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History of Business Law (Master)
Final Examination

I. Perspectives and issues in the history of business law have long been the subject of debate (5 points). Which positions of the discussion can be identified and where would you situate the discipline in terms of perspective? Please give reasons for your argumentation.

The subject area of the history of business law has long been the part of a very controversial academic discussion. At the center of this research conflict is the controversial question of the perspectival orientation of the history of business law.
(1) In this context, a first thesis tries to establish that the history of business law, is a history of law (and legal knowledge) under the influence of economics. Such a perspective formation examines, for example, contract law under the sign of emerging industrialization. Furthermore, according to this first research approach, the question of the emergence of economic administrative law would also be a typical topic of the history of business law. (2) The second, competing view pursues a different perspective. It understands the history of business law as a history of freedom in the medium of law. Specifically, this research approach deals with the development of economic freedom, especially in the period since about 1850. In addition, the conflict between the economic freedom of market actors and the related regulation by the authorities forms a central research perspective.
(3) Although both views seem scientifically defensible, they are nevertheless subject to fundamental problematics. For example, the first position deals with a subject that cannot be sufficiently delimited thematically due to its large global approach. In this respect, the question of the first model is clearly too general and too narrowly formulated. These shortcomings lead to the fact that other paths of influence and factors remain unconsidered. For example, changes in ruling conditions, conceptions of the history of ideas in canon law in the 12th century, or dogma-historical traditions of Roman private law are left out. To a certain extent, however, the problem of generalization and narrowing also exists in the second liberal model. Here, too, other paths of influence remain unconsidered. For example, changes in social formations or the emergence of economic system protection are not included in the perspective formation.
These shortcomings suggest the formation of a different research conception. Accordingly, a model that understands the history of business law as a history of legal development (or legal knowledge development) in the field of tension between market dynamics, sovereign rule and the change of world interpretations would make more sense. Especially the latter has the advantage that influences of religious patterns of interpretation can also be considered. According to such a model of perspective, the initial question thus deals with the emergence and development of markets. It also covers internal market elements (e.g., the organization of market participants and market relations), the change of models of economic and social order, and the rise of state rule.

II. Coinage agreement between Hamburg and Lübeck, 1255 (excerpt) (10 points), taken from: G. F. Sartorius, ed., *Urkundliche Geschichte des Ursprunges der deutschen Hanse*, (Hamburg, 1830), Vol. II, p. 71; reprinted in Roy C. Cave & Herbert H. Coulson, eds, *A Source Book for Medieval Economic History,* (Milwaukee: The Bruce Publishing Co., 1936; reprint ed., New York: Biblo & Tannen, 1965), pp. 145-146, online < https://sourcebooks.fordham.edu/source/1255hamburg-lubeck-coins.asp>:
To all the faithful of Christ to whom these presents shall come, the Advocate, Council, and Citizens of Hamburg give joy and greetings in the Author of Salvation. We wish it to be known to all people, that for the honor and true love we have for them, we have agreed with and allied with our beloved friends, the citizens of Lübeck, that the new denarii which are now being struck in our city, and in Lübeck likewise, ought to weigh thirty-nine solidi less two denarii to the mark,

and so that the coins may endure, the alloy should be of half an ounce. We thus bind ourselves mutually to the promise that our friends of Lübeck will not strike any other new denarii, except these, without our consent, nor ought we in our turn to strike any other new denarii without their consent. And it is further added that, if in the meantime it should happen that both our lords, the Counts, should die, which God forbid, we of Hamburg should be held beyond suspicion by the citizens of Lübeck by reason of the said promise. Therefore, in order that this agreement between us and the citizens of Lübeck may not be changed or broken, we have given this present charter, here written, to our beloved friends of Lübeck, sealed with our seal, properly attested and sealed. Given at Hamburg in the year of Our Lord 1255, on April thirtieth, on the vigil of the feast of St. George.

1. **Please summarize the contents of the text (2 points).**

   This is an excerpt from a coinage contract between the Hanseatic cities of Hamburg and Lübeck. At the beginning, the source text contains a greeting from "the Advocate, Council, and Citizens of Hamburg", which is addressed to all Christian citizens of Lübeck. The text extract also confirms an agreement that the new coins of Hamburg and Lübeck should have a standardized weight ("thirty-nine solidi less two denarii to the mark"). In addition, the alloying of the coins must also meet a contractually specified standard for the purpose of stability. Furthermore, the synallagmatic obligation is stipulated that neither party may mint "any other new denarii" without the consent of the other. The treaty further stipulates that the convention shall endure even if the city authorities of Hamburg or Lübeck were to die in the meantime. Finally, the handing over of the duly authenticated and sealed document to the contracting party from Lübeck is confirmed. The document is dated April 30, 1255.

