

Family Firms and Closed Companies in Germany and Spain

Edited by
HOLGER FLEISCHER, ANDRÉS RECALDE,
and GERALD SPINDLER

*Max-Planck-Institut
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An Introduction to Law and Management of Family Firms

Holger Fleischer

| | | |
|------|--|----|
| I. | Introduction..... | 1 |
| II. | Why Should We be Interested in Family Firms? | 2 |
| | 1. Family Firms are Fashionable | 3 |
| | 2. Family Businesses as the Backbone of the Economy..... | 3 |
| | 3. Family Business Studies and Family Business Law as Emerging Research Fields | 5 |
| III. | What’s Different about Family Firms?..... | 7 |
| | 1. Defining Family Firms | 7 |
| | 2. Coordinating Three Social Subsystems: Family – Business – Ownership | 8 |
| | 3. Taxonomies of Family Firms | 9 |
| IV. | Family Firms and Legal Forms | 11 |
| | 1. Families as Founders of the Roman Societas..... | 11 |
| | 2. Family Firms as Promoters of the Medieval Compagnia, Accomenda and OHG (<i>Medici, Fugger</i>) | 12 |
| | 3. Family Firms in the 19 th Century between Partnership and Company (<i>Siemens, Sal. Oppenheim</i>) | 13 |
| | 4. Family Firms and Variety of Legal Forms in the 20 th and 21 st Century (<i>Merck, Bertelsmann</i>) | 14 |
| V. | Governance Framework for Family Firms..... | 16 |
| | 1. Statutes..... | 16 |
| | 2. Articles of Association | 16 |
| | 3. Shareholder Agreements | 17 |
| | 4. Codes of Governance for Family Firms..... | 17 |
| | 5. Family Constitution | 18 |
| VI. | Outlook: Comparative Family Business Law | 22 |

I. Introduction

Family businesses have long been neglected as a research topic, both from a legal and economic perspective.¹ They share this fate with closed companies

¹ From an economic point of view *I. Lansberg/E. L. Perrow/S. Rogolsky*, Family Business as an Emerging Field, *FBR* 1 (1988) 1, 3: “Until very recently, neither organiza-

in general, dominating the corporate landscape nearly everywhere in terms of numbers,² but nonetheless outweighed by large listed stock corporations in terms of academic attention. From an economic point of view, the scholarly neglect of family firms is partly due to the paucity of readily available data that makes empirical research difficult.³ From a legal point of view, one of the main reasons lies in the significant dynamics of capital market regulation which have fascinated many business law professors over the last two decades, leaving them little time for supposedly old-fashioned corners of company law. However, there are signs that the academic tide is turning: Family firms are slowly, but steadily receiving more attention in law schools and business schools.⁴ This encouraged us to make them the focus of our German-Spanish Symposium, to take stock of the current state of legal research on family businesses and explore promising avenues for future research.

This introductory paper addresses four major topics which will be dealt with one after the other: First, it explains in detail why we should be interested in family firms (II.). Second, it points out what makes family businesses different from other businesses (III.). Third, it takes a closer look at the legal forms in which family firms are organized (IV.). Finally, it analyses the governance framework for family businesses through the lens of company law and contract law (V.).

II. Why Should We be Interested in Family Firms?

As regards the motivation for a closer look at family firms, three points seem to be worth highlighting.

tional nor family theorists have paid much attention to family businesses.”; from a legal point of view *B. Means*, *The Contractual Foundation of Family-Business Law*, Ohio St. L. J. 75 (2014), 675: “Most U.S. businesses are family owned, and yet the law governing business organizations does not account adequately for family relationships. Nor have legal scholars paid sufficient attention to family businesses.”

² For a comparative account *H. Fleischer*, *The Law of Close Corporations*, in: Schauer/Verschraegen (eds.), *General Reports of the XIXth Congress of the International Academy of Comparative Law* (Cham 2017) 319 et seq.

³ See also *Lansberg/Perrow/Rogolsky*, *supra* note 1, 3 et seq., putting forward other important reasons as well: “[R]esearchers find it difficult to study both the family and the business simultaneously. They are trained in one field or the other, and they have gained entry through only one of the two systems.”

⁴ See *F. W. Kellermann/F. Hoy*, *Introduction to the Family Business Companion*, in: Kellermann/Hoy (eds.), *The Routledge Companion to Family Businesses* (New York 2017) 1: “Family firm research has seen an exponential growth in output, quality and topics studies. Despite the youth of the field, growing academic interest has been documented through the publication of annotated bibliographies, reflection pieces, literature reviews, meta-analyses and edited volumes.”

1. Family Firms are Fashionable

To begin with, family firms are fashionable. They seem to be everybody's darling these days. Management thinkers like them because family businesses are considered to take a longer-term view than other firms.⁵ They are regarded as a bulwark against short-termism and myopia, under such key terms as patient capital and sustainability.⁶ Politicians like family firms as well because they provide lots of relatively secure jobs and hesitate to lay off staff in times of crisis.⁷ And the public also likes them because they think family firms are more in touch with local communities than firms owned by anonymous shareholders or foreign institutional investors.⁸

2. Family Businesses as the Backbone of the Economy

Moreover, and more importantly, family firms play a crucial role in economic development across the globe. They are the most widespread form of business organization today,⁹ and this is particularly true for Germany. Here, the Foundation for Family Businesses has been investigating the economic significance of family businesses on a regular basis for more than a decade.¹⁰ These are the current figures:

- Family firms account for 90% of all privately-organized firms in Germany,
- they employ 58% of the private sector workforce,
- they generate 52% of the total turnover in the private sector.¹¹

In addition to those data, here are some more remarkable facts from a comparative perspective:

Compared to other modern industrialized economies, there is a high percentage of very large family firms in Germany almost all of which are household names. The illustrious list of the 500 largest family businesses in terms of turnover is headed by the *Schwarz-Group*, operating under the brand name

⁵ See "Schumpeter Reluctant Heirs", *The Economist*, 5 December 2015, 67.

⁶ See *S. Sharma/P. Sharma*, *Patient Capital. The Role of Family Firms in Sustainable Business* (Cambridge 2019).

⁷ "Schumpeter Reluctant Heirs", *supra* note 5, 67.

⁸ "Schumpeter Reluctant Heirs", *supra* note 5, 67.

⁹ See *A. Cahn/D. C. Donald*, *Comparative Company Law* (2nd ed., Cambridge 2018) 558: "Available data shows family firms to be widespread, if not dominant, in most economies."; *T. Zellweger*, *Managing the Family Business* (Cheltenham 2017) 24: "Depending on the definition one uses, roughly 70% to 90% of all firms across the globe are family firms. However, given the lack of a shared definition among the studies on this topic, the exact estimates and their international variation should be taken with a grain of salt."

¹⁰ Beginning with *Stiftung Familienunternehmen*, *Die volkswirtschaftliche Bedeutung der Familienunternehmen* (1st ed., Munich 2007).

¹¹ Figures taken from *Stiftung Familienunternehmen*, *Die volkswirtschaftliche Bedeutung der Familienunternehmen* (5th ed., Munich 2019) 7.

