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CISG AND THE FREEDOM OF FORM PRINCIPLE VS. RESERVATIONS UNDER ARTICLE 96 OF THE CISG

INTRODUCTION

In dynamic international trade, private entities are focused on the essence of the business itself, rather than its legal formalities. This is where the time-efficiency and flexibility of making transnational deals is much appreciated. For a business person, many times “the principle of a handshake” is enough to feel bound by the contract, rather than a written document itself, even if the “handshake” concerns a several-million dollar contract. That is where the business trustworthiness of oral deals does matter. From a lawyer’s perspective, when thinking of an international sales transaction, one would automatically consider a choice of the best fitting international legal instrument that could provide the most appropriate rules to govern such an international sale of goods contract. Nowadays, there is a rich variety of such instruments¹, which from a business and legal perspective are, at least in principle, intended to facilitate international transactions². Those instruments provide a neutral set of rules that are specifically tailored for the needs of international sales contracts, not favouring either of the national legal systems. The parties, however, whenever considering an international sales transaction by means of an oral agreement in the majority of the cases — the parties neither consider any ‘choice of law clause’, nor consider opting into any *soft law* instrument (for example: UNIDROIT

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¹ For example, *soft law* instruments such as: UNIDROIT Principles on International Commercial Contracts (PICC), the Principles of European Contract Law (PECL), the Draft Common Frame of Reference (DCFR), and the Trans-Lex Principles.

² H. Deeb Gabriel: *The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference*, Brooklyn Journal of International Law 2009, Volume 34, p. 655–672.

Principles³, PECL⁴, DCFR⁵, ACQP⁶, and Trans-Lex Principles⁷). Thus, in such cases, the issue of applicable law is left to the objective connecting factors under the private international law, usually evoked only once needed, namely in the event of a dispute between the parties, or in order to determine the respective rights and obligations of the parties⁷. Hence the soft law instruments referred to above will only rarely be applied for the lack of their choice⁸. Thus, in the majority of the cases, the only international legal instrument that provides any solution in those situations, by virtue of applying automatically (by default), is the United Nations Convention on Contracts for the International Sale of Goods 1980 [hereinafter CISG or the Convention]⁹.

Nowadays, many of international sales contracts are governed by the CISG¹⁰, in at least half of the cases because it applies automatically, regardless whether the parties were aware of it or not¹¹. The CISG's provisions reflect the *freedom of form principle*, much cherished by business parties (and by the lawyers, once the businesses parties are in dispute)¹². By virtue of Article 11 CISG, which reflects this principle, the businesses are not reduced simply to the written form requirement, but are free to conclude a contract in every means as, “[a] contract of sale need not be concluded in or evidenced by writing, and is not subject to any other requirement as to form. It may be proved by any means, including witnesses”¹³. However, as some of the countries that took part in negotiations on the CISG Convention did not

³ UNIDROIT Principles of International Commercial Contracts, UPICC.

⁴ Principles of European Contract Law, PECL.

⁵ Draft Common Frame of Reference, DCFR.

⁶ Acquis Principles of the Existing EC Contract Law (Acquis Principles, ACQP).

⁷ Trans-Lex Principles.

⁸ Although in some cases it is possible to make a subsequent choice, this is difficult in practice, as it is usually difficult to come to an agreement as to the applicable material law by the parties in dispute.

⁹ Nowadays, a great number of countries (83) have ratified the CISG. After such ratification, the CISG automatically becomes part of the State's national legal system, being applicable when both parties to the contract have their businesses in the CISG Contracting State, or when the rules of private international law lead to the law of the CISG Contracting State. Thus taking into consideration the significant number of CISG Contracting States, and the wide possibility of the CISG's application into the international sales transaction, in a majority of the cases, given that the parties did not decide otherwise, the CISG will be applicable automatically (by default). See, for example: K. Winsor: *The Applicability of the CISG to Govern Sales of Commodity Type Goods*, *Vindobona Journal of International Commercial Law and Arbitration* 2010, 1, p. 87.

¹⁰ The Convention has been applied to numerous international trade transactions; as an example, over 3,000 court decisions and arbitral awards have been reported so far — which is certainly not an exhaustive number of all CISG cases. It has been stated on the official CISG Database that there might be as many as 5,000 cases on the CISG, but not officially published. See: <http://www.cisg.law.pace.edu/cisg/text/caseschedule.html>.

¹¹ See: 31 March 2008, *Automobile case*, Appellate Court Stuttgart, Germany, to be found at: <http://cisgw3.law.pace.edu/cases/080331g1.html>.

¹² Such a lack of “formal requirements” may cause significant problems with respect to the certainty as to differentiating which communication arises to the offer, acceptance, or to modification, addition, or termination, leaving a room for lengthy and costly legal proceedings in order to determine the applicable law, which in principle means the longer the proceedings, the more lucrative for the lawyers.

