THE CROSS-BORDER FREEDOM OF FORM PRINCIPLE UNDER RESERVATION: THE ROLE OF ARTICLES 12 AND 96 CISG IN THEORY AND PRACTICE

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TABLE OF CONTENTS

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I. INTRODUCTION

In the unification of laws, as in most endeavors of international cooperation, willingness to compromise is a necessary requirement for success.[1] The preparation of the United Nations Convention on Contracts for the International Sale of Goods (CISG), adopted in Vienna on 11 April 1980 and hailed today as "one of history's most successful efforts at the unification of . . . law governing international transactions,"[2] was no exception: The drafters of the Convention had to reach compromises on a number of difficult questions in the area of sales and contract law, thereby bridging the gaps between different "legal families" (mainly Common Law and Civil Law),[3] different political systems (capitalist and socialist States, or "East and West") and States at different stages of economic development (developed and developing countries, or "North and South").[4]

1. The Struggle for the Freedom of Form Principle

One of the most controversial issues had, from the very beginning, been the necessity of form requirements for the conclusion and modification of international sales contracts.[5] The question whether a certain form should be prescribed by the uniform sales law sat at more than one "fault line" dividing groups of States which followed very different legal concepts and traditions in this matter: First, and eventually most important, the then socialist countries under the leadership of the U.S.S.R.

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[1] *See* Gyula Eörsi, *Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods*, 27 AM. J. COMP. L. 311, 323 (1979). Gyula Eörsi was later elected President of the Diplomatic Conference held in spring of 1980 in Vienna that adopted the final text of the UN Sales Convention (CISG). 1980 U.N.Y.B., 149, U.N. Sales No. E.81.v.8, *available at* http://www.uncitral.org/pdf/english/yearbooks/yb-1980-e/yb_1980_e.pdf.

[2] Michael P. Van Alstine, *Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law*, 37 VA. J. INT'L L. 1, 5 (1996).

[3] On the traditional theory of "legal families" and its weaknesses, *see generally* K. ZWEIGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 63–322 (Tony Weir trans., 3d ed. 1998).

[4] For more detail on these "main conflict lines," *see generally* Gyula Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333, 346–52 (1983).

[5] PETER SCHLECHTRIEM, UNIFORM SALES LAW: THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 43–44 (1986).

Vol. 33, No. 1 (2014) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
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insisted on formal requirements for the making of foreign trade contracts, while others (in particular Western market economies) rejected such requirements as impractical and inappropriate for international commercial transactions. The socialist approach reflected the needs of a "planned economy"[6] which depended on written records of contract conclusions and modifications in order for the planning authorities to be able to match the sales transactions made by state enterprises to the government-made plan. For countries with a socialist planned economy, the emphasis was thus on security without surprises—even at the expense of otherwise desirable contracts not coming into being.[7] At the same time, there existed a second divide, namely between Common Law and Civil Law. It primarily resulted from two traditional Common Law concepts that had, to a varying degree, been maintained in some jurisdictions:[8] On one hand, the remainder of the English 1677 Statute of Frauds which, in a considerably restricted area, required (and even today requires[9]) a written form for the enforcement of the contract, and on the other hand the doctrine of consideration which requires some countervalue for the enforcement of contractual promises and thus does not allow for purely informal contract modifications. The Civil Law countries, on the contrary, mostly accepted contract conclusions and modifications without any form being observed—those jurisdictions that maintained provisions in the tradition of Article 1341 of the French Civil Code (which excludes witness testimony as a means of proving a contract[10]) did usually not apply them to commercial transactions.[11]

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[6] *See* RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 273–80 (2d ed. 1978).

[7] Eörsi, *supra* note 4, at 341.

[8] *Id.* at 346.

[9] U.C.C. § 2-201 (2002).

[10] This rule applies today only to contracts with a value of more than 800 Euros. At the time of the Vienna Diplomatic Conference in 1980, however, the minimum value was still fixed at 50 French Francs.

[11] On the law of some Latin American countries (Argentina, Chile, Ecuador, El Salvador and Paraguay), see generally EDGARDO MUÑOZ, MODERN LAW OF CONTRACTS AND SALES IN LATIN AMERICA, SPAIN AND PORTUGAL 177 (2011). French law also exempts transactions by merchants from the evidence rule in Article 1341 of the Civil Code; *see* ZWEIGERT & KÖTZ, *supra* note 3, at 370.

Vol. 33, No. 1 (2014) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
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After extensive discussions within the United Nations Commission on International Trade Law (UNCITRAL),[12] the body preparing the draft Convention which became the CISG, a decision was eventually reached in favor of the freedom of form principle (or principle of "informality") becoming the basic rule in the uniform law. This general principle was incorporated into the Convention primarily through Articles 11 and 29(1) CISG: Article 11 CISG provides that "[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses," with Article 29(1) CISG adding that "[a] contract may be modified or terminated by the mere agreement of the parties."

2. The Principle Under Reservation: Articles 12 and 96 CISG as an Open Compromise

Once the general policy decision within UNCITRAL had been made, a possibility for Contracting States to declare a reservation against the freedom of form principle was introduced as a compromise.[13] The request for such a reservation—the use of which essentially allows a Contracting State to "opt out" of the freedom of form rule—was made by the socialist States, which felt unable to unconditionally accept and adopt the general rule agreed upon during the previous negotiations. The result was today's Article 96 CISG, which reads:

> 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.

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[12] For details of these discussions, see Peter Winship, *Harmonizing Formal Requirements for Cross-Border Sales Contracts*, INT'L REV. L. 2012:6, at 4–6, *available at* http://dx.doi.org/10.5339/irl.2012.6.

[13] JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION ¶ 129, at 186 (Harry M. Flechtner ed., Kluwer Law International 4th ed. 2009).

The effect of Article 96 reservations is furthermore spelled out in Article 12 CISG, which in substance is a repetition of Article 96 CISG:[14]

> 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.

In contrast to other compromises that became part of the Convention but are not easily recognizable as such,[15] the compromise on the scope of the informality principle is a clear and recognizable compromise,[16] since it has been cast in the form of a reservation in the sense of Article 2(1)(d) Vienna Convention on the Law of Treaties.[17] In the Sales Convention's practical application, however, this alone did unfortunately not result in Articles 12 and 96 CISG being an easy-to-apply rule: both scope and effect of the exception to the freedom of form proved difficult to determine for courts and arbitral tribunals, leading to divergent interpretations of these provisions and to significant uncertainty.[18] The resulting difficulties are particularly important since they concern the contract's formal validity, thus affecting the very existence and enforceability of the parties' contractual rights and obligations.

Against this background, the present article attempts to outline the most important questions that have arisen under the reservation to the CISG's freedom of form principle and suggests possible answers. It proceeds as follows: Part II briefly describes the drafting history of Articles 12 and 96 CISG, before Part III lists the Contracting States that have made

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[14] *Id.* ¶ 129, at 186 & n.2.

[15] An example is Article 16 CISG, which governs the revocation of offers; *see* Ulrich G. Schroeter, *Article 16*, *in* PETER SCHLECHTRIEM & INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 302, 302–03 (Ingeborg Schwenzer ed., 3d ed. 2010).

[16] *See* Eörsi, *supra* note 4, at 352–53.

[17] Vienna Convention on the Law of Treaties art. 2(1)(d), May 23, 1969, 1155 U.N.T.S. 331, 333. Most of the Convention's provisions are regarded as a codification of customary public international law; *see* PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES ¶ 32 (2d ed. 1998). *See* MALCOLM N. SHAW, INTERNATIONAL LAW 811 (5th ed. 2003).

[18] *See* Michael G. Bridge, *Uniform and Harmonized Sales Law: Choice of Law Issues*, *in* JAMES J. FAWCETT ET AL., INTERNATIONAL SALE OF GOODS IN THE CONFLICT OF LAWS 905, 982 (2005); HONNOLD, *supra* note 13, ¶ 129, at 187.

Vol. 33, No. 1 (2014) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
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use of the Article 96 reservation and reports recent developments in this area. Part IV then discusses a number of issues raised by the scope of Article 96 CISG. Parts V and VI focus on different aspects of the (possible) effects of an Article 96 reservation, referred to in the present article as its "negative" effect (Part V) and its "positive" effect (Part VI) respectively. Part VII deals with the determination of a sales contract's formal validity via rules of private international law in CISG cases, before Part VIII addresses the role of party autonomy within the scope of Articles 12 and 96 CISG. Part IX concludes.

II. DRAFTING HISTORY

The drafting history of Article 96 CISG and its companion provision, Article 12 CISG, was as such comparatively uneventful. Both provisions had no predecessor in the Uniform Law on the Formation of Contracts in the International Sale of Goods (ULF) or the Uniform Law for the International Sale of Goods (ULIS) adopted in 1964. During the preparation of the CISG within UNCITRAL as well as during the 1980 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.

