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APPLICATION OF THE CISG TO INTERNATIONAL GOVERNMENT CONTRACTS FOR THE PROCUREMENT OF GOODS

Harmonization is one of the most sought goals in international transactions and one of the main purposes of international treaties and agreements dealing with international commerce. The United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) can offer benefits to government procuring agencies in their international purchases. Conversely, some of its characteristics require the attention of state parties. International government purchases and sales are under the scope of the CISG. Procuring agencies must be aware of the CISG's potential benefits and special requirements. In international government purchases or sales in which the provisions of the CISG are not excluded or derogated, the parties will be subject to the effects of the CISG. This article is based on existing case law, current practice of certain national governments and international agencies, and on a joint interpretation of the CISG and international public procurement models. It aims to discuss the interaction between the CISG and public procurement regulations and to delve into the potential gains for government procuring entities in adopting the uniform contract regulation of the CISG to govern their international transactions with goods. It examines

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potential difficulties in public procurement proceedings when the CISG applies alongside domestic public procurement legislation.

Key words: *CISG, harmonization, international government purchases, public procurement regulations, uniform contract regulation*

INTRODUCTION

The United Nations Convention on the International Sale of Goods (CISG) originates from the efforts of UNCITRAL – United Nations Commission on International Trade Law. This UN Commission is generally charged with recording information and disseminating knowledge regarding the CISG.

It is interesting to realize that the same commission has developed an entirely separate body of rules and recommendations concerning government procurement. This takes the form of a model law, not a convention for a uniform law such as the CISG. The obvious difference is that, while the CISG becomes national uniform law when it is signed and ratified, the UNCITRAL Model Law on Public Procurement is only a reference for national legislators. Nonetheless, the model law is widely acknowledged as an important tool in shaping many countries' regulations of government purchases.[1]

Some states have gone beyond the mere use of the model law as guidance and have joined the Government Procurement Agreement (GPA) under the World Trade Organization (WTO) framework. This is an international convention that creates harmonized rules based on common principles of fairness and probity. It also ensures national treatment to foreign bidders from the other Parties. The GPA was revised in 2011 and the revision entered into force in April 2014. Prior to its future accession, each prospective new member is required to negotiate with all the others to define coverage and legislative harmonization.

Many governments also rely on funding from international financial agencies such as the IRDB – International Reconstruction and Development Bank (World Bank) or any of the other various similar institutions. While they make funding available, such institutions also ensure that the expenditure of such funds

[1] For several aspects of international public procurement, including the UNCITRAL Model Law and the GPAWTO, see Sue Arrowsmith, John Linarelli Jr., Don Wallace, *Regulating Public Procurement. National and International Perspectives*, Kluwer Law International, 2000; Sue Arrowsmith, Martin Trybus, *Public Procurement: The Continuing Revolution*, Kluwer Law International, 2003; Peter Trepte, *Regulating Procurement*, Oxford University Press, 2004. On the changes introduced in the 2011 version of the Model Law see Caroline Nicholas, *The 2011 UNCITRAL Model Law on Public Procurement*, UNCITRAL Secretariat, 2012, 21 P.P.L.R., NA111.

by the recipient government does not discriminate against nationals of other member states. This is achieved through the mandatory application in many cases of certain guidelines issued by the financial agencies themselves.

International government procurement has therefore been the subject of attention by governments, international organizations, and potential suppliers in a variety of forms and angles. The most attention is directed to the harmonization of rules and the avoidance of nationality-based discrimination. The purposes are to ensure access to a global marketplace and give international suppliers a minimum level of foreseeability in the applicable rules.

The CISG has similar purposes from a contractual standpoint. It aims to provide legal uniformity as an instrument to facilitate and foster international commercial transactions. It is somewhat surprising that such international instruments or institutions do not explicitly adopt more often (or rather hardly ever adopt) the CISG as a tool for international harmonization.[2] Some of the reasons for this omission are discussed below.

This article aims at examining certain effects of the CISG on government contracts. It also intends to shed light on the potential benefits of the CISG and to discuss the rights of individual suppliers when the CISG is affirmatively adopted or not effectively excluded or derogated in international government purchases.

SPHERE OF APPLICATION

Articles 1 to 3 CISG generally define the Convention's sphere of application. Article 1(1) provides that "[*t*]his Convention applies to contracts of sale between parties whose places of business are in different States" when both states are CISG contracting states or when the conflict of law rules lead to the application of the laws of a contracting state. International treaty law determines whether a certain country is a contracting state under the CISG. In accordance with Article 99(2) CISG, the Convention enters into force with regard to any state "on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession". Therefore, all the discussion in this article relates to the possible application of the CISG only

[2] See UNCITRAL, Guide to Enactment of the UNCITRAL Model Law on Public Procurement, 61-62, *https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/guide-enactment-model-law-public-procurement-e.pdf*, 20.10.2023. The commentary to Article 3 of the Model Law does not yet address the CISG as a possible international commitment with impact on public procurement.

when a given contract falls under the sphere of application arising from Articles 1 to 3 CISG. If, for instance, one of the countries involved in the relevant contract is not a CISG contracting state and the CISG is not applicable under its Article 1(b), either because the applicable law is that of the non-contracting state or the other country is also not a contracting state, domestic law or other international instruments will apply, and the discussion in this article will be irrelevant.

Article 1(3) complements the provisions regarding the sphere of application and commands that "[…] nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention". The exclusions in Article 2 and the clarifications in Article 3 further define the scope of application of the CISG.

The provision concerning the irrelevance of the civil or commercial character of the parties, or the contract is especially interpreted to mean that the CISG governs any international sales – or, conversely, purchases – of goods, regardless of the nature of the parties or the contract. Government entities are active in international sales, mostly as buyers but potentially also as sellers.[3] Therefore, the CISG sphere of application comprises contracts concluded by national governments at central or sub-central levels. It also comprises contracts subject to either private or public law in states that acknowledge such distinction.[4]

GOVERNMENT PURCHASES AND THE CISG

Applicability of the CISG to Government Purchases

The international interpretation of the CISG assumes generally that the CISG is fully applicable to contracts to which states are parties. This encompasses government departments or agencies, such as those responsible for defense purchases, and any type of government-owned or government-controlled corporations found in many jurisdictions. The state entity can be a purchaser or a seller; oil and gas contracts can often involve government entities as sellers, for instance.

Some of the main international commentators of the CISG have examined this topic and are in favor of the potential application of the CISG to government

[3] In many countries, government entities may be involved in the international supply of goods, especially commodities such as metals or oil and gas. The commercial or administrative nature of such transactions is a matter governed by domestic law. However, they all fall under the general scope of application of the CISG.

