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The Principle of Remediation

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What's in a name? That which we call estoppel
By another name would smell sweeter.
(Shakespeare misquoted)

INTRODUCTION

We feel honoured, privileged and pleased to be able to play a part in this tribute to Professor Albert Kritzer: teacher, mentor and admired friend. It is such an honour, and in the spirit of this particular contribution, we thought we should begin work on our piece before the Editors had an opportunity to withdraw the invitation. Having commenced, it could then be said that we had placed reliance on the invitation and – if withdrawn – that we would have suffered a detriment.¹ If not already apparent, this article deals with the notion of ‘estoppel’ in the United Nations Convention on Contracts for the International Sale of Goods (CISG).

The word ‘estoppel’ does not form part of the language of the CISG. However those conversant with this Convention will immediately recognise what appears to be its presence in the shadows of various of its Articles.² Two points should be noted at this juncture. First, the definition of ‘estoppel’

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¹ The detriment in question was to lose an excuse to catch up, and enjoy a dinner and bottle of wine to plan this paper.

² ‘It seems that the correct view is that estoppel is governed but not explicitly settled in the CISG [...]’: Bazinas, S (2006) ‘Uniformity in the Interpretation and Application of the CISG: The Role of CLOUT and the Digest’ in (2006) *Celebrating Success: 20 Years UNCITRAL Model Law on International Commercial Arbitration – Collation of Papers at UNCITRAL – SIAC Conference 22-23 September 2005*

used in this piece is broader than the more specific term 'precluding conduct' which has its roots not only in civil law but is perhaps closer in etymology to the CISG.³ Second, 'it is not uncommon to find estoppel discussed in the context of good faith as a specialised manifestation of the wider principle'⁴ – a principle enshrined in the Convention by virtue of Article 7.⁵ This contribution seeks to draw that presence from the shadows and argues the case that estoppel can be found in the CISG – but that the word 'estoppel' itself is not a good term to use.

When considering an international convention, language is significant and must be chosen with care – particularly given the penchant for domestic courts to corrupt the meaning of the international legal principles contained in the CISG by applying domestic legal interpretation rules.⁶ Aside from attempting to reflect a meaning appropriate to international commercial law and the CISG, it is important not to be unnecessarily parochial. It is essential that a principle with no common law or civil law bias is adopted to ensure that '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 inter-

Singapore International Arbitration Center at 24. See, for example, Articles 7, 16, 29 CISG (discussed below).

³ The word 'estoppel' is derived from the now obsolete French '*estouppail*' and so one might argue has civil law origins itself. Although it is perhaps more likely that French Law has really only just formally recognised the concept of Estoppel – see Lord Steyn (2006) 'The Challenge of Comparative Law' (8) *European Journal of Law Reform* 3 at 9 referring to the recent recognition of Estoppel in French law.

⁴ MacGibbon, IC (1958) 'Estoppel in International Law' (7) *The International and Comparative Law Quarterly* 468 at 471.

⁵ Article 7 CISG provides:

'(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.'

⁶ U.S. District Court [S.D.N.Y.], 21 August 2002 (*Geneva Pharmaceuticals Technology Corp. v Barr Laboratories, Inc et al*) 201 *Federal Supplement 2d* 236 (S.D.N.Y. 2002), available at: <http://cisgw3.law.pace.edu/cases/020821u1.html>; Supreme Court of Queensland (Australia), 12 October 2001 (*Downs Investments Pty Ltd (in liq) v Perwaja Steel SDN BHD*) [2002] 2 *Queensland Law Reports* 462, available at: <http://cisgw3.law.pace.edu/cases/011012a2.html>.

national trade'⁷. Similarly, the interpretation of the principle – like the CISG – is to be autonomous from domestic law.⁸ As Ferrari notes 'one should not have recourse to any domestic concept in order to solve interpretive problems arising from the CISG.'⁹

It is therefore with reluctance that we chose the word 'estoppel' as our starting point for this piece. We advocate a move towards the term 'remediation' - a term better known to life science and which we explain further below. As it is not a term previously known to law, it (to speak colloquially) therefore carries no legal baggage.¹⁰ In our view it is a term that can be defined so as to better reflect the underlying intent of the CISG.