¹³ Article 11 CISG.

accept the “freedom of form principle”¹⁴, a “reservation” was introduced, providing the contracting State with the possibility to opt-out from the provision allowing oral agreements to conclude, modify or terminate a commercial contract. In principle, the compromise between the freedom of form and the written contract requirement was a win-win situation, allowing for the middle ground and a possible agreement as to the final wording of the Convention between the negotiating Countries — everything for the sake of the international unification of the sale of goods rules as far as possible. However, even in the light of the compromise on the formal requirements of the sales contract, still in practice, a common interpretation as to the effect of the reservation set out in Article 96 CISG has not been reached. The issue that has caused (and continues to cause) many difficulties and controversies, is answering the question whether or not the freedom of form requirement applies **when the contract is concluded between two business entities, where one has its place of business in an Article 96 CISG reservation State, and the other does not**. This question has provoked many discussions, leading to the CISG Advisory Council [hereinafter: CISG-AC]¹⁵ issuing their Opinion in this regard¹⁶. In this respect, both the case law and the doctrine have separated their opinions into two schools of thought, when finding as to the topic in question. **The first opinion**, presented by the minority, is that **when at least one** of the contracting partners has its place of business in an **Article 96 reservation State, no freedom of form principle** applies. However, **the second, majority opinion**, presents an answer that, in order to determine the applicability of the freedom of form principle in the above-mentioned example, **one should look into the rules of private international law**. This article aims to present the consequences of the State’s declaration to opt-out from the freedom of form principle, thus the reservation under Article 96 CISG, the different opinions as to the reservation’s effects, and the proposed opinion in this respect. The author will briefly present the freedom of form principle in the CISG and the possibility for a State to opt-out from this provision, thus the possibility for the Article 96 reservation. On that basis, the effects of Article 96 CISG will be presented, along with an analysis of the “two schools of thought”, where the author will present case law and finally an opinion in this respect and concluding remarks.

¹⁴ The main reason for objecting to the freedom of form was the fact that, for some of the negotiating Countries, agreeing to such a provision was impossible due to their own domestic legislation, which prohibited informality in the contract formation. For more information see below: Article 96 CISG Reservation and the Written Form Requirement.

¹⁵ According to the CISG-AC: “The CISG-AC started as a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sales Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG”.

¹⁶ CISG-AC Opinion No. 15: *Reservations under Articles 95 and 96 CISG*, Rapporteur: Professor Doctor U.G. Schroeter, University of Mannheim, Germany. Adopted by the CISG-AC following its 18th meeting, in Beijing, China on 21 and 22 October 2013.

THE FREEDOM OF FORM PRINCIPLE

In order to create more flexible and practical legal circumstances for business parties, the creators of the Convention introduced the freedom of form principle with respect to the contract formation process, modification and termination, which is not only the legal provision envisaged by Articles 11 and 29 CISG, but is also the Convention's general principle¹⁷. The Article 11 provides that agreements between parties may be established without formal requirement: “[a] contract of sale need not be concluded in or evidenced by writing¹⁸, and is not subject to any other requirement as to form. It may be proved by any means, including witnesses”. In addition, Article 29(1) stipulates that “[a] contract may be modified or terminated by the mere agreement of the parties”, hence in writing, orally or in any other form. Naturally, this principle is enforced unless otherwise agreed by the parties¹⁹ as, in accordance with the principle of party autonomy set out in Article 6 CISG²⁰, the parties, by their agreement, are free to opt-out from Articles 11 and 29 CISG, thus the agreement supersedes the freedom of form requirement. However, the parties need to opt-out from the provision expressly, as the mere conclusion of a contract in a written form does not presuppose that its modification or termination needs to be made in the same manner²¹. With respect to the understanding of the term “written”, although Article 13 CISG provides an explanation, “[f]or the purposes of this Convention, ‘writing’ includes telegram and telex”²² — the forms “telegram” and “telex” are merely examples of means of communication that are equal to written form. In the understanding of Article 13 CISG, any form of communication that would produce

¹⁷ 17 January 2007, *Hibro Compensatoren B.V. v. Trelleborg Industri Aktiebolag*, Netherlands, to be found at: <http://cisgw3.law.pace.edu/cases/070117n1.html>; 29 April 1996, *Conservas La Costeña v. Lanín*, Mexico, to be found at: <http://cisgw3.law.pace.edu/cases/960429m1.html>; 6 February 1996, *Propane case*, Austria, to be found at: <http://cisgw3.law.pace.edu/cases/960206a3.html>.

¹⁸ With respect to the “written form”, the Convention explains that, in accordance with Article 13 CISG: “[f]or the purposes of this Convention, ‘writing’ includes telegram and telex”. According to the current doctrine and case law, emails also fall in the scope of ‘writing requirement’.

¹⁹ U.G. Schroeter (in:) *Commentary on the UN Convention on the International Sale of Goods (CISG)*, ed. I. Schwenzer, New York 2010, p. 481–489.

²⁰ According to Article 6 CISG: “[t]he parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions”.

²¹ 15 May 2002, *Design of a radio phone case*, Appellate Court, Gent, Belgium, to be found at: <http://cisgw3.law.pace.edu/cases/020515b1.html>; 6 February 1996, *Propane case*, Supreme Court, Austria, to be found at: <http://cisgw3.law.pace.edu/cases/960206a3.html>.

²² As an example of what may be the current international position as to the term “in writing”, see for example: Article I.–1:105 DCFR: Meaning of “in writing” and similar expressions. (1) For the purposes of these rules, a statement is “in writing” if it is in textual form, on paper or another durable medium and in directly legible characters. (2) “Textual form” means a text which is expressed in alphabetical or other intelligible characters by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form. (3) “Durable medium” means any material on which information is stored so that it is accessible for future reference for a period of time adequate to the purposes of the information, and which allows the unchanged reproduction of this information.

a durable, retrievable message would amount to written form, thus embodying faxes, emails or any other messages of a retrievable nature²³.

