

CISG ADVISORY COUNCIL OPINION NO 24

ANNEX 2

Scholarly writings on the application of the CISG to international public procurement and government contracts

Author	Reference	Quote
Ana Carolina Aguiar Beneti	‘A Convenção de Viena sobre Compra e Venda Internacional de Mercadorias (CISG) e a questão do Direito do Consumidor’ in I Schwenzer, P Costa e Silva and C Pereira (eds), CISG, Brasil e Portugal (Almedina 2022) 87–102	
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)	<i>The CISG does not distinguish between private law and public law entities and is not limited to contracts between private parties. 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, irrespective of whether a public law tender procedure has preceded the conclusion of the contract. 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.</i>
Bruno Guandalini	‘XVIII Congresso Internacional de Arbitragem do Comitê Brasileiro de Arbitragem’ (2019) XVI(64) Revista Brasileira de Arbitragem 167–77	<i>O segundo, moderado por João Vicente Pereira de Assis, tratou das possibilidades e dos limites da aplicação da CISG a contratos administrativos de compra e venda internacional de mercadorias. Lígia Espolaor Veronese e Gustavo Santos Kulesza colocaram de forma muito clara não somente os limites e as possibilidades jurídicas da aplicação da CISG aos contratos administrativos, mas também sua conveniência.</i>
Cesar Pereira	‘Aplicação da CISG a licitações e contratos administrativos de compra internacional de mercadorias’ in I Schwenzer, P Costa e Silva and C Pereira (eds), CISG, Brasil e Portugal (Almedina 2022) 137–60	

Christoph Brunner, Krisztina Balogh	‘Article 11 [Inapplicability of Domestic Requirement that Contract be in Writing and of Other Domestic Requirements as to Form]’ in C Brunner and B Gottlieb (eds), Commentary on the UN Sales Law (CISG) (Kluwer Law International 2019) 104–05	<i>In any case, Art. 11 does not govern other declarations necessary to validly form a contract, such as the form requirements for agencies, power of representation, or the approval by a public authority. Because the CISG in principle encompasses contracts entered into with governmental agencies, Art. 11 supersedes provisions of administrative law, including especially domestic procurement law. Accessory agreements foreign to sales law which may be subject to particular requirements as to form pursuant to domestic law or other conventions – such as agreements which restrict competition or regarding real estate transactions in connection with the sales contract, or choice of forum clauses and arbitration agreements – are not subject to the principle of freedom from requirements as to form.</i>
Christoph Brunner, Fabian Meier, Marco Stacher	‘Article 2 [Exclusions from the Convention]’ in C Brunner and B Gottlieb (eds), Commentary on the UN Sales Law (CISG) (Kluwer Law International 2019) 34	<i>The term “sale by authority of law” also includes the freehand sale, as long as a public official participates.</i>
Christoph Brunner, Thomas Murmann, Marius Stucki	‘Article 4 [Issues Covered and Excluded; Validity and the Effect on Property Interest in the Goods Sold]’ in C Brunner and B Gottlieb (eds), Commentary on the UN Sales Law (CISG) (Kluwer Law International 2019) 60–61	<i>In principle, orders placed with an intermediary bind the intermediary alone, according to the standard of a reasonable understanding set out in Art. 8(2), unless the intermediary has set out unmistakably that the order will be passed on to a third party. If in doubt, the offeror need not assume that the intermediary will pass on the offer to third parties. Rather, the intermediary then enters in his own name into a separate sales contract with a third party seller to procure the goods.</i>
Christoph Brunner, Domenic Oliver Brand	‘Article 29 [Modification of Contract; Writing Requirement]’ in C Brunner and B Gottlieb (eds), Commentary on the UN Sales Law (CISG) (Kluwer Law International 2019) 196	<i>Article 29(2) second sentence is applied ex officio. Its legal consequence is that while the modification remains invalid due to non-compliance with the requirements as to form, the one party cannot rely on the requirements as to form so long as the other party's trust is protected. Regardless of the general applicability of Art. 6, Art. 29(2) second sentence is mandatory. A prior waiver of the abuse of rights defense – and thereby the principle of good faith in general – is without legal effect. A subsequent waiver, however, in full knowledge of the contradictory behavior, is admissible.</i>
CISG Advisory Council	‘Opinion No 13: Inclusion of Standard Terms under the CISG’, Rule 9 and para 9.1	<i>9. Rule 9. If the meaning of a standard term provided by one party remains ambiguous despite interpretation the meaning more favourable to the other party shall prevail. 9.1. Rule 9 embodies the contra proferentem rule. This is an internationally well known rule of interpretation and it is generally regarded by</i>

		<i>commentators to apply under the CISG as well.⁷⁴ Honnold explains that "Article 8(2) places the burden on one who prepares a communication or who drafts a contract to communicate clearly to a reasonable person in the same position as the other party." This is particularly important in international transactions where parties originate from different cultural, language and business backgrounds. Article 8(2) places the burden on the party drafting the agreement or making a statement.</i>
CISG Advisory Council	'Opinion No 23: Mistake, Fraud, Misrepresentation and Initial Impossibility in CISG Contracts', Rule 2 and para 2.1	<i>Even if an issue is one of validity within the meaning of Article 4, the Convention governs the matter if the Convention provides for it, either expressly or by way of general principle in accordance with Article 7(2). In relation to validity, the Convention recognises this explicitly. Article 4 provides a "counter-exception": the Convention is not concerned with issues of validity "except as otherwise expressly provided in the Convention". This Opinion explains that in relation to claims for damages arising from facts that might give rise to an issue of validity, whether the Convention governs must be determined in the same way.</i>
Daan Willems	'Application of the CISG to Contracts with Public Authorities' in B Heiderhoff and I Queirolo (eds), EU and Private Law: Trending Topics in Contracts, Successions, and Civil Liability (Editoriale Scientifica 2023) 170	<i>So, taken together, the Vienna Sales Convention regulates in general both private and public contracts concerning the sale of movable goods.</i>
Daan Willems	'Application of the CISG to Contracts with Public Authorities' in B Heiderhoff and I Queirolo (eds), EU and Private Law: Trending Topics in Contracts, Successions, and Civil Liability (Editoriale Scientifica 2023) 170	<i>Due to its application (even ex officio by the court - see above 2.1), the question of its relationship with public procurement rules arises. The Vienna Sales Convention and the public procurement rules define distinct aspects of a contract. The focus of the EU public procurement rules is mainly precontractual. However, the Belgian legislator added general performance rules, which govern the contractual phase. The latter leads to a significant overlap with the Vienna Sales Convention, which also regulates the rights and obligations arising from a public contract. Therefore, this contribution proposes a threefold generic typology (see above 3.2) inducting the relation between the Belgian RD Performance and the Vienna Sales Convention. The proposed typology is one of the perspectives on the discussed relation. It is a first step in a terra incognita of the general interface between private and public law, open for debate and further exploration. In any case, the Vienna Sales</i>

