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Susanne Kalss *Editor*

Company Law and the Law of Succession

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Part I
General Report

The Interaction Between Company Law and the Law of Succession – A Comparative Perspective

Susanne Kalss

Abstract The life of humans is limited. So if the business or the shares of a business lie in the hands of a human person, the death of that person entails the mechanism of succession. The law of succession occurs in the life of a company if the owner or the shareholders themselves are not legal entities but humans who die. Company law and the law of succession are therefore strongly connected with private ownership of companies. Typically, ownership of the enterprise or the shares of a company do not offer only economic claims but influence and power to determine the future development of the company. Company law and the law of succession is therefore the field of privately owned companies and enterprises. One of the most important examples of privately owned companies is family businesses.

1 Introduction

1.1 Family and Business

There is no doubt that family businesses play a substantial role in all of the countries included in the report. Numbers range from 62 % of SMEs in England,[1] generating 52 % of all sales turnover in the SME bracket, to 69 % of all businesses in the Netherlands[2] (generating 53 % of the GNP), to around 80 % of all SMEs in Austria[3] (employing around 70 % of all employees[4]) and Poland[5] (excluding agriculture and

[1] Or 66 % of all businesses, depending on the survey cited; Ball 2014: 2.

[2] Burgerhart and Verstappen 2014: 1.

[3] Österreichisches Bundesministerium für Wirtschaft, Familie und Jugend (2012); Cach 2014: 1.

[4] Kalss and Probst 2013a, b: 3.

[5] Soltysinski 2014: 2.

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fishery businesses), to 90 % of all businesses in Germany,[6] Italy,[7] and Finland.[8] In Europe, more than 60 % of all business are family businesses,[9] and the worldwide numbers are something between 65 and 80 %.[10]

These figures demonstrate the prevalence of family businesses. They also have another implication. Surveys conducted by the KMU Forschung Austria showed that in 2012–2021, around 33 % of all SMEs in Austria are expected to be transferred to the next generation.[11] They will have to deal with sophisticated questions of succession.[12]

1.2 Defining Family Business

The term 'family business' combines two – at the first view – antagonistic notions – that of a family and that of a business. Most people will come up with concepts like love, acceptance, faithfulness, and well-being when thinking of the meaning of 'family'. In contrast, doing business is connected to generating profit, productive work and cost efficiency. Being part of a family is a biographical given, while an affiliation to a business is a variable, thinking in models it is qualification.

But what exactly is a family business? Since the term 'family business' lacks a legal definition, the definitions used by various institutions are not clear-cut. It is important to see that this is a definition by types. That means that some criteria must be fulfilled but there is a certain range of varieties.

A common trait that all definitions agree on is that members of one family will need to have control over the business, with the subjective intention to devote the business to the family.[13]

However, there are three common traits that all definitions agree on. Those are expressed in the prevailing model, the so-called "3-Circle" model of family business (Tagiuri and Davis 1982). This model encompasses three factors: family, ownership and business, which are depicted as three intersecting circles. It is at the intersections that problems arise.

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[6] Sanders 2014: 1.

[7] Fusaro 2014: 1.

[8] Kuisma 2014: 1.

[9] European Commission Enterprise and Industry Directorate General 2009: 8, via http://ec.europa.eu/enterprise/policies/sme/promoting-entrepreneurship/family-business/family_business_expert_group_report_en.pdf, accessed on 22 May 2014.

[10] Gersick et al. 1997: 2.

[11] BMWFJ Mittelstandsbericht (2012: 72) via http://www.parlament.gv.at/PAKT/VHG/BR/III-BR/III-BR_00477/imfname_275697.pdf

[12] Kalss and Probst 2013b: 3.

[13] Kalss and Probst 2013b: 9.

The European Commission has suggested the following definition of family business:

> "A firm, of any size, is a family business, if:
>
> 1. The majority of decision-making rights is in the possession of the natural person(s) who established the firm, or in the possession of the natural person(s) who has/have acquired the share capital of the firm, or in the possession of their spouses, parents, child or children's direct heirs.
> 2. The majority of decision-making rights are indirect or direct.
> 3. At least one representative of the family or kin is formally involved in the governance of the firm.
> 4. Listed companies meet the definition of family enterprise if the person who established or acquired the firm (share capital) or their families or descendants possess 25 per cent of the decision-making rights mandated by their share capital."[14]

The English report based its definition of 'family business' on the definition used by the Ministry, the Department of Business, Innovation and Skills (BIS 2013) in a survey on family businesses. According to this approach, the business needs to be

1. family-owned and
2. the majority of owners need to be members of the same family (BIS 2013: 88).

Another possible definition is provided by the German *Stiftung Familienunternehmen*. According to this definition, a family business is a business of any size where

1. the majority of decision-making rights lie with those natural persons, who have founded or acquired the business, or with their spouses, parents or children,
2. the majority of decision-making rights is exercised directly or indirectly by those persons, and
3. a representative of the family officially participates in the management or control of the business.[15]

Finally, family businesses can also be defined as follows: "A family business is a business of any size, where

1. the majority or all of the family members who are authorised to decide
2. subject themselves to a "family constitution" which is
3. designed to last for an indefinite period of time and which can be
4. altered only with the consent of the qualified majority or unanimously (Kalss and Probst 2013a: 115)."

The main difference to the two preceding definition lies in the "family constitution", which seeks to make sure that the decision-making rights remain within the family (Kalss and Probst 2013a: 115).

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[14] Final Report of the Expert Group, Overview of Family-Business-Relevant Issues: Research, Networks, Policy Measures and Existing Strategies (2009: 10) via http://ec.europa.eu/enterprise/policies/sme/promoting-entrepreneurship/family-business/family_business_expert_group_report_en.pdf; accessed on 22 May 2014.

[15] via http://www.stiftungfamilienunternehmen.de

Other than in non-family businesses, it is usually considered less eager and in the same moment obliged to generate short-term profits. It is regarded as much more important to sustain the family estate and wealth, and to ensure the livelihood of the family members, possibly transcending generational boundaries (Kalss and Probst 2013a, b: 2). For these reasons, family businesses are often able to better deal with 'external' (e.g. market) crises.

In order to pursue those goals in a consequent and successful manner, family businesses will need to be provided with a specific legal framework. (Internal) family crises like inheritance, divorce, maintenance, etc. pose a serious threat to the well-being of the business, seeing that in those situations, the emotional dimension will take over the main focus of attention. Therefore, a legal framework for a family business will need to serve as a safeguard and protect its stability and continued existence.

Yet, family businesses often lack clear provisions for the transfer of the business or for cases of conflict. This is largely due to the fact that for mostly personal and emotional reasons, setting up legal provisions for such cases is regarded as a lack of faith in the common project or, even worse, as a lack of trust in each other. "Law begins where love ends", seems to be a common, albeit dangerous belief (Kalss and Probst 2013a, b: 4). In addition, there are no general rules that apply to the special condition of family businesses. Thus, family entrepreneurs have to create their own legal devices within the general framework, and the law of succession is one of the most important parts of such a legal framework.

1.3 Goals and Tasks of Succession Law and Company Law

The Law of Succession and the Law of Companies have diametrically opposed goals. On the one hand, the law of succession has as its main aim to transfer and to equally (or fairly) distribute the estate that a testator has acquired over the course of his or her life amongst the heirs. It can therefore be said that the law of succession is the law of transfer of assets and the law of division of the assets among the heirs (Wiedemann 1999: 1309 et seq).

The company law offers the framework to operate the business, therefore the company law deals with the concentration, the bundling up and tying together of property into one operative entity. This is, amongst others, expressed in the bestowing of legal personality upon such 'bundles of property'. Thus, company law is a law of consolidation, of unification. The company law shapes therefore the assets and shares that – in a second step – will be transferred by the law of succession (Schauer 2010: 988 et seq; Kalss 2007: 146 et seq).

When an entrepreneur dies, a conflict between those two principles of unification and division arises. It is in the interest of the decedent to keep the business intact and working and to make sure his or her lifetime achievements are continued. Moreover, the remaining shareholders or partners wish to retain influence on who succeeds the decedent in his or her 'position' in the business. On the other hand, the decedent has

an interest in being able to freely dispose of his property, On top of that, the prospective heirs will usually aim to get their 'fair share'.

From this follows that company law serves as the planning instrument of choice for the remaining shareholders or partners, and that succession law is the instrument of the decedent and the (compulsory) heirs.

In some cases, compulsory shares (where they exist) can, in turn, threaten the very existence of the company; a substantial part of the company's assets might have to be liquidated in order to satisfy the claims. The session and the contributors are keen on examining the ways in which different systems face this problem.

The project has therefore a twofold intention.

First, this endeavour aims at collecting empirical data on the one hand to demonstrate the outstanding importance and practical relevance of the issue, on the other hand to underline the enhanced need for regulation in this area. Secondly, the intricate workings of transfers of family businesses shall be analysed. Within this frame the possibilities of private autonomy via testate succession and rules on incapacity should be investigated. How will the two opposing principles of succession law and company law be reconciled in different systems. How can the burden of compulsory shares be alleviated? Finally the report discusses if there exist alternative techniques and instruments to continue ownership on companies and assets within the family excluding the break by death and the law of succession.

1.4 The Pertinent Role of Tax Law

One of the most important tools of the legislator either to promote or restrict the transfer of assets by succession is tax law. The famous "Government has the absolute right to decide as to the terms upon which a man shall receive a bequest or devise from another".[16] The authority may therefore impose conditions upon the succession and the share of the state. The following report does not discuss tax law aspects.

1.5 Preliminary Note

The present general report seeks to underline the common aspects of various systems of succession law, with a special focus on company law. Reports from countries , i.e. Austria, Brazil, Cyprus, the Czech Republic, Finland, Germany, Greece, Italy, Japan, Malaysia, Netherlands, Poland, Portugal, Scotland, Taiwan, England & Wales, USA show interesting overlapping as well as different areas, which are due to certain social, political, historical and economic factors.

[16] *T. Roosevelt*, Messages and papers of the Presidents 16 (1917), 7450 (7464) speech 03/12/1907.

The report summarises the most important results of the structure outlined by the Questionnaire sent out to the national reporters, and tries to carve out some insights by comparing the legal framework of different countries.

In short, the most important common aspects are:

- There is a certain degree of freedom of testation in all systems, albeit limited by various rules
- There is a noticeable tendency to prohibit *fideicommissa*
- Consequences of death of shareholder: company law and succession law will be more intertwined if the company has a stronger "personalised" aspect (OG/KG, partnerships etc.)

The most striking differences are

- Existence of trust as a means of estate planning
- Structural differences: no compulsory share in common law systems [functional equivalent in England & Wales (henceforth: England)],
- Another difference lies in the range of people who are entitled to a compulsory share (family vs *de facto* dependants, descendants vs spouses vs ascendants or even other groups)

Therefore, the following considerations can be drawn:

- Most legal systems are faced with similar problems regarding the transfer of family businesses.
- There is a need to introduce new regulations in regard to the transfer of family businesses that take into account the special challenges that are faced in this situation.

2 Economic Impact of Family Business Succession

As for the figures on expected successions, the data seems to be scant. In the Netherlands, 100,000 successions are expected from 2009 to 2019, whereas in Germany, 20,000–25,000 are expected per year. For Austria, around 33 % of SMEs are expected to be transferred between 2012 and 2021. In Italy, more than 128,000 successions of family businesses are expected within the next 5 years. In England, 12–13 % of family businesses expect to be transferred within the next 2 years. The Japanese national report does not provide specific numbers, however does predict 'an explosive increase in the number of business successions'[17] due to the fact that a lot of businesses founded after the Second World War are still under the direction of the founder. So again the figures show an impressive tendency and make clear that business successions play an important role within the next decade.

[17] Matsui 2014: 3.

Two important observations can be made:

(i) The law of succession is the crucial point for the existence or at least the typical character of a privately owned or family business (Fittko and Korman 2014: 61 et seq)[18]: whether the assets or the shares are kept in the hands of few persons or disperse over all heirs.
(ii) The rise and maintenance of a business depend strongly on the fact whether the business succession does take place within the family or outside. The available data on the frequency of business succession within a family is little. As a rule of thumb (and according to the national reports that do provide data[19]), it can be stated that succession within the family is preferred.

The Dutch numbers, for example, show a clear preference for businesses to be transferred within the family (60 % of all businesses; 72.2 % of family businesses and 31.9 % of non-family businesses; while 37.9 % of transfers take place outside the family). Similarly, 60 % of German medium-sized business successions take place within the family, and Japan measures up to those figures with 76 % (between 2002 and 2012) of small businesses and 54.1 % of medium-sized businesses being transferred to a relative.

The legal systems of all countries involved provide for both intestate and testamentary succession.

With the exception of Poland,[20] England,[21] and Brazil,[22] it seems that *inter vivos* transfer is the desired option (instead of transfer based on testate or intestate succession). However, in England, data is difficult to collect since there is no special procedure prescribed if the deceased's estate does not exceed 5,000 GBP.[23] To this effect, 90 % of German transfers happen *inter vivos*, while only 10–11 % of businesses are inherited.[24] The question of an *inter vivos* transfer is particularly interesting in Malaysian (Syariah) inheritance law, whether the testamentary freedom is considerably limited,[25] which shall be discussed in more detail at a later stage.

The majority of the national reports have struggled to submit valid figures on that issue. Nonetheless, a few trends have been made out. In England, there is a trend to make planning a business succession by will the default form of business planning.[26] Germany is expecting an increase in successions (considering that many companies were founded shortly after the Second World War). However, German

[18] See Fittko and Korman 2014: 61 et seq.

[19] Burgerhart and Verstappen 2014: 2, Sanders 2014: 2, Matsui 2014: 4, Cach 2014: 3, Kuisma 2014: 1 et seq, Cerqueira 2014: 4.

[20] Soltysinski 2014: 2.

[21] Ball 2014: 4.

[22] Cerqueira 2014: 5.

[23] Ball 2014: 4.

[24] Sanders 2014: 3.

[25] Meng and Balasingam 2014: 4 et seq.

[26] Ball 2014: 4.

studies suggest that business successions within the family are likely to decrease.[27] Reasons are the decreasing number of children and the decline of ambition to work as an entrepreneur, stemming from diverging educational backgrounds and individual experiences (Kalss and Probst 2013a: 698).

3 Legal Framework

3.1 Basic Principles of Inheritance Law

In every country included here, the principle of testamentary freedom does exist. To a certain extent, it is accompanied by the principle of family succession (Reimann 2001: 42 et seq).[28] In addition, some countries do know other principles. The law of trusts[29] and equity play a major role in English inheritance law.[30] Equity can be defined as the body of rules that have emerged over the last centuries that soften the "hard" rules of the common law, add "a sense of procedural justice".[31] Germany's inheritance law has a basic principle of universal succession, that is that the heir immediately becomes the new party to the deceased's rights and obligations.[32] This can also be found in the Dutch principle of *saisine*, where the heir succeeds the deceased from the moment of his or her.[33] The Taiwanese report mentions a principle of equal inheritance and sexual equality,[34] which is not explicitly mentioned in other reports (except the Syariah law in Malaysia,[35] where the inheritance right does depend on the sex of the heir). In both Dutch and German law, the heir may reject the inheritance within a certain period of time.

In all but two countries (Malaysia and Japan),[36] it does not play a role whether the children were born in or out of wedlock.

The mentioned principles can therefore be summarised as:

- Equity/succession by law
- Universal succession
- Sexual equality
- Equality of legitimate and 'illegitimate' children
- Family tradition

[27] Sanders 2014: 3.

[28] Eg Reimann 2001: 42 et seq.

[29] See below XI.; for a definition of trust see Kulms 2012: 1697.

[30] Ball 2014: 5.

[31] Ball 2014: 5.

[32] Sanders 2014: 4 et seq.

[33] Burgerhart and Verstappen 2014: 5.

[34] Tsai 2014: 2.

[35] Meng and Balasingam 2014: 5.

[36] Meng and Balasingam 2014: 5; Matsui 2014: 7 (however, this distinction has been ruled unconstitutional).

3.2 Starting Point: Testamentary Freedom

For nearly all countries, particularly in the USA,[37] with the exception of Malaysian (Syariah) law, the testamentary freedom is considerably wide. Testamentary freedom describes, nonetheless, there are some limits to the principle of testamentary freedom, especially the mandatory portions for spouses and children (Reimann 2001: 44 et seq; Dutta 2014a: 128). English law has a functional equivalent (Michaels 2006: 367 et seq) to compulsory portions (Meston 2001: 81 et seq). The boundaries of legality, public policy (Scotland), and good morals (Scotland and Germany)[38] are also mentioned.

In Malaysian (Syariah) law, the range of testamentary freedom depends on whether the deceased was a Muslim or not at his or her moment of death. If that is the case, he or she may only dispose of 1/3 of his or her estate freely, 2/3 are distributed according to Syariah law, regardless of the existence of a will.[39]

Another restriction in testamentary freedom is, for most systems, the prohibition of *fideicommissa*, that is, for binding property "for eternity" (see below, 5).

3.3 Family Succession/Family Tradition

In all countries included here, there are elements of the principle of family succession which are reflected in the rules on intestacy and in the instrument of forced shares.[40] A principle of family succession means, that the relations and spouses have a right to succeed to the estate of a deceased family member (Kreuzer 1978). The main idea is to provide for the bereaved who were close to the deceased (Reimann 2001: 36). There may be differences in the scope of the principle, but even in the English system, whose national report emphasises the undeniable conceptual differences between the English system of inheritance and the continental systems, from a functional perspective, the results seem to point in the direction of such a principle; close relatives and even co-habitants (under certain circumstances) have a claim to a (discretionary) portion of the estate even in the case of an (unfavourable) testament, should they be in need. That means that family provisions can be granted in the case of testate or intestate succession.[41] In addition, the rules on intestacy prove to be generous towards the spouse. The spouse is entitled to a portion ranging from 25 % (if there are children) to

[37] Scalise 2012: 144; Süß 2013: 1167; Reid et al. 2007.

[38] Valsan 2014: 9, Sanders 2014: 6 et seq.

[39] Meng and Balasingam 2014: 4, 7.

[40] Eg. Baddeley 2014: transcript 9; Reimann 2001: 35 et seq.

[41] There is no requirement of need with spouses; Ball 2014: 7 et seq; Röthel 2012a, b: 147.

50 % (if there are ascendants) to 100 % of the estate (if there are neither descendants nor parents).[42]

3.4 Compulsory Portion

3.4.1 General Remarks – Spouse and Children

Except in England[43] and (most of) the USA,[44] in every system there is an institution of a specific compulsory portion. A frequent rule is that spouses and children are entitled to 50 % of what they would receive if the testator had died intestate (Germany,[45] Netherlands [only children],[46] Poland,[47] Switzerland,[48] and Greece[49]). The Dutch spouse does not get a compulsory share, but three rights that are similar to a compulsory share. First, he or she may remain in the shared household for 6 months pursuant to the death of the testator. Secondly, the spouse can demand of the heirs to set up a usufruct on the dwelling and the related chattel in his or her favour. Thirdly, a usufruct may also be set up on other assets. The second and third right depend on the spouse's need.[50] In Poland, the percentage depends on whether the descendent is a minor or unable to work, in which case the compulsory portion amounts to 2/3 of what he or she would be have been entitled to in the case of intestacy (Maczynski and Paczobut 2009: 29). In England, the Inheritance (Provisions for Family and Dependents) Act 1975 allows for (discretionary) claims for "reasonable financial provision" whether there is a will or not.[51] According to Scottish law, the spouse and children are entitled to either ½ or 1/3 (depending on whether there is either a surviving spouse or children or both a surviving spouse and children) of the net moveable estate ('legal rights').[52] As has already been mentioned, in England and (most of) the USA (except the heavily civil law-influenced Louisiana[53] and Puerto Rico[54]), there is no statutory claim.[55]

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[42] Sanders 2014: 7.

[43] Ball 2014: 7.

[44] Rosen 2014: 20.

[45] Sanders 2014: 9.

[46] Burgerhart and Verstappen 2014: 8.

[47] Soltysinski 2014: 3.

[48] Baddeley 2014: transcript 10.

[49] Vervessos and Stavrakidis 2014: 73 et seq.

[50] Burgerhart and Verstappen 2014: 6.

[51] Ball 2014: 9.

[52] Valsan 2014: 9; Meston 2001: 75 et seq.

[53] Scalise 2012: 144.

[54] Süß 2013: 1161 et seq.

[55] Ball 2014: 7, Rosen 2014: 20.

3.4.2 Spouse and Civil Partner

However, in the systems in which there is a compulsory portion, usually the children are not the only group that is entitled to it. In most systems, the spouse or civil partner will be entitled to a compulsory portion upon the death of the decedent (Germany,[56] Austria,[57] Malaysia,[58] Taiwan,[59] Poland,[60] Italy,[61] Cyprus,[62] Finland,[63] Greece,[64] Japan,[65] Scotland[66]). In, even the ascendants (Japan,[67] Greece,[68] Austria,[69] and Taiwan[70]) and siblings (Japan,[71] Taiwan[72]) may be entitled to a compulsory portion.

3.4.3 Legitimate and Illegitimate Children

In all legal systems, the spouse is entitled to a claim against the estate that must be satisfied in any case. In Poland,[73] Greece,[74] and Germany,[75] it is 50 % of what he or she would have received in the case of intestacy. In addition, German law grants the surviving spouse a claim to the chattels of the shared household (*Voraus*) and a right to remain in the shared household for 30 days pursuant to the death of the deceased (*Dreißigster*).[76] The law of the Netherlands knows a similar provision: it grants the spouse (or anyone else who has lived with the testator long-term prior to his or her death) the right to continue living in the shared household for 6 months. After this, a usufruct in respect to the household is to be established, if feasible.[77] In Scotland,

[56] Sanders 2014: 9.
[57] Cach 2014:
[58] Meng and Balasingam 2014: 5.
[59] Tsai 2014: Report 4, 2.
[60] Soltysinski 2014: 3.
[61] Fusaro 2014: 3 et seq.
[62] Synodiou et al. 2014: 5.
[63] Kuisma 2014: Report 5.
[64] Vervessos and Stavrakidis 2014: Report 75.
[65] Matsui 2014: 2.
[66] Valsan 2014: 6.
[67] Matsui 2014: 2.
[68] Vervessos and Stavrakidis 2014: 75.
[69] Cach 2014: 8.
[70] Tsai 2014: 4, 2.
[71] Matsui 2014: 2.
[72] Tsai 2014: 4, 2.
[73] Soltysinski 2014: 3.
[74] Vervessos and Stavrakidis 2014: 73 et seq.
[75] Sanders 2014: 9.
[76] Sanders 2014: 10.
[77] Burgerhart and Verstappen 2014: 9 et seq.

the surviving spouse is entitled to ½ or 1/3 (depending on whether there are children) of the net moveable estate.[78] In England, the surviving spouse has a claim to family provisions. Other than the claim of other individuals that may be entitled, the factor of "need" does not play a role in the spousal claim.[79]

For the purpose of inheritance and with the exceptions of Japan and Malaysia, it is irrelevant whether a child be legitimate or illegitimate. In Japan, an illegitimate child gets half of what a legitimate child would have a claim to. However, this law has recently been ruled unconstitutional.[80] In Malaysia, Syariah law does not allow an illegitimate child to inherit from his or her father, but he or she may inherit from his or her mother and her family.[81] In Italy, there remains a difference in the treatment of illegitimate children by the courts. Although there is no difference if the child is born out of wedlock in order to inherit as descendant, "illegitimate" children are treated differently by the courts, their right to inherit will have a lower order than that of other heirs (Eccher and Gallmetzer 2013: 38).[82]

3.4.4 Special Rules

With the exception of agricultural businesses which will be discussed below (see point 3.6), there seem to generally be no specific provisions on business succession. In the Netherlands, a child (or spouse) who has been involved in the business and is intending to continue it may claim it.[83] In Scotland, Model Articles contained in the Companies Act 2006 regulate the transfer of certificated shares via an executor of an estate.[84] In Italy, after having been employed in practice for a while already, the legal instrument of "family agreements" ("*patti di famiglia*") has been introduced.[85]

A "*patto di famiglia*" makes it possible for the testator to separate the business from his or her general estate. All compulsory heirs have to participate in the setting up of a *"patto di famiglia"*.[86] The compulsory heirs who do not receive the business will have to be paid out or receive equal value in other assets according to their compulsory portion. However, they may also renounce this right. In addition, the business will not form part of a potential offset against the compulsory portion.[87] Therefore, the "*patto di famiglia*" is a way in which it is possible to reduce the

[78] Valsan 2014: 8.

[79] Inheritance (Provisions for Family and Dependants) Act 1975, S 1(2)(a); Rudolf 2014: 25.

[80] Matsui 2014: 7.

[81] Meng and Balasingam 2014: 5.

[82] Eccher and Gallmetzer 2013: 38.

[83] Burgerhart and Verstappen 2014:

[84] Valsan 2014: 11 et seq.

[85] Fusaro 2011: 199.

[86] Fusaro 2011: 199.

[87] Padovini 2008: 43 et seq.

compulsory portion to which forced heirs are entitled if the family business is to be transferred to a forced heir and all the other forced heirs consent.[88]

3.5 The Instrument of Fideicommissum

Via a *fideicommissum*, the succession and property ownership over several generations can be determined. It has its roots in Roman law (Dutta 2012: 1682, 2014a, b: 54 et seq). "The *fideicommittens* (X) gave property to the *fiduciarius* (Y) for the purpose of immediately handing it over to the *fideicommissarius* (Z)" (Gretton 2007: 158). The institution of a *fideicommissum* allows the testator to determine the heirs to his or her estate for generations in advance, and unlike a usufructuary, the *fiduciarius* gets full ownership (Gretton 2007: 158).

The countries that broached the issue of *fideicommissa* usually display a hesitant attitude towards them[89] (with the exception of Brazil[90]). The idea of being able to bind an inheritance for many generations does not seem to be overly palatable, there is an identifiable tendency against tying up estate for multiple generations (Dutta 2014a: 54 et seq; Röthel 2011: 159). Thus, in Italy, such a provision would be void.[91] Germany,[92] Austria,[93] Portugal[94] and Taiwan[95] prohibit unlimited *fideicommissa*. In Austria, Germany[96] and Japan,[97] it is however allowed to determine reversionary heirs for up to two generations (*fideikommissarische Substitution*).[98] However, the founding of companies and foundations to maintain a family is broadly accepted in all countries.[99] In Japan[100] and Greece,[101] an inheritance trust can be used to avoid those restrictions. In England, the time limit is 125 years (law

[88] Schauer 2013: 452 et seq.

[89] Especially rigidly: Switzerland; Baddeley 2014: transcript 12.

[90] Cerqueira 2014: 34.

[91] Fusaro 2014: 5.

[92] Sanders 2014: 10 et seq.

[93] Cach 2014: 11, limited to two non-contemporary generations for moveables and one generation for immoveable assets.

[94] Costa et al. 2014: 7 et seq.

[95] Tsai 2014: 3.

[96] Sanders 2014: 37.

[97] Matsui 2014: 14 et seq.

[98] Cach 2014: 28; Dutta 2012: 1681.

[99] eg Sanders 2014: 11.

[100] Matsui 2014: 14 et seq.

[101] Vervessos and Stavrakidis 2014: 66.

of perpetuities),[102] in the USA it is a lifetime plus 21 years.[103] In Poland, *fideicommissa* are not expressly prohibited, but legal acts *mortis causa* must be expressly authorised by law.[104] The Netherlands allow for a substitution clause (*fideicommis*), but the law is only willing to waive the requirement of an 'alive' heir under certain circumstances.[105] The English system, as the most liberal in this respect, will allow that property can be left to a person who is not born yet, but it must "vest" in this person within 125 years.[106] Similarly but less favourable towards testamentary freedom, a Japanese court decision allows for determining two consecutive legatees for a testamentary gift under certain circumstances.[107] Cypriot law does not prohibit *fideicommissa*.

Generally, a strong restrictive opinion can be observed. Nevertheless, different countries recognise quite similar instruments (Dutta 2014a, b: 70 et seq) like the foundation of trust which entitle persons to shape the legal framework to continue ownership and interrupt the law of succession.

The case presents itself in a different light should the appointed heir not succeed in the estate. In this case, it is possible in all legal systems to appoint another heir in case the original successor should drop out before the event of succession, that is, in case the original heir dies or renounces his or her right (substitutional heirship).[108]

3.6 Family Business – Special Rules

With the exception of Italy's "family agreements", which have already been mentioned, no country that has submitted a report seems to have special rules on family business in corporate law.[109]

It is generally underlined that the majority of SMEs are family businesses and therefore the tax benefits etc. for SMEs in effect help family businesses.

[102] Ball 2014: 11.

[103] Scalise 2012: 144.

[104] Soltysinski 2014: 5.

[105] 'fideicommis', Burgerhart and Verstappen 2014: 7.

[106] Ball 2014: 11.

[107] Matsui 2014: 14; Japanese Supr. Ct. Mar. 18, 1983.

[108] E.g. Cerqueira 2014: 36; Meng and Balasingam 2014: 7; Cach 2014: 28; Sanders 2014: 37, Soltysinski 2014: 11; Ball 2014: 23.

[109] However, further research has shown that there is a specific corporate organisation for families in India [Hindu Undivided Family, 'HUF'; Pallien and Oelkers 2014: 94] and that there is special legislation dealing with family businesses planned in Malta. (http://www.kpmgfamilybusiness.com/will-malta-first-eu-state-family-business-act/, accessed 5 May 2014).

The succession in specific businesses, especially agriculture, is an issue in some countries (Japan,[110] Poland,[111] Germany,[112] Austria,[113] England[114]). The main concern in this area is the avoidance of partitioning the estate into smaller and smaller units that will not be able to sustain a farmer anymore (Probst 2010: 113 et seq; Dutta 2014a: 127 et seq). Germany,[115] Austria,[116] and Poland[117] have a similar regulation: The testator may choose a particularly suitable person to succeed him or her. In order to not burden the heir disproportionately, the compulsory shares of the other (forced) heirs are reduced. The heirs that have given way to the person chosen by the testator however are protected if the selected heir does not run the business properly but sells it within a period of 10 years.

In England, a similar regulation existed (with the Agricultural Holdings Act 1985), it is, however, of little to no practical relevance, as there have not been any new tenancies of this type in almost 20 years.[118]

England is working on policy plans (eg the codification of company law with the Companies Act 2006 and a 2005 White Paper to facilitate setting up and running small companies to develop special rules),[119] in Germany, a vivid academic discussion deals with special rules for the law of succession for family businesses.[120] In Austria, by contrast, there is both policy plans and scientific discussion on the issue, above all on the possibility to pay out compulsory portions over a time span of several years and the strengthening of the position of the partner. It is also discussed to extend the special rules applying to the agricultural business to all other kinds of business (Schulz 2013: 1782).

3.7 Conflict of Laws

The provisions regulating the conflict of laws with regard to succession law (international private law) are also of particular interest, because it is an important preliminary question which national law has to be applied in particular. In detail it also difficult to classify areas of applicable law in the different statutes (succession statute, company statute, family statute).

[110] Matsui 2014: 2 et seq.

[111] Soltysinski 2014: 4 et seq, Maczynski 2001: 192 et seq.

[112] Sanders 2014: 13 et seq.

[113] Cach 2014: 13 et seq.

[114] More of historical relevance, Ball 2014: 12.

[115] Sanders 2014: 13 et seq.

[116] Cach 2014: 13 et seq.

[117] Soltysinski 2014: 4 et seq.

[118] Ball 2014: 12.

[119] Ball 2014: 12 et q.

[120] Sanders 2014: 15.

Recently, in 2012, after a long discussion process, the Member states of the European Union adopted the Regulation (EU) No 650/2012 (succession regulation)[121] on the legal basis of Art 67 and Art 81 TFEU. The regulation includes provisions concerning the international civil procedure (law) on succession matters, the conflict of succession laws, the recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession.

3.7.1 Scope of the EU Succession Regulation

It is necessary to distinguish between the time scope of application, the material scope of application, and the territorial scope of application.

(a) Time scope of application: This regulation will be applied to succession cases from the 17th August 2015 (Art 83 para 1 EU-succession regulation). Transitional provisions should guarantee that previously established testamentary dispositions continue to apply. If the testator dies before the 17th August 2015, the current national provisions concerning the conflict of laws are relevant (for instance § 28 Austrian IPRG[122]) and decide which applicable law is usable.
(b) Material scope of application: Art 1 para 1 of the regulation mentions that the regulation shall apply to succession to the estate of deceased persons. It shall not apply to revenue, customs or administrative matters. For the purposes of the succession regulation it covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession (Article 3 para 1 lit a). The term "disposition of property upon death" referred 3 para 1 lit d includes a will, a joint will (Article 3 para 1 lit c), or an agreement as to succession (Art 3 para 1 lit b). Art 23 para 2 shows demonstratively which legal questions are to be judged according to the succession statute; these are subject to the material scope of the succession regulation.[123]

3.7.1.1 Territorial Scope of Application in Detail

The succession regulation doesn't apply in the entire area of the European Union. In 25 of the 28 EU-member states, the regulation is applicable. The regulation doesn't apply to Ireland, the United Kingdom and Denmark. The United Kingdom and

[121] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, L 2012/201, 107.

[122] Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht, Austrian Federal Law Gazette No 304/1978.

[123] Rudolf 2013: 226.

Ireland can make use of their opt-in clause (Recital 82 of the regulation). Denmark could make an agreement, so that the provisions of the succession regulation are applicable (Recital 83 of the regulation). So the United Kingdom will also use their national conflict of laws in matters of succession after 2015.

The international conflict of law provisions have to be distinguished from the inter local law (see also Art 36 succession regulation) within some countries (for example United Kingdom), which may comprise diverging material law (English, Welsh, Scottish or Northern Irish law).

3.7.1.2 General Remit (Generalverweisung) or Reference to the National Law (Sachnormverweisung)?

This question has not been solved so clearly and consistently as in the previous Rome regulations which follow the principle of the reverence to the national law. The aims of the regulation are the harmonization of the existing different national provisions in the area of international inheritance law.[124] A referral between several member states' legal systems is not possible any more. For this reason the principle of reference to the national law is valid to the majority of the EU member states (exceptions are the United Kingdom, Ireland and Denmark).[125] If the transnational succession case includes countries outside of the EU (third countries) two points must be distinguished. If it is not one of the exceptions of Art 34 para 2 succession regulation, the qualification as general remit or reference to national law depends on how the third country's provisions respond to the succession regulation's reference. If the third country's conflict of law provisions refers to its own law, the law of an EU Member State or to another third country's conflict of laws, who accepts the referral, it is a general remit, so that the substantive law of the referenced Member State or the third country has to be applied.[126]

3.7.1.3 Relations to Non EU-Member States

The conflict of law provisions are designed as a uniform law ("*loi uniform*e") so there is no differentiation between "purely intra-Community cases" and "third country cases" (Art 20 succession regulation). If the conflict of laws provisions of the succession regulation refer to the third country's law (or Denmark, Ireland and the UK), these provisions have to be applied.

[124] Recital 4 Succession regulation.

[125] Odersky 2013: 4.

[126] Cach and Weber 2013: 267.

3.7.2 Succession Statute

Different to the current Austrian (§§ 28 IPRG) and German provision (Art 25 EGBGB), which are both oriented to the principle, that the testator's nationality at his death is relevant for the entire succession,[127] Art 21 succession regulation draws on the testator's habitual residence at the time of the death.[128] The habitual residence is the "life center" of a person. The testator has shifted the focus of his life (family, social and professional relationship) in a specific country.[129] However, the application of this provision is difficult when the last habitual residence of the testator is not obvious. A habitual residence in several countries is not possible.[130]

Recital 23 succession regulation specifies the "habitual residence": It will be necessary that the competent authority make an overall assessment of the circumstances of the testator in the years before his death and must take into account all relevant facts, in particular the duration and regularity of stay of testator in the State concerned and the related circumstances and reasons. The habitual residence which will be determined by these facts has to reveal a close and stable connection with the country.[131] The court should consider separately each individual case. A minimum length of stay before the testator has justified the habitual residence is not specified in the succession regulation.[132]

3.7.3 Choice of Law (Art 22 Succession Regulation)

From the Austrian perspective it is also new that the testator may choose the applicable law.[133] Divergent to Art 21 succession regulation, the testator may choose the law of his nationality.[134] Art 22 formulates that a person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death. If the testator has multiple citizenship, he can decide for himself between the law of these several States (Art 22 para 1). Paragraph 2 of the determination inserts in contrast to the Commission's proposal that the choice of law can also be made implicit.[135]

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[127] Kindler 2010: 44.

[128] Art 21 para 2 succession regulation is not mentioned here, which mentions where it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a state other than the State, whose law would be applicable under Art 21 para 1, the law applicable to the succession shall be the law of that other state.

[129] Pawlytta and Pfeiffer 2013: § 33 para 184; Lehmann 2012: 2086; Dörner 2012: 509.

[130] See Rome I Regulation: Sonnenberger 2010: para 724.

[131] See Dörner 2012: 510; Frodl 2012: 951; Faber and Grünberger 2011: 105.

[132] Cach and Weber 2014: 102; Rudolf 2013: 234.

[133] For more information on the historical background in Austria see Cach and Weber 2013a: 90.

[134] Schauer 2012: 84; Cach and Weber 2013: 263.

[135] Vgl Recital 39 succession regulation; see also Remde 2012: 80.

3.7.4 Estate's Unity (Nachlasseinheit)

The referrals of Art 23 succession regulation to Art 21 and Art 22 correspond to the principle of conflict of laws estate unity. The law determined under Art 21 and Art 22 must therefore be applied for the entire movable and immovable estate without regard to the situs of individual estate objects (Recital 37 sentence 4). However, Art 30 breaks this principle: Where the law of the State in which certain immovable property, certain enterprises or other special categories of assets are located contains special rules which, for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets, those special rules shall apply to the succession in so far as, under the law of that State, they are applicable irrespective of the law applicable to the succession.[136]

3.7.5 Distinction of the Company Statute

Art 1 para 1 succession regulation has a wide range of material scope of application. However Art 1 para 2 points out some exceptions. One of these exceptions is Art 1 para 2 lit h succession regulation for the company statute: Questions governed by the law of companies and other bodies, corporate or unincorporated, such as clauses in the memoranda of association and articles of association of companies and other bodies, corporate or unincorporated, which determine what will happen to the shares upon the death of the members are excluded from the succession statute.

4 Immediate Consequences of the Death of the Entrepreneur for the Business?

4.1 Entrepreneur and Partnerships

The consequences of the death of an entrepreneur depend on the legal organisation for the business. In most jurisdictions, the death of a sole proprietor triggers the succession of one or more heir(s) into the business. In accordance with general Austrian and German succession law, an heir may decide whether to accept the inheritance or reject it.[137] Only Polish[138] and Scottish[139] law provide by default the dissolution of the business and distribution of the assets. In English law, trusts play an important role in this area.[140]

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[136] Rudolf 2013: 232.

[137] Cach 2014: 15 et seq; Sanders 2014: 15.

[138] Soltysinski 2014: 6.

[139] Valsan 2014: 4.

[140] Ball 2014: 13 et seq.

The consequences are different if a partnership is concerned. The consequences of the decease of a partner depend on the degree of independence of the business from the partners. A 'mere' partnership, which focusses on the person of the partners, will tend to dissolve upon the death of one partner unless otherwise provided.[141] In a more advanced level of legal personality, like the partnership (*Offene Handelsgesellschaft*) in German law[142] or the Limited Joint Stock Partnership in Polish law,[143] the business will continue if one partner/shareholder dies.

In a partnership, there are two options upon the death of one partner. Either the partnership continues with the remaining partners, or it is dissolved. In case of a dissolution, the heirs will inherit the shares (Germany, Austria, Netherlands), but the partnership will be liquidated. If the partnership is continued, the heirs will receive a financial claim against the remaining partners/the business (England, Germany, Austria).

Whether the business can be continued with the heirs of the deceased, depends largely on the significance of the single members. If the business is defined by special abilities or qualifications (like the professional partnership in Poland[144]) or a partnership in Germany, the heir tends to not become a member but receive a financial claim.[145] The possibility to continue the business with the heirs can also be set out in the partnership agreement (England,[146] Japan[147]).

In all jurisdictions it is possible to set out corresponding provisions in the partnership agreement/articles of association.[148]

Being an heir to a member does not automatically imply being entitled to membership in the partnership.[149] However, heir will usually be compensated if he or she does not become a member. In the Netherlands, Germany, and Austria, a heir can be excluded from membership without compensation.[150]

Usually, the shares will simply be paid out.[151] Only in the Netherlands, a subdistrict court may order to have the assets transferred to a child/stepchild/spouse of a deceased at a reasonable price should they have an important interest (4:38 DCC).[152]

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[141] Soltysinski 2014: 6, Valsan 2014: 3, Cach 2014: 16 (in the case of OG and KG), Cerqueira 2014: 23.

[142] Sanders 2014: 16.

[143] Soltysinski 2014: 8.

[144] Soltysinski 2014: 7.

[145] Sanders 2014: 18 et seq.

[146] Ball 2014: 17.

[147] Matsui 2014: 11.

[148] E.g. Matsui 2014: 11, Ball 2014: 17, Sanders 2014: 18 et seq, Cach 2014: 19, Vervessos and Stavrakidis 2014: 11.

[149] E.g. Soltysinski i 2014: 7, Cerqueira 2014: 25, Cach 2014: 20.

[150] Burgerhart and Verstappen 2014: 14, Sanders 2014: 23 et seq; Baumbach/Hopt, HGB § 139 Rz 17; Cach 2014: 20; Schauer 2010: 1015.

[151] E.g. Vervessos and Stavrakidis 2014: 13, Cerqueira 2014: 25 et seq.

[152] Burgerhart and Verstappen 2014: 6.

