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Janet Walker

Osgoode Hall Law School of York University, jwalker@osgoode.yorku.ca

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AGREEING TO DISAGREE: CAN WE JUST HAVE WORDS? *CISG* *ARTICLE 11 AND THE MODEL LAW WRITING REQUIREMENT*

*Janet Walker**

I. MAKING INTRODUCTIONS

It may seem unusual in a conference celebrating twenty-five years of success with the Convention on Contracts for the International Sale of Goods¹ and twenty years of success with the UNCITRAL Model Law on International Commercial Arbitration² for a proceduralist to speak about the CISG rather than of the Model Law. However, there is a point that lies at the intersection between the two, and on which the CISG may make an important contribution to the further development of the Model Law. This point concerns the formal requirements for dispute resolution clauses in international business contracts and, in particular, the writing requirement for arbitration agreements in international sale of goods contracts. This article argues that the success of the CISG in defining the terms on which persons contract with one another for the international sale of goods may come to influence the extent to which we will be prepared to exempt parties from the formalities that are currently required for demonstrating their desire to resolve their disputes through arbitration.

II. OBSERVING THE FORMALITIES: THE CISG AND THE MODEL LAW

Despite the fact that agreements for the international sale of goods and for the arbitration of disputes often arise in the same transactions, the requirements for the formal validity of these two kinds of agreements are very different from one another. The CISG grants parties virtually complete freedom from formalities. Article 11 of the CISG provides:

* Associate Dean, Osgoode Hall Law School, <http://research.osgoode.yorku.ca/walker>. Yunfeng (Rebecca) Huang provided excellent research assistance.

1. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, Annex I (Vienna, 11 Apr. 1980) [hereinafter CISG].

2. UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, Annex I (Vienna, 21 June 1985) [hereinafter Model Law].

A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses.

Although Article 11 of the CISG eliminates requirements as to form for international sale of goods contracts, state parties to the Convention were given the opportunity in Articles 12 and 96 to make declarations that they would not forgo these requirements.³ A few of the sixty-five countries that signed on to the Convention did make such declarations,⁴ 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 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.

In contrast, Article 7(2) of the Model Law preserves the formal requirement of a written contract for valid arbitration agreements. Article 7(2) provides:

The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract

3. CISG art. 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.

CISG art. 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.

4. The following countries made declarations in accordance with Article 12 that preserved formal requirements for contracts otherwise governed by the CISG: Argentina, Belarus, Chile, Hungary, Latvia, Lithuania, People's Republic of China, Russian Federation, and the Ukraine. Estonia withdrew its reservation concerning Article 11 in 2004. Status, 1980—United Nations Convention on Contracts for the International Sale of Goods, available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

The incongruity between these two approaches must be puzzling to business people. Arbitration agreements are rarely free-standing contracts. They are usually provisions within contracts for the sale of goods or for other commercial dealings. It would probably surprise most people engaged in international sales transactions to learn that they might be bound by a contract even before the pen meets the paper, but that they would not be entitled to rely upon the form of dispute resolution that is frequently preferred in international commercial dealings unless they had a written agreement to that effect. It would probably surprise them even more in view of the fact that, as is clear from the freedom to opt out of the application of the CISG and the Model Law, these instruments were not intended to impose new standards on parties to international dealings, but to approximate their reasonable expectations in the absence of specific agreements to the contrary. How could it be reasonable to suggest that the parties would reasonably expect to be bound by the substantive terms of a sales agreement and yet not by the arbitration agreement that it “contained”? Finally, it might seem almost paradoxical to them to suggest that although, under the doctrine of separability,⁵ the arbitration agreement in a contract could survive a determination that the other terms of the contract were invalid, it could fail to come into existence in an otherwise valid and binding oral contract. In short, most businesspeople would probably think that, over time, there would be a tendency for the standards for formal validity in the CISG and those in the Model Law to converge, at least in respect of contracts for the international sale of goods.

III. CUSTOMS IN THE LARGER COMMUNITY

At some level, requirements as to form are designed primarily to set evidentiary standards for demonstrating the parties' intentions. They help courts decide when parties have reached agreement on some point or another. It may be wondered, then, what the current standards are in other related contexts in international business dealings.

