Article 55 on Open-Price Contract: A Wider Interpretation Necessary?

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ABSTRACT

This article analyses open-price mechanism under the United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980. It proposes for a wider interpretation of Article 55 of the CISG. Currently, the CISG compromises to the preference of its Member States by allowing contracting parties a choice; either to fix price, or to leave price open in a contract of sale. Such option under the CISG is seen under two distinguished provisions, whereby contracting parties may choose to be bound either by a fixed-price term in Article 14(1), or by an open-price term under Article 55. While open-price mechanism could protect the validity of long-term business dealings, the CISG courts tend to validate open-price term dealings under Article 55 subject to the fulfilment of Article 14(1). Hence a more flexible interpretation of Article 55 of the CISG could be given since the current interpretation does not exactly allow a workable open-price mechanism, a useful contracting mechanism to cope with market price changes. In the spirit of upholding friendly international business, this article suggests that not only both provisions should be interpreted separately, but also the scope of Article 55 should be extended to cover more cases of open-price contracts affected by market price changes.

Introduction

Many years before the advent of the United Nations Convention on Contracts for the International Sale of Goods 1980 (hereinafter 'the CISG'), efforts to harmonise and unify commercial law began in the US, Scandinavia and Europe, which then called for a more global and comprehensive response (Rosett, 1984).Unifying international sales law, however, was not a simple task. This difficulty was due to the perceived risk of incompatibility with national laws, which are naturally territorial (Eiselen, 1996). Despite this difficulty, the inter-reliant structure of theworld economy led to the idea that a harmonious, if not unified, set of legal rules should govern transactions all over the world (Rosett, 1984).Such harmonisation was predicted to reduce barriers to international trade (Bridge, 2003). At the initial stage, the United Nations Commission on International Trade Law (hereinafter 'UNCITRAL') emerged with the mission statement 'the development on international trade on the basis of equality and mutual benefit is important in promoting friendly relations among States'(Bridge, 2003).Subsequently, the CISG was established, setting out rules to govern certain aspects of the formation and performance of everyday commercial contracts between sellers and buyers, whose places of business are in different countries (McMahon, 2010).

The CISG 1980

The CISG is a product of compromise, and that itslegal provisions on certainty of price are themselves a product of compromise. Interpreting provisions of open price is not a simple task considering that some contracting states have and prefer fixed-price policies, as opposed to others that prefer open price. To meet preferences and to harmonise national laws of the contracting states, the CISG provides both fixed and open prices provisions, available as an option to all of its Member States.

Thisexample of unification of the national laws of the Member States of the CISG was precipitated by the demands of economic and political realities (Rosett, 1984). In the earlier continental European tradition, legal unification was perceived as beneficial and desirable that it should be actively promoted (Eiselen,

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1996). Modernisation in transportation, communications, and technology are contributory factors to the increase in the legal order supporting worldwide commerce (Rosett, 1984).

By 1968, the UNICTRAL took over the task of unifying the law of international sales consisting of different legal traditions and socio-economic conditions (Garro, 1989). After ten years of work by UNCITRAL, there was a unanimous agreement by participating states on a convention, which was submitted for signature in Vienna (Amato, 1993). Effectively, the CISG was created to facilitate the world trade and to remove uncertainty created by conflicting states' national laws (Rhoades, 1992).

The CISG is a product of more than two generations of international negotiation, and was unanimously approved by delegations representing 62 national legal systems at a diplomatic conference convened by the United Nations General Assembly in Vienna in 1980 (Amato, 1993). Its final text was approved at a diplomatic conference convened by the United Nations General Assembly in Vienna in 1980 (Garro, 1989). The 62 nations comprised of 22 from the 'Western developed' countries, 11 'socialist regimes' and 29 third world countries (Garro, 1989). The US delegates participated actively in the discussions of the CISG, voting in favour of the final text of the CISG (Garro, 1989). The US signed the CISG on August 31, 1981, and subsequently on September 21, 1983, the US President requested for the advice and consent of the Senate to the ratification of the CISG (Garro, 1989). Consequently, the unanimous ratification of the Senate took place in October 1986 (Garro, 1989). By December 11, 1986, officials from the mission to the United Nations of the United States deposited the instrument of ratification at United Nations Headquarters in New York (Garro, 1989).

There was never a consensus reached among the 62 participating nations on the CISG final text, considering their huge differences of views (Garro, 1989). After thirty years of hard technical negotiations, the fact that the delegates were able to agree on a uniform law that displaced familiar national concepts and policies could only be explained as a compromise (Garro, 1989). The completion of the text and its opening for signature were the primary steps, followed by the stage of integrating the CISG as part of international trade practice (Sono, 1986). Consequently, many CISG articles are compromise in nature that they do not represent the individual preferences of the delegates; rather they were drafted to live up to the expectations of all participating countries (Feltham, 1981). In a particular example of open price provisions, the need to reach a consensus has created difficult questions of interpretations.

