

# CISG Advisory Council\* Opinion No. 15\*\*

## Reservations under Articles 95 and 96 CISG

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### OPINION [BLACK LETTER TEXT]

#### *Article 1 CISG*

***(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:***

***(a) [...]***

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\* 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.

At its formative meeting in Paris in June 2001, Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for a three-year term. Dr. Loukas A. Mistelis of the Centre for Commercial Law Studies, Queen Mary, University of London, was elected Secretary. The founding members of the CISG-AC were Prof. Emeritus Eric E. Bergsten, Pace University School of Law; Prof. Michael Joachim Bonell, University of Rome La Sapienza; Prof. E. Allan Farnsworth, Columbia University School of Law; Prof. Alejandro M. Garro, Columbia University School of Law; Prof. Sir Roy M. Goode, Oxford, Prof. Sergei N. Lebedev, Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation; Prof. Jan Ramberg, University of Stockholm, Faculty of Law; Prof. Peter Schlechtriem, Freiburg University; Prof. Hiroo Sono, Faculty of Law, Hokkaido University; Prof. Claude Witz, Universität des Saarlandes and Strasbourg University. Members of the Council are elected by the Council.

At subsequent meetings, the CISG-AC elected as additional members Prof. Pilar Perales Viscasillas, Universidad Carlos III, Madrid; Professor Ingeborg Schwenger, University of Basel; Prof. John Y. Gotanda, Villanova University; Prof. Michael G. Bridge, London School of Economics; Prof. Han Shiyuan, Tsinghua University and Prof. Yesim Atamer, Istanbul Bilgi University, Turkey. Prof. Jan Ramberg served for a three-year term as the second Chair of the CISG-AC. At its 11th meeting in Wuhan, People's Republic of China, Prof. Eric E. Bergsten of Pace University School of Law was elected Chair of the CISG-AC and Prof. Sieg Eiselen of the Department of Private Law of the University of South Africa was elected Secretary. At its 14th meeting in Belgrade, Serbia, Prof. Ingeborg Schwenger of the University of Basel was elected Chair of the CISG-AC.

\*\* Rules 1-2 and 4-6 were adopted unanimously. Rule 3 was adopted with one dissenting vote.

*(b) when the rules of private international law lead to the application of the law of a Contracting State.*

#### *Article 95 CISG*

*Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1) (b) of article 1 of this Convention.*

- 1. A declaration under Article 95 excludes the declaring Contracting State's obligation under public international law to apply the Convention in accordance with Article 1(1)(b). However, it does not prevent the courts of such a State from applying the Convention when their rules of private international law lead to the application of the law of a Contracting State.**
- 2. A declaration under Article 95 is without any effect for the Convention's applicability in accordance with Article 1(1)(a). In applying Article 1(1)(a), it is irrelevant whether the forum State has made an Article 95 declaration or whether one (or both) parties to the sales contract have their place of business in a State which has made an Article 95 declaration.**
- 3. When the forum is in a Contracting State that has made no declaration under Article 95, the Convention applies in accordance with Article 1(1)(b) even when the rules of private international law lead to the application of the law of a Contracting State that has made an Article 95 declaration.**

#### *Article 12 CISG*

*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.*

#### *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.*

4. A declaration under Article 96 may only be made by States whose legislation requires all contracts of sale governed by the Convention to be concluded in or evidenced by writing.
5. Declarations that have been made under Article 96 must be observed by courts in Contracting States even if the prerequisites for such declaration were not or are no longer fulfilled, until the declaration has been withdrawn in accordance with Article 97(4).
6. Where any party to a sales contract has its place of business in a Contracting State which has made a declaration under Article 96,
  - 6.1 no Contracting State is under any obligation under public international law to apply any provision of Article 11, Article 29 or Part II of the 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 (Article 12)
  - 6.2 the forum's rules of private international law determine which law governs the requirements as to form applicable to such sales contract and the manner in which it may be evidenced.

OPINION [BLACK LETTER TEXT] .....	1
COMMENTS .....	3
1. General .....	3
2. Drafting History .....	4
a) Article 95 CISG .....	4
b) Article 96 CISG .....	5
3. Interpretation of Article 95 CISG .....	6
a) General .....	6
b) Scope of the reservation .....	7
c) Effects of the reservation .....	8
aa) Effect in courts of Contracting States that have made an Article 95 declaration .....	8
bb) Effect in courts of Contracting States that have not made an Article 95 declaration .....	10
cc) Effect in courts of Non-Contracting States .....	14
dd) Effect in arbitration proceedings .....	14
4. Interpretation of Article 96 CISG .....	15
a) General .....	15
b) Scope of the reservation .....	16
aa) Prerequisites for reservations under Article 96 CISG .....	16
bb) Lack of prerequisites and its effect .....	17
cc) Unclear declarations .....	18
c) Effects of the reservation .....	19
aa) Exclusion of Contracting States' obligation to apply the Convention's freedom of form provisions (the reservation's 'negative' effect) .....	19
(1) Contractual declarations affected .....	20
(2) Form requirements covered .....	20
(3) Universal effect in all Contracting States .....	21

bb) No determination of rules governing formal validity (no ‘positive’ effect of the reservation) .....	22
cc) Identification of the law governing formal validity via rules of private international law in CISG cases .....	25
dd) Form requirements for sales contracts and party autonomy (Article 12 sentence 2 CISG) .....	27
ADDENDUM: CASES CITED .....	29

## COMMENTS

### 1. General

In its Final Clauses in Part IV of the CISG, the Convention authorizes a number of declarations whereby Contracting States may exclude or modify the legal effect of certain provisions of the Convention. According to Article 98 CISG, the list of reservations in Part IV is exhaustive, with no reservations except those expressly authorized therein being permitted.

Most of the reservations allowed under the CISG have proven to be relatively straightforward, and their effects have caused few difficulties in practice. The present Opinion addresses the two reservations that have raised questions about their proper interpretation and application, namely Articles 95 and 96 CISG. These two reservations are similar only insofar as they both merely affect the applicability of certain individual provisions of the Convention, whereas as declarations under Articles 92–94 CISG each exclude the application of the entire Convention or parts thereof. Beyond this shared general characteristic, the respective subject matters of Articles 95 and 96 CISG are unrelated: While Article 95 CISG affects the application of Article 1(1)(b) CISG, Article 96 CISG concerns the applicability of the freedom of form principle under the Convention.

### 2. Drafting History

#### *a) Article 95 CISG*

**2.1** The drafting history of Article 95 CISG is quite brief. The provision was first proposed during the Vienna Diplomatic Conference by Czechoslovakia<sup>1</sup> and considered during the 2nd meeting of the Second Committee, where it was rejected.<sup>2</sup> Czechoslovakia subsequently re-introduced its proposal in the Plenary, now offering two alternative wordings.<sup>3</sup> After a brief

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<sup>1</sup> Document A/CONF.97/C.2/L.7, *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 Committees* (1981) 145.

<sup>2</sup> *Official Records* (footnote 1) 439.

<sup>3</sup> Document A/CONF.97/L.4, *Official Records* (footnote 1) 170.

discussion, one of the proposed wordings was withdrawn and the other accepted by 24 votes to 7, with 16 abstentions.<sup>4</sup>

**2.2** The discussions about Article 95 CISG in the Plenary were almost exclusively concerned with the reason given by Czechoslovakia for its wish not having to apply Article 1(1)(b) CISG, which was its desire not to limit the practical applicability of one specific domestic law: The CSSR (and, quite similar, also the then German Democratic Republic) had enacted special legislation to govern transactions pertaining to international trade, which applied in Czechoslovakian courts when the rules of private international law referred to the law of the CSSR. Article 1(1)(b) CISG would therefore have had the effect of largely depriving said special legislation of its practical relevance, since it would have meant that the CISG and not the special domestic legislation would have to be applied.<sup>5</sup> At this late stage of the Diplomatic Conference, this – rather narrow – reason for an additional reservation was readily accepted, largely out of the desire not to risk the support of the CSSR and other Socialist countries for the Convention as a whole.<sup>6</sup> The new reservation's precise effect upon the Convention's sphere of application, on the contrary, was neither evaluated nor discussed.

**2.3** Article 95 CISG had quasi-predecessors in Article III of the Conventions relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) and to a Uniform Law on the International Sale of Goods (ULIS) respectively, which both provided for a reservation which had a somewhat similar effect on the Uniform Sales Law's applicability by restricting it to contracts between parties that both had their places of business in Contracting States. Due to the different legal structures of the Hague Sales Laws and the CISG, however, the way by which this effect was achieved differed from the mechanism employed by Article 95 CISG, thereby limiting the guidance that can be drawn from the predecessors for interpretation purposes.

### ***b) Article 96 CISG***

**2.4** The drafting history of Article 96 CISG and its companion provision, Article 12 CISG, was comparatively uneventful. Both provisions had no predecessor in ULIS or in ULF. During the preparation of the CISG within UNCITRAL and during the Vienna Diplomatic Conference, the discussions about a possible reservation on form requirements formed part and parcel of the more general policy discussion about the freedom of form principle under the Convention. The freedom of form principle (primarily incorporated in today's Article 11 CISG) and its scope had from the beginning been one of the most controversial issues,<sup>7</sup> with some countries (in particular the then Socialist countries) insisting on formal requirements for

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<sup>4</sup> *Official Records* (footnote 1) 230.

<sup>5</sup> *Official Records* (footnote 1) 229.

<sup>6</sup> Cf. Malcolm Evans, in Bianca & Bonell eds., *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987), Art. 95 note 2.3.

<sup>7</sup> Peter Schlechtriem, *Uniform Sales Law* (1986), 44.

the making of foreign trade contracts, while others (in particular Western market economies) rejecting such requirements as impractical and inappropriate for international commercial transactions. Once the decision within UNCITRAL had been made in favor of the freedom of form principle, the possibility for Contracting States to declare a reservation against this principle was introduced as a compromise.

An initial proposal in UNCITRAL to include a provision resembling Articles 12 and 96 CISG had already in 1971 been made by the U.S.S.R.,<sup>8</sup> which had legislation requiring contract terms to be expressed in a signed writing. After the compromise mentioned above, the U.S.S.R. continued to be the principal supporter of today's Article 96 reservation,<sup>9</sup> which in turn was essentially viewed by the other States as a price for the Convention's acceptance by the U.S.S.R. and other Socialist States. During the Vienna Diplomatic Conference, this had the practical effect of Articles 12 and 96 CISG receiving relatively little attention from the conference delegates, as there was agreement that the primary concern was the reservation's acceptability for the U.S.S.R.<sup>10</sup> Certain substantive amendments to the language of Article 96 CISG which were nevertheless proposed during the Diplomatic Conference are addressed below where relevant for the interpretation of the provision.

**2.5** A unique feature of the Article 96 CISG reservation is its apparent 'duplication' by Article 12 CISG. The two provisions are almost identical in their wording, although Article 96 CISG is written as a reservation for Contracting States admissible under certain conditions ('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 [...] does not apply where any party has his place of business in that State'), while Article 12 in its first sentence focuses on the reservation's effect ('Any provision [...] 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.'). Furthermore, Article 12 CISG includes a second sentence announcing its mandatory nature<sup>11</sup> which has no counterpart in Article 96 CISG.