		<i>Convention should not become an instrument for evasion of the public procurement rules.</i>
Franco Ferrari	'PIL and CISG: Friends or Foes?' (2013) 31 Journal of Law & Commerce 45, 91	<i>This is why, for instance, one cannot automatically resort to private international law rules to solve problems relating to the formal validity of the contract, since the CISG is ("expressly") concerned with it: Article 11 provides that a contract governed by the CISG need not be concluded in or evidenced by writing and is not subject to any other requirement of form, thus dealing with an issue that in many legal systems is considered to be an issue of validity.</i>
Franco Ferrari	'The CISG's Interpretative Goals, Its Interpretative Method and Its General Principles in Case Law (Part II)' 13(5) Internationales Handelsrecht (IHR) 181	<i>[...] listing the prohibition of venire contra factum proprium and estoppel among the general principles that can be derived from specific provisions such as Articles 16(2) and 29(2) CISG.</i>
Flávia Faermann	Estudo sobre a CISG e seus reflexos na ordem interna (Master's dissertation, Universidade Federal do Rio Grande do Sul 2018) 105	<i>No Brasil, a CISG pode ser aplicada nos contratos administrativos em que presente o elemento de internacionalidade. Em outros países, diferentemente, a regulação específica sobre licitações existe somente na fase de seleção, matéria que, como se verá, a CISG exclui de sua competência, conforme seu art. 4º. É por isso que, na prática, inexistem tantas dificuldades na sua adoção. Já no Brasil, a legislação regula também as fases posteriores à seleção, como a formação do contrato.</i>
Flávia Faermann	Estudo sobre a CISG e seus reflexos na ordem interna (Master's dissertation, Universidade Federal do Rio Grande do Sul 2018) 105	<i>A aplicação ou possível derrogação da CISG em cada caso específico deve ser claramente discutida e decidida de maneira racional. O documento deve ser aplicado, então, desde que não esteja excluído conforme o art. 6º ou uma das exclusões previstas pelos artigos 2º e 3º. Tal exclusão, quando presente, será avaliada e construída conforme os artigos 7º e 9º, ou seja, é a própria CISG que determina o fundamento de validade dos atos que excluem total ou parcialmente a sua aplicação. Derrogação pode dar-se, por exemplo, quando uma norma da CISG confronta algum princípio administrativo elencado constitucionalmente. Melina Kurcgant cita como exemplo art. 19, que apresenta situação intransponível ao administrador-licitante. O dever que a ele se impõe de respeitar os princípios da isonomia, da impessoalidade e do julgamento objetivo, impossibilita-o de acrescentar modificações que descaracterizem uma proposta de preço. Todavia, não se trata de inaplicabilidade decorrente de mera incompatibilidade entre o dispositivo convencional e a Lei Federal nº</i>

		8.666/93, vez que a CISG também tem hierarquia de lei ordinária, devendo ser aplicada somente em conformidade com os ditames constitucionais. O impedimento, neste caso, decorre de afronta a princípios constitucionalmente estabelecidos, sobre os quais a CISG não exerce os poderes de supressão ou revogação. Nesse exame, deve ser levada em consideração a expectativa das partes de ser o regramento que regerá o contrato. Se não forem excluídas, suas normas aplicam-se de forma plena.
Gary F Bell	'Why Singapore Should Withdraw Its Reservation to the United Nations Convention on Contracts for the International Sale of Goods (CISG)' (2005) 9 SYBIL 55, fn 36	<i>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'.</i>
Helen Elizabeth Hartnell	'Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods' (1993) 18 Yale J Intl L 1, 65–66	<i>A similar question arises in connection with domestic laws requiring contracts with some holders of public office to be in writing.² Such requirements directly pose the fundamental question of the scope of article 4(a), and of the relationship between the Convention and mandatory domestic law. [...] In these cases, the provisions of the Convention control, rather than the provisions of domestic law, because the Convention "expressly provides otherwise" and thus displaces the domestic rules. Even domestic rules of formal validity which are mandatory in the narrow sense must yield to the international legal regime, absent a contracting state's declaration preserving the effect of such rules.</i>
Harry M Flechtner	Honnold's Uniform Law for International Sales under the 1980 United Nations Convention (5th edn, Kluwer Law International 2021) 228	<i>Contracts for the purchase of supplies for a government present special problems of administration, such as the authority of government employees to create financial obligations for the public, and the possibility of favoritism, waste and fraudulent claims to public funds. As a consequence, domestic legislation may impose special requirements for the approval, manner of execution and form for procurement contracts made by governmental units.</i>
Harry M Flechtner	Honnold's Uniform Law for International Sales under the 1980 United Nations Convention (5th edn, Kluwer Law International 2021) 182–83	<i>Thus, like the inductive approach employed in case law development, the first step is the examination of instances regulated by specific provisions of the Convention. The examples explored above all featured principles evidenced by multiple CISG provisions: a single instance should seldom be sufficient to establish a "general principle" of the Convention. The second step is to choose between these two conclusions: (a) the Convention deliberately rejected the extension of</i>

