

Please note that the following is a guide of how one might answer in order to get the highest possible number of points. Other answers or elements thereof may also be correct if they are presented as part of a convincing argument. Argumentation in general is key, which means that the recitation of facts, dates etc. alone, even if they are correct, is not enough to get the maximum of points.

***History of Business Law (Master)***  
**Final Examination**

- I. Please read the following text (Excerpt from the Liberties of London (c. 1120), from the Leges Edwardis Confessoris (cited [and slightly redacted] here according to: Thorpe, Benjamin [ed.]: Ancient Laws and Institutes of England, London, 1840, p. 462, reprinted in: Cave, Roy C.; Coulson, Herbert H.: A Source Book for Medieval Economic History, reprint ed., New York, 1965, pp. 199-200) (10 points).**

"C.1. Be it known that within the space of three miles from all parts outside of the city a man ought not to hold or hinder another, and also should not do business with him if he wish to come to the city under its peace. But when he arrives in the city, then let the market be the same to the rich man as to the poor.

5

Concerning Liberty of the Citizens of London.

C.8. And after he [referring here to a free man] has entered the city, let a foreign merchant be lodged wherever it please him. But if he brings dyed cloth, let him see to it that he does not sell his merchandise at retail, but that he sells not less than a dozen pieces at a time. And if he brings pepper, or cumin, or ginger, or alum, or brasil wood, or resin, or incense, let him sell not less than fifteen pounds at a time. But if he brings belts, let him sell not less than a thousand at a time. And if he brings cloths of silk, or wool or linen, let him see that he cut them not, but sell them whole. But if he brings wax, let him sell not less than one quartanum. Also, a foreign merchant may not buy dyed cloth, nor make the dye in the city, nor do any work which belongs by right to the citizens. C.9. Also, no foreign merchant with his partner may set up any market within the city for reselling goods in the city, nor may he approach a citizen for making a bargain, nor may he stop longer in the city."

15

20

- 1. Please summarize this text (2 points).**

(1) The document regulates several aspects that had to be observed in connection with the market in London. (2) These includes rules which are binding not only for people within London itself, e.g. citizens and foreign merchants in C. 8, but also the city of London and actors outside its sphere of influence (C.1). While in theory all free men could participate in the market and were due special protection on the road when within 3 miles of London (C.1), the document also shows that the interests of the citizen of London had clear priority: Foreign merchants had to observe numerous restrictions on how they sold their wares.

**2. Apparently, this charter served several different interests. Please explain these interests by using this text (3 points).**

(1) This charter benefitted in many ways the citizens and city of London, which certainly motivated them to attain and record these rights. These benefits include advantageous trade opportunities for its citizens and guilds because foreign merchants had to obey additional rules which forbade them from selling many goods at retail and instead delegated to them the role of wholesalers (C.8). (2) For the city itself, the guarantee of safe conduct was sure to attract trade to the city (C.1), while it also obtained the exclusive right to hold markets in its territory (C.9). (3) While it is not clear from the text itself, rights like these had to generally be granted by a territorial lord, who was on the one hand interested in seeing towns under his control prosper and on the other hand often received some form of compensation in return (e.g. as seen in the market privilege of Reichenau in the 11<sup>th</sup>. century).

**3. Since the late Middle Ages more and more cities gained legal autonomy. To which extent was this development related to role of markets in the medieval economy? To what extent do such correlations become visible in the present text (3 points)?**

(1) During the Middle Ages the number of markets increased both in quantity and quality. The latter refers not just to the size of a market or something similar, but rather that new kinds of markets developed: International trade fairs, specialized markets for specific goods of local or regional importance and the like. This increase in commercial activity made the right to hold markets correspondingly more important. (2) Once a city had gained the right to hold a market, which was generally based on a privilege, the increase in commercial activity served to both incentivize the city to gain more control over market regulations (to attain more favorable conditions) and to be better able to strive for autonomy thanks to increased revenue and influence. (3) These market regulations additionally often served as the foundation of specialized courts and town charters, once a city had reached a certain amount of financial and political strength.