2. **How can it be explained that Hamburg and Lübeck can dispose of the value of coins at all? Please consider the importance of the so-called coin shelf (4 points).**

   (1) The term "coinage shelf" refers to the imperial or royal authority to put coins into circulation and to declare them to be binding means of payment, which could be used exclusively for the settlement of monetary debts. In this respect, the authority to mint coins was a royal right (*ius regale*) in its starting point. However, as part of the regalia of power, the right to mint coins was also transferable by means of an imperial or royal privilege. Thus, in the course of the expanding monetarization, this authority was initially granted to territorial lords (e.g., nobles and dukes) from about 1100 onward. Since about the 13th century, the right to mint coins was then also conferred on cities by means of an imperial or royal privilege.
   (2) The control of the mint was an important instrument of imperial politics in the Middle Ages and in the early modern period. In particular, the minting regime was often used unilaterally for fiscal purposes. In the course of time, the authorities authorized to mint coins began to devalue coins in order to finance their own expenditures. This was done by declaring old coins invalid and issuing new coins whose precious metal value was lower than the value actually declared by the person entitled to mint them. However, the new coins thus put into circulation rapidly lost value in relation to other currencies. The weak external value regularly led to inflationary tendencies in the domain of the person entitled to the coin, which also caused prices to rise. Most importantly, the value of the coinage held by the citizens decreased, effectively depriving them of part of their asset value.
   (3) In response, various legal concepts emerged to counter this form of monetary policy. In particular, medieval canon law required that changes in the value of money through the issuance of new coins be made only with the consent of the people. Specifically, this meant that the estates should have a say in the changes in value. If this did not happen, there should be a disapproved form of coin counterfeiting. Nicholas Oresme, on the other hand, introduced the thesis that money and coins did not belong to the sovereign alone, but were under the sovereignty of the entire people. Thus, according to Oresme, changes to the coinage were also

subject to the approval of the estates. In order to reduce the consequences of devaluations on trade, so-called value protection clauses in trade contracts or bills of exchange were also created. These guaranteed the precious metal value (real value) of the debt, so that in the event of devaluations the nominal debt amount increased accordingly.

3. What reasons can be found for the agreement between Hamburg and Lübeck? Please give reasons for your opinion (4 points).

(1) Since, in the course of monetarization from about the 12th century onward, coinage regimes were issued to many territorial rulers and later also to cities, a variety of coins could be found in a relatively small area. This diversity of coins in turn led to problems in the area of monetary convertibility. Unlike in modern times, there was no standardized system of conversion rates in the Middle Ages, which meant that market participants always had to fear exchange rate uncertainties and discrepancies. In addition, very high exchange fees were often charged when exchanging two different coins. Moreover, the exchange of low-value coins was regularly not possible, as these were excluded from the exchange. To counter this convertibility problem, merchants often carried coins from different territories, which in turn led to transport difficulties due to the high weight of the coins.
(2) Because of these problems associated with the diversity of coins, territorial rulers and cities founded so-called minting societies and related associations from the 13th century onward (such as the Rheinische Münzverein, 1386-1537, or the Rappenmünzbund, 1399-1584). These were contractual agreements between various minters in a region who agreed on a common coin. The contracting parties regularly agreed on a specific currency value (including the respective precious metal content), on the validity of foreign and, if applicable, own coins, and, under certain circumstances, on the exclusion of certain coins. Coin societies thus served the purpose of establishing a stable currency with jointly fixed rates. At the same time, this was intended to reduce the transaction costs in the turnover of goods, which arose from the necessity of coin conversion. Coinage societies were particularly successful when all partners had the same currency-related interests and therefore did not undermine the jointly established currency rules. This equality of interests was particularly given in the case of similar trade and commercial activities. Another prerequisite was the political, and possibly also military, strength to enforce the agreements within the society's territory.

III. In the course of the Early Modern period, concepts that emphasized state control of the economy increasingly gained ground in Europe (5 points). Please outline these approaches and include the so-called "Policeyordnungen" (Police Mandates) in your considerations.

