Index

Abrams, H. 156
accounting, capital account see capital accounts in limited liability companies and partnerships, basic capital account accounting
accounting firm’s liability for misleading financial reports, Taiwan 458–60
Adams, E. 292, 293, 365
Afsharipour, A. 429–46
agency
external, and binding the firm see common-law perspectives on binding the firm, and external agency
and liability, India 439
power, China 403
Aizawa, T. 376
Albert, S. 365
Alchian, A. 48
Alexander, G. 279
Alexander, K. 368, 369
alternative entities see individual countries; limited liability headings; partnerships
Altman, P. 11, 23, 24
Anderson, E. 45
“apparent authority” doctrine 84, 87–8, 91
Ashforth, B. 45, 46
asset protection limited liability companies, attacking 129–44
affirmative asset partitioning 129–30
bankrupt member’s rights 134
bankruptcy law 133–6, 144
charging order in non-business and single-owner LLCs 130–31
charging order in original partnership context 129–30
charging orders and transferee rights 129–33
contract rights 134
corporate salary payments to principal shareholders as disguised and non-deductible dividends 132
creative enforcement of charging orders 132
family LLCs and fraudulent transfer law 136
fraudulent transfer law 136–7, 144
fraudulent transfer law, transfer occurring before debt 137
levying on entire membership interest 133
management rights 131
personal performance exception and bankruptcy 135–6
statutory reform and choice of law 144
turnover orders 132
voting powers 134
asset protection limited liability companies, attacking, reverse veil piercing 137–43
asset transfers from owner to company 139–40
charging order remedy 139–40, 141–2
control and stakeholder equities 142–3
fraud and creditor knowledge 140–42
inadequate capitalization 142
involuntary creditors 141
non-debtor members and property protection 143
normal piercing grounds 138
shareholder or member’s debt, corporation or LLC liability for 138–9
veil piercing overview 137–8
assets
and estimated depreciation 171–2
“marked to market” 172, 177
securitization, business trusts 275
Taiwan partnerships 452–3
Axberg, R. 280–95
Ayres, I. 49, 50, 386
Babson, E. 255
Bainbridge, S. 108, 110
Baker, D. 171
Baldwin, S. 148
Bankman, J. 159
bankruptcy
counterparty financial distress see counterparty limited liability company’s financial distress, mitigating impact, bankruptcy law, asset protection 133–6, 144
member’s rights 134
UK partnership options 371
see also liquidations
Banks, R. 359, 364
bargaining
close corporations, Japan 377–8
complementarities between legal forms, Japan 385–6, 387
Partnerships, LLCs and alternative forms of business organizations

limitations, Delaware contractual freedom, end of unlimited 12
Bartlett, R. 387
Barzuza, M. 264
Becerra, M. 369
Belyayev, K. 414
benefit corporations and social enterprise law see state laboratories and social enterprise law, benefit corporations and benefit limited liability companies statutes 305
Berle, A. 16, 24
Berry, E. 357–73, 438
Bhattacharyya, S. 377
Bishop, C. 83, 85, 86, 88, 89, 93, 253, 263, 320, 322
Blackett-Ord, M. 359
Blair, M. 49
Blumberg, P. 100, 110
Borden, B. 147–67
Bork, D. 47, 49
Boxx, K. 47
Boyd, C. 107
Brakman Reiser, D. 255, 256
Branson, D. 41, 55–69, 339
Brazil, alternatives to corporate form of organization 471–9
Aliança contracts (projects requiring high investment) 474
bureaucracy problems 472
business association forms 475–7
business groups, contractual and factual 474 “business purpose test” and tax avoidance analysis 472
Civil Code 473
collaboration contracts 473–4
Commercial Code, current discussions 477–8
contractual forms 473–5
dissenters and exclusions 478
EIRELI (sole individual corporation structure) 477
investment funds 475, 476–8
liabilities in sociedade 475–6
private legal entities 475–7
profit distribution 475–6
sociedade 475–7
sociedade limitada (LTDA) 476–8
taxation 472
Brewer, C. 227–51, 253
Bromberg, A. 101, 214
Bruner, C. 264
Brunson, S. 162
Bugg-Levine, A. 261
Burdick, F. 74
Busch, D. 81
business organization law and family law 46–9
business registration, Taiwan 449, 450–51, 454
business termination constraints, UK 362–3
business trusts 268–79
Britain to Massachusetts 269–70
common law to statutory trusts 270–73
Delaware business trust statute 271–2
Employee Retirement Income Security Act (ERISA) 276
future research 278–9
Investment Company Act 271
liability of limited liability entities 103
Massachusetts trusts, advantages of 270, 273
origins 269–73
personal liability limitations 272
Securities and Exchange Commission (SEC) study 271
as separate legal entity 272
as special purpose entity (SPE) 275
Trust Indenture Act 274
trustees’ fiduciary duties of good faith and fair dealing 272
UK Bubble Act 269
business trusts, modern 273–8
asset securitization 275
pension and mutual funds 276–7
pooled asset management 276–7
pooled asset management, asset partitioning 277
pooled asset management, as Maryland corporations 277
property holding 274–5
risk management 275–6
tax advantages 277–8
Butler, W. 423, 425, 426
buyouts capital accounts in limited liability companies and partnerships 173–5, 178
see also mergers
Camargo, A. 471–9
Canada partnership tax system 161–3
U.S.-Canada tax treaty amendments 163–5
capital accounts in limited liability companies and partnerships 168–86
balance sheet and basic accounting principles 169
owners’ individual capital accounts 169
capital accounts in limited liability companies and partnerships, basic capital account accounting 170–75, 176, 178
assets and estimated depreciation 171–2
assets “marked to market” 172, 177
basic maintenance 170–75, 182
cash transactions 170–71
current distributions 175, 178
current versus liquidating distributions and buyouts, confusion over 174–5
equity accounts, mixture of contents 170–72, 175
liquidation of business 173–4, 182
liquidations and buyouts 173–5
loss sharing 173–4
misunderstandings and unintended consequences 173–5
negative account shock to service partner 173–4, 182–3
noncash assets and transfers 171–2
opposite-signed capital accounts 173–4
primacy of intent 170
services contributed by owner 172, 174
capital accounts in limited liability companies and partnerships, federal income tax significance 180–85
“at risk” rules 181
clarity in agreements, lack of 184–5
disregarded allocation, reallocation of 181–2
drafting challenges and strategies 184
“forced” allocation provisions 184
origins of binding tax rules 180–81
owner’s interest in firm, in accordance with 183–4
“passive loss” rules 181
“qualified income offset” 183
safe harbor regulations 182–3
Section 704(b) and ways to defend tax allocations among owners 180, 181–4
special allocations rules 180–81
Subchapter K 180
substantial economic effect and strict capital account observance 181, 182–3
capital accounts in limited liability companies and partnerships, statutory default rules 175–80
buyout provisions (RUPA) 178
Delaware Limited Liability Company Act 180
distributions before dissolution 179
limited liability companies 179
liquidating distributions and RUPA’s capital account reconciliation requirement 177–8
partnership liquidations 177
partnerships 175–8
Revised Uniform Limited Liability Company Act (RULLCA) 179
Revised Uniform Partnership Act (RUPA)
maintenance rules 176–7
set aside conditions 177
and small businesses 177
capital-oriented corporations, Russian alternatives see Russia, alternatives to capital-oriented corporations
care, fiduciary duty see fiduciary duty of care
Carey, S. 150
Carney, W. 149
Cary, W. 259
Case, M. 48
Cauble, E. 160
charging orders, asset protection limited liability companies 129–33, 139–40, 141–2
charitable uses
low-profit limited liability companies (L3Cs), “charitable or education purposes” 258
nonprofit see nonprofit and charitable uses of limited liability companies
Chernoff, D. 253
Child, J. 365
China, partnerships and partnership law 390–411
agency power 403
business scope 401, 402
contemporary China 396–401
contracting out 402
court cases 406–10
court cases, political factors, lack of 409
critical aspects 401–6
Cultural Revolution 393–4
damages remedies 405
default rules 402
definition 390
double-taxation of partnership investors 396
duty of loyalty 408
economic reform 394
FDI introduction and conditions 394, 399–400
fiduciary duties and fiduciary litigation 404–5, 408
foreign private equity funds 397, 400
foreign-invested partnership 398–401, 409
general partnership 397, 399, 401, 403–5, 408
General Principles of the Civil Law of the PRC (GPCL) 394, 395, 396, 408
history and evolution 392–6
immutable rules 402
joint operation enterprises 394
legal “partnership” adjudication 407–8
legal personality and SAIC registration 401–2
limited liability 403–4

