Prof. Dr. Thomas Schmitz — Spring Semester 2024

GERMAN PRIVATE LAW

Contents

More information on this course at www.iuspublicum-thomas-schmitz.uni-goettingen.de and Canvas. For any questions, suggestions and criticism please contact me in office 219, via WhatsApp or via e-mail (tschmit1@gwdg.de).

(Datei: Contents (GermanPrivateLaw))

Prof. Dr. Thomas Schmitz — Spring Semester 2024

GERMAN PRIVATE LAW

Bibliography

A. Textbooks

Robbers, Gerhard	An Introduction to German Law, 8th edition 2023 (cf. part D) [available at the lecturer]
Fischer, Howard D.	The German Legal System and Legal Language, volume 1 and 2, 7th edition 2021 (cf. esp. chapter 10)
Grundmann, Stefan Riesenhuber, Karl (editors)	Private Development in Context. German Private Law and Scholarship in the 20th Century, 2018
Kötz, Hein	European Contract Law, 2nd edition 2017
Miller, Russel A.	An Introduction to German Law and Legal Culture, 2024 [coming soon]
Möllers, Thomas M. J.	Legal Methods. How to work with legal arguments, 2020 [available at the lecturer]
Suzuki-Klasen, Katharina	A Comparative Study of the Formation of Contracts in Japanese, English, and German Law, 2022
Zekoll, Joachim Wagner, Gerhard (editors)	Introduction to German Law, 3rd edition 2018 (cf. esp. chapter 6) [available at the lecturer]
Zippelius, Reinhold	Introduction to German Legal Methods, 2008 [available at the lecturer]

B. Commentaries and encyclopedias

Basedow, Jürgen Hopt, Klaus J. Zimmermann, Reinhard Stier, Andreas (editors)	Max Planck Encyclopedia of European Private Law (Max-EuP 2012), https://max-eup2012.mpipriv.de/index.php/Max_Planck_Encyclopedia_of_European_Private_Law (encyclopedia of private law in Europe with special regard to German law, available as book and online)
Dannemann, Gerhard Schulze, Reiner (editors)	German Civil Code. Article-by-Article Commentary, volume I: Books 1 - 3, 2020; volume II: Books 4 - 5, 2022

C. Journals

AGLJ	Anglo-German Law Journal, since 2015, https://aglawsoc.org/aglj
ERPL	European Review of Private Law, since 1993, https://kluwerlawonline.com/Journals/European+Review+of+Private+Law/589
GLJ	German Law Journal, since 2000, www.cambridge.org/core/journals/german-law-journal

More information on this course at www.iuspublicum-thomas-schmitz.uni-goettingen.de and Canvas. For any questions, suggestions and criticism please contact me in office 219, via WhatsApp or via e-mail (tschmit1@gwdg.de).

(Datei: Bibliography (GermanPrivateLaw))

§ 1 General Introduction

I. Why studying German private law?

1) Why studying foreign private law at all?

- for basic orientation & understanding in case one needs to deal with it later in one's career
- for a *better understanding* of one's own private law, its particularities (and the alternatives), its strong and weak points and possible perspectives of its development
- as a *source of inspiration*: legislators, courts and lawyers in different countries often face similar problems in the field of private law; ideas and legal solutions developed in one country may be useful in others too (lawyers do not need to reinvent the wheel...)
  - examples: new types of contracts or new types of companies, often inspired by models in other countries
  - however, foreign solutions cannot simply be transferred but *need to be adapated* to the pecularities of one's own private law
- for a *better critical analysis of the domestic jurisprudence, doctrine and practice:* courts, scholars or practitioners in other countries may have found better solutions or shown a more sophisticated reasoning when dealing with the same problem
- *not only the success stories* but also the failures of foreign law are interesting: you must not repeat the mistakes of others...

2) Why studying particularly German private law?

- because German private law is a particularly highly developed continental legal system, with many interesting, innovative concepts and practical experience with them
  - therefore, *legal recpetion* of important elements of the German Civil Code in Switzerland, Greece, Portugal, Japan, Korea and Taiwan
- because of its strong *systematic, dogmatic & methodological approach* (see infra, § 3)
  - German laws and lawyers systematise and structure everything
  - German courts and scholars have built up and are cultivating a highly developed legal doctrine
  - legal methodology is sophisticated and diverse, and applied not only in theory but also in legal practice
  - the advantages of this approach can be used by foreign lawyers to improve the quality of their own legal ystem
- because German law *can be exaggerated in its complexity and intricacy* and in these cases serves as example of how better not to do
  - intellectual efforts and benefits are not always balanced - is it worth it?
  - controversial example: the principle of abstraction between obligation and disposal transaction with its complicated consequences (see infra, § 6 III)

II. The concept of private law

1) Law, customs and morality

- legal norms are not the only rules in society, but the only ones that are generally and absolutely binding and enforced by the state
- rules of morality complement them, but in the modern, pluralistic society they are not legally binding and can only be enforced by social sanctions
  - they may, however, influence the interpretation of indefinite legal concepts in legal norms, such as good faith (bona fide) or common decency (bona mores)

2) Public law and private law

- private law (= civil law) is the law that regulates the relationships between legal entities (individuals or legal persons) that are legally (not necessarily economically) equal and act in theory (not necessarily in real life) self-determined

- public law regulates the relationship of the individual to the state and other holders of public authority as well as the relationship between the public institutions and bodies
- private law also applies to the relationships of citizens with the holders of public authority when these act under private law
  - since in these case the partners also act as equals (e.g. when the city government buys a computer)
  - but if the use private-law legal forms to perform public tasks (e.g. to operate the local public swimming pool), the private law is partly superimposed by mandatory public-law standards (so-called "administrative private law")
- the delimitation between private law and administrative law can be delicate
  - see on this problem Slide 8 from the course German Public Law

3) Objective law and subjective rights

- subjective right: a special legal power, usually in form of a personal right, granted to the individual by the law for the protection and enforcement of his legitimate interests
  - example: claims, property

III. General characteristics of German private law

1) A private law in continental-European legal tradition

- no "case-law" like in common law countries, but only jurisprudence
  - jurisprudence is the interpretation of the law, not part of the law itself
  - however, in practice, jurisprudence is also important (and must be studied by the students), especially important decisions of the Federal Court [Bundesgerichtshof]

2) A private law mainly based on Roman law

- the German Civil Code is predominantly based on the Roman law, as codified in the Corpus iuris civilis of the Roman emperor Justinian of 529 to 534
  - especially on the Pandects/Digests (included excerpts from writings of classical Roman scholars)

3) A private law under the influence of the Constitution (see also infra, § 8)

- under the Basic Law for the Federal Republic of German of 1949, constitutional rights and principles unfolded a growing influence in all fields of law, including private law
- *fundamental rights* are *directly binding law* (art. 1(3) BL)
  - consequently, all private law must be interpreted and applied strictly in line with them
  - constitutional complaints of citizens have caused the Federal Constitutional Court to annul decisions of the Federal Court for violation of fund. rights
- resistance against the primacy of fundamental rights over private law among some private law scholars until the 1980s

4) A private law under the influence of European Union law

- the *Europeanisation of private law* - adaptation of national private law to far-reaching European legal requirements
- many new clauses or even sections of the German Civil Code serve the implementation of EU directives
- unlike in the field of administrative law no strong resistance against this development

IV. The spectrum of German private law

1) Private law, civil law and "Bürgerliches Recht"

- *private law* [Privatrecht] and *civil law* [Zivilrecht] are synonyms, covering the whole area as described above (II.2)
  - caution: in common law countries, the term "civil law" is also used as a synonym for continental law!
- *Bürgerliches Recht* [literally translated "citizens' law"] is a specific German term for that part of private law that affects everyone in everyday life in their private legal relationships with others and is regulated in the German Civil Code and a few supplementary laws
- besides, there is *"special private law"* [Sonderprivatrecht] that applies only to certain persons or areas of life and is regulated in special legislation
- court proceedings in private law are governed by *civil procedural law*

2) Overview over the whole spectrum of private law

see **Diagram 1**

3) The focus of this course on the "Bürgerliches Recht"

- on its general part (§§ 4 to 7) and the law of obligations, esp. contract law (§§ 8 - 12)

V. The problem of studying German private law in English

- see also Slide 1 from the course Introduction to the German Legal System
- in the field of private law, legal terms are even more deeply rooted in the traditional national legal culture and therefore more heterogeneous than in other fields of law
  - common law and German private law have developed *totally different legal concepts and terms that often do not correspond* to each other and thus cannot be translated correctly or without further explanation
  - moreover, the legal terminology can be different in English and American law
- this can cause considerable confusion
  - different English translations of German Civil Code provisions can read like translations of different laws
  - subtle conceptual nuances are lost in translation
  - different English publications on German private law topis can read like dealing with different countries

concerning § 1 IV The spectrum of German private law

Diagram 1
The spectrum of German private law

Private law (= civil law)

Bürgerliches Recht
- regulated in the ***German Civil Code*** [Bürgerliches Gesetzbuch] (and supplementing laws)

• general part [Allgemeiner Teil]	- Book 1 BGB
• law of obligations [Schuldrecht] - general law of obligations - particular types of obligations (esp. contracts)	- Book 2 BGB - sect. 241 - 432 BGB - sect. 433 - 853 BGB
• property law [Sachenrecht]	- Book 3 BGB
• family law [Familienrecht]	- Book 4 BGB
• law of succession [Erbrecht]	- Book 5 BGB

Special private law
- special legislation

• commercial law [Handelsrecht	- Commercial Code [Handelsgesetzbuch]
• company law [Gesellschaftsrecht]	- BGB, Commercial Code - Act on Limited Liabilty Companies - Stock Corporation Act - Cooperatives Act
• labour law [Arbeitsrecht]	- Works Constitution Act - Collective Agreements Act - Employment Protection Act - numerous other laws
• competition law [Wettbewerbsrecht]	- Act against Restrict. of Competition - Act against Unfair Competition
• intellectual property law [Immaterialgüterrecht]	- Patent Act [Patentgesetz] - Trade Mark Act [Markengesetz] - Copyright Act [Urheberrechtsgesetz] - Design Act [Designgesetz] - Utility Models Act [Gebrauchsmustergesetz]
• securities law [Wertpapierrecht]	- Bill of exchange act [Wechselgesetz] - Check Act [Scheckgesetz]
• Capital market law [Kapital-marktrecht]	- Capital Investment Code [Kapitalanlagegesetzbuch]
• others	

Civil procedural law
- Code of Civil procedure [Zivilprozessordnung]

International Private Law
(law on conflicts of laws)
- Introductory Act to the Civil Code
- see also EU law: Rome I, Rome II and Rome III Regulations

§ 2 Introduction to the German Civil Code

[Bürgerliches Gesetzbuch (= BGB)]

I. Historical background

- in the early 19th century, private law in the individual German states was very heterogeneous
- there were, however, already some regional codifications:
  - in Bavaria: Codex Maximilianeus Bavaricus Civilis of 1756
  - in Prussia: General Land Law for the Prussian States [Allgemeines Landrecht für die Preußischen Staaten] of 1794
  - in the states on the Rhine's left bank: the French Code Civil of 1804
- the *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 who maintained that time was unripe for such a step
- 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, established by the Federal Council [Bundesrat], prepared a first draft, which, however, was often criticised for being too complicated and elitist
  - from 1890 to 1895, a Second Commission reviewed it and 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
  - strong influence of the *Corpus Iuris Civilis* of 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
    - critics of the first draft claimed that it was a "compendium of pandects cast in legal paragraphs"
  - only limited complementary influence of old German legal traditions

II. Structure and regulated areas

1) Book 1: General part [Allgemeiner Teil]

- a common approach in German law: to formulate general rules and principles for the whole area in an introductory part to the law
- subjects and objects of law
- *declarations of intents* and *legal transactions*
  - incl. rules on the conclusion and validity of contracts and on agency and representation
- periods of time, fixed dates and temporal limitation of claims

2) Book 2: Law of obligations [Schuldrecht]

a) Divisions 1 - 7: General law of obligations

- general rules on the subject matter and extinction of obligations
- *contractual obligations* in general
  - creation, subject matter and termination of contracts, reciprocal contracts etc.
- general terms and conditions
- change of parties, plurality of debtors or creditors

b) Division 8: Special law of obligations

- *particular types of contractual obligations*
  - e.g. purchase, lease, lease with right to appropriate fruits, safekeeping, lending, donation, suretyship, loan, service contract (incl. employment contract), contract to produce a work, brokerage contract, mandate, civil law partnership
  - some special types of contracts have only been regulated in the last decades, due to new developments of business life or to implement EU directives and/or protect consumers
- important *non-contractual obligations*
  - e.g. *unjust enrichment* (practically important), *torts*, agency without specific authorisation

3) Book 3: Property law [Sachenrecht]

- posession [Besitz]
- *ownership* [Eigentum]
  - powers and rights of the owner
  - acquisition and loss of ownership
- general provisions on rights in land
- limited real rights [dingliche Rechte]
  - real rights of use, rights of security

4) Book 4: Family law [Familienrecht]

- marriage [Ehe]
  - including divorce
- relationship
- guardianship, legal curatorship, legal custodianship

5) Book 5: Law of succession [Erbrecht]

- succession
- legal position of the heir
- will
- compulsory share
- certificate of inheritance

III. Systematic and regulatory style

- strong approach of *systematising* the legal matter *as much as possible*
- transparent and widely but not entirely consistent structuring of the Civl Code into books, divisions, titles, sub-titles and chapters
  - later added special provisions on more special types of contracts have made Book 2 more and more complicated
  - later added provisions for better consumer protection are scattered throughout Book 2
- consistent approach of starting the regulation with a general section, even within the specific titles and sub-titles in Book 2
  - see numerous examples in Book 2, Division 8
- frequent references of Civil Code provisions to other Civil Code provisions
- general approach of *abstract regulation* with *abstract but well-conceived, consistant legal terminology*

IV. Complementation by special legislation and judicial further development of law

- originally forgotten rules that needed to be developed by jurisprudence
  - the rules on pre-contractual liability [culpa in contrahendo]
  - the rules on liability for breach of collateral duties (positive breach of contract)
  - both were finally integrated into the Civil Code in 2001
    (sect. 311(1) read together with sect. 280(1) and 241(2), resp. sect. 280(1) BGB)
- external, complementing legislation later incorporated into the Civil Code
  - Marriage Act (now: sect. 1297 et seq. BGB)
  - Act regulating the Law on General Terms and Conditions (now: sect. 305 et seq. BGB)
  - Doorstep Selling Cancellation Act (now: sect. 312b et seq. BGB)
  - Consumer Credit Act (now: sect. 491 et seq. BGB)
  - Distance Selling Act (now: sect. 312 et seq. BGB)

- important current external legislation complementing the Civil 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 [Wohnungseigentumgesetz]
  - Act on Registered Life Partnerships [Lebenspartnerschaftsgesetz]

V. Amendments and reforms

- frequent far-reaching reforms of family law, following the profound changes in society
  - 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*
  - completely new purchase law and law of irregularities in performance
  - incorporation of external legislation into the Civil Code

(Datei: Slide 2 (GermanPrivateLaw))

§ 3 Methodological approach

- see for the broad spectrum of legal methods in *legal practice* **Diagram 2**
- see also for the even broader spectrum of legel methods in *legal science* the **special material** from the course Methodology of Legal Research and Writing, Yogyakarta 2023

I. Jurisprudence of concepts, jurisprudence of interests and jurisprudence of values [Begriffsjurisprudenz, Interessenjurisprudenz & Wertungsjurisprudenz]

- three contrasting basic approaches that altogether, often alternating, determine the German way of dealing with the law
- *jurisprudence of concepts:* an approach developed in the 19th century, understanding the legal order 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
  - still vivid insofar as lawyers still love to focus on legal concepts and their interrelationships
- *jurisprudence of interests:* an approach developed in the early 20th century, 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
  - helpful for the understanding of many Civil Code provisions
- *jurisprudence of values:* an approach of the 20th century focusing on the value judgements of the legislator, in particular the fundamental constitutional values
  - today the most influential approach
  - explains well the practice of interpreting private law in the light of the fundamental rights

II. Legal interpretation

- see Diagram 2, B.I.
- the most important activity of any lawyer
- includes *defining and delimiting legal terms* and identifying important case groups
- there is no hierarchy between the various methods of legal interpretation, but the choice must be transparent and reasoned
- in practice, often the teleological interpretation prevails, and not always can German jurists resist the temptation to present their own political idea as the purpose of the law...

