

CARLO BRUNOLD

Transactions of Minors in English and German Law

*Max-Planck-Institut
für ausländisches und internationales
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und internationalen Privatrecht*

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Mohr Siebeck

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Preface

The present book is a revised version of my doctoral thesis, which I submitted in autumn 2022 to obtain a DPhil in Law from the University of Oxford. It has been updated in November 2023 to reflect a recent reform to guardianship under German law as well as the current editions of books cited.

‘A PhD is a journey’ is trite, yet true. As a German lawyer, for me, the journey was also both one from Germany to England as well as one to English law, which poses additional hurdles to someone trained in a civil law jurisdiction.

This challenging journey was excellently accompanied by my supervisor Professor Birke Häcker. Her friendly yet demanding, diligent but patient supervision proved the right ingredient to enable me to conduct my research and writing at the best of my capabilities. I am deeply grateful for her support.

During a DPhil at Oxford, several stages have to be passed, providing the student with feedback and revisiting his or her progress. Including the final viva voce, these stages were in my case examined by Professor Gerhard Dannemann, Professor Bill Swadling and Professor Simon Whittaker, whose meticulous review of my work and constructive advice contributed greatly to my studies. Towards the end of my degree, I had the advantage of enjoying a stay as a Visiting Researcher at the Max-Planck-Institute for Comparative and International Private Law in Hamburg, and my thanks are due to its welcoming directors and dedicated librarians as well as for including my thesis in the present series.

My studies at Oxford were not only supported by academics but also by friends. I am particularly thankful to my fellow students and teammates at St Cross College, Wolfson College Boat Club and OUBC. The lively postgraduate community of St Cross is a melting pot of students from different countries and subjects, enriching any student’s experience.

Most of all, I would like to thank my dear parents for their continuing and loving support. My – for a German lawyer – rather unconventional choice would have never been possible without them, and it is difficult to put into words how much of the unconventional is now indispensable to me. Of course, the skillset one acquires during a PhD is useful as a lawyer. More importantly, however, like with any good journey, the years in Oxford remain a personal memory whose value is greater than any professional advantage or academic merits. Indulging

in these memories and sharing them with family and friends seems the greatest benefit one can take home.

Frankfurt am Main, December 2023

Carlo Brunold

Survey of Contents

Preface	V
Table of Contents	IX
Abbreviations and Referencing	XV
German Terminology	XVII
Chapter 1: Introduction	1
I. <i>The Meaning of ‘Transactions of Minors’</i>	1
II. <i>Minors, Parents and the State</i>	4
III. <i>Further ‘Classes’ of Vulnerable Persons</i>	5
IV. <i>A Comparative Legal Analysis</i>	5
V. <i>Current Developments</i>	10
VI. <i>Note on Terminology</i>	11
Chapter 2: Contractual Liability	15
I. <i>Contractual Liability and Minority in German Law</i>	15
II. <i>Contractual Liability and Minority in English Law</i>	23
III. <i>Comparative Analysis</i>	40
Chapter 3: Transfers of Rights	55
I. <i>Transfers of Rights and Minority in German Law</i>	55
II. <i>Transfers of Rights and Minority in English Law</i>	61
III. <i>Comparative Analysis</i>	69
Chapter 4: Restitution of Unjust or Unjustified Enrichment	87
I. <i>Unjustified Enrichment and Minority in German Law</i>	87
II. <i>Unjust Enrichment and Minority in English Law</i>	98
III. <i>Comparative Analysis</i>	117

Chapter 5: Minority, Parents and the State	141
I. <i>The Role of Parents</i>	141
II. <i>The Role of the State</i>	160
III. <i>Comparative Analysis</i>	168
Chapter 6: Conclusion	193
I. <i>Policies Underlying Minority</i>	193
II. <i>Very Young Minors</i>	199
III. <i>Other ‘Classes’ of Vulnerable Persons</i>	199
IV. <i>The Role of Parents</i>	200
V. <i>The Role of the State</i>	202
VI. <i>Further Aspects</i>	203
Bibliography	207
Other Sources	215
Tables of Cases	217
Tables of Statutes	219
Index	221

Table of Contents

Preface	V
Survey of Contents	VII
Abbreviations and Referencing	XV
German Terminology	XVII
Chapter 1: Introduction	1
I. <i>The Meaning of ‘Transactions of Minors’</i>	1
II. <i>Minors, Parents and the State</i>	4
III. <i>Further ‘Classes’ of Vulnerable Persons</i>	5
IV. <i>A Comparative Legal Analysis</i>	5
1. English and German Law in Comparison	6
2. ‘Functions’ of Minority	6
3. Structure and Scope of Inquiry	8
V. <i>Current Developments</i>	10
VI. <i>Note on Terminology</i>	11
1. ‘Capacity’	11
2. Parents	12
3. Property, Rights or Assets	12
4. Void, Voidable or Unenforceable	13
Chapter 2: Contractual Liability	15
I. <i>Contractual Liability and Minority in German Law</i>	15
1. Capacity (<i>Geschäftsfähigkeit</i>) in General	16
a) Structure of the BGB	16
b) Legal Acts (<i>Rechtsgeschäfte</i>)	17
c) Declarations of Intention (<i>Willenserklärungen</i>)	17
d) Incapacity (<i>Geschäftsunfähigkeit</i>) of Very Young Children	18
e) Limited Capacity	19
f) Summary: the General Rule under German Law	20
2. Exceptions to the General Rule	21
a) Legally Solely Beneficial Transactions under § 107 BGB	21
b) Pocket Money under § 110 BGB	21
c) Independent Conduct of Business under § 112 BGB	22

d) Employment, § 113 BGB	22
3. Delictual Liability of Minors in Contractual Settings	23
<i>II. Contractual Liability and Minority in English Law</i>	<i>23</i>
1. The ‘General Rule’	24
a) The Common Law Position	24
b) Ratification upon Majority	27
c) The Infants Relief Act 1874	27
d) A Minimum Age to Enter into Contracts under English Law?	29
e) Summary: the General Rule under English Law	31
2. Exceptions to the General Rule	31
a) Contracts for Necessary Goods	31
b) Service Contracts	34
c) Contracts Analogous to Beneficial Contracts of Service	36
d) Contracts Imposing Ongoing Obligations	38
3. Tortious Liability of Minors in Contractual Settings	38
<i>III. Comparative Analysis</i>	<i>40</i>
1. Protection from Liability	40
2. Capacity of other ‘Classes’ of Persons: a Uniform Concept?	44
3. Protection from Promises and Impairment of Intention	48
4. Pragmatism versus Abstraction	50
Chapter 3: Transfers of Rights	55
<i>I. Transfers of Rights and Minority in German Law</i>	<i>55</i>
1. Obligatory and Dispositive Transactions	56
2. Transfers of Rights under the ‘General Rule’	57
3. ‘Legally Solely Beneficial’ Transfers under § 107 BGB	58
4. Transfers of Pocket Money under § 110 BGB	59
5. Partial Capacity under §§ 112, 113 BGB	60
<i>II. Transfers of Rights and Minority in English Law</i>	<i>61</i>
1. Transfers of Rights to Movables and Minority	61
a) Possession	62
b) Transfer of Title	62
c) Sale of Goods	64
d) Deed	65
2. Assignments and Minority	66
3. Trusts and Minority	68
4. Very Young Children	68
<i>III. Comparative Analysis</i>	<i>69</i>
1. Coherence of ‘Minority’ in Contract and Property	70
2. The Policies Underlying Minority	72
a) Protection against Dispositions of Property?	72
b) Third Parties’ Interests	75
c) No Uniform Policies Underlying Contractual Incapacity	77
3. Gifts to Minors	79

