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THE UNCERTAINTY OF *SUN PRINTING*

*George M. Cohen**

Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence.¹

INTRODUCTION

*Sun Printing & Publishing Ass'n v. Remington Paper & Power Co.*² is Judge Benjamin Cardozo's testament to the value of certainty in business transactions and the law of contracts, a value that elsewhere he deemed subordinate to the demands of justice.³ Joined by four other judges, Cardozo famously refused to enforce an agreement between two large companies for the purchase and sale of paper because the parties left open for future agreement (after an initial four-month period) not only the price term but also the

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¹ BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 66 (1924).

² 139 N.E. 470 (N.Y. 1923).

³ See *Jacob & Youngs v. Kent*, 129 N.E. 889 (N.Y. 1921). In that famous case, Cardozo states:

Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier. The decisions in this state commit us to the liberal view, which is making its way, nowadays, in jurisdictions slow to welcome it.

Id. at 891-92.

duration of the price term.⁴ Almost a century later, the case remains a prominent example of the contract doctrine of “uncertainty” or “indefiniteness,” under which courts decline to enforce contracts that omit one or more material terms. The indefiniteness doctrine retains its vitality in the courts,⁵ and *Sun Printing* remains good law in New York as well as a staple of contracts casebooks.⁶ All that despite the efforts of the Uniform Commercial Code⁷ and the Restatement (Second) of Contracts⁸ to encourage courts to fill in gaps left by the parties where possible, a practice for which Cardozo himself was well-known, at least in other cases. The questions of why contracting parties leave gaps in their contracts and what courts should do in response has also in recent years attracted a significant amount of academic interest.⁹

Yet I have always found *Sun Printing* to be a very confusing and frustrating opinion. Cardozo’s rhetoric and logic has a certain force, as it always does, but something has always seemed somewhat off in a sense not present in his other contract law cases. Many commentators have pointed out a tension between Cardozo’s *Sun Printing* opinion and his other contract opinions and have seen the main puzzle to be how, if at all, his approaches in the different cases can be reconciled.¹⁰ But none of the prominent commentators who have offered views on the case has succeeded in uncovering the nub of the problem. This is perhaps not surprising, given that no one to date has undertaken a thorough examination of the case and the surrounding circumstances. Doing so only enhances frustration with Cardozo’s opinion, but opens up an interesting and fresh perspective on a number of aspects of the case. My conclusion is that Cardozo mischaracterized and misunderstood the contract, that his opinion is more likely to have increased uncertainty rather than alleviated it, and

⁴ *Sun Printing*, 139 N.E. at 470.

⁵ See Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1643-44 (2003).

⁶ See, e.g., RANDY E. BARNETT, CONTRACTS 422 (4th ed. 2008); STEVEN J. BURTON, PRINCIPLES OF CONTRACT LAW 89 (3d ed. 2006); JOHN F. DAWSON, WILLIAM BURNETT HARVEY, STANLEY D. HENDERSON, DOUGLAS G. BAIRD, CONTRACTS 376 (9th ed. 2008); BRUCE FRIER & JAMES J. WHITE, MODERN LAW OF CONTRACTS 93 (3d ed. 2012).

⁷ U.C.C. §§ 2-204, 2-305.

⁸ Restatement (Second) Contracts § 33.

⁹ See, e.g., George S. Geis, *An Embedded Options Theory of Indefinite Contracts*, 90 MINN. L. REV. 1664, 1673-75 (2006).

¹⁰ See *infra* p. 124.

that he may unwittingly have helped facilitate and perpetuate anticompetitive activity in the newsprint paper industry.

I begin by detailing Cardozo's opinion in the case, Judge Crane's dissent, and Cardozo's subsequent thoughts about the case. I then summarize the existing academic criticism of the case before turning to an examination of the historical and economic context of the contract. Finally, I use that understanding to offer a new critique of Cardozo's opinion.

I. THE *SUN PRINTING* CASE

A. The Record

Before turning to Cardozo's analysis of the case, it will be helpful to consider the record as it would have appeared to him. On August 5, 1921, the Sun Printing & Publishing Association filed a complaint in New York state court alleging that the Remington Paper & Power Company, Inc. had breached a contract with Sun Printing for the delivery of newsprint paper.

The complaint includes the full contract,¹¹ which stated:

AGREEMENT.

IN CONSIDERATION of the mutual covenants and agreements hereinafter set forth, REMINGTON PAPER & POWER CO., INC., of Watertown, State of New York, hereinafter called the Seller, agrees to sell and hereby does sell and THE SUN PRINTING & PUBLISHING ASSO., of New York City, State of New York, hereinafter called the Purchaser, agrees to buy and pay for, and hereby does buy the following paper.

Tonnage.

Sixteen Thousand Tons rolls News Print, Basis 24x36-32/500.

65% of the tonnage in rolls 73" in width.

15% of the tonnage in rolls 55" in width.

20% of the tonnage in rolls 36½" in width.

¹¹ Complaint at 7-11, *Sun Printing & Publ'g Ass'n v. Remington Paper & Power Co.*, 139 N.E. 470 (N.Y. 1923) (No. 30495-1921) (italics added in the key paragraph in dispute) [hereinafter "Complaint"].

Shipments.

One thousand tons per month in herein specified percentages of sizes during the months of September, 1919, to December 1920, inclusive.

Consignee.

Sun Printing & Publishing Association, Pier 34, East River, New York City.

Specifications.

The paper shall be of substantially the same average quality as sample attached to this agreement and of approximately the basis of weight as above named, without reference to production basis.

Five per cent. (5%) over or under the contract basis of weight, shall be considered good delivery.

Use by the PURCHASER of any paper delivered under this contract, even though not in conformity to the standard, shall, as to said paper, be a waiver of all claims.

Width of rolls are not to be changed excepting with the consent of the SELLER.

Price and Delivery.

The price shall be as hereinafter provided per one hundred (100) pounds actual gross weight of rolls on board cars at mill, including paper and wrappers and paper or sulphite cores.

Terms.

Payments shall be made in New York Exchange, net cash on the 20th of each month for all paper shipped the previous month.

Miscellaneous.

On request of the Seller the Purchaser will on the 16th and last day of each month make settlement by Trade Acceptance payable without interest on the due date of the account for all shipments made during the previous fifteen day period.

The price agreed upon between the parties hereto for all

paper shipped during the month of September, 1919, shall be \$3.73 $\frac{3}{4}$ per hundred pounds gross weight of rolls on board cars at Mills.

The price agreed upon between the parties hereto for all shipments made during the months of October, November and December, 1919, shall be \$4.00 per hundred pounds gross weight of rolls on board cars at mills.

For the balance of the period of this agreement the price of the paper and length of terms for which such price shall apply shall be agreed upon by and between the parties hereto fifteen days prior to the expiration of each period for which the price and length of term thereof have been previously agreed upon, said price in no event to be higher than the contract price for news print charged by the Canadian Export Paper Company to the large consumers, the seller to receive the benefit of any differentials in freight rates.

It is understood and agreed by the parties hereto that the tonnage specified herein is for use in the printing and publication of the various editions of the Daily and Sunday New York Sun, and any variation from this will be considered a breach of contract.

Cores.

Cores may be returned to the SELLER, Norfolk, N.Y., freight prepaid, and upon receipt in good condition, the SELLER will either remit in cash or credit the account of the PURCHASER at ten cents per lineal foot for all cores received in good condition. No allowance will be made for cores of other shippers or for cores not used in shipments made by the SELLER.

Claims.

No allowance shall be made for waste, damage or paper left on cores. In case of claim of any nature applying on any shipment of paper made under this contract, the SELLER shall be notified immediately but no claim shall be allowed for consequential damage.

Contingencies.

In case the SELLER shall be unable and fail at any time to

make and supply, or the PURCHASER shall be unable and fail to take and use said paper in consequence of strikes, fire, explosion, lock-outs, combinations of workmen, flood, drought, embargoes, war, the acts of God, the public enemy, or any cause beyond the control of either party hereto, the SELLER shall not be liable to the PURCHASER for failure to supply such paper, nor shall the PURCHASER be liable to the SELLER for failure to take such paper during the period of such disability.

Cancellation.

If the PURCHASER shall fail to pay any amounts when due under this contract, or fail to make settlements as provided herein, the SELLER may, at its option, cancel this contract, refuse to furnish any more paper thereunder, and declare the obligations of the PURCHASER for all paper furnished hereunder due forthwith, notwithstanding the terms hereof, but the PURCHASER shall remain liable to the SELLER for all loss and damage sustained by reason of such failure.

THIS AGREEMENT is executed in duplicate original and shall be governed by the laws of the place of the legal domicile of the SELLER.

REMINGTON PAPER & POWER CO., INC.,
By M.A. HANNA V.P.

THE SUN PRINTING & PUBLISHING ASSOCIATION,
By V.H. POLACHEK

Watertown, N.Y., Oct. 6th 1919.

The only other information the Complaint provides about the contract was that it “was prepared by or on behalf of [Remington] by filling in by typewriting blank spaces in a printed form of agreement that [Remington] had caused to be printed in advance for use in the conduct of its business.”¹²

The Complaint then alleges that Remington delivered 4000

¹² *Id.* at ¶ V.

tons of newsprint between September 1919 and December 1919, and Sun Printing paid for that newsprint, as required by the contract.¹³ During that time, however, “the supply of newsprint paper such as that referred to in said agreement became scarce within the city and the state of New York and elsewhere in the United States and that the market price of such newsprint paper . . . rose materially and substantially.”¹⁴ On December 5, 1919, Remington “repudiated and abandoned” the contract, notifying Sun Printing that the agreement was “not binding.” Remington did not deliver any newsprint to Sun Printing after January 1, 1920.¹⁵

According to the Complaint, Sun Printing responded to Remington by demanding that Remington deliver to Sun Printing “during each month of the year 1920 one thousand tons of newsprint paper . . . at the contract price for newsprint charged by the Canadian Export Paper Company to the large consumers, [Remington] to receive the benefit of any differentials in freight rates.”¹⁶ Sun Printing repeated this same demand every month in 1920.¹⁷ The Complaint alleges that this contract price was “readily ascertainable”¹⁸ and that Sun Printing was “ready, able and willing to pay” it.¹⁹

Finally, the Complaint alleges that as a result of Remington’s failure to perform the contract, Sun Printing incurred damages of \$1,510,000, comprised of \$910,000 in “general” damages²⁰ and \$600,000 in “special” damages.²¹ Although the Complaint does not explain the calculation of “general” damages, it is likely based on the difference between the Canadian Export Company contract price over the 12-month period of 1920 and the higher market prices for newsprint.²² The grounds for the alleged “special” damages were

¹³ *Id.* at ¶ VI.

¹⁴ *Id.* at ¶ VII.

¹⁵ *Id.* at ¶ IX.

¹⁶ Complaint, *supra* note 11, at ¶ X.

¹⁷ Complaint, *supra* note 11, at ¶ XIII.

¹⁸ Complaint, *supra* note 11, at ¶ XI.

¹⁹ Complaint, *supra* note 11, at ¶ XII.

²⁰ Complaint, *supra* note 11, at ¶ XV.

²¹ Complaint, *supra* note 11, at ¶ XVI.

²² *See* Complaint, *supra* note 11, at ¶ XIV (alleging that the market price was higher than the Canadian Export Paper Company contract price at all times during 1920); *see also* Complaint, *supra* note 11, at ¶ XVI (alleging that Sun Printing had to pay as much as \$.1175 per pound (\$.1175 per 100 pounds) for newsprint in the market). Sun Printing’s appellate brief confirms that “general damages . . . should be measured by the difference between the

that Sun Printing was not able to buy substitute newsprint on the market in sufficient quantities to satisfy its publishing needs, and as a result had to buy inferior quality newsprint, reduce the size of its newspapers, and reject profitable advertising.²³

Remington responded to Sun Printing's complaint with a demurrer, alleging simply that the complaint did not state a cause of action because the contract "does not specify a price to be paid by [Sun Printing] for paper covered by the contract to be delivered after January 1, 1920, but leaves the price to be fixed by future agreement, and is void for want of mutuality."²⁴ On December 5, 1921, Sun Printing moved for judgment on the pleadings, which the trial court denied without opinion on December 20, 1921, giving Sun Printing leave to file an amended complaint.²⁵

Sun Printing then appealed to the Appellate Division, which reversed (3-2), and issued a written opinion.²⁶ The Appellate Division agreed with Sun Printing that the contract's maximum price provision effectively gave Sun Printing an "option" to pay the Canadian Export Paper Company price after January 1, 1920, which Sun Printing exercised by agreeing to pay this price.²⁷ The court found that this price was definite and that Sun Printing had given consideration for the option in the form of the price Sun Printing had paid for the earlier deliveries of newsprint.²⁸ The court noted: "There is no other part of the contract that is claimed to be indefinite."²⁹ Lastly, the court added that Remington by its demurrer conceded that the Canadian Export Paper Company price was ascertainable, and that "the fact that the selling price may vary from month to month does not affect the validity of the contract."³⁰

Remington appealed to the New York Court of Appeals under the certified question of whether the complaint stated sufficient facts

Canadian contract price" for each month and the "market price" during that month. Brief for Respondent at 44, *Sun Printing & Publ'g Ass'n v. Remington Paper & Power Co.*, 139 N.E. 470 (N.Y. 1923) (No. 30495-1921) [hereinafter "Respondent's Brief"].

²³ *Id.* at 44-45.

²⁴ Transcript of Record at 19, *Sun Printing & Publ'g Ass'n v. Remington Paper & Power Co.*, 139 N.E. 470 (N.Y. 1923) (No. 30495-1921) [hereinafter "Record"].

²⁵ *Id.* at 2-4.

²⁶ *Sun Printing & Publ'g Ass'n v. Remington Paper & Power Co.*, 193 N.Y.S. 698 (N.Y. App. Div. 1922).

²⁷ *Id.* at 701.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 702.

to constitute a cause of action.³¹ In its Appellant's Brief, Remington argued against Sun Printing's "option" theory, introducing for the first time the point, which it made repeatedly, that the parties did not intend an option because the contract required agreement not only on price but also on "the length of terms for which such price shall apply."³² Remington contended that the "Canadian Export price, which respondent claims should apply, was, however, not a fixed price but a price constantly changing from month to month and from time to time with the fluctuations of the paper market indicated by the allegations in the complaint."³³ Moreover, Remington argued that the determination of price duration was important to Remington "in order that it might, in the fluctuating state of the market, be sure of some definite time for which the price agreed upon would hold."³⁴ The Canadian Export Paper Company price would not solve this problem, because the parties could agree to a time period for the price during which the Canadian Export Paper Company price might change. The contract price would match the Canadian Export Paper Company price "in the event only that the agreement as to price coincided with the Canadian Export price and the latter price did not fluctuate during the period of the agreement."³⁵

In its Respondent's Brief, Sun Printing built on the option argument that had succeeded in the Appellate Division. It argued that

³¹ Record, *supra* note 24, at 19.

³² Brief of Appellant at 4, *Sun Printing & Publ'g Ass'n v. Remington Paper & Power Co.*, 139 N.E. 470 (N.Y. 1923) (No. 30495-1921) [hereinafter "Brief of Remington"]; *see also id.* at 5 (arguing that Remington "did not give an option as to price . . . by an agreement which provided that the price and the length of time such price should apply should be agreed upon by the parties"); *id.* at 6 ("There is no mistaking the meaning and intention of the parties that there should be future agreements as to prices to be charged for 1920 and as to periods agreed prices should cover."); *id.* at 7 ("There is no period fixed for which respondent shall exercise its alleged option to buy in case of a failure to agree as to price and term, whether a month, or a day, or the whole year, and no provision for notice of the exercise of such option."); *id.* at 14 ("Not only did the parties reserve the price for future agreement but also left the length of time the price was to run to be decided.").

³³ Brief of Remington, *supra* note 32, at 10.

³⁴ Brief of Remington, *supra* note 32, at 15.

³⁵ Brief of Remington, *supra* note 32, at 16. Remington offered a hypothetical example in which Sun Printing and Remington agreed to a price of \$5 per 100 pounds for 3 months, but the Canadian Export Paper Company lowered its price to \$4 during that time. Remington argued that the \$5 price would prevail despite the drop in the Canadian Export Paper Company price. On the other hand, if the Canadian Export Paper Company price was \$4 at the time the price term was agreed to and subsequently rose to \$5 during the three-month period, the contract price (in this case \$4) would again prevail. Brief of Remington, *supra* note 32, at 15.

the “provision of the agreement fixing the *maximum* price to be charged during 1920 was [Sun Printing’s] measure of protection in respect of price,”³⁶ and that if it had not been given the protection of the price maximum, it would not have made the contract with Remington at all.³⁷ Instead, it would have contracted with the Canadian Export Paper Company.³⁸ Remington’s approach rendered the price maximum term Sun Printing had bargained for meaningless.³⁹ Sun Printing added that whatever hardship the changed market conditions created for Remington, “if such price were not ruinous to the Canadian Company, it ought not to be presumed that it would be ruinous to [Remington].”⁴⁰

With respect to the Canadian Export Paper Company contract price, Sun Printing argued that it did not have to allege or prove that this price did not vary, because even if the price

did vary from time to time during the year 1920, that circumstance would not make the contract indefinite or uncertain or incomplete, so long as . . . the price of newsprint to be delivered under the contract . . . *during any given month* could be fixed by reference to an admittedly definite and well defined standard price *for that month*, namely, ‘the contract price for newsprint charged by the Canadian Export Paper Company to the large consumers.’⁴¹

Once Sun Printing agreed to pay the Canadian Export Paper Company price, the contract did not “require any further consent by [Remington] either as to price or length of term.”⁴² As Sun Printing had alleged in its complaint, it demanded during every month of 1920 that Remington provide the contracted-for newsprint at the Canadian Export Paper Company price.⁴³

In its Reply Brief, Remington argued that Sun Printing “entirely ignores the point that length of term was as important as

³⁶ Brief of Remington, *supra* note 32, at 22.

