

Status of suspension of performance in international arbitration

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Introduction

The contracting parties to an international arbitration often come from different legal systems which follow different national laws. In case of breach by either party, the common remedies available for the other party generally includes the rescission of the contract, sue for specific performance, claim for damages, quantum meruit, seeking injunctions etc.

Suspension of performance in terms of relief is quite contrary to the remedy available by terminating the contractual relationship. While the former relates to only temporary separation from work, the latter relates to permanent dismissal and aims to bring the contract to an end. In certain situations depending on the nature of the events, either of the parties would have the right to temporarily suspend the performance of contractual obligations. Examples include force majeure events, unsafe construction work causing threat to the public, failure by a party to perform its obligations etc. This article aims to examine the differences that are existing between the civil law jurisdictions and the Common Law jurisdictions with regard to the issue of suspension of performance in international arbitration. This article also attempts to analyse whether the suspension of performance constitutes a general principle of international law.

The remedy of suspension of performance

Suspension of Performance allows the parties to excuse the performance of the obligations on a temporary basis. Further, the parties have the option to either give them time to cure the breach or even to opt for the termination in case of prolonged suspension of performance. The defaulting party may be provided with a remedy for specific performance, only if the suspension is preferred by both parties.

The maxim '*exceptio non adimpleti contractus*' (in short "*exceptio*") serves as a means of a defence, whereby a party to a treaty can withhold the performance of its obligation till the time the other party has not performed its synallagmatic obligation under the treaty. The [exceptio principle](#) stems from the broader meaning of not being under the requirement to respect an obligation if the other party to the contract did not respect its own'. According to this broader principle, a party to a treaty need not perform its obligations, if the other party to the treaty has not performed its own obligations. In general, the principle '*inadimplenti non est adimplendum*' is considered as encompassing the responses to breach of a treaty and are not restricted to synallagmatic obligations including the 'termination' or the 'suspension' of the operation of a treaty either in whole or in part in response to its material breach.

Civil law jurisdictions

Civil law jurisdictions accomplish this by operation of the *exceptio non adimpleti contractus* ('the exceptio'), which is a specific doctrine only pleaded in cases of suspended performance. This doctrine relates to the performance of an obligation to be withheld if the other party has failed to perform his obligation. The party claiming under this doctrine shall prove that it has performed its obligations.

The principle of *exceptio* can only be applicable to interrelated obligations; otherwise, it would completely undermine the principle of *pacta sunt servanda*. While the codes of the Germanic legal systems enshrine the *exceptio* principle, the Franco-Roman legal systems tend to employ the principle of *exceptio* but not to enshrine it as a general principle. The right to suspend performance has been characterised in certain matters as a general principle of International Private Law which is applicable to all international contracts, as part of the *lex mercatoria*.

Lex mercatoria (merchant law) meaning a national body of legal rules and trading principles used by merchants throughout Europe in medieval, which are developed primarily by the international business community itself based on custom, industry practice, and general principles of law. *Lex mercatoria* allowed the merchants to conclude transactions, without any fear of being subjected to foreign rules in the event of a dispute.

When compared to the other contractual remedies in the case of a breach, suspension of performance is apparently simple. It requires no contractual planning, it fits the aggrieved party's intuitive reactions and it does not require any detailed analysis beyond general requirements of good faith, reasonableness or proportionality. In the case of cross-border transactions, the parties may consent to have the contract entered and be governed by the rules of law that are personalized by the private institutions in order to meet the needs of international trade such as the UNIDROIT Principles and PECL Principles. Due to its inherent characteristics, the remedy of suspension of performance has been considered in the transnational commercial rules referred to as the *lex mercatoria* in the UNIDROIT Principles of International Commercial Contracts as well as in the PECL (*Principles of European Contract Law*). The Vienna Convention accordingly provided for the right of suspension in the cases of material breach.

Common law jurisdictions

Common law jurisdictions on the other hand generally apply applicable rules relating to contractual conditions that are used to regulate suspension of performance.

In the case of International contract law instruments, the [UNIDROIT](#) and [PECL principles](#) are frequently entreated as a 'codification' of the general principles of international private law as a general right to suspend performance. While the CISG (UN Convention on Contracts for the International Sale of Goods) law instrument does not adopt suspension of performance as a general principle.

In light of the above position, a general right to suspend performance does not have international consent.

Suspension of performance in comparative context

Suspension of performance is governed by the *exceptio* principle in Civil Law countries. The principle of *exceptio* is unknown in the Common Law jurisdictions, only analogies can be drawn, though they are far from precise.

The Civil Law systems consider 'suspension' and 'termination' as separate remedies available for the parties. Whereas the common law systems consider both together by invocation of the term 'rescission'.

The right to suspension of performance and termination depends upon the 'conditions' in England and the US. The conditions are of two types:

- Contingent Conditions (one or both parties not bound to perform unless an external event occurs)
- Promissory Conditions (Party A is not obligated to perform until Party B performed its obligations). Precedent, Concurrent and Subsequent promissory conditions are sub-categories.