4.2 Companies Limited

The company continues unaffected if a shareholder dies. In general, the shares are inherited according to the general rules of succession law. There often is a possibility to set out different rules in the articles of association (England,[153] Poland,[154] Japan[155]). In the Netherlands, the heirs acquire the shares but the articles of association will usually require them to offer the shares for sale to the other members of the company.[156] In Austria or Germany, the articles may also oblige the heir to offer the shares to the other shareholders.[157]

If the heirs are not entitled to become members of the company, two different models of procedure can be identified. In most jurisdictions, the shares will pass down to the heirs. However, in jurisdictions in which the company can keep the shares (for example in the Netherlands[158]), the heirs will be granted a claim for compensation.

4.3 General

In jurisdictions where the share passes down to the heir more or less automatically, the heir will be the one who can exercise the rights of the deceased shareholder (e.g. Germany,[159] Austria[160]). In contrast, where there is an executor/administrator (not appointed by the court) who is in charge of distributing the estate or assigning the share, he or she will be able to exercise the rights of the deceased shareholder (Japan, England, particular cases in the Netherlands).

5 Legal Incapacity

Legal incapacity is a phenomenon which has formally far less consequences for the legal form of a company. However in reality, legal incapacity strikes a company tremendously. Permanent incapacity can be qualified as a situation close to the death of a shareholder. Therefore it is necessary to discuss the consequences for the old shareholder and the company itself. In all systems there is a possibility to have

[153] Ball 2014: 18 et seq.

[154] Soltysinski 2014: 9 et seq.

[155] Matsui 2014: 12.

[156] Burgerhart and Verstappen 2014: 12.

[157] Cach 2014: 21 et seq, Sanders 2014: 25.

[158] E,g, Burgerhart and Verstappen 2014: 14, Soltysinski 2014: 13, Cerqueira 2014: 29.

[159] Sanders 2014: 26 et seq.

[160] Cach 2014: 22 et seq.

a representative or custodian take care of the shareholder's affairs. This custodian will usually be appointed by the court (Germany,[161] Austria,[162] Netherlands,[163] England,[164] Poland,[165] Greece],[166] Finland[167]). Another possibility is to give someone a continuing power of attorney in order to represent a shareholder in a company (Finland, England).[168]

As a general rule, if a person is permanently incapacitated, a guardian or curator is appointed by a court, either for all areas or only for specific areas that the person cannot deal with on his or her own anymore. The representation lasts until the death or beyond the death of the shareholder. In Japan, the court may only appoint a guardian upon the family's request.[169]

By default, company law does in no system come up with provisions which enable the exercise of rights of a permanently incapacitated person by a representative (Germany,[170] Netherlands,[171] Poland,[172] England,[173] Austria[174]). With the exception of Poland,[175] articles of association may provide precautions for the case of incapacity of a shareholder. Practitioners strongly advise to regulate this situation either by new articles or by another special contract or legal act.

6 Last Wills

In almost all countries, last wills which intend to dispose of the whole property are valid. In most countries, however, they are subject to one important caveat: the compulsory portions. If a testator does not respect the compulsory portions of his or her forced heirs, then the will as a whole remains valid,[176] but the forced heirs will be

[161] Sanders 2014: 31 et seq.
[162] Cach 2014: Report 23 et seq.
[163] Burgerhart and Verstappen 2014: 17.
[164] Ball 2014: 21 et seq.
[165] Soltysinski 2014: 11.
[166] Vervessos and Stavrakidis 2014: 61 et seq.
[167] Kuisma 2014: 7.
[168] Kuisma 2014: 8.
[169] Matsui 2014: 6.
[170] Sanders 2014: 33.
[171] Burgerhart and Verstappen 2014: 17.
[172] Soltysinski 2014: 11.
[173] Ball 2014: 21 et seq.
[174] Cach 2014: 25.
[175] Soltysinski 2014: 11.
[176] E.g. Valsan 2014: 9, Cerqueira 2014: 32 et seq, Sanders 2014: 34, Kuisma 2014: 8.

assigned their portions (Dutta 2014b: 128 et seq).[177] In Cyprus, a will disposing of the whole property is invalid.[178]

The situation is slightly different in England, seeing as there is no such thing as a compulsory portion. Upon closer inspection, the English institution of (needs-based) family provisions is functionally analogous in the aspect of the validity of the will. A legitimate claim to provisions will not affect the validity of the will as a whole but it will override it.[179]

A last will, disposing of businesses or shares in a business, is generally valid and there are no special regulations on this subject. The considered legal systems reach a similar conclusion. A last will especially disposing of businesses or the shares in a business is considered valid. There are no special default rules on this situation, but e.g. in Germany, such provisions can be included in the articles of association.[180] The Taiwanese law points out that the regulation of this matter depends on the type of business.[181]

6.1 Conditions and Requirements

6.1.1 General

Since a will is an expression of the testator's private autonomy, the testator may, in almost all systems (with the exception of Poland, where the inclusion of conditions is not provided for[182]) include conditions or requirements. Especially the German and Austrian legal systems boast a wide variety of such conditions.[183] Some systems limit the time for which such conditions or requirements can be imposed. In Germany[184] and the Netherlands[185] the condition will need to be fulfilled within 30 years after the testator's death, whereas in England,[186] the perpetuity period (125 years) will limit the validity of conditions or requirements (exception: charitable trusts). Even the USA legal systems contain such a "rule against perpetuities", which is 'a life in being at the time of creation of the interest plus twenty-one years'.[187] Such a condition or requirement may also be imposed in Italy.[188] As

[177] For S only Dutta 2014a: 128 et seq.
[178] Synodiou et al. 2014: 12.
[179] Ball 2014: 22.
[180] Sanders 2014: 35; Zimmermann 2012.
[181] Tsai 2014: 6.
[182] Soltysinski 2014: 11.
[183] Sanders 2014: 35 et seq; Cach 2014: 27.
[184] Sanders 2014: 35.
[185] Burgerhart and Verstappen 2014: 19.
[186] Ball 2014: 22.
[187] Scalise 2012: 167.
[188] Fusaro 2014: 5.

another limit, good morals have been pointed out (Chalmers 2007: 99). In Poland, a will which includes a condition will be deemed invalid, unless the condition imposed has been fulfilled before the death of the testator. Requirements, however, can be included.[189]

From this follows, that such conditions (with the exception of Poland) and requirements may also be used in a business context, i.e. in order to make sure a business is being run in the way he testator intended it, but again, attention will need to be paid to the time limits mentioned in the previous paragraph. However, the suitability of including conditions and requirements relating to business in last wills can be questioned, since the employing of such instruments may lead to a "petrification of the company"[190] and reduce flexibility and the ability to react quickly to economic challenges (Kalss and Probst 2013a: 688).

Therefore, in the systems that provide for the construction of a trust, this instrument will be regarded as the preferential form. So for example in England, trusts are used more often in order to influence a company in the long run, since they are more flexible than last wills.[191]

6.1.2 Fideicommissa

In a similar vein, it is generally not possible (without any restriction) to create a last will in a way that would already determine the succession for the next generation and the generation after that (to create a *fideicommissum*, see above 5).

6.1.3 Other Instruments

Apart from a last will, many systems have other instruments for determining the fate of one's property beyond death. For instance, Germany and Austria know a testamentary contract/agreement.[192] This is a binding agreement between two parties and cannot be amended by the testator alone. In order to be valid, the document needs to be notarised. The Dutch report mentions the possibilities of bequest (Burgerhart and Verstappen 2014: 21 et seq),[193] testamentary obligation (conditions and requirements) and the appointment of a representative, all of which can also be found in

[189] Soltysinski 2014: 11.

[190] Cach 2014: 28.

[191] Ball 2014: 23.

[192] Sanders 2014: 37, Cach 2014: et seq.

[193] Burgerhart and Verstappen 2014: 21 et seq.

most other systems.[194] In Italy,[195] England,[196] and Cyprus[197] there is a possibility to open a trust or to set up a foundation. Foundations may have the form and function of a testament and grant the testator a way of maintaining influence while tying up his estate.

Naturally, the possibility to transfer a business in case of death by contractual agreement depends on the preliminary question of whether there exists a legal instrument like a contractual agreement upon death. This is not the case in Poland, where the permissible legal acts *mortis causa* are restricted to what is specifically authorised by law.[198] For different reasons, English law does not know the instrument of a contractual agreement upon death either.[199] Here, the obstacle is the requirement of consideration for a contract to be valid, which is lacking in a transfer like this. The English instrument of choice would be a trust.[200] Similarly, Italian succession law doesn't permit contractual agreements upon death.[201] By contrast, including a business transfer in a contractual agreement upon death is permissible in Germany,[202] Austria,[203] the Netherlands,[204] Cyprus,[205] Greece,[206] and Japan.[207]

7 How Does Business Succession Take Place in Terms of Ownership?

In general, the business of a sole proprietor is passed down according the usual rules of inheritance law. Both in Germany[208] and the Netherlands,[209] the heirs become owners in the moment of passing, by operation of law. Unlike in Austria, no separate declaration of acceptance of the inheritance (*Einantwortung*) is needed.[210] In England, the situation depends on whether there is a will or not. If there is a will, the

[194] E.g. Gruber et al. 2010: 314 et seq; Burgerhart and Verstappen 2014: 21; Schauer 2013: 458 et seq.

[195] Fusaro 2014: 13.

[196] Ball 2014: 14 et seq.

[197] Synodiou et al. 2014: 24 et seq.

[198] Soltysinski 2014: 5, 17.

[199] Ball 2014: 23.

[200] Ball 2014: 23.

[201] Fusaro 2014: 7 et seq.

[202] Sanders 2014: 37.

[203] Cach 2014: 29 et seq.

[204] Burgerhart and Verstappen 2014: 22.

[205] Synodiou et al. 2014: 14.

[206] Vervessos and Stavrakidis 2014: 67 et seq, within narrow limits.

[207] Matsui 2014: 13.

[208] Sanders 2014: 38.

[209] Burgerhart and Verstappen 2014: 23.

[210] Sanders 2014: 38, Cach 2014: 30.

executor (usually the spouse) will take care of the estate and make small managerial decisions. If there is no will, an administrator will be appointed who manages the business until its transfer or sale.[211]

The legal situation is completely different when regarding the shares of partnerships and companies. The differences depend on the different legal framing of the business entities and the transfer of property in general.

Since the personal aspect is important in partnerships, the destiny of the shares largely depends on the partnership agreement. In order for an heir to become a partner in the partnership, the remaining (surviving) partners need to consent. Otherwise the heir will only have a claim to the value of the share, not to specific assets (e.g. Germany,[212] Austria,[213] Poland,[214] Netherlands,[215] England,[216] Italy[217]).

In contrast to the default rules on partnerships, the shares of a deceased shareholder of a company limited will pass down to the heirs just like any other right according to the law of succession.

For the transfer of shares in a company, the general rules of inheritance law apply (Germany,[218] Italy,[219] Austria,[220] Netherlands,[221] England[222]), so there is no special regulation that differs from the other provisions of inheritance law.

In all jurisdictions it is possible to prevent the transfer of property in partnership agreements for a partnership (see III a) question 5). The situation presents itself as slightly more varied when it comes to companies. In Germany, for instance, it is not feasible to exclude the transfer of property in articles of association of a company, however, the transfer of shares in a partnership may be excluded (*Fortsetzungsklausel*)[223] whereas this is well possible in Italian[224] or Dutch[225] articles of association. In Austria, articles of association may provide for a pre-emption clause in favour of the other members.[226]

Generally there is a tension between the general principles of company law (pursue the company's interest; keep together the assets of the company) and the general principle of inheritance law (equal distribution of assets).

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[211] Ball 2014: 24.

[212] Sanders 2014: 38.

[213] Cach 2014: 30.

[214] Soltysinski 2014: et seq.

[215] Burgerhart and Verstappen 2014: 23.

[216] Ball 2014: 25.

[217] Fusaro 2014: 10.

[218] Sanders 2014: 38.

[219] Fusaro 2014: 10.

[220] Cach 2014: 31.

[221] Burgerhart and Verstappen 2014: 23.

[222] Ball 2014: 25.

[223] Sanders 2014: 38.

[224] Fusaro 2014: 11.

[225] Burgerhart and Verstappen 2014: 24.

[226] Cach 2014: Report 31.

So explicitly Germany,[227] Austria,[228] the Netherlands[229] and Poland,[230] and also for other systems, there does exist a certain conflict between the principles of company and inheritance law. Merely in England[231] there seems to be no such conflict, since inheritance law does not comprise a principle of equal distribution of assets among the bereaved.

8 Anticipated Succession

Succession does not exclusively take place *post mortem*. A wise testator will plan the transfer of his or her business in advance, possibly transferring it during his or her lifetime. This has its advantages – the testator may, for example, retain influence and guide the successor (Kalss and Probst 2013a: 695 et seq).[232]

In all considered legal systems it is possible to transfer a business during the lifetime of the testator. The most common forms of anticipated succession are gift and sale (e.g. Germany,[233] Austria,[234] Netherlands,[235] Japan,[236] Greece,[237] Finland[238]). Another option to transfer a business is by setting up a trust (e.g. England,[239] Cyprus[240]). Finally in Austria, Switzerland and Liechtenstein, a foundation can be established.

The transfer agreement will need to be tailor-made for each individual case.[241]

Within the family, an anticipated transfer mostly takes place in the form of endowment/gift, whereas if the business shall be transferred to a non-family member, it will usually be sold (Germany,[242] Netherlands,[243] Greece[244]).

Whether the transfer relates only to the ownership of the shares or also to the transfer of leadership and controlling functions, depends largely on the will of the

[227] Sanders 2014: 39.
[228] Cach 2014: 31 et seq.
[229] Burgerhart and Verstappen 2014: 24.
[230] Soltysinski 2014: 13 et seq.
[231] Ball 2014: 26.
[232] Kalss and Probst 2013: 695 et seq.
[233] Sanders 2014: 39.
[234] Cach 2014: 32 et seq.
[235] Burgerhart and Verstappen 2014.
[236] Matsui 2014: Report 4 et seq.
[237] Vervessos and Stavrakidis 2014: 70.
[238] Kuisma 2014: 11.
[239] Ball 2014: 26 et seq.
[240] Synodiou et al. 2014: 15.
[241] Kuisma 2014: 12, Cach 2014: 33.
[242] Sanders 2014: 40.
[243] Burgerhart and Verstappen 2014: 26.
[244] Vervessos and Stavrakidis 2014: 70 et seq.

parties involved (Netherlands,[245] Greece,[246] Cyprus,[247] Germany,[248] Finland[249]). Usually, the proprietary and the managerial side of the transfer are separated (Kalss and Probst 2013a: 695 et seq), so that the control over the business is gradually transferred (Germany,[250] Finland[251]).

9 How Is the Maintenance of the Transferor – Who Is Still Alive – Taken Care Of?

King Lear teaches us that the transfer of property in advance can entail tremendous and disadvantageous consequences for the transferor. The daughters Goneril and Regan may be ungrateful shrews. Lear and every transferor have to establish adequate regulations.

In general, no specific rules with regard to the succession of companies apply. Parties are free to arrange whatever they agree upon.

There are a number of possible ways in which a transferor may secure his or her livelihood. Firstly, a usufruct can be granted (Greece,[252] Germany,[253] Poland,[254]). Secondly, a monthly or annual pension can be arranged (Finland,[255] Germany,[256] Poland,[257] Cyprus[258]). Thirdly, the transferor may retain assets and lease them to the business (Germany[259]). Fourthly, shares can be created in favour of the transferor that lack capital but carry rights to management, voting and the business's income (Germany[260]). Fifthly, a partnership can be changed to a company (where the testator may retain his or her shares).[261]

Typical instruments with the help of which the transferor might still secure his influence are: the right of withdrawal, the prohibition to encumber and alienate, or

[245] Burgerhart and Verstappen 2014: 26.
[246] Vervessos and Stavrakidis 2014: 72.
[247] Synodiou et al. 2014: 15 et seq.
[248] Sanders 2014: 40 et seq.
[249] Kuisma 2014: 12.
[250] Sanders 2014: 40 et seq.
[251] Kuisma 2014: 12.
[252] Vervessos and Stavrakidis 2014: 72 et seq.
[253] Sanders 2014: 41 et seq.
[254] Soltysinski 2014: 12 et seq.
[255] Kuisma 2014: 12 et seq.
[256] Sanders 2014: 41 et seq.
[257] Soltysinski 2014: 12 et seq.
[258] Synodiou et al. 2014: 16.
[259] Sanders 2014: 41 et seq
[260] Sanders 2014: 41 et seq.
[261] See Kalss and Probst 2013a: 717 et seq.

an influence on voting rights without shares. Regarding the maintenance of the transferor, the points to be considered are e.g. a usufruct, a pension, a relief from liability, or a maintenance independent from the business.[262]

For instance, a transferor may retain his voting rights in a usufruct (Poland[263]), or when simply transferring the shares without a usufruct (Finland[264]). Unless the transferor has acted fraudulently, it is also possible in Cyprus[265] to discharge him or her from liabilities (as long as the shares are paid up). Other than in Cyprus, such a discharge of liability is not possible in Greece.[266]

10 Right to a Compulsory Portion

Nearly all legal systems recognise a compulsory portion of the children and the spouse (Dutta 2014a: 127 et seq; see above III.4.). In most legal systems that have a right to a reserved portion, the right is only a monetary claim and not a right to certain objects of the estate (Germany,[267] Brazil,[268] Cyprus,[269] Italy[270]). This is different in the Netherlands: descendants have a right to assets belonging to the deceased's estate which have been used in conduct of the deceased's profession or business, if the descendant has participated actively in the business. In addition, the spouse has a right to a usufruct on the dwelling and the household effects.[271]

What most systems have in common is that the right to a compulsory portion of any form usually depends on, not only a *de facto* relationship between the deceased and the forced heir, but on a legal relationship (marriage, children, etc.) which also gives rise to the right to intestate succession.[272] This is different in England, where the sixth category of individuals who might have a claim to family provisions, the 'dependants', consists of those people, who were *de facto* dependant on the deceased.[273]

With the notable exception of English law (although it can be argued that the instrument of "family provisions" functionally amount to a compulsory portion, see

[262] Sanders 2014: 43 et seq.
[263] Soltysinski 2014: 12 et seq.
[264] Kuisma 2014: Report 13.
[265] Synodiou et al. 2014: Report 16.
[266] Vervessos and Stavrakidis 2014: 73.
[267] Sanders 2014: 44; Mayer et al. 2013.
[268] Cerqueira 2014: 49 et seq.
[269] Synodiou et al. 2014: 16.
[270] Fusaro 2014: 5.
[271] Burgerhart and Verstappen 2014: 27.
[272] Röthel 2011: 226.
[273] Meston 2001: 83; Rudolf 2014: 26 et seq; Röthel 2012a, b: 154.

above III.4.) and most jurisdictions in the USA, except Louisiana,[274] every legal system here considered has a "compulsory portion" of some sort.

10.1 Estates and Businesses

Overall, no distinctions seem to be made between estates and businesses. Businesses and business properties are not excluded from the general rules of inheritance law and more specifically from the rules on compulsory portions (Germany,[275] Poland,[276] Japan,[277] Cyprus[278]).

10.2 Four Groups of Entitled Persons

Four groups which may be entitled to a reserved portion can be distinguished here: children, spouses (civil partners), ascendants, and siblings. In English law, there are six groups of individuals who may be entitled to a claim: the spouse, the former spouse who has not remarried, an individual who has lived like a spouse in the same household with the deceased for at least 2 years, the children, individuals who were treated as children, dependants.[279] Children are entitled to a compulsory share in every system that has forced heirship. In all forced heirship systems, the spouse is also entitled to a share (or a usufruct, like in the Netherlands[280]) in the estate. Ascendants are entitled to a portion in Austria,[281] Japan,[282] in Taiwan,[283] and Italy[284] only if there are no children. Siblings are only entitled to a share in Taiwan.[285]

[274] Louisiana Civil Code Art. 1493; Scalise 2012: 144.
[275] Sanders 2014: 44 et seq.
[276] Soltysinski 2014: 4.
[277] Matsui 2014: 8.
[278] Synodiou et al. 2014: 17.
[279] Inheritance (Provisions for Family and Dependants) Act 1975, S 1 (1)(1A).
[280] Burgerhart and Verstappen 2014: 6 et seq.
[281] Cach 2014: 37.
[282] Matsui 2014: 2.
[283] Tsai 2014: 2.
[284] Fusaro 2014: 3.
[285] Tsai 2014: 2.

10.3 Special Rules for Certain Types of Businesses

In most countries, those general rules apply to all sorts of businesses (Netherlands,[286] England,[287] Greece,[288] Taiwan,[289] or Cyprus[290]). Poland, Germany and Austria have diverging provisions for agricultural businesses, by which the compulsory share can be reduced.[291] The reason for special regulations is to secure the maintenance and existence of the farms and forests. As this kind of business is essential for the provisioning of a country, special rules can be justified.[292] In Japan, there is a possibility to reduce the monetary compensation of the forced heir who does not succeed in the business).[293] Italy has introduced so-called "family agreements", which enables family businesses to be inherited with reduced compulsory shares. However, this is not default law, but all forced heirs must participate in them and give their consent.

10.4 Renouncing the Compulsory Portion

A forced heir is, contrary to the semantics of the term, not forced to inherit in any way. No system forces the unwilling heir to accept an inheritance. Thus, it is possible to renounce the reserved portion usually after death[294] (or before death in an Italian family agreement[295]). In the Netherlands[296] and England,[297] no renunciation is needed, because a claim to the estate has to be made by the individual who deems him- or herself entitled (to a reserved portion or a provision).

The requirements to renounce a compulsory portion vary greatly. In Germany, a renunciation (during the testator's lifetime) must be notarised.[298] In Finland, it

[286] Burgerhart and Verstappen 2014: 29.

[287] Ball 2014: 28 et seq.

[288] Vervessos and Stavrakidis 2014: 75 et seq.

[289] Tsai 2014: 4 et seq, under certain conditions it can be excluded.

[290] Synodiou et al. 2014: 17.

[291] Maczynski 2001: 192 et seq.

[292] For the possibility of renouncing the reserved portion before the death of the testator see Kalss and Probst 2013a, b: 749 et seq.

[293] Matsui 2014: 9.

[294] Vervessos and Stavrakidis 2014: 76, Tsai 2014: 2, Matsui 2014: 7, Sanders 2014: 45, Cach 2014: 38, Kuisma 2014: 14, Cerqueira 2014: 51.

[295] Fusaro 2014: 9.

[296] Burgerhart and Verstappen 2014: 29.

[297] Ball 2014: 28 et seq.

[298] Sanders 2014: 46.

merely has to be in writing,[299] whereas in Greece, a renunciation can be effected by express or even just implied unilateral act.[300]

10.5 Compulsory Portion and Shares in a Business

There are only few possibilities to shape provisions under the articles of association regarding the reserved portion, particularly in way of allowing to grant asset claims in company law.

In Germany, if only one heir receives his compulsory share, he or she will have to satisfy the claims of the other forced heirs, which may put a strain on the estate.[301] There might be the possibility for the successor to form a partnership with the testator and provide for the share's accretion upon death. However, this can be problematic if the partnership were to be seen as gift to the successor.[302] In Austria, the testator may transfer the compulsory portion expressly to the person entitled to a compulsory portion.[303] This compulsory portion does not necessarily have to consist of money, but can be assets or a pension.

A compulsory portion will usually be compensated in money, if it needs to be compensated at all (Germany,[304] England,[305] Japan,[306] Greece,[307] Finland[308]).

In this context, the question of who has a say in the distribution of the mandatory portion naturally is of eminent importance. The answers given to this question can be divided in two groups. On the one hand, it is irrelevant who would have a say in the distribution of the mandatory portion of business shares since the claim against the estate is of a merely monetary nature (Germany,[309] Netherlands,[310] Austria[311]). On the other hand, the administrator is mentioned to play a role in the distribution of the assets (England,[312] Scotland,[313] Cyprus,[314] Greece[315]).

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[299] Kuisma 2014: 14.

[300] Vervessos and Stavrakidis 2014: 76.

[301] Sanders 2014: 46.

[302] Schauer 2010: 988 et seq.

[303] Cach 2014: 39.

[304] Sanders 2014: 46 et seq.

[305] Ball 2014: 29 et seq.

[306] Matsui 2014: 11.

[307] Vervessos and Stavrakidis 2014: 77, only by way of agreement with remaining partners/shareholders.

[308] Kuisma 2014: Report 14.

[309] Sanders 2014: 47.

[310] Burgerhart and Verstappen 2014.

[311] Cach 2014: 39.

[312] Ball 2014: 29 et seq.

[313] Valsan 2014: 13 et seq.

[314] Synodiou et al. 2014: 17.

[315] Vervessos and Stavrakidis 2014: 77.

Where the claim is only monetary (Germany,[316] Netherlands,[317] Austria[318]), the question does not arise in specific legal rules. The question is whether it is possible to grant shares instead of money. However, also in other systems, other shareholders do not have a say in the distribution of the mandatory shares[319] (Japan, Greece – for companies with share capital, Scotland, Finland).

10.6 Assessing the Value of the Compulsory Share

In some jurisdictions, there are provisions on the assessment of the reserved portion. For example in Austria, § 784 ABGB stipulates that financial assets and liabilities shall be valuated at their fair market value at the time of the decedent's death. That means that they shall usually be valued at the current market value. It can also mean the "price, which can usually be obtained by the sale of the property in fair dealing."[320] A similar provision can be found in Dutch law (Art. 4:6 DCC) and in German law.[321] English,[322] Scottish,[323] and Cypriot[324] reports either do not mention such provisions or do not have them.

In most systems, the reserved portion relates to a percentage of the property value (Germany,[325] Netherlands,[326] Poland,[327] Japan,[328] Greece,[329] Taiwan,[330] Scotland,[331] Cyprus,[332] Italy,[333] Finland,[334] Brazil[335]). This question does not apply to England[336] and to most jurisdictions of the USA, because the extent of the individual

[316] Sanders 2014: 47.
[317] Burgerhart and Verstappen 2014: 30.
[318] Cach 2014: 39.
[319] Matsui 2014: 8, Vervessos and Stavrakidis 2014: 78, Valsan 2014: 13 et seq, Kuisma 2014: 15.
[320] Cach 2014: 39 et seq.
[321] Graf 2008: para 1.408.
[322] Ball 2014: 29 et seq.
[323] Valsan 2014 does not mention such provisions.
[324] Synodiou et al. 2014: 18.
[325] Sanders 2014: 47.
[326] Burgerhart and Verstappen 2014: Report 31.
[327] Soltysinski 2014: 3.
[328] Matsui 2014: 8.
[329] Vervessos 2014: 78 et seq.
[330] Tsai 2014: 4 (n 7).
[331] Valsan 2014: 9.
[332] Synodiou et al. 2014: 18.
[333] Fusaro 2014: 5 (n 26).
[334] Kuisma 2014: 40.
[335] Cerqueira 2014: 54.
[336] Ball 2014: 29 et seq.

claim is to be determined by the courts.[337] Other than in Germany, Poland, and Austria, where the compulsory heirs "only" receive a financial claim to their portion, most other systems know a *Noterbrecht*, which means that the heirs become successors in respect to their respective compulsory portions.[338]

In Germany,[339] the Netherlands,[340] Poland,[341] Greece,[342] Austria,[343] Brazil,[344] and Taiwan[345] (for children, the spouse, and parents) the reserved portion amounts to 50 % of what the heirs would have received in the case of intestacy. This, in turn, is not a set percentage, because it depends on the existence of a spouse, and the existence and number of children and surviving ascendants (where applicable). In Poland, minors and descendants who are unable to work have a right to three quarters of their intestate portion.[346] In Scotland, the percentage is 33.3 % for the spouse or the children (only taking into account the net moveable estate).[347]

Apart from the special rules for farms and forests in Austria, Germany, Poland, etc.,[348] this percentage cannot be lowered unilaterally.

10.7 Mechanisms of Compensation and Offset

Most countries have compensation mechanisms in case some individuals receive less than their legal share but others receive more.[349] With certain limitations, gifts that have been given to individuals will be taken into account when calculating the reserved portion.[350] That has two implications. Firstly, if a forced heir has received a gift by the testator during his or her lifetime, this will (under certain circumstances) diminish his or her claim to a compulsory share.[351] In Germany, the testator will have to declare his or her intention to have this advance offset against the compulsory portion.[352] Secondly, if an individual, who is not a forced heir, has received a gift

[337] Rosen 2014: 20.

[338] Firsching and Graf 2008: para 1.337; Fusaro 2011: 197.

[339] Sanders 2014: 47 et seq.

[340] Burgerhart and Verstappen 2014: 31.

[341] Soltysinski 2014: 3.

[342] Vervessos 2014: 30.

[343] Cach 2014: 40.

[344] Cerqueira 2014: 54.

[345] Tsai 2014: 4 (n 7).

[346] Henrich and Schwab 2001: 380 et seq.

[347] Valsan 2014: 8.

[348] See above 17.

[349] Cach 2014: 41 et seq, Sanders 2014: 48 et seq, Vervessos 2014: 80, Matsui 2014: 7; Fusaro 2014: 6 et seq; Burgerhart and Verstappen 2014: 31.

[350] *Ibid*.

[351] Henrich and Schwab 2001: 383.

[352] Lange 2013: § 2315 para 14.

during the lifetime of the testator and as a result, the remaining estate does not cover the compulsory shares that are still to be paid out, the heirs can demand that the gift be returned by the done, insofar as it is necessary to cover the claims. With slight variations, this schematic regulation applies to Austria,[353] Germany,[354] Greece,[355] Japan,[356] Italy,[357] France,[358] Scotland,[359] Poland (limit of 10 years for non-heirs)[360] and the Netherlands (Art. 6:65 DCC).[361] In Austria, Switzerland, and Germany, there are time limits for offsetting gifts with compulsory shares (2, 5 and 10 years respectively) which also depend on whether the donee is a compulsory heir or not.[362]

An absolute exception to this rule is Denmark, where any gifts made during the testator's life can be used to minimise the compulsory share.[363]

As a compulsory share does not exist in common law systems, there countries consequently do not regulate these questions.

In general, there seems to be little political discussion about the state of statutory claims relating to business. Some considerations can be made out. In Poland, the introduction of the *fideicommissum* was discussed in a 2006 Green Paper.[364] In Italy, there was discussion on a possible reform of compulsory shares (although this did not specifically relate to businesses).[365] And finally, the Scottish Law Commission suggested a change of the "legal rights" of the spouse from a claim to 33.3–50 % of the net moveable property to a claim to 25 % of the whole estate.[366]

11 Consequences of Business Succession

As a general rule in case of an intestate succession, the general rules of inheritance law apply and the intestate heirs will inherit (e.g. Finland,[367] Germany,[368] Netherlands,[369] Cyprus[370]).

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[353] Cach 2014: 41 et seq.

[354] Sanders 2014: 48 et seq.

[355] Vervessos 2014: 80; Süß 2013: 1051.

[356] Matsui 2014: 7.

[357] Fusaro 2014: 6 et seq.

[358] Süß 2013: 1039 et seq.

[359] http://www.institut-fuer-internationales-erbrecht.de/category/grosbritannien/schottland

[360] Maczynski and Poczobut 2009: 29, Süß 2013: 1114.

[361] Burgerhart and Verstappen 2014: 31.

[362] Röthel 2012a: 165; Süß 2013: 1129.

[363] Süß 2013: 1026.

[364] Maczynski and Paczobut 2009: 27.

[365] Fusaro 2014: 6.

[366] Scottish Law Commission 2009: 33.

[367] Kuisma 2014: 17.

[368] Sanders 2014: 52.

[369] Burgerhart and Verstappen 2014: 33.

[370] Synodiou et al. 2014: 19 et seq.

In the case of intestate succession, the answer to this question depends on the class of heirs. Among the descendants, for instance, the heirs will inherit equal parts (Netherlands,[371] Germany,[372] Cyprus,[373] Finland[374]). Different percentages apply to different classes of heirs (spouses, ascendants, descendants). As is pointed out in the English report, this does not necessarily have to be so in the case of testate succession.[375]

There is a possibility to prevent the shares from being split among the heirs. The possibility is not offered by default law. There is either the possibility to prevent the shares from being split by way of a testament (Finland,[376] Cyprus,[377] England[378]) or by incorporating corresponding provisions in the articles of association/partnership agreements (Germany,[379] Austria,[380] Netherlands[381]).

Mechanisms to prevent the diffusion of the shares are shareholder agreement, provisions under the articles of association, as the requirement of consent of the other shareholders, or structural options under company law, or finally the inclusion in a holding.

In most legal systems it is possible to include regulations on a level of company law, e.g. in articles of association (Cyprus,[382] Netherlands,[383] Germany,[384] Austria[385]). As to the English system, the involvement of company law seems unduly complicated.[386]

In Germany, there are a number of ways in which company law and inheritance law can work together.[387] For one, it is possible to incorporate corresponding provisions in the articles of association/partnership agreement. Rights of a deceased member/partner may be exercised after his death by the heirs.[388] The testator may also include conditions or requirements concerning the business in his or her last will. And finally, there is a whole array of ways to transfer a business without

[371] Burgerhart and Verstappen 2014: 33.
[372] Sanders 2014: 52.
[373] Synodiou et al. 2014: 21 et seq.
[374] Kuisma 2014: 17.
[375] Ball 2014: 31.
[376] Kuisma 2014: 17.
[377] Synodiou et al. 2014: 21 et seq.
[378] Ball 2014: 31.
[379] Sanders 2014: 52.
[380] Cach 2014: 43 et seq.
[381] Burgerhart and Verstappen 2014: 33.
[382] Synodiou et al. 2014: 22.
[383] Burgerhart and Verstappen 2014: 33.
[384] Sanders 2014: 53.
[385] Cach 2014: 44.
[386] Ball 2014: 31.
[387] Sanders 2014: 53.
[388] Sanders 2014: 53.

splitting shares by way of anticipated succession. In the Netherlands, inheritance law can only be used adequately if there is enough leeway left by the provisions of company law, since company law takes priority over inheritance law. Since English law does not know the institution of compulsory portions, the splitting of shares can be prevented more easily by simply including corresponding provisions in a last will.

While in England, articles of association are not thought to be a suitable means of succession, accordingly drafted articles of association in the Netherlands can indeed prevent interference from heirs.[389] Similarly, this is the case in Germany, as can be seen under 4. In Finland, the consent of the heirs is required.[390]

12 Are Foundations Set Up for Business Succession Purposes?

In different legal systems the institution of a foundation or trust for the purpose of family maintenance exists.

The most specific specimen of this type of foundation (trust) can be found in Austria[391] and Germany,[392] the "*Familienstiftung*". Similar types of foundations for the purpose of family maintenance can be found in the Netherlands,[393] in Greece,[394] in Finland[395] and in Italy.[396] In Italy,[397] as in Switzerland,[398] however, only needy family members may receive support by such a foundation. There are no foundations in England, the USA, Scotland, or Cyprus, only trusts. It is not possible to establish a foundation to maintain a family in Malaysia (with the exception of Labuan).[399]

Throughout the legal systems that know a foundation, some kind of written document containing the required information will need to be recognised by the responsible authority, be it a notarial document (Netherlands[400]), a deed of

[389] Ball 2014: 31 et seq.
[390] Kuisma 2014: 17.
[391] Cach 2014: 45.
[392] Sanders 2014: 53.
[393] Burgerhart and Verstappen 2014: 34.
[394] Vervessos 2014: 81.
[395] Kuisma 2014: 17.
[396] Fusaro 2014: 11 et seq.
[397] Fusaro 2014: 11 et seq.
[398] Baddeley 2014: transcript 14.
[399] Meng and Balasingam 2014: 22.
[400] Burgerhart and Verstappen 2014: 34.

foundation (Finland[401]) the statutes providing for appointment of an administration (Greece[402]) or a 'regular' legal document (Germany[403]). In Cyprus,[404] a similar procedure applies to the instrument of institution, which is neither a trust nor a foundation, where a memorandum of association will need to be registered in the register of institutions and require a certificate of registration. This document will have to disclose the purpose of the foundation (institution). Some legal systems also ask for the foundation to be endowed with adequate funds (Germany,[405] Greece,[406] Italy[407]).

In some countries, businesses are run by foundations and serve the purpose to maintain the family or legal successors, but there restrictions do exist.

Only unconditionally in Germany,[408] Switzerland,[409] and in Cyprus,[410] trusts are entitled to run a business. In Italy, businesses may be run by foundations but only needy family members supported, as has been said already. In Greece, it is not permissible for a foundation to run a business as a main purpose, or limit the circle of beneficiaries to family members.[411] Finnish foundations may run a business of doing so furthers the foundation's purpose, and the maintenance of a family through a business may be effected if this is mentioned in the purpose.[412]

Whether a legal successor or the family have influence on a foundation, depends on the fact how the founder has set up the foundation.[413] By default, the answer seems to be no.[414] It is however possible for the founder to appoint the legal successor or family as administrator or managers of the foundation.[415]

The same is true for beneficiaries. Some have rights in the foundation and may transfer those rights only if the articles grant those rights.

The rights depend on whether the founder has appointed the beneficiaries as managers or administrators.

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[401] Kuisma 2014: 17 et seq.

[402] Vervessos 2014: 81.

[403] Sanders 2014: 53 et seq.

[404] Synodiou et al. 2014: 24 et seq.

[405] Sanders 2014: 53 et seq.

[406] Vervessos 2014: 81.

[407] Fusaro 2014: 12.

[408] Sanders 2014: 54.

[409] Baddeley 2014: transcript 14.

[410] Synodiou et al. 2014: 27.

[411] Vervessos 2014: 83 et seq.

[412] Kuisma 2014: 18.

[413] Eg Sanders 2014: 54, Cach 2014: 46 et seq, *Cerqueira*, Brazilian National Report 63.

[414] Eg Synodiou et al. 2014: 28.

[415] Eg Vervessos 2014: 82, Costa et al. 2014: 30.

Germany is the only country that prescribes a minimum duration for a foundation (10 years).[416] A maximum duration for a foundation does not exist in any legal system.

13 Trust or Foundation?

Naturally, the answer to this question will be different for common law and civil law systems, since the former traditionally don't know foundations and the latter don't know trusts. The Greek,[417] and German[418] systems know a "fiduciary foundation" which does not have legal personality and for which state approval is not needed. The Austrian system knows an instrument which has a similar name, but is a regular foundation set up by a fiduciary.[419] The trust as understood in common law countries is not part of the Austrian legal system, nor has the Hague Convention on the Law Applicable to Trusts and on Their Recognition been signed.[420] The German "fiduciary foundation" is rarely used in succession planning,[421] however it may be used for business transfers. The trust is definitely part of the Dutch,[422] Cypriot,[423] English,[424] and US[425] legal system. In Italy, a trust may be set up and is used for estate planning.[426]

The main difference between a trust and a foundation, which has been mentioned in a number of reports, is that a trust lacks legal personality. (Germany,[427] Greece,[428] Cyprus,[429] Finland,[430] Italy[431]). Another difference mentioned is that a trust is not supervised by a public authority (Italy,[432] Greece[433]).

A trust, or a "fiduciary foundation", is preferred for estate planning because of its reduced legal formalism (Italy). In Cyprus, a trust is used if the benefit is private

[416] Sanders 2014: 54 et seq.

[417] Vervessos 2014: 84 et seq.

[418] Sanders 2014: 55; Schlüter and Stolte 2013: para 4.4–80.

[419] Not expressly regulated, but accepted in § 13 para 6 KStG and OGH 14.09.2011, 6 Ob 158/11w.

[420] Cach 2014: 49.

[421] Sanders 2014: 55.

[422] Burgerhart and Verstappen 2014: 36.

[423] Synodiou et al. 2014:

[424] Ball 2014: 5.

[425] Rosen 2014: 12 et seq.

[426] Fusaro 2014: 13.

[427] Sanders 2014: 55.

[428] Vervessos 2014: 84 et seq.

[429] Synodiou et al. 2014: 29.

[430] Kuisma 2014:19.

[431] Fusaro 2014: 13.

[432] Fusaro 2014: 13.

[433] Vervessos 2014: 85.

rather than public, in which case an institution will be the preferred form.[434] Greek fiduciary foundations will be set up if the estate does not reach a certain value.[435] In Germany, the form of foundation will be chosen if a business shall be run.[436]

14 Concluding Remarks

Empirical data show the outstanding relevance of family businesses in various national economies and, as a result, underline the enhanced need for regulation. Due to their overwhelming presence in business life, family businesses play an important role in national economies. Therefore it is obvious that questions relating to the transfer of family businesses are not a niche topic.

The probably biggest difference of the national legal systems that can be noticed is the lack of compulsory shares, i.e. claims by certain individuals which must be satisfied in any case, even if the testament does not mention them, in common law systems. Neither England nor (most of) the USA (with the exception of Louisiana[437]) know such a concept. And as it is, the existence or non-existence of a compulsory share makes all the difference, especially in the case of family businesses – the English "provisions" system does not interfere with the testator's freedom to test in quite the same way.

Since family businesses are preferentially transferred within the family, the rules on compulsory portions are of vital importance. Compulsory portions that need to be satisfied will sometimes threaten the continued existence of the business because not enough liquid means to satisfy the legal claims of forced heirs. So far, only a few legal systems have tackled this problem (mostly 'only' in the case of agricultural businesses),[438] let alone regulated it.

The problem can only partially be avoided by way of anticipated succession. While this may work well for some jurisdictions, in others there is a sometimes limited, sometimes unlimited compensation mechanism at work that might lead to unfavourable consequences for the successor, namely obligations to compensate other forced heirs if they have not yet received their compulsory portion.

Even on a level of private autonomy and company law, the options are limited. The fellow members/partners/shareholders' hands are more often than not tied by cogent rules of inheritance law.

All of this means that for the case of transferring family businesses, the principles of company law and inheritance law remain to be reconciled in most legal systems, with a special focus on finding ways of dealing with potentially fatal claims for compulsory portions.

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[434] Synodiou et al. 2014: 29.

[435] Vervessos and Stavrakidis 2014: 85.

[436] Sanders 2014: 56.

[437] Scalise 2012: 144.

[438] For a suggestion of analogous application of the rules on agricultural businesses on 'regular' family businesses, cf. Schulz 2013: 1782.