[4] In the CLOUT Case No. 1824, the Swiss Federal Supreme Court applied the CISG to a contract entered into by a Swiss state-owned entity.

contracts.[5] Ulrich Schroeter advances a persuasive explanation regarding the context of international purchases in which a supplier is selected through a tender process:

> "The CISG furthermore also applies to international sales contracts concluded with a seller which has been selected by way of a call for tender (invitation to tender, call for bids). This form of contract initiation is frequently employed for purchases by private companies but, occurs particularly often in cases in which the buyer is either a government authority (public procurement) or a private company acting in order to fulfill a contract with a government. Domestic laws which govern call for tender often impose certain rules designed to guarantee the fair selection of the successful tenderer (e.g., principle of non-discrimination, preference for the tender which offers the lowest price or is the 'economically most advantageous'). Within the EU, such rules are often based on EU Procurement Directives, which seek to protect foreign tenders (sellers).
>
> Since domestic laws in this field primarily aim at regulating the phase leading up to the selection of the successful tenderer, the contract can subsequently be concluded in accordance with arts 14–24 without resulting in any conflict between the two sets of rules. The tenders accordingly constitute offers under art. 14(1), among which the successful tender is accepted by way of the award decision which at the same time constitutes the acceptance under art.18(1). Domestic provisions declaring null and void such contracts which have been concluded in violation of public procurement information duties or time periods can be applied to CISG contracts by virtue of art. 4, sentence 2(a).

[5] Peter Schlechtriem, "Unification of the Law for the International Sale of Goods", *German National Reports (Private Law and Civil Procedure) XIIth International Congress of Comparative Law*, Nomos, Baden-Baden, 1987, 126-127; Ingeborg Schwenzer, "Introduction", *Commentary on the UN convention on the international sale of goods (CISG)* (Eds. I. Schwenzer, U. Schroeter), 5th Edition, Oxford University Press, Oxford, 2022, 8 ("Classifying a public body's procurement contracts as 'matters subject to public law' could curtail or exclude the application of the CISG or its individual rules almost at will"); John O. Honnold, Harry M. Flechtner, *Uniform Law for International Sales Under the 1980 United Nations Convention*, 4th Edition, Wolters Kluwer, London, 2009, 180-183; Jacob Ziegel, "The Scope of the Convention: Reaching out to Article One and Beyond, *Journal of Law and Commerce*", Vol. 25, 2005/2006, 59-73; Ulrich Schroeter. "Grenzfragen des Anwendungsbereichs und international einheitliche Auslegung des UN-Kaufrechts (CISG): Zugleich Anmerkung zu Appellationsgericht Basel-Stadt vom 24.8.2018 – ZB.2017.20 (AG.2018.557)", *Internationales Handelsrecht (IHR)*, 2019, 135–136; Daan Willems, "Application of the CISG to Contracts with Public Authorities", *EU and Private Law*: *Trending Topics in Contracts, Successions, and Civil Liability* (Eds. B. Heiderhoff, I. Queirolo), Editoriale Scientifica, Napoli, 2023, 170.

> If, on the contrary, the domestic law on (public or private) calls for tender provides for remedies which are incompatible with the Convention's rules – as, e.g., claims for damages for failure to enter into a contract in situations in which the offer was freely revocable under the CISG – such remedies are pre-empted by the Convention."[6]

These remarks explain in part why one cannot find internationally a large number of cases applying or discussing the CISG in matters involving government entities.[7] In many national laws, unlike in most Latin American countries[8] and in the United States, the specific regulation of government procurement focuses only on the selection of the contractor, not on the formation of the contract or the subsequent contract administration or performance (rights and obligations of the parties). This restriction is also true in multinational systems such as the EU Directives, the UNCITRAL Model Law and the GPA/WTO. In addition, larger or more complex purchases are often made through local vendors or with suppliers with places of business in the country of the purchasing government. In Brazil, to use this country as an example, to supply goods under a contract that requires substantial local activities in Brazil – such as assembly, commissioning, and post-sale support – a foreign company must be previously "authorized to operate in Brazil" (Article 1134 of the Brazilian Civil Code). This may eliminate the international character of the sale and make the CISG inapplicable unless (a) the vendor is able to obtain such authorization regardless of not having a local

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[6] Ulrich Schroeter, "Introduction to Articles 14–24 CISG: General Questions Regarding the Formation of the Contract" *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 5th Edition, Oxford University Press, Oxford, 2022, 294-295.

[7] Regarding this topic under Brazilian law, see Cesar Pereira, "Aplicação da CISG a licitações e contratos administrativos de compra internacional de mercadorias", *CISG, Brasil e Portugal* (Eds. I. Schwenzer, P. Costa e Silva, C. Pereira), Almedina, São Paulo, 2022, 137-160; Flavia Faermann, *Estudo sobre a CISG e seus reflexos na ordem interna*, LL.M. Federal University of Rio Grande do Sul, Faculty of Law, Supervisor: Vera Maria Jacob de Fradera, Porto Alegre, 2018; Melina Kurcgant, "Os contratos administrativos e a Convenção de Viena sobre venda e compra internacional de mercadorias", *Fórum de Contratação e Gestão Pública,* Belo Horizonte, Vol. 13, No. 152, 2014, 54–64.

[8] For Brazil as a reference for similar regulations in Latin America, see Marçal Justen Filho, Cesar Pereira, *Infrastructure Law of Brazil*, 3rd Edition, Forum, Belo Horizonte, 2012; For the US government procurement regulation concerning contract formation and administration, see John Cibinic Jr., Ralph C. Nash, James F. Nagle, *Administration of Government Contracts*, 4th Edition, Wolters Kluwer, London, 2006; John Cibinic, Jr., Ralph C. Nash, Cristopher R. Yukins, *Formation of Government Contracts*, 4th Edition, Wolters Kluwer, London, 2011; Steven W. Feldman, *Government Contract Guidebook*, 4th Edition, Thomson Reuters Westlaw, 2013; W. Noel Keyes, *Government Contracts under the Federal Acquisition Regulation*, 3rd Edition, Thomson West, 2003.

basis (place of business) in Brazil or (b) the seller's relevant place of business, as defined by Article 10(a) CISG, is outside Brazil.

The acknowledgment that government contracts are in the sphere of application of the CISG is just a starting point for understanding the problems regarding international government purchases. The CISG is primarily a body of dispositive rules, which can be excluded or derogated by the will of the parties and applied only in the absence of contrary agreement, with only a few exceptions. Nonetheless, this acknowledgment is an essential element to ensure clarity regarding the rules governing such transactions, especially in view of the CISG rules of which the parties cannot voluntarily contract out of or around.

There are significantly fewer reported court and arbitral decisions dealing with government contracts and the CISG than the economic significance of such marketplaces would suggest. International experts estimate a country's government procurement market at around 10–15 per cent of the country's GNP (Gross National Product). Many of the world's largest economies take part in the GPA/WTO, which among other things ensures access to a substantial portion of each country's government procurement marketplace. In addition, in many large economies such as China and certain countries in Latin America and the Middle East a significant part of the economy's transactions involves government-controlled companies subject to government procurement regulations. There is a constant interplay between government procurement rules and the law governing international transactions, namely the CISG.

Government Purchases under Article 2 CISG

Government contracts are also not excluded by Article 2 CISG. Article 2(b) CISG excludes sales made through "auctions". In many countries, such as in Brazil, reverse auctions or procurement auctions are one of the most used procurement methods. In addition, government agencies often sell in auctions goods that are no longer in use or that have been apprehended in criminal actions. One could object to the applicability of the CISG by assuming that no sale or purchase made through an auction of any kind would be covered by the Convention. However, this argument has been examined and rejected by commentators given the limited purpose of the Article 2(b) CISG exclusion.[9] The same goes for framework agreements or

[9] Pascal Hachem comments on Article 2(b) CISG and explains that "[…] a contract 'awarded' to the highest bidder in a public (international) procurement bid can very well be governed by the CISG"; Pascal Hachem, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Eds. I. Schwenzer, U. Schroeter), 5th Edition, Oxford University Press, Oxford, 68.

