I. INTRODUCTION

The continuing search for fairness and neutrality in legal norms applied to transnational commercial relations has led to a modern resurrection of the medieval lex mercatoria. Embraced with considerable enthusiasm by legal scholars in Europe for the most part1, the reincarnated lex mercatoria has been received with less warmth elsewhere2. The range of reaction seemingly runs from skepticism to qualified acceptance by practising lawyers, with relative indifference the frequent reaction from businessmen. To a certain extent, the fire of scholarly controversy has been fueled by largely unsubstantiated claims of the new lex's normative universality or, on a less grand scale, by a "micro" acceptance of given rules by the so-called "leading" trading nations3. This latter approach - the authority for and content of which tends to reflect a "North-South" division - is far less rigorous analytically in the standards by which it gauges the admission of legal norms into the new lex4.

Broadly speaking, the problems associated with the new lex mercatoria may be divided into three basic categories. First, there is no clear consensus on its sources, although a number of sources have been identified with some consistency in the literature5 and elsewhere. Second, it is unclear when the new lex will be applied6. Third, the new lex mercatoria is simply lacking in content7.

With respect to these problem areas, the one that is most relevant to the topic of inquiry is how the content of the lex is to be ascertained. At this embryonic stage of development, the substance of the lex seems to be little more than maxims8. Granted these maxims may offer some guidance to those who seek to resolve commercial conflicts, but many are so insufficiently developed that they typically cannot perform the substantive role associated with the law as a planning tool. Among the criticisms that may be advanced, then, perhaps the most problematic failing with respect to the new lex mercatoria is the lack of predictability of its substance. After all, how does the merchant either gauge or conform to the correct commercial norm in circumstances where the lex is applicable yet is so vague that it is of not particular benefit? Perhaps the studies undertaken by the International Commercial Arbitration Committee of the International Law Association will serve to enhance predictability and, further, in this way will offer the greatest potential contribution both to the recognition and development of the new lex mercatoria during this decade and into the next century.

To that end, the authors of this report have sought to respond to the question posed to them - "Is the Exceptio non adimpleti contractus (the "Exceptio") part of the new lex mercatoria?" - directly as framed, rather than challenging or analyzing the assumptions upon which it is based. Accordingly, there is no attempt to address the fundamental and continuing issue of whether there is in fact a modern lex mercatoria. While the definitional issue of the appropriate
standard by which to determine the composition of the *lex* - assuming it exists - is not resolved. Nor can it be based upon the present state of legal scholarship, arbitral awards, etc.; rather, the myriad standards proffered seem most consistent with Heraclitus’ proscription.

Still, there are certain common features among -the sources of the new *lex mercatoria* identified in the published scholarship on the subject as well as in some judicial and arbitral decisions. While not all of the criteria seem particularly apt in evaluating the *Exceptio*, several have sufficient potential to act as guidelines for the purposes of this study; particularly, general principles of law. International businessmen, of course, find this concept invoked with some frequency in their contracts with foreign States or State enterprises.

Yet, invocation of this well-recognized approach to ascertaining the new *lex mercatoria* is not without hazard, for as one learned jurist observed: "[a]lthough the essence of the *lex mercatoria* is its detachment from national legal systems, it's quite clear from the literature that some, at least, of its rules are to be ascertained by a process of distilling several national laws. The justification for this process is nowhere clearly described".

While development of a jurisprudential rationale for this approach is outside the ambit of this report, the implied challenge invites some brief comment. Formulation of a well-reasoned and authoritative response would seem to lie in the province of the legal historian. After all, the innovations and content of the medieval *lex mercatoria* were not ignored with the formation of nation States but, rather, were assimilated into national law (when compatible with national policies). This nationalization process, with its attendant systemization and clarification, developed largely in a manner divorced from the experience of other countries, except where colonial influences were at play. There remained, nevertheless, a certain common

thread of commercial practice and understanding that provided some of the core principles for national policies that came to be developed officially and not just through commercial experience. The current attempt to revive the concept of a transnational body of commercial law draws upon the legacy of these “normative customs”. It is the results of that process that we examine in turning to “general principles of law” as an accepted and key criterion - albeit with an understated rationale - by which to measure the content of the new *lex mercatoria*.

