Protecting Reliance: Equitable Estoppel and the CISG

– a Comparative Analysis –

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A. Introduction

The ideal outcome of business negotiations is the execution of a contract. A legal relationship has been created with all its obligations and benefits. However, not all business negotiations culminate in a binding contract. To that end, business negotiations can be classified into three stages, namely:

> a stage involving preliminary negotiations in which each party feels free to withdraw, a stage in which agreement 'in principle' has been reached, that agreement often being expressed in a 'letter of intent' and a stage in which the contract is complete.[1]

The question is, at what stage do legal obligations arise? Two points are clear. First, no legal obligations are expected to arise in the stage of preliminary negotiations. Secondly, once the third stage is reached, that is, a contract is completed; a legal relationship has been concluded. However, at the second stage – where the parties anticipate that a contract will be entered into and all activities are directed towards a performance of the intended economic activity – the matter becomes unclear. As agreement in principle has been reached, a fine line has been drawn. The question is whether the agreement can be considered to be final and therefore contractual, or whether the terms of the contract are still under negotiation. In most, if not all cases, the applicable substantive law will assist in this determination.

The problem which is the cause of this debate arises when parties perform activities which are directed to, and are necessary in, the preparation of a contract. In most cases both parties are aware that no obligations have been created and no expectation of payment ever arises.

The issue which will be analyzed is, that despite the fact that a contract has not been formed, one party believes that such formation either has eventuated or is about to happen and has commenced performance in reliance on that assumption.

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1 M. Spence, Protecting Reliance: The Emergent Doctrine of Equitable Estoppel 83 (1999).

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Most importantly, the other party is aware of this fact. These issues have been difficult to resolve as all "cases arise at the edge of contract."[2] In addition, these cases often arise when the 'battle of the forms' needs to be evaluated.

Using contract law, the mistaken party would suffer the losses despite the fact that the outcome would be patently unjust. To that end, in the common law, a party can rely on equitable estoppel. This is of interest as it has been argued that equitable estoppel gives rise to an independent cause of action where otherwise no possible remedies exist.[3] This paper will investigate whether the CISG can achieve the same outcomes, or whether this area is not covered and is outside the scope of the CISG. The real question is whether the rules governing the contract formation of the CISG are flexible enough to include and protect what is referred to in common law as protecting reliance. If that is not the case, the CISG does not govern this area; hence, this gap would need to be filled by domestic law, namely the doctrine of equitable estoppel. It is obvious that the CISG can only be applied if a valid contract is in existence. The question therefore, is whether under the CISG, a contract can be constructed where the common law fails to do so.

In this instance, the importance of this investigation can simply be measured by the outcome. In equitable estoppel the plaintiff can claim a relief in the form of a *quantum meruit*. The respondent, on the other hand, is left with no remedies whatsoever as he can only rely on an existing contract which, in this case, has not eventuated. If under the CISG a contract can be constructed, both parties have the ability to make claims which are dependent on which party is in breach of the contract.

B. Equitable Estoppel – A Brief Analysis

Before such an investigation is undertaken, a brief understanding of estoppel is required. Brennan J. succinctly stated the problem:

> … the unconscionable conduct which gives rise to the equity [is] the leaving of another to suffer detriment occasioned by the conduct of the party against whom the equity is raised.[4]

Four conditions must be established before a party can rely on estoppel. Firstly, that a representation was made, secondly that the aggrieved party relied on the representation, thirdly the party relying on the representation is worse off and fourthly that it would be unconscionable for the representor to go back on his promise without compensation.[5]

In *Verwayen*,[6] the court made it clear that to depart from an assumption or representation is not only restricted to the present state of affairs, but also to

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2 *Id*., at 78.

3 *See* W *v*. G (1996) 20 Fam L. R. 49.

4 Waltons Stores (Interstate) Ltd. *v.* Maher (1988) 164 CLR 387, at 427.

5 *See generally*, J. Paterson, A. Robertson & P. Heffey, Principles of Contract Law (2005), ch. 9; *see also* M. Spence, Protecting Reliance: The Emergent Doctrine of Equitable Estoppel (1999) chs. 2 & 3.

