SHAREHOLDER PROTECTION IN CLOSE CORPORATIONS

Close corporations, which are legal forms popular with small and medium enterprises, are crucial to every major economy’s private sector. However, unlike their ‘public’ corporation counterparts, close corporation minority shareholders have limited exit options, and are structurally vulnerable in conflicts with majority or controlling shareholders. ‘Withdrawal remedies’ – legal mechanisms enabling aggrieved shareholders to exit companies with monetary claims – are potent minority shareholder protection mechanisms.

This book critically examines the theory and operation of withdrawal remedies in four jurisdictions: the United States, the United Kingdom, Germany, and Japan. Developing and applying a theoretical and comparative framework to the analysis of these jurisdictions’ withdrawal remedies, this book proposes a model withdrawal remedy that is potentially applicable to any jurisdiction. With its international, functional, and comparative analysis of withdrawal remedies, it challenges preconceptions about shareholder remedies and offers a methodology for comparative corporate law in both scholarship and practice.

Alan K Koh is Assistant Professor of Business Law at Nanyang Business School, Nanyang Technological University (Singapore), where he teaches corporate law and governance. He earned his Dr jur at Goethe University Frankfurt and is an Advocate and Solicitor of the Supreme Court of Singapore. His research focuses on comparative law and corporate law and governance in Asia. He is an elected member of the International Academy of Comparative Law.
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Corporate law and financial market regulation have major implications for how the modern economy is organized and regulated and for how risk is managed and distributed – domestically, regionally and internationally. This Series seeks to inform and lead the vibrant scholarly and policy debate in this highly dynamic area by publishing cutting-edge, timely and critical examinations of the most pressing and important questions in the field.

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Shareholder Protection in Close Corporations

THEORY, OPERATION, AND APPLICATION OF SHAREHOLDER WITHDRAWAL

ALAN K. KOH

Nanyang Technological University
To my father, who taught me how (and how not) to learn, teach, and live
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Preface

In close relationships, oppression, discord, and injustice are ubiquitous. Regrettably, no one person, much less a single book, can address that. This Book’s goal is necessarily modest: to show how shareholder oppression and conflict in close corporations may be resolved by withdrawal. My substantive arguments and proposals are aimed primarily at persons working in corporate law (whether scholars, practitioners, or policymakers). But this Book’s very form itself is an argument about comparative law methodology. It shows how comparative law – shorn of the interminable debates plaguing it – may be used as a practical tool for a first serious and coherent scholarly project on a classic legal problem that is executable by a single, determined jurist armed with time and the necessary language proficiencies. In other words, this Book is also intended as a working model of how to do comparative law seriously – and hopefully, to its intended audience, reasonably well – in English.
Acknowledgements

Every scholar begins their career heavily in scholarly debt. Happily, publishing a Book – and writing this section – is a way to acknowledge this, even if such debts only keep mounting. This Book began life as a scholarly project sparked by professional tribulations shortly after earning my first degree at the Faculty of Law, National University of Singapore (NUS Law). Along the way, it became a dissertation that was accepted for the award of the degree of Dr jur (Doctor of Law) (summa cum laude) by the Goethe University Faculty of Law in July 2019. I am deeply in debt to my Betreuer, Professor Moritz Bälz, for accepting me as Doktorand that blazing summer day in 2015, for his patience and candid feedback over the four years and three jobs it took to finish, and (together with Frau Marion Lewald) for shepherding me through an unfamiliar if rational and efficient administrative process. I am also grateful to Professor Tobias Tröger for graciously committing to act as Zweitungstachter (examiner) for a foreigner of strange background and for his critical comments on key parts of the dissertation, and to Professor Andreas Cahn for chairing my Disputation and for his feedback.

Next, I am deeply grateful to my commissioning editor, Joe Ng of Cambridge University Press, for his support and understanding (not least for the inevitable delays), to the anonymous referees who provided constructive feedback, to the International Corporate Law and Financial Market Regulation series editors for accepting this Book, and to Gemma Smith for her assistance on many matters. I would also like to thank James Baker, Helen Kitto, Maureen MacGlashan, Lee Xin Li, and many others without whom a book would be just a manuscript.

