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Vorlesung / Course

Einführung in die Rechtsvergleichung
Introduction to Comparative Law

Winter term (WS) 2016-2017

<http://www.eastlaw.uni-kiel.de>

- 18.10.2016: Basic questions and structures of comparative law
- 25.10.2016 Structures of comparative law (cont'd). Methods of comparative law
- 01.11.2016: Methods of comparative law (continued)
- 08.11.2016: Methods (fin.). Legal families (overview)
- 15.11.2016: Legal families (overview, cont'd). German legal family (deutscher Rechtskreis)
- 22.11.2016: French legal family
- 29.11.2016: Anglo-American legal family
- 06.12.2016: Anglo-American legal family II
- 13.12.2016: The legal systems in Northern and Eastern Europe
- 20.12.2016: Legal systems in Asia
- 10.01.2017: Religious laws
- 17.01.2017: Contracts law (Vertragsrecht)**
- 24.01.2017: Torts law (Deliktsrecht)
- 31.01.2017: Property law (Sachenrecht)
- 07.02.2017: Civil procedure and insolvency



Comparative contract(s) law

- What is a contract? (notion)
- Where are contracts regulated?
(sources, system)
- How is a contract concluded and when is it valid?
- Which are the legal consequences of a contract and its breach?

Steps of comparison

- 1) Formulate the research question
- 2) Find applicable legal norms or jurisprudence.
Quote exactly!
- 3) Common elements
- 4) Differences
- 5) Which are the underlying (possibly divergent) value judgments?
- 6) Make your own evaluation
- 7) Consequences, e.g. proposal de lege ferenda

Law of contract (contracts law) in comparison

- **Issues:**
- notion of contract
- conclusion
- content/interpretation
- performance
- specific contracts
- See also: conflict of laws as preliminary issue

Notion of contract in comparison

Example:

Three students jointly undertake a journey. They travel together in the car of one of them and share the fuel costs.

The driver negligently causes an accident. Is there a contractual basis for liability?

Notion of contract in comparison

- *Merriam-Webster dictionary*: binding **agreement** (?) between two or more persons or parties
- *BusinessDictionary.com*: A **voluntary, deliberate, and legally binding** (?) agreement between two or more competent parties.
- *Cornell University Legal Information Institute*: an agreement creating **obligations** (?) enforceable by law.
- *Rechtswörterbuch.de (in German)*: a **legal transaction** (?) consisting of coinciding **declarations of intent** (offer and acceptance) of at least two persons.

Notion of contract (1): Germany and Switzerland

German Civil Code (1900)

Book 1 General Part

Division 3 Legal transactions (sec.104 et seq.)

Title 3 Contract

Section 145 Binding effect of an offer

Swiss Code of Obligations [Obligationenrecht] (1911)

Art. 1 (1) The conclusion of a contract requires a mutual expression of intent by the parties. ...

-- *both laws do not legally define the term „contract“*

Notion of contract (2): France

French Code Civil (1804/2016)

Art. 1101 A contract is an **agreement of wills** between two or more persons designated to **create, modify, transfer or extinguish obligations**.

Le contrat est un accord de volontés entre deux ou plusieurs personnes destiné à créer, modifier, transmettre ou éteindre des obligations.

Earlier (1804): *“Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelque chose.”*

Notion of contract (3): Russia

Civil Code of the Russian Federation (Part 1, 1994)

Article 420. The Concept of the Contract

1. The contract shall be recognized as an **agreement, concluded by two or by several persons on the institution, modification or termination of civil rights and duties.**

Which similarities can be found e.g. with French law?

Notion of contract (4): USA

Restatement (2nd) on Contracts (1981)

§1. CONTRACT DEFINED

A contract is a **promise** or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

§2. PROMISE; PROMISOR; PROMISEE...

(1) A promise is a **manifestation of intention** to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.

(2) The person manifesting the intention is the promisor.

(3) The person to whom the manifestation is addressed is the promisee....

Comments

b. *Manifestation of intention*.... The phrase "**manifestation of intention**" adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention. A promisor manifests an intention if he believes or has reason to believe that the promisee will infer that intention from his words or conduct.

Restatements of the Law

From Wikipedia, the free encyclopedia

In [American jurisprudence](#), the ***Restatements of the Law*** are a set of treatises on legal subjects that seek to inform judges and lawyers about general principles of common law. There are now four series of Restatements, all published by the [American Law Institute](#), an organization of judges, legal academics, and practitioners founded in 1923.

Contents [hide]

- [Overview](#)
- [Impact](#)
- [Criticism](#)
- [Editions](#)
- [Current versions](#)
- [References](#)
- [External links](#)

Overview [edit]

Individual Restatement volumes are essentially compilations of [case law](#), which are common law [judge-made](#) doctrines that develop gradually over time because of the principle of [stare decisis](#). Although Restatements of the Law are not [binding authority](#) in and of themselves, they are highly [persuasive](#) because they are formulated over several years with extensive input from law professors, practicing attorneys, and judges. They are meant to reflect the consensus of the American legal community as to what the law is, and, in some cases, what it should become. As Harvard Law School describes the Restatements of the Law:

The ALI's aim is to distill the "[black letter law](#)" from cases, to indicate a trend in common law, and, occasionally, to recommend what a rule of law should be. In essence, they restate existing common law into a series of principles or rules.^[1]

Each Restatement section includes a black letter principle, Comments and Illustrations, and, in the form of Reporters' Notes, a detailed discussion of all the cases that went into the principle summarized in that one section. By citing a Restatement section in a legal brief, a lawyer may bring to the attention of a judge a carefully studied summary of court action on almost any common law legal doctrine. The judge can then consider the Restatement section and make an informed decision as to how to apply it in the case at hand. While courts are under no formal obligation to adopt Restatement sections as the law, they often do because such sections accurately restate the already-established law in that jurisdiction, or on issues of first impression, and are persuasive in terms of demonstrating the current trend that other jurisdictions are following.

Restatements are rare in common law jurisdictions outside of the United States.^[*citation needed*] Former [Justice of the High Court of Australia William Gummow](#) attributes the requirement for Restatements in the United States to the lack of a nationwide court of final common law adjudication.^[*citation needed*]

Notion of contract (5): China

Chinese General Principles of Civil Law (1986)

CHAPTER IV Civil Juristic Acts and Agency

Section I Civil Juristic Acts

Article 54 A civil juristic act shall be the lawful act of a citizen or legal person to establish, change or terminate civil rights and obligations.

Chinese Contract Law (1999)

Article 2 A contract in this Law refers to an agreement establishing, modifying and terminating the civil rights and obligations between subjects of equal footing, that is, between natural persons, legal persons or other organizations.

Agreements involving personal status relationship such as on matrimony, adoption, guardianship, etc. shall be governed by the provisions of other Laws.

Which similarities with German and French law? Which peculiar elements? How can these be explained?

Notion of contract – a comparison

Existence of official legal definition

- No: Germany, Switzerland, UK
- Yes: France, Russia, USA

Basic structure

- Offer and acceptance generally used
- Applicability only in law of obligations?
- Based on „legal transactions“: Germany, Switzerland, France, China (*Civil Law approach*).
- Based on „promises“: USA (*Common Law approach*)

Legislative definition of limits: no in these legal systems