³⁷ Respondent’s Brief, *supra* note 22, at 11-12.

³⁸ Respondent’s Brief, *supra* note 22, at 12, 21, 26.

³⁹ Respondent’s Brief, *supra* note 22, at 25.

⁴⁰ Respondent’s Brief, *supra* note 22, at 43.

⁴¹ Respondent’s Brief, *supra* note 22, at 17-18, 42.

⁴² Respondent’s Brief, *supra* note 22, at 29.

⁴³ Respondent’s Brief, *supra* note 22, at 40-41.

price and that both were to be agreed upon.”⁴⁴ Remington focused on the phrase “said price” in the clause containing the maximum price provision, arguing that “[s]aid price” was not a fluctuating price, varying from day to day, or week to week, or month to month, with the Canadian [E]xport price, . . . but was a fixed price for a stated and agreed term.”⁴⁵ Thus, as Remington had argued in its initial brief, the price “was to remain as fixed for such term, irrespective of whether the Canadian price went above or fell below it.”⁴⁶

B. Cardozo’s Opinion

Cardozo, joined by four other judges, reversed the Appellate Division.⁴⁷ Cardozo opens the opinion with a brief and straightforward summary of the facts as alleged by Sun Printing in its complaint.⁴⁸ Cardozo presents us with a seller and a buyer of paper, some contract terms agreed to by the parties, performance on both sides for four months, and then notice by the seller to the buyer that the contract was “imperfect” and that the seller “disclaimed” any future obligations.⁴⁹ There are none of the rhetorical flights of fancy found in the statement of facts in some of Cardozo’s other famous opinions.⁵⁰ The language is plain and workmanlike. The message is clear: this case is a standard one for which ordinary legal principles suffice.

If Cardozo’s factual presentation is spare, his legal analysis, though typically concise, is quite complex and worthy of careful examination. Cardozo begins by accepting the framing of Remington’s counsel in its brief that the contract left two terms for

⁴⁴ Reply Brief for Appellant at 4, *Sun Printing & Publ’g Ass’n v. Remington Paper & Power Co.*, 139 N.E. 470 (N.Y. 1923) (No. 30495-1921).

⁴⁵ *Id.* at 6.

⁴⁶ *Id.* at 7.

⁴⁷ *Sun Printing*, 139 N.E. at 472.

⁴⁸ *Id.* at 470.

⁴⁹ *Id.*

⁵⁰ *See, e.g., Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917), which famously opens with:

The defendant styles herself a ‘creator of fashions.’ Her favor helps a sale. Manufacturers of dresses, millinery and like articles are glad to pay for a certificate of her approval. The things which she designs, fabric, parasols and what not, have a new value in the public mind when issued in her name. She employed the plaintiff to help her to turn this vogue into money.

the parties to negotiate beginning in December 1919: the price and the duration of that price. He then suggests that if the parties had omitted only the price term, he might have been willing to endorse Sun Printing's legal theory, and enforce the contract as one giving the buyer an "option" to pay the maximum Canadian Export Paper Company price referenced in the contract for the remainder of the contract term.⁵¹ Omitting the price duration term, however, was too much, especially because the contract expressly stated that the "length of terms for which such price shall apply shall be agreed upon by and between the parties,"⁵² and did not provide for a maximum (or minimum) price duration. Thus, reasons Cardozo, giving the buyer an option to choose to pay the maximum price "does not dispense with the necessity for agreement in respect of the term during which the price is to apply."⁵³

⁵¹ *Sun Printing*, 139 N.E. at 470. Cardozo here cites one of his earlier opinions, *Cohen & Sons v. Lurie Woolen Co.*, 133 N.E. 370 (N.Y. 1921). In that case, the buyer agreed to buy a fixed quantity of cloth at a stated price with the "privilege . . . to confirm more" if the seller could get more. After the seller delivered the fixed quantity agreed to, the buyer, "exercising its option," demanded as much more of the cloth as the seller could procure. The seller delivered a small amount more but much less than it had in fact procured. Cardozo held that the buyer could enforce the contract and rejected a claim of indefiniteness, because the contract gave the buyer the right to "fix the quantity, subject only to the proviso that the quantity shall be limited by ability to supply." *Id.* at 370-71. In rejecting the indefiniteness claim, Cardozo stated:

The [seller], then, is bound, unless its promise is to be ignored as meaningless. Rejection on that ground is at best a last resort. . . . Indefiniteness must reach the point where construction becomes futile. Uncertainties, thought to be impenetrable, are suggested [by the seller] in respect of subject matter, time, and price. They will be found to be unreal. It is said that we cannot tell whether the buyer, in exercising the option, must make demand for all the seller can supply, or is free to call for less. We think the implication plain that the buyer is to fix the quantity, subject only to the proviso that quantity shall be limited by ability to supply. It is said the option does not state the time within which election is to be announced. We think a reasonable time is a term implied by law. . . . It is said that the option does not embody a statement of the price. We think a 'privilege to confirm more' imports a privilege to confirm at the price of the initial quantity. This option was drawn by merchants. We are persuaded that merchants reading it would not be doubtful of its meaning. It was meant to accomplish something. We find no such elements of vagueness as to justify the conclusion that in reality it accomplished nothing.

Id. The intermediate appellate court in *Sun Printing* quoted this passage in support of its decision upholding the contract. *Sun Printing & Publ'g Ass'n v. Remington Paper & Power Co.*, 193 N.Y.S. 698, 701 (N.Y. App. Div. 1922).

⁵² *Sun Printing*, 139 N.E. at 470.

⁵³ *Id.* at 471.

To Cardozo, the importance of the price duration term seems to be a logical implication from the fact that a maximum price and a price duration are different things. Cardozo states: “Agreement upon a maximum payable this month or to-day is not the same as an agreement that it shall continue to be payable next month or tomorrow.”⁵⁴ Thus, if the buyer agreed (exercised its “option”) to pay the maximum for some stated duration, say one month, the buyer would not be bound to that same maximum price (or a changed maximum price) *beyond* that month. Next, following a line of reasoning in Remington’s brief, Cardozo notes that if the parties had agreed on an initial price duration, they would not have been obliged to follow any change in the Canadian Export Paper Company price that might occur *during* that period. That is, the contract price during the agreed-upon duration would be fixed, and therefore would not fluctuate with the Canadian Export Paper Company price, even if that price changed during the relevant period. In Cardozo’s words, “the standard was to be applied at the beginning of the successive terms, but once applied was to be maintained until the term should have expired.”⁵⁵ From these observations, Cardozo abruptly concludes that in the absence of agreement on the duration of the price, “the contract was inchoate.”⁵⁶ Why that conclusion follows is not immediately obvious.

But Cardozo is just getting started. He next aims to rebut Sun Printing’s argument that the price duration term was not material because the buyer continued to exercise its option at the maximum (Canadian Export Paper Company) price for the remainder of the contract. Or as Cardozo puts the argument, “there was no need of an agreement as to time unless the price to be paid was lower than the maximum.”⁵⁷ Cardozo gives several responses to this argument. First, and most simply, he says that there is “no evidence of this intention in the language of the contract.”⁵⁸

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Sun Printing*, 139 N.E. at 471.

⁵⁸ *Id.* What Cardozo means by “this intention” is not clear. The argument that the price duration did not matter so long as Sun Printing chose the Canadian Export Paper Company maximum price is based on an implication from the structure of the contract. A structural interpretation argument finds “evidence” of the parties’ “intention” in the language of the contract and inferences that can reasonably be drawn from such language. What Cardozo seems to mean is that there is no evidence based on the contract’s language that the parties

Second, and more crucially, Cardozo contends that Remington would not likely have agreed to the option view of the contract because under that interpretation, Remington “would never know where it stood.”⁵⁹ That would be so in part because Sun Printing, as it conceded, “was under no duty to accept the Canadian standard,”⁶⁰ meaning that Sun Printing would have been able to abandon the contract at any time the price was to be renegotiated (even though Sun Printing in fact never expressed any such intention throughout the duration of the contract). Cardozo continues:

Without an agreement as to time, however, there would be not one option, but a dozen. The Canadian price to-day might be less than the Canadian price to-morrow. Election by the buyer to proceed with performance at the price prevailing in one month would not bind it to proceed at the price prevailing in another. Successive options to be exercised every month would thus be read into the contract. Nothing in the wording discloses the intention of the seller to place itself to that extent at the mercy of the buyer.⁶¹

Cardozo then acknowledges that an alternative interpretation of the option theory would be that if the parties could not agree in December 1919 on the price and price duration, Sun Printing was entitled to exercise the option to pay the Canadian Export Paper Company price only once, but then was bound to pay whatever that price happened to be for the remainder of the contract. But even in that case, says Cardozo, “the difficulty would not be ended.”⁶² The “difficulty” Cardozo identifies is that although “[m]arket prices in 1920 happened to rise,”⁶³ they might have fallen. In the falling market price scenario, the “seller’s position” would be adversely affected because, in the absence of an agreement about price

intended that the buyer would be able to enforce the contract by continually agreeing to pay the maximum price. It is true that the contract does not expressly permit the buyer to do that, but neither does it expressly state an intention that the seller could abandon the contract in the face of the buyer’s willingness to pay the maximum price for the remainder of the contract.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Sun Printing*, 139 N.E. at 471.

⁶³ *Id.*

duration, “the maximum would be lowered from one shipment to another with every reduction of the standard,”⁶⁴ resulting in decreasing payments to the seller over time. That is, Cardozo interprets a one-time execution of the option to mean that Sun Printing would agree in December 1919 to pay whatever the Canadian Export Paper Company (and hence, Cardozo apparently assumes, market) price turned out to be at each remaining month of the contract (presumably 15 days before the beginning of each month). If that price fell over time, Remington would make less and less money over the course of the year.⁶⁵ Cardozo’s overall point is that under either the multiple option or single option theory, the contract would lack the “stability and certainty” that would come from an agreement on the duration of the revised price.

Having dispensed with the option theory on the grounds that it would place Remington at Sun Printing’s mercy and deprive Remington of the stability and certainty to which it was apparently entitled, Cardozo next rejects enforcing the contract based either on the parties’ reasons for leaving out the price duration term or on the seller’s motives in refusing to agree to one once the express price term expired. Cardozo thought that the reason for the parties’ omitting the price duration term was irrelevant. Cardozo speculates that the parties might have deliberately left the price duration term for subsequent negotiation and agreement because they believed that the “contingency” of failing to reach agreement later was “remote.”⁶⁶ To Cardozo, however, whatever reason the parties may have had for failing to fill the gap (“whether through design or through inadvertence”) did not matter because the parties had merely made an “agreement to agree,” which a court could not enforce.⁶⁷ With

⁶⁴ *Id.*

⁶⁵ *Id.* at 470-71. This interpretation seems to be in some tension with Cardozo’s earlier point that the maximum price at which the buyer exercised its option was to be fixed during the relevant period, and so any fluctuation in that maximum would not matter. Cardozo avoids the inconsistency, however, by assuming that the relevant (default) duration of the price resulting from the one-time exercise of the option would not be the remaining term of the contract, but rather one month, the period specified in the Sun Printing-Remington contract for each delivery and payment. Essentially, the argument recalls Cardozo’s initial statement that agreeing to the maximum for one month is not the same as agreeing to the maximum for subsequent months.

⁶⁶ *Id.* at 471.

⁶⁷ *Sun Printing*, 139 N.E. at 471. For the proposition that agreements to agree are not enforceable, Cardozo cites a New York Court of Appeals case also involving a contract for newsprint and decided several months earlier, *St. Regis Paper Co. v. Hubbs & Hastings*

respect to the seller's motives, Cardozo says that if the contract is unenforceable due to indefiniteness, the party disadvantaged by performance of the contract has a "legal right" to abandon it.⁶⁸ That right, Cardozo contends, "is not affected by our appraisal of the motive."⁶⁹

Paper Co., 138 N.E. 495 (1923). In fact, the Court of Appeals' opinion in *St. Regis* was issued between the date Sun Printing submitted its brief and the date of Remington's Reply Brief, which cited the opinion as supportive of Remington's position. In *St. Regis*, the parties agreed to a fixed price for the first three months of a two-year contract. After that, the contract stated that the:

price for the balance of the year to be fixed by mutual consent. In the event that the parties to this agreement shall fail to arrange a price for any quarter before the expiration of the preceding three months, this contract, in so far as it pertains to delivery over the unexpired period shall terminate.

St. Regis Paper Co., 138 N.E. at 496. Because the contract in *St. Regis* expressly stated that it would "terminate" if the parties failed to reach agreement on price, the case was arguably distinguishable from *Sun Printing*, whose contract contained no such clause, but Cardozo does not note the distinction. On the other hand, there were other New York cases refusing to enforce indefinite contracts that Cardozo could have cited (some of which he does cite elsewhere in the opinion) in which the contract did not expressly state what the parties wanted to happen if they could not reach agreement on the open term.

⁶⁸ *Sun Printing*, 139 N.E. at 471. Cardozo again cites *St. Regis* in support. After setting forth the proposition that an agreement to agree is not enforceable, *St. Regis* does state that the seller "exercised its legal right in refusing to be bound thereby." *St. Regis Paper Co.*, 138 N.E. at 497.

⁶⁹ *Sun Printing*, 139 N.E. at 471. For the proposition that the motives of the party seeking to avoid an indefinite contract are immaterial, Cardozo cites an older (pre-Cardozo) New York Court of Appeals case, *Mayer v. McCreery*, 23 N.E. 1045 (1890). In that case, a building owner accepted a proposal from a prospective tenant stating that the tenant would "take your building, 483 Fifth avenue, on a twenty-one years' lease from May 1, 1885, to be altered by you similar to one Hume & Co. is now altering, and floors, etc., arranged as spoken about, etc., at the yearly rent of \$5,250 for each year of the term, net rent, no taxes, assessments, etc. Plans, etc., to be mutually agreed upon." *Id.* at 1045. The court held that the statement that the plans were "to be mutually agreed upon" rendered the contract indefinite and unenforceable. With respect to the landlord's motive, the court stated:

The motives of the defendant for his refusal are wholly immaterial; whether they were because he thought he could make a more favorable agreement with some other person, or because he thought there was some difficulty in the deeds upon which he held title, which prevented him from leasing the premises for the purposes intended, is a matter of no importance.

Id. at 1046. An alternative approach that one might have thought Cardozo would endorse would be that the landlord's motive could suggest that the lack of specification of the "plans" was not material given that they were apparently to be "similar" to the alterations being done on another building. *Cf.* *Jacob & Youngs v. Kent*, 129 N.E. 889, 890-92 (N.Y. 1921) (holding that a builder's failure to use "Reading" pipe in a house was not a condition on the owner's making the final payment in part because there was no material difference in the pipe that was installed and suggesting that the owner's conduct in failing to inspect the

At this point, Cardozo offers his strongest and most general statement against contractual gap-filling by courts. He rejects the suggestion that the court could force the seller

to accept a term that would be reasonable in view of the nature of the transaction and the practice of the business. To hold it to such a standard is to make the contract over. The defendant reserved the privilege of doing its business in its own way, and did not undertake to conform to the practice and beliefs of others.⁷⁰

pipe upon arrival, delaying in notifying the builder of the defect, and insisting that even covered up pipe be removed supported the finding of immateriality); *see also* George M. Cohen, *The Negligence-Opportunism Tradeoff in Contract Law*, 20 HOFSTRA L. REV. 941, 990-92 (1992).

⁷⁰ *Sun Printing*, 139 N.E. at 471. Cardozo here cites *United Press v. New York Press Co.*, 58 N.E. 527 (1900), another pre-Cardozo indefiniteness case, which was the basis on which two judges dissented in the Appellate Division, *Sun Printing & Publ'g Ass'n v. Remington Paper & Power Co.*, 193 N.Y.S. 698, 702 (N.Y. App. Div. 1922), and which both parties discussed in their briefs. In that case, *United Press* agreed to supply its “nightly report” to *New York Press* for a price “not exceeding three hundred dollars during each and every week that said news report is received” 1892 to 1900. *United Press*, 58 N.E. at 527. *New York Press* performed for two years and then informed *United Press* that it would no longer take the report because it needed to cut costs. The parties attempted to negotiate a new price but could not come to an agreement. On the page cited by Cardozo, the court states:

The effect upon the instrument of its indefiniteness, or uncertainty, as to the price to be paid, was to make it operative only so long as the parties chose, and were able, to agree upon the price per week. In other words, whether it should have contractual force, would depend upon the subsequent agreement of the parties and, manifestly, if anything remained to be done by them, relating to the subject-matter of the contract, it was an incomplete and unenforceable instrument. The payment of \$300 each week in the past, for the news report furnished, was not an acknowledgment of an obligation to pay that amount during the whole contemplated life of the contract. . . . It is evident that the parties recognized their contract to be uncertain, or indefinite, as to the price, from their correspondence and the efforts to come to a mutual understanding and agreement upon the subject.

Id. at 529. The statement does not support Cardozo’s contention that the court should not require contracting parties to “conform to the practice and beliefs of others,” a kind of trade usage argument. Instead, *United Press* rejects a *course of performance* argument for resolving indefiniteness, and infers from the parties’ failed attempts at renegotiation an intention not to be bound if they could not agree on a new price. *Id.* Neither situation was present in *Sun Printing*. *United Press* is also distinguishable from *Sun Printing* because in *United Press*, the buyer was seeking to escape from a contract with a price maximum, whereas in *Sun Printing*, it was the seller who was trying to escape from a contract with a price maximum, a point conceded by Remington in its brief. *See* Brief of Remington, *supra* note 32, at 11. Thus, the “option” argument was not available in *United Press* because the “wrong” party was seeking to escape the contract. The intermediate appellate court in *Sun*

This statement seems to endorse a textualist approach to interpretation as best reflecting the parties' intentions. Reiterating this point, Cardozo next rejects a specific "reasonable term" – a monthly price duration – as inconsistent with the language of the contract, which states that the price term is "to expire at such intervals as the agreement may prescribe."⁷¹ Cardozo then notes that the parties could have, "with little change of language,"⁷² written a definitive term, but they did not. He then triumphantly concludes the paragraph with the opinion's most memorable line: "We are not at liberty to revise while professing to construe."⁷³ Classic Cardozo.

