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
Unification of law in the field of credit security:

**General aspects**

- Notion and basic types of credit security (secured credit)
- In personam (personal) security – in rem (real) security (security in movables or immovables)
- Possessory – non-possessory security
- Main regulatory topics in credit security law
Unification of law in the field of credit security:
System of sources and models

• **Sources:** National law – EU law – international law – soft law instruments

• **National models:** pledge, retention of title, fiduciary transfer of property, trust, Art.9 UCC security interest; mortgage; suretyship, guarantee.
UCC Article 9 Secured Transactions

Part 2. Effectiveness of Security Agreement; Attachment of Security Interest; Rights of Parties to Security Agreement

[Subpart 1. Effectiveness and Attachment]
§ 9-201. GENERAL EFFECTIVENESS OF SECURITY AGREEMENT.
§ 9-202. TITLE TO COLLATERAL IMMATERIAL.
§ 9-203. ATTACHMENT AND ENFORCEABILITY OF SECURITY INTEREST; PROCEEDS; SUPPORTING OBLIGATIONS; FORMAL REQUISITES.
§ 9-204. AFTER-ACQUIRED PROPERTY; FUTURE ADVANCES.
§ 9-205. USE OR DISPOSITION OF COLLATERAL PERMISSIBLE.
§ 9-206. SECURITY INTEREST ARISING IN PURCHASE OR DELIVERY OF FINANCIAL ASSET.

[Subpart 2. Rights and Duties]
§ 9-207. RIGHTS AND DUTIES OF SECURED PARTY HAVING POSSESSION OR CONTROL OF COLLATERAL.
§ 9-208. ADDITIONAL DUTIES OF SECURED PARTY HAVING CONTROL OF COLLATERAL.
§ 9-209. DUTIES OF SECURED PARTY IF ACCOUNT DEBTOR HAS BEEN NOTIFIED OF ASSIGNMENT.
§ 9-210. REQUEST FOR ACCOUNTING; REQUEST REGARDING LIST OF COLLATERAL OR STATEMENT OF ACCOUNT

Part 3. Perfection and Priority
Part 4. Rights of Third Parties
Part 5. Filing
Part 6. Default
Part 7. Transition
Part 8. TRANSITION PROVISIONS FOR 2010 AMENDMENTS
Unification of law in the field of credit security

- Overview by types of secured credit: personal/real security – in general or selection of types
- Overview by types of legal instruments:
  - International treaties: e.g. **UNIDROIT Cape Town Convention on international interests in mobile equipment 2001 + 3 Protocols** (aircraft, rail, space)
  - Soft law:
    - „Principles“: PICC and PECL do not cover credit securities, but **DCFR** does (security in movables)
  - Legislative guides: **UNCITRAL Legislative Guide on Secured Transactions (2007)**
Chinese enterprise B acquires in 2015 from U.S. manufacturer M an airplane. Payment is due in instalments. In favour of M an "international security interest" in the plane is created, according to which in the case of the buyer's default with paying rates ownership in the airplane is to fall-back to the manufacturer for a small compensation.

What can the manufacturer do when the buyer defaults?
CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT (2001)

Last Updated: Thursday, 07 May 2015 10:27

CONVENTION

ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

THE STATES PARTIES TO THIS CONVENTION,

AWARE of the need to acquire and use mobile equipment of high value or particular economic significance and to facilitate the financing of the acquisition and use of such equipment in an efficient manner,

RECOGNISING the advantages of asset-based financing and leasing for this purpose and desiring to facilitate these types of transaction by establishing clear rules to govern them,

MINDFUL of the need to ensure that interests in such equipment are recognised and protected universally,

DESIRING to provide broad and mutual economic benefits for all interested parties,

BELIEVING that such rules must reflect the principles underlying asset-based financing and leasing and promote the autonomy of the parties necessary in these transactions,

CONSCIOUS of the need to establish a legal framework for international interests in such equipment and for that purpose to create an international registration system for their protection,

TAKING INTO CONSIDERATION the objectives and principles enunciated in existing Conventions relating to such equipment,

