

[ARTICLE]

Reservation of the Freedom-of-Form (FOF)
 Provisions by Articles 12 & 96 of the CISG
 — Let Us Do without Article 11 : We Have 8 —

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INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (CISG) does not require writings or other forms for formation, modification or proof of contracts (Articles 11 and 29(1)¹⁾). It also postulates that an offer, an acceptance, and other indications of intention may be made orally (Articles 18 (2) and 24). Commentators list this principle of *freedom-of-form*²⁾ (hereinafter FOF) as one of the general principles of the CISG.

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1) Article 11 provides: "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." Article 29(1) provides: "A contract may be modified or terminated by the mere agreement of the parties."

2) JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, art. 11, § 127 (Harry M. Flechtner ed., 4th ed. 2009) [hereinafter HONNOLD & FLECHTNER]; SCHLECHTRIEM & SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), art. 7 (Schwenzer/Hachem), para. 32 (Ingeborg Schwenzer ed., 3rd ed., 2010) [hereinafter SCHLECHTRIEM & SCHWENZER]; UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS ↗

However, a state can reserve FOF provisions by the declaration provided in Article 96. According to Article 12, when any party has its place of business in a state which has declared the reservation by Article 96 (“reservation state”), 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...”⁶⁾

↘ (CISG), art. 7 (Viscasillas), para. 58 (Stefan Kröll, Loukas Mistelis & Pilar Perales Viscasillas eds., 2011) [hereinafter KRÖLL/ MISTELIS/ VISCASILLAS].

3) Unless otherwise (expressly or implicitly) indicated, the word “state” is used to mean “Contracting State of the CISG” in this paper.

4) Article 96 provides :

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.

5) CISG Article 12 provides :

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.

6) The states which have declared the Article 96 declaration are Argentina, Armenia, Belarus, Chili, Paraguay, Russian Federation, and Ukraine. Recently Latvia (in 2012), Lithuania (in 2013) and China (in 2013) withdrew its Article 96 declaration and their withdrawals took effect in 2013. See Ulrich G. Schroeter, *The Cross-Border Freedom of Form Principle under Reservation : The Role of Articles 12 and 96 CISG in Theory and Practice*, 33 J.L. & COM. 79, 89(2014) [hereinafter Schroeter (Cross-Border)], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169834. On July 1 in 2015, Hungary deposited an instrument with the Secretary-General of the United Nations withdrawing its Article 96 declaration. The withdrawal will take effect on February 1 in 2016. See, Ulrich G. Schroeter, *The Withdrawal of Hungary’s Declarations under the CISG—Law and Policy*, INTERNATIONALES HANDELSRECHT 210 (2015), available at <http://cisgw3.law.pace.edu/cisg/biblio/Schroeter7.pdf>

In 2013, Russia reformed its Civil Code and abolished the requirement of written form for international sales contracts. See Soili Nystén-Haarala, et. al., *The Interplay of Flexibility and Rigidity in Russian Business Contracting : The Formal and Informal* ↗

These Articles are products of a compromise with the states whose domestic laws imposed writing requirements on contracts for the international sales of goods, for the sake of validity, evidence and administrative control.⁷⁾ The reservation of FOF provisions under Article 12 and 96 is a thorn in the flesh of the CISG. It might be described as a flaw of the Convention, having confused and vexed the commentators and judges.⁸⁾ The controversy has mainly focused on (1) how the applicable law is to be determined when one of the parties is from a reservation state, and (2) whether or not FOF provisions of the CISG are to apply when the law of a non-reservation state is designated.

On both questions, this author respectfully disagrees with what seem to be majority views. Part I considers the two opinions on the question (1), *i. e.*, the opinion that the writing requirements of a reservation state always apply, and the opinion that the applicable law is to be determined by Article 7(2). With both of them denied, it is argued that *the private international law* (hereinafter PIL) should be directly resorted to without an intervention of Article 7(2). In Part II, after considering the majority view as to the question (2), *i. e.*, the view that FOF provisions will apply, it is argued that they should not be applied in the face of the unequivocal command of Article 12. Part III suggests that oral agreements be proved and oral evidence be admitted by Article 8, which, as a general principle of the CISG, governs contractual intentions in general.

I. HOW IS THE APPLICABLE LAW TO BE DETERMINED?

1. Minority and Majority Views

This Part deals with the problem of how the applicable law is to be

↘ *Framework in Contracting*, 2 LAPLAND LAW REVIEW (Rovaniemi, Finland) 110, 122 (2015).

7) *See e. g.*, C. A. BIANCA & M. J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW, Art. 12 (Rajski), § 2.1 (1987) [hereinafter BIANCA & BONELL]; KRÖLL/ MISTELIS/ VISCASILLAS, *supra* note 2, art. 12 (Viscasillas), para. 2.

8) *See infra* note 45, and accompanying text.

determined, when one of the parties to a contract has its place of business in a state which has made a declaration under Article 96 and reserved FOF provisions of the CISG. The minority view is that the form requirements of a reservation state automatically apply whenever one of the parties has his place of business in that reservation state.⁹⁾ However, it is more widely acknowledged that in such a case PIL rules of the forum state will determine which law to apply.¹⁰⁾ Several commentators explain the reasons for resorting to PIL rules by negating the minority approach of always applying the writing requirements of reservation states. It is suggested that “the reservation State’s universal claim to the validity of its form requirements would then exclude the private international law rules of other Contracting States and make those requirements internationally applicable uniform law.”¹¹⁾ It is also suggested that applying the reservation state’s “domestic law form requirements where the tribunal’s PIL principles would not lead to the application of the law of [that State], furthermore, would create a perverse incentive for States to make a declaration under Article 96 in order to extend the influence of that State’s laws ; this would further undermine the Convention’s goal of achieving uniform international sales law.”¹²⁾ These suggestions elucidate the external reasons for following PIL rules, alerting us to the preposterous aftermaths of ignoring them.

A reason intrinsic to the CISG for following PIL rules is expounded on the basis of Article 7(2), which provides : “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 or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.” Applying Article 7(2) to the question concerning the

9) See the cases cited in SCHLECHTRIEM & SCHWENZER, *supra* note 2, Art. 12 (Schmidt/Kessel), para. 2, n. 7.

