

# § 2 Introduction to the German Civil Code

[Bürgerliches Gesetzbuch (= BGB)]

## I. Historical background

- in the early 19<sup>th</sup> 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 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 Juris 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]

- possession [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 Civil 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, consistent 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 [Wohnungseigentumsgesetz]
  - 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