German Civil Code

Bürgerliches Gesetzbuch (BGB)

Volume I
Books 1–3: §§ 1–1296

Article-by-Article Commentary

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Nomos

Preface

No other legislation can rival the *Bürgerliches Gesetzbuch* (BGB) as the embodiment of 'Law made in Germany'. Historically rooted in 19th century pandectist scholarship, it keeps a decidedly 21st century outlook due to modern reforms and the integration of consumer law.[1] No other codification has been equally relevant for legal education, legal methodology, and legal practice in Germany. It eclipses other codifications in the sheer volume of transactions and occurrences which it covers, and accompanies the population of Germany from the cradle (in § 1) to the grave (in Book 5 on successions).

Since its enactment in 1900, the BGB has inspired legislators and scholars well beyond the borders of Germany, from the early influence of the BGB on the Civil Codes of Japan, Greece and Korea up to the recent codification of the General Part of the new Chinese Civil Code. Mutual influences between the BGB and EU law, and between the BGB and the recently partially reformed French Code civil, can be added to this list.

While the BGB has been translated numerous times and into many languages, it is almost surprising that the present book is the first which attempts to provide a comprehensive and systematic explanation of the BGB and its ongoing development through courts and scholars in the modern *lingua franca*, English. The present volume covers general rules, the law of obligations and property law; the second volume will include family and inheritance law.

This book is addressed to readers who are not familiar with German law, as well as to readers who work with German private law in an English language environment. We found this to be a highly challenging task, not least because the BGB relies heavily on concepts[2] which are often equally difficult to translate and to explain. No doubt improvements can be made, and we are very grateful for any suggestions from our readers.

We owe an enormous gratitude all those who have made this commentary possible. It is the brainchild of Dr. Wilhelm Warth from the publishers, C.H. Beck, who provided constant and valuable support throughout, and who even compiled the index. Dr. Jonathon Watson, a true Anglo-German lawyer, played a decisive role as assistant editor. We are also very grateful to our many dedicated contributors, not only because they have written most of this book, but also for many productive discussions, and especially for their patience. We are grateful that we were allowed to use the translation of the BGB that was initially provided in 2007 for publication on gesetze-im-internet.de by Langenscheidt Translation Service and updated until 2013 by Neil Musset and Carmen v. Schöning.[3] We also thank the publishers, C.H. Beck, and especially Thomas Klich, whose skill, enthusiasm and constant support is greatly appreciated. Last, but by no means least, we are very grateful to our helpful student assistants: to Christoph König for the compilation of a terminology synopsis, and to Lorenz Böttcher, Madalina Luca and Sarah Meyer for their valuable support in the editing process.

Some unplanned events have unfortunately delayed the publication of this book. The commentaries reflect the law on 31 December 2018, whereas subsequent changes in legislation were incorporated until 31 December 2019.

Gerhard Dannemann and Reiner Schulze
Berlin and Münster, April 2020

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[1] See -> Introduction, mn. 25–27.
[2] See -> Introduction, mn. 28.
[3] See -> Introduction, mn. 62–65.

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Introduction

Contents

I. An English language commentary on the German Civil Code

The present book is the first English language commentary on the *Bürgerliches Gesetzbuch* (BGB), the German Civil Code. It has been written specifically for readers who are familiar with neither the German language nor German law. Section by section, it presents the German original together with an English translation and explains scope, context, meaning, terminology, relevance and practical application. The present volume includes the first three books of the BGB, namely the General Part *(Allgemeiner Teil)*, the Law of Obligations *(Schuldrecht)*, and Property Law *(Sachenrecht)*. A second volume will complete the commentary with the two remaining books, namely Family Law *(Familienrecht)* and the Law of Succession *(Erbrecht)*. **1**

The *Bürgerliches Gesetzbuch* became the **cornerstone of German civil law** when it was enacted on 1 January 1900. It has since been applied in millions of cases and amended dozens of times. Scholarly contributions on the BGB fill a large library. Several dozens of commentaries have been written on the BGB, many continue to appear. **2**

From early on, the **Anglophone world took considerable interest**. In 1904, *Frederic William Maitland* showered the BGB with praise.[1] In 1905, *Edward Jenks* presented a digest of English civil law which was arranged according to the structure of the General Part of the BGB.[2] The first English translation of the BGB and the first English language textbook on the new German civil law both appeared in 1907.[3] Much more has since been written in the English language on German civil law in general, and the BGB in particular. It is therefore almost surprising that it took almost 120 years after the BGB entered into force for the first English language commentary to appear. **3**

Commentaries on legislative enactments are written in many legal systems, but they take traditionally a **particular place in the development of German law**. This is where, section by section, legislation meets case law and scholarly contributions. Authors show how courts are applying and developing the BGB, presenting the interaction between individual provisions and judgments and discussing how the law could or should be developed in the future. The proximity to legislation as primary source of law, with every single sentence being addressed, has for long made commentaries key to the development of German law. For most practitioners, scholars and students, they provide the first point of reference for specific legal enquiries. **4**

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[1] Fisher (ed.), The Collected Papers of Frederic William Maitland, Vol. III (CUP 1911), p. 463. This article, *The Laws of the Anglo-Saxons* first appeared in 1904 in the Quarterly Review.

[2] Jenks, A Digest of English Civil Law, Book I: General (1905).

[3] Wang, The German Civil Code. Translated and annotated with an historical introduction and appendices (Steven & Sons 1907); Schuster, The Principles of German Civil Law (Clarendon 1907).

5 While all commentaries blend legislation, case law and scholarly writing, there is quite some **variety in emphasis**. Some commentaries are reference works which primarily aim to present the law as it is, but not without noting gaps and proposing solutions for disputed issues. Some of these are predominantly written by judges, as is the case for what is arguably the most frequently used of all German commentaries, the *Palandt*.[4] Others, predominantly written by academics, but frequently also involving practitioners, extend their views of *the law as it is* to a systematic presentation of ongoing or past debates, with a critical evaluation even of well-settled case law. Some commentaries are very comprehensive and extensive; *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* runs over 73,000 pages.[5] The *Münchener Kommentar zum Bürgerlichen Gesetzbuch* comprises around 30,000 pages.[6] The present commentary has no such ambition; in size, it perhaps compares best to the commentary founded by *Othmar Jauernig*,[7] a **handy reference guide** which is popular with practitioners, academics and students.

6 However, the present book is very different from an English translation of one of the existing German language commentaries. These are written for readers who are trained in the German law, who are generally familiar with the legal institutions and the terminology employed by the BGB and how it is embedded in the German legal system. Even BGB commentaries written specifically for students expect their readers to have acquired this basic knowledge through lectures and textbooks. It was therefore **out of the question just to translate** an existing BGB commentary into the English language.

7 Compared to existing BGB commentaries, the present book presents in more detail the **function and scope** of BGB provisions and how they relate to other parts of the BGB. It explains in more detail the numerous **concepts** which the BGB employs throughout, and the terminology which it uses. **Comparative references**, notably to French and English law, and the Draft Common Frame of Reference for European Private Law (DCFR) are added where appropriate. The present commentary also focuses more on explaining the law as it is applied by the courts, and less on academic debates, although these are referred to where they illuminate the present law, relate to unresolved legal issues, or where existing commentaries provide a more detailed exposition.

