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**Review**

# Harmonizing formal requirements for cross-border sales contracts

Peter Winship\*

**ABSTRACT**

Legal systems have different traditions about how to “prove” a contract for the sale of personal property. Most legal systems today permit the contract to be proved by any means but some States require that the agreement be concluded in or evidenced by writing. The United Nations Convention on Contracts for the International Sale of Goods adopts a freedom-of-form rule but authorizes a State to declare that the rule does not apply when the seller or buyer has its place of business in that State. This essay studies the consequences of such a declaration. The Convention text does not expressly state the consequences. The Convention’s *travaux préparatoires* suggest that this silence was deliberate. Doctrine and court opinions are divided on whether the writing formalities of the declaring State always apply or the formalities, if any, of the law applicable by virtue of the rules of private international law govern. In the absence of a consensus, this essay argues that the writing formalities of the declaring State apply. The argument is based on the policies implicit in the decision of non-declaring Contracting States to adhere to a Convention that allows certain Contracting States to opt out of the freedom-of-form rule. The result is consistent with recent private international law treaties that, while providing liberal rules that favor freedom of form, direct application of the fundamental policies not only of the forum but also of other jurisdictions.

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## INTRODUCTION

Twenty-five years ago I purchased a copy of Ṭaḥāwī's Kitāb al-Shurūṭ al-Kabīr.<sup>1</sup> The Arabic text of this 10th century study of the law of sales<sup>2</sup> is reprinted as transcribed from a manuscript preserved in the Süleymaniye Library in Istanbul. There is no translation of the Arabic text but a detailed English-language introduction describes in detail the career of Abū Ja'far Aḥmad b. Muḥammad b. Salāma al-Azdī al-Ṭaḥāwī, the nature of the *shurūṭ* (conditions), the contents of Ṭaḥāwī's chapter on sales, and the historical context in which Ṭaḥāwī worked. For a reader like me, trained in the common law tradition of the United States of America and with only a general understanding of the rich religious and legal traditions of Islamic thought, most of the details set out in the Introduction were both new and illuminating. I was, however, particularly interested in the editor's analysis of how the Ḥanafī school of thought reconciled the refusal to allow written documents as legal proof with the wide-spread use of such documents in practice at that time.<sup>3</sup> Coming from a jurisdiction that requires "some writing sufficient to indicate that a contract for sale has been made,"<sup>4</sup> I recognized how difficult it would be to harmonize these different legal traditions.

This essay examines the attempt to harmonize these different traditions by the United Nations Sales Convention. As explained in what follows, the attempt failed to provide total harmony. The Convention allows a contract to be proved by any means but permits some States to become parties to the Convention but to opt out of this general rule. The essay explores the consequence of a State opting out.

## THE UN CONVENTION "FREEDOM-OF-FORM" PROVISIONS

Although the United Nations Convention on Contracts for the International Sale of Goods<sup>5</sup> adopts many uniform legal rules for the cross-border sale of goods on some issues, the Convention tolerates non-uniformity. One such issue is whether the formation, modification and termination of contracts must satisfy formal writing requirements. Article 11 provides that "a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses." But Articles 12 and 96 of the final convention text state that this freedom from written form does not apply if a Contracting State so declares as to contracts with a business located in the declaring State.<sup>6</sup> As was reported at the 1980 Diplomatic Conference in Vienna, "Article [12] recognizes that some States consider that it is an important element of public policy that contracts or their modification or abrogation be in writing."<sup>7</sup> As of June 2012, eleven of the 78 Contracting States have made a declaration under Article 96.<sup>8</sup>

An Article 96 declaration raises the following practical issue: what law on written form governs when a merchant from a declaring State deals with a seller or buyer in a non-declaring Contracting State? Doctrine and case law provide a variety of answers. The difficulty of the question is illustrated by the differing responses of the late Professors John Honnold and Peter Schlechtriem, who were not only pre-eminent commentators but who also participated actively as delegates to the 1980 Diplomatic Conference and the preparatory work of the United Nations Commission on International Trade Law (UNCITRAL). The following sections of this essay explore possible answers to the question.

<sup>1</sup> *The Function of Documents in Islamic Law*, The Chapters on Sales from Ṭaḥāwī's Kitāb al-Shurūṭ al-Kabīr (Jeanette A. Wakin ed. State University of New York Press, 1972).

<sup>2</sup> Wakin suggests the *shurūṭ* was completed by 305 (ca. 917 A.D.). *Id.* at 25.

<sup>3</sup> *Supra* n. 1 at 4-10.

<sup>4</sup> [US] Unif. Com. Code §2-201(1). This "statute of frauds" can be traced back to the 1677 English statute, 29 Car.II, c.3.