The utilization of "general principles of law" as an evaluative criterion is problematic other than just in the premise that it is an appropriate means of measure. For example, what methodology is to be employed in ascertaining which rules are general principles? The scholarly literature on the subject is somewhat instructive in this regard, if for no other reason than to further illustrate the lack of certainty with respect to acceptable methodology and its concomitant impact on content. For example, the debate over the role of Article 42(1) of the Washington Convention well exemplifies the differing analysis of the reception by international conventions of rules of international law as encompassing transnational contract law. Similarly, the lack of a coherent methodology under the “general principles” rubric is also impacted by the conflict in comparative analysis with respect to the need for or desirability of “universality” in the content of major legal systems. Theoretical considerations aside, as a practical matter, the bottom line in ascertaining general principles seems to be whether the rules of various legal systems, although differently formulated, nevertheless produce the same result in gauging whether a rule is a general principle and part of the new *lex mercatoria*.

Determining these results is no easy task to the extent that arbitral decisions are to be used as evidence of “unifying principles” of the new *lex mercatoria*. Any debate over whether such awards are "declarations" of the general principles of law as autonomous sources or merely indicative of broad trends in contractual interpretations need not be considered in depth in this report. It suffices to say first that they are a source that find at least some recognition by those entities charged with enforcement and, second, that the application of "general principles" in published awards serves to infuse a greater specificity into the rule because of its application to particular facts.

Against this somewhat confusing backdrop of scholarly debate over problems associated with the new *lex mercatoria’s* definition, application and content, we proceed nevertheless with a preliminary examination of the *Exceptio* in the context of "general principles of law." A comparative analysis of three major legal traditions - civil law, Islamic law and the common law - serves to assess the place the *Exceptio* has come to occupy in modern contract law from its ancient Roman origins. A very brief examination of international agreements and arbitral awards with respect to the

*Exceptio* also serves to facilitate substantive consideration of the principle of balance in reciprocal obligations. There
follows the result of our initial investigation of how the Exceptio operates in legal systems influenced by the civil law, including, certain Arab countries, as well as whether the Exceptio finds any substantial equivalent under common law systems. The conditions of operation of the principle and limits are reviewed to determine if the "rule" forms part of the "general principles of law", which are considered to form an important element: of the controversial new lex mercatoria. The conclusion, while qualified, is affirmative in nature.

II. THE EXCEPTIO AS A GENERAL PRINCIPLE OF LAW

Fundamentally, the exceptio non adimpleti contractus is considered to be a right entitling a party to a reciprocal contract to refuse to carry out his obligations as long as his co-contractor has not performed his own or offered to do so17. The Exceptio is based on the idea that mutual obligations are dependent on each other and must, therefore, be carried out at one and the same time. "Donnant, donnant" and "trait pour trait", as the French would say. "Erfüllung Zug um Zug", is the saying according to the Germans. By virtue of this Exceptio, the situation of equilibrium between the parties, which should have existed at the moment of contract formation, is thus maintained at the time of its performance.

The exception should not be misleading as to its origins. Under Roman law, the rule was that "when the order in which the mutual performances are to be made is determined by the nature of the agreement, or expressly, then such order must be observed. But otherwise, it would be inequitable when one party sues for performance who has not yet: performed"18.

Yet, in the classical period, the exceptio non adimpleti contractus was not designated as such; rather, only some of its special applications were recognized. For example, while "de actionibus empti" and "de exceptione doli" were acknowledged, the "ex fide bona" principle was generally considered sufficient to protect the defendant in instances of non-performance of his co-contractor plaintiff19. It was only later on that the exceptio non adimpleti contractus was formulated as a general and autonomous rule by the post-glossators, based on Roman texts. The theory of the Exceptio was further developed by canonists in connection with the moral principle of "non servanti fidem non est fides servanda" (one need not hold to his word vis-à-vis those who do not).

