

§ 7 Basics of German private law

I. Historical development and structure

- in the early 19th century, private law in the many distinct German states was very heterogeneous
- the national *codification debate*: in 1814, German scholar Anton Friedrich Justus Thibaut called for unification and codification of private law in Germany but met fierce resistance of scholar Friedrich Carl von Savigny who maintained that time was not yet ripe
- after the foundation of the German Reich in 1871, the creation of a pan-German civil code became the *most important codification project* of unified Germany
 - from 1874 to 1888, a First Commission prepared a first draft; it was criticised for being too complicated and elitist
 - from 1890 to 1895, a Second Commission prepared a slightly simplified second draft, which, after some amendments by the Federal Council and the Reichstag, was passed in 1896 and entered into force in 1900
- a German Civil Code predominantly based on the Roman law tradition, with strong influence of the *Corpus Iuris Civilis* (529-534) of late Roman Emperor Justinian
 - esp. of the *Digests/Pandects* (fragments of classical Roman legal literature), which had been researched and revitalised by German legal scholars
- frequent amendments and reforms over the course of time, esp. after World War II
 - frequent far-reaching reforms of family law, following the profound changes in society, including introduction of same-sex marriage in 2017
 - frequent amendments to improve consumer protection, often implementing EU directives
 - *comprehensive reform of the law of obligations in 2001*, with a completely new purchase law and law of irregularities in performance
- early distinction of general private law ["Bürgerliches Recht"] and special private law,
 - favoured by early special legislation for business life, esp. the *commercial code* of 1897

II. The German Civil Code [Bürgerliches Gesetzbuch (= BGB)]

1) Introduction

- a) Highly abstract and systematic regulation of the "Bürgerliches Recht"**
 - strong tendency to *systematise it as much as possible*
 - transparent and widely but not entirely consistent division into books, divisions, titles, sub-titles & chapters
 - frequent start of regulations of a topic with a general section (e.g. in Book 2, Division 8)
 - frequent internal references to other Civil Code provisions
 - consequently, often several Civil Code provisions are cited together ("... read together with...")
 - usually *abstract regulation* of the legal area with an *abstract but well-conceived legal terminology*
- b) Complementation by special laws and judicial further development of law**
 - the Civil Code was not and is not exhaustive:
 - some important rules were originally forgotten but developed by jurisprudence and finally included in the Code in 2001
 - rules on pre-contractual liability (culpa in contrahendo)
 - rules on liability for breach of collateral duties (positive breach of contract)
 - others became object of separate legislation and were also finally included in 2001
 - there is still external legislation on general private law complementing the Code
 - Introductory Act to the Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuch]
 - General Act on Equal Treatment [Allgemeines Gleichbehandlungsgesetz]
 - Act on Liability for Defective Products [Produkthaftungsgesetz]
 - Act on the Ownership of Apartments [Wohnungseigentumsgesetz]
 - Act on Registered Life Partnerships [Lebenspartnerschaftsgesetz]

c) **Three scholarly approaches to deal with the Code scientifically**

- three originally opposing approaches to civil law that nowadays altogether, complementing each other, determine the work with the Civil Code
- *jurisprudence of concepts*: understanding the law as a closed system of concepts that need to be defined, analysed and set into correct context with each other in complex conceptual pyramids
 - an approach focusing strongly on legal terms and concepts, logic and a high degree of abstraction
- *jurisprudence of interests*: understanding legal norms as decisions by the legislator to pacify certain conflicts of interests in society
 - an antithesis to the jurisprudence of concepts focusing on and evaluating the conflicting interests
- *jurisprudence of values*: focusing on the value judgements in the law, in particular underlying constitutional values
 - today the most influential approach

2) **General Part (Book 1)** [Allgemeiner Teil]

- general rules that apply to the whole field of private law

a) **Legal subjects and objects**

aa) Legal subjects (legal entities)

α) Natural persons

- all human beings, from completion of birth to brain death

β) Legal persons (→ mostly regulated in special legislation)

