

Some notes on the choice of law flow charts:

1. These flow charts only refer to Problem 4.1 of the Coursebook.
2. These flow charts and discussions are (except for one small exception noted in them) limited to the materials contained in our Coursebook and our Document Supplement.
3. In real life, however, you would, among other things use actual Kansas choice of law rules (not simply use the Restatement on Choice of Law as a proxy), use the actual Kansas commercial code (not the ALI's UCC), and the EC Regulations as interpreted by courts in Europe. Doing this may clarify what appear to be ambiguities discovered in our classroom analysis – or it may make things even more ambiguous.
4. Limiting ourselves in this way allows us to avoid research yet allows you to engage in analysis that would parallel any conflicts of law analysis you might actually encounter, whether it were to involve a Kansas seller and a German buyer or a Chinese Seller, California buyer who may have agreed to have New York law govern their transaction, and so on.
5. There are certainly other paths that can be included in these flow charts which I have not included. I invite you to use your legal imaginations to come up with other paths and assumptions that I have not described here. Some of you have already done so in class. Some of them are incorporated here.
6. Also there may be some paths which you find implausible to argue with a straight face given our hypothetical problem at hand. Different factual patterns, however, may lead you to reconsider the plausibility of what you previously thought was an implausible path.
7. When you are reviewing the paths and discussions listed here, pay particular attention to the following:
  - The assumptions being made and not made.
  - The paths not taken.
  - The *resort to* substantive contract law in order to help answer the question of *which* substantive contract law to apply.
8. This hypothetical problem is not an easy case (and my handwriting may not be legible). Please ask questions if you have any. And please point out any omissions or errors you think may be in these charts.

TEL

# SCENARIO A

- FACT PATTERN #1
- IS THERE A K?
- KS COURT
- IGNORE CISG

STEP #1

RESTATEMENT, CONF OF LAWS § 6(1)  
 (as a proxy for KS common law)

is the UCC a choice of law directive?

Yes

No

UCC § 1-105

IT WOULD APPEAR STRANGE TO ASSUME THAT THE PARTIES REACHED AGREEMENT ON WHICH LAW SHOULD APPLY WHEN OUR VERY QUESTION IS WHETHER OR NOT THEY AGREED TO ANYTHING AT ALL! THEREFORE IT WOULD APPEAR TO BE REASONABLE TO ASSUME THEY DID NOT AGREE FOR PURPOSES OF APPLYING § 1-105

2nd sentence of 1-105(1), the "imperial clause":

KS K LAW ie the UCC

KS K LAW

KS K LAW (ie UCC)

GENERAL K LAW (ie PECL)

OF course, if the did agree, the only law they could have agreed on would be KS law since only KS law was mentioned at all. So if we assume they agreed (which seems like a very sketchy assumption)

1st sentence of 1-105

Refer to the rest of the Restatements.  
 • Section 187 (not reprinted in your Book) says to apply the law that the parties agreed to, but for the same reason as discussed at left under the UCC, lets assume they did not agree to a governing law.  
 • Use sections 6 and 188 to determine the answer; answer depends on the facts of the case.

# PRO ME REGULATIONS\*

\* AS OF 2008, The Regulations  
supersede the original home  
Treaty ARTICLES.

## SCENARIO B

- BUT PATTERN #1
- IS THERE A K?
- GERMAN COURT
- IGNORE CISG.

## STEP #1

### 3 POSSIBLE STARTING POINTS:

#### ARTICLE 3 (1)

"A K shall be governed by the law chosen  
by the parties"  
But this assumes the existence of a K,  
which is the very question we are  
trying to answer

then how abstract...

#### ARTICLE 4

"To the extent the law applicable  
to the K has not been  
chosen ... the law governing  
the K shall be determined  
as follows"

But this too assumes that  
there is a K in the first  
place!

What if we assume that no  
choice of law was chosen  
by the parties...? (Does this  
even make sense when the Q is  
if there is any K at all?)  
But let's assume so...

