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Edited by Michele Graziadei, Ugo Mattei and Lionel Smith  
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## Commercial Trusts in European Private Law

This book examines how fifteen legal systems of the European Union regulate relationships of trust, focusing in particular on asset management. Following the Common Core approach, national reporters examine their Member State's trusts laws primarily through the discussion of a series of hypothetical cases on, amongst other topics, the establishment and termination of management relationships, obligations of loyalty and of professionalism, and the choice of law. There is a special focus on commercial applications such as collective investment, collective secured lending, pension funds and securitisation. In addition to a much-needed comparative treatment of the subject, the book discusses the scholarly setting for the issues and gives guidance on the terminology in the evolving European scene.

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## The Common Core of European Private Law

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 Science (UNESCO)

For the transnational lawyer the present European situation is equivalent to that of a traveller compelled to cross legal Europe using a number of different local maps. To assist lawyers in the journey beyond their own locality *The Common Core of European Private Law Project* was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger. This is its sixth book published by Cambridge University Press.

The aim of this collective scholarly enterprise is to unearth what is already common to the legal systems of European Union member states. Case studies widely circulated and discussed between lawyers of different traditions are employed to draw at least the main lines of a reliable map of the law of Europe.

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and  
Lionel Smith



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To the memory of Professor Peter Birks  
in different ways, a mentor to all of us

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## General editors' preface

This book brings 'The Common Core of European Private Law' over the threshold of a half dozen published results. The project was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger. The methodology used in the Trento project is novel. By making use of case studies it goes beyond mere description to detailed inquiry into how most European Union legal systems resolve specific legal questions in practice, and to thorough comparison between those systems. It is our hope that these volumes will provide scholars with a valuable tool for research in comparative law and in their own national legal systems. The collection of materials that the Common Core Project is offering to the scholarly community is already quite extensive and will become even more so when more volumes are published. The availability of materials attempting a genuine analysis of how things are is, in our opinion, a prerequisite for an intelligent and critical discussion on how they should be. Perhaps in the future European private law will be authoritatively restated or even codified. The analytical work carried on today by the nearly 200 scholars involved in the Common Core Project is a precious asset of knowledge and legitimization for any such normative enterprise.

We must thank not only the editors and contributors to these first published results but also all the participants who continue to contribute to The Common Core of European Private Law project. With a sense of deep gratitude we also wish to recall our late Honorary Editor, Professor Rudolf B. Schlesinger. We are sad that we have not been able to present him with the results of a project in which he believed so firmly. No scholarly project can survive without committed sponsors. The Dipartimento di Scienze Giuridiche of the University of Trento and its

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excellent staff must first be thanked. The European Commission has partially sponsored some of our past general meetings, having included them in their High Level Conferences Program. The Italian Ministry of Scientific Research is now also funding the project, having recognized it as a 'research of national interest'. The Istituto Subalpino per l'Analisi e l'Insegnamento del Diritto delle Attività Transnazionali, the University of Torino, the University of Trieste, the Fromm Chair in International and Comparative Law at the University of California and the Hastings College of Law have all contributed to the funding of this project. Last but not least, we must thank all those involved in our ongoing Trento projects in contract law, property, tort and other areas whose results will be the subject of future published volumes. Our home page on the internet is at <http://www.jus.unitn.it/dsg/common-core>. There you can follow our progress in mapping the common core of European private law.

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Rodolfo Sacco, President of the International Association of Legal Science (UNESCO)

## Preface

This book is the result of a genuinely collective enterprise. As a project, it was conceived at a preliminary meeting of one and a half days in March 1998 at the University of Trento, within a small group made up of two of the editors (Graziadei and Mattei), the chairman of the property group of the Common Core project, Professor Antonio Gambaro, and leading trust scholars Professor John Langbein from Yale, Professor Hein Kötz from Hamburg and Professor Shael Herman from Tulane. At that meeting general issues of applicability of common core methodology to the domain of trust were discussed, and a clear sense emerged that the focus should be on trust law in the commercial setting.

