CONTRACT LAW IN INTERNATIONAL COMMERCIAL ARBITRATION: THE CASE OF SUSPENSION OF PERFORMANCE

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Abstract Despite much attention to the controversial *lex mercatoria*, international commercial arbitration remains underanalysed as a venue for contract law unification. This article considers a specific case of substantive contract law in arbitration, the remedy of suspension of performance: When will one party's non-performance enable the other party to withhold performance without terminating the contract? In domestic laws, suspension of performance is governed by clearly-defined doctrines; however, it remains unclear whether it constitutes a general principle of international law. This article places suspension in a comparative context, then analyses the published arbitral awards for indications of arbitrators' preferences.

I. INTRODUCTION

> Consider the following ethical proposition: If you do not fulfill your promise, I shall not fulfill mine. Although this proposition is intuitively supported by simplicity and fairness, the question remains: When will it be warranted in law?[1]

When confronted with a breach of contract, a lawyer's first reaction may be to file suit. A businessman's instinct would probably be simply to refuse to perform his own obligations. Withholding performance first then litigating (if necessary) has advantages over performing then seeking to recover losses arising from the other party's breach. It requires no advance planning and is simple and intuitive; parties who embark on it may not even be contemplating the use of a legal remedy. Nearly all legal systems recognize that 'performance of an obligation may be withheld if the other party has itself failed to perform'.[2]

On the other hand, excessive withholding of performance can create a windfall for the withholding party or work an injustice on the party in breach. Parties should enjoy reasonable security for their justified expectations but should not be able to take advantage of an insignificant breach to evade their own obligations. Consequently, the right to withhold performance has been

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[1] D Nyer, 'Withholding Performance for Breach in International Transactions: an Exercise in Equations, Proportions or Coersion?' (2006) 18 Pace Intl L. Rev 30.

[2] J Crawford and S Olleson, 'The Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility' (2001) 21 Aust YBIL 55.

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limited in a variety of ways. Civil law jurisdictions accomplish this by operation of the *exceptio non adimplenti contractus* ('the *exceptio*'), which is a specific doctrine only pleaded in cases of suspended performance. Under the common law, on the other hand, generally-applicable rules relating to contractual conditions are used to regulate suspension of performance. Despite diversity of doctrine, different legal systems all seek to balance the interests of an aggrieved party to suspend performance against the right of a breaching party not to be forced to overcompensate the creditor.

The doctrines governing suspension of performance in national laws are well-developed. However, many international commercial disputes are resolved by arbitration, not in court. Proponents of arbitration claim it to be more sensitive to the needs of international commerce. This admittedly vague notion is often used to refer to the purported procedural advantages of arbitration over litigation. However, such sensitivity also impacts substantive determinations in individual cases, in the form of greater attention to trade usages, more frequent application of a 'commercial reasonableness' standard, preference for uniform contract law instruments and the elaboration of general principles of international private law—the so-called *lex mercatoria*.[3]

Unification of commercial law is an obsession among those concerned that differences in national laws hinder commercial activity. Legislative programmes of harmonization have proceeded slowly and unsteadily but, at the same time, arbitrators have begun to build a parallel system that avoids national laws entirely. Leaving aside the thorny issue of whether the general principles expounded by arbitrators actually constitute 'law', they may be a more promising basis for unification of law than any harmonization scheme.

To assess the direction unification through arbitration is pointed, it is important to understand which principles of contract law international commercial arbitrators will tend to prefer. This article studies arbitral decision-making in a particular area of substantive law, namely suspension of performance. This discrete area of contract law has the twin virtues of clear relevance to international commerce and clear distinctions between the different national systems.

To understand how arbitrators apply suspension doctrines, we must place their decisions in the context of how national courts decide similar cases. Consequently, Part II introduces suspension of performance, considers whether this remedy constitutes a general principle of international private law and suggests a scheme for comparing different approaches to this remedy. Part III compares the law on suspension of performance in two major civil law jurisdictions (Germany and France), two major common law jurisdictions (England and the United States) and under the major international contract law

[3] Here, I use 'international private law' to mean the law governing international contractual relationships, as opposed to 'private international law', which is the conflict of laws rules of a State. *Lex mercatoria*, a controversial topic, purports to constitute an autonomous of transnational commercial principles deriving from practices that have evolved in international commerce, public international law and legal principles common to trading nations.

instruments. Finally, Part IV assesses the published arbitral awards that consider suspended performance.

A disclaimer: as with all studies of international commercial arbitration, this article confronts a paucity of raw data. The majority of awards are confidential and those that are published are usually available only in excerpted form; indeed, my research uncovered only eight published arbitral awards dealing with cases of suspended performance. As a result, the conclusions drawn here are tentative.

II. THE REMEDY OF SUSPENSION OF PERFORMANCE

The central question is this: when will one party to a contract (the creditor), faced with non-performance by the other party (the debtor), be justified in withholding its own performance without ending the contractual relationship or otherwise discharging either party's obligations? For the sake of clarity, and because different countries sometimes use the same terms differently and different terms to refer to the same things, I will refer to this remedy as suspension of performance. I have adopted the civil law terminology of 'creditors' and 'debtors'. Here, the debtor will be the party who first breaches the contract and the creditor will be the party who suspends performance.

Suspension of performance is often defined in opposition to remedies that bring an end to the contractual relationship, remedies which I label 'termination'. The distinct characteristic of suspension of performance is that it paralyses the contract but does not kill it. Suspension is 'a dilatory plea which . . . entitles the injured party *for the time being* to refuse to perform his part'.[4] The party suspending performance need not immediately decide whether to terminate the contract; instead, suspension forces the debtor to choose whether to cure his breach or face termination. Conversely, termination brings an end to both parties' obligations; it may give the creditor a right to damages and to the return of such performance as it has already rendered, but will never obligate the debtor to complete performance. A claim by the creditor for specific performance, therefore, is compatible with suspension but not with termination.

Some have characterized the right to suspend performance as a 'general principle' of international private law, applicable to all international contracts as part of the *lex mercatoria*. This position is supported by suspension's association with the *exceptio*, a maxim of long standing and general acceptance in the civil law world.[5] A good example is this unequivocal statement:

> With respect to contracts for sale . . . it is clear that the right of a party not to perform in the face of nonperformance by the other party to an international

[4] GH Treitel, *Remedies for Breach of Contract: A Comparative Account* (Clarendon, Oxford, 1988) 310–11 (emphasis in the original).

[5] Debate also exists as to whether the *exceptio* forms a general principle of *public* international law. See Crawford and Olleson (n 2).

> contract is a part of the *lex mercatoria*. With respect to construction, distribution, or technical assistance contracts . . . there is little doubt about the adoption of the *exceptio* by the international trade practice.[6]

Nevertheless, claims of the universality of the principle embodied by the *exceptio* are overblown. No common law legal system states a general right of creditors to suspend performance and, even within the civil law world, there is not agreement. The codes of the Germanic legal systems explicitly enshrine the *exceptio* as a general principle of contract law, while the codes of the Franco-Roman legal systems tend to employ the *exceptio* but not to enshrine it as a general principle, including it instead in separate provisions dealing with particular nominate contracts.[7]

International contract law instruments promulgated by various nongovernmental and intergovernmental organizations provide a mixed picture. The UNIDROIT Principles of International Commercial Contracts ('UNIDROIT Principles'), which are frequently invoked as a 'codification' of the general principles of international private law,[8] state a general right to suspend performance, as do the Principles of European Contract Law ('PECL'). However, the UN Convention on Contracts for the International Sale of Goods ('CISG'), which is the premier uniform contract law instrument and is frequently applied in international contracts of sale, does not espouse suspension of performance as a general principle. Indeed, despite some case law to the contrary, it is doubtful that the CISG permits a creditor to suspend performance in any circumstances.

An international consensus therefore cannot be said to exist that creditors have a general right to suspend performance. However, even if there were consensus on the existence of a right of suspension, there is none on the availability or effects of the remedy. In the next section, I argue that the

[6] U Draetta, RP Lake and VP Nanda, *Breach and Adaption in International Contracts: An Introduction to Lex Mercatoria* (Butterworths, Salem, 1992) 163; see also PD O'Neill Jr and N Salam, 'Is the *Exceptio non adimplenti contractus* Part of the New *Lex Mercatoria*?' in E Gaillard, *Transnational Rules in International Commercial Arbitration* (ICC, Paris, 1993).

[7] It should be noted that, in a variety of decisions dating back to the 19th century, the *Cour de Cassation* has found a general right to suspend performance under the *Code Civil.* See eg Req, 28 April 1862, *D* 1863.I.250; Req, 17 May 1938, D.H. 1938.419; Civ. 1re, 20 June 1995, Revue de Jurisprudence de Droit des Affaires, 1995, no 1361. Commentators have supported this position. R Cassin, *De l'exception tirée de l'inexécution dans les rapports synallagmatiques (exception non adimplenti contractus) et de ses relations avec le droit de retention, la compensation et la résolution* (Thèse, Paris 1914); J-F Pillebout, *Recherches sur l'exception d'inexécution* (Thèse, Paris, 1971); E Raynaud, *L'exception tirée de l'inexécution dans les contrats synallagmatiques* (Thèse, Paris, 1906).

[8] See eg EA Farnsworth, 'An International Restatement: the UNIDROIT Principles of International Commercial Contracts' (1997) 26 U Balt L Rev 1, 2; F Marella, 'Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts' (2003) 36 Vanderbilt J Transnatl L 1137, 1142; KP Berger 'The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts' (1997) 18 Law & Pol Int Bus 943.

various suspension of law doctrines can all be characterized according to how they deal with the same four issues.

