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Translation from Spanish - Colombia Corte Constitucional May 10, 2000 - Case No./Docket No. Sentencia C-529/00; Referencia: Expedient LAT-154

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CASE TRANSLATIONS

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Colombia Corte Constitucional
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Key issue addressed:
Declaration of validity of the CISG within Colombia

The entire Constitutional Court, in compliance with their constitutional attributions and the requirements and steps settled down in decree 2067 of 1991, has issued the following:

RULING:

I. *Background*

On August 6, 1999, the Presidency of the Republic [of Colombia] dispatched to this Corporation authenticated copies of Act 518 of August 4, 1999, by means of which the United Nations Convention on Contracts for the International Sale of Goods, held in Vienna on April 11, 1980, is approved, in compliance with the provisions of section 10 of article 241 of the Constitution of Colombia.

The Disserting Magistrate (DM), by means of an official communication dated August 30, 1999, started the study of the constitutional adequacy of the law and the referred Convention, and prepared the practice of proofs, the fixation of the matter in

list for 10 days with the purpose of allowing civil intervention and ordered the transfer of the matter to the General Attorney of the Nation in order to surrender the concept of their competence.

Once the steps indicated above were accomplished, and in exercise of the competence that is assigned to it by the Constitution, the Court proceeds to issue the corresponding decision.

II. *Text of the studied act*

It is included, as part of this ruling, authenticated photocopies of Act 518 of 1999 under scrutiny, taken from the copy dispatched by the Juridical Secretary of the Presidency of the Republic.

III. *Opinions*

1. *Foreign Affairs Ministry*

By means of proxy, the Ministry requests the Court to recognize the constitutionality of Act 518 of 1999 that approves the United Nations Convention on Contracts for the International Sale of Goods, and in that sense it contends the following arguments:

> The Convention under scrutiny constitutes one instrument amongst many that the Government [of Colombia] has entered into in the multilateral environment in order to modernize the usages and tendencies of private international law.

The sales contract is regulated in [the] Civil and Commerce Codes [of Colombia], even if, for the application of the Convention, neither the civil nor commercial character of the contract is to be considered.

The contract for the international sale of goods is concluded when negotiations take place between parties whose places of business are in different countries, a situation that would generate uncertainties because of the lack of a uniform law and which today is possible to overcome with the Convention of 1980.

The Convention is structured on the basis of respecting the national sovereignty, the equality of rights and mutual benefit, which agrees with the principles derived from article 9 of the Constitution that founds the foreign affairs of the Country upon

national sovereignty, in the respect of self-determination of the Nations and in the recognition of the principles of international law accepted by Colombia.

In the same manner, the Convention keeps harmony with articles 150-16 and 227 of the Magna Charta that authorizes the State to promote the economic, social integration and politics with other Nations by means of the celebration of Treaties that are carried out on the basis of fairness, equity and reciprocity.

It should be kept in mind that the Convention allows parties to exclude, totally or partially the application of its dispositions, when the Contracting States party to it have established it by means of a reservation (Reserva).

The Convention was subscribed in Vienna on April 11, 1980 and the President of the Republic gave the instrument executive approval on December 28, 1995, subject to the approval of the National Congress.

Once the previous step was completed, the Executive (the President) presented the Senate, during the 1997 legislature, the Bill for the approval by the Congress of the Convention, which was accepted by means of Act 518 of August 4, 1999.

2. *Ministry of Economic Development*

This Ministry, through its official, was allowed to point out on the matter in analysis, the following:

> . . .This office does not find reason to formally or constitutionally object to Act 518 of August 4, 1999, by means of which the United Nations Convention on Contracts for the International Sale of Goods, made in Vienna on April 11, 1980, agreement that, besides being adjusted to the pertinent constitutional and legal requirements to the satisfaction of this Office, is of absolute convenience for the constitution of a juridical instrument that contributes, through its application, to the participation of the Republic of Colombia in the international trade environment.