HAVE AGREED upon the following provisions:

Chapter I
Principles, Definitions and Model Rules of European Private Law

Draft Common Frame of Reference (DCFR)
Outline Edition

Prepared by the
Study Group on a European Civil Code
and the
Research Group on EC Private Law (Acquis Group)
Based in part on a revised version of the Principles of European Contract Law

Edited by
Christian von Bar, Eric Clive and Hans Schulte-Nölke
and
Hugh Beale, Johnny Herre, Jérôme Huet, Matthias Storme,
Stephen Swann, Paul Varul, Anna Veneziano and Fryderyk Zoll

sellier.
european law publishers
ACTES UNIFORMES

Actes Uniformes de l'OHADA

LES ACTES UNIFORMES DE L'OHADA

Les règles de droit matériel communes aux États membres de l'OHADA sont contenues dans des Actes Uniformes, adoptés par le Conseil des Ministres. À ce jour, neuf (09) Actes uniformes ont déjà été adoptés et, pour certains, révisés. Sont concernées, les disciplines suivantes :

1. Droit commercial général

Avant l'intervention du législateur OHADA, la matière était soumise à des règles souvent anciennes et extrêmement diversifiées, tant dans leurs sources (lois, décrets, ordonnances...) que dans leur objet. Afin de faciliter et de sécuriser les échanges entre les opérateurs économiques, le Conseil des Ministres a adopté, le 17 avril 1997, l'Acte uniforme relatif au droit commercial général (AUDCG). Ce texte de 289 articles a été remplacé, après plus d'une décennie d'application, par un nouvel Acte uniforme du 15 décembre 2010.

Encore plus moderne que le précédent, l'AUDCG du 15 décembre 2010 réglemente :
- le statut du commerçant et celui, nouveau, de l'entrepreneur, institué pour favoriser le passage des acteurs de l'économie informelle vers le secteur formel ;
- le Registre du Commerce et du Crédit Mobiler (RCCM) qui regroupe les immatriculations des personnes physiques et personnes morales commercantes, mais aussi les inscriptions de sûretés mobilières, et dont l'informatisation permettra d'accéder en temps réel, à une information fiable sur les agents économiques de l'espace OHADA ;
- le bail à usage professionnel qui, se substituant au bail commercial, organise une protection spécifique de tout professionnel exerçant son activité dans un local dont il n'est pas propriétaire ;
Journal Officiel
ORGANISATION POUR L’HARMONISATION EN AFRIQUE DU DROIT DES AFFAIRES
OHADA
Secrétariat permanent : B.P. 10071 Yaoundé (Cameroun) - Tél.: (237) 22 21 09 05 / Fax. (237) 22 21 67 45

ACTE UNIFORME PORTANT ORGANISATION DES SÛRETÉS
Adopté le 15 décembre 2010 à Lomé

SOMMAIRE

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CHAPITRE 1 - DÉFINITIONS ET DOMAINE D’APPLICATION DES SÛRETÉS 3
CHAPITRE 2 - AGENT DES SÛRETÉS 4
The revised OHADA Uniform Act on security law

INTRODUCTION

Africa is not only a continent with a large and young population but also with abundant natural resources and this creates pressing needs for modern infrastructure. Its potential for development has become its most attractive economic aspect. As a matter of fact, a sustainable investment and development cannot be achieved without a strong and stable legal and commercial framework that would protect private investment or property; nor can it be achieved without an independent judicial system in place to ensure an effective and impartial settlement of disputes. These parameters are essential to enable potential investors to invest in Africa. In these circumstances, a number of African states suffering from outdated and improper legislation agreed to create a modern, harmonised and accessible business law area, known as OHADA.

OHADA is an international organisation created by Treaty signed in Port-Louis (Mauritius) on 17 October 1993 by fourteen African states. The acronym stands for “Organisation pour l’Harmonisation du Droit des Affaires en Afrique” (Organisation for the Harmonisation of Business Law in Africa). Its creation results from a political will to strengthen the African legal system deemed as indispensable for the development of the continent. At present, OHADA has 17 member states, taking into account the recent completion of the accession of the Democratic Republic of Congo in 2012.