		<i>these specific provisions; (b) the lack of a specific provision to govern the case at hand results from a failure to anticipate and resolve this issue. If the latter alternative applies, the third step is to consider whether the cases governed by the specific provisions of the Convention and the case at hand are so analogous that a lawmaker would not have deliberately chosen discordant results for the group of similar situations. In this event, it seems appropriate to conclude that the general principle embracing these situations is authorized by Article 7(2).</i>
Ingeborg Schwenzer	‘Introduction’ in I Schwenzer and U G Schroeter (eds), Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG) (5th edn, OUP 2022) 9	<i>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. The view that the meaning of ‘validity’ for the purposes of Article 4(a) must be decided solely by domestic law must be resolutely rejected. Since, in various cases involving impediments to performance, national laws provide remedies affecting the validity of the contract—nullity ipso iure for initial impossibility, termination by a party or by the court in the event of non-performance, an implied term that the contract will be annulled if incapable of performance—the very core of unified sales law would be at risk, if those questions were to be decided (concurrently, or even exclusively) by domestic law.</i>
Ingeborg Schwenzer, Pascal Hachem	‘Article 2’ in I Schwenzer and U G Schroeter (eds), Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG) (5th edn, OUP 2022) 69	<i>The autonomous interpretation (Article 7(1)) of the term ‘auction’ therefore requires certain restrictions to be made with regard to transactions commonly regarded as sales but maybe resembling auctions. It follows that a contract ‘awarded’ to the highest bidder in a public (international) procurement bid can very well be governed by the CISG.</i>
Jacob Ziegel	‘The Scope of the Convention: Reaching Out to Article One and Beyond’ (2005–06) 25 Journal of Law and Commerce 59	<i>This too [“Parties”] is an undefined term. However, Article 1(3) CISG makes it clear that the nationality of the parties or their civil or commercial character is irrelevant. Does this mean that an order for goods placed by a government agency with a foreign seller will be governed by the CISG even though government contracts are regulated by a separate regime under the domestic law of the agency (Article 11 CISG clearly implies that government contracts were meant to be included)?</i>

John Honnold	Honnold's Uniform Law for International Sales under the 1980 United Nations Convention (5th edn, Kluwer Law International 2021) 228–29	<i>A procurement contract made with a seller in the same State (the most common setting) would not meet the requirement of internationality of Article 1 (40-43, supra). When these requirements are met, the fact that the Convention does not deal with problems of authority of an agent or other representative to bind the principal (65-66, 98, supra) will avoid conflict with many laws on government procurement. A more difficult problem is posed by a procurement contract that would bind the government except for the requirement that it be in written form.</i>
Kazuaki Sono	'Commentary on the Convention on the Limitation Period in the International Sale of Goods' UN Doc A/CONF.63/17, reproduced in (1979) X UNCITRAL Yearbook 145, 149	<i>This definition is intended to show that this Convention is applicable without regard to the form of the organization that enters into a contract of international sale of goods. "Public" entities often engage in commercial activities and it is important to make it clear that such entities are subject to this Convention in the same way as "private" entities. Furthermore, the term public entity covers not only governmental agencies but also States, to the extent that they can sue or be sued. (The question of the immunity of a Contracting State before its own or foreign courts is not affected by this Convention.) An organization need not be corporate to be a "person". A partnership, an association or an "entity" "which can sue or be sued" in its own name under the applicable national law, is a "person" for the purpose of this Convention.</i>
Martin Schmidt-Kessel	'Article 11' in I Schwenzer and U G Schroeter (eds), Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG) (5th edn, OUP 2022) para 17	
Marçal Justen Filho	Comentários à Lei de Licitações e Contratações Administrativas (2nd edn, Thomson Reuters Brasil 2023) 994	
Marçal Justen Filho	Curso de Direito Administrativo (16th edn, Forense 2023) 93	
Marçal Justen Filho	Curso de Direito Administrativo (16th edn, Forense 2025) 103	
Marçal Justen Filho, Cesar Pereira,	Brazil Infrastructure Law (Eleven International Publishing 2016)	

Maria Augusta Rost (eds.)		
Pascal Hachem	‘Article 2’ in I Schwenzer and U G Schroeter (eds), Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG) (5th edn, OUP 2022) 68	<i>[...] a contract ‘awarded’ to the highest bidder in a public (international) procurement bid can very well be governed by the CISG.</i>
Pascal Hachem	‘Article 2’ in I Schwenzer and U G Schroeter (eds), Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG) (5th edn, OUP 2022) 70	<i>[...] auctions on execution of a judgment or as part of bankruptcy proceedings. The same applies where the creditor has seized property of its debtor and is allowed to sell it, as the seller’s authority is based on regulations of execution.</i>
Pascal Hachem	‘Article 10’ in I Schwenzer and U G Schroeter (eds), Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG) (5th edn, OUP 2022) 218–23	
Peter Schlechtriem	‘Unification of the Law for the International Sale of Goods’ in German National Reports (Private Law and Civil Procedure) : XIIth International Congress of Comparative Law (Nomos 1987) 126–27	<i>If the mayor of a German community purchases typewriters or office equipment from a Dutch firm, it is an open question whether those special public law rules on the written form are set aside by art. 15 ULIS or art. 11 CISG. In my opinion, this can basically be assumed, since the domestic characterization of a matter as pertaining to private law, administrative law or public law does not preclude its classification as »matter governed by this Convention«, to which the uniform law alone applies.</i>
Peter Schlechtriem	‘Unification of the Law for the International Sale of Goods’ in German National Reports (Private Law and Civil Procedure) : XIIth International Congress of Comparative Law (Nomos 1987) 126–27	<i>The case of the German mayor is but the tip of an iceberg of parallel problems: in a number of countries, sales contracts by public authorities are subject to special legal regulations that do not just provide for the form but also for the contents of such contracts - army procurement contracts are an example. In all these cases, the question arises as to whether such special public law rules for sales contracts by the state and its authorities are pushed aside by the uniform sales law – which in this author’s view would be the most adequate solution – and whether national courts would really respect the prevalence of uniform law.</i>