Due to the close relationship between Articles 12 and 96 CISG, they were discussed together in the First Committee, although Article 96 CISG would ordinarily have been dealt with in the Second Committee responsible for reservations.<sup>12</sup> A proposal to merge the two provisions into one was made in the First Committee,<sup>13</sup> but rejected.<sup>14</sup> Within the Convention's text as

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<sup>8</sup> See II *UNCITRAL Yearbook* (1971), 48. Predecessors whose wording was closer to today's Articles 12 and 96 CISG were introduced in 1977; see John O. Honnold, *Documentary History of the Uniform Law for International Sales* (1989) 326–27.

<sup>9</sup> John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (4th ed. 2009), para. 129; Peter Schlechtriem & Martin Schmidt-Kessel, in *Schlechtriem & Schwenzler Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd ed. 2010), Art. 12 para. 1.

<sup>10</sup> See e.g. the remark by delegate Date-Bah (Ghana), *Official Records* (footnote 1) 274: '... like the representative of the United States he thought that the agreement reached on article 11 [became Article 12 CISG] was designed merely to eliminate the obstacles which might be encountered by the Soviet Union.'

<sup>11</sup> See Comment 4.24.

<sup>12</sup> *Official Records* (footnote 1) 271.

<sup>13</sup> Document A/CONF.97/C.1/L.42, *Official Records* (footnote 1) 91.

<sup>14</sup> *Official Records* (footnote 1) 271.

eventually adopted, Article 12 CISG is – strictly speaking – superfluous,<sup>15</sup> as can be seen from the fact that no other reservation contained in Part IV of the Convention is accompanied by a provision in Part I–III governing their effect on the CISG’s application. Its insertion immediately following Article 11 CISG may nevertheless serve a useful purpose by drawing attention to the fact that Article 11 might be affected by a reservation.<sup>16</sup>

### **3. Interpretation of Article 95 CISG**

#### ***a) General***

**3.1** The subject matter of Article 95 CISG is the Convention’s applicability in accordance with Article 1(1)(b) CISG, which provides that ‘[t]his Convention applies to contracts of sale of goods between parties whose places of business are in different States [...] when the rules of private international law lead to the application of the law of a Contracting State’. A reservation under Article 95 CISG, when made by a Contracting State, results in the reservation State ‘not being bound’ by Article 1(1)(b) CISG, thereby limiting the applicability of the Convention. The precise effects of an Article 95 declaration raise a number of questions to be addressed in detail below.

**3.2** The practical importance of Article 95 CISG was not insignificant in the first years after the Convention’s entry into force, in particular because two major trading nations (the People’s Republic of China and the United States of America) have made use of this reservation. In recent years, its practical relevance has been greatly diminished by the increasing overall number of CISG Contracting States, which in turn has increased the Convention’s application via Article 1(1)(a) CISG: Today, in the vast majority of cases the CISG applies because both parties to the sales contract have their place of business in different Contracting States (Article 1(1)(a) CISG), thereby making a recourse to Article 1(1)(b) CISG unnecessary. A certain importance of Article 1(1)(b) CISG (and the reservation under Article 95 CISG relating thereto) will, however, remain as long as not every State has acceded to the Convention.

**3.3** The following States have made an Article 95 CISG declaration: Armenia,<sup>17</sup> the People’s Republic of China, Saint Vincent and the Grenadines, Singapore, and the United States of America. According to the prevailing opinion,<sup>18</sup> a reservation in accordance with Article 95 is furthermore in force for the Czech Republic and for Slovakia, since the declaration made by the former Czechoslovakia when depositing an instrument of ratification in 1990 extends to

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<sup>15</sup> Rolf Herber & Beate Czerwenka, *Internationales Kaufrecht* (1991), Art. 12 para. 5; Ulrich G. Schroeter, ‘Backbone or Backyard of the Convention? The CISG’s Final Provisions’, in Andersen & Schroeter eds., *Sharing International Commercial Law Across National Boundaries: Festschrift for Albert H. Kritzer on Occasion of his Eightieth Birthday* (2008) 427.

<sup>16</sup> Honnold, op. cit. (footnote 9), para. 129 footnote 2.

<sup>17</sup> The wording of Armenia’s declaration departs from the wording of Article 95 CISG. See Comment 3.5 below.

<sup>18</sup> Ulrich Magnus, in *J. von Staudingers Kommentar zum BGB, Wiener UN-Kaufrecht (CISG)* (2013), Art. 95 para. 4; Schroeter, op. cit. (footnote 15) 464. *Contra* Fritz Enderlein, ‘Vienna Convention and Eastern European Lawyers’, *IBA International Sales Quarterly* (1997) 12.

these two States due to the principles of state succession. At least one court has confirmed the Czech Republic's status as an Article 95 reservation State.<sup>19</sup>

In addition, Canada had initially made an Article 95 declaration providing that its territorial unit of British Columbia would not be bound by Article 1(1)(b) CISG; however, this declaration was withdrawn in July 1992.

Germany did not make an Article 95 reservation when ratifying to the Convention, but made an interpretative declaration that relates to certain effects of Article 95 reservations made by other Contracting States. It will be addressed in more detail below.<sup>20</sup>

### ***b) Scope of the reservation***

**3.4** The scope of Article 95 CISG does not cause any problems: While some of the reservations under the CISG (namely those according to Articles 93, 94 and 96) may only be made by Contracting States which fulfil certain prerequisites, Article 95 CISG may be used by any State which so desires.<sup>21</sup> A reservation under Article 95 CISG can, however, only be declared at the time of the deposit of the instrument of ratification, acceptance, approval or accession by a new Contracting State, but not later.

**3.5** It furthermore follows from Article 98 CISG that a declaration under Article 95 CISG may only be made with the scope and effects authorized in Article 95 CISG; a State's declaration may therefore not limit, extend or otherwise vary the reservation's scope and effects as laid down in Article 95 CISG. The declaration made by the Republic of Armenia upon its accession to the Convention contains such a variation, because its wording limits the non-application of Article 1(1)(b) CISG by Armenia (i.e., the reservation's effects) „to the parties that declare not to be bound by [Article 1(1)(b) CISG]”.<sup>22</sup> The latter phrase cannot be found in Article 95 CISG, and its purpose is unclear. For the purposes of the present Opinion, it suffices to say that the wording of Armenia's declaration remains without effect for the Convention's application by courts outside of Armenia, because Article 95 CISG reservations generally only affect the application of the Convention by courts in the respective reservation State (an issue to be developed in more detail below<sup>23</sup>). The effect that the Armenian declaration's apparent incompatibility with Articles 95 and 98 CISG may have upon the Convention's application in Armenian courts is primarily a matter of domestic law that lies beyond this Opinion's scope.

### ***c) Effects of the reservation***

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<sup>19</sup> Thüringer Oberlandesgericht in Jena (Germany), 26 May 1998, translated at: <http://cisgw3.law.pace.edu/cases/980526g1.html>.

<sup>20</sup> Comment 3.17.

<sup>21</sup> Schroeter, op. cit. (footnote 15) 432.

<sup>22</sup> Armenia's declaration reads: „Pursuant to Article 95 of the Convention, the Republic of Armenia declares that it will not apply the Article 1, subparagraph (1) (b) of the Convention to the parties that declare not to be bound by the Article 1, subparagraph (1) (b) of the Convention.“

<sup>23</sup> Comments 3.12 et seq.



**3.6** The precise effects of an Article 95 reservation on the Convention’s practical application raise a number of difficult questions which have earned Article 95 CISG a reputation as the ‘probably most complex’<sup>24</sup> and ‘[p]erhaps the most challenging to understand’<sup>25</sup> among the CISG’s reservations.

In addressing these difficulties, it is helpful to distinguish between the effect of an Article 95 CISG reservation in courts of Contracting States that have made an Article 95 declaration (Comments 3.7 et seq.), in courts of Contracting States that have not made an Article 95 declaration (Comments 3.12 et seq.), in courts of Non-Contracting States (Comment 3.18) and in arbitral proceedings (Comment 3.19).

**aa) Effect in courts of Contracting States that have made an Article 95 declaration**

**1. A declaration under Article 95 excludes the declaring Contracting State’s obligation under public international law to apply the Convention in accordance with Article 1(1)(b). However, it does not prevent the courts of such a State from applying the Convention when their rules of private international law lead to the application of the law of a Contracting State.**

**3.7** By providing that a declaring State ‘will not be bound’ by Article 1(1)(b) CISG, Article 95 CISG makes clear that this reservation merely removes the declaring State’s *obligation* under public international law to apply the Convention in accordance with Article 1(1)(b) CISG.<sup>26</sup> Making use of the reservation does, on the contrary, it itself not prevent the courts in the declaring State from applying the Convention in cases where the prerequisites of Article 1(1)(a) CISG are not met, since the Article 95 reservation does not impinge upon the declaring State’s freedom to apply the Convention despite its missing obligation to do so.<sup>27</sup>

**3.8** Such a situation is most likely to arise in practice in cases in which two contracting parties – at least one of which does not have its place of business in a CISG Contracting State (because then Article 1(1)(a) CISG would apply) – choose the Convention as the law applicable to their contract, either by way of an ‘isolated’ choice of the CISG or by choosing the law of a CISG Contracting State: In such a case, many courts are likely to accept the parties’ choice of the CISG, thereby respecting party autonomy as recognized by the rules of

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<sup>24</sup> Filip De Ly, ‘Sources of International Sales Law: An Eclectic Model’, 25 *Journal of Law and Commerce* (2005–06), 1 at 10.

<sup>25</sup> Michael G. Bridge, ‘Uniform and Harmonized Sales Law: Choice of Law Issues’, in Fawcett, Harris & Bridge, *International Sale of Goods in the Conflict of Laws* (2005), para. 16-128.

<sup>26</sup> Schroeter, *op. cit.* (footnote 15) 440.

<sup>27</sup> Gary F. Bell, ‘Why Singapore should withdraw its reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)’, 9 *Singapore Yearbook of International Law* (2005), 55 at 65; Michael G. Bridge, ‘Uniform and Harmonized Sales Law: Choice of Law Issues’, in Fawcett, Harris & Bridge, *International Sale of Goods in the Conflict of Laws* (2005), para. 16-134; Christoph Brunner, *UN-Kaufrecht – CISG* (2004), Art. 95 para. 1; Honnold, *op. cit.* (footnote 9), paras. 47.5, 47.6; Peter Schlechtriem, Ingeborg Schwenzer & Pascal Hachem, in *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd ed. 2010), Art. 95 para. 2; Kurt Siehr, in Honsell ed., *Kommentar zum UN-Kaufrecht* (2nd ed. 2010), Art. 1 para. 21.

private international law of the forum.<sup>28</sup> At least two courts of second instance in the People's Republic of China, an Article 95 CISG-reserving State, adopted the same position and applied the CISG although the prerequisites of Article 1(1)(a) CISG were *in casu* not fulfilled.<sup>29</sup>

**3.9** One Article 95 CISG-reserving State – Singapore – has included in its domestic law a specific provision by which the national legislator explicitly excludes the application of the CISG in all cases in which Article 1(1)(a) is inapplicable:

‘Sub-paragraph (1)(b) of Article 1 of the Convention shall not have the force of law in Singapore and accordingly the Convention will apply to contracts of sale of goods only between those parties whose places of business are in different States when the States are Contracting States.’<sup>30</sup>

At least three U.S. District Courts have taken the same position and held that the *only* circumstance in which the CISG can be applied by a U.S. court is if all the parties to the contract are from Contracting States.<sup>31</sup> It is important to note that this assessment cannot be derived from Article 95 CISG itself, which – as explained above – does not prevent Article 95 reservation States from applying the Convention where the prerequisites of Article 1(1)(a) CISG are not fulfilled.<sup>32</sup>

Another CISG Contracting State which has not made a declaration under Article 95 CISG – the Netherlands – has included in its domestic law an explicit provision addressing cases in which the private international law of an Article 95 reservation State leads to the applicability of Dutch law: This provision<sup>33</sup> requests foreign judges in Article 95 reservation States not to apply the Dutch Civil Code provisions on sales<sup>34</sup> but rather the CISG, if Dutch law is declared applicable by virtue of the local conflicts rules. This suggestion is of course not binding on foreign courts but by enacting this solution, the Dutch legislature has indicated that under

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<sup>28</sup> Johnny Herre, in Kröll, Mistelis & Perales Viscasillas eds., *UN Convention on Contracts for the International Sale of Goods (CISG)* (2011), Art. 95 para. 5.

