

Article 55

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

INTRODUCTION

1. As is revealed by the Convention's *travaux préparatoires*, the interplay of articles 14 and 55 is one of the most difficult questions raised by the Convention.¹ With regard to the constitution of the offer, article 14 requires the price to be fixed or made determinable while article 55 provides a formula for establishing the price where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price of the goods sold. Apart from the key question whether a contract of sale may be validly concluded without a price, the application of article 55 is subject to requirements of a general nature, as shown in existing case law. Judges and arbitrators have also ruled on the methodology for establishing the price to which the parties are presumed to have impliedly made reference in accordance with article 55.

APPLICABILITY REQUIREMENTS OF A GENERAL NATURE

Conclusion of a contract of sale

2. For the implementation of article 55 a contract of sale, within the meaning of the Convention, has to have been concluded. Several decisions have thus rejected claims concerning the determination of the price based on article 55, since the claimants had been unable to prove that the alleged contracts had actually been concluded.² Also, article 55 is inapplicable if the contract involved is not a contract of sale within the meaning of the Convention.³

Observance of the intention of the parties

3. Court and arbitral decisions consistently hold that, in order to determine whether article 55 is applicable, one must refer first and foremost to the intention of the parties. Article 55 does not empower a judge or an arbitrator to establish the contract price when the parties have agreed on a fixed or determinable price within the meaning of article 14.⁴ In other words, article 55 is not a means of judicial price-setting, by reason of the principle of freedom of contract embodied in the CISG.⁵ Moreover, in several arbitral decisions it has been held that article 55 of the Convention was inapplicable where the parties wished to make the formation of the

contract subject to subsequent agreement on the price. In the absence of any such agreement, the sales contract is not concluded.⁶ One arbitration tribunal refused to apply article 55 owing to the existence of a clause allowing the buyer to amend the price after examining the goods, although the buyer had not exercised that contractual right.⁷

4. Where no price has been specified by the parties or where an open-price term applies, judges and arbitrators, in order to arrive at a fixed or determinable price in accordance with article 14, interpret the contract in the light of articles 8 and 9.⁸ This ascertainment of the parties' intention can lead to the conclusion that the parties wished to refer to the price formula set out in article 55.⁹

VALIDITY OF A CONTRACT SPECIFYING NO PRICE

5. Three different interpretations have been adopted in case law with regard to the meaning to be ascribed to the preliminary requirement in article 55, which gives rise to the difficulty of reconciling article 14—which requires, for the constitution of the offer, a fixed or determinable price—with article 55.

6. According to the most liberal view, a contract whose price is not fixed or determinable pursuant to article 14 is nonetheless effective owing to the subsidiary method of price determination set forth in article 55. Several courts have so ruled with respect to contracts whose performance had been commenced by the parties.¹⁰ In support of that interpretation it may be argued that, by commencing the performance of a contract whose price was not contractually established, the contracting parties wished to derogate from the requirement of a fixed or determinable price, as set forth in article 14. Arbitration case law also appears to indicate a willingness to give effect to contracts whose price was not specified by the parties, by reason, *inter alia*, of the needs of international trade.¹¹

7. A few decisions have given precedence to article 14 over article 55, concluding that the contract had not been formed since no price had been specified by the parties. In one famous case, a court held that a proposal to sell aircraft engines did not meet the requirements of article 14 of the Convention because it did not include the price for all the types of aircraft engines from which the buyer could choose,

and that the contract allegedly resulting from the proposal could not come into being.¹²

8. According to a third position taken by the courts, the question of the validity of a contract without a price is governed by domestic law, in accordance with CISG article 4. It should therefore be ascertained whether the national law applicable by virtue of choice-of-law rules allows the conclusion of a contract of sale without a fixed or determinable price before CISG article 55 can be implemented.¹³

DETERMINING THE PRICE UNDER ARTICLE 55

9. Where article 55 applies, the parties are presumed to have intended “the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned”. As was observed by one court, “this provision protects the buyer from paying too much” by establishing an objective standard for determining the price.¹⁴ Conversely, this provision would work against the buyer if the seller was prepared to sell the goods at a price lower than that generally applied to goods sold under comparable circumstances.¹⁵