III. Subsumption

- see Diagram 2, B.II.
- only applies to *rules*, not to principles (which must be concretised and balanced with others in the indiv. case)
- needs to be done transparently, precisely and individually for every single legal prerequisite of the norm and of other norms to which the norm refers

IV. Analogy

- see Diagram 2, B.III.
- must be strictly distinguished from legal interpretation
- only in case of sound reasons for a *(1.) regulatory gap*, which is *(2.) unintended*, and a *(3.) comparable constellation of interests*
- are you sure that you can exclude an argumentum e contrario?

V. Other legal methods

- much more important and multifaceted in legal science than in legal practice
- esp. *economic analysis of law* for an impact-orientated (or at least *also* impact-orientated) interpretation or application of a legal norm

(Datei: Slide 3 (GermanPrivateLaw))

concerning § 3 Methodological approach

Diagram 2
Legal methods in legal practice (overview)

A. Preliminary remarks

- the activities and legal methods of the legal practitioner (the ordinary lawyer) focus on *interpreting and applying the law* and *finding solutions for practical problems* on the basis of the prevailing law
- the activities of a legal scientist also include to gain a deeper understanding of the law (from manifold perspectives) and develop suggestions for its improvement; therefore there is a much *broader spectrum of legal methods in legal science*
- there are differences in legal methodology between common law and continental legal systems, due to the different role of written law and jurisprudence, but they can be less significant in practice than expected
  - example: court decisions, although no "case-law", also play an important role in continental legal practice...

B. Main legal methods

I. Methods of legal interpretation

1) Grammatical (literal) interpretation

- focuses on the *wording* of the norm
- note that the wording sets an absolute *limit* to interpretation!

2) Systematic interpretation

- focuses on the systematic *position* of the provision within a certain part or sub-part of the law or regulation
  - the position often indicates the function and, consequently, the sense of the norm
  - the same legal term may need to be interpreted differently in norms with a different systematic position (e.g. differently in the clause guaranteeing a fundamental right than in that limiting it)
- also aims to avoid inconsistencies in the legal system
- a special kind: the *interpretation of legal provisions in conformity with higher-ranking law* (constitution, human rights, European Union law) to prevent conflicts

3) Historical interpretation

- focuses on the *genesis* of the norm
- important in particular for legal provisions reacting to the failures of their predecessors
- special regard to the explanatory memorandum to the bill and the discussion in the legislative procedure

4) Teleological interpretation

- focuses on the *purpose (ratio legis)* of the norm
- most important method of legal interpretation in practice, requires a deeper understanding of the norm
- jurist must resist temptation to present his own political ideas as purpose of the law (→ difficult for Germans...)
- includes impact-orientated interpretation
  - e.g. avoiding absurd and impractical results, harmful effects and undue hardship
  - e.g. ensuring the *effet utile* (practical effectiveness) of the norm
- can also result in a *teleological reduction*, i.e. not applying a norm, although it would be applicable according to its wording, with regard to its purpose

5) Additional specific methods for constitutional interpretation

a) Interpretation with regard to the *unity of the constitution*

- a holistic approach, understanding the constitution as a homogeneous whole and resolving inconsistencies between individual provisions in its overall context

b) Interpretation according to the principle of *practical concordance*

- a further development of this approach, gently reconciling colliding constitutional norms and values (e.g. the fundamental rights of different citizens) by considerate concretisation and balancing, allowing all of them to unfold under reciprocal limitation as far as possible

6) Only an aid to legal interpretation: comparison of laws

- having regard to the interpretation of a similar norm in a foreign legal order
- cannot be a method of legal interpretation per se, since identical provisions in different legal orders can have a different meaning, due to different historical, ideological or cultural backgrounds
- but often a *source of inspiration* within the teleological (or other kinds of) interpretation

II. Subsumption

- subsuming a factual situation under a legal norm by relating the facts to the legal prerequisites of the norm
- needs to be done individually for every single legal prerequisite of the norm
- congruence of the facts with all legal prerequisites will trigger the legal consequences of the norm

III. Analogy

- application of a legal norm, which offers a suitable solution, to a case not regulated therein but similar to the regulated case (→ analogous application)
- comes into consideration if legislator did not or could not have in mind the given constellation
- presupposes an *unintended regulatory gap* (no conclusive regulation) and a *comparable constellation of interests* - assumes that the legislator would have regulated the case in this way if he had thought of it...
- not possible in criminal law (→ nulla poena sine lege)
- opposite solution: argumentum e contrario

IV. Methods to determine the applicable norm in case of concurrence of laws

- application of the *lex superior rule, lex posterior rule, lex specialis rule*, special rules in criminal law etc.

V. Balancing

- between legally protected interests with regard to a specific situation
- in particular between fundamental rights and public interests but also between private interests - an essential part of the application of the principle of proportionality
- goes often hand in hand with a concretisation of legal principles or values
- determination of the protected interests, compiling of the relevant facts, consideration of all relevant aspects, reasoned balancing decision
- the balancing itself is ultimately a subjective process - here we meet a limit of objectivity in law

VI. The methods and techniques of practical legal case-solving

- a quasi-scientific, strictly logical & methodological approach to solve practical legal cases from an objective perspective - especially highly developed in Germany but adopted in legal education in many other countries
- common in common law systems: the approach to solve practical legal cases from the perspective of one of the parties (→ moot courts)

C. Other legal methods

- note that there are numerous other legal methods in legal science, but few are relevant for legal practice

I. Empirical studies for establishing the existence of customary law

- rare in modern legal systems, since almost everything is regulated in written law
- studies on the required continuous common practice in the population (*consuetodo*)
- studies on the required common opinion that this practice is legally binding (*opinio iuris sive necessitatis*)

II. Comparative methods

- e.g. drawing inspiration from foreign court decisions for answering questions in the own law - common in constitutional law for common issues of fundamental rights or the rule of law

III. Economic analysis of law

- analysis of the existing or potential economic consequences of a certain interpretation or application of a legal norm - usually by microeconomic analysis with special regard to the behavioural consequences

IV. Methods of judicial further developing of law (→ slide 5, IX.)

- only by courts for filling a gap in the law
- "further developing" of the existing law, within its lines and concepts (not making of genuinely new law)
- creative interpretation of indefinite legal concepts, creative interpretation of several norms "read together", introduction of unwritten legal institutions that integrate well with the written law

D. Further reading (selection in English)

- note that there is an abundance of scientific literature on legal methodology in German language

Ginsburg, Jane C.: Legal Methods, 5th edition 2020
Husa, Jaakko; Hoecke, Marc van (editors): Objectivity in Law and Legal Reasoning, 2013
MacCormick, Neil; Summer, Robert S. (editors): Interpreting Statutes. A Comparative Study, 1991
Möllers, Thomas M. J.: Legal Methods. How to work with legal arguments, 2020
Riesenhuber, Karl (editor): European Legal Methodology, 2nd edition 2021
Schmitz, Thomas: Introduction to legal case-solving, course material, Semester 1, 2013/14
Zimmermann, Reinhard: Legal Methodology in Germany, in: Edinburgh Law Review 26 (2022), p. 153 ff.
Zippelius, Reinhold: Introduction to German Legal Methods, 2008

See also, as a classic of legal interpretation, *Friedrich Carl von Savigny*, System of the Modern Roman Law, vol. 1, 1867, sect. XXXIII, p. 171 ff. [German original: System des heutigen Römischen Rechts, vol. 1, 1840, § 33, p. 212 ff.]

Prof. Dr. Thomas Schmitz Semester 1, 2022/2023

INTELLECTUAL AND FORMAL STANDARDS
OF SCIENTIFIC LEGAL RESEARCH AND WRITING
Contribution to the course *Methodology of Legal Research and Legal Writing*

concerning § 2 IV Precise and logical reasoning in accordance with legal methodology

Diagram 1
A brief overview over legal methodology

Preliminary remark: There is sometimes confusion in Indonesia about the essence of legal science and what is and what is not legal methodology. The following overview shall provide orientation but is not exhaustive.

A. The nature of legal science and legal methodology

- legal methodology is not an end in itself - its methods and standards derive from the nature of legal science
- there is a broad global consensus that legal science is essentially a *normative and hermeneutic*, not empirical science
  - it is the science of the *Sollen* ["Ought"] (as ordered in the legal norm, which needs to be interpreted), not of the *Sein* ["Is"]
  - it focuses on the contents, internal interrelations and coherence of the law, not on the phenomena caused by it or leading to it
  - its methods are closer to those of philosophy and theology than to those of natural or social sciences
- the law is also the research object of many other scientific disciplines: political science, social sciences, economics, historical science, philosophy, psychology etc. - *not every research about law is legal research!*
- there is no comprehensive uniform understanding of legal methodology but a broad transnational consensus on the main legal methods, focusing on the correct *interpretation and application of the law*
- attempts to establish empirical approaches on equal footing within legal science are in most countries overwhelmingly rejected; instead, legal research takes into account and often *builds on the results of empirical research in other disciplines*
- there are differences in legal methodology between common law and continental legal systems, due to the different role of written law and jurisprudence, but in practice they can be less significant than expected

B. The activities of the legal scientist

I. What does a legal scientist do?

1) Core activities of legal science

a) Interpreting the law
- the most important activity of a legal scientist
- in particular *defining and delimiting legal terms* and identifying important case groups

b) Applying the law
- usually supporting others who have the jurisdiction to apply the law through legal advice (e.g. legal opinions)
- in particular *subsumption*
- also developing scientifically based solutions for practical problems

c) Systematising the law
- clarifying the subdivision of the law in various fields and sub-fields of law and their relations
- clarifying the typology and hierarchy of norms in the given legal order
- working out the functions of individual legal norms and their consequences
- working out the relation between different legal norms
- *determining the applicabel norm in case of concurrence of laws*
- categorising frequent cases in case groups

d) Analysing, systematising and commenting the jurisprudence
- identifying the doctrinal core content of court decisions
- scrutinising and evaluating the quality of the court's reasoning
- relating new judgements to the previous line of jurisprudence
- compiling important court decisions and reproducing the development of the jurisprudence
- supporting the development of the jurisprudence by critical scientific comments

e) Providing for a deeper inherent understanding of the law
- exploring the potential of legal concepts
- working out the inherent structure of important types of norms (fundamental rights, norms on criminal offences, bases for claims, legal bases for administrative action etc.) and its consequences for their application
- working out the change in the interpretation of a legal norm in the course of time

f) Building up a sophisticated, consistent and differentiated legal doctrine
- working out the basic concepts and strutural principles in the various fields and sub-fields of law
- developing theories for a better (deeper, more consistent etc.) understanding of a field of law
- introducing new legal notions, concepts or principles in legal dogmatics
- critically inventorying the existing legal dogmatics, their limits and deficits, and assessing the state of legal science in a field or sub-field of law
- in some legal orders (e.g. French, EU, public intern. law) working out of inherent unwritten general principles of law

2) Other activities of legal science

a) Establishing the existence of customary law
- rare in highly developed legal systems because almost everything is regulated in laws and regulations
- still important in public international law
- still important in countries with a developing legal system where traditional law plays an important role - see for Indonesia art. 18B(2) Constit. 1945

b) Comparing law with the corresponding law in other legal orders
- thus developing a deeper understanding of the own law, its strong and weak points and possible alternatives
- e.g. studying foreign innovations and approaches as a potential model for the domestic legal development
- e.g. studying the jurisprudence of foreign supreme or constitutional courts on current issues that also arise in one's own country

c) Developing proposals for the improvement of the existing law
- e.g. for solving practical problems in a field or sub-field of law
- e.g. for consolidating or modernising the theoretical foundations of a field or sub-field of law
- often *making use of foreign innovations* that would also be beneficial for the domestic law

d) Developing proposals for a "cleaning up" in a field of law
- for the elimination of inconsistencies, paradoxes, unsuitable elemements imported from foreign law etc.

3) Activities from other scientific disciplines integrated into legal science
- uncharacteristic activities based on or dominated by the approaches of other disciplines but so closely related to the law that they often have been integrated as *complementary side disciplines* into legal science, the researchers are employed at the law faculties and they can be studied as subsidiary (often elective) subjects within the legal studies

a) Exposing the historical backgrounds and reconstructing the historical development of the law
- studies in legal history, inspired or dominated by → historical science

b) Exploring the philosophical foundations of the law
- studies in legal philosophy, inspired by → philosophy
- studies in state philosophy (General Theory of State), dominated by → political philosophy

c) Assessing the economic impact of laws, individual norms or interpretations of norms
- economic analysis of law, dominated by → economic science

d) Examining the law in its relation to and its impact on the society
- studies in sociology of law and *socio-legal studies*, dominated by → social sciences

II. What does a legal scientist not do?

- experiment-based research (→ natural and technical sciences)
- economic research (→ economic science)
  - exception: side approach economic analysis of law
- empirical research (→ social sciences)
  - exceptions: side discipline legal sociology and side approach socio-legal research
- law-related research more closely related to other scientific disciplines
  - forensic research (→ medicine)
  - legal psychological research (→ psychology)
- promoting political objectives (→ politics, political science)
  - exception: legal politics (→ law-related politics - not legal science anymore)
- promoting morality (→ moral philosophy)
  - in a state committed to rule of law and human rights, law and morality are different spheres
- promoting religious objectives (→ religion, theology)

C. The methods of the legal scientists

I. Main legal methods

1) Methods of legal interpretation

a) Grammatical (literal) interpretation
- focuses on the *wording* of the norm
- note that the wording sets an absolute *limit* to interpretation!

b) Systematic interpretation
- focuses on the systematic *position* of the provision within a certain part or sub-part of the law or regulation
  - the position often indicates the function and, consequently, the sense of the norm
  - the same legal term may need to be interpreted differently in norms with a different systematic position (e.g. differently in the clause guaranteeing a fundamental right than in that limiting it)
- also aims to avoid inconsistencies in the legal system
  - a special kind: the *interpretation of legal provisions in conformity with higher-ranking law* (constitution, human rights, European Union law) to prevent conflicts

c) Historical interpretation
- focuses on the *genesis* of the norm
- important in particular for legal provisions reacting to the failures of their predecessors
- special regard to the explanatory memorandum to the bill and the discussion in the legislative procedure

d) Teleological interpretation
- focuses on the *purpose (ratio legis)* of the norm
- the most important method of legal interpretation in practice, requires a deeper understanding of the norm
- jurist must resist temptation to present his own political ideas as purpose of the law...
- includes impact-orientated interpretation
  - e.g. avoiding absurd and impractical results, harmful effects and undue hardship
  - e.g. ensuring the *effet utile* (practical effectiveness) of the norm (favoured by the European Court of Justice)
- can also result in a *teleological reduction*, i.e. not applying a norm, although it would be applicable according to its wording, with regard to its purpose

e) Additional specific methods for constitutional interpretation

aa) Interpretation with regard to the *unity of the constitution*
- a special kind of systematic interpretation, understanding the constitution as a homogeneous whole and resolving inconsistencies between individual provisions in its overall context

bb) Interpretation according to the principle of *practical concordance*
- a further development of this approach, gently reconciling colliding constitutional norms and values (e.g. the fundamental rights of different citizens) by considerate concretisation and balancing, allowing all of them to unfold under reciprocal limitation as far as possible

f) Comparison of laws as a method of legal interpretation?
- not a method of legal interpretation per se, since identical provisions can have a different meaning in different legal orders, due to different historical, ideological or cultural backgrounds
- but often a *source of inspiration* within the teleological (or other classical kinds of) interpretation

2) Subsumption
- subsuming a factual situation under a legal norm by relating the facts to the legal prerequisites of the norm
- needs to be done individually for every single legal prerequisite of the norm
- congruence of the facts with all legal prerequisites will trigger the legal consequences of the norm

3) Analogy
- application of a legal norm, which offers a suitable solution, to a case not regulated therein but similar to the regulated case (→ analogous application)
- comes into consideration if legislator did not or could not have in mind the given constellation
- presupposes an unintended regulatory gap (no conclusive regulation) and a comparable constellation of interests
  - assumes that the legislator would have regulated the case in this way if he had thought of it...
- impermissible in criminal law (→ nulla poena sine lege)
- opposite solution: argumentum e contrario

4) Methods to determine the applicable norm in case of concurrence of laws
- application of the *lex superior rule, lex posterior rule, lex specialis rule*, special rules in criminal law etc.

