

INTERNATIONAL COMMERCIAL ARBITRATION, ANTICIPATORY REPUDIATION, AND THE *LEX MERCATORIA*

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I. INTRODUCTION

Despite much attention¹ to the *lex mercatoria*,² international commercial arbitration remains under-analyzed as a venue for establishing a private, transnational contract law.³ The *lex mercatoria* is a supranational legal system consisting of international commercial usages and of principles and rules common to most nations.⁴ This Note considers a specific issue of substantive contract law in international commercial arbitration: anticipatory repudiation (also called anticipatory breach).⁵ Under the *lex mercatoria*, when will an arbitral tribunal accept the non-breaching party's right to terminate the contract and make a claim for damages before the time of performance? In domestic laws, anticipatory repudiation is governed by different, yet defined doctrines developed through

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¹ See, e.g., JH Dalhuisen, *Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and Its Lex Mercatoria*, 24 BERKELEY J. INT'L L. 129 (2006); KLAUS BERGER, *THE CREEPING CODIFICATION OF THE NEW LEX MERCATORIA* (Kluwer Law Int'l 1999); Sir Michael Mustill, *Contemporary Problems in International Commercial Arbitration*, 17 INT'L BUS. L. 161 (1989).

² One notable commentator has defined the *lex mercatoria* as "the combined perspective of comparative law, usages, customs and practices of international commerce and trade" that has lead "to the evolution of transnational legal principles, rules and standards which are applied in practice in order to arrive at economically sensible solutions to transnational commercial disputes." BERGER, *supra* note 1, at 2.

³ For the purposes of this Note, the terms "international private law" and "transnational law" are both synonymous with the *lex mercatoria*.

⁴ See generally BERGER, *supra* note 1.

⁵ An anticipatory breach occurs when "a party to a contract absolutely and unequivocally expresses an intention—expressly or tacitly—not to perform, or when it becomes otherwise clear, after the conclusion of the contract, that there will be a fundamental non-performance, the other party may terminate the contract." 1 JOSEPH CHITTY ET AL., *CHITTY ON CONTRACTS* § 7.24.2 (London 2004).

case law.⁶ However, it remains unclear which doctrine (if any) governs in the context of international private law. While the provisions in the United Nations Convention on Contracts for the International Sale of Goods (the “CISG”)⁷ and the UNIDROIT⁸ Principles of International Commercial Contracts (the “UNIDROIT Principles”)⁹ have offered guidance, listings of general principles are prone to over-simplification and may not accurately reflect the *lex mercatoria*. Thus, this study turns to the application of anticipatory repudiation by international arbitrators to elaborate on the subtleties of the doctrine under the *lex mercatoria*. Accordingly, this Note assumes the validity of the *lex mercatoria* as a substantive legal standard.¹⁰

Much of the criticism of the *lex mercatoria* derives from its inherent opaqueness due to being ill-defined—unsupported by a body of case law.¹¹ Especially in the arbitration context where decisions lack binding authority, the *lex mercatoria* is constantly in danger (or so it is argued) of suffering from capricious application.¹² Accordingly, this Note argues that, in order for a coherent doctrine of anticipatory breach under the *lex mercatoria* to solidify, arbitral tribunals must respect and build from prior awards concerning the doctrine in order to maintain the harmonization, consistency, and uniformity legal rules require. Because of this, when

⁶ *Id.*

⁷ UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980), available at <http://cisgw3.law.pace.edu> (last updated Sept. 2003) [hereinafter CISG]. Art. 72(1) (“If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.”); art. 73 (“If one party’s failure to perform any of his obligations in respect of any installment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future installments, he may declare the contract avoided for the future.”).

⁸ INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994), available at <http://www.unidroit.org/english/principles/contracts/principles1994/1994fulltext-english.pdf> [hereinafter UNIDROIT Principles].

⁹ *Id.* at art. 7.3.3 (“Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract.”).

¹⁰ See Michael Pryles, *Application of the Lex Mercatoria in International Commercial Arbitration*, 18 INT’L ARB. REPORT 21 (2003) (arguing that when the *lex mercatoria* governs, “a transnational standard is selected”); but see L.J. Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, 4 ARB. INT. 86 (1988).

¹¹ See generally Mustill, *supra* note 1; see also Keith Highet, *The Engima of the Lex Mercatoria*, 63 TUL. L. REV. 613, 618 (1989) (The *lex mercatoria* is “a sort of shadowy, optional, aleatory, international commercial congeries of rules and principles.”).

¹² Thomas Schultz, *Some Critical Comments on the Juridicity of Lex Mercatoria*, 10 Y.B. PRIV. INT’L L. 667 (2008).

tribunals adjudicate anticipatory breach claims under the *lex mercatoria*, they must “identify rules and principles by means of a certain method.”¹³ In other words, the adjudications must fall within a specified analytical process. For “the *lex mercatoria* means more than [just applying] equity in the sense that the former includes more variable elements than equity, and in a given situation the application of the *lex* may prevail over equity.”¹⁴ Thus, tribunals should not act merely as amiable composition,¹⁵ for when applying the *lex mercatoria*, tribunals necessarily use “a body of rules that might be applied in any arbitration.”¹⁶ This will not only increase consistency and foreseeable results, but also maintain the integrity of the doctrine of anticipatory breach as a distinct legal *standard*.¹⁷ Thus, should tribunals rely too heavily on equity, the proper inquiry into the “substantive objectives”¹⁸ of the standard will veer into one concerning “fairness.”¹⁹

The point is not that tribunals should be unduly rigid in their application, but rather should rely predominantly on the doctrine as formulated under the *lex mercatoria* and only apply equity to the extent necessary to be consistent with international norms,²⁰ and/or resolve issues tribunals believe are not covered by the *lex mer-*

¹³ *Id.* at 673.

¹⁴ Abul F.M. Maniruzzaman, *The Arbitrator’s Prudence in Lex Mercatoria: Amiable Composition And Ex Aequo Et Bono in Decision Making*, 18 MEALEY’S INT’L. ARB. REP. 1, 2 (2003).

¹⁵ “Traditionally, amiable composition simply provided an equity correction . . . to the strict rules of law applicable to a dispute. Today, the concept of amiable composition remains quite similar. Such power apparently permits an arbitrator to depart from the strict application of rules of law and decide the dispute according to justice and fairness, when necessary.” Karyn S. Weinberg, Note, *Equity In International Arbitration: How Fair is “Fair”? A Study of Lex Mercatoria and Amiable Composition*, 12 B.U. INT’L L. J. 227, 231 (1994) (internal quotations omitted).

¹⁶ *Id.* at 232.

¹⁷ See generally Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 28–29 (1967) (“Sometimes a rule and a principle can play much the same role, and the difference between them is almost a matter of form alone. . . . Words like ‘reasonable,’ ‘negligent,’ ‘unjust,’ and ‘significant’ often perform just this function. Each of these terms makes the application of the rule which contains it depend to some extent upon principles or policies lying beyond the rule, and in this way makes that rule itself more like a principle. But they do not quite turn the rule into a principle, because even the least confining of these terms restricts the *kind* of other principles and policies on which the rule depends.”) (emphasis in original).

¹⁸ Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976).

¹⁹ Arbitration and Mediation Centre of Paris [CMAP] Case No. 9246 (1996), 12 Y.B. Comm. Arb. 28, 30 (1997) (emphasizing that the *lex mercatoria* is a “body of *rules* of international commerce which have been developed by practice”) (emphasis added).

²⁰ For instance, one way in which any doctrine under the *lex mercatoria* will differ from a common law system is that “the principle of *pacta sunt servanda* [is regarded as] the essence of all [international] contract law.” Dalhuisen, *supra* note 1, at 180.

catoria.²¹ “Thus the normative content of the *lex mercatoria* may not only consist of law but also equity, natural justice principles and other standards of fairness as are objectively tailor-made and fashioned for the particular situations and circumstances.”²² Nonetheless, “[i]n the award of equitable remedies there is often an element of discretion, but never a discretion that is absolute or arbitrary. In equity as at law there are signposts for the traveler.”²³ Should tribunals stray too far from a concrete application, any semblance of a doctrine will be rendered inoperable.

The *Raincoat* case illustrates this danger.²⁴ In this dispute, buyer and seller entered into an installment contract for six deliveries with corresponding payments. The contract specified, among other things, that “[r]easonable differences of material, weight, size, design and color are permissible.”²⁵ “Reasonable” was defined as not exceeding fourteen defects among every 10,000 raincoats.²⁶ The first five installments were outside this scope of reasonableness. However, “after negotiations, the parties agreed to solve the issue by reducing the unit price of the goods.”²⁷ Furthermore, the buyer requested the seller to ship the final installment on May 11, 1998.²⁸ On May 29, however, the buyer informed the seller that, due to the unreasonable defects in the first five installments, it refused to open a letter of credit for the final installment.²⁹ The seller responded, imploring renegotiations; the buyer acquiesced.³⁰ Finally, after quality issues were not ameliorated, the buyer again refused to open a letter of credit prompting the seller to initiate arbitration.

During the arbitration, the buyer argued that the seller’s *prior* fundamental breaches amounted to an anticipatory breach and,

²¹ The U.C.C. instructs a similar solution, for section 1-103 states that unless specifically displaced by the provisions of the Code, “the principles of law and equity, including the law merchant . . . shall supplement its provisions.” U.C.C. § 1-103 (2006).

²² Maniruzzaman, *supra* note 14, at 4.

²³ *Evangelical Lutheran Church v. Sahlem*, 254 N.Y. 161, 167 (1930).

²⁴ China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Award (*Raincoat Case*) (August, 10 1999), available at <http://cisgw3.law.pace.edu/cases/990810c1.html> (last visited Jan. 29, 2013).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Award (*Raincoat Case*) (August, 10 1999), available at <http://cisgw3.law.pace.edu/cases/990810c1.html> (last visited Jan. 29, 2013).

³⁰ *Id.*

thus, it was not required to perform any further obligation (in this instance, open a letter of credit). Finding that CISG³¹ was the substantive law of the contract, the tribunal correctly noted that the buyer had waived any claim of anticipatory breach (regarding the first five installments) once it had successfully renegotiated with the seller and then placed an order for the final shipment.³² It also rightly concluded that seller waived any claim that buyer expressly repudiated on May 29 since subsequently both parties successfully renegotiated.³³ Thus, the tribunal appropriately narrowed the inquiry of liability to the final installment. It is here that the tribunal inappropriately applied a nebulous form of equity. The buyer's other argument for not opening a letter of credit for the final installment was that 10,000 out of the 31,100 raincoats were defective. Yet, because the buyer "did not arrange to inspect the other 21,000 raincoats . . . The [buyer] could not conclude that none of the 31,000 raincoats was qualified." Furthermore, "neither party took active remedial measures as to the defective 10,000 raincoats, nor did they inspect the remaining goods."³⁴ Thus, the tribunal held that, since both parties were at fault, the buyer should compensate the seller for 50% of the loss of anticipated profits.

This award is problematic as a matter of doctrine and may only be explained by conjecture that the tribunal felt this outcome equitable. First, under the contract, the seller "was obliged to provide inspection certificates for the goods exported."³⁵ The buyer had no affirmative duty to inspect the goods. Second, *a fortiori*, nearly one-third of the goods were already found defective. Surely this constitutes a fundamental breach absolving the buyer of any further obligation. The impression one gets is that the buyer's refusal to renegotiate the final installment, unlike the previous defective installments, became dispositive for the tribunal. In other words, the tribunal inferred that, because of past conduct, the buyer had an affirmative duty to conciliate with the seller despite

³¹ The CISG as an expression of the *lex mercatoria* is discussed *infra*, at Part I, Sec. C(1).

³² CISG, *supra* note 7, art. 72(2) ("If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party *in order to permit him to provide adequate assurance of his performance.*") (emphasis added). In other words, implicit in the tribunal's rejection of the buyer's claim is that the renegotiations and subsequent order manifested that adequate assurances were given to preclude an anticipatory breach claim concerning the first five installments.

³³ China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Award (Raincoat Case) (August, 10 1999), *available at* <http://cisgw3.law.pace.edu/cases/990810c1.html>.

³⁴ *Id.*

³⁵ *Id.*

lacking a contractual basis for this imposition.³⁶ Such a finding individualizes the doctrine and vitiates the requisites (harmonization, consistency, and uniformity) for a coherent anticipatory breach standard under the *lex mercatoria*. Fortunately, as illustrated below, it appears that a majority of tribunals have moved away from the *Raincoat* case's ad hoc approach to a standardized application rooted less in equity and more in legal standards.