Security law is an essential piece of legislation providing for various guarantees protecting creditors by securing the enforcement of the debtors’ obligations. The revised OHADA Uniform Act on security law has been adopted on 15 December 2010, but it became effective in each of the then 16 member states on 16 May 2011 - it specifies that the security granted before 16 May 2011 will continue to be governed by the former Uniform Act on security dated 17 April 1997. Since 12 September 2012, the revised OHADA Uniform Act on security law also applies (together with all the other OHADA Uniform Acts) to the Democratic Republic of Congo (to see our article on the accession of Congo to OHADA please click here).
Comparison of structures: Cape Town Convention and CISG

**Cape Town Convention:** Preamble
Chapter I: Sphere of application and general provisions (art.1 – 6)
Chapter II: Constitution of an international interest (art.7 form requirements)
Chapter III: Default remedies (art.8 – 15)
Chapter IV: The international registration system (art.16 – 17)
Chapter V: Other matters relating to registration (art.18 – 26)
Chapter VI: Privileges and immunities of the Supervisory Authority and the Registrar (art.27)
Chapter VII: Liability of the Registrar (art.28)
Chapter VIII: Effects of an international interest as against third parties (art.29 – 30)
Chapter IX: Assignments of associated rights and international interests; rights of subrogation (art.31 - 38)
Chapter X: Rights or interests subject to declarations by Contracting States (art.39 – 40)
Chapter XI: Application of the Convention to sales (art.41)
Chapter XII: Jurisdiction (art.42 – 44)
Chapter XIII: Relationship with other Conventions (art.45bis – 46)
Chapter XIV: Final provisions (art.47 – 62)

**CISG:** Preamble
- **Part I:**
  - Sphere of application
  - General Provisions
- **Part II: Formation of the Contract**
- **Part IV: Final Provisions** (Art. 89–101)
Welcome to the International Registry

What is the International Registry?

The International Registry is an electronic registry which operates under the legal framework of the Cape Town Convention and Aircraft Protocol adopted on the 16th of November 2001. It provides for the electronic registration and the protection of ‘international interests’ which are recognised by all ratifying states, with priority being determined on a “first-to-file” basis.

Registration of interest in an aircraft asset serves as a notification and is considered to be best practice for owners, creditors, debtors, lessors, lessees, agents and others in protecting their financial interest in such an asset. For a full description of the legal protections provided by the Convention and the Protocol, and the risks of not registering, please refer to the text of the Cape Town Convention and the Aircraft Protocol. The Official Commentary by Professor Sir Roy Goode (Revised Edition 2013) on the Cape Town Convention and the Aircraft Protocol is available from the International Institute for the Unification of Private Law (unidroit.org).

As the registrations merely provide notice of the interests in aircraft assets, the facts underlying any such registration shall determine whether the interest falls within the scope of the Convention and the Protocol. Without limiting the foregoing, while there is no technical impediment to the registration of pre-existing rights and interests, such registrations shall have no legal effect under the Convention and the Protocol, except where, by virtue of a declaration under Article 60 (3) of the Convention, registration thereof is required.

How do I use the International Registry?

The two main functions available on the International Registry are 1) registering an interest in an aircraft asset and 2) searching against an aircraft asset to determine what registrations have been made and their relative priority. You may apply for an account on the International Registry and, once approved, you may register interests in airframes, aircraft engines and helicopters. Searching is available to account holders who are approved users and also to guests who do not hold an account.
Principles underlying the Cape Town Convention (according to Unidroit website)

“The Convention is based on 5 underlying principles:

· **Party Autonomy:** the Convention assumes that parties to transactions involving high-value aircraft objects will be knowledgeable and expertly represented, and so permit maximum contractual flexibility;

· **Predictability:** the Convention establishes concise and clear rules for determining priority, thus reducing uncertainty

· **Transparency:** the Convention provides for registration of international interests on an International Registry, which will be searchable by third parties and which will subordinate unregistered interests to holders of registered interests.

