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Legal Analysis of The Auction Exclusion Under The CISG In Reverse Auction Contracts For Government Procurement

Putri Batari Widyadhana [1]; Huala Adolf [2]; Prita Amalia[3]

Faculty of Law, Padjadjaran University, Indonesia
putriibatari@gmail.com, huala.adolf@unpad.ac.id, prita.amalia@unpad.ac.id
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Abstract

This article examines the qualification of the auction exclusion under Article 2(b) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and analyses the mechanism of reverse auction in government procurement, particularly in relation to that provision. The research adopts a normative juridical method with a conceptual approach and library-based legal research, supported by an examination of the CISG, relevant legal doctrine, and pertinent case law. Jurisprudential practice indicates a growing tendency not to characterise reverse auction or competitive public procurement mechanisms automatically as sales by auction, with the consequence that international contracts for the sale of goods arising therefrom may still fall within the scope of the CISG. This position is further supported by the Electronic Electricity Meter Case, in which the Court affirmed that the CISG may remain applicable notwithstanding that the contract originated in a public procurement, on the ground that such procedure constitutes a mechanism for the selection of bids prior to contract formation rather than an auction in the traditional sense.

Keywords: CISG, Auction, Reverse Auction, Government Procurement

A. Introduction

Government procurement constitutes an important part of international trade and serves as the State's principal instrument for fulfilling public needs.[1] International trade in the era of globalization has experienced significant acceleration, with the volume of cross-border transactions reaching USD 33 trillion in 2024. [2] Referring to Huala Adolf, conceptually, international trade law is a set of rules governing commercial relations that are private law in nature, and such legal rules govern transactions from different States.[3]

[1] Syukir and Prita Amalia, "Implications of the Principle of Non-Discrimination in Indonesia-European Union Comprehensive Economic Partnership Agreement on Government Procurement Chapter Toward Regulations of Domestic Product Use in Indonesia", *Transnational Business Law Department*, August 2020, p. 121.

[2] UN Trade and Development (UNCTAD), "Global Trade Hits Record $33 Trillion in 2024, Driven by Services and Developing Economies", UN Trade and Development (UNCTAD), 14 March 2025, <https://unctad.org/news/global-trade-hits-record-33-trillion-2024-driven-services-and-developing-economies?utm>, [Accessed on 11 September 2025].

[3] Huala Adolf, *Hukum Perdagangan Internasional: Prinsip-prinsip dan Konsepsi Dasar*, PT Rajawali Pers, Bandung, 2004, p. 4.

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Furthermore, Roy Goode defines international trade law as a set of rules governing international commercial transactions and applicable in several different legal systems.[4]

This high intensity of trade gives rise to multidimensional legal complexity, particularly in relation to the harmonization of different contract law systems among States.[5] Such complexity arises from differences in legal systems, jurisdictions, languages, and dispute settlement mechanisms, thereby requiring a normative framework capable of realizing uniformity and legal certainty in its implementation. One of the instruments designed for such purpose is the United Nations Convention on Contracts for the International Sale of Goods 1980 ("**CISG**").

The CISG is recognized as a convention that has succeeded in unifying the field of commercial law at the international level.[6] The main objective of the CISG is to establish uniformity and fairness for cross-border contracts for the sale of goods, so that the parties are not required to examine and compare various national and international legal regimes in order to determine the applicable law.[7] Data indicate that more than 80% of world trade involves States that have ratified the CISG.[8] To date, the CISG has been adopted by 97 (ninety-seven) States, including most developed States with the largest trade volumes in the world, including the United States, China, Japan, Germany, France, Canada, and Australia.[9] The CISG has become a lex mercatoria that provides a uniform legal framework for international sale of goods contracts, thereby unifying rules across States and creating uniformity in international trade practice.[10]

However, the provisions of the CISG do not apply universally to all forms of sales of goods. Article 2 of the CISG contains a list of exclusions from the scope of the Convention, among others as follows:

*"**Article 2 CISG***

This Convention does not apply to sales:

(a) of goods bought for personal, family or household use, unless the seller, at any time beforeor at the conclusion of the contract, neither knew nor ought to have known th at the goods were bought for any such use;
(b) by auction;
(c) on execution or otherwise by authority of law;
(d) of stocks, shares, investment securities, negotiable instruments or money;

[4] Roy Goode (et.al.), *Transnational Commercial Law – Texts, Cases, and Materials*, Oxford University Press, Oxford, 2nd ed., 2015, p. ixv.

[5] Viktor Purba, "Kontrak Jual Beli Benda Internasional (Konvensi Vienna 1980)", Postgraduate Program, Faculty of Law, Universitas Indonesia, Jakarta, 2002, p. 1.

[6] Harry M. Flechtner, "United Nations Convention on Contracts for the International Sale of Goods", *United Nations Audiovisual Library of International Law*, 2009, p. 1, <https://legal.un.org/avl/ha/ccisg/ccisg.html> [Accessed on 11 September 2025].

[7] Ingeborg Schwenzer and Pascal Hachem, "The CISG-Successes and Pitfalls", *American Journal of Comparative Law*, No. 57, 2009, p. 458.

[8] Ingeborg Schwenzer, "The CISG Advisory Council", *Nederlands Tijdschrift voor Handelsrecht*, 2012, p. 46.

[9] CISG-Online, "Contracting States", *Faculty of Law University of Basel*, <https://cisg-online.org/cisg-contracting-states>. [Accessed on 11 September 2025].

[10] UNCITRAL Secretariat (a), "Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods", par. 1.

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(e) of ships, vessels, hovercraft or aircraft;
(f) of electricity."