<sup>5</sup> United Nations Convention on Contracts for the International Sale of Goods, UN Doc. A/CONF.97/18, Annex I (1980) [hereinafter "UN Sales Convention"], reprinted in Conference on Contracts for the Intl. Sale of Goods, Official Records, UN Doc. A/CONF.97/19, at 178-90 (1981) [hereinafter "Official Records"]. The Convention was opened for signature on 11 April 1980 and entered into force 1 January 1988. As of June 2012 there were 78 Contracting States, including at least six States where Islam is the predominant religion (Egypt, Iraq, Kyrgyzstan, Syrian Arab Republic, Turkey, and Uzbekistan).

<sup>6</sup> As used in this essay "Contracting State" means a State party to the UN Sales Convention, "declaring State" means a Contracting State that has made an Article 96 declaration, and "non-declaring State" is a Contracting State that has not made such a declaration.

<sup>7</sup> Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat, Article 11, Commentary para. 1, UN Doc. A/CONF.97/5 (14 March 1979) reprinted in Official Records, *supra* n. 5, at 20. (Article 11 in this Commentary became Article 12 in the final text).

<sup>8</sup> *Id.* The eleven declaring States are Argentina, Armenia, Belarus, Chile, China, Hungary, Latvia, Lithuania, Paraguay, Russian Federation, and Ukraine. A twelfth State, Estonia, withdrew its declaration in 2004. None of the six States where Islam is the predominant religion has made a declaration.

## A HYPOTHETICAL CASE

Assume a merchant with its place of business in Chile and another merchant with its place of business in France. The merchant in Chile exports fruit, while the French merchant imports fruit for distribution in the European Union. The two merchants enter into an oral sales contract for the sale of fruit to be delivered from Chile to France at a stated price.<sup>9</sup> Subsequently there is a dispute. How should this dispute be resolved? The UN Sales Convention governs because both Chile and France are Contracting States.<sup>10</sup> Chile, however, is a declaring State,<sup>11</sup> while France is not. Any resolution therefore requires a close reading of Articles 12 and 96. These articles state:

### Article 12

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

### Article 96

*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.*

How these articles are read may differ depending on whether the dispute is brought before a court in Chile, a court in France, or before an arbitral tribunal. Recognizing that Chile's Article 96 declaration evidences the importance placed on written form by its government, a court in Chile may be more likely to conclude that the requirements of Chilean law govern. A court in France, on the other hand, may not feel as compelled to adopt this approach. An arbitral tribunal, *a fortiori*, may have more flexibility in its analytic options depending on the choice of law or arbitral rules chosen by the parties. In principle, however, the interpretation and outcome should be the same no matter which forum hears the dispute.<sup>12</sup>

When reading these articles the basic issue is to determine the consequence of an Article 96 declaration. On the one hand, the articles might be read to require the parties to satisfy the specific writing requirements of the declaring State (here Chile).<sup>13</sup> On the other hand, Article 96 might be read to say that a declaration excludes application of the freedom-of-form provisions of the Convention but is silent as to the consequences of the declaration. In the absence of a specific direction as to consequences, the forum might consult rules of private international law—as it would in the absence of the Convention—to apply the writing requirements, if any, of the law applicable by virtue of these rules. The first of these alternatives is said to be the minority view, while the latter is said to be the majority view.<sup>14</sup>

<sup>9</sup>A more realistic hypothetical case, as shown by the reported litigation, would have the parties conclude a written contract but later enter into an oral agreement modifying the contract. Article 29 of the Convention deals with modifications and requires no particular form unless the parties agree that modifications must be in writing. Articles 12 and 96 specifically refer to Article 29.

<sup>10</sup>UN Sales Convention, *supra* n. 5, Art. 1(1)(b).

<sup>11</sup>In this essay I assume that Chile is entitled to make an Article 96 declaration. That article, however, authorizes a State to make a declaration only if its “legislation requires contracts of sale to be concluded or evidenced in writing.” This limitation is sometimes overlooked. It is sometimes said, for example, that the United States of America could choose to make an Article 96 declaration. The relevant US legislation, *supra* n. 3, neither requires a contract to be concluded in writing nor requires that it be evidenced by writing.

<sup>12</sup>See UN Sales Convention, *supra* n. 5, Art. 7(1) (“In the interpretation of this Convention, regard is to be had ... to the need to promote uniform in its application...”).

<sup>13</sup>A variation on this interpretation is to require a written form but leave it to the forum hearing the dispute to craft a “uniform” form of writing requirement.

<sup>14</sup>Citations to the commentators and cases that support each view may be found in, Commentary on the UN Convention on Contracts for the International Sale of Goods (CISG), Art. 12, para. 2 (Peter Schlechtriem & Ingeborg Schwenzer eds. Oxford University Press, 2nd ed. 2005) (English) [hereinafter “Schlechtriem & Schwenzer”].

Support for each of these alternatives may be found in the *travaux préparatoires* (“legislative” history), doctrine and the opinions of courts or arbitral tribunals. The following sections of the essay consider each of these sources in turn.

### TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* do not provide an answer to the question of the consequence of an Article 96 declaration but do suggest that the answer was deliberately left unresolved.<sup>15</sup> Deliberations at the 1980 Diplomatic Conference support this suggestion. The question had been noted in governmental comments on the draft Convention to be submitted to the conference but no amendments were submitted before or during the conference directly addressing the issue.<sup>16</sup> Delegates, who spoke to the issue, read the effect of the draft text in different ways. The Austrian delegate complained that:

*“[i]n the event that a contract concluded verbally between two States, one of which had entered into a reservation and the other had not, gave rise to litigation and the litigation came under the jurisdiction of the second State, **the judge would be required to respect the reservation and declare that the contract was not valid.**”* (emphasis added)<sup>17</sup>

While he also criticized the text of the article, an English delegate disagreed with the analysis of the Austrian delegate:

*“[the UK] delegation was not sure that, faced with a situation of that kind, the judge in a State which had not entered a reservation would necessarily declare that the contract was not valid since, while article 11 [article 12 in the final CISG text] excluded the application of certain provisions of the Convention, it did not provide for a positive replacement formula such as an obligation to conclude a contract in writing.”*<sup>18</sup>

The Swiss delegate also noted the lack of precision in Article 12 and suggested there was a contradiction between that article and Article 96. He stated:

*“Obviously, the aim of article 11 [article 12 in the final CISG text] was to impose the written form when one of the parties had its place of business in a State which had made a reservation; but that aim was not clearly expressed in the text of the article, which merely indicated that certain provisions did not apply, but did not state legal criteria applicable in the cases where a form other than writing had been used in a country which had not made a declaration.”* (emphasis added)<sup>19</sup>

He called for redrafting Articles 12 and 96 but did not spell out how they contradicted each other. His drafting concerns, however, were ultimately not addressed, leaving the different textual interpretations unresolved.

Evidence that the failure to address the consequences of an Article 96 declaration was deliberate may be found in the prior drafting history within the UNCITRAL. When, in 1977, the full Commission met to adopt the draft text, a proposal was made to add the following paragraph to a draft freedom-of-form provision (i.e. what is Article 11 of the Convention):

<sup>15</sup>Article 32 of the 1969 United Nations Convention on the Law of Treaties provides that *travaux préparatoires* may be consulted to confirm a “plain meaning” reading of a treaty text or to determine the meaning if a “plain meaning” reading is ambiguous or obscure, or leads to manifestly unreasonable results.

<sup>16</sup>The comments of governments and the International Chamber of Commerce are summarized by the Secretary-General in a document submitted to participants of the 1980 Diplomatic Conference. See generally Secretary-General, *Analysis of Comments and Proposals by Governments and International Organizations on the Draft Convention on Contracts for the International Sale of Goods, and on Draft Provisions Concerning Implementation, Reservations and Other Final Clauses*, Doc. A/CONF.97/9 (21 February 1980) [hereinafter “Secretary-General Analysis”], reprinted in Official Records, *supra* n. 5, 74.

<sup>17</sup>First Committee Deliberations, 8th meeting, A/CONF.97/C.1/SR.8, para. 12, reprinted in Official Records, *supra* n. 5, 271. Austria had earlier expressed its concern about the effect of Articles 12 and 96 but it did not submit a proposed amendment to the conference. Secretary-General Analysis, *supra* n. 16, Art. 11, para. 3.

<sup>18</sup>First Committee Deliberations, 8th meeting, A/CONF.97/C.1/SR.8, para. 15, reprinted in Official Records, *supra* n. 5, 271. The United Kingdom, like Austria, had earlier expressed concern about the effect of Articles 12 and 96 but, also like Austria, the UK did not submit a proposed amendment to the conference. Secretary-General Analysis, *supra* n. 16, Art. 11, para. 1.

<sup>19</sup>*Id.* at para. 50, reprinted in Official Records, *supra* n. 5, 274.

*However, when so required by the legislation of any of the States in which the places of business of the parties are situated, a contract must be concluded in written form, failing which, it shall be [null and void] [produce the consequences provided for under such legislation].*<sup>20</sup>

Arguments pro and con were presented. In support it was said that this achieved the “proper balance” between jurisdiction that insisted on written formalities and those that did not.<sup>21</sup> Those opposed argued that the proposal would set aside freedom of form even in cases where the law applicable was of a State that did not require written formalities.<sup>22</sup> Without resolving this debate, the Commission agreed to refer the proposal to a Special Drafting Group consisting of representatives from Brazil, the German Democratic Republic, Nigeria, Singapore, Sweden, the USSR, and the USA.<sup>23</sup> This group recommended that there should be freedom of form but States should be permitted to declare that this provision would not apply where any party had its place of business in a declaring State.<sup>24</sup> Unlike the proposal referred to it, the group did not spell out what legal rules applied if the Convention rule was made inapplicable by such a declaration. In other words, the recommendation neither adopted nor rejected the original proposal; it deliberately left the issue of consequences ambiguous. The Commission adopted the recommendation, which in substance is the draft text submitted to the 1980 Diplomatic Conference.<sup>25</sup> Neither the special drafting group nor the Commission explained why the issue of consequences was left unresolved.