#### ARTICLE 4 (1)

→ KS K LAW (ie UCC)

#### ARTICLE 8

"The existence... of a K... shall be determined  
by the law which would govern it under  
this Convention if the K... were valid"

But if we assume there is a K  
which seems strange since we  
would be, in the process of answering  
our question of whether or not  
there is a K at all, making  
an assumption about the answer,

PLUS! if we want to make this  
assumption, does the contract  
we assume to be "valid"  
contain Kansas law provisions  
OR NOT??

THEFORE SOME  
MIGHT BE  
STYMIED BY  
ARTICLE 8.

SCENARIOS A AND B

STEP #2

Depending on what your conclusion was in Step #1

KS R LAND  
ie. UCC

§2-207 (1)

Yes, A K

GERMAN R LAND  
ie. PECL

ART 2:208  
DID THE KS seller's reply "materially" alter the terms of the German Buyer's original offer?

No

Then, there is  
a K!

Yes

Then, there is  
NOT A K,

NOTE That it is #2  
 First pattern is a  
 we know because parties,  
 on that, and of the  
 the contract etc

SCENARIO C

- First pattern #2
- What uncertainties were made
- KS court.
- IS NOT CISG.

STEP #1

RESTATEMENTS §6(1)

UCC is a choice of law  
 directive.

UCC 1-105

Parties Agreed

Didn't Agree

Continuation From Below  
 under Rome Conv.  
 Didn't Agree  
 Therefore chose the law of the  
 country with which the  
 contract is most closely  
 connected  
 (KS Law) (GERM LAW)

KS Law  
 (in this case, they  
 only could have  
 agreed, if they  
 agreed, on KS  
 law.

KS Law provision was  
 a material alteration.  
 Therefore, they didn't choose.  
 So now where does turn?  
 There is no guidance here

UCC 2-207

KS Law provision  
 was NOT a material  
 alteration

KS Law

§187  
 essentially states,  
 "The law of the state  
 chosen by the parties  
 to govern their  
 contractual rights and duties  
 will be applied"

UCC is NOT a choice of  
 LAW DIRECTIVE

§187

So... did they choose? How do  
 we answer this question? Where will  
 we turn to to answer this question  
 → There are no clear guidelines  
 So let's see what outcomes we get w/ each law.

Restatements - i.e. we assume they  
 didn't agree on a law or we  
 aren't allowed to look at  
 substantive contract law (Kansas  
 or German) to decide their  
 choice of law issue.

German Law

Rome Conv.

Agreed (Art 3)

Didn't Agree (Articles 4, 13)

KS Law  
 (can only be)

Articles 4, 13

KS Law  
 (can only be)

See Box ABOVE

Assuming the UCC  
 is a choice of law  
 directive

UCC 1-105  
 Imperial clause

KS Law

Restatements §6(2) and §188

KS has most sig. relationship

KS Law

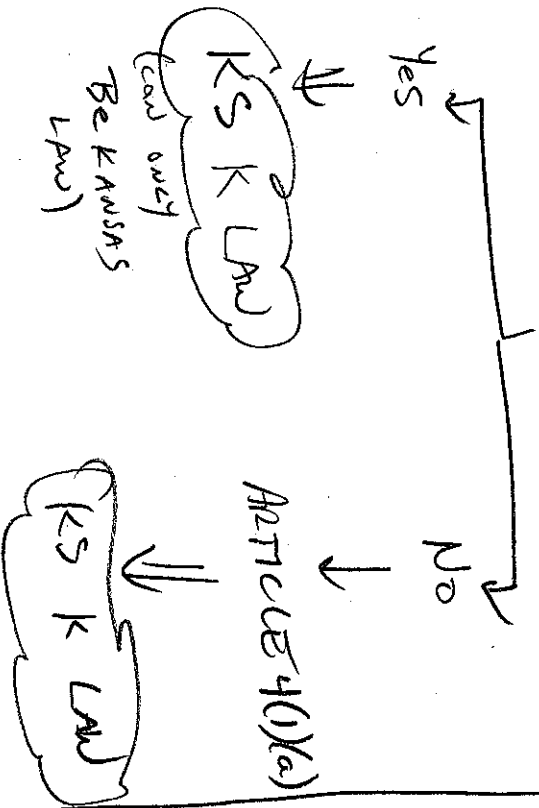
Germany has most sig relationship

GERMAN LAW

NOTE THAT PATTERN #2  
IN FACT KNOW A BLE  
WE KNOW A CONDUCT.  
#2

UNDER ROMAN REGS\*

ARTICLE 3  
DID THEY CHOOSE THE  
GOVERNING LAW?



