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Estoppel in Russian law

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Abstract

In the course of the recent reform of the Civil Code of the Russian Federation, common law legal institutions such as estoppel were implemented in Russian contract law. However, the differences in the doctrinal foundations between common law and Russian law are obvious. Russian private law does not require consideration for the formation of the contract or for its modification, while the doctrine of promissory estoppel is usually taught as a topic ancillary to the consideration rule. Nor does Russian law have a tradition of equity, which enables equitable estoppel and especially proprietary estoppel under English law. Nevertheless, the Russian case law seems at least in parts to follow a logic similar to that of the English doctrine of estoppel. In particular, the Russian courts are obviously concerned with elaborating a value-based notion of estoppel using a definition which refers to reasonable reliance of the other party, good faith and commercial honesty as well as the proscription of inconsistent and unconscionable conduct. The recent cases do not only apply the doctrine of estoppel beyond the boundaries of the relevant provisions of the Civil Code; they also try to develop the general limitations of estoppel on the basis of the good faith doctrine.

Estoppel in Russian law

Eugenia Kurzynsky-Singer*

I. Introduction: Common law transplants in the legal systems of post-soviet countries

Countries which previously formed parts of the Soviet Union have made efforts to approximate the legal conditions governing their markets to those of developed Western economies. Legal transplants, e.g. the borrowing of legal provisions from these legislations, often seem to be a preferred means in the course of such legal reforms. As an example of a successful transplant, one can name the Georgian Civil Code, which was deeply influenced by the German BGB.[1] However, German law is not the only legal order which is a potential source of legal transplants for post-soviet jurisdictions.

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1 See for example: *Chanturia*, Das neue Zivilgesetzbuch Georgiens: Verhältnis zum deutschen Bürgerlichen Gesetzbuch, in: Basedow/Drobnig/Ellger/Hopt/Kötz/Kulms/Mestmäcker (Eds.), Aufbruch nach Europa – 75 Jahre Max-Planck-Institut für Privatrecht, Tübingen 2001, pp. 893–904.

Particularly, in the course of the recent reform of the Civil Code of the Russian Federation,[2] common law legal institutions such as *estoppel,*[3] *warranty*[4] and *indemnity*[5] were implemented in Russian contract law. Other CIS countries, for example Kazakhstan, are similarly engaged in a debate on whether to approximate their legal framework to the common law.[6] This approach is, however, highly controversial.

Historically, the private law of Russia developed as a part of the continental European tradition. Pre-revolutionary scholarship was influenced by European and, above all, German, scholars.[7] Notwithstanding a quite noticeable ideological alignment,[8] the Civil Codes of the Soviet era contained a core of 'ordinary' private law provisions, many of which had their roots in pre-revolutionary, i.e. continental European, legal thinking. The continental European approach on private law was also retained after the collapse of the Soviet Union, with the enactment of a new Civil Code adapted to a market economy.[9]

For these historical reasons Russian legal scholarship was rather sceptical about the implementation of legal institutions from common law jurisdictions.[10] In particular, the failed attempt to introduce *trusts* in Russian law, which was undertaken in the 1990s,[11] was considered as evidence of the difficulty of such reception.[12] The research on the reception process shows further that, in transition countries, the interpretation and application of legal transplants which originate in the Western legal tradition is very likely to differ from the interpretation and application in the original jurisdictions because of different approaches in the valuation of contracting parties' interests, different understandings of basic principles, and differences in the interplay of the relevant rules with other

2 On the reform, see for example: *Shirvindt*, in: Basedow/Fleischer/Zimmermann (Eds.), Legislators, Judges and Professors, Tübingen 2016, pp. 41-55.

3 Art. 431.1 section 2, Art. 432 section 3 Civil Code of the Russian Federation and some further provisions.

4 Art. 431.2 Civil Code of the Russian Federation.

5 Art. 406.1 Civil Code RF.

6 See for example the conference report "Рекомендации участников международной научно-практической конференции на тему: «Совершенствование гражданского законодательства Республики Казахстан на основе имплементации положений английского права» (г. Астана, 25 ноября 2016 года) http://online.zakon.kz/Document/?doc_id=38577969#pos=0;0 (accessed on: 5 February 2018).

7 See for example*: Avenarius*, ZEuP 1998, p. 893*; Nußberger,* ROW 1998, p. 81, 82.

8 Consider especially Art. 1 Civil Code RSFSR (1922) and Art. 1 Civil Code RSFSR (1964).

9 On the development of Russian private law see: *Kurzynsky-Singer*, Russian Civil Code, in: Basedow/Hopt/Zimmermann (Eds.), The Max Planck Encyclopedia of European Private Law, Vol. II, Oxford 2012, pp. 1491 – 1495.

