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Chapter 1

The German Legal System

Learning outcomes
· Explain the key principles of the legal system of the country in question
· To learn more about the National Legislative Process of each respective country
· Obtain fundamental knowledge in key aspects of national legislation relevant to employment and relocation.
.. To learn more about the judicial system in Germany, review the accompanying lesson, 'The Judicial Branch of the Federal Republic of Germany.'



Story

Herta and Ralf are two seniors aged 62 and 63 living together in Hamburg. They lived in the Netherlands 3 years and then they moved to Hamburg. Like all other people over the age of 18, Herta and Ralf may elect the Federal Government every four years. Sometimes there are arguments about this, because both like different parties. But both are very interested politically and they find it important to be politically active.

Now they are happy because starting with 1st April they can participate actively within a law: Seniorenmitwirkungsgesetz.

This law based on existing laws for Hamburg and is oriented to improve the rights of older people. It is a special law which defines a frame for an active participation

of seniors and makes possible that seniors use their life experience. Berlin parliament also adopt such a law in 2017.

Basis Information about Germany

Germany is a federal democracy, with rights guaranteed by the Basic Law, or constitution. The federal government shares power with 16 states - Länder. Germany's capital and largest metropolis is Berlin where the Government is located. With about 82 million inhabitants, Germany is the most populous member state of the EU.

Because of its historical background there are a systematic organization of many areas of German law into general and specific rules, the organization of state, government, and the courts.

Since reunification the German Basic Law, is considered as the German Constitution with fundamental rights guarantees for all citizens and nationals shall apply. The focus is the dignity and equality of all people, which must be respected in all legislation.

1. German legal history and legal development

After the Second World War, the German Reich was divided into four zones oc-



cupied by the victorious powers of the United States, France, Great Britain and the Soviet Union. Although the capital Berlin belonged to the east, four sectors were also formed here. West Berlin and West Germany was controlled by the United States, France and the United Kingdom and East Berlin by the Soviet Union.

As there were ever more conflicts and differences of opinion between the victorious powers, in 1949 the division of Germany into two states occurred. In the west, on 23 May, the Federal Republic of Germany began to emerge with the temporary capital Bonn. In the East, the German Democratic Republic was founded on 7 October with the capital of East Berlin, which was to be left with a permit from now on.

As more and more people wanted to leave the GDR and escape to West Germany, the GDR government began on 13 August 1961 with the construction of the Berlin Wall, which led through Berlin. This wall separates East and West of Berlin into different parts.

Many citizens were very dissatisfied because they were imprisoned in their country. They began to defend themselves and demonstrated in 1989 for an opening of the borders. As the resistance increased, the GDR government gave up and opened the border to West Germany on 9 November 1989. So starting with this day a unified Germany exists: the Federal Republic of Germany.

2. The structure of the courts and law in the Federal Republic of Germany

Germany has a civil law system based on Roman law with some references to Germanic law. The Bundesverfassungsgericht (Federal Constitutional Court) is the German Supreme Court responsible for constitutional matters, with power of judicial review. Criminal and private laws are codified on the national level in the Strafgesetzbuch and the Bürgerliches Gesetzbuch respectively.

A characteristic of the German judicial system is the division of judicial authority into several special jurisdictions. According to the constitution, there are five special jurisdictions of equal status. These are ordinary jurisdiction (i.e. civil and criminal jurisdiction), administrative jurisdiction, fiscal jurisdiction, social jurisdiction and labour jurisdiction (Article 95 of the Basic Law). Each special jurisdiction is independent and has various stages of appeal.

Federal Court of Justice

Germany's supreme court system, called Bundesgerichtshof, is specialised: for civil and criminal cases; the highest court of appeal is the inquisitorial Federal Court of Justice. The Federal Labour Court, the Federal Social Court, the Federal Finance Court and the Federal Administrative Court are responsible for other affairs.

Federal Social Court

The Social Court Act dated 3 September 1953 (Federal Law Gazette part I, page 1239) came into force on 1 January 1954. The inauguration of the Federal Social Court took place on 23 March 1955 when the first public session was held. The Bundessozialgericht is responsible for audits against the social court judgments or leap revisions against judgments of the social.

Federal Family Court

According to Article 23b of the German Constitutional Court (GVG), there is a section of the District Court responsible for the decision of family matters since 1976.



Federal Labour Court

The Federal Labour Court, based in Erfurt, is the highest court in Germany's labour court system. In labour jurisdiction, the Federal Labour Court is of great importance. As a supreme federal court of justice, the court has to promote the consistency of court decisions in the area of labour law and develop the law where necessary.

Federal Fiscal Court

The Federal Fiscal Court (Bundesfinanzhof) is one of five federal supreme courts of Germany, established according to Article 95 of the Basic Law. It is the federal court of appeal for tax and customs matters in cases which have already been heard by the subordinate instance, namely the Finance Courts.

1. Federal Administrative Court.

The Federal Administrative Court (Bundesverwaltungsgericht) is one of the five federal supreme courts of Germany. It is the court of the last resort for generally all cases of administrative law, mainly disputes between citizens and the state. It hears appeals from the Oberverwaltungsgerichte, or Superior Administrative

Courts, which, in turn, are the courts of appeals for decisions of the Verwaltungsgerichte (Administrative Courts).

At the head of the Federal Administrative Court is the President . He is the superior with authority relating to personnel matter affecting judges and the administrative staff of the Federal Administrative Court. His duties also include those of a judge. The judges at the Federal Administrative Court discharge their judicial duties in senates. The roster allocating court business assigns responsibilities to each senate. The Presidential Judge addresses issues of personnel and court administration on behalf of the President.

Court Administration supports the President and the senates in the discharge of their duties. It is divided into the administrative department, the registry, the information services and the presidential department.

3. German Legal System

The German legal system belongs to the European family of legal systems, broadly classified as civil law countries. The Basic Law (constitution) is the primary basis of the legal system, but the laws of the European Union and the international community also are taken into consideration.

Basic Law

Germany's constitution, known as the Basic Law (Grundgesetz), was enacted on May 23, 1949.

The Basic Law recognizes fundamental human rights, such as the freedoms of speech and the press, the right of equality before the law, and the right of asylum. The constitution ("Grundgesetz") is the basis of our community. The Grundgesetz is Germany's national constitution. It contains our most important regulations. The Grundgesetz assures that your human dignity will be protected by laws and by the police, among others. It also includes you being able to freely give expression to your own personality, as long as you are not violating the rights of others.

Another important principle is that all people in Germany are equal, regardless of sex, sexual orientation, origin, religion or political beliefs. The police and judges are not allowed to treat you differently based on these attributes and discrimination is not permitted at work or in day-to-day life. These basic rights are legally binding

and apply equally to the three branches of government: executive, legislative, and judicial.

Despite the fact that all German laws, at least in theory, have an equitable within a unified system of law, the German legal system has been influenced by the Roman legal system with **civil and public laws**.

You can find a translation of the basic law in English language on this website:

https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html

- **Public laws** are concerned with the legal relationships between the citizen and the state, or the manifestations of the state in the form of public authorities.

The public laws include:

- *Constitutional law*
 - *Administrative law*
 - *Administration, civil law*
 - *Criminal law*
- **Civil laws** refer to legal principles concerned with the regulation of civil life, namely the affairs between individuals as private individuals.



Law making

However, it is not just the Members of the German Bundestag who are able to initiate the bills that result in new acts of law. The Federal Government and the Bundesrat also have the right to introduce bills in the Bundestag.

Bundestag

The national parliament, which is called the "Bundestag" in Germany, votes for the Federal Chancellor ("Bundeskanzler") and keeps a check on the government. The government can also be voted out. Laws are voted on in the Bundestag and the majority has the say. The minority must accept the decision.

- The Bundestag is responsible for passing federal laws, which are then implemented by the government.
- Principal legislative chamber
- All legislation must be approved by the Bundestag

- Directly elected every 4 years

Bundesrat

- Legislative authority is subordinate to that of the Bundestag.
- Representation of the federal states
- Members appointed by state governments (representatives of state governments, usually prime minister and other ministers).

Members of the Bundesrat are always Minister-Presidents or ministers in their respective federal states (or, in the case of the city states of Berlin, Bremen and Hamburg, Mayors and senators). State Secretaries may also be Bundesrat members if they have a seat and a vote in the cabinet of their federal state (Article 51, Subsection 1, Basic Law).