The denomination of this rule as an exceptio should also not be misleading as to its nature. In fact, an exceptio ordinarily suggested a formal or procedural defense to a court action, whereas the exceptio non adimpleti contractus was essentially a defense based on the merits of the case20.

The exceptio non adimpleti intractus was adopted in civil law systems where its modern theory has been developed. Due to the wide influence of the French legal system on the legislation and doctrinal development in a large number of countries following the civil system21, particular attention is merited for the elaboration of the contemporary French theory of this Exceptio.

It should be noted at the outset, however, that nowhere in the French Civil code is the exceptio non adimpleti contractus expressly mentioned as a general rule of law. However, articles of the code pertaining to sale22, barter23 and deposit24 all provide for its application. In addition, decisions of French courts - or "Jurisprudence" - have repeatedly sanctioned the Exceptio as being one of the general principles governing obligations in reciprocal contracts25. The works of leading French scholars have substantially contributed to the elaboration of the modern theory of this Exceptio as well26.

In French case law, justifications for the exceptio non adimpleti contractus have generally been derived from the traditional theory of "cause" as elaborated in the classic work of Henri Capitant27. The underlying idea here is that in reciprocal contracts the "cause" of one party's obligation vanishes in the event his co-contractor fails to perform his own obligation - the "cause" of one's obligation being nothing other than his co-contractor's obligation28.

To justify the Exceptio, French courts have also drawn upon the notion of good faith and stressed the idea of the interdependence and reciprocity of obligations in contracts29. It has also been suggested that the basis of the exceptio non adimpleti contractus is to be found in the "implied will of the parties", since a party would not enter into a reciprocal contract had he not considered that the contractual obligations would be performed at the same moment; otherwise, he would have granted a term to his co-contractor30.

With respect to the parameters of the Exceptio under French law, the effect of the exceptio non adimpleti contractus is not
to extinguish the contractual obligations of the parties; rather, its effect is to suspend their performance. Thus, when the plaintiff performs, he then will be entitled to demand that the defendant carry out his obligations. Basically, the *Exceptio* is, therefore, a defensive action which protects the aggrieved party by entitling him to withhold performance. Yet, its exercise equally is a means of pressure aimed at compelling the non-performing party to carry out his obligations. Although this *Exceptio* remains, by its very nature, a temporary action, it could lead to the renegotiation of the contract, its revision, or ultimately to its judicial "résolution" - or termination when plaintiff does not respond to the pressure being put on him to perform. The *Exceptio* differs, however, from the right of resolution in that it represents a particular application of self-help, while the latter generally requires judicial proceedings.

The *exceptio non adimpleti contractus* must also be distinguished from the right of retention ("droit de rétention"). This right confers on the creditor a real security; that is, the right of a creditor who has in his possession a property belonging to the debtor can withhold it until he is paid. Although there are a number of similarities, these two actions are not identical doctrines, for the *Exceptio* can be exercised even in situations in which rétention is not available and regardless of the property which forms its object (in case it exists). Finally, the *exceptio non adimpleti contractus* should also be distinguished well from the conditions and effects of "compensation" or set-off for the latter requires that debtor's obligation be a sum of money - a "liquid" debt - and its operation leads to the extinction of one party's obligation.

French law also has contributed to the modern explication of the conditions governing the exercise of the *exceptio non adimpleti contractus*. In that regard, the following should be observed:

1. Since this *Exceptio* is the result of the interdependence of obligations, it only applies in the context of reciprocal contracts.

2. Silent on the order of execution, it is generally presumed that reciprocal obligations ought to be carried out simultaneously.

3. The plaintiff does not, by virtue of the contract, benefit from a term to perform; otherwise, he could withhold carrying out his own performance until the term accrues.

4. No bad faith is permitted in the defendant's assertion of this *Exceptio* (e.g., being responsible for plaintiff's non performance or in the non-performance of one own's obligation).

5. In the event of imperfect and/or incomplete performance, it should be "substantial" - "sérieux" and "grave" according to French decisions - in order to justify defendant's suspension of performance. Here, French courts have generally required that defendant's "retaliation" not be disproportionate to the nature of the plaintiff's non-performance. In a sale contract, for example, a buyer's default on the payment of interest, though paying the principal, will not entitle the seller to benefit from the *Exceptio* and refuse delivery of the sold object.