10 *Suchanov*, in Horn (Ed.), Die Neugestaltung des Privatrechts in Mittelosteuropa und Osteuropa, München 2002, p. 138 ff.; *Topornin*, in: Seifert (Ed.), Wirtschafts- und Gesellschaftsrecht Osteuropas im Zeichen des Übergangs zur Marktwirtschaft, München 1992, p. 43.

11 Decree of the President of the Russian Federation of 24.12.1994, No. 2296 "On trust".

12 *Doždev,* in: Chazova (Ed.), Žizn' I rabota Avgusta Rubanova, p. 282.

legal institutions and provisions.[13] Nevertheless, such legal transplants can inspire the legal development in recipient countries.[14]

The paper will address the practical application and doctrinal interpretation of one of common law's legal transplants in the Russian Civil Code, namely estoppel, comparing the Russian treatment of the institution to its understanding in the original rules found in English law; to a limited extent the paper will also consider the approach taken by related continental civil law doctrines, especially the affirmation of a contract (legal act) under § 141 Para. 1 BGB.

II. Estoppel in the Russian Civil Code and in Russian legal practice

1. Provisions of the Russian Civil Code and the civil law tradition

The statutory provisions of the Russian Civil Code, which are said to implement estoppel in the Russian Civil Code,[15] do not name the doctrine of estoppel explicitly. Despite this fact, they prescribe the consequences of an affirmation of a contract or a transaction by one of the parties, with the result that this party is precluded from declaring that the contract was not concluded or from claiming that the legal act is void or voidable. Such provisions are in particular Art. 166 Part 2 para 4 and Part 5, Art. 432 Part 3, Art. 431.1 Part 2, and Art. 450.1 Part 5, which refer to different situations.

Art. 166 Part 2 para 4 states, for example, that a party, whose conduct indicates her intent to preserve the transaction may not pursue a claim to declare a transaction invalid or void based on grounds that she was or should have been aware of at the time she expressed this intent. Part 5 of the same article states that a claim to declare a transaction invalid or void may not be made by a person who does not act in good faith, particularly if the conduct of this person caused others to act in reliance on the validity of the contract. It is worth noting that the person acting in reliance need not be a party to the contract, as under certain circumstances the Russian Civil Code gives also to third parties a claim to declare contracts void or to restitute invalid contracts. Art. 432 Part 3 specifies the acceptance of contractual performance as a case of such affirmation for contracts that otherwise could be declared as not having been concluded.

Despite their identical terminology, these provisions of the Russian Civil Code do not implement the same doctrine as § 141 BGB. This provision of German law contains rules on an affirmation of a void contract which facilitates the re-conclusion of the contract. The parties do not have to re-negotiate the whole contract but can refer (implicitly as well

13 *Kurzynsky-Singer,* in: *Kurzynsky-Singer* (Ed.), Transformation durch Rezeption?, Tübingen 2014, p. 3 ff.

14 See for examples especially as regards legal transplants in Georgian law: *Kurzynsky-Singer* (Ed.), Transformation durch Rezeption?, Tübingen 2014.

15 *Карапетов*, https://zakon.ru/blog/2016/6/7/estoppel_na_osparivanie_dogovora_po_p2_st4311_gk.

as explicitly) to the previous declarations.[16] The re-conclusion of the contract is therefore subject to the same rules of contract law as the initial agreement. The Russian law, however, goes far beyond this notion as the estopped party may not plead the invalidity of a contract based on the violation of legal provisions under Art. 168 Russian Civil Code (with some exceptions in Art. 431.1 Part. 2).[17] This notion differs considerably from the underlying idea of the German provision.

