

THE LEGAL SYSTEM OF GERMANY

Library of the Association Henri Capitant

LEGAL SYSTEMS SERIES



THE LEGAL SYSTEM OF LOUISIANA

THE LEGAL SYSTEM OF FRANCE

THE LEGAL SYSTEM OF THE NETHERLANDS

THE LEGAL SYSTEM OF ROMANIA

THE LEGAL SYSTEM OF IRAN

THE LEGAL SYSTEM OF QUÉBEC

THE LEGAL SYSTEM OF GERMANY

Bibliothèque de l'Association
Henri Capitant

*Library of the Association
Henri Capitant*

LEGAL SYSTEMS SERIES



THE LEGAL SYSTEM OF
GERMANY

EDITORS

Alain A. Levasseur

PROFESSOR OF LAW EMERITUS, LSU

J. Randall Trahan

PROFESSOR OF LAW, LSU

David Gruning

PROFESSOR OF LAW EMERITUS, LOYOLA NEW ORLEANS

CAROLINA ACADEMIC PRESS

Durham, North Carolina



Association
Henri Capitant

LGDJ une marque de
Lextenso

Copyright © 2022
Carolina Academic Press, LLC
LGDJ: Lextenso 2017
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Names: Levasseur, Alain A., editor. | Trahan, J. Randall, editor. | Gruning, David W., 1951- editor. | Association Henri Capitant des amis de la culture juridique française, sponsoring body.
Title: The legal system of Germany / edited by Alain A. Levasseur, J. Randall Trahan, David Gruning.
Other titles: Droit de l'Allemagne. English
Description: Durham, North Carolina : Carolina Academic Press, LLC [2021] | Series: Bibliothèque de l'Association Henri Capitant.
Legal systems series | Includes bibliographical references.
Identifiers: LCCN 2021046278 (print) | LCCN 2021046279 (ebook) | ISBN 9781531024147 (paperback) | ISBN 9781531024154 (ebook)
Subjects: LCSH: Law—Germany.
Classification: LCC KK149 .D7613 2021 (print) | LCC KK149 (ebook) | DDC 349.43—dc23/eng/20211109
LC record available at <https://lccn.loc.gov/2021046278>
LC ebook record available at <https://lccn.loc.gov/2021046279>

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
(919) 489-7486
www.cap-press.com

Printed in the United States of America

THE SERIES

The Association Henri Capitant has been working to disseminate, modernise and promote civil law for over eight decades. It has traditionally focused on national and international days and bilateral symposia or seminars, which it organises on a regular basis.

As part of the Association's tireless efforts in pursuit of its objectives, its Deputy General Secretary, Cyril Grimaldi, came up with the idea of creating the "Association Henri Capitant Library." The Association's national groups were therefore invited to explain the broad outlines of their law in a series of books, all based on an identical structure, with a limited character count, to give readers the chance to explore and compare the foundations and fundamental features of various systems of law.

As a result, each book in the collection features chapters on the history of the law, its sources, the constitutional framework, legal professionals, criminal law, legal persons, family, property, contracts, liability, quasi-contracts, businesses and labor law.

This provides an invaluable introduction to each system of law, and more besides. Any member of the Association with a user name (visit <http://www.henricapitant.org> to register) can contact the authors of any of the books by e-mail to discuss issues with them (bibliothequecapitant@lexenso.fr).

The new collection is clearly of immense value, giving everyone the opportunity to explore and understand the substance and spirit that make up and inspire the various systems of foreign law

« THE SERIES »

featured in the series. Its contribution to comparative law is simply unparalleled; it offers undoubted benefits to all those who understand the value of stepping outside the boundaries of their own law to better appreciate it and draw inspiration from other forms of law to support its development.

Denis Mazeaud

PROFESSEUR, UNIVERSITÉ PANTHÉON-ASSAS (PARIS II)

PRESIDENT OF THE ASSOCIATION HENRI CAPITANT

Philippe Dupichot

PROFESSEUR, UNIVERSITÉ PANTHÉON-SORBONNE (PARIS I)

GENERAL SECRETARY OF THE ASSOCIATION HENRI CAPITANT

Cyril Grimaldi

PROFESSEUR, UNIVERSITÉ PARIS XIII

Alain Levasseur

PROFESSOR EMERITUS, LSU LAW SCHOOL

Randall Trahan

PROFESSOR, LSU LAW SCHOOL

David Gruning

PROFESSOR EMERITUS, LOYOLA LAW SCHOOL



THE LEGAL SYSTEM OF GERMANY

COORDINATOR

Niels Petersen

PROFESSOR OF LAW

WESTFÄLISCHE-WILHELMUS-UNIVERSITÄT

CHAPTER AUTHORS

Reiner Schulze

*Professor of Law, Westfälische Wilhelms-Universität de Münster
Director (French Version)*