5) Balancing
- between legally protected interests with regard to a specific situation
- in particular between fundamental rights and public interests but also between private interests
  - an essential part of the application of the principle of proportionality
- goes often hand in hand with a concretisation of legal principles or values
- determination of the protected interests, compiling of the relevant facts, consideration of all relevant aspects, reasoned balancing decision
- note that the balancing itself is ultimately a subjective process - here we meet a limit of objectivity in law

6) Theoretical reflection about the law
- necessary on a large scale for most activities of legal science!
- often actually the predominant part of the work of the legal scientist
- analysing, identifying, describing, defining, concretising, delimiting, categorising, comparing, assessing, evaluating, conceptualising, creative etc. ...

II. Other legal methods

1) Empirical studies for establishing the existence of customary law
   - on the required continuous common practice in the population or among other relevant players (*consuetodo*)
   - on the required common opinion that this practice is legally binding (*opinio iuris sive necessitatis*)

2) Comparative methods
   - classical methods of comparison of laws
   - drawing inspiration from foreign court decisions for answering questions in the own law
   - evaluative comparison of laws [wertende Rechtsvergleichung] (a method developed by the European Court of Justice for identifying and concretising unwritten general principles of European Union law)

3) Adaptation of foreign legal concepts to the specific features of the domestic law
   - a prerequisite for a successful transfer of foreign concepts to the domestic law
   - requires a deeper understanding of both, the foreign legal concept and the domestic law and legal culture
   - must include the adaptation to the cultural, social and economic context of the domestic law

III. Complementary methods from other scientific disciplines

- used for the complementary activities which have been integrated into legal science (→ B.I.3)
- usually only taught in complementary and elective courses

1) Legal historical exegesis
   - historical and legal analysis and interpretation of sources from legal history

2) Specific methods of legal philosophy
   - a broad, heterogeneous spectrum of proposed methods

3) Political-philosophical reasoning
   - the methods in state philosophy (General Theory of State)

4) Economic analysis of law
   - usually by microeconomic analysis, with special regard to the behavioural consequences of legal norms

5) Methods of socio-legal research
   - an interdisciplinary variety of methods but predominantly empirical sociological research
   - useful, for example, as a basis for impact-orientated drafting or interpretation of legal norms
   - useful also to elucidate the influence of the mentality and socio-cultural background of judges on the jurisprudence

> **Note on socio-legal research within legal science:** Be aware that this is not a genuine legal science but a predominantly social sciences approach, which is supported by a small minority of legal scholars. While it is useful for Indonesia, its methods can only complement but not replace the established legal methodology. Do not confuse socio-legal research with legal science as such! The fact that this often happens risks to isolate Indonesian legal scientists in a small cocoon.
> When performing socio-legal research, the theoretical part of your work must still comply with the established standards in legal science, which can be different from those in social sciences. For example, you must not only present and discuss the positions of scholars that support your own approach but also the opposing and mediating opinions and their arguments.

D. Further reading (selection in English)

- note that there is an abundance of scientific literature on legal methodology in German language

Bongiovanni, Giorgio; Postema, Gerald; Rotolo, Antonio and others (editors): Handbook of Legal Reasoning and Argumentation, 2018
Bos, Keen van den: Empirical Legal Research, 2020 (on a controversial approach in legal science)
Ginsburg, Jane C.: Legal Methods, 5th edition 2020
Hardianto, Danang: Reorientation towards the Nature Of Jurisprudence in Legal Research, Mimbar Hukum 26 (2014), p. 340 ff.
Hoecke, Marc van (editor): Methodologies of Legal Research. Which Kind of Method for What Kind of Discipline?, 2013
Husa, Jaakko; Hoecke, Marc van (editors): Objectivity in Law and Legal Reasoning, 2013
MacCormick, Neil; Summer, Robert S. (editors): Interpreting Statutes. A Comparative Study, 1991
Möllers, Thomas M. J.: Legal Methods. How to work with legal arguments, 2020 [→ T.S.]
Núñez Vaquero Álvaro: Five Models of Legal Science, Pravna metodologija 19 (2013), p. 53 ff.
Riesenhuber, Karl (editor): European Legal Methodology, 2nd edition 2021
Scalia, Antonin; Garner, Bryan A.; Easterbrook, Frank H.: Reading Law. The Interpretation of Legal Texts, 2012
Smits, Jan M.: The Mind and Method of the Legal Academic, 2012
Vols, Michel: Legal Research. One Hundred Questions and Answers, 2021
Zippelius, Reinhold: Introduction to German Legal Methods, 2008 [→ T.S.]

See also, as a classic of legal interpretation, *Friedrich Carl von Savigny*, System of the Modern Roman Law, vol. 1, 1867, sect. XXXIII, p. 171 ff. [German original: System des heutigen Römischen Rechts, vol. 1, 1840, § 33, p. 212 ff.]

§ 4 Subjects and objects of law

I. Legal entities (legal subjects) [Rechtssubjekte]

- persons or entities *with legal capacity* (who can have own rights & obligations, cf. § 4 III.)
- can have full or limited legal capacity

1) Natural persons

- all human beings, from completion of birth (sect. 1 BGB) until death (brain death)
- have always unlimited legal capacity
- besides, a *nasciturus* (unborn child) can enjoy certain rights if later born
  - can inherit (sect. 1923 BGB)
  - can claim damages for being harmed by an act of tort

2) Legal persons [juristische Personen]

- associations of persons or pools of assets recognised by the law as independent entities, enjoying comprehensive legal capacity
- different types regulated exhaustively in the law
  - but there are unregulated sub-types and combined types
- *act through their organs* and are liable for their acting
  - are usually represented by a *board* [Vorstand] or *director* [Geschäftsführer]
  - essential decisions usually taken by a *general meeting* or *shareholder meeting*
- liability limited to the legal person's assets
  - members/shareholders not liable for their association's obligations - the main reason for establishing it
  - but nowadays some recognised exceptions (→ piercing the corporate veil...)
- legal persons under private law *registered* in public registers
  - commercial register, registers of associations, foundations, cooperatives

a) Registered association [Verein] (sect. 21 et seq., 55 et seq. BGB)

- needs at least 7 members for registration (sect. 56 BGB)
- traditionally very popular (sports clubs, social, cultural and political associations etc.)
- has lost influence in the last decades in the polarised German society

b) Foundation [Stiftung] (new version 2024 of sect. 80 ets seq. BGB)

- has assets but no members
- needs recognition by Land authority

c) Cooperative [Genossenschaft] (Cooperative Act)

- corporation of an unlimited number of members for promoting its members' business or social or cultural interests through joint business
  - cooperation, not merger: members maintain individual independence
- e.g. agricultural cooperative, retailer cooperative

d) Capital-based corporations [Kapitalgesellschaften]

- companies, in which membership is based purely on monetary participation and not on the personal cooperation of the shareholders
- most important legal persons under private law

aa) **Limited liability company** [Gesellschaft mit beschränkter Haftung (GmbH)] (Act on Limited Liability Companies)

bb) **Stock corporation** [Aktiengesellschaft (AG)] (Stock Corporation Act)
- special type: **partnership limited by shares** [Kommanditgesellschaft auf Aktien] (sect. 278 et seq. Stock Corporation Act)

e) Legal persons under public law

aa) **Public-law corporation** [öffentlich-rechtliche Körperschaft]
- self-governing organisation for a certain territory or group of persons
- e.g. commune, county, chamber of industry & commerce, university

bb) **Public-law establishment/institution** [öffentlich-rechtliche Anstalt]
- independent organisational unit pooling material and human resources for a specific mission or service
- e.g. research centre, the local public swimming pool or library

cc) **Public-law foundation** [öffentlich-rechtliche Stiftung]
- e.g. cultural institution or university organised as foundation

3) Partnerships with partial legal capacity [Personengesellschaften]

- not recognised by the law as legal persons but enjoying a *limited legal capacity*
- act through their partners
- partners personally, jointly and severally liable without limitation (see for an exception 3.b.bb)

a) Civil-law partnership with legal capacity [rechtsfähige Gesellschaft des bürgerlichen Rechts] (new version 2024 of sect. 705 et sect. BGB)

b) Commercial partnerships [Handelsgesellschaften] (Book 2 Commercial Code)
- partnerships for carrying on a commercial business under a joint business name

aa) **General partnership** [Offene Handelsgesellschaft (OHG)] (sect. 105 et seq. Comm. Code)
- partnership where no partner's liability is limited vis-à-vis creditors

bb) **Partly limited partnership** [Kommanditgesellschaft (KG)] (sect. 161 et seq. Comm. Code)
- partnership where the liability of one or more partners is limited vis-à-vis creditors to the amount of a specific contribution of assets, while the others have unlimited liability
  - special type: **GmbH & Co KG** [partly limited partnership with a limited liability company as personally liable partner]

c) Partnership company of members of an independent profession [Partnerschafts-gesellschaften] (Act on Partnership Companies)
- only for the operation of an independent profession (e.g. physician, dentist, lawyer)

d) European Economic Interest Grouping (EEIG) (EU Regulation 2137/85)
- partnership of partners from different EU member states to promote transnational economic cooperation

II. Legal objects

- the objects to which the law refers

1) Things [Sachen] (sect. 90 et seq. BGB)

- only corporeal objects (sect. 90)
  - not energy (heat, electricity) or energy-based online connections (4G, internet)
- *principle of speciality:* even in case of complex transactions, rights and transfers always refer to the individual things, not collectively to aggregates of things
- distinction between *movable things and immovable things*, i.e. *plots of land* (realties) [Grundstücke], to which different rules apply
- distinction between *fungible things* [vertretbare Sachen] *and non-fungible things* (sect. 91)

- *essential parts* of a thing [wesentliche Bestandteile], that cannot be separated without destroying one or the other or changing it in nature, cannot be subject of separate rights (sect. 93)
  - consequently, there is *no ownership of buildings but only of the plots of land where they stand!* (cf. sect. 94)
  - exception: ownership of apartments under the Apartment Ownership Act

2) Animals

- *animal protection* is a *constitutional principle* (cf. art. 20a BL), with legal consequences
  - e.g. criminal offence of killing vertebrates or inflicting significant pain to them without reasonable cause
  - e.g. halal/kosher slaughter only with special license under serious restrictions
- although animals are not considered anymore as things (sect. 90a BGB), the relevant rules apply to them too, unless otherwise provided (what is, however, rarely the case)

3) Intellectual property rights

- property rights (absolute rights) in creations of the human intellect (art, literature, science, inventions, design, know-how, software etc.)
- no ownership in analogy to ownership on things and no codified consistent system but a multitude of heterogeneous i.p. rights under highly specialised legislation:
  - Copyright Act [Urheberrechtsgesetz]
  - Patent Act [Patentgesetz]
  - Trade Mark Act [Markengesetz]
  - Design Act [Designgesetz]
  - Utility Models Act [Gebrauchsmustergesetz]

4) Other rights

- any *claim* [Anspruch] (right to demand another person to do or refrain from an act, sect. 194 BGB)
- *claims under the law of obligations* [Forderungen] may be transferred to others (assignment [Abtretung], sect. 398 et seq. BGB)
- only the individual assets, not the assets as a whole, constitute legal objects

III. Legal capacity and capacity to perform legal acts

- *legal capacity* [Rechtsfähigkeit] is the capacity to have own (subjective) rights and obligations
- *capacity to perform legal acts* or capacity to contract [Geschäftsfähigkeit] (see sect. 104 et seq. BGB) is the capacity to enter valid legal transactions
- it is missing if the person is under 7 years old or mentally disturbed (sect. 104)
- minors between 7 and 18 have *limited capacity to perform legal acts* (sect. 107, 108); conctracts conluded by them require prior consent or subsequent approval of their legal representative
  - until the approval the contract is suspensively invalid
  - exception: if the minor receives merely a legal benefit (sect. 107)
  - exception: if the minor performs with means given to him/her for free disposition by the legal representative or a third party with his approval ("pocket money clause", sect. 110)

§ 5 Declaration of intent and legal transaction

I. Two closely related key concepts of German private law

- the declaration of intent [Willenserklärung] is the foundation of every legal transaction [Rechtsgeschäft]
  - some legal transactions consist solely of a single declaration of intent

II. The declaration of intent (sect. 116 et seq. BGB)

1) The concept of declaration of intent

- definition: expression of an intent (will) aimed at bringing about a certain legal outcome

a) Subjective element: the intent

aa) Intention to act [Handlungswille]
- not in case of force, speaking in sleep or uncontrolled twitching

bb) Intention to make a declaration to be legally bound

α) Willingness to be legally bound [Rechtsbindungswille]
- a purely mental reservation not wanting to be bound is irrelevant (sect. 116 BGB)

β) Intention to make a declaration about the will to be bound [Erklärungswille]
- the problem of a *negligently created impression* of this intention
  - the CONTROVERSIAL case of raising a hand to greet a friend at an auction
  - FEDERAL COURT: deemed as intention if addressee understands it in this way
- not necessary but a ground for avoidance (→ II.3.a): the will to be be bound in a specific way, with specific legal consequences (e.g. to give away, not just to lend) [Geschäftswille]

cc) Intention to communicate this declaration to the addressee [Kundmachungswille]

b) Objective element: the declaration

- the expression of the intent to the outside world (→ II.2)

