INTRODUCTION

When social circumstances change, adjustments to law often occur too. It might therefore be concluded from advancing 'globalization' that national legal systems would come ever closer together. Yet both sides of this causal relationship can be attacked. On the one hand, on the factual side, one conceivable objection is that even today differing natural, economic, cultural and technical circumstances from country to country stand in the way of a uniform society. On the other hand, as regards the consequences, the effect of, for instance, path dependencies and differences in political systems might prevent a convergence of law. Whether internationalization and globalization trends will lead to a fundamental shift in legal systems is therefore an open question.

As regards the protection of shareholders in joint stock companies, current developments suggest further investigating the extent of 'convergence' and 'globalization'. For instance, the increasing cross-border movement of goods, services and capital and the use of the new media may also affect the shareholder's position and lead to a paradigm shift. The shareholder was even earlier often at the centre of the organizational structure of company law, but in the course of the twentieth century had to abandon that position in a number of legal systems, for one of more of a 'passive observer'. Now, however, the new media and the internationalization of shareholder circles might mean expectations of an internationally similar re-evaluation of shareholders' rights to participation, protection and information.

The basis and reference point for this study is the law on shareholder rights and duties of joint stock companies. However, to clarify the overall connections between law and reality, it will also look beyond the positive law. This interdisciplinary aspect accordingly brings an overlap with the debate on the future development of corporate governance. Opinion here ranges from success of the Anglo-American system via convergence on a hybrid system up to continuing divergence of the existing corporate

governance systems.[1] This monograph will, however, make it clear that any such generalizations are problematic. Nor do the economic considerations that have found their way into the legal discussion through the corporate governance literature fully exhaust the interdisciplinary content of the present approach. Since convergence depends on the actions of political decision-makers, the findings of political science have also to be taken into account. Finally, the economic, political and social factors that might be decisive for any rapprochement have to be brought into the discussion of individual 'convergence forces'.

The analysis of this study will be divided into 'diagnosis', 'prognosis', and 'therapy'. Part I will specify the object of study, and Part II goes on to diagnose the present convergence in shareholder law. Here a principled ('typological') stance will be adopted, so as not to get stuck at the surface level of positive law. Moreover, economic and social connections will already be brought in at this point, so as not to study 'dead law' or misclassify the content of legal distinctions. In Part III, the main focus will shift. This prognostic part will ask how the convergence in shareholder law may develop in future, and for this purpose will in particular look closer into the political and social factors affecting convergence. The concluding Part IV returns to the law. In response to the two foregoing parts, it will assess whether, how and with what substantive orientation a convergence in shareholder law ought to develop.

Altogether, therefore, the questions explored will be how far convergence in shareholder law has already occurred *de lege lata* (Part II; Chs. 2–6; Theses 1–5), or is to be expected *de lege ferenda* (Part III; Chs. 7–11; Theses 6–10), or is desirable (Part IV; Ch. 12; Theses 11 and 12). The guideline throughout will be the following theses, to be further substantiated in the course of the study:[2]

1. For shareholder law in the UK, the US, Germany, France, Japan and China the division into different legal families is no longer a persuasive criterion of differentiation.
2. Present shareholder law is based, internationally largely concordantly, on a basic pattern of codifications of company and securities law, supplemented by case law, articles of association, shareholder agreements and corporate governance codes.
3. Although in Germany, France, Japan and China the reception of US law has increasingly expanded the investor aspect, all the legal systems

[1] For an overview see Van den Berghe (2002: 12 *et seq.*).
[2] See also the extended and footnoted version of these theses in Ch. 13.

studied here show a combination of the basic models of the shareholder as 'owner', 'parliamentarian' and 'investor'.

4. Similarly, all the legal systems studied here show a combination of the 'adjectival shareholder types' ('the profit-oriented, active, informed, anonymous, deciding, protected, litigating shareholder').
5. In detail, the provisions referring to the typical original shareholder rights (the 'shareholder as such') show a greater degree of convergence than the provisions on the 'shareholder in the power structure of the company'.
6. It follows from historical precedents, the findings of the public choice theory and studies on the influence of interest groups that changes in factual circumstances can exert decisive influence on future shareholder law and thus act as 'convergence forces'.
7. Although international and informal regulation will grow in importance, for the future development of convergence, it is still codified national law that will count most.
8. As the social, political and economic conditions that form the background to shareholder law come closer together internationally, the law itself will also grow more similar ('convergence through congruence').
9. In situations where individual interest groups press for an approximation of laws ('convergence through pressure'), 'regulatory competition for shareholders' will take on increasing importance compared with 'regulatory competition for company founders' and 'lobbying'.
10. It will be above all the internationalization of enterprises, the approximation of shareholder structures, the new media and shareholder pressure that will contribute to a convergence of law and of its implementation.
11. At legal-policy level, for a convergence in shareholder law the various modes of regulation must be coordinated and their procedures optimized.
12. For the converging law, the shareholder as 'empowered shareholder' should return to the centre of company law.