In line with the foregoing, Article 2(b) of the CISG expressly excludes sales by auction from its scope of regulation. A traditional auction is understood as a competitive mechanism in which bidders successively increase their bid prices until the highest bid is reached.[11] However, along with the development of information technology and the dynamics of business practice, a contemporary form of auction has emerged, known as a reverse auction. Unlike a traditional auction, a reverse auction is a bidding mechanism in which participants compete by gradually lowering their bid prices until the lowest bid that still satisfies the technical and administrative requirements is reached.[12] Government procurement may involve competitive selection mechanisms through which government agencies select suppliers or providers based on predetermined technical, administrative, and financial requirements.[13] The reverse auction mechanism is commonly used in government construction procurement because the government acts as a sole buyer that drives price competition among suppliers for cost efficiency, such as in infrastructure tenders.[14]

In practice, prospective providers must satisfy certain qualification requirements and follow a series of selection stages until the contract is ultimately awarded and signed.[15] Similar mechanisms are also adopted in various public procurement regimes, including Germany, which is regulated under *Vergaberecht*, and the United States under the Federal Acquisition Regulation (FAR). In the context of international contract law, the existence of reverse auctions gives rise to a distinct debate. This occurs particularly in government procurement contracts using such method where foreign providers are involved. The government as buyer is subject to the national legal regime on procurement of goods/services, while foreign providers may potentially seek the application of the CISG as the international contract law regime.

Despite the extensive discussion on the scope of Article 2(b) of the CISG, existing scholarship has not sufficiently clarified the legal qualification of reverse auctions in cross-border government procurement. Most CISG literature discusses sales by auction in the context of traditional auctions, online auctions, or ordinary tender procedures, while the reverse auction mechanism remains underexplored as a distinct procurement model. This creates a normative uncertainty because reverse auctions contain an element of competitive bidding, yet their function differs from traditional auctions: they operate primarily as a buyer-driven offer-selection procedure before the final contract is formed. Consequently, there remains an unresolved question as to whether contracts arising from reverse auctions

[11] Martin Beyeler, *Public Procurement, Public Procurement Law and Compensation: A Contribution to the Doctrine of Market Participation by the State*, Schulthess Juristische Medien, Zurich, 2004, p. 95.
[12] *Ibid.*
[13] Ade Irawan (et.al.), "Pelelangan Pengadaan Barang dan Jasa Konstruksi dalam Perspektif Islam", *Bhakti Nagori (Jurnal Pengabdian kepada Masyarakat)*, Vol. 2, No. 2, December 2022, p. 243.
[14] Chia-Chen Lin (et.al.), "A Fair and Secure Reverse Auction for Government Procurement", *Sustainability*, October 2020, p. 2.
[15] Ade Irawan, *Loc.cit.*

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in government procurement should be excluded from the CISG under Article 2(b) of the CISG, or whether they may still fall within the Convention when the requirements under Article 1 are fulfilled and the parties do not exclude its application under Article 6 of the CISG.

This study differs from Kröll et all (2018) and Schlechtriem and Schwenzer (2022), whose works primarily explain the rationale and scope of the auction exclusion under Article 2(b) of the CISG in relation to traditional auctions[16][17]. Unlike Schroeter (2022), who focuses on call-for-tender mechanisms in the formation of contracts under the CISG[18], and unlike the jurisprudence in Steel Products Case I, Hilaturas Miel, and Fleck Elektroinstallation, which confirms that tender-based procurement does not automatically exclude the CISG, this study specifically addresses the legal qualification of reverse auctions under Article 2(b) of the CISG. Its contribution lies in demonstrating that reverse auctions in cross-border government procurement should be assessed functionally as pre-contractual provider-selection mechanisms, rather than being treated automatically as sales by auction excluded from the CISG.

Based on this gap, this study examines the legal qualification of the auction exclusion under Article 2(b) of the CISG and analyzes whether reverse auctions used in cross-border government procurement may be classified as sales by auction within the meaning of that provision. The study further evaluates the legal implications of applying or excluding the CISG in contracts formed through reverse auction procedures, particularly by distinguishing between the procedural phase of public procurement and the substantive phase of international sale of goods contracts.

B. Research methods

Legal research is a scientific activity conducted consistently on the basis of certain methods, systematics, and reasoning, with the aim of examining one or several specific legal phenomena through analysis.[19] This study adopts, the research method used by the author is juridical-normative, supported by a conceptual and comparative approach. The selection of this method is based on the view that legal writing is a process of identifying legal rules, legal principles, and legal doctrines in order to address the legal issues at hand.[20] The juridical-normative legal research method may also be referred to as doctrinal legal research or library research.[21] Soerjono Soekanto defines normative legal research as research that examines library materials or secondary data in the form of applicable legal principles.[22]

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[16] Kröll, Stefan, Loukas Mistelis, and Pilar Perales Viscasillas. *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary. 2nd ed. C. H. Beck, Hart*, Nomos, 2018.

[17] Schlechtriem, Peter, and Ingeborg Schwenzer. *Commentary on the UN Convention on the International Sale of Goods (CISG). 5th ed*. Oxford University Press, 2022.

[18] Schroeter, Ulrich. "*Introduction to Articles 14–24 CISG: General Questions Regarding the Formation of the Contract." In Schlechtriem and Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG). 5th ed*. Oxford University Press, 2022.

[19] Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, PT Raja Grafindo Persada, Jakarta, 2006, p. 43.

[20] Muhammad Abdulkadir, *Hukum dan Penulisan Hukum*, Citra Aditya Bakti, Bandung, 2004, p. 52.

[21] Soerjono Soekanto and Sri Mamudji, *Loc.cit.*, p. 13-14.

[22] Soerjono Soekanto, *Pengantar Penelitian Hukum*, Publisher Universitas Indonesia, Jakarta, 2008, p. 51.

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Furthermore, the conceptual approach is an approach that refers to views and doctrines, so that the applicable legal concepts and principles remain relevant to the focus of the research.[23] The comparative approach employed by the author is terminologically understood as a research approach that compares legal regulations with their implementation in practice.[24]

In the context of this journal, the author will employ the juridical-normative method to examine the scope of the "sales by auction" exclusion under Article 2(b) of the CISG, based on primary legal materials, namely national laws and regulations, international conventions or agreements, and jurisprudence, as well as secondary legal materials, namely doctrines, books, publications of international organizations, and journal articles by scholars. The travaux préparatoires of the CISG are also used as supplementary interpretative materials to support the analysis of the drafting rationale underlying Article 2(b). The comparative approach is used to support the analysis by examining the regulation and practice of auctions, reverse auctions, and public procurement in several jurisdictions, including Germany, the United States, Brazil, and Switzerland.