4. The ‘Status’ of Minority	81
Chapter 4: Restitution of Unjust or Unjustified Enrichment	87
<i>I. Unjustified Enrichment and Minority in German Law</i>	<i>87</i>
1. Overview of the ‘Absence of Basis’ Approach	87
a) Transfers and ‘Non-Transfers’	88
b) Enrichment	88
c) No Legal Basis	89
d) No Bar to the Claim and No Defence	89
2. Reasons for an Absence of Legal Basis	89
a) Contractual Incapacity	89
b) Further Reasons for an Absence of Legal Basis	90
3. Knowledge that Performance is Not Owed	91
4. Disenrichment and Minority	91
a) Changes in a Minor’s Wealth	92
b) ‘Bad Faith’ as to the Absence of Legal Basis	93
5. Restitution of Executed Reciprocal Contracts	95
<i>II. Unjust Enrichment and Minority in English Law</i>	<i>98</i>
1. Statutory Remedies for Restitution from Minors	98
a) Sale of Goods Act 1979	98
b) Minors’ Contracts Act 1987	98
2. Unjust Enrichment and Minority	100
a) Overview of the ‘Unjust Factor Approach’	100
(i) Enrichment	101
(ii) At the Claimant’s Expense	101
(iii) Unjust	101
(iv) No Defence	102
b) No Legal Basis	102
c) Relevant Unjust Factors	103
(i) Total Failure of Consideration	103
(ii) Minority Not an Unjust Factor	106
(iii) Undue Influence	108
(iv) Unconscionable Bargains	110
(v) Further Unjust Factors	111
d) Defences	112
(i) Minority as a Defence	112
(ii) Change of Position	114
e) Restitution of Executed Reciprocal Contracts	116
<i>III. Comparative Analysis</i>	<i>117</i>
1. Minority as a Ground for Restitution	117
2. A Uniform Ground for Restitution	120
3. Restitution of Executed Reciprocal Contracts	124
4. Minority as Policy-Based Protection from Liability	126
a) The <i>Flugreise</i> Decision	127

b) <i>R Leslie Ltd v Sheill</i> : Fraud by Minors	132
c) Abrogating the <i>ex contractu</i> Defence?	134
d) Interests of Adults and Legal Certainty	135
5. 'Contractual Capacity' Terminologically Inapt	138
Chapter 5: Minority, Parents and the State	141
I. <i>The Role of Parents</i>	141
1. Parental Care in Germany	142
a) Parental Statutory Authority	142
b) Parental Rights and Duties as to Children's Assets	145
c) Assets 'Belonging to' Children	147
d) Limitation on the Imposition of Liability on Minors, § 1629a BGB ..	151
2. Parental Responsibility in England	153
a) No Statutory Agency of Parents	153
b) Parental Responsibility as to Children's Property	154
c) Parental Duties Relating to Property 'Belonging to' a Child	155
d) Property Held by Children	158
II. <i>The Role of the State</i>	160
1. The Role of the Family Court in Germany	161
a) Authorisation by the Family Court	161
b) Court Orders	163
2. The Family Court and the High Court in England	164
a) 'Section 8 Orders'	164
b) The High Court's Inherent Jurisdiction	167
III. <i>Comparative Analysis</i>	168
1. Coherence between Parental Powers and Minors' Capacity	168
2. Reasons for the Extensive Powers of German Parents	169
3. Relationship between Parents and their Children's Property	173
4. Merits of Parental Powers Relating to Minors' Transactions	176
a) Evaluation of the Concept of Parental Statutory Authority	177
b) Parents' Role in Minors' Creditworthiness	179
c) Mitigating the Risk of Parental Authority	181
5. Merits of Measures Taken by Courts	187
a) Monitoring	187
b) Authorising	188
c) Intervening	189
Chapter 6: Conclusion	193
I. <i>Policies Underlying Minority</i>	193
1. Liability of Minors	194
2. Transfers of Rights	196
3. Restitution of Minors' Transactions	196
4. Interests of Third Parties	198

<i>II. Very Young Minors</i>	199
<i>III. Other ‘Classes’ of Vulnerable Persons</i>	199
<i>IV. The Role of Parents</i>	200
<i>V. The Role of the State</i>	202
<i>VI. Further Aspects</i>	203
1. Abstract versus Individual Protection	203
2. Legal Terminology and Clarity	204
3. ‘Functional Equivalence’ and ‘Contractual Capacity’	204
Bibliography	207
Other Sources	215
Tables of Cases	217
England and other Common Law Jurisdictions	217
Germany	223
Tables of Statutes	227
UK Statutory Law	227
German Statutory Law	229
Further Statutory Law	231
Index	233

Abbreviations and Referencing

The style of referencing common law sources follows the Oxford Standard for the Citation of Legal Authorities (OSCOLA) 2006.¹ German sources, too, are cited according to the OSCOLA 2006 to make them more intelligible to non-German readers. Please note that footnote numbering restarts with each chapter; reference to a footnote relates to that footnote in the same chapter unless stated otherwise. The abbreviations used in case law citations follow the recommendations of the Cardiff Index to Legal Abbreviations.² Below is a list of the abbreviations used in this work.

AC	Appeal Cases
AcP	Archiv für die civilistische Praxis
AG	Amtsgericht
All ER	All England Law Reports
alt	alternative
Am J Legal Hist	American Journal of Legal History
Amb	Ambler's Chancery Reports
App Cas	Appeal Cases (2 nd series)
Atk	Atkyns' Chancery Reports
B	Baron
B&Ald	Barnewall & Alderson's King's Bench Reports
B&S	Best & Smith's Queen's Bench Reports
BAG	Bundesarbeitsgericht
BayObLG	Bayerisches Oberstes Landesgericht
BC	Borough Council
Beav	Beavan's Rolls Court Reports
BeckRS	Beck-Rechtssachen (online journal)
Begr	Begründer (founding author/editor)
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
Bing	Bingham's Common Pleas Reports
Bl R	William Blackstone's King's Bench Reports
Bro Parl Cas	J Brown's Cases in Parliament
BroCC	Brown's Chancery Cases
BS	Building Society
BSG	Bundessozialgericht
BT-Drucksache	Official Parliamentary Documentation of the German Parliament

¹ See <https://www.law.ox.ac.uk/sites/default/files/migrated/oscola_2006.pdf>, accessed 26 February 2024.

² See <<https://www.legalabbrevs.cardiff.ac.uk/>>, accessed 26 February 2024.

BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
C&P	Carrington & Payne's Nisi Prius Reports
CA	Court of Appeal
Ca t King	Select Cases in Chancery tempore King
Camp	Campbell's Nisi Prius Cases
CBNS	Common Bench Reports, New Series
cf	compare (confer)
ch	chapter
Ch	Chancery Reports
Ch App	Chancery Appeals
ChD	Chancery Division
CJ	(Lord) Chief Justice
CLJ	Cambridge Law Journal
CLR	Commonwealth Law Reports (Australia)
Cmnd	Command Paper
Co	Company
Co Rep	Coke's King's Bench Reports
Coop temp Brough	Cooper's Chancery Reports tempore Brougham
Corp	Corporation
Cox Eq Cas	Cox's Equity Cases
Cr & Ph	Craig & Phillips' Chancery Reports
Cro Car	Croke's King's Bench Reports
CUP	Cambridge University Press
De G&J	De Gex & Jones' Chancery Reports
De G&Sm	De Gex & Smale's Chancery Reports
De GM&G	De Gex, Macnaghten & Gordon's Chancery Reports
DNotZ	Deutsche Notar-Zeitschrift
East	East's Term Reports, King's Bench
ed	edition
ed(s)	editor(s)
eg	for example (exempli gratia)
EMLR	Entertainment and Media Law Reports
ER	English Reports
esp	especially
Esp	Espinasse's Nisi Prius Reports
et al	and others (et alii)
etc	and so forth (et cetera)
EWCA (Civ)	England and Wales Court of Appeal (Civil Division)
EWFC	England & Wales Family Court
EWHC	England and Wales High Court
f/ff	next/following
FamRZ	Zeitschrift für das gesamte Familienrecht
FLR	Family Law Reports
fn	footnote
gen ed	general editor
H Bl	Henry Blackstone's Common Pleas Reports
H&N	Hurlstone & Norman's Exchequer Reports
HC	High Court

HL	House of Lords
HL Cas	Clark & Finnely's House of Lords Reports New Series
HLR	Harvard Law Review
ibid	in the same place (ibidem)
ie	that is (id est)
Inc	incorporated
IRC	Inland Revenue Commissioners
J	Mr(s) Justice
J Juv L	Journal of Juvenile Law
JA	Juristische Arbeitsblätter
Jac&W	Jacob & Walker's Chancery Reports
JBL	Journal of Business Law
JCL	Journal of Contract Law
JSSL	Journal of Social Security Law
JURA	Juristische Ausbildung
JuS	Juristische Schulungen
JW	Juristische Wochenschrift
JZ	Juristenzeitung
K&J	Kay & Johnson's Vice Chancellor's Reports
Keb	Keble's King's Bench Reports
KG (Berlin)	Kammergericht (only in the city state of Berlin)
LG	Landgericht
LJCP	Law Journal Reports, Common Pleas New Series
Lloyd's Rep	Lloyd's (List) Law Reports
LQR	Law Quarterly Review
LR	Law Reports (1 st series; abbreviation dropped after 1875)
LT	Law Times Reports
Ltd	Limited
M&W	Meeson & Welsby's Exchequer Reports
Mac&G	Macnaghten & Gordon's Chancery Reports
Madd	Maddock's Chancery Reports
McGeorge L Rev	McGeorge Law Review
MLR	Modern Law Review
Mod	Modern Reports/ Leach's Modern Reports
MR	Master of the Rolls
My&K	Mylne & Keen's Chancery Reports
NJOZ	Neue Juristische Online-Zeitschrift (online journal)
NJW	Neue Juristische Wochenschrift
NJW-RR	Neue Juristische Wochenschrift: Rechtsprechungsreport
no(s)	number(s)
NZFam	Neue Zeitschrift für Familienrecht
NZLR	New Zealand Law Reports
OJLS	Oxford Journal of Legal Studies
OLG	Oberlandesgericht
OLGZ	Entscheidungssammlung der Oberlandesgerichte in Zivilsachen
OUP	Oxford University Press
P&CR	Property & Compensation Reports
p/pp	page(s)
para(s)	paragraph(s)

PC	Privy Council
Peake	Peake's Nisi Prius Reports
Peake Add Cas	Peake's Additional Cases at Nisi Prius
Pty ltd	Proprietary limited company
PWms	Peere-Williams' Chancery & King's Bench Cases
QB	Law Reports, Queen's Bench
QBD	Queen's Bench Division
R	The King/Queen (Rex/Regina) = The Crown
RG	Reichsgericht
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
RLR	Restitution Law Review
Rly	Railway
RR	Revised Reports
Russ&M	Russell & Mylne's Chancery Reports
Russel	Russell's Chancery Reports tempore Eldon
s/ss	section/sections
ShowKB	Showers' King's Bench Reports
Sim	Simons' Vice Chancellor's Reports
Sim&St	Simons' & Stuart's Vice Chancellor's Reports
SJ	Solicitors' Journal
SpuRT	Zeitschrift für Sport und Recht
StGB	Strafgesetzbuch
Str	Strange's King's Bench Reports
Taunt	Taunton's Common Pleas Reports
TCLR	Technology and Construction Law Reports
TLR	Times Law Reports
tr	translator
U Toronto LJ	University of Toronto Law Journal
UK	United Kingdom
UKSC	United Kingdom Supreme Court
Urt. v.	Urteil vom (judgment dated)
v	against (versus)
Vent	Ventris' King's Bench Reports
Ves Jun	Vesey Junior's Chancery Reports
Ves Sen	Vesey Senior's Chancery Reports
vol(s)	volume(s)
W BI	William Blackstone's King's Bench Reports
WLR	Weekly Law Reports
WLUK	Westlaw United Kingdom
WM	Wertpapier-Mitteilungen
WN	Weekly Notes of Cases
ZEuP	Zeitschrift für Europäisches Privatrecht
ZEV	Zeitschrift für Erbrecht und Vermögensnachfolge
ZUM	Zeitschrift für Urheber- und Medienrecht

German Terminology

The following is a list of the German legal terminology and its translation as used in this book.

