

Global sales law in a global pandemic: The CISG as the applicable law to the EU-AstraZeneca Advance Purchase Agreement?

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Last week, following severe criticisms of its procurement strategy and a dispute with AstraZeneca over the delays in delivery of the vaccine, the EU Commission has published the Advance Purchase Agreement for the Production, Purchase and Supply of a Covid-19 Vaccine in the European Union (APA) it had concluded with AstraZeneca in August 2020. Although some important clauses were blackened at the request of AstraZeneca, the document gives interesting insights into the procurement practice of the EU and has incited a plethora of comments by the legal experts. Despite the broad coverage in legal and non-legal press, the issue of applicable law has received comparably little attention (but see Till Maier-Lohmann on the CISG's potential applicability). In its first part, this post will argue that, as far as one can tell by the published document, the CISG is likely to be the applicable law to the contract, before outlining some of the consequences of the CISG's potential application in the second part.

I. The CISG as the applicable law to the APA?

The issue of the applicable law would be considered by Belgian courts that are exclusively competent under the APA's forum selection clause (§ 18.5 (b) APA). Since Belgium is a Contracting State to the CISG, Belgian courts are bound to apply the CISG's provisions on its sphere of application that take precedence over the conflict rules in the Rome I-Regulation (Article 25 Rome I-Regulation). Pursuant to Article 1 (1) (a) CISG, the Convention applies to contracts of sale of goods between parties that have their places of business in different Contracting States.

1. Vaccine procurement as a (private) contract for the sale of goods?

The CISG does not distinguish between private law and public law entities and is not limited to contracts between private parties.[1] It is therefore applicable to sales contracts concluded by public law entities such as States if these entities do not act in exercise of their sovereign powers but *iure gestionis* like a private person could act as well,[2] irrespective of whether a public law tender procedure has preceded the conclusion of the contract.[3] The tender process that precedes the conclusion of the contract also does not fall under the exclusion of sales by auction in Art. 2 (b) CISG.[4]

A more nuanced question is whether the APA is a contract for the sale of goods. The question may seem moot since the parties themselves have labelled the agreement Advance Purchase Agreement and the contract provides for the delivery of vaccines against payment. However, it also contains some other elements that may be relevant for the qualification as a sales contract under Articles 1, 3 CISG. The first question is whether the buyers' involvement in the manufacturing process is relevant. Pursuant to Article 3 (1) CISG, the Convention applies to the sale of goods to be manufactured unless the party ordering the goods undertakes to supply a substantial part of the materials. Indeed, the APA contains an obligation of the buyers to "use Best Reasonable Efforts to assist AstraZeneca in securing the supply" of drug substances and other materials (§ 6.1 APA) as well as an obligation to provide funding to AstraZeneca in order to enable it to procure the necessary materials (§ 7.1 APA). However, this assistance and funding does not seem to amount to an undertaking to supply a substantial part of the materials, particularly as the contract stipulates that "AstraZeneca shall secure the supply of all drug substances [...] and drug product capacity [...] as well as components critical to the development, manufacture and supply of the Initial Europe Doses" (§6.1). The second question is whether the obligation to deliver vaccines is "the preponderant part of the obligations" of the seller under Article 3 (2) CISG. Here, it seems clear that the core of the contract is the delivery of the vaccines, not the provision of a service of any kind. Other obligations, such as the reporting obligations (§§ 6.3, 10.2 APA), only seem to serve a complementary purpose to ensure the successful delivery of effective vaccines.

Finally, the APA purports to be merely an advance agreement.[5] The decisive

factor is, however, not the designation of the agreement but whether it already contains the essential features of a sales contract.[6] The APA contains obligations to produce and deliver the vaccine for AstraZeneca (using their 'best reasonable efforts' in the manufacturing) and obliges the Commission and the Participating Member States to acquire vaccines. The APA is thus a sales contract for the purposes of Article 1 (1) (a) CISG.[7]

2. Parties having their places of business in different Contracting States?

Pursuant to Article 1 (1) (a) CISG, the parties to the APA need to have places of business in different Contracting States. The first difficulty is thus to identify the parties to the APA.[8] According to the APA, the parties are AstraZeneca AB and the European Commission "acting on behalf and in the name of the member states of the European Union". The APA goes on to state that "[t]he Commission, the Participating Member States and AstraZeneca may each be referred to herein individually as a '**Party**' and collectively as the '**Parties**'." Taken at face value, this would mean that, on the side of the buyers, both the European Commission and the Participating Member States are the parties to the contract in terms of Article 1 (1) (a) CISG. This understanding is in line with the APA's provisions that not only contain obligations of the Participating Member States but also of the Commission (see e.g. § 9.1 APA).

