

Prof. Dr. Alexander Trunk

# **Vorlesung / Course**

*Einführung in die Rechtsvergleichung*  
***Introduction to Comparative Law***

**Winter term (WS) 2014-2015**

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

27.10.2014: Basic questions and structures of comparative law

*30.10.2014 optional lecture on the legal position of women in China*

03.11.2014: Methods of comparative law *[in addition: guest lecture on Russian constitutional law]*

10.11.2014: Methods of comparative law (cont.)

17.11.2014: German legal family (deutscher Rechtskreis)

24.11.2014: German legal family (cont.)

*28./29.11.2014 optional possibility to participate in conference „Settlement of international trade disputes in/with countries of the region of Caucasus/Central Asia“ (Landeshaus Kiel)*

01.12.2014: French legal family

08.12.2014: Anglo-American legal family

15.12.2014: Anglo-American legal family (cont.). The legal systems in Northern and Eastern Europe

12.1.2015: Legal systems in Asia. Religious laws

19.1.2015: **Law of contract**

26.1.2015: Law of torts. Property law - Sachenrecht

*02.02.2015: Commercial law (date under reservation)*

09.02.2015: Civil procedure and arbitration

# 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, performance
- conflict of laws as preliminary issue
- **Legal sources of contract law – structure:**
  - Civil Codes (continental tradition: „legal transaction“ – contract)
  - Contract Law Acts
  - Common law and equity

# Law of contract (contracts law) in comparison

## International uniform law

- CISG (1980)
- Unidroit Principles of International Commercial Contracts (1994 - 2010)
- PECL (1994 – 1999 - 2002)
- DCFR (2008)
- Draft CESL [Common European Sales Law] Regulation (2011)

# UNCITRAL

United Nations Commission on International Trade Law

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## Welcome

In the years since its establishment, UNCITRAL has been recognized as a leading system in the field of international trade law. A legal body with universal membership, UNCITRAL has reform worldwide for over 40 years, UNCITRAL's business is the modernization of international business.

Trade means faster growth, higher living standards, and new opportunities. To realize these opportunities worldwide, UNCITRAL is formulating modern, fair, and effective trade law. These include:

- Conventions, model laws and rules which are acceptable worldwide
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- Updated information on case law and enactments of uniform commercial law
- Technical assistance in law reform projects
- Regional and national seminars on uniform commercial law

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## The Commission

The Commission carries out its work at annual sessions, which alternate between New York and Vienna. Headquarters in New York and at the Vienna International Centre at the United Nations. The Commission typically holds one or two sessions a year, depending on the subject. The sessions alternate between New York and Vienna.



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UNIDROIT  
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# UNIDROIT PRINCIPLES

OF INTERNATIONAL COMMERCIAL CONTRACTS

# 2010

# Conclusion of contracts in comparison

- Offer and acceptance as the basic rule
- **Binding effect of offer?**
  - „consideration“ English/U.S. law
  - Withdrawal/revocation (revocal) of the offer
- **Conclusion of contract by acceptance.** Mailbox rule of English/U.S. law
- **Own evaluation?**

# Notion of contract (1)

## 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 apply the provisions of other Laws.

# Notion of contract (2)

## Civil Code of Ukraine (2003)

*Chapter 16. TRANSACTIONS § 1. General Provisions on Transactions*

Art.202 Notion and Types of Transactions

1. A **transaction** shall be an **action** [**dejstvie**] of a person aimed at acquisition, changing or termination of civil rights and obligations.

*Chapter 52. THE NOTION AND TERMS AND CONDITIONS OF THE AGREEMENT [**Contract!**]*

Article 626. The Notion and Types of Agreement

1. An agreement [**dogovor**, **contract!**] shall be an arrangement [**dogovorennost'**] between two or more parties targeted at the establishment, change, or termination of civil rights and responsibilities.

# 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.

# Example 1: Is an offer binding?

Buyer B, who is domiciled in Kiel, wants to buy some boxes of wine from seller S, who is domiciled in Switzerland (or Austria, France, UK, USA, China). On 1.10. he sends S a letter containing an order. S receives the letter on 5.10.

Can B still withdraw his order?

# Swiss Code of Obligations (1911)

## **Art. 9**

### *6. Withdrawal of offer and acceptance*

<sup>1</sup> An offer is deemed not to have been made if its withdrawal reaches the offeree before or at the same time as the offer itself or, where it arrives subsequently, if it is communicated to the offeree before he becomes aware of the offer.

2 The same applies to a withdrawal of an acceptance.

## Austrian Civil Code (1811)

§ 862. Das Versprechen (Antrag) muß innerhalb der vom Antragsteller bestimmten Frist angenommen werden. In Ermanglung einer solchen muß der einem Anwesenden oder mittels Fernsprechers von Person zu Person gemachte Antrag sogleich, der sonst einem Abwesenden gemachte Antrag längstens bis zu dem Zeitpunkte angenommen werden, in welchem der Antragsteller unter der Voraussetzung, daß sein Antrag rechtzeitig angekommen sei, bei rechtzeitiger und ordnungsmäßiger Absendung der Antwort deren Eintreffen erwarten darf; widrigenfalls ist der Antrag erloschen. **Vor Ablauf der Annahmefrist kann der Antrag nicht zurückgenommen werden. ...**

## French Code Civil (1804)

**Art. 1101** A contract is an agreement by which one or several persons bind themselves, towards one or several others, to transfer, to do or not to do something.