2) The making (expression, form, receipt) of a declaration of intent

a) The expression of the intent

- can in principle consist in any human behaviour that reveals, obviously or after interpretation, the will to be legally bound in a specific way
- verbally, in writing (sect. 126 BGB), electronically (sect. 126a BGB), in text form (sect. 126b), notarised (sect. 128 BGB) or publicly certified (sect. 129 BGB)
- in daily life often *implicitly* by *conclusive conduct*
  - e.g. nodding the head, raising the hand, inserting a coin, placing goods or money on the counter
- special ***form*** *only* necessary *if prescribed by statute or agreed* (cf. sect. 126 - 127 BGB)
  - consumer protection clauses limit the right of providers to require written form for subscriptions
- silence usually not a declaration of will, except
  - in some cases considered as refusal (e.g. sect. 108(2), 177(2) BGB)
  - in others considered as consent (e.g. sect. 416(1), 455 BGB, commercial letters of confirmation)

b) The receipt of the declaration of intent [Zugang]

- a declaration that needs to be made to another person becomes effective
  - among those present, if addressee notices it
  - in absentia, when it reaches the addressee (sect. 130(1) BGB), i.e. when it comes *within his sphere of influence* (e.g. letter box, e-mail server during his busines hours)
    - even if he does not read it...
    - even if the declaring person dies in between (sect. 130(2))
    - but not if a revocation reaches the addressee previously or at the same time (e.g. by a phone call)
  - the exact time of receipt can have important legal consequences
- the receipt can be substituted by service by the bailiff (sect. 132)

3) The avoidance of a declaration of intent [Anfechtung]

- certain common defects of a declaration of intent do *not* render it *void but voidable*
  - it will become ineffective ex tunc if its author avoids it in time

a) Grounds for avoidance

aa) Mistake about the content of the declaration of intent [Inhaltsirrtum] (sect. 119(1) 1st alternative BGB)
- e.g. about the contract partner, the subject or scope of the transaction or other relevant circumstances
- e.g. about characteristics of a person (e.g. solvency) or thing (e.g. authenticity of the painting) that are regarded as essential in business (sect. 119(2))
- however, an *internal error of motive* is *irrelevant*
  - e.g. calculation error, buying a wedding dress for the daughter who actually will not marry

bb) Mistake in the utterance (sect. 119(1) 2nd alternative BGB)
- no intention of the author to make a declaration with this content at all
- esp. mistake in writing or speaking (e.g. offer for 10.00 instead of 1000 €)

cc) Incorrect transmission (sect. 120 BGB)

dd) Deceit (sect. 123(1) 1st. alternative BGB)

ee) Duress (unlawful threat) (sect. 123(1) 2nd alternative BGB)

b) Declaration of avoidance

- is a declaration of intent itself
- must be made within the *period for avoidance* (sect. 121, 124)
  - in cases aa to cc *without culpable delay* after obtaining knowledge of the ground for avoidance
  - in cases dd and ee within one year
  - in any case within 10 years

c) Liability in reliance damage of the partner (sect. 122 BGB)

- not if partner knew or ought to have known the ground for avoidance

4) The interpretation of a declaration of intent

- focuses on the *true intention*, not the literal meaning of the declaration (sect. 133 BGB)

III. Legal transactions [Rechtsgeschäfte]

- the most important tool for the individual to structure his private affairs of his own initiative

1) The concept of legal transaction

- definition: a process consisting of *one or more declarations of intent* which, either alone or in conjuction with other elements, is aimed to *bring about a legal result because it is intended* by the parties involved
  - the primary reason for the legal result to occur is not the acting but the *intention* of the acting parties
  - while the declaration of intent is aimed at a legal consequence, the legal transaction actually brings it
  - another element can be, for example, the delivery of a movable thing for the transfer of ownership (sect. 929 BGB)
  - the legal result brought about can be complex and include legal consequences not specifically intended by the parties (e.g. applicability of the rules on irregularities in performance...)

2) Unilateral, bilateral and multilateral legal transactions

a) Unilateral legal transactions

aa) Strictly unilateral legal transactions
- e.g. last will, offer of a reward, endowment transaction for a foundation

bb) Unilateral legal transactions requiring receipt
- e.g. termination of / withdrawal from a contract, declaration of avoidance, conferment of authority

b) Bi- and multilateral legal transactions

aa) Contracts
- require two (or more) concurring declarations of intent
- bi- and multilateral contracts

bb) Overall acts
- identical parallel (not reciprocal!) declarations of intent
- e.g. constitutive act for an association
- e.g. resolution of a company's shareholder meeting

3) Other categorisations of legal transactions

- legal transactions under the German Civil Code and under special legislation
  - under the law of obligations, property law, family law, law of succession
  - under commercial law, labour law, company law, banking law etc.
- unilaterally binding and bilaterally binding legal transactions
  - unilaterally binding: e.g. donation, suretyship
- legal transactions between the living and on account of death
- obligation transactions and disposition transactions (→ see infra, § 6)
- abstract and causal legal transactions
  - a categorisation closely linked to the distinction between obligation and disposition transactions
  - abstract legal transactions (e.g. transfer of property) are independent of their legal reason
  - causal legal transactions (e.g. purchase contract) constitute the legal reason for an abstract legal transaction
- others (discussed among scholars)

§ 6 The distinction between obligation transaction and disposition transaction

I. An essential but almost unique feature of German private law

- a core structural element, crucial for the understanding of German private law, but rejected in its rigidity (i.e. including both principles), in almost all other countries
  - exceptions: Estonia, Greece

II. The deconstruction of the business transaction into two (or more) distinct legal transactions: the ***principle of separation*** [Trennungsprinzip]

- uniform business transactions are legally splitted into several legal actions:
  - one obligation transaction that only creates the obligations of the parties [Verpflichtungsgeschäft]
  - one or several disposition transactions that actually perform these obligations [Verfügungsgeschäfte]
- example: the purchase of a book is legally splitted into
  - the purchase agreement (that creates the obligations to deliver the book and procure ownership of it to the buyer resp. to pay the purchase price to the seller and accept delivery of the book, sect. 433 BGB)
  - the transfer of the ownership of the book (cf. sect. 929 BGB)
  - the transfer of the ownership of the paid money (cf. sect. 929 BGB)
- obligation transactions create *rights in personam*, disposition transactions *rights in rem*
- so, unlike in other countries, when you buy something, the purchase agreement as such does not yet make you its owner!

III. The independence of the disposition transaction from the obligation transaction: the ***principle of abstraction*** [Abstraktionsprinzip]

- the *validity and legal effect of the disposition transaction does not depend on that of the obligation transaction*
- so if the seller has made you the owner of the sold thing, you will remain the owner, even if the purchase agreement turns out to be invalid or is avoided

IV. Consequences of the separation and abstraction of obligation and disposition transaction

1) Important role of unjustified enrichment law (sect. 812 et seq. BGB)

- if the obligation transaction turns out to be invalid, the disposition transaction performing the obligation remains valid, but the disposing party may ***claim restitution*** (e.g. retransfer of ownership) for enrichment without legal ground (sect. 812(1) BGB)
- however, there are restrictions; in particular no claim for restitution if recipient is no longer enriched (sect. 818(3) BGB)
  - e.g. if he has spent the transferred money for holidays...

2) New owner of a thing may transfer it to third person

- in case of an invalid obligation transaction, the new owner of thing can transfer in his turn the acquired ownership to a third party, and the original owner will not get it back

3) Purchase agreement does not guarantee acquisition

- the purchase agreement may not allow it, but the seller still *can* effectively sell and transfer the sold thing to a third party

4) Tendency to interpret uniform processes in such a way that they include both, the obligation and disposition transaction

- especially in daily life business transactions
- no risk of irregularities as under IV.2/3, since the obligation is immediately performed...
- low risk of problematic outcomes, since deficiencies in the declarations of intent may relate to both transactions
- written or notarized contracts (e.g. on purchase of land) usually include a clause already performing the disposition transaction

(Datei: Slide 6 (GermanPrivateLaw))

§ 7 Agency and representation (sect. 164 et seq., 1629 BGB)

- definition: *agency* [Stellvertretung] is
  - the making or receiving of a declaration of intent
  - by an *agent* (representative) [Vertreter]
  - in the name of a represented party (the *principal* [Vertretener])
  - based on a *power of agency* (power of representation) [Vertretungsmacht]; (sect. 164(1) BGB)

I. Legal representatives, agents and messengers

- agents are all persons who represent (or try to represent) others
- legal representatives are agents who represent the represented party by law, regardless of the party's will
  - parents with parental custody represent their minor children (sect. 1629 BGB)
  - a guardian represents his ward (sect. 1789(2), 1823 BGB)
  - however, boards and directors represent their legal persons as organs, not agents
- messengers do not make an own declaration of intent but just transmit the declaration of another person

II. Own declaration of intent, but in the name of the principal

- the agent makes a declaration of his own intent but in the name and on behalf of the principal; it shall take effect directly for and against the principal
- need for transparency: if agency does not become sufficiently clear, the agent does not bind the principle but himself (sect. 164(2) BGB)
  - exception: business for whom it concerns in daily life (e.g. the husband buying tampons for his wife)
- the agent cannot enter into a legal transaction with himself (sect. 181 BGB)
  - except if specially authorised or solely performing an obligation
- vitations of intent and relevant knowledge of facts of the agent will be attributed to the principal (sect. 166 BGB)
- if agent acts under the influence of a mistake, deceit or threat (cf. sect. 119, 123 BGB), the principal can avoid the contract

III. The power of agency

1) Statutory power of representation [gesetzliche Vertretungsmacht]

- power of agency granted by the law
- of parents for their minor children (sect. 1629 BGB)
- of guardians for their wards (sect. 1789(2), 1823 BGB)

2) Power of agency conferred by legal transaction

- also called power of attorney or authority [Vollmacht]
- conferred by *declaration to the agent or to the third party* in relation to whom it shall have effect (sect. 167 BGB) or public notice (sect. 171 BGB)
- must not have been expired together with the legal relationship on which its conferment is based (e.g. the employment contract) or have been revoked (sect. 168 - 173 BGB)

3) Fictitious power of agency

- in these cases recognised by jurisprudence, a fictitious power of agency is assumed even though no power of agency was actually granted

a) Agency by estoppel for knowingly tolerating alleged agent [Duldungsvollmacht]

- someone is treated as principle because he knew that someone else was illegitimately acting in his name but did not intervene, if the partner trusted the alleged agent

b) Agency by estoppel for unknowingly tolerating alleged agent [Anscheinsvollmacht]

- someone is treated as principle although he did not know that someone else was illegitimately acting in his name, if he could have known and prevented it with due diligence and the partner trusted the alleged agent

IV. The liability of an agent without power of agency

- if the agent acts without having power of agency, the contract will take effect for and against the principal only if the principal approves it (sect. 177(1) BGB; see exceptions under III.3)
  - until approval the other party may revoke it, unless they knew of the missing power of agency (sect. 178 BGB)
- if the principle does not approve, the other party may demand performance or compensation , if the partner trusted the alleged agent from the agent (sect. 179 BGB)

Prof. Dr. Thomas Schmitz Spring Semester 2024

- FOR ALL COURSES AT MAQSUT NARIKBAYEV UNIVERSITY -

How to answer exam questions

A. The functions of university course exams

- you cannot answer exam questions efficiently if you are not aware of their function!

I. To examine your knowledge

- no successful answering of exam questions without learning...
- however, do not overestimate the importance of this function!
- no "abstract" presentation of your knowledge - only precisely there where it is asked for!

II. To examine your deeper understanding of the subject matter

- because only this will qualify you as an expert
- in particular theoretical backgrounds but also practical problems in the field
- can only be assessed correctly by highly qualified examiners but will be in particular important for them
- does not require long but well thought-out answers

III. To examine important skills with regard to the subject matter

- analytical skills (think sharply)
- transfer skills (use your knowledge in different contexts)
- problem-solving skills (solve problems constructively and in line with the relevant rules, principles and values)
- the skill to apply theoretical knowledge in practice

IV. To examine your presentation skills

- the skill to present your ideas in a clear and logic, dogmatically consistent structure
- the skill to present your reasoning in a clear and logic, comprehensible line of thoughts
- the skill to present all your information and ideas clearly and neatly arranged, allowing quick and easy orientation
- the skill to formulate information and ideas in a in a sober and precise, scientifically correct, yet understandable way
- the skill to make yourself understood without stealing too much precious time of the reader
- last but not least: the professional discipline to first draft your text carefully before starting to write it

V. To examine the achievement of the expected learning outcomes defined for your study program

- check carefully any information on this on the program's website/documents

B. The preparation of the exam

- when learning do not focus on details but on structure and fundamentals, understanding and orientation
- *study* the *course materials thoroughly*; also consider *other materials (e.g. internet resources)* to which the lecturer refers
- ask the lecturer questions (in class, via e-mail/WhatsApp, in his office) if there are important issues you did not understand
- prepare neatly all documents and materials you are allowed to bring with you in case of an open book exam
  - note that in legal education you should always be allowed to have the text of the law with you!
- take drinks and snacks with you (in particular snacks with glucose and lecitihin that support brain activities)

C. The preparation of the writing of the answers in the exam

I. The need to prepare the answers before writing them down

- never start immediately to write down the answers to the exam questions!
  -a very serious but common strategic mistake (unfortunately also common at MNU)
- insufficient preparation before the writing down usually leads to
  - poorly structured (if not chaotic), incomplete and subsequently complemented or corrected and therefore confusing answers
  - wordy, non-focused and poorly weighted answers which cause a higher reading effort and annoy the examinator
- note that any subsequent changes to your text demonstrate a lack of planning and thus of academic professionalism!

II. Exact analysis of the exam questions

- analyse the questions thoroughly - otherwise you cannot answer them in a targeted, precise and concise manner
- make sure that you *identify all sub-questions!*
- avoid misunderstandings that will make your answers useless!
- *avoid any redundant remarks* not asked for, since they will affect the grading! (→ see infra, D.I.)
- pay attention to a special notice that may elucidate the question

III. Brainstorming and drawing up of a draft outline

- gather spontaneous ideas on a separate sheet of paper during the analysis of the questions
  - this prevents that important thoughts and ideas get lost
- set up a framework in the form of an *exactly tuned outline of your answer* on the separate sheet of paper
  - focus on an *appropriate, clear and logic, dogmatically consistent structure* and a *comprehensible line of thoughts*, which allows easy orientation; note that a chaotic or inconsistent order of thoughts can make your answer useless!
  - split up complex questions into separate sub-questions, which may be easier to handle
  - plan the presentation with the help of the draft outline, noting all elements (information, reasoning etc.) at the right place
- update the draft outline constantly, also later during the writing process
- *plan thoroughly* in order to avoid subsequent complementations or corrections that leave a bad impression

IV. Time management

- allow 10 to 15 minutes (in a 90 minutes exam) for the drawing up of the draft outline - it will pay off!
- plan in the draft outline the amount of time you want to spend on each question and each aspect within
  - this shall prevent wasting time on not so important aspects at the beginning and missing it for important parts at the end
  - *plan with regard to the points offered for each question* but also to your skills and knowledge
  - allow for at least 5 minutes reserve
- check later frequently if there is still enough time and correct your time planning realistically at an early stage

D. The writing down

I. Answering the questions precisely and concisely

- make sure that your text answers exactly - and only (!) - what is asked for (→ see supra, C.II.)
  - make sure that it *answers all sub-questions* contained in the questions
  - but be aware that *redundant remarks* on topics not asked for dilute your answers, cause unnecessary additional work for the examiner and therefore will *result in a deduction of points*
  - resist the temptation to simply write down what you have learnt! (a very serious but common mistake at MNU)

II. Focusing on the main aspects

- avoid an imbalanced presentation!
- be aware that your focusing demonstrates your ability to distinguish the more and less important aspects of the topic

III. Structuring the text by well-coordinated, precise headlines

- often ingored but important to allow quick and easy orientation
- use a clear and consistent system for numbering the parts and sub-parts of your answers
- unstructured long text blocks are inacceptable in academic writing, also in exam papers!
- within the answer of the same question, the *headlines must fit together and form a* logically and dogmatically *consistent system*
  - unprecise, merely associative headlines, like in a journalist article, are unsuitable for an academic text
  - if you want to introduce a new sub-level, there must be at least two sub-parts (no "1.1" without "1.2")
- practical tip: start the answer for each exam question with a new sheet of paper; this avoids confusion and allows to write down the answers in a different order than their later arrangement

IV. Exact reasoning

- reveal, which legal methods you apply in your legal reasoning and why (legal interpretation, analogy, further development of law? Which method of legal interpretation?)

