

“Equitable Estoppel And CISG”

Peer-Reviewed Article

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ABSTRACT

Equitable estoppel is one of the most important doctrines in the Common Law Jurisdictions. The concept of estoppel which can be seen as one of the crucial principles of the public international law and the international commercial law, is aimed to protect one party from being harmed as a result of the other party's contradictory deeds, statements or promises. Although the Civil Law does not contain an estoppel doctrine, it contains several basic principles that serve to the same goal which can be summarized as to achieve justice through equity. This study examines whether the doctrine of equitable estoppel can be found compatible with the CISG (The United Nations Convention on Contracts for the International Sale of Goods) which targets to facilitate international trade and to create uniformity in its application.

Key Words

CISG, venire contra factum proprium, equitable estoppel, promissory estoppel, protection of reliance

ÖZET

Equitable estoppel Common Law Sistemi'ne dahil olan yargı çevrelerince benimsenen en önemli doktrinlerden biridir. Devletler genel hukuku ile uluslararası ticaret hukukunda mevcut olan can alıcı ilkelerden birisi olarak görülebilen “estoppel” kavramı, bir tarafın çelişkili eylem, beyan ya da vaatlerinden dolayı karşı tarafın zarar görmesini engelleme amacı taşımaktadır. Söz konusu doktrin Kıt'a Avrupası Hukuk Sistemi'nde yer almamakla birlikte, bu hukuk sistemi de “estoppel” ile aynı amaca hizmet eden çeşitli temel ilkeleri içerisinde barındırır. Bu çalışmada “equitable estoppel” doktrininin uluslararası ticareti kolaylaştırma ve uygulamada yeknesaklık sağlama amacını taşıyan “CISG” (Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması) ile bağdaşır bağdaşmayacağı tartışılmaktadır.

Anahtar Kelimeler

CISG, “venire contra factum proprium”, “equitable estoppel”, “promissory estoppel”, güvenin korunması

INTRODUCTION

As Aristotle explained; the essence precedes the existence. The theory of equitable estoppel is a useful theory to reach equity and justice in the Common Law jurisdictions. Although the doctrine of equitable estoppel cannot be found in the vocabulary of the Continental Law, the essence of this concept lies within the general principles of the Civil Law. In other words whether it is called estoppel or not, the same understanding exists in the Continental Law with different technical specialties. On the other hand, one of the most important attempts to create an international body of law governing the sales law can be seen as the CISG that is The United Nations Convention on Contracts for the International Sale of Goods which is drafted in 1980. The CISG entered into force for Turkey on August 1, 2011. As the scholars among the world assert that the role of Turkey in international trade is very significant and that this significance will highly increase in the following years, the need to evaluate certain specific characteristics of this convention arises.¹ The examination of the question whether the concept of equitable estoppel is regulated within the CISG is a difficult quest since the wordings of the convention do not mention about the doctrine of estoppel. However it can be suggested that several provisions of the convention reflects the idea of the protection of reliance and the prohibition of contradiction. Additionally as the CISG aims to facilitate international trade amongst several states from different jurisdictions, it can be found plausible that a concept which has reflections in both the Common Law and Continental Law is adopted as a principle of CISG. As the convention is the outcome of a compromise between different law systems, the equitable estoppel doctrine is a notion that is in harmony with the spirit of the CISG.

THE CONCEPT OF EQUITABLE ESTOPPEL

In order to examine whether the notion of equitable estoppel can be found in the depth of the CISG, the developments of the doctrine of equitable estoppel should be analyzed. Etymologically, the

word “estoppel” originates from the old French term “estoppe” which means to “stop up” or another French word “estoupail” which means a “stopper plug.” The legal term of estoppel indicates a situation where the promisor is barred from relying on his or her legal rights once he or she promised not to do so and from exercising his or her legal rights on the basis that the promise has been relied upon to the promisee’s detriment.²

Although the understanding of it can slightly differ according to the various philosophical tendencies, the notion of justice can be considered as a concept that is inherently adopted by all mankind. However the means to achieve this quasi-utopic ideal changes according to the law systems. The Common Law and Continental Law adopt different methods to reach the solutions that are as close as it is possible to the idea of justice. In this stage it can be said that the notion of equity plays an important law in both of these two systems. The concept of equity in the frame of the Continental Law has its roots back to the Roman Law. In the framework of *aequitas* in Roman Law, several sub-principles such as *bona fide* or the good faith, *pacta sunt servanda* or the principle of agreements must be kept and the prohibition of *venire contra factum proprium* or the prohibition of contradictory behavior is adopted.

On the other hand in the context of the Common Law, the concept of equity was also considered as a major tool to achieve justice. The notion of equity was begotten by the chancellors in the Ancient England. Because of this reason, the High Court of Chancery which was also known as the *Curia Cancellariae*, emerged as a separate body for the administration of equity in the fourteenth century.³ In order to reach the most equitable outcomes, The Common Law Courts developed several doctrines one of which was the doctrine of equitable estoppel. It is asserted that the first mention on the concept of estoppel was in *The Institutes of Laws of England* that was written by Sir Edward Cook and published in 1628.⁴ The

1 JOHNSON, P., William, “Turkey’s Accession to the CISG: The Significance for Turkey and for Sales Transactions With U.S. Contracting Parties.” *Ankara Law Review*. Year: 2011, Vol: 08 (p. 1-52) p. 3

2 GUOQING, Liu, “A Comparative Study of the Doctrine of Estoppel: A Civilian Contractarian Approach in China.” *Canberra Law Review*. Year: 2010, Vol: 1 (p. 1-28) p. 1

3 ANENSON, T., Leigh, “The Triumph of Equity: Equitable Estoppel in Modern Litigation.” *The Review of Litigation*. Year: 2008, Vol: 27, No: 3 (p. 377-440) p. 378

4 GUOQING, 2010, p. 2

basis of the doctrine of estoppel is explained by the scholars as the policy of making certain formal legal transactions conclusive by preventing a party from asserting the contrary. It is also declared in academia that the concept of estoppel is the reflection of the protection of the legitimate expectations of one party in the Common Law.⁵

As this doctrine is developed and strengthened with the jurisprudence, the legal decisions are the most accurate source to trace it down. In one decision, the purpose of the doctrine of equitable estoppel was explained as "to prevent a party from taking inequitable advantage of a situation he or she has caused."⁶ It can be said that the Courts developed the doctrine of equitable estoppel to block the inequity caused by one party due to his or her contradictory conduct to the disadvantage of the other party. The notion of estoppel was originally confined to formal matters of deeds and records and to matters *in pais* that are the informal words or conduct. However the need to provide equity extended the use of the doctrine beyond its technical understanding and the Common Law started to apply this principle to various cases.⁷

The most famous cases which describe the principle of equitable estoppel is the *Montefiori v. Montefiori* and *Pickard v. Sears* cases that are decided in the early England. The Case of *Montefiori v. Montefiori*⁸ was decided in 1762 by Lord Mansfield. In this case, a brother sued another to compel the return of a promissory note that was given in order to create the impression of wealth and facilitate the defendant's marriage but the Court denied the relief. The second leading case of equitable estoppel is the Case of *Pickard v. Sears*⁹ that is decided by Lord Denham in the next century. In the case, a mortgagee recovery for allowing the defendant to purchase the owner's property at an execution sale was denied by the Court. Lord Denham emphasized that where a party willfully causes another to believe the

existence of a certain state of things and to act on that belief by his words or conduct, and later on alters his previous position, he is barred from claiming this particular issue against the other party.¹⁰