(4) Aspects of these interests and dynamics can be seen in the text in C.1 and C.8: C.1. establishes that no-one within a 3-mile radius should do business with someone planning to visit the market in London, which makes it the only legal trading hub of this kind in that area. (4) C.8 shows that the citizens of London enjoyed many privileges related to the market when compared with people from other areas. It may thus be assumed, that the city had already amassed enough capital, be it political or financial, to gain such favorable odds. (6) Additionally, while it is not spelled out in the text above, if someone broke these rules, they would probably have had to pay a fine, which would be an additional source of revenue for the city.

**4. The emergence of trade fairs correlated with profound changes in monetary and financial services. Please explain the essential aspects of these developments and their legal ramifications (2 points).**

(1) Trade fairs attracted merchants from far and wide and some fairs developed into international trade hubs. This led to an increase in long-distance trade and circulation of currency. (2) Roughly since the beginning of the 13<sup>th</sup>. century the first banking systems existed in Northern Italy, which catered to the needs of trade fair visitors: Currency exchange and money lending, the latter of which developed into promissory notes. These were essentially a certificate that a certain

amount of money had been deposited with a specific bank, which could be used as a sort of payment. (3) Over time banks and exchange institutions became widespread, but a heavy reliance on lending and promissory notes left these systems vulnerable to inflation crises. To counteract that risk, public authorities began in the 17<sup>th</sup>. century to issue guarantees for promissory notes and founded banks themselves.

**II. In the Early Modern Period both the global economy and legal frameworks changed significantly. New global trade networks and empires emerged (8 points).**

**1. What economic factors became determinants of colonization (2 points)?**

(1) The demand for new markets and the exploitation of commodities were very strong in the European countries. Colonized regions became over time increasingly both suppliers of commodities like precious metals as well as markets for trade with European goods, but also with slaves, which were purchased by European merchants in regions which already were or soon became part of a colonial network. These dynamics resulted in the emergence of triangular trade patterns. (2) The dynamics of colonization in terms of exploitation of colonial regions and trade had a strong impact on the European stock markets. Here in particular the necessary capital for further colonial endeavors was collected and formed the financial basis for the activities of colonial companies.

**2. Please describe and explain the impact of the colonization on company law and the European economy (3 points).**

(1) Private companies were heavily involved in both the development of colonies and colonial trade. But both activities required vastly larger amounts of capital compared to past ventures, due to the distance, risk and scale involved. It was for example more expensive to build and equip a ship which could make the journey from Europe to the Caribbean and back compared to an intra-European trip. Chartered companies emerged as a new form of association which could both facilitate raising capital and disperse risk. (2) The founding of such a company required a state decree (*octroi*) which defined its purpose, e.g. "trade with the Western Indies", and its structure. Members had a right to invest and receive dividends, but in many cases voting rights were restricted to a select number of shareholders. (3) Chartered companies could also be granted special privileges like monopolies or the right to raise troops and wage war. This meant that chartered companies could become very powerful indeed and some of them, like the EIC or VOC, developed into a sort of quasi-state actor. (4) The silver supplied by the colonies and the development of paper money since the 17<sup>th</sup>. century increased liquidity in Europe. This fueled investment speculation often centered around chartered companies or colonial ventures, which led to a number of major economic bubbles (e.g. the Mississippi Bubble or the South Seas Bubble).

**3. Mercantilism and later cameralism emerged as political concepts in the 17th century. Please explain the essential points of these doctrines (3 points).**

(1) The main goal of both mercantilism and cameralism was to increase government revenues and to improve the national economy. To accomplish the later they heavily discouraged the import of goods and argued for a high degree of national self-sufficiency. (2) Both were in favor of state intervention into the economy: (a) By raising tariffs to reduce imports. (b) Control of production by making commercial activities reliant on being granted a privilege (c) Encouraging

population growth to gain a bigger work force (d) Investments in infrastructure projects like adjusting water ways or the construction of highways.