III. SUSPENSION OF PERFORMANCE IN COMPARATIVE CONTEXT

In civil law countries, suspension of performance is governed by the *exceptio*, which is found in some form in the laws of every civil law jurisdiction, either explicitly named (as in Germany) or as a rule or set of rules pertaining to particular nominate contracts (as in France). The *exceptio* is unknown in the common law; 'analogies can be drawn [to it], though they are far from precise'.[9] While the same result will frequently be reached in similar cases before common law and civil law courts, the reasoning and terminology used to justify nonperformance is often entirely different.

Treitel suggests two explanations for the absence of the *exceptio* as a singular legal convention in common law countries.[10] First, there is not as elaborate a taxonomy of bilateral contracts as in the civil law systems, where such contracts are divided into nominate sub-groups. Secondly, civil law systems tend to conceive of suspension and termination as separate remedies, while common law systems lump the two together, applying the same rules for their invocation and in some cases using the same term, 'rescission', for both.[11]

In England and the United States, the rights to suspension of performance and termination are both discussed in the context of 'conditions'. This term is used in a variety of senses in Anglo-American contract law, but for our purposes, conditions can be defined as events upon which parties' obligations are conditioned. There are two broad types. If one or both parties are not bound to perform unless an external event occurs, then that event is a contingent condition. If, on the other hand, the contract is immediately binding on both parties, but party A is not obliged to perform until party B has performed certain of its obligations, then party B's performance is a promissory condition of party A's performance. Promissory conditions (the type of interest here) are further divided into precedent, concurrent and subsequent promissory conditions, depending upon whether the condition arises before, simultaneously with, or after the obligation to which it pertains. The simplest example of a contract containing concurrent conditions is the contract of sale, in which the obligations of delivery and payment are contingent upon each other.[12]

The importance of concurrent conditions to suspension of performance is that non-performance by the debtor does not lead to the creditor's performance being excused; rather, the creditor's obligation never becomes

[9] Treitel (n 4) 306. The *exceptio* can be found in jurisdictions that are part of the English legal family but have a civil law heritage, such as South Africa and Scotland.

[10] ibid.

[11] This usage appears to be falling into disfavour.

[12] The presumption of concurrent conditions in sales contracts has been codified. In England, Sale of Goods Act 1979 s 28; in the United States, Uniform Commercial Code ('UCC') §§ 2–507(1), 2–511(1).

due without the performance (or tender of performance) of the debtor.[13] This characterization of conditions in the common law systems provides the conceptual link to the *exceptio* as an 'exception' in the civil law sense. In the civil law, just as the *exceptio metus* is pleaded to assert that a promise agreed to under duress never existed as a binding obligation, the *exceptio non adimplenti contractus* is pleaded to assert that the creditor's obligation never came into existence because of non-performance by the debtor.

Strictly construed, the *exceptio* is a defense: the creditor suspends its performance, the debtor sues, contending that the suspension constituted a breach of contract, and the creditor defends, citing the *exceptio*. In practice, though, suspension of performance is used most frequently as a form of self-help, deployed to coerce the debtor to complete performance rather than as a defense to a suit by the debtor.[14]

The different rules relating to suspension of performance regulate parties' conduct according to four factors. Thus, the laws of States and the decisions of arbitrators can be compared according to the ways they address these factors. First, the doctrine is only applicable to contracts that make the obligations of the creditor contingent in some manner. Second, it only applies to contracts that provide either that the parties perform simultaneously or that the debtor perform before the creditor. Third, breaches must typically meet some minimum standard of severity to justify suspension. Fourth, recognizing that 'the wider the gap between the withdrawn performance and the defective one, the more effective a weapon the [*exceptio*] will prove',[15] courts typically examine the creditor's response.

A. Civil Law Jurisdictions

Throughout the civil law world, suspension of performance is governed by operation of the *exceptio*.[16] It must be considered within the range of remedies available to a creditor, of which three are worth mentioning here. The first is the right of retention, which is roughly comparable to a vendor's lien in the common law and permits a seller or depositee who receives insufficient payment to hold back the goods or the thing deposited. Retention overlaps the *exceptio* in that both put pressure on a debtor by withholding performance. However, the right of retention applies only to tangible things (not money) and

[13] Crawford and Olleson (n 2) 67.

[14] B Nicholas, *The French Law of Contract* (2nd edn, Clarendon, Oxford, 1992) 213–214.

[15] P Legrand Jr, 'Judicial Revision of Contracts in French Law: A Case-Study' (1988) 62 Tul L Rev 963, 1028, citing Cassin (n 7) 633.

[16] Perhaps surprisingly, given its broad acceptance in civil law jurisdictions, the *exceptio* and the wider maxim *inadimplenti non est adimplendum* have no roots in Roman law. They were extrapolated by the medieval glossators from a variety of Roman law principles applicable to specific instances, such as the *exceptio mercis non traditae*, and from the general principle of good faith. R Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP, Oxford, 1996) 801.

thus is generally available only to sellers and depositees of goods. In addition, retention is available in unilateral contracts, where one party's promise is exchanged for the other party's performance.

The *exceptio* also works alongside the remedy of price reduction, which is widespread in civil law jurisdictions. It allows a buyer faced with incomplete delivery or defective goods to reduce the price unilaterally. In common law jurisdictions, a buyer would have to pay the full price then sue for damages or under a theory of unjust enrichment.[17] Price reduction is distinguished from suspension of performance in two ways. First, there is no analogous remedy for the seller, while suspension is available to all contracting parties. Second, price reduction amounts to an amendment to the contract, while suspension insists on performance of the contract without amendment.

Most importantly, suspension must be examined together with termination. Civil law countries distinguish sharply between suspension of performance and termination of a contract, with more serious breaches required for termination. Also, the *exceptio* is a wholly private action; the court's only role is to decide after the fact whether the creditor's suspension was justified. In contrast, in some civil law countries, court intervention is required to terminate contracts.

1. Germany

Suspension doctrine in Germany is characterized by clarity and simplicity. It is expressed in *Bundesgesetzbuch* (BGB) section 320, entitled *Enrede des nicht erfüllten Vertrags* (defense of failure to perform the contract). Section 320 states:

> (1) Unless the contract requires him to perform first, a person bound by a synallagmatic contract may refuse to perform his part until the other party effects counter-performance. . ..
>
> (2) If one party has partially performed, counter-performance may not be refused if, under the circumstances, in particular on account of the relative insignificance of the part not performed, the refusal would constitute bad faith.[18]

BGB section 320(1) restricts the application of the *exceptio* to synallagmatic contracts, ie those where each party's promised performance is

[17] M Müller-Chen, 'Article 50' in P Schlechtriem and I Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd English edn, OUP, Oxford, 2005) 596; J Lookofsky, 'Remedies for Breach Under the CISG' in CL Knapp, *Commercial Damages: A Guide to Remedies in Business Litigation* (Matthew Bender, New York, 1989) 42–43. In England, consumers may require a seller to reduce the purchase price on defective goods. Sale and Supply of Goods to Consumers Regulations 2002, S1 2002/3045.

[18] English translation from the Institute of European and Comparative Law at the University of Oxford <http://www.iuscomp.org/gla/> accessed 8 September 2009.

simultaneously exchanged for the other's.[19] Moreover, the obligation suspended by the creditor must be related synallagmatically to the obligation breached by the debtor.[20] German law thus resolves the two issues of contingency and order of performance in one step by limiting the *exceptio* to synallagmatic contracts. If the contract specifies a particular order of performance or belongs to a class of nominate contracts in which sequential performance is the rule, then the party performing first may not suspend performance.

Restricting the *exceptio* to cases of synallagmatic contracts means that suspension is available in a smaller range of contractual disputes than in other countries. However, the right of retention (*Zurückbehaltungsrecht*) is available in a wider set of circumstances under German law than in other civil law systems, so the difference in the rights of creditors is not as great as it would appear from looking at the *exceptio* alone.

With respect to the debtor's breach, it merely needs to be non-trivial. Any non-performance entitles the creditor to suspend, subject only to the principle *de minimis non curat lex*.[21] In the Germanic family of legal systems generally, the extent of breach required to justify suspension is largely immaterial. This rule exemplifies the doctrinal simplicity of German law with respect to suspension of performance, as it avoids the problem of distinguishing more and less serious breaches.[22]

Instead, German law regulates the availability of the *exceptio* according to the creditor's conduct. Specifically, BGB section 320(2) provides that the creditor may not refuse to perform if 'the refusal would constitute bad faith'. The rule is one of proportionality: if the performance suspended by the creditor is substantially greater than the breach committed by the debtor, German courts will give effect to the *exceptio* only to the extent of the debtor's breach. Moreover, if the breach is not *de miminis* but still relatively minor, courts may not permit the creditor to invoke the *exceptio* at all.[23] German law, therefore, focuses on whether the creditor's suspension of performance was proportionate; the extent of the breach is relevant to this determination but is not decisive.

[19] In the common law, no distinction is made between synallagmatic and non-synallagmatic bilateral contracts. In a synallagmatic contract, such as any contract for the sale of goods, the parties' obligations are exchanged for each other and are contingent upon each other. Delivery of goods is contingent upon payment of the price and *vice versa*. In a bilateral but non-synallagmatic contract, each party takes on obligations but the two performances are not exchanged for each other. The classic example of a bilateral but non-synallagmatic contract is one where an agent has a duty to act and the principal has a duty to reimburse the agent for his expenses. The agent's duty to act is enforced by the contract but is not contingent upon reimbursement of his expenses, while the principal's duty to reimburse is not contingent upon the agent successfully completing his performance. Treitel (n 4) 249.

[20] ibid 287.

[21] RH Christie, *The Law of Contract in South Africa* (4th edn, Butterworths, Durban, 2001) 468.