In UNCITRAL, a provision resembling Articles 12 and 96 CISG had been proposed by the U.S.S.R. as early as 1971,[19] since the country had legislation requiring contract terms to be expressed in a signed writing. After the general policy decision mentioned above, the U.S.S.R. continued to be the principal supporter of today's Article 96 reservation,[20] which in turn was viewed by the other States as essentially a price for the Convention's acceptance by the U.S.S.R. and other socialist States.[21] During the Vienna Conference, this had the practical effect of Articles 12

[19] *See* 1971 U.N.Y.B. 48, U.N. Sales No. E.72.V.4. Drafts 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 326–27 (1989).

[20] *See* HONNOLD, *supra* note 13, ¶ 128; Peter Schlechtriem & Martin Schmidt-Kessel, *Article 12*, *in* SCHLECHTRIEM & SCHWENZER, *supra* note 15, at 214, 214–16.

[21] Camilla B. Andersen, *Recent Removals of Reservations Under the International Sales Law: Winds of Change Heralding a Greater Unity of the CISG*, 8 J. BUS. L. 699, 705 (2012): "It was thus a diplomatic necessity."

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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.[22] Certain substantive amendments to Article 96 CISG's language which were nevertheless proposed during the Conference will be addressed below where relevant for the interpretation of the provision.

A unique feature of the Article 96 CISG reservation is its apparent "duplification" 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,[23] 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 Vienna Conference's First Committee,[24] although Article 96 CISG would ordinarily have been dealt with in the Second Committee responsible for reservations.[25] A proposal to merge the two provisions into one was made,[26] but rejected.[27] Within the Convention's text as eventually adopted, Article 12 CISG is—strictly speaking—superfluous,[28] as can be seen from

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[22] E.g., the remark by delegate DATE-BAH (Ghana): "[L]ike the representative of the United States he thought that the agreement reached on article 11 [which became Article 12 CISG] was designed merely to eliminate the obstacles which might be encountered by the Soviet Union." United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 Mar.–11 Apr. 1980, Official Records, 8th mtg. at 274, U.N. DOC. A/CONF. 97/19 (1991) [hereinafter *Official Records*].

[23] *See infra* Part VIII.

[24] On the committees at the Diplomatic Conference and their respective tasks, *see* HONNOLD, *supra* note 13, ¶ 10.

[25] *See Official Records*, *supra* note 22, ¶ 9, at 271 (remark of the CHAIRMAN).

[26] *Official Records*, *supra* note 22, pt. B, ¶ 7(ii), at 91.

[27] *See Official Records*, *supra* note 22, ¶ 18, at 271.

[28] ROLF HERBER & BEATE CZERWENKA, INTERNATIONALES KAUFRECHT Art. 12, ¶ 5 (1991); Ulrich G. Schroeter, *Backbone or Backyard of the Convention? The CISG's Final Provisions*, *in* SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR

Vol. 33, No. 1 (2014) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2014.79 ● http://jlc.law.pitt.edu

the fact that no other reservation contained in Part IV of the Convention is accompanied by a provision in Parts I–III specifying 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 the freedom of form rule may be subject to a reservation.[29]

III. RESERVATION STATES

The practical importance of Articles 12 and 96 CISG is influenced by both the number of Contracting States that have made use of the reservation and the importance of trade relationships involving parties from those States, because the reservation's effect is triggered whenever at least one of the parties to a sales contract has his place of business in an Article 96 reservation State.

1. Current Reservation States

The following States have currently made use of the Article 96 CISG reservation: Argentina, Armenia, Belarus, Chile, Hungary, Paraguay, the Russian Federation,[30] and the Ukraine. Three other Contracting States—the People's Republic of China,[31] Latvia, and Lithuania—only very recently withdrew the declarations they had made under Article 96 and are therefore still to be regarded as reservation States for the purpose of sales contracts concluded before their withdrawals took effect in accordance with Article 97(4) CISG.[32] In light of the discussions about the freedom of form principle when the Convention was drafted,[33] it is interesting to note that no Common Law jurisdiction has used the reservation in order to preserve its

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ALBERT H. KRITZER ON OCCASION OF HIS EIGHTIETH BIRTHDAY 425, 427 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008).

[29] HONNOLD, *supra* note 13, ¶ 129, at 186 & n.2.

[30] 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, Resolution No. 4670/96 of Mar. 25, 1997, *translated in* Albert H. Kritzer, *CISG: Index of Cases*, *available* at http://cisgw3.law.pace.edu/cases/970325r1.html.

[31] On the somewhat unclear wording of the Chinese declaration and its consequences, *see infra* Part IV.3.

[32] *See infra* Part III.2.

[33] *Supra* Part I.

Vol. 33, No. 1 (2014) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2014.79 ● http://jlc.law.pitt.edu

local statute of frauds or the traditional doctrine of consideration: Instead, these countries chose to forego their domestic form rules in favour of accepting oral international sales contracts,[34] thereby contributing to the Sales Convention's uniform sphere of application.

With its eight remaining reservation States, the reservation against the freedom of form continues to rank as the most popular among the CISG's reservations, with the Article 95 reservation (currently[35] used by seven States) following as the close second. The fact alone that declarations in accordance with Article 96 CISG were made by two major trading nations—the People's Republic of China and the Russian Federation—furthermore means that the provision's relevance in practice has not been insignificant.

2. Developments in Treaty Practice

An Article 96 reservation may be made at "any time," that is, not only at the time of signature, ratification of, or accession to the Convention, but also at any subsequent time.[36] At 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[37] 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.

Reservations that have been made may furthermore be withdrawn at any time, as made clear by Article 97(4) CISG. This provision accordingly offers a flexible possibility to remove reservations and *inter alia* reinstate

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[34] 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 J.L. & COM. 187, 195–96 (1998).

[35] Recent rumor has it that the People's Republic of China is planning to withdraw its Article 95 declaration. *See* Andersen, *supra* note 21, at 711.

[36] *See* Schroeter, *supra* note 28, at 437.

[37] *See Official Records*, *supra* note 22, ¶ 52, at 274 (remarks of delegate SAMI). Jerzi Rajski, *Article 96*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 658, 658–59 (Cesare M. Bianca & Michael J. Bonell eds., 1987).

Vol. 33, No. 1 (2014) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
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the CISG's freedom of form principle. Estonia, which had made an Article 96 declaration upon ratifying the CISG on 20 September 1983, availed itself of this opportunity and withdrew its declaration on 9 March 2004—a step probably inspired by the enactment of the new Estonian law of obligations in 2001 which no longer required a written form for sales contracts.[38] More recently, Latvia followed its neighboring State's example by similarly effecting a withdrawal[39] which, according to Article 97(4) second sentence CISG, means that Latvia has not been an Article 96 reservation State from 1 June 2013 onwards. Soon after, the People's Republic of China and Lithuania formally withdrew their declarations under Article 96 CISG, steps that took effect on 1 August 2013 and 1 June 2014, respectively.[40]

While there is hope that the recent developments in Latvia, China, and Lithuania may also result in other reservation States revisiting their position towards the Convention's freedom of form principle,[41] Articles 12 and 96 CISG will—at least for the time being—continue to affect the CISG's application in practice. It is therefore useful to discuss some of the interpretative issues that have arisen under these provisions.

IV. SCOPE OF THE RESERVATION

1. Prerequisites for Reservations Under Article 96 CISG

Article 96 CISG limits 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

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[38] *See* Irene Kull, *Reform of Contract Law in Estonia: Influences of Harmonisation of European Private Law*, XIV JURIDICA INT'L 122, 128 (2008); Peter Schlechtriem, *The New Law of Obligations in Estonia and the Developments Towards Unification and Harmonisation of Law in Europe*, VI JURIDICA INT'L 16 (2001).

[39] The Latvian notification of withdrawal was received by the depositary of the Convention on 13 November 2012.

[40] *See* Andersen, *supra* note 21, at 710–11.

[41] *See* Ole Lando, *The CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, 53 AM. J. COMP. L. 379, 389 (2005) (proposing, *inter alia*, a revocation of all present Article 96 declarations).

Vol. 33, No. 1 (2014) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
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evidenced by writing.[42] While this interpretation may not be 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 . . ."[43]), it is compelled by the provision's drafting history.[44] 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 [. . .].[45]

At the First Committee's 8th meeting, the amendment by the Netherlands was extensively discussed[46] and subsequently rejected by a vote of 11 in favor and 16 against,[47] 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*"

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[42] *See* Alejandro M. Garro, *The U.N. Sales Convention in the Americas: Recent Developments*, 16 J.L. & COM. 219, 228 (1998) (stating that Article 96 of CISG permits reservation only to Contracting States whose legislations requires contracts of sale to be evidenced in writing). *See also* Johnny Herre, *Article 96*, *in* UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, COMMENTARY ¶ 4 (Kröll, Mistelis & Viscasillas eds., 2011). Rajski, *supra* note 37, art. 96, ¶ 3.1.; PETER SCHLECHTRIEM, INGEBORG SCHWENZER & PASCAL HACHEM, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), art. 96, ¶ 2 (3d ed. 2010) ("must basically exist for all contracts of sale"); Schroeter, *supra* note 28, at 432; ULRICH G. SCHROETER, UN-KAUFRECHT UND EUROPÄISCHES GEMEINSCHAFTSRECHT: VERHÄLTNIS UND WECHSELWIRKUNGEN § 6, ¶ 303 (2005). A similar, but somewhat more flexible approach is favored by Bridge, *supra* note 18, ¶ 16.138, who wants to confine Article 96 CISG to States "that require at least some commercial sales to conform to a writing requirement."