The Common Law Courts created the defense of equitable estoppel in order to avert a party's contradictory arguments advanced at the expense the rights of other parties. It is said that the need to prohibit the inconsistent conduct or conflicting allegations came from the Latin principle *allegans contraria non est audiendus*. This Roman principle was adopted by the English Law during the Enlightenment. As it can be seen, even though the Common Law and Continental Law can *prima facie* seem different, several principles lie on the same foundations. One of these principles that can be traced in both systems is the Common Law principle of equitable estoppel which takes different names and forms in the Continental Law. It is declared that the defense of equitable estoppel is a golden rule erected into law and that the primary principle that governs the equitable estoppel, which is a highly deep doctrine in terms of its scope of application, is morality.¹¹ The Courts underlines that the doctrine of equitable estoppel is based on the grounds of public policy, fair dealing, good faith, and justice.¹²

The doctrine of equitable estoppel in the English Law can be deeply understood by analyzing the elements of it in general. The first element of application of the principle is the element of reliance. This element can be summarized as one party has to rely on other party's conduct and words in order to apply the equitable estoppel against the contradictory party. The reliance must be reasonable according to the circumstances. It is said that the requirement of reliance is the major difficulty in invoking equitable estoppel.¹³ As declared in the nineteenth century, "*the reliance was binding in equity in much the same way that consideration operated at law.*"¹⁴ However it is said that in modern litigation, the doctrine of estoppel is liberalized and the strict requirement

5 CARTWRIGHT, John, "Protecting Legitimate Expectations and Estoppel in English Law." **Electronic Journal of Comparative Law**. Year: 2006, Vol: 10, No: 3 (p. 1-22) p. 6

6 *Horn v. Cole*, (1868) 51 N.H. 287, 289

7 ANENSON, 2008, p. 385

8 *Montefiori v Montefiori*, (1762) 1 Black. W. 363.8

9 *Pickard v. Sears*, (1837) 112 E.R. 179

10 ANENSON, 2008, p. 387

11 ANENSON, 2008, p. 388

12 ANENSON, 2008, p. 388

13 ANENSON, 2008, p. 389

14 GUOQING, 2010, p. 7

of reliance is softened. Without reliance, the doctrine of estoppel extends to an infinite variety of situations. It is defended that the Courts have expanded the equitable estoppel to facilitate the protection of weaker parties and preservation of the integrity of the justice system.¹⁵

Another general element of the estoppel doctrine can be counted as intent. After the *Pickard* Decision, the Courts started to relax the *mens rea* element to include also culpable negligence. In this stage the liability focuses on what the party to be estopped knew or should have known. It must be noted that the bad faith or fraud is not required for this situation.¹⁶ In one of his decisions, Lord Denham explained that “*a party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute the fact in the action against the person whom he has himself assisted in deceiving.*”¹⁷

The Case of *Jorden v. Money*¹⁸ is another well-known nineteenth century case. This particular case distinguished the representation of facts from the representation of intentions, since the representation of facts can base a claim of estoppel. In the case Mrs. Jorden repeatedly declared that she would never enforce a bond against Mr. Money to which he was responsible for paying off the debt of £1200. The statement was considered as a representation of intention and not of fact. It is said that after this case the doctrine of estoppel evolved into a more equitable principle since it emphasises the equitable reliance and future intention rather than contractual consideration and existing facts.¹⁹ In a parallel manner in the *Hughes v. Metropolitan Ry.*²⁰ which was decided in 1877, the doctrine of equitable estoppel is explained in concrete terms by the Court. In the case the plaintiff gave notice to the defendant who was the lessee to repair the premises within six months. The lease provided that otherwise it would be forfeited. One month later, the parties entered into negotiations for the purchase of the leasehold interest by the

defendant but the negotiations did not turn into a sale. During these negotiations, the defendant did nothing to further the repairs. When the six month notice had expired, the plaintiff brought an action for eviction. The Court held that the negotiations had suspended the operation of the original notice and amounted to an implied assurance by the plaintiff that he would not enforce his right to compel forfeiture upon the expiration of the notice. It is declared in academia that the major negativity of the English understanding of estoppel is the complexity of the doctrine due to the dual court system in the English legal history. The English law subdivides the defense of estoppel into estoppel by record, estoppel by deed, estoppel by convention, promissory estoppel and proprietary estoppel. The promissory and proprietary estoppels construct the doctrine of equitable estoppel.²¹

The doctrine of equitable estoppel has been played a major role not only in England but also in other Common Law Countries such as The United States of America, Canada or Australia. It can be said that there are three different approaches taken by the Common Law jurisdictions. The English approach is defined as a restrictive equitable approach while the American approach is a contractarian one. On the other hand, Australia adopts an unconscionability-based approach.²² The most significant difference between the different systems of Common Law can be seen as the doctrine of estoppel can only be used defensively in England. However in the other jurisdictions the doctrine of estoppel is not only used as a shield but also as a sword.²³

It is said that in America, the defense of estoppel is very popular since the Court system wants to merge law and equity to achieve justice.²⁴ It must be noted that in the United States Law the concept of equitable estoppel is understood as a broader concept of equitable defenses. The term “promissory estoppel” is rather used to describe the notion of English equitable estoppel. The United States Courts also admit that the concept of estoppel is aimed to “*prevent the unconscientious and*

15 ANENSON, 2008, p. 389

16 ANENSON, 2008, p. 399

17 *Gregg v. Wells*, (1839) 113 Eng. Rep. 35 (Q.B.)

18 *Jordan v. Money* (1854) 5. H. L. C. 185

19 GUOQING, 2010, p. 9

20 *Hughes v. Metropolitan Ry.* (1877) App. Cas. 439

21 GUOQING, 2010, p. 7

22 GUOQING, 2010, p. 2

23 GUOQING, 2010, p. 8

24 ANENSON, 2008, p. 381

inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of law."²⁵ It must be stated that for more than fifty years before the 1926 proposal for a promissory estoppel section in the *Restatement of the Law of Contracts*, the Courts of the United States regularly applied the principle of promissory estoppel and granted relief where a promisee had acted with justifiable reliance on commercial promises. Nevertheless Langdell and Holmes focused on the bargain in the doctrine of consideration for the purpose of theorizing the contract law, and excluded the element of justifiable reliance. The element of justifiable reliance was a reflection of the Roman conception of *causa* but later the theory developed in to the model of consideration for modern contract law. Nevertheless it is said that the courts tended to afford relief in cases where the promisee had acted in justifiable reliance on a promise.²⁶

The American Law Institute which was formed in February of 1923 drafted the first *Restatement of the Law of Contracts* in 1933. In this sense the Article § 90 provided that *"a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."* The first element of the concept of promissory estoppel according to the *Restatement of 1932* was that the promisor must reasonably foresee the consequence of his or her promise. This element can be understood as the element of intent in the English Law. Another element can be explained as the promise must have induced a definite and substantial reliance or detriment on the part of the promisee. The notion of injustice on the other hand was very controversial since it contains an inherent subjectivity in itself. It is said that during the subsequent fifty years, Fuller's understanding of natural law affected the application of the article by focusing on the protection of the promisee's reliance.²⁷ Nonetheless In 1981, the *Second Restatement of Contracts* was issued. As the new article asserts *"a promise*

which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." It can be stated that the elimination of "definite and substantial character" reflects the shift from the reliance-based approach to a promise-based approach. However the doctrine of estoppel can be applied with or without a contract in question such as the pre-contractual liability problems or quasi-contracts.

