Pace International Law Review

Volume 18
Issue 1 *Spring 2006*

Article 2

April 2006

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WITHHOLDING PERFORMANCE FOR BREACH IN INTERNATIONAL TRANSACTIONS: AN EXERCISE IN EQUATIONS, PROPORTIONS OR COERCION?

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I. INTRODUCTION

"Au premier abord, la matière paraît tellement simple qu'on ne soupçonne même pas quelle difficulté pourrait bien s'élever à son sujet."[1]

"I am convinced that the principle underlying this submission (inadimpleti non est adimplendum) is so just, so equitable, so universally recognized, that it must be applied in international relations also."[2]

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? The considerable body of rules relating to discharge for non-performance or breach to be found in any legal system testifies to the centrality of the question.[3] In this essay, I propose to explore one of its aspects: When is a party justified in temporarily withholding or suspending performance because of the other party's nonperformance? This exploration will be conducted in the context of international transactions as the topic gains special significance in an international setting where judicial assistance is no longer forthcoming. Recourse to domestic courts becomes fraught with difficulties: unfamiliar forum procedures, complex issues of jurisdiction and applicable law, and difficulties in enforcing judgments.[4] And, while the striking development of in-

[1] RAYMOND SALEILLES, DU REFUS DE PAIEMENT POUR INEXÉCUTION DU CONTRAT 50 (ÉTUDE DE DROIT COMPARÉ) (1893), *quoted in* CATHERINE MALECKI, L'EXCEPTION D'INEXECUTION 1 (1999).

[2] Diversion of Water from Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No.70, at 50 (June 28) (dissenting opinion of Judge Anzilloti).

[3] Non-performance and breach are not coextensive. Non-performance does not necessarily amount to a breach entitling the aggrieved party to claim damages as the nonperforming party can be excused, for example, by a supervening event. *See* KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 517 (Clarendon Press ed., 3d ed. 1998). However, as the focus of this essay is not on the availability of damages, the two terms will be used interchangeably.

[4] These concerns are not merely academic. In a 2003 survey of large businesses conducted by the International Chamber of Commerce [hereinafter ICC], forty out of one-hundred businesses polled responded yes to the following question: "Has any significant business decision of your company ever been determined by uncertainty regarding the court that would resolve disputes or the law that would apply to the contract?" *See* ICC's Policy & Business Practices, *Jurisdictional Certainty Is Essential in International Contracts*, http://www.iccwbo.org/policy/law/id45/index.html (last visited Dec. 15, 2005).

ternational arbitration over the last thirty years has addressed part of these concerns, the arbitral process remains cumbersome, unfit to tackle the parties' most pressing needs and, in certain settings, might simply not be a viable alternative.[5] This state of affairs is all the more problematic as the amounts at stake tend to be comparatively higher in international transactions, a result of the obvious threshold effect of any decision to go international.[6] Consequently, parties to international transactions tend to show a marked preference for self-help remedies in case of breach of contract. Due performance of a party's obligations will often be secured by demand guarantees, the so-called performance bonds.[7] Where possible, risks resulting from insolvency or non-performance will be addressed prospectively through elaborate contractual clauses.[8]

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[5] Concerns relating to enforcement and jurisdiction have been addressed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 4739 U.N.T.S. 330 [hereinafter the New York Convention.] Under the New York Convention, foreign arbitral awards enjoy considerably higher prospects of enforcement than foreign judgments notably given the limited grounds for refusing enforcement. *See id.* art. V. The New York Convention has also helped sort out jurisdictional issues as courts in signatory states are obliged to give effect to arbitration agreements and to refer the parties to arbitration. *See id.* art. II. However, while the New York Convention has been widely ratified (137 state parties), it has not gained universal acceptance. Prospects of enforcement might be nonexistent when arbitration is brought against a party based in a non-signatory state and will generally depend on the availability of attachable assets abroad. Further, even in signatory states, difficulties might still arise in practice as the question comes down to the willingness of courts to enforce the award. In this respect, Chinese courts are famed for refusing enforcement on the public policy ground of Article V where enforcement is sought against a state entity. *See* Matthew D. Bersani, *The Enforcement of Arbitration Awards in China*, 10 J. INT'L ARB. 47 (1993).

[6] According to the 2004 statistics released by the ICC, nearly sixty percent of the new cases filed with this institution during that year involved claims in excess of one million U.S. dollars. *See* International Court of Arbitration, *Facts and Figures on ICC Arbitration in 2004*, *available at* http://www.iccwbo.org/court/english/right_topics/stat_2004.asp (last visited Dec. 15, 2005) (additional statistics available on website).

[7] *See generally* UGO DRAETTA, ET AL., BREACH AND ADAPTATION OF INTERNATIONAL CONTRACTS 137 (1992).

[8] Hence, in the financial industry, derivatives contracts often fine-tune the applicable rules of set-off, notably through elaborate acceleration and close-out netting clauses, so as to provide maximum security in case of a party's bankruptcy. *See, e.g.*, the ISDA Swap and Derivatives Master Agreement (2002) (issued by the International Swaps Dealers Assocation, Inc, New York, NY). *See generally* JAN DALHUISEN, INTERNATIONAL COMMERCIAL, FINANCIAL AND TRADE LAW 444 (2d ed., 2004).

Admittedly, as compared to performance bonds and other contractual self-help remedies, withholding performance in case of breach looks rather unsophisticated. Yet this apparent simplicity probably accounts for the success in practice of a remedy known in civil law jurisdictions as the *exceptio non-adimpleti contractus* [hereinafter referred to as the "*exceptio*"].[9] First, it requires no contractual planning. Second, it fits the aggrieved party's intuitive reactions, and it is actually debatable whether a party adopting this course contemplates using a legal remedy at all.[10] Third, for the adjudicator, it appears simple enough not to warrant any detailed legal analysis beyond general requirements of good faith, reasonableness or proportionality.[11] As a result of its rather intuitive, simplistic character, the remedy has swiftly found its way into the emerging corpus of transnational commercial rules referred to as the *lex mercatoria*,[12] a dignified status definitively bestowed by its inclusion in the UNIDROIT Principles of International Commercial Contracts as well as in the Principles of European Contract Law.[13] Of interest is the reception of the remedy in international law proper. First, this reception confirms the importance of the

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[9] The remedy is also known to common law jurisdictions. Yet, as explained in Part IV of this essay, the common law does not approach it the straightforward way the civil law does. In his celebrated article on contracting practices amongst Wisconsin manufacturers, Stewart Macaulay identified suspension of performance as one of the main *non-legal* sanctions available to aggrieved buyers. *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study* 28 AM. SOC. R. 1, at 55, 63 (1963) (emphasis added). He noted: "Buyers can withhold part of all of their payments until sellers have performed to their satisfaction. If a seller has a great deal of money tied up in his performance which he must recover quickly, he will go a long way to please the buyer in order to be paid." *Id.* at 63. On the articulation of this remedy, and of self-help remedies in general, at the border of the legal system, see Celia Taylor, *Self-Help in Contract Law: An Exploration and Proposal* 33 WAKE FOREST L.R. 839 (2002).

[10] *See* DRAETTA, *supra* note 7.

[11] *See id.* at 160. The authors would only limit its use by reference to the good faith principle interpreted as requiring proportionality between the breach and the aggrieved party's refusal to perform.

[12] *See* Case No. 3540, 7 Y.B. COMM. ARB. 124, 133 (International Chamber of Commerce, 1982). *See also*, DRAETTA, *supra* note 7, at 163; DALHUISEN, *supra* note 8, at 211.

[13] *See* UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 7.1.3, *available at* http://unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf. [hereinafter UNIDROIT]; PRINCIPLES OF EUROPEAN CONTRACT LAW, Nov. 1998, *available at* http://www.storme.be/PECL2en.html [hereinafter EUROPEAN CONTRACT LAW].

remedy in contexts where self-help is at a premium. In the context of state-to-state relations, judicial assistance is even less forthcoming than in the context of international commercial transactions.[14] Second, the claim to universality grounding this reception is noteworthy. The remedy has found its way in international law as one of the "general principles of law recognized by civilized nations."[15]

Sweeping statements that a particular doctrine has gained sufficient recognition to belong to general principles of law or the *lex mercatoria* tend to disquiet the cautious comparative lawyer. Obviously, the first concern goes to the very claim of universality. Startlingly, the claim has mainly been voiced by civil law lawyers, common law lawyers remaining conspicuously silent if not overtly hostile.[16] The second concern goes to the

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[14] It is always open to parties to international transactions to have recourse to domestic courts (difficulties only arise in ascertaining which domestic court, the domain of private international law rules.) Such is not the case in the international legal order where jurisdiction whether of *ad hoc* arbitral tribunals or the International Court of Justice hinges on the consent of the disputing states. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 671 (Oxford University Press ed., 6th ed., 2003).

[15] Eduardo Jiménez de Aréchega, *International Law in the Past Third of A Century* 78 REC. DES COURS 1, 81 (1978) [hereinafter Jiménez de Aréchega]. *See also* Diversion of Water From the Meuse, *supra* note 2. The Vienna Convention similarly provides for a right of suspension in cases of material breach. *See* Vienna Convention on the Law of Treaties, art. 60, May 22, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] This provision has been criticized as it requires the aggrieved party to follow the procedure set out in Article 65 before suspending application of the treaty, i.e., two-month notice and further consultations if an objection is raised. *See* Joseph Nisot, *L'Exception "Non Adimpleti Contractus" en Droit International* 1970 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 668. In President Jiménez de Aréchega's view, the *exceptio non-adimpleti contractus* remains provisionally applicable while the procedure set out in Article 65 is underway. *See* Jiménez de Aréchega, *supra* note 15. His position was seemingly vindicated by the arbitral tribunal in the US-France Air Services Agreement Award, Air Services Agreement. *See* Air Services Agreement Case (U.S. v. Fr.), 54 I.L.R. 301 (Perm. Ct. Arb. 1978). In this case, the tribunal held that the United States were well-founded in suspending their obligations by way of counter-measure. *See id.* at 337.

[16] It is telling that in the Air Services Agreement case, while the French government framed its argument alternatively in terms of *exceptio non-adimpleti contractus* or counter-measures, this was eschewed by the U.S. government which formulated its defense in terms of counter-measures only. *See* Air Services Agreement Case (U.S. v. Fr.), 54 I.L.R. 301, 320 (Perm. Ct. Arb. 1978). Lord Mustill, in his famed article on the *Lex Mercatoria* refers to the award in the ICC Case No. 3540, but only in support of a right to terminate for substantial breach. *See* Michael Mustill, *The New Lex Mercatoria: The First Twenty-Five Years* 4 ARB.

content of this allegedly universal principle. Its proponents insist on the effects of the remedy, but fail to elaborate conditions for its use beyond general notions of reasonableness, good faith or proportionality, which admittedly do not provide parties and adjudicators with much guidance.[17] However intuitive, the remedy cannot be unbound. In the *Klöckner* arbitration, the haphazard application of the civil law *exceptio*, which the first arbitral tribunal confused with a set-off, was material to the *ad hoc* committee's subsequent decision to annul the award, the first annulment ever of an award rendered under the auspices of the International Center for the Settlement of Investment Disputes (ICSID).[18] These concerns warrant further examina-

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INT'L. 2, 86, 112 n. 96 (1988), *available at* http://www.kluwerarbitration.com. *See also* Case No. 3540, 7 Y.B. COMM. ARB. 124, 133 (International Chamber of Commerce, 1982). In *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*, Straughton L.J. of the English Court of Appeal stated in obiter dictum "[i]t is well established that if one party is in serious breach, the other can treat the contract as altogether at an end; but there is not yet any established doctrine of English law that the other party may suspend performance, keeping the contract alive." Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd, (1992) 749 Q.B. 656 (U.K.).

[17] The remedy is defined as a "dilatory" and "temporary" plea in the award in ICC Case No. 3540, *supra* note 12, but no guidance is provided as to the conditions of its use. *See* Case No. 3540, 7 Y.B. COMM. ARB. 124, 133 (International Chamber of Commerce, 1982). Draetta considers that the principle is only bound by good faith and proportionality, but does not elaborate further. See DRAETTA, *supra* note 7. Article 7.1.3 of the UNIDROIT Principles is silent and the official comment only states that a party's suspension of performance has to be in good faith. *See* UNIDROIT, *supra* note 13. Article 9:201 of the Principles of European Contract Law is somewhat more explicit: withholding of performance has to be "reasonable in the circumstances." The official comment provides further guidance by explaining that the non-performance needs not be "fundamental" and that the remedy can be used as a way of coercing the other party so long as the reaction is not "wholly disproportionate." *See* EUROPEAN CONTRACT LAW, *supra* note 13, at art. 9:201. *See* discussion *infra* Part VI.

[18] Klöckner, a German company, had contracted to assist the government of Cameroon in developing a fertilizer industry. Part of the deal contemplated the construction of a fertilizer plant, which was delivered but turned out to be unprofitable as it could only be operated at 30% of its nominal capacity. The government refused to pay, and Klöckner initiated arbitral proceedings. The Tribunal, presided by Jimenez de Aréchega, found that the government was well founded in retaining payments under the *exceptio*. *See Klöckner v. Republic of Cameroon*, 1 J. INT'L ARB. 145 (1984). (first award). Annulment proceedings were initiated under Convention on the Settlement of Investment Disputes between States and Nationals of other States. *See Klöckner v. Republic of Cameroon*, 1 J. INT'L ARB. 145 (1984) (annulment decision); *see* Convention on the Settlement of Investment Disputes between States and Nationals of the States art. 52, Mar. 10, 1965, 8359 U.N.T.S. 575 [hereinafter ICSID Convention]. The *ad hoc* committee found that

tion of the key issue: When is a party's refusal to perform an international contract warranted? In other words, when will the law consider it reasonable for a party facing breach to refuse to perform his part of the deal?[19]

The obvious starting point to flesh out the concept of reasonableness is a comparative review of the solutions adopted in national laws. Yet, before undertaking this review, the question must be approached from a prescriptive perspective. Part II of this essay elaborates a model, which hopefully can provide some guidance to parties and adjudicators. At its core lies a test of reasonableness in which the extent of the breach is largely irrelevant. The model is elaborated on the premise that promoting self-help is not only desirable but necessary in international transactions where prospects of judicial enforcement are often remote if not hypothetical. It is contended that, in such a setting, a party's refusal to perform should primarily be conceived as a means of coercing the breaching party into fully performing. This being said, the considerations underpinning this model are not necessarily irrelevant in strictly domestic transactions, and indeed, steadily increasing docket backlogs and judicial delays might militate for the promotion of self-help

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the incoherent treatment of the *exceptio* amounted to a failure on the part of the arbitral tribunal to state reasons for its award, a ground of annulment under the ICSID Convention. *See id.*