6 Commonwealth *v*. Verwayen (1990) 170 CLR 394.

future conduct which "may be taken as a reference to the unconscionable conduct required to found an equitable or promissory estoppel."[7] Interestingly, in *Verwayen*, the court noted that promissory estoppel can also "be applicable to parties in a pre-contractual relationship."[8] However, the court did not elaborate on this issue and it can be assumed to indicate that estoppel can be established when no formal contract has been concluded.

The courts in Australia have been reluctant to establish an estoppel unless the terms of the contract have been settled.[9] This is understandable as equitable estoppel could otherwise be used to award relief where no obligation would have arisen or was ever contemplated.

However, one aspect of estoppel rests on the premise that the doctrine of consideration does not recognize detrimental reliance on a promise as a basis for the enforcement of the promise.[10] The civil law, as well as the CISG, does not recognize consideration as an integral part in the formation of contracts and therefore this aspect of estoppel does not require any discussion. Simply put, equitable estoppel is not required to create an equity or a right when the CISG is applicable. A right has been created under a contract; hence, the aggrieved party can rely on the remedies within the CISG.

As cases dealing with estoppel are at the fringe of the law of obligations, the facts of each case are to be viewed independently and separately from the general principles of law.

For the purpose of this paper, a leading case[11] will be analyzed and comparisons will be drawn on how the CISG would approach litigation if it were under common law and no contract was concluded.

C. Equitable Estoppel and Contract

British Steel is instructive as this case could equally have been factually resolved under the CISG, since it is a sale of goods dispute. For that reason, useful comparative remarks can be made and the differences between the common law and the CISG can be highlighted. For the purpose of this analysis, it is of little significance that in essence the dispute was domestic in nature.

However, the work of the 'Hague Programme of the European Council' which was agreed to by Heads of State at the European Council Meeting on November 5, 2004, may well be the impetus for the UK to ratify the CISG.[12] From that point of view alone this analysis serves a useful purpose.

The facts are not complicated. An engineering company was asked to fabricate steel constructions suitable for a building. The plaintiffs were iron

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7 *Id*., at 453.
8 *Id*. at 454.
9 Waltons Stores (Interstate) Ltd. *v.* Maher, *supra* note 4, at 405-406.
10 *See supra* note 5, at 157.
11 British Steel Corporation *v*. Cleveland Bridge and Engineering Co Ltd. [1984] 1 All ER 504.
12 L. Miller, *The Common Frame of Reference and the Feasibility of a Common Contract Law in Europe*, 2007 (June) The Journal of Business Law June 378, at 389 n. 60.

and steel manufacturers. The defendant, Cleveland Bridge, approached the plaintiff to produce a variety of cast-steel nodes for the project. Cleveland Bridge subsequently sent a letter of intent to the plaintiff, British Steel. In that letter they indicated that a contract was to be concluded. The terms to be agreed upon were contained in the defendant's standard form contract. Furthermore, Cleveland Bridge requested British Steel to commence work immediately "pending the preparation and issuing to you of the official form of sub-contract."[13]

Ultimately, a formal contract was never concluded, despite the fact that all but one of the nodes were delivered. The closest the parties came to reaching an agreement was on the basis of a quotation. However, agreement on terms such as progress payments and liability for the loss arising out of late deliveries was never reached.

I. The Common Law Solution

The court recognized that a formal contract was never entered into between the parties, but that the manufacture of all nodes was affected on the insistence of the defendant. Goff J. noted:

> In most cases, where work is done pursuant to a request contained in a letter of intent, it will not matter whether a contract did or did not come into existence, because, if the party who acted on the request is simply claiming payment, his claim will usually be based on a quantum meruit, and it will make no difference whether that claim is contractual or quasi-contractual.14

As a matter of analysis, Goff J. also investigated whether the possibility of an executory contract existed. However, the court decided that, on the strength of the letter of intent, British Steel did not bind itself to any contractual performance. The reason was because the sub-contract was "plainly in a state of negotiations, not least on the issues of price, delivery dates, and the applicable terms and conditions."[15]

In the end, Goff J. concluded that here was no binding contract and hence:

> the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to the request, such an obligation sounding in quasi contract or, as we now say, in restitution.16

Due to the above reasons, the counterclaim of Cleveland Bridge failed as it was based on the existence of a contract, which, as noted above, never existed.