The scope of this Note is thus two-fold: (1) to delineate the doctrine of anticipatory breach as it is currently under the *lex mercatoria*; and, (2) to evaluate and argue for its consistency in application by international arbitral tribunals. Section I-A discusses when arbitrators will choose to apply the *lex mercatoria* as the substantive law of the dispute. Section I-B explains the doctrine of anticipatory repudiation and discusses its inherent ambiguity. Section I-C assesses the role of the CISG and the UNIDROIT Principles as a manifestation of the *lex mercatoria*. Section II-A explores the severability issue and an arbitrator's competence to hear anticipatory repudiation claims in international commercial arbitration. Section II-B considers the nature of fundamental breach in international commercial arbitration under the *lex mercatoria*. Section II-C considers when a tribunal will hold that "it is clear" that a fundamental breach will occur, thus warranting termination. Section III discusses the inconsistency in the issuance of damages. Section IV ties these findings together and considers them as an expression of the new *lex mercatoria*. This section also contains concluding remarks concerning the parameters of anticipatory repudiation under the *lex mercatoria*.

Before proceeding, a cautionary note is necessary. Language is inherently deficient as a conveyor of thought. For, a "word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."³⁷ Accordingly,

³⁶ Aside from the harm this manner of adjudicating does to harmonization, it also violates a fundamental principle of international arbitration: that the terms of the contract govern the dispute. See, e.g., International Chamber of Commerce [ICC] Award No. 16655 (2012), 4 INT'L. J. OF ARAB ARB. 125, 170 ("The sole arbitrator further recalls that as a general principle in international private law, the *lex contractus* is predominant and supersedes any other criterion."). Thus, since the *lex contractus* here commanded that the breaching party must compensate for lost profits "suffered by the other party as a consequence of the breach," the tribunal overstepped its authority. CISG, *supra* note 7, art. 74. The buyer, here, did nothing to cause the breach regarding the final installment. At most, it refused to renegotiate to help the seller amend its breach.

³⁷ *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

even in cases where “words seem plain and clear and unambiguous . . . One who makes this statement has of necessity already given the words an interpretation—the one that is *to him plain and clear*; and in making the statement he is asserting that any different interpretation is ‘perverted’ and untrue.”³⁸ It follows that these observations are doubly true concerning translations. Since many of the arbitral awards analyzed in this paper have been translated into English, it is only fair to say that a word’s “plain” meaning for the average English-speaker may not have been the arbitrator’s intent, but rather a result of the lacunae between languages, ineloquence, or both.

II. ANTICIPATORY REPUDIATION AND THE *LEX MERCATORIA*

A. *When the Lex Mercatoria Governs*

As a creature of contract, it is a fundamental principle of arbitration that the parties are free to choose the applicable law(s) governing the arbitration.³⁹ Accordingly, parties in an international arbitration

may make a choice of a law to govern their commercial bargain, of a law to govern their arbitration agreement, and of a law to govern the procedures in any arbitration held under that agreement. In theory at least . . . the parties [can] choose a different law for each of these purposes.⁴⁰

As such, an arbitrator’s discretion to apply the *lex mercatoria* is limited, in most circumstances, to the parties’ choice. Furthermore, an arbitrator will also take into consideration whether such a choice may prompt a national court to set aside the award.⁴¹ In other words, an arbitrator may choose not to use the *lex mercatoria* if there is a chance that a national court having jurisdiction over the arbitration may not recognize the *lex mercatoria*’s validity.⁴²

³⁸ Arthur Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 187 (1965).

³⁹ See European (Geneva) Convention on International Commercial Arbitration, Art. VII; I.C.C. Rules of Arbitration, art. 31 (2012).

⁴⁰ *Union of India v. McDonnell Douglas Corp.*, 2 Lloyd’s Law Rep. 48 (Q.B. 1993).

⁴¹ See generally ICC Award No. 5505 (1987), 13 Y.B. Comm. Arb. 110 (1988).

⁴² N.Y. Convention Art. V(1)(a) authorizes a contracting state to refuse to enforce an award if the arbitration agreement “is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.”

In the most obvious case, when the parties specifically choose the *lex mercatoria*, a tribunal will apply it barring the problems alluded to above.⁴³ This includes references to “general principles of law”⁴⁴ or “international principles.”⁴⁵ Even in England, “a jurisdiction traditionally strongly opposed to the application of transnational rules,”⁴⁶ it is recognized that the parties are free to choose transnational rules as the applicable law.⁴⁷ Assuming for the moment that the CISG, as pertaining to anticipatory repudiation, is an accurate expression of the *lex mercatoria*, one may presume that whenever a signatory nation’s laws are expressly chosen, the *lex mercatoria* will be applied. This is because, in the prevailing opinion,⁴⁸ “reference to the substantive law of a country implies reference to treaties ratified by that country.”⁴⁹

Other circumstances occur, where the *lex mercatoria* will be chosen as the substantive law, when the parties are silent as to the choice of law and the tribunal finds applying transnational law to be the most equitable.⁵⁰ Indeed, tribunals subject to the China International Economic and Trade Arbitration Commission (“CIETAC”) are mandated to “render a fair and reasonable arbitral award . . . with reference to international practices.”⁵¹ How-

⁴³ Emmanuel Gaillard, *Use of General Principles of International Law in International Long-Term Contracts*, 27 INT’L BUS. L. 214, 217 (1999) (“When the parties have chosen to have their contractual relationship . . . governed by general principles of international law by referring . . . to general principles of international law, principles common to certain legal systems, *lex mercatoria*, etc., the arbitrators are bound to give effect to that choice, whether or not they consider the choice appropriate.”).

⁴⁴ See ICC Award No. 12111 (2003), available at <http://www.unilex.info/case.cfm?id=956> (last visited Dec. 2, 2012).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Sec. 46 of the English Arbitration Act 1996: “(1) The arbitral tribunal shall decide the dispute—(a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.”

⁴⁸ TIBOR VARADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 706 (5th ed. 2011).

⁴⁹ *Id.*

⁵⁰ See generally ICC Award No. 13012 (2004), available at <http://www.unilex.info/case.cfm?id=1409> (last visited, Nov. 2, 2012) (“Whereas in situations where the parties did not select the material law governing their agreement, arbitrators have frequently filled up this lacuna by a recourse to the general principles of law or *Lex Mercatoria*.”); Norsolor S.A. v. Pabalk Ticaret Sirketi S.A., 24 Int’l Legal Materials 360 (Cour de Cassation, 1984); Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?* 14 AM. U. INT’L L. REV. 657 (1999).

⁵¹ CIETAC Arbitration Rules, art. 47(1).

ever, not all legal systems encourage this discretion.⁵² Furthermore, some conflict-of-laws principles negate using the *lex mercatoria*. For instance, an arbitrator might hold that in a contract of sale, “it is the seller who, in the absence of special circumstances pointing to the contrary, renders the performance most characteristic of the contract . . . [C]ontracts of sale are therefore in general governed by the domestic law of the seller.”⁵³ This discretion is further limited by the practice of imposing the *lex fori*’s⁵⁴ laws where the arbitration is held, absent specific mandate in the contract, despite academic criticism.⁵⁵ Nonetheless, “most national laws . . . do not permit the arbitrator’s decision on applicable law to be subject to review of state courts during *exequatur* proceedings or an action to set aside the award, thus providing arbitrators with a large degree of latitude.”⁵⁶

Finally, the *lex mercatoria* may be used as a gap-filler if the chosen substantive state law does not cover the dispute. For instance, recently, the Swiss Supreme Court upheld a decision by an arbitral tribunal to use the CISG and UNIDROIT Principles when deciding if a “material breach” occurred even though the arbitration clause stipulated the use of Swiss law, because the concept of “material breach” was not defined in Swiss domestic law.⁵⁷ Further, the Court upheld the Tribunal’s decision not to grant the parties the right to be heard concerning this decision because it found the use of the CISG and UNIDROIT Principles to have been foreseeable. This suggests broad discretionary powers for an arbitrator to decide: (1) if the dispute falls outside of the stipulated law and, if so, (2) to resort to general principles of international law. Of

⁵² See UNCITRAL Model Law Art. 28(2); NBI Final Award (1 August 2003), 29 Y.B. Comm. Arb. 133, 153 (2004) (“[O]ne may be tempted to take recourse in the ‘Lex Mercatoria’, which in practice is almost tantamount to making a decision as *amiable compositeur*. However, this latter type of decision is presently precluded by Art. 45(2) of the [Netherlands Arbitration Institute] Arbitration Rules.”).

⁵³ ICC Case No. 6149 (1990), 20 Y.B. Comm. Arb. 41 (1995).

⁵⁴ The *lex fori* refers to the particular laws of a given jurisdiction. See Albert A. Ehrenzweig, *Lex Fori-Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637 (1959).

⁵⁵ See generally Arthur Von Mehren & Eduardo Jimenez de Arechaga, *Final Report on Arbitration Between States and Foreign Enterprises*, 63 ANNUAIRE DE L’INSTITUT DE DROIT INT’L 193–96 (1989).

⁵⁶ Gaillard, *supra* note 43, at 218. See also CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIM TRIBUNAL* 637–38 (1998) (noting how the Tribunal applied the *lex mercatoria* where the dispute could not be resolved on the basis of the underlying contracts due to gaps or ambiguities).

⁵⁷ A (South Africa) v. B (U.S.A.), No. 4A 240/2009 (Swiss Supreme Court 2009).

course, the negative aspect of this principle may deter its use if the arbitrator finds that the dispute falls outside of the *lex mercatoria*.⁵⁸

Regarding construction of an arbitration clause, the parties “may submit an arbitration agreement to a law [or *lex arbitri*]⁵⁹ which is not the substantive law of the main contract.”⁶⁰ As a theoretical matter, most courts and scholars agree that the parties are free to choose the *lex arbitri*.⁶¹ Nevertheless, the parties are rarely explicit about such a choice; in the vast majority of cases, courts and arbitrators apply the *lex arbitri* of the place of arbitration.⁶² Thus, when determining whether the parties intended for the tribunal to adjudicate the merits under the *lex mercatoria*, the tribunal will most likely use the laws of construction of the place where the arbitration is located, absent contractual stipulation to the contrary. However, a general principle of construction can be stated as: “How [is the sentence in question] understood in good faith by a reasonable man active in the international trade?”⁶³ Nevertheless, issues such as parol evidence⁶⁴ are likely to be determined by the rules under the *lex fori* making any comprehensive statements on construction rules suspect.⁶⁵

B. *Anticipatory Repudiation Generally*

In defining anticipatory repudiation under the CISG, it is prudent to avoid reliance to domestic legal concepts, since the CISG itself reminds interpreters of its international character and calls

⁵⁸ See ICC Award No. 5505, 13 Y.B. Comm. Arb. at 113 (holding that the *lex mercatoria* contains no applicable unjust enrichment principle).

⁵⁹ One commentator lists the following issues as generally governed by the *lex arbitri*: (a) the parties’ autonomy to agree on substantive and procedural issues in the arbitration; (b) procedural issues; (c) appointment and removal of arbitrators; (d) extent of judicial supervision of, or interference in, the arbitration proceedings; (e) arbitrators’ liability and ethical standards; and (f) form and making of the award. GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY & MATERIALS 162 (1994).

⁶⁰ *Union of India*, 2 Lloyd’s Law Rep. at 52.

⁶¹ See VARADY ET AL., *supra* note 48, at 683.

⁶² *Id.*

⁶³ *Union of India*, 2 Lloyd’s Law Rep. at 55.

⁶⁴ Alberto Zuppi, *The Parol Evidence Rule: A Comparative Study of the Common Law, the Civil Law Tradition, and Lex Mercatoria*, 35 GA. J. INT’L & COMP. L. 233 (2007).

⁶⁵ Thus, when interpreting and constructing the arbitral provision, the *lex fori* of the seat of arbitration will generally be used, and, depending on such, may compel a tribunal to apply (or not apply) the *lex mercatoria* while another *lex fori*, if used, would compel the opposite result. See VARADY ET AL., *supra* note 48, at 706–08.

for a uniform interpretation and application of its provisions.⁶⁶ Accordingly, “the CISG should be interpreted autonomously and its interpretation should not depend on domestic legal concepts, neither of civil law nor common law origins.”⁶⁷ While this may be true, nevertheless, it is important to chart the doctrine as it has developed prior to the CISG, if only to illuminate its differences from domestic law.

