

ARTICLE 55 CISG: THE UNKNOWN FACTOR

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I. INTRODUCTORY REMARKS

Article 55 of the 1980 United Nations Convention on Contracts for the International Sale of Goods is neither particularly popular, nor widely accepted. But “it would be naïve to hold that unpopularity is synonymous with truth as to believe is synonymous with error.”¹

The lack of popularity can be evidenced by the fact that most commentators,² and indeed the UNCITRAL Digest,³ dedicate only a few paragraphs on the discussion of the Article and its application. The Digest cites eight cases,⁴ of which six are CLOUT abstracted cases,⁵ three of which are arbitration cases.⁶ Typically, the CISG database maintained by the

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1. ALAIN DE BOTTON, *THE CONSOLATIONS OF PHILOSOPHY* 42 (2001).

2. See, e.g., Gunter Hager, *Analysis of Obligations of the Buyer (Arts. 53-60)*, in COMMENTARY ON THE UN-CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 624-28 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005); JOHN HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 353-57 (3d ed. 1999), available at <http://www.cisg.law.pace.edu/cisg/biblio/ho55.htm>; Gyula Eörsi, *Comments on Article 55 CISG [Open-Price Contracts]*, in COMMENTARY ON INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 401-09 (C.M. Bianca & M.J. Bonell eds., 1987).

3. UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Article 55, U.N. Doc. A/CN.9/SER.C/DIGEST/CISG/55 (8 June 2004), available at <http://daccessdds.un.org/doc/UNDOC/GEN/V04/553/64/PDF/V0455364.pdf?OpenElement> (The Digest dedicates five paragraphs on the Article, hardly two pages).

4. *Id.*

5. Case Law on UNCITRAL Texts (CLOUT), available at http://www.uncitral.org/uncitral/en/case_law.html (last visited July 30, 2005). In particular, CLOUT Case Nos. 53, 106, 139, 151, 215 and 343 are referred to in the Digest.

6. Court of Arbitration of the International Chamber of Commerce, Award No. 8324, 1995, published in *JOURNAL DU DROIT INTERNATIONAL* 1019 (1996), also available at <http://cisgw3.law.pace.edu/cases/958324i1.html>; CLOUT Case No. 139 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Award No. 309/1993, 3 Mar. 1995]; Court of Arbitration of the International Chamber of Commerce, Award No. 7819, published in *BULLETIN OF THE ICC INTERNATIONAL COURT OF ARBITRATION* 60 (2001).

Institute of International Commercial Law at Pace University School of Law, incorporating the Queen Mary Case Translation Programme, lists twenty-nine cases, of which nine are arbitration awards; eighteen are in English or available in full text English translation.⁷ Some of these cases will be discussed below to highlight the controversies arising out of this provision of the CISG.

The problems with acceptance of this Article are demonstrated by comments to the effect that “the interplay of articles 14 and 55 is one of the most delicate questions raised by the Convention”;⁸ or that this Article is “subsidiary to contract formation rules.”⁹ However, one should not overlook the fact that Article 55 is a triumph of party autonomy: while Article 14 merely gives a statutory presumption of which terms are the essential content of an offer, Article 55 accepts that the parties need not consider the price to be one of them. Further, Article 55 makes an implied reference to expert determination, in the sense that for the resolution of such disputes no judicial remedy exists and the whole difference lends itself to private determination either directly between the parties or with the use of a neutral party.¹⁰

In scholarly writings and in jurisprudence, Article 55 raises a number of issues, some of which will be discussed below on the basis of decided cases and arbitration awards. In particular, this article briefly examines the interplay between Articles 14 and 55 (*infra* at II); the extent and role of party autonomy (*infra* at III); whether a contract can and should be saved if no price is specified (*infra* at IV); and how can a price be fixed in open price contracts (*infra* at V).

II. INTERPLAY BETWEEN ARTICLES 14 AND 55: OPEN PRICE CONTRACTS

The first and main point of controversy relating to Article 55 is its interplay, if any, with Article 14. Is it possible to have a contract validly concluded while Article 14 clearly anticipates that the “price” or a method “for determining . . . price” is an essential element for an offer to be considered sufficiently definite? What is the impact on harmonization that the CISG is aiming at, if Article 55 were to point back to domestic law on issues

7. See Article 55: UNCITRAL Digest cases plus added cases, at <http://www.cisg.law.pace.edu/cisg/text/digest-cases-55.html> (last visited July 30, 2005).