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Part II
National Reports

The Influence of the Law of Succession and Company Law on Business Succession – The Austrian Way

Christopher Cach

Abstract Family companies are of great importance in Austria. Eighty percent of all partnerships and companies are family enterprises in Austria (Bundesminister für Wirtschaft, Familie und Jugend, Mittelstandsbericht 2012, 70 ff). They contribute to the job creation and economic achievement to a large extent. So family enterprises, which are resident in Austria, employ 70 % of the employees (Mandl, Obenaus 2008: 5; http://www.ots.at/presseaussendung/OTS_20090423_OTS0188/familienunternehmen-spielen-eine-wesentliche-rolle-in-der-oesterreichischen-und-europaeischen-wirtschaft-bild). Family enterprises are not only restricted to small companies. The share of middle- sized family enterprises is about 67 %. Fifty percent of the large companies are family enterprises (Bundesminister für Wirtschaft, Familie und Jugend, Mittelstandsbericht 2012: 72).

The Austrian succession law and the company law have different goals: The succession law accepts the testator's will, although there is a boarder: Some of the deceased's family members have a claim for a compulsory portion against the heir, which can be dangerous for the inherited company because of a splitting effect. The company law on the other side wants to unite the different interests of the various partners of a company to ensure the company's existence and progress.

These controversial aspects lead to the questions, first if it is possible to inherit shares of a partnership or a company and second how the testator can fulfil the wishes of the claims for compulsory portion without risking the liquidation of a business.

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1 Business Succession

According to the calculations of KMU Research Austria for the period between 2012 and 2021, there will be a takeover of 52,500 enterprises in Austria. This number corresponds to about 33 % of small and middlesized companies (*kleine und mittlere Unternehmen, KMU*) in Austria.[1]

The overwhelming number of these 52,500 enterprises, which will face a takeover, are family enterprises.[2]

For the years 2012 till 2021 according to the statistics of KMU Research Austria 6,700 takeovers are to be expected per year. The share of family internal succession decreases. The takeover of the company management within the family circle decreases too. Only 2/3 of the partnerships and companies are carried on by family members in the management. As reasons for the reduction of family influence the decreasing number of children in the families, the different background of education and the different professional orientation of the children in comparison to their parents' have to be mentioned. The difficulty to find a family internal successor has increased.[3]

Because of the decreasing number of children and the different professional interests of children of entrepreneurs or company-shareholders, 50 % of the takeovers will take place with family external persons.[4] While in 1996 still 75 % of the companies transferred the management within the family, only 50 % of the management activities were continued by the children in 2006. Fifteen percent of the partnerships and companies were managed by long-term staff members. In 9 % of the cases external public executives were called to the conduct of business.[5]

The succession within the companies, that is the continuation by the public executives or a leading employee will decrease according to tendency[6]; about 8 % of all takeovers of companies (=16 % of the family external takeovers) are executed by a Management Buy Out. The sale to company-external persons dominates with 42 %, followed by leasing of about 28 %. The rest are other constructions.[7]

1.1 Family Business

The term "family business" is not legally defined by the Austrian corporate law. Yet in some of the corporate law regulations the family is referred to or consequences of corporate law are connected with the institution of a family. The legal concept of the

[1] Kalss and Probst 2013: 3.

[2] Kalss and Probst 2013: 3.

[3] Bundesminister für Wirtschaft, Familie und Jugend, Mittelstandsbericht 2012, III – 386 Blg 24. GP, 72; Steiner and Voithofer 2011: 57, 61.

[4] Kalss and Probst 2013: 698.

[5] Kalss and Probst 2013: 699.

[6] Bundesminister für Wirtschaft, Familie und Jugend, Mittelstandsbericht 2012, III – 386 Blg 24. GP, 72.

[7] Kalss and Probst 2013: 699.

family according to §§ 40f ABGB isn't used thereby. Especially also in the public company law (*Aktiengesellschaftsrecht*) there are references to family enterprises, which have to be interpreted differently because of a different purpose.

1.1.1 Examples

- Bringing in of a family enterprise into a private limited company (*Gesellschaft mit beschränkter Haftung, GmbH*)[8]: According to § 6a para 2 GmbHG a company, which has existed for 5 years at a minimum and only its last possessor, his spouse and his children should belong to it as shareholders, may be brought into a company for the purpose of continuation. In this case the duties to bring in the primary deposit (*Stammeinlage*) are reduced.
- Post–foundation agreement (*Nachgründungsvertrag*): According to § 45 para 1 public company act (*Aktiengesetz, AktG*),[9] post-foundation-agreements are subjected to special regulations, if they are contracts of a company with establishers, who want to bring in the investments or other objects of property for a compensation of at least 10 % of the nominal capital in the company. These agreements need the consent of the general assembly (*Hauptversammlung*) and an examination of an extern examiner. These strict rules are also valid for contracts between the company and close relatives of the founder.
- Incompatibility: In the private foundation according to the private foundation act (*Privatstiftungsgesetz*, PSG)[10] the conditions of incompatibility for institutional functions are especially regulated (§§15, 20 and 23 PSG): The beneficiaries of the private foundation should not have the possibility to influence the private foundation's management board decision about money and benefits, so the beneficiaries aren't allowed to be part of the foundation's management board. This incompatibility also includes a group of close relatives, like the spouse of the beneficiary in straight line as well as the relatives till the third collateral line.[11]

1.1.2 The Agricultural Business

In Austria there are special regulations besides the general ones of the ABGB concerning the law of inheritance of middle-sized agricultural and forestry businesses. These special regulations are the exclusive heir act (*Anerbengesetz*),[12] the Tyrolean

[8] RGBl Nr 58/1906 in the version Austrian Federal Law Gazette I Nr 13/2014.

[9] Austrian Federal Law Gazette Nr 98/1965 in the version Austrian Federal Law Gazette I Nr 35/2012.

[10] Austrian Federal Law Gazette Nr 694/1993 in the version Austrian Federal Law Gazette I Nr 111/2010.

[11] Arnold 2013: 258.

[12] Bundesgesetz vom 21. Mai 1958 über besondere Vorschriften für die bäuerliche Erbteilung (Anerbengesetz) in the version Austrian Federal Law Gazette I Nr 2/2008.

Law of Inheritance for Agricultural Estates (*Tiroler Höfegesetz, TirHG*)[13] and the Carinthian Law on Inheritance of Agricultural Estates (*Kärntner Erbhöfegesetz, KEG*).[14] The aim of these legal regulations is to preserve a stable agricultural structure and to prevent the splitting into mini estates. If the farms were subjected to general regulations of the law of inheritance, there would be a splitting of the farms.[15]

The law of exclusive heir (*Anerbenrecht*) is part of the law of inheritance and does not create a new enforceable instrument of the law of inheritance. Only regulations for such a case are created in which the testator has not disposed of his farm or other essential parts by testamentary disposition. It is therefore decreed by the general regulations concerning the law of inheritance, who the heir is. This exclusive heir (*Anerbe*) consequently has to pay in the prize of acquisition (*Übernahmspreis*) into the estate. The other heirs are to be satisfied with money. The requirements, if a hereditary farm is at hand in the sense of special directives, or who the exclusive heir is, are part of these special laws.[16]

1.2 Company Law vs Inheritance Law

The term "family business" concerns two law areas, the business law and the succession law. There is a tension, because the two areas of law pursue different objectives. The company law wants to unite the different interests of the various partners of a company to ensure the company's existence. The company law has an inventory and a balance function.[17]

One of the succession law principles is the testator's testamentary autonomy, to prohibit the company's shattering and to transfer the shares to one person, which is favored by the testator; although it has to be considered that some family members have a claim for compulsory portion so that there exist some limits in the testators' freedom of testation.[18]

[13] Bundesgesetz vom 12.Juni 1900, betreffend die besonderen Rechtsverhältnisse geschlossener Höfe, wirksam für die gefürstete Grafschaft Tirol, GVBlTirVbg 1900/47 in the version Austrian Federal Law Gazette I Nr 2003/112.

[14] Bundesgesetz vom 13.12.1989 über die bäuerliche Erbteilung in Kärnten, Austrian Federal Law Gazette 1989/658 in the version Austrian Federal Law Gazette I 2003/112.

[15] Koziol and Welser 2006: 477; Ferrari in Ferrari and Likar-Peer 2007: 95.

[16] See also Probst in Gruber et al. 2010: 113.

[17] Kalss and Probst 2013: 654.

[18] Kalss in Kalss and Schauer 2001: 101.

2 Inheritance Law

2.1 Principles

The Austrian law of succession takes its origin from two principles, the "testamentary freedom" and the "law related to compulsory portion" of certain close relatives and the spouse (family succession). It is a mixed system.

2.1.1 Testamentary Freedom

Basically the highest principle is the testamentary freedom of the testator over his property. He should have the possibility to decide himself whom he is going to bequeath which part of his property after his death. The testator can decide on his legal succession by testamentary disposition. However this freedom is restricted by the claims of specific persons entitled to the compulsory portion (*Pflichtteilsansprüche, Noterbrecht*). The testator has to bequeath his close relatives (certain relatives) a valuable minimum share of the testator's estate. If the testator does not bequeath any assets, the persons entitled to a compulsory portion are lawfully entitled to a claim against the dormant estate (*ruhender Nachlass*) and against the heirs.[19]

The testamentary freedom is an expression of private autonomy of the law of inheritance. It is the testator's granted right of disposal over his property. Agreements, which oblige a person to testate in a particular sense, are null and void. However this testamentary freedom is numerously restricted.

- Law related to compulsory portion: Even if the testator wants to transfer his whole property to a person by his will, certain persons have a claim to compulsory portion.
- Testamentary capacity (*Testierfähigkeit*): The testamentary capacity is the ability, to erect testamentary dispositions operatively and to cancel them. The ability to make testamentary dispositions is however –as well as the qualified capacity to enter into a contract not given by birth, but it is linked with the maturity of a human being. So § 569 sentence 1 Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB) prescribes explicitly that persons under the age of 14 are without testamentary capacity. § 569 sentence 2 and 3 ABGB in conjunction with § 568 ABGB determine, that persons from the age of 14 till the completion of the 18th year of their life can only restrictedly testate at court or in a notarial way. Both must be convinced of the freedom of will and the prudence of the testator. A different testamentary disposition is illegal. From the completion of the 18th year of life every natural person can make a will unless a mental deficiency exists.

[19] Ferrari in Ferrari and Likar-Peer 2007: 3.

– Formal requirements of a will: The testator cannot determine his will of how to distribute his assets arbitrarily, but he must observe the corresponding forms of a will. In § 578 ff ABGB the Austrian succession law presents several forms of private and public wills, which are all equal (no preference to notarial wills). The duty to use legally determined forms of wills is a precondition for their validity. If a compelling form of a will has not been observed, this will is invalid. This is even the case, if the document clearly proves the will of the testator. The testator should – before he is going to dispose of his assets – consider consciously if he wants to take this step. The proof of evidence should moreover minimize the risk of a forgery of the will. The public forms of notarial wills additionally provide the possibility that the testator is sufficiently advised about the consequences of his arrangements before the establishment of his will.[20]

2.1.2 Family Succession

The Austrian law of succession includes the basic principle of the family succession. As far as the testator has not made a testamentary disposition, his legacy is given to his close relatives respectively to his spouse according to § 730 ABGB. Only under the condition that the testator has no relatives alive, legatees are declared statutory successors. If no legatees have been enumerated by the testator, the estate has to be declared heirless and the property has to be transferred to the state (Right of reversion according to § 760 ABGB, *Heimfallsrecht des Staates*).

The relationship between the testator and the legal heirs is based on descent (§§ 143 f ABGB).[21] The parentela system (*Parentelsystem*) declares, who as an heir has been transferred the inheritance to; the relatives inherit according to a certain sequence (§731 ABGB): The first parentela are the children of the testator and their descendants. The second parentela are the parents and the siblings of the testator. The third parentela are the grandparents of the testator and descendants. In the fourth parentela are the great grandparents. The descendants of the great grandparents are no legal heirs. For the determination of the real heir the principle is valid, that the closest relative of the testator excludes the more distant relatives. If the testator has children, the parents of the testator don't get a part of the estate. The right to an inheritance is decided according to the heads, so that all heirs get their assets in equal parts. The legal right to an inheritance of the spouse is to be considered independently from that.

The basic principle of the family law of inheritance manifests itself in so far, that in spite of the testamentary disposition there has to be attributed a claim to compulsory portion to a certain group of close relatives, independently of the designated heirs by the testator.[22]

[20] Koziol and Welser 2006: 502.

[21] New structured by the Namensrechtsänderungsgesetz 2013 (NamRÄG 2013), Austrian Federal Law Gazette I Nr 15/2013.

[22] Likar-Peer in Ferrari and Likar-Peer 2007: 335.

2.2 Range of Testamentary Freedom

In Austria there is the institution of the law related to compulsory portion. § 762 ABGB enumerates the children of the testator, the parents (insofar as there are no children present) and the spouses as the circle of people concerned. According to § 537a ABGB registered partners of same-sex partnerships are equal to spouses (*Bundesgesetz über die eingetragene Partnerschaft, EPG*)[23]; see also point 6.[24]

2.3 The Institute of Fideicommissum

According to the present legal situation there is no legal institution of fideicommissum in Austria. Until 1938 §§ 618 ff ABGB regulated the legal institution of the fideicommissum. The German Reich Law Gazette 1938 I 825 repealed the regulations of the fideicommissum and other fixed assets in Austria. This law was taken over into the legal acquis by the Second Republic of Austria in 1945.[25] According to this the fideicommissum isn't part of the Austrian legal system.[26]

3 Legal Incapacity Before Death

3.1 Statutory Provisions in Case of Dementia

In case of permanent loss of capacity a guardian (*Sachwalter*) can be appointed by court. The shareholder can also create a precautionary authority (*Vorsorgevollmacht*) and can designate a person who should exercise the shareholder's rights and duties in case of incapacity. A shareholder can also give a general power of attorney (*allgemeine Vollmacht*) to another person, knowing that he/she won't have the necessary legal capacity and the capability to exercise the rights and duties in the future.

3.1.1 Precautionary Authority

The precautionary authority is a special form of agency regulated in § 284 f ABGB. The person who will need to be represented in the future, charges somebody, who should intervene in case of a mental disease, at the time in which the

[23] Austrian Federal Law Gazette I Nr 135/2009.

[24] Bittner/Hawel in Kletečka and Schauer 2010: §§ 762, 763 marginal number 7; Werkusch in Kletečka and Schauer 2010: § 537a marginal number 2.

[25] StGBl 1945/188.

[26] The historical development of the fideicommissum in Austria, see Kalss and Probst 2013: 28 et seq; Scheuba in Kalss and Schauer 2001: 147, 157 et seq.

legal capacity still exists.[27] Basically every person has the right to be empowered, especially family members. Likewise persons may be designated as the authorized representatives, who live in a common household with the authorizer. Those persons are excluded, who have a close relationship to a care facility.[28] After the occurrence of the mental disease, a doctor's special opinion (*fachärztliches Gutachten*) is required. The precautionary authority of the shareholder or the company's contract or the private foundation's agreement can request for two independent special opinions, if the mental illness is as far as that the legal capacity is gone.[29]

3.1.2 Guardian

At the appointment of a person as a guardian, it is necessary to check how far the mental illness is and how far the extent is so that the person cannot handle his/her affairs independently. The later incompetent person has to appoint a suitable person for the office of the guardian, which may also handle the shareholders' exercises (§279 ABGB).

§ 275 ABGB mentions that the guardian has to fulfill all the assignments ordered by the court. In special matters the guardian needs the court's authorization. The important decisions, such as capital increases or the company-act amendments which intervene on the shareholder's assets, are subject to the court's approval. Without the approval, the guardian's measures are illegal and ineffective.[30]

3.2 Precautions in the Articles of Associations

There are two possibilities to agree to articles of association, that a person can exercise the shareholder's rights and duties in case of permanent legal incapacity:

– precautionary authority (§§ 284 ff ABGB): The precautionary authority can only be applied if the authority is granted in form and content. If the precautionary authority should cover all the shareholder rights, this special power must be named explicitly in the document.[31] This is necessary because otherwise the financial matters would not be part of the ordinary business operation and would not be part of the precautionary authority (§ 284a para 2 ABGB in conjunction with § 154 para 3 ABGB). It is important that the document will be established as a qualified precautionary authority, that means it must be built by a lawyer,

[27] OGH 7 Ob 98/12f; OGH 3 Ob 154/08 f; Spruzina in Gruber et al. 2010: § 23 marginal number 5, 8.

[28] Hopf in Koziol et al. 2014: § 284f ABGB marginal number 3.

[29] Kalss and Probst 2013: 672.

[30] Kalss and Probst 2013: 677.

[31] OGH 3 Ob 154/08 f.

notary or at court.[32] One of these bodies has to inform the principal about the scope of the legal effects and the withdrawal rights. The scope of the precautionary authority can be embellished at the shareholder's leisure. This is the basis to ensure that the assignee can exercise the shareholder's rights.[33]
– Age clause: If shareholders exercise a specific organ function in the company, age limits can be agreed on in the articles of association. At the time the shareholder reaches a specific age, he/she can't continue a management board or supervisory board function anymore. This is especially the case if the board member will lose the legal capacity in the foreseeable future. It is also possible to agree to an article of association, that a person can continue to fulfill his mandate after a specific age with the other shareholders' approval.[34]

4 Consequences for a Business in Case of Death

4.1 The Entrepreneur's Death

If the entrepreneur dies, the enterprise is integrated into the deceased's estate and it is finally passed over to the heir or heirs by devolution (*Einantwortung*). The heir becomes the new owner of the enterprise by devolution. The heir is liable for the testator's obligations according to civil law and business law (*Unternehmensrecht*). In the case of civil law, the heir is liable for obligations according to the inheritor's declaration (*Erbserklärung*), which he has provided. If the heir of an enterprise provides an unconditioned inheritor's declaration (*unbedingte Erbserklärung*), he is liable for all the obligations towards the testator's obligees and towards the legatees for their legacies, no matter if the estate includes enough assets (§§ 801 f ABGB). If the heir provides a conditioned inheritor's declaration (*bedingte Erbserklärung*), the liability is restricted to the amount of the assets of the inheritance after the establishment of an inventory. If there are several heirs, each person is liable according to his part of the inheritance.

Besides the civil law liability, there is the liability of the business law of § 40 lit 1 business law act (*Unternehmensgesetzbuch, UGB*).[35] The heir is unrestrictedly liable for all civil law commitments connected to the enterprise, unless he excludes this liability. Such an exclusion is possible in different ways:

– Discontinuance of the enterprise within three months from the transfer of title onwards;
– Entry of the exclusion of liability into the commercial register;
– Publication of the exclusion in an individual way or in a different and customary way.

[32] Hopf in Koziol et al. 2014: § 284 g ABGB marginal number 5; Spruzina in Gruber et al. 2010: § 23 marginal number 21.

[33] Kalss and Probst 2013: 678 et seq.

[34] Kalss and Probst 2013: 684.

[35] dRGBl S 219/1897 in the version Austrian Federal Law Gazette I Nr 50/2013.

4.2 Death of a Partner in a Partnership

In the following text four forms of Austrian partnerships will be presented (non-commercial partnership, general partnership, limited partnership, silent partnership)[36]:

(a) Non-commercial partnership (*Gesellschaft bürgerlichen Rechts, GesBR*): Starting with January 1st, 2015[37] there will be some amendments in the non-commercial partnership law. According to § 1208 ABGB this partnership is dissolved in the case of a partner's death. The partnership assumes, that with the absence of a shareholder who is personally liable, the interest in a continuous cooperation and the continuation of the partnership ceases. To prevent the liquidation agreements on articles of association may be made.

(b) General partnership (*Offene Gesellschaft, OG*): The general partnership consists of two or more shareholders, who do not only incur liability with the property of the partnership but also with their private property. If one of the partners dies, this partnership is dissolved according to § 131 sentence 4 UGB. As a consequence the partnership has to be liquidated. The partnership assumes, that with the absence of a shareholder who is personally liable, the interest in a continuous cooperation and the continuation of the partnership ceases. To prevent the liquidation agreements articles of association may be made.

(c) Limited partnership (*Kommanditgesellschaft, KG*): A limited partnership consists of two different groups of persons. Besides the general partners (*Komplementäre*), who are liable with their private property for the obligations of the partnership (like the shareholders of the general partnership), there are limited partners (*Kommanditist*). They are only restrictedly liable for the liability amount agreed upon in the articles of association.

   – General partner: If a general partner of a limited partnership dies, this company is dissolved according to § 131 sentence 4 UGB. As a consequence the partnership has to be liquidated.
   – Limited partner: If a limited partner dies, the company is not dissolved, according to § 177 UGB. The limited partner share is hereditary. With the transfer of title the company continues with the heirs of the limited partner. If there is not only one heir but several persons, the limited partner share is split into several parts according to the proportional right to an inheritance.

(d) Silent partnership (*Stille Gesellschaft, StG*): The silent partnership consists of the entrepreneur and the dormant partner, who contributes with his money to the company of the entrepreneur to finance it. According to § 184 lit 2 UGB the partnership is not dissolved at the death of the limited partner. The silent partnership is hereditary. It is part of the inheritance after the death of the testator

[36] The European Economic Interest Grouping (EEIG; Europäische wirtschaftliche Interessenvereinigung) is excluded from this presentation.

[37] Austrian Federal Law Gazette I Nr 83/2014; Wöss, S. 2014. Der Tod des GesbR-Gesellschafters nach der GesbR-Novelle, Journal für Erbrecht und Vermögensnachfolge, 126–137.

and is passed over to the heir with the transfer of title. If there are several heirs, the partnership shares are split into corresponding shares according to the proportional right to an inheritance. In this case several legal relations are created between the new dormant partners and the entrepreneur. If however the entrepreneur dies, the legal relations are dissolved. The death of a shareholder of a private limited company or the public company doesn't concern the continuance of the company.[38]

In the Austrian companies the shares are part of the estate and can be transmitted to the heirs, without their liquidation (in contrast to the partnership). The legal position of a public company has to be assessed differently from that of a partnership. The interest in a company and the dead testator's share are basically part of the inheritance. The shares in both company groups are part of the estate. By transfer of title they pass over to the heirs.

The public company cannot simply deprive the inheritance in general of the company share or the shares.[39]

(e) Private limited company (*Gesellschaft mit beschränkter Haftung, GmbH*): In this company each shareholder can only keep one company share according to § 75 GmbHG. In case of death the law proceeds from the permissibility of division, so that in case of several heirs the participation is made according to their proportional right to an inheritance. The partnership agreement may also provide in case of death the indivisibility, so that the heirs only acquire together the company share.

(f) Public company (*Aktiengesellschaft, AG*): Shares as such are indivisible. Because of the obvious higher number of shares and the possibility of an issue of a multitude of single shares (one euro share), this is of minor importance. Shares of a portfolio do not have to follow a uniform regime. They are singularly attributed to the heirs according to the right to an inheritance together with the transfer of title.

4.3 Provisions in the Articles of Association

On the basis of the freedom to determine the content of a contract of partnership law the continuation may already be taken in the articles of association.

(a) The renewal clause (*Fortsetzungsklausel*): The renewal clause is an agreement that the shareholders want to continue with the partnership in the case of a shareholder's death. The partnership is continued without a dissolution. The shareholder's heirs do not have any rights to succeed into the position of the testator. The partnership's share is replaced by a claim of indemnity.

[38] Kalss in Gruber et al. 2010: § 32 marginal number 6.

[39] OGH 2 Ob 593, 594/90, ecolex 1990, 756; OGH 6 Ob 1013/92, GesRZ 1994, 141; OGH 5 Ob 110/99 h, RdW 2000/307; Kalss in Gruber et al. 2010: § 32 marginal number 8.

(b) Successorship clause (*Nachfolgeklausel*): The successorship clause is the agreement among the partners in case of a shareholder's death that the partnership isn't dissolved but is continued with the heirs of the dead partner. In this case there is also no claim of indemnity of the heirs as they still are shareholders of the partnership. The simple successorship clause allows each heir the entry into a partnership, so that also unwelcome people may become partner of the partnership.
(c) Qualified successorship clause (*qualifizierte Nachfolgeklausel*): It is an agreement on articles of association that only a certain person, who fulfils certain requirements, takes the position of a shareholder as a successor of the dead testator. It is allowed that a certain person is named or that the person should have specific qualities (for example educational background, job experience). The choice has to be made among the people who take the position of an heir. By this agreement it is secured, that a person – who takes the position of a shareholder – is also wanted by the other shareholders.
(d) Accession clause (*Eintrittsklausel*): The accession clause allows a third party after the shareholder's death to enter the partnership instead of the testator. In this case there is a contract to the benefit of a third party, because the third (a stranger) is not yet a shareholder.

In this case the succession does not at all have to be taken into account. The admitted person is free to decide if he wants to enter the partnership. If he declines, the agreement on articles of association fails.

4.4 Exercise of the Shareholder's Rights After His Death

(a) Non-commercial partnership: If the shareholder dies, the heir gets a compensation. The heir consequently receives the value of the testator's partnership-share in cash.[40]
(b) General partnership and limited partnership: The membership of a dead partner passes on to the pure estate, who gets the position of a liquidation partner. According to § 810 para 1 ABGB the estate is represented ex lege by the potential heirs, who have provided an inheritor's declaration. Between the testator's death and the devolution (*Einantwortung*) the potential heirs have the right to use, to represent and to administer the estate. The corresponding representatives follow the laws and duties of an enterprise in liquidation.[41] Only in case if the potential heirs have disputes in the exercise of their common rights and duties, or if the inheritor's declaration is inconsistent (*widersprüchliche Erbantrittserklärung*) the inheritance court can appoint an administrator of the estate (*Nachlassverwalter*, § 156 lit 2, § 157 lit 4 and § 173 lit 2 Außerstreitgesetz).[42]

[40] OGH 1 Ob 607/52; Schauer in Gruber et al. 2010: § 31 marginal number 79.
[41] Schauer in Gruber et al. 2010: § 31 marginal number 11 et seq.
[42] Spruzina in Kletečka and Schauer 2010: § 810 marginal number 9.

(c) Private limited company and public company: At the shareholder's death the company share is part of the inheritance. The shareholder's rights and duties are executed by the administrator of the estate.[43]

According to § 810 ABGB the court transfers the management of the estate to the heir. He sets measures according to the ordinary business enterprise (*Maßnahmen des ordentlichen Wirtschaftsbetriebes*), such as the right to vote without the inheritance court's permission. The sale of the share needs the decision of the court at any time.

As mentioned before – if § 810 ABGB doesn't work out – an administrator of estate is appointed by court, for example if there are disputes about the accounting or if the heirs' declarations are contradictory.[44]

5 Last Wills

5.1 Range of a Last Will

The possibility of anticipated inheritance by testamentary disposition is basically possible on all assets. This does not mean that the mandatory provisions of the compulsory portion could be avoided. In particular, the compulsory portion establishes under certain circumstances a supplemental compulsory portion claim (*Pflichtteilsergänzungsanspruch*) against the person, who has obtained assets by the testator's last will or by a gift.[45]

A testamentary disposition that determines the succession of the entrepreneur or the company's shares is allowed. But for the transferability of the shares the corporate law provisions must be considered for every association type (differentiation between partnerships and companies, see point 4.3.).[46]

5.2 Requirements and Conditions

Condition (*Bedingung*): § 696 ABGB determines that a condition is an attached provision in a will or in a legacy. The occurrence or the abolition of legal effects are dependent on a known incident. It is unknown whether this incident happens or not. The heirs do not have to set up an action to achieve the condition. The condition may be suspensive or subsequent. The condition is suspensive, if the legal effects should occur only with the fulfillment of the condition. The condition is subsequent, if the legal effects occur but at the same time certain actions shall be continuously set.[47]

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[43] Kalss in Kalss and Schauer 2001: 104; Kalss in Gruber et al. 2010: § 32 marginal number 70.

[44] Kalss in Gruber et al. 2010: § 32 marginal number 70.

[45] Saurer in Gruber et al. 2010: § 3 marginal number 2.

[46] Kalss and Probst 2013: 699.

[47] Spruzina in Kletečka and Schauer 2010: § 696 marginal number 12 et seq.

Imposition (*Auflage*): This is a provision that commits the heir or legatee to a particular behaviour. If the heir or legatee does not fulfill his obligation, he forfeits his grant. If the legatee has no possibility to fulfill the task, it is already sufficient to act in a similar way (fulfillment surrogate, *Erfüllungssurrogat*).[48]

Executor (*Testamentsvollstrecker*): In a testamentary disposition the testator can name an executor (§ 816 ABGB). He has to fulfill the testator's last will. This lasts until the time of the devolution (*Einantwortung*) to the heirs. The executor may simultaneously act as the administrator of estate (*Nachlassverwalter*) if he is appointed by court.[49]

The testator can also order a reversionary inheritance (*Nacherbschaft*) in his last will.

5.3 Other Forms

Such provisions, requirements and conditions can be included in last wills. Especially in entrepreneurs-wills it is sometimes provided that specific, trustworthy persons of the entrepreneur should stay as Managing Directors or Supervisory Board members after the shareholder's death. It is also possible that specific corporate structures shouldn't be changed after the testator's death (keep the status quo in the company for a long term). Such measures can be useful to set up continuity in the company. The literature advises against doing such clauses in last wills, because these clauses contribute to a petrifaction of the company and may be impedimental to get rapid decisions in personnel matters.[50]

6 Right to a Compulsory Portion

In Austria there is the institution of the law related to compulsory portion. § 762 ABGB enumerates the children of the testator, the parents (insofar as there are no children present) and the spouses as the circle of people concerned. According to § 537a ABGB registered partners of same-sex partnerships are equal to spouses (*Bundesgesetz über die eingetragene Partnerschaft, EPG*)[51]. [52]The descendants of

[48] Welser in Rummel 2000: § 710 ABGB marginal number 1; Kalss, Probst 2013: 687 et seq; Spruzina in Kletečka and Schauer 2010: § 709 marginal number 2.

[49] Apathy in Koziol et al. 2014: § 816 ABGB marginal number 2; Fritsch in Ferrari and Likar-Peer 2007: 244; Gruber, Sprohar-Heimlich, Scheuba in Gruber et al. 2010: § 18 marginal number 49 et seq; Kalss and Probst 2013: 685 et seq.

[50] Kalss and Probst 2013: 688.

[51] Austrian Federal Law Gazette I Nr 135/2009.

[52] Bittner, Hawel in Kletečka and Schauer 2010: §§ 762, 763 marginal number 7; Werkusch in Kletečka and Schauer 2010: § 537a marginal number 2.

the ancestors and the collateral relatives of the testator (siblings, uncles and aunts) are not part of the circle of persons entitled to a compulsory portion.

6.1 Calculation of the Compulsory Portion

The compulsory portion share regulates the amount of the legitimate portion that means the minimum amount of the inheritance. It is the fractional part of the legal inheritance. The compulsory portion's share of the children is half of what they would get as their legal inheritance share (§ 765 ABGB). The descendants get a third of the legal inheritance (§ 766 ABGB).

There are no requests possible if reasons for exclusion are to be found with the person entitled to compulsory portion:

- Lawful disinheritance (§§768 ff ABGB, *rechtmäßige Enterbung*): Basically the law related to compulsory portion is imperative law (*zwingendes Recht*). Therefore all the persons entitled to compulsory portion have a claim to get a part of the estate. But in case if a potential heir causes a reason for disinheritance to the testator, the testator can exceptionally give the heir not even that part of his abatement. The testator may therefore withdraw by testamentary disposition also this part of his property from the heir. Reasons for disinheritance are the abandonment of the testator in emergency (§ 768 Z 2 ABGB), the heir's conviction on the basis of criminal law to a lifelong or 20 year long prison sentence (§ 768 ABGB) and the relative legal incapacity (*relative Erbunfähigkeit*) to inherit (§ 540 and § 542 ABGB).
- Legal incapacity to inherit according to §§ 538 ff ABGB (*Erbunwürdigkeit*): The entitlement to inherit is the capacity to become an heir. If the capacity is missing, the person is legally unable to inherit. It is to be distinguished between the absolute and the relative incapacity to inherit. § 33 sentence 2 ABGB is case of absolute incapacity (*absolute Erbunwürdigkeit*): A foreigner may be deprived of his entitlement to inherit in Austria if the laws of a foreign state treat an Austrian heir worse than a national citizen. Cases of relative incapacity to inherit (disqualification from inheritance) are for example the committing of an intentional crime (robbery, serious bodily harm), which is threatened by more than a 1-year sentence of imprisonment (§ 540 case 1 ABGB), or the breach of the parental duties (§ 540 sentence 2 ABGB). The falsification of the testator's will can also be a relative reason for a legal incapacity to inherit because of the forgery of the will.
- Renunciation of inheritance (§ 531 ABGB, *Erbverzicht*): The renunciation of inheritance is a contract between the testator and the potential heir about the renunciation of his status as a potential heir (*Erbaussicht*).[53] The renunciation of

[53] Wall in Gruber et al. 2010: § 21 marginal number 3; Likar-Peer in Ferrari, Likar-Peer 2007: 299.

inheritance also includes in case of doubt the renunciation of compulsory portion (see § 767 ABGB).[54]

– Renunciation of compulsory portion (*Pflichtteilsverzicht*; § 551 ABGB per analogy): In this case the future heir renounces his compulsory portion towards his future testator.[55]

According to § 762 ABGB the children of the testator are equally entitled to compulsory portion as the spouses, respectively the recorded partner of the registered partnership. In so far as the testator has no descendants the parents, grandparents and great grandparents are lawfully entitled to attesting the claim to compulsory portion.

According to § 731 ABGB all children of the first parental as well as their descendants are entitled to inherit. With the *Erbrechtsänderungsgesetz* 1989 *(ErbRÄG* 1989) the regulation has been abolished that only legal children are entitled to inherit.[56] Therefore illegal children are equal to legal children according to the intestate succession.

Independent from descendants' or ancestors' rights the surviving spouse or legitimate partner has specific privileges:

– Intestate succession: The intestate succession of the surviving spouse is independent from the intestate succession of the relatives (§ 757 ABGB in connection with § 759 ABGB). A precondition for the possibility to inherit is the maintained state of marriage at the time of the testator's death. If the testator's marriage had been legally divorced at the time of the testator's death, then the surviving former spouse is not granted any law of intestate succession.[57]

  The scope of the legal right of a spouse depends on the fact, that the heirs of the parentela exist. In addition § 757 para 1 ABGB draws its own borderline (*Erbrechtsgrenzen*): According to § 757 para 1 case 1 ABGB the spouse is attributed besides the other relatives of the first parentela (descendants of the testator and his descendants) one third of the inheritance. According to § 757 lit 1 sentence 2 ABGB in connection with sentence 3 the spouse is attributed besides the parents and the siblings of the testator – in so far as there are no descendants – two thirds of the estate. Descendants of formerly deceased siblings of the testator are not attributed any inheritance (limit of the legal right to an inheritance). Besides the testator's grandparents the spouse also inherits two thirds of the inheritance. If there are only relatives beyond the grandparents, the spouse gets the whole inheritance. The fourth parentela (great grandparents) don't get any inheritance, if a spouse is also a legal heir. In these cases the spouse is the only heir.

[54] OGH 7 Ob 202/73, NZ 1974, 155; Werkusch in Kletečka and Schauer 2010: § 551 marginal number 2; Apathy in Koziol et al. 2014: § 551 marginal number 1.

[55] OGH 1 Ob 201/73, EvBl 1974/113; Werkusch in Kletečka and Schauer 2010: § 551 marginal number 2; Apathy in Koziol et al. 2014: § 551 marginal number 1.

[56] Austrian Federal Law Gazette Nr 656/1989.

[57] OGH 1 Ob 411/97 s; OGH 6 Ob 259/02 k; Scheuba in Kletečka and Schauer 2010: § 757 marginal number 4; Spitzer 2003: 837, 845 ff.

- Compulsory portion: Besides existing descendants and ascendents of the testator the spouse – under the precondition of an existing marriage – is attributed according to § 765 ABGB half of what the spouse would get as legal inheritance.
- Right to maintenance (*Unterhaltsanspruch*): The right to maintenance can't basically be passed on by inheritance, yet all existing claims may be passed on (by inheritance). The liability to provide (financial) support may partially be passed on (by inheritance). It should be distinguished between the duty to provide maintenance of spouses and that of divorced spouses. The right to maintenance of a sustained marriage according to § 796 ABGB provides a legitimate maintenance claim towards the heirs of an inheritance. A precondition is, that the marriage is sustained at the time of the death. The right to maintenance, however, exists only till the time of the death or the remarriage of the spouse. If the testator dies, the divorced spouse has according to § 78 Marriage Law Act (*Ehegesetz, EheG*)[58] furthermore a claim of post-nuptial support by the heirs of the inheritance.
- legacy in advance pursuant to law (*gesetzliches Vorausvermächtnis*): Independent from the ancestor or the descendant with whom the spouse or the registered partner of a same-sex partnership shares the inheritance he may claim the legacy in advance pursuant to law (§ 758 ABGB). The legacy in advance pursuant to law comprises the right of residence in the matrimonial flat and the further use of the movable objects, which belong to the matrimonial household (furniture, dishes, pictures). The surviving spouse/the registered partner is lawfully entitled to use these objects insofar as they are necessary for the continuation of the household according to the previous circumstances of living. The spouse's right of habitation, the right to further use the matrimonial flat is independent from a concrete need of a flat. The legacy in advance pursuant to law may be added to the law of succession of the spouse and can only be removed by disinheriting him/her.
- Right of residence according to the tenancy law: According to § 14 para 2 and 3 tenancy law act (*Mietrechtsgesetz, MRG*)[59] there is the right of pre-emption (*Eintrittsrecht*) of certain persons into a tenancy agreement. This is a case of subrogation (*Sonderrechtsnachfolge*). At the testator's death the spouse, the companion, the relative in straight line (including affinitive children) as well as the testator's siblings enter a tenancy agreement. Those who enjoy the right of subrogation according to § 14 MRG precede the heirs of the tenant. Those who enjoy the right of subrogation have to have an urgent need to live there and must have lived so far in the same household with the deceased tenant. If they don't enter the tenancy it follows the intestate succession.

[58] dRGBl I S 807/1938 in the version Austrian Federal Law Gazette I Nr 15/2013.

[59] Austrian Federal Law Gazette Nr 520/1981 in the version Austrian Federal Law Gazette I Nr 50/2013.

6.2 Right to a Compulsory Portion and Business Succession

The succession of company shares is generally subject to the same rules as the succession of any other property object. There aren't any exceptions.

7 Anticipated Succession and the Maintenance of the Transferor's Shareholder Position

7.1 Forms of Anticipated Succession

The anticipated succession is one of the most important points and key questions in family business. It means, that the succession is completed by a transaction between the deceased and another person before the testator's death. Austrian law provides in addition to the last will or a contract of inheritance the possibility of a transfer contract (usually a donation or a purchase inter vivos). The anticipated succession is the best possibility especially in the internal family business succession. It is a psychologically safer variety of business transfer in a family with several potential heirs, because the capacity for conflicts after the testator's death is minimized. The parents as the shareholders furnish an anticipated solution for the business transfer, so that the descendants don't have a choice.[60]

The advantages of this transmission variety are currently in family businesses that subsequent children may be incorporated into the company very early and that they gain experiences in business. An undesirable behaviour of the child can be mitigated by binding legal arrangements. In the worst case the transfer to the successor can be annulled. What matters is the right time for the business succession. There is a risk that the testator doesn't want to start new challenges and that the business transition is delayed or neglected.[61]

The objective of a successful business – especially of a family business – is the cohesion of all the shares in the family. In order to ensure this, the current shareholder and the prospect heirs can agree to a transfer agreement (*Übergabevertrag*). This transfer agreement, which includes elements of family law, inheritance law and company law, includes the following core parts:

- The transfer of the company or the company's shares, including the transfer of management and supervisory functions
- The supply in favor of the transferor and his spouse
- Precautionary measures in favor of the transferor in case of undesirable developments

[60] Kalss and Probst 2013: 699, 701; Saurer in Gruber et al. 2010: § 3 marginal 5; Lorz and Kirchdörfer 2011: § 5 marginal number 1.

[61] Kalss and Probst 2013: 702.

– Supply of discounted heirs
– Additional measures such as the release of compulsory portion of prospect heirs.[62]

7.2 *Influence of the Testator in His Shareholder's Position*

There are several possibilities to supply the transferring testator[63]:

– Time-shifted share transfer: The testator often doesn't intend to transfer his shares immediately and in one act to the heirs. In many cases the shareholder rather wants to retire over a longer period[64] from the company. In this case it is useful to predestinate the extent of the transfer of the shares (the tranches of transfer) and the total planned transition period. As an alternative the testator can define the company's goals to achieve which are combined with the shareholder's transition. The pro longed transition process leaves the transferor the possibility to participate to get revenue and influence over the suffrage.
– enjoyment of fruits and benefits (*Fruchtgenussrecht*) for the transferor: An enjoyment of fruits and benefits entitles the transferring shareholder to benefit from economic use of the transferred business share. The enjoyment of fruits and benefits also has the protective function against a sale by the donee. Typically the transferor combines the transfer of the shares with the duty (by the tool of the enjoyment of fruits and benefits) to finance the transferor's pension by the share's income.[65] The enjoyment of fruits and benefits could be included as a condition in a donation (§ 938 ABGB in conjunction with § 709 ff ABGB).[66]
– Income of the company: More instruments for designing the supply of the entrepreneur are the undisclosed participation, the sub-participation of the testator or a pension. All instruments are characterized, that the transferor gets a certain amount of money out of the company's profit to finance his living.[67]
– Supply by other conditions: It is also conceivable, that a condition (§ 709 ABGB) is formulated. The condition causes an appropriation of the donated share and commits the gifted donee to conclude an enjoyment of fruits and benefits with the donator or to deliver maintenance services (payment of pensions). The condition is designed, so that the transferee loses his share if he/she breaks the engagement, for example in case of non-compliance with the obligations under the contract of enjoyment of fruits and benefits to the surviving spouse or the person

[62] Kalss and Probst 2013: 709.
[63] Kalss and Probst 2013: 717 et seq.
[64] Briem 2012: 31.
[65] OGH 6 Ob 70/00b.
[66] OGH 1 Ob 503/78, SZ 51/25.
[67] Kalss and Probst 2013: 731 et seq.

entitled to a compulsory portion. The revoking party has the burden of proof that the condition isn't complied with the agreement.