IQID (indefinite quantity, indefinite delivery) contracts: they are covered by the CISG when governments are involved in the same way and with the same restrictions as when the parties are private.

Article 2(a) CISG exclusion does not extend to international purchases made by governments. Although a government entity will not ordinarily purchase the goods for resale or as inputs for industrial activities, it does not generally meet the requirements for treatment as a consumer (purchaser for personal, family or household use) under the CISG.[10] In addition, the exclusion of Article 2(a) CISG is not dependent on the concept of consumer transactions given by each country's own domestic consumer law.[11] Even if a government entity can be protected as a consumer under its own law and for certain specific purposes,[12] it does not follow that its international purchases or sales will be excluded as consumer transactions under Article 2(a) CISG.[13]

Current Standpoint: International Case Law and Practice

The existing international case law often upholds the premise that government contracts are generally within the CISG's sphere of application. The Hilaturas Case, which was resolved in 2008, stands out in this regard.[14] It dealt with the supply

In the same sense, Stefan Kröll, Loukas Mistelis, María del Pilar Perales Viscasillas. *UN Convention on Contracts for the International Sale of Goods*, 2nd Edition, C. H. Beck, Hart, Nomos, 2018, 47.

[10] See P. Hachem (2022), op. cit., 62-68.

[11] For the relationship between the CISG and domestic consumer law, see Ana Carolina Aguiar Beneti, "A Convenção de Viena sobre Compra e Venda Internacional de Mercadorias (CISG) e a questão do Direito do Consumidor", *CISG, Brasil e Portugal* (Eds. I. Schwenzer, P. Costa e Silva, C. Pereira), Almedina, São Paulo, 2022, 87-102.

[12] Marçal Justen Filho shows that government contracts are not covered by consumer protection law, only by government procurement law and the provisions of the solicitation and the contract. Consumer law could only apply in exceptional circumstances of a purchase of goods or services directly in the marketplace (Marçal Justen Filho, *Comentários à Lei de Licitações e Contratações Administrativas*, 2nd Edition. RT Thomson Reuters, São Paulo, 2023, 994). The Brazilian Superior Court of Justice ruled in 2010 that consumer law is not generally applicable to government contracts. It will only apply in exceptional circumstances when the government entity is the weaker party in the contract due to specific circumstances of the contract at hand (STJ, RMS 31.073, Rel. Min. Eliana Calmon, Ruled on August 26, 2010).

[13] For the CISG prevalence over domestic consumer protection law, see P. Hachem, op. cit., 66-67.

[14] *Hilaturas Miel, S.L. v. Republic of Iraq*, 573 F. Supp. 2d 781 (S.D.N.Y. 2008), CISG-online No. 1777. The case is also reported by U. Schroeter, op. cit., 294, fn. 401.

of goods to the Iraqi government by a Spanish supplier under the Oil for Food program. The case was ruled in favor of the Iraqi government with grounds on the CISG. Another similar case is ETECSA (Empresas de Telecomunicaciones de Cuba S.A.), involving the purchase by a Cuban mixed-capital company – controlled and partly owned by the government – of cell phones supplied by a South-African vendor. The case was heard by Sala de lo Económico del Tribunal Supremo Popular in Havana, Cuba, on June 16, 2008.[15] A third case discussing the CISG involving government entities is *Agropodderzhka Trade House LLC v. Sozh State Farm Complex*, heard by the Economic Court of the Gomel Region of Belarus on March 6, 2003.[16]

Other cases often mentioned by scholars illustrate ordinary situations involving international government transactions and their relationship with the CISG. In the Russian submarine case, the Russian government sold a decommissioned submarine to a foreign party as scrap material. The decision applied the exclusion of Article 2(e) CISG to conclude that the sale of a ship or vessel was not covered by the CISG, and that the good at issue was still a ship even if considered inactive by the seller.[17] In a case in which the state of Slovenia purchased weapons from an Austrian supplier, a private local Slovenian company intermediated the transaction, but the negotiations were conducted by the then recently formed government (in 1993).[18] The Diversitel case dealt with a subcontract for the purpose of finally supplying certain pieces of equipment to the Canada Department of Defense. The delay in performance by a vendor located in California was considered a fundamental breach because it prevented the Canadian buyer Diversitel from timely performing its supply contract with the Canadian government.[19]

In 2019, the Swiss Federal Supreme Court held that the CISG was applicable to a contract between a Swiss state-owned company and a Slovenian supplier subsidiary in Switzerland.[20]

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[15] Cuba – Jurisprudencia, *http://www.cisgspanish.com/seccion/jurisprudencia/cuba/*, 20.10.2023.

[16] CLOUT Case No. 496.

[17] Russia, 18 December 1998, Maritime Commission Arbitration proceeding 1/1998.

[18] Austria, 24 February 1999, Appellate Court Graz (Military Weapons Case).

[19] Ontario Supreme Court of Justice, *Diversitel Communications Inc. v. Glacier Bay Inc*. This case is reported by U. Schroeter, op. cit., 295, fn. 402.

[20] CLOUT Case No. 1824 (Abstract by Ulrich Schroeter); CISG-online No. 4463. Commentary to the 2018 decision of the Swiss Court of Appeal Canton Basel-Stadt (CISG Case Number 3906) in the Electronic Electricity Meters Case, later confirmed by the Swiss Federal Supreme Court: Ulrich Schroeter, "Grenzfragen des Anwendungsbereichs und international einheitliche Auslegung des UN-Kaufrechts (CISG): Zugleich Anmerkung zu Appellationsgericht Basel-Stadt vom 24.8.2018 – ZB.2017.20 (AG.2018.557)", *Internationales Handelsrecht (IHR)*, 2019.

The Brazilian government frequently uses offices in the United States, usually in Washington, D.C. or in New York, for military purchases. The corresponding contracts provide for the application of the local law of the District of Columbia or New York, with the express exclusion of the CISG. Although the exclusion rules out the application of the CISG – and, for the reasons explained later in this text, it should be reviewed by the Brazilian government –, it is an important recognition that such international contracts are covered by the CISG, which only does not govern them in view of the exclusion allowed by Article 6 CISG.