The sphere of application of the CISG

The CISG applies to contracts of sales of goods between parties whose places of business are in different states (Garro, 1989). Either both states are parties to the CISG, or the rules of private international law of one contracting state lead to the application of the law of another contracting state (Garro, 1989). Each contracting state has two sets of rules for sales: a domestic law of sales for general application, and a set of rules applicable to a particular subgroup of sales, namely the international sales law (Garro, 1989).

If parties have no choice-of-law provision in an international sales contract, they cannot be certain which law a national tribunal will apply to resolve any dispute arising from the contract (Garro, 1989).Under the CISG, a contracting state's court need not apply foreign sales law indicated by choice-of-law rules. Instead, a court in a contracting state will apply the CISG by virtue of Article 1(1), unless the parties to the contract have agreed to exclude some or all of the rules in the CISG.

The provisions of the CISG govern the formation of international sales contracts, and the rights and obligations of the buyers and sellers arising from such contracts (Garro, 1989). At the time of ratification, a state may declare that it will join the CISG only in part: Article 92(1) of the CISG provides an option for a state to refuse to be bound either by Part II, on the formation of contracts, or by Part III, on the rights and obligations of the parties of the CISG. The only mandatory parts are Part I on the sphere of application and other general provisions, and Part IV on the final provisions on ratification and related matters (Garro, 1989).

To apply the CISG, there are three distinct criteria to be satisfied: firstly, the contract must be a contract for the sale of goods (Article 3); secondly, the parties to the contract must have their places of business in different states; and finally, the CISG applies only when (a) both parties are contracting states, or (b) the

rules of private international law lead to the application of the law of one of the contracting states (Goode, 2009). Hence, if a seller whose place of business in England, contracts to sell goods to the buyer B, whose place of business is in Ruritania, CISG will apply if both England and Ruritania are contracting states, or if the law applicable to the contract is that of one of the contracting states (Goode, 2009).

Open price is an option that ensures harmonisation of national laws, and hence it requires a viable interpretive approach. The two existing ways in which a price term may be dealt with under the CISG is Article 14(1), which requires at least an implicit method to fix the price of the goods, and Article 55, which does not require a price term at all in a contract, so long as the price is determinable using 'the price generally charged at the time of the conclusion of the contract, under the general comparable circumstances' (Article 55 CISG).

Open price practice

The states that approved the CISG hold varying views on the definiteness of a price term. Rosett, for example, explained that socialist countries object to the idea of an open price because they need to ensure that their contracts adhere to the predetermined macroeconomic governmental plan (Rosett, 1984). In such a planned economy, open-price contracts are invalid (Garro, 1989). Other states also perceive open-price contracts with hostility, particularly when the unilateral fixing of the price causes disadvantage to the weaker party (Rosett, 1984). Within developing countries, the argument has been that an open price does not serve their interests due to the unfavourable terms of trade for raw materials, in contrast with the ever increasing price of manufactured goods (Date-Bah, 1981). Conversely, the US takes a far more liberal approach; it validates open price and quantity under Sections 2-305 and 2-306 respectively, to allow price and quantity to be adjusted in the light of sellers' output and buyers' requirements.

As a result of the diverging view of the Member states, the CISG has a two-part rule on open price for them to choose from, and this is explained in the following section.

Article 14(1) of Part II versus Article 55 of Part III of the CISG

Contracting states under the CISG may opt for the traditional fixed-price method under Article 14(1), or for an open price under Article 55. Article 14 serves well for the policy of Member States that do not favour open price, while Article 55 is purposeful for parties that are receptive to open price. In fact, these two articles fall into two different parts of the CISG: Article 14(1) is under Part II, on the formation of contracts, while Article 55 falls under Part III, on the sale of goods.

Both of these parts have their own, particular history. The work on the formation of contracts for the international sale of goods began in 1934 when the International Institute for the Unification of Private Law in Rome (hereinafter 'UNIDROIT') separated out formation of contracts (Eiselen 1996), from the Institute's general work on the international sale of goods (Farnsworth, 1988). By year 1936, a draft Uniform Law on International Contracts by Correspondence was prepared (Farnsworth, 1988); although progress on international sales was affected by World War II, and the work was not resumed until 1956 (Farnsworth, 1988),at which point the Governing Council of UNIDROIT completed a new draft for the formation section, and the general work on sales was completed in a Draft Uniform Law on the International Sale of Goods, revised by a special committee named at a conference at The Hague (Farnsworth, 1988).