· **Practicality:** the regime established by the Convention reflects the practical operation of modern financing transactions;

· **Sensitivity to National Legal Cultures:** the Convention allows Contracting States to lodge declarations to modify the operation of select provisions where those provisions would be incompatible with its principles of national law – this flexibility is particularly important to enable the regime established by the Convention to respond to domestic legal norms”
Chinese enterprise B acquires in 2015 from U.S. manufacturer M an airplane. Payment is due in instalments. In favour of M an "international security interest" in the plane is created, according to which in the case of the buyer's default with paying rates ownership in the airplane is to fall-back to the manufacturer for a small compensation.

What can the manufacturer do when the buyer defaults?
Solution of the case (overview)

Possible claims of manufacturer against buyer: deliver airplane or transfer property, art.8 or 9 Cape Town Convention

- Applicability of Cape Town Convention
- Valid international [security] interest between the parties
- **Claim 1: Art.8**, right to take possession or sell (or claim thereto)
- **Claim 2: Art.9**, vesting of ownership
First check of possible relevance of Cape Town Convention

Article 2 — The international interest

1. This Convention provides for the constitution and effects of an international interest in certain categories of mobile equipment and associated rights.

2. For the purposes of this Convention, an international interest in mobile equipment is an interest, constituted under Article 7, in a uniquely identifiable object of a category of such objects listed in paragraph 3 and designated in the Protocol: …

3. The categories referred to in the preceding paragraphs are:
   (a) airframes, aircraft engines and helicopters;
Article 8 — Remedies of chargee

1. In the event of default as provided in Article 11, the chargee may, to the extent that the chargor has at any time so agreed and subject to any declaration that may be made by a Contracting State under Article 54, exercise any one or more of the following remedies:

(a) take possession or control of any object charged to it;

(b) sell or grant a lease of any such object;

(c) collect or receive any income or profits arising from the management or use of any such object.

2. The chargee may alternatively apply for a court order authorising or directing any of the acts referred to in the preceding paragraph.

Article 9 — Vesting of object in satisfaction; redemption

1. At any time after default as provided in Article 11, the chargee and all the interested persons may agree that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.

2. The court may on the application of the chargee order that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.
Solution (detailed) part 1

Possible claims of manufacturer against buyer: deliver airplane or transfer property, art.8 or 9 Cape Town Convention

- Applicability of Cape Town Convention
  = Issues of public international law
  = sphere of application of Convention, art.1-3, 60

- Valid international security interest between the parties
  = Agreement to create interest
  = Registration necessary?

- Claim 1: Art.8, right to take possession or sell (or claim thereto)
- Claim 2: Art.9, vesting of ownership and consequences therefrom
Basic provisions on applicability of Cape Town Convention

- **Article 2 — The international interest**

1. This Convention provides for the constitution and effects of an international interest in certain categories of mobile equipment and associated rights.

2. For the purposes of this Convention, an international interest in mobile equipment is an interest, constituted under Article 7, in a uniquely identifiable object of a category of such objects listed in paragraph 3 and designated in the Protocol:

   (a) granted by the chargor under a security agreement; (b) vested in a person who is the conditional seller under a title reservation agreement; or (c) vested in a person who is the lessor under a leasing agreement. …

3. The categories referred to in the preceding paragraphs are: (a) airframes, aircraft engines and helicopters;

- **Article 3 — Sphere of application:**

  1. This Convention applies when, at the time of the conclusion of the agreement creating or providing for the international interest, the debtor is situated in a Contracting State.

2. The fact that the creditor is situated in a non-Contracting State does not affect the applicability of this Convention.

- **Article 49 — Entry into force**

  1. This Convention enters into force on the first day of the month following the expiration of three months after the date of the deposit of the third instrument of ratification, … but only as regards a category of objects to which a Protocol applies: (a) as from the time of entry into force of that Protocol; (b) subject to the terms of that Protocol; and (c) as between States Parties to this Convention and that Protocol.

