

A General Introduction to German Law

GENERAL CIVIL LAW

What is civil law?

Civil law is part of the legal system. In contrast to public law, it concerns the legal relationships between individuals. In doing so, civil law is based on the assumption of the equality and self-determination of individuals. Civil law is generally divided into substantive and procedural civil law.

What is substantive civil law?

Substantive civil law regulates the rights and duties owed between individuals. It applies to all citizens and is laid out in the following five parts of the German Civil Code:

1. General Part ;
2. Law of Obligations ;
3. Law of Chattels and Property ;
4. Family Law ; and
5. Succession and Inheritance Law.

Additionally, there are special civil rights, e.g. for certain occupational groups or subject areas.

What is procedural civil law?

Procedural civil law includes laws governing legal proceedings and debt recovery. These laws are predominantly contained in the Code of Civil Procedure (ZPO).

1. How can I lodge a claim for payment of a debt in Germany?

If a letter of demand for payment of a debt in Germany is unsuccessful, the claim can be pursued either by commencing legal proceedings or by lodging an application for a court order for payment of the debt, which is a form of summary proceedings.

2. How can I commence legal proceedings?

Legal proceedings are commenced by lodging a statement of claim at the court of relevant jurisdiction. The statement of claim must include details of the plaintiff, the defendant and the facts of the case as well as the relief which the plaintiff seeks.

3. Where do I lodge a statement of claim?

A statement of claim must be lodged at the court of relevant jurisdiction. The laws determining which court has jurisdiction in the matter are found in the Code of Civil Procedure (ZPO). The local jurisdiction is generally determined by the place of residence or business of the defendant(s).

4. What are the costs of legal proceedings?

In legal proceedings, court fees on the one hand, and lawyers' fees on the other, need to be distinguished from each other. Both sets of fees are governed by statutory scales. The higher the value of the claim, the higher the court and lawyers' fees will be.

5. Who bears the costs of legal proceedings?

The unsuccessful party to the legal proceedings is liable for the total costs of the proceedings (court fees and lawyers' fees including the fees of the lawyers for the successful party). If a party is partially successful in its claim, the costs are divided between the parties in proportion to the amount of the claim granted and the amount dismissed.

COMMERCIAL AND CORPORATE LAW

PART 1: COMMERCIAL LAW

What is commercial law?

Commercial law is the specific civil law governing businessmen and commercial enterprises.

Characteristics of a Businessman

Basically any person who operates a trading business is regarded a businessman under German law. A business is defined as an independently, consistently, regularly and professionally run operation whose aim is the realisation of profits. A person can also be defined as a businessman in other ways such as by way of registration of a person or a business in the commercial register.

Frequently Asked Questions

1. What is the legal foundation of commercial law?

German commercial law is set out in the German Commercial Code (HGB) and in various other legislation such as the German Civil Code (BGB), the German Company Law (AktG), the German Proprietary Company Law (GmbH-Gesetz) as well as in common law. In addition, the customs of trade have to be considered irrespective of whether or not they are known to the contracting partners.

2. What are the essential aims of commercial law?

Commercial law has a number of objectives which include efficiency of transactions (e.g. immediate rectification of a defect) - clarity of the law, transparency and increased protection of reliance - stronger connection to customs and conventions - more personal responsibility of the transacting parties.

3. When does commercial law apply?

Commercial law distinguishes between 3 "types" of laws:

- 3.1. laws which only apply when both parties are businessmen as defined by the German Commercial Code (HGB);
- 3.2. laws which apply to both parties even when only one of them is a businessman; and
- 3.3. laws which only apply to the contracting party who is a businessman.

4. When am I deemed a businessman?

There are various ways a person can be defined as a businessman:

4.1. 'actual' businessman:

Generally, any individual who carries on a business is a businessman, whether or not they are registered in the commercial register. Registration of itself only has a clarifying (declaratory) effect. A business in the sense of the German Commercial Code is any commercial enterprise, unless the business is not required to be run in a commercial manner due to its business type or size.

4.2. 'can' or 'registered' businessman:

If a person operates a commercial enterprise which is not a business in the sense of the German Commercial Code, he or she may register their name in the commercial register. The person will be deemed a businessman on registration. Registration therefore also has a creative effect at law. A businessman can request the deletion of his or her name from the commercial register at any time, unless his or her commercial enterprise has become a business in the meantime.