The parties to the APA need to have their respective places of business in different Contracting States, irrespective of where the goods are manufactured or where they are delivered.[9] As per the APA, AstraZeneca AB has its place of business in Sweden while the Commission has its place of business in Brussels. Both Belgium and Sweden are Contracting States. Questions arise only in relation to some of the 27 Participating Member States.[10] While most Participating Member States are Contracting States to the CISG, Ireland and Malta are not. Portugal recently acceded to the CISG but the Convention has not yet entered into force. Amongst the other Participating Member States, Sweden has its place of business in the same Contracting State as AstraZeneca, ie in Sweden,[11] and Finland and Denmark are Contracting States in general but have declared a reservation under Article 94 CISG that exempts sales contracts between parties with their places of business in different Scandinavian States from the CISG's sphere of application.[12] According to the prevailing view, however, in cases of multiparty contracts, it is sufficient that one party on either side of the

transaction have their respective places of business in different Contracting States for the whole contract to be governed by the CISG.[13] Given that the Commission and most of the Participating Member States have their respective places of business in Contracting States other than Sweden, Finland or Denmark, the CISG would be applicable. I have argued elsewhere that the prevailing view is too expansive and that, in cases of multiparty contracts, courts should apply Article 10 (a) CISG by analogy to the different parties (rather than merely to different places of business) on either side of the transaction.[14] Even if one were to follow this approach, the APA would arguably still fall within the sphere of application of the CISG, since the most closely connected place of business on the side of the buyers seems to be the place of business of the Commission that is acting on behalf and in the name of the Participating Member States. The Parties to the APA thus have their respective places of business in different Contracting States pursuant to Article 1 (1) (a) CISG.

However, even if one of the parties were considered to have its place of business in a non-Contracting State,[15] the Convention would still apply by virtue of Article 1 (1) (b) CISG since the Belgian conflict of laws rules, most notably Article 3 (1) Rome I-Regulation, would point to the law of Belgium as a Contracting State to the CISG.

3. Exclusion of the CISG by the Parties in the APA?

The Parties are free to exclude the CISG pursuant to Article 6 CISG. In their choice of law clause, the Parties have chosen the “laws of Belgium” to govern the APA. Although the question of whether the parties wished to exclude the Convention is to be decided on a case-by-case basis, it seems firmly established that, as a general matter, the choice of the law of a Contracting State does not amount to an exclusion of the Convention as the CISG forms part of the Contracting State’s law.[16] Importantly, Belgian courts have repeatedly held that the choice of Belgian law includes the Convention. The choice of law clause would thus in principle not impede the application of the Convention by Belgian courts.

An analysis of the publicly available documents seems to suggest that Belgian courts would indeed apply the CISG to the APA if a claim was brought.[17]

II. Some of the consequences of the CISG’s application

The question one might ask now is: does it matter at all whether the CISG is

applicable? After all, there are a lot of detailed provisions in the contract, for instance on force majeure (§ 18.7 APA) and termination for cause (§ 12.3 APA), that take precedence over the default rules laid down in the Convention (Article 6 CISG). I will briefly outline two of the many consequences of the application of the CISG to the APA.

1. Interpretation of contract

Many of the issues that are currently debated with respect to the contract are ultimately issues of interpretation of contract. For instance, the questions of whether AstraZeneca is only obliged to deliver vaccines that are produced in the EU or of how to apply the notion of 'best reasonable efforts' will turn on how different sections of the APA are interpreted. The relevant CISG provision here is Article 8 CISG, although the Convention's rules on interpretation may, to a certain extent, be modified by the APA's provisions, most notably by the clause on interpretation of the agreement (§ 18.1 APA) and the Entire Agreement-Clause (§ 18.9 APA). Pursuant to Article 8 (1), (2) CISG, the interpretation of the contract is controlled by a common intention of the parties and, lacking such intention, by the understanding of a reasonable third party.

