



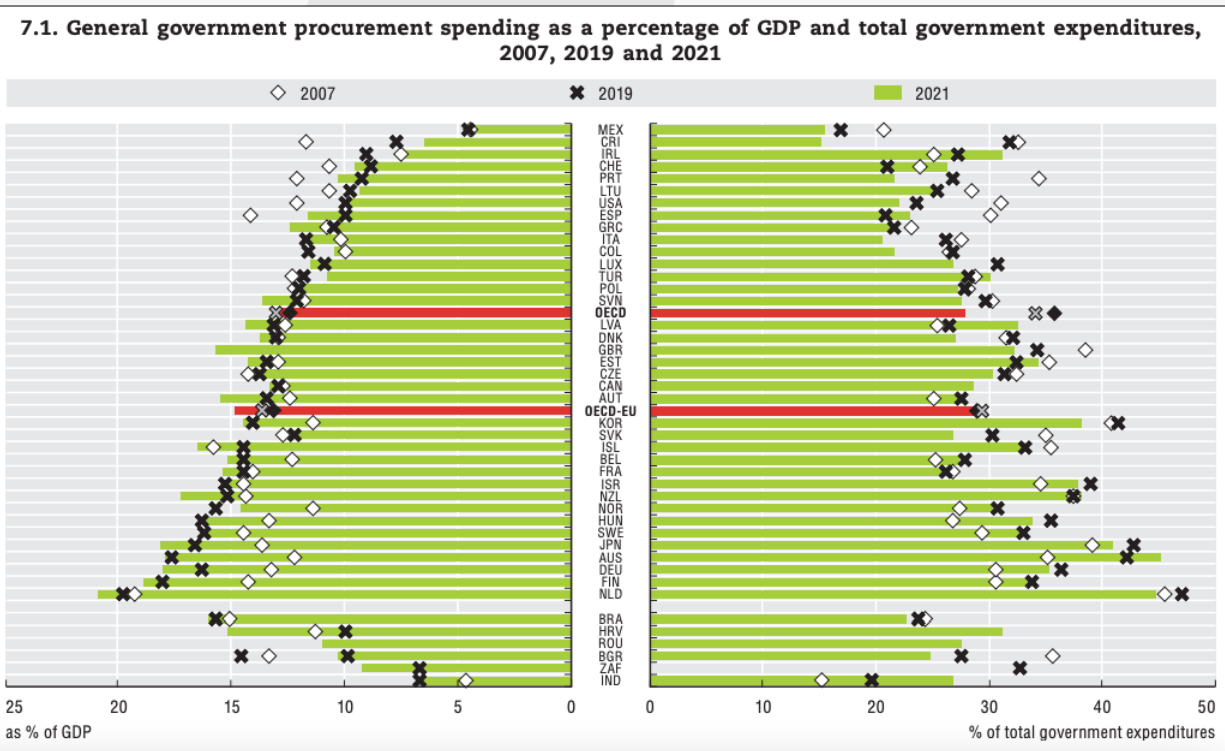
Government Contracts and the CISG

Cesar Pereira C.Arb FCI Arb | cesar@justen.com.br | 15 December 2023

Public Procurement in Numbers

- Government entities are **relevant players** in the international sales market, operating either as buyers or, more rarely, as sellers.
- Public procurement expenditure as a share of GDP increased across **OECD countries** over the years, from **11.8% of GDP** in 2007 to **12.9% of GDP** in 2021.
- In the **European Union** alone, public procurement corresponds to around **14.0% of the member States' GDP**, amounting **EUR 2 trillion** every year.

Public Procurement in Numbers



OECD, "Size of public procurement", in *Government at a Glance 2023*.
Paris: OECD Publishing, 2023.

Government Procurement Agreement



Preamble

*Recognizing the need for an effective multilateral framework for government procurement, with a view to achieving greater liberalization and expansion of, and improving the framework for, the **conduct of international trade**; [...].*

The GPA/WTO currently covers **49 WTO members** and has an estimated market access opportunity of over **USD 1.7 trillion** annually.