<sup>29</sup> *Japan Taiping v. Jiangsu Shuntian*, Jiangsu Higher People's Court, 2001, Case No. Su Jing Zhong Zi (2001) No. 011; *Japan Xingsheng v. Ningxia Capital Steel*, Ningxia Huizu Higher People's Court, 2002, Case No. Ning Min Shang Zhong No. 36.

<sup>30</sup> Sub-section 3(2) of the Singapore Sale of Goods (United Nations Convention) Act.

<sup>31</sup> *Impuls v. Psion-Teklogix*, U.S. District Court [S.D. Florida], 22 November 2002, 234 F.Supp.2d 1267, 1272, available at: <http://cisgw3.law.pace.edu/cases/021122u1.html>; *Prime Start v. Maher Forest Products*, U.S. District Court [W.D. Washington], 17 July 2006, *Internationales Handelsrecht* (2006), 259 at 260, available at: <http://cisgw3.law.pace.edu/cases/060717u1.html>; *Princess d'Isenbourg et Cie Ltd. v. Kinder Caviar, Inc.*, U.S. District Court [E.D. Kentucky], 22 February 2011, available at: <http://cisgw3.law.pace.edu/cases/110222u1.html>.

<sup>32</sup> Contra *Prime Start v. Maher Forest Products*, U.S. District Court [W.D. Washington], 17 July 2006, *Internationales Handelsrecht* (2006), 259 at 260, available at: <http://cisgw3.law.pace.edu/cases/060717u1.html>: ‘Because not all parties are from countries that signed the CISG, the CISG cannot apply to this dispute, even if a traditional choice-of-law analysis leads to the application of the law of the United States (or one of its states) or any other signatory State. Accordingly, some body of law other than the CISG will govern this dispute’; as here Franco Ferrari, ‘Short notes on the impact of the Article 95 reservation on the occasion of *Prime Start Ltd. v. Maher Forest Products Ltd. et al.*, 17 July 2006 (IHR 2006, 259)’, *Internationales Handelsrecht* (2006), 248 at 250; Claude Witz, ‘Droit uniforme de la vente internationale de marchandises – juillet 2006–décembre 2007’, *Recueil Dalloz* (2008), 2620 at 2621.

<sup>33</sup> Article 2 of the Dutch Implementing CISG Act of 18 December 1991.

<sup>34</sup> Book 7, Title 1 of the Dutch Civil Code.

Dutch law it prefers a solution which enhances uniformity rather than one that relies on the local Dutch law of sales.<sup>35</sup>

**2. A declaration under Article 95 is without any effect for the Convention's applicability in accordance with Article 1(1)(a). In applying Article 1(1)(a), it is irrelevant whether the forum State has made an Article 95 declaration or whether one (or both) parties to the sales contract have their place of business in a State which has made an Article 95 declaration.**

**3.10** The language of Article 95 CISG, which entitles any State to declare that it will not be bound 'by subparagraph (1)(b) of Article 1 of this Convention', makes clear that the application of Article 1(1)(a) CISG is *e contrario* not affected by the reservation: Reserving States continue to be bound by this provision.<sup>36</sup>

**3.11** For the application of Article 1(1)(a) CISG, it is furthermore without any relevance whether one (or even both) parties to the sales contract have their place of business in Contracting States that have made an Article 95 CISG reservation – the Convention is nevertheless applicable in accordance with Article 1(1)(a) CISG. This result can on one hand be explained by the general lack of effects that an Article 95 CISG reservation has on Article 1(1)(a) CISG,<sup>37</sup> and on the other hand by reservation States' status as 'Contracting State' in the meaning employed by Article 1(1) CISG which remains unaffected by an Article 95 CISG reservation (a point to be further addressed in Comment 3.14). At least one court in a Contracting State, however, overlooked this.<sup>38</sup>

**bb) Effect in courts of Contracting States that have not made an Article 95 declaration**

**3. When the forum is in a Contracting State that has made no declaration under Article 95, the Convention applies in accordance with Article 1(1)(b) even when the rules of private international law lead to the application of the law of a Contracting State that has made an Article 95 declaration.**

**3.12** In Contracting States that have not made a declaration under Article 95 CISG, the courts are bound to apply Article 1(1)(b) CISG. Article 1(1)(b) CISG in turn provides that the Convention applies to contracts of sale of goods when the rules of private international law lead to the application of 'the law of a Contracting State'. It is a much discussed question

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<sup>35</sup> De Ly, op. cit. (footnote 24) 10.

<sup>36</sup> *Valero Marketing v. Greeni Oy*, U.S. District Court [New Jersey], 15 June 2005, 373 F.Supp.2d 475, 482, available at: <http://cisgw3.law.pace.edu/cases/050615u1.html>; Schlechtriem, Schwenger & Hachem, op. cit. (footnote 27), Art. 95 para. 2; Schroeter, op. cit. (footnote 15) 440.

<sup>37</sup> Comment 3.10 above.

<sup>38</sup> Thüringer Oberlandesgericht in Jena (Germany), 26 May 1998, translated at: <http://cisgw3.law.pace.edu/cases/980526g1.html>: The Convention's applicability to a contract between a seller from the Czech Republic (an Article 95-reservation State) and German buyer was not based on Article 1(1)(a) CISG, but on a choice of law in favor of the CISG made by the parties during the court proceedings.

whether this condition is also fulfilled when the forum's rules of private international law lead to the application of the law of an Article 95 reservation State.

**3.13** The constellation in which the before-mentioned dispute becomes relevant is extremely rare in practice. There is accordingly almost no case law in point. The constellation requires that a dispute arising out of a CISG contract is heard in a court of a Contracting State that has not made a declaration under Article 95 CISG, and that at least one of the parties to the sales contract has its place of business in a Non-Contracting State. (The reason for the latter requirement is that Article 1(1)(a) CISG applies whenever both parties are from Contracting States, so that Article 1(1)(b) CISG has no relevance. Due to the large number of States that have adopted the CISG in recent years, the vast majority of cases is nowadays covered by Article 1(1)(a) CISG, making Article 1(1)(b) CISG constellations less and less common.) In addition, it is necessary that the private international law rules of the forum lead to the application of the law of a Contracting State (Article 1(1)(b) CISG) that has made an Article 95 CISG reservation.

**3.14** According to the preferable opinion,<sup>39</sup> the Convention applies in accordance with Article 1(1)(b) even when the rules of private international law lead to the application of the law of a Contracting State that has made an Article 95 declaration, because such declaration does not affect the declaring State's status as a 'Contracting State'.<sup>40</sup> This becomes clear when comparing the wording of Article 95 CISG with that of its neighbouring reservations in Articles 92, 93 and 94 CISG. The latter reservations all contain a provision that attaches a certain legal effect to their use by Contracting States:

'A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.'<sup>41</sup>

Article 92(2), Article 93(3) and Article 94(2) thereby all provide that a declaration under those provisions deprive the declaring State of its status as a 'Contracting State' for purposes of Article 1(1) CISG. Article 95 CISG, on the contrary, contains no such provision. Whenever the rules of private international law lead to the application of an Article 95 reservation State's law, they therefore lead to the application of the law of a 'Contracting State' as

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<sup>39</sup> Bell, op. cit. (footnote 27), 55 at 63–4 (with certain doubts); Bridge, op. cit. (footnote 27), para. 16-135; Michael Bridge, *The International Sale of Goods: Law and Practice* (2nd ed. 2007), para. 11.46; Fritz Enderlein & Dietrich Maskow, *International Sales Law* (1992), Art. 95 note 1; Franco Ferrari, in Schlechtriem & Schwenger eds., *Kommentar zum Einheitlichen UN-Kaufrecht (CISG)* (5th ed. 2008), Art. 1 para. 78; Herre, op. cit. (footnote 28), Art. 95 para. 9; Martin Karollus, *UN-Kaufrecht* (1991) 31; Burghard Piltz, *Internationales Kaufrecht* (2nd ed. 2008), para. 2-104; Schlechtriem, Schwenger & Hachem, op. cit. (footnote 27), Art. 95 para. 3; Schroeter, op. cit. (footnote 15) 446; Siehr, op. cit. (footnote 27), Art. 1 para. 18.

<sup>40</sup> Bell, op. cit. (footnote 27), 55 at 63–4; Bridge, op. cit. (footnote 27), para. 16-136; Ferrari, op. cit. (footnote 39), Art. 1 para. 78; Herre, op. cit. (footnote 28), Art. 95 para. 8; Schlechtriem, Schwenger & Hachem, op. cit. (footnote 27), Art. 95 para. 3; Schroeter, op. cit. (footnote 15) 446. Contra Schlechtriem, op. cit. (footnote 7), 26–7.

<sup>41</sup> Article 92(2) CISG. Similar provisions are contained in Article 93(3) and Article 94(2) CISG.

described by Article 1(1)(b) CISG. Since the conditions of Article 1(1)(b) CISG are accordingly fulfilled, courts in Contracting States must apply the Convention.

**3.15** The interpretation suggested here is furthermore supported by the drafting history of Article 95 CISG. When the provision was introduced during the Vienna Diplomatic Conference, the delegation of Czechoslovakia had also provided an alternative draft, which would – in addition to what became today’s Article 95 – have introduced the following paragraph:

‘(2) This Convention does not apply if the rules of private international law lead to the application of the law of a State making a declaration under the preceding paragraph unless places of business of the parties to the contract are in different Contracting States.’<sup>42</sup>

In presenting the proposed reservation, delegate *Kopač* (Czechoslovakia) explained:

‘Two alternatives were offered for the proposed new article. Alternative I consisted of two paragraphs. If that alternative were adopted, the provisions of its paragraph 2 would mean that the exclusion of the application of the Convention would be the same in all Contracting States. Alternative II consisted of only one paragraph, namely the first paragraph of article *C bis* as it appeared in document (A/CON.97/L.4).’<sup>43</sup>

The delegates opted for Alternative II<sup>44</sup> which, apart from two minor drafting changes,<sup>45</sup> was identical to today’s Article 95 CISG, thereby intentionally rejecting a reservation according to which ‘the exclusion of the application of the Convention would be the same in all Contracting States’.<sup>46</sup>

**3.16** A significant number of legal writers<sup>47</sup> nevertheless argue that, when the private international law rules of the forum as applied under Article 1(1)(b) CISG lead to the application of the law of an Article 95 CISG reservation State, a court in a Contracting State has to apply the domestic law of the reservation State (and not the CISG). The underlying reasoning is that the law of the Contracting State which the rules of private international law

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<sup>42</sup> Document A/CONF.97/L.4 (Alternative I), *Official Records* (footnote 1) 170.