8 Its style is otherwise in line with that commonly employed by other BGB commentaries. While all efforts are made to make existing German civil law understandable to readers who are not German lawyers, this should not be misunderstood as an attempt to bring German law in line with international legal harmonisation projects, or even to anglicise German law. The law as presented in this book is as **authentic** as that presented in German language BGB commentaries. This is why this book should also be useful to German lawyers who use German law in an Anglophone environment, whose task may be to write English language contracts governed by German law, to explain German law to clients, or to present German law in English language arbitration or court proceedings. The book can thus be seen in the context of *Law – Made in Germany* as an effort to make German law attractive to international audiences.

II. The BGB in the German legal system today

9 Private law forms one of the main areas of the German legal system and is to be distinguished from public law. This commentary concerns the heart of German private law: the BGB. Whereas **private law** determines an individual's rights and duties in relation to others, **public law** often just entitles and obliges the state (or another public body) within the legal relationship, subject to regulation. The distinction between private and public law and their concepts can be traced back to the Roman jurist, *Ulpian*. Indeed, most continental

[4] Palandt, Bürgerliches Gesetzbuch mit Nebengesetzen (79th edn, C.H.Beck 2020).

[5] J. v. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen (13th et seq. adaptation, Sellier-de Gruyter 2000–2018).

[6] Münchener Kommentar zum Bürgerlichen Gesetzbuch (7th edn, C.H.Beck 2015–2018).

[7] Jauernig, Bürgerliches Gesetzbuch: BGB (17th edn, C.H.Beck 2018).

European legal systems, and other legal systems which they have inspired, are underpinned by Roman law to a much larger degree than legal systems based on English common law.

Bürgerliches Recht is a part of German private law which contains general rules applicable, in principle, to legal relationships between individuals. *Bürgerliches Recht* is often translated as *civil law*, and indeed used as a synonym for *Zivilrecht*. However, *Bürgerliches Recht* reflects a clearer distinction from those areas of law which only apply to specific groups and particular social and economic relationships, such as commercial law as the 'law of merchants', competition law (which includes unfair competition and restraints of competition), banking law, insurance law, and labour law (of which some is regulated in the BGB's provisions on service contracts). Such areas of law do indeed form part of private law, though are often referred to as *Sonderprivatrechte* (literally: *special private laws*) in order to distinguish them from *Bürgerliches Recht* as *general private law*. **10**

The BGB codifies the core of civil law, which is expressed by the title *Bürgerliches Gesetzbuch* and its translation as *German Civil Code*. The **BGB** divides the topics into five broad areas, each referred to as a *Book*. **Book I** is the *Allgemeiner Teil* (General Part), which contains rules that apply, in principle, to Books II–V, and also to other areas of private law. Consolidating the general rules in one book reflects a drafting method whereby general provisions are placed before specific provisions (*vor die Klammer ziehen* – the German mathematical expression for factorising, i. e. finding a common denominator and placing this outside of brackets).[8] **Book II** concerns *Schuldrecht* (Law of Obligations). It is divided into general rules applicable to all or several types of obligations (divisions 1–7; §§ 241 et seq.) and specific rules for individual types of obligations (division 8; §§ 433 et seq., including various types of contract, benevolent interventions, unjustified enrichment and tort).[9] **Book III** concerns *Sachenrecht* (Property Law) and contains rules on ownership, possession, restricted real rights to land and movables, and securities in land, movables and other rights.[10] **Book IV** contains provisions of *Familienrecht* (Family Law) and is divided into three broad divisions on marriage, kinship, guardianship, legal curatorship and custodianship. Finally, **Book V** covers *Erbrecht* (Law of Succession) with regard to succession, legal position of the heir, will, contract of inheritance, compulsory share, unworthiness to inherit, renunciation of inheritance, certificate of inheritance, and purchase of an inheritance. **11**

The BGB's provisions on substantive law are **supplemented** by rules in the *Einführungsgesetz zum bürgerlichen Gesetzbuche* (EGBGB; Introductory Act to the Civil Code) for private international law (Arts 3 et seq. EGBGB) and for conflicts between previous enactments and subsequent amendments (*intertemporal law*; Arts 219 et seq. EGBGB). Several additional statutes in the field of civil law are described as **ancillary** with regard to their relationship to the BGB. Such 'ancillary statutes' are often a reaction to new social challenges (in particular the 1919 *Erbbaurechtsgesetz* and the 1951 *Wohnungseigentumsgesetz*). Numerous 'ancillary statutes' fully or partially serve the transposition of EU directives into German law (such as the ProdHaftG, the AGG, and the UKlaG). **12**

The majority of **EU consumer law directives** (especially consumer contract law) have been transposed into the BGB. Initially, the German legislator favoured transposition via individual statutes (in contrast to the approach of a 'Consumer Code' as favoured in other EU Member States). This changed, however, with the 2002 modernisation of the law of obligations, which integrated consumer law into the BGB. The BGB thereby retains its central importance for the numerous day-to-day transactions that citizens conclude as consumers (§ 13). BGB provisions which implement EU consumer law directives change more frequently and are also more detailed than is typical for other provisions of the BGB. Some of the burden which such detailed and changing rules would impose on the BGB was **13**

[8] See → mn. 28–34 for the various techniques employed by the BGB for allocating rules to the highest possible level.

[9] See → mn. 35–44 for a more detailed overview of Book I.

[10] See → mn. 45–53 for a more detailed overview of Book II.

avoided by using instead the EGBGB for transposing EU law, in particular as concerns information duties (Arts 242 et seq. EGBGB). Consequently, consumer law provisions in the BGB are often supplemented by additional rules in the EGBGB.

14 The BGB does not regulate how its rights and duties are to be enforced in a dispute before the courts. It focuses rather on substantive law, as most laws in the continental-European tradition. The provisions concerning **judicial procedures** are to be found in other codes, in particular in the *Zivilprozessordnung* (ZPO; Code of Civil Procedure) and in the *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* (FamFG; Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction). **Court jurisdiction** and composition is regulated in the *Gerichtsverfassungsgesetz* (GVG; Courts Constitution Act). According to § 13 GVG, the *ordinary courts* have *jurisdiction over civil disputes*. Ordinary courts of first instance are the *Amtsgericht* (AG; Local Court) and the *Landgericht* (LG; Regional Court). The latter is court of first instance for *disputes concerning claims involving an amount or with a monetary value not exceeding the sum of five thousand euros* (§ 23 No. 1 GVG). Furthermore, it is a court for appeals on fact and law *(Berufungsgericht)* with regard to first instance judgments from the *Amtsgericht* (§ 72 (1) GVG). The *Oberlandesgericht* (OLG; Higher Regional Court) hears appeals on fact and law from first instance judgments from the *Landgericht* (§ 119(1) No. 2 GVG). Appeals on points of law *(Revision)* against OLG judgments may be lodged at the *Bundesgerichtshof* (BGH; Federal Court of Justice) pursuant to § 133 GVG.