10) KRÖLL/MISTELIS/VISCASILLAS, *supra* note 2, art. 12 (Viscasillas), para. 8; SCHLECHTRIEM & SCHWENZER, *supra* note 2, art. 12 (Schmidt/Kessel), para. 2; HONNOLD & FLECHTNER, *supra* note 2, art. 12, § 129.

11) SCHLECHTRIEM & SCHWENZER, *supra* note 2, art. 12 (Schmidt/Kessel), para. 2

12) HONNOLD & FLECHTNER, *supra* note 2, art. 12, § 129.

need of form for contract, we will find that the provisions that would settle the question are reserved, preventing us from looking to them. Therefore, the question is “not settled” in the CISG. As to the general principles, the very provisions reserved are considered to form the general principle of FOF, which therefore cannot be invoked because of Article 12. Accordingly, Article 7(2) directs the questions “to be settled... in conformity with the law applicable by virtue of the rules of private international law.”¹³⁾

2. PIL Rules Should Be Directly Applied

In this author’s view, Article 7(2) is not designed to fill the blanks generated by reservations. The questions raised by reservations, *e. g.*, in case of Article 12, “the question whether a breach-of-contract claim is sustainable in the absence of a written contract,”¹⁴⁾ are “expressly settled” in the full provisions of the CISG. If we were to treat the matter unsettled and to search for a general principle, we could not but find a penumbra of the reserved provisions.¹⁵⁾ Therefore, it is irrational to resort to a general principle because such a principle is likely to yield a kind of results which the reservation has intended to avoid, and hence likely to nullify the reservation. In other words, such a general principle will plug the very hole that a reservation has bothered to dig.¹⁶⁾ In the case of the Article 12 reservation, it is obvious from the beginning that an effort to invoke a general principle would be futile because it is widely acknowledged the relevant general principle is the FOF

13) As a decision that followed this line of reasoning, *Forestal Guarani S. A. v. Daros Int’l., Inc.*, 613 F. 3d 395 (3d Cir. 2010). See also Schroeter (Cross-Border), *supra* note 6, at 102.

14) *Forestal*, 613 F. 3d at 400. Judge Fisher held that this question was not expressly settled and remanded the case to determine whether New Jersey or Argentine form requirements would govern, according to the New Jersey PIL rules.

15) See HONNOLD & FLECHTNER, *supra* note 2, art. 7, § 102(d) (“A general principle . . . be moored to premises that underlie specific provisions of the Convention.”)

16) This situation is comparable to the case where the parties agree to exclude certain provisions of the CISG without agreeing alternative solutions. See SCHLECHTRIEM & SCHWENZER, *supra* note 2, art. 7 (Schwenzer/Hachem), para. 42 (“In these cases gap-filing using general principles of the CISG is not possible, as it was the very intent of the parties to not have the CISG applied.”)

principle.

It could be said that a reservation performs what might be called a semi-legislative function, amending the Convention and treating some of the enacted provisions as unenacted. It has a formal force prevailing over general principles. Unreasonableness of indentifying a general principle in place of reserved provisions can be underscored by Article 92, which allows a state to reserve Part II or Part III as a whole. In the case of these whole part reservations, it would be irrational to take the trouble to refer to Article 7(2), regard the matters dealt with by the Parts as “not expressly settled” in the CISG, and search for general principles, probably in vain.¹⁷⁾

The crucial language of Article 12 is “does not apply.” It does not say that any FOF provision “does not apply *and the law of the reservation state applies instead.*”¹⁸⁾ Non-application of FOF provisions literally signifies no more than the absence of applicable rules, leaving the place vacuum, or a “tabula rasa.” We, therefore, have to start with the image of the CISG with its FOF provisions deleted into blank. How is this empty space filled? What kind of letters will be inscribed on this tabula rasa? The legislative history of Article 12 demonstrates that the law as to form of a reservation state shall not automatically apply whenever one of the parities has his place of business in the reservation state.¹⁹⁾ In

17) See SCHLECHTRIEM & SCHWENZER, *supra* note 2, art. 92 (Schlechtriem/Schwenzer/Hachem), para. 4 (“Article 92 is intended to allow for Contracting States to abstain from provisions they do not feel able to agree to. This may very well be the case due to fundamentally different approaches taken to the subject matters regulated in the respective Part excluded. It therefore seems reasonable to assume that the general principles exclusively derived from this Part may not be used under Article 7(2).”)

18) See Schroeter (Cross-Border), *supra* note 6, at 104 (Articles 12 and 96 “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.”)

19) See, e. g., BIANCA & BONELL, *supra* note 7, art. 96 (Rajski), § 1.2 (“In the negotiations leading to the compromise, it was proposed that the effect of a declaration under Article 96 be that the formal requirements of the law of the State making the reservation are to be applied. This proposal was rejected on the ground that its adoption would make the formal requirements of the law of the declaring state too widely applicable.”)

The legislative history is incorporated in the interpretation by the “international character” of Article 7(1) of the CISG. See HONNOLD & FLECHTNER, *supra* note 2, art. 7, ↗

other words, those rules are scheduled to govern the transaction as the case may be. How is “the case” determined? Hence, strictly speaking, what needs to be settled in case of the Article 12 reservation is not the question of form itself, but rather the question of when the form requirements of a reservation state are to be applied. This question naturally and logically commands us to diametrically resort to the method universally utilized in such a case, *i. e.*, to look to PIL rules, without interposition of Article 7²⁰⁾. Namely, the form law of a reservation state is applied when PIL rules lead to the law of that state.²¹⁾

II. ARE FOF PROVISIONS APPLIED WHEN THE LAW OF A NON-RESERVATION STATE APPLIES?

1. Majority View That FOF Provisions Be Applied

Several commentators contend that Article 11 (and other FOF provisions)

↘ § 103.2 (“Regard for the Convention’s ‘international character’ requires sensitive response to the purposes of the Convention in the light of its legislative history rather than the preconceptions of domestic law.”) *See also* Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 747-48 (1998) (“An active resort to drafting records increases the font of available interpretive material on these foreign concepts, as well as on the meaning of the related compromises among the drafters. In this way, paradoxically, an active interpretive process promotes uniformity. It does so by diminishing the risk that domestic interpreters will fail to appreciate ambiguities or even affirmatively misunderstand the international nature of the conventions.”)