4.3. 'deemed' businessman:

A person can be deemed a businessman in the following situations:

4.3.1. if a person is registered as a businessman in the commercial register that person must accept being treated as a businessman from a legal point of view, even if the registration was made by mistake. Until the cancellation of the registration, the person is deemed to be a businessman; and

4.3.2. if a person behaves like a businessman in legal transactions and therefore gives the impression of being a businessman, that person will be treated as such pursuant to the principle of the protection of reliance. Only a bona fide third person may rely on the protection of reliance.

4.4. statutory businessman:

All partnerships (civil law association, ordinary partnership, limited partnership) and companies limited by shares (proprietary company, public company) are businessmen.

5. What is the commercial register?

The commercial register is a public database which is administered by the local courts. It essentially provides legal clarity and protection. The commercial register lists all businessmen and companies as well as certain legally relevant information, e.g. the company name, the place of establishment, the directors or partners (in ordinary partnerships). The commercial register constitutes conclusive evidence of the matters stated in it.

6. What effect does registration in the commercial register have?

Registration in the commercial register often has legally constitutive effect, e.g. a person is a businessman at law on the basis of their registration. The legally constitutive effect will commence regardless whether or not the registration was correct. However, the registration can sometimes merely have a declaratory effect, e.g. the registration of an 'actual' businessman who is already deemed a businessman on the basis of his or her operation of a commercial enterprise.

7. What is meant by the transparency of the commercial register?

Third parties can rely on the correctness of the registered information. Conversely, information which is not registered is deemed to be nonexistent. Third parties are protected from new information which is not registered in the register, i.e. as long as new information is not registered, third parties can rely on the registered information in legal transactions.

Example: If some information has to be deleted from the register pursuant to commercial law (e.g. the grant of a power of attorney in favour of a person by a particular company), the power of attorney is valid until it has been deleted from the commercial register.

8. How can I examine the commercial register?

Anyone is permitted to inspect the commercial register at the local court. An extract from the commercial register regarding a particular businessman can be obtained for a fee. Further information is provided on the website: "www.handelsregister.de".

PART 2: COMPANY LAW

What is company law?

German company law governs the establishment, legal transactions and the dissolution of civil enterprises. In this respect, a distinction should be made between *Personengesellschaften* which are in effect limited or unlimited partnerships and *Kapitalgesellschaften* which are actual corporations.

What are partnerships?

A partnership is the coming together of at least two individuals to pursue a common purpose. In contrast to the position with companies, the individual members (partners) of a partnership are very important. A partnership allows the partners a lot of freedom to arrange their relationships with each other by contract. Partnerships are dependent on their partners.

What are companies limited by shares?

In a company limited by shares, shareholders are members of the company by virtue of their investment rather than personal collaboration with each other. Unlike with partnerships, the investment of each member in the company is the relevant contribution in companies limited by shares.

A public company is basically always concerned with the use of capital investments to operate a commercial enterprise. Unlike partnerships, public companies mostly consist of a large number of passive shareholders who have other professions, are not bound to the company and whose participation in the company is merely the holding of shares.

1. What types of partnerships exist?

The following three types of partnerships exist under German law:

1.1. civil law association ("Gesellschaft bürgerlichen Rechts" = GbR):

A civil law association is the basic structure of a partnership.

A civil law association is created through the forming of a partnership agreement. There are no formal criteria for a valid partnership agreement which means it can also be made orally. A civil law association is only created when the parties agree and commit to a common purpose. This common purpose can be any permitted purpose, typically a professional partnership, e.g. many lawyers and accountants are members of a partnership.

1.2. open trading partnership ("Offene Handelsgesellschaft" = OHG):

An open trading partnership is a partnership with the purpose to operate a business under a common firm name. It is also created through the establishment of a partnership agreement. Unlike civil law associations, in ordinary partnerships the common purpose of the partners is to operate a commercial enterprise under a common business name.

1.3. limited partnership ("Kommanditgesellschaft" = KG):

A limited partnership is a partnership with the purpose of operating a business under a common business name. In a limited partnership, however, some partners have only limited liability.

2. To what extent is a partnership liable to its creditors?

The liability of a partnership depends on the type of partnership involved:

2.1. civil law association (GbR):

In a civil law association, not only the partners themselves but the association in its own right are able to acquire rights and create obligations. The association takes proceedings in a court and can be sued as well. As a result, the civil law association with its partnership assets as well as the partners with their private assets are liable to the association's creditors. A judgment against the association is sufficient for the enforcement against the association's and the partners' respective assets. There

is no need to obtain a judgment against all the partners.

2.2. open trading partnership (OHG):

In an open trading partnership, all partners are personally liable to the partnership's creditors.

2.3. limited partnership (KG):

In a limited partnership, at least one of the partners, the general partner, is liable to the creditors without limitation and at least one of the partners, the limited partner, is liable to the creditors, but only to the amount of the partner's particular capital contribution (contribution of liability).