6. Finally, to invoke this *Exceptio* there is no need for prior court authorization or to give notice of default ("mise en demeure"), unless otherwise stipulated in the contract.

In contrast to the French Civil code where, as noted earlier, the general principle of the *exceptio non adimpleti contractus* is not expressly mentioned, a great number of codes of other countries following the civil law system specifically provide for it as a general rule governing reciprocal contracts. Thus, the general principle of balance in reciprocal obligations is, for example, explicitly acknowledged in Articles 320 and 321 of the German Civil Code (BGB), in Articles 1460 and 1461 of the Italian Civil code and in Article 82 of the Swiss Code of obligations.

The *exceptio non adimpleti contractus*, although not designated as such, also finds equivalent rules outside the civil law systems. For example, in classical Islamic Law - where there is no general rule applicable to all sorts of contracts, but rather different types of contracts have been governed by different rules - there are applications with similar effects to those of the *Exceptio* in instances of "Bay" (sale contract) and "Ijara" (hire and lease contracts). Moreover, modern legislation in a number of Arab and Islamic States, which have been influenced by the French legal systems, do expressly...
provide for the general principle of this *Exceptio*. This conclusion is well illustrated in Article 246 of the Egyptian Civil code, Article 272 of the Lebanese Code of obligations and contracts, and Article 247 of the Syrian Civil code. It should be noted, however, that in these codes this *Exceptio* is not clearly distinguished from the right of retention.

In common law countries such as England and the United States of America, the *Exceptio* as such is not explicitly referred to in case law, as it is not a common law doctrine. Indeed, a computerized search of American State and federal judicial decisions revealed only one instance in which the *Exceptio* was specifically referenced. As might be expected, the jurisdiction involved was Louisiana which, of course, continues to operate with a legacy of French legal influence.

Despite the lack of any specific invocation of the *Exceptio* in the common law, the principle of a balance in reciprocal obligations was embraced in the eighteenth century with Lord Mansfield's historic decision in *Kingston v. Prestor*41. In essence, the common law came to view the exchange of promises and the performance of each as a condition of the duty to perform the other, with such implied conditions referenced as "constructive condition of exchange"42. Through that decision and others that followed it, the notion took root that promises in a bilateral contract should be viewed as dependent or conditioned upon performance43. Thus, the idea of a "condition precedent" to performance was born, certain of the limits of which were later explicated in the "substantial performance" doctrine.

This latter doctrine, as announced in *Boone v. Eyre*44, sought to avoid the inequity of forfeiture in circumstances where the performing party's failure to fulfill a promise was inessential. Reduced to essentials, the doctrine evolved to mean that

"if one party's performance is a constructive condition of the other party's duty, only 'substantial' performance is required of the first party before the party can recover under the contract"45. In this manner, the common law sought to compromise its goals of fairness and predictability to accommodate the simple fact that in certain types of contracts - particularly construction contracts - the performance by one party could not be returned and, hence, equity demanded some compensation even for defective performance where a benefit was conferred upon the recipient46. At the same time, the notion that performance be "substantial" had a close analogue in the civil law requirement under the *Exceptio* that a breach be "grave" or "sérieux."

The systemic similarity does not end at that point of comparison, for the substantial performance doctrine was further refined to address circumstances where the injured party was refusing to perform - a scenario which is also quite close to the parameters of the *Exceptio* under civil law. Basically, in response to non-performance a party is entitled under the "substantial performance" doctrine to suspend performance, with a subsequent right to terminate the contract at an appropriate juncture following the failure to cure the defective performance47. Thus, under the common law approach, suspension in performance with respect to service contracts (such as construction) can only be undertaken if a defect in performance is significant, with termination possible, after the passage of an appropriate time period48.

