Musterlösung History of Business Law HS 23

1.1. Please summarize this text (2 points).

(1) This text is an excerpt of a medieval market deed written in 1030 in Dortmund, Germany. It was revised by Udalric, the chancellor of the emperor Conrad, instead of Archbishop Aribo.

(2) In the deed, Conrad, the current king of the Holy Roman Empire, grants one of his faithful subjects a Manigold, the imperial right/privilege of holding a market in Donauworth and a fair.

(3) Furthermore, Conrad gives Manigold the money rights of the market, allowing him to collect the market toll.

(4) Although the deed does not provide specific information on the market dates, the text states that it shall occur at least once a week, on Saturday.

(5) Conrad also allows Manigold to hold a three-day fair in May each year at the exact location as the market on a few conditions. These include stipulating that the Donauworth fair shall be open to all men wishing to trade peacefully and that anyone breaking this peace may be punished equivalent to those given to fair visitors in Ratisbon or Augsburg.

1.2. Based on this text, please elaborate the basic legal elements involved in the establishment and operation of a market in the European Middle Ages (4 points).

(1) According to the text, one can identify three legal elements involved in establishing a medieval market. The first is the market privilege (Marktregal), a permit granted by the territory's ruler that allows the market organiser to hold it in a specific location. As mentioned in lines 3-5 of the text, the emperor Conrad gives the license for Maingold to hold both the fair and the market fair at Donauworth, which is something his father already did.

(2) The second mentioned element is the privilege of collecting money from the market by introducing the market toll. This element, elaborated in lines 4-5 of the text, was vital because it allowed Manigold to collect the funds instead of the emperor. Doing so probably contributed significantly to Maingold's income and ensured the liquidity of Maingold and the manorial system he commanded.

(3) The third element mentioned in lines 9-14 is the market peace (Marktfrieden). In the deed, Conrad, as the highest territorial authority in the region, guarantees peace to all fair visitors if they comply with the internal rules of the market. On the other hand, Conrad also explicitly states that visitors and market participants who disturb this peace will receive punishment in the form of a ban. The term here, probably, refers to the most critical and vital sanction of medieval markets, the market ban, which essentially consisted of an exclusion from the market. Applied to this context, men who disturbed

either the market or the fair at Donauworth could, in extreme cases, be banned from doing any trade with them in the future.

(4) One element that can be mentioned here, but doesn't have to, is the compulsion to use the market (Marktzwang). This feature refers to traders in the region who had to sell their goods on the imperial markets to uphold the legal guarantees governing the market. Because Manigold had received an imperial market and fair privilege from Conrad, traders selling their goods at Donauworth could, among other things, be entitled to receiving a route license for the sales of goods, a guarantee of Maingold that only good faith purchases were going to be conducted on his market, the right to return the goods in case they were damaged during the transport before the sales and the right to settle any disputes they had with their sellers/buyer at a local market court.

1.3. How can it be explained that Manigold needed an imperial privilege to continue the market (1 point)?

(1) The fact that Manigold needed an imperial privilege to continue the market once his father passed away can be explained by the fact that the market privilege was regalian. In 1030, when the deed was issued, the right to create and maintain a market or fair in the Holy Roman Empire was a right that belonged exclusively to the king. This right also included the right to coin the money used on the market. Furthermore, Conrad, the king of the Holy Roman Empire at the time, held sovereignty over all transportation routes within the empire. Since Donauworth was a place and the routes leading towards it were part of the empire, and since Manigold was part of the feudal system, a subject of Conrad, he needed to apply for permission from the king to run the Donauworth market and fair.

(2) *Other interpretations would be perfectly valid if they were based on the text.*

1.4. Why does the text not contain more detailed rules on trading on the market granted to Donauworth (1 point)?

There are several possible explanations possible, all of which may be acceptable.

(1) One reason why the rules don't need to be elaborated might be because they were already in place. As mentioned in the text, Manigold inherited the market privileges from his father after his death. It is this inheritance that Conrad wants to reaffirm with this deed, that Manigold shall receive the same rights as his father did. Because Manigold is taking over an already established market, it seems likely that Conrad did not need to elaborate on the rules on Donauworth market trading that had already been implemented. The rules were probably listed in the original market privilege deed issued to Manigold's father and, thus, didn't need further elaboration in this instance.