The remaining two paragraphs of the opinion respond to two additional arguments. First, Cardozo returns to the question of the nature of the Canadian Export Paper Company price maximum. This time, Cardozo considers a suggestion by the dissent that this price might have stayed constant throughout 1920, thus rendering irrelevant the concerns Cardozo had expressed earlier in the opinion about a fluctuating maximum price, and rendering the price duration term immaterial. Cardozo answers that it was up to Sun Printing as the plaintiff to allege that the Canadian Export Paper Company price was fixed for the remaining twelve months of the contract, but Sun Printing had not done so either in its complaint, or in its brief, or at oral argument. In fact, Cardozo notes, Sun Printing's conduct in coming back to Remington each month to demand delivery at the

Printing distinguished *United Press* on the ground that in that case there was no consideration given for an option, whereas there was consideration in *Sun Printing* based on the definite price stated for the first four months. *Sun Printing*, 193 N.Y.S. at 701.

⁷¹ *Sun Printing*, 139 N.E. at 471. Here Cardozo takes a small but significant liberty with the facts. He ignores the mandatory nature of the language in the contract (the future price and price duration "shall be agreed upon") by stating that the contract states that the prices "are to expire at such intervals as the agreement may prescribe." Cardozo repeats this mischaracterization in his description of the case in *The Growth of the Law*. CARDOZO, *supra* note 1, at 109 (stating that the price was to continue "for such a time, as buyer and seller might agree") (emphasis added). It is true, however, that in the traditional interpretation of the "agreement to agree" rule, the difference between "shall" and "may" or "might" does not matter. In *The Growth of the Law*, Cardozo also allows himself a slight exaggeration concerning the facts of *Sun Printing* when he describes the contract as involving a "stated term of years," rather than the actual contract duration of sixteen months. CARDOZO, *GROWTH OF THE LAW*, *supra* note 1, at 109.

⁷² *Sun Printing*, 139 N.E. at 471.

⁷³ *Id.* Cardozo was fond enough of this aphorism that he quoted it in an opinion he wrote later that year in support of a literal interpretation of an insurance contract provision. *Goldstein v. Standard Accident Ins.*, 140 N.E. 235, 237 (N.Y. 1923). Several years later, however, Cardozo dissented from an opinion in which the majority quoted the line. *Graf v. Hope Bldg. Corp.*, 171 N.E. 884, 885 (N.Y. 1930).

maximum price then prevailing suggested that Sun Printing thought the maximum price was likely to fluctuate from month to month.⁷⁴

Lastly, Cardozo raises the possibility that if Sun Printing, having agreed to pay the maximum price, had also allowed Remington to choose whatever price duration Remington wanted, and Remington had then refused to continue with the contract, the court might have found a breach by Remington. Cardozo says the court need not resolve whether or not this theory of liability is tenable, because Sun Printing did not take that position. “Instead, it gave its own construction to the contract, fixed for itself the length of the successive terms, and thereby coupled its demand with a condition which there was no duty to accept.”⁷⁵

C. Judge Crane’s Dissent

Whereas Cardozo opens his opinion by focusing on the nature of the missing terms, Judge Crane begins his dissent by stressing the parties’ intentions concerning the contract as a whole. He states: “The parties to this transaction beyond question thought they were making a contract for the purchase and sale of 16,000 tons rolls news print.”⁷⁶ In the next sentence, Crane flips Cardozo’s concern that the contract (under the option interpretation) placed the seller at the mercy of the buyer to contend, instead, that allowing the seller to escape the contract would establish a means for the seller to take unfair advantage of the buyer. As Crane puts it, based on an allegation in the Complaint: “The contract was upon a form used by

⁷⁴ *Sun Printing*, 139 N.E. at 471-72.

⁷⁵ *Id.* at 472. Here Cardozo gives his last case citation, to one of his early opinions, *Rubber Trading Co. v. Manhattan Rubber Mfg. Co.*, 116 N.E. 789 (N.Y. 1917). In *Rubber Trading*, Cardozo held that the seller of rubber, in tendering the rubber to the buyer, imposed a condition that the buyer had to stipulate that the rubber was of satisfactory quality before the seller would complete delivery. The court found that this condition was not stated in or implied by the contract and therefore the buyer was permitted to respond by rejecting the rubber without consequence. *Rubber Trading Co.*, 116 N.E. at 889. Cardozo’s point in citing *Rubber Trading* seems to be that the buyer in *Sun Printing* did not merely state its willingness to pay the maximum price, which the contract permitted, but in addition conditioned this willingness on the seller’s acquiescence in a monthly price duration term, which the contract did not permit. In his statement of the facts, however, Cardozo does not indicate that the buyer conditioned its demand to get the paper at the maximum price on the seller’s acceptance of a monthly price term. Rather, Cardozo simply states that the buyer renewed its demand each month, with no response from the seller. *Sun Printing*, 139 N.E. at 470.

⁷⁶ *Id.* at 472 (Crane, J., dissenting).

the defendant in its business, and we must suppose that it was intended to be what it states to be, and not a trick or device to defraud merchants.”⁷⁷

After providing more detail about the terms of the contract than Cardozo offers, Crane expands on his initial points:

Surely these parties must have had in mind that some binding agreement was made for the sale and delivery of 16,000 tons rolls of paper, and that the instrument contained all the elements necessary to make a binding contract. It is a strain upon reason to imagine the paper house, the Remington Paper & Power Company, Incorporated, and the Sun Printing & Publishing Association, formally executing a contract drawn up upon the defendant’s prepared form which was useless and amounted to nothing. We must, at least, start the examination of this agreement by believing that these intelligent parties intended to make a binding contract. If this be so, the court should spell out a binding contract, if it be possible. I not only think it possible, but think the paper itself clearly states a contract recognized under all the rules at law.⁷⁸

Crane’s reasoning is that these sophisticated businesses would not have gone to such effort to write such a detailed and formally executed document if they did not intend it to be enforceable. He believes the court should support this intent rather than deny enforcement to encourage the parties to write more definite contracts.

Crane then turns to the two open terms, starting with the price term. In contrast to Cardozo’s tentative suggestion that if only the price term had been left open the court might have been willing to fill it in, Crane expresses no hesitation in concluding that if the buyer was willing to pay the maximum price, the price term was sufficiently definite to be enforced. In fact, Crane finds that this conclusion “seems to be very clear.”⁷⁹ With respect to Cardozo’s concern that the price duration term was left open, Crane responds that “there are many answers to this.”⁸⁰

⁷⁷ *Id.*

⁷⁸ *Id.* at 472-73.

⁷⁹ *Id.* at 473.

⁸⁰ *Sun Printing*, 139 N.E. at 473. (Crane, J., dissenting).

Crane then proceeds to offer four possible ways of filling in the gap, the first two of which are the ones Cardozo discusses in his opinion,⁸¹ and none of which had been suggested by Sun Printing in its brief. First, the Canadian Export price on December 15th, 1919 could be the price for the remainder of the contract (the single option theory). Crane here suggests that the Canadian Export Paper Company price might have been stable for the entire year, a conjecture Cardozo counters as not asserted or proven by the buyer. Second, the price duration could be monthly, with the buyer able to agree to pay the Canadian Export Paper Company price on the fifteenth of each successive month. Cardozo parries this proposal with his critique that it would create a “dozen options” and the seller would “never know where it stood.” Crane’s third suggestion – and one to which we will return in a subsequent section – is that the price duration could be the price duration in the Canadian Export Paper Company contracts. Cardozo ignores this suggestion except to the extent it is implicitly covered by his critique of the multiple option interpretation. Finally, Crane maintains that as a last resort, the court should “apply the rule of reason and compel parties to contract in the light of fair dealing” by determining a price duration period that “is reasonable under all the circumstances and conditions as applied in the paper trade.”⁸² Cardozo implicitly responds to this suggestion with his statement that the seller “did not undertake to conform to the practice and beliefs of others.”

Crane concludes his dissent by contending that any one of his four solutions would lead to a “practical and just result”; therefore,

⁸¹ Before turning to the four possibilities, Crane for a third time reiterates: “We have reason to believe that the parties supposed they were making a binding contract[; thus,] . . . the court should be very reluctant to permit a defendant to avoid its contract.” *Id.* (Crane, J., dissenting). Interestingly, this statement of the parties’ intent and Crane’s confidence in ascertaining it is more tentative than the first two statements, which asserted that the parties’ contractual intent was “beyond question” and something the parties must “surely . . . have had in mind.” *Id.* at 472. In support of the last phrase quoted about the court’s reluctance to permit contract avoidance, Crane cites the first case in his dissent, *Wakeman v. Wheeler & Wilson Mfg. Co.*, 4 N.E. 264 (N.Y. 1886). The citation is odd because *Wakeman* is a case about whether damages are too uncertain to be awarded, not whether a contract’s terms are too indefinite to be enforced, but one could argue the doctrines are analogous. Crane cited *Wakeman* because of the following statement in that opinion: “A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain.” *Wakeman*, 4 N.E. at 266. More generally, it is worth noting that Crane’s dissent does not cite any of the cases in Cardozo’s opinion; nor does Cardozo cite any of the cases in the dissent.

⁸² *Sun Printing*, 139 N.E. at 473 (Crane, J., dissenting).

allowing the seller to “escape from its formal obligations” would “give the sanction of law to a deliberate breach.”⁸³ In support, Crane adds a string cite of three Cardozo opinions, including his well-known opinion in *Wood v. Lucy, Lady Duff-Gordon*,⁸⁴ though none of those cases involved a claim of indefiniteness or explicitly referenced “deliberate breach.”⁸⁵

D. Remand and Cardozo’s Subsequent (But Not Second) Thoughts

On remand, Sun Printing, the buyer, amended its complaint to allege that the default price duration should be quarterly periods, a solution not suggested by Judge Crane in his dissent. The trial court, finding that the buyer’s allegation did not remove the contract’s indefiniteness, dismissed the complaint.⁸⁶ This time, the Appellate Division affirmed the trial court without opinion.⁸⁷ In response to a subsequent motion for a leave to appeal, Cardozo initially wrote a memorandum supporting the granting of the motion:

The amount involved is very large, over a million, five

⁸³ *Id.*

⁸⁴ 118 N.E. 214 (N.Y. 1917).

⁸⁵ *Sun Printing*, 139 N.E. at 473. *Wood* involved the granting of an exclusive agency to a fashion promoter in an agreement that did not expressly impose any duties on the agent. Cardozo held (with Crane dissenting, interestingly) that there was an implied obligation on the part of the agent to exercise “reasonable efforts to bring profits and revenues into existence.” *Wood*, 118 N.E. at 215. Unlike *Sun Printing*, *Wood* was argued on a theory of lack of mutuality of obligation and consideration; that is, Lady Duff-Gordon argued that she got nothing in return for her promise to *Wood*, the agent, because he made no return promise. Although the *Wood* opinion says nothing about a “deliberate breach,” it does show Cardozo’s willingness to read terms into contracts and to reject an outdated “formalism” in which “every slip [is] fatal.” *Id.* at 214. In the second Cardozo case cited by Crane (and the only one of the cases Crane cites that *Sun Printing* discussed in its brief), *Moran v. Standard Oil Co.*, 105 N.E. 217 (N.Y. 1914), Cardozo held that an employment contract under which the employee agreed to sell paint on the employer’s behalf for five years on a commission basis was not terminable by the employer at will, but rather implied an agreement to employ the agent for five years. Cardozo expressed a hesitation to infer an intention to create “so one-sided an agreement,” as the employer was contending for, especially when the document was drafted by the employer’s lawyers, who could easily have drafted an express at will termination provision. *Id.* at 220. Crane was not making any of these points; thus, his citation is somewhat puzzling. The final case, *United States Rubber Co. v. Silverstein*, 128 N.E. 123 (N.Y. 1920) involved the interpretation of an ambiguously worded guaranty. Its relevance to *Sun Printing* is not clear.

⁸⁶ ANDREW L. KAUFMAN, *CARDOZO* 323 (First Harvard Univ. Press paperback ed., 2000).

⁸⁷ *Sun Printing & Publishing Ass’n v. Remington Paper & Power Co.*, 206 N.Y.S. 966 (App. Div. 1924).

hundred thousand dollars [the total amounts of damages alleged by Sun Printing in its Complaint]. The defendant is trying to squirm out of a contract on very technical grounds. We sustained its position, though with avowed reluctance. If there is any reasonable way of holding this complaint good, I am sure we shall be glad to take advantage of it.⁸⁸

After receiving the seller's brief, however, Cardozo changed his mind, concluding that the chances of reversal were "negligible" and recommending denial of the motion.⁸⁹ The other Court of Appeals judges concurred in Cardozo's assessment.

Around the same time, Cardozo revisited *Sun Printing* in *The Growth of the Law*, based on lectures he gave at Yale Law School as a sequel to *The Nature of the Judicial Process*, also based on lectures he had given at Yale Law School several years earlier. Cardozo opened his last lecture with a discussion of *Sun Printing* as a counterbalance to case examples he had previously referenced that "stress the worth of change, the virtue of flexibility, as contrasted with the worth of certainty."⁹⁰ To Cardozo, *Sun Printing* was a case in which "certainty was founded to be the larger good when mobility was weighed against it."⁹¹ Cardozo then revisited and elaborated on some of the themes of his previously published opinion:

Here was a case where advantage had been taken of the strict letter of a contract to avoid an onerous engagement. Not inconceivably a sensitive conscience would have rejected such an outlet of escape. We thought this immaterial. The court subordinated the equity of a particular situation to the overmastering need of certainty in the transactions of commercial life. The end to be attained in the development of the

⁸⁸ KAUFMAN, *supra* note 86, at 323. The "avowed reluctance" is not evident in Cardozo's opinion, however.

⁸⁹ KAUFMAN, *supra* note 86, at 323 (quoting from Report in *Sun Printing*, CM, Box 2, Folder 2114 (motion 6, Jan. 19, 1925)).

⁹⁰ CARDOZO, *supra* note 1, at 109. The quotation at the beginning of this article represents Cardozo's pro-flexibility views from one of the earlier lectures.

⁹¹ CARDOZO, *supra* note 1, at 109. After then summarizing the *Sun Printing* facts, Cardozo adds a footnote stating that "a different result may be reached if the omitted term is of subsidiary importance (1 Williston, *Contracts*, § 48), but ordinarily the price to be paid, if reserved for subsequent agreement, is to be ranked as fundamental." CARDOZO, *supra* note 1, at 110 n.1.

law of contract is the supremacy, not of some hypothetical, imaginary will, apart from external manifestations, but of will outwardly revealed in the spoken or written word. The loss to business would in the long run be greater than the gain if judges were clothed with the power to revise as well as to interpret. Perhaps, with a higher conception of business and its needs, the time will come when even revision will be permitted if it is revision in consonance with established standards of fair dealing, but the time is not yet. In this department of activity, the current axiology still places stability and certainty in the forefront of the virtues.⁹²

Thus, Cardozo had no misgivings about his earlier opinion.

II. COMMENTARY ON *SUN PRINTING*

A number of commentators, including some of the most prominent writers on contract law, have offered various critiques of *Sun Printing* over the years since its appearance. A brief note on the case published in the year it was decided rejects the option theory but agrees with the dissent that the parties had agreed to make a binding contract.⁹³ The note further argues that, given the monthly payment period specified in the contract, the court should have implied the Canadian Export Paper Company maximum price during the month of each shipment of paper, thus endorsing one of Judge Crane's proposals.⁹⁴ Fifteen years later, Arthur Corbin, in an article on Cardozo's contracts cases, puzzled over *Sun Printing* in a footnote, calling the decision "somewhat surprising[]" and speculating that Cardozo may have been "less moved to cure defects in the work of the well-paid lawyers of two rich corporations."⁹⁵ Grant Gilmore

⁹² CARDOZO, *supra* note 1, at 110-11 (footnote omitted).

⁹³ Case Note, *Contracts – Construction – Agreements to Agree*, 33 YALE L.J. 97, 98 (1923).

⁹⁴ *Id.* ("Since shipments and payments were to be monthly, it seems that the adoption of the maximum price charged by the Canadian Export Company during the month of shipment offered a reasonable basis for giving operative effect to that intent. Nor does any substantial reason appear for the court to refuse to apply to the determination of the period over which a price is to operate the rule of reasonableness which is regularly applied to fix prices or times for delivery.").