[22] D Coester-Waltjen, 'The New Approach to Breach of Contract in German Law' in N Cohen and E McKendrick, *Comparative Remedies for Breach of Contract* (Hart, Oxford, 2005) 141.

[23] Treitel (n 4) 303.

2. France

The use of the *exceptio* in French law is explicable only in contrast to the rules regarding termination (*résolution*). The right to terminate exists in all bilateral contracts under Code Civile (CC) article 1184, but a party cannot simply give notice that it is terminating a contract, as in other legal systems. Rather, a creditor must first serve upon the debtor a *mise en demeur*, which is a formal notification of the delinquency, then launch an *action en résolution.* Termination does not occur until a court orders it. There are only two exceptions to this lengthy and occasionally expensive process: the inclusion in the contract of a termination clause or conduct by the debtor so poor that continuing the contractual relationship would be impossible or unconscionable.[24]

In contrast, the *exceptio* may be relied on without judicial process. If the debtor sues the creditor, the court must give effect to the *exceptio* if the circumstances justify the creditor's refusal to perform. Thus, invocation of the *exceptio* is a particularly attractive option in France; it is regularly invoked even in cases of a breach severe enough that a court would grant *résolution*.[25]

The *exceptio* is not expressed in the French CC as a general principle underlying all contractual relationships. Instead, provisions dealing with certain nominate contracts contain separate expressions of the *exceptio*: sales contracts, (articles 1612 and 1653), *échanges* (article 1704)[26] and *dépôts* (article 1948).[27]

As is typical of the CC, each of these articles states the relevant principle but provides little detail. For example, article 1612, pertaining to sales, reads in full: 'The seller is not obliged to deliver the thing where the buyer does not pay the price of it unless the seller has granted him time for the payment.'[28] Consequently, specific rules limiting use of the *exceptio* have been developed by the courts and by commentators.

The contract must be bilateral but need not be synallagmatic.[29] With respect to order of performance, it is presumed that performance in bilateral contracts is simultaneous, although this can be overridden by express terms or trade usages.[30] For nominate contracts, order of performance is determined statutorily. For example, under CC article 1612, performance in sales contracts is simultaneous unless the goods are bought on credit or payment is not due until a later date. In such cases, the seller performs first.

[24] Y-M Laithier, 'Rights and Remedies' in Cohen and McKendrick (n 22) 118. The Cour de Cassation has upheld the right of a creditor to terminate unilaterally if the breaching party's conduct is egregious but has cautioned that such unilateral action is at the terminating party's risk. Civ 1ere, 28 octobre 1998, *Bull* I, no 211. [25] Treitel (n 4) 311.

[26] An *échange* is a barter contract, where one physical thing is exchanged for another.

[27] A *dépôt* is a deposit contract, where the subject matter of the contract is kept by one party and later returned in kind.

[28] Official English translation available at <http://www.legifrance.gouv.fr> accessed 3 September 2009.

[29] PDV Marsh, *Comparative Contract Law: England, France and Germany* (Gower, Aldershot, 1994) 325. [30] Treitel (n 4) 286–288.

In France and the jurisdictions influenced by it, the severity ('*gravité*') of the breach is an important factor; the breach must be '*suffisament grave*'.[31] The focus is on the effect of the breach on the creditor, not its severity in the abstract. A common formulation is that the breach must be such that, 'if the aggrieved party had known of it, he would not have entered into the contract'.[32]

In practice, the requirement of a serious breach is subsumed within the separate requirement that creditors suspending performance must do so in good faith, ie proportionately. Indeed, some commentators describe the requirement of a serious breach to be an aspect of the general rule of good faith: it would be in bad faith for a creditor to suspend performance in response to a relatively minor breach.[33] Specifically, partial breach or breach of some of the debtor's obligations cannot release the creditor from all of its obligations,[34] while suspension of *any* performance in response to a breach that causes minimal harm is disproportionate.[35]

B. Common Law Jurisdictions

The doctrine that promises in a bilateral contract may be conditional upon each other dates to 1773 and the landmark case of *Kingston v Preston*. In *Kingston*, a silk mercer had promised to sell his business to his apprentice. The price was to be paid in instalments over several years, with the apprentice providing security for the payments before the business was conveyed to him. When the apprentice failed to arrange security, the court excused the seller, holding that requiring performance would be the 'greatest injustice'.[36] Lord Mansfield's judgment allowed that obligations could be independent of one another, but held that the master's promise to convey the business depended on the apprentice's promise to provide security; the buyer's obligation was a 'precedent condition' of the seller's.

The common law rules on suspension of performance continue to be articulated primarily in terms of conditions. Whether expressly stated in a contract or implied by law, conditions determine both the content of a party's obligations and the consequences of their breach. For our purposes, the

[31] Cass. 1e civ., Oct. 19, 1999, RJDA No 1290; see also J Ghestin, C Jamin and M Billiau, *Traité de droit civil*, *vol. 5—Les obligations* (3rd edn, Librarie Générale de Droit et de Jurisprudence, Paris, 2001) 441.

[32] Nyer (n 1) 51.

[33] Marsh (n 29) 324.

[34] Cass soc, Oct 21, 1954, JCP 1955, II, 8563, note P Ourliac and M de Juglart, cited and translated in Legrand (n 15) 1029. Some cases do go the other way. See eg Cass req, Apr 20, 1921, D.P. 1922, I, 181. (Tenant was justified in withholding rent in its entirety after owner refused to make repairs.)

[35] Cass com, Jan 30, 1979, D.S. 1979, Inf. rap. 317. In that case, the Cour de Cassation ruled that a lessee of computer disks that turned out to be defective could not suspend performance. Although the disks did not perform as well as advertised, they were viable for the lessee's purposes.

[36] [1773] 99 Eng Rep 437 (KB).

existence of a condition means that a party's obligation is contingent on an occurrence, namely the other party's performance. The main difference between American and English law concerns whether the obligations in bilateral contracts are presumed to be mutually conditioned.

As with France and Germany, parties performing first cannot suspend performance. However, in both England and the United States, the trend is toward concurrent performance as the default position. The Restatement (Second) of Contracts embodies this trend: where the parties' performances 'can be rendered simultaneously, they are to that extent due simultaneously, unless the language or the circumstances indicate the contrary'.[37]

An important aspect of the holding in *Kingston*—one that continues to influence common law doctrines—is that Lord Mansfield made no distinction between non-occurrence of a condition precedent that would justify suspension and non-occurrence that would justify termination. To this day, no common law legal system distinguishes explicitly between termination and suspension, although there are some circumstances where suspension without a right of termination may be upheld, which will be discussed below. A consequence of this conflation of the standards applicable to termination and suspension is that, under the common law, a creditor may not suspend performance unless the debtor's breach is serious. Moreover, the conduct of the creditor is largely irrelevant. In particular, 'no requirement of proportionality between the breach and the suspension of performance has been advocated in common law jurisdictions'.[38] Instead, the creditor's conduct is regulated by the doctrine of unjust enrichment; courts will award damages in equity to a debtor if the suspension of performance unjustly enriched the creditor.

1. England

Mustill cites a 1976 International Chamber of Commerce (ICC) arbitration awarded to the effect that a serious breach gives rise to a right of termination, but not suspension.[39] Such a position may still be operative under English law. In 1992, the Court of Appeal stated, 'there is not yet any established doctrine of English law that [a creditor] may suspend performance, keeping the contract alive'.[40] Nevertheless, English courts do permit suspension of performance in certain circumstances.

England provides the counterpoint to Germany's doctrinal simplicity. The legal issues are clouded by overlapping terms and a lack of consensus on the tests to be applied. Treitel writes, 'Discussions of this problem are often

[37] Restatement (Second) of Contracts § 234 (1979). This section also provides that, where one party's performance requires a period of time to complete, that party must perform first.

[38] Nyer (n 1) 61.

[39] M Mustill, 'The New Lex Mercatoria: The First Twenty-Five Years' (1988) 4 Arb Intl 86, 113 fn 96, citing ICC Case No 2583, (1976) VII Ybk Intl Arbitration 124.

[40] *Channel Tunnel Group Ltd v Balfour Beatty Contruction Ltd* [1992] 749 Q.B. 656.

widely scattered in the books, with the result that very different solutions are proposed for problems which appear to be basically similar.'[41] Despite the confusion, English suspension doctrine is streamlined in one sense: issues of order of performance, conditionality of performance, and extent of breach are essentially coterminous. To understand the current state of affairs, a historical perspective is required.