“Lidl”, the fourth-largest retailer in the world, and *Robert Bosch*, producer of automotive components, followed by the *Aldi-Group*, again a discounter, the *Metro-Group*, the *Phoenix-Group*, *Heraeus*, *Henkel*, *Bertelsmann*, *Boehringer Ingelheim* and *Merck*.¹² Depending on the definition¹³ one may also add the carmakers *Volkswagen* and *BMW* to this list, as a leading German newspaper does in its most recent survey of family firms¹⁴: *Volkswagen* had a workforce of 671,000 employees worldwide and generated a turnover of 252,000 billion Euros in 2019, making it the second largest enterprise in Europe, second only to *Royal Dutch Shell*.

Furthermore, a huge majority of the so-called hidden champions¹⁵ in Germany, highly specialized, unknown world market leaders in niche markets, e.g. in the engineering and automotive industries, are family firms.¹⁶ In fact, two-thirds of those hidden champions are family-owned and managed. Overall, one-third of German family firms are exporters which lies at the root of the often-lamented German trade surplus in Europa and the world. In fact, the 500 largest family firms in Germany are almost all globally oriented and have just expanded their foreign market dealings to amount to more than 50% of their total sales.¹⁷

Another interesting fact, albeit often overlooked, is the enormous importance of family firms in underdeveloped rural areas; family firms are key figures in the countryside as taxpayers and employers.

Finally, it is worth mentioning that the top 500 family firms in Germany are on average 101 years old; 26 of them were founded before 1800.¹⁸ The median is in the year 1926, meaning that half of this sample of family businesses were founded in or before that year. The oldest German family businesses are the *Coatinc Company Holding GmbH*, a galvanizing company from Siegen in North Rhine-Westphalia (1502), the *William Pry Holding GmbH*, a company for sewing accessories and automotive supplier from Stolberg near Aachen (1530), and *Freiherr von Poschinger Glasmanufaktur*, a glazier from Frauenau

¹² See *Stiftung Familienunternehmen*, *supra* note 11, 29.

¹³ See *infra* III.1.

¹⁴ See “Die großen deutschen Familienunternehmen”, *Frankfurter Allgemeine Zeitung*, 8 July 2020, 22.

¹⁵ Coining this term *H. Simon*, ‘Hidden champions’: Speerspitze der deutschen Wirtschaft, *ZfB* 60 (1990) 9.

¹⁶ Explaining the background in depth *H. Simon*, *Hidden Champions, Lessons from 500 of the World’s Best Unknown Companies* (Boston 1996); more recently *H. Simon*, *Hidden Champions of the Twenty-First Century: The Success Strategy of Unknown World Market Leaders* (New York 2009).

¹⁷ See *Stiftung Familienunternehmen*, *supra* note 11, 42.

¹⁸ See *Stiftung Familienunternehmen*, *supra* note 11, 30.

in Bavaria (1568).¹⁹ This list unequivocally shows that family firms have always been a formative part of Germany's business landscape.²⁰

3. Family Business Studies and Family Business Law as Emerging Research Fields

Given the economic importance of family firms, it comes as no surprise that they have increasingly triggered academic interest worldwide, both at business and law schools. Business practitioners took the lead, with the first Family Business Center founded in 1962 in Cleveland, Ohio.²¹ The first Chair in family business in the US was established in 1978 at Baylor University, the first European Chair in 1987 at IESE in Spain.²² A major step forward in creating a new field of research was the establishment of the "Family Business Review" in 1988, the first journal devoted exclusively to publishing research on family firms.²³ Today, we find plenty of evidence that family business studies is a subject in its own right²⁴ with annual conferences on family enterprises, specialized textbooks²⁵, handbooks²⁶ and two other journals, the "Journal of Family Business Strategy" launched in 2010 and the "Journal of Family Business Management" launched in 2011.

Legal scholarship is lagging behind. Family business law, the law of family firms, as a separate field of study is almost non-existent at major US and UK law schools. It is a playground for corporate practitioners, for tax and estate planners,²⁷ but not, as many scholars seem to think, for serious legal research – many may be reminded of the old joke about the famous 'non-

¹⁹ According to the list published by the *Stiftung Familienunternehmen*, Die ältesten Familienunternehmen Deutschlands, 6 July 2019.

²⁰ For more illustrations see the family firms covered in *W. Seidel*, Die ältesten Familienunternehmen Deutschlands (Munich 2019).

²¹ See *D. B. Parsons/C. Clarke*, Family Business Centers, in: Kellermann/Hoy (eds.), *The Routledge Companion to Family Businesses* (New York 2017) 580: "Leon and Katie Danco created the first family business center in 1962 in Cleveland, Ohio. The Danco's Center for Family Businesses was independent of any supporting organization."

²² See *P. Sharma/L. Melin/M. Nordquist*, Introduction: Scope, Evolution and Future of Family Business Studies, in: Melin/Nordquist/Sharma (eds.), *The SAGE Handbook of Family Business* (Los Angeles 2014) 1, 12.

²³ Explaining the academic motivation behind this the Editors' Notes by *Lansberg/Perrow/Rogolsky*, *supra* note 1, 1 et seq.

²⁴ Emphasizing this point *Sharma/Melin/Nordquist*, *supra* note 22, 1: "Family business studies is a multidisciplinary field of research that is distinguished from its sister disciplines by its singular focus on the paradoxes caused by the involvement of family in business."

²⁵ See, e.g., *T. Zellweger*, *Managing the Family Business. Theory and Practice* (Cheltenham 2017).

²⁶ See, e.g., *L. Melin/M. Nordquist/P. Sharma* (eds.), *The SAGE Handbook of Family Business* (Los Angeles 2014).

book', *Law of the Horse* consisting of five chapters: Chapter 1: Contracting for a Horse, Chapter 2: Owning a Horse, Chapter 3: Torts by a Horse and Chapter 4: Litigating over a Horse.²⁸ The upshot here is that the horse is not a very useful organizing principle for the study of law.²⁹

This is different with family firms which offer the necessary *distinctiveness* for a new field of legal study.³⁰ Family business law occupies a distinctive factual context at the intersection of different disciplines: company law, family law, and succession law. Family business law therefore merits consideration as a separate field of legal study. Indeed, a couple of German law schools have established Institutes for Family Business Law in recent years, for example in Witten, Bayreuth and Hamburg at Bucerius Law School. At our Institute, we started a research agenda on family firms three years ago. We focus particularly on the comparative legal and interdisciplinary dimensions of family firms, teaming up with our colleagues from the Hamburg School of Business Administration. Our first joint conferences covered topics such as "Family Constitutions" (2017)³¹, "Financing the Family Firm" (2018) and "Ownership Management in Family Firms" (2019)³². The academic groundwork for much of the ensuing legal scholarship was laid in a pioneering handbook written by two Austrian colleagues³³, and has since been com-

²⁷ See *G. Zwick/J. J. Jurinsky*, *Tax and Financial Planning for the Closely Held Family Business* (Cheltenham 2019).

²⁸ For the standard version of this joke *H. Koh*, *Is There a 'New' New Haven School of International Law?* *Yale J. Int'l L.* 32 (2007) 559, 572 n. 85.