⁹⁵ Arthur Linton Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 48 YALE L.J.

cited Corbin's criticism of *Sun Printing* in *The Death of Contract*, and quipped that "Cardozo was not always a model of consistency."⁹⁶ Judge Posner, in his book on Cardozo, notes Crane's "powerful dissent" and speculates that Cardozo may have had political (in the broad sense) motivations for deciding *Sun Printing* the way he did. According to Posner: "Cardozo wanted to be an institutional leader and succeeded in this aim, in part, by avoiding the pose of an ostentatious liberal."⁹⁷

Larry DiMatteo has provided the most detailed critique of Cardozo's reasoning in *Sun Printing*, albeit in an article focused on *Wood v. Lucy, Lady Duff-Gordon*.⁹⁸ DiMatteo's main point is that Cardozo, who generally favored contextual analysis in contract cases such as *Wood*, misapplied that analysis in *Sun Printing*. First, DiMatteo notes that Cardozo was willing to consider some contextual evidence in *Sun Printing*. Specifically, "Cardozo ventures outside the contract to note that market prices were on the rise in 1920."⁹⁹ But, DiMatteo argues, Cardozo did not follow the implications of this contextual evidence. He could have recognized that the rising market prices explained why the buyer agreed to a price maximum set at the "prime customer rate" and that if market prices rose higher than that prime rate, "the possibility for exploitation existed."¹⁰⁰ Instead,

426, 428 n.1 (1938); 52 HARV. L. REV. 408, 410 n.1 (1938); 39 COLUM. L. REV. 56, 58 n.1 (1938). Corbin contrasts *Sun Printing* with several other cases that in his view demonstrated Cardozo's "clear genius in his filling of gaps, his finding of promises by implication where none was put into clear words, his discovery and enforcement of the directing purpose for which a contract was made, not permitting that purpose to fail by reason of vagueness in details." 48 YALE L.J. at 427, 52 HARV. L. REV. at 409, 39 COLUM. L. REV. at 57. These cases include *Cohen & Sons*, distinguished by Cardozo in his opinion, see *supra* note 51, and *Moran* and *Wood*, cited by the dissent, see *supra* note 85.

⁹⁶ GRANT GILMORE, *THE DEATH OF CONTRACT* 144 n.137 (Ronald K. L. Collins ed., 1998).

⁹⁷ RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 121 (Univ. of Chicago ed., 1990). Cardozo's eagerness to provide a counterbalance to his general support of judicial flexibility in *The Growth of the Law*. *CARDOZO*, *supra* note 1, provides some support for Posner's view.

⁹⁸ Larry A. DiMatteo, *Cardozo, Anti-Formalism, and the Fiction of Noninterventionism*, 28 PACE L. REV. 315 (2008).

⁹⁹ *Id.* at 338. Cardozo's observation may go outside the contract, but it does not go outside the record. *Sun Printing* noted the increase in prices in its complaint. See *Complaint*, *supra* note 11. In paraphrasing Cardozo's opinion on this point, DiMatteo takes a small, but important, liberty. Cardozo says that market prices "happened to rise." That suggests Cardozo was looking at the matter solely from the *ex post* perspective of what actually happened rather than what the parties expected *ex ante* at the time of contracting, which is what DiMatteo is suggesting, as evidenced by his subsequent analysis. Nevertheless, I agree with DiMatteo's view for reasons discussed in the next section.

¹⁰⁰ DiMatteo, *supra* note 98, at 338. DiMatteo does not explain what he means by the

Cardozo turned to the disadvantage to the seller if market prices had fallen, to which DiMatteo's response is, "why is this a bad thing?"¹⁰¹

Second, DiMatteo criticizes Cardozo's argument that the omission of a price duration term as well as a price term made the contract nothing more than an "agreement to agree" as "strained logic." DiMatteo argues that Cardozo could have based the price duration on the price durations for the first several months of the contract (more of a structural argument than a contextual argument) and found that the contract implied either a monthly or quarterly price duration.¹⁰² Lastly, DiMatteo attacks Cardozo's refusal to read into the contract a reasonable term as inconsistent with his ready use of a "contextual inquiry into business practice" to impose a reasonable efforts requirement in *Wood*. DiMatteo criticizes Cardozo's willingness to blame the buyer for unilaterally insisting on the appropriate price duration term as

not a rational argument given the fact that the buyer had set the new price at the maximum price allowed by the contract, that the unexpired portion of the contract was a modest twelve months, and that the seller's response to the buyer's attempt to set the price and duration of the price change was to reject any obligation under the contract.¹⁰³

Despite his sharp criticism of Cardozo's opinion, DiMatteo (perhaps halfheartedly) nevertheless defends it on the basis of Cardozo's alternative rationale that the decision would "stimulate certainty in legal rules and business transactions."¹⁰⁴ According to

"possibility for exploitation," but I assume he means that the seller would unreasonably try to escape its contractual obligations, which in fact happened.

¹⁰¹ DiMatteo, *supra* note 98, at 338. DiMatteo does not consider the possibilities that a market price decline might be a "bad thing" if it was not anticipated by the parties or if for some reason the maximum fell below the seller's production costs.

¹⁰² DiMatteo, *supra* note 98, at 338. DiMatteo adds that this interpretation would be "especially reasonable given that a price source was accessible" and "the buyer was willing to pay the maximum contract price as represented by that price source." DiMatteo, *supra* note 98, at 338-39. But DiMatteo does not explain how the "price source" would solve Cardozo's price duration concern. It may be that he is implicitly endorsing Judge Crane's suggestion that the applicable price duration could be the duration of the contracts of the Canadian Export Paper Company, a suggestion I take up in the next section.

¹⁰³ DiMatteo, *supra* note 98, at 339 (footnote omitted).

¹⁰⁴ DiMatteo, *supra* note 98, at 340 (adding that, despite his attempt, "[i]t is difficult to reconcile Cardozo's opinion in *Sun Printing with Lucy, Lady Duff-Gordon*, and the cases cited by Justice Crane. . .").

DiMatteo: “Without some limits to the contextual manipulation of material terms, parties would intentionally leave gaps in their contracts,” which “would encourage speculation and exploitation in future commercial transactions.”¹⁰⁵

Several other commentators have offered support for Cardozo’s view. With ambivalence similar to DiMatteo’s, Karl Llewellyn, though he criticizes the *Sun Printing* opinion as “labored and unsatisfactory” as well as a “bothering step backward,”¹⁰⁶ blames the buyer’s lawyers rather than Cardozo for the outcome because the lawyers’ “bad pleadings” failed to provide the relevant commercial or contextual reading of the contract.¹⁰⁷ Charles Brower and Randy Barnett, responding to Crane’s dissent, contend that the fact that Crane was able to come up with so many alternative ways for the court to fill the gap actually proves Cardozo’s point, which was that the court had no basis for choosing from among the various possibilities the one that best represented the parties’ intent.¹⁰⁸ Curtis Bridgeman sees *Sun Printing* as an example of Cardozo’s willingness to adhere to formalism in that “Cardozo considered himself bound to the formal rules of contract even in some cases where they seemed to

¹⁰⁵ DiMatteo, *supra* note 98, at 340.

¹⁰⁶ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 242 (1960).

¹⁰⁷ *Id.* at 242 n.243. See also Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379, 1393 n.72 (1995) (noting that *Sun Printing* is best viewed as a “pleadings case” in that, unlike the dissent, Cardozo was not willing to “assume facts about a particular commodity market” but demanded that the plaintiff buyer plead those facts); KAUFMAN, *supra* note 86, at 322 (arguing that Cardozo’s “position was quite straightforward”: he found an “important gap in the terms of the agreement” and the “plaintiff had produced no evidence of business usage that would fill the gap,” a “defect” that “was fatal”). But see DiMatteo, *supra* note 98, at 339 (criticizing Cardozo’s statements concerning the uncertainty in the record about whether the Canadian Export Paper Company price was fluctuating as “retreat[ing] into the nuance of unsubstantiated facts”).

¹⁰⁸ Charles H. Brower II, *Mind the Gap*, 2016 B.Y.U. L. REV. 1, 11. In Brower’s words:

While appealing in some respects, the menu of options presented by Judge Crane simply reinforced Cardozo’s main point. In the absence of any contractual basis, the court had no disciplined basis on which to supply the omitted term. Although the court might choose any number of solutions, each one might produce vastly different economic consequences in a rising market, none of which may have laid within the contemplation of the parties. In other words, the court would be pulling numbers out of thin air, and that did not constitute a judicial act.

Id. (footnotes omitted); see also RANDY BARNETT, *CONTRACTS* 98 (2010) (“Crane’s ability to articulate numerous different ways of filling in the gap unintentionally supported Cardozo’s conclusion that this contract was too indefinite to be enforced.”).

give an unjust, or at least unhappy, result.”¹⁰⁹ Focusing on Cardozo’s argument that enforcing the contract would put the seller at the mercy of the buyer, Lawrence Cunningham justifies the decision as an example of Cardozo’s desire to deter opportunistic behavior by contracting parties.¹¹⁰

Perhaps most notably, Andrew Kaufman, in his majestic biography of Cardozo, defends *Sun Printing* on the ground that parties who write defectively incomplete contracts should bear the consequences. Kaufman writes:

Cardozo certainly believed in creative interpretation of the language of business contracts to comport with the commercial background. He was not willing, though, to push interpretation to the point where it appeared to him to be revision of a contract that was invalid as written. He would not manipulate the rules of contract interpretation to do justice on an individual case basis. . . . Cardozo’s bottom line in *Sun Printing* was that there were areas of commercial dealing where the parties either by design or accident did not reach binding agreements, and in those areas they took their chances. . . . Cardozo’s opinion reflected one of his

¹⁰⁹ Curtis Bridgeman, *Allegheny College Revisited: Cardozo, Consideration, and Formalism in Context*, 39 U.C. DAVIS L. REV. 149, 184-85 (2005).

¹¹⁰ Cunningham, *supra* note 107, at 1394-95. Cunningham argues:

If the writing were taken to mean that the buyer had agreed to pay the specified ceiling price, the seller would have been “at the mercy of the buyer” with respect to the duration of that price. For example, the buyer could have insisted on paying the ceiling price for so long as it was favorable, and when it became unfavorable, the buyer could then have refused to do so. In short, under the contract as written, the seller had no basis for knowing the duration of the price. Thus, while it would be correct to understand Cardozo’s decision in *Sun Printing* as a refusal to make contracts for the parties and therefore to embrace the principle of freedom of contract, the case warrants a finer reading. It also reflects an unwillingness to countenance exploitive terms to which the parties would most likely not have agreed.

Cunningham, *supra* note 107, at 1394-95 (footnotes omitted). In Cunningham’s view, the anti-opportunism approach (i.e., an approach that avoids interpretations that would put one contracting party “at the mercy” of the other) unifies Cardozo’s decisions in *Sun Printing* and *Wood v. Lucy, Lady Duff-Gordon*. See Cunningham, *supra* note 107, at 1393-97. DiMatteo challenges Cunningham’s mercy argument, contending that in *Sun Printing*, unlike *Wood*, “[i]njustice was not prevented, but was incurred with the non-enforcement of the contract.” DiMatteo, *supra* note 98, at 338.

major instincts – that life, particularly life in modern industrial society, was risky, and that acceptance of a large measure of risk was a necessary cost attending the rewards. In contracts, as in torts, the law offered some protection, but only so much. There were times when people and businesses had to look out for themselves.¹¹¹

Other commentators, rather than agreeing or disagreeing with *Sun Printing*, use the case to illustrate broader points about contracting or contract law or theory. Stewart Macaulay, in his classic article on non-contractual relations in business, references *Sun Printing* (without citing it by name) as an example of the irrelevance of contract law by arguing that the case has had no effect on either contracts in the industry or on business behavior more generally.¹¹² Randy Barnett sees the case as representing a conflict over whether more than intention to be legally bound is necessary for a contract to be enforceable, with Crane taking the position that intent to be legally bound is sufficient and Cardozo taking the position that “more than this is required for an enforceable contract to exist.”¹¹³ Specifically, Cardozo’s view is that if “the parties have failed to make their own private law for the courts to enforce,” they “should be free from having terms to which they did not consent imposed on them by a court.”¹¹⁴

Several commentators use *Sun Printing* as a vehicle for discussing the possibility of “cure by concession” as a solution

¹¹¹ KAUFMAN, *supra* note 86, at 323-24.

¹¹² Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 60 (1963) (“The standard contract used by manufacturers of paper to sell to magazine publishers has a pricing clause which is probably sufficiently vague to make the contract legally unenforceable. The house counsel of one of the largest paper producers [in Wisconsin] said that everyone in the industry is aware of this because of a leading New York case concerning the contract, but that no one cares”). See E. ALLAN FARNSWORTH, CONTRACTS § 3.29, p. 213 n.11 (4th ed. 2004) (quoting this passage and stating that it refers to *Sun Printing*); see also KAUFMAN, *supra* note 86, at 323. Professor Kaufman reads Macaulay’s statement as a “practical confirmation” of Cardozo’s position because it shows that “[b]uyers and sellers in that industry have apparently decided to gain flexibility by leaving some uncertainty in their dealings.” An alternative interpretation of Macaulay’s description is that contracting parties in the newsprint industry are willing to live with the *Sun Printing* rule, not that they prefer it. It is just not worth it to them to contract around it because specifying a more definite price is costly and, in most cases, they work things out.

¹¹³ Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 871 (1992).

¹¹⁴ *Id.*

to indefinite contracts. Omri Ben-Shahar describes this approach, which he reframes as a “no-retraction principle,” as follows: “The party who seeks enforcement of the incomplete agreement is granted an option to enforce the transaction supplemented with terms that are the most favorable (within reason) to the other party.”¹¹⁵ Unlike a “majoritarian” approach to contractual gap-filling, which “imposes” terms on contracting parties, under the cure by concession view, “the missing terms must be such that the completed deal is guaranteed to be no worse than what the retracting party could have presumptively intended when the incomplete promise was made, and it is enforced only if the promisee so chooses.”¹¹⁶ Ben-Shahar then argues that Cardozo seemed willing to adopt this approach in *Sun Printing*, but Cardozo declined to do so because the contract omitted price duration, as well as price, and the buyer did not concede to accept the price duration term most favorable to the seller.¹¹⁷

Finally, several commentators suggest that the Uniform Commercial Code and the Restatement (Second) of Contracts reject the rationale of *Sun Printing* and would dictate a different result if the case were to be decided today.¹¹⁸ In fact, it is quite possible that

¹¹⁵ Omri Ben-Shahar, *Contracts Without Consent: Exploring a New Basis for Contractual Liability*, 152 U. PA. L. REV. 1829, 1862 (2004).

¹¹⁶ *Id.* at 1863.

¹¹⁷ Professors Farnsworth and Barnett offer variations on this theme. Farnsworth, in his treatise, states: “On the court’s own reasoning, had the buyer offered to pay the highest price for the month of delivery or any preceding month during the period subject to agreement, instead of merely offering to pay the Canadian price for the month of delivery, there would appear no reason to refuse to enforce the agreement.” FARNSWORTH, *supra* note 112, at § 3.29, p. 213. It is not clear why Farnsworth refers to the “preceding” month rather than “succeeding” months, or why he focuses on the “highest price for the month” rather than the Canadian Export Paper Company price at the time of renewal. Barnett suggests that the buyer might have prevailed if it had “committed itself to pay for the duration of the agreement any monthly increases in the Canadian standard price, and continued to pay the increased price even if the Canadian standard price later fell.” Barnett, *supra* note 113, at 869. It is not clear why Barnett believes the buyer should have had to commit itself to the highest Canadian Export Paper Company price even if that price later fell. The ambiguity in how to apply the “cure by concession” approach, represented by these two versions, may suggest difficulties in adopting this approach.

¹¹⁸ See Barnett, *supra* note 113, at 870 (“Today, of course, courts would likely reach a different outcome by interpreting the Uniform Commercial Code (U.C.C.) to fill the price term gap.”); see Cunningham, *supra* note 107, at 1394 n.76, 1407 (“While the dissent’s approach in *Sun Printing* was resisted at common law, it has been expressly sanctioned by the U.C.C.”) (stating that “the received understanding of *Sun Printing* – holding that a contract that does not fix a price term is unenforceable – [was] reversed by section 2-305 of the Uniform Commercial Code”); see also Daniel P. O’Gorman, *The Restatement (Second) of Contracts’ Reasonably Certain Terms Requirement: A Model of Neoclassical Contract*

Cardozo could have reached the same result were he to be deciding the case today. UCC § 2-305(1)(b) states:

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 . . . the price is left to be agreed by the parties and they fail to agree.

Comment 1 to that section adds that if the requirements of UCC § 2-305 are met, the UCC “rejects . . . the formula that ‘an agreement to agree is unenforceable.’” On the other hand, UCC § 2-305(4) states: “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.” Thus, the key question is what the parties intended to happen if they could not reach agreement. Although Cardozo is somewhat ambiguous on this point, one could read him to be saying that the parties intended not to be bound unless they agreed on price and price duration. More important, UCC § 2-305 addresses only an “Open Price Term.” It says nothing about price duration, which Cardozo viewed as a separate term (though one obviously intertwined with the price term).¹¹⁹ If § 2-305 does not apply, the UCC’s general gap-filling provision, § 2-204(3) would apply. That section states: “Even though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.”¹²⁰ Under that language, Cardozo would seem

Law and a Model of Confusion and Inconsistency, 36 U. HAW. L. REV. 169, 236 n.388 (2014) (stating that Restatement (Second) § 204 cmt. d and UCC § 2-305 both reject the rationale in *Sun Printing*).

¹¹⁹ See FARNSWORTH, *supra* note 112, at § 3.29, p. 213 n.11 (“Since the court [in *Sun Printing*] viewed the indefiniteness as one of time as well as price, U.C.C. § 2-305 does not compel a different result.”).

¹²⁰ U.C.C. § 2-204(3) (2016). Restatement (Second) of Contracts § 33 is similar to U.C.C. § 2-204(3). It states:

- (1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.
- (2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.
- (3) The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.

to have ample room to reach the same result he did in *Sun Printing*. One could easily imagine Cardozo deciding both that the parties did not “intend to make a contract” absent agreement on the price and price duration terms, and that in any case, there was no principled basis for determining a remedy.

