

UPOV Seminar on harvested material

# **Reflections on recent court cases**

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# Starting point: Cascade

## Article 14 UPOV → Scope

*(1) Propagating material*

*(2) Harvested material*

*(3) Certain products*

## Article 16 UPOV → Exhaustion

# Recent cases

## \* **Amaryllis, NL, 2016/2018**

- **Rechtbank Den Haag, 6.7.2016, Hoge Raad, 13.2.2018**
- **Amaryllis flower bulbs → propagating material**
- **Infringement (+), but case still pending**

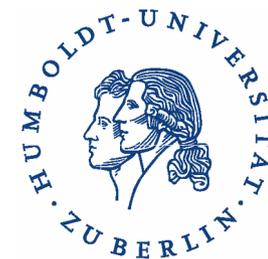
## \* **San Hong Pomelo, CN, 2019**

- **Supreme People's Court, 11.12.2019**
- **Pomelo → no propagating material**
- **Infringement (-)**

## \* **Nadorcott Mandarin, CJEU, 2019**

- **CJEU, 19.12.2019**
- **Mandarins → harvested material**
- **Infringement (-)**

→ **See also Tribunale di Bari, 15.6.2020, IFG (vine)**



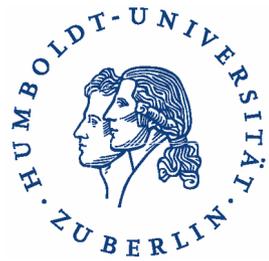
# German case law (1)

## \* **Achat, 1987**

- **Bundesgerichtshof, 15.12.1987**
  - **Potatoes → propagating material under German PVR Act**
  - **Infringement (+)**
- See also OLG (Court of Appeal) Düsseldorf (1996) - Cilena (potatoes)  
→ See also OLG (Court of Appeal) Hamburg (2020) - Fuego (field bean)

## \* **Goldfinger, 1998**

- **OLG (Court of Appeal) Düsseldorf, 24.11.1998**
- **Poinsettia cuttings → propagating material under German PVR Act**
- **Infringement (+)**

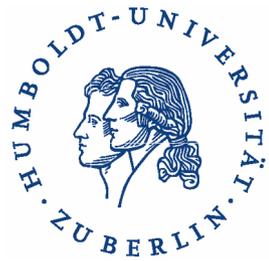


# German case law (2)

## \* **Melanie, 2006**

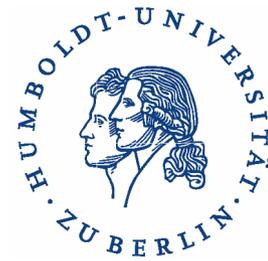
- **Bundesgerichtshof, 14.2.2006**
- **Calluna vulgaris pot plants**
  - **German PVR Act: no propagating material, but other plants under 2nd level of cascade**
  - **CPVR: variety constituents under Art 13 (2) CPVR**
- **Infringement both under German PVR Act and CPVR (+)**

# Interpreting the Cascade (1)



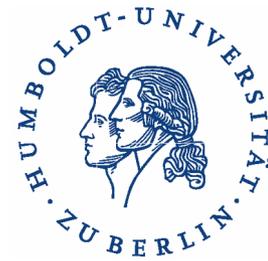
- **Treaty interpretation under the VCLT**
  - \* **Article 31: Ordinary meaning, context, object and purpose**
  - \* **Article 32: Preparatory works as supplementary means of interpretation**
  
- **Ordinary meaning**
  - \* **Propagating ↔ Harvested material**
  - \* **Some cases are inbetween or beyond (pot plants, cut flowers, cuttings, flower bulbs)**
  - \* **Some cases are both (potatoes, field beans)**

# Interpreting the Cascade (2)



- **Context → subsequent practice**
  - \* **CPVO, national PVR Acts (Germany) deviate from Art. 14 UPOV**
  - \* **Unclear if practice of UPOV**
  
- **Object and purpose**
  - \* **Extension to harvested material should foster breeder's position...**
  - \* **... but was not meant to grant exclusivity over the full value chain**
  - \* **Claim for remuneration at an early stage**
  - \* **Conflicts with growers/farmers should be avoided**
  - \* **Double safeguard in Article 14(2): unauthorized, unless breeder has had reasonable opportunity**