It is generally accepted that the concept of estoppel is one of the best defenses in a difficult case. One of the reasons is that the notion of estoppel can be applied in a diversity of cases depending to the factual circumstances that broadens its scope of application. Moreover the concept of equitable estoppel gives the Court a massive discretion which can be found important for eliminating the unjust results of the strict laws. It is said that such freedom of the Court operates as a safeguarding tool for a more favorable judgment.²⁸

II. THE ROOTS OF THE EQUITABLE ESTOPPEL IN THE LAW OF CONTRACTS

After deeply examining the legal history and developments of the doctrine of equitable estoppel, the next step should be tracing down the general principles of law that lies under the notion of estoppel in order to make an accurate analyze of the CISG in this context. As it can be understood from the legal evolution of this concept, the doctrine of equitable estoppel has several aspects that is related to the general principles of Civil Law that arise from the Roman Law. These principles can be considered as the principle of good faith, the prohibition of contradiction or the prohibition of abuse of rights. Some scholars declared that since in the Continental Law vocabulary one cannot see the term "estoppel", there is no counterpart of this concept in the Continental Law.²⁹ However it can be argued that even though the terminology

25 *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980)

26 GUOQING, 2010, p. 7

27 GUOQING, 2010, p. 5

28 ANENSON, 2008, p. 381

29 MATTAR, Mohamed, Yehia, "Promissory Estoppel: Common Law Wine in Civil Law Bottles." *Tulane Civil Law Forum*. Year: 1998, Vol: 4 (p. 71-150) p. 74

is different, the concept of equitable estoppel serves to the identical aim of various concepts of the Civil Law. A rich variety of the principles and rules analogous to estoppel are used in the Continental Law. In this stage the main focus can be identified as the protection of reliance.³⁰

The comparative analysis demonstrates that in certain Civil Law countries such as France or Lebanon, the Courts started implicitly or explicitly referring to the doctrine of estoppel. As an example, in 2008 a Court in Beirut gave an interim judgment that is based on the doctrine of equitable estoppel of the Common Law. The court overruled an objection that was raised against the validity of an arbitration agreement while the bank had appeared throughout the arbitration process without raising such an objection.³¹ It is said that the Courts in the Continental Law jurisdictions use the similar legal reasoning but with different names such as the inadmissibility for a party to contradict itself to the detriment of another or the breach of the duty of loyalty and good faith in proceedings that is the *bona fide* principle. The performance and interpretation of the contracts in the Continental Law are governed with these principles. Article 1134 of the Code Napoléon of France and the Article 221 of the Lebanese Code of Obligations can be considered as the appropriate examples for this situation.³²

Some jurisdictions also refer to more specific legal theories instead of the theory of estoppel. One of these theories is *théorie de l'apparence* of Swiss and French Law. Another one is the abuse of right doctrine that is adopted by many Continental Law jurisdictions. Another one can be thought as the *Lex Mercatoria* rule of *non credit venire contra factum proprium* which can be translated as "no one may set himself in contradiction to his own previous conduct". Also in the German, Belgian, and Dutch Laws the similar theories exist. In a similar manner Swiss case law has also developed a special category of liability that can be found close to the doctrine of estoppel.³³

The Principle of Good Faith and the Prohibition of the Abuse of Right

As Cicero once stated; "these words, good faith, have a very broad meaning. They express all the honest sentiments of a good conscience, without requiring a scrupulousness which would turn selflessness into sacrifice; the law banishes from contracts ruses and clever maneuvers, dishonest dealings, fraudulent calculations, dissimulations and perfidious simulations, and malice, which under the guise of prudence and skill, takes advantage of credulity, simplicity and ignorance."³⁴ The principle of good faith or *bona fide* which derives from the Roman Law of Contracts, is adopted by nearly all of the Civil Law jurisdictions. The doctrine of the equitable estoppel in the Common Law and the principle of good faith in the Civil Law can be considered as the principles which belong to the same family that is the "equity". It is declared in academia that *bona fides* which was one of the most fertile principles that help to develop the Roman Law, is absorbed by *aequitas* which is a broader concept.³⁵

In this stage it must be accepted that the concept of good faith is *per se* ambiguous. It is stated that a clear definition of this concept does not exist and that this doctrine is applied intuitively.³⁶ The contemporary scholars suggest that the principle of good faith has no general positive meaning of its own. Nevertheless it serves to exclude the concrete forms of bad faith such as evading the spirit of the deal, lack of diligence, willfully rendering the imperfect performance, abuse of power or failure to co-operate in the other party's performance.³⁷ It can be said that the concept of good faith is a general and fertile concept that creates a number of sub-principles. One of these principles is the prohibition of the abuse of right. Not only good faith but also the prohibition of the abuse of right is derived from the maxims that were developed by the Roman Law. The rule of "*male enim*

30 MATTAR, 1998, p. 74

31 *FransaBank v. Habib*. Beirut 3rd Ch., 18 December 2008

32 SAKR, Marwan, "The Emerging Use of Estoppel by Lebanese and French Courts: Towards a "Civil Law Estoppel"?" **Lexis Nexis Emerging Issues Analysis**. Year: 2009 (p. 1-40) p. 1

33 SAKR, 2009, p. 3

34 CICERO, *De Officiis*. 3.17

35 ZIMMERMANN, Reinhard/WHITTAKER, Simon, **Good Faith in European Contract Law**. Cambridge University Press, Cambridge, 2000 p. 18

36 MILLER, Alan/PERRY, Ronen, "Good Faith Performance." **Iowa Law Review**. Year: 2013, Vol: 98 (p. 689-744) p. 697

37 MILLER/PERRY, 2013, p. 699

*nostro iure uti non debemus.*³⁸ which can be translated as “we shall not abuse of our rights” is a principle that was unchangeably accepted during the reign of the Roman Law.³⁹ Parallely, in his masterpiece *Römische Geschichte*, Mommsen asserts that “*qui suo iure utitur neminem laedit*” or in other words “the one who uses his right cannot harm another.”⁴⁰

The contemporary Continental Law jurisdictions with Romanist tradition, contain important provisions about the principle of good faith. The Article 242 of the German Civil Code BGB dictates that the obligations must be performed in good faith according to the trade usage. It is declared that this provision operates as a legal anchor to protect the good faith.⁴¹ In a similar manner the Article 1134 of the French Civil Code states that “*the agreements legally formed have the force of law over those who are the makers of them. They cannot be revoked except with their mutual consent, or for causes which the law authorizes. They must be executed with good faith.*” However it is accepted that this provision cannot be expanded to give relief in all the cases of commercial impossibility.⁴² Nevertheless it is obvious that it clearly reflects the essentiality of the principle of good faith for the French Law.