– Insurance independent from the company's income (*ertragsunabhängige Versicherung*): To avoid the risk that the company isn't in the position to generate the transferor's financial claims, it is possible to establish a supply independent from the company's income, for example a direct insurance.[68] The transferor gets a secured maintenance after his departure, even in case of economic failure of the company.[69]

8 Foundation and Trusts as Instruments for Business Succession

8.1 Set Up of a Foundation

In addition to the Federal Foundations and Funds Act (*Bundes-Stiftungs- und Fondsgesetz, BStFG*)[70] and some federal legislation acts, which are exclusively for the creation of foundations and funds with charitable purposes, it is possible to establish private foundations for charitable and non-charitable purposes on the basis of the Private Foundation Act (*Privatstiftungsgesetz, PSG*).[71] A private foundation (§ 1 PSG) is an entity, which is associated with a particular asset. This property is subject to a specific purpose. The private foundation has no members. The purpose of the private foundation expresses the will of the founder. This may be concentrating on the care of the family members. The foundation must have beneficiaries.[72]

A private foundation is established by the foundation's statutes. It is the basis of the private foundation. The foundation statutes contain details (§9 PSG), including the name and address of the private foundation, the dedication of the assets (at least EUR 70.000.-), the foundation's purpose, the designation of the beneficiaries (or the disclosure of any council, which names the beneficiaries), and whether the private foundation is built for a definite or indefinite period of time. The foundation statutes need a notorial deed (*Notariatsakt*).[73]

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[68] Spiegelberger 2009: § 1 marginal number 44.

[69] Kalss and Probst 2013: 734 et seq.

[70] Austrian Federal Law Gazette Nr 11/1975 in the version Austrian Federal Law Gazette I Nr 161/2013.

[71] Bundesgesetz über Privatstiftungen und Änderungen des Firmenbuchgesetzes, des Rechtspflegergesetzes, des Gerichtsgebührengesetzes, des Einkommensteuergesetzes, des Körperschaftsteuergesetzes, des Erbschafts- und Schekungssteuergesetzes und der Bundesabgabenordnung, Austrian Federal Law Gazette Nr 694/1993 in the version Austrian Federal Law Gazette I Nr 111/2010.

[72] Kalss in Doralt, Kalss 2001: 45 et seq; Kalss in Kalss et al. 2008: marginal number 7/10; Helbich in Csoklich et al. 1994: 2.

[73] Kalss, Müller in Gruber et al. 2010: § 25 marginal number 13.

After the establishment, the first foundation board is appointed. Furthermore a foundation's control is necessary (for example, if the minimum amount of assets is not specified in euros but in a foreign currency). In consequence the private foundation is registered by the first foundation board. The foundation board members declare that the property is entirely owned by the foundation. Finally the Register court (*Firmenbuchgericht*) examines the foundation's notification. In compliance with the statutory requirements, the private foundation is registered in the companies register (*Firmenbuch*). With the entry the private foundation is legally existing.[74]

8.2 Influence of Family Members in a Foundation

It depends on how the founder decides to set up the foundation. Basically the private foundation has two organs, a private foundation's management board (*Stiftungsvorstand*; minimum three members) and a foundation auditor (*Stiftungsprüfer*). A supervisory board (*Aufsichtsrat*) must be used in the private foundation only under certain conditions (§ 22 para 1 PSG).[75] In the foundation statutes other organs can be created as well. So specific persons like family members have the possibility to influence the foundation's organisation.[76]

- The founder's position isn't limited to only one person. Several family members could also be founders. The preservation of the founder's rights can be secured by the inclusion of several family members in the foundation's statutes. It is also possible to establish a founder's private limited company, that means a company, which is under the influence of the family members.[77]
- Family advisory board (*Beirat*): The family members can participate in the private foundation by including a family advisory board to manage and control the foundation within the limitations by law and by jurisdiction.[78]

The law concedes the family members as beneficiaries just a few rights:

- According to § 30 PSG the beneficiary has the opportunity to demand information on the foundation's performance, as well as the right of access to the financial statements, the management report, the foundation statutes and the

[74] Kalss in Kalss et al. 2008: marginal number 7/17 et seq; Csoklich in Csoklich et al. 1994: 49 et seq.

[75] Arnold in Arnold and Ludwig 2014: marginal number 6/1.

[76] Arnold in Arnold and Ludwig 2014: marginal number 6/2.

[77] Kalss, Müller in Gruber et al. 2010: § 25 marginal number 129.

[78] Kalss, Müller in Gruber et al. 2010: § 25 marginal number 212.

supplementary foundation statute (*Stiftungsurkunde und Stiftungszusatzurkunde*). The right of access can't be demanded judicially.[79]

- According to § 27 PSG a beneficiary can apply at court for the appointment and dismissal of members of the private foundation's organs.[80]
- The beneficiary can apply for the annulment of the private foundation at court (§ 35 para 3 PSG). He can also apply at court for the reversal of the resolution of annulment adopted by the foundation's management board (§ 35 para 4 PSG).[81]

In addition, the founder can transfer the following rights to the beneficiary:

- The founder can transfer the right to the beneficiary to nominate the members for the management board of the private foundation.[82]
- The founder can grant the beneficiaries more participation and control rights, such as access to information rights, the right to initiate special audit, and influential rights in the management board of the private foundation (appointment rights, dismissal rights, right of direction).[83]
- The founder can authorize beneficiaries to become a member of certain organs, as long as the statutory rules are applied: for example the incompatibility rule (§ 15 para 2 PSG) mentions, that a beneficiary or a close relative can't be a member of the foundation's management board).[84] In practice the beneficiaries are often members in an advisory board (*Beirat*), which has relevant participation rights and control rights in the private foundation.[85]

8.3 Distinction of the Austrian Private Foundation to the Trust

The "trust" as it is understood by the common law systems isn't a part of the Austrian legal system. Sometimes the term "trust" will be translated and seen as equivalent with the terms "*Treuhand*" or "Foundation". This is incorrect, because they are all different legal instruments.[86]

[79] Kalss, Müller in Gruber et al. 2010: § 25 marginal number 134; Arnold in Arnold, Ludwig 2014: marginal number 13/10.

[80] Arnold 2013: § 27 PSG marginal number 29.

[81] Arnold, 2013: § 35 PSG marginal number 19 et seq; Arnold in Arnold and Ludwig 2014: marginal number 13/10.

[82] Kalss, Müller in Gruber et al. 2010: § 25 marginal number 141; Torggler in Gassner et al. 2000: 68.

[83] Kalss, Müller in Gruber et al. 2010: § 25 marginal number 144 et seq; Arnold in Arnold and Ludwig 2014: marginal number 13/10 f.

[84] Arnold in Arnold and Ludwig 2014: marginal number 13/13.

[85] Kalss, Müller in Gruber et al. 2010: § 25 marginal number 141.

[86] Klampfl 2009: 425 ff; Wolff in Gruber et al. 2010: § 43 marginal number 1.

The Austrian Administrative Court (*österreichischer Verwaltungsgerichtshof*) described the trust as follows[87]: "*The term "trust" refers to a creation, that is completely foreign to Austrian law and can be associated only with great difficulty to a specific legal instrument. The possible legal instrument range from a pure Treuhandschaft to processes, that have similarities to foundations or enjoyment of fruits and beneficiaries and reversionary inheritance.*"[88]

Austria hasn't signed the Hague Trust Convention[89] yet. National rules on the recognition of foreign trusts are also missing. Nevertheless the trust's legal construction and its legal consequences are recognized in Austria. In this case "recognition" means, that the trustee is the formal owner of the trust property and certain rights and obligations exist between the trustee, the beneficiary and the protector.[90]

Trust	Austrian private foundation
In a trust the trustee is the owner of the trust property.	The private foundation is a legal entity of its own, and the owner of the foundation's property.
The construction of a trust doesn't need any requirement of form.	The foundation has requirements of form (notarial deed, registration into the company register).
In case of a "breach of trust" the trustee is liable for damages to the beneficiaries.	The foundation's board of management is liable for damages in respect to the foundation and the founders.

Reference: Scheuba in Kalss and Schauer 2001: 159; Wolff in Gruber et al. 2010: § 43 marginal number 1 footnote 2; Klampfl 2009: 425 et seq; Petritz 2008: 275

9 Further Developments

In the working programme of the Austrian Government 2013–2018 the further development of the Austrian law of inheritance is mentioned, which includes a reform of the system of compulsory portion, and comprises the improvement of the position of childless spouses and partners as well as the company succession.[91]

In February 2014 the Austrian Minister of Justice concreted the plan: The compulsory portion should not be paid immediately after the devolution (*Einantwortung*); there should be the possibility, that – especially also for the protection of family enterprises – persons entitled to a compulsory portion should get their part of the

[87] VwGH 20.9.1988, 87/14/0167; VwSlg 6352 F/1988.

[88] The original court decision in Germain: "Der Begriff "Trust" bezieht sich auf eine Gestaltungsform, die dem österreichischen Recht völlig fremd ist und nur mit großen Schwierigkeiten einer bestimmten Gestaltungsform zugeordnet werden kann. Die möglichen Gestaltungsformen reichen dabei von einer reinen Treuhandschaft bis zu Vorgängen, die gewisse Ähnlichkeiten mit Stiftungen oder Fruchtgenußstellungen bzw auch mit Nacherbschaften haben können."

[89] Convention on the law applicable to trusts and on their recognition, concluded on July 1st, 1985.

[90] Wolff in Gruber et al. 2010: § 43 marginal number 47.

[91] Arbeitsprogramm der österreichischen Bundesregierung 2013 – 2018 Erfolgreich.Österreich 86.

estate over several years. Not only relatives and spouses should remain legal heirs, but also the companion (*Lebensgefährte*) should ex lege have a claim for a share of the inheritance.[92]

Legal projects concerning politics for an alteration of the inheritance law isn't only to be found in the present official governmental statement. The programme of the Austrian Government of 2004–2008 already allowed, that, besides the setting of a time limit for the validity of an oral will,[93] also the spouse's situation – without a direct descendant of the testator – should be improved. Moreover it was suggested that the chargeability of donations should be newly regulated as well as the advanced payments according to the will of the testator. The programme of the Austrian Government 2008–2013 provided under the item "Home policy, Justice and Defence" a comprising reform of the law related to compulsory portion. Thereby the law related to compulsory portion shouldn't be totally abolished.[94]

Since 2014 some reform plans are under discussion; the reform of the Austrian Succession Law 2015 has almost been finished.[95]

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[92] Justizminister will das Erben einfacher machen, Kurier vom 12.2.2014 (http://kurier.at/politik/inland/justizminister-will-das-erben-einfacher-machen/51.039.850); a comparative study: Cach 2014: 418.

[93] Regierungsprogramm der Österreichischen Bundesregierung für die XXII. Gesetzgebungsperiode 10 f.

[94] Regierungsprogramm der Österreichischen Bundesregierung für die XXII. Gesetzgebungsperiode 10 f.

[95] see www.parlament.gv.at; Kalss 2015: 50; Cach 2015 (in press).

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Company Law and the Law of Succession in Brazil-Droit des sociétés et le droit des successions au Brésil

Gustavo Vieira da Costa Cerqueira

Résumé Bien que les entreprises familiales participent de manière expressive à la constitution du tissu économique et productif brésilien et que plus de deux tiers de ces entreprises fassent l'objet d'une succession familiale, aucune attention particulière ne leur est accordée par le droit des sociétés ou par le droit des successions. Certes, le droit des sociétés régit les conséquences de la mort d'un associé pour la société et pour les héritiers. Cependant, l'essentiel de la succession des parts sociales est déterminé par le droit des successions et par les principes constitutionnels qui le structurent, à l'instar du principe de solidarité au sein de la famille qui justifiera, entre autres, la protection de la réserve héréditaire et les limites à la liberté testamentaire. Nonobstant cette emprise du droit des successions, il n'y a pas de tension entre les solutions proposées par ce dernier et les principes généraux du droit des sociétés. De plus, le droit des successions offre différents instruments d'anticipation de la succession pouvant bénéficier directement à l'entreprise, comme la substitution fidéicommissaire, par laquelle le testateur programme la succession pour les générations futures, ou la donation-partage, par laquelle le partage s'opère *inter vivos*. En revanche, alors que le trust demeure une institution méconnue du droit brésilien, les fondations n'ont pas vocation à servir d'instrument d'organisation de la succession des entreprises. Par ailleurs, il est utile de noter que le cadre juridique dans lequel la succession des parts sociales s'opère devrait demeurer fondamentalement inchangé pour les années à venir, fors une possible évolution du statut du compagnon survivant à l'égard de la réserve héréditaire.

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S. Kalss (ed.), *Company Law and the Law of Succession*, Ius Comparatum – Global Studies in Comparative Law 5, DOI 10.1007/978-3-319-18011-3_3

Abstract Although family businesses participate expressively to the forging of the Brazilian economic and productive frame and more than two thirds of these companies are subject to family succession, they are given no special attention by corporate law or by inheritance law. If corporate law regulates the consequences of the death of a partner for the company and for the heirs, the bulk of the transmission of the shares is determined by succession law and the constitutional principles that structure it, such as the principle of solidarity within the family, which explains, among other things, the protection of the compulsory portion and the limits on testamentary freedom. Notwithstanding this prevalence of inheritance law, there is no tension between the proposed solutions by the latter and the general principles of corporate law. In addition, succession law provides various instruments of anticipation of succession that may benefit the company directly, such as the fideicommissum, by which the testator programmes inheritance for future generations, or the *divisio parentum inter liberos*, by which the partition is operated *inter vivos*. However, while the trust remains unknown to Brazilian law, foundations are not intended to organize business succession. Furthermore, it is worth noting that the legal framework in which the succession of shares takes place should remain fundamentally unchanged for the years to come, with an exception for a possible evolution of the status of a surviving civil partner with regards to the compulsory portion.

1 Importance des entreprises familiales et de la succession des entreprises

1.1 Données relatives aux entreprises familiales

Au Brésil, la principale source officielle d'informations statistiques est l'*Institut brésilien de géographie et de statistique* (IBGE). Cet Institut est doté d'un Fichier central d'entreprises où il puise l'essentiel des données formelles et économiques à partir desquelles il élabore annuellement une « cartographie globale des entreprises »,[1] la dernière datant de 2011.[2] Ce fichier comporte des informations relatives non seulement aux entreprises, mais aussi aux organes de l'administration publique et aux entités (de droit privé ou de droit public international) sans but lucratif. En 2011, ce fichier répertoriait un total de 15,7 millions d'entités, dont 87 % d'entreprises (dans les secteurs de l'industrie, de la construction civile, du commerce et des services) et 13 % d'organes de l'administration et de groupements sans but lucratif.

[1] Les statistiques de l'IBGE donnent un aperçu des entreprises et des organisations actives dans l'année de référence, selon leur nature juridique, leurs activités et leur taille économique. Y sont privilégiés les informations sur les employées et les salaires mensuels moyens selon le sexe et le niveau de l'éducation des personnes concernées, ainsi que les données régionales sur les unités locales des entreprises et des organisations visées.

[2] IBGE, *Estatísticas do Cadastro Central de Empresas*, Rio de Janeiro, 2013. Disponible à l'adresse : ftp://ftp.ibge.gov.br/Economia_Cadastro_de_Empresas/2011/cempre2011.pdf, consulté le 31 mars 2014.

Parmi ces 15,7 millions d'entités répertoriées, seules 5,1 millions étaient économiquement actives[3] au 31 décembre 2011, dont 89,9 % d'entreprises, 0,4 % d'organes de l'administration et 9,7 % de groupements sans but lucratif. Les auto-entrepreneurs, dénommés « micro-entrepreneurs individuels » (MEI), n'y sont jamais recensés.

Malgré la richesse de cette « cartographie des entreprises », aucun recensement n'est fait dans cette « population »[4] pour dénombrer les entreprises familiales au Brésil. Il est donc difficile de savoir avec certitude combien d'entreprises de ce type existent dans ce pays.

En 2003, l'IBGE a publié une étude spéciale sur les micros et les petites entreprises (MPE) du secteur du commerce et des services,[5] dans laquelle il dénombre 926,8 mille MPE « familiales » dans ces secteurs en 2001.[6] Aux fins de cette étude, l'IBGE considère comme familiales les MPE dans lesquelles travaillent *uniquement* les propriétaires, des associées ou membres de la famille.[7] Du fait qu'elles emploient au moins un salarié, les autres 1,1 million de MPE des secteurs du commerce et des services sont qualifiées, par opposition aux premières, de MPE « employeurs ».[8] Or, nonobstant l'importance des données économico-sociales fournies sur la base d'une telle distinction, les statistiques présentées par cette étude n'expriment que très partiellement la réalité du nombre d'entreprises familiales dans la population analysée puisque le critère employé pour caractériser ce type d'entreprise n'est pas satisfaisant. En effet, ce n'est pas l'absence d'employés qui caractérise l'entreprise familiale, mais plutôt le fait que le contrôle politique et économique ainsi que la gestion de l'entreprise soient entre les mains des membres d'une même famille.[9] Il

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[3] Sur les critères de détermination du caractère économiquement actif des entreprises à des fins statistiques, v. IBGE, *Estatísticas do Cadastro Central de Empresas*, préc., p. 16–17.

[4] Dans la science statistique, « population » correspond à l'ensemble d'unités statistiques déterminées par leurs caractéristiques.

[5] IBGE, *As micro e pequenas empresas comerciais e de serviços no Brasil – 2001*, col. « Estudos e Pesquisas de Informação Econômica », número 1, Rio de Janeiro, 2003 (disponible à l'adresse http://www.ibge.gov.br/home/estatistica/economia/microempresa/microempresa2001.pdf, consulté le 31 mars 2014). Selon cette étude, les MPE du secteur du commerce et des services couvrent 80 % de l'activité totale du secteur des MPE brésiliennes, aussi bien en termes des revenus générés que des personnes qui y sont employées (p. 9).

[6] *Ibid.*, p. 30.

[7] *Ibid*.

[8] *Ibid*.

[9] J. S. R. C. Gonçalves, « As empresas familiares no Brasil », *RAE Light*, vol. 7, n° 1 (jan. – mar. 2000), p. 7–12, p. 8. La définition d'entreprise familiale peut connaître différentes approches. Selon un auteur, « *après avoir vérifié la grande différence entre les auteurs et de leurs approches, on peut définir [la société familiale] comme étant celle créée par l'esprit entrepreneur d'un (ou plusieurs) fondateur(s), dont le capital majoritaire et le contrôle se trouvent dans les mains d'une seule (ou quelques) famille(s) et au sein de laquelle il est une influence réciproque des systèmes entrepreneurial et familial, indépendamment du fait que la gestion se trouve dans la première ou dans les générations postérieures.* » (A. D. Costa, *Sucessão e sucesso nas empresas familiares*, Curitiba : Juruá, 2006, p. 23, *apud* K. Costalunga, « A transmissão patrimonial nas empresas familiares : uma análise sob a ótica dos pactos antenupciais », *in* R. N. Prado (coord.), *Aspectos Relevantes da Empresa Familiar : governança e planejamento patrimonial sucessório*, São Paulo : Saraiva, 2013, p. 89–109, p. 89 *ad notam* 1). Cela a été traduit par nous.

est donc difficile de savoir, sur la base de cette étude, combien d'entreprises familiales existent au Brésil, ne serait-ce qu'au sein de la « population » analysée.

L'autre source officielle de statistiques relatives aux entreprises est le *Département de registre d'entreprises et intégration*, organe central du Système national de registre mercantile. Cette source n'est hélas d'aucune aide, puisqu'elle ne semble pas disposer de statistiques permettant de connaître le nombre d'entreprises familiales existantes au Brésil.[10]

Se tourner vers les entités du Système « S » – ensemble de neuf institutions de droit privé responsables pour élaborer et mettre en œuvre des actions destinées au développement des catégories professionnelles pour lesquelles chacune d'entre elles a été instituée –, qui sont directement liées à l'activité des entreprises, comme le SEBRAE,[11] le SENAC,[12] le SESC,[13] le SENAI[14] et le SESI,[15] n'aboutit à aucun résultat non plus. À titre d'exemple, au premier semestre de 2005, l'Observatoire du Service brésilien de soutien aux micros et petites entreprises (SEBRAE) a publié un bulletin de statistiques,[16] dans lequel ne figure aucun recensement des entreprises familiales au sein de la « population » considérée.

Enfin, si notre recherche se tourne, cette fois-ci, vers d'autres plateformes d'information sur les entreprises familiales d'initiative privée, comme celles mise en ligne par l'*Instituto da empresa familiar,*[17] le résultat n'en sera pas moins décevant sur ce point : aucune estimation quant au nombre d'entreprises familiales n'y est généralement fournie.

Sur la base de données disponibles, il est donc difficile de savoir avec certitude combien d'entreprises familiales existent au Brésil. Il est néanmoins loisible d'estimer que ces entreprises participent de manière expressive à la constitution du tissu économique et productif brésilien.

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[10] Sur le site internet de cet organe qui remplace l'ancien Département national du registre de commerce (DNRC), seules sont disponibles les statistiques sur le *ranking* des chambres commerciales de chaque Etat fédéré (*Juntas comerciais*) depuis l'année 2000. Cf. http://drei.smpe.gov.br//assuntos/estatisticas/ranking-das-juntas-comerciais-constituicao-alteracao-e-extincao-de-empresas, consulté le 1er avril 2014.

[11] Service brésilien de soutien aux micros et petites entreprises, créé en 1972. Adresse électronique : http://www.sebrae.com.br/.

[12] Service national d'apprentissage du commerce, créé en 1946. Adresse électronique : http://www.senac.br/institucional/senac.aspx.

[13] Service social du commerce, créé en 1946. Adresse électronique : http://www.senac.br/.

[14] Service national d'apprentissage industriel, crée en 1942. Adresse életronique : http://www.portaldaindustria.com.br/senai/.

[15] Service social de l'industrie, crée en 1946. Adresse électronique : http://www.portaldaindustria.com.br/sesi/.

[16] SEBRAE, *Boletim Estatístico de micro et pequenas empresas*, 2005, disponible à l'adresse http://www.dce.sebrae.com.br/bte/bte.nsf/03DE0485DB219CDE0325701B004CBD01/$File/NT000A8E66.pdf, consulté le 31 mars 2014.

[17] Cf. http://www.empresafamiliar.org.br/.

1.2 Nombre de successions d'entreprises au sein de la famille – tendances

1.2.1 Successions d'entreprises attendues pour la prochaine décennie

En 2010, la *PricewaterhouseCoopers* a réalisé une enquête mondiale auprès de 1 606 entreprises familiales.[18] Parmi les entreprises consultées, 100 étaient brésiliennes, dont 51 % employant plus de 250 salariés.[19] Ces entreprises couvrent différents secteurs de l'économie : commerce, services et industrie (89 %) ; technologie, information, informatique et divertissement (6 %) ; et services financiers (5 %).

A la question de savoir combien de successions d'entreprises sont attendues pour les prochaines années, cette enquête révèle que 45 % du total des entreprises consultées ne planifient pas de changement dans leur contrôle dans les cinq prochaines années, tandis que 23 % prévoient un tel changement entre les trois et cinq prochaines années, 17 % après les cinq prochaines années et 14 % dans les deux prochaines années. Un pourcent de ces entreprises n'y ont pas répondu.[20] Selon l'enquête, ces pourcentages globaux s'appliquent également aux entreprises brésiliennes consultées : 37 % des entreprises brésiliennes prévoient un changement du commandement dans les cinq prochaines années, tandis que 17 % le prévoient après les cinq prochaines années.[21] Ainsi, 54 % des entreprises brésiliennes comptent opérer un changement dans le contrôle et dans le commandement dans les années à venir.

L'enquête révèle également le sens vers lequel ce changement devrait s'opérer au Brésil : des 54 % entreprises brésiliennes consultées, plus de la moitié (56,8 %) – soit 30% du total – souhaite passer le contrôle de l'entreprise à la prochaine génération.[22] Faute d'enquêtes plus élargies provenant d'autres sources sur cette question, il convient de retenir cette statistique comme une possible tendance applicable à l'ensemble des entreprises familiales au Brésil.

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[18] PricewaterhouseCoopers, *Empresas familiares no Brasil – Cenário e desafios,* 2011, disponible à l'adresse : http://www.pwc.com.br/pt/publicacoes/assets/empresa-familiar-brasil-11A.pdf, consulté le 15 janvier 2014.

[19] *Ibid.*, p. 6.

[20] *Ibid.*, p. 9.

[21] *Ibid.*, p. 11.

[22] *Ibid*. Les autres entreprises envisagent un changement du contrôle des façons suivantes : 13,5 % prétendent vendre l'entreprise à l'équipe gérentielle ; 27 % souhaitent la vendre à des investisseurs privés étrangers ; 21,6 % veulent une troque ; 8 % envisagent d'entrer en bourse ; 16,2 % planifient une restructuration au niveau de la gérance ; 2,7 % misent sur des nouveaux partenariats ; et 5,4 % considèrent la possibilité de fusionner.

1.2.2 Fréquence de successions d'entreprises au sein de la famille

La même enquête menée en 2010 par *PricewaterhouseCoopers* montre que, sur les 100 entreprises familiales brésiliennes consultées, 41 % appartiennent à la seconde génération, 33 % à la troisième ou plus[23] et 26 % à la première génération. Ainsi, 74 % des entreprises brésiliennes consultées ont donc fait l'objet d'une succession au sein de la famille. Faute d'enquêtes plus élargies provenant d'autres sources sur cette question, il convient de retenir cette statistique comme une possible tendance applicable à l'ensemble des entreprises familiales au Brésil.

1.2.3 Les Successions ayant eu lieu en dehors de la famille

Au Brésil, il n'existe pas des statistiques sur cette catégorie de succession. L'enquête menée en 2010 par *PricewaterhouseCoopers* fournit néanmoins deux indicateurs à ce sujet : d'une part, 30 % des entreprises brésiliennes souhaitent passer le flambeau à la prochaine génération ; d'autre part, 74 % de ces entreprises ont déjà fait l'objet d'une succession au sein de la famille. En conjuguant ces deux données, il est possible de présumer que moins de la moitié des entreprises familiales devraient connaître une succession en dehors de la famille, ce pourcentage devant même être égal ou inférieur à 26 %.

1.2.4 Programmation de la succession

Toujours selon l'enquête menée en 2010 par *PricewaterhouseCoopers*, la moitié des entreprises brésiliennes consultées n'ont pas de plan de succession. Sur ce point, l'enquête entend par succession non seulement celle du contrôle de la société, mais aussi celle relative aux fonctions les plus importantes dans la gestion et dans l'administration de l'entreprise.[24] Cette situation reflète d'ailleurs les résultats auxquels l'enquête est arrivée à propos du nombre de successions d'entreprises attendues pour les prochaines années.[25]

Par rapport aux entreprises qui planifient la succession de leurs dirigeants et de leurs administrateurs, la même enquête révèle que 28 % n'envisagent qu'un nombre limité de postes, 13 % la majorité de postes et 12 % la totalité des postes de gestion et d'administration de l'entreprise.

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[23] Un auteur affirme que seuls 10 % des entreprises familiales demeurent sous le contrôle d'une même famille à la quatrième génération. Cf. T. M. Lanz, « Sucessões nas empresas familiares », *in Aspectos Relevantes da Empresa Familiar: governança e planejamento patrimonial sucessório*, *op. cit.*, p. 225–255, p. 226.

[24] PricewaterhouseCoopers, *Empresas familiares no Brasil – Cenário e desafios*, préc., p. 19.

[25] V. *supra*, 1.2.1. Cf. PricewaterhouseCoopers, *As empresas familiares no Brasil – Pesquisa 2010,* 2011, p. 19. Disponible à l'adresse : http://www.pwc.com.br/pt_BR/br/estudos-pesquisas/assets/empresas-familiares-2010A.pdf, consulté le 15 janvier 2014.

En outre, deux tiers des entreprises ayant un plan de succession croient que la direction de l'entreprise demeurera dans la famille, mais seulement la moitié d'entre elles a déjà choisi un successeur.

D'une manière générale, les entreprises brésiliennes ne donnent pas d'attention particulière à la succession.[26] A cet égard, les résultats de l'enquête précitée montrent que presque deux tiers des entreprises consultées sont dépourvus d'une stratégie pour diriger les futurs héritiers vers la gérance et l'administration de l'entreprise.[27] Aussi, seuls 8 % des entreprises consultées ont la succession au centre de leurs préoccupations pour les 24 mois prochains.[28]

Compte tenu de ces éléments et faute d'enquêtes plus ciblées et provenant d'autres sources sur cette question, il est permis de dire qu'il n'y a pas une tendance nette à l'augmentation du nombre d'anticipations de la succession du vivant du testateur. Toutefois, la conjoncture actuelle, marquée par la croissance des entreprises et de leur ouverture vers les marchés externes, impose leur professionnalisation et fait émerger le défi de leur pérennisation. La question de la succession tendra alors à se poser de manière plus recourante et aiguë aux fondateurs et aux dirigeants d'entreprises familiales.

1.3 Cadre juridique

Au Brésil, l'entreprise familiale n'est pas prise en compte de la sorte par le législateur. En droit des sociétés, aucune attention particulière n'est accordée aux entreprises familiales. En outre, les sociétés sont soumises au droit commun des successions. A notre connaissance, il n'y a pas des activités, des domaines ou des secteurs économiques qui en soient exclus.

1.4 Tension entre le droit des sociétés et le droit des successions

Il n'existe pas de tensions visibles entre les principes généraux du droit des sociétés et le droit des successions. Comme il sera vu, les principes du droit des successions, dont celui de la distribution égale des biens entre les héritiers légitimes, ne sont pas mis en cause par les mécanismes du droit des sociétés permettant d'empêcher leur entrée dans la société par voie de succession. Dans ce cas, subsiste pour les héritiers le droit patrimonial représenté par les parts ou les actions non transmises. Le partage de la valeur patrimoniale de ces parts et de ces actions est soumis au droit des

[26] En ce sens également, T. M. Lanz, « Sucessões nas empresas familiares », *loc. cit.*, p. 226–228.

[27] PricewaterhouseCoopers, *Empresas familiares no Brasil – Cenário e desafios,* préc., p. 8.

[28] *Ibid.*, p. 7.

successions et obéit dès lors aux seuls principes dictés par ce dernier. Il en va de même lorsque l'associé fait usage de sa liberté de tester : il doit veiller à ce que les principes régissant l'organisation et le fonctionnement de la société soient respectés.

2 Droit des successions

2.1 Principes du droit des successions

Le droit brésilien des successions est fondé sur un certain nombre de principes, ceux d'origine constitutionnelle étant au premier plan.[29] La place privilégiée des principes constitutionnels en cette matière tient non seulement à la primauté du texte constitutionnel, mais au fait que l'évolution du droit privé brésilien est liée à ses Constitutions.[30] L'évolution actuelle, rattachée à la Constitution fédérale du 5 octobre 1988, est marquée par une forte connotation sociale. Cette Constitution dote en effet l'Etat de mécanismes interventionnistes pour réaliser les objectifs de construction d'une société juste et fraternelle. Ceci laisse des empreintes sur le droit privé[31] dans la mesure où, au-delà des règles relatives à la forme de l'Etat et à l'organisation des pouvoirs publics, la Constitution brésilienne établit des règles et des principes relevant des rapports entre particuliers. Il existe une « constitutionnalisation » du droit privé brésilien,[32] rendue possible notamment grâce au système de contrôle de constitutionnalité *a posteriori* exercé de manière *diffuse et concrète* par le juge du fond, qui peut écarter l'application d'une loi s'il l'estime inconstitutionnelle, ou *concentrée et abstraite*, hypothèse dans laquelle le Suprême Tribunal Fédéral (STF) peut être saisi directement par différentes voies de recours à l'initiative de certaines autorités, des partis politiques et des syndicats de portée nationale.[33]

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[29] C. R. Barbosa Moreira, « Princípios constitucionais e o Direito das sucessões », *Revista Forense*, vol. 390 (2007), p. 45 *sq.*

[30] Cf. A. Wald, « Le droit brésilien et le Code civil de 2002 », *in* A. Wald et C. Jauffret-Spinosi (dir.), *Le droit brésilien : hier, aujourd'hui et demain*, Paris : SLC, 2005, p. 15–28, p. 21.

[31] Cf. M. Fromont, « L'influence de la Constitution sur le Code civil au Brésil », *in La lettre du Centre français de droit comparé*, n° 58, oct. 2009, p. 4–6 ; E. Lemoalle, « Le droit civil », *in* D. Païva de Almeida (dir.), *Introduction au droit brésilien,* Paris : L'Harmattan, 2006, p. 271–293, spéc. p. 279–284.

[32] Expression d'origine doctrinale, le professeur Gustavo Tepedino étant l'un des ténors de cette théorie au Brésil.

[33] Ainsi, G. Vieira da Costa Cerqueira, « Le droit privé brésilien : structure, principes cardinaux et voies juridictionnelles d'application », *Panorama of Brazilian Law*, vol 1, n° 1 (2013), p. 275–368, p. 337–341. Sur ces systèmes de contrôle de constitutionnalité en droit brésilien, cf. T. Morais da Costa, « Le droit constitutionnel : la protection des droits fondamentaux », in *Introduction au droit brésilien, op. cit.*, p. 47–87. Pour une approche comparatiste, v. M. Fromont, *La justice constitutionnelle en France et dans le monde*, Paris : Dalloz, 2015 (à paraître).

En matière des successions, la Constitution reconnaît expressément le **droit à l'héritage** comme étant un droit fondamental (art. 5, XXX).[34] A ce titre, l'héritier sera particulièrement protégé, d'abord au plan constitutionnel lui-même, puis au plan infraconstitutionnel.

Au plan constitutionnel, l'héritier sera, en premier lieu, à l'abri de toute discrimination par rapport à son type de filiation : les enfants issus ou non du mariage ou adoptés ont les mêmes droits successoraux toute désignation discriminatoire relative à la filiation étant interdite (art. 227, § 6).[35] Il sera, en second lieu, assisté par la puissance publique lorsque le *de cujus* aura été victime d'une infraction pénale intentionnelle, sans préjudice de la responsabilité civile de l'auteur de l'acte illicite (art. 245). La protection se projette, en troisième lieu, au plan du conflit de lois, puisque la succession des biens d'étrangers situés au Brésil est régie par la loi brésilienne *au bénéfice du conjoint ou des enfants brésiliens*, à moins que la loi personnelle du *de cujus* ne leur soit plus favorable (art. 5, XXXI).[36] A l'héritier, la Constitution assure, en quatrième lieu, la transmission du droit exclusif d'utiliser, publier ou reproduire les œuvres appartenant à l'auteur de la succession (art. 5, XXVII). Enfin, la protection de l'héritier s'exprime à travers un autre principe constitutionnel : celui de l'**exclusion de responsabilité *ultra vires hereditatis***,[37] consacré à l'art. 5, XLV. Selon ce dispositif, bien que l'obligation de réparer le dommage et la sentence de confiscation des biens peuvent, selon les termes de la loi, être étendues aux héritiers, celles-ci ne peuvent être exécutées contre ceux-ci que dans les limites de la valeur du patrimoine transmis ; qui plus est l'héritier ne doit pas supporter la peine criminelle appliquée à l'auteur de la succession. Le Code civil réglemente ce droit fondamental en réaffirmant que l'héritier n'est pas tenu responsable des obligations supérieures à la valeur de la succession (art. 1792), de même qu'aux créanciers seuls est possible de demander le paiement des dettes reconnues jusqu'à concurrence de la valeur de la succession (art. 1821). Le montant de la succession est donc le seul responsable du paiement des dettes du défunt. Si le partage intervient avant l'acquittement de dettes, les héritiers sont tenus responsables dans la mesure de la part de la succession qui leur est revenue (art. 1997).

Au-delà de ces dispositions constitutionnelles visant expressément la succession *mortis causa*, d'autres principes et garanties constitutionnelles ayant une incidence directe sur la matière sont dégagés par la doctrine. Ainsi, le *droit à l'héritage* serait

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[34] La doctrine souligne qu'il s'agit d'un *droit à la succession* et non *d'hériter* puisqu'avant la mort du *de cujus* il n'existe aucun droit à succéder. Avant la mort, il n'y a qu'expectative d'hériter, nul n'ayant un droit acquis sur un héritage futur. P. Lôbo, *Direito civil – Sucessões*, 2 ª ed., São Paulo : Saraiva, 2014, p. 39.

[35] STJ, REsp 260.079/SP, 4e Ch., aff. jugée le 17 mai 2005, *DJ* 20/06/2005, p. 288.

[36] Cette même règle intègre aujourd'hui le § 1er de l'art. 10 de la Loi d'introduction aux normes du droit brésilien de 1942, selon la rédaction issue de la loi n° 9.047 du 18 mai 1995. Elle est présente depuis la Constitution de 1934 (art. 134) dans l'ordre juridique constitutionnel brésilien.

[37] C. R. Gonçalves, *Direito Civil Brasileiro*, vol. 7, Direito das Sucessões, 8ª ed., São Paulo : Saraiva, 2014, p. 534 ; P. Lôbo, *Direito civil – Sucessões*, *op. cit.*, p. 16 ; E. de Oliveira Leite, *Direito Civil Aplicado*, vol. 6, Direito das Sucessões, 3ª ed. revista, atualizada e ampliada, São Paulo : RT, 2014, n° 30.1.

lui-même éclairé par le **principe de la solidarité au sein de la famille**, qu'un éminent auteur avait qualifié de fondement même du droit moderne des successions.[38] Pour cet auteur, la propriété du *de cujus* est assurée aux membres du groupe familial non parce qu'elle leur serait commune, mais en raison du principe de la solidarité qui fonde les devoirs d'assistance des parents vers leurs enfants et vice-versa, et par extension à d'autres membres de la famille.[39] Ce principe justifierait ainsi, au plan infraconstitutionnel, la réserve successorale (art. 1789 Civ.) ou encore, pour défaut de solidarité, l'exhérédation des descendants par leurs ascendants lorsque les premiers abandonnent les seconds atteints d'aliénation mentale ou d'une maladie grave (art. 1962 Civ.) ; de même, l'abandon de l'enfant ou d'un petit-enfant en cas d'aliénation mentale ou de maladie grave autorisera l'exhérédation des ascendants par leurs descendants (art. 1962 Civ.). Ce principe trouverait, lui-même, un substrat constitutionnel. Ainsi, l'auteur l'attachait à l'art. 229 CF.[40] D'autres[41] l'attachent aux principes de la protection de la famille (art. 226 CF),[42] de la dignité de la personne humaine (art. 1er, III CF)[43] et de la solidarité (art. 3, I CF).[44]

Mettant en lumière le rôle de la Constitution dans la construction du régime des successions d'aucuns affirment que toute norme infraconstitutionnelle en la matière doit être conforme aux principes constitutionnels d'égalité des enfants et entre homme et femme, de dignité humaine et de pluralisme des modèles de famille.[45]

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[38] C. M. da Silva Pereira, *Instituições de direito civil – Direito das Sucessões,* vol. VI, 20 ª ed. revista e atualizada por C. R. Barbosa Moreira, Rio de Janeiro : Forense, 2013, p. 13.

[39] *Ibid.*, p. 13.

[40] Art. 229. « *Les parents ont le devoir d'assister, d'élever et d'éduquer leurs enfants mineurs ; les enfants majeurs ont le devoir d'aider et de protéger leurs parents dans leur vieillesse ou en cas de carence ou de maladie.* »

[41] G. Tepedino et A. Schreiber, « Succession et contrat : rapport brésilien », *in* Travaux de l'Association Henri Capitant, Tome LX – *Les successions*, Bruxelles : Bruylant et LB2V, p. 271.

[42] Art. 226. « *La famille, base de la société, bénéficie d'une protection spéciale de l'Etat. Paragraphe premier. Le mariage est civil ; sa célébration est gratuite. § 2. Le mariage religieux produit des effets civils selon les termes de la loi. § 3. Au regard de la protection de l'Etat, l'union stable entre l'homme et la femme est reconnue comme une entité familiale ; la loi doit faciliter sa conversion en mariage. § 4. Par entité familiale s'entend également la communauté formée par l'un quelconque des parents et ses descendants. § 5. Les droits et devoirs afférents à la société conjugale sont exercés également par l'homme et par la femme. § 6. Le mariage civil peut être dissous par divorce. § 7. La planification familiale, fondée sur les principes de la dignité de la personne humaine et de la paternité responsable, est une libre décision du couple ; il incombe à l'Etat de fournir des moyens scientifiques et d'éducation pour l'exercice de ce droit ; toute manoeuvre coercitive de la part d'institutions officielles ou privées est interdite. § 8. L'Etat garantit son aide à la famille en la personne de chacun de ses membres ; il crée des mécanismes visant à éliminer la violence en son sein.* »

[43] Article 1er. « *La République fédérative du Brésil, formée de l'union indissoluble des Etats, des Communes et du District fédéral, constitue un Etat démocratique de Droit et a pour fondements : […] III – la dignité de la personne humaine ; […].* »

[44] Art. 3. « *Les objectifs fondamentaux de la République fédérative du Brésil sont les suivants : I – construire une société libre, juste et solidaire ; […].* »

[45] G. C. Nogueira da Gama, *Direito civil – Sucessões*, 2ª ed., São Paulo : Ed. Atlas, 2007, Série Fundamentos Jurídicos, p. xvii–xviii.

D'autres suggèrent encore qu'il faut étendre au testament l'exigence de la satisfaction de la fonction sociale du contrat et de la propriété, principes d'ordre constitutionnel, afin de réduire le rôle de la volonté du testateur.[46]

En dehors du champ constitutionnel, d'autres principes normatifs structurant le régime des successions peuvent être dégagés de la lecture du Code civil. Certains sont le corollaire des principes constitutionnels que la discipline du droit des successions dans le Code appréhende.