**Aircraft Protocol (2001)**, in force since 2006
Chapter I Sphere of application and general provisions

Article 1 — Definitions

In this Convention, except where the context otherwise requires, the following terms are employed with the meanings set out below:

(a) “agreement” means a security agreement, a title reservation agreement or a leasing agreement;

(b) “assignment” means a contract which, whether by way of security or otherwise, confers on the assignee associated rights with or without a transfer of the related international interest;

(i) “creditor” means a chargee under a security agreement, a conditional seller under a title reservation agreement or a lessor under a leasing agreement;

(j) “debtor” means a chargor under a security agreement, a conditional buyer under a title reservation agreement, a lessee under a leasing agreement or a person whose interest in an object is burdened by a registrable non-consensual right or interest;

(o) “international interest” means an interest held by a creditor to which Article 2 applies;

(ii) “security agreement” means an agreement by which a chargor grants or agrees to grant to a chargee an interest (including an ownership interest) in or over an object to secure the performance of any existing or future obligation of the chargor or a third person;
Validity of international interest under Cape Town Convention

Art.7 in conjunction with Art.2

Chapter II: Constitution of an international interest

Article 7 — Formal requirements

An interest is constituted as an international interest under this Convention where the agreement creating or providing for the interest: (a) is in writing; (b) relates to an object of which the chargor, conditional seller or lessor has power to dispose; (c) enables the object to be identified in conformity with the Protocol; and ...

= Registration necessary?

Chapter VIII: Effects of an international interest as against third parties

Article 29 — Priority of competing interests

1. A registered interest has priority over any other interest subsequently registered and over an unregistered interest.
Solution (detailed) part 2

Possible claims of manufacturer against buyer: deliver airplane or transfer property, art.8 or 9 Cape Town Convention

- **Applicability of Cape Town Convention**
- **Valid international security interest between the parties**
- **Claim 1: Art.8**, right to take possession or sell (or claim thereto): in conjunction with art.11 requires default = breach of contract, non-performance
- **Claim 2: Art.9**, vesting of ownership and consequences therefrom
- **Problem**: validity of „pacte commissoire“ with minor compensation of value of airplane: **Art.15**
Chapter III Default remedies

Article 8 — Remedies of chargee

1. In the event of default as provided in Article 11, the chargee may, to the extent that the chargor has at any time so agreed and subject to any declaration that may be made by a Contracting State under Article 54, exercise any one or more of the following remedies:

(a) take possession or control of any object charged to it;
(b) sell or grant a lease of any such object;
(c) collect or receive any income or profits arising from the management or use of any such object.

2. The chargee may alternatively apply for a court order authorising or directing any of the acts referred to in the preceding paragraph.

3. Any remedy set out in sub-paragraph (a), (b) or (c) of paragraph 1 or by Article 13 shall be exercised in a commercially reasonable manner.

Article 11 — Meaning of default

1. The debtor and the creditor may at any time agree in writing as to the events that constitute a default or otherwise give rise to the rights and remedies specified in Articles 8 to 10 and 13.

2. Where the debtor and the creditor have not so agreed, “default” for the purposes of Articles 8 to 10 and 13 means a default which substantially deprives the creditor of what it is entitled to expect under the agreement.
Article 9 — Vesting of object in satisfaction; redemption

1. At any time after default as provided in Article 11, the chargee and all the interested persons may agree that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.

2. The court may on the application of the chargee order that ownership of (or any other interest of the chargor in) any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.

3. The court shall grant an application under the preceding paragraph only if the amount of the secured obligations to be satisfied by such vesting is commensurate with the value of the object after taking account of any payment to be made by the chargee to any of the interested persons.

See also Art.8: 6. Where the sums collected or received by the chargee as a result of the exercise of any remedy set out in paragraph 1 or 2 exceed the amount secured by the security interest and any reasonable costs incurred in the exercise of any such remedy, then unless otherwise ordered by the court the chargee shall distribute the surplus among holders of subsequently ranking interests which have been registered or of which the chargee has been given notice, in order of priority, and pay any remaining balance to the chargor.