The comparative law scholars assert that the direct reference to estoppel is an increasing trend in France and Lebanon.⁴³ In an arbitration case, the Commercial Chamber of the French *Cour de Cassation* relied on the principle of good faith and created a broader obligation to protect the legitimate confidence between contracting parties that is nearly identical to the doctrine of equitable estoppel.⁴⁴ Even though in the case the term

estoppel was not used explicitly, In a comment of another decision, this concerning case was referred as “*illustrating a mechanism of estoppel in reality.*”⁴⁵ On the other hand The French *Cour de Cassation* made an explicit and direct application of estoppel in 2005 as a principle of international commercial law applicable to international arbitration.⁴⁶ In this stage another example from the French Law can be examined. In France, the Orléans Court of Appeals dismissed a claim for damages due to an alleged termination of a contract, on the grounds that the claimant was requesting the performance in-kind of the same contract against the same respondent. The Court of Appeals found in this domestic judicial dispute, a situation of estoppel.⁴⁷

Alongside of the French Law, the Lebanese Courts also started to base their decisions on the doctrine of equitable estoppel. It is said that in Lebanon the trend to utilize the doctrine of estoppel in the Court decisions essentially emerge from the application of the general principles of good faith and the prohibition of the abuse of right. Moreover the Sharia Law also contains a similar general provision. The article 100 of the *Mejelle* that was the Civil Code of the Ottoman Empire which affected the Turkish and Lebanese Modern Civil Codes indicates that “*the attempt of every one, who tries to destroy a thing done by him, is rejected*”. The commentators explain that this article refers to a general principle of the law of contracts for prohibiting contradictory behaviors. Additionally it is asserted that some English translations of the *Mejelle* explicitly refer to this article as “estoppel”. As many Lebanese precedents consider that the article is still a part of the legal Corpus of Lebanon, it is seen as a basis for a Lebanese rule of estoppel.⁴⁸ In one case that is decided in 2000, the Beirut Court of Appeals dismissed a claim to annul a contract signed by a CEO exceeding the financial limits set forth in the company’s statutes. In this decision, The Court based its reasoning on the doctrine of estoppel and article 100 of the *Mejelle* since the CEO was aware

38 GAIUS, *Ins.*.1.53

39 RICCOBONO, Salvatore, “The Doctrine of Abuse of Right in the Roman Law.” *The Hague Congress on Comparative Law*. The Hague, 1937, p. 391

40 MOMMSEN, Theodore, *The History of Rome: Volume: II*, Benediction Classics, Oxford, 2011, p. 459

41 KEE, Christopher /OPIE, Elisabeth, “The Principle of Remediation.” *Sharing International Commercial Law Across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*. Wildy, Simmons & Hill Publishing, London, 2008, p. 240

42 KEE/OPIE, 2008, p. 240

43 SAKR, 2009, p. 4

44 SAKR, 2009, p. 5

45 SAKR, 2009, p. 6

46 *Golshani v. Islamic Republic of Iran*, (2005) Civ. 1st Ch. 6 July 2005, JCP G

47 SAKR, 2009, p. 6

48 SAKR, 2009, p. 4

of the limits of his powers but did not disclose it to the other contracting party before.⁴⁹ In this stage it must be told that the Lebanese Courts did not refer to the concept of abuse of right as the legal basis for the rule of non-contradiction in the execution of contractual obligations. However it is defended that it is possible to do so in the light of the French jurisprudence.⁵⁰

The Turkish Courts also utilize the underlying principles of the equitable estoppel especially under the umbrella idea of good faith and the prohibition of the abuse of right. As the Article 2 of the Turkish Civil Code asserts, “every person is bound to exercise his rights and fulfill his obligations according to the principles of good faith. The legal order does not protect the manifest abuse of a right” Although the Turkish Courts did not refer to the doctrine of estoppel yet in their decisions, the concept of the prohibition of the abuse of a right operates as a similar mechanism. This mechanism prohibits one party from the use of his or her right to the detriment of the other.

It can be said that the Common Law remedies are analyzed in two different spheres such as the legal remedies and the equitable remedies. The equitable remedies provide relief to the parties in detriment when there is not any relief that is provided by the written laws. The concept of equity in the sense of the Romanist tradition is not entirely different from this understanding. The notion of *aequitas* of the Roman Law which evolved to the modern concept of equity is an important tool to utilize when the positive law does not provide a just solution or when there is a *lacuna* in the written laws.⁵¹ The concept of equity is closely linked to the several legal principles such as *bona fides*. Consequently it can be suggested that the doctrine of equitable estoppel of the Common Law is not very different from the basic legal principles of the Civil Law since both concepts derive from the crucial notion of equity.

The Prohibition of *Venire Contra Factum Proprium*

In academia, it is suggested that certain general

49 SAKR, 2009, p. 5

50 SAKR, 2009, p. 6

51 MUCKLEY, Peter, *Equity and Law*. (trans. Tella, y, J, F, María) Martinus Hijhoff Publishers, Boston, 2005, p. 24

principles may be a source for a rule of estoppel in the framework of Civil Law. These principles derive from the Roman Law such as the principle of *nemo auditur propriam turpitudinem suam allegans* which means no one alleging his own turpitude is to be heard, the principle of *fraus omnia corrumpit* which means fraud corrupts everything and the principle of *non concedit venire contra factum non valet* which means the prohibition of a party to contradict with itself to the detriment of another party.⁵²

The Roman maxim of the prohibition of *venire contra factum proprium* can be translated as “no one can contradict his own act” or “no one is allowed to go against the consequences of his own act.” This doctrine can also be understood as it is prohibited to enforce a right in contradiction to one’s previous conduct, when that conduct, interpreted in good faith, would justify the conclusion.⁵³ This principle can be considered as the founding stone of the Common Law doctrine of equitable estoppel. The scholars also assert that the prohibition of *venire factum contra proprium* is a broad concept which encompasses the doctrine of estoppel.⁵⁴ Moreover in a United Nations Conference on the Law of Treaties, it is explicitly declared that the prohibition of *venire contra factum proprium* and the doctrine of estoppel reflect the same legal concept in essence.⁵⁵

It is said that the doctrine applies in the cases where a conduct by one party may have created a situation contrary to reality which is apparent and capable of influencing the conduct of others. According to the doctrine, the apparent conduct constitutes the basis for trust by another party who proceeded in good faith and therefore acted in a manner that would cause him or her a detriment. Likewise the prohibition of *venire contra factum proprium* is also linked with the principle that “he who by his representation leads another to do what he would otherwise not have done or refrain from doing what he would otherwise not

52 SAKR, 2009, p. 4

53 MATTAR, 1998, p. 74

54 KEE/OPIE, 2008, p. 239

55 **United Nations Conference on the Law of Treaties**. 26 March - 24 May 1968. 67th meeting of the Committee of the Whole. Vienna, Austria. http://untreaty.un.org/cod/diplomaticconferences/lawoftreaties-1969/vol/english/1st_sess.pdf. (05.09.2013)

have done, shall not subject such person to loss, injury, or detriment.”⁵⁶ As it can be understood, the concept of the prohibition of the contradictory behavior and the mechanism of equitable estoppel lies on the same ideals. It is states that the doctrine of equitable estoppel shifts the loss from the innocent party who originally incurred it to the other party who is or should be liable for that loss just as the prohibition of *venire contra factum proprium* dictates.⁵⁷

II. THE REFLECTIONS OF THE EQUITABLE ESTOPPEL IN THE PROVISIONS OF THE CISG

It is said that the concept of the equitable estoppel is recognized as a general principle in the international commercial law. Although the word “estoppel” is not a part of the language of the CISG, it is accepted that it lives in the shadows of the several Articles of the Convention.⁵⁸ It is admitted that the principle of good faith which lies behind the doctrine of estoppel is a common principle of *Lex Mercatoria*.⁵⁹ The UNIDROIT Principles on the International Sale of Goods articles 1.7 and 1.8, the article 1.106 of The European Principles of Contract Law and several articles of CISG can be considered as an example for this situation. According to the article 1.7 of the UNIDROIT Principles, “each party must act in accordance with good faith and fair dealing in international trade. The parties may not exclude or limit this duty.” Moreover the article 1.8 dictates that “a party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.” As it can be seen the principle of the prohibition of *venire contra factum proprium* is explicitly regulated in this body of law. The article 1.106 of The European Principles of Contract Law sets a similar rule on the principle of good faith. It is said that as these bodies of *Lex Mercatoria* contain good faith and fair dealing as a general principle, it can be understood that the