²⁹ In this sense *D. M. Ibrahim/D. G. Smith*, *Entrepreneurs on Horseback: Reflections on the Organization of Law*, *Ariz. L. Rev.* 50 (2008) 71, 72. Elaborating on this argument *F. H. Easterbrook*, *Cyberspace and the Law of the Horse*, 1996 *University of Chicago Legal Forum* 207: "Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course in 'The Law of the Horse' is doomed to be shallow and to miss unifying principles."

³⁰ Stressing the criterion of distinctiveness for creating a coherent field of legal study *Ibrahim/Smith*, *supra* note 29, 76: "In our view, a new field of legal study is justified when a discrete factual setting generates the need for distinctive legal solutions. This distinctiveness may manifest itself in the creation of a unique set of legal rules or legal practices, in the unique expression or interaction of more generally applicable legal rules, or in unique insights about law."

³¹ From this see for example, *H. Fleischer*, *Family Firms and Family Constitution: A Legal Primer*, *ECL* 2018, 11.

³² From this, see, for example, *H. Fleischer*, *Organisation der Inhaberfamilie und Ownership Management in Familienunternehmen – eine rechtliche Bestandsaufnahme*, *BB* 2019, 2819.

³³ *S. Kalss/S. Probst*, *Familienunternehmen. Gesellschafts- und zivilrechtliche Fragen* (Vienna 2013).

plemented by several conference volumes³⁴ and a comprehensive handbook compiled by practitioners and academics.³⁵ Meanwhile, a couple of doctoral theses have also been published on different aspects of family business law.³⁶ A specialized German journal was launched in 2016, “FuS – Zeitschrift für Familienunternehmen und Stiftungen”, which sees itself as a platform for research on family businesses, and publishes both legal and economic papers.

III. What’s Different about Family Firms?

What’s different about banks?, asks a famous paper by *Eugene Fama*.³⁷ Echoing this title, it is crucial to find out in our context: What’s different about family firms? What distinguishes them from non-family firms?

1. Defining Family Firms

Defining family firms is a thorny issue. The definitional debate has troubled family business researchers for years, and seems set to remain a thicket of contention for years to come.³⁸ We will probably have to accept that there is no consensus definition,³⁹ no single definite answer to this question, even less so on an international level, where country-specific features and cultural differences add an additional layer of complexity. This is clearly troublesome because until researchers agree on what a family business is, they will find it difficult to build on each other’s work and to develop a usable knowledge base.⁴⁰

For business law professors, this is reminiscent of the very similar difficulties in defining the closed corporation.⁴¹ Those difficulties have given rise to the witty but nonetheless accurate remark that a closed corporation is like a spiral staircase, hard to describe but recognizable when you see one.⁴² Simi-

³⁴ See, e.g., H. U. Vogt/H. Fleischer/S. Kalss (eds.), *Recht der Familiengesellschaften* (Tübingen 2017).

³⁵ C. Bochmann/J. Cziupka/J. Prütting (eds.), *Münchener Handbuch des Gesellschaftsrechts*, Bd. 9: *Recht der Familienunternehmen* (Munich 2021).

³⁶ See, e.g., G. Krämer, *Das Sonderrecht der Familiengesellschaften, Befund eines gesellschaftsrechtlichen Realtyps und ausgewählte Rechtsfragen* (Baden-Baden 2019).

³⁷ E. Fama, *What’s different about banks?*, JME 15 (1985) 29.

³⁸ For an overview of different approaches to the definitional problem *Zellweger, supra* note 9, Chapter 2: *Defining the family business*, 4 et seq.

³⁹ Coming to the same conclusion A. Colli, *The History of Family Business, 1850–2000* (Cambridge 2003) 6: “Despite its relevance, a useful definition of the family firm is elusive.”

⁴⁰ In this sense *Lansberg/Perrow/Rogolsky, supra* note 1, 2.

⁴¹ See H. Fleischer, *Internationale Trends im Recht der geschlossenen Kapitalgesellschaft*, NZG 2014, 1081 et seq.

larly, a number of definitional proposals for family companies have been made in the corporate law discourse, none of which has prevailed.⁴³ For our purposes, however, the definitional debate does not need to be gone into here. A working definition is sufficient. Thus, two cumulative criteria are important: (a) the majority of the decision-making rights are in the hands of the family, the *control element*, occasionally reduced to a significant influence-element, and (b) the intention of the family to pass the business on to their descendants, the *intergenerational element*.⁴⁴

2. Coordinating Three Social Subsystems: Family – Business – Ownership

Proceeding further on the basis of this working definition, the easiest way to point out the unique features of family firms is to refer to the Three-Circle Model of the Family Business System (see next page)

This model was developed at Harvard Business School by *Renato Tagiuri* and *John Davies* in 1978,⁴⁵ and remains the dominant paradigm today worldwide.⁴⁶ It clearly presents three interdependent and overlapping groups, three circles, elements that make up the family business: family, business and ownership. These three social subgroups have their own beliefs and value systems: What counts in a family context, is love, affection, and solidarity. What matters in a business setting is performance. Company owners tend to primarily value return on equity.

The uniqueness of, and challenge for, family firms is the interaction and coordination of all three subsystems. With the help of this model, one can identify different groups of people with different needs and expectations: There are people who are merely family members, others that are family members and employees, and others again that are family members, employees and shareholders. There are also non-family members, employees and shareholders as well.

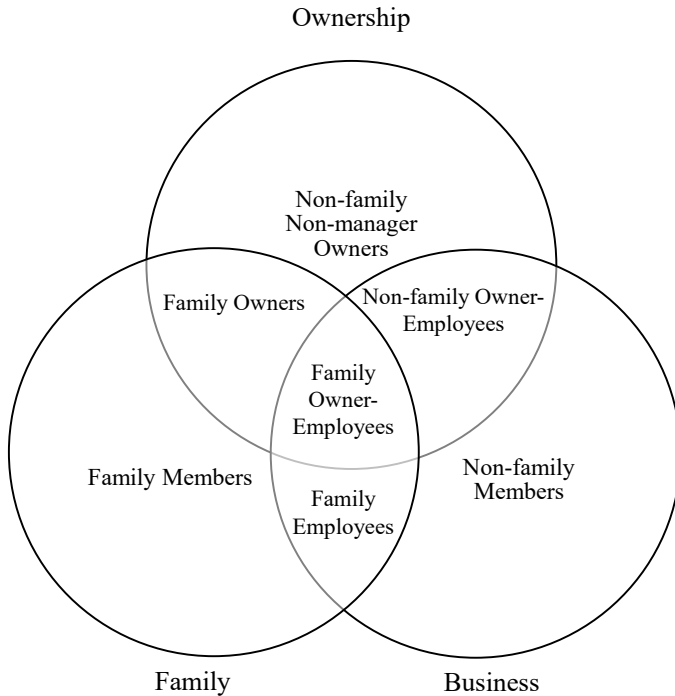
⁴² In this sense *R. A. Kessler*, *With Limited Liability For All: Why Not a Partnership Corporation?*, *Fordham L. Rev.* 36 (1967) 235, 255.

⁴³ For a comprehensive list of these proposals *Krämer*, *supra* note 36, § 3: *Der Meinungsstand zum Begriff der Familiengesellschaft*, 52 et seq.

