Principles, including notes and commentaries to reported decisions.

However, the Principles should not be applied, over and above their rules, to issues that are not relevant unless there is a clear and obvious analogy or similarity. That is why parties are advised to identify, at any time, the domestic law that should fill in the gaps of these Principles. Some gaps cannot be filled because it is difficult to obtain a legal rule that reflects a lowest common denominator in the Caribbean region. Others are simply caused by the effect specific to the dynamics of international trade.

In any case, the proposal to integrate the gaps of these Principles on the basis of underlying general principles or extended rules of application by analogy has not been considered, because it does not contribute undeniably to legal certainty in Caribbean contracts, due to the diversity of legal methods for interpreting or integrating written legal sources. Indeed, one of the most characteristic differences between the legal families represented in the Caribbean area is the ability of the judge or arbitrator to interpret or develop written law. While such an interpretation easily tends to legal

creation through analogy or judicial development in civil law systems, common law seems to favour an interpretation close to the written legal text that leaves the judge very little latitude. This methodological diversity implies that a rule on integration of a written text based on general principles would not pose the same problems to a judge in Guadeloupe or Cuba as to a judge in Jamaica or Antigua.

Consequently, the OHADAC Principles have considered it preferable that their gaps be filled through the application of domestic law and that mechanisms of integration or application by analogy are not imposed and can be examined more flexibly, depending on the jurisdictional or arbitral nature of the dispute and the methodological tendency of each court.

CHAPTER 1

GENERAL PROVISIONS

Article 1.1: *Freedom of Contract*

Parties are free to enter into a contract and to determine its content.

COMMENT

Article 1 of the OHADAC Principles affirms the freedom of contract principle. This is a purely programmatic rule that recognises the private autonomy principle as the basis of contract law.

Freedom of contract is a principle generally recognised in comparative law. In some civil law systems, it is expressly established by acknowledging the freedom of the parties to conclude all contracts, pacts and agreements that they deem appropriate (e.g. Articles 1.547 Honduran Civil Code; 1.839 Mexican Civil Code; 2.437 Nicaraguan Civil Code; 1.106 Panamanian Civil Code; 1.207 of the Puerto Rican Civil Code). The same rule can be found in Article 2 of the Draft Project for Reform of the Law on Obligations prepared by the French Ministry of Justice in 2013 and in international texts harmonising contract law [Articles 1.1 (UP); 1:102 (1) (PECL); II-1:102 (DCFR); 1.1 (CESL). Freedom of contract is also the normative and philosophical principle (will theories) of contract law under common law [*Printing and Numerical Registering Company v Sampson* (1875), LR 19 Eq 462, 465], where a more liberal approach comprises the fundamental respect for contractual freedom and the minimum of governmental interference with this freedom.

As a programmatic principle, the value of freedom of contract is relative. The wording of this principle in civil law systems is evidence of this relativity. The freedom of contract of parties is restricted by the obligation to follow the law, good morals, public policy and even usage. This limitation is shared by common law systems. Therefore, a common principle comprises the possibility of restricting freedom of contract on the fundamental grounds of the public interests at stake. These restrictions affect the legality of the contract and its object, restrictions of its object in some commercial branches reserved for State monopoly, the existence of public policy statutes on trade protection and free competition, the protection of some parties to the contract or the

requirement of certain standards of commercial morality. The mandatory nature or impossibility of derogation of certain rules guarantees freedom of contract as a public interest, insofar as free will is not allowed on rules on valid consent and its voiding reasons.

As mentioned above in the comment to paragraph III of the Preamble, the OHADAC Principles are subject to public policy statutes of national, international and supranational origin that may be legitimately applied on the ground of their geographic proximity and their international public policy scope. The impossibility of derogation of some mandatory rules of the Principles has also been noted.

Finally, it must be observed that the OHADAC Principles are applicable only when the parties have so agreed. Therefore, in cases brought before national courts, the application of the OHADAC Principles will derive from the parties' agreement, the enforceability of which is directly based on the will of the parties. This means that the incorporation by the parties of the OHADAC Principles as an agreement based on the freedom of contract is subject to the limitations imposed on this freedom by the national law applicable to the contract, which will fix the mandatory framework and permit the derogation by the parties. Hence the important point mentioned above that the parties must add the applicable national law of their choice when they adopt the OHADAC Principles.

In arbitral procedures, the OHADAC Principles can work as applicable law on the merits with no submission to any national law. However, as in cases before national courts, the provision included in paragraph V of the Preamble will be applied in any event, since, regardless of the law applicable to the merits, courts as well as arbitrators may take into account public policy statutes from other legal systems closely linked to the contract, in particular the law of the forum and the law of the place of performance of the contract.

Article 1.2: Pacta sunt servanda

Contract parties are bound to perform the agreed obligations according to contractual terms.

COMMENT

Like Article 1.1, Article 1.2 of the OHADAC Principles has a basically programmatic character. As a legal institution, the contract is an agreement that creates obligations

between the parties and its essence is its binding character or enforceability. The *pacta sunt servanda* principle evidences this inherent characteristic of contracts.

In civil law Caribbean systems, this principle is often explicit in civil codes, indicating that contracts have “force of law” between the parties or using a similar expression (e.g. Articles 1.602 of the Colombian Civil Code; 1.022 Costa Rican Civil Code; 233 Cuban Civil Code; 1.134 French and Dominican Civil Code; 1.519 Guatemalan Civil Code; 936 Haitian Civil Code; 6:248 (6.5.3.1.) Dutch and Surinam Civil Code; 1.546 Honduran Civil Code; 1.796 Mexican Civil Code; 2.479 Nicaraguan Civil Code; 1.109 Panamanian Civil Code; 1.210 of the Puerto Rican Civil Code; 1.159 of the Venezuelan Civil Code). Article 102 of the Draft Project of Reform of the Law on Obligations prepared by the French Ministry of Justice in 2013 also includes it, as well as Articles 1.3 UP and II-1:103 DCFR. *Pacta sunt servanda* finds a common law equivalent in the principle of “sanctity of contract”, pronounced from time immemorial both in English (*Paradine v Jane*, 1647) and USA case law (*Adams v Nichols*, 1837).

As a general principle, enforceability of contracts is subject to exceptions and modifications that are common in comparative law, such as those derived from a change of circumstances (hardship), *force majeure* and estoppel. This Article thus corresponds to a common ground in the legal systems comprised in the OHADAC area.

However, the Principles are limited to the enforceability of the contracts. In civil law systems it is common to find a general principle that extends the binding character of contracts to obligations that are not grounded on the parties’ will or on the contract itself, but on objective reasons related to morality, equity, good faith or fairness [Articles 1.603 of the Colombian Civil Code; 1.023 of the Costa Rican Civil Code; 1.546 of the Honduran Civil Code; 1.519 of the Guatemalan Civil Code; 925 and 926 of the Haitian Civil Code; 6:2 (6.1.1.2) and 6:248 (6.5.3.1) of the Dutch and Surinam Civil Code; 1.135 of the French and Dominican Civil Code; 1.796 of the Mexican Civil Code; 2.480 of the Nicaraguan Civil Code; 1.109 of the Panamanian Civil Code; 1.210 of the Puerto Rican Civil Code; 1.160 of the Venezuelan Civil Code; Articles 3, 11 and 103 of the Draft Project of Reform of the Law on Obligations prepared by the French Ministry of Justice in 2013]. The same extension also applies in the United States (Sections 1-203 UCC and 205 of the Restatement (Second) on Contracts), and has been undoubtedly followed in most international texts on contract law (Articles 1.7 and 1.8 UP; 1:201 and 1:202 PECL; II-1:102.1 DCFR; 2 and 3 CESL).

The OHADAC Principles have opted to omit rules or general principles related to a duty of conduct according to good faith, contractual fairness or cooperation principle during the conclusion or performance of contracts. Firstly, the Principles, as mentioned in the

Introduction, do not regulate pre-contractual or negotiation obligations, where consideration of good faith, fairness and cooperation plays a significant role in civil law systems. Secondly, as far as the contract's performance is concerned, the scope of good faith, abuse of law or estoppel reappears in the interpretative question and, especially, in the filling in of gaps, as well as in determining the effects of some clauses, such as integration clauses. The OHADAC Principles aim to remit the regulation of these questions to the respective chapters, but renounce to state general principles that do not respect the minimum common denominator principle, which is the basis of these Principles. Indeed, the scope of fairness and good faith is quite divergent depending on civil law or common law perspectives. In many aspects, coincidences can be remarkable, but while in civil law systems pre-contractual responsibility due to bad faith can be considered as a contractual question, in common law systems, when accepted, their effects are submitted to torts and restitution rules. Moreover, the absence of a general principle does not prevent the consideration of the consequences of acting in bad faith, unfairly or abusively under the interpretation rules included in Section 1 of Chapter 4. As mentioned in the comment on this Article, there is an inevitable margin of appreciation, even before the courts of a concrete national system, when considering context elements that help to conclude obligations established by the parties and, above all, to infer implied terms. Finally, the possibility of including such general principles is not advisable for proportionality reasons. Besides the separation of the OHADAC Principles from principles characteristic of the legal culture of Caribbean common law countries, given that judges in these countries do not have a sufficient experience in applying unfamiliar and too generic rules, its regulation does not guarantee a uniform application in the systems involved either. Civil law systems show different approaches about whether or not to abandon general considerations of good faith or abuse, when it comes to it.

Article 1.3: *Declarations and notices*

- 1. Declarations and notices of the parties must be given by appropriate and effective means. They will be effective when they reach the addressee.**
- 2. A declaration or notice reaches the addressee immediately when it is delivered to it is made orally and in its presence.**

3. A written declaration or notice reaches the addressee when it is delivered to its place of business or mailing address, or when it is received in its fax receiver or e-mail server.

COMMENT

Several rules in the OHADAC Principles deal with the need and effects of declarations and communications unilaterally made by the parties for different purposes. Following a very common line in harmonised international texts on contract law (Articles 1.10 UP; 1:303 PECL; I:1:109 DCFR; 10 CESL), the Principles state a set of guidelines, which are mere assumptions that can be modified, corrected or excluded by the parties through different regulations or according to their usual practices.

In the absence of such agreements or usages, it is presumed that notices must be made in a form appropriate to the circumstances, including the very function of the notice and through effective means of communication. The effectiveness of notice is based on the most widespread criterion in international trade that is the “receipt” principle. As explained in detail in the commentaries on the offer and acceptance, “emission” and “dispatch” principles are not practical in current circumstances of international trade, because they lead to uncertainty and potentially unreasonable and unfair consequences. It seems preferable that notices take effect as soon as they are received by the addressee, i.e. a time that can be considered to neutral and foreseeable.

Obviously, the “receipt” principle cannot lead to the “knowledge by addressee” principle, insofar as dispatch as well as knowledge depends on subjective and optional acts of the sender or the addressee respectively, which leads to uncertainty and unpredictability. That is why paragraphs 2 and 3 define the time when a notice is deemed to have been received by the addressee, depending on how the notice has been made, either orally (when notice is instantaneous) or written, in which case the effective knowledge by the addressee is not necessary and it is sufficient that the notice has come into the area under the addressee’s control. Thus, the notice will be presumably received, if a courier or postal worker has delivered the written communication to the addressee’s mailbox or has delivered it personally to an agent of the addressee who is in the establishment. In case of dispatch by fax, a correct transmittal in the fax machine is enough, even when the fax has not been physically received due, for instance, to a lack of paper or malfunction of the addressee's

terminal. Likewise, an electronic communication is effective when the message comes into the recipient's e-mail server without it being necessary that the addressee has seen, opened or read the message.

Article 1.4: *Computation of time*

- 1. When a period of time is expressed in days, the day of the contract, event, decision or notice from which the period begins is not computed.**
- 2. When a period of time begins from a determined day, such a day is computed within the period.**
- 3. Periods of time expressed in months or years shall end on the day of the last month or year corresponding to the same day fixed for the beginning of that period. When the final month does not include that day, the period shall end the last day of the month. When the period is expressed in months and days, months are firstly computed and days are computed afterwards.**
- 4. Unless otherwise stated, periods of time set by the parties refer to natural days, including official holidays and non-working days. When the period of time for performance ends on an official holiday or non-working day at the place of performance or at the place where the party who has to perform is established, it will be presumed to be extended until the next working or business day.**
- 5. The time zone will be that corresponding to the place of establishment of the party who sets the time. If setting of time is not attributable to any party, as to the performance of obligations the time zone will be that corresponding to the place of performance or, failing that, to the place where the party who has to perform is established.**

COMMENT

The OHADAC Principles include a set of presumptions or criteria on determination of computation of time according to common practice in international trade and to rules generally admitted in harmonised international texts on contract law (Articles 1.12 UP; 1:304 PECL; I-1:110 DCFR; 11 CESL). These rules are available for computation of periods agreed by the parties as well as of those stipulated in these Principles, unless otherwise established.

The rule in paragraph 1 on computation of days follows an express approach in many civil law systems where it is common to determine that computation of time begins the day after the crucial circumstance which determines the beginning of the conclusion of the obligation or after which the obligation became enforceable occurs. This rule is also known in common law systems, but with some qualifications. Indeed, when parties have not agreed on or there is not a reference to a concrete day, the rule seems reasonable. Thus, if it is stated that “Party X must pay in the period of fifteen days after receipt of the goods”, it must be interpreted that such a period begins the day after the day of receipt and ends at the end of the fifteenth day. However, the beginning of the period is more controversial when parties establish a start date. For example, if the parties state that “Party X must pay in a period of fifteen days from first of March of a certain year”, at least under English law there is a tendency to consider the first of March as included within the period. This interpretative rule seems reasonable and is therefore included in paragraph 2.

However, it was not deemed necessary to include a rule on the determination of the start time and end time of the computation of a period calculated in days. Although it is generally admitted that the start time is the first hour of the day while the end time is the last hour of the day, in some cases, it could be reasonable to interpret that the expiry time will not be the last hour of the day (midnight), but the last hour when the receipt of the notice or the performance of an act could be reasonably expected according usual business hours. Consequently, this question remains open to interpretation on a case-by-case basis.

The rule included in subparagraph 3 concerning cases when periods are calculated in months or years instead of days is also a common feature. In these cases, once the start date has been set, the period is deemed to have expired on the same day of the month or year when the period ends. Thus, if a six-monthly period begins on the first of March, it will expire on the first of September. This rule aims to prevent interpretation of word “month” by synonym of “thirty calendar days”, which is only a reasonable criterion when the period is determined by monthly portions (e.g. half-

month). Moreover, the rule corrects the possible consequences of the irregular number of days in a month. For instance, a six-month period that begins on 31 March will expire on 30 September, that is, on the last day of the sixth month. This is a rule that provides legal certainty for computation of monthly and annual periods.

The first rule included in sub-paragraph 4 is also clear and widely used. The period of calculation makes no distinction between working days, non-working days or official holidays, i.e. every day is considered in the same way as a calendar day. The rule is commonly expressed in civil law systems and is also known in common law [*Dodds v Walker* (1981), 1 WLR 1027]. The preophylactic rule that goes with it is also generally accepted. It meets the need to enable performance on schedule and to avoid unnecessary claims of *force majeure* to justify a delay in performance. Thus, if the expiry date of a deadline concerning the performance of an obligation coincides with a non-working day or an official holiday, the period shall be extended until the next working day when the obligor could normally perform his obligation. Compared with more restrictive solutions, such as provided by Article 1.12 (2) UP, it seems reasonable that such an option be possible when the last day is a non-working day in the obligor's place of establishment or in the place of performance, since in both cases a non-working day can seriously hinder performance within the given time limit.

Finally, it is usual in international trade for the parties and the place of the performance to be situated in different time zones. The Principles include in the first sentence of paragraph 5 a well-known rule derived from Article 1.12 (3) UP, which states that in the absence of agreement, the relevant time zone is the time zone of the party set the time limit. However, it is not always possible to determine who sets the time limit. This can be determined, for instance, in determining the expiry of an offer, but not in the case of negotiated contracts when parties have jointly fixed a period of performance of some obligations. This assumption is usually not considered in harmonised texts of international contract law. The OHADAC Principles consider that the most reasonable solution in such a case is the time zone of the place of performance, whenever possible. In certain cases, either because the place of performance is not defined or because the obligation has to be performed in several places with different time zones, the final solution consists in choosing the time zone of the party that must perform the obligation.

Example 1: A firm from Berlin sends an offer to a firm in New York, indicating that it must be accepted before 2 p.m. on 22 September. The period must be considered according to Berlin time.

Example 2: In a sale of goods it has been agreed by the parties that goods must be delivered before 2 p.m. on 22 September in a New York port. The period must be considered according to New York time.

Example 3: In the same contract of sale of goods it is agreed that payment must be made before 2 p.m. on 27 September with no further indications about the means and place of payment. The time limit must be considered as using New York time, since it is buyer's place of establishment.

CHAPTER 2

FORMATION OF CONTRACT

Section 1. Offer and acceptance

Article 2.1.1: Formation of contract

The contract is concluded by the acceptance of the offer.

COMMENT

In the countries belonging to the OHADAC, in both civil law and common law, it is commonly accepted that no one can be obliged without their consent and that the consent is formed by the offer and the acceptance of said offer. This is the habitual model to form and conclude contracts. The offer and acceptance model exists in the Caribbean countries governed by civil law and frequently it is expressed in their civil codes (Articles 1.009 and 1.010 of the Costa Rican Civil Code; Article 311 of the Cuban Civil Code; Article 1.521 of the Guatemalan Civil Code; Article 6:217 of the Dutch and Suriname Civil Code; Article 1.553.1º of the Honduran Civil Code; Articles 1.804-1.811 of the Mexican Civil Code; Article 1.113 of the Panamanian Civil Code; Article 1.214 of the Puerto Rican Civil Code) or in their commercial codes (Articles 845 to 863 of the Colombian Commercial Code; Article 54 of the Cuban Commercial Code; Article 718 of the Honduran Commercial Code; Article 83 of the Nicaraguan Commercial Code; Articles 201 of the Panamanian Commercial Code and 1.113 Civil Code, Article 272.1 of the Santa Lucian Commercial Code, Article 110 of the Venezuelan Commercial Code). Consent is also necessary in the countries belonging to the common law legal tradition. Although the central idea of the contract not the obligation itself, but the exchange of promises through consideration, consent is expressed through reciprocal promises [Section 2 (1) English Sale of Goods Act; Section 3 (1) Sale of Goods Act of Antigua and Barbuda; Section 6 (3) Sale of Goods Act of Bahamas; Section 6 (3) *Sale of Goods Act* of Montserrat; Section 3 (1) Sale of Goods Act of Belize; Sections 2 and 6 (3) Sale of Goods Act of Jamaica; Section 3 (1) Sale of Goods Act of Trinidad and Tobago).

The bilateral model of offer and acceptance has been formulated in the CISG (in force in Colombia, Cuba, Honduras, Dominican Republic, Saint Vincent and the Grenadines and Guyana). Articles 14 to 24 regulate the requirements that the offer and the acceptance must satisfy in order to conclude the contract, although they do not

expressly mention the consent mechanism through the offer and the acceptance. The conclusion of contracts through offer and acceptance is regulated in Article 2.2.2 UP and also in Article 30.2º CESL.

However, the PECL and the DCFR (Article II-4:201) seem to have deviated from the bilateral model and it is stated in Article 2:101 that the formation of the contract requires only that the parties declare their intention to be legally bound and have reached a sufficient agreement. But, the bilateral scheme has not been abandoned, although Article 2:211 PECL specifies that the rules relating to offer and acceptance will be applied with the appropriate adaptations even though the process of contract formation cannot be analysed into offer and acceptance.

Example 1: If a US businessman offers a Jamaican businessman a car for \$ 18,000 and the Jamaican businessman agrees, a valid contract is concluded and the offer and the acceptance can be identified without problems. In other more complicated contracts, with long negotiations, it is necessary to consult the exchange of documents between the parties to see if they have come to an agreement.

Some countries do not mention offer and acceptance, either in the civil code or in the commercial code. This is the case of France and the Dominican Republic (Articles 1.101 and 1.108 Civil Code) or Haiti (Articles 897 and 903 Civil Code), which consider the contract as an agreement that requires consent, capacity, determined object and legal cause. However, the Draft project of reform of the French law of obligations of 2013 reserves Chapter 2 to the conclusion of the contract, using the offer and acceptance model (Articles 13-34).

To demonstrate the existence of contractual consent or an agreement of intentions requires the application of rules on the interpretation of the contract included in section 1 of Chapter 4 of these Principles, which are applicable, *mutatis mutandis*, to unilateral declarations of intention. To this end, the comments to the rules of said Chapter, particularly those that refer to the diversity of comparative systems and to problems raised by subjective and objective tendencies of interpretation. In practice, as analysed in commentaries on Chapter 5, although civil law and common law systems have opposing principles, they coincide in the objective interpretation of declarations in line with reasonable criteria, in the light of a context taken in a broad sense.

Example 2: If during a meal in a restaurant, a Dominican businessman A offers a Haitian businessman B a machine for a good price and the businessman B gives \$ 1000 as a deposit, the contract will have been concluded, although A's intention was to play

a joke on B, since B does not know that A has no intention to be obliged because the proposition and any reasonable person could have believed that A has formulated a real contractual offer.

Article 2.1.2: *Definition of offer*

A proposal for concluding a contract constitutes an offer if it is sufficiently precise and indicates the intention of the offeror to be bound in case of acceptance.

COMMENT

1. The precise nature of the offer

The regulation of the declarations of intention in the codes of the OHADAC territories is varied. Some civil codes, like those of Colombia, Honduras, Nicaragua, Panama or Venezuela, are very detailed. On the other hand, some texts do not even explicitly refer to the offer or the acceptance (Dominican Republic, France or Haiti). In other codes, the references are very brief (Article 444 Costa Rican Commercial Code, that refer to the conclusion of sale contracts; Article 54 Cuban Commercial Code and Article 85 of the Puerto Rican Commercial Code, both about the conclusion of the contracts made by correspondence). The regulation is less detailed in the French Civil Code, as it was mentioned earlier, which is different in the Draft project of reform of the French Law of Obligations of 2013, as stated in Articles 11-34. The influence of the DCFR, the CISG, the UP and the PECL in each country is evident. Those regulatory instruments thoroughly regulate offer and acceptance contracts, following the German model, like the BGB or the Italian Civil Code, which can be found in Chapter 4 of the DCFR on formation of contracts, and particularly in Section 2 (Articles II-4:201-4:211) referring to offer and acceptance, in a manner almost parallel to that of the PECL, that also can be found in Section 2, Chapter 2 about the offer and the acceptance (Articles 2:201-2:211), as well as in CISG (Articles 14 to 24).

In the OHADAC legal systems it is agreed that the offer is a proposal that one party makes to another party in order to conclude a contract, either through declarations or conclusive acts. This proposal, like acceptance, must be notified to the other party in order to form the agreement that constitutes the contract (Article 845 of the Colombian Commercial Code). The principle of freedom of form is recognised, so that

the notice can be made in any form, except for some types of contracts that require certain formalities (deposit contracts, OPAs, property loans, etc.). The offer may be sent through instant communication means such by fax, telephone or e-mail. Notifications by post or telegraph are less frequently used. The sending of the declaration of intention through electronic methods is accepted as a manifestation of the principle of freedom of form and by virtue of the principle of functional equivalence between the written private documents and those written electronically, that are able to store, conserve and reproduce the information [Articles 1.108.1 and 1.316.1 French Civil Code; Article 6:227a.1 Dutch Civil Code; Article 1.834 bis Mexican Civil Code, Articles 197 and 198 Panamanian Commercial Code, Sections 7 (a) and 7 (b) *Uniform Electronic Transactions Act* (UETA), that apply in 47 States of the United States, as well as the District of Colombia, Puerto Rico and the Virgin Islands. The revised Section 2 UCC has substituted the term “written” for “document”, in order to include electronic forms and traditional written forms on paper]. Also Article 11 of the UNCITRAL Model Law on Electronic Commerce says that, unless otherwise agreed, the contractual offer and acceptance can be expressed through a data message, even though state laws can make exceptions when certain formalities for the validity of the contract are required. That can also be found in Article II-3:105 DCFR.

Example 1: In a trade fair, the Mexican businessman A gives his business card to the businessman B from the city of Gustavia (St. Barthélemy). B, who wishes to establish a commercial relationship, sends a contractual offer to A through e-mail, with all of the terms and conditions of the contract. Even though there is not a previous agreement about the use of the electronic methods, this is a valid form of communication between the parties.

However, there is an apparent divergence as to what should be the minimum content of the proposal to constitute an offer. In economic terms, it seems excessive to require that the offer mention all aspects of the contract since, aside from drafting costs, there is always the possibility of missing out something. Therefore, common law systems do not require a minimum content in the offer or the existence of essential elements in the contract, but simply the common intention of the parties, the consideration and adequate description of the object of the contract and the amount are necessary for the conclusion of the contract. Section 2-201 (1) UCC only considers essential the amount of goods covered by the contract and Section 2-204 (3) UCC requires a remedy for the damage that the failure of one party causes to the other (as in Section 33 (2) of the Restatement (Second) of Contracts). Generally, American law does not see any problem with leaving certain aspects open providing reasonable basis for giving an

appropriate remedy. So, the determination of the quantity and price can be omitted, leaving it up to a third person or even one of the parties (Section 2-204 (3) UCC); or let the courts construing terms not agreed, referring to the commercial uses, the regularly established practices between the parties, the terms implied and any remedy appropriate to the circumstances, in short, referring to the criterion of reasonableness (Section 2-204 (3) UCC).

The contract will be deemed not to have concluded only when such integration turns out to be impossible. This is because the parties trust the judges not to override the intention of the parties. However, there are always exceptions, because there are cases where the contract is considered incomplete because they have not yet decided the start date of the contract [*Harvey v Pratt* (1965), 1 WLR 1025] and there are cases when it is estimated that parties have not concluded the contract because they have not fixed the price and that is a sign that the parties will continue the negotiations [*Russell Bros (Paddington) Ltd v John Elliott Management Ltd* (1992), 11 Const LJ 337]. Also in English law, Section 8 (2) of the Sale of Goods Act of 1979 considers that a binding agreement of sale exists from the moment in which the parties have agreed to buy and sell, and they can leave the rest of the questions to be determined through reasonable standards or by the law itself. If the parties have not fixed a price, it is considered that they have agreed on a reasonable price. Other Caribbean systems have followed the same approach.

The same criterion is followed by the UP (Section 2.1.2), the PECL (Article 2:201), the DCFR (Article II-4:201) and the CESL (Article 31.1). Although they require that the proposal that constitutes an offer has sufficiently defined the terms, or is sufficiently precise, they do not list the terms that the offer should contain, which makes it possible to use various techniques of contract integration based on commercial uses and business practices and on the reasonable nature of the technique in question. Even they allow the unilateral setting of prices or other contractual components by only one contracting party or a third person, so that if the party that determines the price or other contractual elements should exceed its powers, the contract would not become void, but should be corrected for a reasonable price by the courts, and if the third person authorised to determine the price does not fulfil its obligation, it is understood that the contracting parties have empowered the judge to do so.

These criteria are in contrast with the rigidity of some civil law systems, which require that the contract is complete and contains all the essential terms (Article 1.108 French and Dominican Civil Code) or conditions of the contract (Article 1.522 Guatemalan Civil Code). Article 14 of the Draft project of reform of the French Law on obligations of

2013 requires that the offer has the essential elements of the contract, like Article 845 of the Colombian Commercial Code, so that subsequent agreements between the parties are not necessary to conclude the contract. Thus, the offer only needs the acceptance of the offeree in order for the contract to be binding.

However, the apparent rigidity of the civil law systems in some countries disappears, because it is presumed that the contract can exist despite the absence of agreement on any of the essentials. In this regard, it is recognised that the determination of some elements is deferred to a later time, provided that the basis for subsequent determination has been fixed in the proposed contract. Even the price, although it is an essential element, can also be determined retrospectively, by reference to a certain thing, or by a third person (Article 1.592 of the French and Dominican Civil Code) or by reference to the stock exchange or market.

Example 2: The Jamaican company A offers company B the sale of 50 head of cattle to the farm that B has in Port of Spain (Trinidad and Tobago) or the number of head of cattle that B needs for this season, for the current price in the cattle fair in Kingston at the time of delivery, or at the usual price between the parties or at a reasonable price. Although some elements of the offer are not certain, nothing prevents determination *a posteriori*.

It is not an impediment to the conclusion of the contract the fact that parties leave some open questions under Dutch and Suriname Law, whose Article 6:227 Civil Code only requires that obligations assumed by the parties are ascertainable; or Mexican Commercial Code, which provides rules for integrating terms not specified by the parties, as the kind and quality of goods to be delivered or deadlines for compliance (Article 83 and 87), as established by Article 421 Costa Rican Commercial Code, Article 101 Nicaraguan Commercial Code, Articles 219, 223.3 and 227 Panamanian Commercial Code and Article 138 of the Venezuelan Commercial Code.

Even a normative text such as the CISG, which seems to respond to the rigorous model of civil law systems, listing in detail the elements required in the offer, is close to the common law model and allows, to a certain extent, the subsequent determination of contract terms. Article 14 CISG provides that, for the offer to be sufficiently definite, it must indicate goods and expressly or implicitly fix and make provision for determining the quantity and price. The lack of any of these terms implies the lack of offer and leads to a mere invitation to offer. However, this requirement is relaxed to admit the existence of an offer if it provides a means for determining the price. The time and place of delivery of goods shall be determined in accordance with Article 31 et seq., and the time and place of payment according to Articles 57 and 58. Even the

essentials, such as the quantity, may be implicitly determined and result from pre-existing agreements or from individual usages or from practices between the parties, if they have previously made repeated orders for the same amount. In short, it is a question of interpretation of the intention of the parties.

Example 3: Car construction company A, registered in Free Town (Bahamas), has had contractual relationships with the U.S. auto parts manufacturer B for several years. Having decided to expand their business, A decided to open a branch in Nassau; so it sends an offer to B for B to deliver the same parts to the Nassau branch. The offer does not specify either the number of pieces or the price, but B accepts the offer. It can be understood that the contract has been concluded, because the terms that do not appear in the offer can be integrated in accordance to the practices established between the parties in their prior contractual relationships.

In this manner, facilitating the integration of elements of the offer which have not been set out through judicial intervention, some approximation between the two models occurs; hence these Principles opt for a flexible approach to the concept of offer. However, as a question of interpretation, certain oscillations, that are related to the different trends in the general field of contract interpretation, discussed in Section 1 of Chapter 4 of the Principles, cannot be excluded. Therefore, in cases in which the offer leaves certain terms open, the party that does not want to leave any doubt of the binding nature of the offer, must ensure that this intention is sufficiently clear.

2. The intention to be bound as a subjective requirement of the offer

In order to consider the proposal as an offer, it must demonstrate the serious intention of the offeror to be bound in case of acceptance (Article 14.1 CISG, Article 2.1.2 UP, Article 2:102 PECL, Article II-4:201 DCFR). However, no regulatory text indicates which words the offeror must use, admitting any formula. The offer should be serious and defined. If done with reservations or without confirmation, it shall not constitute a real offer. Therefore, the inclusion of a clause such as "except confirmation", "safe passage" or "without obligation" implies the offeror's intention not to be bound and provoke the obligation of the recipient in case of acceptance. Such clauses are known under the terms "*sans engagement*", "*senza impegno*", "without obligation", "subject to agreement" or "*freibleibend*".

A statement made for purely informative purposes or with the intention to encourage the party to make an offer are not offers, because they do not involve the will to be bound by the contract. Instead, proposals containing provisions such as "unless lack of stock" or "except price change" are real offers. This limitation to cover the demand for

the product or service as far as possible according to the capacity of the service provider or the available stock of goods has been provided for in Article 849 of the Colombian Commercial Code as a way to end the offer for a just cause. It is also envisaged in Article II-4:201 DCFR, indicating that, although the statement is contained in a catalogue or in a public advertisement shall be deemed as an offer. In any case, if the proponent does not wish to be bound by a proposal of this kind, in order not to leave any doubt as to its true intention, some of the unbinding clauses to which reference has been made before should be added to the proposal.

Ascertaining the offeror's intention to contract is a matter of interpretation that will be resolved in accordance with general rules on interpretation in Section 1 of Chapter 4 of these Principles, which may lead to diverse solutions depending on the different legal traditions. Thus, in English law an offer must not be interpreted subjectively by reference to what is currently happening in the mind of the offeror, but objectively, by reference to the interpretation that a reasonable person in the same position as the recipient of the offer would make [*Centrovincial Estates plc v Merchant Investors Assurance Co Ltd* (1983), Com LR 158]. To conclude a contract for exchange of promises between two parties, where the promise of each one is the consideration for the promise of the other, the intention of both parties must be coincident according to what has been communicated and understood, even if this does not represent the current state of mind of the communicating party [*Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* (1983), 1 All ER 34]. However, if the understanding of the one party is unreasonable, because it cannot be unaware of the real intention of the other party, this party may pull out of the contract (*Hartog v Colin & Shields* (1939), KB 27 AELR 566).

Civil law codes are more prone to a subjective interpretation, so that the basic rule is that no one shall be bound by a contract that it had no intention to conclude (Article 1.156 French and Dominican Civil Code, Article 681 Guatemalan Commercial Code, Article 713 Honduran Commercial Code). However, there are exceptions to this general rule that make these systems closer to the objective interpretation, based on the perception of the statements by the other party, because it must be remembered that in these Codes the principle of good faith governs contract negotiations and leads to the protection of the recipient's trust. This explains that some form of liability for damages may be required in the event of acts of negligence by the offeror.

The regulations contained in Article 2.1.2 of these Principles should therefore be related to the rules of interpretation of the statements of the parties, especially Article 4.1.2. In this regard, it must be assumed an interpretive criterion in the sense that the

intention of the parties must be assessed in the light of the meaning that a reasonable person of the same kind as the parties had given their statements in similar circumstances; signs identified in that rule can be used, allowing coverage of the different interpretative cultures in the Caribbean legal field.

CLAUSES RELATING TO THE BINDING NATURE OF THE OFFER

In any case, it is the rules on interpretation of contracts that will determine whether or not the proposal is an offer. To avoid any doubt about the binding nature of the proposal, depending on whether or not it contains all the essential elements of the contract, it would be useful that the proponent, that does not want to be bound by the proposal, indicates clearly that it will not be bound by the offer, even if the other party accepts all the terms by the. This effect would be achieved with a clause like:

“This proposal is not a contractual offer; therefore the proposer will not be bound by it even if it were accepted in full by the party to whom it is addressed.”

Conversely, if the proposer wants to be bound by the contract, it is useful to prevent possible uncertainties about whether or not their proposal is an offer through precise wording, including all endpoints which should be included in the contract to be valid or anticipating the way of specifying those elements that have not been finally closed, and with specific reference to its intention to be bound by the declaration.

Article 2.1.3: *Offer and invitatio ad offerendum*

- 1. The offer may be directed to one or more specific persons.**
- 2. A proposal directed to the public shall not constitute an offer, unless so provided by the offeror or indicated by the circumstances.**
- 3. Circumstances mentioned in the previous paragraph exist, particularly, in case of exhibition of goods and products at a particular price in physical or virtual spaces. In these cases, the offer is presumed effective**

until the stock of goods or the possibilities to supply the service are exhausted.

COMMENT

1. Proposals made to certain persons and to the general public

The distinction between offers and invitations to make offers is important. The offer binds the offeror, forcing him to make a contract if the recipient accepts, in the terms offered in the proposal. In contrast, the *invitation ad offerendum* does not bind the offeror, who may decide not to conclude the contract.

Generally, the proposal addressed to one or more specific persons constitutes an offer if the other requirements are met. The offeree may be determined on condition that the person is individualised, for example by giving their personal data, although it is enough that the offeree is identifiable. However, in some cases, recipients of the proposal are clearly identified by their first and last names or their company name and the fact that the proposal constitutes an offer raises certain doubts. This happens when catalogues, brochures, flyers, or lists of goods with their prices are sent either by mail or other advertising media, such as mailing to a significant number of people. These proposals will be considered as simple invitations to offer if, according to trade usage, these mailings have an advertising purpose to make a product known and incite the recipient to make proposals to contract. Consequently, the proposer is only obliged if it shows its intention to be bound.

Article 14.2 CISG states that proposals not addressed to one or more specific persons are invitations to make a contract, which has been interpreted as if these proposals are advertisements and not as contractual offers: this is a way to protect the proposers, because it prevents the obligation of the proposer to be forced to satisfy a flood of orders, although this objective could also be achieved through the inclusion of safeguard clauses in the proposal to protect the offeror, such as “while stocks last”. Cases of restricted mailing list are considered binding offers, according to Article 92.2 Nicaraguan Commercial Code, which introduces the caution that at the time of the order there is no alteration in the price and there may be goods in the warehouses of the offeror. Also the PECL and the DCFR admit that these marketing communications are contractual offers [Article 2:201 (3) PECL and Article II-4:201 (3) DCFR]. At any event, these rules provide only a presumption because the advertisement may indicate a different intention or to be inferred from the circumstances. Despite certain differences, the UP, which do not even mention the offerees, reach the same

conclusion, and sending the proposal to an indeterminate public does not mean that there is no offer. Interpretations will therefore be on a case-by-case basis, as the second sub-paragraph of Article 2.1.3 of these Principles suggests.

Example: To make its varieties of green and roasted coffee known, a Nicaraguan businessman sends many Costa Rican businessmen identified with their name and address their product catalogues indicating their price and highlighting their qualities. The proposal also includes the clause “while stocks last”. Although in some legal systems linked by the CISG proposal has advertising purposes, the inclusion of the clause permits interpretation of that clause as a contractual offer.

Proposals made to the general public and not to one or various determined persons are more controversial. Some countries try to protect the proposer against a flood of orders and consider that offers made to the general public are not binding, but they have a commercial function: these proposals do not show a serious and sufficient intention to be bound by a contract. This is the common law approach, unless the proposer indicates otherwise [*Pharmaceutical Society of Great Britain v Boots Cash Chemist (Southern) Limited* (1955), 1 QB 401, 1 All ER 482; *Fisher v Bell* (1960), 1 QB 345, 3 All ER 731 (CA); *Partridge v Crittenden* (1968), 1 WLR 1204]. However, certain common law rulings have deemed that these proposals made public are offers [*Carlill v Carbolic Smoke Ball Co* (1893), 1 QB 256 (CA); *Billings v Arnott* (1945), 80 ILTR 50 (HC); *Lefkowitz v Great Minneapolis Surplus Store* (1957), 251 Minn. 188, 86 NW 2d 689]. Article 847 of the Colombian Commercial Code and Article 92.1 Nicaraguan Commercial Code also follow this approach. Article 14.2 CISG also enables the offeror to provide otherwise, in which case the proposal is an offer provided that all other requirements of precision of the essential terms are met.

In other jurisdictions, however, proposals made to the public with price indication through advertisements in the media are considered as offers, if they contain the price or the essentials (Article 720 Honduran Commercial Code, Article 206 Panamanian Commercial Code, Article II-4:201 DCFR, Article 2:201 PECL, Article 14 Draft project reform of the French law on obligations of 2013). French case law shows hesitations on this point. In the Netherlands, there is no rule of law on this point, although it is generally accepted that public proposals to sell goods or provide services at a certain price are offers as far as the capacity of the service provider or while stocks last.

In the end, both opposing positions are close, because the circumstances and intent of the offeror are what determine one solution or the other. The fact that the proposal is contained in a commercial website aimed at the general public does not change these rules, as under the common law they are to be considered as invitations to offer,

unless otherwise indicated on the website itself, and in the continental systems they are considered as offers if they contain other essential elements of the contract. These circumstances must be taken into account by offerors if they do not want to be bound by the terms of their proposal when acceptance is made.

Given the diverse range of approaches about whether or not proposals made to the public are binding offers, it is best that proposers take precautions to avoid being unintentionally bound if the law governing the contract attributes the character of binding offers to these proposals. If proposers do not intend to be bound by the contract, they should state clearly that the proposal is not a contractual offer. If they wish to be bound, it is recommended that they protect themselves against a flood of orders by including a condition or safeguard clause such as "while stocks last."

2. Display of merchandise in display cases, counters and other places inside establishments showing the price

In some legal systems, exhibition of goods in shop windows or showcases indicating the price is considered or presumed to be binding offers (Article 848 of the Colombian Commercial Code, Article 206.2 Panamanian Commercial Code, Article 2:201 PECL, Article II-4:201 DCFR). Thus, if a wrong price is assigned to the product in the showcase, the cashier is obliged to sell the merchandise at the fixed price. Given the binding nature of these displays, the offeror is protected in Article 849 of the Colombian Commercial Code, establishing that if the goods had run out at the time of acceptance, the offer shall be deemed terminated for just cause.

Common law follows the opposite approach. The presentation of goods in shops and markets is not considered more than an invitation to make an offer [*Fisher v Bell* (1961), 1 QB 394-399; (1960) 3 All ER 731-733; *Pharmaceutical Society of GB v Boots Cash Chemist (Southern) Ltd* (1952), 2 All ER 456]. However, there were cases in which the display of goods in a self-service store has been considered as an offer [*Lasky v Economy Grocery Stores* (1946), 319 Mass 224, 65 NE 2d 305; *Chapelton v Barry UDC* (1940), 1 All ER 356]. Also Article 14.2 CISG considers these proposals as invitations to offer, since it is not a proposal addressed to one or more specific persons. The display is a way of indicating that the product is available and its price, so that the purchase of the product by the recipient is actually a purchase offer, and not a sales offer. Under this approach, the cashier would have no obligation to sell the product exposed to any customer whatsoever or, consequently, be obliged to sell an erroneously labelled product.

The OHADAC Principles have opted for a flexible rule in the third paragraph of Article 2.1.3, based on the denial of an offer in these cases, but at the same time accepts a contextual interpretation. Again, given the various considerations in deciding whether or not these offers are binding, it is recommended that the offeror expressly states that the commercial communication is not binding on the offeror and its subsequent acceptance is essential in order to avoid undesirable results.

Article 2.1.4: *Effectiveness of the offer*

- 1. An offer becomes effective when it reaches the offeree.**
- 2. Any offer may be withdrawn if the notice of withdrawal reaches the offeree before or at the same time as the offer.**

COMMENT

It is generally accepted that the offer becomes effective when it reaches the addressee, orally or in writing or in person at their place of establishment or usual residence. Otherwise, the offeree cannot know the offeror's intention to be bound by a contract. This receipt theory, which assumes that the offeree knows of the offer by receiving it, has been expressly set forth in Article 15.1 CISG and in Article 2.1.3 UP. The rule contained in the first sub-paragraph of Article 2.1.4 follows the general criteria set out in Article 1.3 of these Principles.

However, until there is an acceptance, the offeror is not bound by the contract. An offeror can therefore change its mind about its willingness to conclude the contract for the period of time between the issuance of the statement of intention and its receipt by the offeree. The second paragraph of Article 2.1.4 includes the right to issue another different statement of intention, to rescind or terminate the first proposal made in the offer, which is known as "withdrawal of the offer". Its effectiveness is widely accepted as a part of the broad discretionary power of the offeror with respect to its proposal.

By definition, the offer cannot be withdrawn if it has been made in the presence of the offeree or by using means of instant communication such as the telephone. This is because the withdrawal of the offer cannot reach the offeree before or at the same time as the offer itself. The withdrawal of the offer is possible provided that the offeror

passes this communication to the offeree at the same time or before the offer. If it does it, then it would be a revocation (section 1.010.1 of the Costa Rican Civil Code, Article 1.808 of the Mexican Civil Code, Article 2.450 of the Nicaraguan Civil Code, Article 15.2 CISG, Article 2.1.3 UP, Article 1:303 PECL, Article 15 Draft of reform of the French law of Obligations 2013). In any case, it is recommended to state this possibility in the offer.

The withdrawal of the offer has no impact on its revocable or irrevocable character, since the irrevocability of the offer implies that the offer is complete once it reaches the offeree, whereas withdrawal indicates that the offer has not yet acquired its binding effect because it has not yet reached the recipient. However, although withdrawal and revocation are differentiated in common law systems, these two periods are indistinguishable and the only possibility envisaged is for the offeror to invalidate its original declaration of will.

Article 2.1.5: Revocation of the offer

- 1. The offer may be revoked if the revocation reaches the offeree before the acceptance has been dispatched.**
- 2. However, an offer cannot be revoked if it establishes a period of irrevocability or the offeree could reasonably have believed that the offer was irrevocable and has started to perform acts of execution.**
- 3. When the offer establishes a period of acceptance, this is presumed to be a period of irrevocability, unless otherwise indicated by circumstances.**

COMMENT

The revocation is the cancellation of the offer in the time between receiving the offer and the conclusion of the contract. It is possible when the offer is already effective because it has reached the recipient. The process of formation of the contract is already open, so now the recipient assumes its role. If the recipient accepts, the contract shall be terminated; if it rejects, the offer lapses.

In common law countries, these two moments are indistinguishable, but merely provides for the possibility of the offeror to revoke its original declaration of intent at any time before accepting the offer. In these systems, the revocation is integral to the offer, as the irrevocability of the offer would imply an obligation for the offeror without any consideration for the acceptor (Sections 42, 43 and 47 Restatement (Second) of Contracts). Some Caribbean civil law systems follow the same rule (Article 6:219 Dutch and Suriname Civil Code; Article 87 Nicaraguan Commercial Code; Article 1.137.4º of the Venezuelan Civil Code). However, in these systems the power of revocation is subject to requirements concerning the notification to the acceptor that limit its effectiveness. If, at the time the acceptor sends its acceptance it has not received a notice of revocation of the offer, the offer will be ineffective, and acceptance prevails [*In Re Imperial Land Company of Marseilles, ex parte Harris* (1872), KR 7 Ch. App. 587; *Byrne & Co v Leon van Tienhoven* (1880), 5 CPD 344; *Re London & Northern Bank* (1900), 1 Ch. 200]. The principle of freedom of form which governs the issue of the offer also applies to its revocation, which may be carried out with any wording possible (sections 1.2 and 1.9 UP). Common law case law supports even accepts revocation by selling to a third party. What does not seem sufficient however, is the fact that the acceptor be informed of the revocation by a third party unauthorised by the offeror, although in common law, it is sufficient for the revocation to be disclosed by a reliable source.

The main problem of revocation is fixing the deadline beyond which the offeror can no longer exercise this right. According to common law and Dutch law, that time is set in the moment in which the acceptance is sent by the acceptor (Article 6:219.2 Dutch and Suriname Civil Code; Article 16.1 CISG; Article 2:202 PECL; Article 32.1 CESL). Instead, the Article 1.137.4º of the Venezuelan Civil Code extends the time period in which the revocation may be exercised until the acceptance has come to the knowledge of the offeror.

Other systems establish a principle of irrevocability, at least for a given period, either by stating a fixed time for the acceptance of the offer, either for a reasonable time. This is based on the principle that when a person makes a statement of intention, a binding relation is created (Article 443 Costa Rican Commercial Code; Article 317.1 Cuban Civil Code; Article 1.521 Guatemalan Civil Code; Article 718 Honduran Commercial Code; Article 1.804 Mexican Civil Code; Article 846 of the Colombian Commercial Code; Article 89 Nicaragua Commercial Code; Article 2.453 Nicaraguan; Article 204 Panamanian Commercial Code; Article 1.137.5º of the Venezuelan Civil Code). Some legal systems, such as Dutch and Suriname law, take the same stance

when the offer includes a period for acceptance or provides that it is irrevocable [Section 2-205 UCC; Article 16 CISG; Article 2.1.4 (2) (a) UP; Article 2:202 PECL; Article II-4:202 (b) DCFR; Article 32.3 CESL; Article 16 Draft project reform of the French law on obligations of 2013]. In some legal systems, even the autonomy of the offer is accepted in the event of the death of the offeror, except in cases where it would be contrary to the circumstances, the offeror's intention or of the nature of the contract (Article 846 of the Colombian Commercial Code; Article 1.014 Costa Rican Civil Code; Article 6:222 Dutch and Suriname Civil Code; Article 718 Honduran Commercial Code; Article 1.809 Mexican Civil Code; Article 2.454 Nicaraguan Civil Code; Article 213 Panamanian Commercial Code). Conversely, Article 18.2 of the Draft project of reform of the French Law on obligations of 2013 provides for the expiry of the offer after the offeror's death, like Article 1.528 Guatemalan Civil Code, if the offeror dies before receiving acceptance or if the offeree dies before accepting.

This idea of setting a deadline for acceptance is widespread in civil law systems, especially in German codes, under which the regulation of the acceptance period of the offer has a double effect: it prevents acceptance from being made after that date and, secondly, it means the existence of a promise not to revoke the offer during the validity of the term, which is equivalent to considering these offers as irrevocable. Conversely, the common law and part of continental doctrine consider that the provision of time for acceptance only indicates that, after that period of time, the acceptance of the offer is not admitted, without this constituting a cause of irrevocability. Under French courts, the revocation of the offer in these cases prevents the conclusion of the contract, but it entails liability for damages by the offeror.

Example 1: Company A based in Belize offers a U.S. company B the sale of a certain amount of mahogany under certain conditions and at a certain price. However, the offer includes a clause under which these conditions shall be valid until a specific date. 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.

Domestic laws of OHADAC countries also support the principle of trust as a reason to make an offer irrevocable. The offer shall be irrevocable if the offeree can reasonably believe that it was an irrevocable offer and acted according to such offer, hiring or doing contractual offers with third parties. If the offeror, through its behaviour or statements, induces the offeree to rely on the irrevocability of the offer, this trust should be protected, as a revocation of the offer lacking in good faith or which North American jurisprudence known as promissory estoppel. In this sense, even English

courts, unlikely to recognise good faith or the doctrine of estoppel to enforce obligations not agreed, allow the irrevocability of the offer in cases where, in a unilateral contract, the acceptor has already begun to perform the contract obligations [*Daulia Ltd v Tour Millbank Nominees Ltd* (1978), Ch 231].

The rule contained in Article 2.1.5 of these Principles is the most recognised in line with most systems and is formulated with sufficient flexibility, so it can achieve balanced and accepted solutions for all legal cultures represented in the Caribbean. Finally, the interpretation criteria play an important role in determining whether, in fact, the conduct or statements of the offeror can induce a reasonable person in the same position as the recipient to believe that the offer was irrevocable. In this sense, it is perfectly possible that in a contract between two parties established in common law states, commercial practice and legal usages easily can be used to interpret that the parties have thought that the offer made with an acceptance period was revocable, while interpretation may result in reverse if both parties are located in civil law systems. In mixed cases, the general principle of private international law should not be forgotten: a party can always wield the law of his habitual residence to establish that he has not given its consent if it is deemed unreasonable, under the circumstances, applying contrasting criteria according to the law applicable to the contract, including these Principles [e.g. Article 10.2 of Regulation (EU) no. 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)].

The irrevocable nature of the offer implies that if the recipient agrees, a contract will exist and liability could be required not only by fault *in contrahendo*. In the same line is the Cuban legal system, which provides that the revocation will have no effect in such cases (Article 318.2 Cuban Civil Code). International instruments provide the irrevocability of the offer in cases where the recipient has reason to believe that the offer was irrevocable and acted accordingly [Article 16.2 (b) CISG; Article 2.1.4:2 (b) UP; Article 2:202 (3) PECL; Article II-4:202 (3) DCFR; Article 32.3 CESL]. In contrast, other legal texts, that support the revocable character of the offer, provide that if notice of the revocation reaches the offeree after it has carried out acts of execution of the contract, the offeree should be compensated for damages (Article 208 Panamanian Commercial Code; Article 113 of the Venezuelan Commercial Code and Article 1.139.3 of the Venezuelan Civil Code).

Example 2: An Aruban company A proposes to a Venezuelan company B to build a residential complex in Oranjestad at a certain price. B requests one month to create the models and assess the profitability of the project. A accepts and B begins with the

projected tasks. During the period of one month, A is obliged to maintain the offer. If A were to revoke the offer during this period, the legal consequence will depend on the applicable law (there will either be no consequences or A will be obliged to compensate for damages).

Given the diversity of solutions concerning the determination of the revocable or irrevocable nature of the offer, it is recommended, in any case, to state in the offer itself whether or not it is revocable, although common law does not recognise the possibility for the offeror to produce an irrevocable offer by unilateral intention, because of the consideration requirement. Therefore, the offeror may revoke the offer until the conclusion of the contract (Section 42 Restatement (Second) of Contracts). The only way that the offeror may make the offer irrevocable is by providing the offeree with consideration while the offer still stands, or by making a promise under seal, although the UCC has evolved towards more flexible positions. The irrevocability means that if the offeror decides to revoke it, despite having indicated that it was irrevocable, this statement will be ineffective. Therefore, the contract is concluded if the recipient accepts the offer.

Article 2.1.6: Definition of acceptance

- 1. Acceptance is a firm adhesion to the offer.**
- 2. Acceptance derives from a statement made by or other conduct from the offeree. This conduct may consist in the beginning of performance of the contract by the offeree.**
- 3. Silence or inactivity does not in itself amount to acceptance.**

COMMENT

1. Express and implied acceptance

As a general rule, acceptance is the assent of the offeree to be bound by the projected contract in the terms established (Articles 18.1.1^o and 3^o CISG; Article 2.1.6 UP, Articles 2:102 and 2:204 PECL; Article II-4:204 DCFR). Assent may be expressed in any manner in accordance with the principle of freedom of form (Article 3.1.2 of these Principles). Acceptance is usually expressed through an oral or written declaration of intention, sent to the offeror, indicating the intention to accept the offer. Unlike the

rule sometimes followed under common law, which often requires that the acceptance is communicated by the same method that was used in the offer, most systems are governed by the principle of freedom as to the form, in accordance with provisions of Article 3.1.2 of these Principles. It is therefore not necessary to use a particular means, even the same that was used by the offeror (sections 2.1.13 UP and 2:205 PECL). Nevertheless, there is some consensus in considering that if the means used by the offeror is very fast, as telex, e-mail or telephone, it is not reasonable to respond with another much slower means such as a postal mail, but instead a similar method to that used by the offeror may be used. Rules on contract interpretation may serve to attenuate the principle of freedom of form in relation with acceptance. Moreover, it is not necessary to use a specific word for the offeree to state its willingness to the offeror, unless, exceptionally, something different is established in the offer, as the signed return of the document forwarded by the offeror might be.

The acceptance can also be made through the behaviour of the offeree, through conclusive acts, as the beginning of the execution of the contract in circumstances that allow the offeror to reasonably understand that the acceptance occurs based on the proposed terms (Article 275.3 of the Saint Lucian Civil Code). Under Section 30 (1) of the Restatement (Second) of Contracts, the offer may require that the acceptance is made by an affirmative answer of words, one action or abstention to the execution of a specific act.

2. Silence as acceptance

As a general rule, it is accepted that silence does not amount to acceptance. If the offeree does not say anything after receiving an offer, it is not bound by the contract, because there must be prior communication between the parties, so that they may each know the other party's intentions [Article 444 of the Costa Rican Commercial Code; Article 1.253 of the Guatemalan Civil Code; Article 713.2 of the Honduran Commercial Code; Article 18 CISG; Article 2:204 (2) PECL; Article II-4:204 (2) DCFR, Article 34.2 CESL]. The same rule applies in France (judgments of the *Cour de Cassation* of May 23, 1979 and December 3, 1985), and in common law, where, despite the requirement of consideration, it also raises the treatment of silence as acceptance, although accompanied with certain nuances [*Felthouse v Bindley* (1862) 11 CB NS 869, 142 ER 1037].

However, the rule may vary depending on circumstances and social and economic context. The principles of good faith, legal certainty and trust play a more or less important role depending on the legal system involved. In this regard, Article 21 of the Draft project of reform of the French law on obligations 2013 highlights gives

prominence attributes value to the silence when this is specified in the law, or by custom or trade relations between the parties or by the particular circumstances. Similarly, Articles 18.1 CISG, 2.1.6 UP, 2:204 PECL and II-4:204 DCFR establish that silence alone does not constitute acceptance, and it is understood, conversely, that we must take into account the circumstances of the case, as these can lead to attribute a value of negative or positive declaration of intention, to silence. Given that these circumstances are not specified, the decision must be taken by judges and arbitrators. The need to take into account the circumstances of the case is also seen in common law, where the context may indicate that silence has a clear enough meaning for the other party, and may therefore be exceptionally considered as acceptance. This is the case, for example, where the offeror has been invited to offer by the offeree and the offeree has established that silence constitutes acceptance [*Alexander Hamilton Institute v Jones* (1924), 234 Ill. App]. However, under common law, it seems that it is not enough for the silence of a party to create trust and reliance in the other party for the other party to think that the contract has been accepted. The first party must also have begun to perform its contractual obligations [*Smith-Scharff v PN Hirsch Inc* (1988), 754 SW 2d 92]. So it has been included in Section 2-201(3) UCC and in sections 87(2), 90 and 139 of the Restatement (Second) of Contracts. This trend towards “behaviourism”, which beginning to take root in some countries results in the attribution of the same or even greater value to the conduct of the parties as their declarations (Article 86 Nicaraguan Commercial Code, which does not even require notice to the offeror if the offeror demands the immediate performance of the contract without prior acceptance of the offer, which is not required, in accordance with general trade practices; Article 205 of the Panamanian Commercial Code; Article 246 of the Puerto Rican Commercial Code). Acceptance by conduct or conclusive facts require that these are unequivocal, obvious and clear, such as payment of the price in the offer, dispatch of the goods, acceptance of payment, packaging of the goods, taking out of insurance for the transport of goods, renting of transportation, opening of a documentary credit, rental of facilities for the storage of goods, obtaining of relevant licenses, order to the bank for the transfer of funds, etc. Article 18.3 CISG is a clear example of the value of the performance of contract obligations as acceptance, without necessarily having notified the offeror. An exception to the general rule laid down in Article 18.2 CISG, which does require notice to the offeror. Section 2-201 UCC and Section 54.2 (a) Restatement (Second) of Contracts require that the seller informs the purchaser of the performance of the contract, quickly delivering the goods or by a notice that precedes the receipt of the goods. Therefore, the start of performance of the contract by the offeror is a form of acceptance that binds the offeror, provided it

has received notice of the start of performance of the contract. Otherwise, the offeror is relieved of its contractual obligations.

Among the circumstances that can lead to positive effects attributed to silence are the prior negotiations between the parties. In this case, if one of the parties makes a final offer to another party, this party is obliged to answer, failing which it will be deemed to have accepted the offer. This approach is found in Article 1.253 of the Guatemalan Civil Code or Article 211 of the Panamanian Commercial Code. This is also apparent from American case law [*Filanto SpA. v Chilewich International Corp P* (1992), SDNY (DC) 91 Civ. 3253 (CLB), 789 F. Supp. SDNY 1229-1242; *Smith-Scharff Paper Company v PN Hirsch & Co Stores Inc* (1988), Mis. CA 754 SW Rep. 2d Series 928].

Example 1: In this case, it was usual among the parties that Smith-Sharff stockpiled a number of paper bags printed with the of P.N. Hirsch logo, in order to supply them when the orders were made. When Hirsch terminated its business, Smith-Scharf was in possession of the usual number of bags, and he demanded that Hirsch purchase them. The court imposed the obligation.

Prior negotiations between the parties must therefore be taken into account [*Cole-McIntyre-Norfleet Co v Holloway* (1919), 141 Tenn. 679; 214 SW 87]. In these last cases, it is understood that forcing the offeror to have to answer implies a greater burden. The fact that the acceptor itself indicates that it is considered that the offer is accepted if otherwise not stated within a certain period of time must be considered. These principles are contained in the Restatement (Second) of Contracts, which provides in section 69 acceptance by silence under some exceptional circumstances: when the offeror has given reasons to the offeree to understand that assent may result from silence or inactivity and the offeree believes that by remaining silent or inactive it is accepting the offer; or when, as a result of prior negotiations between the parties, it is reasonable that the offeree should notify the offeror if it does not want to accept. French case law also provides examples of how the interpretation of the facts may lead the courts to estimate that the contract is formed, despite the silence of a party.

Example 2: This happened in the case *Hughes v Technocontact*, where the company Technocontact made an offer to sell electrical equipment to the English company Société Hughes Electronic. Upon receiving the offer, Hughes Electronic requested some changes in the design of the pieces. The French company sent the material with the requested changes and the English company refused to pay, arguing that it had not replied to the acceptance of the modifications made by Technocontact. Instead, the

French Court held that the silence implied acceptance in this context (judgment of the *Cour de Cassation* of 27 January 1998).

It is debatable whether the offeror's renunciation of the acceptance, that is when the offer provides that silence amounts to consent, can bind the offeror. In English law, the offeror must be informed of the other party's intention to accept the offer, even if the silence of the offeree is considered as acceptance. However, some English authors admit that, although the offeree is not bound to the contract, the offeror is obliged. Thus the recipient of the offer will be protected, not having to expend effort or expense to reject the offer and, although it does not remain bound, it may renounce the protection in order to demand that the other party performs the contract.

The same considerations emerge from American law [Section 69 of the Restatement (Second) of Contracts], based on the principle of trust in the content of the offer. However, the offeree may not take advantage of the circumstances to enforce the contract against the offeror, because there have been significant changes in the prices of products. Under French law, however, there is no objection for the offeree to take advantage of the situation, provided the principle of good faith, to which French courts attach a lot of importance, is observed. But for silence to amount to acceptance, it is generally required that it is accompanied by acts of performance.

Trade usages and practices are also taken into consideration under common law [*Minories Finance Ltd v Afribank Nigeria Ltd* (1995) 1 Lloyd's Rep. 134] and in other legal systems in order to assign a value of implied acceptance to silence. The case law of the Court of Justice of the European Union ruled in the same sense (ECJ judgment of 20 February 1997, *Mainschiffarhts-Genossenschaft c. Les Gravières Rhénanes SARL*).

It is sometimes established that silence is regarded as a declaration of intention under certain circumstances. It is the case of Article 19.2 CISG for cases in which there is no substantive change to an offer; for example, if the offeror does not protest about such changes this means that the offeror accepts the amendments, which become part of the contract. Similarly, Article 21.2 CISG provides that silence regarding an acceptance regularly sent but outside the acceptance period implies that acceptance becomes effective, if the offeror does not immediately notify the acceptor that the offer has expired. There are also legal systems that consider silence as acceptance, when the resulting contract benefits only the offeree; under French case law, the judge, in his sovereign assessment of the facts and the intention of the parties, may decide that silence constitutes acceptance, when the offer has been made in the sole interest of the party to whom it is addressed (judgment of the *Cour de Cassation* of 29 March 1988).

Article 2.1.7: *Time of acceptance*

- 1. The offer must be accepted within the time the offeror has fixed, and if no time is fixed, within a reasonable time considering the circumstances.**
- 2. The offer expires at the end of the fixed or reasonable period of acceptance. A late acceptance is not effective, unless the offeror renounces the expiry date by notifying the offeror without delay that it accepts the offer.**

COMMENT

1. Deadline for accepting

Acceptance must be done in timely fashion, i.e. in time. The nature of acceptance in time is clear in cases where contract is made between present parties or through means of instant communication such as the telephone; then the acceptance will occur immediately. This follows from the usual practice in contracts (Article 1011 Civil Code Costa Rican; Article 850 of the Colombian Commercial Code; Article 6:222.1^o Dutch and Suriname Civil Code; Article 1.805 Mexican Civil Code; Article 83 Nicaraguan Commercial Code; Article 2.451 Nicaraguan Civil Code; Article 202 Panamanian Commercial Code; Article 110 of the Venezuelan Commercial Code).

However, it is possible that the offeror allows the offeree to take some time to reflect and express his declaration of intention, especially if the offeree should contact their suppliers and submit the proposal to representative bodies of the company of which it forms part (Article 1011 Costa Rican Civil Code; Article 853 of the Colombian Commercial Code; Article 2.451 Nicaraguan Civil Code). This postponement of the time of the declaration of acceptance may result from the usual practice between the parties.

When contract takes place between people who are not in the same place and they use means that do not allow for instant communication, several problems arise in connection with the acceptance period: up to what point the acceptance can be made, how is the term determined, and if the emission of the declaration of acceptance is relevant or if the declaration should reach the offeror.

All legal systems agree that the deadline for acceptance is set by the offeror. Setting a deadline for acceptance can be done in many different ways, which raises the problem of setting the start and end time. The provisions of Article 1.4 of these Principles must be considered in this respect.

In the absence of indications in the offer, some countries set specific rules. For example, Article 851 of the Colombian Commercial Code, which sets it in 6 days from the date of the proposal, if the offeree resides in the same place. If the offeree lives in another location, the term is increased in proportion to the distance. Article 1.012 Costa Rican Civil Code and Article 2.452 Nicaragua Civil Code establish 3 days if the other party is in the same district, 10 days if it is in a different district and 60 days if it is abroad. Article 1.806 Mexican Civil Code states 3 days in addition to the time required for return mail. Article 111 of the Venezuelan Commercial Code has fixed a time limit of only 24 hours if the parties live in the same place.

However, the most widespread solution is the one established in common law systems. Examples are Article 6:221.1 of the Dutch and Suriname Civil Code and Article 1.523 of the Guatemalan Civil Code, which have opted for an open solution based on a reasonable time limit. This allows some flexibility, with adaptations on a case-by-case basis. This is also the solution specified in the first sub-section of Article 2.1.7 of these Principles, which seems best adapted to the variety and complexity of cross border transactions. Such reasonable time usually includes the time the offer takes to reach the offeree and the time needed by the offeree to reflect and answer [Article 112 of the Venezuelan Commercial Code; Article 1.137.2 of the Venezuelan Civil Code; Section 41 (1) Restatement (Second) of Contracts; Article 18.2 CISG; Article 2.1.7 UP; Article 2:206 PECL; Article II-4:206 DCFR; Article CESL 36.3].

Again, given the diversity of options and in order to achieve greater legal certainty for both parties, it is best for the offeror to clearly specify the acceptance deadline in the offer, setting a specific day, provided that this is reasonable according to the circumstances.

2. Late Acceptance

It may happen that the offeree's answer does not reach the offeror within the time fixed by the offeror or within a reasonable time either because it was sent after that period, or because there were problems during its transmission that caused the delay. Where acceptance is submitted late, it is not effective as acceptance because the offer has lapsed (Article 111 of the Venezuelan Commercial Code). The contract can therefore not be concluded (Article 204.2 Panamanian Commercial Code, which

requires the offeror to notify the offeree). The offeree is responsible for the expiry of the offer, since he has not sent it in time. Many legal systems consider that this is a counter-offer capable of being accepted by the first offeror (Section 70 Restatement (Second) of Contracts). From this point of view, the contract is formed when the original offeror, who is now the offeree, accepts. This acceptance of the counter-offer could occur by silence or inactivity of the first offeror, and is usually rejected unless recognised by usages or practices (United States).

Since the expiry of the offer is a rule established in the interests of the offeror, the conclusion of the contract may be favoured if the offeror acknowledges the effectiveness of the late acceptance, either on its own initiative or at the offeree's request. This is the meaning of the last sentence in Article 2.1.7 of these Principles (Article 6:223 Dutch and Suriname Civil Code; Article 112 of the Venezuelan Commercial Code; Article 1.137.3 of the Venezuelan Civil Code; Article 21 CISG; Article 37.1 CESL). The admission of the effectiveness of the late acceptance can be very beneficial to the offeror. On one hand, it can be beneficial if the offeror defers notice to the other party so as to gain time to speculate on the market and obtain better opportunities from other competitors. On the other hand, if market opportunities are not good, accepting a late acceptance continues to be beneficial, although it could harm the offeree who believed that the offer had lapsed and that the contract had not been concluded. The solution to this problem must strike a balance between the two interests at stake: it can promote the conclusion of the contract, provided that the offeror rapidly informs the offeree of its acceptance within the given time limit. If the offeree's response is not considered as a counteroffer, but as the admission of the effectiveness of a late acceptance, the time of conclusion of the contract is set retroactively at the time of acceptance of the original offer.

It is also possible that acceptance is dispatched on time, but has not reached the offeror due to circumstances beyond the offeree's control. These circumstances include delays in the chosen means of communication, or the fact that the offeror has provided a wrong address which has caused a delayed acceptance. This situation is different from the previous one, because under normal circumstances the acceptance would have been made within the time limit and would have enabled the conclusion of the contract. That is why the law aims to protect the offeree who is not responsible for the delay, by considering that the contract has been concluded unless the offeror promptly manifest its disagreement (Article 6:223 Dutch and Suriname Civil Code; Article 21.2 CISG; Article 37.2 CESL). The rule, however, is a source of legal uncertainty and an exception to the receipt theory that is difficult to define in practice.

Consequently, same rule applies even when the late acceptance is due to reasons beyond the acceptor's control. If the delay was attributable to the offeror, the offeror may incur in non-contractual liability for damage caused to the recipient, but the contract cannot be considered concluded unless the offeror has given notice of its confirmation of the late acceptance.

Example: A Suriname businessman sends a contractual offer to a U.S. businessman setting a period of five days for acceptance. The American businessman answers after eight days. The admissibility of the late acceptance depends on the willingness of the offeror, but also varies depending on whether it is considered to be a counteroffer (which must be accepted by the original offeror) or a case of late acceptance. In any case, it is recommended that the offeror promptly notify whether it accepts or not, to prevent that its failure to oppose the late acceptance encourages the offeree to conduct acts of performance, which will then have to be compensated.

Article 2.1.8: *Acceptance with modifications*

Acceptance by the offeree which establishes or implies additional or different terms that alter or condition the terms of the offer is a rejection of the initial offer and, in turn constitutes a new offer.

COMMENT

The acceptance must be consistent with the offer, since the meeting of the minds between the offer and acceptance should be on the same elements. This requirement of consistency is interpreted differently in the different legal systems. Some systems are based on a rigid approach to the meeting of minds through the classic rules of offer and acceptance and do not support the acceptance of the offer containing modifications, expanding or restricting its terms. Any modification of the offer shall be considered as a rejection of the offer and constitutes a counteroffer, which will, in turn, be accepted by the first offeror in order to conclude the contract, reversing the positions of the parties. This requirement of strict compliance with the acceptance of the terms in which the offer is made is known as the "mirror image rule". To consider the modified acceptance of the offer as a counteroffer moves the burden of the formation of the contract to the last offeror, which is known as the last-shot rule. The contract is considered as concluded if it is deemed that this was the intention of the parties, which means taking into consideration the rules of interpretation of the

contract. The terms of the last counteroffer will be added to the contents of the contract (Article 855 of the Colombian Commercial Code; Article 444 Costa Rican Commercial Code; Article 1.010.2 Costa Rican Civil Code; Explanatory Memorandum to the Guatemalan Civil Code; Article 6:225 Dutch and Suriname Civil Code; Article 1.810 Mexican Civil Code; Article 87.2 and Article 90 Nicaraguan Commercial Code; Article 2.450 Nicaraguan Civil Code; Article 209 Panamanian Commercial Code; Article 1.137.7 of the Venezuelan Civil Code; Section 50 Restatement (Second) of Contracts; *Zambia Steel & Building Supplies Ltd v James Clark & Eaton Ltd* (1986), 2 Lloyd's Rep. 225; *Butler Machine Tool Co Ltd v Ex-Cell-O-Corporation (England) Ltd* (1979), 1 WLR 401; article 19.2 Draft project of reform of the French law on obligations of 2013, Article 19.1 CISG). However, other provisions often lead to the consideration that the contract has been concluded, although the offer does not fully match the acceptance. This can be seen, for example, in the second subsection of Article 6:225 Dutch and Suriname Civil Code, in which the contract can be considered as formed if the acceptance only differs from the offer on minor issues, unless the offeror immediately objects to the differences.

At the other extreme, there are the systems that have a more flexible approach to the meeting of minds, for which a minimum agreement on key elements of the contract and a slight match between the offer and acceptance are sufficient. These systems aim to facilitate the conclusion of the contract, and to go beyond the rigidity of the mirror image rule. They admit that the acceptance constitutes a counteroffer only if it substantially alters the terms of the offer. The model of this trend is the U.S. law, which inspired the UP and Article 19.2 CISG, but this trend is also observed in Dutch law, as has been highlighted, and in the case of countries like France, which tend to a more open concept in accordance with the requirements of international trade. The offer is set rather as an invitation to the other party to cooperate in shaping the content of the contract [Section 2-206 (1) UCC]. The party that does not want to be bound has the responsibility to express its disagreement with such acceptance or it will otherwise be bound by the contract, even against their will. The only way not to be bound by the contract is if the party promptly opposes, without delay or within a reasonable time, or warn, in the offer itself, that only an acceptance that matches the terms specified in the offer will be admitted [Article 19.2 CISG; Article 2.1.11 UP; Article 2:208 PECL; Article II-4:208 (2) DCFR; Article 38.4 ^o CESL; section 2-207 UCC; *Roto-Lith Ltd v F.P. Bartlett & Co* (1962), 297 F 2d 497, 1st Cir]). If the offeror has taken pains to guarantee its contractual intention in this manner, the contract will not be concluded. If the other party has begun to perform acts of performance, believing that the contract was formed, there is no contract and this party will receive compensatory

remedies. However, if the offeror does not object, or objects too late, the contract will be considered as formed under the terms of the offer plus the additions incorporated by amending the declaration of acceptance. In any case, if the parties do not reach a satisfactory agreement on the basic terms of the contract, the contract will not be considered to be concluded. Section 2-207 of the UCC supports this view, stating that there is definite and timely acceptance even when there are additional or different terms compared with the original offer.

However, although this starting point is generally accepted, there is a significant difference between the American UCC, on one side, and the new legislative trends and the CISG, on the other side. Section 2-207 (2) and (3) UCC allows the conclusion of the contract, although the changes to the terms of the offer are substantial. In contrast, under the CISG and the new legislative trends, the conclusion of the contract is only possible if the acceptance does not involve a substantial change in the terms of the contract. Therefore, when the acceptance substantially alters the offer or when the offer is conditional on acceptance by the recipient of all the terms, there will not be acceptance but a counteroffer and the contract is concluded when the intention of the counter party (the initial offeror) to be bound by the contract, is manifest, for example, by implementing acts of performance.

Some texts list the changes that are deemed significant for this purpose (Article 19.3 CISG; Article 38.2 CESL): variations which affect the price, quality and quantity of the goods, place and date of delivery, the extent of liability of a party in respect of the other or the settlement of disputes. This very detailed list seems to leave no room for insubstantial modifications that could allow the conclusion of the contract. Although acceptance changes some aspect of these elements, it does not always conclude that there has been a substantial change in the terms of the offer. The decision on whether the contract has been completed requires an interpretation of the terms of the offer and acceptance in each case. It is usually indicated that an alteration is substantial when it is unexpected and burdensome to the party whose express knowledge has not been incorporated; if a period shorter than reasonable is included; and, finally, if it is unusual or contrary to a balance of benefits typical of this kind of contract or sector of activity concerned and able to go unnoticed by the other contracting party.

Example 1: A businessman from the Virgin Islands offers to enter into a contract with an Antiguan and Barbadian businessman under certain terms. The party from Antigua and Barbados accepts, but introduces an arbitration clause in its answer. The consideration of whether this amendment is substantial or not depends on the customs in the trade sector concerned. In any case, under a flexible approach, in order

not to be bound, objections to the introduction of the clause should be stated without delay.

Example 2: The same party accepts the proposal but asks for more time to perform the service. Cases of extension of time are usually not be considered substantial changes to the offer, even if they are not accepted by the other party [*Global Tankers Inc v Amercoat Europa NV* (1975) 1 Lloyd's Rep 666, 671].

The OHADAC Principles do not follow such a flexible approach, because it creates a risk of legal uncertainty by obliging the parties to predetermine which aspects are essential to the parties before they have definitively expressed their intention. According to the most widespread approach of this flexible approach, an acceptance with non-material modifications could would not be sufficient to conclude the contract if the original offeror declares its disagreement without undue delay. Actually, this rule also forces the offeree to wait for the offeror's confirmation during a reasonable period of time before starting the contract performance, so that the costs, in terms of negotiations, are the same as those resulting from the waiting for a definitive acceptance of the counter-offer. Consequently, it seems more reasonable and predictable to follow the rule requiring that acceptance be fully consistent with the offer and establishing that modifications by the offeree, regardless of their substantial nature, are considered as a counter-offer that must be accepted by the original offeror.

Article 2.1.9: *Standard terms*

- 1. The standard terms of a contract are clauses that are not individually negotiated by the parties and which have been drawn up in advance for a number of contracts of a certain class.**
- 2. In order to oppose the standard terms of the contract to the adhering party, it is necessary for the adherent party to be given notice on them before the conclusion of the contract. This condition shall not be considered satisfied by the mere reference to the conditions in the contract, although the adherent party has signed the contract when**
 - a) they are so surprising or unusual that the adherent could not reasonably take them into consideration**

in regard to the circumstances and purpose of the contract; or

b) they are too onerous, taking into account the nature, language and the way they have been established.

COMMENT

This article regulates the efficiency of the standard terms in standardised contracts. Its first section defines standard terms as terms that have not been negotiated individually by the contracting parties, written by one of the parties in order to be incorporated into several contracts. For the purposes of implementation of the second paragraph, it is only of interest that the clauses have not been individually negotiated, but are part of a previously established form to which the other party simply adheres. The fact that this form has been used in other contracts or not is irrelevant for this purpose.

The inclusion of standard terms in the contract negotiation simplifies the negotiation process and the costs involved. It allows the trader to calculate risks in advance, to know its obligations and to draft in a standardised way all clauses of its contracts, adapting them to the needs of the business.

Although the protection regime for the adherence is characteristic of consumer contracts, the standard terms are also usual in commercial contracts, and legal systems tend to protect the other party regardless of their professional trade. It should also be taken into account that some interpretive rules generally protect the adhering party of the contract. In particular, it shall apply the rule in Article 4.1.3 of these Principles (whose comments should be understood reproduced), which establishes the principle "*contra proferentem*" in order to interpret, among others, ambiguous standard terms of the contract in the sense most favourable to the other party [Article 1.162 French and Dominican Civil Code; Article 672.1 Guatemala Commercial Code; Article 730 Honduran Commercial Code; judgment of the Supreme Court of Jamaica in *Ammar & Azar Ltd v Brinks Jamaica Ltd* (1984), N° A051 de 1981 (Carilaw JM 1984 SC 35)]. This rule can even lead to consider standard terms as not included when they are so abstruse that they may be incomprehensible to an average adhering party.

Moreover, the prevalence of the individually negotiated terms over the standard terms (Article 672.3 Guatemalan Commercial Code; Article 728 Honduran Commercial Code;

Article 2.1.21 UP) must also be considered, in accordance with paragraph second article 4.1.5 of these Principles, whose comments should be reproduced here.

Regardless of interpretative rules established, the second sub-section of Article 2.1.9 of these Principles establishes specific conditions for the effectiveness of the standard terms, which reflect the most current trends in the law of both domestic and international trade and have somewhat subjective and objective scope.

From the subjective point of view, on the ground of obvious reasons of legal certainty and respect for the autonomy of the parties in commercial trade, all legal systems firstly admit that signature incorporated in the document containing standard terms obliges the party signing the contract, according to the *pacta sunt servanda* principle. Therefore, failure to read the standard terms does not avoid the effect of a signature [Article 726 Honduran Commercial Code; Article 6:232 Dutch and Suriname Civil Code; Sections 211 (1) and (2) Restatement (Second) of Contracts; *Parker v South Eastern Railway* (1877) 2 CPD 416; *L'Estrange v Graucob* (1934), 2 KB; *Levinson v Patent Steam Carpet Clearing Co Ltd* (1978), QB 69; *Interfoto Picture Limited v Stiletto Visual Programme Ltd* (1989), QB 433].

However, the fact that the standard terms have been drafted unilaterally leads to many legal systems to establish protective measures for the adhering party, that determine its inclusion in the contract, despite its acceptance [Article 6:233 Dutch and Suriname Civil Code; section 2-302 UCC, Section 211 (3) Restatement (Second) of Contracts]. In American contract law, a set of exceptions to the rule of incorporation of the standard terms to the contract are envisaged: if the clauses are illegible or very small print; if they have not been known to the counterparty and have been placed in unusual places, like the back of the document; if they are indicated by reference or the case deals with contracts in which standard terms are not expected. Another common requirement is that relating to the obligation to make the standard terms available for the other party, so they can be met before the conclusion of the contract [Article 672 Guatemalan Commercial Code; Article 6:234 Dutch and Suriname Civil Code; *Chapelton v Barry UDC* (1940), 1 All ER 356; judgment of the *Supreme Court* of Bermuda, *Robinson v Somers Isles Shipping Ltd* (2008), Nº 275, 2007 (Carilaw BM 2008 SC 9); Article 20.1 Draft project reform of the French law on obligations of 2013].

As an objective condition, the effectiveness of the standard term is also subjected to a test of reasonableness. In English and American law, the test of reasonableness (fair and reasonable) serves as a criterion for determining whether a clause may be incorporated into the contract or whether, on the contrary, it is deemed unfair and ineffective. Reasonableness is assessed according to a set of circumstances that the

parties knew or reasonably had to know when they concluded the contract (Article 11.1 Unfair Contract Terms Act 1977). Hence the degree of communication of a clause is very important to determine whether it is improper or unreasonable. Civil law systems sometimes impose a control of the content of the clauses to prevent excessively onerous terms from being imposed on the other party or to prevent abuse of good faith (Article 6:233 Dutch and Suriname Civil Code).

The rule laid down in the Principles obeys this trend by introducing a flexible formulation that can be adapted to the specific characteristics of the contract. To avoid the ineffectiveness of the contractual consent given by the adhering party, the party who draws up the conditions should avoid the mere reference in the contract to the existence of standard terms in another document, unless the signature is affixed after the indication that the conditions are in another document and unless the adhering party specifically signs the form that contains the standard terms, that the references to these standard terms are clearly visible, and that the standard terms themselves have been drafted in a clear and understandable manner for an average adhering party.

Article 2.1.10: *Battle of forms*

- 1. When both parties use forms with standard terms and they fail to reach an agreement on the terms to use, the contract is concluded on the basis of the agreed terms and the provisions of the standard terms that are substantially common to both parties.**
- 2. However, the contract is not concluded if either party has informed or informs the other party, without undue delay, that it does not intend to be bound by the contract**

COMMENT

Another case where there may be inconsistencies between the offer and acceptance occurs in cases of battles of forms, that is, when the parties mutually exchange forms with conditions unilaterally drafted by each and different from those written by the other contracting party. This raises the question whether, in the event of different forms, the contract is concluded, and if so, what is its content.

Some legal systems consider the classic rules of offer and acceptance as applicable, so that if the acceptance incorporates standard terms that differ from those proposed by the offeror, there will be a counter-offer, which will enable conclusion of the contract if it is accepted by the other party, by declaration, which is the less frequent option (Article 444 Costa Rican Commercial Code), by silence [*BRS v Arthur v Crutchley Ltd* (1967), 2 All ER 785], or by an act of performance [Article 855 of the Colombian Commercial Code; Article 444 Costa Rican Commercial Code; Article 855 Cuban Commercial Code; Article 1.810 Mexican Civil Code; Articles 87.2 and 90 Nicaraguan Commercial Code; Article 209 Panamanian Commercial Code; Article 114 of the Venezuelan Commercial Code; *British Road Services Ltd v Arthur V Crutchley Ltd* (1968) 1 All ER 811; Article 19 CISG]. However, there is another approach in English law, which considers the contract as not concluded, compensates acts of performance, such as through restitution [*British Steel Corporation v Cleveland Bridge & Engineering Co Ltd* (1984) 1 All ER 504]. This approach is also followed in the Article 6:225 Dutch and Suriname Civil Code.

In accordance with the above-mentioned approach, the content of the contract is determined by the form sent last, hence the name “last-shot rule”. Only if the offeror indicates its opposition to the new conditions it will be understood that the contract has not been concluded. This approach favours legal certainty and seeks to encourage the reading of forms, because it considers that the clauses of forms that are not read are still important. However, it is criticised because, for example, in sale contracts, buyers find themselves in a difficult position due to the fact that the contract is not concluded if the seller does not deliver the goods (since the seller is usually the last to send its form) and if the buyer accepts the delivery, then it means he has accepted the seller’s terms. Nevertheless, this solution facilitates legal certainty, to the extent that parties can predict which content of the contract will prevail. This will always be the last form submitted (last-shot rule). However, case law has opted for the distinction between substantial and insubstantial changes [*Butler Machine Tool Co Ltd v Ex -Cell O Corp* (1979) 1 WLR 401 (CA)].

Other legal systems, however, prefer to give priority to contractual balance and seek a more neutral solution that favours neither party because of something as random as being the last party to make the proposal. In these more flexible legal systems, the battle of forms does not prevent the conclusion of the contract, provided that there is an agreement on the essentials. What happens is that substantially coincident clauses form part of the contract, while contradictory clauses in the respective forms are void (knock out rule). In this sense we find the U.S. law (Section 2-207 UCC), Article 2.1.22

UP, Article II-4:209 DCFR, Article 39.1 CESL, and Article 20.2 Draft project reform of the French law on obligations 2013. According to this flexible approach, unlike cases of amending acceptance of the offer, in the case of the battle of forms, substantial changes do not prevent the conclusion of the contract, but they are just deleted from the content of the contract. The party that does not wish to conclude the contract must indicate this expressly, by objecting without undue delay or by submitting a conditional offer or acceptance.

A variant of these flexible systems is Dutch law, which applies the first shot rule, so that changes made by the acceptor will have no effect, unless its acceptance expressly provides rejecting the application of the conditions contained in the offer [Article 6:225.3 of the Dutch and Suriname Civil Code]. The wording is different, but with the same result, in Section 2-207 (1) UCC, which also considers the acceptance as definitive and seasonable, even if though it states terms additional to or different from those offered, unless acceptance is expressly made conditional on assent to the additional or different terms. In both cases, conditional acceptance involves converting the acceptance to a counter-offer and therefore a return to the last-shot rule. Therefore, to impose a condition, the acceptance of the offer must include a clause that states that "acceptance is conditional upon assent from X to additional or different terms introduced by Y".

The rule contained in these Principles qualifies the general rule in Article 2.1.8. It is based on the need to preserve the contract as much as possible, in accordance with substantially common terms and conditions (knock-out rule). If the discrepancy affects the essential aspects of the contract, it may be concluded that the concurrence between offer and acceptance is not sufficient to support a contract as concluded. In any case, we must take into account the rules of interpretation and, above all, the integration of contract rules contained in Section 2 of Chapter 4 of these Principles. Judges and arbitrators will determine to what extent the discrepancy between the terms of the forms is materially important.

The contract will not be concluded either when one of the parties has manifested or makes clear its intention not to be bound unless the provisions of its standard terms form are fully accepted, provided that this clause is not set out standard terms. That is why it is so important that the acceptance clause of standard terms is sufficiently visible in the articles of the contract, in such a way that the other party has the opportunity to know of the standard terms and that the intention not to be bound is clear if the terms considered to be substantial are not accepted by the other party. It is advisable to include a clause of express acceptance of the standard terms surrounded

with maximum guarantee of efficacy and able to prevent unwanted results, regardless of the regulatory text governing the contract.

CLAUSES ON BATTLES OF FORMS:

There are several possibilities to this end. The first option is to specify that the contract is considered as concluded and that contradictory clauses introduced by the other party will not be considered. This is done to reach an agreement on the common clauses. Where there is no agreement, it is presumed that nothing has been agreed to, so that contradictory clauses void each other.

Option A: Forms Compatibility

"The acceptance of the standard terms of a party does not prevent the conclusion of the contract if they are irreconcilable with the standard terms of the other party. The irreconcilable clauses will be deemed as not included".

The second option, if a party wants to impose their own conditions, will require including a cancellation clause of those introduced by the other party that are inconsistent with their own. This clause should be included in a well- featured place and be able to call the attention of the other party. The problem is that the other party can be equally careful and include such a clause in turn; in this case, the will to accept or reject the contract must be explicitly notified because, depending on the legal system to which the contract is subject, this could be considered as a counteroffer (last-shot rule) or will give priority to the first offer eliminating incompatible terms (knock out rule). A second drawback is that such clauses are considered invalid in the light of some legal systems. Thus, French case law does not support the voluntary hierarchy of conditions by one of the contracting parties, i.e. clauses that impose one's own conditions, cancelling those of the counterparty (e.g. judgment of the *Cour of Cassation* of 10 December 1991).

Option B: Exclusion of forms

"The acceptance of the standard terms of a party implies the exclusion of any other standard terms of the other party".

Finally, if the offeror does not wish to be bound by the contract if the other party introduces substantial or simple modifications from the original offer, it shall emphasise through a prominent clause, but if the other party has also included a clause of this kind to avoid being bound by the modifications to the standard terms, the intention not to conclude the contract must be immediately notified within a reasonable time, before contract performance acts are begun.

Option C: Clause of no conclusion of the contract

"If the standard terms of the other party were contradictory with [or" constitute a substantial change regarding "]" those established in the form (...) of this part, the contract is not concluded unless there is an express confirmation of this part to the contrary".

Nevertheless, to avoid all risk, the fact of being unable to find a uniform solution shows that the only true safe option is for the parties to make sure that there are standard terms and to compare them with their own standard terms, in order to express their objection to the inclusion of these standard terms of the contract as soon as possible, before acts of performance are begun.

Section 2. Time and place of conclusion of the contract

Article 2.2.1: Time of conclusion of the contract

Unless otherwise established in the offer, the contract is concluded at the time that the offeror receives the acceptance or at the time the offeror has knowledge of behaviour by the offeree implying acceptance.

COMMENT

1. Diversity of solutions as to the of time of conclusion of the contract

It is important to determine the time of confluence of the consents of both parties, which determines the conclusion of the contract in order to define the time after which obligations become enforceable, up till when the offer or acceptance may be withdrawn or revoked, the law applicable to the contract, the market price, the transfer of risks, the termination of contracts made in fraud of the obligees, etc. In the absence of agreement on the exact moment when contract is concluded, it is recommended that the offeror clearly indicates this time in its proposal. Otherwise, the parties run the risk of not being able to settle several issues related to their declaration of intention.

When contracts are made between parties that are found in the same location, there is no problem in determining the time or the place of conclusion of the contract. However, the parties may give themselves a cooling-off period and postpone their declarations of intention. The medium of communication used by the parties is also relevant. Being able to use an instant medium of communication does not give rise to the same problems as using a medium that requires some time for the other party to meet its counterpart. Therefore, rather than the physical presence of the parties in the same place, the most important point is the time between the manifestation of the first declaration of intention, which constitutes the offer, and the second, which is acceptance.

The declaration doctrine (*Erklärungstheorie*, *Äusserungstheorie*), according to which the conclusion of the contract occurs when the offeree expresses or externalises its declaration of will (Article 310 Cuban Civil Code; Article 54 Cuban Commercial Code) is hardly followed in Caribbean countries, insofar as it would allow the conclusion of the contract by the mere fact that the offeree has externalised his subjective intention, although this intention has not been communicated to the offeror.

The theory of expedition or remission (expedition doctrine, *Absendetheorie* *Übermittlungstheorie*, postal rule or mailbox rule), according to which the decisive moment is that in which the offeree releases his declaration of intention, sending it to the offeror, prevails in common law systems, through the postal rule. However, this old rule [*Adams v Lindsell* (1818), 12 Digest (Rweal.) 86, 477; *Thomson v James* (1855), 18 D1] is limited to the declarations sent via postal mail, and has been replaced by the use of the new means of telematic communications, that make English case law and common law systems actually close to reception theory (Section 64 Restatement

(Second) of Contracts; Section 2-201 UCC). Article 317.2 Cuban Civil Code also provides that acceptance binds the offeree from when it is sent, although it does not bind the offeror but until the acceptance gets to the offeror's knowledge. This theory has the disadvantage of enabling the offeree to get the acceptance back from the post office or by giving the order to withdraw it when postal regulations allow it.

The theory of knowledge or information (information doctrine, *Kenntnisnahmetheorie*, *Vernhemungstheorie*) considers that the contract is concluded when the acceptance is known by the offeror. It is also considered as unfair if the offeree did the best to make its communication reach the offeror, and the offeror does not know of the acceptance by a fact imputable to it (for example, being away on a journey or taking advantage to revoke the offer and conclude a more advantageous contract with another party). This theory is accepted in Article 1.553.2 Honduran Civil Code, Article 1.214.2 of the Puerto Rican Civil Code, Article 112 of the Venezuelan Commercial Code, Article 1.137.1 of the Venezuelan Civil Code. The case of Cuba is unclear, since the Article 317.2 Cuban Civil Code provides that acceptance does not bind the offeror but once the acceptance reaches the offeror's knowledge, although it does bind the offeree from when the acceptance is sent. However, the theory of knowledge appears relaxed in many systems, and it is presumed that the offeror knows the acceptance only because it has been sent to its address. This safeguards legal security, since the offeror is not bound by a contract without knowing that it has been accepted, and prevents the proponent from delaying the time of knowledge of the declaration of intent of the offeree, so that it is said that it tries to maintain a fair balance (Article 1.137.5 of the Venezuelan Civil Code).

Indeed, as already noted in general in the comments on Article 1.3 of these Principles, the most widespread criterion reflects the theory of reception (reception doctrine, *Empfangstheorie* or *Zugangstheorie*), according to which the contract is concluded when the offeror receives the message containing the acceptance in its registered office or its place of business, that is, at home, at its business or mailing address [Article 864 of the Colombian Commercial Code; Article 444 Costa Rican Commercial Code (although Article 1.009 Costa Rican Civil Code appears that follows the rule of emission); Article 1523 Guatemalan Civil Code; Article 3:37.3 Dutch and Suriname Civil Code; Article 1.807 Mexican Civil Code; Article 80 Mexican Commercial Code; Article 84 Nicaraguan Commercial Code; Article 210 Commercial Code Panama; Article Venezuelan 1.137.5 Civil Code; Article 18.2 CISG; Article 1.10 UP; Article 2:205 PECL; Article II-4:206 DCFR; Article 22 Draft project reform of the French law on Obligations 2013]. This theory transfers to the offeror the diligence required to ascertain the

content of the communication, so that even if the offeror does not have a real effective knowledge of the acceptance, the consequences are the same as if it had known the declaration of intention and the contract was concluded. This creates a better balance in the risk of uncertainty between the parties. Article 2.2.1 of these Principles follows the dominant theory. The accuracy of the time of receipt of acceptance will follow the rules laid down in Article 1.3.

Article 2.2.2: Place of conclusion of the contract

Unless otherwise established in the offer, the contract is considered as concluded in the place of the establishment of the offeror.

COMMENT

Freedom of the parties to determine the place of the contract is generally accepted. The place of conclusion of the contract is of relative interest, but may be relevant to some collateral issues. That is why, in the absence of agreement, a subsidiary interpretative rule may be useful. Some legal texts in Caribbean countries deal with this issue. Article 91 of the Nicaraguan Commercial Code provides that the place of conclusion of the contract, if both parties reside in different places, is the residence of the party accepting the first proposal. On the other hand, Article 1.524 of the Guatemalan Civil Code provides, for cases in which the contract is done via telephone, by analogy with contracts between present parties, that the contract is concluded at the place where the offer was made, a rule generally followed in Article 864 of the of the Colombian Commercial Code and Article 115 of the of the Venezuelan Commercial Code.

These Principles have chosen the convergence between time and place, with the understanding that the place of the conclusion of the contract is the place where the declaration that concludes the contract is usually received, that is, the acceptance. This place is determined by the establishment of the offeror, which provides in any case a higher foreseeability and certainty.

Section 3. Representation

Article 2.3.1: *Scope of the section*

- 1. This Section governs the authority of a person (“the agent”) to affect the legal sphere of another (“the principal”) by a contract with a third party, whether the agent acts in the name of the principal or in its own name.**
- 2. This Section does not govern the internal relations between the agent and the principal.**
- 3. This Section does not govern the authority conferred by law to an agent or the authority of an agent appointed by a public or judicial authority.**

COMMENT

This Section deals with the regulation of the authority of the agent to affect the legal position of the principal by means of the contracts that the agent may conclude with a third party, that establish direct legal links between the agent and the principal. This Section, therefore, only concerns the relations between the principal and the agent on the one hand, and the third party on the other hand. In other words, it focuses on the external relations of the authority. Internal relations between the principal and the agent are therefore excluded. Information in this regard (rights and obligations between the principal and the agent) will be found in the provisions of their contract and the law applicable to that contract under private international law of the forum. Specific rules must also be considered, such as mandatory rules for the protection of some specific types of agency relationships, for example, independent commercial agents in the OHADAC territories where the European law is applicable, which guarantees the agent certain rights in case of unilateral termination of the contract by the principal. This means that questions concerning the internal as well as external relations of the authority, such as the conditions of granting and termination of authority, conflicts of interest or the replacement of the agent, will be addressed in this section only from the view point of their effects on third parties.

This Section deals only with intermediaries who have authority to conclude contracts. Intermediaries whose task it is to introduce the parties to each other so they can later negotiate and conclude a contract (brokers or state agents, for example), or negotiate contracts with third parties but without the capacity to conclude them, this task being reserved to the person on whose behalf they are acting (employed representatives or

independent commercial agents not authorised to conclude contracts) are outside the scope of this Section. None of these instances are cases of representation, although the above-mentioned intermediaries are sometimes incorrectly called “representatives”.

Given the special nature of representation characterised by the intervention of three parties (principal, agent and third party), the application of this Section to the said relations will necessarily require the acceptance of the OHADAC Principles by the three parties involved. In short, a “trilateral” agreement around the application of the Principles will be necessary. Given the absence of a direct link between the principal and the third party, that agreement should be broken down in two phases. The first one, in the cases of express authority of the agent, should correspond to date of granting of the authority, and specify that the principal has given authority to the agent to conclude contracts with third parties “in accordance with the provisions of the OHADAC Principles”. The second one will coincide with the moment of the conclusion of the contract between the agent and the third party, with the inclusion of a clause requiring that the contract be governed by these Principles. This stage will obviously be altered in cases of implied authority, apparent authority or lack of authority, although in such cases, the acceptance by the principal of the application of the Principles will take place, generally, after the conclusion of the contract between the agent and the third party. In the case of lack of authority, this time will coincide with the ratification. This *ex post* acceptance of the Principles must not necessarily be express. It can be also tacitly carried out, as in cases where the principal proceeds to perform its obligations under the contract agreed on his behalf by the agent without objection to the clause claiming the application of the Principles to the contract.

Moreover, given the non-imperative nature of the rules on representation existing in the different national regulations, the “trilateral” agreement reached by the parties to the representation concerning the application of the OHADAC Principles will necessarily imply the moving aside of the domestic regulations on the matter. Nevertheless, the regime of these Principles is usually in line with domestic regulations, since they contain principles common to the various national laws.

As mentioned, the OHADAC Principles restrict the scope of application of this Section to the external relations of representation. They therefore differ in this respect from the model followed by most Caribbean civil law systems (Articles 2.142-2.199 of the Colombian Civil Code; Articles 1.251-1.294 Costa Rican Civil Code; Articles 1.984-2.010 Dominican and French Civil Code; Articles 1.686-1.727 Guatemalan Civil Code; Articles 1.748-1.774 Haitian Civil Code; Articles 1.888-1.918 Honduran Civil Code; Articles

3.293-3.389 Nicaraguan Civil Code; Articles 1.400-1.430 Panamanian Civil Code; Articles 1.600-1.630 of the Puerto Rican Civil Code; Articles 1.601-1.661 Saint Lucian Civil Code), which do not distinguish between internal and external relationships of representation, because they consider the authority as a mere effect of the mandate contract. This is also the model followed by the common law systems, where, under the concept of “agency”, the relations between principal and third party and relationship between principal and agent are included.

On the contrary, the OHADAC Principles favour what might be called the “Germanic” model of representation, characterised by establishing a clear difference between authority and the base contract, and therefore, between external and internal relationships of representation. This is also the model followed by the Caribbean countries of Dutch tradition [Articles 3:60-3:67 (representation), 7:414-7:424 (mandate) and 7:428-7:445 (commercial agency) Dutch and Suriname Civil Code], by some countries of Spanish tradition [Articles 56-66 (representation) and 398-422 (mandate) of the Cuban Civil Code; Articles 1.800-1.802 (representation) and 2.546-2.604 (mandate) of the Mexican Civil Code, and implicitly, Articles 274 and 310 of the Mexican Commercial Code; Articles 1.169-1.172 (representation) and 1.684-1.712 (mandate) of the Venezuelan Civil Code, and implicitly, Article 95.2 of the Venezuelan Commercial Code], include the various international instruments of unification of contract law [Articles 2.2.1-2.2.10 UP; Articles 3:101-3:304 PECL; Articles II-6:101-II-6:112 DCFR; Geneva Convention of 17 February 1983 on agency in the international sale of goods (hereon GC, not in force)].

Authors and case law in most legal systems that used to follow the first model have eventually developed the distinction between internal and external relationships of representation [Articles 832-844 (representation) and 1.262-1.339 (mandate) of the Colombian Commercial Code; Articles 731-739 (representation) and 804-825 (commission) of the Honduran Commercial Code; Articles 399 and 436 of the Nicaraguan Commercial Code; Articles 604 and 612 of the Panamanian Commercial Code; Article 200 of the Puerto Rican Commercial Code; Articles 60-68 Draft Reform of the French Law of Obligations 23 October 2013].

Moreover, the OHADAC Principles consider that, to qualify the legal situation in which the agent operates, it is not relevant to specify whether the agent is acting in the name of the principal or in its own name. This makes it possible to use this qualification in both situations. All Caribbean common law systems have the principle that it is irrelevant to establish direct legal relations between the principal and the third party. In these systems the direct link between the principal and the third party is

recommended in cases where the agent discloses its position to the third party (disclosed agency), whether or not he has revealed the identity of the principal. That is why the disclosed principal may be named/identified or unnamed/unidentified [*Universal Steam Navigation Co v James McKelvie & Co* (1923), AC 492; *Benton v Campbell, Parker & Co Ltd* (1925), 2 KB 410; Sections 6.01 (1) and 6.02 (1) Restatement (Third) of Agency]. But even in those cases where the agent, by contracting with the third party, hides the existence of the representation (undisclosed agency), the possibility of establishing direct links between the principal and the third party is admitted once the third party discloses that the person he was dealing with was actually acting as an agent for another one (undisclosed principal) (Comment on Article 2.3.4).

At this point, it could be said that the OHADAC Principles deviate from the approach followed by the Caribbean systems of Spanish, French and Dutch tradition, where the direct effect of the acts of the agent in the legal position of the principal is conditional upon the acting of the agent in the name of the principal. This differentiates between direct and indirect representation depending on the fact that the agent acts in the name of the principal or in its own name. (Articles 1.505 and 2.177 of the Colombian Civil Code and 832, 833.1, 1.336 and 1.337 of the Colombian Commercial Code; Articles 1.275 of the Costa Rican Civil Code and 273 and 318 of the Costa Rican Commercial Code; Articles 57 of the Cuban Civil Code and 245-247, 284-285 and 287 of the Cuban Commercial Code; Articles 1.984.1° of the Dominican Civil Code and 94 of the Dominican Commercial Code; Articles 1.984 of the French Civil Code and Article L132 - 1 of the French Commercial Code; Article 61 Draft project reform of the French law on obligations of 2013; Article 1.686.2 of the Guatemalan Civil Code ; Articles 1.748 and 1.762 of the Haitian Civil Code and 90-91 of the Haitian Commercial Code; Articles 3:60.1, 3:66.1 and 7:425-7:427 of the Dutch and Suriname Civil Code; Articles 1.896 and 1.904 of the Honduran Civil Code and 732 Commercial Code; Articles 2.560-2.561 and 2.581 of the Mexican Civil Code and 283-285, 311, 313 of the Mexican Commercial Code; Articles 2.440.1 and 3.331 of the Nicaraguan Civil Code and 408-410, 437 and 439 of the Nicaraguan Commercial Code; Articles 1.110.1 and 1.408 of the Panamanian Civil Code and 606-607, 609 and 612 of the Panamanian Commercial Code; Articles 1.211.1 and 1.608 of the Puerto Rican Civil Code and 163-165, 202-203 and 205 of the Puerto Rican Commercial Code; Articles 1.615-1.616 and 1.627.1 of the Saint Lucian Civil Code; Articles 1.169 of the Venezuelan Civil Code and 96-97 and 376-379 of the Venezuelan Commercial Code). Such systems, indeed, only envisage the basic effect of the agency, that is the direct link between the principal and the third party, in cases of direct agency, in which the agent acts in the name of the principal. It is commonly

considered that the agent does so when, at the time of contracting, he reveals expressly the third party, under any formula, apart from its condition of agent, the identity of the principal (indicating, i.e. that it acts for “X”, in the name of “X”, as a representative for “X”, etc.), even if finally it is not included in the contract. *Contemplation domini* also characterises cases where the agent only declares that it acts in the name of a principal, but it does not initially reveal his identity, assuming the commitment to disclose it at a later moment. It is also possible that none of these extremes are expressly disclosed, but can be easily deduced from the unmistakable behaviour of the agent or due to other elements.

The representative effect does not take place, however, in the cases of indirect representation, in which the agent acts in its own name, concealing his capacity of agent from the third party. In such cases, the agent, and not the principal, will be personally liable to the third party. There is an exception to this rule in certain domestic legal systems in relation to the things belonging to the principal (Article 1.896.2 Honduran Civil Code; Article 2.561.2 Mexican Civil Code; Article 1.408.2 Panamanian Civil Code; Article 1.608.2 of the Puerto Rican Civil Code). How the agent should transfer the principal the rights acquired from the third party on the principal’s interest or how the agent should cover the obligations acquired with the third party will be decided within the framework of the internal relationship between the principal and the agent. However, we must not forget that even some civil law systems provide some exceptions to the general rule establishing that the principal is not obliged in cases of indirect representation, and admit the possibility that, in some situations, the principal may claim against the third party directly, or conversely, that the third party may directly claim against the principal (Comment on Article 2.3.4).

The solution adopted by the OHADAC Principles clearly coincides with those on the GC (Article 1.1 and 4) and the UP [Articles 2.2.1 (1), 2.2.3 and 2.2.4 (2)], which also expressly provides the irrelevance of the fact that the agent acts in its own name or in the name of the principal in order to bind this one towards the third party. This solution is not far from that offered by either the DCFR (Articles II–6:105 and II–6:106) or the PECL [Articles 3:102 and 3:301 (2) a 3:304]. Although these instruments are based on the distinction between situations in which the acts of the agent affect the legal position of the principal and those where they do not, that is between direct and indirect representation, they leave the possibility, through a legal rule, that these legal effects actually occur.

Finally, this Section refers only to voluntary representation, that is the representation that has its origin in a voluntary act of the principal intended to authorise the agent to

act on his behalf (power), all the while widening his scope of action. In some cases, this voluntary act materialises in a unilateral proxy deed granted on a one-off basis, and in others it is part of a bilateral contract that binds the agent and the principal. This section does not deal with cases of legal representation, where the agent's authority is conferred by law (as in the representation of minors by their parents, holders of parental rights), as well as in those in which the authority derives from a public or judicial authority (as in the representation of disabled people by their tutors). In these cases, determination of the authority of the agent will be done under the domestic law applicable according to private international law. Aside from these two types of representation, the OHADAC Principles follow the line of the two main international instruments of contract law harmonisation: the UP [Article 2.2.1 (3)] and the PECL [Article 3:101 (2)], which also limit their regulation to voluntary representation.

Organic representation, or representation of companies by their organs, is governed by specific rules in company law, which are usually mandatory. This question will be governed by the law applicable to the company, which will prevail on the general rules of representation included in this Section, whose application will be only subsidiary. The provisions of this Section will be applicable, however, to the voluntary representation of the company by those people that the board of directors has dutifully appointed.

Article 2.3.2: *Grant of the authority*

- 1. The principal's grant of authority to an agent may be express or implied.**
- 2. A person is to be treated as having granted authority to an agent if the person's statements or conduct induce a third party acting in good faith reasonably to believe that the apparent agent has been granted authority to perform certain acts.**
- 3. Unless the principal explicitly provide otherwise, the agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authority was granted.**

COMMENT

The OHADAC Principles coincide with the majority of national regulations in stating that the grant of authority is not subject to any requirement of form, so that it may be express or implied [Articles 2.149-2.150 of the Colombian Civil Code; Articles 2.151-2.152 of the Costa Rican Civil Code; Article 1.985 of the Dominican and French Civil Code; Article 1.749 of the Haitian Civil Code; Article 3:61.1 of the Dutch and Suriname Civil Code; Article 1.889 of the Honduran Civil Code; Articles 2.547.3 and 2.550-2.552 Mexican Civil Code; Articles 3.293.1-3.294 Nicaraguan Civil Code; Article 1.401 of the Panamanian Civil Code; Article 1.601 of the Puerto Rican Civil Code; Articles 1.601 and 1.605 Saint Lucian Civil Code; Article 1.685 of the Venezuelan Civil Code; Section 1.03 Restatement (Third) of Agency; Articles 9.1 and 10 GC; Article 2.2.2 (1) UP; Article 3:201 (1) PECL; Article II-6:103 (2) DCFR].

Authority can, of course be granted expressly, either verbally or orally, for example granting of authority made through a mandate or through a verbal or written declaration by the principal, or, if the principal is a company, by the resolution of the board of directors. The advantage of this kind of granting is clear: it makes it possible to prove both the existence and scope of this authority.

Example 1: X grants a power of attorney to Y, so that Y can conclude with Z, at Z's country, the sale of a property belonging to X in such country.

Authority can also be implied, as it happens in cases where the principal's intention to confer authority on the agent can be inferred either from the principal's conduct (e.g. assigning of a specific task to the agent that implies the granting of certain representative powers), or from the circumstances of the case (as in the cases in which the attribution to the agent of representative powers derives from a practice between the parties or trade usages).

Example 2: X appoints Y as the manager of a complex of touristic apartments belonging to X. Y will have the implied authority to conclude contracts of short-term lease of apartments with third parties.

Only a few countries refuse the possibility of granting implied authority, requiring the written - and particularly, the notary - form at all times (Article 414.3 of the Cuban Civil Code and Article 1.687.1 of the Guatemalan Civil Code), with certain exceptions (Article 415 of the Cuban Civil Code and Article 1.687.2 of the Guatemalan Civil Code).

Some of the domestic legal systems, which in principle do not subject the grant of authority to any condition of form, demand that when authority is granted for acts for which the observance of certain formalities are required, it must be made expressly and observe the same formal requirements required for the act to be performed

(Article 836 of the Colombian Commercial Code; Section 3.02 Restatement Third of Agency; Article 1.169.2 of the Venezuelan Civil Code). In other systems, the grant of some types of authority is subject to a specific form, generally a deed (Articles 1.251.2 and 1.226.2 Costa Rican Civil Code; Article 1.892 Honduran Civil Code; Articles 2.555-2.557 Mexican Civil Code; Articles 2.483.5 and 3.293.3 Nicaraguan Civil Code).

The OHADAC Principles, follow, in this respect, the Caribbean systems of Dutch tradition (Article 3:61.2 Dutch and Suriname Civil Code), and common law systems [*Summers v Solomon* (1857), 7 E&B 879; *Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd* (1964), 1 All ER 630; *The Shamah* (1981), 1 Lloyd's Rep 40; judgment of the *Court of Appeal* of Trinidad and Tobago in *Johnstone v Ritchie* (1983), Civ App No 16 of 1979 (Carilaw TT 1983 CA 20); judgment of the *Supreme Court* of Bahamas in *Clean-Away Ltd v St Tropez Marina Bahamas Ltd* (1993), No 1755 of 1990 (Carilaw BS 1993 SAC 21); judgments of the *High Court* of Trinidad and Tobago in *Speedy Service Liquors Ltd v Airports Authority of Trinidad and Tobago* (2002), No 586 of 1984 (Carilaw TT 2002 HC 106) and in *Raymond and Pierre Ltd v HCU Communications Ltd* (2010), No 1064 of 2009 (Carilaw TT 2010 HC 126); Section 1 of the 1889 *Factors Act* of England; Sections 2.03, 2.05, 3.03 and 3.11 Restatement Third of Agency], as well as some from different legal traditions (Article 842 of the Colombian Commercial Code; Article 736 Honduran Commercial Code; Articles 1.630 Saint Lucian Civil Code and 241 Saint Lucian Commercial Code), also envisage the possibility of a third type of authority: apparent authority. This is the authority purported to have existed although it was never granted expressly or implicitly. However, the declarations or conduct of the principal (for example enabling an agent who carried out duties that have granted authority to continue acting on the principal's account even when he has left that position) leads a bona fide third party to reasonably believe that the agent has the authority to act on behalf of the principal. This kind of authority is also admitted by authors and case law in French overseas territories (judgment of the *Cour de Cassation* of 13 December 1962, where apparent authority is recognised, even in the absence of fault on the part of the principal; also, Article 63.1 Draft project Reform of the French law on Obligations of 2013), and in different international instruments of unification of contract law [Article 14.2 GC; Article 2.2.5 (2) UP; Article 3:201(3) PECL; Article II-6:103(3) DCFR].

The idea of apparent authority is a clear manifestation of the application of the principle of good faith and of estoppel and takes on special relevance in cases where the principal is a company. The third party, in fact, usually finds it difficult to determine whether or not the individual acting in the name of a company has actual authority to

do so, and it may therefore prefer to rely on their apparent authority. It will only have to demonstrate that it was reasonable for it to believe that the person purporting to represent the company was authorised to do so, and that this belief was caused by the conduct of those who were actually authorised to represent the company (board of directors, administrators, etc.). In any case, the final decision about whether or not the belief on the part of the third party was reasonable will depend on the circumstances of each particular case (position occupied by the apparent agent in the organisation of the company, type of transaction, acquiescence of the organisation's representatives in the past, etc.).

Example 3: Y, director of a branch of the company X, though lacking actual authority to do so, engages company Z to redecorate the premises of Y. Z will be able to rely on the fact that the director of a branch would normally have authority to enter into such a contract and, hence, it was reasonable for Z to think that Y had actual authority to enter into the contract concluded with Y which binds X.

This Article finally refers to the question of the scope of authority, linking it to the scope of the authority granted by the principal to the agent: unless the principal expressly states otherwise, the agent will have the authority to carry out all acts that may be necessary for the accomplishment of his duties. Consequently, the broader the scope of the assigned tasks for the agent, the wider will be the scope of the authority conferred by the principal. That will be so, even in the case of express authority: the scope of authority will not be *a priori* limited by its literal form, unless the principal expressly deprives the agent of some faculties.

Example 4: X asks Y to buy from Z, at Z's country, certain goods. If, according to the contract agreed with Z, transport from Z's country to X's country is on the buyer, Y will be considered as authorised to contract that transport.

For the question on the scope of authority, these Principles provide the same solution as other international instruments of unification of contract law [Article 9.2 GC; Article 2.2.2 (2) UP; Article 3:201 (2) PECL; Article II-6:104 (1) and (2) DCFR]. Besides, they include a common principle to the current rules in OHADAC territories. In such systems, indeed, apart from some specific features and with the exception of those instances where the authority of the agent is granted by law (certain categories of commercial assistants), it is considered that the scope of the authority will be that dictated by the principal. In some cases, it is provided that the authority given to the agent will be interpreted 'in the broad sense' when it is not possible to consult the principal (Article 2.174 of the Colombian Civil Code; Article 3.330 of the Nicaraguan Civil Code).

In civil law systems, there is a distinction between general and especial authority, depending on the fact that the authority enables the agent for the performance of all businesses of the principal, or just of one or some of them in particular (Articles 2.156 of the Colombian Civil Code and 840 of the Colombian Commercial Code; Article 401 of the Cuban Civil Code; Article 1.987 of the Dominican and French Civil Code; Article 1.690 of the Guatemalan Civil Code; Article 1.751 of the Haitian Civil Code; Article 1.891 of the Honduran Civil Code; Article 2.553 of the Mexican Civil Code; Article 1.403 of the Panamanian Civil Code; Article 1.603 of the Puerto Rican Civil Code; Article 1.603.1 of the Saint Lucian Civil Code; Article 1.687 of the Venezuelan Civil Code; Article 62 Draft project reform of the French law on Obligations of 2013). In some cases a difference is made between three different categories of authorities: universal, general and special authority (Articles 1.253-1.257 of the Costa Rican Civil Code; Articles 3.295-3.298 of the Nicaraguan Civil Code). There is also a distinction between “acts of administration” and “acts of disposal”, and it is commonly considered that the general authority allows the performance of acts of administration, but not acts of disposal, which require the grant of special authority [Article 2.158 of the Colombian Civil Code; Articles 1.253-1.257 of the Costa Rican Civil Code; Article 401 of the Cuban Civil Code; Article 1.988 of the Dominican and French Civil Code; Article 1.693 of the Guatemalan Civil Code; Article 1.752 of the Haitian Civil Code; Article 1.892 of the Honduran Civil Code; Articles 3.295-3.298 of the Nicaraguan Civil Code; Article 1.404 of the Panamanian Civil Code; Article 1.604 of the Puerto Rican Civil Code; Article 1.603.2 and 3 of the Saint Lucian Civil Code; Article 1.688 of the Venezuelan Civil Code. The exception can be found in Mexico, where there general authorities take on the administration of goods, and also perform disposal acts, and where special authorities are qualified as those granted for specific acts, whether of administration or of disposal (Article 2.554 Civil Code)].

However, the underlying principle is always the same: it is the principal who determines the scope of the authority. Nevertheless, the agent will be considered to be authorised to perform as many acts as necessary to perform the assigned task (expressly, Article 1.604, second paragraph, Saint Lucian Civil Code).

Lastly, regarding the cases where principal has not specified the type of authority, as well as in the case of implied authority, it is provided that the scope of authority will depend on the purpose for which it has been granted (expressly, Article 399 Cuban Civil Code).

Article 2.3.3: *Disclosed agency*

- 1. Where an agent acts within the scope of its authority and discloses to the third party that he is acting as an agent, the acts of the agent shall directly bind the principal and the third party. No legal relation is created between the agent and the third party.**
- 2. However, the acts of the agent shall bind the agent and the third party where the agent, with the consent of the principal, undertakes to become a party to the contract.**
- 3. Where an agent acts in the name of a principal whose identity is to be revealed later, but fails to reveal that identity within a reasonable time after a request by the third party, the agent itself is bound by the act.**

COMMENT

The OHADAC Principles follow the GC (Article 12) and the UP [Article 2.2.3 (1)] on this issue, by directly linking the effects of the acts of the agent to the legal position of the principal. In addition to the existence of authority and the actions of the agent within the limits of this authority, it also links the fact that the third party knew that the agent had the authority to act. They refer to this situation under the expression “disclosed agency”. This situation covers both cases of disclosed agency of the common law systems and those of direct representation of the systems of civil tradition, embracing a broad interpretation of the *contemplation domini*.

The agent can reveal to the third party the existence of an agency and the identity of the principal. But it may also happen that the agent only discloses his position to the third party without initially identifying the principal. In both cases (provided the agent finally discloses the identity of the principal) a direct legal link is established between the principal and the third party, leaving the agent on the side of the relationship. That is why, in order to avoid any risk of being personally bound, it is advisable in practice for the agent, not only to clearly disclose his position, but also to indicate expressly the identity of the person on whose behalf he is acting, making sure that the third party knows about his role as agent.

Example 1: Y is a commercial agent for X, authorised to promote and conclude contracts of sale of X's products in Y's country. Complying with the commercial agency

contract between X and Y, Y concludes a sale contract with Z, whom it informs of its position of commercial agent of Y. The sale contract signed by Y under these conditions directly binds X and Z, being X, and not Y, who is responsible for delivering the goods and who is entitled to claim from Z the payment of the agreed price.

Example 2: This is the same situation described in Example 1, except that Y, when contracting with Z, only reveals its position of commercial agent, without identifying the person on whose behalf it is acting. The identification takes place at a later time. In this case the sale contract signed by Y directly binds X and Z.

In most cases, the third party knows of the position of agent of the person with whom he is concluding the contract because the disclosing of such circumstance by the agent himself, regardless of whether it is accompanied by the identification of the principal. But it may not be so. For example, when the agent does not disclose its condition at all, but the third party is aware of it through other means. In such instances there will not be a situation of “disclosed representation”, so that the effects will not be the typical ones of this kind of representation, but those described in the provisions on “undisclosed representation” in Article 2.3.4. National laws consider this situation as a case of undisclosed agency or indirect representation, depending on whether they are common or civil law systems.

Example 3: X, through a commission contract, asks Y to buy from Z a certain good, asking to remain anonymous. Even if Z knows the condition of Y as a commissioner, if the latter contracts with Z without disclosing that it is acting on behalf of X, the typical effect of the representation will not take place, and the sale contract concluded between Y and Z will only bind them, without affecting the legal position of X.

The OHADAC Principles leave no doubt about the effects of the disclosed agency: the contract concluded by the agent will create a direct legal relationship between the principal and the third party. But they also add that no legal relationship will be created between the agent and the third party, reflecting another principle common to both Caribbean systems [Article 2.582 Mexican Civil Code; *Robins v Bridge* (1837), 3 M & W 114; *Boyter v Thomson* (1995), 2 AC 629, 632; *Lucas v Beale* (1851), 109 CB 739; *Fairlie v Fenton* (1870), LR 5 Ex 169; Section 6.01 (2) Restatement (Third) of Agency] and international instruments of unification of contract law [Article 12 GC; Article 2.2.3 (1) *in fine* UP; Article 3:202 PECL; Article II–6:105 *in fine* DCFR].

Nonetheless, the OHADAC Principles envisage two instances of disclosed agency in which the acts of the agent generate a legal relationship between the agent himself and the third party. In the first one, the agent, with the consent of the principal, takes

on the position of a contracting party [Article 1.904 of the Honduran Civil Code; Article 1.416 of the Panamanian Civil Code; Article 1.616 of the Puerto Rican Civil Code; *Southwell v Bowditch* (1876), 1 CPD 374; *Montgomerie v United Kingdom Steamship Association* (1891), 1 QB 370; Section 6.01 (2) Restatement (Third) of Agency; Article 12 *in fine* GC; Article 2.2.3 (2) UP; Article 3:202 PECL)]. It is the case in which the third party, knowing the identity of the principal, specifies that it will conclude the contract only with the agent. The agent, with the principal's consent, agrees to be just himself who becomes bound by the concerned contract. In such case, and in accordance with the provisions of the internal agreement between agent and principal, the agent, after having acquired the rights deriving from the contract signed with the third party, will transfer them to the principal. The same applies to the case where the third party and the agent, and also with the consent of the principal, agree that agent becomes a co-obligor or a simple guarantor of the principal's obligations. This situation must not be confused with the possibility offered by some legal systems (Article 2.178 of the Colombian Civil Code or Article 3.332 of the Nicaraguan Civil Code), whereby the agent, through a covenant, guarantees the principal for the solvency of the third parties it is contracting with, or assumes the uncertainty of the collection. The reason is that such obligation is within the scope of the internal relations between the agent and the principal and does not create a legal relation between the principal and the third party. Lastly, it may also be the case in which the agent, with the knowledge of the third party, acts at the same time on his own behalf and on behalf of the principal, whether or not this is reflected in the contract [*Basma v Weekes* (1950), AC 441; *The Sun Apiñes* (1984), 1 Lloyd's Rep 381]. In any case, depending on whether or not the agent, acts exclusively when it takes on the role of contracting party, it will be considered that the agent is binding himself alone or together with the principal. In this respect, the OHADAC Principles differ from the other international instruments, which either provide the exclusive obligation of the agent (GC and UP) or impose in any case its obligation together with the principal (PECL).

The second case occurs in situations of "unidentified principal", which is when the agent acts on behalf of a principal whose identity he does not reveal at the time of concluding the contract, but commits to reveal that identity later. If the agent does not reveal the identity of the principal within a reasonable time after being asked to do so by the third party, it will be treated as if he had acted on his own behalf, being as a result directly bound to the third party by the contract they both concluded. The solution provided in the systems of Dutch tradition (Article 3:67.2 Dutch and Suriname Civil Code) and in common laws systems [*The Virgo* (1976), 2 Lloyd's Rep 135, C.A.] is precisely the establishment of a direct legal relationship between the agent and the

third party, although it is considered that the personal liability of the agent will only take place insofar as the third party can prove the agent had some contractual will that justifies such responsibility [*The Santa Carina* (1977), 1 Lloyd's Rep 478, CA]. It is even understood that until the disclosure of the identity of the principal, the third party may question the status of agent of the person purporting to act as such, and may hence sue it personally [*Dores v Horne and Rose* (1842), 4 D 673; *Gibb v Cunningham & Robertson* (1925), SLT 608]. This rule also exists in some Romanist legal systems (Article 739 of the Honduran Commercial Code), in the PECL (Article 3:203) and in the DCFR (Article II-6:108).

Common law systems envisage other situations in which the rule of non-obligation of the agent in the instances of disclosed agency can be excluded. It is possible, for example, that the agent's liability towards the third party in a case of disclosed agency derives from a custom between individuals or related to a particular type of agent [*Raiffeisen Zentralbank Österreich Attorney-General v China Marine Bunker (Petrochina) Co Ltd* (2006), All ER (D) 37, 33], a local commercial usage [*Fleet v Murton* (1871), LR 7 QB 126; *Cory Brothers Shipping Ltd v Baldan Ltd* (1997), 2 Lloyd's Rep 58] or a legal provision (e.g. Sections 44.1 (a) and 44.1 (b) of the United Kingdom *Insolvency Act* 1986, amended on Section 2 of the *Insolvency Act* 1994). The link of the agent to the third party is also supported in those instances where the agent, despite having acted for a named principal, has in fact done it on his own behalf. In such a case, the agent will be able to perform the contract after having informed the third party that he acted on his own behalf [*Bickerton v Burrell* (1816), 5 M & S 383], unless such a performance can damage the third party; this will be so, for example, when the third party has agreed regarding the solvency of the principal or other circumstances related to it, or when the agent, once the contract is concluded, comes to know that, for some personal reason, the third party did not want to contract with him [*Fellowes v Gwydyr* (1829), 1 Russ & M 83; *The Remco* (1984), 2 Lloyd's Rep 205]. This relation also exists in cases where the agent declares that he is acting on behalf of a principal, which does not actually exist; such is the case in contracts done by a company that, at the time of the contract, was not yet incorporated [*Kelner v Baxter* (1886), LR 2 CP 174; *Phonogram Ltd v Lane* (1982), QB 938]; however, it is not the case of a contract concluded on behalf of a company that did exist, but was dissolved before the contract was actually concluded; such a contract will be void. In all cases where the agent, in a situation of disclosed agency, becomes bound by the contract, there are two possible interpretations: on the one hand, that only the agent is liable, so that it is obliged only to the third party, but not the principal [*Scrace v Whittington* (1823), 2 B & C 11]; on the other hand, that both, agent and principal, are bound by the contract [*The Swan*

(1968), 1 *Lloyd's Rep* 5, 12; *The Kurnia Dewi* (1997), 1 *Lloyd's Rep* 553, 559]. In this last instance, once the third party has decided to sue the either the agent or the principal, he will lose the possibility of suing the other party [*Debenham v Perkins* (1925), 113 LT 252, 254]. At any event, none of the situations mentioned above are included in the exceptions to the general rule of non-obligation of the agent in cases of disclosed agency set out in the OHADAC Principles. Hence, in those cases where the disclosed agent wishes to contract with a third party in a common law country, to avoid the risk of the agent being bound to the third party, it is advisable to include a clause in the contract expressly excluding any kind of personal liability derived from that contract.

Article 2.3.4: *Undisclosed agency*

- 1. When an agent acts within the scope of its authority but does not disclose to the third party that it is acting as an agent, the acts of the agent shall bind only the agent and the third party.**
- 2. The acts of the agents shall not affect the legal position of the principal in relation to the third party unless this is specifically provided for by the applicable law.**

COMMENT

Under the title “Undisclosed agency”, OHADAC Principles refer to cases where the agent acts on behalf of the principal, within the limits of his authority, but does not disclose his condition to the third party, stating that the acts of the agent in such instances will only bind the very agent towards the third party, without affecting a priori the legal position of the principal [as in Articles Article 2.2.4 (1) UP and 13.1 (a) GC]. The agent will acquire the rights derived from the contract closed with the third party, and only later, according to what was agreed in the internal relations with the principal, he will be able to transfer those rights to the principal.

Example: Y buys a certain good from Z, who does not know that Y acts on behalf of X. The contract entered into between Y and Z only binds these two parties and does not generate any legal relation between X and Z.

The category of “Undisclosed agency” covers both situations of undisclosed agency of the Caribbean common law systems, as well as situations known as “indirect agency”

of Roman-Germanic systems. In the two situations, the existence of an agency and the identity of the principal are not disclosed to the third party, either because the agent acts in his own name, or because he does it in such a way that it is impossible for the third party to know that the person with whom he's contracting has the intention of affecting with his acts the legal position of another person. But, as indicated in the comment to the previous provision, under this category of representation are also covered those other situations in which the agent, when contracting with the third party, does not disclose its condition nor acts in such a way that it can be inferred, but the third party, through other means, has knowledge of that condition. It is considered that the behaviour of the agent in such instances leaves no place for doubt: he only wants to be liable himself, and not affect the legal position of another person [Article 13.1 (2) GC].

The rule that the acts of the undisclosed agent only bind the agent and the third party and do not produce any legal relation between the principal and the third party also constitutes a common rule to all domestic systems applicable to OHADAC territories, whether they are civil or common law systems.

All domestic systems also accept exceptions to this rule, and provide for the possibility that, under certain circumstances, of establishing a direct relationship between the principal and the third party. For example, in the overseas French territories, the third party has the right to sue the principal directly. In French Law, indirect representation, in cases where the third party does not know that the agent is acting on someone else's behalf, is considered a special case of simulation, and it is provided that if the third party acquires knowledge of the fact that the party he contracted with was acting on a principal's behalf, it may bring a declaratory action for a judicial statement of simulation. After obtaining this declaration, the third party can choose either to sue the principal, relying on the hidden contract or sue the agent on the basis of the simulated contract. The third party cannot sue both principal and agent at the same time.

The right of the third party to sue the principal is also recognised in Spanish tradition systems, but only in the presence of a commercial agent. The agent is usually obliged to act in the name of his principal, who is directly bound by his acts (Article 1.336 of the Colombian Commercial Code; Article 287 of the Cuban Commercial Code; Article 267 of the Guatemalan Commercial Code; Article 358 of the Honduran Commercial Code; Article 311 of the Mexican Commercial Code; Articles 435.1, 437 and 439 of the Nicaraguan Commercial Code; Article 606-607 of the Panamanian Commercial Code; Articles 202-203 of the Puerto Rican Commercial Code; Article 96 of the Venezuelan

Commercial Code). However, it is also specified that, if the factor acts on his own name, his acts may end up binding the principal and the third party in certain circumstances (Article 1.337 of the Colombian Commercial Code; Article 287 of the Cuban Commercial Code; Article 267 of the Guatemalan Commercial Code; Article 359 of the Honduran Commercial Code; Article 314 of the Mexican Commercial Code; Article 440 of the Nicaraguan Commercial Code; Article 609 of the Panamanian Commercial Code; Article 205 of the Puerto Rican Commercial Code; Article 97 of the Venezuelan Commercial Code).

Systems based on Dutch law recognise both the right of the principal to sue the third party, and the right of this party to sue the principal, giving a complete relation of circumstances and conditions that in the cases of indirect representation must concur to enable the establishment of a direct legal relation between the third party and the principal (Articles 7:420 and 7:421 of the Dutch and Suriname Civil Code).

Lastly, also common law systems provide for the possibility that, in undisclosed agency instances, direct legal relations between the principal and the third party are established. In such instances, of course, the agent may be contractually bound to the third party [*Sims v Bond* (1833), 5 B & Ad 389, 393; *Boyter v Thomson* (1995), 2 AC 629, 632]. But also, and as an exception to the doctrine of privity of contract of the common law, it is admitted, for reasons of commercial convenience, that a direct legal relation is established between the principal and the third party, as long as the agent has acted within the scope of its authority [*Pople v Evans* (1969), 2 Ch 255; *Siu Yin Kwan v Eastern Ins Co Ltd* (1994), 2 AC 199, 209; Section 6.03 Restatement (Third) of Agency].

There are, however, different regulations in the various domestic systems with regard to the scope of the effects of undisclosed representation. For this reason, OHADAC Principles restrict themselves to providing that the legal position of the undisclosed principal may be affected against a third party depending on whether the domestic legal system will be applied in accordance with Private International Law of the forum. The solution chosen is the same as that provided by Article II-6:107 of the DCFR and the other international instruments of unification of contract law were rejected. This solution consists in stating, based on the model of certain domestic systems, the instances in which the general rule of the principal's obligation towards the third party will be excepted [Article 22.4 (2) UP; Articles 3:302 to 3:304 PECL; Article 13.2, 3, 4 and 5 GC].