(2) A second reason for the absence of detailed rules might be that the trading rules were perhaps made by someone other than Manigold. Possible answers include Count Frederick and/or the local guilds/merchants trading at Donauworth. Over the 12 and 13th centuries, guilds and cooperative organisations significantly increased within local markets. In some

towns in Germany, these guilds and their members would, in collaboration with the territorial ruler, design and implement trading rules/customs (Handelsbräuche) for the local markets. This might have also been the case in Donauworth, although the text does not provide any information. However, there are two reasons why this possibility is less likely. First, the deed was issued to Manigold in 1030 in Donauworth. Since Conrad gave this deed not to the city itself but to a person, Manigold, it seems that the town was probably not large enough to have a lot of guilds or other local business organisations. Furthermore, 1030 also predates when many guilds and other local business organisations in Germany and Europe were founded. Since Manigold was the primary beneficiary, and the year of the deed was 1030, one might argue that the influence of guilds in Donauworth was probably not yet significant enough to impact local trading rules.

1.5. <u>According to the text, what is the legal difference between a market and a fair, and how can this difference be explained (2 points)?</u>

(1) According to the text, two legal differences exist between the market and the fair at Donauworth. The first difference was the schedule. In lines 3-5, the deed suggests that the market at Donauworth is held weekly, probably on Saturday. In lines 7-8, however, the deed specifies that the annual fair is held for three continuous three days and the next two days at the same place. The different market and fair schedules indicate the considerable difference between their visitors. Unlike markets, which only lasted one day and brought together local producers and buyers, the Donauworth fairs lasted much longer because they often gathered merchants travelling longer distances. At the local market at Donauworth, like many other weekly markets, local farmers would, for instance, sell their products to buy clothes or other necessary items. However, at the fair, merchants selling cloth from Italy or France could, for example, show and sell their products to the local and even foreign visitors visiting the event. During the Middle Ages, many cities like Champagne or Frankfurt became famous for their fairs, which drew a large international audience with their diversity of specialised products.

(2) The second difference was the punishment for breaking the peace. Conrad explicitly outlines the punishment for fair visitors disturbing the peace but omits to do this for the market. In lines 10-12, Conrad states that anyone who disrupts the fair will be punished in the same way as they would if they were doing this in Augsburg or Ratisbon. These were two of the largest cities in the South of Germany and were well-known for their trade. The explicit statement of the punishment in the document was no coincidence. One can speculate that Conrad and his chancellor put this clause into place for several reasons. The first one might have been a locality. If Donauworth was close to either of these cities, it seems logical to enforce similar rules to ensure that the trade within a particular territory occurred similarly. Another reason why Conrad might have included the punishment stipulation was economic ones. With this clause, Conrad might have wanted to do two things. Firstly, prevent out-of-town merchants from taking advantage

of the small-town fair. If merchants who sold in Augsburg went to Donauworth to sell those low-quality goods, they would receive the same punishment as they would for it in Augsburg. Secondly, one could argue that Conrad was trying to protect the income and standing of the Augsburg or Ratisborn marketplaces. Since these two cities were more extensive, there is a good chance that some of their fair revenue (i.e. taxes/fair fees, etc.) went to Conrad himself through feudal contributions. However, if merchants travelled to Donauworth instead of Augsburg, Conrad's income from the city would decrease.

2. Mercantilism and cameralism were decisive for developing regulatory concepts for commercial law in early modern Europe (5 points)

2.1. Please outline the central elements of these two doctrines (3 points).

(1) Between the 16th and 18th centuries, mercantilism, and its German version, cameralism, emerged in Europe as two kinds of economic order and political power. The idea behind both was to increase state revenue to ensure that a country's citizens were cared for. The central feature of these two doctrines consisted of creating a positive capital account by introducing an intensive form of state regulation. Laws legislation the market was, on the one side, geared towards increasing the country's domestic economic growth and a positive trade balance. On the other side, they were oriented towards the common good because the state used its tax revenue to finance programs that would reduce poverty and health issues among citizens. A booming domestic industry resulted in more individual income and, thus, better living conditions for citizens.