Le premier principe est d'effet prohibitif : ***viventis nulla hereditas***.[47] Par conséquent, le pacte sur succession future (*pacta corvina*) n'est pas admis en droit brésilien (art. 426 Civ.)[48] et nulle sera toute stipulation d'un potentiel héritier sur une succession non ouverte.[49]

Prenant appui dans l'ancien droit portugais,[50] un second principe se montre étroitement lié au précédent. Parce que c'est au moment du décès[51] que la succession s'ouvre, **le mort saisit alors le vif.** Dès lors, « *[l]a succession se transmet immédiatement aux héritiers légitimes et testamentaires dès son ouverture* » (art. 1784 Civ.). De ce principe découlent quelques effets d'importance majeure : une subrogation personnelle s'opère *pleno jure* de sorte à empêcher que le patrimoine transmis se trouve pour un moment « acéphale » ; le patrimoine se transmet sans que l'héritier ait à réaliser un quelconque acte ; l'héritier a la *legitimatio ad causam* pour protéger la succession ; il y a transmissibilité de la part héritée aux successeurs de l'héritier décédé après l'ouverture de la succession et avant de déclarer s'il accepte la succession (art. 1809 Civ.) ; le droit à la succession ouverte et le lot attribué à un cohéritier peuvent être cédés par acte notarié (art. 1793 Civ.) ; le droit de l'héritier peut fait l'objet d'une renonciation (art. 1804, par. unique Civ.).[52]

Un troisième principe relevé est celui de **protection de la réserve héréditaire** fixée par la loi en faveur des descendants, des ascendants et du conjoint (art. 1845 Civ.) ; comme il sera vu ultérieurement, si la compagne ou le compagnon survivant est considéré comme un héritier « légitime » sur une partie bien précise du patrimoine du défunt (art. 1790 Civ.), il n'est pas pour autant tenu pour un « héritier

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[46] P. Lôbo, *Direito civil – Sucessões*, *op. cit.*, p. 42–43. Pour plus de précisions sur ce thème, v. A. L. Maia Nevares, *A função promocional do testamento : tendências do direito sucessório*, Rio de Janeiro : Ed. Renovar, 2009.

[47] C. M. da Silva Pereira, *Instituições de direito civil – Direito das Sucessões*, *op. cit.*, p. 13.

[48] Art. 426. « *L'héritage d'une personne vivante ne peut pas être l'objet d'un contrat.* »

[49] Selon l'art. 166 Civ. : « *[l]'*acte juridique est nul si : *[…] VII – la loi le déclare expressément nul ou l'interdit, sans lui attribuer de sanction* » (cela a été souligné par nous).

[50] A. M. Villela, *La transmission d'hérédité en droit brésilien et en droit français,* Paris : Libraire Technique, 1971, p. 26.

[51] Il s'agit de la mort biologique, la mort civile n'étant pas admise en droit brésilien. Par exception, la loi admet l'ouverture de la succession des absents (art. 6 et 26 et s. Civ. – mort présumée), au départ provisoire et puis définitive, afin de pallier l'inconvénient social et économique résultant de l'acéphalie du patrimoine en raison de l'absence de son titulaire. V. C. M. da Silva Pereira, *Instituições de direito civil – Direito das Sucessões, op. cit.*, p. 13.

[52] Cf. O. Gomes, *Sucessões*, 15ª ed. revista e atualizada por M. R. Carvalho de Faria, Rio de Janeiro : Forense, 2012, n° 20.

réservataire ». Le principe de protection de la réserve héréditaire s'exprime, en premier lieu, dans la règle qui interdit le testateur de disposer au-delà de la réserve héréditaire (art. 1789 Civ.). Il s'exprime, en second lieu, dans le régime de l'inventaire (art. 1991 et s. Civ.), les descendants concourant à la succession d'un ascendant commun étant obligés d'indiquer la valeur des donations reçues du décédé lorsqu'il était en vie, sous peine de recel successoral (art. 2002 Civ.). Feront l'objet de réduction les donations à propos desquelles il sera constaté que le donateur a disposé d'une valeur supérieure à celle correspondant à la réserve héréditaire, ce qui est calculé par rapport au patrimoine total du donateur au moment de la donation (art. 2007 Civ.),[53] puisqu'est nulle la donation pour cette partie-là de son patrimoine (art. 549 Civ.).[54] Le rapport des donations vise à égaler, dans la proportion établie par la loi, la réserve des descendants et du conjoint survivant ; cette obligation s'impose également aux donataires qui, lors du décès du donateur, ne possédaient plus les biens donnés et reçus (art. 2003). Il s'exprimera, en troisième lieu, lorsque le partage des biens est fait par un ascendant par acte *inter vivos* ou de ses dernières volontés : le partage ne sera valable que dans la mesure où il ne nuit pas la réserve héréditaire (art. 2018 Civ.). La protection de la réserve héréditaire est ainsi un corollaire des principes constitutionnels du *droit à l'héritage* et de la *solidarité familiale* : ces derniers seraient dénués de toute efficacité si au *de cujus* eût été accordé, lorsqu'il était en vie, la liberté de disposer entièrement de ses biens au détriment d'un ou de plusieurs héritiers membres de sa famille ayant vocation légale à lui succéder.[55]

A contrario sensu par rapport au troisième principe, un quatrième principe du droit brésilien des successions est la **liberté de tester sur le patrimoine non réservé** (art. 1857 Civ.), ainsi que de **déterminer librement de son vivant le partage, présent ou futur, de l'ensemble de la succession** (art. 2014 et 2018 Civ., respectivement), y compris pour favoriser davantage un des héritiers réservataires par rapport aux autres, pourvu que la réserve soit respectée (art. 1849 Civ.). La liberté d'une telle anticipation du partage n'est pas conditionnée à l'accord des héritiers légitimes lorsqu'il est fait par testament (testament-partage[56] ou testament ordinaire) ; elle le sera, en revanche, si le partage s'opère par donation (donation-partage).[57]

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[53] STJ, REsp 112.254/SP, 4e Ch., aff. jugée le 16 nov. 2004, *DJ* 06/12/2004, p. 313 ; REsp 5.325/SP, 3e Ch., aff. jugée le 20 nov. 1990, *DJ* 10/12/1990, p. 14807.

[54] Annulable sera également la donation du conjoint adultère à son complice. Cette annulation peut être demandée par l'autre conjoint ou par les « héritiers nécessaires » dans un délai de deux ans à compter de la dissolution de la société conjugale (art. 550 Civ.).

[55] V. G. Tepedino et A. Schreiber, « Succession et contrat : rapport brésilien », *loc. cit.*, p. 271 ; A. L. Maia Nevares, *A função promocional do testamento : tendências do direito sucessório*, Rio de Janeiro : Ed. Renovar, 2009.

[56] Le testament-partage permet d'indiquer comment les héritiers se partageront les biens du défunt. Il précise, par exemple, que tel héritier ayant droit au 1/5 de la succession recevra tel ou tel bien au titre de sa part.

[57] V. *infra*, n° 7.1.

Un cinquième principe est celui de **transmissibilité du patrimoine du *de cujus* comme un tout unitaire**[58] (universalité de l'héritage), exprimé à l'art. 1791 Civ. Par conséquent, jusqu'au partage, la propriété et la possession des biens de la succession forment une indivision.

La **liberté de céder ses droits dans la succession ouverte ou la part attribuée** se présente comme un autre principe fondamental en la matière. Il se trouve exprimé à l'art. 1793 Civ.

Un septième principe est celui de la **vocation à succéder assurée aux personnes déjà conçues** lors de l'ouverture de la succession. Exprimé à l'art. 1798 Civ., ce principe n'est que le corollaire du principe posé à l'art. 2 du même Code selon lequel la loi protège, dès sa conception, les droits de l'enfant à naître.[59] Né en vie,[60] l'enfant héritera.

Un principe d'**égalité du partage** est également mis en exergue par la doctrine.[61] Ce principe s'exprime avec force à l'art. 2017 Civ., selon lequel « *[l]ors du partage des biens, la plus grande égalité possible sera observée en ce qui concerne leur valeur, leur nature et leur qualité*. »

Le principe de la **protection des créanciers et des tiers de bonne foi** complète ce cadre général. Ce principe innerve le droit des obligations, le droit de l'entreprise, le droit des obligations et le droit de la famille. Il est donc naturel qu'il participe à la structuration du régime des successions d'autant plus que le patrimoine du débiteur représente un gage général pour le créancier (art. 391 Civ.)[62] et que les droits des tiers de bonne foi sont protégés à l'égard de tous contractants ayant réalisé un acte juridique simulé (art. 167, § 2 Civ.).

La protection spéciale des créanciers de la succession s'exprime à travers plusieurs dispositions. Ainsi, lorsque la renonciation à la succession nuit aux créanciers de l'héritier, ceux-ci pourront l'accepter à son nom, avec l'autorisation du juge (art. 1813 Civ.) ; le droit de demander le paiement des dettes reconnues, jusqu'à concurrence de la valeur de la succession, est assuré aux créanciers (art. 1821 Civ.) ; les actes ayant une valeur de codicille[63] ne peuvent porter atteinte aux droits de tiers (art. 1882 Civ.) ; le legs que le testateur fait à un créancier n'est pas réputé une compensation de sa dette s'il ne le déclare pas expressément (art. 1919 Civ.) ; il peut y avoir une mise en réserve, dans le cadre de la procédure d'inventaire, des biens suffisants pour le paiement de la dette qui y est réclamée en cas de contestation sérieuse

[58] G. Tepedino et A. Schreiber, « Succession et contrat : rapport brésilien », *loc. cit.*, p. 273.

[59] Art. 2. « *La personnalité civile de la personne commence dès que celle-ci naît en vie ; mais la loi protège, dès sa conception, les droits de l'enfant à naître*. »

[60] Alors que dans d'autres systèmes, comme le droit français, la loi exige que l'enfant soit né vivant et « viable » (art. 725 du Code civil), en droit brésilien, il suffit que l'enfant « respire » pour qu'il acquière la capacité de succéder.

[61] G. Tepedino et A. Schreiber, « Succession et contrat : rapport brésilien », *loc. cit.*, p. 276 ; O. Gomes, *Sucessões*, *op. cit.* , n° 254.

[62] G. Tepedino et A. Schreiber, « Succession et contrat : rapport brésilien », *loc. cit.*, p. 275.

[63] V. *infra*, n° 5.2.1.

de leur existence par les héritiers (art. 1997, § 1er Civ.)[64] ; les créanciers de la succession – comme les légataires, par ailleurs – peuvent exiger que le patrimoine du défunt soit distingué de celui de l'héritier, cas auquel ils auront, en concours avec les créanciers de ce dernier, un droit de préférence pour le paiement (art. 2000 Civ.)[65] ; le partage peut être demandé par les créanciers, même si le testateur s'y était opposé (art. 2013 Civ.).[66]

La protection spéciale des tiers à la succession s'exprime également à travers quelques dispositions. Ainsi l'art. 1817 Civ. dispose que les aliénations à titre onéreux des biens de la succession à des tiers de bonne foi, de même que les actes de gestion pratiqués légalement par l'héritier avant la sentence d'exclusion, sont valables.[67] Suivant cette même logique, l'art. 1827, par. unique Civ. dispose que les aliénations onéreuses faites par l'héritier apparent à un tiers de bonne foi sont tenues comme efficaces.

2.2 Ampleur de la liberté testamentaire

La liberté testamentaire est assez ample. Selon l'art. 1857 Civ., « *[t]oute personne ayant la capacité civile peut disposer de la totalité ou d'une partie de ses biens pour après son décès en faisant un testament* ». De plus, selon le § 2 de ce même article, « *[l]es dispositions testamentaires de nature non-patrimoniale sont valables, même si le testateur n'a pas disposé sur d'autres matières.* »

Cette liberté connaît néanmoins certaines limites. La première est relative à la portion du patrimoine du *de cujus* pouvant en faire l'objet : « *[l]orsqu'il y a des héritiers nécessaires, le testateur ne peut disposer que de la moitié de la succession* » (art. 1789 Civ.) parce que « *[l]a moitié des biens de la succession constitue la réserve successorale, appartenant de plein droit, aux héritiers nécessaires* » (art. 1846 Civ.).[68] En outre, le § 1er de l'art. 1857 Civ. établit que « *[l]a réserve des héritiers nécessaires ne peut être incluse dans le testament* ».[69] Par conséquent, si les

[64] L'efficacité de cette protection fondée sur la mise en réserve de biens est conditionnée à la proposition par le créancier d'une action en recouvrement dans un délai de trente jours à compter de cette mise en réserve (art. 1997, § 2 Civ.).

[65] Comme l'ont souligné G. Tepedino et A. Schreiber, « Succession et contrat : rapport brésilien », *loc. cit.*, p. 275 : « *[c]ela renforce le système adopté par le Code Civil, selon lequel l'hérédité est une universalité de droit distincte du patrimoine personnel de l'héritier. Le législateur a procédé de cette façon pour éviter que, dans certaines situations, il y a un mélange patrimonial, qui puisse porter préjudice au droit des créanciers, ainsi qu'à celui des légataires* ».

[66] Les créanciers du défunt, des héritiers réservataires ou des légataires peuvent également demander au juge d'instaurer la procédure d'inventaire si ceux qui sont en possession ou dans l'administration de la masse successorale restent inertes (art. 615, VI NCPC).

[67] Bien évidemment, les héritiers lésés auront droit à la réparation des dommages et intérêts en raison de tels actes (art. 1817, *in fine* Civ.).

[68] STJ, REsp 191.393/SP, 3e Ch., aff. jugée le 20 août 2001, *DJ* 29/10/2001, p. 201.

[69] V. *supra*, n° 5.

dispositions testamentaires excèdent la quotité disponible, elles seront réduites aux limites de celle-ci (art. 1967 Civ.). Il convient néanmoins de noter qu'« *[u]ne telle limitation ne donnerait pas origine à une violation d'également importants principes de l'autonomie privée du testateur et du droit fondamental à la propriété, une fois qu'il pourrait toujours disposer de l'autre moitié de ses biens comme bien il le trouve.* »[70] Un commentateur[71] souligne également que le § 1er de l'art. 1857 Civ. semble dire plus que ce que n'aurait souhaité le législateur : s'il est vrai que le testament ne peut *disposer* sur le patrimoine réservé, il n'est pas moins possible pour le testateur *d'inclure* la succession légitime dans le testament. En effet, précise-t-il, l'*inclusion* de la légitime ne doit pas être interdite d'autant plus que c'est par ce moyen que le testateur peut faire valoir l'existence d'héritiers réservataires, en mentionnant leur part légitime dans l'héritage, tout en disposant de la moitié disponible ; en outre, c'est dans le testament que figureront les clauses – et leurs motifs – restreignant les droits sur les biens réservés, établies conformément à l'art. 1848 Civ.[72] ; enfin, outre la voie judiciaire, c'est par le testament que les héritiers peuvent être privés de leur réserve ou déshérités dans les cas prévus pour leur exclusion[73] (art. 1964 Civ.),[74] ainsi qu'être pardonnés des actes déterminant leur exclusion de la succession (art. 1818 Civ.).[75] La seconde limite de tester[76] est une conséquence du principe exprimé par la première : si survient un descendant successible du testateur, qui n'existait pas ou qui n'était pas connu au moment où il a testé, le testament est « rompu » en toutes ses dispositions – c'est-à-dire il perd son efficacité – si ce descendant survit au testateur (art. 1973 Civ.) ; aussi, le testament établit dans l'ignorance de l'existence d'autres héritiers réservataires est également rompu (art. 1974 Civ.) ; mais le testament produira ses effets si le testateur dispose seulement de la quotité disponible, et s'il n'attribue aucune partie de celle-ci à ses héritiers réservataires connus, ou s'il les exclut de cette partie (art. 1975 Civ.). La troisième limite de tester ne connaissait pas de parallèle dans l'ancien Code civil de 1916 et réside dans l'impossibilité pour le testateur d'imposer aux biens affectés à la réserve héréditaire les clauses d'inaliénabilité, insaisissabilité et incommunicabilité sans une « juste cause » (art. 1848 Civ.).

Nonobstant l'équilibre trouvé en droit positif entre la liberté de disposer par testament et la protection de la réserve héréditaire, certains auteurs estiment que

[70] G. Tepedino et A. Schreiber, « Succession et contrat : rapport brésilien », *loc. cit.*, p. 271.

[71] Z. Veloso, *Novo Código Civil Comentado*, R. Fiuza (coord.), *op. cit.*, p. 967.

[72] Art. 1848. « *Sauf s'il y a un juste motif, déclaré dans le testament, le testateur ne peut pas stipuler des clauses d'inaliénabilité, d'insaisissabilité ou d'incommunicabilité sur les biens réservés. §1er. Le testateur ne peut pas déterminer la conversion des biens réservés en d'autres d'une espèce différente. […].* »

[73] Ces causes figurent aux articles 1814 et 1962 et 1963 Civ.

[74] Art. 1964. « *L'exhérédation ne peut être ordonnée en testament qu'avec une déclaration expresse de la cause. […].* »

[75] Art. 1818. « *Celui qui a pratiqué des actes déterminant son exclusion de la succession pourra succéder, lorsque l'offensé le pardonne expressément dans le testament, ou dans un autre acte authentique.* »

[76] En ce sens, E. de Oliveira Leite, *Direito Civil Aplicado*, *op. cit.*, n° 26.1.

l'autonomie du testateur doit être davantage restreinte au nom du principe de la solidarité familiale et celui la fonction sociale de la propriété, consacrés constitutionnellement.[77] Pour cette doctrine, ces principes devraient conduire le juge à interpréter le testament en faveur de l'héritier légitime et non en faveur de la volonté présumée du testateur,[78] inversant ainsi la logique de l'art. 1899 Civ., selon lequel « *[l]orsque la clause testamentaire donne lieu à des interprétations différentes, celle qui assure le mieux l'observance de la volonté du testateur prévaut.* » Dès lors, la volonté du testateur ne devrait être prise en compte que dans la mesure où elle ne « compromet » pas la garantie du droit des héritiers.[79] Cette volonté serait ainsi subordonnée à la *fonction sociale de testament.*[80]

Le Supérieur Tribunal de Justice (STJ)[81] semble être sensible à cette approche puisque dans un arrêt du 7 avril 2011,[82] cette Haute juridiction a décidé que la clause testamentaire stipulant l'inaliénabilité d'un immeuble laissé à un héritier légitime conformément à l'art. 1676 de l'ancien Code civil de 1916 (actuel art. 1911 Civ.[83]), peut voir ses effets atténués lorsque ledit héritier fait face à des difficultés économiques exceptionnelles. Malgré le fait que le testament avait été rédigé et la succession du testateur avait été ouverte sous l'ancien texte – donc avant le Code civil de 2002 et son art. 1848 –, pour le STJ cette solution d'atténuation découle du fait que la suppression, par voie testamentaire, du droit de disposer librement de l'héritage ne peut être considérée comme absolue, devant être délimitée par les préceptes constitutionnels tels que la fonction sociale de la propriété et le respect de la dignité humaine ; il ne paraît donc pas raisonnable, souligne le Tribunal, d'admettre que la survie et le bien-être de l'héritier soient mis à mal avec le seul objectif d'obéir à des clauses d'inaliénabilité, d'insaisissabilité ou d'incommunicabilité sur les biens. En définitive, pour le STJ, la propriété grevée ne saurait méconnaître sa fonction sociale, car il n'est pas possible de permettre la conservation d'un bien dans le patrimoine de l'héritier qui finira par nuire à ce dernier, de manière à lui causer de la détresse et des frustrations.

A contrario de la lecture proposée par la doctrine précitée, cette décision de la Haute juridiction n'entend cependant pas inverser le sens de la règle d'interprétation des testaments (actuel art. 1899 Civ. et art. 1666 du Code civil de 1916). Pour le STJ, l'*atténuation* des effets des clauses testamentaires d'inaliénabilité,

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[77] P. Lôbo, *Direito civil – Sucessões*, *op. cit.*, p. 41 *sq*.

[78] *Ibid.*, p. 41 *sq*.

[79] *Ibid*., p. 41–42.

[80] *Ibid*., p. 43. V. également, A. L. Maia Nevares, *A função promocional do testamento : tendências do direito sucessório*, Rio de Janeiro, Ed. Renovar, 2009.

[81] Tribunal supérieur ayant pour mission d'uniformiser le droit infraconstitutionnel fédéral.

[82] STJ, REsp 1158679/MG, 3e Ch., aff. jugée le 07 avr. 2011, *DJe* 15/04/2011. Précédent : STJ, REsp 10.020/SP, 4e Ch., aff. jugée le 9 septembre 1996, *DJ* 14/10/1996, p 39009.

[83] Art. 1911. « *La clause d'inaliénabilité imposée à des biens par un acte de libéralité détermine aussi leur insaisissabilité et leur incommunicabilité. Paragraphe unique. En cas d'expropriation des biens sous ladite clause, ou de leur aliénation, moyennant une autorisation judiciaire, en vertu d'avantage économique, pour le donataire ou pour l'héritier, le produit de la vente sera converti en d'autres biens, qui auront es mêmes restrictions des premiers.* »

d'insaisissabilité ou d'incommunicabilité sur les biens est la mesure qui permet de respecter au mieux la volonté du testateur, à savoir d'assurer la satisfaction des besoins vitaux de ses héritiers. Pour renforcer cette approche herméneutique visant à respecter la réelle volonté du testateur, le Tribunal évoque dans son arrêt du 7 avril 2011 l'art. 85 du Code civil de 1916 (actuel art. 112 Civ.), selon lequel, dans les déclarations de volonté, il faut plutôt s'attacher à l'intention qu'y est incorporée qu'au sens littéral du langage.

Il convient encore de préciser que, selon le paragraphe unique de l'art. 1911 Civ., en cas d'expropriation de biens sous la clause d'inaliénabilité (qui détermine aussi leur insaisissabilité et leur incommunicabilité), ou de leur aliénation, moyennant une autorisation judiciaire, en vertu d'avantage (commodité) économique (nécessaire) pour le donataire ou pour l'héritier, le produit de la vente sera converti en d'autres biens, *sur lesquels seront grevées* les mêmes restrictions des premiers.

Les limites de tester en raison de la protection de la réserve héréditaire n'empêchent cependant pas le testateur de réaliser librement le partage, en indiquant les biens et les valeurs qui doivent composer les lots de la succession revenant à chacun des héritiers, y compris les réservataires.[84] Ce partage prévaudra lorsque la valeur des biens corresponde aux parts établies (art. 2014 Civ.).

Enfin, il convient de noter que le droit brésilien n'interdit pas le fidéicommis. La charge du fidéicommis peut résulter tant d'un acte *inter vivos* que d'une clause testamentaire. Dans ce dernier cas, l'institution fait l'objet d'une réglementation spéciale au sein du Code civil (art. 1951 s.). Ainsi, le testateur peut indiquer des héritiers ou des colégataires fiduciaires, dont le droit à la part ou au legs sera résolu lors de leur mort, ou d'un terme déterminé ou de la réalisation d'une certaine condition, au bénéfice d'autrui, dénommé le fidéicommissaire (art. 1951). Le régime en sera détaillé plus loin.[85]

2.3 Succession légale

Le Code civil établit comme héritiers légitimes les descendants, les ascendants, le conjoint et les collatéraux (art. 1829), ainsi que le compagnon survivant (art. 1790) ; seuls les trois premières catégories d'héritiers sont réservataires (art. 1845), ayant à ce titre droit à la moitié du patrimoine du *de cujus* (art. 1846). Il faut souligner que la *représentation* – fiction juridique qui a pour effet d'appeler à la succession les représentants aux droits de l'héritier représenté, décédé avant le *de cujus* (art. 1851) – a lieu à l'infini dans la ligne directe descendante et est admise dans tous les cas (degrés égaux ou inégaux). En revanche, la représentation n'a jamais lieu en faveur des ascendants : le plus proche, dans chacune des deux lignes, exclut toujours le plus éloigné (art. 1852). Pour ce qui est des collatéraux, la représentation n'est admise que pour les enfants de la fratrie du *de cujus* (art. 1853).

[84] C. R. Gonçalves, *Direito Civil Brasileiro, op. cit.*, p. 561.

[85] V. *infra*, n° 5.1.

Les enfants ne sont concernés par aucune condition spécifique pour figurer comme héritiers réservataires de la succession de leurs ascendants (art. 1834 Civ.). De surcroît, les enfants ont les mêmes droits, qu'ils soient issus ou non du mariage ou adoptés,[86] toute discrimination à cet égard étant interdite par la Constitution (art. 227, § 6).

Si le conjoint survivant figure *a priori* comme héritier réservataire, encore faut-il qu'il soit concrètement considéré de la sorte. Or, d'après l'art. 1830 Civ., le droit de succession du conjoint survivant n'est reconnu que si, au moment du décès, le couple n'était pas séparé judiciairement, ou séparé de fait depuis plus de deux ans, sauf preuve, dans ce cas, que la vie en commun était devenue impossible sans que cela soit de la faute du survivant. De ce dispositif, il est alors aisé de conclure que le conjoint divorcé n'hérite pas non plus, car le divorce met fin non seulement à la société conjugale (art. 1571, IV Civ.), mais également au mariage (art. 1571, §1er).[87] Dans le cadre d'un mariage putatif, le conjoint survivant de bonne foi n'est pas privé de la succession du conjoint décédé si la mort de ce dernier intervient avant la sentence d'annulation du mariage (art. 1561 Civ.) ; en revanche, si la sentence d'annulation intervient avant le décès, le conjoint survivant ne conserve aucun droit à la succession du *de cujus*, même ayant contracté le mariage en bonne foi.[88]

Toujours par rapport au conjoint héritier, une condition particulière lui est applicable à l'égard de la réserve héréditaire lorsqu'il est en concours avec les descendants. En effet, en dépit de la troisième position qu'il occupe dans l'ordre successoral (art. 1829 Civ.), le conjoint survivant concourt à la succession avec les descendants ou les ascendants, ces deux catégories d'héritiers occupant la première et la deuxième place respectivement dans l'ordre successoral. Si aucune condition n'est exigée pour que le conjoint survivant concoure à la succession avec les ascendants, des conditions liées au régime matrimonial conditionnent sa participation à l'héritage en présence de descendants. L'art. 1829, I Civ. dispose que la succession légitime est attribuée aux descendants, en concours avec le conjoint survivant, *sauf* si celui-ci était marié avec le défunt sous le *régime de la communauté universelle* ou celui de la *séparation obligatoire des biens* ou si, sous le *régime de la communauté partielle*, le décédé n'avait pas laissé de biens particuliers (biens, droits et obligations exclus de la communauté – art. 1659 et s. Civ.).[89] En d'autres termes, dans le premier cas, le conjoint survivant n'a pas de droit à l'héritage car la moitié du patrimoine total du conjoint décédé lui appartient déjà en application du régime matrimonial ; dans le second cas, le conjoint survivant n'a pas de droit à l'héritage non plus parce que la séparation des biens a été imposée par la loi due à des circonstances particulières ; dans le troisième cas, le conjoint survivant est appelé à la succession seulement en

[86] Le droit brésilien ne connait que l'adoption plénière.

[87] Ainsi, F. J. Cahali et G. M. F. N. Hironaka, *Direito das sucessões,* 5ª ed. revista, São Paulo : RT, p. 204.

[88] F. J. Cahali et G. M. F. N. Hironaka, *Direito das sucessões, op. cit.*, p. 205.

[89] Pour une critique à cette solution au regard des fondement du droit des régimes matrimoniaux, v. K. Costalunga, « A transmissão patrimonial nas empresas familiares : uma análise sob a ótica dos pactos antenupciais », *loc. cit.*, p. 89–109.

ce qui concerne les biens du conjoint décédé qui étaient exclus de la communauté, car la moitié des autres biens lui appartient déjà en application du régime matrimonial ; dans cet ordre d'idées, le conjoint survivant est appelé à la succession en concours avec les descendants pour la totalité du patrimoine du conjoint décédé lorsque le couple avait choisi le régime de la séparation des biens, dite conventionnelle, raison pour laquelle l'art. 1829, I Civ. n'y fait pas mention expresse.

Pendant quelques années, le STJ a interprété ce dispositif en ce sens que si les conjoints avaient choisi le régime de *séparation des biens*, le conjoint survivant ne peut prétendre, en présence de descendants, avoir droit à la réserve successorale.[90] Pour qu'il y eût droit, il fallait que le conjoint survivant eût été marié en régime de communauté partielle. Dans cette hypothèse, le conjoint participait à l'héritage des seuls biens communs : il en avait alors droit à la moitié en application du régime matrimonial et concourait à l'autre moitié de ces mêmes biens avec les descendants du conjoint décédé.[91] Cependant, une décision récente du STJ a privilégié une interprétation littérale de la loi, consacrant ainsi le principe selon lequel lorsqu'il y a droit à la moitié des biens en application du régime matrimonial, le conjoint survivant n'hérite pas lorsqu'il est en concours avec les descendants, et *vice versa*.[92] Dans le cas où il hérite en concours avec les descendants, le conjoint a droit à un lot égal à celui des descendants succédant par tête ; sa part ne saurait cependant être inférieure au quart de la succession, lorsqu'il est l'ascendant des héritiers avec qui il est en concours (art. 1832 Civ.).

En concours avec des ascendants au premier degré, le conjoint survivant a droit au tiers de la succession, mais il aura droit à la moitié s'il n'y a qu'un ascendant ou si le degré est plus éloigné (art. 1837 Civ.).

Parce que le droit brésilien reconnaît dans l'union civile, dite « union stable », non seulement entre personnes de sexes différents mais aussi entre personnes du même sexe,[93] une nouvelle forme d'organisation de la famille (art. 226, § 3 CF), il

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[90] STJ, REsp 992.749/MS, 3e Ch., aff. jugée le 1er déc. 2009, *DJe* 05/02/2010 ; REsp 689.703/AM, 4e Ch., aff. jugée le 20 avr. 2010, *DJe* 27/05/2010 ; REsp 1.111.095/RJ, 4e Ch., aff. jugée le 1 oct. 2009, *DJe* 11/02/2010 ; REsp 1.377.084/MG, 3e Ch., aff. jugée le 8 oct. 2013, *DJe* 15/10/2013; AgRg na MC nº 23.242/RS, aff. jugée le 3 fév. 2015, *DJe* 19/02/2015. Divergence: STJ, REsp nº 1.430.763/SP et REsp nº 1.346.324/SP, 3ª Ch., aff. jugée le 19 août 2014, *DJe* 02/12/2014. Malgré la jurisprudence constante du STJ sur ce point, un fort débat s'est installé en doctrine à propos de l'interprétation qui conviendrait d'être donnée de l'art. 1829, I Civ. dont la rédaction n'est pas très claire quant aux hypothèses qui, *a contrario,* permettraient au conjoint survivant d'être appelé à la succession légitime en concurrence avec les descendants du conjoint décédé. A propos, v. F. J. Cahali et G. M. F. N. Hironaka, *Direito das sucessões, op. cit.*, p. 192 *sq*.

[91] F. J. Cahali et G. M. F. N. Hironaka, *Direito das sucessões, op. cit.*, p. 192.

[92] STJ, REsp no 1.382.170/SP, 2e Ch., aff. jugée le 22 avril 2015, *DJe* 26/05/2015.

[93] STF, ADI 4277, Ass. plén., aff. jugée le 5 mai 2011, *DJe* 13/10/2011, publié le 14/10/2011, *RTJ* 219, p. 212 ; et ADPF 132, Ass. plén., aff. jugée le 5 mai 2011, *DJe* 13/10/2011, publié le 14/10/2011, *EMENT*, vol. 2607-01, p. 1 ; STF, RE 477554 AgR, 2e Ch., aff. jugée le 16 août 2011, *DJe*-164 25/08/2011, publié le 26-08-2011, *RTJ* V. 220, p. 572) ; STJ, REsp 1183378/RS, 4e Ch., aff. jugée le 25 oct. 2011, *DJe* 01/02/2012). A propos, v. G. Vieira da Costa Cerqueira, « Le droit privé brésilien : structure, principes cardinaux et voies juridictionnelles d'application », *loc. cit*., p. 338–340.

convient de mentionner la place occupée par la compagne ou le compagnon survivant dans le système successoral organisé par le Code civil. L'art. 1790 de ce Code régit leur succession. En dépit du fait qu'il figure parmi les dispositions générales régissant les successions, il interfère directement dans l'ordre successoral de sorte que la succession légitime se fait par la lecture combinée de cet article avec l'art. 1829 et s. Civ.[94] Selon l'art. 1790 Civ., la compagne ou le compagnon survivant participe à la succession de l'autre en ce qui concerne *les biens acquis onéreusement pendant l'union stable*, en concours avec des enfants communs,[95] ou en concours avec des descendants issus seulement du *de cujus,*[96] ou encore en concours avec d'autres parents successibles,[97] venant à hériter la totalité de la succession lorsqu'il n'y a pas de parents successibles.[98] Cela n'implique cependant pas de considérer la compagne ou le compagnon survivant comme héritier réservataire car il n'est pas mentionné à l'art. 1845 Civ.[99] Au regard de l'égalité établie par la Constitution entre la famille issue du mariage et la famille issue d'une « union stable », il s'agit d'un traitement discriminatoire par rapport à la protection accordée au conjoint survivant souvent mis en lumière par la doctrine[100] et illustré au sein d'une jurisprudence assez peu convergente.[101] Quoi qu'il en soit, la compagne ou le compagnon survivant participe à la succession légitime, celle-ci se réduisant à leur égard aux seuls

[94] Ainsi, F. J. Cahali et G. M. F. N. Hironaka, *Direito das sucessões, op. cit.*, p. 211 *sq*.

[95] Hypothèse dans laquelle il aura droit à une part équivalente à celle qui est attribuée par la loi à l'enfant (art. 1790, I Civ.).

[96] Hypothèse dans laquelle il aura droit à la moitié de ce qui é attribuée à chacun d'eux (art. 1790, II Civ.).

[97] Hypothèse dans laquelle il aura droit au tiers de la succession (art. 1790, III Civ.). Il convient de rappeler que les autres parents successibles sont les ascendants, ou, à défaut, les collatéraux jusqu'au quatrième degré (art. 1.839 Civ.), ce qui veut dire que deux tiers de la succession peuvent être dévolus à des grand-oncles, petit-neveux ou cousins germains en dépit de la compagne ou compagnon survivant.

[98] Sur les diverses difficultés techniques de mise en œuvre de ce dispositif, notamment pour les « unions stables » non contractualisées, v. l'intéressante étude de M. F. V. S. Chammas et R. S. Ferrara, « Planejamento familiar e sucessório no contexto da sucessão entre companheiros », in *Aspectos relevantes da empresa familiar*, *op. cit.*, p. 113–124. Il faut également noter que l'hypothèse la plus récurrente, à savoir celle du concours du compagnon survivant avec des enfants communs et avec des descendants issus seulement du compagnon décédé (« filiation hybride »), est passée sous silence.

[99] Ainsi, F. J. Cahali et G. M. F. N. Hironaka, *Direito das sucessões, op. cit.*, p. 215.

[100] En ce sens, Z. Veloso, *Direito hereditário do cônjuge et do companheiro*, São Paulo : Saraiva, p. 159 *sq.* ; F. J. Cahali et G. M. F. N. Hironaka, *Direito das sucessões*, *op. cit.*, p. 211–224, ainsi que K. Costalunga, « O direito à igualdade na relação familiar : uma proposta de interpretação do art. 1790 do Código civil », *Revista Direito GV*, vol. 2, n° 21, julho-dezembro 2006, p. 165–186. Pour une approche plus nuancée, M. F. V. S. Chammas et R. S. Ferrara, « Planejamento familiar e sucessório no contexto da sucessão entre companheiros », *loc. cit.*, p. 113–124.

[101] STJ, REsp 1117563/SP, 3e Ch., aff. jugée le 17 décembre 2009, *Dje* 06/04/2010, *RSTJ* vol. 218 p. 355. V. également les décisions de la Cour d'appel de l'État de São Paulo : TJSP, *Arguição de incontitucionalidade* n° 0359133-51.2010.8.26.0000, aff. jugée le 14 septembre 2011 ; AgI. n° 0048735-84.2011.8.26.0000, aff. jugée le 12 juillet 2011; AgI. n° 0059616-23.2011.8.26.0000, aff. jugée le 28 juin 2011 ; AgI. 567.929.4/0-00, aff. jugée le 11 septembre 2008; AgI. n° 467.591-4/7-

biens acquis onéreusement pendant l'union stable. N'étant pas un héritier réservataire, la compagne ou le compagnon survivant semble cependant pouvoir être exclu(e) de la succession desdits biens par disposition testamentaire.

Enfin, au même titre que les autres héritiers légitimes (collatéraux et compagnons) et les légataires, les héritiers réservataires sont soumis aux règles relatives à l'exclusion de la succession et à l'exhérédation. Par conséquent, la seule condition générale qui doit être satisfaite pour que les héritiers réservataires accèdent à la réserve successorale est celle de ne pas avoir été déclarés indignes par sentence[102] ou déshérités par testament. Il convient de souligner que ces situations peuvent être infléchies par deux moyens. Le premier tient à la déchéance du droit de demander l'exclusion de l'héritier indigne après quatre ans à compter de l'ouverture de la succession (art. 1815, par. unique Civ.) ou de prouver la cause de l'exhérédation après quatre ans à compter de l'ouverture du testament (art. 1965, par. unique Civ.).[103] Le second résulte du pardon exprès par l'offensé de celui qui a pratiqué des actes déterminant son exclusion conformément à l'art. 1814 Civ. ; ce pardon s'exprime dans le testament ou dans un autre acte authentique (art. 1818 Civ.).

2.4 Cadre général dans lequel la succession s'organise

Lorsqu'une personne ne l'a pas anticipée lorsqu'elle était en vie, sa succession s'ouvre par son décès. A cet instant, son patrimoine se transmet immédiatement aux héritiers légitimes et testamentaires (articles 1784 et 1786 Civ.). Si la personne décède sans testament, la succession est dévolue aux héritiers légitimes, la même règle s'appliquant aux biens qui ne sont pas mentionnés dans le testament ; la succession légitime subsiste également si le testament est déchu, ou s'il est jugé nul (art. 1788 Civ.).

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00 (citées par M. F. V. S. Chammas et R. S. Ferrara, « Planejamento familiar e sucessório no contexto da sucessão entre companheiros », *loc. cit.*, p. 118–119).

[102] Le causes d'indignité indiquées à l'art. 1814 Civ. sont exhaustives : homicide volontaire ou tentative d'homicide contre la personne que l'héritier succèderait, son conjoint, compagnon, ascendant ou descendant (que celui-ci en soit l'auteur, coauteur ou complice) ; accusation calomnieuse en justice du *de cujus* ou réalisation d'un crime contre son honneur ou celle de son conjoint ou compagnon ; emploi de moyens violents ou frauduleux pour contraindre ou empêcher le *de cujus* de disposer librement de ses biens par acte de dernière volonté.

[103] Selon l'art. 1962 Civ., outre les causes prévues à l'art. 1814 (v. note précédente), autorisent l'exhérédation des descendants par leur ascendants : l'offense physique ; l'injure grave ; les relations illicites avec le conjoint de la mère ou du père ; l'abandon de l'ascendant en cas d'aliénation mentale ou de maladie grave. Selon l'art. 1963 Civ., outre les causes prévues à l'art. 1814 du même Code, autorisent l'exhérédation des ascendants par leur descendants : l'offense physique ; l'injure grave ; les relations illicites avec le conjoint ou le compagnon de l'enfant ou d'un petit enfant ; l'abandon de l'enfant ou d'un petit enfant en cas d'aliénation mentale ou de maladie grave. L'art. 1964 Civ. dispose encore que l'exhérédation ne peut être ordonnée en testament qu'avec une déclaration de cause, laquelle, complète l'art. 1965, *caput* Civ., doit être prouvée par l'héritier institué ou par celui qui bénéficie de l'exhérédation.

Puisque la succession se transmet comme un tout unitaire, le droit de propriété et de possession des cohéritiers demeure indivisible[104] jusqu'à ce que le partage soit opéré au terme d'une procédure d'inventaire – qui peut être judiciaire ou extrajudiciaire (art. 1791 Civ.). Si les héritiers sont tous civilement capables et se sont mis d'accord et le *de cujus* n'a pas laissé de testament, ils ont la possibilité de choisir l'inventaire extrajudiciaire, où le partage est fait par acte notarié (arts. 2016 Civ. et 610 NCPC).[105] Si l'une de ces conditions n'est pas remplie, l'inventaire judiciaire devient obligatoire, le juge compétent étant celui du lieu du dernier domicile du décédé (art. 1785 Civ.). La procédure peut être « sommaire » – plus rapide, où les héritiers déclarent tout simplement les valeurs des biens hérités, ce qui n'est possible que si le partage se fait à l'amiable – ou « ordinaire » – plus lente, où tous les biens hérités sont évalués judiciairement (art. 630 et s. NCPC) et quelques-uns peuvent être vendus et/ou accédés au long de la procédure si ainsi les héritiers, ou une grande majorité, le souhaitent.

Dès lors, plusieurs phases se succèdent dans l'organisation de la succession. Pendant la période d'inventaire, l'administration de la masse successorale s'impose. Celle-ci connaît deux moments : l'un, *provisoire*, l'autre, *régulier*. L'administration provisoire est celle que l'une des personnes indiquées à l'art. 1797 Civ.[106] exerce jusqu'à ce que la personne chargée de l'inventaire soit nommée par le juge conformément à l'art. 617 NCPC[107] et, le cas échéant,[108] signe le compromis d'inventaire (art. 1797 Civ. et art. 613

[104] Et régi par les règles concernant la copropriété (art. 1791, § unique Civ.).

[105] Selon l'art. 3 de la Résolution n° 35 du Conseil national de justice réglementant la loi n° 11.441 du 4 janvier 2007 modifiant certains dispositifs de l'ancien Code de procédure civile (loi n° 5.869, du 11 janvier 1973), les actes notariés établissant l'inventaire et le partage à l'amiable ou l'adjudication en cas d'héritier unique ne dépendent pas d'une décision d'homologation judiciaire pour produire des effets auprès des différents services publics et institutions privées. Cette résolution devra demeurer en application après l'entrée en vigueur du nouveau Code de procédure civile, le 17 mars 2016.