This issue had not been resolved in the earlier work within the Commission and its Working Group on Sales. Several proposals had been made that would give effect to writing requirements of States whose domestic law required contracts to be in writing. These proposals were not adopted, but they were never definitively rejected.

The issue of written form was contentious from the beginning. A 1970 study prepared by members of UNCITRAL's Working Group on Sales rejected a proposal by the USSR that make the writing requirements of the declaring State applicable. The reason given was that a “third country” might not give effect to the declaration pursuant to its conflict-of-laws rules.<sup>26</sup> When, however, the USSR resubmitted its proposal to the next meeting of the Working Group there was no consensus on this and other issues as to form, so the Working Group decided to refer the question to the full Commission.<sup>27</sup> The Commission reviewed the issue at its fourth session in 1971 and concluded that “the entire problem should be given further consideration by the Working Group.”<sup>28</sup> When it reexamined the issue in 1975, however, the Working Group failed to resolve the issue. As its report for that session states:

*Several attempts at formulating compromises were attempted which would preserve the freedom to create contracts not in writing for those States for whom this is a standard way in which business is done but at the same time to preserve the requirement for the States which presently require it. All such attempts failed.*<sup>29</sup>

This is how the issue stood in 1977 when the Commission adopted the draft text to be submitted to the 1980 Diplomatic Conference.

<sup>20</sup>Report of the United Nations Commission on International Trade Law on the work of its tenth session (Vienna, 23 May-17 June 1977), Annex I: Report of Committee of Whole I relating to the draft Convention on the International Sale of Goods, para. 122, UN Doc. A/32/17 (1977), *reprinted in* VIII UNCITRAL Y.B. 25, 33 (1977).

<sup>21</sup>*Id.* at para. 123.

<sup>22</sup>*Supra* n. 20, at para. 124.

<sup>23</sup>*Supra* n. 20, at paras. 118, 119 & 125.

<sup>24</sup>*Supra* n. 20, at para. 130.

<sup>25</sup>*Supra* n. 20, at para. 134.

<sup>26</sup>Analysis of comments and proposals relating to articles 1–17 of the Uniform Law on International Sale of Goods (ULIS) 1964: Note by the Secretary-General, para. 84, UN Doc. No. A/CN.9/WG.2/WP.6 (19 November 1970), *reprinted in* II UNCITRAL Y.B. 37, 49 (1971).

<sup>27</sup>Working Group on the International Sale of Goods; report on the work of the Second Session, 7–18 December 1970, para.123, UN Doc. No. A/CN.9/52 (5 January 1971), *reprinted in* II UNCITRAL Y.B. 50, 61 (1971).

<sup>28</sup>Report of the United Nations Commission on International Trade Law on the work of its fourth session, para. 80, Official Records of the General Assembly, Twenty-sixth Session, Supp. 17, UN Doc. A/8417 (1971), *reprinted in* II UNCITRAL Y.B. 9, 21 (1971).

<sup>29</sup>Report of the Working Group on the International Sale of Goods on the work of its sixth session (New York, 27 January–7 February 1975), para. 50, UN Doc. A/CN.9/100, *reprinted in* VI UNCITRAL Y.B. 49, 53–54 (1975).

This drafting history does not provide a definitive answer to the issue of what written formalities, if any, apply to the hypothetical contract between our exporter of fruit in Chile and its buyer in France. If anything, this history evidences a willingness to live with the ambiguity and thus to allow subsequent practice to provide an answer. Professor John Honnold has written that “one who offers legislative materials as a guide to interpretation should show that they reveal the prevailing understanding of delegations.”<sup>30</sup> Notwithstanding suggestions to the contrary,<sup>31</sup> the drafting history of Articles 11, 12 and 96 does not satisfy this test.

## DOCTRINE

If the preparatory work of the Convention leaves open the question of what consequence follows from an Article 96 declaration, doctrine does not provide consistent answers. The different analyses of Professors John Honnold and Peter Schlechtriem illustrate the divergent views. Professor Schlechtriem clearly rejects a reading of Articles 12 and 96 that would make the written formalities of a declaring State applicable in all cases where a seller or buyer has its place of business in the declaring State. Instead, the declaration merely makes the Convention’s freedom-of-form provisions inapplicable, leaving the forum to use private international law rules to designate the applicable rule with respect to contract formalities.

*Where Article 12 applies ... courts must apply the conflict rules of the forum in order to determine which law governs requirements as to form. The minority view, i.e. that the rules as to form of the reservation state in which one of the parties has its place of business always prevail, should be rejected, because the reservation state’s universal claim to the validity of its formal requirements would then exclude the private international law rules of other Contracting States and make those requirements internationally applicable uniform law.*<sup>32</sup>

If these conflict rules lead to the law of a non-declaring State, Professor Schlechtriem goes on to argue that the forum should apply the Convention’s freedom-of-form rules even if the domestic law of the non-declaring State requires some formalities.

