

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 (CISG) 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

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.
- **Structure:**

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 (+ rights of buyer) – obligations of buyer (+ rights of seller) – passing of risk – provisions common to seller and buyer (eg damages)

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

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.

Case example:

The claimant is a Spanish agriculture trade enterprise (S), the defendant a German enterprise (B) selling juices. The parties concluded and partly performed two contracts on the purchase of orange juice. The contracts contained a clause according to which “German law is applicable” to the contracts.

At first the parties concluded a contract on the purchase of 500.000 liters orange juice at a price of 1 €/kg. This contract was duly performed by the parties. In a second contract the defendant ordered 2 million liters orange juice at a price of 0.5 €/kg to be delivered within a certain time. Following the claimant, it delivered 1 million liters of this order. The claimant demands payment of the purchase price.

Example (cont'd): The **defendant objects** that the deliveries of the claimant were **defective** as the claimant had not delivered „direct juice“ (as required under the contract). The defendant states that it had **informed the claimant** of the defects first **by an email of 4.3.2012**. At a **meeting** with representatives of the claimant on **25.4.2012** the CEO of the defendant had said that the defendant would **back away** from the contract **for the future**. For **covering purchases** it had had to spend 200.000 €, which it would now claim as damages. Furthermore it had had to pay **10.000 € to a surveyor**. The **defendant** now declares to **set-off** its counter-claims against the payment claim of the claimant. In a procedural document of **2.7.2012** the defendant in addition **reduces the price** to a degree corresponding to the price difference between direct juice and concentrate juice.

The **claimant answers** that it has **duly performed**. As to the **damages** the claimant states that the defendant had made its **covering purchases before the** – disputed – **avoidance** of the contract on 25.4.2012. Besides, the – disputed – avoidance had **not** been declared with a **reasonable time**. Therefore there was no claim for damages.

How should the case be decided?

Solution of the case

Claim of seller (claimant) againsts buyer (defendant) could be grounded on Art.53, 62 CISG

- **Applicability of CISG**: Art.1, 2. Exclusion Art.6?
- **Valid sales contract** between the parties, Art.14 – 16 CISG

= Conclusion of contract

= Validity of contract: no particular form requirement, Art.11 CISG. Other validity, Art.4 a) + cf. *Art.7 II*: national law (by conflict of laws rules)

- Payment **claim due (mature)**? Art.58 CISG
- **Payment claim may have lapsed or be reduced** on the basis of a remedy of the defendant under Art.45 et seq. CISG → *see following slide*

Solution of the case (cont'd.)

- Payment **claim may have lapsed or be reduced** on the basis of a remedy of the defendant under Art.45 et seq. CISG
 - = **Lapsing of claim** under Art.45 I a), 49, 81 CISG („avoidance of contract“)
 - + fundamental breach of contract by seller, 49 I a), 25 (def. fund. breach), 35 (mat. defects) CISG
 - + remedy may be lost under Art.39 CISG (no notice within reasonable time)
 - + avoidance excluded under Art.49 II (avoidance within reasonable time) or 82 CISG?
 - *Lapse only for future?*
 - = **Reduction of claim** under Art.45 I a, 50
 - = **Claim for damages**, Art.45 I b), 74 et seq. Problem covering purchases before avoidance, Art.75. **Set-off** under national law?

Relevant provisions (1): statutory basis for the claim/claims

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.

Section III Remedies for breach of contract by the buyer

Article 62 The seller may require the buyer to pay the price, take delivery or perform his other obligations, *unless the seller has resorted to a remedy which is inconsistent with this requirement.*

Relevant provisions (2): Applicability of CISG

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

- (a) when the States are Contracting States; or
- (b) when the rules of private international law lead to the application of the law of a Contracting State.

Article 2

This Convention does not apply to sales:

- (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

Article 3

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

Relevant provisions (3): Conclusion and validity of contract

Validity of Contract: Art.4: This Convention is ... not concerned (a) with the validity of the 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.

Part II. Formation of the contract

Offer and acceptance: Art. 11 (1) An offer becomes effective when it reaches the offeree. (2) An offer, even if it is irrevocable, may be **withdrawn** if the withdrawal reaches the offeree before or at the same time as the offer.

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.

Compare: Offer and acceptance under German BGB

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.

Relevant provisions (4): Interpretation and gap-filling

CHAPTER II. GENERAL PROVISIONS

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.

Relevant provisions (5): Maturity of claim, place of performance

Article 58

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention.

...

Article 31 *(place of performance by seller: delivery of goods)*

(1) If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer;

(c) in other cases—in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Relevant provisions (6): Remedies of buyer in general, conformity of goods

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:

- (a) exercise the rights provided in art. 46-52;
- (b) claim damages as provided in art. 74-77.

Art.46 – 52:

- *Performance (Art.46 I)*
- *Repair (Art.46 III)*
- *Substitute goods (Art.46 II)*
- *Reduction of price (Art.50)*
- *Avoidance of contract (Art.49)*

Chapter II: Obligations of the seller

Section II: Conformity of the goods and third-party claims

Article 35

(1) The seller must deliver **goods which are of the quantity, quality and description required by the contract** and which are contained or packaged in the manner required by the contract.

Article 39

(1) The **buyer loses the right to rely on a lack of conformity** of the goods if he does not give **notice** to the seller specifying the nature of the lack of conformity **within a reasonable time** after he has discovered it or ought to have discovered it.

Relevant provisions (7): Remedies of buyer (cont'd)

Sec. III: Remedies for breach of contract by 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.

(2) *If the goods do not conform with the contract*, the buyer may require delivery of **substitute goods** only if the lack of conformity constitutes a fundamental breach of contract

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by **repair**, unless this is unreasonable ...

Article 49

(1) The **buyer may declare the contract avoided**: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a **fundamental breach of contract**; or ...

(2) However, **in cases where the seller has delivered the goods**, the buyer loses the right to declare the contract avoided unless he does so:

(b) in respect of any breach other than late delivery, **within a reasonable time**: (i) after he knew or ought to have known of the breach;

Part III: Sale of goods

CHAPTER I. GENERAL PROVISIONS

Article 25 A **breach of contract** committed by one of the parties is **fundamental** if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Article 35

(1) The seller must deliver **goods which are of the quantity, quality and description required by the contract** and which are contained or packaged in the manner required by the contract.

Relevant provisions (8): Avoidance

Chapter V – Common Provisions Section V. Effects of avoidance

Article 81

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due.

Article 82

(1) The buyer loses the right to declare the contract avoided ... if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) The preceding paragraph does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission; ... or

(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

Relevant provisions (8): Price reduction

Section III. Remedies for breach of contract by the seller

Article 50

If the goods do not conform with the contract and whether or not the price has already been paid, the **buyer may reduce the price in the same proportion** as the **value that the goods actually delivered** had at the time of the delivery **bears to the value that conforming goods would have had** at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

Relation with other remedies:

Article 44 Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

Art.45 II The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

Relevant provisions (9): Damages

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 art. 74-77.*

Chapter V: Provisions common to the obligations of the seller and of the buyer - Section II. Damages

Article 74: Damages for breach of contract by one party consist of a **sum equal to the loss**, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss **which the party in breach foresaw or ought to have foreseen** at the time of the conclusion of the contract

Article 75: If the contract is avoided and if, in a reasonable manner and within a reasonable time **after avoidance**, the *buyer has bought goods in replacement* or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 79: (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an **impediment beyond his control** and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.