

Scafom International BV v. Lorraine Tubes S.A.S.: a case review of changing circumstances under the United Nations Convention on International Sale of Goods (CISG) of 1980

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Abstract

This paper analyses the Belgium Supreme Court decision of Scafom International BV v. Lorraine Tubes S.A.S. The case involved a contract of sale of volatile goods ie steel tubes whereby a fixed-price contract caused it to be unenforceable because of the 70% market price increase just before the goods were delivered to the buyer. While the seller requested for renegotiation, for a higher contract price, the buyer refused to come to terms with the former. The court, by virtue of the United Nations sales law, held that renegotiation was the appropriate remedy in such a situation. In addition, the paper tests the different possible outcomes of this decision under the English Sale of Goods Act 1979, as well as the US Uniform Commercial Code. The finding of this test proves that these two sales laws would have tackled the issue of volatile market differently from that of the United Nations’.

Keywords: CISG, fluctuation, renegotiation, fixed-price

JEL Classification: K12, K 22, K33

1. Introduction: United Nations Convention on International Sale of Goods 1980 (CISG) as international law of sales

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 1980.² Its final text was approved at a diplomatic conference convened by the United Nations General Assembly in Vienna in 1980.³ The 62 nations comprised of 22 from the ‘Western developed’ countries, 11 ‘socialist regimes’ and 29 third world countries.⁴ The US delegates participated actively in the discussions of the CISG, voting in favour of the final text of the CISG.⁵ 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

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² Paul Amato, *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 ‘Journal of Law and Commerce’ (1993) 1-29, 2.

³ Alejandro M Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Convention for the International Sale of Goods* 23 ‘International Lawyer’ (1989) 443-48, 444.

⁴ *Ibidem*.

⁵ *Ibidem* 445.

Senate to the ratification of the CISG.⁶ Consequently, the unanimous ratification of the Senate took place in October 1986.⁷ 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.⁸

Through case review, this paper proposes for the validation of open price based on the needs of a relational contract. Relational contract theory views contracts as relationships, and not as discrete transactions.⁹ In a relational contract, the relationship between parties is based on trust, and it involves a high degree of cooperation on a long-term basis. The ongoing interaction between the parties grows and varies as events occur over time.¹⁰ To cope with the trend of the market, any sales law that based its principles on classic approach faces challenges in minimizing presentation and maximising flexibility when addressing open price in relational sales.¹¹

The idea of open price finds support from various scholars, one of which is Professor Ian Macneil. In his writings, Macneil explained the four potential responses of a contract law when applied to relational sales;¹² firstly, the contract law may not apply to the particular contract in question;¹³ secondly, the relational contract may be decided in accordance with concepts of presentation present in the contract law;¹⁴ thirdly, the law may be modified in such a way that total presentation is a theoretical and not an ultimate goal;¹⁵ or, finally, the overall structure of the contract law may be developed for a greater general application by merging both relational and presentation elements.¹⁶

To test which of the three sales laws is the best at catering to uncertainty in the price of the goods, this paper analyses the case of *Scafom International BV v Lorraine Tubes S.A.S.*¹⁷ and demonstrates the consequence of limiting flexibility in price at the time of formation of the contract. The analysis proves that a relational sale such as in *Scafom International* could have used an open price with a price index and/or a price renegotiation clause from the beginning of the contract to cater to the price fluctuations that had occurred before the delivery of the goods. Failure to do so indirectly invited judicial intervention that did not necessarily suit the relational nature of the contract.

⁶ *Ibidem.*

⁷ *Ibidem.*

⁸ *Ibidem* 446.

⁹ Ian R Macneil, *The Many Futures of Contracts* (1974) 47 'Southern California Law Review' 691.

¹⁰ Ian R Macneil, *Restatement (Second) of Contracts and Presentation* (1974) 'Virginia Law Review', vol. 60, no. 4, 595.

¹¹ *Ibidem* 596.

¹² *Ibidem* 597.

¹³ *Ibidem.*

¹⁴ *Ibidem.*

¹⁵ *Ibidem*

¹⁶ *Ibidem*

¹⁷ Belgium 19 June 2009 Court of Cassation [Supreme Court]. The document is available online at <http://cisgw3.law.pace.edu/cases/090619b1.html>, accessed 20 June 2012

The three main points discussed in this paper are: 1) the price flexibility offered by the CISG as a post-hardship remedy, rather than an available choice for the parties; 2) how the merged presentation and flexibility feature under the UCC would have resolved the issue in *Scafom International*; and 3) how *Scafom International* would have found no solution under the SGA, considering that the limited flexibility provided under Section 8 of the SGA neither enforces, nor frustrates the contract.

