

EXPLORING THE IDEA OF PROFESSOR MACNEIL: PRESENTATION OR FLEXIBILITY?

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Abstract

Flexible contracting has been a practice since the period of the law merchant. It remains relevant in today's sale. The objective of this paper is to test Macneil's idea of contractual flexibility under the CISG, the US Uniform Commercial Code and the English Sale of Goods Act 1979 with regard to open price provisions respectively. The method used in this paper is by deriving Macneil's opinion that a contract ought to be viewed as a planning mechanism rather than as a static document. Scholarly views of the three jurisdictions are also taken into consideration. With regards to the international law of the CISG, Macneil would have agreed with the arguments posed by Honnold that both Articles 14 and 55 of the CISG are to be read separately and in regard to the nature of a specific trade. Nevertheless, the CISG courts have shown preference over Farnsworth's approach, whereby a price requirement is a must in spite of the trade type. The result of this paper finds that Macneil's viewpoint is an alternative solution to the diverging interpretations taken. Taking Macneil's view implicates friendlier international business relations, when a contract of sale is updatable as a planning mechanism.

Key words: Macneil, presentation, flexibility, open price, CISG

JEL Classification: K12, K22

1. Introduction

Often, the ultimate goal of parties in making a contract is to maximise their profit. Parties however, can only fulfill their goal during the later stages of the contract, and this results in the deliberate act of leaving essential terms (such as price, quantity and time of delivery) open.² In fact, complex contracts commonly expect business parties to intentionally leave some contractual terms undecided.³ After all, the uncertainty of goods, or external matters affecting market conditions, should not prevent parties from entering into a contract.⁴

To respond to such future uncertainty, parties may braid their contract with both formal and informal mechanisms. Such braiding allows each party to assess the disposition and capacity of the other to respond cooperatively and effectively to unpredictable circumstances.⁵ Through braiding, a buyer and seller are able to leave a range of future adjustments open (for example, price, time or quantity) in order to maintain the practicality of a business.⁶

This paper highlights that such effort of maintaining the practicality of a business should be supported by sales law. As an example, a manufacturer or utility that contemplates long-term energy needs enters a twenty-year fuel supply agreement.⁷ Both buyer and supplier agree on a base price subject to periodic adjustment determined by increased production costs. Initially, both parties are satisfied with the agreement, but later an unanticipated event such as an oil embargo or high

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² Karl N Llewellyn, *Cases and Materials on Sales* (Chicago, Callaghan & Co 1930) 1.

³ A good example within the CISG jurisdiction is the Germany 3 August 2005 District Court Neubrandenburg (*Pitted Sour Cherries case*). The document is available online at <<http://cisgw3.law.pace.edu/cases/050803g1.html>> accessed 20 March 2010. In this case the validity of the sales contract is not hindered by the fact that the parties have only agreed to fix the price 'during the season'. An example found in the English jurisdiction is the case of *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 installments and the price clause says: 'to be agreed before each delivery.' This was because the price for the new 1996 Pistachio crop had not yet been formally appraised in Iran. Hence it was common for the plaintiff to agree forward contracts with his major customers for new crop quantities, which left the price to be agreed subsequently.

⁴ *ibid*.

⁵ Ronald J Gilson, Charles F Sabel and Robert E Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine* (October 2010) 110 'Columbia Law Review', no 6, 1377.

⁶ L Vold, *Open Price Arrangements in the Sale of Goods* (1930-1931) 5 'Temple Law Quarterly' 208.

⁷ Robert A Hillman, *Court Adjustment of Long-Term Contracts: An Analysis under Modern Contract Law* (1987), 1 'Duke Law Journal' 1.

inflation takes place and causes a dramatic rise in costs that outpace the price adjustment formula. The buyer refuses to adjust and the supplier, preferring the uncertain results of litigation to certain continuing losses, repudiates the agreement. There are a few possible ways for the court resolve this issue: 1) granting specific performance or damages to the relying party; 2) conversely, excusing performance under the impracticability doctrine; 3) providing relief based on a party's restitution or reliance interest; 4) deferring any holding and order parties to bargain further; and 5) adjusting the contract by modifying the terms of the agreement and conditioning specific performance on accepting the changes. While different jurisdictions may vary in their preferences over the five possible methods, the writer believes that maintaining the practicality of a business can be best done by the court using the fifth method; ie by adjusting or modifying the contract.