<sup>43</sup> *Official Records* (footnote 1) 229.

<sup>44</sup> *Official Records* (footnote 1) 230: Alternative II, which was eventually the only wording put to the vote, was accepted by 24 votes to 7, with 16 abstentions.

<sup>45</sup> Cf. *Official Records* (footnote 1) 230.

<sup>46</sup> *But see* Peter Winship, ‘The Scope of the Vienna Convention on International Sales Contracts’, in Galston & Smit eds., *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (1984), 1-27 et seq., who alleges that this rejection was based more on the complexity of the last-minute proposal rather than on its content.

<sup>47</sup> Christoph Benicke, in *Münchener Kommentar zum Handelsgesetzbuch* (2nd ed. 2007), Art. 1 para. 39; Evans, *op. cit.* (footnote 6), Art. 95 note 3.4; Vincent Heuzé, *La vente internationale de marchandises: Droit uniforme* (2000), note 116; Honnold, *op. cit.* (footnote 9), para. 47.5; Felix Maultzsch, ‘Die Rechtsnatur des Art. 1 Abs. 1 lit. b CISG zwischen internationaler Abgrenzungsnorm und interner Verteilungsnorm’, in Büchler & Müller-Chen eds., *Private Law: national – global – comparative, Festschrift für Ingeborg Schwenzer zum 60. Geburtstag* (2011), 1225; Karl H. Neumayer & Catherine Ming, *Convention de Vienne sur les Contrats de Vente internationale de Marchandises* (1993), Art. 1 note 8; Ingo Saenger, in Bamberger & Roth eds., *Bürgerliches Gesetzbuch* (2nd ed. 2007), Art. 1 para. 19; Schlechtriem, *op. cit.* (footnote 7), 26–7; Winship, *op. cit.* (footnote 47), 1-27; Witz, *op. cit.* (footnote 32) 2621.

refer to should be applied in the same way as a judge in that Contracting State would apply his law: Accordingly, the CISG should not be applied when – as a result of an Article 95 reservation in said State – a judge in said State would not apply the CISG.<sup>48</sup>

The true source for the difference between the two competing interpretations is thus not primarily a different reading of Article 95 CISG, but rather a different reading of Article 1(1)(b) CISG, which in turn affects the role that the status of an Article 95 reservation State plays within the application of Article 1(1)(b) CISG. The essential assumption underlying the opinion criticized here is that the forum's rules of private international law when applied under Article 1(1)(b) CISG result in the application of the law of the State that the PIL rules refer to, of which the Convention forms a part. This assumption, it is submitted, is incorrect. The reason becomes evident when the wording of Article 1(1)(b) CISG is read in its entirety, including its introductory phrase: '*This Convention* applies to contracts of sale of goods between parties whose places of business are in different States [...] when the rules of private international law lead to the application of the law of a Contracting State'.<sup>49</sup> It is therefore 'this Convention' which the judge in a Contracting State has to apply when its forum's rules of private international law lead to the application of the law of a Contracting State, and *not* 'the law of a Contracting State' (that may or may not have made a declaration under Article 95 CISG).<sup>50</sup> The contrary opinion instead reads the partial phrase 'lead to the application of the law of a Contracting State' as calling for the application of that State's law, thereby confusing cause and effect under Article 1(1)(b) CISG. It should therefore not be followed.

**3.17** The legal situation in the Federal Republic of Germany presents particular challenges, since Germany filed an interpretative declaration<sup>51</sup> about the question discussed here when acceding to the Convention,<sup>52</sup> the content of which is furthermore repeated in a German domestic law (*Vertragsgesetz*).<sup>53</sup> For the purposes of the present Opinion, it suffices to say that Germany's interpretative declaration has no effect on the Convention's application by courts outside of Germany,<sup>54</sup> since the declaration is incompatible with Article 7(1) CISG<sup>55</sup> which delegates the Convention's interpretation to the courts and not the government or

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<sup>48</sup> Evans, op. cit. (footnote 6), Art. 95 note 3.1 et seq: 'No difficulties would seem to exist with regard to this provision if a court in a State taking the reservation under Article 95 (State A) finds its own law to be applicable, but delicate problems could arise if such a court were to find the law of another Contracting State (State B) to be applicable ...'.

<sup>49</sup> Emphasis added.

<sup>50</sup> Bridge, op. cit. (footnote 27), para. 16-30.

<sup>51</sup> Ferrari, op. cit. (footnote 39), Art. 1 para. 79; Herber & Czerwenka, op. cit. (footnote 15), Art. 1 para. 19; Magnus, op. cit. (footnote 18), Art. 1 para. 112; Schroeter, op. cit. (footnote 15) 454.

<sup>52</sup> See Schroeter, op. cit. (footnote 15) 454.

<sup>53</sup> Article 2 of the German *Vertragsgesetz*. See in more detail Ulrich G. Schroeter, in Schlechtriem & Schwenzler eds., *Kommentar zum Einheitlichen UN-Kaufrecht (CISG)* (5th ed. 2008), Art. 2 *VertragsG* para. 1 et seq.

<sup>54</sup> Schroeter, op. cit. (footnote 15) 455; Marco Torsello, 'Reservations to international uniform commercial law Conventions', *Uniform Law Review* (2000), 85 at 117.

<sup>55</sup> Ferrari, op. cit. (footnote 32) 251; Magnus, op. cit. (footnote 18), Art. 2 *VertragsG* para. 6; Torsello, op. cit. (footnote 55), 85 at 117.

parliament of the individual Contracting States.<sup>56</sup> The situation in German courts is largely affected by questions of domestic law and does not require treatment here.<sup>57</sup>

### cc) Effect in courts of Non-Contracting States

**3.18** When the forum is located in a Non-Contracting State, there is at the outset no obligation of any sort under public international law to take Article 95 CISG into account, as there is no obligation to apply Article 1(1)(b) CISG: Both provisions are only directed at CISG Contracting States.<sup>58</sup> Any effect that an Article 95 CISG reservation can have must therefore result from the private international law of the forum,<sup>59</sup> and is as such a merely ‘indirect’ effect. An indirect effect of this kind will usually arise when the private international law rules of a Non-Contracting State lead to the application of a CISG Contracting State that has made an Article 95 reservation: In such a case, the court is likely to apply the domestic law of that State and not the CISG, because a judge in that State – in view of Article 1(1)(b) CISG being inapplicable – would do the same.<sup>60</sup>

### dd) Effect in arbitration proceedings

**3.19** The effect of Article 95 CISG in arbitration proceedings is similar to its effect in courts of Non-Contracting States (Comment 3.18 above), since the Convention neither creates any obligations for arbitration tribunals (whether their place of arbitration is located in a CISG Contracting State or not),<sup>61</sup> nor for Contracting States in respect of arbitration tribunals having their place of arbitration in that State.

The application of Article 1(1)(b) CISG (and of Article 95 CISG affecting such application) can therefore, again, only be an ‘indirect’ one, created and governed by the *lex arbitri* and by arbitration rules agreed upon by the parties, and not by the Convention itself. The rules about the substantive law to be applied by arbitral tribunals are often more flexible in their content than rules of private international law to be observed by courts.

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<sup>56</sup> See Jürgen Basedow, ‘Uniform Private Law Conventions and the Law of Treaties’, *Uniform Law Review* (2006), 731 at 735: ‘With the exception of reservations permitted in the convention, the binding treaty only leaves national legislators a choice between “yes” and “no”.’

<sup>57</sup> See Magnus, op. cit. (footnote 17), Art. 2 VertragsG para. 6; Schroeter, op. cit. (footnote 55), Art. 2 VertragsG para. 1 et seq.

<sup>58</sup> Peter Schlechtriem & Ulrich G. Schroeter, *Internationales UN-Kaufrecht* (5th ed. 2013), para. 34.

<sup>59</sup> See Thomas Kadner Graziano, ‘The CISG Before the Courts of Non-Contracting States? Take Foreign Sales Law As You Find It’, 13 *Yearbook of Private International Law* (2011), 165 at 174.

<sup>60</sup> Oberlandesgericht Koblenz (Germany), 17 September 1993, translated at: <http://cisgw3.law.pace.edu/cases/930917g1.html>: ‘If, as in this case, the rules of conflicts of a non-Contracting State – which Germany was at that time [i.e. the conclusion of the contract] – refer to the internal law of a Contracting State that has not made a reservation under Art. 95 CISG, the CISG applies in accordance with Art. 1(1)(b) CISG, if the other prerequisites for the application are given. The internal law of a Contracting State is then substituted by the Convention [citations omitted]. France has not made a reservation under Art. 95 CISG [...], so that the Convention applies’; Kadner Graziano, op. cit. (footnote 59), 165 at 177.

<sup>61</sup> Schlechtriem & Schroeter, op. cit. (footnote 58), para. 34.

## 4. Interpretation of Article 96 CISG

### *a) General*

**4.1** The subject matter of Article 96 CISG is the freedom of form principle provided for in various of the Convention's provisions, most prominently in Article 11 CISG. The reservation under Article 96 CISG, when made by a Contracting State, excludes the application of certain of the CISG provisions incorporating the freedom of form principle. This effect of Article 96 reservations is furthermore spelled out in Article 12 CISG, which is in substance a repetition of Article 96 CISG.<sup>62</sup> The preconditions for as well as the precise nature of the effects of an Article 96 declaration are, however, disputed (see Comments 4.1 et seq. below).

**4.2** The practical importance of Articles 12 and 96 CISG is primarily influenced by the importance of trade relationships involving parties from Article 96 reservation States, because the reservation's effect applies whenever at least one of the parties to a sales contract has its place of business in such a State.<sup>63</sup> Since the Article 96 reservation is the most popular among the CISG's reservations and since two major trading nations (the People's Republic of China and the Russian Federation) have used it, its relevance is not insignificant. A second factor contributing to its practical importance is the legal effect of writing requirements, the applicability of which is influenced by an Article 96 CISG reservation:<sup>64</sup> Since such requirements usually affect the validity of sales contracts or their enforceability (through rules of evidence), their application is often decisive for the success of claims made under a CISG contract.

**4.3** The following States have made an Article 96 declaration that is currently effective: Argentina, Armenia, Belarus, Chile, Hungary, Paraguay, the Russian Federation,<sup>65</sup> and the Ukraine.

Estonia made an Article 96 declaration upon ratification of the Convention on 20 September 1983, but subsequently withdrew the declaration on 9 March 2004.<sup>66</sup> On 13 November 2012 Latvia<sup>67</sup> and on 1 November 2013 Lithuania<sup>68</sup> similarly withdrew the declarations under Article 96 they had made upon their respective accession to the Convention.

Furthermore, the People's Republic of China had made a declaration which, although not precisely corresponding to the wording of Article 96, should be regarded as an Article 96 declaration.<sup>69</sup> China withdrew its declaration on 16 January 2013.<sup>70</sup>

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<sup>62</sup> Honnold, *op. cit.* (footnote 9), para. 129 footnote 2. See already Comment 2.5 above.

<sup>63</sup> See Comment 4.14 below.

<sup>64</sup> For the precise effect of an Article 96 reservation, see Comments 4.10 et seq. below.

<sup>65</sup> The reservation made by the former U.S.S.R. extends to the Russian Federation in accordance with the principles of state succession; Presidium of the Supreme Arbitration Court of the Russian Federation, 25 March 1997, Resolution No. 4670/96, translated at: <http://cisgw3.law.pace.edu/cases/970325r1.html>.