*In the author’s opinion, if the law of a Contracting State is invoked as governing law, Article 11 should (again) become applicable. Otherwise, rules as to form would be applicable which would not apply at all unless the Contracting State had made a reservation. This is not unfair towards the reservation state, since it would also have to accept freedom as to form if the forum state’s conflicts rules required the application of domestic ‘freedom-of-form’ rules.*<sup>33</sup>

In the first editions of his treatise Professor John Honnold initially agreed that the declaring State’s written formalities should not govern automatically. Like Professor Schlechtriem, he argued that an Article 96 declaration merely excluded the Convention’s “freedom-of-form” rules, leaving the forum to reason about the issue of applicable formalities just as it would in the absence of the Convention. “A tribunal will apply the formal requirements of a declaring State only when it finds that, under conflicts principles, the law applicable to this question is the law of the declaring State.”<sup>34</sup> Unlike

<sup>30</sup>John O. Honnold, *Uniform Law for International Sales under the 1980 UN Convention*, §91 (Kluwer Law International, 3rd ed. 1999) [hereinafter “Honnold Treatise”]. Professor Honnold introduces the quoted text with the comment that “legislative history (like vintage wine) calls for discretion.” That this is true is illustrated by the following anecdote recounted by Professor Honnold to the author in 1991. As a US delegate to the 1980 Diplomatic Conference, he met with Professor Sergei Lebedev, the delegate from the USSR, in the corridors between formal sessions to discuss the consequences of an Article 96 declaration. The two agreed that a court would be free to apply its own choice-of-law rules even if the rules pointed to a law that would not require a written contract. However, as recounted later in this essay, Professor Honnold ignored this “history” when he changed his mind in the 1999 edition of his treatise about the proper interpretation of the effect of an Article 96 declaration.

<sup>31</sup>See e.g. Franco Ferrari, *Writing Requirements: Article 11–13*, in *The Draft UNCITRAL Digest and Beyond: Cases, Analysis, and Unresolved Issues in the UN Sales Convention* 213 (Franco Ferrari, Harry Flechtner & Ronald A. Brand eds. Sweet & Maxwell, 2004).

<sup>32</sup>Schlechtriem & Schwenger, *supra* n. 14, at Art. 12, para. 2. This is the last edition of this treatise to which Professor Schlechtriem contributed.

<sup>33</sup>Schlechtriem & Schwenger, *supra* n. 14, at Art. 12, para. 3.

<sup>34</sup>John O. Honnold, *Uniform Law for International Sales Under the 1980 UN Convention* §129 (Kluwer Law & Taxation Publishers, 1982) and (Kluwer Law & Taxation Publishers, 2nd ed. 1987).

Professor Schlechtriem, however, he would apply the written formalities of a non-declaring State if conflicts rules made that State's law applicable. "If (*e.g.*) the U.S.S.R. makes an Article 96 declaration and the USA does not, in transactions involving these States, the formal requirements of either the USSR or the U.S.A. could be applicable depending on the rules of private international law."<sup>35</sup>

Between the second and third editions of his treatise, however, Professor Honnold changed his mind. He considers the following case:

*Seller has its place of business in a non-declaring State while buyer has its place of business in a declaring State. Seller brings suit in a non-declaring State.*

In his third edition, Professor Honnold argues that the court should dismiss the case.

*Even though conflicts rules point to State S, which does not require a writing, this writer now (contrary to his earlier opinion) suggests that State S should dismiss S's suit... this about-face results from this combination: (1) "any party" could refer to the application of Article 12 to both parties to the transaction, and (2) the acceptance by the Convention of the need, felt by some States, for protection against claims unsupported by a written agreement.*<sup>36</sup>

Although not stated explicitly, the writing requirement would be that of the declaring State rather than a generic writing requirement. Given this new analysis, moreover, there would be no occasion to apply conflicts rules with the possibility that these rules might point to a non-declaring State with written form requirements.

A majority of commentators, Professor Schlechtriem suggests, agree with his analysis.<sup>37</sup> Even Professor Harry Flechtner, the editor of the fourth edition of the Honnold Treatise, rejects Professor Honnold's final analysis. "The reviser of the current edition," Professor Flechtner writes, "believes that the position adopted in the first editions of the treatise rather than the analysis proposed in the third edition is correct because it more accurately reflects the drafting history and purposes of Articles 96 and 12."<sup>38</sup>

There is less agreement, however, on Professor Schlechtriem's suggestion that the Convention's freedom-of-form rules should apply when conflict rules point to the law of a non-declaring State.<sup>39</sup> Professor Flechtner would apply instead the domestic form requirements, if any, of the non-declaring State. He concedes that Professor Schlechtriem's solution might be more sensible but "mere commentators" may not change the Convention text if there is at least some sensible basis for a consistent alternate reading. He finds that basis in the "norm of reciprocity": if the declaring State insists (by making the Article 96 declaration) that its domestic rules should apply then the non-declaring State can fairly apply its form requirements when conflict rules lead to application of that State's law.<sup>40</sup>

Notwithstanding Professor Flechtner's retraction and Professor Schlechtriem's declaration that his is the majority view, doctrine has yet to provide a definitive answer to the question of what consequence follows from an Article 96 declaration. Professor Honnold did not himself recant and Professor Schlechtriem himself<sup>41</sup> lists numerous authors who take the "minority" view. In other words, doctrine provides little more guidance than the *travaux préparatoires* to resolving the question of whether the Chilean written formalities apply to the contract between the Chilean exporter and French importer.

