

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, in particular PICC
- 14.05.2015 Holiday*
- 21.05.2015 Uniform credit security law
- 28.05.2015 Uniform credit security law (fin.)
- 04.06.2015 Uniform transport law
- 11.06.2015 Case on transport law. Uniform information technology (IT) law**
- 18.06.2015 Approximation of laws in the EU (class will be postponed)*
- 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

Basics of IT law

- **Notion of IT law**
- Requirements as to a „Fachanwalt für Informationstechnologierecht“ (lawyer specialising in information technology law)
 - contracts law in the field of information technologies,
 - law of electronic commerce,
 - basics of intellectual property law in the field of information technologies, in particular domain law,
 - data protection law and the law of the security of information,
 - law of communication networks and services, in particular telecommunications law,
 - law of public procurement in the field of information technologies (including e-Government),
 - international dimension of IT law including private international law,
 - particularities of criminal law in the field of information technologies,
 - particularities of procedural law.

Sources of IT law

- **National level:** §§ 126 a, b BGB, SigG, §§ 128 a, 130 a, b, 174 II, 371 a ZPO
- **International level**
- **UNCITRAL:**
 - Model Law on Electronic Commerce 1996
 - Model Law on Electronic Signatures 2001
 - UN Convention on Electronic Commerce 2005
- **ICC: eTerms 2004**
- Others e.g. Hague Convention on Choice of Court Agreements 2005
- **EU law:** Signature Directive 1999, Electronic Commerce Directive 2000, ODR Regulation 2013, partly Brussels Ia Regulation. Only sparsely covered by DCFR and draft CESL Regulation.

Sources of IT law outside UNCITRAL and EU (examples)

Art.3 Hague Convention on Choice of Court Agreements 2005

c) an exclusive choice of court agreement must be concluded or documented

i) in writing; or

ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;

(EU) Brussels Ia Regulation (2012)

SECTION 7

Prorogation of jurisdiction
Article 25

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

Compare: Section 130a German Code of Civil Procedure: Electronic document

(1) Where the written form is required for preparatory written pleadings and their annexes, for petitions of and declarations by the parties as well as for information, testimonies, reports, and declarations by third parties, recording them as **electronic documents** shall comply with this requirement provided that this is suited for processing by the court. The person responsible for the written pleading is to furnish the document with a **qualified electronic signature** pursuant to the Electronic Signature Act (Signaturgesetz). If an electronic document transmitted is not suited for processing by the court, this shall be communicated to its sender without undue delay, specifying the applicable technical framework conditions.

Section 38 German Code of Civil Procedure: choice of venue agreement – in “writing”

Information on national and international IT law

- Internet (examples): <http://www.hg.org/information-technology-law.html>, International Technology Law Association, <http://www.itechlaw.org/>
- Numerous teaching and research materials, e.g. monographs and legal journals, e.g. International Journal of Law and Information Technology, International Review of Law, Computers & Technology, Computer und Recht (CR), MultiMedia und Recht (MMR).

UNCITRAL

United Nations Commission on International Trade Law

Home

About UNCITRAL

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Working Group Documents

Colloquia Materials

General Assembly Resolutions & Related Documents

UNCITRAL Texts & Status

- International Commercial Arbitration & Conciliation
- International Sale of Goods (CISG)
- Security Interests
- Insolvency
- International Payments
- International Transport of Goods

o Electronic Commerce

- Procurement & Infrastructure Development

Texts Endorsed by UNCITRAL

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Case Law (CLOUT)

Library & Research Resources

Transparency Registry



Electronic Commerce

Conventions

- [United Nations Convention on the Use of Electronic Communications in International Contracts \(New York, 2005\)](#)

Model laws

- [UNCITRAL Model Law on Electronic Signatures \(2001\)](#)
- [UNCITRAL Model Law on Electronic Commerce \(1996\)](#)

Legislative guides and recommendations

- [Recommendations to Governments and international organizations concerning the legal value of computer records \(1996\)](#)

Explanatory texts

- [Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature \(2001\)](#)

[Working Group](#)

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[Bibliography](#)

[On-line Resources & Webcasts](#)

UNCITRAL Model Law Electr. Commerce 1996

- **Uniform law:** Basic characteristics: only model law, many open questions or matters of interpretation, not limited to international contracts, consumer contracts not excluded, dispositive character, fundamental principles of „non-discrimination, technological neutrality and functional equivalence”, some provisions on conclusion and validity of contracts: dispatch and receipt, form, on attribution of „data messages“. No provisions on mistake.