[43] Emphasis added.

[44] HONNOLD, *supra* note 13, ¶¶ 88–91 (stating the importance of the drafting history for the Convention's interpretation in accordance with Article 7(1) of the CISG). *See also* Pilar Perales Viscasillas, *Article 7*, *in* UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG), art. 7, ¶¶ 35–37 (Kröll, Mistelis & Viscasillas eds., 2011); Ingeborg Schwenzer & Pascal Hachem, *Article 7*, *in* SCHLECHTRIEM & SCHWENZER, *supra* note 15, ¶ 22.

[45] *See Official Records*, *supra* note 22, at 271.

[46] *Id.*

[47] *Id.* at 92.

was also understood as requiring that the domestic legislation imposes a form on all sales contracts.[48]

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—e.g., consumer contracts or sales of immovables—are subject to a form requirement or not. Against the background of the legislative history, 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[49] fails to convince.

2. Lack of Prerequisites and Its Effect

With respect to some of the Contracting States that have made an Article 96 reservation, commentators have doubted whether the legal prerequisites for making the 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.[50] The same seems to be true for Paraguay.[51] With respect to the People's Republic of China's declaration,[52] similar doubts emerged after China reformed its contract law by enacting its new Uniform Contract Law in 1999,[53] since this

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[48] *Id.* at 92 (providing remarks by delegate Meijer from the Netherlands).

[49] *See* Fritz Enderlein & Dietrich Maskow, *International Sales Law*, art. 96, ¶ 2 (1992), *available at* http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html#art96; Marco Torsello, *Reservations to International Uniform Commercial Law Conventions*, 5 UNIF. L. REV. 85, 111 (2000).

[50] *See* Garro, *supra* note 42, at 229. *See also* FRANCO FERRARI, WRITING REQUIREMENTS: ARTICLE 11–13: THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTIONS 214 n.64 (2001).

[51] *See* MUÑOZ, *supra* note 11, at 175.

[52] *See infra* Part IV.3.

[53] *See* Andersen, *supra* note 21, at 710. *See also* Xiaolin Wang & Camilla Baasch Andersen, *The Chinese Declaration Against Oral Contracts Under the CISG*, 8 VINDOBONA J. INT'L COM. LAW & ARB. 145, at 152 (2004); Lutz-Christian Wolff, *VR China: Neue IPR-Regeln für Verträge*, 28 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS 55, 57 (2008); Dong Wu, *CIETAC's Practice on the CISG*, NORDIC J. COM. LAW 145, 153. (2005); Fan Yang, *The Application of the CISG in the Current PRC Law and CIETAC Arbitration Practice*, NORDIC J. COM. LAW 1, 64 (2006).

law no longer requires all international sales contracts to be concluded in writing.[54]

The problem, however, is arguably more general in nature and extends beyond the examples referred to above. The reason is that all-encompassing writing requirements have become less and less common in domestic laws since the CISG was adopted in 1980,[55] and there is ground to believe that the legal prerequisites for Article 96 CISG reservations have also disappeared in other Article 96 reservation States—as in Belarus, Hungary, the Russian Federation and the Ukraine, whose laws in force today all allow for an oral conclusion of sales contracts[56]—or will do so in the future.

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 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 his role as depositary of the Convention (Article 89 CISG). The procedure prescribed by Article 97(4) CISG thus precludes courts in 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 formally withdrawn in accordance with Article 97 CISG.[57] The contrary approach, which holds that a reservation must be considered ineffective when its conditions are not

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[54] Article 10 of the Chinese Uniform Contract Law: "A contract may be made in writing, in an oral conversation, as well as in any other form."

[55] *See* ZWEIGERT & KÖTZ, *supra* note 3, at 377 (discussing the "general move towards abolishing formal requirements.").

[56] *See* NATIA LAPIASHVILI, MODERN LAW OF CONTRACTS AND SALES IN EASTERN EUROPE AND CENTRAL ASIA 124 (2011); INGEBORG SCHWENZER, CHRISTOPHER KEE & PASCAL HACHEM, GLOBAL SALES AND CONTRACT LAW ¶ 22.01 (2012).

[57] Schroeter, *supra* note 28, at 436. *See also* Ingeborg Schwenzer & Pascal Hachem, *Article 96*, *in* SCHLECHTRIEM & SCHWENZER *supra* note 15, ¶ 2.

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satisfied and should therefore be disregarded by the courts,[58] creates significant legal uncertainty and should not be followed.

3. Unclear Declarations

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 was such a case. The Chinese declaration, in its relevant part, read as follows: "[t]he 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 intended to derogate from these provisions or rather wanted to leave them unchanged. The latter interpretation would have meant that the Chinese Article 96 reservation's effects would only have applied to contract conclusions, but not to contract modifications and terminations.[59]

The interpretation of the unclear declaration made by 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 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

[58] Torsello, *supra* note 49, at 111, 117; Wolff, *supra* note 53, at 57 n.38. *See also* HARM PETER WESTERMANN, MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH (6th ed. 2012), art. 12 CISG, ¶ 3.

[59] *See* James 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 INT'L L.J. 273, 312 (1999).

these provisions.[60] In following 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.[61] Case law has (albeit implicitly) confirmed this view by invoking form requirements for contract modifications where the Chinese Article 96 declaration applied.[62]

V. THE ARTICLE 96 RESERVATION'S "NEGATIVE" EFFECT: EXCLUSION OF CONTRACTING STATES' OBLIGATION TO APPLY THE CONVENTION'S FREEDOM OF FORM PROVISIONS

The making of an Article 96 reservation primarily serves to exclude the obligation under public international law to apply the Convention's freedom of form provisions that Contracting States would otherwise face. This basic effect of an Article 96 reservation stood at the center of the attention when the Convention was drafted, since some States—notably the U.S.S.R.—had made clear that they would not be able to adopt the Convention when such a step would make them *treaty-bound* to apply the principle of freedom of form.[63] The option to make a reservation—and this is sometimes overlooked today—was therefore first and foremost created with a view to removing the *public international law* obligation to respect the Convention's various freedom of form provisions, referred to in the present article as the Article 96 reservation's "negative" effect.

1. General

Where any party to a CISG sales contract has his place of business in a Contracting State that has made a declaration under Article 96, no Contracting State is under any obligation under public international law to

[60] Schroeter, *supra* note 28, at 451.

[61] Wang & Andersen, *supra* note 53, at 146. *See also* Andersen, *supra* note 21, at 710. *Contra* Bailey, *supra* note 59, at 312.

[62] *See* Zhejiang Shaoxing Yongli Printing and Dyeing Co., Ltd. v. Microflock Textile Group Corp., 2008 WL 2098062, at *1 (S.D. Fla. May 19, 2008).

[63] *See supra* Parts I and II (discussing the drafting history of Articles 12 and 96 of the CISG).

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apply any provision of the Convention which provides for freedom of form (Article 12). According to the language of Article 12 first sentence and Article 96 CISG, this "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." How far the effect reaches and by whom it has to be taken into account is nevertheless not immediately clear. These questions will be addressed below in an attempt to establish the exact scope of the reservation's "negative" effect. Its importance is two-fold. First, it determines which freedom of form provisions may be left unapplied to which declarations (and by courts respectively arbitral tribunals in which countries) without causing a breach of international treaty obligations arising from the CISG. Second, the "negative" effect's scope also influences what types of domestic form requirements may under which conditions be potentially applied to CISG contracts:[64] Beyond the reach of the reservation's "negative" effect, the Contracting States' obligation to apply the Convention's freedom of form provisions remains unaffected, and domestic form requirements accordingly remain pre-empted.

2. Contractual Declarations Affected

There is agreement that the effects of an Article 96 CISG reservation only extends to types of contractual declarations specifically mentioned in Articles 12 and 96 CISG, and not to others.[65] It is less clear which declarations are precisely mentioned in these provisions: The wording of Articles 12 and 96 CISG lists a number of party agreements—contracts of sale (Articles 14, 18 and 23 CISG); the modification of a contract of sale (Article 29(1) in conjunction with Articles 14, 18 CISG); the 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."

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[64] The form requirements as to which laws apply is a different question, and will be addressed *infra* in Parts VI and VII.

