Under the terms of the Default Clause, only the first repudiation can constitute default/s

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In an article published in the April 2016 issue of Gaftaworld (p 4), I highlighted that under the Default Clause regime of Gafta Contracts, the fact of “leaving a contract open for performance” had no effect under the terms of the Default Clause. Indeed, once a default is established, the only thing which matters for the calculation of damages is to ascertain whether or not the corresponding “date of default” was modified by the conduct of the parties, and the answer to this question is provided exclusively by the guidelines contained in Toprak Mahsulleri Olisi v. Finagrain Compagnie Commerciale Agricole Et Financiere S.A. [1979] 2 Lloyd’s Rep. 98 Court of Appeal.

In this article, I will show that another important concept, the “continuous repudiations”, has no effect under the terms of the Default Clause, as only the first repudiation is a default. Indeed, continuous repudiations cannot constitute default/s because as it has been judged in 2011 in Thai Maparn Trading Co Ltd v Louis Dreyfus Commodities Asia Pte Ltd [2011] EWHC 2494 (Comm) the first repudiation is the default. Therefore, the additional repudiations which may follow this default change nothing. In practical terms, they do not change the “date of default” because the date of default was already fixed by the first repudiation per Thai Maparn.

“Under the terms of the Default Clause, continuous repudiations cannot constitute default/s, only the first repudiation can.”

Another important feature of this case is that this default exists even if the repudiatory breach is not accepted by the innocent party as default. See: www.jurist-jacquescovo.ch/admin/resources/gaftaworld-february-2017.pdf

It is however not impossible for the additional repudiation/s to give rise to the innocent party’s sudden indulgence to the defaulter, for him to still perform, something this party was, for some reasons, not prepared to grant earlier. In such a case, if the defaulter accepts or relies on the indulgence for performing, but nevertheless defaults again, this will vary the date of the earlier established default date, according to the guidelines of the Toprak case.

For these reasons, while one can say in living room conversations or backstairs gossip that X is continuously repudiating, one cannot say so in the event one’s case is to obtain compensation for the default, and consequently apply the Gafta Default Clause to the continuous repudiations.