<sup>35</sup> *Id.*

<sup>36</sup> *Supra* n. 29, at §129.

<sup>37</sup> Schlechtriem & Schwenzer, *supra* n. 14, at Art. 12, para. 2. Footnote 5 of this text lists the commentators who fall in the "minority" and "prevailing" categories.

<sup>38</sup> John Honnold, *Uniform Law for International Sales Under the 1980 UN Convention*, §129 (Kluwer Law International, 4th ed. 2009) [hereinafter "Honnold-Flechtner Treatise"]. Professor Flechtner goes on to argue that always to apply the law of the declaring State would provide an incentive for States to make article 96 declarations and thus undermine the Convention's goal of uniform rules for sales transactions. This, however, is a make-weight argument. Only the very, very few States whose domestic legislation requires contracts of sale to be concluded in or evidenced by writing may make the declaration. The threat to uniformity is extremely slight.

<sup>39</sup> Schlechtriem & Schwenzer, *supra* n. 14, at Art. 12, para. 3.

<sup>40</sup> Honnold-Flechtner Treatise, *supra* n. 38, §129.

<sup>41</sup> See *supra* n. 36.



## “CASE LAW”

Do the reported opinions of judges and arbitrators provide a more definitive answer to what written form requirements, if any, apply to the Chilean-French contract? The 2012 edition of the UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods reports<sup>42</sup> that “different views exist as to the further effects of [an Article 96] reservation”:

*According to one view, the mere fact that one party has its place of business in a State that made an article 96 reservation does not necessarily bring the form requirements of that State into play;<sup>43</sup> instead, the applicable form requirements—if any—will depend on the rules of private international of the forum. Under this approach,<sup>44</sup> if private international law rules lead to the law of a State that made an article 96 reservation, the form requirements of that State will apply; where, on the other hand, the law of a contracting State that did not make an article 96 reservation is applicable, the freedom-from-form-requirements rule of article 11 governs.<sup>45</sup> The opposing view is that, if one party has its relevant place of business in an article 96 reservatory State, writing requirements apply.<sup>46</sup>*

For the first view, the Digest cites four cases, while for the opposing view it cites four cases and an interpretive ruling of the High Arbitration Court of the Russian Federation. (To the latter group, a recent French decision of the *cour de cassation* may now be added.)<sup>47</sup> If the Digest is accurate, courts in Belgium and Russia<sup>48</sup> (and now France) apply the written form requirements of the declaring State, while courts in Hungary, the Netherlands and the United States<sup>49</sup> apply the written requirements of the applicable law as determined by a conflicts analysis. The Digest carefully avoids indicating which view should be considered the better one.

If one looks not just at outcomes but also at reasons given by these courts one finds little help with the analysis. Opinions holding that an Article 96 declaration entails application of the written formalities of the declaring State merely cite the fact that the seller or buyer has its place of business in a State that has made a declaration. A lower US district court argues that this result follows from the “plain language” of Article 96 only to be reversed by the appellate court, which concludes that

<sup>42</sup>UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, Art. 12, para. 4 (2012 rev.) available at <http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf> (accessed 17-Jun-12). Except perhaps by implication, the Digest does not indicate which view should be considered the better one and in this case does not even suggest that one view is the prevailing one.

<sup>43</sup>[Footnote 8 in quoted text] Rechtbank Rotterdam, the Netherlands, 12 July 2001, English translation <http://cisgw3.law.pace.edu/cases/010712n1.html> (accessed 17-Jun-12).

<sup>44</sup>[Footnote 9 in quoted text] See also US Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100721u1.html>; Rechtbank Rotterdam, the Netherlands, 12 July 2001, English translation <http://cisgw3.law.pace.edu/cases/010712n1.html> (accessed 17-Jun-12).

<sup>45</sup>[Footnote 10 in quoted text] Rechtbank Rotterdam, the Netherlands, 12 July 2001, English translation <http://cisgw3.law.pace.edu/cases/010712n1.html> (accessed 17-Jun-12); Hoge Raad, the Netherlands, 7 November 1997, Unilex, CLOUT case No.52 [Fovárosi Bíróság Hungary 24 March 1992].