These parallels between the common law approach and that of the civil law are self-evident; the limits, however, are not necessarily so. For example, this balanced approach to reciprocal contractual obligations is not embraced under the common law either with respect to contracts of sale involving goods or real property. There, the so-called "perfect tender" rule continues in force, with alternative legal doctrines and approaches available to mitigate against the harshness of forfeitures arising from defective performance49. Equally significant, however, is that both the common and certain civil law approaches tend to blur the dividing line between suspension and termination of contractual obligations because of defective performance. In a sense, then, there is some evidence of systemic efforts to seek justice by sacrificing predictability in the law through dependence upon a case by case factual determination to strike the ultimate balance over when defect turns from excuse to failure in the performance of reciprocal contractual obligations50.

The difficulty that arises from the lack of a "bright-line" test is well exemplified by the ICSID arbitral dispute between Klöckner and Cameroon. As is well-chronicled51, the *Exceptio* was of central importance in that case. Although the tribunal concluded that the applicable law should be the civil and commercial law applicable in Cameroon (based upon the French law)52, in an obiter dictum the arbitrators nevertheless observed that English law and international law reached a similar conclusion. Through a "commercial reality" analysis, the Tribunal evaluated the reciprocal obligations as a single legal relationship despite the existence of separate and successive instruments governing the rights and obligations of the parties.
Ultimately, an ad hoc committee chaired by Professor Lalive annulled the award because, *inter alia*, the Tribunal failed to state reasons why the *Exceptio* could be applied, as it was in the award, to extinguish rather than suspend obligations. The committee determined that the French authority relied upon by the Tribunal did not necessarily lead to this conclusion; nor did the result correspond to the ad hoc committee’s understanding of the *Exceptio*. The delineation of the *Exceptio* under French law reported herein, further confirms the validity of the ad hoc committee's pronouncement in this regard.

Still, the Tribunal's observation regarding the *Exceptio*'s application under international law is worth exploring briefly. There are, in fact, numerous expressions of the doctrine *exceptio non adimpleti contractus* found in the sphere of public law - both municipal and international. For example, the 1958 constitution of the French Fifth Republic states in Article 55: "[T]reaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of Laws, subject, for each agreement or treaty, to its application by the other party". With respect to public international law, in the *Diversion of Water from the Meuse*, a P.C.I.J. 1937 case, Judge Anzilotti stated in his dissenting opinion:

> I am convinced that the principle underlying this submission (in adimpleti non est adimplendum) is so just, so equitable, so universally recognized, that it must be applied in international relations also. In any case, it is one of these 'general principles recognized by civilized nations' which the Court applies in virtue of Article 38 of its Statute.\(^5\)

Lastly, it is important to mention in this regard that particular applications of the principle of the *exceptio non adimpleti contractus* are to be found in Article 71 of the 1980 Vienna Sales Convention on the International Sale of Goods\(^5\). Thus, there is at least some evidence from which to conclude that the Tribunal in the *Klöckner v. Cameroon* arbitration did not seem to overstate the recognition of the *Exceptio* in their dicta concerning international law, however misguided their substantive application of the doctrine may have been.

### III. CONCLUSION

If one accepts the premise that a new *lex mercatoria* exists and, further, depending upon how rigorous a standard one employs in gauging the admission of rules into that *lex*, it does appear that the *exceptio non adimpleti contractus* - if not with its own conditions of operations as elaborated upon in civil law systems, then as a rule of balance in reciprocal obligations - is to be considered to form part of the "general principles of law," which, in turn, are considered to form an important element of the controversial new *lex mercatoria*. The *Exceptio* or its substantial equivalent are found in several different legal traditions, as well as in the public law. The unifying and essential elements of the doctrine that consistently pervade its somewhat varied formulations is a similarity in (i) the conditions of operations - namely, the failure of substantial performance; (ii) its effect - that is, the suspension, not resolution or termination of the obligation to perform; (iii) the lack of a notice requirement - albeit in circumstances where the provision of such notice as a doctrinal requirement could help establish non-performance of the claimant, good faith of the respondent, and eliminate common law evidentiary considerations of "waiver by inaction"; and (iv) the manifest importance of equity - historically and once again a key component in the establishment as well as development of the old and new *lex mercatoria*.

