

## **A Comparative Review of Open Price Term in Uniform Commercial Code and the Sale of Goods Act 1979**

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**Abstract:** Traditionally, it was a vital rule for the contractors to specify the amount of the price of the goods in their sale contract. Yet, it did not last for long; time passed and new circumstances arrived. New necessities and needs of humankind occurred. The need to provide the compatibility of the rules with the new circumstances caused changes. Thus, the concept of open price term was created. It was a true revolution, as it acted against the traditional rule of a sale contract. Yet it was a rational, necessary and beneficial change. However, new changes need to be properly guided on the correct path via good regulations on them. Since, the establishment of the rules of an open price term in a contract of sale of goods, they were rarely amended and reviewed in order to remove the shortcomings. Thus, through a doctrinal type of research and a comparative, analytical and critical approach to the issue, a library based study has been performed in order to highlight the salient aspects of the open price provisions in uniform commercial code and UK Sale of Goods Act (1979) in order to highlight points that could be amended.

**Key words:** Contract of sale of goods Uniform Commercial Code (UCC), UK Sale of Goods act 1979 (SGA 1979), open price term, Malaysia

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### **INTRODUCTION**

The first and most obvious effect of a set of rules that contain vague or conflicting provisions is the additional time and effort required from lawyers, judges, scholars and commentators in order to clarify the uncertainty caused. Such time and effort could be used a more productive way. Another likely effect of a conflicting set of rules is inconsistency in judicial decisions, even when the cases involved are similar. Thus, commentators will continue to grapple with the resulting dilemma. Hence, to mention and analyse the advantages and disadvantages of the sets of rules under study and to specify and show some considerable aspects in the Uniform Commercial Code (UCC) and the Sale of Goods Act (SGA) 1979, as the legislations that have considered open price term in contracts of the sale of goods, comprise the objectives of this study. This could help the steps toward amendment of such laws.

The task of this study is performed through a doctrinal method with a comparative, analytical and critical approach to the subject and this is done through a library based data collection technique. To perform this study, some aspects in the rules are considered. Issues, such as different situations in which the price is called an open price the intention of the parties to form an open-price sale contract; the alternative price that is

suggested by the legislator; 3rd person valuation and failure to fix the price through the fault of one of the parties are different aspects that have been mentioned in this study. In order to open discussion, the open price rules in UCC and the SGA 1979 are stated here:

#### **Sections 8 and 9 of the SGA 1979**

**Section 8; Ascertainment of price:** The price in a contract of sale may be fixed by the contract or may be left to be fixed in a manner agreed by the contract or may be determined by the course of dealing between the parties.

Where the price is not determined, as mentioned in sub-section (1) earlier the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

**Section 9; Agreement to sell at valuation:** Were there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a 3rd party and he cannot or does not make the valuation, the agreement is avoided but if the goods or any part of them have been delivered to and appropriated by the buyer he must pay a reasonable price for them.

Where the 3rd party is prevented from making the valuation by the fault of the seller or buyer, the party not at fault may maintain an action for damages against the party at fault.

**Section 2-305 of the UCC:** The parties, if they so intend can conclude a contract for sale, even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if: a) Nothing is said as to price or b) The price is left to be agreed by the parties and they fail to agree or c) The price is to be fixed in terms of some agreed market or other standard as set or recorded by a 3rd person or agency and it is not so set or recorded.

A price to be fixed by the seller or by the buyer means a price for him to fix in good faith. When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through the fault of 1 party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

Where, however the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return, any goods already received or if unable to do so must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

As the aim of this study is to comparatively review the 2 sets of rules, 5 important aspects of open price namely, open price definition; intention of the parties to form an open-price sale contract; reasonable price; 3rd person valuation and impossibility of price fixation due to fault of 1 party are the focus of discussion hereunder.