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13 British Steel, *supra* note 11, at 504.
14 *Id*., at 510.
15 *Id*.
16 *Id*., at 511.

II. Common Law Analysis of British Steel

It has been argued that the application of the doctrine of equitable estoppel would have produced a solution that would have been more rational and comprehensible. The reason being, that in this case (and all similar cases), no clear exposition was given of the basis upon which the remedy was awarded.[17] In an earlier case, Greer L.J. noted that:

> …an obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by the rule of law, and not by an inference of facts arising from the acceptance of service.[18]

The problem is, as indicated earlier, that there is no clear rule of law. At best, two arguments can be advanced.

Firstly, a claim for pre-contractual performance was successful because the court assumed that there was an implied contract collateral to the one which was the subject of the negotiations.[19] This is certainly a valid argument as the nodes were produced by mutual consent. Both parties were aware that work was being undertaken; hence, a contract could have been implied which was severable from the intended main contract. This argument does become tenuous once the main contract is concluded, as now the collateral contract has been subsumed into the main contract. Therefore, it is questionable as to whether the above argument is a slight of hand or sound reasoning.

The second argument is based on the fact that compensation is possible as it relies on a contract-like doctrine which is concerned with fulfilling the parties' reasonable expectations.[20] This expectation is founded on the principle of quasi-contracts:

> The court will look at the true facts and ascertain from them whether or not a promise to pay should be implied, irrespective of the actual views of intention of the parties at the time when the work was done or the service rendered.[21]

Such a view is arguably in line with the parol evidence rule which assists in the interpretation of contracts under the common law. The argument appears to be, that if objectively viewed, a business would only perform the work for payment and not as part of the preparation for a possible contract, a quasi-contract exists

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17 Spence, *supra* note 1, at 88.

18 Craven-Ellis *v.* Canons Ltd. (1), [1936] 2 All E.R. 1066, at 1073.

19 Spence, *supra* note 1, at 90.

20 *Id.*

21 William Lacey (Hounslow) Ltd., *v.* Davies, [1957] 2 All E.R. 712, at 718. For the facts *see infra* note 23. This case has often been used to explain estoppel as it is a type of ineffective transactions. A contract never eventuated. British Steel and William Lacey both fall into the category of quasi contracts. However William Lacey best explains the principle of Restitution as the party who did not conclude the contract benefited from work done which was expected to be renumerated one way or another. Estoppel, quasi contracts and restitution sometimes melt into the same facts and solutions to the problem of ineffective transactions that is a contract, which was expected to be concluded but never eventuated, could possibly be resolved by using at least one of the three methods mentioned above.

and *quantum meruit* can be awarded. The question is whether such a view can amount to a rule of law or whether the facts alone will determine if restitution should be paid or not. It is difficult to argue that a rule of law has been created if a court finds that the work is considered to be pre-contractual and no pay is expected, versus work done which would eventually form part of a quote and reimbursement would be expected. It could be said that the courts indulged in a 'subjectively objective' exercise.

What stands out in *British Steel* is the fact that the parties were treated unequally. The plaintiff received a reasonable compensation whereas the defendant received nothing. This is despite the fact that some of the nodes were defective, not delivered in the right sequence and supply was late. Spence argues that equitable estoppel would equip the law to treat parties with greater parity.[22]

It is not surprising that the common law arrives at such a resolution. It is difficult to compensate the defendant for two reasons. Firstly, there is no contract; hence, there is no legal relationship on which such a claim can be based. Secondly, it was the defendant who enticed or allowed the plaintiff to do work or expend money in anticipation of a contract. However, both parties suffer losses and only one is compensated.