3. Which types of companies limited by shares exist?

Companies limited by shares are classified as either proprietary companies or public companies:

3.1. proprietary company ("*Gesellschaft mit beschränkter Haftung*" = GmbH):

A proprietary company is a corporation with its own legal personality and whose capital held in portions by its members or shareholders. As a corporation, a proprietary company exists independently of its members. As a legal person, it has the capacity to hold legal rights and duties and can take part in legal transactions in the same way an individual, i.e. a proprietary company can form contracts, sue or be sued and can be registered as landowner in the land register.

The members of a company sign a notarially attested company agreement in order to incorporate a proprietary company. However, the proprietary company is only incorporated once it has been registered in the commercial register. The founder can be an individual, a legal person or a partnership. A proprietary company can also be incorporated by only one person.

3.2. public company ("*Aktiengesellschaft*" = AG):

A public company is a corporation with its own legal personality and whose capital is divided into shares (company limited by shares). A public company has its own assets, can be the proprietor of chattels, property and claims.

4. To what extent is a company limited by shares liable to its creditors?

A proprietary company has unlimited liability to its creditors with all of its assets. Once the members have paid in their capital, they are not personally liable to the company's creditors.

The shareholders of a public company are not personally liable to the company's creditors. The public company's liability is limited to the company's assets.

5. What is a limited partnership ("GmbH & Co. KG")?

A "GmbH & Co. KG" is a limited partnership, where the general partner with unlimited liability is a proprietary company. The other partners are not liable with their private capital but only to the extent of their capital contribution to the limited partnership.

SUCCESSION LAW

What is Succession Law?

Succession law can be described as all the provisions of private law which regulate the transfer of assets after a person's death. German succession law is mainly regulated by the fifth volume of the German Civil Code. Succession law makes provisions about the rights of the beneficiary or beneficiaries.

Principles of Succession Law

German succession law is based upon the following general principles:

1. Privaterbfolge: (private succession): the state is not entitled to a share in the estate unless it is a statutory beneficiary. However, this is only the case if there are no living blood relatives of the deceased.
2. Familienerbrecht: (family succession): unless a deceased provides otherwise, his or her estate

passes to his family by operation of law, namely to his or her spouse and blood relatives.

3. Testamentary freedom: a person has the right to provide who should receive his or her assets after his or her death. Testamentary freedom is only limited by the law of statutory shares and public policy.

4. Universal succession: beneficiary receive the deceased's estate "as a whole" (including all estate liabilities). Generally, beneficiary do not inherit separate assets or rights of the deceased.

5. Vonselbsterwerb: (automatic receipt). The beneficiary or beneficiaries inherit the estate automatically at the date of the deceased's death.

Testamentary Dispositions

A testamentary disposition can be made in the following forms:

1. a Will which can be a handwritten Will or a Will prepared by a public notary;
2. a mutual Will; or
3. an inheritance contract.

Statutory Succession

Statutory succession follows a system of classes or groups. Members of the first class comprise the deceased's children and their issue. Statutory beneficiaries of the second class are the deceased's parents and their issue. The deceased's spouse does not belong to any class and inherits outside the class system. The spouse's share in the estate depends on whether he or she is a beneficiary together with beneficiaries of the first, second or another class.

Statutory Share

If an issue of a deceased, his or her spouse (or registered de facto partner) or, in certain circumstances, the deceased's parents are not beneficiaries under the deceased's Will, they may claim a statutory share of the estate against the beneficiaries.

TESTAMENTARY DISPOSITIONS

Wills

1. Do I have to sign my Will in the presence of a Notary?

No, under German law it is possible to make a handwritten Will. The problem with a handwritten Will is that it may result in time-consuming and costly proceedings because, for example, the wording in the Will is incorrect or ambiguous or the financial circumstances of the deceased have changed between making the Will and the date of death. It is therefore advisable that an experienced notary prepares the Will, especially if the Will-makers family or financial situation is complex.

2. How can I make a valid handwritten Will?

A handwritten Will must be written in its entirety by the testator and signed in his or her own hand. It is advisable to also note the date and place when and where the Will was made on the document.

3. Who can make a Mutual Will?

A Mutual Will can only be made by spouses and, since 1 August 2001, also by registered de facto partners.

4. How can I make a Valid Mutual Handwritten Will?

If spouses or registered de facto partners make a handwritten Mutual Will, it is sufficient if one of them writes the entire Will by his or her own hand and both spouses or de facto partners sign the document.