[65] Gerd Reinhart, *UN-Kaufrecht*, art. 12, ¶ 4 (1991). *See also* SCHLECHTRIEM, *supra* note 5, at 44.

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The meaning of this last, open-ended term is disputed. Its wording, which contains no limiting reference to purpose or context of the declarations covered, seems at first sight to encompass any declaration made in accordance with Parts I–III of the Convention. A narrower and perhaps preferable reading, on the contrary, only includes declarations as far as they relate to the formation of the contract, its modification or consensual termination,[66] as, e.g., withdrawals, revocations and rejections of offers (Articles 15(2), 16 and 17 CISG),[67] acceptances of offers by conduct (Article 18(1) CISG),[68] 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.

3. Form Requirements Covered

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's informality principle but can now (at least potentially[69]) 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., legal provisions requiring a registration of sales contracts in a specified public

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[66] *See Official Records*, *supra* note 22, at 20. *See also* Werner Melis, *Article* 12, *in* KOMMENTAR ZUM UN-KAUFRECHT ¶¶ 2–3 (Heinrich Honsell ed., 2d ed. 2010); Rajski, *supra* note 37, ¶ 2.2; SCHLECHTRIEM, *supra* note 5, at 45.

[67] Ulrich Magnus, *Article 12*, *in* KOMMENTAR ZUM BGB, WIENER UN-KAUFRECHT (CISG) ¶ 6 (J. von Staudinger ed., 2005). *See also* Herre, *supra* note 42, art. 12, ¶ 3. *Contra* Enderlein & Maskow, *supra* note 49, art. 12, ¶ 1; *see* Schlechtriem & Schmidt-Kessel, *supra* note 20, art. 12, ¶ 6.

[68] *See* Bridge, *supra* note 18, ¶ 16.137 n.295.

[69] *See* in detail *infra* Part VII.

office, an authentication by a notary, a certification by a consulate, or an attachment of stamps—are therefore not preserved by a declaration under Article 96 CISG.[70]

4. Universal Effect in All Contracting States

The "negative" effect described applies in courts of all Contracting States, whether or not they have made a reservation under Article 96 CISG.[71] 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 legal 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, an alternative proposal for what became Article 96 CISG was suggested by Austria during the Vienna Diplomatic Conference, the wording of which ("A Contracting State may [. . .] make a declaration that *it* will not apply any provision . . . ."[72]) would have made a reservation under Article 96 CISG binding only on the reservation State and not on other Contracting States.[73] The proposal was discussed in the First Committee, but rejected,[74] thereby underlining the drafters' intention to make the reservation's effects

[70] *See* HONNOLD, *supra* note 13, ¶ 129; Herre, *supra* note 42, ¶ 3; SCHLECHTRIEM & SCHMIDT-KESSEL, *supra* note 20, ¶ 5; Wolfgang Witz, *Articles 11–12, in* INTERNATIONAL EINHEITLICHES KAUFRECHT ¶ 13 (2000). *Contra* Melis, *supra* note 66, art. 12, ¶ 5.

[71] *See* Flechtner, *supra* note 34, at 197; Ulrich Huber, *Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge*, 43 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 413, 434 (1979); Eckard Rehbinder, *Vertragsschluß nach UN-Kaufrecht im Vergleich zu EAG und BGB*, *in* EINHEITLICHES UN-KAUFRECHT UND NATIONALES OBLIGATIONENRECHT 154 (1987); MARC WEY, DER VERTRAGSABSCHLUß BEIM INTERNATIONALEN WARENKAUF NACH UNCITRAL- UND SCHWEIZERISCHEM RECHT 177 (1984).

[72] *See Official Records*, *supra* note 22, at 91 A/CONF.97/C.1/L.42 (emphasis added).

[73] *See Official Records*, *supra* note 22, at 271 (delegate Reishofer explaining the Austrian proposal; "On the question of substance, under the existing article, reservations made by one State bound all other States, which was not justified. . . .").

[74] *See Official Records*, *supra* note 22, at 271.

universally applicable in all Contracting States. Case law has confirmed this interpretation.[75] The opposite view expressed by some commentators[76] ignores the wording of Articles 12 and 96 CISG as well as its legislative history and should not be followed.

5. "Negative" Effect in Courts of Non-Contracting States or in Arbitral Proceedings?

Since the "negative" effect of an Article 96 CISG declaration removes Contracting States' obligations under public international law to apply the CISG's freedom of form provisions, its application in courts of a given State presupposes that the forum State is subject to such an obligation in the first place. The effect does accordingly not apply in courts of Non-Contracting States, since they are at the outset under no obligation of any sort under public international law to take Articles 11 and 29 CISG into account. The same is true for arbitral tribunals, because the Convention neither creates any obligations for arbitral tribunals (whether their place of arbitration is located in a CISG Contracting State or not)[77] nor for Contracting States in respect of arbitral tribunals having their place of arbitration in that State. The separate question of how an arbitral tribunal should determine the formal validity of an international sales contract in a case involving a party from an Article 96 reservation State does not relate

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[75] *See* HR, 7 Nov. 1997 (*Schuermans v. Boomsma Distilleerderij/Wijnkoperij BV*) (Neth.) (Russian Article 96 reservation observed by Dutch court), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/971107n1.html; RB Rotterdam, 12 July 2001 (*Hispafruit BV v. Amuyen S.A.*) (Neth.) (Argentinian Article 96 reservation observed by Dutch court), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010712n1.html; Compromex, 29 Apr. 1996 (*Conservas La Conseña S.A. de C.V. v. Lanin San Luis S.A. & Agroindustrial Santa Adela S.A.*) (Mex.) (Argentinian Article 96 reservation observed by Mexican government commission), *available at* http://cisgw3.law.pace.edu/cases/960429m1.html; Rechtbank van Koophandel Hasselt, 2 May 1995 (*Vital Berry Marketing v. Dira-Frost NV*) (Belg.) (Chilean Article 96 reservation observed by Belgian court), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950502b1.html.

[76] Jürgen Basedow, *Uniform Private Law Conventions and the Law of Treaties*, 5 UNIF. L. REV. 731, at 740–41 (2000); Bridge, *supra* note 18, ¶ 16.140; Torsello, *supra* note 49, at 105.

[77] The Convention does, in its Articles 45(3) and 61(3), contain two provisions which could be read as directly defining obligations of arbitral tribunals by declaring that "[n]o period of grace may be granted to [the party in breach] by a court *or arbitral tribunal* when [the other party] resorts to a remedy for breach of contract" (emphasis added). It seems preferable, however, to view Articles 45(3) and 61(3) CISG as merely defining the parties' remedies for breach of contract by clarifying that no periods of grace as provided for by domestic laws may be granted in CISG cases.

to the reservation's "negative" effect, but rather it's "positive" effect (if any) and/or to the applicable rules of private international law. It will accordingly be addressed below.[78]

VI. DETERMINATION OF THE RULES GOVERNING FORMAL VALIDITY (1): "POSITIVE" EFFECT OF THE ARTICLE 96 RESERVATION?

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 his place of business in an Article 96 reservation State? In the Convention's practical application, this point is of significant importance, since the "negative" effect of an applicable Article 96 reservation alone does not enable a court or arbitral tribunal to assess whether a given sales contract has been validly concluded.

1. Two Schools of Thought

The first matter of dispute in this context is whether Articles 12 and 96 CISG themselves decide about the law governing the formal validity of a sales contract once their application is triggered, or whether this decision lies with the domestic rules of private international law. The question, when framed differently, is whether an Article 96 declaration does not only possess the "negative" effect previously discussed,[79] but in addition has a "positive" effect which determines the law that does apply in place of the Convention's freedom of form principle discarded by the declaration's "negative" effect. Neither Article 12 nor Article 96 CISG provides an obvious answer to this question. Case law and legal writings are divided between two schools of thought.

[78] *See infra* Part VII.2.
[79] *See supra* Part V.

a. The Minority Opinion: "Positive" Effect

One approach—characterized in both case law and legal writing as the "minority view,"[80] although this label arguably says nothing about the merits of its underlying reasoning—considers the domestic form requirements of the Article 96 reservation State involved to be applicable. It has been followed in CIETAC arbitral awards[81] and a Russian arbitral award,[82] in court decisions from Belgium,[83] Russia[84] and the United States,[85] as well as by some commentators.[86] According to this approach,

[80] Forestal Guarani S.A. v. Daros International, Inc., 613 F.3d 395 (3d Cir. 2010); Schlechtriem & Schmidt-Kessel, *supra* note 20, art. 12, ¶ 2.

[81] CIETAC, 31 Dec. 1997 (*People's Republic of China v. France*) (*Lindane case*) (China) ("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."), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/971231c1.html; CIETAC, 17 Oct. 1996 (*Korea v. People's Republic of China*) (*Tinplate case*) (China) ("China made a reservation when signing the CISG, requiring written format."), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/961017c1.html; CIETAC, 6 Sept. 1996 (*People's Republic of China v. U.S.*) (*Engines case*) (China), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960906c1.html.