4 Accord, Mustill, supra note 1, at p. 93.
5 See, e.g., Lando, "The Lex Mercatoria and International Commercial Arbitration", 34 International & Comparative Law Quarterly 747, 749-51 (1985) [listing Public International Law; Uniform Laws; General Principles of Law; the Rules of International Organizations; the Custom and Usage of some trades; Standard Form Contracts or terms thereof (e.g. force majeure and hardship); and reported Arbitral Awards]. See also, Mustill, supra note 1, at p. 109 (adding to Lando's list the public policy of the country from which the enforcement of the award is likely to be requested).
might impose an obligation to act. A notice requirement could also help prove the defendant's good faith and help serve to dispel evidentiary issues of whether a "waiver" by silence or inaction occurred in circumstances where, for example, the common law might impose an obligation to act.

6 See, e.g., Lowenfeld, supra note 2, at pp. 134-137.
7 Accord, Mustill, supra note 1, at pp. 87-93. See also, P. Boden, "A Preliminary Report on the Applicability of Transnational Rules and International Commercial Arbitration" (unpublished manuscript) at pp. 4-8.
8 Accord, Mustill, supra note 1 at pp. 110-114.
9 See ibid at p. 92. See also A. Redfern & M. Hunter, Law and Practice of International Commercial Arbitration 84-87 (1986) (Discussion of general principles of law as a valuable source of law and warning against their application to the exclusion of all national law).
11 See generally, H. Berman and C. Kaufman, supra note 2, at pp. 224-229 and 273-274.
13 See note 3, supra.
15 See P. Boden, supra note 7 at p. 9.
16 Accord, Cremades and Plehn, supra note 10, at pp. 337-38.
17 In the United States, for example, the Exceptio is defined as "[a]n exception in an action founded on a contract involving mutual duties or obligations, to the effect that the plaintiff is not entitled to sue because he has not, performed his own part of the agreement." Black's Law Dictionary at p. 666 citing MacKeldy, Roman Law, §394.
21 French influence has been very important in the development of legal systems in continental Europe and, derivatively through the Spanish and Portuguese colonial influence, in the majority of Latin American Countries as well. Further, the French influence was critical in the "modernization" of the legal system of the Ottoman Empire and, subsequently, a number of Islamic and Arab countries as well. Finally, the role of French and German influences is well known in the shaping of the modern Japanese legal system.
22 Article 1612 reads in translation: "The seller is not bound to deliver the thing if the buyer fails to pay the price, and the seller has not granted him an extension of time for payment"; and Article 1653 reads: "If the buyer is threatened or has good cause to fear the threat of an action, either to enforce a mortgage or for recovery of possession, he may suspend payment of the price until the seller has ended the threat, unless the latter prefers to give security, or unless it has been stipulated that the buyer shall pay not withstanding the threat".
23 Article 1704 reads in translation: "If one of the parties to a barter agreement has already received the thing given to him in exchange, and he proves subsequently that the other party is not owner of that thing, he cannot be compelled to deliver the thing he promised in exchange, but only to return what he received".
24 Article 1948 reads in translation: "The bailee may retain the deposited object until the full payment of what he is due for his custody".
28 Civ. 5 mai 1920, D.P. 1926.1:37. A critique to such a theory can be found in Toureau, note J.C.P. 1977 11.
29 See Reg. 17 mai 1938 D.H. 1939, 419.
31 On self-help in general, see Beguin: "L'adage 'nul ne peut se faire justice a soi-même' en droit français" in Travaux de l'Association Henri Capitant (1969).
32 On the difference between "resolving" and the exceptio non adimpleti contractus, see Ghestin, note D. 1973. 473.
33 See N. Catala-Franjou, "De la nature juridique du droit de rétention" in Rev. Trim. dr. civ. (1967).
34 On the importance of this distinction, see Huet, supra, note 26, at p. 310.
35 See, Com. 27 Janv. 1970, J.C.P. 1970 II. 16554. However, we note that serving notice upon a plaintiff would help establish the latter's non-performance since the party opposing the "Exceptio" is required to prove his co-contractor's non-performance. A notice requirement could also help prove the defendant's good faith and help serve to dispel evidentiary issues over whether a "waiver" by silence or inaction occurred in circumstances where, for example, the common law might impose an obligation to act.
36 Article 320 (Plea of unperformed contract) states: (1) “[w]hoever is bound by a mutual contract may refuse to perform his part until the other party has performed his part, unless the former party is bound to perform his part first. If the performance is to be made to several persons, the part due to one of them can be refused until the entire counter-performance has been effected. The provision of §273(3) does not apply. (2) If one side has performed in part, the counter-performance may not be refused to the extent that the refusal would be, in the circumstances, contrary to good faith, especially in view of the disproportionate triviality of the remaining part”. Article 321 (Deterioration of property) states: “[i]f a person is obliged by a mutual contract to perform his part first, he may, if after the conclusion of the contract a significant deterioration in the financial position of the other party occurs whereby the claim for the counter-performance is endangered, refuse to perform his part until the counter-performance is made or security is given for it. The German Civil Code (Forrester, Goren and Ilgen Translators) at p. 52 (Rothman 1975).