<sup>46</sup>[Footnote 11 in quoted text] US District Court, New Jersey, United States, 7 October 2008, <http://cisgw3.law.pace.edu/cases/081007u1.html> (accessed 17-Jun-12); US District Court, Southern District of Florida, United States, 19 May 2008, available on the Internet at <http://cisgw3.law.pace.edu/cases/080519u2.html>; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 February 2004, English translation <http://cisgw3.law.pace.edu/cases/040216r1.html> (accessed 17-Jun-12); High Arbitration Court of the Russian Federation, Russian Federation, 16 February 1998, English editorial remarks <http://cisgw3.law.pace.edu/cases/980216r1.html> (accessed 17-Jun-12); Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995 [www.law.kuleuven.be/ipr/eng/cases/1995-05-02.html](http://www.law.kuleuven.be/ipr/eng/cases/1995-05-02.html) (accessed 17-Jun-12).

<sup>47</sup>Ecofrut c. Dole France, *Cour de cassation*, Chambre Commercial, pourvoi no. 10-30912, 7 February 2012, <http://www.cisg.fr/decision.html?lang=fr>.

<sup>48</sup>Query whether the Digest's classification of the Russian decision is accurate. The tribunal specifically states that Russian law applies to issues not governed expressly by the CISG and later states that an oral agreement at the time the contract was concluded would not be enforceable not only because of Articles 12 and 96 but also because of Article 162(3) of the Russian Civil Code. Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 February 2004, English translation <http://cisgw3.law.pace.edu/cases/040216r1.html> (accessed 17-Jun-12).

<sup>49</sup>Two of the three US decisions cited by the Digest hold that, by virtue of Articles 12 and 96, the written formalities of the declaring State must be applied, but these two decisions are federal district court decisions and the third decision cited is that of a federal appellate court overruling one of the two district courts.

the plain language in fact compels reference to the law determined by private international law.<sup>50</sup> The appellate court reasoned:

*Because Argentina has opted out of Articles 11 and 29 as well as Part II of the CISG,<sup>51</sup> the CISG does not “expressly settle” the question whether a breach-of-contract claim is sustainable in the absence of a written contract. So Article 7(2) tells us to consider the CISG’s “general principles” to fill in the gap. ... We fail to see how they inform the question whether Forestal’s contract claim may proceed. Indeed, given the inapplicability in this case of any of the CISG’s provisions relaxing or eliminating writing requirements, we do not believe that we can answer the question presented here based on a pure application of those principles alone. Given that neither the CISG nor its founding principles explicitly or implicitly settle our inquiry, Article 7(2)’s reference to “the rules of private international law” is triggered. In other words, we have to consider the choice-of-law rules of the forum state, in this case New Jersey, to determine whether New Jersey or Argentine form requirements govern Forestal’s claim.<sup>52</sup>*

Citing to a secondary source but not itself studying the *travaux préparatoires*, the appellate court suggests that drafting history buttresses its analysis.<sup>53</sup>

The US appellate court opinion perceives its analysis to be the majority view. Court decisions alone, however, are so few, so divided in outcome, and so sparse in reasoning that it is difficult to justify the appellate court’s conclusion on the basis of court decisions alone.

## CONCLUSION

How then should a court or arbitral tribunal decide what written formalities, if any, apply to the oral contract between the seller from Chile and the buyer from France? Despite references to majority or prevailing views by some authors and courts, the preceding survey of drafting history, doctrine, and court opinions demonstrates that at the very least there is no consensus and more probably a relatively evenly-weighted divergence in views. Concluding that the issue is still an open one, I provide the following analysis.

I concur with Professor Schlechtriem and others that Articles 12 and 96 exclude application of the freedom-of-form provisions of the Convention. The language of these articles is unambiguous: the Convention does not apply if any party has its place of business in a declaring State. I thus reject the first of Professor Honnold’s two reasons – “any party’ could refer the application of Article 12 to both parties to the transaction” – for reading Article 96 to require application of the writing requirements of a declaring State.

It is the next step in the analysis that is problematic. If the Convention does not apply, it is argued that one must look to private international law rules that will lead to the domestic law of some State. Recourse to private international law may be justified either because the court would look to those rules if there were no Convention or because Article 7(2) continues to govern notwithstanding the Article 96 declaration.<sup>54</sup> No matter which of these justifications is looked to, however, application of

<sup>50</sup>US Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at <http://cisgw3.law.pace.edu/cases/100721u1.html>, *reversing*, US District Court, New Jersey, United States, 7 October 2008, <http://cisgw3.law.pace.edu/cases/081007u1.html> (accessed 17-Jun-12).

<sup>51</sup>The appellate court itself has difficulty here with plain language! The court had earlier stated that by making an Article 96 declaration Argentina “thereby opt[ed] out of Article 11, Article 29 and Part II.” However, the declaration, quoted accurately in a footnote to this statement, reads “any provisions of [A]rticle 11, Article 29 or Part II of the Convention that allows a contract of sale... to be made in any form other than in writing” (emphasis added).

