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### INTERPLAY BETWEEN ARTICLE 14 AND ARTICLE 55 OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

### ИНТЕРАКЦИЈА ИЗМЕЂУ ЧЛАНА 14 И ЧЛАНА 15 КОНВЕНЦИЈЕ УЈЕДИЊЕНИХ НАЦИЈА О УГОВОРИМА О МЕЂУНАРОДНОЈ ПРОДАЈИ РОБЕ (CISG)

**Summary:** *The paper focuses on the possibility of concluding contracts for the international sale of goods under the CISG when the price is not determined. The paper analyzes a contradiction between Article 14 of CISG which clearly sets the rule that offer must determine prices, which further implies the impossibility of acceptance of the offer when this element is not defined. From the other side, the Convention under Article 55 still contains dispositive rule of determining prices with the contracts that are validly concluded with no further provisions on this. These two opposing articles create a dilemma in terms of their common sense when interpreted in light of the fact that the CISG is uniform, meaningful and non-contradictory convention.*

**Keywords:** *CISG, price, conclusion of contract, the intent of the parties.*

**JEL Classification:** *K2*

**Резиме:** *Рад се бави могућностима склапања уговора о међународној продаји робе у складу са Конвенцијом о међународној продаји робе (CISG) у случају када цијена није утврђена. У раду се анализира контрадикција између члана 14 CISG-а у којем је јасно наведено да се цијена мора одредити у понуди, што даље подразумева да није могуће прихватити понуду у којој тај елемент није дефинисан. С друге стране, члан 55 исте конвенције садржи диспозитивно правило утврђивања цијена када се уговори валидно склапају и не садржи даљње одредбе о истом. Ова два супротстављена члана стварају дилему у погледу њиховог садржаја када се интерпретирају у свјетлу чињенице да је CISG јединствена, значајна и интегрална конвенција.*

**Кључне ријечи:** *CISG, цијена, склапање уговора, намјера уговорних страна.*

**ЈЕЛ класификација:** *K2*

## 1. INTRODUCTION

Controversy is caused by the fact that, from one side, Article 55 of CISG only applies if the contract has been validly concluded without determining the price. On the another hand, Article 14 of CISG sets out that a proposal must expressly or implicitly fix or make provision for determining the price, in order to be considered as an offer. By employing a contrario interpretation, it can be inferred that if price is not determined or determinable in a proposal, there is no offer and without an offer there is no contract. The Secretariat, inter alia, is in favour of this position (Secretariat Commentary 2014). At first sight, the articles seem to be inconsistent with each other and lead to inference that Article 55 of CISG would be applicable only in those cases where a State did not ratify Part II of CISG. However, there are also opposite opinions. It seems helpful for understanding of controversy that arises, to make reference to the legislative history of both articles.

## 2. BACKGROUND OF THE DISCREPANCY BETWEEN ART. 14 AND ART. 55 OF CISG

The wording of Articles 14 and 55 of CISG is the result of the long bargaining process during the international unification of the law of sales contracts. One group of states, such as USSR, Ghana and France (Schlesinger and Bonassies 1986) conditioned adoption of the Convention by stipulating that the price had to be determined or determinable. For example, the French delegate insisted that offer must contain price because the determination of price was necessary to protect the weaker party to a contract of sale. (Lamund 2006) This reasoning especially regarded contracts of sale of raw materials or industrialized goods from developed countries because there is no market price for most of those goods and seller must impose an unfavorable price. USSR supported that position because a planned economic system implied determination of price in the contracts of sale.

On the other side, countries which admitted open price contracts in domestic regulations, such as USA and UK, stand on position that it should be also acceptable at international sales of goods. (Garro 1989) It was suggested that even though one offer does not set price, but had the intention to be bound, the contract can be formed with the price that was generally charged by the seller at the time of the conclusion of the contract or in absence of such price, the price generally charged for such goods under comparable circumstances. (United Nations 1977) Demands of the first group of countries were met by Article 14 of the Draft on the CISG although open price contract was admitted under article 51 of CISG, under condition that it is validly formed. Since the contradiction between both articles was obvious, deletion of second sentence of Article 14 was proposed. But on the other side, delegates from Ghana suggested the deletion of Article 51 of the Draft. (Vienna Diplomatic Conference 1980, 27) Many other delegates thought that Article 51 should be kept because it is necessary in some cases, for example- the sale of spare parts at a non- fixed price to be used for machines purchased earlier (Vienna Diplomatic Conference 1980, 21), when state did not ratify Part II or parties excluded its application (Vienna Diplomatic Conference 1980, 34).