No thanks would suffice for Dan Puchniak, who has looked out for me since my undergraduate days at NUS Law, launched my fledgling scholarly career not once but twice, and who will always be the leading role model in my life as a teacher, scholar, and deeply decent human being. Kevin Tan, Takahashi Eiji, Harald Baum, Nakahigashi Masafumi, Philipp Maume, Ernest Lim, Teo Keang Sood, Mike Klausner, Gary Bell, and Tan Cheng Han have too at critical times offered their encouragement and support, for which I will always be grateful.
Scholarly colleagues who have kindly provided feedback on parts of this Book or other works based on the project material include, in no particular order, Christian Hofmann, Wakita Masanori, Goto Gen, Kim Kon-Sik, Curtis Milhaupt, Shishido Zenichi, Matsumoto Nobuko, Tokutsu Akira, Harata Hisashi, Chen Jianlin, Marc Dernauer, Stacey Steele, Vivien Chen, Akshaya Kamalnath, Chun Kyung-hoon, Robert Thompson, Martin Gelter, Afra Afsharipour, Robert Merkin, and Takahashi Eiji. I am grateful to Kato Akemi, Goto Kiwamu, and Katayama Shino for their kind assistance with obtaining access to Japanese legal materials, to Ng Wei Siang and Lim Jia Ren for their assistance with proofreading, and to Chong Shouyu for able research assistance.

To my contemporaries and erstwhile NUS Law colleagues Tan Zhong Xing, Justin Tan, and Kenneth Khoo: my thanks for the comradeship, despite our political and scholarly differences, in both good times and bad. My former Centre of Asian Legal Studies (CALS) colleagues Ayesha Wijayalath, Chong Siew Men, Shazny Ramlan, Dian Shah, Bo Tiojanco, Margaret Ang, Alexandria Chan, Shirley Mak, Finna Wong, and others also provided a sense of community that kept me going during hard times. The long-suffering librarians of NUS Law’s C.J. Koh Law Library also deserve thanks for their patient support. I am also grateful to the senior scholars who, out of concern for me, tried to dissuade me from writing this Book at all – happily, their fears did not come to pass. My apologies to anyone whom I have inadvertently omitted to acknowledge.

Parts of the research for this Book could not have been performed without the support of institutions across the world. I acknowledge – with gratitude – the generous financial support from my previous employers CALS (Ad Hoc Grants) and NUS Law (Faculty Research and Conference Fund/Faculty Conference Fund) that funded in whole or part research visits, presentations, or conferences at the University of Tokyo, Max Planck Institute for International and Comparative Private Law (MPI-Privatrecht), University of New South Wales, Osaka City University (now Osaka Metropolitan University), La Trobe University, Case Western Reserve University, Seoul National University, Hitotsubashi University, the University of Melbourne, and Goethe University Frankfurt. I also thank the Max Planck Society for funding my Visiting Fellowship at MPI-Privatrecht in summer 2016, and Seoul National University for arranging and funding my visit in November 2019. I also benefited from presenting and discussing this work in Japanese at the 428th Meeting of the Kansai Business Law Study Group in February 2021.

To my current employer, the Division of Business Law, Nanyang Business School (NBS), Nanyang Technological University (NTU), the Head of Division Anil Samtani, and my colleagues (especially my fellow AC2302 Company Law and Corporate Governance instructors Joyce Lee and Fernandez Navprakash), I am grateful for a largely peaceful and supportive work environment (except for the disruptive COVID-19 pandemic) in which I could complete this Book. My NBS AC2302 students, who are a joy to teach, have been patiently understanding of – and
even amused by – my oddly specific and inexplicable enthusiasm for shareholder oppression as a topic. Research funding from the NTU Start-Up Grant 04INS000773C300 is gratefully acknowledged for, inter alia, supporting my attendance at a conference at Monash Business School, purchase of scholarly resources, and employment of a research assistant. This research is also supported by the Ministry of Education, Singapore, under its Academic Research Fund Tier 1 (04MNP001989C300).

With one exception, my immediate family never quite understood what I was doing and why, but my parents tolerated with minimal complaint my constant presence at home before a screen surrounded by precariously balanced towers of paper. For their tolerance and patience I am grateful. An educator both inside and outside the public school system for most of his life, my late father Koh Joon Seng was also my first teacher, and in a roundabout way inspired me to take on the path of not just a scholar, but also an educator like he was. This Book, which was completed shortly after he left us, is dedicated to him. Among the living, my deepest gratitude is to my constant companion and now wife, Samantha, for everything – hugs, handcrafted caffeinated beverages, reading countless drafts of this Book in various stages of despair and completeness, supporting me and my mother through my father’s final days, and the unshakeable belief that this Book would against all odds someday see the light of day. To her I owe everything.