[19] This essay will only briefly touch upon the right of a party to suspend performance when circumstances give rise to legitimate concerns that the other party might not perform (anticipatory breach). While *termination* for anticipatory breach is recognized throughout the common law world, *see, e.g.*, Hochster v. De la Tour, 118 Eng. Rep. 922 (1853), *suspension* for anticipatory breach has so far only gained acceptance in the United States in relation to sales contracts. *See* U.C.C. § 2-609 (1995). A right of suspension for anticipatory breach also exists in civil law jurisdictions and in England, but is generally limited to cases of insolvency. *See* GUENTER TREITEL, REMEDIES FOR BREACH OF CONTRACT – A COMPARATIVE ACCOUNT 291 (1988) [hereinafter TREITEL, REMEDIES]. Certain other scholarly works advocate more wide-spread recognition, but courts still appear reluctant to follow suit. *See, e.g*, RESTATEMENT (SECOND) OF CONTRACTS § 251; UNIDROIT, *supra* note 13, art. 7.3.4; EUROPEAN CONTRACT LAW, *supra* note 13, art. 8:105. *See* ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 2, 577 (3d ed., 2004) (for the American context). Given this limited recognition as well as diverging policy rationales, any attempt to present both remedies alongside runs the risk not only of obscuring the analysis but also of being meaningless. Nevertheless, the policy considerations underpinning suspension of performance for anticipatory breach, and how they diverge from that underpinning suspension of performance for actual breach, will be sketched in Part II of this essay.

domestically.[20] The proposed model also provides critical insights into the solutions adopted by national laws and international instruments, which are presented in subsequent Parts. Parts III and IV undertake a comparative survey of certain civil and common law jurisdictions.[21] Part V is a study of the treatment of one common type of breach—late payments—in construction contracts and charterparties, and illustrates the diverging outcomes the national approaches can yield. These contrasted outcomes challenge the whole undertaking of this essay: Is any attempt at drawing common principles bound to fail where judicial views of reasonableness seemingly diverge? This concern will be refuted. Finally, in Part VI the model is compared to the solutions adopted in the most widely known, and probably the most successful, instrument of harmonization of international commercial law, the 1980 Convention on Contracts for the International Sale of Goods [hereinafter CISG].[22]

II. The Conservatory and Coercive Approaches to Withholding Performance

I now turn to the fundamental question: In case of breach or non-performance by *B*, when should *A*'s refusal to perform be warranted? The question comes down to whether *A*'s reaction was reasonable in the circumstances.[23] Articulated in a vacuum, the standard of reasonableness would be meaningless and would leave the decision to the adjudicator's discretion, a grossly inappropriate solution. *A* needs some objective criteria upon which to adjust his behavior, and, as will be explained in Part III and IV, domestic laws have often found such criteria in the seriousness or extent of *B*'s breach. In this perspective, two propositions have commonly been advocated. Under the first proposition, the standards for termination and suspension are

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[20] *See* Taylor, *supra* note 9, for an interesting discussion of the relevance of self-help in American contract law.

[21] In this task, the invaluable help found in the works of Professor Treitel needs to be acknowledged at the outset. *See* Treitel, Remedies, *supra* note 19.

[22] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, *available at* http://cisgw3.law.pace.edu [hereinafter CISG].

[23] The standard of reasonableness can be equated to a standard of good faith. However, the term reasonableness appears less tradition specific and is preferred in this essay.

equated: a serious or material breach is required for both.[24] Under the second proposition, *A*'s reaction has to be commensurate to *B*'s breach.[25] When *A*'s suspension is regarded as a coercive measure, as I submit it should be in an international setting, both propositions appear unprincipled.

A. *Equations*

In some domestic systems, it is suggested that *A*'s suspension is only warranted where, in the circumstances, *A* would have been justified in terminating the contract, i.e., where *B*'s breach is sufficiently serious or material.[26] By looking at the various factual settings in which the adjudicator, whether a court or an arbitral tribunal, is involved, I shall first try to trace the origins of this proposition tending to equate termination with suspension standards. I shall then turn to consider its merits. It will appear that this proposition, in addition to being fortuitous in its origin, is unjustified in principle.

Determining the origin of the proposition equating these standards requires a clear understanding of the factual setting in which the adjudicator has to decide upon the reasonableness of *A*'s reaction to *B*'s breach. Such an understanding is facilitated by considering the courses of action open to *B*. There are three scenarios. In the first, *B* cedes and performs or cures his breach. *A* will then resume performance. In this case, the reasonableness of *A*'s reaction will generally not be brought to the attention of the adjudicator. (Although *A* may initiate proceedings to obtain compensation for delay, the reasonableness of his

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[24] This proposition is advocated in civil law jurisdictions of the Romano-French family as well as in common law jurisdictions. *See infra* Part III & IV. In international law, it is also endorsed in Article 60 of the Vienna Convention, which requires a material breach for both suspension and termination. *See* Vienna Convention, *supra* note 15.

[25] This proposition is mainly advocated in civil law jurisdictions of the Romano-French family but also appears to be adopted in international law proper. *See* Air Services Agreement Case (U.S. v. Fr.), 54 I.L.R. 301, 337 (Perm. Ct. Arb. 1978). It is also advocated by some has governing suspension of performance in the *Lex Mercatoria*. *See* DRAETTA, *supra* note 7, at 160.

[26] This proposition is advocated in civil law jurisdictions of the Romano-French family as well as in common law jurisdictions. *See infra* Part III & IV. In international law, it is also endorsed in Article 60 of the Vienna Convention, which requires a material breach for both suspension and termination. *See* Vienna Convention, *supra* note 15.

action will generally not be at issue; rather the inquiry will turn on whether *B*'s delayed performance gives rise to a claim for damages.) In the second scenario, *B* accepts *A*'s refusal to perform but abstains from curing his breach or performing further. It is then up to *A* to decide whether to bring the matter to the attention of the adjudicator. In the event *A* initiates proceedings to obtain *B*'s performance or damages, *B* will retort that *A*'s reaction was unwarranted and amounted to a repudiation of the contract. In the third, *B* contests *A*'s refusal to perform and challenges it directly by bringing legal proceedings.

It follows that it is mainly in the second and third scenarios that the adjudicator will be called upon to determine the reasonableness of *A*'s reaction. It is crucial to note that both scenarios result in a deadlock as the two parties refuse to perform further. In effect, the contract is brought to an end. In these circumstances, it should be no surprise that the analysis often comes down to whether *B*'s initial breach was sufficiently serious to warrant the contract being terminated. Presumably, this setting in which adjudicators are involved accounts for the historical failure of certain systems to draw a clear distinction between the remedies of suspension and termination. Hence, at common law both remedies are frequently referred to as rescission, and similar standards of seriousness are applied.[27] Presumably, this specific factual setting also explains that other systems, while identifying termination and suspension as conceptually different remedies, tend to insist on a similar standard of seriousness for both. In civil law jurisdictions of the Romano-French family, *A*'s refusal to perform is only reasonable where *B*'s breach would have warranted *A*'s terminating the contract.[28] The equation between standards appears fortuitous in its origin. It remains to be considered whether this proposition can be justified in principle.

Equating the standards applicable to termination and suspension comes down to restricting the availability of suspension to cases of serious or material breach. Is this approach principled? The main argument made for restricting the availability of termination to cases of serious or material breach is society's

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[27] *See infra* Part IV.

[28] Most notably, in civil law jurisdictions of the Romano-French family. *See infra* Part III.

interest in preserving validly made contracts.[29] And indeed, sound reasons demand that *B*'s non-performance present a certain degree of seriousness before entitling *A* to be freed from his obligations by terminating the contract. A system allowing termination for any, even the most trivial, breach would encourage parties to escape their contractual obligations whenever changed circumstances affect their interests in contractual performance. For example, sellers would seek to terminate contracts when markets are up and, vice versa, buyers likewise would seek to terminate when markets are down. By encouraging opportunistic behaviors, such a system would frustrate the role of contracts as instruments of certainty and rational planning in commercial transactions. The costs to society at large would be excessive. As a result, when faced with a relatively minor breach, *A* has to content himself with damages and, occasionally, with a claim for specific performance.

Can the same argument be made for restricting the availability of suspension to cases of serious or material breach? Answering this question requires analyzing the functions served by suspension. By temporarily suspending his performance pending full performance by *B*, *A* does not seek to escape his contractual obligations definitively. Rather, *A* seeks to (i) preserve his interests by refusing to extend credit to *B* so long as the latter's counter-performance is not forthcoming and (ii) coerce *B* into fully performing by exerting pressure and providing *B* with an incentive to cure his breach. So long as *B* has enough value tied up in his partial performance, he will have an incentive to cure so as to obtain the counter-value represented by *A*'s performance.

The three scenarios outlined above illustrate these conservatory and coercive functions. In the second and third scenarios, *B* does not cure his breach. *A* has failed to coerce *B* into fully performing but has, nevertheless, preserved his interests by avoiding to extend further credit. The contract is brought to a standstill, and, as a matter of fact, the outcome is then similar

[29] Professor Farnsworth puts it as follows: "It is in society's interest to accord each party to a contract reasonable security for the protection of that party's justified expectations. But it is not in society's interest to permit a party to abuse this protection by using an insignificant breach as a pretext for evading its contractual obligations." FARNSWORTH, *supra* note 19, at 510-11.

to that which *A* would have obtained by terminating the contract. If only these last two scenarios were considered, the policy considerations restraining the availability of termination, i.e., society's interest in preserving contracts, might similarly support limiting *A*'s right to suspend only in cases of serious or material breach. One should not rush to this conclusion as it ignores the first scenario where *B* cedes to *A*'s pressure, cures his breach, and *A* resumes performance. In this case, *A*'s suspension has coerced *B* into performing. Rather than disrupting the contractual arrangement, *A*'s suspension has furthered strict adherence to contractual promises. In essence, it has preserved the integrity of a contract that was threatened by *B*'s breach. As a result, rather than restricting the availability of suspension to cases of serious or material breach out of concerns as to its potentially disruptive effect, a principled system should seek to promote suspension as a coercive measure. A system that acknowledges the coercive role of suspension should seek to maximize the cases where the first scenario outlined above materializes. This then leads to the second proposition, which has been voiced in certain domestic systems, that of proportionality.

B. *Proportions*

In some domestic systems, it is suggested that, to be warranted, *A*'s reaction has to be commensurate to *B*'s breach.[30] Admittedly, this proposition can provide some objective guidance to parties and adjudicators alike. Yet is it principled? In other words, can it maximize the cases in which *A*'s suspension will further *B*'s strict adherence to his contractual promises? It is submitted that this requirement of proportionality does not do so as it deprives *A*'s suspension of any coercive effect.

Proportionality is the hallmark of an exclusively conservatory conception of the role played by *A*'s suspension. If *B* delivers 75%, *A* is only entitled to retain 25%. By doing so and refusing to extend credit to *B*, *A* has effectively protected his interests. In contrast, if *A* retains 100% while he has received 75%, he has retained more than necessary to protect his interests. *A* has overreacted and his action is regarded as unreason-

[30] *See, e.g.*, CIVIL CODE OF QUEBEC [CCQ] art. 1591 (1991)(Can).

able. No such proportionality is required when *A*'s suspension is conceived as a dynamic, coercive measure. To the contrary, requiring *A*'s reaction to be commensurate to *B*'s breach would deprive this reaction of any coercive effect.

In the example given above, *B* has delivered 75% and receives 75% of the price. In this situation, absent the threat of having to pay damages, *B* has no further interest in performing than he had when entering into the contract in the first place. Accordingly, if *B* still has a commercial interest in full performance, he will perform the remaining 25%. Conversely, if, as a result of changed circumstances, *B* has no more interest in full performance, he will not perform the remaining 25%. *B* has, in effect, managed to modify the contract unilaterally. *A*'s suspension has failed as self-help, and *A* will have to bring a hypothetical claim in damages or for specific performance against *B*. It is only where *A*'s retaining his performance puts *B* at risk of forfeiting the full value tied up in his partial performance that an incentive to cure is created. That is, *B* has an incentive to perform where he runs the risk of receiving nothing in consideration of his 75% performance. When suspension is conceived as a coercive measure, *A*'s disproportionate reaction is reasonable and, indeed, necessary.

The question arises whether any non-performance by *B*, however trivial, will warrant *A*'s refusal to perform. Suppose *B* has performed 99.99%, will the unperformed 0.01% entitle *A* to retain 100%? Intuitively, a positive answer offends our sense of fairness. As will be explained in subsequent parts of this paper, domestic systems that have acknowledged the coercive role of suspension nevertheless limit its operation where *B*'s breach is only trivial.[31] However, it is submitted that to focus on the extent of *B*'s breach is an unprincipled way of approaching these issues. What degree of non-performance - 0.01%, 0.01%, 1% or 10% - constitutes a trivial breach? Further, *A* being contractually entitled to *B*'s full performance, why should *B* get away with the remaining 0.01%? If *A* is barred from retaining his performance, it is likely that he will never be compensated for the remaining 0.01% as a claim of damages, if available, is unlikely to be an economically viable alternative. In these situa-

[31] This applies mainly in civil law jurisdictions of the Romano-German legal family. *See infra* Part III.

tions, rather than arbitrarily focusing on the extent of the breach as a criterion to determine whether *A*'s reaction is reasonable, the analysis should concentrate on the existence of incentives.

Admittedly, *A*'s coercive suspension is only acceptable insofar as it furthers *B*'s strict adherence to contractual promises, i.e., where it actually provides *B* with incentives to cure his breach. If it does not, *A*'s reaction is plainly oppressive and cannot be justified on any count. Thus, the issue is to determine whether *A*'s reaction can actually create incentives. From this perspective, no incentive to cure can be provided where cure is impossible, and, in this case, *A*'s suspension cannot be justified as a coercive measure. Similarly, coercion should be of no avail where the breach can only be cured by mobilizing resources overly disproportionate with the harm suffered by *A*. In other words, coercion is of no avail where cure is impractical. Most of the 0.01% non-performance cases will fall into this category. Yet where they do not, i.e., where *B* is in a position to perform the remaining 0.01% without incurring disproportionate expenses, there is no principled reason to deny *A*'s right to retain his performance as a means of coercing *B* into fully performing.