Principals who wish to exclude the possibility of a direct relationship with the third party, should demand their agent, when contracting with third parties (without disclosing his condition), to include in the contracts a clause declaring that they

“exclusively” assume the rights and obligations arising from such contracts. Otherwise, the principal will have to assume the risk, pursuant to the national law designated by Private International Law rules of the forum, of being sued by the third party. In addition, the inclusion of such a clause will also be of interest to the third party, since it will exclude the possibility that, in accordance to the applicable domestic law, the principal, initially unknown, may directly sue the third party in performance of the contract concluded with the agent.

Article 2.3.5: *Agent acting without or exceeding its authority*

- 1. When an agent acts without authority or exceeds its authority, its acts shall not affect the legal position of the principal, unless those acts are ratified by the principal according to Article 2.3.9.**
- 2. The agent that acts without authority or exceeds its authority, shall be liable to the third party and shall pay damages that will place the third party in the same position as if the agent had acted with authority and not exceeded its authority. However, the agent shall not be liable if the third party knew or ought to have known that the agent had no authority or was exceeding its authority.**

COMMENT

The first Section of this rule reflects a shared principle: the non-establishment of a direct legal relation between the principal and the third party. In those cases where the agent acts without authority, including apparent authority (it does not matter whether the authority has never existed or if it had existed, but had been extinguished), or exceeding its limits [Articles 833.2 and 1.266.2 of the Colombian Commercial Code; Article 1.998.2 of the Dominican and French Civil Code; Article 1.762.2 of the Haitian Civil Code; Article 737 of the Honduran Commercial Code; Article 3:66 of the Dutch and Suriname Civil Code; *Xenos v Wickham* (1866), LR 2 H.L. 296; *Hopkinson v Williams* (1993), 8 CL 581; Article 14.1 GC; Article 2.2.5 (1) UP; Article 3:204 (1) PECL; Article II- 6:107(1) DCFR; Article 63.1 Draft project reform of the French law on Obligations of 2013; implicitly: Article 1.703 Guatemalan Civil Code; Article 2.583 Mexican Civil Code; Article 2.440.2 Nicaraguan Civil Code; Article 1.110.2

Panamanian Civil Code; Article 1.211.2 of the Puerto Rican Civil Code; Article 1.617 of the Saint Lucian Civil Code].

Contracts that an agent may conclude under these circumstances will be invalid or void, although their nullity will be relative, because, as provided in Article 2.3.9, the possibility of a ratification of the contract by the principal remains open. Besides, in cases of partial lack of authority, nothing prevents total or partial nullity of a concluded contract, depending on whether it is divisible or not and, therefore, it cannot exist without the part that was not authorised [Section 6.05 (1) Restatement (Third) of Agency].

Example 1: X asks Y to buy a certain good, and sets a maximum price for such purchase. Y ends up contracting the purchase with Z, but doing so for a higher price than the one set by X. Having exceeded its authority, the contract between Y and Z does not bind X and has no effect between Y and Z either.

For the cases of lack or excess of authority, unless ratification by the principal, the different national systems also agree to establish the responsibility of the agent towards the third party, forcing the agent to compensate the third party for damages. However, they differ in regard to the extent of such compensation.

In some legal systems, the responsibility of the agent is limited to the so-called “negative interest”, with the only obligation of paying the third party for damage that take it back to the situation prior to contracting. Except for cases where the agent, expressly or tacitly, had guaranteed its authority, it is considered here that the agent is responsible for all damage caused to the third party (Article 1.097 Dominican and French Civil Code).

Other systems, however, consider that the responsibility of the agent is extended to what is known as “positive interest”, so that the third party is made to pay for damage that place the agent in the position in which it would have been if the agent had acted with proper authority or without exceeding its limits. This will allow the third party to obtain as compensation the benefit he would have obtained if the contract concluded with the false agent would have been valid [Article 841 of the Colombian Commercial Code; Article 3:70 of the Dutch and Suriname Civil Code; *Collen v Wright* (1857), 8 E&B 647; *Dickson v Reuter’s Telegram Co* (1877), 3 CPD 1; *V/O Rasnoimport v Guthrie & Co Ltd* (1966), 1 Lloyd’s Rep 1; judgement of the Supreme Court of Bahamas in *Stubbs v Souers* (1986), No 196 of 1985 (*Carilaw* BS 1986 SC 28); Section 6.10 Restatement (Third) of Agency]. Under most legal systems, the agent’s liability arises from the breach of an implied warranty of authority. The agent guarantees the third party its

authority to conclude the contract, and if it deals without authority, whether consciously or unconsciously, it incurs in breach of that warranty, so that it becomes liable for all damage caused to the third party. In any case, the agent's liability for breach of warranty is a strict liability, as well as contractual, because it concerns a contract that is collateral to the main contract and unilateral by nature, which is accepted by the third party when it concludes the contract with the agent.

Finally, a third group of legal systems simply states the personal liability of the agent in relation to the third party and impose the obligation to compensate the third party for damages (Article 1.507 of the Colombian Civil Code; Article 422 of the Cuban Civil Code; Article 1.703 of the Guatemalan Civil Code; Article 1.904 of the Honduran Civil Code; Articles 1.802.2 and 2.568 of the Mexican Civil Code; Articles 3.323 and 3.333 of the Nicaraguan Civil Code; Article 1.416 of the Panamanian Civil Code; Article 1.617 of the Puerto Rican Civil Code).

In any case, we must not forget the existence in the Caribbean scope of certain domestic laws, such as Costa Rican or Honduran laws, in which the third party is recognised as having the right to performance of the contract. The first one, namely, recognises the third party the right to claim the performance as long as it is feasible, and only when this is not possible it has the right to claim damages (Article 1.027 of the Costa Rican Civil Code). However, Honduran law gives the third party the possibility to choose between the performance of the contract or damages (Article 737.2 of the Honduran Commercial Code).

The OHADAC Principles, as well as other international instruments of unification of contract law [Article 16.1 GC; Article 2.2.6 (1) UP; Article 3:204 (2) PECL; Article II-6:107 (2) DCFR], provides that the agent who acts without or exceeds its authority is liable for damages to the third party. This liability extends to positive interest, imposing on the agent the obligation to compensate the third party until it is in the position in which it would have been if the agent had acted with authority or within its limits. As international texts [Article 16.2 GC; Article 2.2.6 (2) UP; Article 3:204 (2) PECL; Article II-6:107 (3) DCFR] and other Caribbean legal systems [Article 2.180 of the Colombian Civil Code; Article 422 of the Cuban Civil Code; Article 1.997 of the Dominican and French Civil Code and judgement of the *Cour de Cassation* 16 June 1954; Article 1.761 of the Haitian Civil Code; Article 3:70 of the Dutch and Suriname Civil Code; Article 1.904 of the Honduran Civil Code; Article 2.584 of the Mexican Civil Code; Article 3.333 of the Nicaraguan Civil Code; Article 1.416 of the Panamanian Civil Code; Article 1.617 of the Puerto Rican Civil Code; *Beattie v Ebury* (1872), LR 7 Ch App 777, 800; *Halbot v Lens* (1901), 1 Ch 344; Section 6.10 (3) Restatement (Third) of

Agency], the Principles provides that the agent will not be liable towards the third party if he knew, or should have known that the agent had no authority or was exceeding its limits. At any event, the burden of proof is on the agent.

The agent will also not be held liable, in the presence of an authority that has duly bound the third party, the agent demonstrates that the principal has been unable to perform the contract or to pay the corresponding damages (for example, in case of insolvency) This second exception, characteristic in common law systems [*Habton Farms v Nimmo* (2003), 1 All ER 1136], is also expressly referred to in the comment on Article 3:204 PECL.

Example 2: Y, who has no authority to do so, sells Z, on behalf of X, a consignment of goods belonging to X. These goods are bought by Z to be distributed on the market. Z ignores the lack of authority of Y. In the absence of ratification of the contract by X, Z will be able to obtain from Y the difference between the price set for the goods and their market value.

Example 3: The case is the same as in example 2, except that Z, when contracting with Y, does so knowing that Y has no authority. In this case, lacking ratification by X, Z could not obtain any compensation from Y.

Article 2.3.6: *Conflict of interest*

- 1. If a contract concluded by an agent involves the agent in a conflict of interests with the principal, the principal may avoid the contract according to the provisions of Section 5 of Chapter 3, unless the third party legitimately did not know of that conflict of interests.**
- 2. There is presumed to be a conflict of interests where the agent has assumed the situation of the other contract party or it is entitled under two or more grants of authority to conclude the contract by itself.**
- 3. The principal may not avoid the contract if it had consented to the agent's involvement in the conflict of interests or if the principal knew or ought to have known it and had not objected within a reasonable time.**

COMMENT

The agent, in the exercise of the agency entrusted to it, must always act in the interests of the principal, and not in its own interests or in the interests of any other person.

The most frequent cases of conflict of interests are, firstly, where the agent concludes a contract entrusted to it by the principal, with itself (or a company in which it has an interest) and, secondly, the case where the agent acts simultaneously on behalf of two principals. However, there is not necessarily a conflict of interest in these cases. For example, the agent's acting for two principals can be consistent with the uses of a specific trade commercial sector, or the principal could confer on the agent such a mandate that is so strict that there is no room to create a conflict of interests. The OHADAC Principles, aligned with the PECL [Article 3:205 (2)] and the DCFR [Article II-6:109 (2)], opt for establishing a general *iuris tantum* presumption of conflict of interests on the mentioned instances, admitting evidence to the contrary by the agent.

Most legal systems provide for situations of conflict of interests, even if some of them address this issue, only to make the self-contract conditional upon the principal's assent [Articles 838-839 and 1.274 of the Colombian Commercial Code; Article 317 of the Costa Rican Commercial Code; Article 288 of the Cuban Commercial Code; Article 270 of the Guatemalan Commercial Code; Articles 365 and 734-735 of the Honduran Commercial Code; Articles 299 and 312 of the Mexican Commercial Code; Articles 3335 of the Nicaraguan Civil Code and 424 and 438 of the Nicaraguan Commercial Code; Articles 611 and 650 of the Panamanian Commercial Code; Articles 185 and 206 of the Puerto Rican Commercial Code; Article 1.606 of the Saint Lucian Civil Code; Articles 1.171 of the Venezuelan Civil Code and 98 and 388 of the Venezuelan Commercial Code; *Hambro v Burnand* (1904), 2 KB 10; *Reckitt v Burnett, Pembroke and Slater Ltd* (1929), AC 176; Article 68 Draft project reform of the French law on obligations of 2013]. The OHADAC Principles provides the same solution as the rest of international instruments of unification of contract law [Article 2.2.7 (1) UP; Article 3:205 (1) PECL; Article II-6:109 (1) DCFR]. They specifically state that, in case of conclusion of a contract by the agent in conflict of interests with the principal, the principal shall have the right to avoid the contract. When the agent has acted within the scope of its authority, the effects of the representation shall take place, establishing a direct legal relation between the principal and the third party under the contract concluded by the agent. Thus, by leaving to the principal to decide whether or

not avoid the contract concluded by the agent, the protection of its interests will be duly guaranteed.

The Principles take also into account the need to protect the interests of the *bona fide* third party in preserving the contract that has been concluded. To this effect, they condition the principal's right to avoid the contract on the fact of the third party could not legitimately not know the existence of this conflict. This condition concurs, obviously, when the agent has concluded the contract with itself, and it is, at the same time, agent and third party.

Example 1: X asks Y to sell an estate belonging to X and located in Y's country. Y, acting on X's behalf, sells the estate to Z, who has also asked Y to buy a property in such country, and on whose behalf it is also acting at the sale transaction. X will be able to avoid the contract concluded by Y as long as he can prove that Z knew or ought to have known the conflict of interests. Z will also be able to avoid the contract as long as he can prove that X knew or ought to have known the conflict of interests.

Example 2: X asks Y to sell an estate belonging to X and located in Y's country. Y, himself, is interested in the property, and ends up buying it. X will be able to avoid the contract made by Y.

The solution reflected in the OHADAC Principles completely coincides with that offered for these situations by the Colombian and Honduran laws, where it is considered that the contract concluded by the agent shall be voidable at the request of the principal if the third party knew or ought to have known the conflict (Article 838 Colombian Commercial Code; Articles 365.2 et 734.2 Honduran Commercial Code). It is also in line with the solution provided for these situations by the common law systems, where the principal is bound by all contracts concluded by the agent within its authority, even if it has acted solely in its own interest (*Hambro v Burnand*), admitting one only exception to this rule: when the third party knew or ought to have known the existence of such a conflict (*Reckitt v Burnett, Pembroke and Slater Ltd*). The Principles, however, differ from other national systems, such as Costa Rican, Cuban, Guatemalan and Venezuelan laws in relation with "mercantile factors": if self-contracting takes place without authorisation of the principal, the benefits will go to the principal and the losses will go to the commercial agent (Article 317 of the Costa Rican Commercial Code; Article 288 of the Cuban Commercial Code; Article 270 Guatemalan Commercial Code; Article 98 of the Venezuelan Commercial Code). They also differ from Article 68 of the Draft project reform of the French law on obligations of 2013, where it is stated that whatever the agent might do in conflict of interest with the principal will be void.

If the principal chooses, within the frame of the OHADAC Principles, to avoid the contract concluded by the agent in conflict of interests, the procedure of avoidance will be that regulated in Articles 3.5.1 to 3.5.3 of the Principles.

The Principles, however, provides for two cases in which the principal loses its right to avoid the contract: the first one is when the principal has previously authorised the implication of the agent in the conflict of interests, and the second one when the principal knew that the agent was acting in conflict of interests (either because the agent itself would have revealed it, or because the principal would have known it otherwise) or when such a conflict could not be unknown, and the principal did not make any objection. There is also similar rules in other International texts, where exceptions to the right of avoidance of the principal are also provided [Article 2.2.7 (2) UP; Article 3:205 (2) PECL; Article II–6:109(3)].

Example 3: The case is the same as in Example 2, except that X, being aware of Y's interest in his estate, authorises it to proceed to the sale at the same time as he authorises it to acquire it for himself, if he decides to do so. X does not have the right to avoid the contract concluded by Y with itself.

Example 4: The case is same as in example 1, except that Y, before selling X's estate to Z, informs to X that he is also acting on behalf of Z, and to Z that he is also acting on behalf of X. If they make no objection, they will lose the right to avoid the contract concluded by Y acting as agent of both X and Z.

Article 2.3.7: *Sub-agency*

- 1. Unless otherwise stated, the agent shall have authority to appoint a subagent to perform acts which are not of a personal character.**
- 2. The rules of this Section shall apply to the acts of the subagent.**

COMMENT

In carrying out the mandate conferred on it by the principal, an agent may find it convenient, or even necessary, to avail itself of the services of other persons, who are considered as sub-agents. This is the case, for example, where certain tasks are to be performed in a place which is far away from the agent's place of business, or if a more efficient performance of the agent's mandate requires distribution of work.

A first group of domestic legal systems, except in cases where the principal has expressly or impliedly authorises it or when the very nature of the assignment requires it, does not allow the appointment of sub-agents [Articles 1.264 of the Costa Rican Civil Code and 277 of the Costa Rican Commercial Code; Article 1.994 of the Dominican and French Civil Code; Articles 1.707 of the Guatemalan Civil Code and 277 of the Guatemalan Commercial Code; Article 1.758 of the Haitian Civil Code; Article 3:64 of the Dutch and Suriname Civil Code; Articles 2.574 of the Mexican Civil Code and 280 of the Mexican Commercial Code; Articles 3.313 of the Nicaraguan Civil Code and 405 and 452 of the Nicaraguan Commercial Code; Articles 1.611 of the Saint Lucian Civil Code and 248.2 of the Saint Lucian Commercial Code; Section 3.15 (2) Restatement (Third) of Agency]. A second group of legal systems grants agents the authority to name a sub-agent as long as the principal has not forbidden it, or asked the agent to personally perform the contract [Article 2.161 of the Colombian Civil Code; Article 407.1 of the Cuban Civil Code; Article 1.900.1 of the Honduran Civil Code; Article 1.412.1 of the Panamanian Civil Code; Article 1.612.1 of the Puerto Rican Civil Code; Article 1.695 of the Venezuelan Civil Code (implicitly), although the opposite principle is sometimes followed with the commission agent and/or the commercial agent (Article 261 and 296 of the Cuban Commercial Code; Article 645 of the Panamanian Commercial Code; Articles 179 and 214 of the Puerto Rican Commercial Code; Article 387 of the Venezuelan Commercial Code)]. We must also bear in mind that some of the countries that do not support in principle the delegation of authority establish, however, some exceptions to this generic rule. This is the case of legal authorities, where the agent delegates its authority to a sub-agent when it lacks the necessary capacity to perform the act that has been assigned, or where the law does not allow it to do so, the delegation becoming therefore indispensable [Article 3:64 (b) of the Dutch and Suriname Civil Code]. It is also the case where the principal has no especial interest in a personal intervention of the agent in the conclusion of the contract, the task assigned by the principal refers to goods that are located outside the agent's country of residence [Article 3:64 (c) of the Dutch and Suriname Civil Code], or the delegation of authority is justified by usages [*De Busseche v Alt* (1878), 8 ChD 286, 310-311; Article 3:64 (a) of the Dutch and Suriname Civil Code]. At any event, all legal systems require that the terms of the authority conferred by the principal be strictly complied with.

The OHADAC Principles, in the first Section of Article 2.3.7, clearly opt for the solution given by the second group of systems, providing that, except in those cases where the principal states otherwise (either because it expressly excludes from the authority of the agent the possibility of designating sub-agents or because it is conditional upon prior approval by the principal), it may be understood that the agent has the authority

to appoint sub-agents. This is fully in line with the other international instruments on contract law [Article 2.2.8 UP; Article 3:206 PECL; Article II-6:104 (3) DCFR]. Like these instruments, it also establishes a limit to the implicit authority of the agent to name sub-agents. The only limitation is that the agent may, under no circumstances, entrust a subagent with tasks that the principal may expect the agent to perform itself. This is the case of acts requiring the agent's personal expertise. Moreover, the agent, as it is expressly stated in the Guatemalan Civil Code (Article 1.702), shall not be able to delegate to the sub-agent an authority wider than the one conferred upon it.

Example 1: X asks Y to buy an estate in another country. Y has an implied authority to name a substitute, S, who resides in that country, to buy the estate on X's behalf.

Example 2: X entrusts Y, an expert in Russian contemporary art, with the selection and the purchase of a painting in Russia, to complete his collection of paintings from that country. As X expects Y, as an expert in the matter, to be the one who personally makes the selection and the purchase, Y cannot designate S, resident in Russia, to proceed with the purchase on X's behalf.

The general provisions contained in this Section will be applicable to the validly appointed sub-agent. The acts that will be performed between the replaced agent and a third party within the scope of its authority and of that of the agent who has appointed it establish a direct legal link between the principal and the third party. However, in cases where substitution is not authorised, the appointment of a sub-agent by the agent will be ineffective, and the sub-agent and its actions will be regulated by the rules related to the agent without authority (Article 2.161 of the Colombian Civil Code; Article 296 of the Cuban Commercial Code; Article 277 of the Guatemalan Commercial Code; Article 1.412.2 of the Panamanian Civil Code; Article 1612.2 of the Puerto Rican Civil Code).

Example 3: The case is the same as in Example 1. The purchase of the estate performed by S on behalf of X shall directly bind X, to the extent that it will be in line with the authority conferred by X to Y and the authority conferred to S by Y.

Article 2.3.8: *Joint authority*

- 1. Where an authority is jointly granted by two or more principals to an agent to perform one or more acts, the principals shall be jointly and severally liable to the third party with whom the involved act or acts have been performed.**

2. Where an authority is jointly granted by the principal to two or more agents, each of them may perform the involved act or acts separately, unless the principal provide otherwise.

COMMENT

In this provision the OHADAC Principles refers to the effects of what it may be called “joint authority”, that covers, firstly the situation in which, under the same instrument, two or more people grant authority to another person to perform one or more acts, and, secondly, the situation in which various individuals are empowered by the same principal through a single authority. Among the various international instruments only the DCFR (Article II–6:110) refers to these situations, which are however found in many national legal systems.

The OHADAC Principles follow the rule shared by national systems, consisting in binding all the principals for the acts that, in the exercise of its authority, may be carried out by the agent, responding jointly and severally towards the third party (Article 1.276 of the Colombian Commercial Code; Article 2.002 of the Dominican and French Civil Code; Article 1.716 of the Guatemalan Civil Code; Article 1.766 of the Haitian Civil Code; Articles 1.910 of the Honduran Civil Code and 361 of the Honduran Commercial Code; Article 2.580 of the Mexican Civil Code; Article 3.344 of the Nicaraguan Civil Code; Article 1.422 of the Panamanian Civil Code; Article 1.622 of the Puerto Rican Civil Code; Article 1.626 Saint Lucian Civil Code; Article 1703 of the Venezuelan Civil Code).

Example 1: X1 and X2 grant a joint authority to Y; Y, on behalf of X1 and X2, hires a musical performance of Z in X1 and X2’s country. The contract between Y and Z shall directly bind X1 and X2 to Z, being X1 and X2 jointly and severally liable for the payment of the remuneration agreed with Z.

The OHADAC Principles equally coincide with most national legal systems when they state that in case of plurality of agents, these may act independently, binding the principal by their actions, unless the principal has stated otherwise, either by imposing a successive action of the agents or by assigning them different tasks [Articles 2.153 of the Colombian Civil Code and 1.272 of the Colombian Commercial Code; Article 1.259 of the Costa Rican Civil Code; Article 1.995 of the Dominican and French Civil Code; Article 269 of the Guatemalan Commercial Code; Article 1.759 of the Haitian Civil Code; Article 3:65 of the Dutch and Suriname Civil Code; Article 1.902 of the Honduran

Civil Code; Article 2.573 of the Mexican Civil Code; Article 3.300 of the Nicaraguan Civil Code; Article 1.414 of the Panamanian Civil Code; Article 1.614 of the Puerto Rican Civil Code; Article 1.612 of the Saint Lucian Civil Code; *Re Liverpool Household Stores* (1890), 59 LJ Ch. 616; *Brown v Andrew* (1849), 18 LJQB 153; *Guthrie v Armstrong* (1822), 5 B & Ald 628; Article II-6:110 DCFR]. In cases where agents act in contravention to what the principal may have established in the authority, the provisions of Article 2.3.5 of the Principles concerning the “agent acting without or exceeding its authority” shall be applied.

Example 2: X, through a single authority, grants authority to Y1 and Y2 to sell a certain good, belonging to X, which is located in Y1 and Y2’s country. Either of them may, exercising the authority granted by X, conclude the sale contract with Z. X will be directly bound by this contract.

Example 3: Same case as in example 2, except that X, in granting of the authority to Y1 and Y2, specifies that both must act together. If any of them individually sells X’s good to Z, it shall exceed its authority and the contract with Z shall not bind X and Article 2.3.5 will be applied.

Some Caribbean legal systems adopt a different solution from the one set out in the Principles, either because they refer exclusively to the stipulations of the principal (Article 402 of the Cuban Civil Code) or because they impose the joint action or the action by the majority of agents, unless the principal authorises them to act separately (Article 1.701 of the Guatemalan Civil Code; Article 362 of the Honduran Commercial Code). In those instances where, under a single authority, various agents are authorised to perform a representative act in the territory of any of those countries, it is advisable for the principal to clearly specify in the authority the way in which he expects the agent to act with third parties.

Article 2.3.9: Ratification

- 1. An act performed by an agent that acts without authority or exceeds its authority may be ratified by the principal. Upon ratification the act produces the same effects as if it had initially been carried out with authority and not exceeded the authority.**
- 2. The third party may by notice to the principal specify a reasonable period of time for ratification. If the principal**

does not ratify within that period of time, it can no longer do so.

- 3. The third party that, at the time of contracting with the agent, neither knew nor ought to have known of the lack of authority, may, at any time before ratification, by notice to the principal indicate its refusal to become bound by a ratification.**

COMMENT

The first Section of this provision includes a common principle: the acts performed by an agent without authority or exceeding its limits may be authorised later by the principal by ratification [Articles 1.507 and 2.186 of the Colombian Civil Code and 844 and 1.266.2 of the Colombian Commercial Code; Articles 1.027-1.029 and 1.275 of the Costa Rican Civil Code; Articles 420-422 of the Cuban Civil Code; Article 1.998 of the Dominican and French Civil Code; Articles 1611-1612 and 1.712 of the Guatemalan Civil Code; Article 1.762.2 of the Haitian Civil Code; Article 3:69 of the Dutch and Suriname Civil Code; Articles 1.906 Honduran Civil Code and 738 of the Honduran Commercial Code; Articles 1.802, 2.565 and 2.583 of the Mexican Civil Code and 289 of the Mexican Commercial Code; Articles 2.440 and 3.339-3.341 of the Nicaraguan Civil Code and 414 of the Nicaraguan Commercial Code; Articles 1.110 and 1.418 of the Panamanian Civil Code; Articles 1.211 and 1.618 of the Puerto Rican Civil Code; Article 1.627.2 of the Saint Lucian Civil Code; Article 1698.2 of the Venezuelan Civil Code; *Bird v Brown* (1850), 4 Ex786, 789; *Wilson v Tumman* (1843), 6 Man & G 236; Section 4.01 (1) Restatement (Third) of Agency); Article 63.3 Draft project reform of the French Law on obligations of 2013; Article 15.1 GC; Article 2.2.9 (1) UP; Article 3:207 (1) PECL; Article II–6:111 (1) DCFR].

However, we must take into account that the possibility of ratification by the principal of the acts of the agent is limited to the cases of disclosed agency. In civil law systems the possibility of ratification is limited to cases where the agent has acted on behalf of the principal. The ratification, by the principal, of the acts of an unauthorised agent under any other formulation is not accepted (Article 2.186 of the Colombian Civil Code; Article 1.275 of the Costa Rican Civil Code; Article 738 of the Honduran Commercial Code; Articles 1.802 and 2.583 of the Mexican Civil Code; Articles 2.440 and 3.339 of the Nicaraguan Civil Code; Article 1.110 of the Panamanian Civil Code; Article 1.211 of the Puerto Rican Civil Code). Likewise, in common law countries, the possibility of

ratification of the acts of the agent in the case of an undisclosed principal is excluded, since it is considered that if the principal was not known at the time of the conclusion of the contract with the third party, it cannot ratify it later on [*Keighley Maxsted & Co v Durant* (1901), AC 240; *Siu Yin Kwan v Eastern Ins* (1994), 2 AC 199]. In these countries, the principal can only ratify the contract concluded by the agent if the concluded the contract as an agent duly appointed by the named principal or, at least, if it had discovered the existence but not the identity of the principal (unnamed principal) [*Hagedorn v Oliverson* (1814), 2 M & S 485; *Eastern Construction Co Ltd v National Trust Co Ltd* (1914), AC 197, 213; *Southern Water Authority v Carey* (1985), 2 All ER 1077, 1085; Sections 4.01 (3) (a) and 4.03 Restatement (Third) of Agency]. This also includes cases when the agent has tried to defraud the principal [*Re Tiedemann & Ledermann Frères* (1899), 2 QB 66].

The possibility of ratification by the principal of the acts of the agent is also subject to other conditions: it is necessary that the principal is personally and validly able to perform the act at the time it is performed. The act to ratify must not be prohibited by law or be a void act, since the ratification of an act of this kind will never make it valid.

Ratification, like the provisions established for the authority in Article 3.3.2 (1) of the Principles, is not subject to any requirement as to form [Article 2.186.2 of the Colombian Civil Code; Article 1.275.2 of the Costa Rican Civil Code; Article 422 of the Cuban Civil Code; Article 1.998.2 of the Dominican and French Civil Code; Articles 1.612 and 1.712 of the Guatemalan Civil Code; Article 1.762.2 of the Haitian Civil Code; Articles 1.906.2 of the Honduran Civil Code and 738 of the Honduran Commercial Code; Articles 3.339.2 and 3.340 of the Nicaraguan Civil Code; Article 1.418.2 of the Panamanian Civil Code; Article 1.618.2 of the Puerto Rican Civil Code; Article 1.627.2 of the Saint Lucian Civil Code; Article 1.698 of the Venezuelan Civil Code; *Cornwall v Henson* (1750), 1 Ves Sen 509; Section 4.01 (2) Restatement (Third) of Agency; Article 15.8 GC; Article 3:207 PECL]. Ratification may be performed by express declaration communicated to the agent or the third party, this being the most usual formula in practice. But there also exists the possibility of an implied ratification inferred from the acts of the principal, when these unequivocally demonstrate that the intention of the principal is to adopt the contract concluded by the agent; such is the case, for example, when the principal accepts the benefits derived from the contract or it voluntarily performs its obligations towards the third party. Mere passive acquiescence, itself, does not imply a tacit ratification (to the contrary, Article 3.340.2 Nicaraguan Civil Code), but it may have such an effect in the case of being combined with other circumstances: for instance, when the principal is aware that the third party thinks that

it has accepted the act made by the agent without authority and it does not take the necessary steps within a reasonable time to repudiate the transaction [*Moon v Towers* (1860), 8 CB (NS) 611; *Michael Elliott & Partners v UK Land* (1991), 1 EGLR 39]. Some systems do not support the freedom of form for the ratification, and impose the adoption of a specific form, in the form of a ratification contract (Article 1.802.1 of the Mexican Civil Code, in contradiction with Article 2.583 of the Mexican Civil Code; Article 844 of the Colombian Commercial Code) or the form required for the granting of the authority (Article 3:69.2 of the Dutch and Suriname Civil Code).

Example: Y agrees with Z, on behalf of X, the purchase of goods, but he does so for a higher price than that which Y had been authorised to pay. When X receives the invoice from Z he makes no objection, proceeding to the payment by a bank transfer of the sum that appears in the mentioned invoice. Even if X has not expressly declared its intention of ratifying, nor has informed Y and Z about the payment, once Z learns of the transfer through the bank, the payment of the sum specified in the invoice is a tacit ratification of the contract concluded between Y and Z.

Ratification by the principal has retroactive effect [Article 844 of the Colombian Commercial Code; Article 1.029 of the Costa Rican; Article 1.611 of the Guatemalan Civil Code; Article 3:69.1 of the Dutch and Suriname Civil Code; Article 3.341 of the Nicaraguan Civil Code; *Bolton Partners v Lambert* (1888), 41 ChD 295; *Boston Deep Sea Fishing and Ice Co Ltd v Farnham (Inspector of Taxes)* (1957), 1 WLR 1051; judgement of the *High Court* of Trinidad-Tobago in *Drew v Caribbean Home Insurance Co Ltd* (1987), No 2993 of 1985 (*Carilaw* TT 1987 HC 94); Section 4.02 (1) Restatement (Third) of Agency; Article 15.1 GC; Article 2.2.9 (1) UP; Article 3:207 (2) PECL; Article II-6:111(2) DCFR]. Therefore, the act of the agent, once ratified, shall produce the same effect as if it had been carried out by the agent by virtue of an authority: direct legal relation between the principal and the third party and release of the agent of any liability towards the third party.

In case of the partial ratification of the act performed by the agent, the third party may reject it, as such ratification will constitute a proposal of modification by the principal of the contract concluded between the agent and the third party [Article 3:69.4 of the Dutch and Suriname Civil Code; Article 15.4 GC]. However, in common law systems if the principal ratifies a part of the contract it is understood that he is ratifying the whole [*Cornwal v Wilson* (1750), 1 Ves Sen 509; *Re Mawcon Ltd* (1969), 1 WLR 78]. The requirement of ratification of the whole act is expressly stipulated in Sections 4.01 (3) d) and 4.07 of the Restatement (Third) of Agency.

Once the third party knows that the act performed by the agent has been ratified, the principal will no longer be able to revoke the ratification, because this revocation would suppose a unilateral withdrawal of the principal from the contract that already binds it to the third party (Article 15.5 GC). Therefore, only a revocation by the principal of the act of ratification will be possible, and only if the ratification in question is not yet known to the third party.

The retroactive effect of the ratification has, however, some limitations. Thus, in cases in which the principal, at the time of the agent's act, did not exist or was unidentified and after its determination or identification it ratifies the act of the agent, it will only be responsible to the third party from the time of its determination or identification (Article 3:207 PECL). This happens, for example, in the case of ratification by a company of the acts made in its name before its incorporation, whenever it is possible according to the law governing the company. Such acts, once ratified, will only have effect from the date of incorporation of the company. The same can be said where the act that has been ratified is subject to a form of constituent publicity, as in mortgages, because such act will not be able to be registered until after the ratification

The ratification by the principal will take effect even in the case that the ratified act cannot be effectively performed at the time of ratification (Article 15.6 GC).

The OHADAC Principles do not regulate the effects that the principal's ratification may have on the rights that the agent may have constituted in favour of third parties in the time elapsed between the act of the agent and the principal's ratification. Such is the case of the conflict that occurs when the principal sells to a third person goods that have previously been sold by the false agent to another third party, and also ratifies the contract concluded by the false agent. The conflict arising in such a case between the third person and the third party who agrees with the false agent, not being regulated by the Principles, will have to be solved according to what it is provided in the law governing the ratified contract. At this point The OHADAC Principles adopt the same approach as the UP, which do not regulate this question either, differing from the one followed by other systems [Article 844 of the Colombian Commercial Code; Article 1.338.3 of the French Civil Code; Article 3.341 of the Nicaraguan Civil Code; *Smith v Henniker-Major* (2003), Ch 182, 71, 73; *The Borvigilant* (2003), 2 Lloyd's Rep 520, 70; Article 3:207 (2) PECL; Article II-6:111(2) DCFR].

Ratification by the principal, except in those cases where a legal term is provided, may take place at any time within a reasonable period of time as from the time the principal learnt about the completion of the unauthorised act [*Re Portuguese Consolidated Copper Mines* (1890), 45 Ch D 16; *Bedford Ins Co Ltd v Instituto de*

Ressaguros do Brasil (1985), QB 966, 987]. It does not matter that the third party, when contracting with the agent, knew that he lacked authority or was acting outside its limits, or that it was informed of these circumstance at a later date. In both cases, it is in the third party's interest to remove all doubt as to whether or not the principal intends to ratify the act of the agent as soon as possible. That is why the OHADAC Principles, adopt at this point the approach followed by certain systems: recognise the third party's right to question the principal in order to find out whether or not it intends ratify, leaving it reasonable time to take a decision [Article 420 of the Cuban Civil Code; Article 3:69.4 of the Dutch and Suriname Civil Code; *Metropolitan Asylums Board v Kingham* (1890), 6 TLR 217; *Dibbins v Dibbins* (1896), 2 Ch 348; Section 4.05 (3) Restatement (Third) of Agency; Article 2.2.9 (3) UP; Article II-6:111 (3) DCFR]. The right of interpellation of the third party is also recognised in PECL, although in a more restrictive way, because its Article 3:208 limits the faculty of the third party to demand a confirmation of the authority or the ratification to those instances where, by the declarations or the conduct of the principal, an apparent authority may be inferred, but the third party remains doubtful that such authority exists, providing as well that the principal's answer in such cases must be immediate.

The ratification by the principal within the period of time specified must be notified to the third party. If the deadline passes without ratification by the principal, this shall be considered as denied, and the principal shall lose the possibility of doing it later. On this last point, the Principles also provide the solution provided in legal systems that recognise the third party the faculty of interpellation, which is also the solution taken by the UP and the DCFR, differing from the PECL, where the silence of the principal before the demand of ratification made by the agent is considered as an authorisation of the agent's act.

It is not possible for the principal to ratify the act of the agent after having told the third party, verbally, that his intention is not to ratify. The same will occur if the third party does not use his right of interpellation to the principal and the intention of not ratifying may be inferred from the course of a reasonable period of time since the principal had knowledge of the performance of the unauthorised act or of the principal's behaviour itself. This will be so when he remains silent for a reasonable period of time after having been notified by the third party of its intention to withdraw from the contract [*McEvoy v Belfast Banking Co* (1935), AC 24].

The OHADAC Principles, like the GC (Article 15.2, first incise) and the UP [Article 2.2.9 (3)], recognise another right to the third party if at the time of contracting with the agent, the third party neither knew nor ought to have known of the lack of authority.

In this case, the bona fide third party will take action against the principal, before he ratifies the agent's act, informing the principal of its refusal to become bound by a ratification. This prevents situations where the principal can speculate by deciding whether or not to ratify, depending on the market trend.

In this way, the OHADAC Principles openly opt in favour of the interests of the third party, and more particularly, the bona fide third party, in an issue that divides Caribbean legal systems: the possibility for the third party to withdraw from the contract concluded with a false agent. There are two main groups of legal systems. On the one hand, those that grant the third party the option to revoke or reject the contract before its ratification by the principal. This group is limited, in principle, to cases where the third party was not aware at the time of contracting of the lack of authority of the agent [Article 3:69.3 of the Dutch and Suriname Civil Code; Article 738 of the Honduran Commercial Code; Article 1.802.1 of the Mexican Civil Code; Article 2.440.2 of the Nicaraguan Civil Code; Article 1.110.2 of the Panamanian Civil Code; Article 1.211.2 of the Puerto Rican Civil Code; Section 4.5 (1) Restatement (Third) of Agency]. Other systems refuse, in principle, this possibility to the third party, whether or not it acts in good faith. There are some qualifications though [*Bolton Partners v Lambert* (1889), 41 Ch D 295]. Given that the ratification by the principal, when there is no specified legal time limit, has to be performed within a reasonable period of time, we must also point out the right of the bona fide third party, in cases where the principal ratifies the act within an unreasonable period of time, to refuse to be bound by the ratification, by promptly notifying the principal (Article 15.2, section 2 of the GC).

Article 2.3.10: *Termination and restriction of authority*

- 1. Termination or restriction of authority is not effective in relation to the third party unless the third party knew or ought to have known of it.**
- 2. Even if the party knows of them, neither termination nor restriction of authority is effective in relation to third party, and the authority of the agents continues, where the principal is under an obligation to the third party not to end or restrict it.**
- 3. Notwithstanding the termination of its authority, the agent remains authorised for a reasonable time to**

perform those acts that are necessary to protect the interests of the principal or of the principal's successors.

COMMENT

This provision does not regulate the causes of termination of authority, because it is a question that falls under the internal relations between the agent and the principal, and such relations, as stated in Article 2.3.1 (2), are not included in this Section. The determination of the causes, which may vary from one system to another, shall be made in the light of the law applicable to the internal relation. The OHADAC Principles, at this point, follow the approach of the UP [Article 2.2.10 (1)] and the DCFR [Article II-6:112 (1)], which do not refer to the causes of termination of authority, differing openly from the PECL, which, as well as the GC, incorporate a relation of reasons or causes for termination [Article 3:209 (1) PECL].

The OHADAC Principles regulate the external dimension of termination, that is, its enforceability against the third party, providing that the termination of authority (for whatever reason) shall be effective in relation to the third party only if it knew or ought to have known of it. The same principle is applicable to the cases of restriction or limitation of authority by the principal [Article 1.170 of the Venezuelan Civil Code; Article II-6:112 DCFR]. The agent's authority continues, regardless of its termination or restriction, until the third party has been informed thereof or can be expected to know of the termination. Until then, the acts carried out by the agent shall be valid and shall have full effect between the third party and the principal. Nevertheless, the third party will be able to decide whether or not demand that the principal performs the obligations that the agent had undertaken on its behalf before learning about the termination or the restriction of authority. The agent must have had knowledge of these termination or restriction of authority. In such situations, the express or implied authority of the agent subsists vis-à-vis the third party in the same way as an apparent authority.

Example 1: Y is a salaried representative of X in Y's country, having been assigned the task of concluding contracts on behalf of X. After X becomes bankrupt, Y concludes a contract with Z, who is not aware of the bankruptcy. Although X's bankruptcy marks the termination of Y's authority, this authority will continue with respect to Z, who will be bound to X by the contract concluded with Y.

The OHADAC Principles follow a rule common among national systems [Articles 2.199 of the Colombian Civil Code and 843 of the Colombian Commercial Code; Articles 2.005 and 2.008-2.009 of the Dominican and French Civil Code; Articles 1.769 and 1.772-1.773 of the Haitian Civil Code; Article 3:76 of the Dutch and Suriname Civil Code; Article 1.628 of the Saint Lucian Civil Code; *Blades v Free* (1829), 9 B & C 167; *Scarf v Jardine* (1882), 7 App Cas 345; *Overbrooke Estates Ltd v Glencombe Properties Ltd* (1974), 1 WLR133], although some systems only maintain the subsistence of authority in cases where the termination or restriction of authority is also unknown by the agent, and in general in cases of revocation notified to the agent [Articles 1.287 of the Costa Rican Civil Code and 320 of the Costa Rican Commercial Code; Articles 66 of the Cuban Civil Code and 279 and 291 of the Cuban Commercial Code; Articles 2.205 and 2.008-2.009 of the Dominican and French Civil Code; Articles 1.719 and 1.723 of the Guatemalan Civil Code and 266.2 and 272 of the Guatemalan Commercial Code; Articles 1.913 and 1.917 of the Honduran Civil Code and 356.2 and 360 of the Honduran Commercial Code; Articles 2.597 and 2.604 of the Mexican Civil Code and 307 and 319-320 of the Mexican Commercial Code; Articles 3.349-3.350 and 3.355 of the Nicaraguan Civil Code and 433, 445 and 447 of the Nicaraguan Commercial Code; Articles 1.425 and 1.429 of the Panamanian Civil Code and 614 of the Panamanian Commercial Code; Articles 1.625 and 1.629 of the Puerto Rican Civil Code and 197 and 208-209 of the Puerto Rican Commercial Code; Articles 1.170, 1.707 and 1.710 of the Venezuelan Civil Code and 106 and 406 of the Venezuelan Commercial Code; Sections 3.07 (2), 3.08 (1), 3.10 (1) Restatement (Third) of Agency; Article 19 GC; Article 2.2.10 (1) UP; Article 3:209 (1) PECL; Article II–6:112 (1) DCFR].

It will be considered that the third party is aware of the termination or restriction of the authority in cases where the principal or the agent has notified them. In the absence of notice, the decision on whether or not the third party ought to have known the extinction or restriction of the authority will depend on the circumstances of the case. It will be understood that the third party ought to have known them when they have been made public by the same means by which it knew about the granting of authority, or when they have been recorded in a register. That is clearly provided by the DCFR [Article II–6:112 (3)].

Example 2: X opens a branch of its company in a foreign city, advertising in a local newspaper, aside from the opening of the branch, the designation of Y as the director of the branch, with full authority to act on behalf of X. When X revokes the authority granted to Y, the announcement of the revocation in the same local newspaper will be enough to make it effective in relation to the clients of X in this city.

Only in one case the extinction or restriction of authority will be ineffective against the third party, even if it is aware of this circumstance. This is the case when a principal is under the obligation to the third party not to revoke or restrict the agent's authority. In this case, if the authority is finally revoked or restricted, it will subsist against the third party even if the third party is aware of termination or restriction [Section 3.10 (2) Restatement (Third) of Agency; Article II-6:112 (2) DCFR]. However, this situation, expressly envisaged in OHADAC Principles, is not very common in practice because of the exceptional nature of irrevocable authority in most systems. Given the revocable nature of the authority in all the legal systems, irrevocable authorities are allowed only exceptionally. In fact, most legal systems admit them only under certain conditions [Article 1.279 of the Colombian Commercial Code; Article 3:74 of the Dutch and Suriname Civil Code; *Gausсен v Morton* (1830), 10 B & C 731, 734; *Frith v Frith* (1906), AC 254; Sections 3.12 and 3.13 Restatement (Third) of Agency; Article II-6:112.2 DCFR], apart from some cases where the law provides for an irrevocable authority [Sections 4 and 5.3 *Powers of Attorney Act* 1971; Sections 9, 11 and 13 *Mental Capacity Act* 2005; Article 1705 of the Venezuelan Civil Code].

The OHADAC Principles, lastly, relates to what is known as “authority of necessity”, which extends the agent's authority after termination or restriction of this authority, to perform all those acts that may be necessary to avoid damages to the interests of the principal or his heirs [Articles 2.193-2.194 and 2.196 of the Colombian Civil Code; Articles 1.283-1.285 of the Costa Rican Civil Code; Article 412 of the Cuban Civil Code; Articles 1.991.2 and 2.010 of the Dominican and French Civil Code; Articles 1.722 and 1.724 of the Guatemalan Civil Code; Articles 1.755.2 and 1.774 of the Haitian Civil Code; Article 3:73.1 and 2 of the Dutch and Suriname Civil Code; Articles 1.897.2, 1.916 and 1.918 of the Honduran Civil Code; Articles 2.600-2.603 of the Mexican Civil Code; Articles 3.351-3.353 of the Nicaraguan Civil Code; Articles 1.409.2, 1.428 and 1.430 of the Panamanian Civil Code; Articles 1.609.2, 1.628 and 1.630 of the Puerto Rican Civil Code; Articles 1.609.2, 1.629, 1.658 and 1.660 of the Saint Lucian Civil Code; Articles 1.711-1.712 of the Venezuelan Civil Code; Article 20 GC; Article 2.2.10 (2) UP; Article 3:209 (3) PECL; Article II-6:112 (4) DCFR].

The OHADAC Principles, like other international instruments, provides for the continuity of the authority, regardless of the reason that had determined its extinction. And like these other instruments, they also materially restrict this continuity, admitting only the performance of the acts that are necessary to protect the interests of the principal and his heirs. Lastly, the duration of this authority of necessity is not indefinite, being only maintained for a reasonable time after the termination of

authority conferred by the principal. This temporary limitation can also be found in the PECL and the DCFR, but not in the UP.

Example 3: X grants Y an authority to purchase, on behalf of X, a consignment of perishable goods. After the purchase, Y is informed of X's death. In spite of the termination of authority as a consequence of X's death, Y remains entitled to proceed to, either the resale of the purchased goods, or the storage of them at an appropriate warehouse.

CHAPTER 3

VALIDITY OF CONTRACT

Section 1. General Provisions

Article 3.1.1: Validity of mere agreement

A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement.

COMMENT

Under the OHADAC Principles on International Commercial Contracts, the mere agreement of the parties is sufficient for the valid conclusion, modification or extinction of the contract, without any further requirements. This rule distinguishes the OHADAC Principles from most Caribbean legal systems inspired by Article 1.108 of the French Civil Code, which require, aside from the consent of the parties, additional conditions of validity of the contracts, such as a legal and possible object and the existence of “cause” (e.g. Article 1.502 of the Colombian Civil Code; Article 1.108 of the Dominican Civil Code; Article 1.552 of the Honduran Civil Code; Articles 1.872 and 2.447 of the Nicaraguan Civil Code; Article 1.112 of the Panamanian Civil Code; Article 1.213 of the Puerto Rican Civil Code; 1.141 of the Venezuelan Civil Code). The Principles differ also from English Law in this point, insofar as in common law systems the mere exchange of promises is not sufficient to conclude a contract, because the intention of the parties to create a legal relationship and, particularly, the presence of consideration are conditions generally required. A very particular case is the Santa Lucian Civil Code, which combines civil law and common law traditions in Article 923, considering “cause” and “consideration” as synonymous.

Nevertheless, the OHADAC Principles follow a trend observed in European and international legislation on contract law harmonisation, which only require the consent of the parties to be valid (Article 3.1.2 UP), or at most include the additional requirement that parties must intend to be legally bound (Article 2:101 PECL; Article II-4:101 DCFR; Article 30 CESL). Likewise, the Dutch and Suriname Civil Code only require the intent of the parties for a contract to be valid (Article 6:217).

In the Proposals for Reform of the law of obligations (2013), cause is no longer a condition of contract validity (Article 85). Some Caribbean civil law systems have also excluded cause from the list of conditions of contract validity (Article 1.251 of the Guatemalan Civil Code; Article 1.794 of the Mexican Civil Code).

The historical origin of both cause and consideration is closely linked to the distinction between gifts and contracts (gratuity or onerous character of obligations), which are of little significance in international commercial contracts. Furthermore, as conditions of contract validity, the two concepts have always been ambiguous and even irritating. They are included in domestic legal systems only because they fulfil certain functions that are nonetheless completely superfluous, especially in the field of international trade.

On the one hand, cause has served as a check for agreements that pursue illegal goals. In cross-border contracts, this function is channelled through the application of national and international mandatory rules (Article 3.3.1 of these Principles). The same applies to the illegality of the purpose.

On the other hand, the requirement of cause as a condition of contract validity aims to exclude the legal effectiveness of apparent agreements if the parties have no actual intention to be bound. It therefore has the same function as “intention” in common law. This role usually refers to effectiveness of commitments and agreements in the family or social sphere, but has a lesser impact in international trade. At any event, the role of cause and consideration is also not justified, because the question of whether or not there has been an agreement between the parties is a matter of interpretation, which must be resolved in accordance with the rules set out Section 1, Chapter 4 of these Principles. Thus, it is not necessary to add another condition to the agreement of parties to deprive simulated contracts of effectiveness if it is deemed that an apparent agreement is not an agreement and that, consequently, where there is simulation there is no consent and, therefore, no contract. Likewise, when a party is threatened with physical violence, the contract lacks consent, and the case is not treated as a defect of consent and invalidates the contract in accordance with Article 3.1.1. Consequently, in the OHADAC Principles, the condition of the true intent to be bound is subject to the sole condition of the existence of an agreement and the very notion of “agreement”.

The fact that the cause and consideration do not determine the validity of the contract does not mean that these two notions are not significant for other purposes. For example, the purpose of the contract or the consideration are the basis of many rules, such as the rule provides for the rescission of the contract due to frustration of

purpose (Article 6.3.2) or those determining the essential breach of contract (Article 7.1.2).

Finally, the Principles opt for a personal characterisation of contracts, excluding specific kinds such as that related to “real contracts”, which require additional requirements of validity, generally related to acts of disposal or transfer of goods. Such categories have clearly fallen into disuse, so that the OHADAC Principles align themselves with the predominant trend both in comparative and international law.

Article 3.1.2: *No requirements as to form*

Contracts will be enforceable regardless of the form of conclusion.

COMMENT

This Article states the principle of validity of the contract regardless of the form, which is consistent with the principle that validity of contract only depends on an exchange of declarations of intention through offer and acceptance. Consequently, a contract is valid regardless of the form of conclusion and its existence is simply a question of proof of declarations of intention.

The freedom of form principle is generally admitted in comparative law. Caribbean systems of civil law tradition usually recognise it expressly [e.g. Articles 1.008 of the Costa Rican Civil Code; 411 of the Costa Rican Commercial Code; 50 of the Cuban Civil Code; 1.574 of the Guatemalan Civil Code; 3:37 and 6:226 (6.5.2.9.) of the Dutch and Suriname Civil Code; 1.574 of the Honduran Civil Code; 1.796 of the Mexican Civil Code; 2.448 and 2.449 of the Nicaraguan Civil Code; 1.230 of the Puerto Rican Civil Code; 1.355 of the Venezuelan Civil Code). Article 79 of the Proposals for the Reform of the Law on Obligations prepared by the French Ministry of Justice in 2013 is in the same sense. English Law also maintains the principle of no requirements as to form (*Beckham v Drake*, 1841, 9 M & W, 79, 92; Article 4 Sale of Goods Act 1979), as well as the USA law (Section 3 Restatement Second on Contracts). The same principle is included in Articles 11 CISG; 1.2 up; 2:101 (2) PECL; II-1:106 DCFR; and 6 CESL.

All legal systems, however, have exceptions to this principle and sometimes require some form as a mandatory condition of validity of certain contracts. Such contracts are named “solemn” in civil law and this expression is common in several civil codes (e.g. Articles 1.007 and 1.009 of the Costa Rican Civil Code; 411 of the Costa Rican

Commercial Code; 1.500 of the Colombian Civil Code; 1.577 of the Guatemalan Civil Code; 1544 of the Honduran Civil Code; 2.228 Mexican Civil Code; 7 Proposals for the Reform of the Law on Obligations, 2003). In Section 6 of the Restatement (Second) on Contracts they are known as “formal contracts”.

In some cases, it is difficult to distinguish between cases where a formal requirement is effectively a condition of validity of the contract and cases where it is a condition that produces non-contractual effects, such as the acquisition of a right in rem, transfer of ownership or the constitution of a company. However, in all the legal systems there are clear cases where a formal requirement (written, notary document, etc.) are conditions of contract validity that lead to nullity if they are not observed. In civil law Caribbean systems is usual to find written or public document requirements as validity conditions for contracts on immovable assets, companies, deposit, agency or simply over certain amount (e.g. Articles 51, 339, 396.3 and 424 of the Cuban Civil Code; 1.575 of the Guatemalan Civil Code; 1.575 of the Honduran Civil Code; 2.319 and 2.690 of the Mexican Civil Code; 2.483 and 3.182 of the Nicaraguan Civil Code; 931, 1.347, 1.348, 1.834 and 2.127 of the French and Dominican Civil Code; 1.131 and 1.358 of the Civil Code; 1.232 of the Puerto Rican Civil Code).

Common law also has significant exceptions. On one hand, in gratuitous contracts or contracts without consideration, the mandatory formal requirement (deed) is an alternative to consideration. On the other hand, some written rules have introduced formal requirements for some contracts, which could be called “solemn”. This is the case of the requirement of deeds in hiring immovable property (Sections 52 and 54 of the Law of Property Act of 1925), of written form in obligations related to negotiable instruments (Sections 3 and 17 of the Bill of Exchange Act of 1882), security interests [Bill of Sales Act 1878 (Amendment) Act of 1882], sales of immovable property (Section 2 of the Law of Property Act of 1989), or “note of memorandum” in guarantees (Article 4 of Statute of Frauds of 1677). Given that such requirements are stated in written law, in many cases they are applied in the Commonwealth countries by incorporation in specific acts, such as Section 47 Property Act, Cap. 236 (Barbados); Section 43 (1) Property Act, Cap. 192 (Belize); Section 4 (1) Conveyancing and Law of Property Act, Ch. 10:04 (Saint Kitts and Nevis); and Section 4 (1) Conveyancing and Law of Property Act, Cap. 26:01 (Trinidad and Tobago); Section 6 (1) Sale of Goods Act (Ch 393) of Antigua and Barbuda; Section 6 (1) Sale of Goods Act (Ch 15.18) of Montserrat; Section 6 (1) Sale of Goods Act (Ch 337) of Bahamas; Section 6 (1) Sale of Goods Act (Ch 83:30) of Trinidad and Tobago; Section 6 (1) Sale of Goods Act (Ch 261) of Belize; Section 5 (1) Sale of Goods Act of 1895 of Jamaica Contracts in Writing Act of Antigua and Barbuda,

Ch 100. Likewise, Caribbean case law of common law countries shows precedents about the mandatory presence of these formal requirements as a condition for the validity of the contract [e.g. Court of Appeal of Jamaica in *Singer Sewing Co v Montego Bay Co-operative Credit Union Ltd* (1997), 34 JLR, 251]; Court of Appeal of Cayman Islands in *Strada Investments Ltd v Temora Investment Ltd* (1996, CILR, 246); Privy Council in *Elias v George Sahely & Co (Barbados) Ltd* (1982, 3 WLR, 956). In US law, formal requirements are required in contracts under seal, settlements, bills of exchange and negotiable instruments (Section 3 UCC).

The principle of freedom of form in the OHADAC Principles does not prevent the consideration of formal requirements that condition contract validity in domestic laws. In many cases, such requirements are overriding mandatory rules from an international point of view and can therefore be taken into account or applied under Paragraph III of the Preamble. Thus, the law of the country where an immovable property is located or the law of the country where the company has its registered office may be applied if it deals with contracts relating to immovable goods or companies located in their country. Given the impact of such a choice on the OHADAC Principles, a court may decide to restrict the effects of the principle of freedom of form set out in these Principles when the domestic law applicable to the requires a specific mandatory form. This possibility is all the more important when there is a close link between the contract and domestic law. In particular this is the law that applies in the absence of choice.

Article 3.1.3: *Initial impossibility*

The mere fact that at the time of the conclusion of the contract the performance of the obligation was impossible does not affect its validity. However, parties may invoke the rules on impossibility (*force majeure*).

COMMENT

Impossibility of contract performance and, more accurately, of the contract's object has traditionally been considered as a reason for nullity or non-existence of the contract (*impossibilium nulla obligatio est*). This rule is expressly set out in most Caribbean civil codes (e.g. Articles 1.518 of the Colombian Civil Code; Articles 627 and 631 of the Costa Rican Civil Code; 1.599 and 1.601 of the Dominican and French Civil Code; 1.564 of the Honduran Civil Code; 1.827 of the Mexican Civil Code; 1.832 of the

Nicaraguan Civil Code; 1.123 of the Panamanian Civil Code; 1.224 of the Puerto Rican Civil Code; Article 70 of the Proposals for Reform of the French law on obligations, 2013).

However, the most recent legal texts prefer a rule similar to the one set out in the OHADAC Principles, which dispel any doubt, not only about the validity of contracts on future goods or on goods that are not in the parties' hands at the time of conclusion of the contract, but also about the validity of obligations that are materially, personally or legally impossible at the time of conclusion of the contract (Articles 3.1.3. UP; 4:102 PECL; II-7:102 DCFR).

These Principles set out the rules of validity of the contract. If the parties did not know about or could not have foreseen that the object or contract performance was not impossible, the Principles do not opt for the doctrine of mistake. This is the approach in USA and English law, where initial impossibility radically voids the contract only if it is the result of a mistake by the parties arising from a material (*res extincta*) or legal (*res sua*) impossibility at the time of conclusion of the contract [*Couturier v Hastie* (1856), 5 HL Cas. 673; *Abraham v Oluwa* (1944), 17 NLR 123].

Conversely, the approach proposed in these Principles aims to apply general rules on contract non-performance, including the rules on impossibility or *force majeure* (Article 7.1.8). The Principles establish a broad notion of *force majeure*, which can be invoked in cases of unforeseen subsequent circumstances, but also when unforeseen circumstances existed impossible at the time of conclusion of the contract and they were not and could not be known by the parties at that time. In this sense, the Principles introduce a distinction between initial impossibility and mistake, which is not very clear in the international texts of harmonisation of contract laws currently adopted.

If the parties are aware or should have known of the impossibility of the object or of the contract's performance and still decide to conclude the contract, it is inferred that they assume the risk of non-performance of the contract due to impossibility and will comply with general rules on the determination of non-performance and the remedies to be applied. Aside from the fact that this approach respects to a large extent the autonomy of parties in international commercial contracts, it also prevents the ineffectiveness of contracts that play on speculative calculations about technical developments and the evolution of circumstances foreseen at the time of conclusion of the contract.

Example 1: Building firm X, who is the owner of land not authorised for construction, concludes a contract undertaking to build an office building and sell it to a services firm within five years. The performance is legally impossible at the time of conclusion of the contract, but the builder is confident of the change of legal regime of lands in the near future and assumes the risk of non-performance if the impossibility remains and it is unable to deliver the building on time.

Example 2: Firm X manufactures electrical engines and promises firm Y, a car manufacturer, to deliver within a period of five years a batch of engines capable of certain technical achievements and reaching a level of output that is currently non-viable in the state of the art. However, the contract is valid, insofar as firm X is aware of the state of the art and is confident that its design and development department will soon achieve a prototype able to perform the required specifications.

Example 3: A plane rental firm rents a specific luxury jet to carry the senior management of a petrol firm. The contract is impossible because the jet had an accident thirty minutes before the conclusion of the contract, and the rent-a-plane firm does not know and cannot know of this accident. The contract is valid, but the plane rental firm can argue “impossibility” and notify the contract’s termination with no responsibility for damages.

Section 2. Capacity

Article 3.2.1: Exclusion

These Principles do not deal with the capacity of the parties or the invalidity of the contract arising from the lack of capacity.

COMMENT

The question of the capacity of the parties as well as that concerning the impact of the lack of capability in the contract’s validity are excluded from the OHADAC Principles and from other international instruments of unification of contract law [Article 3.1.1 UP; Article 4: 101 PECL; Article I-1:101 (2) (a) DCFR]. They will be regulated by the domestic law which, according to private International rules, is applied to the capacity of persons. Depending on the OHADAC territory concerned, that law will be either the domestic law of the person (under Spanish, French and Dutch traditions) or the law of

his domicile (common law tradition territories). Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations and the Inter-American Convention on the law applicable to international contracts (CIDIP V), held in Mexico on 17 March 1994, exclude the question of capacity from their scope of application [Article 1.2 a) of the Regulation and Article 5 a) of the Convention]. That is why, in Member States, national conflict-of-law rules will have to be applied, subject to the “exception of national interest” provided in Article 13 of the Regulation, which presents a very relative interest in international commercial contracts.

Section 3. Illegality

Article 3.3.1: *Illegality*

These Principles do not limit or prevent the application of overriding mandatory rules or international public policy rules of national or international origin, which determine the illegality or opposition to public policy of the object, or the content or the performance of the contract or of some of its obligations.

COMMENT

Although private autonomy governs contract law in comparative legal systems within the Caribbean, all these legal systems without exception depict hypotheses of public policy limitations which restrict freedom of contract related to validity, object and performance of contract obligations and cover a wide range of cases such as cartel or collusion agreements against antitrust rules, sales of *res extra commercium* (e.g. cultural goods), contracts the performance of which implies a crime or that are simply contrary to morality and public decency.

Civil law systems usually require, as a validity condition, the existence of a “legal object” (Articles 631.2º of the Costa Rican Civil Code; 1.251 of the Guatemalan Civil Code; 1.565-1.567 of the Honduran Civil Code; 1.827 of the Mexican Civil Code; 1.122 of the Panamanian Civil Code; 35 and 69 of the Proposals for Reform of the French law on obligations of 2013), a “legal cause” (Articles 1.108 and 1.133 of the Dominican and French Civil Code; 903 of the Haitian Civil Code; 1.874 of the Nicaraguan Civil Code;

1.141 of the Venezuelan Civil Code), or both (Article 1.502 of the Colombian Civil Code). Illegality of the object, content or performance can sometimes lead to the absolute nullity or inexistence of the contract, but in other cases the consequence may merely consist in unenforceability, severance or adaptation of the contract. Divergence also characterises remedies, refund and return of benefits.

For its part, English law does not refer specifically to the legality of the object, but rather to unenforceability when obligations are illicit or illegal (the difference is not always very clear), or when they are legal are objectionable or contrary to morality or public policy. The effects of illegal, illicit or objectionable character are diverse depending on its consequences in contract formation or performance, as in civil law systems. Diversity of cases, categories and effects make them very difficult and even impossible to reduce them to harmonised and uniform rules.

Unlike other international texts on contract law, the OHADAC Principles opt for not including a special regulation of illegality of contracts, reiterating the rule in Paragraph III of the Preamble. There are several reasons for such an option, besides the complexity and diversity of the legal systems involved in the treatment of different cases of illegality.

First, as inferred from the Preamble and Chapter 1, the main objective of the OHADAC Principles points to facilitating for the parties a legal framework alternative to domestic law, through its incorporation or choice by the parties. The OHADAC Principles on international commercial contracts are not a national regulation, so that they are only applicable when parties expressly subject the regulation of their contractual obligations to these Principles. Otherwise, the Principles can only be considered as the law applicable to the merits in arbitral procedures.

In cases when controversies arise before judges and national courts the reference in the contract to the OHADAC Principles generally do not entail the specific effect of the law applicable to contract; in other words, they will not supersede the application of the domestic law applicable by virtue of the conflict-of-laws rules, unless and as far as this domestic law recognises that the Principles represent the will or private autonomy of the parties within the limits imposed by the overriding mandatory rules on international contracts from this domestic law.

Indeed, most of the private international law systems in force in Caribbean countries in OHADAC territory state that parties can only choose a domestic law as the law applicable to contracts. It is only in the arbitral sphere where there is greater flexibility in establishing the law applicable to the merits allow us to consider a choice of a non-

national law as a true choice of the applicable law of the contract. The possibility of considering the OHADAC Principle as the law applicable to contract is only possible (and with serious doubts) before Mexican and Venezuelan courts, which are the only two States that ratified the Inter-American Convention on the law applicable to international contracts (CIDIP V) held in Mexico on 17 March 1994.

Secondly, regardless of the fact that the OHADAC Principles are considered to be applicable rules as the parties choose, and therefore within the strict scope of their contractual freedom, it is common in international contract law that parties cannot prevent the application of overriding mandatory or public policy rules from domestic national, international or supranational law, in force in the country of the courts' seat (*lex fori*) or even in a third State closely connected with the contract, especially in the country where obligations are or must be performed. This private law principle, widespread in comparative law and increasingly accepted in arbitral procedures (except *lex fori* in certain cases), is included in Article 9 of the Regulation (EC) No. 593/2008, of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations in force in the United Kingdom, France and the Netherlands and also in Article 11 of the Mexico Convention itself, in force in Mexico and Venezuela.

The regulation proposed in other international texts which could be a source of inspiration is not however convincing. The third edition of the UNIDROIT Principles (2010) incorporated in chapter 3 a new Section 3 on illegality inspired by Section 178 of the Restatement (Second) of Contracts, whose particular function in the USA legal system cannot be easily transplanted into a body of legal harmonised rules or soft laws. That is why this Section of the UNIDROIT Principles has been strongly criticised. Firstly, the regulation of this section leads to the same results as the one proposed in the OHADAC Principles in cases where the legal system that imposes the mandatory rules on illegality clearly and expressly sets out the consequences of this illegality on the validity and performance of the contract. In the broad sense, it is rare for a system to envisage cases of unlawfulness and illegality without providing for an express solution, whether in the law or in case law, about its effects on the validity and performance of the contract. But even in such cases, a subsidiary solution in the UP aimed at determining the consequences of this illegality, consists in applying the special rules stated in that Section or the more general rules of the UP on restitution. The remedies proposed are also so vague, open and imprecise that they lead practically to the same result as when there are no regulations. In practice, the same

approach and the same concerns are found in Section 15 of the PECL and in rules included in Articles II-7:301 and II-7:304 DCFR.

This is because when judges or arbitrators who have to interpret a contract that is subject to the OHADAC Principles are faced with an overriding mandatory rule of national, international or supranational character establishing the illegality of the contract object, contents or performance and takes into account the admissibility of applying this mandatory rule, by virtue of its content and nature as well as its connection with the contract (*lex fori*, applicable domestic law in the absence of choice, law of the country of performance, law of the market affected, law of origin of a cultural good, etc.), they will apply this mandatory rule and determine the effects on the contract provided in the law. If these effects are unclear in the legal system that establishes illegality, there is no impediment to the judges or arbitrators applying the general rules of the OHADAC Principles chosen by the parties in order to determine the consequences of illegality on the validity and the performance of the contract, as well as the remedies set out in the Principles themselves insofar as they are reasonably suited to the objective and content of the mandatory rule that has been violated.

Section 4. Defective consent

Article 3.4.1: Defects of consent

The defects of consent are mistake, fraud, threat and undue influence.

COMMENT

Caribbean legal systems converge in the fact that, under some circumstances, the contract may be avoided when any one of the parties has expressed its consent defectively. According to the proposed classification, mistake, fraud, threat and undue influence are defects of consent. The defect categories proposed are based on the same criteria of neutrality as all the provisions that govern these Principles. These defect categories mentioned above are aimed at creating a space that is large enough to embrace current doctrines and institutions in Caribbean legal systems which pursue similar purposes.

The classification adopted brings together the significant contractual situations related to defects of consent in all Caribbean legal systems. With this grouping and this legal

comparison, the Principles claim not only to contribute to knowledge and clarification about the regulations on defects of consent in Caribbean legal systems as well as to verify and propose the possible points of convergence as against the harmonising view in a multicultural framework.

The OHADAC Principles follow the classification of defects of consent which include those found in the traditional codes, as well as undue influence characteristic in English equity law to the defects usually envisaged in the civil codes of the 19th century. The concept of undue influence derived from Anglo-American law has generally been adopted in different ways in European and international texts on contract law harmonisation. Therefore, this classification is related to that followed in other legal texts, which also have to harmonise different institutions in order to propose a useful legal framework for both common law and civil law cultures, such as the UP, the PECL, the DCFR or the CESL.

While UP refer to error, fraud, threat and gross disparity as causes of contract avoidance (Articles 3.2.1 a 3.2.7), under a general chapter on validity, PECL deals with mistake (Article 4:103), fraud (Article 4:107), threats (Article 4:108), excessive benefit or unfair advantage (Article 4:109) and unfair terms that have not been individually negotiated (Article 4:110). DCFR lists as defects of consent: mistake (Article II-7:201), fraud (II-7:205, coercion or threats (Article II-7:206) and unfair exploitation (Article II-7:207); CESL also alludes to mistake (Article 48), fraud (Article 49), threats (Article 50) and unfair exploitation (Article 51).

The OHADAC Principles, all the while following the trend of the above-mentioned texts and referring to their treatment in the various Caribbean legal systems, have excluded defects such as personal duress or violence (*vis absoluta*) which, unlike others defects of consent, imply a complete absence of consent. The legal treatment of these situations will be found in Article 3.1.1.

The categories proposed do not present any particular difficulties in civil law systems. These usually consider mistake, duress, threat and fraud as defects of consent (Article 1.556 of the Honduran Civil Code; Article 1.116 of the Panamanian Civil Code; Article 1.217 of the Puerto Rican Civil Code). There is a wide array of expressions [Articles 2.455, 2.457 and 2.460 of the Nicaraguan Civil Code uses the term "*fuerza*" (force) as synonymous of "violence", and "*miedo grave*" (serious fear) in cases of threat; Articles 69 and 71 of the Cuban Civil Code uses "*fraude*" (fraud) in cases where other legal systems commonly uses "*dolo*"; Articles 1.015 to 1.020 of the Costa Rican Civil Code list as defects of consent: "error" (mistake), "*fuerza o miedo grave*" (duress or serious fear), "*intimidación*" (threat) and "*dolo*" (fraud)]. Lastly, most legal systems frequently

put together duress and threat under a generic concept of violence (Articles 1.109 and 1.112 of the French and Dominican Civil Code; Article 904 of the Haitian Civil Code; Articles 1.812 and 1.819 Mexican Civil Code; Articles 1.146 and 1.151 Venezuelan Civil Code) or force (Article 1.508 and Article 1.513 of the Colombian Civil Code). Given the general trend, it appears trivial to mention that the Cuban Civil Code has, formally at least, no rule on duress or threat, and that the Guatemalan Civil Code also includes simulation as a defect of consent (Article 1257), and Saint Lucian Civil Code (Article 925 Civil Code) includes injury together with error, fraud, violence and fear.

The classification adopted also draws on the Dutch system. According to Article 3:44 of the Dutch and Suriname Civil Code, a contract may be avoided once there is duress, fraud and undue influence. It may also be avoided for error under Article 6:228.

The proposed classification takes into consideration the existing divergence between common law and civil law in relation with the understanding of “error” and mistake, which are not perfectly equivalent. “Mistake” embraces different cases which fit in different defects in the light of the OHADAC Principles and of the analysis of legal effects of each kind of case.

English authors distinguish between common mistake, mutual mistake and unilateral mistake. In common mistake cases, the agreement of the parties is grounded in an error, so that generally these cases fit in the rule of Article 3.4.3. However, in view of their consequences (absolute nullity or non-existence of the contract), mistake related to a *res extincta*, which affects the object of the contract when it has perished without the parties knowledge before the contract’s conclusion [*Couturier v Hastie* (1856), 5 HL Cas. 673; *Strickland v Turner* (1852), 155 ER 919], and mistake of the buyer who does not know that it already owns the object sold, or “*res sua*” mistake [*Abraham v Oluwa* (1944), 17 NLR 123], are considered in the OHADAC Principles as cases of initial impossibility (Article 3.1.3). The same treatment applies to the mutual mistake, which is characterised by a misunderstanding between the parties who negotiate, each with a different thing or deed in mind. Given that the consequence of these kinds of mistake in common law countries is the absolute nullity or non-existence of the contract [*Raffles v Wichelhaus* (1864), 2 H. & C. 906; *Scriven Brothers & Co v Hindley & Co* (1913), 3 KB 563], the OHADAC Principles characterises it as cases of non-existence of consent (Article 3.1.1). Finally, a unilateral mistake occurs where only one party makes a mistake, while the other does not but it is aware of the facts or should have been aware of it. In the light of its legal treatment in common law, this sort of mistake fits into the legal regime of mistake in Article 3.4.3.

The proposed characterisation facilitates the legal treatment of the common law institution named “misrepresentation” as cases of error or fraud as they are understood in civil law systems, depending on its characterisation as innocent or fraudulent misrepresentation. Both situations entitle the aggrieved party to avoid the contract (Article 1 Misrepresentation Act of 1967; Article 2 Bermuda Law Reform Act of 1977; Section 164 Restatement (Second) of Contracts).

In cases of documents erroneously signed or signed with a content quite different to that intended, common law also allows, although exceptionally, that contract was considered as void if they have been signed by blind or illiterate persons [decision of the *High Court* of Trinidad and Tobago in *Seepersad v Mackhan* (1982), No 533 of 1977 (Carilaw TT 1982 TT 27); decision of the *Supreme Court* of Bahamas in *Gordon v Bowe* (1988), Carilaw BS 1988 SC 75]. Although error in declaration is subject, under Article 3.4.4 of these Principles, to the same regime as mistake as a defect of consent, these cases are not included in the scope of application of this Section because of the special seriousness of circumstances causing the error and they must be considered as cases of absence of consent.

Violence and threat in civil law systems can be characterised as cases of duress in common law. Like in Caribbean legal systems inspired by French and Spanish law, duress exists where a party is victim of threats or intimidation (*vis compulsiva*).

In the Caribbean civil law systems, there is no specific defect similar to undue influence over one party in order to induce it to conclude a contract. If this happens, contract may be voided providing that the consent of the aggrieved party is not freely expressed because the other party has taken advantage of the situation of trust, necessity, dependence or psychological weakness of the party whose will has been wrongfully determined. Courts in equity have developed the doctrine of undue influence in order to give effect to defects in consent which do not fit in the category of “duress”. However, some cases of undue influence may be considered as threat, as mentioned below in the commentaries on Articles about threat and undue influence.

Article 3.4.2: *Mandatory character of the provisions*

- 1. The provisions on fraud, threat and undue influence are mandatory.**
- 2. The provisions on mistake shall be applicable unless the parties agree otherwise.**

COMMENT

1. Meaning of the mandatory character of the rules governing defects of consent

In most legal systems within the OHADAC, the legal regime of defects of consent is not subject to the freedom of parties, that is to say that it is mandatory. Even if the mandatory character of the legal regime of fraud, threat and undue influence under these Principles reflects domestic solutions, it must be considered as distinct methodological parameters. It must be stressed that the OHADAC Principles are only proposals of contractual clauses that can be integrated into the contract and parties may decide not to use some of its provisions. Aside from this point, by affirming the mandatory character of the rules governing defects of consent, these Principles aim at ensuring the fairness of the contract by imposing these rules over clauses agreed upon by the parties. Given that the aim of regime of defective consent intends to guarantee a declaration free and non-vitiated consent, excluding these provisions would be contrary to international public policy and basic contract morality. The application of the Principles therefore introduces a self-monitoring aspect into the contract which is fully consistent with its grounds of enforceability.

This is a self-monitoring system that is consistent with equivalent tools in all the Caribbean legal systems with respect to defects of consent. In this way, these Principles only serve as a reminder that Caribbean legal systems do not allow contract parties to limit or waive the application of the rules governing defect of consent by virtue of freedom of contract. Although this rule is expressed in some legal systems (e.g. Article 1.021 of the Costa Rican Civil Code; Article 1.822 of the Mexican Civil Code; Article 2.461 of the Nicaraguan Civil Code), the same principle may be easily inferred in any other legal system, given the scope of defects of consent in modern contract law. This mandatory character implies that the OHADAC Principles cannot prevent the application of domestic law applicable to the contract. Indeed, the mandatory regime of defects of consent is finally the one required by the law applicable to the contract by virtue of the parties' choice, in accordance with the recommendation made in the comments on the Preamble of these Principles. Failing that, this regime shall be imposed by the law applicable in the absence of choice under private international law rules. Consequently, the rules proposed in this Chapter do not intend to affect the mandatory application of domestic law, but to contribute to clarify and provide points of contact among Caribbean legal systems, at the same time observing the mandatory rules of domestic laws of the OHADAC countries.

2. Non-mandatory character of the legal regime on mistake

Although there is no legal statement to this effect, the analysis of Caribbean legal systems reveals that in this regional area, as in European systems, there is a non-mandatory legal regime for mistake as a defect of consent. Incidentally, there is only one legal system outside the sphere of OHADAC systems where the regime is mandatory (Article 218 of the Peruvian Civil Code). In compilations of contract law rules, the trend is also to assign a prescriptive character to the mistake regime [Article 3.1.4 UP; Article 4:118 (2) PECL; Article I–7:215 DCFR; Article 56 CESL].

The non-mandatory character of mistake in domestic laws generates two kinds of consequences. Firstly, where parties choose the OHADAC Principles, its legal regime on mistake replaces that established in the applicable domestic law. This is a broad substitution that extends to the definition of the situations concerned by the significant mistake to determine the termination of the contract as well as the defining of the limits to rescind the contract as established in Article 3.4.3 of these Principles. Secondly, the non-mandatory character of the legal regime of mistake in the Principles themselves enables parties to agree the substitution or modification of that regime. Thus, parties may, for example, declare that they will not apply this regime, which will be replaced with a national regime more familiar for them. It is also possible that parties modify the proposed rules through specific clauses as those proposed in clauses recommended in the comment on Article 3.4.3.

Once the parties have opted for the Principles, but prefer, with respect to the legal regime of mistake as well as the defect of consent, to apply a different law, including a law that they have chosen based on recommendations, it is advisable to confirm this with the insertion of a special clause.

Article 3.4.3: *Mistake*

- 1. A party may avoid the contract if, at the time the contract was concluded, it made a relevant mistake either of fact or of law, which determined its consent and if:**
 - a) the other party caused the mistake or made the mistake possible due to its silence contrary to legal duties to inform; or**
 - b) the other party made the same mistake; or**

- c) the other party knew or ought to have known of the mistake, and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error.
- 2. The mistake is relevant if it was of such importance that a reasonable person in the same situation as the party would not have concluded it.
- 3. However, a party may not avoid the contract if:
 - a) it was grossly negligent in committing the mistake (inexcusable mistake); or
 - b) the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party.

COMMENT

1. Scope of the legal regime of mistake

The purpose of this rule is to offer parties a legal regime of mistake able to adapt to the existing legal tradition in the Caribbean, to incorporate the most advanced developments concerning this legal regime and to include the specific requirements of commercial contracts liable to apply to these Principles.

Mistake as a defect of consent is well-known in civil law systems (Articles 1.509 to 1.512 of the Colombian Civil Code and Article 900 of the Colombian Commercial Code; Articles 1.015 to 1.016 of the Costa Rican Civil Code; Article 70 of the Cuban Civil Code; Article 1.110 of the French and Dominican Civil Code; Articles 1258 to 1260 of the Guatemalan Civil Code; Article 905 of the Haitian Civil Code; Article 1.557 of the Honduran Civil Code; Article 6:228 of the Dutch and Suriname Civil Code; Articles 1813 to 1.814 of the Mexican Civil Code; Articles 2.455 to 2.456 of the Nicaraguan Civil Code; Article 1.117 of the Panamanian Civil Code; Article 1218 of the Puerto Rican Civil Code; Articles 1.147 to 1.149 of the Venezuelan Civil Code). In common law systems there is a body of rules, particularly in case law, on mistake and misrepresentation [Article 2 Law Reform Misrepresentation and Frustrated Contracts of Bermuda; Sections 152 to 154 (mistake) and 159 to 165 (misrepresentation) Restatement

(Second) of Contracts]. A legal regime of mistake also exists in countries characterised by a hybrid legal culture (Article 926 of the Saint Lucian Civil Code).

These provisions of these Principles aim at offering a very simple and modern regime of mistake compared to what exists in most Caribbean legal systems, but without contradicting local legal cultures. In the following analysis the most significant divergences and similarities between Caribbean legal systems will be emphasised. These will be worth knowing, not only when the applicable law is that of a Caribbean legal system, but also when a doubt or ambiguity arises during the application of these Principles has to be resolved through interpretation.

The rule in Article 3.4.3 must be applied in all contractual situations in which the mistake is a defect of consent. This includes most cases in civil law systems, which are grouped under the following typologies: “error as to the thing”, “error as to the substance”, “error as to the person” or “error of law”. In the OHADAC Principles, special attention must be paid to the error of sum or calculation. It must be governed by the same rule as the one applicable to the error in declaration included in Article 3.4.4. This will make it possible to avoid difficulties linked to the determination of the time when the error occurred, which could be the time when the declaration was made or a time prior to the calculation or computing stage.

Given the special regime of common law systems, it is necessary to specify typical cases to which the rules in this provision will apply. As mentioned in the comments on Article 3.4.1, some kinds of mistake in common law are not included in the scope of Article 3.4.3, insofar as the fundamental legal problem is treated in other provisions of these Principles because of the very different legal consequences of these situations.

Although cases of common mistake are generally governed by the provisions of Article 3.4.3, two particular kinds of mistake are excluded. First, mistakes on *res extincta* that is, according to common law, where the object of the contract has perished at the time when the contract is made without the knowledge of the parties (Section 6 Sale of Goods Act of 1979; Section 8 Sale of Goods Act of Montserrat; Section 8 Sale of Goods Act of Antigua and Barbuda; Section 8 Sale of Goods Act of Bahamas; Section 8 Sale of Goods Act of Trinidad and Tobago; Section 8 Sale of Goods Act of Belize; Section 7.1 Sale of Goods Act of Jamaica), is considered in the OHADAC Principles as a case of initial impossibility (Article 3.1.3); mistake made by the buyer which does not know that it is already the owner of the goods sold, or “*res sua*” mistake [*Abraham v Oluwa* (1944), 17 NLR 123] is also excluded from the Article 3.4.3 and considered, on the same ground, as a case of initial impossibility subject to Article 3.1.3.

From this point of view, as mentioned in commentaries on Article 3.1.3, the OHADAC Principles propose a distinction between the legal regime of initial impossibility and that of mistake which is not clear enough in international texts on contract law harmonisation (Article 3.1.3. UP; Article 4:102 PECL; Article II-7:102 DCFR).

Neither is Article 3.4.3 applicable to cases where parties did not know or could not foresee the impossibility of the object or of the performance of the contract. Although this ignorance is considered in most Caribbean legal systems as a case of nullity due to mistake (e.g. Article 1.518 of the Colombian Civil Code; Articles 627 and 631 of the Costa Rican Civil Code; Articles 1.599 and 1.601 of the French and Dominican Civil Code; Article 1.564 of the Honduran Civil Code; Article 1.827 of the Mexican Civil Code; Article 1.832 of the Nicaraguan Civil Code; Article 1.123 of the Panamanian Civil Code; Article 1.224 of the Puerto Rican Civil Code), the OHADAC Principles have opted for subjecting these situations to the rules applicable to impossibility of performance. This uniform legal treatment avoids the need to determine between two different legal regimes, that of mistake and that of the effect of non-performance, for situations whose characterisation may often be difficult.

Example: A Colombian firm is the owner of a painting by Picasso and decides to sell it to a private Spanish museum, not knowing that the painting has been destroyed by fire some hours before the conclusion of the contract. If this case is characterised as mistake, the moment of the destruction must be determined, because depending on whether it is prior or subsequent to the conclusion of the contract, the case should be considered respectively as a mistake or as a case of impossibility of performance. The OHADAC Principles avoid such a difficulty and subject both cases to the same rules.

This Article is also not applicable to mutual mistakes, where there is a misunderstanding between the parties as to each other's intentions and they are at cross-purposes. Given that this kind of mistake in common law systems results in the absolute nullity or non-existence of the contract [*Raffles v Wichelhaus* (1864), 2 H. & C. 906; *Scriven Brothers & Co v Hindley & Co.* (1913) 3 KB 563], the Principles consider cases of mutual mistake as cases of absolute lack of consent (Article 3.1.1).

This Article is applicable to cases of unilateral mistake, where only one party is mistaken, while the other party is aware or ought to be aware of the real facts. It is also applicable to many cases characterised in common law systems as innocent or negligent misrepresentation, where the mistake is induced by the other party but there is no bad faith or fraud. As mentioned above, this Article is not applicable to cases of documents erroneously signed or signed with a content quite different to that intended, which in common law are considered as void if they have been signed by

blind or illiterate persons [decision of the High Court of Trinidad and Tobago in *Seepersad v Mackhan* (1982), No 533 of 1977 (Carilaw TT 1982 TT 27); decision of the Supreme Court of Bahamas in *Gordon v Bowe* (1988), No 346 of 1975 (Carilaw BS 1988 SC 75)].

The legal regime of mistake in the OHADAC Principles pivots around two elements. The first is the definition of relevant mistake that empowers a party to avoid the contract. A relevant mistake must accomplish two conditions. It must always be an essential mistake and must be accompanied by at least one of the following circumstances: the mistake has been caused by the other party; it is a common mistake; the other party knew or ought to have known the mistake. The second element to take into consideration refers to circumstances which limit the right to avoid the contract: amongst them, the fact that the mistake is due to negligence of the aggrieved party (inexcusable mistake); or the fact that the risk of mistake had been assumed by the aggrieved party or this party ought to bear that risk.

2. Relevant mistake

The application of the legal regime of mistake presupposes the existence of a relevant mistake. A mistake is considered as relevant where if it did not exist the contract would not have been concluded. The limitation envisaged in the Principles in relation with relevant mistakes is in accord with civil law systems, where such an approach is more or less present (Article 1.511.2º of the Colombian Civil Code; Article 1.015 of the Costa Rican Civil Code; Article 73 of the Cuban Civil Code; Article 1.110 of the Dominican and French Civil Code; Article 1258 of the Guatemalan Civil Code; art, 905 of the Haitian Civil Code; Article 6:228 of the Dutch and Suriname Civil Code; Article 1.557 of the Honduran Civil Code; Article 1.813 of the Mexican Civil Code; Articles 2.462 and 2.463 of the Nicaraguan Civil Code; Article 1.117 of the Panamanian Civil Code; Article 1.218 of the Puerto Rican Civil Code; Articles 1.147 and 1.148 of the Venezuelan Civil Code). This trend is also palpable in Article 40 of the Proposals for Reform of the French law on obligations of 2013.

In common law systems, the notion of common mistake only includes mistakes on fundamental facts (fundamental mistake) or on basic aspects of the contract, without which parties cannot reach an agreement [*Bell v Lever Brothers Ltd* (1932), AC 161, 206; *Galloway v Galloway* (1914), 30 TLR, 531]. Likewise, under U.S.A. law a non-fraudulent misrepresentation leads to contract avoidance only when it is fundamental (Section 162.2 Restatement (Second) of Contracts).

The same approach is found in international texts on contract harmonisation, which tend to restrict the relevance of the mistake to cases where it has proved decisive in the conclusion of the contract (Article 3.2.1 UP; Article 4:103 PECL; Article 48.1 CESL; Article II-7:201 DCFR).

The displacement of the focus of the mistake from the object of the error to its fundamental character makes possible to streamline and simplify this legal regime, so that traditional typological distinctions on the object of the mistake are no longer pertinent (*error in corpore, in persona, in negotio* or *in substantia*), although because the French (Article 1.110 of the French and Dominican Civil Code) and Spanish influence (Articles 1.266 and 1.267 of the Spanish Civil Code) they still survive in most Caribbean civil codes (Articles 1.510-1.512 of the Colombian Civil Code; Article 69 of the Cuban Civil Code; Articles 1.259 and 1.260 of the Guatemalan Civil Code; Article 1.557 of the Honduran Civil Code; Articles 2.455 and 2.467 Nicaraguan Civil Code; Article 1.117 of the Panamanian Civil Code).

The proposed rule only preserves the distinction between mistakes of fact and mistakes at law, the purpose of which is to dispel doubts about the possibility of an error on legal rules. Amongst Caribbean legal systems, only Mexico in Article 1.813 Mexican Civil Code such a simpler distinction is evident. Apart from that, it is also envisaged in international texts on contract law harmonisation, which generally admit any relevance of mistake of facts or of law which are both equally treated (Article 3.2.1 UP; Article 4:103 PECL; Article II-7:201 DCFR; Article 48.1 CESL). The same consideration is found in Article 39 of the Proposals for Reform of the French law on obligations of 2013.

It must be stressed that some Caribbean legal systems have solutions that do not fall within the scope of mistakes at law (e.g. Article 1.509 of the Colombian Civil Code). Given the significant legal inequality liable to be generated between the parties to the contract, these Principles provide that the parties can include a specific clause about their intention to restrict the scope of mistake of law. This may be made by adding a specific clause to the terms mentioned below.

The Principles give an objective consideration of the relevance of the mistake, based on the way a reasonable person situated in the same place and under the same circumstances as the parties making the mistake would have acted. Taking in account the requirements of international trade, the Principles opt for a mere objective perspective according to trade relations, where there is no room for subjective considerations. Then the elements that can determine the relevance of mistake are those established by the trade itself. For example, in trade of works of art the

authenticity of a painting, particularly if it is attributed to a famous painter, is relevant. If the buyer believed it was acquiring a Picasso but the painting is not really from this artist, this is a relevant mistake under the OHADAC Principles, insofar as a reasonable person, in the same situation, would not have concluded the contract.

Far from being innovative, the option envisaged epitomises the development in most Caribbean legal systems, where subjective approaches (Article 73 of the Cuban Civil Code; Article 1.813 of the Mexican Civil Code) have given way to case law interpretations which pay more attention to trade requirements. This is also the case of French law.

This development also supports the option of the Principles, grounded therefore on two pillars: a remarkable case law evolution and an approach towards trade requirements. The proposed rule has the advantage of being in accord with the interests of international trade.

Moreover, the rule is similar to that in Article 3.2.2 (1) UP. Otherwise, PECL and CESL adopts as the focal point the knowledge by the party which has made the mistake of the fact that the party making the mistake would have not concluded the contract if it had known about the mistake.

3. Induced mistake

The existence of a relevant mistake is not sufficient to create a right to avoid the contract. This right is recognised, first, when the mistake has been induced by the other party. The induced mistake comprises two cases: on the one hand, it is possible that one party has unwittingly produced defective information; on the other hand, the mistake may be induced by the non-performance of a duty to inform. Although the Principles do not deal with this kind of contractual duties, they may be required in mandatory rules applicable to contract. Both cases deal with induced mistake without intention to mislead the other party, which implies misrepresentation (Article 3.4.6).

The importance given to induced mistakes is also shared by common law systems. In addition to the variations specific to the case law configuration of misrepresentation, the most common cases of wholly innocent or non-fraudulent misrepresentation occur where one party declares inexact facts and this information has determined the contract's conclusion, so that the right to avoid the contract is justified [Section 2 Law Reform (Misrepresentation and Frustrated Contracts) Act of Bermuda; Section 162 Restatement (Second) of Contracts].

The need for an induced mistake as a condition for the right to avoid the contract is also present in Dutch and Suriname law [paragraph 1 (a) Article 6:228 Civil Code].

There is however a limitation: the right of contract avoidance ceases to exist if the other party would have accepted to conclude the contract despite the erroneous information. This requirement is not so clear in civil law systems. Nevertheless, in practice, the excusable nature of the mistake may lead to similar results.

Moreover, the rule established in these Principles remains consistent with the solutions provided in international texts on contract law harmonisation [Article 3.2.2 UP; Article 4:103 (1) (a) (i) PECL; Article II–7:201 DCFR; Article 48.1 (b) (i) CESL].

4. Common mistake

The OHADAC Principles also permit a party to avoid the contract when a mistake is made by both parties. A similar rule exists in most international texts on contract law harmonisation [Article 3.2.2 (1) (a) UP; Article 4:103 PECL; Article II–7:201 (I) (b) (iv) DCFR; Article 48.1 (b) (iv) CESL]. This rule is also known in all Caribbean legal traditions. In common law systems, the regime of common mistake in equity law has played an important role in granting the right to parties to avoid the contract, especially, taking into account the restrictive approach of assessing this option in common law cases. In a strict application of common law, the decisions rendered did not consider the contract to be void despite the existence of a common fundamental mistake [*Bell v Lever Brothers Ltd* (1932), AC 161; *Leaf v International Galleries* (1950), 1 All ER 693; *Frederick E Rose Ltd v William H Pim Fur & Co Ltd* (1953), 2 All ER 739]. On the contrary, in equity law cases the existence of common fundamental mistakes has justified the contract's avoidance [*Solle v Butcher* (1949), 2 All ER 1107; *Galloway v Galloway* (1914), 30 T.L.R. 531] and this approach is also represented in Caribbean case law [judgment of the Court of Appeal of Anguilla in *Dammer v Wallace* (1993), ECS (Anguilla) Civ App No. 1 of 1991 (Carilaw AI 1993 CA 3); decision of the Court of Appeal of Jamaica in *Stuart v National Water Commission* (1996) Civ App No. 3 1995 (Carilaw JM 1996 CA 31); *Johnson v Wallace* (1989), (Bahamas) 1 Carib Comm LR 49].

It must be stressed that this last approach has been strongly criticised by the English Court of Appeal, which has considered that the interpretation in the *Solle v Butcher* case, insofar as it opens the way to avoid the contract on the ground of a common mistake based on a basic assumption by all parties, could not be reconciled with the interpretation in *Bell v Lever*, and this undermined the security of the contract [*Great Peace Shipping Ltd. Tsavrilis Salvage (International) Ltd* (2002), 4 All ER 689].

The fact that it is currently not possible to know the influence of this restrictive interpretation of the common mistake on Caribbean judges seems a significant factor

to be taken into account when choosing the configuration of mistake from the ones set out in the Principles.

Mistakes are also treated under similar conditions in Section 152.1 of the *Restatement (Second) of Contracts*. The common mistake is also considered as important in Dutch and Suriname law (paragraph 1 of Article 6:228 of the Civil Code), but only as a subject to complex and significant exceptions. In civil law systems there is no reference to common mistake as a requirement to avoid the contract. However, there is a trend to include the existence of a common mistake in the concept of relevant mistake.

Since the subjective reasons that lead parties to conclude a contract are not usually expressed and are therefore not affected by common mistakes, the rule on mistakes set out in these Principles does not attribute any value to mistakes resulting from these subjective reasons. This approach does not only correspond to the need for certainty in trade relations, but is also consistent with the various Caribbean legal systems. However, these Principles do not mean that no importance is attached to the reasons expressed or known by the parties when the contract is concluded. In this case, it will be a common mistake on the reasons or a recognisable mistake. If the buyer makes a mistake in valuing a painting that belonged to his ancestors, there is no error that is liable to allow the avoidance of the contract, because the subjective reasons are not relevant in this case. However, if the other party becomes aware or ought to be aware of the mistake because of the reasons expressed and known by said party, the reason takes on a causal relevance that leads to the recognition of the legal consequences of the mistake. Although legal provisions rules to mistake on the reasons are rare, Article 42 of the Proposals for Reform of the French law on obligations of 2013 has provided a similar rule.

5. Knowledge of the mistake and duty to inform

Like most recent texts on contract law harmonisation [Article 3.2.2 (1) (a) UP; Article 4:103 (1) (a) (ii) PECL; Article II–7:201 (1) (b) (ii) DCFR; Article 48 (1) (b) (iii) CESL], the OHADAC Principles recognise the right to avoid the contract due to relevant mistake where this is known or could be known by the other party. Apart from cases of induced and common mistake, where the mistake was not and could not be known by the other party there is no right to avoid the contract. The rule about the recognisable nature of the mistake implies an implicit duty to unmake the mistake. If a party were in a position to inform the other party of the mistake, but fails to do so, it must assume the consequences of the contract avoidance. While in cases of induced mistake there is a legal duty to inform, this is not the case here, although it might be required by trade practice, for instance.

In common law systems there are some precedents giving significance to unilateral mistake. Thus, this is the case if parties agree a sale of fruit under of a certain price per pound, when the other party knows that the offer intends to refer to a price per unit. According to trade practice in this branch of commerce, which corresponded to mode of conclusion of the negotiations, the contract was considered as void [*Hartog v Colin and Shields* (1939), 3 All ER 566; *Webster v Cecil* (1861), 54 ER 812]. The result of these rulings is that the declaration of nullity results from the fact that the other party that did not make the mistake knew or ought to have known about the other party's mistake.

Aside from cases where the mistake can be obvious, this rule poses the problem of knowing what degree of information must be disclosed. To determine this volume of information, contract law harmonisation international texts use diverse elements. While the CESL refers to duty to inform according to contractual good faith, the UP relates this duty with reasonable commercial criteria of contractual fair dealing. For its part, the PECL directly mention a silent attitude "contrary to good faith" while the DCFR also takes into account good faith and fair dealing. The OHADAC Principles also opt for a legal concept based on trade requirements, and therefore requires the taking into account of duties to inform resulting from "reasonable commercial standards of fair dealing".

The OHADAC Principles acknowledge that these proposals are very innovative for operators used to Caribbean common law systems, where, apart from exceptional cases, the notions of mistake and misrepresentation do not include cases where the parties have concealed or simply have not mentioned relevant contractual circumstances. Under these systems, there is no duty to mutually inform about essential aspects of the contract. Indeed, pursuant to the *caveat emptor*, the seller is not obliged to reveal defects of immovable assets or goods sold [*Keates v Lord Cadogan* (1851), 138 ER 234; *Smith v Hughes* (1871), L.R. 6 Q.B. 597] and usually there is no relationship of trust between seller and buyer from which duty of inform could be inferred, so that the reluctance to inform cannot be considered as a fraud [*Walters v Morgan* (1861), LR 2 Ch App 21]. Silence is considered as misrepresentation only in exceptional cases, particularly in *uberrimae fidei* contracts such as insurance. In US law, silence and concealment of information are considered as misrepresentations in exceptional cases established in Section 161 Restatement (Second) of Contracts. Basically, this is to avoid that previous assertions do not lead to conclude that the contract has been vitiated by a mistake. The situation is different in civil law systems,

where courts usually recognise mutual duty to inform at the time of concluding the contract, despite some limitations.

In the light of this diversity of approaches between common and civil law systems, parties that opt for a legal regime of mistake closer to common law traditions are advised to include a clause in their contract in the terms mentioned at the end of the comment of this article, the purpose of which is to reject contract avoidance if there is a mistake of which the other party knew or could have known, but had no legal duty to inform the other party.

6. Exceptions to the right to avoid the contract

Despite the existence of a relevant mistake accompanied by some of the circumstances mentioned in paragraph 1 (induced mistake, common mistake, known or recognisable mistake), the contract may not be avoided if the party that makes the mistake has not acted with required diligence or, in other words, it is an inexcusable mistake.

In civil law systems, avoidance of the contract is usually excluded if the mistake is inexcusable. The excusable nature of the mistake, as a necessary condition for contract avoidance, is rarely expressed in written law (an exceptional example is the Article 1.146 of the Venezuelan Civil Code). In French law, this condition was created by case law pursuant to the doctrine of mistake as a defect of consent. The condition however appears in Article 39 of the Proposals for Reform of the French law on obligations of 2013.

Under the doctrine of non-excusable mistake, each party must be informed and defend its own interests and cannot trust in the protection of the law or of judges in any circumstance. Each party, therefore, should be informed of the relevant aspects of the contract before its conclusion. Currently, there is an increasing unanimity in case law in the sense that inexcusable mistakes do not require a gross negligence: normal negligence is sufficient. In order to establish the inexcusable nature of a mistake, factors such as age, profession and professional experience are considered.

In common law systems, the notion of fault of the mistaken party plays the same role in avoiding the contract vitiated by mistake. The mistaken party's fault appears as a condition which prevents the power of avoidance, is considered both in court decisions in Caribbean countries [decision of the Court of Appeal of Anguilla in *Dammer v Wallace* (1993), ECS (Anguilla) Civ App No. 1 de 1991, Carilaw al 1993 CA 3] and in USA law [Section 157 *Restatement (Second) of Contracts*]. In international texts on contract law harmonisation, serious fault of the mistaken party or inexcusable mistake are also

set out as conditions that limit the possibility of avoiding the contract [Article 3.2.2. (2) (a); UP; Article 4:103 (2) (a) PECL; Article II–7:201 (2) (a) DCFR].

The OHADAC Principles establish a second exception to contract avoidance when the mistaken party has assumed or should bear the risk of the mistake. Thus, the OHADAC Principles align with most advanced legal treatments of mistake, which also inspire other international texts on contract law harmonisation [Article 3.2.2 (2) (b) UP; Article 4:103 (2) (b) PECL; Article II–7:201 (2) (b) DCFR; Article 48 (2) CESL]. This rule works if the mistake is considered as a problem of distribution of risks and that there are several criteria to be considered. The risk of the mistake may be attributed to the mistaken party by virtue of the agreements or according to trade usages. Other criteria, such as the capacity of the mistaken party (expert, obliged to inform, etc.), must be taken into account. The rule is expressly set out in Article 6:228 of the Dutch and Suriname Civil Code. There are also provisions in common law systems that meet these criteria (Section 154 of the Restatement (Second) of Contracts).

CLAUSES ON MISTAKE

Exclusion of mistake of law

“The parties are not entitled to avoid this contract or any of its clauses due to mistake of law”.

Discharge of the duty to inform

“The Parties renounce their right to avoid the contract or any of its clauses on the grounds of mistake as provided by sub-paragraph c) of paragraph 1 of article 3.4.3 of the OHADAC Principles on international commercial contracts which govern this contract”.

Article 3.4.4: *Error in expression or transmission*

The mistake regime, mentioned in the previous article, is applicable to cases of error or inaccuracy in expression or transmission of a declaration, without prejudice to the rules related to interpretation contained in Chapter 4.

COMMENT

1. Application of the general legal regime of mistake

There is no special treatment of mistakes in expression in the OHADAC Principles; the applicable regime is therefore the same as in the previous. However, the legal regime of error in expression or transmission may be modified by the application of general rules on contract interpretation included in section 1 of Chapter 4 of these Principles.

The application of the general regime of mistake in expression or transmission does not correspond to the majority of Caribbean legal traditions, the legal basis of which, at least in the beginning, depend on the same voluntaristic concepts that established the legal systems. Therefore, civil law systems also distinguish between mistake as a defect of consent and error in declaration (*error obstativo*, *error-obstacle*). While mistakes empower a party to avoid the contract under some circumstances (e.g. relevant mistake, common mistake, inexcusable mistake), an error in declaration automatically makes the contract void or inexistent due to the lack of the will which is necessary to conclude the contract.

Development of legal systems, particularly through case law, reveals the ineffectiveness of preventing the recourse to exceptions against avoidance contained in the defect of consent mistake regime. Aside from the fact that the results may turn out to be obviously unfair, the diversity of regimes for the different mistakes raises characterisation issues. For example, if a seller mistakenly states the wrong price on an article when he makes the offer, that is an error in expression and the seller may invoke error obstacle to demand the avoidance of the contract. Conversely, if the mistake occurred not only at the time the price was given, but before that, through a calculation mistake during the offer preparation phase, and this mistake is not detected when the offer is made, the contract may be avoidable under certain conditions.

The difficulties that arise at the time these appreciations are made have demonstrated the need for the error regime to be governed by more flexible models that take into account risk theories. This would make it possible to highlight the fact of whether the seller assumed the risk of a miscalculation or, in other words, if allowing the other party to demand the contract performance could be deemed contrary to good faith, rather than referring to the time the mistake was made.

International texts on contract law harmonisation clearly opt for this new approach by considering error in expression as equivalent of a mistake made by the party which mistook the expression or the declaration (Article 3.2.3 UP; Article 4:104 PECL; Article II-7:202 DCFR Article 48.3 CESL).

2. Application of the rules on contract interpretation

The last paragraph of this commented Article reminds us that error in declaration can be considered under the rules of contract interpretation included in Section 1 of Chapter 4 of these Principles. It is rare to find in written law express links between error in expression and rules on contract interpretation. However this link is self-evident, insofar as the rules on interpretation often lead to dissipate the error and therefore to prevent contract avoidance since the error has ceased to exist. Obviously, such a consequence is easier to achieve when the rules on interpretation are focused on the true intent of the parties, but it is also usual in objectivistic systems where the meaning of the declarations is distinguished from the intention and determined under objective and reasonable parameters.

Rules on contract interpretation in Section 1 of Chapter 4 may resolve some problems relating to error in expression. Under the first rule, *in claris non fit interpretatio*, a contract term shall not be considered to be clear if, in the light of the contract's context, that term is considered as the consequence of a manifest error. The interpretative rule of Article 4.1.2 opts for an objective approach whereby the intents of the parties are taken into account, regardless of whether they are known or ought to be known. If the other party knows of the intention of the mistaken party, this interpretative rule enables judges and arbitrators to resolve the question of error in expression by reshaping the contract to suit the intent of the aggrieved party. When the contract can be interpreted exclusively on objective criteria, its content may be analysed to determine whether there was an error in expression.

Solutions envisaged in some Caribbean civil codes on error of sum or calculation, which do not grant the right of avoidance of the contract, but rather the right of rectification (Article 1.016 of the Costa Rican Civil Code; Article 1.557 of the Honduran Civil Code;

Article 1.814 of the Mexican Civil Code; Article 2.456 of the Nicaraguan Civil Code), suggest the same principle, in the sense of preferring the application of rules of contract interpretation to this kind of error in expression.

Common law systems do not usually provide a right to avoid the contract in cases of error in declaration. However, rules on equity offer remedies in this respect, such as the action for rectification [*Oyadiran v Bagget* (1962), LLR 96; decision of the High Court of Saint Vincent and Grenadines in *Gonsalves v Cordice* (2012), No. 339 of 2006]. In the case usually considered as the leading case on rectification doctrine [*Craddock Brothers v Hunt*, (1923) 2 Ch. 136], although parties had orally agreed, in a sale contract of an immovable property, the exclusion of an adjacent courtyard, the written contract included that courtyard due to error. According to ordinary rules on common mistake, the aggrieved party has no right because it is not a mistake on a basic element of the contract. However, the Chancery Court ruled that the content of the contract had to be rectified in accordance with the agreement made and the true intent of the parties. Rectification is usually only available when there is a common mistake. However, it has been also recognised in cases of unilateral mistake when the other party knew the mistake and took advantage of it [*Roberts v Leicestershire County Council* (1961), 2 All ER 545]. In U.S.A. law, rectification is envisaged in Section 155 Restatement (Second) of Contracts.

The OHADAC Principles opt for submitting the error of calculation to the rules on error in the expression. In this sense, the legal regime becomes simpler because it does not require that the time when the error occurred be verified, whether it was at the time of the preliminary calculation or at the time of the declaration. Moreover, the proposed rule is not incompatible with other approaches mentioned, for if rectification appears to be the most appropriate solution after applying contract interpretation criteria.

Article 3.4.5: *Loss of the right to avoid*

- 1. The right to avoid the contract shall be extinguished if, before the mistaken party has exercised the right to avoid the contract, the other party notifies his will to accomplish the contract or accomplish it in the sense it was understood by the party having the right to avoid it. This notification is to take place as soon as possible once the mistake is known. In such a**

situation, the contract will be considered as concluded under those terms.

2. The notification of avoidance under mistake given by the mistaken party shall be rendered without effect if the other party notifies without delay its acceptance to accomplish the contract in the sense that it was understood by the mistaken party. In such a situation, the contract will be considered as concluded under those terms.

COMMENT

1. Reasons for the loss of the right to avoid the contract by mistake

This Article deals with cases where, despite the existence of mistake under Article 3.4.3, the aggrieved party loses its right to avoid the contract. This provision is based on the fact that, in the light of new circumstances, the protection of the mistaken party is no longer justified. These new circumstances occur when the content of the contract concluded corresponds to what had been agreed upon or to what the aggrieved party had thought when the contract was concluded. In such cases, the aggrieved party is no longer allowed to withdraw from the contract by notifying the other party that the contract has been avoided. This consequence is reminiscent of the abuse of law and estoppel doctrine. When the contract corresponds to what the mistaken party expected, these Principles transfer legal protection to party that wishes to maintain the legal situation created by the contract. This rule does not affect mandatory rules and at the same time provides a way of preserving the contract.

The same approach is found in most international texts on contract law harmonisation that contain provisions aimed at establishing similar limitations to the right of the mistaken party to avoid the contract [Article 3.2.10 UP; Article 4:105 (1) and (2) PECL; Article II–7:203 (1) and (2) DCFR]. On the contrary, a similar rule is rare in Caribbean civil codes, apart from Article 1.149.2º of the Venezuelan Civil Code.

In order not to interfere with freedom of contract, the OHADAC Principles have omitted a legal regime applicable to adapt the contract when parties have made the same error. These cases are governed by the general legal regime on mistake included in Article 3.4.3.

2. Preservation of contracts vitiated by a mistake

The application of this Article depends on whether the terms agreed upon by the party authorised to avoid the contract is known. This is the only condition under which this article will apply. If there is no certainty on this point and a new agreement is necessary to clarify the contract, this provision will not be applicable.

Where the terms are known, the Principles allow the contract to be preserved in the terms according to which the contract was understood by the mistaken party before notifying the contract's avoidance or even afterwards. Before this notice, the other party may, once the mistake is discovered, notify its intention to perform the contract. It may also perform the contract in the terms understood by the mistaken party, so that the contract is considered as modified in this sense. But preservation of contract is also possible after the notification of avoidance if the other party gives notice without delay of its intention to perform the contract in the sense understood by the party declaring the contract's avoidance.

Article 3.4.6: *Fraud*

A party may avoid the contract if it has been induced to conclude the contract by the other's party fraudulent misrepresentation.

COMMENT

1. Objective of the legal regime of fraud

The inclusion in the Principles of a provision relating to fraud as a defect of consent must be understood in the light of the methodological criteria set out in the comments of the Preamble and Article 3.4.2. Given the mandatory nature of fraud in Caribbean legal systems, the OHADAC Principles have chosen not to make inapplicable the mandatory rules of the domestic law that governs the contract. The rules proposed by these Principles will apply only within the limits defined by the national mandatory rules. This explains why there is no intention to establish a legal system that will replace Caribbean legal systems. Knowledge of these limits for the freedom of choice of operators in relation to fraud, enables the shared construction on issues not included within these limits, which in practice may be of interest for parties. The knowledge of these limits demonstrates, for example, the convergence of Caribbean legal systems around the rule included in the Principles, which enable the aggrieved

party to avoid the contract through a mere non-judicial notice, as mentioned in Article 3.5.1.

Fraud as a defect of consent is well-known in civil law systems (Articles 1.515 and 1.516 of the Colombian Civil Code; Article 900 of the Colombian Commercial Code; Article 1.020 of the Costa Rican Civil Code; Article 71 of the Cuban Civil Code; Article 1.116 of the Dominican and French Civil Code; Articles 1.261 to 1.263 of the Guatemalan Civil Code; Article 909 of the Haitian Civil Code; Article 3:44.3 of the Dutch and Suriname Civil Code; Articles 1.560 and 1.561 of the Honduran Civil Code; Articles 1.815 to 1.817 of the Mexican Civil Code; Article 2.460 of the Nicaraguan Civil Code; Articles 1.120 and 1.121 of the Panamanian Civil Code; Article 1.221 and 1.222 of the Puerto Rican Civil Code; Article 1.154 of the Venezuelan Civil Code). In common law systems, there is also a body of rules on misrepresentation resulting from case law rather than legislative (Article 2 Law Reform Misrepresentation and Frustrated Contracts of 1977 of Bermuda; Section 164 Restatement (Second) of Contracts) and this legal regime is also available in countries with a hybrid legal culture (Article 927 of the Saint Lucian Civil Code).

Within the limits imposed by the mandatory nature of fraud in national legal systems, this Article pursues other aims. Firstly, during negotiations it tries to prevent acts that will lead to misrepresentations, such as the providing of inaccurate information or the concealing of relevant information with the aim of misleading the other party. The Principles also try to contribute to legal comparison and to promote the knowledge of the legal regime of fraud in Caribbean legal systems in order to facilitate the application of the fraud doctrine by judges and arbitrators in cross-border cases. In this sense, the effectiveness of the mandatory nature of these rules is reinforced.

The treatment of fraud is especially relevant in cases when Principles are considered as the only law applicable on the merits. This will be the case, for example, if the dispute is submitted to arbitration and parties have chosen the OHADAC Principles as the law applicable on the merits with no reference to a domestic law. In such cases, the mandatory character of this Article stated in Article 3.4.2 is significant insofar as parties cannot exclude the application of Article 3.4.6.

2. Fraud in Caribbean legal systems

In Caribbean legal systems there are different rules which enable the aggrieved party to avoid the contract. In civil law systems these cases are generally considered under the “*dolo*” doctrine. Article 71 Cuban Civil Code, however, uses the term “fraud” (*fraude*) instead of *dolo*, but both expressions are synonymous.

Fraud also fits in the common law concept of misrepresentation. Misrepresentation itself is a broader concept than fraud because it includes all false representations of reality made by one contract party (made intentionally), or a negligent or even innocent representation, which may be direct or indirect, that is personally or through a third person.

Misrepresentation can be fraudulent, negligent or innocent. A misrepresentation is fraudulent when it is made consciously, and the perpetrator knows that it is not true and acts, not out of mere carelessness but dishonesty with a clear intent to deceive [*Derry v Peek* (1889), 14 App Cas. 337; decision of the Court of Appeal of Jamaica in *Bevad Ltd Oman Ltd* (2008), Civ App No. 133 of 2005 (Carilaw JM 2008 CA 54)]. Negligent misrepresentation implies a special relationship between the parties, which means that if a careless representation by one party is likely to result in the conclusion of a contract, that party is held [*Hedley Byrne & Co v Heller & Partners Ltd* (1963), 2 All ER 575; Section 3 (1) *Misrepresentation Act* (Ch 82:35) of Trinidad and Tobago]. Innocent misrepresentation does not imply a fault. Contracts induced by misrepresentation may be voided in any case. However, written law on misrepresentation usually empowers judges to substitute avoidance through due compensation. In case of fraudulent misrepresentation, the aggrieved party has the right to avoid the contract as well as to damages by misrepresentation. Innocent and negligent misrepresentation can be considered as cases of mistake within the meaning of Article 3.4.3 of these Principles, while fraudulent misrepresentation is included in this Article.

Caribbean systems inspired by Dutch law also recognise the right to avoid the contract in case of fraud (Article 3:44.3 Dutch and Suriname Civil Code).

3. Relevant situations considered as fraud

Although all Caribbean legal systems consider that fraud is a cause to void the contract, definitions of “fraud” are not always convergent. The lowest common denominator requires two conditions: the fraudulent behaviour of a contract party able to induce the other party to conclude the contract.

In civil law systems, fraud implies an error induced by deceit. Fraud may be achieved through words or acts, but omission has the same effect. Fraudulent action and fraudulent omission are both expressly mentioned in some Caribbean codes (Article 1.261 of the Guatemalan Civil Code; Article 1.815 of the Mexican Civil Code). In other cases, legal texts only refer to fraudulent acts (Article 1.560 of the Honduran Civil Code; Article 1.120 of the Panamanian Civil Code; Article 1.221 of the Puerto Rican Civil

Code), but case law has also introduced the concept of fraudulent omission. Caribbean legal systems use separate criteria to determine the criterion to use in defining the scope of relevant information. Trade requirements can be taken into account to determine whether or not there was deceit by concealing the relevant information. Caribbean systems inspired by Dutch law provide a similar solution. Article 3:44 of the Dutch and Suriname Civil Code expressly refers to inexact information and intentional concealing of any significant fact.

In practice, some situations may arise and raise doubts about the existence of a contractual situation of fraud (because relevant contractual information may have been omitted), a contractual situation of known or recognisable mistakes (because an important duty to inform was not performed with respect to fair dealings in trade). The case of fraud by omission may often coincide with that of the recognisable mistake. To distinguish the two situations (recognisable error and fraud by omission), it is necessary to pay attention to the intention likely to have caused the mistake and to check the existence of the deceit. This interpretative difficulty disappears when parties include the recommended clause, and avoid the application of sub-paragraph (c) of paragraph 1 of Article 3.4.3.

In Caribbean common law systems, this kind of delimitation is not necessary. Usually, silence is not considered as representation, and mere fact of concealing the facts is not fraudulent misrepresentation [*Keates v Lord Cadogan* (1851), 138 ER 234; *Walters v Morgan* (1861), LR 2 Ch App 21; Section 161 Restatement (Second) of Contracts]. Misrepresentation occurs when a false image is created actively, with the aim of deceiving the other party. Fraudulent behaviour by omission, due to the silence kept around required or relevant information, is only exceptionally recognised. According to the misrepresentation doctrine, misrepresentation does not only consist of the mere fact of concealing information if it is not a legal obligation. In accordance with this rule, it must be stressed that in the preliminary legislative texts concerning French law, fraudulent omissions are also restricted to cases of the non-performance of the duty of legal information (Article 44 of the Proposals for Reform of the French law on obligations).

4. Relevant fraud to avoid the contract

Fraud is not sufficient to void the contract. Many Caribbean legal systems associate the effect of the avoidance of the contract only to cases where the deception is particularly serious. Like French law (Article 1.116 of the French and Dominican Civil Code), most Caribbean legal systems distinguish between *dolus causam dans* and *dolus incidens*. While the first empowers the aggrieved party to avoid the contract, the *dolus*

incidens only gives the right to damages (e.g. Article 1.515 of the Colombian Civil Code; Article 1.020 of the Costa Rican Civil Code; Article 73 of the Cuban Civil Code; Article 1.116 of the French and Dominican Civil Code; Article 909 of the Haitian Civil Code; Article 1.561 of the Honduran Civil Code; Article 1.816 of the Mexican Civil Code; Article 2.466 of the Nicaraguan Civil Code; Article 927 of the Saint Lucian Civil Code; Article 1.154 of the Venezuelan Civil Code). Although this distinction is not specified in common law, under these legal systems avoidance of the contract is possible only if the representation that led to the deceit, was determinant at the time consent was given (Section 164 Restatement (Second) of Contracts).

Likewise, in legal systems inspired by Dutch law, only serious fraud determining the contract's conclusion can be a cause to void the contract (Article 3:44 Dutch and Suriname Civil Code). On the contrary, declarations on general terms, even false, are not necessarily fraudulent. In this sense, Article 1.821 Mexican Civil Code provides that general considerations of the parties on profits and prejudices presumably resulting of the contract's conclusion, which do not imply deception or threat, are not considered in order to characterise fraud or duress.

Furthermore, fraud shall not justify contract's avoidance if it has been caused by both contract parties (Article 1.020 of the Costa Rican Civil Code; Article 1.261 of the Guatemalan Civil Code; Article 1.561 of the Honduran Civil Code; Articles 1.816 and 1.817 of the Mexican Civil Code; Article 2.460 of the Nicaraguan Civil Code; Article 1.121 of the Panamanian Civil Code; Article 1.222 of the Puerto Rican Civil Code; Article 927 of the Saint Lucian Civil Code; Article 1.154 of the Venezuelan Civil Code).

5. Scope of freedom of contract in relation with fraud

The OHADAC Principles provide that the aggrieved party may avoid the contract through a mere notification. This is consistent with the mandatory legal character of rules on fraud and fraudulent misrepresentation in Caribbean legal systems.

Otherwise, the non-mandatory character of some aspects of fraud in the OHADAC Principles contrasts with the usual trend in international texts on contract law harmonisation (Article 3.2.5 UP; Article 4:107 PECL; Article II–7:205 DCFR; Article 49 CESL). The OHADAC Principles opt for a greater respect for legal traditions, promoting legal convergence through freedom of contract. As far as it does not contradict mandatory rules on fraud, the OHADAC Principles enable parties to extend the legal regime on fraud in relation with silence and concealing of relevant information contrary to good faith and fair dealing. The following clause is proposed in this respect:

Extended clause for fraud:

The parties agree that not only positive actions but also non-disclosure of circumstances, which according to reasonable commercial standards of fair dealing and good faith a party should have previously disclosed, shall be considered as fraudulent.

Article 3.4.7: Threat

- 1. A party may avoid a contract when it has been induced to conclude the contract by the other party's unjustified threat of an imminent and serious wrong.**
- 2. The threat is unjustified if the act or omission with which the party has been threatened is illegal in itself or it is an illegal means to accomplish the conclusion of the contract.**

COMMENT

The inclusion in the Principles of a rule relating to duress as a defect of consent remains, like the legal regime of fraud, conditional upon the mandatory nature of its legal regime in Caribbean legal systems. If the parties opt for the OHADAC Principles to govern their contract, the provisions concerning duress cannot be amended by consent of the parties. Like the other contractual clauses, the OHADAC Principles do not affect mandatory rules of domestic law applicable to the contract. Therefore, the OHADAC rules on duress are not intended to create an independent legal regime derived from the convergence of Caribbean legal systems. This Article pursues, therefore, the same purposes as fraud according to the commentaries on the preceding Article.

Caribbean legal systems converge in allowing contract avoidance when there is duress, violence or duress. Under these concepts, there are two types of possible situations where pressure is exerted on the contracting party. In the first case, absolute physical violence totally inhibits the other party's will, for example where one party signs a contract because the other party forces it to do so. As mentioned above, these situations are regulated by Article 3.1.1, insofar as they must be understood as cases of absolute lack of consent.

Aside from this case, the pressure exerted on the contracting party will normally fall under duress. Duress implies a warning of a future personal, economic or moral wrong, which the aggrieved party would suffer if the contract is not concluded. With duress, psychological pressure is exercised to obtain the conclusion of a contract, which appears as a means of avoiding the expected wrong (Article 72 of the Cuban Civil Code; Article 1.513 of the Colombian Civil Code; Articles 1.018 and 1.019 of the Costa Rican Civil Code; Article 1.112 of the French and Dominican Civil Code; Article 1.265 of the Guatemalan Civil Code; Articles 906 and 907 of the Haitian Civil Code; Article 1.558 of the Honduran Civil Code; Article 2.468 of the Nicaraguan Civil Code; Article 1.219 of the Puerto Rican Civil Code; Articles 928 to 933 of the Saint Lucian Civil Code).

These civil codes establish some common conditions of duress: firstly, one party must provoke a rational fear of suffering an imminent and serious wrong in the other party. Such an imminent and serious wrong must not obey the normal course of events, but acts of the threatening party or which this party has the control. Such acts must be illegal, in the sense that they are illegal in the essence (causing death or injuries) or because it is illegal to have recourse to it to force the other party to conclude a contract (e.g. denouncing a crime). Although some legal systems do not have rules in this respect, generally the normal exercise of a right cannot be considered as threat (Article 1.267 of the Guatemalan Civil Code).

Secondly, all civil codes require that the imminent and serious threat affects the contracting party or some person closely connected with it. However, the criteria are not always the same for the various codes. The different codes refer to the contracting party's person and property, to the persons and property of their spouse, descendants and ascendants. Others mention the contracting party, the contracting party's spouse or all ascendants or descendants. Some other systems extend the threat to the person and honour of the contracting party, or that of the contracting party's spouse or partner, descendants and ascendants or siblings, with the understanding that the judge could extend this to all other persons (Article 1.265 of the Guatemalan Civil Code; and likewise, exclude siblings, Article 2.464 of the Nicaraguan Civil Code and Article 1.152 of the Venezuelan Civil Code). A broader formula, including threats on the life, honour or assets of the contracting party or any third party, is found in Cuban Civil Code (Article 72). The Mexican Civil Code is more precise, referring to relevant threats that pose a risk to lose life, honour, liberty, health or a significant part of assets of the contracting party, its spouse, descendants, ascendants or collateral relatives until the second degree (Article 1.819 Civil Code).

Thirdly, duress may be interpreted in relation with the qualities of the aggrieved party. Condition and age may be taken into consideration (Article 73 of the Cuban Civil Code; Article 1.118 of the Panamanian Civil Code), as well as gender (Article 1.513 of the Colombian Civil Code; Article 1.018 of the Costa Rican Civil Code; Article 1.112 of the French and Dominican Civil Code; Article 1.558 of the Honduran Civil Code; Article 2.458 of the Nicaraguan Civil Code). Under Guatemalan law, any other significant circumstance must be taken into account (Article 1.266 of the Guatemalan Civil Code).

Finally, fear of disappointing persons to which submission and respect is due is not a reason capable of avoiding the contract (Article 1.268 of the Guatemalan Civil Code; Article 907 of the Haitian Civil Code; Article 1.558 of the Honduran Civil Code; Article 1.820 of the Mexican Civil Code; Article 2.465 of the Nicaraguan Civil Code; Article 1.153 of the Venezuelan Civil Code). A similar solution, less restrictive, is found in Article 1.114 of the French and Dominican Civil Code. However, although this Article only excludes avoidance of the contract only if the threat is from the father, mother or any other ascendant, a broad interpretation is in any event possible.

Legal systems inspired by Dutch law obey usually similar principles. According to Article 3:44 of the Dutch and Suriname Civil Code, duress includes threats of illicit wrongs on the contract party, a third person or their goods. Unlike civil law codes of Spanish tradition, under Dutch law valuation of influence is objectified, so that the impact of threat on a reasonable person must be taken into consideration in order to avoid the contract.

In common law systems “duress” is a common institution. Duress requires that violence consists in threats provoking fear to suffer some wrongs relating to the party, its wife or husband, descendants or other relatives, and determinant of the will to conclude the contract. Particularly, it is required that threat affects personal integrity or freedom [*Barton v Armstrong* [(1975), 2 All ER 465].

Although originally duress did not embrace economic threats focused in goods [*Atlee v Backhouse* (1838), 3 M & W 633, 650; *Skeate v Beale* (1840), 11 Ad. & El. 983], in recent times duress of goods is also recognised and contracts avoidance is possible where contract has been concluded under threats of economic damage [*B&S Contracts and Design Ltd v Victor Green Publications Ltd* (1984), ICR 419; *Atlas Express Ltd v Kafko Ltd* (1989), 1 All E.R. 641; *D&C Builders Ltd v Rees* (1965), 3 All ER 837; *Lloyds Bank Ltd v Bundy* (1974), 3 All ER 757; *Ting v Borelli* (2010), 79 WIR 204]. Inclusion of this economic aspect of duress requires a delimitation from other institutions, such as the “inequality of bargaining power” and “undue influence” [judgment of the High Court of Trinidad and Tobago in *Stechers Ltd v Cheesman* (1977), No. 2614 of 1972

(Carilaw TT 1977 HC 66); judgment of the High Court of Barbados in *National Bank v Lehtinen* (1992), No. 1410 of 1988 (Carilaw BB 1992 HC 38)], which is not always easy as demonstrated by decisions that have applied all three approaches [*Lloyds Bank Ltd v Bundy* (1974), 3 All ER 757].

Moreover, for duress to be upheld, the threat must be refer to illegal criminal or civil acts. Hence, a threat to exercise a right usually is not considered as duress. In this sense, the threat of illegal imprisonment is usually considered as duress, while the threat of legal imprisonment is not. Threat of denunciation of a crime actually committed has not been considered as duress [*Fisher & Co v Apollinaris Co* (1875), 10 Ch. App. 297]. A similar criterion is applied to threats of lawsuits for illegal civil acts.

The OHADAC Principles do not intend to create a legal regime of threat as a defect of consent, unlike other harmonised texts on contract law (Article 3.2.6 UP; Article 4:108 PECL; Article II–7:206 DCFR; Article 50 CESL).

In the frame of freedom permitted by the mandatory rules of national legal systems involved, the OHADAC Principles allow the aggrieved party to avoid the contract through a non-judicial notification.

Article 3.4.8: *Undue influence*

- 1. A party may avoid the contract or a contract term if the other party, at the time the contract was concluded, had taken unfair advantage of the first party's dependence, trust, economic distress or urgent needs, or of its ignorance or manifest inexperience.**
- 2. Avoidance can only be invoked if the other party knew or should have known this circumstance and it took advantage of the situation and excessively prejudiced the aggrieved party.**

COMMENT

1. Undue influence in Caribbean legal systems and in international texts on contract law harmonisation

The OHADAC Principles opt for including undue influence and dependence among defects of consent. The definition of the outlines of this doctrine comes primarily from common law countries. This equity law doctrine served to overcome limits of mistake, misrepresentation and duress as exclusive defects of contract. Undue influence helps to define equity law together with mistake, misrepresentation and duress. This article aims to prevent a party from taking advantage of its preeminent situation to reach the contract's conclusion, because of trust, dependence, affliction or necessity of the other party, whose will is unduly undermined. The contract may be avoided if this can be proved.

Undue influence comes from US law in Section 177 Restatement (Second) of Contracts. Beyond common law countries, it has also been adopted by Dutch law [Article 3:44 (4) of the Dutch and Suriname Civil Code] and international texts of contract law harmonisation [Article 3.2.7 UP; Article 4:109 PECL; Article II-7:201 DCFR; Article 51 CESL]. It is also envisaged in Article 50 Draft Project reform of the French law on obligations of 2013.

Equity doctrine of undue influence is considered in common law systems where a party not only uses its predominant influence over the other party, but takes advantage of this influence and, as a consequence, the other party suffers a prejudice when it concludes the contract [*National Commercial Bank (Jamaica) Ltd v Hew* (2003), 63 WLR 183]. The influencing party must be in an objective situation of economic, moral or similar pre-eminence over the other party [*Avon Finance Co v Bridger* (1985), 2 All ER 281]. According to most current characterisation of undue influence [*Barclays Bank plc v O'Brien* (1993), 3 WLR 786; *Murray v Deubery* (1996), 52 WIR 147 (CA, ECS)], two situations must be distinguished depending on whether a particular relationship between the parties existed or not before the contract's conclusion.

2. Cases of undue influence

As cases of undue influence, common law courts have considered the following: determining the contract's consent by means of threats (not illegal, nor made with the purpose of achieving unfair advantages) of denunciation of a crime committed over the contract party, its husband, wife or relative [*Williams v Bayley* (1866), LR 1 H.L. 200]; coercing the will of a person with limited ability, arguing supernatural powers of the influencing party [*Nottidge v Prince* (1860), 2 Giff. 246]; taking advantage of the bad condition of a close relative [*Mutual Finance Ltd v Wetton & Sons Ltd* (1937), 2 KB 389].

Avoidance in cases of undue influence requires that the will of the aggrieved party has been affected by an unfair or inappropriate behaviour of the other party and usually that this party has obtained personal advantages. To be precise, the aggrieved party must prove: that the other party (or any other which has influenced the conclusion of the contract) has the capacity to influence the aggrieved party; that such an influence has been exercised; and that this exercise was a deciding factor in the conclusion of the contract [*Bank of Credit and Commerce International SA v Aboody* (1990), 1 QB 923]. International texts on contract law harmonisation have not included this kind of undue influence [Article 3.2.7 (1) (a) UP; Article 4:109 PECL; Article II-7:207 DCFR; Article 51 CESL].

In common law systems undue influence is presumed and therefore no proof is necessary where there is a special relationship of trust (father/son, guardian/ward, advocate/customer, doctor/patient, priest/parishioner) which lead to suppose an unfair recourse to that relationship in order to reach the contract's conclusion [e.g. judgments of the Supreme Court of Jamaica in *Brown v Dillon* (1983), 20 JLR 37; and in *Lalor v Campbell* (1987) 24 JLR 67]. In such cases, the avoidance of the contract only requires proof of this relationship. The same presumption, however, is not recognised between husband and wife [judgment of the High Court of Barbados in *National Bank v Lehtinen* (1992), Carilaw BB 1992 HC 38] or between banker and customer [*National Commercial Bank (Jamaica) Ltd v Hew* (2003), 63 WIR 183]. Otherwise, there is no *numerus clausus* of particular situations capable to be considered according to the undue influence doctrine; that is why it is submitted that undue influence is applicable whenever influence has been achieved and taken advantage thereof [*Smith v Kay* (1859), 7 HLC 779].

The direct avoidance of the contract where there is a presumption of undue influence facilitates the parties' right to avoid the contract through a mere private notification. The OHADAC Principles provide the same rule enabling parties to avoid the contract where there is a relationship of trust or dependence, following the line of other international texts on contract law harmonisation, which recognise the right to avoid the contract on the ground of defect of consent in cases of dependence (UP) or of dependence or trust (PECL, DCFR, CESL). Relevant situations for contract avoidance are those mentioned above and any other where a situation of trust or dependence can be inferred. US law also envisages these cases of avoidance (Section 177 Restatement (Second) of Contracts).

However, the existence of such a relationship is not sufficient to avoid the contract under the OHADAC Principles. There must also be excessive benefit to the influencing

party, resulting in a disadvantage to the aggrieved party. This approach is generally observed, with some reluctance, in Caribbean common law systems, which usually require a manifest disadvantage (judgment of the Court of Appeal of Guyana in *De Freitas v Alphonso Modern Record Store Ltd* (1991), 45 WIR, 245]. The requirement of an excessive advantage or unfair disadvantage is also current in international texts on contract law harmonisation [Article 3.2.7 (1) UP; Article 4:109 (1) (b) PECL; Article II-7:207 (1) (b) DCFR; Article 51 (b) CESL]. This requirement is however slightly different in US law, which refers to acts of the aggrieved party “inconsistent with his welfare” (Section 177 Restatement (Second) of Contracts).