When UNIDROIT transmitted its draft on the formation of contracts to the Dutch government, it was submitted to the diplomatic conference at The Hague, where the international sales draft was also submitted (Farnsworth, 1988). Hence there were two separate conventions, one dealing with the formation of sales contracts and the other on the substantive law of sales (Farnsworth, 1988). Before both sections became effective, the UNCITRAL was also revising the law of international sales and had considered incorporating the provisions on formation in a 'Part II' of the CISG, similarly to the way in which provisions on formation form part of Article 2 of the Uniform Commercial Code (hereinafter 'UCC') (Farnsworth, 1988).

As some of the provisions of Part II were controversial, it was decided that a contracting state would be granted the option to ratify the entire CISG but leave out Part II (Article 92(1) CISG). Having undergone

minor changes at the Diplomatic Conference in Vienna in 1980 (Farnsworth, 1988), Part II of the CISG on the formation of contracts contains 11 articles based on the traditional premise that a contract is formed by means of an offer and an acceptance (Farnsworth, 1988).The first four articles (Articles 14-17) deal with offer, the following five (Articles 18-22) deal with acceptance and the last two (Articles 23-24) deal with the time at which a contract is concluded.

Part III of the CISG on the sale of goods, contains 64 articles across five separate chapters (Articles 25-88).

Article 14(1): meaning and purpose

Article 14(1) of Part II of the CISG requires a valid contract to have a fixed price, or at least an implicit provision that fixes the price. Subsection (1) is outlined below:
Article 14(1)

> A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is *sufficiently definite* and indicates the *intention of the offeror to be bound* in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

In the above provision, the three criteria of a valid offer are: a) that the offer is addressed to a specific person, b) that the offer is sufficiently definite, and c) that it indicates the offeror's intention to be bound. Two crucial points are the requirement of a sufficiently definite price and the phrase intention of the offeror to be bound.

The unfortunate implication of Article 14(1) is that not only must the goods be indicated, but there should also be an express or at least implicit provision to determine the quantity and price of the goods. In other words, a proposal *is not* sufficiently definite *unless* a price or a price provision to the item is implicitly indicated (Farnsworth, 1988).

Article 14(1) arguably fits the needs of a simple and straightforward, rather than complex, type of business dealing. An example of a simple and straightforward dealis where parties may expressly agree on a price of video recorders through an exchange of calculation charts, and the buyer may agree to the invoicing of the seller (German case of 9 May 2000 CLOUT Case No 343 [Landgericht Darmstadt, Germany, 9 May 2000]). If parties were to agree for an implicit price (Guide to CISG Article 14, [15] of the Secretariat Commentary, 2009),the buyer sends an order for goods listed in the seller's catalogue or where he orders spare parts, he may decide to make no specification regarding price at the time of placing the order. He may not have the seller's price list, or he may not know whether the price list he has is current. Nevertheless, the buyer is implicitly offering to pay the price currently being charged by the seller for such goods. Article 14(1) provides that if this is the case, the buyer has implicitly made provision for the determination of price and his order for the goods would constitute an offer (Guide to CISG Article 14, [15] of the Secretariat Commentary, 2009).

Despite allowing an implicit price, it appears that Article 14 renders unenforceable those contracts that deliberately leave price and quantity open, although it does uphold intention to be bound as a prerequisite of a valid offer. This resembles Section 2-305(1) of the UCC, although the latter extends the intention to be bound to cover cases of absence of a price term due to silence, agreement to agree and failure of a third party or an agreed standard to fix the price. An American attorney would therefore be familiar with the phrase intention of the offeror to be bound in the case of acceptance under Article 14(1) (Murray, 1988). The only, but crucial, difference from the UCCprovision is that Article 14(1) still requires the price to be determinable, at least implicitly, regardless of whether the contract is discrete or relational.

This implicit price requirement is favoured by countries that hold a more restrictive view of contracting, such as the former USSR and France (Farnsworth, 1988).Conversely, it is less appealing to the sales practice of states with a more flexible view of formation, such as the United States and Scandinavian states such as Denmark, Finland, Norway and Sweden, and therefore these states have opted for reservation from the rules of Part II on contract formation (Lookofsky, 2000), as permitted by Article 92(1) of the CISG. Effectively, the Scandinavian states are in favour of open price, leading to the adoption of Article 55 in Part III of the CISG. This provision is explained in the following section:

Article 55: meaning and purpose

Article 55

> Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

Article 55 is drafted in contrast with Article 14(1), whereby a contract may be valid even without an implicit price. At first glance, it seems that Article 55 approves the realities of relational, complex contracts that demand flexibility in the price term. The history of Article 55 dates back to Article 67 of the 1956 Draft of the ULIS wherein the buyer is required to pay the usual price charged by the seller at the time that the contract is concluded, or instead a reasonable price based on the current market price (Eorsi, 1987).