In the two situations highlighted above - where cure is impossible or impractical - coercion as a means of furthering adherence to contractual promises cannot justify *A*'s disproportionate reaction. Does that mean that *B* is entitled to escape with his unperformed 0.01%? It is submitted that in these situations, while *A*'s suspension cannot be justified as a means of coercion, it still can be warranted as a conservatory measure. As explained at the outset, when evaluated in a conservatory perspective, *A*'s suspension has to be proportionate in order to be reasonable. While it would be oppressive for *A* to retain his full performance where it is impossible or impractical for *B* to cure his breach, *A*'s suspension can still be justified up to the value of *B*'s non-performance as a legitimate way of protecting his interests.[32]

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[32] In this case, *A*'s action is final and more in the nature of a set-off of a claim in damages than of a conservatory measure. In this connection, the approach articulated by the CISG is of interest. The aggrieved buyer is given a right to demand cure only where reasonable under the circumstances. *See* CISG art. 46.2. Otherwise, the aggrieved buyer will have to rely on a claim for damages. *See* CISG

Similarly, the reasoning developed in the foregoing can also be applied to suspension for anticipatory breach, should such a remedy be recognized. Suppose *B*'s performance is not yet due, but *A* has reasonable grounds to believe that *B* will not perform, say, ten percent. Is *A* entitled to retain the whole of his performance in an anticipatory fashion? In this situation, *B* has not yet performed, as his performance is not due. As a result, *A*'s anticipatory suspension cannot provide *B* with any incentive as *B* does not run the risk of forfeiting the value tied up in his performance. Thus, the reasonableness of *A*'s behavior cannot be evaluated from a coercive perspective but can, nevertheless, be assessed from a conservatory perspective. It follows that *A*'s suspension can only be justified up to the value of *B*'s threatened non-performance and until *B* gives adequate security for his performance.[33]

Finally, the inquiry into the reasonableness of *A*'s reaction cannot merely rely on ascertaining the presence of incentives. There are other considerations that have to be accounted for, most notably the excessive harm that, under the circumstances, would result for *B* or the public at large if *A* were to suspend performance. Besides being self-defeating, *A*'s suspension can be considered unreasonable where *B*'s economic survival depends on *A*'s continuing performance.[34] Wider public interests

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art. 74. The buyer may also rely on a unilateral reduction of the price or, if the breach is fundamental, on avoidance of the contract. *See* CISG art. 49-50.

[33] The result reached in this section should be contrasted to the approach adopted in the PRINCIPLES OF EUROPEAN CONTRACT LAW. *See* EUROPEAN CONTRACT LAW, *supra* note 13. Under Article 8:105, a party is entitled to suspend performance and demand further assurances of performance where he has reasonable grounds to believe that the other party will commit a "fundamental breach," i.e., the standard adopted in the Principles for termination and not a proportionality standard. *See id.* art. 8:105. Similarly, Article 71 of the CISG, which sets forth a right to suspend performance in case of anticipatory breach, speaks in terms of a party's potential failure to perform "a substantial part" of his obligations. *See* CISG art. 71. In light of the analysis in this section, such approach is unwarranted and should be contrasted to that of the U.C.C., which only requires that suspension of performance be "commercially reasonable" in the circumstances. *See* U.C.C. § 2:609. This more flexible standard permits implementing the approach proposed in this part.

[34] In a dispute involving a professional buyer and an IT service provider, the Toulouse Court of Appeals held that the service provider could not rely on the buyer's failure to pay more than _ 60.000 (roughly $71,000 dollars) to refuse to perform its maintenance obligation. The court emphasized the dependency of the buyer on the continuing maintenance of the IT system and noted that suspension

can also support restricting *A*'s right to suspend performance. In France, private contractors cannot withhold performance under government contracts, a solution that is justified by the overriding public interest in ensuring the continuing provision of public services.[35] In England, the House of Lords has held that a C.I.F. buyer, who has knowledge of the non-conformity of the goods that have been shipped by the seller, cannot refuse to pay against presentation of shipping documents.[36] It is clear from the reasoning of Lord Diplock that an overriding public interest motivated the decision. He stated "[the contrary] view, if correct, would destroy the very roots of the system by which international trade, particularly in commodities, is enabled to be financed."[37]

C. *Coercion and Self-Help*

The model elaborated in this section is premised on a conception of suspension as a coercive measure. In the remainder of this essay, I shall refer to this model as the "coercive model" as opposed to the "conservatory model," which would be premised on a conception of suspension as a strictly conservatory

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of maintenance would put the survival of the buyer's enterprise at risk. *See* Tribunal de Commerce de Toulouse [Commercial Court of Toulouse] Oct. 30, 1985, 1986 (Fr.). *See also* Jacques Mestres, *Le contrôle judiciaire de l'exception d'inexécution*, 1986 REVUE TRIMESTRIELLE DE DROIT CIVIL 531.

[35] *See, e.g.*, Cons. d'Etat, 28 Nov. 1890, *Rec. Lebon* 1890. 881; Cons. d'Etat, 19 Mar. 1930, *Rec. Lebon* 1930. 311.

[36] In *Berger & Co. v. Gill Duffus S.A*, the sellers had sold 500 tons of beans to the buyers, C.I.F. payment against shipping documents on first presentation. *See* Berger & Co. v. Gill Duffus S.A. (1984) A.C. 382 (Eng.). After the goods had been delivered, the sellers presented the documents to the buyer's bank. Upon instruction by the buyers alleging non-conformity of the goods, the bank refused to pay. The House of Lords found for the sellers, holding that by refusing to pay upon presentation of the documents, the buyers had committed a fundamental breach. *See id.* In his treatise, Professor Treitel suggests that *Berger* is an example of the commercial context being taken into consideration in deciding whether a promise is independent or not. However, the House of Lords did not frame its reasoning in terms of dependent or independent promises. *See infra* Part IV; *see also* GUENTER TREITEL, THE LAW OF CONTRACT 765 (2003) [hereinafter TREITEL, LAW OF CONTRACT].

[37] Berger & Co. v. Gill Duffus S.A. (1984) A.C. 382, 393 (Eng.). In so doing, Lord Diplock refused to follow the decision of the High Court of Australia in Henry Dean & Sons (Sydney) Ltd. v. O'Day Pty. Ltd., which had found that buyers were entitled to refuse payment if, upon delivery, the goods turned out to be non-conforming. *See id.*; Henry Dean & Sons (Sydney) Ltd. v. O'Day Pty. Ltd., (1927) 39 C.L.R 330 (Austl.).

measure. The striking feature of the coercive model is that the extent of *B*'s breach is largely irrelevant to determining whether *A*'s suspension is reasonable. This proposition may be disturbing in light of the 0.01% non-performance cases. But even in those cases, it has been argued that focusing on the existence of incentives and acknowledging other overriding public interests is a more principled way of policing *A*'s behavior. Whether suspension is primarily conceived as a coercive measure or as a conservatory measure turns in large part on one's attitude toward self-help.

If self-help is regarded with suspicion, chances are that the conservatory model will prevail. *A*'s right to suspend will be restricted to cases of serious breach or constrained by requiring proportionality. In this perspective, *A*'s reaction is only a waiting position, and should *B* persist in his breach, *A* would have to seek judicial redress. France presents a leading example. In France, the maxim *"nul ne peut se faire justice à soi-même"*[38] still holds considerable sway, and self-help has traditionally been regarded with suspicion.[39] This suspicion is strikingly illustrated by the requirement that an aggrieved party seek judicial approval before terminating a contract.[40] Unsurprisingly, commentators, while acknowledging its coercive role, have emphasized the conservatory aspect of the *exceptio*.[41] The *exceptio* provides a waiting position pending a court's decision on the aggrieved party's right to terminate.

Conversely, if self-help is regarded favorably, the coercive model should prevail. As illustrated above, absent a credible threat of having to pay damages, it is only where a disproportion is permitted that *A*'s refusal to perform can give *B* an incentive to cure and be an effective self-help remedy. The case for adopting the coercive model is compelling in an interna-

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[38] "No one may take the law into his own hands." (author's translation).

[39] *See generally*, Jacques Beguin, *Rapport sur l'adage « nul ne peut se faire justice à soi-même » en droit français* 18 TRAVAUX DE L'ASSOCIATION HENRI CAPITANT 53 (1966).

[40] *See* CODE CIV. [C. Civ] art. 1184 (Fr).

[41] *See* JACQUES GHESTIN, TRAITÉ DE DROIT CIVIL – LES EFFETS DU CONTRAT 424 (2001) [hereinafter GHESTIN]; HENRI MAZEAUD, LEÇONS DE DROIT CIVIL 2, 1173 (1998) [hereinafter MAZEAUD]; JEAN-FRANÇOIS PILLEBOUT, RECHERCHES SUR L'EXCEPTION D'INEXECUTION 239 (1971); *but see* CATHERINE MALECKI, L'EXCEPTION D'INEXECUTION 314-15 (1999).

tional context where judicial assistance is not forthcoming and is too remote to ensure due compliance with contractual undertakings. Before turning to the relevance of the coercive model in interpreting a truly international instrument, the CISG, I first propose to contrast this model with the solutions adopted in various jurisdictions of the civil and common law families. This comparative exercise will give a sense of the coercive model's acceptance. This exercise will also, it is hoped, convince the reader that nothing in the legal systems under consideration opposes wider recognition of this model, at least insofar as international transactions are concerned.

III. THE CIVIL LAW APPROACH: THE EXCEPTIO NON-ADIMPLETI CONTRACTUS

As pointed out earlier, the civil law gives parties to a bilateral contract a right to suspend performance where the other party fails to perform.[42] Known as the *exceptio non-adimpleti contractus*, this remedy, while Latin in its formulation, derives not from Roman law but from the works of the Canonists in the sixteenth century.[43] In essence, the *exceptio* only gives a defense to a party, who has refused to perform in face of the other party's breach and who is sued by that other party. As such, it is only a dilatory, temporary plea pending performance by the other party.[44]

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[42] Strictly speaking, the *exceptio* operates in the context of "synallagmatic" contracts, a subcategory of bilateral contracts under which both parties undertake obligations toward each other and performances are to be exchanged for each other. However, only German law appears to draw a sharp distinction between "synallagmatic" contracts and other bilateral contracts. And, while the *exceptio* is only available in synallagmatic contracts, German law recognizes a wide right of retention, which includes not only retention of things but also of rights under bilateral contracts, *i.e.* the functional equivalent of the *exceptio*. *See* TREITEL, REMEDIES, *supra* note 19, at 249.

[43] *See* GHESTIN, *supra* 41, at 422.

[44] These features of the remedy were acknowledged by the arbitral tribunal that found the *exceptio* to be part of the *lex mercatoria* in ICC Case No. 3540. *See* Case No. 3540, 7 Y.B. COMM. ARB. 124, 133 (International Chamber of Commerce, 1982). Quite obviously, the innocent party cannot be held responsible for the delay resulting from the use of the *exceptio*, and any provision regarding the time for completion, and liquidated damages for delay, will be held inapplicable. The hypothesis will arise frequently in construction contracts. In these contracts, prevention by the employer clearly renders liquidated damages clauses inapplicable. *See, e.g.*, Cass. 3e civ., July 4, 1979, Gaz. Pal. [1979], 1, pan. 489 (Fr.); Cass. 3e civ., Oct. 15, 1980, Gaz. Pal. [1981], 1, pan. 36 (Fr.).

The *exceptio* has presumably been received throughout the civil law world. In some civil law jurisdictions, the code sets forth a general principle, such as Section 320 of the German Bürgerliches Gesetzbuch [hereinafter BGB],[45] Article 82 of the Swiss Code of Obligations, Article 1460 of the Italian Codice Civile and Article 1591 of the Civil Code of Quebec. In other jurisdictions, such as France and Austria, courts and scholars have inferred a general principle from the rules applicable to some specific types of contracts, most notably sales contracts.[46] The *exceptio* was also received in South Africa as part of the principles of law brought along by the Dutch settlers.[47]

Generally, a two-step analysis is required to determine whether, in the circumstances, a party's suspension of performance is warranted under the *exceptio*. First, it must be established that the party in breach was under a duty to perform in advance or concomitantly.[48] The inquiry focuses on the order of performance. Second, as the *exceptio* is not limited to cases of total non-performance but is also available in cases of partial or defective performance, certain limitations have evolved to police the aggrieved party's exercise of his right to suspend performance. The inquiry focuses on the reasonableness of the ag-

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[45] While the *Bürgerliches Gesetzbuch* [hereinafter BGB] underwent a profound overhaul in 2002, section 320 has remained untouched. *See generally*, Reinhard Zimmermann, *Breach of Contract and Remedies under the New German Law of Obligations*, *available at* http://w3.uniroma1.it/idc/centro/publications/48zimmermann.pdf (last visited Dec. 15, 2005) [hereinafter Zimmerman].

[46] In France, Articles 1612 and 1653 of the Civil Code set forth such a principle in relation to sales contracts. *See* C. CIV. arts. 1612-23 (Fr.). The works of Raymond Saleilles and René Cassin were instrumental in the formulation of a general principle. *See* SALEILLES, *supra* note 1. *See also* RENÉ CASSIN, DE L'EXCEPTION TIRÉE DE L'INEXÉCUTION DANS LES RAPPORTS SYNALLAGMATIQUES (EXCEPTIO NON ADIMPLETI CONTRACTUS) ET DE SES RELATIONS AVEC LE DROIT DE RÉTENTION, LA COMPENSATION ET LA RÉSOLUTION (1914) [hereinafter CASSIN]. In Austria, the principle is recognized in relation to exchange (§ 1052 of the Civil Code), which is also applicable to sales contracts (§ 1060). *See* TREITEL, REMEDIES, *supra* note 19, at 286.

[47] *See* R.H. CHRISTIE, THE LAW OF CONTRACT IN SOUTH AFRICA 467 (3d ed., 1996).

[48] This essay does not specifically deal with the remedies available for "anticipatory breach" in common law parlance. Similar equivalents exist in civil law where a party bound to perform first and who has good reasons to worry as to the other party's creditworthiness is entitled to suspend performance. *See* TREITEL, REMEDIES, *supra* note 19, at 291. For the French approach regarding risks of third party claims over the goods sold, see C. CIV. art. 1653 (Fr.). *See also* GHESTIN, *supra* note 41, at 439.

grieved party's reaction, and the extent of the breach is often used as an objective criterion in this task.

A. *Order of Performance*

The civil law rules governing the order of performance in bilateral contracts stem from the very rules setting forth the *exceptio*. Article 82 of the Swiss Code of Obligations is typical. It provides that "[t]he party who demands performance of a bilateral contract by the other must either have performed or tender performance unless the terms or the nature of the contract authorize subsequent performance by him."[49] Thus, as a general rule, performances in bilateral contracts are to be exchanged simultaneously.[50] This rule of simultaneous performance can be displaced by express contractual terms or usages of the trade.[51] By way of example, where goods are sold on credit, the seller has to perform first and is not entitled to rely on the *exceptio*.[52] Similarly, departures from the principle of simultaneous performance can also result from the consequences the law attaches to certain transactions.[53] This is especially true where one party's performance under the contract cannot be rendered instantaneously but extends over a period of time. Generally, this party will have to perform in advance. Hence, absent contractual provisions for interim payments in a construction contract, the employer is not bound to pay before the contractor has completed the works.[54] As a result of this fusion of the rules governing order of performance and the *exceptio*, whenever a party fails to perform, the other party is entitled to

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[49] Translation obtained from SIMON COHEN, THE SWISS CODE OF OBLIGATIONS 16-17 (1987). The French Civil Code provides: "Except where the sale is on credit, the seller is under no obligation to deliver the thing if the buyer does not pay the price." (in relation to sales). *See* C. CIV. art. 1612 (Fr.)

[50] CHRISTIAN LARROUMET, DIR., DROIT CIVIL 3, at 796 (5th ed., 2003). TREITEL, REMEDIES, *supra* note 19, at 286.