The OHADAC Principles take into account the fact that in a number of legal systems, many cases of undue influence based on a relationship of trust or dependence are expressly excluded from the right to avoid the contract. As it has been pointed out in the comment on the previous article, reverential fear or fear of disappointing persons to whom submission and respect are due do not justify the right to avoid the contract (Article 1.114 of the French and Dominican Civil Code; Article 1.268 of the Guatemalan Civil Code; Article 907 of the Haitian Civil Code; Article 1.558 of the Honduran Civil Code; Article 1.820 of the Mexican Civil Code; Article 2.465 of the Nicaraguan Civil Code; Article 931 of the Saint Lucian Civil Code; Article 1.153 of the Venezuelan Civil Code). The limits to the application of this Article, which also recognise the right to avoid the contract in these cases, depend on the mandatory nature of those exceptions in domestic laws.

In common law systems, the existence of undue influence is also presumed, even if there is no prior relationship between the parties, if one party takes advantage of the inexperience, ignorance or poverty of the other party by means of a catching or unconscionable bargain. If these situations are accompanied by an excessive advantage of the preeminent party and an unfair prejudice of the aggrieved party, the aggrieved party has the right to avoid the contract. In Caribbean courts the doctrine of inequality of bargaining power has been followed in some cases, declaring the voidness of the contract on the ground of unequal bargaining power of the parties regardless of the absence of undue influence or economic duress [*Singh v Singh* (1978), 25 WIR 410].

This type of situation is addressed specifically by US law through the doctrine of “unconscionability”. Although its application does not result in avoidance of the contract, the final results may be the same if the defect does not allow the judicial performance of the obligations arising from the contract (Section 208 Restatement (Second) of Contracts; Section 2-302 UCC; *Williams v Walker Thomas Furniture Co*

(1965), 350 F2d, 445, DC Cir). The doctrine is based on the lack of true or significant consent and the existence of contract terms that benefit one party in an extraordinary measure, thus giving rise to the distinction between substantive and procedural unconscionability. The unconscionability doctrine is used in cases of unbalanced contracts to prevent the performance of consumer contracts or terms in consumer contracts, where parties have unequal bargaining powers (*Muscioni v Clemons Boat* (2005) Ohio 4349; *Pierce v Catalina Yachts Inc.* (2000) Alaska 2 P. 3d 618). But it has also been applied in case of gross disparity between the price and the value of the reciprocal obligation (*Repair Master Construction Inc. v Gary* (2009), 277 SW 3d 854 Mo. Ct. App).

Aside from common law countries and countries with legal systems based on Dutch law, rules allowing parties to avoid the contract because the other party took advantage of their ignorance or poverty are rather rare. Article 17 of the Mexican Civil Code can be exceptionally cited among civil law systems insofar as it enables poor and ignorant parties induced to conclude unfair contracts to avoid them whenever the other party has obtained a disproportionate profit in relation with its own obligations.

The OHADAC Principles also consider this kind of undue influence, allowing contract's avoidance on the ground of the ignorance, inexperience, lack of bargaining skill, economic difficulties or urgent needs of the aggrieved party. The proposed rule follows to some extent the formula used in UP, PECL, DCFR and CESL (economic distress, urgent needs, improvidence, ignorance, inexperience or lack of bargaining skill).

3. Conditions for invoking undue influence

As from unfair prejudice, application of undue influence doctrine presupposes that the party has taken advantage of the situation of trust or dependence or took advantage of the weakness of the other party, of which it was aware, or could have been aware. Knowledge of the situation of trust or dependence becomes therefore a condition to void the contract imposed by trade requirements. In this respect, the Principles are in line with international texts on contract law harmonisation (UP; PECL; DCFR; CESL).

The rule established by these Principles concerning undue influence does not affect the possibility of demonstrating that there was no undue influence. This could be of interest in the event of a judicial petition by the party that considers that there has been no undue influence asking for the performance of the contract. In such a situation, the interpretative value that could be acquired by the legal regime of presumed undue influence in common law systems cannot be denied.

Where there is a prior relationship between the parties, the presumption will disappear only if there was no coercion or if consent was given freely, making the contract the consequence of the free will of the parties. However, to disprove presumed undue influence, it is not necessary to have been able to benefit from independent advice if this advice was not followed. The conclusion of the contract must result from the exercise of free will, and the party must have had explanations from an independent, qualified person [*Inche Noriah v Shaik Bin Omar* (1929), AC 127].

In cases of undue influence by inexperience, unequal bargaining power, ignorance or urgent needs, opposition to avoidance requires proving that, despite appearances, the contract has actually been concluded in a correct, fair and reasonable manner [*Earl of Aylesford v Morris* (1873), L.R. 8 Ch. App. 484]. Although some decisions have followed this approach [*Fry v Lane* (1888), 40 Ch. D. 312; *Evans v Llewellyn* (1787), 1 Cox 333, 340], it seems questioned in subsequent cases [*Pao On v Lau Yiu Long* (1980) AC 614; 1979 3 WLR 435; *National Westminster Bank Ltd v Morgan* (1985), AC 686; 1985 2 WLR 588].

International texts on contract law harmonisation also provide for the adaptation of the contract in cases of undue influence if it is required by the aggrieved party, to adjust the contract according to reasonable criteria of fair dealing [Article 3.2.7 (2) and (3) UP], good faith [Article 4:109 (2) and (3) PECL] or good faith and fair dealing [Article II-7:207 (2) and (3)]. The legal regime established by the OHADAC Principles for this defect of consent does not fall within this scope. This article does not aim to influence the freedom of the parties to decide on the relevance of maintaining an avoidable contract. By the very nature of this defect of consent, it is also not appropriate to propose a clause expressly concerning this type of contract adaptation in the event that the contract is maintained, in order to adjust it after the undue influence.

Article 3.4.9: Defects caused by a third person

The party suffering the mistake, fraud, threat or undue influence may avoid the contract when such defects have been caused by a third party, if the other party knew or ought to have known this circumstance.

COMMENT

It is frequent for third persons to be involved in the contract negotiation or conclusion process. These third persons may be responsible for defects of consent of one party. The OHADAC Principles follow in this Article the approach of most international texts on contract law harmonisation, apart from CESL (Article 3.2.8 UP; Article 4:111 PECL; Article II–7:208 DCFR). However, the proposed rule simplifies this approach.

Most Caribbean legal systems contain provisions that attach importance to defects of consent caused by a third person. For example, in the case of fraud, the rule is expressly set out in some civil codes (Article 1.019 of the Costa Rican Civil Code; Article 1.262 of the Guatemalan Civil Code; Article 1.816 of the Mexican Civil Code; Article 927 of the Saint Lucian Civil Code; Article 1.154 of the Venezuelan Civil Code). Likewise, in cases of threat and duress, there are provisions that enable the avoidance of the contract if the defect is due to the conduct of a third person (Article 1.111 of the Dominican and French Civil Code; Article 1.559 of the Honduran Civil Code; Article 1.818 of the Mexican Civil Code; Article 2.459 of the Nicaraguan Civil Code; Article 1.119 of the Panamanian Civil Code and Article 1.220 of the Puerto Rican Civil Code; Article 928 of the Saint Lucian Civil Code; Article 1.150 of the Venezuelan Civil Code; Article 49 of the Proposals for Reform of the French law on obligations of 2013). In common law systems, regulation of misrepresentation usually includes special rules on participation of third persons in representation (Section 164 *Restatement (Second) of Contracts*), as well as in cases of undue influence (Section 177.3 *Restatement (Second) of Contracts*).

This Article empowers the aggrieved party to avoid the contract when the defect is caused by a third person. However, given that the participation of a third person need not be manifest, in order to respect legal certainty, the OHADAC Principles limit the right to avoid the contract to cases when the other party knew or should have known these circumstance. This approach converges with the above-mentioned treatment of fraud and is also set out in Article 3:44 (5) of the Dutch and Suriname Civil Code. With respect to the importance that misrepresentation also attaches to the contracting party's knowledge of the third person's actions (Section 164 *Restatement (Second) of Contracts*), the rule established by these Principles is also consistent with this system.

The OHADAC Principles differ in some respects from current solutions in international texts on contract law harmonisation. Firstly, the Principles do not follow the current distinction on the participation of a third person, depending on whether that person has intervened with the consent or under the responsibility of the benefitting party or not. In this sense, the OHADAC Principles follow the line of national systems and simplify the legal regime. In any case, when the third person has intervened with the

consent or under the responsibility of one contract party, it could be often presumed that this party knew or should have known it.

Secondly, the OHADAC Principles extend the rule, making it possible to avoid the contract that may been vitiated by the intervention of a third person, not only for fraud, as in most legal systems, but also for mistakes, threat or undue influence. On this point, they follow the approach adopted by Dutch law.

Lastly, if the defect was not or should not have been known by the other party, no additional option has been provided to avoid the contract if this party has still not performed or reasonably acted in conformity with the contract at the time of avoidance.

Section 5. Avoidance

Article 3.5.1: Right to avoid the contract

- 1. A contract may be avoided by the party whose consent is defective**
- 2. A contract may also be avoided by the principal in case of conflict of interest with the agent.**
- 3. The right of a party to avoid the contract is exercised by notice to the other party within six months:**
 - a) In case of mistake or fraud, from the moment in which the entitled party knew or must have known of the reality.**
 - b) In case of threat or undue influence, from the moment in which that situation ended or the entitled party could act freely.**
 - c) In case of conflict of interest, from the moment in which the principal knew or must have known of the conclusion of the contract and of the conflict of interest.**

COMMENT

1. The right to avoid the contract

It is commonly accepted in Caribbean legal systems that defects of the consent of a contractual party does not immediately void the contract. Defects of consent, on the contrary, enable the aggrieved party to avoid the contract, which is effective until that right is exercised. Legal systems provide for the right to avoid the contract in various ways. Some of them, inspired by the French Civil Code (Article 1.304), do not distinguish between voidness and avoidability and they provide for an action in nullity, although in cases of defects of consent only the aggrieved party is entitled to exercise this right (Article 1.304 of the Dominican Civil Code; Article 910 of the Haitian Civil Code; Article 1.253 of the Puerto Rican Civil Code; Article 925 of the Saint Lucian Civil Code; Article 1.346 of the Venezuelan Civil Code). In other legal systems, the expression “relative nullity” is related to defects of consent (Article 1.741 of the Colombian Civil Code; Article 836 of the Costa Rican Civil Code; Article 1.587 of the Honduran Civil Code; Article 2.227 and 2.230 of the Mexican Civil Code; Article 2.201 of the Nicaraguan Civil Code or Article 1.144 of the Panamanian Civil Code), due to the influence of the French doctrine, which created the concept in order to set absolute nullity against another kind of nullity (or “rescission” under some of these civil codes) restricted to the entitled parties whose interests are protected by the rule. This doctrine approach was crystallised in the Proposals for Reform of the French law on obligations of 2013 (Article 89).

For its part, English law distinguishes between void and voidable contracts, the latter being subject to the power of avoidance, so that cases of innocent or fraudulent misrepresentation entitle the aggrieved party to avoid or rescind the contract (Article 1 Misrepresentation Act 1967 or Article 2 Bermuda Law Reform Act 1977). The same applies to threats [*Ting v Borelli* (2010), 79 WIR 204] or undue influence [decision of the Supreme Court of Jamaica in *Turnbull & Co v Duval* (1902), AC 429]. The Guatemalan Civil Code (Articles 1.257 and 1.303) also uses the term “avoidability” in cases of contracts subject to defects of consent. More recently, Dutch and Suriname Civil Code considers as avoidable contracts concluded under threat, fraud or abuse (Article 3:44) or mistake (Article 6:228) and Cuban Civil Code provided that mistake, fraud and threat are causes of voidness of the contract at the request of the aggrieved party (Articles 73 and 74). Regardless of conceptual divergences, there is uniformity in the characterisation of contracts affected by defects of consent as merely voidable at request of the aggrieved party, in contrast with void contracts.

An apparently discordant note in this uniformity comes from the treatment of some forms of mistake in common law, which leads to voidness instead of avoidability of contracts. However, such discordance is more apparent rather than real: as detailed in

the commentary to Article 3.4.1 of these Principles, these special cases of common mistake that void the contract are not standard cases of mistake-defect under the civil law tradition. Thus, the case of common mistake called *res extincta*, which happens where the object of the contract disappears before the contract's conclusion without the parties' knowledge and determines the voidness of the contract (Section 6 Sale of Goods Act of 1979; Section 8 Sale of Goods Act of Montserrat; Section 8 Sale of Goods Act of Antigua and Barbuda; Section 8 Sale of Goods Act of Bahamas; Section 8 Sale of Goods Act of Trinidad and Tobago; Section 8 Sale of Goods Act of Belize; Section 7.1 Sale of Goods Act of Jamaica), as well as cases of mistake "*res sua*", which occurs where the buyer does not know that it is already the owner of the sold goods [*Abraham v Oluwa* (1944), 17 NLR 123], are considered in these Principles as cases of initial impossibility (Article 3.1.3). Therefore, the right to avoid the contract provided in this Article does not apply to these cases. Likewise, the case of mutual mistake, where each party operates under a radical misunderstanding concerning a contract or object, is not considered in this Principles as a case of defect of consent giving a power of avoidance, but as a case of absence of consent (Article 3.1.1).

A more precise characterisation of hypotheses covering each defect of consent that would entitle a party to avoid the contract is found in the description of these defects in Section 4 of Chapter 3 of these Principles and, likewise, in Article 2.3.6 in relation to contracts concluded by the agent in cases of conflict of interests with the principal.

2. Avoidance by notification

There are two different legal traditions in the Caribbean legal systems concerning the manner in which the right to avoid the contract is implemented.

On the one hand, tradition inspired by French law considers that a contract cannot be avoided by a mere notification, but requires a judicial action brought by the aggrieved party in a more or less short time, which ends with a judicial decision stating the voidness of the contract. Besides Article 1.304 of the French and Dominican Civil Code, this approach is followed by Cuban Civil Code (Article 114) and Venezuelan Civil Code (Article 1.346), which establish a limitation period for the avoidance action of five years; Colombian Civil Code (Article 1.750), Costa Rican Civil Code (Article 841), Honduran Civil Code (Article 1.593), Nicaraguan Civil Code (Article 2.208), Panamanian Civil Code (Article 1.151) and Puerto Rican Civil Code (Article 1.253), which provide for a period of four years; Guatemalan Civil Code, which provides for a period of two years in cases of fraud and mistake (Article 1.312) and of one year in cases of duress or serious threat (Article 1.313); and Mexican Civil Code, which establish periods of sixty days in cases of mistake and six months in cases of duress (Articles 2.236 and 2.237). A

rare case is found in Haitian Civil Code, which provides a period of ten years (Article 1.089), as well as Saint Lucian Civil Code (Article 2.119).

On the other hand, under the common law tradition the power of avoidance is exercised by a mere notification of the will to avoid the contract addressed to the other party without delay, although the time spent in negotiations to achieve an agreement is not considered [*Erlanger v New Sombrero Phosphate Co* (1978), 3 App. Cas. 1.218]. Likewise, the Dutch and Suriname Civil Code (Article 3:49) allows a non-judicial avoidance, but the period is extended for three years (Article 3:52). This model of non-judicial avoidance is also followed in international texts on contract law harmonisation (Article 3.2.11 UP; Article 4:113 PECL; Article II-7:209 and II-7:210 DCFR; Article 52 CESL).

The OHADAC Principles have preferred a non-judicial system of avoidance for many reasons. First, the self-monitoring system can help reduce procedural expenses and increase legal certainty by putting an end to the uncertainty specific to situations of avoidability. Moreover, it reinforces the position of the aggrieved party, given that the voidness is effective right from the notification and the aggrieved party has therefore the right to obtain the restitution of whatever has been performed and, in case of delay, to compensation. Furthermore, the system of non-judicial notification transfers the burden of litigation to the other party, given that once the avoidance is notified, if the other party wishes to demand the performance, it is obliged to sue before the courts and prove the validity of the contract. Lastly, as analysed below, the non-judicial avoidance system is perfectly compatible with legal systems that provide a mandatory judicial system of avoidance.

Obviously, the fact that the avoidance could be carried out by serving notice to the other party does not mean that the question of the ineffectiveness of the contract does not need to be resolved before a court or arbitral tribunal. These Principles take into account the fact that parties may disagree on the presence of a defect of consent. In this respect, without prejudice to the effectiveness of the declaration of avoidance, the choice of the Principles does not entail the parties' waiving of the right to act before courts in order to declare the contract as valid and enforceable because it is not affected by a defective consent under the applicable law or the agreement by the parties resulting from these Principles chosen by the Parties.

3. Period to exercise the right of avoidance

The OHADAC Principles propose a rule on the right to avoid the contract that aims as much as possible to reconcile the common law tradition, which allows avoidance by

notice, and the civil law tradition, also widespread in Caribbean countries, which require a judicial action within a determined period. In this sense, on the one hand avoidance by non-judicial notice is possible; on the other hand, there is a determined period to exercise such a right, so that imprecise formulas that do not favour legal certainty, especially in a context of legal diversity, are disregarded. In order to establish the period to exercise the right to avoid the contract, the Principles have had to disregard the use of wordings such as “within a reasonable time, having regard to the circumstances” (Article 3.2.12 UP; Article 4:113 PECL; Article II- 7:210 DCR), which are not very compatible with or legal traditions.

However, the requirements of swiftness in international contracts as well as the need not to excessively extend the inherent uncertainty of avoidable contracts mean that the limitation period must be shorter than that envisaged in civil law systems. That is why the period proposed in these Principles is six months, which is the same as provided in cases of avoidance due to threat in Article 2.237 Mexican Civil Code. Likewise Article 52 CESL provides a period of six months in cases of mistake and one year in case of fraud, threat or abuse.

With respect to the time as from which the time available for exercising the right of avoidance is computed, the Principles take into account a common denominator in Caribbean countries. For example, the computation of the period to avoid a contract due to threat begins generally when the threat ends (e.g. Article 1.750 of the Colombian Civil Code; Article 841 of the Costa Rican Civil Code; Article 1.313 of the Guatemalan Civil Code; Article 3:52.b of the Dutch and Suriname Civil Code; Article 1.593 of the Honduran Civil Code; Article 2.237 of the Mexican Civil Code; Article 1.253 of the Puerto Rican Civil Code; Article 2119 of the Saint Lucian Civil Code; Article 1.346 of the Venezuelan Civil Code).

A common approach in case of mistake or fraud seems more controversial. Caribbean legal systems have three different periods that can determine the beginning of the period to avoid a contract. For some legal systems, this period is when the aggrieved party discovers the truth (Article 1.304 of the French and Dominican Civil Code; Article 1089 of the Haitian Civil Code; Article 2.236 of the Mexican Civil Code; Article 2.119 of the Saint Lucian Civil Code; Article 1.346 of the Venezuelan Civil Code and, more recently, in Dutch law, Article 3:52 Civil Code). In other legal systems, the period begins on the day the contract is concluded (Article 1.750 of the Colombian Civil Code; Article 841 of the Costa Rican Civil Code; Article 1.312 of the Guatemalan Civil Code, Article 1.593 of the Honduran Civil Code and Article 2.208 of the Nicaraguan Civil Code). Finally, in other cases the time of performance is preferred as the first day of the

period (Article 1.151 of the Panamanian Civil Code and Article 1.253 Puerto Rican Civil Code). Even some civil codes provide that avoidability is not subject to any limitation period, as an exception to the general rule (Article 843 of the Costa Rican Civil Code; Article 1.595 of the Honduran Civil Code; Article 2.210 of the Nicaraguan Civil Code; Article 1.153 of the Panamanian Civil Code); such an approach is also implied in some systems that establish the moment of the conclusion of the contract as the beginning moment of limitation periods for contracts. For its part, in common law systems the right to avoid the contract is preserved while the aggrieved party does not know or should not have to know the truth in cases of fraudulent misrepresentation [*Aaron's Reff Ltd v Twiss* (1896), AC 273]. However, the point of view changes in cases of innocent misrepresentation, because the time passed after the contract's conclusion may be an obstacle to avoid the contract, even if the aggrieved party has not known the truth beforehand [*Leaf v International Galleries* (1950), 2 KB 86].

To overcome these differences, the Principles have considered that the beginning for the computation of the limitation period is the moment when the aggrieved party knew or should have known the truth. This rule is shared by the international texts on contract law harmonisation (Article 3.2.11 UP; Article 4:113 PECL; Article II-7:211 DCFR; Article 52 CESL). This is the solution that best protects the aggrieved party, because this party may exercise its right to avoid the contract from that moment. The same approach justifies the beginning of the period when undue influence ceased or, if it has not ceased, from the moment when the aggrieved party could freely act. In cases of conflict of interests between the agent and the principal, the initial moment is when the principal knew the conclusion of the contracts as well as the conflict of interests. The occasional delay of this moment in relation with the moment on the contract's conclusion is a source of uncertainty, which is in some way compensated through a short limitation period of six months, within which the aggrieved party must notify its will to avoid the contract to the other party.

4. Impact of international mandatory rules

The OHADAC Principles cannot prevent the application of national overriding mandatory rules on the right to avoid the contract (paragraph III of the Preamble). In exceptional cases, a national court may consider the overriding character of its rules or of the rules of the law applicable to the contract or even of a third state, establishing the mandatory need of a judicial procedure of avoidance, which cannot be waived. The choice of the Principles is not irrelevant in these cases. Both parties have recognised the effects of the avoidance notified within a period of six months, but this does not

prevent from taking legal action for avoidance afterwards, within the mandatory period provided by the domestic law which is considered as overriding mandatory rule.

Example: A contract between a Colombian firm and a Cuban firm is submitted to Colombian Courts and to the OHADAC Principles. Colombian Law is also applied to the contract according to Colombian private international law rules. One of the parties argues that it agreed under mistake. According to Article 3.5.1 of the OHADAC Principles, this party may avoid the contract by notice to the other party within six months from the moment when it knew or should have known of the mistake. The notification implies the effects of avoidance set out in the Principles, insofar as they are compatible with the Colombian rules if they are considered as international mandatory rules. In that case, according to the Article 1.750 of the Colombian Civil Code and providing that mistake justifies the right to avoid a contract under Colombian law, the aggrieved party could sue Colombian courts to avoid the contract in a period of four years after the conclusion of the contract, even if more than six months have passed since it knew or should have known of the mistake.

Article 3.5.2: *Confirmation of an avoidable contract*

The right to avoid a contract is extinguished if the party that is entitled to avoid it confirms it, expressly or impliedly, after knowing of the cause of avoidance and after that defect has ended.

COMMENT

Caribbean legal systems provide that the extinction of the right to avoid a contract by confirmation [Article 1.338 of the French and Dominican Civil Code Article 1.304 of the Guatemalan Civil Code; Article 3:55 of the Dutch and Suriname Civil Code; Article 2.233 of the Mexican Civil Code; Article 1.145 of the Panamanian Civil Code; Article 1.262 of the Puerto Rican Civil Code; Article 1.351 of the Venezuelan Civil Code; *Scholey v Central Railway Co of Venezuela* (1868), LR 9 Eq 2006], ratification (Article 1.752 of the Colombian Civil Code; Article 839 of the Costa Rican Civil Code; Article 1.591 of the Honduran Civil Code; Article 2.206 of the Nicaraguan Civil Code) or validation (Article 68.1 of the Cuban Civil Code). All these concepts refer to the express or implied declaration of intention of the party entitled to opt for its validity.

To ensure the convergence of rules relating to confirmation in Caribbean legal systems, the Principles have opted for the same approach as most of these legal systems: firstly, since confirmation is a unilateral act of the party entitled to avoid the contract, the participation of the other party is not necessary; secondly, confirmation is valid only if the cause of avoidability has ceased and therefore the aggrieved party acts with full freedom and knowledge; thirdly, confirmation may be express or implied. This is also the approach unanimously set out in international and European texts on contract law harmonisation (Article 3.2.9 UP; Article 4:114 PECL; Article II-7:210 DCFR; Article 53 CESL).

However, there remain some divergences, albeit perfectly reconcilable, between the rule set out in the OHADAC Principles and the rules relating to confirmation in some Caribbean legal systems.

First, some legal systems do not expressly provide that the cause of avoidability must have disappeared as a condition of an effective confirmation (Article 1.752 of the Colombian Civil Code; Article 1.338 of the French and Dominican Civil Code; Article 2.206 of the Nicaraguan Civil Code; Article 1.351 of the Venezuelan Civil Code). Such an omission does not contradict these Principles, because it can be easily inferred also in those legal systems that since confirmation is a voluntary act, to be valid, the cause of the avoidance must no longer exist.

Secondly, under these Principles and in accordance with the rule of freedom as to the form (Article 3.1.2), express confirmation is not subject to special formal requirements. It suffices that the will of the aggrieved party to validate the contract or to renounce the right to avoid has been expressed in any way, but not in concrete terms or under a special form. Under the Principles, this is a mere question of proof of the confirming will. However, some legal systems require that the confirmation is made with the same formal requirements of the confirmed contract (Article 1.753 of the Colombian Civil Code; Article 839 of the Costa Rican Civil Code; Article 1.305 of the Guatemalan Civil Code; Article 1.591 of the Honduran Civil Code; Article 2.206 of the Nicaraguan Civil Code; Article 1.145 of the Saint Lucian Civil Code]. This formal requirement does not create an insurmountable divergence in relation with the proposed rule in the OHADAC Principles, given that an express confirmation which does not respect some formal requirements may be effective as a tacit confirmation. That is also the case with some legal systems, which do not require a specific form of express confirmation (Article 1.338 of the French and Dominican Civil Code; Article 1.351 of the Venezuelan Civil Code).

Thirdly, some Caribbean legal systems limit the tacit confirmation to cases of voluntary performance by the aggrieved party of its contractual obligations (Article 1.754 of the Colombian Civil Code; Article 839 of the Costa Rican Civil Code; Article 1.304 of the Guatemalan Civil Code; Article 1.591 of the Honduran Civil Code; Article 2206 of the Nicaraguan Civil Code). In other cases, although this case is mentioned, other hypotheses of tacit confirmation are not expressly disregarded (Article 1.338 of the French and Dominican Civil Code and Article 90 of the Proposals for reform of the French law on obligations of 2013; Article 2.234 of the Mexican Civil Code; Article 1.351 of the Venezuelan Civil Code). On the contrary, the OHADAC Principles do not mention any kind of acts of the aggrieved party which necessarily imply the confirmation of the contract. The search for a lowest common denominator among the legal systems involved excludes the possibility of characterising some acts of confirmation, which are set out only in some domestic systems. Therefore, the tacit confirmation under the Principles is not immediately considered in relation with some kinds of acts considered in the abstract, but must be inferred from the actual behaviour of the aggrieved party, which reveals a will to renounce the contract according to the surrounding circumstances in each case. Even the voluntary performance of a contract, usually considered as a paradigmatic case of tacit confirmation, could exceptionally not be considered as a waiving of the right to avoid the contract, if the performance intends to avoid a greater harm, such as a penalty due to non-performance or the execution of a guarantee.

This flexible or open approach on tacit confirmation is compatible with the above mentioned legal systems, which restrict confirmation to cases of performance by the aggrieved party of its contractual obligations. Certainly, a domestic law of this kind cannot be disregarded by these Principles; that is why under such systems the performance of a contractual obligation by the party having the power to avoid the contract has the effect of a confirmation *ope legis* (by law). This does not contradict the possibility, by virtue of the choice of the Principles by the parties, to extend cases of tacit confirmation beyond the acts of performance of the aggrieved party to any acts able to reveal the will to renounce the avoidance of the contract (e.g. acceptance without objections of the performance of the other party, novation of the contract, resale of the goods received by virtue of an avoidable contract to a third party).

Article 3.5.3: *Right to restitution*

- 1. In case of the avoidance of the contract, each party has a right to the restitution of whatever has been**

performed and a right to compensation for the reasonable benefits obtained by the other party.

- 2. If restitution in kind is impossible or excessively difficult, it has to be made in money. However, the party who terminates is not obliged to return the value if it proves that the loss or destruction of the object was caused by *force majeure*.**

COMMENT

The principle on which contract avoidance rules are based in Caribbean legal systems is *restitution ad integrum*. This is the elimination of consequences of the contract for the parties, leaving them in the original condition as if the contract had not been concluded. This principle even becomes a rule in some legal systems (Article 1.746 of the Colombian Civil Code; Article 844 of the Costa Rican Civil Code; Article 1.596 of the Honduran Civil Code; Article 2.211 of the Nicaraguan Civil Code). According to this principle, the most significant consequence of contract avoidance is the obligation of each party to restore whatever it has received from the other party (Article 75 of the Cuban Civil Code; Article 1.314 of the Guatemalan Civil Code; Article 2.240 of the Mexican Civil Code; Article 1.154 of the Panamanian Civil Code; Article 1.255 of the Puerto Rican Civil Code). Likewise, Article 3:53.1 Dutch and Suriname Civil Code provides that avoidance has retroactive effect and refers to the duty to undo what has been done as the most important consequence of voidness (Article 3:53.2). In common law legal systems restitution of what has been received by both parties is also the most significant effect of voidness [decision of the Supreme Court of Bahamas in *American British Canadian Motors Ltd v Caribbean Bottling Co Ltd* (1973), No. 46 of 1971 (Carilaw BS 1973 SC 5)]. In French law, the effect of restitution in the avoided contracts derives from the right to claim the undue payment (Article 1.377 of the French and Dominican Civil Code) as well as in the Saint Lucian Civil Code (Article 979).

However, the intention to return the parties to the situation they would have been in if the contract had not been concluded requires more than a mere reciprocal restitution of the goods received. Legal systems must therefore resolve three questions: compensation for the benefits or profits that goods or services usually produce; reparation for damage caused to the goods and expenses incurred; material or legal impossibility of restitution of goods or services.

Some Caribbean legal systems expressly provide, as a natural consequence of the contract avoidance, the obligation to restitution of goods and any profit obtained from them as well as the restitution of the price and legal interests on money (Article 1.746 of the Colombian Civil Code; Article 1.154 of the Panamanian Civil Code; Article 1.255 of the Puerto Rican Civil Code). Likewise, the right to receive compensation due to the use of contractual goods by the other party [*Hulton v Hulton* (1917), 1 KB 813] or because the profits obtained through its exploitation [*Erlanger v New Sombrero Phosphate Co* (1978), 3 App.Cas. 1218] is recognised at least in English equity law. Among the international texts on contract law harmonisation Article 172.2 of the CESL provides that the duty of restitution includes legal or natural fruits derived from what had been received.

The right to compensate normal fruits of goods or services received is compatible with legal systems which establish the retroactive effect of avoidance (Article 3:53 Dutch and Suriname Civil Code), insofar as compensation of profits can be considered an implied consequence of the retroactivity of avoidance. The same is applicable in legal systems which provide that the general effect of avoidance is to leave the parties in the same situation they would have been in if the contract had not been concluded (Article 844 Costa Rican Civil Code; Article 2.211 Nicaraguan Civil Code).

A divergent approach in relation with the OHADAC Principles can be found in legal systems which establish that the right to restitution of fruits and interests is limited to those produced from the time of the claim to avoidance, while the fruits produced until the claim are considered as compensated (Article 1.315 of the Guatemalan Civil Code; Article 1.603 of the Honduran Civil Code; Article 2.240 of the Mexican Civil Code). These rules actually provide a kind of compensation *ex lege* of the profits that the parties must return or receive until the time of the claim for avoidance. These rules do not seem incompatible with the Principles, which simply replace this legal compensation with a contractual compensation based on the right to compensate the actual value of the respective profits.

It seems more difficult to reconcile the rule of the OHADAC Principles with that of some Caribbean legal systems which only envisage the obligation to compensate the loss of profits or interests by the party acting in bad faith that is obliged to return the goods received. In cases of avoidable contracts, this party will be the party that has caused the avoidance or knows the cause of the avoidance, (Article 1.378 of the French and Dominican Civil Code and Article 981 of the Saint Lucian Civil Code). Likewise, Article 260 of the Proposals for Reform of the French law on obligations of 2013 states that the party acting in bad faith is obliged to restore the fruits and interests from the

time it received the goods or the price, while the party acting in good faith is only obliged to return fruits or interests received after the avoidance claim. On the contrary, the OHADAC Principles conceive the consequences of avoidance from a compensatory and non-coercive perspective, as well as in Article 7.3.4, that is why good or bad faith is not considered. The application of the Principles when someone of these legal systems is the law applicable to the contract shall depend on the mandatory character attributed to the requirement of bad faith in the domestic legal systems concerned.

With respect to the quantification of profits, the Principles expressly refer to profits “reasonably” obtained. This means that profits will be measured objectively, in accordance with the normal productivity of goods or services. In other words, the right to restitution does not apply to profits actually produced by the goods when they were in the possession of the party obliged to restore. The party which delivered the goods is neither obliged to suffer the consequences of a defective administration from the other party nor, on the contrary, cannot enrich itself due to exceptionally skilled management. Hypothetical profits that could have been derived from the goods had it not been in the possession of the party obliged to restitution will also not be considered. With respect to the restitution of pecuniary obligations, the normal profit that the capital produces is interest, which shall be determined *mutatis mutandis* according to the comments on to Article 7.4.6 of these Principles.

Reparation due to damage or expenses of the goods is a question beyond contract obligations. With few exceptions (e.g. Article 1.746 Colombian Civil Code; Article 1.316 Guatemalan Civil Code) most legal systems do not consider it as a consequence of contract avoidance, but as a question of torts [*Spencer v Crawford* (1939), 3 All ER 271, 288] or related to the transfer of possession to the owner. International texts of contracts harmonisation do not refer to this question as an effect of avoidance, either (Article 3.2.15 UP; Article 4:115 PECL; Article II-7:212 DCFR).

Finally, in some legal systems impossibility of restitution leads to a substitution of the obligation to restore *in natura* by the obligation to deliver the value of the goods or service [Article 75 Cuban Civil Code; Article 1.317 Guatemalan Civil Code, which refers to the value of the goods at the moment of contract conclusion; Article 1.259 Puerto Rican Civil Code, which states that the value must be determined in the moment when the goods perished). On the contrary, under Caribbean common law systems, the consequence of impossibility of restitution due to material reasons or by the transfer of the goods to a third party is the loss of the right to avoid the contract [decision of the High Court of Trinidad and Tobago in *Montrichard v Franklin* (1996), Carilaw TT

1996 HC 215]. The same solution is set out in the Dutch and Suriname Civil Code (Article 3:55.2): if it becomes too difficult to undo the consequences of the contract, courts may refuse the right to restitution, although the benefiting party must compensate the aggrieved party.

Like Article 7.3.4 in cases of termination of contract (whose comments are illustrative), the second paragraph of Article 3.1.5 follows the rule of compensation by equivalent, apart from those cases where the party which has the right to avoid the contract can prove the impossibility of restitution due to *force majeure*.

CHAPTER 4

INTERPRETATION AND CONTENT OF THE CONTRACT

Section 1. Interpretation of contractual terms

Article 4.1.1: In claris non fit interpretatio

- 1. When the conditions or terms of a contract are clear, they will be interpreted according to their literal meaning.**
- 2. A contract term will not be considered clear if it is capable of different meanings or, in the light of the context of the contract, it is inferred that such a term or expression is due to a manifest mistake.**

COMMENT

1. The General problem of contract interpretation in OHADAC legal systems

Rules on contract interpretation give rise to one of the most arduous questions in treating contract from a comparative point of view, as pointed out below in comment to article 4.1.2. Nevertheless, all systems distinguish and provide different solutions to two aspects that are generally included in the generic concept of “contract interpretation”. The first question concerns the meaning or sense given to contract clauses. The interpretation of the contract, which is the subject of Section 1 of Chapter 4 of these Principles, corresponds to this operation in the strict sense. The second question concerns the filling in of gaps in the contract when a provision or obligation necessary for the contract to work has been omitted by the parties. In this case these will be rules of “integration” or “construction” of the contract, dealt with in Article 4.2.1.

Therefore, the interpretation of the contract in the strict sense involves attributing meaning to express contract clauses. There are two approaches or comparative models available to resolve this issue, and both are represented in Caribbean legal systems.

The first approach is based on continental or civil law tradition and seeks to determine the meaning of contract clauses from a subjective postulate consisting in determining

the true common intent of the parties, which prevails over the literal meaning of contract clauses (Articles 1.156 of the French Civil Code; 1.619 of the Colombian Civil Code; 1.156 of the Dominican Civil Code; 946 of the Haitian Civil Code; 1.519, 1.597 and 1.604 of the Guatemalan C; 1.851 of the Mexican Civil Code; 2.496 of the Nicaraguan Civil Code; 1.132 of the Panamanian Civil Code; 1.233 of the Puerto Rican Civil Code; 945 of the Saint Lucian Civil Code). This principle is also present in some characteristic canons of interpretation (1.619 of the Colombian Civil Code; 1.594 of the Guatemalan Civil Code; 1.163 of the Dominican and French Civil Code; 953 of the Haitian Civil Code; 1.578 of the Honduran Civil Code; 1.852 of the Mexican Civil Code; 2.498 of the Nicaraguan Civil Code; 1.134 of the Panamanian Civil Code; 1.235 of the Puerto Rican Civil Code; 952 of the Saint Lucian Civil Code), which reduce the generality of contract clauses, so that goods or cases that are different from those on which the parties intended to contract cannot be considered as included. This subjectivistic trend is clearly maintained in the Proposals for Reform of the French law on obligations of 2013 (Article 96), although it is more obviously shifting towards a rule for objectifying the parties' intention, which is done based on a "reasonable" criteria when intention cannot be inferred, while subjective and intentional interpretation appears more as a principle. This is the orientation followed by the majority of harmonised international texts [Articles 8 CISG; II-8:101 DCFR; 5:101 PECL; 4.1 (1) UP].

The second option, characteristic of the Anglo-American model, gives preference to objective and grammatical signs and focuses on the sense of the terms used by the parties. The severity of this strict interpretation of contractual terms (four corners doctrine) is fundamentally based on the parol evidence rule, which prevents the parties from presenting declarations and evidence extrinsic to the contract to modify, alter or modulate what the terms say. However, formalist severity of grammatical interpretation of traditional English law has experienced significant changes in recent times. US law has progressively relaxed towards an interpretation model more open to subjective elements, as suggested by Section 201 (2) of the Restatement (Second) and the very application of Article 8 CISG by North American courts. English law itself has also been eased, due above all to the increasing significance of context and background of the contract. This development has been emphasised since the decision of the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* (1998, 1 WLR 896), where Lord Hoffmann set out several principles to be require consideration of all elements of context to interpret contract terms and even to determine their own ambiguity. He also declared that that the parol evidence rule is disregarded in English law.

The objectivistic focus progressively adopted by civil law systems, combined with the reduction in the interpretative formalism of common law have, therefore, recently enabled a convergence which, although it does not definitively reconcile the two legal systems, at least facilitates the proposal of uniform rules that could be shared in essence by all legal traditions within the OHADAC area.

2. Scope of the “*in claris non fit interpretatio*” principle

Whatever the general option adopted to guide the interpretation of ambiguous contractual terms, all legal systems have one thing in common related to the scope of the principle and summarised in the rule “*in claris non fit interpretatio*”. To a certain extent, the interpretation of contractual terms is necessary only when their meaning is not obvious or manifestly clear. If terms are clear and unambiguous, there is no room to think about interpretation (first paragraph of Article 4.1.1).

From a strictly linguistic point of view, it must be pointed out that in actual fact, clear terms do not exist and all meanings necessarily depend on context. However, from a legal viewpoint, this mentioned principle plays a significant role in order to achieve legal certainty; so that if contract clauses are clear, univocal and not contradictory, courts and arbitrators must observe their meaning and must not allow the parties to distort them through contradicting contextual evidence.

This principle has been expressly included, with slight differences, in the various Caribbean legal systems (e.g. Article 52 Cuban Civil Code). French case law (e.g. decisions of the *Cour de Cassation* on 15 April 1982 and 14 December 1942) opted for a stricter approach favouring a literal meaning of a “*clause claire et précise*” (clear and precise clause), stated in Article 97 of the Proposals for Reform of the French law on obligations prepared by the Ministry of Justice in 2013. The rule in the Spanish Civil Code [Article 1.281, shared by the Mexican Civil Code (Article 1.851), Guatemalan Civil Code (Article 1.593), Nicaraguan Civil Code (Article 2.496), Honduran Civil Code (Article 1.576), Panamanian Civil Code (Article 1.132) and Puerto Rican Civil Code (Article 1.233)] seems to recognise more easily the prevalence of contextual circumstances that put the true intent before the written terms. However, it must be stressed that such codes usually require an “evident” intent that is contrary to the written text; that is why it actually fits in the exception by mistake or manifest *lapsus linguae* included in Article 4.1.1 (2) of these Principles.

The proposed rule does not follow then the literal interpretative approach, which for a long time characterised English law and inspired many Caribbean systems, particularly those of the Caribbean islands. In fact, under the most traditional approach in English

law, grammatical interpretation is not limited to the sense of words in ordinary language (primary language), but recognises the possibility for the parties of using a specialised language or tongue (secondary language). In such cases, when a term might have an ordinary meaning and a different sense in a specialised jargon this term is not clear in the sense of Article 4.1.1 (2) and therefore the principle included in Article 4.1.1 (1) will not be applied.

Although under English law, after the decision of the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* (1998, 1 WLR, 896), “contextualised” interpretation of contract prevails, it is uncontroversial that context cannot become a pretext to correct clear and precise contract terms [*BCCI v Ali, National Bank of Sharjah v Dellborg* (2001), 2 WLR, 731]. The aim does not differ from the principle set out in civil law systems. The difference lies in that civil law systems are apparently more inclined to consider contextual aspects reflecting the parties’ intent in order to consider ambiguity of terms. In any case, both legal cultures can lead to inevitable divergences to decide if a term is clear, as stated in Article 4.1.1 (1), or ambiguous, as considered in Article 4.1.1 (2), but such divergences are inevitable regardless of competent courts and do not prevent the rule included in Article 4.1.1 from being shared by all legal systems represented in the OHADAC territory.

Otherwise, both in civil and in common law there are exceptions for *lapsus calami*, which are expressions apparently clear but that entail manifest mistakes in the light of the circumstances of the contract. While civil law systems solve these cases through the prevalence of the true intent of the parties, English law provides the recourse to action for rectification from equity law. Although there are different ways, whose availability is not prejudged by the Principles, both are compatible with exception included in paragraph 2 of Article 4.1.1.

Article 4.1.2: General criterion of interpretation

- 1. Contracts and statements of the parties will be interpreted according to the meaning that a reasonable person of the same kind as the parties would give them in similar circumstances.**
- 2. In particular, in the interpretation of a contract and the statements of the parties, the following circumstances will be considered:**

- a) The intent of a party, insofar as that intent was known or should or could have been known by the other party.
- b) The concurrent circumstances at the conclusion of the contract and during its execution.
- c) Commercial usages and practices between the parties.
- d) Commercial usages and the meaning of contractual terms in the trade concerned.
- e) General usages in international trade.
- f) The object of the contract.
- g) Business common sense.

COMMENT

1. Principle of objective interpretation

Article 4.1.2 is perhaps one of the most innovative rules in these Principles and tries to harmoniously reconcile contract interpretation systems of civil and common law orders within the Caribbean. Although final results of the interpretative process are not substantially different, the two legal approaches start from opposite postulates.

In civil law texts a rule on objective interpretation similar to Article 4.1.2 seems admissible, but only as a subsidiary rule to the general rule that prefers the determination of the true intent of the parties. Thus it has been translated into article 8 CISG, in force in Colombia, Cuba, USA, Honduras, Mexico, Netherlands, Dominican Republic, Saint Vincent and the Grenadines and Guyana. Article 8.1 CISG states as the interpretation principle the intent of a party insofar as “the other party knew or could not have been unaware what that intent was”, that is the same criterion included in sub-paragraph a) of Article 4.1.2 (2) of these Principles. Only in the absence of this criterion, Article 8.2 CISG establishes a principle of objective interpretation similar to that established in Article 4.1.2 (1) of these Principles. The same rules are observed in Article 96 of the Proposals for Reform of the French law on obligations of 2013, as well as in Articles 4.1 (2) UP; 5:101 (3) PECL; II-8:101 (2) DCFR; and 58 CESL.

The interpretation criteria have been inverted in the proposed regulation in order to meet the need to draft a rule that is also acceptable to Caribbean common law

systems, particularly for countries where English law is applied. This is because the interpretative principle under English law does not seek to establish the true intent of the parties, but it is “objectivist”, as far as interpretation of contract terms prevails over the presumed intent of the parties. And yet, the wording of Article 4.1.2 (1) coincides with one of the interpretative principles stated by Lord Hoffmann in the *Investors* case. In this case, by adjusting the tradition of literal interpretation characteristic of past English law, the first interpretation criterion emphasised is no longer the meaning of what was expressed by a party, but the meaning that a reasonable person knowing the context and background of the contract would give them at the moment of conclusion.

The generic formula of Article 4.1.2 allows, however, the convergence of the English interpretative approach as well as that of the civil law systems, having regard to the list of criteria which the courts and arbitrators can use to achieve an objective interpretation based on reasonable considerations according to Article 4.1.2 (2). Indeed, although the interpretative criterion of contracts based on reasonable considerations is an objective one, it is also a contextualised interpretation, which requires placing such an ideal person in the same context as the parties at the moment of the contract’s conclusion. Contextual precision enables courts and arbitrators to take into consideration, among others, criteria referring to the knowledge by one party of the intent of the other party and particularly to give relevant value to this intention according to the civil law tradition. As considered in the following paragraph, such an option is likewise compatible with the current sense of English case law.

Moreover, the proposed reversal of these rules avoids the need for additional rules such as included in Article II-8:101 (3) (b) DCFR, which tries to prevent the known intent of a party from harming a third party with contractual rights who ignores such an intent in good faith. It also avoids the undesirable extension of subjective or intentional interpretation where the contract is written in standardised or general terms, whose interpretation should be objectified under the uniform meaning that general users of such contracts would give them.

2. Contextual elements to be considered

Article 4.1.2 (2) includes a set of contextual and circumstantial elements to be considered in contract interpretation according to the rule included in Article 4.1.2 (1). The role of these contextual elements can vary depending on the legal culture of judges or arbitrators. Thus, it is easy to presume that in civil law systems, traditionally in favour of basing the interpretation on the true intent of the parties, subjective circumstances related in sub-paragraphs (a), (b) and (c) may have more weight than

merely objective contextual elements set out in subsequent sub-paragraphs. On the contrary, under a more objectivistic culture characteristic to common law, it is reasonable that objective elements are more valuable. However, in comparative case law theoretical differences do not necessarily have practical reflection, as far as both approaches tend to converge.

The first interpretative criterion, set out in sub-paragraph (a), attaches importance to intent of the parties known or cognisable at the moment of contract's conclusion. As mentioned above, it is a seminal principle in civil law systems (it is expressly included in Article 52 of the Cuban Civil Code), but it is also admissible in current English contract law, at least as a contextual element to determine the meaning of written terms (Article 947 of the Saint Lucian Civil Code). As pointed out, especially in *Investors*, it is said that context or background in the wide sense plays a crucial role in interpretation of ambiguous and unclear contract terms, so that it is possible to consider any circumstance both subjective and objective ("absolutely anything"), which could affect the understanding of contract terms by a reasonable person. In principle, under the English approach, context is essentially objective, but the development of English case law shows the possibility of considering intentional or subjective contextual elements. Leading cases as such *Krell v Henry* (1903), which establish the arguments for frustration of contracts in English law, demonstrate the significance of parties' intent in relation with a contract whose cause or purpose becomes frustrated. In this well-known case, renting of rooms and balconies to see the procession after the coronation of King Edward VII were frustrated due to the monarch's illness. Frustration of contracts was only justified as far as the lessee's intention was or should be known by the lessor. Other precedents, such as *Prenn v Simmonds* (1971, 1 WLR 1381), did not prevent English judges from taking into account elements clearly referred to the common intent of the parties as a part of the context of a written contract.

This principle enables judges and arbitrators to consider as relevant elements, the circumstances that are used to determine the parties' intent, such as preliminary negotiations between the parties. It is expressly considered in Articles 4.3 (a) UP, 5:102 (b) PECL and II-8:102 (1) (a) DCFR, are crucial in civil law systems insofar as it clarifies the parties' true intent. Although under English law, the parol evidence rule at first stigmatises the possibility of having recourse to preliminary negotiations as an interpretative canon, it must be stressed that, in line with the contextual interpretation approach of the *Investors* case in the broad sense, case law tends to consider them as an important interpretative element: e.g. Decisions of the Court of Appeal (Civil Division) of 17 February 2006 (*Proforce Recruit Ltd v The Rugby Group Ltd*)

and of 18 December 2006 (*The Square Mile Partnership Ltd v Fitzmaurice McCail Ltd*) and decision of the High Court of Justice of 22 May 2007 (*Great Hill Equity Partners II LP v Novator One LP & Ors*). More recent precedents point to this trend, although exceptionally or prudently [*Chartbrook Ltd v Persimmon Homes Ltd* (2009, 1 AC 1101); *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* (2011, 1 AC 662)]. It is also remarkable the half-heartedness of the Privy Council in dealing with the appeal in *Yoshimoto v Canterbury Golf International* (2001, 1 NZLR, 523), where preliminary negotiations were openly considered as an interpretative canon (2004, NZLR 1).

More generally, sub-paragraph (b) of Article 4.1.2 (2) enables judges and arbitrators to consider any contextual circumstance existing at the time of conclusion or performance of contracts. This principle, phrased in a general manner in Articles 52 of the Cuban Civil Code and 947 of the Saint Lucian Civil Code, also encompasses acts of the parties' behaviour, whether at the time of the contract's conclusion or subsequently, during performance. These subjective circumstances are expressly mentioned in Articles 1.577 of the Honduran Civil Code; 2.497 of the Nicaraguan Civil Code; 1.133 of the Panamanian Civil Code; 1.234 of the Puerto Rican Civil Code; Section 202.4 *Restatement (Second) on Contracts*; Section 2-208 UCC, as well as in Articles 4.3 (c) UP; 5:102 (a) PECL; II-8:102 (1) (b) DCFR; and 59 CESL. French case law also permits the consideration of consequent behaviour of the parties to interpret their common intent (decision of the *Cour de Cassation* (1^{re} civ) of 13 December 1988). Its relevance in common law is justified by the same reasons as in the case of preliminary negotiations, on the ground of the recent rise in "contextual" interpretation. Particularly, the "*non venire contra factum proprium*" doctrine, characteristic in civil law systems, can be considered when interpreting contract obligations. Certainly, under English law the temporal precision of the "context" to be taken into account points exclusively to the time of conclusion and not to subsequent acts, whose invocation would be contrary to the "parol evidence rule" [*James Miller & Partners v Whitworth Street Estates (Manchester) Ltd* (1970), AC 583; *Prenn v Simmonds* (1971), 1 WLR 1381)], but this limitation, as well as the parol evidence rule itself, is nowadays at the centre of legal debate in England and contradicts other precedents prone to consider subsequent conduct of the parties as a relevant contextual aspect [*Barrier Wharfs Ltd v W Scott Fell & Co Ltd* (1908), 5 CLR 647, 663]; *Hide & Skin Trading Pty Ltd v Oceanix Meat Traders Ltd* (1990), 20 NSWLR 310, 327]. In any case, English law does not prevent judges and arbitrators from considering subsequent behaviour or declarations as a source of new contracts capable of complementing or modifying original contracts or to base the "estoppel" argument.

Previous contracts and practices between the parties are also part of subjective context capable to be considered to interpret ambiguous terms included in a new contract between the parties and to determine the sense that a reasonable person would give to that contract in the same circumstances. The criterion in Article 4.1.2 (2) (c) of the Principles is expressly included in Articles 1.622 of the Colombian Civil Code, and in Articles 4.3. (b) UP, 5:102 PECL; II-8:102 (1) (c) DCFR; and 59 CESL.

Besides this subjective context, other objective elements can clarify contractual terms. Particularly, apart from practices and trade usages between the parties considered in sub-paragraph (c), trade usages in the commercial or economic branch where the contract fits [sub-paragraph (d) of Article 4.1.2 (2)] and general international trade usages [sub-paragraph (e) of Article 4.1.2 (2)] can be taken into account. It is a widespread canon within civil codes in some Caribbean countries (Articles 436 of the Costa Rican Commercial Code; 1.159-1.160 of the Dominican and French Civil Code; 1.599 of the Guatemalan Civil Code; 949-950 of the Haitian Civil Code; 1.582 of the Honduran Civil Code; 1.856 of the Mexican Civil Code; 2.502 of the Nicaraguan Civil Code; 1.138 of the Panamanian Civil Code; 948 and 948 of the Saint Lucian Civil Code) and unanimously included in the international texts on contract law harmonisation [Articles 4.3 (e) and (f) UP; 5:102 (e) and (f) PECL; II-8:102 (1) (d) and (f) DCFR; 59 CESL]. Its objective character also facilitates its application in common law systems. Likewise in English law trade usages are recognised as an interpretative element both in statutes [Sections 14 and 55.1 of the Sale of Goods Act of 1979, reproduced in Sections 55 of the Sale of Goods Act (Ch 15.18) of Montserrat; Section 55 of the Sale of Goods Act (Ch 393) of Antigua and Barbuda; Section 55 of the Sale of Goods Act (Ch 337); Section 55 Sale of Goods Act (Ch 83:30) of Trinidad and Tobago; Section 56 Sale of Goods Act (Ch 261) of Belize; Section 54 Sale of Goods Act of 1895 of Jamaica] and in case law, like in the USA [Sections 219-223 of the Restatement (Second) on Contracts and Section 1-205 UCC]. In English case law, consideration of trade usages is based on the “implied terms” doctrine, particularly “by custom”, insofar as they are clear and of common knowledge, even regardless of their predictability or actual consideration by the parties [*Comptoir d’Achat et de Vente Belge SA v Luis de Ridder Ltd* (1949), AC, 293; *Henry Kendall & Sons v Lillico & Sons Ltd* (1969), 2 AC 31 (HL)]. However, it is obvious that practices between the parties or particular usages have less weight insofar as subjective context plays a more modest role than objective context under the interpretative tradition of common law.

The nature and object of the contract are common interpretative criteria in Caribbean civil law systems (Articles 1621.I of the Colombian Civil Code; 1.158 of the Dominican

and French Civil Code; 1.595 and 1.597 of the Guatemalan Civil Code; 948 of the Haitian Civil Code; 1.581 of the Honduran Civil Code; 1.855 of the Mexican Civil Code; 2.501 of the Nicaraguan Civil Code; 1.137 of the Panamanian Civil Code) and in international texts [Articles 5:102 (c) PECL; II-8:102 (1) (e) DCFR; and 59 CESL]. In English law, the scope of this objective criterion is less adapted to the tendency of English law to refuse “typical” contracts. However, the increasing specialisation of English contract law moderates such a postulate, while the complexity of international trade for its part has toned down the principle of “typicality of contracts” in civil law systems. Moreover, the principle of “non-typicality of contracts” does not prevent judges and arbitrators from taking into consideration, as a significant contextual element, the aim, purpose or cause of a determined contract and even the contract’s denomination by the parties. Therefore, the reference to the “object” of the contracts instead of its ambiguous and equivocal “nature” is preferable and fits better within the principles of contract law in all the legal traditions represented in the Caribbean.

Finally, sub-paragraph (g) of Article 4.1.2 (2) establishes a generic rule that in fact coincides with the criterion of reasonableness that governs the objective interpretation rule in Article 4.1.2 (1). Using a general expression, this Article refers to “business common sense”. This reference is inspired by Articles 4.8 and 5.1.2 UP, but in this case such Articles refer to the contract’s integration and not to interpretation in the strict sense. Its meaning is also the same as the reference to “reason” in Articles 6:2 and 6:248 of the Dutch and Suriname Civil Code. On the contrary, most of the civil law systems treat this general interpretative principle using more undetermined and axiological notions, such as good faith or equity [Articles 1.603 of the Colombian Civil Code; 1.519 of the Guatemalan Civil Code; 925 of the Haitian Civil Code; 1.546 of the Honduran Civil Code; 6:2 and 6:248 of the Dutch and Suriname Civil Code; 956 of the Saint Lucian Civil Code]. The same option is followed by Articles 5:102 (g) PECL; II-8:102 (1) (g) DCFR; and 59 CESL. Likewise, equity is the principle that justifies, more precisely, the interpretative canon in some civil codes, which points to interpret ambiguous terms according to the reciprocity of interests in onerous contracts and to the minimum transfer of assets or rights in gifts (Articles 1.857 Mexican Civil Code; 1.585 Honduran Civil Code; 2.505 Nicaraguan Civil Code). The preference for a less axiological objective criterion, such as the “business common sense”, instead of the “good faith” principle tries to adapt more easily to the difficulty in traditional English law for accepting good faith as an instrument to interpret and especially to integrate contracts. However, especially in the light of the most recent English case law, “business common sense” and “good faith” may be considered as at least convergent criteria. Indeed, whereas admission of good faith in English law is controversial in

relation with pre-contractual obligations and pre-contractual responsibility, it is an interpretative criterion that offers some doubts when it deals with contents of the contract and interpretation of the obligations that parties must perform. Whereas the decision of the English High Court in *Yam Seng Ltd v International Trade Corporation Ltd* [(2013), EWHC 11 (QB)] and the decision of the Supreme Court of Belize in *Bella Vista Development Co Ltd v AG* (Carilaw BZ 2009 SZ 14) seem to admit good faith as an interpretative criterion, the decision of the Court of Appeal in *Mid-Essex Hospital Services NHS Trust v Compass Group UK* [2013 EWCA Civ. 200] significantly limits its scope without disavowing it radically. Hence it seems more reasonable to make a reference to a more objective criterion, such as “business common sense”, which being admissible by all legal families can actually lead to results similar in essence. However, as inferred from the last decisions quoted, parties can opt to include in their contract a generic clause of conduct or of contract interpretation according to good faith standards, the enforceability of which will be more easily recognised by English courts.

Article 4.1.3: Contra proferentem *principle*

Unclear terms will be interpreted in the most adverse sense for the party who has written them.

COMMENT

1. Canons of interpretation

Article 4.1.3 is the first of a set of rules that establishes the so-called “canons of interpretation”. This is a set of specific legal rules characteristic in civil codes from Roman tradition (contrary to BGB and Germanic legal systems), which obey guidelines in interpreting unclear contract terms. To some extent, these canons objectify interpretation, avoiding in some ways the difficulty to determine the “true intent” of the parties, although they are not absolutely mandatory for the courts insofar as, in civil law systems, when judges do not apply them there is no right for the parties to appeal against the decision (e.g. in France decisions of the *Cour de Cassation* of 6 March 1979, 19 January 1981 and 19 December 1995). In English law, as well as in common law systems, these interpretative principles are also applied by courts and, like in civil law systems, they are considered as mere guidelines but not rules of law *stricto sensu*.

Articles 4.1.3 to 4.1.7 stipulate canons of interpretation widely accepted in comparative law and, particularly, in Caribbean legal systems. Other canons, of divergent and controversial application, which obey principles that are no longer relevant in current business, have been excluded

For example, the principle of “*favor debitoris*” is expressly included in some civil codes (e.g. Articles 1.624 of the Colombian Civil Code and Articles 1.602 and 1.603 of the Guatemalan Civil Code). However, it is not an uncontroversial principle in common law and in other civil law systems and it is not present in current codifications of both national and international contract law. Moreover, this principle does not fit with international business requirements, insofar as it provides a contract imbalance with inadequate economic and legal reasons.

Likewise, it seems reasonable to omit the subjective canon of interpretation that limits the generic sense of contractual terms according to the true intent of the parties, insofar as it is a canon characteristic of civil law systems that can be applied under the general criteria included in Article 4.1.2 and it is omitted in most recent contract law systems.

Canons referring to restriction of “*inclusio unius, exclusio alterius*” principles which can be found in some civil codes of Roman tradition (Articles 1.623 of the Colombian Civil Code; 1.164 of the Dominican and French Civil Code; 1.601 of the Guatemalan Civil Code; 954 of the Haitian Civil Code; 1.584 of the Honduran Civil Code; 2.504 of the Nicaraguan Civil Code; 953 of the Saint Lucian Civil Code) are not considered either as they have clearly fallen into disuse in current contract law.

2. *Contra proferentem* principle

In contrast, Article 4.1.3 set up one of the most widespread canons of interpretation in comparative contract law and accepted unanimously by Caribbean systems, which obeys the ancient aphorism “*verba chartarum fortius accipiuntur contra proferentem*” (a contract is interpreted against the person who wrote it) that has been transplanted into some civil codes within the Caribbean (Articles 1.162 Dominican and French Civil Code; 1.600 Guatemalan Civil Code; 952 Haitian Civil Code; 1.583 Honduran Civil Code; 2.503 Nicaraguan Civil Code; 1.139 Panamanian Civil Code; 951 Saint Lucian Civil Code).

English law also shares the convenience of this principle [*Hollier v Rambler Motors (AMC) Ltd* (1972), 2 WLR 401; *Lancashire County Council v Municipal Mutual Insurance Ltd* (1997, QB 897, 910); *Oxonica Energy Ltd v Neuftec Ltd* (2008), EWHC 2127]. However, application of this rule in common law practice must get around a conceptual obstacle derived from the “parol evidence rule”, which might limit

necessary evidence for identifying the eventual proposer or writer, although such evidence is admitted when based on objective facts that are known by the parties. The application of the *contra proferentem* rule is actually confirmed in Caribbean Commonwealth territories, as demonstrated in the decision of the Supreme Court of Jamaica in *Ammar & Azar Ltd v Brinks Jamaica Ltd* (Carilaw JM 1984 SC 35).

Moreover, this rule has been successfully incorporated into the most recent texts (e.g. Article 101 of the Proposals for Reform of the French law on obligations of 2013), as well as in all international texts on contract law harmonisation (Articles 4.6 UP; 5:103 PECL; II-8:103 DCFR; and 65 CESL).

The rule is related to interpretation of unclear terms that have been written by only one of the contract's parties, so that they will be interpreted in the most favourable sense for the party who has not participated in their wording. The aim of this rule is, on the one hand, to promote clarity and precision in writing contracts and, on the other hand, to protect the party who has not participated in the drafting. Although the rule is inherent to consumer and adhesion contracts, in current trade practice it governs even in cases of balanced relationships between *proferens* and *adherens*. Likewise, although its application characterises contracts subject to standard terms it is also possible in case of individually negotiated contracts provided the party that drafted the contract can be identified.

Article 4.1.4: Favor negotii

Unclear terms will be interpreted in the sense most favourable to give effects to them and to all terms of the contract.

COMMENT

The principle of "*favor negotii*" or of interpretation "*in favorem negotii*" is a canon of interpretation generally accepted in comparative law. The principle of contract preservation implies that in case of ambiguity, the interpretation which leads to enforceability of contract terms must be preferred over the interpretation which leads to unenforceability. At the same time, the interpretation which leads to the wider enforceability of the contract as a whole must be preferred.

This interpretative canon is well known in many Caribbean civil codes (Articles 1.620 Colombian Civil Code; 1.157 Dominican and French Civil Code; 1.596 Guatemalan Civil

Code; 947 Haitian Civil Code; 1.579 Honduran Civil Code; Article 1.853 Mexican Civil Code; 2.499 Nicaraguan Civil Code; 1.135 Panamanian Civil Code; 1.236 Puerto Rican Civil Code; 946 Saint Lucian Civil Code). It has been maintained in Article 100 of the Proposals for Reform of the French law on obligations of 2013 as well as in the recent texts on international contract law harmonisation (Articles 4.5 UP; 5:106 PECL; II-8:106 DCFR; and 63 CESL).

Under English law, the traditional approach in case law defends that contract interpretation must not be influenced by legal result or presumed enforceability. However, this approach seems modified in the light of recent precedents [*Lancashire County Council v Municipal Mutual Insurance Ltd* (1996), QB 897; *BCCI v Ali* (2002), 1 AC, 251, 269; *Financial Ombudsman Service v Heather Moor & Edgecomb Ltd* (2009), 1 All ER 328], and common law case law actually demonstrates that the interpretation most favourable to enforceability must be preferred among all equally plausible interpretations. Moreover, the preservation of contract principle is evident in the criteria used by English courts for deducing “implied contract terms”, which reinforces the “*favor negotii*” principle. Finally, it must be stressed that the role of canons of interpretation is not rigid and the principle must be related to other interpretative rules, especially to the general rule of Article 4.1.2. Therefore, it can be concluded that this interpretative canon is perfectly acceptable in Caribbean legal systems inspired by common law and English law [e.g. *NV Handel Smits v English Exporters Ltd* (1955), 2 Lloyd’s Rep. 517].

Article 4.1.5: *Interpretation of the contract as a whole*

- 1. Contractual terms will be interpreted in the light of the entire contract, giving to the particular terms the meaning most in accord with the other terms of the contract.**
- 2. Individually negotiated contractual terms will prevail over terms that have not been individually negotiated.**

COMMENT

The “systematic” interpretation of the contract as a whole also obeys generally accepted canons of interpretation that meet the basic requirements of contract

consistency. Contract terms cannot be considered outside the context of the contract itself.

The principle in Article 4.1.5 is found in most of the Caribbean civil codes (Articles 1622.I of the Colombian Civil Code; 1.161 of the Dominican and French Civil Code; 1.598 of the Guatemalan Civil Code; 951 of the Haitian Civil Code; 1.580 of the Honduran Civil Code; 1.854 of the Mexican Civil Code; 2.500 of the Nicaraguan Civil Code; 1.136 of the Panamanian Civil Code; 1.237 of the Puerto Rican Civil Code; 950 of the Saint Lucian Civil Code). It has been also considered in Articles 99 of the Proposals for Reform of the French law on obligations of 2013; 4.4 UP; 5:105 PECL; II-8:105 DCFR; and 60 CESL. Likewise, this rule is consistent with current principles of common law and English law, because it fits in perfectly with the contextual interpretation of contract terms prevailing in existing case law, without prejudice to the parol evidence rule and other idiosyncratic interpretation criteria under common law. Moreover, the “whole contract rule” has been stated by many precedents since *Bettini v Gye* (1876, 1 QBD 183, 188). Among the most recent precedents, the following may be cited: *Riverside Housing Association Ltd v White* (2007, 4 All ER 97, 110); *Bindra v Chopra* (2008, 11 ITELR 312); *Multi-Link Leisure Developments Ltd v Lanarkshire Council* (2010, UKSC 47); *Re Sigma Finance Corporation* (2010, 1 All ER 571).

Conversely, the rule in Article 4.1.5 (2) of these Principles establishes a canon of interpretation which is not usually considered in national statutes or codes (with the exception of isolated cases such as Article 672.3 of the Guatemalan Civil Code or Article 728 of the Honduran Civil Code), but obeys a clear trend in current contract law, as Articles 5:104 PECL, II-8:104 DCFR and 62 CESL demonstrate. The rule that consists in giving priority to individually negotiated terms over standard terms is actually in line with the meaning of the general rule in Article 4.1.2 of these Principles.

In case of contradiction between an individually negotiated term and a standard term, prevalence of the first type of term is based on the true intent of the parties (subjective criterion), that is, following the interpretative criteria set out by Lord Hoffmann in the *Investors* case. This interpretation of contract terms is based on the understanding that a reasonable person in the same situation as the parties would have, given that both parties would reasonably give preferential enforceability to terms individually negotiated and agreed over standard and general terms that have not been negotiated. This principle is already clear in cases such as *Glynn v Margetson* (1893, AC 531) and *Taylor v John Lewis Ltd* (1927, SC 891, 898).

However, under certain conditions, this interpretation could imply an exception to the “last shot rule” characteristic in English law, in cases where once some contractual

terms have been individually negotiated a party would have sent to the other party general terms that could be complementary in some cases, but are contradictory, in others, to individually negotiated clauses.

Article 4.1.6: *Linguistic discrepancies*

Where a contract is drawn up in two or more language versions, in case of discrepancy between the versions, and if the parties have not agreed to a prevailing version, the version in which the contract was originally drawn will prevail.

COMMENT

Article 4.1.6 of these Principles states a specific and singularly relevant canon for interpretation of international contracts. The diversity of language versions of the same contract easily leads to contradictions between them, which are inherent in any translation and especially in legal translation given its particular difficulties.

The contracting parties may indicate the prevailing or authentic version in case of contradiction between different language versions. In the absence of such agreement, it is necessary to provide reasonable criteria for objectively determining the prevailing version. Current texts on international contract law harmonisation consider this question, opting unanimously for making the original language version prevail, presuming that other version has been translated from the original one (Articles 4.7 UP; 5:107 PECL; II-8:107 DCFR; and 61 CESL). The rule is quite reasonable and has been followed in these Principles.

This is in any case an interpretative principle that judges and arbitrators must balance depending on the context and circumstances of the contract. There is also the possibility of being unable to prove which version is the original version of the contract. In this case, evidential restrictions of the parol evidence rule could be an obstacle in common law if they are applied too restrictively. If the original version cannot be determined, judges and arbitrators should resolve linguistic contradictions according to other interpretative rules included in these Principles. As a last resort, they can ignore the contradictory terms and their object will be determined in accordance with the rules concerning the filling in of gaps and omissions of the contract. In some cases, particularly when contract obligations have not yet been

performed, the impossibility of integrating resulting gaps on fundamental questions can lead to the declaration of the nullity of the contract or of the obligations involved.

Section 2. Content of the contract

Article 4.2.1: Construction of the contract

- 1. The content of contracts exclusively derives from the agreement of the parties.**
- 2. Where the parties have not expressly agreed a contractual term that is decisive in determining their respective obligations, such a term can be inferred implicitly considering its objective reasonableness and the purpose of the contract.**

COMMENT

1. Options for regulating the construction of contracts

This article deals with filling in contract gaps. Integration presupposes that the contract has been validly concluded. Therefore, the provisions of chapter 2 of these Principles must be particularly considered with respect to the minimum requirements for determining the object of the contract required to establish the conclusion of the contract. In many cases, a contract that initially incomplete or insufficiently determined may be deemed to be concluded simply because the parties have performed it. In other cases, regardless of this fact, the contract will be considered as concluded even though there are gaps concerning aspects with no impact on its conclusion. In all these cases, judges and arbitrators are faced with the need to make up for omissions by filling in gaps left by the negotiation of the parties.

As is the case for contract interpretation, there are two opposing approaches in comparative law for filling contract gaps and achieving contract integration. Civil law systems usually adopt a flexible criterion for contract integration, which provides in principle a latitude freedom to implement gap filling. This criterion is commonly stated in an “open texture rule” that incorporates a so-called “general clause” or principle. The most widespread principle in Caribbean civil codes states that contracts are binding not only in relation with contract terms expressly agreed by the parties but

also by virtue of requirements derived from “good faith”, “equity” or from the “nature of the contract” itself [Articles 1.023 of the Costa Rican Civil Code; 1603 of the Colombian ; 1.135 of the Dominican and French Civil Code; 1.546 of the Honduran Civil Code; 1.159 of the Guatemalan Civil Code; 925 and 926 of the Haitian Civil Code; 6:2 (6.1.1.2) and 6:248 (6.5.3.1) of the Dutch and Suriname Civil Code; 1.796 of the Mexican Civil Code; 2.480 of the Nicaraguan Civil Code; 1.109 of the Panamanian Civil Code; 1.210 of the Puerto Rican Civil Code; 956 of the Saint Lucian Civil Code; 1.160 of the Venezuelan Civil Code]. A similar rule is maintained in Articles 3, 11 and 103 of the Proposals for Reform of the French law on obligations of 2013. The same principle is known in the USA (Sections 1-203 UCC and 205 of the *Second Restatement*). Articles 1.621.II Colombian Civil Code and Article 1.160 of the Dominican and French Civil Code follow the same criterion by presuming that clauses that are commonly used in a contract shall be filled even if they have not been expressed.

Conversely, English law uses the “implied-in-law terms” doctrine to fill contract gaps. To some extent, this common law doctrine seems rather similar to the civil law approach: the “implied-in-law” terms that are contract obligations imposed by law, custom or case law coincide with the general requirement of civil law systems of subjecting the contract beyond contract terms to any legal mandatory obligation. However, the question is controversial as far as the method used in filling gaps in the broader sphere of obligations subject to the free will of parties is concerned. In this respect, English courts have recourse to “implied-in-fact terms”, that are contractual terms not expressed by the parties but reasonable and above all necessary for the contract to work and to make business sense. Caribbean common law systems follow the traditional criteria of English case law (“officious bystander test” and “business efficacy test”), as demonstrated for instance in decisions of the High Court of Trinidad and Tobago in *Costa v Murray and Murray* (Carilaw TT 1977 HC 82) and *Pierre v Port Authority of Trinidad and Tobago* (Carilaw TT 1969 HC 23), the latter being a decision referring to the obligation of transporting goods safely and appropriately as an implied term that does not need to be expressed.

The difference between general clauses in civil law and implied terms in common law lies in the specific criteria for the inference of non-express obligations. Whereas civil law points preferably to fairness criteria such as good faith or equity, English law is rather based on mere contract efficiency, validating implied obligations that are indispensable for the contract to work or to have business sense (reasonability) regardless of whether or not they are fair and of their axiological basis. Such a trend is obvious, for instance, in the decision of the Privy Council (Saint Lucia) in *Marcus v*

Lawaetz (Carilaw LC 1986 PC 2). However, as it has been pointed out in the commentary to Article 4.1.2, although there is a recent trend in English law to consider good faith as a canon for contract interpretation or integration, such an approach remains controversial.

The two approaches mentioned above seem to work together, but only apparently. In some cases, they are both found in the most recent international texts on contract law, but in a confusing manner. Thus, UNIDROIT Principles opt for a special rule (Article 4.8) providing an appropriate solution through the intent of the parties, the aim and nature of the contract, general criteria as good faith and fairness, and even the most pure “common sense”. However, it must be stressed that the same indications are used in Article 5.2 UP to define “implied terms”. If both articles and their commentaries are compared, there is no appreciable distinction between a gap filled under Article 4.8 UP and an implied obligation determined with similar criteria under Article 5.2 UP. But in fact if there is an implied term there is no room for gaps, so that Article 4.8 UP would never be actually applied.

In this sense, the proposed regulation in Article 6:102 PECL is more consistent. Under the section “implied terms”, PECL state a unique principle for contract integration. To some extent, the terminology is closer to English law, but an essential difference about the sources of implied terms remains: intent of the parties, nature and object of the contract, and good faith. With minimal variations, the PECL model of regulation is followed in Articles II-9:101 DCFR and 68 CESL, which introduce the notable feature of excluding such integration if the parties have deliberately left a gap risk, thus accepting the risk of so doing. In this case, the literality of contract will prevail.

2. Minimum rule

Drafting of a convergent rule on integration of contract between Caribbean civil and common law systems is today considered unfeasible.

The rule proposed is consciously vague and open, to enable the incorporation of the two prevailing cultures, insofar as it does not prevent or require the necessary incorporation of non-agreed obligations inspired by good faith or equitable principles to determine the reasonableness of a term in the light of contract aims. It must be noted, on the one hand, that many civil law systems are characterised by case law actually reluctant to modify parties’ agreement on the ground of justice arguments, especially in sophisticated trade spheres. On the other hand, it must be stressed that Article 4.1.1 prevents the modification of the contract when the terms are clear. Strictly speaking, the proposed rule does not force English law’s reluctance to accept

good faith and also it does not prevent its consideration. It can therefore be accepted by all the legal systems involved without significantly increasing the risk of divergence of solutions, given the actual diversity of criteria derived from the integration criteria within domestic courts themselves.

Otherwise, if the contract parties are interested in incorporating expressly a rule for equitable integration of the contract inspired by the good faith principle, they may opt to introduce a specific clause in the contract, whose enforceability will be recognised by courts and arbitrators from legal systems inspired by English law.

GOOD FAITH CLAUSE

“This contract will be interpreted in accordance with the requirements of good faith. Each party shall observe good faith towards the other party and hereby warrants that in its dealings with the other it shall not perform any act or omission, which may prejudice or detract from the rights, potential assets or interests of the other party. Each party shall co-operate with the other party to the fullest extent in assisting each other to the benefit of both parties”.

Article 4.2.2: Modification in a particular form

- 1. Where parties have agreed on a particular form to modify or terminate the contract, modification or termination of the contract shall not be made in another form.**
- 2. However, the party whose statements or conduct have induced the other party to act reasonably based on that conduct shall be bound by its own acts and precluded from invoking this Article.**

COMMENT

With this type of clause, parties are seeking to prevent acts or statements made or issued during the performance of the contract from being considered as a change in the contract terms, unless they take a particular form. The use of these clauses is

especially useful when the contract is governed by civil law systems, which make it easier to infer obligations not included in the contract or changes based on the true intent of the parties, which may be appreciated from subsequent behaviour. The rule proposed in this article is similar to that contained in Article 29.2 CISG and in Article 2.1.18 UP. Rules in the PECL (Article 2:106) and in the DCFR (Article II-4: 105) set the rule in a weaker form.

The exception in second paragraph intend to avoid unreasonable effects of the clause when one of the parties, through their conduct, makes statements or acts that reasonably induce the other party to accept or act in accordance with that conduct, involving a modification of the conditions included in the contract.

Example 1: Company A, located in San Juan, Puerto Rico, concludes a contract with Company B, located in Guadalupe, for the construction and turnkey delivery of an industrial facility. The contract, besides a “no oral modification clause”, incorporates an obligation of technical assistance to train A’s technicians in the operation of the installation. The contract provides that this training should take place on A’s premises. Later, A writes a message to B stating that it considers that it is more appropriate that the training be carried out on B’s premises in Guadalupe. Based on this statement, B prepares all processes and requirements in its facilities in order to deliver the agreed training. Two days before the due date, A asks that B gives the training in accordance with what was agreed in the contract. B can invoke A’s conduct to justify its refusal to carry out the training obligation on A’s premises, offering to provide training in Guadalupe.

The limitation is supported in civil law systems based on the doctrine of *actos propios* (“own acts”), and in the U.S. by virtue to promissory estoppel doctrine (Section 90 Restatement (Second) of Contracts). The position of English law, however, is more restrictive [*Hughes v Metropolitan Rly* (1877), 2 AC 439, 448; *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* (1975), WLR 1474]. It is estimated that the institution of estoppel can be invoked, as in the example, to be exempted from an obligation under the contract, but not to enforce an obligation not agreed in the contract.

Example 2: company A, established in Mexico, concludes a contract to supply foodstuffs to Company B, located in Havana, including a no oral modification agreement. The contract provides a clause that the delivery of the containers must be carried FOB to Havana. Company B requests A to make a specific delivery to the port of Santiago de Cuba. Company A agrees, and the request is repeated for the next two deliveries. A refuses a fourth request, because a delivery at a different harbour as the agreed creates additional problems and extraordinary expenses. B could not claim

from A an obligation not agreed in the contract based on English law. Hypothetically, B could do so under other systems and the rule established in these principles, although in the case seems unlikely to deduce from the proper acts of A that B could reasonably have been led to believe in a change of the place of delivery for all future deliveries.

In any case, the rule cannot be separated from the general rules of contract interpretation in Section 1 of Chapter 4 of these Principles, which inevitably will allow a margin of flexibility according to the legal culture of the courts or arbitrators.

Article 4.2.3: *Merger clause*

The content of the contract cannot be modified or completed by previous statements or agreements if the parties have included a clause stating that the contract contains all terms agreed upon by the parties. However, such statements or agreements may be used to interpret the content of the contract.

COMMENT

Merger clauses are often used in international contracts to avoid that statements made by the parties during the negotiation phase, when they exchange proposals, drafts or projects, are invoked to infer from the contract, obligations not included in the final document or to alter or modify the contents of the contract as it has finally been drafted. They are especially indicated in the contracts with complex and long negotiable phases, where parties produce and exchange many messages, drafts, letters of intent, etc. These merger clauses are especially useful when the contract is governed by a civil law system or by U.S. law, because such systems can support more easily the possibility to create obligations under statements outside the contract, given that courts can determine the intent of the parties through both written statements and other extrinsic evidence [Section 209 (3) Restatement (Second) of Contracts]. When parties include a merger clause, the effect that such statements outside the formal contract can produce in relation within the alteration or the modification of what finally is featured in the contract as obligations of the parties is restricted.

Merger clauses are also important in English law, even if a wide role is recognised to the parole evidence rule, because although it is presumed that the written documents contain all the terms of the contract, this presumption may be refuted if there is proof that the parties did not intend for the written document to be the only source of

obligations for the parties, but that their oral statements could be invoked as a source of collateral obligations. Outside the contract, English law does not prevent the parties from agreeing on collateral or additional obligations, including orally. However, to the extent that there is a tension between formalist and contextualist approaches around the interpretation of the contract and that the courts may apply this rule differently, the inclusion of this clause is recommended. The merger clause then serves as a mechanism for refusing collateral obligations other than the written contract [*J Evans & Son (Portsmouth) Ltd v Andrea Mezario Ltd* (1976) 2 All ER 930].

The possible ambiguity of the contract may be considered differently by courts. The merger clause prevents statements, offers and proposals of the parties that are not included in the text of the final contract to be recognised as mandatory or contractual, but do not limit the interpretative effect of these statements, as a contextual element that can be taken into account on the basis of the provisions of Article 4.1.2 of these Principles. Indeed, when the obligations provided in the final contract raise interpretative problems because they are ambiguous or obscure, the statements made by the parties outside the formal contract can be taken into consideration, not to introduce new obligations, but to interpret the meaning of obligations included in the contract. This is recognised, for example, in Section 217 of the Restatement (Second) of Contracts, in Section 2-202 UCC, in Article 2.1.17 UP, in Article 72 CESL, and it has been maintained in Article 8 CISG.

Articles 2:105 PECL and II-4:104 DCFR require that to be effective, the merger clause must be negotiated individually, if the parties want to prevent prior agreement from producing obligations not included in the written contract or to deprive those agreements and declarations of interpretative scope. It was not considered appropriate to include this special rule in the OHADAC Principles, so that if the integration clause is incorporated into the contract as a standard term, effectiveness will depend on the conditions referred to in Article 2.1.9 of these Principles. Certainly, to enhance the effectiveness of these clauses it is advisable that they are not incorporated in the standard terms of the contract, but as individually negotiated terms, since its scope makes it easily capable of being viewed as unreasonable conditions.

Section 3. Contractual obligations

Article 4.3.1: Duty to achieve a result and duty of best efforts

- 1. To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.**
- 2. To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.**

COMMENT

1. The distinction in OHADAC domestic systems

The distinction drawn between the “duty of best efforts” or “duty of specific result” is based on the content and scope of the obligations assumed by the obligor in the contract. It may be an obligation to exert best efforts or an obligation requiring a specific result. This classification is a standard of French origin, which has been subsequently embraced by case law and is reflected in one way or another in the continental European civil law, although not does always formally bear the same name.

In the case of continental European civil law, the distinction is an important aspect related to the general method of allocating contractual liability based on fault. Continental European civil law has been built on the basis of fault as a criterion to measure the extent of the obligor’s duty and default or the attribution of responsibility (Article 1.147 of the French Civil Code). In the case of the duty of best efforts, the diligence of the obligor is included in the content of the obligation so that the accreditation of a lack of diligence determines, per se, a breach of contract. However, in the case of the duty to achieve a specific result, the “fault” is of particular relevance as an autonomous element. It is usually seen as a circumstance “external” to the very content of the obligation, introducing a cause of exoneration from liability even in cases where the breach has been proved (e.g., the failure to obtain the result). Nevertheless, it is true that the various domestic laws have gradually shifted towards an objective approach to contractual liability (regardless of subjective attribution criterion) through presumptions of fault with respect to the duty to achieve a specific result which, in practice, require the obligor to prove his care to exonerate him from liability.

Conversely, the “obligation of means” category was unknown in common law systems. The “obligation of means” involves an analysis of the obligor’s conduct with regard to more or less strict parameters of care. Such an element is not strange to civil law traditions, based on the requirement of fault as a criterion for the breach of contract or, where appropriate, for the attribution of responsibility for non-performance. It has meant, however, an innovation in common law systems, based on strict liability linked to the achievement of a result in the contract. Its starting point is the absolute commitment of the contracting parties for the implementation of the contract (strict liability) and therefore not achieving the intended purpose shall be deemed a breach of contract and it will result in the corresponding liability of the obligor, exclusively based on objective criteria. Under these assumptions, the contract content is essential to determine the extent of the obligor's duties, forcing to define accurately and *ex ante* the commitments made and the causes for responsibility exemption mutually accepted. Taken to its logical conclusion, the definition of any obligation as an obligation of result, regardless of the diligence of the obligor, could be too burdensome for it, particularly in those contractual arrangements in which either difficult to define its result or achieve it directly is beyond the sole control of the obligor. On this basis, case law introduced modulations to the “strict liability”, especially using the technique of implied terms and recognising cases in which the commitment does not ensure the result but only requires the best efforts and consequently, non-achievement does not determine a default by the obligor.

These facts show that clauses of best efforts lighten the duties of the obligor by introducing a parameter analysis of subjective performance, traditionally not found in common law systems. This results in a dual liability system: the strict liability and liability based on best efforts, which resembles the continental law model with its distinction between duty to achieve a specific result and duty of best efforts. The Supply of Goods and Services Act 1982 therefore contains provisions of a sales contract as an example of a performance agreement falls within the scope of a commercial agreements and with the implied term that the goods will be delivered with a satisfactory quality (Sect. 14, Part I); on the other hand, in service contracts, the obligor is obliged only to carry out the service with reasonable care and skill but generally does not assume a result (Sec. 13 of Part II). In American law, Sections 2-306 of the UCC and 379 of the Restatement (Second) of Agency set out obligations, not of specific result, but which only determine the assumption of a commitment to act with a certain diligence.

From this perspective, the scope of the obligations of means assumed by the obligor in the continental systems matches the common law duty of best efforts. Insofar as civil law systems are progressively incorporating the unitary nature of the concept of non-performance and the tendency to objectify liability, the liability of the duty to achieve a specific result is also identical. In both cases, there is non-performance if the result does not meet any of the contractual obligations. With the introduction of fault into contractual non-performance, the initial characterisation of fault as an element of contractual liability has gradually lost its meaning, and this criterion is more linked to liability for tort. From this point of view, the common law duty of best efforts obligations and the diligence obligations in civil law are essentially similar. Differences between both systems will exist insofar as civil law regimes keep, in cases of obligations of result, diligence of the obligor as a criterion for attributing contractual liability.

One can find a similar pattern within the OHADAC legal systems. On the one hand, the civil law systems do not have a rating and a general definition of duties of best efforts and duties to achieve a result. This distinction is only obtained from the analysis of the various types of contracts incorporated in most civil codes, where obligations that may compromise a certain result and those in which the obligor only undertakes diligent conduct are identified. On this basis, a ranking of contract types is possible; an example of obligation of result is the contract of sale (transfer of ownership of the good) and an example of an obligation of best efforts is the contract of mandate or commission (the entrusted business management). The clearest civil code in this regard is the Guatemalan Civil Code, which distinguishes between work and service contracts (Articles 2.000, 2.032 and 2.033) and establishes a duty to achieve results for the first and a duty of care for the second. Similarly, service contracts are regulated in Article 2.615 of the Mexican Civil Code, the performance of which is measured by the level of care developed by the obligor. However, it is common to find both kinds of obligations in the same contract. This is, for example, the case of bailment contracts that contain both an obligation of delivery (of result) and an obligation to save and preserve the goods in a prudent and responsible manner (see, in this sense, among others, Article 1.928 of the Dominican Civil Code).

For its part, Commonwealth Caribbean law incorporates, similarly to English law, a delineation of duties based on sale and agency contracts, which correspond essentially to the obligation of a result or the mere duty of care by the obligor. With respect to the first cases, legal rules set implied conditions on the appropriateness of the product for the purpose of the contract, which will depend on the performance of certain

established requirements [Section 16 (Ch. 393) of the Sale of Goods Act of Antigua and Barbuda; Section 16 (Ch. 337) of the Sale of Goods Act of Bahamas; Section 15 of the Sale of Goods Act of Barbados; Section 16 (Ch. 261) of the Sale of Goods Act of Belize; Section 15 (Ch. 349) of the Sale of Goods Act of Jamaica; Section 16 (Ch. 15.18) of the Sale of Goods Act of Montserrat; Section 16 (Ch. 82:30) of the Sale of Goods Act of Trinidad and Tobago]. By contrast, in the field of contracts such as agency, obligations of the agent are subject to reasonable care and skill, involving liability for damages for any breach of those obligations.

2. The distinction in the texts of contractual harmonisation

The various texts of contractual harmonisation include the distinction between duty of best efforts and duty to achieve a specific result. Article 5.1.4 UP shows the idea of a “transposition” of institutions based on the equivalence between the common law duty of best efforts and the continental obligation of means, as opposed to the obligations to achieve a result. The revision of the PECL proposed by the Association Henri Capitant incorporates the distinction between obligations of result and obligations of best efforts, introducing in the new Article 6:103 a similar regulation to the UNIDROIT Principles.

But it is in the DCFR that the distinction takes on a special relevance to determining the extent of the obligations in service contracts. These contracts usually aim at obligations of care (Section IV.C.-2: 105) and obligations to achieve a specific result (Section IV.C. - 2:106), aside from subsequent developments depending on the specific contractual agreements. Obligations to achieve a specific result are identified if they are established in the contract or if it is a result that the party could reasonably expect under the contract or it had no reason to believe that there was a substantial risk which would jeopardise obtaining that result with the agreed service. The importance of the model in the DCFR derived from the new concept on service contracts has a similar wording in the European Principles of Contract Services (Articles 1:107 and 1:108). Indeed, in these models the "radical" underlying distinction in domestic law between works contracts (usually linked to the performance contract) and services itself (usually linked to the means) is modified. In the DCFR, the definition of service contracts is broad and cross-cutting. They include contracts as diverse as construction, maintenance, storage, design, information, advice and medical treatment. As a consequence of this scope and cross-cutting nature, a direct and automatic association of service contracts to a mere obligation of best efforts is not possible. Moreover, it is not only provided, as a general rule, that service contracts produce results, but also

that they establish presumption of results for certain specific service contracts, as it results in Subsection (1) of said Article IV.C.-2: 106.

The CESL shows a different approach from DCFR for service contracts related to sales [Article 2 (m) of the Proposal]. Such contracts are presumed to be obligations of best efforts, so that, unless they include a specific result, whether as a result of an express or implied obligation, the service provider is only bound by an obligation of care and skill. This article has been criticised for introducing a treatment clearly favourable to the service provider in a broad spectrum of contracts (contracts for installation, maintenance and repair, etc.), in contrast with a model of strict contractual liability. The position of the client, who assumes the burden of proof of the lack of diligent conduct of the obligor in each case, is weakened. However, it should also be noted that the CESL partially clarifies the characterisation of the contract in terms of relationships between professionals or consumers, imposing obligations to achieve a result in the second case. For example, installation contracts are considered obligations to achieve a specific result (section 148.4 in relation to Article 101 CESL and Annex I).

3. Relevance of the distinction and position of OHADAC Principles

The characterisation of an obligation as an obligation of best efforts or obligation to achieve a specific result is essential to determine the extent of the duties of the obligor and, therefore, to identify cases of breach of contract. This characterisation may be of the contract as a whole or of its principal duty (the result of the delivery of goods and transfer of ownership in sales) or on some of its obligations (e.g., the obligation to deliver "within a reasonable time," which transforms the time of the performance into an obligation of best efforts). It is important to link the obligations of best efforts and obligations to achieve a specific result to the criteria of responsibility for damages. Under the UNIDROIT Principles non-performance implies a right to compensation for the obligee, unless the breach is excused under the Principles themselves (section 7.4.1). The causes of exemption of liability are provided for in the contract (section 7.1.6) and *force majeure* (Article 7.1.7), that is an institution midway between the common law frustration and *force majeure* of civil law systems. The advantage of the construction is that it introduces a system of objectification of responsibility (outside the criteria of the fault of the obligor) that primarily corresponds to the common law model. Outside the contractual framework, only *force majeure* can excuse the breach of contract, as an element that is external to the contract itself and beyond the control of the parties. A similar model follows in Article 9:101 of the PECL proposed by the Association Henri Capitant.

The characterisation of the obligation also directly affects the object and the burden of proof of the breach of contract. Strictly speaking, any breach (whether of result or of best efforts) needs to be proved by the obligee, especially when under current contract trends everything is related to the lack of conformity. It happens, however, that the character of each obligation determines the difficulty to prove: in the obligations of result, it suffices that the obligee proves that the result was not obtained in the agreed terms; in the obligations of best efforts, the obligee must prove that the obligor acted without the required care. Such a difference related to the test of infringement is expressly envisaged in Article 6:103 of the PECL revised by the Association Henri Capitant.

It is clear that the obligee's interests are more protected in obligations of result and that the proof of non-performance is simpler, using objective parameters defined in the contract on the contents of the agreed performance. Therein lies the difference between civil law and common law systems: civil law systems observe the conduct of the obligor, while common law focuses on the satisfaction of the obligee. It is true, however, that the traditional understanding of civil law based on fault, in the terms already mentioned, requires additional proof of the lack of care of the obligor's as well as for the duty to achieve a specific result. However, it is precisely in this context that the trend to objectify contractual liability on the basis of the rebuttable presumption of fault and, therefore, reversing the burden of proof becomes significant: the obligor must prove its diligent conduct. These are called "attenuated obligations to achieve a result": they are obligations to achieve a result because fault is presumed; but they are qualified because the obligor may be released if it proves its diligence. In this way, authentic irrebuttable presumptions for obligations of result are finally established; these in fact lead to the elimination of fault as a criterion for attribution of responsibility and prevent the obligor from being exempted from its commitments even demonstrating diligent conduct.

In obligations of best efforts, the failure to achieve the result is irrelevant and the object of proof should be focused on the lack of diligence of the obligor in the performance of the contract. In this case, the position of the obligee is weaker and it must make a greater effort to prove the standard required and then to demonstrate its compliance by the obligor, unless a reversal in the burden of proof is established in this area.

In this context, OHADAC civil codes are based, in general, on two rules: firstly, the requirement of fault related to the breach of the contract (characteristic in obligations

of best efforts) and, secondly, the presumption of this fault (generating reinforced duty of best efforts or attenuated duty to achieve a result).

The basic rule is that the attribution of liability to the obligor is only possible when there has been fault on its part (considered under criteria of more or less strict diligence). A relationship between liability for non-performance and causes that exempt from liability occurs: *force majeure* and also fortuitous event. Therefore, generally there will not be a strict liability for breach of contract. Thus, in most cases there will be a duty of best efforts that limit the obligor's liability to cases of lack of diligence in performing the obligation (Article 1.604 of the Colombian Civil Code; Articles 702 and 703 of the Costa Rican Civil Code; Articles 293 and 298 of the Cuban Civil Code; Article 1.147 of the Dominican and French Civil Code; Article 1.436 of the Guatemalan Civil Code; Article 1.360 of the Honduran Civil Code; Articles 1.852 and 1.864 of the Nicaraguan Civil Code; Article 990 of the Panamanian Civil Code; Articles 1.054 and 1.056 of the Puerto Rican Civil Code; Article 1.003 of the Saint Lucian Civil Code; Articles 6:74 and 6:75 of the Dutch and Suriname Civil Code. Only of the Venezuelan Civil Code opts for what seems a strict liability system (Article 1.264 Civil Code), close to the common law regimes, where the obligor can only be exonerated if it proves that the failure comes from a cause that is not attributable to it, even if it has not acted in bad faith (Article 1271 Civil Code).

However, duties of best efforts appear in many cases reinforced by the rule of presumption of fault, which, in practice, requires that the obligor itself proves its diligence in performing the obligation. This system shows a tendency to objectify liability, which is close to duties to achieve a result, although mitigated, insofar as the proof of the absence of fault and of the presence of unforeseen circumstances releases the obligor from liability (Article 1.733 of the Colombian Civil Code; Article 1.171 of the Colombian Commercial Code; Article 298.2 of the Cuban Civil Code; Article 1.423 of the Guatemalan Civil Code; Article 1.461 of the Honduran Civil Code; Articles 2.647 et seq. of the Mexican Civil Code; Article 1.271 of the Venezuelan Civil Code).

The wording of Article 4.3.1 OHADAC Principles includes the distinction between duties of best efforts and duties to achieve a result in the line established in the UNIDROIT Principles. The inclusion of contracts in each category depends essentially on the scope of the obligations stipulated by the parties; alternatively, the criteria laid down in Article 4.3.2 of these same Principles may be considered. It is not possible or convenient to make a catalogue of contractual agreements and a characterisation of its obligations. For the purposes of the OHADAC Principles it is important to emphasize, considering its scope in the field of business excluding consumer contracts,

that there are no special reasons to opt for duties to achieve a result, which are more protective of the obligee's interests. A neutral option between both obligational models is legitimate in the context of relations between traders and makes it possible, without constraints, to accommodate both civil law and common law Caribbean systems.

Article 4.3.1 makes no reference to the proof of non-performance. However, this aspect is governed by Article 6:103 PECL revised by the Association "Henri Capitant", which provides, in case of duties to achieve a result, that the mere fact of not achieving the intended result is enough to demonstrate non-performance, while in cases of duties of best efforts, the non-performance must be proved. This distinction in the rules of evidence is consistent with the distinction between the two types of duties, but their reflection in the article of the OHADAC Principles could interfere with civil codes which reverse the burden of proof by establishing a presumption of fault and, thus, of the breach of contract. This means, in essence, that if the obligor does not prove their diligence, their liability is assumed by default. In other words, in these cases what should be proved is performance (and not non-performance). The inclusion in the OHADAC Principles of a similar rule to that in PECL would actually mean, although the provision says nothing on the burden of proof, a requirement on the obligee to prove such a breach (i.e. the lack of diligence of the obligor). Therefore, silence on this point in Article 4.3.1 prevents distortions in domestic laws that reverse the burden of proof of the contractual performance.

Article 4.3.2: *Criteria to determine the kind of duty involved*

In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or a duty to achieve a specific result, regard shall be had, among other factors, to

- a) Express and implied terms of the contract.**
- b) The nature and purpose of the contract.**
- c) The degree of risk normally involved in achieving the expected result.**
- d) The ability of the other party to influence the performance of the obligation.**

COMMENT

1. Express and implied terms of the contract.

Determination of whether contract implies duties of best efforts or duties to achieve a result can clearly result from express or implied terms of the contract [Article 5.1.5 UP; Article 6:103 (3) (a) PECL]. Article 4.3.2 of the OHADAC Principles establishes, as a first criterion of interpretation, the express and implied obligations under the contract. The reference to implied obligations should be understood in accordance with the criteria for integration of the contract under Article 4.2.1 of these Principles.

The terms according to which the object of the contract is described are essential to identify if, for example, the obligor agrees to deliver the goods or agrees to make the best effort to deliver goods. There are types of contracts that are usually considered as contracts to achieve a result such as the contract of sale in which the goods must be delivered with the quality agreed in the contract; loan contracts also should be understood as containing duties to achieve a result. Other contracts are usually considered as characterised by obligations of best efforts. This is the case of commercial expansion contracts (such as franchise agreements, distribution or agency) which are usually considered, unless otherwise is agreed, as contracts including duties of best effort through clauses of diligence obligations of the franchisee, dealer or agent in performing their obligations. Within the Caribbean law, the different kinds of mandate contracts, business commission or agency contracts would clearly be included under contracts characterised by duties of best efforts (Article 255 of the Cuban Commercial Code ; Article 1.705 of the Guatemalan Civil Code; Article 1.898 of the Honduran Civil Code; Article 3.309 of the Nicaraguan Civil Code; Article 1.410 of the Panamanian Civil Code; Article 1.610 of the Puerto Rican Civil Code; Article 1.692 of the Venezuelan Civil Code). In any case, the contract practice shows a hybrid system of attenuated duties to achieve a result and reinforced duties of best efforts, and often contracts include obligations of both types.

Example 1: Company A sells goods to Company B, to be delivered on August 1, 2014 (this is a pure duty to achieve a result); it could also be agreed that the goods should be delivered "within a reasonable time" (in this case this would be an attenuated duty to achieve a result).

Example 2: A agrees attorney services of B for advice to start a business (it is a pure duty of best efforts). Otherwise, manufacturer A agrees with Company B the distribution of its product, promising B to make all necessary investments to increase sales (reinforced duty of best efforts).

The introduction of a specific OHADAC rule that establishes the distinction between duties of result and duties of best efforts forces means that special care must be taken in the drafting of contracts, primarily in determining the impact of the obligor's conduct on the contract performance. The contract clauses that will be particularly important in outlining the exact scope of the obligor's obligations will be those that will serve to exactly determine the extent of the obligor's obligations, i.e. clauses that extend the scope of the obligor's liability, and clauses warning the obligee about the risks of the transaction.

Depending on the type of contract, it may be advisable to include specific clauses in the contract that define the exact extent of the obligor's liability. Such an inclusion is particularly relevant in cases such as those relating to the contract of carriage, whose obligations might assume, in accordance with the law of the contract, the form of duties of best efforts or duties of result, for example in relation to damage to persons or goods. In this respect, Article 982 of the Colombian Commercial Code presupposes a result; however, Article 362 of the Cuban Commercial Code assumes a duty of best efforts, in so far as the carrier's liability is conditioned by the proof of its negligence.

Contracts may also include clauses that extend the obligor's liability to cases of *force majeure*, where obligation consists in a duty of result as far as diligent conduct of the obligor is not relevant for determining responsibility. This possibility is explicitly provided, for example, in Article 1.732 of the Colombian Civil Code, Article 703 of the Costa Rican Civil Code and Article 1.928 of the Dominican and French Civil Code.

Finally, the introduction of compliance, warning and information clauses by the service provider to the other party also makes it possible to define the scope of their duties and the alleged breach of contract, considering the risks involved, if any, by the recipient of the service.

Together with express terms of the contract, another determining factor in qualifying the type of obligation is the existence of an implied obligation that may arise from the contract. It therefore has a special impact in the field of security obligations or in obligations to obtain export or import licences related to sale or distribution contracts. When there are no express terms, American case law has moved from implied terms to duties of best efforts in sale or exclusive distribution contracts. In some cases the courts have used implied terms to prove the existence of genuine links and commitments between the parties. In other cases, use of implied terms has served to qualify the extent of the commitment, but always based on an analysis from the perspective of the particular contract and trying to discover the actual intent of the parties. The case *Wood v Lucy, Lady Duff-Gordon* (Courts of Appeals of New York,

1917, 222 NY 88, 118 NE 214) is a landmark in American case law. Firstly, Lucy had entrusted Wood with the distribution of haute couture gowns, but Wood sued Lucy when she decided to sell the clothes herself, deeming that Lucy had violated his exclusive rights. The defendant denied this since there was no commitment. The judge did not grant the request of the plaintiff, who had to pay a percentage of the profits to the defendant, to establish a real contractual obligation on its part and a duty to use its best efforts to make the marketing profitable.

Implied obligations are also derived from the DCFR in relation with certain types of contracts in which one party has a "reasonable expectation" of a specific result. Concretely, the nature of these various contractual practices suggests "reasonable expectation" for construction, design, release or supply of information contracts. This presumption is not established, in principle, for maintenance contracts, advice contract that include recommendations or medical treatment. In relation with the OHADAC Principles, such "reasonable expectation" can be considered as included within the "business common sense" as a source of implied obligations.

Behind all this is emerging a new conception of contractual non-performance, which not only starts with the unitary approach as defined in the UNIDROIT Principles and PECL, but also adds the criterion of "conformity" as a defining factor of non-performance in all contracts. To this extent, any contract may be converted into a contract of obligations to achieve a specific result. However, obvious practical reasons on the viability of service contracts make it impossible to link them to the success of their performance. For this reason, the "result" must be "reasonably expected" by the other party, who must not have accepted those risks through informed consent. From this point of view, the presence of "risk" and the duty to inform and warn imposed on the provider are the two parameters that finally modulate the intensity and the scope of the duties assumed by it.

2. The nature and purpose of the contract

In the absence of an agreement between the parties, the overall characterisation made by domestic laws of labour or service contracts has traditionally served as a guideline for distinguishing duties to achieve a specific result and duties to best efforts. From this point of view, there has been some consensus, acceptable for both common and civil law systems, that some contracts for professional services (such as doctors and lawyers) should be considered duties of best efforts. The type of duty assumed by architects or engineers has been more controversial. Under the DCFR, the characterisation of each type of contract allows the identification, in each case, of the scope of the duties assumed by each party and whether they imply getting a result or

not. As far as no duty of care is established in sale or cession contracts, these are considered as implying obligations of specific result, in which the seller or the transferor is obliged to transfer the ownership of the property or assign its use temporarily. Loan contracts (part F), personal guarantees (part G) and gifts (part H) are also considered as duties to achieve a specific result. For its part, mandate (Article IV.D.-3: 103) or agency agreements, franchise and distribution (Article IV.E.-1:101) are clearly envisaged as duties of best efforts, subject to the obligor's diligence.

In Caribbean legal systems, obligations arising from the sale, duties under loan contracts, delivery duty in deposit contracts or the duties under supply contracts are considered as duties to achieve a specific result. Duty of custody of goods in deposit agreements, different forms of business mandate (through brokers, factors, sellers) or commercial agents, whose duties are generally linked to the instructions of the principal or, in any case, they are to be performed with due diligence, are also characterised as duties to achieve a specific result. Carriage contracts, which adopt different characterisations in domestic laws, seem more controversial in this respect.

Example: If the carrier A is liable to shipper B for any damage caused to the goods during the course of transport, it has assumed a duty to achieve a result. However, if A can be exempted from liability for damages if it carries out the transport with care, then it has assumed a duty of best efforts.

The characterisation of duties to give, to do or not to do, which is usual in several domestic laws, cannot be used as a definitive characterisation criterion. These types of duties are found in Article 629 of the Costa Rican Civil Code; Articles 234 and 298 of the Cuban Civil Code; Articles 1.136 and 1.142 of the French and Dominican Civil Code; Article 1.319 of the Guatemalan; Article 927 et seq. of the Haitian Civil Code; Articles 1.351, 1.357 and 1.359 of the Honduran Civil Code; Articles 2.011, 2.027 and 2.028 of the Mexican Civil Code; Articles 1.845 et seq. of the Nicaraguan Civil Code; Article 973 of the Panamanian Civil Code; Article 1.041 of the Puerto Rican Civil Code; Article 995 of the Saint Lucian Civil Code. An obligation not to do is usually a duty to achieve a result. However, although an obligation to give is usually a duty to achieve a result, it can be sometimes interpreted as a duty of best efforts. Meanwhile, characteristic obligations to do in lease or service contracts may lead to a duty of result besides of a duty of care. Examples of service contracts with a duty to achieve a result are engineering, car repair, dry-cleaning of clothing or building contracts. However, a duty of care is generally assumed in consulting contracts or accounting advice.

There are other terms of the contract which may entail duties of best efforts or to achieve a specific result. This happens, for example, with the agreed price, whose

amount or form of payment can determine the kind or the obligation. This is precisely one of the criteria explicitly used in the Article 5.1.5 UP and it is also found in the Article 6:103 (a) PECL proposed by the Association Henri Capitant. Meanwhile, the inclusion in the contract of a hardship clause can be interpreted as indicating a duty of best efforts as far as it allows the adaptation of the obligation under some events.

Under common law, the basis of liability in the strict liability suggests the inclusion of a specific best efforts clause in the contract in order to limit the duties of the obligor. Only in cases where the guarantee of the result is clearly outside the power of the obligor or it does not depend solely on it, case law has shaped a system of presumption about duties of best efforts in relation with some professional service contracts.

3. The importance of the risk

Case law and texts on contractual harmonisation share an approach about the importance of risks (defined as the absence of exclusive control by the obligor) in order to characterise obligations as duties of best efforts [Article 5.1.5 (c) UP; Article 6:103 (3) (b) PECL revised by the Association Henri Capitant; Article IV.C.-2: 106 DCFR]. But what matters to characterise obligations is not so much the presence of risks that could jeopardise the result but the attribution of which party assumes them (or which party should assume them). Different combined factors play here to lead to one or other characterisation: the quality or expertise of the obligor, which may have been a determining factor for concluding the contract; the condition of the obligee, as a trader or a consumer and the needs it aims to meet with the contract; and, in this regard, the scope of the obligations of information and warning about the risks and possibilities of failure to obtain the intended result.

Example: If A agrees with the clinic B to undergo a sterilisation operation, and nothing is noted in the contract, A can legitimately believe that B is committed to achieving that result in any case, so that a subsequent pregnancy will cause breach of contract. However, if at the time of conclusion of the contract, B gives A proper information on the chances of failure of the intervention, which A accepts, that informed consent of the patient is equivalent to a risk-taking and, therefore, the B obligation becomes clearly a duty of best efforts.

Therefore, the duty of information and warning about the risks incurred by the obligor, the absence of which can transform a duty of best efforts into a duty to achieve a result, is particularly significant. On the contrary, a duty characterised as a duty to achieve a result, but in which the service recipient's is informed about the chances of failure, becomes a duty of best efforts. This is obviously all linked to the "reasonable

and foreseeable" expectations of the obligee in relation with the performance of the contract, which becomes essential for the purposes of verifying the scope of the duties of the obligor and is therefore a parameter for assessing contract performance.

Regarding Caribbean law, assumption of *force majeure* by the obligor can play an essential role here, as established, among other legal regimes, in Article 1.732 Colombian Civil Code. Thus, the obligor assumes the liability for external and unforeseeable circumstances that may determine the breach of its obligations. The commitment is then considered as a true duty to achieve a result.

4. The ability of the obligee to influence the performance of the obligation

Finally, the participation of the obligee in the performance of the obligation through technical assistance, management or advice, may also affect the characterisation as a duty of best efforts, as far as its conduct has been relevant in obtaining or failing to achieve the intended result [Article 5.5 (d) UP; Article 6:103 (3) (b) PECL in the proposal by the Association Henri Capitant].

In the law systems of OHADAC countries, the direct influence of the obligee in the performance of the contract emerges in relation with the instructions given by the principal. Insofar as the broker or agent is limited to complying with the instructions received, it is not responsible for the success or failure of the efforts carried out. This is included, for example, in the Article 254 Cuban Commercial Code.

In this regard, obligations assumed by the obligee under the contract that determine its performance are also important, as it happens with delivery of material in case of a construction contract or transfer of know-how relating to the subject of the contract.

Example: Company A agrees with B to build a warehouse. If A is obliged not only for construction but also must provide all materials, it will be liable for any defect or damage on the building. On the contrary, if A is obliged for the construction but the materials are given by B, A's responsibility is limited to the appropriate use of building materials, but it will not be responsible for the final result.

Article 4.3.3: *Quality of performance*

Where the quality of performance is not established or ascertainable under the contract, a party is bound to render a performance of reasonable diligence and quality and not less than average in the circumstances.

COMMENT

The quality of what is to be supplied or provided under the contract is usually established by specifying the characteristics of goods delivered by setting specific instructions or degrees of care to perform certain obligations. However, there are also contracts in which an obligation is set without specifying a certain quality. This may occur in contracts to deliver indeterminate or generic goods. To fill in these gaps, it is useful to establish a subsidiary rule that starts from a standard medium or "reasonable" quality.

Article 5.1.6 UP establishes a similar rule as that in Article 4.3.3 of these Principles, setting a parameter of "reasonable" quality and not below average. It is specified in the comments that there is indeed a double standard: Firstly, performance must be of an average quality, which should be inferred according to the circumstances of the relevant market and the time of performance; secondly, the test of "reasonableness" is further introduced to justify, in view of the case, the performance according to the circumstances agreed in the contract.

Article 6:104 of the PECL reviewed by the Association Henri Capitant also refers to the average quality, which is established considering the nature of the contract (general economy). The average quality standard is not abstract, but it is based on the circumstances of the contract and the quality of the parties and the specific interest shown in it. This determines the assessment of quality parameters from implied obligations under the contract.

Likewise, Article II-9:108 DCFR establishes the criteria of quality that the recipient can reasonably expect in concrete circumstances. This quality can easily be verified when there are standards available in the relevant trade. Failing which, the criteria used are the nature of the service provided and the circumstances under which the contract is concluded (whether the priority is given to urgency or quality of performance, even with delay). Lastly, the use of the criterion of "reasonable expectations" derived from the contract, rather than the average quality (which could itself be understood as a general category detached from the contractual model in this case), relates to the idea of implied obligations.

For its part, Article 35.2 (a) CISG establishes as the minimum criterion of conformity of the goods under the contract, their suitability for the purposes for which goods of the same type are normally used.

Caribbean law includes, in similar terms, the standard of the average quality of the performance for the performance of the contract [Article 914 of the Colombian

Commercial Code; Article 245 of the Cuban Civil Code; Article 1.246 of the French and Dominican Civil Code and Article 74 of the Proposals for Reform of the French law on obligations of 2013; Article 1.432 of the Honduran Civil Code; Article 2.016 of the Mexican Civil Code; Articles 1.922 and 2.020 of the Nicaraguan Civil Code; Article 1.054 of the Panamanian Civil Code; Article 1.121 of the Puerto Rican Civil Code; Article 1.082 of the Saint Lucian Civil Code; Article 6:28 of the Dutch and Suriname Civil Code; Section 14 (2) to (2c) English Sale of Goods Act 1979 (amended 1994); for service contracts, Section 13 Supply of Goods and Services Act]. In other cases, it is stated that if the use is stated in the contract, the product will have to adapt to it (Article 1.801 of the Guatemalan Civil Code; Article 1.426 of the Haitian Civil Code; Article 773 of the Honduran Commercial Code). To the contrary, the rules set out in the Sales of Goods Acts of the Commonwealth Caribbean, may be understood in the same sense, to the extent that they require the suitability of the product for the particular purpose established in the concrete case. Common law systems usually resolve this issue through implied obligations, considering the relevance of the goods to the particular purpose of the contract depending on whether or not the buyer's intentions or declarations have been stated [Section 16 (Ch. 393) of the Sale of Goods Act of Antigua and Barbuda; Section 16 (Ch. 337) of the Sale of Goods Act of Bahamas; Section 15 of the Sale of Goods Act of Barbados; Section 16 (Ch. 261) of the Sale of Goods Act of Belize; Section 15 (Ch. 349) of the Sale of Goods Act of Jamaica; Section 16 (Ch. 15.18) of the Sale of Goods Act of Montserrat; Section 16 (Ch. 82:30) of the Sale of Goods Act of Trinidad and Tobago].

The wording of Article 4.3.3 of the OHADAC Principles obeys, firstly, the systematic internal consistency of the Principles themselves and, moreover, a common denominator among Caribbean legal systems.

Quality may be determined explicitly or inferred from the content of the contract either as a result of express or implied obligations under the contract, or its object and purpose, or the intention of the parties, or the commercial common sense or professional qualifications of the parties. That happens, for example, with the obligations of warranty and security inherent in the exercise of certain activities or in the performance of certain services.

Example: If A concludes with B a contract under which B must transport a shipment of meat, although not expressly stated in the contract, it is implicit that the truck used for transport should have adequate cooling conditions to ensure that the product arrives at its destination in good condition.

It is also considered, as implied obligation, the fitness of the service or goods delivered for the purpose or intended use stated in the contract. This implies that, at least, the performance or supply of the contract must be consistent with the object and the purpose corresponding to the nature of the contract or the use explicitly established between the parties. In this connection, special uses that have been expressly or implicitly made known to the seller at the time of conclusion of the contract must be considered, as set out in Article 35.2 (b) CISG. From this point of view, the criteria used for the construction of the contract (Article 4.2.1), which make it possible to infer the implied contractual obligations are particularly useful for assessing the "reasonableness" of the quality of the performance and expectations considered "reasonable" from that contract.

The rule on the quality of the performance established in this Article 4.3.3 of these Principles must be applied to contracts, including obligations to give or deliver goods, as well as service contracts, characterised by obligations to do. The first case is usually applicable to contracts to deliver goods of indeterminate or generic quality. The second case applies to contracts that create duties of best efforts, which do not include specific instructions for the performance of the obligation or impose specific standards of due diligence on the obligor.

The establishment of average quality or reasonable care is simple when there are rules of minimum quality of the goods of the contract or technical requirements for certain professional branches that bind the obligor as, for example, in the areas of construction or engineering (as expressly provided in Article 2.033 Guatemalan Civil Code). In other cases, it is common to use pre-defined parameters or technical standards of evaluation, which can shape professional practice through protocols of action such as the rules of the *lex artis* in the medical field even if they are not formalised in normative texts. The question to be asked in this case is whether or not the standard set by substantive law is liable to become universal. The answer will depend on each professional sector. It will therefore be advisable to refer to the local or regional standard in cases where the level of care taken by an agent, licensee or distributor for a given area has to be examined [e.g. Section 379 (1) of the Restatement (Second) of Agency]. A different response will be provided to measure medical diligence, the standards of which must be more or less similar, all the while taking into account the technical resources available in each state or region.

In any case, regardless of any industry-specific requirements that may exist, it is essential to measure the average or reasonable quality "given the circumstances", as indicated in Article 4.3.3 of the OHADAC Principles. This means adapting and relaxing

the quality criteria for each contract depending on several parameters. For example, the criteria set out in Article IV.C-2:105 DCFR are useful: the standards of care and skill expected from the service provider include the nature, frequency and foreseeability of risks involved in the performance of the service; the costs of any precautions to prevent damage; whether the service provider is a business; whether the price is payable and, if so, its amount; the time of performance. Meanwhile, the civil codes of the OHADAC countries also use different criteria to measure the care and skill of the obligor, depending on the nature of the obligation (Article 1.425 of the Guatemalan Civil Code; Article 1.362 of the Honduran Civil Code; Article 1.863 of the Nicaraguan Civil Code; Article 1.057 of the Puerto Rican Civil Code), whether or not the obligor's performance is paid for (related to mandate, Article 1.992 Dominican and French Civil Code; Article 1.756 Haitian Civil Code) and on the interest of the contracting parties in the performance of the obligation. Thus, if the performance is only in the interest of the obligee, the fault will be determined as *culpa lata*, while on the other hand if the provision is in interest of the obligor, the fault required will be the minimum (Article 1.604 of the Colombian Civil Code; Article 1.928 of the Dominican Civil Code; Article 1,363 and Article 1363 of the Honduran Civil Code). Such parameters, established for civil contracts, can be applied to business contracts with some adaptations. In this sense, in the commercial sector all contract obligations are usually remunerated and contracts are concluded in the interest of both parties.

Finally, it should be underlined that Article 4.3.3 of the OHADAC Principles only sets out the average or reasonable quality according to which, at least, the obligor must perform its obligations if nothing is written in the contract. This, of course, does not prevent the obligor from providing top quality performance, but this is not required in any case if not stipulated or established in the contract.

Article 4.3.4: Price determination

- 1. Where a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price.**

- 2. The determination of the price shall not be left to the discretion of one of the parties.**
- 3. Where the price is to be fixed by a third person, and that person not do so, in absence of any indication on the contrary on the contract, the price will be determined by reference to the price generally charged in the trade concerned or, if such price is not available, to a reasonable price.**
- 4. When the price is to be fixed by reference to factors which do not exist or have ceased to exist or to be accessible, the nearest equivalent factor shall be treated as a substitute.**

COMMENT

1. Supplementary rule to price determination

Contract practice, especially in business transactions, shows that the price of goods or provision to be enforced is not always initially fixed. Indeed, usual absence of price determination justifies the specific rule in Article 55 CISG, which has been incorporated essentially in the UNIDROIT Principles (section 5.1.7), the DCFR (Article II-9:104) and the PECL (Article 6:104).

The special character of this rule must be emphasized in contrast with consumer contracts, where legal certainty and protection of customers lead to the need to determine the price, either fixed or at least determinable according to factors or references specified in the contract. These reserves are not given, however, in the field of commercial contracts, where not setting an initial price is more frequent.

It is true that in some civil law systems the lack of determination of the price can be considered as an essential gap which invalidates the contract for failure to identify the object, but this rigid principle does not find a significant application in the field of business relations.

Article 4.3.4 of the OHADAC Principles introduces an element of flexibility in relations among traders, establishing subsidiary rules based on general practice and trade usages, in those cases where parties have not fixed prices or established criteria for its determination. This element of flexibility is consistent with the idea of a balanced position of the contracting parties and respects their will, whether they have agreed

on a price or, could have agreed on a price, but have decided not to do so. The most important point here, at least, is the possibility of determining that this is the result of negotiations, that the contract exists per se and has been concluded. In other words, the absence of an agreement on price does not result from the lack of conclusion of the contract. This situation can only be clarified in the light of the specific circumstances and negotiations and the statements of the parties prior to the conclusion of the contract.

Example: Companies A and B start negotiations in order to conclude a contract of sale, the price being one of the controversial elements. If A later sues B for non-delivery of the goods within the stipulated period, B could argue the lack of agreement between the parties. However, if during the negotiations between A and B the price was never negotiated at all and that only the delivery of the goods at the agreed time appeared important during the negotiations, the contract will be considered as concluded even though the price was not fixed. In this case, the price will be determined according to the subsidiary rule.

The establishment of a subsidiary criterion to determine the price can be especially useful when the contracts concerned can be for the delivery of goods or provision of services, where it is common for prices to be fixed not at the beginning, but until or after the performance of delivery or of provision. In this regard, it is significant that many domestic rules consider that the absence of agreement on the price entails the nullity of sale contracts, without prejudice to cases where goods have already been delivered, in which the price will be the prevailing price at the time the contract is concluded (Article 749 of the Panamanian Commercial Code). However, in the case of service contracts, such as mandate or agency, the same legal systems establish subsidiary rules based on trade usage (Article 582 Panamanian Commercial Code). In any case, the advantages in establishing a subsidiary rule on payment of the price, failing the agreement of the parties, is clear in cases where goods are delivered or the service has already been performed, in order to avoid cases of unjust enrichment.

A principle of minimum legal certainty will always be protected due to the fact that the reference price to be considered is the current price at the time of conclusion of the contract, is a criterion shared by contractual harmonisation texts (Section 5.1.7 UP; Article 6:104 PECL; Article II.-9: 104 DCFR).

The subsidiary introduction of the rule of "reasonableness" to those cases where there are not reference prices derived from trade usage is inspired by common law regimes that often set this subsidiary parameter [Section 10 (Ch. 393) of the Sale of Goods Act of Antigua and Barbuda; Section 10 (Ch. 337) of the Sale of Goods Act of The Bahamas;

Section 10 (Ch. 261) of the Sale of Goods Act of Belize; Section 9 (Ch. 349) of the Sale of Goods Act of Jamaica; Section 10 (Ch. 15:18) of the Sale of Goods Act of Montserrat; Section 10 (Ch. 82:30) of the Sale of Goods Act of Trinidad and Tobago]. It is true that this introduces a significant element of flexibility unusual in principle to the laws based on the civil law model, but this approach does not breach any fundamental principle of these systems and it is fully compatible with the general principle of preservation of contracts.

2. Prohibition of unilateral price determination

Paragraph 2 of Article 4.3.4 is a specific provision of the OHADAC Principles and obeys the most common rule in Caribbean civil codes, which prohibits a unilateral determination of the price by one of the contracting parties (Article 1865 of the Colombian Civil Code; Article 1.609 of the Honduran Civil Code; Article 2.254 of the Mexican Civil Code; Article 2.539 of the Nicaraguan Civil Code; Article 1.219 of the Panamanian Civil Code and Article 1.338 of the Puerto Rican Civil Code). Other civil codes refer only to the determination of the price by the parties and third persons, but say nothing about the determination by one of the contracting parties, while it is not expressly prohibited (Articles 1.056 and 1.057 of the Costa Rican Civil Code; Article 1.591 of the Dominican and French Civil Code; Article 1.796 of the Guatemalan Civil Code; Article 1.376 of the Haitian Civil Code; Article 1.479 of the Venezuelan Civil Code). The same applies in the regulations of the Sales of Goods Acts of the Caribbean Commonwealth.

Rules in UP (Section 2, Article 5.1.7), DCFR (Article II-9:105) and PECL (Article 6:105), however, provide the possibility of fixing the price unilaterally by one of the parties, especially in cases of service contracts where the price is not initially determined. It is also common there a provision establishing the replacement with a reasonable price of the price unilaterally fixed by one contracting party if it is manifestly disproportionate.

Under OHADAC, the incorporation of a provision of this kind would be a substantial modification of domestic laws, the relevance of which should be tested. This does not imply any gap, given that the general criteria of the applicable subsidiary rule under paragraph 1 of this Article shall be applied.

3. Determination of the price by a third person

Apart from the prohibition of unilateral determination of the price by one of the contracting parties, paragraph 3 of Article 4.3.4 OHADAC Principles admits the possibility of fixing the price by a third person, which may be of particular interest in certain areas such as the trade of artwork or jewellery. This system is clearly permitted

in some European laws (Article 1.592 French Civil Code; Section 9.1 of the English Sale of Goods Act 1979). Also in the field of OHADAC territories, domestic rules usually set default rules for cases in which a third person has been appointed to determine the price and failed to do so, either through inability or unwillingness. On this point, there may be different solutions in the provisions of civil and commercial codes. Where the civil codes hold that there is no sale (Article 1.057 of the Costa Rican Civil Code; Article 1.592 of the Dominican and French Civil Code; Article 1.796 of the Guatemalan Civil Code, except only if the goods have been delivered; Article 2.253 of the Mexican Civil Code, Article 2.537 of the Nicaraguan Civil Code; Article 1.217 of the Panamanian Civil Code; Article 1.338 of the Puerto Rican Civil Code; Article 1.479 of the Venezuelan Civil Code), the solution in the field of commercial codes is usually more flexible, admitting the possibility of new appointments or even the intervention of the judicial authority to appoint an expert. In some cases, the price is fixed directly (Article 750 of the Panamanian Commercial Code); in other cases, the parties or a judge are enable to appoint a substitute (Article 134 of the Venezuela Commercial Code). In these cases of failed price determination by a third person, the solution in common law tends to the nullity of the contract [Section 11 (Ch. 393) of the Sale of Goods Act of Antigua and Barbuda; Section 11 (Ch. 337) of the Sale of Goods Act of The Bahamas; Section 11 (Ch. 261) of the Sale of Goods Act of Belize; Section 10 (Ch. 349) of the Sale of Goods Act of Jamaica; Section 11 (Ch. 15.18) of the Sale of Goods Act of Montserrat; Section 11 (Ch. 82:30) of the Sale of Goods Act of Trinidad and Tobago].

In texts of contractual harmonisation, there are slight variations in the determination of subsidiary prices can be found: while in the UNIDROIT Principles (5.1.7.3) the lack of the determination of the price by the third person implies directly the determination of a "reasonable" price, DCFR (Article II-9:106) and PECL (6:106), as long as this does not contradict the contract, enables judges to appoint another third person. It is only when the third person fixes a clearly unreasonable price, that the price is replaced with a reasonable one. This provision aims at leaving the parties with as much free will as possible (for a third party to set the price) and, at the same time, ensures the effectiveness of contractual terms, having recourse only as a last resort to the criterion of a "reasonable price".

Paragraph 3 of Article 4.3.4 of the OHADAC Principles states an intermediate rule between the different models offered by international texts, which is halfway between the different options that Caribbean domestic laws provide. If the third party does not set the price, the subsidiary general rule of paragraph 1 of this provision is applicable. This entails considering directly the average price in the sector and, failing that, a

reasonable price. As already mentioned, the determination of a reasonable price, as the last subsidiary criterion, can be incorporated into Caribbean commercial law. The proposed rule aims to be simple, in accordance with the general principle of preservation of contracts (to avoid, *ab initio*, the nullity of contract if the price is not determined), respects the free will of the parties and is fully consistent with paragraph 1 of Article 4.3.4. In this sense, if the appointed third person does not set the price (for whatever reason, whether by inability or unwillingness) and, in the absence of criteria specified in the contract on new appointments or submission to courts, it will proceed directly to set the price according to general rules.

Article 4.3.4 of the OHADAC Principles tries to establish a more flexible system than that derived from PECL and DCFR rules and thus to avoid delays caused by the need for a new appointment of a third person before having recourse to the criterion of a reasonable price. This rule is also different from the UNIDROIT Principles, insofar as the criterion of a reasonable price is not directly applicable, given that it plays a residual role only where it is not possible to determine the price according to the general criteria of the trade concerned. There is no reason to take into account different subsidiary criteria depending on whether the price must be determined by the parties or by third persons.

At any event, it is important to take the free will of parties into account, insofar as the determination of the price by a third person may have been decisive for the conclusion of the contract. The absence of the determination of the price can be interpreted as a reason for nullity of the contract, if it is derived from the statements of the parties or the interpretation of the contract.

4. Determination of the price by index of reference

Finally, it is common in some specific sectors to set the price using specific indices or reference factors, which, may, be altered or cease to exist. These indices are relevant in construction contracts (related to prices of materials) or in supply contracts (e.g., reference prices for energy), the long term nature of which, together with effects of inflation, justify the inclusion of references to external factors. These indices are also usual for the calculation of interest on loan agreements. In these cases, it seems appropriate, and consistent with the principle of contract preservation, to replace the factor that ceases to exist with the nearest factor. This appears reflected in the UP (paragraph 4 of Article 5.1.7), in the PECL (Article 6:107) and in the DCFR (Article II-9:107), which adds a limit, when the price is unreasonable, by allowing for the possibility of replacement with a reasonable price (II-9:107 DCFR). Paragraph 4 of Article 4.3.4 of the OHADAC Principles does not provide, in this case, for the

substitution with a reasonable price if a close index of reference is not found. In such a case, general rules on price determination in paragraph 1 of this Article shall be applied.

Article 4.3.5: *Conditional obligation*

The obligation that depends on the occurrence of a future and uncertain event is conditional.

COMMENT

1. Treatment of conditions

The inclusion of conditions in contracts is a common practice and raises many questions regarding the effectiveness of the duties committed, the legal position during which the condition exists and the consequences of its non-fulfilment on the effectiveness of the reciprocal obligations. Such clauses are widely known in commercial practice and are treated meticulously and at length in Caribbean civil law systems. Although common law systems also have conditions, within the meaning of this article, they need be specified and differentiated from other meanings that the same term has in such systems. Specifically, conditions in the sense of this Section must be distinguished from conditions as opposed to warranties. These are both terms of the contract able to define the content of the obligations assumed, but generating different consequences depending on the breach of one or the other. International texts on contract law harmonisation are paying increasing attention to conditions in the contractual regime, as shown in its treatment in the UP version of 2010 (Article 5.3.1), the detailed regulation given in the amended version of the PECL proposed by the Association Henri Capitant (Article 8:101 PECL) and the attention paid thereto in the DCFR (Article III -1:106).

Rules in the OHADAC Principles about conditions refer to conditions freely agreed between the parties to the contract, and leave out those from other sources. The model established by the PECL in the proposal revised by the Association Henri Capitant [Article 8:101 (2)] includes, under the same treatment, conditions of legal or judicial origin. Similarly, Section 226 of the Restatement (Second) of Contracts also explicitly refers to conditions included by the judge. For the purposes of the OHADAC Principles, only "contractual" conditions, i.e. those freely assumed by the parties and

incorporated into the contract to determine the degree of involvement and the extent of the respective obligations will be considered.

Example 1: Companies A (seller) and B (buyer) sign a contract for the sale of some goods that require an export licence. If no specific clause is included in the contract, the seller has an absolute obligation (to achieve a result), so that if the delivery of goods is not performed, not having obtained the export licence (legal status for such sale), the seller is presumed to have failed to perform its obligation. However, if the contract includes a clause that says "delivery of goods will take place when the export licence is obtained", this implies a legal condition incorporated by reference. This "contractualisation" of the condition clarifies the obligations of A, so that if the goods are not delivered because of the failure to obtain the licence, this does not automatically entail a breach of contract.

The definition of condition included in the Principles reflects a common denominator, accepted by the laws of Caribbean countries, referred to as an event or circumstance to be uncertain as to its occurrence and not only as to the time of its fulfilment. Here lies the difference between condition and "term", to which an obligation must also be subject.

