

**THE
GERMAN COMMERCIAL
CODE**

**as amended to
January 1, 1978**

SIMON L. GOREN

IAN S. FORRESTER

THE GERMAN COMMERCIAL CODE

(as amended to January 1, 1978)

Translated with an Introduction by

SIMON L. GOREN

*Diploma of Law, British Government Law School, Jerusalem;
Professor of Law, Case Western Reserve University, Cleveland*

and

IAN S. FORRESTER

*M.A., LL.B., University of Glasgow;
M.C.L., Tulane University, New Orleans;
Advocate;
Member of the New York Bar*

Fred B. Rothman & Co.

Littleton, Colorado

1979

Distributors:

In Japan:

Maruzen Company Ltd., Tokyo, Japan

In Europe and the British Commonwealth:

Tjeenk Willink, N.V., Zwolle, The Netherlands

Elsewhere:

Fred B. Rothman & Co.

© 1979 by Fred B. Rothman & Co.,
Littleton, Colorado

ISBN: 0-8377-0606-8
L.C. Card no. 78-65551

All rights reserved.

No part of this book may be reproduced in
any form or by any means without
permission in writing from the publisher.

Printed in the U.S.A.

THE
GERMAN
COMMERCIAL
CODE

INTRODUCTION

The *Handelsgesetzbuch* (HGB) or Commercial Code was promulgated on May 10, 1897, and entered into force in the German Empire, like its civil law counterpart the *Bürgerliches Gesetzbuch* (BGB), on the first day of this century. The HGB did not receive the same critical and patriotic acclaim as was devoted to the BGB, but it has nonetheless been of great importance to the development of commercial law in Germany.

The notion of a Commercial Code, separate from the Civil Code, has been adopted by most of the countries of continental Europe. The Commercial Code is intended to regulate relations between traders, whereas the Civil Code, broadly speaking, confines itself to non-commercial relations between private citizens and, to some extent, between citizens and the state. The HGB does not confine itself to the activities of merchants in the sense of buyers and sellers of goods; it applies to all those who engage in commerce in the widest sense, from small garages to large marine insurance companies. That being said, however, it should be noted that the HGB does not contain the entire body of law affecting every kind of "merchant." The HGB was drafted, like the BGB, in the last quarter of the last century, and like the BGB it reflects the concerns and social and commercial usages of its day. As a result, its provisions on corporate forms are of limited (but, as will be seen below, by no means negligible) modern significance, and the modern *Aktiengesellschaft* (AG) and *Kommanditgesellschaft auf Aktien* (KGaA) (stock corporation and partnership limited by shares, respectively) are governed by a separate enactment, the *Aktiengesetz* of September 6, 1935. However, the *Gesellschaft mit beschränkter Haftung* (GmbH), a German invention as a corporate form, which has been much borrowed by other countries, was established by a law of roughly similar antiquity to the HGB, in April, 1892.

The law concerning bills of exchange, cheques, and related matters is also in the main to be found outside the HGB, in the *Wechselgesetz* of June 21, 1933, and the *Scheckgesetz* of August 14, 1933. At the time the HGB was

INTRODUCTION

enacted, it would have been almost unthinkable to suggest that the state should or could penally proscribe private limitations on free competition or the unrestrained use of market power, but legislation to this effect is to be found in the *Gesetz gegen Wettbewerbsbeschränkungen*, the most recent version of which appeared on April 4, 1974. A number of other statutes deal with warehouse receipts, railway transportation, insurance, unfair competition, advertising and other matters either not mentioned in the HGB or not comprehensively regulated there.

The HGB is thus by no means a comprehensive regulation of all aspects of German commerce. However, for many types of transaction and for a number of businesses, the provisions of the HGB are by far the most important source of legal rules governing day-to-day commerce. This is particularly true with respect to maritime transactions, small trading businesses and a number of specific types of commercial undertaking.

