

# THE GERMAN LEGAL SYSTEM AND **LEGAL LANGUAGE**

Fourth Edition

HOWARD D. FISHER

---

# The German Legal System and Legal Language

---

A General Survey together with  
Notes and German Vocabulary

Howard D. Fisher

LL.B. (Lond.) (Hons.)  
Interpreter and Translator



Routledge·Cavendish

Taylor & Francis Group

LONDON AND NEW YORK

Fourth edition published 2009  
by Routledge-Cavendish  
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada  
by Routledge-Cavendish  
270 Madison Avenue, New York, NY 10016

*Routledge-Cavendish is an imprint of the Taylor & Francis Group,  
an informa business*

© 2009, 2002, 1999, 1997 Howard D. Fisher

Previous editions published by Cavendish Publishing Limited

First edition	1997
Second edition	1999
Third edition	2002

Typeset in Palatino by  
RefineCatch Limited, Bungay, Suffolk  
Printed and bound in Great Britain by  
CPI Antony Rowe, Chippenham, Wiltshire

All rights reserved. No part of this book may be reprinted or  
reproduced or utilised in any form or by any electronic,  
mechanical, or other means, now known or hereafter  
invented, including photocopying and recording, or in any  
information storage or retrieval system, without permission in  
writing from the publishers.

*British Library Cataloguing in Publication Data*

A catalogue record for this book is available from the British Library

*Library of Congress Cataloging in Publication Data*

Fisher, Howard D.

The German legal system and legal language / Howard D. Fisher –  
4th ed.

p. cm.

Includes bibliographical references and index.

ISBN-13: 978-0-415-46856-5

ISBN-10: 0-415-46856-6

ISBN-13: 978-0-415-46594-6

ISBN-10: 0-415-46594-X

1. Law-Germany. 2. Law-Germany-Terminology. I. Title.

KK147.F57 2009

349.43-dc22

2008007132

ISBN10: 0-415-46856-6 (hbk)  
ISBN10: 0-415-46594-X (pbk)  
eISBN10: 0-203-92657-9 (ebk)

ISBN13: 978-0-415-46856-5 (hbk)  
ISBN13: 978-0-415-46594-6 (pbk)  
eISBN13: 978-0-203-92657-4 (ebk)

---

# The German Legal System and Legal Language

## Fourth Edition

---

This new edition of *The German Legal System and Legal Language* has been thoroughly revised and offers a unique, annotated compendium of German public and private law and legal language in English.

The text contains a succinct, systematic survey of the norms and concepts of some of the main areas of German law. It is supported by a companion website, available exclusively to users of the book, which offers an extensive, specialized vocabulary, a bibliography and a paragraph register to help the reader find supplementary information if required.

*The German Legal System and Legal Language* is a reliable source of explanation and orientation for native English-speakers seeking an authoritative and precise guide to this complicated subject and a proper understanding of the relevant terminology. International lawyers, academic jurists, students, translators and anyone interested in German law and legal language will benefit from this valuable print and online reference.

[www.routledgecavendish.com/textbooks/9780415465946](http://www.routledgecavendish.com/textbooks/9780415465946)

**Howard D. Fisher** qualified and practised as an English Solicitor before requalifying as a German *Rechtsanwalt*. He is now a freelance translator and has over 20 years' experience of the translation of German legal texts into English. Since 2004, he has lived in Berlin and is a licensed interpreter for the courts and notaries of the German capital.

---

## In Memory of my Parents

---

---

## Preface to the fourth edition

---

A summary of a legal system is, of necessity, a snap-shot of the system at a particular moment in time.

After the reunification of Germany took place in 1990, Germans were still content in the belief that their legal system could be relied upon in all eventualities.

However, in the last few years, the legislative environment in Germany has become unstable. Lawyers have been confronted with speedily-introduced statutory reforms on a large scale, the permanence of many of which is uncertain. In parallel with this development, the smugness of pre-unification Germany has given way to increasing social uncertainty. Hard-won statuses are being put into question by centralist tendencies, with controversial ramifications for the future role of the state.

