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

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10.1 Introduction

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

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

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

10.2 Freedom of Form and Freedom of Evidence

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

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

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

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

As for the latter, Lorenzetti summarizes:

> the [contractual] freedom of form means that the parts can manifest their will orally or in writing, by the way of a letter or in other solemn document, by a fax, electronic media, or by a tacit declaration.[4]

In this way, the freedom of form relates itself to the expression of the will and its instrument: the vehicle of its achievement. In conclusion, then, the principle of freedom of form has a deep connection with two eminently practical aspects of legal transactions: the theory of (in)validity and the evidential burden. While the latter limits the contractual production of effects to fulfil the formalities required by law, the evidential burden is bound to the duty to demonstrate the contractual content.

10.2.1 As a Validation Criterion

The Latin American legislator often elects the contractual form as a validity requirement when required by law but such kind of requirement usually is exceptional,[5] occasionally pointing out specific requirements such as the requirement that real estate contracts are entered into by public deed (Article 108 of the Brazilian Civil Code). In this case, the disregard for legal requirements would cause the nullity of the contract.[6] Although this is also usual, in particular cases the null agreements produce positive effects (*e.g.* Article 170 of the Brazilian Civil Code and Article 1620 of the Colombian Civil Code).[7]

Moreover, when there is a formal requirement, one must pay attention that it may be the condition for a valid contract (*ad substantiam*) or a condition of evidence (*ad probationem*).[8] Under Brazilian Law, for example, you can see this difference when comparing

4 R.L. Lorenzetti, *Tratado de los Contratos: Parte General* (Rubinzal-Culzoni, Buenos Aires, 2004) p. 127.

5 As, for instance, the: Brazilian Civil Code (Arts. 104, 107 and 108); Uruguayan Commercial (Arts. 194 and 202) and Civil Code (Art. 1259); Argentinian Civil Code (Arts. 284 and 286); Bolivian Civil Code (Art. 452); Colombian Commercial (Art. 824) and Civil Code (Arts. 1502 and 1602); Art. 1009 of the Costa Rican Civil Code; Mexican Civil Code (Arts. 1795, IV and 1832); Art. 1550 of the Honduran Civil Code; Art. 700 of the Paraguayan Civil Code (exceptions); Art. 2436 of the Nicaraguan Civil Code; Art. 1352 of the Peruvian Civil Code; and Art. 1355 of the Venezuelan Civil Code.

6 *E.g.*, Art. 166 of the Brazilian Civil Code; Art.e 285 of the Argentinian Civil Code; Arts. 27 and 835 of the Costa Rican Civil Code; Art. 1833 of the Mexican Civil Code; Art. 1544 of the Honduran Civil Code; Art. 673 of the Paraguayan Civil Code; Art. 1314 of the Salvadoran Civil Code; Art. 1411 of the Peruvian Civil Code.

7 Strange as it may seem for a more traditional reader, the *favor contractus* principles have been used to justify the 'substantial conversion' of the contract, in these cases. For more information, and further reading *see* F.E.Z. Glitz, 'Favor contractus: alguns apontamentos sobre o princípio da conservação do contrato no Direito positivo brasileiro e no Direito comparado,' (2013) 1 *Revista do Instituto do Direito Brasileiro da Faculdade de Direito da Universidade de Lisboa* pp. 475-542.

8 G. Alpa, *Corso di Diritto Contrattuale* (CEDAM, Milano, 2006) p. 72; Lorenzetti, 2004, p. 424.

the provisions that impose a public instrument on real estate contracts (*ad substantiam*) and the one that imposes the limit to testimony on contracts (*ad probationem*). This distinction leads then to the second point to be addressed: the evidence of the contract.

10.2.2 As an Evidence Criterion

The preference for writing, summarizes Gomes, is mainly a concern of proof[9] and, adds Bessone,[10] an interpretation simplifier. Therefore, one should be aware that the form of contract cannot be confused with its evidence[11] although they keep with each other in close connection.[12]

As for contractual evidence, the Latin American legislator often maintains the same rule: freedom of evidence is consecrated. Other legal systems are known to predict, exhaustively, the evidence available to prove the existence of the contract and the contractual content.

That's why Brazilian law, despite some controversy among 'civilists' and 'procedural experts' on the appropriate *locus* of evidence, has kept the treatment of the evidence of the contract also within the Brazilian Civil Code. The same occurs in the Argentinean, Chilean, Ecuadorian, Honduran and Paraguayan civil codes.