Nevertheless, in comparison to the abovementioned ways to resolve this issue, braiding of fixed and open terms from the time of entering into a contract caters best to the changing circumstances throughout the duration of the contract. According to DiMatteo, currently, many modern alliance agreements blend fixed terms with more open, flexible terms.⁸ Whilst hard and clear terms provide firm protection and boundaries for each party's investments and obligations, open and implicit terms and standards allow for greater operational flexibility; this flexibility fully exploits collaborative effort and generates the most innovation-related benefits.⁹ This strikes a balance in a contract struck by '...interweaving explicit and implicit terms that respond to the uncertainty inherent in the innovation process.'¹⁰ Without braiding fixed and open terms, a fixed-term alone might detriment the future of a long-term sales contract.

*Westinghouse Electric Corp v Kerr-McGee Corp*¹¹ illustrates the inefficiency of a purely fixed-price method. The supplier was to supply uranium to the plants at up to twelve dollars a pound when the market price rose sharply to over forty dollars. However, instead of adjusting the contract, the court applied the second solution, the doctrine of impracticability, which does excuse performance in such a situation. If the court in *Westinghouse* adjusted the uranium price based on the current market price, the contract, despite the unpredictable market conditions, would have remained enforceable.¹² Indeed, a court has a duty to adjust modern long-term contracts that are susceptible to unanticipated disruption and might affect more than one party. However, an adjustment solution, although practical, may not appeal to a traditional contract law judge.

The paper focuses on how Macneil's view on open price contract could benefit parties of long-term sales contract in the US, UK and the United Nations. Before going deeper into these jurisdictions' perspectives on open price, we shall understand the background of this practice from the period of the law merchant, and this is explained in the following section.

2. History of Open (Price) Term: the Period of the Law Merchant

As explained in the previous section, a definite, fixed term, particularly price, might be too rigid to accord with the business needs of a party when entering into a contract.¹³ To tackle rigidity, both braiding and adjusting the contract are equally possible. While a court can execute a contract's adjustment,¹⁴ parties can also choose to braid a contract from the beginning stage of the contract by combining open terms and fixed terms.¹⁵

Open price is an example of an open term commonly used in long-term business dealings. The origin of open price is traced to the eleventh and twelfth centuries when commercial

⁸ Larry A DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage* (Winter 2010) 47, Issue 4, 'American Business Law Journal' 1-80, 57.

⁹ Ronald J Gilson, Charles F Sabel and Robert E Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration* (2009) 109 'Columbia Law Review' 431, 435.

¹⁰ *ibid.*

¹¹ 580 Federal Reporter, Second Series 1311 (7th Cir), 99 Supreme Court Reporter 353 (1978).

¹² Paul L Joskow, *Price Adjustment in Long-term Contracts: The Case of Coal* (1988a) 31 'Journal of Law and Economics', 47-83.

¹³ Vold (n 5).

¹⁴ Hillman (n 6).

¹⁵ Dimatteo (n 7).

renaissance took place in Europe.¹⁶ This renaissance was partly related to the beginning of trade with the Eastern markets, and partly to general political and economic developments within Europe including the rise of autonomous political units such as towns and cities.¹⁷ Gradually, the new European trading community grew and created a new system of law to govern its commercial activities.¹⁸ Markets and fairs existed in the West, although without a highly developed legal order, for about two or three centuries.¹⁹ The growth of commerce, the revival of the study of law in universities and the growth of legal systems, both ecclesiastical and secular, developed the law merchant that included the customs of the markets and fairs as well as maritime trade customs.²⁰

The law merchant governed trade between merchants in fairs, markets and seaports²¹ and was distinguishable from local, feudal, royal and ecclesiastical laws.²² The law was unique for being transnational, derived from mercantile customs, administered by merchants themselves, quick and informal in procedure and concentrated on equity and fairness.²³

Although the law merchant was developed in England in a similar manner to other European countries,²⁴ the sixteenth and early seventeenth centuries saw its adoption in the courts of Admiralty and Chancery in England.²⁵ By late seventeenth century, the common-law courts at King's Bench and Common Pleas succeeded in covering jurisdictions over commercial cases.²⁶ During this time, questions relating to mercantile custom were submitted for decision to juries comprised of merchants.²⁷

2.1. Formalisation of the law merchant

The law merchant, being a body of customary law practised by merchants and implicit in jury verdicts did not fit precisely into the common law of a leading commercial power such as eighteenth century England.²⁸ While individual merchants demanded a more clearly defined law,²⁹ the national policy propagated the need for the law's formal development instead of its continuous reliance on the merchant's informal commercial experience.³⁰ This policy was evident in Lord Mansfield's opinion, which claimed that the law merchant's rules should be regarded as questions of law that were only appropriate to be decided by courts.³¹