III. THE CONTEXT OF *SUN PRINTING*

As Cardozo presents the case, *Sun Printing* appears to involve a garden variety commercial contract between two large entities concerning a standardized good in a thick market. Thus, the case seems like a paradigmatic example of the type of “A vs. B” abstraction common in Restatement illustrations and other types of legal analysis. Limited by the information provided by the buyer in its complaint, Cardozo offers no hint as to who the parties are, the circumstances surrounding their agreement, why they might have chosen to structure the deal the way they did, or why the seller was dissatisfied with the contract. Suppose, however, that we dig a little deeper. What would we find? And does it matter?¹²¹

A. Background to the Contract

Sun Printing & Publishing Association published the *New York Sun*, which at the time the case arose was one of the leading urban newspapers in the country, with both daily and Sunday editions. It was best known for having declared, “Yes, Virginia, there is a Santa Claus” in 1897 (and repeatedly thereafter).¹²² The Sun was “widely read by well-off people” and had initially withheld its endorsement from Cardozo when he ran for judge of the New York Supreme Court in 1913, though it did wind up endorsing him shortly before the election.¹²³

RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981).

¹²¹ In his philosophical writings, Cardozo argued that contextual facts should matter in business cases. See CARDOZO, *supra* note 1, at 124-25 (“Often the question before the court is concerned with the rule that is to regulate some business enterprise or transaction. The facts of economic and business life are then relevant considerations.”).

¹²² *National Endowment for the Humanities, Chronicling America: Historic American Newspapers*, LIBR. OF CONG., <http://chroniclingamerica.loc.gov/lccn/sn83030272/> (last visited Oct. 27, 2017).

¹²³ KAUFMAN, *supra* note 86, at 122. Kaufman does not suggest that Cardozo harbored any ill will toward the *Sun* at the time, or later, and in any case the idea that Cardozo would base his decision on any personal animus toward Sun Printing is wholly inconsistent with the

Remington Paper & Power Company, headquartered in Watertown, New York, and originally founded in 1865,¹²⁴ was a large manufacturer of paper, including newsprint. In 1916, Remington was the fifth largest producer of newsprint paper in the United States and the eleventh largest in the U.S. and Canada combined.¹²⁵ In that year, Remington produced 49,426 tons of paper,¹²⁶ and in 1920, Remington's daily tonnage was 156 (56,940 per year),¹²⁷ which means that the 12,000-ton annual quantity stated in the contract was a significant portion (more than 20%) of Remington's annual production.

The manufacture of newsprint paper from wood pulp began in the 1860s.¹²⁸ By the time of the contract, the market had grown significantly. The newsprint market was somewhat segmented. There were the large daily newspapers, of which the *New York Sun* was one. There were a larger number of smaller daily newspapers. And there were weekly newspapers. The daily newspapers tended to buy their newsprint through contracts,¹²⁹ with the larger dailies dealing directly with the manufacturers and the smaller dailies contracting through middlemen (jobbers). The weekly newspapers generally bought newsprint in the open (spot) market.¹³⁰

In the years preceding the contract, the newsprint paper industry had undergone significant turmoil. Between 1910 and 1915, competition in the industry had increased significantly, as a number of new Canadian mills sprang up and older mills added newer, more efficient machines. These Canadian mills, which exported most of their newsprint to the United States,¹³¹ had several advantages over

picture Kaufman paints of him in the book.

¹²⁴ See Howard J. Palmer, *The History of Paper Making in Northern New York, Paper: A Weekly Technical Journal for Paper and Pulp Mills*, at 15-16 (Mar. 16, 1921). The company was organized by Alfred D. Remington, son of Illustrious Remington, who had founded his first mill in Watertown along with Alfred in 1854.

¹²⁵ FED. TRADE COMM'N, REPORT ON THE NEWS-PRINT PAPER INDUSTRY 33 (1917) [hereinafter "FTC 1917 Report"]. Remington's share of the U.S. production was 3.6% and its share of the US and Canadian production was 2.5%. *Id.* Remington operated three newsprint mills containing five paper machines. *Id.* at 35.

¹²⁶ *Id.* at 33.

¹²⁷ *Newsprint Paper Industry: Hearing Before a Subcomm. of the Comm. on Mfrs. U.S. Sen.*, 66th Cong. 508-09 (1920) [hereinafter "Senate Subcommittee Hearings"].

¹²⁸ *Id.* at 441.

¹²⁹ *Id.* at 473 ("About 90 per cent of the total shipments of news-print paper is sold under contract.").

¹³⁰ *Id.* at 118.

¹³¹ *Id.* at 114. By 1916, Canada furnished about 30% of all the newsprint used in the

their American counterparts, including access to cheap wood and cheap water power.¹³² In addition, in 1911 the U.S. removed tariff duties from imports of newsprint from Canadian companies. As a result, Canadian manufacturers could sell newsprint for an average of \$.225 per 100 lbs. (\$4.50/ton) less than American manufacturers.¹³³ The increase in the number of Canadian mills, as well as their price advantage, led to declining prices for newsprint and gave newspaper publishers a market advantage, which they used to secure favorable contract terms, including flexible quantity terms¹³⁴ and terms requiring manufacturers to pay for shipping costs.¹³⁵

In 1916, the newsprint market became more favorable to manufacturers, as prices began to increase and manufacturers were able to negotiate better contract terms with the large newspaper publishers.¹³⁶ In part, this shift resulted from the increased demand for newsprint, as businesses sought more advertising in newspapers to reduce their corporate income taxes and the general public hungered for news of World War I, both of which increased the length of newspapers.¹³⁷ Demand by foreign buyers also increased because of a shortage of paper in foreign markets.¹³⁸ Demand for non-newsprint paper also increased, and manufacturers shifted some production away from newsprint to more profitable types of paper.¹³⁹ The manufacturers claimed they could not meet all of this higher demand with existing mill capacity.¹⁴⁰ In addition, manufacturers faced higher production costs, such as a shortage of coal supplies.¹⁴¹

A final factor was that in April 1915, the newsprint paper

United States. Senate Subcommittee Hearings, *supra* note 127, at 45.

¹³² E.O. Merchant, *The Government and the News-Print Paper Manufacturers*, 32 Q. J. ECON. 238, 240 (1918) [hereinafter "Merchant I"].

¹³³ *Id.*; see also FTC 1917 Report, *supra* note 125, at 45.

¹³⁴ FTC 1917 Report, *supra* note 125, at 56 (stating that before 1917, it was common to have quantity terms that included some flexibility, such as a maximum and minimum or a stated quantity with a stated percentage deviation allowance).

¹³⁵ Merchant I, *supra* note 132, at 240-41.

¹³⁶ FTC 1917 Report, *supra* note 125, at 132.

¹³⁷ Merchant I, *supra* note 132, at 241; FTC 1917 Report, *supra* note 125, at 132; S. REP. NO. 662, at 3 (1920) [hereinafter "Senate 1920 Report"].

¹³⁸ Merchant I, *supra* note 132, at 242.

¹³⁹ Merchant I, *supra* note 132, at 242; Senate 1920 Report, *supra* note 137, at 3.

¹⁴⁰ Merchant I, *supra* note 132, at 242; but see FTC 1917 Report, *supra* note 125, at 134 ("While there was approximately enough paper to go around, publishers were fearful that they could not get their supply.").

¹⁴¹ Merchant I, *supra* note 132, at 243.

manufacturers had decided to form the News-Print Manufacturers Association, in hopes of improving conditions for the mills.¹⁴² Remington was a member of the Association. Another member of the Association was the Canadian Export Paper Company, which was formed in 1916 to pool the export business of, and act as agent for, five of the biggest Canadian companies representing one-third of Canadian output of newsprint paper.¹⁴³ The activity of the Association may also have artificially restricted newsprint output and contributed to the price increases of 1916.¹⁴⁴

The large daily newspapers, which bought most of the newsprint, enjoyed more favorable prices and terms than the smaller purchasers, which often purchased their newsprint through intermediaries (jobbers). The larger publishers, some of which purchased 100 tons of newsprint per day, typically had year-long contracts generally corresponding with the calendar year, while the smaller publishers purchased their newsprint in the more expensive spot market.¹⁴⁵ As a result of their advantages, many of the publishers of the large daily newspapers “did not feel the effects of the rising prices until the end of 1916, when their favorable contracts expired.”¹⁴⁶ In the 1917 contracts, many manufacturers switched to “f.o.b. mill” pricing, meaning the publishers had to pay for transportation. In addition, the manufacturers eliminated the previously existing flexibility publishers had enjoyed on quantity.¹⁴⁷

Meanwhile, in response to complaints by the publishers, the federal antitrust regulators got involved. At the request of Congress, the Federal Trade Commission began an investigation. A report by the FTC “found that prices had been increased in the year 1917 more than could be justified by increased cost” and “that the increase had

¹⁴² Merchant I, *supra* note 132, at 238; FTC 1917 Report, *supra* note 125, at 40.

¹⁴³ FTC 1917 Report, *supra* note 125, at 42. According to testimony before the Senate Subcommittee by Alva Snyder, an examiner for the FTC, George F. Steele, the secretary of the Newsprint Manufacturers’ Association, had advocated the formation of the Canadian Export Paper Company after the FTC and Attorney General’s investigations had started. *See* Senate Subcommittee Hearings, *supra* note 127, part 2, at 121.

¹⁴⁴ Merchant I, *supra* note 132, at 239; FTC 1917 Report, *supra* note 125, at 41-42, 132; Senate 1920 Report, *supra* note 137, at 3.

¹⁴⁵ Merchant I, *supra* note 132, at 240; FTC 1917 Report, *supra* note 125, at 48, 132.

¹⁴⁶ Merchant I, *supra* note 132, at 243.

¹⁴⁷ FTC 1917 Report, *supra* note 125, at 56; *see also* Senate 1920 Report, *supra* note 137, at 1 (noting the shift from f.o.b. destination pricing to f.o.b. mill pricing by the end of 1916, as well as a “strict rule against allowing leeway in tonnage to the buyer, who was compelled to take his allotment monthly whether he needed it or not”).

been due, in part, to the restriction of competition by important manufacturers in Canada and the United States.”¹⁴⁸ More specifically, the FTC uncovered evidence that the newsprint manufacturers, acting through their Association, had tacitly agreed not to interfere with one another’s customers, restricted production, and prevented or discouraged the building of new mills.¹⁴⁹ Based on this evidence, the Department of Justice brought a criminal antitrust action against seven newsprint manufacturers (not including Remington), five of whom pleaded *nolo contendere* and agreed to price regulation by the Federal Trade Commission for the duration of the war and three months thereafter.¹⁵⁰ In response to a subsequent proceeding by the Department of Justice, the newsprint manufacturers (including Remington) agreed to disband the Association,¹⁵¹ though the FTC agreed to collect and publish industry data.¹⁵² The former secretary of the Association, George F. Steele, became the general manager of the Canadian Export Paper Co.¹⁵³

In 1918, the newsprint manufacturers that had settled with the Department of Justice and the publishers fought in various proceedings over the price set by the FTC. The manufacturers succeeded in getting the FTC to raise the regulated price, and the publishers’ attempt to get the FTC or the courts to reopen the case failed. The resulting price for the second half of 1918, \$3.7525 per 100 pounds, was, in the words of one economist, “a complete victory for the manufacturers,” because they “succeeded in getting a price for their product at least as high if not higher than they would have obtained if there had been no proceedings of any kind.”¹⁵⁴ Reaching a similar conclusion, but under a different rationale, a Senate Report in 1920 concluded that the newsprint manufacturers had effected a “virtual nullification of the law”¹⁵⁵ by exploiting a provision in the FTC settlement allowing manufacturers to receive higher prices than the regulated price under the settlement, provided that the price was

¹⁴⁸ J.A. Guthrie, *Price Regulation in the Paper Industry*, 60 Q. J. ECON. 194, 198 (1946).

¹⁴⁹ Merchant I, *supra* note 132, at 248.

¹⁵⁰ Merchant I, *supra* note 132, at 249.

¹⁵¹ Merchant I, *supra* note 132, at 250.

¹⁵² Merchant I, *supra* note 132, at 253.

¹⁵³ Senate Subcommittee Hearings, *supra* note 127, at 121 (testimony of Alva Snyder, examiner for the FTC).

¹⁵⁴ E. O. Merchant, *The Government and the News-Print Paper Manufacturers*, 34 Q. J. ECON. 313, 327 (1920) [hereinafter “Merchant II”].

¹⁵⁵ Senate 1920 Report, *supra* note 137, at 4.

satisfactory to the publisher.¹⁵⁶

That brings us to the summer of 1919, the time of the *Sun Printing* agreement. At that time, World War I had been over for less than a year. In addition, the FTC price regulation regime had ended. What were the prospects for the future of the newsprint market at that time? Concerns about high and rising prices in the newsprint industry remained. As with the price increase in 1916, the causes of concern were some combination of market conditions leading to a shortage of newsprint and anticompetitive practices by newsprint manufacturers. On the market condition side, one economist published an article in February 1920 (thus likely written in the fall of 1919), which stated:

Government investigations and price fixing during the war undoubtedly tended to discourage and retard the expansion of the industry. This was particularly true of the prices fixed by the Canadian government, which were somewhat lower than those established in the United States. During recent months the revival of business and the excess profits tax have stimulated such a volume of advertising and consequently such a demand for print paper that the capacity of existing mills has been entirely inadequate to cope with the situation. As a result we are now witnessing a paper shortage and famine prices which eclipse anything that occurred during the war.¹⁵⁷

Another economist, writing several decades later in 1946, suggested that anticompetitive practices may have continued during

¹⁵⁶ Senate Subcommittee Hearings, *supra* note 127, at 433-36. In fact, the Canadian Export Paper Company included such a “waiver” in its 1919 and 1920 contracts. “The seller has offered to sell and deliver paper to the purchaser in accordance with the provisions of an agreement between the Attorney General of the United States as trustee, and various manufacturers of newsprint paper, . . . and this contract is made with full knowledge on the part of the purchaser of the provisions of said agreement, and the purchaser hereby waives the benefit of any and all provisions of said agreement and represents that it prefers to make this contract regardless of the provisions of said agreement, and that in entering into this contract is acting in its own interest.” Senate Subcommittee Hearings, *supra* note 127, at 431.

¹⁵⁷ Merchant II, *supra* note 154, at 328. In addition to the Government war restrictions mentioned by Merchant, the War Industries Board also apparently regulated the size of newspapers to conserve on paper. See Senate Subcommittee Hearings, *supra* note 127, at 112 (Testimony of Fleming Newbold, Business Manager of the Washington D.C. Evening Star). Removing those regulations would also predictably lead to a greater use of newsprint.

this time: “A rise in prices caused by increased demand and reduced supply of paper of all kinds during World War I provided a favorable opportunity for restraint and suppression of price competition in several branches of the industry.”¹⁵⁸ Moreover: “During World War I and for a few years thereafter, conditions of demand and supply favored paper manufacturers. Prices rose rapidly, price agreements among sellers were fairly numerous, and price competition was frequently suppressed.”¹⁵⁹

Similarly, a Senate Report from March 1920 concluded that in the immediately preceding years “there has existed a shortage of newsprint paper,” and that “certain newsprint manufacturers have taken advantage of this shortage to exploit the purchasers of such paper and hold them up for excessive, unreasonable, and wholly unfair prices.”¹⁶⁰ The Report added that

many of the newsprint makers here and in Canada were acting in collusion, with the apparent intent to bring about restraint of the normal flow of trade and engage in unfair competition by methods in some cases of creating an artificial supply and in others of resorting indirectly through their bureaus of statistics to an actual fixing of price.¹⁶¹

A somewhat different view of the newsprint market during the 1919-1920 period appeared in a trade journal of the newsprint manufacturers. The journal published the text of a speech given by W. J. Pape, president of a group called the Publishers Buying Corporation.¹⁶² According to data provided by Pape, newsprint production in the U.S. and Canada increased in 1919 over the previous year by 183,000 tons, from 2,000,000 tons to 2,183,000 tons, and increased yet again in 1920 to 2,395,000 tons, for a nearly 20% increase over the two-year period, “notwithstanding the drop in production and the stoppage of new construction caused by the war.”¹⁶³ Thus, according to Pape, there was no shortage, artificial or otherwise, of newsprint. Instead, Pape argued that prices rose during

¹⁵⁸ Guthrie, *supra* note 148, at 203.

¹⁵⁹ Guthrie, *supra* note 148, at 211.

¹⁶⁰ Senate 1920 Report, *supra* note 137, at 2.

¹⁶¹ Senate 1920 Report, *supra* note 137, at 2.

¹⁶² W. J. Pape, *Publishers Admit Responsibility for Recent High Newsprint Prices*, A WEEKLY TECHNICAL JOURNAL FOR PAPER AND PULP MILLS, Mar. 23, 1921, at 9.

¹⁶³ *Id.* at 9.

this period because of the strong increase in demand by newspaper publishers, an increase that the publishers knew was coming. According to Pape, in the early months of 1919 “the newspapers knew that the greatest boom in advertising ever known was about to begin. It was being prophesied by their association, the advertising agencies and the trade press. A period of record consumption of newsprint was at hand.”¹⁶⁴ By July 1919, the spot price, which earlier in the year had been below the average contract price of \$75 per ton (\$3.75 per 100 pounds), rose above that price. Pape chided the publishers who did not adequately prepare for the impending increase in demand by securing reserves of newsprint when spot market prices were low, but instead “preferr[ed] to run on a hand-to-mouth policy.”¹⁶⁵

As for the manufacturers, Pape argued that “it does not seem to have occurred to the manufacturers in the early fall of 1919 that prices would be abnormally high in 1920.” Once 1920 rolled around, however, the larger manufacturers “raised their contract prices for 1920 to \$80, \$90, and \$100 a ton,” (corresponding to \$4, \$4.50, and \$5 per 100 pounds) and “[o]ne eastern mill surprised other manufacturers and scandalized eastern consumers by charging its consumers \$130 a ton [\$6.50 per 100 pounds] on its 1920 contracts.”¹⁶⁶ Pape’s view was that the publishers, not the manufacturers, were to blame for the higher contract prices and significantly higher spot prices (between \$200 and \$440 per ton, corresponding to \$10 and \$22 per 100 pounds) in 1920.¹⁶⁷ Naturally, the manufacturers’ trade journal was happy to print this speech. The Publishers Buying Corporation, of which Pape was president, was formed in April 1920 in response to the crisis. Thus, although Pape disagrees with the cause of the rising prices during late 1919 and 1920, in a way that perhaps not coincidentally supports the formation and importance of the newly formed entity he was heading, he confirms that the higher prices in the foreseeable future could or should have been anticipated at least by the publishers in the summer of 1919.

