

# The Law and Economics of Creditor Protection

A Transatlantic Perspective

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Horst Eidenmüller | Wolfgang Schön — editors

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THE LAW AND ECONOMICS OF  
CREDITOR PROTECTION

A Transatlantic Perspective

*Edited by*  
Horst Eidenmüller  
*and*  
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## Foreword

The main topic of corporate finance today is the interaction of shareholders, managers and creditors and the incentives provided for these actors in the framework of company law, accounting law and insolvency law. While in the past economists have tended to analyse the efficiency gains and losses of different institutional settings from a theoretical perspective and lawyers have tended to stick to their doctrinal skills when applying the law as it stands, recent developments have moved both professions to take a more policy-oriented approach towards this subject matter. In the United States, the demise of legal capital as a means of creditor protection, which started in the 1980s, has been fuelled by regulatory competition between the individual states and has produced alternative legal concepts like the fiduciary duties of managers towards a corporation's creditors in the vicinity of insolvency and tailor-made loan covenants in financial contracts. In Europe, the more recent recognition of the freedom of establishment for companies by the European Court of Justice in its *Centros* case law and the ensuing regulatory competition in the field of company law have triggered a debate on the future of company law harmonisation: While some scholars deplore the lack of harmonisation in relation to privately held companies, others plead for a further deregulation of EC directives for public limited companies, which would, it is hoped, stimulate individual and innovative solutions to the basic conflicts between creditors, shareholders and company directors.

This book contains the edited papers of a symposium on 'Efficient Creditor Protection in European Company Law', which took place in December 2005 as a joint venture of Munich's Ludwig Maximilians University and the Max Planck Institute for Intellectual Property, Competition and Tax Law at the premises of the Max Planck Institute in Munich. The aim of this conference was to bring to the fore all relevant academic perspectives. It assembled renowned scholars and officials who are currently working on reform projects in different Member States of the European Union, other experts on company law, insolvency law and accounting law, as well as experts on economics, in order to tackle some of the most intensely debated topics and reach a common understanding of the substantive questions lying at the heart of the current debate. The first part of this book reviews the 'case for regulation', bearing in mind that no legislation should be proposed if market solutions seem available and 'soft' legislation (enabling rules and disclosure obligations) suffices to make this market work. Part II then examines the question which rules on distributions to shareholders should be preferred, comparing the traditional 'balance sheet' approach with alternative instruments: a 'solvency test' in the framework of company law reform or a shift to insolvency law where 'fraudulent transfer' rules play a major role, as in the United States. Part III covers rules and standards for directors' behaviour 'in the

vicinity of insolvency', including a 'timely trigger' for insolvency proceedings and the merits of 'wrongful trading' legislation. The case for a subordination and/or recharacterisation of shareholder loans is also discussed. Part IV, finally, embarks on the ambitious quest for a coherent overall framework for creditor protection and the best allocation of legislative competences in a multi-tier jurisdiction in the context of regulatory competition.

In many respects, this book follows the traditional line of comparative law as an academic discipline and attempts to demonstrate the fruitfulness of this discipline with respect to core issues of company law reform. As is well known, Ernst Rabel founded the world's first comparative law institute, the Institute for Comparative Law at Munich University, in 1916. Ten years later, Rabel moved to Berlin and founded a similar institute at the Humboldt University, which later was integrated into what is now the Max Planck Society for the Advancement of Sciences. Rabel emigrated from Germany in 1939 and later taught at Ann Arbor and Harvard. Hence, the authors from Germany (including Munich University and the Max Planck Society), the United States (including Harvard) and the United Kingdom were not only united by a common research theme but also by a research methodology that dates back to Ernst Rabel and the idea of comparative law as an academic discipline.