Contracting States share similar values.⁶⁰

The CISG does not contain a general prohibition of *venire contra factum proprium* as the UNIDROIT principles do. However, the idea of good faith is an important notion of the CISG. In this stage the Article 7 of the CISG must be examined. The article that focuses on the interpretation of the contract, dictates that “(1) in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.” As it can be seen this provision of the CISG that is influenced by the German concept of “*treu und glauben*” is about the interpretation of the contracts.⁶¹ It is asserted that the Convention contains no explicit provision that imposes a duty of good faith on the parties. Nevertheless the Article 7 of the Convention can also be considered as a general provision on the importance of the good faith as a fundamental principle according to the philosophy of the CISG. Schlechtriem also asserted that the principle of good faith is a general principle of the CISG that affects a great number of provisions in the Convention. It is accepted by the scholars that the principle of good faith is a norm of behavior in equity. As some lawyers consider, numerous unwritten general principles are included in the CISG such as good faith, reasonableness, and estoppel.⁶²

On the other hand there are also scholars who suggest that a general principle that is similar to estoppel was not contemplated to fall within the sphere of the application of the CISG. It

56 MATTAR, 1998, p. 75

57 MATTAR, 1998, p. 76

58 KEE/OPIE, 2008, p. 232

59 AUDIT, Bernard, **The Vienna Sales Convention and the Lex Mercatoria**. <http://www.cisg.law.pace.edu/cisg/biblio/audit.html>, (05.09.2013)

60 KING, Colin, “The CISG-Another One of Equity’s Darlings?” **Vindobona Journal of International Commercial Law and Arbitration**. Year: 2004, Vol: 2 (p. 249-268) p. 263

61 SCHWENZER, Ingeborg/ HACHEM, Pascal, “Article 7 of the CISG”, **Commentary on the UN Convention on the Sale of Goods (CISG)**. (ed. Peter Schlechtriem/ Ingeborg Schwenger.) Oxford University Press, Oxford, 2010, p. 96

62 LOOKOFESKY, Joseph, “Walking the Article 7(2) Tightrope Between CISG and Domestic Law.” **Journal of Law and Commerce**. Year: 2005, Vol: 25, No: 87 (p. 87-105) p. 89

is argued that the statement that the doctrine of estoppel is based on the good faith is not sufficient.⁶³ However even the scholars who adopt the opposite view accept that a customized solution is possible within the open terms of the Convention since the general principles of the CISG are flexible.⁶⁴ The CISG is founded on general principles and a judge will use his or her discretionary power based on good faith. It can be said that the principle of estoppel can be used as a specific application of this process.⁶⁵ In this sense it is indicated in The Digest of the Article 7(2) that some Courts have recognized the principle of estoppel as a general principle of the CISG.⁶⁶ In a parallel manner in a Russian arbitration panel, it is declared that the international arbitration practice should apply the doctrine of estoppel to the international sales contracts on the grounds of the Article 7 of the CISG.⁶⁷

Also, it can be added that The Secretariat Commentary⁶⁸ of the CISG demonstrates that there are various applications of the principle of good faith within the CISG.⁶⁹ It is said that such examples can be counted as the Articles 16(2)(b) on the non-revocability of an offer, 21(2) on the status of late acceptance, 29(2) on to the preclusion of a party from relying on a provision in a contract that modification or abrogation of the contract must be in writing, 37 and 38 on the rights of a seller to remedy the non-conformities in the goods, 40 on the reliance of the seller to a notice of non-conformity in certain circumstances, 49(2), 64(2) and 82 on the loss of the right to declare the contract avoided and 85 to 88 on the obligations to preserve goods.⁷⁰ It can be said

that some of these provisions are open to be considered as the possible applications of estoppel.

As it is accepted the principle of good faith has two dimensions in terms of the application of the Courts. The first aspect is that it is a general principle that is utilized in interpreting the CISG. On the other hand the second aspect is that it is a principle that is regulated in the provisions of the CISG. It can be said that the notion of estoppel is an example of this aspect.⁷¹ In academia it is suggested that the idea of equity will use the notion of estoppel to protect a future right even in the absence of a consideration in the Common Law sense. The term that is referred is the conscience of the parties. It is declared that the idea of estoppel is adopted as a mean to ensure good faith.⁷²

In this point it must be noted that the objective of the CISG is to facilitate the international trade. This objective is nourished by the principle of good faith which provides the flexibility that the CISG aims. It is also said that the broader approach to estoppel examines whether it is unconscionable for a party to be permitted to deny the state of affairs which he or she has allowed or encouraged another to assume to his or her detriment. This aspect is considered as an inherent part of the CISG. The fundamental purpose of the doctrine of estoppel that is to provide protection against the detriment which would arise from a party's change of position demonstrates that the principle of estoppel applied in the CISG and equity are parallel conceptions.⁷³

Schlechtriem claims that estoppel can be used as a gap-filling principle due to the conflicting conducts. Nevertheless it is argued by him that this approach would increase the uncertainties of the examination and notice provisions and also prevent negotiations.⁷⁴ On the other hand it is known that the Arbitration Tribunal of the Federal Chamber of Commerce in Austria adopts this approach. In this case the argument on the possible

63 ZELLER, Bruno, "Protecting Reliance: Equitable Estoppel and the CISG." *European Journal of Law Reform*. Year: 2007, Vol: 641 p. 647

64 ZELLER, 2007, p. 652

65 LOOKOFISKY, 2005, p. 89

66 **Digest of Article 7 Case Law**. <http://www.cisg.law.pace.edu/cisg/text/digest-art-07.html>. (05.09.2013)

67 *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry*. 27 July 1999. <http://cisgw3.law.pace.edu/cases/990727rl.html>. (05.09.2013)

68 **Text of Secretariat Commentary on Article 6 of the 1978 Draft** (draft counterpart of CISG Article 7 (1)) <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-07.html>. (05.09.2013)

69 KING, 2004, p. 258

70 SCHLECHTRIEM, Peter. **Uniform Sales Law-The UN-Convention on Contracts for the International Sale of Goods**.

<http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html>. (05.09.2013)

71 SCHLECHTRIEM, (Uniform Sales Law-The UN-Convention on Contracts for the International Sale of Goods)

72 KING, 2004, p. 265

73 KING, 2004, p. 272

74 SCHLECHTRIEM, Peter. **Uniform Sales Law in the Decisions of the Bundesgerichtshof**. <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html>. (05.09.2013)

increase of the uncertainties of certain provisions can be found plausible. However this approach may also promote good faith in the international transactions which is a generally shared principle by all the law systems and have more benefits than its unwanted costs.

There are scholars who defend that the word "estoppel" is not a good term to use since the language of an international convention must be chosen with great care for not to create confusions.⁷⁵ As the essential principle of the CISG is to promote uniformity in its application and observance of the good faith in its interpretation by ensuring its international character, no Civil or Common Law bias should be adopted. Therefore it is suggested to use the term "remediation" as a non-biased term.⁷⁶ The remediation is defined as the action that is taken to prevent, minimize, remedy or mitigate the effects of the identified unacceptable risks. However it can be defended that whether the terminology is more appropriate or not, the elements of this concept also reflect the Common Law notion of estoppel and the Civil Law notion of good faith principles. As the essence of the concept is not different, this dispute can be found minor.