The purpose of the following discussion is to outline a feasible thesis for the recognition of private international law concepts such as remediation (by that or another name) – the recognition of which would facilitate a more uniform approach to common issues and risks encountered during the course of international trade.

DEFINING REMEDIATION

The label 'remediation' has been drawn from the life sciences in the context of the phenomenon referred to as 'disturbance'. 'Traditionally, disturbances

⁷ Article 7(1) CISG.

⁸ Ferrari, F (2003) 'Gap-filling and Interpretation of the CISG: Overview of International Case Law' (7) *Vindobona Journal of International Commercial Law and Arbitration* 63 at 64. For further references see fn 11 of the Ferrari article.

⁹ Ferrari 'Gap-filling and Interpretation of the CISG' supra fn 8 at 65. In further support of this proposition Ferrari cites at fn 14, 'Honnold, J.O., 'Uniform Law for International Sales under the United Nations Convention', Deventer, 3rd ed., 1999, at p. 89, stating that 'the reading of a legal text in the light of the concepts of our domestic legal system [is] an approach that would violate the requirement that the Convention be interpreted with regard to its international character.' For a similar affirmation in case law, see Italian Supreme Court, June 24th, 1968, *Rivista di diritto internazionale privato e processuale* 1969, 914.'

¹⁰ See generally Rogers, VM and Kritzer, AH (2003) 'A Uniform International Sales Law Terminology' in Schwenzler, I and Hager, G (eds) (2003) *Festschrift für Peter Schlechtriem zum 70. Geburtstag* Mohr Siebeck 223; and Honnold, JO (1995) 'Uniform Laws for International Trade: Early "Care and Feeding" for Uniform Growth' (1) *International Trade and Business Law Journal* 1.

have been viewed as uncommon, irregular events that cause abrupt structural changes in natural communities and move them away from static, near equilibrium conditions'.¹¹ In these circumstances, a species may have intrinsic qualities to overcome the sudden and perhaps severe change in environment – such as the kangaroo during times of food shortage or drought.¹² However, there are instances (for example, in the advent of severe weather or man-made catastrophe) where proactive intervention is required to remediate an environment in order to ensure the protection of a species. The term remediation is also considered appropriate given that it is likely to be understood universally as a response to global phenomenon (environmental damage), albeit occurring often only in a local context.

The particular definition of remediation we advocate comes from a somewhat unlikely source, the Carrickfergus Borough Council website.¹³ In response to the question 'What is remediation?' the following answer is given:¹⁴

'Remediation is action taken to prevent or minimise or remedy or mitigate the effects of any identified unacceptable risks.'

A key aspect of this definition is that unacceptable risks have been identified, which did not exist at the point in time of one person's reliance on an accepted context or environment (here, due to another's conduct). The damaging event in question is in a category of risk that was wholly unexpected, or was thought to have a low chance of occurring.

Simply providing alternate nomenclature to a domestic legal principle does not of itself suffice to identify the legal remedy afforded to a party to an international sales contract. The following section seeks to identify, in the

¹¹ Sousa, WP (1984) 'The Role of Disturbance in Natural Communities' (15) *Annual Review of Ecological Systems* 353, available at: <http://arjournals.annualreviews.org/doi/pdf/10.1146/annurev.es.15.110184.002033> or <http://www.jstor.org/view/00664162/di975358/97p0079k/0>.

¹² 'The female kangaroo is usually pregnant in permanence, except on the day she gives birth; however, she has the ability to freeze the development of an embryo until the previous joey is able to leave the pouch. This is known as diapause, and will occur in times of drought and in areas with poor food sources', available at: <http://en.wikipedia.org/wiki/Kangaroo>.

¹³ Carrickfergus Borough is in the County of Antrim, Northern Ireland.

¹⁴ http://www.carrickfergus.org/site/environment/env_courthalds_site.htm.

context of this paper, those elements of estoppel which appear to have been adopted in some common law countries, and equivalent jurisprudence from some civil law jurisdictions under the principle of good faith. We consider that this approach is consistent with that stated by Professor Kritzer, who has noted that:

‘When a matter is governed by the Convention but not expressly settled in it, the Convention’s solution is (i) internal analogy where the Convention contains an applicable general principle; and (ii) reference to external legal principles (the rules of private international law) where the Convention does not contain an applicable principle.’¹⁵

The discussion will then turn to the transmogrification of these domestic principles into ‘remediation’ through the infusion of private international law, as is mandated by Article 7 CISG.