8. See UNCITRAL Digest Article 55, *supra* note 3, ¶ 1.

9. Hager, *supra* note 2, ¶ 5, at 625.

10. See, e.g., Codice civile [C.C.] art. 1349 (Italy).

of formation? What happens if Article 14 conflicts Article 55 out and vice versa? Why all this mess?

Alejandro Garro summarized the numerous compromises that occurred in the drafting of the contract formation provisions of the CISG, the end result of which left both Article 14 and Article 55:

Socialist countries objected to the conclusion of contracts with open-price terms, because the parties are expected to conform their contracts to a predetermined macroeconomic governmental plan. [. . .] Also in some civil law systems contracts of sale with open-price terms are viewed with hostility, particularly when the unilateral fixing of the price works to the disadvantage of the weaker party. It was also argued at the Vienna Conference that contracts with open-price terms do not serve the interests of the developing countries as a result of the unfavorable terms of trade for raw materials, in contrast with the ever-increasing price of manufactured goods. In contrast, the policy prevailing in the United States on this matter encourages the conclusion of sales contracts for long-term supplies, leaving the price and quantity of goods open to be adjusted in light of sellers' output and buyers' requirements.

In order for a proposal to enter into a contract of sale to be deemed "sufficiently definite," article 14(1) of the Convention (under the formation section) requires the offeror to fix the price, expressly or implicitly. The United States delegation was unsuccessful in attempting to change this language in favor of "open-price" offers. An uneasy compromise was finally reached, not by amending article 14(1) but by inserting a new provision in article 55 (under the section dealing with the obligations of the buyer). This provision seems to say the opposite of what is stated in article 14(1), for it implies that a contract may be "validly concluded" even though it "does not expressly or implicitly fix or make provision for determining the price."¹¹

Pursuant to the CISG, an offer is effective if it is:

- (i) addressed to a specific person,
- (ii) is "sufficiently definite," and
- (iii) indicates the offeror's intent to be bound.

Of interest, and controversy, is the meaning of sufficiently definite. The CISG provides two areas of guidance on the issue in relation to price.

First, Article 14(1) provides a "safe harbor" definition by setting a minimum standard, an offer is 'sufficiently definite' in relation to price, if it

11. Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443-83 (1989) (citations omitted), available at <http://www.cisg.law.pace.edu/cisg/text/garro14,55.html>. Many of the "socialist legal systems" have been reformed or are in the process of being reformed. French law also did not allow open price contracts but the situation has now changed. See Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention On Contracts for the International Sale Of Goods*, 18 YALE J. INT'L L. 1, 66 (1993); and the thorough comparative survey by Maria del Pilar Perales Viscasillas, *El contrato de Compraventa Internacional de Mercancías (Convención de Viena de 1980)* ¶ 152 (2001), at <http://www.cisg.law.pace.edu/cisg/biblio/perales1-55.html>.

“expressly or implicitly fixes or makes provision for determining the . . . price.” There are numerous examples of both expressed and implicit methods of determining price. For example, in the German case of 9 May 2000¹² the court determined that the parties had expressly agreed on a price for video recorders by exchanging calculation charts and agreeing to the invoicing by the seller without objection. This approach is supported in cases involving the sending of a solicited price list,¹³ and a confirmed price within an invoice.¹⁴

Of course, this rule cuts both ways. For example, the German case of 4 March 1994¹⁵ in which the court determined that the exchange of letters containing differing terms (including the ordering of additional goods) amounted to a rejection of the offer and a counter-offer. The buyer’s response letter (or the counter-offer), however, contained no pricing terms on the additional goods. Thus, the court determined that the counter-offer lacked sufficient definiteness as it contained no pricing terms or manner of fixing the price for the additional goods desired by the buyer.

Implicit price determination has been a bit more controversial. One example can be found in the case of *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*¹⁶ in which the Federal District Court of New York determined that a custom of “pricing” existed within the pharmaceutical industry. This custom “implied, unwritten supply commitments . . . that were not embodied in legal documents.”¹⁷ Thus, within the pharmaceutical industry the existing

12. CLOUT Case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000]. Article 55 was asserted by the buyer to be applicable as the application would have resulted in an advantageous situation for the buyer.