Generally, the trend in the law governing most business dealings has been away from strict requirements for formalities. Strict writing requirements are seen as likely to frustrate the reasonable expectations of the parties in a

5. Model Law art. 16(1).

sufficient range of circumstances so as to be unreliable in determining whether the parties had concluded agreements to which they expected to be bound. In this way, the relaxation of formal requirements in the CISG echoes a great many other similar instruments relating to international business agreements. For example, the new UNIDROIT Principles of International Commercial Contracts 2004 contains an expansive definition of “writing”: Article 1:11 defines “writing” as “any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.”⁶ In another example, Article 2:101(2) of the Principles of European Contract Law contains a declaration of freedom from formalities much like that contained in the CISG.⁷ In related contexts, we see a similar trend. For example, in the Rome Convention, which establishes the rules for determining the law governing international contracts, Article 3:1 provides that a choice of law must either be “expressed or demonstrated with reasonable certainty.”⁸

It may be objected, though, that these are situations in which the requirements as to form serve only to indicate that the parties have entered into an agreement concerning their substantive rights, or that they have chosen a governing law for their substantive rights, and not an agreement concerning the procedure for seeking to enforce those rights. What about the standards for evidence of the parties’ agreement in respect of the process of dispute resolution? In the Brussels Regulation,⁹ which governs the jurisdiction of European member states’ courts over civil and commercial matters, a jurisdiction clause need only be in a form which accords with the practices which the parties have established between themselves or, in international trade or commerce, in a form which accords with a usage of which the parties to contracts of the type involved ought to have been aware. In short, in most international commercial contexts there has been a clear tendency to relax the requirements as to form. Courts are regarded as capable of determining the

6. The full text of the UNIDROIT Principles of International Commercial Contracts 2004 can be found at <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf>.

7. PRINCIPLES OF EUROPEAN CONTRACT LAW: PARTS I AND II art. 2:101(2) (1999) [hereinafter PECL], available at <http://www.cisg.law.pace.edu/cisg/text/textef.html>, provides that “[a] contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses.” A comparative study of CISG Article 11 and PECL Article 2:101(2) can be found at <http://www.cisg.law.pace.edu/cisg/text/peclcomp11.html>.

8. Convention on Law Applicable to Contractual Obligations, 1980 O.J. (L 266) [hereinafter Rome Convention]. The full text of the Rome Convention can be found at http://www.rome-convention.org/instruments/i_conv_orig_en.htm.

9. Council Regulation 44/2001, art. 23, 2001 O.J. (L 12) 1 (EC).

parties' agreement both in respect of the applicable law, and in respect of their choice of court on the basis of compelling evidence not confined to the fixed requirement of having executed a written contract.

IV. LOVERS OF ARBITRATION

This trend towards freedom from formalities in the formation of contracts generally, and in applicable law and choice of court agreements in particular, is in marked contrast with the current state of the law in respect of international commercial arbitration agreements, despite the fact that for more than a decade highly respected members of the arbitration community have called for change. As long ago as 1993, a notable lover of arbitration, Gerold Herrmann, argued that the writing requirement in the Model law was "outdated."¹⁰ Two years later, in the Sixth Goff Lecture, Neil Kaplan asked "Is the Need for Writing as Expressed in the New York Convention and the Model Law out of Step with Commercial Practice?"¹¹ and in a 2004 article surveying possible revisions of the UNCITRAL Arbitration Rules, Pieter Sanders suggested that revisions that were being considered for the Model Law in this area should also be considered in revising the Arbitration Rules.¹² This suggestion echoed the concerns of Professor Sanders with excessive formalism in the New York Convention decades earlier—concerns that led to the inclusion of the interpretive guidance in Article II(2) that would serve to safeguard against an unduly rigid application of the writing requirement.¹³

V. WITH FRIENDS LIKE THESE . . .

Notwithstanding the compelling arguments made by those authoritative figures, the history of discussions of the writing requirement for arbitration agreements reveals a greater interest in harmonizing the law than in advancing

10. Gerold Herrmann, *The Arbitration Agreement as the Foundation of Arbitration and its Recognition by the Courts*, in CONGRESS SERIES: INTERNATIONAL ARBITRATION IN A CHANGING WORLD—XITH INTERNATIONAL ARBITRATION CONFERENCE, BABRAIN, 1993 at 46 (Albert Jan van den Berg ed., 1993); see also Gerold Herrmann, *Does the World Need Additional Uniform Legislation on Arbitration?—The 1998 Freshfields Lecture*, 15 ARB. INT'L 211 (1999) (considering features, *inter alia*, of the writing requirement that could warrant codification beyond that contained in the Model Law).

