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978-1-107-02511-0 - Comparative Corporate Governance: A Functional and International Analysis

Edited by Andreas M. Fleckner and Klaus J. Hopt

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COMPARATIVE CORPORATE GOVERNANCE

The business corporation is one of the greatest organizational inventions, but it creates risks both for shareholders and for third parties. To mitigate these risks, legislators, judges, and corporate lawyers have tried to learn from foreign experiences and adapt their regulatory regimes to them. In the last three decades, this approach has led to a stream of corporate and capital market law reforms unseen before. Corporate governance, the system by which companies are directed and controlled, is today a key topic for legislation, practice, and academia all over the world.

Corporate scandals and financial crises have repeatedly highlighted the need to better understand the economic, social, political, and legal determinants of corporate governance in individual countries. *Comparative Corporate Governance* furthers this goal by bringing together current scholarship in law and economics with the expertise of local corporate governance specialists from twenty-three countries.

ANDREAS M. FLECKNER is a senior research fellow at the Max Planck Institute for Comparative and International Private Law, Hamburg, Germany.

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PREFACE

The business corporation is one of the greatest organizational inventions, but it creates risks both for shareholders and for third parties. To mitigate these risks, legislators, judges, and corporate lawyers have at all times tried to learn from foreign experiences and adapt their regulatory regimes to them. Corporate law is therefore a prime exemplar for the comparative law approach: US corporation law has evolved from European precedents, the German states copied many provisions from the French Code de Commerce, and Japan adopted rules from Germany. These are just a few prominent examples. In the last three decades, the comparative approach has grown into an interdisciplinary and international movement that led to a stream of law reforms, client memoranda, law review articles, and international conferences unseen before. Corporate governance, the system by which companies are directed and controlled, is today one of the key topics for legislation, practice, and academia around the world.

The origins of the present volume on *Comparative Corporate Governance* lie in the XVIIIth International Congress of Comparative Law/Le XVIII^e Congrès International de droit comparé of the International Academy of Comparative Law/L'Académie Internationale de droit comparé in Washington, DC from July 25, 2010 to August 1, 2010. The Congress devoted one section to "Commercial law/Droit commercial," and within this section one group of international lawyers focused on "Corporate Governance/Le gouvernement d'entreprise." Klaus J. Hopt, the General Reporter nominated by the International Academy, prepared a questionnaire (reprinted in this volume on pp. 1093–1102), to which corporate lawyers from all over the world (principally chosen by the Academy) responded with thirty-one country reports. These reports gave detailed accounts of the corporate governance regimes of Argentina, Australia, Austria, Belgium, Brazil, China, Croatia, Denmark, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Luxembourg, the Netherlands, Norway, Poland, Portugal, Serbia, South

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Korea, Spain, Sweden, Switzerland, Taiwan, Turkey, the UK, and the US. Building upon both the country reports as well as current scholarship in law and economics, Klaus J. Hopt composed then the subsection's General Report (this volume features a considerably updated and extended version on pp. 1–101).

Corporate scandals and financial crises have again and again highlighted the need to better understand the economic, social, political, and legal determinants of corporate governance in individual countries. Without reliable information, though, comparative law studies reach their limits rather quickly. The main hurdle is the language barrier: to date, the international discussion focuses on a few prominent countries, such as the US, the UK, France, Germany, or Japan. For other countries, there is either no information in English available or it is not easily accessible for the international observer. This is unfortunate because smaller countries are often more willing than larger jurisdictions to take the risk of new approaches, so that their corporate governance regimes deserve more attention than they have received so far. In order to help close this gap in the corporate governance literature and to further the comparative approach, Klaus J. Hopt as the General Reporter invited Andreas M. Fleckner to join him as a co-editor and to develop the conference materials into a volume that presents the current state of corporate governance around the world. Following consultations with the publisher, especially regarding the scope and the length of the envisaged book, the editors selected twenty-three country reports, sent their respective authors suggestions for amendments and changes, and asked them to update their manuscripts to reflect the law *as of January 2011*. Occasionally, the editors let the authors include more recent developments if they significantly altered a country's corporate governance regime, but in general the editors tried to keep the volume as of the same date to facilitate comparative studies.