Like the BGB, a number of the original provisions of the HGB which still survive seem quaint and rather at odds with the reality of the last quarter of the twentieth century. This is particularly true with respect to the provisions on the carriage of goods by sea, a commerce that has been revolutionized by modern techniques and by modern methods of communication. However, the provisions governing the relations between employer and employee in the first book of the HGB have been extensively modified, for example by referring to the hitherto unmentionable topic of abortion (§63).

The HGB is divided into four books. The first and third are of most importance in daily commerce; the second, dealing with various forms of partnership, is of importance to certain forms of business entity, and the fourth deals exclusively with the specialized area of maritime law.

Book One deals with the merchant, the conduct of the merchant's business, and the nature of the relationship between the merchant and various categories of individual to be found in commerce. Sections 1–58 deal with such matters as the Commercial Register, the business name to be adopted by a new entity, the rules according to which business books shall be kept, powers of representation and powers of attorney, and the like—in other words, a codification of the rules by which the existence, nature of business, and personnel of commercial enterprises is made known to the public. Sections 59–83 deal with apprentices, employees, and other renderers of service to the businessman, and their rights and duties with respect to such matters as medical care, accommodation, and non-competition provisions. The provisions on the last issue have been much altered to reflect the more liberal economic principles that distinguish today's Germany from that of 1900. Sections 84–104 are of considerable importance to foreign companies whose interests in Germany are represented by commercial agents, representatives, or distributors. The commercial agent who acts for a foreign (or

German) manufacturer is entitled to certain protections in the event that the relationship is terminated by the manufacturer/supplier, and there is frequently dispute and litigation concerning whether a particular individual has been acting as a commercial agent (and is therefore entitled to the protections envisaged by the HGB), or whether he has been an entirely independent distributor not subject to the manufacturer's instructions (and therefore broadly speaking not entitled to the claims and protections, notably under section 89b, of the agent).

Book Two deals with those forms of business entity not dealt with in other statutes. The commercial partnership (*Offene Handelsgesellschaft* or OHG) is a less common vehicle for doing business today than when the HGB was adopted, but is still the business vehicle used by a number of undertakings (particularly in trade). The *Kommanditgesellschaft* (to be distinguished from the *Kommanditgesellschaft auf Aktien* established by the AG Gesetz) is a quite widespread form of doing business, particularly in the real estate sector. It is interesting to note that the KGaA, which borrows a number of features from the HGB's provisions on the KG, is today being used more frequently, apparently in part as a means of limiting the application of the German provisions on workers' cooperation (*Mitbestimmung*). The KG and the *stille Gesellschaft* are enjoying a considerable vogue currently, as tax shelter vehicles. The so-called *Publikums KG*, using the liberal charter of a KG established under the HGB, may have hundreds of *Kommanditisten* all enjoying the consequential tax write-off advantages of the classical limited partner, something not contemplated in 1897, but illustrating the resilience of the drafting of the German codes and the skills of their interpreters.

Book Three deals with a number of specific types of commercial transaction, which collectively represented a broader spectrum of late nineteenth century commerce than they do today. These are sale, commission transactions, warehousing, freight forwarding and transport of goods. The provisions on admiralty law in Book Four deal with the classical concerns of maritime lawyers, such as the powers and duties of the captain and crew, of the shipper, and of the shipowners, average, salvage, and insurance. The Introductory Act to the Commercial Code (EGHGB) is printed at the end of the HGB, but it is of almost exclusively historical interest today.

The language of the HGB as currently amended is, it is submitted, less rigorously meticulous in its drafting and consistency than that of its more internationally renowned cousin, the BGB. The translators discovered that whereas in the BGB the same concept is almost always described in identical words throughout the BGB, by contrast in the HGB this is not always the case. On the other hand, the language of the HGB can be described as rather simpler, less convoluted and less impenetrable than the language of the BGB. Perhaps understandably, the provisions of the BGB dealing with property

INTRODUCTION

(such as §1138 BGB) are generally more difficult to understand than the provisions of the HGB dealing with such matters as the duties of a freight forwarder. The HGB, in common with the commercial laws of most countries, relies much on reasonableness, good sense, and prudence as guides for the merchant. It envisages the taking of commercial reasonable action and uses such expressions as the care of a prudent businessman, the orderly running of affairs, and businesslike and prudent conduct.

