

### 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.

#### INTRODUCTION

1. Some States consider it important that contracts and related matters—such as contract modifications, consensual contract terminations, and even communications that are part of the contract formation process—be in writing. Articles 12 and 96 of the Convention permit a Contracting State to make a declaration that recognizes this policy: a reservation under article 96 operates, as provided in article 12, to prevent the application of any provision of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing where any party has his place of business in that Contracting State.<sup>1</sup> Article 96, however, limits the availability of the reservation to those Contracting States whose legislation requires contracts of sale to be concluded in or evidenced by writing.

2. As provided in the second sentence of article 12, and as confirmed by both the drafting history of the provision<sup>2</sup> and case law, article 12—unlike most provisions of the Convention—cannot be derogated from.<sup>3</sup>

#### SPHERE OF APPLICATION AND EFFECTS

3. Both the language and the drafting history of article 12 confirm that, under the provision, an article 96

reservation operates only against the informality effects of article 11, article 29, or Part II of this Convention; thus article 12 does not cover all notices or indications of intention under the Convention, but is confined to those that relate to the expression of the contract itself, or to its formation, modification or termination by agreement.<sup>4</sup>

4. Article 12 provides that the Convention's freedom-from-form-requirements principle<sup>5</sup> is not directly applicable where one party has its relevant place of business in a State that made a declaration under article 96,<sup>6</sup> but different views exist as to the further effects of such a reservation.<sup>7</sup> 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>8</sup> instead, the applicable form requirements, if any, will depend on the rules of private international law of the forum. Under this approach,<sup>9</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>10</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>11</sup>

#### Notes

<sup>1</sup>For this statement, albeit with reference to the draft provisions contained in the 1978 Draft Convention, see United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 20.

<sup>2</sup>See United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 20: "Since the requirement of writing in relation to the matters mentioned in article 11 [draft counterpart of the Convention's article 12] is considered to be a question of public policy in some States, the general principle of party autonomy is not applicable to this article. Accordingly, article 11 [draft counterpart of the Convention's article 12] cannot be varied or derogated from by the parties."

<sup>3</sup>Oberlandesgericht Linz, Austria, 23 January 2006, English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 March 2005, English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); CLOUT case No. 651 [Tribunale di Padova, Italy, 11 January 2005]; CLOUT case No. 482 [Cour d'appel de Paris, France, 6 November 2001], also available on the Internet at [www.cisg.fr](http://www.cisg.fr); CLOUT case No. 433 [U.S. District Court, Northern District of California, United States, 27 July 2001]; CLOUT case No. 378 [Tribunale di Vigevano, Italy, 12 July 2000], expressly stating that article 12—as well as the Convention's final provisions—cannot be derogated from (see full text of the decision).

<sup>4</sup>See United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 20.

<sup>5</sup>For references in case law to this principle, see Kantonsgericht Zug, Switzerland, 14 December 2009, available on the Internet at [www.cisg-online.ch](http://www.cisg-online.ch); Corte di Cassazione, Italy, 16 May 2007, Unilex; Rechtbank Arnhem, the Netherlands, 17 January 2007, English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Corte di Cassazione, Italy, 13 October 2006, available on the Internet at [www.cisg-online.ch](http://www.cisg-online.ch); Landgericht Bamberg, Germany, 13 April 2005, English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Rechtbank Arnhem, the Netherlands, 17 March 2004, English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Cour d'appel de Grenoble, France, 28 November 2002, English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Bundesgericht, Switzerland, 15 September 2000, Unilex.

<sup>6</sup>See U.S. Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, available on the Internet at [www.law.kuleuven.be](http://www.law.kuleuven.be).

<sup>7</sup>For a recent overview of the conflicting views, see U.S. Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>8</sup>Rechtbank Rotterdam, the Netherlands, 12 July 2001, English translation available at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>9</sup>See also U.S. Court of Appeals (3rd Circuit), United States, 21 July 2010, available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Rechtbank Rotterdam, the Netherlands, 12 July 2001, English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu).

<sup>10</sup>Rechtbank Rotterdam, the Netherlands, 12 July 2001, English translation available at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Hoge Raad, the Netherlands, 7 November 1997, Unilex; CLOUT case No.52 [Fovárosi Biróság Hungary 24 March 1992].

<sup>11</sup>U.S. District Court, New Jersey, United States, 7 October 2008, available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); U.S. District Court, Southern District of Florida, United States, 19 May 2008, available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 16 February 2004, English translation available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); High Arbitration Court of the Russian Federation, Russian Federation, 16 February 1998, English editorial remarks available on the Internet at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu); Rechtbank van Koophandel Hasselt, Belgium, 2 May 1995, available on the Internet at [www.law.kuleuven.be](http://www.law.kuleuven.be).