

Article 11

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.

INTRODUCTION

1. Subject to article 12, article 11 provides that a contract of sale need not be concluded in writing and is not subject to any other specific requirement as to form.¹ The provision thus establishes the principle of freedom from form requirements.² According to one court, this means that “[u]nder article 11 CISG, a contract of sale can be concluded informally,”³ without the need for a writing requirement to be met,⁴ which in turn has led one court to state that for the purpose of contract conclusion a party’s signature was not required.⁵ In light of the foregoing, it is unsurprising that some courts stated that under the Convention a contract can be concluded orally,⁶ and even through the conduct of the parties.⁷

2. Where, however, the parties have agreed upon a certain form requirement, that agreement—which may be either express or implicit—prevails; consequently, the contract must meet the form requirements agreed upon.⁸ One court held that where the parties agree upon certain form requirements, these requirements are to be met not simply for evidentiary purposes. Rather, they must be considered as having been introduced for validity purposes.⁹

3. The party claiming the existence of an agreed form requirement bears the burden of proof.¹⁰

4. The principle of freedom from form requirements is not only subject to party autonomy, but also to usages applicable pursuant to article 9.¹¹

5. Several tribunals have expressly stated that the freedom-from-form-requirements rule that article 11 establishes with regard to concluding a contract constitutes a general principle upon which the Convention is based.¹² Under this principle, the parties are free to modify or terminate their contract in writing, orally, or in any other form. Even an implied termination of the contract has been held possible,¹³ and it has been held that a written contract may be orally modified.¹⁴ Some courts stated that a notice of non-conformity can be given in any form, basing their decision on the general principle of freedom from form requirements enshrined in article 11.¹⁵

6. As the Convention’s drafting history states, despite the informality rule in article 11 “[a]ny administrative or criminal sanctions for breach of the rules of any State requiring that such contracts be in writing, whether for purposes of administrative control of the buyer or seller, for purposes of enforcing exchange control laws, or otherwise, would still be enforceable against a party which concluded the non-written

contract even though the contract itself would be enforceable between the parties.”¹⁶

FORM REQUIREMENTS AND EVIDENCE OF THE CONTRACT

7. Article 11 also frees the parties from domestic requirements relating to the means to be used in proving the existence of a contract governed by the Convention. One court expressly stated that the Convention “dispenses with certain formalities associated with proving the existence of a contract.”¹⁷ It is therefore unsurprising that various courts have emphasized that “a contract [governed by the Convention] can be proven by any means, including witnesses.”¹⁸ According to one court, this means that “[a] contract may be proven by a document, oral representations, conduct, or some combination of the three.”¹⁹ At the same time, this means that domestic rules requiring a contract to be evidenced in writing in order to be enforceable are superseded;²⁰ one court, for instance, stated that “[u]nder the CISG, evidence of the oral conversations between [seller] and [buyer], relating to the terms of the purchase . . . , could be admitted to establish that an agreement had been reached between [the parties].”²¹ A different court even stated that the “[Convention]’s lack of a writing requirement allows all relevant information into evidence even if it contradicts the written documentation.”²²

8. It is up to those presiding over the tribunal to determine—within the parameters of the procedural rules of the forum—how to evaluate the evidence presented by the parties.²³ It is on this basis that one court stated that even though the Convention allows the performance of the contract to be proved by means of witnesses, it is up to the court to determine whether hearing witnesses is helpful at all.²⁴ A different court²⁵ stated that a judge may attribute more weight to a written document than to oral testimony.

9. For comments on the applicability of the parol evidence rule under the Convention, see the Digest for article 8.²⁶

LIMITS TO THE PRINCIPLE OF FREEDOM-FROM-FORM-REQUIREMENTS

10. “Article 11’s elimination of formal writing requirements does not apply in all instances in which the [Convention] governs.”²⁷ According to article 12, the Convention’s elimination of form requirements does not apply if one party has its relevant place of business in a State that made

a declaration under article 96.²⁸ Different views exist as to the effects of an article 96 reservation.²⁹ According to one view, the mere fact that one party has its place of business in a State that made an article 96 reservation does not necessarily mean that the domestic form requirements of that State apply.³⁰ Under this view,³¹ the rules of private international of the forum will dictate what, if any, form requirements must be met: if those rules lead to the law of a State that made an article 96 reservation, then the form

requirements of that State must be complied with; but if the applicable law is that of a Contracting State that did not make an article 96 reservation, the freedom-from-form-requirements rule laid down in article 11 would apply, as several decisions have stated.³² According to an opposing view, however, the fact that one party has its relevant place of business in a State that made an article 96 reservation subjects the contract to writing requirements,³³ and the contract can only be modified in writing.³⁴