The table of changes in the HGB will reveal how extensively it has been modified since its adoption. This shows no sign of diminishing.

The HGB was the subject of less international comment, translation, and exposition than the BGB. Only one English translation has been found extant, by Bernard A. Platt (London, 1900), a rather less noteworthy effort than the Wang translation of the BGB.

This publication is the last in the series of three companion publications, the first of which was the *German Civil Code, a Translation and Introduction* (Rothman and North Holland Publishing, 1975, by Forrester, Goren, and Ilgen), followed by the *Introductory Act to the German Civil Code and the Marriage Law of the Federal Republic of Germany* (Rothman, 1976, translated by Goren and edited by Forrester). We have continued to follow the stylistic conventions adopted in the translation of these texts, as these are described in the Introduction to the BGB translation. The present work was greatly aided by Barbara Grote, whose important contribution to eliminating translation errors and inconsistencies and to the compilation of the glossary is acknowledged with gratitude. Thanks are also extended to Pauline Turner, who as well as typing much of the text, patiently prepared the index and table of contents. The authors would wish to express their appreciation of the support, encouragement, and interest manifested by Fred Rothman, without which the present work—as well as the previous ones—would doubtless not have appeared.

We hope that the present work may complement the previous translations and will be of service to those having an academic interest in German law, or to practitioners engaged in legal work that crosses international boundaries. In preparing these translations we have come to appreciate the tasks of the codifiers and the skills that they brought to bear on those tasks.

S.L.G.
Cleveland
I.S.F.
Brussels

August, 1978

CHANGES IN THE HGB, 1900–1977

SECTION NO. <i>(Sections not listed are unchanged)</i>	TYPE OF CHANGE <i>(not necessarily of entire section)</i>	DATE
1	Alteration	31 March 1953
	Alteration	6 August 1953
2	Alteration	31 March 1953
3	Alteration	13 May 1976
4	Repeal	31 March 1953
9	Insertion	20 July 1933
	Alteration	15 August 1969
11	Insertion	4 February 1925
12	Alteration	28 August 1969
13–13b	Alteration	10 August 1937
13c	Insertion	10 August 1937
	Alteration	6 September 1965
14	Alteration	6 September 1965
	Alteration	2 March 1974
15	Alteration	15 August 1969
	Insertion	15 August 1969
20	Repeal	30 January 1937
22	Repeal	29 September 1937
30	Alteration	9 October 1973
33	Alteration	10 August 1937
37	Alteration	2 March 1974
38	Alteration	2 August 1965
	Alteration	14 December 1976
39	Alteration	2 August 1965
	Insertion	14 December 1976
40	Insertion	2 August 1965
41	Repeal	2 August 1965
	Alteration	29 July 1976
43	Alteration	14 December 1976

CHANGES IN THE HGB

SECTION NO. <i>(Sections not listed are unchanged)</i>	TYPE OF CHANGE <i>(not necessarily of entire section)</i>	DATE
44	Alteration	2 March 1959
	Alteration	2 August 1965
	Alteration	14 December 1976
44a,4ab	Insertion	2 August 1965
	Repeal	14 December 1976
47a	Insertion	2 August 1965
	Alteration	14 December 1976
47b	Insertion	29 July 1976
55	Alteration	6 August 1953
63	Insertion	1 December 1930
	Insertion	14 August 1969
	Insertion	28 August 1975
65	Alteration	6 August 1953
66,67	Repeal	14 August 1969
68	Alteration	23 October 1923
	Repeal	14 August 1969
69-72	Repeal	14 August 1969
73	Repeal	28 August 1969
74	Alteration	10 June 1914
74a	Alteration	10 June 1914
	Alteration	23 October 1923
74b,74c	Alteration	10 June 1914
75,75a	Alteration	10 June 1914
75b	Alteration	10 June 1914
	Alteration	23 October 1923
75c,75d	Alteration	10 June 1914
75e	Alteration	10 June 1914
	Repeal	17 July 1974
75f	Alteration	10 June 1914
	Alteration	20 January 1934
75g,75h	Alteration	6 August 1953
76	Alteration	10 June 1914
	Repeal	14 August 1969
77-79	Repeal	14 August 1969
80	Repeal	14 August 1969
	Repeal	28 August 1969
81,82	Repeal	14 August 1969
82a	Insertion	10 June 1914
84-87a	Alteration	6 August 1953
87b	Alteration	6 August 1953
	Insertion	29 May 1967
87c-89a	Alteration	6 August 1953