5. Do I have to Appoint an Executor Under my Will?

No. However, in some cases it is advisable to appoint an executor in order to facilitate or expedite the administration of the estate.

6. What is an Inheritance Contract?

An inheritance contract is a binding contract concerning appointment of beneficiaries and the provision of special bequests and/or conditions. Unlike a Will, an inheritance contract cannot be revoked by one of the Will-makers only at any time.

7. When is an Inheritance Contract Valid?

An inheritance contract must be signed by the testator personally. He can therefore not be represented by another person such as an attorney. If there is more than one party to the contract, the contract must be signed by both parties at the same time in the presence of a notary.

8. Can I revoke a Will and, if so, in what manner?

You can revoke a Will at any time by making a new Will or by destroying or amending your Will if this is done with the intention to revoke the Will.

9. Can I revoke a Mutual Will at any time?

If the Mutual Will contains so called "reciprocals provisions", and both spouses or de facto partners are still alive, the Mutual Will can only be revoked by declaration to the other spouse or de facto partner. The declaration must be notarised. Generally, the right to revoke lapses with the death of one of the spouses or de facto partners.

Statutory Succession

10. What happens if I die Without Leaving a Will?

If you do not leave a Will, you die intestate and the rules of statutory succession apply.

11. Who are my Statutory Beneficiaries?

Statutory Succession follows the following principles:

11.1. system of classes: the statutory beneficiaries of the first class (deceased's children and their issue) inherit before all other statutory beneficiaries of the second or other classes. If the deceased does not leave any living blood relative, the state would be the sole statutory beneficiary.

11.2. linear system: If there is more than one blood relative of the same class or same line (children, grandchildren and great grandchildren), the linear system applies. This means that if the deceased's child is still alive at the date of the deceased's death, leaving issue (grandchildren of the deceased), the deceased's grandchildren are not statutory beneficiaries of the deceased but only the deceased's child.

11.3. Succession per stripes : This principle would apply if one issue predeceased the deceased. In those circumstances, the issue of the predeceased child will take his or her place (for example: if a child of the deceased predeceases his or her children (grandchildren of the deceased), the issue will take the share of the estate which his or her or their predeceased parent would otherwise have taken).

12. Is the Spouse a Statutory Beneficiary?

Yes. However, he or she inherits outside the system of classes, namely one quarter together with beneficiaries of the first class, one half of the estate together with beneficiaries of the second class and the deceased's grandparents. If there are no beneficiaries of the first or second class or grandparents of the deceased, the spouse would be the sole statutory beneficiary.

Statutory Share

13. What is the Statutory Share?

A statutory share is one half of the statutory inheritance.

14. Who can claim a Statutory Share?

The issue of the deceased, the deceased's spouse (and since 1 August 2001, also the partner of a registered de facto relationship) and, in certain circumstances, the deceased's parents may claim a statutory share.

15. Must a Statutory Share be claimed within a Certain Period of Time?

A statutory share must be claimed within 3 years starting from the time:

15.1. the person becomes aware of the deceased's death; and

15.2. the person also becomes aware that he or she is not a beneficiary under the deceased's testamentary disposition.

Inheritance

16. Who pays the Estate Liabilities?

The beneficiary/beneficiaries are liable to pay all estate liabilities.

17. What can I do, if I do not want to be a Beneficiary?

If a person does not want to accept their inheritance, he or she must waive their inheritance within 6 weeks after they become aware that you are a beneficiary and the reason why you are a beneficiary (Will or Statutory Inheritance). If the person lives outside Germany, the period is extended to 6 months. A person can waive their inheritance at any of the German Probate Courts or in the presence of a notary.

Certificate of Inheritance

18. What is a Certificate of Inheritance?

A Certificate of Inheritance is an official certificate which states who are the beneficiaries of a deceased estate are. If there is more than one beneficiary, the Certificate of Inheritance will also state the share of each beneficiary in the estate.

19. Why do I need a Certificate of Inheritance?

A Certificate of Inheritance enables the beneficiaries to prove that they are entitled to the estate (for example, at banks or land registries). Further, a Certificate of Inheritance enables the beneficiary or beneficiaries to collect the estate, to dispose of estate assets and to distribute the estate.

20. Who issues a Certificate of Inheritance?

A Certificate of Inheritance is issued by the appropriate Probate Court upon application. Which Probate Court has jurisdiction in this matter is determined by the last residential address of the deceased in Germany or, if he or she did not have an abode in Germany, where the estate is located.

Inheritance Tax

21. Is there Inheritance Tax?

Yes. The amount payable is determined by the value of the net estate and applicable tax class.

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