ARTICLE 96 CISG RESERVATION AND THE WRITTEN FORM REQUIREMENT

At the time of the 1980 Diplomatic Conference, when the CISG text was negotiated, it was difficult to reach an agreement on some of CISG current provisions, as the discussions were led between States from different legal traditions (*Civil* and *Common Law* Countries) and different political systems, namely socialist and capitalist States²⁴. Although the freedom of form principle was accepted by the majority, it remained controversial for some of the negotiating countries, making it impossible for a common, universal provision in this respect²⁵. The main reason for objecting to the freedom of the form was the fact that for some of the negotiating Countries agreeing to such a provision was impossible due to their own domestic legislation, which prohibited informality in the contract formation²⁶, moreover, some States wanted to avoid any possibility of claims unsupported by a written agreement²⁷. As at the time of the Conference it was “necessary to establish rules that would facilitate commercial transactions **on the basis of respect for sovereignty and national independence, non-intervention in the domestic affairs of States and mutual benefit**”²⁸, and agreement in this respect was needed. Eventually, a compromise was reached and the final text of the Convention reflects the majority position for the sake of the freedom of form principle; however, allowing any of the Contracting States to *opt-out* from this principle at the public international law level²⁹. Thus the Convention allows those Countries whose legislation requires all contracts of sale to be concluded in or evidenced by writing, to make an Article 96 reservation, with the effect that the State declaring this reservation will not be bound by the informality principle.

²³ P. Schlechtriem, I. Schwenzer, P. Hachem (in:) *Commentary...*, *op. cit.*, p. 1193.

²⁴ U.G. Schroeter: *The Cross-Border Freedom of Form Principle Under Reservation: The Role of Articles 12 and 96 CISG in Theory and Practice*, *Journal of Law and Commerce* 2014, Vol. 33, No. 1, p. 82.

²⁵ P. Schlechtriem, P. Butler: *UN Law on International Sales, the UN Convention on the International Sale of Goods*, Heidelberg 2009, p. 62. Countries from the socialist states (for example the former U.S.S.R), could not accept the freedom of form principle, as it was not allowed in their domestic legal systems, see: G. Eörsi: *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 *American Journal of Comparative Law* 1983, p. 341.

²⁶ The requirement of writing form was considered to be a question of public policy in some States. See: *Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat*, Article 11, Commentary para. 1, UN Doc. A/CONF.97/5 (14 March 1979) reprinted in *Official Records*, p. 20. (Article 11 in this Commentary became Article 12 in the final text of the Convention).

²⁷ U.G. Schroeter: *The Cross-Border...*, *op. cit.*, p. 21.

²⁸ B. Zeller: *CISG and the Unification of International Trade Law*, New York 2007, p. 29.

²⁹ U.G. Schroeter: *The Cross-Border...*, *op. cit.*, p. 14.

The freedom of form reservation is reflected by the wording of Article 96 and Article 12, where Article 96 CISG addresses the Contracting States or the potential Contracting States, and Article 12 CISG relates to the effect that Article 96 CISG reservation has and its mandatory nature³⁰, which is addressed mainly to businesspersons:

Article 12 CISG reads as follows:

“Any provision of Article 11, Article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply **where any party has his place of business in a Contracting State which has made a declaration under Article 96 of this Convention. The parties may not derogate from or vary the effect of this article**”³¹;

and Article 96 CISG:

“**A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with Article 12** that any provision of Article 11, Article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State”.

Nowadays, Article 96 CISG declarations are maintained by: Argentina, Armenia, Belarus, Chile, Hungary³², Paraguay, Russian Federation, and Ukraine³³. For those businesspersons trading with an entity with its place of business in a country that made an Article 96 CISG declaration, the effects of such a declaration are significant, as the final result may influence the contract’s formal validity, and consequently the parties’ respective rights and obligations arising from the contract, and their possible enforceability.

An Article 96 CISG declaration can be made by a country at any time, thus at the time of accessing the Convention (by signature or ratification), and it also allows for a subsequent declaration³⁴. The only restriction on a declaring country is its own legislation, and thus can only be done if the domestic law of that particular country

³⁰ The business persons from States which made an Article 96 CISG reservation cannot derogate from or change the effects of the Article 12 CISG, thus expressly excluding it from party autonomy reflected by Article 6 CISG. Thus the general principle of party autonomy is not applicable to the Article 12 CISG.

³¹ Article 12 CISG.

³² However, according to the 48th UNCITRAL Session, that took part in Vienna from 29 June until 16 July 2015, the official delegate from Hungary noted, that the Parliament of Hungary decided to withdraw the Article 96 CISG reservation.

³³ Most recently, the Article 96 CISG reservation has been withdrawn by the People’s Republic of China, Lithuania and Latvia. More information as to the CISG Contracting States and the reservations as to certain CISG provisions can be found at: <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>.

³⁴ CISG-AC Opinion No. 15: *Reservations...*, *op. cit.*, para. 4.4.; J. Rajski (in:) *Commentary on the International Sales Law*, eds. C.M. Bianca, M.J. Bonell, Milan 1987, p. 659.

requires all contracts of sale (governed by the Convention) to be concluded in or evidenced by writing at the time when the declaration is made³⁵. At the same time, according to Article 97(4) CISG, the declaring State may withdraw such a declaration: “[a]ny State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary [...]”.

