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# CONVERGENCE IN SHAREHOLDER LAW

MATHIAS M. SIEMS



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## CONVERGENCE IN SHAREHOLDER LAW

On the one hand, it can be argued that the increasing economic and political interdependence of countries has led to the convergence of national legal systems. On the other hand, advocates of the counterhypothesis maintain that this development is both unrealistic and unnecessary.

Mathias Siems examines the company law of the UK, the USA, Germany, France, Japan and China to see how this issue affects shareholder law. The author subsequently analyses economic and political factors which may or may not lead to convergence, and assesses the extent of this development. Thus, *Convergence in Shareholder Law* not only provides a thorough comparative legal analysis but also shows how company law interconnects with political forces and economic development and helps in evaluating whether harmonisation and shareholder protection should be enhanced.

MATHIAS M. SIEMS is a Reader in Commercial Law at the University of Edinburgh and a Research Associate at the Centre for Business Research, University of Cambridge.

## INTERNATIONAL CORPORATE LAW AND FINANCIAL MARKET REGULATION

Recent years have seen an upsurge of change and reform in corporate law and financial market regulation internationally as the corporate and institutional investor sector increasingly turns to the international financial markets. This follows large-scale institutional and regulatory reform after a series of international corporate governance and financial disclosure scandals exemplified by the collapse of Enron in the US. There is now a great demand for analysis in this area from the academic, practitioner, regulatory and policy sectors.

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## PREFACE AND ACKNOWLEDGMENTS

In the last fifteen years, the words 'globalization', 'internationalization' and 'Europeanization' have been seen and heard everywhere. The legal discussion has been no exception: on the one hand, it has sometimes been claimed that national legal systems are increasingly convergent. On the other hand, advocates of the counterhypothesis maintain that convergence of legal systems is neither realistic nor necessary. This book takes a look at how to approach this issue in relation to shareholder law. Although there are already some publications which deal with company law convergence, the reader is often left disappointed. With respect to similarities and differences between countries, the previous literature is dominated by broad statements about different corporate governance systems and anecdotal stories of convergence. A detailed legal analysis is, however, lacking. Similarly, with respect to convergence forces and hurdles, there has often been only a perfunctory analysis of particular topics, such as regulatory competition or shareholder ownership. But, again, a coherent and comprehensive account is missing. Thus, this book aims at filling that gap. Its structure is as follows. First, it compares the company laws of the United Kingdom, the USA, Germany, France, Japan and China. Secondly, it analyzes economic and political factors, which might (or might not) lead to convergence. Finally, it assesses this development.

I started writing the German version of this monograph in June 2001 when I was just finishing my LL.M. in Edinburgh. Since then I have worked and lived in Paris, Berlin, Hamburg, Florence, Cambridge (Massachusetts), Riga, Cambridge (England), and again Edinburgh. I thank everyone who encouraged my research. Specifically for the English edition, I would like to thank Iain Fraser (Florence), Chris Goddard (Riga) and Kim Hughes (Cambridge University Press) for their help and support, as well as Eilís Ferran, Niamh Moloney and Howell Jackson as the editors of the series on International Corporate Law and Financial Market Regulation.

## ABBREVIATIONS

AC	UK Law Reports: Appeal Cases
AcP	<i>Archiv für die civilistische Praxis</i>
AG	<i>Aktiengesellschaft</i>
ALI-Principles	American Law Institute (ALI), <i>Principles of Corporate Governance: Analysis and Recommendations</i> , 1994
All ER	All England Law Reports
ALR	Australian Law Reports
<i>Am. J. Comp. L.</i>	<i>American Journal of Comparative Law</i>
<i>Amer. Econ. Rev.</i>	<i>American Economic Review</i>
<i>Ariz. J. Int'l &amp; Comp. L.</i>	<i>Arizona Journal of International and Comparative Law</i>
BB	<i>Betriebs-Berater</i>
BCLC	Butterworths Company Law Cases
<i>Bell J. Econ.</i>	<i>Bell Journal of Economics and Management Science</i>
<i>Berkeley Bus. L.J.</i>	<i>Berkeley Business Law Journal</i>
<i>Berkeley J. Int'l L.</i>	<i>Berkeley Journal of International Law</i>
BGBI.	German Federal Law Gazette (Bundesgesetzblatt)
BGH	German Supreme Court (Bundesgerichtshof)
BGHZ	Decisions of the German Supreme Court (in private law matters)
BJIR	<i>British Journal of Industrial Relations</i>
<i>Bond L. Rev.</i>	<i>Bond Law Review</i>
<i>Brook. J. Int'l L.</i>	<i>Brooklyn Journal of International Law</i>
BT-Drucks.	Printed Matters of the German Bundestag (Bundestagsdrucksache)