The comparative analysis in this study is conducted on the basis of four parameters. First, the study examines how each jurisdiction regulates auction or auction-like mechanisms, particularly whether the relevant legal system distinguishes traditional auctions, electronic auctions, tenders, and reverse auctions. Second, the comparison assesses the legal function of the mechanism, namely whether it operates as a contract-formation mechanism or merely as a pre-contractual provider-selection procedure. Third, the study considers the point at which the contract is formed, including whether the contract arises at the moment of knock-down, upon the announcement of the award, or only after verification, negotiation, and contract signing. Fourth, the study evaluates the implications of each mechanism for the applicability of the CISG, particularly whether the transaction may fall within the "sales by auction" exclusion under Article 2(b) of the CISG or remains subject to the CISG when the requirements under Article 1 of the CISG are fulfilled and the parties do not exclude its application under Article 6 of the CISG.

Furthermore, the author will use a doctrinal case study by examining decisions that are relevant to the limits of the application of Article 2(b) of the CISG in order to support the analysis. In particular, the decisions in Steel Products Case I, Hilaturas Miel, S.L. v. Republic of Iraq, and Fleck Elektroinstallation GmbH v. Transquest Tag & Tracing Solutions B.V. are used to strengthen the analysis that international sale of goods contracts arising from tender or government procurement processes may remain within the scope of the CISG, provided that the requirements for the applicability of the CISG are fulfilled and the parties do not exclude its application pursuant to Article 6 of the CISG. Accordingly, the use of case law in this research is directed toward constructing a normative argument concerning the distinction between traditional auctions excluded under Article 2(b) of the CISG and

[23] Johny Ibrahim, *Teori & Metodologi Penelitian Hukum Normatif*, Bayumedia Publishing, Malang, 2007, p. 306.

[24] Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana, Jakarta, 2016, pp. 172-174.

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competitive procurement mechanisms, including reverse auctions, which do not automatically preclude the applicability of the CISG.

C. Results and Discussion

1. The Qualification of the Auction Exclusion under Article 2(b) of the CISG

An auction within the meaning of Article 2(b) of the CISG refers to a sales mechanism in which bidders successively increase their bids until the highest bid is reached.[25] The scope of auction under Article 2(b) of the CISG covers transactions that display the characteristic features of an auction, namely the presence of an auctioneer who conducts the process, competitive bidding among participants, and the determination of the successful bidder through a knock-down, which closes the bidding and gives rise to a contract.[26] In practice, forms of transactions commonly regarded as falling within this category include auctions of works of art and antiques, vehicle auctions, auctions of collectibles, and auctions of certain machinery or equipment sold through auction houses.

Nevertheless, the meaning of auction under Article 2(b) of the CISG cannot be determined solely by reference to national legal terminology, but must be interpreted in accordance with the international character of the CISG. This approach is consistent with Article 7(1) of the CISG, which requires that the interpretation of the Convention have regard to its international character and to the need to promote uniformity in its application. The requirement of autonomous interpretation means that terms used in the Convention must be understood independently from domestic legal concepts, even where those domestic concepts appear linguistically similar.[27]

Accordingly, the term “auction” in Article 2(b) of the CISG should not be equated automatically with the meaning of auction, tender, or procurement auction under any particular national legal system. If domestic definitions were allowed to control the meaning of Article 2(b) of the CISG, the same transaction could be excluded from the CISG in one Contracting State but remain within the Convention in another, thereby undermining the uniformity objective expressly mandated by Article 7(1) of the CISG. In this sense, autonomous interpretation also prevents Article 2(b) of the CISG from being expanded merely because a domestic legal system uses broad auction terminology for different forms of competitive procurement. A transaction mechanism therefore cannot immediately be qualified as a “sale by auction” merely because it is referred to as an auction under national law or a particular trade practice. Such qualification must be determined based on the mechanism and manner in which the transaction operates. The decisive inquiry is whether the transaction possesses the essential characteristics of the auction contemplated by Article 2(b) of the CISG, particularly a seller-driven sale,

[25] Martin Beyeler, *Öffentliche Beschaffung, Vergaberecht und Schadener satz, Ein Beitrag zur Dogmatik der Marktteilnahme des Gemeinwesens*, Schulthess Juristische Medien, Zürich, 2004, p. 95.

[26] *Ibid.*

[27] Schlechtriem, Peter, and Ingeborg Schwenzer. Commentary on the UN Convention on the International Sale of Goods (CISG). 5th ed. Oxford University Press, 2022, p. 138.

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competitive bidding directed toward the highest bid, and the formation of the contract at the moment of knock-down.

The exclusion of sales by auction under the CISG is based on two main considerations. First, it seeks to prevent the surprise effect of the CISG at the time of contract formation. The surprise effect refers to a situation in which the application of the CISG to a sale becomes unforeseeable to a party acting in good faith, because at the time of contract formation there is no apparent indication from the contract, the parties' dealings, or any information that the parties have their places of business in different States.[28]

The restrictive interpretation of Article 2(b) of the CISG is also supported by the *travaux préparatoires* of the CISG. The Secretariat Commentary on the 1978 Draft Convention indicates that the exclusion of sales by auction was not intended to remove all transactions involving competitive bidding from the scope of the Convention. Rather, the exclusion was formulated because auction sales were commonly governed by special rules under the applicable national law, and it was considered appropriate for such sales to remain subject to those domestic rules even where the successful bidder came from another State. This drafting history shows that the concern underlying Article 2(b) of the CISG was the special legal character of traditional auction sales, not the mere existence of price competition among participants. Accordingly, the *travaux préparatoires* support a narrow and functional reading of Article 2(b) of the CISG, under which the decisive element is whether the transaction is concluded through a genuine auction mechanism governed by special auction rules, rather than whether the transaction involves a competitive bidding process.

Viewed from this perspective, reverse auctions in government procurement cannot be automatically equated with sales by auction under Article 2(b) of the CISG. Although reverse auctions involve competitive bidding, their legal function differs from the type of auction contemplated by the drafters of the CISG. In government procurement, a reverse auction generally functions as a pre-contractual selection mechanism used by the buyer to identify the most advantageous offer, while the binding contract is commonly formed only after award, verification, clarification, or contract signing. Therefore, the *travaux préparatoires* reinforce the argument that Article 2(b) of the CISG should not be extended to reverse auctions merely because they contain an auction-like bidding structure.