■ CISG and government contracts: in the spotlight

- International public procurement gained visibility during the Covid-19 pandemic due to tendering of vaccines, masks, hand sanitizers and other materials.
- Some of these procurements (particularly of vaccines) were made available to the public and raised a question: **Could the CISG govern an agreement for the purchase of health materials?**

Purchase of Covid-19 Vaccines

European Union-AstraZeneca

APA. Item 18.4. Governing law. *“This Agreement shall be governed by the laws of Belgium.”*

- **Initial remarks.** Law of a contracting State (Belgium) elected as governing law. No apparent exclusion of the CISG.
- **Developments.** In the **European Union v. AstraZeneca AB**, the Court of First Instance of Brussels ruled on 18 June 2021 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”. No consideration was given to the possible application of the CISG.

Purchase of Covid-19 Vaccines

European Union-AstraZeneca

*The APA therefore **falls within the material scope** of the UN Convention on Contracts for the International Sale of Goods. In order for the international standard sales law to be applicable, its personal and spatial scope of application would also have to be opened up. The fact that sovereign authorities are also involved in the APA does not contradict this (see a). However, the contracting parties would also have to have their branches in different countries in accordance with Article 1 I CISG. [...] The location of the relevant branches is not without complexity, but ultimately leads to the direct application of the UN Convention on Contracts for the International Sale of Goods (see b).*

(André Janssen, Christian Johannes Wahnschaffe. Von Impfstoffen und Einheitsrecht: Zur verkannten Rolle des UN-Kaufrechts im Rechtsstreit der Europäischen Union mit AstraZeneca. **EuZW**, Heft 20/2021, p. 877-883. Original in German).

Purchase of Covid-19 Vaccines

Brazilian Ministry of Health-Pfizer

Agreement 52/2021. Item 12.4. Governing law. *“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.”*

- **Initial remarks.** Law of a contracting State (U.S.A.) elected as governing law. No apparent exclusion of the CISG.

Jurisprudence

Swiss Federal Supreme Court (4A_543/2018) (2019)

- **Summary.** A Swiss state-owned entity conducted a public tender for the delivery of electricity meters that were to be installed in private households. The Supreme Court held the CISG was applicable also to multi-party sales contracts involving more than one buyer or more than one seller. The seller's Swiss subsidiary had no impact in the applicability of the CISG and neither did the buyer's governmental nature.
- **Quote.** *"The CISG is applicable to sales contracts including successive delivery contracts [...] about goods between parties that have their establishment in different contracting states (Art. 1 Para. 1 lit. a CISG; judgment 4A_451/2016 of November 8, 2016 E. 2.1)."*

Jurisprudence

Matter of New York State Dept. of Health (2022)

- **Summary.** 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.
- **Quote.** *“The Court does not find Rusi’s argument to be persuasive and, instead, concludes that the Export Contract fails to evince a clear mutual intention to exclude application of the Convention. [...]”*

Sphere of Application of the CISG

United Nations Convention
on Contracts for the
International Sale of Goods



Article 1

[...] **(3)** Neither the nationality of the parties 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 underlying principle of Article 1(3) renders irrelevant the legal character (administrative, governmental, public or private) of the parties or of the contract (Article 7(2) CISG).

Article 2

This Convention does not apply to sales: (...) **(b)** by **auction**; **(c)** on execution or otherwise by **authority of law**; (...).

Exclusion or Derogation

United Nations Convention
on Contracts for the
International Sale of Goods



Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

Exclusion or Derogation

- **Exclusion or derogation** of the CISG should generally be clearly expressed. Whether this is achieved by reference to a particular domestic statute or code in a choice of law clause has been controversial.
- **CISG Advisory Council Opinion No. 16.** “4. Generally, such a clear intent to exclude: (a) should be inferred, for example, from: [...] (iii) **choice of an expressly specified domestic statute or code** where that would otherwise be displaced by the CISG’s application”.
- **In light of the above...** Should the choice for a domestic procurement law amount to an exclusion of the CISG? Should it amount to a derogation from some of the CISG provisions? Which provisions?

Exclusion or Derogation

- Public procurement statutes and regulations usually do not amount to a comprehensive, autonomous, and self-sufficient body of contract law. **Many areas of contract law** (such as contract interpretation or legal definitions) **are under the general rules applicable to contracts.**
- **CISG Advisory Council Opinion No. 16 (UNIDROIT v. INCOTERMS):** “*Selection of INCOTERMS concerns a narrow range of issues, therefore cannot of itself objectively manifest a clear intent to exclude the entire CISG rather than mere derogation from some of its provisions, such as risk, documentation, and payment terms*”.
- Reference to a domestic public procurement statute or regulation will only amount to an exclusion in the **exceptional instance** that such statute or regulation contains a stand-alone body of contract law comparable in scope to that of the CISG. Otherwise there is only a derogation of the contrary provisions of the CISG.