20) As an example of “external gaps,” Professor Ferrari comments on a French case “which . . . correctly, denied the existence of a general principle under the CISG to be used to determine the place of performance for all monetary obligations and determines the place of performance more correctly by resorting to the law applicable by virtue of its private international law rules.” *See* Franco Ferrari, *PIL and CISG: Friends or Foes?* 31 J. L. & COM. 45, 87-90 (2014), available at <http://jlc.law.pitt.edu/ojs/index.php/jlc/issue/view/11>. *See also* France, 14 January 1998, Appellate Court Paris (*Société Productions v. Roberto Faggioni*), available at <http://cisgw3.law.pace.edu/cases/980114f1.html>.

21) *See* YEARBOOK IX 121 (Prior Uniform Law and Proposed UNCITRAL Texts, CISG article (x), Commentary 4) (1978) (Article 12 “has the effect of eliminating from this convention any rule on the requirement of a written form, leaving the determination of the issue to the applicable national law as determined by the rules of private international law of the forum.”), available at http://www.uncitral.org/pdf/english/yearbooks/yb-1978-e/yb_1978_e.pdf.

of the CISG be applied if PIL rules lead to the application of the law of a state which has form requirements in its domestic law, and which nevertheless has not made an Article 96 declaration. One commentator writes :

In the author's opinion, if the law of a [non-reservation] 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 that [non-reservation] State made a reservation.²²⁾

Persuasiveness of this opinion depends on whether the rules as to form of a state are applied *if and only if* the state has made the Article 96 declaration. However, in the case where parties from non-reservation states agree to exclude the application of FOF provisions of the CISG according to Article 6, the form rules of either state may be applied. Therefore, it is not necessarily true that such rules would not apply at all unless the state made a reservation. Probably, the inwardness of this argument is to show the irrationality of applying the domestic form law of a non-reservation state. Such a state deliberately opted not to make an Article 96 declaration in spite of their form law. This option would be futile if their law were applied, because it would bring the same consequence as one brought by the declaration. In this author's view, however, such irrationality by itself is not sufficient to override the unequivocal command of Article 12. Another view urging the application of Article 11 says :

If a non-reservation state is designated, the CISG (Art. 11) applies since the reservation under Art. 96 binds the reservation state but not the non-reservation state, and thus it is the CISG that is the applicable law to determine the issue and not the domestic rules of the non-reservation state, which would have the negative effect to bring into play domestic form requirements of certain states that have internationally and intentionally decided to abandon them.²³⁾

This view appears to involve a fallacy in asserting that a reservation binds

22) SCHLECHTRIEM & SCHWENZER, *supra* note 2, art. 12(Schmidt/Kessel), para. 3.

23) KRÖLL/MISTELIS/VISCASILLAS, *supra* note 2, art. 12 (Viscasillas), para. 10.

only the reservation state. The Vienna Convention on the Law of Treaties 1969 (VCLT) in 1(d) of Article 2 defines the word “reservation”²⁴⁾:

“Reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

Article 22 sets forth the effect of a reservation:

- (1) A reservation established with regard to another party. . . :
 - (a) Modifies for the reservation state in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
 - (b) Modifies those provisions *to the same extent for that other party* in its relations with the reservation state.²⁵⁾

It is clear from these provisions that the reservation under Articles 12 and 96 of the CISG does bind non-reservation states as well and to the same extent as it binds the reservation states. We must not disregard the fact that a state ratified or acceded to the CISG together with its Articles 12 and 96, albeit it might not

24) Article 90 of the CISG provides that it “does not prevail over any international agreement” of the past and future.

Professor Van Alstine argues, “In light of the U. N. Sales Convention’s private sphere of application, the specific rules developed for the interpretation of treaties governed directly by public international law will provide little authoritative guidance. This conclusion obtains in particular for the interpretive standards defined in the Vienna Convention on the Law of Treaties. Whatever force they otherwise may have in this country. . . .” (Van Alstine, *supra* note 19, at 706). However, as far as the definition and effect of a reservation are concerned, the VCLT provides authoritative guidance, because a reservation is a state’s official conduct as a sovereign entity.

25) Emphasis added. The United States has not ratified the VCLT. However, the Third Restatement of Foreign Relations Law recites Article 2(1) (d) of the VCLT in § 313, Comment a. (*Reservation defined*), and provides in § 325 (1), “An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.” *See also* Van Alstine, *supra* note 19, at 706, n71.

avail itself of such a reservation. In so doing, it has “internationally and intentionally” acknowledged that any FOF provision including Article 11 “does not apply” where a party comes from a reservation state, regardless which state law is designated by PIL rules.

Another argument that Article 11 be applied is presented by the CISG Advisory Council Opinion. It says :

The answer cannot be derived from Articles 11, 12 or 96 CISG (the Convention, in other words, is silent about the matter), but is — again — exclusively a matter for the domestic private international law rules. These rules will indeed lead to the application of Article 11 CISG if they follow the traditional conflict-of-laws goal to apply the law of a country that is declared applicable as much as possible in the same manner as a judge in that country would apply the law : Since this judge would apply Article 11 CISG given the fact that its State has made no Article 96 reservation, the judge applying the law via private international law rules would do the same.²⁶⁾

This is another version of the argument that a reservation binds only reservation states. If a judge in a forum state applies the law of a non-reservation country, he would apply the CISG “as much as possible in the same manner as a judge in that country would apply the law” of the country. However, the CISG thus applied still contains Article 12. It is wrong that “this judge would apply Article 11 CISG given the fact that its State has made no Article 96 reservation.” Any FOF provision does not apply as ever so long as a party comes from a reservation state. Article 12 does not except the case where the law of a non-reservation state governs.

26) CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Rapporteur : Professor Doctor Ulrich G. Schroeter, University of Mannheim, Germany. Adopted by the CISG Advisory Council following its 18th meeting, in Beijing, China on 21 and 22 October 2013, § 4.22. As a case which explicitly adopted this theory, Netherlands 7 November 1997 Supreme Court (*J. T. Schuermans v. Boomsma Distilleerderij/Wijnkoperij*), available at <http://cisgw3.law.pace.edu/cases/971107n1.html>.

