

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

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

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)

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. Schwenger),
 - 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**: 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 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

Comparison of some provisions

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, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of 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.

BGB Section 249 Nature and extent of damages

- (1) A person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred.
- (2) Where damages are payable for injury to a person or damage to a thing, the obligee may demand the required monetary amount in lieu of restoration. When a thing is damaged, the monetary amount required under sentence 1 only includes value-added tax if and to the extent that it is actually incurred.

Section 252 Lost profits: The damage to be compensated for also comprises the lost profits. Those profits are considered lost that in the normal course of events or in the special circumstances, particularly due to the measures and precautions taken, could probably be expected.

Example: The claimant is a Spanish agriculture trade enterprise, the defendant a German enterprise 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.

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 4.3.2014. At a meeting with representatives of the claimant on 25.4.2014 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 counterclaims against the payment claim of the claimant. In a procedural document of 2.7.2014 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 25.4.2014. 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.)

- 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?

Some additional provisions relevant to the case

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 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.

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 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;

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.