Founded in Anglo-American case law, the doctrine of anticipatory repudiation (or breach) rests on the proposition that a non-breaching party to a contract can avoid the contract and sue for breach before performance becomes due if it is clear that the other party will not or cannot perform its obligations.⁶⁸ However, the doctrine has been cabined to exclude unilateral contracts and the repudiating party’s promise must not be solely for the payment of money.⁶⁹ This has not been without authoritative criticism.⁷⁰ The clearest case occurs when one party expressly states that he or she will not perform under the contract. In such a case, that party

cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured: and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option.⁷¹

In other words, the non-breaching party has a choice to sue when the express repudiation occurs or wait until the time that performance is due because the repudiation destroys the general right rec-

⁶⁶ CISG, *supra* note 7, at art. 7(1) (“In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”).

⁶⁷ Leonardo Graffi, *Case Law on the Concept of “Fundamental Breach” in the Vienna Sales Convention*, 3 *BUS. L. J.* 338, 338 (2003).

⁶⁸ See generally U.C.C. § 2-610; 23 *WILLISTON ON CONTRACTS* § 63:31 (4th ed.).

⁶⁹ See *Phelps v. Herro*, 137 A.2d 159 (Md. 1957).

⁷⁰ See, e.g., *New York Life Ins. Co. v. Viglas*, 297 U.S. 672, 680 (1936) (“The root of any valid distinction is not in the difference between money and merchandise or between money and services. What counts decisively is the relation between the maintenance of the contract and the frustration of the ends it was expected to serve.”); *Equitable Trust Co. of N.Y. v. W. Pac. Ry. Co.*, 244 Fed. 485, 501 (D.C.N.Y. 1917) (“Assuming as I do not mean to admit, that it has such limits, they result because the eventual victory of the doctrine over vigorous attack . . . has not left it scatheless.”); Arthur Corbin, 4 *CORBIN ON CONTRACTS* § 962, at 865 (1960) (“The harm caused to the plaintiff is equally great in either case; and it seems strange to deny to a plaintiff a remedy of this kind merely on the ground that he has already fully performed as his contract has required.”).

⁷¹ *Hochster v. De La Tour*, 2 El. & Bl. 678 (Queen’s Bench, 1853).

ognized to have the contract kept open and effective.⁷² Further, “there is little to be gained by requiring a party who will be injured to await breach before commencing suit, with the attendant risk of faded memories and unavailable witnesses.”⁷³ Finally, this option allows the non-breaching party to mitigate the damages caused by the repudiation.⁷⁴

Anticipatory repudiations may also occur where the breaching party manifests an inability to perform even without making an express repudiation. Courts usually limit the doctrine to apply only to instances where it becomes “clear”⁷⁵ that the breaching party will “substantially”⁷⁶ or “fundamentally”⁷⁷ breach when performance is due. The dividing line between breach and fundamental breach is an extraordinarily subtle one, and one which often defies definition. One commentator has persuasively argued that the “materiality threshold is crossed when the impairment of the interest in future performance is serious enough that a reasonable person would believe that cancellation was justified.”⁷⁸ American courts have predominately used a balancing test,⁷⁹ whereby, if the breach is so substantial that the contract’s purpose is frustrated and “where the significance of the default is [not] grievously out of proportion to the oppression of the forfeiture,” a breach will be viewed as “material.”⁸⁰

Equally challenging to define is when it becomes “clear” that a fundamental breach will occur. A German District Court of Berlin has held that “a strict test has to be applied in respect to the obviousness of a future breach of contract. However, it is not necessary to prove a degree of probability close to certainty. Rather, a very high probability, obvious to everybody, is required.”⁸¹ In other

⁷² *Frost v. Knight*, L.R. 7 Ex. 111 (1872) (Formation of a contract gives “immediately an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived, giving, in the meantime, a right to have the contract kept open as a subsisting and effective contract.”).

⁷³ *Rachmani Corp. v. 9 E. 96th Apartment Corp.*, 211 A.D.2d 262, 265 (N.Y. App. Div. 1995).

⁷⁴ See *McCloskey v. Minweld Steel Co.*, 220 F.2d 101 (3d Cir. 1955).

⁷⁵ See generally U.C.C. § 2-610, cmt.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Eric G. Andersen, *A New Look at Material Breach in the Law of Contracts*, 21 U.C. DAVIS L. REV. 1073, 1107 (1998).

⁷⁹ 23 WILLISTON ON CONTRACTS § 63:3 (4th ed.).

⁸⁰ *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 243–44 (1921).

⁸¹ District Court (*Landgericht*) Berlin, 99 O 123/92 (1992) (applying CISG), available at <http://cisgw3.law.pace.edu/cases/920930g1.html> (last visited Nov. 2, 2012).

words, an absolute certainty is not necessary. Another way of viewing this subtlety is in terms of an expectation interest—where a party’s reasonable expectation that the other party will perform has been sufficiently diminished, a repudiation has occurred.⁸² Needless to say, consideration of these imponderables has proved difficult for courts and tribunals, as enforcement of such vague standards requires subtlety of mind and solidity of judgment.⁸³

Finally, it is important to distinguish between a party’s present and future interests when dealing with damages. A present interest refers to the general interest in receiving proper performance.⁸⁴ But also, the “moment a contract is formed each party acquires an interest in the likelihood that the other will perform in the future as agreed.”⁸⁵ This latter interest is a party’s interest in future performance.⁸⁶ Although contract law protects both interests, the particular remedies available for each operate distinctly.⁸⁷ For breaches of present interests (non-material), compensatory damages are typically awarded to make the innocent party whole by compensating for the defective or missing performance.⁸⁸ However, when a material⁸⁹ breach occurs, and thus the innocent party’s interest in future performance is sufficiently impaired, that party is entitled to cancellation damages, which consists of: (1) the discharge of all remaining obligations of both parties, and (2) “any damage which has been sustained by reason of the nonfulfillment of the contract.”⁹⁰ Because anticipatory repudiation is a material breach that occurs *before* performance is due, it “always impairs only the interest in future performance.”⁹¹ Thus, “either the repudiation is material, justifying cancellation, or there is no breach at

⁸² See generally, Andersen, *supra* note 78.

⁸³ For a thorough discussion of these difficulties, see *Koompahtoo Local Aboriginal Land Council v. Sanpine Pty Ltd.*, 2007 HCA 61.

⁸⁴ See generally BURTON & ANDERSEN, *CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT* § 6.2, at 201 (1995).

⁸⁵ *Id.* at 202.

⁸⁶ See JOHN RAWLS, *A THEORY OF JUSTICE*, 346, 347 (1971).

⁸⁷ See generally BURTON & ANDERSEN, *supra* note 84, at § 6.2.3, at 207, 208.

⁸⁸ *Id.*

⁸⁹ Or, as used in this Note, “fundamental.”

⁹⁰ *Britton v. Turner*, 6 N.H. 481, 494 (1834). However, this is subject to the mitigation rule. Thus, the amount due the victim is reduced by any costs avoided or gains realized by the victim on account of the discharge of the contract. See also E. ALLAN FARNSWORTH, 2 *FARNSWORTH ON CONTRACTS* § 8.15, at 437 (1990).

⁹¹ BURTON & ANDERSEN, *supra* note 84, at § 6.3.1 at 211.

all. Compensatory damages, as distinct from cancellation damages, are never appropriate.”⁹²

C. *The Role of the CISG and UNIDROIT Principles*

Considerable progress toward formally establishing a private international law came with the implementation of the CISG, which aimed “to do for international sales of goods essentially what Article 2 of the Uniform Commercial Code did for sales within the U.S . . . to reduce legal uncertainties for international sales of goods.”⁹³ The CISG, which in form is an international treaty, is in substance a legal code that has been ratified by more than seventy nations.⁹⁴ The UNIDROIT Principles, much like the American Law Institute’s Restatements and Principles, “offers general principles and rules that are not binding law in any State.”⁹⁵ While not binding, the UNIDROIT Principles offer an elaboration on the CISG to better effectuate its principles and purpose by “promoting the modernization, harmonization, and uniformity of commercial law internationally”⁹⁶ through “developing and publishing collections of principles on private law topics.”⁹⁷ In practice, the UNIDROIT Principles have been used to elaborate on any lacunae found in the CISG.⁹⁸ Thus, for example, “the criteria laid down in Art.7.3.1 of the UNIDROIT Principles for the determination of whether or not there has been a fundamental breach of contract, may be used for a better understanding of the rather cryptic manner in which this important concept is defined in CISG.”⁹⁹

Regarding the texts as expressions of the *lex mercatoria*, Article 9 of the CISG directs arbitrators, who adjudicate under the

⁹² *Id.* at 211, 212.

⁹³ BURTON & EISENBERG, *CONTRACT LAW: SELECTED SOURCE MATERIALS ANNOTATED* 358 (5th ed. 2011).

⁹⁴ This includes the United States; however, while U.S. courts have treated the CISG as the “supreme law of the land” under U.S. Const., art. VI(2), the Supreme Court’s recent decision in *Medellin v. Texas*, 552 U.S. 491 (2008), renders this proposition less tenable. For more on the implication of the *Medellin* decision, see CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 45–49 (2013).

⁹⁵ Graffi, *supra* note 67, at 390.

⁹⁶ BURTON & EISENBERG, *supra* note 93, at 358.

⁹⁷ *Id.*

⁹⁸ Michael J. Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG: Alternatives or Complementary Instruments?*, 26 *UNIFORM L. REV.* 26, 37 (1996).

⁹⁹ *Id.* at 39.

treaty's provisions, to take into account "trade usages" when applying its provisions.¹⁰⁰ Trade usage, of course, is a key element of the *lex mercatoria*.¹⁰¹ The UNIDROIT Principles go further, in its preamble, by stating: "They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like."¹⁰² Thus, at least in the drafters' minds, the UNIDROIT Principles are an expression of the *lex mercatoria*. Nonetheless, for the purposes of this study, it is important to note that "no provision of the UNIDROIT Principles (or CISG) can be considered as a rule of the *lex mercatoria* before checking whether it is really in line with the standards of international trade."¹⁰³ Thus, there is a distinction between the texts, despite purporting to be a consolidation of international law, and principles truly representing the *lex mercatoria*. To be a part of the latter, a certain principle needs to reflect "an international consensus."¹⁰⁴

In the articles enunciating the anticipatory repudiation principles, both texts offer courts and tribunals guidance through similar, yet not identical language. The differences, as illustrated below, lead to different results. For instance, "[t]he CISG takes a more lenient approach to anticipatory breach than the UNIDROIT Principles in that it obliges the innocent party, when time allows, to notify the other party if it intends avoiding the contract, except where the other party has clearly declared its intention not to perform."¹⁰⁵ Nonetheless, the similarities outweigh the differences.¹⁰⁶ While analogous to the common law doctrine, "the serious effect [of the breach] on the other party must be foreseeable. This is not a criterion normally enunciated in American law."¹⁰⁷ Finally, both

¹⁰⁰ See CISG First Draft, A/CN.9/WG.36, art. 31(3) ("The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which they know or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.").

¹⁰¹ See generally BERGER, *supra* note 1.

¹⁰² UNIDROIT Principles, *supra* note 8, preamble.

¹⁰³ Fabio Bortolotti, *The UNIDROIT Principles and the Arbitral Tribunals*, 5 UNIFORM L. REV. 141, 145 (2004).

¹⁰⁴ ICC Award No. 7375 (1996), 11 Measley's Int'l Arb. Rep. 129 (1996).

¹⁰⁵ Sieg Eiselen, Official Comments on the UNIDROIT Principles (2002), available at http://www.cisg.law.pace.edu/cisg/principles/uni71,72.html#N* (last visited Nov. 02, 2012).

¹⁰⁶ Compare CISG, *supra* note 7, with UNIDROIT Principles, *supra* note 8.

¹⁰⁷ Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281, 304 (1994).

texts do little to help define when it is “clear” that a “fundamental” breach will occur.¹⁰⁸

The importance of the texts is in offering stability to international commercial law through the creation, in the words of the Restatements, of “default rules” should the parties agree to incorporate them. Thus, “a coherent set of rules emerges which, although incomplete, displays at least one of the essential characteristics of a legal order: more general rules give rise in turn to more specific rules.”¹⁰⁹ In other words, courts and tribunals can (and do) build from the texts and create the requisite case law that offers stability and foresight for the contracting parties. Much like the *lex mercatoria* itself, the texts offer the parties a neutral set of rules for the contract when they cannot agree otherwise. This is especially important “where one of the contracting parties is a government or state-owned concern in a country which itself has inadequate commercial”¹¹⁰ laws.