In the absence of an express or implicit price, the effective price will be the price generally charged at the time of the conclusion of the contract for such goods, sold under comparable circumstances in the trade concerned. This is the price which would presumably have been agreed upon by the parties at the time of contracting had they agreed upon one at that time. The Commentary states that the seller should not later be able to claim for the price that prevailed at the time of the delivery of the goods, if that price was higher than the one the seller was charging at the time of the conclusion of the contract (Eorsi, 1987).

The Honnold-Farnsworth debate on Article 14 and Article 55 interpretations

Generally, both articles deal with two different matters, yet the interpretation of the two is inter-related. Article 14 is concerned with offers and the formation of a contract, and Article 55 with the obligations and performance of the contract. The debate of what amounts to a proper interpretation is explained in the two sections that follow:

The view of Farnsworth

The American legal scholars who participated in the diplomatic negotiations disagree about the interpretation of Article 55 (Eorsi, 1987). According to Farnsworth (1988), Article 55 only operates if a contract has been validly concluded under Article 14(1). This means that if the US were to ratify the CISG but not take Part II, a contract with an unstated price would be able to be validly concluded because UCC Section 2-305 would then apply. The problem arises if a state is to ratify the entire CISG, including Part II, making it arguable that Article 14 prevents a contract with an unstated price from being validly concluded. This suggests the impossibility of Article 55 to take effect.

In addition, Farnsworth (1988) pointed out that if a contract with an unstated price *is* validly concluded, the CISG differs from the UCC as to how that price is to be determined. Clearly, Article 55 refers to 'the price generally charged in the trade at the *time of the conclusion of the contract*', while Section 2-305 refers to a reasonable price at the *time for delivery*.

The view of Honnold

In contrast with the view of Farnsworth, Honnold viewed both elements of Article 14(1), namely 'definiteness' and the 'offeror's intention to be bound', as key elements, but the latter as the chief element of a valid contract. Honnold(1999) nonetheless admitted that as a price term was crucial to economic success, parties would rarely enter into a binding contract without at least an implicit understanding of the price, or a means of determining the price.A lack of clarity regarding price may occur in emergency situations, such as urgent orders for the manufacture of minor replacement parts, or requests to rush a shipment of goods where the buyer may not have access to the seller's price list. Such situations may be common also due to the ever-increasing spread of standardised goods that have standardised prices, along with modern means of communication that facilitates ordering without bargaining (Honnold, 1999).

In 1977, a review on the element of validity in the opening phrase of Article 55 was made to restrict the scope of the article 'to agreements that were valid by the applicable law', namely the domestic law applicable under rules of private international law (Honnold, 1999). If the law of the state provides that open price agreements are not binding contracts, Article 55 is inapplicable. If, however, the law of the state recognises open price contracts, then it must be ascertained that no other grounds for invalidity exists under the applicable law. From this fact, it is deducible that there is no reason for a deal to be invalidated under Article 55 merely because it does not comply with the implicit requirement of Article 14(1).

To strengthen his proposition, Honnold provided an example in which open price under Article 55 should be independent from Article 14(1). In this case, following negotiations, the seller and the buyer signed a contract of sale that called for the seller to manufacture and ship goods according to the specifications and quantity stated in the agreement. The agreement did not fix a price, and instead stated that it derogates from any implication of Article 14(1). The seller manufactured and delivered the goods, which the buyer accepted and used, but no price could be agreed between the parties.

In the above situation, there was not an exchange of offer and acceptance. However, the parties intended to be bound by the contract even though the price had not been fixed. Potentially, an opportunistic buyer could defend himself using Article 14(1) as an excuse to have a non-binding agreement, as there was not express or implicit way to fix the contract.

Honnold(1999) concluded that it was unreasonable for Article 14 to be a prerequisite of Article 55. Article 14(1) clarifies that a communication that does not state or make provision for the price is not an offer, that a reply stating 'I accept' does not necessarily create a valid contract. However, if there is no clear offer and acceptance, Article 55 resolves the issue, stating that a contract may be validly concluded even if it does not expressly or implicitly fix or make provision for determining the price. Honnold thinks that the phrase 'where a contract has been validly concluded' is indicative of a valid contract to be independent from the need for express or implied provision for determining the price, yet enforceable under the CISG (Honnold, 1999).