The contention that a reservation binds reservation states only seems as if it might be based on slightly different versions of the two Articles. Namely, as if the language of Article 96 were something like “A Contracting State may make a declaration that *it will not apply*”²⁷⁾ any FOF provision, and that of Article 12 were “A Contracting State which has made a declaration under Article 96 *will not apply*” any FOF provision. In this hypothesis, the clear split that a reservation state would not and a non-reservation state would apply FOF provisions would most naturally trigger the PIL analysis. If it designated the law of a non-reservation state, a judge of a forum state would rightly apply FOF provisions.

The wording similar to those in the hypothetical Articles above is in fact adopted in Article 92. Article 92(1) permits a state to make a declaration that “it will not be bound” by the whole Part II or Part III of the CISG. Article 92(2) provides that a state which makes such a declaration “is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.”²⁸⁾ Hence, when one party comes from a state which has declared an Article 92 reservation and the other not, PIL analysis by Article 1(1)(b) will be made. If it leads to the law of the non-reservation state, the reserved Part is applied to the transaction.²⁹⁾ This is the same process as the case where the CISG is applied to a party from a non-Contracting State through Article 1(1)(b).³⁰⁾ On the other hand, Articles 12 and 96

27) A wording similar to this was actually proposed by Austria and rejected in the First Committee of the Vienna Diplomatic Conference in 1980. See UN DOC. A/CONF. 97/19 (1991), at 91, available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf>. See also Schroeter (Cross-Border), *supra* note 6, at 97.

28) Article 1 provides:

- (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
- (a) when the States are Contracting States; or
 - (b) when the rules of private international law lead to the application of the law of a Contracting State.

29) See Ferrari, *supra* note 20, at 80–82.

30) See SCHLECHTRIEM & SCHWENZER, *supra* note 2, art. 1 (Schwenzer/ Hachem), para. 35; HONNOLD & FLECHTNER, *supra* note 2, art. 1, § 46(b).

contain the wording of mandatory nature: “any [FOF] provision ... does not apply,” and are not backed up by a paragraph comparable to Article 92(2). These differences insinuate that Articles 12 and 96 should not be treated in the same way as Article 92.

2. Minority View That FOF Provisions Not Be Applied

The plain meaning of Article 12 that any FOF provision “does not apply” is too plain to be susceptible of any squarely contradictory interpretation that FOF provisions “do apply.” We, therefore, cannot help yielding to the forthright exposition of the stark reality by Professor Flechtner:

[T]he view espoused by many that the freedom-of-form rule in Article 11 applies where one party is located in an Article 96 reservatory State but PIL rules lead to the application of the law of a non-reserving Contracting State simply contradicts Article 12: this article provides that, where “*any party*” is located in a reservation state, the Article 11 rule “does not apply.” To achieve the result for which others argue, Article 12 would have to be amended so that it comes into play only “where any party has his place of business in a Contracting State that has made a declaration under Article 96 of this Convention *and the rules of private international law lead to the application of the law of that State.*”³¹⁾

Professor Schroeter, in his article adopted by the Advisory Council, criticizes this opinion:

It is submitted that this approach misunderstands and, in doing so, overstates the provision’s non-application statement, because Article 12’s wording should be read with the sole purpose of an Article 96 reservation — namely its ‘negative’ effect — 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.

31) HONNOLD & FLECHTNER, *supra* note 2, art. 12, § 129 (emphasis in original).

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.³²⁾

This author agrees with this opinion in arguing that Articles 12 and 96 were devised in order to relieve reservation states from the obligation to apply FOF provisions. However, irrespective of the purpose, Article 12, which works as a relief from the obligation for reservation states can work as a usurpation of the right to resort to FOF provisions for non-reservation states. Moreover, there is some difficulty in understanding this passage. It concerns the phrases used: "[not] on its own volition," "outside reference," and "passively ... applicable." They are not defined in his article. One interpretation is that they are convertible terms meaning the applicability of Article 11 after PIL rules have designated the law of a non-reservation state, *i. e.*, after a reservation state has been given a chance to apply its form law and lost it. Even if this interpretation is correct, it is still unclear why Article 11 becomes applicable after the PIL process.³³⁾ The gist of this view may be that the "passive application as an outside reference" of Article 11 does not amount to the application "on its own volition" in the sense used in Article 12. This author does not agree and believes that, however modified by these adjectives, an application is an application after all. Going through the PIL process (or the exhaustion of the chance by a reservation state) will not transform what "does not apply" into what "does apply." It is doubtful whether the PIL rules of forum states are compatible with these unique notions, and judges are ready to adopt them.³⁴⁾

32) Schroeter (Cross-Border), *supra* note 6, at 113-14.

33) This doubt can also be cast on the CISG-AC Opinion No. 15, *supra* note 26.

34) See Ferrari, *supra* note 20, at 58 ("[W]henever a court has to resort to private international law in the CISG context, it will have to resort to its own private³⁴⁾

III. ORAL AGREEMENTS BE PROVED BY ARTICLE 8

1. Article 12 Reservation Does Not Always Exclude Oral Agreements

In this Part, this author's own view is presented that oral agreements may be proved and oral evidence may be admitted by the application of Article 8, without the aid of FOF provisions reserved by Articles 12 and 96.

Article 12 provides that any FOF provision of the CISG “does not apply.” The phrase should not be taken to imply that any oral agreement “must not” be enforced, or that any oral evidence “must not” be admitted.³⁵⁾ To reserve FOF provisions does not necessarily lead to the result that any agreement, offer, acceptance, and other declaration of intention are inadmissible if made orally. Even where the domestic form law of a reservation state is to be complied with, some kinds of oral declarations of intention other than those charged with form requirements are and must be admitted. If all kinds of oral agreements and evidence were to be excluded, probably no transaction what-so-ever could survive.

Article 96 postulates this: “A Contracting State whose legislation requires contracts of sale to be concluded in *or* evidenced by writing may at any time make a declaration. . . .” If a state in its domestic law requires a contract to be evidenced by writing but does not require it to be concluded in writing, an oral agreement will be enforced if evidenced by written materials;³⁶⁾ if a state requires a contract to

↘ international rules, irrespective of whether the matters in dispute relate to those in respect of which the CISG itself refers to the need for a private international law approach or to one of the many other ones that require resort to private international law.”)

35) See YEARBOOK, *supra* note 21, at 121 (“A declaration under article [96] does not reverse the rules in the affected articles and create a requirement under this convention that the contract be concluded, modified or rescinded in or evidenced by writing.”)

