

MODIFICATION OF CLAUSES ON THE BASIS OF THE CONTRACTUAL CONDUCT OF THE PARTIES. APPLICATION OF ESTOPPEL DOCTRINE

Lecturer **Bazil OGLINDĂ**¹

Abstract

Within the context of identifying a modern trend for increasing the flexibility of contract law, trend which is also internalized by the Romanian legal system through the adoption of the Civil Code from 2009, we intend to analyse the implications as regards the modification of contracts. Specifically, we intend to answer to the following question:

May a clause which requires modification in a certain form only (conventional formalism) be annihilated by the parties' conduct throughout the performance of the contract (namely, a conduct whereby they ignore such clause)?

In order to answer to this question, we consider that it is useful to present the mechanism pursuant to which foreign legal systems or the great European projects for the unification of contract law² settled this issue, following that, at the end, we analyse the viability of importing such mechanisms into the Romanian contract law and the legal ground pursuant to which these mechanisms may operate in the context of the new Romanian Civil Code.

Keywords: *modification in a certain form only, the parties' conduct throughout the performance of the contract, estoppel, new Romanian Civil Code.*

JEL Classification: *K12, K33*

1. Preliminary remarks

A. What is estoppel? The origin of the concept.

Estoppel represents a legal concept of Anglo-Saxon origin which is also integrated by the continental law (e.g. French law), which, in recent years, makes its way in international commercial arbitration; where it is regarded as pertaining to "lex mercatoria", being an equitable rule of law, compliant with all national legal orders.³

B. „Types of Estoppel”

Estoppel, having as basis a contradictory behaviour of one of the parties, is of three types:⁴

¹ Bazil Oglindă – Bucharest University of Economic Studies, Law Department, office@onvlaw.ro

² During the last 15 years, efforts have been made and are still made in order to accomplish certain legislative projects at Community level aimed at codifying the Contract Law within European Union's countries (M. Fabre-Magnan, *Les obligations*, Presses Universitaires de France, Paris, 2004, p. 117-121; L. Pop, *Treaty of Civil Law. Obligations, Vol. II*, Universul Juridic Publishing House, Bucharest, p. 32.)

Thus, the Principles for International Commercial Contracts were published for the first time in 1994 under UNIDROIT's aegis. In 2004, a new edition of UNIDROIT Principles was published. As regards the purpose of UNIDROIT Principles, in the preamble it is provided that "These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract will be governed by them. They may be applied when the parties have agreed that their contract be governed by the general principles of law, the "lex mercatoria" or the like. They may be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as model for national and international legislators." (International Institute for the Unification of the Private Law is an independent intergovernmental organisation, having its headquarters in Rome, Italy. For the analysis of UNIDROIT Principles, please see V. Pătulea, Gh. Stancu, *Structural Change of the Framework for the Regulation of the Contractual Obligational Legal Relations (I)* in "Dreptul" Journal, No. 1/2008, p. 20-24).

³ Osborn's Concise Law Dictionary, Thomson – Sweet & Maxwell, London, 2005, p. 165.

⁴ Specialised literature, following the analysis of the jurisprudence of the states that recognise the concept, identified the following types of estoppel:

- estoppel by conduct (estoppel by representation, estoppel in pais) – it opposes to the party that intends to deny the consequences resulted from its prior behaviour, from a personal fact; it precludes the party to contradict its own representation of the reality, which was previously adopted, in particular if such representation induced to the adversary a correlative belief, who would be prejudiced, if such belief is challenged. This mean is, by assumption, defensive, because it represents an obstacle against any claim (for annulment, for restitution, etc.) which aims at re-discussing a situation that was perceived by the defendant, in consideration of the behaviour of the claimant, as acquired, earned;

- estoppel by deed – it is invoked against the party that intends to deny what it stated in a deed, official document or public registry;

- Out - of - court contradictions: inconsistencies appeared strictly prior to the challenge before a court of law or an arbitral tribunal and which refer, in the matters analysed by this article, to contradictions between prior contractual behaviours (promissory estoppel).
- Mixed contradictions: between a prior behaviour, outside the litigation framework and a certain position, which has for its basis a defence which a party understands to invoke it in procedural terms which are excessively formal.
- Contradictions between steps in proceedings: between two claims, two defences or arguments of the same proceeding.