Spence argues that equitable estoppel would be able to compensate both parties. It is obvious that in cases like *British Steel* both parties relied on the formation of a contract. This case needs to be contrasted with other cases where one party steps away from the contract and a loss is suffered by only one party such as in *William Lacey*.[23]

It is equally obvious that it would be difficult to generate a legal principle to accommodate both types of cases; therefore, it is not surprising to find that *quantum meruit* only favors one party, namely the one who undertook work on the assumption that a contract would eventuate. The argument Spence advances has merits and must be taken seriously as equitable estoppel does allow the defendant to press his counter claim for compensation. Thus, if one party is put into a position, as they would have been had no negotiations taken place, then the other party should be given the same rights, since the issue is intertwined and is founded on a common relationship, namely pre-contractual negotiations.

III. The CISG: Estoppel and British Steel

It must be noted that this analysis is based on the given facts as presented in the Law Report. The first point to consider is whether a valid contract was entered into. It would be trite to argue that the CISG can govern business relations which are not founded on a contractual relationship. Therefore, this observation leads

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22 Spence, *supra* note 1, at 106.

23 The facts in brief were that a builder was asked to submit tenders in order to gain an approval by the War Damages Commission for compensation in rebuilding houses. Due to the work of the plaintiff the amount was substantially increased. The builders spent considerable sums of money having been assured that they were to rebuild the houses. In the end the owner sold the houses instead of having them rebuilt.

to the conclusion that a general principle, similar or the same as estoppel, has not been contemplated to fall within the sphere of application of the CISG. However, in a Russian arbitration proceeding the panel stated:

> in accordance with Article 7 CISG and the requirements of 'observance of good faith in international trade' the international arbitration practice has concluded to apply to contracts for international sales the Anglo-American principle of estoppel.[24]

This decision has been criticized correctly on two grounds. Firstly, it is established – and contained within Article 7 – that domestic principles cannot be applied to a contract governed by the CISG. The second point pertains directly to the application of the principle of estoppel. Saidov commented:

> The ICAC, in this case, has come to the conclusion as to the applicability estoppel of basing itself upon the 'need to observe good faith'. It seems that more thorough analysis should have been carried out before such conclusions should be examined. Therefore a simple statement that estoppel is based upon good faith cannot suffice.[25]

The above has been confirmed in *Caterpillar v Usinor Industeel*[26] where the court stated that "the CISG preempts Plaintiff's UCC and promissory estoppel claims only if such claims fall within the scope of the CISG."[27] It can be assumed that the court had in mind that the UCC and promissory estoppel is only applicable if the CISG cannot be invoked and, only then, can a gap be filled by domestic law.

The question which must be asked is whether pre-contractual duties are regulated by the CISG. Article 8 allows the subjective intent of parties to be taken into consideration when interpreting the contract. The question is whether the influence of Article 8 can be extended to include the interpretation of pre-contractual duties. The liability for *culpa in contrahendo* was rejected as a principle; hence, it is not explicitly included in the CISG.[28] It must be noted that the CISG "addresses the problem of breaking off negotiations and preventing the formation of contract exhaustively."[29] Giving regard to the two stances in relation to the negotiation process, it becomes obvious that a middle path must be applicable. Considering that Article 8 requires the parties to be aware of their intentions, a contract is not only interpreted in an objective fashion but also with the subjective intent of the parties in mind, thus certain pre-contractual duties must be drawn within the sphere of application of the CISG. Schlechtriem argues

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[24] Russia, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Case No 302/1996, 27 July 1999, http://cisgw3.law.pace.edu/cases/990727r1.html, CISG-online No 779.

[25] D. Saidov, *Cases on CISG Decided in the Russian Federation*, 7 Vindobona Journal of International Commercial Law and Arbitration 1, at 33-34 (2003).

[26] Caterpillar, Inc. and Caterpillar Mexico, S.A. *v*. Usinor Industeel, Usinor Industeel (U.S.A.), Inc. and Leeco Steel Products, Inc., US Dist Ct (Illinois), 30 March 2005, http://cisgw3.law.pace.edu/cases/050330u1.html, CISG-online No 1007.