The section below begins by providing the facts and decisions of the presiding courts on *Scafom International*, before moving to the three main issues.

2. Scafom International BV

Scafom International BV is a case held under the CISG. The agreement was for the sale of warm-rolled steel tubes between the seller Exma, a French-based company and the buyer, *Scafom International BV*, a Dutch company, in order for the latter to use them to produce scaffolding. The fixed terms in the contract were for the price, date and place of delivery of the steel (in Belgium), but there was no price adjustment clause in the event of supervening circumstances.

After the conclusion of the contract but prior to delivery, the price of steel unexpectedly rose by about 70%. The seller then gave notice to the buyer to recalculate the agreed price due to the unforeseeable increase. The buyer did not accept the suggestion and sued the seller instead.

Below are the specifics of the decisions from each deciding court on the case.

3. The court decisions

3.1 Tongeren Commercial Court

The report of the decision was brief; it appears that the court ordered the seller to deliver the products to the buyer, and the buyer to pay half of the requested price increase. The court regarded the price fluctuations as foreseeable and believed that a price adjustment clause should have been included in the contract. As part of the business risk assumed by the seller, the court held that the circumstances did not make the contract impossible under Article 79, although they made the performance of it more onerous.

3.2. Appeal Court

The Antwerp Court of Appeal similarly held that the contract was enforceable, but on a different basis. It held that the issue was not covered by the CISG, and that the question should therefore be governed by the national law applicable to the contract. The court referred to Article 4 of the Rome Convention on the Law Applicable to Contractual Obligations, and then applied French law in the judgment. Article 1135 of the French Civil Code gave the parties in such

circumstances the right to renegotiate the contract. The fact that the buyer refused to renegotiate the price constituted a breach of contract and therefore the appeal court entitled compensation to the seller. This caused the buyer to proceed for appeal in the Supreme Court.

3.3. The Supreme Court

The Supreme Court held that the hardship caused by the price increase amounted to an impediment to the performance of the contract under Article 79 of the CISG. Article 79(1) states that a party is not liable for a failure to perform any of his obligations if the impediment was beyond his control, and if he could not reasonably be expected to have taken into account, avoided or overcome the impediment or its consequences at the time of the conclusion of the contract. A pure reliance on Article 79 meant that the contract was avoided. Hence Article 79(1) had a similar effect to a *force majeure*, and led to the avoidance of the contract.

While Article 79(1) resolves *force majeure* conditions by validating non-performance of a contract, there has not been any provision under the CISG that resolves situations of supervening change, such as market fluctuation, which render the performance more onerous or cause hardship to one of the parties. Realising that the price increase did not amount to a *force majeure*, the Supreme Court enforced the agreement by referring to Article 7(1) and (2) of the CISG. According to Article 7(1) and (2), reference can be made to the general principles governing the law of international trade, such as the UNIDROIT Principles for International Commercial Contracts. Under the UNIDROIT Principles, the party invoking changed circumstances that have caused imbalance in the contract is entitled to seek the renegotiation of the contract.¹⁸

Clearly the Supreme Court upheld the decision of the Court of Appeal, holding that renegotiation was the solution to the case, although both courts cited different legal principles to arrive at a similar conclusion. Both courts were unanimous in that the seller was accurate in claiming for renegotiation due to the hardship caused by the unforeseeable increase in the price of steel. Having no price adjustment clause in the contract to adapt to the fluctuation, the buyer was bound to agree to a new price. Renegotiation prevents an exceptionally detrimental situation for the seller, provided that such renegotiation is executed in good faith.¹⁹

Hansebout commented that *Scafom International* was a landmark decision for two reasons;²⁰ primarily, the Supreme Court categorised market fluctuation as impediment under Article 79, and secondly, for the first time in history, the Supreme Court referred to the UNIDROIT Principles in order to resolve a dispute.

¹⁸ Article 6.2.2(1) of the UNIDROIT Principles.

¹⁹ Article 7.1 of the UNIDROIT Principles.