Finally, a compromise solution was eventually found, not by amending Art 14 but by adding a new provision in Art. 55. Additionally, Article 55 was amended by introducing “price generally charged at the time of the conclusion of the contract” instead of “price charged by the seller”. It seems that Art. 55 says the opposite of what is stated in Art. 14(1), for it implies that the contract may be validly concluded even if it does not expressly or implicitly determine the price. (Garro 1989, 443-483) Relation of articles stays controversial because each one can result in different outcome.

Bearing in mind the fact that the contracting states have different economic, political and legal tradition, we have to understand that achieving legal solution requested compromises in order to integrate different concepts and ideas into an autonomous and workable system of regulating international sales. Therefore, in this paper Garro’s interpretative maxim will be uphold, “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 of them” and “it is conceivable and even plausible to reconcile their (Art. 14 and Art. 55) meaning” .(Garro 1989).

## 3. INTERPRETATION OF THE CISG

The CISG is an international convention intended to subject parties from different countries to its set of rules and principles. All countries have to conform to these rules and principles since the CISG will become part of their own legal system. Art. 7 of CISG presents legal instrument for achieving that goal by providing a rule on the interpretation of the CISG. However, disputes will arise regarding its meaning and application. In that occasion, all parties including domestic court and arbitral tribunals are bound to observe its international character and to promote uniformity in its implementation and the observance of the good faith in international trade. (UNCITRAL 1985, 36)

In the first place, an interpreter must observe CISG international character. This means that it has to be interpreted autonomously, implying that terminology and phrases in the CISG should not simply be held as having the same meaning as identical terminology and phrases that may have in the domestic legal systems. They should be considered in the “CISG- meaning”, in the light of the

structure, policy of the Convention<sup>1</sup> and negotiation history (Hubert and Mullis 2006). Analysing negotiation history in previous paragraph, it can be inferred that the CISG is not simply the common denominator of the best practice in the national legal systems, but the result of a political negotiation process, focused on establishing suitable and wide acceptable instrument for international sales.

Secondly, Art. 7 (1) sets out that CISG must be interpreted uniformly. Achieving uniformity on an international scale is, firstly, that the relevant set of laws is interpreted similarly in the different legal systems. Secondly, that the uniform law has an innate ability to develop in a uniform fashion according to the needs of the parties whose relationships it governs or in response to future changes of world trade dynamics. (Felemegas 2001) This is very hard to accomplish because there is no supranational forum empowered to decide with binding effect on the accurate interpretation of the CISG. However, the national courts have to consider foreign case law and academic writing as persuasive authority in the process of interpretation of the CISG.

The third element of Art. 7(1) is the observance of good faith in international trade. The meaning of this standard is vague. Good faith could be described negatively as an absence of intention to harm or positively as a conduct of action according to reasonable set by customary practices and by known individual expectation. (Powers 1999)

Bearing in mind principle of autonomous interpretation, it is clear that the meaning of the standards cannot be transferred from any national legal system. This point can be illustrated by the following example. Under German law, when a party to a sales contract becomes the recipient of a written communication, claiming to constitute a simple confirmation of the prior oral agreement between the parties to the contract, but in fact containing additional or different terms, the recipient is under a duty to immediately object to these terms if he does not want to be bound by them. (Felemegas 2001) In other legal systems such a rule is, however, either entirely unknown, or limited to the case in which the additional or different terms do not materially alter the content of the earlier agreement. Therefore, it is not very likely that such a rule could be applied to a contract of sale governed by the CISG (Felemegas 2001).