Pilar Perales Viscasillas	‘Modification and Termination of the Contract (Art. 29 CISG)’ (2005–06) 25 J L & Com 167, 176	<i>Article 29(2) of the CISG recognizes the will of the parties to agree on the possibility of having the written contract modified or terminated exclusively in written form. The provision also limits the scope of that requirement by the application of the principle of estoppel, or venire contra factum propium. Although this provision refers to situations in which the parties agree on a written form for the modification or termination of the contract, it also applies to situations in which the parties agree on further formalities such as a signature or the presence of a witness.</i>
Rafael Wallbach Schwind	Licitações internacionais: participação de estrangeiros e licitações realizadas com financiamento externo (Fórum 2022) 126	
Riad Waked Jaber	Le contrat administratif international: essai d’une théorie générale à travers l’exemple du contrat BOT (Build, Operate and Transfer) (LGDJ 2013) 363–65	
Robert A. Hillman	‘Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of “No Oral Modification” Clauses’ (1988) 21 Cornell Intl LJ 449, 460–66	<i>Courts seeking a model to resolve NOM clause issues could look to analogous law developed in various states. For example, the law of promissory estoppel in the United States suggests a test of reliance. A promisor is bound to a promise when the promisee’s reliance is substantial and reasonably foreseeable. Even reliance on a revocable offer may be reasonably foreseeable and therefore bar revocation of the offer. Under this approach, when reliance on an oral modification is substantial and reasonably foreseeable, article 29(2) would bar enforcement of a NOM clause. On the other hand, article 29(2) may demand a narrower interpretation of reliance. Otherwise a NOM clause, although recognized by article 29(2), would have little function. In addition, following a particular state’s approach to reliance runs the danger of undermining uniformity of interpretation. In the end, a proper interpretation of "conduct" and "reliance" may depend on one’s view of the value of NOM clauses. Broad interpretations swallow up NOM clauses, while restrictive ones preserve them.</i>

Robert A. Hillman	‘Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of “No Oral Modification” Clauses’ (1988) 21 Cornell Intl LJ 449, 462	<i>The Convention does not expressly preclude parties from "derogat[ing] from" article 29(2)'s reliance exception. In fact, the Convention bars enforcement of the reliance exception when a state makes a declaration under articles 12 and 96 that all contracts and modifications must be in writing. One could assert that the Convention, in light of its emphasis on freedom of contract, confers the same right on the parties. Although the Convention generally quashes formal requirements, the goal was to eliminate such requirements supplied by law, not those supplied by the parties themselves.</i> <i>Despite the Convention's silence, however, the better interpretation probably is that the parties cannot derogate from the reliance exception of article 29(2). Article 29(2) is itself a limitation on the parties' article 6 freedom of contract; otherwise, article 6 completely subverts article 29(2)'s reliance exception. Presumably the drafters intended a role for the latter provision.</i>
Samuel Kofi Date-Bah	Article 29, in C. M. Bianca & M. J. Bonell (eds.), Commentary on the International Sales Law , Giuffrè, 1987, p. 242.	<i>[...] the parties' declared intention that modification or termination be in writing overrides the freedom of form of Article 11.</i>
Sophie Lemaire	Les contrats internationaux de l'administration (LGDJ 2005) 282–83	
Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds)	UN Convention on Contracts for the International Sale of Goods (CISG): Article-by-Article Commentary (2nd edn, CH Beck/Hart/Nomos 2018) 47	
Stephan W. Schill	‘Transnational Legal Approaches to Administrative Law: Conceptualizing Public Contracts in Globalization’ (2014) 1 Rivista Trimestrale di Diritto Pubblico 25–30	<i>[...] In addition, international procurement rules do not only affect contracts with foreign nationals (i.e., international public contracts strictly speaking), but also contracts that would normally be classified as purely domestic. International and supranational law on public contracts law therefore becomes a phenomenon of general impact on the domestic law of public contracts.</i> <i>Finally, there are even instances where international law is used to harmonize domestic public contracts law in multiple jurisdictions. This is the case, for example, with the EU directives relating to public procurement, which harmonize</i>

		<i>the award procedure and law relating to the conclusion of public contracts by EU Member States. But there are also cases where international law is used more broadly to harmonize the public contracts regimes of states. In the mining industry, for example, the West African Economic and Monetary Union started, based on an international treaty, to harmonize the mining laws, including the awarding of mining concessions. This affects domestic and international public contracts law in that specific sector and does away with a strict separation of domestic and international law.</i>
Steven W. Feldman	Government Contract Guidebook (4th edn, Thomson Reuters 2013) 532–35 (formal changes) and 535–45 (constructive changes)	
Ulrich Schroeter	‘Article 29’ in I Schwenzer and U G Schroeter (eds), Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG) (5th edn, OUP 2022) paras 62–79	
Ulrich Schroeter	‘Contract Validity and the CISG’ (2017) 22 Uniform Law Review 47, 62–63	<i>Article 29(1) of the CISG extends the freedom of form to contract modifications by declaring the ‘mere agreement’ of the parties to be sufficient, with the existence of such an agreement being determined according to all circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties (Article 8(3) of the CISG). This means that neither a specific form nor any equivalent requirement (as notably consideration under common law or cause respectively causa in civil law jurisdictions) needs to be observed. In determining what domestic laws relating to formal validity are pre-empted by the express provisions in Articles 8, 11, and 29(1) of the CISG, case law and legal writing have construed the notion of ‘form’ rather widely and have concluded that also statutes of frauds and the parol evidence rule (section 2–202 of the Uniform Commercial Code (UCC)) are displaced by the Convention.</i>

Ulrich Schroeter	‘Introduction to Articles 14–24 CISG: General Questions Regarding the Formation of the Contract’ in I Schwenzer and U G Schroeter (eds), Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG) (5th edn, OUP 2022) 295–96	<i>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).³⁹⁹ 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 fulfil a contract (p. 295) with a government. Domestic laws which govern calls for tender often impose certain rules designed to guarantee the fair selection of the successful tenderer (eg 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 EC Procurement Directives, which in particular seek to protect foreign tenderers (sellers).</i> <i>Since domestic laws of the kind described primarily aim at regulating the phase leading up to the selection of the successful tenderer, the contract can subsequently be concluded in accordance with Articles 14–24 without resulting in any conflict between the two sets of rules. The tenders accordingly constitute offers under Article 14(1), among which the successful tender is accepted by way of the award decision which at the same time constitutes the acceptance under Article 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 Article 4, sentence 2(a). 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 eg 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.</i>
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)’ [2019] IHR 133	[Original in German] <i>The AppGer Basel-Stadt had to clarify whether the applicability of the UN Convention on Contracts for the International Sale of Goods was already excluded because the buyer was the seller of the disputed electricity meters through the procurement process as a bidding process, i.e. through tendering (in Swiss diction: Submission) and in the performance of a public task. The court decided convincingly that neither one nor the other circumstance stands in the way of the application of the Convention. Although the UN Convention on Contracts for the International Sale of Goods is not applicable to purchases “at auction” according to Art. 2 lit. b CISG, it does</i>