²⁰ Alexander Hansebout, 'Landmark Supreme Court decision on hardship under CISG' (29 March 2010), the document is available online at <<http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=6a74fcf3-9728-4469-b63a-5e51ded3f666>> accessed 20 June 2012.

A question arises as to whether market fluctuations do impede the contract (and lead to its avoidance), or, are common affairs of business²¹ that is foreseeable (thus will not be impeding the contract, making the contract enforceable).

4. Renegotiation as a post-fluctuation remedy under the CISG

Traditional fixed-price method does ensure the optimal performance of a contract.²² This is particularly true when parties know all the risks or are risk neutral when entering a contract.²³ Hence, under the circumstances of known or neutral risks, a rational person would not enter into a transaction, in conscious ignorance of the magnitude of risks that might affect his return, when there are ways to precisely determine the risks.²⁴ Nevertheless, a fixed-term contract is less ideal when the risks are not easily determined.²⁵ Economic exchanges are relational and involved risks of market fluctuations,²⁶ making fixed-price deals difficult to be executed during price fluctuations.²⁷ As a result, presentiating price is less crucial or desirable when there is a risk in the uncertainty in price, unless and until future circumstances take place.²⁸

The aim of 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.' In relation to this paper, as opposed to fixed price, open price based on price index or voluntary renegotiation, or both combined, allow equality and mutual benefit between foreign traders, in accordance with the Preamble of the CISG. Open price lessens the risk of non-enforceability of a contract when prices of the goods are uncertain, plans the business relationships of parties that lead to expansion of business using flexible terms and most importantly and minimizes the room for opportunistic behaviour of leaving the contract in fluctuating markets.²⁹

In the case of *Scafom International*, the courts unanimously remedied the situation using a similar shift; the fixed-price term was remedied by a price renegotiation method to enforce the contract. If the parties truly intended to be bound only by a fixed price, the contract should have remained valid despite market fluctuations; no price renegotiation would have been necessary to remedy rigidity caused by the fixed price. However, this was not the case for the parties in *Scafom International*. Although it was not clear why the parties did not include a price adjustment clause, they did intend to be bound by the contract. Both parties' conducts proved that they intended to proceed with the contract despite market

²¹ *Intertraded SA v Lesieur Tourteaux SARL* [1978] 2 Lloyds Rep 509 (Lord Denning).

²² Mark P. Gergen, 'The Use of Open Terms in Contract' (1992) 92 Columbia Law Review 997, 1007

²³ *Ibidem*.

²⁴ *Ibidem*.

²⁵ *Ibidem*.

²⁶ Macneil (n 9) 596

²⁷ *Ibidem*.

²⁸ *Ibidem*.

²⁹ *Ibidem*.

fluctuation; the seller requested for price renegotiation, while the buyer insisted on the original price to apply, despite the fluctuation. Applying both French Civil Code and the UNIDROIT Principles in Court of Appeal and Supreme Court respectively, the courts ordered for price renegotiation to enforce the contract; however, it is questionable whether this reflected the parties' intentions.

Clearly, the courts permitted price flexibility only when the issue of hardship was brought before the courts. An alternative view to this method is if the CISG in itself allowed parties to incorporate a mechanism for price flexibility in the contract, so that recourse need not be had to these external principles each time the court decides to enforce a price term of the contract affected by fluctuation. This is feasible by flexibly interpreting Article 14(1) and thereby removes the dependency of the CISG upon supplemental law such as the UNIDROIT Principles and a State's civil code to provide flexibility to the contract due to changes in market prices³⁰.

Undeniably, the UNIDROIT Principles as a model law carries a great merit when correcting such major deficiency of impeding a contract by Article 79 of the CISG.³¹ However, Flechtner stressed that the CISG ought to be independent from a supplemental law such as the UNIDROIT Principles.³² This is based on Article 7(2) which states that a gap under the CISG is to be filled by looking within *its* provisions to determine its general principles, and not by looking *outside* the CISG to determine general international law principles. Reference to the UNIDROIT Principles to renegotiate the contract price indicated that Article 7(2) has been compromised. If tribunals or courts continue to find a gap in a contract that the CISG could not fill, the CISG would be less than an ideal sales law to achieve its goal of creating a uniform international sales law. No doubt that the CISG was drafted to be simple and clear in character but there will always be an endless competition between the civil law and common law systems in proving which of the two incorporates a more familiar traditional approach into the decisions construing the CISG.