THE EXISTENCE OF ESTOPPEL IN PRIVATE INTERNATIONAL LAW

In 1958 MacGibbon considered that international judicial and arbitral activity has provided ‘substantial grounds [...] to consider estoppel as one of the “general principles of law recognised by civilised nations”’.¹⁶ Earlier in 1927 Lauterpacht had asserted that, in substance, ‘the principles underlying estoppel is recognised by all systems of private law, not only with regard to estoppel by record [...] but also, under different names, with regard to estoppel by

¹⁵ Kritzer, AH (1989) *A Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* Deventer at 117; see also Article 7(2) CISG.

¹⁶ MacGibbon ‘Estoppel in International Law’ *supra* fn 4 at 468, citing McNair (1924) ‘The Legality of the Occupation of the Ruhr’ (5) *British Year Book of International Law* 17 at 34. MacGibbon notes that ‘[t]he question whether the juridical basis of the doctrine of estoppel is to be found in customary international law rather than in the “general principles of law” is not free from difficulty’: MacGibbon at 468, see also *id* at 470. It is noted that customary international law has been deemed a source of international law under Article 38(1)(b) of the Statute of the International Court of Justice. In terms of good faith as set out in Article 7(1) CISG, there is a rule of customary international law requiring good faith in the implementation of treaty obligations.

conduct and by deed'.¹⁷ The fact that estoppel or equivalent legal principle is not named in the CISG does not mean that it cannot form part of this private international law.

ESTOPPEL AND GOOD FAITH UNDER DOMESTIC LAW

The following discussion is an overview of estoppel and civil law equivalents. Readers should note that it is beyond the scope of this paper to provide an extensive overview of the law of estoppel, good faith or related principles such as *venire contra factum proprium*.

Estoppel

Estoppel is a common law doctrine recognised at law and in equity. The definition of estoppel varies between common law jurisdictions because of its varying subsets. By way of example in this paper we focus on the Australian position.¹⁸

Whilst it is not completely settled, it can be argued that estoppel is now a unified concept in Australian law. Since 1989 authors such as Sutton have suggested that the then 'current practice of placing the various types of estoppel in separate categories, with only a tenuous connection between them, is rejected in favour of the view that they are but facets of the same general principle.'¹⁹ Sutton made his comments in the context of landmark Australian High Court cases such as *Legione v Hateley*²⁰ and *Waltons Stores (Interstate)*

¹⁷ Lauterpacht, H (1927) *Private Law Sources and Analogies of International Law* Longmans, Green and Co. Ltd. at 204.

¹⁸ For other legal systems see generally, Ngugi, JM (2006-07) 'Promissory Estoppel: The Life History of an Ideal Legal Transplant' (41) *University of Richmond Law Review* 425; Fleming Powers, J (2006-07) 'Promissory Estoppel and Wagging the Dog' (59) *Arkansas Law Review* 841; see Lord Steyn 'The Challenge of Comparative Law' supra fn 3 at 9 referring to the recent recognition of Estoppel in French law.

¹⁹ Sutton, K (1989) 'A Denning Come To Judgment: Recent Judicial Adventures In The Law Of Contract' *Law Lectures for Practitioners Hong Kong Law Journal Limited* at 136, available at: <http://sunzi1.lib.hku.hk/hkjo/view/14/1400130.pdf>.

²⁰ (1983) 152 *Commonwealth Law Report* 406.

Ltd v Maher.²¹ *Waltons* is a particularly important case in Australia, as it (to use Lee's word) 'exploded'²² the myth that estoppel could only be used as a shield. In that case, the Mahers were able to use estoppel as a cause of action (that is a sword) in circumstances where no pre-existing legal relationship existed. This sword versus shield argument is one platform from which we argue that estoppel is not quite what we find in the CISG.

The High Court continued the approach begun in *Waltons* in the subsequent case of *Commonwealth v Verwayen*.²³ However, it cannot yet be said definitively that estoppel is a unified concept in Australian law. Justice Gyles of the Federal Court, a leading jurist and noted scholar, in *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd*²⁴ stated relatively recently:

'On the other hand, unconscionable or unconscientious conduct is only one element of equitable estoppel. The doctrine of equitable estoppel is distinct from unconscionable conduct, even if the views of Mason CJ and Deane J in *Verwayen* (at 411 and 440 respectively) as to a single overarching or general doctrine of estoppel by conduct were to be accepted (see *Giumelli v Giumelli* (1999) 196 CLR 101 per Gleeson CJ, McHugh, Gummow and Callinan JJ at pars [6] and [7]) and even if equitable estoppel is regarded as a cause of action.