		<i>cover this provision Purchases by tender are neither direct nor analogous. This results primarily from the fact that the central reason for the exception is the lack of clarity about the identity of the buyer until the contract is accepted, which also includes his local branch and therefore the applicability of the UN Convention on Contracts for the International Sale of Goods Seller is unpredictable to the end – is not relevant in tenders, because the person issuing the tender (buyer) can easily find out about the person and location of the individual bidders (sellers) before selecting the successful bidder. Obtaining several offers in international tenders, In order to assume the cheapest, an auction is therefore not an auction within the meaning of Art. 2 lit. In addition, the fact that the buyer acted as an independent public institution when concluding the contract in the performance of public tasks did not exclude the applicability of the UN Convention on Contracts for the International Sale of Goods. However, the buyer had argued that Article 2 lit be excluded. The AppGer Basel-Stadt did not follow this interpretation and declared Article 2 lit. In a historical interpretation, this is clear from the fact that when the Convention was passed in 1980, numerous socialist states still concluded and processed their foreign trade contracts exclusively through state or state-owned agencies, but these international sales contracts were easily viewed as covered by the UN Convention on Contracts for the International Sale of Goods. Correctly, the Convention therefore also covers transactions with direct state participation or the participation of state-owned enterprises (SOEs). In previous international case law on the UN Convention on Contracts for the International Sale of Goods, this therefore applies, for example, to purchases by the Republic of Iraq as part of the “Oil for Food” program or the sale of a decommissioned submarine by the Russian Ministry of Defense.</i>
UNCITRAL	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016 edn, United Nations 2016) 18	<i>Under article 2 (c) sales on judicial or administrative execution or otherwise by authority of law are excluded from the Convention’s sphere of application as such sales are normally governed by mandatory laws of the State under whose authority the execution is made.</i>
UNCITRAL	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016 edn, United Nations 2016) 417	<i>Article 90 aims at providing priority to other international agreements that concern matters covered by the Convention. Specifically, Article 90 aids in the determination of the governing law for a dispute over a contract for the international sale of goods, or some aspect thereof, by providing that the Convention shall not prevail over any</i>

		<i>international agreement “which has already been made or may be entered into...” and which concerns the same matters covered by the Convention, as long as the parties’ places of business are in States party to such agreement.</i>
W Noel Keyes	Government Contracts under the Federal Acquisition Regulation (3rd edn, Thomson West 2003) 566–69	

LITERATURE TABLE ON ARTICLE 6 CISG

Author	Reference	Quote
Bojidara Borisova	'Remarks on the Manner in which the UNIDROIT Principles May Be Used to Interpret or Supplement Article 6 of the CISG'	<i>"When discussing the provisions of CISG Art. 6, one must take into consideration the following basic problems.</i> <i>- First, what is the major prerequisite that allows the contracting parties to choose freely the law applicable to their contractual relations? In this connection, the dispositive character of the CISG provisions must be examined.</i> <i>- Second, does CISG Art. 6 and its counterpart UNIDROIT Principles arts. 1.1 and 1.5 provide the obligatory manner in which the choice of law must be made?</i> <i>- Third, what is the scope of the party autonomy?</i> <i>- Finally, we should examine the question whether party autonomy might be limited. With respect to this, special attention must be drawn to the so-called mandatory provisions of the CISG."</i>
Cesar Pereira	'Application of the CISG to International Government Contracts for the Procurement of Goods' (2023) 2 Review of the Kopaonik School of Natural Law 157, 172–73	<i>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. However, none of the known cases 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.</i>

CISG Advisory Council	'Opinion No 16: Exclusion of the CISG under Article 6', para 2.6	<i>While parties can agree to exclude the CISG during litigation, the only way conduct of legal proceedings itself can potentially alter the prior applicability of the CISG is if it amounts to an agreement to modify the choice of law of the underlying contract. In other words, the CISG is excluded only if such conduct leads to formation of an agreement to modify the original contract in compliance with Arts 6, 11, 14-24 and 29 CISG. Parties must therefore comply with the CISG's internal requirements before their autonomous choice can be effective.</i>
CISG Advisory Council	'Opinion No 16: Exclusion of the CISG under Article 6', Rule 3 and para 3.1	<i>"The intent of the parties to exclude must be determined in accordance with Art. 8 CISG. Such intent should be clearly manifested, whether at the time of conclusion of the contract or at any time thereafter. This standard also applies to exclusions during legal proceedings [...]. Most scholars caution against swift conclusions of implicit exclusion within the contract. Implicit exclusions have been upheld, but most courts and tribunals have been slow to infer exclusion where the intent of a contractual clause is unclear. Generally, a 'certain' or 'real' tangible intent rather than hypothetical intent has been required [...]. In accordance with the cases and commentary, the balance should generally tip in favour of non-exclusion where the facts do not support an inference of clear intent to exclude".</i>
CISG Advisory Council	'Opinion No 16: Exclusion of the CISG under Article 6', Rules 3 and 4	<i>3. The intent of the parties to exclude must be determined in accordance with Art. 8 CISG. Such intent should be clearly manifested, whether at the time of conclusion of the contract or at any time thereafter. This standard also applies to exclusions during legal proceedings.</i> <i>4. Generally, such a clear intent to exclude:</i> <i>(a) should be inferred, for example, from:</i> <i>(i) express exclusion of the CISG;</i> <i>(ii) choice of the law of a non-Contracting State;</i> <i>(iii) choice of an expressly specified domestic statute or code where that would otherwise be displaced by the CISG's application.</i> <i>(b) should not be inferred merely from, for example:</i>