³⁰ Harry M Flechtner, *The Exemption Provisions of the Sales Convention, Including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court*, Legal Studies Research Paper Series, Working Paper No 2011-09, March 2011, University of Pittsburgh School of Law, Pennsylvania, the document is available online at <<http://ssrn.com/abstract=1785545>> accessed 29 June 2012.

³¹ Article 7(1) CISG: 'In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application....'. Article 7(2): Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles, in conformity with the law applicable by virtue of the rules of private international law.

³² Flechtner (n 30).

5. Flexibility within Section 2-305(1) of the UCC: an option for the parties at the time of entering into the contract

There would be two possible resolutions to situation in *Scafom International* under the UCC. Since the UCC recognizes presentation under Section 2-305(4), the first possibility is that the court would determine if the fixed-price term is the reason for parties to agree to the contract. If a UCC court finds that the parties did wish to set a fixed price, then the change in circumstances would not normally affect the enforceability of the contract. In other words, the price remains fixed, and the risk of fluctuation is borne the relevant party.

Nevertheless, the second possibility under the UCC is more interesting. Considering the volatile price of the steel, the parties themselves could have entered into a complete contract from the very beginning, yet left the price term open under Section 2-305(1). Deliberately setting an open price in *Scafom International* would have saved time and cost, as parties could have avoided price haggling process. A fair price could have been negotiated at a later stage, and the price decided would have to have been fair for both buyer and seller. Both buyer and seller in *Scafom International* could validly enter into the contract, yet need not incur court expenses³³ to enforce the open price. Open price allows the dealing of goods that are susceptible to market fluctuation to be flexible, regardless of the contract duration.³⁴

Even if the parties or parties' agreed pricing method failed to set the price, Section 2-305(1) would allow the court to apply a reasonable price. Section 2-305(1) states that reasonable price at the time of delivery applies in three possible situations: silence of parties as to price,³⁵ agreement to agree³⁶ and cases where price was not set by an appointed third party.³⁷ Clearly, setting a reasonable price secures the validity of a contract that falls in any of these three situations. Applying reasonable price is in line with the aim of the UCC principal drafter, Llewellyn, who stressed that, unless the price at the time of delivery is discriminatory or commercially unreasonable, an objective reference as to price (such as that indicated by the current market) is all that is required for a valid open price under the UCC.³⁸

Does this indicate that the UCC enforces every open price agreements regardless of circumstances? With reference to Section 2-615 of the UCC, a contract is unenforceable in impracticable situation. Nevertheless, impracticability does not include cost increase or a change in market condition.³⁹ Rather, frustrating

³³ Gergen (n 21).

³⁴ *Ibidem*.

³⁵ Section 2-305(1)(a) of UCC.

³⁶ Section 2-305(1)(b) of UCC.

³⁷ Section 2-305(1)(c) of UCC.

³⁸ Karl N Llewellyn, *Cases and Materials on Sales* (Chicago, Callaghan & Co 1930) 1, 699.

³⁹ J. M. Perillo, *Hardship and its Impact on Contractual Obligations: A Comparative Analysis* (April 1996), 1-14, 9. The document is available online at <<http://www.cisg.law.pace.edu/cisg/biblio/perillo4.html>> accessed 8 October 2011.

circumstances such as war, embargo, crop failures, or the failure of a major source of supply that contributes to the market change or prevents a seller from obtaining supplies necessary to the performance of the contract are justifications for impracticability.⁴⁰ Clearly, a non-performing party has fewer tendencies to be opportunistic within the limited circumstances of ‘impracticability,’ which excludes market price changes.

6. Flexibility versus frustration within the SGA: which of the two prevails under Section 8?

This section tests the hypothetical impact of Section 8 of the SGA on *Scafom International*. The wording of Section 8(1) is: ‘[t]he price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealings between the parties’. Since the parties in *Scafom International* had primarily fixed the terms of the contract including the price of the steel tubes, the contract was valid in accordance with Section 8(1).

However, Section 8 does not state whether a fixed-price contract remains enforceable in spite of changing circumstances. While there is no direct answer to the issue, Section 8(2) limits the application of ‘reasonable price’ to situations where parties are silent as to price,⁴¹ or where parties have missed or forgotten to set it. Reasonable price does not apply when a fixed-price contract is affected by the market, as in the present case.