<i>Altvermögen</i>	'old assets' (in the context of § 1629a BGB)
<i>Arglist</i>	intention to deceive
<i>Bereicherungsrecht</i>	law of unjustified enrichment (as opposed to unjust enrichment in England)
<i>beschränkt</i>	limited
<i>Bürgerliches Gesetzbuch</i>	German Civil Code
<i>Deliktsfähigkeit</i>	delictual capacity
<i>Einwilligung</i>	consent
<i>elterliche Sorge</i>	parental custody
<i>elterliche Vertretungsmacht</i>	parental statutory authority
<i>etwas</i>	something
<i>fremdnützig</i>	for the benefit of another person
<i>Genehmigung</i>	ratification
<i>geschäfts(un)fähig</i>	(un)able to effect a legal act
<i>Geschäfts(un)fähigkeit</i>	contractual (in)capacity
<i>gesetzliches Treuhandverhältnis</i>	statutory fiduciary relationship
<i>Grundgesetz</i>	German Basic Law
<i>Handlungsfähigkeit</i>	the ability to act with legal effect at all
<i>lediglich rechtl. vorteilhaft</i>	legally solely beneficial
<i>Leistung</i>	(in the context of the law of unjustified enrichment) transfer
<i>Muntherr</i>	~ 'guardian' under Germanic laws
<i>Neuvermögen</i>	'new assets' (in the context of § 1629a BGB)
<i>nichtig</i>	void
<i>Nichtleistung</i>	(in the context of the law of unjustified enrichment) non-transfer
<i>Personensorge</i>	the care for the person (of the child)
<i>persönliche Bedürfnisse</i>	personal needs (of the minor) (in the context of § 1629a BGB)
<i>Pfleger</i>	special officer (under § 1809 BGB)
<i>Rechtsgeschäft</i>	legal act
<i>Rechtsverhältnis</i>	legal relationship
<i>Schuldverhältnis</i>	obligatory relationship
<i>Treugeber</i>	~ settlor
<i>Treugut</i>	the object(s) subject to fiduciary rights and duties
<i>Treuhänder</i>	fiduciary
<i>Treuhandverhältnis</i>	fiduciary relationship

<i>Überwachungstreuhand</i>	supervisory fiduciary
<i>Verfügung</i>	disposition
<i>Verfügungsgeschäft</i>	dispositive transaction
<i>Vermögen</i>	assets
<i>Vermögen im Ganzen</i>	the entirety of one's assets
<i>Vermögenssorge</i>	the care for the assets (of the child)
<i>Verpflichtungsgeschäft</i>	obligatory transaction
<i>Vertrag</i>	contract
<i>Willenserklärung</i>	declaration of intention
<i>Zustimmung</i>	authorisation

Chapter 1

Introduction

Most jurisdictions face the problem that certain members of society are deemed vulnerable. The law must protect them from the consequences of their own decisions or from other persons trying to take advantage of their weaknesses. In some cases, a weakness is specific to a situation, such as when an ill person desperately tries to buy life-saving medicine. Other weaknesses are more general in kind and considered to pertain to a whole group of persons, irrespective of their individual circumstances at the time. A separate ‘status’ is created for this group.

Minority or, in old language, infancy is such a status. The law in England and Germany nowadays attributes it to persons below the age of eighteen years. Every single citizen is subject to this status for roughly the first quarter of his¹ life. The large number of persons affected by it and the generality of the status of minority pose difficulties: the law has to be sufficiently strict to protect all minors effectively, but it should also be flexible enough to take individual developments into account. Balancing these two aspects is the core problem of this area of law. No person gains the experience and cognitive abilities to lead a successful life as an adult suddenly on his eighteenth birthday. The choice of a specific age follows the need for legal certainty. It is much better determinable than, as historically in use, the ability to count money or the beginning of puberty.² Legal certainty is in the interest of both minors and third parties who (wish to) rely on the validity of a transaction with a minor. The appropriateness of the age limit is not re-evaluated here, but appreciating the gradual changes in people’s ‘weaknesses’ related to being underage poses the question of whether the law takes these changes sufficiently into account and strikes the right balance between protecting minors, flexibility, and legal certainty.

I. The Meaning of ‘Transactions of Minors’

This thesis is not a work about minority in general but focuses specifically on ‘transactions of minors’. The core question is: how do English and German law protect minors from improvident decisions *in the context of transactions*?

¹ In this thesis the grammatical masculine is used to denote every gender.

² M Bateson (ed), *Borough Customs, Vol I* (Selden Society Publications, Bernard Quaritch, London 1904) 63 f; B Nicholas, *An Introduction to Roman Law* (revised ed, OUP 2008) 91.

Young persons can make manifold questionable choices, such as quitting school early. Most questions of this sort would be addressed by what is usually referred to as family law. In contrast to family law, this thesis focuses on the ‘transactional side’ of minority.

The meaning of ‘transactions’ requires clarification, not least because this is a comparative legal thesis. In this thesis, the term ‘transaction’ is understood as the voluntary exchange or transfer of value by at least two persons. It can be two-sided, such as in the case of a sale, but it might be one-sided, such as in the case of a gift. It will often relate to money or other property, but it can equally concern the exchange of a service. The basis of every transaction is typically formed by a contract. In English law, ‘contract’ is understood as a legally enforceable promise or set of promises, or as an agreement giving rise to legally enforceable obligations.³ In German law, a contract is essentially any agreement by at least two persons that aims at bringing about a legal consequence, including contracts in the ‘English sense’ as well as, for example, transfers of rights.⁴ In choosing to discuss ‘transactions of minors’, the latter, German understanding of a contract is based upon to include, for example, gifts (which is not the case under English law). The reason for adopting this wide notion of voluntary exchanges is that this thesis aims to analyse the protection provided by English and German law to minors *in the context* of transactions. This analysis requires looking at further-reaching consequences of situations where a minor is party to a transaction, typically with an adult, including their practical consequences. It is one thing for a minor to know that his promise or obligation is not binding on him. But what if he already made a gift, paid the price for goods, or rendered a service to his employer? The protection of minors from improvident transactions is analysed against the background of their functional implications: once a minor has entered a contract, the question is whether he is bound to perform, whether and how he can demand counter-performance, whether his performance or its counterpart is valid, or, if all goes wrong, how the transaction can be reversed. Gifts by minors are subject to special rules, too, and even gifts *to* minors can be restricted. Instead of voluntarily binding themselves, minors could also commit a wrong in a transactional context and, thereby, incur liability.

Having said that, an analysis of the protection that the law affords minors in the context of transactions cannot solely focus on monetary aspects. Entering into transactions is required for participating in social life which, in turn, is crucial for children’s education and successful upbringing. Children or teenagers gradually develop the experience and cognitive abilities which they are deemed

³ See the further explanations by S Whittaker in: HG Beale (gen ed), *Chitty on Contracts, Vol 1 General Principles* (34th ed Sweet & Maxwell, London 2021) [1–031 ff].

⁴ J Neuner, *Allgemeiner Teil des Bürgerlichen Rechts* (13th ed CH Beck, Munich 2023) 329, 340.

to lack before their eighteenth birthday. For that reason, they must be allowed to gain experience by interacting socially and commercially. 'Protecting minors' cannot mean a blanket exclusion of minors' liability or the invalidity of any transfer of property by or to a minor. Third parties would hardly be willing to deal with minors, who, in turn, would be prevented from gaining the experience necessary for becoming successful adults. 'Protecting minors' is also not an end in itself, and the interests of others are worthy of protection, too. Minors in German law have been, rather colloquially, referred to as the 'holy cow of the German Civil Code',⁵ but neither in Germany nor in England has it ever been a dogma that the protection of minors is a virtue above all others, as can be seen in the course of this thesis.

Furthermore, in times in which the right to vote for sixteen-year-olds is politically discussed, the status of minority should accord a certain degree of autonomy to minors. Although persons below the age of eighteen years typically still attend school or complete an apprenticeship, some of them can already have their own ideas of (semi-)professional pathways. Whether one takes the case of a young tennis player, the winner of a talent show, teenagers who, in the course of the 'Covid-pandemic', have begun day-trading,⁶ or 'influencers' earning money on social media – the law should provide a framework that balances protection and autonomy.