*“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.”*

# USA: UCC (1952 et seq.)

## **UCC § 2-204. Formation in General.**

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

## **§ 2-205. Firm Offers**

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

# China: Contract Law (1999)

**Art.13** The parties shall, in making a contract, take the form of offer and acceptance.

**Art.14 An “offer” is an intent indication** showing the desire to enter into a contract with others, and the intent indication shall conform to the following provisions:

(1) the content indicated shall be concrete and definite; (2) the offeror shall, as is indicated, be bound by the intent indication upon its acceptance by an offeree.

**Art.16 An offer becomes effective when it reaches the offeree.** If a contract is made in the form of text in electronic data and the receiver has designated a special receiving system to receive such data text, the time at which the text in electronic data enters the designated special system shall be the time of arrival; if no special receiving system is designated, the time at which the text in electronic data first enters any of the receiver’s systems shall be the time of arrival.

**Art.17 An offer may be withdrawn.** The withdrawal notice of an offer shall reach the offeree before or at the same time as the arrival of the offer at the offeree.

**Art.18 An offer may be revoked.** The revocation notice of an offer shall reach the offeree before the dispatch of an acceptance notice by the offeree.

**Art.19 An offer may not be revoked under any of the following conditions:**

the offeror has specified a time limit for the acceptance, or has explicitly indicated in any other manner the irrevocability of the offer;

there are grounds for the offeree to maintain the irrevocability of the offer and the offeree has made preparations for the fulfilment of the contract.

# Comparison of the approaches?

- Interests of offeror
- Interests of offeree
- Balance of interests
- Predictability and stability of legal exchange?
- Necessary or superfluous differentiation?

# Example 2: When is acceptance effective?

Further development of case 1.

S sends B on 6.10. a letter, in which he accepts the order and at the same time ships the goods. The letter of S is lost by the post. The goods are delivered to B on 31.10. Has the contract been concluded (and when?)

# Swiss Code of Obligations

## Art. 10

*III. Entry into effect of a contract concluded in the parties' absence*

A contract concluded in the parties' absence takes effect from the time acceptance is sent. Where express acceptance is not required, the contract takes effect from the time the offer is received.

# Mailbox rule (from Wikipedia)

The **posting rule** (or **mailbox rule**) ... is an exception to the general rule of [contract law](#) in [common law](#) countries that [acceptance of an offer](#) takes place when communicated. Under the posting rule, that acceptance takes effect when a letter is posted (that is, dropped in a [post box](#) or handed to a postal worker).<sup>[1]</sup> In [plain English](#), the "meeting of the minds" necessary to contract formation occurs at the exact moment word of acceptance is *sent* via post by the person accepting it, rather than when that acceptance is *received* by the person who offered the contract.

The rules of contracts by post (postal rules) includes the following: 1) An offer made by post/letter is not effective until received by the offeree. 2) Acceptance is effective as soon as it is posted. 3) For revocation to be effective, it must be received by the offeree before they post their letter of acceptance.

In England, the rule was established by a series of 19th century cases, starting with [Adams v Lindsell](#) (1818) B & Ald 681, which was later confirmed and expanded in ...

# Form of contracts



# Form of legal transactions, in particular contracts – comparative aspects

- Distinguish: necessity of form – types of form, form requirements in detail, legal consequences of form defects
  - **English/U.S. law:** consideration or deed, Statute of Frauds 1677, recent statutes, in particular UCC
  - **French law:** art.1341 C.civ. Writing required for all transactions over a value set by Government Decree (with exception of commercial transactions). If form is not observed, in principle only testimony by witness excluded.

# Please compare the provisions of German law on the form of a contract with U.S. law.

**Deutschland:** §§ 125 – 129 BGB, § 311 b BGB ..., § 350 HGB

**USA: UCC § 2-201. Formal Requirements; Statute of Frauds.**

(1) Except as otherwise provided in this section a [contract](#) for the [sale](#) of [goods](#) for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a [contract for sale](#) has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of [goods](#) shown in such writing.

(2) [Between merchants](#) if within a reasonable time a writing in confirmation of the [contract](#) and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

(3) A [contract](#) which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the [goods](#) are to be specially manufactured for the [buyer](#) and are not suitable for [sale](#) to others in the ordinary course of the [seller's](#) business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) ...

(c) with respect to [goods](#) for which payment has been made and accepted or which have been received and accepted (Sec. [2-606](#)).

# Chinese Contract Law 1999

## ***Article 10 Forms of Contract; Writing Requirement***

A contract may be made in a writing, in an oral conversation, as well as in any other form.

A contract shall be in writing if a relevant law or administrative regulation so requires. A contract shall be in writing if the parties have so agreed.

## **Article 11 Definition of Writing**

A writing means a memorandum of contract, letter or electronic message (including telegram, telex, facsimile, electronic data exchange and electronic mail), etc. which is capable of expressing its contents in a tangible form.