Robert W. Hillman and Mark J. Loewenstein - 9781783474400
Downloaded from Elgar Online at 05/01/2019 11:47:40PM via free access
limited partnership 397–8, 399, 401, 403, 404, 405, 408
liquidations 395, 405
management rights 402–3, 405
National Social Security Fund 400
partnership interest transferability 403
partnership registrations and registered capital 396–7
post-1904 extra-legal partnership norms 393
PRC Company Law 394, 398–9, 404
PRC National Development and Reform Commission (NDRC) 400
PRC Partnership Enterprise Law 395, 401–6, 408–9
PRC Partnership Enterprise Law, deficiencies 395–6
PRC State Administration of Industry and Commerce (SAIC) 395, 396, 398, 399, 401–2, 408, 409
pre-legalization partnership forms 392–3
private economy and capital contributions 401
profit distribution 407–8
qualified foreign institutional investor (QFII) program 400
Qualified Foreign Limited Partnership (QFLP) pilot initiative 392, 398, 399–401, 409
Reform and Opening to the Outside World program 394
special general partnership 398, 399, 401, 403, 404, 409
Su Qi v. Li Zhanfei 407–8
sub-national pilot programs 399–400
taxation 396, 401, 405–6
Chrisman, R. 14, 18, 147
Clark, R. 138
Clark, W. 254, 255
Clarke, D. 391, 395, 406, 408
Cleveland, S. 339, 340, 341
Cochran, S. 393
Collins, M. 243
common law
business entity governance 199
business trusts 270–73
counteracting arrest of 310
liability of limited liability entities 105–6, 108–9
common-law perspectives on binding the firm, and external agency 81–96
“apparent authority” doctrine 84, 87–8, 91
Delaware LLC statute 86, 88–9, 93–5
deligation permission 94–5
formal statutory reforms 90–93
freedom of contract principle 89–90
general partnership 82–3, 86
inherent agency power 85–6
limited liability company 86–90
manager-managed LLC 87, 91, 92
member-managed LLC 91, 92
non-partner agents 84–5
non-statutory solutions 93–5
North Carolina statute 92–3
operating agreements, impact of restrictions on authority in 87–90, 92
partnership authority 82–3
partnership positional power 83–5, 87, 90–92
potential solutions 90–95
Revised Uniform Limited Liability Company Act (RULLCA) 90–91, 93
self-dealing transactions 92
stickiness problems 93
tax classification for LLCs as partnerships 86
third parties dealing with a partner 82–3, 84, 87–9, 91, 92–3
Uniform Partnership Act 82–3, 84–5, 86, 87
compensation
corporate executives excessive pay packages, concerns over, Delaware 340
corporate salary payments to principal shareholders as disguised and non-deductible dividends 132
taxation 158–9
wage claims of employees’ liabilities 111–12
competition concerns, India, limited liability partnerships 432, 434, 436–7
Conaway, A. 104
collision of interest
Delaware, reintroduction of fiduciary concepts 65, 68
Japan, limited liability companies legislative policy 377–8, 384, 385
resolution, Delaware freedom of contract 30–31, 36
Conti, L. 202
contract drafting see drafting
contract rights, asset protection limited liability companies 134
contractual duty, Delaware, reintroduction of fiduciary concepts 55–6, 59–60, 65–7
contractual freedom
for corporations, lack of, Delaware 28–9
problems, Uniform Limited Liability Company Act (ULLCA) 316–17
contractual freedom, end of unlimited, and alternative entities, Delaware 11–27
bargaining limitations 12
contract evaluation concerns 12–13
Index 485

corporate opportunity doctrine, limiting risks posed by 14–15

corporate statutory requirements comparison 14–15
cost concerns of redrafting 17

Delaware General Corporation Law (DGCL) 14, 15, 16–17, 21, 22, 25
drafting problems 12–13
duty of loyalty as protection to passive investors in corporations and partnerships 12, 13, 19
efficiency and fairness balance 16–17
entity managers and investors, establishment of purely contractual relationship 15–16

equitable principles 13, 16
governing instruments’ investors 11–12
language and contractual prose difficulties 12–13, 16, 17, 19, 24, 27
managerial discretion 12
motivations for creating alternative entities 14–17

Special Approval mechanism 12
standard fiduciary defaults, need for 13
tax minimization aims and pass-through tax treatment 14, 17
waivers of all fiduciary duties 12
contractual freedom, end of unlimited, and alternative entities, Delaware, market standard for conflict-of-interest transactions 18–27
contractual duties, owed by and to whom 20
director and investor liabilities 22, 25–6
duty of good faith and fair dealing 25–6

familiarity illusion and surface-level standardization 18–19
governing fiduciaries and veil piercing patterns 21–4
gross negligence and indemnification provisions 21

indemnification and exculpation provisions 20–21

independent directors’ status 22–3

investor detriments 26–7
liability in subjective bad faith 19–21, 23–4
monetary damages liability and duty of care breach 23–4, 25, 27

publicly traded master limited partnerships (MLPs) 18–19
self-dealing transaction as fair to corporation

self-interest considerations 24–5, 26
contractual freedom and family business 40–51

arm’s-length deals, problems with 43, 45
business organization law and family law 46–9

contract law and adequate protection 42
contractual framework 41–2, 43
contractual challenges 45–7
divorce law implications 46, 47–8

equitable principles 43–4
implied covenant of good faith and fair dealing 41
judicial monitoring, importance of 42, 44, 49
limited liability companies, attraction of 40, 42–3

mergers and equitable principles 43–4
operating agreement creation 43
opportunism concerns 41, 42, 43–4

overlapping doctrine 46–7
overlapping values 45–6, 47

parties’ expectations, protection of 47–9
private ordering principles 48–9
relational aspects 42, 45–6
small-business investors 40

and social identity theory 45–6
status and control concerns 46

succession law 47

see also small businesses

corporal “gap fillers”, Delaware 347, 348–9

corvergence of unincorporated entity law, casual 319–35

ABA Revised Prototype LLC Act 330
casual, use of term 319
efficient uniformity, concerns over 322–3
governmental/admin provisions 324, 325, 327

and interstate business transactions 321
limited liability company internal affairs 324, 325, 327
name requirements 327, 333–4

NCCUSL, advice to committees on organizational laws 330, 332

NCCUSL model acts and uniformity 320–23, 326–7

NCCUSL, and state participation in drafting of uniform statutes 321–2

NCCUSL, and Uniform Limited Liability Company Act (ULLCA) 326
organizational laws, importance of keeping current 329–30
third party provisions 322, 324, 325, 326–7, 332–3
uniformity, arguments against 322–3
uniformity framework 319, 320–23
uniformity, reasons for 320–22

convergence of unincorporated entity law, casual, RULLCA
Partnerships, LLCs and alternative forms of business organizations