13. Oberlandesgericht Graz, Austria, 15 June 2000, available at <http://cisgw3.law.pace.edu/cases/000615a3.html>. Of course, unless the parties’ conduct leads to a different interpretation on the part of the buyer, see Oberlandesgericht Frankfurt, Germany, 30 Aug. 2000, available at <http://cisgw3.law.pace.edu/cases/000830g1.html>. Translation is available for both cases.

14. Landgericht Aachen, Germany, 14 May 1993, excerpt available at <http://cisgw3.law.pace.edu/cases/930514g1.html>. See also CLOUT Case No. 151 [Cour d’appel Grenoble, France, 26 Apr. 1995] (*Alain Veyron v. Ambrosio*), available at <http://cisgw3.law.pace.edu/cases/950426f1.html> (using Article 55, full text translation); Bezirksgericht St. Gallen, Switzerland, 3 July 1997, available at <http://cisgw3.law.pace.edu/cases/970703s1.html>.

15. CLOUT Case No. 121 [Oberlandesgericht Frankfurt, Germany, 4 March 1994], available at <http://cisgw3.law.pace.edu/cases/940304g1.html>.

16. *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*, 201 F. Supp. 2d 236 (S.D.N.Y. 2002), available at <http://cisgw3.law.pace.edu/cases/020510u1.html>.

17. “It is the custom and the understanding of both the manufacturer and the supplier that, upon the issuance of the Notice of Compliance, the supplier will supply the product.” *Geneva Pharmaceuticals Tech.*, 201 F. Supp. 2d at 282.

a custom included a pricing policy and determinations which could provide a mechanism for price fixation.¹⁸

Second, Article 55 impacts the determination of a “sufficient price,” by providing:

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.

Consequently, CISG Article 55 is merely a gap-filling¹⁹ provision designed to provide a structure to determine a price term when the parties have validly concluded a contract but have failed to create, or have created an indefinite, price term. The first sentence of the Article makes clear that the application of Article 55 is based on the state court or arbitral tribunal determining that the *offer* did not fail for lack of definiteness.²⁰ Indeed, Article 55 only applies to those situations in which the gap-filling law permits a contract to be concluded without fixing the price or providing a means of determining the price.²¹

In examining Article 55, there are several considerations that must be borne in mind. First, it is important to understand that the parties do not have to agree on a price, they merely have to provide a method for determining the price.

For example, in the Austrian case of 10 November 1994,²² the parties agreed to the shipment of chinchilla pelts without expressly agreeing on a

18. *Id.*

19. Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS—CONTRACTS 1, 129 ¶ 240 (J. Herbots & R. Blanpain eds., Supp. 29 2000).

20. This, of course, is the controversy of Article 55. Professor Honnold’s interpretation is that “a contract may be ‘validly concluded’ even though it does not expressly or impliedly fix or make provision for determining the price.” HONNOLD, *supra* note 2, § 137, at 163-64. However, Professor Farnsworth vehemently disagreed with this reading and interpreted the language to require a validly concluded contract before Article 55 becomes operative. See E. Allan Farnsworth, *Formation of Contract*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 3.04, at 3-8 (Nina M. Galston & Hans Smit eds., 1984), available at <http://www.cisg.law.pace.edu/cisg/biblio/farnsworth1.html#304>.

21. See ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 134-35 (Detailed Analysis) (Supp. 7 1993).

22. CLOUT Case No. 106 [Oberster Gerichtshof, Austria, 10 Nov. 1994], available at <http://cisgw3.law.pace.edu/cases/941110a3.html>.

specific price per pelt. Instead, the parties established a price range (between 35 to 65 German marks) for the pelts; however, the parties made no provision for the method of agreeing on the price within the range. Nonetheless, the Austrian Supreme Court determined this range constituted a valid price, as required under Article 14²³ with the price to be determined based from a range of prices, and to be fixed based upon the quality of the pelts.