In this regard, the identity of the buyer is only revealed at the moment of knock-down and when the highest bid is accepted, so that the seller only then becomes aware that the buyer is domiciled in another State. To avoid the sudden application of the CISG without any opportunity for anticipation, auctions are therefore excluded from the CISG.[29] This consideration is consistent with Article 1(2) of the CISG, which requires that

[28] Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary*, C. H. Beck - Hart - Nomos, 2nd ed., 2018, p. 47.

[29] John O.Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, Kluwer Law International, 3rd ed., 1999, p. 48.

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Sinta 3; decree No. 0173/C3/DT.0500/2025

the cross-border character be apparent from the contract, from pre-contractual correspondence or negotiations, or from information exchanged before or at the time the contract is concluded.[30] Accordingly, where there is no apparent international indicator from the outset, the CISG does not automatically apply.

Second, traditional auctions are generally conducted in one place and governed by the law of the place where the auction is held (*lex loci auctionis*). This includes the licensing and supervision of auction houses, auction procedures (announcements, bidding format, contract formation, and cancellation), transparency obligations and auction-related liability (including disclosure of defects, returns, fees or commissions), possession and release of goods, as well as conditions of sale recognized as market usages. These matters fall outside the scope of the CISG, such as the validity of the contract, the transfer of ownership, and the capacity or authority of the parties, which are expressly left outside the Convention by Article 4 of the CISG. Therefore, sales that are genuinely formed within an auction mechanism are more appropriately governed by national law than brought within the framework of the CISG. [31]

Furthermore, each exclusion under Article 2 of the CISG arises from specific legal-policy considerations. Consumer contracts, for example, are excluded because many legal systems provide special protection to consumers, whereas stocks, investment securities, and negotiable instruments are excluded because they are subject to special commercial-law and regulatory regimes.[32] By the same logic, the sales by auction exclusion under Article 2(b) of the CISG should also be understood based on its underlying *ratio legis*, and not be interpreted broadly merely because there is an element of competitive bidding.

For example, several States that are parties to the CISG continue to maintain national legal regulation of auctions, including Germany and the United States. Germany applies the *Gesetz über Versteigerungen* (Law on Auctions) 1897, which comprehensively regulates auction procedures, including the obligations of auctioneers, forms of bidding, and protection of third parties. Although Germany ratified the CISG in 1991, auctions remain subject to domestic law and do not fall within the scope of the CISG.[33] Similarly, in the United States, traditional auction practice is regulated under Uniform Commercial Code (UCC) § 2-328 on sale by auction, which includes, among other matters, regulation of auctions with reserve and without reserve, together with the consequences of withdrawing goods.[34]

Although many CISG Contracting States maintain domestic auction regimes, this does not mean that every competitive bidding mechanism in international trade practice

[30] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 5th ed, Oxford University Press, 2022, p. 43.
[31] *Ibid.*, p. 68
[32] Roy Goode, *Op. Cit.* (Note 4), p. 610.
[33] *Law on Compulsory Auction and Compulsory Administration*, as amended and published in the Federal Law Gazette, Part III, Section 310-14, as last amended by Article 1 of the Act of 24 October 2024, Federal Law Gazette 2024 I No. 329, Germany, <https://www.gesetze-im-internet.de/zvg/BJNR000970897.html?utm>, [Accessed on 15 January 2026].
[34] Uniform Commercial Code, <https://www.law.cornell.edu/ucc/2/2-328?utm> [Accessed on 15 January 2026].

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Sinta 3; decree No. 0173/C3/DT.0500/2025

is automatically treated as a "sale by auction" excluded under Article 2(b) of the CISG. Therefore, it is necessary to affirm the limitations of this exclusion in order to distinguish auctions that are genuinely excluded from other competitive bidding mechanisms that remain within the scope of the CISG, namely:

a. Commodity Exchanges

Sales on commodity exchanges are consistently distinguished from the auction exclusion under Article 2(b) of the CISG. The UNCITRAL Digest affirms that the "sales by auction" exclusion covers both private auctions and auctions arising "by authority of law", however, sales on commodity exchanges are not included, as they essentially constitute only a special method of concluding contracts, rather than auctions within the meaning of Article 2(b) of the CISG.[35] By incorporating this limitation, price competition occurring within the framework of exchange trading, which is generally subject to exchange rules and trade usages, is not an auction excluded under Article 2(b) of the CISG, so that the CISG may remain the applicable law insofar as the requirements of Article 1 of the CISG are fulfilled.

b. Call for Tender

Contracts initiated through a call for tender or public tender are, in principle, not "sales by auction" within the meaning of Article 2(b) of the CISG. This distinction is important because a tender is a buyer-driven mechanism through which the buyer requests offers from suppliers, whereas a traditional auction is commonly a seller-driven sale in which goods are offered to be competed for by bidders. This form of contract initiation is indeed often used by private companies, however, in practice, it is frequently used where the buyer is a public authority in the context of public procurement, or where a private party acts in order to fulfil a contract with the government.[36]

For example, in Steel Product Case I on 1 April 1993, a buyer from China issued an international invitation to tender for the procurement of steel products to be used in the construction of a hydroelectric power plant in China. The procurement process then proceeded to the stages of bidding, selection, and agreement between the parties until an international sale of goods contract was formed. In this context, the case demonstrates that the CISG may still apply to an international sale of goods contract, even where the formation of the contract originates from an international tender mechanism.[37]

A similar approach may be observed in Hilaturas Miel, S.L. v. Republic of Iraq on 20 August 2008, a Spanish company submitted a bid for a contract under the United Nations "Oil-for-Food Programme", and the sale of goods contract was subsequently formed with a state-owned enterprise owned by the Republic of Iraq. In this regard, a sale of goods

[35] Schlechtriem and Schwenzer, *Op.Cit.* (Note 25), p. 294.