Does the limited scope of application of reasonable price under Section 8(2) indicate that the English law perceives a contract such as one in *Scafom International* as frustrated or impracticable? Under the English law, there can be a relief from the total impossibility of performance or the total frustration of the purpose of the contract.⁴² However, similar to Section 2-615 of the UCC, the English law does not categorise market fluctuation as a situation of impossibility of performance. While performance was impossible in *Taylor v Caldwell*⁴³ due to a burnt down of a hired music hall prior to the hiring dates, a 1646 case of *Paradine v Jane*⁴⁴ demonstrated that an obligation to pay money differs from impossibility of performance. The fact that the defendant was expelled from his possession by the German prince and army did not release him from the obligation to pay his rent, for the rent was a duty created by the parties, and that ‘the law would not protect him beyond his own agreement...’.⁴⁵

⁴⁰ Section 2-615 of UCC: Note 4 of the Section.

⁴¹ *Traditional Structures Ltd v HW Construction Ltd* [2010] EWHC 1530 (TCC); [2010] Construction Industry Law Letter (CILL) 2899.

⁴² *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD (No 1)* [2001] EWCA Civ 406.

⁴³ (1863) 122 ER 309.

⁴⁴ (1646) Alyn 26, 82 ER 897 (KB).

⁴⁵ *Ibidem*. 898.

The English law would not view the 70% price increase in the steel market as frustration to the contract in *Scafom International*, for a frustration requires ‘a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.’⁴⁶ An increase in the price of labour and materials would not normally impede the performance of the contract.⁴⁷ For example, the failure of a supplier to supply the contractual material would not normally frustrate a contract,⁴⁸ even if it was caused by electrical fault and interruptions in the supply by rail of raw materials to the sellers, as these occurrences were considered common in the world of business.⁴⁹ If a seller makes an unqualified promise to sell, he bears the risk of his contemplated source of supply where that source is not a specific source, or the goods are not specific goods.⁵⁰ He is not excused by frustration, unless it is physically impossible for him to deliver the goods.⁵¹

Avoidance in performing the contract could, arguably, amount to opportunistic behaviour. Applying this principle to the present case, the seller accepted the risk of 70% increment in price. If the seller did not wish to take on that risk, it should have negotiated for the insertion of a price adjustment clause in the contract to cater to the market price. This, of course, is only possible if the legal system allows the parties to insert such clauses in the contract.

6.1 Limited efforts of expanding reasonable price under Section 8(2) of the SGA in securing relational sales

As have been discussed in the earlier section, the SGA would not invalidate the fixed-price term in *Scafom International*. In fact, current trend within the English courts’ decisions show that Section 8(2) has been expanded to cover cases of price fluctuations. The approach is similar to CISG, where an English court would modify the contract, but only if the term is left open. A fixed price term that burdens a party in the performance of the contract is unlikely to be enforceable under the CISG and the SGA. This differs from Section 2-305 of the UCC, where deliberate open price is an alternative method of contracting available for the parties beginning from the time when parties enter into the contract.

In modifying contracts affected by the rigidity of presentation, the English courts have resorted to the traditional maxim of *certum est quod certum reddi potest* to flexibly interpret reasonable price under Section 8(2) and have thereby departed from the classic approach of *May & Butcher*. The maxim assisted the court to validate a contract using reasonable price for the handling fee, in the purchases of crude oil in *Mamidoil*.⁵² In addition to the maxim, Rix LJ reasoned

⁴⁶ *Davis Contractors v Fareham Urban District Council* [1956] App LR 04/19 (Lord Radcliffe).

⁴⁷ *Ibidem*.

⁴⁸ *CTI Group Inc v Transclear SA* [2007] 2 CLC 530 (Comm) (531) (Field J).

⁴⁹ *Intertraded SA v Lesieur Tourteaux SARL* [1978] 2 Lloyds Rep 509 (Lord Denning).

⁵⁰ *Luxor (Eastbourne), Ltd v Cooper* (1941) AC 108, 137.

⁵¹ *Ibidem*.

⁵² [2001] 2 Lloyd’s Rep 76.

that the departure from presentation is possible in three circumstances.⁵³ There are firstly, commercial dealings where parties are familiar with the trade in question, secondly 'agreement to agree' that has come into existence, and thirdly, a contract of future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract. In these situations, the English courts would assist the parties to preserve rather than destroy the contract on the basis that what can be made certain is itself certain (*certum est quod certum reddi potest*).