**OPEN PRICE DEFINITION**

The first and main question is if the parties fix the price implicitly or agree on a method for determination of the price and later, due to any circumstances, it becomes impossible to fix the price, then will the contract be considered, as a valid sale contract with an open price term in it? Will the parties still be considered to have impliedly made reference to the alternative price imposed

by the law or will this situation fall outside the provisions in UCC and the SGA 1979 which results in the nullification of the contract (Table 1)? The UCC preempts the mentioned earlier question by providing for different situations. It states that:

The parties, if they so intend can conclude a contract for sale, even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if; a) Nothing is said as to price or b) The price is left to be agreed by the parties and they fail to agree or c) The price is to be fixed in terms of some agreed market or other standard as set or recorded by a 3rd person or agency and it is not so set or recorded (Section 2-305(1))

That statute clearly explains the different situations in which a court may imply the price of a contract. Thus, contracting parties will not face any uncertainty, as to whether the law will cover their transaction or not. However, it should be mentioned that the provision has made the court responsible to discover the real intention of the parties and this is obviously a negative point for it.

In the SGA, it is provided that where the price is not determined as mentioned in sub-section (1) above, the buyer must pay a reasonable price (Section 8(2)). Similarly in this codified set of rules, nothing is mentioned about cases where the parties have agreed on the special situations described in sub-section (1) but due to some circumstances, it becomes impossible to determine the price in the manner agreed.

The importance of ratification of a comprehensive set of rules to govern the issues identified above can be shown more clearly with some examples. With regard to Section 8 of the SGA, the failure to indicate whether the parties can leave the contractual price completely open, to be fixed through a future agreement, creates a possibility for disagreements, as well as conflicting judicial decisions.

Table 1: A summary of the positive aspects and shortcomings of open price provisions in UCC and SGA 1979

Provisions	Positive	Negative
UCC	Expressly allows the open-price sale contracts Suggests different situations in which the price is an open price Suggests the price of the time of delivery Has not separated the issue of 3rd party valuation There is a proper consideration and provision about the fault of 1 party	There is no explanation for reasonable price The attention of the legislator to the intention of the parties has made it much more possible that a party diverts the result of the litigation to its own benefits claiming that things are out of what he had intended In case of fault of 1 party, the power of the other party to fix a reasonable price rather than to fix the price by court will result to new flow of trials claiming that the party has not fixed the price having a good faith
SGA	Tries to explain the reasonable price There is no expressed reference to the intention of the parties	Section 8(2) has not considered the situation when the mentioned terms exist in the contract but later in practice, they become impossible to be executed The will of a 3rd party can easily make the contract avoided The provision in Section 9(2) concerns other parts of law. It has not mentioned about what would happen to the contract in case of fault of 1 party As to the issue of fault of 1 party, the only considered situation is the 3rd party valuation. Other methods are not included

As Atiyah *et al.* (2010) queries, when Section 8 says that the price may be left to be fixed in a manner agreed, does this exclude the possibility that the manner may simply require the parties to agree on the price? He continues that on this question, different views exist, each of which has led to different results and judicial decisions, even when the situations involved are similar.

One view is that the parties cannot make a binding sale contract at a price to be agreed. This is because in such circumstances, the court will choose a reasonable price for the contract, whereas the intention of the parties was to fix the price through their own future agreement. Thus, the result is that in practice, a sale contract in which the price is left open to be agreed is not a binding contract (Atiyah *et al.*, 2010). This view was affirmed in *May and Butcher v The King* [1934] 2 KB 17n, where the house of Lords held that an agreement in which the parties had agreed to fix the price at a future time, without mentioning any method for doing so will not make a binding contract. In the above case *Dunedin* ([1934] 2 KB 17n, 21) first stated that: We are here dealing with sale and undoubtedly price is one of the essentials of sale and if it is left still to be agreed between the parties, then there is no contract. Since this case, there has been debates (Samek, 1970), as to whether the contracts with open essential terms can be held binding (Ellinghaus, 1971; Mclauchlan, 1998). Tarrant (2006) points out that even by the time when this case was decided, there was a strong tradition in the insurance industry to uphold the validity of the future agreements on an essential term. According to Sutton (1981), an idea reflected from the traditional approach of the courts is that this is a fundamental principle of law that the court will not make a contract for the parties. However as Howard (1973) argues, in case the contractors intended to be bound by what they have created and when the court fills the existing incompleteness of such agreement, it is not as if the court is making a contract for the parties but it is merely enabling them to carry out their own intentions.