- **Structure:**

CHAPTER I. SPHERE OF APPLICATION

Part one. Electronic commerce in general

Chapter I. General provisions

Article 1. Sphere of application, Article 2. Definitions, Article 3. Interpretation, Article 4. Variation by agreement

Chapter II. Application of legal requirements to data messages

Article 5. Legal recognition of data messages, Article 5 bis (von 1998) Incorporation by reference

Article 6. Writing, Article 7. Signature, Article 8. Original, Article 9. Admissibility and evidential weight of data messages

Article 10. Retention of data messages

Chapter III. Communication of data messages

Article 11. Formation and validity of contracts, Article 12. Recognition by parties of data messages

Article 13. Attribution of data messages, Article 14. Acknowledgement of receipt

Article 15. Time and place of dispatch and receipt of data messages

Part two. Electronic commerce in specific areas

Chapter I. Carriage of goods

Article 16. Actions related to contracts of carriage of goods

Article 17. Transport documents

UN Convention Electr. Communications in Int. Contracts 2005

- Uniform law
- Basic characteristics: broad sphere of application, but only „international“ contracts, consumer contracts excluded, provisions on dispatch and receipts of „electronic communications“, form, mistake. Works in combination with other conventions.
- Struktur: CHAPTER I. SPHERE OF APPLICATION

Article 1. Scope of application

Article 2. Exclusions

Article 3. Party autonomy

CHAPTER II. GENERAL PROVISIONS

Article 4. Definitions

Article 5. Interpretation

Article 6. Location of the parties

Article 7. Information requirements

CHAPTER III. USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

Article 8. Legal recognition of electronic communications

Article 9. Form requirements

Article 10. Time and place of dispatch and receipt of electronic communications

Article 11. Invitations to make offers

Article 12. Use of automated message systems for contract formation

Article 13. Availability of contract terms

Article 14. Error in electronic communications

CHAPTER IV. FINAL PROVISIONS (Art.15 – 25)

Case example on Model Law EI. Commerce 1996

People's Republic of China: Second Intermediate People's Court of Shanghai, Case No. 1949, 2011, 21 October 2011, Cases relating to the UNCITRAL Model Law on Electronic Commerce (MLEC) and the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC), Case 1196: MLEC 8; 9; 11; ECC 9

Real estate purchase arrangement between a buyer, a long-term resident of the United States and a Chinese agent. The buyer had purchased numerous real properties in Shanghai and commissioned a local agent to assist in management of those properties, including purchase and maintenance of the property, making necessary payments as well as the management of relevant funds and bank accounts. The dispute arose when the agent transferred the funds, which were transferred by the buyer to the agent's general account in February 2009, into his personal equity trading account. The buyer requested that the funds be returned.

The parties communicated by e-mail, which were submitted as evidence. The agent denied the content of the e-mail and argued that **he was not the owner of the three e-mail accounts** referred to in the case. He further argued that the **e-mails** did not reflect the actual circumstances and the instability and alterability of the e-mails made it **inadmissible in court**.



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CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

	<i>Page</i>
Cases relating to the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC)	4
Case 1195: ECC 10(2) - Canada: Cour d'appel du Québec, 2012 QCCA 1030 (CanLII), Services financiers Paccar ltée c. Kingsway, compagnie d'assurances générales (31 May 2012)	4
Cases relating to the UNCITRAL Model Law on Electronic Commerce (MLEC) and the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC)	5
Case 1196: MLEC 8; 9; 11; ECC 9 - People's Republic of China: Second Intermediate People's Court of Shanghai, Case No. 1949, 2011 (21 October 2011)	5
Cases relating to the UNCITRAL Model Law on Electronic Commerce (MLEC)	6

Solution of the case

- **Legal basis of claim? – e.g. CISG or Chinese contracts law**
- **ECC applicable?**
- Conclusion of valid agency contract: when/how concluded?
- Content of agency contract, e.g. claim for damages for breach of contract
- Relevance of exchanged emails?
- Authenticity?
- When received?