Arne Alberts

*Judge, Amtsgericht Essen
Legal Actors*

Florian Bien

*Professor of Law, Julius-Maximilians-Universität Würzburg
Quasi-Contracts*

Matthias Fervers

*Akademischer Rat, Ludwig-Maximilians-Universität München
Property*

Gerald Mäsch

*Professor of Law, Westfälische Wilhelms-Universität Münster
Contractual Liability and Tort Law*

Günter Reiner

*Professor of Law, Helmut-Schmidt-Universität Hamburg
Persons*

« THE AUTHORS »

Wilfried Schlüter

Professor of Law, Westfälische Wilhelms-Universität Münster
Family Law

Hans Schulte-Nölke

Professor of Law, Universität Osnabrück
Sources of Law and Legal Methodology

Reiner Schulze

Professor of Law, Westfälische Wilhelms-Universität Münster
Contracts

Achim Seifert

Professor of Law, Friedrich-Schiller-Universität Jena
Labor Law

Christoph Teichmann

Professor of Law, Julius-Maximilians-Universität Würzburg
Business Entities

Jan Thiessen

Professor of Law, Eberhard-Karls-Universität Tübingen
Legal History

Michael Tsambikakis

Lawyer, Tsambikakis & Partner Rechtsanwälte mbB
Professor of Law, Universität Passau
Criminal Law and Criminal Procedure

Christian Walter

Professor of Law, Ludwig-Maximilians-Universität München
Constitutional Framework

CONTENTS

LIST OF ABBREVIATIONS	XVII
CHAPTER ONE LEGAL HISTORY	3
Bibliography	8
CHAPTER TWO SOURCES OF LAW	11
Bibliography	17
CHAPTER THREE THE CONSTITUTIONAL FRAMEWORK	19
1. Constitution (<i>Verfassung</i>)	19
1.1. Main Characteristics of the Constitution	19
1.2. Structure of the State	21
2. Separation of Powers (<i>Verfassung und Gewaltenteilung</i>)	22
2.1. Legislative Power	22
2.2. Executive Power	24
3. Judicial Power (<i>Gerichtsbarkeit</i>)	26
Bibliography	26
CHAPTER FOUR LEGAL ACTORS	29
1. Judges (<i>Richter</i>)	29
2. Registrars (<i>Urkundsbeamte</i>)	32
3. Attorneys (<i>Rechtsanwälte</i>)	32
4. Notaries (<i>Notare</i>)	33
5. Bailiffs (<i>Gerichtsvollzieher</i>)	34
6. Corporate Lawyers (<i>Unternehmensjuristen</i>)	34
Bibliography	35

CHAPTER FIVE CRIMINAL LAW	37
1. Substantive Criminal Law (<i>Strafrecht</i>)	37
2. Criminal Procedure (<i>Strafprozessrecht</i>)	40
CHAPTER SIX PERSONS	45
1. Distinction Between Natural and Juridical Persons/Legal Entities (<i>natürliche und juristische Personen</i>)	45
1.1. Capacity	45
1.2. Beginning and End of Personality	48
1.3. Civil Status	52
2. Rights Attached to Personality (<i>Persönliche Rechte</i>)	52
Bibliography	53
CHAPTER SEVEN THE FAMILY	55
1. Marriage and Registered Civil Partnership (<i>Ehe und eingetragene Lebenspartnerschaft</i>)	55
1.1. Marriage	55
1.2. The Registered Civil Partnership	59
2. Dissolution of Unions	59
2.1. Divorce (<i>Scheidung</i>)	59
2.2. Annulment of Marriage (<i>Aufhebung</i>)	60
3. Filiation and Parentage (<i>Mutterschaft/Vaterschaft und Elterliche Sorge</i>)	61
3.1. Filiation	61
3.2. Parentage	62
4. Successions	62
CHAPTER EIGHT PROPERTY	65
1. Scope of Property	65
2. Real Rights <i>In Rem</i> ; Possession	65
3. Use of Things for Purposes of Security	69
4. Disposition of Things	71
Bibliography	72