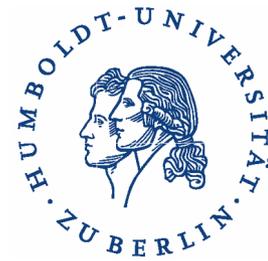
# Interpreting the Cascade (3)



## - Preparatory works

- \* **Records of the Diplomatic Conference, 1991**
- \* **Pages 311-321, 403-405**
- \* **Conference voted in favour of the adopted text in full knowledge of the problems caused especially with regard to the characterisation of fruits and cut flowers as harvested material, see clear statements of CIOPORA during the conference**
- \* **'Including entire plants' in Article 14(2) was meant for pot plants**

# Interpreting the Cascade (4)



## - Preliminary conclusion: sequence of tests

**(1) Plant material not capable of reproduction true-to-type → harvested material (or certain products)**

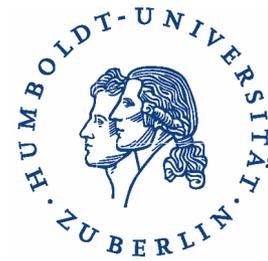
**(2) Plant material capable of reproduction true-to-type → not everything is propagating material (see also UPOV EXN PPM 2017)**

**\* Parts of plants or full plants that are typical products of consumption → harvested material (potatoes, crops, cut flowers, pot plants, flower bulbs?), if not sold or used as propagating material**

**\* Parts of plants or full plants optimized for reproduction → propagating material (potatoes not treated with sprout inhibitor, treated crops)**

**\* Parts of plants or full plants optimized for professional growing → propagating material (flower bulbs, cuttings)**

# Loopholes in the protection?



## - Agricultural sector

\* **Breeders can live with the narrow definition of propagating material as long as 'Achat' principles apply**

## - Ornamental/fruit sector

\* **Ornamental breeders won their cases**

- **Pot plants → German 'Melanie' case**
- **Cuttings → German 'Goldfinger' case**
- **Flower bulbs → Dutch 'Amaryllis' case (pending)**

\* **Fruit cases were lost**

- **Pomelo → Chinese 'San Hong Pomelo'**
- **Mandarin → European 'Nadarcott Mandarin'**
- **Vine → Italian 'IFG Vine'**

**\* Ornamental/fruit cases not settled**

- Unauthorized importation of legally produced plants or cut flowers, especially from Non-UPOV-States**
- Application of 'Achat' principles to ornamental consumption plants → propagating material by purpose?**
- Use of legally produced pot plants for production of cut flowers**

# Policy considerations (1)

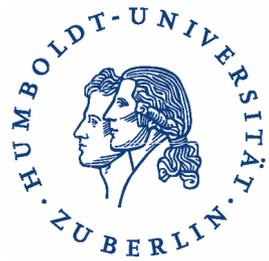
- **Difficulties in the enforcement?**
  - \* **Agricultural sector: no**
  - \* **Ornamental sector: maybe yes, but where are cases?**
  - \* **CJEU 'Nadorcott': not an issue of cascade but of Article 95 CPVR**
  
- **Changes in technology**
  - \* **Plant cells are totipotent → vulnerability**
  - \* **Less time and resources necessary for the reproduction of plants**
  - \* **'Achat' principles can solve many cases**
  - \* **Once material (e.g. cut flower) is used for reproduction, exclusive right is applicable, but production in Non-UPVO-states is a problem**

# Policy considerations (2)

- **Exclusive rights in the value chain**
  - \* **Advantages of 'Cascade'**
  - \* **Conflicts on the second level: acceptance of PVR system in peril (see experience with farmer's privilege)**
  
- **But: Loopholes in PVR system will lead to more patents and trademarks**

# Conclusions

- **Restrictive concepts of prop. material can be handled in the agricultural sector**
- **But: Loopholes of protection for ornamental/fruit breeders**
- **Intermediate solution under UPOV 1991**
  - \* **Broad definition of propagating material? Hard to achieve by way of interpretation**
  - \* **Protection of harvested material could be fostered through careful interpretation**
    - **Import from Non-UPOV-States → 'unauthorized' in the sense of Article 14(2)?**
    - **'Nadarcott' → 'unauthorized' in the sense of Article 14(2)?**
    - **Use of pot plants for production of cut flowers → 'further propagation' in the sense of Art. 16(1)(i)?**



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