36) See KRÖLL/MISTELIS/VISCASILLAS, *supra* note 2, art. 12 (Viscasillas), para. 10 (“It has to be reminded that the reservation applies to countries whose domestic legislation requires writing for the conclusion, or evidence of, a contract and thus it might be possible under the domestic law of the reservation state that the writing requirement only refers to the evidence of the contract. Thus, under domestic law an oral contract ↗

be concluded in writing, but does not exclude oral evidence (*i. e.*, if a state has a law of statute of fraud type but does not have a law of parol evidence rule type), oral evidence will be admitted to supplement and clarify the content of the written contract. Therefore, non-application of FOF provisions does not import total ban on all the oral elements of contractual transactions.

Generally speaking, if a legislator wishes to construct a legal regime requiring formal documents for conclusion of a contract, it must deliberately do so by enacting a law to that effect. However, if it does not have such a wish and makes contracts, oral or written, enforceable, it has two options. One is to enact a law which expressly so provides in order to wipe out possible dubitation.³⁷⁾ The other option is to do nothing. No law is necessary for the purpose, because a legislator has only to leave the world as it is. In the real world, contracts have been, are and will be concluded sometimes by oral agreements and sometimes by formal written documents.³⁸⁾ Therefore, in order to enforce oral contracts and admit oral

↘ might be considered valid, but would require some evidence of its existence in writing, *e. g.*, through an invoice.”)

37) During the drafting discussion by UNCITRAL, a proposal was rejected that the phrase “or evidenced by writing” of Article 11 be deleted, because it was found necessary in order to overcome the statutes of common law countries which enforced a contract only if it was evidenced by writing. See YEARBOOK, *supra* note 21, at 32-33 (Article 3, Paragraph (1), Contracts of sale evidenced by writing, 18.)

38) See 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 6.1 (1990) (“In 1954, after 277 years, Parliament repealed most of the Statute of Frauds. . . Among the reasons given by the English Law Reform Committee for repeal were these : . . . the requirement of a writing is ‘out of accord with the way in which business is normally done’ . . .”); HONNOLD & FLECHTNER, *supra* note 2, art. 12, § 128 (“Most delegates, however, felt strongly that formal requirements were inconsistent with modern commercial practice—particularly in view of the speed and informality that characterized many transactions in a market economy.”); Janet Walker, *Agreeing To Disagree : Can We Just Have Words? CISG Article 11 and the Model Law Writing Requirement*, 25 J.L. & COM. 153, 154 (2006) (“A few of the sixty-five countries that signed on to the Convention did make such declarations, but most did not. The majority of countries chose to enable parties to international sale of goods contracts to contract with one another free of the formal requirements that might otherwise prevent the recognition of the existence of a valid and binding contract between them. They recognized that frequently the business dealings in which persons agreed to buy and sell goods in the international market would ↗

evidence, all that law must do is to refrain from intervening in this private transaction process.

As argued in Section 2 of Part I, non-application of FOF provisions signifies no more than the absence of applicable rules, leaving the space blank. The legislative history shows (1) that Articles 12 and 96 are designed to give reservation states an opportunity to apply their own domestic form laws,³⁹⁾ and (2) that the form requirements of a reservation state are not automatically⁴⁰⁾ applied whenever the place of business of a party is located in the reservation state; in other words, oral agreements and oral evidence may be admissible in some cases.

One logical consequence of above two propositions is that where, as a result of PIL analysis, the law of a reservation state is designated, the form law of that state will govern the transaction. This is a foregone conclusion because it is the very reason why Articles 12 and 96 were enacted and why a state declares the reservation. In this case, the form law of a reservation state trumps not only FOF provisions of the CISG including Article 11, but also the general principle of FOF resulting from Article 7(2). Furthermore, the general principle of interpretation of Article 8 is also circumscribed. Especially “all relevant circumstances of the case” of Article 8(3) are restricted by the domestic regulations of the law of the reservation state.

On the other hand, where PIL rules lead to the law of a non-reservation state, it is preposterous to apply the domestic law of the state. This preposterousness is especially egregious where the non-reservation state has form requirements in its domestic law. The state has designedly opted to dispense with the reservation by the Article 96 declaration, which is expressly and specifically permitted for “A Contracting State whose legislation requires contracts of sale to be concluded in

↘ not be conducted on the basis of written contracts. Accordingly, the establishment of a fixed requirement for a written contract would be artificial and unduly cumbersome.”); KRÖLL/MISTELIS/VISCASILLAS, *supra* note 2, art. 11 (Viscasillas), para. 1 (“Thus, the principle of informality as enshrined in Art. 11 ... recognizes the normal behaviour of business persons when contracting for the sale of goods in international settings.”)

39) See *supra* note 7, and accompanying text.

40) See *supra* note 19, and accompanying text.

or evidenced by writing.” The deliberate forbearance of a sovereign state from making the Article 96 declaration should be given the same force and deference as the deliberate choice to make the declaration. If the judiciary, in face of these conscious determinations, were to hold that the domestic form law would govern the transaction, it would trespass on the domain of the legislator and hence infringe on the sovereignty.⁴¹⁾

The reason why a party invokes the form law is that, although he is fully aware (albeit denies) that an agreement has been reached orally, he wishes to go back on it, alleging the lack of form.⁴²⁾ The other party tries to evade the application of the form law, because he wishes to have his oral agreement judicially enforced and he knows the application of the form law will be fatal. If the domestic form requirements of a non-reservation state were to be invoked, and if they were to be applied to deny the allegation of an oral agreement by a party of that state, it would be indeed “ironic” that the party should be slain by the sword of his own country that has never intended to wield it.⁴³⁾

When PIL rules lead to the application of a non-reservation state, the proper law is the CISG. The legislature of the state has determined to apply it according to the rules provided in Article 1. In the same vein, where a non-reservation state has its own FOF provisions in its domestic law, that law should not govern the transaction. The state, by ratifying or acceding to the CISG, has opted for it instead of its domestic FOF law in relevant cases where the CISG is

41) See HONNOLD & FLECHTNER, *supra* note 2, art. 12, § 129 (“In other words, since [the non-reservation state], which ratified the Convention without the Article 96 reservation, thereby indicated that it was willing to forgo its domestic form requirements for international sales, why should the Article 96 reservation of a different State . . . bring those form requirements back into play?”)