Besides the uncertain character of the event considered as a condition, this event must be a prospective event. This is assumed in most Caribbean civil law systems (Article 1.530 of the Colombian Civil Code; Article 53.1 of the Cuban Civil Code; Article 958 of the Haitian Civil Code; Article 1.938 of the Mexican Civil Code; Article 1.878 of the Nicaraguan Civil Code; Article 1.010 of the Saint Lucian Civil Code; Article 1,191 of the Venezuelan Civil Code) and unanimously required in international texts on contract law harmonisation, considering conditions as uncertain future events or circumstances). There are a few exceptions where some legal systems, notably French law (Article 1.181 of the Civil Code), include past events unknown by the parties in the conditions. In this sense, past events not known by the parties are included in the Dominican Civil Code (Article 1.181), Honduran Civil Code (Article 1.375), Panamanian Civil Code (Article 998) and Puerto Rican Civil Code (Article 1.066).

The OHADAC Principles are based on the generally accepted rule and, as such, reference to past events as condition is excluded. In addition, choosing to include only future events promotes legal certainty and transparency in contracts, without resorting to cognitive referents that require additional evidence to determine the content and enforceability of the performance committed in the contract.

Example 2: Sales contracts to test are a common case of contracts subject to condition. Company A sells machinery to company B, the contract establishing a trial period of one month in order to test the quality of the product and its suitability for the purpose intended (resolutive condition). If after one month it is found that the machinery does not conform to that expected by the buyer, the contract is rescinded.

Example 3: Company A signs a contract of sale of goods with Company B, agreeing that delivery will occur when the price has reached a given reference price in the market (suspensive condition). Until this price is reached, the contract will not be effective.

It is entirely irrelevant for these purposes whether the fact that involves the condition is a legal act, a natural phenomenon or an activity depending on a third person. It is also irrelevant that the event is composed of an event that must occur (the product reaches a certain price on the market) or must not occur (the product does not reach a given price on the market).

There are several criteria for making classifications per type of condition, as can be seen in the civil codes of the OHADAC territories. For example, there can be references to positive or negative conditions, depending on whether or not they are conditional upon the occurrence of an event. There are also causal conditions (which depend on a third party or an event), optional (depending on the will of a contracting party) and mixed conditions (which depend at the same time on the will of one party and on the will of a third party or an event). No general classification of conditions is envisaged in the OHADAC Principles, because it would be purely descriptive and could cause unnecessary interpretative problems. Because of its direct consequences on the contract regime, the distinction between suspensive and resolutive conditions is the only significant classification that deserves a specific treatment in the Principles. The regulation of optional, impossible and illegal conditions is also important, insofar as they determine an invalid conditional obligation.

2. Delimitation from other contractual clauses

The common characteristics shared by the concept of condition allow a consensus view on the classification and delimitation of clauses of the contract which, behind which the formal appearance of conditions, conceals veritable contractual obligations.

Obligations that depend on the occurrence of a future event that is certain to happen, are not considered as conditions. Such circumstances include obligations subject to a term (uncertain term), which deserve a specific treatment.

Example 1: A signs a lease of commercial premises to B, establishing in the contract that it will end when B dies. The death of B is a certain event but uncertain in time.

Obligations assumed by the parties according to the scope of bilateral contracts which are interlinked and mutually contingent (e.g. the obligation to deliver the goods as a precondition for the obligation to pay the price), must not be considered as conditions. However, many Caribbean civil codes consider these obligations as resolute conditions "in the event that one party fails to fulfil its obligation" and they systematically include such regulation in the section on conditions (Article 1.546 of the Colombian Civil Code; Article 1.184 of the Dominican and French Civil Code; Article 1.386 of the Honduran Civil Code). However, apart from terminological issues, the functioning and the consequences derived from these articles is not that corresponding to the resolute conditions, but to the breach of contract regime, giving the obligee an option to enforce the specific performance of the defaulted obligation or to terminate the contract and be compensated for damage (sections 1 and 3 of chapter 7 of the Principles). For this reason, the OHADAC Principles exclude such a provision, as it can be understood that rules including bilateral commitments actually constitute a contractual obligation, not an uncertain event.

Example 2: Company A signs a contract of sale of goods with company B, setting as essential term a delivery date of the goods (1 March) and providing payment after that time. If A does not deliver the goods on the agreed date, B may terminate the contract for fundamental breach under Article 7.3.1 (1) OHADAC Principles and it is discharged from the payment of the price. In this case, the delivery of goods is a part of the obligations of A and it should not be regarded as a condition.

The definition of circumstances that constitute conditions also make it possible to correctly distinguish conditions from other obligations that can be included in generic references under contractual type-clauses (closing dates). These provisions establish the need for the parties to have fulfilled a number of "conditions" on a date specified in the contract and, among them, there are actual conditions in the sense described herein, together with other circumstances that constitute veritable obligations assumed by the parties.

Example 3: In a contract, it is provided that the buyer's obligation to purchase goods on 1 June will be subject to fulfilment on that day of the following "conditions": i) that on that date the goods have reached a certain price (clause incorporating a true condition, due to its uncertain nature); ii) that the seller had previously paid the taxes due (contractual obligation and not an uncertain event).

Article 4.3.6: *Void conditional obligations*

Conditional obligations are void when:

- a) the fulfilment of the condition depends on the sole will of the obligor; or**
- b) the obligation depends on impossible conditions or conditions contrary to law or good customs.**

COMMENT

1. Optional conditions for the obligor

A different position is evident in the laws of the OHADAC territories in relation with the so-called facultative conditions in cases where the fulfilment of the condition depends solely on the will of the obligor. Apart from the silence of the Cuban Civil Code, the common position of the rest of the civil codes in this area is to establish that obligations that are dependent on such a condition are void, since they show a lack of commitment by the obligor and therefore the absence of a real contractual will. This is explicitly stated in the Henri Capitant revision of the PECL (Article 8:103) and in the comments on the UP and the DCFR.

This regulation has the aim of achieving a balanced protection of the parties, insofar as nullity is not provided for any facultative condition (i.e. dependent on the will of the parties), but only for those depending on the obligor's will. In addition, the nullity of such conditions and of obligations concerned takes place when its fulfilment exclusively depends on the will of the obligor, regardless of other factors. This distinguishes optional conditions from other cases where there is a significant dependence of the fulfilment of the condition on the obligor's conduct, this being influenced by circumstances beyond its control.

Example: Company A (purchaser) signs a contract for sale of goods with Company B (distributor), conditional on the fact that B wanted to acquire the goods from Company C (manufacturer), this purchase being absolutely discretionary for the distributor. In this case, there would be an optional condition for the obligor (company B) which voids the contract between A and B. A different issue is that the condition of purchase of goods depends, for example, on the fact that the price of the goods does not reach a certain price; in this case, this factor being external to the will of B, the obligation is valid.

2. Impossible or illegal conditions

The establishment of a specific rule on impossible or unlawful conditions is relevant to the extent that it provides a specific consequence of the obligation on which it depends, in particular, its invalidity. Most European and Caribbean law systems contain similar provisions. The differences in the regulations lie, in these cases, in the extent of such invalidity. Most systems establish that illegal or impossible conditions remove the obligation concerned, and the invalidity will affect the rest of the contract only if that condition was decisive to sign the contract. However, other laws, such as the French Civil Code, directly determine the nullity of the entire contract when there are such conditions. However, the Proposals for Reform of the French law on obligations of 2013 (Article 154) provides the nullity of the conditional obligation, more in accordance with preservation of contracts.

The civil codes of OHADAC territories, with the exception of the Cuban Civil Code, regulate in great detail, impossible and illegal conditions, going as far laying down specific rules depending on whether they concern suspensive or resolute conditions (Articles 679 and 680 of the Costa Rican Civil Code, Articles 1.200 and 1.201 of the Venezuelan Civil Code) or depending on whether they are positive or negative conditions (sections 1.532 and 1.533 of the Colombian Civil Code; Articles 1.172 and 1.173 of the Dominican and French Civil Code; Article 1.378 of the Honduran Civil Code; Article 1.943 of the Mexican Civil Code; Article 1.201 of the Venezuelan Civil Code; Article 678 of the Costa Rican Civil Code; Article 1.001 of the Panamanian Civil Code). The main difference between these provisions is observed in relation to the effect of such conditions. Sometimes the condition is removed and considered as not included, so that the concerned obligation becomes a simple one: as a general solution it is found in Article 1.271 of the Guatemalan Civil Code; Article 1.880 of the Nicaraguan Civil Code; regarding only negative impossible conditions: Article 1.533 of the Colombian Civil Code; Article 1.172 of the Dominican and French Civil Code; Article 963 of the Haitian Civil Code; Article 1.378 of the Honduran Civil Code; Article 1.943 of the Mexican Civil Code; Article 1.001 of the Panamanian Civil Code; Article 1.069 of the Puerto Rican Civil Code; Article 1.201 of the Venezuelan Civil Code). For all other cases, i.e. impossible positive conditions or unlawful conditions, the solution in these civil codes is the invalidity of the conditional obligation. The invalidity, as a sanction for any impossible or unlawful condition is the solution provided in Article 1.011 of the Saint Lucian Civil Code.

Among the international texts on contract law harmonisation, only the PECL revised by the Association Henri Capitant expressly provide for these conditions, while the UP and the DCFR do not consider them. Article 8:102 PECL of the Association Henri Capitant

proposal establishes the ineffectiveness of a condition related to an impossible or illegal event, which implies the ineffectiveness of the contract on which it depends if the condition has been decisive to achieve the agreement of a party, unless otherwise provided by law.

The OHADAC Principles establish a unitary rule that comprises all cases of impossible and illegal conditions whether related to suspensive or resolutive conditions and whether related to conditions to do or not do something. It tries to avoid any kind of effect derived from an event that cannot take place (if it is impossible) or should not take place (if it is illegal). The impact of the condition on the obligation will be determined by the dynamics of the condition.

Example 1: Company A concludes a contract with Company B for the maintenance of computer equipment that includes the condition that B will upgrade all applications and computer programs that may appear in the future, without having to pay the price of the licences to their holders. Such a condition is unlawful to the extent that it violates intellectual property rights protected by law.

Example 2: In a carriage contract concluded between A and B, there is the condition that B will perform the transport only if there is no possibility of rough weather in transit. Such a condition is impossible to the extent that the weather forecast will never establish with certainty that point.

This Article includes a provision about impossible conditions. Unlike illegal conditions, this explicit reference is controversial and could be considered as superfluous to the extent that an impossible condition shall not be, in most cases, uncertain; i.e. generally the non-fulfilment of impossible conditions is certain and, therefore, they do not have the attributes of a condition. These characteristics can perfectly justify that the inclusion of "conditions" of this type is simply irrelevant and therefore they will have no impact on the future of the contract or on the conduct of the parties. However, the consequences of impossible conditions on the dependent obligation are important, and therefore they deserve special attention: if the consequence is that the condition is considered as removed, the obligation becomes a simple one and, therefore, it shall be fully effective; if the consequence is that the obligation is deemed void, this will not have effect. Obviously, each criterion radically changes the perspective respect to the obligor, in particular, when they are included as suspensive conditions: if a voiding effect occurs, the obligor is discharged; if it is removed, the obligor must fulfil the obligation undertaken regardless of the condition.

The OHADAC Principles opt for the invalidity of the obligation on which the impossible condition depends because this will more adequately ensure the protection of the will of the parties and, in particular, the will of the obligee in the case of suspensive conditions.

Example 3: In the case of example 2, it is clear that A has concluded the transport contract with B to ensure that it will have effect. To be consistent, it would not have signed the contract if had known beforehand that the condition on which the service depends was impossible to fulfil.

In a case where the parties are duly informed and have given such consent without defects (mistake, duress, etc.), it is clear that the inclusion of an impossible condition would be superfluous and it simply would have no effect or could not be understood as a determining factor in obtaining the consent of a party; therefore, there is no obstacle in finding that the condition has not been set. But the question is different if the parties, or one of them, did not know of the impossibility of the condition. In this case, considering this as a simple obligation distorts the will of the parties. Thus, it would be more consistent to consider that the obligation depending on the impossible condition as void. This would create fewer difficulties regarding the validation of the scope of contractual consent given.

The invalidity of the obligation depending on an unlawful condition, also provided in this article of the OHADAC Principles, is a consequence of the need to adapt the contract to the legal requirements set by the governing law or by a mandatory law that would be applicable within the meaning of Article 3.3.1 of these Principles. The illegal nature of the event specified as uncertain should not influence the performance of the obligations of the parties. Therefore, in this case it is reasonable that the illegality of the condition entails the invalidity of the dependent obligation. The OHADAC Principles includes as a cause of illegality not only the violation of legal rules but also public decency, following the line in the OHADAC civil codes. Obviously, this inclusion is broader than the mere reference to the laws and it is particularly relevant in the field of trade contracts, where the OHADAC Principles are destined to develop its full effect, and it allows, in fact, taking contravention of the customs and business practices as a parameter.

With respect to the scope of nullity, the OHADAC Principles establish the invalidity of conditional obligations, but not of the whole contract. This follows the trend set in Caribbean civil codes. This is a direct consequence of the principle of preservation of contract, so that the nullity will affect the entire contract only if the obligation is essential, in which case it shall be subject to the general rules on nullity.

Furthermore, the nullity will be automatic, without providing any modulation depending on whether that condition was decisive or not to obtain the consent to the contract. This avoids serious disadvantages about the proof related to the scope of the consent. It is not, however, a unanimously shared solution; in fact, in the OHADAC region, Article 1.200 of the Venezuelan Civil Code provides that an unlawful resolutive condition "voids the obligation for which it has been the decisive cause". The same idea is found in Article 8:102 PECL proposed by the Association Henri Capitant, clearly inspired by the principle of preservation of contracts.

The wording of this Article tries to avoid a differentiated casuistry depending on whether suspensive or resolutive conditions are concerned. In general, the relation of dependence will be recommended for suspensive conditions, given that the obligations subject to resolutive conditions do not depend on these conditions to exist, but precisely stop being effective. The dependent nature of the obligation on the stipulated condition could serve additionally to infer the nullity of the obligation to the extent that this dependence really shows that it has been essential to the obligation and not merely accessory.

Article 4.3.7: Effects of conditions

- 1. A condition is suspensive when the existence of the obligation depends on its fulfilment.**
- 2. A condition is resolutive when its fulfilment implies that the effects of the dependent obligation come to an end.**
- 3. Pending fulfilment of a suspensive condition, the following rules shall be observed:**
 - a) If the object of the contract is entirely destroyed, without the fault of the obligor, the obligation lapses. If the object is entirely destroyed due to the fault of the obligor, he is bound to compensate the damage.**
 - b) If the object of the contract is damaged, without the fault of the obligor, he will perform the obligation delivering it to the obligee in its current state. If the object is damaged due to the fault of the obligor, the obligee has the choice of terminating the obligation**

or its performance, with compensation for damage in both cases.

c) The obligee may perform all acts that tend to retain his right.

4. When the condition is fulfilled, the effects of the conditional obligation operate retroactively at the time it was taken, unless the effects of the obligation should be referred to a different date by the will of the parties or the nature of the act.

COMMENT

1. Models of retroactivity or non-retroactivity of the conditions

The distinction between suspensive and resolute conditions is well-known in comparative law both as to its classification and as to its definition, depending on whether the event determines the start of contract effect (suspensive condition) or the end of this effect (resolute condition). In Europe these conditions are found in many civil codes, such as the Spanish (Article 1.113), Dutch (Article 6:22) and French (Article 1.181 et seq.). These two notions are essentially equivalent to conditions precedent and conditions subsequent, characteristic in common law. The UP, the PECL revised by the Association Henri Capitant and the DCFR also recognise this distinction.

Most Caribbean civil codes also make that distinction, such as the Colombian (Article 1.536), Cuban (Article 53), Dominican and French (Article 1.168), Mexican (Articles 1.939 and 1.940), Nicaraguan (Article 1878), Panamanian (Article 998), Saint Lucian (sections 1.018 and 1.019) and Venezuelan (Article 1198). It is not mentioned in the Guatemalan Civil Code and not expressly cited in the Honduran, although it can be inferred from the wording of Article 376 Civil Code, as well as from Article 1.066 Puerto Rican (Article 1.066 Civil Code); this distinction is also implied in Panamanian and Costa Rican civil codes.

The discrepancies between legal systems on this respect deal with the determination of retroactive or non-retroactive effect of these conditions, which is crucial with respect to the scope of obligations.

A retroactive model assumes that once the event envisaged occurs as a suspensive condition, the contract is deemed to have been effective as from the time it is concluded. If, on the contrary, the resolute condition occurs, the contract is

considered as without effect *ab initio* and the parties must make restitution of what they have received.

For non-retroactive models, the effectiveness of the obligation that depends on the condition is suspended until its fulfilment (in the case of suspensive conditions) or will remain intact until its fulfilment (in the case of resolutive conditions). Obligations actually performed are not affected.

The choice of either one of these two models is a crucial point of divergence within European laws. The French (Article 1.179 Civil Code) and Dutch (Article 6:24 Civil Code) civil codes are examples of retroactive conditions. However, the Proposals for Reform of the French law on obligations of 2013 provide for a dual system: the retroactivity of suspensive conditions and the non-retroactivity of resolutive conditions (Articles 160-161).

For its part, the international texts on contract law harmonisation are based on non-retroactivity as a general rule. This can be seen in Articles 8:301 and 8:302 of the revised PECL, which provides that the obligation takes effect only from the date of the suspensive conditional event and it continues to have effect until the resolutive conditional event, unless the parties have agreed otherwise. A similar rule is found in Article 5.3.2 UP and paragraphs (2) and (3) of Article III-1:106 DCFR.

Most Caribbean legal systems support the retroactivity principle for both suspensive and resolutive conditions: among others the Honduran Civil Code (Articles 1.382 and 1.385), Mexican Civil Code (Article 1941), Nicaraguan Civil Code (Article 1.883 and 1.890), Panamanian Civil Code (Article 1.005), Puerto Rican Civil Code (Article 1.073), Saint Lucian Civil Code (Article 1.016) and Venezuelan Civil Code (Articles 1.204 and 1.209). As far as resolutive conditions are concerned, retroactivity is established in Article 1.544 of the Colombian Civil Code, Article 690 of the Costa Rican Civil Code, and Article 1.183 of the Dominican and French Civil Code. Article 53.2 and 4 of the Cuban Civil Code differs and includes a clear system of non-retroactivity of conditions. Although without a specific mention, Article 1.270 Guatemalan Civil Code can be interpreted in the same sense when it states that "conditional contract takes effect from the fulfilment of the condition, unless otherwise specified", but it allows the obligee, before the fulfilment of the condition, to bring actions for the preservation of its right (Article 1.276). Meanwhile, common law leaves wide latitude for recognition of the autonomy of the parties, such that they can determine and adapt the effect derived from the fulfilment of the conditions.

However, the respective exceptions in both models mitigate theoretical differences between them. Thus, Article 8:205 of the PECL revised by the Association Henri Capitant entitles the conditional obligee to preserve its rights, particularly against fraudulent acts. The same flexibility of non-retroactivity is observed in Article 8:206 of the Henri Capitant revised PECL, which allows the conditional obligee to transfer its rights pending the fulfilment of the condition. In the same vein, Article 53.2 of the Cuban Civil Code establishes the obligation and the responsibility for acts that would defeat or damage the right of the conditional obligee.

Given that contractual conditions depend on parties' will, the OHADAC Principles, following the rule of minimal interference, merely provide for aspects that strictly require a legal treatment, the remaining issues are governed by the contract regime. In this context, it is relevant to determine and define which conditions are suspensive and which are resolutive, the effects they have on the obligations, the essential rules while the condition is pending and the transmission of risks. Particularly, the decision on retroactivity/non-retroactivity of the condition determines when the conditional obligee has acquired the right (in case of suspensive conditions) and the scope of the obligations of restitution (in case of resolutive conditions). However, it seems unnecessary to decide in the Principles on issues such as whether a right of a conditional obligee is transmissible, even if this question appears in many Caribbean civil codes (Article 1.549 of the Colombian Civil Code; Article 684 of the Costa Rican Civil Code; Article 1.890 of the Nicaraguan Civil Code; Article 1.016 of the Saint Lucian Civil Code), given that once the ownership of the credit is determined, general rules on transfer of credits will be applied.

2. Retroactive effect of suspensive conditions

The OHADAC Principles are based on the retroactivity of suspensive conditions, since this is the solution widely followed by the various domestic laws. With respect to suspensive conditions, retroactivity implies the entitlement and the allocation regime of rights and duties during, the condition pending: which party bears the risk of loss or deterioration of the object related to the condition; which party benefits from the interests and fruits; and which party has the obligation to preserve the good. These are questions deserving further regulation in the OHADAC Principles.

Example: In a retroactive model comprising a suspensive condition such as the following: "the art dealer M acquires the picture that from P, if P obtains the export licence", once the condition has been fulfilled (obtaining the export licence), the dealer is supposed to acquire the property of the picture from the time of conclusion of the contract, which therefore implies: 1) the ineffectiveness of subsequent disposals by P,

except those adopted to protect bona fide third parties; 2) possibility by M to carry out an appraisal of the picture; 3) should M die before P has obtained the licence, once this is obtained, M's heirs become the owners of the picture; 4) all acts of disposal performed by the conditional obligee (M) to third parties while the condition is pending (for example, a picture resale to a third party) are valid.

In a system of retroactivity, the allocation of the entitlement to the obligee occurs, once the condition is fulfilled, as from the date of conclusion of the contract. There may be problems as to the effectiveness of the sales and acts of disposal by the obligor made while the condition is pending. To this end, some Caribbean civil codes (e.g. Colombian and Nicaraguan) introduce specific rules on the impact of the condition in such acts of disposal, distinguishing between the alienation of movable and immovable property, with the underlying idea of the protection of bona fide third party purchasers. However, the OHADAC Principles do not include rules on this issue, so that the impact of the conditions on acts of disposal would be subject to rules about cooperation and fair dealing between the parties in relation with conditional contracts. There are two reasons for the legislative silence on this point. Firstly, the solution given by the Caribbean civil codes is not common and most of them do not resolve this issue. Secondly, the effect of the fulfilment of the condition in ownership transfer contracts goes beyond purely contractual matters and affects the legal regime of rights *in rem* and the rights of third-party purchasers. These issues clearly exceed the intended scope of application of these Principles.

The allocation of risks of damage or loss of the property covered by the obligation shows closer links with contractual conditions. In the field of European law, in case of loss, the rule tends to the extinction of the obligation, if there is no fault of the obligor (Article 1.122 of the Spanish Civil Code; Article 1.182 of the French and Dominican Civil Code). It seems clear that the risks of loss are borne by the obligee. In case of damage without fault of the obligor, there are discrepancies between the Spanish (the rule is that if there is no fault of the obligor, the obligee takes the risks) and the French model (the obligee has the right to terminate the contract or to receive the goods without price reduction), which in practice is equivalent here to an exception to retroactivity. These rules are essentially in line with Article 8:305 of the PECL revised by Association Henri Capitant, although this instrument is based on the general rule of non-retroactivity. Certainly, if the first case is a model of pure retroactivity, since the risks of damage are borne by the obligee who has to accept the thing in its current state, the second case is a model of moderate retroactivity, because the obligee can rescind the contract and the risks of deterioration of the thing are borne by the obligor, who is

not released from the delivery of the goods and will not receive the consideration stated in the contract. This second option is followed in French law (Article 1.182 Civil Code).

Both regulatory models are also adopted by the OHADAC countries. Most Caribbean systems opt for a pure retroactivity, attributing risks of deterioration to the obligee, which is forced to take the thing in its actual condition without a price reduction (Article 1.543 of the Colombian Civil Code; Article 1.384 of the Honduran Civil Code; Article 1.948.III of the Mexican Civil Code; Article 1.882.3 of the Nicaraguan Civil Code; Article 1.075.3 of the Puerto Rican Civil Code). On the contrary, Dominican and Costa Rican civil codes (Articles 686 and 1.182, respectively) also give the obligee the option to rescind the contract.

The general rule in the OHADAC Principles states the allocation of risks to the obligee, in accordance with the general principle of retroactivity of suspensive conditions. This is widely accepted in domestic laws and it is applied in any case in the absence of agreement by the parties, which may recognise, for example, the right of the obligee to rescind the contract. The model of retroactivity has the advantage of not requiring further legal safeguards on the duty of care that the conditional obligor must adopt on the property affected by the condition, insofar as the system of transfer of risk itself determines the legal responsibility of the obligor as to its duty of preservation of the thing. For this reason, systems that follow the retroactivity principle must provide specific measures to ensure the right on the conditional credit. Pending the condition, the parties assume a duty of care in order not to frustrate contractual obligations. From that perspective, the retroactive nature of the suspensive condition allows and gives to the obligee a better protection of its rights, since it may seek the appropriate responsibilities from the obligor in case of loss or damage to its right through the fault of the obligor.

3. Retroactivity of resolutive conditions

The retroactive effect of the resolutive conditions basically involves the restitution of what has been provided from the time of conclusion of the contract, in contrast with a model of pure retroactivity, which only affects the benefits undertaken after the fulfilment of the condition, the earlier being unchanged.

The system of non-retroactivity of the international texts of contract law harmonisation, as a general rule, is moderated precisely in respect of resolutive conditions because they set rules on restitution of provisions. In this context, Article 5.3.2 UP provides a dual system, depending on whether or not the parties have agreed

to the retroactivity of the condition: if retroactivity is agreed, then the rules applicable on restitution in case of contractual nullity will be applied; in the absence of agreement, the "non-retroactivity" of the condition simply means that general rules on restitution in case of contract termination will be applied. Article III.-1: 106 (5) of the DCFR also requires the restitution of benefits obtained, applying by the way of reference to Article III-3:510 the rules on contract termination for causes other than breach of contract.

In Caribbean legal systems, the general rule is the retroactivity of the resolutive conditions, according to which there is an obligation of restitution of what has been received under such condition, either because this is the general solution applicable to any condition or because it is specifically stated for resolutive conditions (Article 690 of the Costa Rican Civil Code; Article 1 of the Colombian Civil Code; Article 1.183 of the Dominican and French Civil Code). The retroactive effect of resolutive conditions is also recognised in common law. By contrast, a system of pure retroactivity is found in Cuban law, which states that "the effects produced until then do not lose their effectiveness" (Article 53.2 of the Civil Code).

The OHADAC Principles have opted for the model of retroactivity, according to the dominant approach in comparative law, imposing the obligation of restitution of the property, but with some qualifications. The rule is based on the wording of Article 1.941 of the Mexican Civil Code. Although the proposed rule opts for the first system, it should not be considered as an intolerable interference in Caribbean legal systems, including the Cuban Civil Code. The OHADAC Principles do not envisage a pure system of retroactivity of resolutive condition, insofar as this is subject to the will of the parties and the nature of the obligation.

The parties may agree on specific provisions on the restitution of property. Furthermore, the scope and consequences of the rescission of the contract, even due to the fulfilment of a condition, must be submitted to the rules on restitution applicable according to the nature of the obligation concerned. In this context, problems may arise in relation to the restitution of certain related to obligations to act or not to act. In these cases, some legal systems enable judges to determine, in each case, the retroactive effect of the condition fulfilled (Article 1.385 of the Honduran Civil Code; Article 1.008 of the Panamanian Civil Code; Article 1.076 of the Puerto Rican Civil Code). It is also important to identify whether the obligation in question is of instantaneous or successive performance. In the latter case, it will be more difficult for this to concern obligations that have already been fulfilled. The severable or indivisible character of the conditional obligation also affects the restitution: If severable, the

strict retroactivity on partial fulfilments may be limited on the ground of the principles of preservation of contract; if not severable, termination will reasonably affect the whole obligation.

Example 1: Companies A and B have concluded a supply contract which is paid monthly and subject to the condition that energy does not reach a specified maximum price; once the condition is fulfilled (i.e., reached the maximum price fixed by the parties), the contract will be terminated but it does not affect energy actually provided.

Example 2: Manufacturer A and supplier B have concluded a contract of sale of goods to be delivered and paid in batches. In this case as well, once the condition is fulfilled, the termination will only affect deliveries and payments not yet performed.

Article 4.3.8: *Interference in conditions by a party*

- 1. Prior to fulfilment of a condition, a party cannot, without legitimate interest, behave so as to prejudice the rights of the other party if the condition is fulfilled.**
- 2. If fulfilment of a condition is prevented by a party, without legitimate interest, this party may not rely on the non-fulfilment of the condition.**
- 3. If fulfilment of a condition is brought about by a party, without legitimate interest, this party may not rely on the fulfilment of the condition.**

COMMENT

1. The principle of cooperation in conditional contracts

Another relevant aspect related to conditions deals with obligations of the conduct of parties when suspensive or resolutive conditions are pending. Such obligations derive from general principles of cooperation and good faith. Such principles are considered here in a positive and a negative way: Firstly, they impose obligations of conduct in favour of contract efficiency. Secondly, they state a prohibition of interference by the parties pending the fulfilment of the condition.

The positive aspect of the principle of cooperation and fair dealing between the contracting parties results in the obligation assumed by each party to facilitate the

fulfilment of the condition (in the case of a suspensive condition) or to avoid its fulfilment (in the case of a resolutive condition); the starting point is the common interest of the parties to maintain their contractual relationship and to develop its effects. This duty of cooperation is clearly defined in Articles 8:202 and 8:203 of the PECL revised by Association Henri Capitant. In any case, the definition of which party must succeed (or prevent) the fulfilment of the condition (e.g., obtaining a loan) will depend on the terms of the contract. Therefore, the party that will bear the risks inherent to the condition will be determined according to the contract. The contract also shall establish the degree of commitment of the party in order to fulfil the condition: if the commitment is absolute, it assumes the risks of a breach of condition (obligation to achieve a result); if the commitment is to employ best efforts to achieve the result, the risks of the condition are assumed by the other party. It is also possible that the contract includes an express and specific obligation of one party in relation with the breach of the condition, so that the determination of non-performance will depend on the condition rather than on the main obligation.

Example: Company A (seller) has made a commitment to Company B (buyer) to obtain an export licence to deliver goods to B within the agreed time. If A does not obtain the export licence it will be in breach of contract. On the contrary, if A is obliged to make its best efforts ("everything possible") to obtain the licence and A acts with reasonable diligence, there is no breach of contract if the licence is not granted.

2. Prohibition of interference in conditions

The negative side of the general principle of cooperation and fair dealing means, in these cases, the prohibition of interference or intrusion into fulfilment (or failure) of the conditions, so that if one party interferes in the condition it may not invoke the condition in which it has interfered to its benefit, unless it has a legitimate interest. This is clearly stated in Dutch law (Article 6:22 Civil Code). American case law also provides in this sense on the basis of good faith and fair dealing. A similar conclusion is reached in English law on the basis that an interference in conditions implies a breach of an implied obligation (implied term) of the contract. Protection of fair dealing is implied here, so that it deals with cases where the interfering party obtains some advantage from the fulfilment (or failure) of the condition. These cases are similarly dealt with in comparative law and in the international texts: the aforementioned conduct is considered as contrary to a general duty of cooperation.

Example 1: A buys machinery from B. The machinery must be tested by an expert to verify that it is functioning correctly (suspensive condition). B persuades the expert to make a positive assessment of the machinery, thereby avoiding the drafting of a

negative report about the machine. In this case, the condition cannot be considered as fulfilled and therefore B cannot invoke the obligation on A.

Example 2: Insured A burns down its home for insurer B to pay the sum insured. Once demonstrated that the accident has been provoked by A acting in bad faith, B is not obliged to pay the agreed compensation.

Example 3: Interferences in resolute conditions: A rents out equipment to B at a very advantageous price until B acquires its own equipment. After a long period, B has still not bought any equipment despite having received several offers, and it continues to benefit from the advantages offered by A.

Caribbean civil codes only envisage cases of fictitious fulfilment and none of non-fulfilment. This can be seen, among others, in Article 53.3 of the Cuban Civil Code; Article 1.178 of the Dominican and French Civil Code; Article 1.273 of the Guatemalan Civil Code; Article 1.381 of the Honduran Civil Code; Article 1.944 of the Mexican Civil Code; Article 1.889 of the Nicaraguan Civil Code. Once a general duty of cooperation is assumed as a common principle, nothing prevents both sides of non-fulfilment of conditions from being regulated (e.g. Article 5.3.3 UP; Article III-1:106 (4) DCFR; Article 8:203 of the PECL revised by Association Henri Capitant). Therefore, given that the underlying criterion is the same in both cases, the OHADAC Principles contain a generic rule, similar to the provisions in other international texts on contract law harmonisation. This Article covers the fictitious fulfilment (if the party prevents the fulfilment of the suspensive condition) as well as the fictitious non-fulfilment (if the party causes undue fulfilment of the resolute condition).

Different approaches are found in relation with the consequences of this interference. Under the DCFR, the aggrieved party may consider the condition as fulfilled or unfulfilled (Article III-1:106). Under the PECL, the condition is considered fulfilled or breached to the detriment of the interfering party (Article 8:203). Under the UP, the interfering party may not claim the fulfilment or non-fulfilment of the condition (Article 5.3.3).

Differences in relation with bad faith of the interfering party determine the scope of the actions of the party acting in good faith and aggrieved by the fulfilment or non-fulfilment of the condition. The model of fictitious fulfilment (stated in the PECL), apart from obvious practical problems, could not respond to the interests of the contracting party, which intends to rescind the contract instead of fulfilling the condition.

Example 4: In a contract of sale of goods concluded between the seller A and the buyer B, A must obtain an export licence as a condition. However, A does not obtain the

licence because of its absolute lack of diligence. If the licence has not been actually obtained and cannot be obtained it is paradoxical to consider the condition as concluded and then to infer its consequences. In this case, the presumption of a fictional fulfilment of the condition seems absurd and the buyer will be released from its contractual obligations.

To avoid these problems, other regimes are more suitable to the needs of the innocent party, preventing the party acting in bad faith from invoking the condition it has interfered in, and giving only the aggrieved party a discretionary remedy to consider the condition as fulfilled or unfulfilled according to its interests.

In any case, the OHADAC Principles avoid interpretative difficulties in determining good or bad faith of a party by objectifying the effect of interferences. Unless one party interferes in the condition on the basis of a legitimate interest, for example to protect the object of the contract, that interference in the condition that prejudices the position of the other party will have the effect mentioned in the second and third paragraphs of this Article.

Section 4. Plurality of parties

Article 4.4.1: Plurality of obligors

- 1. When several obligors are bound to the same obligee by the same obligation, this obligation is joint and several if each obligor is bound for the whole obligation, so that the obligee may claim performance from any of the obligors and that the fulfilment by one discharges the others.**
- 2. When each obligor is bound only for its share, the obligations are equal unless the circumstances indicate otherwise.**

COMMENT

The same contract can imply obligations for a plurality of parties in the same position and, to be precise, the same concurrent position (contract is jointly concluded) instead of a consecutive position (such as that derived, for example, from assignment of rights or succession). This plurality of parties may be both of obligors (passive) and of

obligees (active). A plurality of obligors and obligees is also possible at the same time. These are frequent hypotheses in international trade law (especially passive severability); that is why a specific regulation which takes into account particularities of each case seems convenient.

In case of plurality of obligors, it is possible that each one is obliged to perform only a part of the obligation, so that the obligee has only the right to claim against each obligor for its part. In such a case, the plural obligation is called "joint", "separate" (Article 11.1.11 UP; Article 10:101 PECL) or "*mancomunada simple*" (in civil codes such as the Guatemalan, Honduran, Mexican, Panamanian and Puerto Rican). If obligees are jointly obliged, they have only the right to claim their parts of the credit and the obligor must perform only its separate part to each one. In both cases, division or fragmentation of the obligation or the rights implies the independent nature of each obligation, so that acts of modification or extinction of obligation are only referred to each obligor or obligee independently and have effect only in relation with each one. Each obligation and each right are different and independent to all intents and purposes. This kind of obligation calls for a non-mandatory regulation [Article 4.4.1 (2)], according to which each joint co-obligor is obliged for an equal share. This rule is found in several civil codes (Article 246.1 of the Cuban Civil Code; Article 1.348 of the Guatemalan Civil Code; Article 6:6.1^o of the Dutch and Suriname Civil Code; Article 1.986 of the Mexican Civil Code; Article 1.929 of the Nicaraguan Civil Code; Article 1.024 of the Panamanian Civil Code; Article 1.091 of the Puerto Rican Civil Code), as well as in Article 10:103 of the PECL.

In commercial contracts, obligations assumed by a plurality of obligors are usually joint and several. In this case, co-obligors are obliged to perform a single obligation, which may be wholly claimed by the obligee from any obligor [Article 4.4.1 (1)]. This is the sense of the severability between obligors widespread in civil codes (Article 637 of the Costa Rican Civil Code; Article 1.568 of the Colombian Civil Code; Article 248 of the Cuban Civil Code; Article 1.200 of the Dominican and French Civil Code; Article 1.352 of the Guatemalan Civil Code; Article 987 of the Haitian Civil Code; Article 1.400 of the Honduran Civil Code; Article 6:6.1^o of the Dutch and Suriname Civil Code; Article 1.987 of the Mexican Civil Code; Article 1.924 of the Nicaraguan Civil Code; Article 1.024 of the Panamanian Civil Code; Article 1.090 of the Puerto Rican Civil Code; Article 1.034 of the Saint-Lucian Civil Code; Article 1.221 of the of the Venezuelan Civil Code; Article 178 Proposals for the Reform of the French law on obligations of 2013), as well as in Article 11.1.1 UP; Article 10:101 (3) PECL; III-4:102 (3) DCFR. In common law systems

and particularly in English law these obligations are called "joint and several", while separate obligations are named simply as "joint" obligations.

If the co-obligor sued by the obligee performs more than its share, it has an action for recovery against the other obligors. Hence regulation of external relationships between co-obligors and obligee is necessary (Articles 4.4.2 to 4.4.7), as well as regulation of internal relationships between co-obligors themselves where one of them has performed wholly or in part (Articles 4.4.8 and 4.4.9).

Article 4.4.2: *Presumption of joint and several obligations*

An obligation on the part of two or more obligors is presumed to be joint and several, unless declared to be otherwise.

COMMENT

The first relevant question consists in determining the kind of plural obligation resulting from the contract where parties have not expressly agreed thereon. In this respect, presumption of severability is the most extended solution in relation with commercial contracts both in domestic laws and in international texts. *Favor debitoris* supports the contrary presumption in most civil codes, but in commercial contracts the presumption of severability prevails by virtue of the *favor creditoris* principle. Indeed, most civil codes and international texts require an express agreement, rule of law or trade usage in order to consider an obligation as joint and several [Article 1568.3 of the Colombian Civil Code; Article 638 of the Costa Rican Civil Code; Article 248.4 of the Cuban Civil Code; Article 1.202 of the Dominican and French Civil Code; Article 1.353 of the Guatemalan Civil Code; Article 989 of the Haitian Civil Code; Article 6:6.1^o of the Dutch and Suriname Civil Code; Article 1.400 of the Honduran Civil Code; Article 1.988 of the Mexican Civil Code; Article 1.924 of the Nicaraguan Civil Code; Article 1.025 of the Panamanian Civil Code; Article 1.090 of the Puerto Rican Civil Code; Article 1.299 of the former Suriname Civil Code; Article 176 of the Proposals for the Reform of the French law of obligations of 2013]. Likewise, under English law, joint and several obligations must be expressly agreed [*Levi v Sale* (1877), 37LT 709; *White v Tyndall* (1888), 13 App. Cas. 263; *The Argo Hellas* (1984), 1 Lloyd's Rep.296]. However, this rule has been extended to commercial contracts in most legal systems, either by case law (by applying a trade practice, as in France and Puerto Rico) or by virtue of a specific rule (Article 825 of the Colombian Commercial Code; Article 432 of the Costa Rican

Commercial Code; Article 674 of the Guatemalan Commercial Code; Article 711 of the Honduran Commercial Code; Article 102 of the Nicaraguan Commercial Code; Article 221 of the Panamanian Commercial Code; Article 1.036 of the Saint-Lucian Civil Code; Article 11.1.2 UP; Article 10:102 PECL; Article III-4:103 (2) DCFR). That is why a set of specific rules on international commercial contracts directly presumes severability in cases of plurality of obligors.

Article 4.4.3: *Variable joint and several obligations*

An obligation may be joint and several between some of the co-obligors, and not between all of them.

COMMENT

A joint and several obligation does not lose its character if obligors are obliged in different manners. Indeed, each obligor could be subject to different delays, conditions or places of payment. In this Article, "variable severability" is envisaged in the sense of many legal texts [Article 1.569 of the Colombian Civil Code; Article 639 of the Costa Rican Civil Code; Article 1.201 of the Dominican and French Civil Code; Article 1.353 of the Guatemalan Civil Code; Article 988 Haitian Civil Code; Article 1.401 Honduran Civil Code; Article 1.925 Nicaraguan Civil Code; Article 1.027 of the Panamanian Civil Code; Article 1.093 of the Puerto Rican Civil Code; Article 1.035 of the Saint-Lucian Civil Code; Article 1.222 of the Venezuelan Civil Code; Article 10:102 (3) of the PECL].

Article 4.4.4: *Rights of the obligee*

The obligee of a joint and several obligation may apply for total or partial performance by any one of the obligors at its choice.

COMMENT

In joint and several obligations any obligor may perform and the obligee cannot refuse it or ask another obligor for performance. In contrast, the obligee has the right to choose the obligor or co-obligors from which it may claim performance, in whole or in part. Certainly, such a *ius electionis* is limited in English law to the possibility of claiming against one particular obligor (chosen by the obligee) or all obligors together,

so that claims against several obligors excluding one or other obligors are not allowed [*Cabell v Vaughan* (1669), 1 Wms. Saund. 291; *Richard v Heather* (1817), KB. & Ald. 29]. However, the most usual solutions do not provide that limit (Article 1.571 of the Colombian Civil Code; Article 640 of the Costa Rican Civil Code; Article 249 of the Cuban Civil Code; Article 1.203 of the Dominican and French Civil Code; Article 1.357.1 of the Guatemalan Civil Code; Article 990 of the Haitian Civil Code; Article 1.403 of the Honduran Civil Code; Article 6:7.1^o of the Dutch and Suriname Civil Code; Article 1.989 of the Mexican Civil Code; Article 1.927 of the Nicaraguan Civil Code; Article 1.031 of the Panamanian Civil Code; Article 1.097 of the Puerto Rican Civil Code; Article 1.038 of the Saint-Lucian Civil Code; Article 178 of the Proposals for the reform of the French law on obligations; Article 11.1.3 UP, and implicitly in the definition of joint and several obligations in PECL and DCFR). In contrast, a sued co-obligor cannot refer the obligee to another obligor or perform only its part.

Article 4.4.5: *Effects of legal proceedings*

- 1. Performance of the obligation by one of the co-obligors does not extinguish a joint and several obligation, only the part that the co-obligor should have fulfilled.**
- 2. Legal proceedings taken against one of the co-obligors suspend limitation periods for the others**

COMMENT

Many legal systems in the OHADAC sphere provide specific rules on the effects of judicial claims. Thus, it is firstly stated that lawsuits of the obligee against one of the obligors does not prevent judicial or non-judicial claims against other co-obligors insofar as the whole obligation is not performed [Article 1.204 of the Dominican and French Civil Code; Article 1.357 of the Guatemalan Civil Code; Article 991 of the Haitian Civil Code; Article 1.404 of the Honduran Civil Code; Article 1.928 of the Nicaraguan Civil Code; Article 1.031 of the Panamanian Civil Code; Article 1.997 of the Puerto Rican Civil Code; Article 1.039 of the Saint-Lucian Civil Code; Article 1.226 Venezuelan Civil Code; *Blyth v Fladgate* (1891), 1 Ch. 337; Article 178 Proposals for the reform of the French law on obligations of 2013].

Secondly, where the limitation period is suspended because the lawsuit against a co-obligor, the Venezuelan solution, according to which causes of suspension of the limitation period against one co-obligor cannot be invoked against other co-obligors, is rather rare (Article 1.228 of the Venezuelan Civil Code). The contrary approach, according to which lawsuit suspends the limitation period also against all other obligors, prevails (Article 2.540 of the Colombian Civil Code; Article 1.206 of the Dominican Civil Code; Articles 1.206 and 2.245 of the French Civil Code; Article 1.361 and 1.362 of the Guatemalan Civil Code; Article 993 of the Haitian Civil Code; Article 2.302 of the Honduran Civil Code; Article 2.001 of the Mexican Civil Code; Article 1.028 of the Panamanian Civil Code; Article 1.094 of the Puerto Rican Civil Code; Article 2.092 of the Saint-Lucian Civil Code; Article 11.1.7 UP).

Article 4.4.6: *Defences*

A joint and several obligor sued by the obligee may plead all the defences which are common to all the co-obligors as well as such as are personal to himself, but it cannot plead such defences which are purely personal to one or several of the other co-obligors.

COMMENT

This Article deals with a general rule that distinguishes defences which a co-obligor can put against a claim for payment or performance. The distinction between common and personal defences is usual in this respect (Article 1.577 of the Colombian Civil Code; Article 1.208 of the Dominican and French Civil Code; Article 1.360 of the Guatemalan Civil Code; Article 6:11 of the Dutch and Suriname Civil Code; Article 1.410 of the Honduran Civil Code; Article 1.995 of the Mexican Civil Code; Article 1.035 of the Panamanian Civil Code; Article 1.101 of the Puerto Rican Civil Code; Article 1.043 of the Saint-Lucian Civil Code; Article 1.224 of the Venezuelan Civil Code; Article 11.1.4 UP; Article 10:111 PECL; Article II-4:112 DCFR; Article 179 Proposals for Reform of the French law on obligations of 2013). However, the scope of defences varies from text to another. The unanimous solution chosen by the sued joint and several obligor is to plead common defences and its own personal defences against the obligee. This rule is also found in English case law: the co-obligor may plead common defences such as payment [*Porter v Harris* (1663), 1 Lev. 63], forgery [*Gardener v Walsh* (1885), 5 E&B. 84], or fraud of the creditor [*Pirie v Richardson* (1927), 1 KB], as well as its own

personal defences, such as minority or insolvency [*Burgess v Merrill* (1812), 4 Taunt. 468; *Gillow v Lillie* (1835), 1 Bing. No C. 695; *Lovell & Christmas v Beauchamp* (1894), AC 607]. As far as personal defences of other co-obligors are concerned, some codes recognise it but only for the share of the obligation corresponding the sued obligor (Article 1.410 of the Honduran Civil Code; Article 1.931 of the Nicaraguan Civil Code; Article 1.035 of the Panamanian Civil Code; Article 1.101 of the Puerto Rican Civil Code). Thus, The OHADAC Principles opt for the solution chosen by the majority, which does not allow the obligor to plead personal defences of the other co-obligors.

Common defences are those relating to the obligation, including those derived from the legal act and those relating to development or vicissitudes of the obligation (e.g. legal prohibition, irregular form, lack or illegality of cause or object); that is why they can be pleaded by any co-obligor. Moreover, invoking this first kind of defences by co-obligor is considered rather a duty than an option, insofar as if the obligor does not invoke the defence when the obligee claims, it will not recover that part performed in excess of its share by virtue of some recovery remedy (Article 4.4.9).

Personal defences are those resulting from the particular manner in which the obligor concerned assumes its obligations, such as incapacity, incapacitation and defects of consent. That is why they can only be pleaded to the obligee by obligors directly involved. Article 4.4.9 shall be applied if these personal defences cannot be invoked against co-obligors in the recovery action.

The following Article determines the scope of means of performance or extinction of obligations in relation with joint and several debts and the other obligors.

Article 4.4.7: *Extinction of the obligation*

- 1. Performance and set-off declared according to section 2 of chapter 6 extinguish the obligation to the amount paid or compensated.**
- 2. The remission of one co-obligor's obligation extinguishes the obligation, unless the obligee expressly indicates that it is only discharging this co-obligor. In this case, it reduces the part and portion belonging to the co-obligor in the remainder of the obligation.**

- 3. The obligee that renounces the joint and several liability with respect to one of the obligors does not imply the loss of the joint and several liability towards the others, but extinguishes the obligation for the obligor's part and portion that is being renounced.**
- 4. The confusion of rights which arises when the qualities of obligor and obligee are united in the same person extinguishes obligation only for the part and portion of the co-obligor in whom the qualities of obligor and obligee are united.**

COMMENT

Extinction of joint and several obligations occurs when total payment is made (or similar forms of performance, such as delivery or cession of goods as payment, tender of payment and deposit) by any obligor. If performance is partial, extinction will also be obviously partial and proportional to the performance. This is a common solution expressly set out in some texts (Article 251.2 of the Cuban Civil Code; Articles 1.358 and 1366 of the Guatemalan Civil Code; Article 6.7.2º of the Dutch and Suriname Civil Code; 1.934 of the Nicaraguan Civil Code; Article 1.032 of the Panamanian Civil Code; Article 1.098 of the Puerto Rican Civil Code; indirectly, Article 1.577.2 of the Colombian Civil Code; Article 11.1.5 UP). The set-off, declared according to Section 2 of Chapter 6 of these Principles, has the same effect as payment, as far as it has been declared and invoked by the obligor who is at the same time the obligee of the joint obligee and will be invoked by it. It extinguishes the obligation of the amount that concerns it, i.e. the full amount or up to the amount set off.

If the obligee releases the debt of all the joint obligors for an amount covering the entire debt, it is clear that this remission leads to the total extinction of the obligation. Likewise, a partial remission of the debt in respect of all co-obligors reduces the common obligation for that portion and releases all obligors from their performance. When the remission is for only one co-obligor, this is more problematic and there are different legal solutions thereon. Some legal systems establish that such a remission does not affect the obligee's rights against the other co-obligors, that is these systems do not consider the "presumption of remission" in relation with other co-obligors [Article 1.366 of the Guatemalan Civil Code; Article 998 of the Haitian Civil Code;

Article 1.408 of the Honduran Civil Code; Article 11.1.6 UP; Article 10:108 (2) PECL; Article 180 Proposals for Reform of the French law on obligations of 2013]. If the obligee does not declare otherwise, the remission is presumed to have discharged only the obligor involved and the other co-obligors for the released portion, as mentioned below. However, the solution favourable to "presumption of remission" which exists in other legal systems seems preferable (Article 1.573 of the Colombian Civil Code; Article 642 Costa Rican Civil Code; Article 1.285.1 Dominican and French Civil Code; Article 1940 Nicaraguan Civil Code), given that it is more adequate to contractual severability. Thus, if the obligee does not want that remission to benefit all obligors, but only one or some of them, it must declare it expressly. This is also the approach of English courts: remission of the debt is presumed to benefit all obligors, but if the remission affects only one obligor and the obligee reserves its rights against the others it is considered that the obligee has established a "covenant not to sue" that only involves the obligor concerned [*Hutton v Wyre* (1885), 6 Taunt. 289; *Kearsley v Cole* (1846), 16 M & W 128, 136]. In any event, as it is usually considered, remission in respect of a obligor implies the extinction of the obligation only for the remitted part (Article 1.575 of the Colombian Civil Code; Article 646 of the Costa Rican Civil Code; Article 1.366 of the Guatemalan Civil Code; Article 997 of the Haitian Civil Code; Article 1.408 of the Honduran Civil Code; Article 1.992 of the Mexican Civil Code; Article 1.932 of the Nicaraguan Civil Code; Article 1.030 of the Panamanian Civil Code; Article 1.032 of the Saint-Lucian Civil Code; Article 11.1.6 UP).

Moreover, the civil codes state expressly and unanimously that the waiver of severability in respect of one obligor does not imply the loss of severability in respect of the other obligors. This is an express and almost unanimous solution in civil codes (Article 1.573 of the Colombian Civil Code; Article 646 of the Costa Rican Civil Code; Article 1.210 of the Dominican and French Civil Code; Article 1.367 of the Guatemalan Civil Code; Article 997 of the Haitian Civil Code; Article 1.406 of the Honduran Civil Code; Article 1.936 of the Nicaraguan Civil Code; Article 1.045 of the Saint-Lucian Civil Code; Article 1.233 of the Venezuelan Civil Code). However, in those cases some legal systems state that the whole obligation remains intact in respect of the other obligors (Article 1.233 Venezuelan Civil Code). Nevertheless, the solution that is most used has been chosen by these Principles. It provides for the extinction (decreasing) of the obligation in the share of the obligor whose severability is renounced (Article 1.573 of the Colombian Civil Code; Article 646 of the Costa Rican Civil Code; Article 1.210 of the Dominican and French Civil Code; Article 997 of Haitian Civil Code; Article 1.406 of the Honduran Civil Code; Article 1.936 of the Nicaraguan Civil Code). The Guatemalan Civil Code could be incorporated into this group, insofar as it provides that liberation of a

joint and several obligor does not alter obligations of the other obligors in relation with "the rest of the obligation" (Article 1.367 of the Guatemalan Civil Code).

Finally, where a co-obligor is at the same time co-obligor and obligee, the obligation extinguishes in the part corresponding to that co-obligor (Article 1.209 of the Dominican and French Civil Code; Article 1.348 of the Guatemalan Civil Code; Article 996 of the Haitian Civil Code; Article 1.951 of the Nicaraguan Civil Code; Article 1.232 of the Venezuelan Civil Code).

Article 4.4.8: Relationship between joint and several obligors

1. Shares of joint and several obligors are equal, unless the circumstances indicate otherwise.

2. Unless otherwise agreed, if one of the co-obligors is found insolvent, the loss occasioned by its insolvency is apportioned among all the others.

COMMENT

The obligation between joint and several co-obligors is not, in principle, joint and several. Co-obligors may agree a joint and several regime of their internal relationships, but such a clause is not usual. In the absence of agreement, the most common provision is the separate character of the debt: each co-obligor is only responsible for its share against the obligor which has performed more than its share. Shares of co-obligors are presumed equal, as stated in many legal texts [Article 1.579 of the Colombian Civil Code; Article 649 of the Costa Rican Civil Code; Article 1.213 of the French and Dominican Civil Code; Article 1.000 of the Haitian Civil Code; Article 1.999 of the Mexican Civil Code; Article 1.949 of the Nicaraguan Civil Code; *Sholefield Goodman & Sons Ltd v Zyngier* (1986), AC 562; Article 11.1.9 UP; Article 10:105 (1) PECL; Article III-4:106 (1) DCFR; Article 181 of the Proposals for the Reform of the French law on obligations of 2013].

At any event, a mutual obligation to cover risks in case of insolvency is provided as a guarantee in order to remedy any unfair situations. This obligation of distribution among co-obligors (including the one who has paid the obligee) of the share of the obligor unable to reimburse its share of the debt, in proportion to the shares of each obligor in the whole obligation, is found in most codes (Article 1.583 of the Colombian Civil Code; Article 1.214 Dominican and French; Article 1.359 of the Guatemalan Civil

Code; Article 1.001 of the Haitian Civil Code; Article 6:13 Dutch and Suriname Civil Code; Article 1.999 of the Mexican Civil Code; Article 1.945 of the Nicaraguan Civil Code; Article 1.032 of the Panamanian Civil Code; Article 1.098 of the Puerto Rican Civil Code; Article 1.049.2 of the Saint-Lucian Civil Code; Article 1.238 of the Venezuelan Civil Code; Article 10:106 PECL; Article 181 of the Proposals for the reform of the French law on obligations of 2013). The same solution is admitted in equity [*Lowe v Dixo* (1885), 16 QBD 455, 458), modifying the traditional rule of common law, according to which the debt was divided among all obligors regardless of their solvency.

Article 4.4.9: Recovery of contribution and subrogation

- 1. A joint and several obligor who has paid more than its share, may recover the excess from the other co-obligors to the extent of each obligor's share.**
- 2. A joint and several obligor who has performed more than its share may also subrogate in the rights of the obligee.**
- 3. A joint and several obligor against whom a claim is made by the obligee may assert all the defences that are common to all the co-obligors and were not invoked by that co-obligor, as well as the defences that are personal to it, but it may not assert defences that are purely personal to one or more of the other co-obligors.**

COMMENT

Once the share of each co-obligor has been determined, if one of them has paid more than its share to the common obligee, it may claim for the excess from the co-obligors by means of a recovery action usually expressly provided in domestic legal systems. All domestic national systems exclude the joint and several nature of the obligations between the co-obligor who has made the payment and the other co-obligors: the claim for recovery only affects the other co-obligors to the extent of their own share [Article 1.575 of the Colombian Civil Code; Article 651 of the Costa Rican Civil Code; Article 251.3 of the Cuban Civil Code; Article 1.214 of the Dominican and French Civil

Code; Article 1358 of the Guatemalan Civil Code; Article 1.001 of the Haitian Civil Code; Article 6:10 of the Dutch and Suriname Civil Code (Article 6:12.1^o of the Netherland Antilles and Aruba Civil Code); Article 1.999 of the Mexican Civil Code; Article 1.947 of the Nicaraguan Civil Code; Article 1.032 of the Panamanian Civil Code; Article 1.098 of the Puerto Rican Civil Code; Article 1.048 of the Saint-Lucian Civil Code; Article 1238 of the Venezuelan Civil Code; *Davitt v Titcumb* (1989), 3 All ER 417, 422; Article 11.1.10 UP; Article 10:106 PECL; Article III-4:107 (2) DCFR; Article 181 of the Proposals for the reform of the French law of obligations of 2013]. Apart from that, that claim against other co-obligors also includes expenses caused by payment to the obligee. This is a common rule, although it is only expressly envisaged in some legal texts [Article 651 of the Costa Rican Civil Code; Article 1.358 of the Guatemalan Civil Code; Article 1.032 of the Panamanian Civil Code; Article 1.098 of the Puerto Rican Civil Code; 10:106 (3) PECL; Article III-4:107 (3) DCFR]. Obviously, the right to recover is not absolute: when the obligation has been assumed in the interest of only one or several obligors, responsibility of other co-obligors is usually excluded (e.g. Article 2.000 of the Mexican Civil Code).

Besides the right to recover, a co-obligor which has performed more than its share has the possibility of subrogation to the rights of the obligee (Article 1.579 of the Colombian Civil Code; Article 1.251.3 of the French and Dominican Civil Code; Article 1.412 of the Honduran Civil Code; Article 1.999 of the Mexican Civil Code; Article 10:106 (2) PECL; Article III-4:107 (2) of the DCFR). This clarification is important, insofar as it is an additional remedy which, to some extent, helps to mitigate the strictness of the joint and several obligation of co-obligors. As mentioned above, when a co-obligor is sued by the obligee to perform the whole obligation or more than its share there is no possible opposition on the ground of the plurality of obligors. The concerned co-obligor may recover the exceeding part performed through the recovery action and the subrogation action as well. In this last case, unlike what occurs in the recovery action, the time of the obligation is the original one. At any event, the subrogation is not absolute, insofar as the co-obligor which has performed may act against each co-obligor only for its share of the debt (Article 1.049 of the Saint-Lucian Civil Code).

All co-obligors are obliged in respect of all other co-obligor to oppose all common defences against the obligee's claim. As mentioned above, invocation of common defences is necessary when the obligee sues one co-obligor for payment, so that if the co-obligor does not invoke such defences at that moment it will not recover in a recovery action the exceeding amount paid. Other co-obligors may oppose those common defences against the co-obligor which has performed more than its share

(Article 1.208 of the Dominican and French Civil Code; Article 1.360 of the Guatemalan Civil Code; Article 11.1.12 UP). Only good faith consideration might attenuate that consequence: if the sued co-obligor notifies the obligee's claim to the other co-obligors and these co-obligors do not warn it about the existence of a common defence, they will not have the right to invoke that defence in their internal relationships, unless the co-obligor which has performed knew of the existence of such a defence.

Personal defences of one co-obligor claimed for recovery by the obligor that has performed may not be invoked against the obligee, but may be invoked in this way.

Article 4.4.10: Joint and several obligees

If several obligees have a joint and several claim against a single obligor, they can individually claim the fulfilment of the whole obligation from the obligor, so that the fulfilment of the obligation to any obligee releases the obligor.

COMMENT

Where plurality of parties comes from the obligees, that is, when there are several obligees against a common obligor, the obligee usually has a separate or joint character: each obligee may only claim its share in the rights against the obligor. Joint and several claims or “active” severability is rather rare, because the obligor has no significant advantages and obligees may be severely disadvantaged. Each one of the joint and several obligees may claim from the obligor the whole performance of the obligation and the performance made releases the obligor. Thus it is envisaged in different legal texts [Article 1.568 of the Colombian Civil Code; Article 248.2 of the Cuban Civil Code; Article 1.197 of the Dominican and French Civil Code; Article 1.352 of the Guatemalan Civil Code; Article 985 of the Haitian Civil Code; Article 6:16 of the Dutch and Suriname Civil Code (Article 6:15 of the Netherlands Antilles and Aruba Civil Code); Article 1.400 of the Honduran Civil Code; Article 1.987 of the Mexican Civil Code; Article 1.924 of the Nicaraguan Civil Code; Article 1.024 of the Panamanian Civil Code; Article 1.090 of the Puerto Rican Civil Code; Article 1.221 of the Venezuelan Civil Code; Article 11.2.1 UP; Article 10:201 (1) PECL; Article III-4:202 (1) DCFR; Article 248 of the Proposals for Reform of French law on obligations of 2013].

As mentioned earlier, severability of obligees is not common. Indeed, express agreements thereon are only frequent in some bank contracts, such as deposits and

current accounts of indistinct holders. Indistinct holders of a current account or deposit (the co-obligees) expect that the bank (the obligor) obeys the requirements of any one of them, regardless of the ownership of the funds. They shall resolve this issue among themselves according to their internal relations. Thus, risks assumed by joint and several co-owners are self-evident: any of them may claim for refund of all existing funds or even to overdraw if this has been agreed with the bank, which is obliged to honour this request.

The definition of the joint and several claim indicates one of its fundamental effects: allowing co-obligees to claim the whole performance from the common obligor, who may not argue that the co-obligee does not represent all the obligees. Without denying the possibility that the obligor can extinguish the obligation of its own initiative (Article 4.2.14), what is fundamentally important here is to determine the rights of co-obligees against the common obligor. Although the current bank accounts of indistinct co-holders are the most usual hypotheses in this respect, it must be stressed that there is no permanent obligation which the obligor wishes to extinguish or the obligee wishes to liquidate; that is why the *ius electionis* of the debt has not too much sense. However, joint and several credit agreements are also available in other kinds of contracts (joint-ventures, insurance, etc.); then, the proposed rule is not exclusively designed for bank current accounts of indistinct holders.

The second effect implied in the definition refers to the extinction of the obligation where the obligor performs the whole obligation in respect of one of the joint and several obligees. Given that this effect is described in the first rule on joint and several claims, a special rule such as included in Article 1.990 of the Mexican Civil Code or in Article 11.2.2 UP does not seem necessary.

Article 4.4.11: *Non presumption of joint and several rights or claims*

There is no joint and several claims or obligees unless it is expressly agreed between the obligor and the obligees.

COMMENT

Insofar as joint and several credits are only conceivable on the basis of a close relationship of trust among co-obligees, it is advisable to require a contractual source of this relationship. The joint and several nature of claims (unlike that of obligations, as explained above) cannot be presumed. “Active” joint and several rights require, then,

an express agreement between the obligees and the obligor, as expressly stated in most legal texts [Article 1.568 of the Colombian Civil Code; Article 248.4 of the Cuban Civil Code; Article 1.197 of the Dominican and French Civil Code; Article 1.353 of the Guatemalan Civil Code; Article 985 of the Haitian Civil Code; Article 6:16 of the Dutch and Suriname Civil Code (Article 6:15 Civil Code of the Netherland Antilles and Aruba); Article 1.400.3 of the Honduran Civil Code; Article 1.988 of the Mexican Civil Code; Article 1.924.2 of the Nicaraguan Civil Code; Article 1.024 of the Panamanian Civil Code; Article 1.090 of the Puerto Rican Civil Code; Article 1.223 of the Venezuelan Civil Code; *Thompson v Hakewill* (1865), 19 CNBS, 713, 726; Article III-4:203 (2) DCFR]. Although this rule is not expressly set out in the PECL, it can be inferred from commentaries thereon, which state that active joint and several claims may not be presumed. Even more radical approaches forbidding this kind of plurality of parties can be found: Article 636 of the Costa Rican Civil Code provides that joint and several claims are not possible and treat them through rules on agency.

Article 4.4.12: *Variable joint and several claims*

A right or claim may be joint and several only between some of the obligees, and not between all of them.

COMMENT

Like variable “passive” severability, “active” severability also admits the possibility of agreeing to different conditions, periods or methods for claiming the performance by the obligor by each co-obligee. Indeed, this is usual in bank contracts of current account of indistinct holders. This is expressly stated in Article 1.353 of the Guatemalan Civil Code, Article 1.925 of the Nicaraguan Civil Code, Article 1.027 of the Panamanian Civil Code and Article 1.093 of the Puerto Rican Civil Code.

Article 4.4.13: *Rights of the obligor*

The obligor has the option of performing or paying to any of the joint and several obligees.

COMMENT

The various civil codes usually recognise *ius electionis* in cases of “active” severability. The obligor may choose the co-obligee to which the obligation will be paid or performed (Article 1.570 of the Colombian Civil Code; Article 251.1 of the Cuban Civil Code; Article 1.198 of the Dominican and French Civil Code; Article 1.355 of the Guatemalan Civil Code; Article 985 of the Haitian Civil Code; Article 1.402 of the Honduran Civil Code, Article 1.926 of the Nicaraguan Civil Code; Article 1.029 of the Panamanian Civil Code; Article 1.095 of the Puerto Rican Civil Code; Article 1.241 of the Venezuelan Civil Code; Article 248 of the Proposals for Reform of the French law on obligations of 2013). The rule is limited by another rule according to which that choice is excluded when the obligor is sued by a particular co-obligee; in this case, the obligor must perform or pay to the claimant obligee. This rule is not provided in the UP, but is implied in Article 10:201 of the PECL.

Article 4.4.14: *Defences and extinction of the obligation*

- 1. Where an obligor is sued by any of the joint and several obligees, it may assert all the defences that are common to the obligees as well as defences that are personal to its relationship with the obligee, but it may not assert defences that are purely personal to its relationship with one or more of the other co-obligees.**
- 2. Performance as well as set-off declared according to section 2 of chapter 6 extinguishes the claim to the amount paid or compensated.**
- 3. The remission of debt and the confusion of rights which arises when the qualities of obligor and obligee are united in the same person extinguish the claim only for the part and portion of the remitting obligee or the person in whom the qualities of obligor and obligee are united.**

COMMENT

As in “passive” severability, it seems convenient to provide a rule establishing the defences that the obligor sued by any joint and several co-obligee may put forward

(Article 11.2.3 UP). It is stated that the obligor may assert all common defences and all personal defences against the claimant co-obligee, but not its personal defences against other co-obligees. On the different defences, see the comments to Article 4.4.6.

Set-off, as in cases of joint and several obligors, once legally declared, is equivalent to performance (Article 1.570 of the Colombian Civil Code; Article 1.402 of the Honduran Civil Code; Article 1.926 of the Nicaraguan Civil Code; Article 1.991 of the Mexican Civil Code; Article 1.030 of the Panamanian Civil Code; Article 1.096 of the Puerto Rican Civil Code). As far as debts concerned by set-off and claims as well as effects of set-off is concerned, Section 2 of Chapter 6 of these Principles shall be applied. Consequently, if the performance or set-off is in full, the claim is extinguished. If they are partial, extinction will be to the extent of the performance or settlement. This is the most adopted solution, although some legal systems prefer to restrict the extinction to the share of the compensating obligee (Article 1.244 of the Venezuelan Civil Code). It is also the rule in the UP, given the reference made in Article 11.2.3 (2) to the corresponding rule on passive severability.

Although the remission of the credit follows the same treatment as payment and set-off in many civil codes (Article 1.570 of the Colombian Civil Code; Article 1.402 of the Honduran Civil Code; Article 1.926 of the Nicaraguan Civil Code; Article 1.990 of the Mexican Civil Code; Article 1.030 of the Panamanian Civil Code; Article 1.096 of the Puerto Rican Civil Code), an alternative approach seems more appropriate in this case. Remission only extinguishes the debt in the part of the obligee concerned, as it is provided in Article 986.2 of the Haitian Civil Code, Article 1.198 of the Dominican and French Civil Code, Article 1.366 of the Guatemalan Civil Code; in Article 1.244 of the Venezuelan Civil Code; and in Article 10:205 (1) PECL. UP follows the opposite approach: remission of the obligation by a joint and several obligee affects the rest of co-obligees according to Article 11.1.6; although this would be a good solution in cases of bank accounts or deposits of indistinct holders, it seems illogical because co-obligees are not affected by a remission that only affects the part of the obligee who carries out the remission.

Article 4.4.15: *Allocation between joint and several obligees*

- 1. Joint and several obligees are entitled to equal shares,
unless declared otherwise.**

2. An obligee who has received more than its share must transfer the excess to the other obligees to the extent of their share in the right.

COMMENT

Where the proportion of each obligee in the debt is not expressly determined, the debt is considered as divided in equal shares. This rule is expressly provided in some legal texts [Article 1.030 of the Panamanian Civil Code; Article 1.096 of the Puerto Rican Civil Code; Article 10:204 (1) PECL].

The share of each co-obligee, once it has been determined (according to their internal relationships or the preceding rule), must protect the obligee that has not obtained its share in the right claimed against the obligor by another obligee. In other words, the obligee which has obtained the performance beyond its share of the credit must reimburse the other obligees in proportion to their shares [Article 250 of the Cuban Civil Code; Article 1.992 of the Mexican Civil Code; Article 11.2.4 (2) UP; Article 10:204 (2) PECL; Article III-4:206 (2) DCFR].

JOINT AND SEVERAL CLAUSES

Passive severability (of obligors)

"The obligation of the obligors is joint and several. All the obligors ((tenants, lessees, co-contracting parties, etc.) are equally obliged to perform the whole obligation, and the obligee (landlord, lessor, owner, contracting party, etc.) may claim against anyone of them until the obligation is totally extinguished".

Active severability (of obligees)

"The claim is joint and several. Any obligee may claim the entire payment (performance) from the obligor, and the obligor may pay (perform) the entire debt (obligation) to any obligee".

CHAPTER 5

EFFECTS OF THE CONTRACT

Section 1. Term of the contract

Article 5.1.1: Contracts for an indefinite period

- 1. Each party may end a contract involving continuous or periodic performance of obligations unilaterally, at any time and without invoking any cause, by giving a reasonable period of notice.**
- 2. Whenever the reasonable period of notice is observed, the party who decides to end the contractual relationship must only compensate the other party for the reasonable expenses that it has already made towards the performance of the contract.**

COMMENT

Legal systems render the obligations null and void *sine die*. Historically, civil codes tended to include a provision related to the leasing of services, in which lifelong procurement is prohibited, some of which still exist (Article 1.780 French and Dominican Civil Code; Article 1.550 Haitian Civil Code; Article 1.754 Honduran Civil Code; Article 2.995 Nicaraguan Civil Code; Article 1.335 Panamanian Civil Code; Article 1.569 Saint Lucian Civil Code).

However, it is generally admitted that the parties enter into a contract in which no expiry date has been agreed, and this does not result from its nature or circumstances either, or in which it is expressly established that the contract will remain in effect for an indefinite period. The validity of these contracts is generally dependent, both in the civil law or continental as well as in the common law systems, on the parties being able to be released by unilateral will (with or without a period of notice). Thus, for example, the French Civil Code expressly establishes in its Article 1.780 that one person may engage his services only for a definite period; consequently, the leasing of services without any determination of duration will always be able to end through the will of

any of the contracting parties. And we find a similar provision in Article 1.755 Honduran Civil Code.

This power of unilateral withdrawal from the contract is an exception to the principles of enforceability and irrevocability of contracts (Article 1.2 OHADAC Principles and its commentary), for contracts concluded for an indefinite period.

The legal systems of the OHADAC territory, without containing a general rule on the withdrawal from contracts outside the sphere of consumer law, if they govern this for certain contracts that are made to last, such as, for example, construction contracts (Article 1.794 French and Dominican Civil Codes; Article 2.011 Guatemalan Civil Code; Article 7:764 Dutch and Suriname Civil Codes; Article 1.346 Panamanian Civil Code; Article 1.639 Venezuelan Civil Code); the company (Article 1.246 Costa Rican Civil Code; Article 1.865 Dominican Civil Code; Articles 1.844.7º French Civil Code; Article 1.634 Haitian Civil Code; Article 1.879 Honduran Civil Code; Article 2.720 Mexican Civil Code; Article 3.285 Nicaraguan Civil Code; Article 1.391 Panamanian Civil Code; 1.591 Puerto Rican Civil Code; 1.673 Venezuelan Civil Code); agency contracts (Article 2.189 Colombian Civil Code; Article 1.278 Costa Rican Civil Code; Article 409 Cuban Civil Code; Article 2.003 French and Dominican Civil Codes; Article 1.717 Guatemalan Civil Code; Article 1.767 Haitian Civil Code; Article 1.911 Honduran Civil Code; Article 2.595 Mexican Civil Code; Article 3.345 Nicaraguan Civil Code; Article 1.423 Panamanian Civil Code; Article 1.623 Puerto Rican Civil Code; Article 1.655 Saint Lucian Civil Code; Article 1.704 Venezuelan Civil Code); the service contract in general (Article 7:408 Dutch and Suriname Civil Code); and commercial commissions or mandates (Article 1.279 Colombian Commercial Code; Article 197 Puerto Rican Commercial Code).

The codes of the Caribbean countries of the civil law or continental tradition also tend to provide that if no particular expiry date of a contract concluded for an indefinite period has been agreed, the parties may end it through a notice of termination, by giving a sufficient period of notice. Thus, they provide, for contracts for the lease of goods, Articles 1.151 Costa Rican Civil Code, 7:228.2º Dutch and Suriname Civil Code, 1.717 Honduran Civil Code, 2.478 Mexican Civil Code, 1.322 Panamanian Civil Code, 1.560 Saint Lucian Civil Code and Article 1.615 Venezuelan Civil Code; for commercial supply contracts, Articles 977 Colombian Commercial Code and 802 Honduran Commercial Code; for commercial hosting Articles 1.197.2º Colombian Commercial Code and 871 Guatemalan Commercial Code; and for agency contracts Article 7:437 Dutch and Suriname Civil Code.

In the same manner, Anglo-American law permits the release in contracts for an indefinite period (provision of consultancy, supply, licensing services ...), granting the

parties the power to terminate the contract unilaterally, without the need to cite any reason and without the need to give a period of notice either if this has not been agreed [*Baird Textile Holdings Ltd v Mark & Spencer* (2001), EWCA Civ 274; *Crediton Gas Co v Crediton Urban Council* (1928), Ch. 147 44; *Jani King (GB) Ltd v Pula Enterprises Ltd* (2007), EWHC 2433 QB (2008); *Servicepower Asia Pacific Pty Ltd v Service-power Business Solutions Ltd* (2009) EWHC 179 (2010); sections 3:06 (5) and 3:10 *Restatement (Third) of Agency*; section 118 *Restatement (Second) of Agency*]. However, English case law has determined that unless the agreement contains a clause in which the parties are expressly granted the power of withdrawal, this will not in all cases be present in the contract as an implied term, unless the “presumption of perpetual duration” can be applied in the contracts in which there is no determination of the contract’s duration [*Llanelly Ry & Dock Co v L & NW Ry* (1875), LR 7 HL 550].

Articles 5.1.8 UP, 6:109 PECL and III-1:109 (2) DCFR provide for the power of withdrawal in contracts concluded for an indefinite period, always with the obligation to give a reasonable period of notice.

Accordingly, the notice of termination or withdrawal is regulated as the most usual form of termination of contracts for an indefinite period, without the need to cite any reason and give a reasonable period of notice, for the purpose of avoiding the disadvantages resulting from the exercise of the power, in paragraph 1 of the proposed rule in these OHADAC Principles. The withdrawal by giving a reasonable period of notice aims to balance the interests of both contracting parties: the interest of the party that wishes to be released from the contract as well as that of the contracting party that prefers its continuation, due to having made investments with a view to its performance, which will only be profitable for it if the contract lasts for a determined period of time, or due to it being difficult for it to conclude a similar alternative contract with another party immediately.

The proposed rule aims to “fill a gap” in connection with the common law legal systems which, excluding agency contracts, do not contain a provision that imposes the period of notice, nor can they infer this as an implicit term of the contract [*Baird Textile Holdings Ltd v Mark & Spencer* (2001), EWCA Civ 274].

The reasonable nature of the period of notice will depend on numerous factors, including the nature and purpose of the contract, the time that it has lasted, the reasonable investments that have been made, the economic situation and any other circumstances existing at the time of the exercise of the withdrawal, etc. However, the variety of the situations that may exist make it advisable in some contracts for the

parties to establish the period through a contractual clause, in order to avoid problems of interpretation.

Example 1: The financier A hires the legal services of the professional law firm B for an indefinite period. Either of the parties can withdraw unilaterally from the contract by giving notification to the other party a reasonable period beforehand.

The period of notice has a legal nature as an obligation, whose non-performance gives rise to compensation. In effect, as stated in paragraph 2 of the proposed rule, the party that withdraws from the contract in compliance with of the period of notice granted will only have to compensate the reasonable expenses that the other contracting party has incurred for the purpose of the performance of contract, and which they were not able to avoid despite the period of notice (normally due to being prior investments).

However, the party that does not comply with the period of notice disregards the interests of the counterparty, and is obliged to pay damages for non-performance of contract, in accordance with the provisions of Section 4 of Chapter 7 of these Principles.

Example 2: In the facts of example 1, if the constructor decides to terminate the contract with the professional law firm B, without communicating this to it by giving sufficient notice beforehand, it must pay damages not only for the reasonable investments that B has made with a view to the performance, but also for the resulting loss of profits, for example, resulting from the rejection of other clients, and other expenses resulting from the non-performance for which damages would be payable in accordance with these Principles.

Finally, unilateral withdrawal, as the ordinary manner of terminating a contract concluded for an indefinite period, should not be confused with the case of hardship provided in Article 6.3.1 of these Principles. In the case of hardship, unforeseen circumstances determine that the performance becomes excessively disproportionate for one of the parties, which will be able to terminate the contract without the need to observe a period of notice (or renegotiate this if this has been agreed). However, the rule of this provision does not require a change of circumstances, since this is a withdrawal *ad nutum* whose only requirements are the existence of a contract for an indefinite period and the observance of a period of notice.

CLAUSES ESTABLISHING A PERIOD OF NOTICE

As has been noted, sometimes it is appropriate to include in the contract a clause in which the parties determine the adequate period of notice, which prevents the contracting parties from compensating the damages related to the confidence in the performance of the contract.

Option A: Clause with a period of notice in contracts for a definite period

“The parties may terminate this contract, by unilaterally withdrawing from the same and without the need to invoke any reason, by giving a written period of notice with a duration of (...)”.

Clause B: Clause with a period of notice in contracts for an indefinite period

“At any time during the contract period, the parties are empowered to withdraw unilaterally from the same, without the need to invoke any reason, by giving a written period of notice equivalent to one month per year of the contract period, with a maximum period of six months”.

Article 5.1.2: Contracts for a definite period

- 1. Where, in a contract involving continuous or periodic performance of obligations, the parties have determined the period of duration, the contract terminates at its expiry.**
- 2. However, if one party has given notice to the other expressing its intention to renew the contract, the party who does not wish to renew must notify the other of its decision within a reasonable time before the expiry of the contract.**
- 3. Where a contract involving continuous or periodic performance of obligations for a definite period continues to be performed after that period has expired, it becomes a contract for an indefinite period.**

COMMENT

This provision is applied to contracts involving continuous performance whose contract period has been determined by the parties and it is provided that, at the end of the said period, the contract will be extinguished.

The general rule in the systems of the OHADAC territory is extinction through compliance with the agreed term in the long-term contracts (for the lease of goods, this is provided in Articles 2.008 Colombian Civil Code, 1.737 French and Dominican Civil Codes, 1.928 Guatemalan Civil Code, 1.508 Haitian Civil Code, 7:228.1 Dutch and Suriname Civil Codes, 1.716 Honduran Civil Code, 2.483 Mexican Civil Code, 1.455 Puerto Rican Civil Code, 1.561 Saint Lucian Civil Code and 1.599 Venezuelan Civil Code; for partnership agreements, this is included in Articles 1.237 Costa Rican Civil Code, 1.865 Dominican Civil Code, 1.844.7 French Civil Code, 1.634 Haitian Civil Code, 1.879 Honduran Civil Code, 2.685 and 2.720 Mexican Civil Code, 1.391 Panamanian Civil Code, 1.591 Puerto Rican Civil Code and 1.673 Venezuelan Civil Code; for commissions, in Articles 2.189 Colombian Civil Code, 1.278 Costa Rican Civil Code, 2.003 French and Dominican Civil Codes, 1.717 Guatemalan Civil Code, 1.767 Haitian Civil Code, 2.595 Mexican Civil Code, 1.423 Panamanian Civil Code, 1.623 Puerto Rican Civil Code and 1.704 Venezuelan Civil Code; for commercial hosting, Articles 1.197 Colombian Commercial Code and 871 Guatemalan Commercial Code).

However, some codes provide for contracts of lease that if, at the contract period, the hirer remains in possession of the goods with the approval of the hire company, the contract is understood to be renewed and is converted into a contract for an indefinite period, and the rules governing these will henceforth be applied to them (Article 1.738 French and Dominican Civil Code; Articles 1.507 Haitian Civil Code; Article 7:230 Dutch and Suriname Civil Code). And they also regulate the tacit renewal upon the expiry of the period established for the lease, the Articles 392.1 of the Cuban Civil Code, 1.888 Guatemalan Civil Code, 1.456 Puerto Rican Civil Code 1.600 and 1.614 Venezuelan Civil Code.

Likewise, in common law, the continuation of the execution of contract at the end of the agreed contract period, involves its renewal, and it can be terminated through withdrawal by one of the parties, even though nothing has been agreed [*Winter Garden Theatre (London) Ltd v Millenium Productions Ltd* (1948), AC 173].

Despite this preference for tacit renewal in the civil law or continental legal systems, in paragraph 2 of the proposed provision it has been decided not to have the automatic

renewal of the contract. On the contrary, the regulations formulated rely on the will of the contracting parties, by establishing the possibility that one of them demonstrates to the other its intent to continue the contractual relationship, and if the latter does not wish to do this, they must notify this within a reasonable period before the expiry of the contract.

Example 1: A agrees to distribute B's products in the country X for five years. Six months before the expiry of the contract, A notifies to B its intention to renew the distribution contract, which B is opposed to, hence communicating this to A within 15 days of having received that notification.

If the decision against the renewal of the contract is not communicated to it within a reasonable period, the contracting party that has demonstrated its interest in the continuation may rely on it.

Example 2: In the facts of example 1, once four months have passed from the date of the notification, without having received notification from B objecting to the renewal, A will be able to rely on the contract being renewed and will organise its future performance for that purpose.

The projected solution is based on the greatest possible respect for the free will of the contracting parties, instead of forcing the application of some rigid legal standards, which only make sense if there is a weak party to be protected. This system of renewal is the same one which is also stated in Article 1:301 (2) of the European Principles on Commercial Agency, Franchise and Distribution Contracts.

Once the contracting party has received from the other party the notification of its wish to renew the contract, the consideration of the reasonableness of the period for communicating the decision not to renew the contract will depend, among other things, on the time of the receipt of the notification, the nature and purpose of the contract, and the foreseeable expenses in preparation of the performance, etc. It does not appear admissible that the party that wishes to renew the contract unilaterally establishes in the notification that, if it does not receive a response in a fixed-term period, it will understand that the contract has been renewed. This would imply leaving the contract to the discretion of one of the parties. Both contracting parties can of course agree on the periods for notifying the decision to continue the contract and its response in a contractual clause.

The communication of the decision not to continue the contract within an unreasonable period after having received the notification of renewal will make the contracting party liable for the damage that might have caused to the other

contracting party through the confidence in the renewal of the contract (expenses in preparation of the performance, loss of profits...).

Example 3: In the facts of example 1 and 2, if, fifteen days before the expiry of the distribution contract, B communicates to A its decision not to renew the contract, B will be liable for the damage that the untimely notification might have caused to A.

However, if they wish, the parties can include an automatic renewal clause in their contract.

Finally, it is provided in paragraph 3 of the proposed rule that the contract will not be renewed for a period equal to an initial contract period, but it is converted into contract for an indefinite period [Articles 1:301 (3) European Principles on Commercial Agency, Franchise and Distribution Contracts and Article III.-1:111 DCFR], and consequently Article 5.1.1 of these OHADAC Principles applies.

CLAUSES IN CONTRACTS FOR AN INDEFINITE PERIOD INVOLVING CONTINUOUS PERFORMANCE

In some contracts it will be convenient for the parties to specify the periods in which they must notify one another of their wish to renew and the decision against the renewal of the contract, with the object of avoiding conflictive situations. This is because, often, communications which, in the opinion of one of the parties, have been made on the appropriate date may appear untimely to the other party:

Option A: Establishment of the time of notifications on voluntary renewal

“If one of the parties wishes to renew the contract period, it must notify this to the other party in the period of (...) months before the expiry of the contract.

If the other party does not wish to accept the renewal, it must notify this to the other party in a period of (...) days from the receipt of the declaration of renewal or from when, once the contracting party has sent it, it would not have been able to ignore it reasonably”.

It is possible that the parties prefer that the contract will not be extinguished automatically upon the expiry of the established contract period, but that the parties

have to express their intent to terminate it, through a notification to the other party within the established period of notice:

Option B: Automatic renewal for periods equal to the initially agreed period

“The parties will be able to terminate the contract at the end of the contract period, by notifying the other party of their intent not to renew it (...) days before the date of termination of the contract.

Once the agreed contract period has expired without any of the parties having demonstrated their intention not to renew it, the contract will be understood to be tacitly renewed for successive equal periods.

The party that decides to terminate the contract at the end of the initial period or any of its renewals will not be obliged to pay damages to the other party, provided that it observes the indicated period of notice”.

The obligation to communicate the intent to terminate the contract ties in with the provision of the automatic tacit renewal of paragraph 2. Hence, in the absence of express termination by the parties, exercised in the above-mentioned manner, the contract will be renewed tacitly for equal successive periods.

If the power of termination of the contract is exercised in time and form, the damages will not be paid, as indicated in paragraph 3 of the clause. It is a question of terminating a contract at the end of the contract period provided, and consequently no harm has to be generated for the parties (that are already relying on that termination). The breach of the agreed period for giving notice of termination, however, will involve a non-performance of contract which will give rise to damages in accordance with the normal regulations on non-performance of the contract (Chapter 7, Section 4).

As an alternative, the parties will be able to prefer that the contract is not renewed by periods equal to the initial periods, but that it will be converted into a contract for an indefinite period, with the subsequent application of the regulations governing this (Article 5.1.1 OHADAC Principles):

Option C: Automatic renewal and conversion into a contract for an indefinite period

“The parties will be able to terminate the contract at the end of the contract period, by notifying the other party of its intent not to renew it, (...) days before the date of termination of the same.

Once the agreed contract period has expired without any of the parties having demonstrated its intention not to renew it, the contract will be converted into a contract for an indefinite period”.

In accordance with the OHADAC Principles, in the fixed-term contracts for continuous performance, the parties may not terminate the contract unilaterally. The termination prior to the time provided by one of the parties, apart from the case of hardship of Article 6.3.1, must be considered to be non-performance of contract.

However, in the scope of the Principles, the parties are expressly permitted to agree a clause in the contract through which the power of unilateral withdrawal *ad nutum* with a reasonable period of notice is granted to both contracting parties:

Clause D: Unilateral withdrawal

“At any time before the termination of the contract period, the parties are empowered to withdraw from the contract unilaterally, without the need to invoke any reason, by giving a reasonable period of notice.

The contracting party that withdraws unilaterally from the contract must compensate the other party for the expenses that it would have incurred with a view to the performance of contract (and pay damages to it for the loss of profits that have been caused to it upon the termination of the contract prior to the date provided)”.

Paragraph 2 of the clause includes the obligation, incumbent on the party that withdraws from the contract, to compensate the other contracting party for the reasonable expenses that it has been unable to avoid incurring despite the notice.

Likewise, in certain contracts, the parties may consider the possibility to include compensation for the loss of profits (final subparagraph of the clause, which is indicated in brackets); since the belief in the continuation of the contract until its termination can make the contracting party trust in a legitimate expectation of gain, which is invalidated for it when carrying out other transactions.

Section 2. Third party rights

Article 5.2.1: Contracts in favour of third parties

- 1. The parties to the contract (promisee and promisor) may include stipulations in favour of a third party (beneficiary), who will acquire, in the absence of any agreement to the contrary, the right to require the promisor to perform it.**
- 2. The existence and the content of the beneficiary's right against the promisor are determined by the agreement of the parties.**

COMMENT

1. The principle of privity of contract and contracts in favour of third parties in the OHADAC systems

The contract in favour of a third party essentially implies granting a third party a right arising from a contractual relationship between the promisee (the party which has a direct interest in that right) and the promisor (the party which is obliged to the third party or beneficiary). The legal relationship between the promisee and the promisor is called the "cover relationship". The relationship between the promisor and the third beneficiary is called the "value relationship".

The practical utility in international trade of these agreements in favour of a third beneficiary lies in the fact that it is an instrument of contractual simplification and legal economy. In this sense, agreements in favour of third persons are best suited to interlinked contracts or contracts where there is a plurality of participants (chain of contracts, subcontracts or holdings).

Example 1: Insurance company A signs an insurance contract with shipping company B in order to cover it and its subcontractors for certain maritime routes. If a company C assumes, as subcontractor, one of these lines, it would automatically be a beneficiary of the insurance contract between A and B.

In other cases, the contract in favour of a third party may work as a financing instrument, allowing the promisee, which is an obligor of the third party and at the same time an obligee of the promisor, to reach an agreement with the promisor to assume its debt to the third party. Thus, the promisee can pay off its debt to the third party and set-off its right against the promisor through only one transaction.

Example 2: Company A acquires from distributor B a batch of goods, stipulating in the contract that the payment shall be made to manufacturing company C (which is, in turn, a obligee of B). With this contract dealer B has obtained financing to pay its debt to C.

Finally, it is also relatively common in practice to sign contracts in favour of third parties with a clear purpose of guarantee a debt that the third party may have against the promisee obligor [e.g. commercial credit insurances covering the risk of loss resulting from the insolvency of customers so that, for example, the insured (promisee) concludes a factoring contract and designates the factoring company as beneficiary of compensations].

The civil law principle of contract relativity and the common law doctrine of privity of contract start from the same point: firstly, they assume that a third party may not acquire rights or bring actions under a contract in which it is not a party; secondly, they make it impossible to impose obligations on a person which has not agreed. However, overcoming these limits to the subjective scope of contracts has developed differently in different legal systems, which has traditionally implied an important element of divergence within European law between civil law systems (and even some common law system) and English law. While civil law systems allow contracts in favour of third parties in their firmly established legislations, English law maintained its reluctance until very recent times [specifically until the Contracts (Rights of Third Parties) Act 1999], when it admitted for the first time an explicit exception to the privity principle, allowing third parties to invoke rights established in contracts where they are not parties. A general acceptance of contracts in favour of third parties has been supported by its inclusion in different texts on contract law harmonisation (Article 5.2.1 UP; Article 6:109 PECL; Articles II-9:301 to 9:303 DCFR).

This trend of general admission of contracts in favour of third parties is also confirmed in the civil codes of OHADAC countries, which regulate this figure as an exception to the principle of contractual relativity. In some cases, as in the Venezuelan Civil Code, this is qualified by the condition that there is a "personal, material or moral interest in the performance of the obligation" (Article 1.164). Otherwise, as in Haitian Civil Code, there is no general regulation of the contract in favour of a third party, but there are specific provisions which suggest this possibility, such as those in lease contracts in Article 1.737. There is no specific regulation on contracts with clauses in favour of third parties in the Commonwealth Caribbean, which remains reluctant to justify exceptions to privity doctrine, under the direct influence of English common law. However, this legislative silence should not be interpreted rigidly, but rather in the context of the development of English contract law itself. In this sense, everything suggests the recognition of contracts in favour of a third party also under these laws.

2. Identification of contracts in favour of a third party

The first difficulty in contracts in favour of a third party is determining when a contract enables a third party to enforce the obligation stipulated in its favour. In all cases where there is a clearly expressed wish to do so by the contracting parties, no specific problems arise. Difficulties arise when such an event has not occurred. One wonders if liability insurance, manufacturer warranties on product quality, contracts between a travel agency and an air carrier for the transport of their customers or child maintenance agreements include provisions in favour of a third party.

The characterisation of these cases depends on the criteria used in each legal system. Two major models can be distinguished in this area: the first one starts only from the will of the parties and the other also introduces objective parameters for identification of stipulations in favour of third parties.

Under the first model, the intention of the parties is the only criterion from which an actual stipulation for a third party can be inferred. This is the approach in the Contracts Act (Rights of Third Parties) 1999. In drafts developed by the Law Commission, dual intention tests finally envisaged in Section 1 (1) and (2) of the Contracts Act (Rights of Third Parties) of 1999 were already established, determining the available actions for third parties: the first, when a right has been expressly granted by the contract; the second, where the contract confers a right to enforce (rebuttable presumption) unless, according to the proper construction of the contract, it is interpreted that the parties were unwilling to grant this right to a third party. Thus, the determining factor for identifying a contract in favour of a third party is not that a benefit to the third party is derived from the contract, but that there is an expressed willingness to grant the third

party a right to claim the performance granted (right to sue), which can only be inferred, in one way or another, from the will of the parties. Similarly, Article 6:253 of the Dutch and Suriname Civil Code contains an express allocation rule of law, indicating that the third party can claim a performance if the contract contains a stipulation in its favour.

Under the second model, in addition to the express will of the parties, the allocation of the right to the third party may be inferred from objective signs, such as the "circumstances of the contract", the "purpose" of the contract or the usages. This is the model followed in French law, although it cannot be directly inferred from the wording of its provisions. In practice, a set of standard contracts involving provisions for third parties (for example, contracts involving obligations of advice or security or surveillance, carrier obligations regarding the safety of passengers or obligations of the professional seller to a non-expert buyer) are identified. However, the Proposals for reform of the French law on obligations of 2013 (Article 114) seems to opt only for the will of the parties as a source of the right of the third party.

In the OHADAC territories, most civil codes base the effectiveness of stipulations in favour of third parties on the will of the parties, therefore enabling third parties to sue for its performance (Article 1.506 of the Colombian Civil Code; Article 316 of the Cuban Civil Code; Article 1.549 of the Honduran Civil Code; Article 1.869 of the Mexican Civil Code; Article 1.108 of the Panamanian Civil Code; Article 1.164 of the Venezuelan Civil Code). Article 741 of the Honduran Commercial Code establishes the presumption, with the possibility of agreement to the contrary, that any provision in a contract gives the third party the right to require of the promisor the performance of that obligation. A different approach is seen in Articles 1.122 of the French and Dominican Civil Code and Article 1.531 of the Guatemalan Civil Code, which establish a presumption of validity of the contract between the parties "unless otherwise stated or resulting from the nature of the contract" or "when this is derived from the purpose established in the contract". Article 963 of the Saint Lucian Civil Code states in the same sense. These provisions extend therefore the chances of identifying a contract in favour of a third party on the basis of objective circumstances of the contract, even if the will of the contracting parties in this regard is not clearly determined.

The rule laid down in the OHADAC Principles follows the first of the models analysed for the identification and characterisation of a contract as a contract in favour of a third party, based on the will of the parties. This criterion is the most respectful with contract interpretation rules inspired by English law, but it also prevents inevitable legal divergences derived from the second model, insofar as characterisation of the

contract requires here the analysis of the nature or the purpose of the contract. Agreement of the parties as the exclusive source of the right of the third party also excludes the application of these rules to cases in which a third party may have a direct action against a contracting party based on a legal obligation, which often deserve a characterisation as non-contractual obligations. For example, claims that victims can make on the basis of a direct action against insurers of those responsible for damage are not considered as contractual obligations in favour of third parties.

This Article also includes a specific reference to the fact that the right of a third party implies an action against the promisor. Therefore, it is presumed that any contract which contains a provision in favour of a third party entails, unless otherwise agreed by the parties, the granting of an action for the third party to claim against the promisor. This provision, expressly included in the Mexican and Venezuelan civil codes as mentioned, is interesting insofar as the rule itself clarifies what is the distinctive regime of such contracts in contrast with the general rule of privity. The recognition of this rule may be particularly significant and relevant in the sphere of Commonwealth Caribbean. In fact, due respect to freedom of contract and subjection to the strict rules of interpretation in common law systems lead to the recommendation of this express statement in the contract to avoid any doubt about the real scope of the formulation of the right in favour of the third party.

The second paragraph of the article recalls the restrictive nature of the advantage conferred by the contract on which it is based, and its wording is the same as in Article 5.2.1 UP. It is obvious that the rights of the third party depend absolutely on the agreement between the contracting parties. Therefore, the agreement of the parties depends on the recognition of the third party's right as well as the possibility and scope of actions recognised thereto, all the while establishing conditions and limitations to the acquisition and exercise of that right.

3. Regime of post mortem contracts in favour of third parties

A contract including stipulations in favour of a third party causes a variety of relationships between the different parties involved, some of which (the cover relationship and the relationship between the promisor and the beneficiary) are directly based on the contract, while the relationship between the promisee and the beneficiary, being the cause of the contract itself, is actually alien to the main contract. However, this autonomy of the contract regarding the underlying relationship is not confirmed in all cases and it is not recognised to the same extent in all legal systems. The clearest example is the bank deposits including an appointment of beneficiary in case of death of the depositor holder.

In the field of the OHADAC Principles, a specific provision on post mortem contracts in favour of a third party is not envisaged, particularly due to clear differences between civil law and common law systems and even among civil law systems themselves. Such a provision is not found in other international texts on contract law harmonisation, either (UP, PECL and DCFR). The absence of regulation of this issue does not really imply a gap or a legal vacuum on an essential aspect of contracts in favour of third parties. Succession law must be taken into consideration in relation with the “value” relationship between the promisee and the third party and therefore its legal regime is not required in contracts in favour of a third party. From an abstract perspective, the contract in favour of a third party remains in force and fully effective, while the attribution of the right (which constitutes the value relationship) could subsequently be challenged or avoided by the promisee.

For the sake of legal economy, in these cases the inclusion in the contract of specific clauses allowing compliance with the mandatory rules of the value relationship is recommended, either through specific rules of revocation of the stipulation or through incorporation into the contract of a specific regime of exceptions enforceable by the promisor against the claim of the third party beneficiary in order to enforce the obligation. These two aspects will be discussed in the relevant sections of these Principles.

Article 5.2.2: Exclusion or limitation clauses

The parties may give the beneficiary the right to invoke against the promisor a clause that excludes or limits the promisee’s liability.

COMMENT

Among the possible benefits provided to third parties, it is possible to agree the extension of exclusion or limitation of liability clauses contained in the contract between promisor and promisee, so that the third party can also invoke them in its favour in case of a claim against it. Thus, this contractual possibility is expressly recognised in Article 5.2.3 UP and in Article II-9: 301 (3) DCFR. Such stipulations in favour of a third party show special features in the most common cases of contracts in favour of a third party: firstly, although the third party generally assumes the position of plaintiff against the promisor, in this case the beneficiary is sued by the promisor; furthermore, in current contracts in favour of a third party, action brought by the third

party is based on the contract between the promisor and the promisee, whereas in this case the claim of the promisor against the third party is usually based on tort. Thus, agreements in favour of a third party are particularly useful in sectors such as the construction or transportation to extend the benefits of exclusion or limitation clauses included in the main contract, such as so-called "Himalaya clauses" to auxiliary companies. This type of "rights" is found in the field of transport contracts, which often include limitative clauses of the carrier's liability that will also apply to other parties that participate in performing the transport. As the actual carriers, but who are, strictly speaking, not parties in the contract of carriage, they benefit from the same protection and the same limitations as the carrier who signs the contract, should a claim be brought against them.

Example: Company A and carrier B sign a contract of carriage, fixing the maximum liability at \$30,000. To carry out a part of the transport, B subcontracts with C. The goods suffer some damage during transportation. A claims for damages against C. C may invoke the maximum limitation of liability of \$ 30,000, which was included in the contract between A and B.

Section 3 (6) of the Contracts (Rights of Third parties) Act 1999 contains a general treatment of these clauses, while Section 6 (5) deals with them in relation with contracts of carriage by sea and contracts of carriage by rail, road and air. The particular history of English law justifies the need of an express treatment of these clauses in the Contracts (Rights of Third parties) Act, which are so important in the field of maritime law that provoke the use of different legal arguments to circumvent limitations derived from privity principle. Thus, rules in the Contracts (Rights of Third Parties) Act means the admission under English law of the effectiveness of "Himalaya clauses", which allow the extension of limitations of liability of the carrier to stevedores and parties others than the carrier. Following the line established by the Hague-Visby Rules concerning servants and agents of the carrier (Article IV.bis of the International Convention for the Unification of Certain Rules relating to bills of lading, dated 25 August 1924), it implies establishing the same system of limitation of liability regardless of the type of action brought (based on contract or on tort).

There is no similar provision in European laws involved in the OHADAC territory, even in the Proposals for Reform of the French law on obligations of 2013. However, this legislative silence does not mean a refusal of granting these rights to third parties. Obviously, the final answer will depend on each legal system, but the general trend is that the absence of an express rule does not entail a prohibition of such rights under contracts in favour of third parties.

In this context, the absence of an express statement in Caribbean civil codes must not be understood as either a prohibition or an impossibility to agree such clauses in favour of third parties. There are specific regulations that support, expressly or impliedly, the extent of limitations of liability to third parties (e.g. Article 702 Honduran Commercial Code or Article 216 of the Trade Act of Maritime 2006 Venezuelan). Therefore, it can be considered that, within the limits of freedom of contract, it is possible to include exclusion of liability clauses for a third party. In any case, the effectiveness of such clauses must be considered in the light of Articles 7.1.7 and 7.4.7 of these Principles.

Article 5.2.3: *Revocation of the stipulation in favour of a third party*

The stipulation may be modified or revoked while the beneficiary has not notified its acceptance to any of the contracting parties.

COMMENT

1. General rule of revocability and its limits

The contractual source of the rights of third parties implies the significance of the contract content and the time conditions, if any, established for the acquisition of those rights. In this sense, it is important to set the deadline for the revocation or modification of the rights of the third party, which actually determines the time from which the third party can consider its rights as acquired. In the absence of an express agreement to the contrary, the limit lies in the acceptance of the right by the third party. This is intended to keep a balance between the contractual freedom of the contracting parties and the legal certainty of the third party. This is the system followed in the French and Dominican Civil Code, in section 2 (3) of the Contracts (Rights of Third Parties) Act 1999 and in Dutch and Suriname Civil Code, providing the acceptance by the third party as the limit for revocation [Article 6:253.2^o]. It is also the solution supported in Spanish law as well as in many Caribbean civil codes (Article 1.010 of the Costa Rican Civil Code; Article 1.121 of the Dominican and French Civil Code; Article 1.549 of the Honduran Civil Code; Article 1.871 of the Mexican Civil Code; Article 1.875 of the Nicaraguan Civil Code; Article 1.108 of the Panamanian Civil Code; Article 1.209 of the Puerto Rican Civil Code; article 962 of the Saint Lucian Civil Code). It is also the solution adopted in the UP and the PECL. However, the DCFR starts from a partially different premise, which is to set the limit to the modification or revocation of

the right at the time of notification to the third party that this right has been granted under the contract. This implies setting a system of automatic and immediate entitlement of the beneficiary forcing thus to establish a waiver system [Article II-9:303 (1) DCFR] which works, *mutatis mutandis*, as a kind of resolutive condition of the right of the third party.

The rule in these Principles follows the most widespread principle, establishing the acceptance by the third party as the deadline to modify or revoke the right. Unless otherwise established, it supposes the need for acceptance of the right by the third party of the right, so that if the beneficiary dies before having accepted it had no right and nothing will pass on to its heirs.

This rule favours and also facilitates the contractual relationship between promisor and promisee, who know in advance the time available to amend or revoke the agreements affecting the third party. It is fundamental not only the fact of the acceptance but also that the acceptance is communicated to all contracting parties, which may result from an express declaration of intent or from a claim brought against the promisor to demand its fulfilment (as provided for in Article 316 of the Cuban Civil Code). In both cases, there is notification and this is the general criterion shared by Caribbean civil law systems. Notification of the acceptance is a circumstance which also guarantees legal certainty of the contracting parties.

Determining the addressee of the acceptance is also important. The Caribbean civil law systems which deal with this question establish that the acceptance must be communicated to the promisor, which is obliged to perform (this solution is found in the civil codes of Cuba, Honduras, Nicaragua, Panama and Puerto Rico). The same solution is established in the Contracts (Rights of Third Parties) Act 1999. However, the rule included in the OHADAC Principles states the possibility of communication of the acceptance to any of the contracting parties, as provided in Dutch and Suriname Civil Code [Article 6:253.3 ⁹] or in the Draft project reform of the French law on Obligations of 2013 (Article 115). This solution is consistent with the system of entitlement to revoke mentioned below.

In the field of the OHADAC Principles the possibility of tacit acceptance of the right is excluded. This option is found in Colombian Civil Code (Article 1.506), when derived from acts of the obligor that only could have been executed under the contract; it is also established with a more flexible formula in Article 5.2.5 of the UP. Such criterion, besides not being the most commonly accepted in the OHADAC sphere, causes important interpretative problems to identify conducts that may imply, or not, acceptance and therefore introduce unnecessary uncertainty in contract law.

Despite the silence of Caribbean civil codes on this point, the rule includes not only the possibility of revocation, but also to modify the right of the third party, as provided in the UP and the DCFR. The logic here is similar to the revocation, as the acceptance of the benefit granted in its favour by the third party has been done in the agreed terms; a subsequent modification, particularly if it was detrimental to the interests of the third party, could be considered as a restriction of their acquired rights.

In any case, it is inconceivable that the rule established over the limit of the revocation is mandatory if the parties have expressly agreed a special arrangement for the revocation or the modification of the right and, therefore, it is a fact known by the third party. This is what is provided, for example, in the Guatemalan Civil Code, which states that the promisee reserves the right to revoke the right of the third party (Article 1.533). Therefore, the rule included in the OHADAC Principles is merely a presumption that ensures legal certainty of the beneficiary, to the extent that it knows the conditions and the scope of the right on the basis of the contract, and also ensures the autonomy and freedom of the contracting parties, which can freely design the right they wish to give to the third party.

2. Entitlement to the right of revocation

The OHADAC Principles do not establish any rule relating to the entitlement of the right to revoke, considering that this question must be determined on a case-by-case basis by the contracting parties. Comparative law offers at this point two divergent models: the exclusive entitlement of the promisee, contained in the second paragraph of Article 6:253 Dutch and Suriname Civil Code, and the Proposals for Reform of the French law on obligations of 2013; and the shared entitlement, with requirement of agreement between promisor and promisee, stated in the Contracts (Rights of Third Parties) Act 1999.

The same diversity is found in international texts on contract law harmonisation: whereas the UP prefer a shared entitlement between promisor and promisee, the PECL attributes the exclusive entitlement to the promisee and the DCFR leaves the determination of entitlement of the right of the revocation to what is stated in the contract.

This duality in the field of the entitlement of the right to revoke is also observed in the existing regulations in OHADAC countries. The Colombian Civil Code establishes the will of both contracting parties (Article 1.506). Venezuelan law (Article 1.164 Civil Code) assumes the entitlement of the promisee when it indicates that it cannot revoke if the third party has declared that it wants to take advantage of it; a similar solution is

provided in Article 962 Saint Lucian Civil Code. In a more extreme sense, Guatemalan law (Article 1.533 Civil Code) allows the promisee to reserve the right to substitute the third party regardless of its will and of that of the other contracting party. Other civil codes, such as the Cuban, Dominican, Mexican or Nicaraguan, do not establish it.

The absence of a specific rule in the OHADAC Principles just means that the contracting parties, in view of the circumstances of each contract, will establish which party can amend or revoke the right. From a strictly contractual perspective, it is not strictly necessary, especially in the absence of consensus, to establish a specific regime of entitlement of the right to revoke which it is mainly related to the underlying relationship between the promisee and the third party. The absence of an express regulation is not a gap, but a general submission to the interpretation of the contract that binds the promisor and the promisee and to the parties' expressed will. This solution is the most consistent with the contractual nature of the right of the third party and allows, in each case, the establishment of the possibilities for revocation based on which party has a real interest in the attribution of the right to the third party. Usually, it is understood that the interest corresponds to the promisee, but nothing prevents the promisor also from having an interest and, consequently, an agreement to any modification or revocation would be required.

Article 5.2.4: *Defences*

The promisor may only assert against the beneficiary, in the absence of any agreement to the contrary, the defences derived from the contract which contains the stipulation in favour of the beneficiary.

COMMENT

Contracts in favour of a third party determine the scheme of defences which may be asserted by the promisor when the third-party beneficiary claims the fulfilment of the contract: in these cases, available exceptions must be determined on the basis of trilateral relationships: the relationship between promisor and promisee, embodied in the contract that contains the stipulation; the value relationship between the promisee and the third party; and relationships between the promisor and the third party, apart from the main contract.

The regime of exceptions enforceable by the promisor against the third party is one of the least controversial questions, within the regime of contracts in favour of third parties, from a comparative point of view: the third party takes its own position, solely dependent on conditions on its right established by promisor and promisee in the contract. This distinguishes the stipulation in favour of a third party, with the characteristic autonomy of this right, from the rights that "successors" of the contracting parties may be entitled to. This question has particular relevance in the field of English maritime liability law when assessing the position of the injured party claiming against the Club Insurance Protection and Indemnity (P & I). By denying the quality of third parties beneficiaries, their position is conditioned by the position previously assumed by the insured party (i.e. the injured party "will fit into the shoes" of the insured).

By virtue of a logical correspondence with this autonomy of the right of the third party, personal defences based on relationships outside the contract containing the provision in favour of the third party, which the promisor has against the promisee, are not enforceable. This rule is clear in legal systems that explicitly state it, but also in other systems which do not recognise it explicitly, given the nature of the contract in favour of third party. Thus, the promisor cannot invoke, for example, a set-off of credits derived from prior obligations with the promisee, against a claim made by the third party against the promisor to enforce the agreed provision in its favour.

Based on the same principle, the promisor cannot raise defences against the third party based on the value relationship between the promisee and the third party. In general, the promisor cannot invoke against the third party issues such as the invalidity or the revocation of the value relationship to avoid the performance of its obligations.

The solution afforded in the OHADAC Principles follows the meaning of Article 1.872 of the Mexican Civil Code and of Article 745 of the Honduran Commercial Code, which expressly limit the promisor to rely on those defences based on the contract from which the right of the third party derives. The silence of the rest of the civil codes should not imply a different approach on this point, insofar as the autonomy of third parties' rights and its origin in the contract between promisor and promisee is, as mentioned, inseparable from the recognition of contracts in favour of a third party. As a general presumption in such contracts, personal defences that the promisee has against the promisor cannot be invoked.

This rule is not in any case mandatory. Another solution may be agreed in the contract that binds the promisor and the promisee. This is usual in cases of assumption of debt

owed by the promisee to the third party; in these cases, personal defences that the promisor has against the promisee are available against the third party.

Example: In a contract of sale, the buyer (X) retains part of the price to pay the debts of the seller (Y) with respect to certain obligees (Z1, Z2 and Z3) to which it is obliged to pay. Y is the promisee, the promisor is X and Z1, Z2 and Z3 the beneficiaries.

To the extent that it does not affect the autonomy and setting of the right granted to the third party, nothing prevents the promisor from asserting against the third party all defences based on personal relations between it and the third party, governed by the general regime of the obligation applicable between them. There is no need for a specific rule on that point in the Principles, to the extent that this possibility of enforceability of clauses responds to the usual dynamic of contracts and therefore it is not related to specific stipulations in favour of a third party.

CHAPTER 6

PERFORMANCE OF THE CONTRACT

Section 1. General rules

Article 6.1.1: *Place of performance*

- 1. If the contract does not determine the place of performance of a contractual obligation, this place shall be:**
 - a) In the case of pecuniary obligations, the place of business or, failing that, the habitual residence of the obligee at the time of the conclusion of the contract.**
 - b) In other cases, the place of business or, failing that, the habitual residence of the obligor at the time of conclusion of the contract.**
- 2. If there is more than one place of business, the place of business shall be the one that is most closely connected with the contract at the time of its conclusion.**
- 3. However, if a party has changed its place of business after the conclusion of the contract, that party may request or deliver the performance in the new place of business, providing that it gives sufficient notice to the other party. In that case, the party that has changed its place of business or residence shall bear the expenses and costs resulting from the change of the place of performance.**

COMMENT

The place of performance of the obligation will be that expressly agreed by the parties in the contract. Even if such a circumstance is not expressly provided, rules on contract

interpretation, including commercial usages, lead very often to conclude an implied term of performance in a determined place. Thus, in relation with a pecuniary obligation, “cash clear”, “cash against invoice” and “cash before delivery” clauses usually imply that payment must be made at the seller’s place of business. Likewise, when payment must be made against delivery of goods or documents in international sales, the place of payment shall be the place of delivery [Section 28 of the Sales of Goods Act of 1979; Section 29 of the Sale of Goods Act of Antigua and Barbuda; Section 29 of the Sale of Goods Act of Montserrat; Section 29 of the Sale of Goods Act of Bahamas; Section 29 of the Sale of Goods Act of Trinidad and Tobago; Section 30 of the Sale of Goods Act of Belize; Section 28 of the Sale of Goods Act of Jamaica; Article 1.929 of the Colombian Civil Code; Article 1.087 of the Costa Rican Civil Code; Article 352 (a) of the Cuban Civil Code; Article 1.651 of the French and Dominican Civil Code; Article 1.825.2 of the Guatemalan Civil Code; Article 1.426 of the Haitian Civil Code; Article 7:26 of the Dutch and Suriname Civil Code; Article 1.436 of the Honduran Civil Code; Articles 2.084 and 2.294 of the Mexican Civil Code; Article 2.661 of the Nicaraguan Civil Code; Article 360 of the Nicaraguan Commercial Code; Article 1.271 of the Panamanian Civil Code; Article 773 of the Panamanian Commercial Code; Article 1.389 of the Puerto Rican Civil Code; Article 1.443 of the Saint Lucian Civil Code; Article 299 of the Saint Lucian Commercial Code; Article 1.528 of the Venezuelan Civil Code; Article 57.1 (b) CISG].

If the contract does not specify or give any indication as to the place of performance, a subsidiary rule, acting as an interpretative or integration rule to fill in the gap seems appropriate. The first paragraph of Article 6.1.1 of the OHADAC Principles makes the distinction, on this subject, between pecuniary and non-pecuniary obligations.

There is a wide diversity of solutions in Caribbean legal systems for pecuniary obligations. On the one hand, most of them provide that pecuniary obligations must be performed in the creditor’s place of business [e.g. Article 1.083 of the Saint Lucian Civil Code; Article 57.1 (a) CISG; Article 6.1.6 (1) (a) UP; Article III-2:101 (1) (a) DCFR], determined in some cases at the time of conclusion of the contract [Article 7:101 (1) (b) PECL; Article 125.1 CESL. This rule is also usual in common law countries] and in other cases at the time of payment (e.g. Article 236.1 of the Cuban Civil Code). On the other hand, most civil law systems prefer the opposite rule, inspired by the *favor debitoris* principle, which leads to the debtor’s place of business (Article 778 of the Costa Rican Civil Code; Article 451 of the Costa Rican Commercial Code; Article 1.646 of the Colombian Civil Code; Article 1.247 of the French and Dominican Civil Code, maintained in Article 191 of the Proposals for the Reform of French Law on Obligations

of 2013; Article 1.398 of the Guatemalan Civil Code; Article 1.033 of the Haitian Civil Code; Article 1.436 of the Honduran Civil Code; Article 2.082 of the Mexican Civil Code; 2.031 of the Nicaraguan Civil Code; Article 1.058 of the Panamanian Civil Code; Article 1.125 of the Puerto Rican Civil Code; Article 1.295 of the Venezuelan Civil Code).

The OHADAC Principles have opted, in letter (a) of paragraph 1, for the rule that considers that the place of performance of pecuniary obligations is that of the creditor's place of business at the time the contract is concluded. This choice is more in line with international trade practices and the more common means of payment. Moreover, the determination of this place at the time of conclusion of the contract meets the need for predictability as well as the contractual equilibrium that recommends that the obligor be able to anticipate expenses inherent to the payment. Although this rule does not converge with contrary presumptions in most civil law systems, its application is not controversial, given the non-mandatory character of this question. The choice of the OHADAC Principles by the parties shall imply the inclusion of this rule in the contract, being a purely factual circumstance that does not entail interpretative difficulties.

There is a greater unanimity in determining the place of performance of non-pecuniary obligations where this place cannot be inferred from the contract. It is presumed to be the place where the party obliged to perform has its place of business (Article 1.646 of the Colombian Civil Code; Article 778 of the Costa Rican Civil Code; Article 451 of the Costa Rican Commercial Code; Article 1.247 of the French and Dominican Civil Code, maintained in Article 191 of the Proposals for the Reform of the French Law on Obligations of 2013; Article 1.398 of the Guatemalan Civil Code; Article 1.033 of the Haitian Civil Code; Article 6:41 of the Dutch and Suriname Civil Code; Article 1.436 of the Honduran Civil Code; Article 2.082 of the Mexican Civil Code; Article 2.031 of the Nicaraguan Civil Code; Article 1.058 of the Panamanian Civil Code; Article 1.125 of the Puerto Rican Civil Code; Article 1.083 of the Saint Lucian Civil Code; Article 1.295 of the Venezuelan Civil Code; Article 31 (c) CISG; Article 6.1.6 (1) (b) UP; Article 7:101 (b) PECL; Article III-2:101 (1) (b) DCFR]. Letter (b) of paragraph 1 of this Article follows this rule generally accepted and fully consistent with the contract equilibrium. In civil law systems, however, there are some special rules about obligations on specific goods, which point to the place of situation, production or delivery of the goods to the bearer [Article 1.646 of the Colombian Civil Code, Article 778 of the Costa Rican Civil Code; Article 1.247 of the French and Dominican Civil Code Article 236 of the Cuban Civil Code; Article 1.398 of the Guatemalan Civil Code; Article 1.033 of the Haitian Civil Code; Article 6:41 of the Dutch and Suriname Civil Code; Article 1.436 of the Honduran

Civil Code; Article 2.083 of the Mexican Civil Code; Article 2.031 of the Nicaraguan Civil Code; Article 1.050 of the Panamanian Civil Code; Article 758 of the Panamanian Commercial Code; Article 1.125 of the Puerto Rican Civil Code; Article 1.083 of the Saint Lucian Civil Code; Article 1.295 of the Venezuelan Civil Code; Articles 31 CISG]. In any case, these special rules do not question the general rule, because to a large extent, as stated in Article 6.1.1, the subsidiary rules are only applicable where the place of performance cannot be inferred from the rules on contract construction or from trade practices.

Paragraph 2 states an interpretative rule in cases where the current place of business or residence cannot be determined because the party has several places of business or residences. The place of business or the residence most closely connected at the time of conclusion of the contract will be applied [Articles 7:101 (2) PECL; III-2:101 (2) (a) DCFR; and 125.2 CESL].

If a party changes its place of business, for economic reasons, performance should be at the new place of business, providing that that party gives sufficient notice to the other party and assumes the expenses deriving from that change, which may be justified by many reasons, including banking negotiation costs. Hence the rule stated in paragraph 3 [also included in Article 2.032 and 2.033 of the Nicaraguan Civil Code; Article 1.400 of the Guatemalan Civil Code; Article 6.1.6 (2) UP; Article III-2:101 (1) (a) DCFR].

Article 6.1.2: *Time of performance*

1. The obligor has to perform its obligations:

- a) At the time agreed, when the contract states a determined or determinable time.**
- b) When the contract states a determined or determinable period, at any time within that period, unless it is interpreted that the choice of the time of performance is to the obligee.**
- c) In other cases, within a reasonable time after the conclusion of the contract.**

2. The obligor must perform its obligation completely in one time as far as possible, unless otherwise indicated by the circumstances.

COMMENT

1. Determination of the time of performance

Parties are free to establish the date or time when the contract must be performed. The performance date must be set in relation to a concrete day, week on month, and in this case, it is considered as determined. Nevertheless, the date can also refer to a concrete fact (e.g. the day after acceptance of goods), in which case it is undetermined. In both cases the time of performance will be that provided in the contract according to letter (a) of second paragraph of this Article. A similar rule can be found in Articles 6.1.1 (a) UP; 7:102 (1) PECL; and III-2:102 (1) DCFR.

It is also usual that parties provide a period of performance instead of a determined or undetermined date. Rules included in Article 1.4 of these Principles will be observed for the computation of such a period. The rule established in letter (b) of first paragraph allows the party to perform at any time within the agreed period [e.g. Article 776 of the Costa Rican Civil Code; Article 1.187 of the French and Dominican Civil Code; Article 1.282 of the Guatemalan Civil Code; Article 976 of the Haitian Civil Code; Article 1.389 of the Honduran Civil Code; Article 6.1.1 (b) UP; Article 7:102.2 PECL; Article III.-2:102 (2) DCFR; Article 165 Draft Project of reform of the French law on obligations of 2013]. This is the most common interpretation on periods or fixed terms, which are usually considered in favour of the obligor, but it is also possible, in accordance with the rules on contract interpretation under Section 1 of Chapter 4 and the terms and aim of the contract itself, to conclude that is the obligee who will set, within the agreed period, the precise date when the obligor must perform. This is the case, for example, if parties have agreed on an FOB sale.

However, sometimes parties do not decide on anything as to the time or period of performance of their obligations. In this case, default rules in Caribbean legal systems adopt different solutions leading to different results. In common law countries performance of obligations must be implemented within a reasonable time from the contract's conclusion [Article 330 (2) of the Saint Lucian Commercial Code; Section 29.3 of the Sale of Goods Act of 1979; Section 30.2 of the Sale of Goods Act Antigua and Barbuda; Section 30.2 of the Sale of Goods Act of Montserrat; Section 30.2 of the Sale of Goods Act of Bahamas; Section 30.2 of the Sale of Goods Act of Trinidad and Tobago; Section 31.3 of the Sale of Goods Act of Belize; Section 29.2 of the Sale of Goods Act of Jamaica).

The solution in civil law systems is different. In some cases, there are presumptive periods depending of the character of the obligation (to give or to do), which cover from 24 hours until one year. Thus, in commercial sales the period of delivery is fixed in some legal systems in 24 hours (e.g. Article 924 of the Colombian Commercial Code; Article 465 of the Costa Rican Commercial Code; Article 337 of the Cuban Commercial Code; Article 379 of the Mexican Commercial Code; Article 352 of the Nicaraguan Commercial Code; Article 758 of the Panamanian Commercial Code; Article 255 of the Puerto Rican Commercial Code); the most usual rule, however, points to immediate or “at present day” performance (*statim debetur*: Article 774 of the Costa Rican Civil Code; Article 6:38 of the Dutch and Suriname Civil Code; Article 1:013 of the Panamanian Civil Code; Article 1:212 of the Venezuelan Civil Code), generally from the time when the obligee calls for performance or, in sales contracts, at the time of delivery of the goods (e.g. Article 947 of the Colombian Commercial Code; Article 380 of the Mexican Commercial Code; Article 753 of the Panamanian Commercial Code Article 1.443 of the Saint Lucian Civil Code; Article 299 of the Saint Lucian Commercial Code). Indeed, the obligor is usually in delay after the call of the obligee for performance (Article 1.608.3 of the Colombian Civil Code; Article 295.1 of the Cuban Civil Code). Such a requirement is not consistent with efficiency in international trade, creates unnecessary procedural expenses, gives excessive discretionary power to the obligee and does not contribute to increasing legal certainty. Its rigidity is often toned down either by granting the obligor a reasonable time for performance in accordance with criteria of good faith or reasonableness (Article 2.080 of the Mexican Civil Code) or by empowering judges to determine the time of performance (Article 1.551 of the Colombian Civil Code; Article 1.901 of the French and Dominican Civil Code; Article 1.401 of the Guatemalan Civil Code; Article 1.390 of the Honduran Civil Code; Article 1.900 of the Nicaraguan Civil Code; Article 1.081 of the Puerto Rican Civil Code; Article 1.212 of the Venezuelan Civil Code).

The rule in letter (c) of the first paragraph deals with these criteria through a flexible solution that consists in considering a “reasonable time”, the openness of which is essential in the flexible and variable field of international trade. This is also the rule, with slight changes, in international texts on contract law [Article 33 c) CISG; Article 6.1.1 (c) UP; Article 7:102 (3) PECL; Article III.-2:102 (1) DCFR; Article 95.1 CESL], and it is compatible with current trends in Caribbean law.

For determining the time of performance of obligations, the relation between the obligations and the order of performance according to Article 6.1.4 must be considered.

2. Performance on one occasion or in instalments

The second paragraph is based on Article 6.1.2 of the UP and deals with performance of several obligations where parties have not agreed on a specific and precise time of performance. Consequently, if this is not the case, there is no doubt that the obligation must be performed at the time agreed upon by the parties. Where the time of performance of a severable obligation is not determined or if a period or time of performance has been determined, the question arises as to whether or not the obligor needs to fulfil its obligations completely in one step or the has the right to perform in instalments or in different steps within the agreed or reasonable period.

The proposed rule is based on premise that the obligation must be completely fulfilled once at one time. This assumption obeys the reasonable principle of contract economy. It is expressly stated for sale contracts in Article 302 (1) of the Saint Lucian Commercial Code; Section 31 of the Sale of Goods Act of 1976; Section 32 of the Sale of Goods Act of Antigua and Barbuda; Section 32 of the Sale of Goods Act of Montserrat; Section 32 of the Sale of Goods Act of Bahamas; Section 32 of the Sale of Goods Act of Trinidad and Tobago; Section 33 of the Sale of Goods Act of Belize; Section 31 of the Sale of Goods Act of Jamaica; section 2-307 UCC). In civil law systems, this rule is rarely expressed (Article 462 of the Costa Rican Commercial Code), but there is a general principle of equal treatment of obligations between a sole obligor and a sole obligee, regardless of the severable nature of the obligations, which is why the rule also fits within this legal family.

This rule is obviously not rigid. Firstly, it requires that performance in one step be materially feasible. In some severable obligations, there is a certain natural order of performance that requires deferred or staggered fulfilment. So, in complex engineering contracts for which there is a general delivery deadline, it is obvious that turnkey delivery or the supply of technological equipment precedes, for example, technical assistance for the training of the workers responsible for operating the equipment. However, aside from these cases, even in more homogeneous and perfectly severable obligations, such as the delivery of generic goods, commodities or batches of products, delivery in one step and at one time, may not be feasible for logistic reasons concerning both parties. Consequently, the rule must be understood as a rebuttable presumption, which leads to a specific interpretative canon and serves as a guide within the general framework of rules relating to the interpretation of the contract.

It must be noted that despite written rules on sale contracts, English case law rather tends to severability both of obligations and performance when parties have not

expressly stated an obligation of performance at one time [The Juliana (1822), 2 Dods. 504; Davidson v Jones-Fenleigh (1980), 124 SJ 204]. Nevertheless, if both parties are subject to the OHADAC Principles, this will imply the incorporation by reference of the commented rule, the effects of which can be clearly recognised by judges and arbitrators of common law tradition.

Obviously, despite the interpretative scope of the rule, it is always recommendable that parties agree on a specific and unequivocal regime as to the time of performance of their respective obligations.

Article 6.1.3: *Early performance*

- 1. The obligee may not refuse the early performance of the obligation unless it has a legitimate interest in doing so.**
- 2. Additional expenses derived from an early performance must be borne by the obligor, without detriment to any other remedy of the obligee.**
- 3. The acceptance of an early performance by the obligee does not modify the time of performance of its obligation.**

COMMENT

An early performance implies that a party performs its obligation before the term fixed or the beginning of the period established according to the preceding Article.

It is presumed that generally an early performance is not detrimental to the other party. Such a presumption becomes a rule in most civil law systems which consider that the term or period of performance is fixed to favour of the party obliged, such that the obliged party has the right to waive this advantage by performing before the term. unless this is clearly stated otherwise in the contract (e.g. Article 776 of the Costa Rican Civil Code; Article 238 of the Cuban Civil Code; Article 1.187 of the French and Dominican Civil Code, maintained in Article 165 Draft Project reform of French law on obligations of 2013; Article 1.282 of the Guatemalan Civil Code; Article 976 of the Haitian Civil Code; Article 6:39 of the Dutch and Suriname Civil Code; Article 1.958 of the Mexican Civil Code; Article 1.214 of the Venezuelan Civil Code). However, most of these legal systems accept exceptions derived from the nature and purpose of the

contract that make it possible to consider that the term or period fixed is in the interest of both parties or exclusively of the obligee. Moreover, in other civil law systems the *favor debitoris* principle is not followed and the term or period fixed is interpreted in the interest both of the obligor and the obligee (e.g. Article 1.389 of the Honduran Civil Code; Article 1.899 of the Nicaraguan Civil Code; Article 1.012 of the Panamanian Civil Code; Article 1.080 of the Puerto Rican Civil Code). Early performance will thus be limited by the legitimate interest of the obligee to obtain timely performance. In common law Caribbean legal systems, the obligee may usually reject an early performance, and the same principle applies in civil law countries that only recognise early performance agreed by the parties (Article 1.889 of the Nicaraguan Civil Code).

The OHADAC Principles have chosen to follow international texts on contract law harmonisation, which initially recognise early performance, providing that it does not prejudice the legitimate interests of the obligee [Article 6.1.5. (1) UP; Article 7:103 (1) PECL; Article III-2:103 (1) DCFR; Article 130 CESL]. That rule is more restrictive for the obligee than that stated in Article 52 CISG, which provides the obligee with a discretionary power to admit or reject goods delivered early. Indeed, early performance (particularly in case of pecuniary obligations) does not usually prejudice the obligee and this party must therefore accept it. In case of non-pecuniary obligations the obligee may reasonably reject early performance if it provokes damage or frustrates its expectations.

Example: A garment retail franchise undertakes to buy from a manufacturer a batch of garments for the spring season, which must be delivered to its wholesaler in the second half of January. The manufacturer offers to deliver the batch in the second half of December. The buyer can reject the early performance because, until the contractual period, its warehouse will still be holding winter garments and does not have storage capacity for new garments until the agreed period.

If the obligee cannot reasonably justify its rejection of early performance, it must accept this performance. According to the second paragraph of Article 6.5.3, expenses resulting from early performance will be borne by the obligor. In any case, the acceptance of the performance does not imply the waiving by the obligee of any remedy or action to which it may be entitled in accordance with the rules on contract non-performance. This rule is also found in Article 6.1.5 (3) UP.

Furthermore, in accordance to paragraph 3, this acceptance will also not modify the time of performance of the obligee's obligations. The OHADAC Principles opt thus for a rule similar to that of Articles 7: 103 (2) PECL and III-2:103 (2) DCFR. Some legal

systems, in line with Article 6.1.5 (2) UP, only provide such an effect in cases where the time of performance of the obligee's obligation is fixed regardless of the obligor's early performance, but not otherwise. Thus, when in a sale contract, the payment is fixed at the time of delivery of the goods, and the obligor delivers the goods a month before the agreed date, the obligee is also obliged to an early payment, unless it can refuse the early performance because of the difficulties caused by the early payment. Such a consequence seems neither reasonable nor efficient, and increases the chances of rejection of an early performance. In the example, if the seller anticipates the delivery of the goods, the buyer will be able to pay on the agreed date of delivery, so that the obligor assumes the risk derived from early performance. For instance, if the agreed date is within a given period, in the above example, the obligor will fulfil the contract if it pays on the last day of the period fixed for the delivery of goods.

Article 6.1.4: *Order of performance*

- 1. In the absence of agreement, obligations of the parties must be performed simultaneously unless otherwise indicated by circumstances.**
- 2. Notwithstanding, where the performance of only one party requires a period of time, in the absence of agreement, this performance should be performed at an earlier time unless otherwise indicated by circumstances.**

COMMENT

This Article contains one of the most generally accepted rules in international trade. Its original formula is found in Section 234 of the Restatement (Second) of Contracts and very similar rules are in Articles 6.1.4 UP, 7:104 PECL and III-2:104 DCFR. This rule is not very common in Caribbean legal texts, but is usually admitted by case law. In any case, it is an open rule with subsidiary presumptions that can be contradicted by general rules on contract interpretation.

Firstly, agreements of the parties on the time and order of performance shall prevail. Secondly, even if there is no express agreement, the rules of this Article will not be applied either if a specific order of performance can be inferred from the contract provisions, such that it becomes unreasonable to apply the proposed presumptions.

Thus, if one obligation is a condition precedent, it must be interpreted that this obligation must be performed first. In other cases, commercial terms used by the parties imply a different order of performance (e.g. a C.I.F. sale, where payment is due against documents representing the goods).