The reason for this regulation of the Russian Civil Code was stated in the Concept of the Reform, a document prepared by different working groups which contained the main ideas, values and proposals for the ongoing reform of the Russian Civil Code.[18] According to this document the contract law of the Russian Federation could not provide for reliable legal relationships between the parties as nearly every contract could be declared void.[19] The corresponding cause of action was delivered by the provision of Art. 168 of the Russian Civil Code, which stated that a contract which violated any statutory provision was void or voidable. Although the Russian provision does not seem to differ much from a German counterpart (§ 134 BGB) in its wording, the Russian courts applied it much more broadly. It is due to the intellectual heritage of soviet law that Russian courts demanded that a contract comply very strictly with the provisions of the statutes, with rules issued by any authority or with any further regulations. Otherwise the contract could be declared void.[20] This contributed to the described situation of an absence of legal certainty regarding the validity of a contract. It was not in the competence of the working groups to revise the legislation in public law or the further rules which concern contracts. However there was a possibility to amend Art. 168 of the Russian Civil Code in a way which would limit the invalidity of contracts in cases of a contradiction with the statutory provisions. The construction of § 134 BGB stands as a good example. A contract that violates a statutory provision is void only where the violated provision aims to prohibit the contract as such.[21] Yet, as it will be shown later, the Russian courts extended the application of estoppel to the rules on the formation of a contract as well. Such effect would not be possible under § 134 BGB.

However, the underlying idea of the Russian provisions is to some extent familiar to German law as well. § 242 BGB, which states the obligation of the parties to perform in good faith, prohibits, pursuant to German scholarship and case law, a party's inconsistent behaviour (*venire contra factum proprium*).[22] This implies, for example, that a failure to

16 *Busche*, Münchener Kommentar zum BGB, 7th edition 2015, § 141 margin note 1.
17 See references to case law below.
18 See in detail: *Shirvindt*, in: Basedow/Fleischer/Zimmermann (Eds.), Legislators, Judges and Professors, Tübingen 2016, pp. 41-55.
19 Концепция совершенствования общих положений Гражданского кодекса Российской федерации, Abschnitt V § 1 1.1, Вестник ВАС 2009, No. 4, p. 49.
20 For references see: *Kurzynsky-Singer*, in: Vasiljević/Kulms/Josipović/Stanivuković (Eds.), Private Law Reform, p. 306 ff.
21 See on the differences in the German and Russian approaches: *Kurzynsky-Singer*, in: Kurzynsky-Singer (Ed.), Transformation durch Rezeption?, Tübingen 2014, pp. 89 – 104.
22 See for example: *Schubert*, Münchener Kommentar zum BGB 7th edition 2016, margin note. 309 ff.

comply with formal requirements can be ignored if it would be unconscionable for one party to allege the invalidity of the contract under the given circumstances.[23] However, whereas German courts apply this doctrine only in rare and exceptional cases, Russian courts use the notion of "estoppel" quite widely.

2. Russian case law

There is a significant number of recent decisions by Russian commercial courts which explicitly refer to "estoppel" in contract law cases in a remarkable way.[24]

First, the courts do not limit estoppel to the provisions of the Russian Civil Code mentioned above but consider it instead a broader concept linked to the good faith doctrine. Sometimes they refer to the good faith doctrine even in cases where one of the mentioned provisions could have been applied directly.[25] The courts are also disposed to go beyond the mentioned provisions. In one case the court explicitly applied the doctrine of estoppel to a contract which was subject to the law existing prior to the enactment of the reform provisions.[26] It was held that estoppel is a part of the good faith doctrine, which formed the foundations of the civil law of the Russian Federation from the very beginning of its existence. In another decision where the court explicitly stated that the estoppel provisions of the Civil Code were not applicable to a contract which was concluded before the reform, it was held that these provisions reflect a general principle which is to be applied by means of analogy.[27] It should be mentioned that Russian courts, especially the

23 See for example: BGH, Urteil vom 25. Juli 2007 – XII ZR 143/05 – margin note 14, juris; BGH Urteil vom 19. Mai 2011 – III ZR 16/11 –, margin note 9, juris.

24 See for example the following cases which build the pool for the analysis undertaken in this paper: Постановление Арбитражного суда Уральского округа от 13 сентября 2017 г. N Ф09-4969/17 по делу N А60-37354/2016; Постановление Арбитражного суда Уральского округа от 15 сентября 2017 г. N Ф09-4177/17 по делу N А50-21799/2016; Постановление Арбитражного суда Уральского округа от 15 сентября 2017 г. N Ф09-3937/17 по делу N А60-41103/2016; Постановление Арбитражного суда Западно-Сибирского округа от 18 октября 2016 г. N Ф04-4049/16 по делу N А70-16337/2015; Постановление Арбитражного суда Западно-Сибирского округа от 1 апреля 2016 г. N Ф04-303/16 по делу N А03-20637/2014; Постановление Арбитражного суда Московского округа от 24 августа 2017 г. N Ф05-12034/17 по делу N А40-196429/2016; in these descisions the court considered estoppel doctrine but held it not applicable: Постановление Арбитражного суда Восточно-Сибирского округа от 24 октября 2017 г. N Ф02-2981/17 по делу N А10-1430/2016; Постановление Арбитражного суда Северо-Западного округа от 25 октября 2017 г. N Ф07-11328/17 по делу N А44-9080/2015.