Nevertheless, the law merchant did not just apply to merchants alone, but to all people and, subsequently, became an integral part of substantive English common law.³² Lord Mansfield and his successors' decisions resulted in the creation of a body of judicially declared English commercial law, which incorporated and refined rules developed earlier in Europe.³³ The incorporation of the law merchant added a cosmopolitan dimension to English common law, making the common law courts fulfill the needs of Britain's growing commerce.³⁴

However, the law merchant gradually became less influential when sales law was codified.³⁵ Commercial law was nationalised and separated from the experience of merchants in England, the

¹⁶ Harold J Berman and Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*(1978) 19 'Harvard International Law Journal' 221, 224.

¹⁷ *ibid.* Berman and Kaufman also cited Robert Lopez, *The Commercial Revolution of the Middle Ages* (1971) 950-1350; Robert Lopez and Irving Raymond, *Medieval Trade in the Mediterranean World* (New York, Columbia University Press 1968).

¹⁸ *ibid.*

¹⁹ *ibid.* 225.

²⁰ *ibid.*

²¹ *ibid.*

²² *ibid.*

²³ *ibid.*

²⁴ *ibid.* 226.

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ *ibid.* See also Theodore Plucknett, *Concise History of the Common Law* (5thedn, Butterworths 1956), 660-64.

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ *ibid.*

³¹ *Pillans v van Mierop* 3 Burrow's King's Bench Reports 1663, 97 English Reports 1035.

³² Berman and Kaufman (n 15).

³³ *ibid.*

³⁴ *ibid.*

³⁵ *ibid.* 227.

US, France, Germany and other European countries.³⁶ Clearly, codified sales law prevailed over the law merchant in most jurisdictions, but the US, upon the enactment of the UCC in 1952, is an exception to this.

The international community of merchants engaged in trade across national boundaries and was absorbed by the UCC, which proves the relevance of mercantile elements such as retaining a flexible, open price in sales.³⁷ The practice of including open term is supported by Carlton, stating that ‘transactions often take place under ‘contract’ ... [but] many contracts specify neither a price nor quantity. They seem not to be binding legal documents, but rather more like agreements to agree’.³⁸

Arguably, the adoption of the UCC’s approach to open prices improves the adaptability of the SGA and the CISG as sales laws, especially during changing circumstances. To fulfill this purpose, the adoption of the law merchant principles is crucial; this will be discussed in the next section.

3. Professor Ian Macneil as the Pioneer of Relational Contract Theory

It is a clear fact that open price is inherited from the period of the law merchant, underwent formalization process, and gradually departed from the actual practices of the merchants. Professor Ian Macneil, the founder of relational contract theory contributed an utmost effort in reviving law merchant element of flexibility through many of his writings. His ideas precipitated from the idea of classical contract law’s value which, according to him, ought to be replaced by a novel theory that perceives contracts as a social and economic institution. Contracts result from relationship between people- and very often tensions emerged between the simultaneous nature of individual interest and social interest.

According to Macneil, classical contract law tends to be unrealistic in rules of acceptance and the agreement of remedies, to name a few aspects. This should not occur, as contract is “hardly a neat and logical structure of rules, but like all law a social instrument designed to accomplish the goals of a man. The perspective offered by Macneil is that the traditional contract law is incapable of governing extensive, carefully planned, inter-firm contracts between large but economically interdependent firms. An example is a building contract where the contract is too complex to be specified during pre-contractual negotiations. It is in this type of dealing that parties often need to adjust price and time in an unspecified manner to suit their expectations and obligations during the stages of construction and on the completion of performance of the building contract. To fix the future price at the time of entering into the contract, or to presentiate the price, would be inconvenient for the parties.

3.1. Presentiation in Modern Contracts

The term presentiation, as coined by Macneil, is a process of looking at things in which a person perceives the effect of the future on the present.³⁹ It is a recognition that the course of the future is so unalterably bound by present conditions that the future has been brought effectively into the present so that it may be dealt with just as if it were in fact present.

While presentiation works ideally within simple, buyer and seller transactions, it may not be easily applied to complex, relational contracts. The longer the duration of the contract, the more difficult it is to presentiate by merely inspect the original agreement and provide satisfactory answers. To reduce this difficulty, Macneil suggested as follows: ‘...to develop an overall structure of contract law of greater applicability than now exists and to merge both the details and the

³⁶ *ibid* 228.