If you want to get more information you can visit a plenary session . If you would like to visit the plenary session, you will need to book in advance with the visitor service. Find more information: <http://www.bundesrat.de/EN/service-en/besuch-plenum-en/besuch-plenum-en-node.html>

4. Milestones in the German Path to the EU

Democratic Germany, which evolved from the aftermath of the Second World War, was, with France, directly involved in the foundation of the European Community (European Union – EU). Germany belongs to the six original members of the EU and is the main financial contributor within it.



"We must build a kind of United States of Europe. The first step in the formation of the European family must be a cooperation between France and Germany (Churchill 19.9.1946)."

- On 25 March 1957, the treaties of Rome were signed. Signatories were the Benelux countries, France, Italy and Germany
- With the reunification of Germany, the European Union was realized by the Treaty of Maastricht in 1992.
- Over the following decades many new members joined them while at the same time integration of economic, cultural, judicial and so forth would then deepen the relationships distinct European entity.

- Important were the insertion in 1993 of a “Europe Article” (Art. 23) into the Basic Law, the Act on the Exercise by the Bundestag and by the Bundesrat of their Responsibility for Integration in Matters concerning the European Union (IntVG), and the new Act on Cooperation between the Federation and the Länder in European Union Affairs (EUZBLG) of 2009.



5. Examples and advices of German experts

1. What would be central contact persons or institutions?

The Federal Agency for Labor, it is a central point of contact and also provides various information for migrant workers in different languages. But the industrial and commercial chambers are also important partners in the craft sector. Chambers and employers' associations have a great interest to participate in this because of the specialist problem. Perhaps they could also be invited as experts to training courses like these developed within BRIGHT. The points of contact also always depend on the profession, but the Federal Agency is a good first point of entry, since it all enters.

2. Where can importantly information be found on the Internet?

The Internet disposes of a good base of information which also are not everybody only on German.

Other recommended institutions:

The BAMF (Responsible for third countries and citizens of the European Union) - first information on important subjects, for example: how can one use the generosity?

The federal agency for work: there one finds information if it is about the recognition of occupational ends. The side also offers information about social benefits.

EU commissions which publish information in all European languages. This is a base platform where EU directives are provided. It contains also information about works abroad: i. e. Which permissions need them? How is this with the equal treatment?

Quiz

After reading this chapter, try and answer these questions to confirm your understanding of the material provided.

- *What experience have formed the current German legal system?*
- *What is the German legal system based on?*
- *What are the most important courts?*
- *What types of law are existing in Germany?*
- *In how many parts where Germany divided after the second world war?*
- *When did German join the European Union?*
- *What implications has the European Union had on the German legal system?*

Chapter 2

Contracts Law

Learning outcomes
Define the nature and meaning of a contract
Identify the regulation of the form of contracts and apply relevant examples
Reflect on their abilities to effectively analyse problems and apply relevant legal principles

Story

Herta and Ralf have a contract for their flat. On Sunday morning they have met their Apartment owners. It was very noisy on the football field, but the owners talked about termination. He said he needed the apartment itself. Herta and Ralf have not responded so far. For a termination, which cannot be understood because of a noisy environment, is not legally binding.

1. What is a contract?

A contract is a legally enforceable agreement between two or more parties that creates an obligation to do or not do particular things. The German word for it is “Vertrag”. The conditions of contract law are named “Vertragsrecht” (Richter 2011).

Contracts are usually governed and enforced by the laws of the state where the agreement was made. In this agreement, the parties put their mutual rights and duties in relation to the contract base. Legal persons can be humans (which are legally known as “individuals”) or corporations, limited liability companies, and other entities. Only those contracts can be closed without the permission of third parties, which is unlimited legal capacity. This is possible for people in Germany with age of 18 years.



What is legal status of contractual terms in your jurisdiction?

Contract law is based on the civil code. In the civil code is by §§ 145 et seq. Civil Code regulated the formation of a contract. There are treaties in the law of obligations, but also in the law, Family law and inheritance law.

Freedom of contract is a right protected by Basic Law. Contracts do not require consideration, can contain whatever the parties agree upon and, unless specifically required by law, do not have to be in any particular form. Therefore, compensation can be claimed both for the violation of a major obligation and of an ancillary obligation. However, some stipulations differ slightly from other terms agreed on:

- One distinction that can be drawn is whether or not liability exists under the clause independent of fault. As a rule, this depends on an interpretation of the respective contractual arrangement.
- German law also generally permits conditions precedent and conditions subsequent. These allow the validity of the relevant contractual provisions to be made contingent on external circumstances.



Contracts of sale and contracts for work and services (including the subcategory contracts for work and materials), which are of particular relevance in the business environment, are covered by the German Civil Code. This Code sets out a statutory regime of rights in relation to defects under these types of contract (Richter 2011).

Formal legal requirements

For a legally enforceable contract to be created there must be two corresponding declarations of intent. These are known as offer and acceptance. The declarations of intent must be sufficiently specific (for example, the offer must contain all the essential elements to be valid). In addition, the party giving the declaration must have capacity both to act and to contract (Rechts- and Geschäftsfähigkeit). This is the case where the party can be the holder of rights and duties, and can also carry out transactions with legal effect.

The content of contract are:

1. An offer and the specific conditions
2. The acceptance of the offer, fixed in form of a signature
3. Contractual conditions, including terms of payment and the date of payment
4. Both contracting parties be of legal capacity
5. The intent of both parties to carry out their promise
6. Legally enforceable terms and conditions, also called object of the contract

Contracts can be concluded in various forms. In general, it is not necessary to formalise the content of a contract. In addition it's not necessary had collated all documents of the agreement to agree to them. If the parties specify the documents sufficiently accurately or attach them for example as annexes, they can become part of the agreement by



reference alone and do not necessarily need to be handed over. In practice, a lot of agreements are also concluded orally or even by implied behaviour.

In a number of situations, the law will prescribe the contents of particular kinds of contracts. For example: rent-contracts, employment-contracts, marriage contract.

Employment-contract (Arbeitsvertrag): the contract of employment being used in labor law to attribute rights and responsibilities between the parties of “employee” and “employer”. Much of the contained conditions are obligatory.

In Germany the normal way of serious employers is sending a written work contract.

In reference to other contract conditions the agreements of German contracts are more transparent (Hill/ King 2004). There is much less explanation, qualification, and limitation in the language and the legalese is almost identical from contract to contract.

2. Contract Formation and Parties Obligations (Vertragsabschluss und Pflichten der Parteien)

German Civil Code (BGB) regulates the design of contracts

- According to § 145 BGB a contract offer (application) is usually binding
- According to § 146 BGB contract offers automatically apply only for a limited time.

(https://www.gesetze-im-internet.de/englisch_bgb/)

3. Refer to sample contracts (Musterverträge)

German law distinguishes between statutory and contractual written form requirements. If the written form is required by statute, the document must be authenticated by the issuer personally by means of his signature or by a handwritten mark certified by a notary. In the case of a contract, both parties must sign on the same document. The written form can be substituted by the electronic form and by notarisation. Where the written form requirement is merely a contractual stipulation, it is sufficient for the declaration of intent to be transmitted by means of telecommunication and, in the case of a contract, by exchange of letters.

The concept of a document/deed (*Urkunde*) is not consistent in German law. A document in terms of criminal law is not consistent with a document in terms of civil or procedural law, and even within the civil and procedural law the term is not consistent.

Checklists

You can find a collection of sample contracts on the websites listed below:
<https://www.frankfurt-main.ihk.de/recht/mustervertrag/>

You also can find a checklist on the website
<https://www.verbraucherzentrale.de/englisch-neu>. There are written in English. For example, there is a list who gives important information before signing a contract.

4. Termination of Contracts (Kündigung)

An offer is ordinarily binding; that is, it cannot be cancelled during the period stipulated for its acceptance or, if no such time period is stipulated, for a reasonable period of time after it reached the offer.

For cancellations, a distinction is made between the ordinary termination and extraordinary terminate. The ordinary termination includes any statements of reasons and are bound by a time limit. The right of ordinary termination is different for each type of contract, and thus takes into account the specific characteristics of the respective Rechtsbereichs. The extraordinary termination occurs within the contract term. For this, an important reason is necessary.

Labor law has special conditions of termination. Here especially the protection against the dismissal Act (KSchG) be aware, high demands on the effectiveness of the ordinary termination of certain working conditions. The relevant provisions can be found in Section 314 BGB (as well as in § 543 for leases and the § 626 for service contracts). Workers with the protection against dismissal lawsuit can proceed against labor code unjustified dismissals.