The result of these efforts is a volume that offers, as the subtitle states, *A Functional and International Analysis* by bringing together current scholarship in law and economics (Part I, pp. 1–101) with the expertise of local corporate governance specialists from twenty-three countries (Part II, pp. 103–1092).

Part I combines a functional comparative analysis of corporate governance regimes from all over the world with the most recent insights from the law and economics literature. Readers of this part will gain a general idea of the world's corporate governance rules and will make themselves familiar with the leading corporate governance literature.

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Takeover law, though an essential part of external corporate governance, is left out because the feedback from the individual countries was rather heterogeneous.

Part II allows readers to study the corporate governance regimes of a wide range of countries, including those with different ownership structures (such as the US or the UK on the one side, and France or Germany on the other), major economies (such as the US or Germany), dynamic emerging markets (such as Brazil or China), and smaller countries with interesting approaches (such as Australia or Norway). While the ownership structure or similar aspects may be suitable categories to organize a volume like the present, the editors have refrained from employing these or other qualitative criteria (such as legal family or leaders and followers in the corporate governance movement). Instead, the volume follows geographical and alphabetical principles, to make it easy for readers to find the countries whose corporate governance regimes they want to study. Why include as many as twenty-three countries? The editors believe, as mentioned earlier in this preface, that the comparative approach is contingent upon reliable information from more than a handful of arbitrarily chosen countries, to account for differences and similarities in jurisdictions from various continents, different economies and cultures, diverse traditions, and distinct legal families. A key factor in this regard is the background of the authors: the national reporters are all corporate law and governance experts from the country they are dealing with in their chapter. Readers can therefore be confident that the contributors to the present volume are familiar with both the legal regime as well as its economic and social setting (unlike many other corporate governance studies, which build upon the data of international scholars with no or no comparable legal experience).

All country chapters follow more or less the same method, i.e. a functional instead of a merely doctrinal or descriptive approach, and the same structure, i.e. the questionnaire prepared by the General Reporter for the conference in Washington (Part III, pp. 1093–1102). This common conceptual basis will especially appeal to readers who want to follow certain issues, for instance the composition of the boards or the role of the shareholders, for several jurisdictions. In addition, all country chapters feature an annex with a selection of the jurisdiction's key corporate governance cases, its main corporate governance literature, and other country-specific sources, such as information on the competent supervisory authority. While the questionnaire and, later, the publication concept of this volume provided for a common framework, it was

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of course left to the authors to decide where they followed the general guidelines and where they preferred to adhere to local conventions. Any such deviations from the common path should be welcomed as first-hand accounts of a country's corporate governance system, not as an "inconsistency" in the context of this volume. After all, different styles and methods often give a first idea of why the law may differ as well.

The book follows – in a loose way – a number of similar conferences and volumes that, taken together, reflect the progress that the comparative approach has made over recent years, such as *Comparative Corporate Governance: The State of the Art and Emerging Research* (edited by Klaus J. Hopt *et al.*, 1998), *Reforming Company and Takeover Law in Europe* (edited by Guido Ferrarini *et al.*, 2004), and *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US* (edited by Klaus J. Hopt *et al.*, 2005) as well as *Comparative Corporate Governance of Non-Profit Organizations* (edited by Klaus J. Hopt and Thomas von Hippel, 2010).

The editors would like to use this opportunity to express their gratitude not only to the authors but also to the many people behind the scenes that contributed to the genesis of this volume. Nina Marie Güttler as well as Christian Jung and Edda O'Hara, all of the Max Planck Institute in Hamburg, organized the exchange with the authors and prepared the manuscripts for publication. That the heterogeneous collection of country reports became one consistent volume is largely their accomplishment. The editors have also been fortunate to benefit from the comments, ideas, and thoughts of Kim Hughes, Lorenza Toffolon, and Richard Woodham, all of Cambridge University Press. The publication of a book like the present volume can be a long and painful process, but with them it was a pleasure and delight at any time. Last but not least, the editors are very grateful to Kate Ollerenshaw and Kristen Zetsche. Both read the entire manuscript very carefully, polished the non-native speakers' English, and corrected many spelling errors.

