

# **GERMAN PRIVATE AND COMMERCIAL LAW**

## **AN INTRODUCTION**

**Norbert Horn, Hein Kötz  
and Hans G. Leser**

**Translated by Tony Weir**



# GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION

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## Foreword

A survey of modern German private law is a subject of great attraction to the lawyer in the common law jurisdictions. Modern German law is still founded, to a large extent, on the great codes of 1897, which came into operation on 1 January 1900. This codification has sometimes been criticized as *Professorenrecht*, because undue attention has been paid to the controversy of the Germanistic school, led by von Gierke, and the Romanistic school of Windscheid. That the criticism is unjustified clearly emerges from a study of this volume. The codes have provided a firm foundation on which the German courts have been able to develop, in a pragmatic fashion, a modern legal system that satisfies the needs of a complex modern industrial society. In that respect the German codes can be compared with the great Victorian codifications of commercial law in the United Kingdom. These commercial codes, though operating in a much more restricted field, are still, in essence, with us. Their finest examples are the Bills of Exchange Act 1882, the Sale of Goods Act 1893 (now 1979), the Partnership Act 1890 and the Marine Insurance Act 1906. The modern lawyer can but admire the intellectual achievement of his forerunners at the end of the nineteenth century.

The aim of this slim volume is to introduce the lawyer working in one of the common law jurisdictions to the study of German law. The work should be of interest to the practitioner, the academic lawyer, and the student of comparative law. It will enable the practitioner to understand the methodology and traditional way of thinking of his German colleague. It will indicate to the academic lawyer how a code law system — incomprehensible if one only reads the codes — is made to operate in practice, and it will give the comparative lawyer a key to an understanding of the science of comparative law, which is perhaps the most stimulating and interesting branch of modern law, so necessary to appreciate the growing interdependence of international commercial and personal relations.

The outstanding features of this work are utmost clarity of

presentation and its practical approach. Three distinguished and leading German scholars, Professors Norbert Horn, Hein Kötz, and Hans Leser, have combined to introduce the common lawyer to German law, as it is today. They are all experts in comparative law. They all have studied the common law at English or American institutions and approach their exposition of German law with a view to making clear what the common lawyer should know about it in order to appreciate the differences between his own legal system and German law. A warm tribute should be paid to Mr Tony Weir, the distinguished Cambridge scholar, who has translated the work into impeccable English with consummate skill.

This work owes its origin to the practical experience of teaching the elements of German private law to English lawyers. The International Summer Courses of Law, sponsored by the British Institute of International and Comparative Law and the London Office of the German Academic Exchange Service, have since 1973 annually arranged a course in Modern German Law for English Lawyers. This course, which is held in London, has attracted considerable interest, as the growing number of participants shows. The three authors of this book have taught at these courses regularly, and this book is the result of their accumulated teaching experience. They have wisely introduced their treatment of private law by a brief description of the German constitutional situation and a survey of the organization of the German courts.

The work constitutes an invaluable enrichment of the relatively scanty literature on comparative law in the English language. Following the publication of *An Introduction to Comparative Law* by Professors K. Zweigert and H. Kötz, likewise translated into English by Mr Tony Weir, it will become an indispensable tool for the teaching of comparative law at the law schools of the English-speaking countries and will acquire a position similar to that held by the renowned classic in French law, *Amos and Walton's Introduction to French Law*. The function of comparative law in the setting of our small modern world need not be emphasized. Every lawyer, whether in practice or in law teaching, knows that today this approach is a necessity for the understanding of his own legal system and for the proper performance of the tasks with which he will be faced.

The thanks of the legal profession in the common law countries are due to the three German scholars who have undertaken the task of presenting this work and to their English translator. They have widened the horizon of the common lawyer.

Clive M. Schmitthoff

## Authors' Preface

This book is based mostly on teaching experience the authors have gained since 1973 in summer courses on Modern German law held at the London School of Economics and sponsored by the British Institute of International and Comparative Law and the German Academic Exchange Service (DAAD). The authors hope that the book will serve as a useful first guide to the same sort of readers as participated in their courses over the years: young students of comparative law as well as experienced scholars in this field, practising lawyers as well as members of the civil service dealing with legal matters involving German law. The authors wish to thank the DAAD for promoting the project of this book and, in particular, the head of the London Branch of DAAD 1976–81, Franz Eschbach, who encouraged them to write it as well as Tony Weir who, in a most enjoyable collaboration, put their texts into readable English. The book was produced with the financial assistance of the Stifterverband für die deutsche Wissenschaft and the Deutscher Akademischer Austauschdienst.

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The authors



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## Historical Introduction

One cannot really understand the law of a country without knowing something of its legal history; and its legal history must be seen in the context of its general history, that is, of the political, economic, and social conditions in which the law developed. The student of German law in particular needs (1) some knowledge of the emergence of the Bundesrepublik as a federal democracy committed to the rule of law, (2) some idea of Germany's growth as a mercantile and industrial power, and (3) a sense of those factors in the history of ideas which have put their mark on German law and contributed to its characteristic mode of legal thinking.

### 1 THE BUNDESREPUBLIK, THE FEDERAL REPUBLIC OF GERMANY

The Bundesrepublik emerged as a political entity after the Second World War (1939–45). At the end of that war a line of demarcation was drawn which bisected Germany and divided Europe into two political blocs, the countries of the North Atlantic Treaty Organization on the one side, and the members of the Warsaw Pact on the other. It was on that part of the German Empire which was occupied at the end of the war by the Western Allies, viz. the United States of America, England, and France, that the Bundesrepublik was formed. Its constitution, or Basic Law (*Grundgesetz*, GG), came into force on 23 May 1949 after being debated in draft and adopted by a representative pre-parliamentary body, the *Parlamentarischer Rat*. Elections for the first Parliament of the Bundesrepublik were held on 14 August 1949, and the first federal government was formed by Konrad Adenauer, whom the Bundestag had chosen to be the first Federal Chancellor. The Bundesrepublik obtained sovereignty as a state on 5 May 1955 pursuant to treaties with the Western Allies, and sees itself as the legal successor of the German Empire and as the political homeland