V. Objective and precise style of writing

- essential for any legal writing - also in exam papers and also in foreign languages!
- formulate as exactly as possible, with precise terms and smart and correct use of prepositions, conjunctions, verbs etc.
- use a consistent terminology within the same text
  - in particular: use the same English translation for the same foreign legal term within the same text
- do *not* use emotional expressions, strong language or *exaggerations* ("certainly", "of course", "without doubts", "very" etc.)
  - they do not compensate for shortcomings in your reasoning but rather point to them!
- do *not* use *subjective style* ("we...","I..." etc.) in any scientific or legal writing!
- specify legal norms as excactly as possible (article, section, sub-section, no., lit. etc.)
- underline important keywords (because many examiners are searching for them...)
- formulate in your own words - never "copy and paste", not even from the course materials!

VI. Appealing form

- form does matter in an exam paper - for many examiners it proves the professional sovereignty of the writer
- avoid confusing addenda and side notes since they may irritate the examiner
- *write legibly* even in a hurry, since readability problems are at the expense of the student

E. The final check

- reserve 5 minutes for a final check - you will loose little time but may gain much!
- Does your text really answer the questions and does it become apparent? Does it answer all sub-questions?
- Is something important missing?
- Have you processed all important ideas noted at the beginning on the separate sheet of paper during the brainstorming?
- Have you arranged all sheets of paper in the right order and numbered them correctly?

Name:

Result: / 100 points (= 50 % of final grade) **01.03.2024,** Thomas Schmitz

Special comments

Prof. Dr. Thomas Schmitz Spring Semester 2024

GERMAN PRIVATE LAW

Mid-term examination

(100 points = 50 % of the final grade)

1. What is a declaration of intent (declaration of will) [Willenserklärung] and a legal transaction [Rechtsgeschäft], and how are they related? What does a declaration of intent require and how is it made? (46 of 100 points)

   ADDITIONAL QUESTION: Why can it make a difference if a declaration of intent sent by e-mail to a store arrives at the store's e-mail server during or after the store's business hours? (up to 8 extra points)

2. German private law differs from the private law of almost all other countries through a combination of two fundamental principles that are crucial for understanding it and entail an important distinction. Please present and discuss these principles, the distinction and the consequences. Please also demonstrate them using the example of buying a chocolate bar in a shop. (54 of 100 points)

   ADDITIONAL QUESTION: Finally, please comment on them: Would you recommend a country that wants to make a new Civil Code to follow the German approach? (up to 8 extra points)

Note: This is an academic examination. Please write in legible handwriting and present your text in an appealing form. Read the questions very carefully and think carefully before you formulate your answers. Make sure that your text answers precisely the questions, is concise, has a clear and consistent structure with well-formulated precise headlines and shows well your deeper understanding of the subject matter. After the exam, all students are welcome to contact me to discuss in detail the strong and weak points of their paper (e-mail: tschmit1@gwdg.de; phone/WhatsApp: +7 775 364 2384).

The topics were discussed extensively in the lectures and in ***Slide 5 ("Declaration of intent and legal transaction")*** and ***Slide 6 ("The distinction between obligation transaction and diposition transaction")***, which are available for download at the course website (www.iuspublicum-thomas-schmitz.uni-goettingen.de/Lehre/German_Private_Law.htm). See also the links to further resources at the course website.

I. Allocation of points: /100 points

1. Declaration of intent (d.i.) and legal transaction(l.tr.) (/46 points)

a) Definitions (/ 12 p.)
- declaration of intent: expression of an intent (will) aimed at bringing about a certain legal outcome / other:
- legal transaction: process of one or more d.i. which, alone or with other elements, is aimed to bring about a legal result because it is *intended* by the parties involved / other:

b) How are they related? (/ 8 p.)
- d.i. is foundation of every l.tr.; some l.tr. consist solely of a single d.i.
- while d.i. aims at a legal consequence, l.tr. actually brings it / other:

c) What does a declaration of intent require? / 12 p.)
aa) Subjective element: *intent* (to • act at all, • make declar. to be legally bound and • communicate it to addressee) (/ 10)
bb) Objective element: declaration (expression) (/ 2)

d) How is a declaration of intent made? / 14 p.)
aa) Expression of the intent (/ 10)
- verbally, in writing, electronically, in text form, notarised, publicly certified or *implicitly by conclusive conduct*
- in general no special form required

bb) Receipt of the d.i. (/ 4)
- d.i. needs to reach addressee (come within his sphere of influence)

e) ADDITIONAL QUESTION: D.i. by e-mail arriving at store's e-mail server during or after business hours / 8 p. extra)
- outside business hours not yet received; can still be revoked (e.g. by phone call)
- store may still revoke offer to which the d.i. by e-mail replied (e.g. by phone call)

2. The principles of separation and abstraction (/ 54 points)

a) The ***principle of separation*** (/ 24 p.)
- legal splitting of uniform business transactions into several legal actions:
  - one ***obligation transaction*** (creates only rights in personam)
  - one or several ***disposition transactions*** (perform the obligation and create rights in rem)
- special aspects discussed:

b) The ***principle of abstraction*** (/ 10 p.)
- validity & legal effect of disposition transaction *does not depend* on that of the obligation transaction
- special aspects/problems discussed:

c) Consequences (/ 12 p.)
- purchase agreement does not yet make buyer the new owner!
- important role of unjustified enrichment law (sect. 812 et seq. BGB)
- new owner of a thing may transfer it to third person
- purchase agreement does not guarantee acquisition of ownership
- tendency to interpret uniform processes in such a way that they include both, obligation & diposition transaction
  - in particular common practice to include clause performing the disposition transaction in written/notarised contracts

d) The example of buying a chocolate bar in a shop (/ 8 p.)
- one simple business transaction, deconstructed in German private law into
  - 1 obligation transaction: the purchase agreement (sect. 433 BGB)
  - 2 disposition transactions: the transfer of the ownership of the chocolate bar and of the paid money (sect. 929 BGB)
  - plus 2 physical actions: the delivery of the chocolate bar and the money (required in sect. 929 BGB)

e) ADDITIONAL QUESTION: Your comment: Would you recommend to follow this approach? (/ 8 p. extra)
- clear statement? deep/original/sufficient/superficial reasoning?

II. Adjustment with regard to compliance with general standards of legal writing +- 0 points

- adjustment by deducting or adding points only in the ***exceptional case*** *of considerable positive or negative deviation* from what can be expected in this course (for a grading with the points achieved under I.), also with regard to international standards and practice

a) Precise and concise answer to the exam question: **(/-20 to +10 p.)**
- does paper answer exactly what has been asked for and is confined to it? Are there irrelevant parts diluting the answer?

b) Correct focus on the main aspects: **(/+-10 p.)**
- answer focused on most relevant points, avoiding imbalanced presentation?

c) Clear and consistent structure: **(/+-10 p.)**
- answer sufficiently and clearly structured into parts & sub-parts? in case of fundamental errors: (/-20 p.)
- answer structured logically consistently, reflecting dogmatic structure?
- headlines precise & well-coordinated?

d) Legal methodology skills: **(/-10 to +20 p.)**
- precise work with the relevant legal norms?
- only legal reasoning, exact, precise and transparent, showing methodological sovereignty?

e) Objective, conscise and precise style of writing: **(/+-10 p.)**
- answer concise & succinct? Legal norms specified exactly?
- no emotional expressions, strong language, exaggerations or subjective style?

Note: With regard to the small number of less than 30 students in the course, this grading does not follow the grading concept of grading on a curve (Bell curve). After the final examination, the average of the points achieved in the two exams will be converted in grades in letters (A, A-, B+, B, B-, C+, C, C-, D+, D- etc.), following the general grade-rating letter system of this University. See on the details the Syllabus for this course (part IV.)

§ 8 Private autonomy and its limits

I. The concept of private autonomy [Privatautonomie]

- definition: the right to organise one's own legal relations in free self-determination and self-responsibility in legal transactions
- a concept deeply rooted in the political-philosophical approach of *liberalism* and the idea of *individual self-determination* from the era of Enlightenment, presupposing that human action is based on free will and reason
- most important part: the *freedom of contract* [Vertragsfreiheit]

II. Private autonomy as the fundamental idea behind the Civil Code

- not explicitly proclaimed but taken for granted in the German Civil Code
  - see, for example, sect. 311(1) BGB
- the basic and dominating idea behind the whole Civil Code, which in most cases links legal consequences to a legal transaction, based on one or more freely made declarations of intent
  - in particular the fundamental idea behind the law of obligations
- a considerable amount of freedom granted by private law, already at a time when no fundamental rights were guaranteed in the constitution

III. Private autonomy as a fundamental right and a threat to fund. rights

1) Private autonomy as a fundamental right under the Basic Law

- private autonomy as part of the general freedom of action (art. 2(1) BL)
  - comprehensive but easily restrictable to protect private rights or public interests
- protection of a core of private autonomy as part of human dignity (art. 1(1) BL)
  - cannot be eliminated, even not by constitutional amendment (→ art. 79(3) BL)
- stronger protection in special contexts by other fundamental rights as lex specialis
  - e.g. by freedom of occupation (art. 12(1) BL), for employment contracts and professonal contracts
  - e.g. by freedom of science (art. 5(3) BL), for third-party funding contracts in the area of research & teaching
  - e.g. by protection of marriage (art. 6(1) BL), for marrying

2) Private autonomy as a fundamental right under European Union law

- private autonomy as part of the freedom to conduct a business (art. 16 ChFR)
  - weak protection: only in accordance with Union law and national laws and practices
- protection of a core of private autonomy as part of human dignity (art. 1 ChFR)
- stronger protection in special contexts by other fundamental rights as lex specialis
- protection as a recognised general principle of European Union law (art. 6(3) EU Treaty, ECJ, case C-240/97, Spain vs. Commission, no. 99)

3) Private autonomy as a threat to fundamental rights

- although primarily an expression of freedom & self-determination, private autonomy can also endanger them and other fund. rights:
- the power to shape one's own legal relations inevitably involves the *power to influence the legal relations and* thus the *living conditions of others*
- this impact *cannot always be justified* by referring to the others' "self-responsibility"
  - as the actual circumstances, esp. economic *power imbalances* (between employer & employee, landlord & tenant, provider & consumer etc.) often do not allow to reject a defavourable offer
  - or the other party lacks the necessary insight to actually act as a self-responsible partner

- moreover, selective exercise of private autonomy can lead to *discrimination*
- therefore, legislation and jurisprudence have defined ***limits of private autonomy***
  - by introducing special rules for the protection of potentially weaker partners
  - by setting or recognising certain rules in the Civil Code as mandatory (ius cogens)
  - by assessing unfair contract clauses imposed by abuse of economic power as invalid
  - by stating an obligation to contract [Kontrahierungszwang] of important providers
  - esp. in the fields of labour law, residential tenancy law, consumer protection law, data protection law and anti-discrimination law

IV. The social state principle as a limit to private autonomy (art. 20(1) BL)

- one of the fundamental values and ideas that define the constitutional identity of the state
  - the German implementation of the European value of solidarity/social security, social justice and social cohesion
- includes the constitutional *mandate of the state to actively shape the social conditions*
  - not only but also by the way of limiting or directing private autonomy
  - can justify fundamental rights restrictions in support of weaker or disadvantaged groups of persons in economic life (employees, tenants, consumers, minorities...)

V. Fundamental rights as a limit to private autonomy

1) Limitations by the indirect horizontal effect of fundamental rights and the state's duties of protection

- in principle, fundamental rights have only an *indirect horizontal effect* among the citizens: they do not directly bind the citizen but must be taken into account by the legislator when making the law and by the courts when interpreting and applying it
- moreover, where the private autonomy is abused to encroach on the fund. rights of others, e.g. by forcing unfair conditions that hinder their free exercise in the future, the state must intervene actively to protect these rights (*duties of protection*)
- this may cause the legislator to adopt new laws and the courts to reconsider their interpretation of legal norms, esp. indefinite legal terms

2) Direct limitations under fundamental rights

- such fund. rights clauses are rare, since they amount to the opposite of a classic fund. rights norm: not a guarantee of freedom but a *prohibition by fundamental right*
- the Basic Law only includes one such clause (art. 9(3) phrase 2 BL)
- the ***Charter of Fundamental Rights of the European Union***, following a more modern approach, focuses more strongly on the defence against threats emanating from private parties and therefore *expressly prohibits*
  - eugenic practices, in particular those aiming at the selection of persons (art. 3(2) lit. b ChFR)
  - making the human body and its parts as such a source of financial gain (art. 3(2) lit. c ChFR)
  - the reproductive cloning of human beings (art. 3(2) lit. d ChFR)
  - human trafficking (art. 5(3) ChFR)
  - the employment of children (art. 32 sub-sect. 1 phrase 1 ChFR);

  this includes the prohibition and thus invalidity of respective agreements

VI. The problem of restricting private autonomy to protect it against itself

1) The question

- does private autonomy need protection against itself, i.e. against the conclusion of contracts that bear the risk of practically destroying it?

2) The example of personal guarantees (suretyships) by close family members with little income for the high debts of their family

a) Facts of the cases

- young adults with small income guarantee under the moral pressure of family relations for their parents' or husband's very high business bank loans, because the bank insists on it
- later the parents/husband go bankrupt, the guarantors will not be able to pay off the debt during their life and consequently they will be insolvent and thus practically unable to make use of their private autonomy again for the rest of their life

b) The old practice of the FEDERAL COURT

- the Federal Court had considered the guarantee valid and enforceable
- it argued that private autonomy included the right of the "responsible contract partner" to assume the most severe liability risks regardless of his own economic capacity

c) The position of the Federal Constitutional Court (BVerfGE 89, 214)

- the Federal Constit. Court required a *content review of the guarantee (suretyship) contract* with regard to the general clauses in private law, such as sect. 138 BGB (invalidity for offending common decency) and sect. 242 BGB (performance in good faith), with the result to free the young adults from their debt
- it argued that the *state must preserve private autonomy* from de facto overriding by dominant contract parties; if one party is structurally inferior, the private law system *must* react in a protective and, if necessary, corrective manner

d) Problem: substantive or procedural solution?

- a problem concerning the sensitive relationship between constitutional and civil law jurisdiction
- does the protection of private autonomy against itself require under all circumstances a solution under substantive private law (denying a valid legal obligation of the young adults) or would a procedural solution (e.g. permanent non-enforcement of the civil court judgement) be sufficient?
- what if the guarantor later inherits a large fortune and can easily pay the debt?
- should this question be decided by the constitutional or civil court?