(2) The primary tool that governments imposed to follow their social and fiscal interest was the "Polizeiordnungen" (policy orders). These promote domestic manufacturing, trade, and infrastructure projects to grow their tax revenue and simultaneously improve their citizens' living standards. *This reference is not necessary to receive the full score.*

(3) In the economic and legal spheres, the doctrines of cameralism and mercantilism often manifested themselves in direct market intervention. One example of this was the financing of public construction projects. By improving the domestic road system, for instance, governmental officials lowered the transportation costs of producers and traders and generated new jobs for the local communities where the roads were being built. Another tool of mercantilism and policy orders was the giving of privileges. Many states issued to companies to conduct business either in the domestic territory or the colonies (i.e. charter companies like the British East India Company). However, in some countries, the governmental frameworks not only tried to organise all aspects of economic but also social life. In some instances, governments banned citizens from emigrating to other countries or promoted childbirth through tax subsidies to prevent the loss of current labour workers and ensure the supply of future ones.

2.2. How can the governmental establishment of colonial companies be placed in the conceptual context of these doctrines (1 point)?

(1) The establishment of colonial companies was directly linked to the emergence of the mercantile doctrine in the 16th and 17th centuries because these companies often acted as an extended branch of the state. In the United Kingdom, the founding of the British East India Company in 1601 was granted extensive privileges by the British crown. It was set up to maintain the British trade with the British territories in East India. The East India Companies' operation in the Far East was an expression of the mercantile doctrine because its trade increased not only the state revenue of the British crown but also because the companies' dealings created both new jobs for British citizens and decreased the domestic prices for imported goods from India and other locations (i.e. tea, silk, cotton, etc.). In doing so, the company's creation thus benefited not only the state and its shareholders or the nation's growth but also contributed to improving the domestic living standard by bringing down prices for British families in the kingdom at home.

2.3. How can the reservations of cameralist authors towards monopolies be explained (1 point)?

Proponents of cameralism believed that the entire population of a country should, in times when the country was prosperous, receive a share of the nation's wealth. To secure the “common good”, cameralists would argue that the state needed high sources of revenue, i.e. from taxes. However, state companies with a market monopoly often only secured profits for their shareholders, usually at the expense of other members in foreign and domestic societies. While the shareholders of the British or Dutch East India Company shareholders would receive large sums as dividends, the English staff working on the ships and the docks did not necessarily receive similar benefits. Furthermore, many members of the indigenous population became victims of racism and violence because these companies abused military power to secure their production sites/supply chain (i.e. slavery in the U.S.; racism against the Indian population).

3. During industrialization, stock corporations and the stock exchange became increasingly important for the economic order (10 points)

3.1. How can the rise of public stock corporations be explained (1 point)?

(1) In the 18th and 19th centuries, public stock companies emerged as a new company form. Its main characteristic was the division of ownership among shareholders. To qualify as a shareholder, one usually bought several shares/stocks issued by the company at one of the many stock exchanges. The primary purpose of this company form was to raise more capital and devise the risks and responsibilities affiliated with the business's potential failure and any debts that might arise. Then, the buyer of the shares would not only give

the company some money. Legally, the shareholders would, as the company's owners, be responsible if the company failed/went broke, etc. In the case of a public stock corporation, the distribution of shares also led to a distribution of debts. If one company went out of business and owed its employees a payment worth 50.000 dollars, the amount would be distributed among the shareholders. The majority shareholders owned more than 500.

(2) The main reason public stock companies emerged at the time was industrialization. Between the 18th and 19th centuries, agricultural and other goods production became more and more efficient due to technological changes. Mechanization introduced the stream engine and facilitated the rise of railways and steamboats. Factories built goods via a chain and were introduced as new production units. However, these technological innovations were, at the time, costly. To build railways and railway lines, for instance, a railway company required a large amount of capital to buy the land it wanted to operate on, source the metals, and hire the labour force needed to build the railway lines and engines. To generate this large amount of capital. The railway company would issue stocks to generate the necessary financial means, selling shares at one of the big stock exchanges in London, New York, or Paris.

3.2. Which legal problem did the "fiction theory" and the doctrine of real corporate personalities ("reality theory" ") seek to solve and how (5 points)?

(1) The central legal problem both theories address is whether associations can be seen as legal entities with rights and obligations, just as a natural person (i.e. a human).