It can be acceptable that meaning of good faith in international trade should be considered in the light of usage and trade practices, academic writing regarding fair and reasonable behavior and from case law. Good faith is envisaged to be used as a principle for interpretation of the CISG's provisions. For example, ICC Court of Arbitration stated that "since the provisions of the Art. 7(1) CISG concern only the interpretation of the Convention, no collateral obligation may be derived from the promotion of good faith" (ICC Arbitration Case 1997). It is prevailing opinion that the practical impact of the good faith standard is limited because it is not a tool to override the rules of CISG but rather it only can influence the concrete result of the interpretation of a provision where the other methods of interpretation offer unfair solution. (Hubert and Mullis 2007, 7)

However it is not acceptable to interpret the CISG in good faith without also indirectly affecting the conduct of parties. This position was upheld in a case heard before the German Provincial Court of Appeal. (Oberlandesgericht Munchen 1994) This case comprised an Italian buyer and a German seller. The parties had concluded an agreement for the sale of eleven cars. The contract of sale set out that the buyer was to supply a bank guarantee in favor of the seller, which he did. The time of delivery was defined after the contract was concluded. Five cars were prepared for delivery in August and the other six in October. However, in October, the buyer informed the seller that acceptance of the delivery of cars was impossible due to extreme exchange rate fluctuations between the Lira and the Deutschmark. The buyer requested the seller to postpone delivery from the supplier. Rather, the seller cancelled its orders with the supplier and demanded and received payment of the bank guarantee. The court ordered the seller to repay the guarantee money as they had been obtained without legal grounds - the bank guarantee was to cover an obligation to pay and was not to act as a penalty for not taking delivery by the buyer. However, the buyer's claim for damages was dismissed. The court determined that there had not been a fundamental breach, as the cars were ready for delivery in October; therefore there was no right to avoid for non-delivery. In any event, the buyer failed to declare the contract avoided at the time. (Keily 1999, 24) Therefore, violation of the principle of good faith in article 7(1)

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<sup>1</sup> For example, the CISG never requires a party to act promptly. Therefore where a party is required to act within a reasonable time, a "reasonable time" should not mean "promptly," because the policy of the Convention does not require prompt action.

of the CISG would occur by allowing the buyer to declare the contract void at the time of the trial, two and a half years after the event.

The CISG tries to provide a uniform set of law to international sale transactions. It does not establish an exhaustive set of law, and thus does not set out rules for solutions of all the problems that can arise from an international sale transaction. Therefore, Art. 7 (2) sets out rules for gap filling. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. (United Nations 1980) Without intent to explain all consequences of this article, it can be inferred that gaps in the law constitute a danger to the uniformity and autonomy of the CISG's interpretation.

Other articles of the CISG setting out interpretation's rules will be explained in the following part of the paper.

### *Meaning and purpose of the Article 14 of CISG*

Art. 14 is located in Part II of the Convention on the formation of the Contract. The CISG adopts the „offer-acceptance“ model of contracting, and does not include a „consideration“ requirement that is characteristic for American law (Folsom et al. 2012). Art. 14 set is aimed to give a definition of an offer by setting out that “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 offerer 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“ (CISG 1980).

To constitute an offer, a proposal must meet the Convention requirements;

- a) Addressed to a specific person
- b) Is sufficiently definite
- c) Indicates the offerer's intent to be bound

The requirement of definitiveness is the major issue for this topic, and it will be explained after two other requirements.

The offer must be addressed to specific person or to two or more persons acting together if the goods are to be sold or bought by them. Offer can be made simultaneously to a large number of specific persons. There is a risk for a proposal to fall under an invitation to make an offer. For example, a catalogue or advertisement of goods that is sent directly by the mail to large number of specific addressees would be considered as an offer, although same catalogue or advertisement provided to the public would not be considered as an offer. Paragraph (2) is addressing a “public offer”. Public offer is made by display of goods in a store window and vending machine or advertisement provided directly to the public at large scale. It sets out that a proposal directed to other than one or more specific persons is usually considered as an invitation to make offers unless it clearly indicates an intention to make an offer, for example, by stating “these goods will be sold to the first person who presents cash”(Secretariat Commentary 2014, 5).

A proposal should indicate offerer willingness to be bound in the case of acceptance. This intention is known in Latin as *animus contahendi*. It is usually expressed with certain commercial phrase such as, “we offer for sale” or “we order for immediate delivery”. When the meaning is vague, the intention of offerer will become clearer when the proposal is interpreted in its full context based on the Art. 8. When it is found that offerers intent to bind themselves in the case of acceptance then it is an offer, if not, then the proposal is merely an invitation to make offers.