¹⁶⁴ *Id.* at 10.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 11.

¹⁶⁷ Pape, *supra* note 162, at 11 (According to Pape, “90 percent of the 1920 tonnage was sold under contract and . . . the extortionate spot prices applied to only about 5 percent of the production.”).

B. The Contract

Given that background, we may now consider why the parties might have written the contract the way they did. Many of the contract provisions corresponded with the usual practice in the newsprint paper market, and likely with Remington's prior contracts given that (according to Judge Crane's dissent) the contract was based on Remington's standard form. First, the contract term was structured consistently with a year-long contract based on the calendar year. The contract had fixed prices for the last four months of 1919 and then provided for a reset of prices at the beginning of the calendar year 1920. Second, the fact that the parties left prices "open" for 1920 was also consistent with standard practice in the industry. Prices in the newsprint market did not stay constant over the year and future market prices were hard to predict. Third, the fact that the parties did set prices for the first four months is also consistent with standard industry practice. Many, if not most, contracts in the newsprint industry at that time provided for price resets every quarter.¹⁶⁸ The first month of the contract, September 1919, was the last month of the third quarter of 1919 and had a fixed price, most likely based on the prices for that quarter that existed in contracts in the industry,¹⁶⁹ which would have been known to the parties. The next three months of the contract (October-December 1919) had a higher fixed price, which could have been based on a reasonable prediction of what market prices were likely to be in the last quarter (most of those contract prices would probably have been determined around the same time or not long after the contract was made).

¹⁶⁸ See Senate 1920 Report, *supra* note 137, at 2. The Report states that in the three years before 1920, "the contracts nearly all have the same terms of delivery and reserve the right to readjust terms quarterly. Even the large publishers can not to-day, in most cases, contract for a year's supply at a fixed annual price. The mills, with few exceptions, reserve the right to fix prices quarterly and there is invariably a rise in price each quarter. Moreover, it has been the custom of the large manufacturers during the past three years to notify their customers in advance that it would be necessary to reduce their previous allotments." That was apparently a change from the years leading up to 1917. See FTC 1917 Report, *supra* note 125, at 48 (stating that most newsprint bought by the large dailies at the time was pursuant to one-year contracts at fixed prices).

¹⁶⁹ The price stated in the contract for September 1919 was \$3.73 3/4 per 100 pounds or \$74.75 per ton. W. J. Paper, president of the Publishers Buying Corporation, reported an average contract price of \$75 per ton in July 1919. See Pape, *supra* note 162, at 10.

1. The Sixteen-Month Duration

The contract did, however, contain several apparently unique features, including the open price duration term emphasized by Cardozo and at the heart of his view of the case. But that was not the only unusual feature of the contract. For some reason, Sun Printing found itself in need of a new contract before the end of 1919. Perhaps Sun Printing's needs for paper increased beyond what it had contracted for at the beginning of 1919, or perhaps Sun Printing had contracted with a different manufacturer for 1919 and either Sun Printing or its contracting partner had decided not to perform. In response to this situation, Sun Printing and Remington could have chosen simply to contract for the remainder of 1919 and then enter into a new contract for 1920 in December 1919, but they did not. Instead, they stipulated that the relationship would last for sixteen months. Whether this attempted locking in of a contract partner for 1920 was more important to the buyer or the seller or whether it was of equal importance to both parties is not clear. Even though both parties may have wanted to ensure the stability of a longer-term relationship, there were plenty of alternative publishers and paper manufacturers for the parties to deal with. We can get some information, however, from what we know of the market conditions existing at the time as reflected in the other contract provisions.

2. The Price Ceiling

The key provision, another apparently unique feature of the contract, was the stipulation that the price could be no "higher than the contract price for newsprint charged by the Canadian Export Company to the large consumers." This provision was a price maximum or ceiling. The most natural reason the parties would agree to a price ceiling and not a floor is that they thought there was a reasonable possibility that market prices would increase over the term of the contract. That the parties contemplated higher prices over the term of the contract is further reflected in the fact that the stated price for the last three months of 1919 was higher than the stated price for September 1919.¹⁷⁰ Moreover, the expectation of higher prices was

¹⁷⁰ Two alternative possibilities are that the September 1919 price was some kind of price discount by Remington to induce Sun Printing to agree to the sixteen-month contract, or – less likely – that the October-December price was some kind of above-market price designed

supported by the prevailing market conditions at the time, as noted in the last section. These market conditions included not only increased demand for newsprint, which could lead to a newsprint shortage, but also the concern with recent and possibly continuing anti-competitive (collusive) behavior by the newspaper manufacturers. Either of these scenarios could have led Sun Printing to want to lock in a contract for 1920 early.

Of course, it is possible that market prices could have fallen over the term of the contract.¹⁷¹ Some unexpected new technology could have been invented that reduced production costs for paper manufacturers significantly, for example. Alternatively, exports from other countries could have increased. But neither these, nor other typical causes of falling prices seemed to be on the horizon.¹⁷² Although new plants and adding new machines to existing plants could increase capacity and competition, as had happened earlier in the decade, the Association (according to the Government, at least) and World War I suppressed the building of new plants. Government supervision over prices had only recently ended and even if manufacturers decided to build new plants or add new machines, it would take some time to do those things and other parties in the market would likely know well in advance of future enhanced capacity.¹⁷³ It's telling, for example, that Remington (as discussed

to induce Remington to agree to the longer-term contract. I have found no evidence to support either of these possibilities.

¹⁷¹ Frank A. Munsey, publisher of the New York Sun, as well as the New York Herald, New York Evening Telegram, and the Baltimore News, testified before the Senate Subcommittee that some publishers did not make contracts for the 1920 year. He said, "There are many men who believed that paper would go lower." Senate Subcommittee Hearings, *supra* note 127, at 148. He then added that even he underestimated how much the price would rise: "I must say that my judgment was very bad in that respect. I did not expect to see paper keep on climbing the way it has." Senate Subcommittee Hearings, *supra* note 127, at 148. Indirectly, Munsey's testimony supports the idea that Munsey at least was expecting prices to rise and that concern was motivating him to make the contract with Remington.

¹⁷² Howard Palmer, *The History of Paper Making in Northern New York – Part VII, Paper: A WEEKLY TECHNICAL JOURNAL FOR PAPER AND PULP MILLS*, Mar. 30, 1921, at 13 (stating that between 1916 and 1921 there had been "[n]o radical changes made in the mills" other than "replacing some of the machinery and the rebuilding of the paper machines to make them faster").

¹⁷³ Senate Subcommittee Hearings, *supra* note 127, at 419-20 (testimony of Victor F. Lawson, publisher of the Chicago Daily News, that new mills to alleviate the then-existing newsprint shortage would take about two years to build and that adding additional machinery would take several months); Senate Subcommittee Hearings, *supra* note 127, at 27 (testimony of George McAneny, Executive Manager of the New York Times, that the

below) was at the time of the contract proposing to increase its capacity by merger, which would not increase the capacity of the industry as a whole, rather than by building a new plant. Nor was there any reason to suppose a decline in demand for newsprint. Yes, the war had ended, which could have reduced demand, but any such tendency would have probably been evident by the summer of 1919, when the contract was made. Instead, the indications were that, if anything, demand for newsprint was likely to increase,¹⁷⁴ especially since businesses were starting to recover from the war and taking out more advertising space in newspapers.

Finally, it is possible that the Government had succeeded through its antitrust enforcement activity in eliminating the risk of collusive behavior in the newsprint industry, which would lead to more competition and hence lower prices. That does not seem to have been the perception at the time the contract was drafted, however. On August 20, 1919, right around the time the contract was likely entered into, the U.S. Senate passed Resolution 164, authorizing an investigation into “the news-print paper industry and to ascertain whether it is now or has been engaged in discriminatory, unjust, or illegal practice, and whether the prices now being charged for news-print paper or similar products are excessive, and the causes for existing prices.”¹⁷⁵ Although it is possible that the parties might have thought that swift Senate action would potentially lead to declining prices in 1920, it seems equally if not more plausible that, given the past spotty antitrust record of the Government, the Senate’s huffing and puffing would not have much practical effect on the newsprint manufacturers’ behavior. In fact, on March 6, 1920, just a few months after Remington abandoned the contract, the House of Representatives asked the Secretary of Commerce to provide information concerning “any shortage in the supply of . . . print paper and the classes of newspapers or periodicals that have been affected by such shortage.”¹⁷⁶ Of course, it is possible that the shortage of supply would not have been apparent to the parties in August 1919,

Canadian Export Paper Company had installed new machines in November 1919 but they would not “go in under a year, or until 1922”). Senate Subcommittee Hearings, *supra* note 127, at 27.

¹⁷⁴ A.R.R. Jones, *Canadian Export Paper Co’s Huge Operations: PULP & PAPER MAGAZINE*, May 5, 1921 at 476 (stating, in 1921, that “the last few years have witnessed an unprecedented and unparalleled demand for products of the [paper] industry”).

¹⁷⁵ S. RES. 164, 66th Cong., (Aug. 20, 1919).

¹⁷⁶ H.R. RES. 489, 66th Cong., at 257 (Mar. 6, 1920).

but given that the industry likely knew what was going on some time before Congress, this evidence provides at least some support for the notion that the expectation at the time of the contract was rising prices, or at most continued high prices, not declining prices.

The price ceiling had other important and interesting features. First, as Cardozo noted, the maximum was not a numerical price but based on prices charged by the Canadian Export Paper Company. The Canadian Export Paper Company was not a manufacturer, but instead a “central sales organization,” based in Montreal, that handled the output of several of Canada’s top paper mills.¹⁷⁷ Why would the parties peg the maximum to the price charged by the Canadian Export Paper Company? One possibility, noted by Judge Crane’s dissent, was that the Canadian price was not a “fluctuating price,” but was likely to be stable for the full year. This suggestion is implausible, based both on the nature of the contract and the history of the paper industry, and Cardozo was correct to challenge it. If the parties wanted a price maximum that would not fluctuate over the term of the contract, one would have expected them to state that price maximum explicitly in the contract rather than reference the Canadian Export Paper Company price. Moreover, most contracts in the newsprint industry, as we have seen, involved prices that were not fixed but were periodically reset over the generally year-long term of the contracts. There was no reason to believe the Canadian Export Paper Company price did not conform to that business norm.

Another possible reason to peg the maximum price to the Canadian Export Paper Company price would be that the Canadian company’s prices tended to be fair representations of the going “market” price. Apparently, the Canadian Export Paper Company had “a highly efficient and well equipped statistical department,” in which “the official trade returns of practically every country in the world are received and collated.”¹⁷⁸ If the parties said in their

¹⁷⁷ Jones, *supra* note 174, at 476.

¹⁷⁸ Jones, *supra* note 174, at 477. The article continues:

Constant touch, by means of correspondence, is maintained with the government statistical offices of the various countries, and detailed information of the pulp and paper trade throughout the world, – and much of it of an invaluable kind – is thus obtained. The mode of operation followed in this department is for the records to be collected, converted into Canadian weights and currency, and issued, in the form of monthly, quarterly, and annual reports, to the various departments concerned. In this manner close track is kept of the world’s markets,

contract that they would agree to a price that reflected the prevailing market price, that could have led to distracting and costly disagreements over what exactly this price was. At least the Canadian price would be, as the dissent put it, “definite,” as well as, apparently, fairly accurate and up to date.¹⁷⁹

The more plausible explanation for pegging the maximum to the Canadian Export Paper Company price, however, is that the parties anticipated that the Canadian Export Paper Company price would not exactly track the “market” price, but would potentially be lower, at least for U.S.-based manufacturers. Otherwise, why agree to a price maximum? In fact, prices by Canadian manufacturers were apparently often lower than prices of U.S. manufacturers because of the Canadian companies’ greater access to cheaper wood and water power.¹⁸⁰ In addition, Sun Printing argued in its brief that it would

sources of supply and trade possibilities.

Jones, *supra* note 174, at 477. Although this description of statistical record-keeping in a leading trade journal is unsurprisingly positive, another perspective was that this information facilitated anticompetitive collusion. See Senate 1920 Report, *supra* note 137, at 2-3 (stating that “the companies gathered general statistics on the amount of paper consumed by their different customers so as to estimate what quantity of paper would produce the most favorable market conditions.”).

¹⁷⁹ Further evidence of the Canadian Export Paper Company’s importance in the market can be found in the fact that in February 1919 (several months before the contract), the accounting firm Perley Morse published a tract entitled *Cost Keeping for Newsprint Paper Mills*, which proposed a uniform cost accounting system for integrated newsprint manufacturers. See Perley Morse & Co., *Cost Keeping for Newsprint Paper Mills* (1919). The tract was commissioned by an entity called the Committee on Uniform Cost Keeping, of which Canadian mills associated with the Canadian Export Pricing Company were members and of which one E.S. Coleman, representing those mills, was the co-chair. The proposed system was submitted to the Federal Trade Commission, which in a letter stated that it generally approved of the approach, but cautioned that it had not had sufficient time “to make a thorough study of this matter such as constructive criticism would require.” *Id.* at 5.

¹⁸⁰ One contemporary trade article listed the advantages held by the companies represented by the Canadian Export Paper Company:

Prominent among these [advantageous resources] are great water powers which guarantee a continuity of service at a reasonable rate, stable in flow, with large drainage areas, and with high heads capable of cheap development. Labor is abundant and satisfactory in quality. The tidewater locations are easy of access to the great markets of the world. The big consuming markets are accessible. And, finally, there is the supreme advantage of efficient and expert management.

Jones, *supra* note 174, at 477. Even if one takes some of these boasts with a grain of salt, there is probably at least some truth to them. See also FTC 1917 Report, *supra* note 125, at 114 (stating that the cost of producing newsprint in Canada “is from \$4 to \$5 [per ton, corresponding to \$.20 per 100 pounds] less than in this country”); Senate Subcommittee Hearings, *supra* note 127, at 403 (testimony of Mr. Gefeall of the Chicago Daily News that the Canadian Export Paper Company did not sell at the highest price it could get “because

have in fact contracted with the Canadian Export Paper Company if Remington had not been willing to match its (lower) price. That suggests the price maximum was a variation on a “most favored nation” clause. Moreover, the fact that the contract stipulated that the price maximum was based not just on any old Canadian Export Paper Company price but the price charged to the “large consumers,” who were the publishers like Sun Printing most likely to get price discounts because of the large volume they purchased, further supports the proposition that the Canadian Export Paper Company price was, if anything, likely to be lower than the “market” price.¹⁸¹

But if the parties anticipated that the Canadian Export Paper Company price would be lower than the market price, then why state the price as a maximum rather than simply say that the price will be the Canadian Export Paper Company price? One possibility might be that Remington might have been reluctant to agree to expressly tie the contract price to that of the Canadian Export Paper Company for fear of arousing the antitrust regulators.¹⁸² More likely, the buyer was protecting against the (possibly remote) possibility that the Canadian Export Paper Company price could rise above the market price and the seller was willing to give the buyer protection against that contingency.

Thus, the price maximum was most likely designed as a form of partial price protection for Sun Publishing, which feared higher market prices over the duration of the contract and sought to reduce this risk to some degree. Remington might have been willing to give Sun Publishing this protection for several reasons. First, Remington might have been anxious to obtain and lock in Sun Printing’s significant business for 1920, and offering some price protection was a way to do so. Remington might have been particularly interested in shoring up customers for 1920 early because it had been in negotiations to merge with the St. Regis Paper Company, the number twelve U.S. producer in 1916. Negotiations concerning this merger,

the price of domestic paper, American mills, was higher than that”).

¹⁸¹ The Canadian Export Paper Company sold not only to the large dailies but also to jobbers who resold to smaller newspapers. FTC 1917 Report, *supra* note 125, at 42.

¹⁸² This concern would not have been entirely speculative. Several months after Remington abandoned the contract in December 1919, the U.S. House of Representatives passed a resolution asking the Secretary of Commerce to furnish information concerning, among other things, “whether any class of newspapers have secured by contract or otherwise any undue preference or advantage over other classes of newspapers in the supply of print paper; and such information.” H.R. RES. 489, *supra* note 176, at 276.

which would make Remington the third largest newsprint manufacturer in the U.S., were publicized on August 28, 1919,¹⁸³ and were probably known by Sun Printing at the time the contract was entered into. Demonstrating a guaranteed stable of important customers might have made the deal more attractive and likely to be agreed to by St. Regis. On the other side, the proposed merger deal might have made Sun Printing more apprehensive that Remington would be more likely to demand exorbitant prices post-merger because of its enhanced market power.

Second, Remington might have thought it was not making much of a concession to Sun Printing because Remington might have predicted that the Canadian Export Paper Company price was not likely to deviate too much from the prevailing market price.¹⁸⁴ The anticompetitive version of this story would be that Remington anticipated a market more tightly controlled by manufacturers in the upcoming year and that the Canadian Export Paper Company, given its size and market position in Canada, would be a price leader and thus not likely to undercut prevailing market prices.¹⁸⁵ An alternative reason Remington might not have been too concerned about the price maximum was that Sun Printing agreed to pay Remington any difference in freight rates between the rates Sun Printing would have to pay to ship the paper from Remington's mill and the rates it would have to pay to ship the paper from the Canadian Export Paper Company mills. So perhaps Remington gave with one hand and took back with the other.¹⁸⁶ The freight rate differential might not have been so great, however. In 1916, freight rates from mills in eastern

¹⁸³ *Watertown Paper Mills Plan Merger*, N.Y. TIMES, Aug. 29, 1919, at 18.