25 Постановление Арбитражного суда Уральского округа от 13 сентября 2017 г. N Ф09-4969/17 по делу N А60-37354/2016.

26 Постановление Арбитражного суда Западно-Сибирского округа от 18 октября 2016 г. N Ф04-4049/16 по делу N А70-16337/2015.

27 Постановление Арбитражного суда Западно-Сибирского округа от 1 апреля 2016 г. N Ф04-303/16 по делу N А03-20637/2014.

Supreme Commercial Court,[28] indeed applied the doctrine of estoppel in its present form already before the reform, without however mentioning it explicitly but rather as a part of the good faith doctrine.[29]

Second, the courts are obviously concerned with elaborating a value-based notion of estoppel using a definition which refers to reasonable reliance of the other party, good faith and commercial honesty as well as the proscription of inconsistent and unconscionable conduct.[30]

Third, the recent cases do not only apply the doctrine of estoppel beyond the boundaries of the relevant provisions of Civil Code; they also try to develop the general limitations of estoppel on the basis of the good faith doctrine. It was stated, for example, that the estoppel rule is not applicable if the party who alleges the contract to be void does so in good faith.[31]

This is a trend which discontinues the links to the soviet heritage in legal thinking. It is well known that in the Soviet Union the judiciary was limited to a strict application of legal provisions, not having much freedom to interpret them.[32]

The most problematic issue, however, is the application of estoppel in cases where one party asserts the invalidity of the contract because of the violation of legal provisions. The courts do not admit such a defence, at least where the party that confirmed the contract is a commercial entity. In two separate cases the courts held that, as the party was a "professional participant of business relationships", she would have been able to verify and assure the compliance of the contract with statutory provisions.[33] In the above-men-

28 Постановление Президиума Высшего Арбитражного Суда РФ от 13 апреля 2010 г. N 16996/09.

29 On the case see below.

30 See for example: Постановление Арбитражного суда Уральского округа от 15 сентября 2017 г. N Ф09-4177/17 по делу N А50-21799/2016 „Исходя из того, что действующим законодательством не допускается попустительство в отношении противоречивого и недобросовестного поведения субъектов хозяйственного оборота, не соответствующего обычной коммерческой честности (правило эстоппель); таким поведением является в частности поведение, не соответствующее предшествующим заявлениям или поведению стороны, при условии, что другая сторона в своих действиях разумно полагалась на них; в соответствии с п. 3, 4 ст. 1 Гражданского кодекса Российской Федерации при установлении, осуществлении и защите гражданских прав и при исполнении гражданских обязанностей участники гражданских правоотношений должны действовать добросовестно; никто не вправе извлекать преимущество из своего незаконного или недобросовестного поведения (...)".

31 Постановление Арбитражного суда Северо-Западного округа от 25 октября 2017 г. N Ф07-11328/17 по делу N А44-9080/2015.

32 *Knieper*, WiRO 2003, S. 65. On the continuity in the development of Russian civil law see: *Kurzynsky-Singer,* Russian Civil Code, in: Basedow/Hopt/Zimmermann (Eds.), The Max Planck Encyclopedia of European Private Law, Bd. II, Oxford 2012, p. 1491 – 1495.

33 Постановление Арбитражного суда Уральского округа от 15 сентября 2017 г. N Ф09-4177/17 по делу N А50-21799/2016; Постановление Арбитражного суда Уральского округа от 15 сентября 2017 г. N Ф09-3937/17 по делу N А60-41103/2016.

tioned pre-reform case, the Supreme Commercial Court decided that an insurance company which had designed the clauses of the contract could not assert a defence that these clauses did not conform with the statutory requirements.[34] In a further decision,[35] the provisions on the formation of the contract were circumvented by application of estoppel. The court acknowledged that a set-off agreement was invalid for the reason of lack of certainty, but it decided that as the parties were acting in accordance to their belief that the agreement was valid they were estopped from denying the existence of a binding agreement.

Among the analysed decisions there are two where the court held estoppel not to be applicable. In the first one the court refused to apply the doctrine of estoppel because mandatory provisions of public law were violated in a case of privatization.36 In another case, which was already cited above,37 the court held that the party was not estopped from referring to a provision which was established for the protection of this party, namely Art. 174 of the Russian Civil Code.