A major point to focus in this point is that the Common Law doctrine of estoppel can be applied in the various stages of the contracts such as the pre-contractual stage, the interpretation of the contract or the determination of the remedies.⁷⁷ It is said that the defense of estoppel is crucial in terms of the pre-contractual negotiations or in a state of *quasi-contractus* in terms of Roman Law. In this stage one may consider whether the Civil Law notion of *culpa in contrahendo* on the pre-contractual liability which derives from the Pandect law on the basis of good faith is regulated by the CISG or not. It is submitted that the CISG does not provide a regime for the breach of the pre-contractual duties. Nonetheless it is also defended that the domestic rules of *culpa in contrahendo* should be applicable irrespective of that the contract is governed by the CISG.⁷⁸

Schlechtriem stated that the Vienna Conference rejected a proposal by the German Democratic Republic of a general clause of *culpa in contrahendo* and that this subject remained in the sphere of the domestic law applicable according to the rules of the conflict of laws. The proposal intended to cover the cases in which the negotiations have already progressed so far that one side relying on the belief that a contract would materialize has made considerable expenditures.⁷⁹

On the other hand there is a view which suggests that in some exceptional cases such as the case when the seller has innocently induced the buyer to conclude the contract by not correctly informing him or her about certain defects of the goods, the CISG prevails over the domestic law.⁸⁰ Although in some situations there are special regulations in the CISG that prevail over the domestic law, it can be said that here is a plausible area of compromise. In this sense it can be decided that in general the domestic law applies for the pre-contractual negotiations. Consequently the notion of estoppel will be applicable in case of the domestic law is part of the Common Law. On the other side if the domestic law is part of the Continental Law, the doctrine of *culpa in contrahendo* will provide the necessary protection on the grounds of the principle of *bona fide*. For this reason, in order to analyze the application of the doctrine of estoppel in the context of the CISG, it can be found more appropriate to focus on the contractual stage rather than the pre-contractual stage. In a parallel manner several Convention commentators suggest that the doctrine of estoppel can be capable of settling the problems of avoidance and revocation.⁸¹

The Article 8 of the CISG

It is said that one article that can be found related to the doctrine of the equitable estoppel is the Article 8 of the CISG. The Article 8 of the CISG on the interpretation of statements or other conduct of a party is regulated in the Part I amongst the General Provisions. The article states that "(1) for

75 KEE/OPIE, 2008, p. 233

76 KEE/OPIE, 2008, p. 235

77 CARTWRIGHT, 2006, p. 7

78 HUBER, Peter/MULLIS, Alastair . **The CISG: A New Textbook for Students and Practitioners**. European Law Publishers, Mu-

nich, 2007, p. 28

79 SCHLECTRIEM, (**Uniform Sales Law in the Decisions of the Bundesgerichtshof**.)

80 HUBER/MULLIS, 2007, p. 29

81 LOOKOFISKY, 2005, p. 94

the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.” It is said that the Article 8 refers to what a person of the similar background engaged in the same occupation or trade as the recipient of the statement would understand it to be.⁸²

Although it is considered that the Article 8 is focused not only the interpretation of the contract but also the statements and conducts of the parties. In one of the cases,⁸³ the German Court applied the Article 8(2) of the CISG to the post-contractual conduct of the party as a waiver. The case can be summarized as a dispute between a German seller and an Austrian buyer on a sale contract of the surface-protective film. The buyer found that the good was defective and notified the seller the next day that was twenty four days after the delivery. The buyer paid the expenses of fixing the good and brought a claim for reimbursement of these expenses against the seller. The appellate Court dismissed the buyer's claim but the *Bundesgerichtshof* reversed the decision. As the CISG is found applicable, the Supreme Court held that the seller had waived its right to rely on the Articles 38 and 39 of the CISG on the examination and the lack of conformity of the goods. It is stated by the Court that a seller can waive its rights not only expressly but also in an implied way if only there are specific indications that would cause the buyer to understand the seller's

action as a waiver. The fact that a seller enters into negotiations over the lack of conformity cannot necessarily be regarded as a waiver. Each case should be considered according to the specific circumstances. In this case the buyer could reasonably understand that the seller would not invoke the delay in giving a notice of non-conformity and the seller had waived its right to rely on such delay. The scholars assert that the reasoning of the Court is an equivalent of the Common Law doctrine of estoppel.⁸⁴ Nonetheless, there are also opposite views about the application of the doctrine of estoppel. Some scholars suggest that the doctrine of estoppel and the Article 8 of the Convention cannot achieve the same results since the doctrine only works to create a contract when technically none exists.⁸⁵ Although opposite views exist, it can be decided that the majority opinion and the Court practices show that the CISG contains a hint of estoppel which can be used for altering or adding a term to a contract.

The Article 16 of the CISG

Another provision that openly reflects the doctrine of estoppel in the CISG can be considered as the Article 16 on the revocability of the offer. This article is regulated in the Part II of the Convention which explains the formation of the contract. As the article states, “(1) until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance. (2) However, an offer cannot be revoked: (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.”

The article 16(2)b expressly states the principle that a person should not act in a contradictory manner.⁸⁶ As it can be understood by the wordings of the Article 16(2)b, it explicitly protects the reli-

82 SUN, Chan, Leng, “Interpreting an International Sale Contract.” **Singapore International Arbitration Centre Conference**. Singapore, 2005 p. 77

83 *Bundesgerichtshof*. 25 November 1998. <http://cisgw3.law.pace.edu/cases/981125g1.html>. (05.09.2013)

84 SUN, 2005, p. 77

85 ZELLER, Bruno. “Determining the Contractual Intent of Parties under the CISG and Common Law -- A Comparative Analysis.” **European Journal of Law Reform**. Year: 2002, Vol: 4, No: 4 (p. 629-643)

86 SCHROETER, Ulrich, “Article 16 of the CISG”, **Commentary on the UN Convention on the Sale of Goods (CISG)**. (ed. Peter Schlechtriem/ Ingeborg Schwenzer.) Oxford University Press, Oxford, 2010, p. 309

ance of the offeree on the offer. The scholars also suggest that the underlying norm of the Article 16(2)(b) is the "reliance theory." According to this concept, the offeror's right to revoke an offer is suspended in order to prevent the injustice upon the offeree since it would be unjust if the offeror knew or should have known of the offeree's reliance upon an offer remaining open and revokes it nonetheless. Reasonable reliance can be created by a communication by the offeree before or in the course of dealings. There could also be a well-known and existing usage in the industry that such offers remain open unless expressly stated otherwise.⁸⁷ In this stage it must be noted that *per se* reliance is not sufficient. It is required by the CISG that the offeree must have acted in reliance on the offer. It is explained that an act performed in reliance of the binding nature of the offer may be starting the production of the goods, the acquisition of the materials, the conclusions of other contracts, the undertaking of costly calculations or the rental of a storage space. Moreover it can be added that an "act" does not have to be a positive act. The "failure to act" such as a demonstrable failure to solicit further offers is also considered in this context.⁸⁸ In this point, it can be said that this situation can be an example of estoppel since the national Court which will apply the CISG to solve the legal problem must prohibit or "stop" the offeror from revoking his or her offer if the conditions of the article are met.