³⁷ *ibid*.

³⁸ Dennis W Carlton, *The Rigidity of Prices* ‘American Economic Review’ (1986) 76(4) 637-58, 640.

³⁹ Ian R Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neo-Classical, and Relational Contract Law* (1978) 72 ‘Northwestern University Law Review’ 854, 862.

structure of transactional contract into that overall structure'.⁴⁰ While the classical contract law theory relies on individual, rational self-interest as governing norm, Macneil recommended the ten common contract norms to replace the former. The contractual norms recommended by Macneil are integrity, reciprocity, implementation of planning, effectuation of consent, flexibility, contractual solidarity, restitution, reliance on expectation, creation and restraint of power, propriety of means and harmonization with the social matrix.⁴¹

3.2. Macneil's recommended techniques for greater contractual flexibility

While Macaulay has written on businesses problems faced in 1963 and generally explained that businesspeople have disliked formality, stating that 'the powerful norms, rather than legal rules, govern most contracting behaviour',⁴² Macneil was the first scholar that expanded on the elements of contractual norms. Macneil enumerated the various techniques applicable for adapting the flexible, relational nature of a contract that, as observed by Macaulay, do not always involve thorough planning for performance and non-performance.⁴³

Depending on the nature and type of transaction, there are five applicable techniques suggested by Macneil that permit a certain amount of flexibility under any sales law: the use of standards, direct third party determination of performance relations, one party's control of terms, cost and gaps in planning, and agreements to agree.⁴⁴

The first technique, the use of standards such as the Consumer Price Index is useful in periods of fluctuation, but it may cause problems if the standard is discontinued or altered. However, alternatively, a third party not related to the contractual relationship could establish a suitable standard.⁴⁵

The second technique, a direct third party determination of performance, draws on the expertise of an outsider to the contract. An architect from the architects' institution could determine a number of aspects such as the performance of a relationship, general administration and the approval of a contractors' selection of superintendent.⁴⁶ Another way of using this technique is through arbitration, a method that is mostly known for solving existing rights arising from contracts.⁴⁷

The third technique, one party's control of terms, is used instead of using external standards or independent third parties; one of the contract's parties will define, directly or indirectly, parts of the contractual relationship.⁴⁸ This technique entails that one party has the ability to terminate the relation, and is important in certain areas of enterprise including financial markets, commercial real estate transactions, commercial sales of goods and certain types of consumer transactions (such as insurance). To cope with the difficulties of the doctrine of consideration, the transactional legal structure produced a wide range of concepts, provisions, techniques and other devices limiting the doctrine's impact. According to Macneil, the drafter who desires to achieve workable flexibility must be aware of not only the limitations the law imposes on available techniques, but also the opportunities the law offers. For example, under the US Uniform Commercial Code, the typical practice regarding the sale of gasoline requires the supplier to decide the price in good faith before each delivery takes place.

The fourth technique is a combined pricing method of all three of the above techniques namely, the use of standards, direct third-party determination and one-party control.⁴⁹ While this method is possible, all case laws cited in this paper do not involve a mixed method but rather a

⁴⁰ Ian R Macneil, *Restatement (Second) of Contracts and Presentation* (1974) 'Virginia Law Review', vol 60, no 4, 589, 597.

⁴¹ Macneil (n 38).

⁴² Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study* (1963) 28 'American Sociological Review' 55-67, 55.

⁴³ *ibid.*

⁴⁴ Macneil (n 38) 866-67.

⁴⁵ *ibid* 866.

⁴⁶ *ibid* 866-68.

⁴⁷ *ibid* 868.

⁴⁸ *ibid* 868-69.

⁴⁹ *ibid* 869.

single price determination method for the purposes of discussion on whether open price works best and not necessarily on the issue of which of the open-price method is the most ideal.

The fifth technique is the agreement to agree which allows parties to fill in gaps in their relation at a later date, but still defines what the contract's completion would require at the outset.⁵⁰ Macneil affirmed that these processes often lead to a future agreement.⁵¹ In light of this, Macneil asserted that sales law should treat these gaps similarly to other gaps.⁵² While applying an agreement to agree can be fatal to later securing judicial gap-filling,⁵³ this is avoidable by adding of an alternative gap-filling technique to come into operation if the parties are unable to agree.⁵⁴ While agreement to agree is commonly practised in relational contracts, classic contract law may not be able to validate this method of contracting, hindered by its presentation character that requires precise determination of terms in every relational contract.⁵⁵

