

Chapter 16

Discussion Report Part 4: Legal Research II

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Susanne Kals: Succession in Family Businesses – Legal Frameworks

Katrin Deckert: Family Firms and Family Constitutions in France – A General Overview

At the beginning of the discussion, Kals was asked about the debate on family constitutions and their legal effects in Austria. She replied that the legal classification as a binding agreement or a moral obligation depends on the specific document. Types of family constitutions as they are increasingly worked out in legal literature may be helpful as a first step to assess their legal nature in the case at hand. At least, a family constitution would be considered as an aid for the interpretation of the company statutes. It may even have the legal effect of restricting the rights of shareholders, for example when they agreed to accept share prices for a buy-out below the fair value. Tailor-made family constitutions also contain provisions for a way out, such as an internal buy–sell arrangement. Often, the core parts of a family constitution in Austria, Kals explained, are similar to a typical shareholder agreement.

A second part of the discussion was devoted to the legal infrastructure between succession law and company law, following the presentation by Susanne Kals. A German law professor stated that the role and responsibility of the legislature are to offer legal rules suited to the needs of family firms, especially with regard to the doctrinal reconciliation of succession law and company law. It seems that romanistic legal orders (France, Italy, Spain) have difficulties in this respect, he

Family Firms and Family Constitution, 225–226



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explained. For instance, some of them do not acknowledge the validity of inheritance contracts. The family constitution may help as a remedy to overcome some of these deficiencies of succession law. Kalss added that in Austria the right to a compulsory portion (“Pflichtteilrecht”) in succession law gives rise to further problems. They may be overcome in later generations by making use of the civil-law foundation (“Privatstiftung”), but in the first generation the compulsory portion regime remains a stumbling block for lawyers. Asked about current reform proposals to improve the interplay of company and succession law on the European level, Kalss responded that there are no such plans. In this context, a German law professor reminded the audience of the fact that company law is similar across jurisdictions, whereas the law of succession differs in many respects, reflecting path dependences and cultural differences.

Finally, the discussion on Austrian law turned to legal forms for family businesses, in particular the partnership limited by shares (“Kommanditgesellschaft auf Aktien”) which has become increasingly popular in Germany. Kalss explained that this type of business organization was eliminated from the menu of legal forms in Austria in the 1960s due to its practical irrelevance. From today’s point of view, this loss of flexibility for family businesses is regrettable.

Moving on to family constitutions in France, Deckert explained that their development is a rather recent phenomenon, having emerged more broadly over the last 10–15 years. The Mulliez family’s constitution is considered a role model. It was drafted after the patriarch had died intestate in the 1950s. His heirs worked together with a Belgian business professor and the family notary to create an agreement for their future cooperation. Looking more globally, an Australian management scholar and a German law professor shared the observation that modern family constitutions differ from their early predecessors in the way their content is shaped: today, family consensus has replaced the patriarch’s dictatorship.

The last part of the discussion revolved around a decision by the Paris Court of Appeal of 2015 which considered the family constitution as an aid for interpreting the company charter. Since then, Deckert reported, that practitioners are well aware of the fact that a family constitution may have legal significance. However, this decision did not receive much attention from legal scholars. A possible explanation for the dearth of legal scholarship in this respect is that most disputes within family businesses in France are resolved by mediation or arbitration.