Andreas M. Fleckner and Klaus J. Hopt
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ABBREVIATIONS

Ab	Privat aktiebolag
Abp	Publikt aktiebolag
ABS	Australian Bureau of Statistics
ACLC	<i>Australian Company Law Cases</i>
ACSI	Australian Council of Superannuation Investors
ACSR	<i>Australian Corporations and Securities Reports</i>
ADAM	Association de défense des actionnaires minoritaires
ADC	<i>Anuario de derecho civil</i>
AFEP	Association française des entreprises privées
AFG	Association française de la gestion financière
AFGC	Audit Firm Governance Code
AFJPs	Administradoras de Fondos de Jubilaciones y Pensiones
AFM	Autoriteit Financiële Markten
AFS	Act on Financial Supervision
AFSA	Audit Firms Supervision Act
AG	Aktiengesellschaft; <i>Die Aktiengesellschaft</i>
AGM	Annual general meeting
AGREF	Association des grandes entreprises françaises
AICD	Australian Institute of Company Directors
AIM	Alternative Investment Market
AJP	<i>Aktuelle Juristische Praxis</i>
AKEIÜ	Arbeitskreis Externe und Interne Überwachung der Unternehmung
AktG	Aktiengesetz
ALFI	Association Luxembourgeoise des fonds d'investissements
ALI	American Law Institute
ALJR	<i>Australian Law Journal & Reports</i>
ALR	<i>Australian Law Reports</i>
AMF	Autorité des marchés financiers
Ann. dr. Lux.	<i>Annales de droit Luxembourgeois</i>
ANSEF	Pension Funds National Administration
APRA	Australian Prudential Regulation Authority

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ABBREVIATIONS

Arr.	Arrêté
ARUG	Gesetz zur Umsetzung der Aktionärsrechterichtlinie
ASA	Australian Shareholders Association
ASFFI	Association des sociétés françaises de fonds et d'investissement
ASFR	Act on Supervision of Financial Reporting
ASIP	Association suisse des institutions de prévoyance
ASX	Australian Securities Exchange
AUASB	Auditing and Assurance Standards Board
AuslInvG	Auslandsinvestmentgesetz
AVO	Aufsichtsverordnung
BaFin	Bundesanstalt für Finanzdienstleistungsaufsicht
BanKV	Bankenverordnung
BB	<i>Betriebs-Berater</i>
BBl	<i>Bundesblatt der Schweizerischen Eidgenossenschaft</i>
BCBA	Bolsa de Comercio de Buenos Aires
BDB	<i>Bulletin Droit et Banque</i>
BEHG	Börsen- und Effektenhandelsgesetz
BGBL.	<i>Bundesgesetzblatt</i>
BGE	<i>Entscheidungen des Schweizerischen Bundesgerichts</i>
BGH	Bundesgerichtshof
BGHZ	<i>Entscheidungen des Bundesgerichtshofs in Zivilsachen</i>
BIJ	<i>Bulletin d'Information sur la Jurisprudence</i>
BilMoG	Gesetz zur Modernisierung des Bilanzrechts
BIS	UK Department for Business Innovation and Skills
BJS	<i>Bulletin Joly Sociétés</i>
BKR	<i>Zeitschrift für Bank- und Kapitalmarktrecht</i>
BKV	Budapesti Közlekedési Zrt.
BM&FBovespa	Brazilian Stock, Commodities, and Futures Exchanges
B.O.	<i>Boletín Oficial</i>
BOFI	Banks and other financial institutions
BörseG	Börsegesetz
BörsG	Börsengesetz
BörsZulV	Börsenzulassungsverordnung
BPN	Banco Português de Negócios, S.A.
BTDrucks	<i>Drucksachen des Deutschen Bundestages</i>
BVerfG	Bundesverfassungsgericht
BVerfGE	<i>Entscheidungen des Bundesverfassungsgerichts</i>
BX	Berne Exchange
C.J.	Chief Justice
CA	Communicatiekanaal aandeelhouders; Companies Act; Court of Appeal(s)