CHANGES IN THE HGB

SECTION NO. (Sections not listed are unchanged)	TYPE OF CHANGE (not necessarily of entire section)	DATE
89b	Alteration	6 August 1953
	Alteration	13 May 1976
90-92c	Alteration	6 August 1953
93	Alteration	21 June 1973
103	Alteration	2 March 1974
130a,130b	Alteration	29 July 1976
177a	Insertion	29 July 1976
178-194	Repeal	30 January 1937
195	Alteration	7 March 1935
	Repeal	30 January 1937
196-225	Repeal	30 January 1937
226-227	Alteration	19 September 1931
	Repeal	30 January 1937
227a	Insertion	19 September 1931
	Repeal	30 January 1937
228-230	Repeal	30 January 1937
230a	Insertion	19 September 1931
	Repeal	30 January 1937
240	Alteration	25 March 1930
	Alteration	1 August 1931
	Repeal	30 January 1937
240a	Insertion	19 September 1931
	Repeal	30 January 1937
241	Alteration	25 March 1930
	Repeal	30 January 1937
242-244	Repeal	30 January 1937
244a	Insertion	19 September 1931
	Repeal	30 January 1937
245	Repeal	30 January 1937
246	Insertion	19 September 1931
	Repeal	30 January 1937
247-259	Repeal	30 January 1937
260	Alteration	19 September 1931
	Repeal	30 January 1937
260a-262g	Insertion	19 September 1931
	Repeal	30 January 1937
263-265	Repeal	30 January 1937
266-270	Alteration	19 September 1931
	Repeal	30 January 1937
271-283	Repeal	30 January 1937
284	Alteration	7 March 1935
	Repeal	30 January 1937

CHANGES IN THE HGB

SECTION NO. <i>(Sections not listed are unchanged)</i>	TYPE OF CHANGE <i>(not necessarily of entire section)</i>	DATE
285-297	Repeal	30 January 1937
298	Insertion	25 March 1930
	Repeal	26 February 1935
	Repeal	30 January 1937
299-311	Repeal	30 January 1937
312	Alteration	26 May 1933
	Repeal	30 January 1937
313,314	Repeal	30 January 1937
315	Alteration	25 March 1930
	Alteration	26 February 1935
	Repeal	30 January 1937
316-318	Repeal	30 January 1937
318a	Insertion	19 September 1931
	Repeal	30 January 1937
319-322	Repeal	30 January 1937
323	Alteration	7 March 1935
	Repeal	30 January 1937
324	Repeal	30 January 1937
325	Alteration	25 March 1930
	Repeal	30 January 1937
326-334	Repeal	30 January 1937
363	Alteration	10 August 1937
	Alteration	21 June 1972
367	Alteration	22 January 1944
	Alteration	17 May 1950
453-460	Alteration	4 September 1938
461-473	Repeal	4 September 1938
474,475	Repeal	21 December 1940
481	Alteration	2 June 1902
	Alteration	21 June 1972
482	Alteration	21 June 1972
485	Insertion	10 August 1937
	Alteration	13 October 1954
486	Alteration	13 October 1954
	Alteration	21 June 1972
487	Alteration	21 June 1972
487a-487d	Insertion	21 March 1973
488	Alteration	21 June 1972
491	Alteration	21 December 1940
493	Alteration	21 June 1972
494	Repeal	21 March 1973