The argument to the contrary of my conclusion must involve the proposition that there is an overarching or general doctrine of unconscionability recognised by equity which encompasses all circumstances in which behaviour which can be described as unconscionable plays a part in the entitlement to relief.'

This case then went to the High Court on appeal, where the majority of the court found it unnecessary to consider whether the position espoused by Gyles J was correct and so did not do so.

²¹ (1988) 164 *Commonwealth Law Report* 387.

²² Lee, S (2002) 'Review Essay: Choice Of Law For Claims In Unjust Enrichment' (26) *Melbourne University Law Review* 192 at fn 137.

²³ (1990) 170 *Commonwealth Law Report* 394

²⁴ (2001) 191 *Australian Law Reports* 342 at 390 (paras 124, 125). The citations of cases referred to by Giles J have been omitted.

In our view there is a clear movement towards a unified principle of estoppel, and it is a movement that in many ways now seems inevitable.²⁵

In the introduction to the second edition of *The Law of Waiver, Variation and Estoppel*,²⁶ a text that comprehensively discusses developments in the United Kingdom, Sean Wilken identifies a trend towards unification. Although his preferred position would be a series of interlocking doctrines, the trend is most definitely apparent. Whilst the CISG may not form part of English law, many common law countries still take their lead from the UK courts; particularly in issues of equity.

Good Faith

The position in civil law jurisdictions is only somewhat different. Indeed it can be argued that notions of 'good faith' and the more specific 'venire contra factum proprium' are broad doctrines which encompass estoppel.²⁷ The notion of good faith is expressly set out in § 242 of the German Civil Code²⁸ and Article 1134 of the French Civil Code²⁹. Like estoppel in the common

²⁵ The cases and commentary highlighted above are indicative of the Australian position going even further than simply unifying estoppel by effectively subsuming it into a general principle of unconscionability.

²⁶ Wilken, S (2002) *The Law of Waiver, Variation and Estoppel* (2nd ed) Oxford University Press.

²⁷ '[E]stoppel is governed but not explicitly settled in the CISG as it is a manifestation of the general principle of good faith underlying the CISG': Bazinas 'Uniformity in the Interpretation and the Application of the CISG' supra fn 2, citing Ferrari, F (2004) 'Scope of application: Articles 4-5' and 'Interpretation of the Convention and Gap-Filling: Article 7' in Ferrari, F, Flechtner, H and Brand RA (eds) *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* Sellier. European Law Publishers at 108-9 and 162-3.

²⁸ § 242 Bürgerliches Gesetzbuch (or 'BGB') provides: 'An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration' (English translation, available at: http://bundesrecht.juris.de/englisch_bgb/englisch_bgb.html). For a commentary on this provision, see Schlechtriem, P (1997) 'Good Faith in German Law and in International Uniform Laws', available at: <http://w3.uniroma1.it/idc/centro/publications/24schlechtriem.pdf>.

²⁹ Article 1134 Code Napoleon provides: 'Agreements legally made take the place of law for those who make them. They may be revoked only by mutual consent or for causes which the law authorizes. They must be executed in good faith' (English translation).

law, the meaning of 'good faith' and the extent of its application varies under civil law.³⁰

Michael Bridge notes that 'Good faith is enshrined in art. 1134 of the French civil code but its practical impact can be described as shallow: it has done nothing to disallow penalty clauses, it has not expanded the narrow categories of lesion and it has not been employed to give relief in what we would now call cases of commercial impossibility'³¹. As a contrast to this position, the application of the equivalent German Civil code has been considered far too broad as 'you can find a source (be it a court decision or a scholarly theory) for every solution imaginable or wanted, 242 BGB [Good Faith] serving as the legal anchor to even the wildest propositions and results'³².