<i>BU Int'l L.J.</i>	<i>Boston University International Law Journal</i>
<i>Bus. Hist.</i>	<i>Business History</i>
<i>Bus. Law.</i>	<i>Business Lawyer</i>
BVerfG	German Constitutional Court (Bundesverfassungsgericht)
BVerfGE	Decisions of the German Constitutional Court
<i>C. &amp; SLJ</i>	<i>Company and Securities Law Journal</i>
Cal. App.	California Appellate Reports
<i>Cal. L. Rev.</i>	<i>California Law Review</i>
Cal. Rptr.	California Reporter
CalGCL	California General Corporation Law
CalPERS	California Public Employees' Retirement System
<i>Cardozo J. Int'l &amp; Comp. L.</i>	<i>Cardozo Journal of International and Comparative Law</i>
<i>Cardozo L. Rev.</i>	<i>Cardozo Law Review</i>
CEO	Chief Executive Officer
CFO	Chief Financial Officer
ch., chs., Ch., Chs.	Chapter, Chapters
Ch., ChD	UK Law Reports: Chancery Division
ChinArticles	Chinese Guide to Articles of Association of Companies Limited by Shares of 6 December 1997
ChinCA	Chinese Companies Act
ChinCG-Code	Code of Corporate Governance for Listed Companies of the China Securities Regulatory Commission (CSRC) (English translation available at <a href="http://www.csrc.gov.cn/en/homepage/index_en.jsp">www.csrc.gov.cn/en/homepage/index_en.jsp</a> )
ChinMandProv	Chinese Mandatory Provisions in the Articles of Association for Companies Listed Overseas of 27 August 1994 (English translation available at <i>China Law and Practice</i> , Vol. 9 (1995), No. 4, p. 19)
ChinSA	Chinese Securities Act



<i>CLJ</i>	<i>Cambridge Law Journal</i>
<i>Colum. Bus. L. Rev.</i>	<i>Columbia Business Law Review</i>
<i>Colum. J. Eur. L.</i>	<i>Columbia Journal of European Law</i>
<i>Colum. J. Transnat'l L.</i>	<i>Columbia Journal of Transnational Law</i>
<i>Colum. L. Rev.</i>	<i>Columbia Law Review</i>
<i>Comp. Law.</i>	<i>Company Lawyer</i>
<i>Comp. L. L. &amp; Pol'y J.</i>	<i>Comparative Labor Law and Policy Journal</i>
<i>Conn. J. Int'l L.</i>	<i>Connecticut Journal of International Law</i>
<i>Cornell Int'l L.J.</i>	<i>Cornell International Law Journal</i>
<i>Cornell L. Rev.</i>	<i>Cornell Law Review</i>
CSRC	China Securities Regulatory Commission
<i>DB</i>	<i>Der Betrieb</i>
DC Cir.	United States Court of Appeals for the District of Columbia
Del. Ch.	Delaware Court of Chancery
<i>Del. J. Corp. L.</i>	<i>Delaware Journal of Corporate Law</i>
Del. Supr.	Delaware Supreme Court
DelGCL	Delaware General Corporation Law
<i>DStR</i>	<i>Deutsches Steuerrecht</i>
DSW	Deutsche Schutzvereinigung für Wertpapierbesitz e.V.
<i>EBLR</i>	<i>European Business Law Review</i>
<i>EBOR</i>	<i>European Business Organization Law Review</i>
EC	European Community; Treaty establishing the European Community
<i>ECFR</i>	<i>European Company and Financial Law Review</i>
ECJ	European Court of Justice
ECR	European Court Reports
EEC	European Economic Community
<i>ELJ</i>	<i>European Law Journal</i>
<i>E.L. Rev.</i>	<i>European Law Review</i>
EU	European Union
<i>Europ. Econ. Rev.</i>	<i>European Economic Review</i>
<i>Europ. J. Law &amp; Econ.</i>	<i>European Journal of Law and Economics</i>
<i>EuZW</i>	<i>Europäische Zeitschrift für Wirtschaftsrecht</i>