Freedom of Form

United Nations Convention
on Contracts for the
International Sale of Goods



Article 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Article 29

(1) A contract may be modified or terminated by the mere agreement of the parties.

(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.

Freedom of Form

- **Potential conflict.** Freedom of form does not conform to the writing requirement often imposed by domestic procurement laws. The adoption of a domestic government procurement law may amount to a **derogation from the freedom of form** under Article 6 CISG.
- **Amendments.** There can arguably be **amendments with freedom of form**. If the parties have not either expressly or by incorporation excluded oral amendments, these will be valid under Articles 11 and 29 CISG.
- **Constructive changes in government contracts** (US approach).

Conclusions

- **Sphere of application.** The underlying principle of Article 1(3) CISG renders irrelevant the administrative, governmental or public legal character of the parties or the contract.
- **Exclusions.** Government contracts resulting from reverse auctions or other methods of public procurement are not excluded from the CISG's application by Article 2(b) and are not contracts made on authority of law (Article 2(c) CISG).
- **Exclusion or derogation (Article 6 CISG).** Contractual reference to a domestic public procurement statute or regulation will amount to an implied exclusion of the CISG only if it contains a stand-alone body of contract law. Otherwise, there will be only an implied derogation of the contrary provisions of the CISG.
- **Freedom of form.** Unless there is an exclusion or derogation under Article 6 CISG, Articles 11 and 29 CISG are applicable to exclude a writing requirement in government contracts and especially in their amendments.

Draft AC Opinion Black Letter Rules (Tentative)

- 1. The administrative character of any of the parties or of the contract is not to be taken into consideration in determining the application of the CISG, pursuant to Article 1(3) CISG.**
- 2. The fact that a government or its entities are parties to a contract of sale of goods does not prevent the application of Article 1 CISG to determine whether it falls under the sphere of application of the CISG.**
- 3. A government contract for the international purchase or sale of goods is governed by Part I CISG, which will determine whether there is an exclusion or derogation from the CISG under Article 6 CISG.**
- 4. The exclusion of Article 2(a) CISG does not encompass purchases made by a government or its entities for their own use.**
- 5. The exclusion of Article 2(b) CISG does not encompass reverse auctions or other methods of selection of government suppliers, but it encompasses government sales made by auction.**

Draft AC Opinion Black Letter Rules (Tentative)

- 6. A government purchase or sale does not fall under the exclusion of Article 2(c), except if it is a means to enforce a judgment, award, or order.**
- 7. Issues of validity of a public procurement process or of a government contract are outside the sphere of application of the CISG (Article 4(a) CISG), and they are governed by the otherwise applicable international or domestic law.**
- 8. A contractual choice of one of more specific public procurement statutes or regulations as applicable law amounts to an exclusion under Article 6 CISG only if the relevant statutes contain an autonomous and self-sufficient system of contract law.**
- 9. A contractual choice of one or more specific public procurement statutes or regulations that do not contain an autonomous and self-sufficient system of contract law amounts to an Article 6 CISG derogation only of the contrary provisions of the CISG.**

Draft AC Opinion Black Letter Rules (Tentative)

- 10. A counterparty to a contract of international sales of goods with any central or subcentral government of a Contracting State or its entities is presumed to have the legitimate expectation that the CISG will apply except if and to the extent it is excluded or derogated clearly under Article 6 CISG.**
- 11. If a contractual provision that may amount to an exclusion or derogation under Article 6 has been introduced unilaterally by one of the parties, contra proferentem interpretation applies to determine the existence of an exclusion or the scope of the derogation.**
- 12. A contract concluded by a domestic subsidiary or branch of a company with places of business in one or more other States falls under Article 10(a) CISG.**
- 13. To the extent the CISG is not excluded or derogated, Articles 11 and 29 CISG apply to government contracts and their amendments, formal or informal modifications, or termination, except if Article 12 CISG applies.**



Thank you!

Cesar Pereira C.Arb FCI Arb | cesar@justen.com.br | 15 December 2023