<sup>66</sup> According to Article 97(4) CISG the withdrawal took effect on 1 October 2004.

<sup>67</sup> According to Article 97(4) CISG the withdrawal took effect on 1 June 2013.

<sup>68</sup> According to Article 97(4) CISG the withdrawal will take effect on 1 June 2014.

<sup>69</sup> See in more detail Comments 4.8 and 4.9 below.

<sup>70</sup> According to Article 97(4) CISG the withdrawal took effect on 1 August 2013.



**4.4** An Article 96 reservation may be made at ‘any time’, that is, not only at the time of signature, ratification of, or accession of the interested State to the Convention, but also at any subsequent time. At the time of the adoption of the Convention in 1980, this flexibility was viewed as a very important consideration, since it was expected that some States (in particular developing countries) might introduce form requirements into their domestic laws after having become CISG Contracting States,<sup>71</sup> and would therefore be interested to avail themselves of Article 96 CISG. In practice, this prediction has not materialized: No Contracting State has ever made an Article 96 declaration after having acceded to the Convention.

**b) Scope of the reservation**

**aa) Prerequisites for reservations under Article 96 CISG**

**4. A declaration under Article 96 may only be made by States whose legislation requires all contracts of sale governed by the Convention to be concluded in or evidenced by writing.**

**4.5** Article 96 CISG restricts the making of declarations in accordance with Article 12 CISG to Contracting States whose legislation require *all* contracts of sale governed by the Convention to be concluded in or evidenced by writing.<sup>72</sup> While this interpretation is not immediately apparent from the English language version of Article 96 CISG (‘A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing ...’), it is supported by the provision’s drafting history. During the Vienna Diplomatic Conference, the delegation of the Netherlands had proposed an alternative wording of the provision that became Article 96 CISG:

‘A Contracting State whose legislation requires *all or certain types of* contracts of sale to be concluded in or evidenced by writing may [...] make a declaration [...] that any provision [...] which allows a contract of sale [...] to be made in any form other than in writing shall not apply *to the contracts concerned* where any party [...].’<sup>73</sup>

At the First Committee’s 8th meeting, the amendment by the Netherlands was extensively discussed<sup>74</sup> and subsequently rejected by a vote of 11 in favour and 16 against,<sup>75</sup> thereby clearly demonstrating the delegates’ rejection of a reservation that could have been used by States whose law prescribed a form requirement for certain types of sales contracts only. In addition, the French version of Article 96 CISG which speaks of “*les contrats de vente*” was

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<sup>71</sup> Remarks of delegate Sami (Iraq), *Official Records* (footnote 1) 274; Rajska, in Bianca & Bonell eds., op. cit. (footnote 6), Art. 96 note 2.1.

<sup>72</sup> Alejandro M. Garro, ‘The U.N. Sales Convention in the Americas: Recent Developments’, 17 *Journal of Law and Commerce* (1998), 219 at 228; Herre, op. cit. (footnote 28), Art. 96 para. 4; Rajska, op. cit. (footnote 71), Art. 96 note 3.1; Schlechtriem, Schwenzler & Hachem, op. cit. (footnote 28), Art. 96 para. 2: ‘must basically exist for all contracts of sale’; Ulrich G. Schroeter, *UN-Kaufrecht und Europäisches Gemeinschaftsrecht: Verhältnis und Wechselwirkungen* (2005), § 6 para. 303; Schroeter, op. cit. (footnote 15) 432.

<sup>73</sup> Document A/CONF.97/C.1/L.76, *Official Records* (footnote 1) 91.

<sup>74</sup> *Official Records* (footnote 1) 271 et seq.

<sup>75</sup> *Official Records* (footnote 1) 92.

also understood as requiring that the domestic legislation imposes a form on all sales contracts.<sup>76</sup>

Accordingly, the legislation of a Contracting State must require all contracts of sale to be concluded in or evidenced by writing in order to entitle him to make an Article 96 reservation. Of course, this prerequisite only refers to sales contracts potentially governed by the Convention; it is irrelevant whether contracts of sale which are outside the Convention's sphere of application – like e.g. consumer contracts or sales of immovables – are subject to a form requirement or not.

Against the background of the legislative history described above, the minority view among commentators which hold that Article 96 should not be read as imposing a particular threshold as to the required content and scope of domestic form legislation<sup>77</sup> fails to convince.

#### **bb) Lack of prerequisites and its effect**

**5. Declarations that have been made under Article 96 must be observed by courts in Contracting States even if the prerequisites for such declaration were not or are no longer fulfilled, until the declaration has been withdrawn in accordance with Article 97.**

**4.6** With respect to some of the Contracting States that have made an Article 96 reservation, commentators have doubted whether the legal prerequisites for making this reservation were or are still fulfilled. Such doubts have been raised with a view to the Article 96 declarations by Argentina and by Chile, since neither the legislation in Argentina nor in Chile prescribes a mandatory written form for all sales contracts.<sup>78</sup> With respect to the People's Republic of China's former declaration,<sup>79</sup> similar doubts emerged after China reformed its contract law by enacting its Uniform Contract Law in 1999,<sup>80</sup> since this new law no longer requires all international sales contracts to be concluded in writing.<sup>81</sup>

**4.7** The possibility of Article 96 reservations having been made or maintained although the legal prerequisites for such reservation are lacking raises the question which effect such a

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<sup>76</sup> Remarks of delegate Meijer (Netherlands), *Official Records* (footnote 1) 273.

<sup>77</sup> Enderlein & Maskow, op. cit. (footnote 39), Art. 96 note 2; Torsello, op. cit. (footnote 55), 85 at 111. A somewhat more flexible approach than the one favored here is also taken by Bridge, op. cit. (footnote 27), para. 16-138 who wants to confine Article 96 CISG to States 'that require at least some commercial sales to conform to a writing requirement'.

<sup>78</sup> Garro, op. cit. (footnote 72) 229; Franco Ferrari, 'Writing Requirements: Article 11-13', in Franco Ferrari et al. eds., *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* (2005) 214 footnote 64.

<sup>79</sup> See further Comment 4.8 below.

<sup>80</sup> Xiaolin Wang & Camilla Baasch Andersen, 'The Chinese Declaration against Oral Contracts under the CISG', 8 *Vindobona Journal of International Commercial Law and Arbitration* (2004), 145 at 152; Lutz-Christian Wolff, 'VR China: Neue IPR-Regeln für Verträge', *Praxis des Internationalen Privat- und Verfahrensrechts* (2008), 55 at 57; Dong Wu, 'CIETAC's Practice on the CISG', *Nordic Journal of Commercial Law* (2005) #2 at 12-13; Fan Yang, 'The Application of the CISG in the Current PRC Law and CIETAC Arbitration Practice', *Nordic Journal of Commercial Law* (2006) #2 at 15.

<sup>81</sup> Article 10 Chinese Uniform Contract Law: 'A contract may be made in writing, in an oral conversation, as well as in any other form.'

constellation has for the Convention's practical application: Can (or must) courts refrain from observing such a declaration and accordingly apply the freedom of form principle enshrined in the Convention? The answer is in the negative: Article 97(4) CISG designates the only way by which a reservation's effect may be removed, i.e. through its withdrawal by a formal notification in writing addressed to the UN Secretary General in its role as depositary of the Convention (Article 89 CISG). The procedure provided by Article 97(4) CISG thus precludes courts in various Contracting States from making their own and possibly divergent assessments about the compatibility of domestic laws with Article 96's prerequisites. Declarations that have been made under Article 96 must accordingly be observed by courts in Contracting States even if the prerequisites for such declaration were not or are no longer fulfilled, until the declaration has been withdrawn in accordance with Article 97 CISG.<sup>82</sup>

The contrary approach, which holds that a reservation must be considered ineffective when its conditions are not satisfied and should be disregarded by the courts,<sup>83</sup> creates a significant degree of legal uncertainty and should therefore not be followed.

### **cc) Unclear declarations**

**4.8** The exact scope of an Article 96 reservation (and, being determined by the scope, also the reservation's effect) is more difficult to assess where a Contracting State has made an unclear reservation, the wording of which does not exactly conform to the wording of Article 96 CISG. The declaration made by the People's Republic of China upon approval of the Convention (that since has been withdrawn<sup>84</sup>) was such a case. The Chinese declaration, in its relevant part, read as follows:

‘The People's Republic of China does not consider itself bound by [...] article 11 as well as the provision of the Convention relating to the content of article 11.’

The declaration by China resembled the declaration envisaged by Article 96 CISG, but its language was not as encompassing. In particular, it made no reference to Article 29 CISG, and could therefore raise doubts whether the People's Republic of China also wanted to derogate from these provisions or wanted to leave them unchanged. The latter interpretation would mean that the Chinese Article 96 reservation's effects would only apply to contract conclusions, but not to contract modifications and terminations.<sup>85</sup>

**4.9** The interpretation of the unclear declaration made by the People's Republic of China should be guided by Article 31(1) Vienna Convention on the Law of Treaties in conjunction with Article 98 CISG: When read together, these two treaty provisions indicate that all reservations should be interpreted in good faith in accordance with the ordinary meaning to be

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<sup>82</sup> Schroeter, op. cit. (footnote 15) 436; accord Schlechtriem, Schwenzer & Hachem, op. cit. (footnote 27), Art. 96 para. 2.

<sup>83</sup> Torsello, op. cit. (footnote 55), 85 at 111 and 117; Wolff, op. cit. (footnote 80), 55 at 57 footnote 38; probably also Harm Peter Westermann, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (6th ed. 2012), Art. 12 para. 3.

<sup>84</sup> See Comment 4.3.

<sup>85</sup> James E. Bailey, ‘Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales’, 32 *Cornell International Law Journal* (1999) 273 at 312.

given to the terms used therein and thus, in the light of the object and purpose of Article 98 CISG, should be construed as invoking Articles 92–96 CISG (only) in accordance with the respective reservation’s prerequisites and effect as laid down in these provisions.<sup>86</sup> In accordance with this interpretative guideline, the People’s Republic of China’s declaration should be read as not only covering Article 11 CISG, but also the Convention’s other provisions allowing for an oral or implicit conclusion, modification or termination of CISG contracts, as this reading conforms to the reservation’s scope and effect as laid down in Article 96 CISG.<sup>87</sup> Case law has (albeit implicitly) confirmed this view by invoking form requirements for contract modifications where the Chinese Article 96 declaration applied.<sup>88</sup>

*c) Effects of the reservation*

**aa) Exclusion of Contracting States’ obligation to apply the Convention’s freedom of form provisions (the reservation’s ‘negative’ effect)**

**6. Where any party to a sales contract has its place of business in a Contracting State which has made a declaration under Article 96,**

**6.1 no Contracting State is under any obligation under public international law to apply any provision of Article 11, Article 29 or Part II of the 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 (Article 12)**

6.2 [...].

**4.10** The making of an Article 96 reservation primarily excludes the obligation under public international law to apply the Convention’s freedom of form provisions that Contracting States would otherwise face (referred to here as the Article 96 reservation’s ‘negative’ effect<sup>89</sup>). In terms of practical application of the CISG, declarations under Article 96 thereby reduce<sup>90</sup> the applicability of the freedom of form principle under the Convention.