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ABBREVIATIONS

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Calif. Corp. Code	California Corporations Code
CAMAC	Corporations and Markets Advisory Committee
CASAC	Companies and Securities Advisory Committee
CASS	Chinese Academy of Social Sciences
Cass. Civ.	Cour de cassation, chambre civile
Cass. Com.	Cour de cassation, chambre commercial
Cass. Crim.	Cour de cassation, chambre criminelle
Cass. lux.	Cour de cassation du Luxembourg
Cass. Soc.	Cour de cassation, chambre sociale
CBA	Commonwealth Bank of Australia
CBFA	Commission Bancaire, Financière et des Assurances
CCC	Code of Commercial Companies
CCL	Commercial Companies Law
CDFH	China Development Financial Holding Company
CEBS	Committee of European Banking Supervisors
CEF	Centro para la estabilidad financiera
CEO	Chief executive officer
CFD	Contracts for difference
CFIUS	American Committee on Foreign Investments
CFO	Chief financial officer
CFR	Code of Federal Regulations
CGN	Corporate Governance Network
CGS	Código de Governo das Sociedades
CHF	Swiss franc
CLERP	Corporate Law Economic Reform Program
CLR	<i>Commonwealth Law Reports</i>
CME	Loi sur la confiance et la modernisation de l'économie
CMF	Code monétaire et financier; Conseil des marchés financiers
CMVM	Comissão do Mercado de Valores Mobiliários
CNC	Commission des normes comptables
CNMV	Comisión Nacional del Mercado de Valores
CNPF	Conseil national du patronat français
CNV	Comisión Nacional de Valores
CO	Code of Obligations
COB	Commission des opérations de bourse
COO	Chief operating officer
CPA	Certified public accountant
CPMA	Consumer Protection and Markets Authority
CR	Commercial Register
CRD III	Capital Requirements Directive amendment III
CSA	Chinese Securities Association

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ABBREVIATIONS

CSC	Código das Sociedades Comerciais; Confédération des syndicats chrétiens
CSRC	China Securities Regulatory Commission
CSSF	Commission de surveillance du secteur financier
Cth.	Commonwealth
CVM	Código dos Valores Mobiliários; Comissão de Valores Mobiliários
D&O	Directors and officers
D.	<i>Dalloz</i>
DAH	Directive on Ad hoc Publicity
DAI	Deutsches Aktieninstitut
DAOR	<i>Revue internationale du droit des affaires</i>
DB	<i>Der Betrieb</i>
DBA	Danish Business Authority
DBW	<i>Die Betriebswirtschaft</i>
DCC	Dutch Civil Code
DCG	Directive on Information relating to Corporate Governance
DCGK	Deutscher Corporate Governance Kodex
Del.	Delaware
Del. Code	Delaware Code
DFR	Directive Financial Reporting
DG	Directorate General
DGCL	Delaware General Corporation Law
DIN	Deutsche Industrienorm
DMT	Directive on Disclosure of Management Transactions
DoLR	Division of leadership responsibilities
Dr. et patr.	<i>Droit et patrimoine</i>
Dr. pén.	<i>Droit pénal</i>
DrittelbG	Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat
DStR	<i>Deutsches Steuerrecht</i>
DSW	Deutsche Schutzvereinigung für Wertpapierbesitz e.V.
DTI	Department of Trade and Industry
EBA	European Banking Authority
EBOR	<i>European Business Organization Law Review</i>
EBRD	European Bank of Reconstruction and Development
ECFR	<i>European Company and Financial Law Review</i>
ECGI	European Corporate Governance Institute
ED	<i>El Derecho</i>
EEA	European Economic Area
EFTA	European Free Trade Association
EGAktG	Einführungsgesetz zum Aktiengesetz