42) A party from a non-reservation state may raise this Article 12 defense against a party from a reservation state. *Forestal Guarani S. A. v. Daros Int’l., Inc.*, 613 F. 3d 395 (3d Cir. 2010) is such a case.

43) Harry M. Flechtner, *Symposium—Ten Years of the United Nations Sales Convention : 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, 196(1998).

applied.⁴⁴⁾

However, it is the same CISG that does have Article 12, and therefore, the blanks otherwise occupied by FOF provisions remain unfilled, unlike the case where a reservation state law is designated by PIL rules. What shall we do, then? We seem to have been put back where we started, but one thing is different: we no longer need to consider the possibility of filling the blanks by the form law of a reservation state. The lacuna produced by the reservation is susceptible both to the writing requirements and to the freedom of form. At this stage where the opportunity for a reservation state to apply its own form law has already been exhausted, and in light of the legislative determination by a non-reservation state not to make an Article 96 declaration, we have to manage to fill the space by allowing oral agreements and evidence of oral declarations of intention. The revival of FOF provisions is very attractive, but it could not possibly be logically deduced or induced in the face of the unequivocal command of Article 12. A court must review a transaction at hand in order to determine the existence of a contract, regardless of whether it was concluded orally or by writing, without invoking Article 11.⁴⁵⁾

2. Article 8 Be Used on Behalf of Article 11

In order to enforce an oral agreement and to admit oral evidence, the CISG is equipped with a versatile tool, *i. e.*, Article 8, which is located not in Part II subject

44) See Peter Schlechtriem, *Uniform Sales Law - The Experience with Uniform Sales Laws in the Federal Republic of Germany*, JURIDISK TIDSKRIFT (1991/92) 1, 5, available at <http://www.cisg.law.pace.edu/cisg/biblio/schlech2.html#ps27> (“If private international law rules lead to the application of French or Italian law, [Art. 1(1)(b)], as a provision of French or Italian law, regulates which body of French or Italian law is applicable. In other words, the function of Art. 1(1)(b) is the same as that of legal provisions telling us whether in Germany the Commercial Code or the Civil Code is applicable, or whether a loan is covered by the Consumer Credit Act or by the common rules in the German Civil Code concerning credits. It is not in itself an international conflict of law provision.”)

45) This author believes that the compromise between form laws and FOF principles was inadequate. Article 12 should have expressly mandated the revival of FOF provisions. It is hard to see a reason why the space for FOF provisions must be kept blank in this situation, except for the letter of Article 12. It is a flaw of the CISG.

to the Article 12 reservation, but in Part I entitled “Sphere of application and general provisions.”

It provides :

- (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
- (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
- (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 8 obliges a court to search for a subjective intent of the parties (paragraph (1)), to refer to the “reasonable person” standard (paragraph (2)), and to give due consideration to “all relevant circumstances of the case” (paragraph (3)). The scope of Article 8 “is not limited to the interpretation of the contract terms in order to determine the meaning of the contract. It also applies to the interpretation of statements and other conduct during the negotiation stage (*e. g.*, an offer, an acceptance, a revocation of an offer, a rejection of an offer) in order to determine *whether a contract has been concluded in the first place.*⁴⁶⁾ Consideration under paragraph (3) of the negotiations and

46) BIANCA & BONELL, *supra* note 7, art. 8 (Farnsworth), para. 2.1 (emphasis added). *See also* SCHLECHTRIEM & SCHWENZER, *supra* note 2, art. 8 (Schmidt/Kessel), para. 1 (“The particular subject matter for interpretation are statements leading to the formation of a contract...”) ; Franco Ferrari, *Interpretation of Statements : Article 8*, in THE DRAFT UNCITRAL DIGEST AND BEYOND : CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U. N. SALES CONVENTION 175 (Franco Ferrari et al. eds., 2004) [hereinafter DIGEST AND BEYOND] (“Courts have indeed resorted to the criteria set forth in Article 8 to interpret ↗

subsequent conducts includes the examination of the materials they produce (*e. g.*, invoices, letters and emails), and all the statements and utterances. Thus, Article 8 enables a court to detect by all sorts of evidence an intention of the parties to orally conclude a contract and to be bound by it.

Invoking Article 8 in this situation may seem sophistic because it will lead to the same result as when Article 11 and other FOF provisions are applied. However, the reasoning is faithful to or at least does not contradict the literal meaning of Article 12, which does not exclude the application of any other provision in Part I than Article 11. As a general principle for interpreting parties' intention, Article 8 patches the flaw of Article 12, which commands that any FOF provision does not apply even when PIL rules lead to the law of a non-reservation state. It could also be objected that the application of Article 8 be restricted to the extent it may function as the general principle of FOF reflective of Article 11.⁴⁷⁾ However, such a restriction is out of place once writing requirements of a reservation state have been determined as irrelevant.

Unless mechanically recorded, direct evidence of an oral agreement by its nature can rarely be presented except for a unilateral allegation by the party insisting on its existence. A survey of the cases which applied Article 11 shows us that in order to detect an oral agreement the "subsequent conduct of the parties" is particularly important among the "relevant circumstances of the case," to which Article 8(3) orders courts to give due consideration.

A decision by a Swiss district court elucidates this point.⁴⁸⁾ Applying Article 8, the court found a contract concluded, by inferring an intention to be bound from the fact that the non-paying buyer had requested the seller to issue an invoice for

↘ statements and conduct relating to both formation of contracts governed by the CISG and the performance of such contracts ...")

47) SCHLECHTRIEM & SCHWENZER, *supra* note 2, art. 8 (Schmidt/Kessel), para. 14 ("Article 8(3) generalizes the rule for sales contracts in Article 11 in [that] ... a statement to which the Convention is applicable is not required to be in written form and can be evidenced in any manner...")