An offer is not only the expression of the offerer's aim to conclude the contact, addressed to specific person, it is more matrix for a possible future contractual relationship, thus the proposal must determine goods, quantity and price to the extent that acceptance of the offer can lead to the successful formation of contract. These elements should not be determined in the rigid way, it is sufficient that the elements are at least determinable. The extent of the specification of these elements will depend upon the type of goods and circumstances that rule in certain case. For example, in the case before German Court of Appeal Frankfurt am Main, it is held that no contract was formed where the parties' correspondence and oral communications failed to agree on the quality of glass for test tubes. (Oberlandesgericht Frankfurt 1995)

The degree of specification of the price has triggered a considerable amount of controversy. While American and UK law admitted open price contracts, on the other side Soviet countries, developing countries and French advocate that price must be determined or determinable in the offer. Diplomatic Conference found compromised solution by adopting both Article 14 and Article 55, and transferred debate within academic community and subsequent court deliberations. This paper takes a position that the solution of this issue should be searched for in interpretation of Article 14 in conjunction with Article 55. The result of this method of interpretation will show that the practical importance is likely to be limited. In the following paragraphs, it will be tried to explain the ground for interpretation.

#### 4. UNDERSTANDING OF INTERPLAY BETWEEN ART. 14 AND ART. 55 OF CISG

The tension between Art. 14 and Art. 55 of CISG, to the large extent, is produced by application of methods of interpretation that are not completely adequate for these articles.

From one side, scholars (Farnsworth 1984) who based their argument on a contrario interpretation of article 14 inferred that if no price is determined or determinable in an offer, there is no offer, and without an offer there is no contract. By Professor Farnsworth opinion, Art. 55 of CISG was designed for use only where a Contracting State did not ratify Part II of the CISG (Farnsworth 1984).

On the other side, other authors, like professor Honnold, took position that “a contract may be validly concluded even though it does not expressly or impliedly fix or make provision for determining the price”(Honnaold 1982, 163). He asserts that in such case parties have impliedly made reference to generally charge price, resulting in exclusion of argument that fails to determine price which produces a fatal gap in the contract that contravenes the provisions of definiteness in Art. 14. (CSIG 1980, 163)

These opinions are shaped by interpretation of article 14 and 55 separately from each other. Convention’s interpretation rule has to be undertaken within the entire structure of the CISG. An interpretation rule that appears suitable within the confines of a single CISG article may in fact be an improper interpretation due to its incapability to be harmonized with the CISG as a whole. A certain interpretation rule can only be justified if it provides a proper fit regarding to the other CISG article or CISG as a whole. In interpretation of the CISG contract formation article 14, due regard has to be given to the article 55 and the interpretative template provided by artifices 6,7,8,9 of CISG.

This paper will try to prove that the most adequate approach is reading of article 14 in conjunction of 55 because of several reasons.

First, the CISG is unique set of rules which has to be in harmony, thus in the case of possible contradiction and tensions between articles, it should be tried to interpret articles in wider context in order to reconcile their meanings.

Secondly, the Vienna Convention is not compilation of best national legal solutions, neither common denominator for legal system of contracting states; its provisions are result of political negotiations toward finding compromised solution between several blocks of states. Vienna Convention has international character (CISG 1980, Art 7), thus, its provisions should be given by a “CISG-meaning”, based on the structure, essential policies of the CISG and negotiation history (Hubert and Mullis 2007, 7)

Finally, the need to promote uniformity in its application (CISG 1980, Art 7) assumes the necessity of integrated interpretation of these articles 14 and 55. Otherwise, different national courts and tribunal will give preference to one of these two articles, which would undermine the objective of the Convention to promote certainty and predictability in international trade.

Applying only the literal interpretation on articles 14 and 55, the intention of parties could be misunderstood. Judge should not pull the language of Convention to pieces and make nonsense of it. He should find out the intention of Convention and carry it out rather by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis. Therefore, only integrated approach of interpretation is suitable for adequate determination whether open price term contract is admitted in certain case. Interplay between article 14 and art. 55, should be considered in the light of case facts. It is not only the question of law but also question of facts.

The integrated approach implies progressive analysis in which the judge:

- a) first considers whether the certain proposal fulfills formation requirements to constitute an offer, in the light of the ordinary meaning of the words of article 14. If it is case, than there is no doubt.
- b) If not, than it should take a broad view of what discerns the intent of party, by virtue of articles 8 and 9 of the CISG (CISG 1980, Art 8 and 9) ,
- c) And where the above mentioned analysis offers differing options, good faith guideline should influence concrete result (CISG 1980, Art 7) by virtue of article 7.