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

[37] *Steel products case I*, China International Economic & Trade Arbitration Commission (CIETAC), China, 1 April 1993, CISG Online 1428, <https://cisg-online.org/files/cases/7350/translationFile/1428_13796959.pdf>, [accessed on 5 February 2026].

contract arising from a bidding process within the framework of a government procurement programme remained within the scope of the CISG.[38]

Subsequently, in Fleck Elektroinstallation GmbH v. Transquest Tag & Tracing Solutions B.V., decided by the Rechtbank Gelderland in the Netherlands on 6 November 2013, the public authority of the City of Vienna issued an international tender for the replacement of a Radio Frequency Identification (RFID) system. Fleck, a private Austrian company, participated in the tender and, in order to satisfy the procurement requirements, subsequently cooperated with Transquest, a private Dutch company, as the supplier. The dispute arose within the private commercial relationship between those parties (B2B), which had been formed to support the performance of the government tender. The court treated the contract as falling within the sphere of the CISG, thereby indicating that a connection with government procurement does not automatically transform the character of a private supply contract into an "auction" excluded under Article 2(b) of the CISG.[39]

Based on the foregoing, it may be affirmed that Article 2(b) of the CISG must be understood restrictively. This exclusion applies only to sales genuinely formed through a traditional auction mechanism, namely a sale by an auctioneer to the highest bidder, with the contract being formed at the moment of knock-down. Conversely, other competitive bidding mechanisms, such as trading on commodity exchanges, calls for tender, and various forms of competitive procurement, cannot automatically be brought within the category of "sale by auction".

2. **Reverse Auctions in Government Procurement under Article 2(b) of the CISG and the Legal Implications**

This article has shown in the previous section that an auction under Article 2(b) of the CISG is commonly understood as a previously announced public sale in which goods are allocated to the highest bidder through a knock-down mechanism, namely the acceptance of the best bid that marks the formation of the contract. [40] In such a model, the characteristic elements of an auction lie in the presence of an auctioneer, competitive bidding to obtain the goods, and the formation of the contract at the moment when the successful bid is formally accepted. On the basis of these criteria, a reverse auction in government procurement cannot easily be equated with an auction in the traditional sense. A reverse auction more closely resembles a pre-contractual competitive procedure that culminates in the determination of the successful bidder or award, whereas contract formation generally occurs only at the post-award stage through final negotiation, verification, and signing.

[38] *Hilaturas Miel, S.L. v. Republic of Iraq*, U.S. District Court for the Southern District of New York, U.S.A, 20 August 2008, CISG Online 1777, <https://cisg-online.org/files/cases/7695/fullTextFile/1777_10937058.pdf>, [accessed on 6 February 2026].

[39] *Fleck Elektroinstallation GmbH v. Transquest Tag & Tracing Solutions B.V.*, Rechtbank Gelderland (District Court Gelderland), Netherlands, 6 November 2013, CISG Online 2590. <https://cisg-online.org/files/cases/8504/fullTextFile/2590_37215591.pdf>, [accessed on 6 February 2026].

[40] Schlechtriem and Schwenzer, *Op.Cit.* (Note 25), p. 68.

PALAR (Pakuan Law Review) Volume 12, Number 01, January-March 2026, Pages 189-209
https://journal.unpak.ac.id/index.php/palar
e-ISSN:2614-1485
p-ISSN:2716-0440
Doi: https://doi.org/10.33751/palar.v12i1
Sinta 3; decree No. 0173/C3/DT.0500/2025

Conceptually, a reverse auction is a buyer-driven procurement mechanism, whereby the buyer invites a number of suppliers or providers to compete by offering the lowest possible price or the most advantageous offer in accordance with the predetermined needs.[41] This model includes government procurement, such as tenders for infrastructure projects, which aims to achieve price efficiency, particularly where the specifications of the goods or services can be formulated with sufficient clarity from the outset.[42] Therefore, unlike a traditional auction, which is intended to maximize the selling price for the seller, a reverse auction is instead directed at minimizing the acquisition price for the buyer without disregarding the technical, administrative, and qualitative requirements that have been determined.

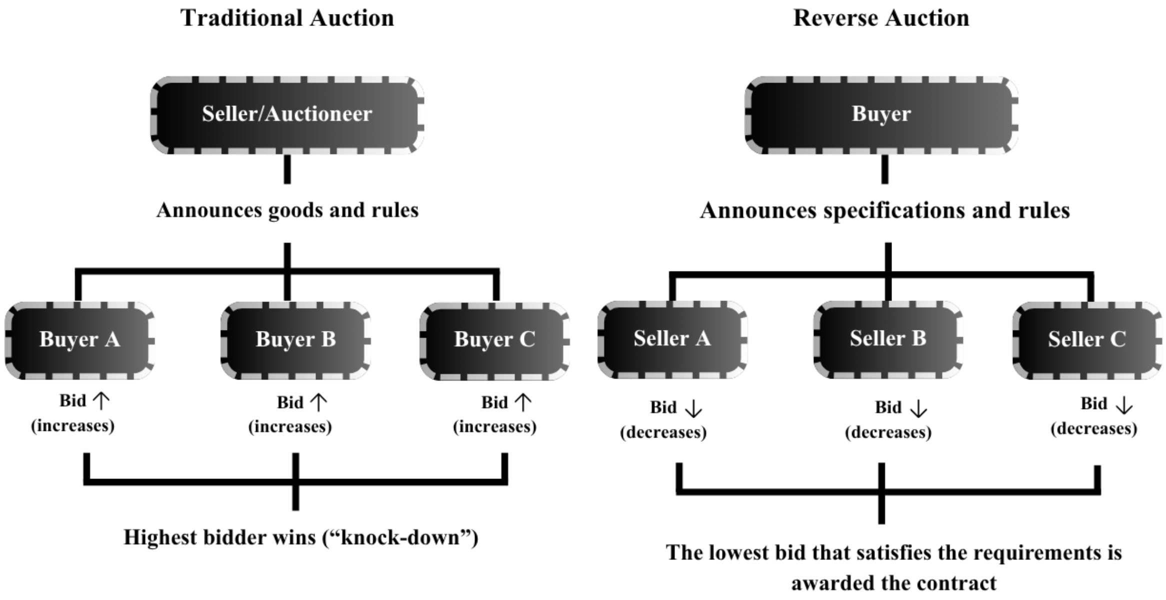

Figure 1. Traditional Auction and Reverse Auction Mechanisms

Within the framework of public procurement, the primary function of a reverse auction is not to sell goods to the highest bidder, but to select a provider through price competition before the contract is agreed upon. This is consistent with the view of Becq, as cited in the International Handbook of Public Procurement, which demonstrates the significant development of legal unification and procedural standardization, particularly at the stage of provider selection.[43] Accordingly, a reverse auction does not operate as an open bidding forum that immediately produces a contract upon the acceptance of a bid, but rather as an instrument for screening offers before the final contractual relationship is formed.