[106] A savoir : i) le conjoint ou le compagnon, s'il avait une vie commune avec le décédé au moment de l'ouverture de la succession ; ii) l'héritier qui a la possession et l'administration des biens, et, s'il y en a deux ou plus, le plus âgé ; iii) l'exécuteur du testament ; ou iv) une personne de la confiance du juge, lorsque les personnes indiquées dans les alinéas précédents sont absentes ou excusées, ou si elles ont été désavouées par des raisons graves, présentées au juge.

[107] L'ordre des personnes pouvant être nommées par le juge selon le Code de procédure civile suit essentiellement l'ordre prévu dans le Code civil, sauf qu'avant l'éventuelle nomination de l'exécuteur testamentaire, celle d'un héritier quelconque n'ayant pas la possession et l'administration des biens (al. III) et d'un héritier mineur, par son représentant légal (IV), est priorisée. Aussi, selon le Code de procédure civile, avant l'éventuelle nomination d'une « personne de la confiance du juge » (art. 1797, IV Civ.), le cessionnaire de l'héritier ou du légataire (art. 617, al. VI NCPC) un administrateur judiciaire sont priorisés (art. 617, al. V NCPC). Dans ce dernier cas, il s'agit d'un fonctionnaire du Tribunal de Grande Instance qui s'occupe notamment de l'administration des biens des successions où il y a une grande animosité entre les héritiers ; l'administrateur judiciaire a les mêmes fonctions et obligations que les administrateurs réguliers et se rapporte toujours au juge, qui continue à entendre les héritiers sans néanmoins être indifférents à l'avis de l'administrateur judiciaire.

[108] La procédure dite « sommaire » dispense la signature d'un compromis d'inventaire (art. 660 NCPC), la simple nomination de l'administrateur de la succession par le juge étant suffisante. Si l'administrateur doit faire preuve de sa qualité à l'égard des tiers, il suffit de demander une attesta-

NCPC). En principe, cette période ne devrait couvrir plus que deux mois (art. 611 NCPC) si les personnes habilitées à introduire l'instance ne demeurent pas inertes (arts. 615 et 616 NCPC) – auquel cas le juge pouvait se saisir d'office sous l'égide de l'ancien Code de procédure civile de 1973 (art. 989). Si les personnes habilitées à introduire l'instance ne respectent pas les délais légaux, elles encourent une amende d'une valeur correspondant à 10 % des droits de mutation. Quoi qu'il en soit, pendant cette période, l'administrateur représente la succession et y apporte les fruits qu'il a perçus dès l'ouverture de la succession ; s'il a le droit de se faire rembourser des frais avancés, il répond des dommages qu'il a causés par sa faute à la succession (arts. 613 et 614 NCPC).

L'administration provisoire cesse dès la signature du compromis par la personne chargée de procéder à l'inventaire ou, dans le cadre de la procédure « sommaire », dès la nomination de celle-ci par le juge. Cette personne est nommée par le juge parmi celles figurant à l'art. 617 NCPC et exerce ses fonctions jusqu'à l'homologation du partage (art. 1991 Civ.). Il lui revient à l'obligation, parmi d'autres, de représenter celle-ci *ad judicia* et *extra judicia*, d'administrer les biens avec soin et diligence, de procéder aux premières et dernières déclarations des biens et des héritiers, de conférer les biens reçus par les héritiers absents, exclus ou qui ont renoncé, demander l'insolvabilité de la succession (art. 618 NCPC). Il lui incombe également, après avoir écouté les intéressés et avec l'accord du juge, dans le cadre de la procédure « ordinaire », d'aliéner des biens de toute espèce, transiger *ad judicia* et *extra judicia*, payer les dettes de la succession et assurer, en engageant les frais, la conservation et l'amélioration des biens de la succession (art. 619 NCPC).

Une fois conclu l'inventaire, réalisé le paiement des dettes du décédé (1997 Civ. et 642 NCPC),[109] y compris les dépenses funéraires (1998 Civ.) et la compensation de l'exécuteur testamentaire (art. 1987, par. unique Civ.), il est procédé au partage de la succession, en séparant, le cas échéant, la moitié du patrimoine commun des époux qui sera recueillie par le conjoint (ou la compagne ou le compagnon) survivant, ainsi que la moitié disponible (art. 651 NCPC). L'objectif de la procédure d'inventaire est de mettre fin à l'indivision de la succession. S'il n'est pas établi par testament (art. 2014 Civ.), ni décidé à l'amiable entre les héritiers et lorsqu'ils sont tous capables (art. 2015 Civ.), le partage des biens sera réalisé par le juge, après avoir entendu les héritiers (arts. 2016 Civ. et 647 et s. NCPC). Après l'acquittement de l'impôt de transmission *mortis causa*, le juge prononce, par décision de justice, le partage de la succession (art. 654 NCPC).[110] Celle-ci consolide la propriété des héritiers sur les biens qui leur ont été transmis *mortis causa*. Une fois que la décision de partage acquiert l'autorité de chose jugée, les héritiers reçoivent définitivement les biens et, quel que soit le type de procédure suivi, un document dénommé

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tion au greffe de la chambre du Tribunal de Grande Instance où la procédure se déroule. Dans l'inventaire extrajudiciaire, l'administrateur de la succession est désigné par les héritiers eux-mêmes dans l'acte notarié, ce document faisant preuve de la qualité d'administrateur.

[109] Paiement qui peut néanmoins avoir lieu après le partage.

[110] Dans la pratique, il arrive souvent que le juge approuve le partage et, seulement après, les calculs sont effectués pour le paiement de l'impôt de transmission *mortis causa*, quel que soit la procédure instaurée (« ordinaire » ou « sommaire ») ; une fois cet impôt acquitté, le « formal de partilha » – ou la « carta de adjudicação » – est établi.

le « formal de partilha » est établi par le juge. Le « formal de partilha » peut également être établi par le juge après sa décision d'homologation, passée en force de chose jugée, du partage fait à l'amiable en cas de pluralité d'héritiers – ou de l'adjudication après inventaire établi en faveur de l'héritier unique capable, au « formal de partilha » se substituant alors une « carta de adjudicação » (art. 659 NCPC), si l'inventaire extrajudiciaire n'a pas été possible.[111]

Le « formal de partilha », la « carta de adjudicação » ou l'acte notarié, selon le cas, a une valeur probante de la propriété acquise par succession. Opposable aux autres héritiers et aux tiers, le document concerné permet alors à chaque héritier de procéder à diverses diligences auprès de l'administration publique et des différents registres publics prévus par la loi, ainsi qu'auprès de différentes personnes et institutions privées (sociétés, institutions bancaires, bourse de valeurs).

2.5 Règles spécifiques pour la succession des entreprises en droit des successions

2.5.1 La succession des entreprises en droit des successions

Au sein de la réglementation des succession par le Livre V de la Partie spéciale du Code civil de 2002, aucune règle spécifique n'est prévue pour la succession des entreprises.

En revanche, le Livre II de la Partie spéciale de ce même Code, dédié au droit de l'entreprise,[112] ainsi que la loi sur les sociétés par actions de 1976 contiennent certaines règles concernant les conséquences pour les entreprises et pour les héritiers de la mort d'un associé. Le régime en sera détaillé plus loin.[113]

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[111] Arts. 26 et 27, Résolution n° 35 du Conseil national de justice réglementant la loi n° 11.441 du 4 janvier 2007.

[112] A propos, v. I. Aguilar Vieira et G. Vieira da Costa Cerqueira, « L'influence du Code de commerce français au Brésil (Quelques remarques sur la commémoration du bicentenaire du Code français de 1807) », RIDC, 2007-1, p. 27–78 ; C. Lima Marques, « Das neue brasilianische Zivilgesetzbuch vom 2002 : Bemerkung zum neuen Unternehmensrecht und der Quellendialog mit dem Verbraucherschutzbuch von 1990 », *in* E. Jayme et Ch. Schindler (dir.), *Portugiesisch – Weltsprache des Rechts,* Aachen : Shaker, 2004, p. 127–153 ; A. Jaeger Jr., *Das neue brasilianische Bürgerliche Gesetzbuch und das Unternehmensrecht*, in *Portugiesich – Weltsprache des Rechts, op. cit.*, p. 217–235 ; G. Vieira da Costa Cerqueira, « Données fondamentales pour la comparaison en droit privé français et brésilien », *in* M. Storck, G. Cerqueira, T. Morais da Costa (dir.), *Les frontières entre liberté et interventionnisme en droit français et en droit brésilien– Études de droit comparé*, Paris : L'Harmattan, 2010, p. 67–149 ; du même auteur, « Le droit privé brésilien : structure, principes cardinaux et voies juridictionnelles d'application », *loc. cit.*, spéc. p. 307 *sq* ; A. Wald, « Le droit de l'entreprise au XXI[e] et le Code civil brésilien », *loc. cit.*, p. 249–273. Pour une vision générale du nouveau Code, v. A. Wald, « Le droit brésilien et le Code civil de 2002 », *in* A. Wald (dir.), *Code Civil brésilien, op. cit.*, p. 15–28 ; et Cl. Witz, « Regards d'un juriste européen sur le nouveau Code civil brésilien », *in Code Civil brésilien, op. cit.,* p. 29–45.

[113] V. *infra*, n° 4.

2.5.2 La succession des entreprises consacrées à des activités spécifiques

En droit brésilien, il n'existe pas des règles spéciales sur la succession des entreprises consacrées à des activités spécifiques, comme l'agriculture ou l'artisanat, bien que la législation leur reconnaisse certaines spécificités. Lorsque l'entreprise rurale ou artisanale prend la forme sociétaire, la succession des parts sociales ou des actions obéit aux dispositions du droit des sociétés et du droit des successions. Une étude récente montre, par ailleurs, que l'adoption d'une forme sociétaire facilite l'organisation de la succession des entreprises rurales.[114] L'avantage de l'organisation de l'entreprise rurale ou artisanale au sein d'une société est d'autant plus intéressant que le Code civil détermine qu'il soit assuré un traitement plus favorable, différencié et simplifié à l'entrepreneur agricole et au petit entrepreneur, en ce qui concerne le registre et ses effets (art. 970 Civ.). L'entreprise rurale pourra prendre la forme d'une société simple (art. 982 Civ.) ou d'une société entrepreneuriale (art. 984 Civ.), étant alors entièrement soumise, dans les deux cas, au régime sociétaire de la forme choisie.

Nonobstant la soumission de la succession de l'entreprise rurale ou artisanale au droit commun, il existe dans le « Statut de la terre » (loi n° 4504 du 30 novembre 1964) une disposition relative au partage de parcelles rurales qui peut constituer une restriction au droit garanti à tout héritier de demander le partage de la succession, conformément à l'art. 2013 Civ. En effet, l'art. 65 de ce Statut détermine que l'immeuble rural n'est pas divisible en parcelles de taille inférieure au « module de la propriété rurale », celui-ci étant conçu comme l'immeuble rural directement exploité par l'agriculteur et sa famille dans le but d'assurer leur subsistance et le développement social et économique, dont la taille maximale est définie par un organe foncier fédéral – l'INCRA – en fonction de chaque région du pays et du type d'exploitation (art. 4, I et II du Statut de la terre). Dès lors, en cas de succession à cause de mort concernant un immeuble rural, celui-ci ne pourra pas être divisé en parcelles inférieures au « module de la propriété rurale » (art. 65, § 1er du Statut de la terre). De plus, il est interdit aux héritiers et légataires d'immeubles ruraux de les diviser, après le partage, en parcelles de taille inférieure au dit module (art. 65, § 2 du Statut de la terre). Si l'immeuble hérité correspond à une taille inférieure au module de référence, il sera conservé en indivision en cas de pluralité d'héritiers et de légataires. Lorsque l'un des héritiers ou légataires décide d'exploiter l'immeuble mis en indivision, l'INCRA peut lui accorder un financement pour « indemniser » les copropriétaires (art. 65, § 2 du Statut de la terre). Le Statut de la terre détermine cependant que l'interdiction de fractionner l'immeuble rural en parcelles inférieures au module de la propriété rurale ne s'applique pas lorsque les immeubles de taille inférieure au module de référence intègrent les programmes officiels de soutien à l'activité agricole familial et dont les bénéficiaires sont des agriculteurs qui ne possèdent aucun autre immeuble, rural ou en ville (art. 65, § 5 du Statut de la terre).

[114] N. de B. Alcântara, *O processo de sucessão no controle de empresas rurais brasileiras – Um estudo multicasos*, Dissertação, Universidade de São Paulo, 2010, 112p., spéc. p. 85.

Ce cadre juridique devrait demeurer inchangé pour les années à venir, car il n'existe pas aujourd'hui une politique législative tournée vers l'établissement de règles spéciales visant à la succession des entreprises consacrées à des activités spécifiques, comme l'agriculture ou l'artisanat.

Font également défaut une discussion scientifique et des propositions de la part de la doctrine sur le sujet. Les travaux se limitent à souligner la nécessité pour les entreprises familiales de ces secteurs de préparer leurs successions – tant d'un point de vue de la propriété que de la gestion – en s'y prenant à l'avance, afin d'assurer leur pérennité et leur réussite dans les générations futures.

3 Incapacité juridique de l'associé

3.1 Régime légal

3.1.1 L'exercice des droits de l'associé incapable

Ceux qui, à cause d'une infirmité ou d'un trouble mental, n'ont pas le discernement nécessaire à la pratique des actes de la vie civile sont considérés comme *absolument incapables* (art. 3, II Civ.). Si la personne est retardée en raison d'un développement mental incomplet, elle est considérée comme incapable *relativement* à certains actes ou à la manière de les exercer (art. 4, III Civ.). Dans le premier cas, la personne est représentée, dans le second, assistée.

En cas d'une incapacité permanente amenant un associé à être relativement près du décès, les droits de l'associé peuvent être exercés par un représentant.[115] Cela se déduit de deux dispositions clefs du Code civil.

La première, relative à la capacité d'une personne pour exercer l'activité typique d'entrepreneur, établit que l'incapable pourra, moyennant un représentant (ou dûment assisté en cas d'incapacité relative), continuer à exercer, dans l'entreprise, les mêmes fonctions qu'il exerçait auparavant, lorsqu'il avait la capacité civile pleine, ou qui étaient exercées par ses parents ou par le *de cujus* (art. 974, *caput* Civ.).

La seconde règle concerne directement la personne de l'associé. Selon le § 3 de l'art. 974 Civ., le Registre des sociétés *doit* enregistrer les statuts d'une société – ou leurs modifications – impliquant un associé incapable, lorsque trois conditions sont remplies : l'associé incapable n'exerce pas l'administration de la société, il se présente dûment représenté (assisté en cas d'incapacité relative) et le capital social se trouve entièrement libéré.

Aussi, l'exercice des droits sociaux des personnes frappées d'incapacité permanente peuvent être assurés par un curateur – indiqué par la loi ou nommée par le juge, selon le cas – conformément au régime de la curatelle prévu aux articles 1767 à 1783 Civ., et à laquelle s'appliquent subsidiairement les dispositions régissant la tutelle (arts. 1728 à 1766 Civ.).

[115] Celui-ci peut être désigné par la loi ou par l'intéressé avant l'évènement l'ayant rendu incapable (art. 115 Civ.).

3.1.2 La protection de l'associé incapable

Le Code civil possède des règles de protection de l'incapable représenté. Tout d'abord, la manifestation de volonté du représentant ne produit des effets relativement au représenté que dans les limites des pouvoirs qui lui ont été conférés (art. 116, Civ.). Ensuite, sauf permission de la loi ou du représenté, l'acte juridique que le représentant conclut avec lui-même, dans son propre intérêt ou pour le compte d'un tiers, est annulable (art. 117, *caput* Civ.). A cet égard, est considéré comme conclu par le représentant l'acte juridique réalisé par celui à qui les pouvoirs ont été délégués (art. 117, par. unique Civ.). Aussi, le représentant doit prouver aux personnes avec qui il traite au nom du représenté sa qualité et la portée de ses pouvoirs, sous peine, s'il ne le fait pas, de répondre des actes qui excèdent ses pouvoirs (art. 118 Civ.). En outre, l'acte juridique conclu par le représentant en conflit d'intérêt avec le représenté est annulable[116] si la personne avec qui il a traité avait ou aurait dû en avoir connaissance (art. 119, *caput* Civ.).

D'autres mesures de protection peuvent encore résulter des conditions et des effets de la représentation légale établis par des lois spéciales et par le régime du mandat (arts. 653 à 691 Civ.) applicable à la représentation volontaire.

En revanche, hormis la protection au niveau du registre des sociétés prévue par le § 3 de l'art. 974 Civ., le droit des sociétés ne contient pas de dispositions sur la protection des droits d'associé d'une personne frappée d'une incapacité permanente. La seule règle prévue en la matière consiste à permettre à la majorité des autres associés à demander judiciairement l'exclusion de celui qui est devenu incapable (art. 1030 Civ.). Cette règle régissant la société simple est applicable à nombre d'autres sociétés.[117] Dans la loi n° 6.404 du 15 décembre 1976 sur les sociétés par actions, l'incapacité d'un actionnaire n'est pas un motif ou un droit au retrait ou à l'exclusion.

3.2 Rôle des statuts dans la protection de l'associé incapable

La matière est d'ordre public, de sorte que les statuts ne peuvent pas déroger aux dispositions impératives sur la curatelle et sur la tutelle. Si les statuts règlement la question, les dispositions y afférents doivent être en conformité avec les objectifs et les règles posées par le droit commun. Quoi qu'il en soit, toute règle statutaire visant à rendre difficile, voire impossible l'exercice des droits sociaux des associés frappés d'interdiction en raison de leur incapacité, est considérée comme étant nulle.

[116] Le délai de déchéance pour la demande d'annulation est de cent-quatre-vingts jours à compter de la conclusion de l'acte ou de la cessation de l'incapacité (art. 119, par. unique Civ.).

[117] A savoir : la société en commun, la SARL (art. 1085 Civ.), la société en participation, la société en nom collectif et la société coopérative.

4 Conséquences du décès d'un associé pour la société et pour les héritiers

4.1 Différentiation de formes sociales

Le droit brésilien suit le principe de la typicité légale des formes sociales (art. 983 Civ.).[118] Celles-ci peuvent être ou non dotées de la personnalité morale, être ou non entrepreneuriales, être ou non à responsabilité limitée. Aux fins de ce rapport, il convient d'envisager les sociétés selon la responsabilité des associés : les sociétés à responsabilité illimitée (*partnerships*) et les sociétés à responsabilité limitée (*companies limited*).

En ce qui concerne les sociétés à responsabilité illimitée, certaines sont dépourvues de la personnalité morale : la société en commun (arts. 986 à 990 Civ.) et la société en participation (arts. 991 à 996 Civ.). D'autres sont, en revanche, dotées d'un tel attribut : la société simple (arts. 997 à 1038 Civ.), la société en nom collectif (arts. 1039 à 1444 Civ.) et la société en commandite simple (arts. 1045 à 1051 Civ.).

Les dispositions prévues pour la société simple s'appliquent aux sociétés en nom collectif (art. 1040 Civ.) et, par hypothèse, parce que dépourvues de la personnalité morale, à la société en commun (art. 986 Civ.) et à la société en participation (art. 996 Civ.).

Les sociétés dont la responsabilité des associés est limitée à leurs apports sont de deux types : les sociétés à responsabilité limitée (SARL) et les sociétés par actions. Les SARL sont aujourd'hui régies par le Code civil (art. 1052 à 1087) ; à ces sociétés s'appliquent subsidiairement les règles régissant la société simple (art. 1046) ou, si les statuts le prévoient, les règles régissant la société anonyme (art. 1053 Civ.). Depuis la loi n° 12.441 du 11 juillet 2011, la SARL connaît une variante : l'entreprise individuelle à responsabilité limitée (EIRELI), régie par l'art. 980-A Civ. et subsidiairement par les dispositions régissant la SARL, conformément au § 6 de ce dispositif. Les sociétés par actions sont régies par la loi n° 6.404 du 15 décembre 1976, les dispositions du Code civil s'appliquant dans les cas non prévus dans cette loi (art. 1 989 Civ.). Outre la forme anonyme, ces sociétés aussi prendre la forme d'une société en commandite par actions. Celle-ci est régie par les articles 1090 à 1092 Civ., qui reproduit à l'identique les articles 280 à 284 de la loi n° 6.404 du 15 décembre 1976. Conformément aux articles 1090 Civ. et 280 de cette loi, les dispositions régissant la société anonyme s'appliquent subsidiairement à la société en commandite par actions. Il convient de préciser que le droit brésilien connaît un type de société anonyme unipersonnelle : la société anonyme filiale à 100 %, régie par les articles 251

[118] Art. 983. « *La société entrepreneuriale doit être constituée selon un des types prévus dans les articles 1039 à 1092 ; la société simple peut être constituée selon un de ces types, se subordonnant, les cas échéant, aux règles qui lui sont propres. Paragraphe unique. Exception est faite aux dispositions concernant la société en participation et la société coopérative, de même qu'à celles des lois spéciales qui imposent, pour l'exercice de certaines activités, la constitution selon un type déterminé.* »

à 253 de la loi du 15 décembre 1976. Cette société ne peut être constituée que par une société de droit brésilien, et ce quel qu'en soit le type.

Les sociétés coopératives sont régies par la loi n° 5.764 du 16 décembre 1971, ainsi que par le Code civil (art. 1093 à 1096) ; à ces sociétés s'appliquent subsidiairement les dispositions régissant la société simple, sous réserve de leur compatibilité avec les caractéristiques de la société coopérative (art. 1096 Civ.). Les sociétés coopératives peuvent, quant à elles, être marquées par la responsabilité illimitée ou limitée de ses associés.[119]

Pour le Code civil, la société peut être simple ou entrepreneuriale. Est réputée entrepreneuriale la société dont l'objet est l'exercice de l'activité typique de l'entrepreneur sujet à l'inscription dans le registre des sociétés commerciales du lieu de son siège social (art. 982 Civ.). Est considéré entrepreneur celui qui exerce professionnellement une activité économique organisée pour la production ou la circulation de biens et de services (art. 966). Dès lors, simple sera la société qui n'organise pas professionnellement les facteurs de production pour réaliser son objet social, quand bien même elle ait un but lucratif[120]; indépendamment de la manière dont elles organisent l'exploration de leur objet, les coopératives sont réputées être des sociétés simples (art. 982, par. unique, Civ.).

4.2 Conséquences en cas de mort d'un associé

4.2.1 Conséquences en cas de décès de l'unique propriétaire

Parmi les types de sociétés à responsabilité illimitée, aucun ne peut être l'entreprise d'un seul propriétaire, la pluralité d'associés étant exigée.[121] Toutefois, quelques situations inusitées pourront faire émerger la figure d'un seul associé, de sorte qu'il convient de s'intéresser au sort de la société en cas de décès de ce dernier.

La première situation inusitée concerne l'EIRELI non immatriculée. Dans l'hypothèse où l'associé unique manque à son obligation d'inscrire l'acte constitutif au registre des sociétés, la société sera caractérisée comme société en commun. Dès lors, il est légitime d'estimer que les règles régissant cette dernière s'appliquent. Or, parmi les dispositions régissant la société en commun, aucune ne concerne la mort d'un associé. Il convient alors de se reporter au régime de la société simple, applicable subsidiairement à la société en commun, sauf pour ce qui concerne l'organisation de celle-ci, conformément au renvoi opéré par l'art. 986 Civ. Face au

[119] Selon l'art. 1095 Civ., dans la société coopérative, la responsabilité des associés *peut* être limitée ou illimitée.

[120] Ainsi, F. Ulhoa Coelho, *Manual de Direito Comercial,* 16ª ed., São Paulo : Saraiva, 2005, p. 111–112 ; A. Wald, « Le droit de l'entreprise au XXIe et le Code civil brésilien », *loc. cit.*, p. 249–273.

[121] Cf. Art. 1033, IV Civ. régissant les causes de dissolution de la société simple, de la société en nom collectif, de la société en participation ; et l'art. 1051, II Civ., régissant la dissolution de la société en commandite simple.

décès de l'associé unique d'une EIRELI non immatriculée se pose alors la question de l'application de l'art. 1028 Civ. Selon ce dispositif, en cas de mort d'un associé, sa part sera liquidée, sauf si : le contrat en dispose autrement ; les associés restants choisissent la dissolution de la société ; ou par accord avec les héritiers, il y a le remplacement de l'associé décédé. Le principe est donc de la continuité de l'entreprise, la mort de l'associé n'entraînant pas la dissolution de plein droit de la société. Par ailleurs, cet événement ne figure pas parmi les causes de dissolution de la société simple prévues aux articles 1033 et 1034 du Code civil. Si l'art 1028 Civ. semble inadapté à l'EIRELI – puisqu'il est conçu pour les sociétés ayant une pluralité d'associés et que la mise en œuvre de la solution de principe qu'il consacre (liquidation des parts sociales de l'associé décédé avec continuation de la société) aboutirait à la dissolution de la société unipersonnelle à travers la liquidation de la totalité des parts sociales[122] –, le principe qu'il recèle permet d'affirmer que la mort de l'associé unique n'implique pas la dissolution de la société, sauf si l'acte constitutif en a disposé autrement (art. 1028, I et art. 1035 Civ.).

La seconde situation concerne les sociétés connaissant deux catégories d'associés : la société en commandite simple et la société en participation. En effet, même si ces formes sociales sont marquées par la pluralité d'associés, leur existence *peut* être impactée par la mort d'un associé lorsque celui-ci est *le seul* appartenant à l'une des deux catégories d'associés composant la société en cause. Certes, il serait inapproprié de parler du *seul propriétaire de l'entreprise* en pareille situation, mais celle-ci mérite d'être abordée en raison des conséquences qu'elle engendre.

Pour ce qui concerne la société en commandite simple, son existence *peut* être impactée par la mort d'un associé lorsque celui-ci est l'unique représentant de l'une des deux catégories d'associés composant cette société, à savoir les commandités et les commanditaires (art. 1045 Civ.). En effet, selon l'art. 1051, II Civ., la société est dissoute de plein droit lorsque l'absence de l'une des deux catégories d'associés dépasse quatre-vingts jours. En outre, si le commanditaire unique disparaît, la dissolution pourrait résulter d'une clause contractuelle, puisque selon l'art. 1050 Civ. « *[e]n cas de décès de l'associé commanditaire, de la société, sauf disposition du contrat, continuera avec ses successeurs, qui désigneront leur représentant*. » Le contrat social peut donc disposer que la société sera dissoute en cas de décès de l'associé commanditaire, neutralisant ainsi le jeu de l'art. 1051, II Civ., qui permet, dans le délai qui y est fixé, la régularisation de la pluralité des catégories d'associés. Si l'associé commanditaire était le *seul* de cette catégorie au sein d'une société en commandite simple, le jeu de la clause de dissolution à cause de mort produira le même effet. En revanche, si le décès concerne l'unique associé commandité, une telle clause ne saurait être efficace, puisque le paragraphe unique de l'art. 1051

[122] Malgré le fait que la société unipersonnelle a son capital concentré entre les mains d'une seule personne, il n'est pas interdit de le faire représenter par des parts sociales. En ce sens, par une interprétation *a contrario*, v. le point 1.2.16.1 de l'Instruction normative n° 117, du 22 novembre 2011, de l'ancien DNRC sur le registre de l'EIRELI auprès des Registres du commerce et des sociétés (*Juntas comerciais*). Disponible à l'adresse : http://www.dnrc.gov.br/legislacao/in%20117%202011.pdf, consulté le 12 avril 2014.

exige que les commanditaires nomment un administrateur provisoire pour pratiquer les actes de l'administration pendant la période de quatre-vingts jours prévue au numéro II du même article ; ce n'est que dans l'hypothèse où les commanditaires ne parviennent pas à nommer un nouvel associé commandité que la société sera dissoute de plein droit.

En ce qui concerne la société en participation, aucune disposition similaire aux articles 1050 et 1051, II et par. unique Civ. n'existent, alors que cette société connaît également deux catégories d'associés : les associés apparents et les associés occultes (art. 991 Civ.). Qui plus est, à la société en participation sont applicables subsidiairement les dispositions régissant la société simple. Celle-ci connaît néanmoins une règle proche de l'art. 1051, II Civ. et peut donc être réputée dissoute lorsque la pluralité d'associés n'est pas reconstituée dans un délai de quatre-vingts jours (art. 1033, IV Civ.), sauf si entre-temps elle s'est transformée en une EIRELI (art. 1033, par. unique Civ.). Cependant, l'art. 1033, IV Civ. n'envisage pas la question sous l'angle de chaque catégorie d'associés. Il est donc difficile de le faire jouer dans la situation où la société en participation continue marquée par la pluralité d'associés néanmoins réduite à une seule des catégories nécessaires à sa configuration. Compte tenu du parallélisme des formes, il semble toutefois permis de raisonner par analogie et soutenir que, comme à l'égard des sociétés en commandite simple, l'absence *mortis causa* du *seul* associé appartenant à l'une des catégories de la société en participation doit être régularisée dans quatre-vingts jours sous peine de dissolution de la société. Certes, la mise en œuvre d'une telle exigence n'est pas évidente puisque la société n'est ni soumise au registre des sociétés ni censée d'être connue des tiers. Elle peut néanmoins être significative à l'égard des associés survivants puisqu'entre eux la société existe bel et bien et, à leur égard, produit bien des effets. Par ailleurs, la mort du *seul* associé appartenant à l'une des catégories de la société en participation peut donner lieu à la dissolution de la société en raison d'une disposition contractuelle, conformément à l'art. 1035 Civ.[123] Enfin, si après le décès de l'un des associés, la société est réduite à un seul associé, celui-ci peut aussi décider, dans le délai de quatre-vingts jours suivant le décès de son associé, de transformer la société en participation en une EIRELI (art. 1033, par. unique Civ.) et faire ainsi subsister l'entreprise.

4.2.2 Conséquences de la mort d'un associé d'une société à responsabilité illimitée

Solution de principe. Avant le Code civil de 2002, tant le Code civil de 1916 (art. 1399, IV) que le Code de commerce de 1850 (art. 335, IV) prévoyaient la dissolution des sociétés en cas de mort d'un associé, sauf si le contrat social en disposait autrement. Ces règles ne s'appliquaient pas aux sociétés par actions, ni aux sociétés

[123] Selon ce dispositif régissant la dissolution de la société simple, le contrat social peut prévoir d'autres causes de dissolution, qui doivent être néanmoins vérifiées judiciairement lorsqu'elles sont contestées.

coopératives, alors régies par des lois spéciales. Le principe était la dissolution, la survie de la société en cas de décès d'un associé ayant été conditionnée à la volonté contraire des fondateurs expressément manifestée dans le contrat social.

Le nouveau Code civil a inversé le principe, comme il est possible de déduire des dispositions régissant la société simple et la société en commandite simple, les seuls types de société à responsabilité illimitée ayant fait l'objet des dispositions régissant expressément la question des conséquences du décès d'un associé pour la société.

Sociétés simples et celles régies subsidiairement par ses dispositions. Les statuts peuvent prévoir qu'en cas de décès d'un associé la société continuera avec les héritiers de l'associé défunt ou avec les seuls associés survivants ou encore avec d'autres bénéficiaires que les héritiers ; les statuts peuvent également stipuler que le conjoint, l'héritier, l'ascendant ou le descendant ne deviendra associé qu'après avoir été agréé, ou encore que la société sera dissoute. La liberté statutaire résultante des articles 1028 et 1035 Civ. est donc pleine sur cette question.

Si la société se voit réduite à un seul associé et décide de continuer sans les héritiers ou d'autres associés, elle peut en outre se transformer en une EIRELI dans les cent quatre-vingts jours suivant au décès de l'associé (art. 1033 Civ.).

Société en commandite simple. La dissolution de la société à cause de mort d'un associé commanditaire ne peut avoir lieu qu'en raison d'une clause contractuelle la stipulant (art. 1050 Civ.). Lorsque la mort d'un associé réduit à néant l'une des catégories d'associées composant la société en commandite simple, les associés ont quatre-vingts jours pour régulariser la situation et rétablir l'existence d'associé(s) dans la catégorie momentanément déficitaire, sous peine de dissolution de plein droit (art. 1051, II Civ.).

4.2.3 Conséquences de la mort d'un associé d'une société à responsabilité limitée

Les sociétés à responsabilité limitée de droit brésilien obéissent à un même principe : la continuité de la société en cas de mort d'un associé, sauf disposition contraire des statuts. Nonobstant leur soumission à cette même règle de principe, des spécificités propres à chaque type existent.

Société coopérative. Ni les dispositions du Code civil ni celles de la loi n° 5.764 du 16 décembre 1971 n'apportent une réponse claire sur les conséquences pour la société de la mort d'un associé. Il faut alors se reporter au régime de la société simple, applicable subsidiairement aux sociétés coopératives, conformément à l'art. 1096 Civ.

SARL. Les dispositions du Code civil sont également silencieuses sur la question. Il convient alors de se reporter aux régimes ayant vocation à s'appliquer subsidiairement à ce type de société, à savoir celui de la société simple (art. 1053, *caput* Civ.), ou celui des SA, si les statuts le prévoient (art. 1053, par. unique Civ.). Il résulte aussi bien de l'un que de l'autre de ces régimes qu'en cas de décès d'un associé la société continue, sauf si les statuts ou les associés survivants en décident autrement en assemblée (articles 1028, I et II et art. 1035, pour la société simple ; art. 206, I, *b* et *c* de la loi n° 6.404 du 15 décembre 1976, pour les sociétés par actions).

EIRELI. La mort de l'associé unique n'est pas non plus une cause de dissolution de la société, sauf si le contrat social en dispose autrement (art. 1035 Civ.). Bien que le texte soit silencieux quant aux modalités de mise en œuvre de cette solution en cas de pluralité d'héritiers, deux situations semblent pouvoir être envisagées. S'ils deviennent tous associés du fait du partage, une transformation doit être opérée : l'EIRELI devient une SARL ou une autre forme de société pluripersonnelle. A l'inverse, si les héritiers décident de conserver la part en indivision et de nommer un administrateur, la forme unipersonnelle peut demeurer. En effet, la mise en indivision de la part unique n'a pas pour conséquence de multiplier le nombre d'associés et donc de changer la nature de l'EIRELI. Il en va par ailleurs de même s'agissant de l'indivision précédant le partage. En outre, si l'associé unique établit, par testament, qu'après sa mort l'entreprise sera transmise à un seul des héritiers, la forme unipersonnelle persiste également.

Sociétés par actions. La continuité est la règle, la dissolution de la société en raison du décès d'un associé ne pouvant résulter que d'une clause statutaire (art. 206, I, *b* de la loi n° 6.404 du 15 décembre 1976) ou d'une délibération de l'assemblée générale extraordinaire statuant à la majorité qualifiée (art. 206, I, *c* de la loi du 15 décembre 1976). L'hypothèse reste néanmoins d'école, notamment pour les sociétés cotées.

La société anonyme unipersonnelle quant à elle ne peut être affectée qu'indirectement par la mort d'un associé de la société mère.

4.3 Destination des parts sociales en cas de mort d'un associé

4.3.1 Destination des parts d'une société à responsabilité illimitée

Dans le cas où la société subsiste après la mort d'un associé, les parts sociales appartenant à ce dernier suivent divers sorts.

Sociétés simples et celles régies subsidiairement par ses dispositions. Dans ces sociétés, les parts sociales de l'associé décédé seront liquidées en faveur de la succession. Le procédé d'évaluation et les modalités de paiement sont établis par les statuts ou communément décidés entre les parties. A défaut de telles dispositions ou d'accord, le régime indiqué à l'art. 1031 Civ. s'applique : la part sera alors liquidée selon la situation patrimoniale de la société au jour de la résolution, vérifiée moyennant un bilan spécialement dressé[124] ; elle sera payée en argent, dans un délai de quatre-vingt-dix jours, à compter de la liquidation. Les héritiers quant à eux

[124] A ce propos, v. R. O. B. Mendes, « Apuração de Haveres na Retirada do Sócio e Fundo de Comércio (Aviamento) », F. L. Yarshell, G. Setoguti J. Pereira. (Org.), *Processo Societário*, São Paulo : Quartier Latin, 2012, p. 647–666; en matière de successions : R. N. Prado et R. Vilela, « Falecimento de cotista da sociedade limitada : dissolução parcial como regra geral e as alternativas via cláusulas contratuais de planejamento sucessório – Boas práticas de governança corporativa », *in* F. Ulhoa Coelho et M. Andrade Feres (coord.), *Empresa Familiar – Estudos Jurídicos*, São Paulo : Saraiva, 2013, p. 425–444.

demeurent responsables des obligations sociales antérieures, dans les deux ans après l'inscription de la résolution de la société par rapport à l'associé décédé (art. 1032 Civ.).

Si le contrat social prévoit l'entrée des héritiers dans la société (art. 1028, I Civ.) ou si en l'absence d'une telle prévision, les associés survivants donnent leur accord au remplacement de l'associé décédé par les héritiers (art. 1028, III Civ.), les associés adoptent les modifications statutaires nécessaires pour y intégrer les nouveaux associés (art. 1033 Civ.).[125] Ces modifications sont ensuite apportées au registre compétent, s'il s'agit de sociétés personnifiées. Il convient de préciser que, à l'égard de la société en participation, la succession ne portera pas sur les « parts sociales », mais sur les droits découlant du contrat.[126]

Sociétés en commandite simple. Dans ces sociétés, il y a lieu de distinguer selon il s'agit de la succession d'un associé commanditaire ou d'un associé commandité. Dans le premier cas, les héritiers acquièrent la qualité d'associé, sauf si le contrat social dispose autrement (art. 1050 Civ.). Les héritiers sont alors sommés par la loi d'indiquer celui qui le représentera en assumant la condition d'associé commanditaire. En revanche, s'il s'agit de la succession d'un associé commandité, les héritiers n'acquièrent pas la qualité d'associé, sauf si le contrat social stipule autrement.[127] Selon la doctrine, cette différence de traitement des héritiers en fonction de la catégorie de l'associé auquel ils succèdent tient à la double nature de la société en commandite simple : elle est une « société de personnes » entre les commandités – d'où l'exigence de la prévision contractuelle admettant leur entrée dans la société –, alors qu'elle se présente comme une « société de capital » entre les commanditaires – d'où l'exigence de la prévision contractuelle pour interdire leur entrée dans la société.[128] Un auteur souligne cependant que, dans le cadre de la succession des commanditaires, si les associés commanditaires survivants ne peuvent s'opposer à ce que la société continue avec les successeurs de l'associé commanditaire décédé, ils peuvent s'opposer à la désignation de la personne choisie pour représenter les

[125] Art. 1003. « *La cession total ou partielle d'une part de la société, sans la modification correspondante du contrat social avec le consentement des autres associés, ne sera opposable à ceux-ci et à la société.* »

[126] Cf. l'art 994 Civ. : « *La contribution de l'associé occulte avec celle de l'associé apparent, un patrimoine spécial, qui est l'objet du compte de participation relatif aux affaires sociales.* »

[127] F. Ulhoa Coelho, *Manual de Direito Comercial, op. cit.*, p. 149. L'auteur fonde cette solution sur l'art. 1028, I, Civ., sans néanmoins indiquer à quel titre ce dispositif régissant la société simple s'applique à la société en commandite simple, alors que celle-ci doit être régie subsidiairement par les règles gouvernant la société en nom collectif, conformément à l'art. 1046 *caput* Civ. L'explication à la solution prônée par F. Ulhoa Coelho se trouverait peut-être dans le renvoi au régime de la société simple qu'opère, à son tour, l'art. 1040 Civ. applicable à la société en nom : « *[l]a société en nom collectif suit les règles de [la société en nom collectif], et, en cas d'omission de celui-ci, celles de [la société simple].* » La solution inscrite à l'art. 1028, I, Civ. étant compatible avec le caractère *intuitu personae* des rapports entre commanditées, comme l'exige l'art. 1046, *caput* Civ., elle semble pouvoir être ici retenue.

[128] F. Ulhoa Coelho, *Manual de Direito Comercial, op. cit.*, p. 150.

héritiers en raison de l'*affectio societatis* qui les unit.[129] La question de la représentation des héritiers de l'associé commanditaire décédé constituant une nouveauté introduite par le nouveau Code civil de 2002 dans le régime de ces sociétés, il n'existe pas encore une opinion de la jurisprudence du STJ sur le fonctionnement de ce mécanisme.

Lorsque l'héritier, quelle qu'en soit la catégorie, acquière la qualité d'associé, il est nécessaire de modifier le contrat social afin d'y indiquer la nouvelle composition sociétaire et la catégorie à laquelle appartient le nouvel entrant, conformément l'exigence du paragraphe unique de l'art. 1045 Civ.[130] Cette modification ne produit d'effets vis-à-vis des tiers qu'après l'inscription de cette modification il y a lieu de distinguer selon il s'agit de la succession d'un associé commanditaire ou d'un associé commandité (solution par analogie à l'art. 1048 Civ.[131]). Pendant la procédure d'inventaire, l'administration des droits sociaux de l'associé commanditaire est assurée, en cas de pluralité de successeurs, par le représentant qu'ils ont désigné (art 1050 Civ.).

Sociétés coopératives. Un régime particulier leur a été réservé par le Code civil. Selon l'art. 1094, est coopérative la société caractérisée par « *l'incessibilité des parts du capital à des tiers étrangers à la société, même par voie de succession* ». Sur cet aspect, le Code a innové puisque l'art. 4, IV de la loi n° 5.764 du 16 décembre 1971 ne prévoit l'incessibilité des parts sociales qu'aux seuls tiers étrangers à la société, ignorant la cession par voie de succession. Face à cette interdiction d'ordre public, les parts sociales de l'associé décédé seront liquidées en faveur de la succession. Reste néanmoins ouverte la question de savoir si une telle interdiction joue lorsque l'héritier de l'associé de la coopérative est, lui aussi, associé de la même coopérative au moment du décès dudit associé.