Thus, this study analyses only the concept of promissory estoppel (as a form of equitable estoppel), estoppel by conduct (with reference both to out – of – court contradictions and mixed contradictions), due to the fact that solely these types of estoppel are relevant for the theme approached.

C. Promissory estoppel

Estoppel represents a mean to invalidate a contractual clause which requires a certain form for the modification of the contract, in cases when the enforcement of the clause would be inequitable if compared to the conduct presented throughout the performance of the contract by the party which invokes it.⁵

Considering the approach regarding modification of a contract, courts of law frequently asserted the *estoppel* theory in order to ascertain variations of the contract by the conduct of the parties, even when the contract contained a clause prohibiting unwritten variations. Thus, in case the debtor did not express its disagreement as regards a non-performance of an obligation for a certain period of time and did not notify the other party with respect to a breach of a contractual provision, and the other party based, to its own detriment, on the absence of the mandatory compliance with that contractual provision which was breached, courts of law, in general, shall acknowledge that the debtor is precluded to invoke that the variation should have been done in writing. The courts of law usually retain the variation of the contract in case the debtor based on the supposed variation to its own detriment.⁶

Equitable Estoppel doctrine (preclusion/blocking)⁷ facilitates the modification of a contract on the basis of a misrepresentation or concealment of factual elements by one of the parties, in cases when the application of the clause which requires a certain form for the modification of the contract is inequitable, even if such party did not do express promises. Equitable estoppel prevents the enrichment without legal cause of a party whose actions evidence the intention to modify the contract, and even the artificial application of a claim based on a unjust enrichment (*actio de in rem verso*). Due to this conduct, the modifications become mandatory and that party is prevented from enforcing the no oral modification clause of the contract.

Claims referring to oral modifications based on Equitable Estoppel theory may be ruled upon with difficulty. The courts of law verify whether clear and pertinent evidences exist as regards a conduct which attests that a promise was made. Even if the court of law may find a ground to remove the no oral modification clause, the probatory evidences do not always offer a proper fundament based on which the refuse the enforcement of no oral modification clause be removed.⁸

If one party, based on the statements or the conduct of the other party, acts to its own detriment, it is required, pursuant to the principle of good – faith, that the party which makes a

- estoppel by record (or by *res judicata*) - precludes reiteration (re-challenge) of a litigation already settled

- equitable estoppel – having two types: promissory estoppel and proprietary estoppel etc. (A.C. Ciurea, *About Estoppel Theory or New Instruments for Filtering the Actions in Law*, in *Revista Română de Drept Privat* No. 4/ 2012.)

⁵ T.L. Stark, *Negotiating and Drafting Contractual Boilerplate*, American Lawyer Media Publishing, 2003, p. 522-523.

⁶ *Ibidem*.

⁷ *Ibidem*.

⁸ *Arasimowicz v. Bestfoods, Inc.*, 2000 US Dist. Lexis 17818 (S.D.N.Y. Nov. 27, 2000): “under the estoppel concept, a contract may be modified if either words or actions of one party to the contract induce another party to act in derogation of that contract, and the other justifiably relies upon the words or the deeds of the first party.”

statement to secure itself an advantage adheres to its statement whether true or false. In this case, the good – faith has to be seen as an interpretative principle that assists the application of the rule of fair and equitable treatment as regards the legitimate expectations of the contractual partners. The rule prevents obtaining an advantage due to own incoherence, to the detriment of the other party which, in good – faith, based on the representation thus issued.⁹

The specialized literature affirmed that “estoppel emphasises the consistency in understandings, which creates confidence in international commerce, one of the legitimate expectations of the international commercial community.”¹⁰

The key requirements of estoppel are: a) the statement or representation on which one acts must be clear and unambiguous; b) the statement or representation must be voluntary, unconditional and authorised and that there must have been reliance in good faith upon the statement either to the detriment of the reliant party or to the advantage of the party making the statement. It is not necessary to prove that there was an intention to mislead.¹¹