§ 9 The conclusion, validity and content of a contract

- a contract is a bilateral or multilateral legal transaction, in which a legal result is to be achieved by (at least two) concurring declarations of intent

I. The conclusion of the contract through *offer and acceptance*

(sect. 145 et seq. BGB)

1) The offer (sect. 145, 146 BGB)

- the offer must be intended to be binding
  - therefore, it must be specific and contain all necessary details
- preparatory business activities do not yet constitute an offer
  - the advertisement online, in a newspaper or on the street is not yet binding
  - the display of goods in a store only constitutes an *invitatio ad offerendum*
    - the invitation to the customer to make an offer himself
    - the actual offer then consists of the customer placing the goods on the counter at the checkout
    - the store is still free to deny to sell the displaid goods

2) The acceptance (sect. 147 - 142 BGB)

- the offer needs to be accepted in due time (sect. 147, 148)
- the offer must be accepted exactly as it is
  - an "acceptance" altering the offer is considered a counteroffer, which then the original offerer can accept or reject (sect. 150(2))
- overt and hidden lack of agreement:
  - if parties have not agreed on a point on which agreement was considered necessary by one of them, the contract is, in case of doubt, not concluded (sect. 154)
  - if parties 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)

3) The receipt of offer and acceptance

- both declarations of intent must not only be concurring but also need to be received by their respective addressee to become effective (see sect. 130 BGB and supra, § 5 II.2.b)

II. The validity of the contract

1) Contractual capability

- both parties need contractual capability, i.e. the *capacity to perform legal acts* [Geschäfts-fähigkeit] (see supra, § 4 III)
- contracts concluded by minors generally require prior consent or subsequent approval of their legal representative (sect. 107 et seq. BGB, see supra, § 4 III)

2) No lack of form (sect. 125 BGB)

- a special form of the contract is only necessary if prescribed by statute or agreed (cf. sect. 126 - 127 BGB)
- a contract missing the legally prescribed form and in case of doubt also a contract missing the agreed form is void
- the prescribed form has the function
  - to warn the parties
  - to provide evidence
  - in the case of notarial recording to ensure professional advice

3) No violation of statutory prohibitions (sect. 134 BGB)

- a contract violating a statutory prohibition is void
- but this only applies if the prohibition is directed precisely against this legal transaction, not only against the circumstances
  - e.g. a service contract to kill someone or a purchase contract on drugs
  - e.g. not the contract to buy a beer in a bar that has exceeded legal closing time

4) No offence of common decency [Sittenwidrigkeit] (sect. 138 BGB)

- a contract offending common decency (an agreement contra bones mores) is void
- decisive criterion: "the legal and moral instincts of all just and reasonable citizens"
  - they can change over time; example: prostitution contracts (valid contracts today)
- examples:
  - usury (sect. 138(2))
  - adhesion contracts unreasonable restraining trade or competition [Knebelungsverträge]
  - contracts supporting criminal activities
  - contracts incompatible with fundamental rights as objective values in the legal system or with other constitutional values

III. The interpretation of the contract (sect. 157 BGB)

1) General principles

- in principle, application of the common methods of legal interpretation (→ diagram 2)
- but interpretation as required by *good faith*, taking into consideration *customary practice*

2) Filling gaps by "supplementary interpretation" ["ergänzende Vertragsauslegung"]

- often the contracts do not provide provisions for certain issues that can occur in practice
- if the Civil Code does not provide a solution, the judge will fill in the regulatory gaps in the contract by supplementing the parties' intentions and eliminating contradictions
- the judge must proceed with caution so as not to uninentionally change the content of the contract; he may not disregard in any way the will of the contracting parties

IV. General terms and conditions [Allgemeine Geschäftsbedingungen] (sect. 305 et seq. BGB)

1) The issue of general terms and conditions

- an area of contract law with high practical importance, formerly regulated in a special law, since 2001 in the Civil Code
- general terms and conditions are (usually extensive collections of) provisions that have been pre-formulated by one party for the use in many cases and are incorporated into the contract without negotiation with the partner when the contract is concluded
  - e.g. in annexes to offers, displays in the shop or pop-up sites requiring agreement when installing apps or software
- general terms and conditions are often unfair because in business life the customer has virtually no choice to reject them; therefore, the law needs to regulate them

2) Restrictions on general terms and conditions in the German Civil Code

- individually agreed terms have always priority (sect. 305 BGB)
- surprising and ambiguous provisions will not form part of the contract (sect. 305c BGB)
- 15 different types of unfair provisions are strictly prohibited and thus invalid (sect. 309 BGB)
- 9 types of often but not always unfair provisions require valuation by the interpreter with regard to both parties' interests and are invalid in case of negative valuation (sect. 308 BGB)
- for other provisions there is a *general content check*: any provisions that *unreasonably disadvantage* the other party contrary to good faith, are invalid (sect. 307 BGB)

V. Special rules for consumer contracts [Verbraucherverträge] (sect. 312 et seq. BGB)

- background: strong expansion of consumer protection law in the last 30 years, *caused by the approximation of laws in the European internal market by EU legislation* (art. 114 et seq. FEU Treaty), which aims at a high level of consumer protection (art. 114(3))
- consumer contracts are concluded between a trader (acting in exercise of his trade, business or profession) and a consumer (acting privately) (see legal definition in sect. 310(3) BGB)
- special rules apply when *consumer pays* a price, regardless whether *in money or personal data* (sect. 312(1, 1a) BGB)
- these special rules do not follow the Civil Code's traditional approach of abstract regulation but are complicated, detailed and specifi
- *enforcement by consumer rights associations*: according to the *Consumer Rights Enforcement Act* [Verbraucherrechtedurchsetzungsgesetz] of 2023, registered consumer protection associations are entitled to initiate *class actions* or *model declaratory actions* to enforce consumer law; moreover, they can initiate *actions for injunction* against certain business practices violating consumer rights (e.g. unlawful general terms and conditions) under the *Act on Injunctive Relief* [Unterlassungsklagengesetz]

1) Principles applying in general to consumer contracts

- *detailed information obligations* of the trader on his identity, essential characteristics of the goods or services, the total price, the contract period, the consumer's right of withdrawal (where applicable) and other issues (sect. 312a(2) BGB, art. 246 Introductory Act to the Civil Code)
- a trader contacting a consumer by phone call to conclude a contract must *disclose* from the start his *identity and* the *commercial purpose* of his call (sect. 312a(1))
- extra payments by the consumer need to be agreed on expressly (sect. 312a(3))
- trader must provide customary payment method free of charge (sect. 312a(4))
- hotline for contract issues must be free (sect. 312a(5))

2) Special rules for special types of consumer contracts

- stricter special rules for ***off-premises contracts*** (concluded outside the trader's business premises) and ***distance contracts*** (concluded via telecommunication) (sect. 312b et seq. BGB)
  - more extensive information obligations, for a better protection against common unfair business tricks (sect. 312d BGB, art. 246a, 246b Introductory Act Civil Code)
  - ***right of withdrawal*** within 14 days (sect. 312g, 355(2) BGB)
- special rules for ***e-commerce contracts*** and *online marketplaces* (sect. 312i et seq. BGB)
  - e.g. mandatory option to terminate contract at the website (sect. 312k(2))
- special rules for consumer contracts on digital products (sect. 327 et seq. BGB), consumer credit agreements (sect. 491 et seq. BGB), contracts for delivery by instalments (sect. 510 et seq. BGB) and consumer construction contracts (sect. 650i et seq. BGB)

VI. Special rules against discrimination: the General Act on Equal Treatment

[Allgemeines Gleichbehandlungsgesetz]

- further reading: see the Guide to the General Equal Treatment Act
- a law once adopted for the implementation of four EU directives
- a law against discrimination on grounds of *race, ethnic origin, gender, religion, worldview (ideology), disability, age or sexual orientation* (cf. sect. 1),
  - in professional life, social security and education (cf. sect. 2 no. 1 - 7),
  - in business life for the supply with publicly available goods and services, incl. housing (cf. sect. 2 no. 8)
- *prohibition of disadvantageous treatment of employees* on the prohibited grounds (sect. 7)
  - except in case of narrowly defined justifying reasons (sect. 8 - 10)
- employer must take necessary measures to protect against discrimination (sect. 12)
- employees have right to complain, to refuse performance and to compensation in case of discrimination, and must not be disadvantaged for asserting their rights (sect. 13 - 16)

- *prohibition of disadvantageous treatment in private-law relations* on the prohibited grounds
  - when founding, executing or terminating *bulk businesses* or insurances (sect. 19(1))
  - on grounds of race or ethnic origin also when founding, executing or terminating other obligations under sect. 2(1) no. 5 to 8 (sect. 19(2))
  - except in case of narrowly defined justifying reasons (sect. 19(3-5), 20)
- discriminated persons can demand within two months the stop of the discriminatory conduct, sue for an injunction and require compensation of damages (sect. 21)
  - in litigations reversal of burden of proof if facts suggest that there has been a discrimination (sect. 22)
- discriminated persons can be supported - also before the courts - by anti-discrimination organisations (sect. 23)
- Federal Anti-Discrimination Agency with Independent Federal Commissioner for Anti-Discrimination for the promotion of equal treatment at work and in everyday life (sect. 25 et seq.)

(Datei: Slide 9 (GermanPrivateLaw))

§ 10 Performance and irregularities in the performance

I. The duty to perform (sect. 241 et seq. BGB)

1) General aspects

- by virtue of an obligation [Schuldverhältnis], a creditor (obligee) is entitled to claim performance from the debtor (obligor) (sect. 241(1))
- the substance of both parties' performances is usually specified precisely in the contract
  - within the limits drawn by mandatory provisions in the Civil Code
  - where necessary complemented by dispositive provisions in the Civil Code
  - the parties can leave the specification of the renumeration, as consideration (performance in return) for one party's performance, to this party
    - in case of service contracts (e.g. for medical treatment or transport) or contracts to produce a work (e.g. to repair a car) the renumeration must then follow existing tariffs or the usual renumeration (sect. 612(2), 632(2) BGB)
    - where such standards do not exist, it must be determined in reasonable exercise of discretion (sect. 315 BGB)

2) Specific obligation and obligation in kind [Stückschuld & Gattungsschuld]

- in case of a *specific obligation (determinate obligation)*[1], the debtor owes a specific thing
  - e.g. his own, five years old Porsche car, or a famous painting
- in case of an *obligation in kind (indeterminate obligation)*[2], the debtor ows a thing or a quantity of things of a certain category/class
  - e.g. a new Porsche 718 Cayman, model 2024, or 10 kg apples
  - in this case, the creditor is not interested in a specific thing but in any thing of this category
  - the debtor mus supply a thing of the relevant category/class of average kind and quality (sect. 243(1) BGB)
- in case of a *limited obligation in kind*, the debtor ows a thing or a quantity of things of a certain category/class, but only out of a certain stock
  - e.g. "... as long as stock lasts"
- consequences of the distinction: in both cases, the debtor does not need to perform if the performance is impossible (sect. 275 BGB), but...
  - in case of a specific obligation this is the case if the specific thing has gone
    - the seller's own, five years old Porsche car has been stolen, lost, confiscated or destroyed in an accident
  - in case of an obligation in kind this is not the case, as long as things of its category/class are still available on the market
    - the seller whose new Porsche 718 Cayman has been stolen from his business premises needs to buy another one to supply it to the buyer
  - the debtor can, however, transform his obligation in kind into a specific obligation by the way of *specification* (sect. 243(2) BGB)
    - "doing what is necessary on his part to supply such a thing"
    - apart from chosing an object from his stock, the requirements depend on the agreed modalities of delivery:

3) Place of performance

- an important issue in the performance of purchase agreements
- three different constellations:

a) Debt to be collected [Holschuld]

- the standard constellation, relevant unless otherwise specified (sect. 269 BGB)
- debtor performs and fulfills his obligation at his place
  - by separating the owed good and keeping it ready for collection
- creditor must pick up the goods at the debtor's place

---

[1] In English, also the term "obligation to supply ascertained goods" is common.

[2] In English, also the terms "generic obligation" or "obligation to supply unascertained goods" are common.

b) Debt to be delivered [Bringschuld]

- debtor performs and fulfills his obligation at the creditor's place
  - by bringing the good to the creditor's place
- applies also to payment obligations: debtor bears risk and costs of the money transfer to the creditor's place (sect. 270 BGB)

c) Debt to be sent [Schickschuld]

- debtor performs his obligation at his place
  - by separating the owed good at his place and sending it via a transport company to the creditor's place
- however, the obligation is fulfilled at the creditor's place
  - since the creditor will only become owner of the product when it is handed out to him (cf. sect. 929 BGB)
- the risk (of loss or damage) devolves to the creditor once the debtor has delivered the good to the transport company (sect. 447)
  - exception: purchase of consumer goods (sect. 475(2) BGB)

4) Time of performance

- if not specified or evident from the circumstances, debtor may perform and creditor demand performance immediately (sect. 271 BGB)
- special regulations for a number of particular types of contracts
- non-performance of a due obligation despite a reminder constitutes default (sect. 286 BGB)
- the exact time of performance can be absolute, so that any later performance will not fulfill anymore the obligation
  - example: booking of a place at the apartment window for the time of a carnival parade in the street

5) Order of performance

- the principle: *debtor must perform when performance is due*
  - non-performance after a reminder of the creditor will put him in default (sect. 286 BGB)
- exception: *right of retention* [Zurückbehaltungsrecht] (sect. 273 BGB), if
  - debtor and creditor have claims against each other (reciprocity)
  - debtor's own claim is due, at least in case of own performance (maturity)
  - both claims result from the same legal relationship (connectivity)
    (interpreted genenerously: any internal, natural resp. economical connection)
  - retention not excluded by agreement or the kind of obligation
- exception: *objection (defence) of unperformed reciprocal contract* (sect. 320 BGB), if
  - there is a reciprocal contract (performance promised for the sake of consideration)
  - there is a synallagmatic relationship between the refused and requested performance
  - requested performance is due (maturity)
  - debtor not obliged to perform in advance
- exception: *objection of uncertainty* (sect. 321 BGB), if claim to consideration will apparently be jeopardised by the other party's inability to perform
- in case of these exceptions, in court proceedings the court will not order performance per se but *concurrent (step by step) performance* (sect 274, 322 BGB)

II. In particular: the duty to perform in good faith (bona fides) [Treu und Glauben]

Sect. 242 BGB: "The debtor is obliged to perform the obligation in accordance with the requirements of good faith, with due regard to common usage."