[27] *Id*.

[28] United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March to 11 April 1980, Official Records at 294-295.

[29] I. Schwenzer & F. Mohs, *Old Habits Die Hard: Traditional Contract Formation in a Modern Wold*, 2006 Internationales Handelsrecht 239, at 239.

that pre-contractual duties compel the parties to disclose relevant information to each other; specifically, matters which pertain to conditions or conformity of goods.[30]

The conclusion which can be drawn from the above is that the CISG does not govern matters which are outside a validly concluded contract. However, statements made and behavior of parties during the negotiation process can be scrutinized far closer than the common law in order to ascertain whether they have a bearing on the formation of a contract.

Taking the above discussion into consideration, two obvious conclusions can be drawn. Firstly, the CISG does not govern situations which fall outside a contract and are regulated under the common law principle of equitable estoppel. Hence, the gap must be filled by domestic law. The second possibility is that the rules as to the formation of contract, as contained within the CISG, allow these situations to fall within the ambit of the CISG. In other words, the facts as contained in *British Steel* lead to the conclusion that a contract has been formed.

Such a conclusion would not be unusual, as demonstrated in *MCC Marble*.[31] Due to Article 8, a party could claim damages where otherwise under the common law – due to the parol evidence rule – such a claim would have been unsuccessful. Article 8, which, as one of the core principles, advocates the use of subjective consensus, guarantees that appropriate solutions can be formulated.[32] This is of paramount importance, because in reality, business negotiations are not distinctly formulated as offer and acceptance, but are a flow of information moving forward and backward which eventually culminates in an understanding that certain obligations have been entered into which could be described as a consent to be legally bound.

IV. The CISG and British Steel

1. Offer – Article 14

The starting point in this analysis is Article 14. The important point is to determine who made the offer and if the offer was validly made. An offer must contain an indication of the goods, and "expressly or implicitly [fix] or [make] provisions for determining the quantity and the price."[33] The facts in *British Steel* clearly show that several offers were made by both sides. In the meantime, a casting was made which proved to be unsatisfactory and as a consequence the parties did not come to an agreement at all. However, on August 1, the parties reached a provisional agreement on the basis of the quotation of the plaintiff which was made previously. Arguably therefore, an offer was made, since the goods were

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[30] P. Schlechtriem, *Intro to Arts. 14-24*, *in* P. Schlechtriem & I. Schwenzer (Eds.) Commentary on the UN Convention on the International Sale of Goods (CISG) (2005), para 6b.

[31] MCC-Marble Ceramic Center, Inc. *v*. Ceramica Nuova D'Agostino, SpA, US Ct App (11th Cir) (USA), 29 June 1998, http://cisgw3.law.pace.edu/cases/980629u1.html.

[32] *See* C. Fountoulakis, *Bearbeitung der Artt. 1-13, 53-100 CISG*, *in* I. Schwenzer & C. Fountoulakis (Eds.), International Sales Law 84, at 90 (2007).

[33] Art 14(1) CISG.

identified, the price was set and the quantity was determined. The fact that other terms of the contract have not yet been determined is of no consequence in the ability of a party to submit a valid offer. Of importance in this issue is that the plaintiff was instructed to commence production. This fact alone would indicate – and is supported by Article 8 – that the conduct of the defendant, at a minimum, supports the view that a valid offer was in existence. Furthermore, from the facts it can be concluded that the offer was never revoked. Again this is supported by the conduct of the defendant who took delivery of the nodes as they were shipped.

2. Acceptance

The problem, however, is whether an acceptance of the offer took place. The facts of the case are clear on this issue. There was never an express acceptance by either party. However, the CISG does not rule out an acceptance by conduct pursuant to Articles 8 or 9 in connection with Article 18. Assent by conduct includes the shipping of the goods[34] or the acceptance of the goods by the other party, which was precisely the fact in this case. In many business transactions it is not unusual to conclude a contract without the acceptance having been manifested in an express way, but as contemplated by Article 18(3) by conduct.[35] It follows that the exact moment when acceptance has been affected is difficult to pinpoint. Nevertheless, an indication of when an acceptance becomes effective needs to be ascertained. Article 18(2) supplies the answer in sentence two, namely "the moment when the indication of the offeree's assent reaches the offeror."[36] Considering that Article 18 allows for an acceptance by conduct, and that an acceptance is only effective if it reaches the offeror, the manufacturer on dispatch of the goods fulfills both requirements of Article 18.