Where a party's non-performance is not in the nature of breach of 'condition', but of an 'intermediate' term, the right of the other Party not in breach to treat itself as discharged from reciprocal performance will depend upon the 'gravity of the consequences of the breach'. In the modern law, the term of a contract will be classified as an 'intermediate' term, and not as a 'condition', unless the Court concludes that it falls as a condition by Statute or by Judicial decision or express mention in contract or based on the circumstances.

Suspension of performance is mostly used in the form of self-help in order to coerce the debtor to complete performance rather than as a defense. The principle of *exceptio* is thus construed as a 'defense'.

Rules of suspension of performance

The laws of States and various decisions by the arbitrators based the applicability of the doctrine based on four factors as under:

- (1) Contracts that make the obligations of the creditor contingent in some manner;
- (2) Contracts that provide parties to perform simultaneously (or) debtor to perform before creditor;
- (3) Nature of Breach justifying suspension shall meet some minimum standard of severity;
- (4) *Exceptio* will prove, when the gap between withdrawn performance and the defective one is wider.

The UNIDROIT Principles and PECL

UNIDROIT is an intergovernmental organization aimed at harmonizing international private law across countries through a set of uniform rules, international conventions, and production of model laws, sets of principles, guides and guidelines etc. Initially established in 1926, as part of the League of Nations, it was re-established in 1940 following the League's dissolution through a multilateral agreement, the 'UNIDROIT' Statute. As of 2019, UNIDROIT had 63 member states. The "UNIDROIT Principles" set forth general rules for international commercial contracts. These principles may be applied when the parties to the contract have agreed to follow general principles of law, the *lex mercatoria* or in cases where the parties have not chosen any law to govern the contract.

Their main goal of both the PECL (Principles of European Contract Law) and the UNIDROIT Principles was the compilation of uniform legal principles for reference, and, if necessary, the development of national legal systems. In the compilation of the PECL, the Law of the EU member states, and thus common and civil law, as well as Non-European Law was taken into consideration. The PECL Principles are applied in European Communities, as general rules of contract law. These principles are applied where the parties in the contract had agreed to be governed by *lex mercatoria* or the like or the parties have not chosen any rule of law to govern their contract.

The suspension of performance is governed by a single provision in both the UNIDROIT principles and PECL. Article 7.1.3 of UNIDROIT Principles, includes suspension of performance in situations where the parties are to perform simultaneously and consecutively to withhold performance until the first party has performed. Under Article 9:201 (1) of PECL principles provides for a party to perform simultaneously and has a right to withhold performance. The option of withholding whole or part of the performance of the first party depends on the reasonableness in the circumstances.

The only difference between these two principles is the 'requirement of reasonableness' test in the case of the PECL principle.

The CISG and ULIS

The recent globalisation trends and the rising volumes of international trade have made it necessary for effecting increased regulations in international sales. Hence in the early 1980s, the [UN Convention of Contracts for the International Sale of Goods](#) (CISG) came into effect. CISG was thus the result of efforts originating from the 1964 Hague Conventions of Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) involving 28 states. The rule of international trade was facilitated further in 1994 when the International Institute for the Unification of Private Law (UNIDROIT) had put forth its Principles of International Commercial Contracts or the UNIDROIT Principles. Noticeably, in the same year, the European Contract Laws Commission also brought out its first part of the Principles of European Contract Law (PECL), followed by its complete version in the year 1998. Many people who participated in the creation of the CISG were also instrumental in drafting the UNIDROIT and the PECL.

The CISG and ULIS relate to only contracts involving the sale of goods that are bilateral and synallagmatic in nature.

The provision for suspension of performance under the CISG Rules is provisioned under Article 71, which provides that a party has the right to suspend the performance, only if it becomes apparent that the defaulting party will not perform a 'substantial' part of its obligations, in the case of anticipatory breach of contract. In cases where the breach has already occurred the Courts have applied Article 71 in two different matters to find the right of suspension by analysing the provisions of various Articles and the non-existence of the general provision in respect of the requirement of the parties to act in good faith. Accordingly, the Courts have gone on to hold that nothing in the text of Article 71 states the extent to which the performance may be suspended.

The ULIS under Article 73 provides an analogous provision under Article 71 of CISG. The buyer's right to reduce the purchase price is provided for under ULIS Rules and the same shall not be construed as a specific instance of 'suspension of performance'.