15 Specific provisions apply to **family law** disputes. The *Amtsgericht* is court of first instance, but the *Oberlandesgericht* has jurisdiction with regard to legal remedies *(Rechtsmittel)* (§ 119 (1) No. 1 GVG). A separate jurisdiction with three instances was created for **labour disputes**: *Arbeitsgericht* (ArbG; Local Labour Court), *Landesarbeitsgereicht* (LAG; Regional Labour Court) and *Bundesarbeitsgericht* (BAG; Federal Labour Court).

III. The process of drafting and enactment of the BGB

16 The prominent role played by the BGB in the German legal system is explained not only by its position within the legal framework but also by its **historical importance**. The BGB entered into force on 1 January 1900 and was understood as a decisive contribution towards the development of uniform law for Germany. To a certain extent, the BGB represented the **keystone** in the architecture of the national law that had arisen since the formation of the German Empire in 1871.

17 **Uniform law** had already existed in the German Empire in 1871, or shortly thereafter, i.a. through its constitution, common commercial law (on the basis of the *Allgemeines Deutsches Handelsgesetzbuch*, which applied since 1861 in almost all German states) and a uniform criminal law (*Strafgesetzbuch für das deutsche Reich* from 15 May 1871). By 1877 the *Reichsjustizgesetze* had created common rules for court structure and procedural law. However, the constitution did not afford the German Empire the **competence** to legislate in the field of civil law. Different laws therefore continued to exist across the individual states and in part within the different regions of these states (e.g. the *Preußisches Allgemeines Landrecht*, the *bayerische Codex*, the *Sächsische Bürgerliche Gesetzbuch*, the French *Code civil* also applied in some parts of Western Germany, and also *gemeines* (common) law based on Roman law and German legal traditions). National legal opinion in the late 19th century viewed this fragmentation as an obstacle to the development of trade and a common market within the national framework. Moreover, examples from other countries (such as the French *Code civil* from 1804 and the Italian *Codice civile* from 1865) highlighted the important symbolism of a code for national unity.

18 In 1873, the Empire acquired the competence to legislate in the field of civil law by means of an amendment to the constitution sponsored by the Liberal members of Parliament, *Eduard Lasker* and *Johannes von Miquel*. Work on the first plan of a **draft** *Bürgerliches Gesetzbuch* was undertaken the following year by a pre-commission *(Vorkommission)* before

a commission of judges, civil servants and legal scholars commenced work on the draft itself. This 'first commission' presented its results in 1887 to Chancellor *Otto von Bismarck* and in 1888 published the proposal for legislation with explanatory statements *(Erster Entwurf* with *Motiven)*. These explanatory statements are still used to understand the provisions of the BGB and are referred to as part of the **historical interpretation**. The overall structure of the draft (e. g. the division into five books) and many other aspects are based on notions that had emerged from research in Roman law over the course of the 19th century. The work by *Friedrich Carl von Savigny* (especially his *System des Heutigen Römischen Rechts* from 1840–1849) and subsequent doctrines from *Georg Friedrich Puchta* and other proponents of the *Pandektenwissenschaft* heavily influenced the concepts and principles underpinning the draft and so provided the outline for the *Bürgerliches Gesetzbuch*. Several criticisms were raised during the lively discussion of this draft, i.a. that its wording was too abstract, unwieldy and 'remote from the people', and was too liberal and individualistic as it did not give sufficient consideration to social demands.[11]

19 The draft was revised by a second commission which was largely dominated by civil servants from the *Reichtsjustizamt*. This **second draft** was published in 1895 together with the minutes *(Protokollen)* as explanations. The latter led to a series of changes to the content and wording and, in particular, improved the comprehension of several parts of the text. However, it only gave little consideration to social demands and, in this respect, did not deviate from the main features of the first draft. A **third draft**, which ultimately arose during the legislative process and through controversial discussions in the *Reichstag*, featured several politically motivated changes (especially in the law on associations – *Vereinsrecht*), but brought no fundamental changes to other parts or to the overall structure.

20 The *Reichstag* eventually passed the BGB with a majority from the National Liberal Party and the Centre Party, with the Social Democrats opposing. After approval by the *Bundesrat*, *Kaiser Willhelm II* promulgated the *Bürgerliches Gesetzbuch* on 18 August 1896. The BGB was to enter into force on **1 January 1900**, therefore affording jurists and the public with more than three years in order to become familiar with this new legislation. Its entry into force was met mostly with praise as a 'work of the century' which not only reflected an exceptional undertaking by legal science and the legislator but also expressed national unity.

21 The BGB also received considerable attention **abroad**, even before it entered into force e. g. in the Japanese Civil Code from 1898. The English legal historian, *Frederic William Maitland*, deemed the BGB as 'the best code that the world has yet seen'.[12]

IV. Change

22 The academic foundation through the *Pandektenwissenschaft* since the first half of the 19th century, more than 25 years of legislative preparations, and praise as a 'work of the century' did not prevent the BGB from undergoing diverse and extensive changes since it entered into force. This change was initially foremost apparent in the **courts**, as the legislator originally preferred to regulate new matters outside of the BGB, as in the *Erbbaurechtsgesetz* on hereditary building rights of 1919). Within the first decades of the 20th century, courts and scholars moved well beyond the originally intended meaning and interpretation of BGB provisions and principles and modified its structure with **new concepts**. For example, the new notion of 'an established and active business' *(eingerichteter und ausgeübter Gewerbebetrieb)* made an inroad into the exclusion of tortious liability for pure economic loss originally intended by § 823(1) BGB, and at the same time introduced new terminology. For contractual liability, the BGB provisions on impossibility, delay, revocation, and damages were solidified into an overarching *Leistungsstörungsrecht* ('law concerning the various forms non-

[11] See especially von Gierke, Der Entwurf eines Bürgerlichen Gesetzbuches und das Deutsche Recht (Duncker & Humblodt 1889) and, even more critical, Menger, Das bürgerliche Recht und die besitzlosen Volksklassen (Laupp 1890).

[12] Fisher (ed.), The Collected Papers of Frederic William Maitland, Vol. III (CUP 1911), p. 463.

compliance with contractual obligations')[13] and expanded by the new concept of *positive Vertragsverletzung* ('positive breach of contract').[14] The prominent liberal values espoused by the BGB which frequently left it to individuals to negotiate for their economic well-being were also toned down by the courts, who would sometimes resort to more paternalistic elements for giving more prominence to societal needs. In particular, the broad extension of the principle of *Treu und Glauben* ('good faith') resulted in the judicial development of additional legal institutions such as pre-contractual liability through *culpa in contrahendo* and termination or modification of contracts in case of *Störung der Geschäftsgrundlage* (interference with the basis of the transaction, now § 313). This approach paved the way for the general recognition of protective duties in favour of the other party to a contract (in practice usually the weaker party), and, to a certain extent and mostly indirectly, judicial involvement in the relationship between performance and counter-performance.