Where the contract does enable the determination of an express or implied order of performance, the presumptions included in this Article, which as has been said, are flexible should be considered. The first rule is that obligations must be performed simultaneously whenever possible. English law arrives at the same result with the rebuttable presumption, according to which, if simultaneous performance is possible, the mutual obligations create concurrent conditions and must be performed simultaneously. This rule is expressly stated in relation with payment at the time of delivery in sales contracts [e.g. Article 1.929 of the Colombian Civil Code; Article 1.087 of the Costa Rican Civil Code; Article 352 (a) of the Cuban Civil Code; Article 1.651 of the French and Dominican Civil Code; Article 1.825 of the Guatemalan Civil Code; Article 1.436 of the Haitian Civil Code; Article 7:26 of the Dutch and Suriname Civil Code; Article 1.659 of the Honduran Civil Code; Article 2.294 of the Mexican Civil Code; Article 2.661 of the Nicaraguan Civil Code; Article 1.271 of the Panamanian Civil Code; Article 1.389 of the Puerto Rican Civil Code; Article 300 (2) of the Saint Lucian Commercial Code; Article 1.528 of the Venezuelan Civil Code; Section 28 of the Sale of Goods Act of 1979; Section 29 of the Sale of Goods Act of Antigua and Barbuda; Section 29 of the Sale of Goods Act of Montserrat; Section 29 of the Sale of Goods Act of Bahamas; Section 29 of the Sale of Goods Act of Trinidad and Tobago; Section 30 of the Sale of Goods Act of Belize; Section 28 of the Sale of Goods Act of Jamaica; 58.1 CISG; Article 126 CESL].

The second rule is more specific. Where one of the obligations can be performed instantaneously (such as payment), while the other party's obligation requires a time for performance (for example the execution of a work), the rule of simultaneity actually requires that the obligation that requires a period of performance must begin earlier. In practice, this rule implies that non-pecuniary obligations are performed before pecuniary obligations. In this way, simultaneity is actually achieved when the contract performance is completed, as the payment will be made, for example, at the time when the work or the service is completed. On the balance, the rule follows the same principle based on the general rule that in a sale contract the payment must be made at the same time as the delivery of goods. In actual fact, the seller's performance therefore begins before because it usually requires a time for shipping, transportation, etc. Moreover, this rule will not pose a problem in English law, because the submission

of the parties to the OHADAC Principles will mean that the parties commit to abide by these reasonable rules, which are fully acceptable in English law. However, it must be noted that under English law, should the parties fail to agree, the general interpretation rule for non-simultaneous and independent obligations is that there is no concrete order of performance, so that each party may demand the performance by the other party even when it has not performed its obligation. The other party will not be able to invoke the non-performance to avoid that required performance. The required party must firstly perform and, once its obligations are performed, it may claim performance from the other party. Hence the rules of these Principles are a safer alternative for preventing a battle of claims and the difficulties that arise with the determination of the first shot.

Article 6.1.5: *Partial performance*

- 1. The obligee may not refuse a partial performance, whether performance has been guaranteed or not, unless it has a legitimate interest in doing so.**
- 2. Additional expenses derived from a partial performance must be borne by the obligor, without detriment to any other remedy of the obligee.**
- 3. Where the obligation is severable, the obligee that accepts a partial performance may for its part perform its obligation partially or proportionally.**

COMMENT

Regardless of the severable or entire nature of the obligation, this Article deals with the possibility of a partial performance. Partial performance implies a breach of contract. However, it is important to establish if such a partial performance must be accepted and therefore the breach is also partial. The rule does not deal with breach of contract caused by the obligee's behaviour or induced by the obligee preventing the obligor's performance [e.g. decision of the Supreme Court of Jamaica (1977) in *Charles Gibbs Martin Foster v Dewar* (1977), *Carilaw JM 1977, SC 18*]. In these cases, rules on interpretation, modification and non-performance shall be applied.

The rule in paragraph 1 (shared by Articles 51 CISG, 6.1.3 UP and 130.2 CESL) adopts as a starting point that the obligee is not obliged to accept a partial performance offered

by the obligor at the time of expiry of its obligation, even if it is accompanied by guarantees for total performance. Obviously, cases of performance in instalments expressly agreed are not considered. Otherwise, obligations must be entirely performed according to the contract terms and the general principle stated in Article 1.2 of these Principles. However, this rule is too inflexible where partial breach is not fundamental according to the contract's circumstances, the scope of the reference of the parties in the contract to a total performance, the degree of partial performance and the actual damage caused to the obligee by the partial performance. That is why the rule is relaxed where the obligee has no legitimate interest in rejecting the partial performance.

Example 1: Under a building contract, the contractor delivers 99% of the works at the expiry of the contract. One of the ornaments of the façade's plaster projected in the project design could finally not be incorporated due to technical difficulties. The obligee has no legitimate interest in rejecting the partial performance, insofar as the contract has been substantially performed and the consequences of the breach are not fundamentally damaging in relation with the aim of the contract.

The rule chosen is also in line with the essential rules of a comparative approach of the Caribbean legal systems. Although the contract terms do not provide for the need of a complete performance, the related applicable presumptions and interpretative rules in the Caribbean sphere seem dissimilar in principle. Some civil law systems, in the absence of an agreement, do not recognise the obligor's right to implement or call for a partial performance, so that a partial performance implies a fundamental and entire breach of contract [Article 1.649 of the Colombian Civil Code; Article 927 of the Colombian Commercial Code; Article 772 of the Costa Rican Civil Code; Article 330 of the Cuban Commercial Code; Article 1.244 of the French and Dominican Civil Code, maintained in Article 189 of the Proposals for the reform of the French law on obligations of 2013; Article 1.387 of the Guatemalan Civil Code; Article 1.030 of the Haitian Civil Code; Article 6:29 of the Dutch and Suriname Civil Code; Article 1.434 of the Honduran Civil Code; Article 2.078 of the Mexican Civil Code; Article 2.021 of the Nicaraguan Civil Code; Article 1.056 of the Panamanian Civil Code; Article 1.123 of the Puerto Rican Civil Code; Article 248 of the Puerto Rican Commercial Code; Article 1.080 of the Saint Lucian Civil Code; Article 1.291 of the Venezuelan Civil Code). Sometimes partial performance is admitted in cases specially determined by law or according to the nature or circumstances of the contract. At any event, the principle of good faith and abuse of law doctrine enable judges to consider some exceptions when the refusal of the partial performance is disproportionate or unreasonable. Particularly, some

legal systems allow partial performance when obligations have a liquid and a non-liquid portion, because the first must be performed before the second becomes liquid (Article 1.387 of the Guatemalan Civil Code; Article 1.434 of the Honduran Civil Code; Article 2.078 of the Mexican Civil Code; Article 2.021 of the Nicaraguan Civil Code; Article 1.056 of the Panamanian Civil Code; Article 1.123 of the Puerto Rican Civil Code; Article 1.292 of the Venezuelan Civil Code). Finally, in some cases, partial performance is permitted when the judge decides to divide the payment in instalments (Article 1.244.1 of the French and Dominican Civil Code; Article 1.030 of the Haitian Civil Code).

In common law, the solution depends on the severable or entire nature of the obligation. In cases of entire contracts, the obligor must perform entirely (full performance). Partial performance leads to breach of contract and the creditor is not obliged to accept it or to pay a part of the agreed price [Section 30.1 Sales of Goods Act of 1979; Section 31 of the Sale of Goods Act of Antigua and Barbuda; Section 31 of the Sale of Goods Act of Montserrat; Section 31 of the Sale of Goods Act of Bahamas; Section 31 of the Sale of Goods Act of Trinidad and Tobago; Section 32 of the Sale of Goods Act of Belize; Section 30 of the Sale of Goods Act of Jamaica; Section 235 Restatement (Second) of Contracts; *Cutter v Powell* (1775), 6 TR, 320; *Sumpter v Hedges* (1898), QB 673; *Hoenig v Isaacs* (1952), 2 All ER 176; *Bolton v Mahadeva* (1972), 1 WLR 1009; *The Hansa Nord* (1976), QB 44; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* (1991), 1 QB 1]. This rule is relaxed if partial performance does not imply a fundamental breach or even when it benefits the creditor, discrepancies are minor or the rejection by the creditor is unreasonable [*Re Thornett and Fehr and Yuills* (1921), 1 KB, 219; *Mitchell v Darthez* (1836), 2 Bing. NC 555]. Conversely, partial performance is admitted in cases of severable obligations [*Ritchie v Atkinson* (1808), 10 East 295].

Acceptance by the obligee of partial performance does not imply a waiver of any remedy or action resulting from the obligor's non-performance, according to paragraph 2. Obviously, this acceptance means that the breach is only partial. This does not preclude that the obligee will accept the performance without objections, which could limit or exclude further action by breach of contract. Moreover, expenses derived from partial performance (duplication in the receipt of goods or in banking operations, replacement or substitution of the non-performed part, etc.) are borne by the obligor. If the obligee covers such expenses, they may be taken into account in calculating the damages due as a result of partial performance. If the obligee accepts the partial performance without objections, expenses must merely be reimbursed by the obligor.

Acceptance by the obligee of a partial performance requires determining the effects on the obligee's obligation. There is no general solution, because it depends on the severable or entire nature of this obligation, according to paragraph 3. Thus, in the case of a sale contract of a batch of units, the obligee who accepts a partial delivery performs by paying for the units delivered. This rule is quite reasonable and so is established, for example, in Section 31 of the Sale of Goods Act of Antigua and Barbuda; Section 31 of the Sale of Goods Act of Montserrat; Section 31 of the Sale of Goods Act of Bahamas; Section 31 of the Sale of Goods Act of Trinidad and Tobago; Section 32 of the Sale of Goods Act of Belize; Section 30 of the Sale of Goods Act of Jamaica. On the contrary, where obligations are entire the obligee must entirely perform, without detriment to the remedies by breach of contract.

Example 2: The case is the same as in example 1. The creditor must pay the agreed price for the delivery of the building, because the cost of the absent ornaments is not severable in relation with the building. It may claim for breach of contract and damages for this partial breach.

Example 3: A manufacturer of cars sited in country X concludes a contract with a manufacturer of spark plugs for car engines, sited in country Y. The contract establishes the obligation to deliver 50,000 units within a given period. The supplier delivers only 40,000 units. The car manufacturer can get the missing units in the market and use the 40,000 delivered units, so that it has no legitimate interest in rejecting the partial performance. It must pay with a reduction of 20% and may claim for damages derived from expenses, delays and inconveniences related to the replacement solution for the 10,000 non delivered units.

Article 6.1.6: *Performance by a third person*

Unless the contract requires a personal performance, the obligee may not refuse the performance by a third person acting with the obligor's consent.

COMMENT

Each party to the contract is obliged to perform its contractual obligations. However, most legal systems accept the discharge of the obligor by a third person (vicarious performance). Performance by a third person in this sense, where there is no assignment or agreed substitution, does not exempt the obligor for being held liable in

case of defective performance by the third person. The rule allows vicarious performance as a way of performance of the obligor, who continues to be obliged to the obligee and responsible for breach of contract. This rule is expressed in most Caribbean civil law systems (Article 1.630 of the Colombian Civil Code; 765 of the Costa Rican Civil Code; Article 1.236 of the French and Dominican Civil Code, maintained with some modifications in Article 186 Proposals for reform of the French law on obligations of 2013; Article 1.380 of the Guatemalan Civil Code; Article 1.022 of the Haitian Civil Code; Article 6:30 of the Dutch and Suriname Civil Code; Article 1.423 of the Honduran Civil Code; Articles 2.065-2.068 of the Mexican Civil Code; Article 2.010 of the Nicaraguan Civil Code; Article 1.045 of the Panamanian Civil Code; Article 1.112 of the Puerto Rican Civil Code; Article 1.072 of the Saint Lucian Civil Code; Article 1.283 of the Venezuelan Civil Code). Common law systems also recognise the possibility of vicarious performance, but with some conditions relating to the obligor's consent.

Paragraph 1 of Article 6.1.6 therefore recognises the possibility of performance by a third party insofar as it acts with the consent of the obligor (Article 7:106 PECL; Article III-2:107 DCFR; Article 127 CESL). It is considered that the obligee has an interest in obtaining the performance of the contract regardless of whether it comes from the obligor or from a third person acting with its consent.

It has been considered significant to require as condition that the third person acts with the obligor's consent [Article 7.106 (1) (a) PECL; Article III-2:107 (1) (a) DCFR; and Article 127 (2) (a) CESL]. It is a characteristic condition in common law systems, although some exceptions are found in case law. In any case is openly considered, for example, if the obligor subsequently ratifies the third party's performance. Under Section 278 of the Restatement (Second) of Contracts, consent need not be express, but can simply be tacit or implied, following, for instance from the mere passivity of the obligor, who knows of that performance and does not oppose it. In most civil law systems, however, the obligee must accept the performance if the third person is not authorised by the obligor or even if it acts against the common will of both the obligee and the obligor, although there are different consequences with respect to the subrogation effect. Article 186 of the Proposals for reform of the French law on obligations of 2013 proposes a more flexible and more qualified criterion by limiting this principle in cases of justified opposition of the obligor or legitimate interest of the obligee. The OHADAC Principles have opted, following this line, to make the performance conditional upon the express or implied consent of the obligor. The contrary rules in force in Caribbean civil law systems cannot be considered as international public policy. Moreover, this rule is more consistent with the freedom of

contract principle. The obligee is bound by the contract and when the obligor has not authorised the performance by a third person the obligee is not obliged to accept it. Payment by a third person could prejudice the obligor who has a legitimate interest to personally perform the obligation. If the obligee accepts the performance, it becomes exposed to the obligor's claim for damage as a result of the third person's performance. The obligee must therefore accept the performance only if the obligor's consent is acknowledged. In this respect, the obligee must check, reasonably and without excessive expense, that there is consent. Otherwise it is free to accept the performance, but it is not released from the liability arising from damage to the obligor as a result of this consent.

The rule does not consider the possibility that the obligee, in the absence of the consent of the obligor, was obliged to accept the performance by a third person who has a legitimate interest when the obligor does not perform or it is evident that it will not perform. This possibility is envisaged in Article 7:106 (1) (b) PECL; Article III-2:107 (1) (b) DCFR; and Article 127 (2) (b) CESL. Failing the agreement of the parties, it is not advisable to add a rule, which, even if it is appropriate for the structure of legal relationships in some cases, favours the interests of the third party rather the interests of the obligor and the legal certainty of the obligee itself, whose contract has been subject to these Principles. Therefore, such a possibility will only be taken into account if the parties have so expressly agreed in the contract or by virtue of the applicable law according to private international rules.

Obviously, there is an exception to this general rule when the status of person who must perform the obligation is an essential aspect of the contract. In *intuitu personae* obligations, the obligee is not obliged to accept the performance by a person other than the obligor. This is a common rule both in civil law systems (Article 1.630 of the Colombian Civil Code; Article 765 of the Costa Rican Civil Code; Article 235 of the Cuban Civil Code; 1.237 of the French and Dominican Civil Code; Article 1.381 of the Guatemalan Civil Code; Article 1.023 of the Haitian Civil Code; Article 6:30 of the Dutch and Suriname Civil Code; Article 1.426 of the Honduran Civil Code; Article 2.064 of the Mexican Civil Code; Article 2.013 of the Nicaraguan Civil Code; Article 1.048 of the Panamanian Civil Code; Article 1.115 of the Puerto Rican Civil Code; Article 1.073 of the Saint Lucian Civil Code; Article 1.284 of the Venezuelan Civil Code) and in common law [Davies v Collins (1945), 1 All ER 247; Martin v N Negin Ltd (1945), 172 LT 275; Edwards v Newlands & Co (1950), 2 KB 534].

Finally, the rule does not prejudge the legal treatment of the relationships derived from the performance by a third person, particularly its subrogation of the obligee's

rights against the obligor, which shall be determined in the frame of the legal relationship between the obligor and the third person, that is alien to the obligee and to the contract between the obligee and the obligor.

Article 6.1.7: *Forms of payment*

- 1. A pecuniary obligation may be paid by any form used in the ordinary course of business.**
- 2. Where the creditor accepts a negotiable instrument, order or promise to pay, it is presumed to do so only on condition that it will be honoured.**

COMMENT

In international trade, parties are free to determine the form of payment of their pecuniary obligations (cash, documentary credits, autonomous guarantees, remittances and transfers of funds, orders of payments, negotiable instruments, bills of exchange, etc.). This is a principle sometimes envisaged in legal texts [e.g. Section 2-511 (2) UCC; Article 6.1.7 UP; 7:107 PECL; Article III-2:108 (1) DCFR; Article 124.1 CESL]. In some cases, as a manner of performance, forms of payment may be subject to restrictions established by overriding mandatory rules and control of exchanges in the law of the place of performance (e.g. Article 240 of the Cuban Civil Code), which will be taken in consideration according to paragraph III of the Preamble to these Principles.

Another usual rule, often affected by trade practices, establishes that such forms of payment do not imply acceptance of performance, insofar as it is presumed that they are accepted on condition that are honoured or “with recourse”, that is if the payment becomes effective [Article 1.394 of the Guatemalan Civil Code; Article 1.435 of the Honduran Civil Code; Article 6:46 of the Dutch and Suriname Civil Code; Article 2.024 of the Nicaraguan Civil Code; Article 1.057 of the Panamanian Civil Code; Article 1.124 of the Puerto Rican Civil Code; Section 2-511 (3) UCC; *D & C Builders Ltd v Rees* (1996), 2 QB 617 (CA); Article 6.1.7 (2) UP; Article 7:107 PECL; Article III-2:108 (2) DCFR; Article 124.1 CESL].

Article 6.1.8: *Currency of payment*

- 1. The parties may agree that payment shall be made in a specified currency. If the payment in the agreed currency is impossible or the currency of payment is not agreed, the payment shall be made in the currency of the place where the payment is due.**
- 2. In the absence of agreement, a pecuniary obligation expressed in a currency other than that of the place of payment may be paid in the currency where payment is due providing that it is a freely convertible currency.**
- 3. Payment in the currency where payment is due shall be made according to the exchange rate applicable in the place where payment is due at the time when payment is due. If the debtor has not paid at the agreed time, the creditor may opt to require the payment according to the exchange rate applicable there at the time when payment was due or at the time of actual payment.**

COMMENT

Pecuniary obligations must be paid in the agreed currency of payment [e.g. Article 771 of the Costa Rican Civil Code; Article 6:121 of the Dutch and Suriname Civil Code; Article 1.435 of the Honduran Civil Code; Article 2.022 of the Nicaraguan Civil Code; Article 1.057 of the Panamanian Civil Code; Article 1.124 of the Puerto Rican Civil Code; Article 7:108 (1) PECL; Article III-2:109 (1) DCFR].

However, in certain cases, payment in the agreed currency is not possible because of payment restrictions in the country where the obligation must be performed (Article 240 of the Cuban Civil Code; decision of the French Cour de Cassation of 11 October 1980) or because of a temporary impossibility to get the amount of currency needed. In other less usual cases, the parties simply do not agree on a currency of account because they fix the price in an undetermined way or without any reference to a concrete currency. In these cases, paragraph 1 of this Article establishes the currency of the place of payment as the currency for payment. Such a rule is expressly envisaged in some legal systems (e.g. Article 771 of the Costa Rican Civil Code; Articles 6:112 and 6:122 of the Dutch and Suriname Civil Code; Article 1435 of the Honduran

Civil Code; Article 2.022 of the Nicaraguan Civil Code; Article 1.057 of the Panamanian Civil Code; Article 1.124 of the Puerto Rican Civil Code; Articles 6.1.9 (2) and 6.1.10 UP; Article III-2:109 (4) DCFR].

The second paragraph deals with a different assumption: parties do not agree on the currency of payment, they simply determine the price in a determined currency ("currency of account"). In these cases, the obligor may opt to pay in the currency of account or in the currency of the place of payment. It is also a common rule (e.g. Articles 6:121 and 6:123 of the Dutch and Suriname Civil Code; Article 6.1.9 (1) UP; Article 7:108 (2) PECL; Article III-2:109 (2) DCFR]. However, unlike most of these legal texts, if the currency of the place of performance is not freely convertible it is considered excessively burdensome for the creditor, so that the obligor shall pay in the currency of account that determines the price of the contract. It must be stressed that the US dollar, pound sterling and euro are the only convertible official currencies in the Caribbean States.

Paragraph 3 of this Article solves the problem of determining the exchange rate of the currency when the payment must or may be made in the currency of the place of payment, in accordance with preceding paragraphs. The general rule is to apply the prevailing exchange rate or the preferential at the time fixed for the payment [e.g. Articles 771 of the Costa Rican Civil Code; Article 1.395 of the Guatemalan Civil Code; Article 6:124 of the Dutch and Suriname Civil Code; Article 6.1.9 (3) UP; Article 7:108 (2) PECL; Article III-2:109 (2) DCFR]. However, this rate must be determined where the obligor makes an early or late payment in relation with the time fixed for payment in accordance with Articles 6.1.2 and 6.1.3. In this case, there are three possibilities. The first consists in maintaining the general rule, so that the exchange rate shall be the prevailing or preferential rate at the time of the undue payment; given that the fluctuation might prejudice the obligee, it may include the difference regarding to the exchange rate at the due time of payment as a part of damages derived from breach of contract because a delayed payment or a part of the compensation due to early performance [e.g., Article 6:125 of the Dutch and Suriname Civil Code; *Milangos v George Frank (textiles) Ltd* (1976), AC 433]. A second possibility, found in French case law, is to apply in any case the exchange rate at the agreed time of payment. Finally, a third option is represented by international texts of harmonisation of contract law [Article 6.1.9 (4)]; Article 7:108 (3) PECL; Article III-2:109 (3) DCFR], which allows the creditor to choose between claiming for payment according to the exchange rate at the agreed time of payment or according to the prevailing exchange rate at the actual time of payment. All these solutions are inspired by the same logical criterion that

makes the obligor bear the risks and expenses of payment made at a time other than the agreed time. However, the rule of these Principles serves the legitimate interests of the creditor better and, above all, implies a greater economy of resources.

Article 6.1.9: *Imputation of payment*

- 1. In the absence of an agreement, an obligor owing several pecuniary obligations to the same obligee may specify, at the time of payment, the obligation to which it intends the payment to be applied, providing that it put due obligations before those not yet due. However, the payment shall first discharge expenses, then due interests and finally the principal.**
- 2. If the obligor makes no such specification, the obligee may, within a reasonable time after payment, declare to the obligor the obligation to which it imputes the payment, provided that the obligation is due and undisputed.**
- 3. In the absence of imputation under the preceding paragraphs, payment shall be imputed to the obligation which meets one of the following criteria in the order indicated:**
 - a) the obligation which is due or is the first to fall due;**
 - b) the obligation for which the obligee has no security or the least security;**
 - c) the obligation which is the most burdensome for the obligor;**
 - d) the obligation which has arisen first.**
- 4. If none of the preceding criteria applies, payment shall be imputed to all obligations proportionally.**
- 5. The preceding rules shall be applied by analogy to non-pecuniary obligations of the same nature.**

COMMENT

1. Power of the obligor to impute the payment

Where there are several obligations between one obligee and one obligor and a payment is made, which is not sufficient to satisfy all obligations, it is important to establish to which obligation among all the payment must be imputed and therefore which obligation is extinguished thereby, especially if different guarantees for different obligations exist, these are subject to different rates of interest or their periods of limitation expire in different dates. In such cases, legal systems within OHADAC coincide in declaring that, in the absence of agreement, the obligor may determine, at the time of performance, the obligation to which the payment is imputed [Article 779 of the Costa Rican Civil Code; Article 1.654 of the Colombian Civil Code; Article 239.1 of the Cuban Civil Code; Article 1.253 of the French and Dominican Civil Code (maintained in Article 195 Draft Project of reform of the French law on obligations of 2013); Article 1.404 of the Guatemalan Civil Code; Article 1.039 of the Haitian Civil Code; Article 6:43 (1) of the Dutch and Suriname Civil Code; Article 1.437 of the Honduran Civil Code; Article 2.092 Mexican Civil Code; Article 2.050 of the Nicaraguan Civil Code; Article 1.059.1 of the Panamanian Civil Code; Article 1.126.1 of the Puerto Rican Civil Code; Article 1.089 of the Saint Lucian Civil Code; Article 1.302 of the Venezuelan Civil Code; Section 258.1 of the Restatement (Second) of Contracts]. English law shares this general rule, but the obligee may reject the imputation and return the payment received within a reasonable time [Thomas v Ken Thomas Ltd (2006), EWCA Civ 1504, 21].

The obligor must generally give notice of the imputation to the obligee, expressly or impliedly (e.g. where the obligor pays the exact amount of one of the obligations). In any case, this is not a rigid rule. A limit generally accepted in Caribbean civil law systems provides that if the obligation produces interests payment cannot be imputed to principal, before the interests are paid (Article 780 and 783.1 of the Costa Rican Civil Code; 1.653 of the Colombian Civil Code; Article 1.254 of the French and Dominican Civil Code; Article 1.407 of the Guatemalan Civil Code; Article 1.040 of the Haitian Civil Code; Article 1.438 of the Honduran Civil Code; Article 2.094 of the Mexican Civil Code; Article 2.051 of the Nicaraguan Civil Code; Article 1.060 of the Panamanian Civil Code; Article 1.127 of the Puerto Rican Civil Code; Article 1.090 of the Saint Lucian Civil Code; Article 1.303 of the Venezuelan Civil Code), unless the obligee consents or it is otherwise agreed between the parties. The term “interest” covers both contract and legal interests.

Texts on harmonisation of contract law also provide the priority of the payment of interests and they add the preferential imputation of expenses as well [Article 6.1.12

(1) UP; Article 7:109 (4) PECL; Article III-2:110 (5) DCFR; Article 128.6 CESL], following thus the Germanic law model (Article 6:44 of the Dutch and Suriname Civil Code; § 367 BGB]. The UP, the PECL, the DCFR and the CESL allow the obligee to alter the mentioned order. The OHADAC Principles, however, in the absence of agreement, prefer that order was mandatory and imputes the payment first to expenses, secondly to interests and finally to the principal. The modification of such order, which reflects the economy of the contract in a natural way, can only be justified by a common agreement, but not by a unilateral decision of the obligee.

The OHADAC Principles also envisage a limit to the obligor's power which is recognised in some national legal systems, so that the payment of a non-expired obligation cannot be imputed before an obligation already expired (Article 1.654 of the Colombian Civil Code). On the contrary, it does not seem reasonable to oblige the obligor to pay firstly obligations guaranteed by a third person (Section 258.2 Restatement (Second) of Contracts). Obviously, the obligor may take it into account where it decides the imputation, but the consequences of its decision regarding to the guarantor shall be submitted according to the rules applicable to this relationship, regardless of the Principles.

2. Imputation by the obligee

In the absence of agreement, some Caribbean legal systems give the obligee the power to impute payments. This is a usual rule in common law countries for commercial contracts [Peters v Anderson (1814), 5 Taunt. 596; Cory Bros & Co Ltd v Owners of Turkish SS "Mecca" (1897), AC 286; West Bromwich Building Society v Crammer (2002), EWHC 2618 (Ch); Section 259 Restatement (Second) of Contracts]. This is also the rule in Cuban law, providing that the obligor does not oppose immediately (Article 239.2 Civil Code), and in the harmonised texts [Article 6.1.12 (2) UP; Article 7:109 (2) PECL; Article III-2:110 (2) DCFR; Article 128 (2) CESL]. However, the rule is not absolute and admits some exceptions. Thus, the imputation by the obligee is not possible where the obligation is not still due (Section 259 Restatement (Second) of Contracts], it is illegal [Wright v Laing (1824), 3 B & C 165; Keeping v Broom (1895), 11 T.L.R 595; A. Smith & Son (Bognor Regis) Ltd v Walter (1952), 2 QB 319] or it is disputed (Section 259 Restatement (Second) of Contracts). The fact that the limitation period has expired is not usually considered an obstacle for the obligee to impute the payment made by the obligor [Mills v Fowkes (1839), 5 Bing NC 455; Stepney Corp v Ososky (1937), 3 ALL ER 289; comment to Section 259 Restatement (Second) of Contracts].

Although civil law systems do not usually bestow such a power on obligees, if the obligee, due to the inactivity of the obligor, imputes the payment on the receipt to

some obligations and the obligor accepts such an imputation, the obligor loses the right to reject the imputation afterwards, apart from cases of fraud by the obligee or a similar cause that avoids it (Article 1.654 of the Colombian Civil Code; Article 781 of the Costa Rican Civil Code; Article 1.255 of the French and Dominican Civil Code; Article 1.405 of the Guatemalan Civil Code; Article 1041 of the Haitian Civil Code; Article 1.437.2 of the Honduran Civil Code; Article 2.052 of the Nicaraguan Civil Code; Article 1.059.2 of the Panamanian Civil Code; Article 1.126.2 of the Puerto Rican Civil Code; Article 1.091 of the Saint Lucian Civil Code; Article 1.304 of the Venezuelan Civil Code).

Paragraph 2 of this Article gives the obligee the right to impute payments if the obligor has renounced its right. Usually, if the obligor pays without imputation, the obligee may impute the payment in the receipt or in any other way, providing that it gives notice in due time to the obligor. The non-performance of this duty does not avoid the imputation, but could lead to damages derived from the prejudice for the obligor caused by such a lack of due diligence. In any case, the obligee may only impute the payment to expired or due obligations that are not controversial or disputed. Otherwise, imputation shall be ineffective. The Article does not refer to the legality of the obligation from which the imputed obligation derives, insofar as illegality is a question excluded from the Principles in accordance with Article 3.3.1, but it does not prejudice that illegality could avoid the imputation if this is the effect foreseen in the national, international or supranational law establishing the illegality of the obligation.

3. Imputation criteria, failing the imputation by the obligor and by the obligee

Most civil law systems provide legal criteria of imputation in the absence of imputation by the obligor. Other systems envisage these criteria also in the absence of a subsidiary imputation by the obligee [Article 1.655 of the Colombian Civil Code; Article 783 of the Costa Rican Civil Code; Article 239.3 of the Cuban Civil Code; Articles 1.256 of the French and Dominican Civil Code; Article 1406 of the Guatemalan Civil Code; Article 1.042 of the Haitian Civil Code; Article 6:43.2 of the Dutch and Suriname Civil Code; Article 1.439 of the Honduran Civil Code; Article 2.093 of the Mexican Civil Code; Article 2.053 of the Nicaraguan Civil Code; Article 1061 of the Panamanian Civil Code; Article 1.128 of the Puerto Rican Civil Code; Article 1.092 of the Saint Lucian Civil Code; Article 1.305 of the Venezuelan Civil Code; Section 260 Restatement (Second) of Contracts; Article 6.1.12 (3) UP; Article 7:109 (2) PECL; Article III-2:110 (4) DCFR; Article 128 (4) CESL]. There is no perfect convergence about these criteria, sometimes inclined to the *favor debitoris* principle, sometimes to the opposite *favor creditoris* principle. The most usual order is the following: due obligations, obligations more favourable to the obligor, and obligations that first arise [Article 783 of the Costa Rican Civil Code;

Article 1256 of the French and Dominican Civil Code, maintained in Article 195 Proposals for the reform of the French law on obligations of 2013); Article 1.406 of the Guatemalan Civil Code; Article 6:43.2 of the Dutch and Suriname Civil Code; Article 2.093 of the Mexican Civil Code; Article 2.053 of the Nicaraguan Civil Code; Article 1.092 of the Saint Lucian Civil Code]. Under other legal systems, due obligations prevail and failing that those that the obligor chooses or are more onerous, or simply the more burdensome among the due obligations (Article 1.655 of the Colombian Civil Code; Article 1.042 of the Haitian Civil Code; Article 1.439 of the Honduran Civil Code; Article 1.061 of the Panamanian Civil Code; Article 1.128 of the Puerto Rican Civil Code). Some of them only envisage the preferential order of due or expired obligations (Article 239 of the Cuban Civil Code).

Paragraph 3 follows the rule in Article 1.305 of the Venezuelan Civil Code, which contains the most widespread criteria in international texts [Article 6.1.12 (3) UP; Article 7:109. (3) PECL; Article III-2:110 (4) DCFR; Article 128 (4) CESL]. According to a principle already present in the preceding paragraphs, first due or expired obligations must be preferred. This criterion gives preference to the performance of obligations and therefore benefits both parties. Failing that, the second criterion prefers the imputation to the obligation that entails more risks or less guarantees for the obligee, thus facilitating the contract's efficiency and maximising the internalisation of risks of breach of contract. Failing that, the same economic inspiration leads to prefer the payment of the most onerous obligations for the obligor. Finally, the last solution aims at an objective criterion that is merely temporal.

4. Final solution based on a pro rata calculation

Where any of the objective criteria of imputation are available, the final solution is the proportional imputation to all obligations. The rule in paragraph 4 of this Article is that usually followed by most legal systems [Article 783.4 of the Costa Rican Civil Code; Article 239.3 of the Cuban Civil Code; Article 1.256 of the French and Dominican Civil Code (maintained in Article 195I of the Proposals for reform of the French law on obligations of 2013); Article 1.406 of the Guatemalan Civil Code; Article 1.042.2 of the Haitian Civil Code; Article 6:43.2 of the Dutch and Suriname Civil Code; Article 1.439.2 of the Honduran Civil Code; Article 2.093 of the Mexican Civil Code; Article 2.053.2 of the Nicaraguan Civil Code; Article 1.061 of the Panamanian Civil Code; Article 1.128.2 of the Puerto Rican Civil Code; Article 1.092 of the Saint Lucian Civil Code; 1.305 of the Venezuelan Civil Code; Article 6.1.12 (3) UP; Article 7:109 (3) PECL; Article III-2:110 (4) DCFR; Article 128 (4) CESL].

5. Imputation of performance of non-pecuniary obligations

Imputation of non-pecuniary obligations is rare. However, in contracts with successive performance, the obligor obliged by a non-pecuniary obligation (e.g. the delivery of goods in a supply contract) often does not perform one or more deliveries at the fixed time, and when it makes a delivery it must be determined the obligation to which that delivery is imputed. In these cases, the criteria of imputation of payments may be applied by analogy (*mutatis mutandis*), provided that the non-pecuniary obligations are of the same nature. This rule, established in Article 6.1.13 of the Unidroit Principles, also obeys the fact that most of the legal systems analysed do not distinguish between imputations related to pecuniary or non-pecuniary obligations.

Article 6.1.10: *Refusal of performance*

- 1. The obligee cannot refuse the performance by the obligor under the contract terms and, failing which, under the rules of these Principles.**
- 2. If the creditor refuses the payment of a pecuniary obligation by the debtor, the debtor may pay by depositing, if possible, under the law of the place of payment.**
- 3. If the obligee refuses the performance of a non-pecuniary obligation by the obligor, the obligor shall adopt all reasonable measures to mitigate the consequences of the refusal, including the preservation of the goods concerned if appropriated. Particularly, where the obligee refuses the delivery of goods by the obligor, the obligor may perform by depositing goods, if possible, under the law of the place of payment.**

COMMENT

1. Obligation of the parties to accept performance of obligations

This Article states the obligation of the parties not only to perform its obligations but to accept and not to prevent the performance by the other party. Therefore, refusal to accept or obstruction of the performance of the obligations of the other party implies breach of contract the consequences of which are determined in the following

chapter. The rule presumes the performance by the obligor; it does not prejudice cases where refusal to accept the performance is justified, for example, owing to non-compliance with goods or defective performance, since in these cases there is “non-performance” of the contract by the obligor, the consequences of which in relation with the obligee’s performance shall be governed by the rules included in the following chapter or those applicable according to the specific nature of the contract and applicable trade practices depending on the type of contract (e.g. Article 86.2 CISG).

2. Refusal to accept pecuniary obligations

The rule distinguishes between pecuniary and non-pecuniary obligations. For pecuniary obligations, civil law systems usually provide two legal institutions that often go together and enable the obligor to accomplish its obligations: tender of payment followed by deposit, although some legal systems only envisage the deposit (Articles 1.656-1.665 of the Colombian Civil Code; Articles 797-802 and 1.084 of the Costa Rican Civil Code; Article 254 of the Cuban Civil Code; Articles 1.408-1.415 and 1.930 of the Guatemalan Civil Code; Articles 1.257-1.264 and 1.961 of the French and Dominican Civil Code (Articles 205-207 Proposals for reform of the French law on obligations of 2013); Articles 1.043-1.050 of the Haitian Civil Code; Articles 1.454-1.459 of the Honduran Civil Code; Articles 6:66 a 6:71 of the Dutch and Suriname Civil Code; Articles 2.097-2.103 of the Mexican Civil Code; Articles 2.055-2.068 and 2.670 of the Nicaraguan Civil Code; Articles 1.063-1.067 of the Panamanian Civil Code; Articles 1.130-1.135 of the Puerto Rican Civil Code; Articles 1.093-1.099 of the Saint Lucian Civil Code; Articles 1.306-1.313 of the Venezuelan Civil Code).

Conversely, common law systems do not have a similar institution. The tender of performance constitutes an attempted performance. The obligor may prove that it has tried to perform the obligation [*Startup v Macdonald* (1843), 134 ER 1029], which enables it to claim for damages. But if the creditor refuses a tender of money, such a refusal does not free the debtor from its obligation of payment, so that it must be ready to pay if the creditor calls for it. The judicial deposit is a mechanism only available in cases of judicial claim (e.g. Part 35 Civil Procedural Rules of Jamaica of 2002).

Paragraph 2 of Article 6.1.10 of these Principles takes into consideration this diversity of solutions and adopts a flexible criterion, such that the possibility of an alternative performance through the tender of payment and/or deposit is only available where this is a way of performance admitted in accordance with the national law of the place of payment [Article 7:111 PECL; Article III-2:112 (1) DCFR]. 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.

3. Refusal to accept non-pecuniary obligations

Cases of refusal of non-pecuniary obligations create more difficult problems and more alternatives. Refusal to accept “obligations to do” or provisions of services prevent the obligor from performing its obligations through the fault or delay of the obligee. This has two effects: first, the obligor is not responsible for breach of contract and has the right to suspend the performance of its own obligation; secondly, the obligee does not perform its obligation to receive or accept the other party’s performance, so that it is in breach of contract with the consequences established in the following chapter. Other additional consequences for the obligee who is late are, for example, the impossibility of rescinding the contract by invoking *force majeure* when the performance becomes impossible due to an event occurring after its unjustified refusal to accept the performance by the obligor.

The most controversial cases deal with the refusal to accept an “obligation to give” that is to accept a tangible or material good. Where such a refusal is unjustified, some legal systems, particularly in the field of sale contracts, oblige the seller to take reasonable steps to preserve the goods (Article 253 of the Cuban Civil Code; Section 20 of the Sale of Goods Act of 1979; Section 22 of the Sale of Goods Act of Antigua and Barbuda; Section 22 of the Sale of Goods Act of Montserrat; Section 22 of the Sale of Goods Act of Bahamas; Section 22 of the Sale of Goods Act of Trinidad and Tobago; Section 22 of the Sale of Goods Act of Belize; Section 21 of the Sale of Goods Act de 1895 of Jamaica; Article 85 CISG). Other legal systems qualify this duty more precisely, by allowing the obligor to sell the property if it is liable to rapid deterioration or its preservation is unreasonably expensive. In this case, the obligation to deliver the goods becomes an obligation to pay the replacement value of the said good (Article 6:90 of the Dutch and Suriname Civil Code). The PECL also envisage this solution in Article 7:110, which includes the possibility of obtaining discharge from the obligation by depositing the property on reasonable terms with a third person to be held to the order of the creditor, and notifying the creditor of this, as in Article III-2:101 (1) DCFR and in Article 97 of the CESL. In other legal systems, a limited responsibility of the obligor is only provided when there is a fraud or a serious fault of the obligee (e.g. Article 1.883 of the Colombian Civil Code and Article 2.292 of the Mexican Civil Code) or they merely state the transfer of risks to the obligee (Article 106 Proposals for reform of the French law on obligations of 2013). In common law systems, the general rule is that refusal to accept performance implies breach of contract that allows the

obligor to terminate the contract according to the general rules on breach of contract [Stein, Forbes & Co Ltd v County Tailoring Co Ltd (1916), 86 LJB 448 (KB)]. The resale of the goods by the seller in case of refusal of the buyer to accept them implies the immediate termination of the contract according to the rules in Section 48 of the Sale of Goods Act of 1979; Section 48 of the Sale of Goods Act of Antigua and Barbuda; Section 48 of the Sale of Goods Act of Montserrat; Section 48 of the Sale of Goods Act of Bahamas; Section 48 of the Sale of Goods Act of Trinidad and Tobago; Section 49 of the Sale of Goods Act of Belize; Section 47 of the Sale of Goods Act of Jamaica; RV Ward Ltd v Bignall (1967), 1 QB 534 (C.A)].

The solution proposed in paragraph 3 of this Article is deliberately open, aiming to facilitate the adoption of solutions adapted to the circumstances. It takes into account solutions resulting from comparative studies. The delay of the obligee constitutes non-performance of its obligations and the obligor, in the light of the circumstances, should take all reasonable measures to mitigate the consequences of this non-performance by the obligee, including, if necessary the preservation of goods or their disposal when preservation expenses are excessive.

As in the case of deposit of payment, most civil law systems recognise the possibility of alternative performance through the deposit of the goods (Articles 1.656-1.665 of the Colombian Civil Code; Articles 797-802 and 1.084 of the Costa Rican Civil Code; Article 477 of the Costa Rican Commercial Code; Article 254 of the Cuban Civil Code; Article 332 of the Cuban Commercial Code; Articles 1.408-1.415 and 1.830 of the Guatemalan Civil Code; Articles 1.257-1.264 and 1.961 of the French and Dominican Civil Code (Article 205-207 of the Proposals for reform of the French law on obligations of 2013); Articles 1.043-1.050 of the Haitian Civil Code; Articles 1.454-1.459 of the Honduran Civil Code; Articles 2.097-2.103 of the Mexican Civil Code; Articles 2.055-2.068 and 2.670 of the Nicaraguan Civil Code; Articles 1.063-1.067 of the Panamanian Civil Code; Article 768 of the Panamanian Commercial Code; Articles 1.130-1.135 of the Puerto Rican Civil Code; Articles 1.093-1.099 of the Saint Lucian Civil Code; Articles 1.306-1.313 of the Venezuelan Civil Code; Article 146 of the Venezuelan Commercial Code). This possibility is, however, not characteristic of common law systems, where deposit is only for payments in case of judicial claim (e.g. Part 36 Civil Procedural Rules of Jamaica of 2002). As in deposit of payments, it seems reasonable to allow such a deposit only where it is available as an alternative performance according to the national law of the place of delivery. Besides, the final rule in paragraph 3 fits in the generally admitted principle of private international law according to which manners

of performance of obligations are not subject to the contract law, but to the law of the place of performance.

Given that the refusal to accept the performance leads to the non-performance by the obligee, it must be taken into account that expenses arising from such a refusal by the obligor are considered as damage whose indemnity is on the obligor according to the rules on breach of contract in chapter 7. That is why it is not necessary to include a rule such as that included in Article 7:110 (4) PECL [Article 1.883 of the Colombian Civil Code; Article 1.084 of the Costa Rican Civil Code; Article 255 of the Cuban Civil Code; Article 1.830 of the Guatemalan Civil Code; Article 2.292 of the Mexican Civil Code; Article 2.670 of the Nicaraguan Civil Code; Article 308 of the Saint Lucian Commercial Code; Section 37 of the Sale of Goods Act of 1979; Section 38 of the Sale of Goods Act of Antigua and Barbuda; Section 38 of the Sale of Goods Act of Montserrat; Section 38 of the Sale of Goods Act of Bahamas; Section 38 of the Sale of Goods Act of Trinidad and Tobago; Section 39 of the Sale of Goods Act of Belize; Section 37 of the Sale of Goods Act of Jamaica. Therefore, the obligor's diligence in preserving the goods or even in transferring them to avoid their loss or minimise the storage expenses is actually a evidence of the general duty to mitigate the consequences of a breach of contract, which is a general principle of the doctrine of breach of contract. Likewise, damage suffered as a result of the deposit is due to the obligee's refusal to accept the performance and justifies the obligor's right to compensation.

Article 6.1.11: *Public licences*

- 1. The party obliged to apply for and manage public licences and authorisations required as a condition for the validity or the performance of the contract or of its obligations shall be determined according to the mandatory rules of the country concerned and, failing that, in accordance with the agreements by the parties.**
- 2. In the absence of agreement, it is presumed that the obligation to apply and manage public permissions and authorisations is the obligation of the party which has its place of business in the country concerned, unless this is considered unreasonable in the light of the circumstances. Failing that, the**

obligation is on the party obliged to perform the obligation for which the licence or authorisation is required.

- 3. The obligation to apply for and manage the licences and authorisations mentioned in preceding paragraphs requires that the obligor act with reasonable diligence, bear the resultant expenses and notify the other party about the grant or refusal without undue delay.**

COMMENT

This Article is inspired by Articles 6.1.14 to 6.1.17 of the Unidroit Principles. It exclusively deals with the obligation to obtain public authorisations and licences that are necessary for the validity and efficacy of the contract and especially with its regime of imputation and expenses. It does not determine the consequences of the lack of these authorisations or permissions where they are conditions of validity of the contract or of some of its terms, or they limit in any way the efficacy of the contract. These questions shall be governed by the general rules on illegality and especially by those related to *force majeure*. Particularly, if the authorisation is denied or its grant is excessively or unreasonably delayed, the parties may invoke the termination of the contract by *force majeure* or legal impossibility. Therefore, a specific regime such as the one included in Articles 6.1.16 and 6.1.17 of the Unidroit Principles is not considered necessary.

Given that obtaining public licences or authorisations is an overriding mandatory requirement imposed by a specific national law, usually the law of the place of performance, following the rule in paragraph III of the Preamble to these Principles the regime of imputation to one party of the obligations to apply and negotiate these permissions shall be firstly that of the national law requiring the authorisations. Failing specific rules within that law or if these are not mandatory, the regime of imputation shall be that agreed by the parties in the contract, as paragraph 1 states.

In the absence of an agreement between the parties, paragraph 2 introduces a rebuttable presumption, which obeys firstly an economic principle. If only one of the parties has its place of business in the country which requires the authorisation, this party is considered as being in the best position to apply and negotiate, because of its better knowledge of the context and this minimises the expenses. This presumption

must not be interpreted rigidly. According to the general rules on contract interpretation, it may be considered in the light of circumstances that this rule is unreasonable. That is the case where the party established in the country where the authorisation must be obtained is not the party performing the characteristic part of the contract and therefore lacks the experience and know-how of the party performing the characteristic part, who is established in another country but is most accustomed to the administrative procedures pertaining to the contract in question.

Example 1: Two mining companies enter into a joint venture to exploit together a diamond mine in country X. One of the parties has its place of business in country X while the other is in country Y. The project requires obtaining public authorisations from the authorities of country X to explore and exploit the deposits. The party established in country X is responsible for the application and management of these authorisations.

Example 2: The owner of a large plot of land in country X enters into an agreement with a foreign oil firm to exploit its property. The contract requires obtaining several public authorisations from different ministries in country X (industry, agriculture, environment, etc.). Although the rule firstly imputes the owner the duty to obtain such authorisations, this is not reasonable and the foreign oil firm shall be responsible for these formalities as the characteristic performer which has the necessary experience and know-how to manage the application and negotiation of authorisations.

The obligation to apply for and manage the authorisation by the party obliged to perform the obligation that is subject to authorisation is subsidiary. At first, this rule links the regime of the authorisation with the characteristic performance. Such a presumption is applicable when none of the parties has its place of business in the country where the authorisation must be obtained and, on the contrary, where more than one party is established in such a country. Likewise, this subsidiary rule shall be applied where the imputation of that duty to the party established in the concerned country would not be considered as reasonable.

The duty to apply for and to manage the authorisation comprises, in accordance with paragraph 3, completing the formalities necessary for obtaining the authorisation with due diligence, in accordance with the best efforts rule. This is a very important requirement, since refusal or failure to obtain the authorisation entitles either of the parties to terminate the contract, on the grounds of legal impossibility. While the party that is not responsible for obtaining authorisations does not have to prove the insurmountable and external nature of the legal event that makes performance impossible or constitutes a *force majeure*, providing that this party has duly

collaborated with the other party during the procedure of authorisation, especially in relation to information provided, the party obliged to obtain the authorisations must prove its best efforts and due diligence if it wishes to terminate the contract as a result of legal incapability. In this sense, the requirement of a diligent notice is also suited to the conditions required to justify the non-performance and terminate the contract for reasons of incapability or *force majeure*.

Furthermore, the obligation to apply for and manage negotiate authorisations includes the obligation to bear the expenses resulting from the procedure in question. This is simply the application of the general principle that provides that the performance of an obligation entails the assumption of the expenses arising thereof, as it is stated in the following Article.

Article 6.1.12: *Costs of performance*

Unless otherwise specified, each party shall bear the costs arising from the performance of its obligations.

COMMENT

The costs and expenses derived from the performance of obligations may be expressly or implicitly fixed in the contract. In many cases, the party that should bear the expenses is determined in accordance with the uniform commercial terms used (INCOTERMS) or trade practices. If the contract does not specify these criteria, the generally accepted rule in commercial trade is that each party must bear the expenses of the performance of its obligations [Article 1.629 of the Colombian Civil Code; Article Colombian 909 Commercial Code; Article 784 of the Costa Rican Civil Code; Article 337 of the Cuban Civil Code; Article 1.248 of the French and Dominican Civil Code (Article 192 of the Proposals for reform of the French law on obligations of 2013); Article 1.399 of the Guatemalan Civil Code; Article 1.034 of the Haitian Civil Code; Article 6:47.1 of the Dutch and Suriname Civil Code; 1.433 of the Honduran Civil Code; Article 2.086 of the Mexican Civil Code; Article 382 of the Mexican Commercial Code; Article 2.009 of the Nicaraguan Civil Code; Article 1.055 of the Panamanian Civil Code; Article 1.122 of the Puerto Rican Civil Code; Article 256 of the Puerto Rican Commercial Code; Article 1.084 and 1.405 of the Saint Lucian Civil Code; Article 330 (5) of the Saint Lucian Commercial Code; Article 1.297 of the Venezuelan Civil Code; Section 29.6 of the Sale of Goods Act of 1979; Section 30.5 of the Sale of Goods Act of Antigua and Barbuda; Section 30.5 of the Sale of Goods Act of Montserrat; Section 30.5 of the Sale of Goods

Act of Bahamas; Section 30.5 of the Sale of Goods Act of Trinidad and Tobago; Section 31.5 of the Sale of Goods Act of Belize; Section 29.5 of the Sale of Goods Act of Jamaica; Article 6.1.11 UP; Article 7.112 PECL; Article III-2:113 (1) DFCR].

Section 2. Set-off

Article 6.2.1: Conditions and effects of set-off

- 1. Where two persons owe each other reciprocally and are each other's main obligor and obligee, either party may set off its obligations against the obligation of the other. Both parties must have authority to decide on the set-off.**
- 2. Set-off extinguishes both obligations as from the date it is notified.**
- 3. If the obligations are for different amounts, the set-off extinguishes them up to the amount of the lesser obligation.**

COMMENT

1. Comparison of set-off systems

In accordance with the nature of the choices made OHADAC Principles, the second section of this chapter introduces a conventional rule for set-off. Although it is not as exhaustive as a legal set-off regime, like the ones on which the other international texts are based, the rules included in this section are the result of a comparative approach to the legal regulation of set-off presents in the Caribbean law systems and they aim to ensure transparency and agility in legal transactions.

In countries that follow the civil law model, set-off has a substantive nature, whereas in common law systems set-off was originally conceived as a strictly procedural device (independent set-off). In this last case, simultaneous extinction of the claims of the subjects involved takes effect only after judicial procedure. Until then, all the legal and contractual means required to perform the contract should be used, without the obligor being able to invoke or declare set-off.

However, the difference between the two legal families is not as considerable as it may seem. On one hand, common law systems have “transactional set-off”, whose substantive nature has been confirmed by authors and case law [Hanak v Green [1958], 2 QB 9, 29; BICC plc v Burndy Corp [1985], RPC 273, 315; Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri) (1978), 1 QB 927, 981F; Aectra Refining and Manufacturing Inc v Exmar NV (1994), 1 WLR 1634, 1649; Eller v Grovecrest Investments Ltd (1995) 1 QB 272; Modern Engineering (Bristol) Ltd v Gilbert-Ash Northern Ltd (1974), AC 689, 717; transaction set-off is considered a means of payment in Burton v Mellham (2006), UKHL 6, 23]]. On the other hand, in civil law systems, it is possible that the judge declares set-off even if not all the requirements established in the respective legal system for legal set-off are met and in the absence of a contractual set-off agreement.

2. The requirement of reciprocity in the OHADAC legal systems

The reciprocity of claims is an essential requirement for legal set-off, such that the other requirements serve only to enable automatic set-off. The aim behind this requirement is to avoid the claim of one person being used without his or her consent to satisfy the obligation of another person. Accordingly, in principle, an obligation cannot be set off with a claim external to the obligation or an obligation external to the claim.

Legal provisions of many legal systems include reciprocity as a requirement for set-off. Article 1.289 of the French and Dominican Civil Code simply requires that two persons be obliged to each other. A similar statement can be found in Article 1.714 Colombian Civil Code; Article 1.073 of the Haitian Civil Code; Article 2.141 of the Nicaraguan Civil Code; Article 13:101 PECL; Article III-6:102 DCFR and Article 8.1 UP. However, Article 218 of the Proposals for the Reform of French Law on obligations of 2013 no longer refers to obligations but to “reciprocal obligations”. Other civil codes (Article 806 of the Costa Rican Civil Code; Article 1.469 of the Guatemalan Civil Code; Article 1.473 of the Honduran Civil Code; Article 2.185 of the Mexican Civil Code; Article 1.081 of the Panamanian Civil Code; Article 1.149 Porto Rican Civil Code) reproduce the more concrete wording of Article 1.195 of the Spanish Civil Code, which specifies that both people must be by their own right each other’s obligee and obligor. It follows that people with a special connection with someone else’s estate (representatives, agents, heirs, partners, etc.) cannot set off their obligations with a claim of this estate because they would not be offsetting on their own right. According to this, paragraph 3 of Article 6:127 of the Dutch and Suriname Civil Code establishes that the right to set off does not exist when the claim or the counterclaim of the obligor or the other party

belong to separate properties. Furthermore, Article 1.474 of the Honduran Civil Code, Article 1.082-1 of the Panamanian Civil Code and Article 1.150-1 Porto Rican Civil Code follow Article 1.196 Spanish Civil Code and add that every obligor must be each other's main obligee and obligor. According to this rule the obligor cannot set off with a claim that is owned by an accessory obligor (like the bail) or to set off while he is still an accessory obligor.

Reciprocity is also considered an essential requirement under common law systems (mutuality). Independent set-off is not allowed when the trustee wants to set off an obligation of the beneficiary with a claim of his own in order to follow the interests of the beneficiary. However, the consideration of the owner of the claim (see through) is possible in equity [*Bankes v Jarvis* (1903) 1 KB 549, 552]. It is also possible that the beneficiary sets off with a claim that the trustee is holding in its name [*Cochrane v Green* (1860) 9 LB (n.s.) 448, 464, doubting this *Middleton v Pollock, ex parte Nugee* (1875), LR 20 Eq 29]. In the field of transactional set-off there is controversial case law according to which a tenant can set-off with a counterclaim that it has with his former landlord [*Smith v Muscat* (2003), EWCA Civ. 962]. A winding down of the reciprocity requirement also has been considered necessary when, for example, a third person sells goods to the trustee in a transaction authorised by the trust and the trustee pays the price with his own money. In this case, it is held that it should be able to offset damage caused by the defective goods with the price paid for them.

Departing from the general rule, some civil codes from the OHADAC area have regulated some specific examples of lack of reciprocity. Articles 1.716 Colombian Civil Code and 2.141 of the Nicaraguan Civil Code state that the main obligor cannot set off against the obligee what the obligee owes to the bail and that if the obligor of a ward is required to pay, it cannot set off with what the custodian owes to it. These rules are followed in both civil codes with a rule on set-off in case of joint obligors. In accordance with Article 1.716 Colombian Civil Code, set-off is not possible except if the owner of the counterclaim allows for it. In accordance with Article 2.142 of the Nicaraguan Civil Code in this case set-off is possible without need for any intervention of the joint obligor which owns the counterclaim. Another particular case is dealt specifically in Article 1.474 of the Guatemalan Civil Code, according to which a broker or another intermediary cannot set off the sums that he receives to buy specific goods nor the price received for the goods sold with the sums de principal owes to it. Finally, in accordance with Article 2.143 of the Nicaraguan Civil Code, in case of securities payable on demand the obligor cannot set off with the endorsee what was owed to it by the former endorsers.

Apart from these special rules, proper exceptions to the general rule can also be found in legal systems within the OHADAC area. The most relevant ones are the possibility of set-off after assignment of the principal claim, the possibility of setting off with a counterclaim that is owned by another of the joint obligors and the possibility that the bail pleads set-off with regards to what the obligee owes to its principal obligor. The first two exceptions are dealt with in Section 1 of Chapter 8 and in Section 4 of Chapter 4 of these Principles.

The third exception concerning the bail has been expressly regulated in Article 1.294 of the French and Dominican Civil Code (maintained in Article 225 Proposals for the Reform of French Law on obligations of 2013), 1.475 of the Guatemalan Civil Code, 1.078 of the Haitian Civil Code, 2.145 of the Nicaraguan Civil Code, 1.083 of the Panamanian Civil Code, 1.151 Porto Rican Civil Code, 1.121 St. Lucian Civil Code and 1.336 of the Venezuelan Civil Code. This rule would have its counterpart in a rule stating that the obligor cannot set off with a claim of the bail. Article 2.198 of the Mexican Civil Code allows the bail that has been sued by the obligee to plead set-off with an own claim against the obligee for the benefit of the obligor. Article 6:139 of the Dutch and Suriname Civil Code also deal with the surety and in general with the person whose goods serve as a security for someone else's obligation, but they do not refer to the possibility that the bail offsets with a claim of the obligor. In accordance with Dutch and Suriname Law, it is only possible to invoke the suspension of the liability as far as the obligee is entitled to set-off his secured claim against a due and demandable obligation indebted to him by the obligor. This is a dilatory defence as known from German and Swiss law (§ 770 German Civil Code, Article 121 Swiss Civil Code). In these legal systems set-off also requires a declaration. The guarantor and the person whose goods serve as a security for someone else's obligation may furthermore invoke that they are released from their liability as far as the obligee has lost its right of set-off unless the obligee had reasonable grounds to waive this right or he is not to blame for the loss.

Finally, Article 1.717 Colombian Civil Code introduces a particular exception: the agent may set off with an own claim the claim of a third party against the principal if it provides a security stating that the principal will confirm the set-off. But it may not set off a claim that a third party has against him with a claim owned by its principal unless the principal itself agrees.

In common law reference must be made to the interveners. Intervenors are specific subjects (assignees, owners of a floating charge, obligees with a Mareva injunction, a principal if its agent had concluded a contract without specifying that it was acting on

behalf of its principal, etc.) whose intervention puts an end to reciprocity. It must be assessed in every particular case if priority must be given to the guarantee function of set-off or to the interest of the intervener. The type of set-off must also be taken into consideration. The general rule in these cases is that the obligor may set off against the intervener in the same manner as if he were the obligee if claim and counterclaim had been created or had resulted of a transaction entered before the time in which the obligor knew about the intervention. Additional requirements apply in the context of an independent set-off.

The set-off of an own obligation with someone else's claim or of someone else's obligation with an own claim is also not possible according to the OHADAC Principles. On the one side, the common understanding of the reciprocity requirement allows a regulation in accordance with all the legal traditions of the geographical area. On the other side, if we consider that the obligations imposed by these Principles are not of legal nature but the result of an agreement of the parties a restriction to its effects to the sphere of the contractual parties seems most advisable.

The wording of Article III–6:102 (c) DCFR has also been adopted. It seems very appropriate because it does not only prevents agents, trustees, etc. from offsetting an own obligation with a claim of the principal, beneficiary etc., but it also contains the prohibition to set off with a seized claim.

The traditional exception to the reciprocity requirement in favour of the bail has not been included. As it has been seen, this exception has only sense when set-off operated automatically and is not included in the legal systems that require a declaration of set-off.

3. Effects of set-off

The substantive or procedural characterisation of set-off may affect greatly the regulation of its effect. In those OHADAC legal systems which follow the French and Spanish traditions it is considered that set-off takes effect automatically, even when the parties ignore the meeting of the legal requirements (Article 1.715 Colombian Civil Code; Article 809 of the Costa Rican Civil Code; Article 1.290 Dominican and French Civil Code, maintained in Article 223 of the Proposals for the Reform of French Law on obligations of 2013; Article 1.074 of the Haitian Civil Code; Article 1.480 of the Honduran Civil Code; Article 2.186 of the Mexican Civil Code; Article 2.140 of the Nicaraguan Civil Code; Article 1.088 of the Panamanian Civil Code; Article 1.156 of the Puerto Rican Civil Code; Article 1.118 of the St. Lucian Civil Code; Article 1.332 of the Venezuelan Civil Code). The automatic effect of set-off is not satisfactory in terms of

legal certainty, as the existence or non-existence of the claim in the assets of the obligee will depend exclusively on the existence of legal requirements, which may sometimes be difficult to assess. Nevertheless, the consequences of the automatic effect of legal set-off in these legal systems are influenced in particular by the fact that the judge cannot declare set-off *ex officio*, but the set-off must be declared by one of the parties in the proceedings. Due to this rectification at the procedural level, the French-Spanish solution comes closer to the solution maintained in the civil legal systems of Germanic influence, according to which set-off can only take place after a declaration. Consequently, it has retroactive effect as from the time when the legal requirements are met. This is also solution adopted in Articles 6:127 and 6:129 of the Dutch and Suriname Civil Code, Article 302 of the Cuban Civil Code and Article 1.471 of the Guatemalan Civil Code.

However, the option for one solution or the other will have significant consequences. First, in the legal systems where set-off occurs automatically, a payment made when the requirements for set-off are met is considered a waiver of set-off (e.g. Article 1.299 of the French and Dominican Civil Code; Article 1.084 of the Haitian Civil Code). The voluntary waiver to extinguish the personal claim means that third parties should not be negatively affected by this decision, unless the obligee was not aware of its right to set-off. This could lead to a *condictio indebiti*. In legal systems that require a declaration, if there is no declaration, there is no set-off to be waived and the obligee cannot use a *condictio indebiti* to recover the money it has paid. However, in both cases, interest for late payment and penalties will no longer apply. The party declaring set-off will be entitled to recover default interest or sums paid in this respect as from the time when set-off occurred or the time when the requirements for set-off were met.

Secondly, in legal systems where set-off occurs automatically, joint obligors that do not own the counterclaim could in principle plead the set-off that has already taken place if the obligee requires payment from any one of them. In the legal systems in which set-off requires a declaration of the owner of the counterclaim, the other solidary obligors cannot, in principle, replace the owner of the counterclaim and declare set-off. In this case, the set-off would be a personal exception.

Thirdly, if set-off occurs automatically, once the legal requirements are met, the assignment of either claim or counterclaim after fulfilment of formal set-off would be in fact the assignment of any one of the obligations concerned by the set-off, will actually affect the claim that has already been extinguished. That is why, in legal systems that include this rule, the assignee, in principle, can only enforce its own claim when there

has been a waiver of set-off by the obligor, which is implicitly declared with the assignment. In legal systems where set-off requires a declaration, the end of reciprocity in the positions of obligor and obligee due to an assignment of the claim means that set-off cannot be declared after the date of the assignment. However, in these legal systems it is exceptionally allowed to declare set-off under specific conditions that aim to protect the assignee.

Lastly, if mutual claims are extinguished automatically when the requirements for set-off are met, the later limitation of one of the claims is irrelevant. Although the situation that entitles the party to set-off is necessary at the time of the declaration, in principle set-off is not necessary if said situation has already occurred, for example because one of the claims is time-barred. Consequently, in legal systems in which set-off has retroactive effect after its declaration, the possibility of declaring set-off with a time-barred claim must be explicitly allowed (e.g. Article 6:131 of the Dutch and Suriname Civil Code; Article 1.472 of the Guatemalan Civil Code]. This possibility is relevant with respect to counterclaims. If the principal claim is time barred, the obligor can plead its limitation to avoid set-off.

In the common law legal systems, set-off generally has an *ex nunc* effect. This is clear in the case of the independent set-off, which does not require that the claim and counterclaim arise from the same legal relationship or from closely connected legal relationships. Contractual set-off also does not have a retroactive effect, even if the fact it has been agreed in a contract to consider the possibility of a set-off still remains despite the assignment of the main obligation, for as long as the obligor has not been informed. However, there is no absolute certainty about the effects of the transactional set-off, which is possible because of the close connection between the claim and the counterclaim. It has been suggested that the transactional set-off should have retroactive effects as payment in arrears at the time the counterclaim is due. It also has been considered that if set-off is pleaded before the obligee has resorted to self-help remedies, the obligee will not be able to use them if the set-off extinguishes its claim entirely [Eller v Grovecrest Investments Ltd (1995), 1 QB 272, 278E; Fuller v Happy Shopper Markets Ltd (2001) 1 WLR 1681, 1690D]. However, the obligee must be allowed to resort to these remedies as long as the obligor does not declare the set-off. Conversely, if set-off is pleaded as a defence against a contested claim, it is considered that it should have retroactive effect. Another school of thought considers that transactional set-off does not legally extinguish the claim, but the exercise of contractual remedies by the obligee in this case would be abusive.

The UP (Article 8.5), the PECL (Article 13:106) and the DCFR (Article III–6:107) adopt a solution that originates from the Nordic countries. According to these sets of rules, set-off has *ex nunc* effect after notice has been given by one party to another. This is an optimal solution from the point of view of legal certainty, which also makes legal transactions easier because the existence of all the legal requirements is only relevant at the time of the notification.

With respect to existing solutions, it could seem at first that it would be possible to opt, in the OHADAC principles, for an automatic or *ipso jure* set-off with *ex tunc* effects up to its declaration or with *ex nunc* effects. The option for an automatic effect is the one that currently prevails in OHADAC area legal systems. However, this solution is not appropriate for enhancing cross-border legal relations in the region. On the contrary, it seems that best option with respect to legal certainty is to make the set-off depend on the declaration.

Nevertheless, it is not recommended to assign a retroactive effect to the declaration. This is because the retroactive effect is accepted only for transactional set-offs, and even then with certain reservations. However, it does not seem advisable to give retroactive effect to the declaration. On the one side, in common law systems retroactive effect of set-off is only accepted with some reservations in relation to transactional set-off. Moreover, this solution may act as an incentive for the obligor because he will be interested in declaring set-off as soon as possible in order to avoid default interests or contractual or legal remedies for non-performance. If the obligor wants to declare set-off with retroactive or even automatic effect it can always resort to the national regulation which is applicable in order to fill in gaps left by these principles. Likewise, it is advisable to consider a set-off agreement with retroactive effect.

Lastly, set-off extinguishes the obligations concerned, totally if they are of the same value or amount, and partially if they are different. In the second case, set-off reduces the amount of the higher obligation by the amount of the lesser obligation, which will be the only obligation to be extinguished.

Article 6.2.2: Eligible obligations

- 1. Set-off may be declared where both obligations are for an amount of money or for fungibles of the same kind and the same quality, if these have been specified.**

- 2. Obligations expressed in different currencies may be set off provided that both currencies are freely convertible and the parties have not agreed that the obligation of the party declaring set-off shall be paid only in a specified currency.**
- 3. Set-off may only be declared if both obligations are due and payable or performable.**
- 4. An obligor may not declare the set-off if its right is unascertained as to its existence or value unless the set-off will not prejudice the interests of the obligee. Where the rights of both parties arise from the same legal relationship it is presumed that the obligee's interest will not be prejudiced.**

COMMENT

1. Obligations eligible for set-off in domestic legal systems of the OHADAC area

In all legal systems of the OHADAC area, set-off is possible with for pecuniary obligations. Most civil law systems also provide for set-off when both obligations are for exchangeable fungible goods of the same kind (Article 1.715 of the Colombian Civil Code; Article 1.291 of the French and Dominican Civil Code; Article 1.075 of the Haitian Civil Code) and of the same quality (Article 806 of the Costa Rican Civil Code; Article 1.470 of the Guatemalan Civil Code; Article 1.474.2º of the Honduran Civil Code; Article 2.187 of the Mexican Civil Code; Article 2.140.1º of the Nicaraguan Civil Code; Article 1.082 of the Panamanian Civil Code; Article 1.150 Porto Rican Civil Code; Article 1.118 of the St. Lucian Civil Code; Article 1.333 of the Venezuelan Civil Code). Article 2.151 of the Nicaraguan Civil Code also states that obligations to perform actions are not eligible for set-off. A partial exception to this more flexible rule can be found in Article 1.723 Colombian Civil Code and Article 2.156 of the Nicaraguan Civil Code: in accordance with both provisions, if the obligations are to be paid in different places, set-off is allowed only if both claims are monetary claims. In this case, the person who pleads set-off must take into account the delivery costs (see Article 6.2.3 of these Principles). The condition of the quality of the goods is not expressly required in Article 1.291 of the French and Dominican Civil Code (but note that Article 219 of the Proposals for the Reform of French Law on obligations of 2013 is more explicit in this respect) nor in Article 1.075 of the Haitian Civil Code, but these codes include the

possibility of setting off monetary claim against an undisputed claim in crops or commodities whose price is settled according to market prices. The Dutch and Suriname Civil Code do not refer to these requisites. All common law legal systems only allow set-off with monetary claims.

It is considered in general that foreign currency set-off is possible if the parties have agreed on performance in a specific currency and providing that both currencies are freely convertible. However, given money price fluctuations, set-off with a foreign currency should not be allowed. French case law considers that a claim expressed in a foreign currency is a non-liquidated claim. This solution has been unanimously criticised because of its rigidity and it has been asserted that set-off should be possible when external convertibility is complete. In the civil codes of the OHADAC area the possibility of foreign currency set-off is not mentioned. Nevertheless, this is allowed in Article 8.2 UP, Article 13:103 PECL and Article III-6:104 DCFR, unless performance with a single currency has been agreed by the parties. Foreign currency set-off is also allowed in common law legal systems, but there is considerable uncertainty as to the date that has to be taken into consideration in order to make the conversion. In case of a contractual set-off, the date of conversion will be the one agreed by the parties. If set-off had been exercised out of court, it is held that the date that has to be taken in consideration by the court is the date of the declaration of set-off or, in the event of a possible retroactive effect of the declaration, the time when the requirements for set-off were met. In case of a transactional set-off which is being pleaded for the first time in court, the relevant date can be one in which the counterclaim liquidated or diminished the principal claim, but if the connection between both claim and counterclaim is not a close one, it can be considered to take the date of the judgement as the relevant date. If the requirements for independent set-off are met, it is considered that the date of the judgement should be the relevant one. The alternative of excluding the possibility of set-off in these cases and converting the currency in the execution stage is considered unsatisfactory.

Furthermore, legal set-off is only possible if it affects obligations the performance of which may be claimed. This requires that certain conditions or terms (due dates) are met and the obligations be due and payable. Void or natural obligations can be therefore not eligible for set-off. Although some legal systems of the OHADAC area that follow the model of Article 1.196 Spanish Civil Code explicitly require that the obligation be payable and outstanding (Article 1474.3º of the Honduran Civil Code; Article 1082.3º and 4º of the Panamanian Civil Code; Article 1150.3º and 4º of the Porto Rican Civil Code), in most legal systems, a reference to time and conditions for

performance has been considered unnecessary as it is included in the notion of a due claim. Paragraph 2 of Article 6:127 of the Dutch and Suriname Civil Code is vaguer: the party pleading the set-off must be entitled to perform its own obligation and to demand performance from the opposite party. According to common law claims must be mature, which means that they have to be due and payable. A claim is due when an action on the obligation can be brought before the court. A claim becomes payable when the time for payment agreed in the contract arrives. Set-off with a counterclaim that has become due after the principal claim is possible, but only if the counterclaim has become due before the beginning of the proceedings.

It is generally also considered that for set-off to be possible, the existence and amount of the claim must be known. The rigidity of the liquidity requirement as provided in most civil codes of the OHADAC area (Article 1.715.2º of the Colombian Civil Code; Article 806 of the Costa Rican Civil Code; Article 301 of the Cuban Civil Code; Article 1.291.1º of the French and Dominican Civil Code, maintained in Article 219 of the Proposals for the Reform of French Law on obligations of 2013; Article 1.470 of the Guatemalan Civil Code; Article 1.075 of the Haitian Civil Code; Article 1.474.4º of the Honduran Civil Code; Article 2.188 of the Mexican Civil Code; Article 2.140.2º of the Nicaraguan Civil Code; Article 1.082.4º of the Panamanian Civil Code; Article 1.150.4º of the Porto Rican Civil Code; Article 1.118 of the St. Lucian Civil Code; Article 1.333 of the Venezuelan Civil Code), has been occasionally countered at procedural level. Article 2.189 of the Mexican Civil Code deserves special attention. According to this rule, a liquidated claim is a claim the amount of which has been determined or can be determined within nine days. Reference must be also made to Article 2.146 of the Nicaraguan Civil Code, which establishes that in order to plead set-off it is not necessary that the counterclaim be recognised. If the set-off is not accepted, the obligor can resort of all the defences available to him. In common law a distinction must be made again considering the different types of set-off. In transactional set-off, the obligor can assert its counterclaim even when it is still not liquidated. This privilege is given to it due to the close relation between claim and counterclaim. However, transactional set-off is not permitted when the counterclaim of the obligor is so uncertain that its assessment would require extensive investigation [Rawson v Samuel (1840), Cr. Fh. 161, 183]. The possibility of asserting a non-liquidated claim seems to exist also in Saint Lucia because Article 1.127A St. Lucian Civil Code establishes that set-off is possible in all cases in which it may be pleaded by the law of England. As for the independent set-off, mutual claims have to be liquidated or they must be easily and quickly ascertainable on court. The obligor can only assess his claim as

counterclaim if he meets the legal requirements [Bennett v White (1910), 2 QB 643, 648; Stooke v Taylor (1880) 5 QB D 569, 575].

According to Article 6:136 of the Dutch and Suriname Civil Code, if the court cannot easily ascertain whether the set-off invoked by the defendant is justified, it may award the legal claim of the opposite party without taking notice of this defence, provided that the legal claim is awardable otherwise. Also the PECL (Article 13:102) and the DCFR (Article III-6:103) resort to judicial discretion with regard to the interests at stake. The court can allow the offsetting of a non-liquidated claim if it considers that this does not affect the interests of the obligor, for example because the liquidation of the claim does not mean a relevant prolongation of the process. It is presumed that the obligor is not affected if the claims are closely connected to each other. This makes sense because due to the fact that the claim and counterclaim derive from the same relationship it can be presumed that their liquidation will take place simultaneously. This is a rebuttable presumption, but it must be recognised that in the majority of cases the possibility of an impairment of the interests of the obligee may be dismissed if the claims are connected. Thus, according to this solution, liquidity is not an essential requirement, but the contrary applies to the right of the obligor not to be damaged because of the absence of liquidity. A less developed solution is found in Article 8.1 (2) UP, which simply assesses the requirement of existence and liquidity except from connected claims.

2. Rights eligible for set-off in the OHADAC Principles

In the OHADAC Principles, it has been considered that not only monetary claims but also claims on exchangeable goods of the same species and quality are eligible for set-off if the parties have agreed to this. The existing limitation in independent and transactional set-off is not an obstacle to this solution, which is regulated by contractual set-off.

However, given that the OHADAC Principles are meant to be applied in cross-border transactions, it is preferable to include a specific rule about set-offs of obligations in foreign currency. Aside from the fact that this is allowed each time the parties do not agree on a given currency for the contract performance and providing that both currencies are convertible, the rules in paragraph 3 of Article 6.1.8 of these Principles will be applied to conversion as far as possible. Consequently, the exchange rate will be usually the one established when notice of the declaration was given at the place where the payment of the set-off must be made.

The lack of liquidity of the counterclaim represents an important obstacle as it makes impossible to assess whether the extinction of the principal claim will be (or has been) total or partial. On one hand, it does not seem very reasonable that the obligor cannot plead the set-off if its counterclaim is non-liquidated, because it prevents it from performing the obligation and consequently it opens it up to any remedies for delay or non-performance from the owner of the principal claim. However, on the other hand, the determination of the amount of the counterclaim during the proceedings may considerably extend its duration and the obligor could use this to delay performance fraudulently, at least with regards to the difference in value between claim and counterclaim. In the context of the OHADAC Principles, it is reasonable to find a solution that does not require the use of the respective domestic procedure laws. It has been considered that granting a certain level of discretionary powers to the court, as in Article 13:102 PECL and III-6:103 DCFR, could be a relevant solution.

Article 6.2.3: *Obligations payable in different locations*

If set-off refers to obligations to be payable in different locations, compensation must be paid for damage derived from the performance not being rendered at the designated place.

COMMENT

1. Obligations payable in the various domestic legal systems of the OHADAC area

Most civil codes in the OHADAC area contain a rule on set-off in the event that the obligations have to be performed in different locations. It originates in Article 1.296 of the French Civil Code, according to which, in this case, set-off may only be raised by making good the costs of delivery. The same wording can be found in Article 1.296 of the Dominican Civil Code, 1.081 of the Haitian Civil Code and 1.123 of the St. Lucian Civil Code and in Articles 1.723 of the Colombian Civil Code and 2.156 of the Nicaraguan Civil Code, although the two last countries allow only set-off with monetary claims. Articles 1.477 of the Honduran Civil Code, 2.204 of the Mexican Civil Code, 1.085 of the Panamanian Civil Code, 1.153 Porto Rican Civil Code and 1.338 of the Venezuelan Civil Code add that delivery or exchange costs at the place of payment must be compensated. In this context, exchange costs are costs arisen because of the transfer of money from one place to another or for commission fees. However, Article 1.476 of the Guatemalan Civil Code does not refer to exchange costs. Article 6:138 of

the Dutch and Suriname Civil Code contains a similar rule according to which when the place of performance of the obligations is not the same, the party who makes the set-off has to pay compensation for damage that the opposite party suffers from the fact that parties did not actually perform their obligations at the relevant places of performance. Furthermore, in this case the obligee may oppose set-off. In the common law legal systems this question has not been subject to regulation.

2. Obligations to be performed in different places in the OHADAC Principles

The inclusion of this question in the OHADAC Principles is most advisable if we recall that the Principles are intended for the use in cross-border transactions and therefore there will be numerous cases in which the parties will be interested in a set-off even if the goods or the money are placed in different places of performance by the time the respective claims are payable. The wording that has been adopted is the one in paragraph 1 of Article 6:138 of the Dutch and Suriname Civil Code. However, the extension of a possible opposition to set-off to the whole OHADAC area has been considered too difficult.

Article 6.2.4: *Multiple obligations*

In case of multiple obligations, the obligor must designate the right or claim against to which set-off is declared. Failing that, rules on imputation of payments in Article 6.1.9 of these Principles shall be applied.

COMMENT

1. Set-off in case of multiple obligations in the legal systems of the OHADAC area

If an obligee owns multiple claims and a set-off is possible against all of them, it must be determined which claim or claims are going to be object of set-off. In the legal systems in which set-off requires a declaration, it is possible that the obligor resorts to his contractual autonomy and determines which obligee's claim or claims against it meet the requirements for set-off it wants to fulfil totally or partially with its counterclaim. This is provided in Article 2.196 of the Mexican Civil Code. In some legal systems (Article 6:137 of the Dutch and Suriname Civil Code) the owner of the principal claim can oppose to the determination made by the owner of the counterclaim. The reason for allowing this possibility is the understanding that the imputation of performance cannot depend on which party declared set-off first. If there is no

declaration, the rules on imputation of performance are applied. The resort to party autonomy is not specified in those legal systems in which set-off operates automatically. Consequently, in these legal systems, this question is resolved by exclusively applying the norms on imputation of performance (Article 1.722 Colombian Civil Code; Article 810 of the Costa Rican Civil Code; Article 1.927 of the French and Dominican Civil Code; Article 1.477.1º of the Guatemalan Civil Code; Article 1082 of the Haitian Civil Code; Article 1.479 of the Honduran Civil Code; Article 2.155 of the Nicaraguan Civil Code; Article 1.087 of the Panamanian Civil Code; Article 1.155 of the Porto Rican Civil Code; Article 1.125 of the St. Lucian Civil Code; Article 1.339 of the Venezuelan Civil Code).

The PECL and the DCFR also provide for the application of the rules on imputation of performance with “appropriate adaptations” [Articles 13:105 (2) PECL and III–6:106 (2) DCFR] when the party giving notice of set-off has to perform two or more obligations towards the other party. If the party giving notice of set-off has two or more rights against the other party, the notice of set-off must identify the right to which it relates. Article 8.4 (2) UP sets these solutions partially aside and establishes that in the absence of a specification of the obligations to which the declaration refers, the other party may, within a reasonable time, declare the obligations to which set-off relates. If such a declaration is not made, set-off is related to all the obligations proportionally.

2. Set-off in case of multiple obligations and obligations in the OHADAC Principles

Given that it has been provided, in the OHADAC Principles, that set-off will operate only by declaration, it is convenient to assign primacy to freedom of choice on this issue. If there parties have not agreed on a declaration or if the obligation concerned by the set-off cannot be determined from the declaration, the rules on imputation of performance in Article 6.1.9 of these Principles will apply.

Section 3. Hardship

Article 6.3.1: *Hardship*

- 1. A party is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.**

2. Notwithstanding paragraph 1 a party is entitled to terminate the contract where this party proves that:

- a) the performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that**
- b) it could not reasonably have avoided or overcome the event or its consequences; and that**
- c) it did not assume the risk of the event.**

3. The party claiming an event that renders performance excessively onerous shall notify the other party in writing without delay, together with sufficient evidence of this event certified by a relevant body. This party is obliged to take all reasonable steps to limit the effect of the event invoked on the performance of its contractual duties.

4. Where either contracting party has, by reason of anything done by another contracting party in the performance of the contract, derived a benefit before the termination of the contract, the party deriving such a benefit shall be under a duty to pay the other party a sum of money equivalent to the value of such benefit.

COMMENT

1. Hardship in national legal systems within OHADAC

Rules on hardship are aimed at regulating the impact on the contract's performance of events not contemplated by the parties that justify rescission by *force majeure* when performance is not impossible but places an excessive burden on one party. The aim therefore is to guarantee the equilibrium of the contract or to share between the parties the economic risk derived from an event unforeseen and beyond their control

but without preventing the performance, which will continue to be of interest to the parties.

The legal regime of hardship is particularly necessary in long-term international contracts or contracts that may be exposed to change in circumstances that can unbalance the contract obligations (building, farming and mines, transportation, supply, leasing, rental, etc.). It is also relevant in instant contracts where benefits, even pecuniary, are delayed with respect to the time of conclusion of the contract.

Many domestic OHADAC legal systems do not recognise that any change of circumstances has legal effects, so that the party affected by the supervening unforeseen event must perform the contract at the risk of being in breach of contract. This is the characteristic approach in OHADAC countries under French legal tradition as well as under common law tradition or under the influence of USA law, which is why the parties in such legal systems must provide for a detailed contractual regulation of hardship.

In legal systems based on French law, in accordance with the prevailing case law in France, the *“théorie de l’imprévision”* is only applicable to public contracts or public interest contracts, such as the supply of gas or electricity, although there is an approach towards a general duty by the parties of renegotiating in good faith (decisions of the Cour de Cassation of 3 November 1992, 24 November 1998, 13 March 2004 and 29 June 2010). In common law countries, effects of hardship must be considered in specific clauses.

The approach is different in Spanish-speaking legal systems, which have established a specific legal treatment of hardship. Among these, some state that the termination of contract is the only effect of hardship, a line followed by these Principles. That is the sense of Article 80 of the Cuban Civil Code. On the contrary, Article 1.330 of the Guatemalan Civil Code determines only the possibility of judicial review of the contract. Article 868 of the Colombian Civil Code represents a mixed approach, where the first option is the adaptation of the contract by the judge and, failing that, the termination of contract. In the opposite sense, Article 1.161-A of the Panamanian Civil Code, clearly inspired by Italian Civil Code, establishes as the first option the right of termination, although the obligee can argue an equitable adaptation. Other legal systems do not have special rules on hardship, although case law often uses general principles such as the *rebus sic stantibus* principle, in order to find substantive solutions for each cases, which are particularly suited to the adaptation of contracts exposed to money fluctuations. Therefore, the comparative analysis in these countries eventually leads to a great diversity and clearly results legal uncertainty.

Legal systems based on Dutch law also have an express rule derived from Article 6:258 (6.5.3.1) of the Dutch and Suriname Civil Code, which enables judges to opt for the adaptation or the rescission of the contract.

The relevance of a legal hardship regime has been underlined even in legal systems that recognise its effects only through contractual clauses. The issue has been addressed in the successive projects to reform the French Civil Code. Lastly, Article 104 of the Proposals for the Reform of the French law on obligations of 2013 envisages the possibility of an adaptation of the contract by agreement of the parties and, failing this, the rescission of the contract. Likewise, all international texts on contract law harmonisation contain a specific hardship regime.

2. Hardship in international texts on contract law harmonisation

There are doubts as to whether Article 79 CISG is applicable to hardship cases over and above the usual assumptions of impossibility (*force majeure*). It must be stressed that CISG has been ratified by some countries such as the Netherlands, Colombia, Honduras and Mexico, but also by countries whose domestic legal systems do not recognise the legal treatment of hardship (USA, France, Saint-Vincent and the Grenadines and Guyana). Several OHADAC territories are thus concerned CISG. In any case, the legal uncertainty about the interpretation of this article and its limited efficacy in the OHADAC sphere are additional arguments in favour of the incorporation of a specific treatment in the OHADAC Principles.

Articles 6.2.1 to 6.2.3 UP include a regulation of hardship applicable when the Unidroit Principles are applicable. Article 6.2.2 UP allows considering events occurred or simply known after the time of conclusion of the contract. On the one hand, Article 6.2.3 UP states that the aggrieved party must firstly claim for renegotiation and cannot withdraw the performance of its obligation during renegotiation. This rule can be excessively costly depending on the nature of the contract. Moreover, if negotiations are not successful, the parties can sue before the courts, which can opt for termination or adaptation of the contract. Obviously, many contracting parties are not interested in courts rewriting their contracts, particularly if they are familiar with Anglo-American legal culture.

PECL Article 6:111 provides in for a change of circumstances. Unlike UP, the PECL only recognise hardship related to events subsequent to the conclusion of the contract. However, the solution is rather similar and suggests the same reservations: the contract parties must renegotiate in good faith at the risk of being condemned to pay damages, but if they do not reach an agreement, the judge will decide to rescind or

adapt the contract. Aside from a few differences, the rule set out in Article III.-1:110 DCFR is similar.

3. Hardship rules proposed in the OHADAC Principles

The rules proposed in the OHADAC Principles obey the common core or approach in the countries of the OHADAC sphere. As in the Unidroit Principles, it has been considered more convenient to establish the conditions for hardship admissibility on the ground of unforeseen events in the time of the conclusion of the contract regardless of their subsequent or unknown character, as far as they imply risk not assumed by the parties. The content and the comment to Article 7.1.8 on impossibility must be taken into account to interpret the rules on hardship.

Hardship provide parties with the right to terminate the contract after accomplishing some requirements related to the proof and notification of the unforeseen event and the adoption of any measure to minimise its consequences, whose omission can imply responsibility for damages caused to the other party. Termination of contract will imply the return of and, if needed, the compensation for benefits already obtained by one party.

Unlike other regulations (Panamanian Civil Code, UP, PECL and DCFR) the obligation to renegotiate before termination is not expressly provided. It is considered that such a renegotiation will take place if the parties are interested in preserving the contract. Otherwise, it is not advisable to impose a duty to renegotiate which does not exist in common law systems and gives rise to doubts about the consequences of passivity or bad faith during renegotiations and the responsibilities derived therefrom. Moreover, the statement of a generic obligation to renegotiate implies legal uncertainty related to the temporal and material scope of such an obligation. That is why it seems more convenient to grant parties the freedom to choose the regime on the contract's renegotiation and otherwise to guarantee legal certainty though the unconditional right to termination.

Likewise, it is considered inappropriate to follow the line of some national systems (Dutch and Suriname, Guatemalan, Colombian and Panamanian Civil Code) and of most of international texts in order to enable judges to adapt the contract, as an alternative to termination, regardless of the parties' will. This legal power is a source of uncertainty in international trade and it is radically contrary to the common law tradition. The OHADAC Principles try to offer a legal regime valid and admissible in all OHADAC countries, which does not prevent an adaptation by a third. As in relation with the possibility of adaptation through renegotiation, it is considered that

adaptation by judges or arbitrators cannot be imposed by law but only by virtue of parties' will in accordance with the terms expressly agreed in the contract.

Having regard to all these reasons the regulation of hardship in the OHADAC Principles, respecting the rule of the common minimum denominator and the common legal tradition in all OHADAC countries, must be carefully considered by the parties, as well as the possibility of modifying such a legal regime through complementary contractual terms.

SPECIFIC HARDSHIP CLAUSES

Even when parties have submitted their contract to the OHADAC Principles on International Commercial Contracts and, failing that, to a domestic law, both the Principles and domestic laws recognise the priority of contractual terms in regulating cases of hardship. In international trade, there are well-known standardised hardship clauses, such as the ICC Hardship Clause 2003. The International Chamber of Commerce has drafted this model clause that can be incorporated into contract by reference. However, its wording is much more modest than the regulation proposed in the OHADAC Principles themselves.

This clause is clearly inspired by international texts such as the UNIDROIT Principles and PECL. However, it can be criticised in some points, because given the object of the contract or the interests at stake, parties may prefer to establish the right to terminate the contract instead of the option consisting in the obligation to renegotiate first, which may be undesirable depending on contracts involved. Moreover, when termination is considered as the main or only option or it is a subsidiary option at any event, the terms of the right to termination, the effects on restitution or the payment of benefits must be determined in the same manner as for cases of *force majeure*. However, the ICC hardship clause does not take such circumstances into consideration.

OHADAC therefore advises against completing the OHADAC Principles using the ICC hardship clause. To drafting a clause that complements the OHADAC Principles, parties must balance the additional utility of these clauses insofar as they contribute to correct or determine the proposed regulation in different ways.

1. Determination of the events causing hardship

The hardship rules of the OHADAC Principles may create some interpretative difficulties, particularly when the case is brought before an Anglo-American court or when the contract is governed alternatively by English law. In common law trade

practice, the general requirement of precision in contracts advises the parties to include a hardship clause, even by including the exact wording of parts of the article of the OHADAC Principles. In this clause, the events causing hardship may be defined precisely. The first two paragraphs could therefore be written as follows:

Clause A: Termination option

"1. A party to this contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.

2. Notwithstanding paragraph 1 of this Clause, either party is entitled to terminate the contract if it proves that:

a) the performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract, such as but not limited to:

a') war (whether declared or not), armed conflict or the serious threat of same (including but not limited to hostile attack, blockade, military embargo, hostilities, invasion, act of a foreign enemy, extensive military mobilisation;

b') civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience;

c') act of terrorism, sabotage or piracy;

d') act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation;

e') act of God, plague, epidemic, natural disaster such as violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal

wave, tsunami, flood, damage or destruction by lightning, drought;

f') explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged breakdown of transport, telecommunication or electric current;

g') general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories or premises;

and that

b) it could not reasonably have avoided or overcome the event or its consequences;

and that

c) it did not assume the risk of such events.

3. The party alleging any event rendering performance excessively onerous shall notify the other party in writing without delay, together with sufficient evidence of such event certified by a relevant body, and it is under an obligation to take all reasonable means to limit the effect of the event invoked upon performance of its contractual duties.

4. Where either contracting party has, by reason of anything done by another contracting party in the performance of the contract, derived a benefit before the termination of the contract, the party deriving such a benefit shall be under a duty to pay the other party a sum of money equivalent to the value of such benefit”.

2. Regulation of the renegotiation process

The rules of the OHADAC Principles do not provide for an obligation to renegotiate the contract. The parties have therefore the right to terminate the contract in accordance with the conditions stated in these Principles, which require that the obligor provides notice and sufficient proof of the event causing hardship. The other party may however disagree on the accomplishment of the conditions required to terminate the

contract or on the effects of termination on compensation for benefits, and in this case, may claim the performance or the payment of damages.

As mentioned above, the Principles have not established an obligation to renegotiate, considering it rather restrictive and vague. Moreover, it is difficult to establish a generic legal regime for a possible renegotiation which is not always feasible depending on the type of contract. The contract term period and process may be tricky issues depending on the purpose and nature of the contract, and could lead to legal uncertainty and risks of abuse. Furthermore, establishing a satisfactory regime of responsibility for a party impeding renegotiations or renegotiating in bad faith does not also seem possible. Therefore, where the parties' interests and the contract recommend this, the OHADAC Principles have preferred to leave to the parties the option of choosing a regime of renegotiation between the parties. To this end, they can complete the submission to the Principles with a specific clause.

In practice, parties are advised to establish mediation clauses through mechanisms of ADR implemented by or subject to OHADAC Arbitration and Conciliation Rules to bring the negotiations to a successful conclusion. It is also advisable to set a maximum period for renegotiation and to specify whether performance is delayed for one or both parties during this period, depending on the nature of the contract. To this intent, parties will consider the inclusion in the contract of a clause as follows:

Clause B: Option for renegotiation and mediation

"1. A party to this contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.

2. Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:

a) the performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract, such as but not limited to:

a') war (whether declared or not), armed conflict or the serious threat of same (including but not limited to hostile attack, blockade, military embargo, hostilities, invasion, act of a foreign enemy, extensive military mobilisation;

b') civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience;

c') act of terrorism, sabotage or piracy;

d') act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation;

e') act of God, plague, epidemic, natural disaster such as violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought;

f') explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged breakdown of transport, telecommunication or electric current;

g') general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories or premises;

and that

b) it could not reasonably have avoided or overcome the event or its consequences;

and that

c) it did not assume the risk of such events;

the parties are bound, within a period of (days/months) to negotiate alternative contractual terms which reasonably allow for the consequences of the event. During this period the performance of the respective obligations will (not) be deferred. (Parties will submit the renegotiation to

mediation according to the OHADAC Mediation and Conciliation Rules).

3. Where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the parties within the established period, either party is entitled to terminate the contract by the way of notification to the other party.

4. The party alleging any event rendering performance excessively onerous shall notify the other party in writing without delay, together with sufficient evidence of such event certified by a relevant body, and it is under an obligation to take all reasonable means to limit the effect of the event invoked upon performance of its contractual duties.

5. Where either contracting party has, by reason of anything done by another contracting party in the performance of the contract, derived a benefit before the termination of the contract, the party deriving such a benefit shall be under a duty to pay the other party a sum of money equivalent to the value of such benefit”.

3. Regulation of adaptation by a third party

The submission of adaptation of contract to a third party is an option that can be alternative or cumulative with the renegotiation of the contract. In the first case, it has the advantage of being more rapid, leaving the decision to equitably adapt or terminate the contract to a neutral expert. To this end, it is also advisable to use the services of an arbitrator or expert, who is competent to determine the existence of a hardship event, to adapt the contract terms if needed, or failing this, to decide on the termination of contract, if in the case of termination, to determine any relevant set-offs. The proposed clause could be drafted as follows:

Clause C: Option for adaptation by a third party

“1. A party to this contract is bound to perform its contractual duties even if events have rendered

performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.

2. Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:

a) the performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract, such as those mentioned below as well as all events of similar nature:

a') war (whether declared or not), armed conflict or the serious threat of same (including but not limited to hostile attack, blockade, military embargo, hostilities, invasion, act of a foreign enemy, extensive military mobilisation;

b') civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience;

c') act of terrorism, sabotage or piracy;

d') act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation;

e') disaster, invasion, epidemic, natural disaster such as violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought;

f') explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged breakdown of transport, telecommunication or electric current;

g') general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories or premises;

and that

b) it could not reasonably have avoided or overcome the event or its consequences;

and that

c) it did not assume the risk of such events;

the parties will submit the adaptation of the contract to the decision of a unique arbitrator according to the OHADAC Arbitration Rules.

3. The arbitrator will be empowered by the parties to determine the effective existence of events causing hardship under the conditions established in paragraph 2 of this clause. The arbitrator will decide to adapt the contract terms, taking into account the nature and contents of the contract and according to equity principles. If the arbitrator considers the adaptation as impossible or inadequate, he may decide on the termination of contract. If either contracting party has derived a benefit before the termination of the contract, by reason of anything done by another contracting party in the performance of the contract, the arbitrator will fix a due compensation for the other party, equivalent to the value of such benefit.

4. The party invoking the hardship event shall notify the other party in writing without delay, together with sufficient evidence of such event certified by a relevant body, and it is under an obligation to take all reasonable means to limit the effect of the event invoked upon performance of its contractual duties.”

The adaptation of the contract by a third person is compatible with the possibility for parties to first try to renegotiate the contract. Calling on a third person therefore aims at maximising the chances of preserving the contract, but certainly with the inconvenience of delay. If, in the light of contract's circumstances, the parties consider that this regime is relevant, it is advisable to have a combination of clauses B and C is advisable, according to the following model clause:

Clause D: Option for renegotiation and adaptation by a third party

"1. A party to this contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.

2. Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:

a) the performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract, such as but not limited to:

a') war (whether declared or not), armed conflict or the serious threat of same (including but not limited to hostile attack, blockade, military embargo, hostilities, invasion, act of a foreign enemy, extensive military mobilisation;

b') civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience;

c') act of terrorism, sabotage or piracy;

d') act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation;

e') disaster, invasion, epidemic, natural disaster such as violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought;

f') explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged breakdown of transport, telecommunication or electric current;

g') general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories or premises;

and that

b) it could not reasonably have avoided or overcome the event or its consequences;

and that

c) it did not assume the risk of such events;

the parties are bound, within a period of (days/months) to negotiate alternative contractual terms which reasonably allow for the consequences of the event. During this period the performance of the respective obligations will (not) be deferred. (Parties will submit the renegotiation to mediation according to the OHADAC Mediation and Conciliation Rules).

3. If parties do not reach an agreement during the period fixed to renegotiation, they agree to submit the adaptation of the contract to the decision of a unique arbitrator according to the OHADAC Arbitration Rules.

4. The arbitrator will have the power attributed by the parties to determine the effective existence of events causing hardship under the conditions established in paragraph 2 of this clause. The arbitrator will decide the adaptation of the contract terms having regard to the nature and contents of the contract and according to equity principles. If the arbitrator considers the adaptation as impossible or inadequate, he will be able to state the termination of contract. Where either contracting party has, by reason of anything done by another contracting party in the performance of the contract, derived a benefit before the termination of the

contract, the arbitrator will fix a due compensation for the other party, equivalent to the value of such benefit.

5. The party alleging any event rendering performance excessively onerous shall notify the other party in writing without delay, together with sufficient evidence of such event certified by a relevant body, and it is under an obligation to take all reasonable means to limit the effect of the event invoked upon performance of its contractual duties.”

Article 6.3.2: Frustration of the purpose of the contract

The rule of the preceding article will also be applied to the cases where the events in question lead to a substantial frustration of the contract’s purpose, when both parties have assumed such purpose.

COMMENT

The doctrine of frustration of purpose, cause or finality of contracts finds its roots in Anglo-American law. This approach developed in England from the “Coronation cases” of the early 20th century. US law expressly provides for this in Section 265 of the Second Restatement. Case-law in common law Caribbean countries reflects this English doctrine [e.g. Supreme Court of Jamaica (2010) in *Clacken v Causwell*: Carilaw M 2010 SC 101; Court of Appeal of Bermuda (1981) in *Benevides v Minister of Public Works and Agriculture*: Carilaw BM 1981 CA 22). As in cases of hardship or *force majeure*, frustration of contract occurs when circumstances external to and unforeseen by the parties frustrate the interests and legitimate expectations of the parties, depriving the contract of sense and cause for one of the parties. In the cases related to the coronation of Edward VII, frustration came from the king’s illness, which frustrated the objective of balcony renting from which one party intended to enjoy the foreseen procession. Frustration alters the negotiating bases of the contract and deprives it of any value and purpose from the point of view of one party.

Given that frustration of contract purpose does not entail a material impossibility of performance, as in hardship cases, in legal systems inspired by French law no effect is recognised due to frustration. However, there is a clear trend toward its incorporation

in civil law systems, where case law has recourse to the “*rebus sic stantibus*” principle or to the German doctrine of *Wegfall der Geschäftsgrundlage*. Thus is stated in § 313 German Civil Code (BGB), after the reform made in 2002, in Article 1.213 of the Proposals for the Reform of the Spanish Civil Code and it is also possible under Article 104 of the Proposals for the Reform of the French law on obligations of 2013. Moreover, frustration of purpose actually implies, as hardship, the loss of economic expectations for one of the parties that is an unexpected and extreme cost; that is why to some extent it can be considered as a hardship case that will result in the termination of the contract.

It is absolutely essential that the aim of purpose of the contract has been assumed and shared by all parties in order to consider the contract’s purpose as frustrated. In the coronation cases it was obvious that landlords knew or reasonably had to know that the aim of balcony renting, and at otherwise high prices, was to attend the ceremonial procession on the occasion of the king’s coronation. But in other cases one party cannot invoke the termination of contract by frustration of purpose when such purpose or aim is not known or does not have to be known by the other party.

Example: An arms manufacturer buys a consignment of commodities (steel and nickel) in order to produce weapon components destined to the government of a country in the Persian Gulf. A few days later, exportations of such materials to the destination country are forbidden by virtue of a blockade imposed by the United Nations. The manufacturer intends to invoke against the supplier frustration and termination of the contract. The supplier did not know and did not have to know the final destination of the products transformed by the manufacturer from the supplied commodities; therefore, frustration of contract’s purpose cannot be argued.

CHAPTER 7

NON-PERFORMANCE OF THE CONTRACT

Section 1. Non-performance in general

Article 7.1.1: *Concept of non-performance*

There is non-performance when a party does not carry out all its contractual obligations in the agreed form, regardless of the cause.

COMMENT

1. Unitary nature of the notion of non-performance

This article defines the concept of non-performance used in these Principles and characterises it according to two essential aspects: its unitary and objective nature. Under this article, there is non-performance in any case of non-performance by a contracting party of any of its main or collateral contractual obligations, where the non-performance is total or merely defective, non-conforming or delayed. This wide notion of non-performance is inspired by the Anglo-American legal tradition, where breach of contract is an all-encompassing category.

In civil law Caribbean systems there is no legal definition of breach or non-performance of the contract; however, case law has inferred it from rules on performance and different forms of non-performance (delay of the obligor, defective performance, etc.) as well as from the rights of the obligee in cases of non-performance (judgment of the Supreme Court of Justice of Colombia, Civil Chamber, of 4 July 2002). However, the special rules on compensation for defects in sale contracts in these systems makes adoption of an all-encompassing notion difficult.

Apart from CISG, which only offers an implicit concept of non-performance in Articles 45 and 46, all other international texts on contract law harmonisation accept an all-encompassing notion of non-performance in the same way as common law. Thus, Articles 7.1.1 UP; 1:301 (4) PECL; III-1:102 (3) DCFR; and 87 CESL embrace, within the notion of non-performance, all cases where a contract party does not adapt its behaviour to the contractual programme, establishing first a general rule and second a list of type of cases of non-performance. The OHADAC Principles share also this encompassing notion but unlike the definitions of uniform texts, do not provide a list

of types of non-performance, preferring a general rather than a casuist rule that will be applicable to all kinds of contracts.

The choice of a single concept is not merely theoretical or aesthetic, but is based on its proven efficiency which enables the creation of a framework of remedies that is consistent with respect to contractual liability and is available for all non-performance, regardless of contract type, with the exceptions mentioned in this section (Articles 7.1.3 and 7.1.8 of these Principles).

The total and definitive non-performance of the obligation is the first assumption envisaged in Article 7.1.1.

Example 1: A, an IT consultancy in country X has undertaken to deliver a custom software application to B, a pharmaceutical firm in country Y, on 9 July. In mid-June, after the software has already been created, A decides to sell it to C, a rival pharmaceutical company, which had offered a higher price.

The second kind of non-performance deals with delayed or out of time performance. Civil law systems consider late performance as a specific institution, because a mere delay does not lead *per se* to obligor's responsibility, the "constitution in default" or "in mora" being necessary (Article 1.608 of the Colombian Civil Code; Article 1.084 of the Costa Rican Civil Code; Article 295 of the Cuban Civil Code; Article 1.139 Dominican and French Civil Code; Article 1.428 of the Guatemalan Civil Code; Article 1.355 of the Honduran Civil Code; Article 2.080 of the Mexican Civil Code; Article 1.859 of the Nicaraguan Civil Code; Article 985 of the Panamanian Civil Code; Article 1.053 of the Puerto Rican Civil Code; Article 999 of the Saint-Lucian Civil Code; Article 1269 of the Venezuelan Civil Code) only if specific conditions are met: the main ones being formal notice to the obligor to perform its obligation and penalties for delivery.

This rigidity of civil law legal systems is eased, in many cases, by legal and case law exceptions with the simple requirement of formal notice or *interpellatio*. Some commercial codes also do not provide for the serving of formal notice (e.g. Article 418 of the Costa Rican Commercial Code; Article 677 of the Guatemalan Commercial Code; Article 232 of the Panamanian Commercial Code; Article 94 of the Puerto Rican Commercial Code). This makes it possible to align civil law solutions with those of the common law systems or international solutions in harmonised texts, much closer to international trade requirements. To enable the exercise of the rights and actions available in case of breach of contract, international codification does not provide for a formal act of constitution in default (mora) [Articles 45 to 52 and 61 to 65 CISG; Article 7.1.1 UP; Article 1:301 (4) PECL; Article III-1:102 (3) DCFR].

In line with international texts, under the OHADAC Principles, a delay by the obligor in performing its obligations constitutes a case of non-performance and entails its contractual liability without the need for notification or formal notice for payment.

This kind of non-performance presupposes the possibility of performance and the fact that performance, even delayed, is still satisfactory for the obligee. If the obligation becomes definitively impossible or no longer corresponds to the obligee's interests, the situation is no longer that of a delay, but that of a definitive and complete non-performance as mentioned above, with different legal effects. This will always be the case where non-performance is subject to an essential time period. In this case, this is fundamental non-performance equivalent to fundamental breach in common law systems [judgment of the Supreme Court of Bahamas in *Canadian Imperial Bank of Commerce v Owners of MV "New Light"* (1997), N. 1217 of 1994 (Carilaw BS 1997 SC 87)].

Example 2: The initial facts are the same as in example 1, but here, the IT consultancy does not perform the obligation to deliver on 9 July, because work to solve technical difficulties has been harder than foreseen. However, delivery is still possible, although one month later, and the pharmaceutical firm is still interested in the software. This is a case of late performance of the obligation.

Thirdly, early performance constitutes non-performance where the established period had been agreed upon in favour of the obligee or of both parties. The OHADAC Principles accept early performance whenever it does not prejudice the obligee or its legitimate interests; in these cases, early performance would constitute a breach of contract (Article 6.1.3).

Fourthly, defective performance is considered to be a breach of contract. This term covers a broad range of assumptions where the obligor's performance does not meet the contract obligations. While civil codes of French and Spanish tradition deal only with lack of identity or integrity of obligations (partial performance governed by Article 6.1.5 of these Principles) and establish a special regime of compensation in sale contracts, the OHADAC Principles follow the line of common law systems and international texts, unifying all cases of defective obligations, whether by quantity, quality or function, and also including *aliud pro alio* (the delivery of something different from that which was agreed).

Example 3: The facts are the same as in example 1. Firm A delivers the software on 9 July, as agreed, but after its download onto the hardware of the pharmaceutical firm B, the system does not provide the output agreed in the contract.

Example 4: A, a carriage firm, buys some high-powered refrigerators for the transportation of deep frozen fish. However, after delivery, A realises that the refrigerators do not have the advertised characteristics that led to the purchase.

Example 5: A, a construction firm of country X, builds the ceiling of the grandstand of the stadium of a football club in country Y. Once the work is finished, the first rains reveal leaks in the ceiling.

Lastly, the lack of cooperation of any party to the contract to achieve full effect also constitutes non-performance. This includes, in a broad sense, non-performance inherent to duties to cooperate, which is particularly significant in some contracts (e.g. construction contracts). In civil law systems of French or Spanish tradition, these cases are known under the generic term of *mora credendi* and admit two different models of legal treatment. The first model corresponds to legal systems which lack general discipline in the treatment of *mora creditoris*, but has many fragmented applications of principles on which this doctrine is based (Articles 1.257 to 1.264 of the French and Dominican Civil Code; Article 1.044 of the Haitian Civil Code; Article 1.351 of the Honduran Civil Code; Article 1.130 of the Puerto Rican Civil Code; Article 2.098 of the Mexican Civil Code; Article 2.057 of the Nicaraguan Civil Code). The second model characterises legal systems which have a specific regulation of *mora creditoris* (Article 252 *et seq.* of the Cuban Civil Code; Article 1.429 of the Guatemalan Civil Code; Article 695 *et seq.* of the Honduran Commercial Code; Article 6:58 *et seq.* of the Dutch and Suriname Civil Code).

For their part, common law systems, because of their single concept of non-performance, do not use the *mora creditoris* as an autonomous legal institution since the obligee is responsible, in the same way as the obligor, for the breach of contract. However, there are also references to the obligee's duty to cooperate (Section 37.1 English of the Sale of Goods Act; Section 38.1 of the Sale of Goods Act of Bahamas, Montserrat, Antigua and Barbuda, and Trinidad and Tobago; Section 39.1 of the Sale of Goods Act of Belize and Section 37.1 of the Sale of Goods Act of Jamaica), which is the base of the civil law institution of *mora credendi* [Seubert Excavators Inc v Eucon Corp (1994), 871 P.2d 826, 831 Idaho], and to the very offer of performance and subsequent unjustified refusal by the obligee as a case of breach of contract [Lea v Exelby (1608), 78 English Reports (ER) 1112; Ball v Peake (1660), 82 ER 941].

Equally the Unidroit Principles do not include a rule on *mora creditoris*, although its effect can be recognised under Article 7.1.2 (interference by the other party), which corresponds with the duty to cooperate envisaged in Articles 1:202 PECL and III-1:104 DCFR.

Example 6: The facts are the same as in Example 1. The pharmaceutical firm B had to provide consultancy firm A with certain information which was necessary for the custom software. B is afraid of divulging strategic information, and avoids providing A with some information.

2. Objective character of the non-performance notion

Aside from its unitary nature, the concept of non-performance in the OHADAC Principles is objective and neutral. Consequently, and in accordance with Article 7.1.8 of these Principles, the breach of the contract is ascertained regardless of the cause for which the obligor has not performed its contractual obligation. This is irrespective of whether or not the breach of contract is justified. Although *force majeure* renders inoperative certain actions in contract, it constitutes a case of non-performance because the obligee's right has been infringed, even the prejudice was justified.

Example: Firm A bought an apartment building to be operated as a hotel in a specific location, based on the architectural drawings. The building was to the extreme west of all the other future buildings in residential complex project and overlooked the sea and without no buildings in front of it. Seller firm B had to modify the original plan during the construction of the complex due to requirements by public authorities, which modified permissions and imposed the sitting of a green zone. Consequently, the residential complex was reorganised, modifying the number of blocks, so that the property bought was no longer in the original location but further east, with another building opposite which partially concealed the original view. In this case, there is a non-performance by the seller, although it is justified in accordance with Article 7.1.8 of the OHADAC Principles. Consequently, A has no right to damages for breach of contract, but firm B is contractually liable and A could exercise its right to avoid the contract, unless B offers A a *commodum representationis* (e.g. the delivery of another building in another location, but with similar features to those required in the original contract).

French and Spanish legal systems do not technically have a subjective notion of non-performance, insofar as only fault is required for a remedy in damages (comment on Article 7.4.1 of these Principles; however, due to the weight of tradition, fault is considered as the central point of breach of contract, and cases of lack of fault are dealt with under risk doctrines (comment on Article 7.3.1 of the OHADAC Principles). On the contrary, objective doctrine is inherent to common law systems, where breach of contract doctrine is construed regardless of obligor's fault, insofar as contract parties are not obliged in respect of a promise for future conduct, but in respect of a given result. This is also the approach in the Dutch and Suriname civil codes.

The objective approach also prevails in harmonised texts. Thus, in Articles 46 and 61 CISG, non-performance is determined regardless of whether there is fault of the contract party in breach of contract or a cause of exoneration of responsibility included in Article 79, which does not entail the absence of contractual liability, but merely the reduction of remedies against breach of contract. Even more clearly, PECL and DCFR define non-performance in Articles 1:301 (4) and III-1:102 (3), respectively, in a neutral way, and set out in Articles 8:108 PECL and III-3:104 DCFR what is known, under a good technical expression, as “excuse due to an impediment”. Thus, they specify that there is non-performance and the obligor is not exonerated, although, since the non-performance is justified, the obligee has no right to specific performance or to damages [Article 8:101 (2) PECL; Article III-3:101 (2) DCFR]. Similar rules are found in UP (Articles 7.1.1 and 7.1.7 on *force majeure*). Likewise, in Article 87 CESL non-performance is defined as “any failure to perform that obligation, whether or not the failure is excused”, and excuses for non-performance are governed by Article 88 CESL.

Article 7.1.2: *Fundamental non-performance*

A non-performance of a contractual obligation is fundamental if:

- a) strict observance of the obligation which has not been performed is of essence under the contract; or**
- b) the non-performance substantially deprives the other party of what it was entitled to expect under the contract, unless at the time of conclusion of the contract, it has not been foreseen or could not reasonably have been foreseen such result; or**
- c) the non-performance is of a nature that leads the obligee to believe that, in view of the circumstances, it cannot rely on the future performance of the other party.**

COMMENT

The notion of serious or fundamental non-performance is important in order to determine the framework of remedies and defences open to the aggrieved party against the damage to its contractual rights.

Legal systems inspired by French and Spanish tradition do not determine in written law the concept of fundamental breach of contract. This is developed by case law, where an important breach of contract is required in order to open the termination remedy (comment on Article 7.3.1 of these Principles). Likewise, some commercial codes, in particular in the provisions that regulate contracts, require significant non-performance as a fair cause to terminate the contract (e.g. Article 973 of the Colombian Commercial Code for supply contracts or Article 1.325 of the Colombian Civil Code for agency contracts; Article 711 of the Guatemalan Commercial Code for supply contracts; or Article 773 of the Honduran Civil Code for sale contracts). Dutch law does not recognise or applies this concept.

In common law systems, however, there is a broad development of the concept called "substantial failure in performance", both in case law and in written law [Boone v Eyre (1789), 1H Black 273; Glaholm v Hays (1841), 2 Man & G 25; Universal Cargo Carrier Corp v Citati (1957), 2 QB 401; Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisa Ltd (1962), 2 QB 26; Photo Production Ltd v Securicor Transport Ltd. (1980), UKHL 2; Thompson v Corroon (1993), Privy Council Appeal Antigua and Barbuda 42 WIR 157; Sections 241 and 242 Restatement (Second) (Second) of Contracts; Section 2-612 (2) UCC; Sections 31 (2) of the Sale of Goods Act of England and Jamaica; Sections 32 (2) of the Sale of Goods Act of Bahamas, Montserrat, Barbuda, and Trinidad and Tobago; and Section 32 (2) of the Sale of Goods Act of Belize].

In harmonised law, Article 25 CISG defines the concept of fundamental breach from tests on "fundamental detriment" and "foreseeable result", which determine an objective concept of fundamental breach that inspires all other international texts. Based on this approach, Articles 7.3.1 (2) UP, 8:103 PECL and III.3:502 DCFR add other tests that require the consent of the parties as well as the subjective or intentional element (difficult to prove). Article 87.2 CESL comes back to the objective model by specifying that non-performance is fundamental if "a) it substantially deprives the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the non-performing party did not foresee and could not be expected to have foreseen that result; or (b) it is of such a nature as to make it clear that the non-performing party's future performance cannot be relied on".

The article proposed in the OHADAC Principles also opts for an objective concept of fundamental non-performance, like English law and international texts on sale contracts, establishing a list of circumstances that are used to determine cases of fundamental non-performance. Despite the general nature of these criteria, it is possible that some specific assumptions, considered by the parties as cases of serious

non-performance be left out of the list. That is why it is recommended to add clauses to the contract that complete the rule.

The first criterion derives from the nature of the contractual obligation, which, by mutual agreement of the parties or because the contract itself and the circumstances of performance are essential for the satisfaction of the obligee's interests.

Example 1: Parties have agreed that goods must be delivered at a given time, after which the obligee will no longer be interested in the performance. Absence of performance at that fundamental time constitutes a serious non-performance.

The second circumstance refers to when the non-performance substantially deprives the obligee of what it was reasonably entitled to expect according to the nature and the terms of the contract. Whether such a deprivation is fundamental or not must be analysed on a case-by-case basis under contextual circumstances. Moreover, there is no fundamental breach if serious damage to contractual rights derived from non-performance were not reasonably foreseeable when the contract was concluded. The foreseeable nature also depends on the declarations of the parties and circumstances taken into account at that time (information disclosed by the parties, preliminary agreements, etc.).

Example 2: A and B have agreed that A will build a garage for B to park heavy machinery. They agree on a project, but A reserves the right to make minor changes. After work has begun, A decides to make changes to the project due to economic reasons. These changes consist in reducing the opening of the door by 5 cm on each side. When the work is delivered, it is discovered that some heavy machines that were to be parked inside the garage are larger than the dimensions of the door. This serious loss of functionality of the structure could not have been foreseen by A, given that B did not inform it at any time about the size of machinery which would be parked in the garage.

Finally, the third criterion deals with non-performance which, according to circumstances, provides the aggrieved party with enough reason to reasonably believe that the other party will not perform in the future. In the wording of this third parameter of serious non-performance, the OHADAC Principles have ignored the consideration of subjective elements that are on the contrary present in UP, PECL and DCFR, which refer to "intentional" non-performance. That does not prevent such an intention from being taken into account in order to consider the circumstances that lead one party to be convinced of the future non-performance. However, an inflexible

mention of the party's intention could result in specific difficulties of application, and not only in common law systems.

Example 3: In the same case as in example 2, the construction firm A brings the work to a standstill just as it had begun, due to the offer from firm C to carry out construction work under more advantageous terms. Since A cannot reasonably assume both projects, it decides not to perform the contract agreed with B. The circumstances of this example characterise the non-performance as fundamental, so that B has the right to terminate the contract and it is not obliged to give an additional period of performance [Article 7.3.1 (1) OHADAC Principles].

SPECIFIC CLAUSE ON FUNDAMENTAL NON-PERFORMANCE

The wide range of hypotheses that give rise to fundamental non-performance under this Article calls for the inclusion, in certain contracts, of a clause specifying the cases of fundamental breach for a given contract.

“Particularly, non-performance of obligations established in clauses (...) of this contract will be considered fundamental breach of this contract”.

Article 7.1.3: Remedies for non-performance

- 1. In case of non-performance, the obligee, without affecting the right to cure by the debtor, may resort to the remedies set out in this Chapter, but may not claim damages if the non-performance is excused under article 7.1.8 of these Principles.**
- 2. The remedies for non-performance may be cumulated if they are not incompatible with each other.**
- 3. The obligee who is exercising its right to performance may change the remedy if it has not obtained satisfaction of its claim.**

COMMENT

1. Available remedies and possibility of accumulation

The option chosen of the unitary concept of non-performance makes it possible to present, in these Principles, a harmonious set of measures, actions and remedies developed in sections 2, 3 and 4 of this Chapter. This framework comprises the right to performance, termination of contract and right to damages. It also comprises suspension of the performance itself, as specified in Article 7.1.4.

Romanist legal systems have not developed a system of non-performance and remedies in written law, but treat this matter in a fragmented manner, for example by moving contract termination to the chapter on conditional obligations. This is because they consider that the right to terminate the contract is an implicit resolutive condition in reciprocal obligations (comment on Article 7.3.1). Conversely, common law systems, despite its inclination for avoiding categories and classifications, establishes a system of remedies, as in international texts and Article 125 of the Proposals for the Reform of French Law on obligations of 2013.

The starting point for the application of all these remedies that establishes contractual liability in the OHADAC Principles is the non-performance by one of the contracting parties. Thus, in some cases, these remedies are available only under specific conditions. For example, the direct right to termination requires fundamental non-performance [Article 7.3.1 (1) OHADAC Principles], and the aggrieved party has no right to damages where non-performance is excused by a justified cause under Article 7.1.8 of the OHADAC Principles.

Despite the general declaration in paragraph 1 of this Article, the array of remedies is not available for the aggrieved party where non-performance is caused exclusively by its action or omission [Article 7.1.2 UP; Article 8:101 (3) PECL; Article III- 3:101 (3) DCFR; Article 106.5 and 131.4^o CESL]. A different hypothesis arises where the aggrieved party has participated in the cause of non-performance or in its effects that is regulated in Article 7.4.4 of these Principles.

The second paragraph envisages the possibility of accumulation of remedies for contractual responsibility, as far as they are compatible. Particularly, remedy of damages is compatible with specific performance and termination of the contract (Articles 7.3.5 and 7.4.1 and their respective commentaries). The right to specific performance and the right to terminate the contract are logically incompatible, insofar as no one can intend the extinction and the preservation of the contract at the same time.

2. *Ius variandi* between remedies

Paragraph 3 of this Article deals with the exercise of *ius variandi* as one of the remedies, which is recognised in some domestic legal systems in the Caribbean sphere.

Under French law, although the Civil Code does not expressly provide it, case law admits the freedom to change remedies in the course of the judicial procedure (including appeal). This means that the fact that a party has chosen to terminate a contract does not prevent it from demanding specific performance and vice versa, since the French Cour de Cassation considers that both constitutes “two different forms of exercising the same right” (Cass. 3 civ., 26 April 1989). In most other legal systems, however, *ius variandi* cannot be freely chosen, but is subject to restrictions justified by the protection of the other contract party and by its right to trust that obligee’s declaration will not be modified and organise its interest according to it. Thus, Articles 1.386 of the Honduran Civil Code, 747 of the Honduran Commercial Code, 1.949 of the Mexican Civil Code, 1.536 of the Guatemalan Civil Code, 1.009 of the Panamanian Civil Code and 1.077 of the Puerto Rican Civil Code favour a change of remedy from the specific measure of protection to the right to termination, and not on the contrary. Besides, the possibility of changing the remedy is conditioned in most legal systems by the impossibility of specific performance.

In common law systems, this question does not arise given that specific performance is not a usual remedy. However, insofar as these systems allow the termination of contract through a mere notification without the need of previous notice, they have implemented rules to avoid sudden changes of opinion by the obligee, so that if this party renounces the right to termination it only will be able to revoke its decision through a reasonable notification [Charles Rickards Ltd v Oppenheim (1950), 1 KB 616].

In international texts on contract law harmonisation, whereas the UP expressly envisage the possibility of changing remedies (Article 7.2.5), the PECL and the DCFR do not directly solve this question, although commentaries on Articles 8:102 PECL and III-3:102 DCFR establish a set of criteria to modify the original claim.

Following the line of these international texts and according to Caribbean civil law systems, the ODAHAC Principles allow a change of remedies from the specific performance to termination of contract, where the obligee has not obtained due satisfaction of its right under its first attempt, providing that *the ius variandi* was not exercised out of time and did not prejudice the obligor. Consequently, if the obligee has opted for specific performance and has notified the obligor in this sense, and the obligor, trusting in this decision, has adopted certain measures to perform its obligations, the obligee cannot change the remedy on a whim. Contractual loyalty and legal certainty are the limits of the *ius variandi*. However, the obligee may change the

remedy if, after having opted for performance, this becomes impossible or if the new remedy obtained after request for performance also turns out to be non-conforming with the contract.

Example: The firm A in country X asked the marketing firm B in country Y to design a project for an advertising campaign to promote certain products according to quality guidelines agreed in the contract. The initial project delivered did not correspond to the contractual requirements and contained serious defects. Despite this, firm A opts for specific performance and gives B a new deadline to correct its defective performance. The persisting faults in the new project eventually lead B to terminate the contract.

Article 7.1.4: *Withholding performance*

- 1. Where parties must perform their obligations simultaneously, either party may withhold performance until the other party has tendered its performance or has effectively performed its obligations.**
- 2. The party who must perform its obligation at a later time than the other party may withhold performance until the other party has performed its obligations.**
- 3. In any case, either party will be able to cancel the performance of its obligation as soon as it becomes clear that the other party will not perform theirs on the due date.**

COMMENT

The proposed rule takes up the concept of *exceptio non adimpleti contractus*, which is a defensive solution, granted to the obligor of a reciprocal obligation in order to 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.

In those systems which follow French tradition, the basis of the *exceptio* lies in the general theory of cause: the reason of this remedy for breach of contract is that the cause of the obligation of one of the parties disappears, in reciprocal obligations, when the other party does not comply with its own obligation. Therefore, in OHADAC

countries which follow this tradition, the exercise of the *exceptio* is based on articles rules relating to the bilateral nature of reciprocal obligations and on the principle of simultaneous performance underlying this kind of obligation (Article 1.609 of the Colombian Civil Code; Article 692 of the Costa Rican Civil Code; Article 295 of the Cuban Civil Code; Articles 1.146 and 1.184 of the French and Dominican Civil Code; Article 1.432 of the Guatemalan Civil Code; Article 974 of the Haitian Civil Code; Article 1.356 of the Honduran Civil Code; Article 1.949 of the Mexican Civil Code; Article 1.860 of the Nicaraguan Civil Code; Article 985 of the Panamanian Civil Code; Article 1.053 of the Puerto Rican Civil Code). Article 1.168 of the Venezuelan Civil Code is more specific, as it expressly explains that each party can refuse to perform its obligation until the other party has performed its obligation. Articles 262 and 263 of the Dutch Civil Code, which are literally reproduced in the same articles of the new Suriname Civil Code, expressly regulate the withholding of performance, by allowing its application even when it is foreseeable that the obligor will not perform. Likewise, this tendency to expressly regulate withholding performance also appears in Article 160 of the Proposals for the reform of the French law on obligations of 2008. This reform specifically acknowledges the right to withhold performance in reciprocal obligations, and excludes its use in those cases contrary to good faith. This means that the performance of the obligation should be withheld in an equivalent proportion to the breach of the other party. Articles 125 and 126 of the Proposals for the Reform of French Law on obligations of 2013 also expressly acknowledge this exception.

This solution is also found in common law systems which recognise this exception to non-performance as they allow the obligee to withhold the performance of its obligation until the reciprocal obligation has been performed by the other party [Bollech v Charles County (2003), MD, 166 F. Supp 2d 443; SMR Technologies Inc v Aircraft parts international Combs, Inc (2001) WD Ten. 141 F. Supp. 2d 923, 932; Pack v Case (2001), Ut. CA, 30 P. 3d 436, 441; Universal Cargo Carriers Corporation v Citati (1957), 2 QB 401.450]. However, in common law countries this right to withhold performance is limited to situations where there is a fundamental breach of contract and in those cases where the contract, whether implicitly or explicitly, make the performance of a specific obligation conditional upon the performance of another obligation [Section 53(1)(a) of the English Sale of Goods Act; of Montserrat, Antigua and Barbuda, the Bahamas and Trinidad and Tobago; Section 52(1)(a) of the Jamaican Sale of Goods Act; Section 54(1)(a) of the Sale of Goods Act of Belize and section 2-609 UCC]. In any other case, the obligee must comply with the terms of the contract, although it can claim damages when there has been a breach of contract.

International texts that harmonise contract law also expressly regulate this defence against breach of reciprocal obligations. The UP mentions withholding of performance in Article 7.1.3., where it is stated that the party who has reason to reasonably believe that the other party will fall into a fundamental breach can demand a guarantee of performance and also withhold its own obligations in the meantime (Article 7.3.4). The Article 9:201 of the PECL allows withholding of performance as a way of putting pressure on the obligor, even when the non-performance is not particularly important, whenever the cost of the withheld performance is not disproportionate to the non-performed obligation and the party withholding performance is acting in good faith. It is also possible to withhold one's own performance when it is foreseeable that the other party will not comply with its part, even when it is not a fundamental breach. The DCFR also specifically regulates the right to withhold performance in reciprocal obligations (Article III-3:401), even when faced with foreseeable non-performance, and links its use to the principle of good faith and fair dealing (Article I-1:103). In the CISG system, withholding of performance is allowed when it is foreseeable that the obligor will not perform (Article 71), and a fundamental breach is not necessary, although it is required that this non-performance extends to a substantial part of the obligations and is communicated to the other party, which can avoid the withholding, offering enough guarantees of performance in the future. In the same way, this right to withhold performance is recognised in Articles 113 and 115 of the CESL.

Paragraphs 1 and 2 of this Article are dedicated specifically to the concept of *exceptio non adimpleti contractus* as a solution to non-performance, all the while distinguishing the situation where the obligee must perform its obligation either at the same time or after the obligation of the obligor. This measure, which is accepted in one way or another in all the OHADAC territories, allows the obligee to respond to non-performance and to exert pressure on the other party to perform. The breach of contract does not need to be fundamental in order to justify the use of the *exceptio* by the obligee. It is more in the cases of fundamental breach described in Article 7.1.2 that the obligee usually draw upon to the right to terminate the contract (Article 7.3.1). Therefore, the scope of this remedy would be in those cases where the non-performance of the obligation reveals a basic breach in the accuracy of contractual obligation, which generally is still useful to the obligee if it is performed successfully. This solution is different from that of contract termination, in which the seriousness of the breach creates a situation of breakdown of the basic elements of contract with respect to the possible satisfaction of the obligee's interests.

Example: an IT company signs a contract in which it is bound to maintain and repair their customer's computers. The client undertakes to pay in consideration a monthly amount of money within the first five days of the month. Two months after signing the contract, the customer has not yet made the monthly payment; therefore, the IT company is no longer bound to maintain and repair its customer's computers.

Paragraph 3 of the proposed rule allows one party to withhold its own performance when it is foreseeable that the other party will breach its obligation. This is a possibility both in common law [Section 41(1) of the English Sale of Goods Act; of Montserrat, Antigua and Barbuda, The Bahamas and Trinidad and Tobago; Section 42(1) Sale of Goods of Belize; Section 40(1) Sale of Goods of Jamaica] and in civil law countries (Article 336 of the Costa Rican Commercial Code; Article 1.653 of the French and Dominican Civil Code; Article 1.828 of the Guatemalan Civil Code; Article 6:263 of the Dutch and Suriname Civil Code; Article 752 of the Honduran Commercial Code; Article 384 of the Nicaraguan Commercial Code). Likewise, the CISG provides special rules for cases in which it is clear that the other party will either not perform a substantial part of its obligations or fall into a fundamental breach within the agreed period of time (Article 71). Also in the PECL system, when one party is obliged to perform before the other, it must have the right to defer or postpone its obligation if it is clear and foreseeable that the other party will not perform before the agreed period of time. In this situation, the party who was to perform first has the right to terminate the contract on the grounds of anticipatory breach (e.g., Article 9:304).

Article 7.1.5: *Cure of non-conforming performance*

- 1. The obligor may cure any non-performance, at its expense, on condition that:**
 - a) it notifies the obligee, without undue delay, of the manner and timing of the cure; and**
 - b) the cure is appropriate to the circumstances; and**
 - c) the obligee has no legitimate interest in refusing the cure; and**
 - d) the cure is effected promptly.**
- 2. The obligee may withhold its own performance pending cure.**

- 3. Notwithstanding cure, the obligee retains the right to claim damages for delay and for any harm caused or not prevented by the cure. However, the rights of the obligee that are not compatible with the cure will be suspended from the time of the effective notification of the commitment to cure until the expiry date of the reparation.**
- 4. The notification that a contract has been terminated does not exclude the right of the obligor to cure its non-performance.**

COMMENT

The possibility of the cure of non-performance intends to favour preservation of the contract as well as to mitigate damage caused by its breach. The proposed regulation is similar to the solutions in international texts on harmonisation of contract law. These texts expressly envisage this right, which is widely recognised both in common law and in civil law systems.

The right to cure non-conforming performance is expressly regulated in Section 2-508 UCC and has also been recognised in the landmark English case [*Borrowman Philips & Co v Free & Hollis* (1878), 4 Q.B.D. 500 CA]. The new Suriname Civil Code reproduces the same solution on this issue as the Dutch Civil code and specifically recognises the right to cure for non-conforming performance, when it declares that the obligee can refuse the obligation of the obligor if it fails to offer immediate compensation for damage and payment for expenses caused by non-performance (Article 6:86 Civil Code). In both cases it is provided that the right to repair non-conforming performance ends when the obligee notifies the obligor its choice of either claim damages instead of the performance or to terminate the contract (Article 6:87 Civil Code).