1. What the Tribunals have Held

Whether or not the CISG and/or UNIDROIT Principles are an articulation of the *lex mercatoria* and, thus, represent an “international consensus,”¹¹¹ is a question that myriad tribunals have answered in the affirmative. For example, in a dispute where a claimant argued that a defendant acted in bad faith by purposely trying to circumvent a licensing agreement, the tribunal, after finding that the parties had expressly chosen the *lex mercatoria* as the governing substantive law, invoked both the CISG and UNIDROIT Principles as accurate expressions of good faith and pertinent construction principles under the *lex mercatoria*.¹¹² Another tribunal went further by holding that the CISG and UNIDROIT Principles are “normative texts that can be considered helpful in their interpretation of all contracts of an international nature.”¹¹³ In an award concerning fundamental breach, a tribunal applied the UNIDROIT Principles where the substantive law of

¹⁰⁸ See Graffi, *supra* note 67, at 343.

¹⁰⁹ Gaillard, *supra* note 43, at 221.

¹¹⁰ Vivien Gaymer, *The UNIDROIT Principles as a Guide for Drafting Contracts: A View from an International Commercial Lawyer*, in UNIDROIT PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS: A NEW LEX MERCATORIA? 100 (1994).

¹¹¹ See Bonell, *supra* note 98, at 37.

¹¹² ICC Award No. 9875 (2000), available at <http://www.unilex.info/case.cfm?id=697> (last visited Nov. 19, 2012).

¹¹³ ICC Award No. 8908 (1998), available at <http://www.unilex.info/case.cfm?id=663> (last visited Nov. 19, 2012).

the contract was “the general principles of law and the general principles of equity commonly accepted by the legal systems of most countries.”¹¹⁴ Another tribunal applied the UNIDROIT Principles to adjudicate an anticipatory breach claim when the contract expressly chose the *lex mercatoria* as the governing substantive law.¹¹⁵ These awards suggest that the texts have been adopted into the *lex mercatoria* since their inclusion was premised on being “recognized as such by the business community and its arbitrators.”¹¹⁶ The arbitrators, so to speak, have spoken.¹¹⁷ It is also noteworthy that the parties, even after expressly choosing the *lex mercatoria* as the governing substantive law, acquiesced in the tribunals incorporating the CISG and/or UNIDROIT Principles. This consolidation around these texts is a welcome evolution as it provides the *lex mercatoria* with a greater degree of transparency.¹¹⁸

III. ANTICIPATORY REPUDIATION IN INTERNATIONAL COMMERCIAL ARBITRATION

A. Courts Upholding an Arbitral Award of Anticipatory Repudiation

As a preliminary matter, of course, a tribunal must have

¹¹⁴ ICC Award No. 9797 (2000), 15 Mealey’s Int’l Arb. Rep. 8 (2000), Doc A-1.

¹¹⁵ ICC Award No. 10422 (2001), available at <http://www.unilex.info/case.cfm?id=957> (last visited Dec. 1, 2012).

¹¹⁶ Hans Van Houtte, *The UNIDROIT Principles as a Guide to Drafting Contracts*, in UNIDROIT PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS: A NEW LEX MERCATORIA? 118 (1994).

¹¹⁷ *Ad hoc Arbitral Award* (San Jose, Costa Rica) (Apr. 30, 2001), available at <http://www.unilex.info/case.cfm?id=1100> (“[T]he UNIDROIT Principles . . . have been specifically conceived to apply to international contracts in instances in which . . . it has been found that the parties have agreed that their transactions shall be governed by general legal rules and principles.”).

¹¹⁸ ICC Award No. 4237 (1984), 10 Y.B. Comm. Arb. 54 (1985). See also Arthur Hartkamp, *The Use of the UNIDROIT Principles of International Commercial Contracts by National and Supranational Courts*, in UNIDROIT PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS: A NEW LEX MERCATORIA? 258 (1994) (“In my view it will often be difficult to assess the contents of . . . general principles without having recourse to internationally accepted rules and customs, broadly called ‘*lex mercatoria*.’ The UNIDROIT Principles will, it is hoped, develop into a significant part of this *lex mercatoria* and may in this way contribute to fill the gaps in the written international law.”).

kompetenz-kompetenz (competence)¹¹⁹ to hear an anticipatory repudiation dispute. At first glance, one may conclude that once a contract has been repudiated and the non-breaching party has elected to terminate, only a court may hear claims for damages since the contract is legally terminated—assuming there was a sufficient repudiation. However, much deference is now generally given to arbitrators to establish if there is a valid arbitration clause and their competence to hear the dispute.¹²⁰ If there is such a finding, courts will, generally, not set aside an award absent corruption, fraud, or undue means.¹²¹ Furthermore, allowing arbitrators to hear an anticipatory repudiation claim is consistent with the severability principle, which holds: “When the parties to an agreement containing an arbitration clause enter into that agreement they conclude not one but two agreements, the arbitral twin of which survives any birth defect or acquired disability of the principle agreement.”¹²² Thus, the Eleventh Circuit was correct in upholding the competence of an arbitration tribunal to decide future damages, not just past damages, in an anticipatory repudiation claim.¹²³ This is consistent with established arbitration principles and international comity.

¹¹⁹ “Kompetenz-kompetenz refers to an arbitral tribunal’s power to determine whether it has jurisdiction to decide a controversy.” Natasha Wyss, *First Options of Chicago, Inc. v. Kaplan: A Perilous Approach to Kompetenz-Kompetenz*, 72 TUL. L. REV. 351, 351 (1997).

¹²⁰ See *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. The Government of the Libyan Arab Republic*, 53 Int’l L. Rep. 389–409 (1979) (“International case law has continuously confirmed that arbitrators are necessarily the judges of their own jurisdiction . . . The writings of legal scholars unanimously recognize that arbitrators may decide their own jurisdiction.”).

¹²¹ See, e.g., Art. 1448 of the French New Code of Civil Procedure (2011) (“When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.”); *First Options of Chicago, Inc. v. Kaplan, Et UX. and MK Invs., Inc.*, 514 U.S. 938 (1994) (“[W]here a party has agreed to arbitrate, he or she, in effect, has relinquished much of [the right for the court to adjudicate the dispute]. The party still can ask a court to review the arbitrator’s decision, but the court will set that decision aside only in very unusual circumstances.”); see generally GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2333–34 (2009).

¹²² *Sojuznefteexport v. JOC Oil, Ltd.*, 15 Y.B. Comm. Arb. 384 (Court of Appeal of Bermuda) (1990).

¹²³ *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.*, 312 F.3d 1349 (11th Cir. 2002) (per curiam) (“The argument of MedPartners that the Agreement—under section G—permits arbitration only of controversies over past due amounts, and not future amounts, is unavailing. Where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach.”).

B. *Good Faith in International Commercial Arbitration*

A prominent way in which the doctrine of anticipatory breach differs under the *lex mercatoria* from the common law approach is that it is imbued with a good faith requirement. Tribunals readily hold that there is a positive obligation to act in good faith.¹²⁴ This is so even under the CISG which does not expressly mandate this obligation¹²⁵ because “good faith is a recognised principle of *lex mercatoria*, and is also provided for in the UNIDRIOT Principles.”¹²⁶ Of course, defining the parameters of good faith is more challenging than merely acknowledging its existence. Here, as with anticipatory repudiation, the decisive distinctions are those of degree and not of kind. However, it may be said that underlying this good faith obligation is the principle *pacta sunt servanda*.¹²⁷ In other words, so pervasive is this principle in international law that a party has a moral duty to keep its promise(s), that any perceived deviation is seen as a “failure to acknowledge the axis that regulates international trade” and will be adjudged as a breach.¹²⁸ Accordingly, it may be said that under the *lex mercatoria* a contractual relationship forms a marriage between the parties whereby their obligations to each other go beyond the stipulated terms, precluding them from depriving the other of the fruits of the common enterprise (i.e., the other’s expectation interest). In other words, the principle of good faith and fair dealing extends “to cover the parties’ conduct all the way through development of contract relations, starting from the holding of negotiations on making a contract and ending with steps on settlement of disagreements that arose in fulfillment of the contract.”¹²⁹ Thus, any deviation from

¹²⁴ See, e.g., ICC Award No. 5713 (1989), 15 Y.B. Comm. Arb. 70 (1990).

¹²⁵ CISG, *supra* note 7, at art. 7(1).

¹²⁶ Troy Keily, *Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)*, 3 VINDOBONA J. INT’L L. & ARB. 15, 25 (1999).

¹²⁷ This is generally understood as a *moral* obligation to keep a promise, rather than just a *legal* obligation. “According to this interpretation of the *pacta maxim*, then, the role of the law is to provide a state sanction for moral norms. This point, so obvious to civil lawyers, is much less so to anyone trained in the Holmesian tradition.” Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 VA. J. INT’L L. 405, 406 (1994).

¹²⁸ Dulces Luisi, *S.A. de C.V. v. Seoul Int’l Co. Ltd. y Seoulia Confectionery Co.*, 19 J.L. & COM. 265, 274 (2000).

¹²⁹ Arbitral Award 18 (2007), Russian Federal International Court of Arbitration, *available at* <http://www.unilex.info/case.cfm?id=1478> (last visited Jan. 12, 2013).

the mutual enterprise is generally seen as bad faith exacerbating the breach.¹³⁰

For example, in *ICC Award No. 9875*¹³¹ the claimant, a French company, and defendant, a Japanese company, entered into a license agreement giving claimant the exclusive rights to sell and distribute defendant's products in Europe. The dispute arose around a subsequent contract that the defendant entered into with a third-party that omitted a prohibition on sales to the European market. The claimant argued this was a fundamental breach. The tribunal agreed because it found evidence suggesting that the defendant knew that the third party's intention was to resell its goods in Europe. It reasoned that it is contrary to good faith "to do indirectly what the contract prevents from doing directly." In other words, while the defendant did not expressly breach the contract by selling directly to Europe, it infringed upon the claimant's expectation interest by selling to a third party that it knew would sell directly to Europe. It was thus violative of the mutual enterprise.

*ICC Award 8128*¹³² demonstrates how this affirmative good faith obligation is conjoined in the adjudication of separate claims, even when only an anticipatory breach is alleged. The dispute involved an installment contract where buyer was to supply a specialized "bag" for seller to "fill" with chemical fertilizers. Seller brought the action arguing, *inter alia*, that the buyer (1) gave it insufficient instruction to fulfill its obligation of providing a bag in accordance with the regulations of the chemical industry of the Ukraine, and (2) chose a supplier who was technically incapable of filling the bags with the contracted-for fertilizer. The seller argued, in defense, that the faulty performance of the supplier was not foreseeable and, thus, it could not rectify the impediment of performance. The tribunal, after finding the CISG governed, held that because it chose the supplier, the seller was "not exempt from lia-

¹³⁰ Professor Farnsworth, who participated in the drafting of the UNIDROIT Principles, equated good faith under the Principles to that of the civil law's conception. He explained the difference thus: "Civil law lawyers demonstrate an unsettling tendency to use the doctrine of good faith as a cloak with which to envelop other doctrines. While a common law lawyer would not combine the doctrine of good faith with that of unconscionability, it is not unheard of for a civil law lawyer to argue that a party who seeks performance of an unconscionable contract does not act in good faith." E. Allen Farnsworth, *Duties of Good Faith and Fair Dealing Under The UNIDROIT Principles, Relevant International Conventions, and National Laws*, 3 TUL. J. INT'L & COMP. L. 47, 60 (1995).

¹³¹ ICC Award No. 9875 (2000), available at <http://www.unilex.info/case.cfm?id=697> (last visited Dec. 1, 2012).