Within integrated approach, Article 7 should be used as a corrective tool for eliminating an interpretation option which does not comply with meaning of the good faith as reasonable standard of fair dealing. It should prevent a party from abusing a legal right and refer to anything that would oblige parties to behave in a manner that would promote justice, fairness or ethical behavior. The purpose of promoting good faith would be jeopardized by an interpretation of article 7 which allowed parties to escape liability where their conduct is mala fides. (Keily 1999, 24) The principle of good faith mitigates the rigid application of contract formation requirements to real business situation.

The ultimate criteria for determining whether a contract has been validly concluded must be defined by using rule of the interpretation of the parties' intention. (CISG 1980, Art 8) If, even lacking the price term, the parties consider certain offer sufficiently defined and, on the basis of such offer, conclude a sales contract, then there is no reason for the judge not to accept contractors will. (Cvetkovic 2014, 2) How can we say that it is not an offer if the party dispatching the proposal seriously intends to be bound and other party seems to be serious to be bound and article 55 could be called to fill any gap in their agreement regarding price terms? It is important to take all the facts of a case, as a whole, before drawing conclusion. It is unsuitable to take the case step-by-step and evaluate the legal situation without taking into account entire context.

The legal ground for such reasoning could be one of the following. First approach envisages that, the second sentence of Article 14 (1) could be interpreted as a mere example of a proposal that may become an offer, while the first sentence sets out conditions for a proposal to constitute a CISG-offer. Second sentence does not give a definition of an offer, it purely sets out that "a proposal is sufficiently definite if..."<sup>2</sup> It is an illustrative and educational provision only. (Flechtner 1999) Whereas, first sentence of article 14 (1) states that a proposal is an offer if it is addressed to one or more specific persons, sufficiently definite and indicates the serious intention of the offerer to be bound. It implies that an offer should be characterized by a serious intention to be bound and definiteness, so that a court can find the means to enforce the agreement by reference to article 55. Therefore, a proposal that does not fulfill the requirements of the second sentence of Article 14(1) could still be sufficiently definite (Flechtner 1999).

One could come to the same practical result by using following argumentation. Second approach envisages that, there is implicit exclusion of the Article 14 by the virtue of Article 6 and the implicit 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 by the virtue of article 55. This approach employs Article 55 to fix the price as long as there is a general and serious intent to enter a contract. It would save the contract even though the acceptance was, in reality, a response to an incomplete-offer. (DiMatteo 2011) For example, a proposal that is anticipated as an offer but lacks a definite price could be validated by an addressee's conduct, such as the acceptance of delivered goods. It leads to conclusion that parties are implicitly derogated from rules of Article 14. (DiMatteo 2011) In this example, the derogations would be the removal of Article 14's requirement that a price must be expressly or implicitly fixed in the offer. (DiMatteo 2011) If the parties perform like there is the contract, despite the lack of a price term, it would seem reasonable for a court to apply Article 55. (DiMatteo 2011)

It can be stated that Article 14's notion of "implicitly" fixing the price can be interpreted broadly in order to take into consideration all factors that are not expressly included into the offer such as trade usage, negotiations, practices, intent of parties and their letter conduct. The judge is entitled to imply intent or terms into a contract. (DiMatteo 2011) This authority is assumed expressly by articles 8, 9, 14(1) and implicitly through the use of the term "reasonable" throughout the CISG. (DiMatteo 2011) This led to the conclusion that so long as an intention to be bound is clear, the formal proposal need not contain much detail regarding determination of price. (DiMatteo 2011) The argument in

<sup>2</sup> See, this opinion is advocated by Professor Kazuaki Sono of Tezukayana University.

favour of wide-ranging judicial authority to fix a price where the price term is left open was accommodated by the assumption, noted in Article 55, that, in the absence of a fixed price, the parties implicitly 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." (Schlechtriem 1986)

Therefore, one can conclude that application of the Article 55 is based on a triumph of the party autonomy; while Article 14 only provides a statutory presumption of which terms are essential content of an offer, Article 55 entitles the parties to non-consider the price to be one of them. (Mistelis 2005).