		(i) the choice of the law of a Contracting State; (ii) choice of the law of a territorial unit of a Contracting State.
CISG Advisory Council	'Opinion No 16: Exclusion of the CISG under Article 6', paras 6.3–6.4	6.3 <i>Domestic procedural rules of waiver are not displaced by the CISG. However, the CISG itself determines the question of its exclusion, and autonomously controls its own sphere of applicability. Accordingly, for contracts to which it already applies ipso jure, the CISG can only be excluded by means of an agreement which satisfies Arts 6, 11, 14-24 and 29 CISG. The exercise of party autonomy to exclude during proceedings involving a contract to which the CISG already applies requires modification by agreement. Parties cannot oust the CISG from a contract to which it already applies, without actual agreement in accordance with the standard of intent outlined above [§5].</i> 6.4 <i>It might be argued that counsel are agents of the parties, thus their conduct of proceedings should be sufficient for tacit exclusion, or that if counsel agree to exclude, as agents they thereby form a post-contractual exclusion agreement under Art. 6. The CISG does not deal with matters of agency. However, the comments above apply equally irrespective of the existence of an agency relationship; i.e., conduct of proceedings alone is not sufficient to support a strong inference of intent to exclude. If parties have authorized counsel acting as their agents, not only to litigate the dispute, but also to modify their original business dealings with the counterparty by amendment of the contract without further instructions, then express agreement by counsel to modify the choice of law may be sufficient. Such consent would be rare in practice. As the Polish Supreme Court recently noted, the behaviour of counsel was irrelevant to the issue of agreement to exclude – a matter that is governed by the CISG - since the parties' legal representatives 'had no authority to choose the applicable law on behalf of the parties'. Further, even if specifically authorized to modify contractual dealings, in order to exclude at the post-contractual</i>

		<i>stage counsel would need to be aware of the CISG's application before entering such an agreement.</i>
Eberhard Schmidt-Aßmann	La teoría general del derecho administrativo como sistema (Marcial Pons 2003) 59	
First Committee	<i>United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980: Official Records</i> (United Nations 1981) UN Doc A/CONF.97/19, Summary Records of Meetings of the First Committee, Thursday, 13 March 1980, 10 am	<i>[United Kingdom (A/CONF.97/C.1/L.8): Add the following sentence to article 5 [became CISG article 6]: "Such exclusion, derogation or variation may be express or implied."]</i> <i>[Belgium (A/CONF.97/C.1/L.41): Add a new paragraph (2): "Such exclusion, derogation or variation may be express or derive with certainty from the circumstances of the case." Add a new paragraph (3): "The application of this Convention shall be excluded if the parties have stated that their contract is subject to a specific national law."]</i> <i>[Pakistan (A/CONF.97/C.1/L.45): The word "expressly" may be added after the words "the parties may."].</i> <i>[...] 27. The United Kingdom proposal would have the effect of making the meaning of article 5 [became CISG article 6] clearer but it also introduced a degree of woolliness in that, as could be seen from national case law, judges were often tempted to give a purely hypothetical interpretation of the will of the parties.</i> <i>28. The Belgian proposal was an attempt to add an element of security by providing that, where the will of the parties was not expressly declared in writing, it must be</i>

		clearly apparent from all the circumstances of the case. 29. Mr. KIM (Republic of Korea) said that, if the parties chose the law of one of the Contracting States, it was possible that the implied exclusion might be contrary to the provisions of article 1 [became CISG article 1], paragraph 1(b) of the Convention. 30. The CHAIRMAN put to the vote the proposals by Pakistan (A/CONF.97/C.1/L.45), Belgium (A/CONF.97/C.1/L.41) and the United Kingdom (A/CONF.97/C.1/L.8). 31. All three proposals were rejected.
Franco Ferrari	Contracts for the International Sale of Goods: Applicability and Applications of the 1980 United Nations Sales Convention (Martinus Nijhoff 2011) 165–69	<i>"In this author's opinion, however, this solution is not tenable under the CISG, not unlike under the ULIS; the indication of the law of a Contracting State (or that of a State within a Federal State) does per se not exclude the CISG's application, as confirmed by many court decisions and arbitral awards. And this is true even when the law chosen is that of a Contracting State that made an Article 95 reservation, provided that the Court is not located in that very Contracting State. Of course, when the purely domestic law of a Contracting State is chosen as the law applicable, the CISG will not apply, as confirmed in case law. Thus, where the parties choose to apply "the domestic German law" or "the Swiss Law of Obligations" to their contract, the CISG is implicitly excluded, as it is in those cases where the parties' choose to apply "the law of a Contracting State insofar as it differs from the law of the national law of another Contracting State"."</i>
Harry M Flechtner	'Chapter I. Sphere of Application (Articles 1–6)' in Honnold's Uniform Law for International Sales under the 1980 United Nations Convention (5th edn, Kluwer Law International 2021) 135	<i>"Without expressly mentioning the CISG, parties can exclude its application by agreeing to a choice of law clause that designates the law of a non-Contracting State to govern their contract, or by clearly providing that the transaction is governed by the domestic sales law of a Contracting State."</i>

Harry M Flechtner	Honnold's Uniform Law for International Sales under the 1980 United Nations Convention (5th edn, Kluwer Law International 2021) 142	<i>"Suppose, for example, parties include a choice of law clause designating the law of a U.S. state that has adopted Article 2 of the UCC, and the clause does not expressly exclude the CISG; throughout their contract, furthermore, the parties employ language derived from UCC Article 2 rather than from the Convention—e.g., they include a disclaimer of the "implied warranty of merchantability" (a term not used in the Convention) and they draft the disclaimer to comply with the conspicuousness and phrasing requirements of UCC §2-316(2) (requirements not imposed by the Convention). Might these facts, especially if they are part of a consistent pattern in which UCC language is employed and Convention terminology shunned, properly cause a court to conclude, applying the Convention's own rules of interpretation, that the parties intended to exclude the Convention? That possibility must, at the least, be entertained."</i>
Heidi Stanton	'How to Be or Not to Be: The United Nations Convention on Contracts for the International Sale of Goods, Article 6' (1996) 4 Cardozo J Intl & Comp L 423	<i>"The exclusion of the latter portion of ULIS article 3 evinces that the drafters of the 1978 Convention were cognizant of the provision's potential interpretational problems. What the drafters did not do, however, was answer the question they formulated: How does one accurately exclude the Convention, expressly or impliedly?</i> <i>In reference to the drafting process of article 6, the conference at Vienna has been criticized as follows:</i> <i>'The language of article 6 can be inconsistently interpreted as either requiring express, written exclusion of the Sale of Goods Convention or permitting exclusions to be implied by conduct. The language of article 6 strikes a balance between the drafters' opposing positions. While the compromise language enabled parties to sign the Sale of Goods Convention, it now threatens the uniform law's ultimate success'."</i>