Further topics for comparison

- Conclusion of contract by automated systems: comp. Model Law with Unidroit Principles
- Attribution of electronic communications: comp. Model Law with ECC and German law
- Time of receipt of electronic communications: comp. Model Law with ECC and ICC eTerms 2004
- Requirements of „writing“: comp. Model Law with EU law and German law
- Mistake: input error: comp. with German law
- Evidential weight of emails: comp. Model Law with German and EU law

Some provisions compared

Article 6 ML. Writing

(1) Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.

(3) The provisions of this article do not apply to the following: [...].

Article 7. Signature

(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:

(a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and

(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

Article 2 ML EI. Signatures. Definitions

For the purposes of this Law:

(a) “**Electronic signature**” means data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message;

(b) “**Certificate**” means a data message or other record confirming the link between a signatory and signature creation data;

Article 6. Compliance with a requirement for a signature

1. Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used that is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

3. An electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in paragraph 1 if:

(a) The signature creation data are, within the context in which they are used, linked to the signatory and to no other person;

(b) The signature creation data were, at the time of signing, under the control of the signatory and of no other person;

(c) Any alteration to the electronic signature, made after the time of signing, is detectable; and

...

Some provisions compared

Article 6 ML EI Signatures.

Compliance with a requirement for a signature

1. **Where the law requires a signature** of a person, that requirement is met in relation to a data message if an electronic signature is used that is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

3. **An electronic signature is considered to be reliable** for the purpose of satisfying the requirement referred to in paragraph 1 if:

- (a) The signature creation data are, within the context in which they are used, linked to the signatory and to no other person;
- (b) The signature creation data were, at the time of signing, under the control of the signatory and of no other person;
- (c) Any alteration to the electronic signature, made after the time of signing, is detectable; and

...

Article 9 ECC 2005. Form requirements

1. Nothing in this Convention requires a communication or a contract to be made or evidenced in any particular form.

2. **Where the law requires** that a communication or a contract should be **in writing**, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

3. Where the law requires that a communication or a contract **should be signed** by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

(a) A method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

Some provisions compared

ML EI. Signatures 2001

Article 12. Recognition of foreign certificates and electronic signatures

1. In determining whether, or to what extent, a certificate or an electronic signature is legally effective, no regard shall be had:
 - (a) To the geographic location where the certificate is issued or the electronic signature created or used; or (b) To the geographic location of the place of business of the issuer or signatory.
3. An electronic signature created or used outside [the enacting State] shall have the same legal effect in [the enacting State] as an electronic signature created or used in [the enacting State] if it offers a substantially equivalent level of reliability.
4. In determining whether a certificate or an electronic signature offers a substantially equivalent level of reliability for the purposes of paragraph 2 or 3, regard shall be had to recognized international standards and to any other relevant factors.

EU EI Signatures Directive 1999

Article 7 International aspects

1. Member States shall ensure that certificates which are issued as qualified certificates to the public by a certification-service-provider established in a third country are recognised as legally equivalent to certificates issued by a certification-service-provider established within the Community if:
 - (a) the certification-service-provider fulfils the requirements laid down in this Directive and has been accredited under a voluntary accreditation scheme established in a Member State; or
 - (b) a certification-service-provider established within the Community which fulfils the requirements laid down in this Directive guarantees the certificate; or
 - (c) the certificate or the certification-service-provider is recognised under a bilateral or multilateral agreement between the Community and third countries or international organisations.
2. In order to facilitate cross-border certification services with third countries and legal recognition of advanced electronic signatures originating in third countries, the Commission shall make proposals, where appropriate, to achieve the effective implementation of standards and international agreements applicable to certification services. In particular, and where necessary, it shall submit proposals to the Council for appropriate mandates for the negotiation of bilateral and multilateral agreements with third countries and international organisations. The Council shall decide by qualified majority.