The active role performed by state-owned entities in transactions related to the Covid-19 pandemic shed light to the possible applicability of the CISG to public procurement of goods. The EU-AstraZeneca contract for the purchase of vaccines in the European Union ("APA") is one prominent example.[21] The APA concluded in 2020 was governed by the laws of Belgium, a Contracting State to the CISG. When the European Union brought a claim relating to the APA before the Belgian courts, the Court of First Instance of Brussels merely stated that "[*t*]he agreements must be interpreted with regard to the common intention of the parties, in accordance with Article 1156 of the former Civil Code"[22], thus not resolving the question of the applicability of the CISG.[23]

At least one of the agreements signed by the Brazilian government concerning the international purchase of vaccines during the Covid-19 pandemic came to public knowledge upon its conclusion.[24] Its language revealed a choice of law clause that does not appear to exclude the CISG ("All disputes shall be governed by the Laws of the State of New York, USA, excluding, however, its conflict of law provisions other than Section 5-1401 of the Law New York General Obligation Bonds, except that any dispute regarding arbitrability or the scope and application of this Section shall be governed by the United States Federal Arbitration Act" – item 12.4 of the Agreement 52/2021).[25]

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[21] Advance Purchase Agreement (APA) for the Production, Purchase and Supply of a Covid-19 Vaccine in the European Union, *https://commission.europa.eu/system/files/2021-01/apa_astrazeneca.pdf*, 21.10.2023.

[22] *European Union v. AstraZeneca AB*, Court of First Instance of Brussels, Decided on 18 June 2021. Original in French: "Les conventions doivent être interpretées au regard de l'intention commune des parties, conformément à l'article 1156 de l'ancien Code Civil".

[23] The issue was addressed in scholarly writing: Ben Köhler, "Global sales law in a global pandemic: The CISG as the applicable law to the EU-AstraZeneca Advance Purchase Agreement?", *Conflict of Laws.net*, 2021.

[24] The agreements signed by the Brazilian government are listed and available in Portuguese, *https://www.gov.br/saude/pt-br/acesso-a-informacao/licitacoes-e-contratos/coronavirus*, 23.10.2023.

[25] Regarding the non-existence of exclusion of the CISG by reference to "New York State Laws", see New York Governing Law in US-Style Commercial Agreements. *https://www.jdsupra.com/legalnews/new-york-governing-law-in-us-style-22799/*, 23.10.2023, and Court Analyzes Application of

In a 2022 decision, the Supreme Court of New York applied the CISG to a public procurement of masks tendered in the early stages of the pandemic. The court held the CISG is a "self-executing" treaty and there was no clear intention to exclude the applicability of the CISG.[26]

Lastly, many governments and procuring agencies already acknowledge the application and relevance of the CISG in government purchases. In a classic work on the US Federal Acquisitions Regulation (FAR), W.N. Keyes discusses the CISG as part of the rules applicable to international purchases ("international acquisitions" in the book's terminology).[27] In 2005, G. Bell reported that the Singapore government had started to define the CISG as applicable law in its international contracts.[28] In an unpublished paper dated 2013, Hanson mentions the New Zealand practice, which takes into consideration the manual prepared for the New Zealand government as guidance for foreign bidders. The material expressly mentioned the CISG as part of the system of rules governing such purchases, and the New Zealand government included the reference in an explanation of rules relating to international tender procedures. The provision was removed in a later version of the handbook, which alluded instead to the "common law of contracts"[29] – thus including the CISG only implicitly. The World Bank standard tender rules for the purchase of goods recommended the adoption, as applicable law, of the purchasing country's law, without making reference to any exclusion of the CISG.[30] Therefore,

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UN Convention on Contracts for International Sale of Goods, *https://www.schlamstone.com/blogs/commercial/2015-10-28-court-analyzes-application-of-un-convention-on-contracts-for-international-sale-of-goods,* 23.10.2023.

[26] Matter of New York State Dept. of Health (Rusi Tech. Co., Ltd.). Supreme Court of New York [Trial Court]. Decided on January 25, 2022.

[27] W. Noel Keyes, *Government Contracts Under the Federal Acquisition Regulation*, West Group Publishing, 2003, 566–569.

[28] Gary Bell, "Why Singapore Should Withdraw its Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG), *Singapore Year Book of International Law*, 2005, 55–73, fn. 36: "A happy exception is now found in the standard procurement contract terms of the Government of Singapore which, in most cases, no longer excludes the CISG. The standard choice of law clause now reads: 'This Contract shall be deemed to be made in Singapore and shall be subject to, governed by and interpreted in accordance with the Laws of the Republic of Singapore for every purpose'"; See Guide to Singapore Procurement, issued by the Government of Singapore, *https://www.gebiz.gov.sg/singapore-government-procurement-regime.html#guide-for-suppliers*, 20.10.2023.

[29] New Zealand Government Procurement, Principles, Charter and Rules, *https://www.procurement.govt.nz/procurement/principles-charter-and-rules*, 23.10.2023.

[30] World Bank, Policy & Procedure Framework, *https://policies.worldbank.org/en/policies/all/ppfdetail/a3656cb7-8847-417b-886f11fa0235216e*, 23.10.2023.

if the purchasing country is a CISG contracting state or if the applicable private international law leads to the application of the law of a contracting state (CISG, Article 1(a) and 1(b), respectively), the World Bank rules should lead to the application of the CISG unless the parties have agreed otherwise under Article 6 CISG.

This brief review of scholarly writings and case law leads to the conclusion that international purchases made by government entities are comprised in the CISG abstract sphere of application. This conclusion is a starting point for a detailed discussion of the many problems arising from the interplay between the CISG and the domestic and international regulation of government procurement.

The CISG is generally applicable to international sales regardless of whether government entities are involved. A *lex specialis* argument to favor domestic government procurement law over the CISG is not persuasive. If the government procurement law may be considered special because it deals with public sales whether domestic or international, the CISG is equally special because it deals with international sales whether public or private. The CISG prevails with regard to international sales because it is the outcome of an international treaty. The full application of the CISG, excluded or derogated only in accordance with its own Article 6, corresponds to a commitment made by each contracting state toward each and all the others.

APPLICATION OF THE CISG TO GOVERN ITS OWN EXCLUSION OR DEROGATION

In strict legal terms, the main and most immediate consequence of the conclusion that government contracts for the international purchase or sale of goods are within the CISG's sphere of application is that the CISG's secondary rules[31] (rules of structure or competence – the ones dealing with interpretation of contracts and construction of the parties' conduct) will always apply. These are the CISG rules that govern the Convention's own exclusion or derogation.

In most situations, the CISG allows the parties to agree on the exclusion or derogation of its provisions. Therefore, the CISG will only govern a certain transaction between a seller and a buyer if the parties have not effectively excluded its application. The CISG is the legal source of the validity and effectiveness of the parties' actions that exclude or derogate the CISG's own provisions. Such actions are interpreted within the framework of the CISG, including the principle of uniform

[31] The reference is to H. L. A. Hart. Hart's classification of rules in its Concept of Law: primary rules govern conduct; secondary rules govern the enactment, modification, interpretation, application, and enforcement of primary rules.

international application (Article 7 CISG). This guideline will require attention to international commentary and case law from the parties and the domestic decision-maker. Otherwise, domestic views concerning the power to exclude or derogate may undermine the application of uniform law and the CISG's international character. This concern is especially true in jurisdictions where government entities are considered to have certain extraordinary prerogatives in government contracts, in affiliation with the French notion of administrative contract (*marché public* and *contrat administratif*). The introduction of the CISG in a certain national context creates normative restrictions to the exercise of government prerogatives. The structural provisions contained in Articles 6 to 9 will generally govern the extent to which the parties – typically a government entity and a private supplier – will have excluded or derogated from the CISG.