[82] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 9 June 2004 (*Russian Federation v. Cyprus*) (Russ.) ("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, alteration 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."), ¶ 3.3, *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/040609r1.html.

[83] Rechtbank van Koophandel Hasselt, 2 May 1995 (*Vital Berry Marketing v. Dira-Frost NV*) (Belg.), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950502b1.html.

[84] Presidium of the Supreme Arbitration Court of the Russian Federation, *supra* note 30 ("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 Dec. 2009 (*Russia v. Poland*) (Russ.), *available at* http://cisgw3.law.pace.edu/cases/091223r1.html; Presidium of the Supreme Arbitration Court of the Russian Federation, 15 Apr. 2011 (*Germany v. Russia*) (*Restaurant Renovation Materials*) (Russ.), *available at* http://cisgw3.law.pace.edu/cases/110415r1.html.

[85] Zhejiang Shaoxing Yongli Printing and Dyeing Co. v. Microflock Textile Grp. Corp., 2008 WL 2098062, at *1 (S.D. Fla. May 19, 2008) ("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."). *But see Forestal Guarani*, 613 F.3d 395.

[86] Andersen, *supra* note 21, at 703; JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION ¶ 129 (3d ed. 1999) (but note that the previous editions of this treatise adopted—and the 4th edition, edited by Harry Flechtner, again adopts—the opposite position); Reinhart, *supra* note 65, art. 12, ¶ 3; Winship, *supra* note 12, at 9–11.

Articles 12, 96 CISG result in the universal applicability[87] of a reserving State's national law on formal requirements to every sales contract concluded by a party from this State. It thereby accords Article 96 reservations a "positive" effect.

Remarkably, none of the arbitral awards and court decisions cited above elaborates in any detail *why* they arrive at this interpretation of Article 96 CISG,[88] although it is not without interest to note that most of them were made by arbitrators or judges sitting in two Article 96 reservation States (Russia and China).[89] The approach's 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,[90] or make reference to the need, felt by some States, for protection against claims unsupported by a written agreement.[91] While these points invoke the commonly accepted historical background of the Article 96 reservation, they arguably fail to address the issue relevant here, namely whether a reservation that has been made under Article 96 merely respects domestic form requirements through its "negative" effect or goes (much) further by actively invoking their applicability.

b. The Majority Opinion: No "Positive" Effect

The opposite 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 rather 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 govern the question whether a breach-of-contract claim is sustainable in absence of a written contract. In such a situation, Article 7(2) CISG calls for the application of the rules of

[87] *See* Schlechtriem & Schmidt-Kessel, *supra* note 20, art. 12, ¶ 2.

[88] Note that for some of the decisions, only an abstract was available in a language accessible to the present author.

[89] *See* Winship, *supra* note 12, at 3.

[90] Reinhart, *supra* note 65, art. 12, ¶ 3.

[91] HONNOLD, *supra* note 86, ¶ 129; Winship, *supra* note 12, at 9–11.

private international law of the forum, which therefore must determine the law governing the contract's formal validity.

This view has been adopted by courts from Austria,[92] Hungary,[93] the Netherlands,[94] Russia[95] and the United States,[96] as well as by the clear majority among international commentators.[97]

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[92] Oberster Gerichtshof [OGH] 22 Oct. 2001, Docket No. 1 Ob 77/01g (*Gasoline and Oil Case*) (Austria) (governing the formal validity of an Austrian-Hungarian sales contract determined via Austrian conflict of law rules), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/011022a3.html; Oberster Gerichtshof [OGH] 31 Aug. 2005, Docket No. 7 Ob 175/05v (*Tantalum Case*) (Austria) (governing the formal validity of a (Hong Kong) Chinese-Austrian sales contract determined via Chinese conflict of law rules), *available at* http://cisgw3.law.pace.edu/cases/050831a3.html.

[93] FB Budapest (Metropolitan Court) 24 Mar. 1992, Docket No. 12.G.41.471/1991/21 (Hung.) (governing the formal validity of a German-Hungarian sales contract determined via Hungarian conflict of laws rules), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/920324h1.html.

[94] HR, 7 Nov. 1997 (*Schuermans v. Boomsma Distilleerderij/Wijnkoperij BV*) (Neth.) (governing the formal validity of a Russian-Dutch sales contract determined via Dutch private international law rules), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/971107n1.html; RB Rotterdam, 12 July 2001), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010712n1.html.

[95] Presidium of the Supreme Arbitration Court of the Russian Federation, Mar. 20, 2002 (*Tumensky fanerny kombinat v. Dor-Bat and Demirel Inshaat*) (Russ.) (law governing the formal validity determined via Russian conflict of laws rules), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020320r1.html.

[96] Forestal Guarani S.A. v. Daros International, Inc., 613 F.3d 395 (3d Cir. 2010) (remanding to District Court in order to have the applicable law determined via New Jersey conflict of laws rules).

[97] JORGE ADAME GODDARD, EL CONTRATO DE COMPRAVENTA INTERNACIONAL 125–26 (1994); Bridge, *supra* note 18, ¶ 16.141; Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 N.W. J. INT'L L. & BUS. 299, 323–24, 327–28 (2004); FERRARI, *supra* note 50, at 213–14; Flechtner, *supra* note 34, at 196–97; HONNOLD, *supra* note 13, ¶ 129; Alejandro Osuna González, *Mexico's COMPROMEX Issues Another Recommendation Applying the CISG*, 17 J.L. & COM. 435, 438 (1998); Herre, *supra* note 42, art. 96, ¶ 5; PETER HUBER, MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, art. 96 CISG, ¶ 1 (6th ed. 2012); ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 143 (1989); JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG: A COMPACT GUIDE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 174, 174–75 (3d ed. 2008); ALEXANDER LÜDERITZ & ANJA FENGE, BÜRGERLICHES GESETZBUCH, VOL. 13: SCHULDRECHTLICHE NEBENGESETZE—CISG (Soergel 13th ed. 2000), art. 12, ¶ 2; Magnus, *supra* note 67, art. 12, ¶ 8; Henry Mather, *Choice of Law for International Sales Issues Not Resolved by the CISG*, 20 J.L. & COM. 31, 166–67 (2001); Melis, *supra* note 66, ¶ 4; Herre, *supra* note 42, art. 12, ¶ 8; Rajski, *supra* note 36, art. 12, ¶ 2.3; art. 96, ¶ 2.2; INGO SAENGER, BÜRGERLICHES GESETZBUCH, art. 96, ¶ 2 (Bamberger & Roth 2d ed. 2007); Schlechtriem & Schmidt-Kessel, *supra* note 20, art. 12, ¶ 2; SCHLECHTRIEM, SCHWENZER & HACHEM, *supra* note 42, art. 96, ¶ 3; Schroeter, *supra* note 28, at 443; KURT SIEHR, KOMMENTAR ZUM UN-KAUFRECHT (Honsell 2d ed. 2010), art. 96, ¶ 2; WESTERMANN, *supra* note 58, art. 12 CISG, ¶ 2; PETER WINSHIP, THE SCOPE OF THE VIENNA CONVENTION ON INTERNATIONAL SALES CONTRACTS, INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1–47 (Galston & Smit eds., 1984) ("[Article 96] does not make the declaring State's

2. Discussion

In the author's opinion, the majority view has it right, as will be demonstrated in more detail below. As a preliminary point, it is submitted that the existence, if any, of the reservation's "positive" effect is exclusively a matter of Article 12 and 96 CISG's interpretation in accordance with the rules governing such interpretation, and neither a question of the policies declaring and non-declaring States "implicitly" adopt when they become parties to the Convention[98] nor a question of comity.[99] The legal effect of reservations under the Sales Convention is not primarily affecting the governments of Contracting States, as it would be the case e.g. under treaties providing for the sale of minerals from one State to the other or for the temporal use of one State's territory by the other (*traités contrats*): Under treaties of this type, it may indeed be permissible and appropriate to have recourse to general considerations of inter-government policy when determining the treaty obligations. Under a uniform private law convention like the CISG (a *traité loi*),[100] on the contrary, it is primarily the private parties to international sales contracts—from reservation States, other Contracting States and Non-Contracting States alike—who are affected by the legal consequences of a reservation, because these consequences will influence the rules of private law governing their contracts (including, in case of Articles 12 and 96 CISG, their formal validity). This means, in turn, that the reservation's precise effect has to be established in accordance with the Convention's own rules on interpretation, as notably those deduced from Article 7(1) CISG.[101] The appropriate degree of comity and respect for reservation States' government policies is therefore the one uniformly laid done in Articles 12 and 96 CISG—no less and no more. The interpretation of these provisions below will show that a reservation against the freedom of form principle under the

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formal requirements binding on parties which trade with organizations in the declaring State."). *But see* Winship, *supra* note 12, at 9–11).