III. A brief survey of the doctrine of estoppel in English law

1. Forms of estoppel

It would go far beyond the scope of this paper to try to analyse the different categories of estoppel as well as differences between the individual common law jurisdictions. Therefore, the following survey points out only such benchmarks of estoppel in English law which are important for the comparative analysis aimed at by this paper.

Basically described, estoppel is a principle of justice and equity. A brief description has been formulated as follows: "It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so."[38] On a first impression, this formula allows for flexibility by responding to general concepts of justice. However, it has been said that "despite these eminent claims for its ethical simplicity, there is hardly a more controversial or more complex area of the law of obligations."[39]

34 Постановление Президиума Высшего Арбитражного Суда РФ от 13 апреля 2010 г. N 16996/09.

35 Постановление Арбитражного суда Уральского округа от 13 сентября 2017 г. N Ф09-4969/17 по делу N A60-37354/2016.

36 Постановление Арбитражного суда Восточно-Сибирского округа от 24 октября 2017 г. N Ф02-2981/17 по делу N A10-1430/2016.

37 Постановление Арбитражного суда Северо-Западного округа от 25 октября 2017 г. N Ф07-11328/17 по делу N A44-9080/2015 (where ***the court held*** that the estoppel rule is not applicable if the party who alleges the contract to be void does so in good faith).

38 Denning MR in Moorgate Mercantile Co. Ltd. v. Twitchings [1976] 1 QB 225, CA, at p. 241 (lexis library); quoted for example by *Cooke*, The Modern Law of Estoppel, Oxford 2000, p. 2; *Morgan*, Great Debates in Contract Law, New York 2012, p. 57.

39 *Morgan*, Great Debates in Contract Law, New York 2012, p. 57.

Estoppel has traditionally been perceived as having a number of quite separate strands which operate in very different ways and are based on different principles;[40] they can be based both in common law and equity.[41]

The central and original function of estoppel is to prevent a party from making an averment which contradicts her former representation.[42] This form of estoppel encompasses, for example, cases which establish preclusion rules.[43] However the doctrine of estoppel has evolved further and reaches far beyond this aim.

Estoppel by convention, for example, arises where the parties to an agreement have acted on the basis that some provision in the contract has a particular meaning and will operate to prevent one of the parties from later trying to argue that the provision means something different.[44]

Promissory estoppel is held as having much in common with waiver, addressing similar situations on the basis of equity.[45] It allows for the modification of a contract without any additional consideration. The preconditions for its application are (i) a pre-existing legal relationship between the parties, (ii) a clear or "unequivocal" promise or representation, (iii) the promisee must have relied upon the promise, (iv) it must be inequitable for the promisor to go back on the promise.[46] The most prominent case on this form of estoppel is *Central London Property Trust Ltd v High Trees House Ltd*.[47] However, it has been questioned if this case should be viewed as an example of estoppel for it provides instead an equitable analogue to consideration.[48] The main impact of promissory estoppel is

40 *McFarlane*, Current Legal Problems 66 (2013) pp. 267-305 (p. 304); see further *Thomson*, Cambridge Law Journal 42 (2) 1983, 257-278 (277); see in detail on different forms of estoppel: *Cooke*, The Modern Law of Estoppel, Oxford 2000, p. 16 – 53; *Treitel*, Some Landmarks of Twentieth Century Contract Law, Oxford 2002, p. 38.

41 *Hudson*, Understanding Equity and Trusts, London & New York 2015, p. 123.

42 *Cooke*, The Modern Law of Estoppel, p. 119; *McFarlane*, Current Legal Problems 66 (2013) pp. 267-305 (p. 271); *Thomson*, Cambridge Law Journal 42 (2) 1983, 257-278 (257).

43 Ismail v Polish Ocean Lines [1976] 1 All E.R. 902, CA. For further case law see: *Thomson*, Cambridge Law Journal 42 (2) 1983, 257-278 (257); *Cooke*, The Modern Law of Estoppel, p. 119 et seqq.

44 *Stone*, The Modern Law of Contract, London 2013, p. 128.

45 See for example: *Treitel*, The Law of Contract, p. 115 et seqq, p. 119.

46 *Treitel*, The Law of Contract, p. 120.