**4.11** According to the language of Articles 12 and 96 CISG, the reservation’s ‘negative’ effect extends to ‘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’. The scope of this effect is at the same time relevant for the application of domestic form requirements to CISG contracts (to be further discussed below), because it defines the scope for such an application: Beyond the reach of the reservation’s ‘negative’ effect, the Contracting States’ obligation to

<sup>86</sup> Schroeter, op. cit. (footnote 15) 451.

<sup>87</sup> Wang & Andersen, op. cit. (footnote 80), 145 at 146. *Contra* Bailey, op. cit. (footnote 85) 273 at 312.

<sup>88</sup> *Zhejiang Shaoxing Yongli Printing and Dyeing Co., Ltd v. Microflock Textile Group Corporation*, U.S. District Court (S.D. Fla.), 19 May 2008, available at <http://cisgw3.law.pace.edu/cases/080519u2.html>.

<sup>89</sup> See Ulrich G. Schroeter, ‘The Cross-Border Freedom of Form Principle Under Reservation: The Role of Articles 12 and 96 CISG in Theory and Practice’, 31 *Journal of Law and Commerce* (forthcoming 2014).

<sup>90</sup> Article 96 CISG does not *entirely* exclude the principle of form as enshrined in various provisions throughout the Convention, as the reservation’s effect is limited in its scope. See in detail Comment 4.12 below.

apply the Convention's freedom of form provisions remains unaffected, and domestic form requirements are accordingly pre-empted.

### **(1) Contractual declarations affected**

**4.12** There is agreement that effects of a reservation under Article 96 CISG only extend to types of contractual declarations that are specifically mentioned in Articles 12 and 96 CISG, and not to others.<sup>91</sup> What is less clear is which declarations are precisely mentioned in these provisions: The wording of Articles 12 and 96 CISG lists a number of party agreements – contract of sale (Articles 14, 18 and 23 CISG); modification of a contract of sale (Article 29(1) in conjunction with Articles 14, 18 CISG); termination of a contract of sale by agreement (Article 29(1) in conjunction with Articles 14, 18 CISG) – as well as unilateral declarations – offer (Article 14 CISG) and acceptance (Article 19 CISG) –, but then goes on to refer to ‘any [...] other indication of intention’. The meaning of this latter, open-ended term is disputed. Its wording, which contains no limiting reference to purpose or context of the declarations covered, seems to encompass any declaration made in accordance with Parts I–III of the Convention. A narrower (and, it is submitted, preferable) reading, on the contrary, only includes declarations as far as they relate to the formation of the contract, its modification or consensual termination,<sup>92</sup> as e.g. withdrawals, revocations and rejections of offers (Articles 15(2), 16 and 17 CISG),<sup>93</sup> acceptances of offers by conduct (Article 18(1) CISG),<sup>94</sup> objections to discrepancies in acceptances (Article 19(2) CISG), declarations fixing a time for acceptance (Article 20(1) CISG), notices dispatched in reaction to late acceptances (Article 21 CISG), and withdrawals of acceptances (Article 22 CISG). Not covered (and therefore always subject to Article 11 CISG's freedom of form principle) are, *inter alia*, declarations of avoidance (Article 26 CISG), notices of non-conformity (Article 39 CISG), declarations of mitigation (Article 50 CISG), declarations fixing time-limits, and other communications made in the context of contract performance.

### **(2) Form requirements covered**

**4.13** A related interpretative issue concerns the types of form requirements covered by an Article 96 reservation's effect, which would normally be displaced by the Convention but can now (at least potentially<sup>95</sup>) be applied to CISG contracts. The language of Articles 12 and 96 CISG suggests that the effect of Article 96 reservations is limited to writing requirements, since these provisions derogate only from the provisions of the Convention that permit an agreement ‘in any form other than in writing’. Other types of form requirements – as e.g. a legal provision requiring registration of sales contracts in a specified public office,

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<sup>91</sup> Gerd Reinhart, *UN-Kaufrecht* (1991), Art. 12 para. 4; Schlechtriem, *op. cit.* (footnote 7), 45.

<sup>92</sup> Secretariat Commentary, *Official Records* (footnote 1) 20; Werner Melis, in Honsell ed., *op. cit.* (footnote 27), Art. 12 paras. 2, 3; Rajski, *op. cit.* (footnote 71), Art. 12 note 2.2; Schlechtriem, *op. cit.* (footnote 7), 45.

<sup>93</sup> Magnus, *op. cit.* (footnote 17), Art. 12 para. 6; Perales Viscasillas, in Kröll, Mistelis & Perales Viscasillas eds., *op. cit.* (footnote 28), Art. 12 para. 3. *Contra* Enderlein & Maskow, *op. cit.* (footnote 39), Art. 12 note 1; Schlechtriem & Schmidt-Kessel, *op. cit.* (footnote 9), Art. 12 para. 6.

<sup>94</sup> Bridge, *op. cit.* (footnote 27), para. 16-137 footnote 295.

<sup>95</sup> See Comments 4.15 et seq.

authentication by a notary, certification by a consulate, attachment of stamps – are not preserved by a declaration under Article 96 CISG.<sup>96</sup>

### (3) Universal effect in all Contracting States

**4.14** The effect described applies in courts of all Contracting States, whether or not they have made a reservation under Article 96 CISG.<sup>97</sup> The making of an Article 96 reservation by one Contracting State, in other words, reduces not only its own, but all Contracting States' obligations to apply the Convention's freedom of form provisions. This is clearly expressed by the language of Articles 12 and 96 CISG which connects the reservation's effect to the place of business of at least one of the parties to the sales contract in an Article 96 reservation State, and not to the location of the deciding court. The provisions' language furthermore frames their effect in a general manner ('any provision ... does not apply'), thereby confirming that it applies independent of the location of the court in an Article 96 reservation State. In addition, during the Vienna Diplomatic Conference an alternative proposal for what became Article 96 CISG was suggested by Austria, the wording of which ('A Contracting State may [...] make a declaration that *it* will not apply any provision ...'<sup>98</sup>) would have made a reservation under Article 96 CISG binding only on the reservation State and not on other Contracting States.<sup>99</sup> The proposal was discussed in the First Committee, but rejected,<sup>100</sup> thereby underlining the drafters' intention to make the reservation's effects universally applicable in all Contracting States. Case law has confirmed this interpretation.<sup>101</sup>

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<sup>96</sup> Honnold, op. cit. (footnote 9), para. 129; Perales Viscasillas, op. cit. (footnote 93), Art. 12 para. 3; Schlechtriem & Schmidt-Kessel, op. cit. (footnote 9), Art. 12 para. 5; Wolfgang Witz, in Witz, Salger & Lorenz, *International Einheitliches Kaufrecht* (2000), Artt. 11–12 para 13. *Contra* Melis, in Honsell ed., op. cit. (footnote 27), Art. 12 para. 5.

<sup>97</sup> Harry M. Flechtner, 'The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)', 17 *Journal of Law and Commerce* (1998), 187 at 197; Ulrich Huber, 'Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge', 43 *Rebels Zeitschrift für ausländisches und internationales Privatrecht* (1979), 413 at 434; Eckard Rehbinder, 'Vertragsschluß nach UN-Kaufrecht im Vergleich zu EAG und BGB', in Schlechtriem ed., *Einheitliches UN-Kaufrecht und nationales Obligationenrecht* (1987), 154; Marc Wey, *Der Vertragsabschluß beim internationalen Warenkauf nach UNCITRAL- und schweizerischem Recht* (1984), 177.

<sup>98</sup> Document A/CONF.97/C.1/L.42, *Official Records* (footnote 1) 91. (Emphasis added.)

<sup>99</sup> See the explanation of the Austrian proposal by delegate Reishofer, *Official Records* 271: 'On the question of substance, under the existing article, reservations made by one State bound all other States, which was not justified. ...?'

<sup>100</sup> *Official Records* (footnote 1) 271.

<sup>101</sup> Supreme Court (Netherlands), 7 November 1997 (*J.T. Schuermans v. Boomsma Distilleerderij/Wijnkoperij*), *Nederlands Internationaal Privaatrecht* (1998) No. 91, available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/971107n1.html>: Russian Article 96 reservation observed by Dutch court; District Court Rotterdam (Netherlands), 12 July 2001 (*Hispafruit BV v. Amuyen S.A.*), translated at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010712n1.html>: Argentinian Article 96 reservation observed by Dutch court; Compromex Arbitration proceeding (Mexico), 29 April 1996 (*Conservas La Costeña v. Lanín*), 17 *Journal of Law and Commerce* (1998) 427, translated at: <http://cisgw3.law.pace.edu/cases/960429m1.html>: Argentinian Article 96 reservation observed by Mexican government commission; Rechtbank van Koophandel Hasselt (Belgium), 2 May 1995 (*Vital Berry Marketing v. Dira-Frost*), *Rechtskundig Weekblad* (1995-96) No. 40, available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950502b1.html>: Chilean Article 96 reservation observed by Belgian court.

The opposite view expressed by some commentators<sup>102</sup> ignores the wording of Articles 12 and 96 CISG as well as its legislative history and should not be followed.

**bb) No determination of rules governing formal validity (no ‘positive’ effect of the reservation)**

**6. Where any party to a sales contract has its place of business in a Contracting State which has made a declaration under Article 96,**

6.1 [...]

**6.2 the forum’s rules of private international law determine which law governs the requirements as to form applicable to such sales contract and the manner in which it may be evidenced.**

**4.15** The most difficult question concerning the effect of an Article 96 reservation is the following: Which law governs the formal validity of a CISG contract when one of the parties to that contract has its place of business in an Article 96 reservation State? Neither Article 12 nor Article 96 CISG provides an obvious answer to this question. Case law and legal writing are divided between two schools of thought:

**4.16** One approach considers the domestic form requirements of the Article 96 reservation state to be applicable. It has been followed in CIETAC arbitral awards<sup>103</sup> and a Russian arbitral award,<sup>104</sup> in court decisions from Belgium,<sup>105</sup> Russia<sup>106</sup> and the U.S.,<sup>107</sup> as well as by a

<sup>102</sup> Basedow, op. cit. (footnote 56), 731 at 740–1; Bridge, op. cit. (footnote 27), para. 16-140; Torsello, op. cit. (footnote 55), 85 at 105.

<sup>103</sup> CIETAC Arbitral Award, 31 December 1997 (*Lindane case*), translated at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/971231c1.html>: ‘when ratifying the Convention, China denounced Articles 11 and 29 of the Convention on formation, modification and termination of the contract, that need not to be concluded by means of writing. Therefore, the formation of the contract must be concluded by means of writing’; CIETAC Arbitral Award, 17 October 1996 (*Tinplate case*), translated at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/961017c1.html>: ‘China made a reservation when signing the CISG, requiring written format’; CIETAC Arbitral Award, 6 September 1996 (*Engines case*), translated at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960906c1.html>.

<sup>104</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 9 June 2004, Case No. 125/2003, translated at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/040609r1.html>, para. 3.3: ‘the Tribunal calls attention to the fact that, if one of the parties to an agreement is a Russian company, according to Article 12 of the Vienna Convention of 1980, alterations of the conditions of the agreement [...] is admissible only in written form and cannot be proved solely by the testimony of witnesses. This provision of the Vienna Convention of 1980 takes into consideration peremptory norms of Russian civil legislation (Article 162 of Russian Civil Code), according to which non-observance of simple written form of an external economic agreement entails its nullity’.

<sup>105</sup> Rechtbank van Koophandel Hasselt (Belgium), 2 May 1995 (*Vital Berry Marketing v. Dira-Frost*), *Rechtskundig Weekblad* (1995-96) No. 40, available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950502b1.html>.