Other notes about termination (Source: Kündigungsschutzgesetz – KSchG)

- § 309 Abs. 9 BGB specifies that a clause in the GTC is ineffective, which stipulates that the period of notice expires more than three months before the automatic (silent) contract renewal.
- § 313 (3) BGB sets a right of termination in the event of a disruption of the business basis.
- In addition to the previous statutory provisions on termination, there are still some special rules for contracts for services and work
- There are other special statutory termination arrangements, for example for rental and loan agreements, which cannot be discussed here.

5. Breach and Remedies for Breach

Private autonomy has a high priority in German law. Therefore, contracts and arrangements are generally valid, and a contract will only be found to be invalid in exceptional circumstances. These include transactions that violate a statutory pro-

hibition, and these contracts are null and void. These are exceptional cases, which affect professional law and principles (for example, it is not permissible to work in a dual capacity as an auditor and a chartered accountant).

A party can generally rescind and reverse a contract if all of the following are met:

The party owing performance has been set a deadline for performance that has not been met.

The party to whom performance is owed is not primarily responsible for such non- or poor performance.

The duty involved is not immaterial in nature (that is, it is not insignificant relative to the contractual duties).

It is important to note that rescission does not prevent claims to damages.

When a breach of contract happens (or at least when a breach is alleged) one or both of the parties may wish to have the contract "enforced" on its terms, or may try to recover for any financial harm caused by the alleged breach.

There are several remedies for breach of contract, such as an award of damages, specific performance, rescission, and restitution. In courts of limited jurisdiction, the main remedy is an award of damages (Sesta 2016).

Breach of contract distinguishes between the following scenarios:

- The distinction, if the debtor does not, late or otherwise, is then irrelevant.
- The debtor can rely on the fact, that no charge may be made to him or his assistants and
- 3 A special defect warranty right is unnecessary in the common law, because it is here only to liability for breach of contract. But also the common law cannot help to take into account possible impediments to performance of the debtor: this does however not during a test of fault, but the question, to what extent the meaning of the Treaty at all, a guarantee was taken over.

Contracts may be ineffective, despite associating agreement. The reasons for such ineffectiveness are above all the legal incapacity (§ 105 BGB), the limited legal capacity (sections 106 et seq.), a lack of any form (§ 125 BGB), a violation of a legal ban on (§ 134 BGB), immorality (§ 138 BGB) or the appeal (§ 142 BGB).

Right of withdrawal

The right to withdraw from a contract can be given as a legal right of withdrawal in the case of contractual service disruptions, ie if a contract was not or only insufficiently fulfilled, or by a contractually agreed right of withdrawal.

The legal regulations for both variants of the resignation apply to all mutual contracts, ie legal transactions in which a service and a consideration (usually: "money against goods" or "money against performance") have been agreed or already effected. Typical reciprocal contracts are: purchase contract, work contract and service contract. The rental contract and the employment contract are also mutual contracts, but termination instead of resignation for good cause (including extraordinary dismissal) may be the appropriate legal remedy.

For both ways of the resignation applies beyond that the declared resignation is final.

Thus, the person who has withdrawn from the contract can't demand no fulfillment of the contractually agreed services, after his interests have changed. A resignation is basically irrevocable.

Quiz

1. What are the authority/capacity rules for entering contracts, for different commercial entities?
 - Authority on the basis of a law
 - Authority on the basis of an individual contract
 - Authority on the basis of apparent authority
2. What are the essential requirements to create a legally enforceable contract?
3. What are the main forms of contract?
4. What are the rules relating to invalidity, misrepresentation and mistake relating to contracts?

Chapter 3

Employment Law

Learning outcomes
To understand the structure and the context of work contracts
To separate the different types of employment forms

Story

Herta and Ralf worked more than 10 years in the same company a German company with a subsidiary in the Netherlands. Now it is possible they become unemployed. But the German laws assure in their case to get the salary for 18 months after the hiring so they are happy with this work law. In order to make Germany eligible for pension rights from her time in the Netherlands, they would have to apply to the pension fund in the Netherlands. Because you always have to submit an application to the country where you last worked.

Key legislation

- Civil Code (Bürgerliches Gesetzbuch).
- Law on temporary employment (Arbeitnehmerüberlassungsgesetz).
- Act on Working Hours (Arbeitszeitgesetz).
- Federal Data Protection Act (Bundesdatenschutzgesetz).
- Federal Family Allowance and Parental Leave Act (Bundeselterngeld- und Elternzeitgesetz).
- Federal Leave Act (Bundesurlaubsgesetz).
- Maternity Protection Act (Mutterschutzgesetz).
- Part-time and Fixed-term Employment Act (Teilzeit- und Befristungsgesetz).
- Labour Court Act (Arbeitsgerichtsgesetz).

Which issues would you most highlight to someone new to your country?

In general, German employment laws offer a high level of protection for employees. These provisions are not codified in one act, but are spread out over several statutes, including:

- the Protection Against Dismissal Act (which provides for strong dismissal protection after six months of employment and in operations of more than 10 employees);
- the Working Time Act (which limits daily/weekly working hours and provides for rest breaks and public holidays);
- the Part-Time and Limited-Term Act (which provides for part-time entitlements and restricts fixed-term contracts); and

- the Minimum Wage Act.

1. Employment Contract



Work contract (Arbeitsvertrag)

A contract of employment is essential for any job in Germany. It contains precise provisions of the employment relationship. It should be carefully read and asked if something unclear or does not conform to the oral agreements reached. Finally, it must be signed to make it legally binding. It must insist on a written contract, which is, however, usual in Germany. If the person has not handed a contract of employment, this should give reason for suspicion – so an enquire at the trade association or employment agency is necessary.

The contract of employment regulates the rights and obligations for employer and employees. Main provisions are the definition of working tasks and remuneration, also the duration of the probationary period, working hours and workplace, as well as break-time and holiday regulations.

The employment contract is often derived from the requirements of a current collective agreement, which the industry association has concluded with the respective union.

A contract of employment is a special type of contract for the rendering of services and is subject to §§ 611 et seq. of the Civil Code (Bürgerliches Gesetzbuch). Arrangements entered into in favor of employees in collective agreements and company agreements as well as industrial safety regulations must be observed when filling in the general framework of employment contracts.

Working hours

The collective agreement usually prescribes a working week of between 37 and 40 hours. Germans, however, actually work an average of almost 41 hours a week. There are often flexible working time schemes (flexitime arrangements) that allow you within limits to decide on your working hours yourself. In some occupations, bonuses are paid for night work and work on holidays, in the health and security sectors and shift work in companies, for example (Sesta 2016).

Wages and salaries

A standard minimum wage applies in Germany of EUR 8.50 per hour. Every employee is entitled to receive this pay at the least. There are, however, currently exceptions in a few industries. Many have their own higher minimum wages, the building trade, for example. Otherwise, wages are negotiated in collective bargaining between trade unions and employers' associations. If there is no collective wage agreement in the corresponding industry, the pay could be negotiated with the employer yourself.

Social security

An employee in Germany is a member of the national social security system. It comprises statutory health, nursing, accident, pension and unemployment insurance. As soon as the employer registered as an insured person, she/he will be assigned a so-called social insurance number. When recording the first employment, you get a social security card (SV ID) by the pension insurance funds. This includes surname, maiden name, first name and the insurance number. For certain occupations (such as construction), the SV ID must contain a photo and you must lead him constantly while working.

Employees have a legal right to the continued payment of 80% of wages or salaries in the event of sickness (Continued Payment Act - Entgeltfortzahlungsgesetz). This right extends to a period of six weeks.



The incapacity for work and its probable duration must be reported to the employer without delay. No later than the third day after the beginning of the incapacity for work, your doctor must examine you and issue a certificate of incapacity for work and its probable duration. The doctor sends the certificate to the health insurance company, whereas you have to send it to your employer.

2. Different types of employment (e.g. part time/ for a definite period etc)

Many people, including the majority of blue-collar workers, white-collar workers and civil servants, will be given a fixed-term full-time employment contract.

An increasing number of people work part-time (Teilzeitarbeit). In addition to "regular" part-time work, which is subject to social security insurance, there are also so-called "mini jobs", in which the employee may earn up to €450 per month. Many people employed as cleaners, health workers, catering staff and those in the retail trade have these "mini jobs". The exercise of a slightly paid employment or a short-term employment is allowed in addition to a full social insurance contributions employment. Several slightly paid occupations exercised by one person, these are so to be together. The de minimis limit is exceeded by EUR 450 as a result of

aggregation, these pursuits not more than slightly paid occupations, but as fully liable for social security jobs are counted.

One way of adapting to changing conditions is part-time work in its diverse manifestations. The varied working time models such as personal daily and weekly working hours, sabbaticals and gradual transition to retirement are flexible forms of work organisation.