10. When referring to “the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned,” article 55 says nothing about the geographical area where the trade is carried on. Court decisions favouring the trade

at the seller’s place of business can be cited.¹⁶ According to another view, reference should be made first and foremost to the price at the place where delivery of the goods should have been made. This approach may be advantageous in regard to the choice of such place under article 76 (2) for calculating damages in the event of contract avoidance. While no court decisions have adopted that second approach, a link between article 76 and article 55 was nonetheless established by one court, which took article 55 as a basis for interpreting the concept of a current price for the goods, as stated in article 76 (1).¹⁷

11. Determining the price generally charged in the trade concerned gives rise to difficulties where there is no market price. That is mainly the case with sales involving manufactured products. In order nevertheless to determine the price, some decisions have referred to the seller’s list prices,¹⁸ thus rendering the sales contract effective. Conversely, the court which gave precedence to article 14 over article 55 in the well-known case involving an airline and an aircraft engine manufacturer had also held that the price of the aircraft engines could not be determined under article 55 since there was no market price for the goods, and it therefore concluded that the contract had not been formed.¹⁹

12. The reference to sales made “under comparable circumstances” requires that consideration be given to delivery and payment terms, such as those defined by the Incoterms, or to discounts generally applied.²⁰

Notes

¹ 1980 Vienna Diplomatic Conference, Summary Records of Meetings of the First Committee, 8th meeting, Monday, 17 March 1980. See also the Digest for article 14, paragraphs 13-17.

² See CLOUT case No. 1451 [Nejvyšší soud České republiky, Czech Republic, 25 June 2008], available in English on the Internet at www.cisg.law.pace.edu (it is necessary to assess whether a contract of sale has been concluded and whether it is valid); CLOUT case No. 908 [Handelsgericht Zürich, Switzerland, 22 December 2005], *Internationales Handelsrecht*, 2006, 161 (determining the price under article 55 requires the conclusion of a valid contract).

³ CLOUT case No. 695 [U.S. District Court, Eastern District of Pennsylvania, United States, 29 March 2004], 312 F. Supp. 2d 681 (Amco Ukrservice et al. v. American Meter Company), available in English on the Internet at www.cisg.law.pace.edu (the court referred to the contradiction between article 14 and article 55 but without resolving it, since the contract involved was not a sales contract but a joint venture agreement).

⁴ CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000] *Internationales Handelsrecht*, 2001, 27, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu (freedom of contract underlies United Nations uniform sales law); CLOUT case No. 151 [Cour d’appel de Grenoble, France, 26 April 1995], available in French on the Internet at www.cisg-france.org, available in English on the Internet at www.cisg.law.pace.edu (rejection of a claim for a price reduction on the basis of the market price pursuant to article 55, which was inapplicable by reason of the price fixed by the parties); CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994], *Zeitschrift für Rechtsvergleichung*, 1995, 79, available in German on the Internet at www.cisg-online.ch, available in English on the Internet at www.cisg.law.pace.edu (chinchilla furs case: if a price may be considered sufficiently determined within the meaning of article 14, it is not necessary to resolve the question whether a contract can be validly concluded through the fiction of an agreement under article 55).

⁵ CLOUT case No. 343 [Landgericht Darmstadt, Germany, 9 May 2000] *Internationales Handelsrecht*, 2001, 27, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu (freedom of contract underlies United Nations uniform sales law).

⁶ CLOUT case No. 981 [China International Economic and Trade Arbitration Commission, People’s Republic of China, 25 December 1998], *Zhōngguó guójì jīngjì mào yì zhōngcái cáijué shū xuǎnbiān*, vol. 1998, 3034, available in English on the Internet at www.cisg.law.pace.edu; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 22 November 1995, available in English on the Internet at www.cisg.law.pace.edu; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 3 March 1995 (Arbitral award No. 304/1993), available in English on the Internet at www.cisg.law.pace.edu; CLOUT case No. 139 [International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russia, 3 March 1995 (Arbitral award No. 309/1993)]. These cases have to be distinguished from those where the parties refer to a subsequent agreement on the price without making that agreement a condition of the sale;

see Landgericht Neubrandenburg, Germany, 3 August 2005, *Internationales Handelsrecht*, 2006, 26, available in German on the Internet at www.cisg-online.ch, available in English on the Internet at www.cisg.law.pace.edu, and the reasoning elaborated in footnote 9.