⁴⁴ For a similar family business definition *Zellweger*, *supra* note 9, 22: “A family firm is a firm dominantly controlled by a family with the vision to potentially sustain family control across generations.”

⁴⁵ For a refined version *R. Tagiuri/J. Davis*, *Bivalent attributes of the family firm*, *FBR* 9 (1996) 199.

⁴⁶ Discussing the advantages and disadvantages of circle models *Zellweger*, *supra* note 9, 18 et seq.

Three-Circle Model of the Family Business System*3. Taxonomies of Family Firms*

Continuing our classification exercise, one can group family firms according to various criteria: their field of business, the strength of the family influence, whether they are listed or not, their size, their age.⁴⁷ These numerous classification features already suggest that the universe of family businesses is more diverse than it may seem at first glance. Therefore, while the fundamental distinction between family and non-family firms remains vital, one must not lose sight of the significant heterogeneity within the population of family firms.

A taxonomy which deserves closer attention in a legal context is one organized around different types of owners in the lifecycle of the family firm. Starting with the founder and sole owner, a typical evolutionary pathway will lead to a sibling company in the second generation and a cousin consortium in the third one, ending up with a true family dynasty at a later stage.⁴⁸ As the

⁴⁷ See *A. Davis, Toward a Typology of Family Business Systems*, in: Tàpies/Ward (eds.), *Family Values and Value Creation* (Basingstoke 2008) 127 et seq.; *P. Sharma/M. Nordquist, A Classification Scheme for Family Firms*, *ibid.*, 71 et seq.

⁴⁸ See *Zellweger, supra* note 9, 59 et seq.

number of family shareholders increases and the business grows in size, more sophisticated governance structures will have to be implemented.

Empirical evidence seems to suggest that, for a variety of reasons, it is rare for a family firm to survive three generations.⁴⁹ In fact, many nations and languages have some variant of the American saying: “From shirtsleeves to shirtsleeves in three generations”.⁵⁰ In England they prefer to say “From clogs to clogs in three generations”, the French explain the cycle of wealth and poverty as the ‘law of three generations’: “La première génération construit, la deuxième développe, quand en s’entend, et la troisième fout la boîte par terre”, and the Germans put it like this: “Der Vater erstellt’s, der Sohn erhält’s, dem Enkel zerfällt’s”. This widespread phenomenon of the rise and decline of a family firm within three generations is usually referred to as the *Buddenbrooks syndrome*,⁵¹ deriving its name from German Nobel Prize-winner *Thomas Mann’s* novel “Buddenbrooks”, published in 1901. If one reads the novel carefully, this is actually not fully correct, as Senator *Thomas Buddenbrook* was already a representative of the fourth generation when the trading business was liquidated after his premature death.

It is nonetheless informative and entertaining to analyze a family business in literature from a law and literature perspective.⁵² One of my pet projects is to collect older and more recent novels about family firms. By now, we have identified the usual suspects, with *Charles Dickens’* “Dombey and Son” from the UK, France’s *Emile Zola’s* “The Ladies’ Paradise”, and from Turkey *Orhan Pamuk’s* “Cevdet and his Sons”, and a couple of others⁵³ Along the same lines, a recent paper written by two economists sees great promise in drawing on literary fiction for family business research.⁵⁴ They argue convincingly that

⁴⁹ See *T. Zellweger/R. Nason/M. Nordquist*, From longevity of firms to transgenerational entrepreneurship of families, *FBR* 25 (2012) 136.

⁵⁰ Discussing this commonality *S. Rau*, The Riddle of the Three Generations. Why so many family firms around the world don’t survive long term, Inaugural lecture, King’s College London, 2016; see also *Zellweger*, *supra* note 9, 322.

⁵¹ See *T. C. Barker/M. Lévy-Leboyer*, An Inquiry into the Buddenbrook Effect in Europe, in: *Hannah* (ed.), From Family Firms to Professional Management (Budapest 1982) 10; *T. Hilker*, Das Buddenbrook-Syndrom – Ursache des Niedergangs von Familienunternehmen, *Familiendynamik. Systemische Praxis und Forschung* 26 (2001) 338; *C. Lorandin*, Looking beyond the Buddenbrooks Syndrome: the Salvadori Firm of Trento, 1660s–1880s, *Business History* 57 (2015) 1005.

⁵² See with a broader approach also *V. Chilese*, Die Macht der Familie. Ökonomische Diskurse in Familienromanen, in: *Galli/Costagli* (eds.), *Deutsche Familienromane: Literarische Genealogien und internationaler Kontext* (Munich 2010) 121 et seq.

⁵³ More recently *N. Bossong*, *Gesellschaft mit beschränkter Haftung* (Munich 2012); *E.-W. Händler*, *Fall* (Frankfort-on-the-Main 1997); *M. V. Jung*, *Phönix oder Suppenhuhn: Ein Roman über Nachfolge in einem Familienunternehmen* (Cologne 2018).

⁵⁴ See *M. Nordquist/W. B. Gartner*, Literature, Fiction and the Family Business, *FBR* 33 (2020) 122.

using that kind of literature expands our ability to see more of the details, the complexities, and the richness of families and their businesses.⁵⁵

IV. Family Firms and Legal Forms

Moving on to core legal issues, the choice of legal form by a family enterprise deserves our primary attention. As far as I can see, a family company as such does not exist anywhere, there is no special codified type of business organization solely for family firms. In Germany, a proposal to that effect was discussed in the late 1930s by a committee of the Academy for German Law, but was quickly rejected, not least because of insurmountable definitional difficulties.⁵⁶ Instead, family firms have to choose from among the general types of business organizations available in their jurisdiction. How these different legal forms evolved over time, is worth recounting and actually provides a history lesson in the making of business law: family businesses have always been the driving force behind the evolution of partnerships and companies all over the world.⁵⁷

1. Families as Founders of the Roman Societas

The partnership in early Roman law, the *societas*, developed from a partnership created from an undivided inheritance among heirs who decided, after the death of the *paterfamilias*, to administer their inheritance jointly rather than distributing it amongst themselves (*consortium ercto non cito*).⁵⁸ This type of partnership was called *societas fratrum*, i.e. a partnership of brothers.⁵⁹ In this sense, one can say, that family firms gave actually birth to partnership law as a separate field of legal study.

⁵⁵ Nordquist/Gartner, *supra* note 54, 126.

⁵⁶ See J. Lieder, *The Corporate Form of Family-Owned Companies*, RTDcom. 2016, N° 2, 37, 44: “In the end, the committee dismissed the idea of an independent legal form for family companies. First, members of the committee were at odds with the term and the ‘typical criteria’ of family companies that made a legal fixation seem highly problematic. Second, the members considered a renewed law of the GmbH to be flexible enough to enable family shareholders to address the specific needs and individual preferences by using the articles of association.”

⁵⁷ For a more detailed account of the following: H. Fleischer, *Familiengesellschaften und Familienverfassungen: Eine historisch-vergleichende Standortbestimmung*, NZG 2017, 1201 et seq.