37 Article 1460 (defense based upon non-performance) states: “[I]n contracts providing for mutual counter-performance, each party can refuse to perform his obligation if the other party does not perform or offer to perform his own at the same time, unless different times for performance have been established by the parties or appear from the nature of the contract. However, performance cannot be rejected if, considering the circumstances, such rejection is contrary to good faith (1371). Article 1469 (change in patrimonial conditions of contracting parties) states: “[E]ach party can withhold the performance due by him, if the patrimonial conditions of the other party have become such as obviously to endanger fulfillment of the counter-performance, unless adequate security is given.” The Italian Civil Code, at pp. 65-66 (Oceana 1991).

38 Celui qui poursuit l'exécution d'un contrat bilatéral doit avoir exécuté ou offrir d'exécuter sa propre obligation, à moins qu'il ne soit au bénéfice d'un terme d'après les clauses ou la nature du contrat. See generally, P. Engel Traité des Obligations en Droit Suisse § 188 ("l'Exception de l'Inexécution (Exceptio non adimpleti contractus") at pp. 443-44 (Neuchatel 1973).

39 See generally, N. Coulson, Commercial Law in the Gulf States: The Islamic Legal Tradition (London 1984) and J. Schacht, An Introduction to Islamic Law (Oxford 1964). However efforts to elaborate what would amount to a general theory of contracts in Islamic Law have been attempted. See, e.g., C. Chehata, Essai d'une Théorie Générale de l'Obligation en Droit Musulman (Cairo, 1936).

40 See Ibib.

41 99 English Reports 437 (K.B. 1773).

42 See Farnsworth, On Contracts, § 8.9 at p. 605.

43 See generally Chitty on Contracts, §§ 1723-1727 at pp. 1086-1088.

44 126 English Reports 160 (K.B. 1777) (Mansfield, J.).

45 See Farnsworth, supra note 44, at § 8.12 at p. 616.

46 See, ibid.

47 See Restatement of Contracts (Second) at §237.

48 See, generally, Farnsworth, supra 2 note 44, at §814 at pp. 632-634. See also ibid. at §8.16 at p. 638 (Material Breach and Suspension) ("In order for a breach to justify the injured party's suspending performance, the breach must be significant enough to amount to a non-occurrence of a constructive condition of exchange. Such a breach is termed substantial. Substantial performance is performance without a material breach, and a material breach results in performance that is not substantial.").

49 There are a variety of approaches available under the common law, ranging from restitution to the divisibility of contracts (see generally Farnsworth, supra note 46, at §§ 813 and 814), as well as the right of cure in installment contracts covering the sale of goods. See, e.g., UCC §§ 2-508; 2-608; and 2-612. See also Farnsworth at §8.17.

50 See, e.g., Jacobs & Young v. Kent, 230 N.Y. 239 (1921) (Cardozo, J.).


52 See Award at pp. 104-105.

53 P.C.I.J., Case of diversion of water from Meuse, 28 June 1937, Ser. A/B no 70, p. 50.


Referring Principles:

V.1.4 - Principle of simultaneous performance; right to withhold performance