[98] *But see* Winship, *supra* note 12, at 10.

[99] *But see* Andersen, *supra* note 21, at 704.

[100] *See* SHAW, *supra* note 17, at 88–92 (discussing the distinction between "treaty-contracts" (*traités contrats*) and "law-making" treaties (*traités lois*)).

[101] *See* in detail SCHROETER, *supra* note 42, § 8, ¶¶ 23–33; Schroeter, *supra* note 28, at 427–28.

Vol. 33, No. 1 (2014) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2014.79 ● http://jlc.law.pitt.edu

Sales Convention has no "positive" effect which would in itself determine the rules governing the formal validity of CISG contracts.

a. Language of Articles 12 and 96 CISG

Among the reasons supporting this "majority" 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 his own form requirements do apply.[102] Where the Convention wants to authorize a Contracting State to directly look 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,[103] but the provisions' wording was nevertheless left unchanged.

b. Legislative History of Article 96 CISG

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[104] was discussed in UNCITRAL, but rejected. The reported 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.[105] This decision made by the drafters of the Convention should be respected.[106]

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[102] Schroeter, *supra* note 28, at 443.

[103] See the remark by delegate Feltham (United Kingdom), *Official Records*, *supra* note 22, at 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."

[104] Document A/CN.9/SR.8 (unpublished).

[105] HONNOLD, *supra* note 13, ¶ 129; Rajski, *supra* note 37, ¶ 1.2.

[106] SCHLECHTRIEM, SCHWENZER & HACHEM, *supra* note 42, art. 96, ¶ 3.

Vol. 33, No. 1 (2014) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2014.79 ● http://jlc.law.pitt.edu

c. Purpose of the Reservation

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.[107] The reservation's "negative" effect fulfills this purpose. A "positive effect" of Article 96 CISG reservations, as suggested by the minority approach[108] rejected here, 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,[109] 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.

d. Domestic Form Requirements as Internationally Mandatory Rules

The rejection of a "positive" effect of Article 96 CISG does as such not exclude the possibility for a State to impose a domestic writing requirement on all international contracts involving its nationals, as some States may theoretically be interested in doing. Such was apparently the position of the U.S.S.R.'s law as in force in 1980, which prescribed

[107] *See supra* Part V.
[108] *See supra* Part VI.1.a.
[109] *See supra* Part V.4.

Vol. 33, No. 1 (2014) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2014.79 ● http://jlc.law.pitt.edu

mandatory form requirements for all foreign trade transactions concluded by Soviet organizations.[110] The path towards such an internationally mandatory application of domestic form requirements, however, is not paved alone by declaration of an Article 96 reservation, but in addition requires the respective form provisions to qualify as "internationally mandatory rules" under the applicable rules of private international law.[111] Such rules, which are also referred to as "overriding mandatory provisions"[112] or "*règles d'application immediate*," are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under the rules of private international law.

The application of internationally mandatory rules causes few difficulties if they form part of the *lex fori*,[113] and the frequent indiscriminate application of domestic form requirements of Article 96 CISG reservation States by courts in those States[114] could arguably be explained by their qualification as internationally mandatory rules of the respective *lex fori*. The difference between the application of domestic form requirements as internationally mandatory rules on one hand and as part of Article 96 CISG's purported "positive" effect on the other hand becomes apparent where their application by foreign courts is concerned: While Article 96 CISG, when interpreted as rejected here, would make it imperative for foreign courts (if located in CISG Contracting States) to apply the reservation State's form requirements, rules of private international law at most grant courts discretion to apply foreign

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[110] Aleksandar Goldštajn, *The Formation of Contract*, *in* UNIFICATION OF THE LAW GOVERNING INTERNATIONAL SALES 44 (Honnold ed. 1966); Rajski, *supra* note 37, ¶ 2.1, with reference to Article 125 of the Fundamentals of Civil Legislation of the U.S.S.R. and the Soviet Republics.

[111] *Cf.* Enderlein & Maskow, *supra* note 49, art. 96, ¶ 10.

[112] As in Article 9 of the EU's Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I).

[113] Limitations may, of course, exist where the applicable private international law rules have been unified through international Conventions or other international legal acts like EU regulations.

[114] *See supra* notes 80, 81 & 83.

Vol. 33, No. 1 (2014) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2014.79 ● http://jlc.law.pitt.edu

internationally mandatory rules, but do not oblige them to do so.[115] This difference, again, indicates that a "positive" effect of Article 96 CISG would go beyond the accepted degree of comity for foreign mandatory rules.

e. Internationally Mandatory Rules Under Private International Law Conventions

The last point can be further illustrated by looking at uniform private international law conventions,[116] two of which were adopted in the 1980s, not long after adoption of the CISG. The Rome Convention on the Law Applicable to Contractual Obligations of 19 June 1980 allowed courts in Contracting States of the Rome Convention to apply internationally mandatory rules of the *lex fori*,[117] but gave them discretion as far as the application of foreign internationally mandatory rules was concerned.[118] In addition, it provided Contracting States with the possibility to make a reservation even against the latter possibility,[119] thereby excluding any (although only discretionary) application of foreign internationally mandatory rules—an option that was used by a number of States.[120] A comparable philosophy was followed by the drafters of the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods of 22 December 1986 which entitles any Contracting State to make a reservation that would enable him to continue to apply his own mandatory

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[115] *See supra* Parts VI.2.e and VII.1.a. *See also* LAWRENCE COLLINS ET AL., THE CONFLICT OF LAWS ¶ 1-055 (14th ed. 2006) ("Mandatory rules which are not part of the law of the forum or of the applicable law are not normally applied by the English courts.").

[116] For a very different reading of the trend in international private international law instruments, *see* Winship, *supra* note 12, at 10–11.

[117] The Convention on the Law Applicable to Contractual Obligations 1980, 19 June 1980, art. 7(2) [hereinafter Rome Convention]. This rule has been maintained under the Rome I Regulation which replaced the Rome Convention in 2009; *see* Rome I Regulation art. 9(2).

[118] Rome Convention, 19 June 1980, art. 7(10), today Article 9(3) Rome I Regulation: "Effect *may* be given to . . ." (emphasis added). *See* Dieter Martiny, *Article 9*, *in* MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH ¶ 118 (5th ed. 2010): Article 9(3) Rome I Regulation grants the courts discretion whether or not to apply foreign mandatory provisions; PETER STONE, EU PRIVATE INTERNATIONAL LAW 344 (2d ed. 2010).

[119] Rome Convention, 19 June 1980, art. 7(2).

[120] Germany, Ireland, Luxembourg, Portugal and the United Kingdom.

form requirements,[121] but contains no provision that would make such mandatory rules applicable in other Contracting States. The Inter-American Convention on the Law Applicable to International Contracts of 17 March 1994 again leaves it to the forum to decide whether to apply mandatory provisions of the law of other States,[122] thereby granting discretion to each Contracting State where foreign mandatory form requirements are concerned.

A "positive" effect of Article 96 CISG reservations, on the contrary, would go significantly beyond the consistent approach in uniform private international law by making the application of reservation States' domestic form requirements mandatory in all CISG Contracting States, with no possibility for non-reserving States to exercise discretion or to make a reservation against this obligation. It is submitted that it is quite unlikely that the Convention's drafters intended to (implicitly!) impose such a far-reaching obligation on Contracting States.

f. Contracts Between Two Parties from Different Reservation States

Finally, a specific difficulty arises under the "positive" effect approach that further demonstrates the weakness of its construction. 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—which should by no means be uncommon in practice, since the current Article 96 reservation States form two geographical "clusters" in Eastern Europe and South America respectively—it remains unclear *which* reservation 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 again accords with the limited purpose of Article 96 CISG, which is restricted to excluding the obligation to apply the freedom of form provisions mentioned in Article 96

[121] Article 21(1)(c) Hague Convention.
[122] Article 11(2) Inter-American Convention.

Vol. 33, No. 1 (2014) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2014.79 ● http://jlc.law.pitt.edu

(the reservation's "negative" effect): As far as rules on the contract's form are concerned, this reservation only removes, but does not provide.

3. Conclusion

In summary, it is the applicable rules of private international law which determine the law governing the formal validity of international sales contracts and the manner in which they may be evidenced whenever one of the parties to the contract has his place of business in an Article 96 reservation State.

VII. DETERMINATION OF THE RULES GOVERNING FORMAL VALIDITY (2): APPLICATION OF PRIVATE INTERNATIONAL LAW IN CISG CASES

1. Court Proceedings

As Articles 12 and 96 CISG, when read in accordance with the interpretation favored here, do not by themselves determine the rules governing the formal validity of the sales contract, one could be lead to believe that the courts are next required to look for general principles underlying the Convention as prescribed by Article 7(2) CISG.[123] It is submitted, however, that such an approach would be misguided in cases in with Articles 12 and 96 CISG apply, since the "negative" effect of those provisions means that the question at hand—the formal validity of sales contracts involving at least one party from an Article 96 reservation State—is in those cases not governed by the Convention, and therefore does not constitute an "internal" gap in these cases.[124] A recourse to general principles on which the Convention is based—freedom of form (informality) being one of the principles frequently listed by courts and

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[123] This approach was followed in *Forestal Guarani S.A. v. Daros Int'l, Inc.*, 613 F.3d 395 (3d Cir. 2010).