This was in spite of the fact that only 2 years earlier, the same Court in *Hillas and Co., Ltd. v Arcos Ltd.* [1932]. All ER Rep 494, widely seen as a landmark house of lords case on contract law, first began to move away from a strict, literal interpretation of the terms of a contract. Instead, it tried to interpret them in a manner that preserved the parties bargain. The court ruled that rather declaring a contract void, judges may infer terms into it, based on the past dealings of the parties. In this case, Lord Wright ([1932] All ER Rep 494, 503-505) believed that: If the construction of the words used may be difficult that is not a reason for holding them too ambiguous or uncertain to be enforced if the fair meaning of the parties

can be extracted. Therefore by having regard to the previous commercial relations between the parties to the contract at hand, the court held that they had already known each other's intention and no vague feature existed in the contract. The judges held that the contractors had fully intended to enter into that commercial agreement. Moreover, they believed that the parties had decided to be bound by the contract and in such circumstances, they stated that whenever possible, the gaps in the contract should be filled by the help of the court and the court should give effect to the agreement (*Hillas and Co., Ltd. v Arcos Ltd.* (1932) All ER Rep 494).

In *Foley v Classic Coaches Ltd* [1934] 2 KB 1, there were some noticeable factors in the court's decision. In this case, the intention of the parties to be bound by the contract was enough to convince the English court of appeal that an agreement for the sale of petrol at a price to be agreed by them was a valid and binding contract. The agreement was considered as a complete contract in which the parties had a plain intention to be bound by the contract. To the court, the previous transactions between the parties were good signs of awareness of the parties as to the price. Several years of practicing the same type of contractual relations was an effective factor (Chorley, 1935). Nevertheless, subsequently in *Courtney and Fairburn Ltd. v Tolaini Bros (Hotels) Ltd.* [1975] 1 WLR, the same court refused to recognize a contract in which the price was to be agreed by the parties. Also as Atiyah *et al.* (2010) explains, a few years before that case, the Australian High Court, in *Hall v Busst* (1960) 104 CLR 206, suggested that according to Section 8, a reasonable price will be determined for a sale contract in which the parties have been totally quiet about the price, only in the executed contracts in which the goods have been delivered and accepted. Otherwise, the contract should be void. The implication of the Australian High Court's decision, therefore is that Section 8 should not be extended unduly; rather it should be interpreted narrowly. In the 1983 case of *Sudbrook Trading Estate Ltd. v Eggleton* [1983] 1 AC 444, where the price was left to be fixed by valuers appointed by the parties, the lessee has appointed the valuer while the lessor refused to. Thus, the house of lords held that the failure of the lessor could not deprive the lessee from his right once he has exercised his option to buy. In fact in this case also, the same line of reasoning was followed.

Yet, it might be due to the inadequacies and incomprehensive nature of the SGA that the inconsistency in judicial decisions has continued in different cases. When an amendment and a considerable change and passage from traditions to a new era are

governed under a good rule, the evolution happens faster and through a correct path. For example, the first part of SGA contains a shortcoming as explained in above which UCC does not contain. Thus, the debate as to whether a sale in which the parties are silent, as to the price is valid or not is still on the table in courts. However, the courts that follow the UCC have gone much further and sometimes state that: In the produce industry, the term open price or price after sale assumes that the parties will negotiate a price after the goods are sold by the buyer of the produce (*Brutyn, v. Anthony Gagliano Co.*, No. 04-C-527, 2007 US Dist. LEXIS 48008, 2007 WL 1959178). Yet, to be negotiated is a phrase that in the law of UK is a sign that shows that there is still no contract between parties. In *Courtney and Fairbairn v Tolaini* [1975] 1 All ER 716 Lord Denning ([1975] 1 All ER 716, 719-720) stated that:

But, here there is no such contract at all. There is no machinery for ascertaining the price except by negotiation. In other words, the price is still to be agreed. Seeing that there is no agreement on so fundamental a matter as the price, there is no contract. I think we must apply the general principle that when there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract

This does not mean that today all of the agreements with different conditions are surely upheld; however this shows the changes in the views and opinions in result of the developments in the world trade circumstances. In fact, Section 8 of the SGA 1893 (that were not amended in SAG 1979) that aims to show the possibility of formation of open-price sale contract and the need for flexibility and upholding the agreements seems not to be written clearly and comprehensively. In fact, the above problem mentioned by Atiyah *et al.* (2010) may not have happened if the wording of the provision was different. Perhaps, if instead of the phrase the price in a contract of sale may be fixed by the contract or may, the provision imposed that the parties if they so intend may conclude a contract for sale even though, then the issue would be less problematic.