[51] Article 1591 of the Civil Code of Quebec provides that a party may be bound to perform first by "the law, the will of the parties or usage," and this approach is broadly recognized in all civil law jurisdictions. CIVIL CODE OF QUEBEC [CCQ] art. 1591 (2004) (Can). *See also* MAZEAUD, *supra* note 41, at 1170-71; *see also* TREITEL, REMEDIES, *supra* note 19, at 288-91.

[52] This results clearly from Article 1612 of the French Civil Code. *See* C. CIV. art. 1612 (Fr.).

[53] *See* TREITEL, REMEDIES, *supra* note 19, at 289.

[54] For example, Article 2111 of the Civil Code of Québec provides: "The client is not bound to pay the price before the work is accepted." *See* CCQ art. 2111.

withhold his performance so long as he is not under a duty to perform first. While this result cannot be questioned in cases where non-performance is total, it remains to be seen whether it is also justified where performance has been rendered but only in a partial or defective fashion.

B. *Reasonableness: Is the Extent of the Breach Relevant?*

Where a party has performed, but only in a partial or defective fashion, some limits are put on the right of the aggrieved party to withhold performance. That is, the aggrieved party's reaction has to be reasonable under the circumstances. In determining what should be regarded as reasonable, the Romano-German and Romano-French legal families apparently diverge as to the weight to be given to the extent or seriousness of the breach.[55] Under the German BGB, in case of partial or defective performance, the aggrieved party can suspend his performance so long as such course conforms to the overriding requirement of good faith. Such is not the case where the breach is only trivial.[56] The threshold is different from that required for termination, which is available under the BGB where, as a result of the breach, performance of the contract is of "no interest" to the aggrieved party.[57] Similarly, the right to suspend performance set forth in Article 82 of the Swiss Code of Obligations is only restrained by the overriding requirement of good faith.[58] In Austrian law, the *exceptio* is available in all cases of non-performance short of abuse of right, and an abuse of right would notably be found where the non-performance is

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[55] *See generally* ZWEIGERT & KÖTZ, *supra* note 3 (explaining the differences between the Romano-German (Germanic) and Romano-French (Romanistic) legal families).

[56] Burgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, § 320, ¶ 2 (F.R.G.); *see also* TREITEL, REMEDIES, *supra* note 20, at 303 (containing an English commentary).

[57] *See id.* The German rules are particularly intricate in this area, not least because the BGB does not have a unitary concept of breach of contract. Rather, a distinction is drawn between impossibility, delay, and positive breach of contract, and different rules of termination are applicable. Further, these rules have been affected by the 2002 overhaul of the BGB, which, most notably, did away with the requirement of fault for termination. *See* Zimmermann, *supra* note 45, at 38. Nonetheless, Treitel states that, generally, the standard for termination would be linked to the lack of interest of the aggrieved party in performance of the contract seems still accurate.

[58] *See* TREITEL, REMEDIES, *supra* note 19, at 304.

only trivial.[59] In a striking example provided by Professor Treitel, an Austrian court found the buyer of a piano well-founded in retaining payment of the price in face of "a defect so slight that it would have taken only five minutes to cure."[60] It is noteworthy that the court would have referred to the coercive function of the *exceptio* in coming to this result.[61]

The remedy adopted in the Romano-German family apparently fits the model elaborated in Part II of this essay. The standards applicable in matters of termination and suspension are not equated. To the contrary, the extent of the breach is largely out of the picture, assuming only a marginal role in determining the reasonableness or good faith of the party's withholding performance. This approach has been adopted beyond the Romano-German family, and South Africa offers a significant example. Common law thinking has had an important influence in this jurisdiction,[62] and as will be discussed in Part IV below, refusal to perform is available in common law jurisdictions under the same conditions as termination, i.e., where a party's breach goes to the root of the contract.[63] However, while some South African decisions have articulated the standard for the *exceptio* in those terms, it is noteworthy that this approach was discarded as being the unfortunate result of common law's influence.[64] A clear distinction is now drawn between the standards applicable for suspension and termination. It is said that:

> The extent of the plaintiff's failure to perform is immaterial. His duty is to perform fully and exactly in accordance with the contract, and his failure to do so, no matter how slight that failure may be, entitles the defendant to raise the *exceptio*, subject only to the principle *de minimis non curat lex*.[65]

The Romano-French family stands in sharp contrast, as jurisdictions of this genus seemingly cling to seriousness of the

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[59] *See id.*

[60] *See id.*

[61] *See id.*

[62] *See* ZWEIGERT & KÖTZ, *supra* note 3, at 231 (for a brief introduction of the interplay between civil and common law in South Africa).

[63] *See* discussion *infra* Part IV.

[64] The leading case is BK Tooling (Edms) Bpk v. Scope Precision Engineering (Edms) 1979 (1) SA 391 (A) (S. Afr.), *cited in* RH CHRISTIE, THE LAW OF CONTRACT IN SOUTH AFRICA 468 (2001).

[65] CHRISTIE, *supra* note 64, at 468.

breach as a relevant criterion to determine whether it was reasonable for the aggrieved party to raise the *exceptio*. The French *Cour de cassation* speaks in terms of "sufficiently serious" breach ("*inexécution suffisament grave*"),[66] and commentators believe the breach must be such that if the aggrieved party had known of it, he would not have entered into the contract.[67] This approach appears to be followed in Québec where the standard laid down in Article 1591 of the Civil Code is that of "substantial" breach.[68] In both jurisdictions, authors have traditionally emphasized the need for proportionality between the extent of the breach and the aggrieved party's reaction,[69] or equated the standard applicable to suspension to that applicable in matters of termination.[70]

The requirement of proportionality, an academic elaboration which unfortunately found its way into the Civil Code of Québec during its 1994 revision, deprives the *exceptio* of any coercive role.[71] As explained earlier in Part II, when a party is strictly limited to a proportionate reaction the aggrieved party's suspension of performance cannot provide the breaching party with any incentive to cure his breach. In theory, the prospect of having to pay damages provides the necessary incentives but, in an international setting, this threat is remote and grossly inadequate. Bound by a requirement of proportionality, the *exceptio* has no teeth, cannot promote respect for contractual undertakings, and is limited to a purely conservatory role, not dissimilar to that played by termination. In this respect, the *exceptio* can still be useful in the French setting where termination requires judicial approval but, by no means, in Québec where *a priori*

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[66] GHESTIN, *supra* note 41, ¶ 380, at 441; LARROUMET, *supra* note 50, at 798; Cass. 1e civ., Oct. 19, 1999, R.J.D.A. No. 1290 (Fr.).

[67] *See* MAZEAUD, *supra* note 41, at 1172. *See also* LARROUMET, *supra* note 50, at 798. (emphasis added).

[68] *See* CCQ. art. 1591.

[69] For the French approach, see GHESTIN, *supra* note 41, ¶ 381 at 442, PHILIPPE MALAURIE, LAURENT AYNÈS & PHILIPPE STOFFEL-MUNCK, LES OBLIGATIONS 418 (2003), LARROUMET, *supra* note 50, at 797 (the principle of simultaneous performance is only applicable where the obligations are of similar importance). For the approach in Québec, see JEAN-LOUIS BAUDOIN & PIERRE-GABRIEL JOBIN, LES OBLIGATIONS 813 (6th ed. 2005).

[70] For the French approach, see MAZEAUD, *supra* note 41, at 1171. For the approach in Québec, *see* BAUDOIN & JOBIN, *supra* note 69.

[71] *See* CCQ art. 1591, which states that the aggrieved party "may refuse to perform his correlative obligation to a corresponding degree."

judicial supervision of termination has been abandoned.[72] It has been shown earlier that, once the coercive role of the *exceptio* is recognized, it is ineffective and, in fact, illogical to insist upon proportionality. Nonetheless, many commentators in France and Québec, while acknowledging the coercive function of the *exceptio*, still insist on the requirement of proportionality.[73]

Regarding the second proposition—that equating standards for termination and suspension?it was argued earlier in Part II of this essay that there is no principled reason to sustain it either.[74] The policy considerations that restrain availability of termination to cases of serious breach, i.e., the general interest in preserving validly made contracts, do not command the same solutions in matters of suspension of performance insofar as this remedy tends to further strict adherence to contractual promises. Several further observations are in order in the civil law context. First, it should be noted that nothing in the civil codes of France and Québec implies that standards for termination and suspension are similar. Termination under the Civil Code of Quebec is available so long as the breach is not of "minor importance."[75] The French Civil Code simply fails to spell out any standard of seriousness for termination, and the courts have come to require that the breach be sufficiently serious.[76] When speaking of a breach that is "sufficiently serious", the *Cour de cassation* does not articulate a standard in a vacuum. Rather, the *Cour* has in contemplation one of the two remedies, and the breach has to be "sufficiently serious" to warrant the innocent party's suspending performance or has to be "sufficiently serious" to warrant termination. It does not necessarily follow that the same degree of seriousness is required in both cases. The study of payment delays in construction contracts and charterparties undertaken in Part V below will show that,

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[72] *See* CCQ art. 1604.

[73] *See* GHESTIN, *supra* note 41; MAZEAUD, *supra* note 41; PILLEBOUT, *supra* note 41. *But see* MALECKI, *supra* note 41. For Québec, *see* BAUDOIN & JOBIN, *supra* note 69, at 812.

[74] *See* discussion *infra* Part V. For a detailed criticism of the French academic position, *see* MALECKI, *supra* note 41, at 280.

[75] *See* CCQ art. 1604.

[76] *See* CODE CIVIL [C. CIVIL] art. 1184 (Fr.) (only provides that a termination clause is to be implied in all bilateral contracts). *See* GHESTIN, *supra* note 41, at 516. Cass. civ., May 5, 1920; (1921), 1 S. Jur 298 (Fr.).

in practice, the standard of seriousness is applied in a purposive fashion and yields different results in matters of termination and suspension. Before turning to this point, I first propose to explore the approach to suspension of performance adopted in common law jurisdictions where, as will be seen, it is also suggested that the standards of seriousness for termination and suspension are equivalent.

IV. THE COMMON LAW APPROACH: CONDITIONAL PROMISES

The *exceptio* was not received in the common law world. As was pointed out earlier, the doctrine, unknown to Roman law, only evolved under the influence of the Canonists in the sixteenth century.[77] At about the same time in England, as actions of *assumpsit* emerged and wholly executory bilateral contracts came to be recognized, it was thought that a party confronted with the other party's non-performance remained obliged to perform his part of the deal.[78] Contractual promises were regarded as strictly independent.

It was not until 1773 and Lord Mansfield's well-known decision in *Kingston v. Preston* that this state of affairs was questioned.[79] A silk manufacturer had undertaken to sell his business to his apprentice, who had agreed to pay monthly installments and to provide security for these payments. The apprentice having failed to arrange security, Mansfield (speaking for the Court of the King's Bench), found that it would be the "greatest injustice" to require the seller to perform his part of the deal.[80] While acknowledging that certain promises could be independent, he held that others were dependent upon one another. In effect, Mansfield read in the contract a term whereby

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[77] *See* GHESTIN, *supra* note 41, at 422.

[78] *See* FARNSWORTH, *supra* note 19, at 472-73 (referring to the decision in Nichols v. Raynberg, (1615) 80 Eng. Rep. 238 (K.B.)).

[79] *See* Kingston v. Preston, (1773) 99 Eng. Rep. 437 (K.B.) (case appears in counsel's arguments in Jones v. Barkley, (1781) 99 Eng. Rep. 434 (K.B.) (U.K.). *See* HUGH BEALE, REMEDIES FOR BREACH OF CONTRACT 28 (1980). *See* FARNSWORTH, *supra* note 19, at 473. *See also* Taylor, *supra* note 9, at 860.

[80] Kingston v. Preston (1973) 99 Eng. Rep. 438 (K.B.).

the provision of security for the payments was a condition precedent of the seller's duty.[81]

Where promises are construed as dependent, non-performance by a party provides the other party with (i) a claim for breach of contract, provided performance is due and no excuse is available, and (ii) an excuse for refusing to perform his own promise.[82] Before turning to the conditions in which promises are construed as dependent, one point should be kept in mind. As was explained earlier in Part II, the validity of a party's suspension of performance is generally challenged in court only where the contract has, in effect, been brought to an end. Unsurprisingly, the common law has historically failed to draw a clear distinction between the remedies of termination and suspension of performance, indiscriminately referring to them as rescission.[83]

A. *Order of Performance*

As in civil law, the right to suspend performance is intimately linked to the order of performance and is of no avail to a party who is to perform in advance.[84] Surely, it is open to parties to spell out in their contracts the order in which performances are to be rendered, and the seller who accepts to sell on credit has to deliver in advance of being paid.[85] Absent contractual provisions, the order of performance has to be determined by the courts, which, as is the case in civil law jurisdictions, will, whenever possible, construe contracts as requiring simultaneous performances.[86] The nature of the contract also affects

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[81] *See* FARNSWORTH, *supra* note 19, at 475. The doctrine has come to be known as that of "constructive conditions of exchange" in the United States reflecting the fact that courts find dependent promises by construing contracts. *See id.*

[82] *See* FARNSWORTH, *supra* note 19, at 474.

[83] *See* TREITEL, REMEDIES, *supra* note 19, at 245.

[84] While termination for anticipatory breach is recognized throughout the common law world, suspension for such breach has so far only gained acceptance in the United States in relation to sales. *See* U.C.C. § 2-609 (1977). A right of suspension for anticipatory breach also exists in England, but is limited to cases of insolvency in sales contracts. *See* TREITEL, REMEDIES, *supra* note 19, at 291.

[85] *See* FARNSWORTH, *supra* note 19, at 483; BEALE, *supra* note 79, at 19.

[86] For the English approach, *see* BEALE, *supra* note 79. For the American approach, *see* FARNSWORTH, *supra* note 19, at 484. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 259 (1981), which provides:

Order of Performance:

the analysis. Where a party's performance can only be rendered over a period of time, that party will, as a result, have to perform first.[87] Thus, the contractor will have to perform the works before he is entitled to any payment by the employer.[88] The rules relating to the order of performance appear similar in both the civil and common law traditions. Yet, in contrast to the civil law approach, determining the order of performance is not the end of the matter as it remains to be considered whether the promises are dependent or independent.[89]

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(1) Where all or part of the performances to be exchanged under an exchange of promise can be rendered simultaneously, they are to that extent due simultaneously, unless the language or the circumstances indicate the contrary.

(2) Except to the extent stated in (1), where the performance of only one party under such an exchange requires a period of time, his performance is due at an earlier time than that of the other party, unless the language or the circumstances indicate the contrary.

RESTATEMENT (SECOND) OF CONTRACTS § 259 (1981).

[87] *See* FARNSWORTH, *supra* note 19, at 486 (referring to Coletti v. Knox Hat Co., 169 N.E. 648 (N.Y 1930)). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 259(2) (1981).