As discussed above, at the time when the Convention was negotiated, i.e. in the 1980s, many countries had to make a reservation as to the freedom of form principle using Article 96 CISG, because it was required by their national legal systems. However, many of them no longer have such a requirement under their respective domestic legislations. Although some of those countries have effectively withdrawn their Article 96 reservation, (recent examples include Lithuania³⁶, Latvia³⁷ and the People’s Republic of China³⁸), some countries have retained this declaration, even though their domestic legislation no longer imposes an obligation of the written form requirement, for example, the Russian Federation³⁹, Ukraine⁴⁰, Argentina and Chile⁴¹. For that reason, the practicability of the Article 96 CISG reservation has been questioned in cases where such a declaration is maintained by a Contracting State whose domestic laws no longer impose writing requirements on international sales contracts⁴². Although in those cases the prerequisites for such declarations are no longer met, to the question of whether, in practice, the courts should follow such a declaration or refrain from applying the freedom of form, the answer has been deemed “negative”⁴³. The CISG A-C, in its opinion on this regard, highlighted that courts can refrain from that principle only when the Article 96 CISG declaration is successfully withdrawn in accordance with Article 97 CISG⁴⁴. In addition, it has been highlighted in the doctrine that in this respect the courts should be precluded from making their own “divergent assessments” about the possible “compatibility of domestic laws and Article 96 CISG prerequisites”⁴⁵. The reasons for that were

³⁵ CISG-AC Opinion No. 15: *Reservations...*, *op. cit.*, para. 4.5.

³⁶ Lithuania withdrew its Article 96 CISG declaration on 1 November 2013.

³⁷ Latvia withdrew its Article 96 CISG declaration on 13 November 2012.

³⁸ China withdrew its objection to the Article 11 CISG on 16 January 2013.

³⁹ V. Musin: *Offer and Acceptance under the Russian Civil Code*, Russian Law Journal 2013, Volume I, Issue 1, p. 90.

⁴⁰ U.G. Schroeter: *The Cross-Border...*, *op. cit.*, p. 12, note 56 referring to: N. Lapiashvili: *Modern Law of Contracts and Sales in Eastern Europe and Central Asia*, 2011.

⁴¹ F. Ferrari: *Writing Requirements: Article 11–13: The Draft Uncitral Digest And Beyond: Cases, Analysis And Unresolved Issues In The U.N. Sales Conventions* (in: *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* [Papers of the Pittsburgh Conference Organized by the Center for International Legal Education (CILE)], eds. F. Ferrari, H. Flechtner, R. Brand, London 2004, p. 214.

⁴² U.G. Schroeter: *The Cross-Border...*, *op. cit.*, p. 93, and the literature cited in the footnote no. 58.

⁴³ CISG-AC Opinion No. 15: *Reservations...*, *op. cit.*, p. 11; U.G. Schroeter: *The Cross-Border...*, *op. cit.*, p. 92.

⁴⁴ *Ibidem*.

⁴⁵ U.G. Schroeter: *The Cross-Border...*, *op. cit.*, p. 12.

given as to the need to protect legal certainty in international law⁴⁶, and that this practice would infringe rules of international public law. The author, however, takes the opposite opinion, assuming a more functional method, a teleological (purposive) method of interpretation. Therefore, in the event that, by virtue of the conflict of law rules, the law applied by the court would be that of a State with an Article 96 reservation, even though the legal prerequisites for such a declaration are no longer met in that State's legislation (because that State's national legal system no longer imposes strict formality as to the obligation of a written contract), then a choice has to be made between two options: to declare the contract **invalid** or to apply the friendly interpretation (based on the rule *in favor contractus*), calling for the principle of **upholding the contract**⁴⁷. The court should, in the author's opinion, opt for the second choice, i.e. upholding the contract. In the author's belief, those countries that maintain such a declaration, even though that declaration is, in principle, no longer needed, create a legal situation that should be regarded rather as a relic of the past, as no functional approach can be seen in declaring a commercial contract invalid, when the conflict of law rules point to the law of a State with the Article 96 reservation, even though the same State's domestic law would now uphold the contract.

An example of a country that has changed its formal approach from the time when the Convention was negotiated to the present is the Russian Federation. At the time when the USSR ratified the CISG, its socialist legal system prohibited any kind of non-written form of agreements. The 1964 RSFSR Civil Code (Article 45) and the RF Civil Code both required written form for contracts on the foreign trade transactions, and the consequence of a failure to observe this requirement rendered the contract and the whole transaction invalid⁴⁸. Before the reform of 2013, Article 162(3) of the Russian Civil Code provided that: "a failure of a 'foreign commercial transaction' to comply with 'the simple written form [...] shall render the transaction invalid". However, under the current provisions of the Russian Civil Code in this respect, after the reform of 7 May 2013, effective from 1 September 2013, "according to Art 162 (sect 1), if a transaction is not made in writing, **the transaction will not become invalid**, but its parties, in the event of a dispute, **will not be entitled to rely on witness testimony** to confirm either the fact that the transaction was made or its terms, although written and other (e.g. tangible) evidence will be admitted." Therefore, the parties are "simply deprived of the right to rely on the testimony of witnesses in proving the conclusion of the contract and its terms, **but are not de-**

⁴⁶ For the opposing view see publication: Marco Torsello: *Reservations to international uniform commercial law Conventions*, Uniform Law Review 2000.

⁴⁷ The principle of *favor contractus* is regarded as one of the CISG's general principle, under Article 7(2) CISG, see: B. Keller: *Favor contractus, Reading the CISG in Favour of the Contract Sharing International Commercial Law across National Boundaries: Festschrift for A.H. Kritzer*, eds. C.B. Andersen, U.G. Schroeter, 2008, p. 247–266.

⁴⁸ V. Musin: *Offer...*, *op. cit.*, p. 90.

prived of their right to present written and other evidence” (Art 162(1) CC)⁴⁹. Moreover, in accordance with Article 159(2) of the reformed Russian Civil Code: **“transactions performed at the same time as they are concluded can be made orally”**. Thus, in a case where the CISG would be applicable, and when the conclusion and performance of the contract could not be denied, because of the exchange of the goods and the payment, then the parties’ conduct — despite there being no written contract — would mean that any ruling that the contract is invalid would be inconsequential in light of the parties’ course of dealing, and in light of the new domestic laws in this respect, which would find such a contract to have been upheld⁵⁰.