The trust project was officially launched in July of the same year at the general meeting of the Common Core project, in Trento, where a rudimentary first draft questionnaire was discussed in depth under the leadership of Professor Antonio Gambaro, at the property session. At that meeting Lionel Smith (at that time of Oxford University) joined the editorial team and the first participants joined in. In June 1999 all the participants to the project met in Como for a three-day conference sponsored by the University of Insubria. At that meeting draft responses to the new version of the questionnaire were discussed together with Professor John Langbein, who also gave a speech on institutional investors and the law of trusts. Professor Paul Matthews of King's College London participated in our work and addressed the group on the law of trusts in offshore jurisdictions. Professor Jonathan Macey from Cornell intervened on the economic aspects of fiduciary relationships. More work with most of the participants was devoted to the finalisation of the questionnaire at the 1999 meeting in Trento, and in January 2000 the editors met for ten days of joint work on the draft responses at

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Oxford University. Feedback and changes in the reports and in the questionnaire happened through the following year and a half, with another joint two days of work in Trento in July 2000. Finalised answers were prepared in the course of the following year, and at the July 2001 meeting the editors met for some more planning and for the final editorial organisation of the volume. The very last meeting with all the participants was organised at Stresa, Italy and sponsored by the Facoltà di giurisprudenza of the Università del Piemonte orientale, whose faculty was meanwhile joined by Professor Graziadei. At that meeting, Professor Donovan Waters, Dr Joshua Getzler of St Hugh's College, Oxford, and Mr Stuart Willey, of the UK Financial Services Authority, participated in the discussion of the country reports and delivered papers on the Hague Convention of 1985 on the law applicable to trusts and on their recognition, on the Trustee Act 2000, and on fiduciary duties in financial services law.

This long and thorough joint effort can be seen as a truly collective authorship of the questionnaire and of the semantics of the answers, and should be reflected in a relatively high level of homogeneity between the national reports. What is most important to point out, however, is that in this process comparison has been carried on as a matter of learning by doing, and a high level of communication between lawyers of so many different traditions has certainly been reached. The very existence of this book shows that when comparative work is done (even in traditionally very tricky areas like property and trust), it looks less problematic than when one limits oneself to discussing how it should be done.

Like everyone else, the editors were shocked and saddened by the news of the death of Professor Peter Birks, as this book was going to press. He was an intellectual leader in the field of comparative private law, as in so many other fields, and he was a great friend and supporter of the Trento enterprise. In different ways, each of the editors is intellectually indebted to Peter Birks, to whose memory this book is dedicated.

The authors jointly wish to thank all the aforementioned participants to the conception of this volume who might or might not appear as authors but who have all helped us tremendously in carrying out our task. Thank you to the brilliant Managing Editor of The Common Core of European Private Law, Mrs Carla Boninsegna, for kindness, softness and efficiency. We wish to thank Finola O'Sullivan and Professor David Ibbetson at Cambridge University Press, together with the anonymous

referee of this volume, who have all, in different ways, greatly helped to improve our final artefact. We are grateful to Professor Martijn Hesselink and to Professor Rick Verhagen who joined in our discussions in Trento at an early stage of the project and who kindly corresponded with us. We thank Dr avv. Edoardo Andreaoli for his early contribution to the Italian report. We are also indebted to Professor Silvia Ferreri and to Dr Bianca Gardella Tedeschi for their effective support in the organisation of the Stresa meeting of our group. Finally, we wish to thank Mauro Bussani, General Editor of the Common Core Project, Andrea Pradi, President of the Associazione R. B. Schlesinger per lo Studio del Diritto Europeo, and Luisa Antonioli, Professor of Comparative Law at the University of Trento, for their tremendous organisational efforts during and in between the Trento meetings.