[88] The harshness of the requirement of full performance in advance has been mitigated by the equitable doctrine of entire and severable (or divisible) contracts. Under this doctrine, where the contract can be severed in several discrete performances, a party having to perform in advance but who fails to perform fully will be entitled to recover on a restitutionary basis *pro rata* his performance. The seminal case in England is Roberts v. Havelock (1832) 3 B & Ad. 404 (U.K.) (shipwright entitled to payment for advanced although unfinished works.) *See* BEALE, *supra* note 79, at 29. For a discussion of this doctrine in the United States, *see* FARNSWORTH, *supra* note 19, ¶ 8.13 at at 496.

[89] In civil law, the order of performance stems from the very provisions setting forth the *exceptio non-adimpleti contractus*, and the dependent character results as a matter of course from the determination of the order of performance. *See* discussion *supra* Part III, Section A. Except where the parties have explicitly excluded the workings of the *exceptio*, civil law ignores independent promises or any similar concept. *See* TREITEL, REMEDIES *supra* note 19, at 292. Treitel refers to certain German cases, which would have recognized independent obligations. *See id.* However, these cases seem to have arisen from certain idiosyncrasies of the BGB, namely the restriction of the *exceptio* to case of synallagmatic contracts *stricto sensu* as opposed to bilateral contracts as in other civil law jurisdictions. *See id.* In France, Larroumet suggests that the *exceptio* should play only as between promises of equivalent importance. *See* LARROUMET, *supra* note 50, at 797. As a result of this approach, minor promises would be independent in the sense that non-performance would not entitle the innocent party to suspend his performance. However, this proposal, motivated by the requirement of proportionality, is unacceptable for the reasons detailed earlier, and has apparently not carried the day in courts. *See* discussion *supra* Part II, Section B.

B. *Dependent and Independent Promises*

When *A* is to perform concurrently or after *B*, *A*'s promise can be regarded as dependent on *B*'s performance or tender thereof. In such case, where *B* is to perform first, *B*'s performance is a condition precedent of *A*'s duty to perform. Similarly, where both *B* and *A* are to perform concurrently, *A*'s and *B*'s performance or tender thereof are concurrent conditions.[90] Yet, as was recognized by Lord Mansfield in *Kingston*, some promises might be independent in the sense that a party's duty to perform is not conditional upon the other party having performed or tendered to. The parties may stipulate that certain obligations are to be regarded as independent.[91] For example, non-competition or confidentiality covenants in employment contracts will often be termed independent; employees will be bound to abide by their non-competition and confidentiality obligations even where employers are in breach of their own obligations.[92] Conversely, it is open to the parties to make a promise dependent by expressly making it conditional upon the performance of another promise. However, absent clear indications as to the parties' intent, which criteria govern the construction of promises as independent or dependent? Or, using the prevailing American terminology, when will courts construe promises as "conditions of exchange"?[93]

Traditionally, common law courts were inclined to find promises independent where the promise that was breached appeared immaterial or insufficiently important.[94] This reluc-

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[90] *See* Morton v. Lamb, (1797) 101 Eng. Rep. 890 (K.B.). *See also* FARNSWORTH, *supra* note 19, at 480.

[91] *See* FARNSWORTH, *supra* note 19, at 476; TREITEL, REMEDIES, *supra* note 19, at 281-82.

[92] For an American example, *see* Orkin Exterminating Co. v. Harris, 164 S.E.2d 727 (Ga. 1968).

[93] This is the terminology adopted by the Restatement (Second), which considers the independent-dependent terminology to be misleading. *See* RESTATEMENT (SECOND) OF CONTRACTS § 232 cmt. b (1981). This approach was advocated by Corbin and Patterson. *See* Arthur Corbin, *Conditions in the Law of Contract* 28 YALE L.J. 739 (1919); Edwin Patterson, *Constructive Conditions in Contract*, 42 COLUM. L. REV. 903 (1942).

[94] For the American practice, *see* GEORGE PALMER, LAW OF RESTITUTION, § 4.5 at 415 (1978). Palmer states that "a decision that the promises are independent is frequently a means of rejecting a defense because the breach is not regarded as sufficient to justify excusing the innocent party under the contract." *See id.* For the English practice, *see* TREITEL, LAW OF CONTRACT, *supra* note 36, at 764.

tance to construe promises as dependent can easily be explained by keeping in mind the common law's historical failure to distinguish between termination and refusal to perform.[95] Construing terms as dependent promises – i.e., as conditions precedent or concurrent conditions of the other party's duty to perform – meant that *any* breach of these terms could justify terminating the contract. (By extension, in England these terms have come to be known as "conditions" as opposed to "warranties," the breach of which only gives a claim in damages.)[96] Under these circumstances, before labeling a given promise as dependent, courts insisted that the promise be sufficiently important to justify, should the promise be breached, to put the contract to an end.

A clear illustration is provided in *Boone v. Eyre*, a well-known case in which Mansfield could measure the potential harshness of his prior holding.[97] The buyer of a plantation refused to pay the agreed price, contending that the seller did not possess and, accordingly, could not transfer title of all the slaves working on the plantation. The court rejected the contention. Mansfield reasoned that the promise at stake was not going to the full consideration of the contract and was thus independent of the buyer's obligation to pay. The buyer's only remedy was in damages. Obviously, the decision was motivated by the court's reluctance to let the buyer evade his obligations by alleging some minor contractual deviations. It was thus to police the buyer's right to terminate that the court characterized the promise as independent. I will refer to this approach of policing termination as an indirect approach as opposed to a direct approach, which would have consisted in (i) construing terms as

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[95] *See* TREITEL, REMEDIES, *supra* note 19, at 245.

[96] This terminology was consecrated in the Sale of Goods Act, 1893, 56 & 57 Vict., c. 71 (U.K.). *See* CHITTY ON CONTRACTS – GENERAL PRINCIPLES 570 (Sweet & Maxwell ed., 27th ed., 1994) [hereinafter CHITTY]. The connection between independent terms and warranties is less explicit, but appears accurate. The editors of CHITTY have it as follows:

> In the exceptional case of independent mutual promises, each party has his remedy on the promise made in his favour without performing his part of the contract and conversely neither party can claim to be discharged from liability on the contract by reason of the failure of the other to perform his part.

Id. ¶. 24-31 at 1169-70.

[97] *See* Boone v. Eyre, (1777) 126 Eng. Rep. 160(a) (K.B.).

dependent and then, (ii) directly controlling the reasonableness of the buyer's attempt to terminate by focusing on the extent of the breach.

In the United States, the indirect approach was abandoned early on. Under the doctrine of "constructive conditions of exchange," every term came to be construed as conditional upon performance by the other party.[98] *Boone v. Eyre* is now read as focusing not so much on the importance of a given term as on the extent of a given breach, and is viewed as originating the twin doctrines of substantial performance and material breach.[99] Under these doctrines, the aggrieved party is only entitled to terminate where the breach is material, i.e., where the other party has failed to perform a substantial part of his obligations.[100] This direct approach is, sensibly, considered to be less confusing.[101] It has found its way into the Restatement (Second) of Contracts, which generally recognizes constructive conditions and restricts a party's right to refuse performance – whether, definitively, by way of termination or, temporarily, by way of suspension – to cases of material breach.[102] As a result, Professor Farnsworth states that "if there is a choice, the judicial preference for constructive conditions of exchange and the self-help remedies that they afford the injured party is overwhelming."[103]

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[98] The RESTATEMENT (FIRST) OF CONTRACTS was structured upon the concept of "promises for an agreed exchange" whereby "[a]ll bilateral contracts, with a few exceptions, are brought within the operation of constructive conditions, on the assumption that the parties expect and intend not only an exchange of promises in the making of the contract but also a later exchange of performances." Patterson, *supra* note 93, at 914.

[99] *See* FARNSWORTH, *supra* note 19, at 488.

[100] *See id.* Farnsworth notes that "the doctrine of material breach is simply the converse of the doctrine of substantial performance." *Id.* at 518.

[101] *See id.* at 476.

[102] RESTATEMENT (SECOND) OF CONTRACTS § 231 (1981) provides that "[p]erformances 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." Section 237 of the RESTATEMENT provides that except in case of divisible or severable agreements, "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." RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981).

[103] *See* FARNSWORTH, *supra* note 19, at 477.

In contrast, the indirect approach to policing termination has only been abandoned relatively recently in England. For a long time, the policing of termination was exclusively achieved by classifying terms as dependent or independent, using the consecrated dichotomy between "conditions," breach of which gave a right to terminate, and "warranties," breach of which only gave rise to a claim in damages. The shift to a direct approach to policing termination only came with the unveiling of a third category of terms, the so-called "intermediate terms." In the landmark *Hong Kong Fir Shipping* case, the English Court of Appeal had to decide whether a ship-owner's failure to provide a seaworthy ship entitled the charterer to terminate the charterparty.[104] The court refused to arbitrarily classify the term regarding the ship's seaworthiness as a "condition" or a "warranty." Rather, the court held that, except where the contract or the statute explicitly made a term a condition, the range of available remedies depended "entirely on the nature of the breach."[105] Classifying a term as an "intermediate term," gives the court more flexibility as termination will only be available where the non-performance "go[es] to the root of the contract" or "deprives [the other party] of substantially the whole benefit which it was the intention of the parties that he should obtain."[106]

In spite of this development, the effects of the indirect approach are still felt when courts characterize terms as dependent or independent. English courts have traditionally relied on a classic reading of *Boone v. Eyre* and inquired whether the term went to "the root" or to "the foundation of the whole" con-

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[104] *See* Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd., (1961) 2 Q.B. 26 (U.K.).

[105] *Id.* at 64. In so doing, *Boone v. Eyre* was reinterpreted as providing that only where *the breach* did not go to the root of the contract would the aggrieved party have to content with a claim in damages (emphasis added). *See* Boone v. Eyre, (1777) 126 Eng. Rep. 160 (K.B.) The Court relied on the interpretation given by Lord Ellenborough, C.J, in *Davidson v. Gwynne,* (1810) 12 East at 389, who stated "[t]he principle laid down in *Boone v. Eyre* has been recognized in all the subsequent cases, that unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages"

[106] Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd., (1961) 2 Q.B. 26, 64, 72 (U.K.).

tract.[107] This test is still upheld in authoritative treatises.[108] As courts have shown marked preference for construing terms as intermediate, commentators have called for liberal recognition of dependent promises and of the protection they afford.[109] However, the law still appears in a state of flux, and courts' findings may still be constrained by the weight of precedent.[110]

C. *Continuing Relevance of the Seriousness of Breach*

Constructive conditions are generally recognized in the United States, and English law appears set for widespread recognition of dependent promises. The question remains whether, once *A*'s duty to perform is found to be conditional upon *B*'s performance, any non-performance by *B* entitles *A* to refuse to perform.

Where the contract expressly makes performance of a term a condition precedent or a concurrent condition of the other's party duty to perform, it is undisputed that any non-performance entitles the aggrieved party to refuse to perform.[111] The situation is different where a term is construed by the court as being a condition precedent or a concurrent condition of the other party's duty to perform. In this case, in the United States the doctrine of material breach applies.[112] Guidelines are provided by the Restatement (Second) of Contracts, and an often

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[107] Lord Blackburn in Mersey Steel and Iron Co. v. Naylor, Benzon & Co., (1884) 9 A.C. 434, at 443-44 (U.K.).

[108] *See* 9.1 LORD MACKAY OF CLASHFERN, HALSBURY'S LAWS OF ENGLAND 711 (4 ed. 1998) [hereinafter HALSBURY'S]

[109] Referring to the RESTATEMENT (SECOND) OF CONTRACTS §§ 233(2), 234(1) (1981), Treitel states that "the law should, in doubtful cases, favour such a classification [as dependent promises] whenever simultaneous performance by both party is possible." TREITEL, LAW OF CONTRACTS, *supra* note 36, at 764. *See also* BEALE, *supra* note 79, at 27. Beale further notes that "[i]t is important to note that that the new approach does not involve abandoning the notion that performance by A may be a condition precedent to or a concurrent condition of B's obligation to perform." *Id.* at 43.

[110] The insistence by the editors of HALSBURY'S on the traditional criteria for construing promises as dependent indicates that the law is still in a state of flux. *See* HALSBURY'S, *supra* note 108, ¶ 967.

[111] *See* CHITTY, *supra* note 96, at 570-71; *see, e.g.*, FARNSWORTH, *supra* note 19, at 422.

[112] *See* FARNSWORTH, *supra* note 19, at 517. Under the RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981), a party's duty to perform is conditional upon there being no "*uncured material failure*" by the other party (emphasis added). RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981).

decisive factor is "the extent to which the injured party will be deprived of the benefit which he reasonably expected."[113] Similarly, in England, some have argued that the test set forth in *Hong Kong Fir Shipping*?whether the breach deprived the aggrieved party of the substance of his bargain? should apply.[114] It follows that the standards of seriousness would be identical in matters of termination and suspension. It was argued earlier in Part II that there is no principled reason for adopting such an approach since the policy considerations that restrain availability of termination to cases of serious or material breach do not command the same solution in matters of suspension of performance.[115] Several further observations should be made in the common law context.

First, no requirement of proportionality between the breach and the suspension of performance has been advocated in common law jurisdictions. In Part II of this essay, it was argued that whether to require proportionality depended on one's view of the role performed by an aggrieved party's suspension of performance. Requiring proportionality is illogical and ineffective where one acknowledges the coercive function of a party's refusal to perform. In this respect, this coercive function has been recognized both in England and, maybe more strongly, in the United States. It has been said that English courts "may be concerned with providing incentives."[116] In the United States, Patterson, who was instrumental in elaborating the doctrine of "constructive conditions of exchange," recognized early on the coercive function these conditions served.[117] The Official Comment to the Restatement offers a striking recognition of this coercive function when stating:

> The likelihood that the injured party's withholding will induce the other party to cure his failure is particularly important [in assess-

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113 RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981). *See, e.g.*, FARNSWORTH, *supra* note 19, at 518-19.

114 *See* BEALE, *supra* note 79, at 43. This is also the understanding of the English position expressed in the Lando Commission's Comments to the Principles of European Contract Law. COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW art. 9:201 cmt. This might be explained by the presence of Professor Beale in the Lando Commission.

115 *See supra,* Part II, Section A.

116 BEALE, *supra* note 79, at 27.

117 Patterson, *supra* note 93, at 925.

> ing the materiality of the breach] because the very reason for suspending rather than immediately discharging the injured party's duties is that this will induce cure.[118]

Second, the suggestion that standards for termination and suspension are similar may not be completely accurate within the common law context. In the United States, the Restatement (Second) of Contracts articulates a period of cure between a party's suspension of performance and termination of the contract.[119] For the purpose of terminating, the materiality of the breach has to be reconsidered in light of the effects of delayed performance, most notably on the aggrieved party. While a slight delay in delivering commodities can justify termination given the high volatility of commodities markets, a significant delay in conveying land may be more adequately compensated in damages.[120] There is therefore room under the Restatement for articulating two different standards of materiality. Similarly, in England, Professor Treitel suggests that, while nonperformance of a condition precedent or of a concurrent condition would warrant the aggrieved party's refusal to perform, termination would not necessarily be justified in the same circumstances.[121] As an illustration, he refers to employment contracts. When an employee fails to perform his duty, the employer is entitled to retain payment but not necessarily to terminate the contract.[122] Here again, there appears to be some room for articulating two different standards. This conclusion is confirmed by the study of payment delays in Part V, which supports the suggestion that courts assess the materiality of a given breach differently for purposes of terminating the contract and for the purposes of suspending performance.