This distinction is important because, in cross-border government procurement transactions, the contractual aspect does not stand alone. Public procurement is influenced by national law, administrative provisions, standard contracts, objection

[41] Chia-Chen Lin, (et. al.), *Loc.Cit.*
[42] *Ibid.*
[43] Khi V. Thai, *International Handbook of Public Procurement*, Routledge: Taylor & Francis Group, pp. 7-8.

PALAR (Pakuan Law Review) Volume 12, Number 01, January-March 2026, Pages 189-209
https://journal.unpak.ac.id/index.php/palar
e-ISSN:2614-1485
p-ISSN:2716-0440
Doi: https://doi.org/10.33751/palar.v12i1
Sinta 3; decree No. 0173/C3/DT.0500/2025

mechanisms, arbitration, and relevant international trade instruments.[44] In this context, the CISG does not regulate the entire procurement regime, but only certain aspects of international sale of goods contracts. This is expressly reflected in Article 4 of the CISG, which provides:

"This Convention governs only the formation of the contract of sale and rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold."

Although government procurement has a strong public-law dimension, particularly in relation to procedure, accountability, and compliance with the procurement regime, the contract that arises after the award is, in essence, still a commercial contract that gives rise to rights and obligations for the parties.[45] Accordingly, both public and private contracts, in matters such as contractual terms, disputes, and breach of contract, are essentially subject to the same contractual regime.[46]

A reverse auction is a procurement mechanism initiated by the buyer by determining the needs, the specifications of the goods or services, and the basic parameters for the conduct of the auction, which constitutes the initiation of the exchange process. Thereafter, the buyer publishes a Request for Proposals containing the scope of procurement, the implementation period, the auction format, and the participant criteria.

At the bidding stage, qualified providers submit bids competitively, with the main characteristic being a decrease in price in order to obtain an opportunity to win the contract. Such bids may contain not only price, but also other relevant information, such as the implementation period or the provider's capability. During the process, bids are generally visible to the buyer and, in certain systems, also to other participants, although the identity of the participants is commonly kept confidential in order to preserve the integrity of competition.

[44] *Ibid.*

[45] Cesar Pereira, "Application of the CISG to International Government Contracts for the Procurement of Goods", *Revija Kopaoničke Škole Prirodnog Prava*, br. 2, 2023, p. 162.

[46] *Ibid.*

PALAR (Pakuan Law Review)
https://journal.unpak.ac.id/index.php/palar
Volume 12, Number 01, January-March 2026, Pages 189-209
e-ISSN:2614-1485
p-ISSN:2716-0440
Doi: https://doi.org/10.33751/palar.v12i1
Sinta 3; decree No. 0173/C3/DT.0500/2025

After the bidding stage ends, the buyer evaluates all submitted bids. At this stage, the buyer may reject certain bids, prepare a shortlist of participants, or request further clarification, so that the award does not always automatically give rise to a contract.[47]

Figure 2. Schematic Flow of the Reverse Auction Process

In assessing the position of reverse auctions under Article 2(b) of the CISG, there are two possible approaches. First, if a reverse auction is understood purely formally as a form of auction because it uses a competitive bidding mechanism in an electronic format, the resulting contract may potentially be qualified as a sale by auction and, accordingly, fall within the exclusion under Article 2(b) of the CISG. This approach rests on its procedural form, namely the existence of bidding competition and the determination of the winner through an auction mechanism.

This approach finds support in the Online Auction of Car case, decided by the Brandenburg Court of Appeal on 8 April 2016 in case 11 U 44/14, in which the dispute arose from the premature termination of an offer to sell a car through an internet auction platform after the highest bid had been submitted by the claimant. The court affirmed that the applicable law was German law and held that the CISG did not apply, not only because the international element could not be recognized by the seller at the time the contract was concluded pursuant to Article 1(2) of the CISG, but also because auctions are excluded from the scope of the CISG under Article 2(b).[48]

In the Online Auction of Photography case, decided by the Swiss Federal Supreme Court on 8 November 2016 in case 4A_451/2016, the dispute arose between an Austrian seller who conducted an online photography auction through an internet platform and a Swiss buyer who successfully bid for seven vintage photographs but subsequently failed to pay the purchase price. The Swiss Federal Supreme Court affirmed that the CISG did not apply to the contract because Article 2(b) of the CISG excludes online auctions from the scope of the Convention. The court further held that the law governing the contract was Austrian domestic law, as the law of the State of the seller's habitual residence at the

[47] Uladzimir L. Radkevitch, *Online Reverse Auctions for Procurement of Services*, Erasmus Research Institute of Management (ERIM), Erasmus University Rotterdam, 2008, p. 53.
[48] *Online Auction of Car Case,* Higher Regional Court of Brandenburg, Germany, 08 April 2016. CISG-Online No. 2727, <https://cisg-online.org/files/cases/8641/fullTextFile/2727_56440138.pdf>, [accessed on 10 February 2026].

Volume 12, Number 01, January-March 2026, Pages 189-209
e-ISSN:2614-1485
p-ISSN:2716-0440
Doi: https://doi.org/10.33751/palar.v12i1
Sinta 3; decree No. 0173/C3/DT.0500/2025

time the order was received.[49] These two decisions indicate that courts in certain jurisdictions tend to regard electronic auctions as auctions in the formal sense, so that contracts arising from them may potentially fall within the exclusion under Article 2(b) of the CISG.