⁵⁸ See G. Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (Cham 2015) 139; R. Zimmermann, *The Law of Obligations* (Cape Town 1990) 451 et seq.; in greater detail F. Wieacker, *Societas. Hausgemeinschaft und Erwerbsgesellschaft – Untersuchungen zur Geschichte des römischen Gesellschaftsrechts* (Weimar 1936) 126 et seq.

⁵⁹ See D. Daube, *Societas as Consensual Contract*, Cambridge L. J. 6 (1938) 381 et seq.

2. Family Firms as Promoters of the Medieval *Compagnia*, *Accomenda* and *OHG* (*Medici*, *Fugger*)

During the Middle Ages, most trading firms were also family businesses.⁶⁰ Their names were all family names (*Peruzzi*, *Bardi*, *Medici*, *Welser*, *Fugger*).⁶¹ Their partners were mostly close relatives who founded commercial partnerships with full personal liability.

This new type of business association was developed in the 14th century in northern Italian cities⁶² and called *compagnia*, derived from the Latin “cum pane”, that is community of those who share their bread, again signaling that this was a legal form primarily for family firms.⁶³

A famous example for such a partnership agreement is the *Medici* banking house founded in Florence in 1397.⁶⁴ A decade later, the *Medici* made use of a Florentine law from 1408, allowing them to set up an *accomenda* in which some of the partners could limit their liability – the historical prototype of the modern limited partnership⁶⁵.

A century later, in 1494, the year, when the *Banco Medici* finally collapsed and the *Medici* family had to leave Florence, three brothers in Southern Germany, *Ulrich*, *Georg* and *Jakob Fugger*, signed a commercial partnership agreement⁶⁶ which was actually one of the first of its kind in Germany and came to be known as the “fundamental law of the Fugger dynasty”.⁶⁷ *Jakob Fugger*, *Jakob*

⁶⁰ See *E. S. Hunt/J. M. Murray*, *A History of Business in Medieval Europe, 1250–1550* (Cambridge 1999) 33: “The intense family orientation of medieval businesses shows up most clearly in the intermingling of the affairs of a business and the extended family of its owners that so often appears in the surviving accounts and letters of medieval businessmen.”

⁶¹ See *E. S. Hunt*, *The Medieval Super-companies. A Study of The Peruzzi Company of Florence* (Cambridge 1994) Chapter 1: “The Company and the Family”, 6 et seq.

⁶² The *locus classicus* still is: *M. Weber*, *The History of Commercial Partnerships in the Middle Ages, 1889*, translated by *L. Kaelber* (Lanham et al. 2003).

⁶³ See *B. Hawk*, *Law and Commerce in Pre-Industrial Societies* (Leiden/Boston 2016) 9.210: “[T]he medieval Italian *compagnia* originally reflected small family relationships between father and son or among several brothers – men who lived in the same house, who broke the same bread (as the word *compagno* implies) and who found it natural to accept unlimited liability, for each other’s actions.”

⁶⁴ For the standard reference on the legal status and economic structure of this institution *R. de Roover*, *The Rise and Decline of the Medici Bank, 1397–1494* (Cambridge 1963) 77 et seq.; more recently also *R. A. Goldthwaite*, *The Economy of Renaissance Florence* (Baltimore 2009) 64 et seq.

⁶⁵ See *de Roover*, *supra* note 64, 89; *Goldthwaite*, *supra* note 64, 67: “In any event, Florence seems to have been far ahead of the other Italian centers in devising this kind of limited-liability contract, although the instrument never realized its potential for evolving into something like a joint-stock company.”

⁶⁶ Reprinted in *M. Jansen*, *Die Anfänge der Fugger bis 1494* (Leipzig 1907) Vol. I, Appendix, 263–268.

the Rich, as he was called, was the richest man who ever lived on earth,⁶⁸ head of a merchant family and leading banker with direct trading relationships to the Pope and the Emperor, *Maximilian I*. A closer analysis of the partnership contract concluded by him and his two brothers in 1494 is highly instructive as it already contained many clauses which were later incorporated into the modern Commercial Codes, e.g. a strict prohibition of competition.⁶⁹

Generally, the *Medici* and *Fugger* examples show that family firms were the main promoters of the medieval types of commercial partnerships in Italy, Germany and elsewhere.

3. Family Firms in the 19th Century between Partnership and Company (*Siemens, Sal. Oppenheim*)

The next major leap did not occur before the 19th century, when the demand for new legal forms with limited liability had become more pressing than ever. Key legislative developments in Germany included the Prussian Stock Corporation Act of 1843 (*Preußisches Aktiengesetz*), and, even more importantly for smaller enterprises and family firms, fifty years later, the introduction of the Limited Liabilities Companies Act of 1892 (*GmbH-Gesetz*).

A nice illustration how family firms made use of the different types of business organization over the course of time, is the history of *Siemens*, the electrical and engineering company, now a conglomerate company.⁷⁰ *Werner von Siemens*, the inventor of the pointer telegraph, started the business as a commercial partnership (*Offene Handelsgesellschaft, OHG*) (“*Siemens & Halske Telegraph Construction*”) together with his business partner *Johann Georg Halske*, in 1847 in a Berlin back courtyard. Throughout his business life, *Werner von Siemens* strongly opposed any conversion into a capital company. In 1890, he at least agreed to convert the business into a limited partnership (*Kommanditgesellschaft, KG*), with him becoming a limited partner, and two of his sons as general partners. It was only after his death that *Siemens* finally became a stock corporation (*Aktiengesellschaft, AG*) in 1897. The articles of the stock corporation were drafted carefully to preserve the family’s influence through a powerful supervisory board.⁷¹ With respect to corporate finance,

⁶⁷ See *H. Fleischer*, *Der Gesellschaftsvertrag der Fugger: Frühform des OHG-Rechts*, in: Dreher/Drescher et al. (eds.), *Festschrift für Alfred Bergmann zum 65. Geburtstag am 13. Juli 2018* (Berlin/Boston 2017) 183.

⁶⁸ *G. Steinmetz*, *Der reichste Mann der Weltgeschichte. Leben und Werk des Jakob Fugger* (Munich 2016).

⁶⁹ See *Fleischer*, *supra* note 67, 190 et seq.

⁷⁰ For a richer analysis of all the partnership contracts and articles of association preserved in the *Siemens* archives *H. Fleischer*, *Die Siemens AG: Rechtliche Wegmarken von der Familien- zur Publikumsgesellschaft, AG 2019*, 481 et seq.

⁷¹ See *Fleischer*, *supra* note 70, 487 et seq.

Siemens kept the typical financing patterns of family firms: a preference for internal financing, and regular retention of two-third of its profits.

The *Siemens* case is also remarkable in yet another respect: as an early example of family multinationals.⁷² *Werner von Siemens* utilized family ties to build his global empire, sending two of his brothers who jointly managed the company with him to London and Saint Petersburg. In that respect, he very much resembled *Jakob Fugger* four centuries ago whom he admired as a founder of a world business.⁷³

A similar story can be told about the development of the private bank *Sal. Oppenheim jr. & Cie.*⁷⁴ In 1789, *Salomon Oppenheim junior*, then only 17 years old, founded a money-trading business in Bonn before moving to Cologne in 1794, where the bank retained its principal business seat for the next centuries.⁷⁵ When he died in 1828, his wife and her two eldest sons, *Simon* and *Abraham*, took over, forming a commercial partnership (OHG). Three generations later, in 1904, the business was converted into a limited partnership (KG). Finally, in 1989 the partners decided to change the legal form once again, transforming their private bank into a partnership limited by shares (Kommanditgesellschaft auf Aktien, KGaA).