The facts cannot be analyzed with reference to Article 18 only. In order for an acceptance to be without controversy it must coincide with all the terms contained within the offer. In *British Steel*, substantial alterations between the first offer and what may be termed the last offer of May 16 – on which the subsequent relationship was built – took place. For this reason, Article 19 also plays a major role. The CISG, in the first instance, arguably follows the common law approach of the mirror image rule. The application of the mirror image rule resulted, amongst other facts, in the judgment indicating that no formal contract was ever entered into.[37]

However, unlike the common law, the strict mirror image rule is modified by Article 19(3) which stipulates that a reply which does not "materially alter the terms of the offer [still] constitutes an acceptance."[38] Thus, the problem hinges

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34 H. Gabriel, Contracts for the Sale of Goods 73 (2004).

35 J. O. Alban, *Acceptance of an Offer: Commentary on the manner in which the UNIDROIT Principles Arts 2.6 and 2.7 may be used to interpret or supplement CISG Art. 18*, *in* J. Felemegas (Ed.), An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law, at 98 (2007).

36 Art. 18(2) CISG

37 British Steel, *supra* note 11, at 504.

38 Art. 19(3) CISG.

on whether the outstanding issues would materially alter the terms contained in the offer. Article 19(3) provides a list which – though not exhaustive – lists items such as price, payment, quality and quantity of the goods. The facts of the case indicate that the only major disagreements were in relation to progress payments and liability for loss arising from late delivery. It can be ascertained from the facts, that price, quality and quantity of the goods was agreed on and furthermore delivery of the nodes was made and accepted by the defendant.

The facts of the case also clearly indicate that on August 1 only provisional agreement was reached; hence, a solution to the problem of the 'battle of the forms' needs to be found. Witz argues that a literal interpretation of Article 19 is only permissible if the parties are still in a state of negotiations and have not yet started to perform the contract.[39] In *British Steel*, arguably one party has performed their intended contractual duty which, under normal contractual relationships, would trigger a corresponding response, namely paying the price of the delivered goods or at least accepting the goods. It appears that in this case the 'last shot doctrine'[40] is of little use. It is plainly obvious that the constant offers and counteroffers have lead to a partial acceptance as discussed above.

Usually solutions can be found by using the 'last shot doctrine' – which may be predictable as far as courts are concerned – but in this case the doctrine would arguably contradict the reality. It would be difficult to ascertain which is the last shot in the exchange of offers and rejections. After all, partial agreements have been reached and only individual elements of the standard form contracts are in dispute. Simply put, as performance of the contract has been commenced the 'last shot doctrine' is of little utility and another solution needs to be found, namely the 'knock out rule.'[41]

Regarding the clauses where no agreement has been reached, neither party prevails, as "such clauses 'knock out' one another."[42] As the contractual terms are removed, the fall back position needs to be adopted, namely the CISG. The validity of this general proposition is founded on Article 4(1). This article makes it clear that the CISG exclusively regulates the execution of sales contracts. Hence, the duties and responsibilities of buyer and seller are regulated within the CISG and recourse to domestic law is not allowed. Article 4 makes it clear that recourse to the parol evidence rule would not be permitted. As far as payment is concerned, the CISG govern this issue in section 1 of Chapter III, namely Articles 54 to 59. Regarding loss arising from late delivery, the matter is again governed

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[39] W. Witz, H.-C.Salger & M. Lorenz (Eds.), International Einheitliches Kaufrecht (2004), Art 19, para. 15.