Importance of the intent of parties can be clearly shown in the following example. A proposal contains all three terms necessary for the offer to be sufficiently definite: type, quantity of the goods and a price of Swiss francs 10 million. However, by taking a broad view of what discern the intent of party, by virtue of articles 8 it can be inferred that there might have been no intention to be bound to a contract in case of acceptance. Because it would normally be the case that a seller would not contract for such a large sale without specification of delivery dates, quality standards, etc. (Secretariat Commentary 2014)

Concerning all above mentioned, it can be concluded that examples of practical importance for application of Article 55 include situation when the parties derogated from Article 14 by operation of Article 6; or when a trade usage or established practice between the parties exclude Article 14 by virtue of Article 9; or in case where a Contracting State did not ratify Part II of the CISG by the virtue of article 92 or 94 of CISG. These examples of application of Article 55 will be addressed in next chapters.

#### *Party autonomy and interpretation of its conduct and statements*

The principle of party autonomy governs the application of the CISG. According to the Article 6 the parties may exclude the application of the CISG entirely or derogate from or vary the effects of any of its provisions. It is clear that parties can expressly derogate the effects of formation provisions set out in article 14 and thus refer to article 55 to fix the price. Nonetheless there is doubt whether parties are entitled to impliedly exclude the article 14. Even if the Convention does not mention the possibility of an "implied" exclusion, this does not mean that a tacit exclusion is impossible. The intent of deleting the word "implied" was to prevent the courts from being too quick to impute exclusion of the Convention. (Schlechtriem 1986)

Within interplay between article 14 and article 55, party autonomy has essential role;

- a) Firstly, the parties may agree to validly make a contract without any reference to price, but normally with an implied or express reference to how the price may be determined;
- b) Secondly, article 14 is a non-mandatory provision and may be excluded by an agreement that the contract has been concluded by derogation from the requirements for essential content of the offer;
- c) Thirdly, in the case of a dispute as to the price of goods its determination may be made between the parties by direct negotiation, or delegated to the seller, or delegated to a neutral third party. There is no automatic recourse to state courts or arbitration tribunals (Mistelis 2005).

It is a clear how to treat party's agreement to expressly derogate the formation requirements in the article 14 of CISG, but there is a doubt about interpretation of party statement and conduct which can be understood as an implied exclusion of Article 14. That doubt has to be resolved by application of article 8.

Article 8 provides as follows:

1. *For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.*
2. *If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.*

3. *In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties* (CISG 1980, Art 8).

First paragraph is conceived on the “subjective “approach. Interpretation is to be based on a speaker’s “intent” but only “where the other party knew or could not be unaware of the intent. (Honnold 1982, 107) This would amount to a “subjective meeting of the minds“ and in such situation there will be no place for objective modification. (Hubert and Mullis 2007, 12) If both parties consider the same thing although objectively they made an inaccurate expression for it, their common intention will triumph regardless of what an objective outsider may understood. (Ferrari 2005, 177) The rare and famous example is *Raffles v. Wichelhaus* (The Peerless Case).<sup>3</sup> Also, ICC Court of Arbitration applied Art. 8(1) and came to conclusion that “the seller's actual intention, as emerged from the parties' statements and the wording of the contract and the further documents they had exchanged, was to establish a merely provisional price subject to revision, and that the buyer could not have been unaware of the seller's intention”(ICC Court of Arbitration 1995).

Because of practical obstacles to determine the intent of the two parties, especially when they are involved in a dispute, most problems of interpretation will fall under paragraph (2) that provides the objective approach setting that statements by a declaring party “are to be interpreted according the understanding of a reasonable person of the same kind as the other party (addressee party) would have had in the same circumstances. (Honnold 1982, 107) In the context of interplay between article 14 and article 55, subsequent communication and conduct of the parties, despite of the lack of a sufficiently definite price, can result in a valid contract, which is prerequisite for application of article 55, only if “a reasonable person of the same kind” as the addressee would understand that as a declaring party intent to conclude a valid contract with reference to article 55. There are several cases in which the acceptance of goods, in spite of the fact that the price is not determined or determinable, has resulted in valid contracts, when parties intend to be bound, Article 55 upholds the agreement.