PART I

The object and course of the investigation

1

Dimensions of convergence in shareholder law

The delimitation of this book follows from the spatial, objective, temporal and legal methodological dimensions of convergence in shareholder law. The 'spatial dimension' (section I below) will include the legal bases of international organizations, the EU, the UK, the US, Germany, France, Japan and China. In the discussion on 'objective dimension' (section II below), it will be clarified what kind of companies and investors 'shareholder law' covers. In the discussion on 'temporal dimension' (section III below), the question of whether and how far the current process of convergence is to be regarded as a continuation or endpoint of the developments to date will be considered. Finally, the section on 'methodological dimension' (section IV below) will set out further steps of this monograph.

I. The spatial dimension: the legal systems covered

In selecting the legal systems to be studied, it is sensible to restrict their number, though without thereby narrowing the comprehensiveness of the study. Accordingly, I will consider the law of the US, the UK, Germany, France, Japan and China as well as international legal bases.

Further specification is needed for the EU, the US and China. At the European level, in addition to harmonization through directives, the European Company (Societas Europaea, SE) in particular now has to be taken into account. The focus here will be on the European law on the SE. This is not intended to give the impression that the SE is a uniform European legal form. Since the European rules are far from constituting a complete company law, there are instead, depending on the nationality of the state of establishment, various types of SE.[1] It has additionally to be borne in mind that, in the US, company law is also not uniform, since according to the US-Constitution legislative competence lies with the states.[2]

[1] Cf. Enriques (2004a); Siems (2005a).
[2] Cf. the interstate commerce clause in Art. I s. 8 of the US Constitution.

Federally, company law is regulated only insofar as securities law in part contains regulations with content that is to be classified as company law, and because the Model Business Corporation Act (MBCA)[3] of the American Bar Association and the Principles of Corporate Governance 1994 of the American Law Institute[4] set informal standards. The MBCA has contributed to a manifest convergence of states' company laws,[5] so that I will deal particularly also with the MBCA, as well as the Delaware General Corporation Law as the most important state act. Finally, some local differences also have to be taken into account for the People's Republic of China. While in principle the national Companies Act is decisive, older local provisions, especially those in Guangdong, Hainan, Shenzhen and Shanghai, continue to have validity as long as they are not in contradiction with national company law.[6]

The choice of these legal systems is based, first, on a search for countries of particular importance as business centres. The law of these legal systems serves as a model for other countries. Additionally, the choice of the larger legal systems offers the advantage of being able to consult large numbers of individual comparative legal studies. It is accordingly possible here to do without separate general country reports for the given shareholder law, and instead to differentiate between the various legal systems only within the individual subject areas.

Additionally, I refrained from taking only one country from each legal system, or comparing only two legal systems. A legal comparison of two or three countries is insufficient for the purposes of establishing an overall thesis of a convergence of legal systems. According to the usual subdivision, therefore, two countries each were taken from the common law (US, UK[7]), the civil law (Germany, France) and mixed Asian legal systems (Japan, China). This, however, makes it necessary, contrary to a widespread practice, to use primarily not the original company law technical terms but translations of them. This is not to ignore, for instance, that equating 'Gesellschaft', 'company', 'corporation' and 'société' can be problematic.[8] Since, however, with six legal systems the original words would tend rather to confuse, and the Chinese and Japanese terms are not

[3] Since the 1984 version the term RMBCA (Revised MBCA) is also used; the first version was produced in 1950.
[4] American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* (1994).
[5] See Carney (1998: 731 *et seq.*). [6] Cf. Comberg (2000: 48 *et seq.*); Thümmel (1995: 15).
[7] Despite the devolution effected in the United Kingdom, the Scotland Act 1998, Schedule 5, para. C1, leaves competence for company law with the UK Parliament.
[8] Cf. Foster (2000: 578).

generally familiar anyway, 'multilingualism' is waived here for pragmatic reasons. It should accordingly be borne in mind that use of a common umbrella term like 'management' or 'company' is not intended to posit any legal identity.