In *Boone v Eyre*,[42] Lord Mansfield elaborated on the doctrine he laid down in *Kingston*. *Boone* involved a contract for sale of a plantation, including the slaves who worked on it. After discovering that the seller did not have title to all of the slaves, the buyer refused payment. The court held that the obligation at issue—to deliver title to the slaves—did not go to the heart of the bargain and therefore that the buyer could not avoid his obligation to pay the purchase price. Setting out the rule, Lord Mansfield held that, 'where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent.'[43]

Later cases extended this concept to recognize the existence of 'concurrent' conditions (also called 'interdependent'), which exist when performance is to be simultaneous.[44] Thus, with respect to order of performance, 'Where the obligations are concurrent or the breached obligation is a condition precedent of the other party's obligation', the breach may justify withholding performance.[45]

In the Victorian era, courts came to categorize contractual obligations as either 'conditions' or 'warranties'. The breach of a 'condition' would allow the aggrieved party to withhold his performance, whereas the breach of a 'warranty' would give rise only to a claim for damages. This terminology was codified in the Sale of Goods Act 1893.[46]

Whether English courts spoke of conditions versus warranties or (following the terminology in *Kingston*) dependent versus independent obligations, the main factor by which suspension was regulated was the importance of the contractual term breached by the debtor. The conditionality of the parties' obligations was typically reasoned backward from this point, so that collateral or relatively unimportant obligations would be characterised as warranties while obligations going to the heart of the benefit the creditor expected to receive were conditions.[47]

In determining whether an obligation constitutes a condition, English courts looked first to evidence of the parties' intent, in particular for any terms designated 'of the essence'. Absent such evidence, English courts have tended to

[41] GH Treitel, 'Some Problems of Breach of Contract' (1967) 30 MLR 139.
[42] [1777] 126 Eng. Rep. 160 (KB).
[43] ibid.
[44] Treitel (n 4) 281.
[45] Marsh (n 29) 325.
[46] In particular, ss 10–14.
[47] Treitel (n 4) 283.

rely on characterizations adopted by previous case law in relation to specific types of contracts. In this manner, English law came to resemble the civil law distinctions between different nominate contracts. Thus, for example, under employment or construction contracts, work by the employee or builder is considered a condition precedent for payment.[48]

The focus on the importance of the term breached persisted until the 1962 judgment in *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha*.[49] This case involved a charterparty in which the ship's owner covenanted to maintain the ship in 'seaworthy' condition. The charterer withheld payment, alleging breach of the seaworthiness term for missing equipment and lack of a competent crew. Lord Diplock shifted his analysis away from the question of conditions versus warranties, observing that complex obligations such as ensuring seaworthiness, which are endemic in modern contracts, cannot be *a priori* divided into the two categories. Instead, he set out a standard that focuses on the effect of the breach on the creditor, not the centrality of the term breached:

> . . .the judge had to . . . look at the events which had occurred as a result of the breach . . . and to decide whether the occurrence of those events deprived the charterers of substantially the whole benefit which it was the intention of the parties as expressed in the charterparty that the charterers should obtain.[50]

Since *Hong Kong Fir Shipping*, contractual terms have been considered innominate as a general rule—neither conditions nor warranties—unless the contract says differently. (Certain types of contractual terms are presumed to be conditions by operation of statute or by common law. For example, as will be discussed below, the Sale of Goods Act 1979 specifically classifies some implied terms to be 'conditions'.) Today, whether performance may be suspended depends primarily on the seriousness of the breach and its consequences for the creditor. *Hong Kong Fir Shipping* places English law on a course familiar to civil lawyers, where the consequences of the breach to the creditor is a key factor.

Despite this holding, the law remains unsettled. The test set out by Lord Diplock in *Hong Kong Fir Shipping* is cited as the controlling one by various later cases and by the official comment to article 9:201 of the PECL. However, some English courts and commentators continue to look to the importance of the term breached and continue to speak of independent versus dependent conditions or conditions versus warranties. For example, the Sale of Goods Act 1979 contains a section entitled 'when condition to be treated as

[48] A Ogus, 'Remedies: English Report' in D Harris and D Tallon, *Contract Law Today: Anglo-French Comparisons* (Clarendon, Oxford, 1989) 244–245, citing *Sumpter v Hedges* [1898] 1 QB 673. However, for a contractor to have the right to suspend work for missed payments, this must be provided in the contract.

[49] [1962] 2 QB 26.

[50] ibid 72.

warranty'[51] and specifically designates as 'conditions' certain implied terms, such as those describing the goods[52] or requiring them to be of a particular quality.[53]

As noted above, there is no general distinction made in England between breaches that justify termination of a contract and those that justify only suspension. However, it should be noted that circumstances do exist in which a creditor may suspend performance without terminating. Perhaps most importantly, when a breach occurs, the creditor need not declare termination immediately, but can negotiate with the debtor regarding a cure of the breach. While negotiations are ongoing, the creditor need not continue to perform.[54] In addition, Goode identifies four circumstances where there is no breach that justifies termination but where the creditor may nevertheless suspend performance. Of these, two have been discussed: where the contract provides for such a right and where the creditor is to perform after the debtor and its performance is conditional on the debtor's (or where the parties are to perform simultaneously obligations are mutually dependent). In addition, suspension may be permitted where the debtor does not object to the suspension, or where the creditor's performance is hindered (such as by the debtor's breach, the imposition of additional requirements beyond the terms of the contract, or the failure of the debtor to cooperate in a manner necessary for the creditor's performance).[55]

The overall lack of distinction made between breaches justifying termination and those justifying suspension, combined with the lack of a general duty of good faith in English contract law, means that little attention is paid to the creditor's conduct. Proportionality only matters in one sense: if the obligation breached by the debtor is severable, its breach justifies suspension of only the equivalent aspects of the creditor's obligations that remain unperformed.[56] This is most likely in long-term relationships like distributorships or construction contracts where performance is in stages or instalments.

2. *The United States*

In the United States, there is less linguistic confusion than in England. The non-occurrence of any precedent or concurrent condition will entitle a party to suspend performance. In addition, performance is presumed to be mutually conditional and simultaneous in all bilateral contracts, under the doctrine of 'constructive conditions of exchange'.[57] Unlike in England, therefore, the bar

[51] Sale of Goods Act 1979 s 11. This and the following sections are largely unchanged from the 1893 Act. [52] ibid s 12. [53] ibid s 14.

[54] R Goode, *Commercial Law* (3rd edn, Penguin, London, 2004) 127. The debtor may have the right to cure a breach and thus avoid termination, but this right is not as clearly developed in English law as in the United States. See below.

[55] ibid 127–128 (citations omitted). [56] Treitel (n 4) 596–601.

[57] Restatement (n 37) § 259; see also EA Farnsworth, *Contracts* (3rd edn, Aspen Law & Business, New York, 1999) 561–565.

is low for a finding that an obligation is conditional on the other party's performance. Thus, the Restatement provides:

> Performances are to be exchanged under an exchange of promises if each promise is at least part of the consideration for the other and the performance of each promise is to be exchanged at least in part for the performance of the other.. . .[58]
>
> It is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.[59]

Summing up the American jurisprudence, Farnsworth states:

> [O]nly by the clearest language can the parties make a promise to which the concept of constructive conditions does not apply . . . the judicial preference for constructive conditions of exchange and the self-help remedies that they afford the injured party is overwhelming.[60]

Thus, proving the conditionality of its obligations is seldom problematic for an American creditor seeking to justify suspension of performance. Furthermore, absent circumstances that indicate a particular order of performance, US courts will generally construe all bilateral contracts to require simultaneous performance.[61] In keeping with its more permissive attitude towards self-help, American law applies the doctrines relating to suspension of performance in all bilateral contracts.

Balancing these presumptions, which favor creditors, are strict rules relating to the severity of the breach required to justify suspension, namely the doctrine of material breach. Only a material breach by the debtor justifies suspension or termination. Under the Restatement, five factors 'are significant' in a determination of material breach:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected
(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.[62]

[58] Restatement (n 37) § 231.
[59] ibid § 237.
[60] Farnsworth (n 55) 556.
[61] Restatement (n 37) § 259.
[62] Restatement (n 37) § 241.

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It should be noted that the first four factors relate to the effects of the breach upon the creditor rather than to the importance of the term breached. They are thus in line with the trend in English law that follows from *Hong Kong Fir Shipping*.

In theory, US courts do not distinguish between different levels of breach to justify suspension and termination.[63] However, American courts may in fact set different standards for suspension and termination. The Restatement indirectly promotes a differential standard by focusing on what happens after the breach. Factor (d) of the five factors in section 241 is 'the likelihood that the party failing to perform ... will cure his failure'. Furthermore, section 237 states that it is a condition of a party's remaining performance that there be no '*uncured* material failure' of the other party's performance (emphasis added). Finally, section 242 states that, when determining how long a creditor must wait before its obligations are discharged, the factors in section 241 are relevant, as well as 'the extent to which it reasonably appears to the injured party that delay may prevent or hinder him in making reasonable substitute arrangements'.

It thus appears that, if a material breach is incurable or if a delay in performance would prevent the creditor from concluding a substitute transaction, the creditor may treat the material breach as 'total' and terminate the contract immediately.[64] In other words, in cases where a material breach may be cured within a reasonable period of time, 'such a breach would justify only *suspension* of performance by the injured party: he is only discharged if the breach is not cured within the time allowed by law'.[65] In this way, although suspension and termination are not doctrinally distinguished in American law, they have evolved into separate dilatory and permanent remedies, just as in the civil law, dilatory (the *exceptio*) and permanent (termination) withholding of performance are distinct remedies.[66]

US law dwells little on the creditor's conduct. Despite some notable exceptions, American courts will permit a party 'to refuse non-conforming performance to avoid suffering an uncompensated loss even though the refusal imposes a disproportionate loss on the defaulter'.[67] As in England, the relevant jurisprudence deals primarily with contracts that involve severable obligations. Thus, a breach with respect to one instalment will justify suspension only the creditor's performance relating to that instalment, while a creditor's suspension of its entire performance will be upheld only if a breach with

[63] MP Gergen, 'The Law's Response to Exit and Loyalty in Contract Disputes' in Cohen and McKendrick (n 22) 76.

[64] The UCC also contemplates a period between suspension and termination, during which the debtor may cure its breach and thus prevent termination. See UCC § 2-508.

[65] Treitel (n 4) 313.

[66] Farnsworth (n 55) 525.

[67] Gergen (n 61) 84. The two well-known exceptions to this general rule are *Jacob and Youngs v Kent*, 230 NY 239, 129 N.E. 889 (1921) and *Plante v Jacobs*, 10 Wis. 2d 567, 103 N.W. 2d 296 (1960).

respect to one or more instalments 'substantially impairs the value of the whole contract'.[68]

C. International Contract Law Instruments

1. Applicability and construction

The major international contract law instruments were all drafted by representatives of both common and civil law jurisdictions. These instruments take one of two forms: conventions that mimic domestic statutes or compilations of principles in the manner of the American Restatements. As to the conventions, parties may apply them to directly their contracts by including choice of law clauses invoking them. More commonly, however, they apply when the parties are domiciled in different states and choice of law analysis leads to the law of state party to the convention.[69] Generally, the domestic choice of law rules of contracting states provide that the convention will apply to contracts between parties from that state and another contracting state.