In this respect, scholars sustain that “*the clear and unequivocal representation, the prejudice and the detriment are not simple addenda; they trigger the very justification for specific protection of the expectations agreed by the parties.*”¹²

The conduct of the other party causes losses that must be made good since it is not allowed to give assurances on which the contractual partner acts, and subsequently to reconsider and withdraw its promise. The new contractual relation results following the promise. Thus, none of the parties suffers damages because it relied upon the statement / promise of the other party.¹³

Another definition reads that “*the rule of estoppel operates so as to preclude a party from denying before a tribunal the truthfulness of a statement of fact made previously by that party to another, whereby that other party has acted to his detriment or the party making the statement has secured some benefit.*”¹⁴

Pursuant to this doctrine, the judge may accept the claim of the plaintiff, if it acted in reliance upon the conduct or the promise of the other party, even when the contract contains a clause which requires the contract be modified in writing. The enforcement of this rule establishes an implicit modification of the contract based on the behaviour of the parties, which proves that they understood to derogate from the condition that required a modification to be made in a particular form.

2. Application of Estoppel Doctrine with respect to the Modification of the Contract under the Vienna Convention [CISG]

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) [CISG] regulates under Article 29 the implications of the parties’ conduct as concerns the modification of the contract, in case when a contractual provision requires that the modification should be done in writing.

Article 29 CISG provides that: (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.*

⁹ C. Yost, *A Case Review and Analysis of the Legitimate Expectations Principle as it Applies within the Fair and Equitable Treatment Standard*, ANU College of Law Research Paper No. 09-01, 2009, pp. 33-34.

¹⁰ P. Bowden, *L’interdiction des se contredire au detriment d’autrui (estoppel) as a Substantive Transnational Rule in International Commercial Arbitration*, in Gaillard, *Transnational Rules in Commercial Arbitration*, ICC Pub Nr 480/ 4, Paris, 199, p. 125.

¹¹ C. Yost, *A Case Review and Analysis of the Legitimate Expectations Principle as it Applies within the Fair and Equitable Treatment Standard*, ANU College of Law Research Paper No. 09-01, 2009, pp. 35.

¹² J.P. Müller, T. Cottier, *Estoppel*, in N.S. Antunes, R. Bradley and C. H. Schofield, *Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement*, 2000, p. 35.

¹³ S. Dutta, *Principles of Equity and Contracts*, p. 10, available at: http://papers.ssrn.com/sol3/papers.cfm?Abstract_id=895862

¹⁴ D. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 33 BYIL (1957), p. 176.

Article 29 CISG represents an expression of freedom of contract and autonomy of the party's will, principles which form the foundation of Article 2.18 of UNIDROIT Principles.¹⁵

A critical analysis of the manner in which CISG deals with the amendment of the contract by the behaviour and the statements of the parties, a more vanguard approach¹⁶ proposes the complete abandonment of clauses preventing the amendment by verbal understandings of the parties or by the parties' behaviour ((no oral modification clauses), considering that an efficient alternative methodology would be a contextual analysis comparing the initial bargaining with the subsequent modifications oral or resulted from conduct, situation when a contractual provision which requires a certain form for the amendment of the contract would be totally useless. On the other hand, one may be discuss about an alternation between flexibility and incertitude, when it may be difficult to understand, from one case to another, what kind of conduct, if relied on by the other party, is sufficiently expressive to determine the other party to act and which conduct is invoked only as an excuse in order to elude the contractual obligations, situation when the flexibility may degenerate into chaos.¹⁷

This provision relies upon the principle of good – faith, since it would be contrary to this principle that a party be allowed to assert a clause which it neglected through its own conduct, thus creating losses to the party which, in good – faith, relied upon the conduct and the promises of the contractual partner.¹⁸

In doctrine,¹⁹ it is also considered that an agreement between the parties in order to elude the formalities required by a clause equals with an implicit abrogation of such clause.