4. The acceptance of Macneil's theory in the US

Macneil's relational theory gained much attention in the US for many years, and Macneil was described as both 'a perceptive analyst of the American contract law scholarship and too modest'.⁵⁶ Relational contract theory left a significant impact on the understanding and teaching of contract law in the US, and at a basic level of understanding, contractual relations are categorised as 'discrete' and 'relational' within mainstream of scholarship and teaching concerning contracts in the US.⁵⁷ The US's classic contract law is closely associated with Williston and the original *Restatement of Contracts*; these sources were motivated by the 'isolated bargain between independent, self-interested individuals',⁵⁸ which stands in stark contrast to the ten norms of relational contracts suggested by Macneil.⁵⁹

Subsequently, contextualisation occurred after the enshrinement of classical contract law in Williston's (1920) treatise and the Restatement (American Law Institute 1932) in the 1920s.⁶⁰ The UCC however, continues to provide elements to adapt to the needs of the relational contracts; this includes performance, course of dealing, and usage of trade as sources of contract interpretation (Section 2-208) and good faith as a baseline obligation (Sections 1-201(19), 1-203, 2-103(1)(b)).

Although a formalist, Scott concurred with Llewellyn, Macaulay and Macneil in that the world's states are infinite, yet contracting parties have a limited capacity to specify their future performance, which leaves parties to favour incomplete contracts.⁶¹ Leaving a contract incomplete is a deliberate act, and when examined, the contract often employs linguistic ambiguity or fails to specify provisions in numerical terms.⁶² In addition, parties have a mutual desire for binding but flexible, responses to uncertain future conditions, and so intentionally limit the scope and precision of verifiable terms.⁶³

⁵⁰ *ibid* 870-71.

⁵¹ *ibid*.

⁵² *ibid*.

⁵³ *ibid*.

⁵⁴ *ibid*.

⁵⁵ *ibid*.

⁵⁶ Jay Feinman, *The Reception of Ian Macneil's Work on Contract in the USA*, ch 2, 59 in David Campbell (ed), *The Relational Theory of Contract: Selected Works of Ian Macneil* (London, Sweet and Maxwell 2001).

⁵⁷ *ibid*.

⁵⁸ *ibid*.

⁵⁹ Macneil (n 38).

⁶⁰ Classic law is seen as inaccurate, misleading or indeterminate in terms of its abstract rules. Focusing on the facts and circumstances of each individual case initiates the construction of principles and policies, but compliance with formal rules merely guides contract law decisions.

⁶¹ Robert E Scott, *A Theory of Self-Enforcing Indefinite Agreements* (November 2003) 'Columbia Law Review', vol 102, 1, 3.

⁶² Oliver E Williamson, *Transaction Cost Economics: The Governance of Contractual Relations* (1979) 22 'Journal of Law & Economics' 233, 235-238.

⁶³ Gillian K Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts* (Apr, 1990) 'Stanford Law Review', vol, 42, no 4, 927-992, 928.

The assumption that contracts fit into a simple two-step formula of 'offer' and 'acceptance' encourages contractual rigidity.⁶⁴ In reality, parties are not strangers; they are normally familiar with each other and prefer to interact off contract and to be 'mediated not by visible terms enforceable by a court, but by a particular balance of cooperation and coercion, communication and strategy'.⁶⁵ Scott discovered that cooperation might arise without any contracts at all, and that 'contracting parties use a mix of legal and extra-legal mechanisms, as well as patterned and individualised responses, to ameliorate the information and enforcement deficits that threaten emergence patterns of cooperation'.⁶⁶

Scott found that one of the reasons parties, such as the merchants, write deliberately incomplete agreements is because these agreements are potentially self-enforcing.⁶⁷ Scholars have appreciated that if the contracting parties have a good reputation, especially through repeated interactions, their contract is self-enforcing.⁶⁸

5. The acceptance of Macneil's relational contract theory in England

While most contract law scholars in England did not support Macneil's relational contract theory, Collins seemed to concur with the view that there is a need for flexibility in UK contract law. He advocated that contract doctrine needs to overcome fundamental obstacles presented by classic law (for instance, by upholding consensual modifications made following changed circumstances) and that courts should consider long-term interests as a guide to cooperation requirements so that economic opportunities can be maximised.⁶⁹