and “bad” case law, concerns about borrowing 331
certificate of formation requirement 332
consistency concerns 332
and consistency with states’ other unincorporated entity statutes 331
and cost savings created by convergence 331–2
dispute resolution concerns 333
state decisions, reasons for convergence 329–32
state decisions on use or variation from 328–34
state powers, concerns over maintenance of 333
state-specific variation from 324–6, 327
and states’ ability to cross-reference with other states 331
and states’ concerns about being left behind 330
use of familiar terminology 321, 322, 330
convergence of unincorporated entity law, casual, state LLC law 323–34
LLC Act committee members’ interviews, and reasons for state adoptions and variations 328–34
reasons for convergence with RULLCA 329–32
reasons for divergence from RULLCA 332–4
research study data 324–8
Cooney, K. 260
Corbin, A. 60
corporate law and freedom of contract, fundamental changes see fundamental changes in limited liability companies, path divergence and convergence, corporate law and freedom of contract corporate managers see management corporate opportunity doctrine, limiting risks posed by, Delaware 14–15
corporations as separate legal entities 100
counterparty limited liability company’s financial distress, mitigating impact 116–28
key issues 117–26
operating agreement as executory contract 120–21
planning, importance of 116–17
series LLC (multiple businesses under a common organizational umbrella) 126–8
series LLC (multiple businesses under a common organizational umbrella), assets and liabilities, substantive consolidation analysis 127–8
counterparty limited liability company’s financial distress, mitigating impact, bankruptcy
court enforcing prepetition contractual agreements between creditor and LLC 122–3
creditor blocking 119
creditor enforcing a charging order in 123–4
creditor filing involuntary bankruptcy against LLC 120
creditor pursuing non-debtor parties 124
language in operating agreement 118–19
LLC filing for 117–19
member’s bankruptcy affecting LLC and LLC’s creditors 124–6
Countryman, V. 120, 121
Crane, J. 148, 149
Crespi, G. 138
Cross, M. 371
Cuff, T. 152
Dagan, H. 43
Daines, R. 259–60
Dalley, P. 448
damages
monetary liability and duty of care breach, Delaware 23–4, 25, 27
remedies, China 405
Dammann, J. 323
Dawson, S. 127
Dean, S. 159, 256
Deards, E. 358
default duties, uncertainty surrounding, judicial power expansion in Delaware 343
default rules
argument (opt-in/opt-out of fiduciary duty), Delaware 56, 57, 59–60, 64–5, 66–7
capital accounts see capital accounts in limited liability companies and partnerships, statutory default rules China, partnerships and partnership law 402
separation/non-separation of ownership and management, Japan 376–7
Delaware
ad hoc harmonization 306, 309
business trust statute 271–2
contractual freedom, end of unlimited see contractual freedom, end of unlimited, and alternative entities, Delaware freedom of contract see freedom of contract for alternative entities in Delaware, reality of
judicial power expansion see judicial power expansion in Delaware
jurisdictional competition for corporation charts 260, 261–2, 263–4
LLC law 180, 194–5, 198–200
LLC statute, common-law perspectives on binding the firm 86, 88–9, 93–5
Series, liability of limited liability entities 104
Delaware, alternative entities, and reintroduction of fiduciary concepts 55–69
agreement drafting 64–7
conflict of interests 65, 68
contractual duty 55–6, 59–60, 65–7
contractual provisions superseding implied covenant 63
default rules argument (opt-in/opt-out of fiduciary duty) 56, 57, 59–60, 64–5, 66–7
Delaware Limited Liability Company Act 57–8, 60
directors’ personal liability 57–8, 68
elimination of fiduciary duties 57–9, 64–5
hedge funds 64–5, 67
judicial attitudes 58–9
loyalty breaches and litigation costs 58
Master Limited Partnerships (MLPs) 64–5, 67
mergers and deal protection measures 56–7
Paramount Communications v. QVC Network 55, 56–7
revenues and profits generation 60
Delaware, alternative entities, and reintroduction of fiduciary concepts, good faith and fair dealing contract 56, 58, 59, 60–62
agreement drafting 64–7
conduct breaching and not breaching 61–2
exercise of discretion 64
interpretation of 62–4
delegation permission, common-law perspectives on binding the firm 94–5
DeMott, D. 81–96
Demsetz, H. 48, 148
Dewan, S. 234
DiMatteo, L. 43
disclosure
and filing requirements, UK 370
obligations, India 440
dispute resolution
concerns, convergence of unincorporated entity law 333
and decision on duty of care, unincorporated entity 219–21
harmonization 309
Taiwan Code 453
dissenters’ rights 256, 259
dissolution
distributions before 179
fundamental changes in limited liability companies 195–6, 197–8
unincorporated entity see unincorporated entity, care and loyalty after dissociation from or dissolution and winding-up of partnership, Taiwan 457–8, 461
see also withdrawal procedure
Djelic, M. 368
Dodd, E. 269
Donn, A. 99–115
drafting
contract drafting improvements, Delaware 345–6
contract redrafting concerns, Delaware 12–13, 17
legislative drafting choices 201–2
unincorporated entity see unincorporated entity, care and loyalty after dissociation from or dissolution, drafting, need for careful
see also language
Drake, D. 45
Drozdova, N. 413
Dubler, A. 47
Dunn, W. 270
duties see fiduciary duties
Easterbrook, F. 79, 148, 369
education programs 310
Egashira, K. 375
Eisenberg, M. 48
Elliott, A. 156
Ely, B. 127
Emerson, J. 261
employee-owned enterprise, Russia 426–7
Empson, L. 368
entrepreneurs
foreign direct investment in entrepreneurial projects, India 433, 442–4
and sweat equity scheme, Japan 378, 379, 380
and vesting scheme, Japan 383
equity
accounts, mixture of contents 170–72, 175
claims, and freedom of contract, Delaware 30
foreign private equity funds, China 397, 400
holder voting rights, Delaware 31–3, 38
exit options
Japan see Japan, limited liability companies legislative policy, exit options
see also withdrawal procedure
expulsion options, law firm as industry model
282

family firms
bargaining position, Japan 377, 379, 382, 386–7
and contractual freedom see contractual freedom and family business
exit options, Japan 382, 386–7
fiduciary duties, Japan 384, 386
and fraudulent transfer law 136
see also small businesses
Fang, L. 392, 393, 394
Farnsworth, E. 18
Feetham, N. 104
Fenton, W. 271
fiduciary concepts, Delaware reintroduction see Delaware, alternative entities, and reintroduction of fiduciary concepts

fiduciary duty
China 404–5, 408
and contractual freedom, Delaware 15–17, 19
India 440
Japan see Japan, limited liability companies legislative policy, fiduciary duties
partners during and after dissolution and winding up of partnership 216–18
partners resigning and remaining after partner’s withdrawal 212–16
UK partnership options 366–7

fiduciary duty of care
contractual freedom, Delaware 23–4, 25, 27
Japan 383–4, 386, 387
Taiwan 453, 467
UK partnership options 366–7
unincorporated entity see unincorporated entity, care and loyalty after dissociation from or dissolution

fiduciary duty of good faith
corporate law and freedom of contract 199–200
UK partnership options 366

fiduciary duty of loyalty
breach of, Delaware 33–4
China, partnerships and partnership law 408
Japan 383–4, 386, 387
as protection to passive investors, Delaware 12, 13, 19
Taiwan 467
unincorporated entity see unincorporated entity, care and loyalty after dissociation from or dissolution
Field, H. 159
financial distress see counterparty limited liability companies financial distress, mitigating impact
Finch, V. 358
Fisch, J. 339, 340, 341, 350, 352
Fischel, D. 79, 148, 369
Fisher, S. 292
Flannigan, R. 268, 274
Fleischer, V. 159
flexible purpose corporation (FPC) statute 256, 257, 258–9, 262
Folk, E. 16
foreign direct investment 394, 399–400, 433, 442–4
foreign private equity funds, China 397, 400
foreign-invested partnership, China 398–401, 409
Frankel, T. 270–71, 272
Freedman, J. 358, 359
freedom of contract
common-law perspectives 89–90
and corporate law see fundamental changes in limited liability companies, path divergence and convergence, corporate law and freedom of contract
India 429–30, 435, 439
Japan 376, 379, 383–4, 387
nonprofit and charitable uses of limited liability companies 231
freedom of contract for alternative entities in Delaware, reality of 28–39
breach of fiduciary duty of loyalty 33–4
conflict of interest resolution 30–31, 36
contractual freedom for corporations, lack of 28–9
Delaware Limited Liability Company Act 29, 31, 35–6, 37–8
enforceability of operating agreement precluding judicial dissolution 30
equity claims 30
equity holder voting rights 31–3, 38
good faith negotiations 31–9
hedges, use of 29–32
implied covenant of good faith and fair dealing 34–6
judicial dissolution access 29–30
management majority written consent without prior notice 33
maximum effect concept 29
merger cases 32–3
narrow construction of an agreement 33–4
“Special Approval” consideration 36
Friedman, H. 40
Frost, S. 82, 89, 90, 91–2
fundamental changes in limited liability
companies, path divergence and
convergence 189–205
buysouts of member interests as non-
dissolution remedy 196
dissolutions 195–6
dissolutions, state variations 196
legislative drafting choices 201–2
legislative drafting choices, “junction box”
statutes 201–2
organizational documents, amendments to
191–2
Revised Prototype Limited Liability
Company Act (RPLLCA) 190, 191,
193, 195–6, 198
Revised Uniform Limited Liability
Company Act (RULLCA) 190, 191,
192–3, 195–6
Revised Uniform Partnership Act (RUPA)
196, 198
series LLC 190–91
vested property rights 200–201
vested property rights, state differences 200
fundamental changes in limited liability
companies, path divergence and
convergence, corporate law and freedom
of contract 197–200
contractual relations of the partners 198–9
customization of fiduciary duties 199–200
Delaware law 198–200
dissolution schemes 197–8
good faith and fair dealing 199–200
statutory and common law elements of
business entity governance 199
unanimous consent, move away from 197,
200–201
fundamental changes in limited liability
companies, path divergence and
convergence, mergers, conversions and
domestications 192–5
corporatization of fundamental change rules
194–5
Delaware’s LLC law 194–5
state variations 193–4
unanimous member consent requirements
194
fundamental policy changes, and
harmonization 315–16
Gazur, W. 305–6
general partnerships
China 397, 399, 401, 403–5, 408
common-law perspectives 82–3, 86
India 432, 438
law firm as industry model 290, 291, 292
liability of limited liability entities 101
Russia 412, 423–4
special general partnership, China 398, 399,
401, 403, 404, 409
Taiwan 450–58, 464, 468–9
UK 357–8, 360, 361, 363, 366, 367, 368,
370
Gerson, C. 184
Gertner, R. 49, 50, 386
Geu, T. 204, 220, 398
Gevurtz, F. 88, 129–44, 352
Gilbert, W. 99
Gillers, S. 293
Gilson, R. 49, 339
Goforth, C. 291, 321, 322, 331
Goldberg, D. 159
Golub, T. 184
good faith, fiduciary duty see fiduciary duty of
good faith
Gould, J. 271
Gravelle, J. 227, 228
Grayson, T. 269
Greenbaum, A. 293
Griffiths, A. 365, 369
Groschoff, D. 254
Grossman, N. 319–35
Gryta, T. 157
Gulati, G. 48
Gupta, A. 162
Haden, E. 156
Halloran, M. 378, 382, 383
Halpern, P. 275, 278
Hamilton, R. 21
Hanks, J. 100
Hanna, C. 155
Hansmann, H. 148, 272, 277, 279, 369
Haren, S. 359
Harman, T. 271
harmonization, rationalization and uniformity
299–318
ad hoc harmonization (Delaware) 306, 309
alternative approaches to harmonization
305–8
“benefit corporation” statutes 305
benefits and drawbacks of harmonization
308–11
characteristics, eliminating idiosyncratic
differences 309, 310
Partnerships, LLCs and alternative forms of business organizations