¹³² ICC Award No. 8128 (1995), 123 J. DU DROIT INT'L 1024 (1996).

bility due to [the supplier's] failure to perform."¹³³ In other words, the frustration doctrine is not a defense when the situation can be remedied by the obligor.¹³⁴ Before concluding that this amounted to a fundamental breach and, therefore, the buyer was entitled to terminate the contract voiding any future obligation(s) (hence the present breach was sufficient to "make it clear" that a future "fundamental" breach would occur), the tribunal addressed the seller's last defense: that the buyer suffered no damage since the bags remained free and ready to be filled at any moment. The tribunal responded that this was inconsistent with the principle of good faith under the CISG.¹³⁵ In other words, even if damages to the non-breaching party were minimal and/or nonexistent, the derivative principle of *pacta sunt servanda*, enshrined in international law's conception of good faith, obligates a party to actively fulfill its partner's expectation interest (where foreseeable). The fact that the non-breaching party may not suffer any tangible harm is irrelevant.

This is a stronger mandate than found in the common law, which loathes affirmative duties, and only requires, at most, that parties refrain from acting in bad faith without imposing obligations bordering that of a fiduciary. For instance, under American jurisprudence, breach of good faith is generally limited to instances where the breaching party has acted dishonestly¹³⁶ or tried to recapture a foregone economic opportunity.¹³⁷ Under English law, the doctrine is not explicitly recognized;¹³⁸ however, English law does seek to effectuate "the implication of terms,"¹³⁹ thus rendering this non-recognition moot.¹⁴⁰ The common law conception of good faith is best understood as excluding tortious-like behavior,¹⁴¹ as opposed to the imposition of affirmative duties under the *lex mercatoria*. Indeed, "[t]here is no general rule in the common law, either in the form of the *pacta* maxim or in any other form, that all

¹³³ *Id.* at 1025.

¹³⁴ This is, more or less, in accordance with the common law. See *Canadian Indus. Alcohol Co. v. Dunbar Molasses Co.*, 258 N.Y. 194 (1932).

¹³⁵ ICC Award No. 8128 (1995), 123 J. DU DROIT INT'L at 1026.

¹³⁶ See *Centronics Corp. v. Genicom Corp.*, 132 N.H. 133 (1989).

¹³⁷ See *Market Street Assocs. Ltd. P'ship v. Frey*, 941 F.2d 588 (7th Cir. 1991).

¹³⁸ See Keily, *supra* note 126, at 18.

¹³⁹ Johan Steyn, *The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy*, 1991 DENNING L.J. 131, 133 (1991).

¹⁴⁰ For an American application of this definition, see *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88 (1917).

¹⁴¹ See generally Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

promises or all agreements are binding . . . a contract is simply a promise that the law, for whatever reason, has decided to enforce . . .”¹⁴² Thus, there is no attached moral obligation, which may explain the reluctance of common law judges to impose additional affirmative obligations beyond the terms of the contract.

C. *Defining “Fundamental” Breach in International Commercial Arbitration*

1. The CISG

Article 25 of the CISG unhelpfully states that a breach is fundamental “if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract”¹⁴³ unless it was not foreseeable to the breaching party. In some instances the tribunals have held that a breach does not immediately warrant a termination—because it was not fundamental—but that such a breach can become fundamental if not timely remedied. For instance, one tribunal reasoned that missing the third installment payment was not itself a fundamental breach, but became so when, after several months, the party in default did not cure.¹⁴⁴ This was so because, only at this point, it became “absolutely clear that [buyer] did not have [the requisite] financial resources.”¹⁴⁵ Thus, while a late delivery is certainly a breach, it is, at best and without more, a rebuttable presumption of a fundamental breach.

Cases of non-compliance can also warrant a fundamental breach. One tribunal held that where the goods are not of the quality required by the contract and, consequently, the “lack of conformity of an important part of the goods supplied amounts to a breach of the contract which, under Article 25, is fundamental . . . [Seller] is not entitled to supply substitute items after the delivery date specified in the contract without the consent of [Buyer].”¹⁴⁶ This holding illustrates how the terms of the contract can be used to define not only what is “fundamental,” but also the opportunity to cure. In other words, the parties may contract around the notifi-

¹⁴² See Hyland, *supra* note 127, at 429.

¹⁴³ CISG, *supra* note 7, at art. 25.

¹⁴⁴ ICC Award No. 7585 (1992), ICC Arb. Bull. (Nov. 1995) 60–64.

¹⁴⁵ *Id.* at 62.

¹⁴⁶ ICC Award No. 7531 (1994), ICC Arb. Bull. (1995) 67–68, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=139&step=FullText> (last visited Jan. 19, 2013).

cation requirement by expressly stating “that performance of an obligation is of essence”¹⁴⁷ since “there will be little room for proving that the breach caused an unforeseeable detriment.”¹⁴⁸ This case can be contrasted with *ICC Award No. 8213*,¹⁴⁹ where no fundamental breach was found because the seller’s product did not breach either the express or implied warranted quality. Furthermore, the buyer’s contentions failed because seller “was not aware at the time of entering into the Purchase Agreements of the identity of the end-user.”¹⁵⁰ The seller thus “did not know or have reason to know of such a particular purpose intended by [the buyer].”¹⁵¹ In other words, since the seller could not have reasonably deduced the buyer’s ultimate intention for the goods, either from past business relations or other parol evidence, the parties were bound by the contractually-specified purpose. This is illustrative of how the expectation interest cuts both ways – buyer could not have reasonably expected a product of a higher quality specified in the contract without an indication that seller knew buyer expected this quality.

This indicates that tribunals consider the foreseeability requirement of Art. 25 in their analysis, holding that fundamental breaches do not occur where “the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen”¹⁵² that a certain act would frustrate the contract’s purpose. In *ICC Award No. 10274*,¹⁵³ buyer and seller entered into a four segment installment contract of agricultural feed product. The contract stipulated that once seller notified buyer that it was ready to ship an installment, buyer was obliged to punctually open a letter of credit. The contractual relationship was stipulated to conclude by August of Year X. After the first installment was concluded seamlessly in January of Year X, seller, in that same month, informed buyer that the second installment was ready and requested it open a letter of credit. Buyer did not respond until April of Year X “that it will not accept any further shipment before July [of Year X].”¹⁵⁴ The tribunal found this

¹⁴⁷ Graffi, *supra* note 67, at 339.

¹⁴⁸ *Id.*

¹⁴⁹ ICC Award No. 8213 (1995), ICC Arb. Bull., Vol. 11/No. 2 (2000) 49–52, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=520&step=FullText> (last visited Oct. 25, 2012).

¹⁵⁰ *Id.* at 51.

¹⁵¹ *Id.*

¹⁵² ICC Award No. 10274 (1999), 29 Y.B. Comm. Arb. 89, 100 (2004).

¹⁵³ *Id.* at 101.

¹⁵⁴ *Id.* at 102.

amounted to a fundamental breach concerning the second installment and sufficiently vitiated seller's expectation interest regarding the final two installments justifying an anticipatory breach finding. The tribunal noted two dispositive findings: (1) buyer's delay "resulted in more costs for" the seller which "alone constitutes a fundamental breach because it deprives the [seller] of what it could expect under the sales contract;"¹⁵⁵ and, (2) the buyer "refused to accept any installment before July. According to the contract . . . the last installment was to be shipped in July/August."¹⁵⁶ Thus, this "can be seen as a final refusal to perform" because buyer manifested an intention to perform the second installment when the contract was stipulated to conclude. Since buyer objectively "did foresee this result as well as any reasonable person"¹⁵⁷ in its position would, it was liable to seller for any damages caused to the seller for the avoidance of the contract.

Under the common law, a fundamental breach is usually not articulated as having a foreseeability requirement.¹⁵⁸ "Yet, the idea of foreseeability so permeates our system of contract and tort law that it may be considered an unarticulated premise in our notions of what is a [fundamental] breach."¹⁵⁹ Thus, it is dubious whether the "added" requirement of foreseeability augments the doctrine under the *lex mercatoria* compared to its common law counterpart. Nonetheless, as the preceding paragraphs illustrate, international arbitral tribunals will expressly consider it in their analysis, not just implicitly.

¹⁵⁵ *Id.* Arguably this, at least under common law principles, is not necessarily alone sufficient. As shown in ICC Case No. 7585 (1992), late performance will only become a fundamental breach, as opposed to a remediable breach, after the tardiness utterly frustrates the innocent party's expectation interest. Thus, if the contractual relationship was supposed to expire much later, then the buyer could have conceivably cured by compensating the seller for the higher costs caused by the delay. In other words, the delay itself was not sufficient, it only became so in conjunction with the fact that the buyer expressed it would not perform its second obligation when the final was supposed was to be performed, thus rendering the buyer's ability to perform its third and fourth obligations on time impossible. However, if one views this delay through the prism of the *pacta sunt servanda* principle discussed in Sec. II(B), it may be that the tribunal found the buyer's delay in informing respondent that it was going to breach particularly troubling. Thus, should the buyer have informed the seller in, say, early February that it would have to delay its payments, at least the seller was put on notice and could have worked to mitigate its loss immediately and/or come to a new arrangement with the buyer.

¹⁵⁶ ICC Award No. 10274, 29 Y.B. Comm. Arb. at 104.

¹⁵⁷ *Id.*

¹⁵⁸ For instance, it is not among the criteria for measuring fundamental breach under the rubrics found in the Restatements. See Restatement (Second) of Contracts § 241 (1979); Restatement of Contracts § 275 (1932).

¹⁵⁹ Perillo, *supra* note 107, at 307.

2. The UNIDROIT Principles

Article 7.3.1 of the UNIDROIT Principles lists five factors for a tribunal to consider and does not have a foreseeability requirement.¹⁶⁰ For instance, one tribunal found a fundamental breach because: (1) respondent neglected certain obligations; (2) the obligations were “of the essence of the” governing agreement; (3) this non-performance gave respondent reason to believe future performance would be inadequate; (4) respondents would not suffer a disproportionate loss if the contract was terminated; and (5) because claimants did not terminate the contract prior to arbitration, there was no need for a notice of breach.¹⁶¹ However, the tribunals do not view the factors as necessary conditions, but rather may hold an individual factor(s) to be dispositive. For instance, one tribunal found that the defendant violated an exclusivity agreement and failed to deliver certain goods; accordingly, since three of the five criteria in Art. 7.3.1 were met, this failure constituted a fundamental breach.¹⁶² The tribunal reasoned that the defendant’s failure to deliver the goods specified deprived the claimant of the goods it was entitled to expect under the contract, and that the defendant’s violation of the exclusivity clause was intentional; these two conditions gave the claimant reason to believe defendant would not perform in the future.¹⁶³ Arguably, the breach of the exclusivity clause was more damaging to the business relationship because it was in bad faith and a clear instance showing that the defendant had no qualms breaching the contract, whereas the non-delivery could be explained away and reassurances given to mend the business relationship.¹⁶⁴ If a contract is a marriage,¹⁶⁵ the failure to adhere to the exclusivity clause was a clear case of adultery, the non-delivery a remediable transgression.¹⁶⁶

¹⁶⁰ UNIDROIT Principles, *supra* note 8, at art. 7.3.1.

¹⁶¹ ICC Award No. 9797 (1999), 15 Mealey’s Int’l Arb. Rep. A1 (2000), available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=668&step=FullText> (last visited Nov. 12, 2012).

¹⁶² Centro de Arbitraje de Mexico Award (Nov. 30, 2006), available at <http://www.unilex.info/case.cfm?id=1149> (last visited Dec. 3, 2012).

¹⁶³ *Id.*

¹⁶⁴ UNIDROIT Principles, *supra* note 8, at art. 7.1.4 (cure by non-performing party).

¹⁶⁵ Consistent with the principle of *pact sunt servanda*. See *supra* Part II, Sec. B.

¹⁶⁶ ICC Arbitral Award No. 8817 (1997), 25 Y.B. Comm. Arb. 355, 363 (2000) (“[W]hen merchants have habitual sale relations, in particular when they are bound by an exclusive distributorship contract, there is breach when one party suddenly modifies payment conditions.”).

D. *Defining “When it is Clear” that a Fundamental Breach will Occur*

As noted above, the CISG and UNIDROIT Principles are similar in their enunciation of the doctrine of anticipatory repudiation, with the main difference that the CISG requires a notification of breach, when possible, whereas the UNIDROIT Principles do not.¹⁶⁷ Nonetheless, their application may lead to differing results.