- registered association (sect. 21 et seq. BGB)
- foundation (sect. 80 et seq. BGB)
- cooperative (Cooperative Act)
- limited liability company [GmbH] (Act on Limited Liability Companies)
- stock corporation [AG] (Stock Corporation Act)
- legal persons under public law
 - public-law corporation, establishment/institution and foundation

γ) Partnerships (under BGB and Commercial Code)

- not recognised as legal persons but enjoying a limited legal capacity; partners fully liable
 - civil-law partnership with legal capacity [Gesellschaft bürgerlichen Rechts (GbR)]
 - general partnership [Offene Handelsgesellschaft (OHG)]
 - partly limited partnership [Kommanditgesellschaft (KG)]
 - partnership company of free-lancers (Act on Partnership Companies)

bb) Legal objects

α) Things (sect. 90 et seq. BGB)

β) Animals

γ) Intellectual property rights

δ) Other rights (e.g. claims)

b) **Declaration of intent and legal transaction**

- two closely related key concepts of German private law

aa) The **declaration of intent** [Willenserklärung] (sect. 116 et seq. BGB)

- expression of an intent (will) aimed at bringing about a certain legal outcome
- *subjective element: the intent*
 - intention to act, to make a declaration to be legally bound and to communicate this declaration to the addressee
- *objective element: the declaration*
 - *expression* of the intent (usually not special form required; also implicitly by conducive conduct)
 - *receipt* of the declaration of intent by the addressee (need to come within his sphere of influence)
- later *avoidance* by timely declaration of avoidance possible in the event of mistake, incorrect transmission, deceit or duress (sect. 119 et seq. BGB)

bb) **Legal transactions** [Rechtsgeschäfte]

- a process of one or more declarations of intent which, alone or in conjunction with other elements, is aimed to bring about an intended legal result
 - most common example: *contract*
- unilateral, bilateral and multilateral legal transactions

c) **The principles of separation and abstraction and the distinction between obligation transaction and disposition transaction**

- an essential but almost unique feature of German private law
- **principle of separation:** legal deconstruction of the business transaction into an obligation transaction, which creates an obligation, and one or more disposition transactions, which fulfill it
 - example: the purchase of a book (sect. 433 BGB) consists of (1.) the purchase agreement, (2.) the transfer of ownership of the book and (3.) the transfer of ownership of the paid money
 - when you buy something, the purchase agreement as such does not yet make you its owner!
- **principle of abstraction:** independence of the disposition transaction from the obligation transaction
 - the validity and legal effect of the disposition transaction does not depend on that of the obligation transaction
 - this makes German private law more complicated
 - other serious consequences:
 - important role of unjustified enrichment law
 - new owner of a thing may transfer it to third person
 - purchase agreement does not guarantee acquisition
 - tendency to interpret uniform processes as including both

d) **Agency and representation** (sect. 164 et seq., 1629 BGB)

- **agency** [Stellvertretung] is the making or receiving of a declaration of intent by an *agent* (representative) in the name of a represented party (the *principal*), based on a *power of agency* (power of representation) (sect. 164(1) BGB)
- an own declaration of intent of the agent, but in the name of the principal
 - need for transparency (exception: business for whom it may concern in daily life)
 - vitiations of intent and relevant knowledge of fact of the agent will be attributed to the principal
- distinction between agents, legal representatives and messengers
 - agents: those who represent others
 - legal representatives: agents who represent someone by law, regardless of his/her will (parent, guardians)
 - messengers: do not make own declaration but transmit that of someone else
- kinds of power of agency
 - statutory power of representation (of the parents or guardian)
 - power of agency conferred by legal transaction (vis-à-vis the agent or third party)
 - fictitious power of agency (agency by estoppel) for knowingly tolerating an alleged agent or unknowingly tolerating him if due diligence could have prevented it