In particular, the irresistible pressures of globalization are still chiselling away at national legal heritage with more and more harmonized and standardized norms. Moreover, the 'shelf-life' of rules has become shorter due to advances in instantaneous communication. At the same time, legal language still remains clothed in mystery. Thus, diametrically opposed forces are at work.

On the European front, the question of the location of the ultimate seat of power in the European Union remains unresolved and a 'do nothing' approach has apparently become politically acceptable. A precarious calm has set in, while the labyrinth of supra-national legislation continues to grow. Will such legislation eventually totally eclipse national norms?

At the same time, scholars have begun the search for the 'holy grail' of pan-European law, in the earnest belief that law is a product, like money, which can be standardized. However, they forget that, unlike the languages in this world, the patterns of human thought are limitless.<sup>1</sup>

In such a confused climate, making sense of the German legal system becomes an increasingly difficult task. The quality of navigation is particularly crucial for someone who comes cold to local rules and is

suddenly faced with unfamiliar terminology. Without at least a general guide at his or her side, such a person would be lost.

In my book, I have tried to provide more than a blurred picture or bird's eye view of the German legal system and legal language. The purpose I have set myself is to try to expound in English what German law says and the way it says it. Thus, wherever possible, the main text follows the layout of German laws and sets out German norms in their original numerical order. In addition, the main body of the work is cross-referenced to more detailed notes and a specialized vocabulary. The English speaker is thereby equipped with the information and terminological 'spectacles' needed to achieve a basic understanding of many standard German legal issues.

The approach adopted in the book reflects the fact that, in the first instance at least, legal knowledge in civil law systems is acquired less from casebooks or commentaries than from a comprehension of the exact words of a codified norm and of the concept to which the relevant norm refers. The codified norms always remain the benchmark against which the facts of each new case have to be tested afresh every time. This is an entirely different legal method from that of the common law.

On a personal level, the publication of this 4<sup>th</sup> Edition is a proud event for me. The book is the product of knowledge I have gained and added to slowly over the years under my own steam, without grace or favour from outside persons or organizations. Leading me on throughout has been my belief that, although memories may fade and despite the sophistication of modern methods of communication, it is still steps by individuals which lay the foundation for progress. To this end, I have been fortunate to have behind me the experience and continuing support of my publishers, which gives me encouragement for the future. To all at Routledge-Cavendish, I extend my sincere thanks for their kind help, attention and efforts in enabling this new edition to be realized.

Although I have tried to be as thorough as possible, collating information on a subject such as this is like constructing a sandbank against a flood. Where the book contains mistakes or omissions, for example regarding recent changes in the law or new statutory numbering, it would be helpful if readers could draw these to my attention, so that they can be rectified and taken into consideration in a subsequent edition. My work is intended as a contribution to the available literature and, like everything else, can of course be improved. Nevertheless, I express the hope that those consulting the book will continue to find it of value.

Finally, after long experience as a translator, I wish to leave readers with the following thought:

Every word has its equivalent in the foreign language – the only difficulty is to choose the right one!

This task is no less easy today than it ever was.

Viel Erfolg!

Howard D. Fisher  
Berlin,  
January 2008



---

# Preface to the third edition

---

This edition consolidates and broadens the position reached in the previous two editions with revisions and updating.

The greater maturity of this edition goes hand in hand with a deeper treatment of the BGB, which continues to represent the foundation for many areas of civil law in Germany. Indeed, despite numerous amendments and refinements,<sup>1</sup> the BGB has gone into the new millennium largely unscathed, and the special legal language used by German lawyers to describe legal concepts remains intact. I have, therefore, decided to relegate the resolution I set myself in the first edition (viz. to avoid more detailed exposition of the BGB) to the 'wishful thinking' department!