¹⁸⁴ The subsequent Senate Report provides some support for the theory that the price maximum did not result from Sun Printing's bargaining power or superior market position. See Senate 1920 Report, *supra* note 137, at 5 ("Even the large newsprint publishers are at the mercy of the manufacturers. It is a special favor to-day for any manufacturer to contract at any price to furnish newsprint paper to any publisher.").

¹⁸⁵ Victor Lawson and J.A. Gefaell, *Declare Canadians Rule Paper Market*, N.Y. TIMES, May 13, 1920, at 26. That article reported that the sales manager of the Interstate Pulp and Paper Company testified before Congress that "[a] combination of Canadian manufacturers practically controls the print paper market through the Canadian Export Paper Company" and that "the prices it set were followed by other manufacturers." In addition, the publisher of the Chicago Daily News testified that "his experience had been that the Canadian company prevented competition."

¹⁸⁶ See FTC 1917 Report, *supra* note 125, at 48 ("The chief cause of the variation in prices between different sections of the country is the wide range in freight rates due to the localization of the news-print industry in the spruce timber regions of northern United States and in Canada.").

states to New York City averaged \$.14 per 100 pounds (\$2.80 per ton),¹⁸⁷ whereas freight rates from Canadian provinces to various states in the U.S. ranged from \$.10 to \$.20 per 100 pounds (\$2 to \$4 per ton).¹⁸⁸ The New York Times reported paying \$.23 per 100 pounds (\$4.60 per ton) for freight on its contracts with the Canadian Export Paper Company in 1920.¹⁸⁹ And Remington's main mills were located in Norfolk and Raymondtown, New York (northeast of its headquarters in Watertown), near the Canadian border and only about 100 miles from Montreal, the headquarters of the Canadian Export Paper Company. The freight rate provision may have just been a hedge against any attempt by the Canadian Export Paper Company to charge its customers lower base prices but then get the money back by charging them more for shipping.

3. *The Price Duration Term*

That leaves the price duration term. Why might the parties have left that open? The first thing to note is that to the extent that the parties expected prices to rise in 1920, the buyer would generally favor a longer price term and the seller would generally favor a shorter price term – that is, a price term with more frequent price adjustments – to align more closely with rising market prices. The standard price duration term in the industry was three months (quarterly) and that was reflected in the price term for the first four months of the contract, as discussed above. Why not just agree to a quarterly price duration term? Perhaps this was another concession that Remington extracted from Sun Printing in exchange for the price maximum. Remington perhaps wanted to reserve the possibility of more frequent (e.g. monthly or bi-monthly) price adjustments.

But it's not clear that Remington would actually benefit from this possibility. It would depend on the duration of the Canadian Export Paper Company contracts with its large customers. If the Canadian Export Paper Company followed the three-month price

¹⁸⁷ FTC 1917 Report, *supra* note 125, at 49. For the 1917 contracts, freight rates in the northeast averaged around \$.15. FTC 1917 Report, *supra* note 125, at 57.

¹⁸⁸ FTC 1917 Report, *supra* note 125, at 50. It's not clear whether the parties meant that the applicable freight rate for the Canadian Export Paper Company would be the freight rates it charged its largest customers, or the freight rates it would charge for shipping paper to New York City, where Sun was located.

¹⁸⁹ Senate Subcommittee Hearings, *supra* note 127, at 22-23 (testimony of George McAneny, Executive Manager of the New York Times).

term that was the industry norm at the time, then that price would be fixed for three months. Suppose in January 1920 that the Canadian Export Paper Company agreed to three-month price terms with its large customers and set the contract price at \$4.50 per 100 pounds. That price would prevail for January, February, and March. Even if spot market or contract prices rose during that period, if Remington demanded a monthly reset of prices, the contract price under the maximum price term would still be \$4.50 each month until the next reset of the Canadian Export Paper Company contract prices in April 1920. So, insisting on a monthly price would not do Remington any good. That suggests the open price duration term, like the price maximum term, was actually for the benefit of Sun Printing, the buyer. If the parties were to deviate from the three-month price duration norm, it would likely be to *lengthen* the price duration term, something Remington would probably not agree to unless both parties thought prices were likely to remain stable for longer than three months.

Alternatively, it is possible that the parties did not know what price duration term the Canadian Export Paper Company would use in 1920 and were just waiting to see what it did. The dissent suggests this possibility by saying the price duration from the Canadian Export Paper Company contract could be used to fill the price duration gap. The natural question, however, is why the parties did not simply say that. They could have said that the price would be no greater, and price duration no shorter, than those in the Canadian Export Paper Company contracts. But it is possible the parties thought they *had* effectively said that, and Sun Printing did not realize that the failure to spell out the duration more explicitly would be fatal to enforcement of the contract. As Cardozo himself perceptively noted, there was a close connection between price and price duration. But Cardozo did not follow the implication of this insight to its reasonable conclusion. To say that the price was to be no higher than the Canadian Export Paper Company's "contract price" was arguably a shorthand. It was not necessary to reference the price duration because, of course, the price duration could not be any shorter than that reflected in the Canadian company's contracts once the parties settled on the Canadian price maximum.

C. Why did Remington Breach the Contract in 1920?

As Cardozo notes in his opinion, and as discussed above, market prices indeed rose during 1920. Although that would generally motivate a seller to avoid its contract, that would be true only if the contract price were fixed. But the contract price was to be renegotiated in December 1919. So, the key must be the Canadian Export Paper Company contract price, which was the crucial feature of the Sun Printing-Remington contract.¹⁹⁰ What was that price? It turns out that the Canadian Export Paper Company contract price was \$4.50 per 100 pounds,¹⁹¹ a 12.5% increase over the Sun Printing-Remington contract price for the last quarter, and probably not too far out of whack from the going contract prices.¹⁹² What is interesting, however, is what happened to the price duration term. For its contracts beginning in January 1920, the Canadian Export Paper Company, somewhat surprisingly increased its contract price duration term from three months (quarterly) in 1919, to six months.¹⁹³

¹⁹⁰ The publisher of the New York Sun, Frank A. Munsey, testified before Congress in May 1920 that all the other manufacturers other than Remington had kept their contracts with him. Senate Subcommittee Hearings, *supra* note 127, at 130. That suggests that what led to the breach was the unique aspects of the contract with Remington.

¹⁹¹ Senate Subcommittee Hearings, *supra* note 127, at 432; *see also* Senate Subcommittee Hearings, *supra* note 127, at 21 (testimony of George McAneny, Executive Manager of the New York Times, that it had a contract with the Canadian Export Paper Company at 4 ½ cents per pound, or \$4.50 per 100 pounds); Senate Subcommittee Hearings, *supra* note 127, at 118 (testimony of Fleming Newbold, Business Manager of the Washington, D.C. Evening Star, that he made a contract with the Canadian Export Paper Company in December 1919 at 4 ½ cents per pound, or \$4.50 per 100 pounds).

¹⁹² The publisher of the New York Sun, Frank A. Munsey, testified that he was able to get a 4 ½ contract price for the first quarter of 1920, suggesting that the Canadian Export Paper Company contract price tracked the market price at that time, although it could be that he was simply referencing the contract with Remington that he thought he had. Senate Subcommittee Hearings, *supra* note 127, at 141. The subsequent Senate Report found that contract prices for the large metropolitan daily publishers during the first quarter ranged from 3 cents to 5 cents per pound (\$3 to \$5 per 100 pounds). *See* Senate 1920 Report, *supra* note 137, at 4. *But see* Senate Subcommittee Hearings, *supra* note 127, at 21 (testimony of George McAneny, Executive Manager of the New York Times, that at the beginning of 1920 it had contracts with one mill for 6.75 cents per pound and one contract with a price changing monthly that ran from 7 ½ cents to 8 ¼ cents per pound).

¹⁹³ *Compare* Senate Subcommittee Hearings, *supra* note 127, at 434 *with* Senate Subcommittee Hearings, *supra* note 127, at 432; *see also* Senate Subcommittee Hearings, *supra* note 127, at 21-22 (testimony of George McAneny, Executive Manager of the New York Times, discussing contracts with the Canadian Export Paper Company, which in 1919 had quarterly adjustments, and in 1920, which had an adjustment after six months); Senate Subcommittee Hearings, *supra* note 127, at 116 (testimony of Fleming Newbold, Business Manager of the Washington, D.C. Evening Star, that it had a contract at 4 ½ cents with the

Perhaps to compensate for the apparent generosity to the buyer of that price duration term, given the expected increase in prices during 1920, the Canadian contract also changed one other feature of its contract. The 1919 contract had stated that the price for the first three months was \$3.65 per 100 pounds. It then had provided: “[t]he price for the second three months, and for each succeeding three-month period, shall be such as the parties shall mutually agree, and in case of failure to so agree, this contract shall terminate at the end of any three-month period for which price has been so agreed upon.”¹⁹⁴ In the 1920 contract, however, the “price for the second six months [is] to be fixed exclusively by the seller on or before June 1, 1920.”¹⁹⁵ That is, the contract changed from one requiring mutual agreement at the time of the price reset, to one giving the seller unilateral discretion to reset the price.

Thus, although this information does not provide a conclusive reason as to why Remington breached, it does suggest why Remington would have been unhappy. The Canadian Export Paper Co. extended its contract duration term during a time of rapidly rising market prices. Although I have not been able to determine exactly how much Remington gained from avoiding the contract or how much Sun Printing lost, at the very least, Remington was probably not expecting the Canadian Company’s change in business practices.¹⁹⁶

Canadian Export Paper Company until July 1, 1920 and after that time the price was “subject to change by the manufacturer”).

¹⁹⁴ Senate Subcommittee Hearings, *supra* note 127, at 435.

¹⁹⁵ Senate Subcommittee Hearings, *supra* note 127, at 432. A letter from G.F. Steele, General Manager of the Canadian Export Paper Company, to Victor F. Lawson, Publisher of the Chicago Daily News, dated April 26, 1920, stated that Steele expected that on July 1, 1920, he expected to impose “quite a material advance in price.” Senate Subcommittee Hearings, *supra* note 127, at 432; *see also* Senate Subcommittee Hearings, *supra* note 127, at 21 (New York Times contract with Canadian Export Paper Company also had a price for the first six months, after which the company had “the right to change their figures to all their customers on the 1st of July”). Because the Senate Hearings in which this letter was presented occurred in May 1920, they do not reveal how big the price increase was.

¹⁹⁶ The testimony of Frank A. Munsey, the publisher of the Sun, at Senate Subcommittee Hearings on the Newsprint Paper Industry on May 1, 1920 provides some insight, but because the focus of the inquiry was elsewhere, the testimony is ambiguous and inconclusive. First, Munsey stated that he was currently paying 5 cents per pound (corresponding to \$5 per 100 pounds or \$100 per ton) for contract newsprint in the second quarter of 1920 after paying 4 ½ cents in the first quarter (corresponding to \$4.50 per 100 pounds, the Canadian Export Paper Company contract price). Senate Subcommittee Hearings, *supra* note 127, at 141. If that was the case, then given the Canadian Export Paper Company’s price of 4 ½ cents per pound (corresponding to \$4.50 per 100 pounds and \$90

IV. CARDOZO'S ANALYSIS REVISITED

Now that we have some sense of what was going on at the time Sun Printing and Remington made their contract, we can return to Cardozo's opinion to reconsider his analysis in light of these facts.

A. The Canadian Export Paper Company Contract and the Materiality of the Open Price Duration Term

For a contract to be indefinite, the missing term or terms must be material. Cardozo's first argument is that the open price duration term was material, even if the buyer agreed to pay the maximum Canadian Export Paper Company price. Cardozo, following the suggestion of Remington's counsel, leads us to believe the price duration term was material in part by implying that the Canadian Export Paper Company price was a constantly fluctuating price, or at least that the duration of the Canadian Export Paper Company price

per ton), the damages on the Remington contract for the first three months of 1920 would have been 0, and in the second quarter of 1920, during which 3000 tons were to have been delivered, would have been only \$30,000. If those prices had prevailed during the third and fourth quarters, that would result in only \$90,000 in damages, far less than the \$910,000 of "general" damages alleged by Sun Printing. It is, of course, possible that the market prices continued to rise during the third and fourth quarters of 1920 to such an extent (Sun Printing alleged that the prices rose to as much as \$11.75 per 100 pounds) that the \$910,000 figure alleged by Sun Printing would make sense, but that would only be the case if the Canadian Export Paper Company kept its contract price at \$4.50 per 100 pounds for the second half of 1920, which seems very unlikely. If the Canadian price stayed at \$4.50 per 100 pounds, and the market price was \$11.75, then Sun Printing's damages for the last six months of 1920 would be \$870,000 [(\$11.75-\$4.50) x 20 x 6000].

The 1920 contract price of \$5 per 100 pounds stated by Munsey is also significantly less than other large papers were reporting paying on their contracts during 1920. See *Declare Canadians Rule Paper Market*, N.Y. TIMES, May 13, 1920. I am not sure how to reconcile the discrepancy. Perhaps Munsey was not able to get contracts for all of the newsprint he was supposed to get from Remington, or was not able to get them for the first quarter of 1920. He does mention having to go into the spot market, where he had to pay as much as 12 cents per pound (\$12 per 100 pounds), but then said that he was no longer buying in the spot market as of May 1, 1920. Senate Subcommittee Hearings, *supra* note 127, at 141. Later in his testimony, he said that between contract and spot purchases, his average price for newsprint was 6 cents per pound. Senate Subcommittee Hearings, *supra* note 127, at 146. Finally, Munsey added that "with the situation that developed and the welshing on the part of the Remington Paper Co., and the way that things have turned out, if I had not bought the New York Herald with its paper contract I should have been compelled to stop either the morning or the evening Sun. I could not have got the paper." Senate Subcommittee Hearings, *supra* note 127, at 146. I do not know whether Munsey actually bought the Herald as an act of mitigation or whether he had already purchased it and just lucked out in inheriting its contracts, which presumably left the Herald with more newsprint than it needed.

would be shorter than the price duration term that Sun Printing and Remington were likely to agree on. Hence, Cardozo states that the parties “did not understand that, if during the term so established the price charged by the Canadian Export Paper Company was changed, the price payable to the seller would fluctuate accordingly.”¹⁹⁷

But Cardozo’s suggestion ignores the fact that the parties in their contract referenced the Canadian Export Paper Company *contract* price, not a spot market price. If the Canadian Export Paper Company sold to the “large customers” under contracts rather than on the spot market, which it did,¹⁹⁸ the price it charged would last for the duration of the price term of those contracts, and would change only when the contract price with the large customers was reset. Thus, as noted in the previous section, so long as Sun Printing was willing to pay the Canadian Export Paper Company price, the price duration term of the Sun Printing-Remington contract would be immaterial at the time of the initial price reset unless one or both parties sought a price duration term *longer* than the contract price duration term of the Canadian Export Paper Company contracts. Again, as noted in the last section, the Canadian Export Paper Company contract price for January 1920 was \$4.50 per 100 pounds of newsprint and that price term lasted for six months. Because Sun Printing agreed to pay this price, there would have been no point in the parties negotiating a price duration term less than six months, unless Sun Printing for some reason expected not to want to continue paying the Canadian maximum price for the whole six months, which was not likely in a rising market. And although Remington would obviously have objected to a price duration term longer than six months, there is no evidence that Sun Printing sought that.

If this point is correct, then not only did the Canadian Export Paper Company contract price act as a price maximum, but the Canadian Export Paper Company contract duration simultaneously acted as a price duration minimum. Cardozo missed this point. Instead, he found no language in the contract to support the argument that “there was no need of an agreement as to time unless the price to

¹⁹⁷ *Sun Printing*, 139 N.E. at 471.

¹⁹⁸ See testimony of Mr. McAneny, Senate Subcommittee Hearings, *supra* note 127, at 38 (“You take the big ones, the International, the Great Northern, the Canadian Export, those three groups comprise the great majority of tonnage. I do not think any of them sell except at their contract price. They fix one price for every customer and they do not depart from that.”).

be paid was lower than the maximum.”¹⁹⁹ Contrary to Cardozo’s reasoning, the language and structure of the contract do support the argument. If, as Cardozo surmised, Sun Printing’s exercising the “option” to expressly agree to pay the maximum price would solve the indefiniteness problem caused by the open price term, then exercising the same option to impliedly agree to the minimum duration in the Canadian contract, which stated that maximum price, should have solved any indefiniteness problem with the open price duration term.²⁰⁰

B. The Option Theory, Market Prices, and the Buyer’s Ability to Take Advantage of the Seller

The heart of Cardozo’s argument is that filling the price duration term with one-month periods would give the buyer a dozen options, to which the seller would not plausibly have agreed because the seller would “never knew where it stood” and would be placed “at the mercy of the buyer.”²⁰¹ Cardozo uses two hypothetical examples to prove his points: a rising Canadian Export Paper Company price, and a declining market price. To unpack and critique Cardozo’s reasoning, let us take as given for the moment Cardozo’s assumption (wrong though it was) that the filled-in price duration would be one month. First, what does Cardozo mean by the buyer having an “option?” At the very least, he means that the buyer did not have to accept the Canadian maximum price. But Cardozo also implies that having an option meant that the buyer could, if it chose, simply abandon the contract without consequence if it did not want to pay the Canadian maximum price. That seems to be the sense in which Cardozo believes the seller would be disadvantaged by the option interpretation. Cardozo’s argument raises several further questions: When would the buyer not want to accept the maximum price? How likely were these conditions to arise? If these conditions did arise, did the parties really expect or intend that the buyer could simply walk away from the contract? And even if the buyer did walk away or threaten to do so, would that place the seller at the buyer’s mercy?

The primary reason the buyer would fail to choose the

¹⁹⁹ *Sun Printing*, 139 N.E. at 471.