1. CISG

a. Express Repudiation

As mentioned earlier, one of the clearest examples of anticipatory repudiation is when a party expressly states that it will not perform. One tribunal found such a repudiation when a formerly state-owned seller was overtaken by a private company who promptly declared to the buyer that it was unwilling to make any future deliveries.¹⁶⁸ Seller refused to negotiate even after buyer warned that it would suffer substantial prejudices if the goods were not supplied in a timely manner. Despite the fact that buyer refused to pay the seller for past deliveries once seller repudiated the contract, the tribunal still found the buyer anticipatorily repudiated. The tribunal reasoned that there was no indication that the buyer was unable or unwilling to perform its payment obligations, nor that they had committed a breach of contract, and that, regardless, the seller had failed to fix an additional time for payment.¹⁶⁹ Similarly, in a dispute concerning an installment contract, a sole arbitrator sitting in Milan found that a buyer anticipatorily breached the contract after making an initial down payment by stating unambiguously that it would not make any further installment payments.¹⁷⁰ Furthermore, the buyer insisted that the seller reclaim the delivered machines, alleging malfunctioning—another express manifestation of non-performance.¹⁷¹ After finding that the machines were not deficient and the seller did not commit an *exception non adimpleti contractus*,¹⁷² the arbitrator found the buyer's avoidance unjustified and thus found the renunciation an

¹⁶⁷ See Eiselen, *supra* note 105.

¹⁶⁸ Arbitral Award No. ZHK/95, 23 Y.B. Comm. Arb. 128 (1998).

¹⁶⁹ *Id.* at 135.

¹⁷⁰ Chamber of Arbitration of Milan Award (22 Feb. 2008).

¹⁷¹ *Id.*

¹⁷² An exception to mandatory performance of one's contractual obligations. See generally M. P. Furmston, *Breach of Contract*, 40 AM. J. COMP. L. 672, 673 (1992).

anticipatory repudiation awarding damages to the seller.¹⁷³ These are clear illustrations where an unjustified, express renunciation of the contract or “substantial” term of the contract evinces an anticipatory breach. However, not all anticipatory breach claims fall into this category.

b. Withholding Performance to Gain Additional Consideration

Withholding performance—after the execution of the contract—unless the other party agrees to additional consideration, may also constitute an anticipatory breach. In one instance, the parties agreed on a delivery of fifteen truckloads of cheese.¹⁷⁴ Originally, the contract stipulated that seller would deliver the truckload first and then buyer had five days to transfer payment. However, the seller insisted on receiving payment before delivery, to which the buyer agreed. The first shipment and payment went according to contract; however, after this, the seller wanted additional consideration and refused to deliver unless the buyer consented. The tribunal found an anticipatory breach because the seller, “after agreeing to delivery upon prepayment, then makes its delivery dependent on the performance of other demands . . . [A] prepayment agreement is generally—also in international commerce—in itself to be understood as calling for the performance . . . without other demands being settled beforehand.”¹⁷⁵ In cases such as this, oftentimes the reason for the breach is one party’s bad faith attempt to renege on, or supplant, a bad deal.¹⁷⁶

This often occurs when the market price shifts, tempting a party to find a more economically beneficial exchange.¹⁷⁷ For instance, in an award finding anticipatory breach, buyer contracted to buy sets of CD-R and DVD-R production systems.¹⁷⁸ After buying a few systems, buyer sent a letter to seller asking for a reduction in price in accordance with current market prices or, in the alternative, to go to arbitration. Seller replied with a letter to buyer arguing that its action manifested intent not to perform the contract. As a result, the seller sold the remaining goods to an-

¹⁷³ *Id.*

¹⁷⁴ Hamburg Arbitration Award (29 Dec. 1998), 22 Y.B. Comm. Arb. 13 (1999).

¹⁷⁵ *Id.* at 19.

¹⁷⁶ See generally Steve Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 387 (1980) (“A recapture by one party of forgone opportunities necessarily harms the other.”).

¹⁷⁷ *Id.*

¹⁷⁸ CIETAC Award (Oct. 2007), available at <http://cisgw3.law.pace.edu/cases/071000c1.html> (last visited Dec. 12, 2012).

other party. The tribunal held buyer's letter and refusal to adhere to the contract was sufficient to prove that buyer had no intention of performing, thus an anticipatory breach occurred. Clearly, refusing to perform unless additional consideration is granted, combined with the threat of arbitration, is a bad faith attempt to coerce a seller into relinquishing forgone opportunities.¹⁷⁹

While tribunals generally adhere to this conception of bad faith under the *lex mercatoria*,¹⁸⁰ it is not universal. For instance, in the *Wool* case,¹⁸¹ buyer admitted that it did not issue the letter of credit as required by the contract due to the decreasing price at the wool market. Despite this, the tribunal did not find this amounted to a fundamental breach, and instead, applying general international principles of law, found seller partially liable for not "urging" buyer to perform. There was nothing in the contract requiring seller to remind buyer of its obligation. However, perhaps feeling that seller was cheated, it held "that based on principles of equity, the [buyer] shall compensate certain amount to the [seller], and US \$10,000 would be reasonable."¹⁸² This award suffers from the *Raincoat* case's deficiencies—departure from doctrine and misapplication of equitable principles. Here, the tribunal utterly disregarded buyer's blatant attempt to recapture a forgone opportunity, which is a good faith violation under the *lex mercatoria*, and then relied on equity to make an arbitrary award.

c. Late Delivery Highly Probable

Another common instance of anticipatory repudiation occurs when it becomes "clear" that timely execution of the breaching party's obligation will be near impossible. For example, one tribunal found that in the context of seasonal merchandise, a late delivery of sample products made it impossible for the performance of the contract.¹⁸³ "It was the conduct of the [seller] which caused its inability to deliver the final product on time. Had the samples been promptly provided to the [buyer], [buyer] would have had time to accept or reject the samples in ample time for production to begin and delivery to be completed as agreed."¹⁸⁴ Moreover,

¹⁷⁹ See generally Burton, *supra* note 176.

¹⁸⁰ See, e.g., ICC Award No. 11849 (2003), 31 Y.B. Comm. Arb. 148 (2006) (finding bad faith by trying to use a foregone opportunity to terminate the underlying contract when prices rose).

¹⁸¹ CIETAC Arbitration Award (27 Apr. 2000) (The Wool Case), available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000427c1.html> (last visited Nov. 11, 2012).

¹⁸² *Id.*

¹⁸³ ICC Award No. 8786, 11 ICC ARB. BULL., 70, 70–76 (2000).

¹⁸⁴ *Id.* at 73

the General Conditions for Delivery expressly stated that the failure to timely deliver the products was a “fundamental breach of contract,” making it an easy determination “that the [seller] had committed an anticipatory breach.”¹⁸⁵ Again, we see a tribunal relying on the contract itself to define what constitutes “fundamental,” aiding the tribunal in its construction of the contract as applied to the proceedings’ facts. Further, the tribunal rightly noted the importance that the merchandise was seasonal, which indicates that time is of the essence. Thus, the purpose of the delivery times was to make sure that the buyer could sell the products in season; tardiness forces the buyer to sell the products out-of-season, clearly frustrating the purpose of the clauses.¹⁸⁶ Furthermore, allowing for additional time to cure would be inadequate given the buyer’s “special interest”¹⁸⁷ in timely delivery.

An exception to the timely delivery requirement is when fulfilling the obligation would prejudice one of the parties. The *Medical Manufacturing Equipment* case is instructive.¹⁸⁸ There, the seller contracted with the buyer to produce proprietary machines that buyer would ultimately use in its factories. However, subsequent to the contract, the buyer contracted with one of the seller’s competitors with the effect that, should seller perform, it “would expose the new expertise of the [seller] . . . [to seller’s] competitors.”¹⁸⁹ Certainly, the seller did not expect that its intellectual property would be infringed by performing under the contract. This award stands for the related propositions that the party who terminates the contract needs to be innocent and that a party does not have to perform if, because of the actions of the other party, it would be detrimental.

As the *Centro de Arbitraje de Mexico* award¹⁹⁰ shows, exclusivity may signal to a tribunal a material provision, the violation of which constitutes fundamental breach. Accordingly, a tribunal found that a contract containing a clause which stipulated that the buyer’s goods were to be the exclusive products on seller’s cargo ship was breached by seller loading a third party’s goods onto its

¹⁸⁵ *Id.*

¹⁸⁶ See generally Andersen, *supra* note 78.

¹⁸⁷ See Graffi, *supra* note 67, at 340.

¹⁸⁸ CIETAC Arbitration Award (27 Dec. 2002) (Medical Manufacturing Equipment Case), available at <http://cisgw3.law.pace.edu/cases/021227c1.html> (last visited Nov. 12, 2012).

¹⁸⁹ *Id.*

¹⁹⁰ Centro de Arbitraje de Mexico Award (Oct. 30, 2006), available at <http://www.unilex.info/case.cfm?id=1149> (last visited Dec. 3, 2012).

ship.¹⁹¹ The tribunal found that the clause showed the buyer's intent, when he included such a provision in the contract, "was to create guarantees of retaining the quality of the food product."¹⁹² It did not matter that seller loaded like products onto the ship, since the exclusivity clause was the *condition sine qua non* for the parties.¹⁹³ Thus, "seller's breach of obligation . . . led to the situation that the shipment was indefinitely postponed"¹⁹⁴ entitling the buyer to anticipatorily terminate the contract.

2. The UNIDROIT Principles

*ICC Award No. 10422*¹⁹⁵ is illustrative of a tribunal considering the above mentioned imponderables while relying on the UNIDROIT Principles as its source of contractual law. In this dispute, the plaintiff-buyer had entered into two exclusivity agreements with the defendant-seller privileging it with the sole right to retail seller's product in its country. However, while the contract was still in effect, seller notified buyer that it had been purchased by Group X and had entrusted "the management, the follow-up, and the control of"¹⁹⁶ its product to company Y, a subsidiary of Group X. Subsequently, buyer submitted two orders; seller confirmed the receipt of the order and reiterated the change of corporate structure. However, it also added that due to payments owed to Group X, it could not execute before receiving payment in advance. Buyer initially objected to this payment schedule arguing that under the terms of the contract it was obligated to pay within 120 days of the date of dispatch not prior to this date. Nevertheless, it agreed to negotiate and the two parties reached an accord whereby seller agreed to ship by air instead of by sea in order to accommodate for delays caused by the disagreement over payment. Buyer asked to be reimbursed for the cost of air; seller agreed to cover the difference between the cost of carriage by air and by sea. Before shipment was executed, seller asked for details of the sales quantity; buyer obliged. Seller, after some time had passed, then informed buyer its sales under the contract were sub-

¹⁹¹ Russian Federation Arbitration Award No. 238/1998 (1999), available at <http://cisgw3.law.pace.edu/cases/990607r1.html> (last visited Nov. 12, 2012).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ ICC Award No. 10422 (2001), available at <http://www.unilex.info/case.cfm?id=957> (last visited Dec. 1, 2012).

¹⁹⁶ *Id.*

stantially low and sent notification that it was terminating in accordance with Article 10.1.3 of the contract.

The contract lacked a choice of law merely providing for ICC arbitration. The tribunal inferred that the parties sought a neutral law; accordingly, the natural solution was to “apply the general rules and principles of international contracts, the so-called *lex mercatoria*.”¹⁹⁷ Citing prior arbitral awards, the tribunal then held that the “UNIDRIOT Principles have been applied as an expression of the *lex mercatoria* or of international trade usages.”¹⁹⁸

As to the merits, the tribunal held that seller was unjustified in its termination and, accordingly, its repudiation amounted to an anticipatory breach. Firstly, it noted seller’s behavior was contrary to the principle of *pacta sunt servanda* due to the seller’s unjustified “unilateral” decision to modify the terms of payment since buyer’s solvency was never doubted and its alleged debts to Group X were irrelevant.¹⁹⁹ Secondly, seller had waived any right it might have had by taking an unreasonable amount of time to terminate the contract after receiving buyer’s purchase order. Finally, *a fortiori*, the contract did not stipulate a minimum purchase order, but rather set “guidelines” to which the buyer’s order was sufficiently close and, therefore, was not a breach, let alone a fundamental breach. Interestingly, the tribunal only needed to discuss this last finding, since, if a breach was not committed, the termination was unjustified, empowering the buyer to bring an anticipatory breach claim because seller had expressly repudiated. One may speculate that the tribunal felt that the seller, no longer its own master, was used as a proxy to compel buyer to fulfill its alleged obligations to Group X.²⁰⁰ This may explain why the tribunal emphasized seller’s bad faith in seeking modification and, even after buyer’s acquiescence, terminating the contract after an “unreasonable” amount of time. This is consistent with the persuasiveness of the good faith requirement as a general principle of international law.²⁰¹ Finally, this is another example where an anticipatory repudiation can arise out of an invalid termination.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* The tribunal cited ICC Award No. 7110, Arb. Bull. CCI, 2/1999; ICC Award No. 8502, Arb. Bull. CCI, 2/1999; ICC Award No. 7375, A1 Mealey’s Int’l Arb. Report 11 (1996).