The main structural provisions (secondary rules) of the CISG are those dealing with exclusion or derogation (Article 6), interpretation and related principles such as uniformity and internationality (Article 7), broad admissibility of evidence and guidelines for the qualification of a party's conduct (Article 8) and uses and practices as source of duties (Article 9). Even if the government entity deliberately opts to exclude or derogate from certain provisions of the CISG, as allowed by Article 6 CISG, this option will be recognized, construed, and given legal significance in accordance with the CISG own provisions. As Pascal Hachem put it, "[*t*]he formation and interpretation of the exclusion of the CISG is subject to the rules of the Convention, as the CISG determines its sphere of application autonomously".[32] In a later work, Pascal Hachem further explains this issue as follows:

> "Where the CISG is objectively applicable, its rules on the formation of contracts must also govern the question of whether an agreement on the exclusion of the Convention has been formed. This notion appears to be undisputed. However, the exclusion of the CISG is typically part of a choice of law clause which at the same time designates the law the parties intend to apply instead of the Convention. The prevalent rule in private international law is that it is the law designated by the parties which governs the formation of the positive choice of law, that is the choice of the law that is intended to apply to the contract. It seems to me that while clearly it is the role of the CISG to decide whether the parties managed to opt out of it, it is just as clearly not the role of the CISG to decide whether the parties also successfully opted into the chosen law."[33]

[32] P. Hachem (2022), op. cit., 119.

[33] P. Hachem, "Applicability of the CISG – Articles 1 and 6", *Current Issues in the CISG and Arbitration* (Ed. I. Schwenzer, Y. Atamer, P. Butler), Eleven, 2014, 37. Hachem concludes that

RELATIONSHIP BETWEEN THE CISG AND DOMESTIC GOVERNMENT PROCUREMENT LAW

Governments in general usually adopt in their government contracts a reference to their domestic public procurement laws and regulations. They also tend to use detailed contracts to carefully describe the rights and obligations of each party. Article 6 CISG governs the relationship between such choices and the CISG general provisions. The reference to domestic law and detailed contractual provisions amount to an exclusion or derogation of the CISG, as seen below in this article.[34]

International commentary points out that the two main points of contact between the CISG and any domestic government procurement law are the issues of *validity* (Article 4 CISG) and *freedom of form* (Articles 11, 12 and 13 CISG). Validity is generally excluded from the scope of the CISG, and it is closely related to issues of agency – or, in administrative law terminology, competence and mandate of the procuring agency or official. Freedom of form could, in theory, lead to oral agreements between a government agency and its suppliers.

Article 4 excludes validity from the CISG's sphere of application. Therefore, the selection method for determining the contractor or supplier is normally considered to be outside the scope of the CISG. In countries where domestic procurement law does not govern the content of the contract, only the selection of the contractor, the application of the CISG to international government purchases should be commonplace and not raise any specific concern.

The same reasoning explains the situation of agent-principal relationship – or competence of the procuring agency and respective officials. Domestic administrative law will define who the competent official is to act on behalf of the government. This definition is outside the CISG and has no bearing in the application of the CISG. This is why commentators strongly stress that the identification of true agency or competence issues must be strict. An undue confusion between issues of *competence* and *form* can lead to an improper expansion of the field that is excluded from the CISG's sphere of application.

On the other hand, the *freedom of form* enshrined in Article 11 is generally seen as a point of potential conflict with domestic government procurement

"one may interpret an exclusion of the CISG to have been made under the caveat that the choice of law option must, at the same time, be successful", 38.

[34] D. Willems refers to the mention of Belgian regulations on public procurement of goods in contracts as an example of exclusion of the CISG by reference to a specific national body of law, since there are conflicting provisions that render the CISG excluded (D. Willems, op. cit., 165).

regulation. Domestic procurement laws generally require government contracts to be made in writing.

Honnold points out that scholars adopt one of two possible interpretations about the interplay between Articles 4 and 11 CISG regarding government contracts required to be made in writing by domestic law.[35]

One line of thinking considers that the freedom of form (Article 11 CISG) is overridden by the domestic law requirement since this is an issue of validity, and Article 4 CISG excludes validity from the sphere of application of the CISG. However, this will take place only if the written form requirements under domestic law are justifiable and not merely a formality.

The other view considers that Article 11 CISG is an exception admitted by Article 4 CISG. This latter provision defines that "[…] except as otherwise expressly provided in this Convention, [*the CISG*] is not concerned with: (a) the validity […]". By providing that "[*a*] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form", Article 11 CISG is an exception to Article 4 CISG. Therefore, it provides for freedom of form even when domestic law requires written form for government contracts. In this view, the CISG freedom of form supersedes the domestic form requirement and makes it inapplicable. It is not a matter of validity under Article 4 because Article 11 is an exception to Article 4 and places this issue under the coverage of the CISG.

This paper takes the latter view. However, as demonstrated below, the adoption of a domestic government procurement law may amount to a derogation from the CISG under Article 6 CISG. In this context, Article 11 CISG will not apply because of the Article 6 derogation, not due to the Article 4 exclusion.

DOMESTIC GOVERNMENT PROCUREMENT LAW AS A DEROGATION FROM THE CISG (ARTICLE 6)

In general, a government contract will be made in writing and contain reference to the applicable domestic law.[36] It will also contain as contractual clauses many or most of the applicable legal provisions regarding each party's obligations and the consequences of their breach.

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[35] J. Honnold, H. M. Flechtner, op. cit., 181–183.

[36] For instance, the standard Belgian public procurement provides for the applicability of specific national regulations, namely "Public Procurement Act of 17 June 2016, Legal Protection Act of 17 June 2013, RD Award of 18 April 2017 and RD Performance of 14 January 20013" (D. Willems, op. cit., 165).

Such references and clauses may be construed as contractual exclusions or derogations from the CISG in accordance with Article 6 CISG.

It follows that the criteria laid out by the CISG for the interpretation of the exclusion or derogation will apply to determine the effectiveness and the extent of the derogation of the CISG by the domestic government procurement law or by the contractual provisions. International scholarship and case law set forth requirements for such interpretation, such as (i) the need of clear intent to exclude or derogate, so that the CISG will remain applicable in the absence of an unambiguous choice to avoid such application[37] and (ii) the application of the CISG rules on the formation and interpretation of contracts for the construction of the agreement to exclude or derogate, including Articles 8 and 9 CISG. As pointed out below in this article, the standards of proof for the exclusion of the CISG in unilaterally drafted government contracts may be higher due to the constitutional protection of the counterparty's trust and legitimate expectations or, when such protection is not available, due to the *contra proferentem* doctrine.

Whether the CISG is excluded or derogated by a contractual reference to domestic public procurement laws depends on a case-by-case analysis of the compatibility between the CISG and the adopted domestic public procurement laws, as these domestic regulations tend not to regulate most aspects of contractual law. The prevailing view construes a contractual reference to a domestic body of law as an Article 6 exclusion, rather than a derogation.[38] However, none of the known cases

[37] The need for a clear and unambiguous exclusion is generally recognized. See *Forestal Guarani, SA v Daros International, Inc.* (CISG-online 1779), *Easom Automation Systems, Inc v Thyssenkrupp Fabco, Corp* (CISG- online 1601), *Cedar Petro chemicals, Inc v Dongbu Hannong Chemichal Co, Ltd* (CISG-online 1509), *Property Casualty Company of America et al v Saint-Gobain Technical Fabrics Canada Limited* (CISG-online 1435), *TeeVee Toons, Inc et al v Gerhard Schubert GmbH* (CISG-online 1272) and *Ajax Tool Works, Inc v Can-Eng Manufacturing Ltd* (CISG-online 772).