CHAPTER NINE CONTRACT	75
1. Contract in Private Law	75
1.1. Formation	75
1.2. Performance/Execution	78
2. Aspects of Government Contracts	81
Bibliography	82
CHAPTER TEN DELICTUAL LIABILITY	83
1. Introduction	83
2. Contractual Liability (<i>Vertragliche Haftung</i>)	84
2.1. Basic Requirements for the Claim for Damages	
Resulting from Sect. 280, para. 1 BGB	84
2.1.1. Obligation (<i>Schuldverhältnis</i>)	84
2.1.2. Breach of Duty (<i>Verletzung einer Pflicht</i>)	85
2.1.3. Responsibility/Liability (<i>Vertretemüssen</i>)	85
2.2. Additional Requirements for Certain Types	
of Damages	86
2.2.1. Distinction Between Damages “In Lieu of the	
Contractually Owed Performance” and “In	
Addition to the Contractually Owed	
Performance”	86
2.2.2. Damages “Instead of the Contractually Owed	
Performance,” Sect. 280, Para. 1 and 3,	
Sects. 281 and 283 BGB	86
2.2.3. Payment of Expenses	88
2.2.4. Damages for Delay of Performance, Sect. 280	
paras. 1 and 2, Sect. 286 BGB	88
2.3. Contracts Stipulating a Duty to Protect Third Parties	89
2.3.1. Legal Basis	89
2.3.2. Requirements for the Existence of a Contract	
with the Duty to Protect Third Parties	89
2.3.3. Legal Consequences	90
3. Liability Arising from Quasi-contractual and	
Pre-contractual Obligations	90

3.1. The Concept of <i>Culpa in Contrahendo</i> , Sect. 311, para. 2 BGB	90
3.2. Liability for Breach of the Duty of Caution	91
4. Third Party Liability According to the Principles of <i>Culpa in Contrahendo</i>	91
5. Delictual Liability (<i>Deliktrechtliche Haftung</i>)	92
5.1. General Remarks	92
5.2. Sect. 823 BGB	92
5.2.1. Sect. 823, para. 1 BGB	93
5.2.2. Sect. 823, para. 2 BGB	95
5.3. Wilful Damage Contrary to Public Policy, Sect. 826 BGB	95
5.4. Liability for Employees, Sect. 831 BGB	96
5.5. Other Types of Liability Under Sects. 832 et seq. BGB	96
6. Delictual Liability Beyond the BGB	97
6.1. Product Liability Act (<i>ProdHaftG</i>)	97
6.2. Road Traffic Act (<i>StVG</i>)	98
6.3. Unfair Competition Act (<i>UWG</i>)	98
7. Legal Consequence: Damages (<i>Schadensersatz</i>)	98
7.1. General Remarks	98
7.2. Nature of Compensatory Damages	99
7.3. Calculation of Damages	99
7.4. Contributory Negligence (<i>Mitverschulden</i>)	100
8. Liability of Multiple Parties	100
9. Contractual Exclusion from Liability	100
10. Prescriptions (<i>Verjährung</i>)	101
11. Civil Procedure	101
11.1. Sovereign Power of the Trial Judge	101
11.2. Standard of Proof	102
11.3. Reduced Burden of Proof : ZPO, BGB	102
Bibliography	102
CHAPTER ELEVEN QUASI-CONTRACTS	105
Bibliography	111

CHAPTER TWELVE BUSINESS ENTITIES	113
1. Forms of Business Entities	113
1.1. Sole Trader	113
1.2. Companies and Partnerships	114
1.2.1. Partnerships	114
1.2.2. Companies	115
2. Difficulties Encountered by Business Entities	116
2.1. Prevention of Companies' Difficulties	116
2.2. Addressing Companies' Difficulties	117
3. Supervision of Companies' Activities	117
3.1. Consumer Protection	117
3.2. Protection of Competing Companies	118
3.3. Market Protection	118
CHAPTER THIRTEEN LABOR AND EMPLOYMENT LAW	121
1. Individual Labor Relations	121
1.1. Formation of the Employment Contract	121
1.2. Formation of the Employment Contract	123
1.2.1. Duties of the Employee	123
1.2.2. Duties of the Employer	124
1.3. Termination of the Employment Contract	125
1.3.1. Dismissal	125
1.3.2. Fixed-Term Contracts	127
2. Collective Labor Relations	128
2.1. The Right of Collective Bargaining and Action	128
2.2. Institutionalized Forms of Employee Representation	131
2.2.1. Employee Representation in the Workplace: The Works Councils	131
2.2.2. Board-Level Representation	133
Bibliography	134