Also of interest, is the French case of *Fauba v. Fujitsu*,²⁴ in which the parties agreed to a price “subject to later increases or decreases” in the market price. In reliance upon the agreement, the seller shipped the goods which the buyer rejected on the grounds that no fixed price existed. Both the Court of Appeal and the Cour de Cassation rejected the buyer’s assertions that the price lacked definiteness and ordered payment for the goods.

However, Article 55 should not be used to supplant otherwise agreed upon price determination mechanisms of the parties. For example, in the Russian Federation Tribunal case of 3 March 1995,²⁵ the Tribunal determined that the parties’ agreement to determine the price of the goods in question “ten days prior to the New Year” was not sufficient to establish either a price or a method of determining the price. Instead, the Tribunal determined that the parties had merely agreed to negotiate at a later, albeit specific, time. Moreover, the Tribunal rightly determined that the parties, by agreeing to fix a price at a later date in negotiations, had removed the Tribunal’s ability to use Article 55 to establish the price.

Second, a proposal that does not set a pricing mechanism does not necessarily invalidate the contract of the parties. Contracts are rarely concluded in a simple offer and acceptance dialogue. Instead, there is often a series of exchanges and the exact offer is an elusive concept. Thus, parties that seek to rely upon the indefiniteness of the offer may be shocked to find that subsequent communications and conduct of the parties can, in fact, be sufficient to validly conclude the contract. For example, there are several cases in which the acceptance of the goods, despite the lack of a sufficiently definite price, has resulted in a valid contract being concluded. In *Alain*

23. *Id.* The lower court had relied on Article 55: clearly this is an incorrect application as the parties had established a price range, thereby making the offer sufficiently definite. All that remained was for the Court to determine the quality of the pelts and fix the price based upon the range.

24. CLOUT Case No. 158 [Cour d’appel Paris, France, 22 Apr. 1992] (*affirmed by* Cour de Cassation (Supreme Court), 4 January 1995) (*discussed in* HONNOLD, *supra* note 2, at 353-57).

25. CLOUT Case No. 139 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 3 Mar. 1995], excerpt *available at* <http://cisgw3.law.pace.edu/cases/950303r1.html>.

Veyron v. Ambrosio,²⁶ for instance, the French Appellate Court determined that the buyer's taking delivery of the goods without challenging the sale price contained within the invoice could be viewed as acceptance of the price stated in the invoice.

Third, there are cases in which the parties do not specifically exchange "prices" but do exchange lists or letters that include information from which a price can be determined. For example, the German Appellate Court decision of 10 October 2000²⁷ in which the parties contracted for the sale of crawfish without specifically discussing a price, although they did exchange a seller's "purchase list" which the Court later stated that it included a price list. Nonetheless, the Court looked to Article 55 because it is based in the "assumption that the parties have impliedly made reference to the price which was usually charged for comparable goods at the time of contract conclusion in the same field of business under similar circumstances, as far as no indications against such an assumption are given." The Court then concludes that the "usual list price can be taken as the price agreed upon."

Scholars disagree in regard to the interpretation of Article 55: Honnold points out that a contract with an open ("unstated") price may be validly concluded.²⁸ In contrast, Farnsworth is of the view that Article 55 is an "empty set" since it applies, according to its opening clause, only in cases "where a contract has been validly concluded," and if there is no reference to the price there can be no offer, hence no valid contract could have been concluded.²⁹ Garro suggests a useful interpretative maxim, that "in a codified set of rules such as the Convention, every effort should be made to construe seemingly incompatible provisions in order to make sense out of them" and "it is conceivable and even plausible to reconcile their [Article 14 and Article 55's] meaning."³⁰ Hager stresses the point that the rule in Article 55 can only

26. CLOUT Case No. 151, *supra* note 14. See also CLOUT Case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997], available at <http://cisgw3.law.pace.edu/cases/970703s1.html>.

27. Oberlandesgericht Rostock, Germany, 10 Oct. 2001, translation available at <http://cisgw3.law.pace.edu/cases/011010g1.html>.

28. HONNOLD, *supra* note 2, §§ 137.4-137.5, at 150-52. KRITZER, *supra* note 21, at 134-35, points out that "Article 55 subtracts nothing from Article 14(1). However, 'Where a contract has been validly concluded,' it can permit a more open-price arrangement than Article 14(1). The opening phrase of Article 55 makes a specific concession to domestic law (Honnold Text, 2d ed., 413, n.7)."