On the international scene, the expansion of, and pioneering developments in, the European Union continue apace, but, so far, national sensibilities have largely shielded existing structures. Thus, for the time being, the thorny subject of an eloquent European Constitution, inevitable in the long term, appears not to be a priority.<sup>2</sup> Moreover, the European Court of Justice is still struggling to free itself from political shackles and find its place in the popular consciousness.<sup>3</sup>

Since the second edition, I have added new material on a multitude of topics:

- standard business terms
- the provisions of the BGB concerning damages (§ 249ff BGB);
- delay (*Verzug*);
- contracts having protective effect in favour of a third party;
- transactions stipulating an exact time for performance (*Fixgeschäft*);
- long-distance transactions (*Fernabsatz*);
- contracts of rental (*Miete*);
- contracts of loan (*Darlehen*)
- the doctrine of the duty of safety (*Verkehrssicherungspflicht*) in tort;
- the public credence of the Land Register;
- the transfer of ownership of land;

- mortgages and land charges;
- the law of succession;
- the terms *Gesellschaft*, *Gemeinschaft* and *Verband*;
- unincorporated associations;
- the duties of members of a civil law company (*BGB-Gesellschaft*);
- the terms *Geschäftsführung*, *Vertretung* and *Haftung*
- competition by employees before and after employment;
- the private limited company;
- the importance of § 139 ZPO;
- the prohibition on representation in § 157 ZPO;
- the specificity principle in civil procedure (§ 253 ZPO);
- objections to procedural defects (§ 295 ZPO) and preclusion of submissions (§ 296 ZPO);
- conduct of the proceedings and closure of the hearing;
- settlement of disputes out of court;
- employees rights on insolvency;
- accidents at work;
- the law of securities;
- the jurisdiction of the courts in criminal matters;
- the evidential treatment of documents.

I have also extensively revised the notes and draw attention to the following recent German statutory enactments:

- the proposed Laws to Reform the Law of Obligations and Civil Procedure (Preface to the Second Edition, Note 11);
- the E-Commerce Law (Chapter X, Note 57);
- the Law to Accelerate Due Payments (Chapter X, Note 137);
- the Law concerning Long-Distance Transactions (Chapter X, Note 241);
- the Rental Law Reform Act (Chapter X, §§ 535ff BGB);
- the Law concerning Bank Transfers (Chapter X, Note 266);
- changes to Book 8 of the ZPO (Chapter XIII, Note 206);
- the Law concerning Part-Time Work (Chapter XVIII, Note 13);
- the Law concerning Shares issued in the Name of a Particular Person (Chapter XIX, Note 37);
- the Law to revise Private International Law in respect of Non-Contractual Obligations (Chapter XX, Note 37);
- the Law regarding the Activity of European Lawyers in Germany (Chapter XXII, Note 56).

Finally, I have added and cross-referenced a Table of the articles from the legal magazine ZAP, to which reference is made in the text (Appendix F).

I hope that the changes made will increase the usefulness of the book and improve its reliability.

Howard D. Fisher  
Frankfurt am Main,  
October 2001

---

# Preface to the second edition (with corrections)

---

## **The German legal system**

Germany has one of the most scientific legal systems anywhere in the world. For a person with English as his or her mother tongue to seek to understand that system is not easy, even someone with a legal education. Why is this so? The principal reason lies in the fact that, for historical reasons, the methods and sources of German and English law have developed differently. Another reason is the German language and its seemingly endless supply of formal terminology. Certainly, legal and everyday language are not the same anywhere, but where can this be more so than in Germany?

If the linguistic complexities were not enough, the enormous codification of practically every area of law in Germany will remain a formidable obstacle to comprehension of the German system for a foreigner, even after the dawn of the 'new' Europe after 1993. The German legal system remains, generally speaking, a system of (positive) norms i.e. traditional German legal thinking revolves, in the vast majority of cases, around the twin immutable 'pillars' of an established system and norms regarded as authoritative.<sup>1</sup>

This contrasts markedly with the 'mixed' system of precedents and statutes and thinking in terms of problems (*Problemdenken*) prevalent in common law countries.