3) **Law of obligations (Book 2)** [Schuldrecht]

a) **The distinction between general and special law of obligations**

- 7 divisions with general rules for all obligations: on their substance, performance, irregularities in performance, general terms & conditions, contractual obligations in general, transfer of claims, assumption of debt and pluralities of debtors & creditors
- one comprehensive division on 27 particular types of obligations, mainly based on different kinds of contracts but also on unjustified enrichment or torts

b) Private autonomy as fundamental idea behind the law of obligations

- the right to organise one's own legal relations in free self-determination and self-responsibility in legal transactions
 - includes *freedom of contract*
- although not explicitly mentioned, the dominating idea behind the Civil Code
- nowadays also a *fundamental right* of the citizen
 - in Germany part of the general freedom of action (art. 2(1) BL)
 - in the European Union a general principle of law & part of the freedom to conduct a business (art. 16 ChFR)
- can, however, *also be a threat to fundamental rights*, when abused in constellations of economic power imbalance, where the weaker partner actually cannot reject a defavourable offer
- therefore numerous restrictions based on the principle of the social state (art. 20(1) BL) and the state's duty to protect the fundamental rights of the weaker
 - in labour law, residential tenancy law, consumer protection law, data protection law, anti-discrimination law
 - special problem: restricting private autonomy to protect it against itself: the case of personal guarantees (suretyships) of young family members

c) The contract

- a bi-/multilateral legal transaction, in which a legal result is to be achieved by *concurring declarations of intent*
- aa) Conclusion through *offer and acceptance* (sect. 145 et seq. BGB)
 - two (or more) declarations of intent that need to be received by their addressees
 - offer needs to be accepted in due time (sect. 147, 148)
 - offer must be accepted exactly as it is
 - an "acceptance" altering the offer is considered a counteroffer (sect. 150(2))
 - if parties have not yet agreed on any point, contract is, in case of doubt, not concluded (sect. 154)
 - if they are not aware of their dissent, whatever is agreed is applicable if it is to be assumed that the contract would have been concluded even without a provision on this point (sect. 155)
 - preparatory activities do not constitute an offer
 - e.g. advertisement online or in a newspaper (not yet binding)
 - e.g. display of goods in a store (only an "invitatio ad offerendum")
- bb) The validity of the contract
 - no lack of form (sect. 125 BGB)
 - note that in general no special form is required
 - no violation of statutory prohibitions (sect. 134 BGB)
 - if prohibition is directed precisely against this legal transaction, not just the circumstances
 - no offence of common decency (no agreement contra bonos mores) (sect. 138 BGB)
 - e.g. no usury (sect. 138(2)) or unreasonable restraints of trade or competition
 - decisive: "the legal and moral instincts of all just and reasonable citizens"
- cc) The interpretation of the contract (sect. 157 BGB)
 - in principle with the same methods as for the interpretation of laws (→ diagram 1)
 - but as required by good faith, with due consideration to customary practice
 - judge will fill in regulatory gaps in the contract by cautiously supplementing the parties' intentions and eliminating contradictions ("*supplementary interpretation*" ["ergänzende Vertragsauslegung"])
- dd) Restrictions on general terms and conditions (sect. 305 et seq. BGB)
 - restrictions on provisions that are pre-formulated by one party for many cases and used without negotiation when the contract is concluded
 - surprising and ambiguous provisions will not form part of the contract (sect. 305c)
 - certain types of provisions are strictly prohibited and thus invalid (sect. 309)
 - other types are prohibited in case of a negative valuation with regard to both parties' interests (sect. 308)
 - general content check: any provisions are invalid if they unreasonably disadvantage the other party against good faith (sect. 307)

ee) Special types of contract regulated in the German Civil Code

- purchase contract (sect. 433 et seq. BGB)
- lease (rental) contract (sect. 535 et seq. BGB)
- usufructuary lease contract (sect. 581 et seq. BGB)
- gratuitous loan (sect. 598 et seq. BGB)
- service contract (sect. 611 et seq. BGB)
- contract to produce a work [Werkvertrag] (sect. 631 et seq. BGB)
- loan contract (sect. 488 et seq. BGB)
- donation (sect. 516 et seq. BGB)
- brokerage contract (sect. 652 et seq. BGB)
- agency contract (sect. 675 et seq. BGB)
- payment services contract (sect. 675f et seq. BGB)
- package travel contract (sect. 651a et seq. BGB)
- others