The core insight that this thesis has to offer is that the perception of what 'protecting minors' means in the context of transactions in England and Germany is entirely different. In other words, the law governing minors' transactions follows entirely different policies. In English law, the policy underlying the 'protection of minors' from improvident bargains is that minors' promises are unenforceable as against them, whether directly or indirectly, but minors can otherwise dispose of rights or acquire them and, thereby, validly perform an agreement or even make gifts. By contrast, in German law minors are 'protected' from improvident bargains by conferring the control over their transactions on their parents. As will be shown, each jurisdiction follows its own policy consistently, that is to say, the policy is reflected in the context of contract law, transfers of rights, and the restitution of executed transactions. Furthermore, each jurisdiction's policy proves to be the correct basis for interpreting a legal provision in case of doubts about its precise meaning.

⁵ AG Kerpen, [2007] BeckRS 4952 (24.05.2006).

⁶ See, for example, L Kellaway, 'Crypto in the classroom: Lucy Kellaway on the kids' new craze', *Financial Times*, 19 November 2021, <<https://www.ft.com/content/6ff0f503-f20b-45d5-b2d3-7f93da184e8c>>, accessed 26 February 2024; C Barrett, 'Should parents fear a trading app for teenagers?', *Financial Times*, 21 May 2021, <<https://www.ft.com/content/3c574399-9f10-4b3a-83bb-8872c83c47cf>>, accessed 26 February 2024.

II. Minors, Parents and the State

When discussing the consequences of the minority of a party to a transaction, one might not immediately think of the roles that parents or even the state play in this context. Why their roles require specific analysis in an individual chapter needs explanation. The upbringing of children and teenagers is an ongoing process. Most importantly, parents maintain and look after their children with regard to manifold aspects of life. They have a natural degree of control over their children, stemming from mutual love and affection but also the simple dependency of children on their parents. In some sense, good parenting is the most effective protection for minors. This insight does not only apply to everyday rules, such as not crossing a road unless no car is approaching. Making wise choices about one's spending is equally part of the skills one should learn before reaching adulthood, and parents play a significant role in directing their children in their spending. Parents in England and Germany can take their children's belongings into their possession and exert control over them – whereas they are not at liberty in dealing with them. Going even further, the German concept of 'parental statutory authority' allows parents to enter into contracts on behalf of their children as agents. Thereby, they can make their child party to a transaction even without the child knowing it. Furthermore, parents do not only control whether their child enters into a transaction or not. They often also own or at least control property that, economically, 'belongs to their child'. For example, a relative might gift money 'to the child' for its third birthday but, naturally, hands it over to the parents. They could dispose of the money and practically effect a 'transaction of their child'. Some parents are not always aware that they are dealing with their child's funds, and, even if they are, they can find themselves in a conflict of interests. Such conflicts of interests and parents' possible ignorance about them open a new perspective on the protection of minors from improvident bargains: not only their own ability to bind themselves or to transfer rights needs to be assessed, it is also their parents' ability to do so. There are also risks arising from parents' powerful position, and these have to be counter-balanced by special provisions balancing both the protection and threat that the status of minority entails for minors in respect of transactions to which they are (made) parties. To English law, the concept of 'parental statutory authority' is alien; however, English parents do have certain powers in respect of their children's property which have not been analysed in the legal literature or case law with sufficient clarity. We will see that the rights and duties that parents have in relation to their children's property are quite similar in England and Germany, although the legal historical and conceptual bases are very different.

The insight that parents' influence over their children's transactions can pose a risk to the latter leads to the question of the state's role in protecting minors from improvident bargains. The state protects the vulnerable, whether under the

written constitution in Germany or following the role of the Crown as *parens patriae* in England. The state is, to a certain extent, responsible for protecting children from their parents' abuses of power. This responsibility is conferred on courts and administrative bodies. The principal case of state interference with parents' powers is child abuse and thus outside the scope of this thesis. But there are important cases in which, generally speaking, a minors' wealth is at risk because parents abuse their powers. There are several measures that English and German courts can take to protect minors from improvident transactions. Furthermore, a general proposal is made as to how English and German law can protect minors who happen to acquire valuable property from its misappropriation by their parents. The role that administrative bodies play in this context is not important and not discussed.

III. Further 'Classes' of Vulnerable Persons

Minors are not the only group of persons to whom the law attributes a special 'status' of protection. Sometimes, a person will typically be in a weaker position than the other party to a transaction, such as consumers versus businesses with a strong market position or tenants in relation to their landlords. Such 'classes' of persons differ from minority in that the 'weaknesses' suffered by consumers or tenants are immanent to a specific type of transaction or relationship. The weakness is not part of the person of the consumer or tenant *per se* but typical for that kind of situation, whereas a person who is a consumer in one case might well sell something as a business owner to a consumer the next minute. But there are other weaknesses that are more akin to minority in that their roots lie in the individual person rather than the type of transaction. A particularly important one is mental incapacity, eg, following from a mental illness or cognitive disability. With an aging society and increasing number of older persons, these groups of persons are very relevant in legal practice. The 'class' of persons lacking mental capacity is additionally explained in this thesis to inform the comparative analysis. Central to this analysis is the question of what similarities the legal provisions governing the protection of minors and mentally incapable persons from improvident transactions have or should have.

IV. A Comparative Legal Analysis

This thesis is a piece of comparative legal research. As such, it aims at gaining insight into one jurisdiction by analysing it alongside another, comparing or contrasting each, or by finding similarities. Conducting a comparative legal analysis *per se* does not require justification; however, this leaves open the

questions of why English and German law are analysed and what exactly is understood by comparative legal analysis in *this* thesis.

1. *English and German Law in Comparison*

At a very general level, comparing English and German law means comparing a common law with a civil law jurisdiction. This fact alone entails several differences in respect of the law governing minority. For example, the German Civil Code (BGB) provides very abstract rules that interlink with each other, whereas the English counterpart has developed more separate legal concepts. On the one hand, the focus on doctrinal coherence and the objective of governing any possible case in advance can lead to rather impractical (and practically irrelevant) provisions. On the other hand, the doctrinal coherence of the relevant German provisions has made ‘minority’ a popular topic in legal education and research. The field can be said to be understood rather well by most German lawyers. By contrast, the concept of minority has no prominent role in English legal education or academia. The lack of comparative accounts of minority in the context of several areas of law makes the analysis in the following chapters even more interesting, especially for anyone with a special interest in English law. For example, English academics still debate the question of whether a minor can seek restitution of a transaction merely on the ground that he was below the age of eighteen.⁷

2. *‘Functions’ of Minority*

The orthodox method of comparative legal research is ‘functionalism’.⁸ According to it, ‘the basic methodological principle of all comparative law is that of *functionality*’.⁹ It states that legal concepts are comparable only if they fulfil a similar function. One might ask what ‘functions’ this thesis focuses on. Doing so is valuable in that contemplating the so-called ‘functional equivalence’ of ‘minority’ in English and German law leads to the question of which legal objectives or underlying policies can be identified in the context of protecting minors from improvident transactions in each jurisdiction. However, a few points should be noted in relation to ‘functionalism’ vis-à-vis the methodology adopted in this thesis.