EWS	<i>Europäisches Wirtschafts- und Steuerrecht</i>
FASB	Financial Accounting Standards Board (USA)
<i>Ford. Int. L.J.</i>	<i>Fordham International Law Journal</i>
FrCCom	Code de Commerce (France)
FrCG-Principles	Principes de gouvernement d'entreprise résultant de la consolidation des rapports conjoints de l'AFEP et du MEDEF, 2003
FrCMon	Code monétaire et financier (France)
FrDécret	Décret No. 67-236 sur les sociétés commerciales (France)
FrRGAMF	Règlement général de l'Autorité des marchés financiers (AMF) (France)
FSA	Financial Services Authority
<i>Ga. L. Rev.</i>	<i>Georgia Law Review</i>
GATS	General Agreement on Trade in Services
<i>Geo. L.J.</i>	<i>Georgetown Law Journal</i>
GerAktG	German Law on Joint-Stock Companies (Aktiengesetz)
GerBGB	German Civil Code (Bürgerliches Gesetzbuch)
GerBörsG	German Stock Exchange Act (Börsengesetz)
GerBörsZulV	German Stock Exchange Admission Regulation (Börsenzulassungsverordnung)
GerCGK	German Corporate Governance Code (Deutscher Corporate Governance Kodex) (English version available at <a href="http://www.corporate-governance-code.de/index-e.html">www.corporate-governance-code.de/index-e.html</a> )
GerFGG	German Ex-Parte Jurisdiction Act (Gesetz über die freiwillige Gerichtsbarkeit)
GerGmbHG	German Law on Private Liability Companies (Gesetz betreffend die Gesellschaft mit beschränkter Haftung)
GerHGB	German Commercial Code (Handelsgesetzbuch)

GerStGB	German Criminal Code (Strafgesetzbuch)
GerUmwG	German Transformation Act (Umwandlungsgesetz)
GerWpHG	German Securities Trading Act (Wertpapierhandelsgesetz)
GerWpÜG	German Takeover Act (Wertpapiererwerbs- und Übernahmegesetz)
GerZPO	German Code of Civil Procedure (Zivilprozessordnung)
<i>Harv. Bus. Rev.</i>	<i>Harvard Business Review</i>
<i>Harv. Int'l L.J.</i>	<i>Harvard International Law Journal</i>
<i>Harv. J. on Legis.</i>	<i>Harvard Journal on Legislation</i>
<i>Harv. L. Rev.</i>	<i>Harvard Law Review</i>
IAS	International Accounting Standard
IASB	International Accounting Standards Board
<i>IBL</i>	<i>International Business Lawyer</i>
<i>ICCLJ</i>	<i>International and Comparative Corporate Law Journal</i>
<i>ICCLR</i>	<i>International Company and Commercial Law Review</i>
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
<i>IFLR</i>	<i>International Financial Law Review</i>
IFRS	International Financial Reporting Standards
<i>Int. L.</i>	<i>The International Lawyer</i>
IMF	International Monetary Fund
<i>Int. J. Bus.</i>	<i>International Journal of Business</i>
<i>Int'l Rev. L. &amp; Econ.</i>	<i>International Review of Law and Economics</i>
IOSCO	International Organization of Securities Commissions
JapCA	Japanese Corporation Act (kaisha hô), Law No. 86/2005