23 The **National Socialists** (1933–1944) included the *Bürgerliches Recht* in their efforts towards aligning society and the legal system with national socialist ideology. Initially, the BGB was to be replaced with individual pieces of legislation – the racist *Ehegesetz* (Marriage Act) and the *Testamentsgesetz* (Wills Act) were created in 1938 for this purpose. In the long term, leading jurists envisioned a *Volksgesetzbuch* ('People's Code') based on racist and fascist notions which would be linked with a *renovation* of contract and other areas of law. Following the end of National Socialist rule, a committee of the Allied Control Council repealed the provisions in the *Bürgerliches Recht* which were clearly an expression of nationalist ideology.[15]

24 When Germany was divided after the Second World War, the BGB remained applicable in both West and East, but developed differently. The Eastern story is shorter: in the **German Democratic Republic,** the **BGB** was perceived as **remnant of a capitalist society** and even terminologically irritating, as *bürgerlich* translates as *bourgeois*. Efforts to replace the BGB with a socialist codification nevertheless took a long time: it was not until 1976 that a new ***Zivilgesetzbuch*** entered into force. With unification in 1990 the *Zivilgesetzbuch* was again replaced by the BGB, which has since again applied uniformly throughout all parts of Germany. An exception was made, however, for testamentary dispositions made under the ZGB before unification (Art. 235 § 2 EGBGB), to which the ZGB thus still applies. There are some aspects in which GDR reform preceded FRG reform. All legislation discriminating between men and women (including family law provisions) were abolished by Art. 7 of the GDR constitution of 1949. The **1965 codification of family law** *(Familiengesetzbuch)* introduced a no-fault divorce and abolished the distinction between children born within and outside of marriages.

25 Since the **Federal Republic of Germany** was founded in 1949, the BGB gradually experienced the constitutionalisation of private law. In particular, the **basic rights** of the *Grundgesetz* (GG) and the values which it embodies have driven the change in the *Bürgerliches Recht*. This is expressed, for example, in the development of the *Allgemeines Persönlichkeitsrecht* (general personality right) which does not feature in the text of the BGB, but which allowed recovery for both pecuniary and non-pecuniary losses in cases of violations of privacy, even though the BGB sought to limit recovery for non-pecuniary losses in cases of physical injury. In comparison to the BGB's original focus on the protection of property, the courts thus highlighted the protection of personality as one of the tasks for the *Bürgerliches Recht*.

26 **Family law** is an area which has seen considerable extensive legislative changes which have replaced the BGB's original patriarchal structure. Art. 3(2) GG provides not only for equality of men and women with regard to the *civic* rights and duties (as also under the 1919 Weimar Constitution) but also with regard to the *civil* rights and duties. However, the corresponding reform of family law in the BGB was especially slow, subject to controversy, and took many

[13] Stoll, Die Lehre von den Leistungsstörungen (Schriften der Akademie für Deutsches Recht 1936).

[14] Staub, Die positiven Vertragsverletzungen und ihre Rechtsfolgen, in: Festschrift für den 26. Deutschen Juristentag (Guttentag 1902), p. 131 et seq.

[15] In the Federal Republic of Germany, the legislator re-integrated reformed versions of the provisions on marriages and wills into the BGB in 1953.

steps to be completed. The 1957 *Gleichberechtigungsgesetz* (Equality Act) and the 1961 *Familienrechtsänderungsgesetz* (Family Law Amendment Act) removed many, but not all provisions which effectively discriminated between men and women in family law. Similarly, the *Grundgesetz* postulated equality between children born outside of marriage and children born inside of marriage (Art. 6(5) GG). In the implementation of this provision, the legislator was dragging its feet for so long that it took a reminder from the *Bundesverfassungsgericht* (BVerfG; Federal Constitutional Court) until the *Nichtehelichengesetz* (Extra-marital Children Act) was eventually passed in 1969. But it took until 1998 that the *Kindschaftsrechtsreformgesetz* (Act on the Reform of Parent and Child Law) eventually abolished all forms of discrimination of children born outside of marriages. Further key reforms in family law concerned divorce (in particular in 1976 with the transition from fault-based divorce to marital breakdown as reason for divorce), custody (1979), adoption (1970), guardianship (1990/92) and family name (1993). Over the last two decades, German law, in line with developments in many other countries, modified family law to accommodate same-sex couples, first by the introduction of a registered partnership with some marriage features in the 2001 *Lebenspartnerschaftsgesetz* (Civil Partnership Act), and ultimately with the introduction of marriage for same-sex couples (2017).

Alongside family law the **law of obligations** has also experienced considerable changes. In addition to the aforementioned changes, the second part of the 20th century also saw an extension of the scope used by the courts for value-based approaches (e.g. with regard to compensation through the *normativer Schadensbegriff* (normative concept of damage) and the judicial development of compensation for loss of use as a pecuniary damage. Compensation as function of tortious liability was increasingly complemented by prevention, not just in relation to the aforementioned protection of general personality rights, but also more generally in contract law and tort law. In consequence, the BGB gradually moved beyond its original, liberal understanding as a legal framework for self-determined acts of individuals and embraced as an additional function the value-based legislative regulation of the behaviour of interacting participants. This shift in approach of both case law and legislation, exemplified in residential tenancy law, thus strengthened the protective functions of civil law for socially weaker parties and for disadvantaged parties in particular economic situations. This direction was also followed by the development of **consumer law** which, since the 1980s, was shaped by EEC, EC and EU directives and which expressed the significant influence of European legislation on German law. In light of these and other developments, a *Kommission zur Überarbeitung des Schuldrechts* (Commission on the Revision of the Law of Obligations), engaged by the Minister for Justice, focused since 1984 on proposals for a comprehensive reform of the law of obligations. The implementation of several European directives ultimately presented the opportunity to develop the *Schuldrechtsmodernisierungsgesetz* (SMG; Act to Modernise the Law of Obligations) and to allow it to enter into force in 2002. This modernisation of the law of obligations implemented the *Gesetz über Allgemeine Geschäftsbedingungen* (AGBG; Standard Terms and Conditions Act) and several other individual pieces of legislation in the field of consumer contract law (i.a. the *Haustürwiderrufsgesetz* – Doorstep Selling Withdrawal Act, and the *Verbraucherkreditgesetz* – Consumer Credit Act) into the BGB and restructured broad parts of the General Law of Obligations, the law concerning individual types of contract (especially sales and contracts to produce a work), and the law on limitation periods. **27**

V. The style of the BGB

Unlike the French *Code civil*, the BGB made no effort to be understandable to a layperson: it was written by lawyers and for lawyers.[16] It has been hailed for its precision and criticised for its thick conceptual language. The BGB certainly has its own style. The **28**

[16] See → mn. 18.

following **six interacting elements** can be identified:[17] (i) a high reliance on concepts, (ii) a high level of abstraction, (iii) the allocation of rules to the highest possible level using concentric circles and (iv) some overlapping circles of scope, (v) the use of models and cross-references and (vi) a top-down approach with frequent use of general clauses supplemented by specific provisions.

