

The Art. 2(b) CISG Conundrum: Are Tender Contracts Under the Ambit of an Auction?

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Introduction

It is beyond dispute that *The Convention of International Sales of Goods, 1980* (CISG) has facilitated international trade disputes. However, Courts and tribunals continue to apply their minds in adjudicating the applicability of CISG before advancing into substantive issues. This exercise is not very prolific as it prolongs proceedings. Chapter 1 of the convention lays down the scope and extent of the CISG. Amongst other things, the CISG application *does not apply* to contracts formed by, inter-alia, auctions under Art. 2(b) of CISG. The word *auction* itself is nowhere defined in the convention.

This led to ambiguity. Courts of different jurisdictions had to adjudicate the definition of the word *auction*. Take, for instance, the *Electronic electricity meter case*. The Swiss Federal Supreme Court had to determine if the bidding process in a tender contract was the same as an auction. The similarities between a bidding process and an auction cannot be understated. However, unlike an auction, in a tender contract, it is the sellers that bid, not the buyers. Hence, a tender contract *may* be construed as a reverse auction, not an auction. This leads to the issue: *Are tender Contracts—by them being reverse auctions—barred by the CISG under Article 2(b)?*

The Exclusion of Auctions in CISG—but Why?

Article 2(b) explicitly reads that the CISG exempts sales by auction. In an auction, sellers invite buyers to bid on goods, with the highest bidder securing the purchase. The process ensures competition among buyers, with the help of the seller or an intermediary, and ends with the auctioneer declaring the winning bid. The reason for this exclusion in the convention is not well-founded but speculated.

First, it is excluded because auctions are often subject to special rules under the applicable national law, and it is best to not harmonize them. *Second*, there was no need to include an auction since auctions universally, at that time, did not take place across borders in any case. *Third*, in an auction, the seller may not know the details about the buyer, including but not limited to, domicile, nationality, and place of operations. That is why, the applicability of the CISG would be uncertain due to Article 2(b) of the CISG since the aforesaid information determines whether the contract is an international one. These reasons justify exclusion, however, defining the term *auction* would have abated vagueness and ambiguity. Since, in the present context, The exclusion of “sales by auction” can be narrowly interpreted to apply only to traditional auctions, where sellers solicit bids from buyers. However, alternatively, it can be broadly construed to include any competitive bidding process, including reverse auctions.

A Case for CISG Applicability vis-à-vis Tender Contracts

Tender contracts, despite being formed after an auction, do not come under the ambit of Art.2(b). ***First***, *just because tender contracts are formed through a bidding process does not make it an auction*. It is advanced that tender contracts differ from an auction but may be similar to reverse auctions. In a reverse auction, it is the buyer who invites multiple sellers to bid, to secure goods or services at the lowest possible price. This process is common in procurement, particularly in government tenders and large-scale corporate sourcing. Similarly, since *primarily*, a tender involves a buyer inviting potential sellers to submit bids for goods or services; the process can be closely equated with a reverse auction in its characteristics—not auctions. Also, the procurer can also consider several other factors and have the discretion to determine to award the contract. This is unlike how an auction functions. In an auction, the seller typically does not have the discretion to consider other factors besides the highest price quoted. Ulrich G. Schroeter, a member of the CISG advisory council, (2022 paper) advances that CISG is applicable in Tender contracts. He states, “*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).*” The aforementioned arguments suggest that at the very least it would not be correct to construe tender contracts as auctions. The question that then follows is whether reverse auctions can also be presumed to be included in the ambit of *auction* mentioned in Art.2(b); which is answered in the subsequent point.

Second, *the absence of explicit exclusion extends to implied inclusion.* The UNCITRAL Commentary of Art 2 of the convention advances that all international sale of goods contracts can be governed by CISG besides the following. Art 2 does not refer to contracts formed by bidding process or reverse auctions but just auctions. In addition to this, the World Bank standard tender rules also do not explicitly exclude the application of CISG. From these, there is a reasonable inference that reserving an auction or just contracts formed via bidding are not explicitly included. On the contrary, if anything, the CISG application was included in the New Zealand government as guidance for foreign bidders, although it was later changed to “*Common Law of contracts.*” Such an inclusion is also present in an international purchase of equipment, by a Brazilian nuclear power state-owned entity. With this argument in mind, a counter-argument may be taken to advance that a court/tribunal can extend the interpretation of an auction to also include a reverse auction. However, that would be a way too broad interpretation and no coherent argument exists to make such a broad interpretation.

Third, *precedents have historically not exempted CISG application in tender contracts.* In 2019, the Swiss Federal Supreme Court dealt with the issue of tender contracts in CISG. It established that contracts initiated through public tenders do not fall under the ambit of Art. 2(b). The test laid is whether or not one party is foreign or not to the tender contract. So long as that element is present in the transaction, tender contracts are just as valid as any other contract with respect to Art 2(b). In another Swiss precedent, while not directly addressing the issue at hand, the tribunal held that an invitation to a tender is a form of invitation to a contract. Hence, a contract formed through just a process of bidding, though not an auction, can be governed by CISG as it so was in the said precedent. Additionally, as stated above, government procurement is done through mostly reverse auctions/Tender contracts/bidding. Such government procurement when faced with an international element has invoked the application of CISG.

Conclusion

This question at hand is pertinent since CISG has proven to be a successful framework, hence, its scope and applicability should not be restricted. Especially

with relation to tender contracts since they form a substantial method of procurement of big entities and governments. Not to mention, no valid reason exists for the exclusion. The economic reasons are present and not even touched upon since the article strictly restricted itself to legal arguments. To summarize, the applicability of CISG to tender contracts is ambiguous due to Article 2(b), which excludes “sales by auction” from its ambit. Auctions are usually seller-driven competitive bidding. Whereas, Tender contracts are where buyers ask for bids from sellers. By virtue of this, Tender contracts are different from auctions in certain aspects such as control, procedural formalities, and evaluation criteria which are considered factors beyond price. Since it is a form of reverse auction, it would be incorrect to include reverse auctions as an *auction* under Art.2(b). More importantly, previously, courts and tribunals have not given the word *auction* such a broad interpretation. It has allowed CISG to govern the contract. Hence, in conclusion, tender contracts do not come under the ambit of “*auction*” of Art 2(b) CISG.

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