It is acknowledged that argument may be made that trying to unify varying legal concepts from different domestic jurisdictions will not lead to certainty in international trade – one of the underlying aims of the CISG. However, just as international trade has developed significantly over time, so too has international trade law, comprising of (i) case law concerning the CISG and (ii) domestic law. These developments relate not only to recognised rights and obligations, but also to the type of remedy or relief available. Both commercial reality and legal doctrine support the evolution – some might say, recognition of – relief for those disabused of a position because of reliance (encouraged in some way by another) on conduct. Case law arising from both the common law and civil law in this area demonstrate that courts can, where appropriate, intervene to assist a party who has relied on

³⁰ It should be noted that there are common law jurisdictions which do recognise 'good faith' at law. The United States expressly recognises 'good faith', in § 1-203 of the Uniform Commercial Code and § 205 of the Restatement (Second) of Contracts. By contrast, it has not been accepted by the High Court of Australia that the obligation of good faith exists as part of Australian contract law. Despite this, it was acknowledged as *obiter dictum* that 'the ratification by a great many countries of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980), art. 7(1) of which requires regard to be had to the observance of good faith in international trade in the interpretation of the convention': Court of Appeal, New South Wales, 12 March 1992 (*(ME) Pty. Ltd v Minister For Public Works*) (26) *New South Wales Law Reports* (1992) 234-283.

³¹ Bridge, MG (1984) 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?' (9) *Canadian Business Law Journal* 385 at 414-5.

³² See generally Schlechtriem, P (1986) *Uniform Sales Law* Manz.

another's conduct to its detriment. Our proposition is that these common elements to legal principle or doctrine recognised at both the common law and civil law should be recognised internationally under the CISG.

APPLICATION OF PRIVATE INTERNATIONAL LAW

The UNCITRAL Digest on Article 4 CISG case law notes:³³

'One court has found that estoppel is not dealt with by the Convention,³⁴ however other courts have concluded that estoppel should be regarded as a general principle of the Convention.'³⁵

'Estoppel' is most commonly attributed to Articles 16(2) and 29(2) CISG, although it should be noted that there are many Articles in the Convention which can be considered to rely on or enshrine this principle.³⁶

Article 16 CISG

Article 16(2)(b) CISG provides:

'(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:

³³ A/CN.9/SER.C/DIGEST/CISG/4 [8 June 2004], available at: <http://www.cisg.law.pace.edu/cisg/text/anno-art-04.html>.

³⁴ Rechtbank Amsterdam (Netherlands), 5 October 1994, available at: <http://cisgw3.law.pace.edu/cases/941005n1.html>.

³⁵ See Oberlandesgericht Karlsruhe (Germany), 25 June 1997, available at: <http://cisgw3.law.pace.edu/cases/970625g1.html>; Vienna Arbitration Award No. SCH-4318, 15 June 1994, available at: <http://cisgw3.law.pace.edu/cases/940615a4.html>; Vienna Arbitration Award No SCH-4366, 15 June 1994, available at: <http://cisgw3.law.pace.edu/cases/940615a3.html>; Gerechtshof s'Hertogenbosch (Netherlands), 26 February 1992, available at: <http://cisgw3.law.pace.edu/cases/920226n1.html>.

³⁶ See also Article 2, Article 9(2), Article 16(2), Article 14(2), Article 18(2), Article 19(2), Article 21(2), Article 25, Article 33, Article 39(2), Article 41, Article 46(1), Article 47(2), Article 48(2), Article 49(2), Article 62, Article 63(2), Article 64(2), and Article 66 CISG.

- 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.’

Mather considers that Article 16(2)(b) CISG ‘looks very much like American promissory estoppel’³⁷, a view supported by Andrea Vincze.³⁸ Ahmad Azzouni suggests the same article goes further than common law estoppel.³⁹

It is recognised that domestic legal principles should be adapted to – and not merely adopted into – an international private law context. In the United States case of *Geneva Pharmaceuticals Technology Corp. v Barr Laboratories, Inc et al.*,⁴⁰ it was stated that the ‘CISG establishes a modified version of promissory estoppel’, albeit in a form different to that recognised under American law given the lack of a requirement in the CISG of foreseeability or detriment’.⁴¹

Article 29 CISG

Pilar Perales, citing Sieg Eiselen, has stated estoppel can be found in Article 29(2) CISG.⁴²

³⁷ Mather, H (2000) ‘Firm offers under the UCC and the CISG’ (105) *Dickinson Law Review* 31 at 48.