3. Estoppel Doctrine under the Modern Projects for Codification in Contract Matters

The aspects analysed in this article are also of interest for the modern projects for codification in contract matters. The Common Frame of Reference (DCFR) or the UNIDROIT Principles are among those modern projects which approach, in a flexible manner, the modification of the contract pursuant to the parties' conduct or statements, when a clause which requires modification in a certain form only exists.

a) Draft Common Frame of Reference (DCFR)

Draft Common Frame of Reference (DCFR) regulates under Article II.-4:105 the modification in certain form only: (1) *A term in a contract requiring any agreement to modify its terms, or to terminate the relationship resulting from it, to be in a certain form establishes only a presumption that any such agreement is not intended to be legally binding unless it is in that form.* (2) *A party may by statements or conduct be precluded from asserting such a term to the extent that the other party has reasonably relied on such statements or conduct.*²⁰

The rule provided under par. 1 of Article II.-4:105 DCFR recognizes as bearing evidence only to the written modification clauses.

Par. (2) of Article II.-4:105 DCFR provides that a party may, by statements or conduct precluded from asserting such no oral modification clause to the extent that the other party has reasonably relied on such statements or conduct. Similar provisions are to be found in the legislation of most UE countries.

¹⁵S. Eiselen, *Remarks on the manner in which the UNIDROIT Principles of International Commercial Contracts may be used to interpret or supplement Article 29 of the CISG*, 2002, available at: http://www.cisg.law.pace.edu/cisg/principles/uni29.html#*

¹⁶ R.A. Hillman, *Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of "No Oral Modification" Clauses*, *Cornell International Law Journal* (21/1988), pp. 449-466.

¹⁷ S. K. Date-Bah, *ARTICLE 29 CISG*, in Bianca-Bonell, *Commentary on the International Sales Law*, Giuffrè: Milan (1987), pp. 240-244.

¹⁸ S. Elsen, *Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Article 29 of the CISG*, 2002, available at: <http://www.cisg.law.pace.edu/cisg/text/peclcomp29.html#10>.

¹⁹ P.H. Schlechtriem, K. Bacher, *Kommentar zum einheitlichen UN Kaufrecht* 3rd ed (2000 München) Art 7 Rn 48.

²⁰ DCFR, pp. 312-315.

Thus, according to the legislator in Finland, Denmark and Sweden, even if the parties agreed that modifications are to be made in writing, they may agree subsequently through an oral understanding to ignore the no oral modification clause. The Party invoking such oral agreement bears the burden of the proof²¹ The German law is similar. Whoever wants to make an informal modification can do so, but it is possible for such modification to be difficult to prove.

As concerns jurisprudence, The Supreme Court of Greece stated that if the parties agreed the entering into of an agreement in writing, they can subsequently modify such orally. Also, in such situations the principle *venire contra factum proprium* is applied.²² The modern tendency towards flexibility transpires from Spanish court cases, where the Supreme Court accepted oral or tacit understandings regarding the payment of supplementary works in case of a construction contract, once the works have been finalized.²³

In Greece, Italy and France effect is given to a clause which prevents the amendment of a contract through informal understandings, but a similar situation to the one regulated by par. 2 of Article II-4:105 DCFR will be enforceable, on the basis of the good-faith principle, more specifically the principle *venire contra factum proprium*.

For example, Article 1352 of the Italian Civil Code imposes a more rigid approach, considering that if the parties agreed in writing a certain form for the entering into of a future contract, it is presumed that such form was established *ad validitatem*²⁴. The same rule applies if the parties established a certain form regarding the amendment of a contract. From this perspective, at the regulatory level one can notice a propensity towards formalism, but the application of the principle *venire contra factum proprium* generates a flexibility at court level.

b) UNIDROIT Principles

Article 2.1.18. of UNIDROIT *Principles (Modification in a particular form only)* provides that: “*A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct.*”

This Article provides that, in general, such clause invalidates any modification or termination by mutual agreement of the parties, which is not in the required particular form.

However, the Article provides an exception from the general rule; it is an application of the principle which precludes inconsistent conduct. A party may be precluded by its conduct from asserting a clause which requires modification in a particular form, to the extent that the other party has acted in reliance on that conduct.²⁵

In this respect, the UNIDROIT Principles Commentary offers an example aimed at reflecting the situation when this exception from the rule of conventional formalism applies.²⁶

²¹ Bryde Andersen: *Grundlæggende 235 and Finnish case law e.g. CC 1998:75* (Finnish Supreme Court in e.g. Sisula-Tolokas, Twenty Cases).