The two most prominent examples of this type of international instrument are the CISG and its predecessor, the Uniform Law for International Sales ('ULIS'). These two instruments apply only to contracts for the sale of goods for commercial use. The CISG applies to contracts that have both sales and non-sales aspects so long as the sales aspects form the 'preponderant part' of the parties' obligations.[70] If a contractual relationship consists of two or more separate contracts, then the CISG applies to the contract of sale and the appropriate domestic law applies to any other contracts.[71]

The second type of international contract law instrument, the compilations of principles, are usually drafted by representatives of states but are not conventions to be ratified. The two best known are the UNIDROIT Principles and the PECL. These instruments are usually applied to contracts indirectly, as embodiments of general principles of international private law.[72] The UNIDROIT Principles or PECL may apply directly as the governing law of the contract if the parties so designate, but this is rare in practice.

Moreover, under the 1980 EC Convention on the Law Applicable to Contractual Obligations ('Rome Convention')[73] and under the Rome I

[68] UCC § 2-612(3); the English Sale of Goods Act 1979 s 31(2) contains a similar rule.

[69] United Nations Convention on the International Sale of Goods, (adopted 11 April 1980, entered into force 1 January 1988) (CISG) art 1(1).

[70] CISG art 3(2).

[71] Oberlandesgericht Stuttgart, RIW 1978, 545, 546.

[72] Farnsworth (n 8) 3. PECL art 1 : 103(3) is indicative. It states that the PECL may be applied as the substantive law governing a contract when the parties 'have agreed that their contract is to be governed by "general principles of law", the "lex mercatoria" or the like; or have not chosen any system or rules of law to govern their contract'.

[73] Convention on the Law Applicable to Contractual Obligations art 4, 19 June 1980 (80/934/EEC).

Regulation[74] (applicable to contracts concluded after 17 December 2009), courts of member states cannot apply international instruments. Under the Rome Convention, a contract may be governed by 'the law chosen by the parties', or, in the absence of such choice, by 'the law of the country with which [the contract] is most closely connected'. Similar rules obtain under the Rome I Regulation, except that, if the parties do not make a choice of law, a series of rules applicable to particular cases determine the governing law in most situations.[75] Because international instruments are considered 'rules', not 'laws', State courts have interpreted these words to require application of a national law, even if the parties explicitly choose non-State rules.[76] Despite this, the UNIDROIT Principles and PECL have proved influential; for example, the 2001 Civil Code of Lithuania contains 'many clauses [that] repeat almost word for word sections of the [PECL] or UNIDROIT Principles'.[77]

International instruments should be construed 'autonomously', without reference to any national principles. General principles of international law are frequently cited in the interpretation of these instruments. CISG article 7 states:

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

The other three instruments all contain similar language, making them amenable to the importation of general principles of international law, either to fill gaps or to interpret their provisions.[78] In particular, the UNIDROIT Principles and PECL are frequently invoked as sources of general principles of international law and are used to interpret and supplement the provisions of the CISG and the ULIS.[79]

With respect to termination, all four instruments are similar to the point of using the same terminology. They all distinguish between ordinary and

[74] 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) [2008] OJ L 177, 6 ff.)

[75] Rome I Regulation art 4.

[76] The European Commission proposed that the Rome I Regulation permit the application of 'rules of law', but this proposal was not accepted.

[77] T Klimas, *Comparative Contract Law: A Transsystemic Approach with an Emphasis on the Continental Law* (Carolina Academic Press, Durham, 2006) xxvi.

[78] ULIS art 17; UNIDROIT Principles art 1.6; PECL art 1 : 106.

[79] AM Garro, 'The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG' (1995) 69 Tul L Rev 1149.

fundamental breaches of contract and limit termination to cases of fundamental breach, differing only in whether they define fundamental breach according to 'general interpretive guidelines' (the CISG and ULIS) or lists of factors relevant to such a determination (the UNIDROIT Principles and PECL).[80] They also all contain specific provisions governing instalment contracts, to the effect that a fundamental breach of one instalment can only lead to termination with respect to that instalment, unless the breach gives rise to a legitimate concern that fundamental breach will recur in future instalments.

On suspending performance, however, they differ. Most importantly, the UNIDROIT Principles and PECL state a general right to suspend performance, while the CISG and ULIS permit suspension only in limited circumstances, if at all.

2. The UNIDROIT Principles and PECL

In both the UNIDROIT Principles and PECL, suspension of performance is governed primarily by a single provision. UNIDROIT Principles article 7.1.3 states:

> (1) Where the parties are to perform simultaneously, either party may withhold performance until the other party tenders its performance.
> (2) Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed.

Thus, availability of suspension to a creditor is dealt with in a single step. This provision works together with article 6.1.4, which creates a presumption of simultaneous performance but provides that, if only one party's performance is to be rendered over time, that party is deemed to perform first. The conditionality of the creditor's obligations is regulated implicitly, in that contracts are presumed to be bilateral and no requirement of synallagma is expressed. In addition, the UNIDROIT Principles follow the Germanic position in that no minimum severity of breach is required. Finally, while the creditor's conduct is not addressed, the official comment makes clear that the creditor must conform to the overriding requirement of good faith and fair dealing stated in article 1.7.

The PECL's suspension of performance regime is similar. Article 9:201(1) states:

> A party who is to perform simultaneously with or after the other party may withhold performance until the other has tendered performance or has performed.

[80] C Liu, 'The Concept of Fundamental Breach: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law' (2005) 9 Vindobona J Intl Commercial L & Arbitration 123, 124.

> The first party may withhold the whole of its performance or a part of it as may be reasonable in the circumstances.

Performance is presumed to be simultaneous unless 'circumstances indicate otherwise'.[81] Thus, the only significant difference with the UNIDROIT Principles is that the requirement of reasonableness on the part of the creditor is explicit. The official comment to article 9:201 makes the matter even clearer: the breach need not be 'fundamental', but the performance suspended must not be 'wholly disproportionate' to the obligation breached.

3. The CISG and ULIS

The CISG and ULIS concern only contracts for the sale of goods, which are by nature bilateral and synallagmatic. They both presume that performance is simultaneous but permit the parties to agree otherwise.[82]

Whether, under the CISG a creditor may suspend performance for non-performance by the debtor is a matter of debate. The only CISG provision that has ever been held to permit suspension is article 71, which is entitled 'suspension of performance':

> (1) A party may suspend the performance of his obligations if, after the conclusion [execution] of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:
>
> (a) a serious deficiency in his ability to perform or in his creditworthiness; or
>
> (b) his conduct in preparing to perform or in performing the contract.

Notwithstanding its title, article 71 does not create a general right to suspend performance. It may only be invoked before performance is due and thus before any breach could occur.[83] In other words, article 71 is available only for cases of 'prospective failure of performance'.[84] As suspension is to termination, article 71 is to anticipatory repudiation.

The Polish Supreme Court has recently reaffirmed this view. It held that article 71 'regulates the right to suspend the performance of obligations in the case of an anticipatory breach of contract whereby it becomes apparent that the other party will not perform a substantial part of his obligations.'[85] Moreover, the difference between suspension of performance and the remedy described in article 71 is underlined by the provision's legislative history, which makes clear that it was designed to address such situations as when

[81] PECL art 7:104.

[82] CISG art 58; ULIS art 71.

[83] Explanatory Note by the UNCITRAL Secretariat, Part Three, 33 <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-71.html> accessed 3 September 2009.

[84] JO Honnold, *Uniform Law for International Sales* (3rd edn, Kluwer, The Hague, 1999) 428.

[85] 11 May 2007 [V CSK 456/06]. English translation available at http://cisgw3.law.pace.edu/cases/070511p1.html.

goods are purchased on credit but the buyer becomes insolvent prior to delivery.[86]

Nevertheless, at least two courts have applied article 71 to find a right of suspension in cases where breach has already occurred.[87] Therefore, some discussion of the circumstances under which article 71 might permit suspension is warranted. Here, too, there is disagreement. Article 71 states that the prospective nonperformance must constitute a 'substantial part' of the debtor's obligations, a standard that is not defined and appears only in one other article of the CISG.[88] On the other hand, fundamental breach is explicitly defined in article 25 and appears in several articles. Article 71's *travaux préparatoires* provide no guidance; debate on its wording focused on the degree of certainty with which the prospective nonperformance must be foreseeable.[89]

Heuzé argues that, to define 'substantial' in article 71, one should analogise to CISG article 46, which permits a buyer to demand cure only if the seller's breach is fundamental; therefore, a requirement of prospective fundamental breach is implied by article 71.[90] However, one could as reasonably analogize to the remedy of price reduction under CISG article 50, which does not require fundamental breach.[91] More importantly, article 71 does not use the term 'fundamental', while article 72, which deals with anticipatory repudiation, refers specifically to prospective fundamental breaches. Thus, whatever 'substantial' means, it must be something less than 'fundamental'.[92]

When it comes to regulating the creditor's conduct, nothing in the text of article 71 states the extent to which performance may be suspended; there is no mention of proportionality. The CISG does not even contain a general provision requiring the parties to act in good faith.[93] Schlechtriem maintains, in line with CISG article 50, that prospective suspension of performance under article 71 must 'correspond with the disadvantage caused by the

[86] ibid 426.