characteristics of organization 299, 300–301, 307, 309, 310, 311–14
common law, countering arrest of 310
common terminology for common characteristics 314
contractual freedom problems and Uniform Limited Liability Company Act (ULLCA) 316–17
corporate concept of voting 315
dispute resolution 309
education programs 310
external characteristics 300, 301, 303, 312
form of organization 299–300, 303, 304, 306–8, 309, 310, 311–12
fundamental policy changes 315–16
future amendment effectiveness 309
Harmonization of Business Entity Acts (NCCUSL Harmonization Project) 302, 314–16, 317, 318
harmonization characteristics 302–3
harmonization definition 302
harmonization evaluation 308–18
internal characteristics 301, 313, 316, 317
judicial interpretation, scarcity of 310
“Junction Box” harmonization (Colorado and META) 306–8
language conformity 306, 309
LLC creation and Organic statute modification 306–8
LLP legislation adoption 304
Model Entity Transactions Act (META) 302
Model Registered Agents Act (MRAA) 302
names as characteristics 302–3
non-policy-driven distinctions, elimination of 309–10
nuances of meaning, concerns over 311
over-harmonization dangers 314–18
partnership formation characteristics 313
plumbing Characteristics 302, 310
rationalization benefits and drawbacks 311–13
rationalization combination problems 314–16
rationalization definition 303
rationalization, differences from harmonization 313
regressive legislation dangers 317–18
special interest groups and uniformity pursuit 304–5
state statutes 299, 300, 301, 302, 303, 304, 306–8
third party rights and expectations 303
Uniform Partnership Act (UPA) 299
uniformity pursuit, benefits and drawbacks 313–14
unintended statutory inconsistencies between corresponding characteristics 310
Harner, M. 116–28
Hart, J. 207
Hasen, D. 149
Haynsworth, H. 305
Heminway, J. 189–205, 303
Hiller, A. 127
Hillman, R. 208, 283, 284, 288, 291, 366
Hirsch, A. 50
Hobbs, P. 148
Hoffman, D. 107
Hopkins, J. 253
Horton, B. 12, 18–19, 344, 345, 346
Horwitz, M. 148
Howson, N. 390–411
Huang, H. 409
Hwang, E. 253
hybrid entities
company/partnership suggestion, India 432, 435
taxation 161–5
India, limited liability partnerships 429–46
adjudication delays 432
Advocates Act 436, 442
agency and liability 439
Bar Council’s Rules of Professional Conduct, concerns over violation of 442
“body corporate” eligibility to be a partner 438
cessation of partnership interests 440–41
Chandra Committee for enactment of LLP law 431–3, 434, 435, 441
Companies Act 429, 430, 432, 433, 438
compny/partnership hybrid suggestion 432, 435
designated partners 438
disclosure obligations and powers of government 440
economic liberalization effects 429–30, 431
fiduciary duties 440
foreign direct investment in entrepreneurial projects 433, 442–4
freedom of contract 429–30, 435, 439
general partnerships 432, 438
harmonization with other economic legislation 436
Indian Partnership Act 432, 438, 439
international competition concerns 432, 434, 436–7
Index  

in limited partnerships 76–7
and Uniform Partnership Act 75–6
Ivey-Crickenberger, J. 116–28

Jackson, J. 148, 149, 153
Japan, limited liability companies legislative policy 374–89, 375, 376–7
bargaining positions of close corporations 377–8
Companies Act 376, 379, 380–81
complementarities between legal forms 385–7
complementarities between legal forms, bargaining positions 385–6, 387
conflicts of interest 377–8
default rule of separation/non-separation of ownership and management 376–7
entrepreneurs and sweat equity scheme 378, 379, 380
trepreneurs and vesting scheme 383
family firms, bargaining position 377, 379, 382, 386–7
freedom of contract 376, 379
human capital in exchange for membership rights 379, 380
joint-venture corporations and shareholder agreements 380
legal forms of business organizations 375–6
Limited Liability Partnership (LLP) 375–6
order-made membership rights 378–80
partnership-type firms 377–8, 379–80, 382, 387
Stock Company 375
Stock Company/LLC comparison 376–7, 378–9
taxation 376
venture capital-backed firms, bargaining position 378, 379, 380, 382–3, 387
voting rights 378–9
Japan, limited liability companies legislative policy, exit options 378, 380–83
family firms 382, 386–7
mandatory withdrawal rights 382–3
partnership-type firms 382, 387
shareholders and transfer of stock 381–2
squeeze-out, reducing risk of 386
Stock Companies vs. LLCs 380–82, 383, 387
transfer of membership rights 381
US comparison 380
venture capital-backed firms 382–3, 387
Japan, limited liability companies legislative policy, fiduciary duties 378, 383–5
conflicts of interest 384, 385
costs and benefits of contracting around 386
directors and officers 383

Robert W. Hillman and Mark J. Loewenstein - 9781783474400
Downloaded from Elgar Online at 05/01/2019 11:47:40PM
t via free access
Partnerships, LLCs and alternative forms of business organizations

duty of care and duty of loyalty 383–4, 386, 387
family firms 384, 386
freedom of contract 383–4, 387
gap-filling role 386
and opportunistic behavior 385, 386
partnership-type firms 384–5, 386, 387
self-dealing transactions 384
Stock Companies vs. LLCs 383–4, 387
US comparison 383–4
venture capital-backed firms 385, 386, 387
Jensen, M. 138
Johnson, E. 161, 164
joint ventures
China 394
nonprofit and charitable uses of limited liability companies 238–40
Russia 421
shareholder agreements, Japan 380
Jones, G. 104
Jones, S. 269, 277
judicial exceptions to liability shield 107–10
judicial interpretation, scarcity of, and harmonization 310
judicial monitoring, importance of, contractual freedom and family business 42, 44, 49
judicial power expansion in Delaware 336–53
cash versus stock consideration and Revlon question 338, 339
“conclusive presumption” cases 348, 349
confidential arbitrations 351
contract drafting improvements 345–6
contractual “gap fillers” 347, 348–9
corporate charters, attracting 340
corporate criminal malfeasance concerns 340
corporate executives excessive pay packages, concerns over 340
default duties, uncertainty surrounding 343
dictum’s emergent role in alternative entity jurisprudence 341–9
dictum’s emergent role in alternative entity jurisprudence, guidance function 341–4
dictum’s emergent role in alternative entity jurisprudence, regulatory function 344–6
dictum’s emergent role in alternative entity jurisprudence, responsiveness function 340, 346–9
dictum’s judicial empowerment element 349–52
dictum’s recognised role in corporate jurisprudence 336–41
dictum’s recognised role in corporate jurisprudence, corporate law 337–8
dictum’s recognised role in corporate jurisprudence, guidance function 339
dictum’s recognised role in corporate jurisprudence, regulatory power 339
dictum’s unintended consequences 340–41
dictum’s valuable functions, recognition of 340–41
directors’ oversight obligations 337
extra-judicial engagement with business law practitioners 349
fiduciary duty of good faith and fair dealing 337, 338, 340, 344, 345, 347–9
frauds statute and LLC agreements 341, 342
future behavior of corporate actors, and dictum use 339
future developments, foreshadowing 343–4
future doctrinal changes and dictum use 339
limited rights afforded in the alternative entities, concerns over 346–7
mergers and acquisitions 339
overreach by drafters of publicly traded alternative entity governing agreements, caution against 347
partnership agreements and elimination of fiduciary duties 342
regulatory efficiency and dictum use 339
“special approval” provisions for publicly traded alternative entities 344–5, 346, 349
state constitution amendments 350
state courts’ control over business law 351
state statute involvement 351
“transcript opinions” to address emergent and unresolved legal questions 349–50
vulnerabilities of public investors, addressing 347
“junction box” statutes 201–2, 306–8
jurisdictional competition for corporation charters see under state laboratories and social enterprise law

Kahan, M. 18, 260, 339
Kamar, E. 260, 263, 339
Kean, W. 92
Keatinge, R. 106, 107, 299–318
Kessler, R. 305
King, T. 156
Kirby, W. 392
Klausner, M. 18
Kleinberger, D. 83, 85, 86, 88, 89, 93, 149, 253, 263, 320, 322
Knutson, R. 157
Kobayashi, B. 260, 313, 322, 326–7, 333, 352
Koriya, D. 376
Kraakman, R. 277, 279, 369
L3Cs (low-profit limited liability companies)  
see under state laboratories and social enterprise law