In other countries belonging to OHADAC a specific rule on this right of the obligor cannot be found. This is because French and Spanish laws, from which these systems are often derived, do not have specific rules in this respect, although the right to cure non-conforming performance is recognised by courts [judgement of the Cour de Cassation (Civ) of 24 February 1970]. However, if the defendant makes an offer to cure the non-conforming performance after requesting the termination of the contract, the cure can be refused [judgement of the Cour de Cassation (Civ) of 15 February 1967]. The right to cure non-conforming performance can also be inferred from Articles 1.609

and 1.546 of the Colombian Civil Code; 295 and 306 of the Cuban Civil Code; 1.138 Dominican and French Civil Code; 937 of the Haitian Civil Code; 1.386 of the Honduran Civil Code; 1.949 of the Mexican Civil Code; 1.859 and 1.885 of the Nicaraguan Civil Code; 985 and 1.009 of the Panamanian Civil Code; 1.053 and 1.077 of the Puerto Rican Civil Code; and 1.269 and 1.167 of the Venezuelan Civil Code.

The OHADAC Principles include a specific rule on this right, which is recognised in all OHADAC countries, following the model of the texts on contract law harmonisation (Article 48 CV, Article 7.1.4. UP, Article 8:104 PECL and Articles III-3:201 to 3:204 DCFR). The proposed rule contains a detailed description of the conditions under which the obligor may exercise this right, particularly those related to the notification and scope of the cure, as well as to the rights of the obligee.

This article requires that the obligor, immediately after receiving the obligee's notice of its intention to take the measures intended to cure the non-performance, notifies the obligee in its turn and without undue delay of its intention to cure the non-performance itself. Moreover, the timing for the exercise of this right is fundamental, because the obligor cannot force the obligee to wait the performance for a prolonged period of time. However, the absence of prejudice to the obligee may under no circumstances justify the delay of the obligor. The notice must explain exactly how and when the cure will take place. This may be reparation and/or substitution, as well as any other activity intended to cure the non-performance and to provide the obligee with all that it is expecting according to the contract.

It is also necessary that the cure be suited to the circumstances of the contract, in such a way that it is reasonable to allow the obligor to make another attempt at performance. The factors to be taken into consideration in determining the appropriateness of the cure include whether the proposed cure promises to be successful in resolving the problem and whether the necessary or probable delay in effecting the cure would be unreasonable or would itself constitute a fundamental non-performance. However, the right to cure is not defeated by the fact that the obligee subsequently changes its position after it has received notice of cure.

Example: Company A signs a contract with Company B, according to which A commits to the installation of a construction waste-processing facility. Company A is responsible for the planning, drawings and execution of the project as well as the assembly of the aggregate plant. It is also bound to deliver it completely equipped and ready for use, its purpose being to transform construction waste into recycled material, which should be fit for selling before 1 January. However, by the due date, a hopper with its feeder and five out of ten conveyor belts, all being tools necessary for the recycling process,

had yet to arrive and be installed. That very same day Company A wrote to their client and notified that everything would be delivered, installed and working in the facility by 10 January.

Finally, the interest of the obligee to refuse the reparation of the breach must be taken into consideration (this interest must be legitimate). The cure of the non-conforming performance shall not be denied to the obligor merely because the obligee no longer wishes to continue the contractual relationship. This limitation to the cure of non-conforming performance is consistent with the idea of fundamental breach, but also with the anticipatory breach, inasmuch as it should be understood that the obligee will have the option for legally refusing cure if it has grounds to believe the obligor will not be capable of curing the non-performance.

When the obligor has given effective notice that it intends to cure the non-performance of its obligation, and as long as the above-mentioned conditions are met, the obligee shall withhold performance until the cure is completed. Nevertheless, the obligee will not be able to exercise any action inconsistent with the performance of the contract, which justifies that the notice for the termination of the contract does not exclude the obligor's right to cure the non-conforming performance.

If the obligee has correctly terminated the contract (pursuant to Article 7.3.1.), the effects of termination will be suspended by an effective notice of cure, and they will begin only when the period for cure has expired without the fundamental non-performance having been cured.

The obligor will be held liable for any harm occasioned by the non-performance, even if the cure is successful. It is also responsible for any additional damage caused by the cure itself, for the delay in the performance of the contract or for any other damage, which could not have been prevented by the cure (principle of full compensation).

If the obligee receives an effective notice of cure of the non-performance, it shall accept this cure and cooperate with the obligor, allowing, for instance, any inspection that is reasonably necessary for the obligor to carry out the cure. If the obligee refuses to allow the cure when it is required, the notice to terminate the contract will be null and void and the obligee will not be able to pursue damages, which could have been prevented through the cure of the non-performance.

Article 7.1.6: *Extension of time for performance*

- 1. In the event of non-performance, the obligee may grant the other party, by notice, an extension of time for performance.**
- 2. During the period of extension, the obligee may withhold performance of its own obligations and claim payment for damage but it will not be able to resort to any other remedy for non-performance of its obligations, except in the case where the other party gives notice that it will not perform in the extension period.**
- 3. If the delay in performance is not an essential non-performance, the obligee which has given notice to the other party of the provision of an additional reasonable period for performance may terminate the contract at the end of such period. An unreasonable additional period of performance is considered to be extended to a reasonable time.**
- 4. In any case, on notifying the concession of this extension the obligee may stipulate that the contract will be terminated automatically if the other party does not perform within the agreed period.**

COMMENT

The concept that inspires this article of the OHADAC Principles is the *Nachfrist* of German Law (§ 323 BGB). The acknowledgement of this additional period for performance is based upon the broad concept of non-performance handled by the OHADAC Principles, under which it is not necessary to warn the obligee in case of non-performance, so that termination of contract is carried out by the obligee and not the judge or an arbitrator. Whenever a fundamental breach occurs or when the other conditions for terminating the contract are met (Articles 7.3.2 and 7.3.3 of these Principles), the obligee may terminate the contract by notifying the party which has not performed.

In civil law systems, the granting of an additional period of time to perform can be based on those precepts that enable judges, if there are justified causes, to determine a time frame for performance before it orders the termination of the contract (Article 1.184 of the French and Dominican Civil Code; Article 974 of the Haitian Civil Code; Article 1.386 of the Honduran Civil Code; Article 1009 of the Panamanian Civil Code; Article 1.077 of the Puerto Rican Civil Code). More explicitly, Article 134 of the Proposals for the reform of French law on obligations of 2013 permits the obligee to terminate the contract by notifying the obligor which does not perform in a reasonable period of time, after having been requested. Furthermore, Article 748 of the Honduran Commercial Code establishes that the obligee should demand the obligor to perform within an adequate period of time, not less than 15 days, unless the nature of contracts, trade practices or the agreement allows a shorter period. After this deadline, if the contract has not been performed, it will be rightfully terminated.

We can find some analogies between the *Nachfrist* technique and certain common law institutions. For instance, when the terms of a lease contract state that the lessor can terminate it on the ground of non-payment by the lessee, even if one single rent is owed, Section 146 of the English Law of Property Act establishes the granting of an additional period to perform. Moreover, a judge may grant a new deadline or grace period (relief against forfeiture). In consumer matters, the granting of an additional period of time to perform is also required (Articles 87 and 88 Consumer Credit Act 1974, for the United Kingdom; and Sections 5-110 and 5-111 Uniform Consumer Credit Code for the USA).

The possibility of providing the obligor with an additional period of time to perform can also be found expressly in international texts on harmonisation of contract law. Thus, Articles 47(1) and 63(1) CV recognise, respectively for the buyer and the seller, the possibility to settle an additional period of time of reasonable duration, so that the other party can perform its contractual obligations. Similarly, Article 7.1.5 UP allows the obligee to grant the other party a reasonable additional period for the performance of its own obligation, at the end of which it may terminate the contract *ex Article 7.3.1(3)*. Likewise, Article 8:106(3) PECL refers to the granting by the obligee of an additional period for performance, during which the obligee can withhold performance and claim damages. That same benefit is recognised to the obligor in accordance with Article III.-3:503 DCFR. Similarly, Articles 115 and 135 CESL regulate termination due to delay after the additional period of performance was notified.

These Principles describe this remedy to breach of contract in the same way as the above mentioned international instruments. They clearly state that during the

additional period to perform set by the obligee, this party is not allowed to take any legal action against the obligor, but it may withhold its own performance and claim damages caused by non-performance or delay. However, the obligee may not expect specific performance nor terminate the contract during the additional period granted by the notice.

The introduction of this rule into the OHADAC Principles implies that the termination of the contract shall only be acceptable on two assumptions: when there is a fundamental breach and when there are no grounds to confer an additional period for performance. Thus, by granting a reasonable period of time to perform, the party which afterwards wishes to terminate the contract may do so with the full knowledge that the initial breach (whether fundamental or not) will not be a hindrance. Based upon this, the proposed rule distinguishes two situations that shall be differently approached. In cases where the obligee has an immediate right to terminate the contract as a consequence of a breach of the other party (fundamental breach), if the obligee is still willing to accept the performance, it cannot change its view without first notifying it the obligor. When there is a delay in performing, which cannot be considered fundamental (because the agreed period of time was not part of the nature of the contract and because the delay has not yet caused the obligee major problems), the obligee may terminate the contract only after notifying this to the obligor within a reasonable period of time.

In the first situation, the granting of an additional period for performance does not grant the obligee any added right, although it is a useful solution. Even when the delay or non-performance is fundamental and consequently the obligee may immediately terminate the contract, it might not wish to do so, because it may prefer the exact obligor's performance, as long as it is done within a reasonable period of time. The established procedure in this situation offers the obligor a last chance to perform or to correct the defective performance, without losing the obligee's right to claim the specific performance or to terminate the contract, if the obligor has not performed by the end of the set period of time. However, the fact that the obligee cannot use these remedies during the additional period for performance protects the obligor from a sudden change of opinion of the obligee. In these cases, if the contract has still not been performed by the end of this additional period, the right to terminate it on the grounds of fundamental breach becomes operative.

Nevertheless, in the second situation, when the delay of performance is not a fundamental breach, the obligee will not be entitled to immediately terminate the contract on the sole ground of the completion of the period. Nonetheless, once the

additional period set by the obligee to the obligor for performance is over, the obligee may terminate the contract. The deadline set by the obligee must be reasonable, because in cases where the delay does not entail a fundamental breach, the obligee has an additional right. The decision of what is a reasonable time shall be made by judges or arbitrators, which must take into consideration aspects such as the initial deadline to perform the obligation; the obligee's need for a timely performance, as long as this is an obvious necessity for the party who has performed; the nature of the goods; the services or rights that have to be provided; or the situation which caused the delay (the additional period for performance should be longer if one party has been unable to perform due to the bad weather, rather than if had it simply forgotten its obligations).

Example: A textile company signs a sale contract under which it undertakes to deliver 100,000 denim jeans to its client, from sizes 38 to 44, before 1 March, with the purpose of selling them during the spring season. However, by the set date, the selling company only delivers 25,000 jeans, with wrong sizes and of inferior quality to the one agreed. The buyer grants the seller an additional period of 30 days to deliver all the goods in the agreed conditions. At the end of the extension period the textile company has still not performed its obligation. In this situation, the buyer has the right to terminate the contract.

Regardless of the essential nature of the non-performance, the final paragraph enables the obligee which notifies an additional period to state that the contract will be considered as automatically terminated if the obligor does not perform during the additional period. Then, once the period has expired, the contract is considered as terminated as also stated in paragraph 2 of Article 7.3.3.

Article 7.1.7: *Exemption clauses*

A clause that limits or excludes one party's liability for non-performance or which allows one party to render performance substantially different from what the other party reasonably expected, may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract and to the circumstances under which the non-performance took place.

COMMENT

1. Definition of exemption clauses and the need for their regulation

In the international sphere, clauses imposing on contract parties, or on only one contract party, a greater or lesser liability than that legally envisaged in case of non-performance are common. This formula makes it possible to adjust the liability regime of contract parties when agreed conditions are met. This option is particularly relevant in certain transactions in high-risk economic sectors or transactions with partners located in countries whose financial systems are not sufficiently stabilised.

Most legal systems in Caribbean sphere recognise the freedom of parties in organising their contractual liability, although there are many differences in relation with the scope and limits of this power.

In Caribbean civil law systems, although there are no legal provisions for clauses restricting contractual liability, they are considered in case law. Despite the rich case law on this matter, the absence of specific, clear and precise written rules which permit such clauses entails some uncertainty when it comes to harmonisation.

For example, in civil law systems, exemption clauses are legally admitted under the freedom of contract principle, but they are subject to limits imposed by law, public policy and good custom (Article 1.616 in relation with Article 1.604 of the Colombian Civil Code; Article 312 of the Cuban Civil Code; Article 1.547 of the Honduran Civil Code; Article 702 of the Honduran Commercial Code; Article 2.437 of the Nicaraguan Civil Code; 1.106 of the Panamanian Civil Code; Article 1.207 of the Puerto Rican Civil Code). For their part, in the Costa Rican Civil Code (Article 1.092) and the Venezuelan Civil Code (Article 1.505) exemption clauses are regulated in the field of sale contracts. In French law, the lack of written rules provokes a debate about the validity of such clauses. The main argument in favour of these clauses is based on freedom of contract established in Article 1.134 of the French and Dominican Civil Code or in Article 925 of the Haitian Civil Code, although some special rules prohibit exemption clauses in particular contracts or under special circumstances. The projects of reform of the French Civil Code deals with this question (Article 76 of the Proposals for the reform of the French law on obligations) and consider clauses depriving the main obligation of its essence as not written. Territories under Dutch law influence do not have an express regulation either. Validity of agreements limiting the contractual liability is inferred from Article 6:248 of the Dutch and Suriname Civil Code.

In England, the Unfair Contract Terms Act (UCTA) of 1977 includes a control system which has the disadvantage of not embracing all contracts and clauses, this being a regulation with limited purposes. It deals with exemption and exclusion of contractual

liability clauses in certain non-individually negotiated contracts (Section 3), given that its aim is to protect weak parties, although both commercial contracts between traders and consumer contracts are included. Under the limits established in the UCTA, Article 55 of the English Sale of Goods allows modification and exclusion of rights, obligations and responsibility legally derived from the contract through an express or implied agreement. The same rule is found in Sections 55 of the respective Sale of Goods Act of Montserrat, Barbuda, Bahamas and Trinidad and Tobago; Section 54 Sale of Goods Act of Jamaica and Section 56 Sale of Goods Act of Belize. In USA law, Section 2.719 UCC provides for the modification and limitation of contractual responsibility, for example where parties expressly agree the availability of only one remedy. However, there is a limit where concurrent circumstances in a concrete case lead to the frustration of the essential purpose of such remedy; then other legal remedies shall be available. Moreover, Section 2.316 UCC states that parties interested in an exemption clause must be conspicuous and clearly mentioned in the contract.

In international texts on contract law harmonisation, Article 7.1.6 UP states that “a clause which limits or excludes one party’s liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract”. The formula used in this rule, inspired by common law, is wide enough to embrace all kind of agreements about limitation of contractual liability, even the distinction between direct and indirect limitation of liability for non-performance. For its part, Article 8:109 PECL uses general terms to include all clauses that in practice could prevent the obligee from obtaining usual remedies and it does not distinguish between exemption or exclusion clauses. In the same sense, Article III-3:105 DCFR neither differentiates nor imposes a specific legal regime for each kind of clause.

The rule set out in the OHADAC Principles opts for a legal regime of exemption and exclusion clauses similar to the one established in international texts, which should eliminate questions and difficulties related to characterisation of clauses limiting contractual liability, classification or types of clauses, determination of ways of control, limits of validity and legal consequences and sanctions. Under a fragmented regime, it is not easy to interpret or integrate the interests of the obligee against the obligor, which aims at benefitting from a weaker system of contractual liability. A general legal regime for these clauses facilitates the balance of opposing interests and legal certainty, diminishing risks in international trade.

Following the line of international texts, the OHADAC Principles include a wide notion of exemption and exclusion clauses, which allows a common rule applicable to all these clauses. The terms “limit” and “exclude” must be interpreted widely as far as possible, given that both terms try to make the obligee bear risks that usually fall on the obligor. The most usual clause consists in agreeing an exclusion or limitation of damage related to the remedy of damages, but it could also be applied to other remedies for non-performance, such as termination, specific performance or reduction of the contract’s price. Besides, the clause allowing a party to perform an obligation substantially different from what the other party could reasonably expect must also be considered as included in that wide notion of exemption and exclusion clauses.

Example: A, a firm in country X that exports cocoa, concludes a sale contract with B, a firm in country Y. The parties agree that if cocoa available at the time of delivery is not of the first quality agreed, the seller could perform by delivering cocoa of similar basic characteristics, including an exemption clause in such a case. The time of delivery comes and the cocoa is clearly of a lower quality, so that it is not according with what the buyer reasonably expected. Therefore, the exemption clause shall not be applied.

2. Limits of the validity of clauses excluding or restricting contractual liability

Most civil law Caribbean systems state some limits of exemption clauses on the ground of the law, morality or public policy (Article 1.547 of the Honduran Civil Code; Article 2.437 of the Nicaraguan Civil Code; Article 1.106 of the Panamanian Civil Code; Article 1.207 of the Puerto Rican Civil Code). Likewise, there are similar rules declaring exemption clauses in case of fraud or serious fault of a party as void (Articles 63 and 1.522 of the Colombian Civil Code; Article 1.150 of the French and Dominican Civil Code; Article 940 of the Haitian Civil Code; Article 1.360 of the Honduran Civil Code; Articles 987-988 of the Panamanian Civil Code; Articles 1.054, 1.055 and 1.056 of the Puerto Rican Civil Code). Under these systems, liability arising from the obligor’s fraud cannot be limited through parties’ agreement; a clause of this kind would be inconsistent with the obligation itself, insofar as the intention to create obligations becomes absurd if the obligor is deliberately and consciously authorised not to perform.

Generally, in common law systems, validity of exemption and exclusion clauses is considered according to the “reasonableness test”, as stated in the Unfair Contract Terms Act of 1977. Indeed, some kinds of clauses restricting or limiting contractual liability are prohibited where terms are considered unjust or unreasonable in the light of the circumstances of the contract. When the Act is not applicable, the case being out of its scope of application, courts have recourse to the general doctrine of

fundamental breach of contract. This doctrine implies that the obligor interested in invoking the effect of an exemption clause cannot benefit from it if the non-performance affects essential obligations of the contract, as far as it is considered as particularly serious.

Dutch and Suriname Civil Code appeal to reason and equity to give effect to any agreement excluding liability (Articles 6:2 and 6:248). This principle enables judges, in the event of those exceptional circumstances, to replace effects envisaged in the contract or in law in order to achieve an equitable solution.

In USA law, a minimum standard must be respected by any restrictive clause, in accordance with Section 2-302 of the UCC, which enables judges to cast aside unfair terms or even the whole contract where it is not reasonable (unconscionable). The Article does not determine clearly when a clause may be considered as unconscionable. This term is close to good faith and, in practice, plays an essentially coincident role. The expression “unconscionable” may be considered as synonymous of “too disproportionate” or “immoral”. The unconscionability doctrine tries to avoid unfair negotiations. Moreover, exemption clauses are contrary to public policy where there is fraudulent intention or serious fault. Particularly, the Restatement (Second) of Contracts establishes that limitation of liability shall not be accepted if there is damage intentionally caused or serious negligence.

In the field of international texts on contract law harmonisation, Article 8:109 PECL, strongly inspired by civil law, provides that exemption or exclusion clauses must not be contrary to good faith or fair dealing. Article III-3:105 (2) DCFR refers, in the same sense, to any remedy and is applied even if the exemption or limitation clause is valid under the rules on non-individually negotiated clauses, providing a kind of subsidiary protection, so that the clause cannot be invoked if it is contrary to good faith or fair dealing. In the first paragraph of the Article there is a reference the remedy in damages, establishing the nullity of clauses of exemption or exclusion of liability for injury caused intentionally or by serious negligence. The notion of good faith, however, has not been formally translated into Article 7.1.6 UP, but it can be inferred from the expression “if it would be grossly unfair”, which implies that exemption clauses must be invoked according to good faith, insofar as it is submitted that UP rules limit validity of exemption clauses on the ground of morality, good faith and civil law notion of abuse of rights.

In the rule proposed here, exemption as well as exclusion clauses are subject to the same principles with regard to admissibility. The regime controlling those clauses must be similar, regardless of their name or characterisation, favouring contract balance by

avoiding a party achieves the exemption of liability through a disproportionate limitation clause. In this sense, the Article defines validity limits according to the legal systems involved, adopting a wide range of concepts all the while remaining in line with the Caribbean legal systems of the OHADAC region.

As mentioned, some OHADAC legal systems refer to proof of good faith or similar criteria as limits applicable to these clauses, in contrast with common law systems, which are based on reasonableness and the observance of the essential obligations of the contract. Although such limits are not expressly envisaged in the Article proposed, exemption and exclusion clauses that violate them would be void. There are fundamental requirements of public policy, morality and good custom which determine contract law and are considered in most legal systems as far as they contradict a mandatory rule, so that reiteration in this respect in the rules on exemption clauses seems unnecessary. Thus, the fact that a party invokes a limitation clause in cases not envisaged or different from those considered at the conclusion of the contract is considered as contrary to good faith and fair dealing or unreasonable.

The terms “unconscionable” in common law is determined according to a mixed criterion, integrated by a subjective or contextual element inferred from the particular circumstances of the parties, and/or by an objective element derived from the atypical nature of the bargain. Therefore, if the clause turns out to favour one party, it makes that clause unconscionable or excessive, and the clause cannot be invoked. Where clauses are manifestly unfair, if their application leads to a disproportionate imbalance between the obligations of each party or to non-equitable results, the legal solution is the same as the one adopted under the fundamental breach of contract doctrine or on the ground of the reasonableness test.

Finally, in order to eliminate negligent and abusive conduct by the obligor, some civil law systems avoid limitation clauses in cases of fraud or serious fault. The express mention in this Article of such a formula seems awkward, since it is alien to common law. To overcome the clash of the different legal cultures, the rule proposed gets around limits related to subjective conduct of the obligor, but uses wide categories able to embrace them as the UP do. Thus, given that circumstances of non-performance must be considered, the intentional or negligent conduct of the party must be taken into account to avoid effect of exemption clauses.

Example: A, a firm in country X, has a plot of land where it intends to build a photovoltaic solar plant, for which it concludes a contract with B, a firm in country Y specialised in this kind of turnkey contract. The contract includes a clause excluding B’s liability if the facility is not completed, certified and made operational as a result of

legal changes (already announced) that concern said facility. B does not employ due care in carrying out logistics and work on the field, which results in a delay obtaining documents needed to certify the installation in the form and time defined. In this case, the non-performance is intentional and the obligor cannot invoke the application of the limitation clause set out in the contract.

Article 7.1.8: *Impossibility* (Force majeure)

- 1. A contract party may justify breach of contract when the performance of its obligations becomes impossible due to *force majeure* reasons.**
- 2. There is *force majeure* when the aggrieved party proves the existence of an event:**
 - a) alien to its responsibility and beyond its reasonable control, and**
 - b) whose risk it has not assumed, and**
 - c) which could not be reasonably expected or taken into consideration at the moment of the conclusion of the contract, and**
 - d) which makes impossible the performance of its obligations.**
- 3. A party that invokes an event which makes performance impossible must give written notice to the other party as soon as possible, providing reliable evidence of that event and taking all reasonable measures to limit the effects on the performance of its contractual obligations. If this notification does not reach the other party in a reasonable period from the time when the invoking party has known or ought to have known of the *force majeure* event, the other party has the right to damages resulting from the absence or delay in notification.**
- 4. The contract will be deemed to be terminated as from notification, unless the other party declares that it wishes otherwise within a reasonable period. If one**

of the parties has received a benefit before termination due to acts of performance made by the other party, it must compensate this party by paying a sum of money equivalent to the benefit obtained.

5. When impossibility is temporary, termination of contract will only be possible if the delay in performance significantly deprives one party of its reasonable expectations. In other cases, the party invoking *force majeure* must perform once the event disappears.

6. When impossibility is partial, termination of contract will only be possible if partial performance significantly deprives one party of its reasonable expectations. In other cases, the party invoking *force majeure* must perform partially and the obligation of the other party will be proportionally adjusted.

COMMENT

1. Definition of cases of *force majeure*

The excuse for breach of contract due to circumstances of *force majeure* or impossibility is common in all legal systems in comparative law and particularly in legal systems in the OHADAC area. Most traditional texts include a rule related to obligations of transfer of goods that have been lost or destroyed (Articles 1.302 Dominican and French Civil Code; 298 of the Cuban Civil Code; 1.729 of the Colombian Civil Code; 830-834 of the Costa Rican Civil Code; 1.344 of the Guatemalan Civil Code; 1.087 of the Haitian Civil Code; 1460 of the Honduran Civil Code; 2.017 of the Mexican Civil Code; 2.165-2.168 of the Nicaraguan Civil Code; 1.068 of the Panamanian Civil Code; 1.136 of the Puerto Rican Civil Code; 1.344 of the Venezuelan Civil Code). Most of the civil codes extend this rule to “obligations to do” or generally to any obligation, usually by reference to *force majeure*, act of God or both (Articles 64 and 1.729-1.739 of the Colombian Civil Code; Article 834 of the Costa Rican Civil Code; 299.1 of the Cuban Civil Code; 1.148 of the French and Dominican Civil Code, maintained in Article 126 of the Proposals for the Reform of the French law on obligations of 2013; 1.325 and 1.426 of the Guatemalan Civil Code; 937 and 1.087 of the Haitian Civil Code; 6:74 (6.1.8.1) and 6:75 (6.1.8.2) of the Dutch and Suriname Civil Code; 1.363 and 1.462 of

the Honduran Civil Code; 2.111 of the Mexican Civil Code; 1.851, 1.864 and 2.164 of the Nicaraguan Civil Code; 34-D, 990 and 1.070 of the Panamanian Civil Code; 1.058 and 1.138 of the Puerto Rican Civil Code; 1.272 of the Venezuelan Civil Code). This institution also appears invariably in international texts for contract law harmonisation (Articles 7.1.7 UP; 8:108 PECL; III-3:104 DCFR; 88 CESL), which tend, like modern national projects, to a unique institution on *force majeure*, abandoning the old institution of act of God. Finally, this rule also applies in common law, especially after the leading case in English case law “Taylor v Caldwell”, reflected for instance in the decision of the High Court of Barbados of 2004 in *Hulse v Knights Ltd* (Carilaw BB 2004 HC 29) and in the decision of the Supreme Court of Jamaica of 2002 in *Couttes Ltd v Barclays Bank plc* (Carilaw JM 2002 SC 84). The rule is also included in Section 2:613 UCC and articles 1.130-1-132 of the Saint Lucian Civil Code.

The definition of *force majeure* cases in paragraph two incorporates the usual conditions for considering the excuse for breach of contract by the aggrieved party.

Firstly, it must obey the existence of an event beyond the responsibility and control of the obliged party and not caused by its own conduct. Certainly, these conditions may vary and result in different criteria because under some legal systems, such as the French legal system, the “beyond the control” and alien nature of the event is considered with extreme rigour in comparison with other legal systems, insofar as it must be absolutely external and irresistible [decision of the Cour de Cassation (plenary) of 14 April 2006]. The cases where a businessman or a firm argues *force majeure* unsuccessfully due to a strike of its workers are really illustrative. It seems reasonable that a general or sectorial strike is considered enough to justify breach of contract. However, under French law the courts sometimes have considered a particular strike insufficient in order to recognise *force majeure*, because the mere will of the businessman would finish the strike by acceding to the wishes of strikers. Less controversial is the fact that impossibility is imputable to the obliged party and cannot be argued when this party is in default and the event happens once the performance period has ended.

Secondly, the supervening or concurrent event must entail a risk that the obliged party does have not to assume. The aim of this rule in paragraph 2 is to cast aside the *force majeure* argument in contracts where the risk is inherent given the objective and aim of these contracts (insurance or speculative contracts) or where the risk has been or ought to have been assumed by a contracting party [e.g. *E. Johnson & Co (Barbados Ltd) v NSR Ltd* (1997, AC 400)].

Thirdly, the supervening event must be a fact that parties could not reasonably foresee or take into account at the time of conclusion of the contract. Generally, unpredictability is considered in all systems as synonymous of reasonable improbability. It must be stressed that the proposed rule does not require that circumstances or events causing impossibility are supervening or subsequent to the conclusion of the contract. It suffices that they were not have been foreseen or taken into account at the time of conclusion of the contract, although they existed at that time. In many legal systems, if the circumstances causing impossibility exist at the time of conclusion of the contract but the parties ignored them, it is usual to opt for nullity of contract due to mistake or initial impossibility of the contract's object, with similar effects (e.g. Articles 1.601 Dominican and French Civil Code; 4:103 and 8:108 PECL; II-7:201 and III-3:104 DCFR). However, this approach has some disadvantages. Firstly, mistake doctrines are more complex and irreducible in comparative law. Secondly, in modern trade law there is a significant trend to consider that a contract whose object is initially impossible is not necessarily void, apart from cases of common mistake, insofar as the parties can be confident that an originally impossible performance can become possible at the time of performance (e.g. Articles 3.1.3 UP; 4:102 PECL; II-7:102 DCFR). Hence the excuse of breach of contract by subsequent unforeseen impossibility or *force majeure* has the same scope when such impossibility is ignored and contemporary with the contract conclusion. This is the approach of Section 266 of the USA Restatement (Second) and in some opinions of the Articles 79 CISG. 7.1.7 UP and 88 CESL.

Finally, the impediment must make the performance of the obligation impossible. Impossibility can be invoked in cases of material (physical), legal or personal impossibility of performance. It is not arguable when performance becomes simply more costly (the rule on hardship included in Section 2 of Chapter 6 of these Principles being thus applicable) or if the contract refers to generic goods or obligations to do which are replaceable. In principle, economic impossibility cannot be invoked on the ground of this Article, either. If an unforeseen event causes an exorbitant increase of costs of one obligation, particularly of the payment obligation, the generic nature of money or the material feasibility of the performance make the performance materially possible, although economically absurd. Although economic impossibility is recognised as a case of impossibility in some Caribbean legal systems, especially those inspired by USA law and the notion of impracticability (Section 2: 615 UCC and Section. 261 of the Second Restatement), it is not admitted in civil law systems inspired by French law and, in more widespread opinion, in legal systems inspired in common law either. However, cases of economic impossibility can be considered, depending on

circumstances, and have the same effects as hardship or frustration of purpose included in Section 3 of Chapter 6 of these Principles.

2. Effects derived from the proof of impossibility

Paragraph 4 of this Article determines in fine the legal effects of the excuse of breach of contract due to impossibility. Such excuse implies the negation of remedies for damages as well as the termination of contract *ipso jure* since the notification of the event by the obliged party. These effects are not recognised in the impossibility rules in many legal systems (e.g. Articles 7.1.7 UP; 79.5 CISG), although they are characteristic in others (e.g. Article 299.1 of the Cuban Civil Code; Article 1.130 of the Saint Lucian Civil Code). In English law, termination *ipso jure* is considered from the time when the event happens, regardless of the time of notice. This is the option of PECL in the light of commentaries on Article 9:303 (4), as well as of Articles 88 CESL and III-3:104 DCFR. Under the rule included in these Principles, the termination is produced *ipso jure* since notification by the obliged party, but the other party has the right to preserve the contract. This caution is interesting in cases where impossibility is temporal or partial and, even frustrating the purpose or the expectation of the parties, a delayed or partial performance or a solution by replacement can be valuable for the other party.

The notification required in paragraph 3 of this Article is a condition for determining the time when the contract is considered as terminated owing to *force majeure*. The party affected by the *force majeure* event has an obligation of notification based on two reasons: first, this party has the duty to mitigate the effects of impossibility through expeditious notice to the other party. Otherwise, it should assume responsibility for the damage caused to the other party as a result of a delay or absence of notification. Secondly, this party must prove the events that prevent the performance of its obligations. This requirement to provide proof of the event causing impossibility seems justified and is expressly required in some legal texts in force in Caribbean countries (e.g. Articles 1302 Dominican and French Civil Code; 1.733 of the Colombian Civil Code; 1.363 and 1.461 of the Honduran Civil Code; 2.169 of the Nicaraguan Civil Code). In other words, the burden of proof for the events causing impossibility is on the party who intends to put forward the excuse of breach of contract and such proof must accompany the notification as far as possible.

Non-performance by a party exempts the other party from the performance of its obligations; this must be considered a logical effect of the termination of contract. However, benefits received must be returned when a party has performed its obligation in whole or in part and, failing that, benefits obtained by the other party by

virtue of performance must be compensated. This rule is based on an elemental principle of contractual equity expressly included in Articles 299.2 of the Cuban Civil Code; 1.325 of the Guatemalan Civil Code; 1.851 of the Nicaraguan Civil Code; 1.070 of the Panamanian Civil Code. English law suffered more concerns in this regard: although case law have sometimes recognised it on the ground of lack of consideration (decision of the House of Lords of 1943 in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*), in order to get around the principle “the loss lies where it falls” some specific written rules have been stated for achieving the same effects. The English Law Reform – Frustrated Contracts Act of 1942 brought about identical acts in some Caribbean common law countries: Law Reform (Frustrated) Act of Jamaica of 1968; Ch. 166 of the Law of Contract Act of Belize of 2000; Ch. 202 of Frustrated Contracts Act of Barbados of 1978; Law Reform (Misrepresentation and Frustrated Contracts) Act of 1977 of Bermuda; Article 1.132 of the Saint Lucian Civil Code. The solution in the USA has been achieved in case law and in some continental countries through quasi-contracts (unjust enrichment). Despite this diversity of courses of action, there is substantial convergence as to the final effect, which is the return of benefits and compensation for the benefits obtained.

3. Partial and temporal impossibility

Paragraphs 5 and 6 of this Article deal with the limited effects of merely temporal or partial impossibility. In these cases, it is considered that termination of contract is only reasonable if a partial or delayed performance frustrates the reasonable expectations and the objectives in the contract of the other party; that is in essence if it leads to a fundamental or essential breach of contract. The rule has been expressly included in Articles 1.376.3^o of the Guatemalan Civil Code; 6:74 (6.1.8.1.) of the Dutch and Suriname Civil Code; 1.132 of the Saint Lucian Civil Code; 79.3 CISG; 7.1.7 UP; 8:108 AND 9:401 PECL; III-3:104 DCFR; and 88 CESL. English case law points to the same result (*Jackson v Union Maine Insurance Co.*, 1874; *Metropolitan Water Board v Dick, Kerr & Co*, 1918; *Bank Line Ltd v Arthur Capel & Co*, 1919) as well as French case law, although in this last case the recognition of frustration of contract by temporal impossibility is considered more rigidly.

According to the rules proposed in these Principles, even if it is considered that temporal impossibility frustrates the contract, the other party could declare against the termination of the contract (paragraph 4). In cases where temporal impossibility does not frustrate the expectations of the parties or the aim of the contract, the obliged party does not fall into breach of contract by delay and the contract must be performed by both parties.

Example 1: A firm dealing in the retail of textile products buys a batch of seasonal garments from a wholesale firm that produces and distributes swimming trunks for its commercial chain. The swimming trunks are made in the wholesaler's garment factories located in an Asian country. An unexpectedly violent cyclone causes significant damage that delays production and prevents delivery on the established date, with a delay of at least two months. Although the impossibility is temporal, the contract must be considered as terminated by the seller, insofar as the delivery of swimming trucks two months later frustrates the reasonable expectations of the buyer, being a seasonal product which must be sold within a given time. However, the buyer has the right to notify the preservation of the contract to the party that asking for termination.

Example 2: A construction firm is obliged to build and deliver an industrial plant within a two-year period. Different phases of the constructions are achieved according to the schedule established in the contract. One month before the completion of the work, an armed uprising of a revolutionary group affects the transport of supplies necessary for concluding the works. The construction firm cannot complete the works in the established period, although 97% of the works are finished. The builder is not responsible for the delay and the other party is not entitled to terminate the contract.

In principle, the other party can withdraw the performance of its obligation while the impossibility of performance remains for the party affected by the event causing impossibility. However, this rule is subject to exceptions depending on the order of performance agreed and the character of the delayed performance, because in some cases the withdrawal of its obligation could actually result in the frustration of the contract.

Partial impossibility, for its part, does not frustrate the contract if the obligations can reasonably be performed in separate parts. Otherwise, contract will be considered as terminated if a partial performance frustrates the reasonable expectations of the other party in relation with the contract considered as a whole. This is a rule included in Articles 1.376.3^a of the Guatemalan Civil Code; 51 CISG; 9:302 (2) PECL; and III-3:506 DCFR. The proposed rule is also followed in French case law (decision of the Cour de Cassation of 1 June 1964), according to the principle stated, for instance, in Article 1.722 of the Dominican and French Civil Code. This rule faces some difficulties in common law systems, because English law permits the termination of the contract if a partial impossibility frustrates its purpose, but it finds more concerns in adjusting or adapting proportionally the involved obligations in cases of partial impossibility. This

seems easier in USA law, as demonstrated by Section 2:615 b) UCC and Section 270 of the Second Restatement.

Example 1: Organisers of a congress conclude a contract with a hotel chain and rent 100 rooms in order to accommodate the participants in an international congress that will be held on the hotel premises. The congress hall becomes unfit for use because of floods and it cannot be repaired before the congress date. Although the contract can be performed partially as far as accommodation is concerned, the contract can be terminated because the expectations of the organisers must be considered as frustrated because they cannot accommodate the participants in the same location where the sessions will be held.

Example 2: A manufacturer of cars located in country X concludes a contract with a supplier of spark plugs for cars located in country Y. The contract establishes the delivery of 50,000 units within a given period. As a result of a political conflict, exports between countries X and Y are suspended by a commercial blockade. The supplier, who has already delivered 40,000 units, cannot deliver the remaining 10,000 units. The contract is not considered as terminated insofar as the car manufacturer can obtain the remaining units on the market and use the 40,000 units delivered. The supplier is not responsible for the non-performance and the manufacturer must pay the agreed price with a reduction of 20%.

Section 2. Right to specific performance

Article 7.2.1: Scope of the right to performance

- 1. The obligee is entitled to require specific performance independently of its content.**
- 2. The right to specific performance may include the remedying or correction of a defective performance, the replacement and any other remedy to cure defective performance.**

COMMENT

1. Specific performance of monetary obligations

Paragraph 1 of the article grants the obligee the right to specific performance of any kind of obligation. The recognition of this right is generally accepted in the Caribbean legal systems in relation to monetary obligations.

In the civil law or continental legal systems, based on the principle of *pacta sunt servanda*, the obligee can compel the obligor to comply with the obligation (Articles 1.546 Colombian Civil Code and 870 Commercial Code; Articles 692 Costa Rican Civil Code and 463 Commercial Code; Articles 305 Cuban Civil Code and 329 Commercial Code; Article 1.184 French and Dominican Civil Codes; Article 1.535 Guatemalan Civil Code; Article 974 Haitian Civil Code; Articles 1.386 Honduran Civil Code and 747 Commercial Code; Articles 1.949 Mexican Civil Code and 376 Commercial Code; Article 1.885 Nicaraguan Civil Code; Articles 1.009 Panamanian Civil Code and 759 Commercial Code; Articles 1.077 Puerto Rican Civil Code and 250 Commercial Code; Articles 1.167 Venezuelan Civil Code and 141 Commercial Code; which establish for reciprocal obligations the possibility to choose between termination or specific performance). This right faces few obstacles when it comes to the delivery of an unascertained thing such as money (Article 693 Costa Rican Civil Code; Article 3:296 Dutch and Suriname Civil Code; Article 1.847 Nicaraguan Civil Code; Article 981 Panamanian Civil Code; Article 1.049 Puerto Rican Civil Code). The means of obtaining the specific performance of the monetary obligation are regulated in procedural laws (e.g. Article 527 Colombian Code of Civil Procedure; Articles 420 et seqq. Mexican Code of Civil Procedure; Articles 1.038 et seqq. Panamanian Judicial Code; Article 527 Venezuelan Code of Civil Procedure).

In common law as well if the non-performed obligation not is a payment obligation an action for an agreed *sum* exists. However, these actions for claiming the payment of a sum of money do not fall systematically under the remedy of specific performance, or under the remedy of the payment of damages, since the amount obtained by the injured party is nothing other than the agreed sum, plus interest sometimes. The provisions based on English law regulate two types of actions: firstly, the action for claiming a sum of money resulting from a contract, for example the price of the goods in accordance with the laws on the sale of goods (section 49 *Sale of Goods Act* of England, of Bahamas, Antigua and Barbuda, Montserrat, and Trinidad and Tobago; section 50 *Sale of Goods Act* of Belize; and section 48 *Sale of Goods Act* of Jamaica). Secondly, the action for claiming a reasonable price for the goods sold, in accordance with the regulations governing the sale of goods, if the price was established in the contract (section 8 *Sale of Goods Act* of England; section 10 *Sale of Goods Act* of Bahamas, Antigua and Barbuda, Montserrat, Trinidad and Tobago and Belize; and

section 9 *Sale of Goods Act* of Jamaica). It is established as a requirement in the first case that the right of ownership has passed to the buyer; however, if the price must be paid on a particular date, regardless of the delivery, and the buyer refuses to pay, the seller has an action for claiming the price, although the right of ownership has not passed to the buyer. The United States legislation on the sale of goods also regulates the action for price in Section 2-709 UCC.

The right to claim the payment of a monetary obligation is likewise regulated in the texts of the uniform law. Indeed, and for the contract for the sale of goods, Articles 62 CISG and 132 CESL grant the seller an action for claiming the payment of the price. And, in general, for sums of money, Articles 7.2.1 UP; 9:101 PECL and 3:301 DCFR recognise the obligee's right to receive performance. These two last-named provisions consider the possibility provided by common law rules on the sale of goods that the obligee can continue the performance and receive the payment of the price even though it has not delivered the goods. However, they establish two limits to this right, namely: that the obligee could have carried out a reasonable replacement transaction without significant effort or cost; or that the performance was not reasonable according to the circumstances.

Hence, the proposed rule is in accordance with all the systems present in the OHADAC zone in relation to monetary obligations. This provision applies to all of the monetary obligations, whatever the currency in which the payment has to be made, and includes the obligations to pay damages if they concern the payment of a sum, which is the normal case. The procedural channels for the claim will be those set out by the national laws.

Despite the general manner in which the provision has been expressed, the right is not unlimited, but its exercise must be adequate for meeting a criterion of reasonableness. Subsequently, and in accordance with the PECL and DCFR, if the goods have not been delivered or the services have not yet been provided, these principles will advise the realisation of a reasonable replacement transaction, in accordance with the rules on mitigation of the damage (Article 7.4.3 OHADAC Principles).

2. Specific performance of non-monetary obligations

As a consequence of the binding and obligatory nature of the contract (Article 1.2 OHADAC Principles), the obligee should be able to claim the specific performance not only of the monetary obligations, but also of the non-monetary ones. However, this effect of the enforceability of the contract is not common to all the systems present in the Caribbean zone, since, while specific performance as a remedy for the non-

performance of any kind of obligations is admitted without any problems in the civil law or continental legal systems, it is an exceptional remedy in common law.

Indeed, in the civil law or continental legal systems, the claim for performance has traditionally been considered the key remedy, as a consequence of the principle of *pacta sunt servanda*, and it is generally recognised in all of the codes for the obligations to deliver, and for affirmative and negative covenants. Hence, in the laws of the civil law tradition, provisions are contained which entitle the obligee to request the court to compel the obligor to carry out the delivery (obligations to deliver an ascertained thing); or the obligation is performed at the obligor's expense (obligations to deliver an unascertained thing and affirmative covenant); or that the harm done is undone also at the expense of the non-performing obligor (affirmative and negative covenant): Articles 1.546, 1.610, 1.612 Colombian Civil Code and 870 Commercial Code; Articles 692, 693, 694, 695, 696 Costa Rican Civil Code and 463 Commercial Code; Articles 233, 289, 290 and 291 Cuban Civil Code; Articles 1.184, 1.143 and 1.144 French and Dominican Civil Codes; Articles 1.535, 1.323, 1.324 and 1.327 Guatemalan Civil Code; Articles 974, 933 and 934 Haitian Civil Code; Articles 1.386, 1.357, 1.359 Honduran Civil Code and 747 Commercial Code; Articles 949, 2.027, 2.028, 2.064 Mexican Civil Code and 376 Commercial Code; Articles 1.885, 1.847, 1.849, 1.850, 1.853, 1.856, 1.858 Nicaraguan Civil Code; Articles 1.009, 981, 983, 984 Panamanian Civil Code and 759, 774 Commercial Code; Articles 1.077, 1.049, 1.051, 1.052 Puerto Rican Civil Code and 250 Commercial Code; Articles 997-998 Saint Lucian Civil Code; Articles 1.167, 1.266, 1.268 Civil Code and 141 Venezuelan Commercial Codes. The specific performance of non-monetary obligations is regulated in the same vein in the Dutch and Suriname Civil Code (Articles 3:296 and 3:299).

On the contrary, in Anglo-American law, the normal remedies for non-performance are the claim for an agreed sum, if the non-performance is of a monetary obligation, and the claim for damages in the other cases. The specific performance is an exceptional remedy that can to be granted on a discretionary basis by the courts in some cases. If the claim for performance is based on an obligation to deliver or an affirmative covenant, the remedy is called order or decree of specific performance; and if it is based on a negative covenant (not to do something), one is then in the presence of an injunction. However, the terminology is variable, since sometimes injunction is used for the specific performance of affirmative covenants.

The exceptional nature of the remedy [*Co-operative Insurance Society Ltd v Argyll Stores Ltd* (1997), UKLH 17; sections 345, 357-369 *Restatement (Second) of Contracts*] determines that it is only granted if the damages are inadequate to repair the non-

performance [*Beswick v Beswick* (1968), AC 58], either due to the impossibility or extreme difficulty of the calculation of the damage, or because the service that has not been performed is unique and irreplaceable (e.g. a particular real estate property or movable property which is not easy to find in the market or which has an emotional value for the acquirer). This is also the basis of the prospect of specific performance in the laws governing the sale of goods in England and in the Caribbean territories under its influence (Article 52 *Sale of Goods Act of England*, of Montserrat, Antigua and Barbuda, Bahamas, and Trinidad and Tobago; Article 53 *Sale of Goods Act of Belize*; and Article 51 *Sale of Goods Act of Jamaica*).

However, in the United States, the courts have extended the remedy of specific performance to cases of sale of unascertained goods whose delivery is urgent for the buyer, or which are impossible or very difficult to substantiate under the circumstances of the case. This tendency has been confirmed legislatively in Section 2-716 UCC and although this current is not clearly appreciated in English law it has sometimes justified some terminations [*Sky Petroleum Ltd v Petroleum Ltd* (1974), 1 WLR 576].

On the other hand, given that it is an exceptional remedy, the courts will calibrate the provenance of the remedy, taking into account, for example, the balance between the harm that the specific performance inflicts on the obligor and the benefit obtained by the obligee, the obligee's own conduct or the contractual balance. In addition, the remedy is not available in employment contracts and contracts for personal services [*Lumley v Wagner* (1852), EWHC (Ch.) J96; *Duff v Russell* (1891), 14 NY Supp. 134]; or in the continuous contracts or contracts for continuous performance (construction contracts and contracts for other provisions of services) either, due to the difficulty of supervision of the performance on the part of the courts (difficulty of supervision); finally it is excluded if, due to the nature of the contract, the parties may not reciprocally claim specific performance.

This uneven panorama presented by the national legislations obliges us to be cautious when regulating specific performance for the non-monetary obligations in the OHADAC Principles, since the differences between the civil law or continental and Anglo-American legal systems of the Caribbean zone are not only theoretical, and the clash between principles that are fundamental in the different States must be avoided. Therefore, it has been decided to follow the example of the texts of the uniform law (Articles 46 CISG; Article 7.2.3 UP; Article 9:102 PECL; Article III-3:302 DCFR; Article 110 CESL), conceding the claim for performance in the same manner as the civil law or

continental legal systems (Article 7.2.1), but regulating exceptions that tie in with the model of common law (Article 7.2.2).

This is intended to recognise the advantages of the remedy of the right to receive performance, which provides a response to the binding force of the contract and is the most adequate remedy for the full satisfaction of the obligee's right. But it is also accepted that this right to compel the obligor to render its performance must be aware of limits.

On the other hand, just like what occurred in the previous article, it will be the national legislations that will mark out the procedural channels for achieving the specific performance.

3. Scope of the right to specific performance

Paragraph 2 of the proposed provision concerns the case where the performance is not in accordance with the agreed programme of services (defective performance or partial performance). For these cases, the claim for performance involves the right to the rectification of the defects of the performance, whether through the correction or reparation of the performance, or through the replacement of the defective goods by another one in conformity.

In the Caribbean legal systems of the civil law tradition the reparation or replacement of the defective performance are not regulated, apart from the claims involving buildings in contracts for the sale of goods, which deal with the traditional topic, i.e. which permit the buyer to choose between discount of the price or termination (and not through the rectification of the defect). These cases are only regulated for consumer contracts (e.g. Article 80 Venezuelan Law for the Defence of the Persons for Access to Goods and Services; Articles 11, 13 and 29 Decree 3466 of 1982, for Colombia).

Likewise, in French and English law, the transposition of Directive 1999/44 provide consumers with the right to have non-conforming goods repaired or substituted (Articles L 211-1 a L 211-18 *Code of Consummation*; and Part V of *Sale of Goods Act* 1979), but no general regulation of the claim exists for commercial contracts. In Anglo-American law, the ordinary remedy for a defective performance is damages. The obligor can avoid the liability for damage by rectifying the defect, but it cannot be compelled to do this by the obligee.

Indeed, the reparation of the non-conforming performance is regulated in Dutch law, both generally (Article 7:21 Dutch and Suriname Civil Code), as well as in consumer contracts (Article 7:22 Dutch and Suriname Civil Code). And it is also detailed in the

texts of the uniform law. Hence, Article 46.2^o CISG permits the buyer to request substitution if the lack of conformity constitutes a fundamental non-performance; in other cases, it will carry out the reparation in accordance with paragraph 3 of the same article. The CESL provides for the right in general in Article 110.2^o CESL, regulating this for consumer contracts in Article 111 CESL. And, finally, the remedy is also regulated in Articles 7.2.3 UP, 9:102 PECL and III-3:302 DCFR.

The right to reparation or substitution of the non-conforming performance in the OHADAC Principles is subject to the same limits as the general claim for performance, and which are enumerated in the following article.

Article 7.2.2: *Specific performance of non-monetary obligations*

The right to specific performance of non-monetary obligations is excepted:

- a) where performance is impossible in fact or in law;
or**
- b) where performance is of an exclusively personal
character of the obligor; or**
- c) where performance or their ways of execution
demand unreasonable efforts or expenses; or**
- d) where obligee, in the light of circumstances, may
be satisfied in a more reasonable way; or**
- e) the obligee does not require performance within a
reasonable time from it has known or should have
known of the non-performance.**

COMMENT

The proposed article articulates the limits to the claim of specific performance of non-monetary obligations, in accordance with the legal systems present in the OHADAC zone and the rules of the uniform law.

The first of these limits concerns the physical or legal impossibility of non-performance, which is an exception to the specific performance generally admitted in all the OHADAC systems. The physical impossibility will occur through the loss or

destruction of goods and the legal impossibility that will be able to be derived from the prohibition of the non-performance through a legal norm, an administrative decision, etc. In these cases, the avenues of the remedy of termination and damages remain available to the aggrieved contracting party. If the impossibility is only temporary, does not constitute a real limit for the exercise of the remedy of specific performance, unless the execution of the performance on a particular date is fundamental for the satisfaction of the interest of the obligee.

Example 1: on the date of 15 February, A, manufacturer of pesticides and fungicides for agricultural use of the country X, agrees with the agricultural entrepreneur B, of the country Y, on the delivery of 1000 units of its product on the date of 1 April. At the time of the performance, A does not carry out the delivery, due to a lack of sufficient stock to cover the order at that time. On the date of 7 April, B claims specific performance, but on 5 April a regulatory norm has been published through which the authorities of the country X prohibited the sale and export of products that contain a particular component which is used for the manufacture of the pesticides. Specific performance is legally impossible: B will proceed to terminate the contract and/or claim damages.

In the uniform law this limit of the impossibility is provided in Articles 7.2.2 (a) UP; 9:102 (2) (a) PECL; III.-3:302 (3) (a) DCFR; 110.3^o (a) CESL.

The second of the limits is also commonplace in all the legal systems of the OHADAC territory: the cases in which the performance consists of granting the obligor personal rights.

This limit is expressly alluded to in Articles 1.612.1^o Colombian Civil Code; 790 Costa Rican Civil Code; 290 and 293 Cuban Civil Code; 1.324 and 1.328 Guatemalan Civil Code; 1.359.1^o Honduran Civil Code; 2.027.1^o *a contrario* and 2.064 Mexican Civil Code; 1.850 Nicaraguan Civil Code; and for the English law: Article 16 *Trade Union and Labour Relations Act* 1974; Articles 69-71 *Employment Protection (Consolidation) Act* 1978. In the texts referred to the exception is considered in Articles 7.2.2 (d) UP; 9:102 (2) (c) PECL and III.3:302 (3) (c) DCFR.

In these cases, compelling the obligor to perform would involve a breach of its liberty. However, the procedural laws of some legal systems have opted to regulate indirect measures for encouraging the obligor to perform: they are the fines or *astreintes* of French and Dutch law, and which are also regulated to a limited extent in Article 7.2.4 UP.

In these Principles preference has been given to the regulation of these cases as a limit to the remedy of specific performance, foregoing the pecuniary sanctions for compelling the execution, in order to avoid a clash with the systems of common law.

The greatest difficulty in this exception consists in defining what should be understood by an exclusively personal performance by the obligor. A too broad interpretation would involve excluding the majority of the obligations involving the performance (construction of properties, fiscal or legal consultancy services, IT services...) from the remedy of specific performance. And this is because it is evident that if the obligee has chosen to hire one professional instead of another this is because it has confidence in their professional aptitudes. However, it is clear that on numerous occasions the obligor's qualities are not indispensable, so that the other person, with analogous qualities and experience, can render the performance at the expense of the obligor.

The granting of a legal document is not considered to be an exclusively personal performance either, since, provided that the transaction that is documented is determined in all of its fundamental elements, the obligor's declaration of intent will be able to be substituted by the judge or arbitrator, unless this is incompatible with the nature of the legal transaction (Article 3:300 Dutch and Suriname Civil Code).

Concerning personal negative covenants, it is possible to impose on the obligor its inactivity through an award or judgment, whose infringement will give rise to compensation for damages.

Example 2: A textile company of country X, and B, a fashion designer of country Y, have included in the contract for the performance a non-competition clause, whose validity period is 2 years from when the legal relationship between both of them ends. 5 months after having ended that relationship, B hires C, a company dedicated to the same sector as A, to provide its services and this requests the court to observe the clause during the agreed period in the contract. If B does not observe the judgment it will be liable for damages.

Other times, however, the specific performance of the personal negative covenant may not be made.

Example 3: Based on the same facts as example 1, if a confidentiality clause is agreed in the contract, and B breaches professional secrecy, the only remedy available for A is damages.

In reality, the scope of application of the exception is comprised of the cases in which the obligor's personality is unique and irreplaceable (irreplaceable artist or professional), so that the realisation of the performance cannot be delegated; or if the

performance involves a confidential and personal relationship between the contracting parties.

Example 4: A, of country X, commissions the famous painter B, of country Y, to paint a mural in the boardroom of the company. Before the non-performance by B, A will not be able to make use of the remedy of specific performance, since it cannot oblige B to make the painting (this would infringe his personal liberty, as well as impact on the quality of the work); and another artist cannot substitute it in the performance either.

Example 5: A, B and C have undertaken to found a professional company. However, A decides at the last minute not to form part of the company and does not attend the signing of the deed of incorporation. The other partners cannot compel A to perform, since this would involve imposing on him the maintenance of personal relationships against his will. The remedy available before the non-performance by A will be damages.

The following two limits to the exercise of the remedy of specific performance are based on the unreasonableness of the claim. Sometimes, the performance is not impossible nor the obligor's personal obligation, but it is not reasonable to require it through implying an excessive effort or expense for the obligor, in relation to the advantages that the aggrieved party obtains from this through the non-performance; or through the injured party being able to obtain a sufficiently satisfactory replacement transaction easily. In the end, given that specific performance can sometimes imply a far too blunt measure; its origin, in accordance with the parameter of reasonableness, must be considered in any case.

The exceptions indicated tie in with the regulation of specific performance in the *common law* systems and, although they are not expressly provided in the OHADAC systems of the French or Spanish tradition, it is not absolutely alien to these either, since it can easily be deduced from the principle of good faith and the prohibition of the abuse of rights. It is indeed included in the Draft Project of Reform of the French Law of Obligations of 2013 (Article 129) and in the texts of the uniform law [Article 46.3 CISG; Article 7.2.2 (b) and (c) UP; Article 9:102 (2) (b) and (d) PECL; Article III-3:302 (3) b) DCFR; Article 110.3^o (b) CESL].

The limit contained in letter c) is expressed in terms of "excessive effort or expense", in order to prevent this from being identified with exclusively economic hardship. The provision covers the cases in which the cost is disproportionate, as well as those cases in which the performance implies some exorbitant disadvantages for the obligor in relation to the benefit that the performance brings to the obligee.

Example 6: In a construction contract for the construction of a pool of specific dimensions in the contract, the construction company did not perform, by delivering a pool that differed by 10 cm from the agreed dimension. Requesting specific performance by the owner, the claim will not be successful, since the high economic cost and the effort of rectification of the defect of capacity is disproportionate with the benefit that the injured party will obtain through the non-performance.

Example 7: A rents to B a property for its utilisation as a testing field for "four by four" motor vehicles, establishing in the contract a clause through which, upon termination of the contract, the land must to be returned perfectly smoothed. B does not observe this clause, and A demands specific performance which, however, is not estimated. The substantiation of the rejection of the claim is based on the property having been rented on a continuous basis to a leisure activities company, for the construction of quad routes, which facilitates the irregularity of the land. Although the cost of the observance of the contractual clause is not very high, this does not bring any benefit for A. The exercise of the claim is not reasonable.

The existence of a reasonable replacement transaction [letter d)] is also important at the time of assessing the provenance of the claim of specific performance. For the assessment of the "reasonableness" not only the nature of the goods and the purpose of the contract have to be taken into account, but also the circumstances in which the non-performance and the effort involved for the injured party by resorting to a substitute provider.

Finally, letter e) of the proposed provision imposes an indirect limit on the claim of specific performance based on its prompt exercise. Thus, the injured party loses the right to receive performance, if it does not claim this within a reasonable period from when it knew or ought to have known of the performance.

The rule is derived from English law and is also included in Articles 46.2º and 3º CISG; 7.2.2 and) UP; 9:102 (3) PECL and III-3:302 (4) DCFR. This rule is analogous to that provided in Article 7.3.3 (3) of these Principles for the exercise of the right to terminate and, like that, aims to protect the obligor from the disadvantages that may be derived from an untimely exercise of the right of performance, and prevent the possible abuses and speculations by unprincipled obligees, to the detriment of the market. It is a question of preventing the non-conforming party from having to have the performance prepared (making available the goods or not hiring its services with another person), until when the obligee deems it convenient to request it.

What constitutes a reasonable period will depend on each contract and on the nature of the goods, as well as on the circumstances of the non-performance. The period will run from the time when the injured party knew or ought to have known of the non-performance, if this is fundamental. And in the case of non-fundamental non-performance, the reasonable period begins from the end of the additional period granted for the performance, in accordance with Article 7.1.6 of the OHADAC Principles.

The loss of the right through untimely exercise must not be confused with the prescription of the action, which also limits the exercise of the right in accordance with the provisions of Chapter 9 of these Principles.

Section 3. Termination

Article 7.3.1: Right to terminate the contract

- 1. A party may terminate the contract in case of a fundamental non-performance by the other party.**
- 2. A party may also terminate the contract where the non-performance is non-fundamental, if the additional period conceded under article 7.1.6 has expired, and the other party has failed to perform or remedying the non-performance, unless the consequences of non-performance are minor.**

COMMENT

1. The configuration of non-performance in relation to termination of the contract in accordance with an objective model

In all the legal systems, the remedy of termination is a consequence of the synallagma. Thus, in bilateral or reciprocal contracts, each one of the parties is only obliged to render its performance subject to receiving what has been promised to it and consequently, in view of the non-performance of the other party, the aggrieved party has the right to be released from the obligation incumbent on it. However, the possibility to terminate the contract in the case of non-performance clashes with a cardinal principle of the law of contracts: *pacta sunt servanda*. For this reason, and for

other practical and economic reasons, the different legal systems impose more or fewer obstacles and requirements on the remedy of termination of the contract.

The investigation or not of the cause of the non-performance for granting the unsatisfied obligee the possibility to terminate the contract makes the difference between the subjective and objective models of non-performance in relation to termination of the contract in the systems of the Caribbean area.

In the "fault-based" systems the termination appears with a distinct sanctioning nature (termination-sanction of private law), and is conceived as a reproach to the negligent or wilful misconduct of the non-conforming obligor; while the hypothesis of fault-free non-performance is realigned with the doctrine of the risks (*e.g.* Articles 1.068-1.072 Panamanian Civil Code; Article 1.344 Venezuelan Civil Code). On the other hand, in common law systems, the imputability or not of the non-performance is not conditional on the right to terminate the contract (in the same sense, Article 6:265.1^o Dutch and Suriname Civil Code).

In the uniform law, the objective tendency also prevails. In the UP, the unsatisfied obligee has the right to terminate the contract entirely regardless of the criterion of imputation (Articles 7.3.1 et seqq.). In a similar manner, in the CISG the party injured through the non-performance will be able to resort to the remedy of termination, provided that the required conditions are met (fundamental non-performance), regardless of fault (Articles 45 and 61).

For their part, the PECL and the DCFR, despite accepting a unitary and objective concept of non-performance, distinguish in the regulation of the termination of the contract the cases in which the non-performance must be a complete and permanent impediment which the obligor does not have to answer for, in which case the contract is terminated automatically [Articles 9.303 (4) PECL and III-3:104 (4) DCFR]. And in the same vein, this is set out in Article 126 Draft Project of Reform of the French Law of Obligations of 2013.

This last-named solution is the one whose adoption has been preferred for the OHADAC Principles, in accordance with some laws in force in the zone, in which the contract is "automatically destroyed" as a consequence of the impossibility of performance due to *force majeure* (Article 7.1.8 of these Principles). An objective concept of non-performance of termination is adopted, concerning the specialisations through the concurrence of cause of justification solely for the termination of the contract, which will be *ipso iure* in this case (paragraph 4 of Article 7.1.8).

2. Serious or fundamental non-performance or the granting of an additional period for performance as requirements for the termination of the contract

The majority of the systems of the civil law tradition, through the influence of Article 1.184 French Civil Code, articulate the termination of the contract for non-performance as an implicit condition for termination of the contract in bilateral or synallagmatic contracts for the case in which one of the obliged parties does not perform what is incumbent on it (Article 1.546 Colombian Civil Code; Article 692 Costa Rican Civil Code; Article 1.184 Dominican Civil Code; Article 1.535 Guatemalan Civil Code; Article 974 Haitian Civil Code; Articles 1.386 Civil Code and 747 Honduran Commercial Codes; Article 1.949 Mexican Civil Code; Article 1.885 Nicaraguan Civil Code; Article 1.009 Panamanian Civil Code; Article 1.077 Puerto Rican Civil Code; Article 141 Venezuelan Commercial Code). Exceptions to the rule are Article 306 Cuban Civil Code, which regulates the termination among the causes of extinction of the obligations; and Article 1.167 Venezuelan Civil Code, which governs it among the effects of the contract, as a specific effect of bilateral contracts. And in the majority of commercial codes it is not regulated in accordance with the pattern of the implicit termination condition either, whether it is foreseen generally (Articles 870 Colombian Commercial Code) or for particular contracts (*e.g.* Articles 973 and 1.325 Colombian Commercial Code; Article 463 Costa Rican Commercial Code; Article 329 Cuban Civil Code; Article 711 Guatemalan Civil Code; Article 376 Mexican Commercial Code; Article 759 Panamanian Commercial Code; Article 250 Puerto Rican Civil Code)

Due to this lack of coordination of termination of the contract as a remedy in its own right for the non-performance, these codes of the French and Spanish legacy do not limit the criteria for its exercise by constructively requiring, for example, fundamental non-performance. However, that requirement has been claimed by the doctrine and by the court rulings based on grounds of equity (judgment of the Supreme Court of Justice of Colombia 18 December 2009, Exp. 41001-3103-004-1996-09616-01; 22 October 2003, Exp. 7451; and 11 of September of 1984, *Gaceta Judicial*, volume 176, no. 2415). The Draft Project of Reform of the French Law of Obligations of 2013 (Article 132) also establishes the seriousness of non-performance as a prerequisite of the remedy of termination of the contract.

Traditionally, the English and United States legal systems (and the legal systems under their influence), have adjudicated filters for avoiding indiscriminate recourse to the termination of the contract. In their classic approximation, these laws divide the contractual clauses into conditions and warranties, granting to the injured party only the non-performance of the former the right to terminate the contract (*e.g.*, following

the regulations of Section 53 Sale of Goods Act of England: section 53 *Sale of Goods Act* of Bahamas, Montserrat, Antigua and Barbuda and Trinidad and Tobago, with identical drafting; and secs. 52 and 54 *Sale of Goods Act* of Jamaica and Belize, respectively).

A contracting party is also permitted to terminate the contract (even though we are not in the presence of a condition) in the case of a renunciation or repudiation of the contract by the other party. One can say that an obligor repudiates the contract if it demonstrates its intention not to perform through its behaviour or words or expressly declares that it will be impossible for it to execute the performance in its fundamental terms.

However, the rigid classification between the contractual terms is made flexible by judicial and legislative means and hence, in some cases, the judges consider that the clause is of an “intermediate” type (intermediate or innominate term), permitting the termination based on an assessment whether the non-performance is sufficiently serious and involves serious consequences for the obligee [*Hong-Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* (1962), 2 QB 26]. The introduction of the third category of contractual clauses has served to place emphasis on the termination of the contract in the consequences of non-performance, although such a shift of criterion has been more formal than substantive, since, from the historical and practical point of view, the principle for considering that non-performance grants authority to terminate the contract was that it had seriousness, i.e., its consequences seriously affect the result or benefit that the obligee claimed to obtain with the contract. It is the principle known as substantial failure in performance for United States’ Dependent Territories. [Article 2, Particle 7: *Remedies* UCC; sections 241 and 242 *Restatement (Second) of Contracts*].

On the other hand, in the Dutch and Suriname Civil Codes, the filter used for avoiding whimsical terminations is the technique of *Nachfrist*. Thus, while non-performance would even be possible, the obligee will not be able to declare the termination of the contract without a declaration that the obligor is in default beforehand (Article 6:265.2º Dutch and Suriname Civil Code). In consequence, the obligee must notify the obligor in writing, granting it an additional period for rendering the performance. And the termination will take place only after this period has passed in an unsatisfactory manner. Neither the default nor the additional period is required if the parties have agreed a fundamental term (*fatale termijn*). Also worth noting is that termination without notice if the execution of the performance is temporarily or definitively impossible, without it mattering whether this is due to its fault or *force majeure*. As a

limit related to the institution of non-performance, the cited provision excludes the termination if the non-performance “in view of its minor nature or importance, does not justify the termination and its effects”.

In the same sense, the uniform law uses a combined mechanism of fundamental breach and the technique of *Nachfrist*. These regulations on termination can be found in Articles 49 and 64 CISG; 7.3.1 UP; 9:301 PECL; III-3:502 DCFR; and 114 and 134 CESL.

Following this line of inspiration, the OHADAC Principles adopt a solution which, although not included in some of the national laws, however, is not alien to them. The power of terminate the contract is granted to the unsatisfied contracting party in the presence of any non-performance, comprising delay and defective performance. In the presence of the fundamental non-performance provided in Article 7.1.2 or in a clause established by the contracting parties, the aggrieved obligee will be able to terminate the contract, without the need to grant an additional period, which in these cases does not make any sense. But, if the performance continues to be possible and useful to the obligee (non-fundamental non-performance, either for delay or for the existence of defects in the performance), will be able grant an additional period, in order to grant it a final opportunity to perform. The regulations provided in Article 7.1.6 imply that the obligee has the right to terminate the contract once the period has passed, although it is non-fundamental non-performance. However, a correction is introduced in order to prevent the opportunist contracting party from using the termination route for escaping from a bad transaction, claiming non-performance of minor importance. For this reason, it is established that the remedy of termination of the contract will not be able to be established if the non-performance is of minor nature, unless, as we have seen, they also include Article 6:265 Dutch and Suriname Civil Code and Directive 1999/44/EC (Article 3.6).

Article 7.3.2: Anticipated non-performance and inadequate assurance

- 1. If before the date of performance of the contract it becomes obvious that one of the parties will fundamentally fail to perform its obligations, the other party may terminate the contract.**
- 2. Where a party has good reasons to believe that there will be a fundamental non-performance by the other party, it may grant it a reasonable period of time to provide an adequate assurance of due performance, and meanwhile withhold its own performance. If no**

such assurance is provided and the period has expired, it will be entitled to terminate the contract.

COMMENT

1. Termination of the contract for anticipated non-performance

The rule proposed in the first paragraph describes what common law knows as anticipatory breach of the contract, allowing one party to terminate the contract before the agreed period of time when a fundamental breach is foreseeable to the obligee. The rule is not only useful for the obligee (which can use these solutions against breach without waiting for the contract to be breached, thus having to search for a new provider in the market) but also for the obligor, whose duty to damages will be limited.

The right to terminate a contract before its breach is based upon the idea that one party should not bear the consequences of a breach if it is clear and foreseeable that the other party will not be able to perform within the agreed period of time. This right can be understood as a way to protect credit, which is somewhere in between the fundamental breaches of anticipated non-performance, and delayed and failed performance. Thus the party who terminates the contract on the grounds of anticipated non-performance is enabled to use any remedies for breach of contract, including damages. However, damages shall not be claimed if upon the agreed period of time the obligor offers a justification of its non-performance ex Article 7.1.8 of these Principles.

This rule is found in common law [*Hochster v de La Tour* (1853), 2 E&B 678]; *Universal Cargo Carriers Corp v Citati* (1957), 2 QB 401; *Frost v Knight* (1872), LR 7ex 111; *Federal Commerce & Navigation Ltd v Molma Alpha Inc* (1979), AC 757; and *Woodar Investment Development Ltd v Wimpey Construction UK Ltd*, (1980), WLR 277] and has been mentioned in Section 250 of the *Restatement (Second) of Contracts* and in Section 2-610 UCC. In common law Caribbean systems, case law recognises expressly this solution against breach of contract, allowing the obligee to terminate the contract when it is clear that the obligor will not perform its obligations [judgment of the High Court of Trinidad and Tobago in *Jemmott v Rodríguez* (2009), No. 2888 de 2006 (Carilaw TT 2009 HC 49)].

In civil law systems there are no general rules which allow the obligee to terminate the contract on the grounds of anticipated non-performance of the obligor. However, this possibility is not entirely unknown in these systems, since they permit to terminate a

contract in case of foreseeable non-performance, particularly in sale contracts (Venezuelan Civil code section 1.530). There is a principle which is favourable to the termination of the contract due to intentional breach by the obligor, which would permit the recognition of this remedy for breach of contract, based on the following Articles: 1.546 Colombian Civil Code, 306 Cuban Civil Code, 1.184 Dominican and French Civil Code, 1.432 Guatemalan Civil Code, 1.386 Honduran Civil Code, 1.949 Mexican Civil Code, 1.009 Panamanian Civil Code, 1.077 Puerto Rican Civil Code, and 1.167 Venezuelan Civil Code.

Regulation of non-performance in Article 6:80 Dutch and Surinam Civil Code and in the Draft project of reform of French law on obligation of 2013 (Article 128) is more explicit. Articles 116 and 136 CESL consider the risk of anticipated non-performance (by the buyer or the seller, respectively) as a reason to lawfully terminate a contract if the breach is fundamental.

In a similar way, the anticipated non-performance has been widely accepted in international texts on uniform contract law (Article 72.1 CV; Article 7.3.3. UP; Article 9:304 PECL; Article 3:504 DCFR), which, as the Principles, require two conditions in order to allow the obligee to terminate the contract before the expiry of the agreed time period for performance.

Firstly, it is necessary that the future breach is evident [*Chilean Nitrate Sale Corp v Marine Transport Co Ltd (The Hermosa)* (1982), All ER 234], a mere suspicion not being sufficient even if it is well founded; therefore, the obligor must show a lack of capacity or willingness for performance, which can be expressly declared by the obligor or inferred from its behaviour. Otherwise, if the obligor's behaviour only raises doubts about his willingness or capacity to perform the obligation, the aggrieved party may demand a guarantee of performance within a reasonable period of time, according to the second paragraph of this Article. This solution will also be applicable when there is a threat of delay in the performance: if one party is committed to perform, but with certain delay, the aggrieved party will be able to terminate the contract if the time for performance is fundamental under the contract.

Secondly, the foreseen breach must be a fundamental one [*Afovos Shipping Co SA v Pagnan and Lli (The Afovos)* (1983), 1 WLR 195] in the sense conveyed by Article 7.1.2 of the OHADAC Principles, insofar as it causes the obligee a qualified damage, that deprives it substantially from what it had the right to expect from the contract, obviously unless the other party had not foreseen or had not been able to foresee this outcome.

Example 1: A family company of design, manufacture and marketing of jewellery signs a sale contract. The company agrees to deliver a hundred unique pieces designed especially for an event to be celebrated on 5th January. On 2 January the company notifies the client that the delivery of the pieces on time is impossible. Therefore, the customer may terminate the contract.

2. Termination of the contract due to inadequate performance guarantees

Thus, as in paragraph 1 the evidence of the fundamental non-performance is required, paragraph 2 of this Principle is in conformity with the existence in the obligee of a well-founded or reasonable suspicion in that regard. Hence, the measures provided are not the same, since in this second case the contracting party is not directly authorised to terminate the contract.

For the sake of the protection of its interest, the solution offered by this rule to the contracting party that fears the fundamental non-performance of the other consists in suspending its own performance (if however it has not rendered its performance), while it requests from the other party that it provides the adequate guarantees that permit it to trust in the performance, in a reasonable period.

If the obligee does not receive the said guarantees and continues to believe in a well-founded and reasonable manner that the other party will not perform, it will be able to terminate the contract in accordance with the provisions in article 7.3.3 of these Principles, since the failure to provide the performance guarantee is considered to be anticipated non-performance of the obligation and opens up the means of the remedy of termination of the contract.

Example 1: A of country X, a renowned architect and owner of a construction company, undertakes to realise the project and the construction of the new buildings which accommodate the offices of the merchant B, of country Y, and must be delivered on a particular date, stipulated in the contract as a fundamental term. A short time after signing the contract, B obtains knowledge that A has accepted another large-scale project. Subsequently fearing that his construction will not be completed in the period provided, B requests from A to assure it in a reasonable manner in a period of ten days that he will perform in time. If A does not do it, B will have the right to terminate the contract.

The general rule on the “adequate guarantee of performance” has been developed in United States law and is included in Section 2-609 UCC, but is not specifically enshrined in any other legal system of the zone. However, in some of these systems, the seller’s power to withhold its performance in the presence of the suspicion of non-

performance of the other party, fundamentally in the presence of the risk of insolvency, is indeed regulated for contracts for the sale of goods, although they do not grant the power of termination. Hence, this is done in Articles 1.073 Costa Rican Civil Code; 1.613 Dominican and French Civil Code; 1.624 Honduran Civil Code; 2.287 Mexican Civil Code; 2.594 Nicaraguan Civil Code; 1.237 Panamanian Civil Code; 1.356 Puerto Rican Civil Code; 1.407 Saint Lucian Civil Code; 1.493 Venezuelan Civil Code. In English law, however, we do not find any equivalent rules. The rule is expressly included in Article 6:80 (1) (c) Dutch and Suriname Civil Code, as well as in the harmonised law (Article 7.3.4 UP; Article 8:105 PECL; Article III-3: 505 DCFR).

What these reasonable guarantees consist of will depend on each contract and on the circumstances involved in each case, although it has to be taken into account that the rule must not be interpreted in the sense of requiring the obligor to provide guarantees per se from the legal point of view (in rem or ad personam), but that, sometimes, a simple commitment to perform on the part of the obligor and other actions by it likely to arouse in the obligee confidence in the performance will be sufficient.

Example 2: In the case of the construction contract of example 1, it will be sufficient for B to undertake to perform, providing proof to A, in addition, that it has increased its workforce in order to be able to attend to the two projects.

Article 7.3.3: Exercise of the right to terminate

- 1. Unless otherwise agreed, the right to terminate the contract will be exercised by notice to the other party.**
- 2. Where the obligee has established an additional period for performance stating, under paragraph 3 of Article 7.1.6, the automatic termination of the contract if the other party does not perform within the period, new notice will not be required and the contract will be terminated at the end of the additional period or of a reasonable period from the time of notice.**
- 3. In cases of defective non-performance or late offer to perform, the obligee loses the right to terminate the contract if it does not exercise it within a reasonable**

time after it has, or ought to have, become aware of the non-performance or of a late offer to perform or after the expiry of the additional period for performance.

COMMENT

The proposal adopts a system of extrajudicial termination by simple notification to the non-conforming party given by the aggrieved contracting party due to the non-performance. This is the model that has actually been converging in comparative law and which we can find, with some differences of the regulations, in the Dutch and Anglo-American traditions.

However, the legal systems of civil law tradition, in line of principle, adopt a model of judicial termination, a legacy of Article 1.184 French Civil Code and, through the influence of this, of Article 1.124 Spanish Civil Code. Now that the non-performance has been verified, the obligee will not be able to declare the contract unilaterally terminated, but it must request the termination judicially. The decision regarding the termination is definitively in the hands of the judge, who will control *a priori* the opportunity of resorting to this remedy. The system is the obligor of the conception of the termination as a sanction, whose application must be reviewed by the judge (Article 1.546 Colombian Civil Code; Article 692 Costa Rican Civil Code; Article 1.184 Dominican and French Civil Codes; Article 1.582 Guatemalan Civil Code; Article 974 Haitian Civil Code; Article 1.386 Honduran Civil Code; Article 1.949 Mexican Civil Code; Article 1.885 Nicaraguan Civil Code; Article 1.009 Panamanian Civil Code; Article 1.077 Puerto Rican Civil Code; Article 1.167 Venezuelan Civil Code).

Despite this, the model recognises exceptions to the judicial termination. Traditionally, the codes have regulated one for the sale of movable properties, in which termination is provided *ipso iure* or automatically if the buyer has not presented itself to collect the goods in the period provided (Article 1.085 Costa Rican Civil Code; Article 1.657 French and Dominican Civil Code; Article 1.442 Haitian Civil Code; Article 1.664 Honduran Civil Code; Article 1.2752^o Panamanian Civil Code; Article 1.394 Puerto Rican Civil Code; Article 1.531 Venezuelan Civil Code). Another exception to judicial termination, this time based on an agreement and not based on the law, is given in the presence of an express termination clause in the contract for the sale of real estate properties (Article 1.656 French and Dominican Civil Codes; Article 1.441 Haitian Civil Code; Articles 1.663

Honduran Civil Code; Article 1.275.1º Panamanian Civil Code; Article 1.393 Puerto Rican Civil Code).

In addition, in the majority of these systems the judicial termination has been relaxed by the case law, for the sake of the facilitating legal and economic transactions. In a word, the necessity of turning to the judge for the termination of the contract in the presence of non-performance is not established as a logical indisputable and fundamental principle in these laws. The Draft Project of Reform of the French Law of Obligations of 2013 pursues the path of the suppression of this requirement.

A peculiar characteristic of Dutch law is that it welcomes the two models, permitting the aggrieved obligee to choose between both (Article 6:267.1º Dutch and Suriname Civil Code).

Anglo-American law follows a model of extrajudicial termination characterised by its scarce formal requirements. The termination of the contract for non-performance does not occur automatically, but the obligee has the power to opt between terminating the contract or maintaining it. It is unsatisfied obligee's prerogative to opt between one remedy and another, evaluating their economic consequences, without the automatic mechanism of the measure being able to impose on it an untimely termination. The problem focuses on determining how the obligee will have to exercise the said option. On this point, the broad formal freedom recognised by these systems makes it possible for the remedy of termination to be exercised without the need for any declaration of the obligee, it is sufficient for it to provide proof through its "unequivocal" conduct, of the decision to terminate the contract [*Sookraj v Samaroo* (2004), UKPC 50]. Normally, silence or mere inactivity will not be sufficient for this purpose, although the rule is not absolute, since silence sometimes clearly demonstrates that the contract is considered to be terminated [*Vitol SA v Norelf Ltd* (1996), AC 800].

Notwithstanding the above, in the majority of cases, the termination will be exercised through the obligee's notification to the obligor; and occasionally it is required by the law. But the notification is not required if the obligee, in order to satisfy the duty to mitigate damage, has implemented a contract of substitution of the non-performed contract, in which case it is understood that it has opted for the termination [*Guston v Richmond-upon-Thames LBC* (1981); section 2.706 UCC; section 48.3 Sale of Goods Act of England and of Bahamas, Montserrat, Antigua and Barbuda and Trinidad and Tobago; secs. 47.3 and 49.3 *Sale of Goods Act* of Jamaica and Belize, respectively].

In the uniform law, the right to terminate the contract is exercised extrajudicially through the unilateral declaration of the aggrieved obligee. Thus, this is established in articles 26 CISG and 118 and 138 CESL.

The exercise through notification to the other party is likewise provided in Articles 7.3.2. (1) UP, 9:303 (1) PECL and III-3:507 (1) DCFR. These texts furthermore comprise the limits of the right to terminate the contract [Article 7.3.2. (2) UP; Article 9:303 (2) PECL; Article III-3:508 (1) DCFR].

Finally, with respect to the form that will have to be adopted by the obligee's declaration of intent for it to declare the contract terminated, in general the majority of the systems express a preference for freedom of form, although not in such an extreme manner as we have seen in the system of common law. Following this principle, the CISG (Article 26) speaks only of the notice, just like the UP [Article 7.3.2 (1)], the PECL [Article 9.303 (1)], the DCFR [Article III-3.507 (1)] and the CESL (Articles 118 and 138). The two texts of the Principles and those of the DCFR, by establishing the concept of "notification", explain that this can be given by any means appropriate to the circumstances [Articles 1.9 UP; 1.303 (1) PECL; Article I-1.109 (2) DCFR]. The tendency to formal freedom presents exceptions in some systems. This is the case in the Dutch and Suriname legal system, which requires that the obligee's declaration be given in writing (Articles 6:267 Dutch and Suriname Civil Code), although without requiring a specific written form, and consequently the private document will be sufficient (Article 3:37.1^o Dutch and Suriname Civil Code).

In keeping with these texts, in the OHADAC Principles, the right to terminate the contract is exercised, unless agreed otherwise, through a unilateral declaration by the injured party to the other party, opting for the simple formula of the notification (paragraph 1), with freedom of form, without prejudice to the written form being advised in practice, in order to facilitate the proof.

The termination then involves the exercise of a power of legal pattern or facultative right on the part of the obligee. The model shows evident advantages from the practical point of view, since, in addition to the flexibility, validity and lowest economic cost of the remedy, an elimination of the uncertainty was achieved which hovers over the contract on the assumption of judicial termination during the entire time that the process lasts, favouring the promptness of the transaction. This does not mean that the parties can resort to the recourse indiscriminately and without control; rather, the requirement of fundamental or serious non-performance or the granting of the additional period for performance, as prerequisites of the right to terminate the

contract, are submitted to a reply by the aggrieved party, the means of litigation remaining open in the case of disagreement.

In the cases of termination through the passage of the additional period of performance, normally the injured party will issue two notifications to the other party: the first one setting the new grace period and the other one declaring the termination. However, in accordance with the provisions of Article 7.1.6 (3) of these Principles, it is possible for the obligee to grant the new period in a single notification and declare that if the obligor does not perform within this period, the contract will be terminated automatically upon its expiry. This possibility is also expressly provided in Articles 7.1.5 (3) UP; 8:106 (3) PECL; III-3:507 DCFR; 115.3 and 135.3 CESL. In such cases, a new notification would be reiterative, which is why paragraph 2 of the provision dispenses with it.

And, finally, in paragraph 3 the limits to the right to terminate the contract are established based on an untimely exercise, as has been seen in Article 7.2.2 (4). In the cases of late performance and non-conforming performance, the obligee's silence can make the obligor think that it accepts the performance, and that the termination right is not going to be exercised. Thus reason, the injured party must communicate its decision to terminate the contract within a reasonable period. If the obligee has granted the obligor an additional period for the performance, the reasonable period for the notification of the termination of the contract will begin to run from the time of the termination of that additional period; and in the other cases, it will be calculated from the time when it knew or ought to have known the offer of the performance outside of the period or the lack of conformity of the performance.

What must be understood by a "reasonable period" will depend of each contract, the nature of the purpose, the period initially established for the performance and the circumstances of the non-performance. Thus, in the case of perishable goods, the period is reduced, and also in which it is possible to obtain a replacement transaction easily, in order to prevent abuses from exploiting from the fluctuation of the prices.

Article 7.3.4: Effects of termination

- 1. Termination releases both parties from their obligations under the contract in future.**
- 2. Termination will not affect any provision for the settlement of disputes or any other term regulating**

the rights and obligations of the parties in case of termination.

- 3. Each party may require restitution of its performance providing that it simultaneously proceeds to the restitution of the performance received. If restitution in kind is impossible or excessively difficult, it has to be made in money. However, the party who terminates is not obliged to return the value if it proves that the loss or destruction of the object was caused by *force majeure*.**
- 4. The party obliged to perform restitution shall return the benefits received as a result of the performance and it is entitled to claim for necessary or preserving expenses.**

COMMENT

1. The releasing effect of the termination of the contract

There are two typical consequences of the termination of the contract: the release of the parties from the not yet performed obligations (releasing effect) and the possible restitution of the performance already received (restitutory effect).

In the Caribbean systems of the civil law tradition, the articulation of the termination for non-performance as an implicit termination condition in the synallagmatic contracts (commentary at Article 7.1.1) implies the application of the typical effects of these: leave the things in the pre-existing state before the conclusion of the contract. This *ex tunc* validity is similar to that established in the cases of nullity of the contract. However, this theoretical termination-annulment of the contract is a source of problems in the practical application, which is why the court rulings recognise important exceptions to the rule of the retroactive validity, as are those related to the contractual clauses of extrajudicial solution of disputes and the contracts for continuous performance or periodic performance.

On the contrary, in the English and American legal systems and the laws under their influence the termination only produces effects from the time when it is exercised by the obligee, and does not affect the obligations met or those enforceable before the termination. Hence, the releasing effect only operates in a forward direction: the

parties are released from the obligations although not due at the time of the termination of the contract, but they continue to be obliged to meet the obligations due beforehand. And the same idea is included in systems in the Dutch sphere, in which the termination lacks retroactive effects [Articles 6:269 and 6:271 Dutch and Suriname Civil Code].

Based on what the traditions have in common, paragraph 1 of the proposed rule includes the releasing effect of the termination. The termination only produces effects that are exercised by the contracting party affected, releasing the parties from their future obligations, but without affecting the obligations met or those due and enforceable before the termination of the contract.

Example: A and B conclude a construction contract, A being the principal and B the agent. If the principal opts to terminate the contract for non-performance by the agent, B will have the right to receive from the party the price corresponding to the construction that it has satisfactorily executed before the termination, and also the duty to deliver to A the part of construction carried out.

In this same vein, the international texts of the uniform law also govern the discharging effect [Article 81.1 CISG; Article 7.3.5 (1) UP; Article 9:305 (1) PECL; Article III-3:509 (1) DCFR].

2. Contractual clauses not affected by termination

A consequence of the survival of the contract is the applicability after the termination of the clauses of the terminated contract that do not directly concern the object of the performance: contractual clauses on liquidated damages and other contractual penalty clauses; those related to an extrajudicial solution of disputes resulting from the contract; those related to the choice of forum, those related to the choice of applicable law, the contractual clauses on confidentiality or restraint of competition, etc., whose survival is referred to in paragraph 2.

This rule is commonplace in all the systems. Thus, in the Anglo-American systems, the so-called ancillary obligations are not affected by the remedy of termination [*Heyman v Darwins* (1942), AC 356, HL]. In the Dutch or Suriname Codes no rule exists which expressly includes the criterion, but it is deduced from Articles 6:269 and 6:271]. In the civil law tradition, the applicability of these contractual clauses in the stage following the termination of the contract is one of the exceptions recognised by the case law for retroactive validity. Article 138 of the Draft Project of Reform of the French Law of Obligations of 2013 is pronounced in this regard.

Example: A design company and manufacturer of luxury automobiles includes in the commercial contracts for the performance that it realises to the engineers the following clause: "Both parties recognise that the information and documentation received in any type of format (digital or analog, etc.) from the other, or to which it has access on account of this being necessary for providing the service that is the purpose of the contract, all of which is of a highly confidential nature, and it must not be disclosed or used for a purpose different to the activity that is the purpose of this contractual agreement". Once the contract is terminated by the company for non-performance by one of the engineers of the agreed provision related to the date of delivery of the project, that clause shall continue to be applicable for a reasonable period and the termination shall not release the contracting party from its obligation of confidentiality.

Likewise, the rule is contained in the international texts of the uniform law: Articles 81.1 CISG; 7.3.5 (3) UP; 9:305 (2) PECL; III.- 3:509 (2) DCFR.

3. The restitutory effect of the termination of the contract

The restitutory effect of the termination is included, based on a limited retroactivity, in paragraph 3 of the proposed provision, with a view only to the elimination of the situation existing between the parties as a consequence of the non-performance. One opts then for the modern model of validity of the remedy of termination, adopted by the Dutch and Suriname Civil Code, and by some texts of the uniform law.

Indeed, while Anglo-American law represents the absence of retroactive validity (with some exceptions), the civil-law systems propose as a general rule restitution with in rem effects, a consequence of the retroactivity of the termination; in the model proposed the focus is on the problem with the greatest empiricism, opting for the establishment of some simple rules that make it possible to settle the economic situation existing between the parties after the termination.

It is an option which, however, is not absolutely alien to any of the traditions present in the Caribbean zone. If it is certain that the theoretical starting points of the systems are those indicated in the above paragraph, it is no less so that the case law and legislative development has qualified the rigid initial postures in connection with the non-retroactivity or retroactivity of the termination.

Thus, in Anglo-American law, although the general rule is the absence of restitutory effect, in some circumstances the party that has rendered its performance in full or in part is permitted the power to recover it (restitutory remedy).

In the contract for the sale of goods, the termination by the seller for non-performance of the buyer normally has as its sole effect a personal restitution obligation, without which it is accompanied by the recovery of the ownership of the goods sold to the detriment of third parties or the obligees of the buyer [Articles 38-48 *Sale of Goods Act of England*; secs. 39-48 *Sale of Goods Act* of Bahamas, Montserrat, Antigua and Barbuda and Trinidad and Tobago; secs. 40-49 *Sale of Goods Act* of Belize; secs. 40-47 *Sale of Goods Act* of Jamaica; sections 2-703 (2) and 2-706 UCC; while Section 2-702 (2) UCC considers a limited exception to this rule]. However, the justified rejection of the goods by the buyer (termination) indeed brings about the recovery of the ownership of the goods by the buyer, both in English law [*Kwei Tek Chao v British Traders Ltd* (1954), 2 QB 459], as well as in the UCC [section 2-401 (4); Article 2-602 (2)].

As regards the recovery of the sums paid, English and United States laws differ between one another. English law heavily restricts the scope of application of the exception to the general principle of non-retroactivity, so that the aggrieved obligee can claim the restitution of sum paid only if has had frustration of the contract [section 1 *Law Reform (Frustrated Contracts) Act*; Article 20 *Contract Act* of Belize; section 3 *Law Reform (Frustrated Contracts) Act* of Jamaica; section 6 *Law Reform (Misrepresentation and Frustrated Contract)* of Bermuda] or in the cases of termination for breach, if it has not received any consideration (total failure of consideration); since if it has had a principle of performance, however small, it is said that there is partial failure of consideration, and one should not exercise the restitutory claim and indeed only the personal action for damages. However, often, the difficulty to distinguish between partial performance and which differs substantially from what was agreed, grants flexibility to the application of the English rule. In the United States this rule is not applied: failure of consideration is not necessary: it is sufficient that the non-performance is sufficiently serious for justifying the termination of the contract, for the party is justified to recover the sum paid beforehand, except in the cases of partial termination.

For its part, the validity the *ex tunc* termination with in rem effects predicated on the national systems of the Romano-German tradition, is softened by the case law, given the practical difficulties that entails the proceeding of full retroactivity. To avoid these, a wide scope of action has been granted to the means of the restitution by means of equivalent measures and, even more, exceptions have been created to the general rule based on the divisibility or indivisibility of the contractual obligations (in the continuous-performance contracts or contracts of continued performance). On the other hand, the in rem effect of the restitution ceases in the presence of a third party

which has to be protected. This evolution is enshrined in Article 137.3^o and 4^o of the Draft Project of Reform of the French Law of Obligations of 2013.

In the proposed model, it is intended to reach the solution that the person that has rendered performance without receiving anything in exchange must be able to recover it, either in specie or by means of equivalent measures. The objective pursued is the elimination of the situation existing after the termination. This system is the one essentially followed by the proposals of the uniform law [Article 81.2^o CISG; Article 7.3.6 (1) UP; Articles 9:307-309 PECL; Articles III-3:511 et seqq. DCFR].

In the rule proposed in these Principles, the termination marks the birth of a legal obligation of restitution of the benefits received by the parties. As a consequence, the party that would have been paid a sum of money beforehand and would not have received a conforming performance will be able to recover the said sum. Not concerning money, the contracting party that would have delivered goods to the other, without receiving consideration, will be able to recover it. However, in this final case, the recovery *in natura* of the delivered goods is impossible (for example, due to having been lost or having passed into the hands of a third party), the restitution will be done in money.

Remember we are not dealing with a claim for damages here, although in practice, on many occasions, the amount of the claim for damages can contain as one of its parts the value of the performance received and which cannot be returned. However, there are other cases in which there will not be a claim for damages, due to concerning a justified non-performance (Article 7.1.8), and the party will have to, however, reconstitute the sum received in order to avoid unjust enrichments.

The restitution by means of equivalent measures is also done if, although the repayment *in natura* is not impossible, it is not reasonable due to involving an excessive difficulty or a disproportionate economic cost.

Example 1: A, a sculptor, was hired by B to make create some carved bas-reliefs directly in the stone of the base of the main façade of his house. Once the artistic construction is completed, B does not pay the agreed price, and consequently A decides to terminate the contract. Although is not physically impossible to dismantle the bas-reliefs of the facade, the costs would be disproportionate. Subsequently, B must reconstitute to A the value of the construction.

For putting a figure on the equivalent measures, unless it has been agreed otherwise, the value of the performance at the time specified for the performance will be taken as a reference.

The injured party through the non-performance will not be obliged to restate the value of the performance that would have been delivered by the non-conforming obligor if it provides proof that the loss or destruction of the goods has occurred due to a cause of *force majeure* (Article 7.1.8 of these Principles).

Example 2: The company A of country X, a tropical fruit-based drinks and sodas manufacturer, concludes with the orchard fruit company B of the country Y a contract for the sale of goods, binding the second party, on the delivery of five tonnes of bananas. B, who had met a better buyer for his bananas, delivers to A five tonnes of mangos. Faced with this non-performance, A decides to terminate the contract and acquire the bananas from the other producer. However, before it may realize the restitution, an explosive storm which lifted large waves, which tore down all of the boats from the jetties of the port, provoked the loss of the bananas. The company A is not liable for the perishing of the goods; it does not lose its right to terminate the contract and will not be obliged to restate the performance to the company B.

4. The elimination of the ownership status of the obligor of the restitution

In accordance with paragraph 4 of the proposed provision, the elimination of the ownership status of the obligor of the restitution will be done in accordance with the following criteria: firstly, the obligor of the restitution has the obligation to 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. Secondly, it has the right to be paid the expenses that might have been incurred for the storage of the goods. And thirdly, the other expenses will be paid insofar as they determine an enrichment of the party to whom they are restituted.

Such rules are not far removed from any of the legal Caribbean systems of the civil law or continental tradition and imply an application of the doctrine of the unjust enrichment or of the retroactivity of the termination. In the systems based on English law, the first criterion will probably be followed if the obligee of the restitution was the injured party through the non-performance of the contract [*Planché v Colburn* (1831), 8 Bing 14], or in the cases of frustration [section 1 *Law Reform (Frustrated Contracts) Act*; Article 20 *Contract Act* of Belize; section 3 *Law Reform (Frustrated contracts) Act* of Jamaica; and section 6 *Law Reform (Misrepresentation and Frustrated contract* of Bermuda]. But if the party that claims the restitution was at fault for the non-performance it does not have the right to payment of the benefits [*Sumpter v Hedges* (1989), 1 QB 673]. In Anglo-American law, the seller that is in possession of some justifiably refused goods (due to a lack of conformity with the contract) is treated as a mere depositary, with an obligation of reasonable care for its storage [section 36 *Sale*

of Goods Act of England; section 37 *Sale of Goods Act of Bahamas, Montserrat, Antigua and Barbuda and Trinidad and Tobago*; section 38 *Sale of Goods Act of Belize*; section 36 *Sale of Goods Act of Jamaica*; section 2-602 (b) and (c) UCC]. In English law it appears to be its only obligation; however, in the United States law, if the buyer is a trader, the obligation to proceed to carry out the resale of the goods can also be imposed on it in particular circumstances (section 2-603 UCC).

5. Third party rights

This rule claims only to regulate the relations between the parties and does not affect the third party rights in connection with the goods that are they object of the contract affected by the termination, which must be determined in accordance with the applicable national laws. For example, the possible existence of a third party acquirer protected whose exercise of the remedy of termination must not be affected.

Article 7.3.5: Compatibility between termination and damages

Termination does not exclude the right to damages for non-performance subsisting after termination. However, the defaulting party shall not be liable for any loss that the aggrieved party would have suffered, to the extent that the latter could have reduced them by taking reasonable measures.

COMMENT

Faced with the non-performance of contract, the aggrieved contracting party will be able to use as many remedies as it considers necessary for the defence of its right, provided that they are not incompatible [Article 7.1.3 (2) OHADAC Principles]. Specifically, the right to terminate the contract and the claim for damages shall be considered compatible remedies.

This occurs in common law, where the non-performance by a contracting party of the performance provided in the contract (primary obligation) gives rise to the secondary obligation of the payment of the damages caused by the non-performance (secondary obligation: to pay damages). And also in the systems based on the civil law or continental tradition the general rule is the compatibility of the remedies [Article 1.546.2º Colombian Civil Code; Article 692 Costa Rican Civil Code; Article 306 Cuban Civil Code; Article 1.184.2º Dominican and French Civil Codes; Article 1.535.2º

Guatemalan Civil Code; 974.2º Haitian Civil Code; Article 6:277 Dutch and Suriname Civil Codes; Article 1.386.2º Honduran Civil Code; Article 1.949.2º Mexican Civil Code; Article 1.885.2º Nicaraguan Civil Code; Article 1.009.2º Panamanian Civil Code; Article 1.077.2º Puerto Rican Civil Code; Article 1.167 Venezuelan Civil Code; Articles 45 and 61 CISG; Articles 7.3.5 and 7.4.1. UP; Article 8:103 PECL; Article III-3:102 and III.-3:502 DCFR). The condition precedent for all of these is that the non-performance of termination of the contract is not justified by the concurrence of *force majeure*.

In comparative law more problems are created by the determination of whether the damage related to termination of the contract must be the positive interest (interest of performance) or the negative interest (interest of confidence). In the models belonging to the retroactive model an antithesis can occur that the positive interest accrues to the obligee and, however, the termination has *ex tunc* effects. However, the admitted rule is the claim for damages of the positive contractual interest and this is also the option pursued by the Dutch legal system (Article 6:277 Dutch and Suriname Civil Code: *positief contractsbelang*).

In Anglo-American law the positive interest is protected, since the objective is to place the affected party in the same situation as if the contract had been performed [“so far as money can do it (...) in the same situation (...) as if the contract had been performed”]. But if it so desires, the aggrieved obligee will be able to opt for the negative interest (reliance loss), but never for both remedies cumulatively. The limit of the combination of claims (loss of bargain, reliance loss and restitution) is the principle that prohibits the double recovery of the same damage (principle against double recovery).

In the uniform law, the general rule is the claim for damages of the so-called positive interest [Article 74 CISG; Article 7.4.2 (1) UP; Article 9:502 PECL; Article III.-3:702 DCFR; Articles 160 CESL].

In the proposed provision an open rule has been chosen, without establishing that the interest payable as damages is the positive interest or the negative interest, the aggrieved contracting party can choose between one and the other, as required.

It is important not to confuse the claim for damages with the possibility to claim the agreed sums which, as has been seen in the commentary on the above provision, derive from the non-retroactivity of the termination, such sums only being able to be obtained if they have fallen due before the termination.

Example: If in a contract for the sale of goods it has been agreed that the buyer delivers a sum as a signal (security deposits), and the contract is terminated precisely

through the non-performance of that obligation of the payment of the security deposit, the seller will be able to request: a) the security deposit, as the sum agreed and due before the termination, and b) the damage caused by the non-performance of contract.

Finally, the duty to mitigate the damage is imposed on the injured party, in such a way that it will not be able to request damages for the losses that they could have been avoided by combining, for example, a replacement transaction if this is possible (commentary at article 7.4.3 OHADAC Principles).

Section 4. Damages

Article 7.4.1: Right to damages

- 1. The obligee is entitled to damages for loss caused by the non-performance of the contract, either exclusively or together with any other remedies, unless the non-performance is excused under these Principles.**
- 2. Only loss for non-performance, including future losses, which may be established with a reasonable degree of certainty will be recoverable.**
- 3. The obligee has the right to full compensation for damage. Damages shall include any loss and any reasonable gain of which the obligee was deprived.**
- 4. The non-economic loss as a result of the non-performance of the contractual obligations will also compensable, including suffering, loss of enjoyment or emotional distress.**

COMMENT

1. Independence and compatibility of the right to compensation for damages

Compensation for damages is integrated in the framework of remedies that comprise contractual liability. The breach of the agreed obligation provokes an impairment of the obligee's interest, and the damages serve to compensate for damage that it

produces. Thus, the right to be paid damages arises in the presence of any non-performance, provided this is not justified.

In English law, it is said that non-performance of the obligation agreed in the contract (primary obligation) gives rise to the secondary obligation to pay damages (secondary obligation to pay damages), which is the normal remedy, since common law is restrictive in the recognition of the claim for performance [*Photo Production Ltd v Securicor Ltd.* (1980), UKHL 2].

In the legal systems of the civil law or continental tradition the duty to pay damages for the damage resulting from non-performance of contract is also generally considered (Articles 1.613 et seqq. Colombian Civil Code; Articles 701 et seqq. Costa Rican Civil Code; Article 293 Cuban Civil Code; Articles 1.146 et seqq. French and Dominican Civil Code; Articles 1.433 et seqq. Guatemalan Civil Code; Articles 936 et seqq. Haitian Civil Code; Articles 1.360 et seqq. Honduran Civil Code; Articles 2.107 et seqq. Mexican Civil Code; Articles 1.860 et seqq. Nicaraguan Civil Code; Articles 986 et seqq. Panamanian Civil Code; Articles 1.054 et seqq. Puerto Rican Civil Code; Articles 996 and 1.001 et seqq. Saint Lucian Civil Code; Articles 1.264 et seqq. Venezuelan Civil Code). However, in some systems of this tradition, the question of the independence of the remedy of damages has been raised. This has occurred in Colombia, where the court rulings have accepted the independence of the actions in civil matters, as occurs in commercial matters [Article 925 Colombian Commercial Code; judgment of the Supreme Court of Colombia, Social Cassation Chamber, of 3 October 1977 (*Gaceta Judicial*, CLV volume no. 2396, 1977, p. 320-335); against, rulings of the Supreme Court of Justice, Social Cassation Chamber, of 2 June 1958, (*Gaceta Judicial*, volume LXXXVIII, no. 219, pp. 130-134) and of 14 August 1951 (*Gaceta Judicial* 1951, p. 55-63). Likewise, in Venezuela, the legislator's silence has brought the doctrine to discuss the possibility of exercise of the action for damages regardless of the termination or specific performance, or if it is subordinated to these remedies. The court rulings declared the autonomy of the action in the important judgment of 10 November 1953 (CFC/SCMT, 10/11/1953, *Gaceta Forense*, 2a E., No 2, pp. 431 ss.), despite the main part of the doctrine continues to have difficulties with the construction of a general rule of the independence of the action. On the other hand, the Dutch and Suriname Civil Codes design a basic regulation applicable to contractual or non-contractual damage, i.e., to any obligation to pay damages in Articles 6:74 et seqq.

In paragraph 1 of this principle the right to contractual damages is comprised as an independent remedy compatible with other remedies. It is independent because, in the framework of these Principles, the injured party can opt to exercise it as a unique

remedy for defective or non-conforming performance, or for the impossibility of performance imputable to the obligor. But it can also be exercised with other remedies with which it is compatible, for example, for compensating for the damage resulting from contractual termination related to fundamental non-performance, or combined with the right to specific performance in the case of late performance, for compensating for the damage that the delay has caused to the obligee.

2. Irrelevance of the fault

The majority of the systems of the civil law or continental tradition assume the fault of the non-conforming contracting party as a prerequisite for the granting of the claim for damages to the aggrieved contracting party. They are, then, subjective or “fault-based” systems (Articles 1.147 and 1.148 French and Dominican Civil Code; Articles 937 and 938 Haitian Civil Code; Article 1.424 Guatemalan Civil Code; Articles 1.360 and 1.362 Honduran Civil Code; Articles 1.860, 1.862, 1.863, 1.864 Nicaraguan Civil Code; Articles 986, 988, 989, 990 Panamanian Civil Code; Articles 1.054, 1.056, 1.057 and 1.058 Puerto Rican Civil Code). Other codes, like the Cuban (Article 293), the Saint Lucian (Article 1.002) and the Venezuelan (Article 1.264), appear to opt for the objective thesis; however, in this last-named code in reality liability based on fault is established, which is absolutely presumed by the legislator (Articles 1.271 and 1.272 Venezuelan Civil Code).

The Dutch and Suriname legal systems, although they reflect a spirit of objectivity, do not manage to dissociate themselves entirely from the fault. Thus, article 6:75 Dutch and Suriname Civil Code establishes that for a duty to pay damages to exist the non-performance must to be imputable to the obligor, either because it has been due to its fault, or because it is a risk which it must tolerate based on a law, a legal transaction or a “generally accepted opinion” (*of in het verkeer geldende opvatting*). As can be seen, reference is made to the imputation through fault and also through risk (subjective and objective imputation).

Among the clearly objective systems are the laws of the Anglo-American sphere, where the obligor incurs liability through the mere fact of non-performance, if there are no positive reasons that can excuse it, and this without the need to find out whether or not it has incurred fault. In this same vein, the Article 77 CISG regulates the remedy for damages objectively, providing in Article 79 that this will only occur if a ground for exemption provided in this provision applies. The UP is also found in this group (Article 7.4.1) and the two harmonisation proposals of the law in Europe: Articles 9:501 (1) PECL and III-3:701 (1) DCFR. And likewise, Article 159.1 CESL opts for the objective system.

In accordance with this tendency to objectification, and in accordance with the adoption of a concept of objective non-performance (commentary at Article 7.1.1 of these Principles), the fault of the non-conforming obligor has been dispensed with in the proposed rule for granting the injured party the right to damages. Consequently, this will occur provided that the non-performance by the obligor is not justified due to the concurrence of *force majeure* (Article 7.1.8) or is covered by a clause of exemption or limitation of liability (Article 7.1.7).

3. Irrelevance of the declaration that the obligor is in default

On the other hand, in the majority of the Caribbean civil law or continental legal systems, in the case of delay in the performance there will not be liability if there is no declaration that the non-conforming contracting party is in default. In these laws, the declaration that the obligor is in default marks the beginning of the transfer of the risks for the loss of the goods due and also of the duty to pay damages for the damage caused by the delay in the performance (Article 1.615 Colombian Civil Code; Article 1.084 Costa Rican Civil Code; Article 255 Cuban Civil Code; Article 1.146 French and Dominican Civil Code; Article 1.433 Guatemalan Civil Code; Article 936 Haitian Civil Code; Article 1.364 Honduran Civil Code; Article 2.105 Mexican Civil Code; Article 1.859 Nicaraguan Civil Code; Article 985 Panamanian Civil Code; Article 1.053 Puerto Rican Civil Code; Article 999 Saint Lucian Civil Code; Article 1.269 Venezuelan Civil Code). In the same way, the Dutch and Suriname Civil Code requires the declaration that the obligor is in default in the cases in which the performance is however possible or if it is only temporarily impossible (Article 6:74.2^o). However, some codes of commerce dispense with the requirement of the declaration that the obligor is in default for there to be liability for the delay in the performance of the commercial obligations (Article 418 Costa Rican Commercial Code; Article 63 Cuban Commercial Code; Article 677 Guatemalan Commercial Code; Article 85 Mexican Commercial Code; Article 232 Panamanian Commercial Code; Article 94 Puerto Rican Commercial Code).

For the lawyers of the Anglo-American sphere, default is an alien concept. In the case of non-performance, the duty to pay damages runs from the date agreed in the contract for the performance of the obligation. If no day for the performance has been agreed, the obligor must perform in a reasonable period of time and the right to damages will come into existence when that period expires, without which the obligee must meet some requirement. In the same way, from the time when it does not perform, the contracting party assumes the risks (section 20 United Kingdom *Sale of Goods Act* and 1979; section 22 *Sale of Goods Act of Bahamas, Montserrat, Barbuda, Trinidad and Tobago and Belize*; and section 21 *Sale of Goods Act of Jamaica*), and will

not already be able to claim frustration for being released from the obligation in the case of impossibility of the performance, since it will be considered that self-induced frustration exists.

Following the slipstream marked by the common law systems, the declaration that the obligor is in default or the communication of the non-performance is not necessary, as a condition for being able to claim damages for the delay in the CISG, UP, PECL and DCFR.

In the proposed rule, in accordance with the explanations in the commentary of article 7.1.1 in connection with the concept of non-performance, the requirement of the determination that the obligor is in default for the duty to pay damages to arise has been omitted. And this is the case despite, as we have seen, a great number of systems of the Caribbean area making the obligation to pay damages of the delayed performance dependent on the obligor having been summoned. However, this option will clash directly with the Anglo-American legal conceptions, for which default is a “disruptive” institution, as well as that it constitutes a more practical, rapid and secure system, as required by commercial transactions.

4. The requirement of certainty of the recoverable damage

The remedy of damages has a compensatory function, and consequently the simple non-performance of the contract is not sufficient for the duty to pay damages to arise, but the said non-performance needs to cause damage to the obligee and this needs to be certain (paragraph 2).

Example 1: A, company of country X, has not performed its obligation to deliver to the company B, of country Y, certain unascertained goods whose price is decreasing. Since B has not paid the price, however, if it manages to buy the goods from another provider for a price lower than that agreed in the original contract, it will not have suffered any damage, and consequently A will not have to pay damages to it although it has not performed the contract.

Example 2: Advised negligently by its attorney who spotted some unfounded prospects of benefit, A decides to invest its savings in a transaction. If finally it turns out that, by chance, the economic results that it obtains are beneficial, A will not be able to claim damages from its attorney, despite the fact that he/she has not performed though not acting with the due diligence according to his/her *lex artis*, since no effective damage exists.

An exception to this affirmation which is the golden rule in the majority of the legal systems, are the so-called nominal damages of common law. The symbolic damages

are granted to the plaintiff through the mere fact of non-performance, although this has not caused it effective damage [*Surrey Civil Code v Bredero Homes Ltd* (1993), 1 WLR 1361] or, if there is damage, it is not possible to prove its existence [*Columbus & Co Ltd v Clowes* (1903), 1 KB 244] or its amount [*Erie County Natural Gas and Fuel Co Ltd v Carrol* (1911), AC 105]. However, the usual objective of nominal damages is no other than to confirm the breach of the plaintiff's right.

As well as this particular feature of common law, and although much less known, there also exists in France an exception to the principle of the compensatory nature of damages in article 1.145 French Civil Code, according to which, concerning a particular obligation not to make, the obligor will be obliged to pay damages for the simple breach of the obligation. This same exception is found in Articles 1.612 Colombian Civil Code, 1.145 Dominican Civil Code, 1.326 Guatemalan Civil Code, 2.104 *in fine* Mexican Civil Code, 1.001 Saint Lucian Civil Code, and 1.266 Venezuelan Civil Code. In addition, all the systems consider another exception for the pecuniary obligations (commentary at Article 7.4.6 OHADAC Principles).

It is implicitly required that the damage results from non-performance, i.e., that it is a consequence of this, which presupposes a sufficient causal nexus between the non-performance and the damage caused.

The rule of this paragraph 3 also includes the obligation to pay damages for the future damage, namely, which however has not occurred but can be established with a reasonable degree of certainty. Hypothetical damage or damage based on mere conjectures or hopes is excluded. Future damage often takes the form of loss of profits or loss of opportunity. Articles 74 CISG, 7.4.3 UP, 9:501 (2) (b) PECL and III-3:701 (2) DCFR refer to future damage in the uniform law.

5. The principle of full reparation

The principle of the full reparation of the damage, according to which the damages aim to re-establish as far as possible the balance of interests destroyed by the non-performance of the contract and place the aggrieved party in the situation in which it would have been in if this had not taken place, represents the essence of the remedy of damages, has to be considered the axis of the calculation of the damages in all of the OHADAC legal systems [Article 1.613 Colombian Civil Code; Article 1.149 French and Dominican Civil Code; Article 1.434 Guatemalan Civil Code; Article 939 Haitian Civil Code; Articles 6:95 and 6:96 Dutch and Suriname Civil Code; Article 1.365 Honduran Civil Code; Articles 2.108, 2.109 and 2.115 Mexican Civil Code; Article 1.865 Nicaraguan Civil Code; Article 991 Panamanian Civil Code; Article 1.059 Puerto Rican Civil Code;

Article 1.004 Saint Lucian Civil Code; Article 1.273 Venezuelan Civil Code; section 1-106 UCC; section 347 *Restatement (Second) of Contracts*; judgment of the High Court of Barbados in *Vaugh v Odle* (1982), No. 765, *Carilaw* BB 1982 HC 44; Article 74 CISG; Articles 7.4.2 and 7.4.3 UP; Article 169 CESL).

A consequence of the principle of full reparation is the preference in the majority of the systems for positive interest or performance as a general measure of the damages related to contracts. The compensation for damages for positive interest involves placing the obligee in the same situation and with the same economic results that it would have been in if the non-performance had not occurred. On the other hand, the so-called “negative or confidence interest” strives to place the obligee in the situation that it was in before the conclusion of the contract.

In English law, the rule of the payment of damages for positive interest is included in the judgment of the case *Robinson v Harman* in 1848 (1 Ex Rep 850) even though, sometimes, the contracting party can claim only the negative interest, for example because the loss of benefit is very difficult to prove [*Anglia TV v Reed* (1971), 3 All ER 690; *McRae v Commonwealth Disposals Commission* (1951), 84 CLR 377]. United States law, in the same vein, permits the aggrieved party to choose between positive or negative interest (sections 347 and 349 *Restatement (Second) of Contract*), which is the practical result to which English law likewise leads.

The Caribbean systems of the civil law or continental tradition do not dogmatically include the distinction between positive or negative interest, despite the courts indeed having picked up the difference. In the PECL and DCFR it is expressly recognised in both provisions (Article 9:502 and III-3:702) under the heading “general calculation of the damage”, and equally positive interest is present in Article 160 CESL.

However, despite being considered the most appropriate form for providing a response to the principle of full reparation and to promote confidence in contracts, preference has been given not to establish definitively the option for the obligation to pay damages for the interest of performance in this Principle. Sometimes, it will be difficult to calculate and to grant, and consequently preference has been given to an open rule that permits the aggrieved contracting party (or the judge or arbitrator) to establish a calculation of the damage adequate to the circumstances.

The principle of full reparation also functions as a limit to the remedy of damages, in order to avoid the enrichment of the victim, and involves the prohibition of so-called “punitive damages”, whose nature is sanctionary. In English law, although admitted in some cases of non-contractual civil liability, non-performance of contract cannot

substantiate the award of punitive damages, rejected in the judgment *Addis v Gramophone Co. Ltd* (1909, AC 488). In the United States this rule contrary to punitive damages is enshrined in numerous statutory rules and in Section 1-106 UCC, although the courts indeed grant it in cases of non-contractual liability and, including, in cases in which, having non-performance of contract, an action of *tort* is exercised jointly [*St Louis and SFR Cov v Lilly* (1916), 162 SW 266; *Armada Supply Inc v S/T Agios Nocolas* (1986), 639 F. Supp. 1161, 1162; *Thyssen Inc v SS Fortune Star* (1985), 777 F.2d 57, 63].

6. Emerging damage and loss of profits

According to paragraph 3 of the proposed Principle, damage includes what is known as emerging damage (*damnum emergens*) and loss of profits (*lucrum cesans*) under Roman law. Emerging damage consists of the effective and known loss suffered and covers, firstly, intrinsic damage, namely, the value of the performance not rendered (or the additional work on the defectively rendered performance), but also any expense incurred by the obligee and which has become useless through the non-performance or the impairment to the obligee's goods, including non-patrimonial ones, resulting from the non-performance of the performance due. The loss of profits concerns the reasonable gains which have ceased to be obtained, i.e., the advantages whose acquisition has been frustrated by the non-performance. The obligation to pay damages of both concepts is commonplace [Article 1.613 Colombian Civil Code; Article 1.149 French and Dominican Civil Code; Article 1.434 Guatemalan Civil Code; Article 939 Haitian Civil Code; Article 6:96.1^o Dutch and Suriname Civil Code; Article 1.365 Honduran Civil Code; Articles 2.108 and 2.109 Mexican Civil Code; Article 1.865 Nicaraguan Civil Code; Article 991 Panamanian Civil Code; Article 1.059 Puerto Rican Civil Code; Article 1.004 Saint Lucian Civil Code; Article 1.273 Venezuelan Civil Code; Article 74 CISG; Article 7.4.2 (1) UP; Article 9:502 PECL; Article III-3:702 DCFR; Article 160 CESL]. In common law, there is no doubt that the expectation interest covers the two elements, although the distinction is not used very much by the courts.

The loss of profits involves a certain degree of uncertainty and randomness, by taking concrete shape normally when moving forward towards the future. Hence, the simple possibility or hope of realising gain is not sufficient for its determination, but a certain objective and reasonable probability that it will occur has to exist. This "reasonableness" referred to in paragraph 3 of the provision will be an advantage taking into account the ordinary course of events and the special circumstances of the specific case.

Example: The vessel "Calixto", owned by the company A of country X, was brought to the shipyard of B of country Y, for cleaning and painting work of its bottom to be

carried out in the same. For carrying out the construction not in accordance with the professional expertise required, a slippage of the vessel occurred, due to which it has been stranded in a defective manner, causing it significant damage which resulted in a delay of three months in its delivery to A. The merchant A requested damages, comprising the loss of gain through the stoppage of the vessel that it could not carry out the fishing chores during these three months. In the estimation of this loss of profits, the average of the catch made by the boat in the same months in previous years will be referred to, cautiously assessing and excluding the doubtful or unfounded gains or gains founded only on hopes.

7. Contractual moral damage

Even though it will not be very frequent in commercial contracts, paragraph 4 of the Principle provides that recovery of the damage resulting from the non-performance of contract will also include, where appropriate, non-economic damage or moral damage.

In the OHADAC area, however, there is no common position regarding the obligation to pay damages for this damage. The starting point in English law is the negative position, represented in the well-known judgment in the case *Addis v Gramophone* (1909, AC 488), and repeated in a multitude of cases, including the recent case [*Johnson v Gore Wood & Co* (2002), UKHL 65]. However, in recent times, the misgivings have been softening and the English courts and courts of the Caribbean States of the *common law* tradition have admitted the compensation of the contractual moral damage in two types of cases: firstly, if the contract consists in providing pleasure, relaxation or peace [cases *Jarvis v Swans Tours* (1973), QB 233; *Ruxley Electronics and Construction v Forsyth* (1996), UKHL 8; *Farley v Skinner* (2002), AC 732; judgment of the High Court of Barbados in *Brathwaite v Bayley* (1992), Carilaw BB 1992 HC 23; *Jamaica Telephone Co Ltd v Ratray* (1993), 30 JLR 62]; secondly, if the non-performance of contract causes physical disadvantages and discomforts [*Watts v Morrow* (1991), 4 All ER 937; judgment of the High Court of Barbados in *Harvey-Ellis v Jones* (1987), Carilaw BB 1987 HC 44].

In French law, although the Civil Code does not consider it expressly, the doctrine and the court rulings have defended the view that moral damage is generally recoverable. Equally, the judgment of 9 December of 2010 of the Plenary Council of the Colombian Constitutional Court in the judgment C-1008/10 has established the reparation of the patrimonial and non-patrimonial damage in contractual matters, consequently with the principle of full reparation. In Cuba, the doctrine favours the obligation to pay damages, based on Article 294 Cuban Civil Code, which refers to non-contractual liability for the stipulation of damages for non-performance of contract. However, in

other civil law or continental legal systems, given the silence of the civil codes, the courts show themselves restrictive in its recognition: hence, it occurs in Mexico or in Venezuela, where the judgment of the Supreme Court of Justice, Social Cassation Chamber of 12 August 2011, declared that the damages for contractual moral damage occurs only in the cases in which, together with contractual liability, non-contractual fault occurs. In Holland, moral damage appears to be limited to the cases of Aquilian liability, although, based on article 6:106 Dutch and Suriname Civil Code, it is also maintained regarding contractual liability. At the European Community level, the judgment of the Court of Justice of the European Community of 12 of March of 2002 (As. C-168/00: *Simone Leitner/TUI Deutschland GmbH & Co KG*) declares the obligation to pay damages for moral damage.

Equally, the doctrinal proposals of the uniform law recognise that the repairable damage is not limited to pecuniary damage, but includes the pains, discomforts, the psychological stress or, in general, the “moral damage” that the non-performance can cause to the other contracting party [Article 7.4.2. (2) UP; Article 9:501 (2) PECL: Article III-3:701 DCFR].

Under the proposed rule the suffering or the emotional anxiety, the loss of leisure or pleasure, as well as the injury to the personal or professional reputation will be recoverable. The damages can come from economic damage, which will be the most normal course of action, or of other measures that are adequate to the case in question, such as the publication of a press notice or notice of relief, etc.

Example: A, a known tenor of the country X, is contracted for the inauguration of the new national opera theatre of the country Y. If there are a few months before the start and the action of A having been published in national and international media, the organizers of the event decide to contract a ultimately fashionable young European tenor, terminating the above contract. A will then be able to claim damages, not only for the economic injury that involves not obtaining the remuneration agreed by the action and other expenses made in view of the performance, but also for the damage caused to his reputation, being demeaned by the artist, with an international broadcast.

Article 7.4.2: *Scope of damages*

The obligor is liable only for loss which the parties foresaw or could reasonably have foreseen at the time

of the conclusion of the contract as a likely result of the non-performance.

COMMENT

1. The rule of remoteness of the damage in the national systems

A strict application of the principle of full compensation for the damage would involve an exorbitant risk for the obligor, hampering the legal and economic transaction. Hence, criteria have been developed for limiting the scope of recoverable damage. The main criterion, used by the majority of the legal systems of the zone, is the so-called “rule of remoteness”.

The rule is enshrined in Articles 1.150 and 1.151 French Civil Code using the parameters of foresight and remoteness as a criterion for the determination of the recoverable damage if the non-performance is not fraudulent, and in this second case limiting the compensation to damage that is an “immediate and direct consequence of non-performance of contract”. The doctrine of remoteness permits a sharing of the risks of the contract between the parties, so that the non-conforming contracting party will only be liable for the foreseen damage or the damage that the parties would have been able to foresee at the time of the conclusion of the contract. Hence, the rule of remoteness is based on the agreement of intent itself.

The rule of remoteness has been incorporated in the civil law or continental legal systems (Article 1.617 Colombian Civil Code; Articles 1.150-1.151 Dominican Civil Code; Articles 940-941 Haitian Civil Code; Article 1.366 Honduran Civil Code; Article 1.866 Nicaraguan Civil Code; Article 992 Panamanian Civil Code; art 1.060 Puerto Rican Civil Code; Articles 1.005-1.006 Saint Lucian Civil Code; Articles 1.274-1.275 Venezuelan Civil Code), generally differentiating between good faith obligor and fraudulent obligor, for making the first one liable only for the foreseen damage or the damage that it has been able to foresee at the time of the conclusion of the contract and the second one for all of the damage that is an immediate and direct consequence of the non-performance.

Other codes of the zone, however, only support a criterion of adequate causality, making the non-conforming obligor liable for damage that is an immediate and direct consequence of the non-performance of the obligation, without distinguishing between fault or fraud at the time of determining the extent of the recoverable damage [Article 704 Costa Rican Civil Code; Article 6:98 Dutch and Suriname Civil Code; Article 1.434 Guatemalan Civil Code; Article 2.110 Mexican Civil Code].

In English law, the judgment in the case *Hadley v Baxendale* (1854, EWHC J70) tends to be considered the starting point of the rule of “remoteness of damages”. In this, the criteria of “remoteness or unforeseeability of damages” appear, connecting these with the “just and reasonable consideration of the parties” at the time of the conclusion of the contract. The future development of the manner of understanding the “rule of remoteness” distances it from the connection with the contract, placing the emphasis on the remoteness of the damage by the contracting party obliged to pay damages. However, the judgment in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* (2008, UKHL 48) implies a return to the rule that bases remoteness in what was agreed by the parties in the contract and in the subsequent interpretation. These very principles have been also applied by the Caribbean courts [judgment of the High Court of Barbados in *Frederick v Lee* (2007), No. 662, 2006, Carilaw BB 2007 HC 18]. The rule of remoteness likewise informs Section 2-715 UCC.

2. The rule of remoteness of damage in the international texts of harmonisation of contract law

The CISG drinks from the well of common law and welcomes the doctrine of remoteness in its Article 74: after proclaiming the principle of full reparation in its first subparagraph, limits its scope in the second, in accordance with the criterion of remoteness refers only to the knowledge held by the non-conforming obligor, as English case law had understood before the case *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*, and not to the agreement between both parties expressly or tacitly contained in the contract. The optional instrument of the sale of goods (CESL) contains a similar rule in Article 161. The UP includes the rule in its article 7.4.4. Just like the CISG, the UP refers to remoteness of damage at the time of the conclusion of the contract and only with respect to the non-conforming party. In the commentary, it is clarified that the non-conforming party must not suffer the reparation of damage that it could not foresee at the time of concluding the contract, or the risks which, for that reason, it could not consider and cover with insurance.

A compromise solution between the civil law or continental trend and common law appears to be included, however, in articles 9:503 PECL and III-3:703 DCFR, which cover the rule of remoteness as understood in the English manner, and thus referring only to the non-conforming obligor, but establishing a special rule for the cases of intentional or deliberate non-performance, in the French manner.

3. The rule of remoteness in the OHADAC Principles

In the proposed provision the rule of remoteness is presented, establishing a distribution of the risks through the consequences of non-performance of the contract based on private autonomy. Thus, reference is made to the damage foreseen by the parties or damage which they would reasonably have been able to foresee, i.e., to the liability for the risks covered within the scope of the agreement of intent. The reinterpretation made by the UP, PECL and DCFR which, as we have seen, directs the rule of remoteness only to the non-conforming party, is thus rejected.

On the contrary, the provision in which the rule is proposed refers both to parties and to the nature of the damage, permitting the contracting parties to know what they are bound by and what consequences are set out in the event of not complying with what has been agreed. This is also the reason for connecting “foresight or reasonable remoteness” to the time of the conclusion of the contract.

According to this rule, therefore, the non-conforming party will be liable for damage that is 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 (for example, based on the previous commercial relations existing between the parties or the information revealed by the same).

Example: A fire is generated in a car park due to a lack of vigilance and control by A, the owner company; the flames cause significant damage due to combustion in a truck belonging to the professional company B, an art dealer, which is parked there. A will be liable for a failure to observe the duty of care, for the damage suffered by the truck driver. But its liability does not extend to the loss of a collection of old photographs of great value which are found inside it, since the content has not been the purpose of an express declaration and the company owning the car park could not reasonably foresee that a cargo of such value would be kept in the vehicle.

The exception, which, as we have seen, is provided by some legal systems and rules of harmonisation regarding the liability of the obligor, whose non-conforming behaviour is fraudulent or greatly negligent has not been included in the proposed rule. The reasons for this legislative option are various: firstly, the contrary solution would oblige the legal operator to deal with the thorny issue of the investigation of the intentionality of the obligor, an often complicated task given that it belongs to the subjective realm, and is alien to the logic of commercial transactions. Secondly, the common law and some civil law or continental legal systems do not know the difference, which is not found in the CISG, the CESL or in the UP. The third reason is of a practical nature and is endorsed by the experience of the established court rulings of

some legal systems which indeed enshrine the distinction between the imputation to the fraudulent obligor and the obligor at fault: given that only what is foreseeable is causally necessary, the extension of liability ends up being the same in both cases.

Article 7.4.3: *Duty to mitigate*

- 1. The obligor is not liable for any loss that the obligee could have prevented or reduced by taking reasonable steps.**
- 2. The obligee is entitled to recover reasonable expenses in which it incurred in attempting to mitigate the loss, even if the measures have been unsuccessful.**

COMMENT

The so-called “duty to mitigate” is enshrined in this article, i.e., the rule which prevents the party injured through the non-performance from claiming damages for the losses that could have been prevented, reduced or offset, simply taking reasonable steps appropriate to the specific circumstances.

The mitigation of the damage constitutes a fundamental principle of the Anglo-American law of contracts; a leading case in the area is considered to be the pronouncement on the case *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* (1912, AC 673). The principle is also applied by the courts in the Caribbean territories under the common law influence [e.g. judgment of the Court of Appeal of Jamaica in *National Transport Co-operative Society Ltd v Attorney General* (2011), Civ. App. no. 117].

In the Caribbean legal systems of civil law or continental tradition, the civil codes do not include the obligee’s duty to reduce the damage caused by the non-performance; however, the rule can be based on contractual good faith, enshrined as a general principle. Indeed, we can find a positive application of the duty in some commercial codes (e.g. Articles 1.074, 1.077, 1.078 and 1.079 Colombian Commercial Code). The Dutch and Suriname Civil Code does not expressly include the duty to mitigate, but the doctrine is understood to be included in Article 6:101, which regulates the concurrent negligence as a limit to contractual damages and which will be dealt with in the commentary of Article 7.4.4 of these Principles.

In reality, both the duty to mitigate and concurrent negligence are limits that can be related to causality: the obligor must only to be liable for the damage effectively caused by it, and not for the damage that is due to the victim's own conduct facilitating or aggravating the harm. These limits are present in all the systems, as can be asserted by the non-conforming obligor to restrict the amount of the recoverable damage.

The analysis of the rule under discussion makes it possible to mark out three rules. According to the first rule, the injured party does not have the right to obtain recovery of the damage that could be (and should be) prevented or reduced by taking the reasonable steps adequate to the circumstances (paragraph 1). In reality, and despite its English name as "duty to mitigate", it is not a real obligation, since it does not entail the correlative right, but is an obligation whose infringement will be the reduction of the amount of the damages. The objective of the imposition of the rule is to prevent the passivity of the party injured through the non-performance from increasing harm that could have been easily reduced.

The "reasonable steps" will vary from one case to another, depending on the circumstances, and at times will exist simply in the realisation of a replacement transaction in accordance with Article 7.4.6 of these Principles. What is not required, in any case, is for the aggrieved contracting party to take steps that can entail economic risk.

