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Venture Capital Contracting as Bargaining in the Shadow of Corporate Law Constraints

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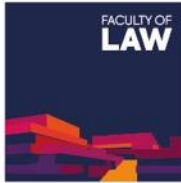
Comments

Geneviève Helleringer



Project: How corporate law impacts VC market

- Comparative—a trilogy
 - Contributions relating to
 - Formal and informal institutional determinants of VC investments & role of corporate law (vs securities law in the book)
 - Corporate law's rigid versus flexible structure
 - The importance of corporate law's flexibility to support entrepreneurship & financial innovation.
 - Differences in corporate law matter for the allocation of cash-flow and control rights in VC-backed firms and startups
 - Contractual “transplant” (or imports)
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Perspective: Law in Action

- Corporate law rules
 - Narrow mandatory core (e.g., min capital rules, limitation on fiduciary waiver, disclosure duties)
 - Default terms: can be altered; transaction costs
 - Interlocking governance terms
 - Corporate charter, bylaws (preferred shared), shareholders agreement, stock
 - In action, interplay can be muddy
 - Law & Finance 2.0 enquiry
 - Compare: rules (Doing Business) vs the economic rationality (models) vs thicker “CG machine”
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Motivation

- Promotion of the European Silicon Valley
 - Assumption: in start-ups, governance quality is a function of bargaining
 - Parties' ability to bargain "contracts"
 - If corporate law is "channels" more rigidity, then it is less efficient
 - Presumption: US contractual framework is efficient (look at the figures)
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Which contract?

- Bylaws: rights incorporated in the shares (dual-class, preferred-stock covenants)
- Stand alone shareholders' agreement
- "Incorporated" shareholders' agreement (French SAS = blank sheet)

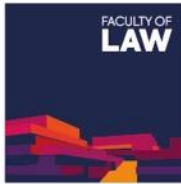


Which rigidity?

- Absolute vs relative
 - Limited strict prohibitions (liquidation preference)
 - Role of interpretation
 - Uncertainty culture
 - High uniformity in charters even in dimensions where opt-out freedom
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What “channels” of rigidity?

- Stickiness of governing law and default
 - Stickiness of market templates and market practice
 - Influence of regulatory technology (adopted for market access)
 - Leveraged by the “VC corporate machine”
 - practitioners (incl. notaries, *entry-level lawyers*)... *more!*
 - Courts Intensity of scrutiny; ex post fairness outlook: stakeholder can’t participate in initial bargaining
 - *Quid inertia, network effect, agency problems?*
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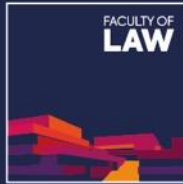
How not to be stuck?

- Activism
 - Regulatory nudges?
 - Path dependence (switching costs): altering rules?
 - Rauterberg, Sanga (Yale J Reg, 2025): process rules to adjust powers by contract while still protecting non-consenting investors
 - Key: procedures that simulate fair bargaining. E.g., super-majority votes, information rights, cooling-off periods
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Whose shadow... or grasp?

- Corporate law toothless
- Bargaining in the grasp of the VC corporate machine?



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