d) **Performance and irregularities in the performance**

- a contract will usually specify both parties' performances precisely
 - within the limits drawn by mandatory provisions in the Civil Code
 - where necessary complemented by dispositive provisions in the Civil Code
- concerning the delivery of things, German private law distinguishes
 - specific obligations (the debtor owes a specific thing, e.g. his old Porsche car)
 - obligations in kind (the debtor owes a thing or quantity of things of a certain category/class, e.g. e.g. a new Porsche 718 car or 10 kg apples)
 - the distinction has consequences, if a thing is lost, stolen or destroyed
- different rules for different places of performance and fulfillment:
 - *debt to be collected* (creditor must pick up goods at debtor's place)
 - *debt to be delivered* (debtor must bring goods to creditor's place)
 - *debt to be sent* (debtor must send goods via a transport company to creditor's place)
 - in this case, the risk of loss or destruction on the way is borne by the creditor
- duty to perform obligations in *good faith* (bona fides)
 - an indefinite legal concept concretised by jurisprudence
 - allows to prevent unfair solution and ensures respect for fundamental rights
 - complements the primary duties of the parties by secondary duties of loyalty and consideration, due diligence and protection, collaboration, and information
- a *complicated system of consequences of irregularities in performance*
 - differentiates between impossibility of performance, failure to perform in time, defective performance (incl. breach of collateral duties) and breach of pre-contractual duties (culpa in contrahendo)
 - creditor can claim compensation of damages if debtor breaches any duty, but only in case of fault (intent or negligence) (sect. 280, 276 BGB)
 - creditor can rescind a reciprocal contract under certain conditions (sect. 323 et seq. BGB)
 - rules for the various cases of impossibility of performance (sect. 275 et seq., 311a BGB)
 - special rules for several important types of contracts

e) **Unjust enrichment** (sect. 812 et seq. BGB)

Sect. 812(1) BGB: "A person who obtains something as a result of the performance of another person or otherwise at that person's expense without legal grounds for doing so is under a duty to surrender to that person what has been obtained. This duty also exists if the legal grounds later cease to exist or if the result intended to be achieved by an act of performance in accordance with the substance of the legal transaction does not materialise."

- the most difficult area within German private law, but partially just a necessary consequence of the principle of abstraction

- complicated arrangements under the law of obligations to reverse or compensate for transfers of assets ("enrichments") that occurred on another person's expense and are not justified by legal grounds ("unjust")
- correction of the undesired asset situation by the way of "*condictiones*" ["Kondiktionen"] (claims to surrender the benefit), following the model of Roman law
 - *performance condictiones*: of benefits obtained through claimant's performance (several subtypes)
 - *condictiones by other means*: after an encroachment on claimant's rights (interference condition), after claimant has performed an obligation for someone else (recourse condition) or for expenses to improve things of someone else (condition for expenses)
- important exception: *no claim for surrender if and to the extent that the recipient is no longer enriched* (sect. 818(3) BGB)

f) Law of torts (liability for wrongful acts) (sect. 823 et seq. BGB)

- under the German civil code only liability for fault (intention or negligence)
 - for own fault and the fault of deployed vicarious agents
 - strict liability (without fault) only in exceptional cases under special laws (e.g. for operating cars, airplanes or atomic plants)
- most frequent case: liability for the violation of absolute rights (sect. 823(1) BGB)
 - of life, body, health, freedom, property and other rights that can be enforced against anyone, e.g. the right to an established an operating business
 - not protected: the assets as a whole
- liability for the breach of a protective law (sect. 823(2) BGB)
 - of statutory law intended to protect another person
 - in particular criminal offences
- liability for intentional damaging offending common decency (sect. 826 BGB)
- liability under special clauses (sect. 824, 833 et seq. BGB)
 - liability for endangering credit, of animal keepers, of land owners etc.