The trend of the CISG courts, however, is to automatically categorise a case under Article 14(1) when a contract includes an 'implicit' method of determining the price. Yet there is no resolution for the conflict between Articles 14(1) and 55. Whether open price under Article 55 is subject to implicit requirement or is independent from Article 14(1) as intended by parties is an issue rarely discussed in most court decisions(*Chinchilla furs case,* 1994).

Honnold's opinion as the prevailing view

In resolving the tension between Articles 14 and 55, the writer believes that the reasoning given by Honnold in the debate is the more cogent opinion, forming a sensible interpretation of the seemingly incompatible provisions of the CISG in order to maintain their sensibility (Garro, 1989).

Garro(1989) supports the reconcilability of both provisions, since Article 14(1) requires that the price be at least implicitly fixed, while Article 55 validates open price using an implicit price fixed by operation of law, namely, the price generally charged at the time of conclusion of the contract.Both provisions require an objective standard to determine price, and hence should not conflict with each other when dealing with certainty of price. Such reconcilability is also supported by both Articles 7(1) and 8 of the CISG (in Part I, which is a mandatory section for all contracting states). Article 7(1) states that the international character and uniformity of the CISG, and good faith are to be upheld when interpreting the provisions of the CISG; Article 8(1) emphasises the intent of a party as a tool of interpreting the party's statements and conduct, wherein such interpretation is 'according to the understanding that a reasonable person of the same kind as the other party would have had in the circumstances (Article 8(2); Murray, 1988).' In determining the intent of a party or the understanding a reasonable person would have had, due consideration is given to all relevant circumstances of the case, including negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties (Article 8(3) CISG). These provisions indicate that there should not be any conflict between Articles 14(1) and 55 in order to maintain the international character of the CISG as a whole.

In addition to the sensibility and reconcilability of the CISG, the view of Lookofsky (2000) is that the absence of a price term should not render the agreement unenforceable, particularly when the intention of the parties was to enter into a binding agreement. If a reasonable person regards the deal as binding, the agreement must be recognised as binding. The emphasis of the CISG on the reasonable understanding of the parties and their predominant intention could overcome any notion that the language of Article 14(1) concerning an explicit or implicit fixing of the price should be construed to permit technical gaps regarding that understanding and intention.

The interpretation made by Honnold best serves the best interests of both buyer and seller in relational sales during rapid price fluctuations. This is because a mere reliance upon the restrictive wording of Article 14(1) and a narrow construction of Article 55 lead to the nullity of the contract, particularly if parties are of contracting states that are less receptive to open price contracts. Hence, Honnold's approach would help to ensure the validity of relational, complex contracts.

Impact of open price under Article 55 of the CISG in comparison with Section 2-305 ofthe UCC

According to the Commentary to Article 55, this provision has effect only if one of the parties has his place of business in a state which has ratified or accepted Part III but not Part II of the CISG, and if the law of the state provides that a contract can be validly concluded even though it does not expressly or impliedly fix or make provisions for determining the price(Guide to CISG Article 55, [2] of the Secretariat Commentary). Lookofsky(2000) explained that Article 55 had relevance for the Scandinavian States who all declared themselves 'not bound' by Article 14. The perception of open price under Article 55 as dependent on 'implicit price' under Article 14 reflects that Article 55 is *only* significant in cases where one of the parties reside in a Scandinavian state.

By comparison, the UCC complies with the concept suggested by Lookofsky, in that Section 2-305 provides the courts with an excuse to impose, to the extent of the parties' original intentions, a price term not found in the agreement. Section 2-305 embraces the fact that agreeing to an open price means that the parties intend to accomplish profit out of a contract, a practical reality ignored by most courts (Prosser, 1932). If parties do not wish the court to set the price but would rather the contract failed in the absence of their ability to agree on a price, it is obligatory upon them to make an express statement to that effect in the contract itself, or to show by other convincing evidence that such result was intended (Section 2-305(4) UCC).

Despite the independence of Article 55 in validating intentional open price, relevant decisions demonstrate that open price is valid only if it fulfils Article 14(1). As explained earlier, the court may be able to discern parties' true intention based on Article 8, whereby if parties appear to be intended to be bound without a price clause, then the parties' intention to leave the price open is to prevail. This is particularly essential if the parties have dealt with each other and having prior course of dealing or in cases where trade usage allows a price to be implied. Similar to the law merchant under the UCC, the parties' experiences as well as their trade usage are useful in supplying open terms. The CISG provides that open terms may be supplied by recourse to usage (Article 9(2)), by practices established between the parties (Article 9(1)) or by general interpretation of the parties' conduct (Article 8).

