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'.

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