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ABBREVIATIONS

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EGM	Extraordinary general meeting
EOROC	Estatuto da Ordem dos Revisores Oficiais de Contas
EOWA	Equal Opportunity for Women in the Workplace Agency
ESG	European Shareholders Group
EuGH	Europäischer Gerichtshof
EU-VerschG	EU-Verschmelzungsgesetz
EuZW	<i>Europäische Zeitschrift für Wirtschaftsrecht</i>
EWMI JILEP	East–West Management Institute Judicial Independence and Legal Empowerment Program
EWS	<i>Europäisches Wirtschafts- und Steuerrecht</i>
FACPCCE	Federación Argentina de Consejos de Profesionales en Ciencias Económicas
FCAFC	Federal Court of Australia Full Court
FDUP	Faculdade de Direito da Universidade do Porto
FEB	Fédération des entreprises de Belgique
FES	Foro ecuménico social
FESE	Federation of European Securities Exchanges
FGD	Fonds de garantie des dépôts
FGTB	Fédération Générale du Travail de Belgique
FIEA	Financial Instruments and Exchange Act
FIEs	Foreign-invested enterprises
FINMA	Financial Market Supervisory Authority
FINMAG	Finanzmarktaufsichtsgesetz
FINRA	Financial Industry Regulatory Authority
FIRB	Foreign Investment Review Board
FM	Financiële Markten
FMA	Financial Market Authority
FMStFG	Gesetz zur Errichtung eines Finanzmarktstabilisierungsfonds
FRC	Financial Reporting Council
FRRP	Financial Reporting Review Panel
FSA	Financial Services Authority; Financial Supervisory Authority
FSB	Financial Stability Board
FSC	Financial Supervisory Commission
FSMA	Financial Services and Markets Authority
FTSE	Financial Times Stock Exchange
FusG	Fusionsgesetz
GDP	Gross domestic product
GeS	<i>Zeitschrift für Gesellschafts- und Steuerrecht</i>
GesAusG	Gesellschafter-Ausschlussgesetz
GesKR	<i>Schweizerische Zeitschrift für Gesellschafts- und Kapitalmarkt-recht sowie Umstrukturierungen</i>

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ABBREVIATIONS

GesRZ	<i>Der Gesellschafter – Zeitschrift für Gesellschafts- und Unternehmensrecht</i>
GIZ	Gesellschaft für Internationale Zusammenarbeit
GLE	Georgian Law on Entrepreneurs
GmbH	Gesellschaft mit beschränkter Haftung
GmbHG	Gesetz über die Gesellschaften mit beschränkter Haftung
GRI	Global Reporting Initiative
GSE	Georgian Stock Exchange
GSML	Georgian Securities' Market Law
GTSM	Gre Tai Securities Market
GTZ	Gesellschaft für Technische Zusammenarbeit
GWR	<i>Gesellschafts- und Wirtschaftsrecht</i>
H.B.	House Bill
H.R.	House of Representatives
H3C	Haut Conseil du commissariat aux comptes
HFSA	Hungarian Financial Supervisory Authority
HGB	Handelsgesetzbuch
HUF	Hungarian forint
ICCLR	<i>International Company and Commercial Law Review</i>
IAGO	Instituto Argentino para el Gobierno de las Organizaciones
IARSE	Instituto Argentino de Responsabilidad Social Empresaria
IAS	International Accounting Standards
IASB	International Accounting Standards Board
IBEF	Instituto Brasileiro de Executivos de Finanças
IBGC	Instituto Brasileiro de Governança Corporativa
ICAEW	Institute of Chartered Accountants for England and Wales
ICE	Information and consultation of employees
IDEA	Instituto para el Desarrollo Empresarial de la Argentina
IDET	Instituto de Direito das Empresas e do Trabalho
IFA	Institut français des administrateurs
IFAC	International Federation of Accountants
IFC	International Finance Corporation
IFRS	International Financial Reporting Standards
IFSA	Investment and Financial Services Association
ILA	Institut Luxembourgeois des administrateurs
InvÄndG	Investmentänderungsgesetz
InvG	Investmentgesetz
InvModG	Investmentmodernisierungsgesetz
InvStG	Investmentsteuergesetz
IOSCO	International Organization of Securities Commissions
IPCG	Instituto Português de Corporate Governance