The conference programme and the approach of the authors fully reflect this tradition. Comparative law has always been functional in its approach, looking at the problem that certain rules are meant to solve rather than at the doctrinal peculiarities of a particular jurisdiction and caring less about whether certain rules formally belong to a specific branch of law (such as company law or insolvency law). For example, comparativists increasingly resort to economic theory as a fruitful instrument for assessing the merits of legal rules. The editors believe that the chapters published in this volume demonstrate the fruitfulness of the comparative method as applied to issues of company law reform. They are confident that this book will not fail to inform and influence the current policy debate.

The proceedings of this conference were published in the *European Business Organization Law Review* in 2006. They spurred considerable interest, leading the publisher of this journal, T.M.C. Asser Press, to suggest republishing them in a stand-alone book. We have accepted this invitation with pleasure. The editors hope that the manifold thoughts presented by these outstanding scholars will reach a wider audience through this volume. Moreover, as the debate on these topics rages on, we trust that new readers will find important insights while they make up their minds on the 'law and economics of creditor protection in Europe'.

*Horst Eidenmüller and Wolfgang Schön*

## Abbreviations

2d Cir.	Second Circuit
6th Cir.	Sixth Circuit
13 Eliz.	Statute of Elizabeth
ABA	American Bar Association
Abacus	Journal of Accounting, Finance and Business Studies
ABF	American Bar Foundation
AC	Law Reports Appeal Cases
Academy Management Rev.	Academy of Management Review
Accounting Rev.	The Accounting Review
ACSR	Australian Corporations and Securities Reports
ADHGB	Allgemeines Deutsches Handelsgesetzbuch
AEG	Allgemeine Elektrizitäts-Gesellschaft
AEI	American Enterprise Institute for Public Policy Research
AG	Die Aktiengesellschaft
AktG	Aktiengesetz
All ER	All England Law Reports
ALR	Australian Law Reports
Am. Bankr. L.J.	American Bankruptcy Law Journal
Am. J. Comp. L.	American Journal of Comparative Law
AnfG	Anfechtungsgesetz
App. Div.	Appellate Division
APR	absolute priority rule
ASB	Accounting Standards Board
Bankr. D. Ark.	Bankruptcy Court for the District of Arkansas
BAP	Bankruptcy Appellate Panel
BB	Betriebs-Berater
BC	Bankruptcy Code
BCC	British Company Law Cases
BCLC	Butterworths Company Law Cases
Bell J. Econ.	Bell Journal of Economics
BFuP	Betriebswirtschaftliche Forschung und Praxis
BGB	Bürgerliches Gesetzbuch
BGBI	Bundesgesetzblatt
BGH	(German) Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen
BIICL	British Institute of International and Comparative Law
BPIR	Bankruptcy and Personal Insolvency Reports
B.R.	Bankruptcy Reporter

Brook. L. Rev.	Brooklyn Law Review
Bus. Law.	Business Lawyer
CA	Court of Appeal
CBCA	Canada Business Corporations Act
CEO	Chief Executive Officer
CESR	Committee of European Securities Regulators
CFO	Chief Financial Officer
CFR	Code of Federal Regulations
Ch	English Law Reports, Chancery Division
CLR	Commonwealth Law Reports
Cm	Command
CMLR	Common Market Law Reports
CML Rev.	Common Market Law Review
Cmnd.	Command
Co	company
Coke	Coke's King's Bench Reports
Colum. L. Rev.	Columbia Law Review
COM	European Commission document
COMI	Centre of Main Interests
Cong.	Congress
Coreper	Comité des Représentants Permanents (EU)
Cornell L. Rev.	Cornell Law Review
DB	Der Betrieb
Del. Ch.	Delaware Court of Chancery
Del. L. Rev.	Delaware Law Review
DG MARKT	Directorate General Internal Market and Services
DIP	debtor-in-possession
DM	Deutsche Mark
D. N.H.	District of New Hampshire
Doc.	Document
DStR	Deutsches Steuerrecht
DTI	Department of Trade and Industry
Duke L.J.	Duke Law Journal
EBLR	European Business Law Review
EBOR	European Business Organization Law Review
EC	European Community
ECFR	European Company and Financial Law Review
ECGI	European Corporate Governance Institute
ECJ	European Court of Justice
ECR	European Court Reports
E.D. Va.	Eastern District of Virginia
EEA	European Economic Area