[38] Case law on the exclusion of the CISG suggests that incorporating a specific domestic law in the agreement will generally amount to an exclusion, not a derogation, of the CISG. For instance, see: Teslas Case, Oberlandesgericht München (Court of Appeal Munich), 7 U 4810/21, 12 December 2022, CISG-online No. 6210; *Del Gaudio France S.A. v. Agrenfrut S.L.*, International commercial chamber at the Paris Court of Appeal (CCIP-CA), 20/00977, May 18, 2021, CISG-online No. 5790; *SMS Ersanlar Tarim v F.lli Rinaldi s.n.c.* Tribunale (District Court of Foggia), December 27, 2021, CISG-online No. 5787; Porsche Cayenne Case, Oberlandesgericht Koblenz (Court of Appeal Koblenz), 5 U 781/15, 20 January 2016, CISG-online No. 2741; The Linz Appellate Court decision on 23 January 23 2006 displays the early stages of the discussion (Oberlandesgericht (OLG) (Appellate Court of Linz). 6 R 160/05z. 23 January 2006). The court ruled that the reference to the Austrian Consumer Protection Act and the Austrian Commercial Code (HGB) in the seller's standard terms did not amount to an exclusion of the CISG since these terms were primarily concerned with domestic transactions. The decision was later overturned by the Austrian Supreme Court on the grounds

addresses the application of public procurement laws. Government contract laws generally do not contain a comprehensive and autonomous body of rules of contract law, but rather regulate specific aspects of a government contract while relying on general principles of contract law found elsewhere in the applicable law. Therefore, a contractual reference to domestic public procurement laws will in principle not amount to an Article 6 exclusion but to a derogation of the conflicting provisions of the CISG.

The incorporation of government procurement law into the contract may cause the contract to be governed by the CISG but with most of its substantive provisions having been derogated by domestic public procurement law. This solution may be undesirable but is acceptable under Article 6 CISG. There is only a difference in degree between the derogation of only one provision of the CISG and the derogation of most of its provisions. If the incorporation by reference of the contrary conditions of the domestic public procurement law renders inapplicable all but one provision of the CISG (e.g., Article 11 about freedom of form), this will still be important and useful for the party invoking the CISG for its protection.

One point that may be relevant in practice is precisely the freedom of form under Article 11 CISG. Even if the original contract is generally in writing, as is the international practice in government contracts, there can arguably be amendments made with freedom of form. If the parties have not either expressly or by incorporation excluded oral amendments, these will be valid in accordance with Article 11 CISG.

Frequently in public procurement conflicts contractors invoke the exchange of correspondence or other acts from the state agency or entity as the basis for modifications to contractual obligations.

In U.S. government procurement practice, scholars and case law adopt the idea of constructive changes as opposed to formal changes to the contract. The former are inferred from conduct rather than derived from formal agreements.[39] Equivalent concepts exist in other jurisdictions. It is generally common for contractors in disputes with procuring agencies to use letters exchanged between

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that the reference to specific domestic regulations implied an exclusion of the CISG (Oberster Gerichtshof (Supreme Court), 2 Ob 95/06v. 4 July 2007). The prevailing understanding seems to encompass the reasoning in the Advisory Council Opinion No. 16: "It is not necessary for the purposes of exclusion of CISG for the choice of law clause to refer to the specific non-uniform Sales Law within a Code. A reference to a Code containing the purely domestic sales law should be sufficient, provided the Code does not also enact the CISG".

[39] See Steven W. Feldman, *Government Contract Guidebook*, 4th Edition, Thomson Reuters Westlaw, 2013, especially 532-535 (Formal Changes) and 535-545 (Constructive Changes).

the parties or other actions attributable to the government entity as grounds to establish constructive changes. Article 11 CISG will apply in such situations to give the nature of a binding agreement to such actions intended to modify the original contract even if they do not take the form of written agreements. It will provide an extra ground of validity by attributing contractual character to acts performed even if in a different form from that of the original contract. The solution will depend on the limits of the CISG derogation observed in each case.

POSSIBLE VIOLATION OF BIDDERS' RIGHT TO EQUAL TREATMENT

In accordance with Article 1 CISG, the Convention will only apply to contracts between parties with places of business in different states. Internationality is one of the requirements for the CISG to apply. In a certain tender process initiated by a national procuring agency of a contracting state, and assuming that the conflict of laws rules lead to the application of such state's law (Article1(1)(b) CISG), the CISG will apply if the contract is awarded to an international supplier. However, there may be international and domestic bidders. This will lead to a situation in which each bidder may be subject to a different set of substantive rules depending on whether it is domestic or international.

A principle that is internationally accepted in government procurement is the equal treatment of the bidders. All national systems that follow international standards avoid discriminatory provisions that submit bidders to different treatments without reasonable justification. Many countries adopt benefits for small and medium enterprises (SME), create preferences for locally made goods or services ("buy national") or use public procurement as a public policy tool (green procurement, for instance). These benefits and preferences must follow certain requirements and above all must not merely result from arbitrary discrimination against certain bidders, products, or services.

A question one must address is whether equal treatment is violated when a procuring agency tenders out a contract that may be subject to the CISG or to domestic law depending on who the winning bidder is. Putting it in another way, is the government entity required to have tenders only with international suppliers (subject to the CISG) or only with domestic suppliers to avoid this possible breach to equal treatment?

In the situation above, there is no breach to equal treatment and no requirement for a separate tender process for each category of supplier. The difference in applicable law (CISG or domestic law) simply reflects a factual difference between the suppliers. Being in different countries, they are subject to a variety of different

burdens and benefit from a variety of different advantages. The bidder will be allowed to choose whether to take part in the tender as an international company or to set up a place of business in the procuring country. This arrangement is not different from any other tax or corporate structure the bidder may adopt. The bidder is responsible for the consequences of its choice.

This leads to the application of Article 10(a) CISG, which deals with parties that have more than one place of business. The rule provides for the criteria to determine which place of business is material and decisive to the contract.[40] In a 2019 decision, the Swiss Federal Supreme Court examined a situation in which a foreign supplier, in a contract with a Swiss state-owned entity, established a subsidiary in Switzerland. It was held that the sellers' places of business were relevant in determining the applicability of the CISG, and that the presence of a foreign company ensured the application of the CISG.[41]

The application of different rules for the contract depending on the relevant place of business of the winning bidder is possible and lawful. It leads to no invalidity or defect of the tender process. However, it is convenient that the rules are substantially the same to allow for a better comparison between the various bids. In the international practice, it is widely acknowledged that the CISG has been serving as inspiration for the reform of domestic law on the purchase and sale of goods.[42]

Uniformity may lead to important gains for the procuring agency. The government can create uniformity by adopting contractually agreed-upon rules that are substantially the same for domestic and international suppliers. This will reduce the possible and otherwise lawful discrepancy between the different sets of rules to which each potential party may be subject.