In a similar manner the scholars assert that the structure of the Article 16 mixes two competing approaches. The first paragraph of the article reflects the general rule of the revocability of the offer while the second paragraph sets two exceptions of the general rule. Some commentators consider this provision as the rule of "firm offer".⁸⁹ It is said that the first case that is reflected in the sub-paragraph a is the Civil Law notion of the irrevocability while the second case that is reflected in the sub-paragraph b is found similar to the Common Law notion of promissory

estoppel.⁹⁰ The Digest of the Article 16 asserts that the sub-paragraph (b) of paragraph (2) can be considered as an evidence of a general principle of estoppel.⁹¹ For some scholars on the other hand, this provision goes further than the doctrine of estoppel of Common Law.⁹² It reflects the prohibition of the *venire contra factum proprium* as a general principle applicable to revocation of a declaration of avoidance of the contract. In this stage it is also important to state that the domestic legal rules on the promissory estoppel are not pre-empted. However when the CISG provides the equivalent of the promissory estoppel as in the example, the CISG prevails.⁹³ It can be said that the wording of this sub-paragraph can seem unfamiliar to the Civil Law lawyers. However whether the Civil Law contains the institution of estoppel or not, since there are other mechanisms to provide equity within this law system, the lawyers from the Civil Law jurisdictions should not be philosophically stranger to the concept of estoppel. Again in this article the compromise between the Civil and Common Law is visible.⁹⁴

In one case that is decided by the Arbitral Tribunal of Denmark in 2000 and reviewed by the Supreme Court of Denmark in 2006⁹⁵, it is explicitly indicated that the Article 16(2)b refers to the Common Law principle of estoppel. The case involved a sale of casting mould machine that is designed to mass produce concrete slabs for pig sties from a Danish seller to a Canadian buyer. In their contracts the parties agreed that the seller would install the machine in Canada and help the buyer to start the production. The buyer specified that the good should be larger than the one which was previously manufactured by the seller

87 DIMATTEO, Larry. "Critical Issues in the Formation of Contracts Under the CISG." *Belgrade Law Review*. Year: 2011, No: 3 (p. 67-83) p. 75

88 SCHROETER, 2010, p. 309

89 MATHER, Henry, "Firm Offers Under the UCC and the CISG." *Dickinson Law Review*. Year: 2000, Vol: 31 (p. 31-56) p. 48

90 VINCZE, Andrea, **Remarks on whether and the extent to which the UNIDROIT Principles may be used to help interpret Article 16 of the CISG.** <http://www.cisg.law.pace.edu/cisg/principles/uni16.html>. (05.09.2013)

91 **Digest of Article 16 Case Law.** <http://www.cisg.law.pace.edu/cisg/text/digest-2012-16.html>. (05.09.2013)

92 AZZOUINI, Ahmed., **The Adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom.** <http://www.cisg.law.pace.edu/cisg/biblio/azzouni.htm>. (05.09.2013)

93 SUN, 2005, p. 77

94 VINCZE, (**Remarks on whether and the extent to which the UNIDROIT Principles may be used to help interpret Article 16 of the CISG.**)

95 *Supreme Court of Denmark*. 3 May 2006. <http://cisgw3.law.pace.edu/cases/060503d1.html>. (05.09.2013)

for a business in Denmark. After the machine was installed on the buyer's premises and the production commenced, the buyer complained about the quality of the slats produced and demanded that the seller should repair or modify the machine. The seller attempted to help the buyer to produce better slabs but became unsuccessful. The buyer on the other hand claimed that the seller had fundamentally breached its obligations to deliver the good in accordance with the contractual specifications, declared the contract avoided and demanded repayment of the price. After the seller refused to accept the buyer's avoidance, the buyer revoked its avoidance and took steps to provide the necessary repairs and modifications by third parties. Nevertheless the buyer later started arbitration proceedings and demanded damages for both the cost of repair and lost production. The tribunal applied the CISG since it was the domestic law of the seller's country. It is concluded by the tribunal that the machine and mould delivered did not conform to the contract under the Article 35 of the CISG and that the seller had committed a fundamental breach since he had not repaired the machine within a reasonable time. In this stage, it is also declared that the seller had unjustifiably refused to accept the buyer's avoidance and that the buyer was entitled to revoke its avoidance in accordance with the Articles 7(2) and 16(2)(b) of the CISG. The buyer was entitled to repair the machine and recover damages for the expenses incurred under the Article 74 of the CISG. Nevertheless the tribunal reduced the amount of damages because of that the buyer failed to promptly inform the seller of its decision to revoke its termination and initiate its own repairs.

It is said that this attempt constituted a failure by the buyer to fully mitigate its loss. It is said by Schlechtriem that whether a declaration of avoidance is binding upon the declaring party, is governed but not settled by the CISG. In this case the tool that will help to settle is seen as the doctrine of "estoppel" which is a general principle of the Convention.⁹⁶ Some scholars predict that the Courts will use the Article 16(2)(b) of the CISG just

as the American Courts have used the doctrine of promissory estoppel.⁹⁷ In the light of these information, it is plausible to assert that the provision of the Article 16(2)(b) of the CISG supports the idea of the equitable estoppel since it adopts a perspective of equity.⁹⁸

One crucial case about the concept of estoppel in the CISG is a dispute on a sale contract of clathrate between a Canadian seller and an American buyer.⁹⁹ The decision is held by the U.S. District Court for the Southern District of New York in 2002. The buyer which is an American corporation called *Geneva Pharmaceuticals* that develops, manufactures and distributes a generic drug to treat blood clots, obtained sample amounts of clathrate from the seller which is a Canadian company named *Barr Corporation*. The buyer sent the reference letter that demonstrates the application to the Federal Drug Administration for the approval of the drug. Before the buyer obtained the approval yet, the seller concluded an exclusive purchase agreement with a third party. After having the approval the buyer sent a purchase order to the seller for 750 kg of clathrate which was denied by the seller. The buyer sued the seller due to the breach of the contract and demanded that it must be estopped from rejecting the order. It is claimed by the buyer that there is an industry usage that the buyers could rely on implied supply commitments. The Court which found that the contract is governed by the CISG, examined that the buyer's initial proposal was an offer according to the Article 14(1) and the seller has accepted the offer based on the Article 18(3) of the CISG. Under the "implied-in-fact" contract, the seller was obligated to supply calthrate if the buyer gave it commercially reasonable notice of an order. It can be said that the Court applied the Article 16(2)(b) of the CISG just as it establishes a modified form of promissory estoppel that does not require foreseeability or detriment.

The Article 29 of the CISG

Another example of the doctrine of estoppel in

96 LOOKOFSKY, Joseph, **Understanding the CISG in the USA: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods**. Kluwer Law International, The Hague, 2004, p. 120

97 MATHER, 2000, p. 132

98 KING, 2007, p. 21

99 *The U.S. District Court for the Southern District of New York*. 21 August 2001. <http://cisgw3.law.pace.edu/cases/020821u1.html>. (05.09.2013)

the provisions of CISG can be counted as the Article 29 of the Convention on the writing requirements in case of the modification of the contract. The article is found among the general principles of the Part III that regulates the sale of goods. As the article states “(1) a contract may be modified or terminated by the mere agreement of the parties. (2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.”