Notes

¹See *Kantonsgericht Zug*, Switzerland, 14 December 2009, available on the Internet at www.cisg-online.ch; U.S. District Court, Southern District of Ohio, United States, 26 March 2009, available on the Internet at www.cisg.law.pace.edu; U.S. District Court, Delaware, United States, 9 May 2008, available on the Internet at www.cisg.law.pace.edu; Regional Court Zilina, Slovakia, 25 October 2007, English translation available on the Internet at www.cisg.law.pace.edu; American Arbitration Association International Centre for Dispute Resolution, United States, 23 October 2007, available on the Internet at www.cisg.law.pace.edu; Regional Court in Zilina, Slovakia, 18 June 2007, English translation available on the Internet at www.cisg.law.pace.edu; Congrád County Court, Hungary, 6 June 2007, English translation available on the Internet at www.cisg.law.pace.edu; Corte di Cassazione, Italy, 16 May 2007, Unilex; District Court in Nitra, Slovakia, 9 March 2007, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 847 [U.S. District Court, Minnesota, United States, 31 January 2007]; U.S. District Court, Southern District of New York, United States, 23 August 2006, available on the Internet at www.cisg.law.pace.edu; District Court in Nitra, Slovakia, 27 June 2006, English translation available on the Internet at www.cisg.law.pace.edu; District Court in Nitra, Slovakia, 17 May 2006, English translation available on the Internet at www.cisg.law.pace.edu; Regional Court in Banska Bystrica, Slovakia, 10 May 2006, English translation available on the Internet at www.cisg.law.pace.edu; District Court in Nitra, Slovakia, 27 February 2006, English translation available on the Internet at www.cisg.law.pace.edu; *Kantonsgericht Freiburg*, Switzerland, 11 October 2004, English translation available on the Internet at www.cisg.law.pace.edu; *Bundesgericht*, Switzerland, 4 August 2003, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 576 [U.S. Circuit Court of Appeals (9th Circuit), United States, 5 May 2003]; *Cour d'appel de Liège*, Belgium, 28 April 2003, English translation available on the Internet at www.cisg.law.pace.edu; *Cour de Justice de Genève*, Switzerland, 13 September 2002, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 537 [Oberlandesgericht Graz, Switzerland, 7 March 2002]; CLOUT case No. 424 [Oberster Gerichtshof, Austria, 9 March 2000], also available on the Internet at www.cisg.at; CLOUT case No. 215 [Bezirksgericht St. Gallen, Switzerland, 3 July 1997] (see full text of the decision); CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision); CLOUT case No. 308 [Federal Court of Australia, 28 April 1995] (see full text of the decision); CLOUT case No. 137 [Oregon [State] Supreme Court, United States, 11 April 1996]; for similar statements, see United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 20.

²See *Kantonsgericht Zug*, Switzerland, 14 December 2009, available on the Internet at www.cisg-online.ch; Corte di Cassazione, Italy, 16 May 2007, Unilex; *Rechtbank Arnhem*, the Netherlands, 17 January 2007, English translation available on the Internet at www.cisg.law.pace.edu; Corte di Cassazione, Italy, 13 October 2006, available on the Internet at www.cisg-online.ch; *Landgericht Bamberg*, Germany, 13 April 2005, English translation available on the Internet at www.cisg.law.pace.edu; *Rechtbank Arnhem*, the Netherlands, 17 March 2004, English translation available on the Internet at www.cisg.law.pace.edu; *Cour d'appel de Grenoble*, France, 28 November 2002, English translation available on the Internet at www.cisg.law.pace.edu; *Bundesgericht*, Switzerland, 15 September 2000, Unilex.

