Class

Unification of Law - Uniform Law (Rechtsvereinheitlichung)

Summer term 2016
Time schedule of the class

21.04.2016 Basics of unification of law: notion, purposes, history
28.04.2016 Institutions and methods of unification of law
05.05.2015 Holiday
12.05.2016 Uniform sales law (CISG) I
19.05.2016 Uniform sales law II
26.05.2016 Uniform law in other parts of the law of obligations
02.06.2016 Uniform credit security law
09.06.2016 Uniform transport law I + II
16.06.2016 Seminar
23.06.2016 Uniform information technology (IT) law
30.06.2016 Approximation of laws in the EU
07.07.2016 Unification of the law of civil procedure
14.07.2016 Unification of insolvency law

Text - Explanatory note

Date of adoption: 11 April 1980
Entry into force: 1 January 1988

Purpose
The purpose of the CISG is to provide a modern, uniform and fair regime for contracts for the international sale of goods. Thus, the CISG contributes significantly to introducing certainty in commercial exchanges and decreasing transaction costs.

Why is it relevant?
The contract of sale is the backbone of international trade in all countries, irrespective of their legal tradition or level of economic development. The CISG is therefore considered one of the core international trade law conventions whose universal adoption is desirable.

The CISG is the result of a legislative effort that started at the beginning of the twentieth century. The resulting text provides a careful balance between the interests of the buyer and of the seller. It has also inspired contract law reform at the national level.

The adoption of the CISG provides modern, uniform legislation for the international sale of goods that would apply whenever contracts for the sale of goods are concluded between parties with a place of business in Contracting States. In these cases, the CISG would apply directly, avoiding recourse to rules of private international law to determine the law applicable to the contract, adding significantly to the certainty and predictability of international sales contracts.

Moreover, the CISG may apply to a contract for international sale of goods when the rules of private international law point at the law of a Contracting State as the applicable one, or by virtue of the choice of the contractual parties, regardless of whether their places of business are located in a Contracting State. In this latter case, the CISG provides a neutral body of rules that can be easily accepted in light of its transnational nature and of the wide availability of interpretative materials.

Finally, small and medium-sized enterprises as well as traders located in developing countries typically have reduced access to legal advice when negotiating a contract. Thus, they are more vulnerable to problems caused by inadequate treatment in the contract of issues relating to applicable law. The same enterprises and traders may also be the weaker contractual parties and could have difficulties in ensuring that the contractual balance is kept. Those merchants would therefore derive particular benefit from the default application of the fair and uniform regime of the CISG to contracts falling under its scope.

Key provisions
The CISG governs contracts for the international sales of goods between private businesses, excluding sales to consumers and sales of services, as well as sales of certain specified types of goods. It applies to contracts for sale of goods between parties whose places of business are in different Contracting States, or when the rules of private international law lead to the application of the law of a Contracting State. It may also apply by virtue of the parties' choice. Certain matters relating to the international sales of goods, for instance the validity of the contract and the effect of the contract on the property in the goods sold, fall outside the Convention's scope. The second part of the CISG deals with the formation of the contract, which is concluded by the exchange of offer and acceptance. The third part of the CISG deals with the obligations of the parties to the contract. Obligations of the sellers include delivering goods in conformity with the quantity and quality.
Uniform sales law:
The 1980 UN Convention on Contracts for the International Sale of Goods (CISG)

Short characterization:
• international treaty on unified sales law (UNCITRAL)
• currently 85 members
• history
• „liberal“ content
• compromise between different legal traditions, in particular Continental law and Common Law.
# Contents


- PREAMBLE

## Part I. Sphere of application and general provisions

- **CHAPTER I. Sphere of application**
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- **CHAPTER II. General provisions**
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## Part II. Formation of the contract

- Article 14
- Article 15
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II. Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods

This note has been prepared by the Secretariat of the United Nations Commission on International Trade Law for informational purposes; it is not an official commentary on the Convention.

Introduction


2. Preparation of a uniform law for the international sale of goods began in 1930 at the International Institute for the Unification of Private Law (UNIDROIT) in Rome. After a long interruption in the work as a result of the Second World War, the draft was submitted to a diplomatic conference in The Hague in 1964, which adopted two conventions, one on the international sale of goods and the other on the formation of contracts for the international sale of goods.