[40] This theory found expression in Butler Machine Tool Co Ltd *v*. Ex-Cell-O-Corp (Eng) Ltd [1979] 1 All ER 965. *See also*, Reese Bros Plastic Ltd *v.* Hamon-Sobelco Australia Pty. Ltd (1988) 5 BPR 11, 106 (NSWCA).

[41] Schwenzer & Mohs, *supra* note 29, at 244.

[42] *See* the decision of the German BGH (Supreme Court), 9 January 2002, http://cisgw3.law.pace.edu/cases/020109g1.html, CISG-online No 651. Furthermore, this rule is also used in various other systems and is not unique to the CISG which makes this knock out rule universally acceptable. It can be found in §2-207 of the UCC, §§154 and 155 of the German BG, in Article 2:209(1) of the Principles of European Contract Law and Article 2.22 of the UNIDROIT Principles.

by the CISG and can amount to a breach of contract giving rise to damages or avoidance of the contract.

The German Supreme Court confirmed the 'knock out rule', thus giving validity to the contract. The court argued that a "partial contradiction of the referenced general terms and conditions of buyer and seller did not lead to the failure of the contract within the meaning of art. 19(1) and (3)."[43] As in *British Steel*, the contract in this case was also performed. That is, the seller supplied the goods and the buyer accepted the goods. The court elaborated on the above by stating:

> The question to what extent colliding general terms and conditions become an integral part of a contract where the CISG applies, is answered [that] … partially diverging general terms and conditions become an integral part of a contract (only) insofar as they do not contradict each other; the [CISG] provisions apply to the rest.[44]

British Steel is also a classic example of the customary habit of business to take little notice of standard form terms and erroneously consider that the contract has been validly concluded and commence in the performance of the contract. It follows, therefore, that the "question of contract formation has to be separate from the question of its content."[45] Thus, it can be argued that the agreed terms of the April 21 offer formed the basis of the contract. Furthermore, general terms of both parties which do not contradict that particular offer, and are not contradicting each other, can also be added. All other terms are knocked out and any claims by plaintiff or defendant which are now not part of the express terms of the contract must be based on the general rules of the CISG.

A second possible solution can be envisaged to resolve the problem of contract formation. The starting point is the recognition that the problem of an approach to Article 19 has to be resolved. If Article 19 could be deleted, the maxim of essentialia negotii could come into existence. The CISG does allow derogation from its rules under Article 6. The problem which needs to be overcome is that Article 6 allows such derogations only under two circumstances. Derogation or exclusion must be communicated, either in express form or by implication. Arguably the parties in this case derogated by implication from Article 19, since they reached agreements essentially on most of the terms and hence a contract came into existence. The Appellate Court of Köln came to the same conclusion as they stated "… the interpretation of contracts with conflicting terms leads to the application of at least those provisions which do not differ."[46] The only problem which needs to be overcome is that some terms within the contract are still under dispute. In other words, the question is not the formation of the contract anymore, but rather the determination of some terms within the contract. Such a

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43 *Id.*

44 *Id*.

45 Schwenzer & Mohs, *supra* note 29, at 244.

46 Oberlandesgericht Cologne (Germany), 24 May 2006, http://cisgw3.law.pace.edu/cases/060524g1.html, CISG-online No 1232.

determination overcomes the problem in Article 19, namely to ascertain whether the outstanding items are 'material'.

The problem which needs to be addressed in this particular case is the fact that both parties were still negotiating terms. However, in the alternative, it must be noted that the contradictions of the terms did not appear to be an obstacle to the execution of the contract. There appears to be compelling evidence that a party would not manufacture goods, deliver the goods and the other party accepts the goods without some legal foundation.

In brief, the solution under the CISG arguably would have been that the initial exchanges of letters were offers and counteroffers. The casting of the first node was work which was essential as a foundation on which a binding contract could be built. No reimbursement was ever expected, nor would such a reimbursement for costs ever be contemplated, under the CISG. However, pursuant to Article 8, the plaintiff was aware that time is of the essence and that production must commence as soon as possible pending technical agreement on the production of the nodes. On August 1 the parties reached provisional agreement as it must have been known to the defendant that production of the nodes was in progress. Pursuant to Articles 18 and 19, a contract has been formed. The terms on which there is no agreement have been knocked out and replaced by principles of the CISG. By December 28 all but one node were delivered and accepted. This again indicates that a contract must have been contemplated. Good faith, as expressed in Article 7, would not allow the defendant to accept delivery and then turn around and complain of damages due to late delivery and nodes being delivered out of sequence, unless a belief was held that a contract was in existence.