²⁰⁰ It is perhaps worth pointing out that the price duration term also had a maximum—one year—the amount of time left on the contract. *Id.* at 470.

²⁰¹ *Id.* at 471.

Canadian Export Paper Company contract price would be if the “market” price fell below the Canadian company’s contract price. The key, therefore, was the relationship between the Canadian price and the market price, not whether those prices were rising or falling. Yet Cardozo writes as if an increase in the Canadian Export Paper Company price alone might lead Sun Printing to decline to exercise its “option” to continue paying it. It is, of course, true that buyers prefer to pay lower prices than higher prices. But even if the Canadian Export Paper Company price rose, so long as market prices also rose and the Canadian Export Paper Company price remained below the market price, which is what happened, Sun Printing would still have an incentive to choose the Canadian Export Paper Company price throughout the term of the contract. Sun Printing would not do better by abandoning the contract and either entering into a substitute contract or going into the spot market to buy newsprint.²⁰² Similarly, under Cardozo’s second hypothetical example, falling market prices would not lead Sun Printing to abandon the contract so long as the Canadian price also fell and remained at or below market prices.

Next, the analysis in the last section suggests that the parties anticipated that the Canadian Export Paper Company contract price was likely to remain lower, or at least not rise above, the prevailing market price offered to the large newsprint publishers. In fact, that was the whole point of using the Canadian Export Paper Company price as a maximum. Thus, there was no reason to anticipate that the buyer would want to exit the contract, and that is in fact what happened. The Canadian Export Paper Company contract price remained below the market price and the buyer expressed its willingness to pay the Canadian company’s price for the remaining twelve months of the contract. Of course, it is possible that the Canadian price could have risen above the market price. For example, the United States could have suddenly and unexpectedly increased tariffs on Canadian newsprint. Alternatively, perhaps Sun Printing would have been able to find some newsprint manufacturer with sufficient capacity and a willingness to undercut the Canadian

²⁰² Even if the Canadian Export Paper Company contract price rose above the market price for long-term contracts, it is unlikely that it would have risen above the spot market price, which was generally higher at the time than contract prices. *See* FTC 1917 Report, *supra* note 125, at 49. (“Contract purchases ordinarily average a lower price than market purchases, and transactions involving large quantities a lower price than those involving small quantities.”).

Export Paper Company contract price. But the likelihood of those scenarios was probably pretty small at the time Sun Printing and Remington negotiated the contract.

Suppose, however, that for some reason the Canadian Export Paper Company contract price had risen above the market price. Suppose, for example, that the Canadian company raised its contract price in July 1920 (the second six-month period) to an above-market price to make up for its low price for the first six months (recall that contract with its buyers allowed it to unilaterally set the price after six months). Would Sun Printing have just walked away from the contract in that case at the time of price renegotiation? Most likely not. Sun Printing would probably have sought to renegotiate the price to the lower market price, as permitted by the contract. Remington would likely have accepted that price, or something close to it, since Remington would not have done much better selling to a different buyer if Sun Printing walked away from the contract negotiations. If there were costs involved in the buyer switching suppliers mid-year, or foregone benefits in losing a long-term relationship with the seller, perhaps the price would be negotiated somewhere between the market price and the Canadian price.

It is true that the parties might not reach a deal through either stubborn bargaining positions or honest disagreement about what counted as the market price. Probably, however, they would have agreed, and that is what the parties would have expected to happen at the time they made the contract. From that conclusion to the conclusion that the parties “intended” this result is not a big leap; in fact, it is the leap that UCC § 2-305 takes in allowing courts to fill in open price terms with a “reasonable” (i.e. market) price. In any case, the likelihood of the buyer walking away from the contract seems very small. Thus, viewing the contract as an “option” in the traditional sense seems misleading.

In light of the foregoing analysis, in what possible sense could enforcing the contract have placed Remington at Sun Printing’s mercy? As discussed above, Remington was likely unhappy with the contract because the market price rose while the Canadian Export Paper Company contract price was fixed for six months, but that problem cannot be what Cardozo had in mind. Remington’s unhappiness was a consequence of the express price maximum to which Remington had agreed, and the resulting risk associated with

agreeing to that maximum.²⁰³ The same would have been true if both the Canadian Export Paper Company contract price and the market price had fallen, but the relationship between the two remained the same (Canadian contract price below market price). Perhaps if both prices dropped, but the Canadian Export Paper Company price fell below Remington's costs of production, Remington would have a legitimate ground for complaint, but that possibility seems remote and could perhaps have been dealt with by allowing excuse for the seller. If, on the other hand, the Canadian Export Paper Company price had risen above the market price and Sun Printing for whatever reason had abandoned the contract, Remington would have been no worse off than if the contract had not been made. It would likely have been able to find another buyer willing to pay the then-prevailing market price. Thus, although Remington was certainly disadvantaged by the way things turned out, it is hard to see how it was, or could have been, placed at Sun Printing's mercy. If Remington was at the mercy of anything, it was the contract to which Remington voluntarily agreed.

C. Filling in the Price Duration Term

Cardozo's third main argument is that there was no reasonable way for the court to fill in the missing price duration term. Specifically, Cardozo objected to reading into the contract a monthly price duration term. In Cardozo's view, since the contract language spoke of an agreement about price duration rather than a monthly term, implying a term based on trade usage would "make the contract over."²⁰⁴ Moreover, Cardozo emphasized that the buyer had not allowed the seller to choose a price duration, but instead had insisted on a monthly duration, possibly for self-serving reasons. None of these points is convincing.

²⁰³ Remington could perhaps have argued that because the Canadian Export Paper Company acted in an unexpected way in extending its contract term to six months, Remington should have been excused from the contract on the ground of mutual mistake. It is unlikely that claim would have succeeded at the time, or even today. The claim resembles the one that prevailed (many years after *Sun Printing*) in the famous *Alcoa* case (involving a price index designed by Alan Greenspan that did not perform as the parties anticipated), though that case has been subject to extensive criticism (though I happen to agree with the *Alcoa* court's result) and has not generally been followed. *see* *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53, 55 (W.D. Pa. 1980).

²⁰⁴ *Sun Printing*, 139 N.E. at 471.

Cardozo's focus on monthly pricing (the "dozen options" theory) as the most likely gap-filler is understandable. The duration of the initial price in the contract was one month. The contract had monthly delivery and payment terms, which (along with the fifteen-day advance notice requirement) makes it unlikely the parties contemplated a price duration less than one month. The dissent mentioned one month as one of its possible gap-filling durations,²⁰⁵ and Sun Printing made monthly demands to Remington for delivery after Remington declared it would no longer perform.

Nevertheless, a quarterly price term duration would have been the more plausible gap-filler. As noted above, the contract language provided two important reference points on price duration. It structured the price for the first four months consistently with quarterly pricing. The fact that the initial price was only one month was likely a consequence of the fact that it was the last month of the third quarter of 1919. Moreover, as Judge Crane pointed out in his dissent, the contract specifically referenced the contract price of the Canadian Export Paper Company, which (unbeknownst to Judge Crane) had most recently used quarterly pricing in its contracts.²⁰⁶ Moreover, quarterly pricing was the standard price duration term for year-long contracts in the newsprint industry.²⁰⁷ The fact that on remand Sun Printing argued for quarterly pricing also supports this conclusion. Whether to imply a quarterly price duration gap-filler would have been an issue if the Canadian Export Paper Company had reduced its contract price duration to, say, one month in 1920 and Sun Printing insisted on quarterly pricing. As it turned out, however, the Canadian Export Paper Company contract price duration was six months (as already noted), so implying a quarterly price duration term for the first quarter of 1920 would not have made sense. It is puzzling that Sun Printing did not point this out and argue for six-month pricing periods.

Finally, the fact that Sun Printing made monthly demands after Remington declined to perform is most likely a result of the fact that the deliveries were to be made monthly, not an assertion of the

²⁰⁵ *Id.* at 472.

²⁰⁶ *Id.*

²⁰⁷ Quarterly pricing was also the standard used in the *St. Regis* case, which Cardozo had decided only months before *Sun Printing*. *St. Regis Paper Co. v. Hubbs & Hastings Paper Co.*, 138 N.E. 495, 496-97 (N.Y. 1923). Somehow, that fact did not stick in the minds of either Cardozo or Crane.

price duration term Sun Printing preferred. To the extent that Cardozo was suggesting that Sun Printing was acting opportunistically in asserting one-month duration periods, that suggestion makes no sense. As Cardozo mentions in his opinion and as the background discussed above shows, prices in the newsprint market were rising and were expected to continue rising. Under those circumstances, the buyer would want the longest price duration possible and the seller would prefer a shorter price duration. If anything, the one-month price duration period would have been most favorable to Remington, putting aside the Canadian contract duration. Moreover, even on remand when Sun Printing could have argued for a six-month duration term based on the Canadian Export Paper Company contracts, it argued only for a quarterly price duration term (though that may have been a meaningless show of generosity given that a quarterly price duration term would not, for reasons already explained, have changed the outcome). In any case, Cardozo's insinuation of bad behavior by Sun Printing turns out to be more than a bit ironic. Even under the "cure by concession" view mentioned by Cardozo and supported by several commentators, Sun Printing acceded to the price duration term most generous to Remington. Thus, Cardozo should have enforced the contract.

D. Stability and Certainty

Underlying Cardozo's analysis in *Sun Printing* is a larger jurisprudential point. In Cardozo's view, declining to enforce the contract would promote "stability and certainty."²⁰⁸ But how, exactly? There are two possibilities: more certain law, and more certain contracts.

Uncertainty in contract law can certainly create uncertainty for businesses subject to that law. They may respond to that uncertainty by writing more detailed contract terms to overcome it, by attempting to exploit it to their advantage and the disadvantage of their contracting partners, or at the extreme by foregoing contracts. In my view, however, Cardozo's opinion does not reduce uncertainty in contract law. Cardozo does repeat the contract law "rule" that agreements to agree are not enforceable (albeit not until about halfway through his analysis), but how does his opinion clarify

²⁰⁸ *Sun Printing*, 139 N.E. at 471.

contracting parties' understanding of that rule? Cardozo himself suggests that he might have been willing to enforce the contract, despite its "agreement to agree" language, if the parties had left open only the price term, so Cardozo apparently believes that some agreements to agree are enforceable. Which ones? Perhaps Cardozo's gloss on the "rule" is that one open material term is not fatal but two or more are. Or that if the parties leave out the price term and one other material term, the contract is indefinite. Or perhaps the rule is limited to price and a term closely connected to price. Or perhaps the rule is limited to situations in which enforcing the contract would enable one party to place the other at its mercy. It is hard to know.

Cardozo advises that courts may not "revise" contracts, but may "construe" them.²⁰⁹ How does one tell the difference? Cardozo suggests a textualist approach that refuses to make the parties "conform to the practice and beliefs of others"²¹⁰ in the face of a contract that does just that in the form of the price maximum set according to the contract price of the Canadian Export Paper Company. Moreover, Cardozo seems to have been willing to consider contextual evidence if Sun Printing had provided it, especially if the evidence would reduce Cardozo's concern that enforcing the contract would permit the buyer to take unfair advantage of the seller. Thus, Cardozo does not provide much clarity or certainty on this question either.

Cardozo's bigger concern is that the parties themselves need to write more certain contracts, so that courts can "construe" rather than "revise" them. He suggests that the parties "with little change of language" could (and therefore should) have written a more certain contract. The issue, however, is not whether the parties could have written a more complete contract but why they did not and whether it would have been efficient to do so. If the parties thought it not worth the time and trouble to spell out a precise price duration term, or if they thought they actually did spell it out in by referencing the Canadian Export Paper Company's contract price, then why should the court not respect that decision? Renegotiated price terms were the norm in newsprint contracts at the time. Cardozo's opinion arguably increased uncertainty in the industry by making the

²⁰⁹ *Id.*

²¹⁰ *Id.*

enforceability of all those contracts, which no one before had any reason to doubt, an open question. Moreover, Cardozo's question could be turned around. "With little change of language," the parties could have stated that if they did not reach agreement on the price or price duration terms, the contract would terminate.²¹¹ That is precisely what the Canadian Export Paper Company did in its 1919 contracts and also what the St. Regis company did in the contract that Cardozo and his colleagues had addressed only months before the *Sun Printing* case.²¹²

Cardozo's view may be that it does not matter whether the parties "intended" to have the court enforce the contract if they could not reach agreement, because the "indefiniteness" rule is really about regulating contracting behavior regardless of their intentions.²¹³ But Cardozo's opinion on this point, as on the others, is highly ambiguous. Even if one accepts that Cardozo is arguing for a regulatory purpose for the rule, it's not clear that such a purpose argues for his result. If the parties in the industry did not respond by making their contracts more certain, as Macaulay's article suggests happened, then what exactly did the regulatory approach accomplish, other than to reduce the benefits of the contracting device? An ongoing debate rages among contract law theorists about whether the indefiniteness rule is more about fulfilling the parties' intentions or about regulating contracting behavior, or whether those two approaches are even really distinct. Cardozo's opinion does nothing to clarify this debate, however.

E. Antitrust Concerns

Finally, suppose there was something to the concerns about

²¹¹ Cf. VICTOR GOLDBERG, *Reading Wood v. Lucy, Lady Duff-Gordon With Help From The Kewpie Dolls*, in FRAMING CONTRACT LAW: AN ECONOMIC PERSPECTIVE (Harvard University Press 2006). Another contract around the same time had an explicit best efforts provision. Goldberg argues from that fact that Cardozo should not have implied one in *Wood*.

²¹² In *St. Regis Paper Co.*, recall that Cardozo cited this case in his opinion but did not address the fact that the contract in that case had an express termination clause. *St. Regis Paper Co.*, 138 N.E. at 496.

²¹³ See, e.g., Geis, *supra* note 9, at 1716-18 (suggesting that courts should fill in gaps in contracts only when the parties have made "efficient upfront investments in contractual specificity" to discourage parties from deliberately leaving gaps to take advantage of an "embedded option" – the possibility that a court might fill in the gap with a term favorable to one side – and to "prevent parties from externalizing contracting costs to the courts").

antitrust violations in the paper industry and consider the contract from that perspective. One plausible explanation for the longer price duration term in the Canadian Export Paper Company contract is that the Canadian Export Paper Company, for some reason, decided not to go along with the collusive prices in the paper industry as much as Remington expected it to. In modern parlance, the Canadian Export Paper Company may have been “cheating” on the cartel. It turned out to be a price cutter, not a price leader. Another related possibility is that market prices were not as high in January 1920 as the newsprint manufacturers wanted, and Remington might have (secretly) agreed with other manufacturers to reduce its output and abandoned the Sun Printing contract because the large quantity in that contract exceeded Remington’s production “quota.” Either of these possibilities makes Remington’s decision to abandon the contract troubling not only from a contract perspective, but from an antitrust perspective as well (though of course antitrust concerns are typically not a factor in contract law cases). On the other hand, if Remington breached simply to sell the full quantity on the spot market (a fact on which I have no evidence, and which seems unlikely), Remington’s breach could have helped alleviate Congress’s concern with the “shortage” of newsprint available to the smaller publishers at the time.

CONCLUSION

I put myself in the camp that finds Cardozo’s *Sun Printing* opinion disappointing and inconsistent with a number of his other contract law opinions. He justified failure to enforce a contract that even he conceded involved an actual opportunistic attempt by the seller to escape an assumed risk by impugning imagined opportunistic behavior by the buyer.²¹⁴ He railed against contract revision and imposed terms when, as I believe both the textual and the contextual evidence shows, there was a plausible and sensible way to resolve the indefiniteness consistent with the express and implied intentions of the parties.²¹⁵ It is ironic that Cardozo, the

²¹⁴ By contrast, as Professor Kaufman writes, “[a]cting with honor, fulfilling a duty, accepting responsibility, and keeping promises were important themes in Cardozo’s equity, torts, and contracts opinions.” KAUFMAN, *supra* note 86, at 359.

²¹⁵ By contrast, in his other contract opinions, Cardozo proceeded from the “need to bring common law doctrine into line with evolving social or economic conditions,” KAUFMAN,

judge who preferred writing opinions that avoided sweeping statements of rules and preserved “options for the future,”²¹⁶ was so unforgiving in this case of contracting parties reasonably trying to do the same thing. It is equally ironic that he so fervently believed that his legally ambiguous and factually mistaken opinion would encourage certainty in business transactions.

Some may be tempted to conclude from Cardozo’s blunder that if even the great Cardozo cannot understand the business context, how can we hope other judges to do so (except perhaps for the Posners and Easterbrooks of the world). Thus, they should not attempt to do so, but instead should stick to textualism. I do not draw that conclusion. The contract and surrounding circumstances in this case were not so hard to understand, and enforcing the contract here would be consistent with both textualist and contextualist approaches. If Sun Printing’s lawyers had done a better job explaining these things (as Llewellyn argued), I am confident Cardozo would have reached the right result. To me, the lesson of *Sun Printing* is that continually striving to improve lawyers’ and courts’ understanding of contracting conduct and context will lead to better, and more certain, transactions and law. To paraphrase the great judge, we must revise our understanding so that courts may better construe.

supra note 86, at 358, and “looked to contemporary commercial practice for enlightenment.” KAUFMAN, *supra* note 86, at 359.

²¹⁶ KAUFMAN, *supra* note 86, at 358. The passage from which this phrase comes aptly describes Cardozo’s opinion in *Sun Printing*. Professor Kaufman wrote that Cardozo:

used the record in each case to produce a sharp vision of the relevant evidence. In the important cases at the crossroads of doctrine, he usually sought to write an opinion that dealt with the problem but that decided no more than necessary. Many Cardozo opinions therefore appear to have been decided on unique facts, for Cardozo usually did not emphasize which facts were decisive. . . . They preserved options for the future.

KAUFMAN, *supra* note 86, at 358.