3. Almost immediately upon the adoption of the two conventions there
Structure of the CISG

- Part I: Sphere of Application and General Provisions (Art. 1–13)
- Part II: Formation of the Contract (Art. 14–24)
- Part IV: Final Provisions (Art. 89–101)
Literature and case law on the CISG

• Commentaries by Schlechtriem/Schwenzer, Kröll/Mistelis/Perales Viscasillas, Honnold, Bianca/Bonnell and others

• Case law databases:
  - CLOUT (UNCITRAL)
  - Global Sales Law (www.cisg-online.ch: Prof. Schwenzer),
  - Albert H. Kritzer CISG database (http://www.cisg.law.pace.edu)
  - Unilex (by Unidroit and the University of Rome „La Sapienza“: Prof. Bonell) (http://www.unilex.info/)
Search CLOUT Cases

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- Decision Date: start: 
- to: 
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OPINION

Plaintiff Cedar Petrochemicals, Inc. ("Cedar"), brought this breach of contract action against Defendant Dongbu Hannong Chemical Co., Ltd. ("Dongbu"), alleging that Dongbu had delivered non-conforming liquid phenol, in violation of the parties' written and oral contracts and in contravention of its obligations under the Convention on Contracts for the International Sale of Goods, Apr. 11, 1980. A nonjury trial was held in this action on September 30, October 1, and October 2, 2013.

In short, the parties' dispute relates to a 2005 maritime shipment of the liquid petrochemical phenol. The phenol at issue ("the Phenol") was transported from its on-shore storage tank in Yuso, Korea, to Defendant's ship, the Green Pioneer, which carried it to Ulsan Anchorage, Korea. Once there, the Phenol was transferred from the Green Pioneer to Plaintiff's ship, the Bow Flora, which carried it to port at Rotterdam, The Netherlands. On arrival at Rotterdam, it was determined that the Phenol was damaged. In order to demonstrate liability, Plaintiff must prove by a preponderance of the evidence that the Phenol was injured before it passed the rail of the Bow Flora. On this factual point, the Court was unpersuaded.

I. FINDINGS OF FACT

A. The Parties and Jurisdiction …

III. CONCLUSION: Based on the above-mentioned findings of facts and conclusions of law, the Court concludes that Plaintiff has not shown by a preponderance of the evidence that the Phenol at issue was injured prior to crossing the rail of the Bow Flora. Having failed to make this showing, Plaintiff cannot establish that Defendant breached the parties' agreement. Accordingly, judgment is granted in favor of Defendant.
Kurzinformationen zum UN-Kaufrecht

Das UN-Kaufrecht regelt zentrale Aspekte internationaler Kaufverträge.
A first comparison: the CISG and German law

- **Part I:**
  - Sphere of Application: “international” sale of “goods”, no consumer sales
  - General Provisions (Art. 1–13): e.g. interpretation of CISG (Art.7), interpretation of statements by parties (Art.8) form of contract (Art.11), good faith? (see Art.7 I)

- **Part II: Formation of the Contract** (Art. 14–24): offer and acceptance (eg Art.16 revocability of offer)

- **Part III: Sale of Goods** (Art. 25–88): General provisions – obligations of seller (+ rights of buyer) – obligations of buyer (+ rights of seller) – passing of risk – provisions common to seller and buyer (e.g. damages)

- **Part IV: Final Provisions** (Art. 89–101)

- Sphere of application: BGB - all sales and other contracts; HGB – commercial sales
- „General provisions“: interpretation of BGB, of declarations of will and contracts (sec.157), principle of good faith (sec.242), form of contract (sec.125 et seq.)
- Formation of contract: sec. 145 et seq., 130 et seq (legal transactions), 311 et seq.
- Validity of contract (104 et seq., 119 et seq, 305 et seq. – no parallel in CISG
- Contents of (sales) contract, sec.433 et seq.: mutual obligations, defects, passing of risk, retention of title, sale of rights
- Violation of contract: sec.275 et seq, 320 et seq., 434 et seq.
- In particular: damages (sec.280, 249 et seq)
Structure of the sales provisions in the Croatian Law of Obligations Act 2005

• Chapter 2: Contracts
  • Section 1: Contract of Sale
    • I General Provisions
    • II Contents of Contract of Sale
    • III Obligations of the Seller
      1 Delivery
      2 Liability for Material Defects
      4 Liability for Legal Defects
    • IV Obligations of the Buyer
    • V Obligation to Preserve a Thing for Co-Contractor
    • VI Compensation of Damage in Case of Termination of Sale
  • VII Various Modes of Sales