47 As reported by *Stone*, The Modern Law of Contract, p. 117: The plaintiffs were owners of a block of flats in London, which they rented to the defendants. Following the outbreak of the Second World War in 1939, the defendants were unable to find sufficient tenants to take the flats because of the large numbers of people leaving London. As a result, the plaintiffs agreed that under the circumstances the rent could be reduced by half. This arrangement continued until after the war ended in 1945, when the difficulty in letting the flats ceased. The plaintiffs then sought to return to the original terms of the agreement, and also queried whether they might not be entitled to claim the other half of the rent for the war years since the promise to accept less was not supported by any consideration. It was held that the plaintiffs were entitled to recover the full rent from the end of the war. However, the plaintiffs would not be able to recover the balance for the war years.

48 *McFarlane*, Current Legal Problems 66 (2013) pp. 267-305 (especially pp. 273-274).

therefore to soften the rigorousness of the consideration requirement.[49] The classical doctrine of consideration limits namely the enforceability of agreements as it requires that a contract is either made under deed or supported by some consideration, e.g. a benefit which the promising party obtains in exchange for her promise.[50] This doctrine is based on the idea of the reciprocity: "something of value in the eye of law" must be given for a promise in order to make it enforceable as a contract.[51] Under the estoppel rule, however, it is possible to give a binding effect to a promise, a representation or some other manner of conduct without any consideration in the event of sufficient reliance by the other party. Estoppel is considered to be an exception to the general doctrine of consideration which "does not strike at its roots",[52] although there is a noticeable discussion in English legal literature as to whether consideration may be challenged or even replaced by the notion of reliance as a reason for the enforcement of a promise.[53]

The most significant form of estoppel available in equity is proprietary estoppel, whose purposes is described as "preventing claimants from suffering detriment, creating rights in property and circumventing statutory formalities to achieve fairness".[54] In general, it is acknowledged that estoppel can be used only defensively and not as a cause of action – or that estoppel can act only as a shield and not as a sword.[55] The doctrine of proprietary estoppel, by contrast, will grant an equitable interest to a person who has been induced to suffer detriment in reliance on a representation that she would acquire some rights in the property as a result.[56] In particular, there has been a strong tradition of protecting and granting rights to those who have developed or invested in land as a result of a mistake or common expectation which the owner encouraged.[57] As a case that illustrates this doctrine. *Thorner v Majors*[58] can be cited. The facts of the case are summarized in the decision as the following:

> "The Appellant David Thorner is a Somerset farmer who, for nearly 30 years, did substantial work without pay on the farm of his father's cousin Peter Thorner. The judge found that from

49 *Stone*, The Modern Law of Contract, London and New York 2013, p. 119.
50 Generally on consideration see for example: *Treitel*, The Law of Contract, London 2015, p. 78 seqq.; *Stone*, The Modern Law of Contract, p. 90 seqq.
51 *Treitel*, The Law of Contract, p. 78.
52 *Stone*, The Modern Law of Contract, London 2013, p. 120.
53 As one of the most prominent proponents of this theory see *Atiyah*, Essays on Contract, Oxford 1986: "The contract is binding because the parties intend to be bound; it is their will or intention which creates the liability" (p. 12). Consideration is stated in his work, however, to be a "technical requirement" (p. 12) and a reason for the recognition of an obligation (p. 183).
54 *Hudson*, Understanding Equity & Trusts, London and New York 2015, p.123.
55 *Treitel*, The Law of Contract, p. 125; See however *Robert Goff J., Amalgamated Investment & Property Co. Ltd (in liquidation) v Texas Commerce International Bank ltd* QB [1981] 2 WLR 554 at 571. See further CA [1981] 3 All ER 577 (lexis library) where estoppel by convention was applied instead. Concerning the current debate see in detail: *Morgan*, Great Debates in Contract Law, p.64, *Cooke*, The Modern Law of Estoppel, p. 118 et seqq.
56 *Hudson*, Understanding Equity and Trusts, p. 124.
57 *Cooke*, The Modern Law of Estoppel, p. 127 et seqq.
58 *Lord Hoffman,* House of Lords [2009] UKHL 18 (Lexis Library).

> 1990 until his death in 2005 Peter encouraged David to believe that he would inherit the farm and that David acted in reliance upon this assurance. In the event, however, Peter left no will. In these proceedings, David claims that by reason of the assurance and reliance, Peter's estate is estopped from denying that he has acquired the beneficial interest in the farm."