Pascal Hachem	'Article 6' in I Schwenzer and U G Schroeter (eds), Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG) (5th edn, OUP 2022) 119	<i>"Derogation may be made implicitly, although there is no longer any express provision to that effect [...]. However, in particular US courts seem to have trouble with this notion and apparently conclude from the wording of Article 6 that only an express exclusion of the CISG is possible which has resulted in a number of problematic statements [...]. Read in conjunction with other provisions—in particular Articles 30, 53, 35(1) ('required by the contract') or Article 32 ('in accordance with the contract')—Article 6 expresses a general principle 'on which [the CISG] is based' (Article 7(2)), namely the principle of freedom of contract. Accordingly, under the CISG any contractual agreements—eg INCOTERMS used in the contract—take prevalence over the default provisions dealing with the same subject matter."</i>
Pascal Hachem	'Article 6' in I Schwenzer and U G Schroeter (eds), Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG) (5th edn, OUP 2022) 130–31	<i>"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—eg 'this contract is governed by the provisions of the (p. 130) 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 satisfied by both parties."</i>
Pilar Perales Viscasillas	'Applicable Law, the CISG, and the Future Convention on International Commercial Contracts' (2013) 58 Vill L Rev 733, 740	<i>[...] derives from a systematic interpretation of the CISG, which applies ex officio, and it ought to be considered the default applicable law. Therefore an exclusion should be clearly expressed.</i>
Michael Joachim Bonell	'Article 6' in C M Bianca and M J Bonell (eds), Commentary on the International Sales Law: The 1980 Vienna Sales Convention (Giuffrè 1987) 51–64	<i>"1.2. - This article [Article 6 CISG] is based on Article 3 of ULIS which provided: 'The parties to a contract of sale shall be free to exclude the application thereto of the present Law either entirely or partially. Such exclusion may be express or implied.'</i> <i>During the preparation of the present Convention only a few States expressed reservations about the principle of the autonomy of the parties as such. Their concern was that, in practice, the principle could be abused by the economically stronger party imposing his own national law or contractual terms far less balanced</i>

than those contained in the Convention (see Yearbook, I (1968-1970), 168; II (1971), 43-44; III (1972), 73). A proposal to provide for some restrictions on the freedom of the parties received wider support. In particular, it was suggested that the parties, when excluding the Convention in its entirety or derogating from any of its provisions, should be required to indicate what other [page 51] law or rules should govern their contract (see Yearbook, I (1968-1970), 166, 168). The same condition had already been imposed in the 1963 Draft (Article 6), according to which:

'(1) The parties may entirely exclude the application of the present law provided that they indicate the municipal law to be applied to their contract.

(2) The parties may derogate in part from the provisions of the present law provided that they agree on alternative provisions, either by setting them out or by stating to what specific rules other than those of the present law they intend to refer.'

However, at the 1964 Hague Conference the majority of delegations was against such a restriction (see HERBER, in DÖLLE, *Einheitliches Kaufrecht*, 19-20). Similarly, the prevailing view in UNCITRAL was in favour of the widest possible recognition of the parties' autonomy. [...] At the Vienna Conference a proposal to reintroduce a reference to the possibility of an implied exclusion or derogation was rejected for the same reasons (see Official Records, II, 249-250). Nonetheless, **the majority of delegations was equally opposed to the proposal according to which a total or partial exclusion of the Convention could only be made expressly** (see Official Records, II, 249-250).

Michael Joachim Bonell	'Article 6' in C M Bianca and M J Bonell (eds), Commentary on the International Sales Law: The 1980 Vienna Sales Convention (Giuffrè 1987) 51–64	"Article 6 refers to two cases: one in which the parties exclude the application of the Convention in its entirety; the other in which, while agreeing to have their contract governed by [page 53] the Convention, they intend to derogate from or vary the effects of some of its individual provisions. Although the two possibilities are dealt with in the same article, they should at least in theory be considered separately. The right of the parties to contract out of the entire Convention is an application of a generally recognized principle of private international law according to which the parties to an international contract of sale of goods are permitted to choose the applicable law. In the absence of a uniform law, the parties' choice was restricted to the existing domestic laws. Article 6 makes it clear that, notwithstanding the advent of the Convention, the parties remain free to decide what should be the proper law of their contract -- that of the Convention or that of some existing municipality. The right of derogation raises different issues. Even where the Convention applies as the proper law of the contract, the parties, under this right, may adapt the Convention to their special needs, either by excluding some of its provisions or by agreeing on contractual terms to supplant them. Existing domestic laws grant the parties the same freedom of contract, provided they do not contravene rules of a mandatory character. The absence of similar limitations under the Convention, except in Article 12, should not come as a surprise. The Convention expressly excludes consumer purchases from its scope (see Article 2(a)) and, with respect to contracts of sale between merchants; it does not deal with questions relating to their validity nor with the effect on the property of the goods sold (see Article 4). It follows that its scope is restricted to transactions and issues which, within the various domestic laws, are traditionally governed by provisions of a non-mandatory character."
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Pascal Hachem	'Applicability of the CISG – Articles 1 and 6' in I Schwenzer, P Butler and Y Atamer (eds), Current Issues in the CISG and Arbitration (Eleven International Publishing 2014) 34	<i>[...] 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.</i>
Pascal Hachem	'Applicability of the CISG – Articles 1 and 6' in I Schwenzer, P Butler and Y Atamer (eds), Current Issues in the CISG and Arbitration (Eleven International Publishing 2014) 36–37	<i>"It is unanimously agreed that Article 6 expresses the Convention's 'opting-out' approach. The term 'opting-out' is used to indicate that where the CISG is applicable to an agreement, based on an objective test, it applies ex officio and, in particular, no choice by the parties is necessary for the Convention to apply. If the parties do not wish to have the CISG applied, it is possible to exclude the Convention, but is also necessary for the parties to reach a prior agreement in this regard. It is undisputed that the CISG can be excluded by explicit or implicit agreement. The predecessor of the CISG, the Uniform Law for the International Sale of Goods (ULIS), expressly envisaged the possibility of its implicit exclusion to an agreement. This wording was changed at the Vienna Conference. However, it is commonly understood that the CISG drafters merely intend to prevent courts from applying a threshold that was too low to enable a purported implicit exclusion of the Convention. Nevertheless, in practice, an implicit exclusion is almost impossible. In particular, The United States courts apply a very high threshold for when implicit exclusion exists"</i>
Pascal Hachem	'Applicability of the CISG – Articles 1 and 6' in I Schwenzer, P Butler and Y Atamer (eds), Current Issues in the CISG and Arbitration (Eleven International Publishing 2014) 37	<i>"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,</i>