ICC Case no 4629 of 1989

The contract in the present [case](#) required the construction of a hotel called for by the Middle Easter Hotel developer (the Respondent, herein) to be constructed by the Claimant within a specific timeframe. Whereas soon after the commencement of the work by the Claimant, the Respondent who is obligated to obtain licenses/ authorisations and to fulfil certain credit stipulations set by the claimant's bank, had failed to fulfil its obligations. Resultantly, the Claimant suspended performance on the ground. The Respondent drew down the performance guarantee issued by Claimant due to suspension of performance and hence Claimant initiated the arbitration. The subject contract between the disputing parties provides for a clear and valid 'choice of law' to invoke a specific national law, and hence there is a rare occasion for an arbitration tribunal or a court to choose a different law, against the intent of the contract. The suspension of a performance issue in the present case was decided by the arbitral tribunal in accordance with the provisions of the Federal Act on the Amendment of the Swiss Code, "*The Code of Obligations*" (CO), as the contract agreement entered into between the parties contained an express choice of Swiss law. The Tribunal analysed the claim of suspension as per Article 82 of CO as embodying the exceptio principle and found that the parties are to perform simultaneously.

The Tribunal held the Respondents "could not reasonably insist" the Claimants to finish the work by the targeted dates, as the Respondent itself had breached its obligations in the present case. The Tribunal found that when the Respondent refused to remedy its non-performance, as the Claimant is entitled to terminate the Contract as per Article 108(1) of CO, fortiori the Claimants were justified in suspending performance of its obligations.

It is evident that the ruling of the Tribunal on suspension of performance is consistent with the Swiss approach and in order to invoke direct termination a more severe breach is required to be justified.

Klöckner Industrie-Anlagen GmbH (FR Germany) v. United Republic of Cameroon

[Klöckner entered into several contracts with the Government of Cameroon.](#) The contract intends to supply and construct a fertilizer plant providing technical and commercial management services. No choice of law has been agreed into in the Contracts. The contract was running smoothly for nineteen months and after which the plant shut down. Consequently, Klöckner instituted arbitration for non-payment of the contract price. Government of Cameroon defended on several grounds including the principle of exceptio alleging various breaches committed by Klöckner.

The Arbitration Tribunal in the present case applied French derived Cameroonian law as the Cameroonian court would consider based on the location and place of contract execution. The Arbitral Tribunal found the exceptio principle to embody a general principle of 'French, English and International law'.

The Tribunal cited to various French commentaries and judgments having satisfied that it could recognise the principle of exceptio, held that the debtor's breach must be of more than 'slight importance' that partial non-performance by the debtor does not justify the suspension of the entirety of the creditor's performance and that the Tribunal must 'measure the relative effect of the refusal to perform against the seriousness of the faulty performance'.

In light of the aforesaid position, the Tribunal held that breaches committed by Klöckner had partially discharged the obligations of the Government of Cameroon and held that Klöckner is not entitled to any more payment in excess of what has already been received by it. The Tribunal held that exceptio is a dilatory plea that permits the creditor to temporarily withhold the payments but do not discharge the obligations of the parties.

ICC Case no 3267 of 1979

The contract in the subject matter of this case relates to a fixed price contract that is subjected to modifications only under very limited circumstances. The Claimant is obligated to achieve contractual milestones in order to enable the Respondent to pay in instalments. During the course of execution of work, the Respondent alleged failure of the Claimant to reach milestones and deducted the sixth and seventh payments, which the Tribunal characterised as suspension of performance. The Claimant subsequently terminated the Contract.

The Contract contained no choice of law. The Tribunal was thus empowered to act as an amiable compositeur. The Tribunal accordingly applied '*general principles of international commercial law with no specific reference to a particular system of law*'.

The Tribunal held that the payment deductions by the Respondent were not justified as the Respondent failed to follow the procedure specifically stated in the contract to deal with this kind of contingencies. The Tribunal held that '*the respondent argument on deduction was made in accordance with.... international trade usages*' does not carry any weight.

Accordingly, the Tribunal declined to state whether suspension of performance constituted a general principle of law consonant with 'international trade usages' in view of the agreement provisions between the parties overrides any such principles.

Conclusion

From the above instances, it is apparent that the Arbitration Tribunals in order to justify the suspension of performance have preferred:

- International contract law instruments and/or,
- General principles of international law.

The Arbitration Tribunal declared that suspension of performance is a general principle of international law in the cases including Klo"ckner Industrie-Anlagen GmbH (FR Germany) v United Republic of Cameroon, ICC Case no.3267 of 1979, ICC Case no.3540 of 1980 and ICC Case no.8547 of 1999.

The Arbitration Tribunal in a series of decisions tends to view the suspension of performance as a principle by promoting the application of the general principles of international private law in contracts of bilateral nature. Order of performance has been discussed in ICC Case nos. 4629 of 1999 and ICC Case no.8547 of 1999.

The Tribunals addressing suspension of performance preferred the rule that contains a requirement of proportionality in the creditor's conduct rather than the requirement of a serious breach. As the Arbitrators being composed mostly of civil lawyers, the awards published by them may have an influence on more diverse tribunals which owe much to the *exceptio* principle and specifically to its Germanic formulation. The recently enacted major international contract law instruments such as UNIDROIT Principles and PECL too adopt the Germanic approach to suspension of performance with the remedy in future characteristics of the general principles of international law.

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