It is apparent that the behavior of both parties is consistent with the existence of a contract and modifications pursuant to Article 29 were the only outstanding issues. The problem with the last outstanding node must be dealt with under Article 77 because the strike at the plaintiff's factory constitutes an impediment. As indicated above, a contract is afoot and as such both parties can rely on remedies pursuant to the CISG.

D. Conclusion

The fact that the parties did not arrive at a mutual understanding regarding all terms within the contract does not fatally invalidate the contract. The CISG fills the gaps and the parties can then determine the relevant position they will take. The most important point being that the CISG is able to overcome the impediment which persists in the common law, namely the rigid rule as to the formation of a contract. Due to the open terms within the CISG, a customized solution is possible, as flexibility within the general principles is a feature of the CISG. This does not mean that the CISG has lost consistency and predictability. The real difference between the common law and the CISG is that the rigid application of rules of laws has been replaced by principles of law which take on life only when the facts are known.

Uniformity has two facets or expressions. It can be judged by outcomes or, more importantly, from the point of view that the approach to the solution of a problem is uniform.

Arguably, because of the nature of contract formation, every decision is not uniform and can be unique in each case. However, the method by which the decision has been reached is uniform. This is so, because the methodology of applying and interpreting the CISG is clearly described. Any inconsistencies or vagueness is not with the CISG but with those applying it. Interpretation, and hence application, of the CISG must be approached with Article 7 in mind.

Two points need to be observed. Firstly, the drafters of the CISG purposefully incorporated words which need to be understood in an international rather than national context. Honnold suggested that the drafters solved this problem by "rooting out words with domestic connotations in favor of non-legal earthy words to refer to physical acts."[47] Secondly - and following from the first point - recourse to domestic law is only appropriate in cases where the CISG is silent.

Schlechtriem in his 'Celebration Anthology' of 50 Years of the German Federal Supreme Court explains the relationship between Article 7 and any municipal court:

> The rule in Art. 7(1) CISG compels the discipline, so to speak, that members of an orchestra without a conductor must exercise: no easy task when one essentially gives the cadence himself, which the others must follow. Moreover, this task is especially difficult because one must constantly observe how other highest courts decide and one is more dependant on the receipt of information via the legal academic community than is the case with domestic law.[48]

"Giving the cadence" allows the court or tribunal to investigate the facts as they exist in each case, and by definition, a variance of outcomes is possible if not inevitable. The criticism that the rules as to the formation of a contract are not clear and do not contribute towards a successful solution to the problem is arguably based on the variability of outcomes. However, as this paper has already indicated, the important fact is that uniformity is achieved through each court and tribunal using the same principles as contained within the CISG. Of importance in achieving this goal is Article 8, which examines how a contract is interpreted. Overall, Article 8 allows the courts to interpret the contract in a way which reflects the true intent of the parties. Having worked out the real reason or purpose of the contract the solution is, by definition, tailor-made to the understanding of the contractual parties.

In essence the solution of the CISG to *British Steel* would be that the plaintiff as well as the defendant can rely on their respective rights pursuant to the principles of the CISG. This is in contrast to the common law, where equitable estoppel only allows one party reimbursement of costs and leaves the other party without recourse.

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[47] J. Honnold, *Uniform Laws for International Trade: Early "Care and Feeding" for Uniform Growth*, 1 International Trade and Business Law Annual 2 (1995).

[48] P. Schlechtriem, *Uniform Sales Law in the Decisions of the Bundesgerichtshof*, *in* 50 Years of the Bundesgerichtshof, A Celebration Anthology from the Academic Community, http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html.