Article 15 — Derogation: In their relations with each other, any two or more of the parties referred to in this Chapter may at any time, by agreement in writing, derogate from or vary the effect of any of the preceding provisions of this Chapter except Articles 8(3) to (6), 9(3) and (4), 13(2) and 14.
Chapter III Default remedies

Art.8 — Remedies of chargee: 6. Where the sums collected or received by the chargee as a result of the exercise of any remedy set out in paragraph 1 or 2 exceed the amount secured by the security interest and any reasonable costs incurred in the exercise of any such remedy, then unless otherwise ordered by the court the chargee shall distribute the surplus among holders of subsequently ranking interests which have been registered or of which the chargee has been given notice, in order of priority, and pay any remaining balance to the chargor.

Article 9 — Vesting of object in satisfaction; redemption

1. At any time after default as provided in Article 11, the chargee and all the interested persons may agree that ownership of … any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.  
2. The court may on the application of the chargee order that ownership of … any object covered by the security interest shall vest in the chargee in or towards satisfaction of the secured obligations.

3. The court shall grant an application under the preceding paragraph only if the amount of the secured obligations to be satisfied by such vesting is commensurate with the value of the object after taking account of any payment to be made by the chargee to any of the interested persons.

Article 15 — Derogation: In their relations with each other, any two or more of the parties referred to in this Chapter may at any time, by agreement in writing, derogate from or vary the effect of any of the preceding provisions of this Chapter except Articles 8(3) to (6), 9(3) and (4), 13(2) and 14.
UNCITRAL Legislative Guide on Secured Transactions
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F. Recommendation 1

1. In order to provide a broad policy framework for an effective and efficient secured transactions law (the “secured transactions law” is hereinafter referred to as “the law” or “this law”), the law should be designed:

   (a) To promote low-cost credit by enhancing the availability of secured credit;
   (b) To allow debtors to use the full value inherent in their assets to support credit;
   (c) To enable parties to obtain security rights in a simple and efficient manner;
   (d) To provide for equal treatment of diverse sources of credit and of diverse forms of secured transactions;
   (e) To validate non-possessory security rights in all types of asset;
   (f) To enhance certainty and transparency by providing for registration of a notice of a security right in a general security rights registry;
   (g) To establish clear and predictable priority rules;
   (h) To facilitate efficient enforcement of a secured creditor’s rights;
   (i) To allow parties maximum flexibility to negotiate the terms of their security agreement;
   (j) To balance the interests of all persons affected by a secured transaction; and
   (k) To harmonize secured transactions laws, including conflict-of-laws rules relating to secured transactions.
Chapter 1: General rules
Chapter 2: Creation and coverage
Chapter 3: Effectiveness as against third persons
Chapter 4: Priority
Chapter 5: Predefault rules
Chapter 6: Termination
Chapter 7: Default and enforcement
Some provisions of the DCFR on credit security:

Book IX: Proprietary security in movable assets

- **IX. – 1:101: General rule:** (1) This Book applies to the following rights in movable property based upon contracts for proprietary security: (a) security rights; and (b) ownership retained under retention of ownership devices.

- **IX. – 1:102: Security right in movable asset:** A security right in a movable asset is any limited proprietary right in the asset which entitles the secured creditor to preferential satisfaction of the secured right from the encumbered asset.

- **IX. – 2:101: Methods of creation of security rights:** A security right in a movable asset may be created: (a) by the security provider granting the security right to the secured creditor; ...

- **IX. – 2:102: Requirements for creation of security rights in general:** The creation of a security right in a movable asset requires that:(a) the asset exists; (b) the asset is transferable; (c) the secured right exists; and ...

- **IX. – 2:103: Possessory and non-possessory security rights:** Unless otherwise agreed by the parties, the creation of a security right by contract does not require possession of the encumbered asset by the secured creditor.

- **IX. – 3:102: Methods of achieving effectiveness:** (1) For security rights in all types of assets, effectiveness may be achieved by registration of the security right pursuant to Section 3.