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## Abbreviations

A.2d	Atlantic Reporter (2d series) (US)
AAMN	Anales de la Academia Matritense del Notariado
ABGB	Allgemeines bürgerliches Gesetzbuch
Abs	Absatz
AC	Appeal Cases
act. juris. [in French report, with D.]	Recueil Dalloz actualités jurisprudentielles
Act. proc. coll.	Actualité des procédures collectives
ADC	Anuario de Derecho Civil
AFM	Autoriteit Financiële Markten
AG	Die Aktiengesellschaft – Zeitschrift für das gesamte Aktienwesen
AJCL	American Journal of Comparative Law
AktG	Aktiengesetz of 6 September 1965, 1965 Bundesgesetzblatt part I, 1089
All ER	All England Reports
ALR	Australian Law Reports
AMF	Autorité des marchés financiers
Annales Droit lux.	Annales du droit luxembourgeois
ANVR	Algemeen Nederlands Verbond van Reisondernemingen
AP [in French report]	Assemblée plénière (de la Cour de cassation)
AP [in German report]	Hueck/Nipperdey/Dietz, <i>Nachschießwerk des Bundesarbeitsgerichts – Arbeitsrechtliche Praxis</i>
AP [in Greek report]	Greek Supreme Court in Civil and Criminal Matters

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App.	Corte di Appello
App. Cas.	Appeal Cases (1875–90)
Arch. Civ.	Archivio civile
Arch. locazioni	Archivio delle locazioni
Arch. N.	Archeion Nomologias
art.	article
ASCI	Act on the Supervision of Credit Institutions ( <i>Wet Toezicht kredietinstellingen</i> )
ASCIS	Act on the Supervision of Collective Investment Schemes
ASCS	Act on the Supervision of the Credit System ( <i>Wet Toezicht kredietwezen</i> )
ASII	Act on the Supervision of Investment Institutions ( <i>Wet Toezicht beleggingsinstellingen</i> )
ASST 1995	1995 Act on the Supervision of the Securities Trade ( <i>Wet Toezicht Effectenverkeer 1995</i> )
ATF	Arrêts du Tribunal fédéral suisse
Az.	Aktenzeichen
B & C	Barnewall & Cresswell's Reports (reprinted in ER)
BAG	Bundesarbeitsgericht
BAO	Bundesabgabenordnung
BB	Der Betriebs-Berater
BCC [in Belgian report]	Belgian Civil Code
BCC [in English report]	British Company Law Cases
BCLC	Butterworths Company Law Cases
Beav.	Beaven's Reports (reprinted in ER)
Betr AVG	Gesetz zur Verbesserung der betrieblichen Altersversorgung of 19 December 1974
BG	Bundesgesetz
BGB	Bürgerliches Gesetzbuch of 18 August 1896
BGBL.	Bundesgesetzblatt
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BMJ	Boletim do Ministério da Justiça
BPG	Betriebspensionengesetz
Bull. civ.	Bulletin civil de la Cour de cassation

Bull. Droit et Banque	Bulletin Droit et Banque
Bull. Joly	Bulletin Joly
Bus. Law.	Business Lawyer
BV	Besloten Vennootschap
B-VG	Bundes-Verfassungsgesetz 1920 idF von 1929
BWG	Bankwesengesetz
CA	Cour d'Appel, Court of Appeal
Cal. L. Rev.	California Law Review
Cass. [in French report]	Cour de Cassation
Cass. [in Italian report]	Corte di Cassazione
Cass. Fr. Com.	French Cour de Cassation, Commercial Chamber
Cass. Fr. Req.	French Cour de Cassation, Chambre des Requêtes
CBFSAI	Central Bank and Financial Services Authority of Ireland
CC	Civil Code
C. civ.	Code civil
C. com. [in French report]	Code de commerce
C. com. [in Spanish report]	Código de comercio
CC Proc.	Greek Code of Civil Procedure
CCSM	Continuing Consolidation of the Statutes of Manitoba
cf.	compare
Ch. [in English report]	Chancery Division Reports
Ch. [in French report, with D.]	Recueil Dalloz Chroniques
Ch. D.	Chancery Division Reports (1875–90)
Civ.	French Cour de Cassation, Civil Chamber (First, Second or Third)
CJ	Colectânea de Jurisprudência
CLJ	Cambridge Law Journal
CMLR	Common Market Law Review
C. mon. et fin.	Code monétaire et financier
CMVM	Código do Mercado dos Valores Mobiliários
CNMV	Comisión nacional del mercado de valores
Col. J. Eur. L.	Columbia Journal of European Law
Com. C.	Commercial Code