⁷ Viz, it is contentious whether minority is a so-called ‘unjust factor’; see Chapter 4, Section II 2 c) (ii) (pp 106 ff).

⁸ K Zweigert, H Kötz, and T Weir (tr), *Introduction to Comparative Law* (3rd ed OUP, Oxford 1998) 32 ff; see also R Michaels, ‘The Functional Method of Comparative Law’ in: M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd ed OUP, Oxford 2019) 345 with many further references, emphasising at *ibid* p 347 that there are several types of ‘functionalism’.

⁹ Zweigert/Kötz/Weir, *Introduction to Comparative Law* (fn 8) 34.

The functional equivalence of ‘minority’ in English and German law is merely a starting point for the present legal analysis. Identifying the functions that legal concepts fulfil in two or more jurisdictions is relevant for determining what legal concepts can usefully be compared in the first place. Choosing two random, disconnected legal concepts and ‘comparing’ them cannot lead to further comparative legal insight. However, this thesis does not intend to exemplify or even prove a functional equivalence between ‘minority’ in English and German law. Rather, as will be seen over the course of this thesis, when looking closely enough, ‘minority’ in English and German law can really be said to have dissimilar functions. In this context, it should be noted that the functional equivalence of the legal concepts at hand is sometimes regarded as a heuristic principle in the sense of a precondition to comparing these legal concepts.¹⁰ This view is not followed in this thesis. If it were, the value of this thesis for comparative legal research would be doubtful because, as just explained, the functional equivalence of ‘minority’ in English and German law can only be identified at a very general level. In contrast to this, carving out the differences between the functions of ‘minority’ in English and German law can be regarded as a primary insight of this thesis.

One further difference to ‘orthodox functionalism’ should be mentioned here. Functional analyses are often conducted by comparing groups of cases with similar factual situations. The analysis focusses on outcome of these cases instead of their doctrinal constructions. This approach is not followed here; instead, this thesis focusses on doctrinal aspects of each jurisdiction, and its structure is organised according to doctrinal categories such as contract law or restitution of unjusti(fied) enrichment, as explained in the following sub-section. Furthermore, a ‘functionalist’ analysis would explore explanations for the differences between the conceptual approaches or results of cases reaching much further than the present legal-doctrinal analysis.¹¹ By contrast, this thesis does not conduct a result-orientated exploration of non-legal contexts, such as social, cultural, economic, or political aspects. In fact, the degree of protection from improvident transactions offered to minors, including the protection of their families or of third parties dealing with them, is closely connected to current social norms, political or economic developments, or culture. Exploring these aspects could be very interesting in the context of minority; but the limits of a doctoral thesis do not allow such a broad analysis.¹²

Going back to the functions that ‘minority’ fulfils in English and German law, it can safely be said that, first and foremost, the status of minority has the function of protecting minors; however, this statement only holds true at a very general level of inquiry, as will be seen over the course of this thesis. A sec-

¹⁰ Zweigert/Kötz/Weir, *Introduction to Comparative Law* (fn 8) 40.

¹¹ Cf Zweigert/Kötz/Weir, *Introduction to Comparative Law* (fn 8) 36.

¹² See the further references in the conclusion, Chapter 6, Section VI 3 (pp 204 ff).

ond important function or objective underlying ‘minority’ is the protection of the interests of third parties in balance with the protection of minors’ interests. This function follows from the fact that third parties’ interests cannot be bluntly ignored and, even more so, ignoring them could exclude minors from participating in transactions and thereby undermine their interests, too. Furthermore, parents need to have influence over the upbringing and education of their children. These similar functions make it appear sensible to compare the legal concepts of ‘minority’ in the context of transactions in English and German law from a ‘functionalist viewpoint’. What is interesting is that, although ‘functional equivalence’ can be identified at this general level, this thesis shows that the ideas of ‘protecting minors’, balancing their protection with third parties’ interests, or the necessary degree of parental control over minors’ transactions differ strongly between England and Germany. But these differences in the functions do not undermine the value of comparing English and German law in this regard. Rather, it is shown that *comparative* legal research allows us to understand what ‘protecting minors’ or safeguarding third parties’ interests means, whereas this has not been possible with a similar emphasis in the national legal literature.

3. *Structure and Scope of Inquiry*

The scope of inquiry has already been touched upon earlier. The thesis is, in general terms, concerned with the effects of the minority of one party to a transaction, be it the agreement, its performance, or its reversal, and the additional role played by parents and the state play. Apart from this introduction and the conclusion, this thesis is divided into four chapters. Each of these is divided into three sections, the first two of which can be referred to as the ‘descriptive part’: a plain description of or, where necessary, inquiry into the relevant legal provisions of each jurisdiction. The purpose of these descriptions or inquiries is to set a basis for the subsequent comparative analysis, and this purpose determines the degree of detail of the ‘descriptive parts’. Certain aspects can be essential when writing a commentary but might be omitted here because they are not relevant or interesting enough for the comparative analysis. Other aspects might be considered very detailed even at a national level of discussion but are interesting for the comparative analysis. The separation between descriptive and analytical sections must not be understood as an end in itself. Certain aspects which are contentious in or new to the legal discussion at a national level are occasionally discussed (in full detail) only in the comparative analysis of a chapter. This is the case where the direct comparison with the other jurisdiction proves particularly fruitful.

To begin with, Chapter 2 discusses minority in the context of liability arising from contracts or wrongs committed in relation to them. Mostly, this involves questions around minors being party to a contract in the narrower English sense.

Both in England and Germany, contractual liability is determined by the concept of ‘contractual capacity’. To complement that discussion, tortious (in England) or delictual (in Germany) liability of minors are discussed with a specific focus on transactions. Minority in the context of the German ‘pre-contractual liability’ unfortunately cannot be discussed due to the quantitative limits on a doctoral thesis.

Chapter 3 discusses whether and how minors can transfer rights or acquire them in the context of a transaction, including gifts by or to minors. By contrast, transfers of rights by law are not discussed, such as by way of inheritance. Importantly, this thesis is also not concerned with rights to land. This seemingly arbitrary limitation follows from the fact that, in England, minors cannot hold legal estates in land since the enactment of section 1(6) of the Law of Property Act 1925, and thus the impact of minority on transfers of legal¹³ rights to land is small. In German law, the topic is indeed not irrelevant but highly complex and would require much further explanation, to an extent that is not feasible in this thesis. The same consideration applies to the question of whether and to what extent minors can be members of a partnership or hold shares in limited companies.

Chapter 4 inquires whether and how transactions to which a minor is party and which are fully or partly executed can be reversed according to the law of restitution of unjust enrichment (in England) or unjustified enrichment (*Bereicherungsrecht* in Germany). Based on a wide and ‘functional’ understanding, restitution can mean any ‘gain based recovery’,¹⁴ which could include remedies that are part of other areas of law, such as the *vindicatio* under German law or the tort of conversion under English law.¹⁵ However, the chapter is solely concerned with the areas of unjust or unjustified enrichment. Again, the reasons are the quantitative limits to a doctoral thesis and, additionally, the fact that the English and German concepts of unjust(ified) enrichment serve as very interesting material for comparative discussion.