4) Property law (Book 3) [Sachenrecht]

- the legal norms governing the relation between a person and a thing; this is not about rights *to* a thing (claims, rights in personam) but *over* a thing (rights in rem)
- *rights in rem* [dingliche Rechte]
 - absolute rights: directed and defensible against everyone
 - types regulated conclusively in the Civil Code and a few complementing laws
 - distinction between *unlimited and limited rights in rem*
 - unlimited: → ownership
 - limited: usage and exploitation rights; security rights in rem (mortgage, land charge, pledge (lien) etc.)
 - creation, transfer or cancellation of a right in rem to a plot of land requires registration in the Land Register [Grundbuch], which is operated by the local district court
- *principle of speciality*: a right in rem always relates to one specific thing; changes for an entirety of items require a legal transaction for each individual thing
 - example: transfer of ownership of a stock of goods requires a transfer of ownership for each individual item
 - however, the general consent is interpreted as including all necessary declarations of intent...
- *ownership of things*
 - important distinction between possession (actual control) and ownership
 - in principle, the owner may deal with his thing at his discretion and exclude others from exercising any influence whatsoever (sect. 903 BGB)
 - he may require an illegitimate possessor to surrender the thing (sect. 985, 986 BGB) and a disturber to remove/stop the interference (sect. 1004 BGB)
- *transfer of ownership of a thing*
 - of a movable thing in principle by agreement and delivery (sect. 929 BGB)
 - also *good faith acquisition from a person not entitled* (cf. sect. 932, and on the limits sect. 935 BGB)
 - of a plot of land by agreement and registration in the Land Register (sect. 873 BGB)
 - agreement needs to be recorded by a notary

5) Family law (**Book 4**) [Familienrecht]

- 3 divisions on marriage, relationship (incl. parental custody) and guardianship, curatorship and legal guardianship
- since 2017 also *same-sex marriage* (cf. sect. 1353(1) BGB)
 - from 2010 to 2017 there was already a less close option: the registered partnership for life [Lebenspartnerschaft]
- spouses live in *community of accrued gains* [Zugewinnngemeinschaft] unless they agree on separation or community of property by marriage contract; their assets stay separated, but if marriage ends the accrued gains acquired will be equalised (sect. 1363 BGB)
- divorce only by judicial decision and only if marriage has broken down (if spouses have lived apart for 1 year and both consent to divorce or if they have lived apart for 3 years; moral aspects are irrelevant)
 - after divorce equalisation of accrued gains [Zugewinnausgleich] and complicated equalisation of pension rights [Versorgungsausgleich] under a special law
- lineal relatives (grandparents - parents - children/grandchildren) obliged to maintain each other
 - maintenance obligations for parents may arise if the parents become dependent on care and their pensions and care insurance does not cover all nursing expenses

6) Law of succession (**Book 5**) [Erbrecht]

- the law on the devolution of the inheritance from the decedent to his legal successor, the heir
- three guiding principles: universal succession, testamentary freedom, inheritance by the family (at least compulsory share)
- unless otherwise provided in a [last] will, the decedent's spouse inherits $\frac{1}{2}$ of the inheritance ($\frac{1}{4}$ as inheritance + $\frac{1}{4}$ by equalisation of accrued gains), alongside the decedent's descendants
- *compulsory share*: a spouse or descendent excluded from succession by [last] will is still entitled to a compulsory share of half of the value of the regular share (sect. 2303 BGB)
 - he can only be deprived of that in serious exceptional cases that usually involve a criminal offence
- the testator can make his [last] will only in person, by a declaration written and signed in his own hand or recorded by a notary (sect. 2064, 2231, 2247 BGB)
- common: the so-called "*Berliner Testament*", a joint will made by spouses, in which they appoint each other as sole heirs and stipulate that after the death of the longest-living spouse, a third party, usually their children, shall become the heirs

III. Private international law (conflict of laws) [Internationales Privatrecht]

(sect. 3 et seq. Introductory Act to the Civil Code)

- the law that regulates which national law is to be applied in an individual case with an international connection
- usually limited to regulate the conflict of laws but not containing itself substantive rules
- nowadays *widely replaced by European regulations*, in particular
 - Rome I Regulation (Regulation 593/2008 on the law applicable to contractual obligations)
 - Rome II Regulation (Regulation 864/2007 on the law applicable to non-contractual obligations)
 - Rome III Regulation (Regulation 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation)
 - and others in the field of family law and law of succession
- *ordre public proviso*: foreign legal norms are not applied where this would lead to a result manifestly incompatible with fundamental principles of German law (e.g. fundamental rights) (sect. 6)