Contrats, conc., consom.	Contrats, concurrence, consommation (journal)
Contr. e impr.	Contratto e impresa
Conv.	Conveyancer and Property Lawyer (legal periodical)
Cornell LQ	Cornell Law Quarterly
Corr. giur.	Il corriere giuridico
CPEREF	Código dos Processo especiais de Recuperação da Empresa e da Falência
Cr. & Ph.	Craig and Phillips' Reports (reprinted in ER)
Crim. LR	Criminal Law Review
CSSF	Commission de Surveillance du Secteur Financier
CVM	Código dos Valores Mobiliários
D. [in French report]	Recueil Dalloz
D. [in Greek report]	Diki
D [in Scottish report]	Dunlop's Session Cases
D. [year] Ch. [in French report]	Recueil Dalloz Chroniques
D. Aff.	Dalloz affaires
DB	Das Betrieb
DCB	Dutch Central Bank ( <i>De Nederlandse Bank</i> )
Def.	Répertoire du notariat Defrénois
DepG	Depotgesetz
Dir. comm. int.	Il diritto del commercio internazionale
Dir. fall.	Il diritto fallimentare
Diss.	dissertation
DJT	Deutscher Juristentag
DKK	Danish kroner
d. lgs.	decreto legislativo (legislative enactment)
DLR	Dominion Law Reports (Canada)
DNotZ	Deutsche Notar-Zeitschrift Verkündungsblatt der Bundesnotarkammer
Doc. Parl.	Parliamentary Documents
DP	Dalloz Périodique
DSII	Decree on the Supervision of Investment Institutions ( <i>Besluit Toezicht Beleggingsinstellingen</i> )
DSST 1995	1995 Decree on the Supervision of the Securities Trade ( <i>Besluit Toezicht Effectenverkeer 1995</i> )

DULJ (ns)	Dublin University Law Journal (new series)
ECOJ	European Community Official Journal, two parts (L and C)
ecolex	Fachzeitschrift für Wirtschaftsrecht
Edin. LR	Edinburgh Law Review
EEA	European Economic Area
E. Emp. D.	Epitheorisis tou Emporikou Dikaiou
EEN	Epitheorisis Hellinon Nomikon
Ef.A	Efatio Athinon
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch
Ef.	Greek Court of Appeal
Enc. dir.	Enciclopedia del diritto
EPEY	Company Providing Investment Services (Greece)
Eq. Cas. Abr.	Equity Cases Abridged (reprinted in ER)
ER	English Reports
ERPL	European Review of Private Law
EU	European Union
Europa e dir. priv.	Europa e diritto privato
EvBl	Evidenzblatt der Rechtsmittelentscheidungen in Österreichische Juristen-Zeitung
EWHC	England and Wales High Court Cases
EzA	Entscheidungssammlung zum Arbeitsrecht
F	Fraser's Session Cases
F.2d	Federal Reporter, Second series (US)
Fallimento	Il fallimento
FCP	fonds commun de placement
FEfA	Athens Court of Appeal for Tax Litigation
FFFS	Finansinspektionens författnings samling
FLR	Family Law Reports
Foro it.	Il foro italiano
FRMSST 2002	Further Regulations on Market Conduct Supervision of the Securities Trade 2002 ( <i>Nadere regeling gedragstoezicht effectenverkeer 2002</i> )
FRSST 1999	Further Regulations on the Supervision of the Securities Trade ( <i>Nadere regeling toezicht effectenverkeer 1999</i> )