LIST OF ABBREVIATIONS

AG	Aktiengesellschaft Public Limited Company
AGG	Allgemeines Gleichbehandlungsgesetz General Act on Equal Treatment
AktG	Aktiengesetz Act on Public Limited Companies
ArbZG	Arbeitszeitgesetz Working Time Act
BetrVG	Betriebsverfassungsgesetz Works Constitution Act
BGB	Bürgerliches Gesetzbuch German Civil Code
BGH	Bundesgerichtshof Federal Court of Justice
BNotO	Bundesnotarordnung Federal Code for Notaries
BRAO	Bundesrechtsanwaltsordnung Federal Lawyer's Regulations
BtMG	Gesetz über den Verkehr mit Betäubungsmitteln Narcotics Act

« ABBREVIATIONS »

BVerfG	Bundesverfassungsgericht Federal Constitutional Court
BVerfGE	Entscheidungen des Bundesverfassungsgerichts Decisions of the Federal Constitutional Court
BVerfGG	Gesetz über das Bundesverfassungsgericht Federal Constitutional Court Act
CISG	U.N. Convention on Contracts for the International Sales of Goods
DRiG	Deutsches Richtergesetz German Judiciary Act
DrittelpG	Gesetz über die Drittelpartizipation der Arbeitnehmer im Aufsichtsrat Act on Employee Participation by One Third
ECHR	European Convention of Human Rights
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuche Introductory Act to the Civil Code
EWIV	Europäische wirtschaftliche Interessenv- ereinigung European Economic Interest Grouping
FamFG	Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit Law on Procedures in Family Matters and in Matters of Voluntary Jurisdiction
FGB	Familiengesetzbuch der Deutsche Demokratische Republik Family Code of the German Democratic Republic

« ABBREVIATIONS »

GbR	Gesellschaft bürgerlichen Rechts General Partnership Company
GDR	German Democratic Republic
GG	Grundgesetz German Constitution, Basic Law
GmbH	Gesellschaft mit beschränkter Haftung Limited Liability Company
GmbHG	Gesetz betreffend die Gesellschaften mit beschränkter Haftung Act on Limited Liability Companies
GoA	Geschäftsführung ohne Auftrag Management without a Mandate
GVG	Gerichtsverfassungsgesetz Courts Constitution Act
GWB	Gesetz gegen Wettbewerbsbeschränkungen Act Against Restrictions on Competition
HGB	Handelsgesetzbuch Commercial Code
InsO	Insolvenzordnung Insolvency Act
KG	Kommanditgesellschaft Limited Partnership Company
KSchG	Kündigungsschutzgesetz Act on Dismissal Protection
LPartG	Lebenspartnerschaftsgesetz Civil Partnership Law
MitbestG	Gesetz über die Mitbestimmung der Arbeitnehmer Act on Employee Participation

« ABBREVIATIONS »

MontanMitbestG	Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie Act on Employee Participation in the Coal and Mining Industry
OHG	Offene Handelsgesellschaft General partnership
PartG	Partnerschaftsgesellschaft Partnership company
PatG	Patentgesetz Patent Act
PrALR	Allgemeine Landrecht für die Preußischen Staaten Prussian General Land Law (General State Laws for the Prussian States)
ProdHaftG	Gesetz über die Haftung für fehlerhafte Produkte Product Liability Act
PStG	Personenstandsgesetz Civil Status Act
StGB	Strafgesetzbuch Criminal Code
StPO	Strafprozessordnung Code of Criminal Procedure
StVG	Straßenverkehrsgesetz Road Traffic Act
TFEU	Treaty on the Functioning of the EU

« ABBREVIATIONS »

TSG	Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen, also Transsexuellengesetz Act on the Change of First Name and Sex Designation in Cases of Transsexualism
TVG	Tarifvertragsgesetz Act on Collective Agreement
TzBfG	Gesetz über Teilzeitarbeit und befristete Arbeitsverträge Act on Part-time Work and Fixed-Term Contracts
UrhG	Gesetz über Urheberrecht und verwandte Schutzrechte Copyright Act
UWG	Gesetz gegen den unlauteren Wettbewerb Unfair Competition Act
VwVfG	Verwaltungsverfahrensgesetz Administrative Procedure Act
ZPO	Zivilprozessordnung Code of Civil Procedure

