10 The CISG and the Contractual Freedom of Form and Evidence: A Latin-American Perspective

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10.1 Introduction

One of the most traditional principles of continental contract law is the freedom of form. Through it Civil Law consecrates the notion that formal or solemn contracts would be exceptional[1] just as any prohibition to the adoption of a certain contractual form would be exceptional.[2]

The Latin American doctrine, in general, faces this issue when addressing the classification of contracts (formal *versus* non-formal agreements).

This approach illustrates a first necessary distinction: the principle of contractual freedom of form, as a rule, should be associated with private autonomy (*contractual liberty*) as an expression of the negotiating liberty (freedom to contract what and with whom one wishes). On the other hand, the consensualism principle is another facet of the normative power of this same freedom: consent is sufficient to bind the party.[3]

10.2 Freedom of Form and Freedom of Evidence

The difference, at first, may seem tenuous, but leads to different conclusions: private contracts as a rule are non-formal agreements (the manifestation of will is enough), but there are exceptions – those that require the delivery of the contractual object (expression of the consensualism). On the other hand, the manifestation of the contractual freedom is independent of specific form unless legal exceptions (expression of freedom) are present.

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1 O. Gomes, *Contratos* (6th edn, Forense, Rio de Janeiro, 1977) p. 64; P. Nader, *Curso de Direito Civil*; *Contratos* Vol. 3 (5th edn, Forense, Rio de Janeiro, 2010) p. 42; A.A. Alterini, *Contratos: Civiles, Comerciales e de Consumo Teoria General* (Abeledo-Perrot, Buenos Aires, 2005) pp. 182, 234-235.

2 G. Mamede, *Teoria Geral dos Contratos* (Atlas, São Paulo, 2010) p. 20.

3 It is important to say that not every author admits this distinction (*e.g.* C.R. Gonçalves, *Direito Civil Brasileiro* Vol. I (Saraiva, São Paulo, 2003) p. 318.