Thus the Brazilian Civil Code establishes the "freedom principle of evidence" (Article 212), since the wording of the legal disposition is, at least, generic. The most common interpretation of the Brazilian Civil Code favors the list mentioned in its items as merely illustrative. The Brazilian (Article 227), Chilean (Articles 1708, 1709 and 1710), Ecuadorian (Article 1725), Honduran (Article 1528, not limited to contractual cases), Nicaraguan (Article 2423), Paraguayan (Article 706), Salvadoran (Article 1681), and Venezuelan (Article 1387) civil codes, however, impose a limit on testimony evidence in contractual cases. The new Argentinean Civil and Commercial Code prohibits the testimonial evidence of contracts that usually are written (Article 1019, *fine*).

Thus, as a general rule, unless specific cases (for example, the insurance that would be prove the policy) as well as to the evidence, the contractors would have complete freedom to demonstrate the existence of the contract and its obligatory content.

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9 Gomes, 1977, p. 64; P. Nader, *Curso de Direito Civil: Contratos* Vol. 1, (5th edn, Rio de Forense, Janeiro, 2010) p. 516.

10 D. Bessone, *Do Contrato: Teoria Geral* (Saraiva, São Paulo, 1997) p. 110.

11 C.R. Gonçalves, *Direito Civil brasileiro* Vol. III (Saraiva, São Paulo, 2004) p. 19; G. Mamede, *Teoria geral dos contratos* (Atlas, São Paulo, 2010) p. 22.

12 J. Mosset Iturraspe, *Teoria General del Contrato* (Orbir, Córdoba, 1970) p. 270.

10.3 The Treatment of the Criterion in the CISG

The United Nations Convention on Contracts for the International Sale of Goods (CISG – Vienna, 1980) 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 11)

The wording of this disposition also indicates the presence of both manifestations of the contract freedom (freedom of form and freedom of evidence) enshrined within the CISG. The first part of Article 11 clearly refers to the principle of freedom of contract form, while the second part mentions the freedom of evidence.

10.3.1 Freedom of Form

The wording of the first part of Article 11 may indicate that its contents would apply only to the formation of the contract. Schlechtriem and Butler warn that the principle of freedom of form applies to all binding acts governed by the CISG, especially modifications, additions, and contract termination (Article 29).[13] Thus, for example, a contract governed by the CISG can be formed or modified by the mere conduct of the parties.[14]

Also any formal requirement of domestic legislation would be excluded once it applied the CISG.[15] This would be a result of unification regime played by the Convention.[16]

One issue that could be raised is that the Convention itself does not define what constitutes 'form' or even 'evidence.' According to Perales Viscasillas, the doctrine has interpreted both concepts quite broadly: while the former corresponds to the means by which the statements should be externalized in order to gain wide validity and effectiveness; the latter would be the means to demonstrate those statements.[17]

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13 P. Schlechtriem & P. Butler, *UN Law on International Sales: The UN Convention on International Sale of Goods* (Springer, Berlin, 2009) p. 61. *See also*: S. Kröl, L. Mistelis & P. Perales Viscasillas (ed.), *UN Convention on Contracts for the International Sale of Goods (CISG)* (Hart, Oxford, 2011) p. 184.

14 "Article 18 (3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph." *See also*: Kröl, 2011, p. 185.

15 Schlechtriem, 2009, p. 61; A. Calvo Caravaca, L.F. De la Gándara, (Direc.) *Contratos Internacionales* (Tecnos, Madrid, 1997) p. 233; P. Huber & A. Mullis, *The CISG* (Sellier, München, 2007) pp. 37-38.

16 Kröl, 2011, p. 187.

17 Kröl, 2011, p. 185.

One should, however, be aware that the Convention itself provides a very broad exception to accommodate those States which require the form or written evidence of the contract. Such an exception is provided for in Article 12[18] through the reservation of Article 96.[19] This was the case for example of Lithuania, which until recently required the written form for contracts.[20]

In the Latin American context, for instance, an interesting case would be the already mentioned Argentinean requirement for written form (Article 1019, *fine* Civil Code). One may doubt, however, that Argentina, which approved a new civil code recently, will withdraw its reservation to the CISG (under Article 96).

It should also be pointed out that the contractors themselves are allowed, under the Convention, to preserve the requirement of written form or even establish other formalities,[21] which is another reflection of the same contractual freedom.

10.3.2 Freedom of Evidence

The second part of Article 11 states that not only the CISG allows freedom in attesting to the existence of the contract and its contents by any means, as it does, even by testimonial evidence.[22]

Here, there is a clear distinction between the laws that limit the testimonial evidence of the contract, at least that held exclusively a certain value (as in Brazil, Chile, Ecuador, Honduras, Nicaragua, Paraguay, Salvador, Venezuela), the Argentinean Law that prohibits it, and the CISG.