[124] *Contra Forestal Guarani S.A.*, 613 F.3d 395, where the Court assumed an "internal" gap, but held that there are no "general principles" underlying the CISG which would fill in the gap. *See also* Camilla B. Andersen, *General Principles of the CISG—Generally Impenetrable?*, *in* SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H. KRITZER ON OCCASION OF HIS EIGHTIETH BIRTHDAY 13, 32 (Andersen & Schroeter eds., 2008).

Vol. 33, No. 1 (2014) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2014.79 ● http://jlc.law.pitt.edu

arbitral tribunals[125] as well as commentators[126] as such a general principle—would obviously circumvent this effect of an Article 96 reservation and should therefore not be allowed. Instead, the court must look to the rules of private international law in force in the forum State in order to determine the form requirements (if any) to be applied.[127]

a. Favor Validitatis *vs. Internationally Mandatory Form Requirements*

Conflict of laws rules for sales transactions are by no means globally uniform in their content, although a number of international instruments have been adopted in attempts to unify at least some of the private international law rules in this area, usually on a regional basis. As far as these instruments (*inter alia* the EU's "Rome I" Regulation, the Hague Convention of 1986 and the Inter-American Convention of 1994 which were already mentioned) address the law governing the form of the contract,[128] they all follow a tolerant *favor validitatis* approach by treating the contract as formally valid if it satisfies the formal requirements of *either* (1) the law which governs it in substance (the *lex causae*),[129] (2) the law of the State where it is concluded (the *lex loci contractus*)[130] or (3) the law of either of the countries where either of the parties or their agent is present at the time of conclusion (the *lex loci actus*),[131] with some instruments alternatively listing (4) the law of the country where either of the parties had his habitual residence at the time of the conclusion of the contract[132] or

[125] Rb Arnhem 17 Jan. 2007 (*Hibro Compensatoren B.V. v. Trelleborg Industri Aktiebolag*, Rolnummer) (Neth.), *available at* http://cisgw3.law.pace.edu/cases/070117n1.html; Tribunale di Padova, 31 Mar. 2004 (*Scatolificio La Perla S.n.c. di Aldrigo Stefano e Giuliano v. Martin Frischdienst GmbH*) (*Pizza Boxes case*) (Italy), *available at* http://cisgw3.law.pace.edu/cases/040331i3.html.

[126] *See* HONNOLD, *supra* note 13, ¶ 127; Herre, *supra* note 42, art. 7, ¶ 58; Schwenzer & Hachem, *in* SCHLECHTRIEM & *supra* note 15, ¶ 32. *See also* Magnus, *supra* note 67, art. 7, ¶ 46, who correctly lists the freedom of form principle as a general principle "subject to the limitation by Article 12."

[127] RB Rotterdam, 12 July 2001 (*Hispafruit BV v. Amuyen S.A.*) (Neth.) (Article 9(1) Rome Convention applied), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950502b1.html.

[128] According to its Article 5, the Hague Convention on the Law Applicable International Sales of Goods of 15 June 1955 does not apply to the form of the contract.

[129] Article 11(1), (2) Rome I Regulation; Article 11(1), (2) Hague Convention of 1986; Article 13(1), (2) Inter-American Convention of 1994.

[130] Article 11(1), (2) Rome I Regulation; Article 11(1), (2) Hague Convention of 1986; Article 13(1), (2) Inter-American Convention of 1994.

[131] Article 11(2) Rome I Regulation; Article 11(2) Hague Convention of 1986.

[132] Article 11(2) Rome I Regulation.

(5) the law of the place where the contract is performed (the *lex loci solutionis*).[133] Many national conflict of laws rules adopt similarly tolerant positions.[134] The prevailing approach in private international law accordingly aims at preventing a formal invalidity of sales contracts by letting the least stringent form requirements suffice.[135]

As already mentioned above,[136] a different outcome may result from a domestic form requirement exceptionally qualifying as an "internationally mandatory provision," thereby demanding to be applied to a contract notwithstanding the general *favor validitatis* approach. It is, however, unlikely that form requirements for commercial sales contracts—like the contracts covered by the CISG[137]—will meet the prerequisites for an overriding mandatory provision, since their application would have to be "crucial" for a country's political, social or economic organization or its other public interests. Although these rather steep requirements were met by the Soviet law's writing requirements during the U.S.S.R.'s time as a planned economy,[138] the situation has arguably changed since then, with the few remaining form provisions for sales of movable goods hardly being regarded as crucial for a country's public interests but merely as traditional rules of (mostly) evidence.[139] And even in the unlikely event that a form requirement does qualify as an internationally mandatory provision, its actual application will only be guaranteed when it forms part of the *lex fori*,

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[133] Article 13(1), (2) Inter-American Convention of 1994.

[134] *See, e.g.*, Article 124(1), (2) Swiss Federal Act on Private International Law; Article 11(1), (2) German Introductory Act to the Civil Code (EGBGB). The U.S.-American Restatement (Second) of Conflict of Laws § 199 (1971) is somewhat less flexible by (only) letting the form requirements of either the *lex causae* or the law at the place of the contract's execution (§ 199(2): ". . . will usually be acceptable") suffice—but note that the Restatement is pre-dating the CISG by a number of years.

[135] *See* STONE, *supra* note 118, at 327.

[136] *Supra* Part VI.2.d, e.

[137] Of course, the Convention's applicability does not depend on a contract being "commercial" or concluded between "merchants," as Article 1(3) CISG makes clear—practically, however, the vast majority of CISG contracts will be considered commercial contracts under most domestic legal systems.

[138] Goldštajn, *supra* note 110, at 44; Rajski, *supra* note 37, art. 96, ¶ 2.1.

[139] Here lies another advantage of the majority opinion over the minority opinion: According to the minority opinion, form requirements in the law of reservation States would have to be applied even when they had lost the importance that initially lead the respective States to make a declaration under Article 96 CISG, as long as the declaration has not been withdrawn. The result would be a "petrification" of the legal situation which—strangely—would not only preserve the domestic form rules' role in international transactions, but would accord them a greater role than they would have if the CISG did not exist.

Vol. 33, No. 1 (2014) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
DOI 10.5195/jlc.2014.79 ● http://jlc.law.pitt.edu

since conflict of laws rules mostly grant courts discretion as far as mandatory provisions of third States are concerned.[140]

With the determination of the law governing formal validity being left to the rules of each forum, the outcome is not necessarily uniform, since the rules of private international law (and of evidence) are not. The case law on CISG contracts, however, nevertheless demonstrates some international uniformity in this matter: When conflict of laws rules declare the law of an Article 96 reservation State applicable, this usually is read as applicability of that State's domestic form requirements (often resulting in the contract's formal invalidity),[141] while the application of the law of a State that has not made an Article 96 reservation results in the application of the freedom of form principle.[142]

b. Role of the CISG's Freedom of Form Principle

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, are the form requirements to be applied those of the domestic law of that State, or is it the freedom of form principle of Articles 11, 29(1) 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 Articles 11 or 29(1) CISG would not.

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[140] *Supra* Part VI.2.e.

[141] Presidium of the Supreme Arbitration Court of the Russian Federation, Mar. 20, 2002 (*Tumensky fanerny kombinat v. Dor-Bat and Demirel Inshaat*) (Russ.) (Russian law applied by virtue of the Russian private international law rules—oral modification of contract held invalid), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020320r1.html.

[142] *See* HR, 7 Nov. 1997 (*Schuermans v. Boomsma Distilleerderij/Wijnkoperij BV*) (Neth.) (*see also infra* note 147); Oberster Gerichtshof [OGH] 22 Oct. 2001, Docket No. 1 Ob 77/01g (*Gasoline and Oil Case*) (Austria) (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), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/011022a3.html; RB Rotterdam, 12 July 2001 (*Hispafruit BV v. Amuyen S.A.*) (Neth.) (*see also infra* note 147), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010712n1.html; FB Budapest (Metropolitan Court) 24 Mar. 1992, Docket No. 12.G.41.471/1991/21 (Hung.) (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), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/920324h1.html.

The answer, it is submitted, 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.[143] 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 each country as much as possible in the same manner as a judge in that country would apply the law:[144] As this judge would apply Article 11 CISG since his State has not made an Article 96 reservation, the foreign judge applying the law via private international law rules would do the same.[145] (It may be helpful to add that, for purposes of this assessment of the content of a Non-Article 96 CISG reservation State's law, the fact that the contract concerned also involves a party from an Article 96 reservation State—which lead to the application of Articles 12 and 96 CISG in the first place—is not to be taken into account a second time.) At least two Dutch courts (including the Supreme Court) have explicitly adopted the position taken here.[146]

Authors supporting the contrary position[147] 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 his 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

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[143] 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, *supra* note 50, at 214; Herre, *supra* note 42, art. 12, ¶ 10; WESTERMANN, *supra* note 58, art. 12 CISG, ¶ 2.