Chapter 5 deviates from the earlier chapters by addressing a broader spectrum of legal areas. Analysing parents’ and the state’s role in protecting minors from improvident transactions requires a more ‘functional approach’. This analysis concerns areas such as family law, the law of trusts and fiduciaries or contract law. What is important to note is that, as mentioned before, the focus is solely on the consequences of transactions for minors. Occasionally, that involves looking at the duties of parents, such as asking whether they can be liable to their child for misappropriating its property. Furthermore, the compar-

¹³ The term ‘legal’ is used here in contrast to ‘equitable’; a minor could have equitable rights to land, see Chapter 3, Section II 3 (p 68).

¹⁴ P Birks, *Unjust Enrichment* (2nd ed OUP, Oxford 2005) 3.

¹⁵ See generally G Dannemann, *The German Law of Unjustified Enrichment and Restitution; A Comparative Introduction* (OUP, Oxford 2009) 13 ff.

ative analysis in this chapter also contemplates how minors can be protected better from improvident bargains or, in general terms, how their wealth can be preserved instead of being squandered by their parents. For that purpose, some aspects of US law are also analysed and taken as examples, and it is asked whether the concept of parental statutory authority under German law is outdated.

V. Current Developments

In England and Germany, the law governing minority, whether generally or specifically in respect of legal transactions, is very old and legislative intervention scarce. Most noteworthy, the age of majority was lowered from 21 to eighteen years in England with effect as of 1970 and in Germany as of 1975.¹⁶ As explained in more detail in the following chapter, there have also been legislative changes in England in 1874 and in 1987 that, however, did not have too much of an effect. Whether the introduction of ‘parental responsibility in relation to children’s property’ by the Children Act 1989 significantly changed English law or merely consolidated it is difficult to say, as explained in Chapter 5. There, it is also shown that the only legislative change to the provisions immediately governing minority in relation to legal transactions in Germany since the BGB came into force in 1900 has been the introduction of § 1629a BGB in 1998, which – again – has not had too much effect in legal practice. In addition, a recent reform to the law governing guardianship indirectly caused small changes to the powers and duties of German parents, too.¹⁷ In this light, the law governing minority and legal transactions has proved very long-lasting. In line with that legislative consistency, the relevant case law in England has not been subject to significant changes either. A further observation in this context is that, in England, reports of modern cases concerned with a minor as party to a transaction are rather scarce. In Germany, more cases concerning minors can be found, but, in respect of each jurisdiction, it seems that reducing the age of majority from 21 years to eighteen significantly limited the amount of litigation to which minors are party. Before, undergraduate students, apprentices or even young professionals, having already moved out of their parental home, would usually be underage. The difference between both jurisdictions in the amount of case law is especially significant with regard to the powers of parents in relation to their children’s property. At least since the enactment of the Children Act 1989, parents in England are liable for misappropriating their children’s

¹⁶ According to the Family Law Reform Act 1969 and the *Gesetz zur Neuregelung des Volljährigkeitsalters* of 1974.

¹⁷ Under the *Gesetz zur Reform des Vormundschafts- und Betreuungsrechts*, which came into force on 1 January 2023; cf Chapter 5, Section II 1 a) (p 161).

Index

- Abstraction (of legal provisions) 15, 45, 48, 50, 85, 144, 161, 162, 170, 178, 188
- Abstraktionsprinzip*, see under ‘principle of abstraction’
- Action of account 155
- Age limits 1, 44, 49, 50, 69, 81, 171, see also under ‘minimum age for contractual capacity’
- Age of majority 10
- Altvermögen* (under § 1629a BGB), see under ‘minimum age for contractual capacity’
- Animus possidendi* 57, 62, 69, 80
- Apprenticeships 34, 36, 75, 161
- Assets
- protection of 72, 177, 181, 187
 - terminology 12
 - *Vermögen* 12, 151, 161
- Assignment 57, 66, 72, 174
- Assumpsit, action of 83, 139, 195
- Autonomy 3, 29, 44, 77, 120, 151, 177, 182, 195, 200
- Bad faith 93, 115, 127, 138
- Bailiff 158
- Bereicherungsrecht* 9, 87
- Beschränkte Geschäftsfähigkeit*, see under ‘contractual capacity’
- Bösgläubig*, see under ‘bad faith’
- Bundesverfassungsgericht*; see under ‘Federal Constitutional Court’
- Bürgerliches Gesetzbuch*, see under ‘German Civil Code’
- California 180, 184
- Change of position 114, 124, 134, 136, see also under ‘disenrichment’
- Contract, definition of 2
- Contracts imposing recurring obligations 38, 161, 188
- Contracts of service 34, 36, 41, 60, 75, 161
- Contractual capacity
- general rule in English law 31, 71
 - general rule in German law 20, 70
 - historical developments 82, 83, 170, 172
 - limited 19, 120
 - of mentally ill persons 45, 77, 121
 - of very young children 18, 29, 49, 57, 62, 66, 68, 82, 90
 - partial 22, 60, 90, 163
 - relative 195, 197
 - terminology 11, 138
 - unconstitutional 78
- Coogan trust account 184, 202
- Court of Chancery 132, 190, 191
- Court of Wards and Liveries 154, 191
- Court orders, see also under ‘wardship jurisdiction’
- by German courts 163, 186, 187
 - prohibited steps order 165
 - section 8 order 165, 185, 187, 190
 - specific issues order 165
- Creditworthiness 52, 79, 179, 189
- Cura* 170
- Declaration of intention 16, 17, 18, 45, 49, 50, 56, 57, 82, 90, 120, 138
- Deed
- definition 65
 - transfer by 30, 69
- Delictual liability, see also under ‘*ex delicto/ex contractu*’
- age limits 23

- in a transactional context 23, 41, 44, 82, 128, 133, 135
- Deliktsfähigkeit*, see under ‘delictual liability’
- Delivery
 - of title 62
 - *Übergabe* 57
- Dienst- or Arbeitsverhältnis*, see under ‘employment’
- Dingliches Geschäft*, see under ‘real agreement’
- Disenrichment 75, 92, 96, 127, 133, 136
- Dispositive transaction 18, 56
- Doctrinal coherence 45, 50, 70, 77, 120
- Doctrine of consideration 64
- Double representation 143
- Duress 90, 111