4. Family Firms and Variety of Legal Forms in the 20th and 21st Century (*Merck, Bertelsmann*)

Today's picture of family firms in Germany is characterized by the huge variety of legal forms and their combinations.⁷⁶ This, however, is not a special feature of family companies, but a general characteristic of German company law: The law and life of business organizations in Germany is quite diverse. There is no single dominant form, but different types of business organizations for different purposes.⁷⁷ To take some statistics as examples:⁷⁸

⁷² See *C. Lubinski*, A Family's Multinational's Quest for Unity, *Siemens's Early Business in India 1847–1914*, in: *Lubinski/Fear/Pérez* (eds.), *Family Multinationals. Entrepreneurship, Governance, and Pathways to Internationalization* (New York 2013) 37, 40: "Siemens was one of the earliest and best-known family multinationals in Germany."

⁷³ See *Fleischer*, *supra* note 70, 485.

⁷⁴ For a richer account of all the partnership contracts and articles of association preserved in the *Sal. Oppenheim* archives, *H. Fleischer/J. Tittel*, *Familiengesellschaftsverträge als Forschungsgegenstand: Die Fallstudie Sal. Oppenheim jr. & Cie*, *FuS* 2020, 10 et seq.

⁷⁵ See *G. Teichmann*, *Private Banks and Industry in the Light of the Archives of Bank Sal. Oppenheim jr. & Cie.*, Cologne, in: *Cassis/Cottrell/Fraser* (eds.) *The World of Private Banking* (Farnham/Burlington 2016) 205 et seq.

⁷⁶ For a more detailed account *Lieder*, *supra* note 56, 37 et seq.

⁷⁷ Explaining this feature in greater depth *H. Fleischer*, *A Guide to German Company Law for International Lawyers – Distinctive Features, Particularities, Idiosyncrasies*, in: *Fleischer/Hansen/Ringe* (eds.), *German and Nordic Perspectives on Company Law and Capital Markets Law* (Tübingen 2015) 3, 7 et seq.

As of January 1st 2020, there were 1,329 million limited liability companies (GmbH), among them 152,000 entrepreneurial companies (Unternehmergesellschaft, UG), a subtype of the GmbH introduced in 2008, requiring no capital minimum. In addition, there were 14,200 stock corporations (AG), 650 European companies (SE) and 360 partnerships limited by shares (KGaA). Apart from that, partnerships still play an important role in Germany, with 23,000 commercial partnerships (OHG) and 280,000 limited partnerships (KG), 90% of them hybrid companies with a legal person serving as general partner (GmbH & Co. KG). Finally, there are more than 200,000 civil partnerships (GbR) not registered in the commercial register, but running as a business and obliged to file turnover tax declarations.

Family-owned businesses make use of all these types of business organization. This is also true for less well-known types such as the partnership limited by shares (KGaA) which is becoming increasingly popular among larger family firms. The KGaA is a two-class company, characterized by the difference between a general partner who is fully and personally liable towards creditors, and shareholders with limited liability. It allows family firms to maintain an effective influence on the management without the need for a capital majority or supermajority. One prominent example is the pharmaceutical family giant *Merck*, the world's oldest operating pharmaceutical-chemical company in the world, founded in 1668, and now listed on the Frankfurt stock exchange. The *Merck* family currently holds 70% of the shares as a general partner and the remaining 30% in the hands of external shareholders.⁷⁹

Apart from the basic legal forms, family firms may also consider combinations of them. By far the most popular combination is the GmbH & Co. KG. In this case, a limited liability company serves as a general partner within a limited partnership. This structure combines the advantages of a capital company (limited liability, external management) with those of a partnership (tax transparency, contractual freedom and flexibility).

Even more sophisticated is another hybrid legal form: the SE & Co. KGaA. In this case, a European company serves as a general partner of a partnership limited by shares. This structure has recently been utilized by *Bertelsmann*, Germany's largest media company and one of the largest media conglomerates in the world, offering television and radio (RTL group) as well as books (Penguin Random House) and education services. The SE & Co. KGaA combines the advantages of the KGaA with those of the SE. At the same time however, it suffers from its very complicated organizational struc-

⁷⁸ Figures taken from *U. Kornblum*, Bundesweite Rechtstatsachen zum Unternehmens- und Gesellschaftsrecht (Stand: 1.1.2020), GmbH-Rundschau 2020, 677 et seq.

⁷⁹ For more on *Merck*'s corporate history *C. Burhop/M. Kießener et al.*, *Merck. Von der Apotheke zum Weltkonzern* (2nd ed., Munich 2018).

ture and high founding costs, making it only appealing for large family firms which need access to the capital market.

The takeaway lesson here is, that family firms in Germany can choose from a wide range of options, when picking the suitable legal form for their business.

V. Governance Framework for Family Firms

The governance framework for family firms usually consists of a series of layers that are at times corporate, or contractual or non-normative in nature.⁸⁰ These layers together make up the whole, summoning up the image of the layers of an onion.⁸¹

1. Statutes

Statutes are necessarily the first port of call for regulation in the legal framework for family firms. They offer a governance pattern with varying levels of flexibility depending on the type of company in question. In Germany, the Stock Corporation Act (AktG) provides the least room to maneuver with the iron principle of statute stringency enshrined in § 23 para. 5.⁸² This explains, as has already been pointed out⁸³, why German family firms aiming to access the capital market are increasingly turning from the rigid corset of the stock corporation (AG) to the softer vestments of a partnership limited by shares (KGaA), a European Company (SE) or a hybrid SE & Co. KGaA.

2. Articles of Association

Usually, the most important rules governing family partnerships and limited liability firms are found in the articles of association rather than legislation. According to § 109 German Commercial Code (*Handelsgesetzbuch*, HGB) and § 45 para. 1 German Limited Liability Company Act (*Gesetz betreffend die Gesellschaft mit beschränkter Haftung*, GmbHG), shareholders can set up

⁸⁰ In more detail *Kalss/Probst*, *supra* note 32, marg. no. 4/1 et seq. Generally on the many layered governance framework for closed corporations *Fleischer*, *supra* note 2, 319; also, but with some differences *J. A. McCahery/E. P. Vermeulen*, The Corporate Governance Framework of Non-listed Companies, in: *McCahery/Vermeulen* (eds.), *Corporate Governance of Non-Listed Companies* (Oxford 2008) 1, 5 et seq., explaining that the three pillars of the governance framework differentiate between company law, contract and optional guidelines.

⁸¹ On the following see *Fleischer*, *supra* note 33, 11 et seq.

⁸² From a comparative perspective *T. Rothärmel*, *Gestaltungsfreiheit der Familiengesellschafter im deutschen und im US-amerikanischen Aktienrecht* (Bielefeld 2006).