- one of the most important provisions in the German Civil Code, preventing unfair solutions under private law, correcting distorted results of a schematic application of the Civil Code and serving as important gateway for the practical effect of the fundamental rights in private law
- based on an indefinite legal concept that needs to be concretised permanently, also with regard to new developments in business life and society, in an abundance of jurisprudence
- excludes any interpretation of contracts in such a way that obligations under the contract would be incompatible with fundamental rights or human dignity as objective values
- complements, *together with sect. 241(2) BGB*, the primary duties under the contract by *secondary (collateral) duties under the contract* to ensure a fair and equitable overall performance
  - duties of loyalty and consideration
    - parties must do everything that favours the contract purpose and refrain from anything that would impair or frustrate it
    - in particular: no venire contra factum proprium (inconsistent, contradictory conduct)
  - duties of due diligence and protection
    - parties must avoid to cause any harm or danger to anyone in all their activities linked to the contract (e.g. keep the premises in safe conditions, use only safe devices)
  - duties of collaboration
    - parties must take any action necessary to ensure that the contract purpose is achieved (e.g. cooperate with authorities, apply for licenses)
  - duties to inform
    - parties must inform each other about the scope, risks and negative effects of performances and decisions or dangers they notice during their performance

III. The debtor's (obligor's) liability for breach of duty

1) The creditor's claim to compensation for damages

- an important general clause on compensation for damages in *sect. 280 BGB*
- if debtor breaches any duty under the obligation, creditor can demand compensation for the caused damages *in addition to performance* if debtor is responsible for the breach of duty (→ see infra, III.2)
- creditor can even claim compensation of *damages in lieu of performance* if
  - debtor does not render/not render correctly performance after creditor has set a reasonable time limit (sect. 281 BGB)
  - debtor has violated a duty of loyalty and consideration and creditor cannot reasonably be required anymore to accept debtor's performance (sect. 282, 241(2) BGB)
  - debtor does not need to perform because it is impossible (sect. 283, 275 BGB)
- damage: any involuntary loss of assets
- causality: if, according to general life experience, breach of duty is likely to bring about an outcome of this kind (theory of adequacy [Adäquanztheorie])

2) The debtor's responsibility for intent and negligence (sect. 276 - 278 BGB)

- if not agreed or resulting from the obligation otherwise, debtor is only liable in case of *fault* (intent and negligence)
  - strict liability (liability without fault) only in exceptional areas, under special legislation
- negligence: the failure to exercise the care required in business dealings (sect. 276(2))
  - in some rare cases, special provisions require gross negligence for liability
- debtor also liable for fault of his legal representative or *vicarious agent* [Erfüllungsgehilfe], i.e. a person whose services he uses to perform the obligation (sect. 278)
  - in particular liability for fault of sub-contractors and employees

IV. The creditor's (obligee's) right of rescission in the case of irregularities in performance (sect. 323 - 326 BGB)

- a special option, limited to reciprocal contracts
- does not presuppose fault of the debtor
- the rescission [Rücktritt] invalids the contract ex nunc and transforms the original obligation into an obligation to reverse the contract (details regulated in sect. 346 BGB)
  - it does not exclude a possible claim for compensation of damages (sect. 325 BGB)

1) Rescission for non-performance or incorrect performance (sect. 323 BGB)

- if performance is due and debtor does not perform or not perform correctly, creditor may, after setting a reasonable additional period of time, rescind the contract
  - except if creditor is responsible for the circumstances that would entitle him to do so (sect. 323(6))
  - under certain circumstances, setting an additional period of time may be dispensed (sect. 323(2))
- debtor may already rescind before performance is due if it is obvious that the prerequisites for rescission will be met (sect. 323(4))

2) Rescission for violation of a duty of loyalty and consideration (sect. 324, 241(2) BGB)

- if, after a violation of such a duty, creditor can no longer be reasonably expected to uphold the contract, he may rescind it

3) Rescission in case of debtor's impossibility of performance (sect. 326(5), 275(1-3) BGB)

- if debtor does not need to perform because performance is impossible, creditor does not need to perform consideration (cf. sect. 326(1)) but also has the option to rescind the contract

V. Impossibility of performance [Unmöglichkeit] (sect. 275, 283 - 285, 311a, 326 BGB)

- note: besides the following general rules there are special rules for the most important kinds of contracts

1) Objective and subjective, initial and subsequent impossibility of performance

- performance is impossible if it cannot be rendered for factual or legal reasons
- it may be impossible for the debtor (*subjective impossibility*) or for everyone (*objective impossibility*)
- performance may have been impossible from the beginning (*initial impossibility*) or become impossible after the contract was concluded (*subsequent impossibility*)

2) Release of the debtor from the duty to perform (sect. 275(1) BGB)

- no duty of performance where performance is impossible! (→ impossibilium nulla est obligatio)
- besides, *debtor may refuse an unreasonable performance* in case of
  - *de facto impossibility:* performance would require grossly disproportionate expenditure
    - sect. 275(2) BGB; example: the owed but lost ring lies on the ground of a lake
  - *impossibility for personal reasons:* a significant impediment turns the performance of a debtor who needs to perform in person unreasonable (requires balancing with creditor's interests)
    - sect. 275(3) BGB; example: serious illness of a close family member

3) Release of the creditor from consideration (sect. 326(1-4) BGB)

- except if creditor is responsible for the impossibility of performance, or in default, or demands the surrender of a substitute benefit

4) Right of the creditor to rescind the contract (sect. 326(5) BGB)

5) Secondary claims of the creditor

a) Claim for surrender of a substitute benefit (sect. 285 BGB)
- e.g. of insurance benefits for the stolen car

b) In case of original impossibility: claim for compensation for damages in lieu of performance or reimbursement of futile expences (sect. 311a, 284 BGB)
- contract is valid but limited to secondary claims
- creditor can chose between the two options
- claim does not require debtor's responsibility for the impossibility of his performance
- but no claim if debtor can prove that he was not aware of the impediment preventing performance when he concluded the contract, and not responsible for his lack of awareness (sect. 311a(2))

c) In case of subsequent impossibility

aa) **Claim for compensation of damages in lieu of performance** (sect. 280(1, 3), 283 BGB)
- only if debtor is responsible for the impossibility, i.e. he or his vicarious agents have caused it intentionally or negligently (cf. sect. 280(1) phrase 2, 276, 278 BGB)

bb) **Claim for reimbursement of futile expences** (sect. 284 BGB)
- creditor can choose this option as alternative to the claim for damages
  - consequently, it also requires responsibility of the debtor for the impossibility
- reimbursement of expences made in reliance on receiving performance

VI. Failure to perform in time (default) [Verzug] (sect. 286 BGB)

1) Requirements for debtor's default

a) **Non-performance** of the debtor

b) **Maturity**

c) **Reminder** (sect. 286(1))
- in certain cases not necessary (cf. sect. 286(2))
- in business life often replaced by a formal reminder notice served by the court for easier enforcement [Mahnbescheid] (sect. 286(1) phrase 2)
- alternatively in case of *claims for payment:* **expiry of 30-days period** after receipt of invoice or statement of payment (sect. 286(3))
  - in case of a consumer only if consequences specifically noted in the document

d) **Responsibility** of the debtor for the delay (sect. 286(4))

2) Legal consequences of debtor's default

a) Claim for compensation for damage caused by the delay (sect. 280(2), 286 BGB)
- in addition to the claim for performance
- includes the costs for the reminder or for a debt collection agency

b) Claim for compensation for damages in lieu of performance (sect. 280(1, 3), 281 BGB)
- only after creditor has set a resonable time limit (sect. 281(1) phrase 1)

c) Claim for default interest (sect. 288, 286 BGB)
- with increased interest rate (sect. 288(1) phrase 2)
- even claim for a lump sum of 40 € (sect. 288(5))

d) Right to rescission for non-performance (sect. 323 BGB)
- possible in addition to claiming compensation of damages (sect. 325 BGB)

VII. Defective performance (cf. sect. 280(1, 3), 281(1), 282, 241(2) BGB)

- the practically important liability for "positive breach of contract" [positive Vertragsverletzung], developed by judicial further development of law but after 100 years finally incorporated into the German Civil Code
- performance is rendered, even in time, but "not rendered as owed"

1) Case groups

a) Liability for violation of a secondary (collateral) duty [Nebenpflicht] (see sect. 241(2) BGB)
- of a duty of loyalty and consideration, due diligence and protection, collaboration or information

b) Liability for malperformance [Schlechtleistung]
- performance has been rendered, but not correctly
  - e.g. some of the delivered goods are damaged or there are bugs in the delivered food

2) Legal consequences

- note: concerning malperformance, there are also special rules for particular kinds of contracts

a) Claim for compensation for damages (sect. 280(1) BGB)

b) Claim for compensation for damages in lieu of performance (sect. 280(1, 3), 281 BGB)
- creditor must first set a reasonable time limit for supplementary performance (sect. 281 BGB)

c) Right to rescission for defective performance (sect. 323 BGB)
- creditor must generally first set a reasonable time limit for supplementary performance (sect. 323(1) BGB)
- possible in addition to claiming compensation of damages (sect. 325 BGB)

3) Special case: pre-contractual liability (culpa in contrahendo)

(sect. 280(1) read together with sect. 241(2) and 311(2, 3) BGB)
- another legal institution developed by judicial further development of law and after 100 years finally incorporated into the Civil Code
- already before a conctract is concluded, contract negotiations, a certain initiation of a contract or similar business contacts create a *pre-contractual obligation* (sect. 311(2)) with collateral duties (cf. sect. 241(2)) - even with third persons (sect. 311(3))
- violation of these duties leads to a *claim for compensation for damages*, even if later a contract is not concluded

VIII. Creditor's default (sect. 293 et seq. BGB)

- the non-acceptance of the debtor's factually and correctly offered performance by the creditor
  - in particular failure to collect the goods provided by the debtor (cf. sect. 295 BGB)
  - also if creditor does not offer the consideration in a case of concurrent (step by step) performance (sect. 298 BGB)
  - no creditor default: if debtor was actually incapable of effecting performance (sect. 297)
- dogmatically not a breach of a contractual obligation but neglect of a responsibility that is in the creditor's own interest [Obliegenheitsverletzung]
- legal consequences:
  - debtor may still demand consideration (sect. 326(2) BGB)
  - debtor henceforth only responsible for intention and gross negligence (sect. 300(1))
  - in case of an obligation in kind, risk of loss or destruction moves to creditor (sect. 300(2))
  - debtor entitled to abandon possession of land or a ship (sect. 303)
  - debtor may deposit valuables, securities and other documents at the depository (sect. 372 BGB)
  - debtor may claim compensation for extra expenses (sect. 304)

§ 11 The most important types of contracts regulated in the German Civil Code

I. Purchase (sales) contract [Kaufvertrag] (sect. 433 et seq. BGB)

- profoundly modernised by the reform of the law of obligations in 2001
  - in particular the specific rules for irregularities of performance
- special rules for special types of purchase (sect. 454 et seq. BGB): purchase on approval, preemption, purchase of consumer goods (sect. 474 et seq.)
- purchase contracts for plots of land (real estate) must be notarised (sect. 311b BGB)

II. Lease (rental) contract [Mietvertrag] and usufructury lease contract [Pachtvertrag] (sect. 535 et seq., 581 et seq. BGB)

- comprehensive special rules for the lease of residential space (sect. 549 et seq. BGB), providing strong social protection to the lessee (tenant)

III. Service contract [Dienstvertrag], esp. employment contract [Arbeitsvertrag] (sect. 611 et seq. BGB)

- incl. employment contract (sect. 611a BGB and extensive special legislation)

IV. Contract to produce a work [Werkvertrag] (sect. 631 et seq. BGB)

- profoundly modernised in 2017
- a contract obliging the contractor to produce a promised work
  - e.g. to produce something, repair something, transport something/someone somewhere
  - the renumeration is not paid for the service but for its results
- special rules for construction contracts, construction contracts with consumers, contracts for architectural and engineering services and developer contracts

V. Loan contract [Darlehensvertrag] (sect. 488 et seq. BGB)

VI. Others

- gratuitous loan (sect. 598 et seq. BGB)
- donation (sect. 516 et seq. BGB)
- agency contract (sect. 675 ets seq. BGB)
- payment services contract (sect. 675f et seq. BGB)
- package travel contract (sect. 651a et seq. BGB)
- others (see comprehensive and detailed regulations in Book 2, Division 8 BGB)

Prof. Dr. Thomas Schmitz — Spring Semester 2024

GERMAN PRIVATE LAW

concerning § 12 of the course

Case 1

(facts of the case)

A runs a coffee shop in an office district. In the early mornings, he does not work there himself, but rather his employee, student B. In winter, B also has the task of safely clearing the entrance area of all snow and ice before opening the coffee shop.

B is a very reliable, careful employee. But one early morning, he is not so fit because he has been partying all night. He ignores that dangerous black ice has formed at the entrance area, which is very slippery but very difficult to notice by passers-by. So he opens the coffee shop without taking any measures against the ice. Five minutes later, student C approaches, urgently in need for a coffee, but she slips on the ice, falls down and completely breaks her brand new glasses.

C wants A to reimburse her for the costs of a new pair of glasses because the entrance area of his coffee shop had not been cleared from the black ice, but A refuses to do so. He argues that she should have been more careful herself and that he, A, has done nothing wrong. He points out that not him but his employee B has been working in the coffee shop on this morning and that he, A, has chosen his usually reliable and careful employee carefully.

1. Does C have a claim against A for reimbursement of the costs of new glasses?

2. How is it if B forgot to clean the entrance are of normal ice that had formed in the night after snow had thawed during the day, but C did not notice the ice because she was looking at her smartphone?

Outline of the case solution

Subjects: Claims for compensation of damages under the law of obligations; defective performance: liability for the violation of a collateral duty; pre-contractual liability (culpa in contrahendo); contributory negligence.

A. Question 1: Claim for compensation of damages for breach of duty under sect. 280(1) phrase 1 BGB after C slipped on black ice

- Introductory sentences:[1] Since C slipped on the ice, fell down and broke her glasses in the entrance area of A's coffee shop when she was on the way to buy a coffee there, she may have a claim against A for compensation for the costs of new glasses, in the form of a *claim for compensation of damages for the breach of a duty arising from an obligation* under sect. 280(1) phrase 1 BGB. This is the case, if (I.) there is an obligation [Schuldverhältnis] between A and C, (II.) A has breached a duty arising from this obligation, (III.) A is responsible for this breach of duty, (IV.) the breach of duty has caused a damage and (V.) the claim is not excluded in the given case because C should have been more careful herself.

I. Obligation between C and A: (+)[2] (→ sect. 280(1) phrase 1 BGB)

1) Obligation arising from a purchase contract between C and A (sect. 433 BGB): (-)

- C wanted to buy but had not yet bought a coffee in A's coffee shop when she slipped on the black ice

2) Pre-contractual obligation (sect. 311(2) BGB): (+)

- an obligation with limited duties can already come into existence before an intended contract is concluded
- here: creation of a pre-contractual obligation by the *initiation of a contract* [Anbahnung] *by entering the business premisses* (entrance area) of A's coffee shop (cf. sect. 311(2) No. 2 BGB)

II. Breach of a duty arising from this obligation: (+) (→ sect. 280(1) phrase 1 BGB)

- pre-contractual obligations are limited to collateral duties under *sect. 241(2) BGB*
- here: breach of a *duty of due diligence and protection*: to keep one's business premises in safe conditions, in order to avoid harm or danger to customers
  - sect. 241(2) does not oblige to prevent damage from customers at all costs, but to take measures that are necessary and reasonable (not out of proportion)
  - here : despite the danger caused by the slippery and difficult to notice black ice, *no measures* were *taken at all*:
    - neither was the entrance area cleared of the black ice,
    - nor was it closed, nor the customers warned of the black ice

---

[1] Note: The *introductory sentence* is essential because it *presents* without unnecessary explanations the *structure of the following examination*, which must follow the dogmatic structures of the relevant law. A precisely formulated introductory sentence may facilitate the understanding of the case solution considerably, in particular for non-experts in the field (such as clients, managers or heads of departments). If a single sentence would become too long and complicated, two introductory sentences may be appropriate.

[2] Note: Introductory sentences do not only make sense at the very beginning of the examination but also at the beginning of major parts of the examination. Each major part needs to finish with a *concluding sentence*, that indicates clearly, which sub-question has been answered (in which context) with which result. This is important for the orientation of the reader.