Employers who are responsive to the desires and needs of their employees not only have more satisfied staff, but also benefit from their higher degree of motivation in carrying out their work. Improved motivation leads to higher productivity and a higher standard of work, which ultimately benefit the business.

Talk openly with the employer about their working time preferences. The Federal Agency for work off before you can advise about the advantages and disadvantages of the various forms of work.

Fixed-term-Contract (Befristung) and part-time and fixed contract Law (Teilzeit- und Befristungsgesetz)

- Without any grounds – two years max. – or four fixed-term contracts (altogether not longer than two years: for instance a consecutive series of six-month contracts).
- No time lapse between two fixed term contracts can lead to an unlimited contract; a trap for employers which they sometimes step into it. In such a case, the employee can sue the employer and get a permanent contract.
- When the fixed term contract ends, but the employee continues working and the employer says nothing, the employee automatically gets an unlimited contract. Employers need to watch out for such a situation as in these circumstances, the employee can sue the employer and achieve a permanent contract.
- With grounds– longer than two years (for instance, the employee is pregnant and is not at work for the next three years (parental leave) – a fixed term contract is possible. A fixed term contract is also possible for a project which is estimated to last five years.

These regulations are referring to the “Teilzeit- und Befristungsgesetz” (TzBfG).



3. Basic Obligations of the Parties

Nearly every work contract consists of general terms and conditions made by the employer pertaining to a large number of employees (Allgemeine Geschäftsbedingungen). The employer has the power and dictates the conditions of the work contract without negotiations between employer and employee. Because the employee's negotiation position is the weakest, the law (clause 305 ff. BGB – German civil code) is geared to protect the employee. This means that not everything that is written in the contract is allowed by law. Generally, it should be asked by signing a work contract which contains conditions not permitted by law. But if the conditions aren't permissible in the contract they may be invalid. In brief, the lawyer will check the contract and identify permissible conditions as well as impermissible ones. The latter do not apply since they are unlawful to begin with.

In civil law, the party who loses the case has to pay the court fees and the legal expenses of the winning party. In labour law cases it is different. In the first level of jurisdiction (1. Instanz) each party has to for pay its own lawyer – regardless of which party wins or loses, which can be costly. Therefore legal protection insurance (Rechtsschutzversicherung) is necessary. Note that the insurance is valid from three months after signing for insurance coverage.

Who is legal capacity in Germany?

In Germany, the minimum age for regular employment in a business is 15. Child labour is banned under the Child Protection Law (Jugendarbeitsschutzgesetz). Children fewer than 18 but still in full-time educations are also subject to restrictions in terms of the number of hours they may work.

Anyone aged 15 and above and no longer in full-time education may be employed for up to eight hours a day (40 hours per week) in an appropriate role. This means that they must not be overstretched physically or asked to perform tasks which are inappropriate given their age and experience.

Trainees may work in a business under a vocational training contract, which is not employment in the conventional sense. The federal employment agency in the context of a vocational guidance advises on the design of educators and the content of occupations and their subsequent labour market opportunities. A date for the advice can be agreed with the competent federal agency.

4. Basic Rights of Employees stemming from legislation



Maternity protection (Mutterschutzgesetz)

On 1 January 2017, a new Maternity Protection Act came into force with various amendments and consolidation of related law. One of the changes is that if an employee gives birth to a disabled child, the period of protection for all rights (i.e. to maternity leave and pay and protection against dismissal) increases from eight to twelve weeks.

- From the beginning of pregnancy until four months after giving birth, the employer is not allowed to give notice to the employee;

- type of work allowed is restricted;
- work is not allowed at certain times;
- working isn't allowed six weeks before giving birth;
- working isn't allowed eight weeks after giving birth;
- breastfeeding mothers are entitled to special breastfeeding breaks of at least half-an-hour twice a day or one hour once a day.

Parental leave (*Elternzeit*)

- Good News: The *elternzeit could be taken* until the child is three years old – so the third birthday is the first day of work. The employer doesn't have to agree.
- Here are some points to note:
- During *elternzeit* there is a 'sleeping contract'. This means that the contract still exists but it is not necessary to work and the employer doesn't have to pay. Both parties must, however, observe the other's rights and duties. That means that both have to be loyal to each other – for instance, the employee may not work for other employers or as a freelancer without asking the employer; otherwise, the employer has the right to fire. It is legally possible to work part-time during *elternzeit*.

How to apply

Elternzeit can be taken from one day to the next. The employee must be informed at least seven weeks in advance.

- The letter:
- "Sehr geehrte Damen und Herren,
- *ich nehme elternzeit für meinen Sohn, geboren am, für die Zeit vom ... bis zum*"
- Sign the letter.

Fathers also can take *elternzeit*.

Part-time work during *elternzeit*

- During *elternzeit* the employee can work part-time, but no more than 30 hours per week (75 percent). It makes no difference if the employee works part-time for your employer or freelance for another employer – 30 hours per week is the maximum.

Elterngeld

The employee could qualify for '*elterngeld*'. It is paid by the state and can be paid from the date of birth until the end of the 14th month.

With the introduction of ElterngeldPlus and the four additional partnership bonus months to the retrofits the existing federal parental benefits and parents time Act was fundamentally reformed.

The ElterngeldPlus is a new service for this generation of compatibility. The combination of parental allowance and part-time work is made easier. Parents are supported in their wish to enter a compatible partnership of family and vocation early on. The ElterngeldPlus encourages parents to implement their ideas of family life and partnership.

How to apply for the ElterngeldPlus:

- You can choose between the Elterngeld and ElterngeldPlus, or combine both of them.
- The ElterngeldPlus is applied for, like the Elterngeld, after the birth of the child in written form and at your parental allowance office.
- A retrospective payment of the parental allowance is possible at most for three months prior to the month in which the application was submitted to your parental allowance office. It is therefore recommendable to submit the application to the parental allowance office within the first three months of your child's life.
- Each parent can apply individually for a parental allowance. The respective application can be altered until the end of the parental allowance period of entitlement, but only for monthly sums not yet paid. Months in which ElterngeldPlus has already been paid can subsequently be converted into Elterngeld months.

Work after *elternzeit*

The employer is obliged to take the employee back because there exist a working contract. Part-time work after *Elternzeit* is also possible.

In many cases part time work is not possible, because the employer doesn't want it due to their belief that the employee will be absent frequently due to children being ill or other child-related reasons for being off work.

Some employers offer a corporate child care to strengthen the reconciliation of family and career. Also, there is a State right to a place to child care in Germany.

5. Termination of Employment

An employment agreement can be terminated either mutually or unilaterally, such as termination by agreement, expiry of a fixed period (eg reaching retirement age) or notification of termination. In principle, the employer and even specially protected employees are free to agree on the termination of the employment agreement at any time (a termination agreement). In order to be valid, any termination agreement must be in writing.

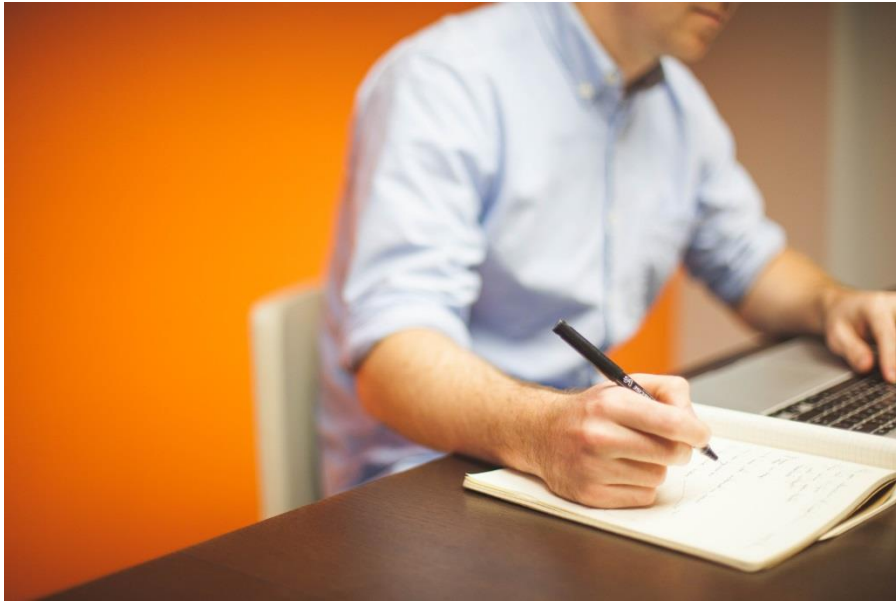
There are three different ways in the grounds for cancellation:

Three types (operational – *betriebsbedingt*, behavioural / breaking the rules of the contract – *verhaltensbedingt*, for reasons which are not based on bad behaviour such as a long illness – *personenbedingt*).