Finally, the existing literature has not yet satisfactorily illuminated the convergence of shareholder law. Apart from studies confined to particular sub-areas of law,[9] more economics-oriented comparisons of corporate governance[10] and collections from groups of scholars,[11] this is true also of the much-cited research findings of Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny.[12] La Porta *et al.* used a quantitative methodology in order to examine the differences in shareholder protection in forty-nine countries and its impact on financial development.[13] For this, eight variables were used as proxies for shareholder protection. These variables coded the law for 'one share one vote', 'proxy by mail allowed', 'shares not blocked before the meeting', 'cumulative voting', 'oppressed minorities mechanism', 'pre-emptive rights to new issues', 'share capital required to call an extraordinary shareholder meeting', and 'mandatory dividend'. In each case, a country was graded either '1' where shareholder protection was present or '0' where it was not. In recent years, many quantitative studies have used these La Porta *et al.* variables on shareholder protection.[14] Furthermore, the European Commission's impact assessment on the Draft Directive on Shareholders' Rights explicitly refers to La Porta *et al.*[15] The problem is, however, that the findings of La Porta *et al.* are inaccurate. Various studies have identified many coding errors,[16] and the limited number of La Porta *et al.*'s variables hardly provides a meaningful picture of the legal protection of shareholders.[17] Furthermore, a numerical comparative analysis has its intrinsic limits and only leads to a superficial understanding of different legal systems.[18] As in other academic fields, a quantitative approach does not therefore exclude a qualitative analysis, as it is pursued in this monograph.

[9] See e.g. Baums and Wymeersch (1999). [10] See e.g. Van den Berghe (2002).
[11] See e.g. Hansmann and Kraakman (2004); Hopt *et al.* (2005).
[12] See La Porta *et al.* (1998), (1999), (2000a), (2000b).
[13] On the 'law-matters thesis' see Ch. 7, section I.1; Ch. 8, section IV.1.a below.
[14] E.g. Dyck and Zingales (2004); Licht *et al.* (2005); Pagano and Volpin (2005).
[15] Impact assessment on the proposal for a directive on the exercise of shareholders' voting rights, SEC(2006)181, at pp. 7, 53; available at http://register.consilium.eu.int/pdf/en/06/st05/st05217-ad01.en06.pdf.
[16] Cools (2005); Braendle (2006); Spamann (2006).
[17] Lele and Siems (2007). [18] See Siems (2005e); Vagts (2002).

II. The objective dimension: the shareholder of a joint stock company

The shareholder of a joint stock company is to be distinguished above all from shareholders in 'small companies' and other types of investors.

1. Demarcation from shareholders in 'small companies'

At first sight, there is a distinction in many countries between joint stock companies and small companies. A closer look,[19] though, shows there are a number of national peculiarities, which are, however, coming closer together.

In Germany, the small company form 'GmbH' was created in 1892, without a historical model. The background was the interest of small, less capital-intensive firms in a flexible and simple legal form of association, which was nonetheless capable of excluding the personal liability of the shareholders. In the twentieth century, this idea was taken up by a number of countries. Comparable legal forms were accordingly adopted on the German model, in France in 1925 with the 'société à responsabilité limitée' (SARL), in Japan in 1938 with the 'yugen kaisha'[20] and in the People's Republic of China in 1993 with the 'you xian ze ren gong si'.[21] European law too contains a differentiation in the company law directives and the SE law between joint stock companies and private limited companies.[22]

The demarcation in detail varies, however. While internationally it is in principle uniformly the case that firms can freely choose the desired type of company, differences arise from the conditions for forming a joint stock company or a private limited company. For instance, in France and China – by contrast with Germany – no more than fifty shareholders may be involved in a private limited company (Art. L. 223-3 FrCCom; § 24 ChinCA). In China, on an international comparison, the conditions for setting up a joint stock company are set very high and the establishment procedure very costly, so that the Chinese joint stock company is decidedly a legal form exclusively for large firms.[23] By contrast, in Germany in 1994 a reform act deliberately opened up the law of joint stock companies

[19] From a comparative point of view see De Kluiver and Van Gerven (1995); Lutter (1998a).
[20] See Maruyama (1995: 284); Hayakawa (1996: 267); on the JapCA 2005 which repealed the 'yugen kaisha' see text accompanying note 39 below.
[21] See Tomasic and Fu (1999: 122 *et seq.*).
[22] Cf. Art. 1(1) of the Second Directive 77/91/EEC; SE-Reg, Annex I a.
[23] Cf. Comberg (2000: 51); Thümmel (1995: 46).

somewhat for smaller firms.[24] A further variant is offered by French law. There, a separate legal form, the SAS, was created, intended in its present form to cover the area between the big joint stock company (SA) and the small private company (SARL).[25]

The Anglo-American counter-model started originally from a unitary type of company.[26] The later distinctions between the 'closely held corporation' and the 'publicly held corporation' in the US, and between 'private' and 'public' companies in the UK, are therefore often today still seen as two different versions of a single company form.[27] This appears even in the terminology, since by contrast with the German term 'Aktionär', which refers only to joint stock companies, the term 'shareholder' is used comprehensively with all types of company.