This Book draws on papers that have received the American Society of Comparative Law Younger Comparatists Committee’s Colin Picker Prize in Comparative Law (2018), the Asian Law Institute’s Asian Law Junior Faculty Workshop Best Paper Prize (2019), and a commendation by the Governance Institute of Australia at the 2020 Corporate Law Teachers Association Annual Conference. Parts of Chapters II and VII build on material originally published as Alan K. Koh, ‘Shareholder Protection in Close Corporations and the Curious Case of Japan: The Enigmatic Past and Present of Withdrawal in a Leading Economy’ (2020) 53(4) Vanderbilt Journal of Transnational Law 1207–64. I gratefully acknowledge Vanderbilt University Law School and the editors of the Vanderbilt Journal of Transnational Law for granting permission to incorporate published material into this Book.

I have attempted to state the laws of the various jurisdictions touched on as they were available to me as of the end of 2020 to early 2021, although (fittingly and usually unavoidably for most comparative works) due to limitations in accessibility to resources greatly exacerbated by the COVID-19 pandemic, the laws of Germany and Japan are mostly stated as of 2017–18 with only partial updates since. Errata and updates, if any, will be available at my website (www.alankkoh.com) or SSRN page (http://ssrn.com/author=1855690).
<table>
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<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>A; A2d; A3d</td>
<td>Atlantic Reporter 1st/2nd/3rd series (West)</td>
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<tr>
<td>AB</td>
<td>Aktiebolag</td>
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<tr>
<td>AC</td>
<td>Appeal Cases</td>
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<tr>
<td>AD2d; AD3d</td>
<td>New York Reports Appellate Division, 2nd/3rd series</td>
</tr>
<tr>
<td>AG</td>
<td>Aktiengesellschaft</td>
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<tr>
<td>All ER</td>
<td>All England Law Reports</td>
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<tr>
<td>ann.</td>
<td>annotated</td>
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<tr>
<td>AnnCalCorpCode</td>
<td>West's Annotated California Corporations Code</td>
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<tr>
<td>AppCt</td>
<td>Court of Appeals; Appellate Court; Appeals Court</td>
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<td>AppDiv</td>
<td>Appellate Division</td>
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<tr>
<td>BB</td>
<td>Betriebs-Berater</td>
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<tr>
<td>BCC</td>
<td>British Company Cases</td>
</tr>
<tr>
<td>BCLC</td>
<td>Butterworths Company Law Cases</td>
</tr>
<tr>
<td>BGB</td>
<td>Bürgerliches Gesetzbuch</td>
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<tr>
<td>BGBi</td>
<td>Bundesgesetzblatt</td>
</tr>
<tr>
<td>BGHZ</td>
<td>Entscheidungen des Bundesgerichtshofes in Zivilsachen</td>
</tr>
<tr>
<td>BR</td>
<td>West's Bankruptcy Reporter</td>
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<tr>
<td>Bt</td>
<td>beteti társasag</td>
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<tr>
<td>BT-Drs</td>
<td>Bundestagdrucksache</td>
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<tr>
<td>BV</td>
<td>Besloten vennootschap</td>
</tr>
<tr>
<td>c.; ch.; Ch.</td>
<td>chapter of a book; a statute</td>
</tr>
<tr>
<td>CA</td>
<td>Court of Appeal (may differ by context but usually England and Wales)</td>
</tr>
<tr>
<td>CalApp4th; CalApp5th</td>
<td>California Appellate Reports, 4th/5th series</td>
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<tr>
<td>CalRptr2d; CalRptr3d</td>
<td>California Reporter, 2nd/3rd series</td>
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<tr>
<td>CB</td>
<td>Cumulative Bulletin</td>
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<tr>
<td>CDCal</td>
<td>United States District Court for the Central District of California</td>
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</table>
## List of Abbreviations

cf. 
*confer/conferatur* (compare)
CFR 
Code of Federal Regulations
Ch 
The Law Reports, Chancery Division series (England and Wales); Chancery Division, High Court of Justice of England and Wales (as part of neutral citation)
ChD 
Chancery Division, High Court of Justice of England and Wales
1st/2nd/...Cir 
United States Court of Appeals for the 1st/2nd/...Circuit; (Louisiana) Court of Appeal, 1st Circuit
Co. 
Company
Comp. 
Compiled
Corporation
CSOH 
Outer House of the Court of Session (Scotland) (neutral citation)
Ct 
Court
CtApp 
Court of Appeals; Court of Appeal
Cth 
Commonwealth (Australia – federal)
D__ 
District (United States District Court for __ District)
DB 
*Der Betrieb*
DC 
District of Columbia
Del 
Delaware
DelCh 
Court of Chancery of Delaware
DGCL 
Delaware General Corporation Law
Dist. 
District
Div. 
Division (of the Inner House of the Court of Session (Scotland))
DLLCA 
Delaware Limited Liability Company Act
EBOR 
*European Business Organization Law Review*
ECFR 
*European Company & Financial Law Review*
ECR 
European Court Reports
ed.; eds. 
editor; editors
ed. 
edition
...Edw7 
King Edward VIII (years of reign)
EEC 
European Economic Community
e.g. 
*exempli gratia* (for example)
et al. 
and others
et seq. 
and what follows
EU 
European Union
EWCA Civ 
Court of Appeal of England and Wales (Civil Division) (neutral citation)
EWHC ... (Ch) 
High Court of Justice of England and Wales (Chancery Division) (neutral citation)
List of Abbreviations