#### **INTENTION OF THE PARTIES TO FORM AN OPEN-PRICE SALE CONTRACT**

Treitel (2003) explains the position of intention in contracts in a precise manner. He states that no one disputes that an agreement is not a contract, if the parties expressly provide that it is not to be legally binding. However, it is said that an agreement containing no such

provision will generally be a contract although no positive intention to create a legal obligation existed in the minds of the parties. In this respect, he quotes Williston to the effect that if, under the circumstances, a reasonable person would understand the words used, as importing that the speaker promised to do something if given a requested exchange, therefore it is immaterial what intention the offeror may have had. Treitel (2003) further maintains that as to an ordinary commercial contract, there should be no doubt in the statement of Williston. In fact, the law does not require any positive intention in order to decide on the existence of a legal obligation as an effect of a contract. However, the question is how is the intention is proven? It is almost impossible to read the inner will; there is no way unless to rely on the manifested will of the parties. In order to do this, the legislator should be careful and precise enough in writing the law in a way that does not prepare a proper bed for those who nurse ill will and want to abuse any weaknesses that may be present in the rules. The attempt by the parties to mislead the court when there is no legal presumption has been mentioned in different texts (Anonymous, 1980) explaining that in order to discover the intention of the parties and as a result, to protect their legitimate expectations what the court must pay attention to is how the interaction was framed and yet, parties may attempt to mislead the court (Anonymous, 1980). The difficulty of figuring out the real intention of the parties can be understood from criminal cases and procedures. Many written texts address the issue of how to discover the real intention of the accused person (Glenys and Dingwall, 2004; Glanville, 1987; Ferzan, 2008).

To Treitel (2003), contractual obligations are based on agreement but this idea is based on some qualifications. One of them is that the law is often concerned with the objective appearance rather than with the actual fact of agreement. He stresses that whatever the intention of a party may be, he is bound to the contract, if a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into a contract with him. This objective principle is in line with the requirements of commercial convenience. Although to believe that the law of contract has no concern at all with actual agreements is a wrong idea, considerable uncertainty would result if A, after inducing B reasonably to believe that he (A) had agreed to certain terms, could then escape liability merely by showing that he had no real intention to enter into that agreement. In order to prevent this, there should be a legal presumption to the effect that what has appeared from and been demonstrated by each party, the contents of the contract, for example are assumed to be their real and inner intention, unless they can prove a will contrary to

that it should be mentioned that the situation is even more complicated where one of the contracting parties is trying to bind the other party without intending to be bound himself. Accordingly Draetta (1988) notes that in some cases, each party seems to be ready to try to prove that the other party is bound in order to prevent him from re-discussing the points of agreement, including even those that are recorded in the letter of intention while simultaneously preserving the right to re-discuss the said points.

The difficulty in fashioning any special rules for the issue of whether or not the contracting parties intended to create contractual obligations was mentioned in *Ermogenous v Greek Orthodox Community of SA Inc* ((2002) 209 CLR 95), where a majority of the High Court judges held that the circumstances which might be taken into account in order to unveil the relevant intention of the parties are so varied as to preclude the formation of any prescriptive rules. Section 2-305 of the UCC commences with this statement, the parties if they so intend can conclude a contract. Usually, rules that have pointed to the intention of the parties as a criterion will face to this question that who is able to figure out the real intention of the parties at the time of conclusion of the contract? In fact, such rules provide the best possibility for the party who aims to escape from the contractual responsibilities to claim that he did not have any intention to be bound. In the UCC, the expressed reference to the intention of the parties may cause problems as to how the courts can figure the real intention of the parties out. Thus, new debates occur in order to determine the intention of the parties. In American case of *Stern Oil Company, Inc., v James R. Brown* 2012 SD 56, it is mentioned that:

Whether the parties intended to enter into a contract containing an open price term is, in most cases, a question to be determined by the trier of fact. Furthermore, actions involving state of mind which include cases involving intent are not usually suited for summary disposition. This is a sign that shows how problematic can determination of the real will and intention of the parties be

Yet, the provision in the SGA is not as problematic as the UCC is. In the SGA, unlike the UCC, there is no expressed reference to the intention of the parties, although there is not a clear presumption as well. What is important is that the rule should be written and codified in a diligent manner, so that it will prevent any abuse of the law. The benefit of legal presumptions is that the parties can only claim that they had any other intention if they have reliable evidence to offer to the court.