(2) The ideas of the legal fiction theory, which represents the older and more traditional political and legal practice, argue that there are conditions that associations need to fulfil if they are to be classified as legal entities by the law. The main argument of the fiction theory was that associations, be they companies or corporations, did not exist in real life and that they were “fiction” because they did not have a visual, corporal appearance like, i.e. humans did. Since associations were fictional, they could, typically, not possess any legal capacity in and of themselves.

(3) The fiction theory also provided a solution to the problem. To make an association a legal entity protected by and prosecutable under the law, fictional theorists argued that associations might achieve legal status if it was bestowed upon them by the state. One example of this was chartered companies. In the case of the British East India Company, for instance, the company became a fully legal entity after getting permission from the monarch and the English parliament.

(4) The second doctrine, which addressed the issue of whether associations and corporations were legal entities, was the reality theory. It was a product of the liberal legal tradition which emerged in the 19th century. The main argument of this doctrine was that associations and corporations did not need any form of governmental approval to operate.

After all, associations were living entities with inherent qualities because these associations were founded, made up and run by people.

(5) According to reality theory scholars such as Otto Gierke, an association was not a fictional but a legal entity because it did, for instance, have activities carried out by its members or management. The idea behind this argument was that if, for example, a company where 100 people were selling shoes, it was legal because it had 100 employees who sold shoes.

3.3. To what extent can the observations on "Modern Corporation and Private Property" (1932) by Berle and Means be interpreted as an observation of a profound change in the property and economic order caused by the rise of the corporation as the dominant organizational form of the economy (4 points)?

(1) Berle and Means included several vital observations in their book “Modern Corporation and Private Property” (1932). In their work, the authors first observed that during the 20th century, the number of corporations in the U.S. had increased tremendously. Furthermore, they stated that the autonomy of these corporations had expanded just as much. According to Berle and Means, big decisions and the day-to-day operations of companies were increasingly decided not by the owners/stakeholders of the company but by the managers, CEO, and Board of Directors that were put into place to govern them instead of the shareholders. Building on this observation, Berle and Means put forward their Principle-Agent theory. In this scenario, shareholders were no longer directly involved but instead transferred their collective right as owners to make decisions to agents representing their interests. This was, in most cases, the Board of Directors.

(2) Berle and Means's 1932 argument that the current structure of U.S. corporate law led to a separation of ownership and control. The traditional definitions and understanding of property were altered by introducing new management forms and separating owners from the day-to-day business.

(3) The rise of American corporatism, for instance, replaced the system of landowners and dependents (manorialism) with factory workers/ laborers with CEO and business typhoons.

(4) Other points that may be included are history’s impact on Berle and Means’s conclusions. In 1932, American corporatism underwent a massive expansion. Since the 1890s, more and more of the large-scale public-stock corporations, which the pair observed, had emerged on the American domestic market. Furthermore, the Great Depression of 1929 shaped the observations. Berle and Means's book emerged in 1932, three years after the Wall Street Crash. During this depression, many American companies failed or experienced severe financial trouble because they made terrible/unsound financial investments in the American stock markets. One could argue that Berle’s and Means's observation about the governance of U.S. corporations was also about providing the public with an answer of who was at fault and who was responsible for a company's financial failures during a crisis.

4. Protection against unfair competition is characteristic of modern business law systems (10 points)

4.1. Why was protection against unfair competition practices of rather little importance to rulers and governments in the Middle Ages and early modern period (2 points)?

(1) Throughout history, the state's stance on unfair competition practices often evolved due to structural societal changes. In the Middle Ages, territorial rulers often favoured the creation of market monopolies because they benefitted themselves financially or politically. Especially if local city guilds usually enacted these. For instance, merchant guilds in many cities would dominate the local wheat markets, setting prices for bread, flowers, etc. However, these guilds would pay market fees to the local rules to conduct these sales, especially in smaller towns. Medieval rulers not only received income from wheat traders but also, in some cases, used their imperial market rights to impose a monopoly of their own. Some records show that German archbishops, whom the Holy Roman Emperor had granted market rights during the Middle Ages, used this privilege to decree that their wine had to be sold before any other wine merchant could sell it.