Labouchere, H. 369

Lafontaine, F. 377

Lang, R. 252, 253

Langbein, J. 268, 274, 275, 276, 277, 279

language

conformity, and harmonization 306, 309, 311, 314

and contractual prose difficulties, Delaware 12–13, 16, 17, 19, 24, 27

in operating agreement, bankruptcy 118–19

use of familiar terminology, convergence of unincorporated entity law 321, 322, 330

see also drafting

Lansberg, I. 46

Larson, J. 171

Laster, J. 11–27, 41, 44, 344, 345, 348, 350, 351, 386, 387

law firm as industry model for entity choice and management 280–95

business model evolution 292–4

centralized management 286

corporate formality concerns 286

entity selection trends 291–2

ethics rules 281–4

expulsion options 282

fees regulation 282–3

general partnerships 290, 291, 292

global law firm, future of 294

historical entities 288–9

law firm ownership volatility 283

lawyer exclusivity in ownership 282–4

lease obligations 284

liability 285, 288, 289

limited liability company 291–2

limited liability partnership (LLP) 290–91, 292

management considerations and Model Rules 281–3

management and control considerations in partnerships 285–6

Model Rule 5.4 282, 292–3

modern entity forms 290–91

multidisciplinary practice 292–3

multijurisdictional practice, future of 293–4

non-competition clauses 283–4

non-equity partner, emergence of 287–8

operation considerations 285–8

organizational framework or policy statement 281–2

professional corporation 290, 291

profits and compensation 286–7, 288

protection for economic interests 284

regulatory requirements 281–5

relationships between lawyers and non-lawyers 282, 292–3

safeguards 289

sale of law practices 283

shareholder dividends 286, 290

sole proprietorship 290

state by state licensing and geographic boundaries 293–4

state regulation 284–5

tax benefits 289, 290, 291, 292

two-tier partnership structure 287–8

Uniform Partnership Act (UPA) and Revised Uniform Partnership Act (RUPA) 289

Verein structure and global law firms 294

Lawrence, S. 242

legal personality

and capacity restrictions, Taiwan 451–2, 454–5

and SAIC registration, China 401–2

Taiwan 464, 467–8

UK partnership options 361–3

legislative drafting see drafting

Lewis, W. 86, 148

liability

joint certified public accountant (CPA), cases, Taiwan 460–61

law firm as industry model 285, 288, 289

limited see limited liability headings

personal see personal liability protection, nonprofit and charitable uses of limited liability companies 231, 232

liability of limited liability entities 99–115

business trusts 103

capital contribution deficiencies 106

common law of agency 105–6

corporate income tax treatment 99

corporate parent of a general partner 109–10

corporations as separate legal entities 100

Delaware Series 104

direct liability imposed on owners or affiliates by other statutes 110–13

direct liability for own acts or omissions 105

donative trusts 103

employment laws 110–11

environmental laws 112

exceptions 105–7

federal common law of piercing 108–9

Federal Volunteer Protection Act 104

full shield states 102

general partnerships 101

general principles 100–104

interim distributions 106–7
judicially created exceptions to liability shield 107–10
lawyer’s right to protection 103
limited liability companies 100–101, 104, 105–6, 108, 112
limited liability limited partnerships 102
limited liability partnerships 102, 105, 106
limited partnerships 101, 104
pension funding 113
personal trusts 103
piercing the corporate veil 107–9, 110
professional entities 103
“responsible person” tax statutes 112
Revised Uniform Limited Partnership Act (RULPA) and “safe harbor” list of activities 101
Revised Uniform Unincorporated Nonprofit Association Act (RUUNA) 103–4
single business enterprise doctrine 110
statutory trusts 103
“substantive consolidation” 108–9
successor liability 109
trust funds 112
Uniform Trust Code 103
unincorporated nonprofit associations 103–4
voluntary personal liability 106
wage claims of employees’ liabilities 111–12
wrongful liquidation distributions 107
Lidstone, H., 257
Lifshitz, S., 48
Lille, G., 161, 164
limited liability companies
attraction of, family business 40, 42–3
capital accounts see capital accounts in limited liability companies and partnerships
common-law perspectives 86–90
counterparty’s financial distress see counterparty limited liability companies financial distress, mitigating impact
fundamental changes see fundamental changes in limited liability companies, path divergence and convergence
Japan see Japan, limited liability companies legislative policy
law firm as industry model 291–2
liability see liability of limited liability entities
low-profit (L3Cs) see under state laboratories and social enterprise law
nonprofit and charitable uses see nonprofit and charitable uses of limited liability companies
and organic statute modification 306–8
“pick-your-partner” (PYP) rule 77–8
Russia 412–13, 416, 421–3
series 126–8, 190–91
single member 159–60, 231–6
Taiwan, evolution of non-corporate forms of business 447
unincorporated entity law see convergence of unincorporated entity law, casual, state LLC law
limited liability limited partnerships 102
limited liability partnerships
India see India, limited liability partnerships
Japan 375–6
law firm as industry model 290–91, 292
legislation adoption and harmonization 304
liability of limited liability entities 102, 105, 106
UK partnership options 358–9, 360, 361, 362–3, 364–5, 366–9, 370
limited partnerships
China 397–8, 399, 401, 403, 404, 405, 408
liability of limited liability entities 101, 104, 346–7
master limited partnerships (MLPs) 18–19
“pick-your-partner” (PYP) rule 76–7
Russia 412, 424–5
UK partnership options 358, 360, 361, 365, 366, 367, 368, 370
see also partnerships
Lin, A., 447–70
Lin, C., 449
Lin, L., 392, 408
Lins, G., 271
Lipton, R., 156
liquidations
and capital accounts 173–5, 177–8, 182
China 395, 405
Russia 419–21
Taiwan 453, 458, 461
wrongful distributions 107
see also bankruptcy
Liu, S., 470
Loewenstein, M., 28–39, 255, 305, 311
Long, W., 46–7
Lord, R., 60
low-profit limited liability companies (L3Cs) see under state laboratories and social enterprise law
loyalty, fiduciary duty see fiduciary duty of loyalty
Lubaroff, M., 11, 23, 24
Luthra, R., 437
McCarthy, E., 156
McCray, R., 236
Macey, J., 48, 107, 110, 114, 262, 263
Macgregor, L. 81
Machell, J. 363
McKee, W. 181
McLoughlin, M. 127
McMeel, G. 85
McNally, E. 349
Mallen, R. 285
management
China, partnerships and partnership law 402–3, 405
common-law perspectives 87, 91, 92
discretion, and contractual freedom 12
freedom of contract and majority written consent without prior notice 33
and interest group theory 263
law firm as industry model see law firm as industry model for entity choice and management
rights, and asset protection 131
Russia, general partnership 423
Taiwan, business affairs 463–4, 467
Taiwan, partnership affairs 454–5, 457
UK partnership options 365–7
Manesh, M. 12, 17, 19, 21, 260, 262, 336–53
Manning, B. 100
market standard for conflict-of-interest transactions see contractual freedom, end of unlimited, and alternative entities, Delaware, market standard for conflict-of-interest transactions
Marks, G. 202
Marsico, N. 127
Martin, C. 365
Martin Rhodes, A. 280–95
master limited partnerships (MLPs) 18–19
Mathes, J. 107
Mattei, U. 277, 279
Mazie, E. 271
Means, B. 40–51
Meckling, W. 148
members
expulsion/exclusion, UK partnership options 362–3
member-managed limited liability company, common-law perspectives 91, 92
member-managed limited liability company, unincorporated entity 210–11
membership limitations, lack of, nonprofit and charitable uses of limited liability companies 231
withdrawal, Russia 422–3, 426
mergers
contractual freedom and family business 43–4
deal protection measures, Delaware 56–7
freedom of contract for alternative entities in Delaware 32–3
fundamental changes see fundamental changes in limited liability companies, path divergence and convergence, mergers, conversions and domestinations
judicial power expansion in Delaware 339
Russia 419
see also buyouts
Merrill, T. 279
Miller, C. 248
Miller, G. 208, 262, 263
Miller, P. 276, 278
Miller, S. 12, 15, 42, 43, 199
Millon, D. 107
Minnighe, E. 253
Mitts, J. 107, 110, 114
Moll, F. 41, 43
Monroe, A. 149, 150, 151, 152, 154, 180
Morgensgon, G. 346
Morse, S. 159
Murray, J. 252–67
NCCUSL (National Conference of Commissioners on Uniform State Laws) see under convergence of unincorporated entity law, casual
Nedelsky, J. 46
non-equity partner, emergence of, law firm as industry model 287–8
non-partner agents 84–5
non-policy-driven distinctions, elimination of 309–10
non-statutory solutions, common-law perspectives 93–5
nonprofit and charitable uses of limited liability companies 227–51
charitable private foundations 228, 229
controlled “subsidiaries” 230–31
donor uses for LLCs 247–8
donor uses for LLCs, anonymity measures 248
employment taxes 228–9, 234–5
federal excise taxes 229
federal income tax law and tax exemptions 227, 228–9
grantmaking foundations 228
mutual benefit nonprofit corporations 229–30
“nondistribution constraint” 230, 232
operating foundations 228
public benefit nonprofit corporations 229–30
public charities 228
Partnerships, LLCs and alternative forms of business organizations