FRST 2002	Further Regulations on Prudential Supervision of the Securities Trade 2002 ( <i>Nadere regelgeving prudentieel toezicht effectenverkeer 2002</i> )
FSA	Financial Services Authority
FSMA	Financial Services and Markets Act 2000
FSR	Fleet Street Reports
FTH	Fondos de Titulización Hipotecaria
Gaz. pal.	La gazette du palais
Ges RZ	Der Gesellschafter
Giur. comm.	Giurisprudenza commerciale
Giur. it.	La giurisprudenza italiana
Giust. civ.	La giustizia civile
Gmb. H.	Gesellschaft mit beschränkter Haftung
GRAMF	General Regulation of the AMF
GWD	Green's Weekly Digest
Harm.	Harmenopoulos
HC	High Court (Ireland)
Hellin.Dni	Helliniki Dikaiosi
HGB	Handelsgesetzbuch
HKC	Hong Kong Cases
HL	Judicial Committee of the House of Lords
HR	Hoge Raad
Hrsg.	Herausgeber
HS	Handelsrechtliche Entscheidungen
IATA	International Air Transport Association
ICLQ	International and Comparative Law Quarterly
I. d. F.	in der Fassung
IIA	Investment Intermediaries Act
ILRM	Irish Law Reports Monthly
ILTR	Irish Law Times Reports
InvFG	Investmentfondsgesetz
IR [in French report, with D.]	Recueil Dalloz Informations Rapides
IR [in Irish report]	Irish Reports
ISP	Instituto dos Seguros de Portugal
JBl	Juristische Blätter
J.comp. Leg. and Int.L.	Journal of Comparative Legislation and International Law

JCP éd. E	La Semaine Juridique édition entreprise et affaires
JDI	Journal du droit international
Jdt	Journal des Tribunaux
JherJB	Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts
J. Int'l Tr. Corp. Plan.	Journal of International Trusts and Corporate Planning
JO	Journal Officiel du Grand-Duché de Luxembourg
JOR	Jurisprudentie ondernemingsrecht
JTCP	Journal of International Trust and Corporate Planning
JW	Juristische Wochenschrift
JZ	Juristen-Zeitung
KAGG	Gesetz über Kapitalanlagegesellschaften of 14 January 1970
KB	King's Bench Division Reports
KKO	Korkein oikeus
KO	Konkursordnung
KSchG	Konsumentenschutzgesetz
KWG	Gesetz über das Kreditwesen of 11 July 1985
LC	Lord Chancellor
Ld. Raym.	Lord Raymond's Reports (reprinted in ER)
lett.	letter
Lit.	litera
Lloyd's Rep.	Lloyd's Law Reports
Lloyd's Rep. Banking	Lloyd's Law Reports (Banking Cases)
LMV	Ley del Mercado de Valores
LQR	Law Quarterly Review
LRI	Law Reports (Ireland)
LSA	Ley de Sociedades Anónimas
M	Macpherson's Session Cases
Mass. giur. lav.	Massimario di giurisprudenza del lavoro
MDR	Monatsschrift für Deutsches Recht
MFPA	Athens Court of First Degree for Tax Litigation
MietSlg	Mietrechtliche Entscheidungen
MPA	Athens Court of First Degree

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mwN	mit weiteren Nachweisen
NCL Rev.	North Carolina Law Review
NCPC	Nouveau code de procédure civile
Necigef	Nederlands Centraal Instituut voor Giraal Effectenverkeer BV
NJ	Nederlandse jurisprudentie
NJA	Nytt Juridiskt Arkiv
NJW	Neue Juristische Wochenschrift
NJW-RR	NJW-Rechtsprechungs-Report Zivilrecht
NoB	Nomikon Vima
Non-UCITS	collective investment schemes other than UCITS
NotC	Código do Notariado
NSWLR	New South Wales Law Reports (Australia)
NV	Naamloze Vennootschap
Nw. U. L. Rev.	Northwestern University Law Review
NYU L. Rev.	New York University Law Review
NZ	Österreichische Notariats-Zeitung
NZA	Neue Zeitschrift für Arbeits- und Sozialrecht – Zweiwochenschrift für die betriebliche Praxis
ÖBA	Österreichisches Bankarchiv
obs.	observations
OGH	Oberster Gerichtshof
Oxford J. Leg. Stud.	Oxford Journal of Legal Studies
Pas.	Pasicrisie luxembourgeoise
PC	Judicial Committee of the Privy Council
PIF	Pensionsinvestmentfonds
PPR	Plano de Poupança-Reforma
Prop.	Proposition (a government's bill presented to the Swedish parliament)
PSW	Pensioen- en Spaarfondsenwet
QB	Queen's Bench Division Reports
QBD	Queen's Bench Division
Quot. jur.	Quotidien juridique
R	Rettie's Session Cases
RAO	Rechtsanwaltsordnung
Rass. dir. civ.	Rassegna di diritto civile
RCDIP	Revue critique de droit international privé
r.d.	regio decreto