Legal basis of termination: German Employment Protection Act: *Kündigungsschutzgesetz* – KSchG

The requirements of an effective ordinary termination at a glance:

- Only three-week period for filing suit (*3 Wochen Klagefrist*).
- Employer must prove that you received notice.
- Notice has to be written and signed by the employer – verbal notices are not valid.
- If the employee is uncertain whether the signatory has legal power in this instance, she/he has a maximum of five days to inquire.



Quiz

- What contains a contract of employment?
- Which are the types of employment in Germany?
- Please mention some obligations of the employer
- What means parental leave (Elternzeit)
- Please mention some conditions for employment termination

Chapter 4

Business Law

Learning outcomes

Learning about the different types of companies and their characteristics

To get an overview about obligations and rights of business law

Story

Herta and Ralf think to be self-employed if they are fired from the company they worked more than 10 years and they are a bit afraid. But “Best Ager” i.e. people after 50 – have many experience useful for young ones. In Germany due to demographic changes will be more older self-employers in future so Herta and Ralf will not be alone. For their idea, however, they must first register a patent and change their health insurance. Self-employed pay a different contribution in Germany than employees or pensioners. Company founders in Germany can apply for state subsidies to found a company. The support depends on the offer. There are local counselling centres for this purpose.

1. What includes business law?

Business law encompasses all of the laws that dictate how to form and run a business. This includes all of the laws that govern how to start, buy, manage and close or sell any type of business. Business laws establish the rules that all businesses should follow. A savvy businessperson will be generally familiar with business laws and know when to seek the advice of a licensed attorney. Business law includes state and federal laws, as well as administrative regulations. Let's take a look at some of the areas included under the umbrella of business law. Commercial law in the classical sense includes codifications such as parts of the Civil Code, commercial and corporate law, securities law, stock exchange and insurance law as well as

industrial property rights. Furthermore, this includes the currency, money and coinage, tax law, antitrust law, chamber law, v. a. the chambers of commerce and industry and the chambers of commerce, and the law of economic supervision. The social market economy includes, in particular, individual and collective employment law as well as regulations on economic development, eg Eg subsidies and stimulus packages. The basis for the intervention of the state today is u. a. the stability law. An integral part of commercial law is also the budgetary law of the Federation and the Länder. Business law i. w. It also includes EC law and the law of international economic organizations

2. What is a Company?



A company is an economic financial and legal unit for which the acquisition economic principle is constitutive - in contrast to for example public companies.

Private companies belong to a private owner and their main goal is to maximizing profit.

Public companies, however, are the property of the State. Public companies are subject to a "public purpose" and may be used not solely or mainly for profit maximization.

One peculiarity of German corporate law is the distinction between "small industrial unit" and "commercial operation". This difference is only important for "one-man businesses" and not in legal entities.

Commercial enterprises have to be entered in the Register of Commerce. As a matter of principle, the German Commercial Code (HGB) is applicable to them.

Non-commercial enterprises can be entered in the Register of Commerce voluntarily and are then treated like businessmen. If they do not make any use of this possibility, then they are subject to the German Civil Code (BGB) and not the HGB as a matter of principle as regards their legal transactions.

The question of whether an enterprise is of a commercial nature is based on whether the business operation requires a commercial set-up as regards its nature and scope (§ 1 HGB). Decisive criteria are primarily the turnover, the number of employees, the amount of operational assets, the loan volume as well as the number of locations or branch establishments. Turnovers of more than Euro 250,000 are generally an indication for the fact that the framework of a small industrial unit has been exceeded.

A small industrial enterprise can be run by a single person as a small industrial entrepreneur or by a civil-law corporation in the form of a civil-law partnership (GbR). Commercial one-man companies are a single merchant (e.K. = e.Kfm, male or e.K. = e.Kfr., female), a general partnership (oHG), a limited commercial partnership (KG) and a one-man company with limited liability (GmbH & Co. KG, GmbH & Co. oHG).



2. Available company types

The most common type of business organisations in Germany is the company with limited liability (Gesellschaft mit beschränkter Haftung = GmbH) governed by the Act concerning Companies with Limited Liability (Gesetz betreffend die Gesellschaften mit beschränkter Haftung - GmbHG).

Gesellschaft mit beschränkter Haftung (GmbH)- Company with limited liability

The LLC (GmbH) is a trade company with a corporate organisation and its own legal personality. Unlike partnerships, it is not the combination of persons, but the provision of capital amounts which is in the foreground. It can be set up for any admissible purpose. It has a share capital determined by the Shareholders' Agreement, which matches the sum total of the share contributions to be made by the shareholders. Only the company is liable to creditors for corporate debts.

Aktiengesellschaft (AG) – Joint-stock company; public limited company

The joint-stock corporation (AG) is a company with its own legal personality. Only the corporate assets are liable to the creditors for its liabilities. It has an authorised capital split up into shares. By choosing the AG as its corporate form, an enterprise can procure large amounts of money as needed by a modern large company. As the stockholders do not enter into any further obligations with the purchase, the AG can address a broad public on the general capital market. The easy assignability of the shares is also characteristic, in the case of enterprises quoted on the stock exchange via the latter. The AG is the preferred corporate form for large enterprises. After an amendment of the German Stock Corporations Act in 1994, some formal directives were simplified for stock corporations with shareholders known by name (e.g. family-run companies). One-man formation is now admissible. In this way, the form of an AG under the designation "small stock corporation" also became attractive for small and medium-sized enterprises.

The AG must be entered in the Register of Commerce. It only originates as an independent legal entity upon entry. Entry in the Register of Commerce is to be applied for at the locally competent Local Court by all founders, members of the Board of Directors and the Supervisory Board. The signature and the signing of the corporate name must be certified by a Notary Public. It may only be done if the required amount has properly been paid in for each share and is finally at the free disposal of the Board of Directors. The Notary Public submits the application to the competent register court in an electronic form.

General partnership (oHG)

The oHG is a corporate form, the purpose of which is aimed at operation of trading business or a joint company, in which all the partners are liable towards the creditors without limitation. It is particularly suited for small and medium-sized companies.

According to the German Commercial Code (HGB), enterprises exercising the typical trading activities are deemed trading companies (formerly: basic commercial trades):

e.g. wholesale and retail trade, the manufacturing trade, the bank and insurance sector, transport trade, trade representatives etc.. But people running a craft or any other kind of industrial enterprises are also deemed merchants.

The law of oHGs has been regulated in §§ 105-160 of the German Commercial Code (HGB). As a supplement, the directives on the basic form of any company, the civil-law partnership (GbR) (§§ 705-740 BGB), are applicable. From the view of the corporate form, the oHG can also be regarded as a special form of a GbR for a trading company with a commercial scope of business. The oHG is a partnership. Differently to a capital company the focus lays at the personal commitment of the partners instead of the capital. Mostly they use their own working power, which builds a certain personal connection to the enterprise results. Forming of the partnership is not dependent of a certain minimum capital.

Offene Handelsgesellschaft (OHG) *(General partnership)*

In contrast to GmbH and AG, the partners in an OHG have unlimited liability. Every partner is legally obliged to participate actively in operating the business unless the articles of partnership (Gesellschaftsvertrag) otherwise provides. The OHG can sue or can be sued in a court of law. For internal matters decisions should be made unanimously, but articles of partnership usually allow decisions by a majority of votes.

Kommanditgesellschaft (KG) *(Limited partnership)*

This is basically a partnership but provides a limitation of liability on behalf of some of the partners. A KG bears two kinds of partners: 1) the general partner (Komplementär), who has an unlimited liability extending to his or her personal assets, and 2) the limited partner (Kommanditist) whose liability extends only to his or her nominal holdings in the company.

GmbH & Co. KG *(Limited partnership with a limited liability company as general partner)*

This combines a limited liability company with a limited partnership by making the former the sole general partner of the latter. The limited partners are, also like every KG, only liable to the extent of their registered holdings.

Zweigniederlassung *(Branch)*

This is rather a non-independent business branch, dependent in every aspect on the head office, which also is in charge of the central administration.

The distinction between a subsidiary and a branch office is important because it determines whether an entry must be made in the Register of Companies. The distinction is also relevant in determining the place of the actual business in terms of German tax law.