29 The BGB uses numerous **concepts** such as *Rechtsgeschäft* (legal transaction)[18] and *Willenserklärung* (declaration of intent)[19] in order to achieve a **high level of abstraction** of legal rules where e.g. provisions on mistake in § 119 are attributed to *Willenserklärung* and thus apply throughout all five books of the BGB, necessitating exceptions for the rescission of a marriage (which is seen as a contract, but where rescission is disallowed) or a will (which is seen as a unilateral legal transaction) on the ground of mistake.[20] The related principles of separation and of abstraction,[21] which distinguish sharply between the creation of an obligation (e.g., by sales contract) and the change of rights (e.g., transfer of ownership) and which keep apart the validity of each of these separate acts, are another obvious example for the BGB's high level of abstraction.[22]

30 One way of achieving a high level of abstraction (and avoiding repetition), is the way in which the BGB groups its rules in **concentric circles of scope**. A simple transaction such as a sales contract can thus be allocated over up to seven circles of rules which range from the most general to the most specific. The widest of these, circle 1, is formed by rules which apply throughout the entire private law, such as rules on *Rechtsfähigkeit*, the capacity to be subject of rights in private law. These will regulate e.g. whether an unregistered football fan club or its members are such subjects, and can thus also be buyers in a sales contract (see § 54 BGB). Circle 2 contains rules on *Willenserklärungen* (declarations of intent) in §§ 104 et seq., which includes what elsewhere might be seen as core issues of contract law, such as mistake, deceit, and duress, but which in German law apply over all five books of the BGB and indeed throughout private law. Where one or several *Willenserklärungen* mature into a *Rechtsgeschäft* (legal transaction), we have reached circle 3, which contains i.a. rules on illegality in § 134, which again apply over all five books of the BGB and beyond to all private law. Circle 4 is formed by rules which apply to all contracts, such as rules on formation under §§ 145 et seq. These are nevertheless placed in the General Part, not in the law of obligations, because contracts go well beyond obligations and extend to property, family, and inheritance law contracts. Circle 5 is formed by rules on the entire law of obligations, i.e. contract, tort, unjust enrichment and benevolent interventions *(negotiorum gestio)*, including e.g. §§ 249 et seq. on the assessment of damages. Circle 6 is formed by rules on synallagmatic contracts *(gegenseitige Verträge)*, which would e.g. allow a buyer to suspend performance under § 320. The innermost Circle 7 consists of rules which apply to a specific type of contract, such as sales contracts under §§ 433 et seq., where e.g. §§ 446–447 regulate the passing of risk.

31 On closer look, circles 4 (all contracts) and 5 (all obligations) are not concentric, but overlapping, namely in their application to contracts which create, modify or extinguish obligations. The BGB also uses this technique of partially **overlapping circles of scope** for abstracting its rules to the highest possible level. Another example can be found in the transfer of ownership (and title) in moveable property under §§ 929 et seq. which apply regardless of whether this is done under e.g. a sales contract, a donation contract, as part of a barter, for the purpose of providing security, or for a shareholder's contribution in kind.[23]

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[17] Dannemann/Markesinis, The Legacy of History on German Contract Law, in: Cranston (ed.), Making Commercial Law: Essays in Honour of Roy Goode (Clarendon Press 1997), p. 1–29, 16 et seq.

[18] See → mn. 39.

[19] See → mn. 39.

[20] See → §§ 1313, 1314(2) and 2078.

[21] See → mn. 41.

[22] See → mn. 42.

[23] The strict separation between any underlying obligation and the transfer of ownership follows from the principle of abstraction *(Abstraktionsprinzip)*: see → mn. 42.

Finding the largest possible common denominator for rules in circles of higher abstraction is not the BGB's only mechanism for avoiding repetition. Another such drafting mechanism is the use of **models** which are **invoked** in other similar situations **by cross-references**. For example, rules on benevolent intervention *(negotiorum gestio)* in §§ 677 et seq. are modelled on rules on mandate contracts in §§ 662 et seq. Rather than providing a special set of benevolent intervention information duties and remedies, §§ 681, 683 invoke mandate provisions for cases of justified interventions, and unjustified enrichment rules for cases of unjustified interventions, § 684. Within the wider field of restitution type remedies, the BGB has created a total of seven models (unjustified enrichment, unwinding of contracts after termination, benevolent intervention, intentional intermeddling, tort, owner/possessor claims and substitution) which relate and refer to each other.[24] This has led to the infamous use of *Paragraphenketten* – **paragraph chains**. Take the example of A who keeps a bicycle in the reasonable belief of having inherited this from C. When it transpires that C has instead left the entire estate to B, B asks A to surrender the bicycle. Before doing so, A repairs a puncture and seeks recovery from B for parts and labour. § 2021 on possession of somebody else's inheritance refers to § 812 on unjustified enrichment. As A, when repairing the puncture, was aware of B's right, § 819 invokes the *general provisions*, meaning § 292, which refers to property law and in particular §§ 989 and 994(2) on unauthorised expenditure. The latter provision invokes the law of benevolent intervention for the question whether A's repair was justified. Assuming this is the case, § 681 then invokes § 670 on the mandatee's right to recover expenditure – in this case, for parts, but not for labour. This excessive use of cross-references is certainly one of the less attractive aspects of the BGB. Some wisdom can nevertheless be found in the use of models beyond the mere avoidance of repetition, namely by allowing similar cases to be treated and developed by common provisions and case law. **32**

Another defining feature of the BGB is that, in common with many continental codifications, it is largely written top-down, **from general clauses to specific regulations**. General clauses in contract law include § 241 (the duty to perform an obligation in Sub. 1, protective duties in Sub. 2), § 242 (the duty of good faith and fair dealing). Other obligations also use general clauses: § 677 for benevolent interventions, § 812 for unjustified enrichment, § 823 for tort law. Important general clauses in property law include § 854 (acquisition of possession), § 985 (vindication of property), in family law § 1353 (effects of marriage) and § 1626 (parental custody), in inheritance law § 1922 (universal succession). **33**

General clauses are frequently placed at the beginning of a book, division or title. Their often very broad proposition is then hedged, refined, occasionally also extended with more specific clauses, which may then be made even more specific by additional layers of refinement. Some general clauses use innominate terms which invite courts to elaborate the details, as is the case for e.g. §§ 241, 242, 1353 and 1626, but not for e.g. §§ 854, 985 and 1922. The reader of a general clause is well advised to read on for more specific clauses; conversely, whoever first comes across a rather specific rule should look for the context in which this rule is placed. This context is explained in the present commentary. **34**

VI. Books I–III: An overview

Book I, the *Allgemeiner Teil*, is central in expressing the **legal method** and **legislative technique** underpinning the BGB. It contains concepts and rules which apply to all other parts of the BGB – and mostly in the whole of private law. This General Part contains mostly abstract general rules which are placed in the BGB before those parts concerned with separate areas of the *Bürgerliches Recht*. **35**

The provisions in the *Allgemeiner Teil* provide a **conceptual basis** and are therefore to be distinguished from catalogues of principles as well as mere introductory provisions in other civil codes. In contrast to guiding principles, they are not simply an aid to interpretation or a **36**

[24] See → Introduction to §§ 812–822.

guideline for the application of the rules in the other four books of the BGB but are rather **directly applicable provisions**. Unlike a preliminary or introductory part, the *Allgemeiner Teil* does not contain fundamental principles concerning, for example, the application of the BGB when in conflict with foreign or former laws. Such issues are regulated separately in the EGBGB. The *Allgemeiner Teil* is also not concerned with methods of statutory interpretation. The German legislator rather left this task to legal science and the courts. At the time when the BGB was enacted, the traditional *canon* of interpretation was already well established. It proceeded from the literal meaning of a statutory provision, which was to be interpreted taking regard of the legislative context, taking note of the historical intention of the legislator, but above all in light of the purpose which the provision to be interpreted, and the statute in general, aimed to achieve.[25] Courts and scholars have since further developed this traditional *canon* in the light of new circumstances (in particular, the interpretation in conformity with the constitution, the interpretation in conformity with EU law, and the discussion surrounding comparative interpretation).