Example 1: A, an "online" sales company, hires the constructor B to repair the cover of its ship used to store supplies, work which must be completed in one month, before the start of the storm season. Once the agreed date is reached, the construction has not yet been completed. Given the threat of the rains and that A is aware, on the one hand, that if it stops its activity this would entail great losses for it and, on the other hand, that the goods that it stores are delicate and would be irreparably damaged by the rains, decides to hire C, a plastics manufacturing company, to make a temporary cover in order to protect the roof of the boat until the repairs are completed.

In accordance with a second rule, the mitigated damage is not recoverable. Thus, if the obligee manages to reduce or prevent the damage, it will not be able to claim damages for the mitigated damage.

Example 2: A fishing company of country X, has concluded a contract with B, of country Y, to deliver the catches made each day. The morning of the day "d", the merchant B does not arrive in the port to collect the fish and A decides to sell them on the wharf,

obtaining a better price than that agreed with B. Consequently, A will not be able to claim any damage from B.

Including if the steps taken would have exceeded reasonable limits, resulting in an extraordinary reduction of the damage that it may have suffered, it will not be compensated in respect of the difference. This is because, as we have seen, damages have a merely compensatory function (commentary of Article 7.4.1).

A third rule indicates that the injured party must be reimbursed for the expenses that it has incurred due to its mitigating action, provided that those expenses were reasonable, and this regardless of the success or failure of the steps (paragraph 2).

Example 3: In the factual case of example 1, the company A will be able to seek from B the reimbursement of the expenses caused by the commissioning of the protective plastic cover of the ship used to store supplies.

On the contrary, if the obligee has taken extraordinary and disproportionate steps that have increased the damage, it will not be able to recover the expenses or seek damages for the further damage.

The duty to mitigate is detailed in Article 77 CISG; Article 7.4.8 UP; Article 9:505 PECL; Article III-3:705 DCFR; and Article 163 CESL.

Article 7.4.4: Loss attributable to the obligee

The obligor is not liable for loss suffered by the obligee to the extent that the conduct of the latter has contributed to the non-performance or its results.

COMMENT

As has been indicated in the commentary of the above article, the injured party's conduct contributory to the causation of the damage constitutes the other limit of the damages intimately connected with the causal nexus.

Even though it is related with the duty to mitigate, and some systems even regulate it jointly [Article 6:101 Dutch and Suriname Civil Code), it is not the same limit. The duty to reduce the damage does not arise until the non-performance occurs; it is then when the obligee must take the reasonable steps to reduce the resulting damage. However, in this rule the widest possible assumption is made, in which the obligee contributes to the occurrence of the non-performance itself or the damage. In reality, the proposed

rule simply aims to impute to the liable party only the part of the damage for which it is effectively liable, which is why we are facing a problem of causality or objective imputation.

The provision covers two different factual cases. In one of these, the non-performance occurs due entirely or partly to the conduct of the obligee, for example through the non-performance of its duties to collaborate if they were necessary for the performance of a service under the liability of the obligor, non-performance of contracts which had some connection, or for the acts and omissions of persons for whom the obligee must be liable, etc.

Example 1: The pharmaceutical company A, of country X, hires C, of the country Y, to construct a building for new laboratories, regarding a project that B, a known architect had made for it. Once constructed, it is noted that the construction does not provide the seismic resistance required, since it is demonstrated that it is due to an error in the project; subsequently, C will not be liable for the non-performance.

The second case concerns the injured party's conduct (action or omission) that affects the aggravation of the damage occurred through the non-performance.

Example 2: The fruit and vegetable company A of country X had sold 3 tonnes of avocados to the company B of country Y, for making jars of guacamole. Under the terms of the contract there is a clause in which it is specified that those avocados must be delivered in a state of maturity which permits their storage in refrigerated rooms for at least one week. Once the goods have been delivered, the avocados begin to rot on the second day. It was demonstrated that although B had not performed by delivering overripe avocados, the temperature of A's refrigerated rooms was not adequate for the maintenance of the fruits in the optimum condition. Subsequently, B will not be liable for all of the damage.

The consequence, in any case, will be the exclusion or reduction of the liability, depending of the degree of intervention of the injured party's conduct in the non-performance or in the causation of the damage.

In the Caribbean legal systems of the civil law or continental tradition this limit, although not generally enshrined in the codes, has been developed in the established court rulings. Indeed, both in contractual liability as well as in Aquilian liability, the courts understand that the concurrence of the obligee's negligence in the occurrence of the non-performance or its effects must produce a reduction of the *quantum* for damages, proportionate to the degree of participation by the aggrieved party, or

including an extension of liability if there has been exclusive fault on the part of the aggrieved party.

In common law the question of the intervention of fault on the part of the aggrieved party in the production of the damage will not be considered relevant, in light of the claims for contractual damage until 1945, a date on which the *Law Reform (Contributory Negligence) Act* was passed. There is similar legislation in other states of the Commonwealth, as well as in some North American countries. The new rule imputes the reduction of the damages through concurrence of the fault on the part of the victim in cases of non-contractual liability (tort). Until then, the problem of contributory negligence had been scarcely discussed in English law, since the solid development of the established case law of the doctrine of the duty to mitigate would make it possible to terminate satisfactorily the majority of the cases. However, the possibility to extend the application of the rule to contractual liability has been raised subsequently. In any case, it has been argued that including in the case of contractual liability, if the defendant manages to demonstrate that the harm caused is due exclusively to the negligent action of the actor, would not be liable at all [*Lambert v Lewis* (1982), AC 255].

The PECL and the DCFR include in some provisions the case of losses attributable to the aggrieved party (Article 9:504 PECL) or to the obligee (Article III-3:704 DCFR), declaring that it will not be the liability of the non-conforming. In a similar manner, article 162 CESL provides that the obligor will not be liable for the losses suffered by the obligee insofar as this objective has contributed to the non-performance or its effects. In greater detail, the UP, establishes in its article 7.4.7 that if the damage is due in part to an act or omission of the injured party or another happening through which that party assumes the risk, the amount of the damages will be reduced insofar as such factors have contributed to the damage, taking into consideration the conduct of each of the parties. Hence, it provides for the reduction of damages, which, as we will see, occurs in the civil law or continental legal systems. No specific provision on concurrent negligence is included in the CISG, however, the question will be able to be subsumed in the case of article 80.

Article 7.4.5: *Calculating the damages*

- 1. The obligee who has terminated the contract and has concluded a reasonable replacement transaction may recover the difference between the price agreed in**

the contract and the price of replacement transaction.

- 2. The obligee who has terminated the contract without making any replacement transaction, but there is a current price for the performance contracted for, may recover the difference between the contract price at the time of termination. Current price means the usual price for performance in similar circumstances in the place where performance was due or, in the absence, current price in another place which could be reasonably considered.**
- 3. The provisions of the preceding two paragraphs shall be without detriment to any compensation due to the obligee for additional damages for any further loss, under this Section.**

COMMENT

To facilitate the calculation of the damage in contractual liability if there has been a termination of the contract, some systems positively embody rules of specific and abstract calculation. One of these is based on the actual price, for example, because a substitute or replacement transaction has been made. The abstract calculation is carried out if the damages are calculated based on a standard, which can be the market value of the goods which the obligee must have received.

In the harmonised law, patterns are expressly included for the assessment of the damage in the non-performance of termination that is liable for these specific and abstract calculation systems. Thus, Articles 75 CISG, 7.4.5 UP, 9:506 PECL, III-3:706 DCFR and 164 CESL establish that if the obligee has carried out a replacement transaction in reasonable time and manner, the damages must consist of the difference between the price established in the non-performed contract and the price of the substitute transaction. In addition, there will be damages for any other demonstrated loss. If no replacement transaction has been made, Articles 76 CISG, 7.4.6 (1) UP 9:507 PECL, III-3:707 DCFR and 165 CESL denote a system of abstract calculation: the difference between the contractual price and the market price.

Such calculation criteria are not included in the Caribbean civil codes, but are indeed taken into account by the courts at the time of the stipulation of the amount payable

as damages, above all in commercial contracts. In addition, a specific form of calculation of the damages is detailed, although under the aspect of specific performance, regarding the affirmative covenant, which the obligee can mandate to be executed at the expense of the obligor in the case of non-performance (Article 1.610 Colombian Civil Code; Article 695 Costa Rican Civil Code; Article 290 Cuban Civil Code; Article 1.144 French and Dominican Civil Code; Article 1.323 Guatemalan Civil Code; Article 934 Haitian Civil Code; Article 1.357 Honduran Civil Code; Article 2.027 Mexican Civil Code; Article 1.849 Nicaraguan Civil Code; Article 983 Panamanian Civil Code; Article 1.051 Puerto Rican Civil Code; Article 997 Saint Lucian Civil Code; Article 1.266 Venezuelan Civil Code).

In other systems, the rules on the specific and abstract calculation are established only for the purpose of the regulation of the contract for the sale of goods; this thus occurs in articles 7:36 and 7:37 Dutch and Suriname Civil Code; and in the rules of the English tradition, although referring only to the abstract calculation [secs. 50 (3) and 51 (3) *Sale of Goods Act* of England, and with identical drafting: secs. 50 (3) a 51(3) *Sale of Goods Act of Antigua and Barbuda*, Bahamas, Trinidad-Tobago, Belize, Montserrat, and secs. 49 (3) a 50 (3) *Sale of Goods Act of Jamaica*]. The United States legislation, however, provides both calculation criteria: specific calculation [sections 2-706 (1) and 2-712 (1) UCC], and abstract calculation (section 2-713 UCC).

In the rule of these Principles the two assessment criteria of the damage are included. Paragraph 1 makes reference to the specific calculation, based on a substitute transaction or replacement transaction, executed in reasonable time and form. The damages will be calculated based on the difference between the price agreed in the contract and the price obtained in the replacement transaction. If the substitute transaction made by the obligee is not reasonable, due to comprising an exorbitant difference with the price agreed in the non-performed contract, this rule will not be applied.

Example 1: A, a cocoa export company of country X, has concluded a contract for the sale of goods with the company B of country Y, under which the first party undertakes to deliver 2 tonnes of cocoa and B, to pay 200. When the time of delivery is arrived at, A does not perform, and B is obliged to buy the cocoa from C, who sells it for 250. A must pay damages for the value of 50, i.e. the difference between the agreed price and the price paid in the replacement transaction.

The abstract calculation is detailed in paragraph 2, dealing with the market price, if any, of the performance covered by the contract. In this case, the amount of damages will be calculated taking in account the difference between the contractual price and

the current price. The difficult question about the time when the calculation has to be addressed is raised, since this is the fluctuating market price (above all the price of some goods), the amount of the damage could vary considerably according to whether it is expected on one date or another. The international texts prefer to refer to the calculation at the market price at the time of the termination [Articles 76 (1) CISG; Article 7.4.6 (1) UP; Article 9:507 PECL; Article III-3:707 DCFR; Article 165 CESL]. However, in the Anglo-American system the general rules which have to be the market price of the goods at the time when non-performance occurs [Articles 50 (3) and 51 (3) *Sale of Goods Act* of England, and with identical drafting: secs. 50 (3) a 51(3) *Sale of Goods Act* of Antigua and Barbuda, Bahamas, Trinidad and Tobago, Belize, Montserrat; and secs. 49 (3) to 50 (3) *Sale of Goods Act* of Jamaica], or if the obligee had knowledge of the same [section 2-713 (1) UCC]. This final option claims to prevent that the parties can speculate with the non-performance in a fluctuating market. This is the rule that is also adopted for the assessment of the equivalent measure in Article 7.3.4 (3) of these Principles. However, in the case of compensation for damage the OHADAC Principles are inclined to favour the first solution, to the extent that the consideration of the price at the time of the termination is more consistent with the principle of full reparation of both emerging damage and damage through loss of profits. In the case of a notable difference or negligent or speculative termination, the rules contained in articles 7.4.2 and 7.4.3 (1) will be used for adjusting the calculation or, where applicable, opt for the reference price at the time of the non-performance.

Example 2: In the facts of example 1, if A is prepared to carry out the delivery, the cocoa is unjustly refused by B and it does not manage to place the goods, the damage will be assessed taking in account the market price of the cocoa on the day of the termination i.e. if the price agreed in the contract and the price that has not been paid is 200 and the market price 300, A will be able to recover damage for the value of 100 (300-200).

One has opted for the introduction of these calculation criteria of the damage in the non-performance of termination despite the fact that most Caribbean systems do not consider this favourably, for reasons of utility in the commercial operations, since they provide an easy, rapid and secure calculation method.

However, this article contains some simply evidential rules that do not exempt the general principles on the determination of the damage. It is a question merely of easing the burden of the proof that weighs on the obligee at the time of assessing the intrinsic damage (*propter rem ipsam non habitam*), not of limiting the *quantum* of the

damages, since the injured party can recover other additional damages in accordance with this section (paragraph 3).

Article 7.4.6: *Damages for late payments of money*

- 1. In the absence of agreement, if payment of a sum of money is delayed, the debtor is entitled to interest upon that sum, whether or not the non-performance is excused.**
- 2. Interest shall be payable from the time when the payment is due.**
- 3. The debtor may also claim additional damages for any further loss, if it is recoverable as provided for in this Section.**

COMMENT

1. The obligation of payment of the interest

In this article a special rule for the calculation of the damage is established in the cases of late performance of a monetary obligation. In such cases, the majority of the Caribbean legal systems find the emerging damage and the loss of profits in a *forfait*: the interest. Hence, from the time when the obligor is declared to be in default (if the requirement is necessary) or from when there is a delay in the performance, the sum agreed as a principal obligation will accrue interest, which will constitute the damages, directly and without the need of any proof [Article 1.617 Colombian Civil Code; Article 706 Costa Rican Civil Code; Article 1.153 French and Dominican Civil Code; 1.435 Guatemalan Civil Code; Article 943 Haitian Civil Code; Article 1.367 Honduran Civil Code; Article 707 Honduran Commercial Code; Article 2.117.2º Mexican Civil Code; Article 1.867 Nicaraguan Civil Code; Article 993 Panamanian Civil Code; Article 223 Panamanian Commercial Code; Article 1.061 Puerto Rican Civil Code; Article 1.008 Saint Lucian Civil Code; Article 1.277 Venezuelan Civil Code; section 354 (1) *Restatement (Second) of Contracts*; Article 78 and 84 CISG; Articles 7.4.9 (1) UP; Article 9:508 (1) PECL; Article III-3:708 (1) DCFR; Articles 168-171 CESL].

Cuba merits a special mention, where the agreement of interest is illegal, except in the obligations stemming from operations with foreign loan or commercial entities (Article

294 Cuban Civil Code). Thus, Article 315 Commercial Code permits the agreement of interest without tax or any kind of limitation for commercial loans.

In England, until quite recently, the obligor was not obliged to pay interest for delayed payment, except if the obligation had its origin in commercial values or there was an express agreement to pay interest (in which case it is not a question of compensation for damage but of a sum due in the performance of the agreed obligation). In 1982 it was permitted by law (*Administration of Justice Act*) that the court can grant the payment of interest, including if the obligor has paid before the judgment, on condition that it has been done after being required judicially and, for commercial obligations, the *Late Payment of Commercial Debts (Interest) Act* of 1998, obliged the payment of default interest as an “implied term” in this type of contracts.

In line with all of the above, the proposed rule grants the party injured through the non-performance of the obligation of payment of a debt of money the right to the interest agreed in the contract. The right to charge the interest is not, in reality, damages; hence, the general rules on this remedy established in this section will not be applied to it. The interest is the product or fruit of the money (civil fruit), the non-conforming party is therefore obliged to make its payment although the non-performance is justified in accordance with Article 7.1.8 OHADAC Principles, since the contrary solution would determine an enrichment of the obligor, which receives interest of the sum that it should already have delivered to the other party.

Example: A of the country X, has bought 100 tonnes of coffee from B of the country Y. Once the obligation to pay the price has expired, it is impossible for A to pay the amount on account of a new national regulation that controls the outflows of capital abroad. In this case, although the non-performance is justified due to the occurrence of *force majeure*, A must pay to B the corresponding interest.

Due to the nature of the interest as the fruit of the money, the injured party’s right to its collection is not subject to any proof of existence of certain damage, as has already been indicated in the commentary at Article 7.4.1 of these Principles.

This obligation to pay interest agreed is governed in the absence of which the parties have agreed otherwise for the non-performance, for example through the introduction of a contractual clause on the liquidation of damage in accordance with article 7.4.7 of these Principles.

2. Type of interest

The majority of the Caribbean legal systems tend to leave the determination of the rate of interest to the freedom of contract and, in the absence of agreement, the

accrual of the legal interest on the money is established as a supplementary rule [Article 1.617 Colombian Civil Code; Article 1.435 Guatemalan Civil Code; Articles 6:119 and 6:120 Dutch and Suriname Civil Code; Article 1.367 Honduran Civil Code (legal interest of 6%); Article 2.117.2º Mexican Civil Code; Article 1.867 Nicaraguan Civil Code (legal interest of 9%); Article 993 Panamanian Civil Code (legal interest of 6%); Article 1.061 Puerto Rican Civil Code (legal interest of 6%)]. On the other hand, the *Late Payment of Commercial Debts (Interest) Act* of 1998 also permits, although with limits, the agreement of contractual interest (Article 8). The Cuban Commercial Code, however, in its regulation of commercial loans, permits the agreement of contractual interest and - in the absence of agreement in writing - the loan will be free of charge (Articles 314 and 315 Cuban Commercial Code). Interest will be regarded as any performance agreed for the benefit of the obligee (Article 315.2º Cuban Commercial Code).

Other systems in force in the zone refer directly to the legal interest (Article 1.153 French and Dominican Civil Code; Article 943 Haitian Civil Code; Article 1.277 Venezuelan Civil Code).

Articles 9:508 (1) PECL and III-3:708 (1) DCFR provide that the type of interest will be calculated in accordance with the average rate applied by the commercial banks in short term loans to qualified clients, for the currency of payment in the place where performance must be realised. The same rate is also the starting point in Article 7.4.9 (2) UP, which subsequently adds that if this rate does not exist in that place, then the same rate will be applied in the state of the currency of payment and in the absence of that rate in those places, the rate of interest will be the rate that is appropriate in accordance with law of the state of the currency of payment. The CISG, however, does not stipulate any rate of interest, given that it was impossible to reach an agreement on a standard rate. The discount rate was considered to be inadequate for correctly measuring the costs of the loan, and there was no consensus either on if whether it had to opt for the costs of the loan of the seller country or of the buyer country.

Similar problems have been raised at the time of stipulating the supplementary interest rate to the contractual rate agreed in the proposed rule. It is necessary to avoid favouring a strong currency to the detriment of another, and on the other hand the legal interests applicable in different states of the zone are very disparate. Thus, it has been understood that, concerning commercial contracts, the most adequate solution will be to leave it to the parties autonomy to regulate the question and, failing this, it will be up to arbitrators or courts to establish an *ad hoc* reference index or in accordance with the law that governs the contract or the own law of the forum.

Hence, it is recommended to include in the contract a clause which determines the rate of interest that will govern the monetary obligations resulting from the contract, like those indicated at the end of the commentary to this provision.

3. *Dies a quo* of the accrual of interest

The interest begins to accrue from the day when the debt is due and is unpaid, without any need or requirement of any notification by the injured party (paragraph 2). That is to say, if a determined or determinable date for the payment would have been stipulated in accordance with the provisions of Article 6.1.2 (a) of these Principles, and the obligor does not comply, the interest will run from that time. And if a period within which the obligor must comply would have been indicated, in accordance with the provisions of Article 6.1.2 (b), the interest will accrue from the end of that period.

This is the system preferred by the rules of harmonised law, which do not require the declaration that the obligor is in default for the delay in the payment to constitute non-performance [Article 7.4.9 (1) UP; Article 9:508 (1) PECL; Article III-3:708 (1) DCFR], and also constitutes the model adopted by these Principles (Article 7.1.1). Hence, if the injured party has granted an additional period for payment in accordance with Article 7.1.6, the interest will have run from the initial date when the obligation has fallen due and not from when the time when notification was made or after the passage of the additional period.

Example: A of country X, has bought 100 tonnes of coffee from B of country Y, having stipulated 1 June as the date of delivery and payment. When the time comes, B delivers the goods, but A does not observe its obligation to pay the price, claiming that it is awaiting the collection of some sales. B decides to grant it an additional period of 30 days for the performance. Finally, A pays the price on the date of 30 June. B has the right to the interest from the date of 1 June, which was the time of the expiry of the debt.

4. Additional damages

The objective of the interests is to prevent lateness of payment from being economically beneficial for the non-conforming party, but does not inherently constitute damages, since it does not require proof of damage. Consequently, the injured party will be able to claim damages for other additional damage that the failure to comply with the date would have caused it, provided that they are recoverable in accordance with these Principles, namely, if the failure to comply is not justified and the damage claimed meets the requirements of certainty and remoteness.

Example 1: If, in the facts of the example of epigraph 1, the value of the money falls as a consequence of inflation between the time of the expiry and the time of the effective payment to such an extent that the fall is not compensated with the interest that would be due in accordance with paragraph 1 of the provision, B will not be able to claim additional damage for this reason, since the A's failure to comply was covered for a ground for justification.

Example 2: A, of country X, concludes a contract for the sale of goods of real estate properties with B, of country Y. The contractually agreed date of payment of the price is the date of 3 April; the significance of the date of performance being reflected in the date of the contract, given that A required the money to repay a loan that became due on that day, this being the real reason for the sale. The buyer B does not pay the price on the agreed date and, as a consequence, A cannot repay the loan on the expiry date and must tolerate the high default interest. The seller will be able to claim from B not only the interest that accrues on the price from the date of 3 April until the time of the effective payment, but also the interest on the loan as additional damage.

This is the solution that also adopted by the international texts [Article 7.4.9 (3) UP; Article 9:508 (2) PECL; Article III-3:708 (2) DCFR]. And, equally, it is included in some commercial codes of the OHADAC territory (*e.g.* Article 679 Guatemalan Commercial Code; Article 708 Honduran Commercial Code). However, it is not possible to claim additional damages in some legal systems of the zone, as in the Dutch and Suriname laws (Article 6:119, with the exception included in paragraph 1) or in Costa Rica (Article 706 Civil Code).

SPECIFIC INTEREST CLAUSES

As has been noted in paragraph 2 of the commentary of this article, the difficulty of stipulating a single interest rate that functions as an addition to the contractual interest rate, obliges the parties that have submitted their contract to the regulations of the OHADAC Principles to include in the contract a clause of determination of the applicable interest rate.

The contractual clauses proposed below distinguish according to whether a determined date for the payment has been stipulated (clause A), or on the contrary, the contracting parties have established a period within which the obligor must perform the monetary obligation (clause B).

Both respond, however, to the spirit of these Principles and, subsequently, do not require declarations that the obligor is in default, or any requirement for the delay to constitute non-performance (Article 7.1.1).

In paragraph one the rate of interest and the time of accrual is established. And paragraph two includes the possibility of damages for additional damage and is optional, since that damage will be recoverable even though nothing is indicated, through the provision of Article 7.4.6 (3) of these Principles.

Option A: Date determined for the performance

“The non-payment of the obligation of (payment of the price, repayment of the loan, etc...) on the date of performance agreed in the clause (...) of this contract will entitle the injured party to interest of (...)% from the date of expiry and until the time of the effective payment, whether the failure to pay is or is not justified.

The aggrieved party will also be able to claim damages for other additional damage, provided that is certain, foreseeable and the performance is not justified”.

Option B: Period for the performance

“The non-payment of the obligation of (payment of the price, repayment of the loan, etc...) at the contract period of time for the performance agreed in the clause (...) of this contract will entitle the aggrieved party to interest of (...)% from the final day of the period established and until the time of the effective payment, whether the failure to pay is or is not justified.

The aggrieved party will also be able to claim damages for other additional damage, provided that it is certain, foreseeable and the performance is not justified”.

Article 7.4.7: Liquidated damages

- 1. Where the contract provides that a party who does not perform its obligation must pay a specified sum of money, the obligee is entitled to claim that sum irrespective of its actual loss.**
- 2. Despite any provision to the contrary, the sum so agreed in the contract may be reduced to a reasonable amount where it is grossly excessive and disproportionate in the light of circumstances.**

COMMENT

1. Characterisation of the penalty clauses.

As provided in paragraph 1 of this article, the contracting parties can stipulate the amount of the compensation for contractual damage, according to which the contracting party that does not perform its obligation must pay a determined sum to the injured party for the non-performance, regardless of the damage that has been caused. It is a question of the so-called “compensatory penalties” or “contractual penalty clauses” with anticipated liquidation of damage function in the civil law or continental legal systems and “liquidated damages clauses” in common law.

Indeed, the Caribbean civil law or continental legal systems admit, as a general rule, the contractual penalty clauses or conventional penalties, with very varied functions, which can be agreed in the commercial contractual sphere of the principle of the freedom of contract (Articles 1.592-1.601 Colombian Civil Code; Article 867 Colombian Commercial Code; Articles 708-714 Costa Rican Civil Code; Articles 268-269 Cuban Civil Code; Articles 1.152 and 1.226-1.233 French and Dominican Civil Code; Articles 1.436-1.442 Guatemalan Civil Code; Articles 942 and 1.013-1.020 Haitian Civil Code; Articles 6:91-6:94 Dutch and Suriname Civil Code; Articles 1.417-1.420 Honduran Civil Code; Articles 1.840-1.850 Mexican Civil Code; Article 88 Mexican Commercial Code; Articles 1.985-2.003 Nicaraguan Civil Code; Articles 1.039-1.042 Panamanian Civil Code; Articles 1.106-1.109 Puerto Rican Civil Code; Articles 1.062-1.068 Saint Lucian Civil Code; arts- 1.276-1.263 Venezuelan Civil Code).

The criterion in these systems is that the stipulated sums replace the damages that the injured party could receive for the non-performance (compensatory penalty). So that the clause has a punitive function (cumulative penalty), the parties have to expressly give it that nature through agreement (Article 712 Costa Rican Civil Code; Article 268 Cuban Civil Code; Article 1.418 Honduran Civil Code; Articles 1.991 and 1.999

Nicaraguan Civil Code; Article 1.040 Panamanian Civil Code; Article 1.107 Puerto Rican Civil Code); and equally that agreement is necessary for configuring the clause as a facultative or disclaimer clause of the obligation (Article 1.418 Honduran Civil Code; Article 1.990 Nicaraguan Civil Code; Article 1.107 Puerto Rican Civil Code).

However, if the liquidated penalty has been stipulated for the cases of delay or partial or defective performance and the obligor has not performed its obligation entirely and irrevocably, the aggrieved obligee can demand the performance of the principal obligation or the damages plus the penalty (Article 1.594 Colombian Civil Code; Articles 1.229 French and Dominican Civil Code; Article 1.437 Guatemalan Civil Code; Article 1.016 Haitian Civil Code; Article 1.419 Honduran Civil Code; Article 1.846 Mexican Civil Code; Article 1.991 Nicaraguan Civil Code; Article 1.108 Puerto Rican Civil Code; Article 1.064 Saint Lucian Civil Code; Article 1.258 Venezuelan Civil Code).

For its part, in Anglo-American law, the contractual clauses through which the payment of a sum is stipulated in the case of non-performance can be of two types: contractual penalty clauses (penalty clauses) and liquidated damages clauses (liquidated damages clauses). The first ones, real penalties (consistent with what are called “cumulative penalty” in continental law), are null and void and the obligee will be able to claim only for the really suffered losses. The second (consistent with the contractual penalty clauses with the function of previous liquidation of damage) are valid. According to case law [*Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* (1915), UKHL 1], the essence of the penalty clause resides in that they are stipulated *in terrorem*, with the purpose to oblige the obligee to perform its principal obligation. The contractual clauses on the liquidation of damage, on the contrary, are a prior assessment of the losses that the obligee would suffer in the case of an imputable non-performance. The delimitation between a penalty clause and a clause on liquidation of damage is an interpretative question which must be unravelled in view of the existing circumstances (amount, damage that the non-performance would cause...) and the intention of the parties [judgment of the High Court of Trinidad-Tobago in *Quality Really Services Ltd v Peterson* (1982), Carilaw TT 1982 HC 84; judgment of the Court of Appeal of Barbados in *Furniture Ltd v Clark*, (2004), Civ. app. no. 21, 1997 (Carilaw BB 2004 CA 1); section 356 *Restatement (Second) of Contracts*].

The European texts on harmonisation of the law adopt the continental focus of accepting the contractual penalty clauses, permitting them in Articles 9:509 PECL and III-3:712 DCFR, including if, due to being of high amount, have a coercive objective or the objective to guarantee the performance. However, paragraph 2 of these provisions subjects the clause to reduction taking account of the effective loss resulting from the

non-performance and other circumstances. The UP contains a practically coinciding rule in its article 7.4.13.

This disparity of criteria with which the OHADAC national systems deal with the contractual penalty clauses leads to limiting the possibility of agreement in these Principles to the so-called previous liquidation clauses or liquidated damages clauses, since the solution which signifies a consideration of the possibility of introducing real penalties (cumulative penalty or penalty clauses) would involve a mighty clash with the tradition of common law.

The contractual clauses that establish the possibility of the obligor being released from its obligation by paying the agreed amount are also not regulated in this provision since, in reality, the regulation of these contractual clauses (facultative penalty) is part of the scope of the so-called facultative obligations.

Consequently, as a result of paragraph 1 of this article, the contractual clauses in which the parties establish a sum to be paid by the non-conforming party, in the case of a failure to perform, and which functionally represent an anticipated assessment of the damage, are valid. These contractual clauses have the advantage of allowing the injured party to dispense with the proof of the certainty and the amount of the damage. The aggrieved party will not be able to seek greater damage, and the non-conforming party cannot claim that it has not suffered any damage.

Example: A and B conclude a construction contract, through which A undertakes to construct a building for B, being obliged to deliver it before 31 January. In the contract a clause is introduced in which it is provided that the constructor must pay 100 for each day of delay in the delivery of the construction. If A fulfils its obligation late, on the date of 10 February, it will be obliged to pay 1,000 whatever damage has been suffered by B.

In keeping with that provided by the national legal systems, in principle, the injured party will only have a right to claim payment of the provisions of the clause in the cases in which it would have the right to damages, i.e., if the non-performance is not justified in accordance with Article 7.1.8 of these Principles. However, there are no disadvantages for the parties to establish otherwise based on its private autonomy.

2. Reduction of the disproportionate or excessive agreed damages

In some Caribbean civil law or continental legal systems the judicial moderation of the agreed “penalty” is provided if it would have been provided for a complete non-performance and the obligation would have been performed partially or irregularly (Article 1.596 Colombian Civil Code; Article 713 Costa Rican Civil Code; Article 269

Cuban Civil Code; Article 1.231 French and Dominican Civil Code; Article 1.438 Guatemalan Civil Code; Article 1.018 Haitian Civil Code; Article 1.419 Honduran Civil Code; Article 1.844 Mexican Civil Code; Article 1.992 Nicaraguan Civil Code; Article 1.041 Panamanian Civil Code; Article 1.108 Puerto Rican Civil Code; Article 1.260 Venezuelan Civil Code).

This possibility to moderate is wide in other codes, which not only provide for the reduction for the case in which the penalty has been agreed for the complete non-performance have had a principle of performance, but in a general manner in order to avoid the excessive penalties (Articles 942 Haitian Civil Code; 6:94.1^o Dutch and Suriname Civil Code; Articles 1.007 and 1.066 Saint Lucian Civil Code). In many codes markdown rules or rules on the proportional adaptation of excessive contractual penalty clauses can be found (*e.g.* Article 1.596 Colombian Civil Code; Article 867 Colombian Commercial Code; Article 712 Costa Rican Civil Code Article 1.843-1.845 Mexican Civil Code; Article 2.002 Nicaraguan Civil Code).

As well as to authorize the judge for their markdown, some texts permit the penalty to be increased if it would be derisory (Article 1.152 French and Dominican Civil Code; Article 942 Haitian Civil Code) or if this is required by the standards of reasonableness or equity (Article 6:94.2^o Dutch and Suriname Civil Code). This provision opens up to the judges a means of control of the contractual liquidated penalty clauses, if they do not contain a previous assessment, but directly to limitation of liability in the case of non-performance, and fraudulent or seriously fraudulent non-performance will occur. In these cases, the French and Dutch laws do not permit the limitation of liability, and consequently the judges will be able to increase the agreed penalty in order to make it coincide with the damage effectively suffered by the obligee. In the other systems, the control of this type of contractual penalty clauses involves a greater difficulty, and it must resort to the applicable rules to the contractual clauses of limitation of the liability (Article 7.1.7).

In the common law legal systems, on the other hand, the contractual liquidated damages clauses cannot be modified, hence it is considered the fruit of the agreement between the parties and including if the agreed sum is very low [*Cellulose Acetate Silk Co Ltd v Widness Foundry Ltd* (1925), AC 20] the judge cannot increase it. However, indeed it can be invalid if it is a general condition, due to constituting an unreasonable limitation of liability (*Unfair Contract Terms Act* of 1977 and *Unfair Terms in Consumer Contracts Regulations* of 1999).

In the uniform law, the UP, PECL and the DCFR only grant the courts the power of reduction if it is evident that the sum stipulated substantially exceeds the actual loss.

Paragraph 2 of this article sanctions the moderating power of the agreed damages, in order to make possible the control of the unreasonable and manifestly abusive stipulations. It is an imperative rule that will not be able to be excluded by the parties through an agreement to the contrary. Hence, if the amount agreed by the contracting parties is manifestly excessive and disproportionate, in relation to the damage that the injured party has effectively suffered, and regarding the existing circumstances in the specific case, the judge or arbitrator will be able to mark down proportionally the agreed damages, until these are reasonable. However, the damages do not have to be adjusted to the actual losses, since it must be considered that the parties' intention that, in the use of their contractual freedom, they have claimed to introduce a deterrent measure of the non-performance.

Precisely for the sake of the respect for the freedom of contract of the parties, which, in commercial contracts, are normally situated at the level of equality, the power of the courts or arbitrators to increase the agreed amount has not been provided in this article. However, if the clause involves a limitation or exemption of liability, regarding the existing circumstances, it will have to be in accordance with the provisions of Article 7.1.7 of these Principles.

CHAPTER 8

ASSIGNMENT

Section 1. Assignment of rights

Article 8.1.1: Scope of application

- 1. By the assignment of rights, the obligee, called the “assignor”, transfers or provides as security to another person, called the “assignee”, its rights in a contract.**
- 2. This Section does not apply to:**
 - a) assignments of rights governed by special rules on transfer of a business;**
 - b) assignments of negotiable or financial instruments and documents of title.**

COMMENT

1. Proposal for a functional regulation

The OHADAC Principles govern the assignment of contractual rights, since in international business, it constitutes a significant means of financing of the obligee who receives the payment in advance, with the deduction of a portion which becomes the benefit of the assignee. The assignment may also play an important role as a guarantee of the obligee’s performance in another contract.

In this context, the Principles are based on two standards: firstly, the need to find a minimum consensus among the laws of the OHADAC member States, and secondly, maximum observance of the freedom of the parties. The Principles therefore propose a functional regulation through seven articles, compared with the fifteen articles of the UNIDROIT Principles, the seventeen articles in PECL and the twenty articles in DCFR. The OHADAC Principles provide greater flexibility for the parties at this point in contrast with the rigidity of other international texts, more influenced by the idea of codification. They also try to provide a clear systematisation of easy handling which is based on the aspects of particular interest to practitioners: conditions of assignments (Article 8.1.1: scope; Article 8.1.2: objective conditions; and Article 8.1.3: subjective

conditions) and effectiveness of such assignment, in general (Article 8.1.4) and in relation to each part (Article 8.1.5, concerning the obligor; Article 8.1.6., concerning the transferor, and Article 8.1.7, concerning the assignee). At any event, it should be noted that the full application of these principles requires that they are chosen in two contracts: in the original contract, primarily to determine the position of the obligor, and then in the assignment agreement proper, which deals with the assignor-assignee relationship.

2. Definition and scope

The Principles propose a definition of minimum and of consensus in the legal systems of the OHADAC, explaining the functioning of transfers of rights. The obligee transfers a right to a third party, the assignee, so that this right is excluded from the assets of the obligee in order to include in the assets of the assignee (Article 1690 Colombian Civil Code). Likewise, the obligee can offer its right as a guarantee to a third party.

The assignment shall meet two conditions. Firstly, the obligation, the right to performance of which is assigned, shall necessarily derive from a contract. Consequently, assignments of obligations under the law are excluded, as for instance, monetary rights in favour of a person injured by a non-contractual prejudice. Note that the systematisation of this chapter of the Principles is designed for the transfer of the contract as a whole, of any of its rights or its obligations. The obligation may be a monetary claim or other type of non-financial right, including an obligation to do or not do. As it will be analysed more in detail, to give maximum latitude to the will of the parties, the Principles remind that assignment may be total or partial as the transferor and transferee parties may wish, and grant a right to one or more third parties.

3. Assignments exclusions of the Section

As a starting point, the Principles only govern contractual assignments, i.e. those produced by an agreement between the obligee and the third party to whom the right is transferred. In the same line of the UP (section 9.1.1), legal assignments imposed by a legal system without the parties' participation are excluded. Transfers resulting from a unilateral act of the obligee are also excluded, such as a donation, in cases in which a bilateral act is not required, and in particular, the acceptance of the donor.

But, the Section lays down two exclusions even if the assignment is of contractual rights. First, the Section does not apply to transfers of rights arising from the transfer of business as a whole (in the same sense as Article 9.1.2 UP). Since it is a complete assignment, there are special rules that override the rules on contractual assignments, which have a different legal rationale. This does not prevent that the fact that, as a

result of a transfer of business, an individual transfer of rights to a third party occurs alongside this transfer. This individual legal transfer shall be governed by these Principles.

Example: Company A has several claims against firms B, C and D. When company A is absorbed by company E, all the claims are transferred to E. This assignment is excluded from these Principles.

A second exclusion by reason of the subject must be stressed, insofar as the section does not apply to transfers of securities or of negotiable or financial instruments and documents of title (Article 1966 Colombian Civil Code; and among international texts, Art 9.1.2. UP; Article 11:101 PECL; Article III-5:101 DCFR). This is due to the special rules governing these instruments. Regarding the titles, they are often justified because the endorsement and the transfer of title automatically involve transferring the underlying right, regardless of this one. To this is added that, in relation to financial instruments, these are negotiated and transferred in financial markets, also independently of the underlying obligation. The above mentioned does not exclude that these underlying rights can be object of a legal transfer, regardless of such securities or instruments, which would be governed by the Principles.

Finally, it should be noted that the transfer of rights in a contract may be influenced by the existence of a dispute between the original parties. The rules of private international law will determine how the controversial or litigious nature of a right affects or not their possible assignment (Article 1107 Costa Rican Civil Code, Article 1.472 Haitian Civil Code).

Article 8.1.2: Conditions relating to the assigned rights

- 1. Rights, either to payment of a monetary sum or to performance of non-pecuniary obligation, may be assigned if they satisfy the following conditions:**
 - a) the rights exist at the time of the assignment or are future and recognizable rights; and**
 - b) the rights are individually identified or are recognisable.**
- 2. A right may be totally or partially assigned, and in favour of one or several assignees. The partial**

**assignment or in favour of several assignees is valid
only if the assigned right is severable.**

COMMENT

1. Rights eligible for assignment

The Principles follow the contractual practice in international trade, regulated for instance by the UNIDROIT Principles (Sections 9.1.1., 9.1.3. and 9.1.5), according to which monetary rights or rights of performance of a non-pecuniary obligation may be transferred. Existing rights or future rights may also be assigned, as well as rights identified individually or mentioned in a generic manner. In the second case and in the case of future rights, the rights must be able to be identified in the provisions mentioned in the assignment agreement [Article. 9.1.5 and 9.1.6 UP; Article 11:102 PECL; Article III-5:106 DCFR; Article 235 Proposal for the reform of the French law on Obligations of 2013; *Groveholt Ltd v Hughes (2005) EWCA Civ 897*, in reference to "equitable assignment" of future rights].

Example: A supplier sells a piece of high technology to a manufacturer that will be incorporated in a machine. As security for the payment as far as the due amount, the manufacturer assigns the future credit to be generated at the time that it sells the equipment to a third party (signer of a pre-contract). In accordance with the Principles, the assignment of future receivables is valid provided that they are properly identified in the assignment agreement.

2. Divisibility of the assignment

The Principles allow full or partial transfer of a right provided that the division is and does not impair or impede the obligor's performance [e.g. Article 1.116 of the Costa Rican Civil Code; Article 235 of the Proposals for the Reform of French Law of Obligations (Article 1.692 of the French Civil Code); the English "equitable assignment", in contrast with the "statutory assignment" in Section 136 (1) Property Law Act: *Holt v Heatherfield Trust Ltd. (1942)*, 2 KB; *Crosstown v Rive Droite Music Company Ltd & Ors Music (2010)* EWCA Civ 1222; Article 9.1.4 UP; Article 11:103 PECL; Articles III-5:102 and III-5:107 DCFR]. Thus, there will be no objection to a partial assignment of monetary rights (Articles 1.444 and 1.447 of the Guatemalan Civil Code), but the partial assignment of obligations will not be possible if they are indivisible, pursuant to the provisions of these Principles. As will be seen later (Article 8.1.3), if partial assignment makes the obligation more onerous, the obligor's consent will be required. At any event, it is up to the applicable law to determine whether or not an obligation is

divisible for its transfer. This achieves a minimum consensus among the OHADAC legal systems, particularly, those less favourable to the partial assignment [e.g. "absolute legal assignment of legal things in action" in Section 136 (1) of the English Property Law Act, unlike the "equitable assignment" already mentioned: *Holt v Heatherfield Trust Ltd.* (1942) 2 KB; *Crosstown v Rive Droite Music Company Ltd & Ors Music* (2010) EWCA Civ 1222].

Example 1: Company A buys a high-tech machine from manufacturer B, paying in monthly instalments over ten years. After three years of regular payments, and in order to obtain liquidity, the manufacturer assigned the remaining amount of the credit to a financial institution C, after deducting a significant amount. Under the Principles, this assignment is completely legal since pecuniary obligations are essentially divisible.

If the right is divisible the assignment can also be made in favour of one or more assignees, whose internal relations will be governed by the rules set out by the Principles concerning the plurality of obligees. The rights of transferees can be separate, if each assignee can only claim its own portion; the rights can be joint and several, if each transferee may require the entire obligation; and the rights can be pooled if all transferee jointly require the obligation at the same time.

Example 2: In the same case as above, manufacturer B assigns its credit to financial institutions C, D and E, and the assignment contract includes a clause on active solidarity. Each of the financial institutions may ask the obligor to pay up the entire debt.

Article 8.1.3: *Conditions relating to the parties*

- 1. The assignment requires agreement between assignor and assignee.**
- 2. Furthermore, the consent of the obligor shall be required if:**
 - a) its obligation is personal; or**
 - b) its obligation is more burdensome as a consequence of the assignment; or**
 - c) assignor and obligor had agreed such consent or the prohibition of the assignment of rights.**

3. The consent of the obligor may be given expressly or tacitly, simultaneously or subsequently to the conclusion of the assignment agreement.

COMMENT

1. Agreement between assignor and assignee

The Principles generally set forth that an agreement between the transferor and the transferee is sufficient for the assignment to take effect between the parties; the consent of the obligor is not, therefore, necessary. This rule is reflected in numerous provisions of the laws of the OHADAC [Article 1.104 of the Costa Rican Civil Code; Article 257.1 of the Cuban Civil Code; Article 1443 of the Guatemalan Civil Code; Article 2030 of the Mexican Civil Code; Article 2114 of the Nicaraguan Civil Code; Section 16 of Chapter 6:01 of the Guyana Civil Law Act 1953; Section 19 (d) of the Supreme Court Act 1905 of Bermuda; Article 1.434 of the Suriname Civil Code previous reform] and in texts such as Article 235 of the Proposals for the reform of the French law on obligations of 2013 (Article 1.692 of the French Civil Code) and Article 9.1.7 UP. No specific form is required for this assignment, except those that may result from mandatory rules, such as the requirement of a written document or even an authentic deed [Article 1.959 of the Colombian Civil Code; Article 256 of the Cuban Civil Code; Article 1.445 of the Guatemalan Civil Code; Article 2.033 of the Mexican Civil Code; Article 236 of the Proposals for the reform of French law on obligations of 2013 (Article 1690 of the French of the Civil Code)].

The mere agreement between the assignor and the assignee without notice or consent of the obligor is sufficient for two reasons. On the one hand, it is the greatest freedom possible to the parties, the transferor and transferee, in the agreements concluded between them. This corresponds to the philosophy of countries such as Belize and Trinidad and Tobago, who, in keeping with the common law tradition, have not codified this subject. On the other hand, it is a matter of maintaining the freedom of choice between the transferor and the transferee since it will not alter the position of the obligor, who continues to be bound to perform the same agreement that was agreed in the original contract.

2. Obligor's consent

There are however three exceptions that require the obligor's consent (e.g., Article 257.2 of the Cuban Civil Code; Art 2.030 of the Mexican Civil Code): when the obligor's obligation is personal; when this obligation is more burdensome as a result of the

transfer; or when the obligee and obligor have agreed thus in the original contract.

Firstly, the obligor's obligation may be understood as a performance in favour of a specific obligee, depending on its personal conditions [Article 235 of the Proposals for the reform of French law on obligations of 2013 (Article 1.692 of the French Civil Code); *Don King Productions Inc v Warren* (1998) 2 All ER 608; Section 2-210 UCC; Article 11:302 PECL; Article III-5:109 DCFR]. In these circumstances, any transfer to a third party alters the obligation of the obligor [*Stevens v Benning* (1854), 1 K & J 168, 176, 69 ER 414].

Example 1: A supplier concludes a commercial distribution with a company B, who shall market the goods to third parties as an official distributor. Under the contract, the distributor has the right to use the supplier's distinctive emblems (trademarks and trade names) and he intends to transfer this right to the company C. The assignment is not valid or takes effect if the provider is not notified and does not consent to this. This is because A granted the distributor B the right to use its distinctive signs based on its personal qualities and economic and business reputation.

Secondly, the obligation may be more burdensome for the obligor due to the assignment. In these cases, the obligor's consent is necessary, because its obligation is adversely affected as a result of the transfer (e.g. Section 2-210 UCC). The principles present, in this point, two advantages over the UNIDROIT Principles, which distinguish between substantial or non-substantial increases of burdensomeness. Firstly, with respect to substantial increases of burdensomeness, the UNIDROIT Principles do not rely on the will of the parties and "prohibit" assignment (see, in respect of non-monetary credits Article 9.1.3 UP and, in particular with respect to partial assignments, Art 9.1.4 UP, and, along the same lines, Art III-5.107 DCFR). By contrast, the OHADAC Principles absolutely respect the will of all parties affected by the transfer, transferor, and transferee and, in this case, the obligor, who will be free to consent or not an assignment with substantial increases of burdensomeness. Secondly, with respect to non-substantial increases of burdensomeness, the UNIDROIT Principles provide that the obligor have to support the increases in exchange for a right to compensation for the additional costs caused by the assignment (Section 9.1.8). The OHADAC Principles fully comply with the principle of respect for the obligor's original position, so that any assignment that becomes more burdensome requires consent, regardless of whether the obligor may be compensated by the additional costs.

Example 2: A manufacturer A has signed a supply contract with a supplier B, who undertakes to promptly supply the number of parts required. Manufacturer A assigns its right to a company C, whose production is three times more than the transferor. Under

these conditions, the assignment requires notification and consent of the obligor, according to these Principles, since the performance of its obligation to supply the required amount and in the agreed time becomes more burdensome.

Thirdly, the assignor-obligee and the obligor might agree in the contract the obligation of notification and consent for any transfer of rights. This clause is observed by the Principles as an expression of the free will of the parties [Article 1.443 of the Guatemalan Civil Code; Article 2.030 of the Mexican Civil Code; and it is also the main source of regulation in States such as Belize or Trinidad and Tobago, due to their common law tradition; Article 235 of the Proposals for the reform of French law on obligations (Article 1.692 of the French Civil Code)]. This is a common and relatively standard clause that the parties use to maintain control over the contract during the total performance and to generate greater legal certainty and less conflict about the meaning given to personal obligation or more burdensome obligation, both of which require the obligor's notification and consent. This provision also includes clauses that refer to a obligor's right to object, during a specified period where the obligor's silence means consent positive and is sufficient to validate the assignment. The UP and the UCC state the same (Section 9-406).

Example 3: if obligee and obligor agree under the contract that any rights or obligations cannot be assigned without the prior written agreement of the parties, the transfer of rights is not prohibited, but the consent of the obligor is required in any case.

In this sense, the Principles require the consent of the obligor if the assignment has been prohibited by the contract [Article III-5:108 (3) DCFR]. This consent acts as a subsequent agreement in time amending the original clause prohibiting assignment. There is thus a total respect for the autonomy of the parties.

However, if there is a lack of consensus, the OHADAC Principles do not provide for the hypothesis when a right is transferred without the required consent of the obligor. This issue will be governed by the applicable law which refers to the rules of private international law. There are, at this point, two possible solutions. The first goes to deny the validity or effectiveness of the credit assignment, due to the breach of the original contract [*Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1993) UKHL 4]. Notwithstanding, the transferee might bring actions against the assignor. This solution seeks, therefore, to protect the maximum legal certainty and the "text" of the contract, and it has been partially adopted by Art III-5:108 (3) DCFR. It is true that the DCFR is referred to the validity and enforceability of the assignment without consent, but also it is true that the obligor is discharged if it performs in favour of the transferor and not of the assignee. The second solution is the affirmation of the validity or even

the effectiveness of the assignment of rights, despite the provisions of the original contract. This solution aims to protect the assignee, as a third party in good faith, who does not know the existence of the prohibition of transfer, without prejudice to any claim brought by the obligor against the assignor. This solution has been followed by the UNIDROIT Principles, when they state that the assignment of monetary rights has effect despite the prohibition or limitation in the contract, notwithstanding the claim based on the breach of contract (Section 9.1.9). The same applies in relation to the assignment of non-monetary rights if the assignee did not know or could not know the prohibition of assignment.

Example 4: Company A transfers a debt to company B, but when A requires payment to the obligor C, B objects it on the grounds that, in the original contract, the parties had agreed the acceptance in writing of the obligor, which is not willing to do. The law applicable under the rules of private international law will determine whether or not the transfer produces effects. If this law establishes that there is no assignment of the right, the assignee B could sue the assignor A for damages, since the transferor knew or ought to have known the existence of such a prohibition of assignment. Conversely, if the law applicable to determine the effectiveness of the assignment, the assignee B may invoke it before the obligor C, although this latter may claim compensation for damages for breach of contract against the assignor.

3. Form and time of consent

Pursuant to these Principles, the parties are free to choose the form and time of the obligor's consent. Consent may be expressly given through unequivocal acts evidencing the obligor's acceptance, as, for example, an initial payment to the assignee (Article 1.962 of the Colombian Civil Code; Article 1.448 of the Guatemalan Civil Code; Article 2.038 of the Mexican Civil Code; Article 2.723 of the Nicaraguan Civil Code; Articles 1.550 and 1.551 of the Venezuelan Civil Code). In this regard, it is interesting to note, as in Article 1.105 of the Costa Rican Civil Code, that indirect knowledge is not itself equivalent to the notification and shall be accompanied by a fact that indicates tacit acceptance.

Similarly, consent may be obtained at any time. The safest option is that the obligor's consent is given at the time of signing the assignment. Consent given subsequent to the agreement has the advantage that the obligor knows the exact terms of the assignment, but it has the disadvantage that all the negotiations and conclusion of the contract of assignment may be frustrated by the subsequent position of the obligor. Lastly, the obligor's advance consent has the advantage that the transferor and transferee will negotiate and conclude the assignment agreement with maximum

certainty as to their effectiveness, but it has the risk of mismatches between the terms accepted by the obligor the terms finally agreed by the assignor and assignee. In any case, when the obligor consents, it shall be informed of the exact date on which the transfer agreement will be effective in order to proceed to pay the assignee [*Barbados Trust Company Ltd v Bank of Zambia & Anor* (2007) EWCA Civ 148].

The requirement of consent by the obligor and the possibility that this occurs after the assignment raise questions about which effects are concerned by the transfer agreement if consent is not given. It should be understood that the assignment agreement includes a condition precedent, whereby the transfer agreement signed has no effect until the obligor accepts such assignment.

Article 8.1.4: *Effectiveness of the assignment*

- 1. The assignment is effective against the obligor:**
 - a) From the time when the notification of the assignment is received by the obligor, if the consent was not required or has been given in advance.**
 - b) From the time when the consent is given by the obligor, simultaneously or subsequently to the conclusion of the agreement of assignment.**
- 2. After the assignment is effective, the obligor is discharged only by performing in favour of the assignee.**
- 3. When an assignee successively transfers the right to other assignee, the obligor is discharged according to the last assignment that was effective.**
- 4. When the same assignor transfers the same rights to two or more assignees, the obligor is discharged according to the first assignment that was effective.**

COMMENT

1. Functions of the notice to the obligor

It is a common principle in the OHADAC Member States that the transfer must be

notified to the obligor [Article 1.960 of the Colombian Civil Code; Article 261 of the Cuban Civil Code; Article 1.690 of the French and Dominican Civil Code; Article 1.448 of the Guatemalan Civil Code; Article 2.036 of the Mexican Civil Code; Article 2.720 of the Nicaraguan Civil Code; Article 1.479 of the Saint Lucian Civil Code; Article 1.550 of the Venezuelan Civil Code; Section 136 (1) of the English Property Law Act; Article 1.599 of the Panamanian Civil Code; Section 16 of Chapter 6:01 of the Guyana Civil Law Act; Section 19 (d) of the Supreme Court Act of Bermuda; Article 1.104 of the Costa Rican Civil Code]. It is also a principle shared by Article 240 of the Proposals for the reform of French law on obligations of 2013, Section 9-406 of the UCC and Article 9.1.10 of the UP. Only in this case can the obligor perform on behalf of the transferee. Otherwise, it would be a "silent transfer" unknown to the obligor and therefore it is not enforceable against it. The obligor will be discharged of its obligation only by paying the assignor.

This principle of notice to the obligor applies each time the obligor's consent is not required or when the required consent was provided in advance. Note that, in the latter case, the obligor needs to know the actual date on which the agreement will enter into force. Conversely, if the obligor's consent has been given simultaneously or after the conclusion of the agreement, the transfer takes effect at that time, because the obligor has a full and actual knowledge of the existence of the assignment.

The principles set out shall be completed with the freedom of choice of the parties and, where appropriate, with the law governing the notice. Thus, the parties may agree on a deferred date of effect of the assignment, such that, in the notice or at the time of consent, the exact date on which the transfer becomes effective is specified. Since the OHADAC Member States do not have a clear stance on this issue, the Principles do not exhaustively regulate the contents of the notice (transferee data, scope of the assignment if partial, special information, etc.) that would be sufficient to allow adequate performance in favour of the assignee and, where appropriate, informed consent. In the latter case, the notice shall contain all the information necessary to assess whether or not the assignment increases burdensomeness.

2. Effects of the assignment

Once the assignment becomes effective against the obligor, the obligor is discharged only by performing in favour of the assignee, and not of the assignor [Article 2.041 of the Mexican Civil Code; Article 1.479 of the Saint Lucian Civil Code; Section 136 (1) of the Property Law Act and *English Tolhurst v Associated Portland Cement Manufacturers Ltd* (1902) 2 KB 660; Section 16 of Chapter 6:01 of the Guyana Civil Act; Section 19 (d) of the Bermuda Supreme Court Act; Section 9-406 of the UCC; Article 11:303 of the PECL; Article III-5:113 and 118 of the DCFR]. On the contrary, while there

is no notice to the obligor or no consent if required, the obligor shall have no obligation to the assignee, which may not require their rights as transferee. The obligor is discharged by paying or performing in favour of the assignor (obligee in the original relationship) (Article 1.963 of the Colombian Civil Code; Article 1.106 of the Costa Rican Civil Code; Article 1.464 Haitian Civil Code; Article 1.691 of the French and Dominican Civil Code; Article 1.667 of the Honduran Civil Code; Article 2.040 of the Mexican Civil Code; Article 2.724 of the Nicaraguan Civil Code; Article 1.279 of the Panamanian Civil Code; Article 1.551 of the Venezuelan Civil Code).

3. Successive assignments

The Principles adopt the solution whereby, after the transferor assigns the right to the transferee, the transferee again assigns the right to a third party ("second assignee"). It is true that there is no definition of this rule in the OHADAC systems aside from a mere partial allusion, as that provided by Article 1.105 of the Costa Rican Civil Code, which refers to collusion or gross negligence of a second assignee. However, it is also true that there is a common solution in these systems, which may even be considered a contractual practice in international trade. This common solution in cases of successive assignments is that the obligor shall be discharged by paying according to the last assignment that produced effects according to the date of notification or acceptance by the obligor, as appropriate.

Example 1: Assignor A transfers a debt of \$100,000 to assignee B, paying \$95,000. Given the liquidity requirements of assignee B, it decides to further assign the debt to the second transferee C. If this second assignment is properly notified to the obligor, the obligor is discharged only by paying to the second assignee C.

In this context, successive assignments that do not produce effects against the obligor are not taken account.

Example 2: In the above case, assignee B notifies the assignment to the obligor. Once the credit is required, the obligor fulfils in favour of the transferee B, notifying the second transferee C of its assignment a few days after the performance. The obligor has been discharged by paying to the assignee B, because it was the last notified assignment.

A particular problem arises where the chain of notifications is broken, i.e., the second assignee notifies the assignment before the first assignee. This case implies a malfunction of the chain: the obligor is informed by the second assignee, which has no direct relation with this obligor in respect of assignment by a first transferee (now transferor), which has no direct relation with the obligor. In these cases, the second

assignee is entitled to receive the performance of the obligation if the chain of assignments between transferor, second transferor and second transferee is proven.

4. Multiple Assignments

The Principles also refer to those cases in which an assignor transfers the same right to several assignees. This case creates a situation of high legal uncertainty for the obligor, who must be given a clear solution to be discharged, i.e., perform in favour of the assignee whose assignment first took effect. The obligor shall be immediately discharged, regardless of any other assignments. As in the case of successive assignments, this solution is unusually not found in the OHADAC countries aside from Article 2.039 of the Mexican Civil Code, although it has been adopted by the legal systems of influence in the OHADAC region [Article 237 of the Proposals for the reform of the French law on Obligations of 2013 (Article 1.689 of the French Civil Code)] and international texts (Article 9.1.11 UP; Article 11:401 PECL; Arts III-5.114 and 121 DCFR). At any event, there is a consensus for a tacit solution, which can be classified as a contractual practice in international trade.

Example 1: transferor A assigns a right to transferee B and, a week later, B assigns the same right to the assignee C. C gives notice of the assignment to the obligor the day after the agreement, while the notification of the assignment to B is received fifteen days later. The obligor is discharged by paying to assignee C, regardless of whether the date of assignment is later than the contract in favour of transferee B. In fact, any payment made by the obligor to the assignee B will not discharge it since the first assignment that it received was not in favour of B.

A problem may arise in respect of notifications already made, but which are suspended until adequate proof of the assignment is given, in accordance with the requirements in the original contract. In such cases, the reference shall be the date of service, provided that proof of the transfer is offered in a reasonable time. Conversely, if adequate proof of transfer is not provided in reasonable time, the notice is considered as not given and therefore the assignment is not considered as a reference of the performance of the obligor.

Example 2: As in the previous case, the transferee C notified the assignment the day after the agreement, while the notification of the assignment to B was received two weeks later. The obligor, in accordance with its contract, requires that transferee C provide adequate proof of the transfer sixteen days after the notice. According to the Principles, transferee C continues to be the party most entitled to receive the payment. Although adequate proof of transfer was provided after notice of the transferee B,

notice of the assignment was made prior to that.

These multiple assignments pose a problem with respect to the relations between the transferor and the transferees, which is not addressed by these Principles, given that these Principles are a rule of minimum consensus and this issue persists in the internal scope of several transfer agreements. Thus, the various assignees may claim against the assignor if the assignor has transferred a right that, strictly speaking, no longer belonged to it (it was already owned by the first assignee). It should also be analysed whether a hierarchy of the various assignees was established in the relevant assignment contracts and, in particular, if the credit was transferred to several assignees as contractual warranty.

Article 8.1.5: *Position of the obligor*

- 1. The obligor may assert against the assignee all defences that it could assert against the assignor.**
- 2. The obligor may assert against the assignee any right of set-off available against the assignor and that arose before the assignment took effect.**
- 3. The obligor shall be compensated for additional costs caused by the assignment. The assignor and the assignee are jointly and severally bound to pay these costs.**

COMMENT

1. Opposition of defences by the obligor

The Principles are based on a common fundamental idea in the legal systems of the OHADAC: the legal position of the obligor cannot be altered as a result of the transfer. This idea is projected in three key areas: the defences of the obligor, the right of set-off and the compensation for additional costs.

Firstly, the Principles recognise the obligor's right to assert against the transferee all defences that he could assert against the assignor [Article 1.964 of the Colombian Civil Code; Article 1.111 and Article 1.104 of the Costa Rican Civil Code; Article 262 of the Cuban Civil Code; Article 1.450 of the Guatemalan Civil Code; Article 6:145 of the Dutch and Suriname Civil Code; Article 1.440 of the Suriname Civil Code before the

reform; Article 2,035 of the Mexican Civil Code; Article 2.725 of the Nicaraguan Civil Code; Section 16 of Chapter 6:01 of the Guyana Civil Act; Section 19 (d) of the Bermuda Supreme Court Act; Article 240 of the Proposal for the reform of the law of obligations; Section 9-404 UCC; Article 9.1.13 UP; Article 11:307 PECL; Article III-5:116 DCFR]. This is because the obligor cannot be in a worse situation due to the assignment, especially when it has to be remembered that, as a general rule, and subject to certain exceptions, the assignment takes effect without the obligor's consent. In any case, the obligor and the transferor might include a clause prohibiting this right (Section 9-403 UCC).

Example 1: The debt is barred under the governing law of the contract. Nevertheless, the transferor assigns the credit to a transferee which claims the obligor. In accordance with the Principles, the obligor may oppose the defence of limitations against the transferee, regardless of what assignee and assignor agreed in the contract.

The above does not affect the right of the assignee to exercise all legal action available against the assignor with regard to bad faith or breach of contractual duties of the transfer agreement. It should be recalled, in this sense, that one of the defences that the obligor could assert against the assignee could be the *exceptio non adimpleti contractus* or the right not to perform if the assignor has not fulfilled its obligations. In fact, it could happen that a negligent conduct of the assignor has negative implications for the transferee, to which the obligor might assert this exception.

Example 2: company A sells goods to company B and, immediately after conclusion of the contract, assigns the credit arising from the payment of money to the company C. However, company A (seller and transferor) does not deliver the goods, so that when the transferee C requires the payment of credit to company B (buyer and obligor), company asserts its right of non-performance until the company A fulfils its obligation. According to the Principles, the obligor is entitled to assert the *exceptio non adimpleti contractus* against the transferee, notwithstanding that the transferee may claim against the assignor on the basis of its negligent conduct in the sale.

2. Obligor's right to set-off

To preserve the obligor's position and to ensure that it is not adversely affected by the transfer, these Principles include a provision on the obligor's right to set off its claims. In this sense, the obligor may assert against the assignee any right to set-off that it has against the assignor and that was incurred prior to notification of the assignment or, if applicable, prior to acceptance of this [Article 1.718 of the Colombian Civil Code; Articles 813 and 1.111 of the Costa Rican Civil Code; Article 6:130 Dutch and Suriname

Civil Code; Article 1.476 of the Honduran Civil Code; Article 2.035 of the Mexican Civil Code; Article 1.084 of the Panamanian Civil Code; Article 1.152 of the Puerto Rican Civil Code; Article 1.122 of the Saint Lucian Civil Code; Article 1.452 Suriname Civil Code prior to the reform; Article 1.337 of the Venezuelan Civil Code; Article 240 of the Proposals for Reform of the French law on obligations of 2013; Section 2-210 UCC; Article 9.1.13 UP; Article 11:307 PECL; Article III-5:101 DCFR]. In short, the rationale of the first paragraph is followed, according to which the obligor may assert against the assignee the defences enforceable against the assignor. The "anomaly" of asserting a claim against the assignee when the obligor is the assignor is based on the fact that the right to set off under these Principles had arisen before the transfer becomes effective. In other words, the peculiarity is that the claim to be set off arose before the assignment, but the set-off is asserted after the transfer.

Example 1: Company A is the supplier of distributor B which makes regular purchases. Company A assigns its right to C. Meanwhile the distributor B holds a claim against the supplier A, based on the obligation to repurchase the stock in the event that this stock cannot be placed in the market. The credit of the distributor-obligor is due and payable fifteen days before the transferee C informed about the assignment. When the transferee seeks payment of the assigned right, the obligor-distributor B asserts set off with its proper credit against the supplier A. According with the Principles, the set off is opposable because it was created before the notification of the assignment.

Once the notice was sent or once the obligor has accepted the assignment, in cases where it is required, the right of set-off arising in respect of debts of the transferor is no longer enforceable, as set out in Article 1.476 of the Honduran Civil Code. On the contrary, the obligor may invoke the right to set-off in relation with debts of the transferee.

Example 2: The case is the same as in example 1. The credit of the distributor-obligor based on the repurchase of stock by the supplier-obligee is due and payable one month after the assignee has notified the transfer of credit. Under the Principles, the obligor is not entitled to assert set off against the assignee.

3. Compensation of additional costs

As a result of the assignment, the obligation of the obligor cannot be more burdensome. Therefore, according to the trend of the UNIDROIT Principles (Article 9.1.8), the DCFR (Article III.5:107) and what can be considered a general practice contract, the obligor is entitled to be compensated for the additional costs of the assignment, unless otherwise agreed (Article 240 of the Proposals for Reform of the

French law on obligations of 2013). The compensation is payable by the transferor or transferee, establishing joint and several liability in accordance with the rules of the OHADAC Principles. Thus, the obligor may require the transferor or transferee which will be bound to pay the full additional costs, without prejudice to any reimbursement and without the obligor being able to claim double compensation for the same cost.

This joint and several obligation of the transferor and the transferee favours the obligor and is for two reasons. On one hand, it is logical that the transferor be required to compensate the obligor, because it is causing the transfer and it is the party in the original contract with the obligor. On the other hand, it is also logical that the transferee be obliged to compensate the obligor, because it is the payment to it which has increased the costs of the obligation. In the practice of the transfer of monetary rights, perhaps the fastest and most agile way to compensate the additional cost is attribute them to the transferee. Thus, when the obligor pays this assignee, it may deduct the additional costs in advance.

Example: The obligor, established in State A, and the transferor had agreed to the payment of a \$100,000 loan through a transfer to a bank account in State A. When the credit is assigned to the transferee, payment shall be made through a transfer to a bank account in State B. Since this is a cross-border bank transfer, there are \$2,000 of charges, so that, in accordance with the Principles, the obligor can claim these costs to the assignor or the assignee. Even at the time of paying to the assignee, the obligor could deduct these additional costs ex ante.

Article 8.1.6: Position of the assignor

Unless otherwise is agreed, the assignor undertakes towards the assignee that:

- a) the right exists or is a future and recognizable right, that can be assigned and that is free from any right or claim of a third person; and**
- b) it is entitled to assign the right, that the obligor does not have any defences and that there is not and there will not be any set-off with debts of the assignor.**

COMMENT

1. Guarantee of the objective conditions of the right

The Principles set out the obligations assumed by the assignor in relation with the assignee, the non-performance of which results in contractual liability unless otherwise agreed [Article 1.965 of the Colombian Civil Code; Article 1.113 of the Costa Rican Civil Code; Article 259 of the Cuban Civil Code; Article 1.693-1.695 of the French and Dominican Civil Code (Article 239 of the Proposals for Reform of the French law on obligations of 2013); Article 1.466 of the Haitian Civil Code; Article 1.451 of the Guatemalan Civil Code; Article 1.669 of the Honduran Civil Code; Article 2.042 of the Mexican Civil Code; Article 2.726 of the Nicaraguan Civil Code; Article 1.281 of the Panamanian Civil Code; Article 1.419 Puerto Rican Civil Code; Article 1.553 of the Venezuelan Civil Code; Section 16 of Chapter 6:01 of the Guyana Civil Act; Article 9.1.15 UP; Article 11:204 PECL; Article III-5:104 and 112 DCFR].

The first obligation is to ensure the conditions of the assigned right. Thus, the transferor shall ensure that the credit exists or it is a future right which can be identified. It must be noted that, otherwise the right cannot be assigned, in accordance with these Principles. This guarantee does not mean that the transferor shall ensure the solvency of the obligor, unless otherwise is agreed, which is a general principle adopted, for example, by the Costa Rican Civil Code (Article 1.114) by the French and Dominican Civil Code (Articles 1.694 and 1.695), the Haitian Civil Code (Article 1.467), by the Guatemalan Civil Code (Sections 1.451 and 1.452), the Honduran Civil Code (Article 1669), the Mexican Civil Code (Article 2.043), the Nicaraguan Civil Code (Article 2.726), the Panamanian Civil Code (Article 1.281), the Puerto Rican Civil Code (Article 1.419), or by the Venezuelan Civil Code (Article 1.554), and also present in Article 239 Proposals for Reform of the French law on obligations of 2013.

In addition, the assignor shall ensure that the credit can be assigned, taking into account the restrictions that may be applied to such an assignment: in case of generic rights, which cannot be identified; or in the case of a partial transfer, where the right is not divisible, etc. Finally, the assignor shall ensure that the credit is free from any rights and claims of third parties. Note that this is especially important in cases where the transferor has made multiple assignments to multiple assignees. Sometimes a pathological situation occurs when the second assignment affects rights that are not owned by the assignor. At other times, multiple transfers are regular situations: the assignor is the owner of the right in all assignments that have been made as securities.

Unlike what happens in the UNIDROIT Principles [Article 9.1.15 (c)], in OHADAC Principles there is no express reference to "credit has not been previously assigned to another assignee". Thus, repetitions are avoided since this obligation is already included in the statement that the assigned right is free from any rights or claims of third parties, which may be other assignees with a better right. This expression also is more accurate than the expression used by the UP, because terms such as "the claim has not been previously assigned to another assignee" appear to harm perfect legal situations that do not give rise to any problem, as is the case of successive assignments "chain" (assignor-assignee-subsequent assignee). In these cases, the right has been previously assigned to another assignee, but no pathology is observed, because that "other assignee" becomes "subsequent assignor" and assigns the credit again to a "second assignee". The first assignee legally acts because it is the owner of the right, with the peculiarity that it repeats the operation and assigns the right again, which does not necessarily happen in the multiple transfers of rights.

2. Guarantee of the subjective conditions of assignment

The second obligation of the assignor, under penalty of breach of contract, is to ensure the existence of the necessary conditions for the assignment with regard to the parties. The assignor shall ensure, therefore, that it is entitled to assign the credit or otherwise it makes mention of the need for obligor's consent due to the assignment involves an increase in the burdensomeness, the obligation of the obligor is personal or when the obligor and obligee have agreed such consent of the other party. This latter is perhaps the more interesting case, since it is the most difficult to estimate by the transferee, particularly if it has no access to the original contract between the obligor and the obligee for reasons of confidentiality. In such a case the assignee shall trust in the statements of the transferors concerning its power to assign the right.

In this sense, the transferor also guarantees that the obligor has no defences against it that can be asserted against the assignee. Along the same lines, it must be ensured that there is no right of set-off between the assigned claim and the debts of the transferor. This assurance is especially useful for the transferee, who assumes a significant risk until notice of the transfer or if the acceptance occurs, if the obligor can assert the set-off against the assignee but in relation to the transferor's debts. This situation is detrimental to the transferee because the value of the assigned credit is null (the obligor sets off a debt of the transferor and not a debt of the transferee). It must be also stressed that the Principles establish that the transferor ensures that there is not and there will not be a right of set off. That "there is not" refers to the time of conclusion of the assignment; that "there will not be" refers to the period between

the conclusion of the agreement and the time when the assignment is notified to the obligor, when it takes effect and the right to set off is extinguished. Logically, this guarantee does not extend to the right to set off between the assigned claim and the debts of the assignee, which already belongs to the scope of the assignee and does not result in any liability of the transferor.

Article 8.1.7: *Position of the assignee*

- 1. The assignee acquires the assigned right, as well as the accessory rights and guarantees.**
- 2. Notwithstanding the provisions of the preceding paragraph and unless otherwise stated by a guarantor, a guarantee made by third persons shall be extinguished if:**
 - a) the obligation of the obligor is more burdensome as a consequence of the assignment; or**
 - b) assignor and obligor had agreed the prohibition of the assignment of rights; or**
 - c) the guarantor had granted the guarantee with the condition that the right should not be assigned.**

COMMENT

1. Scope of the assignment

It is a common principle that the transferee acquires all the rights derived from the assigned right [Article 1.964 of the Colombian Civil Code; Article 1.109 of the Costa Rican Civil Code; Article 257.1 of the Cuban Civil Code; Article 1.692 of Dominican and French Civil Code; Article 1.444 of the Guatemalan Civil Code; Article 1.465 of the Haitian Civil Code; Article 6:142 of the Dutch and Suriname Civil Code; Article 1.668 of the Honduran Civil Code; Article 2.032 of the Mexican Civil Code; Article 1.280 of the Panamanian Civil Code; Article 1.418 Puerto Rican Civil Code; Article 1.479 of the Saint Lucian Civil Code; Article 1.552 of the Venezuelan Civil Code; Section 136 (1) of the English Law Property Act in relation to the "statutory assignment"; Section 19 (d) of the Bermuda Supreme Court Act; Article 9.1.14 UP; Article 11:201 PECL; Article III-5:115 DCFR]. For this reason, the OHADAC Principles guarantee the full transmission of

rights, including all accessory rights and rights derived from the assigned right. This implies a contractual duty of cooperation between the parties and, in particular, the transferor, which shall inform about all ancillary rights added to the assigned right and shall take all appropriate measures to enable the assignee to exercise these rights. In any case, the assignor and the assignee may agree on a solution other than the one mentioned, using a transfer only of the principal right. It is also recommended that the parties clearly agree on how to assign accessory rights in cases of partial assignment of a divisible right.

The aforementioned is particularly important in relation to the monetary rights, because if the late performance includes payment of a contractual interest, this one shall be paid to the assignee [e.g. Article 2,032 of the Mexican Civil Code and paragraph 2 of Article 6:142 Dutch and Suriname Civil Code].

Example 1: Buyer and seller agreed the payment by instalment of some goods and the payment of certain penalties in case of delay. The seller assigns the debt to a third party (assignee), which claims for recovery of interest in accordance with the Principles, due to the late payment by the obligor.

The transfer of accessory rights to the assigned right also applies to non-monetary-rights after determining what rights derive from the assigned right.

Example 2: Buyer and seller agree that any delay in delivery of goods will result in compensation in accordance with a penalty clause in the contract. The buyer assigns its right to receive the goods to a third party (assignee), which demands that the assignor pays for this compensation, in accordance with the Principles, due to the late delivery.

Similarly, the OHADAC Principles state, in order to preserve the integral transmission of the assigned rights, that the assignee shall be the beneficiary of all guarantees to ensure compliance (Article 1.109 of the Costa Rican Civil Code, Article 257.2 of the Cuban Civil Code, Article 1, 692 of the French and Dominican Civil Code, Article 1.668 of the Honduran Civil Code; Article 2.725 of the Nicaraguan Civil Code; Article 1.280 of the Panamanian Civil Code; Article 1,418 Puerto Rican Civil Code). There is here a preservation of the *status quo* with the aim of not to damage any of the parties involved. It is logical that the transferor, when it transfers its right, also assigns those additional rights to ensure the performance of the obligation. The transferee also has a special interest in that the transfer of securities occurs in order to ensure compliance. For the obligor, the transfer of securities does not alter its legal position and its obligation to fulfil in favour of the assignee. As for the guarantor, if it is not the same

as the obligor, its position also remains unchanged, since it is concerned by the performance of the obligor and not the beneficiary of the guarantee that it provides.

That said, it should be noted that the keeping of the guarantees relating to the assignee may cause a double-guarantee effect. As already noted, it is usual that the assignment of claims is made precisely to guarantee the performance of an obligation of the transferor. Thus, upon the default by the assignor, the compliance by the obligor of the assigned claim would be a first guarantee for the assignee. Upon the default by the obligor of the assigned claim, the performance by the guarantor would be a second security in favour of the transferee.

2. Exceptions to the conservation of the guarantees

Unlike the UP, the OHADAC Principles include three exceptions to the principle of conservation of guarantees, which may be considered as contractual practices in international trade concerning guarantees provided by third parties. Any of these exceptions implies that the guarantor shall not ensure the performance on behalf of the transferee and, therefore, the security shall be extinguished as a result of the assignment, unless there is a statement against the guarantor. One might think that the Principles are innovative in this area, but it is a more apparent rather than a real impression. The Principles do nothing different but explain a principle that informs the laws of the states within the OHADAC: the impossibility of putting the third party guarantor in a different and more adverse situation than that under which it provided the security.

The first exception to the conservation of the guarantee is where the obligor's obligation becomes more burdensome as a result of the transfer. In this case, the risk that the obligor will not comply significantly increases and the guarantor shall not automatically assume this risk, unless expressly stated otherwise. In this regard, notice that the transfer requires the consent of the obligor, but its consent alone cannot affect third-party guarantors, who may not agree with the assignment involving such a relevant change of circumstances. Article 1701.III of the Colombian Civil Code includes an interesting case when it provides that "if, for example, the first debt does not generate interests, and the second one does, the mortgage over the first debt shall not extinguish the interest".

The second exception concerns the case where the obligee and obligor agreed in the original contract on the prohibition of assignment of rights. In this case, the guarantor has provided securities in certain circumstances, which cannot be altered by an agreement between the assignor and assignee affecting third parties.

The third exception is where the third-party guarantor has provided the security under the condition that the guaranteed right is not assigned. In this case, the transfer takes effect (Section 9-401 UCC), but the Principles should protect the wish expressed by that guarantor. This rule is probably tacitly inferred from the UP, but needs to be made explicit regarding the legal certainty of the commercial trade of guarantees.

SPECIFIC TERMS OF ASSIGNMENT OF RIGHTS

1. Clauses on the consent to the assignment

The clause by which the transfer is prohibited is not recommended for monetary rights, since the payment is not dependent on the personal qualities of the obligee or the obligor and the transfer of credit involves a way for the assignor to obtain liquidity or ensure performance of other contracts. The use of the clause may be, however, more justified when the parties consider that the contractual rights have been granted *intuitu personae* or when they want to preserve absolute confidentiality of the contract:

Clause A: *Prohibition of assignment of rights*

"The transfer of any right conferred by this Agreement is prohibited".

The validity of the assignment of rights contravening this clause will depend on the law applicable under the rules of private international law and, in any event, can give rise to a claim for damages. However, this clause is always open to a change of opinion by the parties, manifested by the assignor's intention to conclude an agreement of assignment, and by the obligor throughout the consent required in such cases, in accordance with these Principles.

Moreover, the parties may expressly refer to the need for the obligor's consent in order for the assignment to take effect. Unlike the preceding clause, the assignment is not prohibited but requires acceptance of the obligor, as in the following clause:

Clause B: *Mandatory consent of the obligor to the assignment of rights*

"The assignment of any rights under this contract requires the agreement in writing of the parties."

In this case, the Principles comply with the will of the parties and require their consent. This type of clauses provides the parties with greater legal certainty and reduces the risk of dispute about terms that may be debatable, as for example, if a personal obligation has or has not been assigned, or if the assignment makes the obligor's obligation more burdensome. For greater security, this can be agreed in writing in order to record the obligor's consent. As in the previous clause, its use is recommended in case of transfers of non-financial rights, which may alter the configuration of the obligation. It is less desirable in case of transfer of monetary rights, because compliance is not affected by the personal quality of the transferee and because these assignments are a source of liquidity for the transferor and a way of ensuring the compliance with other contracts.

A variant of these clauses that call for the obligor's consent is that in which the obligor defines a time limit for objection to the assignment as from the notification of the assignment.

Section C: *Opposition to the assignment of rights by the obligor*

"The assignment of any rights under this contract does not require the agreement of the parties.

However, the obligor of the obligation may object to the transfer within [number of days], starting from the date in which it received notice of such assignment."

The specific feature of this clause is that the obligor's silence is understood as an acceptance of the assignment. However, the obligor may object to the transfer. As in the preceding clause, the obligor's opposition implies that this obligor is discharged of its obligation by performing in favour of the transferor and not of the transferee.

2. Clauses on adequate proof of the assignment

Notification can be made by any party in the assignment agreement, the transferor or the transferee (Article 1.449 of the Guatemalan Civil Code; Article 2.037 of the Mexican Civil Code; Section 9-406 UCC), although the transferee may have the greater economic interest in the performance of the obligor in its favour. It happens, however, that notification through the transferee creates a level of insecurity or mistrust of the obligor, due to the fact that the transferee is an unknown third party, without any legal

relationship with the obligor. Given that the actual assignment of rights has not taken place, there is an increased risk that the obligor pays a third party by mistake and then it is forced to pay the original obligee. To avoid these risks, it is advisable to include contractual clauses that provide greater security to the notice by the transferee and, in particular, require that transferee provides adequate proof of the assignment within a reasonable time. Thus, for example:

Clause: Adequate proof of assignment

"The transfer of any right conferred by this Agreement shall be notified to the obligor-counterparty. If it is notified by the assignee, the obligor-counterparty may request adequate proof of the assignment within a reasonable time. Until this proof is provided, the assignment shall not take any effect."

The appropriate proof required by the recommended clause could be a statement of the transferor with which the obligor does have a legal relationship, but also a copy of the assignment (Article 1.961 of the Colombian Civil Code; Article 2.721 of the Nicaraguan Civil Code), to the extent that confidentiality clause is not violated. Unlike the UP (Section 9.1.12), the PECL (Article 11:303), the DCFR (Section III-5: 120) or the UCC (Section 9-406), the OHADAC Principles have not regulated this provision of accredited proof because there is no common principle in Caribbean legal systems. It is therefore recommended that the parties include contract clauses that deal with this issue.

When proof of the transfer is requested, the effects of the transfer are suspended. This means that the obligor is no longer obliged to pay the transferee and will be discharged from its obligation if it pays the original obligee. Once adequate proof of the transfer has been given, the notification shall be effective from the time it was received or at a later date if it is specified in the notification (deferred effectiveness). The reference to the date on which the notice was given, provided that is subsequent to that of the adequate proof, is especially important in cases of multiple assignments. This can be illustrated by the following example:

Example: Assignor A transferred a claim to the assignee B, which immediately informs the obligor of this. Since the obligor has no relation to the transferee, that obligor may require adequate proof of the transfer. Until accredited proof of the assignment is given,

the obligor is obliged to the assignor and he will not have any obligation to pay assignee B.

3. Clauses on the place of performance of the assigned right

Since most legal systems of the OHADAC have not provided any rule about the place of performance of the assigned right, the Principles have not included a provision regarding the effect of the transfer on the place of performance. The UP is also silent on this point, in contrast with the PECL (Article 11:306) and the DCFR (Article III-5:117). Given this absence of codification, it is advisable for the assignor and obligor to include an express clause in the original contract, with which the assignee shall have to comply.

To this end, the performance of economic rights must be differentiated from that of non-economic rights. Regarding the first category, there may be greater flexibility in changing the place of payment, because it might not be excessively more burdensome. In any case, it may require that payment be made in the same State as the one in which the assignor was going to pay, to avoid the risk of increasing additional costs. For added security, and although it is now expressly provided in the Principles, by way of reinforcing of the Principles an additional stipulation could be included requiring that any additional cost for the obligor will be supported by the transferor or transferee, which are jointly and severally liable. This clause protects the obligor more than the application, for example, of the PECL or the DCFR, which only provides for the liability of the transferor. For these reasons, the following types of clauses are recommended:

Clause A: Place of performance of a claim

"In case of assignment of the monetary debt, the assignee may require payment anywhere in [insert State].

Any additional cost for the obligor caused by the change of the place of payment will be compensated by the transferor or the transferee, who are jointly and severally liable."

The issue is presented differently when a non-monetary right is transferred, since any personal obligation is potentially more burdensome if it is to be performed in a place other than the location initially agreed. Therefore, in line with the PECL and the DCFR,

it is recommended that contractual clauses prohibit any alteration of the place of performance:

Clause B: Place of performance of a non-monetary right

"The assignment of a non-monetary right may not involve any modification of the place of performance."

In any case, in order to avoid the rigidity of such clauses, the obligor can always accept the change of the place of performance once it knows the conditions of the transfer and the specific circumstances of the transferee.

4. Clauses about the repercussion of the assignee's performance

The transferor may assume the obligation of passing on to the assignee any performance made in its own favour. The OHADAC Principles, unlike UP, do not envisage this obligation because it is not unanimously recognised by the various legal systems analysed. However, and especially when the obligor's consent is not mandatory, it is advisable that the assignor and the assignee include this clause in the assignment agreement, so that any payment made by the obligor to the assignor is transferred to the assignee. Similarly, when non-monetary rights are assigned, the delivered goods to the assignor shall be forwarded to the transferee. Therefore the introduction of clauses like the following are recommended:

Clause: Imputation of the performance on behalf of assignee

"The transferor shall impute in honour of the assignee any performance made in favour of such transferor from the entry into force of this agreement until it has been served on the obligor."

In this regard, one of the differences of the proposed clause in respect of the UP is that the term "reimburse" the payment is avoided. This is because, in some languages, this term connotes the beneficiary-assignee has been returned the money that it first paid in advance, which does not happen in this case. Furthermore, the term "reimburse" may have the connotation of referring only to monetary rights, ignoring other situations such as delivery of goods by the transferor to the transferee.

The term referred to the clause is the period between the entry into force of the assignment agreement and the notification of this to the obligor. The case is especially important: the obligor, unaware of the transfer agreement, pays to the assignor in good faith and with full diligence on its part. However, since the transferor is aware of the existence of the transfer agreement, it is obliged to repay the amount to the transferee. In this regard, a reference to the "entry into force " of the contract is preferable if this is later or delayed with respect to the time of conclusion of the assignment. Anyway, the obligation is not referred to other time periods. Payment prior to assignment agreement does not create any obligation to reimburse in favour of the transferee, unless otherwise agreed by the parties. Furthermore, the performance of the obligor in favour of the assignor after notice of the assignment has already indicated some negligence on the part of the obligor and unjust enrichment of the transferor. These circumstances will be solved by the law applicable according to the rules of private international law.

5. Clauses of additional costs reimbursement

According to OHADAC Principles, the obligor is entitled to be compensated by the additional costs generated by the assignment, unless otherwise agreed. The compensation is payable by the transferor or transferee, including a joint and several liability in accordance with the rules of the OHADAC Principles. However, the Principles are silent on which party should bear these costs and how the actions of reimbursement operate between the assignor and the assignee. The governing law of the contract will determine which party shall finally bear the compensation by additional costs depending basically on what the parties agree in the contract. For example, the Proposals for Reform of the French law on obligations of 2013 establishes that the costs should be borne by the transferee unless otherwise agreed (Article 240). Haitian Civil Code (Article 1.471) has a similar provision. For these reasons, it is advisable that an allusion to the reimbursement of costs is made in the contract, with provisions as follows:

Clause: Reimbursement of paid additional costs

"The assignee shall reimburse to the assignor any amount paid or discounted to the obligor by way of additional costs generated by the assignment."

Section 2. Assignment of obligations

Article 8.2.1: Scope of application

- 1. The assignment of obligations occurs by agreement of the obligee or the obligor, called the “assignor”, with a third party, called “assignee”, who agrees to perform the obligations in a contract.**
- 2. This Section does not apply to assignments of obligations governed by special rules on transfer of a business.**

COMMENT

1. Proposal for a functional regulation

The OHADAC Principles on the assignment of obligations are structured, as in the case of the assignment of rights, on two objectives. The first objective is to give the maximum importance to the freedom of choice of the parties, which is essential in systems such as Belize, Guyana and Trinidad and Tobago, and in general in systems, which, due to their common law tradition, have no legal provisions on the transfer of obligations. The second is to collate the rules on which there is a consensus in comparative law of the OHADAC, ignoring matters where there is no lowest common denominator. Consequently, a functional rule is proposed, which does not have too much of an effect on the codification of the assignments of obligations, as much on its effectiveness in respect of the non-contracting third parties.

With this idea, the Principles are proposing rules structured into seven articles, organised according to the points of special interest to the parties: conditions for the conclusion of the assignment (Article 8.2.1 on the definition, Article 8.2.2. about the permitted terms of assignment, and Arts. 8.2.3 and 8.2.4 about the objective and subjective conditions, respectively) and effectiveness of such assignment (Article 8.2.5 on the obligor's discharge conditions, Article 8.2.6 on its subsidiary obligations, and Article 8.2.7 on joint and several obligations). In any case, the full application of the Principles requires that they are chosen in the original contract, especially for determining the position of the obligor, and also in the assignment agreement in order to regulate the relationship between the transferor and the transferee.

For the rules to be useful to operators without imposing non-consensual solutions in the OHADAC States, important points have not been treated, concerning the scope of information provided to the obligee in order to accept the assignment or situations that result from the assignment such as confusion of debts or concurrence in the same person of the status of obligor and obligee. Legal consequences arising from the situation of invalidity or nullity of legal relations concerned are not regulated either, except with regard to the transmission of the defences of the transferor or the transferee. Thus, provisions concerning the nullity or invalidity of the contract from which the debt arises (object of the assignment) are not included, as well as the effect of the nullity of the main contract between the original obligor and the assignee (cause of the assignment), since few systems contain a regulation in this regard, with exceptions such as the Dutch and Suriname Civil Code (Article 6: 158). Voidness and invalidity of the proper assignment contract are not considered either, particularly if original obligor's obligation resurfaces, except with respect to third parties in good faith. Consequently, the case where the obligee may claim compensation from the transferee for damages resulting from the defective assignment (e.g. by extension of guarantees of third parties in good faith) is also not addressed. There is no unanimity on this point, although some articles can be noted as paradigmatic, such as Article 816 of the Costa Rican Civil Code; Article 1.468 of the Guatemalan Civil Code; Article 2.057 of the Mexican Civil Code; Articles 2.097 and 2.103 of the Nicaraguan Civil Code; Article 1.162 of the Puerto Rican Civil Code; and Article 1.094 of the Panamanian Civil Code. Compensation will be determined by the law applicable under the rules of private international law.

2. Definition and scope

The Principles do not exclusively focus on the assignment of monetary debt, but refer to any obligation contractually determined (e.g. Article 1.690 of the Colombian Civil Code; Article 9.2.1 UP). This assignment of obligations has two types. On the one hand, it may refer to the agreement in which the original obligor assigns its obligation to assume the debt to the assignee. On the other hand, it can be pointed out the agreement of *expromissio* whereby it is the obligee, not the obligor, which makes an agreement of assumption of the obligation with the assignee. Despite their significant differences, these terms have a common consequence, which is that a third party assumes the obligation generated under a previous relationship with another obligor. Therefore, many instruments provide rules with a common core, for instance, the UP and the DCFR, which is less categorical.

In this context, the OHADAC Principles seek to provide a useful mechanism that is accepted in the various systems of the OHADAC with respect to contractual assignments. They therefore do not apply to transfers of non-contractual and quasi-contractual obligations arising out of the contracts. Moreover, they cannot be applied to the assignment of obligations subject to special rules on joint transfer of a business or assets. There are individual agreements of assignment of obligations for these assignments and they are therefore excluded from the Principles (Articles 1.465 and 1.466 of the Guatemalan Civil Code; Article 9.2.2. UP).

Example: A company owes several debts to companies B, C and D. When company A is absorbed by company E, all A's debts are assumed by E. This assignment is excluded from the Principles.

Article 8.2.2: *Types of assignment*

- 1. Assignor and assignee may agree to:**
 - a) the discharge of the original obligor; or**
 - b) a subsidiary obligation of performance by the original obligor in the event that the assignee does not perform its obligation properly; or**
 - c) joint and several obligations of performance by the original obligor and the assignee.**
- 2. Different types of assignment may be agreed upon concerning different obligations included in the same contract.**
- 3. In the absence of express or tacit agreement on the type of assignment, the original obligor and the assignee shall be jointly and severally liable.**

COMMENT

Several OHADAC legal systems establish classifications of types of assignment of obligations (Article 1.694 of the Colombian Civil Code; Article 2.101 of the Nicaraguan Civil Code; Article 9.2.5 UP; Article III-5:202 DCFR). But even in those systems which ignore any classification by virtue of the common law, all kind of agreement between

the parties in this regard are admitted through “novation” [*Tolhurst v Associated Portland Cement Manufacturers Ltd* [1902] 2 KB 660; *Essar Steel Ltd v The Argo Fund Ltd* (2006) EWCA Civ 241, *Co-Operative Group (CWS) Ltd v Stansell Ltd & Anor* (2006) EWCA Civ 538].

Under these circumstances, the OHADAC Principles are restricted to ensuring the maximum freedom of choice of the parties. Thus, the assignor and assignee may agree on three types of assignment that may be included in the same contract concerning different obligations: a discharge of the original obligor, an obligation of subsidiary performance by the original obligor or joint and several liability of the original obligor and the assignee. Before dealing with each term, it must be pointed out that, in order to find the maximum consensus among the OHADAC States, the Principles have avoided innovative terms such as those included in the DCFR, which refers to "complete substitution" with relation to the obligor's discharge, to the "incomplete substitution" referring to the subsidiary obligation of the transferor, and to the "addition of obligors" in reference to the joint obligation of the transferor and transferee.

As noted, the first mode of transfer involves the discharge of the original obligor and the new obligor assuming the debt in full, without any liability or burden for the original obligor (Article 814 of the Costa Rican Civil Code; Article 1.276 of the French and Dominican Civil Code; Article 1.462 of the Guatemalan Civil Code; Article 1100 of the Saint Lucian Civil Code; or in the English "novation": *British Energy Power & Trading Ltd & Ors v Credit Suisse & Ors* (2008) EWCA Civ 53; *Shell UK Ltd & Ors v Total UK Ltd & Ors* (2010) EWCA Civ 180, *Bexhill UK Ltd v Razzaq* (2012) EWCA Civ 1376]. Due to the lack of consensus among the Caribbean States, the Principles do not regulate what happens in the event of transfers of obligations when there are several original obligors. Whether the substituted obligor is the only discharged obligor in the amount that corresponds in the partial obligations is an issue governed by the applicable law under the rules of private international law. In joint and several obligations, this issue also depends on the provisions of domestic law, although it is true that many systems, especially of Napoleonic influence, lays down the discharge of all joint and several obligors by the “novation” of one of them, unless the obligee has demanded accession (Articles 1.576 and 1.704 of the Colombian Civil Code; Article 819 of the Costa Rican Civil Code; Article 1.281 of the French and Dominican Civil Code; Article 1.065 of the Haitian Civil Code; Article 1.409 of the Honduran Civil Code; Article 2.109 of the Nicaraguan Civil Code; Article 1.110 of the Saint Lucian Civil Code; Article 1.229 of the Venezuelan Civil Code; Article 1.445 of the former Suriname Civil Code). The discharge

of the obligor means that this obligor cannot guarantee the future solvency of the new obligor. However, since there is no unanimity, the Principles do not govern the liability of the original obligor for the insolvency of the new assignee-obligor if this insolvency is known and precedes the transfer (Article 1.276 of the French and Dominican Civil Code; Article 1.061 of the Haitian Civil Code; Article 1.485 of the Honduran Civil Code; Article 1.092 of the Panamanian Civil Code; Article 1.160 of the Puerto Rican Civil Code; Article 1.318 of the Venezuelan Civil Code; Article 1.439 of the former Suriname Civil Code; and with a different scope, Article 2.053 of the Mexican Civil Code). It depends on the law applicable under the rules of private international law.

Example 1: A sells to B industrial machinery worth \$1 million, payable in ten instalments of \$100,000. After paying \$500,000, B resells the machinery to C for \$900,000. The parties agreed in the contract to pay an initial deposit of \$400,000 to B (reseller) and pay the remaining payments to A (original seller) in the agreed time, discharging to B. After A (original seller) has accepted the assignment, the non-performance by C (assignee) does not entitle A to claim against B (reseller) in its position of transferor.

The second form of assignment of obligations is where the original obligor maintains the legal relationship of having subsidiary liability for the case when the transferee does not adequately perform its obligations. Therefore, its cause is an assignment of debt without discharge.

Example 2: In the same case of example 1, for the seller to accept the assignment, the contract establishes that reseller B will have subsidiary liability if the new buyer C does not perform the instalments due to initial seller A. In this context, before any default of the transferee C, seller A may claim against the reseller B in its position of transferor.

With the third form of assignment, the original obligor continues to be bound pursuant to the initially agreed terms. What is different here is that a new obligor is incorporated. This accumulation of obligors does not mean substitution of obligors, but creates a joint and several obligation between the new and the former obligor, under which both are liable for the entire debt with respect to the obligee. Although a joint and several obligation is more characteristic in assignments of total debt, it can also occur in cases of assumption of a part of the debt, for which the transferee is bound by the same conditions as the original obligor.

Example 3: Obligor A concludes a contract with B, making it an obligor of the obligee C, under the same conditions as the original obligor. The obligee C may claim performance from both A and B.

Finally, special attention must be paid to the initial expression "assignor and assignee may agree" about the appropriate form of assignment. It is clear, therefore, that the parties in the assignment contract establish the type of assignment, with the consent of the other party when required, in accordance with the following provisions. The OHADAC Principles differ here from the UP, which state that the "obligee" may discharge to obligor, retain it or make it a joint obligor. At first sight, it appears that the Unidroit Principles grant an exclusive right that excludes the obligee without the assignor and the assignee being able to decide on this issue. Conversely, the OHADAC Principles are based on the maximum respect of the autonomy of the parties. The transferor and the transferee agree on the type of assignment, and the other party can only consent or refuse the agreed type.

2. Silence of parties

To determine the effect intended by the parties, the contract should be interpreted and completed. It may be that there is an implied intention of the parties, deducible from the content and context of the transaction, in particular, from the negotiation, from the backgrounds, from purposes and from other contract terms. This is the case,

for example, of clauses that govern the remedies open to the original obligor against the new obligor. It can be inferred that is this whether there are joint and several liabilities, as a result of an agreement of addition of obligors, or whether there are a secondary liability, a result of transmission of debt without discharge, from the reimbursement. It must be also stressed that the obligee has to consent to the assumption of debt, including their effect on the original obligor, so that some indication of the will of the parties could be inferred from the communications to that obligor or from the wording of the consent of the obligee.

When the contract does not establish the type of assignment and a solution cannot be inferred from its terms, the OHADAC Principles opt, as the UP and the DCFR (Article III-5: 202), for establishing a joint liability between the transferor and the transferee. This solution is also inferred from most Caribbean systems where novation is not presumed (e.g. Article 815 of the Costa Rican Civil Code). This secondary solution is justified by the stability and “life” of the contract and, in particular, because the original obligor shall continue liable to the obligee under the terms originally agreed. This can only be achieved by establishing a joint liability between the original obligor and the assignee, which promotes legal certainty and protects the expectations of the obligee. Conversely, if as a subsidiary solution a secondary liability of the original obligor is established, the terms of the original contract would be disproportionately altered, since the parties have expressed that intention.

Article 8.2.3: *Conditions relating to the assigned obligations*

- 1. Obligations, either of the payment of a monetary sum or of the performance of non-pecuniary obligation, may be assigned if they satisfy the following conditions:**
 - a) the obligations exist at the time of the assignment or are recognisable future obligations; and**
 - b) the obligations are individually identified or are recognisable.**
- 2. An obligation may be totally or partially assigned, and in favour of one or several assignees. The partial assignment or in favour of several assignees is valid only if the assigned right is divisible.**

COMMENT

As is stated in the assignment of rights, not only duties to pay a monetary debt but also any other obligation of performance may be assigned. It is a principle of consensus in the OHADAC, which tries to respect the autonomy of the parties.

Similarly, not only existing obligations at the time of assignment and those which are individually identified may be assigned, but also future or generic obligations, provided that they can be identified by the parties. Unlike what happens in relation with transfer of rights, such a principle is rare in written law, but in any case it is a widespread and fully accepted contractual practice.

Finally to give the parties maximum importance and reduce the regulations to a generally agreed minimum, it must be underlined that the maximum permissiveness of the transfer of obligations can conflict with the limit of the mandatory rules and public order. So much so, that the assumption can be made for one or more assignees and for all or part of the debt. The only requirement is that the obligation results be divisible, since otherwise the transfer distorts and perverts the configuration of the obligation.

Example: A sells a high-tech asset to B worth \$300,000, payable in 3 instalments of \$100,000. While the two instalments are pending, B resells the asset for \$ 250,000 to C. In the resale contract, the parties agree that the re-buyer (transferee) pays the second instalment of \$100,000 to the seller (obligee) and the other one of \$ 150,000 to the re-seller, which would continue bound by the third instalment. This is a partial assignment of debts, only per one instalment, which can be extremely useful for the assignor by cash or liquidity reasons.

Article 8.2.4: Conditions relating to the parties

- 1. The assignment by the obligee does not require consent of the obligor unless in the contract:**
 - a) that consent is envisaged; or**
 - b) the prohibition of assignment is stipulated.**
- 2. The assignment by the obligor requires the consent of the obligee.**

- 3. The consent may be given expressly or tacitly and previously, simultaneously or subsequently to the conclusion of the agreement of assignment.**
- 4. In the absence of consent, the original obligor remains bound to the obligee. The performance by the assignee shall be governed by the applicable rules on performance by a third party included in article 6.1.6 of these Principles.**

COMMENT

1. Assignment by the obligee

The OHADAC Principles state that, in the event of transfer of the obligation by the obligee, the obligor's consent is generally not required. This is a widely accepted principle in the different systems of the OHADAC Member States [Article 1.690 *in fine* of the Colombian Civil Code; Article 1.274 of the French and Dominican Civil Code; Article 1.459 of the Guatemalan Civil Code; Article 1.059 of the Haitian Civil Code; Article 1.484 of the Honduran Civil Code; Article 2.096 of the Nicaraguan Civil Code; Article 1.091 of the Panamanian Civil Code; Article 1.159 of the Puerto Rican Civil Code; Article 1.103 of the Saint Lucian Civil Code; Article 1.316 of the Venezuelan Civil Code; Article 1.437 of the former Suriname Civil Code; Article 248 of the Proposals for the Reform of the French law on obligations of 2013; Article 9.2.3 UP; Article III-5:203 DCFR). However, there are two other cases in which the obligor's consent is required in accordance with the freedom of the parties. Firstly, when the parties have included this consent in the contract [*Barbados Trust Company Ltd v Bank of Zambia & Anor* (2007) EWCA Civ 148] and secondly, when the parties have prohibited the assignment of obligations in the contract by [*Co-Operative Group (CWS) Ltd v Stansell Ltd & Anor* (2006) EWCA Civ 538]. In this regard, the prohibition does not preclude the validation of this assignment by a subsequent agreement with the other party. Consequently, the obligor's consent therefore acts as a subsequent agreement that has precedence over the previous agreement: the original contract which prohibited the assignment. It is therefore acknowledged that contracts are not frozen but can be changed according to the wishes of the parties, which must be respected, in accordance with the primary purpose of the Principles on this point.

Aside from these two exceptions, the transfer of obligations by obligee constitutes an agreement in favour of a third party, the obligor, which is the beneficiary of the

assignment. Provisions relating to the waiver of this right by the obligor, set out in Section 2 of Chapter 5 of these Principles may therefore apply. This could create a joint and several liability between the transferee, which is bound by the agreement with the obligee, and the original obligor, which waives the discharge (Article 1695 of the Colombian Civil Code; Article 2,102 of the Nicaraguan Civil Code).

2. Assignment by the obligor

The OHADAC Principles reflect a common denominator of all the OHADAC systems, whereby the transfer of the obligation by the obligor requires the consent of the obligee [Article 263 of the Cuban Civil Code; Article 1.275 of the French and Dominican Civil Code; Article 1.459 of the Guatemalan Civil Code; Article 6:155 of the Dutch and Suriname Civil Code; Article 1.438 of the former Suriname Civil Code; Article 1.484 of the Honduran Civil Code; Article 2.051 of the Mexican Civil Code; Article 1.091 of the Panamanian Civil Code; Article 1.159 of the Puerto Rican Civil Code; Article 241 of the Proposals for the reform of the French law on obligations of 2013; *Graiseley Properties Ltd & Ors v Barclays Bank Plc & Ors* (2013) EWCA Civ 1372]. The obligee is only entitled to discharge the obligor or modify the requirement that an obligor had assumed, since the obligor cannot unilaterally decide on the assignment of the obligation, so altering the position of the obligee without its consent. The need for consent can be explained using two test cases.

Under the first one, it is agreed to discharge the obligor or relegate its obligation, making it a secondary one. Here the requirement of consent of the obligee is common in international texts [Article 9.2.3 UP; Article 12:101 PECL; Article III- 5:203 (1) DCFR]. The main reason is that the assignment of debt implies a modification of the contract, on which the original parties must agree. This consent plays an essential role in discharge-transmissions, where the original obligor is discharged of its obligation. There is no doubt that this is a substantial modification of the contract, which cannot be understood without the consent of the obligee-counterparty. Consent also plays a key role in cases of non-discharge transmissions, where the original obligor is presented as having secondary liability in the event of the non-performance of the new obligor. The position of the original obligor changes: it is no longer the principal obligor, which means that there is a significant change in the contract terms.

In the second test case, a joint and several liability is agreed between the original obligor and the assignee. Again, the OHADAC Principles opt for the more consensual and less innovative solution, i.e., even in cases where the obligation is created between the obligor and the transferee, the obligee's consent is required. This is a change that may be relevant to the obligee and will therefore lead it to take a stance.

It is true that for the obligee, the creation of joint and several obligations has the advantage of increasing its chances of successful payment. However, it also has disadvantages in the case where confidential data about the contract may be revealed. The solution adopted by the Principles departs from other more innovative ones, like those found in certain systems which, as a result of the many obligors for the obligee, do not require the obligee's consent. As a result, the consent of the obligee is presumed unless it expresses its objection [Article III- 5:203 (3) DCFR].

In this context, we should remember something already stated in reference to the modalities of assignment. These are agreed by the transferor and transferee; the obligee only consents or not the form of the assignment chosen by the transferor and transferee, but the obligee is not entitled to choose the type of transfer, unless this right has been conferred by the transferor and the transferee.

3. Form and time of the consent

The third and fourth paragraphs refer to common rules for any case where the consent of the other party is required. Paragraph 3 refers in particular to the possibility that the consent is express or tacit, for example, accepting partial payments or interests by the new obligor and on its own behalf (Article 1.461 of the Guatemalan Civil Code; Article 2.052 of the Mexican Civil Code).

This third paragraph also covers the possibility that the consent of the other party is prior, simultaneous or after the transfer agreement. It is worth to repeat here the considerations about the consent of the transfer of rights. As noted there, it is maybe advisable to obtain the consent of the obligor when the assignment is signed. Otherwise, the consent in advance of the other party (Article 9.2.4 UP; Article 12:101 PECL) has the advantage that the transferor and the transferee negotiate the transfer agreement with full certainty of its effectiveness, but also it is true that creates risk of distortions between the terms accepted by the obligor and the terms of the subsequent contract. For its part, the consent subsequent to the agreement has the advantage that the other party knows the terms of the assignment exactly. However, it entails a risk of frustration of the assignment by the subsequent opposition of the obligor. While the consent of the other party does not occur, it should be understood that the assignment agreement includes a condition precedent under which the transfer agreement signed has no effect until the obligor accepts such assignment.

4. Consequences of lack of consent

It is important to determine the consequences of the absence of required consent, either of the obligor or of the obligee. In this regard, the Principles have adopted the

widely accepted rule that the lack of acceptance means that the original obligor remains bound and has to pay the debt on the agreed time. The Principles also regulate the particular case of performance by the assignee without the consent of the obligee, either because the consent was not obtained or because the assignment is an "internal" assumption between the original obligor and assignee, which does not provide rights to the obligee. In this case, performance by the transferee will be treated as payment on behalf of a third party (the original obligor): Articles 1.691 and 1.694 of the Colombian Civil Code; Article 819 of the Costa Rican Civil Code; Arts. 1.275 and 1.277 of the French and Dominican Civil Code; Article 1.060 of the Haitian Civil Code; Article 2.101 of the Nicaraguan Civil Code; Article 1.104 of the Saint Lucian Civil Code; Article 1.441 of the former Suriname Civil Code; Article 1.317 of the Venezuelan Civil Code; Article of the 256 proposals for the Reform of French law on obligations of 2013; *North & Anor v Brown & Anor* (2012 EWCA Civ 223), concerning the vicarious performance. Given that in these cases there has been no actual transfer of the obligation, but mere delegated performance, the Principles opt for the reference to the rules of the performance on behalf of a third party contained in Article 6.1.6 of these Principles, unlike what is suggested by the UP (Article 9.2.6).

Note, however, that these Principles, in the absence of consensus among the legal systems of the OHADAC States, do not rule on the validity and effectiveness of legal relations without consent (as set out for example in Article 1.487 of the Honduran Civil Code). These issues will be governed by the applicable law in accordance with the rules of private international law. For example, the Principles do not determine the validity of the assignment agreement concluded without consent. This agreement of the parties will have to suffice since it will be up to them to draw up the transfer agreement as an obligation conditional upon obtaining the obligee's consent. Without this consent, the contract will be terminated, including internal obligations between obligor and transferee. For resolving cases where the parties have not reached an agreement, we observe two trends in the systems that do contain rules on this point. The first one, present in instruments such as the German Civil Code, simply establishes that the fact that the obligee has not given its consent removes all effectiveness from the assignment of the obligation [§ 415 (2) BGB]. The second one, followed by the UP, qualifies this solution and acknowledges the validity and effectiveness of the transfer between the obligor and the transferee, as an "internal" assumption, which creates rights and obligations between them [Article 9.2.6 (1) UP]. With regard to the obligee, no rights and obligations are created, since they have not given their consent. The obligee therefore retains its actions against the original obligor and not against the transferee [Article 9.2.6 (2) UP]. If the transferee pays, performance is functionally

considered as payment on behalf of third persons, which cannot be refused by the obligee unless the payment concerns a personal obligation [Article 9.2.6 (1) UP].

In the framework of the consequences of the assignment without the consent of the other party, the case of an assignment that hides the fact that there is a contractual prohibition or requirement of consent is particularly interesting. The assignee could claim to the assignor for bad faith or negligence in the negotiation and conclusion of the assignment contract.

Article 8.2.5: *Discharge of the original obligor*

- 1. In case of discharge of the original obligor, its defences against the obligee may be asserted by the assignee.**
- 2. The defences of the assignee against the original obligor may not be asserted against the obligee.**
- 3. The claims of the assignee can be set off with those of the obligee. Nevertheless, the claims of the original obligor cannot be set off after its discharge.**
- 4. The discharge of the original obligor discharges the guarantees made for the performance, unless otherwise stated by the guarantor.**

COMMENT

1. Defences of the original obligor

In the legal systems of the OHADAC States, the attribution to the assignee of all the defences of the original obligor is commonly accepted [Article 265 of the Cuban Civil Code; Articles 1.463 and 1.467 of the Guatemalan Civil Code; Article 2.056 of the Mexican Civil Code; Article 242 of the Proposals for the reform of French law on obligations of 2013; Article 9.2.7 UP; Article 12:102 PECL; Article III-5:205(1) DCFR]. It is therefore a complete transmission of the legal relationship based on the fact that the transferee acquires the same obligations and defences as those of the original obligor. The integrity of the assignment is positive for the new obligor, who knows in advance

all available defences at its disposal. However, it also does not imply risks to the obligee, whose contractual position is not altered.

Example: A is designing and manufacturing industrial machinery to B, worth \$500,000. B must pay half at the time of order and the other half at the time of delivery. Before delivery of the machinery, B resells machinery to C, which assumes the debt against the manufacturer. If the manufacturer demands the payment of the price from C, this new obligor may preclude such payment for as long as the manufacturer has not delivered the machinery (*exceptio non adimpleti contractus*), under the same conditions that B could have asserted.

In any case, it must be remembered that these triangular relationships often result from the consent of all parties: the obligors, as signatories to the transfer agreement; the obligee, as the party that agrees to the transmission. This means that, in most systems, some of these exceptions are negotiable for parties. Obligor could agree in the contract to reduce defences and exceptions and the obligee could easily agree if this is to its benefit. The obligee may also: a) consent to an extension of the defences of the new obligor by accepting a contractual change in its position; b) to accept the assignment on condition that the scope of the defences of the new obligor is reduced or modified. In the latter case, the effectiveness of the contract will depend on whether or not obligors have included the obligee's claims.

Similarly, it should be noted that the law applicable under the rules of private international law can qualify this solution. For example, domestic law determines whether there are personal exceptions that are therefore out of the scope of transmission (Article 1.467 of the Guatemalan Civil Code; Article 2.056 of the Mexican Civil Code). In addition, domestic law determines whether the transmission of defences extends to those that were created after the substitution without the consent of the obligee.

Lastly, the domestic law that governs the contract between the obligee and the obligor (the *expromissio contract*) will determine the defences that the new obligor has against the obligee. This case has not been treated by the Principles because it is a purely contractual matter depending on the contract between the obligee and the new obligor, without affecting third parties, which is the case that these Principles refer to.

2. Defences between obligors

It is a common principle in OHADAC States that the assignee cannot assert any defence against the obligee, if these defences arise from the contract of assignment concluded between the original and the new obligor. This is because such exceptions are born

from a relationship in which the obligee has not participated, whose contractual position cannot be modified, unless otherwise specified. In particular, the transferee cannot assert to the obligee the breach of contract of transfer of debt by the former obligor: *the exceptio non adimpleti contractus*. Non-performance of this type belongs to the scope of relations between the both obligors and that does not include the obligee.

Example: A sells to B industrial machinery worth \$600,000, with \$200,000 payable at the time of the order, \$200,000 payable at the time of the delivery and \$200,000 within the next two years. After it has delivered the machinery and paid two of the three instalments, B resells the machinery to C, which assumes the debt against the manufacturer. The manufacturer may demand payment from C (re-purchaser and transferee), who cannot refuse the payment on the grounds that B (re-seller and transferor) has not delivered the machinery to C.

From a transnational point of view, the UP are silent in this regard, but the impossibility of asserting defences against the obligee arising from the relationship between obligors is derived from the general functioning of its rules and from *a sensu contrario* interpretation of its Article 9.2.7 (which only allows to asserting defences from the relationship between obligee and original obligor). Meanwhile, the DCFR contains the prohibition that, in the context of a complete or incomplete substitution, the new obligor asserts defences or rights derived from the delegation contract signed with the original obligor [Arts III-5:205 (3) and III-5:207 (1)].

3. Set-off of the claims

Special mention must be made of set-off rules for cases of assignment of monetary debts. In this sense, set-off with regard to the assignee's claims seems possible, insofar as the obligee has consented to the assignment and has thus accepted this possible method of payment. This rule may however vary, as a result of the freedom of the parties (novation agreements), with maximum observance of the common law systems, such as Belize, Guyana and Trinidad and Tobago, which have no written law about this question [*Hughes v Groveholt Ltd* (2005) EWCA Civ 897]. Firstly, if the original contract between the obligee and the obligor excluded the possibility of setting off claims, this exclusion is asserted against the transferee. In fact, the transferee has the obligation to fulfil the terms originally agreed with the original obligor. Secondly, and conversely, the third party may be only willing to assume the debt if the possible set-off of claims is included, which will only have effect if it is accepted by the obligee. Thirdly, it is possible that the obligee accepts the transmission under the condition that eventual set-off is excluded. This happens, for example, in

cases where the obligee did not include such clause in the original contract because it had no prior relationship with the original obligor, unlike what happens with the third party, with which it has previously done business. From a transnational perspective, neither the UP nor the DCFR have rules with respect to this set-off of claims between the obligee and the obligor-transferee. Nevertheless, the assignee's right to assert its own claim against the obligee's claim is included in the general rules of set-off.

After analysing the set-off of the assignee's claims, these Principles deal with the set-off of claims of the original obligor. It is commonly accepted that, once the original obligor has been discharged, the new obligor may not assert any right to set-off that the original obligor had. The original obligor has been discharged and is no longer liable to the obligee. Claims belonging to that obligor can therefore not be asserted by the assignee, who may consequently only assert the rights of set-off of its own claims. This also has practical relevance for the obligee who agrees to the substitution of obligors. If, after substitution has taken place, the original obligor claims the payment of debts not covered by the substitution from the obligee, the obligee is obliged to pay. It cannot assert the set-off of claims because it agreed with the full discharge and substitution of the obligor. The UP (Article 9.2.7) and the DCFR [Article III -5: 205 (2)] follow this solution by stating that the obligor-transferee may not assert any right of set-off that the original obligor had against the obligee.

4. Extinction of the guarantees

There is a common principle in the OHADAC States, whereby the transfer of obligations extinguishes any personal guarantee or security that the obligor had provided to the obligee for performance (Article 1.701 of the Colombian Civil Code; Article 820 of the Costa Rican Civil Code; Article 264 of the Cuban Civil Code; Articles 1.278, 1.279 and 1.281 of the French and Dominican Civil Code; Article 1.063 of the Haitian Civil Code; Article 6:157 Dutch and Suriname Civil Code; Articles. 1.443 and 1.445 former Suriname Civil Code; Article 1.463 of the Guatemalan Civil Code; Article 2.055 of the Mexican Civil Code; Article 2.106 of the Nicaraguan Civil Code; Article 1.108 of the Saint Lucian Civil Code; Article 1.321 of the Venezuelan Civil Code; Article 243 of the Proposals for the reform of French law on obligations of 2013). This is a common principle in comparative law, based on the fact that the guarantor has provided the guarantee according to the risk of performance or not (solvency or insolvency) of the original obligor. The advent of a new obligor introduces a variable outside the assessment of the guarantor, which has not participated in the negotiation of the assignment and could not calculate *ex ante* the risk of insolvency of the transferee.

National law applicable under rules of private international law determines whether extinction occurs even though the assignment is later declared void or invalid.

However, this general principle has an exception: the guarantee attached to performance by the assignee is maintained if the guarantor, whether the original obligor or a third party, accepts it. This is reflected in the UP (Article 9.2.8), in the PECL (Article 12:102), in the DCFR [Article III -5: 205 (5)] and many of the OHADAC systems (e.g. Article 820 of the Costa Rican Civil Code; Article 1.463 of the Guatemalan Civil Code; Article 2.055 of the Mexican Civil Code; Article 2.106 of the Nicaraguan Civil Code; Article 1.443 of the former Suriname Civil Code; Article 1.108 of the Saint Lucian Civil Code; *Caterpillar Financial Services Ltd v Goldcrest Plant & Groundworks Ltd & Ors* (2007) EWCA Civ 272; *Rhodia Rhodia International Holdings Ltd v Huntsman International UK Ltd LLC* (2007) EWHC 292]. Due to the lack of a clear and unanimous solution among the different systems analysed, the OHADAC Principles have not included a second exception, under which a guarantee is not void if the guarantor is the new obligor [Article 9.2.8 UP; Article 12:102 PECL; Article III-5:205 (5) DCFR]. In any case, this lack of regulation is easily resolved by the acceptance of the obligee, on condition that the new obligor keeps the guarantees that it had provided in favour of the former obligor. These Principles have also not included a third exception under which the security is maintained if it covers property whose ownership is transferred from the original obligor to the assignee previously or simultaneously to the assignment of obligations. This is because some systems, such as Nicaragua, require the termination of the guarantee and the formation of a new one (Articles 2.107 and 2.108 Civil Code). At any event, as it will be seen below, it is recommended to include a contractual clause in this sense, because of its significant legal and economic function.

Article 8.2.6: *Subsidiary obligation of the original obligor*

- 1. When the original obligor becomes a subsidiary obligor, the assignee has the rights and obligations laid down in the previous Article.**
- 2. The original obligor, when it is subsidiarily liable, may assert the set-off of its own claims.**
- 3. The guarantees made before the assignment shall ensure the subsidiary performance of the original obligor.**

COMMENT

1. Position of the assignee

When the original obligor agrees to an obligation of subsidiary compliance, the assignee shall have the rights and obligations provided by the preceding article. This is based on the fact that the assignee is placed in a position of main obligor, leaving the original obligor as the subsidiary obligor. It is logical, therefore, that the transferee, which is the main obligee, may assert against the obligee all defences of the original obligor, avoiding by this way that the defences are relegated to the background, in the event of a subsidiary claim against the original obligor. At the same time, it is also justified that the transferee may not assert any exception against the obligee arising from the relationship between the assignee and the original obligor, as well as the transferee cannot claim any right of set-off belonging to the original obligor, since this would create an anomaly in the payment, made with assets not included in the new contractual relation: those of the original obligor.

2. Position of the original obligor

Unlike the aforementioned, the Principles follow the idea that the original obligor's position changes in relation with the previous article, because it has not been discharged and it remains as a subsidiary obligor. In this context, if the new obligor makes the payment and the obligee secondarily claims payment to former obligor, the latter may, at that particular time, assert its right of set-off, because it asserts a proper claim. The UP is silent on this matter and the DCFR is also not too clear, because it simply states that, in the case of incomplete substitution, the rules of set-off will be the same as the one applicable to complete substitution [Article III -5: 207 (1)], i.e., the inadmissibility of the set-off with the claims of the original obligor. This article is appropriate to prevent that the new obligor sets off claims belonging to the original obligor. But it is insufficient because it does not focus on the differentiated fact of incomplete substitution, i.e. the original obligor has secondary liability and, as such, may set off its own claims.

Example 1: A, the obligee, accepts that B, the obligor, assigns \$100,000 of debt to C, the transferee, provided that the transferor B remains as a subsidiary liable in the event that the assignee does not perform. Meanwhile, the transferor B has also a claim against the obligee A, worth \$ 80,000. When the obligee requires payment to the assignee C, this latter is not entitled to assert set-off. But if the assignee C fails to pay to A and the obligee claims against the assignor B, which has subsidiary liability, B can assert the set-off of its own claim.

This same applies to the guarantees provided before the transfer in order to ensure the performance of the original obligor, when it is claimed subsidiarily (Article 243 of the Proposals for the reform of French law on obligations of 2013). The guarantees must have the same treatment as the principal obligation to which they are attached, the non-performance of the original obligor in this case. It would be disproportionate, in fact, for these guarantees to be extinguished when the liability of the original obligor that they guarantee is not extinguished. The *iter* of the claim is therefore as follows: in the event of non-performance of the new obligor, a claim against the original obligor; in the event of the failure of the original obligor. This approach has been followed by the DCFR (Article III-5:207). It is also followed by the UP through *a sensu contrario* interpretation of the provisions on termination of securities in cases of discharge of the obligor (Article 9.2.8). of course, the above does not prevent that the third guarantor accepts a modification of the guarantee and ensures the performance of the transferee-obligor.

Example 2: In the same case as in example 1: obligee A, accepts that B, the obligor, assign \$100,000 of debt to C, the transferee, provided that the transferor B remains as a subsidiary liable in the event of breach of the assignee. The debt was secured by a personal guarantee of D. If the transferee does not pay, the obligee may claim against transferor B; if this latter does not pay, the obligee may enforce the personal guarantee.

Article 8.2.7: *Joint and several obligation between the obligor and the assignee*

- 1. When the original obligor is jointly and severally bound, the right of the assignee to assert the defences of the original obligor, the right of set-off and the effects on the guarantees shall be governed by the rules on joint and several obligations.**
- 2. The defences of the assignee against the obligor-assignor may be asserted against the obligee in accordance with the rules on contracts in favour of third parties. The assignee shall be considered as the promisor, the original obligor as the promisee, and the obligee as the beneficiary.**

COMMENT

1. The rationale of joint and several liabilities

Most OHADAC systems and international instruments do not expressly refer to the original defences in cases of joint and several liabilities between the original obligor and the assignee. Therefore, the Principles refer to the general rules on joint and several obligations, as also occurs in the DCFR (Article III-4:112) and the UP (Article 11.1.4), that enable each obligor to assert their own defences or those ones that are common to all obligors.

In the same vein, both the new and the original obligor could set-off their claims with the obligee, extinguishing the obligation for the remaining obligors. This happens in other international instruments, such as the DCFR, which, by referring to the rules on plurality of obligors [Article III-5:209(2)], provides a clear solution about the set-off of one of the obligors extinguishes the obligation of the others [Article III-4:108 (1)]. Although the UP do not expressly envisage it, it is understood that there is a reference to the rules on solidarity and, in particular, to Article 11.1.5, which states the extinction of the obligations by the set-off of claims of any co-obligors.

Example 1: obligee A claims debt to a new obligor C, jointly added by the original obligor B. The new obligor asserts the set-off of an own claim against the obligee, resulting the extinction of the obligation of both the new and the former obligor B and C.

The required obligor, whether the original obligor or the jointly and severally added obligor, does not assert defences of other obligors that are not common to the other obligors. Likewise, the obligor may not assert the set-off of the claims of other obligors, because they are not part of its own assets.

Example 2: In the case of Example 1, the obligee A claims the debt to the original obligor B and not to the new obligor C, jointly and severally added and which has a claim against the obligee A. The original obligor is obliged to pay without the possibility of claiming set-off of claims of other obligors. Thus, the obligee can obtain liquidity by avoiding set-off of claims.

Finally, in relation with guarantees, since the original obligor 's position is not modified and it remains jointly and severally responsible for the performance, the guarantees are preserved in order to ensure performance (Article 1.702 of the Colombian Civil Code; Article 243 of the Proposals for the reform of French law on obligations of 2013).

2. Rationale of stipulation in favour of third parties

If the transferee is jointly and severally liable with the transferor-obligor through an agreement with the transferor-obligor, it becomes functionally bound through a

“stipulation in favour of a third party”, the obligee (beneficiary), with which it has not established a direct relationship. Therefore, the Principles, along the same lines as the DCFR [Article III -5: 209 (1)], allow that the new obligor can assert the defences that it has against the original obligor. For the obligee, there is no prejudice and it has the same contractual position before the addition of the obligor, where it was obliged only to the original obligor. As it can be noted, unenforceability of exceptions among obligors against the obligee, which exists in cases of discharge of the original obligor or the establishment of a subsidiary obligation, does not apply in these cases. Strictly speaking, there is no "assignment" of the obligation, but joint and several obligations assumed by the original obligor and the new obligor.

Example: obligee A has a claim against original obligor B who agrees with C to add C as a joint and several obligor in payment for services provided by the original obligor B. After B fails to provide the agreed services, the new obligor may raise the exception of non-performance (*exceptio non adimpleti contractus*) against obligee A when it is asked to fulfil its performance.

SPECIFIC CLAUSES FOR THE TRANSFER OF OBLIGATIONS

1. Clauses relating to the form of assignment of obligations

As noted above, these Principles leave the assignor and assignee with the freedom to agree on the form of assignment of obligations that they deem appropriate, notwithstanding that the consent of the other party is sometimes required. Thus, the assignor and assignee may agree to discharge of the original obligor, who is then freed of all liability to the obligee.

Clause A: Discharge of the assignor

"The assignee assumes the debt mentioned in clause [insert number]. The assignor shall be discharged without any liability to the obligee."

Moreover, the parties may agree that the assignor continues to have subsidiary liability, in the event that the assignee fails to perform its obligation.

Clause B: Subsidiary obligation of the assignor

"The assignee assumes the debt mentioned in clause [insert number]. The obligee may bring legal action against the assignor only if the assignee does not fully pay the debt mentioned."

Although this clause does not provide for the discharge of the original obligor, its obligation is relegated to the secondary background, and it is no longer the main obligor.

Lastly, the assignor and the assignee may agree on a joint and several relationship between them, so that the obligee may claim the entire debt from any of the co-obligors without prejudice of actions of reimbursement:

Clause C: Joint and several obligations between co-obligors

"The assignee assumes the debt mentioned in clause [insert number]. The assignor shall continue to be jointly and severally bound with respect to the obligee."

Although the Principles have opt for this condition when the parties are silent on this point, it is highly recommended to include a clause of this type in the assignment contract.

2. Clauses on the obligor's consent to the assignment

As already noted, the OHADAC Principles regulate the assignment of obligations by the obligor or by the obligee. In the latter case, the general rule is that the obligor's consent is not required, unless otherwise stated in the contract.

The first contrary stipulation may concern the prohibition of assignment of obligations, for example:

Clause A: Prohibition of assignment of obligations

"The assignment of any obligation under this contract is prohibited."

This type of clause is not very common because the assignment of obligations by the obligee is usually beneficial to both parties. The obligee is interested because it preserves its free will to assign the obligation for reasons it deems appropriate. The obligor is interested because the assignment may discharge it from its obligations. However, the insertion of this clause has two consequences. Firstly, any assignment of obligations by the obligee will require the obligor's consent, so that the initial prohibition included in the contract will be considered modified if the obligor consents to an assignment at a later date. Secondly, if the obligee assigns the obligor's obligation without its consent, it could be liable for compensation for damages.

The second possibility, which is more flexible than the previous one, is that the parties expressly include in the contract that the obligor's consent is required. The same situation arises when the clause refers not to the consent of the obligor but to the "agreement of the parties".

Clause B: Mandatory consent of the obligor to the assignment

"The assignment of any of its obligations under this contract requires the written consent of the parties"

In such cases, the obligee's will is clear by the mere fact of signing the assignment, and the obligor's consent is therefore mandatory. Likewise, the obligor may be granted a right of opposition within a given period. Thus, for example:

Section C: Obligor's right to object to the assignment

"The assignment of any of its obligations under this contract does not require the consent of the parties.

However, the obligor of the obligation may refuse the assignment within [insert time], as from the date it receives notice of this assignment."

In regard to the latter clause, if there are no objections, the obligor's silence is understood as acceptance of the assignment. While the DCFR has laid down this rule (Article III-5: 202), the lack of a clear rule in the OHADAC States makes it advisable to include a simple recommendation as a contractual clause.

3. Statements on acceptance of the assignment

The Principles require acceptance of the other party in the original contract only in specific cases, the most important of which is the case where the obligee's consent is required for the assignment agreed between the original obligor and a third party. Statements of acceptance are therefore very important for the effectiveness of the assignment. In this regard, it should be noted that the obligee may accept the assignment, but cannot decide on the assignment conditions, unless this right has been granted by the assignor and the assignee. These principles reject such questionable assertions as those of UP according to which "the obligee may discharge the original obligor" or "the obligee may also retain the original obligor" (Article 9.2.5). Instead, the OHADAC Principles and recommended clauses and statements make clear that the choice of the conditions of assignment is up to the parties to this agreement (assignor and assignee). The obligee has simply the power to accept, reject or make a counteroffer.

Thus, the first possibility involves the acceptance of the assignment under the terms and conditions that have been notified to the other party. It is important, therefore, to include in the statement of acceptance documents setting forth the terms of the assignment, and stating that any variation in these terms and conditions shall be notified to the other party who will decide whether or not to accept. The statement below is therefore recommended:

Statement A: Acceptance of assignment

"[Name], holder of passport number [insert], national of [State], of legal age, residing at [insert], and on behalf of the corporation [company name], incorporated by public document authorised by the Notary of [insert town and country], [name of authorising notary], dated [insert date] and protocol number [insert number of protocol], with its registered office in [insert full address], registered in the Commercial Register of [insert town, country and circumstances of the registration: volume, sheet,

*inscription], and tax identification code [indicate number]
STATES:*

1.- That it ACCEPTS the assignment of the debt mentioned in the document appended to this statement in the terms and conditions set forth therein [attach the document signed by the assignor or the assignee by which the assignment is notified and the other party is informed of its conditions].

2.- That any variation in the terms and conditions of the assignment contained in the document appended to this statement shall be notified to the signatory in order to pronounce whether or not it is accepted.

Statement signed in [insert town and country] on [insert date]."

The second possibility of the other original party, usually the obligee, consists in not accepting the assignment under the terms and conditions that have been notified to it. It is not really necessary to have a declaration objecting to the assignment, since consent is given by silence. However, an express statement of the other party provides greater legal certainty to the parties. It has two advantages. For the transferor and transferee, the statement avoids undue delay that would occur if they wait to know the opinion of the other party, even after the conclusion of the assignment agreement. For the other party, the statement may be useful to neutralize any hint of tacit acceptance, if it is stated that any past or future act shall not be considered as acceptance. In short, statements like the following would be advisable:

Statement B: Opposition to the assignment

"[Name], holder of passport number [insert], national of [State], of legal age, residing at [insert], and on behalf of the corporation [company name], incorporated by public document authorised by the Notary of [insert town and country], [name of authorising notary], dated [insert date] and protocol number [insert number of protocol], with its registered office in [insert full address], registered in the

Commercial Register of [insert town, country and circumstances of the registration: volume, sheet, inscription], and tax identification code [indicate number] STATE:

1.- That I DO NOT ACCEPT the assignment of the debt mentioned in the document appended to this statement and I do not accept any of the terms or conditions set forth therein [attach the document signed by the assignor or by the assignee by which the assignment is notified and the other party is informed of its conditions].