These cases reveal a possible divergence in the interpretation of Article 2(b) of the CISG among Contracting States, particularly where courts are confronted with auction-like mechanisms that do not fit neatly within the model of traditional auctions. The German and Swiss online auction cases show that electronic bidding platforms may be treated as falling within the auction exclusion where they resemble traditional auction sales. However, the same conclusion does not necessarily follow for competitive procurement mechanisms. This comparison shows that the risk of divergence lies in whether courts adopt a formal approach, which emphasizes the auction label or bidding structure, or a functional approach, which examines the legal function of the mechanism and the moment of contract formation.

Against this background, the formal characterization cannot automatically be applied to reverse auctions in government procurement, because this mechanism is substantively different from traditional auctions. When viewed from the perspective of contract formation, a reverse auction in government procurement is more appropriately understood as part of the offer-selection process at the pre-contractual stage, rather than as a sale by auction in the classical sense. This is because the mechanism is essentially intended to select providers through price competition, whereas contract formation generally occurs only after several stages have been completed. Accordingly, the more appropriate qualification of reverse auctions in government procurement is that of a competitive tender, not a traditional auction. Consequently, the sales by auction exclusion under Article 2(b) of the CISG cannot be applied automatically to contracts arising from such a mechanism.

This functional understanding is supported by jurisprudence concerning public procurement and tender-based contracts. Such cases demonstrate that procurement mechanisms bearing the character of reverse auctions in the context of public procurement do not automatically exclude the CISG, and that international sale of goods contracts arising from procurement processes may still potentially be governed by the CISG. In the Electronic Electricity Meter Case, decided by the Swiss Federal Supreme Court on 28 May 2019 in case 4A_543/2018, the buyer, a Swiss public institution, issued an open tender for the procurement of electricity meters advertised in the Swiss Commercial Gazette. The court's decision affirmed that the exclusions under Article 2 of the CISG are exhaustive.

Furthermore, the fact that a contract is initiated through a public tender does not automatically render it a "sale by auction" within the meaning of Article 2(b) of the CISG. Although a tender has a competitive character, in which participants compete with one

[49] *Online Auction of Photography Case,* Federal Supreme Court of Switzerland, Switzerland, 08 November 2016. CISG-Online No. 2803, <https://documents.un.org/doc/undoc/gen/v18/052/82/pdf/v1805282.pdf>, [accessed on 10 February 2026].

Volume 12, Number 01, January-March 2026, Pages 189-209
e-ISSN:2614-1485
p-ISSN:2716-0440
Doi: https://doi.org/10.33751/palar.v12i1
Sinta 3; decree No. 0173/C3/DT.0500/2025

another to become the successful bidder, the mechanism of contract formation under such procedure is substantially different from a traditional auction as contemplated under Article 2(b) of the CISG. Therefore, the Court held that the CISG applied to the contract, unless the parties expressly or impliedly excluded it pursuant to Article 6 of the CISG.[50] The *ratio decidendi* of this decision is that a public tender functions as an offer-selection procedure before the contract is formed, and not as an auction mechanism that produces a contract at the moment of knock-down. By analogy, this reasoning is relevant to reverse auctions in government procurement, insofar as reverse auctions also operate as buyer-driven provider-selection mechanisms rather than traditional auction sales.

In addition to jurisprudential support, Brazil serves as an example of a State that makes intensive use of reverse auction mechanisms in public procurement, particularly through *pregão eletrônico*. This is also supported by the World Bank Group, which states that reverse auctions are the most widely used competitive method in the procurement of goods and services by the Federal Government of Brazil.[51] *Pregão eletrônico* is a procurement or auction modality under Brazilian procurement law conducted online through an e-procurement platform, particularly for the procurement of goods and services. At the federal government level, the use of pregão eletrônico for the procurement of goods and services by federal ministries/agencies is mandatory under Decreto No. 10.024/2019, particularly Article 1 § 1.[52]

The practice in Brazil further demonstrates that government entities and State-Owned Enterprises recognize and acknowledge that cross-border procurement transactions may potentially fall within the CISG regime, and therefore its application is often managed through the drafting of contractual clauses, particularly governing-law clauses and dispute settlement mechanisms. One example may be found in Nuclebrás Equipamentos Pesados S.A. (NUCLEP), a Brazilian public company in the form of a limited liability company with *capital fechado* status. NUCLEP is linked to the Brazilian Ministry of Mines and Energy, with one hundred percent of its capital controlled by the *União*. Its commercial activities therefore remain within the framework of State corporate governance. NUCLEP is an industry that manufactures heavy capital goods based on orders, particularly in the sector of large metal structures, with objects covering the planning and production of heavy components for nuclear power plants, as well as equipment for shipbuilding or offshore construction and other heavy projects.

In Contract CB-103/2021, the supplier is identified as Forgiatura Moderna Arese S.p.A., a business entity in the form of a società per azioni, or a share-based company, domiciled in Italy, while the buyer is a State-Owned Enterprise in Brazil. The contract is an international procurement contract for the heavy capital goods industry, namely the purchase of forged materials and components, such as round bars with American Society

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[50] *Electronic Electricity Meter Case,* Swiss Federal Supreme Court, Switzerland, 2019, CISG-online No. 4463, <https://cisg-online.org/files/cases/11376/fullTextFile/4463_53208862.pdf.>, [accessed on 15 February 2026].

[51] Alexandre Borges de Oliveira (et.al.), "Auction Length and Prices: Evidence from Random Auction Closing in Brazil", *World Bank Group: Policy Research Working Paper*, April 2019, p. 2.

[52] Decree No. 10.024 of 20 September 2019 <https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/decreto/d10024.htm>, [accessed on 17 February 2026].