[87] The Austrian Supreme Court, OGH Feb 12, 1998, 2 Ob 328/97t <http://cisgw3.law.npace.edu/cases/980212a3> accessed 3 September 2009, and a district commercial court in Hasselt, Belgium, *JPS BVBA v Kabri Mode BV*, AR 3641/94, Rechtbank van Koophandel Mar. 1 1995 <http://www. unilex.info> accessed 3 September 2009.

[88] Article 3(1), which deals with the CISG's applicability to mixed manufacturing and sales contracts.

[89] Honnold (n 84) 428–430.

[90] V Heuzé, *La vente internationale des marchandises: droit uniforme* (Joly Éditions, Paris, 1992) § 393.

[91] M Koehler (tr), P Schlechtriem, 'Auslegung, Lückenfüllung und Weiterentwicklung' (2003) Symposium zu Ehren von Professor Dr. iur. Dr. h.c. Frank Vischer, 11/5, 2003 17 <http://www.cisg-online.ch/cisg/Schlechtriem-e.pdf> accessed 3 September 2009. Article 50 should not be taken as a specific right of suspension; the *travaux* make clear that it derives from the remedy of price reduction, not from the *exceptio*.

[92] T Bennett, 'Article 71' in C Bianca and M Bonell (eds), *Commentary on the International Sales Law* (Guiffre, Milan, 1987) 518.

[93] CISG art 7(1) states merely that good faith is to be regarded in the interpretation of the convention.

nonconformity'.[94] However, he cites nothing the text or the travaux of article 71 to support this conclusion.

The relevant rules under the ULIS are essentially identical to the CISG. The ULIS does not create a general right of suspension of performance but does include, in article 73, an analogue of CISG article 71. Also like the CISG, the ULIS contains a buyer's right to reduce the purchase price; however, as noted above, this should not be construed as a specific instance of suspension of performance.

IV. SUSPENSION OF PERFORMANCE IN INTERNATIONAL COMMERCIAL ARBITRATION

When international arbitral tribunals are convened, the international nature of the proceedings means that choice of law is always an issue. Thus, in contrasting the approaches of arbitral tribunals and courts on cases of suspended performance, one must consider not only to how these tribunals apply the law, but also to how they determine which substantive law applies.

An important difference between courts and arbitral tribunals is that arbitration agreements may empower arbitrators to act under amiable composition.[95] Tribunals so empowered may decide according to their own sense of equity without reference to any particular law. Amiable composition clauses give tribunals much latitude: they may choose any law they consider appropriate or choose no law at all. Although it is no longer common, all the major arbitral rules permit parties to choose amiable composition.[96]

Amiable composition is not incompatible with application of national laws, but is closely tied to the *lex mercatoria*. When tribunals are empowered to act as *amiables compositeurs*, they frequently take this as evidence that the parties intended to apply *lex mercatoria*.[97] Goldman goes so far as to assert that inclusion of an amiable composition term in a contract constitutes a designation of *lex mercatoria* as the applicable law.[98]

It is suggested that what arbitrators do when they may choose any principles of law or equity is the best evidence of their preferences. Consequently, cases of amiable composition are particularly important for their role in the developing *lex mercatoria* jurisprudence. For example in his commentary on International Chamber of Commerce (ICC) Award no 3540, Derains applauds the tribunal for creating new *lex mercatoria* by declaring the availability of a set-off to be a general principle of international law: 'In elevating [set-off]

[94] Schlechtriem (n 91) § II, 5 (c)(aa).

[95] Tribunals so constituted are often referred to in French as '*amiables compositeurs*' or are said to decide '*ex aequo et bono*'. These terms are synonymous as generally construed.

[96] AM Redfern and M Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London, 2004) 54.

[97] Journal du droit international *(Clunet)*, 1981, n° 4, 924.

[98] B Goldman, *La lex mercatoria dans les contrats et l 'arbitrage internationaux* (Clunet, Paris, 1979) 475.

to the level of general principles of law, the arbitral tribunal has made a new contribution to the constitution of the *lex mercatoria*.'[99]

When a tribunal does not sit as *amiable compositeur*, it must choose the applicable law. If the parties' contract selects a particular law, the tribunal will generally respect that choice. If the contract does not designate a substantive law, most arbitral rules permit the tribunal either to select the choice of law rule it considers appropriate or to designate an applicable law directly (*voie directe*). National courts, on the other hand, must follow the choice of law rules prescribed by their states' private international law regimes, which may prohibit the application of non-national rules or general principles of law.

Once the applicable law is determined, state courts can be expected to take the approach associated with their national legal traditions and to rely on domestic statutes and precedents as sources of law. Thus, for example, a French judge confronted with a case of suspended performance can be expected to determine first whether a breach is sufficiently serious to permit suspension by the creditor and then to examine whether the creditor's response was proportionate. A German judge might focus first on whether the contract was synallagmatic and then go directly to a determination of whether the suspension was proportionate (in good faith). Only occasionally will courts reach outside their domestic law, such as when the parties specifically contract for the application of general principles of law to supplement their choice of national law, or when a judge seeks to reinforce an interpretation by noting that courts of other states have reached the same conclusion.

By contrast, after determining that a particular law applies, arbitral tribunals frequently refer to general principles of law and employ patterns of reasoning and terminology associated with other jurisdictions. This is so regardless of the country of origin of the arbitrators and regardless of whether any given national law or international contract law instrument is applied. Thus, for example, we might see an arbitrator considering a contract under American law make reference to the *exceptio*, or an arbitrator applying German law consider whether the debtor breached an important term of the contract.

A. Some Awards

In any award that reaches a decision on the merits, arbitral tribunals can take one of four courses of action:

- state that a particular national law or international instrument governs, then apply that law closely, using terminology and reasoning particular to the state or instrument and turning to authorities associated with the state or instrument;

[99] Journal du droit international *(Clunet)*, 1981, n° 4, 927 (author's translation).

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- state that a particular law governs, but also appeal to general principles or utilise terminology or reasoning associated with a different jurisdiction;
- apply general principles directly, either because the contract calls for their application or because the tribunal, acting as *amiable compositeur*, declines to make a choice of law; or
- apply no legal principles whatsoever, when acting as *amiable compositeur*.

I will examine the publicly available arbitral awards that deal with cases of suspension of performance. Where the nationality of the parties or of the arbitrators is stated in the published version of the award, I will supply these. Although the number of awards is small, each of the four possible outcomes occurs at least once.

1. ICC Case no 4629 of 1999[100]

The tribunal considered a construction contract containing an express choice of Swiss law. It acted as a court would have and applied Swiss law; where a contract contains a clear and valid choice of law clause invoking a particular national law, there is little leeway for a court or an arbitral tribunal to choose a different law.

This award is also paradigmatic of an arbitral tribunal following the approach of a national court in applying the law: the tribunal decided the suspension of performance issue in accordance with the relevant provision of the Swiss Code of Obligations (CO), article 82, and referred only to Swiss authorities to interpret article 82.

The contract called for the claimants to construct a hotel for the respondent, a Middle Eastern hotel developer. The respondent was, among other things, to obtain import licenses and regulatory authorisations and to fulfill various credit conditions set by the claimants' bank. The claimants began work, but soon suspended performance on the ground that the respondent had failed to fulfill its obligations. When the respondent drew down a performance bond that the claimants had issued, the claimants initiated arbitration.

The tribunal held that the respondent had breached its obligations, so it 'could not reasonably insist' that the contractors finish by their deadline. It analysed the propriety of the claimants' suspension under CO article 82, which it characterised as embodying the *exceptio*, and which it found to apply when the parties are to perform simultaneously. The tribunal further cited the Swiss federal court to the effect that article 82 is inapplicable to breaches of collateral obligations, but found that the obligations breached by the respondent were not collateral. Finally, the tribunal held that, under CO article 108(1), the claimants would have been entitled to terminate the contract as

[100] (1993) XVIII Ybk Commercial Arbitration 11.

soon as the respondent refused to remedy its non-performance, so the claimants 'were *a fortiori* justified in suspending their work'. Such a ruling is consistent with the Swiss approach, which requires a more severe breach to justify termination than suspension of performance.

2. Klöckner Industrie-Anlagen GmbH (FR Germany) v United Republic of Cameroon[101]

Klöckner entered into several contracts in the 1970s with the government of Cameroon to supply and construct a fertilizer plant, then provide technical and commercial management for the plant. The contracts contained no choice of law term.

Arbitration was in front of a tribunal of the International Center for the Settlement of Investment Disputes (ICSID). The parties agreed that Cameroonian law applied. However, Cameroon has a dual judicial heritage, different parts of the country having been colonies of France and the UK. The two systems of law remain; disputes between parties from the same region are decided under the law historically in force in that region. Since the fertilizer plant was located and the contracts negotiated in eastern Cameroon, where the law is French, the tribunal applied French-derived Cameroonian law. This appears to be the approach a Cameroonian court would have taken.

After nineteen months, the plant shut down. Klöckner instituted arbitration for the outstanding portion of the contract price. Cameroon defended on several grounds under French-derived law, including the *exceptio*, alleging various breaches by Klöckner. Although the tribunal's analysis referred to French law, it did note that 'English law and international law reach similar conclusions'.

The tribunal (composed of Uruguayan, American and French arbitrators), found the *exceptio* to embody a general principle of 'French, English and international law'. Its characterisation of the *exceptio* under French law will be discussed below.

As to English law, the tribunal cited a single ICC arbitration award,[102] in which the sole (English) arbitrator wrote that, given the 'mutuality' inherent in all contracts, 'if the seller does not [perform], the buyer may release himself from his obligation to pay'. The tribunal cited no English statute or case law to the effect that the *exceptio* constitutes a general principle under English law. Had an English court decided the issue, it is unlikely to have made such a statement, since the necessary 'mutuality' is not presumed under English

[101] (1994) 2 ICSID Rep 95 (original decision, English translation); (1986) XI Ybk Commercial Arbitration 162 (annulment decision, English translation).