2.- That any past or future act made by the undersigned shall not be considered as tacit acceptance of such assignment.

Statement signed in [insert town and country] on [insert date]."

There is a third possibility: the other party could accept the assignment on condition that the terms of the transfer agreement be modified, and in particular, the conditions of assignment. In this respect, it is usually in the interest of the assignor and assignee to discharge the original obligor, who will be exempt from all obligations to perform. Conversely, the obligee's interest is usually the relationship of joint and several liability between the new obligor and the original obligor, to increase the chances of performance of the obligation. To this end, there are several options open to the other party. These include opposition to the assignment, accompanied by an invitation to modify the terms of the transfer agreement. After the modification is completed, the assignment will be submitted to the other party for a final decision. In such cases, a statement of the following type is recommended:

Statement C: Opposition to the assignment and invitation to negotiate

"[Name], holder of passport number [insert], national of [State], of legal age, residing at [insert], and on behalf of the corporation [company name], incorporated by public document authorised by the Notary of [insert town and country], [name of authorising notary], dated [insert date]

and protocol number [insert number of protocol], with its registered office [insert full address], registered in the Commercial Register of [insert town, country and circumstances of the registration: volume, sheet, inscription], and tax identification code [indicate number] STATE:

1.- That I DO NOT ACCEPT the assignment of debt referenced in the document appended to this statement under the terms and conditions set forth therein [attach the document signed by the assignor or the assignee in which the assignment is notified and the other party is informed of its conditions].

2.- That any past or future act made by the signatory shall not be considered as tacit acceptance of such assignment.

3.- That I agree to reconsider the acceptance of the assignment of debt mentioned if the assignor and assignee modify the terms set forth in the document attached to this statement and agree that the assignor [Option 1: remains jointly and severally liable for the debt] /Option 2: can be sued for payment if the assignee does not pay the referenced debt in full].

Statement signed in [insert town and country] on [insert date]."

One last option would be the acceptance of the assignment in advance by the other party, provided that the condition imposed is included. This normally consists in maintaining the subsidiary or joint and several liability of the original obligor. It must be pointed out that if the condition is not accepted, this means there is opposition to the assignment. Thus, for example:

Statement D: Conditional acceptance

"[Name], holder of passport number [insert], national of [State], of legal age, residing at [insert], and on behalf of the corporation [company name], incorporated by public

document authorised by the Notary of [insert town and country], [name of authorising notary], dated [insert date] and protocol number [insert number of protocol], with its registered office in [insert full address], registered in the Commercial Register of [insert town, country and circumstances of the registration: volume, sheet, inscription], and tax identification code [indicate number] STATE:

1.-. That if, and only if, the assignor [Option 1: continues to have subsidiary liability for the entire debt] / Option 2: can be sued for payment if the assignee does not fully pay the referenced debt]. I ACCEPT the assignment of the debt referenced in the appended document [append the document signed by the assignor or the assignee in which the assignment is notified and which contains the terms of the assignment].

2 -. That any change to the terms and conditions of the assignment contained in the document appended to this statement, and other than the terms set out in paragraph 1, shall be notified to the signatory who will state whether or not it accepts these changes.

3.- That, if the conditions set out in paragraph 1 are not met, I DO NOT ACCEPT the debt referenced in the document appended to this statement in the terms and conditions set forth therein.

4.- That, if the conditions set out in paragraph 1 are not met, any past or future act made by the signatory shall not be considered as tacit acceptance of this assignment.

Statement signed in [insert town and country] on [insert date]."

4. Clauses relating to securities in case of assignment

The OHADAC Principles follow the basic principle that the transfer of debt voids any personal or proprietary security, unless its preservation is accepted by the guarantor,

whether is the original obligor or a third party. The Principles have not gone beyond this point for lack of consensus among the OHADAC States, but it is highly recommended that a "shield" clause be included in the original contract between obligee and obligor, under which the security is preserved if it concerns property that has been transferred by the original obligor to the assignee prior to or at the same time as the assignment of obligations. To provide the obligee with added certainty, at the time of acceptance of the assignment, the obligee may make this acceptance conditional upon the preservation of the security. This could result in a clause such as follows:

Clause in the original contract: Conservation of security

"The obligee shall accept the assignment of this debt to a third party only if, after the assignment, the asset mentioned as being the guarantee of payment of the debt continues to be available."

Statement: Acceptance of the assignment with conservation of security

"[Name], holder of passport number [insert], national of [State], of legal age, residing at [insert], and on behalf of the corporation [company name], incorporated by public document authorised by the Notary of [insert town and country], [name of authorising notary], dated [insert date] and protocol number [insert number of protocol], with registered office in [insert full address], registered in the Commercial Register of [insert town, country and circumstances of the registration: volume, sheet, inscription], and tax identification code [indicate number] STATE:

That I ACCEPT that the assignment of the debt mentioned in the appended document [append the document signed by the assignor or the assignee in which the assignment is notified and which contains the terms of the assignment], IF, AND ONLY IF, the assignee and new owner of the asset referenced as security of the payment of this debt, maintain that asset as security.

Signed in [insert town and country] on [insert date]."

This consists in inserting a contractual clause or a statement along the lines of the UP (Article 9.2.8), the PECL (Article 12:102), the DCFR [Article III-5:205 (4)] and of some OHADAC legal systems [Article 1.464 of the Guatemalan Civil Code; Article 6:157 of the Dutch and Suriname Civil Code; or contrary: Article 2.107 of the Nicaraguan Civil Code; Article 1.063 of the Haitian Civil Code]. The consent of the original obligor, which is the original owner of the asset that serves as a security, is not necessary for the security to ensure the new obligor's performance. The clause and the statement are based on an economic rationale and they attribute "parallel destinies" to the parties and their assets: discharge of the original obligor and its asset, replaced by the new obligor and its property. This rationale does not have an adverse impact on the expectations of the assignee which carried out the negotiation on property with collateral charges. It also protects the expectations of the obligee: if the original obligor, as the owner of the property, uses them to guarantee the transaction, it makes perfect sense that the assignee, as the new owner, also assigns the asset to the transaction. The fact that the asset continues to be used as security does not harm the original obligor because it is no longer the owner of the asset in question. The following example shows how this clause works:

Example: the obligor buys unmovable property and obtains financing from a bank by creating a mortgage on the property. Then the obligor sells the property to a third party who assumes the debt to the bank under the same conditions and with the same instalments. The proposed clause implies that the obligee's consent to the assignment is conditional upon the continued effectiveness of the mortgage.

As noted, the clause covers two standard situations. In the first one, the assets guarantee the payment by the transferee when its assignment is linked to the relationship resulting from the duty to assume the debt. The above example illustrates the case of the sale of mortgaged property whereby the assignee acquires the property and the debt owed to the obligee under the same conditions as the original obligor. In the second example, the assets also ensure the performance of the assignee, if they are transferred through a transaction unrelated with the duty assume the debt but prior to this duty. Conversely, the security is extinguished if the component asset is transferred to the assignee after the duty to assume the debt and irrespective of the security.

Section 3: Assignment of the Contract

Article 8.3.1: Scope

- 1. By the assignment of the contract, a contracting party, called the “assignor”, transfers to another person, called the “assignee”, its rights and obligations in a contract in respect of the other contracting party, called “counterparty”.**
- 2. This Section does not apply to assignment of contracts governed by special rules on transfer of a business.**

COMMENT

1. Functioning of the Assignment of Contracts

The Principles, after regulating the assignment of a contractual right (Section 1) and a contractual obligation (Section 2), deals with the assignment of a contract as a whole, which has the added difficulty of transferring both rights and obligations [Section 2-210 UCC; Article 6:159 of the Dutch and Suriname Civil Code; Article 9.3.1 UP].

Example: A franchisee wishes to assign its international franchise agreement to a third party. It shall be governed by this Section of the Principles because the assignment involves the rights of the franchisee (acquisition of knowledge and know-how, use of trademarks, supply of products or raw materials, etc.), but also its obligations (trade of products, payment of remunerations and economic considerations, etc.). Conversely, if the franchisee only wished to assign its obligation to pay monetary compensation to the franchisor, the Section on transfer of obligations would apply.

In this context, many systems of the OHADAC States do not provide for independent rules for the assignment of contracts, which differs from the assignment of rights and obligations. Consequently, the minimum consensus is found in basic rules, accompanied by a reference, as appropriate, to the transfer of rights and obligations, along the lines of the UP (sections 9.3.6 and 9.3.7), the PECL (Article 12:201), the DCFR (Article III-5:302) and Article 244 of the Proposals for the Reform of the French law on Obligations of 2013. Other aspects, such as the conditions for modifying a contract subject to assignment (Section 9-405 UCC), shall be governed by national law in accordance with the rules of private international law.

It has to be noted that in order to make the OHADAC Principles entirely effective they should be chosen in both the original contract and the agreement of assignment.

2. Assignments excluded from the Section

Like the previous Sections on transfer of rights and transfer of obligations and in accordance with the UP (section 9.3.2) and the DCFR (Article III-5: 301), this Section on assignment of contracts does not apply to transfers under the special rules concerning the joint transfer of business or assets. In these cases, given that there is a complete assignment of the entire legal relations of one of the parties, the rules concerning the individual assignment of each of the contracts is applied.

Article 8.3.2: *Conditions relating to the parties*

- 1. The assignment requires the consent of the other party.**
- 2. That consent may be given expressly or tacitly and before, at the same time, and after the conclusion of the agreement of assignment.**

COMMENT

1. Consent of the other party

To the extent that the assignment of the contract involves not only the transfer of rights but also of obligations, the consent of the other party is required (Article 244 of the Proposal for the Reform of the French Law on Obligations of 2013; *Tolhurst v Associated Portland Cement manufacturers* (1902), 2 KB 660, *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1994) 1 AC 85, HL; Article 9.3.3 UP; Article 12:201 PECL; Article III-5:302 DCFR). Thus, the Principles do not follow the rules on assignment of rights and follow the rules for the assignment of obligations. As noted in the comments on these Principles, the need for consent by the other party is based on the fact that the obligor of the obligation cannot dispose at will of its own obligation, since it can produce a clear loss to the obligee.

2. Time of giving of consent

As in the previous sections, consent may be given at different times. For example, it can be given when the agreement concluded, which is strategically the safest option. It can also be obtained after the conclusion of the agreement, in which case there is the

risk that the efforts of the parties with respect to the negotiation and conclusion of the assignment are not rewarded because they will depend on the counterparty *a posteriori*. Finally, this consent can be provided in advance prior to the conclusion of the assignment agreement (Article 9.3.4 UP, Article III-5:302 DCFR). This strategy comprises two risks: firstly, the risk that the information provided to the other party to obtain its consent changes at the time of conclusion of the agreement. The parties need to tackle this risk by offering a closed agreement to the counterparty that only needs to be signed. The second risk, which these Principles can deal with themselves, is that the counterparty must be aware of when the assignment takes effect. This will require notice to the counterparty to ensure that it identifies the effective date of the agreement, for example, if when the consent is sought, the counterparty is informed of the date of the conclusion of the agreement.

3. Special incidence of the assignments in the obligations

As already noted, the transfer of contracts may involve a discharge of the obligor or retention as a subsidiarily or jointly and severally liable obligee in relation with the transfer of obligations. At this point, the OHADAC Principles have an advantage over the UP (section 9.3.5).

These are led by the expression "the other party may" discharge the assignor, retain it or make it jointly or severally bound, which, at a first glance, appears to be a unique and exclusive right of the counterparty. This could imply that the assignor and the assignee do not agree on anything, which is inaccurate. In fact, this interpretation may result in disproportionate prejudice to the assignor, since it can transfer its rights to the assignee, and lose ownership thereof, all the while continuing to be jointly and severally liable for all contractual obligations, because the counterparty has so decided. Also the expression of the UNIDROIT Principles raises considerable legal uncertainty between transferor and transferee, because a fundamental term of the assignment agreement depends on a third party who is not a party to the agreement.

In order to avoid risks of this type, the OHADAC Principles establish that the transferor and the transferee decide on the assignment conditions in which they are interested. This is probably one of the central aspects of the negotiation of the contract assignment agreement. However, the transferor and the transferee shall require the consent of the other party (Article 244 of the Proposal for the Reform of the French Law on Obligations of 2013). The counterparty may only consent to the assignment in the terms set by the assignor and the assignee. For example, if the transferor and transferee agree to an assignment with the discharge of the assignor [*Graiseley Properties Ltd & Ors v Barclays Bank Plc & Ors* (2013) EWCA Civ 1372], the

counterparty may or may not accept it. However, if it accepts on condition that the transferor continues jointly and severally obliged, this will mean that it refuses the assignment under the terms agreed by the assignor and assignee. Indeed, the condition that weighs on the counterparty alters a fundamental term of the assignment agreement. It is true that the assignor and assignee may grant the other party a right to decide on the assignment conditions, although it is quite uncommon in practice. However, this provision would be, in any case, a right granted by the transferor and the transferee, and not by these Principles.

Example 1: A contractor wishes to assign a construction contract to a third party and, for these reasons, it requires the consent of the principal. Assignor and assignee will decide if the original contractor is discharged or has subsidiary or joint liability for the performance of the work. The customer may accept the terms of the transfer agreement, prior to, concurrent with or subsequent to its conclusion, but it may not unilaterally change them. If the assignor and assignee have agreed to discharge the original contractor, the counterparty is unable to accept the assignment under the condition of the joint and several liability of the original contractor. This consent would be equivalent to rejecting the assignment agreement under the terms under which it was drafted.

Article 8.3.3: Effectiveness of the assignment

- 1. The assignment is effective against the counterparty:**
 - a) From the time when the consent is given by the counterparty, simultaneously or subsequently to the conclusion of the agreement of assignment.**
 - b) From the time when the notification of the assignment is received by the counterparty, if the consent has been given in advance.**
- 2. After the assignment is effective, the counterparty is discharged only by performing in favour of the assignee.**
- 3. When an assignee successively transfers the contract to another assignee, the counterparty is discharged by performing according to the last assignment that was effective.**

COMMENT

1. When the assignment becomes effective

Given that the assignment of contracts may involve the transfer of rights, it is essential to determine at which time this assignment takes effect and when the counterparty must perform its obligations in favour of the assignee. This question has already been raised in the assignment of rights to the obligor and, in fact, the rules have many aspects in common. The main difference is that, in the assignment of contracts, the consent of the counterparty is always required and this greatly influences the time when the assignment takes effect. If the counterparty has accepted in advance, this time is when the counterparty receives notification of the agreement, without prejudice that the effective date may be deferred (Article III-5:302 DCFR). Provision is also made for the possibility that the counterparty may know from other sources when the assignment becomes effective, for example, if the counterparty, at the time of giving its consent in advance, had been informed of the effective date of the future contract (Article 244 of the Proposal for the Reform of the French Law on Obligations of 2013). If the counterparty has agreed at the same time as or after the conclusion of the agreement, this agreement will become effective when the counterparty consents, unless the parties agree on a later effective date.

In any case, once the assignment of the contract involves the transfer of rights vis-à-vis the counterparty, the counterparty is obliged to perform the obligation in favour of the assignee. Therefore, and in the same way as the assignment of rights, after notification of the assignment or the consent of the counterparty, when this is required, the counterparty will be only discharged after performing the obligation in favour of the assignee.

Example 2: the contractor assigns the execution of the construction work to a third party. A) If the principal has accepted before the conclusion of the assignment, once it receives notice that the agreement has become effective, payments for the execution of the work and delivery of materials shall be made to the assignee. B) If the principal has accepted at the same time as or after the conclusion of the agreement, it shall perform its obligations in favour of the assignee as from that time.

2. Successive assignments

The Principles also establish the rule tacitly agreed in the practices of OHADAC States, whereby, when an assignee successively assigns the contract to another assignee, the

counterparty shall be discharged from its obligations by performing in favour of the last assignee whose assignment has been served or accepted.

However, the rule on "multiple assignments" by the same assignor, provided for the assignment of rights, is here obviated, as this case is anomalous and it is not regulated by most OHADAC States. In the assignment of rights, this rule made sense especially in relation to monetary rights, because the same claim could serve as guarantee of assignor's performance in several contracts. Therefore, several rights of third parties could be asserted against the same claim. Nevertheless, the assignment of the contract does not act as a guarantee of the transferor's performance, so a rule similar to the rule of assignment of rights is not necessary.

Article 8.3.4: Legal framework of the assignment

- 1. To the extent that the assignment of contract involves a transfer of rights, Section 1 of this Chapter shall be applied.**
- 2. To the extent that the assignment of contract involves a transfer of obligations, Section 2 of this Chapter shall be applied.**

COMMENT

1. Rights in the assignment of contracts

As already highlighted in the commentary on Article 8.3.1, the lowest common denominator among the OHADAC legal systems refers, as appropriate, to the rules on assignment of rights and obligations. This trend is also observed in the UP (sections 9.3.6 and 9.3.7) the PECL (Article 12:201) the DCFR (Article III-5:302) and in Article 244 of the Proposals for the Reform of the French law on obligations of 2013.

Example: The case is the same as in the previous example where the contractor has assigned the performance of the construction to a third party. As soon as an assignment of right is involved, for example, the right to receive payment, the rules on transfer of rights will apply to the right. When an assignment of obligations is involved, for example, the contractor's obligation to provide materials or to deliver the construction, the rules on assignments of obligations will apply.

When the other party is the obligor of the obligation and the assignor is the obligee, the rules on transfer of rights will apply. Thus, the counterparty may assert against the assignee all defences provided against the assignor and any right to compensation against the assignor and that arose prior to the notification of the assignment or, if applicable, acceptance of this. Likewise, the obligor-counterparty is entitled to be compensated for the additional costs incurred by the assignment.

In this context, as an obligee of the obligation, the assignor will assume the following obligations against the assignee, unless stated otherwise. Firstly, it must ensure that the right exists or it is an identifiable future right that can be transferred and which is free from any claim or right of third parties. Secondly, it must ensure that it is entitled to transfer the right and that the obligor has no objection and there never will be a right of set-off against debts of the transferor. It has also been agreed in the contract of assignment that any performance in favour of the assignor, made since the transfer agreement entered into force until it was served on the obligor, is considered to be in favour of the assignee.

In these cases, the transferee, as a result of the contract assignment, acquires the rights. It will be the beneficiary of all guarantees to ensure the performance of the assigned right. However, the guarantees provided by third parties do not ensure the performance and shall be considered as extinguished in three cases; firstly, if the obligor's obligation becomes more burdensome as a result of the transfer; secondly, if the obligee and the obligor agreed to the prohibition of assignment of rights; thirdly, if the third party guarantor had provided the guarantee on condition that the right was not assigned.

2. Obligations in the assignment of contracts

When the counterparty is the obligee of the obligation and the assignor is the obligor, the rules on transfer of obligations will apply. There may be several options. The first one consists in the discharge of the assignor, who is exempted from all contractual obligations. The second option is a subsidiary obligation of performance by the transferor, in case the assignee does not perform its obligation properly. Subsidiary liability is established in the event that the assignee does not properly perform. Thirdly, a joint and several liability is established between the assignor and the assignee, so that the counterparty may claim the due performance against either of them. It is important to underscore that, in accordance with the section on the transfer of obligations, and unless otherwise agreed, joint and several liability between the transferor and the transferee will be presumed (see Article 9.3.5 UP in the same sense).

This rule implies that, if the discharge of the original obligor (assignor) is agreed, the assignee may assert against the obligee (counterparty) all defences of the original obligor. Instead, the transferee may not assert against the obligee counterparty any defence arising from the relationship between the assignee and the original obligor. In this context, the transferee may claim set off of its claims against the counterparty-obligee. However, it may not claim set off of those claims held by the original obligor (assignor). In addition, the obligor's discharge extinguishes guarantees provided for payment unless otherwise is stated by the guarantor. Also the guarantees could be maintained by agreement if they are referred assets the ownership of which was transmitted to the transferee by the obligor prior to or at the same time as the transfer of obligations.

When the original transferor-obligor agrees to a subsidiary obligation of performance, it could, whenever this is necessary in a subsidiary capacity, assert the set off of its claims. The guarantees provided before the transfer ensure the performance by the original obligor, when it is required.

In case of joint and several liability between the transferor (original obligor) and the assignee, the assignee's right to assert the defences of the transferor, the right to claim set off and the guarantees shall be governed by the provisions of these Principles on joint and several liability. The defences of the assignee against the assignor may be asserted against the counterparty (the obligee), regarded as a beneficiary under the terms of these Principles on agreements in favour of third parties.

SPECIFIC CLAUSES FOR ASSIGNMENT OF CONTRACTS

1. Clauses on the Scope of the Assignment of the Contract

It has already been pointed out that the assignment of contracts involves not only the transfer of rights but also of obligations. Therefore, it is important that the position of the transferor is regulated in the contract between the assignor and the assignee. See various possibilities:

Clause A: Discharge of the Assignor

"The assignee assumes all obligations under the assigned contract. The assignor shall be discharged without any liability to the other party of the assigned contract".

Under this clause, the transferee assumes all the obligations of the assigned contract and discharges the assignor, which is not bound to the other party, unlike clauses such as the following:

Clause B: Subsidiary Obligation of the Assignor

"The assignee assumes all obligations under the assigned contract. However, in case of default or defective performance, the other party in the assigned contract may claim against the assignor".

In this case, the assignor is not discharged and continues to have subsidiary liability when the assignee does not perform properly. Clauses of this style encourage the other party to accept the assignment, as is the case, but more strongly expressed in the following clause:

Clause C: Joint and Several Obligation between assignor and assignee

"The assignee assumes all obligations under the assigned contract. However, the assignor will remain jointly and severally bound to the other party".

According to the preceding clause, the assignor and the assignee are jointly and severally liable to the other party in the assigned contract, except for reimbursement actions. Although this rule is applicable when the assignor and the assignee have not agreed upon anything in the assignment agreement, it is advisable to mention this joint and several obligation explicitly regulated in order to provide the parties with greater legal certainty for the parties and also to incite the other party to the assigned contract to consent to the assignment.

2. Clauses on Prohibition of Assignment

In accordance with the OHADAC Principles, the assignment of a contract requires the consent of the other party. For this reason, it is not necessary to include this provision in the original contract or expressly prohibit the assignment. This assignment will not take place if there is no subsequent agreement of the parties under the assigned contract stated as follows: by the assignor in the assignment agreement itself; by the

counterparty, through the consent that it shall necessarily provide in connection with such assignment.

However, it is common for the parties to include clauses in the original contract that prohibit or admit the assignment. These clauses sometimes create issues of interpretation. The following sections and cases are, in this sense, paradigmatic: Section 2-210 (4) UCC on how to interpret expressions such as "prohibition of assignment of contract" or admission of "the assignment of all rights in the contract", and certain English judgments [Helstan Securities Ltd v Hertfordshire County Council (1978) 3 All ER 262; Barbados Trust Company Ltd v Bank of Zambia & Anor (2007) EWCA Civ 148]. In these circumstances, the OHADAC Principles govern the interpretation of the contract, but it is highly recommended that the parties clarify and specify the exact meaning of their words and, in particular, whether the prohibition to assign the contract also affects the transfer of a right or specific obligation. In practice, this is particularly relevant in relation to the assignment of specific rights. If it is interpreted that the assignment is not prohibited, this transfer may be made by the obligee without the consent of the obligor. Conversely, if it is understood that individual assignment of rights is also prohibited, the obligee would require the obligor's consent to any assignment of any right.

In this context, the clause could be drafted in an absolute manner, prohibiting not only the assignment of the contract as a whole, but also the individual assignment of any of its rights and obligations:

Clause prohibiting assignment of contract rights and obligations

"The assignment of this contract to third parties is prohibited, as well as the assignment of any of the rights and obligations under the contract."

According to the referred clause, the obligee of a particular right may not freely dispose of it without the consent of the obligor. Conversely, it could be that the parties prohibit the assignment of the contract as a whole, notwithstanding they might dispose of their rights. Such would be the case in the following clause:

Clause: Prohibition of Assignment of the Contract but not of Rights

"The assignment of the contract or of any obligation under the contract is prohibited. However, the obligee may assign a right conferred by this contract to third parties without the consent of the obligor".

This clause prevents the assignment of the contract and of any of its obligations without the other party' consent. However, the parties may dispose of their contractual rights and freely transfer them, according to the Principles, without consent of the obligor. These clauses can also be modulated in the interests of the parties, admitting, for example, only the assignment of monetary rights arising under the contract.

3. Statements on the acceptance of the assignment (referral)

As in assignments of obligations, the acceptance of the assignment by the counterparty is very important. The reference to the models of statements contained therein is convenient, taking into account that the respondent acts as the other party, not only as a obligee, and that it accepts, conditionally or not, an assignment of the contract, and not only of obligations.

CHAPTER 9

LIMITATION PERIODS

Article 9.1: Rights and actions submitted to limitation periods

Unless otherwise agreed, the rights and actions derived from contracts are subject to limitation periods due to the expiry of a period of time according to the following Articles.

COMMENT

1. Scope of prescription

The differences between the civil law or continental legal systems and the systems of common law origin and in respect of the regulation of prescription start with their very name and the nature that is attributed to the institution; such differences are represented in the Caribbean region.

In the OHADAC environment, the systems of the continental or civil law or continental tradition, especially the tributaries of French law, collectively approach the treatment of “acquisitive or positive” prescription, and “extinctive, negative or discharging” prescription”.

The Anglo-American legal systems vary each one with distinct expressions of the impact that time has in the legal relationships. The expression “prescription” is reserved, in general, for the phenomenon of consolidation of ownership or other in rem rights through the passage of time (*Prescription Act, Chapter 158*, of Bahamas; *Prescription Act, Chapter 192*, of Belize; *Limitation and Prescription Act, Chapter 252*, of Barbados; *Prescription Act, Chapter 7:02*, of Dominica; *Prescription Act of 1973* of Jamaica). To indicate the defensive or inhibitory effect of prescription, which permits a subject to adopt a negative attitude towards a claim, based on the mere passage of time, the terms limitation actions or limitation periods are commonly used. In these systems its regulation, from a more procedural perspective, remains on the fringes of substantive private law regulations [*Limitation Act 2000, Chapter L60*, of Anguilla; *Limitation Act 1997* of Antigua and Barbuda; *Limitation Act 1995, Chapter 83*, of Bahamas; *Limitation of Actions Act, Chapter 173*, of Grenada; *Limitation Act, Chapter 7:02*, of Guyana; Article 2.047 Saint Lucian Civil Code, *Revised laws of Saint Lucia*, 2006, Chap 4.01; *The limitation of Actions Act, particle IV (Debt and Contract)* of Jamaica; *Limitation Act, Chapter 2.12*, of Montserrat; *Limitation Act, Chapter 90*, of Saint

Vincent and Grenadines; *Limitation of Certain Actions Act, Chapter 7:09*, of Trinidad and Tobago; and *Limitation of Actions Act*, of Jamaica].

In these Principles the term “prescription” (without qualifiers) indicates the effect that the prolonged inactivity over time has in the exercise of the rights and actions derived for each party from the conclusion of the contract. Its regulation in the Principles, as a private regulation, aims to guarantee the promptness and security of legal transactions. The coexistence in the international sphere of a multitude of systems with different regulation alternatives and options that affect the thematic nuclei of the prescription (object, objective or subjective framework in the calculation of the time limits, interruption versus suspension, default of time periods, extinctive or merely defensive effect, scope of the private party autonomy, effectiveness in relation to the guarantees that protect rights...) constitutes a serious constraint on and obstacle to international commerce, making necessary a convergence between systems, fundamentally between the civil law or continental model and the Anglo-American model, through the proposal of uniform provisions which can essentially be shared by all the legal families that make up the OHADAC territory.

This convergence between the systems is affected by the debate about the procedural or substantive nature of prescription and the imperative or dispositive character of its regulatory standards. The clear tendency in international contracts is towards a substantive qualification, as a “contractual” matter, as deduced from Article 12 of Regulation (EC) 593/2008, of the European Parliament and of the Council, of 17 June 2008, on the Law Applicable to Contractual Obligations (Rome I).

2. The object of prescription in the national systems of the OHADAC

The rules on prescription raise an initial doubt regarding its object: if they are claims (*créance*, in French, *rechtsvordering*, in Dutch) or rights (*droits* in French, *rechts*, in Dutch). If the centre of gravity is located in the rights, prescription provokes its extinction; if the focus is on the authority to exercise them, prescription only permits the adoption of a negative attitude towards the untimely claim by the holder, i.e. the obligor continues to be obliged although the law suits have been undermined by the claim for the loan. In accordance with the first of the perspectives, prescription affects the same right by provoking its extinction, and in addition, the automatic mechanism or extinction *ipso iure* of the same right is defended. On the contrary, to maintain that what it prescribes is not the right but the claim which acts as a cover for enforcing it in law means that, once the prescription is verified, the subjective right will continue to exist, although deprived of any possibility find protection before the courts.

In common law the very expression limitation actions, which focuses on the procedural nature of the institution, emphasises the general position in the Anglo-American legal system, in which it is recognised that prescription is aimed not at the subjective right, but the claim, understood as the right to claim from whoever is responsible for the observance or satisfaction of the subjective right through determined active or passive conduct [English *Limitation Act 1980* and paragraph 2.93 of the Report of the English Law Commission, presented to the Parliament in 2001 (*The Law Commission - Law Com, num 270-, Limitation of Actions. Item 2 of the Seventh Programme of Law Reform*-)]. This focus involves the continued existence of the subjective right after the consummation of the prescription, although the beneficiary through this can refuse to perform the service or object in a different way to the exercise of the right (thus, also § 194.1 and § 214.1 German Civil Code [BGB]). However, in the United Kingdom, the *Prescription and Limitation Act 1973* of Scotland differs from this conception.

The tributary territories of Dutch law have a regulation resulting from Article 3:306 Dutch Civil Code, which relates the prescription to the exercise of the rights through claims (Article 3:306 Suriname Civil Code).

The solution is different in some Spanish-speaking legal systems and in OHADAC territories that are tributaries or directly under the influence of French law. These express prescription as a method of extinction of claims or rights (Articles 1.625 and 2.512 Colombian Civil Code; Articles 633, 865, 866 and 868 Costa Rican Civil Code; Article 112 Cuban Civil Code; Article 2.219 French and Dominican Civil Code; Article 1.501 Guatemalan Civil Code; Article 2.263 Honduran Civil Code; Article 1.684 Honduran Commercial Code; Article 1.698 Panamanian Civil Code, Article 1.830 Puerto Rican Civil Code, Article 1.069 Saint Lucian Civil Code) or a mechanism for being discharged from the performance of obligations (Article 1.135 Mexican Civil Code, Articles 868 and 869 Nicaraguan Civil Code, Article 1.952 Venezuelan Civil Code and Article 2.047 Saint Lucian Civil Code).

3. Prescription in international texts of harmonisation of contract law

The suitability of establishing a regulation of prescription invariably appears in all international texts of unification of contract law as a mechanism for resolving the conflicts that arouse the divergences between the legal systems in international commercial transactions as regards the conceptual basis, time periods and effects of the prescription.

In these texts prescription is presented as a figure that does not automatically produce an extinctive effect, but which permits the beneficiary to utilise it as a means of

defence against the claim or the procedural exercise of the claim on the part of the obligee. This is the case of United Nations Commission on International Trade Law (UNCITRAL) Conference on Prescription (Limitation) in the International Sale of Goods of 1974 (hereinafter Convention on Prescription), which establishes uniform rules on the period in which the parties in a contract of the sale of international goods of commodities can assert a claim resulting from the contract, in connection with its non-performance, revocation or validity. It must be taken into account, however, that the Convention, whose entry into force occurred on 1 August 1988, has a limited validity in the geographical sphere of OHADAC, given that it has been ratified by few states (Cuba, United States., Mexico and Dominican Republic), which introduces elements for incorporating a specific treatment of the matter into the OHADAC Principles.

Prescription is the object of specific attention in Chapter 10 of the UNIDROIT Principles, in Part III of the PECL and in Chapter 7 of Book III of the DCFR which, with slight variations, includes the provisions of the PECL. All of these texts openly opt for what one might call the defensive conception of prescription. It is the criterion of the UNIDROIT Principles which configure prescription as a limit to the exercise of rights (Article 10.1) and expressly affirm that the expiry of the limitation period does not extinguish the right (Article 10.9); the PECL (Articles 14:101 and 14:501) and the DCFR (Article III-7:101). Terminologically, the PECL alludes to “claims subject to limitation”, while the DCFR uses as a general heading “rights subject to limitation”.

This same conception is derived from the Proposal for Regulation of the European Parliament and of the Council on a Common European Sales Law (2011) by providing, as an effect of prescription, that “the debtor is entitled to refuse performance of the obligation in question and the creditor loses all remedies for non-performance except withholding performance” (Article 185 CESL).

4. The scope of prescription proposed in the OHADAC Principles

Once the different conceptual perspectives of prescription are analysed, without doubt, the most striking aspect of the debate is not what it is about, but the consequences that are derived from it. And it is certain that, sometimes, the effects that are derived from each one of the conceptions maintained (waiver of prescription gained, admissibility or not of the repetition of the spontaneously satisfied prescribed debt, enforceability of the loan prescribed through set-off, ex officio assessment or not of the prescription...) do not always maintain the required consistency.

On the one hand, if prescription is conceived as a phenomenon which provokes the extinction of rights, it is difficult to justify certain provisions such as the necessity of its

assertion, the possibility of waiving the consummated prescription and subsequent re-establishment or reappearance of the prescribed right or the non-repeatability of the sum paid after the consummation of the prescription.

On the other hand, if prescription is configured as a merely defensive instrument, which can only be assessed at the instance of a party, it cannot very easily prohibit the alteration through an agreement on the limitation periods or apply the principle of being an accessory, so that if the prescription of the principal claim is claimed, its effect is spread to the claims due to accessory services.

The proposed provision, faithful to the minimum requirements of these Principles, responds to what can be considered the basis or common nucleus of the institution in the countries that make up OHADAC: prescription is directed at the specific powers resulting from the conclusion of the contract, which each of the parties can exercise in relation to one another. The rule relates prescription to the exercise of the rights and claims derived by the parties from the conclusion of the contract, including, not only the principal rights which, in accordance with these Principles, are incumbent on the parties to the contract (claim for performance, exercise of any of the remedies resulting from non-performance, assertion of the invalidity of the contract), but also in relation to those that arise from the contractual agreement for each one of them, such as, e.g. the compliance with a penalty clause.

Example: In a contract for the provision of consultancy services between consultant A and company B, dedicated to the manufacture of IT products, a confidentiality clause is included through which A undertakes not to disclose any information on the production process of the company B, stipulating for the case of non-performance, in addition to the corresponding compensation for damages, the payment of one million euros. Both the action for damages as well as the action for the claim for the penalty will be subjected to the limitation period.

Article 9.2: *Limitation periods*

- 1. The general limitation period is three years beginning at the moment when a party knew or should have known the facts as a result of which such a party can exercise a right.**
- 2. The parties may agree the extension or the shortening of limitation periods, provided that the agreed period**

is not shorter than one year and longer than ten years.

3. The maximum limitation period is fifteen year beginning at the moment when the right could be exercised, regardless of the knowledge of the facts which allows this exercise, the agreement of the parties or the concomitance of any cause of suspension.

COMMENT

1. The limitation period and free will in the national systems of OHADAC

There are three key elements of the configuration of prescription in any system, namely: the duration of the limitation periods; the time from when they begin to run; and the room for manoeuvre that is given to free will for modifying them.

In a good part of the Spanish-speaking national systems that make up OHADAC or in those with a civil law or continental influence a plurality of limitation periods proliferate, although there is a general period, which has as its starting point an objective criterion, the rule of the *actio nata*, namely, the time when the right or claim can be exercised or is enforceable. In general, in these systems, the alteration of the framework through the will of the parties is not permitted.

The duration of the generally established periods is indeed different: 3 years (Article 1.151 Nicaraguan Commercial Code); 4 years (984 Costa Rican Commercial Code); 5 years (Article 2.536 Colombian Civil Code; Article 868 Costa Rican Civil Code; Article 114 Cuban Civil Code; Article 943 Cuban Commercial Code; Article 1.502 Guatemalan Civil Code; Article 1.708 Honduran Commercial Code; Article 1.650 Panamanian Commercial Code); 10 years (Article 2.292 Honduran Civil Code; Article 1.159 Mexican Civil Code; Article 1.047 Mexican Commercial Code; Article 1.977 Venezuelan Civil Code; Article 132 Venezuelan Commercial Code); and finally, 15 years (Article 1.864 Puerto Rican Civil Code). In some cases, the period in civil contractual matters is greater than in commercial matters. This is the case of the 7 years established in Article 1.701 Panamanian Civil Code (compared to the 5 years provided in its Commercial Code); or 10 years provided in Article 2.292 Honduran Civil Code compared to the 5 years of its Commercial Code.

The start of the calculation, in general in these systems, tends to be established starting from the time when the claim could be exercised (Article 2.535 Colombian Civil Code; Article 874 Costa Rican Civil Code; Article 969 Costa Rican Commercial Code; Article 2.297 Honduran Civil Code; Article 1.685 Honduran Commercial Code; Article 1.159 Mexican Civil Code; Article 1.040 Mexican Commercial Code; Article 1.650 Panamanian Commercial Code) or, concerning a claim exercised in a proceeding, from the time when the court judgment becomes final (Article 873 Costa Rican Civil Code; Article 986 Costa Rican Commercial Code Article 120.1 and 2 Cuban Civil Code; Article 2.299 Honduran Civil Code; Article 1.871 Puerto Rican Civil Code). In certain cases, for certain actions for invalidity or non-contractual damage, the start of the calculation is made to depend on the knowledge of the cause of invalidity or the damage (Article 120.3 and 4 Cuban Civil Code).

In the majority of these Spanish-speaking national systems no rule, either prohibitive or permissive, is expressly formulated on the scope of free will with regard to prescription, and consequently it tends to be understood that the validity of agreements is subject to general contractual clauses (good faith, public policy), which creates a distinction between contractual clauses which provide for an extension of the time periods and contractual clauses that restrict the legal duration. As regards the former, the principle of irrevocability of future prescription applicable in some systems leads them to consider agreements of imprescriptibility or the prolongation agreements, whose disproportionate prolongation in practice represents an authentic imprescriptibility, as contrary to public policy and, ultimately, prohibited. On the other hand, the agreements to curtail or reduce time periods are considered to be valid, provided that they meet the requirements of good faith and the right balance of the performance, so that they do not involve deprivation of the possibility to act for the plaintiff of the claim or holder of the right. However, no national system expressly enshrines the prohibition of amendment of the time periods through an agreement between the parties. This is the case of Article 119 of the Cuban Civil Code and Articles 1.158 and 1.686 Honduran Commercial Code.

In the territories under the influence of French law extended deadlines tend to be provided, similar to the *Code* before its reform operated by *Loi no. 2008-561, du 17 juin 2008, portant réforme de la prescription en matière civile*. This is the case of the 20 years established by Article 2.262 Dominican Civil Code and Article 2.030 Haitian Civil Code. However, the new regulation of the French Civil Code, operated by Law 2008-561, of 17 June, introduces significant innovations in the regulations governing prescription. In the foreground, it sensibly reduces both the duration as well as the

number of prescriptions and the multiplicity of periods. Secondly, as regards the calculation, it adopts a subjective starting point: the day when the holder of the right has known or ought to have known the facts that permit it to exercise it (*vid.* Article 2.224 French Civil Code, for actions concerning persons and moveable properties, and Article 2.227 French Civil Code, for *ad personam* or *in rem* claims), with some exceptions (Articles 2.225, 2.226 and 2.232 French Civil Code). In any case, Article 2.232 French Civil Code aims to delimit the maximum duration by indicating that neither the subjective criterion stipulated as a starting point nor the suspension or the interruption of prescription, can lead, apart from a few exceptions, to the limitation period exceeding the twenty years from the time when the right arises. Finally, a broad sphere of action is granted to free will (Article 2.254 French Civil Code).

In the sphere of common law, commercial transactions tend to be accompanied by brief limitation periods. This is the characteristic situation of the OHADAC territories that are tributaries or directly subject to the influence of English law, whose special legislations in relation to limitation actions provide for periods between 4 and 6 years from the time when the right could be exercised (Articles 3.4 and 7 *Limitation Act 1997* of Antigua and Barbuda; section 3.1 *Limitation of Certain Actions Act* of Trinidad and Tobago; section 7 *Limitation Act* of Bermuda ; section 4 *Limitation Act* of Montserrat) or the court decision is final (Article 2.10.a *Limitation Act 1997* of Antigua and Barbuda; section. 3.2 *Limitation of Certain Actions Act* of Trinidad and Tobago; section 26 *Limitation Act* of Bermuda). Hence, the criterion enshrined in the *Limitation Act* of England of 1980 is followed, which establishes a period of 6 years from the date when “the cause of action accrued” for cases of non-performance or damage. It is the prevailing general rule in common law which, however, for certain claims, opts for the subjective criterion. The English *Limitation Act* requires knowledge or the possibility to know the dates when this concerns actions in respect of personal injuries (section 11), actions related to defective products (section 11 A) or the actions under fatal accidents legislation (section 12) or in the cases of fraud, concealment or mistake (section 32). In the same sense, section 12 *Limitation Act* of Bermuda ; section 5 *Limitation of Certain Actions Act, Chapter 7:09*, of Trinidad and Tobago; section 11 *Limitation Act* of Guyana; section 36 *Limitation Act* of Bahamas; section 29 *Limitation Act 1984* of Bermuda; section 21 *Limitation Act, Chapter 2.12*, of Montserrat.

The *English Law Commission* (paragraph 3.5 of Report no.270- *Limitation of actions*) proposes to generalise the establishment of the “the date of knowledge” (subjective criterion) as a starting point of prescription, underlining, also, the dates that the plaintiff must know, although the limitation period will not be able to be extended

beyond 10 years from the time when the claim arises (except in relation to personal injuries claims). In any case, the *Law Commission* opts for the admissibility of amendment of the framework of limitation by an agreement (paragraph 3.175), although subject to certain limits, not so as to include the minimum and maximum duration of the periods, but derived from the rules on consumer protection.

In the United States the time periods resulting from non-performance of the contract differ from one state to another, fluctuating between periods of 3 to 15 years. In the majority of the States, there tends to be a distinction between a shorter limitation period for verbal contracts and a longer period for written ones. Generally, the calculation of the limitation periods is based on an objective factor: once the facts giving rise to the exercise of the claim occur, without addressing the matter whether they are or are not known. However, what is known is the evolution of the North American system to subjective criteria, through the case law doctrine of “delayed discovery doctrine” or “discovery rule” which entails that the claim is not considered to have arisen until the plaintiff discovers or ought to have discovered certain facts that permit it to lodge the claim. This is the criterion of Section 2-725 of the UCC, in connection with the claim of non-performance of any contract for sale, whose period is established as 4 years, although it grants the parties the possibility to reduce this to no less than 1 year, although its extension through an agreement is prevented. The admissibility of the contractual amendment of the periods in commercial transactions is the object of favourable court judgments in some States, as is the case of the pronouncements of the Supreme Court of Massachusetts in the case *Creative Playthings Franchising Corp v Reiser* (SJC-11026, Mass. November 21, 2012), in which it is considered that contractual agreements related to the curtailment of the limitation periods are not contrary to public policy provided that they are “reasonable”.

The tributary territories of Dutch law also have a regulation derived from the Dutch Civil Code, which has reduced the maximum period of thirty years to twenty (Article 3:306 Dutch and Suriname Civil Code) and generalised the period of five years (Articles 3:308, 3:309, 3:310 and 3:311), in particular for the obligations resulting from non-performance of the contract (Article 3:307), unless the right is derived from a court judgment or arbitral decision, in which case the period is increased to 20 years from the day following the date of the signing of the decision (Article 3:324). The criterion of *actio nata* is generally adopted, namely, the time when right or claim is enforceable (Articles 3:307, 3:308, 3:313, 3:314 and 3:315), although the calculation of the period is excepted from this rule for the claim for compensation for damages which depends on a subjective criterion (Article 3:310: 5 years from when it has knowledge both of the

damage and of the identity of the liable person), although in any case it is limited by a preclusive period of 20 years from the day when the event causing the damage occurred.

2. Limitation periods and free will in the international texts

In the international texts of unification of contract law there is an appreciable clear tendency towards the simplification and reduction of the periods. In this way it is sought to clarify the regulations governing prescription by unifying periods and reducing their duration. In general, relatively brief general or ordinary limitation periods are established: 3 years (Article 10.2 UP; Article 14:201 PECL; Article III–7:201 DCFR) or 4 years (Article 8 UNCITRAL Convention on Prescription). However, in the PECL and in the DCFR, the period is extended to 10 years if this concerns claims established judicially or through arbitration (Article 14:202 PECL; Article III–7:202 DCFR).

As regards the *dies a quo* for the calculation of the period, with a marked objective taint, in the international sphere, the UNCITRAL Convention (Articles 9 to 12), generally establishes the start of the limitation period on the date when the claim can be exercised, although they can also be subjective periods (*e.g.* date when there was fraud or this may reasonably have been discovered). In any case, Article 23 of the Convention establishes a general limit: the limitation period in any case will expire at the latest after the passage of ten years from the date of its commencement. However, the most current tendency in the international texts involves the combination of a relative, brief and subjective period (based on the plaintiff's or affected holder's knowledge of certain information that makes up the claim) with an absolute period, longer and absent in objective parameters, called preclusive period, whose objective is to prevent the prescription from being excessively prolonged for the purpose of the subjective calculation of the periods or the overlapping of causes of interruption or suspension (Article 10.2 UP; Article 14:301 PECL; Article III-7:301 DCFR Article 180 CESL).

If the time periods and the calculation are established, the scope reserved for free will differs from one text to another. The UNCITRAL Convention on Prescription expressly enshrines the prohibition of amendment of conventions on the rules governing prescription (Article 22.1). This is a provision to be taken into account in connection with the provisions in paragraph III of the Preamble of these Principles, since it affects the validity of subjecting the parties to the regulations governing prescription established in these Principles if they concern international sales and purchases of goods and the courts or the legislation of the Caribbean States party are affected:

Cuba, United States, Mexico and Dominican Republic. Subjecting the parties to the Principles, however, must be understood as an express exclusion by the parties of the application of the Convention, in accordance with its article 3.2^o.

On the contrary, the most recent international texts show an option clearly favourable to the moderate admissibility of the agreements on prescription appears, although with a different scope (Article 10.3 UP; Article 14:601 PECL; Article III–7:601 DCFR; Article 186 CESL).

3. Time periods, calculation and free will in the OHADAC Principles

The proposed regulation in the OHADAC Principles on international commercial contracts responds to the need to discover a meeting point between systems which guarantees the greatest degree of promptness of international commercial transactions, which requires a reduction of the limitation periods provided in some systems and a greater degree of security for international operators.

It has been considered improper to follow the line marked in some national laws which establish excessively long limitation periods; this legal possibility is the source of insecurity in international commercial transactions, and in addition, clashes head-on with the legal culture of the tributary countries of common law.

Some greater degrees of legal security are obtained through the combined set of two periods (a general period and maximum period) which permit, in view of the different calculation criteria provided, a balance of the interests of parties in conflict. The start of the calculation of the general or voluntary period from the time of having knowledge or the possibility to know certain elements (criterion of the possibility of knowledge by using reasonable diligence) guarantees the position of one of the contracting parties but presents a greater degree of insecurity for whoever pleads the prescription and obliges it to provide proof of the event which constitutes its starting point, given the difficulties that can be offered by the determination of the *dies a quo* and proof of the knowledge of certain circumstances by the other party. However, the balance is obtained with the provision of a longer period whose calculation is made leaving aside knowledge or not of the existence of the claim by its holder or of its personal situation. The objective of this maximum period consists in avoiding that prescription is excessively prolonged on grounds of the subjective calculation, suspension or renewal of the period, and thereby impacting the legal security. Prescription will take place in any case once this maximum period has passed, hence it is destined to rebalance the uncertainties that can be provoked by the subjective elements introduced in the regulations governing the prescription.

It can be discussed if the duration provided in the Principles for the general time period (three years) and for the maximum period (fifteen years) is the most appropriate. In principle, both periods appear sufficient, reasonable and adequate for a regulation intended to guarantee transparency and the promptness of cross-border legal transactions in the region.

Example: On 10 May 1995 the company A commissioned the construction and installation of industrial equipment from the company B, stipulating in the contract damages if its production is less than 200.000 units at a certain level of quality at any time of the useful life of the equipment. On 10 May 2005, as a result of an annual audit of quality, it was detected that the level of quality of the units produced does not conform to what was agreed. A can claim the agreed damages in the period of 3 years from 10 May 2005, a time when it knows the facts, although the lack of quality of the unit was earlier.

It does not appear advisable, however, to impose this regulation strictly. It is considered more appropriate to leave the parties certain freedom to modulate the general period, guaranteeing the contractual balance and legal security through the establishment of a minimum and maximum period.

RECOMMENDED CLAUSES:

Clause amending the general period in an engineering contract

“No action or proceeding under this contract will be able to be lodged against the provider of services or contractor after: (a) the period of one year from the date of the complete termination of the services; or (b) if this does not occur, the period of one year from the date when the last of the services related with the project is carried out”.

Article 9.3: Suspension of limitation periods

- 1. The computation of a general or voluntary limitation period is suspended by the commencing of judicial, arbitral, conciliating or any other procedure whose objective is to take a decision on the concerned right, as well by the opening of a procedure of insolvency or**

dissolution of the obligor where the obligee exercises a right. The suspension carries on until the definitive issue or the conclusion of the procedure otherwise.

2. The death or the incapacity of any contract party as well as any other circumstance reasonably unforeseeable and inevitable which prevent a party from exercising a right are causes of suspension of the limitation period until the designation of a heir or representative or until the impediment disappears.
3. The commencement by the parties of a negotiating process on the right or on the circumstances from which the right can be exercised shall suspend the limitation period until six months shall have passed since the last communication made within the negotiating process or since a party notified the other party it did not want to continue the negotiations.
4. The suspension of a limitation period stops temporarily the computation of time without deleting the time already passed.

COMMENT

1. The break of the limitation period: interruption, suspension and extension

In all of the systems certain facts or circumstances are provided which affect the course of the limitation periods, although their occurrence can provoke different effects, which occur either through a mere extension of the initially provided period, or through the commencement of a new period.

The civil systems of the civil law or continental tradition traditionally distinguish two basic forms of break of the limitation period: interruption and suspension. While interruption determines the futility of the limitation period that has passed and the commencement of a new period, in general, of identical duration to the original, suspension only paralyses or stops the running of the limitation period, which is resumed and continues to run once the determining cause ceases the suspension. The difference between the suspensive event and the interruptive event underlines, then,

the fact that while the former provokes the “resumption” of the limitation period, the latter originates its “recommencement”.

To a large extent, the interruptive circumstances or events coincide in the OHADAC territories of the continental civil law or continental tradition. Principally, these are the judicial exercise of the law and the recognition of the obligee’s right by the obligor.

The suspension, with weaker effects on the limitation period, means that it is a legal occurrence more broadly considered by the different systems which, in this manner, have conferred a special force to the expressed rule by the aphorism “*contra non valentem agere non currit prescriptio*”, whose meaning is clearly included in the reform (2008) article 2.234 of the French Civil Code.

Although the causes of suspension provided by the different systems are multiple and varied they tend to obey cases in which, for some sufficient cause, the holder cannot exercise its claim effectively. Firstly, there are objective circumstances or impediments outside of the control of the plaintiff, which prevent it from exercising this, principally *force majeure* (Article 2.234 French Civil Code; Article 2.530 Colombian Civil Code; Article 123 Cuban Civil Code). A second frequent motive is the uncollected or recumbent inheritance or succession (Article 2.237 French Civil Code; Article 880 Costa Rican Civil Code; Article 10.8 (2) UP). Thirdly, subjective, personal or family circumstances of the holder of the claim or plaintiff that make difficult its exercise, such as: minority or incapacity without legal representation or, being subjected to legal representation, for the reciprocal claims between representatives and represented parties are considered [Article 2.235 French Civil Code and Article 59 Draft Project of Reform of the French Law of Obligations of 2013; Article 2.530 Colombian Civil Code; Article 880 Costa Rican Civil Code; Article 976 Costa Rican Commercial Code; Article 2.252 Dominican Civil Code; Article 1.505 Guatemalan Civil Code; Article 1.691 Honduran Commercial Code; Article 2.020 Haitian Civil Code; Article 1.166 Mexican Civil Code, Article 931 Nicaraguan Civil Code; Article 2.093 Saint Lucian Civil Code; Article 1.965 Venezuelan Civil Code]. The existence of marriage or de facto cohabitation, in connection with the reciprocal claims between spouses or live-in partners (Article 2.236 French Civil Code; Article 123 Cuban Civil Code; Article 1.505 Guatemalan Civil Code; Article 1.691 Honduran Commercial Code; Article 1.167 Mexican Civil Code; Articles 2.094 to 2.096 Saint Lucian Civil Code); the fact of subjecting certain goods or relations between the legal persons and their directors or representatives to administration, in connection with the reciprocal relations between persons whose goods are administered and whoever administers them or between the legal persons and their representatives (Article 976 Costa Rican Commercial Code;

Article 1.691 Honduran Commercial Code); the obligee's ignorance or lack of knowledge of the identity of the obligor or the circumstances on which the claim is based (Article 14:301 PECL; Article III-7:301 DCFR); the fraudulent concealment of the debt (Article 880 Costa Rican Civil Code; Article 976 Commercial Code Costa Rican; Article 1.691 Honduran Commercial Code; Article 931 Nicaraguan Civil Code).

The postponement of the maturity (extension of the maturity, extension of the prescription) is a distinct figure upon the interruption and the suspension, which has been gaining ground in some systems. Its effect is not the break of the period, but the extension or prolongation of the time of expiry of the limitation period, in a manner that the limitation period ends only after the expiry of a certain time period added to the initial period. It is the solution opted for the Dutch Civil Code (Articles 3:320 and 3:321) for the majority of the causes of suspension that we have just considered above. The extension (*verlenging van de verjaring*) means that the concurrence of some of these subjective or objective circumstances at the time of the expiry of the limitation period or in its final six months determines its extension until six months pass from the end of the cause of extension. The extension is equally the formula proposed by Section 28 of the English *Limitation Act* for cases of incapacity, and the mechanism used in the territories under its influence for the case of death (section 11 *Limitation Act* Guyana), incapacity or minority (section 11 *Limitation Act* of Guyana; section 42 *Limitation of Actions Act, Chapter 173* of Grenada; section 36 *Limitation Act* of Bahamas; sections 29 *Limitation Act* 1984 of Bermuda; section 21 *Limitation Act* of Montserrat; section. 11 *Limitation of Certain Actions Act* of Trinidad and Tobago).

2. Suspension as the general rule in the international texts

Interruption, suspension and extension appear with different degrees of intensity in the texts of harmonisation of the contract law. These recognise a certain margin to the extension of the limitation period or postponement of the maturity. The extension is provided, firstly, for the case in which the parties are negotiating on the claim or the circumstances that could give rise to the origin of a claim, so that the limitation period will not expire until when one year has passed from the time of the final communication made at the time of the negotiations (Article 14:304 PECL; Article 182 CESL); secondly, for cases of incapacity if no representation exists, in which the limitation period for or against the said person will not be exhausted until one year has passed from the time of the disappearance of its incapacity or from the time when they have been appointed as representative (Article 14:305 PECL; Article III-7:305 DCFR); and, finally, for the case of death of the obligee or the obligor, a case in which the limitation period of a loan for or against the inheritance will not be extinguished

until one year from the time when it may be exercised for or against an heir or a representative of the hereditary estate has passed (Article 14:306 PECL; Article III-7:306 DCFR).

What stands out in these texts is that they generally convert the suspension of the prescription in view of its interruption, establishing as cases of suspension: cases of *force majeure*, death or incapacity, (Article 10.8 UP; Articles 14:303 PECL; Article III-7:303 DCFR; Article 21 Convention UNCITRAL); cases in which the obligee does not know or may reasonably not know the obligor's identity or the facts that have given rise to the origin of the loan, including, in the case of compensation for damages, the type of damage caused (Article 14:301 PECL; Article III-7:301 DCFR); the commencement by the obligee of a judicial or extrajudicial proceeding for the claim of its loan (Article 13 UNCITRAL Convention; Articles 10.5 and 10.6 UP; Article 14:302 PECL; Article III-7:302 DCFR) or the proceedings directed at avoiding the insolvency of the obligor (Article 10.5 UP and Article 181 CESL).

The interruption and subsequent recommencement of the period plays a residual role for the cases of recognition of the debt by the obligor (Article 10.4 UP; Article 14:401 PECL; Article III-7:401 DCFR; Article 184 CESL) and the obligee's intent to obtain the performance by enforcement proceedings (Article 14:402 PECL; Article III-7:402 DCFR).

3. Suspension in the OHADAC Principles

Regardless of the effect in the limitation period, there is one aspect in common between all the systems: both the judicial, arbitral or other alternative dispute resolution proceedings, as well as those subjective or objective events which, escaping its sphere of control and not being foreseeable, prevent one of the contract parties from exercising its rights, have an impact in the course of the limitation period. The rule contained in article 9.3 tries to reconcile harmoniously the regulations on the break of the limitation periods in the civil law or continental and *common law* legal systems present in the Caribbean, recognising the impact of these circumstances in the limitation periods.

Out of the possible options (interruption/suspension/extension), the one adopted in the proposed regulation obeys the necessity of drafting an acceptable rule in all the systems of the OHADAC area and is an adequate solution for a regulation aimed at facilitating cross-border legal transactions in the region. It is not recommended to attribute interruptive validity to these events, since this declaration with retroactive effect is excessively onerous for the obligor. The existence of a judicial proceeding or other type of proceeding, or the concurrence of an outcome that escapes the

plaintiff's control, will produce merely suspensive effects. This same validity expressly recognises the negotiations between the parties.

As regards the first group of causes which, in accordance with the Principles, provoke the suspension (the commencement of a judicial, arbitral, mediation or any other type of proceeding), has been preferred for recognising suspensive validity at the start of any of these proceedings in accordance with the provisions in the *lex fori*, including if the claim exercised is rejected through a procedural exception, which does not permit it to know the merits of the case, either due to being defective, a lack of jurisdiction, due to the abatement of the instance or due to the withdrawal of the actor. This aspect is expressly excluded in some systems, in which the judicial claim provokes the interruption (Article 877 Costa Rican Civil Code; Article 977 Costa Rican Commercial Code; Article 944 Cuban Commercial Code; Article 2.243 French Civil Code; Article 1.506 Guatemalan Civil Code; Article 2.015 Haitian Civil Code; Article 3:316.2^o Dutch and Suriname Civil Code; Article 1.692 Honduran Commercial Code; Article 1.649A Panamanian Commercial Code; Articles 2086 and 2087 Saint Lucian Civil Code; Article 17 UNICITRAL Convention). The reason for the option welcomed in these Principles is that, even though the proceeding has not ended with a termination based on the merits, its commencement by one of the parties shows its intent to exercise its right, including in the cases of the plaintiff's withdrawal or abatement of procedure, in which the procedural impulse to the proceeding in question has ceased to be realised; such attitudes must not be considered as an act of waiver of the prescription, since there is no express intent aimed at achieving that purpose. The suspension will be prolonged until the proceeding reaches its end in accordance with the determinations of the procedural law of the forum.

Example 1: The multinational insurance company A undertakes to provide medical assistance services to the employees that the consultant B has in the entire Caribbean region for 10 years from the date of the conclusion of the contract on 1 September of 2005. On 10 July 2010 the insurance entity decides to close its clinics in Guatemala and Mexico due to low profitability. The consultant B commences a judicial proceeding for non-performance of contract on 1 January 2013, which terminates through a judicial ruling, on 15 December 2013, in which the executive body abstains from knowing due to lack of jurisdiction. The period between 1 January and 15 December will not be calculated for the purpose of the general or voluntary limitation period.

Another group of causes, provided in paragraph 2 of article 9.3, covers the traditional suspensive events considered in the majority of the legal systems; cases in which the holder of the right considers itself unable to act, to exercise its right, either for

personal reasons, or for reasons beyond its control. Included here are cases like those of minors and persons lacking in capacity without legal representation, who do not have legal mechanisms for exercising their rights; claims against and for the existing inheritance, in which the suspension operates as a form of protection of the interests of the future successors; or cases of *force majeure*, unlike what occurs in systems like the tributaries of common law, fraudulent conduct by one of the parties that cause concealment or deception on certain aspects for the exercise of its right by the counterparty will not be considered as suspensive causes in these Principles, given the criterion of the knowledge or possibility to know adopted (Article 9.2 OHADAC Principles) concerning the commencement of the calculation of the general period.

Finally, the recognition of suspensive effect to the negotiations conducted between the parties prevents, on the one hand, them from being against the holder of the right as a mechanism for delaying the performance of the obligation due and to exhaust the limitation period and, on the other hand, which can be catalogued as an interruptive case in accordance with the provisions in the following article of these Principles, preventing the assimilation that could occur with the recognition of the debt, which would not benefit at all anyone who arrives to deal with the claim with its obligee informally.

The effect of the suspension implies the failure of the commencement of the limitation period, in some cases, or its temporary paralysation for the period of duration of the cause of the suspension. In accordance with the provisions in these Principles, it will be sufficient for the cause of suspension to take place within the limitation period for the suspension to come into play, and the said period is paralyzed. Reasons of convenience, connected to the swiftness of commercial transactions, mean that it is imperative not to adopt that criterion welcomed by some systems for the purpose of specifying the time when the event generating the suspension must occur, as occurs with the systems that require the event to occur at a time prior to the expiry of the period (Article III–7:303 DCFR) or the suspension to be prolonged for a certain time after the end of the suspensive event. The underlying motive in the systems that impose that limitation (to prevent an excessive prolongation of the limitation period after the suspension) is addressed in the OHADAC Principles with the maximum period provided in article 9.2.

Whatever event interferes in the passage of the limitation period, the suspension affects the ordinary or voluntary limitation period. The certainty and diligence required by cross border transactions require that the plaintiff can enforce the expiry of the

maximum limitation period against the holder of the claim if such a period has passed before it can exercise it.

Example 2: The same events as in example 1. The multinational insurance company A and the consultant B conduct negotiations for establishing the amount of the damages for non-performance which are prolonged until 20 July 2024. Once judicial proceedings have commenced on 1 August 2025, the insurance company A will be able to claim validly the passage of the maximum limitation period.

Article 9.4: *New limitation period by acknowledgment*

- 1. If the obligor acknowledges the obligee's right, a new limitation period begins the day after the acknowledgment**
- 2. Acknowledgment derives, particularly, from performance, partial performance, payment of interests, provision of a guarantee or declaration of set-off.**
- 3. Acknowledgment deletes the limitation period passed and implies the beginning of a new limitation period of the same length than the limitation period deleted.**
- 4. The maximum limitation period will not be renewed by acknowledgment and cannot be overtaken by the beginning of a new general or voluntary limitation period.**

COMMENT

1. The scope of the interruption-renewal of the limitation period

Article 9.4 reflects on one of the cases that provoke the so-called "interruption" of the prescription in the territories of the civil law or continental tradition, known as "renewal" in the common law system. Interruption or renewal prevents prescription from occurring, by eliminating and making useless the useful period passed until then and giving a commencement to the calculation of a new limitation period of identical duration to the annulled period.

In a good part of the national systems that make up OHADAC a wide margin tends to be given to interruption of prescription. This is the characteristic situation of the territories that are subject directly to the influence of French law, in the Spanish-speaking legal systems and in the tributary territories of Dutch law. The circumstances or events that provoke it are, principally: the judicial exercise of the right (Article 2.539 Colombian Civil Code; Article 876 Costa Rican Civil Code; Article 121 Cuban Civil Code; art 944 Commercial Code Cuban; Article 2.244 Dominican Civil Code; Article 2.241 French Civil Code; Article 1.506.1 Guatemalan Civil Code; Article 2.012 Haitian Civil Code; Article 3:316 Dutch and Suriname Civil Code; Article 2.301 Honduran Civil Code; Article 1.041 Mexican Commercial Code; Article 927 Nicaraguan Civil Code; Article 1.711 Panamanian Civil Code; Article Puerto Rican Civil Code 1.873; Article 2.085 Saint Lucian Civil Code; Article 1.969 Venezuelan Civil Code); the obligor's recognition of the obligee's right (Article 2.539 Colombian Civil Code; Article 876 Costa Rican; Article 2.242 Dominican Civil Code; Civil Code Article 2.240 French Civil Code; Article 1.506.2 Guatemalan; Article 2.016 Haitian Civil Code; Article 3:318 Dutch and Suriname Civil Code; Article 2.301 Honduran Civil Code; Article 1.041 Mexican Commercial Code; Article 927 Nicaraguan; Article 1.711 Panamanian Civil Code; Article 1.873 Puerto Rican Civil Code; Article 2.088 Saint Lucian Civil Code); the extrajudicial claim of the obligee (Article 977 Commercial Code Costa Rican; Article 1.711 Panamanian Civil Code; Article 1873 Puerto Rican Civil Code; Article 1.973 Venezuelan Civil Code); the written communication in which the obligee reserves its right to receive performance (Article 3:317 Dutch and Suriname Civil Code); and the payment of interest or amortisations by the obligor, as well as the partial performance of the obligation on the part of the obligor (Article 1.506.3º Guatemalan Civil Code).

In the sphere of common law, "renewal" or "fresh accrual action" is a figure practically circumscribed for the recognition by the obligor of the obligation and the payment or partial performance (section 29 *Limitation Act* of United Kingdom; sections 29-31 *Limitation Act 1997* of Antigua and Barbuda; section 10 *Limitation Act, Chapter 7:02* of Guyana; sections 38-40 *Limitation Act* of Bahamas; section 30 *Limitation Act 1984* of Bermuda ; section 37 *Limitation of Actions Act, Chapter 17* of Grenada; section 22 *Limitation Act, Chapter 2.12* of Montserrat; section 12 *Limitation of Certain Actions Act, Chapter 7:09* of Trinidad and Tobago).

This is the direction taken, closer to the common law model, in the international texts of harmonisation of the contract law. In the international texts there is a clear preference for the mechanism of the suspension in view of the recommencement of the limitation period, which is relegated to the recognition made by the obligor (Article

20 UNCITRAL Convention; Article 10.4 UP; Article 14:401 PELC; Article III-7:401 DCFR; Article 184 CESL). Articles 14:402 PELC and Article III-7:402 DCFR also provide for the renewal of period for the judicially established loans, each with reasonable intent of execution by the obligee (renewal by attempted execution).

2. The commencement of a new limitation period in the OHADAC Principles

The formulation of the article 9.4 permits the convergence between the model provided in English law and the civil law or continental legal systems in the scope of cross border commercial transactions, when ascribing the causes that provoke the commencement of a new limitation period only to the recognition made by the obligor of the right of the obligee. This limited effectiveness of the interruption-renewal of the limitation period seeks to reach a balance between the requirements of promptness imposed by the functioning of commerce in the region and in order to ensure legal security. Once prescription is established in the need to provide certainty to the situation of the passive subject of the claim faced with a prolonged silence by the holder of the right, there is no reason for protecting the confidential situation in which the prolonged silence of the holder of the right could have been created if the obliged party itself demonstrates expressly or tacitly that it knows and expects the claim.

The recognition has to be unequivocal. It is not considered adequate to impose formal requirements for its validity, as is done in the tributary systems of common law. A declaration or action of the obliged subject whom the prescription has to favour, unequivocally indicative of its conformity with the existence, validity and appurtenance of the right in question, prevents whoever carries it out from invoking the time passed from the commencement of the calculation of the limitation period for its benefit. As an illustration, paragraph 2 of article 9.4 mentions, as conclusive conducts that unequivocally emphasise and reveal the obligor's conformity with the existence and appurtenance of the right, the performance or partial payment, payment of interest, provision of a guarantee or set-off, in line with article 184 CESL. Such acts do not exhaust the list of what can be considered as recognition made by the obligor; everything reveals the obligor's willingness to perform will have to take this into consideration, *e.g.*, request for deferment of the payment. In any case, regardless of the form, express or tacit, written or oral, through which the obligor shows the knowledge and acceptance of the obligee's right, this demonstration will be regarded as recognition, and proof of its realisation is incumbent on the holder of the right favoured by the commencement of a new limitation period.

The recognition affects the general period or, where applicable, the voluntary period established by the parties, in accordance with the provisions of article 9.2 of these

Principles, although it will not be able exceed in any case, not even as a consequence of multiple recognitions, of the maximum period of fifteen years.

Example: The 1 April 2008 the company A commissions the construction of an industrial plant from the company B undertaking to deliver to it on 1 October 2008. The delivery is delayed by 6 months. A claims extrajudicially, on repeated occasions, the damages for delay (2010, 2015, 2018 and 2021), the debt in all of them being recognised by the company B. On 2 October 2023 the limitation period will have expired, without the final recognition made, the company B in 2021 can bring about an extension of the maximum limitation period.

Article 9.5: *Effects of limitation periods*

- 1. When a limitation period expires, the contract party benefiting must invoke it in order to be effective against any party having a right.**
- 2. What has been performed cannot be required simply because the limitation period had expired at the moment of performance, even when this circumstance was not known.**

COMMENT

1. Defensive validity of prescription in the OHADAC Principles

The article is focused on the defensive or inhibitory effect of prescription which permits one of the contract parties to adopt a negative attitude towards a claim, based on the mere passage of the time, but without ascertaining the impact that the phenomenon of prescription has on the rights. It is so-called “weak” validity, which considers the institution as a means of defence for late and untimely claims, without affecting the right. This conception is characteristic of the procedural perspective of the institution in the common law model [*Rodriguez v Parker* (1967), 1 QB 116, (1966) 2 All ER 349], and the conception welcomed in the international sphere (Articles 10.1 and 10.9 UP; Articles 14:101 and 14:501 PECL; Article III-7:501 DCFR, Article 185 CESL). However, it cannot be denied that in the OHADAC sphere certain tributary systems of French law confer extinctive or “strong” validity to prescription, considering that, once the limitation period has passed, the right is extinguished (Article 2.219 French Civil Code)

Although the Caribbean legal systems adopt different conceptions as has been indicated in the commentary at article 9.1 of these Principles, the results or effects tend to be consistent in these three aspects: necessity of assertion by the beneficiary party, no repetition of the amount paid voluntarily in the performance of the prescribed debt and the possibility of waiver of consummated prescription.

2. No ex officio assessment of the prescription

Whatever the basis (implicit presumption of abandonment of rights or protection of security and legal certainty) or the effect of the prescription (extinction or survival of the right, action or claim), is commonplace in the Caribbean systems that the prescription does not operate automatically (*ipso iure*) and the courts cannot accept it or assess it ex officio by rejecting the claim although it turns out that the limitation period has passed without interruption or suspension.

The necessity of assertion, characteristic of the proceduralist perspective of the institution in the tributary systems of common law [*Ronex Properties Ltd v John Lang Construction Ltd* (1983), 1 QB 404], one finds expressly enshrined in some OHADAC systems (Article 2.513 Colombian Civil Code; Article 973 Commercial Code Costa Rican; Article 2.223 Dominican Civil Code; Article 2.247 French Civil Code; Article 1.991 Haitian Civil Code; Article 3:322.1 Dutch and Suriname Civil Code; Article 1.688 Honduran Commercial Code; Article 876 Nicaraguan Civil Code; Article 1.956 Venezuelan Civil Code), and in the international texts (Article 24 UNCITRAL Convention; Article 10.9 (2) UP).

3. Legitimation for invoking prescription

Only if it is promptly invoked, direct legitimation for asserting prescription is incumbent on the contract party favoured by it. However, although not clearly admitted in all of the Caribbean systems, some systems, for the purpose of avoiding damage to whoever is affected by the mere passivity of whoever can invoke it in its own right or through its waiver, expressly recognise the legitimation of certain third parties for invoking or excepting the prescription. In detail, some Spanish-speaking legal systems and OHADAC territories that are tributaries or directly subject to the influence of French law allow prescription of the obligees of the obligor favoured by the prescription and any person affected or with a legitimate interest (Article 974 Costa Rican Commercial Code; Article 2.225 Dominican Civil Code; Article 2.253 French Civil Code; Article 1.993 Haitian Civil Code; Article 1.689 Honduran Commercial Code; Article 1.143 Mexican Civil Code; Article 877 Nicaraguan Civil Code; Article 1.837 Puerto Rican Civil Code; Article 2.051 Saint Lucian Civil Code; Article 1.958 Venezuelan

Civil Code). The OHADAC Principles are without prejudice to the possibility of invoking prescription on the part of third parties not reached by the optional and material nature of the present regulation. The said question must be resolved by the national law applicable in accordance with the rules of private international law.

4. No repetition of the sum paid voluntarily in performance of a prescribed debt

This effect is a consequence of the fact that the prescription, in accordance with the Principles, does not extinguish the right and only operates if it is invoked by the subject that it favours. Hence, if whoever can oppose it pays or performs instead of invoking it the payment will not be improper or by mistake (although the effect of the passage of the time is denied by the obligor), but that will indeed be done by whoever has declined to be defended, thus having a private interest. It will be a non-recoverable payment, and the exercise of an action for enrichment without cause will not [*Mill v Fowkes* (1839), 5 Bing NC 455].

Some systems justify this effect by considering that, after the observance of the limitation periods, the obligation is transformed into a legally imperfect natural obligation, insofar as its performance should not be imposed on a compulsory basis, but that the legal system excludes restitution (*soluti retentio*) due to there being a moral duty to pay the prescribed debts (Article 1.527 Colombian Civil Code; Article 1.372 Honduran Civil Code). Without resorting to this justification, many systems expressly recognise the honourability of the sum paid in performance of a prescribed debt, although it has been made in ignorance of the prescription (Article 975 Costa Rican Commercial Code; Article 113 Cuban Civil Code; Article 2.249 French Civil Code; Article 1.690 Honduran Commercial Code; Article 26 UNCITRAL Convention; Article 10.11 UP; Article 14:501-2 PECL; Article III-7:501 (2) DCFR).

Example: The company A, a supplier of prosthetic material and equipment to the company B, with the objective of maintaining the commercial ties pays damages for defective prosthetic equipment once more than 3 years have passed from the date of delivery and discovery of its defects. After the break of the commercial relations through disagreements occurred 2 months afterwards, will not be able to claim the return of the damages for unjust enrichment or undue payment, arguing they have paid it once the limitation period had expired.

Article 9.6: Renunciation of limitation periods

1. The benefiting party may renounce the consolidated limitation only once the limitation period has expired.

2. An anticipated renunciation of a limitation period has the same effects than an acknowledgment according to that stated in Article 9.4.

COMMENT

1. Renunciation of consummated prescription

The configuration of prescription as an institution which authorises the contract party that has benefitted to use it as a means of defence against the claim or the procedural exercise of the action on the part of the obligee admits that, by affecting available rights and interests, the interested party can renounce the economic advantage entailed by the prescription itself. The validity of this renunciation will require that the entire limitation period has passed, its interruption already not being possible. The renunciation entails the start of a new, general or voluntary, limitation period. From the proceduralist perspective of common law, the renunciation will be translated into a simple lack of opposition proceedings to the judicially exercised action. The abandonment of this defensive medium permits that an untimely claim can obtain a favourable termination of the right of whoever promotes it.

The proposed provision does not impose any formalism for the validity of the renunciation, admitting, as established by the majority of the systems of the Caribbean region, both express as well as tacit renunciation (Article 851 Costa Rican Civil Code; Article 2.514 Colombian Civil Code; Article 2.221 Dominican Civil Code; Article 2.251 French Civil Code; Article 1.504 Guatemalan Civil Code; Article 1.989 Haitian Civil Code; Article 2.268 Honduran Civil Code; Article 1.687 Honduran Commercial Code; Article 1.141 Mexican Civil Code; Article 874 Nicaraguan Civil Code; Article 1.835 Puerto Rican Civil Code; Article 2.049 Saint Lucian Civil Code; Article 1.957 Venezuelan Civil Code). The express renunciation can derive from a declaration of unilateral intent of the party favoured by the prescription as well as from an agreement or covenant with the other party, through which prescription is renounced in exchange for a consideration. Among the expressive acts of a tacit renunciation are payment of the prescribed debt, its recognition by the obligor, the offer of payment to the obligee, the request of a deadline for making it valid, the negotiations on the amount to be paid or the submission of its determination at the discretion of a third party [*Lubovsky v Snelling* (1944), KB 44; *Wright v John Bagnall & Sons Ltd* (1900) 2 QB 240; *Rendall v Hill's Dry Docks & Engineering Company* (1900) 2 QB 245].

If a plurality of subjects exist in any of the contracting parties, the effects of the renunciation formulated only by some or regarding some of the subjects that combine the active or passive side of that relationship (loan or obligation) will be determined by the specific rules so that the specific type of obligation is governed (solidarity, association) in accordance with the provisions of these Principles. To avoid the treatment based on prescription of the impact that the plurality of subjects causes in any of the contract parties based on the assertion, suspension, recognition or renunciation of the limitation period provides clarity to the system (Article 177 of the Draft Project of Reform of the French Law of Obligations developed in 2013).

2. Legitimation

The Principles only regulate the effects of the renunciation between the contracting parties. They do not prejudice any third party rights of aggrieved parties in their legitimate interests for objecting to the renunciation to the consummated prescription (Article 2.225 Colombian Civil Code; Article 974 Commercial Code Costa Rican; Article 2.253 French Civil Code; Article 1.993 Haitian Civil Code; Article 2.270 Honduran Civil Code; Article 1.689 Honduran Commercial Code; Article 877 Nicaraguan Civil Code; Article 1.837 Puerto Rican Civil Code; Article 2.090 Saint Lucian Civil Code, Article 1.958 Venezuelan Civil Code), which will eventually be determined by the applicable national law in accordance with the rules of private international law.

3. Renunciation of future prescription

Through the influence of the French Civil Code (Articles 2.250 to 2.253), the majority of the Caribbean systems of the continental or civil law or continental tradition expressly reject the admissibility and validity of anticipated renunciation by covenant between the parties or by unilateral declaration by the affected party (Article 2.514 Colombian Civil Code; Article 850 Costa Rican Civil Code; Article 970 Commercial Code Costa Rican; Article 2.220 Dominican Civil Code; Article 1.503 Guatemalan; Article 1.988 Haitian Civil Code; Article 2.268 Honduran Civil Code; Article 1.687 Honduran Commercial Code; Article 3:322.2 and 3 Civil Code Dutch and Suriname; Article 1.141 Mexican Civil Code, Article 873 Nicaraguan Civil Code; Article 1.835 Puerto Rican Civil Code; Article 2.048 Saint Lucian Civil Code, Article 1.954 Venezuelan Civil Code).

The irrevocability to the future prescription is based on the objective foundation of the institution, vetoing the legal transactions aimed at making imprescriptible the exercise of rights that the law declares prescriptible and in this way imposing limits on free will. Its basis is found in preventing an excessive prolongation of the periods, which could convert a prescriptible claim into an imprescriptible one.

In these Principles, given the limited admissibility that is realised by the agreements aimed at amending the general limitation period (Article 9.2), it is considered unnecessary to declare the nullity of the anticipated renunciation of the prescription, since it is more reasonable to showcase its consideration as a case of (tacit) recognition by the obligor of the obligee's right in accordance with the provisions in article 9.4.

Example: 2 years after the delivery of the defective goods, the buyer and the seller agree that the seller renounces to assert the limitation period of the action for damages due to a lack of conformity, which the buyer can exercise. This agreement will serve to commence a new general limitation period.

OHADAC PRINCIPLES ON INTERNATIONAL COMMERCIAL CONTRACTS
(2015)

PREAMBLE

- I. The OHADAC Principles on International Commercial Contracts will be applied, in whole or in part, when the parties have so agreed.
- II. Unless otherwise stated, the rules included in these Principles may be excluded or modified by the parties. Contractual clauses that are contrary to these Principles will prevail.
- III. These Principles do not prevent the application of overriding mandatory rules or international public policy rules of national or international origin, which are applicable according to Private International Law rules.
- IV. These Principles do not prevent the application of commercial usages in international trade.
- V. These Principles will be uniformly interpreted in accordance with their international scope.

CHAPTER 1
GENERAL PROVISIONS

Article 1.1: Freedom of Contract

Parties are free to enter into a contract and to determine its content.

Article 1.2: Pacta sunt servanda

Contract parties are bound to perform the agreed obligations according to contractual terms.

Article 1.3: Declarations and notices

- 1. Declarations and notices of the parties must be given by appropriate and effective means. They will be effective when they reach the addressee.
- 2. A declaration or notice reaches the addressee immediately when it is delivered to it is made orally and in its presence.
- 3. A written declaration or notice reaches the addressee when it is delivered to its place of business or mailing address, or when it is received in its fax receiver or e-mail server.

Article 1.4: Computation of time

- 1. When a period of time is expressed in days, the day of the contract, event, decision or notice from which the period begins is not computed.
- 2. When a period of time begins from a determined day, such a day is computed within the period.

3. Periods of time expressed in months or years shall end on the day of the last month or year corresponding to the same day fixed for the beginning of that period. When the final month does not include that day, the period shall end the last day of the month. When the period is expressed in months and days, months are firstly computed and days are computed afterwards.

4. Unless otherwise stated, periods of time set by the parties refer to natural days, including official holidays and non-working days. When the period of time for performance ends on an official holiday or non-working day at the place of performance or at the place where the party who has to perform is established, it will be presumed to be extended until the next working or business day.

5. The time zone will be that corresponding to the place of establishment of the party who sets the time. If setting of time is not attributable to any party, as to the performance of obligations the time zone will be that corresponding to the place of performance or, failing that, to the place where the party who has to perform is established.

CHAPTER 2

FORMATION OF CONTRACT

Section 1. Offer and acceptance

Article 2.1.1: Formation of contract

The contract is concluded by the acceptance of the offer.

Article 2.1.2: Definition of offer

A proposal for concluding a contract constitutes an offer if it is sufficiently precise and indicates the intention of the offeror to be bound in case of acceptance.

Article 2.1.3: Offer and invitatio ad offerendum

1. The offer may be directed to one or more specific persons.
2. A proposal directed to the public shall not constitute an offer, unless so provided by the offeror or indicated by the circumstances.
3. Circumstances mentioned in the previous paragraph exist, particularly, in case of exhibition of goods and products at a particular price in physical or virtual spaces. In these cases, the offer is presumed effective until the stock of goods or the possibilities to supply the service are exhausted.

Article 2.1.4: Effectiveness of the offer

1. An offer becomes effective when it reaches the offeree.
2. Any offer may be withdrawn if the notice of withdrawal reaches the offeree before or at the same time as the offer.

Article 2.1.5: *Revocation of the offer*

1. The offer may be revoked if the revocation reaches the offeree before the acceptance has been dispatched.
2. However, an offer cannot be revoked if it establishes a period of irrevocability or the offeree could reasonably have believed that the offer was irrevocable and has started to perform acts of execution.
3. When the offer establishes a period of acceptance, this is presumed to be a period of irrevocability, unless otherwise indicated by circumstances.

Article 2.1.6: *Definition of acceptance*

1. Acceptance is a firm adhesion to the offer.
2. Acceptance derives from a statement made by or other conduct from the offeree. This conduct may consist in the beginning of performance of the contract by the offeree.
3. Silence or inactivity does not in itself amount to acceptance.

Article 2.1.7: *Time of acceptance*

1. The offer must be accepted within the time the offeror has fixed, and if no time is fixed, within a reasonable time considering the circumstances.
2. The offer expires at the end of the fixed or reasonable period of acceptance. A late acceptance is not effective, unless the offeror renounces the expiry date by notifying the offeror without delay that it accepts the offer

Article 2.1.8: *Acceptance with modifications*

Acceptance by the offeree which establishes or implies additional or different terms that alter or condition the terms of the offer is a rejection of the initial offer and, in turn constitutes a new offer.

Article 2.1.9: *Standard terms*

1. The standard terms of a contract are clauses that are not individually negotiated by the parties and which have been drawn up in advance for a number of contracts of a certain class.
2. In order to oppose the standard terms of the contract to the adhering party, it is necessary for the adherent party to be given notice on them before the conclusion of the contract. This condition shall not be considered satisfied by the mere reference to the conditions in the contract, although the adherent party has signed the contract when
 - a) they are so surprising or unusual that the adherent could not reasonably take them into consideration in regard to the circumstances and purpose of the contract; or
 - b) they are too onerous, taking into account the nature, language and the way they have been established.

Article 2.1.10: *Battle of forms*

1. When both parties use forms with standard terms and they fail to reach an agreement on the terms to use, the contract is concluded on the basis of the agreed terms and the provisions of the standard terms that are substantially common to both parties.
2. However, the contract is not concluded if either party has informed or informs the other party, without undue delay, that it does not intend to be bound by the contract

Section 2. *Time and place of conclusion of the contract*

Article 2.2.1: *Time of conclusion of the contract*

Unless otherwise established in the offer, the contract is concluded at the time that the offeror receives the acceptance or at the time the offeror has knowledge of behaviour by the offeree implying acceptance.

Article 2.2.2: *Place of conclusion of the contract*

Unless otherwise established in the offer, the contract is considered as concluded in the place of the establishment of the offeror.

Section 3. *Representation*

Article 2.3.1: *Scope of the section*

1. This Section governs the authority of a person ("the agent") to affect the legal sphere of another ("the principal") by a contract with a third party, whether the agent acts in the name of the principal or in its own name.
2. This Section does not govern the internal relations between the agent and the principal.
3. This Section does not govern the authority conferred by law to an agent or the authority of an agent appointed by a public or judicial authority.

Article 2.3.2: *Grant of the authority*

1. The principal's grant of authority to an agent may be express or implied.
2. A person is to be treated as having granted authority to an agent if the person's statements or conduct induce a third party acting in good faith reasonably to believe that the apparent agent has been granted authority to perform certain acts.
3. Unless the principal explicitly provide otherwise, the agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authority was granted.

Article 2.3.3: *Disclosed agency*

1. Where an agent acts within the scope of its authority and discloses to the third party that he is acting as an agent, the acts of the agent shall directly bind the principal and the third party. No legal relation is created between the agent and the third party.
2. However, the acts of the agent shall bind the agent and the third party where the agent, with the consent of the principal, undertakes to become a party to the contract.
3. Where an agent acts in the name of a principal whose identity is to be revealed later, but fails to reveal that identity within a reasonable time after a request by the third party, the agent itself is bound by the act.

Article 2.3.4: *Undisclosed agency*

1. When an agent acts within the scope of its authority but does not disclose to the third party that it is acting as an agent, the acts of the agent shall bind only the agent and the third party.
2. The acts of the agents shall not affect the legal position of the principal in relation to the third party unless this is specifically provided for by the applicable law.

Article 2.3.5: *Agent acting without or exceeding its authority*

1. When an agent acts without authority or exceeds its authority, its acts shall not affect the legal position of the principal, unless those acts are ratified by the principal according to Article 2.3.9.
2. The agent that acts without authority or exceeds its authority, shall be liable to the third party and shall pay damages that will place the third party in the same position as if the agent had acted with authority and not exceeded its authority. However, the agent shall not be liable if the third party knew or ought to have known that the agent had no authority or was exceeding its authority.

Article 2.3.6: *Conflict of interest*

1. If a contract concluded by an agent involves the agent in a conflict of interests with the principal, the principal may avoid the contract according to the provisions of Section 5 of Chapter 3, unless the third party legitimately did not know of that conflict of interests.
2. There is presumed to be a conflict of interests where the agent has assumed the situation of the other contract party or it is entitled under two or more grants of authority to conclude the contract by itself.
3. The principal may not avoid the contract if it had consented to the agent's involvement in the conflict of interests or if the principal knew or ought to have known it and had not objected within a reasonable time.

Article 2.3.7: *Sub-agency*

1. Unless otherwise stated, the agent shall have authority to appoint a subagent to perform acts which are not of a personal character.
2. The rules of this Section shall apply to the acts of the subagent.

Article 2.3.8: *Joint authority*

1. Where an authority is jointly granted by two or more principals to an agent to perform one or more acts, the principals shall be jointly and severally liable to the third party with whom the involved act or acts have been performed.
2. Where an authority is jointly granted by the principal to two or more agents, each of them may perform the involved act or acts separately, unless the principal provide otherwise.

Article 2.3.9: *Ratification*

1. An act performed by an agent that acts without authority or exceeds its authority may be ratified by the principal. Upon ratification the act produces the same effects as if it had initially been carried out with authority and not exceeded the authority.
2. The third party may by notice to the principal specify a reasonable period of time for ratification. If the principal does not ratify within that period of time, it can no longer do so.
3. The third party that, at the time of contracting with the agent, neither knew nor ought to have known of the lack of authority, may, at any time before ratification, by notice to the principal indicate its refusal to become bound by a ratification.

Article 2.3.10: *Termination and restriction of authority*

1. Termination or restriction of authority is not effective in relation to the third party unless the third party knew or ought to have known of it.
2. Even if the party knows of them, neither termination nor restriction of authority is effective in relation to third party, and the authority of the agents continues, where the principal is under an obligation to the third party not to end or restrict it.
3. Notwithstanding the termination of its authority, the agent remains authorised for a reasonable time to perform those acts that are necessary to protect the interests of the principal or of the principal's successors.

CHAPTER 3

VALIDITY OF CONTRACT

Section 1. General Provisions

Article 3.1.1: *Validity of mere agreement*

A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement.

Article 3.1.2: *No requirements as to form*

Contracts will be enforceable regardless of the form of conclusion.

Article 3.1.3: *Initial impossibility*

The mere fact that at the time of the conclusion of the contract the performance of the obligation was impossible does not affect its validity. However, parties may invoke the rules on impossibility (*force majeure*).

Section 2. *Capacity*

Article 3.2.1: *Exclusion*

These Principles do not deal with the capacity of the parties or the invalidity of the contract arising from the lack of capacity.

Section 3. *Illegality*

Article 3.3.1: *Illegality*

These Principles do not limit or prevent the application of overriding mandatory rules or international public policy rules of national or international origin, which determine the illegality or opposition to public policy of the object, or the content or the performance of the contract or of some of its obligations.

Section 4. *Defective consent*

Article 3.4.1: *Defects of consent*

The defects of consent are mistake, fraud, threat and undue influence.

Article 3.4.2: *Mandatory character of the provisions*

1. The provisions on fraud, threat and undue influence are mandatory.
2. The provisions on mistake shall be applicable unless the parties agree otherwise.

Article 3.4.3: *Mistake*

1. A party may avoid the contract if, at the time the contract was concluded, it made a relevant mistake either of fact or of law, which determined its consent and if:
 - a) the other party caused the mistake or made the mistake possible due to its silence contrary to legal duties to inform; or
 - b) the other party made the same mistake; or
 - c) the other party knew or ought to have known of the mistake, and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error.
2. The mistake is relevant if it was of such importance that a reasonable person in the same situation as the party would not have concluded it.

3. However, a party may not avoid the contract if:

- a) it was grossly negligent in committing the mistake (inexcusable mistake); or
- b) the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party.

Article 3.4.4: Error in expression or transmission

The mistake regime, mentioned in the previous article, is applicable to cases of error or inaccuracy in expression or transmission of a declaration, without prejudice to the rules related to interpretation contained in Chapter 4.

Article 3.4.5: Loss of the right to avoid

1. The right to avoid the contract shall be extinguished if, before the mistaken party has exercised the right to avoid the contract, the other party notifies his will to accomplish the contract or accomplish it in the sense it was understood by the party having the right to avoid it. This notification is to take place as soon as possible once the mistake is known. In such a situation, the contract will be considered as concluded under those terms.

2. The notification of avoidance under mistake given by the mistaken party shall be rendered without effect if the other party notifies without delay its acceptance to accomplish the contract in the sense that it was understood by the mistaken party. In such a situation, the contract will be considered as concluded under those terms.

Article 3.4.6: Fraud

A party may avoid the contract if it has been induced to conclude the contract by the other's party fraudulent misrepresentation.

Article 3.4.7: Threat

1. A party may avoid a contract when it has been induced to conclude the contract by the other party's unjustified threat of an imminent and serious wrong.

2. The threat is unjustified if the act or omission with which the party has been threatened is illegal in itself or it is an illegal means to accomplish the conclusion of the contract.

Article 3.4.8: Undue influence

1. A party may avoid the contract or a contract term if the other party, at the time the contract was concluded, had taken unfair advantage of the first party's dependence, trust, economic distress or urgent needs, or of its ignorance or manifest inexperience.

2. Avoidance can only be invoked if the other party knew or should have known this circumstance and it took advantage of the situation and excessively prejudiced the aggrieved party.

Article 3.4.9: Defects caused by a third person

The party suffering the mistake, fraud, threat or undue influence may avoid the contract when such defects have been caused by a third party, if the other party knew or ought to have known this circumstance.

Section 5. Avoidance

Article 3.5.1: Right to avoid the contract

1. A contract may be avoided by the party whose consent is defective
2. A contract may also be avoided by the principal in case of conflict of interest with the agent.
3. The right of a party to avoid the contract is exercised by notice to the other party within six months:
 - a) In case of mistake or fraud, from the moment in which the entitled party knew or must have known of the reality.
 - b) In case of threat or undue influence, from the moment in which that situation ended or the entitled party could act freely.
 - c) In case of conflict of interest, from the moment in which the principal knew or must have known of the conclusion of the contract and of the conflict of interest.

Article 3.5.2: Confirmation of an avoidable contract

The right to avoid a contract is extinguished if the party that is entitled to avoid it confirms it, expressly or impliedly, after knowing of the cause of avoidance and after that defect has ended.

Article 3.5.3: Right to restitution

1. In case of the avoidance of the contract, each party has a right to the restitution of whatever has been performed and a right to compensation for the reasonable benefits obtained by the other party.
2. If restitution in kind is impossible or excessively difficult, it has to be made in money. However, the party who terminates is not obliged to return the value if it proves that the loss or destruction of the object was caused by *force majeure*.

CHAPTER 4

INTERPRETATION AND CONTENT OF THE CONTRACT

Section 1. Interpretation of contractual terms

Article 4.1.1: In claris non fit interpretatio

1. When the conditions or terms of a contract are clear, they will be interpreted according to their literal meaning.

2. A contract term will not be considered clear if it is capable of different meanings or, in the light of the context of the contract, it is inferred that such a term or expression is due to a manifest mistake.

Article 4.1.2: *General criterion of interpretation*

1. Contracts and statements of the parties will be interpreted according to the meaning that a reasonable person of the same kind as the parties would give them in similar circumstances.
2. In particular, in the interpretation of a contract and the statements of the parties, the following circumstances will be considered:
 - a) The intent of a party, insofar as that intent was known or should or could have been known by the other party.
 - b) The concurrent circumstances at the conclusion of the contract and during its execution.
 - c) Commercial usages and practices between the parties.
 - d) Commercial usages and the meaning of contractual terms in the trade concerned.
 - e) General usages in international trade.
 - f) The object of the contract.
 - g) Business common sense.

Article 4.1.3: *Contra proferentem principle*

Unclear terms will be interpreted in the most adverse sense for the party who has written them.

Article 4.1.4: *Favor negotii*

Unclear terms will be interpreted in the sense most favourable to give effects to them and to all terms of the contract.

Article 4.1.5: *Interpretation of the contract as a whole*

1. Contractual terms will be interpreted in the light of the entire contract, giving to the particular terms the meaning most in accord with the other terms of the contract.
2. Individually negotiated contractual terms will prevail over terms that have not been individually negotiated.

Article 4.1.6: *Linguistic discrepancies*

Where a contract is drawn up in two or more language versions, in case of discrepancy between the versions, and if the parties have not agreed to a prevailing version, the version in which the contract was originally drawn will prevail.

Section 2. Content of the contract

Article 4.2.1: Construction of the contract

1. The content of contracts exclusively derives from the agreement of the parties.
2. Where the parties have not expressly agreed a contractual term that is decisive in determining their respective obligations, such a term can be inferred implicitly considering its objective reasonableness and the purpose of the contract.

Article 4.2.2: Modification in a particular form

1. Where parties have agreed on a particular form to modify or terminate the contract, modification or termination of the contract shall not be made in another form.
2. However, the party whose statements or conduct have induced the other party to act reasonably based on that conduct shall be bound by its own acts and precluded from invoking this Article.

Article 4.2.3: Merger clause

The content of the contract cannot be modified or completed by previous statements or agreements if the parties have included a clause stating that the contract contains all terms agreed upon by the parties. However, such statements or agreements may be used to interpret the content of the contract.

Section 3. Contractual obligations

Article 4.3.1: Duty to achieve a result and duty of best efforts

1. To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.
2. To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.

Article 4.3.2: Criteria to determine the kind of duty involved

In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or a duty to achieve a specific result, regard shall be had, among other factors, to

- a) Express and implied terms of the contract.
- b) The nature and purpose of the contract.
- c) The degree of risk normally involved in achieving the expected result.
- d) The ability of the other party to influence the performance of the obligation.

Article 4.3.3: *Quality of performance*

Where the quality of performance is not established or ascertainable under the contract, a party is bound to render a performance of reasonable diligence and quality and not less than average in the circumstances.

Article 4.3.4: *Price determination*

1. Where a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price.
2. The determination of the price shall not be left to the discretion of one of the parties.
3. Where the price is to be fixed by a third person, and that person not do so, in absence of any indication on the contrary on the contract, the price will be determined by reference to the price generally charged in the trade concerned or, if such price is not available, to a reasonable price.
4. When the price is to be fixed by reference to factors which do not exist or have ceased to exist or to be accessible, the nearest equivalent factor shall be treated as a substitute.

Article 4.3.5: *Conditional obligation*

The obligation that depends on the occurrence of a future and uncertain event is conditional.

Article 4.3.6: *Void conditional obligations*

Conditional obligations are void when:

- a) the fulfilment of the condition depends on the sole will of the obligor; or
- b) the obligation depends on impossible conditions or conditions contrary to law or good customs.

Article 4.3.7: *Effects of conditions*

1. A condition is suspensive when the existence of the obligation depends on its fulfilment.
2. A condition is resolutive when its fulfilment implies that the effects of the dependent obligation come to an end.
3. Pending fulfilment of a suspensive condition, the following rules shall be observed:
 - a) If the object of the contract is entirely destroyed, without the fault of the obligor, the obligation lapses. If the object is entirely destroyed due to the fault of the obligor, he is bound to compensate the damage.
 - b) If the object of the contract is damaged, without the fault of the obligor, he will perform the obligation delivering it to the obligee in its current state. If the object is damaged due to the fault of the obligor, the obligee has the choice of terminating the obligation or its performance, with compensation for damage in both cases.

- c) The obligee may perform all acts that tend to retain his right.
4. When the condition is fulfilled, the effects of the conditional obligation operate retroactively at the time it was taken, unless the effects of the obligation should be referred to a different date by the will of the parties or the nature of the act.

Article 4.3.8: Interference in conditions by a party

1. Prior to fulfilment of a condition, a party cannot, without legitimate interest, behave so as to prejudice the rights of the other party if the condition is fulfilled.
2. If fulfilment of a condition is prevented by a party, without legitimate interest, this party may not rely on the non-fulfilment of the condition.
3. If fulfilment of a condition is brought about by a party, without legitimate interest, this party may not rely on the fulfilment of the condition.

Section 4. Plurality of parties

Article 4.4.1: Plurality of obligors

1. When several obligors are bound to the same obligee by the same obligation, this obligation is joint and several if each obligor is bound for the whole obligation, so that the obligee may claim performance from any of the obligors and that the fulfilment by one discharges the others.
2. When each obligor is bound only for its share, the obligations are equal unless the circumstances indicate otherwise.

Article 4.4.2: Presumption of joint and several obligations

An obligation on the part of two or more obligors is presumed to be joint and several, unless declared to be otherwise.

Article 4.4.3: Variable joint and several obligations

An obligation may be joint and several between some of the co-obligors, and not between all of them.

Article 4.4.4: Rights of the obligee

The obligee of a joint and several obligation may apply for total or partial performance by any one of the obligors at its choice.

Article 4.4.5: Effects of legal proceedings

1. Performance of the obligation by one of the co-obligors does not extinguish a joint and several obligation, only the part that the co-obligor should have fulfilled.

2. Legal proceedings taken against one of the co-obligors suspend limitation periods for the others

Article 4.4.6: Defences

A joint and several obligor sued by the obligee may plead all the defences which are common to all the co-obligors as well as such as are personal to himself, but it cannot plead such defences which are purely personal to one or several of the other co-obligors.

Article 4.4.7: Extinction of the obligation

1. Performance and set-off declared according to section 2 of chapter 6 extinguish the obligation to the amount paid or compensated.
2. The remission of one co-obligor's obligation extinguishes the obligation, unless the obligee expressly indicates that it is only discharging this co-obligor. In this case, it reduces the part and portion belonging to the co-obligor in the remainder of the obligation.
3. The obligee that renounces the joint and several liability with respect to one of the obligors does not imply the loss of the joint and several liability towards the others, but extinguishes the obligation for the obligor's part and portion that is being renounced.
4. The confusion of rights which arises when the qualities of obligor and obligee are united in the same person extinguishes obligation only for the part and portion of the co-obligor in whom the qualities of obligor and obligee are united.

Article 4.4.8: Relationship between joint and several obligors

1. Shares of joint and several obligors are equal, unless the circumstances indicate otherwise.
2. Unless otherwise agreed, if one of the co-obligors is found insolvent, the loss occasioned by its insolvency is apportioned among all the others.

Article 4.4.9: Recovery of contribution and subrogation

1. A joint and several obligor who has paid more than its share, may recover the excess from the other co-obligors to the extent of each obligor's share.
2. A joint and several obligor who has performed more than its share may also subrogate in the rights of the obligee.
3. A joint and several obligor against whom a claim is made by the obligee may assert all the defences that are common to all the co-obligors and were not invoked by that co-obligor, as well as the defences that are personal to it, but it may not assert defences that are purely personal to one or more of the other co-obligors.

Article 4.4.10: Joint and several obligees

If several obligees have a joint and several claim against a single obligor, they can individually claim the fulfilment of the whole obligation from the obligor, so that the fulfilment of the obligor to any obligee releases the obligor.

Article 4.4.11: *Non presumption of joint and several rights or claims*

There is no joint and several claims or obligees unless it is expressly agreed between the obligor and the obligees.

Article 4.4.12: *Variable joint and several claims*

A right or claim may be joint and several only between some of the obligees, and not between all of them.

Article 4.4.13: *Rights of the obligor*

The obligor has the option of performing or paying to any of the joint and several obligees.

Article 4.4.14: *Defences and extinction of the obligation*

1. Where an obligor is sued by any of the joint and several obligees, it may assert all the defences that are common to the obligees as well as defences that are personal to its relationship with the obligee, but it may not assert defences that are purely personal to its relationship with one or more of the other co-obligees.
2. Performance as well as set-off declared according to section 2 of chapter 6 extinguishes the claim to the amount paid or compensated.
3. The remission of debt and the confusion of rights which arises when the qualities of obligor and obligee are united in the same person extinguish the claim only for the part and portion of the remitting obligee or the person in whom the qualities of obligor and obligee are united.

Article 4.4.15: *Allocation between joint and several obligees*

1. Joint and several obligees are entitled to equal shares, unless declared otherwise.
2. An obligee who has received more than its share must transfer the excess to the other obligees to the extent of their share in the right.

CHAPTER 5

EFFECTS OF THE CONTRACT

Section 1. Term of the contract

Article 5.1.1: *Contracts for an indefinite period*

1. Each party may end a contract involving continuous or periodic performance of obligations unilaterally, at any time and without invoking any cause, by giving a reasonable period of notice.

2. Whenever the reasonable period of notice is observed, the party who decides to end the contractual relationship must only compensate the other party for the reasonable expenses that it has already made towards the performance of the contract.

Article 5.1.2: Contracts for a definite period

1. Where, in a contract involving continuous or periodic performance of obligations, the parties have determined the period of duration, the contract terminates at its expiry.
2. However, if one party has given notice to the other expressing its intention to renew the contract, the party who does not wish to renew must notify the other of its decision within a reasonable time before the expiry of the contract.
3. Where a contract involving continuous or periodic performance of obligations for a definite period continues to be performed after that period has expired, it becomes a contract for an indefinite period.

Section 2. Third party rights

Article 5.2.1: Contracts in favour of third parties

1. The parties to the contract (promisee and promisor) may include stipulations in favour of a third party (beneficiary), who will acquire, in the absence of any agreement to the contrary, the right to require the promisor to perform it.
2. The existence and the content of the beneficiary's right against the promisor are determined by the agreement of the parties.

Article 5.2.2: Exclusion or limitation clauses

The parties may give the beneficiary the right to invoke against the promisor a clause that excludes or limits the promisee's liability.

Article 5.2.3: Revocation of the stipulation in favour of a third party

The stipulation may be modified or revoked while the beneficiary has not notified its acceptance to any of the contracting parties.

Article 5.2.4: Defences

The promisor may only assert against the beneficiary, in the absence of any agreement to the contrary, the defences derived from the contract which contains the stipulation in favour of the beneficiary.

CHAPTER 6
PERFORMANCE OF THE CONTRACT

Section 1. General rules

Article 6.1.1: Place of performance

1. If the contract does not determine the place of performance of a contractual obligation, this place shall be:
 - a) In the case of pecuniary obligations, the place of business or, failing that, the habitual residence of the obligee at the time of the conclusion of the contract.
 - b) In other cases, the place of business or, failing that, the habitual residence of the obligor at the time of conclusion of the contract.
2. If there is more than one place of business, the place of business shall be the one that is most closely connected with the contract at the time of its conclusion.
3. However, if a party has changed its place of business after the conclusion of the contract, that party may request or deliver the performance in the new place of business, providing that it gives sufficient notice to the other party. In that case, the party that has changed its place of business or residence shall bear the expenses and costs resulting from the change of the place of performance.

Article 6.1.2: Time of performance

1. The obligor has to perform its obligations:
 - a) At the time agreed, when the contract states a determined or determinable time.
 - b) When the contract states a determined or determinable period, at any time within that period, unless it is interpreted that the choice of the time of performance is to the obligee.
 - c) In other cases, within a reasonable time after the conclusion of the contract.
2. The obligor must perform its obligation completely in one time as far as possible, unless otherwise indicated by the circumstances.

Article 6.1.3: Early performance

1. The obligee may not refuse the early performance of the obligation unless it has a legitimate interest in doing so.
2. Additional expenses derived from an early performance must be borne by the obligor, without detriment to any other remedy of the obligee.
3. The acceptance of an early performance by the obligee does not modify the time of performance of its obligation.

Article 6.1.4: *Order of performance*

1. In the absence of agreement, obligations of the parties must be performed simultaneously unless otherwise indicated by circumstances.
2. Notwithstanding, where the performance of only one party requires a period of time, in the absence of agreement, this performance should be performed at an earlier time unless otherwise indicated by circumstances.

Article 6.1.5: *Partial performance*

1. The obligee may not refuse a partial performance, whether performance has been guaranteed or not, unless it has a legitimate interest in doing so.
2. Additional expenses derived from a partial performance must be borne by the obligor, without detriment to any other remedy of the obligee.
3. Where the obligation is severable, the obligee that accepts a partial performance may for its part perform its obligation partially or proportionally.

Article 6.1.6: *Performance by a third person*

Unless the contract requires a personal performance, the obligee may not refuse the performance by a third person acting with the obligor's consent.

Article 6.1.7: *Forms of payment*

1. A pecuniary obligation may be paid by any form used in the ordinary course of business.
2. Where the creditor accepts a negotiable instrument, order or promise to pay, it is presumed to do so only on condition that it will be honoured.

Article 6.1.8: *Currency of payment*

1. The parties may agree that payment shall be made in a specified currency. If the payment in the agreed currency is impossible or the currency of payment is not agreed, the payment shall be made in the currency of the place where the payment is due.
2. In the absence of agreement, a pecuniary obligation expressed in a currency other than that of the place of payment may be paid in the currency where payment is due providing that it is a freely convertible currency.
3. Payment in the currency where payment is due shall be made according to the exchange rate applicable in the place where payment is due at the time when payment is due. If the debtor has not paid at the agreed time, the creditor may opt to require the payment according to the exchange rate applicable there at the time when payment was due or at the time of actual payment.

Article 6.1.9: *Imputation of payment*

1. In the absence of an agreement, an obligor owing several pecuniary obligations to the same obligee may specify, at the time of payment, the obligation to which it intends the payment to

be applied, providing that it put due obligations before those not yet due. However, the payment shall first discharge expenses, then due interests and finally the principal.

2. If the obligor makes no such specification, the obligee may, within a reasonable time after payment, declare to the obligor the obligation to which it imputes the payment, provided that the obligation is due and undisputed.

3. In the absence of imputation under the preceding paragraphs, payment shall be imputed to the obligation which meets one of the following criteria in the order indicated:

- a) the obligation which is due or is the first to fall due;
- b) the obligation for which the obligee has no security or the least security;
- c) the obligation which is the most burdensome for the obligor;
- d) the obligation which has arisen first.

4. If none of the preceding criteria applies, payment shall be imputed to all obligations proportionally.

5. The preceding rules shall be applied by analogy to non-pecuniary obligations of the same nature.

Article 6.1.10: *Refusal of performance*

1. The obligee cannot refuse the performance by the obligor under the contract terms and, failing which, under the rules of these Principles.

2. If the creditor refuses the payment of a pecuniary obligation by the debtor, the debtor may pay by depositing, if possible, under the law of the place of payment.

3. If the obligee refuses the performance of a non-pecuniary obligation by the obligor, the obligor shall adopt all reasonable measures to mitigate the consequences of the refusal, including the preservation of the goods concerned if appropriated. Particularly, where the obligee refuses the delivery of goods by the obligor, the obligor may perform by depositing goods, if possible, under the law of the place of payment.

Article 6.1.11: *Public licences*

1. The party obliged to apply for and manage public licences and authorisations required as a condition for the validity or the performance of the contract or of its obligations shall be determined according to the mandatory rules of the country concerned and, failing that, in accordance with the agreements by the parties.

2. In the absence of agreement, it is presumed that the obligation to apply and manage public permissions and authorisations is the obligation of the party which has its place of business in the country concerned, unless this is considered unreasonable in the light of the circumstances. Failing that, the obligation is on the party obliged to perform the obligation for which the licence or authorisation is required.

3. The obligation to apply for and manage the licences and authorisations mentioned in preceding paragraphs requires that the obligor act with reasonable diligence, bear the resultant expenses and notify the other party about the grant or refusal without undue delay.

Article 6.1.12: *Costs of performance*

Unless otherwise specified, each party shall bear the costs arising from the performance of its obligations.

Section 2. Set-off

Article 6.2.1: *Conditions and effects of set-off*

1. Where two persons owe each other reciprocally and are each other's main obligor and obligee, either party may set off its obligations against the obligation of the other. Both parties must have authority to decide on the set-off.
2. Set-off extinguishes both obligations as from the date it is notified.
3. If the obligations are for different amounts, the set-off extinguishes them up to the amount of the lesser obligation.

Article 6.2.2: *Eligible obligations*

1. Set-off may be declared where both obligations are for an amount of money or for fungibles of the same kind and the same quality, if these have been specified.
2. Obligations expressed in different currencies may be set off provided that both currencies are freely convertible and the parties have not agreed that the obligation of the party declaring set-off shall be paid only in a specified currency.
3. Set-off may only be declared if both obligations are due and payable or performable.
4. An obligor may not declare the set-off if its right is unascertained as to its existence or value unless the set-off will not prejudice the interests of the obligee. Where the rights of both parties arise from the same legal relationship it is presumed that the obligee's interest will not be prejudiced.

Article 6.2.3: *Obligations payable in different locations*

If set-off refers to obligations to be payable in different locations, compensation must be paid for damage derived from the performance not being rendered at the designated place.

Article 6.2.4: *Multiple obligations*

In case of multiple obligations, the obligor must designate the right or claim against to which set-off is declared. Failing that, rules on imputation of payments in Article 6.1.9 of these Principles shall be applied.

Section 3. Hardship

Article 6.3.1: Hardship

1. A party is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.
2. Notwithstanding paragraph 1 a party is entitled to terminate the contract where this party proves that:
 - a) the performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that
 - b) it could not reasonably have avoided or overcome the event or its consequences; and that
 - c) it did not assume the risk of the event.
3. The party claiming an event that renders performance excessively onerous shall notify the other party in writing without delay, together with sufficient evidence of this event certified by a relevant body. This party is obliged to take all reasonable steps to limit the effect of the event invoked on the performance of its contractual duties.
4. Where either contracting party has, by reason of anything done by another contracting party in the performance of the contract, derived a benefit before the termination of the contract, the party deriving such a benefit shall be under a duty to pay the other party a sum of money equivalent to the value of such benefit.

Article 6.3.2: Frustration of the purpose of the contract

The rule of the preceding article will also be applied to the cases where the events in question lead to a substantial frustration of the contract's purpose, when both parties have assumed such purpose.

CHAPTER 7

NON-PERFORMANCE OF THE CONTRACT

Section 1. Non-performance in general

Article 7.1.1: Concept of non-performance

There is non-performance when a party does not carry out all its contractual obligations in the agreed form, regardless of the cause.

Article 7.1.2: Fundamental non-performance

A non-performance of a contractual obligation is fundamental if:

- a) strict observance of the obligation which has not been performed is of essence under the contract; or
- b) the non-performance substantially deprives the other party of what it was entitled to expect under the contract, unless at the time of conclusion of the contract, it has not been foreseen or could not reasonably have been foreseen such result; or
- c) the non-performance is of a nature that leads the obligee to believe that, in view of the circumstances, it cannot rely on the future performance of the other party.

Article 7.1.3: Remedies for non-performance

1. In case of non-performance, the obligee, without affecting the right to cure by the debtor, may resort to the remedies set out in this Chapter, but may not claim damages if the non-performance is excused under article 7.1.8 of these Principles.
2. The remedies for non-performance may be cumulated if they are not incompatible with each other.
3. The obligee who is exercising its right to performance may change the remedy if it has not obtained satisfaction of its claim.

Article 7.1.4: Withholding performance

1. Where parties must perform their obligations simultaneously, either party may withhold performance until the other party has tendered its performance or has effectively performed its obligations.
2. The party who must perform its obligation at a later time than the other party may withhold performance until the other party has performed its obligations.
3. In any case, either party will be able to cancel the performance of its obligation as soon as it becomes clear that the other party will not perform theirs on the due date.

Article 7.1.5: Cure of non-conforming performance

1. The obligor may cure any non-performance, at its expense, on condition that:
 - a) it notifies the obligee, without undue delay, of the manner and timing of the cure; and
 - b) the cure is appropriate to the circumstances; and
 - c) the obligee has no legitimate interest in refusing the cure; and
 - d) the cure is effected promptly.
2. The obligee may withhold its own performance pending cure.
3. Notwithstanding cure, the obligee retains the right to claim damages for delay and for any harm caused or not prevented by the cure. However, the rights of the obligee that are not compatible with the cure will be suspended from the time of the effective notification of the commitment to cure until the expiry date of the reparation.
4. The notification that a contract has been terminated does not exclude the right of the obligor to cure its non-performance.

Article 7.1.6: *Extension of time for performance*

1. In the event of non-performance, the obligee may grant the other party, by notice, an extension of time for performance.
2. During the period of extension, the obligee may withhold performance of its own obligations and claim payment for damage but it will not be able to resort to any other remedy for non-performance of its obligations, except in the case where the other party gives notice that it will not perform in the extension period.
3. If the delay in performance is not an essential non-performance, the obligee which has given notice to the other party of the provision of an additional reasonable period for performance may terminate the contract at the end of such period. An unreasonable additional period of performance is considered to be extended to a reasonable time.
4. In any case, on notifying the concession of this extension the obligee may stipulate that the contract will be terminated automatically if the other party does not perform within the agreed period.

Article 7.1.7: *Exemption clauses*

A clause that limits or excludes one party's liability for non-performance or which allows one party to render performance substantially different from what the other party reasonably expected, may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract and to the circumstances under which the non-performance took place.

Article 7.1.8: *Impossibility* (Force majeure)

1. A contract party may justify breach of contract when the performance of its obligations becomes impossible due to *force majeure* reasons.
2. There is *force majeure* when the aggrieved party proves the existence of an event:
 - a) alien to its responsibility and beyond its reasonable control, and
 - b) whose risk it has not assumed, and
 - c) which could not be reasonably expected or taken into consideration at the moment of the conclusion of the contract, and
 - d) which makes impossible the performance of its obligations.
3. A party that invokes an event which makes performance impossible must give written notice to the other party as soon as possible, providing reliable evidence of that event and taking all reasonable measures to limit the effects on the performance of its contractual obligations. If this notification does not reach the other party in a reasonable period from the time when the invoking party has known or ought to have known of the *force majeure* event, the other party has the right to damages resulting from the absence or delay in notification.
4. The contract will be deemed to be terminated as from notification, unless the other party declares that it wishes otherwise within a reasonable period. If one of the parties has received a benefit before termination due to acts of performance made by the other party, it must compensate this party by paying a sum of money equivalent to the benefit obtained.

5. When impossibility is temporary, termination of contract will only be possible if the delay in performance significantly deprives one party of its reasonable expectations. In other cases, the party invoking *force majeure* must perform once the event disappears.

6. When impossibility is partial, termination of contract will only be possible if partial performance significantly deprives one party of its reasonable expectations. In other cases, the party invoking *force majeure* must perform partially and the obligation of the other party will be proportionally adjusted.

Section 2. Right to specific performance

Article 7.2.1: Scope of the right to performance

1. The obligee is entitled to require specific performance independently of its content.
2. The right to specific performance may include the remedying or correction of a defective performance, the replacement and any other remedy to cure defective performance.

Article 7.2.2: Specific performance of non-monetary obligations

The right to specific performance of non-monetary obligations is excepted:

- a) where performance is impossible in fact or in law; or
- b) where performance is of an exclusively personal character of the obligor; or
- c) where performance or their ways of execution demand unreasonable efforts or expenses;
or
- d) where obligee, in the light of circumstances, may be satisfied in a more reasonable way; or
- e) the obligee does not require performance within a reasonable time from it has known or should have known of the non-performance.

Section 3. Termination

Article 7.3.1: Right to terminate the contract

1. A party may terminate the contract in case of a fundamental non-performance by the other party.
2. A party may also terminate the contract where the non-performance is non-fundamental, if the additional period conceded under article 7.1.6 has expired, and the other party has failed to perform or remedying the non-performance, unless the consequences of non-performance are minor.

Article 7.3.2: Anticipated non-performance and inadequate assurance

1. If before the date of performance of the contract it becomes obvious that one of the parties will fundamentally fail to perform its obligations, the other party may terminate the contract.

2. Where a party has good reasons to believe that there will be a fundamental non-performance by the other party, it may grant it a reasonable period of time to provide an adequate assurance of due performance, and meanwhile withhold its own performance. If no such assurance is provided and the period has expired, it will be entitled to terminate the contract.

Article 7.3.3: *Exercise of the right to terminate*

1. Unless otherwise agreed, the right to terminate the contract will be exercised by notice to the other party.

2. Where the obligee has established an additional period for performance stating, under paragraph 3 of Article 7.1.6, the automatic termination of the contract if the other party does not perform within the period, new notice will not be required and the contract will be terminated at the end of the additional period or of a reasonable period from the time of notice.

3. In cases of defective non-performance or late offer to perform, the obligee loses the right to terminate the contract if it does not exercise it within a reasonable time after it has, or ought to have, become aware of the non-performance or of a late offer to perform or after the expiry of the additional period for performance.

Article 7.3.4: *Effects of termination*

1. Termination releases both parties from their obligations under the contract in future.

2. Termination will not affect any provision for the settlement of disputes or any other term regulating the rights and obligations of the parties in case of termination.

3. Each party may require restitution of its performance providing that it simultaneously proceeds to the restitution of the performance received. If restitution in kind is impossible or excessively difficult, it has to be made in money. However, the party who terminates is not obliged to return the value if it proves that the loss or destruction of the object was caused by *force majeure*.

4. The party obliged to perform restitution shall return the benefits received as a result of the performance and it is entitled to claim for necessary or preserving expenses.

Article 7.3.5: *Compatibility between termination and damages*

Termination does not exclude the right to damages for non-performance subsisting after termination. However, the defaulting party shall not be liable for any loss that the aggrieved party would have suffered, to the extent that the latter could have reduced them by taking reasonable measures.

Section 4. Damages

Article 7.4.1: Right to damages

1. The obligee is entitled to damages for loss caused by the non-performance of the contract, either exclusively or together with any other remedies, unless the non-performance is excused under these Principles.
2. Only loss for non-performance, including future losses, which may be established with a reasonable degree of certainty will be recoverable.
3. The obligee has the right to full compensation for damage. Damages shall include any loss and any reasonable gain of which the obligee was deprived.
4. The non-economic loss as a result of the non-performance of the contractual obligations will also compensable, including suffering, loss of enjoyment or emotional distress.

Article 7.4.2: Scope of damages

The obligor is liable only for loss which the parties foresaw or could reasonably have foreseen at the time of the conclusion of the contract as a likely result of the non-performance.

Article 7.4.3: Duty to mitigate

1. The obligor is not liable for any loss that the obligee could have prevented or reduced by taking reasonable steps.
2. The obligee is entitled to recover reasonable expenses in which it incurred in attempting to mitigate the loss, even if the measures have been unsuccessful.

Article 7.4.4: Loss attributable to the obligee

The obligor is not liable for loss suffered by the obligee to the extent that the conduct of the latter has contributed to the non-performance or its results.

Article 7.4.5: Calculating the damages

1. The obligee who has terminated the contract and has concluded a reasonable replacement transaction may recover the difference between the price agreed in the contract and the price of replacement transaction.
2. The obligee who has terminated the contract without making any replacement transaction, but there is a current price for the performance contracted for, may recover the difference between the contract price at the time of termination. Current price means the usual price for performance in similar circumstances in the place where performance was due or, in the absence, current price in another place which could be reasonably considered.
3. The provisions of the preceding two paragraphs shall be without detriment to any compensation due to the obligee for additional damages for any further loss, under this Section.

Article 7.4.6: Damages for late payments of money

1. In the absence of agreement, if payment of a sum of money is delayed, the debtor is entitled to interest upon that sum, whether or not the non-performance is excused.
2. Interest shall be payable from the time when the payment is due.
3. The debtor may also claim additional damages for any further loss, if it is recoverable as provided for in this Section.

Article 7.4.7: Liquidated damages

1. Where the contract provides that a party who does not perform its obligation must pay a specified sum of money, the obligee is entitled to claim that sum irrespective of its actual loss.
2. Despite any provision to the contrary, the sum so agreed in the contract may be reduced to a reasonable amount where it is grossly excessive and disproportionate in the light of circumstances.

CHAPTER 8 ASSIGNMENT

Section 1. Assignment of rights

Article 8.1.1: Scope of application

1. By the assignment of rights, the obligee, called the “assignor”, transfers or provides as security to another person, called the “assignee”, its rights in a contract.
2. This Section does not apply to:
 - a) assignments of rights governed by special rules on transfer of a business;
 - b) assignments of negotiable or financial instruments and documents of title.

Article 8.1.2: Conditions relating to the assigned rights

1. Rights, either to payment of a monetary sum or to performance of non-pecuniary obligation, may be assigned if they satisfy the following conditions:
 - a) the rights exist at the time of the assignment or are future and recognizable rights; and
 - b) the rights are individually identified or are recognisable.
2. A right may be totally or partially assigned, and in favour of one or several assignees. The partial assignment or in favour of several assignees is valid only if the assigned right is severable.

Article 8.1.3: Conditions relating to the parties

1. The assignment requires agreement between assignor and assignee.

2. Furthermore, the consent of the obligor shall be required if:
 - a) its obligation is personal; or
 - b) its obligation is more burdensome as a consequence of the assignment; or
 - c) assignor and obligor had agreed such consent or the prohibition of the assignment of rights.
3. The consent of the obligor may be given expressly or tacitly, simultaneously or subsequently to the conclusion of the assignment agreement.

Article 8.1.4: Effectiveness of the assignment

1. The assignment is effective against the obligor:
 - a) From the time when the notification of the assignment is received by the obligor, if the consent was not required or has been given in advance.
 - b) From the time when the consent is given by the obligor, simultaneously or subsequently to the conclusion of the agreement of assignment.
2. After the assignment is effective, the obligor is discharged only by performing in favour of the assignee.
3. When an assignee successively transfers the right to other assignee, the obligor is discharged according to the last assignment that was effective.
4. When the same assignor transfers the same rights to two or more assignees, the obligor is discharged according to the first assignment that was effective.

Article 8.1.5: Position of the obligor

1. The obligor may assert against the assignee all defences that it could assert against the assignor.
2. The obligor may assert against the assignee any right of set-off available against the assignor and that arose before the assignment took effect.
3. The obligor shall be compensated for additional costs caused by the assignment. The assignor and the assignee are jointly and severally bound to pay these costs.

Article 8.1.6: Position of the assignor

Unless otherwise is agreed, the assignor undertakes towards the assignee that:

- a) the right exists or is a future and recognizable right, that can be assigned and that is free from any right or claim of a third person; and
- b) it is entitled to assign the right, that the obligor does not have any defences and that there is not and there will not be any set-off with debts of the assignor.

Article 8.1.7: Position of the assignee

1. The assignee acquires the assigned right, as well as the accessory rights and guarantees.

2. Notwithstanding the provisions of the preceding paragraph and unless otherwise stated by a guarantor, a guarantee made by third persons shall be extinguished if:

- a) the obligation of the obligor is more burdensome as a consequence of the assignment; or
- c) assignor and obligor had agreed the prohibition of the assignment of rights; or
- c) the guarantor had granted the guarantee with the condition that the right should not be assigned.

Section 2. Assignment of obligations

Article 8.2.1: Scope of application

1. The assignment of obligations occurs by agreement of the obligee or the obligor, called the “assignor”, with a third party, called “assignee”, who agrees to perform the obligations in a contract.
2. This Section does not apply to assignments of obligations governed by special rules on transfer of a business.

Article 8.2.2: Types of assignment

1. Assignor and assignee may agree to:
 - a) the discharge of the original obligor; or
 - b) a subsidiary obligation of performance by the original obligor in the event that the assignee does not perform its obligation properly; or
 - c) joint and several obligations of performance by the original obligor and the assignee.
2. Different types of assignment may be agreed upon concerning different obligations included in the same contract.
3. In the absence of express or tacit agreement on the type of assignment, the original obligor and the assignee shall be jointly and severally liable.

Article 8.2.3: Conditions relating to the assigned obligations

1. Obligations, either of the payment of a monetary sum or of the performance of non-pecuniary obligation, may be assigned if they satisfy the following conditions:
 - a) the obligations exist at the time of the assignment or are recognisable future obligations; and
 - b) the obligations are individually identified or are recognisable.
2. An obligation may be totally or partially assigned, and in favour of one or several assignees. The partial assignment or in favour of several assignees is valid only if the assigned right is divisible.

Article 8.2.4: Conditions relating to the parties

1. The assignment by the obligee does not require consent of the obligor unless in the contract:
 - a) that consent is envisaged; or
 - b) the prohibition of assignment is stipulated.
2. The assignment by the obligor requires the consent of the obligee.
3. The consent may be given expressly or tacitly and previously, simultaneously or subsequently to the conclusion of the agreement of assignment.
4. In the absence of consent, the original obligor remains bound to the obligee. The performance by the assignee shall be governed by the applicable rules on performance by a third party included in article 6.1.6 of these Principles.

Article 8.2.5: Discharge of the original obligor

1. In case of discharge of the original obligor, its defences against the obligee may be asserted by the assignee.
2. The defences of the assignee against the original obligor may not be asserted against the obligee.
3. The claims of the assignee can be set off with those of the obligee. Nevertheless, the claims of the original obligor cannot be set off after its discharge.
4. The discharge of the original obligor discharges the guarantees made for the performance, unless otherwise stated by the guarantor.

Article 8.2.6: *Subsidiary obligation of the original obligor*

1. When the original obligor becomes a subsidiary obligor, the assignee has the rights and obligations laid down in the previous Article.
2. The original obligor, when it is subsidiarily liable, may assert the set-off of its own claims.
3. The guarantees made before the assignment shall ensure the subsidiary performance of the original obligor.

Article 8.2.7: *Joint and several obligation between the obligor and the assignee*

1. When the original obligor is jointly and severally bound, the right of the assignee to assert the defences of the original obligor, the right of set-off and the effects on the guarantees shall be governed by the rules on joint and several obligations.
2. The defences of the assignee against the obligor-assignor may be asserted against the obligee in accordance with the rules on contracts in favour of third parties. The assignee shall be considered as the promisor, the original obligor as the promisee, and the obligee as the beneficiary.

Section 3: Assignment of the Contract

Article 8.3.1: Scope

1. By the assignment of the contract, a contracting party, called the “assignor”, transfers to another person, called the “assignee”, its rights and obligations in a contract in respect of the other contracting party, called “counterparty”.
2. This Section does not apply to assignment of contracts governed by special rules on transfer of a business.

Article 8.3.2: Conditions relating to the parties

1. The assignment requires the consent of the other party.
2. That consent may be given expressly or tacitly and before, at the same time, and after the conclusion of the agreement of assignment.

Article 8.3.3: Effectiveness of the assignment

1. The assignment is effective against the counterparty:
 - a) From the time when the consent is given by the counterparty, simultaneously or subsequently to the conclusion of the agreement of assignment.
 - b) From the time when the notification of the assignment is received by the counterparty, if the consent has been given in advance.
2. After the assignment is effective, the counterparty is discharged only by performing in favour of the assignee.
3. When an assignee successively transfers the contract to another assignee, the counterparty is discharged by performing according to the last assignment that was effective.

Article 8.3.4: Legal framework of the assignment

1. To the extent that the assignment of contract involves a transfer of rights, Section 1 of this Chapter shall be applied.
2. To the extent that the assignment of contract involves a transfer of obligations, Section 2 of this Chapter shall be applied.

CHAPTER 9

LIMITATION PERIODS

Article 9.1: Rights and actions submitted to limitation periods

Unless otherwise agreed, the rights and actions derived from contracts are subject to limitation periods due to the expiry of a period of time according to the following Articles.

Article 9.2: Limitation periods

1. The general limitation period is three years beginning at the moment when a party knew or should have known the facts as a result of which such a party can exercise a right.
2. The parties may agree the extension or the shortening of limitation periods, provided that the agreed period is not shorter than one year and longer than ten years.
3. The maximum limitation period is fifteen year beginning at the moment when the right could be exercised, regardless of the knowledge of the facts which allows this exercise, the agreement of the parties or the concomitance of any cause of suspension.

Article 9.3: Suspension of limitation periods

1. The computation of a general or voluntary limitation period is suspended by the commencing of judicial, arbitral, conciliating or any other procedure whose objective is to take a decision on the concerned right, as well by the opening of a procedure of insolvency or dissolution of the obligor where the obligee exercises a right. The suspension carries on until the definitive issue or the conclusion of the procedure otherwise.
2. The death or the incapacity of any contract party as well as any other circumstance reasonably unforeseeable and inevitable which prevent a party from exercising a right are causes of suspension of the limitation period until the designation of a heir or representative or until the impediment disappears.
3. The commencement by the parties of a negotiating process on the right or on the circumstances from which the right can be exercised shall suspend the limitation period until six months shall have passed since the last communication made within the negotiating process or since a party notified the other party it did not want to continue the negotiations.
4. The suspension of a limitation period stops temporarily the computation of time without deleting the time already passed.

Article 9.4: New limitation period by acknowledgment

1. If the obligor acknowledges the obligee's right, a new limitation period begins the day after the acknowledgment
2. Acknowledgment derives, particularly, from performance, partial performance, payment of interests, provision of a guarantee or declaration of set-off.
3. Acknowledgment deletes the limitation period passed and implies the beginning of a new limitation period of the same length than the limitation period deleted.

4. The maximum limitation period will not be renewed by acknowledgment and cannot be overtaken by the beginning of a new general or voluntary limitation period.

Article 9.5: Effects of limitation periods

1. When a limitation period expires, the contract party benefiting must invoke it in order to be effective against any party having a right.
2. What has been performed cannot be required simply because the limitation period had expired at the moment of performance, even when this circumstance was not known.

Article 9.6: Renunciation of limitation periods

1. The benefiting party may renounce the consolidated limitation only once the limitation period has expired.
2. An anticipated renunciation of a limitation period has the same effects than an acknowledgment according to that stated in Article 9.4.