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[118] RESTATEMENT (SECOND) OF CONTRACTS § 242 cmt. b. (1981).

[119] *See id.* Similarly, the Uniform Commercial Code allows the seller whose goods have been rejected as nonconforming to substitute a conforming tender. *See* U.C.C. § 2-508.

[120] The example is given in RESTATEMENT (SECOND) OF CONTRACTS § 242 cmt. c. (1981).

[121] *See* TREITEL, LAW OF CONTRACT, *supra* note 36, at 766.

[122] *See id.* Professor Treitel refers to Wiluszynski v. Tower Hamlets LBC, [1989] I.C.R. 493 (U.K.) and Ticehurst & Thompson v. British Telecommunications, [1992] I.C.R. 383 (U.K.). *See id.*

V. WITHHOLDING PERFORMANCE FOR LATE PAYMENTS

In this section, I propose to explore, particularly in the context of construction contracts and time charterparties,[123] the civil and common law approaches to a common type of breach, late payments. More than a mere illustration of the workings of civil and common law mechanisms governing a party's right to suspend performance, I intend this exercise to illustrate the purposive way in which the standard of seriousness or materiality is applied in practice. Hopefully, this analysis will deal a final blow to the suggestion that standards for termination and suspension are similar.

It was explained earlier that both in common law and civil law, a party whose performance cannot be rendered instantaneously must perform in advance.[124] Construction contracts were offered as the most common example of this principle.[125] Contractors have to perform before being entitled to payment. However, since contractors would be under considerable strain if they had to finance the whole works before being paid, mechanisms for progress or interim payments are usually provided for in construction contracts.[126] Similarly under the civil and common law default rules relating to the order of performance, the ship-owners' obligations under time charterparties (most notably, making the ship available throughout the contract) would have to be performed in advance payment. However, as a matter of common practice, the hire is stipulated to be payable

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[123] Professor Tetley gives the following definition of a time charterparty: "A time charterparty is a contract whereby the lessor (the ship owner or demise charterer) places a fully equipped and manned ship at the disposal of the lessee (the time charterer) for a period of time for a consideration called "hire" payable at specified intervals during the term of the charter." William Tetley, *Glossary of Maritime Law Terms*, *available at* http://www.mcgill.ca/maritimelaw/glossaries/maritime. *See generally* MICHAEL WILFORD ET. AL., TIME CHARTERS (5th ed. 2003) [hereinafter TIME CHARTERS] (for a discussion on time charterparties).

[124] *See supra* Parts III, Section A and IV, Section A.

[125] *See supra* Parts III, Section A and IV, Section A.

[126] *See, e.g.,* Clause 14 of FIDIC's Conditions of Contract for Construction (a.k.a., the new Red Book), Conditions of Contract for Plant and Design-Build (a.k.a., the new Yellow Book), and Conditions of Contract for EPC/Turnkey Project (a.k.a., the Silver Book). On FIDIC's new suite of contracts, *see generally*, Christopher Seppala, *FIDIC's New Standard Forms of Construction Contract: An Introduction, available at* http://www1.fidic.org/resources/contracts/seppala.asp (last visited December 15, 2005).

monthly.[127] Under these circumstances, is the contractor or ship-owner entitled to suspend performance by, for example, suspending the works or ordering the ship to stay at berth when the payment is not timely?

The *exceptio* provides a straightforward answer in civil law. As they impose obligations on both parties, construction contracts and time charterparties are bilateral contracts. Payment being the charterer's or employer's main obligation, authorities agree that the ship-owner or contractor is entitled to suspend performance in case of late payment.[128] At common law, the issue turns on whether the obligation to proceed with the work or the ship-owners' obligations under the charterparty is regarded as conditional or dependent upon the employer making the interim payment or upon the charterer paying the hire.[129] In this respect, a distinction can be drawn between England and the United States.

With regard to time charterparties, the leading English authority is Justice Mocatta's decision in the *Agios Giorgis*.[130] Charterers had made unwarranted deductions to the hire, and the owners had refused to unload cargo pending payment of the balance. The hire was eventually paid in full, but the charterers brought proceedings due to the delay in unloading. The owners unsuccessfully argued that payment of the hire was a condition precedent of their duty to perform.[131] The court found that the obligations to pay and unload were independent, and

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[127] *See* TIME CHARTERS, *supra* note 123, ¶16.44, at 273. Timely payment is regarded as so fundamental to the parties that standard forms invariably include a clause, known as a "withdrawal clause," entitling the owner to terminate the contract for any failure to pay the hire timely. *See id.* at 263.

[128] For France's position, *see* R. RODIÈRE, TRAITÉ GÉNÉRAL DE DROIT MARITIME 155 (1967), JEAN-BERNARD AUBY & HUGES PÉRRIET-MARQUET, DROIT DE L'URBANISME ET DE LA CONSTRUCTION 413 (3d ed., 1992), GEORGES LIET-VEAUX, LE DROIT DE LA CONSTRUCTION 289 (7th ed., 1982). *See also* Cass. 3e civ., Feb. 11, 1987, No. 85-17300 (Fr.) (unpublished). The solution is different in administrative contracts. *See supra* note 35.

[129] *See supra* Part IV, Section B.

[130] *See* Steelwood Carriers Inc. of Monrovia, Liberia v. Evimeria Compania Naviera S.A. of Panama, (1976) 2 Lloyd's Rep. 192 (Eng.) (the "*Agios Giorgis*"). The *Agios Giorgis* was followed in England in Aegnoussiotis Shipping Corportion of Monrovia v. A/S Kristian Jebsens Rederi of Bergen, (1977) 1 Lloyd's Rep. 268 (Eng.), Int'l Bulk Carriers (Beirut) S.A.R.L. v. Evlogia Shipping Co. S.A. and Marathon Shipping Co. Ltd., (1978) 2 Lloyd's Rep. 186 (Eng.).

[131] *See Agios Giorgis*, 2 Lloyd's Rep. at 201 (Eng).

key to this finding was the fact that late payment of the hire would not have been sufficiently serious a breach to entitle the owners to terminate the charter party.[132]

With respect to construction contracts, the leading authority in the Commonwealth appears to be the New Zealand Court of Appeal's decision in *Canterbury Pipe Lines Ltd. v. Christchurch Drainage Board.*[133] In this case, contractors had suspended work following the employer's failure to make an interim payment. After a careful review of English, Canadian and American precedents, the court appeared inclined to hold that timely payment was not a condition precedent of the contractors' duty to proceed with the work and that no right of suspension existed at common law.[134] This position was vindicated, albeit in obiter, by the English Court of Appeal in the *Channel Tunnel* case.[135]

In the United States, maritime arbitrators have blindly applied the *Agios Giorgis* without inquiring into the existence of a condition precedent or the relevance of the reasoning in the American context.[136] In this respect, the solution adopted by the U.S. Supreme Court in *Guerini Stone Co. v. Carlin Construction Co.* stands in striking contrast to the English position and, in light of the Court's careful consideration of the issue, is arguably much more convincing.[137] In this construction case, the Court found that timely payment of progress certificates was a condition precedent to the contractor's duty to proceed with the work, a position that appears generally followed in the

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[132] Absent the usual withdrawal clause. *See id.* at 202.

[133] Canterbury Pipe Lines Ltd. v. Christchurch Drainage Board [1979] 2 N.Z.L.R. 347 (N.Z.C.A.) Referred to as "persuasive authority" in England. *See* R. PETTIGREW, PAYMENT UNDER CONSTRUCTION CONTRACTS LEGISLATION 121 n. 1 (2005).

[134] The Court's reasoning might be considered obiter dictum as the case was decided on the fact that the engineer had failed to issue an interim payment certificate. *See Canterbury*, 2 N.Z.L.R. at 355.

[135] *See* Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd, (1992) 2 W.L.R. 741, 749 (Eng.).

[136] *See* True Seal Shipping Co. Ltd. v. Naviera Neptuno (the "Dominique"), Int'l Comm. Arb., SMA Award No. 2535 (Jan. 5, 1989); Karin M, Int'l Comm. Arb., SMA Award No. 2869 (1992).

[137] *See* Guerini Stone Co. v. Carlin Construction Co., 248 U.S. 334, 346 (1919).

United States.[138] Finding that the contractor's suspension was justified, the Court stated:

> [I]n a building or construction contract like the one in question, calling for the performing of labor and furnishing of materials covering a long period of time and involving large expenditures, a stipulation for payments on account to be made from time to time during the progress of the work must be deemed so material that a substantial failure to pay would justify the contractor in declining to proceed. . . . As is usually the case with building contracts, it evidently was in the contemplation of the parties that the contractor could not be expected to finance the operation to completion without receiving the stipulated payments on account as the work progressed.[139]

Installment sales could further illustrate this divergence between the English position and that held in other jurisdictions, including the United States.[140] In sum, while payment delays are regarded as sufficiently serious to warrant suspension of performance in civil law jurisdictions and in the United States, such is not the case in England and in other common law jurisdictions of the Commonwealth. Such a striking divergence warrants further examination.

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[138] *See* Aiello Constr. v. Nationwide Tractor Trailer Training & Placement Corp., 413 A.2d 85 (R.I. 1980); Mangarno Corp. v. HITT Contracting, 193 F.Supp. 2d 88 (D.C. 2002). For earlier cases, see South Fork Canal Co. v. Gordon, 73 U.S. 561, 569 (1867); Phillips Construction Co. v. Seymour, 91 U.S. 646, 649 (1975). *See also* FARNSWORTH, *supra* note 19, ¶ 8.16, at 520.

[139] *Guerini Stone Co.*, 248 U.S. at 345-46.

[140] Mersey Steel & Iron Co. v. Naylor, Benzon & Co. (1884) 9 A.C. 434, 444 (U.K.) (seller not entitled to suspend deliveries where the buyer has failed to pay the previous installment.) In the United States, the seller would be entitled to suspend further deliveries pending payment under section 2-703 of the Uniform Commercial Code. *See* U.C.C. § 2-703 (1977). The leading case appears to be the decision of the Supreme Court of New York in Portal Galleries, Inc. v. Tomar Products, Inc., 302 N.Y.S.2d 871 (N.Y. App. Div.) (1969). The solution is approved *in* DEBORAH NELSON & JENNIFER HOWICZ, WILLISTON ON SALES § 24-9, at 3 (5th ed. 1994). Similarly, in civil law jurisdictions, the seller would be entitled to suspend further deliveries pursuant to the *exceptio non-adimpleti contractus.* For the French position, *see, e.g.,* Somos v. Eustache, Chambre commerciale et financiere [Cass. com.] [Commercial Court], Apr. 28, 1982, Bull. civ. IV, 144 (Fr.). For the position adopted by courts in Belgium, *see* Comm. Brux. (July 9, 1913) *Jur. Com. Brux.*, 1914 p.70. *See also* MALECKI, *supra* note 41, at 389. For the Swiss position, *see* Federal Tribunal April 29, 1958, 84 ARRETS DU TRIBUNALE FEDERAL SUISSE [ATF] II 149 (Switz.).

To begin with, the view apparently heralded by English and other Commonwealth courts appears at odds with industry practice and basic commercial expectations. The frequent recourse to contractual clauses providing for a right to suspend performance in case of delayed payment bears witness to the fact that commercial parties consider late payment a serious issue. Following the *Agios Giorgis*, the two leading standard-setting organizations in the shipping industry, the Association of Ship Brokers and Agents, Inc. (U.S.A.) and the Baltic and International Maritime Council ("BIMCO"), modified their standard forms for time charterparties and included a right of suspension in case of late payment.[141] Similarly, the standard conditions of contract of the Fédération Internationale des Ingénieurs-Conseils ("FIDIC"), the key standard-setting organization in the international construction industry, have long included clauses providing for a right to suspend performance in case of late pay-

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[141] The Association of Ship Brokers and Agents standard form, the New York Produce Exchange (NYPE) Time-Charter form was amended in 1993. Clause 11(a) *in fine* of the NYPE 93 reads:

> "At any time after the expiry of the grace period provided in Sub-Clause 11(b) hereunder and while the hire is outstanding, the Owners shall, without prejudice to the liberty to withdraw, be entitled to withhold the performance of any and all of their obligations hereunder and shall have no responsibility whatsoever for any consequences thereof, in respect of which the Charterers hereby indemnify the Owners, and hire shall continue to accrue and any extra expenses resulting from such withholding shall be for the Charterers' account."

The Baltic and International Maritime Council [hereinafter BIMCO] issued a new standard form in 1999, the General Time Charter-Party (Gentime) designed to replace its aging 1939 Uniform Time-Charter (Baltime 1939). Clause 8(c) *in fine* of the Gentime form provides:

> "Further, at any time after the period stated in Box 26, as long as hire remains unpaid, the Owners shall, without prejudice to their right to withdraw, be entitled to suspend the performance of any and all of their obligations hereunder and shall have no responsibility whatsoever for any consequences thereof in respect of which the Charterers hereby agree to indemnify the Owners. Notwithstanding the provisions of Clause 9(a)(ii), hire shall continue to accrue and any extra expenses resulting from such suspension shall be for the Charterers' account."

However, in 2001, BIMCO issued an update of the Baltime 1939 form, which does not include such a clause. The limited scope of the update, which was designed to avoid the use of archaic terms and a number of out-dated standard clauses, may account for this absence. *See generally*, comments on BIMCO's website, *available at* http://www.bimco.dk (last visited Dec. 15, 2005).

ment.[142] In England, late payment in the construction industry was perceived as a problem sufficiently serious to warrant legislative intervention.[143] Part of the legislative scheme includes recognition of a right to suspend performance in case of late payment.[144] A 2004 survey of payment practice across Europe conducted by Experian, a credit reference agency, found that payment delays were significantly higher in England than in other European countries.[145] Experian concluded as follows:

> The UK has a longstanding culture of late payment that is damaging to business, employment and our reputation as trading partners. . . . Late payment is a misguided and short-term measure, which ultimately wastes valuable resources and leads to more bad debt, less trust between companies and higher costs for consumers.[146]

In light of the foregoing, the position adopted by English and Commonwealth courts appears commercially unsound and unwarranted. This position is, however, more the result of historical constraints than of misconceived judicial views. The *Agios Giorgis* and *Canterbury Pipe Lines* cases illustrate the shortcomings of an approach that insists on similar standards for termination and suspension. In both cases, the courts refused to hold that timely payment was a condition precedent of the other party's duty to perform as late payment, in the circumstances, did not amount to a repudiatory breach.[147] That is,

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[142] *See, e.g.*, Sub-Clause 16.1 "Contractor's Entitlement to Suspend Work" of the Conditions of Contract for Construction (the new Red Book), Conditions of Contract for Plant and Design-Build (the new Yellow Book), and Conditions of Contract for EPC/Turnkey Project (the Silver Book).