In order to present a hypothetical example, one could imagine a situation where two merchants, for example Polish and Russian, thus the second being from an Article 96 declaration State, conclude a commercial contract orally during a business meeting. Of course no practical consequences would appear until the parties are in dispute. If the case would be disputed, and if the court or arbitral tribunal would apply the CISG with rules on the form of a reservation State (even though the domestic law of that State no longer demands such formality as to the international commercial contracts), then in light of the suggestions given by the CISG-AC (described above), the commercial contract concluded orally between those merchants should be rendered invalid, as Russia, despite having changed its domestic law in this respect, did not withdraw its Article 96 declaration.

There can be various reasons for such a dispute between our hypothetical Polish-Russian case, for example, one party can claim a breach of the contract, a defect in the goods that appeared several weeks after the oral contract has been made, or many other reasons. Depending on the stage or the advancement of the contractual performance, the situation may appear that one would not be able to deny that the parties wanted to conclude the contract for certain types of goods (for example, if proven by the conduct of the parties). There would be a difference between a case where the existence of the contract is undeniable because of such conduct, and a case where one party claims a lack of certain characteristic of the goods promised by the other party orally, and which therefore cannot be proved in any of documents. Where in the first situation it would be rather obvious that the contract has been concluded, because of the conduct of the parties (which is often

⁴⁹ D. Saidov: *Conference on ‘35 Years CISG and Beyond’, 29–30 January 2015, Basel, Switzerland* (University of Basel, SVIR/SSDI (Swiss Association for International Law) and UNCITRAL) Presentation: ‘The Reservation from the Freedom of Form Principle under the CISG: The Case of Russia’.

⁵⁰ Such a ruling, as to the contract being invalid because of the lack of the written contract, although the exchange of goods and payment was made, has been given by the Federal District Court 7 October 2008 in the *Forestal Guarani, S.A. v. Daros International, Inc.*, United States, New Jersey, to be found at: <http://cisgw3.law.pace.edu/cases/081007u1.html>. However, for the appealation see: 21 July 2010 Federal Appellate Court [3rd Circuit], *Forestal Guarani S.A. v. Daros International, Inc.*, United States, to be found at: <http://cisgw3.law.pace.edu/cases/100721u1.html>.

possible to prove because of the exchange of goods for money), in the second situation, however, it would be much more likely to be subject to probative problems. To give an example of a case where one party pleaded that a contract was invalid because of the lack of the formal requirements, although the performance of the contract was undeniable, there is *Conservas La Costeña v. Lanín*, decision of 29 April 1996 in the Compromex Arbitration proceedings (Mexico), the claimant (the buyer) sued the seller (an Argentine company) for the restitution of the amount paid to the respondent, plus damages, because of damaged goods. The respondent argued that the CISG was not applicable because “Argentina had entered a reservation pursuant to Articles 12 and 96 CISG, from which it would follow, according to Lanín [the respondent], that even if the CISG were to apply, the alleged contract of sale would be invalid, due to the fact that it was not in writing”. The arbitral tribunal (Compromex) dismissed the respondent’s argument and reasoned that what was required was “not a formal contract (contained in a single instrument), but evidence in writing that a contract existed”. The tribunal determined that such evidence could be found in the various documents on file describing the terms of the contract, including the letter of credit. In the end, the tribunal “issued a recommendation holding that the respondent was liable for not having properly supervised the performance of the contractual obligations by the company to which it had subcontracted, and therefore had to pay the Mexican company [the claimant] the money claimed by the latter [...]. As for the damages, no recommendation was issued due to the lack of sufficient evidence”⁵¹.

With respect to the above case, one could observe that nowadays (probably in the majority of the cases), it would be possible to prove existence of such an oral arrangement, as there will be always some kind of “durable and retrievable means” that would reflect a contract’s existence. However, problems may arise in extreme situations where no such communication can be proven, as everything was arranged purely through oral conversations (before any exchange of goods or payment of the price). It would also be difficult to prove any modifications, or the particular specifications of goods, if those are made orally. However, those problems relate to issues of evidence in the proceedings, and usually depend on the particular circumstances of the case, and the rules applied are the rules determined by the *lex fori*.

Coming back to our case of the Polish and Russian merchants, in a situation when the case is disputed before the court, the applicable law would have to be determined, if the parties have not reached agreement in this respect. The court would apply the CISG, but would have to determine whether or not to apply the formal requirements set out in Article 96. For that, it would give recourse to the conflict of law rules, which if they pointed to the law of Russia, would mean that the court has

⁵¹ 29 April 1996, *Conservas La Costeña v. Lanín*, Compromex Arbitration proceeding, Mexico, to be found at: <http://cisgw3.law.pace.edu/cases/960429m1.html>.

to apply the formal requirements of Article 96. As the CISG does not cover all the “problems” that may arise out of the dispute, in many cases the court would, by virtue of Article 7(2) *in fine* CISG and the “gap-filling process”⁵² have to make recourse to the Russian domestic law, to seek an answer to a particular question not covered by the CISG. In this situation, if the court would make recourse to Russian domestic law, why not also apply the recently more liberal law concerning the formal requirements. Therefore, in the author’s belief no functional approach can be seen in declaring a commercial contract invalid, when the conflict of law rules point to the law of a State with an Article 96 reservation, even though the same State’s domestic law would uphold the contract.