IV. Commercial law and company law

1) Commercial law [Handelsrecht]

- special private law on the *relationships between merchants* (business people) [Kaufleute]
 - merchants are those who carry a commercial business that requires a commercially organised business operation
 - rules also apply to commercial companies and partnerships
- regulated in the Commercial Code [Handelsgesetzbuch] of 1897, which entered into force in 1900 together with the German Civil Code, and some complementary laws
- takes into account that merchants need less protection but greater freedom to contract with each other in their business life
- strongly influenced by special jurisprudence and international treaties; special consideration of the prevailing commercial customs and usages (cf. sect. 346 Commercial Code)
- transparency is provided by the
 - *Commercial Register* of merchants [Handelsregister], operated by the local district courts
 - *Business Register* [Unternehmensregister] with more comprehensive information, operated by the Federal Ministry of Justice (sect. 8, 8b Commercial Code)

2) Company law (corporate law) [Gesellschaftsrecht]

- note that company law is very different in the individual EU member states and differs strongly from that in common law countries!

a) Capital based corporations [Kapitalgesellschaften]

- membership based purely on monetary participation
- pay own taxes

aa) *Limited liability company* [Gesellschaft mit beschränkter Haftung (GmbH)]

- regulated in the Act on Limited Liability Companies
- tendencies to limit the limitation of liability in case of abuse (→ lifting the corporate veil)

bb) *Stock corporation* [Aktiengesellschaft (AG)]

- regulated in the Stock Corporation Act
- see also the *Societas Europaea* (SE), a special form of stock corporation under EU law

cc) Special type: *Partnership limited by shares* [Kommanditgesellschaft auf Aktien]

- a combination of limited and unlimited liability, regulated in sect. 278 et seq. Stock Corporation Act

b) Personal partnerships [Personengesellschaften]

- act through their partners, who are fully liable

aa) *Civil-law partnership* [Gesellschaft des bürgerlichen Rechts (GbR)] (sect. 705 et seq. BGB)

- with or without legal capacity

bb) *General partnership* [Offene Handelsgesellschaft (OHG)] (sect. 105 et seq. Comm. Code)

- no partner's liability is limited vis-à-vis creditors

cc) *Partly limited partnership* [Kommanditgesellschaft (KG)] (sect. 161 et seq. Comm. Code)

- liability of some partners is limited to the amount of a specific contribution of assets
- special type: *GmbH & Co KG* (with a limited liability company as fully liable partner)

dd) *Partnership company of free-lancers* [Partnerschaftsgesellschaft] (Act on Partnership Companies)

V. Other fields of private law

- labour law (Works Constitution Act, Collective Agreements Act, Employment Protection Act, other laws)
- competition law (Act against Restriction of Competition, Act against Unfair Competition)
- insolvency law (Insolvency Code)
- securities law (Bill of exchange act, Check Act)
- intellectual property law (Patent Act, Trade Mark Act, Copyright Act, Design Act, Utility Models Act)
- capital market law (Capital Investment Code)
- civil procedure law (Code of Civil procedure [Zivilprozessordnung])

VI. The perspective: towards a European Civil Code?

- a controversial discussion about the necessity and the advantages of unifying private law in the European Union in a European Civil Code since the 1990s
 - an idea especially supported by many scholars and the European Parliament but rejected by the European Commission and the Council of the European Union
- important preparatory work in scholarly commissions and working groups:
 - the Principles of European Contract Law of 1995, 1999 and 2002
 - the Principles of European Tort Law of 2004
 - the Principles of European Family Law of 2004, 2007 ff.
 - the Principles of European Insurance Contract Law of 2009
- the Draft Common Frame of Referenc (DCFR) of 2009
 - a European frame of reference: an alternative European private law as an *option* that the parties can choose and a *tool box* for European legislation in the field of private law
 - prepared by several groups of scholars, esp. the Study Group on a European Civil Code
 - politically failed but a valuable source of inspiration and catalyst of the scholarly debate about harmonisation of private law and a future unified private law in Europe