<sup>106</sup> Presidium of the Supreme Arbitration Court of the Russian Federation, 25 March 1997, Resolution No. 4670/96, translated at: <http://cisgw3.law.pace.edu/cases/970325r1.html>: ‘Article 12 establishes that a contract of sale shall be made or modified in writing’; Presidium of the Supreme Arbitration Court of the Russian Federation, 23 December 2009, Case No. VAS-16382/09, available at: <http://cisgw3.law.pace.edu/cases/091223r1.html>; Presidium of the Supreme Arbitration Court of the Russian Federation, 15 April 2011, Case No. VAS-2499/11, available at: <http://cisgw3.law.pace.edu/cases/110415r1.html>.

minority opinion in legal literature.<sup>108</sup> According to this approach, Articles 12, 96 CISG result in the universal applicability of the reserving State's national law on formal requirements whenever a party from this State is involved.<sup>109</sup> It thereby accords Article 96 reservations a 'positive' effect.

Reasons for this interpretation are rarely given. Its few supporters in literature argue that the delegates at the Vienna Conference accepted Articles 12, 96 CISG in order to enable the Socialist countries to accept the Convention,<sup>110</sup> or make reference to the need, felt by some States, for protection against claims unsupported by a written agreement.<sup>111</sup>

**4.17** The opposite and, it is submitted, preferable view is that Articles 12 and 96 CISG themselves do not address the question which law governs the formal validity of a sales contract – the legal effect of these CISG provisions is limited to excluding the Contracting State's obligation to respect the Convention's freedom of form principle. Whenever a Contracting State, by making a declaration under Article 96, has opted out of Articles 11 and 29 as well as Part II of the CISG, the Convention does not 'expressly settle' the question whether a breach-of-contract claim is sustainable in the absence of a written contract. In such a situation, Article 7(2) CISG calls for the application of the rules of private international law, since there are no 'general principles' underlying the CISG which would fill in the gap.<sup>112</sup> The determination of the law governing the formal validity is therefore a matter left to the rules of private international law of the forum. This view has been adopted by courts from Austria,<sup>113</sup> Hungary,<sup>114</sup> the Netherlands,<sup>115</sup> Russia<sup>116</sup> and the U.S.,<sup>117</sup> as well as by the clear majority among commentators.<sup>118</sup>

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<sup>107</sup> *Zhejiang Shaoxing Yongli Printing and Dyeing Co., Ltd v. Microflock Textile Group Corporation*, U.S. District Court (S.D. Fla.), 19 May 2008, available at <http://cisgw3.law.pace.edu/cases/080519u2.html>: 'The plaintiff's principal place of business is in the People's Republic of China. The Chinese Declaration requires all contracts to be in writing to be enforceable.'

<sup>108</sup> John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd ed. 1999), para. 129 (but note that the 1st, 2nd of the treatise adopted and the 4th ed. again adopts the opposite position); Reinhart, op. cit. (footnote 91), Art. 12 para. 3.

<sup>109</sup> Schlechtriem & Schmidt-Kessel, op. cit. (footnote 9), Art. 12 para. 2.

<sup>110</sup> Reinhart, op. cit. (footnote 91), Art. 12 para. 3.

<sup>111</sup> Honnold, op. cit. (footnote 108), para. 129.

<sup>112</sup> *Forestal Guarani S.A. v. Daros International, Inc.*, U.S. Court of Appeals (3rd Cir.), 21 July 2010, available at: <http://cisgw3.law.pace.edu/cases/100721u1.html>.

<sup>113</sup> Supreme Court (Austria), 22 October 2001, translated at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/011022a3.html>: law governing the formal validity of an Austrian-Hungarian sales contract determined via Austrian conflict of law rules; Landesgericht Innsbruck, 6 February 2003 (*Tantalum powder case*): law governing the formal validity of a Chinese (Hong Kong)-Austrian sales contract determined via Chinese conflict of law rules.

<sup>114</sup> Metropolitan Court (Hungary), 24 March 1992 (*Adamfi Video v. Alkotók Stúdiósa Kisszövetkezet*), translated at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/920324h1.html>: law governing the formal validity of a German-Hungarian sales contract determined via Hungarian conflict of laws rules.

<sup>115</sup> Supreme Court (Netherlands), 7 November 1997 (*J.T. Schuermans v. Boomsma Distilleerderij/Wijnkoperij*), *Nederlands Internationaal Privaatrecht* (1998) No. 91, available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/971107n1.html>: law governing the formal validity of a Russian-Dutch sales contract determined via Dutch private international law rules; District Court Rotterdam (Netherlands), 12 July 2001 (*Hispafruit BV v. Amuyen S.A.*), translated at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010712n1.html>: 'Article 12 CISG does not entail that the rules concerning form requirements laid down in the applicable domestic law of the State which made a declaration as



Among the reasons supporting this approach, the first is the language of Articles 12 and 96 CISG: These provisions merely state that the Convention's freedom of form provisions do 'not apply', rather than entitling a reserving State to declare that its own form requirements do apply.<sup>119</sup> Where the Convention wants to authorize a Contracting State to directly look to to its 'own law', it clearly says so, as demonstrated by Article 28 CISG. The fact that Articles 12 and 96 CISG do not contain a positive rule about the applicable form requirements was already noticed during the Diplomatic Conference,<sup>120</sup> but the provisions' wording was nevertheless left unchanged.

**4.18** The second reason lies in Article 96's legislative history. An alternative wording of Article 96 CISG which would have imposed the form requirements in a declaring State's domestic law also on other Contracting States<sup>121</sup> was discussed in UNCITRAL, but rejected. The ground for the rejection was that the proposal's adoption would have made the formal requirements of the law of the declaring State too widely applicable.<sup>122</sup> This decision made by the drafters of the Convention deserves to be respected.<sup>123</sup>

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meant in Article 96 CISG (here: Argentina) automatically govern the contract of sale when one of the parties has its place of business in that State. The question whether the contract has been validly concluded, while considering the form requirements, should be answered by the law which is applicable according to the rules of private international law. This is also in accordance with Article 7 CISG.'

<sup>116</sup> Presidium of the Supreme Arbitration Court of the Russian Federation, 20 March 2002, Resolution No. 6134/01, translated at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020320r1.html>: law governing the formal validity determined via Russian conflict of laws rules.

<sup>117</sup> *Forestal Guarani S.A. v. Daros International, Inc.*, U.S. Court of Appeals (3rd Cir.), 21 July 2010, available at: <http://cisgw3.law.pace.edu/cases/100721u1.html>: remanded to District Court in order to have the applicable law determined via New Jersey conflict of laws rules.

<sup>118</sup> Jorge Adame Goddard, *El Contrato de Compraventa Internacional* (1994) 125–26; Bridge, op. cit. (footnote 27), para. 16–141; Larry A. DiMatteo et al., 'The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence', 24 *Northwestern Journal of International Law & Business* (2004) 299, 323–24, 327–28; Ferrari, op. cit. (footnote 78) 213–14; Flechtner, op. cit. (footnote 85) 187 at 196–97; Harry M. Flechtner in Honnold, op. cit. (footnote 9), para. 129; Alejandro Osuna González, 'Mexico's COMPROMEX Issues Another Recommendation Applying the CISG', 17 *Journal of Law and Commerce* (1998) 435 at 438; Johnny Herre, op. cit. (footnote 28), Art. 96 para. 5; Peter Huber, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (6th ed. 2012), Art. 96 para. 1; Albert H. Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (1989) 143; Joseph Lookofsky, *Understanding the CISG: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods* (3rd ed. 2008) 174–75; Alexander Lüderitz & Anja Fenge, in Soergel ed., *Bürgerliches Gesetzbuch, Vol. 13: Schuldrechtliche Nebengesetze – CISG* (13th ed. 2000), Art. 12 para. 2; Magnus, op. cit. (footnote 17), Art. 12 para. 8; Henry Mather, 'Choice of Law for International Sales Issues Not Resolved by the CISG', 20 *Journal of Law and Commerce* (2001) 166–67; Melis, in Honsell ed., op. cit. (footnote 27), Art. 12 para. 4; Perales Viscasillas, op. cit. (footnote 28), Art. 12 para. 8; Rajski, op. cit. (footnote 71), Art.12 note 2.3 and Art. 96 note 2.2; Saenger, op. cit. (footnote 47), Art. 96 para. 2; Schlechtriem & Schmidt-Kessel, op. cit. (footnote 9), Art. 12 para. 2; Schlechtriem, Schwenzler & Hachem, op. cit. (footnote 27), Art. 96 para. 3; Schroeter, op. cit. (footnote 15) 443; Siehr, op. cit. (footnote 27), Art. 96 para. 2; Westermann, op. cit. (footnote 83), Art. 12 para. 2; Winship, op. cit. (footnote 47), 1–47.

<sup>119</sup> Schroeter, op. cit. (footnote 15) 443.

<sup>120</sup> See the remark by delegate Feltham (United Kingdom), *Official Records* (footnote 1) 271: '... while article 11 [became Article 12 CISG] excluded the application of certain provisions of the Convention, it did not provide for a positive replacement formula such as an obligation to conclude a contract in writing.'

<sup>121</sup> Document A/CN.9/SR.8 (unpublished).

<sup>122</sup> Rajski, op. cit. (footnote 71), Art. 96 note 1.2.

<sup>123</sup> Schlechtriem, Schwenzler & Hachem, op. cit. (footnote 27), Art. 96 para. 3.

**4.19** The third reason pertains to the purpose of the Article 96 CISG reservation and its limits, as evident from the provision's drafting history. It has already been outlined above that the inclusion of the Article 96 CISG reservation into the Convention served the purpose to exclude the declaring States' obligation under public international law to apply the Convention's freedom of form provisions. The reservation's 'negative' effect<sup>124</sup> fulfils this purpose. A 'positive effect' of Article 96 CISG reservations as suggested by the interpretation rejected here<sup>125</sup> would go significantly further than that by making the application of the reservation State's domestic form requirements a rule in all situations governed by Article 96 CISG, i.e. whenever a CISG contract involves a party from the reservation State. It would be irrelevant whether the party from the reservation State is the buyer or the seller, where the contract was concluded or where it had to be performed, or whether any other factor commonly used in rules of private international law decisively connects the contract at hand to the reservation State – independent of such connecting factors, Article 96 CISG by itself would provide the domestic form requirements with an all-encompassing sphere of application. Due to the reservation's universal effect,<sup>126</sup> the obligation to observe it would furthermore apply in courts of all Contracting States, which – being treaty-bound to apply Article 96 CISG with all the effects such a reservation has – would equally have to apply the reservation State's domestic form requirements. It is submitted that such an understanding clearly exceeds the provision's purpose.

**4.20** Finally, the opinion assuming a 'positive' effect of an Article 96 reservation results in a difficulty which demonstrates its weakness. It becomes apparent in situations in which a contract of sale has been concluded between two parties which *both* have their place of business in States that have each made a declaration under Article 96 CISG (Examples: a sales contract between a Russian seller and a Hungarian buyer, or a sales contract between a seller from Chile and a buyer from Argentina): In cases as these, it remains unclear which State's law governs the formal validity of the contract, since neither Articles 12, 96 CISG nor the declarations authorized by these provisions address this question. Their failure to do so accords with limited purpose of the Article 96 CISG (as correctly recognized by the opposite opinion below), which is restricted to excluding the obligation to apply Article 11 CISG and the other provisions mentioned in Article 96 (the reservation's 'negative' effect): As far as rules on the contract's form are concerned, this reservation only removes, but does not provide.