		<i>that is the choice of the law that is intended to apply to the contract."</i>
Pascal Hachem	'Applicability of the CISG – Articles 1 and 6' in I Schwenzer, P Butler and Y Atamer (eds), Current Issues in the CISG and Arbitration (Eleven International Publishing 2014) 37–38	<i>"Rather, in my view, the best way to proceed is to apply a two-step test to choice of law clauses. In the first step, the court or tribunal must apply the CISG to the question, whether the parties have managed to exclude the Convention's application. In the second step, the court or tribunal will have to apply the law designated by the parties to determine whether they have also successfully entered this law."</i>
Paul Reynolds	'Legitimate Expectations and the Protection of Trust in Public Officials' [2011] PL 330, 359–61	<i>The promotion of trust allows for good administration by producing several instrumental boons without which such administration would be virtually impossible. Recognising the doctrine of legitimate expectations' relationship with trust reinforces its connection with good administration and presents a fully coherent doctrine. Moreover the relevance of trust to good administration will indicate how the protection of an applicant's legitimate expectations may be directly in the wider public interest.</i>
Stephan W. Schill	'The Impact of International Investment Law on Public Contracts' (2017) Amsterdam Law School Legal Studies Research Paper No 2017-08, 7–8	<i>Customary 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.</i>
Simon Cornelius Manner, Moritz Schmitt	'Article 6 [The Contract and the Convention (Primacy of the Contract)]' in C Brunner and B Gottlieb (eds), Commentary on the UN Sales Law (CISG) (Kluwer Law International 2019) 81	<i>"Since the CISG follows the "opting-out" model (i.e., the parties need not positively agree on the application of the CISG; rather its application follows automatically from Arts. 1–3; for the application of the CISG by arbitral tribunals and courts of non-contracting states, cf. Art. 1 paras. 16–18) and Art. 6 is an exception provision concerning the CISG's sphere of application, the burden of proof for the factual requirements of an exclusion, derogation or variation of effects of CISG provisions lies with the party, which relies on them."</i>

Stefan Kröll	'Arbitration and the CISG' in I Schwenzer, P Butler and Y Atamer (eds), Current Issues in the CISG and Arbitration (Eleven International Publishing 2014) 59–86	<i>"A survey conducted by the International Chamber of Commerce (ICC) in 2000 revealed that in 70% of the cases the parties have included a choice of law clause in their contract. It can be assumed with considerable certainty that in the majority of cases that choice will point to a particular national law. As a consequence and in light of such a choice, arbitral tribunals will apply the CISG as part of the chosen law, pursuant to Article 1(1)(b) of the CISG. Like state courts, arbitral tribunals have generally refrained from interpreting the reference to the law of a contracting state as an exclusion of the CISG, pursuant to Article 6 of the CISG."</i>
Ulrich Schroeter	'A Time-Limit Running Wild? Article 39(2) CISG and Domestic Limitation Periods' in M B Andersen and R F Henschel (eds), A Tribute to Joseph M Lookofsky (DJØF Publishing 2015) 335, 352–54	<i>In explaining the term "shall not affect", the official commentary states that the Limitation Convention "is not applicable" to time-limits as Article 39(2) CISG and "has no effect" on such rules. What is not entirely clear is whether this lack of applicability and effect is a specific result of Article 1(2) Limitation Convention or would have been the case anyway, as the Limitation Convention is at the outset not concerned with time-limits for notices of non-conformity. It is furthermore interesting to note that the CISG does not include a counterpart to Article 1(2) Limitation Convention addressing its relationship with statutes of limitation. The Secretariat's Commentary on the draft CISG contains some-what contrary indications, in that it stresses that "the principles which lie behind [Article 39(2) CISG and Articles 8, 10 Limitation Convention] are the same", only to add that the obligation under Article 39(1) CISG to give notice "is a completely separate obligation from that to commence judicial proceedings under the Prescription Convention". Arbitral decisions have stressed the latter point. By contrast, commentators have argued that it might be difficult to reconcile the policies underlying the two Conventions, and have even spoken of a "clash of policies" between the two time-limits.</i>
UNCITRAL	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016 edn, United Nations 2016) 34	<i>"According to this line of decisions, the choice of the law of a Contracting State, if made without particular reference to the domestic law of that State, does not exclude the Convention's applicability,⁴⁷ not even where the law chosen is that of a State within a Federal State, at least not</i>

		<i>according to some courts. Of course, if the parties clearly chose the domestic law of a Contracting State, the Convention must be deemed excluded.</i>
UNCITRAL	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016 edn, United Nations 2016) 34	<i>"According to some courts, the fact that the parties incorporated an Incoterm into their agreement does not constitute an implicit exclusion of the Convention. According to a different court, the Convention can be excluded if the parties agree on terms that are incompatible with the Convention."</i>