state law and prevalence of nonprofit corporations 229–31
state law and prevalence of nonprofit corporations, tax exemption under federal law 230
tax-deductible charitable contributions 230, 232, 233, 234, 235
nonprofit and charitable uses of limited liability companies, charitable subsidiary and affiliated LLCs 231–40
charitable contributions vehicle 234
development of adjacent land as rental property 232
election to be treated as corporation for tax purposes, reasons for 234
employment tax requirement 234–5
federal unrelated business income tax (UBIT) 233–4, 238
freedom of contract 231
liability protection 231, 232
membership limitations, lack of 231
nonprofit/for-profit joint ventures and ancillary joint ventures 238–40
nonprofit/for-profit joint ventures and ancillary joint ventures, membership interest “substantial” or “insubstantial” part of its activities and assets 239
nonprofit/for-profit joint ventures and ancillary joint ventures, passive investments 239
private foundation grants 232
regarded but tax-exempt LLCs 236–7
single-member LLCs, disregarded 231–6
tax treatment, malleable 231
taxpayer entitlement to charitable contribution deduction 235–6
“veil piercing” arguments made by claimants against parent organizations 235
nonprofit and charitable uses of limited liability companies, strictly for-profit but charitably used LLCs 240–47
benefit LLCs 245–7
impact investing and for-profit social enterprise 243–4
low profit limited liability company (L3C) 244–5
low-income housing and new markets tax credit LLCs 240–41
program-related investments (PRIs) by private foundations and LLCs 241–3
program-related investments (PRIs) by private foundations and LLCs, “expenditure responsibility” rules 242
program-related investments (PRIs) by private foundations and LLCs, limited technical guidance 242–3
Norli, O. 275, 278
O’Connor, B. 185
Oesterle, D. 42, 305–6
Oh, P. 99, 107, 108, 268–79
O’Hara, E. 259
O’Neal, F. 40, 41
opportunism concerns
contractual freedom and family business 41, 42, 43–4
corporate opportunity doctrine, limiting risks posed by, Delaware 14–15
Japan 385, 386
Orlov, V. 412–28
Orts, E. 81
Palmer, F. 361, 362
Parsons, D. 31, 63, 340, 345, 346, 348
partnerships
agreements and elimination of fiduciary duties, Delaware 342
authority, common-law perspectives 82–3
“body corporate” eligibility, India 438
capital accounts see capital accounts in limited liability companies and partnerships
cession of interests, India 440–41
China see China, partnerships and partnership law
company/partnership hybrid suggestion, India 432, 435
formation characteristics 313
interest transferability, China 403
interest transfers see interest transfers among existing partners and members, Achaian v. Leemon Family case
legal capacity, Russia 415
limited see limited partnerships
limited liability see limited liability partnerships
parallel partnerships, India 442
partner numbers, India 437, 438, 442
partnership-type firms, Japan 377–8, 379–80, 382, 387
positional power, common-law perspectives 83–5, 87, 90–92
registrations and registered capital, China 396–7
silent 424–5, 458
Taiwan see Taiwan, evolution of non-corporate forms of business, partnerships law under Civil Code.
Index

497

taxation see under taxation
UK see UK partnership options
“passive loss” rules, capital accounts 181
pension funding 113, 276–7
personal labor participation, Russia 413
personal liability
directors 57–8, 68
India, limited liability partnerships 439
UK partnership options 358, 366, 368–70
voluntary 106
see also liability headings
personal performance exception and
bankruptcy 135–6
personal trusts 103
“pick-your-partner” (PYP) rule see interest
transfers among existing partners and
members, “pick-your-partner” (PYP) rule
piercing the corporate veil see veil piercing
Platt, C. 143
Plerhoples, A. 256
plumbing characteristics, harmonization,
rationalistization and uniformity 302, 310
Polsky, G. 149, 150, 151, 152
Pomeroy, C. 133
Popondopulo, V. 423, 424, 425
Posner, E. 331
Prentice, R. 304–5
Presser, S. 107, 108
price discrimination concerns 260–62
private equity, India 444
production cooperative, Russia 413, 418,
425–6
profit sharing
China 407–8
law firm as industry model 286–7, 288
Russia 426
Taiwan 456–7
UK partnership options 365, 370
property holding, business trusts, modern
274–5
property information used for private gain 213,
221
public benefit corporations (PBCs) 257, 258,
262, 263
Qiu, C. 448, 449, 453
“qualified income offset”, capital accounts
183
Quinn, B. 351
Ragazzo, R. 43
Rawhouser, H. 262
Reiss, D. 158
representation restrictions, Taiwan 454–5, 467
Reyes, F. 149
Ribstein, L. 42, 43, 81, 82, 84, 89, 101, 107,
137, 144, 149, 214, 259, 260, 313, 316, 322,
326–7, 333, 352, 360, 365, 439
Richmond, D. 287
risk management, business trusts, modern
275–6
Roberts, E. 305
Rock, E. 339
Romano, R. 252, 259, 260, 264, 330
Rosen, K. 47
Rosin, G. 148
Rowley, S. 74
RPLLCA (Revised Prototype Limited Liability
Company Act), fundamental changes in
limited liability companies 190, 191, 193,
195–6, 198, 211
Rubin, B. 156
RULLCA (Revised Uniform Limited Liability
Company Act)
capital accounts 179
common-law perspectives 90–91, 93
convergence of unincorporated entity law
see convergence of unincorporated
entity law, casual
fundamental changes in limited liability
companies 190, 191, 192–3, 195–6
unincorporated entity 210–11, 212
RUPA (Revised Uniform Partnership Act)
buyout provisions, capital accounts 178
fundamental changes in limited liability
companies 196, 198
maintenance rules, capital accounts 176–7
unincorporated entity 209–10, 212
Ruskola, T. 392
Russia, alternatives to capital-oriented
corporations 412–28
administration in corporate entity 418
capital contribution 416
capital transfer in general partnership 424
charter capital of limited liability company
422
constituent (founding) document of juristic
persons 415–16
corporate agreement 416–17
corporation definition 412
employee-owned enterprise 426–7
executive power 418
general partnership 412, 423–4
invalid decisions on reorganization 420
joint stock company 421
juristic person (legal entity), legal capacity
414–15
liability of partners in general partnership
423–4
liability rule 418–19
limited liability company 412–13, 416, 421–3
limited partnership 412, 424–5
liquidation of limited partnership 425
management in general partnership 423
management of production cooperative 426
member withdrawal from limited liability company 422–3
member withdrawal from production cooperative 426
membership interest in charter capital of limited liability company 422
mergers 419
partnership participants, legal capacity 415
personal labor participation 413
production cooperative 413, 418, 425–6
profit distribution of production cooperative 426
reorganization and liquidation of juristic person 419–21
rights and duties 417–18
shareholders in employee-owned enterprise 426–7
silent partner in limited partnership 424–5
solidary liability 420
voting rights 417, 420, 427
voting rights in employee-owned enterprise 427
withdrawal of partner in general partnership 424
Rutledge, T. 91–2, 206–23, 311, 341
safe harbor regulations 151–2, 182–3
salaries see compensation
Saltuk, Y. 261
Sargent, M. 219
Savitt, W. 339, 340, 341, 350, 352
Schneider, S. 185
Schündeln, M. 323
Schwarcz, S. 268, 274, 275, 276
Schwidetzky, W. 219
Seavoy, R. 269
self-dealing transactions 19, 92, 384
Sergeev, A. 414, 423, 424, 425, 426
series limited liability companies 126–8, 190–91
see also limited liability companies
service sector growth, India 433, 434, 437
shareholders
    corporate salary payments to principal shareholders as disguised and non-deductible dividends 132
debt, corporation or LLC liability for 138–9
dividends, law firm as industry model 286, 290
    in employee-owned enterprise, Russia 426–7
share transfer to new partner, Taiwan 456
    and transfer of stock, Japan 381–2
see also voting
Shen, K. 451
Sherlock, M. 227, 228
Sherman, J. 47
Shishido, Z. 374–89
silent partnerships 424–5, 458
Simmons, D. 155
Simmons, O. 264
Simpson, J. 294
Singapore, Limited Liability Partnership Act, similarity to India 437–8, 441
Singer, J. 48
Singh, S. 436
single business enterprise doctrine 110
single member limited liability companies 159–60, 231–6
see also limited liability companies
Sissel, S. 46–7
Sitkoff, R. 47, 48–9, 268, 270, 271, 272, 273, 277, 278, 279
small businesses
    and capital accounts 177
    India 433, 434, 436, 442–4
taxation 156–7, 158–9
see also family firms
Smith, H. 279
social enterprise law see state laboratories and social enterprise law
social identity theory, contractual freedom and family business 45–6
sole proprietorship 290, 448
“special approval” provisions 12, 36, 344–5, 346, 349
special general partnership, China law 398, 399, 401, 403, 404, 409
special interest groups and uniformity pursuit 304–5
state laboratories and social enterprise law 252–67
corporate managers and interest group theory 263
flexible purpose corporation (FPC) statute 256, 257, 258–9, 262
flexible purpose corporations and social purpose corporations 256
“impact investing” 261
interest group theory and benefits 262–3
jurisdictional competition for corporation charters 259–61
jurisdictional competition for corporation charters, Delaware pre-eminence 260, 261–2, 263–4
jurisdictional competition for corporation
charters, race to the bottom/race to the bottom theories 259–60
jurisdictional positioning 261–2
lawyers and business people and interest group theory 263
low-profit limited liability companies (L3Cs) 252–4, 258–9, 262, 263
low-profit limited liability companies (L3Cs), “charitable or education purposes” 258
low-profit limited liability companies (L3Cs), statutes passed 253–4
low-profit limited liability companies (L3Cs), suggested reforms 253
price discrimination concerns 260–62
profit concerns 253
Program Related Investments (PRIs) and L3Cs 252–3
public benefit corporations (PBCs) 257, 258, 262, 263
social enterprise law iterations and innovations 257–9
social enterprise law iterations and innovations, entity conversion requirements 259
social enterprise law iterations and innovations, and L3Cs 258–9
social enterprise law iterations and innovations, Model Benefit Corporation Legislation 258–9, 260, 263
social purpose (SPC) statute 256, 257, 258, 262
Socially Responsible Investing (SRI) 261
state politicians and interest group theory 262–3
state laboratories and social enterprise law, benefit corporations and benefit limited liability companies 254–6
benefit corporation law, benefit reporting requirements 255–6, 257, 258
benefit corporation law and increased accountability and transparency 254–6
benefit corporation purpose clause 254
Benefit Corporation White Paper (Proponent White Paper), criticism of 255
benefit corporations and “general public benefit purpose”, criticism of 255, 256, 258, 260
dissenters’ rights 256, 259
statutory default rules, capital accounts
see capital accounts in limited liability companies and partnerships, statutory default rules
statutory inconsistencies, and harmonization 310
statutory trusts 103
Stein, R. 304
stock companies, Japan 375, 376–7, 378–9, 380–82, 383–4, 387
Strine, L. 49
Taiwan, evolution of non-corporate forms of business 447–70
Company Act 447, 462, 463, 464, 466, 468–9
corporations (companies limited by shares) 447–8
foreign companies 448
limited liability companies 447
Limited Liability Partnership Act 447
QIU Zhe Qian et al. v. LIN Jin 451
sole proprietorships 448
Taiyuan Construction Corporation v. Yingcheng Paint 455
unlimited liability companies 447, 462
unlimited liability companies with limited liability shareholders 447
Yu You Ren Cultural and Educational Foundation v. LI Qi 452
Taiwan, evolution of non-corporate forms of business, Limited Partnership Act, proposed 461–9
addition of limited liability partner 466–7
contribution and return of capital 466
definition, responsible person, and representative 465–6
fiduciary duties of care and loyalty 467
general partner qualification 464, 468–9
legal personality 464, 467–8
limited partnership/silent partnership comparison 463–5
major content 465–7
management of business affairs 463–4, 467
representation restrictions 467
taxation 463, 469
transfer of limited partnership interest 466
unlimited company/limited liability shareholder comparison 463–5
venture capital regime 461–2
withdrawal from partnership 466–7
Partnerships, LLCs and alternative forms of business organizations