2. Allocation of vaccines amongst several buyers in cases of shortage of supply

It was reported that AstraZeneca limited its delivery to the EU while fulfilling its obligations towards other third-party buyers such as the United Kingdom. The allocation of scarce goods amongst competing buyers has been debated in CISG scholarship and the prevailing opinion seems to point to a pro rata delivery to the different buyers in proportion to their respective contractual entitlements.[18] Of course, this default position may need to be reconsidered in light of the provisions of the APA, eg the default allocation between Participating Member States on a pro rata basis reflecting the size of their respective populations (§ 8.3 (b)) or AstraZeneca's warranties (§ 13 APA).

III. Conclusion

The above analysis may be surprising: Why should a Convention that is unknown even to many lawyers govern the arguably most important procurement contracts in recent European history? Conversely, however, one might ask which legal instrument should be more appropriate to govern an international sales contract

between 29 Parties from 27 different States? More than forty years after its adoption, the CISG may face its first test on global centre stage - it will be up to the test!

[1] Peter Mankowski in: Mankowski (ed.), *Commercial Law* (C.H. Beck Hart Nomos, 2019), CISG, Art. 1, para. 31; Ulrich G. Schroeter, „Grenzfragen des Anwendungsbereichs und international einheitliche Auslegung des UN-Kaufrechts (CISG)“, IHR 2019, 133, 134.

[2] Mankowski (n 1) Art. 1, para. 31.

[3] Schroeter (n 1) 134.

[4] Ulrich Magnus in: *Staudinger-BGB, CISG*, [2018], Art.2, para. 34; Schroeter (n 1) 134; Frank Spohnheimer in: Kröll, Mistelis & Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, C.H. Beck Hart Nomos 2018), Art. 2, para. 30.

[5] Till Maier-Lohmann, “EU-AstraZeneca contract - applicability of the CISG?”.

[6] See Magnus (n 4) Art. 1, para. 13; Ingeborg Schwenzer & Pascal Hachem in: Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, C.H. Beck Oxford University Press 2016) Art. 1, para. 8.

[7] Maier-Lohmann (n 5); see, on the application of the CISG to purchase options, Magnus (n 4) Art. 1, para. 41; Schwenzer & Hachem (n 6) Art. 1, para. 10.

[8] Maier-Lohmann (n 5).

[9] See Clayton P. Gillette & Stephen D. Walt, *The UN Convention on Contracts for the International Sale of Goods - Theory and Practice* (2nd edn, Cambridge University Press 2016) 27; Magnus (n 4) Art. 1, para. 11, with further references.

[10] See APA, Schedule B.

[11] Maier-Lohmann (n 5), with the question of how this may affect the CISG’s applicability.

[12] According to the prevailing opinion, the reservation is also to be applied in other Contracting States such as Belgium, Johnny Herre in: Kröll et al. (n 4) Art. 94, para. 5; Schwenger & Hachem (n 6) Art. 94, para. 7.

[13] Schweizerisches Bundesgericht, Entscheid vom 28.5.2019 - 4A_543/2018, CISG-online no. 4463, IHR 2019, 236; Ulrich G. Schroeter, „Irrtumsanfechtung nach nationalem Recht und Anforderungen an Ausschlussvereinbarungen bei Anwendbarkeit des UN-Kaufrechts (CISG)“, IHR 2019, 231, 232.

[14] Claude Witz & Ben Köhler, “Panorama Droit uniforme de la vente internationale de marchandises“, Recueil Dalloz 2020, 1074, 1077.

[15] See, the question of Maier-Lohmann (n 5), hinting at AstraZeneca’s presence in the UK.

[16] Maier-Lohmann (n 5); see, with further references, CISG Advisory Council Opinion no. 16: “Exclusion of the CISG under Article 6, Rapporteur: Lisa Spagnolo, Comment 4 (b) (i); Mankowski (n 5) Art. 6, para. 8.

[17] See also Maier-Lohmann (n 5): „the Convention’s applicability cannot be excluded from the outset”.

[18] Christoph Brunner in: Brunner & Gottlieb (eds), *Commentary on the UN Sales Law (CISG)* (Kluwer 2019) Art. 79, para. 12; Schwenger in: Schwenger (ed.) (n 6) Art. 79, para. 28; Ben Köhler, *Die Vorteils- und Gewinnherausgabe im CISG* (MohrSiebeck, forthcoming 2021) 225.