IV. *State Attorney's point of view*

The Magistrate begins to examine the approbatory act of the Convention holding that, since there is no special procedure to follow, it is to be approved in accordance with the prescrip-

tions usual for the expedition of the ordinary laws, as per articles 157, 158 and 160 of the Constitution.

After an exhaustive examination of the procedure in the Legislative Chambers to which the Act was subjected to, the State Attorney's office concludes that, from a formal point of view, the Statute under consideration does not deserve any comments:

"The mercantile activity between Colombia and the rest of the Nations is carried out by means of contracts for the international sale of goods, therefore it is crucial that the national legislation is harmonized with the usages and tendencies of international law."

After the precise analysis of some of the dispositions of the Convention, in which analysis the importance of the dispositions and the fact that none in particular thwarts our constitutional order, the State-Attorney concludes:

> . . .The essential aspects of the United Nations Convention on Contracts for the International Sale of Goods, given the justice and convenience thereof, they serve as a foundation to rank this International Instrument as adjusted to the Magna Charta of our country, since they harmonize with the constitutional principle that the international relationships of the Colombian State are to be based upon national sovereignty, in regard to the self-determination of Nations and in the recognition of the principles of international law accepted by Colombia.

V. *Considerations and Foundations*

1. *Formal revision*

In connection with the formal aspect for the adoption of the Convention by the National Government and approval by the Congress of the Republic, the Court observes that the necessary requirements were completed, as derived from the approbatory material that is in the dossier. Indeed:

a. The United Nations Convention on Contracts for the International Sale of Goods is a multilateral treaty open to adhesion by States that did not intervene in its conclusion according to paragraph 3 of article 91 that indicates: "This Convention is open for accession by all States which are not signatory States as from the date it is open for signature (September 30, 1981)."

Since Colombia did not take part amongst the States that initially subscribed to the Convention, the President of the Republic in order to adhere the Colombian State to this Convention performed the executive approval and he ordered the Minister of Foreign Affairs, doctor Rodrigo Pardo Garcia-Peña, to subject the mentioned Instrument to the consideration of the Congress in order to approve the corresponding Act.

b. Remission of the approbatory law and of the Convention on behalf of the National Government. The Act 518 of August 4, 1999, by means of which the United Nations Convention on Contracts for the International Sale of Goods, concluded in Vienna on April 11, 1980, was remitted to this Corporation by the Juridical Secretary of the Presidency of the Republic on August 6, 1999, that is to say, within the term of six days that are provided for in paragraph 10 of article 241 of the Constitution, since the law was sanctioned on August 4, 1999.

c. Before the Congress of the Republic. The Bill was presented before the Senate of the Republic and was treated as an ordinary law, since the Constitution does not establish a special procedure for the expedition of approbatory acts of International Agreements. The respective steps were completed in the following manner:

aa. In the Senate of the Republic. According with the certifications and other documents that are in the file, the Bill was received under number 124 of 1997 in the Senate of the Republic. Doctors María Emma Mejía Vélez and Almabeatriz Rengifo López, then officers of the Ministries for Foreign Affairs and for Justice and Law, respectively, presented this project. The text of the project and the rationales of the act were published in the Congress Gazette number 455 of October 31, 1997. Congressmember Luis Eladio Pérez Bonilla elaborated the report of the first debate in the Second Commission and it was published in the Congress Gazette number 510 of December 4, 1997. Subject to approval in first debate, the Commission approved with 8 votes in favor, with a quorum of eight of the thirteen members, on December 16, 1997, according to certification sent by the General Secretary of September 28, 1999. The report for second debate was surrendered by the same Congressman Pérez Bonilla and published in the Gazette number 11 of March 17, 1998. The project was approved before the entire Senate in the

session corresponding to the records 07 of August 25, 1998, published in the Gazette 167 of August 31, 1998. This session had a quorum of ninety senators, according to certification sent by the General Secretary of the Senate (Fl. 232).

bb. In the Representatives' Chamber. The Project was received in the Representatives' Chamber under number 061/98 and was treated as follows:

> The report of the first debate was presented by Representative José Walteros Lenis Porras and published in the Gazette number 243 of October 29, 1998.
>
> The Second Commission gave its unanimous approval to the project in session of November 11, 1998, with the attendance of seventeen Representatives, according to certification of the General Secretary of this Commission dated September 9, 1999 (Fl. 35).
>
> The report of the second debate was presented by the same Representative Lenis Porras on November 25, 1998 and published in the Congress Gazette number 54 of April 21, 1999.
>
> The project was approved unanimously by the Entire Chamber on June 15, 1999 with a quorum of 107 votes, according to certification sent by the General Secretary of this organism on September 14, 1999.

2. *Material revision*

a. Contents. With the purpose of establishing the consistency of the Convention under analysis with the Constitution, its contents is dismembered highlighting the most important formulations in this Instrument:

The Convention consists of a preamble, 101 articles distributed in four parts, which are divided into chapters and sections. In the preamble, the important point of the Convention is when it affirms that the adoption of these uniform rules applied to the contracts for international sale of goods entered into between different social, economic and juridical systems, would contribute to the suppression of juridical obstacles which impede international trade stops and it would instead promote its development.

The First Part (articles 1 to 13) contains two chapters respectively, which regulate the Sphere of Application and General Provisions. In the first chapter it is laid down that the

Convention will be applied to contracts for the sale of goods between parties that have establishments in different States, and that it will not take into consideration either the nationality or the civil or commercial character of the parties or of the contract. It clarifies that the Convention only regulates the formation of the sale contract and the rights and obligations of the seller and the buyer that arise out of the contract, notwithstanding that the parties can exclude the application of the present Convention. In the second Chapter, some general measures settle down essentially the matters of interpretation of the Convention, which should be observed by the contracting parties. It is important to point out in this chapter that the contract need not be concluded nor evidenced in writing; therefore, any means of proof is conclusive. That general rule has its exception and it is when the internal legislation of a State does not allow it. In such case that disposition will not be applied, provided that the respective reservation (reserva) is made as established in article 96 of this Convention.

The Second Part consists of ten articles that regulate the formation of the contract, from the offer until the conclusion thereof.

The Third Part is distributed in five chapters that govern the seller's and the buyer's obligations, the transmission of risk and a description of the seller's and the buyer's obligations, which are defined in twelve sections.

The Fourth Part contemplates the final dispositions. Among other clauses, it is affirmed that instruments of ratification, acceptance, approval and adhesion to the Convention will be deposited before the General Secretary of the United Nations. Equally, the possibility is settled of making declarations or reservations, notwithstanding that after being ratified the Convention can be denounced by means of a formal notification made to the recipient in writing.

3. *Constitutionality of the Convention*

a. The economic integration with other States is a constitutional strategy that should be achieved on the basis of fairness, reciprocity and national convenience (Article 150-16). In the Convention that is analyzed, it is observed that this purpose is indeed complied with when being able to unify the criteria for

the international sale of goods in order for it to become more expeditious for parties located in different countries to engage in the commercialization of goods which will surely translate also into a better quality of life of the inhabitants of the Nations where they reside.

On this aspect the Government expressed in the following rationales presented by its respective ministers before the Congress of the Republic:

> . . . in developing this type of treaties, commercial exchange is intensified among the parties and it increases, in consequence, the number of business and international juridical acts that the individuals conclude within a certain juridical frame. Experience and international practice led to the conclusion that the regulation of contracts for the international sale of goods was considered as one of those issues that required, with more urgency, a uniform regulation that adapts to the necessities of international trade and that, at the same time, can enjoy a general acceptance on behalf of the different juridical systems that govern the world. The Convention on Contracts for the International Sale of Goods fulfills these requirements. It responds, without doubts, to a necessity felt inside the international economic relationships; the best test of it is the fact that at the end of 1994, forty five (45) States were party to this Convention.

b. The Convention does not ignore the autonomy of the private consent, in the measure in that that it does not hinder the right of the freedom that the parties have to enter into any agreement as per articles 13, 16 and 333 of the Magna Charta. In such train of thought, it is allowed that the parties that conclude the contract can exclude totally or partially the application of the dispositions of the Convention, tacitly or expressly in conformity with article 6 of the international Instrument that is analyzed.