The first situation mentioned by Rix LJ on commercial dealings where parties are familiar with the trade, relates to Llewellyn's concept of objectivity, where an open price is determinable based on the market price/any objective standard⁵⁴ referable at the time of delivery. In the second situation of an 'agreement to agree', there is an example from a court decision of *Acertec Construction Products Ltd* (formerly BRC Limited) *v* *Thamesteel Limited*⁵⁵ where the English court did validate an 'agreement to agree' by applying reasonable price when the agreement provided no mechanism to ascertain price in default of agreement. Richard Sibbery QC held that the post-termination mechanisms were utilisable to enforce the clearly-expressed intention of the parties so that the obligations were binding upon the parties. The third situation refers to long-term contract, where matters are adjusted at a later stage of the contract on the basis of *certum est quod certum reddi potest*. Again, the courts should be willing to make certain what is already certain. This correlates well with Berman's idea that matters are best adjustable based on the gap between the time of contract formation and the time of delivery of the goods, as price fluctuation may take place at any point of time in the gap.⁵⁶ This demonstrates the openness of the English court in accepting contract as a planning mechanism rather than a document of specified terms, although the SGA as a sales law has not been as expressive on the issue. In addition, the courts have been more receptive towards the element of trust between the parties in setting the price based on the parties' familiarity with each other through good repute and repeated interaction in the duration of the contract.⁵⁷

Bearing in mind however, that *Scafom International* is distinguishable from *Mamidoil* and *Acertec* as it was a contract where the parties fixed the price upfront, without any reference to a price adjustment clause. An English court does not enforce a contract where parties have fixed the price, but affected by changing circumstance. Flexible interpretation of Section 8(2), (as seen in *Mamidoil*) is feasible only if the parties leave the price open whereby the court is willing to

⁵³ *Mamidoil* (n 41) [69].

⁵⁴ Llewellyn (n 37).

⁵⁵ [2008] EWHC 2966.

⁵⁶ Harold J Berman, 'Excuse for Nonperformance in the Light of Contract Practices in International Trade' (Dec, 1963) *Columbia Law Review*, vol. 63, no 8, 1413-1439, 1437.

⁵⁷ Good repute and repeated interactions are elements of a contract that self-enforces, (See Scott, Chapter One, 'A Theory of Self-Enforcing' (n 158) 1).

maintain the equilibrium of the contract by applying a fair and reasonable price for both buyer and seller.⁵⁸

Within the English law, elements of co-operation, flexibility and trust are not new ideas,⁵⁹ although the current English law is regarded to have fallen out of step with commercial practice⁶⁰ and no longer reflects the reality of the market.⁶¹ Although Macneil's relational contract theory is not well-received in many decisions, recent trends exemplified in *Mamidoil* and *Acertec Construction* prove that English judges have been prepared to depart from the rigidity of requiring a definite or fixed price on the ground of the relational nature of a trade. In trades that typically involve a considerable gap between the time when the contract is formed and the time when actual delivery of the goods takes place, market fluctuations are common affairs, and the courts now recognise that parties should have the option of providing for their own price renegotiations. This applies not only to *Scafom International*, but also to *Rafsanjan* case,⁶² where the parties could have opted for open price in order to allow for unforeseen circumstances and to save litigation costs. Open price allows long-term contracts to function as planning documents, instead of documents that specify terms,⁶³ which often leads to hardship in performance during price fluctuations.

7. Conclusion

While open price is an ideal alternative method in countering uncertainty in price, a fixed-term contract is general preferable when both parties know the probability of all possible outcomes. In fact, if a buyer wants to be assured of a supply and that the seller is risk neutral, a fixed price works in such relationship. Otherwise, the fixing of terms, particularly the price term, can make the overall sale unworkable. In *Westinghouse*, the fixed-price term caused the risk of the changing price unevenly distributed between a buyer and a seller. This is particularly true when the seller is at higher risk to honour the contract.⁶⁴

⁵⁸ This remedy is not available under the UNIDROIT Principles, for a failed renegotiation means the court is to terminate the agreement or even imposed a term into the contract which the parties had never agreed to in the first place (Article 6.2.3).

⁵⁹ *Baird Textile v Marks and Spencer Plc* (2003) (HL) [51] (Baroness Mulandrew) in *Feminist Judgments From Theory to Practice* (Rosemary Hunter, Clare McGlynn, Erika Rackley (eds), Hart Publishing 2010)

⁶⁰ *Ibidem* [37].