(2) In the Early Modern Period, state governments continued to perceive the medieval trend to utilise monopolies for their good. For instance, establishing colonial companies in the U.K. and France provided the British and French monarchies with additional revenue from taxation. It expanded the political sphere of influence into new geographical territories. On the domestic market, the view of governmental officials and rulers within Europe that the state was allowed to intervene and create monopolies for its benefit complemented their foreign colonial trade policy approach. For example, in the 16th and 17th centuries, the British monarchy introduced a set of laws called the Navigation Acts. The purpose of these acts was twofold. On the one hand, they eliminated foreign competition in the British domestic market, especially from the Dutch colonies. Conversely, the state increased its fiscal revenue stream by forcing its colonies to sell their goods to English merchants.

4.2. To what extent can we observe the interdependencies between the emergence of the law of unfair competition and the emergence of the protection of immaterial goods (5 points)?

(1) A historical analysis of the law of unfair competition and the legislation protecting immaterial goods shows that both fields were, to a certain degree, entangled with each other.

(2) Protection against unfair competition became an issue when the state guaranteed free competition in the wake of the French Revolution. The actors in this competition were

explicitly allowed to compete. However, the question arose as to whether and where the boundaries of this competition should be drawn.

(3) The starting point for drawing these boundaries was the legal sphere of the competitors: to interfere in this sphere was to exceed the limits of individual market freedom.

(4) Intellectual property law was one of the means which conceptualized the legal sphere of market actors. Here, the concept of property was also expanded in the context of legislation in the wake of the French Revolution. From 1793 onwards, it included tangible goods and intangible products, referred to as "propriété litteraire et artistique". It also included business relationships, trademark rights and, in this respect, the reputation of companies. Any encroachment on these spheres constituted a case of "concurrence deloyale", which was ultimately an unlawful infringement and, therefore, subject to legal action.

(5) In this way, the development of the protection of intellectual property rights provided the legal starting point for the legal positioning of unfair competition practices. At the same time, it became clear that the protection against unfair competition practices was directed exclusively at market participants acting as entrepreneurs, i.e. exclusively at individual law.

4.3. How can it be explained that the protection of competition itself only became the focal point of unfair competition law at a comparatively late stage in time (2 points)?

(1) For a long time, fair and unfair competition was perceived as irrelevant. The absence of competition, in general, shaped the municipal economy. Few producers/market participants were competing, limited markets were available, and long-distance trading was not yet developed. In the Early Modern Period, the lack of a free market can explain the absence of legislation for (un)fair competition. Between the 14th and 16th centuries, forming a company without state approval was impossible. This ensured that only a few actors operated within the domestic market, so there was less competition between companies.

(2) The right to free competition, a fundamental feature of many economic market orders, first appeared in Europe during the French Revolution. Here, it emerged as part of an intellectual paradigm shift, which argued that all individuals inherently possessed the right to compete in free markets and that free markets were generally the best way to distribute goods and generate individual income. However, legislation which enforced legislation against unfair/fair competition also only gradually started to appear because a competition law that allowed the state to intervene in the market to offer protection against unfair competition was seen as critical. In some instances, advocates of free argued that a competition law that allowed the state to intervene violated the free market. The protection of competition became an increasing focal point in the 18th century as part of the extended property tort law. In France, for example, the owners of companies and their brands were protected from defamation, imitation, insider trade, trade espionage, etc.,

through federal-state legislation. This legislation was based on the argument that the right to free competition also included protection from its abuse. A company, for instance, which was spying on its competitor was, according to this view, violating the right of its competitor to compete in the market by spying on them. In the 19th and 20th centuries, protection against unfair competition became more prominent in personal and public law fields. In Switzerland, jurists argued that individuals had the right to have their rights to compete protected by the state. In Germany, where the state was focused on preserving the workings of the market, officials stated that the state could and should intervene whenever the freedom of competition within the domestic market was threatened. *Overlapping answers with the former question are possible.*

4.4. What role did the issue of consumer protection play in the evolution of unfair competition law in Switzerland (1 point)?

(1) For a long time, the rules on unfair competition in Switzerland were based on the principle of protecting competition under individual law, which was geared to competition between different suppliers on the market. This meant that the consumer sphere was left out. However, to stand up for their rights and advance their collective interests, consumers sometimes would co-operate in the form of Konsumvereine/Konsumgenossenschaften.

(2) It was not until the Unfair Competition Act of 1943 that this situation changed: competition became the subject of protection, and its abuse was the subject of legal disapproval.