Indeed, the Constitutional Court has pointed out the following in several rulings:

> The autonomy of the individual consent consists more or less in the widespread recognition of the juridical effects of certain acts or manifestations of will of the individuals. In other words, it consists of the delegation that the legislator makes to individuals of the faculty or power that it has of regulating the social relationships, a delegation that they exercise by means of the conclusion

of juridical acts or business. The individuals, freely and according to their best convenience, they are unbound to determine the content, reach, conditions and modalities of their juridical acts. When proceeding to conclude their acts, they should observe the necessary requirements that follow reasons concerning with the protection of their own agents, of third parties and of the general interest of society.
(Ref. Ruling T-338 of 1993. DM.: Alejandro Martínez Caballero).

Inside a juridical system that, as ours, recognizes - although not with an absolute character - the autonomy of private consent, it is the normal case that individuals submit the effects of their juridical acts to the clauses of their mutual agreements, provided that they do not thwart public-policy (imperative) dispositions of the law, commonly well-known as laws of public order.
(Ref. Ruling C-367 of 1995. P.M.: José Gregorio Hernández Galindo).

. . . private autonomy of consent, although no rule exists in the Constitution that contemplates it specifically, is deduced respectively from articles 13 and 16 (of the Constitution), which consecrate the freedom and free development of the capacity of the individual (Personalidad), which serve as a foundation to affirm that individuals are to be recognized the possibility to behave according to their free will, provided they do not do so against the law and the rights of others. Additionally, a series of constitutional articles warrant certain rights which exercise assumes the autonomy of consent; such is the case of the right of the juridical capacity (personalidad jurídica) (art. 14), the right to associate (art. 38), to enter into marriage contracts (art. 42), and the limits of economic type outlined in article 333.
In the Colombian Civil Code of 1887, both [(i)] the then prevailing free-will-system (voluntarista) as [(ii)] public order and good customs as limits to the autonomy of the free-will were consecrated; they are proven, amongst others in articles 16, 1151, 1518, 1524 and 1532. Therefore, it can be said, that institution [1] referred, although limited, acquired a preponderant and fundamental place within the system.
(Ref. Entire Court. Ruling C-660 of 1996. DM: Carlos Gaviria Díaz).

c. Equally, the exercise of the commercial activity that the individuals develop with other citizens of different States must fit the principle of good faith, just as the Convention stipulates in paragraph number one of article 7. This principle should not

only be observed in the contractual relationships or negotiations, but in the relationships between individuals and the State and in the procedural performances. Indeed, the Court pointed out:

"Good faith, in conformity with article 83 of the Magna Charta is presumed and this presumption may only be invalidated through the mechanisms consecrated by the enforceable juridical order" (Ref. Ruling C-253 of 1996. DM.: Hernando Herrera Vergara).

> In connection with the topic of obligations and their demonstration during a process, it is not acceptable to affirm that the corresponding policy thwarts article 83 of the Constitution, based upon the general presumption that good faith would be incompatible with its demonstration in court. There is nothing more against reality: in all juridical systems that recognize the principle of good faith, validation is a form of granting security to the life of business and, in general, to all juridical relationships.
> (Ref. Ruling C-023 of 1998. DM.: Jorge Arango Mejía).

According to the foregoing, the principle of the good faith consecrated in the Convention in article 7(1) "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade" is according to the postulate of the Magna Charta regarding good faith.

d. In order to perform a sales contract under the parameters of the Convention it is not necessary for it to be in writing. Indeed, article 11 of the Convention states: "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses" but if the State's internal legislation does not allow the conclusion, modification or the extinction for a mutual agreement for the sales contract or the offer, the acceptance or any other intent manifestation to be made otherwise than in writing, the relevant declaration to the mentioned disposition in conformity with article 96 of the Convention must be made which establishes: "A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 . . ."