4.3.2 Destination des parts d'une société à responsabilité limitée

La destination des parts sociales ou des actions d'une société à responsabilité limitée varie selon le type de société.

*SARL. L*e régime est ici assez particulier en raison de la combinaison d'un régime propre, mais lacunaire, de cession des parts avec des régimes subsidiaires, néanmoins applicables en amont, relatifs aux conséquences, pour la société, de la mort d'un associé. Il convient de vérifier, avec précision, comment cela se présente.

La transmission des parts sociales par voie de succession est soumise à l'art. 1057 Civ. relatif à la cession des parts d'une SARL.[132] Selon cet article, les conditions

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[129] R. Fiuza, *Novo Código Civil Comentado*, R. Fiuza (coord.), 2ª ed., São Paulo : Saraiva, 2004, p. 967.

[130] Art. 1045, par. unique. « *Le contrat doit désigner les commandités et les commanditaires.* »

[131] Art. 1048. « *La diminution de la part du commanditaire, en vertu de la réduction du capital social, ne produit d'effets vis-à-vis des tiers qu'après l'inscription de cette modification du contrat, toujours sans préjudice des créanciers préexistants.* »

[132] R. Fiuza, *Novo Código Civil Comentado*, *op. cit.*, p. 975.

et modalités de cession des parts entre vifs ou de leur transmission à cause de mort sont prévues dans les statuts. Sur cet aspect, il y a une convergence parfaite avec le principe posé à l'art. 1028 Civ. sur les conséquences, pour la société – et pour les parts sociales concernées – de la mort d'un des associés. Ainsi, les statuts peuvent établir que la société continuera avec un ou plusieurs des héritiers, ce qui emporte l'attribution immédiate à leur profit des parts sociales. Dans ce cas, les parts attribuées aux héritiers sont exclues de l'indivision successorale sans attendre le partage définitif. Si la valeur des parts sociales au jour du décès excède leurs droits successoraux, la différence doit être rapportée à la succession. Les attributaires sont alors redevables d'une soulte. L'*intuitu personae* qui marque la SARL peut également conduire les statuts à conditionner, voire à empêcher aux héritiers d'acquérir, par voie successorale, la qualité d'associé. Dans l'hypothèse où la société continue sans les héritiers, seul le droit patrimonial relatif aux parts de l'associé décédé leur est, de plein droit, transmis.[133]

En cas de silence des statuts, l'art. 1057 Civ. autorise, dans un premier temps, l'associé à céder librement ses parts, totalement ou partiellement, à un autre associé, indépendant de la consultation des autres. Il en résulte qu'en cas de mort d'un associé, ses parts peuvent être librement transmises aux héritiers qui étaient déjà coassociés de l'associé décédé au sein de la SARL. L'art. 1057 Civ. autorise, dans un seconds temps, l'associé à céder ses parts à un tiers pourvu qu'il n'y ait pas d'opposition d'associés représentant plus du quart du capital social. L'agrément sera alors nécessaire si les héritiers sont étrangers au cadre social, la transmission des parts ne se faisant pas lorsqu'au moins ¼ du capital représenté s'y oppose. La solution est ici clairement divergente de celles proposées par l'art. 1028 Civ. Les choses se compliquent néanmoins en cas de non-agrément des héritiers, car l'art. 1057 n'offre aucune réponse. Il faut alors envisager deux situations. Si les statuts de la SARL n'ont pas fait le choix de soumettre subsidiairement la société aux règles régissant la SA, il faut se rabattre sur l'art. 1028 Civ. et procéder à la liquidation des parts, dont la valeur est déterminée par expertise et fixée au jour de la date de l'ouverture de la succession (jour de la résolution de la société par rapport à l'associé décédé).[134] Si, en revanche, les statuts de la SARL ont choisi de soumettre subsidiairement la société aux règles régissant la SA, surgit une impasse car, en renvoyant aux statuts la compétence pour réglementer la procédure d'agrément dans les sociétés non cotées, l'art. 36 de la loi n° 6.404 du 15 décembre 1976 n'offre aucune solution alternative en cas de leur silence sur les conséquences du refus d'agrément, si ce n'est l'interdiction faite aux statuts d'empêcher la négociation des actions.

Quoi qu'il en soit, lorsque les parts sociales d'une SARL sont transmises aux héritiers par voie de succession, les statuts devront être modifiés pour remplacer l'associé décédé par ses héritiers dans la composition du capital social. La modification statutaire suit les règles régissant la SARL (art. 1071 et s. Civ.). La transmission des parts ne sera opposable à la société et aux tiers, y compris pour les fins du

[133] O. Gomes, *Questões mais recentes de direito privado: pareceres*, São Paulo : Saraiva, 1987, p. 354.

[134] STJ, REsp 1352461/DF, 3e Ch., aff. jugée le 21 mars 2013, *DJe* 14/05/2013.

paragraphe unique de l'art. 1003 Civ.,[135] qu'à partir de l'inscription des modifications statutaires auprès du registre des sociétés (art. 1057 Civ.).[136] Il convient de rappeler que, tant que le partage ne se réalise pas (pendant la procédure d'inventaire donc), l'administration des droits sociaux est exercée par l'administrateur de la succession (art. 1056, § 1er Civ.).

EIRELI. En ce qui concerne l'EIRELI, la solution de principe est inverse à celle de la SARL soumise au régime supplétif de la société simple : étant donné que, sauf clause statutaire contraire, la société subsiste à la mort de l'associé unique et que l'*intuitu personae* n'est pas un élément caractéristique de la société unipersonnelle, il est permis de conclure que les parts se transmettent aux héritiers, qui peuvent devenir associés.[137]

En présence d'un seul héritier, les parts seront adjugées par ce dernier – par acte notarié ou par décision de justice –, qui modifiera l'acte constitutif de la société et procédera à l'enregistrement de ces modifications auprès du registre des sociétés de l'Etat fédéré dans lequel la société a son siège social, ou auprès du registre civil de personnes morales, si elle n'exerce pas une activité entrepreneuriale. Si la société n'est pas administrée par une autre personne au moment du décès de l'associé unique, elle le sera par l'héritier unique pendant la période comprise entre l'ouverture de la succession et l'adjudication des parts de la société.

En présence de plusieurs héritiers, la société sera administrée conformément aux règles exposées plus haut. Si, lors du partage, la propriété de la société est attribuée à un seul héritier, il suffira pour celui-ci de promouvoir la modification de l'acte constitutif auprès du registre compétent et de poursuivre l'activité. Si, en revanche, elle doit être partagée entre plusieurs héritiers, deux solutions se présentent : soit ils la mettent en indivision et nomment un administrateur, ce qui peut paraître contradictoire avec la nature de cette société ; soit ils décident de la transformer en une société à pluralité d'associés, en choisissant le type leur convenant le plus. Dans l'un et dans l'autre cas, il faudra modifier l'acte constitutif puis enregistrer les modifications auprès du registre compétent.

Si malgré la pluralité d'héritiers, la société a fait l'objet d'un legs, le légataire en sera le seul propriétaire et procédera à la modification de l'acte constitutif et à l'enregistrement de ces modifications auprès du registre compétent.

Il convient néanmoins de noter que cette forme sociale est toute nouvelle en droit brésilien et que, de ce fait, il n'existe à ce jour aucune jurisprudence des tribunaux supérieurs confirmant cette solution.

Sociétés par actions. Pour ces sociétés, le principe est la libre transmission des actions, de sorte que les héritiers ont vocation à en devenir actionnaires par voie de succession. Pourtant, si la nature de la SA néglige l'*intuitu personae*, des clauses

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[135] Art. 1003. Par. unique : « *Pendant les deux ans qui suivent l'inscription de la modification du contrat social, le cédant répond solidairement avec le cessionnaire, vis-à-vis de la société et des tiers, des obligations qu'il avait comme associé.* »

[136] R. Fiuza, *Novo Código Civil Comentado*, *op. cit.*, p. 975.

[137] Sur les conséquences de ce transfert de parts sociales sur la nature de la société, v. *supra* n° 4.2.3.

de filtrage peuvent conditionner l'entrée des nouveaux arrivants. Lorsque la société n'est pas cotée, le jeu d'une clause d'agrément est admis par l'art. 36 de la loi 6.404 du 15 décembre 1976. La transmission des actions nominatives[138] d'un actionnaire décédé à ses héritiers peut alors être conditionnée à l'accord préalable des actionnaires survivant, selon la procédure d'agrément établie par les statuts. Dans le cas où l'agreement leur est refusé, les héritiers conservent le droit patrimonial sur les actions de l'actionnaire décédé et peuvent demander leur rachat.[139] Faisant exception au principe de la libre cessibilité des actions, les clauses d'agrément s'interprètent strictement.[140] Dès lors, il est possible d'affirmer que faute de stipulation explicite, la clause est inapplicable au cas de changement de contrôle à l'échelon d'une société actionnaire d'une autre dont les statuts prescrivent l'agrément. Cette solution est particulièrement importante dans le cadre d'une organisation de la succession par l'intermédiaire d'une société *holding*.

L'art. 31, § 2 de loi du 15 décembre 1976 détermine que la transmission des actions nominatives en vertu d'une succession légitime ou d'un legs ne peut se faire que moyennant la retranscription dudit transfert dans le « registre des actions nominatives » au vu d'un document habile à le prouver – le « formal de partilha », la « carta de adjudicação » ou l'acte notarié, selon le cas –, qui sera conservé dans l'entreprise. La formalité est importante car selon le *caput* de cet article, les titres sont *présumés* appartenir au titulaire du compte. Par conséquent, en l'absence d'inscription en compte, le prétendu actionnaire ne bénéficie pas de cette présomption.[141] Mais toujours est-il qu'il conserve la possibilité de prouver sa qualité d'actionnaire par les moyens du droit commun.[142] Comme pour les autres types de société, pendant la procédure d'inventaire, l'administration des droits sociaux est assurée par la personne en charge de procéder à l'inventaire (arts. 1991 Civ. et 618, II NCPC). La transmission des actions n'a pas à être publiée au registre des sociétés.

Sociétés coopératives. Quant aux sociétés coopératives à responsabilité limitée (art. 1095, §1er Civ.), le régime est le même que celui décrit plus haut à propos des

[138] Depuis 1990, les actions aux porteurs sont interdites en droit brésilien (cf. l'art. 20 de la loi n° 6.404 du 15 décembre 1976 dans la rédaction issue de la loi n° 8.021 du 12 avril 1990).

[139] M. Carvalhosa, *Comentários à Lei das Sociedades Anônimas,* 3e ed., São Paulo : Saraiva, 2000, p. 269.

[140] *Ibid.*

[141] Cette solution s'applique également aux « ações escriturais », qui sont des actions nominatives dont les registres sont conservés auprès d'une institution financière autorisée par les Commission des valeurs mobilières (articles 34 et 35 de la loi n° 6.404 du 15 décembre 1976).

[142] F. Martins, *Comentários à Lei das Sociedades Anônimas*, 4ª ed. (revista et atualizada por R. Papini), Rio de Janeiro : Forense, 2010, n° 122 à 124. Par ailleurs, dans le cadre d'une société familiale, il est possible qu'aucun registre des titres ne soit tenu. Lors du décès d'un ascendant commun, un conflit s'installe entre les descendants sur un ensemble d'actions, les uns prétendant que ces actions faisaient partie de l'indivision successorale, un autre soutenant que ces actions lui appartenaient en nom propre à la suite d'une vente par le défunt à son profit. Ce dernier peut alors se voir reconnaître sa prétention malgré l'absence d'inscription en compte au motif notamment qu'il avait exercé les droits attachés auxdites actions, dont la perception des dividendes correspondants (exemple tiré du droit français : Cass. com., 5 mai 2009, *Rev. soc.*, p. 580, note Dubertre).

sociétés coopératives à responsabilité illimitée : ne pouvant être transférées par voie de succession aux héritiers, les parts sociales seront liquidées en leur faveur (art. 1094, IV Civ.).

4.4 Apports de l'autonomie de la volonté

L'associé peut éviter que les parts sociales soient partagées entre les héritiers en les attribuant, de son vivant, à un seul d'entre eux, soit par testament-partage (art. 2014), soit par une donation-partage (art. 2018). Dans le premier cas, aucun accord de la part des héritiers n'est exigé quant à l'attribution des parts sociales ou des actions, seul le respect de la réserve étant exigé. Dans le second cas, l'accord exprès de tous les héritiers réservataires est essentiel pour que le partage de son vivant soit efficace.[143] Cette exigence étant d'ordre public, le donateur ne peut pas y déroger. Par ces deux techniques, l'associé peut également attribuer ses participations dans différentes sociétés à chacun des héritiers, de sorte qu'à chacun d'eux soient individuellement transmis les titres d'une société déterminée.

Par donation également, mais sans pour autant réaliser un partage de son vivant, l'associé peut concentrer l'intégralité de ses parts sociales entre les mains d'un seul futur héritier sans néanmoins l'exposer à l'obligation de retour au moment de l'inventaire. Pour cela, il suffit d'indiquer dans l'acte que la libéralité provient de la quotité disponible de la succession (art. 2005 Civ.), car autrement la donation sera présumée comme une avance sur leur partie (réservée) de l'héritage (art. 544 Civ.).[144] La dispense du rapport des parts sociales et des actions ainsi transmises ne sera cependant efficace que si la donation ne dépasse pas la quotité disponible, en considérant la valeur totale de celle-ci au moment de la donation (art. 2005 et 2006 Civ.)

De façon plus drastique, l'associé peut, avec le concours de ses coassociés, établir dans les statuts de la société (non cotée) une clause d'agrément permettant d'empêcher l'entrée future de tout héritier. Cependant, quand bien même les statuts des sociétés empreintes d'*intuitu personae* peuvent établir que la société continuera avec les héritiers d'un associé décédé et désigner le successeur d'un gérant, ils ne peuvent pas jouer un rôle d'instrument de partage de la succession. Il s'agit d'un instrument inadéquat pour y parvenir.

Enfin, à travers la constitution d'une société *holding*, il est également possible d'éviter la dispersion, entre les héritiers, des parts sociales détenues par l'associé décédé dans d'autres sociétés. La technique permet la concentration des droits sociaux entre les mains d'une seule personne, la société holding, tout en laissant la

[143] STJ, REsp 6528/RJ, 3e Ch., aff. jugée le 11 juin 1991, *DJ* 12/08/1991, p. 10553 ; REsp 730.483/MG, 3e Ch., aff. jugée le 3 mais 2005, *DJ* 20/06/2005, p. 287, précité. En ce sens également, A. Wald, « O regime jurídico da partilha em vida », *RT* vol. 622 (1987), p. 7–15, n° 42 et bibliographie et jurisprudence citées par l'auteur.

[144] STJ, REsp 730.483/MG, 3e Ch., aff. jugée le 3 mai 2005, *DJ* 20/06/2005, p. 287.

liberté à l'associé de diviser équitablement les parts de la *holding* entre ses héritiers ou d'en avantager certains, pourvu que la réserve légale soit respectée.

4.5 Exercice des droits de l'associé après son décès

En droit brésilien, le patrimoine héréditaire est mis en indivision au moment de la mort du *de cujus.* Indivisible jusqu'au partage, le droit des cohéritiers se trouve alors régi par les règles de la copropriété (art. 1791 Civ.).

C'est donc à partir de règles de l'indivision qu'il convient d'envisager l'exercice des droits sociaux composant le patrimoine du *de cujus* pendant la procédure d'inventaire et/ou, le cas échéant, de liquidation des parts sociales ou des actions éventuellement non transférées aux héritiers. Par ailleurs, selon les règles concernant la copropriété, le testateur peut établir l'indivision totale ou partielle de son héritage pour une période non supérieure à cinq ans (art. 1320, § 2 Civ.). Cette règle peut concerner les parts sociales qui, selon le régime applicable, ont vocation à être transférées aux héritiers.

Quoi qu'il en soit, l'art. 1056, §1er Civ. détermine qu'en cas de copropriété des parts d'une SARL, les droits qui lui sont inhérents ne peuvent être exercés que par le *copropriétaire représentant* ou par l'*administrateur de la succession* de l'associé décédé. La dernière partie de ce dispositif reprend la règle générale relative à l'administration de la succession pendant la période d'inventaire inscrite à l'art. 1991 Civ. Selon ce dernier, l'administration de la succession sera exercée par la personne chargée de procéder à l'inventaire. Par conséquent, c'est l'administrateur de la succession qui exercera, pendant la période de l'inventaire, les droits sociaux de l'associé décédé. La solution est également valable dans d'autres types de société, notamment quand il s'agit de la succession de l'associé commanditaire d'une société en commandite simple, la règle de l'art. 1050 Civ. disposant expressément que, lorsque la société continue avec eux, les successeurs de l'associé commanditaire désignent leur représentant.

Si les parts sociales ou les actions demeurent en régime d'indivision après l'inventaire, le *copropriétaire représentant* sera choisi par la majorité des copropriétaires, celle-ci étant calculée selon la valeur des quotes-parts (arts. 1323 et 1325*, caput* Civ.) ; lorsqu'il n'est pas possible d'atteindre la majorité absolue, le juge décidera, sur requête de tout copropriétaire, après avoir entendu les autres (art. 1325, § 2 Civ.). L'art. 1324 Civ. établit, enfin, que le copropriétaire qui administre l'indivision sans opposition des autres est présumé *représentant commun* ; cette règle ne devrait pourtant pas jouer dans le cadre de l'administration de parts sociales et d'actions mises en indivision compte tenu de l'« informalité » qu'elle présuppose et des exigences formelles requises en droit des sociétés pour l'exercice des droits sociaux.

5 Testaments

5.1 Ampleur de la liberté de tester[145]

5.1.1 Liberté quant à l'objet

Bien que le droit des sociétés ne possède pas de règles en la matière, une liberté de disposer tant sur les affaires que sur les parts sociales et les actions peut être reconnue au testateur en application du droit commun (art. 1857 et s. Civ.).

Le testament peut ainsi contenir des dispositions de nature non-patrimoniale. Ces dispositions sont valables, y compris lorsque le testament se limite à elles (art. 1857, § 2 Civ.).[146] Rien n'interdit donc au testateur de disposer de manière particulière sur l'entreprise et sur les parts ou sur les actions de la société de sorte à avoir une influence sur la vie d'une entreprise sur le long terme. L'efficacité de ces dispositions sera néanmoins conditionnée à la conformité de leur contenu aux règles et principes régissant le droit des sociétés, voire le droit des obligations. Ainsi, les dispositions testamentaires ne pourront pas porter atteinte aux prérogatives fondamentales d'un associé héritier ou encore aux prérogatives fondamentales des organes de la société. Aussi, l'intérêt social doit primer sur la volonté individuelle de chaque associé, même lorsque celui-ci est majoritaire, de manière que son attachement aux dispositions testamentaires concernant l'entreprise doit être infléchi lorsque celles-ci se montrent contraires à l'intérêt social.

L'art. 1857, § 2 Civ. constitue néanmoins une innovation apportée par le législateur en 2002, faisant encore défaut une jurisprudence des tribunaux supérieurs indiquant l'exacte portée de ce dispositif.

5.1.2 Programmation de la succession pour les générations futures : le fidéicommis

Par la substitution fidéicommissaire *mortis causa*, il est possible de programmer la succession entre les générations. Conformément à l'art. 1951 Civ., le testateur peut en effet indiquer des héritiers ou des colégataires fiduciaires, dont le droit à la part ou au legs sera résolu lors de leur mort, ou d'un terme déterminé ou de la réalisation d'une certaine condition, au bénéfice d'autrui, dénommé le fidéicommissaire. Le

[145] V. *supra*, n° 2.2.

[146] Voici quelques exemples : disposition, à titre gratuit, sur son propre corps à des fins scientifiques ou altruistes (art. 14 Civ.) ; orientations sur les funérailles (art. 1881 Civ.); reconnaissance de filiation (art. 1609, III Civ.) ; nomination d'un tuteur des enfants mineurs (art. 1634, VI et 1729, par. unique Civ.) ; révocation d'un testament antérieur (1969 Civ.) ; nomination de l'exécuteur testamentaire (1976 Civ.).

fiduciaire a ainsi la propriété limitée – dans le temps ou en raison d'une condition particulière – du lot ou du legs (art. 1953 Civ.).[147]

La substitution fidéicommissaire n'est cependant permise qu'au bénéfice de personnes non-conçues au moment de la mort du testateur (art. 1952 Civ.), peu importe s'ils sont leurs descendants ou pas.[148] Si, cependant, au moment de l'ouverture de la succession, l'héritier ou légataire fidéicommissaire est déjà né, il acquerra la nue-propriété des biens du fidéicommis, le droit du fiduciaire devenant usufruit (art. 1952, par. unique Civ.). La doctrine souligne que cette solution ne joue pas si le testateur décide de revenir sur sa décision initiale en modifiant le testament sur ce point puisque, à la différence de la constitution du fidéicommis par donation *inter vivos* suivie d'une acceptation par le donataire fiduciaire,[149] la substitution fidéicommissaire *mortis causa* est révocable à tout moment du vivant du testateur (art. 1969 et s. Civ.).[150]

Dans la pratique antérieure au Code civil de 2002, la substitution fidéicommissaire pouvait même jouer en sens inverse, le testateur étant libre d'instituer son fils comme fidéicommissaire et ses petits-enfants comme fiduciaires[151] ; au regard de l'encadrement posé par l'actuel art. 1952 Civ. et de la finalité du mécanisme, il n'est pas sûr qu'elle serait aujourd'hui admise par les tribunaux.[152] En effet, compte tenu de l'exigence de l'art. 1952, *caput* Civ., il semble impossible pour le testateur d'indiquer les personnes non-conçues au moment de sa mort comme fiduciaires et celles déjà existantes comme fidéicommissaires : il manquera, au moment de la mort, le maillon fondamental de la chaîne, ce qui empêche techniquement la substitution fidéicommissaire. En outre, en admettant l'utilisation du mécanisme en faveur des fidéicommissaires déjà nés au moment de la mort du testateur, le

[147] Le fiduciaire est alors obligé de faire l'inventaire des biens grevés, et de rendre caution de leur restitution lorsque le fidéicommissaire l'exige.

[148] G. Tepedino et A. Schreiber, « Succession et contrat : rapport brésilien », *loc. cit.*, p. 278.

[149] La constitution du fidéicommis par donation *inter vivos* se trouve aujourd'hui limitée par l'interdiction de la clause de réversion, en cas de mort du donataire, au profit d'un tiers prévue au paragraphe unique de l'art. 547 Civ., de sorte que la substitution fidéicommissaire ne pourra jamais avoir lieu en raison de la mort du donataire fiduciaire. Autrement dit, la constitution du fidéicommis par donation *inter vivos* sera valable tant que la condition ou le terme prévu n'est pas lié à la mort du donataire fiduciaire. Sous l'égide du Code civil de 1916, le fidéicommis par donation *inter vivos* n'était pas soumis à une telle limitation, étant donné que la règle du paragraphe unique de l'art. 547 est une innovation du législateur de 2002.

[150] M. R. Carvalho de Faria, *Direito das Sucessões*, 7ª ed., Rio de Janeiro : Forense, 2013, p. 190–191.

[151] Pour un exemple : STJ, REsp 820.814/SP, 3e Ch., aff. jugée le 9 octobre 2007, *DJ* 25/10/2007, p. 168. Cette décision rendue après l'entrée en vigueur du Code civil de 2002 concerne néanmoins des faits régis par les dispositions de l'ancien Code civil de 1916.

[152] Dans l'arrêt cité à la note précédente, alors même que la validité de clause testamentaire relative à la substitution fidéicommissaire « inverse » n'était pas en cause, le rapporteur de la décision a émis des critiques à la manière dont le mécanisme avait été utilisé au regard de sa finalité : la sauvegarde des enfants futurs et la protection des intérêts patrimoniaux de la famille. Par conséquent, le rapporteur a estimé que la substitution fidéicommissaire ne devrait pas être utilisée en inversant l'ordre successoral.

paragraphe unique de l'art. 1952 Civ. rend la substitution en sens inverse sans objet (vide de sens), puisque le fidéicommissaire en devient immédiatement propriétaire des biens du fidéicommis.

La rédaction de l'art. 1952 a suscité une question en doctrine : n'ayant prévu que les situations concernant les fidéicommissaires « non-conçus » (*caput*) ou « déjà nées » (par. unique), que se passe-t-il lorsque ce dernier a été « conçu » mais n'est pas encore né au moment de l'ouverture de la succession ? Le *nasciturus* est-il exclu du fidéicommis, lequel toutefois subsiste à l'égard des personnes encore « non-conçues » au moment de la mort du testateur, ou bénéficie-t-il de la règle du par. unique de l'art. 1952 Civ. ? Pour un auteur, il convient de suivre la seconde alternative et d'appliquer la solution du paragraphe unique de l'art. 1952 Civ. afin de respecter la volonté réelle du testateur : celle de prendre en considération par le mécanisme de la substitution fidéicommissaire l'enfant qui va naître.[153] Cette interprétation est en effet conforme à ce qui dispose l'art. 1899 Civ. : « *[l]orsque la clause testamentaire donne lieu à des interprétations différentes, celle qui assure le mieux l'observance de la volonté du testateur* ».

La liberté de programmation de la succession pour les générations futures est néanmoins limitée par la loi. En effet, par la substitution fidéicommissaire, seules la « première génération » (1er degré = le fiduciaire) et la « seconde génération » (2nd degré = le fidéicommissaire) peuvent être valablement désignées. Au-delà, le fidéicommis est considéré comme nul (art. 1959 Civ.).

La nullité prévue à l'art. 1959 a un impact direct sur la validité des clauses de sécurisation du patrimoine, comme celles grevant d'inaliénabilité les biens fidéicommis. En effet, si ces clauses peuvent jouer sans les restrictions de l'art. 1848 Civ., puisque le fidéicommis n'est institué que sur la partie disponible de l'héritage,[154] elles ne sauraient imposer des restrictions à la propriété du fidéicommissaire car cela reviendrait à instituer un fidéicommis de 3e degré, ce qui est interdit. Ainsi, toute clause d'inaliénabilité grevant les biens fidéicommis après son transfert au fidéicommissaire serait nulle par la loi (art. 1959 Civ.). Pour la doctrine, dans une telle hypothèse, la nullité de la clause ne concernerait que les restrictions à la propriété imposées au fidéicommissaire, subsistant celles relatives au fiduciaire.[155]

Complètent ce régime les règles de la substitution en cas de renonciation. Sauf disposition contraire du testateur, si le fiduciaire renonce à la part ou au legs, le fidéicommissaire a le pouvoir de l'accepter (art. 1954 Civ.). La liberté testamentaire permet ainsi au testateur d'instituer d'autres fiduciaires en cas de refus du premier indiqué au lieu de, par son silence, ouvrir au fidéicommissaire le droit d'accepter, immédiatement au refus du fiduciaire, la part ou le legs qui lui reviendrait ultérieurement. Dans cette hypothèse, deux régimes de substitution se combinent : la

[153] M. R. Carvalho de Faria, *Direito das Sucessões*, *op. cit.*, p. 190.

[154] *Ibid.*, p. 191.

[155] *Ibid.*

substitution fidéicommissaire et la substitution dite « vulgaire ».[156] Le fidéicommissaire majeur peut aussi renoncer à la part ou au legs. Dans ce cas, le fidéicommis devient caduc, la propriété du fiduciaire n'étant plus résoluble, sauf disposition contraire du testateur (art. 1955 Civ.). En revanche, si le fidéicommissaire accepte la part ou le legs, il a droit à la part accrue par le fiduciaire à tout moment (art. 1956 Civ.). Enfin, le fidéicommis devient caduc si le fidéicommissaire meurt avant le fiduciaire, ou avant l'avènement de la condition résolutoire des droits de ce dernier. Dans ces cas, la propriété sera attribuée définitivement au fiduciaire, selon la règle de l'art. 1955 Civ.

L'un des plus importants avantages du fidéicommis est d'ordre fiscal. A deux reprises le STJ a décidé que, dans le silence de la loi, la transmission des biens fidéicommis du fiduciaire au fidéicommissaire est exemptée d'impôt de transmission à cause de mort car ce dernier a été recueilli lors de l'institution du fidéicommis.[157]

5.1.3 Nomination d'un autre héritier en cas de renonciation du successeur testamentaire original

Il est possible de nommer un autre héritier en cas de renonciation – qui est un acte irrévocable (art. 1812 Civ.) – du successeur testamentaire original. Il s'agit de la substitution dite « vulgaire »[158] par rapport à la substitution fidéicommissaire, disciplinée séparément dans le Code civil en raison de ses spécificités. La renonciation donnant lieu à la substitution « vulgaire » ne se confond pas avec la renonciation du fiduciaire ou du fidéicommissaire dans le cadre de la substitution fidéicommissaire, même si le testateur *peut* se servir de la substitution « vulgaire » en cas de refus par le fiduciaire ou du fidéicommissaire à sa part ou à son legs (art. 1954 et 1955 Civ. respectivement).

Les dispositions régissant la substitution concernent à la fois l'héritier testamentaire – celui à qui est transmise une part idéale du patrimoine faisant l'objet du testament – et le légataire – celui à qui est dévolu un bien déterminé et certain.[159]

Selon l'art. 1947 Civ., le testateur peut prévoir le remplacement d'un héritier indiqué en cas de refus ou d'impossibilité d'acceptation de la part ou du legs. Le remplacement est présumé être stipulé pour les deux hypothèses, même si le testateur n'en a indiqué qu'une.

Par ailleurs, le remplacement peut se faire d'une personne par plusieurs, ou le contraire. De plus, il peut être réciproque ou non (art. 1948 Civ.). Il est encore à

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[156] *Ibid*., p. 188.

[157] STJ, REsp 1004707/RJ, 1re Ch., aff. jugée le 27 mai 2008, *DJe* 23/06/2008; STJ, REsp 606.133/RJ, 1re Ch., aff. jugée le 08 mars 2005, *DJ* 11/04/2005, p. 183.

[158] H. F. C. de Mello, *Comentários ao Código Civil Brasileiro*, vol. 17 : do direito das sucessões/H. F. C. de Mello, M. I. do Prado, P. S. Gagliano, coordenadores : Arruda Alvim e Thereza Alvim, Rio de Janeiro : Forense, 2008, p. 182 ; M. R. Carvalho de Faria, *Direito das Sucessões*, *op. cit.*, p. 188.

[159] *Ibid*., p. 5.

noter que le remplaçant est soumis à la charge stipulée pour la personne remplacée, sauf disposition contraire du testateur, ou si une autre solution découle de la nature de la condition ou de la charge prévue (art. 1949 Civ.).

Complète ce régime la règle selon laquelle, dans l'hypothèse où il y aurait plusieurs cohéritiers ou légataires de parts inégales, s'il y a remplacement réciproque, la proportion des parts prévues dans la première disposition est présumée maintenue pour la seconde. Lorsqu'une nouvelle personne est appelée à remplacer conjointement avec celles nommées antérieurement, la part vacante sera attribuée en parts égales aux remplaçants (art. 1950 Civ.).

Il convient enfin de préciser que la substitution prévaut sur le droit des héritiers et des légataires de voir leurs parts accrues, de sorte qu'en présence d'un remplaçant les cohéritiers testamentaires ou les colégataires n'ont pas le droit d'accroître leur part ou leur legs en raison d'une impossibilité ou du refus de l'un d'entre eux (art. 1941 à 1943 Civ.). Ainsi, en cas de doute, la substitution prévaut, en cas de silence du testateur, non.[160]

5.2 D'autres formes d'actes de manifestation des dernières volontés

5.2.1 Le codicille

Outre le testament, le droit brésilien offre aux personnes ayant la capacité de tester la possibilité d'établir un codicille. Il s'agit d'un acte écrit sous seing privé, daté et signé par lequel son auteur prend des *dispositions spéciales* pour son enterrement, pour des aumônes de *valeur réduite* destinées à des personnes déterminées, ou en général, pour les pauvres d'un lieu déterminé, de même que faire des legs portant sur son mobilier, ses vêtements et ses bijoux d'usage personnel et de *valeur réduite* (art. 1881 Civ.). Par cet acte, il est également possible de nommer ou de remplacer les exécuteurs testamentaires (art. 1883 Civ.).

Il peut être réalisé que son auteur ait laissé ou non un testament, sous réserve du droit des tiers (art. 1882 Civ.). Les codicilles peuvent être révoqués par d'autres actes de même nature et sont réputés révoqués lorsqu'il y a un testament ultérieur, de n'importe quelle espèce, si celui-ci ne les confirme ou ne les modifie pas (art. 1884 Civ.).

Dans l'interprétation de l'expression « valeur réduite » des aumônes ou des biens disposés par codicille, la jurisprudence montre une tendance à considérer que cette valeur ne doit pas dépasser les 10 % de la valeur totale de la succession.[161]

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[160] *Ibid.*, p. 181.

[161] TJRS, AgI. 70018393660, aff. jugée le 9 mai 2007, citée par E. de Oliveira Leite, *Direito Civil Aplicado*, *op. cit.*, p. 191.

5.2.2 Le transfert de société *mortis causa* par voie contractuelle – quelle possibilité ?

Le contrat n'est pas un instrument adéquat pour opérer un transfert de société à cause de mort. Le legs d'une société ne peut être établi que par voie testamentaire, sachant que le codicille n'est en aucun cas un instrument adéquat pour instituer un tel legs compte tenu des restrictions liées à la valeur des biens qu'il est possible de transférer par cet acte.

La seule possibilité d'utiliser le contrat pour réaliser une telle opération successorale concerne le partage du vivant du disposant, ce qui implique d'opérer un transfert de propriété *avant* le décès. En effet, de son vivant, le propriétaire d'une société peut la transférer, à titre successoral, soit par une *donation simple* – hypothèse où le transfert constitue une *avance de part réservée* (art. 544 Civ.) –soit à travers une *donation-partage* (art. 2018 Civ.) – hypothèse où le donateur réalise *un partage* de son vivant.[162] Dans l'un et dans l'autre cas, la réserve héréditaire doit être respectée.

6 Droit à une réserve héréditaire

6.1 La réserve héréditaire

6.1.1 Une réserve fondée sur une part idéale du patrimoine

Si le droit brésilien attribue 50 % des biens de la succession à la réserve successorale (art. 1846 Civ.). Celle-ci ne correspond pas à une valeur nominale précise. Par ailleurs, la loi ne réserve aucun bien ou aucune somme à aucun individu en particulier, la liberté de disposer quant à leur destination étant absolue, tant qu'en termes quantitatifs et qualitatifs la réserve héréditaire soit respectée. Ainsi, les différents héritiers nécessaires ont droit à une part idéale des biens réservés, même lorsqu'ils sont en concours entre eux, sachant que cette part change selon les catégories d'héritiers qui concurrent. Les règles régissant le partage confortent cette opinion.[163]

Il convient toutefois de noter que la date et la forme d'acquisition des biens laissés par le *de cujus* peuvent influencer directement la succession des réservataires en raison de l'importance accordée au régime matrimonial (art. 1829, I Civ.). De plus, lorsque la succession concerne la compagne ou le compagnon survivant, la loi précise bien que leur participation ne se fait qu'à l'égard des biens acquis onéreusement pendant l'union stable. Or, cela peut conduire effectivement à bloquer certains de ces biens, empêchant ainsi au testateur d'en disposer librement. Il s'agit donc d'infléchissement à la solution de principe.

[162] V. *infra*, n° 7.

[163] V. *infra*, n° 6.2.1.

6.1.2 Une réserve distribuée égalitairement sauf en cas concurrence

Le principe d'égalité des héritiers légitimes conduit à ce qu'il n'y ait pas un pourcentage minimum attribué aux individus ayant droit à la réserve héréditaire, sauf dans une situation bien précise concernant le conjoint survivant. En effet, lorsque le conjoint survivant est en concurrence avec les descendants (art. 1829, I Civ.),[164] il a droit à une part égale à celle des descendants succédant par tête ; *mais sa part ne saurait être inférieure au quart de la succession*, lorsqu'il est l'ascendant des héritiers avec qui il est en concours (art. 1832 Civ.).

Sans établir un véritable pourcentage minimum, la loi détermine, dans d'autres situations de concurrence dans l'ordre successoral, la fraction à laquelle aura droit le conjoint survivant. Ainsi, lorsqu'il est en concours avec des ascendants au premier degré, le conjoint a droit au *tiers de la succession*, mais il aura droit à la *moitié* s'il n'y a qu'un ascendant ou si le degré est plus éloigné (art. 1837 Civ.). Cela veut dire que la part du conjoint ne saurait être inférieure au tiers de la succession, lorsqu'il concoure avec des ascendants du *de cujus*.

Pour ce qui est de la succession légitime dans un sens large, il convient de préciser que la compagne ou le compagnon survivant aura droit, en ce qui concerne *les biens acquis onéreusement pendant l'union stable*, à la *moitié* de ce qui a été attribué à chacun des descendants issus seulement du *de cujus* lorsqu'elle/il est en concours avec eux (art. 1790, II Civ.) ; en concours avec d'autres parents successibles, elle/il aura droit au *tiers*, cette fois-ci, de la totalité de succession (art. 1790, III Civ.), venant à hériter la *totalité* de la succession lorsqu'il n'y a pas de parents successibles.

Par ailleurs, les mécanismes de la fente et de la représentation modifient le schéma normal de la dévolution successorale selon les ordres et les degrés.

Lorsqu'il y a des ascendants survivants n'appartenant pas au premier degré, le mécanisme de la fente fait que la famille du défunt devienne divisée en deux lignes, la famille paternelle et la famille maternelle ; la moitié de la succession va alors aux parents paternels, l'autre aux parents maternels. En d'autres termes, si la personne décédé laisse, par exemple, un grand-père paternel et ses deux grand-mères, chacune des grands-parents de la branche paternelle aura droit à la moitié de la part de la grand-mère de la branche maternelle (art. 1836 § 2 Civ.). Dans une logique similaire, lorsqu'il y a de la fratrie survivante, la fratrie unilatérale aura droit à la moitié de la part de la fratrie bilatérale (art. 1841 Civ.).

En cas de représentation dans la ligne descendante, le partage des biens a lieu dans un nombre de parts correspondant au nombre de descendants vivants ou représentés (art. 1835 Civ.). C'est ainsi, par exemple, que chacun des deux enfants d'un enfant prédécédé du *de cujus* aura droit à la moitié de la part d'un autre enfant du *de cujus* qui est vivant lors du décès de son père. La même logique s'applique à la représentation dans la ligne collatérale (art. 1840) – chacun des deux enfants d'une sœur prédécédée du *de cujus* aura droit à la moitié de la part d'une autre sœur du *de cujus* qui est vivante lors du décès de son frère ; et la moitié de la moitié si la

[164] V. *supra*, 2.3.

sœur prédécédée était unilatérale alors que la sœur survivante était bilatérale (art. 1.843, § 2 Civ.).

Il convient enfin de noter que les pourcentages ci-dessus visés restent les mêmes quel que soit le type de bien dans la succession.

6.1.3 Mécanismes de protection de la réserve héréditaire et du droit des réservataires

Le Code civil offre quatre mécanismes de protection de la réserve héréditaire et du droit des réservataires. Il convient de présenter, dans cet ordre, chacun de ces mécanismes.

Le recel de biens. Conformément à l'art. 1992, il y a recel des biens de la succession lorsque l'héritier ne les indique pas dans la procédure d'inventaire. Plusieurs conséquences en découlent pour le receleur. Lorsque les biens se trouvent en son pouvoir, le receleur perd le droit qui lui revenait sur ces biens. Il en va de même lorsqu'il connaissait le recel des biens en possession d'autrui, s'il les omet du rapport auquel ces biens sont soumis, ou s'il ne les restitue pas (art. 1992). Cette sanction permet d'accroître les parts des cohéritiers réservataires, le cas échéant. De plus, l'art. 1995 détermine que lorsque les biens recelés ne sont pas restitués car le receleur ne les a plus en son pouvoir, celui-ci doit payer la valeur des biens qu'il a cachés, plus des dommages et intérêts. Cette sanction permet de préserver la valeur originale de la réserve, s'il le recel n'avait pas existé.

L'obligation de rapport. En rapport direct avec la discipline du recel, l'obligation du rapport a pour objectif d'égaler, dans la proportion établie par la loi, la réserve des descendants et du conjoint survivant (art. 2003). Dès lors, conformément à l'art. 2002, les descendants concourant à la succession d'un ascendant commun sont obligés d'indiquer la valeur des donations reçues du décédé lorsqu'il était en vie, sous peine de recel. Selon une lecture combinée de l'art. 544[165] avec l'art. 2003 du Code civil, les donations effectuées au profit du conjoint doivent également être rapportées à la succession, lorsqu'il est en concours avec les descendants (art. 1829, I et 1832), nonobstant le silence de l'art. 2002 sur ce point.[166] Aussi, les petits-enfants succédant à leurs grands-parents par représentation sont obligés de rapporter à la succession les biens que leurs parents auraient été obligés de restituer, même s'ils ne les ont pas hérités (art. 2009). Celui qui renonce à la succession ou en est exclue doit, lui aussi, vérifier les donations reçues, afin de restituer ce qui excède la quotité disponible (art. 2008). Le retour oblige également les donataires qui, lors de l'ouverture de la succession, ne possédaient plus les biens donnés. Il s'en suit que, lorsque, après le calcul des valeurs des donations faites en avancement de la réserve, il n'y a pas dans l'ensemble du patrimoine du décédé des biens suffisants pour

[165] Art. 544. « *La donation des ascendants à des descendants, ou* ***d'un conjoint à l'autre****, constitue une avance sur leur partie de l'héritage* » (Cela a été souligné par nous).

[166] C. R. Gonçalves, *Direito Civil Brasileiro, op. cit.*, p. 506 ; O. Gomes, *Sucessões*, *op. cit.*, n° 235 ; E. de Oliveira Leite, *Direito Civil Aplicado*, *op. cit.*, p. 315.