## **REASONABLE PRICE**

In Section 2 (305)(1) of the UCC, the referred time for determining the reasonable price is at the time of delivery. As Murray (1984) mentions, the time of delivery or time of execution of the contract, can be seen in some other civilian codifications as well. He points out that the matter of timing will appear to be essential by considering the volatile price fluctuations or the continuous inflationary economies (Murray, 1984). SGA Section 8 has not even gone through this issue and has just imposed that the price to be fixed is supposed to be a reasonable price and apparently has given the court the authority to chose. However, which of these laws are more practical and reasonable? This question should be answered based on what the main reason for creation of an open price term is. In the coming parts of this study, the above question will be answered considering the reasons of creation of open price term.

According to Edwards and Ma (1992), the reason why parties to a sale contract may choose to use an open-price term is to avoid any risk caused by price fluctuations. That is the main reason why they are usually unwilling to adopt, in their agreement, the price prevailing at the time of the contracts' formation. They prefer not to agree on the price until the goods are ready and are delivered. In that case, whatever the reasonable price of the goods is at the time of their delivery will be the contractual price. This point can also be gleaned from Section 2 (305)(1) of the UCC which talks of the reasonable price at the time for delivery. Prosser (1932) explains that the most important function of an open price term in a sale contract is to shift the risk caused by a fluctuating market from one of the parties to another and the situation is similar to this when the contract is for future delivery. However in most of the times, the parties to a sale contract are not willing to agree to this particular exchange of risks; the parties may wish to enter into a safe contract with the least contractual risks. He continues that considering these conditions, there were attempts to deal with this transfer of risks of a changing and fluctuating market between the parties. Finally, this has led to a variety of business arrangements by which, in a contract for the sale of goods, the price is left open for future determination.

It is hard to accept that the legislators have not considered the situations in which the parties have left the price open with the earlier mentioned proposes and accordingly, the price of the time of conclusion will not be beneficiary for them. This issue seems unusual to Mistelis (2006) to the extent that he gives an example of a situation when the parties have contracted with the intention to create a long-term contract that recognizes the changes that occur over time to the pricing of the goods. To solve

this situation, he suggests that a legal assumption of the time of the conclusion of the contract should be treated as a rebuttable presumption. He continues in such situations, it is appropriate for the tribunal or court to consider contract adaptation. Although, there are always exceptional cases generally, if the parties had any intention to adopt the price prevailing at the time of the conclusion of the contract, as their contractual price, they would not leave the price to be open, neither would they chose a method for its future determination. Yet, if there are other reasons for the parties to leave the price open rather than the above situation and if the parties intend to deliver the goods and exchange the considerations by the time of the conclusion of the contract, then the price of the time of delivery will still be reasonable, as it will be the same price of the time of conclusion of the contract.

The SGA is silent on the above issue. All it does is to state that the price will be a reasonable price. That act may nonetheless, have its advantage in that it provides a brief explanation of the meaning of reasonable price. It states that what is a reasonable price is a question of fact dependent on the circumstances of each particular case (Section 8(3)). In short, it seems to be proper to give a brief description of the suggested price in order to make it clearer what the legislator means by the provision. Bearing in mind, the fact that reasonableness is a relative matter that can be different in each situation, one cannot expect that an exact and unchangeable definition on what a reasonable price is, should be in the written provisions. However, an unclear rule is always the best material for those who have ill will and want to abuse the law as it is not self-explained and needs to be interpreted. Thus, anyone who is engaged in any litigation will have the opportunity to interpret the rule matching his own benefits and probably offer seemingly proper reasoning.

As long as the definition of reasonable price is concerned, there might be no much worries about mal-interpretations as the word reasonable is normally supposed to be explained through the norms of the society and according to what a reasonable person may understand from it and this will reduce the risk. However to explain it, as much as possible may even stop the courts to be confused in special cases where there can be different reasonable criterions on one subject.

