

Class

**Unification of Law - Uniform Law  
(Rechtsvereinheitlichung)**

Summer term 2015

# Time schedule of the class

09.04.2015 Basics of unification of law: notion, purposes, history

16.04.2015 Methods of unification of law

**23.04.2015 Methods of unification of law (cont'd). Uniform sales law (CISG) I**

30.04.2015 Uniform sales law II. Unidroit Principles of Int. Commercial Contracts (PICC).

07.05.2015 Uniform law in other parts of the law of obligations

*14.05.2015 Holiday*

21.05.2015 Uniform credit security law

28.05.2015 Uniform transport law I

04.06.2015 Uniform transport law II

11.06.2015 Uniform information technology (IT) law

18.06.2015 Approximation of laws in the EU

25.06.2015 Unification of the law of civil procedure

02.07.2015 Unification of insolvency law

09.07.2015 Unification of arbitration law

16.07.2015 Voluntary test on unification of law

23.07.2015 Unification of private international law

# Legal sources of uniform law

- Distinguish: Binding legal norms – non-binding rules (soft law)
- International treaties – supranational law – model laws – quasinormative rules (eg Unidroit Principles of International Commercial Contracts) – general principles of law
- Case law
- Legislative guides – autonomous unification of law
- Trade customs – general contract terms: Incoterms etc.)

# Incoterms 2010

(now) 11 clauses, e.g. EXW

**"Ex Works" (EXW)** means that the seller delivers when it places the goods at the disposal of the buyer at the seller's premises or at another named place (i.e., works, factory, warehouse, etc.). The seller does not need to load the goods on any collecting vehicle, nor does it need to clear the goods for export, where such clearance is applicable.

**Compare with German law: Section 269 BGB**

**Place of performance**

(1) Where no place of performance has been specified or is evident from the circumstances, in particular from the nature of the obligation, performance must be made in the place where the obligor had his residence at the time when the obligation arose.

# Vienna Convention on the Law of Treaties (1969)

## **SECTION 3. INTERPRETATION OF TREATIES**

### **Article 31 General rule of interpretation**

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty ...; (c) any relevant rules of international law applicable in the relations between the parties.

### **Article 32 Supplementary means of interpretation**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, ...

### **Article 33 Interpretation of treaties authenticated in two or more languages**

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

3. The terms of the treaty are presumed to have the same meaning in each ... text. ...

# Methods of unification of law

- **Legislative technique**

Style of codification – choice of terminology – languages – Treaty or legislative materials (travaux préparatoires)

- **Interpretation**

- Principles of interpretation (Auslegungscanones)?
- „Model character“ of a specific legal order?
- Uniform interpretation?
- Autonomous interpretation?
- Aids for interpretation on the national level?

# 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 83 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)

## International Sale of Goods (CISG) & Related Transactions

### Conventions

- [United Nations Convention on Contracts for the International Sale of Goods \(Vienna, 1980\) \(CISG\)](#)
- [Convention on the Limitation Period in the International Sale of Goods \(New York, 1974\)](#)

### Contractual texts

- [Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance \(1983\)](#)

### Explanatory texts

- [UNCITRAL Legal Guide on International Countertrade Transactions \(1992\)](#)

[Working Groups](#)

[Digests](#)

[Colloquia Materials](#)

# 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](http://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/>)

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**United States District Court, Southern District of New York**  
***Cedar Petrochemicals, Inc., Plaintiff, v. Dongbu Hannong Chemical Co., Ltd., Defendant***  
No. 06 Civ. 03972(AJN), October 21, 2013

**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.

# 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 (eg 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.
  - Violation of contract: sec.275 et seq, 320 et seq., 434 et seq
  - In particular: damages (sec.280, 249 et seq)

# 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
- The form of the contract: Art.11
- Offer and acceptance
- The interpretation of the contract
- Specific performance
- The concept of (fundamental) breach of contract
- Damages

# Comparison of some 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.

Interpretation of BGB?

Gap-filling?

# Comparison of some provisions

## 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.

# Comparison of some provisions

## 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

### 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

### 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 ....