²² DCFR, p. 315.

²³ Supreme Court decision of 25 January 1989 RAJ (1989).

²⁴ Art. 1352 *Forme convenzionali: Se le parti hanno convenuto per iscritto di adottare una determinata forma per la futura conclusione di un contratto, si presume che la forma sia stata voluta per la validità di questo* (2725).

²⁵ UNIDROIT, *Unidroit Principles Commentary*, Roma, 2004, p. 64-65.

²⁶ *A, a contractor, contracts with B, a school board, for the construction of a new school building. The contract provides that the second floor of the building is to have sufficient bearing capacity to support the school library. Notwithstanding a “no oral modification” clause in the same contract, the parties orally agree that the second floor of the building should be of non-bearing construction. A completes construction according to the modification and B, who has observed the progress of the construction without making any objections, only at this point objects to how the second floor has been constructed. A court may decide that B is not entitled to invoke the “no oral modification” clause as A reasonably relied on the oral modification, and is therefore not liable for non-performance.* (UNIDROIT, *Unidroit Principles Commentary*, Roma, 2004, p. 64-65).

4. No Oral Modification Clauses

Clauses which require the modification or the termination of a contract in writing (or in other specified forms) are often met, particularly in long – term contracts. According to this provision, a relative assumption is being created, pursuant to which oral agreements of the parties or agreements resulting from the conduct of the parties shall not be enforceable. If nevertheless it is proven that both parties agreed upon the modification or termination of the contract without the observance of the required form, effect must be given to such agreement. The agreement shall be given effect even when a clause individually negotiated by the parties and included in the contract provides that no oral modification clauses shall be enforceable.

If the parties reached an agreement orally and it cannot be proven that they agreed to disregard the clause, but a party has reasonably acted in reliance of that oral agreement, the other party is precluded from asserting such a clause which bars the effects of the oral agreement.

For example, a construction contract contains a clause according to which “*this contract may be modified only in writing with the signature of both parties*”, and subsequently the parties agree orally upon certain modifications in favour of the beneficiary. The obligations arisen out following the modification are performed. Subsequently, when the contractor invokes in its favour other modification that was done orally, the beneficiary invokes the no oral modification clause. The contractor may invoke the performance of the first obligation orally undertaken in order to attest that the second agreement is enforceable, considering that, in fact, it based on the abrogation of that no oral modification clause.

In certain cases, oral modifications are enforceable even if the contract contains contrary provisions.²⁷ At common law, parties can modify a written contract by subsequent oral agreement despite a contract provision requiring modifications to be in writing.²⁸ This rule is based on the theory according to which the parties of a contract cannot deprive themselves from the possibility to modify the contract subsequently pursuant to a new agreement.²⁹

I consider that this solution applies in the continental law systems as well and, in particular, in the Romanian legal system.

²⁷ T.L. Stark, *Negotiating and Drafting Contractual Boilerplate*, American Lawyer Media Publishing, 2003, p. 522-523.

²⁸In furtherance we present a series of excerpts from common law jurisprudence which we consider relevant for the aspects approached in this study:

(i) *APAC-Carolina, Inc. v. Towns of Allendale and Fairfax*, 868 F. Supp. 815, 826 (D.S.C. 1993): “*a party may be estopped from enforcing no oral modification provision.*”

(ii) *Fidelity Deposit Co. Of Maryland v. Tom Murphy Construction Co., Inc.*, 674 F.2d 880, 884-885: “*an oral modification of written contract permitted under circumstances of detrimental reliance even though the contract contained a provision prohibiting its alteration except in writing.*”

(iii) *Florida: W.W. Contracting, Inc. v. Harrison*, 2000 WL 1838363, 779 So.2d 528 (Fla. Dist. App. 2000): “*an oral modification is permitted when it is accepted and the parties act in a manner not permitting the modification to work a fraud on the other party.*”

(iv) *Massachusetts: A. Spadafora Iron Works, Inc. v. Morse Co. Inc.*, 1998 Mass. App. Div. 114, 1998 WL 283206: “*parties to a written contract may modify or waive the contract by oral agreement even when the contract requires modification to be in writing.*”

