PREFACE TO THE SECOND EDITION

This second English edition is based on the sixth edition of our German book *Lehrbuch der ökonomischen Analyse des Zivilrechts* [Textbook of Economic Analysis of Civil Law], which was published by Springer Gabler in December 2020, and which is aimed at introducing the law and economics approach to the German speaking readership. This English edition is, however, not a mere translation of the German version. Instead, Hans-Bernd Schäfer has adapted the text towards an international readership by dropping those cases and legal materials which are less relevant to an international reader yet maintaining those which are of general importance or scholarly interest. Beyond that, he incorporated illustrations as well as cases and materials from other civil law countries, thereby illustrating the variance with which jurisdictions of different countries react to similar economic problems and challenges.

This book uses microeconomic and welfare-theoretical analyses to examine not only the actual effects of legal norms and the objectives of law-making, but above all, the application of the law. In this way, a theoretical interest is pursued, but even more so, the implementation of economic impact analysis and impact assessment in the solution of concrete legal problems and in the further development of existing law. We hold that economic analysis not only sheds light on the function of legal norms but is also capable of directly and sustainably stimulating legal doctrine and jurisprudence.

The term “Civil Law” in the title of this book has a double meaning. First, it refers to civil law as private law, that is the law of contracts, torts, property and corporations, but not public law, constitutional law and criminal law, with some exceptions, where it was deemed necessary. Second, “Civil Law” also indicates that this book was primarily written for a readership in civil law countries as opposed to common law countries. All civil law countries have Roman law as their common heritage. Starting with its resurrection in the Middle Ages, an updated Roman law developed into the *jus commune* and later into the national codifications, for instance the French Code Civil. However, codifications do not constitute a fundamental difference between the role of courts in civil law and common law countries. In all civil law countries judge made law plays an important role. If at all, differences between civil law and common law countries do exist to the extent of such judge made law. In Germany, the development of the latter is undisputed and endorsed by the constitutional court. In some cases, judge made law even included the rejection of the wording in the code. In Switzerland, Article 1 of the Civil Code of 1907 obliges judges explicitly to find a rule “like a legislator” and on that basis to decide whether the code provides no norm for the case. The French Code Civil of 1804 – in the spirit of 18th century rationalism – prohibits law-making by judges in Article 5. When the civil code was enacted, tort law was undeveloped. The French tort law consisted of five sections, which was the basis upon which French courts erected a vast and comprehensive tort law by way of interpretation. In all civil law countries the crucial interplay between codes and the jurisdiction can lead to an understanding of the law. Judges everywhere must interpret texts. Teleological interpretation becomes more important over time as social sciences grow and produce more reliable results about the consequences of choices. This necessarily stimulates interdisciplinarity and triggers the integration of social sciences in the discipline of law, irrespective of the

legal family. We hold, therefore, that a monograph on the economic analysis of law must not be conceptually different within the realm of one legal family.

This book is aimed at all law students as well as economics students who want to explore the economic implications of legal norms. However, it is also intended for colleagues in science and practice. Prior knowledge of economics is not required. Therefore, some basic elements of microeconomics and institutional economics are presented, which the knowledgeable reader can comfortably skip. Mathematical deliberations have been largely omitted in favour of the lawyers.

This interdisciplinary book would not have come about without the close cooperation between an economist and a jurist in both research and teaching. Fortunately, the teaching and research conditions at the Faculty of Law II at the University of Hamburg have both facilitated and effected this cooperation and led to the first German editions of this book. In fact, the integration of law and social sciences was an important part of the educational reform programme at the University of Hamburg.

Over the last years “Law and Economics” has expanded in many universities in civil law countries, both in research and teaching. In recent decades, the discipline has become more econometric and, under the influence of behavioural research, more psychological. This will also become evident in the underlying edition. The model of rational behaviour is not invalidated by behavioural research, as we will show. However, in cases of permanent and systematic violation of minimal consistency conditions for rational decision-making by legislators, courts, or by subjects of the law, a psychologically informed legal economics reaches new insights. This edition has been developed in a time-consuming process with the help of new and recent literature. The excellent working conditions and the special support of interdisciplinary research at Bucerius Law School in Hamburg, where Hans-Bernd Schäfer has been an Affiliate Professor since his retirement at the University of Hamburg, have greatly facilitated this work.

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