11. Neil Kaplan, *Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?*, 12 ARB. INT'L 28 (1996).

12. Pieter Sanders, *Has the Moment Come to Revise the Arbitration Rules of UNCITRAL?*, 20 ARB. INT'L 243 (2004).

13. Kaplan, *supra* note 11, at 37-38.

it. This would appear to have been the objective of the brief discussions of the point in the New York Conference;¹⁴ and this preoccupation seems to have carried over to the review in recent years by the UNCITRAL Working Group on International Commercial Arbitration. In the Report of the Working Group on Arbitration on the Work of its Thirty-sixth Session,¹⁵ the Working Group outlined the proposal to revise the writing requirement for arbitration clauses contained in Article 7(2) of the Model Law. However, it is clear from the Report that the main interest in revising Article 7(2) was not in challenging the need for a writing requirement—it was merely in clarifying the application of the writing requirement in certain factual circumstances in which courts or commentators had developed differing views.¹⁶

The factual circumstances that had caused doubt tended to be those, such as maritime salvage contracts, in which contracts were concluded orally or by performance, with reference to a pre-existing standard form contract containing an arbitration clause, and circumstances in which contracts were concluded orally but subsequently confirmed in writing referring to an arbitration clause. The Working Group agreed that the arbitration agreements contained in these kinds of contracts should be regarded as meeting the writing requirement. However, the Working Group felt that “purely oral contracts” should not be regarded as meeting the writing requirement.¹⁷

The value of the Working Group’s proposals to harmonize the law should not be dismissed lightly. National laws on arbitration agreements vary from maintaining a fixed writing requirement for their validity, to requiring them to be verified by a written record, to permitting oral agreements.¹⁸ For example, arbitration agreements are valid only if in writing in Austria, Belgium, Brazil, Finland, Hong Kong, India, Japan, Norway, Switzerland, Taiwan, and the United Kingdom;¹⁹ but they need only be verified by a written

14. *Id.*

15. U.N. Commission on International Trade Law, New York, 4-8 Mar. 2002, U.N. Doc. A/CN.9/508.

16. *Id.* ¶ 27.

17. *Id.*

18. In 2006, UNCITRAL Working Group II on Arbitration published an extensive review of state practice in this area. Settlement of commercial disputes, U.N. Doc. A/CN.9/WGII/WP.139, available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

19. Austria: Code of Civil Procedure (as modified by Federal Law of February 2, 1983) Fourth Chapter, Art. 577(3) provides that “[t]he arbitration agreement must be in writing or be contained in telegrams or telex exchanged by the parties.” Belgium: Belgian Judicial Code, Sixth Part: Arbitration (Adopted 4 July 1972, amended 27 March 1985 and 19 May 1998), Art. 1677 provides that “[a]n arbitration agreement shall be constituted by an instrument in writing signed by the parties or by other documents binding on the parties and showing their intention to have recourse to arbitration.” Brazil: Law

record in Spain, Singapore and Netherlands;²⁰ and they may be made orally in New Zealand and the Canadian provinces of Alberta and Ontario.²¹ Similarly, the value of clarifying the standards for a valid agreement in circumstances in which national courts might reach different results can be very important for international contracts.

Nevertheless, it is not clear why the desire to harmonize and clarify the law must necessarily entail a willingness to forgo its advancement. It might be asked why there would exist among experts in the field of international commercial arbitration a desire to maintain a presumption *against* arbitration. Why would they wish to presume, in the absence of a particular form of evidence of the parties' intent—that of a written agreement or reference to a written agreement—that the parties intended to resolve their disputes through litigation rather than through arbitration? That is, after all, the practical effect