(1) In the course of the early modern period, those ideas gained strong support that not only approved of social and economic interventions by the state or authorities, but actively demanded them. This led to the rise of an image of the state with increasing attribution of state responsibility for the economy and society. The idea of a very active and interventionist government or administration as the basic concept of a political order found its starting point in the so-called *policey* (lat. *politeia* = community). The concept of "*Guten Policey*" is based on the idea of a well-ordered community. The community is understood here in its broadest sense and includes not only social and cultural but also governmental and economic reference systems. (2) The guiding principle of *policey* finds its normative form of action in the so-called *Policeyordnung*. This was the dominant type of ruling norm in the 16th and early 17th centuries, which was characterized by its pronounced intensity of regulation for all areas of life. The *Policeyordnung*en as a whole were committed to the goal of realizing the "common good". Behind this was the idea that it was the task of state power to secure the interests of both subjects and the state through commandments and prohibitions. For this reason, the economy was also the subject of intensive regulation. The "common good" also included the protection of the "little man" from overreaching. For this reason, police regulations often followed a latent anti-capitalist tendency and limited the activities of monopolies

and cartels, for example, but also created regulations to protect consumers (e.g., in the law of sales and interest measures). In this context, the state thus appeared as an actor controlling and regulating the economy.
(3) The model of *Policeyordnung*en was increasingly condensed in so-called mercantilism (in Germany: cameralism), an economic order that was predominant in large parts of Europe in the 16th-18th centuries. It was characterized in particular by intensive state regulation of the economy in the social and fiscal interest. The actual goals of mercantilism were related to both the increase of state revenues and a positive capital balance. The primary means to this end was intensive state promotion of the economy. The mercantilist objectives were implemented through privileges, the promotion of manufactories and the expansion of infrastructures through the development of inland transport routes (construction of roads), the costs of which, however, were often passed on to regional and local rulers. In addition, population growth was promoted, primarily through migration policy (e.g., the Edict of Potsdam in 1685).

IV. Cartels and antitrust law were the subject of intense debate and repeatedly changing legal regulation in the 19th and 20th centuries (10 points).

1. How can it be explained that in the period up to about 1870 cartels were rather critically evaluated in Europe (2 points)?

(1) The phenomenon of cartels can be compared to some extent with the movement of guilds. Both ideas are based on equal participation in the profits of the members. However, while the guilds of the Middle Ages lived from their monopolies, or rather the guild obligation represented the classic monopolization of an economic sector in the city and was accepted by society, in the 18th century the idea prevailed that ideally the entire population should share in the prosperity of a country. Monopolies, on the other hand, merely secure the profit of individuals at the expense of others. (2) When, in the wake of the French Revolution, freedom of trade was introduced as an individual right, cartels fully became legally disapproved arrangements of market actors. They were seen as a threat to individual freedom of trade, against which the state had to intervene. This was reflected in legal provisions such as those in Prussia and France, which declared the formation of such associations null and void or – as in France – even criminalized them.

2. How did it come about that cartels and trusts were increasingly appreciated more positively in Europe since about 1870, while a more cartel-critical position prevailed in the U.S. in the period up to about 1934 (5 points)?

(1) Since the 19th century, more and more corporate groups have been formed. These are associations of individual companies or single-capital companies that are bundled into a single economic unit and operate with a highly centralized, uniform management. This development can be observed in a particularly pronounced way in the USA, using the example of the Standard Oil Company. In the early 1870s, several refinery owners, including the owner of the Standard Oil Company, planned to form an alliance in order to obtain discounts from the railroads for transporting their oil and to persuade the railroads to charge higher prices to oil refiners outside the alliance. Later in the expansion, more than 40 individual oil companies formed a trust. The right of determination over the trustees takes place over the corresponding shares. Standard Oil resp. its founder held most of the shares, thus concentrating an enormous economic power in himself and at times being responsible for more than 90% of the oil production in the USA. Such developments and the consequences of such monopolization increasingly led to a distrust of cartels and an anti-cartel or anti-trust movement. This statued that cartels represented an undue and harmful influence at the political level, in particular a threat to the republican idea and economic freedom. From an economic point of view, the distrust of cartels was based on the fear of losing customers through price fixing and the obstruction or even

sabotage of competition and labor law. The anti-cartel stance of the U.S. Congress finally found its legal standardization in the Sherman Act in 1890. The Sherman Act provided, among other things, for prohibitions of conspiracies to secure monopolies and unlawful interference with commerce. As a result, several cartels were broken up on the basis of the Sherman Act.