[143] *See* Housing Grants, Construction and Regeneration Act, 1996, c.53, (U.K.). On this piece of legislation, *see generally*, PETTIGREW, *supra* note 133.

[144] *See* Housing Grants, Construction and Regeneration Act, 1996, c.53, § 112, (U.K.).

[145] *See* PETTIGREW, *supra* note 133. The survey data is available *at* http://experian.global-pressoffice.com/ ("Surveys" hyperlink) (last visited Dec. 15, 2005).

[146] Statement by Mr. Phil Cotter, Managing Director of Experian's Business Information Division, http://www.danielssilverman.co.uk/articles.php?aid=20.

[147] *See Agios Giorgis*, 2 Lloyd's Rep. at 202 (Eng) (referring to the English Court of Appeal's decision in *The Brimnes* [1974] 2 Lloyd's Rep. 241). *See also* Canterbury Pipe Lines Ltd. v. Christchurch Drainage Board [1979] 2 N.Z.L.R. 347, 351 (N.Z.C.A.) (referring to the House of Lord's decision in Mersey Steel & Iron Co. v. Naylor, Benzon & Co. (1884) 9 A.C. 434, 444 (U.K.). This approach to payment delays was already embodied in the Sale of Goods Act 1873, which provided that time of payment was not of the essence in sales, *i.e.* that failure to make timely

the courts found that the breach was not sufficiently serious to warrant termination.[148] Under the modern, direct approach to policing termination presented earlier, courts in these cases would have been free to find that the terms regarding payment were both "conditions precedent" of the other party's duty to perform and "intermediate terms" giving rise to a right to terminate only in limited circumstances. The issue would then have turned on whether the breach was serious enough to warrant suspension as opposed to termination. In this respect, the results reached in the United States and France, where standards for termination and suspension are purportedly similar, are noteworthy. While a mere delay in payment could justify suspension, it would not justify immediate termination by the unpaid party.[149] The point was clearly made by the Supreme Court of Pennsylvania in *Turner Concrete Steel Co. v. Chester Constr. & Contracting Co.*:

> [While] the builder could undoubtedly have ceased operations temporarily if overdue demands remained unsatisfied . . . it cannot be said that the abandonment of a contract of the magnitude here shown, within a few hours of a large payment, was justifiable.[150]

This purposive approach is sensible and should be commended.

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payments was not repudiatory. *See* United Kingdom, Sale of Goods Act 1893, §10(1).

[148] This approach is in itself contradictory since the New Zealand Court of Appeal in *Canterbury Pipe Lines* acknowledged that, under certain circumstances, failure to pay timely would undoubtedly amount to repudiation, for example in cases of insolvency or clear refusal to continue performance of the contract. *See Canterbury Pipe Lines*, 2 N.Z.L.R. at 351 (referring to the House of Lord's holding in Mersey Steel & Iron Co. v. Naylor, Benzon & Co. (1884) 9 A.C. 434, 444 (U.K.)). As a result, the nature of a term as a condition precedent or an independent promise is bound to vary with the circumstances surrounding the breach, which, admittedly, does not make much sense.

[149] FARNSWORTH, *supra* note 19, at 521. In France, the aggrieved party would have to seek a court order to terminate Whether to issue this order is left at the discretion of the court. *See* Troisième chambre civile [Cass. 3e civ.], Oct. 11, 1972, Bull. civ. III, No. 514 (Fr.). Commentators consider that the unpaid party would first have to suspend and, depending on the circumstances, could then seek judicial termination. *See* AUBY & PÉRRIET-MARQUET, *supra* note 128.

[150] 114 A. 780, 82 (Pa. 1921).

VI. CONCLUSION: WHICH MODEL FOR THE *LEX MERCATORIA*?

The gist of the comparative exercise undertaken in this analysis was to convince the reader that nothing in the various national laws considered opposes a wider recognition of the coercive model elaborated earlier in Part II. In particular, even in those systems that cling to a test of materiality or seriousness of the breach, the standard is articulated in a pragmatic, purposive manner and yields different results where suspension or termination is sought. As a result, there undoubtedly exists room in these national laws for acknowledging considerations particularly relevant to international transactions – remote and often hypothetical prospects of judicial enforcement – and for drawing the logical consequences of this state of affairs – the marginalization of the materiality of breach as a relevant criterion in determining whether the aggrieved party's reaction was reasonable. Beyond national laws, I propose in this final section to study the relevance of the coercive model in a truly transnational setting. In this respect, the UNIDROIT Principles of International Commercial Contracts [hereinafter the "UNIDROIT Principles"] and the Principles of European Contract Law [hereinafter the "PECL"] provide an interesting starting point. I then turn to the Convention on Contracts for the International Sale of Goods, an ideal field of study given the considerable wealth of materials and decisions interpreting this instrument of harmonization of international commercial law.[151]

A. *UNIDROIT Principles and PECL*

In case of breach of a bilateral contract, both the UNIDROIT Principles (Article 7.1.3) and the PECL (Article

[151] The CISG has been ratified by the United States and all the European Union members with the notable exception of the United Kingdom. Absent contrary agreement, the CISG is applicable to contracts for sale of goods entered into by parties having their "places of business" in different contracting states or where the conflict rules lead to the application of the law of a contracting state (Article 1). *See generally* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (3d ed., 1999). *See also* Peter Schlechtriem, *Uniform Sales Law – The UN Convention on Contracts for the International Sale of Goods*, *available at* http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html#a4 (last visited Dec. 15, 2005) (additional information relating to the CISG is available on this website).

9:201) give a right to withhold performance to the aggrieved party who, under the contract, has to perform simultaneously or after the other party.[152] The PECL are probably more detailed and explicit as Article 9:201 requires that performance be withheld in whole or in part "as may be reasonable in the circumstances."[153] It would, however, be incorrect to consider that this standard of reasonableness is absent from the UNIDROIT Principles since the Official Comment to Article 7.1.3 makes clear that the withholding party has to conform to the overriding requirement of good faith.[154] As was discussed in Part II of this essay, the standard of reasonableness cannot be articulated in a vacuum and requires an understanding of the purposes underlying a party's right to withhold performance, i.e., to protect his interests or to coerce the other party into performing fully. In this respect, the UNIDROIT Principles do not spell out which approach it has adopted. In contrast, the Official Comment to PECL Article 9:201 makes clear that non-performance need not be "fundamental" and that the remedy of withholding performance can be used as a means of coercing the other party so long as the reaction is not "wholly disproportionate."[155] The PECL, thus, supports in an international setting the coercive model elaborated earlier in this essay.

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[152] *See* UNIDROIT, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 7.1.3 (1994), which reads: "(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." *Id.* *See also* COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW ART. 9:201, which reads: "(1) 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. The first party may withhold the whole of its performance or a part of it as may be reasonable in the circumstances. (2) A party may similarly withhold performance for as long as it is clear that there will be a non-performance by the other party when the other party's performance becomes due."

[153] PRINCIPLES OF EUROPEAN CONTRACT LAW art. 9:201.

[154] UNIDROIT, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, art. 7.1.3 (1994).

[155] COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW ART. 9:201.

B. *Convention on Contracts for the International Sale of Goods (CISG)*

As one could expect from an instrument governing sales contracts, the CISG regulates in detail the order of performance. Built into this framework are mechanisms that provide for a party's right to suspend performance pending performance by the other party. The key provision is Article 58, which provides that the buyer need not pay the price before the goods or documents of title are handed over and, where consistent with the agreed procedure for delivery and payment, before the goods are examined.[156] Conversely, the seller may demand payment as a condition for handing over the goods or documents.[157] From a civil law perspective, these solutions can be seen as specific applications of the *exceptio*.[158] From a common law perspective, the seller's obligation to deliver and the buyer's obligation to pay can be seen as concurrent conditions.

While covering the most common of situations, the CISG nevertheless fails to articulate a general right of suspension for breach. In particular, such a right cannot be read into Article 71(1), which entitles a party, pending further assurances of performance, to suspend his own performance "where 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."[159] This remedy, similar to that found in the United States' Uniform Commercial Code, is preventive in nature and may only be used before performance is due and before any breach actually occurs.[160] While the scope of this provision has given rise to

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[156] *See* CISG arts. 58(1), (2).

[157] *See* CISG art. 58 (1). Similarly, when the sale involves a carriage, the seller can ship the goods under terms stipulating that the documents of title will only be handed over against payment. *See* CISG art. 58 (2).

[158] *See* VINCENT HEUZÉ, LA VENTE INTERNATIONALE DE MARCHANDISES 271-72 (1992). This proposition was adopted by the arbitral tribunal in Int'l Comm. Arb., Case No. 7645 (1995) *reported in* 11:2 ICC BULL. 34 (2000). In its award, the tribunal held that the *exceptio non-adimpleti contractus* was embodied in Article 58. *See id.* at 44.

[159] CISG art. 71(1).

[160] *See* Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods (1980), Part Three, ¶ 33, *available at* http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.

confusion,[161] its strictly preventive character was reaffirmed in a recent ICC award, which made clear that Article 71 "does not give [the buyer] the right to withhold payment for deliveries already occurred."[162] In addition, applying Article 71 to cases of actual breaches might also be undesirable given the different considerations underpinning suspension of performance for actual and anticipatory breach.[163] At most, Article 71 illustrates the CISG's openness to unilateral suspension for breach and self-help in general.

Therefore, the scheme articulated in the CISG conspicuously leaves open some gaps. One obvious gap, which results in much confusion in practice, relates to the situation where goods are delivered but turn out to be nonconforming. Is the buyer entitled to retain payment? Further, is the buyer entitled to retain payment for other breaches as, for example, where the seller delivers conforming goods but fails to provide security for their proper functioning (in the form of a performance bond or else)?[164] Admittedly, these questions are likely to be of little

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pdf. (making clear that the remedy is available only "prior to the date on which performance is due."). *See also*, UNCITRAL *Digest of Case Law on the United Nations Convention on the International Sale of Goods*, art. 71, cmt. 1, *available at* http://www.uncitral.org/unicitral/en/case_law/digests/cisg.htm ("A/CN.9/SER/C/DIGEST/CISG71" hyperlink) (last visited 15 Dec. 2005).

[161] For an interpretation of Article 71 of the CISG as giving rise to a right to suspend performance in case of actual breach, *see* Case No. VB/94131, CLOUT 164 (Arb. Ct. of the Hung. Chamber of Commerce and Industry, 1995), *available at* http://cisgw3.law.pace.edu/cases/951205h1.html (last visited Dec. 15 1995) (Sellers justified in withholding reparation of non-conforming goods under Article 71 due to Buyer's failure to pay the price on time.) *See also,* DRAETTA, ET AL., *supra* note 7, at 161.

[162] Case No. 9448, 11 ICC BULL. 2, at 103, 105 (International Chamber of Commerce, July 1999), http://www.cisg-online.ch/cisg/urteile/707.htm. The Tribunal did not consider the existence of a general right of suspension under the CISG however. *See also*, Chengwei Liu, *Suspension or Avoidance due to Anticipatory Breach: Perspectives from Articles 71/72 CISG, the UNIDROIT Principles*, PECL, and Case Law, ¶ 3.1, *available at* http://www.cisg.law.pace.edu/cisg/biblio/liu9.html (last visited Dec. 15 2005).

[163] Article 71 insists on a failure to perform a "substantial part" of the contract, which is not acceptable in the context of actual breach. Even in the context of anticipatory breach, Article 71's insistence on a "substantial breach" might appear unprincipled. The conclusion reached in Part II was that, in these circumstances, refusal to perform could be justified so long as commensurate with the anticipated breach. *See supra* note 34 and accompanying text.

[164] This later example is provided by Dietrich Maskow *in* CESARE BIANCA & MICHAEL BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW 429 (1987).

comparative importance as international sales are generally documentary sales where payments are made under letters of credit upon presentation of shipping documents.[165] Consequently, the buyer will generally have no knowledge of the nonconformity until long after payment is made, and even if he came to know of the nonconformity, his right to refuse payment would likely be frustrated by the bank's stringent, independent obligation to pay upon presentation of the documents.[166] While this feature of international sales presumably accounts for the CISG's failure to articulate an overarching principle of refusal to perform for breach, the question still needs to be addressed as not all international sales are documentary. Moreover, difficulties can arise in totally different settings where the primary issue is not the buyer's entitlement to retain payment but, rather, the seller's right to suspend performance because of the buyer's failure to pay. Hence, in an installment sale where the buyer fails to make payment for one installment, is the seller entitled to retain delivery of subsequent installments?

Maskow agrees that in such cases the buyer should be allowed to withhold payment.

[165] *See* J. Bermand & M. Ladd, *Risk of Loss or Damages in Documentary Transactions under the Convention on the International Sale of Goods* 21 CORNELL INT'L. L.J. 423 (1988) (for the interplay between the CISG and documentary sales). Joseph Lookofsky puts it as follows: "The CISG Convention, while recognizing documentary sales practices as a fact of commercial life, does not purport to define or regulate them. So any contractual gaps regarding documentary sales practices (hereunder: questions relating to payment against documents, insurance, etc.) will usually have to be filled in by the customs of the trade or by the otherwise applicable domestic law." Joseph Lookofsky, Excerpt from *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, Part III, § 268, *available at* http://www.cisg.law.pace.edu/cisg/biblio/loo66.html.

[166] For a comparative account of the principle of independence of the bank's obligations from the underlying transaction, *see* AN OELOFSE, THE LAW OF DOCUMENTARY LETTERS OF CREDIT IN COMPARATIVE PERSPECTIVE 354 (1997). For a useful presentation of national laws on the topic, *see* ROLF SCHÜTZE & GABRIELE FONTANE, DOCUMENTARY CREDIT LAWS THROUGHOUT THE WORLD (2001). Maskow points out that the buyer's right not to pay before he examines the goods is substantially curtailed not only where letters of credit are used, but also where the "cash against document" clause is agreed upon. *See* Maskow, *supra* note 164, at 425. Irrespective of the independence of the bank's obligation, the applicable law might even deny the buyer's very right to refuse payment in these situations out of policy considerations. In this respect, see the decision of the English Court of Appeal in Berger & Co. v. Gill Duffus S.A. (1984) A.C. 382 (Eng.). *See supra* notes 36 and 37 and accompanying text.

The existence of a general right of suspension for breach was touched upon in a Zurich Chamber of Commerce award.[167] The defendant seller and the plaintiffs had entered in a long-term agreement for the supply of certain raw materials. At a certain point, the defendant suspended deliveries, and the plaintiffs, as a result, brought arbitration. The defendant, while admitting that suspension of deliveries would constitute a fundamental breach, argued that he was excused by the plaintiffs' failure to pay for a previous installment.[168] In civil law jurisdictions, the seller, in this situation, could have invoked the *exeptio* and would have been entitled to suspend further deliveries pending payment.[169] In the United States, a similar result would have stemmed from section 2-703 of the Uniform Commercial Code.[170] Had English law applied, the outcome might have been different as the unfortunate seller would have had to live with some unprincipled nineteenth century decisions, refusing to construe payment as a condition precedent of his duty to carry on with the deliveries.[171] Having found the CISG applicable, the tribunal held that the *exceptio* was available as a general principle and could constitute a valid defense for unpaid installment sellers.[172] Yet, under the circumstances,

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[167] *See* Case no. 273/95, 23 YEARBOOK COM. ARB. 128 (1998) (Zurich Chamber of Commerce, 1996).