For example, in the *Oven case* the buyer makes an order of generic goods which he never acquired before and without any reference to a price, in case of urgency, this order constitutes an invitation to bid and the seller makes an offer to contract by delivering the goods: the buyer then accepts this offer by accepting the delivered goods, by using them or by reselling them. If the seller does not indicate the price of the delivered goods, the price is deemed to be the price currently practiced for such goods: the buyer thus bears the risk to pay more than foreseen if he accepts the delivered goods. Furthermore, a sales contract can be validly concluded without any reference to the price (express or implicit) by the parties; the price is then objectively determined by reference to article 55. (Switzerland Canton Appellate Court Valais 2007, 4)

Further explanation for application of both subjective and objective test is provided by article 8 (3) that is identifying elements that should be given due consideration in determining the intention of the parties. Due consideration has to be given to all relevant circumstances including negotiation, practices established between parties (Art. 9(1)), usages (Art. 9 (2)) and any subsequent conduct of the parties. Subsequent conduct of the parties does not mean that the parties can change the content of their agreement by subsequent behavior. It should be considered as indicator of what their intentions were at the time when they made the declaration or concluded the contract. (Hubert and Mullis 2007, 14)

In several cases the parties conceive that a contract has come into existence by the delivery or the use of the goods to the buyer. For example, a Dutch seller (plaintiff) and a Swiss buyer (defendant) concluded an agreement for goods to be manufactured by the buyer with the raw material delivered by the seller. After the buyer had used certain quantity of the raw material, the cooperation between the buyer and the seller was dismissed and the residual goods returned to the seller. The seller sued the buyer for the purchase price of the whole shipment. The court adjudicated that the buyer had to pay the price for all the material delivered and not only for the used part. The court found the legal ground,

<sup>3</sup> *Raffles* sold cotton to *Wichelhaus*. It was agreed that goods were to be shipped on the ship “Peerless”. Neither party was aware that there were two ships names “Peerless” shipping cotton from Bombay to Liverpool, one arriving in October and the other in December. *Wichelhaus* thought he had purchased the cotton arriving on the October ship, but *Raffles* sent his cotton on December ship. *Wichelhaus* refused to accept delivery of the cotton arriving on the December ship and *Raffles* brought this lawsuit for breach of contract.



in the first place, on the buyer's subsequent conduct (article 8(3) CISG). The buyer had requested the seller to send the invoice without any reservations although it already knew that the whole material would not be used. The purchase price had not been fixed by the parties and was determined by the court in application of article 55 of CISG (Switzerland District Court St Galen 1997).

Generally courts and arbitration tribunals, when dealing with the conflict between Article 14 and 55 accept responsibility for determining the missing price with the ultimate aim of salvaging the contract, as far as no indications against such an assumption are given. (Misterlis 2005, IV) This is established as an absolute rule when the intention for the parties is to save the contract. If the party challenges the validity of the contract, then the forum may also decide in favor of the validity of the contract as a matter of legal certainty and protection of the market or third party. (Misterlis 2005, IV)

### *The function and scope of Article 9 of CISG*

Besides the article 6, article 9 also sets out provision that makes it possible for other sources of law to apply to international contracts for the sale of goods which fall under realm of the CISG. Its dispositive provision expressly makes relevant sources other than the CISG, which is more suitable to the requirements of a particular industry, (Ferrari 2005, 9) when stating both that "[t]he parties are bound by any usage to which they have agreed and by any practices which they have established between themselves" (Article 9(1)) and that "[t]he parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned" (Article 9(2)).

Article 9(1) recognizes two different sources, namely usages and practices established between the parties. It covers the rare situation where the parties have *agreed* to be bound by a certain trade usage; indeed, virtually any agreement between the parties takes precedence over the otherwise applicable CISG supplementary rule. Therefore, local, regional or national usage may be applicable. More commercially significant group of cases are regulated by practices which they have established between themselves. By practices is meant a course of dealing adopted by the individual parties. Unless a party expressly excludes their application for the future, courses of dealing are automatically applicable not only to supplement the terms of the contractual agreement but also, pursuant to Article 8, to help to determine the parties' intent. (Bonell and Bianca 1987) Therefore, if the practice exists between the parties which admit open-price term contracts then the practice triumphs over the formation provision of the CISG.