37 Division 1 of the *Allgemeiner Teil* is concerned with **natural and legal persons** (§§ 1–89). In this respect, the BGB follows a similar approach to most other civil codes. Title 1 on natural persons is, however, broadened by the amendments concerning consumers and entrepreneurs which were added when consumer law was included in the BGB (§§ 13, 14). The provisions on legal persons refer specifically to associations and foundations; the rules for associations, however, apply to other legal persons insofar as no specific rules apply.

38 The provisions on persons are followed by a short division with several definitions and basic rules for **things and animals** as objects allocated to persons by subjective rights (§§ 90–103). The third division concerns the topic central to the *Allgemeiner Teil*, namely legal transactions *(Rechtsgeschäfte)*. Further divisions contain general rules on time and fixed dates (§§ 186–193), limitation (§§ 194–225), prohibition of chicanery, self-defence, necessity, and self-help (§§ 200–231), and the provision of security (§§ 232–240).

39 The provisions on ***Rechtsgeschäfte*** (legal transactions, §§ 104–185) form the core of the *Allgemeiner Teil*, which distinguishes the German BGB from all earlier civil codes. The concept of a legal transaction is based on the notion that (natural and legal) persons can establish legal relationships with others, and determine, transfer and abrogate the content thereof (principle of **private autonomy**). The legal transaction is the **most important legal instrument** made available by the legal system for such acts. Its necessary element is always a *Willenserklärung* (declaration of intent) by at least one person who wants to create a legal consequence within the framework of private autonomy. The legal system therefore considers legal transactions to be declarations of intent which can create direct legal consequences. Unilateral legal transactions *(einseitige Rechtsgeschäfte)* require the declaration of intent from just one person (e.g. a will). Bilateral or multilateral legal transactions *(zweiseitige* or *mehrseitige Rechtsgeschäfte)* consist of two or more declarations of intent (e.g. a contract). The mere presence of the declaration(s) of intent may be decisive for the legal consequence; other requirements may, however, be necessary (e.g. the registration in the Land Register in order to acquire ownership of land, § 873(1)).

40 As concerns the legal consequences of legal transactions, German law distinguishes sharply between ***Verpflichtungsgeschäfte*** (transactions creating an obligation) and ***Verfügungsgeschäfte*** (dispositions over rights). This distinction is central for the structure of the German *Bürgerliches Recht*. The *Verpflichtungsgeschäft* establish obligations whereby one person (*Schuldner* – obligor) is to perform vis-à-vis another party (*Gläubiger* – obligee), such as a sales or service contract which create mutual obligations to perform. In contrast, the *Verfügungsgeschäft* directly affects an existing right through a change in content, transfer, encumbrance or termination, such as the transfer of ownership (§§ 929 et seq.) assignment (§ 398) or by creating a mortgage (§ 1113).

[25] See Dannemann, An Introduction to German Civil and Commercial Law (BIICL 1993), p. 3–5.

In order to achieve the desired outcome – the economic success in the case of a contract – both types of legal transaction are relevant. For example, a sales contract (or a donation) just gives rise to the *Verpflichtung* (obligation) to procure ownership for the other party (§§ 433(1) 1st St.; 516). In addition, a *Verfügung* (disposition) is necessary in order to perform the obligation and to transfer ownership (§§ 929 et seq. for movables, §§ 873, 925 for land). With regard to acquisition of property, the sales (or donation) contract as the *Verpflichtungsgeschäft* and the transfer of ownership as the *Verfügungsgeschäft* are to be viewed as **two separate legal transactions** (*Trennungsprinzip* – principle of separation). Accordingly, performing the obligation to transfer a claim or another right requires the distinction between, on the one hand, the sales contract (§§ 453, 453) as the *Verpflichtungsgeschäft* and, on the other, the transfer of the claim or the other right (§§ 398, 413) as the *Verfügungsgeschäft*. **41**

An important feature of German law is closely related to the distinction between *Verpflichtungsgeschäft* and *Verfügungsgeschäft*. In accordance with the ***Abstraktionsprinzip*** (principle of abstraction) these two legal transactions do not depend on each other in order to exist. For example, the buyer of goods under a void sales contract can still acquire ownership if the transfer is effective according to § 929. This principle aims to ease business dealings as the buyer of goods as owner is in a position to sell the goods to a third party. Subsequent sales to third and fourth parties will therefore not depend on whether the first sales contract was effective, or is later avoided, e.g. due to mistake. While the first seller under a void contract therefore cannot rely on ownership (vindication under § 985) to reclaim the goods, this seller nevertheless has claims under unjust enrichment rules in §§ 812 et seq. This is initially a claim against the first buyer for restitution of the goods in kind (§ 812(1) 1st St.). Once the goods have been acquired by a third party, the first buyer is instead liable for compensation of value (§ 818(2)).[26] **42**

The BGB does not regulate the whole of **contract law** in one separate division. Rather, different aspects are covered in different parts. Title 3 of Division 3 is concerned with the conclusion of contract as a particular type of legal transaction (§§ 145–157). In principle, these provisions apply to the formation of all types of contract irrespective of where they are regulated in the BGB, whether they concern obligations or dispositions, and irrespective of whether the respective contract contains obligations for both parties (bilateral contracts, e.g. sale, rent etc.) or for one party (unilateral contract, e.g. donation, gratuitous loan etc.). It is disputed whether the effects of a binding agreement may arise in particular circumstances without the legal transactions as the basis foreseen in the *Allgemeiner Teil* (*faktischer Vertrag* – factual contract; *Selbstbindung ohne Vertrag* – binding oneself without contract). The courts have recognised this possibility in some specific situations and with particularly narrow requirements (in particular in labour law and company law), but not as a general concept. **43**

The provisions in the *Allgemeiner Teil* concerning contract are limited to the formation of the contract by agreement between the parties, and the interpretation of contracts. In contrast, the provisions on the legal consequences of the conclusion of contract are not contained in the *Allgemeiner Teil*, but are rather to be found in the other Books of the BGB. The general provisions of the Law of Obligations in Book II concerning the **rights and duties** apply to contractual obligations insofar as no other specific provisions apply. **44**

The **Law of Obligations** *(Schuldrecht)* forms the **second Book of the BGB**. As one of the core areas of private law, it concerns the bulk of the law concerning non-corporeal assets (*Vermögensrecht*), in particular the rights and obligations from contracts, the transfer of claims and the assumption of debt, the restitution of unjustified enrichments, and the liability for torts. Its **structure** follows the same pattern adopted across the BGB, namely the regulation of the general before the specific.[27] The first seven Divisions contain the ***Allgemeines Schuldrecht*** (General Law of Obligations), with Divisions 1 and 2 containing provisions concerning the content of all obligations (such as having to perform the obliga- **45**

[26] In some cases, the first buyer may be liable for surrender of a substitute under § 818(1), see → § 818 mn. 7–8.