III. Responsibility of A for the breach of the duty: (+) (→ sect. 280(1) phrase 2 BGB)

1) Responsibility of A for own fault (sect. 276(1) phrase 1 BGB): (-)

- here relevant: fault in the form of negligence
- A himself *did not act negligently himself* but had entrusted his employee B with the task of keeping the entrance area clear from snow and ice

2) Responsibility of A for the fault of his employee B: (+)

a) Fault of B (cf. sect. 276(1, 2) BGB): (+)

- here in the form of *negligence* (failing to exercise the care required in business dealings, sect. 276(2) BGB):
- B acted carelessly, failing to take any measures against the dangerous black ice, although this was obviously necessary and also reasonable to prevent harm from persons entering the entrance area
- the fact that he was not fit that morning, because he had been partying all night before, explains but does not exclude, justify of excuse his negligence

b) Responsibility of A for the negligence of B (sect. 278 phrase 1 BGB): (+)

- A is not only responsible for own fault but also for the fault of his *employee B* as his ***vicarious agent***
- unlike in torts law (cf. sect. 831(1) phrase 2 BGB), carefully selecting and supervising the vicarious agent does not exempt the principal from liability
  - so A's objection is irrelevant

IV. Damage caused by the breach of duty: (+) (→ sect. 280(1) phrase 1 BGB)

1) Damage: (+)

- damage is any involuntary impairment of assets, here: the *complete breaking of C's glasses*, which makes it necessary to buy new ones

2) Causality: (+)

- the breach of duty is the cause of the damage if, *according to general life experience, it is likely to bring about* an outcome of this kind (theory of adequacy [Adäquanztheorie])
- this is the case, since every year, numerous people slip and fall down on uncleaned ice in shop premises and break their glasses, watches, smartphones, legs...

V. Claim not excluded for contributory negligence (sect. 254 BGB): (+)

- the claim for compensation for damages is excluded or reduced, if *fault on the part of the injured person* contributed to the occurence of the damage
  - this raises the question if C should have been more careful herself when stepping into the coffee shop's entrance area
- exclusion of the claim would presuppose that the damage was totally or largely caused by the claimant; this is evidently not the case
- moreover, there is no indication in the facts that C might have walked carelessly (e.g. too fast, inattentively or with inappropriate shoes)
  - the *mere fact that C slipped cannot be interpreted as contributory negligence*

- **Result:**[3] C has a claim against A under sect. 280(1) phrase 1 BGB for full reimbursement of the costs of new glasses as compensation for damages for breach of duty.

---

[3] Note: Every case solution must be concluded with a concluding sentence, often a cascade of concluding sentences, leading to and presenting the final result. Make sure that the concluding sentence answers exactly the question raised in the introductory sentence!

B. Question 2: Claim for compensation of damages for breach of duty under sect. 280(1) phrase 1 BGB after C slipped on normal ice when looking at her smartphone

- C may have a claim against C under sect. 280(1) phrase 1 BGB for the same reason as under question 1, but since she slipped on normal ice, which she could have noticed easily but did not notice because she was looking at her smartphone, her claim may be excluded or reduced for *contributory negligence* under sect. 254 BGB.
- As under question 1, A is responsible for his employee's B breach of a duty under a pre-contractual obligation with C (cf. sect. 311(2), 241(2), 276(1, 2), 278(1) phrase 1 BGB) and must in principle compensate the damage (the costs for new glasses) caused by this.[4]
- However, looking at the smartphone when walking outside in times of snow and ice, when attention should focus on the ground, constitutes a *significantly careless and thus negligent behaviour of C*, which is likely to have contributed to the accident to the same extent as B's failure to clear the entrance area from the ice.
- On the other hand, it does not supersede, neutralise or excuse the other side's negligent acting.
- So all in all, in this case the negligence at both sides leads to an *equally shared liability* and thus a reduction of C's claim for compensation by 50 percent.[5]
- **Result:** C has a claim against A under sect. 280(1) phrase 1 BGB for reimbursement of *50 %* of the costs of new glasses as compensation for damages for breach of duty.

[4] Note: Concerning these aspects, there are no differences between questions 1 and 2. Consequently, it is not necessary to repeat the comprehensive examination above, but it can be summarised in one precisely formulated sentence.

[5] The German jurisprudence on contributory negligence in case of slipping on ice is abundant but heterogeneous. The question must be answered individually for each case, with due regard to its specific circumstances.

§ 13 Other fields regulated in the German Civil Code

I. Unjustified enrichment [Bereicherungsrecht] (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 by far most difficult area within German private law
- partially above all 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 *"condictions"* ["Kondiktionen"], i.e. claims to surrender the benefit, following the model of Roman law
  - *performance condictions*: of benefits obtained through claimant's performance (several subtypes)
  - *condictions by other means*: after an encroachment on claimant's rights (interference condiction), after claimant has performed an obligation for someone else (recourse condiction) or for expenses to improve things of someone else (condiction for expenses)
- important exception: *no claim for surrender if* and to the extent that the recipient is *no longer enriched* (sect. 818(3) BGB)

II. Law of torts [Recht der unerlaubten Handlungen] (sect. 823 et seq. BGB)

- liability for wrongful acts: under the Civil Code only 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
    - practically important: 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 for criminal offences
- liability for intentional (!) damaging offending common decency (sect. 826 BGB)
- liability under special clauses (sect. 824, 833 et seq. BGB)
  - for endangering credit, of animal keepers, of land owners etc.

III. Property law [Sachenrecht] (Book 3, sect. 854 est seq. BGB)

- 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 defendable 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*, except if the thing was stolen, missing or lost in another way (sect. 932, 935 BGB)
  - of a plot of land by agreement (recorded by a notary) and registration in the Land Register (sect. 873 BGB)

IV. Family law [Familienrecht] (Book 4, sect. 1297 et seq. BGB)

- regulation of 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* [Zugewinngemeinschaft] 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

V. Law of succession [Erbrecht] (Book 5, sect. 1922 et seq. BGB)

- the law on the devolution of the inheritance from the decedent to his legal successor, the heir
- guiding principles: universal succession, testamentary freedom, inheritance by family (at least the compulsory share)
- unless otherwise provided in a [last] will, the deceent's spouse inherits ½ of the inheritance (¼ as inheritance + ¼ by equalisation of accrued gains), alongside the decedent's descendents
- *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)
  - can only be deprived of that in serious exceptional cases that usually involve a criminal offence
- 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

§ 14 Important fields regulated in special legislation

I. 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
  - commercial law also applies 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, as necessary in the economic process, is provided by the
  - *Commercial Register* of merchants [Handelsregister], operated by the local district courts
  - *Company Register* [Unternehmensregister] with more comprehensive information, operated by the Federal Ministry of Justice (sect. 8, 8b Commercial Code)

II. Corporate law (company law) [Gesellschaftsrecht]

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

1) Capital based corporations [Kapitalgesellschaften]

- membership based purely on monetary participation; pay own taxes (see supra, § 4.I.2)

a) 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)

b) Stock corporation [Aktiengesellschaft (AG)]

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

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

- a combination of limited and unlimited liability (→ sect. 278 et seq. Stock Corporation Act)

2) Personal partnerships with partial legal capacity [Personengesellschaften]

- act through their partners, who are fully liable (see supra, § 4.I.3)

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

- with or without legal capacity

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

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

c) 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)

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

III. Labour law [Arbeitsrecht]

- combines elements of private law and public law
- structured into individual labour law and collective labour law
- important special legislation (selection):
  - Employment Protection Act [Kündigungsschutzgesetz]
  - Occupational Safety and Health Act [Arbeitsschutzgesetz]
  - Working Hours Act [Arbeitszeitgesetz]
  - Posted Employees Act [Arbeitnehmer-Entsendegesetz]
    (on mandatory working conditions for foreign employees posted in Germany)
  - Collective Agreements Act [Tarifvertragsgesetz]
  - Works Constitution Act [Betriebsverfassungsgesetz]
    (on employees' participation in company management via an elected Works Council [Betriebsrat])
  - Co-determination Act [Mitbestimmungsgesetz]
    (on employees' participation in the management of large companies via elected representatives in the Board)

IV. Civil procedural law [Zivilprozessrecht]

- the law on the court proceedings in private law before the ordinary courts
  - district courts [Amtsgerichte]
  - regional courts [Landgerichte]
  - higher regional courts [Oberlandesgerichte]
  - Federal Court [Bundesgerichtshof] (the supreme court in private law matters)
- includes the law on the *compulsory enforcement* (foreclosure) [Zwangsvollstreckung]
- regulated mainly in the *Code of Civil Procedure* [Zivilprozessordnung]
- procedural maxims:
  - principle of party disposition [Dispositionsmaxime]
    - parties shall determine initiation, subject matter and end of the proceedings
  - principle of production of evidence by the parties [Beibringungsgrundsatz]
    - it is for the parties to adduce evidence of the facts of the case
  - principle of orality [Mündlichkeitsgrundsatz]
    - judgment may only take into account what is presented at the oral hearing (which may, however, refer to documents)
  - principle of immediacy [Unmittelbarkeitsgrundsatz]
    - oral hearing & taking of evidence before the deciding court
  - principle of public trial [Öffentlichkeitsgrundsatz]
  - right to be heard before the courts (sect. 103(1) BL)
  - principle of trying to concentrate the procedings in one oral hearing [Konzentrationsgrundsatz]
  - right to a fair trial

V. Private international law (law of conflicts) [Internationales Privatrecht]

- regulated in sect. 3 et seq. of the 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)

Name:

Result: / 100 points (= 50 % of final grade) **30.04.2024,** Thomas Schmitz

Special comments

Prof. Dr. Thomas Schmitz Spring Semester 2024

GERMAN PRIVATE LAW

Final examination

(100 points = 50 % of the final grade)

The law of obligations, especially contract law, has a major influence on civil life. Contracts are concluded and fulfilled daily, again and again. Mostly, everything goes smoothly. Sometimes, however, the owed performance ist not performed or not performed correctly. Then we need the expertise of the lawyers:

1. Which are the main groups of *irregularities in performance* distinguished in the German general law of obligations? Please describe them briefly! (50 of 100 points)
2. In which cases of irregularity of performance can the creditor *rescind the contract*? (20 of 100 points)
3. Please discuss *debtor's default* and *creditor's default* under German private law (definition, dogmatic classification, requirements and legal consequences)! (30 of 100 points)
4. ADDITIONAL QUESTION: Which provision in the German Civil Code is the *general legal basis for claims for compensation of damages* under the law of obligations, and which two other provisions are closely related to it?
   (short answer is sufficient; up to 15 extra points)

Note: This is an academic examination. Please write in legible handwriting and present your text in an appealing form. Read the questions very carefully and think carefully before you formulate your answers. Make sure that your text answers precisely the questions, is concise, has a clear and consistent structure with well-formulated precise headlines and shows well your deeper understanding of the subject matter. After the exam, all students are welcome to contact me to discuss in detail the strong and weak points of their paper (e-mail: tschmit1@gwdg.de; phone/WhatsApp: +7 775 364 2384).

This is a closed-book exam. However, as in any law exam, students are allowed to use the text of the law (here: the German Civil Code [Bürgerliches Gesetzbuch]).

The topics were discussed extensively in the lectures and in ***Slide 10 ("Performance and irregularities in the performance")***, parts III. - VIII., which is available for download at the course website (www.thomas-schmitz-astana.kz/Courses/German_Private_Law.htm). See also the links to further resources at the course website.

I. Allocation of points: /100 points

1. The main groups of irregularities in performance **(/50 points)**

a) Non-performance (when performance is still possible) (/ 7 p. extra)
- only irregularity in performance in wide sense - creditor can still require performance

b) Impossibility of performance (sect. 275 BGB) (/ 16 p.)
- different case-groups
- release of debtor from duty to perform (sect. 275 BGB)
- release of creditor from consideration (sect. 326(1-4) BGB)
- right of creditor to rescind the contract (sect. 326(5) BGB)
- secondary claims, in particular for compensation

c) Failure to perform in time (default/debtor's default) (sect. 286 BGB) (/ 12 p.)
- only after *reminder* / other aspects:

d) Defective performance (/ 14 p.)

aa) Violation of a secondary (collateral) duty (see sect. 241(2) BGB) (/ 7)
- also *pre-contractual* violation (culpa in contrahendo) (/ 4 extra)

bb) Malperformance (/ 7)

e) Creditor's default (sect. 293 et seq. BGB) (/ 8 p.)
- non-acceptance of offered performance / other aspects:

2. The creditor's *right of rescission* in case of irregularities of performance (sect. 323 - 326 BGB) **(/20 points)**
- limited to reciprocal contacts (but does not presuppose debtor's fault) (/ 2 p.)

a) In case of *non-performance or incorrect performance* (sect. 323) (/ 8 p.)
- after setting reasonable additional period of time / other aspects

b) In case of *violation of a duty of loyalty and consideration* (sect. 324, 241(2)) (/ 5 p.)
- if creditor can no longer reasonably be expected to uphold contract

c) In case of debtor's *impossibility* of performance (sect. 326(5), 275(1-3) BGB) (/ 5 p.)

3. Debtor's default and creditor's default (sect. 286 et seq., 293 et seq. BGB) **(/30 points)**

a) Debtor's default (sect. 286 et seq. BGB) (/ 15 p.)
- dogmatically a breach of a contractual obligation
- definition/requirements: non-performance of a due performance (→ maturity) after reminder; responsibility
- legal consequences: claim for compensation for damage / others:

b) Creditor's default (default in acceptance) (sect. 293 et seq. BGB) (/ 15 p.)
- dogmatically not a breach of a contractual obligation but neglect of own responsibility
- definition/requirements: non-acceptance of correctly offered performance by creditor / other aspects:
- serious legal consequences: still duty to consideration / debtor may claim compensation for extra expenses / others:

4. ADDITIONAL QUESTION: the general legal basis for claims for compensation of damages (/15 extra points)
- legal basis: sect. 280 BGB (/ 8 p.)
- closely related: sect. 276 BGB (liability only for fault = intention or negligence) (/ 4 p.)
- closely related: sect. 278 BGB (liability also for fault of vicarious agent) (/ 3 p.)

II. Adjustment with regard to compliance with general standards of legal writing +- 0 points

- adjustment by deducting or adding points only in the ***exceptional case*** *of considerable positive or negative deviation* from what can be expected in this course (for a grading with the points achieved under I.), also with regard to international standards and practice

a) Precise and concise answer to the exam question: **(/-20 to +10 p.)**
- does paper answer exactly what has been asked for and is confined to it? Are there irrelevant parts diluting the answer?

b) Correct focus on the main aspects: **(/+-10 p.)**
- answer focused on most relevant points, avoiding imbalanced presentation?

c) Clear and consistent structure: **(/+-10 p.)**
- answer sufficiently and clearly structured into parts & sub-parts? in case of fundamental errors: (/-20 p.)
- answer structured logically consistently, reflecting dogmatic structure?
- headlines precise & well-coordinated?

d) Legal methodology skills: **(/-10 to +20 p.)**
- precise work with the relevant legal norms?
- only legal reasoning, exact, precise and transparent, showing methodological sovereignty?

e) Objective, conscise and precise style of writing: **(/+-10 p.)**
- answer concise & succinct? Legal norms specified exactly?
- no emotional expressions, strong language, exaggerations or subjective style?

Note: With regard to the small number of less than 30 students in the course, this grading does not follow the grading concept of grading on a curve (Bell curve). After the final examination, the average of the points achieved in the two exams will be converted in grades in letters (A, A-, B+, B, B-, C+, C, C-, D+, D- etc.), following the general grade-rating letter system of this University. See on the details the Syllabus for this course (part IV.)