[168] Defendant further alleged fraud on the part of plaintiffs, but the contention was also rejected.

[169] *See* Somos v. Eustache, Cass. com., Apr. 28, 1982, Bull. civ. IV, No. 144 (Fr.); Comm. Brux. (July 9, 1913) *Jur. Com. Brux*, 1914 p.70 (Belg.); Federal Tribunal Apr. 29, 1958, 84 ARRETS DU TRIBUNALE FEDERAL SUISSE [ATF] II 149 (Switz.).

[170] *See* U.C.C. § 2-703 (1977). *See* Portal Galleries, Inc. v. Tomar Products, Inc., 302 N.Y.S.2d 871 (N.Y. App. Div.) (1969).

[171] *See* Mersey Steel & Iron Co. v. Naylor, Benzon & Co. (1884) 9 A.C. 434, 444 (U.K.)

[172] *See* Case no. 273/95, 23 YEARBOOK COM. ARB. 128 (1998) (Zurich Chamber of Commerce, 1996) at 145. An alternative approach could have been found in Article 71. This approach was addressed by the Austrian Supreme Court in OGH [Supreme Court], Feb. 12, 1998, 2 Ob 328/97t, *available at* http://cisgw3.law.pace.edu/cases/980212a3.html (website contains case abstract as well as full text translated in English). In this case, an Austrian buyer of umbrellas had failed to pay several installments to his Czech seller, and the seller avoided the whole contract. The lower court and the court of appeal found for the seller. The court of appeals held that, while the seller's avoidance was premature, under Austrian law, applicable as gap-filling law under Article 7(2), the seller was well-founded in retaining payment (strictly speaking not under the *exceptio non-adimpleti contractus*, but under the wide right of retention available in civil law jurisdictions of the Germanic family. *See supra* note 42 and accompanying text). The Austrian Supreme

the tribunal decided that the defendant's refusal to perform was unjustified. The reasoning is of interest. The tribunal faced a situation where the contract had, in effect, been brought to an end and read the *exceptio* in Article 81, which spells out the consequences of termination ("avoidance" in CISG parlance).[173] Under Article 81, avoidance is available only in case of "fundamental breach." Using similar standards for refusal to perform and termination, the tribunal was bound to find that, absent indication as to the buyers' unwillingness to pay or insolvency, a mere delay in payment was not serious enough to justify either remedy. Coming from a panel of distinguished Swiss arbitrators, this result is surprising but was admittedly motivated by other considerations, one being the obvious bad faith of the defendant who had not taken any step to clarify, upon request of the buyers, the outstanding amount.[174] Yet the tribunal would have been better advised to directly accept these considerations as determinative in evaluating the reasonableness of the defendant's reaction, rather than seek a concept of "funda-

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Court overturned the decision holding that recourse to domestic remedies was unnecessary as Article 71 provided a right of suspension. The Court held that the remedies of suspension under Article 71 and avoidance under Article 73 could be available concurrently. In the event, the Court found that the buyer's failure to pay two installments was not sufficient to show the "serious lack of creditworthiness" required under Article 71 and that, accordingly, the seller was not entitled to suspend performance. This decision is questionable. First, the Court's application of Article 71 to instances of actual breach is unwarranted. *See supra* notes 152-54 and accompanying text. Second, the Court's reading of Article 71 is overly narrow. The Court required that the breaches at hand, i.e., the payment delays, showed a "serious loss of creditworthiness," thus focusing on the first prong of Article 71(1) only. The Court entirely ignored the second, alternative prong of Article 71(1), *i.e.*, that an anticipated substantial non-performance be apparent from the party's "conduct in preparing to perform or *in performing the contract*" (emphasis added). This could arguably have got the seller of the hook as the buyer's actual failure to pay two previous installments could reasonably render "apparent" that the buyer will not pay for further deliveries. Ultimately, this case illustrates the inappropriateness of Article 71 to deal with cases of actual breach of contract. For another application of a similar line of reasoning, *see, e.g.*, J.P.S BVBA v. Kabri Mode BV, Rechtbankvan Koophandel, Hasselt (Belgium), Mar. 1, 1995, AR 3641/94 *reported in* UNILEX, *available at* www.unlilex.info (seller entitled to suspend further deliveries due to buyer's seven month payment delay.)

[173] *See* Case no. 273/95, 23 YEARBOOK COM. ARB. 128 (1998) (Zurich Chamber of Commerce, 1996). at 145.

[174] On defendant's bad faith, *see id.* at 144. The panel was comprised of P.A. Karrer, C. Kalin-Nauer and B.F. Meyer-Hauser. Their decision is surprising since under Swiss law the *exceptio non-adimpleti contractus* is available so long as the breach is not trivial. *See supra* Part III.

mental breach" in a provision otherwise irrelevant to a party's right to suspend performance.

This case clearly illustrates the difficulties resulting from the gaps in the CISG's treatment of suspension of performance. Pursuant to Article 7(2), the general gap-filling provision, where questions that are not expressly settled in the CISG arise, recourse should be had first to "the general principles on which [the CISG] is based."[175] In this respect, French professor Vincent Heuzé suggests that the buyer is entitled to refuse payment against defective goods where he would be entitled to demand redelivery under Article 46(2), i.e., where the nonconformity amounts to a fundamental breach.[176] He suggests, more generally, that a buyer is entitled to retain payment whenever the seller commits a fundamental breach of his obligations.[177] These two propositions do not stem from the language of the CISG, but are rather inferred from particular applications of the *exceptio*, notably Articles 58 and 71, a process not dissimilar to that which led to general recognition of the *exceptio* in France.[178]

Heuzé's reliance on Article 7(2) appears legitimate, and this approach was vindicated in a recent decision of the Austrian Supreme Court.[179] However, why insist on a fundamental

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[175] CISG art. 7(2).

[176] *See* HEUZÉ, *supra* note 158.

[177] *See id.*

[178] As was noted earlier, in France the *exceptio non-adimpleti contractus* was inferred as a general principle from two provisions relating to sales, Articles 1612 and 1653. *See supra* Part II.

[179] Oberster Gerichthof, 8 November 2005, No. 4 Ob 179/05k [Austrian Supreme Court] *translated at* http://www.cisgw3.law.pace.edu/cases/051108a3.html. The dispute opposed the Italian seller of a gravel crushing machine to an Austrian buyer. As the delivered machine was not performing as expected, the buyer retained the balance of the price pending repairs by the seller. Having to decide upon the existence of a right to withhold performance in the CISG, the Austrian Supreme Court held that this issue was not explicitly covered by the text and could appropriately be dealt with by reference to Article 7(2). Referring to Articles 58 and 71, the Court found that the principle of simultaneous performance underlies the CISG and that a buyer, who demands substitute delivery and repairs under Article 46, is well-founded in retaining performance pending conforming performance by the seller. The decision does not explicitly address the issue of the extent of nonperformance. However, by referring not only to the right of the buyer who demands redelivery under Article 46(2), which requires proof of a fundamental breach, but also to the right of the buyer who demands repairs under Article 46(3), which makes no such requirement, the Court intimates that fundamental breach

breach—that is, a breach sufficiently serious to terminate or "avoid" the contract? Other than an innocent cultural bias for equating standards for termination and suspension, it is difficult to see any principled reason for insisting on the breach being fundamental. Neither Article 58 nor Article 71 uses the phrase "fundamental breach." Admittedly, Article 71 speaks in terms of a failure to perform a "substantial part."[180] However, assuming that this article relating to anticipatory breach is helpful in drawing a general principle of refusal to perform for actual breach, Heuzé contrasts this language with that used in Article 72, which provides for termination in case of anticipatory breach and speaks in terms of "fundamental breach."[181] Here, Heuzé correctly notes that the difference in language in the two articles is unlikely to be innocent and must reveal a gradation in the standards applicable to suspension and termination for anticipatory breach.[182] Why then insist on a "fundamental breach" where the aggrieved party suspends performance not for a hypothetical, anticipatory breach but for an actual breach? Similarly, referring to Article 7(2), Professor Schlechtriem considers that, as a general rule, the buyer is entitled to retain payment where goods are non-conforming.[183] While he eschews restricting this right to cases of fundamental

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is not required. The decision does not explicitly address the issue of proportionality, and, on the facts of the case, no further conclusion can be drawn (the sum retained by the buyer amounted to 10% of the contract price, which in light of the machine's defects would presumably have been regarded as a proportionate reaction).

[180] CISG art. 71 (1).

[181] *See* HEUZE, *supra* note 158, at 298.

[182] *See id.*

[183] *See* Peter Schlechtriem, *Interpretation, Gap-Filling and Further Development of the UN Sales Convention*, § II, 5(c)(aa) (English translation and adaptation of the text "Auslegung, Lückenfüllung und Weiterentwicklung" read at a symposium in honor of Professor Dr. Dr. Frank Vischer Basel, May 11, 2004] (translation by Martin Koehler), *available at* http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem6.html, http://www.cisg-online.ch/cisg/Schlechtriem_Symposium_Vischer.pdf (German text) (last visited Jan. 3, 2006)). Professor Schlechtriem reads in the CISG a general "right of retention" in the German sense, i.e., as including retention of contractual rights, *see supra* note 42 and accompanying text. As an original application of this right, he suggests that a buyer would be entitled to refuse temporarily to take delivery of nonconforming goods pending seller's cure or buyer's decision to avoid the contract or demand redelivery. While the seller adopting such a course could be under an obligation to take possession and store the goods, he would not assume the risks of loss. *See id.* § 5(c)(bb).

breach, Schlechtriem insists that the buyer's retention "correspond with the disadvantage caused by the non-conformity."[184] In other words, in order to be justified, the buyer's reaction would have to be proportionate to the seller's breach.

Both Heuzé's requirement of a fundamental breach and Schlechtriem's insistence on proportionality appear misplaced. Throughout this essay it has been argued that concentrating on the extent of non-performance, whether by equating standards for termination and suspension or by requiring proportionality, is not an appropriate way of furthering the role of suspension as a self-help remedy. In this connection, should one still have to be convinced of the pressing need for self-help in international transactions, attention should be paid to a number of provisions in the CISG that set forth wide-ranging self-help remedies. Articles 71 and 72, which address anticipatory breach, provide an obvious starting point.[185] Under these articles, the right to suspend performance is so wide as to include a right to recall goods already in transit.[186] Further, reference should be made to the very controversial Article 50, which allows a buyer to unilaterally reduce the price when goods are nonconforming.[187] Additionally, in cases of delayed performance, the innocent party can, pursuant to Articles 47 and 63, fix an additional and final period of time for performance and then terminate the contract. Finally, the buyer is entitled to demand cure of defects under Article 46(3) or to reject nonconforming goods and to demand redelivery under Article 46(2). Given the importance of self-help in the CISG framework, any attempt to find a general right to suspend performance for breach should acknowledge the coercive function of this remedy and draw inspiration from the model elaborated in the Part II of this essay.

In this respect, a recent ICC award is significant.[188] The case involved a predecessor of the CISG, the 1969 Uniform Law on the International Sale of Goods [hereinafter the "ULIS"],

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184 *Id.* § 5(c)(aa).

185 *See* CISG arts. 71, 73.

186 *See* CISG art. 71(2).

187 *See* CISG art. 50; DALHUISEN, *supra* note 8, at 365 (noting that Article 50 of the CISG is often perceived as excessive).

188 *See* Case No. 8547, 28 YEARBOOK COM. ARB. 27 (2003) (International Chamber of Commerce, 1999).

which for purposes of this essay is similar in principle.[189] A Bulgarian seller and a Greek buyer had entered into a contract for the delivery of several installments of goods. Several thousand tons of goods had been delivered to the satisfaction of the parties but, at some point, the buyer suspended payment alleging non-conformity of the preceding shipment. A dispute ensued, and the seller initiated arbitral proceedings. Acknowledging that the ULIS contained no general rule allowing a party to suspend performance, the tribunal nevertheless found that the buyer was justified in suspending payment pending resolution of the nonconformity issue. In coming to its decision, the tribunal relied on general principles of law as embodied in the UNIDROIT Principles, notably Article 7.1.3.[190] The tribunal acknowledged the coercive nature of the remedy and discounted the extent of non-performance as a relevant criterion. Its reasoning bears reproducing:

> Until an agreement is reached between the parties as to the degree of the lack of conformity and as to how to proceed in regard to the non-conformity, the buyer does not have to pay the price. . . . It would amount to a curtailment of the rights of the buyer if he had to continue payment of the goods without knowing what will happen in regard to the non-conformity. . . . Once the seller knows of a possible non-conformity it is his duty to act upon this knowledge to clear up the degree of the non-conformity. . . . *The*

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189 Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 11929 U.N.T.S. 834 [hereinafter ULIS]. Under Article 71 of the ULIS, delivery and payment are concurrent conditions. As the CISG, the ULIS is silent on the existence of a right to suspend performance for breach. Article 17 of the ULIS sets forth a gap-filling rule similar to that found in Article 7(2) of the CISG. The ULIS is even more internationalized in that this gap-filling rule, contrary to that of the CISG, makes no reference to national law as a last resort.

190 *See* UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, art. 7.1.3. Note that reference to the UNIDROIT Principles is questionable in this case. Under Article 17 of the ULIS, as under Article 7(2) of the CISG, matters not expressly settled are to be decided in accordance with the general principles on which the law or convention is based. In this sense, *see* F. Sabourin (on *Québec*) and J. Basedow, (on *Germany*) *in* A NEW APPROACH TO INTERNATIONAL COMMERCIAL CONTRACTS: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (M. J. Bonell, ed., 1999). *But see* M. J. Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Harmonization of International Sales Law*, 36 REVUE JURIDIQUE THEMIS 335, 348 (2002). On the recourse to general principles as a gap-filling method, *see generally*, Fabien Gélinas, *Codes, silences et harmonie – Réflexions sur les principes généraux et les usages du commerce dans le droit transnational des contrats* 46 CAHIERS DE DROIT 4, 941.

degree of non-conformity is therefore irrelevant in regard to the right of the defendant to suspend payment.[191]

Dealing with gap-filling under Article 7(2), Professor Schlechtriem recently compared the CISG to a construction site.[192] Regarding a party's right to withhold performance in case of breach, the comparison is probably accurate. Yet on this particular construction site, equations and proportions are of little help to the legal architect.

[191] Case No. 8547, 28 YEARBOOK COM. ARB. 27, 35 (2003) (International Chamber of Commerce, 1999) (emphasis added).

[192] *See* Schlechtriem, *supra* note 183, Final Remarks.