Colombia would not have to make a declaration or reservation on the matter, since our commercial legislation does not require that contracts for the sale of goods be carried out necessarily in writing. Indeed, article 824 of the Commerce Code, expresses that merchants will be able to express their intent to hire or to oblige verbally, in writing or by any unequivocal way, except when a legal rule estates that certain solemnities are an essential requirement of the juridical business, in which case, it will not exist while the solemnity is not fulfilled.

e. On the other hand, the rules that the Convention contains promote the internationalization of economic relationships based upon the national sovereignty, in recognition of the self-determination of Nations and in the recognition of the principles of international law. . . (Articles 9 and 226 of the Magna Charta). This can be concluded from the Convention, since the contracts of international sale of goods regulated by it facilitate and promote the international trade of Colombia with other countries of the world. Also, the principles and regulations incorporated in this Instrument are adapted to the limits of our Constitution, since they are based in the sovereignty, the respect for the self-determination of Nations and the recognition of the principles of International Law accepted by Colombia.

In this understanding, the Government affirms the following in the rationales elucidation of the approbatory bill of the Convention:

> . . . the lack of a uniform law in this matter generates a juridical uncertainty that can never be convenient for the development of international trade. It is here where the true importance of the project that the Government presents today to the consideration of the honourable members of Congress resides. Starting from the moment in which our country approves and complies with the United Nations Convention on Contracts for the International Sale of Goods, [that the uncertainty] will disappear or at least it will substantially decrease the problem generated by the legislative diversity and the need to apply the conflict-of-law rules.

For all the above-mentioned it is held that the contents of the revised Convention fully respect the principles and commands of the Magna Charta. In consequence, their implementation must be declared as well as that of Act 518 of 1999 that approves it.

VI. *Decision*

In regards of the above, the entire Constitutional Court, administering Justice on behalf of the People and by command of the Constitution

RESOLVES:

FIRST:

To declare the Convention of the United Nations on Contracts for the International Sale of Goods, made in Vienna on April 11, 1980, executable.

SECOND:

To declare Act 518 of August 4, 1999, by means of which the Convention referred in number one above is approved, executable.

THIRD:

To order that this decision is communicated to the Presidency of the Republic, to the President of the Congress of the Republic and the Ministers Foreign Affairs and of Economic Development, for the purposes contemplated in article 241, number 10 of the Magna Charta.

Be notified, communicated, published, inserted in the gazette of the Constitutional Court and filed.

ALEJANDRO MARTINEZ CABALLERO
President
ANTONIO BARRERA CARBONELL
Magistrate
ALFREDO BELTRÁN SIERRA
Magistrate
CARLOS GAVIRIA DIAZ
Magistrado
JOSÉ GREGORIO HERNÁNDEZ GALINDO
Magistrate
EDUARDO CIFUENTES MUÑOZ
Magistrate
FABIO MORON DìAZ
Magistrate
VLADIMIRO NARANJO MESA
Magistrate

ÀLVARO TAFUR GALVIS
Magistrate
MARTHA SACHICA DE MONCALEANO
General Secretary

Editorial remarks

Editor: Patricia Rincón Martín

The final objective of this decision, held by the highest court of Columbia, is to declare the CISG valid and a part of their Law. It is interesting, however, to examine the process required to do so, for it differs from that followed in other countries.

As the court decision explains, under the Columbia Constitution the President of the Republic of Columbia may take the initiative in having international treaties such as the CISG approved. The treaty must be sent as a bill to the Congress and approved as an regular law (approved by both the Senate and the House of Representatives). Immediately afterwards, the law is sent to the Constitutional Court. This court checks that all formalities required in the Congress were fulfilled and also examines the material content of the international treaty.

In this case, the court confirmed that Law 518 of 1999 was formally correct and that the contents of the CISG respect the principles and provisions of the Colombian Constitution. Consequently, the court declared that both the CISG and the law which approved it were valid.