JapCC	Japanese Commercial Code (Shôhô), Law No. 48/1899
JapCCExcA	Japanese law for special exceptions to the Commercial Code concerning audit, etc. of joint stock companies (Kabushiki gaisha no kans tô ni kansuru shôhô no tokurei ni kansuru hôritsu), Law No. 22/1974
JapCG-Principles	Tokyo Stock Exchange, Principles of Corporate Governance for Listed Companies 2004.
JapSEA	Japanese Securities and Exchange Act (Shôken torihikohô), Law No. 25/1948
JBL	<i>Journal of Business Law</i>
J. Corp. L.	<i>Journal of Corporation Law</i>
JCL	<i>Journal of Comparative Law</i>
JCLS	<i>Journal of Corporate Law Studies</i>
JCMS	<i>Journal of Common Market Studies</i>
JCP	<i>Juris Classeur Périodique</i>
J. Econ. Manage. Strategy	<i>Journal of Economics and Management Strategy</i>
J. Empirical Legal Stud.	<i>Journal of Empirical Legal Studies</i>
J. Finance	<i>Journal of Finance</i>
J. Finan. Econ.	<i>Journal of Financial Economics</i>
JJS	<i>Journal of Japanese Studies</i>
J. L. & Econ.	<i>Journal of Law and Economics</i>
J. L. Econ. & Org.	<i>Journal of Law, Economics and Organization</i>
J. Legal Stud.	<i>Journal of Legal Studies</i>
J. Polit. Economy	<i>Journal of Political Economy</i>
JZ	<i>Juristenzeitung</i>
Law & Pol'y Int'l Bus.	<i>Law and Policy in International Business</i>
Law & Soc. Inquiry	<i>Law and Social Inquiry</i>
Loy. LA Int'l & Comp. L.J.	<i>Loyola of Los Angeles International and Comparative Law Journal</i>
LQR	<i>Law Quarterly Review</i>
LSE	London Stock Exchange
MBCA	Model Business Corporation Act (USA)
Melbourne U. L. Rev.	<i>Melbourne University Law Review</i>

<i>Mich. L. Rev.</i>	<i>Michigan Law Review</i>
<i>Minn. J. Global Trade</i>	<i>Minnesota Journal of Global Trade</i>
<i>MJ</i>	<i>Maastricht Journal of European and Comparative Law</i>
<i>MLR</i>	<i>Modern Law Review</i>
NAFTA	North American Free Trade Agreement
<i>NC J. Int'l &amp; Com. Reg.</i>	<i>North Carolina Journal of International Law and Commercial Regulation</i>
<i>NJW</i>	<i>Neue Juristische Wochenschrift</i>
No(s).	Number(s)
<i>Nw. J. Int'l L. &amp; Bus.</i>	<i>Northwestern Journal of International Law and Business</i>
<i>Nw. U. L. Rev.</i>	<i>Northwestern University Law Review</i>
NYBCL	New York Business Corporation Law
<i>NY Int'l L. Rev.</i>	<i>New York International Law Review</i>
<i>NYL Sch. J. Int'l &amp; Comp. L.</i>	<i>New York Law School Journal of International and Comparative Law</i>
NYSE	New York Stock Exchange
NYSE Manual	Listed Company Manual of the New York Stock Exchange
<i>NYU L. Rev.</i>	<i>New York University Law Review</i>
<i>NZG</i>	<i>Neue Zeitschrift für Gesellschaftsrecht</i>
OECD	Organization for Economic Co-operation and Development
OECD-Principles	OECD Principles of Corporate Governance (available at <a href="http://www.oecd.org/dataoecd/32/18/31557724.pdf">www.oecd.org/dataoecd/32/18/31557724.pdf</a> )
<i>OJLS</i>	<i>Oxford Journal of Legal Studies</i>
<i>Penn St Int'l L. Rev.</i>	<i>Penn State International Law Review</i>
<i>QJ Econ.</i>	<i>Quarterly Journal of Economics</i>
<i>RabelsZ</i>	<i>Rabels Zeitschrift für ausländisches und internationales Privatrecht</i>
<i>Rev.int.dr.comp.</i>	<i>Revue internationale du droit comparé</i>
<i>Rev. Int. Polit. Economy</i>	<i>Review of International Political Economy</i>
<i>Rev.soc.</i>	<i>Revue des sociétés</i>
RG	Supreme Court of the German Reich (Reichsgericht)