No. 9.307 of 23 September 1996, Art. 4 provides that “[t]he arbitration clause shall be in writing contained in the contract itself or in a separate document referring thereto.” Finland: Arbitration Act (23 October 1992/967) (in force 1 December 1992), Art. 3 provides that an arbitration agreement shall be in writing, and it lists circumstances where the writing condition is met. Hong Kong: Arbitration Ordinance-Chapter 341 (1997), 2AC provides that “[a]n agreement is not an arbitration agreement for the purposes of this Ordinance unless it is in writing.” It goes on to list the numerous situations where there is an agreement in writing. India: The Arbitration and Conciliation Act (1996), Art. 7(3) provides that “[a]n arbitration agreement shall be in writing.” Art. 7(4) provides lists of situations where there is an arbitration agreement in writing. Japan: Arbitration Law, Art. 13 contains detailed provisions providing that arbitration agreements must be in written form. Norway: Civil Procedure Code, Art. 452:2 provides that “[t]he arbitration agreement shall be entered into in writing.” Switzerland: Private International Law Statute Art. 178(1) provides that “an arbitration agreement shall be valid if made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.” Taiwan: Taiwanese Arbitration Act 1998, Chapter I, Art. 1 provides that “[t]he arbitration agreement shall be in writing.” The English Arbitration Act, Art. 5(1) provides that “[t]he provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.” The full text of these laws may be found at <http://www.kluwarbitration.com/arbitration/arb/home/>.

20. Spain: Law 60/2003 of 23 December on Arbitration (in force 26 March 2004), Art. 9 provides detailed rules on forms of arbitration agreement, in essence, “[t]he arbitration agreement shall be verifiable in writing.” Singapore: Arbitration Act 2001: Art. 4 provides that the arbitration agreement shall be in writing unless there is deemed to be arbitration agreement because there is no objection to the assertion of the existence of an arbitration agreement. Netherlands: Arbitration Act, Art. 1021 provides that “[t]he arbitration agreement must be proven by an instrument in writing. For this purpose an instrument in writing which provides for arbitration or which refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly or impliedly accepted by or on behalf of the other party.” The full text can be found at <http://www.kluwarbitration.com/arbitration/arb/home/>.

21. New Zealand: Arbitration Act 1996, Art. 7 provides that “[a]n arbitration agreement may be made orally or in writing.” Alberta Arbitration Act provides in Art. 5:1 that “[a]n arbitration agreement need not be in writing.” The same wording exists in Art. 5(3) of Ontario Arbitration Act. The full text can be found at <http://www.kluwarbitration.com/arbitration/arb/home/>.

of maintaining a fixed evidentiary standard such as a writing requirement for arbitration agreements.

VI. CIVILIZED COMMUNITIES

Perhaps one of the clearest statements of the presumption against arbitration underlying the writing requirement is that of Alan Redfern and Martin Hunter in the third edition of their text:

By agreeing to arbitrate, parties give up one of the basic rights of the citizens of any civilised community—that is to say, the right to go to their own courts of law. This is a serious step, for which written evidence is needed.²²

Indeed, the high principle reflected in the statement of these learned authors, can also be found in basic human rights laws such as Article 6 of the European Convention on Human Rights.²³ Still, in the arbitration of international commercial disputes, the observation seems to be subject to challenge on at least two grounds.

First, this statement seems to be out of step with the current evidentiary standards in related settings—standards that accord greater latitude to courts to refer to the context of the parties' dealings as a whole to decide whether, in fact, they have chosen to arbitrate or to litigate their disputes. Accordingly, in situations in which the parties have, in fact, reached some agreement, it does not give enough credit to courts or arbitral tribunals to treat them as unable to assess the evidence and make a determination of the nature of the parties' agreement in the absence of fixed standards. Written contracts may continue to be the clearest evidence of the parties' agreements, and may even tend to override other evidence to the contrary. However, in the absence of writing, there does not seem to be a compelling reason to preclude the parties from presenting evidence of an agreement that would not meet the current standards of the writing requirement. All of this is even more the case in a world of changing technologies in which the capacity to record the transmissions of audio, video, typewritten and handwritten communications

22. ALAN REDFERN & MARTIN HUNTER, *THE LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 5 (3d ed. 1999). The fourth edition, which has since been released, contains a more detailed and nuanced discussion of this point at 134-37.

23. Article 6.1 provides in part "[i]n the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The Convention is available at <http://www.echr.coe.int/echr>.

increasingly blurs the distinction between the various means of demonstrating the existence of an agreement.