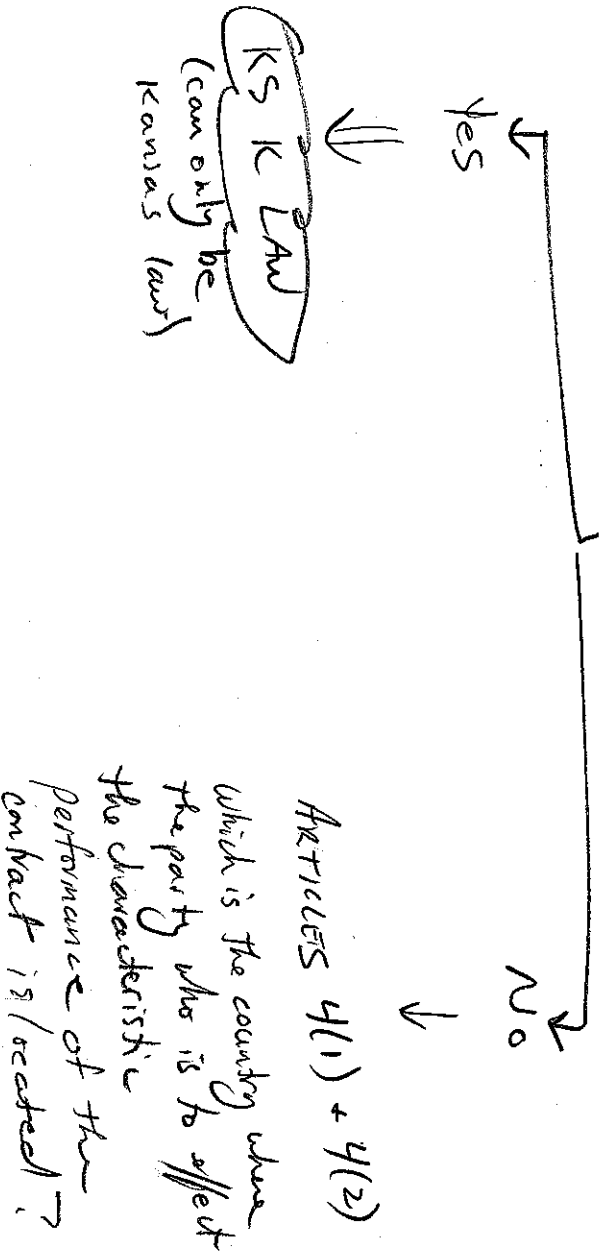
SCENARIO D

FACT PATTERN #2  
WHAT WAIVERIES WERE MADE?  
GERMAN COURT  
IGNORE CISC

STEP #1

UNDER ROMAN CONVENTION\*

ARTICLE 3  
DID THEY CHOOSE THE  
GOVERNING LAW?



\* FOR PURPOSES OF THE CLASS, WE ARE LOOKING AT BOTH THE CONVENTION AND THE REGS.

SCENARIOS C + D  
 • ASSUME KS LAW

STEP #2

UCC 2-207 (2)  
 IS THE "AS IS" TERM A MATERIAL ALTERATION?

Yes

No.  
 THEREFORE, NO WARRANTY  
 See Section 2-316 (3)(a)  
 to clarify this conclusion

Both of these parties must be taken -

Merchantability  
 UCC 2-314

Is seller a merchant of "goods that kind"?

Yes, then goods must be fit for ordinary purposes

This implied warranty exists so the question becomes one of fact: Did the KS seller violate this warranty?