[27] See → mn. 33.

tion). The provisions applicable to contractual obligations follow in Division 3 (§§ 311–361), which as a 'general law of contract' contains a separate part (Title 2; §§ 320–327) with provisions applicable specifically to reciprocal or synallagmatic contracts (such as sales, services, lease etc.), but not to unilateral contracts such as donation, gratuitous loan and mandate). The extensive Division 8 contains the ***Besonderes Schuldrecht*** (Specific Law of Obligations) with specific rules for numerous different types of separate obligations (§§ 453–853), including some two dozen different types of contracts, benevolent interventions, unjustified enrichment, and tort.

46 The Law of Obligations comprises obligations formed by **legal transactions,** which applies to all contracts, as well as **statutory obligations,** such as torts. The former are created by (natural or legal) persons on the basis of private autonomy, with the contract being the most important instrument for creating such obligations. The principle of **freedom of contract** is central to private autonomy and forms the primary basis for concluding and determining the content of contracts. There are some constitutional restrictions on freedom of contract, which is also limited by other public, by criminal and by other private law provisions. In consequence, the BGB's provisions in the law of obligations are primarily background law which can be altered by way of contract, but this freedom of contract is limited by a number of mandatory rules. Consumer law in particular provides that contractual deviations from statutory provisions are generally permitted only if they are to the advantage of the consumer. Mandatory provisions feature with similar prominence in residential tenancy contracts, and in labour law.

47 Next to contracts, which are bilateral or multilateral legal transactions, the BGB also recognises **unilateral legal transactions** *(einseitige Rechtsgeschäfte)*. Some of these, such as avoidance, revocation or declaration of set-off, can alter existing obligations. But as the example of a promise of a reward (§ 657) shows, the BGB also employs unilateral legal transactions for the creation of an obligation: the promise is effective without any need of acceptance by the promisee.

48 In contrast to obligations which are created by legal transactions, **statutory obligations** are not based on private autonomy, but arise directly from statute by the mere occurrence of certain facts, with statutory provisions determining both requirements and consequences. Statutory obligations include in particular benevolent interventions *(negotiorum gestio)* (§§ 677 et eq.), unjustified enrichment (§§ 812 et seq.), and torts (§§ 823 et seq.). On the borderline to contracts, statutory obligations in the form of pre-contractual liability may also arise by the initiation of a contract or similar business contacts (§ 311(2)). Furthermore, several provisions in the BGB's other Books also give rise to statutory obligations (e.g. the owner-possessor relationship in §§ 987 et seq., maintenance obligations under §§ 1601 et seq., and the claim to a compulsory share in an inheritance under §§ 2317 et seq.).

49 The duties which arise from an obligation can be divided into various different categories. A particular distinction is necessary with regard to *Leistungspflichten* (performance duties) and *Schutzpflichten* (protective duties). The basic rule on **performance duties** (§ 241(1) 1st St.) entitles the obligee to claim performance from the obligor. Such performance duties may concern any conferral of an advantage (e.g. the transfer of ownership of goods, the performance of a service, the payment of the price for goods or services). This basic rule is that an obligee is entitled to performance in kind (specific performance). Exceptions exists for some duties which are to performed personally *(höchstpersönlich)* due to statutory requirements, to contractual agreement or according to their nature. For example, a party under a duty of service must in case of doubt render the services in person (§ 613 1st St.).

50 **General protective duties** *(Schutzpflichten)*, as provided in § 241(2), are a particular feature of German law. They oblige each party to take account of the rights, legal interests and other interests of the other party (e.g. health and property; for instance, the seller must not damage the buyer's furniture when laying a carpet in the buyer's home). While such protective duties often form part of an obligation alongside performance duties, they can also exist as standalone duties (in particular with respect to pre-contractual liability under § 311 (2), (3)). Protective duties do not entitle the obligee to request their performance, but their

breach may entitle the obligee to damages or a right of revocation (§§ 280, 241(2); 280(2), (3), 282, 241(2); 324).

A further distinction concerns *Haupt-* and *Nebenpflichten* (primary and collateral duties). **51** **Primary duties** are those which form the core of the obligation. They arise directly from statute in the case of statutory obligations, or concern the *essentialia negotii* in a contract. **Independent collateral duties** are also actionable (in particular notification and information duties, as well as duties to render account which serve to preparation, performance and security of the main performance duty, e. g. the previous obligee's duty to provide information to the new obligee according to § 402). The protective duties under § 241(2) are not independent collateral duties because they are not actionable by themselves; their breach only triggers compensation claims and rights of revocation.

Vast parts of the Law of Obligations were redesigned in 2002 by the ***Schuldrechtsmodernisierungsgesetz*** (SMG). **52** This legislation created new statutory provisions for matters originally not contained in the BGB, but which had been developed by the courts (such as § 311(2), (3) for pre-contractual liability and § 313 for interferences with the basis of the transaction). In addition, the SMG also integrated consumer contract law into the BGB and used the opportunity presented by the necessary implementation of EU directives (especially the EU Consumer Sales Directive) to undertake reforms extending beyond consumer law. The SMG not only adapted sales law beyond consumer sales law but also took account of principles and tendencies at European and international level in reforming general contract law and the General Law of Obligations. This concerns, for example, the introduction of uniform requirements for breach and non-conforming performance (§§ 280, 323) in line with the model under the CISG and for non-conformity in line with the EU Consumer Sales Directive. The influence of these two sources extended to a restructuring of the system of remedies not only for sales but also for the Law of Obligations in general. The German legislator did, however, follow the European approach under the EU Consumer Sales Directive rather than the CISG by allowing revocation even without a *fundamental* breach (§ 323). In contrast to the CISG, it does not impose strict liability in damages. The obligor is liable only if this person is responsible for a non-performance, whereby the obligor bears the burden of pleading and proving that this is not the case (§ 280).

It is with these and later changes that the modernisation of the law of obligations has led, **53** for the most part, to a '**recodification**' of the Law of Obligations into the BGB taking account of international and especially European contract law. The modern German Law of Obligations has acquired features of a 'Euro-German' law through the link between original concepts in the BGB with such European models. The 2002 'recodification' did not in any case end the development of the Law of Obligations, but appears to the starting point of a phase of further changes in the redesigned framework, as can be seen by the new provisions introduced over recent years (in particular the new provisions on treatment contracts in §§ 630a et seq., in the implementation of new European directives on consumer rights, mortgage credit, and package travel, adapting consumer sales law to CJEU case law (e. g. § 439(3)), and most recently, the new provisions on architect and engineering contracts (§§ 650p et seq.).