⁷ International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russia, 16 February 1998, available in English on the Internet at www.cisg.law.pace.edu.

⁸ Arbitration Court of the International Chamber of Commerce, France, 1995 (Arbitral award No. 8324), *Journal du droit international* 1996, 1019, available in French on the Internet at www.unilex.info, available in English on the Internet at www.cisg.law.pace.edu (application of articles 8 and 9 to interpret the contract in connection with a clause providing for a provisional price which was to be revised according to the actual price obtained from the final buyer); CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994], *Zeitschrift für Rechtsvergleichung*, 1995, 79, available in German on the Internet at www.cisg-online.ch, available in English on the Internet at www.cisg.law.pace.edu (chinchilla furs case: application of article 8 (1) and (2) in connection with a clause providing for a price range from 35 DM to 65 DM per pelt depending on the quality).

⁹ Landgericht Neubrandenburg, Germany, 3 August 2005, *Internationales Handelsrecht*, 2006, 26, available in German on the Internet at www.cisg-online.ch, available in English on the Internet at www.cisg.law.pace.edu (in connection with a clause providing that the price of fruit had to be determined during the season, the court held, as the main argument, that the clause referred to the seasonal price applied by the seller and thereby provided for a determination under the standards of article 55).

¹⁰ CLOUT case No. 934 [Tribunal cantonal du Valais, Switzerland, 27 April 2007], *Revue suisse de droit international et européen*, 2008, 184, available in French on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu (concerning an urgent order for an oven by a restaurant owner; “[i]f the seller does not indicate the price of the delivered goods, the price is deemed to be the price currently practised for such goods”; also, the contract of sale may be concluded without any price having been indicated by the parties); Landgericht Neubrandenburg, Germany, 3 August 2005, *Internationales Handelsrecht*, 2006, 26, available in German on the Internet at www.cisg-online.ch, available in English on the Internet at www.cisg.law.pace.edu (in connection with a contract of sale relating to jars of fruit which provided that the “price is to be fixed during the season”, the court stated subsidiarily (for the main argument, see footnote 9 *supra*) that, assuming the clause was construed as referring to a subsequent agreement by the parties on the price, the validity of the contract was unaffected since the parties were free to derogate from article 14 and that, in the absence of a later agreement, article 55 had to be implemented; the court held that the Russian arbitration ruling of 3 March 1995 was markedly different since the parties, in commencing performance of the contract, did not wish to make the formation of the contract subject to an agreement on the price); CLOUT case No. 215 [Bezirksgericht St. Gallen, 3 July 1997], *Revue suisse de droit international et européen*, 1998, 84, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu (see, for this decision, the Digest for article 14). See also Landesgericht für Zivilrechtssachen Graz, Austria, 4 March 1993 (for the higher-court ruling in the chinchilla furs case see CLOUT case No. 106 [Oberster Gerichtshof, Austria, 10 November 1994], *Zeitschrift für Rechtsvergleichung*, 1995, 79, available in German on the Internet at www.cisg-online.ch, available in English on the Internet at www.cisg.law.pace.edu; the intermediate appeals court relied on article 55, basing its finding on the principle that the price was not fixed or determinable in accordance with article 14, whereas the Oberster Gerichtshof held that the price was fixed or determinable within the meaning of article 14).