One reason for the difference between the US and continental Europe has been seen by Roberta Romano in the fact that the European possibility of choice of legal form – a 'European genius of state competition' – is a functional equivalent to the American possibility of choosing the state of incorporation.[28] Since, however, there is no comparable choice in the UK, yet in principle only a single form of company existed, another reason is more plausible: in both the US and the UK, company law was permissive to a greater extent than in other countries.[29] Consequently, there was no comparable pressure from smaller firms for a new, less cumbersome legal form, since these firms too were content with the existing more flexible range of instruments.

However, the contrast between the two groups of countries is becoming increasingly diluted. There now exist in both the UK and the US strongly marked differentiations in company law. In the UK, since 1980, the distinction is made such that a company is in principle a private company (Ltd), unless specified in its articles of association as a public company (plc) and the tighter conditions of establishment (s. 4(2) UK-CA) complied with. No further barriers are set up. Thus, for private companies, by contrast with the previous situation, there is no limit on the number

[24] Gesetz für kleine Aktiengesellschaften und zur Deregulierung des Aktienrechts of 02.08.1994, BGBl. I 1961.
[25] See Ch. 2, section III.1 below.
[26] For the US: Vagts (1998: 279–80, 288–9); for the UK: Lutter (1998a: para. 2-9); Cheffins (1997: 49).
[27] See Grantham (1998: 556–7); Goulding (1995: 57).
[28] Romano (1993: 138 *et seq.*); on regulatory competition see Ch. 9, section I.1, VI.1; Ch. 12, section II.1.a below.
[29] See Ch. 2, section IV. 1. b below.

of shareholders allowed,[30] and there is now no longer any restriction on the transfer of shares.[31] For the substantive differences, the first decisive step came with the Companies Act 1989. Since EU directives in particular had over the course of time increased the mandatory requirements on (large) companies, more room was now left to private companies through special provisions. Secondly, the 2006 reform of British company law has extended the existing differentiation still further. For instance, with respect to resolutions at meetings, the more demanding rules now apply only to public or even only to quoted companies (ss. 336 *et seq*., and ss. 341 *et seq*. UK-CA).

In the US, small firms can be established either as a close corporation or as a limited liability company (LLC). The success of state LLC laws[32] is based particularly on the fact that, while LLCs have the legal form of a company, for tax purposes they are treated as a partnership.[33] The regulations for close corporations are in some states contained in a close corporation supplement (e.g. §§ 341 *et seq*. DelGCL), while in other states exceptional provisions are integrated into the overall text.[34] These provisions are then applied where the shareholders deliberately so decide and the company does not, for instance, have more than fifty[35] shareholders. Additionally, in the US, a link is made with the distinction between public companies and other ones. For instance, the MBCA makes agreements departing from the Act impossible where shares are traded on a public capital market (§ 7.32(d) MBCA). Conversely, it is not just companies traded on the public capital markets which come under securities law. Instead, since 1964, special rules have also applied to all companies with more than 500 shareholders and total assets in excess of US$10 million.[36]

This overlap between company and securities law is not, however, a specifically American phenomenon. In other countries too, a stock exchange listing for the small company form (GmbH, Ltd, etc.) is disallowed.[37] By contrast, joint stock companies are potentially eligible for

[30] In the Companies Act 1907, the limit was fifty shareholders; see Cheffins (1997: 49).
[31] See Davies (2003: 37).
[32] See also National Conference of Commissioners on Uniform State Laws, Uniform Limited Liability Company Act (1995).
[33] See Goldman and Filliben (2000: 707); Cox and Hazen (2003: § 1.11).
[34] Cf. Cox and Hazen (2003: § 14.01); Lutter (1998a: para. 2-28).
[35] § 3(b) Model Statutory Close Corporation Supplement.
[36] For details see § 12(g) US-SEA. Similarly in Japan, see § 24(1) JapSEA; Hertig *et al.* (2004: 203).
[37] See e.g. for the UK: s. 755 UK-CA; Davies (2003: 628); for Germany: GerBörsG and GerBörsZulV which do not mention shares of a GmbH.