48) Switzerland, Bezirksgericht, St. Gallen, 3 July 1997, (*Unpaid fabric case*), available at <http://cisgw3.law.pace.edu/cases/970703s1.html>.

the goods already delivered. The plaintiff was engaged in sales of textiles in the Netherlands, and the defendant was a creator of fashion clothes in Switzerland. In spring, 1995, they orally agreed that the defendant would make fashion clothes by the material supplied by the plaintiff. Before being delivered to the defendant, the material was to be embroidered by the third party. Accordingly, the defendant sent a fax requesting the plaintiff to send a certain amount of fabric to the embroiderer. However, after having used 10% of the material delivered through the embroiderer, the defendant informed the plaintiff by letter that she was no longer interested in continuing the transaction with the plaintiff, and requested the plaintiff to issue an invoice for the fabrics delivered. The plaintiff issued an invoice which included the costs for embroidering. Only after about one month, the defendant requested the plaintiff to adjust the invoice price, claiming that it was higher than the amount actually delivered. After another one month, the defendant informed the plaintiff that she was going to return the unused fabrics.

The court pointed out that the commercial interactions between the parties were carried out in writing, by telephone, and by face-to-face conversations in the Netherlands, and that the defendant's "intent to be bound, the quantitative amount of the goods and the purchase price are in dispute."⁴⁹⁾ Reciting the provisions in Article 8, the court stated that "As possible agreements have neither been recorded in writing nor are particular usages known,⁵⁰⁾ the subsequent conduct of the parties is of major importance in the instant case." On the issue of the defendant's intent to be bound and the quantity of the fabrics, the court concluded that by the letter requesting an invoice ("Please invoice the material."), the defendant "has objectively, noticeably, clearly and unambiguously expressed that she was willing to pay for the material which she obtained."⁵¹⁾ On trial, the defendant alleged that the letter covered only the material that she had already used, but the court denied the allegation. It said, "the fact is crucial that

49) *Id* (Reasoning and decision, 2(c)).

50) *Id* (Reasoning and decision, 3(c)).

51) *Id* (Reasoning and decision, 3(a)).

[the defendant] herself requested the invoicing of the material without mentioning any restriction or, respectively, without specifying her intent to pay only for the processed material after the receipt of the first invoice.⁵²⁾

As to the indefiniteness of the price term, the court held that “[b]y reason of the contract being already executed, the lack of an express determination of the sales price does not bar the contract’s accomplishment. Rather, the sales price is to be determined according to Art. 55 CISG, the provision for filling gaps.”⁵³⁾ Applying Article 55, the court upheld the price that the plaintiff claimed.⁵⁴⁾

The court in substance held the request of the invoice to be understood as a manifestation of the intention to perform the obligation of the existing contract and hence as a manifestation of the intention to be bound by it. That is “the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances” (Article 8(2)).⁵⁵⁾

What is notable of this case is that the court did not make any offer-acceptance analysis of Articles 14 and 18. No wonder, because it is next to impossible and perhaps unnecessary to pinpoint a particular statement during the conversation between the parties as an offer or an acceptance. It is pointed out by Professor Schlechtriem that in some cases “it is very difficult and sometimes

52) *Id* (Reasoning and decision, 4(a)).

53) *Id* (Reasoning and decision, 5). Article 55 provides: “Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.”

54) The application of Article 55 is rightly criticized as being unnecessary and dangerous because the court implicitly found that the buyer made a tacit acceptance of the invoice price. See Pilar Perales Viscasillas, *Comments on the Draft Digest Relating to Articles 14-24 and 66-70*, in *DIGEST AND BEYOND*, *supra* note 46, at 276 .

55) See John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J. L. & COM. 11, 33 (1988), available at <http://www.cisg.law.pace.edu/cisg/text/murray8.html> (“If a reasonable person would regard the deal as binding, the interpretation of the parties’ manifestations requires recognition of that agreement.”)

arbitrary ; to point out at what stage there was an offer and an acceptance.” Or even “it is simply untrue that all or even most contracts are formed by means of a salient or even recognizable offer followed by a similarly salient acceptance.”⁵⁶⁾ An oral agreement is a kind of black box. Because no external observer knows what’s inside, one has to infer it by checking what comes out of it. As a general principle of interpretation, Article 8 prevails over (and hence dispenses with the analysis by) the Articles of the CISG governing offers and acceptances, and enables a court to find an agreement by detecting a reasonable intention of the parties to conclude a contract.⁵⁷⁾

Applying Article 11, three courts held that a contractual relationship by an oral agreement was established, because the seller had delivered the goods and the buyer had accepted them (*China defective sheet glass case*)⁵⁸⁾, because the seller had delivered the goods and the buyer had signed the bill of lading (*Slovakia nonpayment case*)⁵⁹⁾, and because the invoice issued by a brokerage firm had been received by both the seller and buyer without any complaint (*Spain uncollected cereal case*)⁶⁰⁾.

These cases did not concern the Article 12 reservation of FOF provisions.

56) Schlechtriem, *supra* note 44, at 17.

57) Shawn J. Bayern, *Offer and Acceptance in Modern Contract Law : A Needless Concept*, 103 CALIF. L. REV. 67, 68 (2015).

58) Professor Melvin Eisenberg introduced the notion of expression rules, *i. e.*, conventional rules of interpretation for certain kinds of expressions produced in contractual transactions (such as “an advertisement is not an offer”). He argued that those expression rules which are incongruent with the principles generally applied to the interpretation of all expressions should be dropped. His insight can be applied to the relation between specific Articles of the CISG (especially on offers and acceptances) and the general principle of interpretation of Article 8. *See* Melvin Aron Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 CALIF. L. REV. 1127 (1994).

59) China, 14 October 2010, Hebei High People’s Court [Appellate Court] (*Defective sheet glass case*), available at <http://cisgw3.law.pace.edu/cases/101014c1.html>.

60) Slovak Republic, 11 October 2010, District Court in Michalovce (*Nonpayment case*), available at <http://cisgw3.law.pace.edu/cases/101011k1.html>

61) Spain, 1 July 2013, Supreme Court (*Uncollected cereal case*), available at <http://cisgw3.law.pace.edu/cases/130701s4.html>.

However, because there were no written contracts involved and oral agreements were held to be concluded, they are suitable models to make up a hypothetical reservation case. The following is a fictitious reservation case applying Article 8 instead of Article 11 :

As a result of a conference held at the Buyer's office in a non-reservation state, an oral agreement was made with the Seller coming from a reservation state. The Buyer's state by its domestic law required a contract to be concluded in writing. By the agreement, the Seller would provide 15 thousand bushel of wheat for the Buyer, who would pay 50 thousand US dollars to the Seller. The wheat was scheduled to be delivered in three batches. The Seller sent an invoice to the Buyer, who received it without any complaint. Two weeks later (during the period, the market price of wheat rapidly sagged), the first delivery was made at the agreed port, but the Buyer did not collect it. In order to inquire into the default, the Seller made a telephone call to the Buyer, who negated the agreement. The Seller sued the Buyer for the damages in a court in his state. The court, applying its PIL rules, held that the law of the Buyer's state be applied. The Buyer insisted that the form law of his state would nullify the Seller's claim because of the absence of a written contract.

