

Summary of Contents

<i>Table of Contents</i>	vii
<i>Abbreviations</i>	xiii
Introduction	1
1. The German Civil Code and the Development of Private Law in Germany	5
2. Remedies for Non-performance, Viewed against the Background of the Principles of European Contract Law	39
3. The Development of Liability for Non-conformity in German Sales Law	79
4. The New German Law of Prescription and Chapter 14 of the Principles of European Contract Law	122
5. Consumer Contract Law and General Contract Law	159
<i>Index</i>	229

Table of Contents

Abbreviations

xiii

Introduction	1
 1. The German Civil Code and the Development of Private Law in Germany	 5
I. The Codification Movement in Europe	5
II. The German Civil Code as a Late Fruit of the Codification Movement	6
III. The Programme of 'Historical Legal Science'	8
IV. 'Historical Legal Science' and Codification	10
V. Legal Unity by Way of Legislation	11
VI. The BGB as a 'Prison Cell'?	14
VII. The Reaction of the Courts	17
VIII. Unity of the System of Private Law?	20
IX. The Resilience of the BGB	22
X. The Development of Private Law under the Code	24
XI. Criticism of the BGB	27
XII. The Modernization of the Law of Obligations	30
XIII. The Europeanization of Private Law	35
 2. Remedies for Non-performance, Viewed against the Background of the Principles of European Contract Law	 39
I. The Path to the New Rules	39
1. The old law, <i>Abschlussbericht</i> and 'Discussion Draft'	39
2. From the 'Discussion Draft' to the new law	41
II. Specific Performance and Exclusion of the Right to Specific Performance	43
1. Impossibility of performance	43
2. 'Practical Impossibility' and 'Economic Impossibility'	45
3. The problem of 'subjective impossibility'	47
4. 'Moral impossibility'	48
III. Damages	49
1. Conceptual foundations	49
2. Damages in lieu of performance	52

a) Impossibility of performance	52
b) Delay of performance and deficient performance	53
c) Infringement of ancillary duties which do not affect the performance as such	54
3. Damages for delay of performance	56
a) <i>Mora debitoris</i>	56
b) Excursus: other consequences of <i>mora debitoris</i>	57
4. 'Simple' damages	58
IV. Claim for the Substitute in Cases of Impossibility	60
V. Expenses Incurred in the Expectation of Receiving Performance	61
VI. Initial Impediments to Performance	62
1. Validity of the contract	62
2. Essential elements of the liability regime	64
3. Initial impossibility and the rules on mistake	65
VII. Termination	66
1. Doctrinal and historical background to the new law	66
2. Automatic release of the creditor in cases of impossibility of performance on the part of the debtor	68
3. Requirements for, and mechanics of, termination	70
4. Comparison	72
VIII. Other Remedies	75
IX. Concluding Observations	76
 3. The Development of Liability for Non-conformity in German Sales Law	 79
I. Introduction	79
1. The old approach	79
2. The Consumer Sales Directive	80
II. Liability for Latent Defects: The Old BGB and its Historical Background	82
1. Roman law	82
2. <i>Ius commune</i>	83
3. The sale of unascertained goods	84
a) Roman law	84
b) Tensions	85
c) Controversy and compromise	87
III. Problem Areas	89
1. Supplementary performance	90
2. Damages	92
3. Extinctive prescription	93
4. Other precarious borderlines	95

IV. Reform	96
1. Characteristic features	96
2. The basic structure	98
V. Supplementary Performance	99
1. Repair or replacement	99
2. Details	101
3. Open questions	102
4. Second chance	104
VI. Secondary Rights	106
VII. Termination	107
VIII. Damages	108
1. Damages in lieu of performance	109
a) The concept explained	109
b) When can they be claimed?	110
2. Simple damages	111
3. Damages for delay of performance	112
4. Appendix: claim for the substitute in cases of impossibility	113
IX. Reduction of the Purchase Price	113
X. Unsolved Problems	116
XI. Conclusion	117
 4. The New German Law of Prescription and Chapter 14 of the Principles of European Contract Law	 122
I. Introduction	122
II. The Development of the Law of Prescription	124
1. The reform process in Germany	124
2. The UNCITRAL Convention, the Principles of European Contract Law and the UNIDROIT Principles	126
3. A common framework	128
III. Subjective or Objective System	129
IV. The Thirty-year Prescription Period	131
V. Liability for Non-conformity	133
1. The law of sale	133
2. Contracts for work	136
VI. Commencement of Prescription	138
1. Implementing the subjective system	138
2. Reasonable discoverability; obligations to refrain from doing something	140
3. Due date	141
4. Other peculiarities of the German regulation	142

VII. Renewal of the Period of Prescription	143
VIII. Suspension and Postponement of Expiry	144
1. Judicial and other proceedings	144
2. Impediment beyond the creditor's control	145
3. Negotiations	146
4. Close personal ties and incapacity	147
5. Sexual abuse	150
6. Deceased's estate; right to refuse performance	152
IX. Effects of Prescription	153
X. Modification by Agreement	154
XI. Another Reform	155
XII. Conclusion	157

5. Consumer Contract Law and General Contract Law	159
I. Introduction	159
II. Freedom, Equality, and Social Responsibility at the Time of the Original BGB	160
1. Protecting the weaker party	160
2. Economic background	162
3. The drops of social oil	163
4. The Act concerning Instalment Sales	165
5. Early 'doorstep' legislation	167
6. Industrial workers, domestic servants, railway engines	168
7. Usury	169
III. The Rise of Modern Consumer Legislation	171
1. The first period: until the end of the 1970s	171
a) Origins	171
b) Instalment sales, distance teaching, package travel	172
c) Standard terms of business	173
aa) A 'Page of glory' in the history of private law adjudication	173
bb) Consumer protection?	175
d) Which 'model of society'?	177
2. The European Community takes over	178
a) A promising field of activity	178
b) The beginning: doorstep selling, product liability, consumer credit	179
c) Changing gear: developments up to the Consumer Sales Directive	182
aa) Package travel and unfair terms in consumer contracts	182
bb) Timeshare agreements and cross-border credit transfers	183
cc) Distance contracts	184

dd) Late payments, electronic signatures, e-commerce	185
ee) Consumer sales	186
IV. Incorporation: The Law as it Stands Today	187
1. Definitions, unsolicited performances, standard terms of business	187
2. Particular forms of marketing	189
3. Right of revocation (general rules)	189
4. Sale of consumer goods	191
5. Credit transactions	192
6. Package travel	194
V. General Comments	194
1. Consumer contract law and the EC	194
2. Being caught by surprise	196
3. A newly gained transparency?	197
4. The new provisions and the system of the BGB	198
5. 'Throw-away' legislation	200
6. Excessive implementation	203
VI. The Decision to Incorporate: An Evaluation	205
1. General background	205
a) Freedom of contract and self-determination	205
b) A combination of criteria	207
c) Close family members of the main debtor as sureties	207
d) Excessive interest rates	209
e) Consumer protection	210
2. The main devices for protecting consumers	210
a) Duties of information	211
b) Right of revocation	213
aa) 'Being caught off-guard'	213
bb) Other policy considerations	215
cc) Timeshare agreements	216
dd) Instalment supply contracts, distance contracts, distance teaching contracts	217
c) Unilaterally mandatory rules of law	218
aa) Specific protective rules	218
bb) Policing types of contract	219
d) The concept of 'consumer'	222
3. Possible objections	224
4. Building site or museum?	226