⁸³ See *supra* IV.3.

tailor-made organizational structures in family firms and establish ownership rights according to their specific needs. This can be complimented by the creation of additional corporate organs, for example an advisory board made up of non-family members.⁸⁴

3. Shareholder Agreements

In addition to the relevant legislation and the articles of association, shareholder agreements may also contain provisions on corporate governance in the family firm. Their most significant regulatory items include voting rights agreements, transfer restrictions, pre-emptory purchase rights and agreements regarding the make-up of the various corporate organs. From a strictly legal perspective, these are independent agreements between some or all shareholders that operate *alongside* the articles of association, something the nomenclature in other languages makes clear, such as the Italian *patti parasociali* and the Spanish *pactos parasociales*. The relationship here is purely contractual, and in contrast to the articles of association, can only be altered with unanimous agreement, rather than a qualified majority. The contents of these agreements, and even their very existence is usually shielded from the curious gaze of the outside world; they remain “the invisible side of the moon”⁸⁵.

4. Codes of Governance for Family Firms

Codes of corporate governance provide a further layer of regulation that has already reached the privately held limited liability corporation⁸⁶ and the family firm.⁸⁷ The main instrument in Germany is the “Governance Code for Family Businesses” created in 2004 as the result of a private initiative, with its third edition released in May 2015. In legal terms, it is distinct from the Ger-

⁸⁴ See *A. Sanders*, Der Beirat als Instrument der Family Business Governance in der Entwicklung des Familienunternehmens, NZG 2017, 961; with a broader approach also *A. Koeberle-Schmidt/D. Caspersz*, Family Governance Bodies. A Conceptual Typology, in: *Smyrnios/Potziioris/Goel* (eds.), Handbook of Research on Family Business (2nd ed., Cheltenham 2013) 125 et seq.

⁸⁵ *P. Forstmoser*, Corporate Governance – eine Aufgabe auch für KMU?, in: Aktuelle Fragen des Bank- und Finanzmarktrechts. Festschrift für Dieter Zobl zum 60. Geburtstag (Zurich 2004) 475, 501 playing on a poem by *Matthias Claudius*.

⁸⁶ See *C. Konnertz-Häußler*, Ein Corporate Governance Kodex für die GmbH (Göttingen 2011).

⁸⁷ See *R. Hirsch*, Decoding Family Businesses: Are Corporate Guidelines Necessary for Family Business?, NZBLQ 17 (2011) 126–127: “Starting in the early 2000s with just a few countries engaged, the list of corporate governance guidelines including or focusing on family businesses is steadily expanding at national as well as international policy levels.”

man Corporate Governance Code for listed companies in that it, *inter alia*, lacks a statutory comply-or-explain mechanism like that of § 161 AktG.⁸⁸

According to its preamble, the Governance Code for Family businesses tries to help families to ask themselves the necessary questions about their own companies. As such, the Code fulfils a heuristic function, assisting families in finding tailor-made solutions rather than issuing generalized provisions. The Code clearly recognizes the great diversity and heterogeneity of family firms. These differences, the Code says, make it impossible to provide ‘one size fits all’ recommendations for good family governance.

5. Family Constitution

Last, but by no means least, there is the family constitution, also known as the family charter or family protocol. This is a rather novel governance instrument, although one can point to early predecessors in the house laws of the high nobility in continental Europe, the family pacts of the Habsburg and Hohenzollern dynasty.⁸⁹ In substance, a family constitution is a written document usually signed by all family members which sets out the family principles, the common values and collective goals for the family enterprise.

a) International developments

Family constitutions have, by now, become a global phenomenon, found in the US as well as in Spain, Germany, and a number of other countries as well.⁹⁰

In the United States, the initial spark that lit the family constitution flame came from recommendations made in management literature: John Ward of the renowned Kellogg School of Management in Chicago was to become the most influential pioneer, first outlining the challenges for strategic planning for family firms at the end of the 1980s.⁹¹ Together with his colleague Miguel Ángel Gallo from Barcelona he coined the term family constitution in its Spanish form *protocolo familiar* in 1992.⁹² Numerous further publications resulted in a

⁸⁸ § 161 AktG stipulates: “The management board and the supervisory board of listed companies shall declare annually that the recommendations of the ‘Government Commission German Corporate Governance Codex’ published by the Federal Ministry of Justice in the official section of the electronic Federal Gazette have been and are complied with or which of the Code’s recommendations have not been applied or are not being applied and the reasons therefor. The declaration shall be made available to the shareholders on a permanent basis.”

⁸⁹ See *Fleischer, supra* note 57, 1205.

⁹⁰ For a comparative account *Fleischer, supra* note 31, 12 et seq.

⁹¹ Preparing the way *J. Ward, Keeping the Family Business Healthy. How to Plan for Continuing Growth, Profitability and Business Leadership* (New York 1986).

⁹² *J. Ward/M. A. Gallo, Protocolo Familiar, Nota técnica de la División de Investigación del IESE DGN-448 1992.*

2005 handbook compiled together with Daniela Montemerlo on the ‘Family Constitution’⁹³ that covered the experiences of over eighty families.

In Spain, the *protocolo familiar* has been making its way into corporate practice via US management literature since the 1990s,⁹⁴ and has even been granted mention in a number of governance codes for non-listed companies and family firms.⁹⁵ Based on an authority to issue ordinances from 2003, the *Real Decreto* 171/2007 put a specific legal definition to the family protocol⁹⁶ and created the opportunity for non-listed companies to disclose the whole protocol or some of its rules through the commercial register.

In Germany, the Governance Code for Family Businesses⁹⁷ recommends that family firms create their own governance code.⁹⁸ Moreover, specialized consulting services and law firms have now discovered the family constitution for themselves, and praise its virtues both in providing guidance and creating consensus. As a consequence, the spread of the family constitution in Germany has increased exponentially, although exact figures are lacking. Current studies find some sort of family constitution in more than one third of all investigated family businesses.⁹⁹

⁹³ D. Montemerlo/J. Ward, *The Family Constitution. Agreements to Secure and to Perpetuate Your Family and Your Business* (Marietta 2005).

⁹⁴ See A. V. Valmaña Cabanes, *El régimen jurídico del protocolo familiar* (Granada 2013) 103 et seq.

⁹⁵ See *Guía práctica para el gobierno de las empresas familiares*, 2012; *Guía para la pequeña y mediana empresa familiar*, 2008; *Principios de Buen Gobierno Corporativo para Empresas No Cotizadas*, 2014.

⁹⁶ *Real Decreto* 171/2007 of 9 February 2007, Art. 2 para. 1, which can be translated roughly as follows: “The family protocol laid down in this Royal Decree covers all the agreements between the shareholders with each other and with third parties with whom they have a family relationship and which deals with a non-listed company in which they share a common interest in creating a communication model and achieving consensus in decision making to regulate the relationships between family, ownership and undertaking that affect the company.”

⁹⁷ *Supra* IV.4.

⁹⁸ Para. 8 Governance Code for Family Firms: “Creation and Validity of an Own Governance Code. 8.1: It is recommended that the elements of this Governance Code be incorporated into individual rules. 8.2: These rules should be jointly drawn up and approved by the owner family. The process of joint elaboration and opinion-forming is at least as important as the outcome. 8.3. The individual rules should be reviewed by the owner family from time to time and amended if necessary. With this in mind, early on the family should determine the decision-making authorities and majorities required for subsequent amendment of their Code. 8.4.: The family should also determine the legal quality attaching to the Code and its content, particularly as this relates to articles of association and other legal documents.”