[102] The *Fertilizer Corporation of India* case, published as an annex to J Paulson, 'Third World Participation in International Commercial Arbitration' (1984) 2 ICSID Rev 19.

law. Instead, an English court would likely have inquired first (following *Hong Kong Fir Shipping*) whether the debtor's breach substantially deprived the creditor of the benefit it expected to receive under the contract or (according to the older formulation) whether the obligation breached constituted a condition of the creditor's performance.

The tribunal also cited an opinion of the Permanent Court of International Justice in the *Diversion of Water from the Meuse* case,[103] which, the tribunal alleged, held that the maxim *inadimplenti non est adimplendum* constitutes a general principle of international law. This citation is dubious. First, the tribunal did not address the distinction between general principles of public and of private international law; the *Meuse* case dealt with the treaty obligations of states, not the contractual obligations of private parties. Second, it failed to note that the opinion cited, that of Judge Anzilotti, was a dissent. Third, it did not distinguish between the wider maxim of *inadimplenti non est adimplendum* and the more specific *exceptio non adimplenti contractus*.

Satisfied that it could recognise the *exceptio* in principle, the tribunal turned to the circumstances in which it might apply. Citing French commentaries and judgments, the tribunal held that the debtor's breach must be of more than 'slight importance', that partial non-performance by the debtor does not justify 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'. This approach corresponds to what a French (or Cameroonian) court would likely do.

However, the tribunal also found that, given Klöckner's defective performance, it was not entitled to any more payment than it had already received; that is, Klöckner's breaches partially discharged Cameroon's obligations. No authority was cited for this, and indeed a French court is unlikely to have reached the same conclusion. As discussed above, the *exceptio* is a dilatory plea; it permits a creditor to withhold payment temporarily but cannot lead to the discharge of any party's obligations.

Klöckner moved for annulment of the award. The *ad hoc* annulment committee (composed of Swiss, Egyptian and Austrian arbitrators), annulled the award on several grounds, including its treatment of the *exceptio*.[104] It declined to consider whether the award correctly construed the requirements for invocation of the *exceptio*, so it is unclear whether the annulment committee agreed that the *exceptio* constitutes a general principle of French, English or international law. However, the annulment committee did find that the tribunal misunderstood the effects of the *exceptio*:

> It looks as if the Arbitral Tribunal considered the *exceptio non adimplenti contractus* as giving rise to the *extinction* of obligations under French law,

[103] [1937] PCIJ (ser A/B), No. 70, 4, 50.
[104] There was also a second annulment proceeding, but the opinion has never been published.

a conclusion which, on any reading of the citations used in the Award itself, does not necessarily follow and, moreover, does not appear consistent with what the ad hoc Committee knows about this area of law.

3. Zurich Chamber of Commerce Case no. 273/95 of 31 May 1996[105]

Pursuant to a series of contracts, the Russian respondent was to supply materials to Claimant 1, a Hungarian enterprise, and Claimant 2, an Argentine conglomerate. The respondent also took a minority share in both claimants. At the time of contracting, the respondent was a government entity, but it was later privatised; its new owners ceased delivery on the contracts. The claimants initiated arbitration, seeking specific performance. The respondent argued that its cessation of delivery was justified by prior breaches of the claimants, that they had not paid for certain instalments and had fraudulently induced the respondent to purchase an ownership interest in them.

The dispute was decided by an arbitral tribunal of the Zurich Chamber of Commerce, composed of three Swiss lawyers. The 'main thrust' of the contracts was held to be the supply of the raw materials, but an 'ancillary aspect' was the sale of interests in the claimants to the respondent. The tribunal applied the Swiss Private International Law statute (as required by the Zurich Chamber of Commerce Rules), which provides that, if the parties do not make a choice of law, the law of the seller's domicile governs. The seller's domicile was Russia, so the tribunal applied Russian law. Since Russia had ratified the CISG and the parties all came from countries party to the CISG, the CISG applied to the sale of goods aspects of the contracts and Russian domestic law to the remainder of the contractual relationship (in particular, the sale of shares in the claimants).

The tribunal's approach to the choice of law is similar to one a court would have taken. It began by applying the Swiss choice of law rules. These called for the seller's law, which the tribunal then assessed to determine which Russian law would apply to which aspects of the relationship. Even if a court could not apply the CISG directly, then the CISG's application would still be warranted because of its incorporation into Russian law. Finally, the tribunal applied the CISG strictly to the sales aspects of the contract, which is the narrow approach that a national court would likely take.

The respondent asserted that the claimants' missed payments amounted to fundamental breach. Finding that the CISG creates no general right of suspension, the tribunal analysed the respondent's actions under the CISG's termination provisions. In particular, CISG article 73 permits termination of an entire instalment contract only if a breach as to one instalment gives the

[105] (1998) XXIII Ybk Commercial Arbitration 128.

creditor 'good grounds to believe' that a fundamental breach will also occur with respect to future instalments. The tribunal found that no such grounds existed. In sum, the tribunal found that the CISG—an international instrument—governed, and interpreted it without reference to general principles or exogenous terminology.

4. *ICC Case no 9448 of 1999*[106]

The claimant, a Swiss manufacturer of roller bearings, and the respondent, an American distributor, entered into an exclusive distribution contract. The contract contained a choice of law clause applying Swiss law. Switzerland had ratified the CISG and the tribunal characterised the contract as "successive sales and deliveries of bearings [from] Claimant . . . to Respondent, while granting Respondent exclusive representation in the USA". Therefore, the contract was within the CISG's scope of application. The tribunal did not state that it considered the sales aspects of the contract to predominate, but did assert that 'all preconditions for the application of the CISG . . . are fulfilled'. A national court is likely to have made the same determination.

After two years, the respondent refused payment for future instalments on the grounds that some prior instalments had arrived late and that there were shortfalls in the number of bearings in other shipments. The claimant initiated arbitration to recover the missing payments. The respondent claimed the right to suspend performance based on the claimant's alleged breaches, citing CISG article 71.

The tribunal stated that it need not determine whether the breaches alleged by the respondent had actually occurred. The respondent's allegations, even if true, could not justify suspension of performance under article 71, since that provision gives a party the right only 'to withhold its performance corresponding to a future anticipated breach'. Since the respondent had already received the deliveries, it had to pay for the amount received and could assert separate claims for lateness and incompleteness of the deliveries. Moreover, if the late or incomplete deliveries had constituted fundamental breach, the Respondent could have terminated the contract with respect to those deliveries under article 73(1) of the CISG. However, the respondent did not allege fundamental breach or attempt to terminate the contract.

The tribunal's analysis of the CISG stays close to the text. For interpretive guidance, the tribunal cited two well-known treatises on the CISG.[107] As to the interest rate (which is not governed by the CISG), the tribunal cited a

[106] Available at <http://www.unilex.info> accessed 3 September 2009.

[107] P Schlechtriem (ed), *Commentary on the UN Convention on the International Sale of Goods* (CISG) (2nd edn, OUP, Oxford, 1998); Bianca and Bonell (n 87).

Swiss Federal Court decision. A national court would likely have followed the same approach and reached the same conclusions.

5. ICC Case no 11849 of 2003[108]

This case involved an exclusive distributorship agreement between the respondent, an Italian fashion house, and the claimant, an American retailer. The agreement provided that the goods were to be delivered in seasonal instalments; payment was by draw-downs after each delivery from a letter of credit opened in favor of the respondent.

The agreement contained a choice of law clause directing the sole arbitrator to 'apply the [CISG] for what is not expressly or implicitly provided for under the contract. Letters of credit shall be governed by the [ICC] Uniform Customs and Practices for Documentary Credits.' However, the claimant took the position that the CISG cannot apply to long-term relationships like distributorships and that therefore it should apply only to each of the individual sales between the parties, not the general framework of their relationship.

The sole arbitrator rejected this argument and applied the CISG to the entirety of the contractual relationship. He appears not to have considered the CISG's own rules for its application. Instead, he applied the CISG because 'the parties have clearly indicated their intention to avoid their respective internal law rules, and to resort to neutral solutions'. A court is unlikely to have cited as decisive an apparent preference of the parties for non-national rules. Instead, a court would likely have cited the text of CISG and commentary or case law interpreting CISG article 3's requirement that, for the CISG to apply to mixed contracts, sales aspects of a contract must predominate.

After a few deliveries, the respondent demanded higher prices for future instalments. The claimant refused to open a new letter of credit reflecting the increases. After unsuccessful negotiations, the respondent set a deadline for the claimant to open a letter of credit, after which the respondent would consider the agreement terminated. When this deadline passed, the respondent terminated the contract.

The claimant initiated arbitration, claiming that the respondent's attempt to terminate the contract was unjustified. The respondent defended on the grounds that the claimant's failure to open the letter of credit before the deadline it set justified termination. In turn, the claimant asserted that the respondent's attempt unilaterally to increase the price justified the claimant's having suspended payment. It is this action—the claimant's refusal to open the letter of credit at the higher price—that the claimant characterized as suspension.

[108] (2006) XXXI Ybk Commercial Arbitration 148.