¹⁹⁹ UNIDRIOT Principles, *supra* note 8, at art. 1.3.

²⁰⁰ Of course, another reason may well have been that it was concerned about the award being set aside by a domestic court and thus wanted to provide as thorough an analysis as possible.

²⁰¹ *See supra* Part II, Sec. B.

IV. DAMAGES AND THE DUTY OF MITIGATION

While a proper discussion of damages is beyond the scope of this paper, for present purposes it is illustrative to examine the principles tribunals use to award damages. The CISG provides that damages “consist of a sum equal to the loss, including loss of profit, suffered . . . as a consequence of the breach” on condition that they “may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract.”²⁰² Most, but not all tribunals, have read this language, in the anticipatory repudiation context, to mean “the economic loss caused by the non-performance.”²⁰³ Damages are limited to pecuniary losses and “it is generally held that punitive or exemplary damages may not be awarded.”²⁰⁴ Indeed, the CISG specifically disallows “the liability of the seller for death or personal injury caused by the goods to any person.”²⁰⁵ The UNIDROIT Principles contain similar provisions.²⁰⁶ However, the UNIDROIT Principles are, in certain provisions, more specific and elaborate than the CISG and thus are sometimes used as a gap-filler.²⁰⁷ Accordingly, tribunals generally agree that damages must be: (1) “foreseeable;” (2) “reasonable;”²⁰⁸ and, (3) mitigated by the innocent party, if possible.²⁰⁹ However, while tribunals agree on these broad propositions, uniform rules on “specific aspects of damages are lack-

²⁰² CISG, *supra* note 7, at art. 74. This much at least is in accord with the common law. See *Hadley v. Baxendale*, 156 ER 145, 9 ExCh 341 (1854).

²⁰³ Ingeborg Schwenzer & Pascal Hachem, *The Scope of the CISG Provisions on Damages*, in *CONTRACT DAMAGES: DOMESTIC AND INTERNATIONAL PERSPECTIVES* 94 (Ralph Cunningham & Djakhongir Saidov eds., 2008).

²⁰⁴ *Id.* at 102.

²⁰⁵ CISG, *supra* note 7, at art. 5.

²⁰⁶ UNIDROIT Principles, *supra* note 8, at art. 7.4.4 (“The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance.”).

²⁰⁷ See, e.g., ICC Arbitral Award No. 8817 (1997), 25 Y.B. Comm. Arb. 355 (1997) (using the UNIDROIT Principles to supplement the CISG, which was expressly chosen). For instance, the CISG contains no provision on the currency to use in calculating the loss, while the UNIDROIT Principles state that “[d]amages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the harm was suffered, whichever is more appropriate.” UNIDROIT Principles, *supra* note 8, at art. 7.4.12.

²⁰⁸ Foreseeability and reasonability are measured objectively. See generally Larry A. DiMatteo, et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 34 Nw. J. OF INT’L L. & BUS., 299, 419–22 (2004).

²⁰⁹ See generally ICC Arbitration Award No. 9187 (1999), available at <http://www.cisg-online.ch/cisg/urteile/705.htm> (last visited Dec. 5, 2012). It should be noted that these three requirements are interrelated. For instance, damages are not “reasonable” if the innocent party had a chance to mitigate the harm, but instead chose inertia.

ing, [thus] similarly situated parties sometimes receive vastly different results.”²¹⁰ In other words, this is an untidy area of the *lex mercatoria*.

As the *Raincoat* case described above suggests, tribunals are not always doctrinaire in their award of damages. For instance, in the *Chilling Press* case,²¹¹ buyer and seller entered into an installment contract with a contract price of \$3,380,000. Buyer was required, under the contract, to issue a letter of credit worth \$676,000 for the first installment, which it did. Upon receiving the goods, however, it found severe defects and subsequently commenced arbitration. Applying the CISG, the tribunal found that the defects constituted a fundamental breach that amounted to an anticipatory breach regarding the other installments; thus, the entire contract was terminated and buyer returned the defective product. Despite this, the tribunal only awarded the buyer \$676,000, the time value of that amount, and arbitral fees. In other words, it did not award a “sum equal to the loss, including *loss of profit*”²¹² to the buyer, but merely awarded restitution. This directly contradicts the CISG’s provisions and, also, falls outside the principal goal of the anticipatory breach doctrine: to protect the future interest of a party.²¹³ Instead, the tribunal should have awarded restitution *plus* expected profits arising from the entire contract, since the entire contract was voided due to seller’s anticipatory breach.

This award can be contrasted with *ICC Award No. 11849*²¹⁴ where the tribunal stayed within the required analytical doctrine. There, buyer and seller entered into an installment contract. Buyer was late on one of the installments but gave adequate reassurances to the seller. Consequently, seller extended the period to open a letter of credit by twenty days. However, the seller did not furnish the buyer, even after multiple inquiries, with the requisite information to open the letter of credit, merely allowing the twenty days to expire and then declaring the contract terminated. The tribunal found that it would be violative of the “general principle of good faith . . . to allow respondent to take advantage of the elapsing of the additional time granted to claimant while claimant was pre-

²¹⁰ John Y. Gotanda, *Using the UNIDROIT Principles to Fill Gaps in the CISG*, in *CONTRACT DAMAGES: DOMESTIC AND INTERNATIONAL PERSPECTIVES* 108 (Ralph Cunningham & Djakhongir Saidov eds., 2008).

²¹¹ CIETAC Arbitration Award (Aug. 2006) (*Chilling Press Case*), available at <http://cisgw3.law.pace.edu/cases/060800c1.html> (last visited Feb. 2, 2013).

²¹² CISG, *supra* note 7, art. 74 (emphasis added).

²¹³ See generally CHARLES FRIED, *CONTRACT AS PROMISE* 8 (1981).

²¹⁴ 31 Y.B. Comm. Arb. 148.

vented to perform because of respondent's late response to a request for information necessary for performance."²¹⁵ Accordingly, it found that seller's bad faith termination amounted to an express anticipatory repudiation and awarded buyer lost profit because "it was perfectly foreseeable to respondent, at the time the Agreement was signed, that its premature termination would cause a loss of profit."²¹⁶ Thus, the tribunal rightly held that, consistent with international norms of good faith under the *lex mercatoria*, seller had committed a bad faith breach²¹⁷ and awarded buyer its expectation interest.

Another area of discord involves the duty to mitigate. While tribunals generally agree that "it is a principle of international commercial law that the party suffering harm must take the necessary steps to mitigate the harm,"²¹⁸ there is no consensus on which party has the burden of proof. For instance, in *ICC Award No. 8786*,²¹⁹ the tribunal found that seller anticipatorily breached through continued late deliveries. When discussing the resulting damages, the tribunal noted that buyer's duty of mitigation was satisfied because the seller "did not offer any evidence which would suffice to hold that the [buyer] did not take necessary measures to mitigate damages."²²⁰ In other words, the breaching party had the burden to prove that the non-breaching party failed to mitigate the harm. In contrast, in an award under the auspices of the Ukrainian Chamber Commerce and Trade,²²¹ the tribunal found that seller had fundamentally breached by unlawfully withholding performances. Buyer asked for expectancy damages, but was refused full compensation because it "failed to submit to the Tribunal evidences of any mitigation measures." In other words, the non-breaching party, unlike in *ICC Award No. 8817*, had the burden to prove it mitigated damages.

As the above illustrates, tribunals are highly inconsistent when awarding damages for anticipatory breach under the *lex mercatoria*. Undoubtedly, this is partially due to the reality that "a

²¹⁵ *Id.* at 153.

²¹⁶ *Id.* at 155.

²¹⁷ CISG, *supra* note 7, at art. 47(2) ("Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract.").

²¹⁸ ICC Arbitral Award No. 8817 (1997), 25 Y.B. Comm. Arb. at 365.

²¹⁹ ICC Arb. Bull., Vol. 11/No. 2 (Fall 2000) 70–76.

²²⁰ *Id.* at 75.

²²¹ Ukrainian Chamber of Commerce and Trade Arbitral Award (13 Feb. 2006), available at <http://cisgw3.law.pace.edu/cases/060213u5.html> (last visited Dec. 29, 2012).

breach of contract can occur in an almost infinite variety of circumstances [and thus] no statute can specify detailed rules for measuring damages in all possible cases.”²²² But this fact illustrates the imperative for tribunals to rely on previous awards, if only to maintain some semblance of consistency thereby providing foreseeability of outcome. Moreover, it is one thing for tribunals to differ over the parameters of what is “foreseeable,” but quite another for tribunals to deviate from underlying principles by only awarding restitution damages for an anticipatory breach.²²³ As noted above, an anticipatory breach warrants the acceleration of the benefits under the contract (expected profits) for the innocent party while freeing it of any further obligation.²²⁴ When dealing with an anticipatory breach, restitution, without more, is never sufficient.²²⁵

V. SUMMATION AND ARGUMENT

A. *Summation*

The broad acceptance of the CISG and UNIDROIT Principles as embodiments of the *lex mercatoria* has brought some clarity establishing the foundational principles that tribunals will rely on when adjudicating a dispute under the *lex mercatoria*.²²⁶ This is especially important because, unlike a court’s decision in a common law jurisdiction, an award has no precedential force. Thus, this reliance mitigates the ad hoc nature of arbitration, moving closer to a consistent international standard. Moreover, while the

²²² J. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 445 (3d ed., 1999).

²²³ See China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Award (Raincoat Case) (August, 10 1999), available at <http://cisgw3.law.pace.edu/cases/990810c1.html> (last visited Jan. 29, 2013).

²²⁴ See Part I, Sec. B.

²²⁵ However, this is not to say that monetary damages are the only remedy. For instance, in certain circumstances, the CISG provides for specific performance. “Under Article 46, the buyer may demand delivery of substitute goods if the lack of conformity of the goods constitutes a fundamental breach if he gives notice under Article 39 or within a reasonable time thereafter. However, this right may be limited in some countries by Article 28, which relieves a court of the obligation to order specific performance if such a remedy would not be granted under domestic law.” DiMatteo et al., *supra* note 208, at 401.

²²⁶ 15 Mealey’s Int’l Arb. Rep. A-1; ICC Award No. 10422 (2001); accord ICC Arbitral Award No. 8817 (1997), 25 Y.B. Comm. Arb. at 362 (“[I]t is a principle of international commercial law that the party suffering harm must take the necessary steps to mitigate the harm . . . If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.”).

doctrine of anticipatory repudiation will always remain opaque due to the difficulties in articulating its contours, a degree of guidance may now be gleaned from analyzing recurrent situations where it is invoked.

As demonstrated above, a tribunal will hold a party anticipatorily breached, under the *lex mercatoria*, in a number of situations. Remembering that the *lex mercatoria* is first and foremost a manifestation of the evolution of international legal principles,²²⁷ counsel can reasonably expect that an international arbitral tribunal will adjudicate the dispute through the lens of good faith, in particular holding the *pacta sunt servanda* principle sacrosanct;²²⁸ this will compel a tribunal to find a greater degree of breach where the breaching party deviates from the common purpose of the contract. As a threshold matter, the party bringing suit may not be guilty of a fundamental breach itself.²²⁹ Counsel should expect that if a contractual term is expressly defined as “fundamental,” a breach of this term will constitute a fundamental breach allowing the non-breaching party to terminate the contract.²³⁰ The non-breaching party may also validly terminate if a term is implicitly found to be fundamental (e.g., an exclusivity clause).²³¹ Tribunals will find an anticipatory repudiation when one party expressly refuses to perform²³² or invalidly terminates a contract.²³³ Attempting to reclaim a foregone economic opportunity by making performance contingent upon additional consideration is (usually) per se bad faith and a tribunal will likely hold this warrants termination.²³⁴ Late execution may not initially be sufficient for an anticipatory breach claim, but may become so,²³⁵ especially if the contract’s purpose would be completely frustrated by tardy performance.²³⁶ Performance is not mandatory where it would prejudice the performing party due to the other party’s bad faith.²³⁷

²²⁷ See generally BERGER, *supra* note 1.

²²⁸ See, e.g., ICC Award No. 8128 (1995), 123 J. DU DROIT INT’L 1024 (1996).