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[40] See P. Hachem, Article 10 CISG: Place of Business, *Commentary on the UN convention on the international sale of goods (CISG)* (Eds. I. Schwenzer, U. Schroeter), 5th Edition, Oxford University Press, Oxford, 2022, 218-223. Hachem in another work mentions that the preferable view "operates on a case-by-case basis and relies on the domicile of the place of business which has the strongest influence on the contractual relationship. The strongest influence will typically be exerted by the place of business where customer complaints are ultimately handled, not merely filed, and in particular where the decisions on the next steps to take in handling disputes, including legal measures, are made"; P. Hachem (2014), op. cit., 34.

[41] CLOUT Case No. 1824 (Abstract by Ulrich Schroeter); CISG-online No. 4463; Commentary to the 2018 decision of the Swiss Court of Appeal Canton Basel-Stadt (CISG Case Number 3906) in the Electronic Electricity Meters Case, later confirmed by the Swiss Federal Supreme Court: U. G. Schroeter, "Grenzfragen des Anwendungsbereichs und international einheitliche Auslegung des UN-Kaufrechts (CISG): Zugleich Anmerkung zu Appellationsgericht Basel-Stadt vom 24.8.2018 – ZB.2017.20 (AG.2018.557)", *Internationales Handelsrecht (IHR)*, 2019.

[42] See P. Hachem (2022), op. cit., 218-223.

NEED FOR CLARITY IN GOVERNMENT CONTRACTS

The CISG as default applicable law will combine with domestic procurement law and specific contractual provisions, since this domestic law and these provisions will be incorporated as Article 6 derogations from the CISG. This combination will establish the rules ultimately applicable to a certain government contract. This arrangement is valid and legally effective, but it can be inconvenient. Ideally, the procuring government agency should have a clear definition in its contracts of the points on which the CISG provisions will be replaced with domestic law or contractual provisions. Ambiguities or uncertainties are legally resolved in favor of the application of the CISG due to the international commitments the Convention is designed to carry out.

In addition to being required by the CISG as a condition for the effectiveness of any exclusion or derogation, clarity in the adoption, derogation, or exclusion of the CISG is part of any contracting state's commitment upon joining the CISG system. In the international context, the accession of any country to the CISG community creates in the international counterparties the legitimate expectation that their contracts with the other country's nationals will be governed by the CISG. This expectation must not be frustrated, especially by the government agencies themselves when they are the contractual parties. Therefore, they should avoid using ambiguous contractual language and (or) creating an uncertainty for international suppliers as to what law and other conditions will apply.

The consequence of these premises is that the general criteria for recognition of an effective exclusion or derogation will apply. Scholars and case law have extensively developed such criteria. In general, both explicit and implied agreements are admitted to exclude or derogate. For instance, whilst case law does not consider a choice of "Brazilian law" as an exclusion of the CISG (since the Convention is part of that law), a choice of "Brazilian Civil Code" may amount to an exclusion under Article 6 CISG if it reflects the intent of the parties to adopt an entirely different system of rules, rather than the CISG. But even in light of said general criteria, this conclusion is not absolute. According to Hachem, certain limitations in the statute governing the contract may retain the CISG as the applicable law.[43]

[43] P. Hachem, op. cit., 129-130: "It seems common ground that the reference to a set of non-unified domestic sales provisions sufficiently indicates an intention to derogate from the entire Convention – e.g. 'this contract is governed by the provisions of the German Civil Code (BGB)'. Such reference may, however, fail to effect a derogation from the entire CISG where the set of rules designated is only applicable to 'merchants' as defined by the domestic set of rules envisaged and this requirement is not fulfilled by both parties."

Such reasoning is not immediately and entirely applicable to government contracts, in which a higher standard of clarity is required for an exclusion to take place. International suppliers to a state entity may expect their contracts to be in principle governed by the uniform law adopted by the state. This amounts to a legitimate expectation covered by the protection of trust. By adopting the CISG, a state makes a promise to its potential international suppliers – or buyers, when the state is a seller – that the uniform law will be applicable. This promise does not make it impossible for the state to exclude or derogate from the CISG under Article 6. However, it sets a higher standard of proof for the intent to exclude. Protection of trust is generally acknowledged as a derivation of widely accepted public law principles,[44] including some arising from international treaties that interfere in administrative law.[45] It entitles the counterparties in a government contract for the international sale of goods to expect the CISG to apply unless clearly and expressly excluded. This is a matter of validity of exclusion based on domestic public law standards, which are incorporated by Article 4 CISG.

The same conclusion can be reached from a *contra proferentem* perspective, provided that the relevant government entity in a given transaction unilaterally defines the terms of its contract under public law. This goes beyond the notion that in doubt the application of the CISG should be favored. It requires the contract to be interpreted in any case in favor of the application of the CISG unless the opposite clearly arises from the language of the contract.

In a legal system in which no protection of trust is available and in which government contracts are negotiated without any prevalence of the government position – i.e., in which the fundamental terms are not unilaterally set by the procuring agency – a higher standard of proof for exclusion or derogation will not exist. Conversely, in systems that recognize such a higher standard of transparency applicable to government action, an exclusion of the CISG in a government contract must be express and explicit, and the usual standards for exclusion by implication will not apply. The CISG will then apply given that the contract will be in its sphere of application.

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[44] Paul Reynolds, "Legitimate Expectations and the Protection of Trust in Public Officials". *Public Law*, Vol. 2011, 330. Similarly, Stephen W. Schill argues: "[*c*]ustomary international law, however, offers, as part of the international minimum standard, some substantive protection to the foreign party's rights under a public contract, provided the breach of the contract or a change of the governing law constitute an independent tort under international law *vis-à-vis* the foreigner's home State" (Stephen W. Schill, "The impact of international investment law on public contracts", *Amsterdam Law School Legal Studies Research Paper*, No. 2017-08).

[45] Eberhard Schmidt-Asmann, *La Teoría General des Derecho Administrativo como Sistema*, Marcial Pons, Madrid, 2003, 59.

ROLE OF BID PROTESTS AND CHALLENGES

Most domestic procurement laws provide for mechanisms for bidders to interfere in the drafting of the solicitation or the contractual documents. Although this varies from country to country, the potential bidders are generally allowed to object to conditions in the solicitation documents or to challenge specific decisions by the procuring agency. Depending on each domestic system, such challenges may be escalated to higher ranks within the government or ultimately be taken to courts.

The phase after the advertisement of the tender and the actual bidding session is the appropriate period for this form of participation. This is the drafting stage in which the procuring agency will finalize the solicitation and make all necessary decisions that will guide the entire process. If a bidder considers that the provisions concerning the applicable law are not sufficient, it should exercise its right to protest to request the application of the CISG or of part of its rules to the contract at issue.

ADVANTAGES FOR THE PROCURING AGENCY IN APPLYING THE CISG

Another angle to explore is how convenient it may be for the procuring agency to opt to keep the CISG as applicable law for the formation and content of the international sale contract, refraining from excluding or derogating its rules.