(v) *Pennsylvania: Brinch v. Jenck*, 2000 Pa. Super. 209, 757 A. 2d 388, 399 (2000). Prevalence is given to: “*oral modification based on conduct clearly showing intent to waive no oral modification provision.*”

(vi) *Somerset Community Hospital. Allan B Michell & Associates, Inc.* 454 Pa. Super. 188, 197, 685 A.2d, 141, 146 (1996). It is acknowledged the existence of “*a contract modified by conduct of parties despite no oral modification provision.*”

(vii) *Rhode Island: Thompson v. McCann*, 762 A.2d 432, 436-437 (R.I. 2000): “*where the dilatory conduct of one party to a time is of the essence of the contract delayed the closing, court declined to enforce provision prohibiting oral modifications against the other party thus extending the closing date.*”

²⁹ *Beatty v. Guggenheim Exploration. Co.*, 225 N.Y. 380, 387-388, 122 N. E. 387, 381 (1919), in McCauliff, *Corbin on contracts* (Perillo ed. rev. 1999). The court of law stated that: “*those who make a contract may unmake it. The clause which forbids a change may be chnged like any other. What is excluded by one act is restored by the other. Whenever two persons contract, no limitation self imposed can destroy their power to contract again.*”

5. Reception into the Romanian Law of the Modern Trends to Increase the Flexibility of the Formalism as regards the Modification of Contracts

An interesting question refers to whether the contractual security is better promoted by rigid rules or by rules which use terms like “reasonable”, which entails flexibility. The answer depends of the nature of the contract. In a contract for the purchase of goods in areas where the prices fluctuate rapidly, certainty is important. In this case, nobody desires that a chain of transactions be broken by the use of vague criteria. In such situation, certainty means safety.

On the other hand, in long – term services agreements (including construction contracts), where the contractual relation may last years and the context may change significantly throughout the performance of the contract, formalism will not create security. In this case, the contractual security is established by the existence of some mechanisms adaptable to the change of circumstances. This is the purpose of developing certain rules and principles like the principle of good – faith throughout the performance of obligations, the obligation to cooperate (contractual solidarity) or the principle of safeguarding the contract. Therefore, enforcing rigid rules, when such are not appropriate, leads to the increase of contractual insecurity.³⁰

In my opinion, the new Romanian Civil Code embraced in an original manner the trend for increasing the flexibility of the rules in contract matters, while the concepts and the theories developed by foreign doctrine and jurisprudence („not oral modification clauses”, „estoppel”, „inconsistent behaviour”) may be applied in our legal system, as the new Civil Code provides the legal grounds for the modification of the contract by parties’ conduct, even when the contract requires the observance of a formal condition for its modification, for example, the modification in writing of the contract.

Firstly, the legal ground is provided by Article 1243³¹ of the Civil Code corroborated with Article 1242 par. 2³² of the Civil Code. According to these Articles, the principle of the symmetry of forms is applicable for modification of the contract and it imposes a general and relative rule (derogations are allowed exclusively if provided by the law) which requires that the modification of a contract is made pursuant to the same mechanism as the formation of the contract.³³ Therefore, the will of the parties to modify a contract must have the same form as the one provided by the law upon its entering into.³⁴

Considering that the law refers to the conditions for the conclusion of the contract, by symmetry, it results that the rule provided under par. 2 of Article 1242 is also applicable in case of modification of contracts. By way of consequence, we infer that “if the parties agreed that a contract may be amended in a particular form, which is not required by the law, such contract shall be considered validly even if such form was not observed.”

Therefore, in case of the contract modification form established based on the consent of the parties, the same parties that established such form may derogate from it; the principle of freedom of legal deeds acts in both ways, namely, it allows both the conventional establishment of the modification form and the subsequent waiver, also conventional, to the condition referring to the form for the modification of the contract.

³⁰ DCFR, p. 60.

³¹ Article 1243: Modification of the Contract:

If the law does not provide otherwise, any modification of the contract is subject to the formal conditions required by the law for its conclusion.