**III. The proliferation of new technology which could replace physical labor with the power of steam led to a new age of profound changes for all parts of society: The Industrialization (10 points).**

**1. Which stages of industrialization can be distinguished (3 points)?**

(1) The first phase started in the latter half of the 18<sup>th</sup> century and is characterized by a change in production methods due to an increase in mechanization. Older economic and production systems become replaced, the workshop system gives way to factories and the abolition of serfdom is accompanied by the rise of mechanized agriculture.

(2) The second phase extends roughly from the last years of the 19<sup>th</sup> century up to the 1980s. The main defining features are an increase in mass production (including consumer goods), the emergence of international conglomerates and industries based on electricity and new technology become the most important economic sectors.

(3) The third phase began in the 1980s with the increased availability of computers and the transition from mechanization to automatization. The IT- and biotechnology sector gain considerable influence.

(4) The idea that we are no longer in the third, but a new fourth phase of industrialization has become increasingly widespread. What separates this from the former phase is the degree with which almost all aspects of economy and everyday life are permeated with digital tools and interconnected via digital networks.

**2. The emergence and the spread of cartels were a typical phenomenon of the industrialization. What reasons have been put forward for and against the existence of cartels (4 points)?**

(1) The concentration of economic power in increasingly fewer companies and conglomerates was especially pronounced in the USA. The scale and consequences of this consolidation also led to an increase of distrust of cartels and encouraged the growth of an anti-trust movement. The anti-trust movement thought that cartels had an undue and detrimental influence both on politics (including the claim that cartels endangered the basic ideals of a republic) and the economy. The latter can be summarized as concerns regarding customers due to price fixing, hindering or even sabotaging competition and workers' rights. With the Sherman Act of 1890 that political stance was expressed in a legal form and multiple cartels were broken up. (2) While there were also grass-roots counter-movements to cartels in Europe, their influence did not have an impact on politics on the national level. On the contrary, cartels were often thought to be a positive factor. These arguments could be both ideological or practical. The former was expressed e.g. in Swiss Jurisprudence with the argument that a truly free market also contained the right of market actors to choose to form a cartel. The latter argument was more often invoked, e.g. in Germany, in the aftermath of market crises or during times of war, where cartels were perceived as a stabilizing influence, precisely because of their ability to set prices and control large parts of the economy. Though the utilization of cartels during wartime ultimately led to their condemnation in the Potsdam Agreement, where the anti-trust views of the USA heavily influenced the rules for the reorganization of the German economy after 1945.

**3. The law of unfair competition was also influenced by industrialization. What links to intellectual property law can be identified in historical retrospect (3 points)?**

(1) Dominant at the start of this period was the concept of *concurrance déloyale* which defined unfair competition rather narrowly as acts which directly harmed competitors (for example defamation) and was treated as part of property law. Towards the end of the 19<sup>th</sup> century unfair competition was generally deemed to be part of the sphere of personal law, with the main issue being that the personal rights of all competitors are respected. This was coupled, however, with the belief that competitors were entitled to act as ruthlessly as possible, as long as they did not directly break the law. (2) The connection of IP law with ideas about what constitutes fair competition can be seen in the *concurrance déloyale*, which in contrast to older concepts posited that trade espionage was to be treated as unfair and thus forbidden. Similarly, the industrialization led to a boom in innovation and media, which were part of an increasingly global marketplace. New patent and copyright laws were thus developed (e.g. Berne Convention for the Protection of Literary and Artistic works in 1886) to protect immaterial assets. The idea that the protection of intellectual property was an aspect of fair competition was also expressed by legal theorists of the time, like J. Kohler who argued that both the protection of immaterial goods and the protection of basic good will interactions were both integral parts of the sphere of personal law.