³CLOUT case No. 95 [Zivilgericht Basel-Stadt, Switzerland, 21 December 1992] (see full text of the decision); see also Corte di Cassazione, Italy, 13 October 2006, available on the Internet at www.cisg-online.ch.

⁴*Handelsgericht St. Gallen*, Switzerland, 29 April 2004, English translation available on the Internet at www.cisg.law.pace.edu; *Oberlandesgericht Hamm*, Germany, 12 November 2001, English translation available on the Internet at www.cisg.law.pace.edu.

⁵CLOUT case No. 828 [Hof 's-Hertogenbosch, the Netherlands, 2 January 2007]; U.S. District Court, Southern District of New York, United States, 23 August 2006, available on the Internet at www.cisg.law.pace.edu; *Rechtbank van Koophandel Tongeren*, Belgium, 25 January 2005, English translation available on the Internet at www.cisg.law.pace.edu; Hof van Beroep Ghent, Belgium, 4 October 2004, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 633 [U.S. District Court, Southern District of New York, United States, 7 November 2001].

⁶CLOUT case No. 330 [Handelsgericht des Kantons St. Gallen, Switzerland, 5 December 1995].

⁷See U.S. District Court, Eastern District of California, United States, 21 January 2010, available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 1203 [Rechtbank Breda, the Netherlands, 16 January 2009], English translation available on the Internet at www.cisg.law.pace.edu; District Court in Dolny Kubin, Slovakia, 17 June 2008, English translation available on the Internet at www.cisg.law.pace.edu; U.S. District Court, Minnesota, United States, 16 June 2008, available on the Internet at www.cisg.law.pace.edu; Supreme Court of the Slovak Republic, Slovakia, 27 June 2007, English translation available on the Internet at www.cisg.law.pace.edu; District Court in Nitra, Slovakia, 27 June 2006, English translation available on the Internet at www.cisg.law.pace.edu; District Court in Nitra, Slovakia, 17 May 2006, English translation available on the Internet at www.cisg.law.pace.edu; *Rechtbank van Koophandel Tongeren*, Belgium, 25 January 2005, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 222 [U.S. Court of Appeals (11th Circuit), United States 29 June 1998] (see full text of the decision); CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision); CLOUT case No. 134 [Oberlandesgericht München, Germany, 8 March 1995]. For an example of a case where an oral contract was held to be valid, see CLOUT case No. 120 [Oberlandesgericht Köln, Germany, 22 February 1994], also available on the Internet at www.cisg-online.ch.

⁷For this statement, see *Rechtbank van Koophandel Tongeren*, Belgium, 25 January 2005, English translation available on the Internet at www.cisg.law.pace.edu; *CLOUT* case No. 1017 [*Hof van Beroep Ghent*, Belgium, 15 May 2002], available in Dutch on the Internet at www.law.kuleuven.be; *CLOUT* case No. 134 [*Oberlandesgericht München*, Germany, 8 March 1995].

⁸*Kantonsgericht Zug*, Switzerland, 14 December 2009, available on the Internet at www.cisg-online.ch.

⁹*Ibid.*

¹⁰*Ibid.*

¹¹*Ibid.*

¹²See *Rechtbank Arnhem*, the Netherlands, 17 January 2007, English translation available on the Internet at www.cisg.law.pace.edu; *CLOUT* case No. 1193 [*Compromex Arbitration*, Mexico, 29 April 1996]] also available on the Internet at www.cisgspanish.com; *CLOUT* case No. 176 [*Oberster Gerichtshof*, Austria, 6 February 1996] (see full text of the decision).

¹³*CLOUT* case No. 422 [*Oberster Gerichtshof*, Austria, 29 June 1999], *Zeitschrift für Rechtsvergleichung*, 2000, 33.

¹⁴*CLOUT* case No. 1017 [*Hof van Beroep Ghent*, Belgium, 15 May 2002], available in Dutch on the Internet at www.law.kuleuven.be; *CLOUT* case No. 176 [*Oberster Gerichtshof*, Austria, 6 February 1996] (see full text of the decision).

¹⁵*Appellationshof Bern*, Switzerland, 11 February 2004, English translation available on the Internet at www.cisg.law.pace.edu.

¹⁶United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 20.

¹⁷U.S. Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at www.cisg.law.pace.edu.