### **THE 3RD PERSON VALUATION**

Another issue in comparing the provisions of SGA and UCC, displays the significant difference between these 2 rules when the parties agree to leave the price open to be fixed by a 3rd party and that 3rd party cannot

or does not want to do so. In such a situation, according to SGA the contract is avoided (Section 9(1)). However based on the UCC, the rule is that if it becomes impossible to set the price by a 3rd party, then a reasonable price will be set and it will not invalidate the contract (Section 2 (305)(1) (c)). A good rule is a comprehensive rule that has considered as many aspects of the concerning issue as possible; the issue of 3rd party valuation thus should also be studied based on the UCC and the SGA. This can clarify which of the provisions seems to be written more effectively.

In some cases, although the parties have not agreed on the price, however as some parts of the contract are exercised the court prefers to recognize the contract. This is in fact to respect the will of the parties. This seems to be a general legal idea in almost all legal systems to respect the will of the parties as much as possible. To Atiyah *et al.* (2010), the court normally tries to find a solution in order to maintain the agreement of the parties alive and valid. He adds that even in the absence of agreement on a term which might have been fatal if the whole agreement had remained executory. Following to this, he explains that:

It seems possible, therefore that where parties agree on a sale of goods at prices to be agreed in the future and the goods are actually delivered and accepted or the agreement is otherwise partly performed, the courts may now be more willing to treat this, as a binding contract to sell at a reasonable price and to provide machinery for the ascertainment of such reasonable prices, even in the absence of a provision, such as an arbitration clause by which this could be done under the contract itself

Considering the above legal basis, the SGA provision in Section 9(1) seems truly unjustifiable. In this provision, the legislature has surprisingly donated the power to invalidate a contract that has been validly concluded between the contractors, to a 3rd person. In this section, it is expressed that where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a 3rd party and he cannot or does not make the valuation, the agreement is avoided. Although, the provision continues by providing that but if the goods or any part of them have been delivered to and appropriated by the buyer he must pay a reasonable price for them yet, it does not cover the unfair imposed provision by it at all. In fact, this provision has weakened the power of the parties of the contract and has given the power of termination of it to a 3rd person. By comparing the issue with UCC provisions, what is found is that the recent

codification has not the same problem. In UCC, the issue of valuation of a third person is treated the same, as the other situations meaning that in case if the price is not set or recorded by the 3rd person, then a reasonable price will be charged for the contract (Section 2-305(1)). This issue has even been mentioned in the aforementioned UK case *May and Butcher v The King* [1934] 2 K.B. 17n in which the final decision of the court was refusal of the contract. However as to the above matter, Lord Buckmaster ([1934] 2 K.B. 17n, 20) remarks a considerable opinion as follows:

I find myself quite unable to understand the distinction between an agreement to permit the price to be fixed by a 3rd party and an agreement to permit the price to be fixed in the future by the 2 parties to the contract themselves. In principle, it appears to me that they are one and the same thing

There is another point of course to be considered about this issue. If the parties can by any reasonable evidence, prove their real intention and agreement then their agreement has priority to the legal presumption and should be imposed. With regard to the agreement of the parties on valuation of a 3rd person, an Official Code Comment to Section 2-305 of UCC explains:

The section recognizes that there may be cases in which a particular person's judgment is not chosen merely, as a barometer or index of a fair price but is an essential condition to the parties intent to make any contract at all. The difference would support a finding that the parties did not intend to make a binding agreement if that expert were unavailable (Anonymous, 1967)

#### **IMPOSSIBILITY OF PRICE FIXATION DUE TO FAULT OF 1 PARTY**

Fault of 1 party may have 2 reasons; 1 is the mistake of the party that has happened by no ill will and the other reason could be the party's bad intention. If it is any of them, UCC seems to have considered both. It provides that if the price fails to be fixed through the fault of 1 party, the other party has the option either to assume the contract as cancelled or to fix a reasonable price by himself (Section 2-305(3)). In fact, the minimum advantage of this provision is that if the affected party believes that the delinquent party has any bad intention, he has the option to cancel the contract and stop his commercial relation with him. On the other hand, if the impossibility of price determination has happened by the fault of a party while he had no ill will to make any disturbance in the process of the contract, the other party can have the possibility to choose the price by himself. Thus, this