This usage referred to in Article 9(1) should not to be confused with the usage regarded in Article 9(2), according to which, absent any agreement to the contrary, the parties are bound by specific international trade usages that fulfill certain requirements. (Ferrari 2005, 9) The determining requirement whether a particular usage is to be considered as having been impliedly made applicable to a certain contract will often be whether it was "widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." In such a case it may be considered that the parties "ought to have known" of the usage. (Secretariat Commentary 2004) This does not imply that all persons who are engaged in that particular branch of trade must know these usages; also, this usage prevails over the CISG provisions. For example, in Wood case (Austria Supreme Court 2000) the Austrian Supreme Court held that these Bavarian usages prevailed over the provisions of CISG, since these usages were widely known to and regularly observed by parties in cross-border timber trade between Austria and Germany. (Poch and Petz 2002) Also, the ICC Court of Arbitration stated that the revision of the price is a usage regularly observed by parties to contracts of the type involved in the actual trade concerned (Art. 9(2) of CISG), so that the clause of a provisional price was acceptable also on such grounds (ICC Court of Arbitration 2014).

## **5. EXPLANATION OF ART. 92 AND 94 OF CISG**

As we have seen, in most cases it can be hold, where the parties' intention to be bound is evident, that the parties impliedly derogated article 14 by virtue of article 6 in conjunction with article 7, 8, 9 and impliedly made reference to the price generally charged at the time of the conclusion of the contract for such good sold under comparable circumstances in the trade concerned. Beside cases

where these articles are employed for resolution of ambiguity, there are cases in which the contract is regulated by the CISG with the exception of Article 14-24 of CISG. This situation can occur when Contracting State by virtue of Article 92 or 94 made reservation regarding Part II of the CISG. In these cases the conclusion of the contract does not fall under realm of the CISG but the relevant national law will be applicable. If the national law allows a contract to be validly concluded even if there is no determination of price, Article 55 will apply without any doubt.

Article 92 of CISG provides that a Contracting State may declare that it will not be bound by Part II or by Part I of the Convention (CISG 1980, Art 92). Interest in this alternative was shown primarily by the Scandinavian States, based on their satisfaction with their regional uniform law on contract formation. In fact, Denmark, Finland, Norway and Sweden have all ratified the Convention subject to a declaration under Article 92 not to be bound by Part II: Formation of the Contract.<sup>4</sup> No other State has made a declaration under Article 92.

There will be a little difficulty with the application of Article 92. However, it may be useful to illustrate the interplay of a reservation excluding Part II and the alternative grounds for applicability in Article 1(1)(a) and (b). *For example, Seller (in State A) and Buyer (in State B) communicated with each other in a manner that raised a question as to whether they had concluded a contract. Both States had adopted the Convention but State B had also made reservation under Article 92 excluding Part II of the Convention on formation of the contract. Under what circumstances will Part II apply to this question?* Applicability cannot be based on Article 1(1)(a). Under Article 92(2) "in respect of the matters governed by" Part II, State B "is not to be considered a Contracting State" within Article 1(1). Consequently, with respect to Part II on Formation the places of business of *both* parties are *not* in "Contracting States". Under Article 1(1)(b), Part II will apply if "the rules of private international law lead to the application of the law of State A but not if the P.I.L rules point to State B (Honnold 1982)

Article 94 of CISG entitled Contracting States which have reached a certain degree of regional unification of their sales laws, to declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States (CISG 1980, Art 94). Denmark, Finland, Norway and Sweden, in ratifying the Convention, have made the declaration authorized by Article 94 (Honnold 1982).

## 6. CONCLUSION

For all above mentioned reasons it could be drawn that under the Vienna Convention, however, it is possible to conclude valid contracts on the basis of the offer which does not define a price for the goods, for at least two reasons: first, because it stems directly from the provisions of Article 55 of Convention, and secondly, because the parties have the right, in accordance with Article 6 of the Convention, to exclude the implementation of dispositive provisions of Article 14, which imposes the obligation to determine the price of goods on offer.

The very act of the contract conclusion without pricing suggests that the parties wish to arrange their contract in such a way. Their subsequent behavior confirms their will, for example, the enforcement of contractual obligations despite the fact that the contract does not contain a provision on the price of goods. In practice, international trade is common for contracts concluded in two steps: sending the offer and its acceptance. However, it is possible to form a contract by the execution of an action, for example by sending the goods or payment of rates when the intentions of the parties are interpreted based on the relevant circumstances of the case, including their negotiations, mutual practices, customs and any other subsequent treatment (Article 8, paragraph 3).

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<sup>4</sup>See, a list of Reservation States at [www.unicitral.org](http://www.unicitral.org)

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