¹⁸See U.S. District Court, Southern District of Ohio, United States, 26 March 2009, available on the Internet at www.cisg.law.pace.edu; *Kantonsgericht Freiburg*, Switzerland, 11 October 2004, English translation available on the Internet at www.cisg.law.pace.edu; *Oberlandesgericht Rostock*, Germany, 27 October 2003, English translation available on the Internet at www.cisg.law.pace.edu; *Cour d'appel de Liège*, Belgium, 28 April 2003, English translation available on the Internet at www.cisg.law.pace.edu; *Rechtbank van Koophandel Veurne*, Belgium, 19 March 2003, English translation available on the Internet at www.cisg.law.pace.edu; *Cour de Justice de Genève*, Switzerland, 11 November 2002, English translation available on the Internet at www.cisg.law.pace.edu; *Rechtbank van Koophandel Hasselt*, Belgium, 22 May 2002, available on the Internet at www.law.kuleuven.be; *Rechtbank van Koophandel Kortrijk*, Belgium, 4 April 2001, available on the Internet at www.law.kuleuven.be; *CLOUT* case No. 330 [*Handelsgericht des Kantons St. Gallen*, Switzerland, 5 December 1995]; *CLOUT* case No. 134 [*Oberlandesgericht München*, Germany, 8 March 1995].

¹⁹*CLOUT* case No. 579 [U.S. District Court, Southern District of New York, United States, 10 May 2002].

²⁰See U.S. District Court, Colorado, United States, 6 July 2010, available on the Internet at www.cisg.law.pace.edu; U.S. District Court, Southern District of Ohio, United States, 26 March 2009, available on the Internet at www.cisg.law.pace.edu.

²¹*CLOUT* case No. 414 [U.S. District Court, Southern District of New York, United States, 8 August 2000] (see full text of the decision).

²²U.S. District Court, Eastern District of Pennsylvania, United States, 29 January 2010, available on the Internet at www.cisg.law.pace.edu, at note 6.

²³See *Rechtbank van Koophandel Kortrijk*, Belgium, 4 April 2001, available on the Internet at www.law.kuleuven.be; *Landgericht Memmingen*, 1 December 1993, available on the Internet at www.cisg-online.ch.

²⁴*Hof van Beroep Antwerpen*, Belgium, 24 April 2006, English translation available on the Internet at www.cisg.law.pace.edu.

²⁵*Rechtbank van Koophandel Hasselt*, Belgium, 22 May 2002, available on the Internet at www.law.kuleuven.be.

²⁶See paragraphs 22 and 23 of the Digest for article 8.

²⁷U.S. Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at www.cisg.law.pace.edu.

²⁸See U.S. Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at www.cisg.law.pace.edu; *Rechtbank van Koophandel Hasselt*, Belgium, 2 May 1995, available on the Internet at www.law.kuleuven.be.

²⁹For a recent overview of the conflicting views, see U.S. Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at www.cisg.law.pace.edu.

³⁰*Rechtbank Rotterdam*, the Netherlands, 12 July 2001, English translation available at www.cisg.law.pace.edu.

³¹See also U.S. Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at www.cisg.law.pace.edu; *Rechtbank Rotterdam*, the Netherlands, 12 July 2001, English translation available on the Internet at www.cisg.law.pace.edu.

³²*Rechtbank Rotterdam*, the Netherlands, 12 July 2001, English translation available on the Internet at www.cisg.law.pace.edu; *Hoge Raad*, the Netherlands, 7 November 1997, *Unilex*; *CLOUT* case No. 52 [*Fovárosi Biróság*, Hungary 24 March 1992].

³³U.S. District Court, New Jersey, United States, 7 October 2008, available on the Internet at www.cisg.law.pace.edu; U.S. District Court, Southern District of Florida, United States, 19 May 2008, available on the Internet at www.cisg.law.pace.edu; *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry*, Russian Federation, 16 February 2004, English translation available on the Internet at www.cisg.law.pace.edu.

³⁴The High Arbitration Court of the Russian Federation, Russian Federation, 16 February 1998, English editorial remarks available on the Internet at www.cisg.law.pace.edu; *Rechtbank van Koophandel Hasselt*, Belgium, 2 May 1995, available on the Internet at www.law.kuleuven.be.