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ABBREVIATIONS

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IPO	Initial public offering
ISAs	International auditing standards
ISC	Institutional Shareholders' Committee
ISS	Institutional Shareholder Services
IVM	Instituto dos Valores Mobiliários
J.Japan.L.	<i>Journal of Japanese Law</i>
JA	<i>Jurisprudencia Argentina</i>
JCGF	Japan Corporate Governance Forum
JCP	<i>Jurisclasseur périodique</i>
JCP E	<i>Jurisclasseur périodique, éd. Entreprise</i>
JDE	<i>Journal de droit européen</i>
JDSC	<i>Jurisprudence en Droit des Sociétés Commerciales</i>
JITE	<i>Journal of Institutional and Theoretical Economics</i>
JOR	<i>Jurisprudentie Onderneming en Recht</i>
JORF	<i>Journal officiel de la République française</i>
JPY	Japanese yen
JT	<i>Journal des Tribunaux</i>
JZ	<i>Juristen-Zeitung</i>
KAGG	Gesetz über Kapitalanlagegesellschaften
KapInHaG	Kapitalmarktinformationshaftungsgesetz
KapMuG	Kapitalanleger-Musterverfahrensgesetz
KKO	Korkein oikeus
KMU	Kleine und mittlere Unternehmen
KonTraG	Gesetz zur Kontrolle und Transparenz im Unternehmensbereich
LIFFE	London International Financial Futures and Options Exchange
LIGFI	Luxembourg Institute for Global Financial Integrity
LL	<i>La Ley</i>
LLC	Limited liability company
LLP	Limited liability partnership
LMV	Ley del Mercado de Valores
LO	Landsorganisasjonen
LSA	Ley de Sociedades Anónimas
LSC	Ley de Sociedades de Capital
LSE	London Stock Exchange; Luxembourg Stock Exchange
LSF	Loi de sécurité financière
LTI	Long-term incentive scheme
MB	<i>Moniteur Belge</i>
MEDEF	Mouvement des entreprises de France
MgVG	Gesetz über die Mitbestimmung der Arbeitnehmer bei einer grenzüberschreitenden Verschmelzung

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ABBREVIATIONS

MiFID	Markets in Financial Instruments Directive
MitbestG	Gesetz über die Mitbestimmung der Arbeitnehmer
Model Bus. Corp. Act	Model Business Corporation Act
MontanMitbestErgG	Gesetz zur Ergänzung des Gesetzes über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie
MontanMitbestG	Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie
MOPS	Market Observation Post System
MoRaKG	Gesetz zur Modernisierung der Rahmenbedingungen für Kapitalbeteiligungen
MSCB	Moving Strike Convertible Bond
MTF	Multilateral Trading Facility
NASD	National Association of Securities Dealers
NaStraG	Gesetz zur Namensaktie und zur Erleichterung der Stimmrechtsausübung
NBG	National Bank of Georgia
NBStraf	<i>Nieuwsbrief strafrecht</i>
NCCA	Cámara Nacional de Apelaciones en lo Comercial
NCP	Normas Contables Profesionales
NCPC	Nouveau Code de Procédure Civile
NED	Non-executive director
NHO	Næringslivets Hovedorganisasjon
NIIF	Normas Internacionales de Información Financiera
NJ	<i>Nederlandse Jurisprudentie</i>
NJW	<i>Neue Juristische Wochenschrift</i>
NRE	<i>Nouvelles régulations économiques</i>
NSWCA	New South Wales Court of Appeal
NSWLR	<i>New South Wales Law Reports</i>
NSWSC	New South Wales Supreme Court
NTU	National Taiwan University
N.Y. Gen. Bus. Law	New York General Business Law
NYSE	New York Stock Exchange
NZG	<i>Neue Zeitschrift für Gesellschaftsrecht</i>
NZZ	<i>Neue Zürcher Zeitung</i>
ÖBA	<i>Österreichisches Bankarchiv</i>
OECD	Organisation for Economic Co-operation and Development
OGH	Oberster Gerichtshof
OJ	<i>Official Journal of the European Community/Official Journal of the European Union</i>