In light of the existing law, i.e. in the case of Russia, given the formal requirements of Article 96 CISG and the less strict domestic law in this respect, the advising lawyers will have two possibilities in arguing the case, depending on what will be the most favourable argumentation for their clients. They can plead the contract to be invalid — as this would be in accordance with the existing Article 96 CISG reservation and the formal requirements, or they can plead that the contract be upheld, for the sake of *de lege lata* Russian domestic law, with its less strict formal requirements.

THE EFFECT OF ARTICLE 96 — TWO SCHOOLS OF THOUGHT

Although the reservation rules are quite comprehensive and straightforward, in practice however, they have caused many problems as to their appropriate interpretation and application⁵³. The problematic words relate to the last sentence of Article 96 CISG, which provides that the freedom of form principle “[...] does not apply **where any party has his place of business in that [Article 96 reservation] State**”. With respect to the above, the question arises as to the effects of such a declaration when the commercial contract is concluded by parties, where one is from a Contracting State that requires a written contract to be effective by virtue of an Article 96 CISG reservation, while the second has its place of business in a State that allows for non-written contracts. The international doctrine and case law have developed two schools of interpretation on the effect of an Article 96 reservation. **The first school of interpretation, represented by the majority of scholars**⁵⁴,

⁵² Article 7(2) CISG: (2) “[q]uestions concerning matters governed by this Convention that are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, **in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law**”.

⁵³ CISG-AC Opinion No. 15: *Reservations...*, *op. cit.*, para. 4.15.

⁵⁴ CISG-AC Opinion No. 15: *Reservations...*, *op. cit.*, footnote 118 presents the prevailing doctrine in this respect.

presents the view that when such a situation occurs, the court or arbitral tribunal should give recourse to the rules of private international law in order to determine which law governs the formal requirements as to the contract⁵⁵. This position has been presented by the CISG-AC Opinion No. 15⁵⁶, in the CISG Official Commentary⁵⁷, and many more prominent CISG Commentators⁵⁸. The author supports the majority opinion as being more appropriate, as to apply the opposite view would lead to the total exclusion of the private international rules of the non-reservation State would mean making the formal requirements of the reservation State “internationally applicable uniform law”⁵⁹. Moreover, it was argued that the justification for the recourse to the rules of private international law can be found in the possibility of applying Article 7(2), thus the gap filling procedure where the court, after failing to find an answer in the Convention’s general principles⁶⁰ (in the event if there are no such principles), can apply the rules of private international law⁶¹, i.e. the law designated by the parties in their choice of law clause⁶², and in the absence of such a choice, the rules of private international law of the forum⁶³. As an example, such reasoning was made by a US court in a case between two merchants from Argentina and United States: the parties entered into an oral agreement, where Argentina has made a reservation under Article 96 CISG, and the US has not. One party pleaded a breach of a contract claiming the buyer’s refusal to pay. The case was brought before a US Court⁶⁴, which stated that as “one party’s country of incorporation has made a declaration, while the other’s has not, **the court must first decide, based on the forum state’s choice-of-law rules**, which forum’s law applies, and then apply the law of the forum designated by the choice-of-law analysis.”⁶⁵ Thus, the court eventually decided that, as the issues of whether a written contract

⁵⁵ CISG-AC Opinion No. 15: *Reservations...*, *op. cit.*, para. 4.17.

⁵⁶ *Ibidem*.

⁵⁷ P. Schlechtriem, M. Schmidt-Kessel (in:) *Commentary...*, *op. cit.*, p. 204; P. Schlechtriem (in:) *Commentary...*, 2005, *op. cit.*, p. 169–171.

⁵⁸ P. Schlechtriem, P. Butler: *UN Law on International Sales...*, *op. cit.*, p. 62; U.G. Schroeter: *The Cross-Border...*, *op. cit.*, p. 103.

⁵⁹ P. Schlechtriem, Schmidt-Kessel (in:) *Commentary...*, 2010, *op. cit.*, p. 215; P. Schlechtriem, P. Butler: *UN Law on International Sales...*, *op. cit.*, p. 62; U.G. Schroeter: *The Cross-Border...*, *op. cit.*, p. 105.

⁶⁰ J. Bonell (in:) *Commentary...*, *op. cit.*, p. 67–77; J.O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed., Hague 1999, p. 102–104.

⁶¹ According to Article 7(2) CISG: “(2) [q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law”.

⁶² I. Schwenzer, P. Hachem, (in:) *Commentary...*, *op. cit.*, p. 104 and p. 108.

⁶³ According to Article 7(2) CISG: “[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law”.

⁶⁴ In this case, it was the United States Court of Appeals for the Third Circuit [Federal Court of Second Instance].

⁶⁵ 21 July 2010, *Forestal Guarani S.A. v. Daros International, Inc.*, Federal Appellate Court, 3rd Circuit, United States, to be found at: <http://cisgw3.law.pace.edu/cases/100721u1.html>.

is required is not “settled” under the CISG, by virtue of Article 7(2) it performed an analysis in accordance with the of rules of private international law in determining its final decision.

The case law seems to generally accept and follow the majority view, whereby the mere fact that one party to a commercial contract has its place of business in a State that made an Article 96 reservation does not in itself trigger the applicability of the written form requirement⁶⁶. This seems to be the common position of many domestic courts⁶⁷ and arbitral tribunals⁶⁸, which state that, in order to determine the law governing the formal validity of the commercial contract, one should have recourse to the rules of private international law of the forum.