RGZ	Decisions of the Supreme Court of the German Reich
RIW	<i>Recht der internationalen Wirtschaft</i>
s. (ss.)	section(s), sentence(s)
<i>S. Cal. L. Rev.</i>	<i>Southern California Law Review</i>
Sarbanes–Oxley Act 2002	Sarbanes–Oxley Act (Public Company Accounting Reform and Investor Protection Act) (USA) of 30 July 2002
SE	Societas Europaea (European Company)
SE-Reg	Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE)
SEC	Securities Exchange Commission (USA); Regulations and Rules of the SEC based on Securities Exchange Act of 1934; 17 CFR Parts 200–301
SI	Statutory Instrument
<i>St John's J. Legal Comment.</i>	<i>Saint John's Journal of Legal Commentary</i>
<i>St Louis U. L.J.</i>	<i>Saint Louis University Law Journal</i>
<i>Stan. L. Rev.</i>	<i>Stanford Law Review</i>
<i>Transnat'l L. &amp; Contemp. Probs.</i>	<i>Transnational Law and Contemporary Problems</i>
<i>Transnat'l Law.</i>	<i>Transnational Lawyer</i>
<i>Tul. L. Rev.</i>	<i>Tulane Law Review</i>
<i>U. Chi. L. Rev.</i>	<i>University of Chicago Law Review</i>
<i>U. Cin. L. Rev.</i>	<i>University of Cincinnati Law Review</i>
<i>UC Davis L. Rev.</i>	<i>UC Davis Law Review</i>
<i>UCLA Pac. Basin L.J.</i>	<i>UCLA Pacific Basin Law Journal</i>
<i>U. Pa. J. Int'l Econ. L.</i>	<i>University of Pennsylvania Journal of International Economic Law</i>
<i>U. Pa. L. Rev.</i>	<i>University of Pennsylvania Law Review</i>
<i>U. Pitt. L. Rev.</i>	<i>University of Pittsburgh Law Review</i>
UK-CA	Companies Act 2006 (United Kingdom)
UK-City Code	City Code on Takeovers and Mergers of the Panel on Takeovers and Mergers (United Kingdom)
UK-Combined Code	Combined Code on Corporate Governance (United Kingdom)

UK-FSMA	Financial Services and Markets Act 2000 (United Kingdom)
UK-Listing Rules	UK Listing Rules
UK-Table A	Table A of the Companies (Table A to F) Regulations 1985 (United Kingdom)
US-GAAP	Generally Accepted Accounting Principles (USA)
US-SA	Securities Act of 1933 (USA), ch. 38, 48 Stat. 7, codified at 15 USC secs. 77a–77m
US-SEA	Securities Exchange Act of 1934 (USA), ch. 404, 48 Stat. 881, codified at 15 USC secs. 78a–78kk
US-UCC	Uniform Commercial Code (USA)
<i>Va. J. Int'l L.</i>	<i>Virginia Journal of International Law</i>
<i>Va. L. Rev.</i>	<i>Virginia Law Review</i>
<i>Vill. L. Rev.</i>	<i>Villanova Law Review</i>
<i>Wash. ULQ</i>	<i>Washington University Law Quarterly</i>
WLR	Weekly Law Reports
WM	<i>Wertpapier-Mitteilungen</i>
WTO	World Trade Organization
<i>Yale J. Int'l L.</i>	<i>Yale Journal of International Law</i>
<i>Yale J. on Reg.</i>	<i>Yale Journal on Regulation</i>
<i>Yale L.J.</i>	<i>Yale Law Journal</i>
ZEuP	<i>Zeitschrift für Europäisches Privatrecht</i>
ZfRV	<i>Zeitschrift für Rechtsvergleichung</i>
ZGR	<i>Zeitschrift für Unternehmens- und Gesellschaftsrecht</i>
ZHR	<i>Zeitschrift für das gesamte Handels- und Wirtschaftsrecht</i>
ZJapanR	<i>Zeitschrift für Japanisches Recht</i>
ZRP	<i>Zeitschrift für Rechtspolitik</i>
ZVglRWiss	<i>Zeitschrift für vergleichende Rechtswissenschaft</i>

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