[144] *See* JAN KROPHOLLER, INTERNATIONALES PRIVATRECHT § 31 I 2 (6th ed. 2006).

[145] Schlechtriem & Schmidt-Kessel, *supra* note 20, art. 12, ¶ 3; SCHLECHTRIEM, SCHWENZER & HACHEM, *supra* note 42, art. 96, ¶ 3; Schroeter, *supra* note 28, at 443; Witz, *supra* note 70, Arts. 11–12, ¶ 12.

[146] *Schuermans*, HR, 7 Nov. 1997: 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 law rules; *Hispafruit*, RB Rotterdam, 12 July 2001: "following Dutch law, the 'freedom of form' rules laid down in articles 11 and 29 CISG apply unrestrictedly."

[147] Flechtner, *supra* note 34, at 196 (characterizing the result of his approach as "rather ironic"); HONNOLD, *supra* note 13, ¶ 129; Herre, *supra* note 42, art. 96, ¶ 6; LÜDERITZ & FENGE, *supra* note 97, art. 12, ¶ 3; Magnus, *supra* note 67, art. 12, ¶ 9.

Vol. 33, No. 1 (2014) ● ISSN: 2164-7984 (online) ● ISSN 0733-2491 (print)
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be read with the sole purpose of an Article 96 reservation—namely its "negative" effect[148]—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 an "outside" reference to its provisions by conflict of laws rules, resembling an "opting in." In such a case, Article 11 CISG does not "actively" apply due to the Convention's own applicability provisions, it is rather "passively" being declared applicable by (outside) private international law rules. 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,[149] although the decisions do not indicate whether the point discussed here was considered by the courts.

2. Arbitration Proceedings

When a dispute arising out of an international sales contract is heard by an arbitral tribunal, the determination of the contract's formal validity essentially follows the same principles as in a court of law: The arbitral tribunal will identify the rules of substantive law governing the formal validity of the sales contract and subsequently apply those rules. An important difference lies in greater flexibility that the *lex arbitri* as well as arbitration rules chosen by the parties often provide to both the parties and the arbitrators:[150] While courts must commence by applying the private international law of the forum which, in most cases, will direct them to

[148] *Supra* Part V.

[149] FB Budapest (Metropolitan Court) 24 Mar. 1992, Docket No. 12.G.41.471/1991/21 (Hung.) (German domestic law applied via Hungarian conflict of laws rules), *available at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/920324h1.html; Forestal Guarani S.A. v. Daros International, Inc., 613 F.3d 395 (3d Cir. 2010) (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)).

[150] *See* JULIAN LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶ 17-43 (2003).

apply a specific national domestic substantive law (and may also restrict the parties' choice of law to domestic laws[151]), the *lex arbitri* often accords the parties a wider choice which may allow them to choose "rules of law" to be applied to the substance of the dispute.[152] In such a case, the parties may select the CISG as the rules of law applicable to their contract, including or excluding the Convention's freedom of form provisions in Articles 11, 29(1) CISG, irrespective of whether one of the parties has his place of business in an Article 96 reservation State. The basis and the limits of the parties' freedom to choose is the *lex arbitri*, not the CISG and its allowable reservations.

Where the parties have failed to make a choice of law, the arbitrators will determine the law applicable to the substance of the dispute in accordance with the *lex arbitri* and the arbitration rules chosen by the parties (if any). In this context, arbitrators will often be accorded a greater flexibility than judges through recourse to either the conflict of laws rules which the arbitral tribunal considers applicable[153] or even directly to the rules of substantive law which it considers appropriate (*voie directe*).[154] Certainly in the latter case, but arguably also in the former case,[155] the

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[151] Such is the situation under the EU's Rome I Regulation, where Article 3 restricts the parties' choice to the domestic laws of a country—at least according to the prevailing opinion; *see* Jan von Hein, *Rom I-VO, Rom II-VO*, *in* EUROPÄISCHES ZIVILPROZESS- UND KOLLISIONSRECHT (EUZPR/EUIPR) (2011), art. 3 Rom I-VO, ¶ 63; STONE, *supra* note 118, at 301–02—excluding a choice in favour of an international Convention (like the CISG) or other "rules of law," as e.g. the Unidroit Principles of International Commercial Contracts.

[152] *See* Article 28(1) UNCITRAL Model Law on International Commercial Arbitration (2006); Article 1511(1) French New Code of Civil Procedure (2011); Article 1054(2) Netherlands Arbitration Act (1986); Article 187(1) Swiss Federal Act on Private International Law; § 1051(1) German Code of Civil Procedure.

[153] *See* Article 28(2) UNCITRAL Model Law on International Commercial Arbitration (2006). PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNCITRAL MODEL LAW JURISDICTIONS ¶ 6-010 (3d ed. 2010) (notes that the arbitral tribunal has "far less freedom of choice" under the UNCITRAL Model Law than the parties, since Article 28(2) restricts the tribunal to the application of a "law," as opposed to "rules of law.").

[154] Article 1511(1) French New Code of Civil Procedure (2011); Article 1054(2) Netherlands Arbitration Act (1986); Article 21(1) ICC Arbitration Rules (2012); Article 35(1) UNCITRAL Arbitration Rules (2010) (although with reference to "the law," not "rules of law"). *See also* ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION ¶ 2-83 (4th ed. 2004).

[155] Article 1 CISG contains unilateral conflict of laws rules, which—if "considered applicable" by the arbitral tribunal in accordance with respective *lex arbitri*—lead to the applicability of the CISG. The difference to an application of the CISG by *voie directe* lies in the prerequisites named in Article 1

arbitrators may opt for a direct application of the CISG without regard to reservations used by particular Contracting States. If, on the contrary, an arbitral tribunal considers the law of a CISG Contracting State which has made an Article 96 CISG declaration to be the law applicable to the substance of the dispute, the domestic law of that State will govern the formal validity of the contract because the private international law rules applied by the arbitrators have so provided. While arbitral tribunals can, in certain circumstances, also be obliged to apply mandatory provisions of laws related to the dispute,[156] it is unlikely that form requirements for international sales contracts will fall into this category: In this respect, the principles outlined above in connection with conflict of laws rules for courts[157] are equally applicable in arbitration proceedings.

VIII. FORM REQUIREMENTS FOR SALES CONTRACTS AND PARTY AUTONOMY (ARTICLE 12 SECOND SENTENCE CISG)

Finally, 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[158]—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.

Where the parties have excluded the Convention's application in its entirety in accordance with Article 6 CISG, Article 12 sentence 2 CISG

CISG (as e.g. the parties' places of business being located in different CISG Contracting States, Article 1(1)(a)) which must be fulfilled if the Convention is to be applied via conflict of laws rules, while they are not relevant under a *voie directe* approach.

[156] *See* JETTE BEULKER, DIE EINGRIFFSNORMENPROBLEMATIK IN INTERNATIONALEN SCHIEDSVERFAHREN (2005); LEW ET AL., *supra* note 150, ¶¶ 17-27–17-31.

[157] *Supra* Part VII.1.a.

[158] *See* Ulrich G. Schroeter, *Freedom of Contract: Comparison Between Provisions of the CISG (Article 6) and the Counterpart Provisions of the Principles of European Contract Law*, *in* AN INTERNATIONAL APPROACH TO THE INTERPRETATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) AS UNIFORM SALES LAW 261–68 (2007).

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does not apply.[159] 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 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.

IX. CONCLUSION

The incorporation of the freedom of form principle, allowing the parties to cross-border sales transactions to conclude and modify their contract without regard to any form, was an important policy decision when the UN Sales Convention (CISG) was adopted in 1980. It came, however, subject to a compromise, namely the reservation defined in Articles 12 and 96 CISG. The present article has outlined the difficulties that this reservation has generated in practice, and has discussed the numerous disputes it has caused in case law and legal writing.

In hindsight, the use of a reservation as a legal technique to accommodate a diplomatic compromise has proven troublesome, since it lacks the flexibility necessary to adapt to subsequent political and legal changes: Although many of the domestic form requirements that the Article 96 CISG reservation initially preserved have since been abolished, the declarations made under this provision mostly remain in force. Until they have been comprehensively withdrawn, the cross-border freedom of form principle will therefore remain "under reservation," providing a sufficient reason to continue the search for an internationally uniform and practically suitable interpretation of Articles 12 and 96 CISG.

[159] Magnus, *supra* note 67, art. 12, ¶ 13; WESTERMANN, *supra* note 58, art. 12 CISG, ¶ 1.

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