¹¹ Arbitration Court of the International Chamber of Commerce, September 1999 (Arbitral award No. 9819), extracts in *International Court of Arbitration Bulletin*, 2001, vol. 12, No. 2, 56 (“Sale without prior fixing of a price is common in international trade, as is shown by the Vienna Convention of 11 April 1980 on the International Sale of Goods (article 55) [...]”); Arbitration Court at the Chamber of Commerce and Industry of Bulgaria, Bulgaria, 30 November 1998, *Praktika Bălgarska tãrgovsko-promishlena palata* (BTPP) 1998-1999, No. 4, 15, available in English on the Internet at www.cisg.law.pace.edu (according to CISG article 55, the contract is valid even if the contractual price is not expressly or implicitly fixed).

¹² CLOUT case No. 53 [Legfelsõbb Bíróság, Budapest, Hungary, 25 September 1992], available on the Internet in Hungarian at www.unilex.info and in English at www.cisg.law.pace.edu; for more on this decision, see paragraph 11 *infra*.

¹³ International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 30 May 2001, available on the Internet in English at www.cisg.law.pace.edu (“Since, according to article 4 CISG, [the CISG] does not deal with the validity of the contract itself, its validity has to be determined according to the applicable national (in the present case—Russian) law. Russian law, according to article 424 of the Russian Federation Civil Code, allows conclusion of contracts without setting forth the price.”); cf. International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, Russian Federation, 22 November 1995, available in English on the Internet at www.cisg.law.pace.edu.

¹⁴ CLOUT case No. 934 [Tribunal cantonal du Valais, Switzerland, 27 April 2007], *Revue suisse de droit international et européen*, 2008, 184, available in French on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu.

¹⁵ *Ibid.*

¹⁶ Landgericht Neubrandenburg, Germany, 3 August 2005, *Internationales Handelsrecht*, 2006, 26, available in German on the Internet at www.cisg-online.ch, available in English on the Internet at www.cisg.law.pace.edu (in connection with the sale of jars of fruit, the court referred to the seller’s market price since the seller fixed its financial terms on the basis of that market); see also the reasoning elaborated in footnote 9 *supra*; cf. Oberlandesgericht Rostock, Germany, 10 October 2001, *Internationales Handelsrecht*, 2003, 17, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu (in connection with the sale of fish products, the court, applying article 55, referred to the seller’s list price since the orders had been placed in accordance with the seller’s product lists); CLOUT case No. 934 [Tribunal cantonal du Valais, Switzerland, 27 April 2007], *Revue suisse de droit international et européen*, 2008, 184, available in French on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu.

¹⁷ CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004], *Internationales Handelsrecht*, 2005, 70, available in German on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu.

¹⁸ CLOUT case No. 934 [Tribunal cantonal du Valais, Switzerland, 27 April 2007], *Revue suisse de droit international et européen*, 2008, 184, available in French on the Internet at www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu (in connection with an order for an oven placed by a hotel owner); see, in support such an approach, even in regard to non-manufactured products, Oberlandesgericht Rostock, Germany, 10 October 2001, *Internationales Handelsrecht*, 2003, 17, available in German on the Internet at www.globalsaleslaw.org.

www.globalsaleslaw.org, available in English on the Internet at www.cisg.law.pace.edu (sale of fish products). This approach is, however, impracticable for goods, such as equipment, which are specially designed to the buyer's requirements.

¹⁹ CLOUT case No. 53 [Legfels bb Bíróság, Budapest, Hungary, 25 September 1992], available on the Internet in Hungarian at www.unilex.info and in English at www.cisg.law.pace.edu. To prevent a contract being regarded as not having been formed in the absence of a market price, the reasonableness standard, conceived as a general principle within the meaning of article 7 (2), could lead a judge to fix a reasonable price. This approach has not yet been established in case law.

²⁰ Landgericht Neubrandenburg, Germany, 3 August 2005, *Internationales Handelsrecht*, 2006, 26, available in German on the Internet at www.cisg-online.ch, available in English on the Internet at www.cisg.law.pace.edu (an order for a larger quantity of goods generally leads to a more favourable price); Arbitration Court of the International Chamber of Commerce, France, 1995 (Arbitral award No. 8324), *Journal du droit international*, 1996, 1019, available in French on the Internet at www.unilex.info, available in English on the Internet at www.cisg.law.pace.edu (referring to customary or negotiated discounts in connection with a provisional price to be revised by the parties).