³² Article 1242: Sanction:

(1) A contract is null and void absolutely if entered into in the absence of the form which the law expressly requires for its valid conclusion.

(2) If the parties agreed for a contract to be entered into in a particular form, which the law does require, the contract is deemed valid, even if the form was not observed.

³³C. Zamșa, *Comment on Article 1243*, in *New Civil Code. Article by Article Commentary*, (coordinators Fl. Baias, E. Chelaru, R. Constantinovici, I. Macovei), C.H. Beck Publishing House, Bucharest, 2012.

³⁴ L. Pop, *Treaty of Civil law. Obligations, vol. II, Contract*, Universul Juridic Publishing House, Bucharest, 2009, p. 398.

In doctrine³⁵, even under the Civil Code from 1864, it was stated that “*the same principle of freedom of legal deeds which allows the voluntary establishment of the form of certain legal operations also allows the subsequent conclusion of contrary deeds, whereby the parties waive, expressly or implicitly, the form previously agreed. Moreover, in some cases, such waiver may be inferred from the parties’ conduct, independently from the existence of an express manifestation of the parties’ will. Therefore, the conclusion of a deed without the observance of the conditions referring to form, previously agreed, and the execution by both parties of the obligations deriving from that deed may be construed as a waiver to the form previously agreed.*”

Considering that the law refers to the conditions for the formation of the contract, it results, by symmetry, that the provisions of Article 1196 of the Civil Code are also applicable in case of modification of the contract.³⁶ Also, we consider that the provisions of Article 1270 par. 2 of the Civil Code³⁷ or the provisions of Article 1272 of the Civil Code³⁸ from the section referring to the effects of the contract are relevant for the theme approached. Therefore, as long as the acceptance of the offer to contract may be tacit (and thus the contract may be concluded), resulting from “*any act or fact of the recipient*”, the modification of the contract may also be tacit, resulting from the parties’ conduct, which clearly shows that they understand to derogate from the previous conventional formalism.³⁹

Article 1270 par. 2 of the Civil Code comes to strengthen the idea we affirmed in this study, according to which if the parties have the option to include a clause that requires modification of the contract in a particular form, the same parties are entitled to waive such condition. In this respect, the enforceability of a contract does not preclude the waiver of the formalism condition, because the new agreement of the parties is enforceable and, since it is subsequent to the first agreement, it shall be governed by the principle „*mutus consensus, mutus dissensus*”.

Article 1272 of the Civil Code provides that the consequences generated by the “*practices established between the parties*” create obligations which come within the object of the contract. Therefore, the parties establish new obligations by their contractual conduct and such obligations shall be construed as deriving from the contract.

From our point of view, these legal provisions fall within the paradigm of flexibility of Romanian Contract Law, as supplementary arguments to support the idea of modification of contract by the parties’ conduct, despite the existence of a clause which requires modification in a particular form; such idea is validated by the legislator by adopting Article 1242 par. 2 of the Civil Code.

Thus, it results that the mechanisms developed by the European modern doctrine were, in principle, imported and, subsequently, they may be enforced under the Romanian law, in light of the fact that the new Romanian Civil Code provides legal grounds for practitioners when they apply theories like “*estoppel*”, “*no oral modification clauses*” or “*inconsistent behaviour*”.

6. Conclusions

In this study, we intended to answer to the question whether a contractual clause which requires modification in a certain form only (conventional formalism) may be annihilated by the parties’ conduct throughout the performance of the contract (whereby such clause is ignored).

³⁵ D. Cosma, in V. Terzea, *New Civil Code Vol. II. (Article 1164-2664)*, Universul Juridic Publishing House, Bucharest, 2012.

³⁶ Article 1196: Acceptance of the offer

(1) *Any act or fact of the recipient, if it undoubtedly indicates its consent to the offer, as formulated, and arrives in due term at the offer author. The provisions of Article 1186 shall remain applicable. (2) The recipient’s silence or inaction stands for acceptance only when it results from the law, from the parties’ agreement, from the practices settled between them, from usual practices or from other circumstances.*

³⁷ Article 1270: Enforceability of a contract

A contract may be modified and terminated only with the agreement of the parties or for causes authorized by the law.