⁶¹ *Ibidem* [50].

⁶² *Rafsanjan Pistachio Producers Cooperative v Kaufmanns Ltd* (Independent, January 12, 1998; (Queen's Bench Division (Commercial Cases), where the contract contemplates that delivery should be in instalments and the price clause says: 'to be agreed before each delivery.'

⁶³ Ian R Macneil and Paul J Gudel, *Contracts: Exchange transactions and relations: cases and materials*, (3rdedn, New York, Foundation Press 2001) 2.

⁶⁴ A M Polinsky, *Fixed Price versus Spot Contracts: A Study in Risk Allocation* (1987) 3 'Journal of Law, Economics, and Organization' 27, 40 has proven the effectiveness of an open price in situation of uncertain risk on the part of the seller (and a neutral risk on the part of the buyer) to allow estimation of the cost in order to supply the goods to the buyer. If both buyer and seller are equally at risk, an open price with a floor or minimum price is agreed. If it is only the buyer who

Clearly a similar effect of *Westinghouse* is seen in *Scafom International*, which illustrates the unworkability of a relational sale when a price is fixed and the parties cannot be confident that the courts will uphold an agreement with an open price. In fact, parties greatly depend on the courts to provide flexibility to counter the hardship caused by the fixed-price contract during market fluctuation. In *Scafom International*, the parties might have wished to have left the price open, as steel products have reference as to market price at the time of delivery. Alternatively, the parties might have included flexibility by agreeing on a voluntary renegotiation clause in case the market price fluctuates. While renegotiation seems ideal in keeping the contract in line with the current market conditions, the highlight of the UCC is that it validates deliberate open price as a choice for the parties at the time of entering a contract, as opposed to remedying the situation using price renegotiation after hardship / fluctuations occur. However, under the CISG, it was not clear that either route was possible.

Cases involving situation such as that of *Scafom International* are common, and raise a crucial question of how a sales law resolves the unenforceability of a fixed-price in market fluctuations. While the CISG courts have successfully effected renegotiation in this case, recourse needed to be had to external principles ie the UNIDROIT Principles, instead of relying on the CISG itself. There is no option for deliberate open price. Even if the parties did opt for open price, Article 55 is often bound by the interpretation of Article 14(1), which means that the CISG court would not necessarily enforce the contract when circumstances changed. In fact, Article 55 applies 'price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned' which does not address the impact of the 70% price increase that has affected the seller in order to deliver the goods.

The English law would have not perceived the situation of *Scafom International* as to have been frustrated, yet at the same time it would not modify the contract for the parties as the price was agreed and fixed. In *Mamidoil*, the contract was enforceable because the parties left the price open. The court applied reasonable price (or rather the reasonable fee on the open handling fee) using the old legal maxim *certum est quod certum redid potest* (that is certain which can be made certain) open term.⁶⁵ Nevertheless, open price has been an acceptable concept, although not expressly acceptable statutorily. More than eight decades ago, Scrutton LJ took a similar approach to secure the agreement to agree on a petrol price in *Foley v Classique Coaches*,⁶⁶ using the principle in *The Moorcock*.⁶⁷

As a commercial code, the UCC stood out in its efficiency with relational contracts; not only by securing the validity of relational sale during price

is at risk, and the seller could precisely determine his costs, then a fixed price term would have worked for the business relationships, regardless of duration of the contract.

⁶⁵ Rix LJ directly applied the maxim to hold that there was a valid contract in *Mamidoil-Jetoil Greek Petroleum Co SA v Oka Crude Oil Refinery AD (No.1)* [2001] EWCA Civ 406 by stating that Lord Dunedin has invoked this maxim in *May and Butcher v The King* (1934) 2 KB 17, 21.

⁶⁶ *Foley v Classique Coaches Ltd* (1934) 2 KB 1, 10.

⁶⁷ (1889) LR 14 PD 64.

fluctuations but by also providing the parties to flexibly price the goods, in lieu of the traditional fixed-price method, from the time parties enter into the contract. The UCC is not a flawless sales law but its trait of enabling a balance between flexibility and certainty of a contract is commendable. Clearly a similar concept is implementable by the SGA and the CISG, given the fact that these sales laws implement flexibility only to remedy hardships, rather than provide extensive flexibility as a method of contracting method for contracting parties.

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