The next section discusses the interdependency of both Articles using examples from the relevant court decisions. These examples are crucial to show the impact of reconciling, or separating the interpretation of both Articles 14 and 55.

Decisions relating to Articles 14 and 55

***Oven case*– silence as to price**

In this case, the seller was managing a business covering the manufacturing, repairing, acquiring and selling of kitchen equipment, while the buyer was managing a hotel in Switzerland. The contract was for the purchase of an oven to replace an existing oven that broke down before a particular weekend- a situation of urgency for most hotel businesses.

On Friday, 8 March 2002, the oven in the kitchen of Public Utility E broke down and in the same afternoon, its executive chef asked the seller to repair or replace the defective equipment or to replace it. Nevertheless, under undocumented circumstances, the executive chef rejected the repair of the oven. K, the representative of the seller, contacted its oven supplier, Company L, indicating the reasons for urgent delivery of the replacement oven to Switzerland the next day. Company L had only one oven available, and K accepted this oven, of the brand and type Lainox ME 110 P, but did not mention the oven's price to the executive chef. The seller alleged to have sold the oven to the buyer, for which the issued bill remained unpaid. The seller thus based its action on the conclusion of a contract with the buyer for the international sale of goods.

The court enforced the inadvertently missing price by deriving the intention of the parties through the behaviour of the buyer after the delivery. When the buyer asked for a copy of the bill, she never contested the price. In addition, the buyer requested the seller to send her a letter of guarantee for the oven. This behaviour, which took place over several months, implied that the sale was concluded even though the seller had not initially indicated the price.

The conduct of the buyer was only a part of the reason used by the court to derive intention. Article 55 resolved the issue, for a contract may be validly concluded without any (express or implicit) reference to price, since the price may be objectively determined according to the price generally charged at the time of conclusion of the contract. In this case, the contract gave no indication as to the price of the oven, it was deemed to be the price currently practised for such goods, and the buyer thus bore the risk of paying more than foreseen if he accepted the delivered goods. Applying Article 55, the court applied the price currently practised, which amounted to 6,972.17 €.

Article 55 fills the gap of a price when parties have indeed validly concluded the contract, even in emergency situations where there was no proper offer and acceptance. Naturally in this case, the delivery took place almost instantly after the time of formation of the contract. The 'price generally charged at the time of the conclusion of the contract' under Article 55 was accurately applied for the sale of the oven in this case, which did not involve volatile market as far as the oven is concerned.

This leads to the question of whether the application of Article 55 would be similarly effective for products such as steel and oil, where the relational nature of those contracts creates a large gap between the time the contract is formed and the time of delivery. Would Article 55 be able to cope with products of volatile prices whereby the product's price may fluctuate that the price at the time of delivery far deviates from the price generally charged at the time of conclusion of the contract? The following court decision illustrates the limited application of Article 55 when comes to relational, complex contract.

Pratt and Whitney v Malev Hungarian Airlines case

The case involved a proposal for the sale of two jet engines, with an additional engine option. The selection of the engine would depend on whether Malev purchased aircraft of Airbus, or of Boeing. The proposal included prices for both engines, but later, when the proposal was amended to include the additional engine, there was no price stated for this additional engine option. Malev telexed a letter that it had chosen Pratt & Whitney engines for Boeing aircraft. This option took place after various exchanges with Pratt & Whitney on engine maintenance and building a spare parts pool in Hungary. However, three month after signing the acceptance letter, Malev informed that it would not purchase the engines.

The primary concern was whether the missing price term of the additional engine caused uncertainty in contract. While Malev claimed that there was uncertainty in price as Pratt & Whitney did not indicate its own price index in order to calculate the base price of the additional engine, Pratt & Whitney claimed that the price was determinable in a precise manner. The proposal stated the product, quantity and data on how the price calculation could be made. The Budapest Metropolitan Court held that there was a valid contract between the parties for 'an offer may be valid even without a fixed price or number of goods, if it contains provisions for the definition of the price and quantity'.

The Supreme Court reversed the decision and reached the opposite conclusion; it found that no valid contract had been formed. The court relied primarily on Article 14(1), stating that in order to constitute an offer, a proposal is sufficiently definite if it indicates the product, the quantity and the price or contains directions as to how these terms can be defined. Since a price was not stated for the additional Boeing engine option that Pratt & Whitney had added to the contract, the proposal lacked a sufficient price term

that cannot constitute an offer under the CISG. Recognising the approach of Farnsworth, the Supreme Court held that the divergence of Article 14 and 55 implies that both of them cannot be construed together, and that Article 55 applies only if there is a valid contract under Article 14.