Compare with CISG
  • Part I: Sphere of Application and General Provisions (Art. 1–13)
  • Part II: Formation of the Contract (Art. 14–24)
  • Part III: Sale of Goods (Art. 25–88): General provisions – obligations of seller – obligations of buyer – passing of risk – provisions common to seller and buyer (e.g. damages)
  • Part IV: Final Provisions (Art. 89–101)
Basic obligations and rights under the CISG and German law

CISG Chapter II OBLIGATIONS OF THE SELLER

Article 30: The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

Chapter III OBLIGATIONS OF THE BUYER

Article 53: The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Chapter II Section III. Remedies for breach of contract by the seller

Article 45
(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) exercise the rights provided in articles 46 to 52; (b) claim damages as provided in articles 74 to 77.

BGB Book 2 Law of Obligations
Division 8 Particular types of obligations
Section 433 Typical contractual duties in a purchase agreement
(1) By a purchase agreement, the seller of a thing is obliged to deliver the thing to the buyer and to procure ownership of the thing for the buyer. The seller must procure the thing for the buyer free from material and legal defects.
(2) The buyer is obliged to pay the seller the agreed purchase price and to accept delivery of the thing purchased.

Book 2 Division 1 Subject matter of obligations - Title 1 Duty of performance
Section 275 Exclusion of the duty of performance
(1) A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person.

Division 3 Contractual obligations
Title 2 Reciprocal contracts
Section 320 Defence of unperformed contract
(1) A person who is a party to a reciprocal contract may refuse his part of the performance until the other party renders consideration, …
Typical issues

- Applicability of the CISG: in particular Art.1 - 3
- Relation between the CISG and national law; the problem of external and internal gaps: Art.7 II
- The form of the contract: Art.11
- Offer and acceptance: Art.14 et seq.
- The interpretation of the contract: Art.8?
- **Specific performance:** Art.28
- The concept of (fundamental) breach of contract: Art.25
- Damages: Art.74 et seq.
Some provisions (as an example)

Article 46 (1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

Chapter I GENERAL PROVISIONS

Article 28 If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.
Comparison of some provisions: interpretation

Interpretation of CISG

Art. 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.

Gaps of CISG Art. 7 (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Gap-filling?

Interpretation of BGB?
Comparison of some provisions: conclusion of contract

Form of contract

**Art. 11** 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.

**Art. 13** For the purposes of this Convention "writing" includes telegram and telex.

Offer and acceptance **Art. 16**

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Form of contract

**Sec. 125 – 127 BGB**

Electronic form – „text form“

Offer and acceptance

**Sec. 145 et seq**

**Sec. 130 BGB** Effectiveness of a declaration of intent to absent parties

(1) A declaration of intent that is to be made to another becomes effective, if made in his absence, at the point of time when this declaration reaches him. It does not become effective if a revocation reaches the other previously or at the same time.
Good faith

Chapter II GENERAL PROVISIONS

Article 7

(1) In the interpretation of this Convention, regard is to be had to its international character and ...the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or ....

Article 8 (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew ...what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

Good faith

Sec.157 BGB Interpretation of contracts

Contracts are to be interpreted as required by good faith, taking customary practice into consideration.

Sec. 242 BGB Performance in good faith

An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.
Comparison of some provisions: specific performance

Specific performance

Chapter II OBLIGATIONS OF THE SELLER

Article 46 (1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

Chapter I GENERAL PROVISIONS

Article 28 If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

Specific performance

German law: Where is the problem?

Common law: only exceptionally under equity doctrines of specific performance and discretion of the court
Comparison of some provisions: Damages

**Damages**

Chapter II OBLIGATIONS OF THE SELLER

Section III. Remedies for breach of contract by the seller

**Article 45**

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(b) claim damages as provided in articles 74 to 77.

Chapter III OBLIGATIONS OF THE BUYER

Section III. Remedies for breach of contract by the buyer

**Article 61**

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

(b) claim damages as provided in articles 74 to 77.

**Damages**

Section 280 BGB Damages for breach of duty

(1) If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty.

Section 437 Rights of buyer in the case of defects

If the thing is defective, the buyer may, ...

3. under sections 440, 280, 281, 283 and 311a, demand damages ....