<sup>52</sup>US Court of Appeals (3rd Circuit), United States, 21 July 2010, <http://cisgw3.law.pace.edu/cases/100721u1.html> (accessed 17-Jun-12). The quoted opinion is that of two of the three-judge court; the dissenting judge wrote that “it still appears that, given the plain language of this international treaty, its structure, and its purposes, a written contract is required where, as here, one of the relevant countries has exercised its right to make an Article 96 declaration.” For analysis similar to the majority, see Rechtbank Rotterdam, the Netherlands, 12 July 2001, English translation <http://cisgw3.law.pace.edu/cases/010712n1.html> (accessed 17-Jun-12).

<sup>53</sup>*Id.*

<sup>54</sup>The latter argument assumes that notwithstanding an Article 96 declaration the issue of form remains a matter governed by the Convention but not expressly settled in it. UN Sales Convention, *supra* n. 5, Art. 7(2) (“Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based ...”). Assuming this is correct, one must still consider that before applying private international law rules the gap is first to be filled in conformity with the “general principles on which [the Convention] is

the private international law rules implicitly ignores the policies declaring and non-declaring States implicitly adopt when they become parties to the Convention.

Consider the governmental policies of Chile and France. Chile has filed an Article 96 declaration; France has not made such a declaration—nor could it do so because its legislation does not require that contracts of sale between merchants to be concluded in or evidenced by writing. Chile's declaration evidences the great importance Chile places on its policy as to the written form. France, by becoming a party to the Convention, recognizes that a few States consider a writing requirement to be a matter of fundamental policy. France, like other Contracting States, is willing to tolerate non-uniformity in this area because there is a greater interest in having declaring States become parties to the Convention than to have them refuse to accept the Convention at all. In other words, by becoming a party to the Convention, France has subordinated its interest in freedom-of-form provisions to the greater good of having wider participation in the Convention.

Chile and France also have an interest in promoting the expectations of their exporters and importers. But what are these expectations? As a practical matter, most merchants will know of those States, like Chile, that require foreign trade contracts to be in writing and will comply with their formalities as a matter of course. Moreover, the Convention itself curtails expectations. Article 12 expressly prohibits the seller and buyer from derogating from a declared exclusion of freedom-of-form provisions.

These policies should not be ignored by a "private international law analysis" of the issue raised by the oral contract between the Chilean exporter and French importer. There is a trend in international private international law instruments that follows the same pattern as the UN Sales Convention: there is a general rule in favor of freedom of form but contrary fundamental policies of a State are recognized. The EU Regulation on the law applicable to contractual obligations<sup>55</sup> and the Inter-American Convention on the law applicable to international contracts<sup>56</sup> recognize the formal validity of a contract if the domestic law of any jurisdiction related to the contract would give effect to the contract that adopts such a rule. However, the EU Regulation<sup>57</sup> and the Inter-American Convention<sup>58</sup> also provide exceptions to their general rules not only for the public policies of the

based." *Id.* Among these general policies is the promotion of uniformity implicit in subarticle (1) of Article 7, which directs that when interpreting the Convention "regard is to be had to ... the need to promote uniformity." *Id.* Art. 7(1). Thus, not only should Article 96 be interpreted uniformly but the application of private international law should lead to uniform results.

<sup>55</sup>Regulation on the Law applicable to Contractual Obligations (Rome I), Art. 11(2):

*A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.*

Official Journal of the EU, L 177 (4 July 2008) [hereinafter "EU Regulation"].

<sup>56</sup>Inter-American Convention on the Law applicable to International Contracts, 1994, Art. 13(2):

*If the persons concerned are in different States at the time of its conclusion, the contract shall be valid as to form if it meets the requirements of the law governing it as to substance, or those of the law of one of the States in which it is concluded or with the law of the place where the contract is performed.*

[hereinafter "Inter-American Convention"].

<sup>57</sup>EU Regulation, *supra* n. 55, Art. 9(3):

*Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.*

Paragraph (1) of Article 9 defines "overriding mandatory provisions" in the following language:

*Overriding mandatory provisions 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 organisation, 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 this Regulation.*

*Id.* Art. 9(3).

<sup>58</sup>Inter-American Convention, *supra* n. 56, Art. 11(2) ("It shall be up to the forum to decide when it applies the mandatory provisions of the law of another State with which the contract has close ties"). The Convention does not define "mandatory provisions."

forum but also in limited circumstance for mandatory policies of other jurisdictions. There is no reason why these exceptions would not include an exception for writing formalities considered fundamental by a State—as they are by Chile.

If one accepts the above analysis, the response to the question of whether to enforce the oral contract between the Chilean exporter and the French importer should be resolved by applying Chilean writing formalities. In other words, there is a uniform answer to what law applies when an enterprise contracts with a merchant with its place of business in a declaring State: the writing formalities of the declaring State govern. The answer, moreover, applies even if the relevant non-declaring State itself has a writing formality. Thus, although my reasoning differs, I ultimately come to the same conclusion as Professor Honnold does in his third edition.