In addition to Collins, Halson admitted that contracting parties are not omniscient, and that contracting for all future possibilities in an uncertain and complex world would be very costly, if not impossible, for them to provide.⁷⁰ Although Halson did not suggest the use of open terms as an alternative to resolve the cost issue, he agreed that the costs of a contract's terms at the initial stage could be reduced if the law facilitates and encourages adaptive behaviour between contracting parties.⁷¹ This is in concurrence with the view by Berman, whereby compliance with classic contract law demands for rigid price-fixing is 'a convenient trap-door through which the imprudent or unscrupulous obligor can escape, leaving the innocent obligee to bar not only the loss of expected benefits but also the burden of liability to sub purchasers'.⁷²

Campbell and Harris stated that the explanation of long-term contracts using classic contract law is very problematic⁷³ because 'efficient long-term contractual behaviour must be understood as consciously cooperative' as a long-term contract is an analogy to a partnership.⁷⁴ Instead of aiming directly at utility maximisation through the performance of obligations that are specified in advance, parties would indirectly aim for long-term cooperative behaviour based on trust.⁷⁵ This cooperative mechanism, through which utility is achieved in a long-term relationship, is fundamentally different from a short-term, specified contract,⁷⁶ where the precise conduct and the shares in the joint product required by future long-term cooperation are not specifiable in advance.⁷⁷

⁶⁴ John O Honnold, *International Sales Law and the Open-Price Contract* (1989), 915-933, 916. The document is available online at <<http://www.bibliojuridica.org/libros/2/645/8.pdf>> accessed 5 June 2007.

⁶⁵ *ibid.*

⁶⁶ Gilson, Sabel and Scott (n 4) where the term used was 'braiding'.

⁶⁷ Scott, 'A Theory of Self-Enforcing' (n 60) 1.

⁶⁸ *ibid.*

⁶⁹ Hugh Collins, *The Law of Contract* (Cambridge University Press, 2003) 309.

⁷⁰ Roger Halson, *Opportunism, Economic Duress and Contractual Modifications* (Oct 1991) 'Law Quarterly Review' 107, 649-78, 649.

⁷¹ *ibid.*

⁷² 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.

⁷³ David Campbell and Donald Harris, *Flexibility in Long-Term Contractual Relationships: The Role of Co-operation* (1993) 20 'Journal of Law & Society' 166.

⁷⁴ *ibid.* 167.

⁷⁵ *ibid.*

⁷⁶ *ibid.* 173.

⁷⁷ *ibid.* 167.

Consequently, parties accept a general and productively vague norm of fairness to apply to their long-term commercial relationship.⁷⁸

Within the English judicial position, these scholars' findings were not applied by the courts even though flexibility, trust and cooperation are not new ideas to English law.⁷⁹ However, the recent decision of *Mamidoil*⁸⁰ proved that the English court has been more receptive to the idea of maintaining long-term cooperation between parties. This indicated that the English law has indirectly accepted a long-term contract as 'self-enforcing' when it is made between a buyer and seller of repeatedly good reputation.

6. The acceptance of Macneil's relational contract theory by the CISG

The CISG has been influenced by a variety of jurisdictions (including civil law) and incorporates both civil and common law methods. Beginning in 1968, the task of unifying international sales law was taken over by the United Nations Conference on International Trade Law (UNCITRAL), whose broad membership includes countries of different legal traditions and socio-economic conditions.⁸¹ The 62 nations comprised of 22 from the 'developed' world, 11 from socialist regimes and 29 from third world countries.⁸²

Because states have different backgrounds and jurisdictions, during ratification a state may declare that it will only join the CISG in part.⁸³ A state may refuse to be bound either by Part II (on the formation of contracts), or by Part III (on the rights and obligations of the parties).⁸⁴ The only mandatory parts are Part I on the sphere of application and other general provisions, and Part IV on the final provisions on ratification and related matters.⁸⁵

As sales are often relational, the CISG provides two approaches to making a contract. In the first approach, a state may choose to contract under Article 14(1), which requires a price to be implicitly fixed, and preference for a classical, fixed price approach is found under this provision. The socialist legal systems are more inclined towards this provision, because of their needs to comply with the requirements of a planned, state-operated economy.⁸⁶ This approach prioritises the contract's security and guaranteed foresight over other values.⁸⁷ The second approach, favoured by some Western legal systems, allows parties to adjust a contract without judicial interference.⁸⁸ This is found under Article 55, which recognises the relational element of a sale even if the price is not set at the time of entering into the contract.