- Einwilligung*, see under ‘parental consent’
- Elterliche Sorge*, see under ‘parental care’
- Elterliche Vertretungsmacht*, see under ‘parental statutory authority’
- Employment
 - contract 22, 34, 37, 38, 52, 90, 114, 118, 161
 - transfers of rights under 60
- Enrichment
 - by transfer 129
 - generally 88
 - in any other way 88, 129
- Equity 26, 68, 119, 120, 135
- Erfüllungsgeschäft*, see under ‘performance of an obligation’
- Ex delicto/ex contractu* 39, 41, 84, 112, 126, 132, 134
- Executed reciprocal contracts 95, 116, 124, 136
- Failure of consideration
 - partial 125
 - total 104, 107, 116, 125, 137
- Family Court 22, 61, 146, 161, 164
 - authorising transactions 161, 178, 188
 - intervening 163, 164, 167, 189
 - monitoring parents 187
- Federal Constitutional Court 151, 177, 182, 201
- Fiduciary duties
 - generally 149, 156
 - parental 148, 150, 155, 160, 174, 184
- Flugreise* decision 127
- Fraud
 - by a minor 38, 47, 113, 132, 134
 - generally 90, 94
- Functionalism
 - functional equivalence of minority 7, 72, 204
 - legal methodology 6
- Genehmigung*, see under ‘ratification’
- German Civil Code
 - general part 16, 18, 45, 50, 170, 177
 - structure 16
- Gesamtbetrachtungslehre* 145
- Geschäftsfähigkeit*; see under ‘contractual capacity’
- Gifts
 - by minors 63
 - to minors 21, 79
- Guardianship
 - in socage 154, 155
 - of the estate 154, 155
 - of the person 154

- Handlungsfähigkeit* 49, 82

- Illegality 76, 90, 112, 118
- Impubes* 170
- In loco parentis* 110, 119, 121
- Independent conduct of business (under § 112 BGB) 22, 60
- Infancy 25, 139
- Insichgeschäft*, see under ‘self-dealing’
- Intangibles 12, 57, 72, 99
- Intention, impairment of 48, 50, 73, 77, 82, 106, 118, 120, 130
- Investment of children’s assets 146, 156, 164, 183, 190, 202
- Ius commune* 170

- Lediglich rechtlich vorteilhaft*, see under ‘legally solely beneficial’
- Legal act 17, 41, 55, 81, 90, 138
- Legal basis
 - absence of 89, 102, 108, 120, 138
 - of a transfer 71

- Legal certainty 30, 42, 50, 81, 135, 170, 177, 179
- Legal relationships 17, 18, 45, 56, 170
- Legally solely beneficial 82, 144, 168, 171, 194
- contracts 21, 46
 - transfers of rights 58, 70, 79
- Lottery-ticket case 74, 77
- Management contracts 36, 41, 162
- Mental illness, see under ‘mental incapacity’
- Mental incapacity 45, 53, 77, 121, see also under ‘contractual capacity’
- Minimum age of contractual capacity, see under ‘very young children’
- Minores* 171
- Minority
- as a defence 31, 41, 126
 - as a ground for restitution 99, 106, 117
- Mistake 90, 111
- Movables 57, 61, 99, 159, 173
- Muntherr* 171
- Necessaries 82, 113, 136, 172, 201
- contracts analogous to service contracts 36, 52
 - contracts for necessary goods 31, 43, 49, 52, 63, 98
 - contracts for necessary services 34, 52
 - executory contracts for necessary goods 32
 - historical origin 33, 172
 - in German law 78
- Negotiorum gestio* 137, 139
- Neuvermögen*, see under ‘new assets (under § 1629a BGB)’
- New assets (under § 1629a BGB) 151
- Obligatory relationships 18
- Obligatory transactions 56, 59, 79
- Old assets (under § 1629a BGB) 151, 179, 187
- Parens patriae* 164, 176
- Parental care (in Germany) 161, 171
- for the child’s assets 142, 146, 163, 190
 - for the person of the child 142
- Parental consent 19, 42
- revocation of 20
- Parental responsibility (in England) 153, 154, 165, 167, 184, 188
- Parental statutory authority 142, 150, 153, 169, 177
- considered unconstitutional 151, 177, 182
 - historical development 170
- Parents’ liability (to their child) 146, 155, 182
- Paterfamilias* 171
- Patria potestas* 171
- Personensorge*, see under ‘parental care (in Germany)’
- Pocket money (under § 110 BGB) 40, 45, 59, 70, 72, 173
- Policy reasons
- underlying minority 48, 72, 85, 91, 93, 105, 118, 126
 - uniformity of 77, 123, 168
- Praetor* 171
- Principle of abstraction 179
- Principle of separation 179
- Prohibited steps order, see under ‘court orders’
- Puberty 170
- Ratification (of minors’ transactions) 19, 27, 28, 91, 199
- Real agreement 79, 83
- Rechtsgeschäft*, see under ‘legal act’
- Rechtsgrund*, see under ‘legal basis’
- Rechtssicherheit*, see under ‘legal certainty’
- Rechtsverhältnisse*, see under ‘legal relationships’
- Rescission 90, 102, 108, 120, 133
- Restitutio in integrum* 107, 116, 124
- Roman law 137, 170
- Saldotheorie* 96, 124, 136
- Sale of goods 27, 31, 64, 98
- Schuldverhältnisse*, see under ‘obligatory relationships’

- Section 8 order, see under ‘court orders’
- Selbstständiger Betrieb eines Erwerbsgeschäfts*, see under ‘independent conduct of business’
- Self-dealing 143
- Service contracts, see also under ‘necessaries’, and under ‘employment (under § 113 BGB)’
- contracts ‘on the whole beneficial’ 34, 37, 41, 75, 82, 201
- Social media 58
- Softair toy gun case 74
- Solo consensu*, transfer 62, 64
- Specific issues order, see under ‘court orders’
- Status principle 81
- Synallagma* 96
- Taschengeld*, see under ‘pocket money (under § 110 BGB)’
- Third party protection 30, 51, 60, 75, 179
- Title (to a movable) 61
- Tortious liability 38, 84, see also under ‘*ex delicto/ex contractu*’, and under ‘delictual liability’
- Trading contracts 32, 43, 53, 180
- Trennungsprinzip*, see under ‘principle of separation’
- Trespass on the case 83
- Treuhand* 149, 186
- quasi-*Treuhand* 150
 - *Überwachungstreuhand* 176
- Trust account 185, see also under ‘Coogan trust account’
- Tutela* 170
- Tutor* 171
- Übergabe*, see under ‘delivery’
- Unconscionable bargains 79, 110, 119, 120, 135
- Undue influence 108, 119
- presumption of 109, 121
- Unjust factor, see also under ‘failure of consideration’, ‘undue influence’, ‘unconscionable bargains’, and under ‘minority’
- Unjust factors 101
- Verfügungen*, see under ‘transfers of rights’
- Verfügungsgeschäft*, see under ‘dispository transactions’
- Vermögenssorge*, see under ‘parental care (in Germany)’
- Verpflichtungsgeschäft*, see under ‘obligatory transactions’
- Verträge über wiederkehrende Leistungen*, see under ‘contracts imposing recurring obligations’
- Very young children, see under ‘contractual capacity’
- Void
- ‘absolutely void’ 27
 - definition 13
 - provisionally void 19
- Ward of court 167, 191
- Welfare, of children 73, 163, 165, 188, 190
- Wille*, see under ‘intention’
- Willenserklärung*, see under ‘declaration of intention’
- Young professionals 3, 41, 162, 179, 183, 188, 203