29. Farnsworth, *supra* note 20, 3-1 to 3-18, at 3-8 to 3-10. See also Denis Tallon, *The Buyer's Obligations Under the Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (Nina M. Galston & Hans Smit ed., 1984), 7-1 to 7-20, at 7-9 to 7-13, also available at <http://www.cisg.law.pace.edu/cisg/biblio/tallon.html#703>.

30. Garro, *supra* note 11, § II(B)(3). See also Perales Viscasillas, *supra* note 11, ¶ 152; Paul Amato,

be a subsidiary to the provision of contract formation (Part II of the CISG), with the consequence effect that the scope of Article 55 is “considerably reduced” but “not without practical importance.”³¹ The examples of practical importance he highlights, include situations where the parties have derogated from Article 14 (by virtue of Article 6 CISG), or when a trade usage or established practice between the parties exclude Article 14 (by operation of Article 9 CISG), or in cases where Part II of the Convention has not been adopted by the state whose law governs.³²

III. PARTY AUTONOMY

Article 55 specifically enumerates that the parties are free to make agreements concerning the pricing structure of their transaction (“in the absence of agreement to the contrary”). Consequently, it is not surprising that the French courts in *Alain Veyron v. Ambrosio*³³ stated: “the reference made by article 55 CISG to a market price, in as much as this article is applicable to the case, is overridden by a contrary agreement between the parties, such as the provisions of CISG in their entirety, with the exception of article 12 (art. 6).”³⁴

It is important to note that party autonomy can sometimes be achieved through the courts incorrect application of law. For example, the Russian case of 30 May 2001,³⁵ in which the Arbitration Tribunal specifies:

By virtue of Art. 4 CISG, the validity of the contract is to be determined according to the applicable national law” and Russian law (Article 424 of the Russian Federation Civil Code), which is applicable to the present contract, permits the existence of a valid contract in which the price is not specified.

U.N. Convention on Contracts for the International Sale of Goods—The Open Price Term and Uniform Application: An Early Interpretation by the Hungarian Courts, 13 J.L. & COM. 1 (1993), also available at <http://www.cisg.law.pace.edu/cisg/biblio/amato.html>.

31. Hager, *supra* note 2, ¶¶ 5-6, at 625-26.

32. Hager, *supra* note 2, ¶ 6, at 626. Hager also highlights the theoretical differences with many references to the debate and the assessment that, given that the test courts and tribunals apply on the interpretation of Article 14(1) and the assessment of the sufficiently definite character of the offer, there would be rather few disputes associated with the interplay between Article 14 and Article 55.

33. CLOUT Case No. 151, *supra* note 14.

34. *Id.* (Quotation from the translations).

35. Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 30 May 2001, translation available (and relied upon) at <http://cisgw3.law.pace.edu/cases/010530r2.html>.

Of course, it was inappropriate to look to Russian law to determine the availability of an “open price”³⁶ contract; however, the case demonstrates the length that courts will go to when faced with international law that seems to contradict what would otherwise be normal commercial practice within a given trade.

Party autonomy is a central concept of Article 55 as evidenced by the following points:

- First, the parties can agree that a contract may validly be concluded without any reference to price, but normally with an implied or express reference to how the price may be determined.
- Second, Article 14 is a non-mandatory provision and may be disposed either by an (express or implied) agreement that the contract has been concluded and derogation from the requirements for essential content of the offer, as per Article 14,³⁷ or by trade usages or established practice between the parties.³⁸
- Third, in the event of a dispute as to the price of goods, its determination may be made internally, i.e. between the parties by direct negotiation, the determination may be delegated to the seller, or externally, by a neutral third party. There is no automatic recourse to state courts or arbitration tribunals.

Accordingly, Article 55 does not empower a judge or arbitrator to determine the price when it has already been determined,³⁹ or made determinable by the contracting parties.⁴⁰

Strengthening party autonomy is a significant aspect of this provision. The only weakness of the provision is that its harmonizing effect is limited, although one could argue that it does elevate the presumption that “the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances” to a statutory provision.