EWHC . . . (Comm) High Court of Justice of England and Wales (Commercial Court) (neutral citation)
F; F2d; F3d Federal Reporter 1st/2nd/3rd series (West)
f.; ff. folio (on the (next) page(s))
fig. figure
Fla Florida
fn.; fns. footnote(s) (usually referring to a footnote in the cross-referenced text)
FSupp Federal Supplement (West)
Ga Georgia
GenG Genossenschaftsgesetz (Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften)
GK Gōdō Kaisha
GmbH Gesellschaft mit beschränkter Haftung
GmbHG Gesetz betreffend die Gesellschaften mit beschränkter Haftung
GmbH-Rundschau
Hare Hare’s Reports (English Reports)
HB House Bill
HGB Handelsgesetzbuch
HKC Hong Kong Cases
HKCA Hong Kong Court of Appeal
HKCFA Hong Kong Court of Final Appeal
HKL RD Hong Kong Law Reports and Digest
HL House of Lords (UK)
IH Inner House of the Court of Session (Scotland)
Ill Illinois
Ill2d Illinois Reports, 2nd series
IllApp3d Illinois Appellate Court Reports, 3rd series
Inc. Incorporated
Ind Indiana
IRC Internal Revenue Code (US)
IRS Internal Revenue Service
ibid. ibidem (in the same place)
i.e. id est (in other words)
J Judge/Justice (United States); Justice (common law jurisdictions generally)
JCLS Journal of Corporate Law Studies
Kaishahō Kaisha Hō [Companies Act] (Japan)
Kan Kansas
KanApp2d Kansas Court of Appeals Reports, 2nd series
kft korlátolt felelősségű társaság
List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
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<tr>
<td>KG</td>
<td>Kommanditgesellschaft</td>
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<tr>
<td>KGaA</td>
<td>Kommanditgesellschaft auf Aktien</td>
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<tr>
<td>KK</td>
<td>Kabushiki Kaisha</td>
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<tr>
<td>KMU</td>
<td>kleine und mittlere Unternehmen</td>
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<td>L</td>
<td>law; laws</td>
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<td>La</td>
<td>Louisiana</td>
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<td>LG</td>
<td>Landgericht</td>
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<tr>
<td>LJ</td>
<td>Lord Justice/Lady Justice; Law Journal</td>
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<tr>
<td>LLC</td>
<td>Limited Liability Company</td>
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<tr>
<td>LRev</td>
<td>Law Review</td>
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<tr>
<td>LMCLQ</td>
<td>Lloyd's Maritime and Commercial Law Quarterly</td>
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<tr>
<td>LQ</td>
<td>Law Quarterly</td>
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<tr>
<td>LQR</td>
<td>Law Quarterly Review</td>
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<tr>
<td>Ltd</td>
<td>Private Limited Company (UK); Public Limited Company (Singapore)</td>
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<tr>
<td>Mass</td>
<td>Massachusetts; Massachusetts Reports</td>
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<td>MassLRptr</td>
<td>Massachusetts Law Reporter</td>
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<tr>
<td>MBCA</td>
<td>Model Business Corporation Act</td>
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<td>Md</td>
<td>Maryland; Maryland Reports</td>
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<tr>
<td>Md App</td>
<td>Maryland Appellate Reports</td>
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<tr>
<td>MdSpecApp</td>
<td>Maryland Court of Special Appeals</td>
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<td>Mich</td>
<td>Michigan; Michigan Reports</td>
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<td>Minn</td>
<td>Minnesota</td>
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<td>Minshû</td>
<td>Saïkō Saibansho Minji Hanreishû</td>
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<tr>
<td>Misc 2d/3d</td>
<td>New York Miscellaneous Court Reports, 2nd/3rd series</td>
</tr>
<tr>
<td>MLR</td>
<td>Modern Law Review</td>
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<td>Mo</td>
<td>Missouri</td>
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<td>MoMiG</td>
<td>Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen</td>
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<td>Mont</td>
<td>Montana; Montana Reports</td>
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<td>n.; nn.</td>
<td>note(s) (usually referring to another footnote within this Book but also for sources using endnotes/non-footnotes)</td>
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<tr>
<td>NC</td>
<td>North Carolina</td>
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<tr>
<td>NCAp</td>
<td>North Carolina Court of Appeals Reports</td>
</tr>
<tr>
<td>NCCUSL</td>
<td>National Conference of Commissioners on Uniform State Laws</td>
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<tr>
<td>ND</td>
<td>North Dakota (state and neutral citation)</td>
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<tr>
<td>NE2d; NE3d</td>
<td>North Eastern Reporter, 2nd/3rd series (West)</td>
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<td>Neb</td>
<td>Nebraska; Nebraska Reports</td>
</tr>
<tr>
<td>Nev</td>
<td>Nevada; Nevada Reports</td>
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</table>
List of Abbreviations