(2) In Europe, criticism of the cartel movement has also been voiced in some quarters, but this criticism has not found its way into the political arena. On the contrary, cartels have long enjoyed a more positive reputation in Europe than in the USA. This more positive reputation is based partly on ideological and partly on practical reasons. During World War I, European countries increasingly relied on the cartel as a form of economic organization. The practical benefits of allocating goods as efficiently as possible and preventing shortages were touted. Cartels were seen as stabilizing market factors, especially during market crises or in post-war periods, because their organizational form as a cartel allowed them to set prices and thus counteract any fall in prices and the associated negative economic development. It is precisely this control of the economy that ultimately serves the common good. The Reichsgericht in Germany, in particular, follows an approach based on the common good, according to which the organizational form of a cartel is desirable for the national economy in order to limit mutually ruinous competition and stabilize the economy.

3. How can the development of antitrust law in Switzerland in the 20th century be placed within these developments? Please justify your position (3 points).

The development of cartel law in Switzerland can be compared to a certain extent to the evolutionary path in Germany. (1) However, while Germany follows a national economic approach, the Federal Court emphasizes that the creation and justification of cartels is primarily an expression of economic freedom and, to that extent, the freedom to self-organize, and thus follows a liberal and individual rights-based justification approach. Thus, at the beginning of the 20th century, the idea that market participants should order the market in the form of self-organization prevailed for the most part in Switzerland. An example of this is the Vögtlin decision of the Federal Court. In this case, an individual of an association of bakeries was sued by the same association for the fulfillment of the contractual penalty promise. The association members undertook under penalty of contract to collude in prices, purchasing, production standards and production volume. The defendant vainly invoked the unlawful content of the contract and the unconscionability of the promise of contractual penalty, since it intensively restricted the affected party in its constitutionally protected freedom of trade and thus violated or infringed it. The Federal Court protected the contract and the contractual penalty of the association with the argument that the fundamental right of economic freedom also includes the right to exercise this economic freedom to the full extent. The fundamental right of freedom of trade and market includes precisely such forms of self-organization. It is within the party autonomy of the market participants that they can also waive their freedom of trade within the framework of their economic and contractual freedom. In the consequence of a strong individual-rights conception of man, there is also the possibility of disposition and relinquishment of the own individual rights. (2) Another argument for the legislator's reluctance to limit cartels could be that cartels were interpreted as a continuation of the cooperative element that was widespread throughout Switzerland. Even after World War I, the cartel form of organization continued to prevail in Europe, although criticism of cartels increased as a result of the crisis-like developments. This can be seen in the establishment of a price formation commission in Switzerland in 1927, which was supposed to monitor price formation, especially starting from cartels. However, cartels continue to be regarded as a legitimate form of economic organization and are thus not fundamentally banned. In the middle of the 20th century, a change of perspective increasingly occurs, according to which the protection of actual *competition* is given higher priority. The 1930s and 1940s saw the first expansion of state control in favor of competition protection. The "economic article" of 1947 authorizes the federal

government to intervene in the economic order in order to form a structure in the national economic interest. In 1951, the first publication of an already completed survey of the cartel stock is commissioned. In 1962, Parliament passes a Cartel Act, but its application by the Cartel Commission remains restrained. Finally, in 1985, the first tendencies toward decartelization set in. The amendment to the Cartel Act of the same year allows cartels to be dissolved for the first time. The motive for this could be the fear of cartels as planned organizational structures. The 1995 revision of the Cartel Act further extends the state's rights of access to cartels.

V. Intellectual property law became an important factor of industrialization (5 points).

1. What concepts of protection for intangible property can be identified in the period before 1789 (2 points)?

(1) For a long time, the protection of property rights was linked to dominion and assignment to a thing. The Italian jurist Bartolus, for example, advocates the classical definition of property, according to which the concept of property only includes the right to dispose of *physical* things. From this point of view, the question arises as to how property rights to works that are not bound to a thing, such as intellectual productions, are to be protected. In accordance with the ancient tradition, the protection of intellectual works is therefore originally based on the *medium of* an intellectual work. This solution, however, raises new questions as to the extent to which, for example, an author's book is protected if he or she has produced it using someone else's book material.