In this stage it must be emphasized that the second sentence of the second paragraph of the article explicitly defines the concept of estoppel. It can be said that with this provision, a great importance is attributed to the reliance of one party on the conduct of the other. It is also accepted in the scholarly works that the Articles 16 and 29 clearly prevent a party from allowing the other to rely on a state of affairs and to act to their detriment.¹⁰⁰ In the guide of the Article 29, it is declared that the exception of the Article 29(2) can lead to the interpretational difficulties. Nevertheless it is also admitted that the rule is based on the principles contained in the *mißbrauchseinwand* of the German Law, *nemo suum venire contra factum proprium* principle of the Roman Law or the doctrine of estoppel of the Anglo-American Law. It can be defended that all of these principles are related on the principle of good faith and the prohibition of the abuse of rights.¹⁰¹ It is possible to state that the concerning provision which contains an important principle that is reflected both in the Continental and Common, can be adopted uniformly by the Contracting States rather than causing interpretational difficulties.¹⁰²

It is commented that the Article 29(2) of the CISG recognizes the will of the parties to agree on the possibility of having the written contract

modified or terminated exclusively in a written form. This provision also applies to the situations in which the parties agree on other formalities such as a signature or the presence of a witness. The commentators defend that this provision limits the scope of that requirement by the application of the prohibition of *venire contra factum proprium* as an equivalent to the application of the doctrine of estoppel.¹⁰³

It is also argued that the “no oral modification” or “NOM” clauses operate like a private statute of frauds. It can be said that this view also supports the underlining concept of the good faith in this article. According to a view, whether the reliance of one party on the conduct of the other party renders the “NOM” clause ineffective or not, is found in the Articles 8, 16(2)(b) and 80 of the CISG. As the Article 80 on the exemptions states, “a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party’s act or omission.” It is defended that these concerning articles adopt the principle of estoppel, or *venire contra factum proprium* as a general principle applicable within the Convention.¹⁰⁴

Another important problem can be thought as whether the statements made by one party and the reliance of the other party on such statements are sufficient to apply the Article 29(2) of the CISG or not. In this point, it is stated that the CISG principle only refers to conduct. The UNIDROIT principle adopts a similar rule. However the Article 2. 106 of The European Principles of Contract Law also mentions about the possibility of the reliance on the statements made by the other party. The scholars suggest that the statements can be considered within the scope of the Article 29 only if the other party relied on them by interpreting the term “conduct” in a flexible manner.¹⁰⁵

The reliance is also essential in this context. The fact that one party has relied on the other party’s conduct must have resulted in some kind of action being taken by that party. It is said that

100 *The U.S. District Court for the Southern District of New York*, 21 August 2001

101 SCHROETER, Ulrich, “Article 29 of the CISG”, **Commentary on the UN Convention on the Sale of Goods (CISG)**. (ed. Peter Schlechtriem/ Ingeborg schrnzer.) Oxford University Press, Oxford, 2010, p. 484

102 **Guide to Article 29**. <http://cisgw3.law.pace.edu/cisg/text/peclcomp29.html>. (05.09.2013)

103 VISCASILLAS, Perales, Pilar, “Modification and Termination of the Contract (Art. 29 CISG)” **Journal of Law and Commerce**. Year: 2005, Vol: 25 (p. 167-179) p. 176

104 VISCASILLAS, 2005, p. 177

105 VISCASILLAS, 2005, p. 178

the second sentence of the Article 29(2) explicitly requires the action to be active and that mere passive reliance is not protected.¹⁰⁶ Non-exhaustively the active actions can be exemplified as manufacturing of contractually agreed goods in accordance with an orally amended specification, making considerable expenditures for this purpose or changing the financial planning in reliance on the other party's declaration.¹⁰⁷

In order to see the importance of this view, one may examine the judgments of the Courts on the international disputes. An important case in this context is an arbitration case that was decided by Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft of Austria in 1994.¹⁰⁸ The case is related to a contract of sale of rolled metal sheets between an Austrian seller and a German buyer. In the case the parties agreed that the goods would be delivered in installments 'FOB Rockstock'. After receiving the first two deliveries, the buyer sold the goods to a Belgian company and the latter shipped them to a Portuguese manufacturer who refused to accept the rest since he found that the goods were defective. The German buyer sent a notice of non-conformity to the Austrian seller but it refused to pay damages. Nonetheless the seller gave a justifiable impression that it recognized the lawfulness of the complaint despite the lateness of transmission. Consequently the buyer commenced the arbitration proceedings. The arbitrator decided that the CISG applies as the international sales law of Austria. In the proceedings, it is found that in the contract the parties derogated from the Articles 38 and 39 of the CISG and the buyer had not complied with the contractual requirements on the examination of the goods and notice. According to the contract the notice should be delivered within two months of delivery. The important point is that the arbitrator held that the seller was estopped from claiming that the notice was not timely. In order to conclude this decision the arbitrator applied the Article 7(2)

and referred to the Articles 16(2)b and 29(2) of the Convention. In the case it is emphasized that the fact that the seller did not immediately reject the complaint as having been made after the expiry of the contractually agreed time-limit is not very important. According to the arbitrator the main point was that even after the complaint had been made, the seller remained in contact with the buyer in order to keep itself informed on the part of the Portuguese ultimate customer and the Belgian intermediary. Moreover the seller repeatedly made statements to the buyer from which the latter could reasonably infer that the seller would not set up the defense of late notice.

The case can be found crucial in this frame since it is held that estoppel on the basis of the prohibition of *venire contra factum proprium* is a general principle that is reflected in the CISG. It is said in the decision that the reasoning is based on the principle of good faith and is strongly related with the principle of estoppel on the grounds of the prohibition of *venire contra factum proprium*. It is also declared that a legal position of a party is regarded as forfeited when the conduct of that party reflects that it is no longer wished to exercise the right or defence and when the other party acted in reliance of this situation.

CONCLUSION

The CISG does not explicitly mention the doctrine of "estoppel" which comes from the Common Law tradition. On the other hand, most scholars assert that in the provisions of the CISG the reflections of the concept of estoppel can be clearly observed. In this stage one can think that as the CISG is an independent body of law that aims to create uniformity in its application and to facilitate international trade, it is not appropriate to adopt a notion which is specific to Common Law. Nevertheless it must be understood that even though the mechanism of estoppel comes from the Common Law and does not exist in the Continental Law, the underlying philosophy and the aim of the doctrine is also adopted by the Civil Law system.

The notion of estoppel is based on the need to achieve equity which is a commonly adopted notion by all the law systems from Common Law to Civil Law. Moreover the notion of equity generally

106 SCHROETER, 2010, p. 486

107 SCHROETER, 2010, p. 486

108 Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft of Wien. 15 June 1994. <http://cisgw3.law.pace.edu/cases/940615a4.html>. (05.09.2013)

overlaps with the concept of good faith which is a founding stone for the Continental Law. It is said that several articles in the CISG such as the Article 16(2)b and 29(2), are designed to prevent the parties from acting in a manner that the law consider unacceptable.¹⁰⁹ It can be argued that such actions are essentially the actions that are found unacceptable by both the Common Law and Civil Law since it is contradictory with the notion of equity. As the CISG is a method of compromise between different methods and principles of law systems, it can be found plausible that the Convention contains the notion of estoppel as a general principle since it reflects the values that are inherently adopted by both the Common and Civil Law regardless of the terminology. It can be concluded that the doctrine of estoppel that is adopted in the CISG is a hybrid principle that is shared by the Common Law through its doctrine of estoppel and by the Continental Law through its principle of *bona fides*.

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109 KEE/OPIE, 2008, p. 244

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