# The strategy of deeming performed an unperformed 'obligation'

In the wake of a recent judgement, we examine a selective strategy that allows a creditor to secure the effects that actual performance would produce.

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The absence of a written rule under English law comparable to Article 1119 of the Spanish Civil Code has made possible a disparity of opinions between the High Court and the Court of Appeal in the case of *King Crude Carriers SA & Ors v Ridgebury November LLC & Ors*. The case concerned the purchase of vessels. The buyers were obliged to pay a non-refundable 10% deposit into a bank account. In order to open the account, the parties had to provide the necessary documentation, which the buyers failed to do. The sellers terminated the contracts and claimed the deposits as a debt. According to the buyers and the High Court, the sellers could not operate as if the condition had been *dispensed with* and only a remedy of damages for breach was available. On appeal, the seller prevailed by application of a principle expressed as follows: "where the accrual of a party's obligation to pay a debt is subject to a condition, and the putative debtor wrongfully prevents that condition from being fulfilled, the condition is treated as dispensed with or fulfilled, with the result that the debt accrues".

It is well-known that the rule created or discovered by the above court of law had already been enunciated back in the days of Justinian's Digest and today it is included in Article 1119 of the Spanish Civil Code, known as 'fictitious fulfilment' of the condition.

*It is called a 'codicillary clause' and it states: let it be performed any which way if it does not increase the cost*

But this rule has factual limits that must be taken into account. According to this rule, there should be a 'condition' (whether optional or not, but influenced by the conduct of the party). In *King Crude* there was not a condition as such, but respective obligations to do something. Article 1119 of the Civil Code assumes that the putative creditor has no independent interest in the fulfilment of the condition and only has an interest in the underlying substance (that which is subject to condition). Therefore it can be considered fulfilled, because his contractual interest is in the successive satisfaction of the debt, which is what matters to him. Note that this will not always be the case. It may be the case that the putative creditor is as interested in the fulfilment of the 'condition' as in the satisfaction of the resulting debt. In such cases, it will not do the creditor much good to 'deem the condition fulfilled' because it is not in fact fulfilled and that is (moreover) what he is interested in.

On the other hand, it may be the case that the series of 'contingent conduct' is characterised as a series of obligations, not conditions. But can an *obligation* be a conditioning factor of a second *obligation*? Certainly so. In this case, can the putative creditor deem 'performed' the first obligation in order to pass on to the second, dependent on the first, if the second is the priority? I think so, provided that it is in his interest. He thus renounces the value of the first obligation in the sequence in order to jump to the second. The first is already 'deemed performed', so that the putative creditor will not be able later, when he has moved on to the second, to claim performance of the first or request compensation for non-performance of the first.

But let us return to *King Crude*. In the case it could be doubted whether we were dealing with a condition precedent (elective) to an obligation or to serial and conditional obligations. Note that the final *obligation* (non-refundable deposit of 10% of the price) was not independent of the conditioning one (opening a bank account). The escrow deposit could not be made if the account had not been opened. Even if the conditioning phase (fulfilling all the necessary steps to open the account) was deemed to have been fulfilled, the final obligation could not take place because there was still no account into which the deposit could be made. In reality, the Court of Appeal is not applying the 'fictitious fulfilment' rule of the conditioning stage, but making equivalent performance of the final obligation possible when the debtor makes impossible by his own acts a specific performance (i.e. pay 10% directly as a debt when the debtor has made it impossible to pay it into a non-refundable deposit). And this step is beyond Article 1119 of the Civil Code because, even if the obligation to provide for the opening of the account was deemed to have been performed, the fact remains that the account was still not open, which prevented a deposit from being made.

We have said that in *King Crude* there was not, strictly speaking, a problem of fictitious fulfilment of conditions, but rather the search for a palliative performance of the obligation that was equivalent to the omitted performance. But how do we justify this in our own system? By relying on the remedy of implied terms that was formerly known as the *implied codicillary clause* and that today can be based on Article 1284 of the Civil Code (rule of effectiveness), by virtue of which, *if x cannot be performed in its terms, perform it* omni meliore modo *in order for the transaction to produce its effects*.

The above-mentioned rule can be an interesting strategy in contracts with overlapping or serial obligational structures.