³⁸ Vincze, A ‘Remarks on whether and the extent to which the UNIDROIT Principles may be used to help interpret Article 16 of the CISG’, available at: <http://www.cisg.law.pace.edu/cisg/biblio/vincze1.html>.

³⁹ Azzouni, A ‘The adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom’, available at: <http://www.cisg.law.pace.edu/cisg/biblio/azzouni.html>. For further authority, see also Lookofsky, J (2005-06) ‘Walking the Article 7(2) Tightrope Between CISG and Domestic Law’ (25) *Journal of Law and Commerce* 87, available at: <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky16.html>.

⁴⁰ *Supra* fn 6.

⁴¹ *Id* at 287, per Sweet J.

⁴² Perales Viscasillas, P ‘Modification and Termination of the Contract (Art. 29 CISG)’ (25) *Journal of Law and Commerce* 167 at 177, available at: <http://www.uncitral.org/pdf/english/CISG25/Viscasillas.pdf>.

Article 29(2) CISG provides:

‘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.’

This article prevents a party from undertaking or failing to undertake an action where the other party has relied on the first party’s conduct. In *Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft*,⁴³ Bonell (as arbitrator) stated:

‘However, at the least the principle of estoppel or, to use another expression, the prohibition of *venire contra factum proprium*, which represents a special application of the general principle of good faith, may without doubt be seen as one of the ‘general principles on which the Convention is based’, which according to Article 7 (2) of the CISG may be invoked to solve the question of a possible forfeiture of the defence of late notice, not expressly settled in the Convention.’⁴⁴

The potential for the application of estoppel or good faith to this article is due to its allowance for parties to rely on agreed, implied or common practices used between them, or in contracts of a similar kind, subject to the parties being in a jurisdiction that observes trade usages.⁴⁵

⁴³ Arbitral Tribunal - Vienna 15 June 1994, No. SCH-4366, available at: <http://cisgw3.law.pace.edu/cases/940615a3.html>.

⁴⁴ Id at para 5.5, referencing Bonell, MJ in Bianca, CM & Bonell, MJ (eds) (1987) *Commentary on the International Sales Law* Giuffrè at 81 (with a reference to the provisions contained in Articles 16(2)(b) and 29(2) CISG); Herber, R and Czerwenka, B (1991) *Internationales Kaufrecht* Beck at 48. See also Sheehy, B ‘Good Faith in the CISG: Interpretation Problems in Article 7’, available at: <http://law.bepress.com/cgi/viewcontent.cgi?article=1815&context=expresso>.

⁴⁵ Perales Viscasillas ‘Modification and Termination of the Contract’ supra fn 42 (cf U. S. Court of Appeals [9th Circuit], 5 May 2003 (*Chateau des Charmes Wines Ltd. v. Sabaté USA Inc.*), 328 F.3d 528 (9th Cir. 2003), available at: <http://cisgw3.law.pace.edu/cases/030505u1.html> where it was held that modifications concerning forum selection clauses are required to be expressly agreed). See also to Article 9 CISG, which provides:

The articles we have identified all contain rules that are designed to prevent parties from acting in a manner that the law deems unacceptable. Here we emphasise the synergy with the definition of Remediation we advocated above, in particular the treatment of unpredicted outcomes arising from unacceptable risk.

COMMENT

In our submission there is a general principle encapsulated in the CISG which is currently slumbering within the clutches of pre-existing meanings in both common and civil law jurisdictions. Far from delusions of grandeur for a new discovery, our purpose here is to promote further discussion that will hopefully explore the boundaries of the Principle of Remediation.

As part of this discussion, it is suggested that the doctrine should be considered to exhaustively pre-empt all traditional estoppel considerations emanating from domestic law. The very important caveat – so important that the prior sentence cannot be read in its absence – is that this must be limited to matters within the scope of the Convention. This immediately presents two perennial problems; the towering twins of pre-emption and concurrent remedies. The *Geneva Pharmaceuticals Technology Corp*⁴⁶ case referred to above, critiqued by Lookofsky amongst others,⁴⁷ has become a well cited example of these problems. We do not propose to describe the facts in detail here. It is sufficient to note that the court allowed a promissory estoppel claim governed by New Jersey law, notwithstanding the CISG was found to

'(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew 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.'