Alternative legal methods have not (yet) made great inroads in Germany.<sup>2</sup>

The main tool of the German legal system is the German legal language, which is of a precision unmatched (and perhaps unattainable) in English.<sup>3</sup>

## **This book**

This book contains a general survey in the English language of the structure and concepts of some of the main areas of German law. My aim has

thereby been to provide a basic insight into the German legal system and technical language.

The book is based on my understanding and study of German laws and texts and constitutes a summary and introduction only. A more detailed account, for example, of the *Grundgesetz* and the BGB, would have involved lengthy exposition, which I wanted to avoid. Understanding the layout of the various laws is, in my view, the main task for the newcomer (see Chapter X, Note 117).

In particular, the book does not deal with banking, competition, insurance, intellectual property, planning (building), environmental or tax law, nor with many of the numerous statutes in the fields of private and public law to be found in the handbook collections *Schönfelder* and *Sartorius* (for examples, see Chapter XIX A). These areas can be considered at another time.

It should also be mentioned that I merely touch upon the Special Part of the Criminal Code (StGB; Chapter XVI B) and that, in the law of criminal procedure, a description of the provisions concerning the main hearing and consequent remedies still needs to be added (Chapter XVII G).

To well-versed German lawyers and experts the book will, I am sure, provide opportunity for criticism of misunderstanding, errors and incompleteness. Readers are, therefore, advised to consult German laws, authorities and guides in their original versions for the necessary detail or in cases of doubt.

Readers with a love for plenty of case law should always remember that it is a fact that the German legal system is almost entirely based on codifications. This book contains references to only a handful of cases, most of which stem from Donald Kommers' *The Constitutional Jurisprudence of the Federal Republic of Germany* and from the *Sourcebook on German Law* by Raymond Youngs. They concern the *Grundgesetz*, the first two Books of the BGB and the StGB (Chapters II, V, VII, VIII, X and XVI).

## **The international perspective**

For those readers who wish to compare English and German law, I have indicated in the Index (under 'English law') where aspects of English law are referred to in the book. However, I do not hold the book out as a work on comparative law. If that is what is sought, I would draw the reader's attention to the distinguished treatise in the field of private law by Zweigert and Kötz, to the scholarly analysis by B.S. Markesinis (*The German Law of Obligations: A Comparative Introduction*) and to the admirable work by Raymond Youngs (*English, French & German Comparative Law*). Worthy of study are also the following:

- the concise and lucid guide to the divergence between common law and civil law by Martin Vranken (*Fundamentals of European Civil Law*); and
- the renowned, annotated casebook by Rudolf B. Schlesinger *et al.* (*Comparative Law*), which not only examines the procedural treatment of foreign law in the United States, but also contains astute observations on the civil law systems in France and Germany, and draws particular attention to the 'special hazards' of comparative law (e.g. language difficulties and differences in classification between legal systems).

Zweigert and Kötz make the interesting prediction that 'the day may not be too far distant when the project of a European Civil Code will be undertaken' (Chapter 14 II). Whatever the chances of such a Code ever being enacted, I would venture to wager that the long-established and highly-developed concepts contained in the various codifications of German law will remain in use for so long as German is spoken. The vital role of language and the question of popular acceptance should not be underestimated.<sup>4</sup>

In the light of developments in the European Union,<sup>5</sup> it should be pointed out here that some very difficult problems, perhaps ultimately requiring root-and-branch reform, still exist:

- The coordination and 'harmonization' of the various legal systems and procedures in Europe (*Rechtsangleichung*) is extremely complex. What should be retained or copied and what is irrelevant or outdated? How much is really necessary?<sup>6</sup>
- Constitutional issues are bound, more and more, to preoccupy the European legislatures. Is a federal system a foregone conclusion? What will happen to the monarchies?<sup>7</sup>
- Can the traditionally immovable national administrative structures be integrated? Should they be streamlined? How can the risk of a usurpation of power be minimized?
- Can the principle of legal certainty (*Rechtssicherheit*) be upheld in a multilingual environment?<sup>8</sup>