RD	Real Decreto
r.d.l	Regio decreto legge
Req	Chambre des Requêtees (Cour de Cassation)
Resp. civ. prev.	Responsabilità civile e previdenza
Rev. proc. coll.	Revue des procédures collectives
RG	Reichsgericht
RGBL	Reichsgesetzblatt
RGICSF	Regime General das Instituições de Crédito e das Sociedades Financeiras
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
Riv. dir. civ.	Rivista di diritto civile
Riv. dir. impresa	Rivista di diritto dell'impresa
Riv. dir. int. priv. proc.	Rivista di diritto internazionale privato e processuale
Riv. giur. sarda	Rivista giuridica sarda
Riv. soc.	Rivista delle società
RTD civ.	Revue trimestrielle de droit civil
RTD com.	Revue trimestrielle de droit commercial
Rz	Rundzahl
S	Sirey
SB	Securities Board of the Netherlands ( <i>Stichting Toezicht Effectenverkeer</i> )
SC [in Irish report]	Supreme Court
SC [in Scottish report]	Session Cases
SCC	Supreme Court of Canada
Sch. & Lef.	Scholes & Lefroy Law Reports
SchVG	Gesetz betreffend die gemeinsamen Rechte der Besitzer von Schuldverschreibungen of 4 December 1899
SCR	Supreme Court Reports (Canada)
Sel. Cas. T. King	Select Cases in the Time of Lord Chancellor King (reprinted in ER)
SGTA 1977	1977 Securities Giro Administration and Transfer Act ( <i>Wet Giraal Effectenverkeer 1977</i> )
SI	Statutory Instrument
SICAV [in French and Luxembourg reports]	société d'investissement à capital variable

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SICAV [in Italian report]	società di investimento a capitale variabile
SICAV [in Portuguese report]	sociedade de investimento de capital variável
SLT	Scots Law Times
SMEs	small and medium-sized enterprises
Soc	French Cour de Cassation, Social Chamber
Società	Le società
Somm.	Sommaires (part of Revue Dalloz)
SPV	special purpose vehicle
Stan. L. Rev.	Stanford Law Review
Stbl.	Staatsblad
Str.	Staatscourant
STJ	Supremo Tribunal de Justiça
STS	Sentencia del Tribunal Supremo
STSJ	Sentencia del Tribunal Supremo de Justicia
SZ	Entscheidungen des österreichischen Obersten Gerichtshofes in Zivil- (und Justizverwaltungs-) sachen
T.	Tribunale
T & AT	Trusts e attività fiduciarie
TA	Tribunal d'Arrondissement
Tex. L. Rev.	Texas Law Review
TR Évora	Tribunal da Relação de Évora
Trib.	Tribunale
Trib. Arb.	Tribunal Arbitral
Tr/Trs	Trustee/Trustees
Trust L. Int.	Trust Law International
UCITS	Undertakings for Collective Investment in Transferable Securities
VABEF	Vereenvoudigde Administrative en Bewaring Effecten
Vand. J. Trans. L.	Vanderbilt Journal of Transnational Law
VersR	Versicherungsrecht, Juristische Rundschau für die Individualversicherung
Ves.	Vesey's Reports (reprinted in ER)
Vita not.	Vita notarile
WLR	Weekly Law Reports
WM	Zeitschrift für Wirtschafts- und Bankrecht, Wertpapier-Mitteilungen

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WTLR	Wills and Trusts Law Reports
Z	Zahl, Ziffer
ZBB	Zeitschrift für Bankrecht und Bankwirtschaft
ZPO	Zivilprozessordnung
Zeup	Zeitschrift für Europäisches Privatrecht