3. Special forms in forming companies

Partnership companies

The legal form of a partnership company can only be chosen by freelancers, e.g. doctors or lawyers. Alongside the partnership's assets, the partners are also personally liable to the creditors for the partnership's liabilities. However, they can limit their liability for claims to damages on account of defective exercising of the professions (also making use of general terms and conditions of business) to the partner who is to render the professional service within the partnership or to manage and monitor it under his responsibility.

The law of partnership companies has only been regulated very concisely in the Partnership Companies Act. As a result of the possibility of forming a GmbH for some freelancers, interest in this legal form has dropped. Partnership companies are to be entered into the Register of Partnerships at the Local Court.

Silent partnerships

Silent partnerships are business partnerships in which someone obtains a holding in someone else's trade business with an asset contribution which is assigned to the other person against a share in the profits, §§ 230 et seq., German Commercial Code. Silent partnerships are not recognisable to the outside, the silent partner does not make any business registration.

Only the proprietor and not the silent partner is entitled and obligated from the trade transactions concluded with third parties. Limited control rights accrue to the silent partner, as a matter of principle he can merely demand written notification of the annual financial statements and have insight into books and papers in order to examine their correctness.

The silent partner participates in the profits and losses. Unlike participation in the profits, which is compulsory, participation in the losses can be ruled out. After dissolution of the company, the silent partner shall have a claim to disbursement of his credit. A passive balance does not obligate to subsequent payment as a matter of principle, but becomes irrelevant. If there is deviation from the statutory (typical) regulation, it is a question of an atypical silent partnership, for example if the silent partner is granted more control rights or participates in the management or similar.

European Economic Interest Grouping (EEIG)

The EEIG is a joint corporate form of European law. It is to facilitate cross-border cooperation and support the domestic market. The EEIG must be composed of no less than two participants and at least two of its members must have their headquarters or their registered offices in differing member states.

The EEIG itself may not pursue any economic purposes and achieve profits for itself. It is limited to supporting the economic purposes of its members, which often makes this legal form uninteresting.

The formation agreed is valid without formalities. But as it is to be deposited at the Register of Commerce and has to contain certain information according to the EEIG Directive, written form is factually necessary. A further prerequisite for formation in Germany is entry of the EEIG in the Register of Commerce.

The members of an EEIG are liable for their liabilities without limitation and jointly and severally. Unlike an oHG, however, the members' liability is subsidiary. Creditors can only make claims against the members when they have requested payment from the company and this has not been performed within a suitable period.

Small and medium-sized companies SMEs

Most of Germany's business, on the contrary to other industrial countries, is conducted by the small and medium-sized companies of the Mittelstand. In one of Business Week's recent



lists of the world's thousand biggest firms, 345 were Japanese and 353 American.

Only 30 of these biggest companies were German, which means that the Mittelstand is the engine of the German economy. The Mittelstand firms are often family-owned with a dominant founder or manager. They have a benevolent attitude towards their employees, who, in turn, are exceptionally well-qualified and motivated. In the past most of the Mittelstand firms' business was conducted locally, and relationships with the customers were close. The market success was based rather on quality than on price.

The concept of the Mittelstand backdates to medieval times and is connected with a long handicraft tradition. Today it is one of the foundations of the middle class and the reason why the phrase "Made in Germany" has been a hallmark of quality for more than a century.

Because of the lack of an official definition of the term "Mittelstand" (and no satisfactory English translation!) it is hard to demonstrate its importance statistically. A firm employing less than 500 persons and having an annual turnover of € 500 million or less is a widely accepted approach of a definition. It is estimated that there are 3,3 million Mittelstand firms in Germany, producing 57 percent of the gross national product, employing 70 percent of the work force and training 80 percent of the apprentices.

Mittelstand firms tend to be concentrated in industry, commerce, the skilled trades, professions, and such service branches as construction, transport, retailing and the hotel and restaurant business.

4. Obligations and rights

For many people, founding a company is a new experience and there are many things to do. After all, the company should be located at a suitable Internet address. The company name should be clear and unambiguous. A brand protection for the products and services secures the position in the competition. However, you must not forget that these topics are not a one-way street. If you start a company, you must also be careful not to violate existing intellectual property rights.

Antitrust and Competition Law in Germany

For doing business in Germany, German Antitrust Law, i.e. the Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen - GWB) and EC Antitrust Law, i.e. Articles 81 and 82 EEC Treaty and the Merger Control Regulation, have almost the same importance in practice. The German Federal Cartel Office (Bundeskartellamt) enforces German as well as EC Antitrust Law. In addition, German Antitrust Law is enforced by State Antitrust Offices (Landeskartellbehörden), while EC Antitrust Law is enforced by the EC Commission.

Unfair Trade Practices are governed by the Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb - UWG). In practice, most cases fall under the general prohibition of § 1 UWG and are therefore subject to case law. § 1 UWG provides that whoever in commerce, for competitive purposes, acts contra bonos mores is subject to an action for injunctive relief or damages. The UWG is enforced by private parties, especially competitors, and private consumer organisations before the courts, but generally not by governmental authorities.

Intellectual Property Rights in Germany

Patents are subject to the Patent Act (Patentgesetz) and are granted by order of the German Patent and Trademark Office located in Munich, entered into the patent register and announced in the Patent Office Gazette. The procedure for issuing patents is subject to a fee. Only new inventions permitting commercial use can be patented. Only the original applicant (excepting a prior application of the invention in a Convention Country of the Paris Union) has the right to be granted a patent. Foreigners may apply for a patent under the same conditions as German Nationals. Protection is given for a period of 20 years from registration. The holder of a patent or, in the event of an exclusive licensing agreement, the licensee, may apply for an injunction against any unlawful use of a patented invention by third parties. This "right of prevention" provides temporary protection and is effective as soon as the patent registration is announced by the Patent Office.

Quiz

- Assessment questions
- Which are the available company types in Germany?
- Please mention some special forms of German companies

- What means EEIG
- Which types have the most of German business?
- When were the Allgemeines Deutsches Handelsgesetzbuch updated?

Chapter 5

Important Aspects of Civil Law and Public Law

Learning outcomes
To get an overview about important aspects of marriage and divorce law
To learn the regulations of lease agreements and acquisition of real estate
To understand the different types of tax liability

Story

Ralf and Herta think to marry but they are a bit afraid because both had a unhappy earlier marriages. Their marriage has already been legally divorced in the Netherlands. Now they have to submit the documents certifying the legal validity of the divorce to the civil registry office in Germany. Since both belong to the Catholic religion, they have two feasts. First, they marry at the registry office and in the second step in the church. With the wedding, they're both in a different tax bracket.

Introduction: The focus of the family law is the regulations of the **German civil code**. It makes clear that for cohabitation of the sexes as well as the socialization and education of children-related regulations

1. Valid marriage and divorce

Marriages and civil partnerships are considered legal unions or "legally binding contracts" between the persons involved. While Civil Partnerships were recognized legally in 2001 (and paved the way for same-sex unions), marriage has traditionally been protected from the outset under the Constitution. Everybody getting married or entering into a civil partnership in Germany must first appear physically at a *Standesamt* for a civil ceremony. This is actually all that is needed, and the great majority of couples go no further. Couples planning to get married or enter into a civil partnership in Germany should get started with the legal formalities as soon as possible. Several months out is not too soon. Things can usually be disposed of in far less time than that, but a number of legal issues, particularly previous marriages, can create a hassle (Sesta 2016).

When is a marriage valid?

In Germany, any valid marriage must be performed at the registry office (*Standesamt*), regardless of whether there'll be a religious wedding as well. In Germany, there is freedom of religion by law. This means that individuals can choose whether they are clerical and civil or only civil want to trust.

The first places to check when you decide to get married are your local embassy or consulate and the local magistrate's office (*Standesamt*). Ask at these places what documentation is needed. Requirements may vary from region to region and there may be some extra requirements depending on the nationality, previous marital status and other circumstances of one or both partners (Münder/ Ernst 2009).

What you need for documents?

- A valid passport
- An official birth certificate
- Proof of a minimum of 21 days of continuous residence in Germany (this can be a *Meldebescheinigung* issued by the local *Anmeldeamt*)
- Proof of being single (*Ledigkeitsbescheinigung*)
- Birth certificates of children (if any) the couple may have had together
- The required application and questionnaire from the *Standesamt*

One or both partners may have to provide the following depending on their particular circumstances and the requirements of the local magistrate's office:

- Certificate of No Impediment (CNI) (*Befreiung vom Ehefähigkeitszeugnis*)
- Marriage certificates from previous marriages
- A financial statement

Persons who were previously married must present either a death certificate for the former spouse or proof that the marriage was permanently dissolved by divorce. The former is usually no problem; the latter a rock on which many marriage plans have been wrecked. A simple divorce decree from an American or British court is usually not enough. Proof probably will be required that this decree can no longer be contested. It is usually necessary to get a statement to this effect from the court that granted the divorce.