As a result, not only did the Supreme Court denied Pratt & Whitney any recovery, but it ordered them to reimburse Malev HUF 15,150,000 for the costs of the litigation, and that Pratt & Whitney was to bear its costs itself. Article 55 did not have any impact on the Supreme Court's analysis (Flechtner, 1988). In fact, Article 14(1) 'implicit price' requirement has somewhat constituted a prerequisite to a valid contract under Article 55. The perturbing factor was that the Supreme Court avoided addressing the issue of whether there was an element of intention to be bound between the parties when applying Article 14(1), and that the price of the additional engine was determinable based on the data provided by Pratt & Whitney. Although an aircraft engine is specialised goods, there could have been an acceptable method to determine its price. Koneru(1997) suggested that 'an independent appraiser familiar with the aircraft engine industry' is one possible method of price determination in this case. Hence, there was a possibility of a valid contract not only under Article 55 but also under Article 14(1) as the price of the additional engine were determinable. Koneru(1997) also commented that the court could have derived the parties' intent based on their conduct, under Article 8, and failure of the Supreme Court to address Article 8 reflected the fact that 'not only Malev, but also the Court failed to observe good faith under the Convention'.

The decision would have resulted otherwise under Section 2-305 of the UCC. The contract would have been valid based on the evidence of intention of the parties and thus the UCC courts would not approve of Malev's bad faith in repudiating in agreement that Malev itself almost certainly assumed was binding. This is detrimental to Pratt & Whitney, who have incurred on reliance costs based on the agreement made. Flechtner(1988) added that '[i]magine if the tables were turned, and it was Pratt & Whitney who refused to sell the engines after Malev had committed to purchase Boeing aircraft'.Arguably, the Supreme Court's decision ignored the international character of the CISG by straining for an interpretation favourable to the party of the same nationality as the court.

Would the court apply Article 55 if parties did not have proper exchange of offer and acceptance in a deal? The subsequent section exemplifies a case.

A case where parties deliberately left the price open

Based on the Pace Law website, there are 42 reported cases under Article 55 on deliberate open price, but only one involved goods of changing price based on the market, where the price was determinable only when the product was in its season. In this category, the parties deliberately opt for an open price, with a price mechanism to allow calculation of the price.
The case is explained below.

Pitted Sour Cherries case

The German plaintiff (the buyer), a trader of fruits and vegetables, maintained supply contracts with a trade chain which operates a branch, while the Belgian defendant (the seller) was a company processing foods and vegetables. Upon completion of an oral discussion regarding the delivery of pitted sour cherries, the seller sent the buyer a letter on 13 June 2003, stating that the quantity of pitted sour cherries would be 400,000 jars, with their price to be fixed during the season. The deliveries were to take place between July 2003 and May 2004, and payments were to be made within 30 days of each invoice. The buyer then ordered 50,000 jars of sour cherries from the seller at a price of EUR 0.95 per jar, which the seller delivered directly.

On 15 October 2003, the seller sent the buyer a second letter to confirm the purchase of 400,000 jars, this time at a price of 0.90 Euro per jar. This letter stated that the first truck would be delivered in November 2003 and that the rest of the deliveries were to continue until the end of May 2004. The seller stated that the 50,000 jars of sour cherries previously purchased, although these were obtained by the buyer from the seller after 13 June 2003, were not to be regarded as performance on the basis of this contract. The buyer purchased a total of 130,464 jars between January and July 2004, paying between EUR 0.87 and 0.90 per jar for the six deliveries in this period.

The buyer insisted that based on Article 14(1), there was no valid contract of sale of sour cherries at the price of EUR 0.90, alleging that the letters dated 13 June and 15 October 2003 were neither offers within the meaning of Article 14(1) nor as commercial letters of confirmation. The buyer claimed that the letter dated 13 June 2003 lacked a price proposal and gave no implicit price. In the absence of implicit price, the buyer

claimed that there was no binding contract and no obligation to accept a further 269, 536 jars of the cherries.

The court nonetheless held that the second letter of the seller dated 15 October 2003 constituted circumstantial evidence of conclusion of the contract and stated that the arrangement to fix the price 'during the season' indicated that the price was implicitly determinable within Article 14(1). Furthermore, the buyer had taken delivery of the goods and paid the price charged by the seller with respect to every delivery received. The court also applied Article 8 and interpreted the clause 'to be fixed during the season' as an implicit agreement of the seasonal prices of the seller for the year 2003.

Again, Article 14(1) was referred to in order to decide whether the price was determinable, but following Honnold, the courts did focus on intent to be bound by looking at the conduct of the parties and the fact that partial delivery had taken place. Article 55 was applicable without depending on Article 14(1) requirement of an implicit price, thus validating the contract without being affected by the vagueness of the phrase 'to be fixed during the season.'