EEC	European Economic Community
EFRAG	European Financial Reporting Advisory Group
EIR	European Insolvency Regulation
ELJ	European Law Journal
Emory L.J.	Emory Law Journal
Eng. Rep.	English Reports
ESRC	Economic and Social Research Council
ETH Zürich	Eidgenössische Technische Hochschule Zürich
EU	European Union
EuGH	Europäischer Gerichtshof
EuInsVO	Europäische Insolvenzverordnung
EWCA Civ	England and Wales Court of Appeal (Civil Division) Decisions
F.2d	Federal Reporter, 2nd Series
FASB	Financial Accounting Standards Board
FD	fair disclosure
Fin. Mgt.	Financial Management
FRRP	Financial Reporting Review Panel
FRS	Financial Reporting Standard
FSA	Financial Services Authority
F.Supp., F.Supp.2d	Federal Supplement, 1st and 2nd series
FT	Financial Times
GAAP	Generally Accepted Accounting Principles
GDP	gross domestic product
Geo. L.J.	Georgetown Law Journal
German LJ	German Law Journal
GeS	Zeitschrift für Gesellschafts- und Steuerrecht
GesRZ	Der Gesellschafter
GIRÄG	Gesellschafts- und Insolvenzrechtsänderungsgesetz
GM	General Motors
GmbH	Gesellschaft mit beschränkter Haftung
GmbHG	Gesetz betreffend die Gesellschaften mit beschränkter Haftung
GmbHR	GmbH-Rundschau
Harv. Int'l L.J.	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review
HGB	Handelsgesetzbuch
HL	House of Lords
HLG	High Level Group
HMSO	Her Majesty's Stationery Office
HM Treasury	Her Majesty's Treasury
HR	House of Representatives



IA	Insolvency Act
IAS	International Accounting Standards
ICAEW	Institute of Chartered Accountants in England and Wales
ICAS	Institute of Chartered Accountants of Scotland
ICCLR	International Company and Commercial Law Review
IDW	Institut der Wirtschaftsprüfer in Deutschland
IFRS	International Financial Reporting Standards
ILRM	Irish Law Reports Monthly
Inc.	Incorporated
InsO	Insolvenzordnung
Int. Rev. Law Econ.	International Review of Law and Economics
IOSCO	International Organization of Securities Commissions
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
IRB	Internal Ratings-Based Approach
IRC	Internal Revenue Code
ISAB	International Accounting Standards Board
ISBN	International Standard Book Number
J. Accounting Research	Journal of Accounting Research
J. Bus.	Journal of Business
JCLS	Journal of Corporate Law Studies
J. Corp. Fin.	Journal of Corporate Finance
J. Corp. L.	Journal of Corporation Law
J. Econ. Lit.	Journal of Economic Literature
J. Econ. Perspectives	Journal of Economic Perspectives
J. Fin.	Journal of Finance
J. Fin. Econ.	Journal of Financial Economics
JITE	Journal of Institutional and Theoretical Economics
J.L. Econ. & Org.	Journal of Law, Economics & Organization
J. Leg. Stud.	Journal of Legal Studies
J. Pol. Econ.	Journal of Political Economy
JW	Juristische Wochenschrift
JZ	Juristenzeitung
Kan.	Kansas Supreme Court
KB	King's Bench
LBO	leveraged buy-out
LIBOR	London Interbank Offered Rate
liq.	liquidation
LL.M.	Legum Magister [master of laws]
Ltd	limited