The House of Lords confirmed the duty of the Peter Thorner's administrators to transfer the farm to David, this being an operation of equitable estoppel.[59]

2. Estoppel and invalid contracts

The most significant issue for the purposes of the current research concerns, however, the impact of the doctrine of estoppel on the enforcement of invalid contracts, especially its interaction with statutory provisions which set standards regarding the formation or validity of a contract. Although the interaction of estoppel and statutes under English law is claimed to be "a rather neglected aspect of estoppel",[60] some rules in this regard have been identified.

When considering the interaction of estoppel under English law with a statute, one should first note that it is not permissible to use estoppel to enable or oblige a public authority to do something which is beyond its powers.[61]

Concerning contracts between private parties, English doctrinal analysis has held that "there is no difficulty in principle in finding that a party is estopped from denying the existence of a contract."[62] An example of this approach is established in *Amalgamated Investment & Property Co. Ltd (in liquidation) v Texas Commerce International Bank ltd*.[63] This case concerned the enforceability of a guaranty which was ineffective. However, both parties believed it was valid and acted in correspondence to this belief. Both decisions (Queen's Bench and Appeal Case) applied estoppel, albeit in their different forms.

Further, estoppel can be used to validate a transaction in spite of a failure to meet a statute's requirements.[64] As demonstrated above, English courts are likely to overrule the formal requirements of a will, as stated by the Wills Act 1837, by means of propriety estoppel in cases concerning land.[65] However, these cases bear some peculiarities which impede the borrowing of this rule in Russian legal practice without further consideration. Many of the English land cases put into effect informal, sometimes domestic arrangements that the parties never regarded as having legal force but in which they placed their

59 See on this case for example: *McFarlane*, Current Legal Problems 66 (2013) pp. 267-305 (p. 268 et seqq, referring to further similar cases at p. 274); further *Cooke*, The Modern Law of Estoppel, p. 129.
60 *Cooke*, The Modern Law of Estoppel, p. 150.
61 *Cooke*, The Modern Law of Estoppel, p. 137; consider p. 138 et seqq. for exceptions.
62 *Cooke*, The Modern Law of Estoppel, p. 123.
63 QB [1981] 2 WLR 554; CA [1981] 3 All ER 577 (lexis library).
64 *Cooke*, The Modern Law of Estoppel, p. 141.
65 *Thorner v Majors,* House of Lords [2009] UKHL 18 (Lexis Library), see above.

trust – and where one of the parties later suffered a detriment as a result of this reliance.[66] Especially in cases where the enforcement of promises of inheritance was claimed, it should be recalled that the law provides for testamentary freedom and that intentions and wills are revocable.[67] Nevertheless these cases give an impression of how far the possible effects of estoppel can go. Thus it is not surprising that the defendant can be estopped, for example, from asserting the defence that the limitation period for the claim set by the Limitation Act has expired or from relying upon the provision establishing that a guarantee of a debt is unenforceable by action unless it is in writing or is evidenced in writing.[68] However, such a circumvention of statutory provisions is not always possible. A party cannot been estopped from claiming a statutory protection where the provision is imposed in the public interest or on grounds of general public or social policy.[69]

The practical application of these principles is difficult, with the result that considerable uncertainty remains, as demonstrated by the case *Yaxley v Gotts*.[70] Here the contract between the claimant and the defendant violated s.2 of the Law of Property Act 1989, which renders land contracts void if not concluded in writing. It was stated: "Parliament's requirement that any contract for the disposition of an interest in land must be made in a particular documentary form, and will otherwise be void, does not have such an obviously social aim as statutory provisions relating to contracts by or with moneylenders, infants, or protected tenants."[71] However, s. 2 can be seen as protective legislation as well, designed to prevent people from entering into transactions hastily and without proper advice.[72]

IV. Doctrine of estoppel in common law as persuasive authority for cases under Russian law?

The doctrine of estoppel in Russian law is in the early stages of development. Especially the judiciary faces the challenge of constructing an appropriate test for determining what sorts of statutory provisions can be set of effect by means of this legal institute and which cannot. This raises the question of whether the cases under English law can be used as persuasive authority for cases arising under Russian law.