(2) In the middle of the 15th century, the question of the protection of intellectual creations became more pressing than ever. The invention of letterpress printing by Johannes Gutenberg immensely increased the circulation of texts, which also gave new weight to the question of protecting intellectual productions. In this context, the first copyrights emerge in the form of sovereign printer and book privileges. Printer's privileges protect the printer from competition by prohibiting other printers and/ or publishers from reprinting any of the printer's books without the consent of the original printer or sovereign permission. Sovereign printer privileges can thus be understood as state-issued printer monopolies. In contrast, sovereign book privileges "only" protect against the unauthorized reprinting of a single book without the consent of the printer holding the privilege. Nevertheless, the privileges are sovereignly granted privileges – i.e., not general legal protection, but individual or individually granted privileges – and thus not protection for the author.

(3) The 18th century not only brings a cultural turnaround, but also increases the pressure on the debate about authors' rights. With the Enlightenment, man is repositioned as a creative and thinking being. This development is followed by demands regarding the legal protection of the productions of enlightened man. Johann Stephan Pütter states that it must actually follow from the nature of the matter and the common law of all nations that there are also universal authorial privileges, so that the author as the producer of these intellectual works is also protected.

2. What concepts of protection for intangible property developed during the 19th century (3 points)?

The developments in the 18th century around the author's rights are dogmatically reworked in different ways in the Central European context in the 19th century. Otto von Gierke and Karl Gareis, for example, argue that the author's right is part of the personality, which means that it is protected by the actio iniurarium – which can be defined as an action for infringement of personality in the broader sense. André Morillot, on the other hand, differentiates between two types of copyright protection: droit d'exploitation and droit moral. The former is the

property right, that is, the right to exploit one's own intellectual work. Ultimately, this is the right protected by the French Revolutionary Decree (the actual property right). The property right itself, however, flows from the personal right as its source behind it (droit moral). Josef Kohler, on the other hand, partly adopts Morillot's view, but states that although property rights have a personal rights origin, they ultimately form a new genre of property rights, namely intangible property rights, which must be protected accordingly as such.

VI. Commercial law is often referred to as "special private law" (5 points).

1. To what extent can this finding be substantiated with regard to the development of commercial law in the Middle Ages and the early modern period (2 points)?

(1) In the Middle Ages, commercial law was mainly anchored in the city laws and the general common law, where certain commercial customs developed. In the 13th century, the Lex mercatoria develops its own semantics for the collection of commercial customs. Already in the Middle Ages, commercial law is the law that covers only a specific group of market actors. This can be observed in the emergence of jurisdictions solely for commercial disputes or disputes between merchants. In addition, the tendency that certain legal powers (e.g. the bill of exchange or the execution of a certain type of purchase) belong only to specific market actors is formed at an early stage. (2) In 1673, after a long period of mainly customary existence, commercial customs found their first form of legal consolidation in the Ordonnance de Commerce. The Ordonnance de Commerce has a great impact throughout Europe, especially due to the progress of international trade.

2. What role did the possible special role of merchant women and merchant men play in the Swiss codification debates of the 19th century (3 points)?

(1) In the 19th century, two systems of commercial law were opposed to each other: the objective system and the subjective system. The subjective system provides for a specific group of legal subjects, namely merchants, a separate right for their type of transactions, i.e., commercial transactions. Under this commercial law system, only merchants were also assigned the legal power for certain types of legal transactions. Commercial law in the subjective system is thus based on the subjective characteristics of the legal subjects (here: merchant status) and, as the special law of a particular social group, reflects the class stratification of society. The objective system, on the other hand, contains special rules for a certain type of legal transaction – in the case of merchants, commercial transactions – without deriving from this the necessity of a special right for a *type of person.* Accordingly, the commercial law of an objective system applies as soon as a legal transaction has the characteristics of a commercial transaction. (2) In this context, therefore, the question arises whether commercial law should be regulated in a separate codification (which would correspond to a special law under the subjective system). In this codification debate, Switzerland refrained from regulating commercial law in its own codification (which would be considered a special law under the subjective system) and opted for a "code unique" solution, which it combined with a commitment to the objective system. Commercial law was merged with general civil law in one codification. Proponents of this decision argued that, especially in the 19th century, which is strongly characterized by the dissolution of social status structures, a special law for a single group of society runs counter to the principles of equality before the law and equal treatment.