seems to be a good provision when the price fails to be fixed because of the fault of 1 party. At the same time in this latter case, it seems more appropriate that the reasonable price be fixed by the court rather than by the party, as it may be a base for further challenges and disagreements between the parties. This is because the party at fault may believe that the price that is fixed by the other party is not reasonable and this may again bring the case to the court. It seems that alike with other cases in which the method of price determination is not enforceable and the parties bring the case to the court, in the case of fault of a party, the contract should be treated the same if a reasonable price is to be determined. The fact is that with regard to Section 2-305(3) of UCC, another point to be mentioned is the options of the party not in fault. To clarify the issue to be discussed, it seems proper to perform a brief study on Section 2-305(2). In addition, to Section 1-203 that imposes: Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement, the requirement of the law for acceptance of the price that has been determined by 1 of the parties is that he should perform in good faith. Good faith, also has a nature similar to the intention of the parties. The requirement of good faith is not an objective criterion, thus there has been many article and texts (Cook, 1968) written on the issue of good faith and there are many cases from years ago in the courts accordingly (*Skeels v. Universal CIT Credit Corporation* (335 F. 2d 846); *Centerre Bank of Kan. City, N.A. v Distribs Inc.*, 705 S.W. 2d 42 (Mo. Ct. App. 1985); *Fulton National Bank v Willis Denney Ford, Inc.*, 154 Ga. App. 846 (1980) 269 S.E.2d 916) In Section 2-305(3), one of the options for the party not at fault is to fix a reasonable price by himself. Thus, the concept of good faith is required. The party not at fault should fix a price that is reasonable and this should be exercised in good faith. This means that there are significant possibilities that the determination of the price by the party not at fault causes another case at court. Whatever the fixed price of the party not at fault might be, the other party may have dissatisfaction. Moreover, if the party at fault has not been really honest and has prevented the determination of the price deliberately, he may maintain an action to the court in order to lengthen the judicial procedures to postpone the performance of the contract. To provide that the party not at fault can ask for a price determination from the court will result to a lesser waste of time.

The provision of SGA on this topic is somehow different. This codification has considered the matter of fault of 1 party; however it is odd point is that the provision has imposed no rule to govern and clarify the situation of the contract after the fault of the party and impossibility of specification of the price through the agreed method. In fact, the effect of the fault on the continuity of the contract itself is the missing element in

this section. Instead, the article provides that where the 3rd party is prevented from making the valuation by the fault of the seller or buyer, the party not at fault may maintain an action for damages against the party at fault. The possibility of maintaining an action for damages against the party at fault is a separate issue that can be done in any case. The provision that is supposed to be imposed in this part is whether the contract will be cancelled due to the fault of 1 party or a reasonable price will be determined or any other suggestion that clarifies the future situation of the contract. Nonetheless, the section has not clarified that what will happen to a contract in which the fault of 1 party has caused the open price fail to be fixed. The matter of claim for damages is another issue; it is in fact the right of the party not at fault to claim for any probable damages that he has suffered from due to the fault of the other party. To maintain an action for damages is a right that the party not at fault can perform either if the contract remains enforceable by fixing a reasonable price or in case of cancellation of it. Thus, SGA has not determined what will happen to the contract in which the fault of 1 party has disturbed the agreed process of price specification. The issue of validity and enforceability of the contract and the possible options that the party not at fault may have are the missing issues in this part of the Section 9. There is yet another question that rises from this provision. Why the section has just considered the prevention of valuation by 3rd party as a result of fault of 1 party? As it is imposed by UCC and was mentioned earlier, any method that parties agree to fix the price through can become impossible to be performed via the fault of 1 party. In fact, there should be no difference between prevention of 3rd party of valuation and prevention of price fixation via other methods.

### CONCLUSION

To compare different provisions that govern similar issues in different codifications is an effective method in order to figure out the useful points or the shortcomings of each. This method will thus help to reach to a unique result that can be applicable in many legal systems. The result of this research seems to be useful in 2 fields; 1st it can be used as a suggestion to the countries that do not have any provision about open price and want to add this rule to their law. The 2nd, those countries that already have accepted the open price term in their law may rely on the information existing in this research and bring them into account in their future amendments of rules. These are in fact the fundamental activities towards the unification of the commercial laws. Accordingly to propose an article on open price term, as a unified research on the issue can be the next step to be taken in favor of this important part of the world's today

sale contracts. The reviewed positive aspects and the shortcomings of the UCC and the SGA 1979 provisions are summarized in Table 1.

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