In sum, this case shows that the CISG can be applied due to seasonal variations, as long as the price is sufficiently determined or at least determinable based on the market.

Conclusion: Amending or flexibly interpreting Article 55 makes it a more effective gap filler for deliberate open-price contracts

There is some room to validate relational/complex contracts under the CISG that apply open-price contract under Article 55, but subject to the requirement under Article 14(1). While open price under Article 55 is an alternative to parties that deal with specialised or seasonal goods, such as in *Malev* and *Pitted Sour Cherries* respectively, Article 14(1) is often cited by an opportunistic party that intended to leave the relational contract. Clearly Article 14(1) governs the contract if both parties intend to be bound only if there is a fixed or implicitly fixed price in their contract. However, the situations in *Malev* and *Pitted Sour Cherries* were the opposite; both cases involve relational elements that require flexibility, and that parties intend to be bound even though the prices were not specified.

In *Malev*, Pratt & Whitney was left uncompensated despite incurring reliance costs on the basis of the agreement. As the court's decision was based on Article 14(1), it refused to go further into examining the determinability of the price of the jet engine. Instead, it concurred with the claim by the buyer (Malev) that there was no valid contract. In fact, evidence of intent and determinability of price existed in this case, as discussed above. In *Pitted Sour Cherries* the buyer similarly relied on Article 14(1) in order to be released from the contract when in fact the buyer had accepted the partial delivery of the sour cherries.

The CISG courts have not been able to decide whether or not intention to be bound is the main requirement of a valid relational sale that applies open price. Whether applying Articles 14(1) or 55, the court has tended to consider whether a price term is sufficiently definite but without due consideration of the nature of the business in which the contract was formed. In *Malev,* the Supreme Court stated that Article 14(1) was not fulfilled effectively in deriving the intention of the parties, but neither stated nor explained whether *Malev* fell into the Article 55 category.

Recognising the fact that an open price contract may be validly concluded (even without a clear offer and acceptance under Article 55), the writer agrees with the argument offered by Lookofsky (2000), who stated that the courts and arbitrators ought to discern the intention of the parties in the concrete case, and determine whether or not the parties themselves actually *wanted* their open-price agreement to be binding. Amending or interpreting Article 55 in a similar way to Section 2-305 would benefit many relational sales in the future, as the courts would be able to evaluate the validity of a sale, as long as parties intend to be bound by a contract under Article 55. Recourse need not be had to Article 14(1) as Article 55 directly validates the contract. This enhances the relational character of Article 55 without being impeded by the character of Article 14(1).

Another benefit of flexible interpretation of Article 55 would be that all Member States (except Scandinavian states that have clearly excluded Article 14(1) and Part II of the CISG) that have ratified both

Articles 14(1) and Article 55 would benefit from intentional open prices under Article 55. This improves the current situation where an incompletely drafted contract is subject to the interpretation of Article 14(1) which may or may not nullify an open price term even in cases where parties intended to be bound by the deal. Finally, and most importantly, opportunistic parties may not be able to use the requirement of a 'sufficiently definite' price under Article 14(1) to nullify the contract.

Clearly Article 55 has not been as relational as the US had hoped for after opposing the language of Article 14(1) in Vienna. This is because Article 55 applies reasonable price at the time of entering into the contract, rather than at the time of delivery. It does not exactly cater to the need of changing markets when applying 'price generally charged at the time of the conclusion of the contract', leading to the impracticality of the CISG in dealing with contracts of volatile prices. It seems that Article 55 is limited to resolving accidental omission of price such as seen in the *Ovencase*, considering that an item such as an oven is not in the category of goods of volatile price.

This article suggests that the price at the time of delivery matters in contracts that involve goods of volatile price is preferable to the price generally charged at the time of the conclusion of the contract provided by current Article 55. Based on the *Pitted Sour Cherries* case, it would appear the price at the time of delivery is more practical for considering the seasonal products, for which price determination is not possible until the season has started. For sales involving products such as steel and fuel, the sustainability of the sale if concluded under Article 55 is questionable, but certainly improvable by adopting an interpretation that allows application of price at the time of delivery, rather than at the time of the conclusion of the contract.
In sum, the interpretation of a contract should aim to fulfill the parties' intention, but more importantly to uphold the international character of the CISG as pronounced by Article 7(1). In fact, the Preamble of the CISG states that '[c]onsidering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States' shows that the CISG should minimise opportunism by parties who use Article 14(1) to release themselves from contractual obligations. Departing fromthe shackle of Article 14(1) improves the overall purpose of Article 55 CISG as part of an international sales law.

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