The second school of interpretation, represented by a minority of the scholars⁶⁹, supports the argument that, **when at least one** of the merchants has its place of business in an Article 96 reservation State, the formality rule will prevail regardless of the rules of private international law. The scholars adopting this minority view primarily refer to the “plain language”⁷⁰ of the Convention, referring to the wording of Article 12 CISG: “[a]ny provision of Article 11 [...] does not apply [...] where any party has his place of business in a Contracting State which has made a declaration under Article 96 of this Convention”. This argues that the freedom of form principle cannot be applied where at least one party to the international contract has its place of business in an Article 96 CISG reservation State. However, it has been highlighted by the CISG-AC, in its opinion, that the wording of Articles 12 and 96 CISG do not provide an explanation, as the wording uses the “negative effect” — that the freedom of form provisions *do not apply*, rather than providing for a “positive term”, which would point to the exclusive application of the laws as to the formal requirements of the reserving State⁷¹. With respect to the case law, many court decisions are cited in the texts of the CISG-AC⁷², in the UNCITRAL

⁶⁶ 12 July 2001, *Hispafruit BV v. Amuyen S.A.*, District Court Rotterdam, the Netherlands, to be found at: <http://cisgw3.law.pace.edu/cases/010712n1.html>; 7 October 2008, *Forestal Guarani, S.A. v. Daros International, Inc.*, Federal District Court, New Jersey, United States, to be found at: <http://cisgw3.law.pace.edu/cases/081007u1.html>.

⁶⁷ 22 October 2001, *Gasoline and gas oil case*, Supreme Court, Austria, to be found at: <http://cisgw3.law.pace.edu/cases/011022a3.html>; 24 March 1992, *Adamfi Video v. Alkotók Studiósza Kiszövetkezet*, Metropolitan Court, Hungary, to be found at: <http://cisgw3.law.pace.edu/cases/920324h1.html><http://cisgw3.law.pace.edu/cases/920324h1.html>; 7 November 1997, *J.T. Schuermans v. Boomsma Distilleerderij/Wijnkoperij*, Supreme Court, Netherlands, to be found at: <http://cisgw3.law.pace.edu/cases/971107n1.html>.

⁶⁸ 20 March 2002 High Arbitration Court (or Presidium of Supreme Arbitration Court) of the Russian Federation Russia, to be found at: <http://cisgw3.law.pace.edu/cases/020320r1.html>.

⁶⁹ I. Schwenzer, P. Hachem (in:) *Commentary...*, *op. cit.*, p. 215, see also therein footnote 7 with the minority doctrine in this respect; also: P. Winship: *Harmonizing Formal Requirements for Cross-Border Sales Contracts*, *International Law Review* 2012:6.

⁷⁰ P. Winship: *Harmonizing...*, *op. cit.*, p. 8.

⁷¹ CISG-AC Opinion No. 15: *Reservations...*, *op. cit.*, p. 17.

⁷² CISG-AC Opinion No. 15: *Reservations...*, *op. cit.*, p. 15, para. 4.16, footnotes 103–106.

Digest of Case Law⁷³, and in the doctrine⁷⁴, for the purpose of giving the case-examples where Article 96 had a “universal” effect, thus applying the formality rule just because at least one country was from a declaring State (thus to support the minority opinion). However, from the author’s analysis, in many of the cases presented therein, the court’s reasoning **was not** precisely in accordance with the argumentation of Article 96’s universal effect, but the court’s reasoning was **different**, giving recourse rather to the majority opinion: namely the rules of private international law. In the examples that will be presented below, the courts gave recourse to the parties’ will if expressed in the contract, thus the choice of law clause, and in the lack of such a choice of law clause it applied the conflict of law rules, and finally the contractual provision as to the possibility of modifications being made only in writing, thus again — the parties’ will. With respect to the above, as an example of some of those cited cases, the factual background at the court’s reasoning can be found below, which **will not** prove the minority’s view, but the opposite.

In a decision of 16 February 2004, in a case brought before a Russian Court⁷⁵, the Buyer from USA, argued that the Seller from Russia had committed a fundamental breach of the contract, as it had failed to send the Buyer an experimental consignment of goods for testing by an independent laboratory prior to production and shipment of the contractually agreed quantity of goods, **where such a request had been made by oral agreement**. The court held that, as **in their written contract the parties had a clause stating that any modifications of the contract could be introduced only in writing and signed by both parties**, by virtue of Article 29(2) CISG, such an oral modification was not possible as: “[a] contract in writing that contains a provision requiring any modification or termination by agreement to be in writing, may not be otherwise modified or terminated by agreement”. Moreover, as the parties in their contract did not make an agreement on the applicable law, **the court applied the conflict-of-law rules** of the private international law of Russia, which were in force at the time when the contract was concluded, **which pointed to the law of the Russian Federation**. The court took into consideration “the supremacy of the provisions of the CISG, being an international treaty, over the provisions of the domestic law [...], the Tribunal found that the CISG is applicable to the relations of the parties to the contract, and the provisions of Russian law are applicable to issues not governed expressly by the CISG”. Thus the court pointed to the fact that Russia made an Article 96 reservation, and, by virtue of Article 162(3) of the Russian Civil Code, an agreement (of an external economic nature) must be in

⁷³ 42 *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods*, Art. 12, para. 4, footnote 11. (2012 rev.) available at <http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf>.

⁷⁴ P. Winship: *Harmonizing...*, *op. cit.*, p. 8.