Taiwan, evolution of non-corporate forms of business, partnerships law under Civil Code 448–58
accounting firm’s liability for misleading financial reports 458–60
assets of partnership 452–3
business registration 449, 450–51, 454
compulsory legal effects 452–6
contemporary issues 458–61
contribution of additional capital 457
dispute resolution 453
dissolution and winding-up of partnership 457–8, 461
duty of care 453
enterprise creation 450–52
general partnerships 450–58
incorporated certified public accountant (CPA) 460
internal and external relationships, regulation of 450
“legal person” concept 448
legal personality and capacity restrictions 451–2, 454–5
liability of joint certified public accountant (CPA), cases regarding 460–61
liquidations 453, 458, 461
management of partnership affairs 454–5, 457
new partner introduction 456
partner’s supplementary joint liability 455–6
partnership autonomy 456–7
partnership contract 449–50, 452
profit and loss sharing 456–7
representation and mandate 454–5
resignation and removal of partners 450, 453–4
right to inspect partnership affairs 454
share transfer to new partner 456
silent partnerships 458
taxation 452–3
withdrawal from partnership 456

Talley, E. 15
Tang, Q. 391, 409
taxation
aggregate versus entity taxation 148–9, 151, 152, 153, 154–5, 159
allocation of tax items 149–52
allocation of tax items, governance problems 151
alternative forms of business organization 147–67
business trusts 277–8
Canada partnership tax system 161–3
Canada partnership tax system, U.S. - Canada tax treaty amendments 163–5
capital-intensive partnerships and tax allocations 150
China, double-taxation of partnership investors 396
China, partnerships and partnership law 396, 401, 405–6
classification for LLCs as partnerships 86
compensation payments 158–9
correlation and distribution rules 153–5
corporations and entity-level tax 147, 149
depreciation deductions and tax allocations 150, 151
distribution waterfall and tax allocations 150–51, 157
elective classification rules 158–60
employment tax planning 158–9
federal income tax significance see capital accounts in limited liability companies and partnerships, federal income tax significance
hybrid entities 161–5
“income-stripping” arrangements and hybrid entities 162–3
India, limited liability partnerships 436, 441
Japan, limited liability companies legislative policy 376
minimization aims and pass-through tax treatment 14, 17
non-U.S. entities 160
nonprofit and charitable uses of limited liability companies 227–38
partners’ interest in a partnership, shortcomings of test for 151
partnership liabilities, effects of 155–6
partnership and LLC taxation overview 147–56
partnership tax classification 72
partnership tax law 147
partnership taxation, election out and inapplicability of 158–60
pre-contribution gain or loss 157
publicly traded partnerships 160
real estate investment trusts (REITs) 157, 158
real estate mortgage investment conduits (REMICs) 157–8
regulated investment companies (RICs) 158
“responsible person” tax statutes 112
safe harbor requirements 151–2
single member LLCs 159–60
small business corporations (S corporations) as entity-minus regime 156–7, 158–9
“special allocations” 149–50
start-ups 159
substantial economic effect, two-part test 151–2
Taiwan 452–3, 463, 469
tax benefits, law firm as industry model 289, 290, 291, 292
tax-free disguised sales of property 155
tax-free formations and dissolutions 154–5
terminology problems 152
transfers of partnership property and interest in partnerships 152–3
UK partnership options 364, 371
Taylor, W. 162
third parties
contracts, UK partnership options 361–2
convergence of unincorporated entity law 322, 324, 325, 326–7, 332–3
dealing with a partner, common-law perspectives 82–3, 84, 87–9, 91, 92–3
protection, UK partnership options 369
rights and expectations, and harmonization 303
Thomas, W. 236
Thompson, R. 40, 41, 42
Tikhomirov, M. 415
“transcript opinions”, judicial power expansion in Delaware 349–50
transfer of partnership interests 129–33, 152–3, 466
trust funds, liability of limited liability entities 112
trusts, business see business trusts
Tsoflias, P. 104
Tyler, J. 340
UK
Bubble Act 269
limited liability partnerships, similarities to India 432–3, 437–8, 441
UK, cases
Burland v. Earle 362
Castledine v. RSM Bentley Jennison 360
Clyde & Co v. Bates van Winkelhof 364
Coward v. Phaistos Ltd 360
Cowell v. Quilter Goodison 364
Daniels v. Daniels 342
Dare v. Harvey 360
Eaton v. Caulfield 362–3, 368
Ebrahimii v. Westbourne Galleries 363
Ellis v. Joseph Ellis & Co 364
F&C Alternative Investments (Holdings) v. Barthelemy (No 2) 367
Foss v. Harbottle 362
Gilford Motor Co Ltd v Horne 369
Hurst v. Bryk 363
Iott v. Williams 360
Khan v. Miah 360
M Young Legal Associates v. Zahid 367
Mullins v. Laughton 363
O’Neill v. Phillips 362, 363
Reinhard v. Ondra 364–5
Smith v. Croft (No 1) 362
Tann v. Herrington 366
Tiffin v. Lester Aldridge 364
Winsor v. Schroeder 366
UK partnership options 357–73
agreements, lack/scarcity of 360–61
Bills of Sale Act and floating charges to secure loans 367–8
business “carried on” extent 359–60
business termination constraints 362–3
compound law and LLPs 358–9
derivative claims, regulation of 362
disclosure and filing requirements 370
duty of care 366–7
duty of good faith 366
employment status 364–5
exclusion of right to petition 363
fiduciary duties 366–7
finances 365, 367–8, 370
general partnerships 357–8, 360, 361, 363, 366, 367, 368, 370
insolvency 371
integrated management and ownership, benefits of 365–6
liability 358, 366, 368–70
limited liability partnerships (LLPs) 358–9, 360, 361, 362–3, 364–5, 366–9, 370
limited partnerships 358, 360, 361, 365, 366, 367, 368, 370
management rights and responsibilities 365–7
members’ expulsion/exclusion 362–3
model agreement 361
partner/member agreements 360–61
Partnership Act 358, 361–2
partnership formation 359–60
personal liability concerns 358, 366, 368–70
“persons”, understanding of 359
profit sharing 365, 370
proper plaintiff principle 362
registration proof 360
risk of fraudulent behavior, reducing 369–70
separate legal personality and continuity 361–3
separate legal personality and continuity, disadvantages of 362–3
taxation of members 364, 371
third party contracts 361–2
Partnerships, LLCs and alternative forms of business organizations

third party protection 369
unlimited liability risk 369
uniformity see harmonization, rationalization and uniformity
unincorporated entity, care and loyalty after dissociation from or dissolution 206–23 “member-managed” LLC 210–11 “opportunity” for venture withdrawal 212 Revised Prototype Limited Liability Company Act (RPLLCA) 211 Revised Uniform Limited Liability Company Act (RULLCA) 210–11, 212 Revised Uniform Partnership Act (RUPA) 209–10, 212 Uniform Partnership Act (UPA) 209, 212 unincorporated entity, care and loyalty after dissociation from or dissolution, case law 212–21