Second, this statement seems to be out of step with current standards for doing business in related settings. In situations in which the parties have not, in fact, turned their minds to the method of dispute resolution for the business dealings in question, and the writing requirement serves to impute or impose a choice on the theory that it is the reasonable choice, it does not give enough credit to persons engaged in international business dealings to presume that they would prefer to litigate rather than arbitrate their disputes. It is true that where “their own courts of law” refers to the English Commercial Court or another highly regarded court that prides itself on the quality of its adjudication of international commercial disputes, it should not readily be presumed that the parties intended to forgo access to it. However, international commercial dealings, by their nature, often involve citizens from different communities (“civilized” or otherwise), and recourse to local courts may well raise the specter of hometown justice or simply a lack of expertise in handling the complexities of international disputes. The increasing use of arbitration by businesspersons who plan for dispute resolution does not support the view that recourse to the local courts is a basic right in international commercial dealings. On the contrary, it suggests that freedom from the obligation to seek recourse in the local courts or to respond to claims brought in them might properly be regarded as a basic right of persons engaged in international commerce. In the “civilized community” in which the rule of the law merchant prevails, it might reasonably be expected that situations in which a history of dealings between the parties, the customs of the trade, or industry usage suggest that arbitration is the norm, then it may be appropriate to presume it to be the parties’ choice in the absence of evidence of an agreement to the contrary. As Gerold Herrmann aptly put it, “in an international setting the thrust of an arbitration agreement is not the negative idea of excluding court jurisdiction . . .; rather, it is the positive idea of creating for an individual case something that does not currently exist, namely an international commercial court.”²⁴ To the extent that parties have come to rely on it in a particular context in the past, they should not be prevented from doing so simply because they lack a written agreement to that effect. Indeed, in some business contexts, attributing to the parties the reasonable expectation that their disputes will be resolved by an international commercial tribunal may, in fact, be far less artificial and surprising to them than the practice

24. Herrmann, *supra* note 10.

currently permitted under the Model Law of attributing to them the arrangements contemplated by a standard form contract to which scant reference may have been made in reaching oral agreement on the substantive terms of their contract.²⁵

VII. CAN WE JUST HAVE WORDS?

The efforts to maintain the writing requirement in the face of the need to accommodate new technologies and the range of commercial contexts in which international arbitration agreements are entered into has led to an incremental triumph of form over substance. Toby Landau described the outcome in respect of the English Arbitration Act, which requires only that arbitration agreements be made “by reference to terms which are in writing,” as one in which “written” has now been defined to include “oral.”²⁶ To this paradoxical observation, Alan Uzelac has added that the current work on the revision of Article 7(2) of the Model Law has now carried on longer than it took to produce the entire Model Law.²⁷

The net result is that the law lags farther and farther behind the needs of international business. The concern is not, and has never been, with those situations in which the parties are able to arrange their affairs so as to make plain their intentions for dispute resolution. The concern is with the increasingly rapid and routine transaction of business across borders, particularly business between small firms and sole proprietorships, in which there is little or no scope for negotiating the form or forum for dispute resolution. It is in these situations, just as in the traditional contexts of commodities associations, that access to familiar and reliable dispute resolution is becoming as important a feature of doing business as the ability to rely on standardized trade terms. We may well be approaching the tipping point at which it will simply no longer make sense to say that it is wrong to presume that the parties’ reasonable expectations would be met through international commercial arbitration despite the absence of a written agreement to that effect.

25. See *supra* note 17 and surrounding text.

26. Toby Landau, *The Written Form Requirement for Arbitration Agreements: When “Written” Means “Oral,”* in CONGRESS SERIES: IMPORTANT CONTEMPORARY QUESTIONS—XVITH INTERNATIONAL ARBITRATION CONGRESS, LONDON, 2002 (2002).

27. Alan Uzelac, *Written Form of the Arbitration Agreement: Case Law and the Current Work of UNCITRAL*, presented at Celebrating Success: 20 Years UNCITRAL Model Law on International Commercial Arbitration (Mar. 17, 2005).

The success of the CISG, with its presumptive application of internationally harmonized standards suggests the way forward. The many references in the Convention to provisions for dispute resolution in international sales contracts underscores the view that arbitration agreements need not be treated differently from the other provisions of international sales contracts. For example, Article 19(3) lists provisions for the settlement of disputes among those relating “to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the other” as material provisions of the contract.²⁸ Article 81(1) gives effect to the principle of separability, under which a dispute resolution clause survives the avoidance of the balance of the terms of the contract.²⁹ The inclusion in the CISG of these references to dispute resolution clauses suggests that the other articles of the Convention, including the Article 11 provision for freedom from formality, could also apply to dispute resolution agreements, including those for arbitration.