**IV. Please read the following text (excerpt from a text of Otto von Gierke (1902) (12 points). Translated from: Gierke, Otto: Das Wesen der menschlichen Verbände. Rede, bei Antritt des Rektorats am 15. Oktober 1902 gehalten, Leipzig, 1902, p. 12, 26, 31; the square brackets contain the original version of the preceding words, to aid your understanding of the text):**

"The law attributes personality to associations. Thus, like the individual, it must be a physical-spiritual living entity [*Lebenseinheit*], which has desires and act to achieve what it wants. [...] These are the basic ideas from which the so-called organic theory originated. [...] The organic theory considers the state and other associations as social organisms. Thus, it asserts the existence of aggregate organisms [*Gesamtorganismen*], whose parts consist of humans, above individual organisms. [...]"

But is it not quite irrelevant how the problem of the juridical person is solved for the jurisprudence as such? [...] Not at all! The entire systematic structure of the law, the form and content of the most important legal concepts and the decision of numerous very practical separate questions depend on the construction of the personhood of associations [*Verbandspersönlichkeit*]. [...] Birth and death of association beings are in the eyes of the law at the same time legal processes, which again cannot be constructed with individual-legal terms and therefore trigger a new world of socio-legal terms. [...]"

**1. Please summarize the main themes presented in this text (3 points).**

(1) Gierke argues that associations should be regarded as real existing beings with both desires and agency. (2) Based on this premise, he then asserts, that this is no mere theoretical distinction but of fundamental importance for "The entire systematic structure of the law" (see text above, lines 8-10). (3) He calls this thesis "organic theory" in the excerpt above, which is

more well-known by the name reality theory or 'theory of real corporate personhood' (*Theorie der realen Verbandspersönlichkeit* in German).

**2. Please describe the legal fiction theory (*Fiktionstheorie*) and the legal reality theory (*Realitätstheorie*). Please include the political and socio-economic background of both approaches (4 points).**

(1) The source text above is essentially an abbreviated definition of the theory of real corporate personhood. Its main points are that associations are actual and real entities in their own right, with the legal rights and obligations that this entails. (2) Legal fiction theory can in many ways be regarded as the exact opposite of reality theory: It posits, that non-human entities like associations do not possess any legal capacity in and of themselves. Accordingly, any legal status and capacity connected with them must be a kind of legal fiction, which has to be bestowed by the state.

Legal fiction theory is representative of older legal and political practice, where explicit permission by public authorities was necessary for the founding of a capital company (like octroi and chartered companies for example). This practice slowed the formation of new companies, which in turn made it more complicated to finance larger industrial projects. Reality theory, on the other hand, is a product of the liberal tradition of the 19th century. This ideology was opposed to governmental interventions into the economy and was more in favor of a laissez-faire approach.

**3. Which tradition is represented in the text given above? Please explain your answer (2 points).**

(1) The author of the source is Otto Gierke, a well-known proponent of reality theory. (2) The presented excerpts are entirely in line with this reputation. For example, in the lines 1-2 he explicitly asserts that associations are, in truth, actual living entities. That claim is completely in opposition to legal fiction theory. (3) Similarly, in lines 10-12 the way in which associations come to exist is described as being like a birth which at the same time functions as a legal process. Thus the legal status and capacity of an association are not bestowed on them by the state, as legal fiction theory posits, but rather inherent qualities.

**4. The late 19th century witnessed the introduction of a new kind of capital company in Germany and later in other European jurisdictions. Please describe the legal structures of this new type of company and explain how was it connected with concerns about speculation (3 points)?**

(1) After the economic crisis of 1873 laws were passed that made it more difficult for smaller investors to participate in the stock market in an effort to discourage speculation. (2) GmbHs, modelled after LLCs, were introduced in 1892 and had vastly lower requirements for founding capital. In this way they could serve as an investment alternative for people who did not have sufficient means for investing in or founding a joint stock company. (3) GmbHs were seen as comparatively speculation proof, because their shares could not be traded.