Bluestein v. Davis 213–14 Cass JV v. Host International 219, 221 dispute resolution and decision on duty of care 219–21 fiduciary duties of partners during and after dissolution and winding up of partnership 216–18 fiduciary duties of resigning and remaining partners after a partner’s withdrawal 212–16


UPA (Uniform Partnership Act) common-law perspectives on binding the firm 82–3, 84–5, 86, 87 harmonization, rationalization and uniformity 299 and interest transfers among existing partners and members 75–6 law firm as industry model 289 unincorporated entity 209, 212 US business trusts see business trusts capital accounts see capital accounts in limited liability companies and partnerships common-law perspectives on binding the firm see common-law perspectives on binding the firm, and external agency comparison, India, limited liability partnerships 432–3 comparison, Japan, limited liability companies 383–4 contractual freedom and family business see contractual freedom and family business convergence of unincorporated entity law see convergence of unincorporated entity law, casual Delaware see Delaware headings Employee Retirement Income Security Act (ERISA) 276 Federal Volunteer Protection Act 104 harmonization, rationalization and uniformity see harmonization, rationalization and uniformity interest transfers among existing partners and members see interest transfers among existing partners and members, Achian v. Leemon Family case Investment Company Act 271 Model Entity Transactions Act (META) 302 Model Registered Agents Act (MRAA) 302 RPLLCA (Revised Prototype Limited Liability Company Act), fundamental
changes in limited liability companies 190, 191, 193, 195–6, 198, 211
RULLCA see RULLCA (Revised Uniform Limited Liability Company Act)
RUPA see RUPA (Revised Uniform Partnership Act)
RUUNA (Revised Uniform Unincorporated Nonprofit Association Act) 103–4
Securities Exchange Act 13
state laboratories and social enterprise law see state laboratories and social enterprise law
taxation see taxation
UPA see UPA (Uniform Partnership Act)
U.S.-Canada tax treaty amendments 163–5
US, cases
In re 210 West Liberty Holdings 118
In re A-Z Electronics 117, 118
Achaian v. Leemon Family see interest transfers among existing partners and members, Achaian v. Leemon Family case
Albert v. Alex Brown Mgmt Svs. 25
In re Albright 135–6
Allied Capital Corp. v. GC-SUN Holdings 26
In re Atlas Energy Resources 20, 23, 33, 345
Ault v. Brady 73
Auriga Capital Corp. v. Gatz Props. 25, 26, 58–9, 62, 304
In re Avalon Hotel Partners 117–18
B.A.S.S. Group v. Coastal Supply Co. 94
In re Bay Club Partners 119
Bay Ctr. Apartments Owner v. Emery Bay PKI 24, 344
Bluestein v. Davis 213–14
Boilermakers v. Chevron 351
Braswell v. Ryan Investments Ltd 141
Brickwell Partners v. Wise 23–4, 30–31
Brinkerhoff v. Enbridge Energy Co. 19–20, 345, 348
In re Caremark 337–8, 339, 340
Cass JV v. Host International 219, 221
In re Catron 121
Chambers v. Kay 283
Cohen v. Lord, Day & Lord 283–4
In re DB Capital Holdings 119–20, 122
In re Delta Starr Broadcasting 118
In re Desmond 126
In re East End Dev. 118–19
Elf Atochem N. Am. v. Jaffari 11, 71
In re Encore Energy Partners LP Unitholder Litigation 22, 31–2, 35, 345, 346–7, 348
Feeley v. NHAOCG 99, 200, 304, 344
Firmani v. Firmani 136
Fliegler v. Lawrence 68
Forsythe v. ESC Fund Mgmt Co. 25, 345
Fouchek v. Janicek 212–13
Frates v. Nichols 216–17
In re Frye 122
In re Garcia 125, 126
In re Garrison-Ashburn 124, 125
Gatz Props. v. Auriga Capital Corp. 200, 304, 342–3
Gelfman v. Weeden Investors 25, 344, 346
Gerber v. EPE Holdings 22, 35–8, 66–7, 345, 347, 348–9
Gotham Partners v. Hallwood Realty Partners 20, 23, 25, 57, 109, 342, 343, 344
In re Green Power Kenansville 119, 122
In re H & W Food Mart 117, 118
Hooper v. Yoder 217–18
Howard v. Babcock 284
Huatuco v. Satellite Healthcare 29–30, 199
In re Hyde Park P’ship 126
Jack J. Morris Assoc. v. Mispillion Street Partners 93–4
Kahn v. Icahn 24
Kahn v. Lynch Communications 338, 339, 340
Kahn v. M&F Worldwide 338, 339, 340
In re Keeler 123
In re Klingerman 124, 125
Litchfield Asset Management Corp. v. Howell 139
Lonergan v. EPE Holdings 345, 348
In re Lull 125–6
Lund v. Albrecht 214–15
Meinhard v. Salmon 208–9, 215, 218–19, 378
Milford Power Co. v. PDC Milford Power 72, 125
Miller v. American Real Estate Partners 33–4
Monin v. Monin 218
Monroe v. Berger 123–4
Nemec v. Shrader 26, 347, 348
Newburger, Loeb & Co. v. Gross 215, 222
Olmstead v. FTC 133, 135
Olson v. Halvorsen 11, 341, 342
Oram Sylvania v. Townsend Ventures 63
Paige Capital Mgmt. v. Lerner Master Fund 20–21, 344
Paramount Communications v. QVC Network 55, 56–7
In re Phillips 108, 117
Pierre v. Comm’t 235–6
R & R Capital v. Buck & Doe Run Valley Farms 30, 39, 55, 199
Partnerships, LLCs and alternative forms of business organizations

In re Raiton 123
RERI Holdings I 235–6
Revlon 56–7, 254, 338, 339, 351
Schnell v. Chris-Craft Indus. 16, 33, 34, 68
Shuttleworth, Ruloff & Giordano v. Nutter 284
Sonet v. Timber Co. 32, 342
Stewart v. Bolthouse Holdco 62
In re Trans World Airlines 122, 123
In re Tristar Esperanza Props. 123
Twin Bridges Ltd. Partnership v. Draper 33, 38
In re USACafes 22, 23, 343–4
VGS v. Castiel 32, 33, 38, 41, 43–4
In re Walt Disney Co. Derivative Litig. 26, 337, 339, 340
Weinberger v. UOP 19, 337, 338, 339
Winshall v. Viacom 35, 63–4
Wood v. Baum 57

Varley, M. 369
veil piercing
liability of limited liability entities 107–9, 110
nonprofit and charitable uses of limited liability companies 235
patterns, and contractual freedom 21–4
reverse see asset protection limited liability companies, attacking, reverse veil piercing
venture capital-backed firms
Japan 378, 379, 380, 382–3, 385, 386, 387
Taiwan 461–2
Vermeulen, E. 149
Verret, J. 339, 340, 349
Vestal, A. 253, 360
vested property rights 200–201, 383, 436
voluntary sector see nonprofit and charitable uses of limited liability companies
voting
corporate concept, and harmonization 315
equity holder rights, and freedom of contract 31–3, 38
rights, Russia 417, 420, 427
see also shareholders
Vranka, L. 254, 255
Walker, D. 257
Wang, J. 462
Wang, W. 461
Warren, E. 270
Weidner, D. 42, 168–86
Westaway, K. 262
Whittaker, J. 363
Williston, S. 60–61, 62, 148
Winship, V. 350
Winter, R. 259
withdrawal procedure
Japan see Japan, limited liability companies
legislative policy, exit options
Russia 422–3, 424, 426
Taiwan 450, 453–4, 456, 466–7
see also dissolution
Wood, A. 253
Wu, Y. 398
Yablon, C. 261, 264
Yang, J. 455
Yang, S. 451
Ye, S. 451
Ye, X. 462
Yin, G. 159
Yockey, J. 255
Zall, B. 248
Zelin, M. 392
Zelnik, R. 413
Zhang, H. 391, 409
Zhang, Y. 400