Introduction

- Nature of international sales transactions
- Modifications often necessary
- CISG and freedom of form Art 11
- Party autonomy Art 6
- No Oral Modification (NOM) clauses
- Formalities
  - Writing
  - Signature
“No amendments and additions to the present Contract shall be **valid** unless the same are in **writing** and signed by duly authorized representatives of both parties.”

NOM clauses

- Usually hidden away as part of standard terms

- Purpose
  - Evidential
    - Provide tangible evidence
    - Proof of authority
  - Constitutive
    - No change unless formalities complied with
    - Presumption in favour of constitutive function

- Art 29(2) CISG
Art 29(2)

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.
Writing

- Both offer and acceptance in writing
- What is writing
  - Telex and telegram Art 13
  - Electronic communications
    - Email, whatsapp, texting (sms)
    - CISG Advisory Council Opinion 1

“The term "writing" in CISG also includes any electronic communication retrievable in perceivable form”
Article 9. Form requirements

2. Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.
Writing requirement more likely to be complied with in the electronic era
Signature is more problematic
Purpose of signatures
  • Authentication
  • Assent
  • Identification
Electronic signatures

- Problematic from the outset
  - UNCITRAL Model Law 1996
  - UNCITRAL Model Law 2001
  - UN Electronics Convention of 2005
Various solutions

- Technology specific – e.g. PKI, biometrics
- Functional equivalence – appropriate for the specific context
- Two tiered approach
  - Simple electronic signatures
  - Advanced electronic signatures

UNCITRAL study 2007

Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods
3. Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

(a) A method is used to identify the party and to indicate that party’s intention in respect of the information contained in the electronic communication;

and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.
Signature - Conclusion

- Often difficult to comply with
- Uncertainty
- Commercially unreasonable
NOM clauses perceived to be important
- Widely used
- Supported by Art 29 CISG
- Consider carefully which formalities
  - Writing ✓
  - Signature x
- Consider redrafting standard terms