NI Northern Ireland
NJ New Jersey; New Jersey Reports
NJSuper New Jersey Superior Court Reports
NJW Neue Juristische Wochenschrift
NJW-RR Neue Juristische Wochenschrift Rechtsprechungs-Report
No. number
NM New Mexico; New Mexico Reports
NTA Kokuzei-chō [National Tax Agency] (Japan)
NW; NW2d North Western Reporter, 1st/2nd series (West)
NY; NY2d; NY3d New York; New York Reports, 1st/2nd/3rd series
NYBCL New York Business Corporation Law (McKinney)
NYLLCL New York Limited Liability Company Law (McKinney)
NYS2d; NYS3d West’s New York Supplement, 2nd/3rd series
NZG Neue Zeitschrift für Gesellschaftsrecht
NZLR New Zealand Law Reports
OH Outer House of the Court of Session (Scotland)
OHG offene Handelsgesellschaft
OLG Oberlandesgericht
Or Oregon; Oregon Reports
OrApp Oregon Reports, Court of Appeals
P; P2d; P3d Pacific Reporter 1st/2nd/3rd series (West)
Pa Pennsylvania
PA Public Act (US)
para. paragraph
PL Public Law (US)
plc. Public Limited Company (UK)
Pte Ltd Private Limited Company (Singapore)
Pty Ltd Proprietary Limited Company (Australia)
PULLCA Prototype Limited Liability Company Act
QC Queen’s Counsel
r.; rr. rule(s)
RSC Revised Statutes of Canada
Rdn Randnummer
Re. . . . in the matter of . . . (common law cases)
Rev. Revised
RG Reichsgericht
RGBl Reichsgesetzblatt
RGZ Entscheidungen des Reichsgerichts in Zivilsachen
RI Rhode Island
RULLCA Revised Uniform Limited Liability Company Act
s.; ss.; § section(s)
S Seite
List of Abbreviations

SB  Senate Bill
SC  South Carolina; South Carolina Reports
SGC Supreme Court of Canada (neutral citation)
Scot Scotland
SCR Supreme Court Reports (Canada)
SE Societas Europaea
SE2d South Eastern Reporter (West), 2nd series
SGCA Singapore Court of Appeal (neutral citation)
Shōhō Shōhō [Commercial Code] (Japan)
SI Statutory Instrument
SME small and medium enterprise
SLR Singapore Law Reports
SLT Scots Law Times
So3d Southern Reporter, 3rd series (West)
SpruchG Spruchverfahrensgesetz (Gesetz über das gesellschaftsrechtliche Spruchverfahren)
Stat. Statutes
SupCt Supreme Court
Super Superior Court
SW2d; SW3d South Western Reporter, 2nd/3rd series (West)
tbl. table
Tenn Tennessee
Tex Texas
UG Unternehmergesellschaft
UK United Kingdom of Great Britain and Northern Ireland
UKPC Privy Council of the UK (neutral citation)
ULLCA Uniform Limited Liability Company Act
USA/US United States of America
US United States Reports
US-CC US-Close Corporation
USCA United States Code Annotated (West)
... v. ... against (common law cases)
Va Virginia; Virginia Reports
VC Vice-Chancellor (England and Wales; Delaware)
... Vic Queen Victoria (years of reign)
VLR Victorian Law Reports (Victoria, Australia)
vol. volume
Wash Washington
Wash2d Washington Reports, 2nd series
Washington Appellate Reports
Wheat Wheaton (volume of United States Reports by Henry Wheaton)
List of Abbreviations

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<td>WL</td>
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