Certified translations of non-German language documentation may also be required and many documents' issue dates shouldn't be older than six months.

If either one of the partners is a foreigner documents may be sent to a higher regional court in order to verify the legal status of that person (Münder/ Ernst 2009).

Though it is no bar to a marriage, those planning to return to their homeland one day may wish to consider the legal status of their partner. There may be some bar, such as nationality, criminal record or medical condition, that would keep the partner from accompanying you. Your embassy or consulate can advise you on all emigration formalities. It is also a good idea to check if a marriage in Germany will be recognized in your home country.

Legal Differences Between a Marriage and a Civil Partnership

While the process is the same when getting married or entering into a civil partnership, there are still some legal differences between the two unions.

A legal union between same-sex partners confers many of the legal protections (and obligations) that a marriage confers in matters regarding tenancy and inheritance rights; basis for obtaining a residence permit if one of the partners is a foreigner; the taking of a partner's name; the obligation to support a partner financially and a settlement in case the partners separate. In recent years other rights have been extended to same-sex couples: survivor's pension, protection against testifying against a partner in court and the ability to adopt the biological children of a partner (Sesta 2016).

There are currently some differences in how the tax code is applied to same-sex couples and how inheritances are taxed. But, these issues are in the courts and may

be resolved soon. It should be noted that same-sex marriages that are officially recognized in other countries, they are also recognized as legal civil partnerships in Germany.

Legal Consequences

If you are a foreign national getting married to a German citizen, it can impact your residence status. If you aren't living in the country yet, you may need to apply for a special visa. Non EU-nationals cannot enter the country on a visitor visa if they are planning to get married in Germany. The required German visa is usually valid for three to six months (Baumann 2017).

Once you are married to a German national, you are normally entitled to a residence permit. Marrying a German national does not automatically result in German citizenship, though. Depending on your citizenship, you can apply for naturalization later on.

Financial Consequences based on the German Civil Code (Bürgerliches Gesetzbuch)

- **Spousal Support during the marriage (“Familienunterhalt”)**

According to the German Civil Code (Bürgerliches Gesetzbuch) spouses in Germany are legally obliged to support each other while the marriage persists.

- **Housekeeping allowance (“Haushaltsgeld”)**

Part of the family maintenance is the housekeeping allowance. Each spouse has to support the other (and the children) to meet basic needs (accommodation, food, clothes, medical support, health and pension insurance) regardless of how long they are married. If one of the spouses is unemployed, he is obliged to do the housekeeping.

2. Divorce and separation regulation

Example for the calculation of the duration of the marriage: the marriage period refers to the period between the marriage and the divorce application. It is not important how long persons before or since have lived together in an unmarried relationship (Baumann 2017).

In Germany a married couple can generally only file for divorce if the couple were separated for at least one year before (“Year of separation”, “Trennungsjahr”) the couple files for divorce (Baumann 2017).

During this “cooling off period” spouses are legally obliged to pay each other spousal support, again in relation to their own means and their own ability to work and to earn money.

If one spouse doesn't want the divorce, he is not able to stop it from happening. After three years of separation the marriage is generally considered to be „irretrievably broken.“

The spouses are not automatically obligated to pay spousal support in the year of separation. Thus, the receiving spouse has to claim the spousal support from the other spouse.

Generally the spouse with the lower income is entitled to receive spousal support during the year of separation.

After the divorce spouses may be obliged to pay post-marital spousal support to the other spouse.

Since this obligation is different from the obligation to pay spousal support during the year of separation, a new claim has to be made by the spouse in need.

However, after the divorce generally the principle of personal responsibility applies. In the last years the courts in Germany became very strict to apply the principle of personal responsibility. Thus, each spouse is generally responsible for his own maintenance and cannot rely on the spousal payments for very long.

However, in many situations there is still a chance to get post-marital spousal support..

Compensation for the increase in communal property (“Zugewinnausgleich”)

If no notarised marriage contract has been set up by the spouses, each party is entitled after the divorce to be compensated for half of the capital value of the assets acquired by the spouses during the marriage.

This procedure is called “Zugewinnausgleichsverfahren” The “Zugewinn” (gain) is the positive difference (gain) between the value of the property of each spouse before the marriage and its value and at the end of the marriage.

3. Social Security

Participating in the German social security system is largely compulsory. Contributions are based on your income and are automatically deducted from your gross salary if you are an employee. Most self-employed people also have to contribute financially to various insurance funds. Of course, nearly everybody is entitled to social benefits as well. For less serious illnesses, for example colds or headaches, you can buy medication directly from the pharmacy. The people working there can also advise you.

Visiting a doctor

If you are seriously ill and would like to go to a doctor, you must first go to the Sozialamt (social services department), where you will get a special Krankenschein (health insurance certificate). You can then go to a doctor with this certificate. The Sozialamt (social services department) pays for the doctor's appointment and medication. In order to obtain stronger medication, the doctor will give you a Rezept (prescription) which you then take to the pharmacy.

For example, expatriate families in Germany may apply for a child allowance (Kindergeld) from the government. If they accumulate retirement benefits by working in Germany for a longer period, they can receive those when retiring abroad. Generally speaking, whoever contributes to the German benefit system receives financial benefits, at least after a certain waiting period.

Various Types of Social Security

The German social security system is organized in a somewhat haphazard fashion. The welfare system was obviously not designed from scratch, but has grown over a period of more than 125 years. Generally, there are three categories of benefit funds: funds paid solely by the employer, welfare funds where employer and employee share the costs, and tax-based benefits.

Employer-Financed Benefits

The most important fund in this category is work-related accident insurance (Unfallversicherung). The coverage extends to work-related illnesses and to accidents which happen on your way to or from work. All resulting disabilities, however, are covered by a separate fund (Münder/ Ernst 2009).

Benefits Shared by Employers and Employees

The most expensive parts of the German system, healthcare and pension insurance (Rentenversicherung) with their considerable financial burden, are shared between employer and employee. All employees contribute 9.45% of their gross income to the retirement and pension fund. Health insurance follows with 7.3% and nursing care with 1.025%. Your employer contributes roughly the same amount.

Unless you are self-employed, these social security contributions are automatically deducted from your salary or wages every month. The amount that was deducted from your gross salary will be recorded on your pay slip. Depending on how long you contribute to the fund, you should receive up to 67% of your average net in-

come as a pension when you retire. The legal retirement age in Germany is now 67 years.

Since the topic of health insurance (including nursing care for the elderly) is complex, we'd like to refer you to the article on health insurance in Germany.

Unemployment Insurance in Germany

Social security in Germany also provides for unemployment insurance (Arbeitslosenversicherung), to which both the employer and the employee contribute 1.5% of the employee's gross income. Unemployment compensation is a combination of subsistence allowance and contribution-based claims. You will receive about 60% of your previous net income for a period of six to 24 months of unemployment.

After this period of up to two years, everybody receives welfare aid (ALG II or Hartz IV, as it is more widely known), a standardized subsistence allowance. A condition for receiving this allowance is your willingness to accept all job offers, even low paid ones or menial tasks. Since its introduction in 2005, Hartz IV has drawn a lot of criticism and sparked plenty of debates.

Social Security Benefits for Families

The most important tax-financed benefits within the German social security system are the child allowance (Kindergeld), maternity benefits (Mutterschaftsgeld), and student loans for universities in Germany (Bafög).

The child allowance is of interest to expat families. After living in Germany for 12 months, every resident can apply for it at the local employment agency (Arbeitsamt). Parents receive between EUR 184 and EUR 215 per month for each child. Even children between 18 and 25 years of age can still receive this kind of allowance if they attend school or university. In order to apply for the child allowance, you need your residence permit, your local registration certificate, an application form, and your children's birth certificates.

Germany has many laws to protect pregnant women and new mothers. Expecting mothers have the right to temporarily stay home from work for six weeks before childbirth. They are forbidden to work for eight weeks after childbirth. (If you are having twins or if your baby was born prematurely, you may stay at home for three months after giving birth.) An expecting mother only has to inform her employer, and she'll be put on paid maternity leave.