Now a hypothetical opinion by a judge well-informed of the CISG would be as follows :

Although the Commercial Code of the Buyer's state provides that oral agreements are not enforceable, the proper law of this case is the CISG. Because it is a part of the law of the Buyer's state which is to be applied in cases defined by Article 1. The Buyer insists that the domestic form law be applied, but it is clearly against the sovereign agency of the Buyer's state, which deliberately refrained from making a declaration under Article 96, restrictedly permitted for a state having form laws. By applying the CISG, first we must consider whether an oral agreement alleged by the Seller was actually concluded, but in so doing, we must not

invoke Article 11 and other FOF provisions in Part II of the CISG. It is an inviolable unequivocal command of Article 12 when a party has its place of business in a reservation state. In this case, the Seller has his place of business in our state, a reservation state. Therefore, instead of relying on Article 11, we resort to the general principle for interpreting the intention of parties, provided in Article 8. We have no exact “statements made ... by a party,” because the conference held at the Buyer’s office was not recorded and each party alleged a different version of its content. We cannot conclusively determine it. However, there is an objectively ascertainable “conduct of a party,” *i. e.*, sending and receiving of the invoice. Neither party alleged that he had attached a special, subjective meaning to this conduct (Article 8(1)). Therefore, we apply Article 8 (2), giving due consideration to “all relevant circumstances of the case including ... any subsequent conduct of the parties” (Article 8 (3)). “[A] ccording to the understanding that a reasonable person of the same kind as the [Buyer] would have had in the same circumstances” as in this case, sending an invoice specifying the goods, amount, price and the date and place of delivery is interpreted as a performance by the Seller of a consolidated agreement. “[A] ccording to the understanding that a reasonable person of the same kind as the [Seller] would have had in the same circumstances,” receiving such an invoice without objection or any complaint is interpreted as the acknowledgment by the Buyer of an existing agreement. We, therefore, hold that an oral agreement as alleged by the Seller and as embodied in the invoice was actually concluded.

In the case where a party takes advantage of the Article 12 defense, it is likely that an existence of an oral contract will be established relatively easily, because a writing requirement defense is prone to be made after the parties have already substantially committed themselves to the bargain. As in the hypothetical case above, such commitment will leave traces of the agreement (“subsequent conduct”). In addition, a party invoking the defense actually knows well that he

himself has had an agreement. In some cases, assuming an oral agreement is unenforceable, such a party will have “Yes, we had an oral agreement. So what?” stance. *Forestal Guarani S. A. v. Daros Int’l., Inc.*⁶²⁾ is one of those cases. Forestal (plaintiff) in Argentina, a reservation state, sold wooden products to Daros (defendant) in New Jersey. Daros paid certain dollar amount, and Forestal demanded the balance due, which Daros refused to pay. Judge Fisher noted that “[w]hile Daros *does not deny that it had a contract* with Forestal, the thrust of Daros’ argument is that the parties do not have a written contract. . . .”⁶³⁾ If Article 8 were to be applied, trumping the writing requirements of Argentina or New Jersey, it would be fatal to Daros.

IV. CONCLUSION

The majority view that FOF provisions be applied when PIL rules designate the law of a non-reservation state appears to be fair and, therefore attractive, because a non-reservation state itself has no intention whatsoever to exclude FOF provisions. However, unfortunately enough, it is against the clear command of Article 12. We must not yield to the lure of teleological arguments.

It may seem sophistic to resort to Article 8 on behalf of Article 11 and other FOF provisions when they are excluded by the Article 12 reservation. However, it is justified partly by the literal reading of Article 12 which does not interfere with any other provision in Part I than Article 11, and partly by the heightened status of Article 8 as a general principle for interpretation of intention. It is also justified by Article 7(1) : “the need to promote uniformity in its application and the observance of good faith in international trade.” An invocation of the Article 12 defense by a party is rarely motivated by his wish to observe the domestic regulatory schemes requiring writing for international transactions. If so, the party has only to ask the other party to sign and send back the document

62) 613 F. 3d 395 (3d Cir. 2010).

63) *Forestal*, 613 F. 3d., at 397 (emphasis added).

complying with the regulations. More often than not, the defense is made by his bad faith motive: *e. g.*, his desire to evade the contract which he knows well was orally concluded, in order to move on to a better bargain after a change in the market price. In such a case, finding an agreement and enforcing it by Article 8 will promote the observance of good faith.⁶⁴⁾

Moreover, if the relevant domestic law has its own FOF provisions, applying Article 8 rather than the domestic law will promote uniformity of the application of the CISG, even when the result would be the same.⁶⁵⁾ Presumably Article 11 itself, whose full-sweeping admission of every kind of evidence is unlikely to become a source of serious disputes. What is in need of the accumulation and uniformity of case law is the interpretation of parties' intention by Article 8.

64) See Van Alstine, *supra* note 19, at 782 (“article 7 (1) calls upon adjudicators to consider how their decisions will promote the observance of good faith by other transactors in the future.”) It also serves the principle of the CISG favouring the continuation of the contract. See KRÖLL/MISTELIS/VISCASILLAS, *supra* note 2, art. 8 (Zuppi), para. 29 (“Under the CISG there is a clear position, praised by both doctrine and jurisprudence, for favouring the continuation of the contract whenever possible (*favor contractus*), having regard for the international character of the agreement and the necessity expenses involved in it.”)

65) Japanese Civil Code Article 555 provides that a sales contract is concluded by “promising,” requiring no writing for a contract to be enforceable. The Civil Code has been revised, and the bill for the new Civil Code is now under the Diet deliberation and will be promulgated in near future. Article 522(2) of the revised Civil Code clarifies that no writing is necessary providing “Unless otherwise specifically provided by law, it is not necessary for the conclusion of a contract to be drawn up in writings or to be equipped with other formalities.”