The Honnold-Farnsworth debate provides us with two opposing views: while Honnold takes a similar view to Macneil, believing that a contract with an unstated price is potentially valid,⁸⁹ Farnsworth thinks that an open price is only valid when there is an implicit requirement to

⁷⁸ *ibid.*

⁷⁹ Mance LJ recognised this in deciding *Baird Textiles Ltd v Marks & Spencer Plc* [2001] England and Wales Court of Appeal (Civil Division) 274; [2002] 1 All England Law Reports (Commercial Cases) 737; [2001] Commercial Law Cases 999; quoting Bowen LJ in *Sanders Bros v Maclean & Co* (1882-83) Law Reports 11 Queen's Bench Division 327, 343: 'Credit, not distrust, is the basis of commercial dealings; mercantile genius consists principally in knowing whom to trust and with whom to deal, and commercial intercourse and communications is no more based on the supposition of fraud than it is on the supposition of forgery.'

⁸⁰ *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD (No1)* [2001] England and Wales Court of Appeal (Civil Division) 406.

⁸¹ Alejandro M Garro, *Reconciliation of Legal Traditions in the UN Convention on Convention for the International Sale of Goods* (1989) 23 'International Lawyer' 443-48, 443.

⁸² *ibid* 444.

⁸³ *ibid.*

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ GyulaEorsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods* (1983) 31 'American Journal of Comparative Law' 342.

⁸⁸ *ibid* 343.

⁸⁹ John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (9thedn, The Hague, Kluwer International 1999).

price. If there was an absence of an implicit standard, Farnsworth would claim there is no sufficient ground to make an offer or construct a valid contract.⁹⁰ The subtle difference between the two opinions is that that Honnold's view would validate open-price contracts regardless of their method of price determination, whereas Farnsworth's view requires a certain standard that takes away the possibility of having an 'agreement to agree' on a price. However, the remaining price-determination techniques suggested by Macneil (cost, market price, third party determination and one party determination) are compatible with Farnsworth's view.

Nevertheless, during periods of rapid price fluctuation, a controversy may arise if Farnsworth's view is applied to sales. When a CISG court is not receptive to open-price contracts, the wording of Article 14(1), together with a narrow construction of Article 55, could lead to the nullity of a contract.⁹¹ To maintain the enforceability of relational sales during times of price fluctuation, open prices leave a contract's price flexible.

7. Conclusion

Open price is not a modern practice; it originates from the law merchant and was later integrated into codified sales law. Its integration into a sales law improves the facilitative effect of commercial law. The tendency to leave the contract incomplete by leaving the price open was common in the trade of the merchants, but more importantly the practice continues in today's modern alliances and long-term industries. Parties braid a contract by fixing some terms, but leaving others, such as the price open. While some parties may consider open price as a preferable option, it is a particularly necessary practice to counter the effects of price fluctuations in the sale of goods. The *Westinghouse* case showed that a fixed-price method could not guarantee a transaction's convenience during times of price fluctuation. Leaving the price term to be determined at a later stage would ensure that the parties could maintain long-term cooperation and, more importantly rely on the completion of their contract when circumstances change. In other words, price fluctuations, whilst causing difficulties, should not frustrate a contract. Instead of being bound by a fixed price, which could become unfairly high or low during changing circumstances, parties could counter the hardship by setting an open price.

Ultimately, legislation should not be a trap door for a relying party when the contract's performance is excused on grounds of changing circumstances. Indeed, this is what happened when most sales laws were formalised and separated from the practices of merchants. However, US sales law was critically transformed to adapt to changes improvised to adapt to the changes, after the economy shifted from agrarian to industrialised practices 'characterised by cosmopolitanism' between 1870 and 1920. Llewellyn replaced classic formalism with principles of actual business practices, which is why the UCC carries numerous mercantile principles. The UCC not only acknowledges the legal obligation to perform the contract, but it also recognises the non-legal obligation, ie the moral duty to perform the contract in a rapidly changing economy.

Further research from Macaulay and Macneil illustrates the theoretical aspect of the complexity of modern contracts. The relational contract is used to distinguish complex, 'arm's length' deals, and is opposed to a 'discrete contract,' which signifies a traditional, direct, 'face-to-face' way of contracting where all the contract's terms could be easily fixed from the outset. It was discovered that most businesses problems are not resolvable if classic contract law demands presentation from the parties in relational transactions. Parties may have tacit expectations that are costly and difficult to predict, and so sales law should be more adaptable to their needs. If parties are unable to set a price when they enter into a new contract, sales law should be able to validate the deal using standards of good faith and commercial reasonableness instead of imposing a fixed-price requirement for valid contracts. The departure from the classic approach is particularly necessary

⁹⁰ E Allan Farnsworth, *Formation of Contract*, ch 3, Section 3.04 in Matthew Bender, *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (Galston & Smit ed. 1984).