Property Law is covered in **Book III**. This builds on the definition of *things* in § 90 as **54** corporeal, i. e. tangible objects only, excluding both intellectual property rights and rights *in personam*, which are often considered to be part of property law in the common law world (choses in action). The BGB notion of property is thus limited to **land** *(Grundstücke)* and **movables** *(bewegliche Sachen)*, i. e. chattels. Both the style and development of Book III differ considerably from Book II: whereas the law of obligations has witnessed considerable developments since 1900 in both case law and legislation,[28] property law has by comparison remained almost static. This is not accidental: property law was designed to be considerably more rigid than contract law in particular.

[28] See → mn. 27.

55 **Five principles** lie behind the provisions in §§ 854–1296:[29] (i) absoluteness, (ii) standardisation, (iii) abstraction, (iv) speciality, and (v) publicity.

56 (i) The principle of **absoluteness** *(Absolutheitsprinzip)* is perhaps the easiest to explain: rights *in rem* are absolute and provide equal entitlement against anybody else, whereas the common law world applies a more relative concept of property.

57 (ii) The principle of **standardisation** *(Typenzwang)* stands in stark contrast to the law of obligations and in particular the principle of freedom of contract: parties are not free to create new property rights but are limited to the types which are regulated by the BGB itself, or have been created by other legislation, including in particular hereditary building rights *(Erbbaurechte)* under the *Erbbaurechtsgesetz* of 1919, and co-ownership of a residential property *(Wohnungseigentum)* under the *Wohnungseigentumsgesetz* of 1951. Courts have been reluctant to expand the types provided by legislation; arguably the only clear inroad is the so-called *Anwartschaftsrecht*, an inchoate right to ownership which may arise where transfer of ownership depends on a condition, as e. g. under a sales contract where payment in instalments is combined with a retention of title clause.[30]

58 (iii) The principle of **abstraction** *(Abstraktionsprinzip)*, which has been explained above,[31] provides a barrier between property law and the law of obligations in particular; property law dispositions are valid even where the underlying obligations are not.

59 (iv) The principle of **speciality** *(Spezialitätsprinzip)* means that rights *in rem* can be created and transferred only in specified objects. If, for instance, goods stored in a warehouse are to be used as security, these must be ascertained at the time when a security right is created. It is not sufficient that the goods can be ascertained at a later date.

60 (v) The principle of **publicity** *(Publizitätsgrundsatz)* requires that any creation, transfer or extinction of a right *in rem* must be somehow visible to the outside world. For rights in land, this is effectuated by a change in the Land Register; the same applies to chattels for which a similar registry exists, in particular boats and aircraft. For other chattels, transfer of possession (which may precede or follow transfer of ownership) is the standard method of achieving publicity. However, the BGB provides inroads to the principle in §§ 930 and 931, whereby transfer of possession can be replaced by an agreement or assignment, neither of which is normally visible to the outside world.

61 Book III contains eight divisions. The first regulates **possession** (§§ 854–872). The second contains **general provisions on rights in land** (§§ 873–902), including provisions on the role and function of the Land Register *(Grundbuch)*. Division 3 regulates **property**, including content and limit of property rights, transfer of ownership in land, transfer of ownership in chattels, claims arising from property (such as vindication and *actio negatoria*, but also some rights *in personam* against possessors) and rules on co-ownership. Division 4 regulates **servitudes**, including easements, usufruct and so-called restricted personal easements. Division 5 covers **pre-emption** (as a right *in rem* to acquire somebody else's property). Division 6 covers **charges on land** *(Reallasten)*. Practically more relevant than divisions 4–6 is division 7 on the three types in which **ownership in land can be used as security**, namely by way of mortgage *(Hypothek)*, land charge *(Grundschuld)* and annuity land charge *(Rentenschuld)*. Division 8 contains rules on how moveable property and other rights *in rem* can be used as security, namely by way of **pledge** *(Pfand)*.

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[29] See MüKo BGB/Gaier, Einl. SachenR mn. 9–22 (adding *Akzessorietät* as sixth principle, mn. 23).

[30] But see MüKo BGB/Gaier, Einl SachenR mn. 11–14, arguing that both *Sicherungseigentum* and *Sicherungsgrundschuld* are also judicial extensions of the *numerus clausus* of BGB property rights. The *Reichsgericht*, on the other hand, thought it fairly obvious that the BGB allows transfer of full ownership in chattels as security *(Sicherungseigentum)*: RG 9.3.1926 – VI. 508/2, RGZ 113, 57. The *Sicherungsgrundschuld* is now mentioned in § 1192(1a).

[31] See → mn. 42.

Book III has arguably the highest concentration of provisions which are difficult to understand for persons who are not trained in German law. If readers should find the BGB's property law divisions somewhat enigmatic even after having read our commentaries, they may derive some comfort from the fact that many German lawyers who are not experts in property law may harbour similar feelings. **62**

VII. Notes on the BGB translation

The translation of the provisions of the BGB used for this commentary is the one which the German Federal Ministry for Justice and Consumer Affairs and juris GmbH have made publicly available at gesetze-im-internet.de.[32] As this represents the state of legislation of 2013, *Jonathon Watson* and *Gerhard Dannemann* have added translations of all subsequent amendments using, where possible, the same terminology and style as the 2013 version. It is of course always the German original which represents the existing law, not the English translation. **63**

The BGB uses terminology with a high degree of consistency: the mere mention of a term must often be understood as reference to other provisions using the same term. Consistency in terminology is thus paramount for any translation. But sometimes, this cannot be achieved without either committing linguistic cruelty or misleading the readers. There is, for example, only one English word, namely performance, to cover *Leistung* und *Erfüllung*. Similarly, *Anspruch* and *Forderung* are not the same, but there is again just one English word for both, namely claim. Neologisms are sometimes an option, but are frequently irritating and even more misleading. Conversely, *Bestellung* can take the meaning of either appointment (of a person to a position), an order of works or of goods, or the creation of a property right. Different English words will thus sometimes have to be used to translate one single German expression. 'False friends' can also hamper understanding: the German *Gegenleistung* is very different from the notion of consideration in English law, and the same applies to a German *Hypothek* and an English mortgage. For these and many other reasons, translating statutes in general, and the BGB with its thick conceptual language in particular, is an all but impossible task. **64**

As would be expected, the BGB translation which we used also contains some avoidable flaws, more of which were bound to become apparent during the process of writing the commentaries. When we embarked on the project in 2016, we sought permission to alter the translation whenever we saw room for improvement. For a variety of reasons, we did not have this permission at the time when the meanwhile assembled team of authors embarked on writing the comments. Any post-drafting attempt to improve on the translation in a consistent manner would have been very time-consuming and would have delayed the publication by a long stretch. **65**

This is why readers will frequently find in the comments suggestions for better English translations of the BGB's provisions. We hope that a future edition of this commentary will give us an opportunity to improve on the accuracy and clarity of the BGB translation without reducing its consistency. **66**

[32] http://www.gesetze-im-internet.de/englisch_bgb/index.html. Translation provided by the Langenscheidt Translation Service. Translation regularly updated by Neil Mussett and most recently by Samson Übersetzungen GmbH, Dr. Carmen v. Schöning. The same website also provides translations of a number of other important German statutes.