In theory, these are matters which can be resolved, provided the member states of the European Union have the necessary (political) will and mutual trust and are not deflected by internal frictions and other pressures.<sup>9</sup>

For centuries, codified and common law have been opposite poles and have coexisted side by side. Despite some doubters,<sup>10</sup> movement has now set in and the debate between the supporters and opponents of both systems will have to be faced. If, indeed, pan-European law should become a

reality,<sup>11</sup> lawyers will play an important part in ensuring that accessibility, clarity and flexibility do not suffer.

Whether European law is ultimately nothing more than a mirage, time will tell. Much will depend on the ingredients placed in the European 'legal crucible'.<sup>12</sup>

The possible scenario that, unless the quantity of norms is controlled, the mushrooming and overlapping of legal sources ('bloated law') in the European member states will, at some stage, result in chaos may be pessimistic, but it cannot be ignored entirely. The achievement of efficiency and transparency in a jungle of norms must involve some sacrifice.<sup>13</sup>

## **Practical points**

I hope that, despite such imperfections as it may have, this book will prove useful to those native English speakers who deal with legal matters in Germany, to those who wish to try to 'grasp the nettle' of the German legal system and legal language for the first time and to those who aim to qualify as German lawyers. Comments and suggestions regarding the book are welcome.

Since the first edition, I have made various additions and corrections, more often than not in the Notes and Appendices. Insertions and reorganization of information have meant changes in the numbering of Notes. In particular, there are two new Chapters, entitled 'Business Law' (Chapter XIX) and 'International Legal Cooperation' (Chapter XXI). I have added new sections on Foreign Relations (Chapter II H), the Hearing in the Administrative Court (Chapter XV D), the Defence Lawyer (Chapter XVII C), Personal and Family Matters (Chapter XX C) and Judicial Administration (Chapter XXII C 6) and a Table of English Statutes (Appendix E). I also draw attention to recent reforms to the Commercial Code (HGB) and controversial changes in employment law and lawyers' practice rules.

The content (and, therefore, size) of the Notes results from the fact that I amend the book (and insert new Notes) sporadically in the course of my experience. I acknowledge that, in places, the length of some Notes is out of proportion to detail in the main text and that some users dislike having to locate relevant detail in a lengthy Note. Consequently, a shortening of some Notes and a transfer of information to the text is desirable. However, when one deals with such intricate subject-matter, such an operation is not merely a question of style – it will involve substantial (and time-consuming) reorganization. The problem can perhaps be tackled in a future edition.

In the meantime, the Notes now comprise a separate section following the main text, instead of being integrated therein, as in the first edition. Moreover, the size of print of both the Notes and the main text is now the same.

I hope that these changes will be considered helpful.

Finally, as before, I have endeavoured to maintain correct and consistent translation and to cross-reference the text, Notes and Appendices.

Howard D. Fisher  
Frankfurt am Main,  
June 1999



---

# Translations

---

Paragraphs which are translated into English in the *Sourcebook on German Law* are indicated in the Paragraph Register by a 'T'. English translations of selected provisions from particular areas of law (e.g. constitutional law and the law of obligations) can also be found in other works (e.g. Foster, Kommers and Markesinis). In addition, there is a large collection of German laws in English translation which is accessible in the internet, for example via the following web-site: [www.words-worth.de/robin/german-law](http://www.words-worth.de/robin/german-law)

Finally, if readers of this book have German legal texts which they wish to have translated into English, they can address enquiries directly to the author. His contact details are:

Howard Fisher,  
Ribeckweg 16,  
14165 Berlin,  
Germany

Tel. (0049) 30-845 92923

Fax (0049) 30-845 92924

E-Mail: [howard.fisher@german-law-translation.de](mailto:howard.fisher@german-law-translation.de)

Web: [www.german-law-translation.de](http://www.german-law-translation.de)