⁹¹ *ibid.*

when parties are so familiar with each other that they interact off contract and create an ongoing, self-enforcing contractual relationship.

The three world's prominent sales law of Uniform Commercial Code (UCC), the Sale of Goods Act 1979 and the United Nation's CISG based on four responses. Macneil explained the four potential responses of a contract law when applied to relational sales; firstly, the contract law may not apply to the particular contract in question; secondly, the relational contract may be decided in accordance with concepts of presentation present in the contract law; thirdly, the law may be modified in such a way that total presentation is a theoretical and not an ultimate goal; or, finally, the overall structure of the contract law may be developed for a greater general application by merging both relational and presentation elements.

The UCC is designed to maintain a contract's certainty, yet it also functions as a 'gap-filling' law when parties leave terms open, either inadvertently or deliberately. As commercial law has different broad principles to international sales, which form the 'bifocal world of international sales law', both the SGA and CISG need to keep up with the requirements of complex contracts. Recognising the reliability of the SGA and the CISG in both local and international sales, this paper proposes that both sales laws adopt a more flexible approach to price fixing in order to maintain relational sales. The design of the UCC was based on the fourth response; it recognizes presentation, by enforcing a fixed-price contract, if that was intended by the parties from the beginning of the deal.⁹² At the same time, it promotes relational elements by validating contracts with inadvertent or deliberate open price terms. This is evident in Section 2-305(1) of the UCC, where a contract is valid on the basis of reasonable price in three situations: when parties are silent regarding price, when parties fail to agree on a price and when an appointed third party or a standard fails to set the price. The law merchant practices of open price and duty to set the price in good faith enrich the overall structure of the UCC by merging presentation and relational characteristics in a sale.

However, the SGA and the CISG portray the characteristics of the second response. Many decisions on relational sales are made in accordance with the concept of presentation.⁹³ While the SGA and CISG courts are inclined to take the approach in line with the third response, namely to limit presentation as a theoretical rather than ultimate goal of the law, they are still limited by the principles of presentation. For example, when deciding the validity of a relational sale, English courts frequently cite the *May & Butcher* principle of agreement to agree being a non-binding agreement on the basis of there being no price presented for the sale of tantage. The post-*May & Butcher* decisions such as *Hillas*⁹⁴ and *Foley*⁹⁵ proved to be exceptions to the rule, but the current decision of *Rafsanjan* proves that presentation under Section 8 and in *May & Butcher* remains the guiding principle of the SGA. The relational contract in *Rafsanjan* was invalidated even though the parties had been dealing with each other for eight years and there was an available market price for the pistachios that the court could refer to in order to apply reasonable price.

Similarly, the CISG courts are bound by the presentation character of Article 14(1) that requires 'implicit price' as a requirement to a valid contract, although its Article 55 provides some flexibility with regards to having an unintentionally open price contract. In other words, the CISG provides both presentation and relational approaches as options under Articles 14(1) and 55 respectively. Under the CISG, contracting parties may choose to be bound either by a fixed (express or implicit) price term or by an open-price term under Articles 14(1) and 55 respectively.

The abovementioned decisions prove that while the courts have been able to modify relational contracts to sustain enforceability, the way flexibility is applied to the contract is also

⁹² Section 2-305(4) of UCC.

⁹³ *May and Butcher Limited v The King* [1934] 2 KB 17; Hungary 25 September 1992 Supreme Court (*Pratt & Whitney v Malev*), the document is available online at <<http://cisgw3.law.pace.edu/cases/920925h1.html>> accessed 20 March 2010. Both cases highlighted of application of presentation approach in the English and CISG jurisdictions respectively.

⁹⁴ *Hillas & Co v Arcos Ltd* (1932) 147 LT 503.

⁹⁵ *Foley v Classique Coaches* [1934] 2 KB 1.

crucial. The UCC proves to be advantageous as it allows parties, from the beginning of the contract, to choose to have a fixed price or an open price. The SGA, to a lesser extent allows flexibility, subject to the decision of the court, to enforce open price. Similar to the SGA, price flexibility under the CISG is granted by the courts when required, as opposed to being an option for the parties from the time when they first entered into the contract. As a result, potentially valuable relationships are unnecessarily difficult to enter into under both SGA and CISG. Contrary to the approach suggested by Macneil, parties under the SGA and CISG may have no choice but to enter into a contract of sale with a fixed price, even at the risk of market fluctuation or other uncertainties.

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