3. Tax Obligations

Germany charges a tax on the income earned by physical persons. The income tax is an annual tax applied to the income earned in a calendar year (assessment period) from:

- Agriculture and forestry
- Business operations
- Self-employment*
- Dependent employment
- Capital assets
- Rentals and leases, and
- The other income stated in § 22 of the German Income Tax Act (EStG) (e.g. income from a pension drawn from the legal pension insurance fund or income from private sales)

*) Self-employment / Dependent employment as per § 2 Paragraph 1 of the German Income Tax Act (EStG)



German income tax law distinguishes between two types of tax liability: full income tax liability and partial income tax exemption.

At the end of a calendar year, you have the option of applying to the tax office for income tax adjustment at your place of residence, so you may have part of the tax you have paid refunded. The filing of a tax return is obligatory.

Consult a tax adviser for more information. You will have to pay for this, but a tax adviser can help you to set up a tax return.

Full liability to pay income tax in Germany

If your primary place of residence is in Germany, you are fully liable to pay income tax here. This means that all your income, regardless of whether you earned this within Germany and/or abroad, must be taxed in Germany (principle of global income).

When you move to Germany for professional reasons, you might be surprised after you get a look at your first payslip: your gross monthly income and the net salary you actually receive often differ considerably. For example, in 2012, a childless, single, 37-year-old expat employee living in western Germany would earn a gross salary of €5,000 a month; but they would only get back around €2,875 after PAYE taxes. However, this difference isn't due to taxation alone: some contributions for social security schemes are directly deducted from most employees' wages in Germany. The country still has a fairly extensive welfare state, though recent reforms to cut both costs and benefits sparked various heated debates in the media. The German social security system as well as local taxation sometimes involve quite a bit of red tape. If you're lucky, the financial advantages will outweigh the hassle, though.

In addition to Lohnsteuer, you have to pay the so-called solidarity surcharge (5.5% of your income tax) as well as church tax (Kirchensteuer). However, the latter kind of tax in Germany only applies if you are a registered member of the Catholic or Lutheran-Protestant religion in Germany.

Tax-relevant information on employees, such as their number of children or their religious affiliation, is registered in their electronic tax card (elektronische Lohnsteuerkarte). You just need to provide your employer with your tax identification number and date of birth, and then they can access all your relevant tax information from the German central revenue service (Bundeszentralamt für Steuern) and add you to the company payroll.

Quiz

- What means a valid marriage in Germany?
- What are the differences between a marriage and a Civil Partnership?
- Please mention some regulations of divorce and separation
- Which are the types of social security in Germany?

Chapter 6

Data Protection Laws



Story

Herta and Ralf like to shop on-line. But as in other cases they suffered a cybercriminal attack and lost money and some personal data. So in the future they have to be more informed and more carefully. In social networks, they are sometimes not sure what data can be retrieved and what information can be published on the Internet. When they were still working, they were able to attend data protection training courses at their company. Companies in particular are committed to data protection.

What is the principal data protection legislation?

In Germany, data protection is governed by numerous laws and regulations which can be classified into the following categories:

- Federal legislation:
 - The Federal Data Protection Act (BDSG)
 - Federal data protection regulations governing specific areas
- State legislation:
 - The data protection acts of the states
 - State data protection regulations governing specific areas

In determining which law or regulation to apply one needs to start by looking at whether the data are processed by public or private entities.

Data protection legislation governing the private sector

The general data protection requirements that have to be met by business enterprises in Germany are laid down in the Federal Data Protection Act. The English versions of the Act can be found on the Federal Data Protection Commissioner's homepage.

The Federal Data Protection Act provides that companies are allowed to process personal data only if

- processing of the data is permitted under a specific legal provision, or if
- the person whose data are to be processed has given his or her consent.

In addition, there are data protection regulations that apply to specific areas and that are contained in special laws. Those special laws take precedence over general legislation. Examples include the German Banking Act and the Money Laundering (Prevention) Act, the Telecommunications Act and the Regulation on the Supervision of the Telecommunications Sector.

Data protection legislation governing the public sector

The data protection laws and regulations at state level lay down the legal requirements that must be satisfied for public authorities and other public bodies in a German state to be allowed to process personal data. Like the Federal Act, the North Rhine-Westphalia Data Protection Act provides that a citizen's personal data may be processed only if

- processing of the data is permitted under a specific legal provision, or if
- the citizen whose data are to be processed has given his or her consent.

Apart from the general data protection laws there are special laws at both state and federal level that contain data protection provisions governing specific areas. For instance, the North Rhine-Westphalia Police Act includes special provisions concerning data processing by police services. Public authorities have to observe, with precedence, the data protection provisions laid down in the special laws that apply to them.

Data processing by federal authorities and other federal public bodies is governed by the Federal Data Protection Act. However, at the federal level, too, processing of personal data is increasingly regulated by special legislation. For example, the local Labour Offices which report to the Federal Employment Agency are subject to special regulations such as the 10th Volume of the Code of Social Law.

Overview of the BDSG

- First section (§ § 1-11): General and common rules
- Second section (§ § 12-26): Data processing by public bodies
- Third section (§ § 27-38a): Data processing by non-public bodies and public competitor companies
- Fourth section (§ § 39-42): Special provisions
- Fifth section (§ § 43-44): Criminal and civil penalty provisions

- Sixth section (§ § 45-46): Transitional provisions

Data Protection Act (2017)

On 27 April 2017 the German Parliament passed an entirely new Federal Data Protection Act (Bundesdatenschutzgesetz – BDSG). The new BDSG replaces the old BDSG, which has been in force for the last 40 years. The new BDSG shall adapt the German law to the provisions of the EU General Data Protection Regulation (GDPR). The new BDSG will now form the basis for the adaption of German acts to the GDPR. Further acts concerning special processing situations like social security data protection are likely to follow

2. Important definitions which refers to the data protection legislation

Personal data: Personal data means any information concerning the personal or material circumstances of an identified person

That means...

Everyone has the right to the protection of personal data concerning him or her.

Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. Compliance with these rules shall be subject to control by an independent authority.

-> Article 8 Charter of Fundamental Rights of the European Union

Types of personal data

Personal data means all data that provide information about personal relationships or facts about an identified or identifiable natural person. They include:

- Personal relationships: name, address, occupation, e-mail, IP address, or personal number
- Factual circumstances: income, taxes, ownership
- Special kind of personal data: racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, health, or sex life. These data are subject to special protection.

Protected personal data does not include anonymized data, where the person's identity is not discernible. Pseudonymized data (where the person's name is replaced with a pseudonym) is protected by the BDSG, because the data relates to a person whose identity is discernible. The BDSG does not protect the data of legal

persons, such as corporations, although some courts have extended protection to legal persons.

Data Processing: The legal term ‘data processing’ stands, in particular, for the collection, storage, modification and transfer of personal data. All modalities of data usage are restricted in the same way. Personal data may only be processed,

- if the data subject has unambiguously given his or her prior consent or
- if data processing is permissible under the statutory exemptions applying to data processing.

The above requirements of data processing do not in the same manner apply to sensitive data. In principle, such data may not be processed. Derogation is only permissible under very specific circumstances, e.g. with the data subject’s explicit consent (referring to the processing of sensitive data) or if the processing of such data is mandated by German employment law.

What are the key principles that apply to the processing of personal data?

- Transparency
- Lawful basics for processing
- Purpose limitation
- Data minimisation
- Proportionality
- Retention

3. Basic Principles

The basic principles of German (and EU) data protection and security allow a comprehensive appraisal of what needs to be regarded, when using personal data.

- Personal data must be processed fairly and lawfully.
- Personal data must be collected for explicit and legitimate purposes and must be used accordingly.
- Personal data must be relevant and not excessive in relation to the legitimate purpose.
- Personal data must be accurate and if necessary kept up to date.
- The concerned individual (data subject) must be able to rectify, erase or block incorrect data.

- Personal data must not be kept longer than necessary.
- Personal data must be protected by appropriate technical and organizational measures against unauthorized or unlawful processing, accidental loss and destruction.

4. Data Transfer within a Group of Companies

Companies within a group of companies are not generally privileged. Each company is regarded a separate entity.

The forwarding of data from one company to another within a group of companies qualifies as transfer of data to the effect that the general restrictions on data processing apply. The exemption based on the processing entity's legitimate interest is often referred to for justification.

In these cases, however, the legitimate interest needs to be demonstrated for every individual transfer. If, for instance, the transfer of data in an anonymized form had served the purpose equally, the transfer of personal data may no longer be covered by the legitimate interest.

Also, when relying on the exemption based on legitimate interest, such interest has to prevail the data subject's privacy interest.

Where can I find further information?

<http://www.bamf.de/EN/Willkommen/Aufenthalt/eAufenthaltstitel/Datenschutz/datenschutz-node.html>

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