The differences in the doctrinal foundations between common law and Russian law, the latter of which is a part of a civil law tradition, create doubt about the provisions of

66 *Cooke*, The Modern Law of Estoppel, p. 128.
67 *Cooke*, The Modern Law of Estoppel, p. 130 with references to cases where estoppel was held inapplicable.
68 For cases see: *Cooke*, The Modern Law of Estoppel, p. 141 et seqq.
69 *Cooke*, The Modern Law of Estoppel, p. 142 -143. This exception overlaps significantly with the principle that estoppel cannot restrict or extend the court's jurisdiction. See: *Cooke*, The Modern Law of Estoppel, p. 140.
70 [2000] Ch. 162 (lexis library).
71 By Robert Walker L.J. p. 175.
72 *Cooke*, The Modern Law of Estoppel, p. 146.

the Russian Civil Code on estoppel being an effective legal transplant rather than merely an inspiration for further development on the grounds of pre-existing Russian legal traditions. It is obvious that Russian private law does not require consideration for the formation of the contract or for its modification, while the doctrine of promissory estoppel is usually taught as a topic ancillary to the consideration rule.73 Nor does Russian law have a tradition of equity, which enables equitable estoppel and especially proprietary estoppel under English law.

Indeed, there is no evidence that the Russian legislature considered the English doctrine of estoppel in detail. To the contrary, it was claimed that "in many cases the working groups concentrated primarily on the blackletter rules, not paying much attention either to the history or the functions of the respective rule at issue, its interdependence with other parts of the system, or to the way it is applied by the courts, let alone to its critical assessment in the national literature."[74] Considering the pre-reform case of the Supreme Commercial Court[75] where the estoppel rule was applied, one could assume that the implementation of estoppel in the Russian Civil Code was not a real case of a legal transplant but merely an attempt to justify the already existing case law with a proper labelling.

Nevertheless, the Russian case law seems at least in parts to follow a logic similar to that of the English doctrine of estoppel. In this respect the doctrine of estoppel has not been applied in cases of privatization where provisions of public law were violated.76 The reasoning behind this decision seems to be similar to the idea that it is not permissible to use estoppel to enable or oblige a public authority to do something which is beyond its powers.[77] The idea that a party can be estopped from denying the existence of a contract[78] corresponds with the Russian decision[79] where the court acknowledged that while a set-off agreement was invalid for a lack of certainty, the objecting party was estopped from denying the existence of a binding agreement since it had acted in accordance with its belief that the agreement was valid. As far as a Russian court held that a party was not estopped from referring to a provision which is established in protection of this party,[80] it relates to the understanding in the English doctrinal analysis whereby a party cannot been

73 *Smith*, Contract theory, p. 233.

74 *Shirvindt*, in: Basedow/Fleischer/Zimmermann (Eds.), Legislators, Judges and Professors, Tübingen 2016, p. 60.

75 On the case see Fn. 34 above.

76 Постановление Арбитражного суда Восточно-Сибирского округа от 24 октября 2017 г. N Ф02-2981/17 по делу N А10-1430/2016.

77 *Cooke*, The Modern Law of Estoppel, p. 137, consider p. 138 et seqq. for exceptions.

78 *Cooke*, The Modern Law of Estoppel, p. 123.

79 Постановление Арбитражного суда Уральского округа от 13 сентября 2017 г. N Ф09-4969/17 по делу N А60-37354/2016.

80 Постановление Арбитражного суда Северо-Западного округа от 25 октября 2017 г. N Ф07-11328/17 по делу N А44-9080/2015 (where ***the court held*** that estoppel rule is not applicable if the party who alleges the contract to be void does so in good faith).

estopped from claiming a statutory protection in cases where the provision in question has been imposed in the public interest or on grounds of general public or social policy.[81]

Further, it should be recalled that the foundations of the doctrine of estoppel are themselves a subject of controversy under English law. The debate concerns the question whether the purpose of estoppel is to protect detrimental reliance or to enforce a promise.[82] It has been claimed that both of these views can explain the requirements and rules that case law has developed for estoppel, but they are vulnerable to certain fairly obvious objections.[83]

Therefore the conceptual differences between English and Russian law should not be overestimated. As long as the market economy continues to develop in Russia, the Russian legal order will face problems which are similar to those encountered in other jurisdictions possessing developed markets. The notion of justice and the appropriate behaviour of the parties can be similar under different jurisdictions despite their legal systems having different foundations, as it was demonstrated above for the particular case of estoppel.

81 *Cooke*, The Modern Law of Estoppel, p. 142 -143. This exception overlaps significantly with the principle that estoppel cannot restrict or extend the court's jurisdiction. See: *Cooke*, The Modern Law of Estoppel, p. 140.

82 On this debate see in detail: *Smith*, Contract Theory, p. 233 – 244; *Morgan*, Great Debates in Contract Law, pp. 57 – 66.

83 *Smith*, Contract Theory, pp. 233 – 244.