⁷⁵ 16 February 2004, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitration proceeding 107/2002, Russia, to be found at: <http://cisgw3.law.pace.edu/cases/040216r1.html>.

writing. However, at the same time the court highlighted that the contract itself expressly provided that its modifications can only be introduced in writing. Similarly, in the case of 9 June 2004 before the Russian court⁷⁶, the parties did not stipulate the choice of law clause in their contract. The court used the conflict of law rules to determine that the law of the seller, namely Russian law, applied, and held the application of the CISG and “subsidiary, norms of Russian civil legislation” as applicable to relations between the parties. The court held that a “provision of the Vienna Convention of 1980 takes into consideration peremptory norms of Russian civil legislation (Art. 162 of Russian Civil Code), according to which the non-observance of simple written form of an external economic agreement entails its nullity”. Thus, in this case the court rejected the possibility of [the Buyer]’s petition to call out witnesses to evidence the possibility of interpreting the agreement concluded by the parties more broadly. A similar reasoning was given by a court in a case 16 February 1998, High Arbitration Court (or Presidium of Supreme Arbitration Court) of the Russian Federation, when applying the CISG and Russian law, because the contract stipulated the Russian choice of law clause⁷⁷.

The final case that the author would like to draw attention to in this article is the case of *Forestal Guarani, S.A. v. Daros International, Inc.*, which was heard before a US court in New Jersey. In this case, the parties to the dispute — an Argentine seller (the claimant) and a US buyer (the respondent) — entered into an oral agreement for the sale of wooden finger joints with a value of US\$1.8 million⁷⁸. The US company failed to pay the whole purchase price, making the Argentinian company bring a claim for the remaining amount⁷⁹. The case was heard first before the U.S. District Court, New Jersey [federal court of 1st instance]⁸⁰, and in its decision the court held that, because of the lack of a written agreement between the parties, and because Argentina had made an Article 96 declaration, the claim brought by the claimant for payment was rejected. However, the Argentinian company brought an appeal to the Third Circuit, and the Appellate court reversed the decision of the District Court, reaching a different conclusion and giving recourse to the rules of private international law.

⁷⁶ 9 June 2004, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Arbitration proceeding 125/2003, Russia, to be found at: <http://cisgw3.law.pace.edu/cases/040609r1.html>.

⁷⁷ 16 February 1998 High Arbitration Court (or Presidium of Supreme Arbitration Court) of the Russian Federation, Russia, to be found at: <http://cisgw3.law.pace.edu/cases/980216r1.html>.

⁷⁸ \$ 1,857,766.06.

⁷⁹ Argentinian company (Forestal) shipped \$ 1,857,766.06 worth of finger-joints to US company (Daros), and, in turn, Daros remitted a total of \$ 1,458,212.35 in payments for the finger-joints. At stake now is the remaining \$419,553.71.

⁸⁰ 7 October 2008, *Forestal Guarani, S.A. v. Daros International, Inc.*, Federal District Court, New Jersey, United States, to be found at: <http://cisgw3.law.pace.edu/cases/081007u1.html>.

CONCLUSION

The freedom of form principle is a crucial principle of international commercial law. In the CISG, the possibility of concluding, modifying or terminating a contract without any formal requirements is envisaged in Articles 11 and 29 CISG. However, at the time when the Convention was negotiated, as a compromise between countries supporting the freedom of form principle and countries that could not agree to such a provision, the possibility of a reservation was provided, which remains reflected by Article 96 CISG, and circumscribed in Article 12 CISG. For those businesspersons trading with an entity with its place of business in a country that made an Article 96 CISG declaration, the effects of such a declaration are significant, as the final result may influence the contract's formal validity, and consequently the source of the parties' respective rights and obligations arising from the contract, and their possible enforceability. When the contract is concluded between two business entities, where one has its place of business in an Article 96 CISG reservation State, and the other does not, in the author's opinion the court should look into the rules of private international law in order to determine the applicability of the freedom of form principle.

Although the CISG Contracting States, after having made a declaration under Article 96 CISG, can withdraw such a declaration at any time, some of the Contracting States have not yet done so, even though their domestic legal systems no longer meet the prerequisites for such a reservation. In the author's opinion, in cases where the prerequisites in the domestic legal laws for such reservations are no longer met, the courts should, in practice, by virtue of the conflict of law rules, make an assessment about the possible compatibility of domestic laws and Article 96 CISG prerequisites, and apply the less formal approach of the respective legal system. Such an interpretation will serve for more functional result of upholding the contract, where otherwise it would have been regarded as invalid. Because of the *in favor contractus* functional interpretation, the parties' will not be prevented from determining their respective rights and obligations arising from the contract, and their possible enforceability in cases when one party would allege the contract's invalidity, only when no longer 'interested' in the contract's performance, or in the case of a (fundamental) breach of the contract.

MAŁGORZATA POHL

CISG AND THE FREEDOM OF FORM PRINCIPLE
VS. RESERVATIONS UNDER ARTICLE 96 OF THE CISG

S u m m a r y

This article aims to present the consequences of a State's declaration to opt-out from the freedom of form principle, under Article 96 of the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG). In practice, problems have developed as whether or not to apply the freedom of form when a contract is concluded between two business entities, where one has its place of business in an Article 96 CISG reservation State, and the other does not. The issue concerning the reservation's effects has led to the creation of "two schools of thought" established by the doctrine and case law in this respect. It is the author's intention to present the proper methodology of the interpretation and application of Articles 12 and 96 CISG bearing in mind the various opinions in this respect. In the author's opinion, in such situations the court should follow the rules of private international law to seek an answer as to whether or not the obligation of written form applies.

Some of the CISG Contracting States that currently maintain an Article 96 CISG declaration, refrain from withdrawal of their declaration despite the fact that the prerequisites for such a reservation are no longer met, as their domestic legal systems do not impose a written form requirement, as was the case at the time when the CISG was negotiated. In the author's opinion, in cases where the rules of private international law point to the law of such a State, the courts should, in practice, refrain from following the Article 96 CISG reservation, i.e. no freedom of form, and should instead apply the less formal domestic law as to the form.