36. For a further discussion of this dilemma see Garro, *supra* note 11.

37. CISG art. 6.

38. CISG art. 9.

39. CLOUT Case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000], also available at <http://cisgw3.law.pace.edu/cases/000509g1.html> (video recorders case); Cour d'appel Grenoble, *supra* note 143.

40. Award No. 8324, *supra* note 6. Remarks by Larry DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 34 NW. J. INT'L L. & BUS. 299, 338-39 (2004); CLOUT Case No. 106 [Oberster Gerichtshof, Austria, 10 Nov. 1994], also available at <http://cisgw3.law.pace.edu/cases/941110a3.html> (chinchilla pelts case).

IV. CAN A CONTRACT BE SAVED IF NO PRICE IS SPECIFIED?

As several of the above discussed cases demonstrate, there are instances where the parties expect that a contract has come into existence as demonstrated by the delivery (and sometimes the use) of the goods to the buyer. For example, in the Swiss case of 3 July 1997, the seller had delivered raw material to the buyer, in turn the buyer used the materials in its production processes. During the course of using the raw materials, a dispute arose between the parties and the buyer returned the unused raw materials and refused to make payment. The Court (Bezirksgericht St. Gallen) determined that the buyer's conduct post-delivery evidenced the existence of a contract despite the parties failing to establish a price for the raw material. The Court, through the application of Article 55, was left to determine the price of the raw materials based upon the usual invoice price of the seller.⁴¹

Of course, a "clear" reading of any international legal article (or other legal principle) always leads to difficulty. Probably the best known oddity in this area is demonstrated in the case of *United Technologies International Inc. Pratt & Whitney Commercial Engine Business v. Malev Hungarian Airlines*⁴² in which the Supreme Court of the Republic of Hungary, after determining that no contract existed because of the insufficient price within the offer, went on to proclaim that "the price (of the aircraft engines) cannot be determined according to Section 55 of the Agreement either, as jet systems have no market prices." One must assume the Court was merely playing devil's advocate and making a statement such as, "even if we were to look to Article 55;" however, the proclamation is out of place and demonstrates the potential pitfalls should the goods in question be of a unique or specialized category.⁴³

Generally state courts and arbitration tribunals, when having to decide the conflict between Articles 14 and 55, "give precedence to Article 14 and accept responsibility" for determining the missing price⁴⁴ with the ultimate aim of

41. Bezirksgericht St. Gallen, *supra* note 26, abstract published in German in 1 *Schweizerische Zeitschrift für Internationales und Europäisches Recht* 84 (1998). The case was also discussed in Carlos A. Gabuardi, *Open Price Terms in the CISG, the UCC and Mexican Commercial Law*, available at <http://www.cisg.law.pace.edu/cisg/biblio/gabuardi.html>.

42. CLOUT Case No. 53 [Supreme Court, Hungary, 25 Sept. 1992], translation available at <http://cisgw3.law.pace.edu/cases/920925h1.html> (English translation). See also the extensive commentary by Amato, *supra* note 30.

43. See Hager, *supra* note 2, at 626 n.16, who points out that this case is out of line in relation to all other cases opting for a more liberal interpretation of Article 14. See also the comments by Amato, *supra* note 30.

44. UNCITRAL Digest, Article 55, *supra* note 3, ¶ 4. See also Gabuardi, *supra* note 41, at

salvaging the contract (*favor contractus* interpretation). This becomes an absolute rule when the intention of the parties is such as to have the contract saved. If the parties contest the validity of the contract, then courts and tribunals may also decide in favour of the validity of the contract as a matter of legal certainty and protection of the market or third parties.

V. HOW IS THE PRICE FIXED?

Article 55 is relatively clear that in the absence of an express or implicit price term, it is to be presumed that the parties have agreed 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.” Hence we have a statutory and autonomous guidance. This guidance should be treated as a rebuttable presumption primarily because the parties may have contracted with the intention to create a long-term contract that recognizes the changes that occur over time to the pricing of the goods. In such situations, it is appropriate for the tribunal or court to consider contract adaptation. However, the reference to the time of the conclusion of the contract, and not of delivery, ensures that neither the seller nor the buyer may benefit from changes in price until the conclusion of the contract.⁴⁵

Article 55 does not address the question as to who fixes or determines the price. It seems, as we have discussed above, that primacy is given to party autonomy. It may also be possible to retain experts to determine the price. In fact, in civil law systems, experts are frequently retained to determine the subject matter of the contract such as the price of sale agreements. For example, the Italian Civil Code⁴⁶ distinguishes two cases. First, if in the contract the parties do not specify that a neutral third party should make a price determination entirely upon his own discretion and the determination is clearly wrong or unfair, then the parties can appeal to the court for the expert’s decision to be set aside. In these cases the party seeking to challenge the decision must prove, for instance, that the opinion of the expert is manifestly wrong or illogical. If the court decides that the determination is

Conclusion.