Any country that joins the CISG is in a way affirming the virtues of the Convention. This does not entail a duty to apply the CISG provisions. However, it does require the decision to exclude or derogate to be reasonable and grounded on sound legal reasons. Otherwise, a country's own government will be denying the conditions to fulfill the international expectations regarding such country's disposition in adopting the uniform legislation.

There are important advantages in the total or partial adoption of the CISG to govern international purchases made by government entities.[46]

Firstly, there are CISG provisions that give reassurance to the international supplier and facilitate transactions. Its rules result from extensive discussion and the reconciliation of different legal systems. Three important examples are (i) the duty to inspect the goods and to give notice of non-conformity within a reasonable period (Articles 38 and 39 CISG), (ii) the provision that a party is liable only for

[46] For a comprehensive overview of why parties should apply or exclude the CISG, albeit not specifically focused on government contracts, see Lisa Spagnolo, *CISG Exclusion and Legal Efficiency*, Wolters Kluwer, London, 2014. especially 78-100 (Substantive Advantages and Disadvantages of the CISG) and 101-148 (Non-Substantive Advantages and Disadvantages).

damages that the party "foresaw or ought to have foreseen at the time of the conclusion of the contract" (Article 74 CISG) and (iii) the duty to mitigate one's losses as a requisite for full recovery (Article 77 CISG). Derogation from these or other rules will cause contractual insecurity and may discourage responsible suppliers from bidding on a certain procuring agency's tender process.

In addition, there is the issue of subcontracting. In many situations, a party supplying international goods to a government agency will have subcontracts that are subject to the CISG. When the government agency can foresee that this may be the case, it is especially important that the CISG applies also to the contract between the government agency (ultimate buyer) and the immediate supplier. This will make it easier for the supplier to manage its contractual relationships with its own subcontractors. One of the cases mentioned above relating to the CISG in government transactions is Diversitel. The case involved an international sale in the defense sector for the ulterior purpose of supplying the item to Canada's Ministry of Defense. Even if the CISG does not directly apply to the supply contract, its provisions can inspire a contractual arrangement that is like the subcontract. In Diversitel, for instance, the immediate contractor was Canadian and, therefore, not subject to the CISG; the Convention applied primarily to the subcontract.

These advantages may impact on the price to be paid. Although there are no known specific statistics about this issue, one may infer that an increase in the assurances given to the international bidder will result in reduction of price.

International banks or development agencies also play a role in this matter by analyzing and approving contracts for the use of funds that are donated or loaned. Another of the most well-known cases involving the CISG in government contracts involves a Spanish supplier and the Iraqi government within the program Oil for Food, with international funding.

A government procuring agency must not take the easy road of simply excluding directly or indirectly the application of the CISG. Either because of the international commitment the CISG represents or the many advantages of the uniform law, the government agency is obligated to examine specifically the CISG and decide in a rational manner on its full application or possible derogation.

CONCLUSION

The CISG's sphere of application under Articles 1 to 3 CISG generally covers contracts concluded by government agencies or entities. When a government agency or entity from a CISG contracting state makes an international purchase (or, more rarely, a sale), the CISG will apply unless the relevant contract excludes

or derogates from the CISG in accordance with Article 6 CISG or one of the exclusions of Article 2 or 3 CISG is in place. The effectiveness and scope of any exclusion or derogation will be assessed and construed according to Articles 7 to 9 CISG. The constitutional protection of the private counterparty's trust or legitimate expectations may lead to a higher standard of proof for the exclusion of the CISG. A contractual reference to a state's domestic government procurement law will primarily not be interpreted as an agreed-upon exclusion of the CISG, but rather only as a derogation of the conflicting CISG provisions based on Article 6 CISG. The CISG provisions will apply especially in the areas in which the incorporated domestic government procurement law is silent.

In most national systems, the main areas of potential conflict between the CISG and international government procurement regulation are the issues of agency (Article 4 CISG) and freedom of form (Article 11 CISG). However, contract administration issues may be relevant in states in which government procurement legislation comprises not only the selection of the contractor, but also the formation and content of the contract, such as in most Latin American countries and the United States. In the latter states, the role assigned to domestic procurement law is greater, and there will naturally be less space for possible application of the CISG. Government transparency and effectiveness require clarity in the exclusion of the CISG. The lack of clear exclusion will allow a private contractor to rely on the CISG provisions that have not been derogated by contractual provisions or by incorporation of domestic government procurement rules into the contract.

Government agencies and entities must weigh the benefits of adopting the CISG and should avoid unfounded or unreasoned exclusions. Bidders and interested third parties, such as citizens in systems that recognize the citizen's standing to challenge bidding procedures, have a role under national legislation to participate in the effective adoption of the CISG by submitting protests and challenges to tender solicitation. These tools give bidders the means to influence the final language of the contract regarding the application or derogation of the CISG.

The CISG interferes directly with any government's international purchases. No government entity in a CISG contracting state may ignore the uniform law. Governments and international bidders must be aware of this legislation and its impact on their international transactions. The application or possible derogation of the CISG in each specific case must be clearly discussed and decided in a rational manner.

Domestic laws generally provide the tools for each government's agencies to make informed decisions and for bidders to interfere directly in the process of creating the solicitation for tenders. These tools comprise the ability to cause the procuring agency to reflect and decide upon the application of the CISG based

on rational reasons. In countries in which the accession to the CISG is relatively recent, the foreseeable inertia of government agencies to adjust to the CISG may be generally overcome by the active, careful, and attentive conduct of the suppliers that potentially take part in the government's procurement proceedings.

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PRIMENA BEČKE KONVENCIJE O MEĐUNARODNOJ PRODAJI ROBE NA MEĐUNARODNE VLADINE UGOVORE O JAVNIM NABAVKAMA

Rezime

Konvencija Ujedinjenih nacija o ugovorima o međunarodnoj prodaji robe iz 1980. godine (CISG) vladinim agencijama koje obavljaju nabavke u međunarodnom kontekstu može doneti brojne koristi. Da bi ih one što bolje iskoristile, moraju biti svesne potencijalnih prednosti, ali i posebnih zahteva koje primena Bečke konvencije nameće, naročito imajući u vidu da se na ovakvu vrstu prodaje Bečka konvencija načelno primenjuje – u slučaju javnih nabavki ili prodaja u međunarodnom kontekstu. Oslanjajući se na postojeću sudsku praksu, trenutnu praksu pojedinih vlada i međunarodnih agencija, kao i brojna tumačenja Bečke konvencije i modela međunarodnih javnih nabavki, autor u radu analizira odnos između Bečke konvencije i propisa o javnim nabavkama. Pored toga, analizirane su i potencijalne koristi za one koji se odluče za usvajanje jedinstvene regulative ugovora na koje se primenjuje Bečka konvencija. Najzad, u radu su obrađene i potencijalne teškoće u postupcima javnih nabavki, konkretno u slučajevima kada se Bečka konvencija primenjuje zajedno sa domaćim zakonodavstvom o javnim nabavkama.

Ključne reči: Bečka konvencija o međunarodnoj prodaji robe, harmonizacija, međunarodne javne nabavke, propisi o javnim nabavkama, uniformna regulativa ugovora

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