Volume 12, Number 01, January-March 2026, Pages 189-209
e-ISSN:2614-1485
p-ISSN:2716-0440
Doi: https://doi.org/10.33751/palar.v12i1
Sinta 3; decree No. 0173/C3/DT.0500/2025

of Mechanical Engineers (ASME) specifications, as well as items manufactured in accordance with technical drawings or custom-made components. The contract contains the following choice-of-law and arbitration clause:

> *"The Agreement shall be governed based on the United Nations Convention on Contracts for the International Sale of Goods (CISG, Vienna Convention). The arbitration shall be held in accordance with the rules of the International Chamber of Commerce of Paris, in France, in English."*

This provision indicates that, although the selection of suppliers in public procurement may be carried out through competitive mechanisms such as reverse auctions, the applicability of the CISG at the final contract stage remains a matter of contract law. A reverse auction essentially functions as an offer-selection procedure before the contract is formed, so that the auction character of the procurement process does not necessarily place the contract resulting from the award within the category of "sales by auction" excluded under Article 2(b) of the CISG.

The legal implication is that national procurement law and the CISG do not always exclude one another, but may operate at different layers. In this respect, public procurement law regulates the procedure for selecting providers, administrative requirements, transparency, objections, and the governance of the use of public funds. By contrast, the CISG regulates the formation of the sale of goods contract and the rights and obligations of the seller and the buyer arising from that contract.

Based on these provisions, the existence of domestic procurement regulations does not in itself exclude the CISG. Rather, what occurs is a distinction between the regulatory sphere of the procedural phase of procurement and the substantive phase of the international sale of goods contract. Therefore, insofar as the requirements for the application of the CISG are fulfilled and the parties do not exclude it pursuant to Article 6 of the CISG, the Convention may continue to function as a uniform legal framework governing the performance of the parties' contractual obligations at the post-award stage.

The issue becomes more complex where the government procurement contract contains a governing law clause. A possible conflict may arise where the contract designates the law of a particular State as the governing law, while the requirements for the automatic application of the CISG under Article 1 of the CISG are also fulfilled. Under Article 1(1)(a) of the CISG, the Convention applies automatically to contracts for the international sale of goods between parties whose places of business are in different Contracting States. Therefore, where a government entity and a foreign supplier are both located in CISG Contracting States, the CISG may apply by operation of law, unless the parties exclude it pursuant to Article 6 of the CISG.

In this respect, a governing law clause referring generally to the law of a Contracting State does not necessarily exclude the CISG.[53] The CISG is not external to the chosen law. Instead, it forms part of the sales law of the Contracting State. Accordingly, if the parties

[53] Schlechtriem and Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 5th ed, Oxford University Press, 2022, p. 123-124.

PALAR (Pakuan Law Review) Volume 12, Number 01, January-March 2026, Pages 189-209
https://journal.unpak.ac.id/index.php/palar e-ISSN:2614-1485
p-ISSN:2716-0440
Doi: https://doi.org/10.33751/palar.v12i1
Sinta 3; decree No. 0173/C3/DT.0500/2025

intend to apply only domestic sales law and exclude the CISG, such exclusion should be made expressly, for instance by stating that the contract is governed by the law of a particular State "excluding the CISG".[54]

This distinction is particularly important in government procurement contracts because national procurement law and the CISG regulate different legal layers. National procurement law governs the public-law and administrative aspects of procurement, including provider selection, transparency, qualification requirements, objections, and accountability in the use of public funds. By contrast, the CISG may govern the private-law aspects of the final international sale of goods contract, including contract formation and the rights and obligations of the seller and the buyer. Therefore, the existence of a governing law clause or domestic procurement regulation does not automatically displace the CISG. The decisive question is whether the CISG applies under Article 1 and whether the parties have excluded or modified its application under Article 6 of the CISG.

The potential conflict is different where one of the parties is located in a non-Contracting State. In such circumstances, the CISG does not apply automatically under Article 1(1)(a) of the CISG, because the parties are not both located in Contracting States. Nevertheless, the CISG may still become applicable under Article 1(1)(b) of the CISG if the rules of private international law lead to the law of a Contracting State, unless the relevant State has made a reservation under Article 95 of the CISG.[55] Alternatively, the parties may expressly choose the CISG or incorporate its provisions into the contract. Thus, the governing law clause plays an important role in determining whether the CISG is applied, excluded, or incorporated contractually in cross-border government procurement.

D. Conclusions and Recommendations

This study concludes that the auction exclusion under Article 2(b) of the CISG must be interpreted restrictively and functionally. A transaction should not be classified as a "sale by auction" merely because it contains competitive bidding or is labelled as an auction under domestic law. Within the CISG framework, the exclusion is more appropriately limited to traditional auctions in which the contract is formed through a knock-down mechanism. Accordingly, reverse auctions in cross-border government procurement should not automatically be excluded from the CISG, because they generally function as pre-contractual provider-selection procedures rather than mechanisms that immediately form a sale contract. The legal implication is that national procurement law and the CISG may operate at different regulatory layers: national procurement law governs provider selection, administrative requirements, transparency, and accountability, whereas the CISG may govern the substantive rights and obligations of the buyer and seller in the final international sale of goods contract.

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[54] Michael Bridge, "*A Commentary on Articles 1-13 and* 78.", in Franco Ferrari (*et.al.*), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N Sales Convention*, Sellier: European Law Publishers, p. 249.

[55] Franco Ferrari (*et.al.*), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N Sales Convention*, Sellier: European Law Publishers, pp. 48-50.

Volume 12, Number 01, January-March 2026, Pages 189-209
e-ISSN:2614-1485
p-ISSN:2716-0440
Doi: https://doi.org/10.33751/palar.v12i1
Sinta 3; decree No. 0173/C3/DT.0500/2025

This study recommends clearer harmonization between national procurement regulations and the application of the CISG in international procurement contracts. Procurement authorities and contracting parties should expressly regulate the governing law, the inclusion or exclusion of the CISG, and the dispute settlement mechanism in contract documents, particularly in reverse auction-based procurement where uncertainty may arise between the procedural status of procurement and the substantive law governing the final contract. Future research may further examine the application of the CISG in electronic procurement systems and smart procurement contracts, especially because digital procurement increasingly involves automated bidding, algorithmic evaluation, and electronic contract formation, which may raise new legal questions concerning offer and acceptance, party autonomy, transparency, and the boundary between procurement procedure and international sale of goods contract law.

Volume 12, Number 01, January-March 2026, Pages 189-209
e-ISSN:2614-1485
p-ISSN:2716-0440
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