CHANGES IN THE HGB

SECTION NO. <i>(Sections not listed are unchanged)</i>	TYPE OF CHANGE <i>(not necessarily of entire section)</i>	DATE
496	Alteration	21 June 1972
501	Alteration	28 August 1969
	Alteration	21 June 1972
503	Alteration	21 December 1940
507	Alteration	21 March 1973
509	Insertion	21 March 1973
509-518	Alteration	21 March 1973
519	Repeal	24 May 1965
520	Alteration	26 July 1957
	Alteration	24 May 1965
521	Repeal	24 May 1965
522-528	Alteration	21 March 1973
528	Insertion	21 March 1973
528-530	Repeal	21 March 1973
531-534	Alteration	21 March 1973
534	Repeal	21 March 1973
535	Alteration	21 March 1973
	Insertion	21 March 1973
536	Alteration	21 March 1973
537	Repeal	21 March 1973
528-540	Alteration	21 March 1973
541	Insertion	10 August 1937
	Alteration	21 March 1973
542-544	Alteration	21 March 1973
545	Alteration	26 July 1957
	Alteration	21 March 1973
546	Alteration	26 July 1957
547	Alteration	2 June 1902
	Insertion	24 December 1927
	Repeal	26 July 1957
548,549	Alteration	2 June 1902
	Repeal	26 July 1957
550,551	Repeal	26 July 1957
552	Alteration	21 March 1973
553	Alteration	2 June 1902
	Alteration	12 May 1904
	Alteration	16 December 1927
553a,553b	Insertion	2 June 1902
	Insertion	16 December 1927
553c	Alteration	16 December 1927
	Repeal	26 July 1957

CHANGES IN THE HGB

SECTION NO. <i>(Sections not listed are unchanged)</i>	TYPE OF CHANGE <i>(not necessarily of entire section)</i>	DATE
554	Repeal	26 July 1957
555	Repeal	26 July 1957
	Alteration	21 March 1973
559	Alteration	10 August 1937
560	Alteration	21 March 1973
563	Alteration	10 August 1937
564	Alteration	10 August 1937
564a-564c	Insertion	10 August 1937
567	Alteration	21 March 1973
580	Alteration	21 March 1973
588	Alteration	21 March 1973
591,592	Alteration	21 March 1973
594	Alteration	21 March 1973
601,602	Alteration	21 March 1973
604	Alteration	21 March 1973
606-609	Alteration	10 August 1937
610	Alteration	10 August 1937
	Alteration	21 March 1973
611-613	Alteration	10 August 1937
615	Alteration	21 March 1973
622	Alteration	21 March 1973
627	Alteration	10 August 1937
628	Alteration	21 March 1973
632	Alteration	21 March 1973
	Repeal	21 March 1973
634	Alteration	21 March 1973
636	Alteration	21 March 1973
636a	Insertion	10 August 1937
	Alteration	21 March 1973
642-644	Alteration	10 August 1937
	Alteration	21 March 1973
645,646	Alteration	10 August 1937
647	Alteration	10 August 1937
	Alteration	21 March 1973
648	Alteration	10 August 1937
649-652	Alteration	10 August 1937
	Alteration	21 March 1973
653	Alteration	10 August 1937
654	Alteration	10 August 1937
	Alteration	21 March 1973
655	Alteration	10 August 1937