³⁸ Article 1272: Content of the Contract

A valid contract binds not only to what is expressly stipulated but also to all the consequences that practices established between the parties, custom, law or equity give to such contract, according to its nature.

³⁹ B. Oglindă, *Business Law. General Theory. The Contract*, Universul Juridic Publishing House, Bucharest, 2012, p. 193.

In other words we intended to answer to the question: which party is entitled to win a court case, namely the party which relies on the contractual clause or the party which relies on the common and subsequent conduct of the parties against the contractual clause?

From our point of view, within the context of the New Civil Code and, in particular, under the terms of Article 1242 par. 2 which represents an implicit acknowledgement of estoppel doctrine as regards the modification of the contract (the estoppel doctrine representing, doubtlessly, *ratio legis* for the Romanian legislator from 2011), the answer is in the sense that such possibility was expressly regulated; even more, the Romanian legislator, under the provisions of Article 1242 par. 2, invalidates *de plano* any contractual clause which adds supplementary conditions with respect to form, other than the ones provided by the law.

Bibliography

1. A.C. Ciurea, *Despre teoria estoppel sau noi instrumente de filtrare a acțiunilor în justiție*, „Revista Română de Drept Privat” no. 4/ 2012.
2. B. Audin, *La vente internationale de marchandises. Convention des Nations – Unies – 11 avril 1980*, L.G.D.J., Paris, 1980.
3. B. Oglindă, *Dreptul afacerilor. Teoria generală. Contractul*, Universul Juridic Publishing House, Bucharest, 2012.
4. Bryde Andersen: *Grundlæggende 235 and Finnish case law e.g. CC 1998:75* (Finnish Supreme Court in e.g. Sisula-Tolokas, Twenty Cases).
5. Fl. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *Noul Cod civil. Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2012.
6. C. Yost, *A Case Review and Analysis of the Legitimate Expectations Principle as it Applies within the Fair and Equitable Treatment Standard*, ANU College of Law Research Paper No. 09-01, 2009.
7. D. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence.*, 33 BYIL, 1957.
8. J.P. Müller, T. Cottier, *Estoppel*, in N.S. Antunes, R. Bradley și C. H. Schofield, *Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement*, 2000.
9. L. Pop, *Tratat de drept civil. Obligațiile*, vol. II, *Contractul*, Universul Juridic Publishing House, Bucharest, 2009.
10. Osborn’s Concise Law Dictionary, Thomson - Sweet&Maxwell, London, 2005.
11. P. Bowden, *L’interdiction des se contredire au detriment d’autrui (estoppel) as a Substantive Transnational Rule in International Commercial Arbitration*, în Gaillard, *Transnational Rules in Commercial Arbitration*, ICC Pub Nr 480/ 4, Paris, 1990.
12. P.H. Schlechtriem, K. Bacher, *Kommentar zum einheitlichen UN Kaufrecht* 3rd ed (2000 München) Art 7 Rn 48.
13. R.A. Hillman, *Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of "No Oral Modification" Clauses*, Cornell International Law Journal 21/1988.
14. S. Dutta, *Principles of Equity and Contracts*, p. 10, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=895862
15. ¹S. Eiselen, *Remarks on the manner in which the UNIDROIT Principles of International Commercial Contracts may be used to interpret or supplement Article 29 of the CISG*, 2002, available at: http://www.cisg.law.pace.edu/cisg/principles/uni29.html#*
16. S. Elsen, *Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Article 29 of the CISG*, 2002, available at: <http://www.cisg.law.pace.edu/cisg/text/peclcomp29.html#10>.
17. S. K. Date-Bah, *ARTICLE 29 CISG*, in Bianca-Bonell, *Commentary on the International Sales Law*, Giuffrè: Milan, 1987.
18. T.L. Stark, *Negotiating and Drafting Contractual Boilerplate*, American Lawyer Media Publishing, 2003.
19. UNIDROIT, *Unidroit Principles Commentary*, Roma, 2004.
20. V. Pătulea, Gh. Stancu, *Schimbarea structurală a cadrului de reglementare a raporturilor juridice obligatoriale contractuale (I)*, „Dreptul” no. 1/2008.