45. Hager, *supra* note 2, ¶ 9, at 628. With further references to Heinz Strohbach, in FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, Article 55 at 211 n.7 (1992), also available at <http://www.cisg.law.pace.edu/cisg/biblio/enderlein-art55.html#art55-7a>.

46. C.C. art. 1349. Similar provisions exist in other civil codes, e.g. Code civil (C. CIV.) art. 1592 (Fr.); Código Civil (C.C.) arts. 1449-1450 (Spain).

wrong or unfair then the court itself makes this determination. If, on the other hand, the parties specify expressly that they wish to rely totally on the discretion of the third person, and his decision is final, then the expert determination is binding as a contract and it can only be challenged on the ground of bad faith of the third person. The contract is void if the third party cannot for some reason determine the subject matter of the agreement and the parties do not agree to substitute the third party.⁴⁷

Gabuardi points out also the decision of the Supreme Court of Virginia which held that “open price provisions are enforceable in sales contracts, provided the party that is to set the price does not have the power to act arbitrarily,”⁴⁸ and comments that in Mexico, the rule is even more rigid since the validity or performance of contracts may not be left to the will of one of the parties.⁴⁹

By introducing objective standards for the determination of price, Article 55 moves away from the prior uniform law practice that relied upon the price the seller generally charged for the goods.⁵⁰ The method would accordingly rely on objective or objectifiable facts and circumstances, such as the common list price for the goods.

VI. CONCLUSION

While Article 55 appears to have caused considerable debate, the dust has settled since 1980. Although not all court decisions have produced the desired results, it is now clear that Article 55 would be used to “save” a contract and the methods of determining the price are not particularly controversial. It is important that Article 55 reiterates the policy of the Convention in favour of party autonomy with whatever risk taken in respect of uniformity.

It is also worth noting that subsequent attempts to establish principles of international commercial contracts, namely the UNIDROIT Principles and the Principles of European Contract Law, contain provisions similar to Article 55. Article 5.7 of the UNIDROIT Principles in its first paragraph incorporates the principles of Article 55 CISG; in the second paragraph it anticipates that if the price is to be determined by one party, such determination may be controlled

47. See similarly Germany, Bürgerliches Gesetzbuch (BGB) §§ 317-319. See also STEFAN KRÖLL, ERGÄNZUNG UND ANPASSUNG VON VERTRÄGEN DURCH SCHIEDSGERICHTE 248 *et seq.* (1998).

48. American Trading and Production Corporation v. Fairfax County Board of Supervisors, 214 Va. 382, 200 S.E.2d 529 (Va. 1973).

49. Gabuardi, *supra* note 41, at nn.91-92 and accompanying text.

50. This was the practice under ULIS. See Strohbach, *supra* note 45, at n.8.

or substituted if it is manifestly unreasonable; in the third paragraph provision is made for determination by a third person and the fourth paragraph refers to the eventuality of inexistent relevant factors and their substitution.⁵¹ The Principles of European Contract Law contain four relevant articles: Article 6:104 to Article 6:107 following the same issues as the UNIDROIT Principles and opting for the same solutions.⁵²

If the principle of Article 55 is now widely accepted and endorsed by restatements of contract law then it may well be that it is no longer an unknown factor.

51. See the comparison of UNIDROIT Principles with CISG Article 55 with editorial remarks by Jumpita Ruangvichathorn, *available at* <http://www.cisg.law.pace.edu/cisg/principles/uni55.html>.

52. See comparison of Article 55 CISG with the Principles of European Contract Law with editorial remarks by Andrea Vincze, *available at* <http://www.cisg.law.pace.edu/cisg/text/peclcomp55.html>.