No. Then no warranty

Therefore, the "as is" term is NOT Partly the K. But what about implied warranties

UCC 2-314 and 2-315

FITNESS

UCC 2-315

Did the seller have reason to know:  
 (i) any particular purpose for which the goods are required? AND  
 (ii) that the buyer is relying on the seller's skill or judgment?

Yes

Yes. Then there is an implied warranty of fitness

No.

No implied warranty of fitness

# SCENARIOS C+D

ASSUME GER LAW.

GER § 2

PECL ARTICLE 2:208 (1) + (2)  
IS THE "AS IS" TERM A MATERIAL ALTERATION?

yes (but now what?)

yes

No.

No.



Counter offer  
Accepted by Germans  
when they accepted and  
paid for goods.

"AS IS" IS A PART  
OF THE CONTRACT

"AS IS" IS A "CONFLICTIBLE  
BEHAVIOR CONDITION"

(PECL ARTICLE 2:209)

NOT A COMMON TERM

"AS IS" IS NOT PART OF THE K

"AS IS" IS A  
PART OF THE  
CONTRACT

Q: Would "AS IS" operate under  
German law to waive  
warranties? How would  
"AS IS" BE INTERPRETED?  
(UNDER GERMAN LAW?)

IMPLIED WARRANTIES (P 95-6)

- IMPLIED GUARANTEE THAT THE GOODS ARE OF A "REGULAR QUALITY"
- IMPLIED WARRANTY THAT THE MERCHANDISE IS OF AN "AVERAGE COMMERCIAL TYPE AND QUALITY"

WHAT IF THE "AS IS" PROVISION WAS NOT A MATERIAL ALTERATION, BUT THE KS LAW PROVISION WAS, ETC?

# SCENARIO E

• FIRST PATTERN #1

• IS THERE A K

• K S K

STEP #1: BOTH GERMANY AND THE US ARE PARTIES TO THE CISG, THEREFORE THE SUBSTANTIVE K LAW FOR BOTH GERMANY AND KANSAS IS THE SAME. THEREFORE STEP #1 IS EASY - THE CISG APPLIES.\*

STEP #2:

CISG ARTICLE 19

ARTICLE 19(3) STATES THAT ADDITIONAL TERMS relating to the extent of one party's liability to the other is a material alteration to the original offer. Therefore, Article 19(2) would not apply.

↓  
ARTICLE 19(1):

K S apply is a counter offer  
Therefore, there is no contract.

\* However, is there an argument that THE KS SECTION MEANT TO SPOT OUT OF THE CISG? IF YOU THINK THERE IS (e.g. by virtue of their reference to the UCC), THEN STEP #1 BECOMES VERY COMPLICATED.

# SCENARIO F

- FIRST PATTERN #2
- WHAT WARRANTIES MADE
- GERMAN COURT.

WE KNOW IS THERE A 12.

STEP # 1: SEE DISCUSSION ON SCENARIO E SHEET.

STEP # 2:

CISC ART 19

ARTICLE 19(3) STATES THAT ADDITIONAL TERMS RELATING TO THE EXTENT OF ONE PARTY'S LIABILITY TO THE OTHER IS A MATERIAL ALTERATION TO THE ORIGINAL OFFER. THEREFORE, ARTICLE 19(2) WOULD NOT APPLY

ARTICLE 19(1):

KS REPLY IS A COUNTER OFFER

ARTICLE 18

THE CONDUCT OF THE GERMAN INDICATES AN AGREEMENT TO THE KS (COUNTER) OFFER.

↳ THE KS REPLY WAS THE "LAST SHOT" UNDER - LAST SHOT DOCTRINE; THE "AS IS" PROVISION IS INCLUDED IN THE TERMS.

BUT MANY COURTS HAVE RELIED ON ARTICLE 17'S GOOD FAITH PROVISION TO AVOID IMPOSING THE BURDEN OF THE LAST SHOT RULE. IF USED, THEN THE IMPLIED WARRANTIES SUGGESTED BY ARTICLES 35+36 APPLY.