²²⁹ *Id.*

²³⁰ See, e.g., ICC Award No. 7531 (1994), ICC Arb. Bull. (1995), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=139&step=FullText> (last visited Jan. 19, 2013).

²³¹ See, e.g., Centro de Arbitraje de Mexico Award (Nov. 30, 2006), available at <http://www.unilex.info/case.cfm?id=1149> (last visited Dec. 3, 2012).

²³² See, e.g., Arbitral Award No. ZHK/95, 23 Y.B. Comm. Arb. 128 (1998).

²³³ See, e.g., ICC Award No. 8128 (1995), 123 J. DU DROIT INT’L 1024 (1996).

²³⁴ See, e.g., Hamburg Arbitration Award (29 Dec. 1998), 22 Y.B. Comm. Arb. 13 (1999).

²³⁵ See, e.g., ICC Award No. 7585 (1992), ICC Arb. Bull. (Nov. 1995).

²³⁶ See, e.g., ICC Award No. 8786 (1997).

²³⁷ See, e.g., CIETAC Arbitration Award (27 Dec. 2002) (Medical Manufacturing Equipment Case), available at <http://cisgw3.law.pace.edu/cases/021227c1.html> (last visited Nov. 12, 2012).

Finally, the harm inflicted on the innocent party must have been foreseeable.²³⁸

B. *Argument*

Despite apparent uniformity in certain respects, as the *Raincoat* and *Wool* cases suggest, there are deviations in application of rudimentary principles. For instance, finding fundamental breach where a party withholds performance in order to force the other to yield additional consideration in some instances, but not others,²³⁹ is anathema to maintaining a discernible legal standard. Nowhere is this more apparent than in the awarding of damages, which is most problematic since the entire purpose of a dispute is to ascertain this question; legal principles are merely the avenues which adjudicators use to arrive at the remedy. Abandoning these avenues for the murky waters of equity will only create greater inconsistency and “lead to an incoherent body of rules to be claimed as the *lex mercatoria*, which, in turn, may cause the unpredictability of the outcome of any dispute.”²⁴⁰ Of course, anticipatory breach is a fluid concept, which turns on the assessment of particularized facts. But this provides a cogent reason for tribunals to look to past awards instead of, presumably, viewing a dispute as one of first instance.

In other words, for there to be a coherent doctrine of anticipatory breach under the *lex mercatoria*, arbitral tribunals must collectively cease attempts at *amiable composition* and apply a doctrine uniformly. The twin desiderata of equity and predictability militate against each other and, thus, preclude harmonization. When tribunals cause disharmony by relying too heavily on equity, they violate the CISG’s express mandate that commands tribunals to always consider “the need to promote uniformity in its application.”²⁴¹ It goes on to require that “matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based.”²⁴² In such cases, tribunals must then rely on “internationally accepted

²³⁸ See, e.g., ICC Award No. 8213 (1995), ICC Arb. Bull., Vol. 11/No. 2 (2000), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=520&step=FullText> (last visited Oct. 25, 2012).

²³⁹ See discussion *supra* Part II(D)(1)(b).

²⁴⁰ Maniruzzaman, *supra* note 50, at 733.

²⁴¹ CISG, *supra* note 7, at art. 7(1).

²⁴² *Id.* at art. 7(2).

principles of contract law”²⁴³ that embody the *lex mercatoria* and not revert into *amiabile compositeurs*. In other words, even if the CISG does not expressly or implicitly cover the dispute, the tribunal must still predominantly adjudicate using legal principles not ad hoc equitable determinations rooted in an arbitrary notion of “fairness.”

Limiting the use of equity, however, would not impede discretion. Applying any standard requires exercising discretion, which, admittedly, precludes absolute homogeneity. This is especially so under the *lex mercatoria*, which has been amalgamated with the highly amorphous good faith doctrine.²⁴⁴ Yet, slight deviations in application do not eviscerate harmonization. This may readily be seen from the development of the Uniform Commercial Code, the project which inspired the drafting of the CISG. Of course, the Code is not truly “uniform” since many states have modified it to some degree.²⁴⁵ However, a “limited degree of variation has not interfered with essential uniformity.”²⁴⁶ The purpose of the U.C.C. was not to create rigid application of its principles, but rather “to point the law in the indicated directions, and to restore the law merchant as an institution for growth only lightly kept in bounds by the statute.”²⁴⁷ In other words, so long as courts continually apply the U.C.C. as first principles, slight variations do not overthrow a doctrine, merely evolve it “as is reasonably required by the new facts before the court.”²⁴⁸ For the same reasons, if tribunals stay within the bounds of the *lex mercatoria*, slight variations will not loosen the doctrine from its moorings, but rather evolve the *lex mercatoria* by refining its anticipatory breach doctrine to meet the needs of particularized disputes. This is an altogether welcome result.

In order to achieve this and guard against unfettered equitable determinations, international arbitral tribunals must heed three considerations to achieve harmonization in the application of the anticipatory breach doctrine under the *lex mercatoria*. First, that

²⁴³ Dalhuisen, *supra* note 1, at 129.

²⁴⁴ See Farnsworth, *supra* note 130, at 60.

²⁴⁵ See generally R. M. Buxbaum, *Is the Uniform Commercial Code a Code?*, in RECHTSREALISMUS, MULTIKULTURELLE GESELLSCHAFT UND HANDELSRECHT 197 (U. Drobnig & M. Rehbinder eds., 1994).

²⁴⁶ J. F. Dolan, *Fundamentals of the Uniform Commercial Code*, in PERSPECTIVES ON COMMERCIAL LAW 24 (A. Mugasha ed. 2000).

²⁴⁷ *Id.* at 23.

²⁴⁸ Arthur Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 48 YALE L. J. 426, 427 (1939).

marriage is at the root of anticipatory repudiation.²⁴⁹ Parties to a contract “are affianced to one another,”²⁵⁰ the equivalent of an engaged couple “during the period between the time of the engagement and the celebration of marriage.”²⁵¹ Should one party do something “to the prejudice of the other inconsistent with [their engagement],”²⁵² that party must make the innocent party whole just as, at early common law, when “a party who had promised to marry [someone] at a future date had in the meantime married someone else, this was a breach of contract and made the breaching party liable in damages.”²⁵³ In both cases, the non-breaching party’s future interest in the arrangement is being protected. Thus, the anticipatory breach doctrine protects the non-breaching party’s expectation of what it would have received had the contract not illegally dissolved.²⁵⁴ Deviation from this axiom will, as illustrated above,²⁵⁵ lead to anomalous results.

Second, unless the contract expressly prohibits this, tribunals should turn to the UNIDROIT Principles whenever the contract stipulates the *lex mercatoria*, in one form or another, as the substantive governing law. The UNIDROIT Principles offer a more developed enunciation of the principles expressed in the CISG, and, thus, offer more guidance to tribunals. In other words, they should be used “in order to fill a gap”²⁵⁶ in the CISG. Such use is specifically encouraged since, “per its article 7, [the CISG] may be supplemented by those general principles which have inspired its provisions and particularly those which have been substantiated and codified in the UNIDROIT Principles.”²⁵⁷ Moreover, “the need to promote uniformity in the application of the [CISG is] more likely to be fulfilled by application of the UNIDROIT Princi-

²⁴⁹ See generally Peter Goodrich, *The Posthumous Life of the Postal Rule Requiem and Revival of Adams v. Lindsell*, in *FEMINIST PERSPECTIVES ON CONTRACT LAW* 75–89 (Linda Mulcahy & Sally Wheeler eds., 2005).

²⁵⁰ *Hochester*, 2 El. & Bl. at 688–89.

²⁵¹ *Id.* at 689.

²⁵² *Hochester*, 2 El. & Bl. at 688.

²⁵³ Goodrich, *supra* note 249, at 86.

²⁵⁴ *Frost*, 16 Q.B.D. at 460 (“Indeed the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed *in futuro*.”).

²⁵⁵ China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Award (Raincoat Case) (August, 10 1999), available at <http://cisgw3.law.pace.edu/cases/990810c1.html> (last visited Jan. 29, 2013).

²⁵⁶ Michael J. Bonell, *The UNIDROIT Principles in Practice: The Experience of the First Two Years*, 2 UNIFORM L. REV. 34, 40 (1997).

²⁵⁷ ICC Award No. 12460 (2004), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=1433&step=FullText> (last visited Nov. 14, 2012).

ples than of any domestic law.”²⁵⁸ This appears to be the trend, as “parties have increasingly chosen these Principles to govern their contracts, even in the absence of an express reference to them within the contract, as an expression of general principles of law, the *lex mercatoria*.”²⁵⁹ With this added guidance, tribunals are less likely to substantially deviate from the core principles enunciated in the CISG facilitating greater consistency. Thus, it is critical that tribunals take recourse in the UNIDROIT Principles to augment the terse CISG.

Finally, tribunals must effectuate the parties’ choice of the *lex mercatoria* as the substantive law by using it as the governing law, not merely “within the framework and limits set by [state] law.”²⁶⁰ In other words, when the parties choose the *lex mercatoria*, tribunals cannot just apply the principles of the *lex mercatoria* “that have been integrated into state laws.”²⁶¹ They must recognize that the *lex mercatoria* is a distinct supranational body of legal rules separate from, and not bound to, any state legal system. To interject state law into the proceedings violates the parties’ choice of substantive law, because, by choosing the *lex mercatoria*, the parties “only left room for the application of general legal rules and principles adequate enough [to] govern the Contracts but not originated in a specific municipal legal system.”²⁶² This aligns with the consecrated contractual and arbitral principle that the parties choose the governing law in the contract, absent public policy issues.²⁶³ Thus, the tribunal in the *Raincoat* case violated this principle by resorting to equity (as directed by Chinese law)²⁶⁴ to determine damages instead of relying on the CISG, which was expressly chosen by the parties. To mitigate discrepancies in applica-

²⁵⁸ ICC Award No. 11638 (2002), available at <http://www.unilex.info/case.cfm?id=1407> (last visited Dec. 14, 2012).

²⁵⁹ Michael J. Bonell, *Do We Need a Global Commercial Code?*, 106 DICK. L. REV. 87, 99 (2002) (internal quotations omitted). See also Serbia Foreign Trade Court of Arbitration Award No. T-9/07 (White Crystal Sugar Case) (2008) (“Respectable Arbitral Tribunals in the world (especially the ICC Court of Arbitration) have long since made awards pursuant to these Principles and arbitrated disputes between Parties by applying these principles as *lex mercatoria*.”), available at <http://cisgw3.law.pace.edu/cases/080123sb.html> (last visited Dec. 12, 2012).

²⁶⁰ Chi Manjiao, “*The Iceberg Beneath the Water*”: *The Hidden Discrimination Against the Lex Mercatoria in Chinese Arbitration*, 7 J. PRIV. INT’L L. 341, 343 (2011).

²⁶¹ *Id.*

²⁶² ICC Award No. 13012 (2004), available at <http://www.unilex.info/case.cfm?id=1409> (last visited Jan. 27, 2013).

²⁶³ Thomas E. Carbonneau, *Arbitral Law-Making*, 25 MICH. J. INT’L L. 1183, 1890 (2004).

²⁶⁴ Manjiao, *supra* note 260, at 350.

tion, tribunals must stay under the *lex mercatoria*'s umbrella when the parties have chosen it as the substantive law of the dispute.

VI. CONCLUSION

Anticipatory breach under the *lex mercatoria* has germinated, but not yet reached the maturity of a legal standard. Nonetheless, despite the assessment of damages, there appears to have evolved in international commercial arbitration a consensus as to when an anticipatory breach has been committed under the *lex mercatoria* as outlined above. The rules of law in relation to anticipatory breach have become clearer and lead, in most cases, to relatively predictable results. In order to make the doctrine even more transparent, tribunals should draw on past awards to continue this progression towards harmonization, consistency, and uniformity. In addition, tribunals must remember the foundational considerations of anticipatory breach, use the UNIDROIT Principles as a lode-star, and genuinely apply the *lex mercatoria* when the parties have so chosen. This will facilitate the “airing and molding of principles [that] are necessary to the consistency and even-handedness (and, therefore, the legitimacy)”²⁶⁵ of the doctrine's application under the *lex mercatoria*. Only then can the boundaries be truly apparent within which tribunals will exercise their discretion, and, thus, will a solidified legal standard be established.

²⁶⁵ Carbonneau, *supra* note 263, at 1192.