⁹⁹ See R. Rösen/M. Hülsbeck, *Die Unternehmerfamilie und ihre Familienstrategie. Einblicke in die gelebte Praxis von Family Governance* (Witten 2019) 6, 25; P. Ulrich/S. Speidel, *Die Familienverfassung als Instrument der Corporate Governance in Familienunternehmen. Aktuelle empirische Befunde*, ZCG 2017, 197, 199 et seq.

b) *Legal effects of a family constitution in germany*

From a legal point of view, family constitutions are largely unexplored territory, although a couple of recent publications have shed some light on them.¹⁰⁰ Management scholars and business consultants emphasize that family constitutions are only moral contracts and never legally binding. Some of them firmly believe in this, others purport it only for strategic reasons, i.e. to keep the lawyers, as potential competitors, out of the consultancy market.

At least from a German perspective, the widely held point of view that family constitutions are never legally binding falls short of the mark, as it fails to recognize that there is no such thing as a 'standard' family constitution.¹⁰¹ Rather, in practice, one is confronted with a range of forms all with differing levels of obligation, making it far more appropriate to speak of family constitutions as a chameleon-like instrument¹⁰²: They come in different shapes and flavors, varying from a short mission statement to a fully-fledged agreement, and cannot be reduced to a single uniform model. Depending on the context, therefore, they may well produce legal effects of one kind or the other:

Technically, family constitutions can be integrated into the preamble of the articles of association by way of reference. Depending on their wording and function, they may also qualify as ordinary shareholder agreements. In still other cases, they may indeed amount to nothing more than a social agreement that does not cross the threshold of legal materiality.¹⁰³

Apart from that, there are even more nuanced and indirect ways in which a family constitution can create legal effects. Let me briefly explain by way of three examples¹⁰⁴:

First, it is conceivable that individual rules in a family constitution are validated through intra-shareholder practice. Case law of the German Federal Court of Justice recognizes that many years of a particular practice may constitute a tacit modification of the partnership contract.¹⁰⁵ In fact, there is a

¹⁰⁰ See, e.g., H. Fleischer, *Das Rätsel Familienverfassung: Realbefund – Regelungsnatur – Rechtswirkungen*, *Zeitschrift für Wirtschaftsrecht* 2016, 1513; S. Bong, *Gesellschaftsrechtliche Wirkungen einer Familienverfassung – Zur rechtlichen Relevanz einer tatsächlichen Willenseinigung mit Rechtsgeschäftsbezug in Familiengesellschaften*, doctoral thesis, Bucerius Law School 2012; T. Hueck, *Die Familienverfassung – Rechtliche Konturen eines Instruments der Governance in Familienunternehmen* (Tübingen 2017).

¹⁰¹ See Fleischer, *supra* note 100, 1515 et seq.

¹⁰² U. Gläßer, *Die Familienverfassung – zahnlose Absichtserklärung, unzulässiges Disziplinierungsmittel oder integratives Steuerungsmittel – Annäherungen an ein Chamäleon*, in: Dauner-Lieb/Freudenberg/Werner (eds.), *Familienunternehmen im Fokus von Wirtschaft und Wissenschaft. Festschrift für Mark K. Binz* (Munich 2014) 228, 234.

¹⁰³ See Fleischer, *supra* note 57, 1209.

¹⁰⁴ For the following already Fleischer, *supra* note 31, 18 et seq.

¹⁰⁵ BGH, 2 February 1978, BGHZ 70, 331, 332; BGH, 29 March 1996, BGHZ 132, 263, 271.

presumption that a sustained deviation from the partnership agreement may be tantamount to a consensual change to its contents.¹⁰⁶ Things are more complicated in incorporated family firms where a tacit derogation from the articles of association through intra-shareholder practice faces unsurmountable problems of form. What is feasible however, is a gap-filling supplementary practice or an interpretive observance where an unclear provision of the articles of association has been constantly construed in a particular way.

Second, a family constitution can be valuable as an interpretative aid for partnership agreements. Take the example¹⁰⁷ that the company statute uses the term ‘child’, without providing further definition. This may lead to subsequent debate as to whether the children of a patchwork family or adopted children are to be granted the same status as biological children. Were the family constitution to provide an indication, or indeed, a comprehensive definition¹⁰⁸, that definition could (and would) hardly be ignored by the German courts.

Third, the family constitution could and should also play a role in specifying the duty of loyalty between co-partners or co-shareholders in family firms. In a leading 1968 decision, the Federal Court of Justice declared that the family bond could have an impact on the shareholders’ duty of loyalty.¹⁰⁹ This must hold true a fortiori when these bonds are expressed in the family constitution. As an example: the family constitution contains a provision limiting dividend distribution to 40% of annual profits after taxes, which is not mentioned in the articles of association. In my opinion, a shareholder, voting on profit distribution resolutions in a manner inconsistent with the family constitution, may, in individual cases be in breach of the duty of loyalty. A second example:¹¹⁰ the family constitution provides for a reduced compensation where a shareholder leaves the company, with no further details provided in the articles of association. In this case, too, a shareholder demanding full compensation, may, depending on the situation, also be acting in breach of the relevant clause. In the same vein, the German Federal Court decided in favor of an agreement between all shareholders that was not included in the articles of association, but was contained in a contractual side agreement. One of the arguments advanced by the Federal Court for this finding drew on the provision outlining contradictory conduct in § 242 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB).

¹⁰⁶ BGH, 29 March 1996, BGHZ 132, 263, 271.

¹⁰⁷ According to Higher Regional Court of Stuttgart, 14 November 2012, BeckRS 2012, 23633.

¹⁰⁸ See para. 7.1.3 Governance Code for Family Firms: “An approach to family governance should also specify who is a member of the owner family.”

¹⁰⁹ Explicitly BGH, 9 December 1968, BGHZ 51, 204, 206.

¹¹⁰ According to *R. Kirchdörfer/R. Lorz*, Corporate Governance in Familienunternehmen. Familienverfassungen und Schnittstellen zum Gesellschaftsvertrag, FuS 2011, 97, 105.

Put more generally, the greatest challenge in doctrinal terms is to explain how all these formal and informal agreements (articles of association, shareholder agreements, governance codes, family constitutions) interact and influence each other in a family business context. This is a very complex story which will have to be told some other place, some other time.¹¹¹

VI. Outlook: Comparative Family Business Law

In recent years, family business law has emerged as a vibrant field for legal research. Given the prevalence of family firms around the world, similar legal issues will sooner or later surface in a number of jurisdictions and have to be resolved either by arbitration proceedings or by national courts. The legal effect of family constitutions briefly discussed in this paper is only one example. In light of this, great promise lies in a comparative approach, seeking to find out how family dynamics are dealt with in company law doctrine in different jurisdictions. This may well open up the doors to a new subdiscipline in the realm of comparative private law: comparative family business law.

¹¹¹ First thoughts in *Fleischer, supra* note 31, 17 under the sub-heading “From Nexus of Contracts in Family Firms to the Doctrine of Linked Contracts”.