**cc) Identification of the law governing formal validity via rules of private international law in CISG cases**

**4.21** Since the determination of the law governing the formal validity is left to the private international law of the respective forum, this necessarily means that the outcome is not internationally uniform, since the applicable rules of private international law are not. The existing CISG case law, however, nevertheless demonstrates a certain degree of uniformity in

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<sup>124</sup> Comment 4.10.

<sup>125</sup> Comment 4.16.

<sup>126</sup> Comment 4.14.

this matter: When conflict of laws rules declare the law of an Article 96 reservation State applicable, this usually is read as leading to the application of the form requirements of the reservation State's domestic law (often resulting in the formal invalidity of the sales contract concerned),<sup>127</sup> while the application of the law of a Contracting State that has not made an Article 96 reservation results in the application of the freedom of form principle.<sup>128</sup>

**4.22** In the latter case, an additional question arises: When rules of private international law call for the application of the law of a (non-reserving) CISG Contracting State to the formal validity issue, are the form requirements to be applied those of the domestic law of that State, or is it the freedom of form principle of Article 11 CISG? The question becomes practically relevant whenever the domestic law contains form requirements and would therefore lead to the formal invalidity of the sales contract, while an application of Article 11 CISG would not.

The answer cannot be derived from Articles 11, 12 or 96 CISG (the Convention, in other words, is silent about the matter), but is – again – exclusively a matter for the domestic private international law rules.<sup>129</sup> These rules will indeed lead to the application of Article 11 CISG if they follow the traditional conflict-of-laws goal to apply the law of a country that is declared applicable as much as possible in the same manner as a judge in that country would apply the law.<sup>130</sup> Since this judge would apply Article 11 CISG given the fact that its State has made no Article 96 reservation, the judge applying the law via private international law rules would do the same.<sup>131</sup> At least two Dutch courts (including the Supreme Court) have explicitly adopted the position taken here.<sup>132</sup>

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<sup>127</sup> Presidium of the Supreme Arbitration Court of the Russian Federation, 20 March 2002, Resolution No. 6134/01, translated at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020320r1.html>: Russian law applied by virtue of the Russian private international law rules – oral modification of contract held invalid.

<sup>128</sup> Supreme Court (Netherlands), 7 November 1997 (*J.T. Schuermans v. Boomsma Distilleerderij/Wijnkoperij*), *Nederlands Internationaal Privaatrecht* (1998) No. 91, available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/971107n1.html> (see below); Supreme Court (Austria), 22 October 2001, available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/011022a3.html>: despite Hungary's declaration under Art. 96 CISG, a merely implicitly concluded Austrian-Hungarian contract was held formally valid as the Austrian conflict of law rules pointed to Austrian law; District Court Rotterdam (Netherlands), 12 July 2001 (*Hispafruit BV v. Amuyen S.A.*), translated at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010712n1.html> (see below); Metropolitan Court (Hungary), 24 March 1992 (*Adamfi Video v. Alkotók Stúdiósa Kisszövetkezet*), available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/920324h1.html>: although Hungary has declared a reservation under Article 96 CISG, an oral German-Hungarian contract was held formally valid as the Hungarian conflict of laws rules pointed to German law.

<sup>129</sup> The majority of commentators seem to adopt a different approach and turn directly to the Convention for an answer. In doing so, many reach the conclusion that Article 11 CISG should be applied; see e.g. Ferrari, *op. cit.* (footnote 78) 214; Perales Viscasillas, *op. cit.* (footnote 28), Art. 12 para. 10; Westermann, *op. cit.* (footnote 83), Art. 12 para. 2.

<sup>130</sup> See Jan Kropholler, *Internationales Privatrecht* (6th ed. 2006), § 31 I 2.

<sup>131</sup> Schlechtriem & Schmidt-Kessel, *op. cit.* (footnote 9), Art. 12 para. 3; Schlechtriem, Schwenzer & Hachem, *op. cit.* (footnote 27), Art. 96 para. 3; Schroeter, *op. cit.* (footnote 15) 443; Witz, *op. cit.* (footnote 96), Artt. 11–12 para 12.

<sup>132</sup> Supreme Court (Netherlands), 7 November 1997 (*J.T. Schuermans v. Boomsma Distilleerderij/Wijnkoperij*), *Nederlands Internationaal Privaatrecht* (1998) No. 91, available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/971107n1.html>: Article 11 CISG was first declared inapplicable to a Russian-Dutch contract because of the Russian reservation under Article 96 CISG, but was then applied as part of Dutch law which, being the law at the seller's place of business, was deemed applicable by virtue of the Dutch private international

**4.23** Authors adopting the contrary position<sup>133</sup> primarily refer to the language of Article 12 first sentence CISG (‘Any provision of article 11 [...] does not apply...’) and argue that, because of its clear indication that the Convention’s freedom of form principle can never apply where one party has its place of business in an Article 96 reservation State, the only form requirements that can be applied are those of domestic law. It is submitted that this approach misunderstands and, in doing so, overstates the provision’s non-application statement, because Article 12’s wording should be read with the sole purpose of an Article 96 reservation – namely its ‘negative’ effect<sup>134</sup> – in mind: Article 12 CISG merely wants to exclude the Contracting States’ obligation under public international law to apply Article 11 CISG (and related provisions), thereby preventing that Article 11 CISG applies on its own volition. Beyond this purpose which, at the present stage of applying the forum’s conflict of laws rules, has already been fulfilled, there is nothing in Article 12 CISG to indicate that the Convention rejects a reference to its provisions by conflict of laws rules, resembling an ‘opting in’. At least two courts, however, have followed the contrary position and applied the formal requirements of domestic law as part of the *lex contractus* invoked by their private international law rules.<sup>135</sup>

**dd) Form requirements for sales contracts and party autonomy (Article 12 second sentence CISG)**

**4.24** Article 12 in its second sentence provides that ‘[t]he parties may not derogate from or vary the effect of this article’, and Article 6 – which generally grants the parties the freedom to derogate from or vary the effect of any of the Convention’s provisions – explicitly recognizes this limitation to party autonomy (‘... , subject to article 12, ...’). Article 12 second sentence CISG is designed as a safeguard to the Article 96 reservation’s ‘negative’ effect and prevents that the parties to a sales contract re-establish the Convention’s freedom of form principle by derogating from or varying said effect in their sales contract.

**4.25** Where the parties have excluded the Convention’s application in its entirety in accordance with Article 6 CISG, Article 12 sentence 2 CISG does not apply.<sup>136</sup> This result can be derived from the language of Articles 6 and 12 CISG which limits the mandatory nature of Article 12 to party agreements that derogate from or vary the effect of individual CISG provisions. In addition, there is no room for the ‘negative’ effect of a reservation under

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law rules; District Court Rotterdam (Netherlands), 12 July 2001 (*Hispafruit BV v. Amuyen S.A.*), translated at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010712n1.html>: ‘following Dutch law, the “freedom of form” rules laid down in articles 11 and 29 CISG apply unrestrictedly’.

<sup>133</sup> Flechtner, *op. cit.* (footnote 85) 187 at 196 (characterizing the result of his approach as ‘rather ironic’); Flechtner in Honnold, *op. cit.* (footnote 9), para. 129; Herre, *op. cit.* (footnote 28), Art. 96 para. 6; Lüderitz & Fenge, *op. cit.* (footnote 118), Art. 12 para. 3; Magnus, *op. cit.* (footnote 17), Art. 12 para. 9.

<sup>134</sup> Comment 4.10 above.

<sup>135</sup> Metropolitan Court (Hungary), 24 March 1992 (*Adamfi Video v. Alkotók Stúdiósa Kisszövetkezet*), available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/920324h1.html>: German domestic law applied via Hungarian conflict of laws rules; *Forestal Guarani S.A. v. Daros International, Inc.*, U.S. Court of Appeals (3rd Cir.), 21 July 2010, available at: <http://cisgw3.law.pace.edu/cases/100721u1.html>: New Jersey and Argentine domestic law considered alternatively based on New Jersey conflict of laws rules (the appellate court eventually remanded the matter to the court of first instance).

<sup>136</sup> Magnus, *op. cit.* (footnote 17), Art. 12 para. 13; Westermann, *op. cit.* (footnote 83), Art. 12 para. 1.

Articles 12 and 96 CISG where the parties have already excluded the freedom of form principle along with the rest of the Convention, and accordingly no need to safeguard it through Article 12 sentence 2 CISG.

## **ADDENDUM: CASES CITED**

### **Austria**

Supreme Court, 22 October 2001 (*Agricultural products case*)  
Landesgericht Innsbruck, 6 February 2003 (*Tantalum powder case*)

### **Belgium**

Rechtbank van Koophandel Hasselt, 2 May 1995 (*Vital Berry Marketing v. Dira-Frost*),  
*Rechtskundig Weekblad* (1995-96) no 40

### **People's Republic of China**

China International Economic and Trade Arbitration Commission (CIETAC)

- Arbitral Award, 31 December 1997 (*Lindane case*)
- Arbitral Award, 17 October 1996 (*Tinplate case*)
- Arbitral Award, 6 September 1996 (*Engines case*)

*Japan Taiping v. Jiangsu Shuntian*, Jiangsu Higher People's Court, 2001, Case No. Su Jing Zhong Zi (2001) No. 011

*Japan Xingsheng v. Ningxia Capital Steel*, Ningxia Huizu Higher People's Court, 2002, Case No. Ning Min Shang Zhong No. 36

### **Germany**

Oberlandesgericht Düsseldorf (Germany), 2 July 1993 (*Veneer cutting machine case*)

Oberlandesgericht Koblenz (Germany), 17 September 1993 (*Computer chip case*)

Thüringer Oberlandesgericht in Jena (Germany), 26 May 1998 (*Live fish case*)

### **Hungary**

Metropolitan Court, 24 March 1992 (*Adamfi Video v. Alkotók Stúdiósa Kiszövetkezet*)

### **Mexico**

Compromex Arbitration proceeding, 29 April 1996 (*Conservas La Costeña v. Lanín*)

## **Netherlands**

Supreme Court, 7 November 1997 (*J.T. Schuermans v. Boomsma Distilleerderij/Wijnkoperij*), *Nederlands Internationaal Privaatrecht* (1998) No 91

District Court Rotterdam, 12 July 2001 (*Hispafruit BV v. Amuyen S.A.*)

## **Russian Federation**

Presidium of the Supreme Arbitration Court of the Russian Federation

- Resolution No. 4670/96 of 25 March 1997
- Resolution No. 6134/01 of 20 March 2002
- Case No. VAS-16382/09 of 23 December 2009
- Case No. VAS-2499/11 of 15 April 2011

Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry

- Case No. 125/2003 of 9 June 2004

## **United States of America**

*Forestal Guarani S.A. v. Daros International, Inc.*, United States Court of Appeals, Third Circuit, 21 July 2010

*Impuls v. Psion-Teklogix*, United States District Court (S.D. Florida), 22 November 2002

*Prime Start v. Maher Forest Products*, United States District Court (W.D. Washington), 17 July 2006

*Valero Marketing v. Greeni Oy*, United States District Court (New Jersey), 15 June 2005

*Zhejiang Shaoxing Yongli Printing and Dyeing Co., Ltd v. Microflock Textile Group Corporation*, United States District Court (S.D. Florida), 19 May 2008