CHANGES IN THE HGB

SECTION NO. <i>(Sections not listed are unchanged)</i>	TYPE OF CHANGE <i>(not necessarily of entire section)</i>	DATE
656	Alteration	10 August 1937
	Alteration	21 March 1973
657-663	Alteration	10 August 1937
663a,663b	Insertion	10 August 1937
656,666	Alteration	21 March 1973
673	Alteration	10 August 1937
	Alteration	21 March 1973
675	Alteration	21 March 1973
679-699	Repeal	21 March 1973
700	Alteration	21 March 1973
702	Alteration	21 March 1973
704	Alteration	21 March 1973
	Insertion	21 March 1973
706	Alteration	21 March 1973
708	Alteration	10 August 1937
	Alteration	21 March 1973
721a	Insertion	21 March 1973
722	Alteration	21 March 1973
723	Alteration	10 August 1937
	Alteration	21 March 1973
	Repeal	21 March 1973
724-726	Alteration	21 March 1973
726a	Insertion	21 March 1973
728	Alteration	21 March 1973
731	Alteration	21 March 1973
	Repeal	21 March 1973
732	Alteration	10 August 1937
	Alteration	21 March 1973
734-736	Alteration	7 January 1913
737-738	Alteration	7 January 1913
	Alteration	21 March 1973
738a	Insertion	21 March 1973
	Alteration	3 December 1976
738b,738c	Insertion	21 March 1973
739	Alteration	7 January 1913
740,741	Alteration	7 January 1913
742,743	Alteration	7 January 1913
	Alteration	21 March 1973
744,748	Alteration	7 January 1913
749	Alteration	2 June 1902
	Alteration	21 March 1973

CHANGES IN THE HGB

SECTION NO. <i>(Sections not listed are unchanged)</i>	TYPE OF CHANGE <i>(not necessarily of entire section)</i>	DATE
750	Alteration	7 January 1913
	Alteration	21 March 1973
751,752	Alteration	21 March 1973
752a	Insertion	21 March 1973
753	Alteration	21 March 1973
754	Alteration	10 August 1937
	Alteration	21 March 1973
755-764	Alteration	21 March 1973
765-777	Repeal	21 March 1973
780	Alteration	21 March 1973
782	Repeal	30 May 1908
787-789	Alteration	30 May 1908
790-791	Repeal	30 May 1908
796,797	Alteration	30 May 1908
807-811	Alteration	30 May 1908
811a,811b	Insertion	30 May 1908
812	Repeal	30 May 1908
814,815	Alteration	21 March 1973
821	Alteration	30 May 1908
	Insertion	30 May 1908
822	Alteration	21 March 1973
824	Alteration	30 May 1908
830	Alteration	30 May 1908
848	Alteration	21 March 1973
860	Alteration	10 August 1937
873	Alteration	21 March 1973
875	Alteration	10 August 1937
883	Alteration	30 May 1908
886,887	Alteration	30 May 1908
890	Alteration	30 May 1908
895	Alteration	30 May 1908
898,899	Alteration	30 May 1908
901	Alteration	7 January 1913
	Alteration	21 March 1973
902	Insertion	10 August 1937
	Alteration	21 March 1973
903	Insertion	7 January 1913
	Insertion	10 August 1937
	Alteration	21 March 1973
904	Alteration	7 January 1913
	Repeal	21 March 1973

CONTENTS

INTRODUCTION	ix
TABLE OF CHANGES	xiii

BOOK ONE—THE MERCHANT

<i>Section I</i>	Merchants §§1–7	3
<i>Section II</i>	Commercial Register §§8–16	4
<i>Section III</i>	Firm Name §§17–37	8
<i>Section IV</i>	Business Books §§38–47b	13
<i>Section V</i>	Signing Power (<i>Prokura</i>) and Commercial Authority §§48–58	16
<i>Section VI</i>	Commercial Clerks and Commercial Apprentices §§59–83	18
<i>Section VII</i>	Commercial Agents §§84–92c	23
<i>Section VIII</i>	Commercial Brokers §§93–104	30

BOOK TWO—TRADING ASSOCIATIONS AND DORMANT PARTNERSHIPS

<i>Section I</i>	Open Partnership §§105–160	35
<i>Title 1</i>	Establishment of a partnership §§105–108	35
<i>Title 2</i>	Legal relationships among the partners §§109–122	36
<i>Title 3</i>	Legal relations of the partners to third parties §§123–130b	39
<i>Title 4</i>	Dissolution of the partnership and withdrawal of partners §§131–144	42
<i>Title 5</i>	Liquidation of the partnership §§145–158	45
<i>Title 6</i>	Prescription §§159–160	48