However, this also made it possible to consider and protect the consumer side - as part of competition. With the new version of the UWG and the explicit focus on competition as an object of protection of the law, this position was fully secured and is reflected in Art. 8 UWG.

5. The legal assessment of monopolies, trusts and cartels was not uniform in 19th and 20th centuries (5 points).

5.1. How can the fundamentally positive assessment of cartels in the Swiss legal tradition of the late 19thcentury and into the last third of the 20th century be explained (2 points)?

(1) In the Swiss legal tradition, the positive assessment of cartels was derived from three reasons. The first one is the convergence of legal and cooperative traditions.

(2) Switzerland's legal tradition followed the German example during the 19th century to a certain degree. In Germany, like in most of Europe, cartels had a more positive reputation for ideological and economic reasons. On the one hand, cartels were seen as an expression of individual economic freedom because market actors merged out of their own free will and were allowed to organize in any way they wanted without any outside pressure. In

the Vögtlin case, the Swiss federal court declared this, stating that the plaintiff, a baker who tried to undercut the prices of the Vögtlin baker association, was not entitled to do so because the association was an expression of the economic freedom of all its members.

(3) Furthermore, Switzerland's cooperative movement (Genossenschaften) had a long tradition that lasted beyond WWI and WWII. One example is Migros, the country's largest co-cooperatives of supermarkets and banks (Migrosbank). Founded officially in 1925, both supermarket chains are owned by several shareholders of all sizes and capital input, all of whom are included in important decisions. In 2022, when Migros management deliberated whether to introduce alcohol into its product portfolio, the chain's shareholders voted against it. Respecting the decision, the chain thus continues to abstain from selling alcohol.

(4) Third, cartels served the state's political interests. Like in many other European countries, Swiss state officials saw cartels as a tool to ensure an equal and efficient allocation of goods, especially in times of duress. During WWI, food cartels became one of the most prominent forms of economic organization because they helped the state organise domestic and foreign food production/distribution. This allowed them to overcome food shortages.

5.2. What background can be identified for the US-American regulatory tradition of anti-trust law that began with the Sherman Antitrust Act (1890) and how did this approach manifest itself in the Potsdam Treaty of 1945 (3 points)?

(1) There are several reasons why the American tradition of anti-trust law has historically been critical. In the U.S., a cartel-critical approach developed in the second half of the 19th century for several economic reasons. The first one was the rise of U.S. corporatism. Many smaller companies felt that the emergence of big companies threatened their economic survival due to their significant market share/market dominance. Between 1870 and 1920, more and more companies were bundled into one singular economic unit characterized by a centrally organized management system. One prominent example of this is the formation of Standard Oil, the largest U.S. Oil company in history. Over the time of its existence, it was a conglomerate of more than 40 smaller companies. Their trustees represented each entity within the Standard Oil Board of Trustees. The principal shareholders of Standard Oil and central managers were the Rockefeller Family and especially its first head, John D. Rockefeller Sr. In the 1910s, however, Standard Oil, due to the increasing political influence of the anti-cartel movement, was dissolved by Congress and divided into several smaller companies, such as Shell.

(2) Economic reasons were not the only ones fuelling the anti-cartel movement in the U.S. One of the most immense driving forces was ideological reasons. This was the link between

individual and economic freedom. Many people believed that large-scale cartels and conglomerates were a threat to American democracy and American citizens because they prevented these citizens (and their firms) from competing in the market and turning a profit. In the case of Standard Oil, critics argued that the company's market share, which, at its height, included more than 90%, prevented smaller companies from becoming successful and thus infringed on their economic freedom. Standard Oil, the country's largest oil and mining company, also operates on the largest networks of corporate towns. The company's presence often influenced local elections in these towns, where thousands of Standard Oil employees lived close to their workplaces. In the foreign arena, the link between individual and economic freedom was transferred to other countries after WWII. In Germany, which came under Allied occupation in 1945, the Potsdam Treaty of 1945 was a move towards legislative decartelization. Then, the treaty declared that under the auspices of the American, French, British and Soviet military governments, German cartels such as the I.G. Farben, which had supported the NSDAP in their war efforts, were to be dissolved. Only medium-sized companies were allowed to remain in place because these were economically viable (big enough to turn a profit) but not large enough to eliminate competition.