Admittedly, Article 90 of the CISG provides for deference to international agreements, raising the possibility that, despite the treatment of the dispute resolution clause as just another term of the contract, the CISG intended to permit the writing requirement of the New York Convention to prevail.³⁰ Indeed, the concern that the writing requirement for arbitration agreements could be modified only by renegotiating the terms of the New York Convention has contributed considerably to the reluctance to engage in serious review of it. However, a careful reading of Articles II and VII suggests that the Convention need not impede progress in this area and may even to promote it. Article II, which provides for the writing requirement, merely mandates the recognition of arbitration agreements in writing;³¹ it does not

28. CISG art. 19(3) provides that “[a]dditional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the other or *the settlement of disputes* are considered to alter the terms of the offer materially” (emphasis added).

29. CISG art. 81(1) provides that:

Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

30. CISG art. 90 provides that “[t]his Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.”

31. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(1) (1958) [hereinafter New York Convention] states:

prohibit the recognition of arbitration agreements in other forms. Clearly, mere permission in the Convention to recognize arbitration agreements other than in writing is not enough to create certainty across legal systems and to promote confidence in the recognition of the ensuing award.³² However, this is where the entitlement to benefit from a more favourable law under Article VII of the New York Convention comes into play.³³

To the extent that the existence and validity of a dispute resolution clause, like any other contractual provision, is determinable through reference to the applicable law, Article 11 of the CISG may be directly relevant to the formal validity of international sales contracts as applicable. This is supported by the general proposition observed by the learned authors of *Dicey and Morris* that, "the question whether a contract (or any term thereof) has come into existence depends on the law by which the contract would be governed if the contract (or term) were valid."³⁴ But it is also supported by the fact that although Article 90 of the CISG encourages deference to the New York Convention, Article VII(1) of the New York Convention affords the benefit of the informality of the CISG, and both Article II(1) of the New York Convention and Article 11 of the CISG permit the recognition of arbitration agreements as valid despite the absence of writing. Perhaps more significantly, it accords

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

32. See *Decision of the Halogaland Court of Appeal (Norway), August 16, 1999, published in Yearbook of Commercial Arbitration XXVII—2002 at 519* (Albert Jan van den Berg ed.), in which the Norwegian court refused, pursuant to the writing requirement in Article II of the New York Convention, to enforce the award even though the arbitration agreement was held to be valid as to form under the law of the seat; see also ALAN REDFERN ET AL., *THE LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 136 (4th ed. 2005).

33. New York Convention art. VII(1) provides that:

The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

In 2006, at its 44th session, UNCITRAL Working Group 2 on Arbitration considered whether to adopt a recommendation: [T]hat article VII(1) of the Convention should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

U.N. Doc. ACN.9/WG.II/WP.139.

34. DICEY AND MORRIS ON THE CONFLICT OF LAWS 430 (Lawrence Collins et al. eds., 13th ed. 2000).

with the practical reality of ordinary commercial dealings. Businesspersons are likely to be more aware of the terms of the agreement and perhaps even of the effect of the applicable law on those terms than they are of the interpretation that might be placed on them by a national court to which they had not thought their dispute might be submitted. Where they operate in a business environment that recognizes agreements without fixed requirements as to form, the arbitrary imposition of such requirements by the application of the law of some other country in the course of deciding whether to recognize an arbitral award is unlikely to meet with the parties' reasonable expectations.

Of course, this represents a relatively narrow opportunity for advancing the law. It is confined to international sale of goods agreements governed by the CISG, and beyond this, to those in which the parties' intent to arbitrate may be demonstrated with sufficient specificity to make the commencement of the arbitration practicable. A history of dealings between the parties in the industry that would indicate their expectations as to the composition of the tribunal, the method of appointment, the terms on which the arbitration is to be administered, and other logistical features of the arbitration would all be important to establish evidence of the parties' agreement and a means to implement it. Nevertheless, relaxing the formal requirements for arbitration agreements and thereby signaling the end of the presumption against arbitration would mark a welcome step forward—not one that would produce a situation in which parties would be likely to be forced into an arbitration to which they had not agreed, but one in which an arbitral tribunal would be afforded the opportunity to determine on all the evidence whether it had jurisdiction under an expanded scope for the operation of *Kompetenz-Kompetenz*, a principle with which we are becoming increasingly comfortable. Perhaps, in time, a new standard for requirements of form will emerge that would be similar to that of the Brussels Regulation for forum selection clauses.³⁵ Then, it would be possible, when agreeing to disagree, just to have words.

35. See *supra* note 9 and surrounding text.