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18 "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."

19 "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."

20 *Cf.* <www.unis.unvienna.org/unis/pressrels/2013/unisl192.html> accessed 17 December 2013.

21 L.A. DiMatteo *et al., International Sales Law: A Critical Analysis of CISG Jurisprudence* (Cambridge University Press, Cambridge, 2005) p. 38; Huber, 2007, p. 39; J.O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn., Kluwer Law International, Netherlands, 1999) p. 135; J. Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods: Articles 11 and 12 No Writing Requirement for CISG Contract; Declaration in Derogation' <http://cisgw3.law.pace.edu/cisg/biblio/loo11.html> accessed 17 December 2013.

22 I. Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, Oxford University Press, Oxford, 2010) p. 204.

Also of little importance would be whether the issue of evidence is such as substantive or procedural, since the Convention rules out the application of domestic law here too.[23] This is in the same range as previously seen when addressing freedom of form.[24]

One can also point out that the CISG admits the evidence of witnesses, a sign that it admits the demonstration of the intention of the parties and even the negotiations, course of action, duty to know[25] or documents that the parties eventually exchanged before the contract formation, during negotiations or after training (confirmation letters or invoices).[26]

Regarding the instrument itself, the Convention, for example, establishes (Article 13) that telegrams and telex would be considered 'written.' Perhaps here the Commission's concern was reflected in guiding the courts to consider more efficient means that were not foreseen at the time of the Conference.[27] Thus, for example, the technological risk (electronic documents, etc.) would be removed. But the question might be, for example, the very existence of the contract in the absence of a 'written' document. According to DiMatteo, few courts insisted on written evidence of the contract to declare its existence.[28]

Another extremely important fact is that the principle of freedom of form would apply not only to court proceedings but also to arbitration.[29]

In this sense, a certain global trend follows; the same connection between freedom of form and freedom of evidence is mentioned in the UNIDROIT Principles 2010 (Article 1.2.):

> Nothing contained in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses.

Specifically in relation to the freedom of evidence, the United Nations Convention on the use of electronic communications in international contracts,[30] for example, explicitly states: "Nothing in this Convention requires a communication or a contract to be made or evidenced in any particular form." (Article 9.1)

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23 Kröl, 2011, p. 189; J. Oviedo Albá, 'The General Principles of the United Nations Conventions for the International Sale of Goods' (2012) 4 1 *Cuadernos de Derecho Transnacional* p. 173. In the opposite sense: Schwenzer, Oxford, 2010, p. 205.

24 Schlectriem, 2009, p. 62.

25 DiMatteo *et al.*, 2005, p. 39.

26 Kröl, 2011, p. 190.

27 DiMatteo *et al.*, 2005, p. 39.

28 DiMatteo *et al.*, 2005, pp. 41-43.

29 Kröl, 2011, p. 189.

30 The Convention was adopted on 23 November 2005. It entered into force in six countries: Congo, Dominican Republic, Honduras, Montenegro, Russian Federation and Singapore. Panama and Paraguay are other Latin American counties that have signed this Convention. <www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html> accessed 11 June 2015.

In addition, the Conventional text emphasizes the equivalence of the electronic document to the written one whenever the domestic legislation so requires (Articles 9.2; 9.3; 9.4).

Oviedo, however, reflects that this principle applies where the domestic law is applicable to the contract (according to the rules of conflict of law) does not determine, in specific cases, otherwise.[31] But, once again, the exceptional character of the formality requirement relating to contractual evidence is perceived.

The Inter-American Convention on Proof of and Information on Foreign Law (Montevideo, 1979), for example, works with the notion of 'suitable means' mentioning in the documentary form, experts and the information provided by the States (Article 3). However, the New York Convention (1958) on recognition and enforcement of foreign arbitral awards requires written form for the arbitration clause (Article IIa).

10.4 Conclusion

Thus, in summary, it may be said that Latin American contract law, according to the general rule of European continental law, provides for freedom of contractual form and freedom of evidence of the contractual existence and content. Thus, respectively, the contractors would keep the possibility to conclude the contract by any means (except specific and express legal exceptions), and could prove its existence and content by any means legally admissible (witnesses, expertise, assumptions, etc.). Argentina is an exception.

In the CISG the meaning of the freedom of form transcends the purely material sphere to also reach the procedural sphere,[32] whether judicial or otherwise.

Although there are minor differences, one can say that the way Latin American legislation deals with the freedom of evidence and form on contractual matters are very much the same consecrated by the CISG.

31 Oviedo Albán, 2009, p. 317.

32 Calvo Caravaca, 1997, p. 233.