MBCA	Model Business Corporation Act
Mich. J. Int'l L.	Michigan Journal of International Law
Mich. L. Rev.	Michigan Law Review
MindestkapG	Gesetz zur Neuregelung des Mindestkapitals der GmbH
MIT	Massachusetts Institute of Technology
MJ	Maastricht Journal of European and Comparative Law
MLR	Modern Law Review
NBER	National Bureau of Economic Research
N.D. Ill.	Northern District of Illinois
N.E.	Northeastern Reporter
New L.J.	New Law Journal
NJW	Neue Juristische Wochenschrift
Norton Ann. Surv. Bankr. L.	Norton Annual Survey of Bankruptcy Law
NPV	net present value
Nw. U.L. Rev.	Northwestern University Law Review
N.Y.	New York Court of Appeals
nyr	not yet reported
NYSE	New York Stock Exchange
N.Y.S.2d	West's New York Reporter
NYU	New York University
N.Y.U. L. Rev.	New York University Law Review
NZCLC	New Zealand Company Law Cases
NZG	Neue Zeitschrift für Gesellschaftsrecht
NZI	Neue Zeitschrift für das Recht der Insolvenz und Sanierung
NZLR	New Zealand Law Reports
OECD	Organisation for Economic Co-operation and Development
OGH	Oberster Gerichtshof
OJ	Official Journal of the European Communities/Union
plc	public limited company
QC	Queen's Counsel
Q. J. Econ.	Quarterly Journal of Economics
Q. Rev. Econ. & Fin.	Quarterly Review of Economics and Finance
Rev. Econ. Stat.	Review of Economics and Statistics
Rev. Fin. Studies	Review of Financial Studies
RG	Reichsgericht
RIW	Recht der Internationalen Wirtschaft
RMBCA	Revised Model Business Corporation Act

Rutgers L. Rev.	Rutgers Law Review
Scandinavian J. Econ. Sched.	Scandinavian Journal of Economics Schedule
SCR	Supreme Court Reports
S.D.N.Y.	Southern District of New York
SE	Societas Europaea
SEC	European Commission documents which cannot be classified in any of the other series
SEC	Securities and Exchange Commission
Sess.	session
SFB-TR	Sonderforschungsbereich-Transregio
SI	statutory instrument
SLIM	Simpler Legislation for the Internal Market
SLT	Scots Law Times
SME	small and medium sized enterprises
SSRN	Social Science Research Network
Stan. J.L. Bus. & Fin.	Stanford Journal of Law, Business and Finance
Stan. L. Rev.	Stanford Law Review
StuW	Steuer und Wirtschaft
SZ	Entscheidungen des österreichischen Obersten Gerichtshofs in Zivilsachen
T&FV	true and fair view
TEC	Treaty establishing the European Community
TECH	Technical Release
Tenn. L. Rev.	Tennessee Law Review
Tex. Ct. App.	Texas Court of Appeals
Tex. L. Rev.	Texas Law Review
UCC	Uniform Commercial Code
U. Chi. L. Rev.	University of Chicago Law Review
UCLA	University of California, Los Angeles
UCLA L. Rev.	UCLA Law Review
UFTA	Uniform Fraudulent Transfers Act
U. Ill. L. Rev.	University of Illinois Law Review
UK	United Kingdom
UMAG	Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts
U. Pa. L. Rev.	University of Pennsylvania Law Review
URN	Unique Reference Number
US	United States
US	United States Reports
USA	United States of America
USC	United States Code

Va. L. Rev.	Virginia Law Review
Vand. L. Rev.	Vanderbilt Law Review
Wall St. J.	Wall Street Journal
Wis. L. Rev.	Wisconsin Law Review
WL	Westlaw
WLR	Weekly Law Reports
WM	Wertpapier-Mitteilungen
WODC	Wetenschappelijk Onderzoek- en Documentatiecentrum
WPg	Die Wirtschaftsprüfung
Yale L.J.	Yale Law Journal
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht
ZInsO	Zeitschrift für das gesamte Insolvenzrecht
ZIP	Zeitschrift für Wirtschaftsrecht
ZvglRWiss	Zeitschrift für vergleichende Rechtswissenschaft

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