The claimant invoked the *exceptio*. The arbitrator found that under the CISG, the *exceptio* is expressed in article 71, but held that article 71 permits only prospective suspension of performance. However, the arbitrator did not rule against the claimant on the grounds that the CISG does not permit suspension for prior nonperformance. Instead, he ruled that the claimant's suspension of performance was improper because it was 'excessive and disproportionate'. Under CISG article 54, a refusal to open a letter of credit is tantamount to a total refusal to pay the purchase price, while the disagreement related to '10 or 15 per cent only of the prices'. Except for the reference to article 54, there was no analysis of the claimant's actions under the CISG, nor did the arbitrator cite any source for the 'excessive and disproportionate' standard. The tribunal thus applied the CISG according to a theory of party intent that international instruments would prevail, then applied under the CISG principles not found anywhere in its text.

6 ICC Case no 8547 of 1999[109]

The claimant, a Bulgarian seller of goods, and the respondent, a Greek importer, concluded a contract through a series of telexes for delivery of goods in instalments. One telex sent by the claimant stated that the contract was to be 'governed by, constructed and interpreted in accordance with the [ULIS]'. The tribunal held the entire contract to be governed by the ULIS.

Leaving aside whether the exchange of telexes formed a contract encompassing all of the deliveries, a court is likely to have reached the same conclusion. ULIS article 4 provides that it applies where the parties have chosen it as the governing law of a contract, regardless of whether the states in which they are domiciled have ratified it. The tribunal found this rule to be 'in accordance with the principle of party autonomy'. Party autonomy is a cornerstone of arbitration, but emphatically not an important principle in litigation. Indeed, courts have divided on the question of whether the ULIS can apply simply because the parties have chosen it. For example, the German *Bundesgerichtshof* (federal supreme court) applied the ULIS in such a situation[110] but a US Federal District Court in New York refused to do so.[111]

After delivery commenced, the respondent alleged that the goods were of poor quality. The claimant admitted this but took no action to cure the nonconformity. In response, the respondent suspended payment for subsequent deliveries, specifically citing the *exceptio* in its communications with the claimant. Asserting that the respondent's suspension breached the contract, the claimant initiated arbitration.

[109] (2003) XXVIII Ybk Commercial Arbitration 27.
[110] *Bundesgerichtshof*, Case VIII ZR 185/92 (9 March 1994).
[111] *Tarbert Trading, Ltd v Cometals, Inc*, 663 F. Supp. 561, 566 fn 9 (SDNY 1987).

The tribunal stated unequivocally that the respondent had the right 'to stop payment because of the nonconformity of the goods'. It noted that the order of performance under the contract was such that the payment was to occur after delivery, then asserted that 'It would amount to a curtailment of the rights of the buyer if he had to continue payment . . . without knowing what will happen in regard to the nonconformity.' Finally, 'the degree of nonconformity is . . . irrelevant in regard to [the] right to suspend payment', so the respondent was justified in suspending performance.

The tribunal so decided although it acknowledged that a right to suspend performance 'is not expressly stated in ULIS'. The tribunal found that the *exceptio* is a general principle of international law, made applicable to the ULIS by its article 17, which states that gaps may be filled by reference to general principles. The tribunal cited UNIDROIT Principles article 7.1.3, the relevance of which was reinforced by 'the internationality of the relations between the parties'. The tribunal thus displayed a clear preference for general principles of international law, even when these conflict with the law chosen by the parties.

If a court had decided this case, it would not likely have found a right to suspension of performance since such a right is not granted by the ULIS. In particular, the mere fact that the parties came from different countries would be insufficient to apply the UNIDROIT Principles.

7 ICC Case no 3540 of 3 October 1980[112]

The claimant, a French construction company, contracted with a Yugoslav subcontractor (the respondent) to build a project in the USSR. The contract contained no choice of law clause and empowered the tribunal to act as *amiable compositeur*. The tribunal, composed of Swiss, Yugoslav and French arbitrators, was constituted in Switzerland under the ICC rules.

The parties disagreed on the substantive law, the respondent pleading for French law, the claimant for Swiss. The tribunal determined that arbitral tribunals in general, especially when acting as *amiables compositeurs*, choose whichever law (or no law) they consider appropriate; it then decided to apply *lex mercatoria*.

Under the contract, payment was to be in monthly instalments. A dispute arose and the Claimant refused to pay for some of the instalments. The respondent raised a counter-claim seeking an interim award for the monthly payments that the claimant had withheld. In its defense, the claimant invoked the *exceptio* and, subsidiarily, a set-off to the extent of the damages that it claimed from the respondent.

[112] (1981) 4 Journal du droit international (Clunet) 914–921. (This award is available in full only in French; translations are the author's own.)

The tribunal held that the *exceptio* 'must be considered as belonging to the general principles of law forming the *lex mercatoria* applicable here'. It gave no authority or justification for this conclusion but did note that both Swiss and French law—the laws pleaded by the parties—recognise the *exceptio*. The tribunal went on to state a familiar description of the remedy as 'by nature dilatory . . . it momentarily paralyses the action for execution of the creditor's obligations'.

The tribunal decided that it was 'more expedient' to resolve the dispute on the basis of the claimant's alternative argument for a set-off, so it declined to determine whether the claimant's invocation of the *exceptio* was proper. A common lawyer might say that the tribunal's characterisation of suspension of performance as a general principle of international private law was dictum.

8 ICC Case no 3267 of 1979[113]

In this case, too, the contract called for amiable composition. The respondent, a Belgian building contractor, subcontracted part of a building project to the claimant. The tribunal found that, since it was appointed as *amiable compositeur*, it need not 'decide which specific law governs the contractual relationship between the parties'. Instead, it applied 'general principles of international commercial law . . . with no specific reference to a particular system of law'.

The contract called for a fixed price, subject only to limited circumstances that could justify modification. The respondent was to pay in instalments, after the claimant reached specified contractual milestones. The respondent deducted from the sixth and seventh payments, alleging failures by the claimant to reach certain milestones. In response, the claimant terminated the contract.

The tribunal characterized the respondent's deductions as suspensions of performance. Since the contract mandated a particular procedure for withholding payments 'specifically devised for this kind of contingency', and the respondent did not follow this procedure, the payment deductions were not justified. Importantly, the tribunal held that the existence of a particular contractual term on-point means that 'The argument that such . . . deduction was made in "accordance with . . . international trade usages", does not carry any weight.' In other words, the tribunal declined to state whether suspension of performance constituted a general principle of law consonant with 'international trade usages' because the agreement of the parties supersedes any such principles.

V. CONCLUSION

Given the small sample, firm conclusions and ironclad generalizations cannot be made about international arbitrators' approaches to suspension of

[113] Collection of ICC Arbitral Awards (vol 1 1974–1985) 76.

performance. However, based on what evidence is available, certain patterns may be discerned.

Throughout the awards, international arbitrators' preference for international contract law instruments and general principles of international law is apparent in their choice of law analyses. In six of the eight awards, either an international instrument or general principles of international law were applied, sometimes over the objection of one or both parties. Particularly noteworthy is ICC case no 11849, where the CISG was applied to parts of the contractual relationship that were not sales on the grounds that the parties' references to the CISG and to the ICC Uniform Customs and Practices for Documentary Credits evinced an intent to avoid national laws. In three awards, general principles of international law were invoked by the tribunal and were decisive in the tribunal's decision on the propriety of a party's suspension of performance. In one award, ICC Case no 8547, general principles were applied contrary to the explicit language of the governing law, which was the ULIS, itself an international instrument.

Perhaps most striking, arbitrators did not hesitate to declare that suspension of performance is a general principle of international law.[114] As discussed above, such a conclusion is questionable; even if there is general agreement that some right to suspend performance exists, there is no international consensus on when and how this right may be exercised. In each of the awards that held suspension of performance to constitute a general principle, the tribunals were composed of entirely civil lawyers, except for one American arbitrator in *Klöckner*. This may account for the readiness of these tribunals to invoke the *exceptio* by name and to declare it to be universally accepted.

Now that these tribunals have made such declarations, their prophecies may become self-fulfilling. While the decision of one tribunal cannot bind another in the sense of *stare decisis*, few arbitral awards are published and tribunals do cite published awards on points of substantive law. This is especially so in cases dealing with the *lex mercatoria*, an area of law which is almost exclusively the province of arbitrators. The awards discussed here indicate that international arbitrators tend to promote the application of general principles of international private law and to view suspension of performance as such a principle. Moreover, they tend to permit parties to suspend performance even when the governing law is silent on the matter or provides no right to suspend.

Among the tribunals that discussed the circumstances in which a creditor may suspend performance, there was no disagreement. In all of the cases where the issue was addressed, the contracts were bilateral and no tribunal mentioned a requirement that the contract be synallagmatic. Order of performance was discussed only in ICC Cases nos 4629 and 8547, where the creditor was to perform simultaneously with or after the debtor. In no case was

[114] This occurred in four of the eight awards, *Klöckner* and ICC Cases nos 8547, 3540 and 3267.

a standard for the severity for the breach advanced. As to the creditor's conduct, ICC award no. 4629 implicitly addresses proportionality—since the breach was serious enough to justify termination under the applicable Swiss law, the lesser response of suspension was '*a fortiori*' acceptable. In ICC Case no 11849, decided under the CISG, the tribunal described the creditor's response as unjustifiable because it was 'excessive and disproportionate'; however, no authority was cited for this standard.

In conclusion, therefore, tribunals addressing suspension of performance seem to prefer a rule that does not require a serious breach but does contain a requirement of proportionality in the creditor's actions. It is unclear how much trades usages have influenced this formula, although businesses do tend to choose self-help remedies when they are available. However, the awards clearly owe much to the *exceptio*, and in particular to its Germanic formulation. While this may be due to the tribunals being composed mostly of civil lawyers, the fact that their awards were published means that they may influence more diverse tribunals in the future. The UNIDROIT Principles and PECL—the most recently-enacted major international contract law instruments—also adopt a Germanic approach to suspension of performance, so that version of the remedy will likely be the dominant one in future characterisations of the general principles of international law.