⁴⁶ *Supra* fn 6, reconsideration denied by the same court on 21 August 2002, both decisions available at: <http://cisgw3.law.pace.edu/cases/020510u1.html>.

⁴⁷ See in particular, Lookofsky, J 'CISG Case Commentary on Pre-emption in Geneva Pharmaceuticals and Stawski', available at: <http://cisgw3.law.pace.edu/cisg/biblio/lookofsky8.html>.

apply. It has been a widely criticised judgement and is disappointing in many respects.⁴⁸

Our criticism of the *Geneva Pharmaceuticals* case is that the CISG does cover contract formation and consequently in our submission the actions that precede formation.⁴⁹ Therefore when it is the governing law applicable to a contract, it should be seen ‘to cover the field’ – that is apply to the exclusion of all other laws and/or remedies unless specifically excluded by the CISG itself. Such exclusions (validity and the passing of property for example) can be found in Article 4 CISG. What have not been excluded are notions of what is right and wrong; neither has what sort of behaviour is to be considered acceptable and unacceptable. These can be described as value judgements, and are the sorts of considerations that are at the very foundation of common law notions of equity. The CISG has many articles that contain implicit value judgements. The list, not surprisingly, is identical to the one we noted earlier when describing those articles in whose shadows we could see estoppel.⁵⁰ These are the ‘identified unacceptable risks’ from the definition of the Principle of Remediation we advocate.

We believe that Remediation as a general principle has the potential to go further and could become a fundamental consideration in other debates within the CISG. We refer specifically to two particular debates: those concerning the Parole Evidence Rule, and the Revocation of Avoidance.

When considering the Parole Evidence Rule, Silvia Ferreri has wondered whether the ‘the safest strategy may work through reliance on general principles such as the prohibition of *venire contra factum proprium*. Both in common law (by way of the estoppel doctrine) and in civil law (by the “bona fides” clause), it may be possible to react to the unfair conduct of one of the parties who pretends to enforce the literary meaning of a contract, forgetting

⁴⁸ It must be noted that there were some positive aspects to come from the decision as well. See DiMatteo, L et al. (2005) *International Sales Law, A Critical Analysis of CISG Jurisprudence*, Cambridge University Press at 59-60.

⁴⁹ See generally Gil-Wallin, S (2007) ‘Liability Under Precontractual Agreements and their Application Under Colombian Law and the CISG’ (1) *Nordic Journal of Commercial Law* 1. Gil-Wallin at 14 argues that it is possible to establish the existence of pre-contractual liability within the scope of the CISG. Whilst we agree that it is a matter within the scope of the CISG we do not necessarily share the view that the CISG permits such a claim.

⁵⁰ See fn 36 above.

representations or assurances given in the preliminary stage of the contract.⁵¹ We essentially agree, however in our submission it is the general principle of Remediation that provides this solution.

The Revocation of Avoidance can be similarly analysed. Müller-Chen, citing Schlechtriem, suggests that whether a buyer is bound by their valid notice of avoidance is determined by general principles.⁵² Specifically 'According to these principles, the decisive factor is whether the seller has an interest worthy of protection in the irrevocability of the declaration of avoidance of the contract, because he would reasonably be permitted to rely on that fact, and has adjusted his position to the changed legal situation and made dispositions accordingly.'⁵³ Whilst this is a classical estoppel argument, Müller-Chen does not use that word, and we think he is right not to.⁵⁴ In our submission the general principal is that of Remediation.

CONCLUSION

This paper has sought to discern a principle which can be used as a consistent means of facilitating an outcome which is recognised in jurisdictions around the world, in response to conduct relied upon by a party to a contract, to its detriment.

Although the above analysis of law has been brief, and limited to Western legal concepts, it is hoped that the concept of adopting a principle of the nature – if not the name – of Remediation is not dismissed.

⁵¹ Ferreri, S (2005) 'Remarks Concerning The Implementation Of The CISG By The Courts (The Seller's Performance And Article 35)' (25) *Journal of Law and Commerce* 223 at 235.

⁵² Müller-Chen, M in Schlechtriem, P and Schwenzer, I (eds) (2005) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd ed) Oxford University Press at 525.

⁵³ Id.

⁵⁴ Müller-Chen does suggest the circumstance amounts to an equivalent of *venire contra factum proprium*.