égaler les réserves des descendants et du conjoint, les biens donnés seront conférés en nature, ou, s'ils n'appartiennent plus au donataire, selon sa valeur au moment de la libéralité. Tout ceci sous réserve de ce qui dispose l'art. 2005 Civ.[167]

Lorsqu'il est constaté que le donateur a disposé d'une valeur supérieure à celle dont il pouvait disposer, les donations sont alors réduites, conformément aux dispositions de l'art. 2007 et, subsidiairement, à celles applicables à la réduction des dispositions testamentaires (arts. 1966 à 1968 Civ.). L'excès est déterminé en fonction de la valeur que les biens donnés avaient au moment de la donation (art. 2007, § 1er) ; la réduction implique la restitution de l'excès constaté à l'ensemble du patrimoine du décédé ; elle se fait en nature, ou lorsque le bien n'est plus en pouvoir du donataire, en argent, selon la valeur du bien au moment de l'ouverture de la succession (art. 2007, § 2). La réduction s'étend à la partie de la donation faite à des héritiers réservataires excédant leur part de la succession, accrue de la quotité disponible (art. 2007, § 3). Lorsque plusieurs donations ont été faites à des héritiers réservataires, à des dates différentes, elles seront réduites à partir de la plus récente, jusqu'à l'élimination de l'excès (art. 2007, § 4). Le Code ne précise cependant pas l'ordre de réductions lorsque les donations sont faites le même jour et dépassent la quotité disponible.

Il convient également de souligner que, si l'excès est vérifié vis-à-vis d'une succession anticipée, la réduction ne s'opère pas dans le cadre d'une éventuelle procédure d'inventaire, mais dans le cadre d'une action en réduction contre une atteinte à la réserve. Cette action est exercée par l'un des réservataires.

La garantie des parts de la succession. Selon l'art. 2024 Civ., les cohéritiers sont réciproquement obligés de s'indemniser les uns aux autres en cas d'éviction des biens attribués par le partage. Cette obligation mutuelle cesse par accord contraire entre les cohéritiers, ainsi qu'en cas d'éviction du fait de l'évincé, ou d'un fait postérieur au partage (art. 2025 Civ.). La garantie consiste pour l'évincé d'être indemnisé par les cohéritiers dans la proportion des parts de la succession revenant à chacun d'eux ; en cas d'insolvabilité de l'un, les autres seront tenus responsables, dans la même proportion, de la différence entre la part de l'insolvable et celle qu'il devrait payer à l'évincé (art. 2026 Civ.).

La vente judiciaire. Lorsque les biens ne peuvent être ni divisés commodément, ni être inclus dans la moitié du conjoint survivant ou dans la part d'un seul héritier, l'art. 2019 Civ. ordonne qu'ils fassent l'objet d'une vente judiciaire, dont la somme obtenue sera partagée, à moins qu'il n'y ait un accord pour l'adjuger à tous les héritiers. Si le conjoint survivant ou l'un des plusieurs héritiers demandent l'adjudication du bien, l'adjudicataire remet aux autres, en argent, la différence, après une estimation fixée ; si l'adjudication est requise par deux ou plusieurs héritiers, une procédure de licitation sera réalisée et celui qui l'aura emportée remettra aux autres la différence en argent.

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[167] Art. 2005 (*caput*) : « *Les donations indiquées pas le donateur comme provenant de la quotité disponible de la succession sont dispensées du retour, pourvu qu'elles ne la dépassent pas, en considérant la valeur totale de celle-là au moment de la donation.* »

Au-delà de ces mécanismes légaux, la jurisprudence sanctionne la fraude pour rétablir la réserve héréditaire et assurer l'égalité du partage de lots entre les héritiers réservataires. Ainsi, le STJ a sanctionné la vente, par l'un des héritiers, des biens composant la masse successorale sans l'accord préalable de tous les héritiers et l'homologation du juge, qui sont les moyens de contrôle de la légalité de l'aliénation des biens avant le partage, nécessaires pour éviter toute fraude aux héritiers et aux créanciers.[168] Ce même Tribunal a confirmé les décisions des juges du fond ayant sanctionné les coassociés survivants d'avoir frauduleusement opéré, quelques jours avant le décès d'un associé, une modification des statuts par laquelle ce dernier leur cédait l'intégralité de ses parts sociales, alors même que les statuts prévoyaient la continuité de la société avec les héritiers.[169]

6.2 La réserve héréditaire et la succession des parts sociales

6.2.1 Les personnes légitimes pour influencer la distribution des parts sociales composant la réserve

L'identification de ces personnes réclame de prendre en compte différents scénarios.

Dans le cadre d'une donation-partage, le donateur doit discuter avec les héritiers réservataires de la distribution de ses droits sociaux. Cette phase de discussion préalable à la conclusion de l'acte de donation concrétisant le partage est nécessaire pour recueillir l'accord de tous les réservataires, sans lequel le partage de son vivant ne sera pas valable.[170] Dans cette phase, tous peuvent influencer sur la manière dont les parts sociales et les actions seront distribuées, les circonstances et les caractéristiques de chaque famille étant alors des éléments déterminants.

En revanche, si le partage est défini par un testament-partage (art. 2014 Civ.),[171] il revient pratiquement au seul testateur d'arbitrer la distribution de ses droits sociaux. Ce partage volontaire prévaudra, pourvu que la valeur des biens corresponde aux parts établies.

Si le partage n'est pas défini en vie, il revient aux héritiers capables de le réaliser à l'amiable (art. 2015 Civ.), en observant la plus grande égalité possible en ce qui concerne leur valeur, leur nature et leur qualité (art. 2017 Civ.). Ici encore, la distribution des parts sociales de la réserve héréditaire est soumise à des influences pouvant venir de tous les bords. Si les héritiers parviennent à un accord, le partage doit être mis en œuvre par acte notarié, par un acte dans le dossier de l'inventaire, ou par

[168] STJ, REsp 1072511/RS, 4e Ch., aff. jugée le 12 mars 2013, *DJe* 30/04/2013.

[169] STJ, REsp 1352461/DF, 3e Ch., aff. jugée le 21 mars 2013, précité.

[170] V. *infra*, n° 7.1.

[171] Art. 2014. « *Le testateur peut indiquer les biens et les valeurs qui doivent composer les parts de la succession revenant à chacun des héritiers, en délibérant le partage. Ce partage volontaire prévaudra, pourvu que la valeur des biens corresponde aux parts établies.* »

instrument sous seing privé, ces derniers faisant l'objet d'une homologation du juge (art. 2015 Civ.).

Si, toutefois, les héritiers ne se mettent pas d'accord, ou si l'un deux est incapable, le partage devient l'affaire du juge (art. 2016 Civ.) et suit la procédure indiquée aux articles 647 à 656 CPC. Le juge doit veiller à ce que la plus grande égalité possible soit observée en ce qui concerne leur valeur, leur nature et leur qualité (art. 2017). Cette règle de principe peut conduire à deux résultats concernant les parts sociales : soit le juge les distribue également entre les héritiers, soit il les concentre entre les mains d'un seul héritier. Dans le premier cas, il répond à la littéralité de l'art. 2017 qui, selon la doctrine, implique pour les héritiers de recevoir « *part égale en meuble et immeubles, en créances et en actions, en choses certaines et choses dont l'existence est incertaine, partageant également le bon et le mauvais* »[172] ; le juge procède ainsi *ex bono et aequo*, tout en évitant l'indivision.[173] Dans le second cas, le juge enrichit la règle de l'article 2017 Civ. des exigences posées par l'ancien Code de procédure civil de 1939[174] et repris par l'article 648 NCPC, à savoir la *prévention des litiges futurs* et la *commodité des cohéritiers, du conjoint ou du compagnon survivant*. Ces exigences s'appliqueraient parfaitement à la succession des droits sociaux quand, par exemple, l'héritier était déjà associé du défunt. Pour certains, en présence de plusieurs biens composant le patrimoine du défunt, il convient d'attribuer à l'héritier déjà associé du défunt l'intégralité des parts sociales appartenant à ce dernier afin de satisfaire le « *principe de la plus grande commodité des cohéritiers* ».[175]

Enfin, si les parts sociales ne peuvent ni être divisés commodément ni être inclus dans la moitié du conjoint survivant ou dans la part d'un seul héritier, au lieu de le destiner à une catégorie quelconque d'héritiers privilégiés, la loi ordonne qu'il fasse l'objet d'une vente judiciaire, dont la somme obtenue sera partagée, à moins qu'il n'y ait un accord pour l'adjuger à tous les héritiers (art. 2019 Civ.).

6.2.2 La légitimité des associés survivants pour influencer la distribution des parts sociales composant la réserve

Sur ce point, différentes situations peuvent être envisagées. En premier lieu, si les héritiers ne sont pas admis dans la société, les associés survivants n'ont aucune influence sur la manière dont la valeur patrimoniale résultant de la liquidation des parts sociales ou des actions d'une société anonyme fermée sera distribuée lors du partage. En second lieu, si l'entrée des héritiers dans la société est soumise à

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[172] S. Rodrigues, *Direito das Sucessões*, vol. 7, 25ª ed., São Paulo : Saraiva, 2002, p. 298.

[173] O. Gomes, *Sucessões*, *op. cit.*, n° 253.

[174] Art. 505 CPC de 1939. « *Lors du partage seront observées les règles suivantes :*

I – La plus grande égalité possible quant à la valeur, à la nature et à la qualité des biens ;

II – La prévention de litiges futurs ;

III – La plus grande commodité des cohéritiers. »

[175] H. F. C. de Mello, *Comentários ao Código Civil Brasileiro*, *loc. cit.*, p. 182 ; M. R. Carvalho de Faria, *Direito das Sucessões*, *op. cit.*, p. 555.

l'agrément des associés survivants, une *influence indirecte* de ces derniers sur la distribution des parts sociales ou des actions d'une société anonyme fermée peut alors être exercée. Une telle influence peut se manifester à deux moments bien distincts : lors de la rédaction du testament-partage ou, dans le cadre d'une succession *ab intestat* ou avec testament ordinaire, au moment du partage. En effet, lors de la rédaction du testament-partage (art. 2014 Civ.), le testateur qui souhaite, sans modifier les règles de la dévolution légale, y désigner les héritiers des droits sociaux qu'il détient dans les sociétés dont les statuts contiennent une clause d'agrément, doit au préalable s'assurer auprès de ses coassociés de leur agrément futur. Lors de la succession *ab intestat* ou avec testament ordinaire, les héritiers peuvent à leur tour influencer pour que les droits sociaux aillent à l'héritier ayant la plus grande chance d'être agréé. Cela présuppose alors des consultations informelles auprès des associés survivants ; leur influence sur le partage devient alors incontestable. Si, en revanche, les héritiers ne parviennent pas à un accord, le partage sera judiciaire. Dans cette hypothèse, la loi reste silencieuse sur la solution qu'il faudrait retenir en cas de conflit entre le partage réalisé par le juge et le refus postérieur d'agrément du bénéficiaire des droits sociaux.

6.3 Calcul de la réserve héréditaire

En droit brésilien, la réserve se calcule sur la valeur des biens existants au moment de l'ouverture de la succession, avec déduction des dettes et des frais des funérailles, et en ajoutant la valeur des biens qui doivent être rapportés à la succession (art. 1847 Civ.). Si la succession est anticipée par donation-partage, la réserve se calcule sur la valeur des biens existants au moment de la libéralité, avec déduction des dettes, et en ajoutant les donations réalisées antérieurement au partage par le donateur.[176]

L'évaluation des biens de la succession permet le calcul des droits de mutation et le partage entre les héritiers.[177] Les dispositions sur l'évaluation des biens de la succession se trouvent dispersées dans le Code civil et dans le nouveau Code de procédure civile.

Ce dernier établit que la personne chargée de procéder à l'inventaire déclare, dans un premier temps, « la valeur courante de chacun des biens de la succession (art. 620, IV, *h*). Dans cette phase initiale de la procédure dédiée aux premières déclarations, le juge détermine que soit établit le bilan de l'établissement commercial, si le *de cujus* était un entrepreneur individuel (art. 620, § 1er, I), ainsi que la liquidation de parts sociales, s'il était associé d'une société autre qu'une société anonyme (art. 620, § 1er, II). Toujours dans cette phase, le Trésor public est tenu d'informer au juge la valeur des biens immeubles déclarés par la personne en charge de l'inventaire ; cette information se fait selon les éléments constants du registre foncier (art. 629). Ensuite, dans la phase d'évaluation des biens de la

[176] Cf. A. Wald, « O regime jurídico da partilha em vida », *loc. cit.*, n° 30, et la décision du Tribunal de Justice de Minas Gerais citée par cet auteur (TJMG, Ap. n° 141, *RF* 84/673) au n° 54.

[177] C. R. Gonçalves, *Direito Civil Brasileiro, op. cit.*, p. 506.

succession – régie par les articles 630 à 638 –, un expert est nommé par le juge (art. 630); s'il s'agit d'établir le bilan d'un établissement commercial ou de liquider les parts sociales d'une société autre qu'anonyme, le juge nomme un expert-comptable (art. 630, par. unique) – la liquidation des parts sociales se fait alors de manière à préserver la valeur due aux héritiers, celle-ci devant être calculée avec équité en y intégrant les dividendes non distribués à l'associé décédé afin d'éviter l'enrichissement sans cause des associés restants.[178] Dans l'évaluation des titres de la dette publique, des actions et des titres des sociétés cotées dans un marché réglementé, leur valeur correspondra à *leur cotation officielle du jour* (art. 871, III). S'agissant d'un bien immeuble, l'art. 872, paragraphe unique prévoit que l'expert l'évaluera en parts, en suggérant les démembrements possibles, lorsqu'il peut être divisé commodément. De plus, les biens conférés en cas de retour, ainsi que les accessions et améliorations ajoutées par l'héritier donataire, sont calculés par la valeur qu'ils ont au moment de l'ouverture de la succession (art. 639, par. unique). Toutefois, l'évaluation n'aura pas lieu lorsque, tous les héritiers étant capables, le Trésor public manifeste son accord avec les valeurs attribuées aux biens de la succession par la personne en charge de l'inventaire lors de ses premières déclarations (art. 633) ; si les héritiers sont d'accord avec les valeurs déclarées par le Trésor public (biens immeubles), l'évaluation sera limitée aux autres biens (art. 634).

Dans le Code civil, les principales règles en la matière concernent le rapport (obligatoire) des biens transférés en vie par donation. Ainsi, l'art. 2004 établit que la valeur de rapport des biens donnés sera celle qui a été attribuée par l'acte de donation, qu'elle soit déterminée ou estimative.[179] Le paragraphe premier de cet

[178] REsp 282.300/RJ, 3e Ch., aff. jugée le 04 septembre 2001, *DJ* 08/10/2001, p. 212 ; REsp 271.930/SP, 4e Ch., aff. jugée le 19 avril 2001, *DJ* 25/03/2002, p. 290.

[179] Ce dispositif, qui reproduit la même solution auparavant consacrée à l'art. 1972 du Code civil de 1916, est en évidente contradiction avec la solution retenue par le paragraphe unique de l'art. 639 NCPC (ancien art. 1014 CPC de 1973), lequel détermine, pour faire face à l'inflation monétaire et garantir une véritable égalité des parts de la réserve héréditaire, que les biens conférés en cas de retour, ainsi que les accessions et améliorations ajoutées par l'héritier donataire, sont calculés par le valeur qu'il ont au moment de l'*ouverture de la succession*. Alors que les tribunaux supérieurs décidaient que l'avènement du Code de procédure civile en 1973 avait tacitement dérogé l'ancien art. 1972 du Code de 1916 (cf. STF, RE n. 76.454 EDv, Ass. Plén., aff. jugée le 14 sept. 1978, *DJ* 20/10/1978 p. 8205 ; REsp 10.428/SP, 3e Ch., aff. jugée le 09 déc. 1991, *DJ* 17/02/1992, p. 1373), le maintien du même critère par le Code civil de 2002 crée de l'incertitude quant au moment où il conviendra de se placer pour calculer la valeur de la libéralité. Un auteur affirme que les juges du fond penchent vers le critère posé à l'art. 2004 Civ. (E. de Oliveira Leite, *Direito Civil Aplicado*, *op. cit.*, p. 315), alors qu'une partie de la doctrine entend qu'afin d'éviter l'enrichissement sans cause la valeur du rapport sera celle que le bien avait à l'époque de la libéralité (art. 2004, *caput* Civ.) seulement dans l'hypothèse où ce bien n'appartient plus au donataire, le paragraphe unique de l'art. 639 NCPC devant s'appliquer s'il en demeure le propriétaire (l'Enoncé n° 119 approuvé dans les cadre des Journées de droit civil organisées par le Centre d'études judiciaires du Conseil de la Justice Fédérale). Le STJ ne semble pas encore avoir eu l'occasion de trancher la question. Une décision rendue par le STJ en novembre 2003, après donc l'entrée en vigueur du nouveau Code civil le 1er jan. 2003, laisse néanmoins entrevoir la suite : en justifiant l'application de l'art. 1014, paragraphe unique CPC de 1973 à l'espèce, les juges de Haute juridiction font référence au fait qu'il *était en vigueur à l'époque des faits*… (STJ, REsp 595.742/SC, 3e

article précise que si l'acte de donation n'indique pas la valeur précise, et s'il n'y a pas d'estimations faites à l'époque de la donation, les biens seront conférés lors du partage selon la valeur que l'on estime qu'ils avaient au moment de la donation. Le paragraphe second de ce même article détermine que seule la valeur des biens donnés sera incluse dans le retour. Par conséquent, la valeur des améliorations, les revenus et les profits obtenus, ainsi que les dommages et les pertes subis par les biens donnés sont exclus de la valeur des biens conférés. Le Code civil précise aussi que pour faire le calcul de la réserve, la valeur des biens conférés y sera comptée, sans augmenter la quotité disponible (art. 2002, par. unique). Toutefois, les donations indiquées par le donateur comme provenant de la quotité disponible de la succession sont dispensées du retour, pourvu qu'elles ne la dépassent pas, en considérant la valeur totale de celle-là au moment de la donation (art. 2005).[180] Le partage en vie par une donation-partage dispense les biens transférés du retour lors d'un inventaire des biens acquis postérieurement par le *de cujus*.[181]

6.4 Renonciation à la réserve héréditaire

6.4.1 Possibilité de renonciation et conditions

L'héritier n'est pas obligé de recevoir l'héritage.[182] Tout héritier peut ainsi renoncer à la succession (art. 1804 Civ.), y compris les héritiers réservataires à leur part réservée (articles 1808, § 2 et 1810 Civ.). Encore faut-il qu'il soit capable, puisque la renonciation à l'héritage équivaut à un acte de disposition.[183] S'il s'agit d'un héritier incapable, la renonciation par leur représentant légal n'est pas valable puisque si ces derniers ont le pouvoir d'administration, il leur fait défaut le pouvoir de disposer du patrimoine de la personne représentée.[184] L'art. 1691 confirme cette approche, en disposant que les parents – représentants légaux des enfants et responsables de l'administration de leur patrimoine (art. 1690, par. unique Civ.) – ne peuvent ni aliéner ni grever de droits réels les immeubles des enfants, ni engager à leur nom des obligations dépassant les limites de la simple administration, sauf en cas de nécessité ou d'intérêt évident des enfants, par une autorisation préalable du juge. Si le mineur est sous tutelle, l'acceptation à son nom par le tuteur d'héritages, legs ou

Ch., aff. jugée le 6 nov. 2003, *DJ* 01/12/2003, p. 356, précité). Le maintien de la solution ancienne dans le nouveau CPC devait conduire à la suppression du conflit des normes par l'application du principe *lex posterior derogat legi priori.*

[180] Est présumée ressortant de la quotité disponible, la donation faite à un descendant qui, au moment de l'acte, n'aurait pas été appelé à la succession comme héritier nécessaire (art. 2005, paragraphe unique Civ.).

[181] P. Lôbo, *Direito civil – Sucessões*, *op. cit.*, p. 39 ; A. Wald, « O regime jurídico da partilha em vida », *loc. cit.*, n° 55.

[182] C. M. Silva Pereira, *Instituições de direito civil – Direito das Sucessões, op. cit.*, p. 50.

[183] *Ibid.*, p. 51.

[184] *Ibid.*, p. 51.

donations, même soumises à des charges, dépend de l'autorisation du juge (art. 1748 Civ.). Pour la doctrine, la renonciation de l'héritage par le représentant de l'incapable peut néanmoins être autorisée par le juge lorsque la mesure convient au représenté[185] ; en tout état de cause, l'intervention du Ministère public est obligatoire.

Sur la forme, la renonciation doit être expressément mentionnée dans un acte notarié ou dans un acte judiciaire (art. 1806 Civ.).

Les actes de renonciation – tout comme ceux d'acceptation de la succession – sont irrévocables (art. 1812 Civ.). En outre, elle ne saurait être partielle, sous condition ou à terme (art. 1808, *caput*).[186]

6.4.2 Dispositions statutaires concernant la réserve héréditaire et compensation des parts sociales réservées

Lorsque la société continue sans les héritiers de l'associé décédé, ces derniers sont investis, par le droit de saisine, d'un droit patrimonial envers la société. Pour satisfaire à ce droit, la société doit procéder à la liquidation des parts sociales auparavant détenues par l'associé décédé afin de « rembourser » ces héritiers.

En ce qui concerne les sociétés régies par les dispositions applicables à la société simple, il est reconnu aux associés une ample liberté pour déterminer tant la manière dont les parts seront évaluées que celle dont la société s'en acquittera auprès de la masse successorale.

En effet, selon l'art. 1031 Civ. la liquidation des parts de l'associé décédé suit le procédé d'évaluation et les modalités de paiement établis par les statuts ou communément décidés entre les parties. A défaut de telles dispositions ou d'accord, le régime supplétif indiqué à l'art. 1031 Civ. s'applique : la part sera alors liquidée selon la situation patrimoniale de la société au jour de la résolution de la société vis-à-vis de l'associé décédé – c'est-à-dire au jour du décès (art. 605, I NCPC) –, vérifiée moyennant un bilan spécialement dressé. L'article 606 NCPC précise que l'évaluation patrimoniale porte sur les « biens et droits composant l'actif, tangibles et intangibles, conformément à leur prix de vente », tout comme sur le « passif, qui est évalué de la même manière ». La part ainsi liquidée sera payée en argent, dans un délai de quatre-vingt-dix jours, à compter de la liquidation (arts. 1031, § 2 Civ. et 609 NCPC).

Ce régime ne fait que consacrer la solution de principe consacrée à l'art. 668 du Code de procédure civile de 1939, applicable jusqu'au 16 mars 2016 en raison d'un renvoi opéré par l'art. 1218, VII du Code de procédure civile de 1973. Selon cette règle, « *lorsque la mort ou le retrait d'une société n'entraîne pas la dissolution de la société, seules ses parts feront l'objet de liquidation et la valeur calculée sera payée conformément à ce qui a été établi dans le contrat social, ou selon ce qui a été conventionné, ou*

[185] *Ibid.*, p. 52.

[186] Sur ce point, les paragraphes 1er et 2 de l'art. 1808 Civ. précisent que l'héritier à qui on a fait des legs peut les accepter et renoncer à la part lui attribuée, ou accepter la part et renoncer aux legs (§ 1er) ; et que l'héritier qui est appelé à la succession de plusieurs parts, sous des titres successoraux divers, peut décider à son gré les parts qu'il accepte et celles auxquelles il renonce.

encore selon la modalité fixée par une décision de justice. » La liberté statutaire et conventionnelle garantie par l'art. 668 CPC de 1939 – et aujourd'hui réaffirmée par les articles 604, II et 606 NCPC – concerne aussi bien le moyen de paiement que la date à laquelle il doit avoir lieu, son échelonnement étant parfaitement admis.[187]

Fondées sur la force obligatoire des conventions, les dispositions contractuelles en la matière ne voient leur efficacité anéantie que lorsqu'elles s'avèrent contraires aux dispositions d'ordre public et aux principes généraux du droit, à l'instar du principe du non-enrichissement sans cause, dont la caractérisation doit être révélée par la situation particulière de l'espèce.[188]

Il est donc permis d'affirmer que les statuts des sociétés empreintes d'*intuitu personae* peuvent prévoir le remboursement des parts sociales liquidées à la masse successorale – et donc aux héritiers réservataires et légitimes, le cas échéant – par un paiement au comptant ou échelonné, en espèce (argent) ou en nature (un bien particulier ; les actions détenues dans d'autres sociétés, etc.). En revanche, si les statuts ne spécifient pas le moyen de paiement et se limitent à prévoir le paiement échelonné, la jurisprudence considère qu'il ne peut y avoir paiement en nature.[189] Lorsque seul le moyen de paiement est prévu : celui-ci sera dû immédiatement après l'évaluation des parts sociales lorsque celle-ci se fait judiciairement.[190]

Il est également permis de reconnaître aux statuts la liberté de prévoir la constitution d'une réserve visant à satisfaire, en cas de décès d'un associé, le remboursement des droits patrimoniaux aux héritiers à qui la qualité d'associé est refusée. Dans ce cas, la réserve devra être prise en considération pour l'évaluation des parts du défunt, puisque celui-ci a également participé à sa constitution. Une telle solution résulte de la jurisprudence du STJ concernant la liquidation des parts sociales en cas de « dissolution partielle de la société », selon laquelle les réserves conventionnellement constituées – ainsi que le fonds de commerce et les dividendes non distribués à l'associé décédé – intègrent le patrimoine de la société et doivent, à ce titre, être incorporés dans le calcul de la valeur patrimoniale des parts sociales de l'associé exclu ou qui a exercé son droit de retrait.[191]

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[187] STJ, REsp 302.366/SP, 4e Ch., aff. jugée le 5 mai 2007, *DJ* 06/08/2007, p. 492.

[188] V., par exemple : STJ, REsp 1371843/SP, 3e Ch., aff. jugée le 20 mars 2014, *DJe* 26/03/2014 ; REsp 1239754/RS, 4e Ch., aff. jugée le 5 mai 2012 *DJe* 22/05/2012 ; AgRg dans le AREsp 149.330/SP, 3e Ch., aff. jugée le 20 novembre 2012, *DJe* 04/12/2012 ; REsp 453.476/GO, 3e Ch., aff. Jugée le 1er septembre 2005, *DJ* 12/12/2005, p. 369, REsp 450.129/MG, 3e Ch., aff. jugée 08 octobre 2002, *DJ* 16/12/2002, p. 327.

[189] STJ, REsp 302.366/SP, 4e Ch., aff. jugée le 5 mai 2007, *DJ* 06/08/2007, p. 492.

[190] STJ, REsp 138.428/RJ, 4e Ch., aff. jugée le 18 décembre 1997, *DJ* 30/03/1998, p. 74 ; REsp 77.122/PR, 4e Ch., aff. jugée le 13 février 1996, *DJ* 08/04/1996, p. 10475.

[191] STJ, REsp 271.930/SP, 4e Ch., aff. jugée le 19 avril 2001, DJ 25/03/2002, p. 290 ; REsp 77.122/PR, 4e Ch., aff. jugée le 13 février 1996, *DJ* 08/04/1996, p. 10475.

7 Succession anticipée

7.1 Formes de succession anticipée

Si l'héritage d'une personne vivante ne peut pas être l'objet d'un contrat (art. 426 Civ.), il est néanmoins possible pour une personne d'anticiper sa propre succession en faisant un partage de son vivant de son patrimoine, soit par testament, soit par le biais de donations ou d'*un* acte de dernière volonté. A la différence du testament, qui ne produit des effets qu'après la mort du testateur, le transfert du patrimoine *inter vivos* opère le partage avant la mort de l'ascendant.[192]

Le partage opérant un transfert du patrimoine avant le décès est expressément admis par la loi : selon l'art. 2018 Civ., « *[l]e partage fait par un ascendant par acte* inter vivos *ou de ses dernières volontés est valable, pourvu qu'il ne nuise pas la réserve des héritiers nécessaires* ». Mais, mis à part les deux modalités d'actes qu'il énonce et la limite à laquelle ils sont circonscrits, l'art. 2018 Civ. n'indique pas le régime qu'il convient d'appliquer à la succession anticipée. Fait alors défaut un régime qui lui soit spécifique. Il convient alors de se tourner vers les actes énoncés par l'art. 2018 Civ. pour en découvrir le régime.

Lorsqu'il s'agit d'anticiper le règlement de la succession par acte *inter vivos*, c'est au régime des donations auquel fait souvent appel l'ascendant.[193] Il s'agit à la fois d'une donation et d'un partage de ses biens entre ses héritiers présomptifs, la nature juridique de ces deux institutions ne se confondant pas. La *donation* (acte juridique – un contrat unilatéral) n'est qu'un moyen par lequel le partage de son vivant (succession) se réalise.[194] Les donations sont régies par les articles 538 à 564 Civ., dont certains concernent directement la succession.

C'est particulièrement le cas des articles 544 et 549 Civ. Le premier dispose que « *[l]a donation des ascendants à des descendants, ou d'un conjoint à l'autre, constitue une avance sur leur partie de l'héritage* », tandis que le second considère nulle la partie de la donation « *qui excède celle dont le donateur, au moment de la libéralité, pouvait disposer par testament* ».[195] Ces articles confirment l'encadrement posé par l'art. 2018 Civ. : le respect de la réserve des héritiers nécessaires, qui ne saurait être réduite,[196] et la protection de l'égalité des parts entre les descendants et le conjoint survivant.[197]

En tant qu'instrument privilégié d'anticipation de la succession, la donation-partage obéit aux conditions de formes des donations.[198] Elle se fait par acte notarié ou par instrument sous seing privé, conformément à l'art. 541 Civ. Cette exigence

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[192] M. R. Carvalho de Faria *Direito das Sucessões*, *op. cit.*, p. 328.

[193] F. J. Cahali et G. M. F. N. Hironaka, *Direito das sucessões, op. cit.*, p. 483.

[194] En ce sens, A. Wald, « O regime jurídico da partilha em vida », *loc. cit.*, p. 7–15.

[195] STJ, REsp 1.361.983/SC, 3e Ch., aff. jugée le 18 mars 2014, *DJe* 26/03/2014 ; STJ, REsp 86.518/MS, 4e Ch., aff. jugée le 1er sept. 1998, *DJ* 03/11/1998.

[196] En ce sens, A. Wald, « O regime jurídico da partilha em vida », *loc. cit.*, n° 48.

[197] STJ, REsp 1.361.983/SC, 3e Ch., aff. jugée le 18 mars 2014, *DJe* 26/03/2014.

[198] O. Gomes, *Sucessões*, *op. cit.*, n° 255.

formelle est de l'essence de l'acte (articles 104, III et 107 Civ.),[199] étant considérée comme nulle la donation qui ne l'a pas respectée (art. 166 Civ.).[200] L'exception quant à la forme prévue au paragraphe unique de l'art. 541 Civ. – validité des donations verbales ayant pour objet des biens meubles de moindre valeur –, ne devrait jouer que très rarement en matière de succession anticipée. Quoi qu'il en soit, s'agissant d'une donation des droits réels sur des biens immeubles d'une valeur trente fois supérieure au salaire minimum le plus élevé en vigueur dans le pays, l'acte notarié est essentiel à la validité de la donation (art. 108 Civ.).

Pour que l'acte valable en la forme le soit aussi sur le fond, outre le respect de la réserve héréditaire, la donation-partage ne peut réduire le donateur à l'état d'insolvabilité. En effet, selon l'art. 548, « *la donation de tous les biens du donateur sans réserve d'une partie ou d'une rente suffisante pour assurer sa subsistance est nulle.* » Pour échapper à la sanction prévue à cet article en cas de donation-partage portant sur la totalité des biens, il convient de l'assortir d'une clause grevant d'usufruit viager la totalité ou seulement certains biens donnés. Si la donation-partage concerne des parts ou des actions d'une société, le donateur pourra se réserver l'usufruit des droits patrimoniaux, voire politiques (droit de vote et d'administration) desdites parts et actions.[201]

A ces règles s'ajoute la possibilité pour le donateur de stipuler une clause de retour des biens s'il survit au donataire (art. 547 Civ.),[202] ainsi qu'une clause d'inaliénabilité, d'insaisissabilité et de non-intégration dans la communauté des biens relevant de la quotité disponible ou sur l'intégralité des biens transférés. A propos de cette dernière clause, il est permis de considérer que le donateur n'est pas tenu de la justifier, alors qu'elle ne peut figurer dans un testament qu'en cas de juste motif (art. 1848 Civ.). Sur ce point, la donation-partage présente un avantage consi-

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[199] Art. 104, III. « *La validité de l'acte juridique requiert : […] une forme prescrite ou non prohibé par la loi.* »

Art. 107. « *La validité de la déclaration de volonté n'est pas subordonnée à une forme spécifique, sauf si celle-ci est expressément exigée par la loi.* »

[200] Art. 166, IV. « *L'acte juridique est nul: […] s'il ne revêtit pas la forme prescrite par la loi.* »

[201] Ce qui est parfaitement admis par la jurisprudence des tribunaux supérieurs : STJ, REsp 1169202/SP, 3e Ch., aff. jugée le 20 septembre 2011, *DJe* 27/09/2011. Pour une appréciation positive, ne serait-ce qu'accessoirement, des opérations de *démembrement* de la *propriété* des *droits sociaux*, v. STJ, REsp 595.742/SC, 3e Ch., aff. jugée le 06 novembre 2003, *DJ* 01/12/2003, p. 356. Il convient encore de noter que selon l'art. 114 de la loi n° 6.404 du 15 décembre 1976 sur les sociétés par actions, le droit de vote des actions grevées d'usufruit est exercé conformément à ce qui a été librement établie entre les parties dans l'acte de constitution de l'usufruit ; à défaut d'une telle stipulation, le vote ne pourra être exercé que moyennant un accord préalable entre l'usufruitier et le nu-propriétaire. Il en résulte que, si l'usufruitier et le nu-propriétaire ne parviennent pas à un accord, les actions seront privées de vote lors des assemblées générales (cf. F. Martins, *Comentários à Lei das Sociedades Anônimas*, *op. cit.*, n° 494).

[202] Le paragraphe unique de cet article précise que la clause de réversion au profit d'un tiers ne peut pas prévaloir. Cela limite le pouvoir d'organisation anticipée de la succession par le mécanisme du fidéicommis *inter vivos* dans la mesure où l'ascendant, par exemple, ne pourra pas stipuler en faveur des autres enfants ou de son conjoint le retour des biens donnés en cas de mort du donataire avant celle du donateur. V. *supra*, note 149.

dérable par rapport au testament, au moins du point de vue de la liberté du donateur/testateur.

Dans le régime des donations, d'autres règles intéressent directement le partage fait du vivant de la personne. Tout d'abord, il s'agit de la possibilité d'annulation de la donation du conjoint adultère à son complice par le conjoint, ou par ses autres héritiers réservataire, dans un délai de deux ans à compter de la dissolution de la société conjugale (art. 550 Civ.). Ensuite, il s'agit de considérer comme répartie entre les donataires en parts égales la donation commune ; si les donataires sont, dans ce cas, mari et femme, la donation subsistera dans sa totalité pour le conjoint survivant (art. 551 Civ.). Enfin, c'est la possibilité de révocation de la donation offerte au donateur – et non pas aux héritiers – en cas d'ingratitude[203] qui peut avoir une incidence sur l'anticipation de la succession.[204]

Si, dans une donation-partage, les dispositions de l'acte contenant la libéralité excèdent la quotité disponible ou méconnaissent d'une quelconque façon la part légitime d'un héritier nécessaire, elles seront réduites à travers une *action en réduction contre une atteinte à la réserve.*[205] Dans le cadre de cette action, la réserve sera calculée par rapport au patrimoine du donateur existant au moment de la libéralité,[206] et non au moment de son décès[207] (art. 2007 Civ.).[208]

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[203] Art. 555. « *la donation peut être révoquée pour ingratitude du donataire ou pour inexécution de la charge. »*

Art. 557. *« Les donation peuvent être révoquées par ingratitude :*

I – si le donataire a attenté à la vie du donateur, ou s'il a commis le crime d'homicide volontaire contre celui-ci ;

II – s'il a commis une offense physique contre le donateur ;

III – s'il a injurié gravement le donateur ou l'a calomnié ;

IV – si, le pouvant, il a refusé de fournir au donateur les aliments dont celui-ci avait besoin »

Art. 558. *« La révocation pourra également avoir lieu quand l'offensé, dans le cas de l'article précédent, est le conjoint, l'ascendant, le descendant, même adoptif, ou le frère du donateur. »*

[204] Art. 560. « *Le droit de révoquer la donation ne se transmet pas aux héritiers du donateur et ne nuit pas à ceux du donataire. Mais les premiers peuvent poursuivre une action intentée par le donateur et la continuer contre les héritiers du donataire, si celui-ci vient à décéder après que l'instance ait été introduite.»*

[205] A. Wald, « O regime jurídico da partilha em vida », *loc. cit.*, n° 55 ; C. R. Gonçalves, *Direito Civil Brasileiro, op. cit.*, p. 561.

[206] Ainsi, STJ, REsp 1361983/SC, 3e Ch., aff. jugée le 18 mars 2014, *DJe* 26/03/2014 ; STJ, REsp 86518/MS, 4e Ch., aff. jugée le 1er sept. 1998, *DJ* 03/11/1998, précités.

[207] A. Wald, « O regime jurídico da partilha em vida », *loc. cit.*, n° 55.

[208] Art. 2007. « *Les donations seront réduites lorsqu'il sera constaté que le donateur a disposé d'une valeur supérieur à celle dont il pouvait disposer.*

*§ 1*er. *L'excès sera déterminé en fonction de la valeur que les biens donnés avaient au moment de la donation.*

§ 2. La réduction de la libéralité aura lieu par la restitution de l'excès constaté à l'ensemble du patrimoine du décédé. La restitution se fera en nature, ou lorsque le bien n'est plus en pouvoir du donataire, elle se fera en argent, selon la valeur du bien au moment de l'ouverture de la succession. Dan ce cas les règles de ce Code concernant la réduction des dispositions testamentaires seront observées lorsqu'elles seront applicables.

Revenant au droit des sociétés, dans de nombreux cas, l'anticipation de la succession par donation-partage prend la forme de la constitution d'une *holding* familiale sous la forme d'une SA ou d'une SARL. Celle-ci peut être constituée pour concentrer les participations dispersées au sein d'autres sociétés ou encore administrer, au sein d'une seule société de gestion, le patrimoine immobilier du donateur. Dans certains cas la *holding* pourra être mixte ou active, car outre le contrôle des participations dans d'autres sociétés, elle pourra elle-même développer certaines activités. Ainsi, à travers la constitution d'une société *holding*, il est possible de concentrer le patrimoine du donateur pour le répartir ensuite entre les membres de sa famille, en leur transférant de son vivant les titres de la société *holding* le représentant. Souvent l'acte contenant la libéralité portant sur les titres de cette société contient une *clause d'usufruit viager* des droits patrimoniaux et politiques en faveur du donateur – le droit brésilien admet que l'intégralité des droits politiques soit conventionnellement transférée à l'usufruitier – et une *clause d'inaliénabilité, d'insaisissabilité ou d'incommunicabilité* pouvant aller, dans leur durée, au-delà de la mort du donateur. Parfois, au lieu d'une clause d'inaliénabilité, les statuts ou le pacte d'associés peuvent stipuler une clause de préférence, ce qui permet la libre circulation des parts et d'actions sans mettre en péril le contrôle familial de l'entreprise après le partage.[209] Puisque les parts ou les actions mises en vente peuvent ne pas être préemptées, la clause de préférence peut, bien évidemment, être combinée avec une clause d'agrément afin de bien « filtrer » l'entrée des nouveaux arrivants, y compris de la propre famille. Le choix de la forme juridique détermine en grande partie le périmètre de liberté contractuelle nécessaire pour accommoder les exigences financières et politiques du donateur. Outre les avantages liés à l'organisation en vie de la succession, la constitution d'une société *holding* permet une réduction des droits de mutation.

L'art. 2018 admet que le partage en vie fait par un ascendant se fasse également *par acte de dernière volonté*. Ce dispositif ne précise pas les conditions de forme nécessaire à la validité de l'acte ; il affirme tout simplement que l'acte *est valable*, « *pourvu qu'il ne nuise pas la réserve des héritiers nécessaires* ». La doctrine opère deux lectures possibles de cette partie du dispositif. Pour certains, il s'agit d'une ouverture de la loi à tout « acte authentique », par lequel l'ascendant peut ordonner, sans les formalités d'un testament, la façon dont son patrimoine devra être partagé : ainsi, il pourra dicter comme acte de dernière volonté que les immeubles appartiendront aux filles, alors que les meubles et les effets de commerce appartiendront aux

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§ 3. Selon la règle du paragraphe précédent, la réduction s'étend à la partie de la donation faite à des héritiers nécessaires excédant leur part de la succession, accrue de la quotité disponible.

§ 4. Lorsque plusieurs donations ont été faites à des héritiers nécessaires, à des dates différentes, elles seront réduites à partir de la plus récente, jusqu'à l'élimination de l'excès. »

[209] Le mécanisme de clause de préférence est assez connu : l'associé qui souhaite céder ses actions doit d'abord proposer celles-ci à ses coassociés, sans avoir à révéler le nom du cessionnaire pressenti. Les autres associés peuvent alors racheter les parts ou les actions à proportion de leur part dans le capital, ce qui permet de conserver l'équilibre des participations. La procédure varie selon les clauses. Dans les sociétés familiales, il est possible de prévoir que la préemption opère d'abord au sein de la branche familiale à laquelle appartient le cédant, avant d'être élargie ensuite à tous les associés. (Cf. M. Cozian et *alii*, *Droit des sociétés*, 25e éd., Paris : LexisNexis, 2012, n° 765).

garçons.[210] Pour cette doctrine, bien qu'étant pleine d'inconvénients, le procédé est parfaitement admis par la loi. D'autres auteurs soutiennent en revanche qu'il s'agit d'une référence au testament ; dans ce cas, l'acte en revêt la forme.[211] Le testateur réalise alors le partage de son patrimoine en déterminant le legs revenant à chacun de ses futurs successeurs. En présence d'héritiers réservataires, ce partage obéit aux règles relatives à la réduction des dispositions testamentaires (art. 1966 à 1968 Civ.)

Il convient encore de souligner que, dans l'hypothèse d'anticipation de la succession des droits sociaux par acte *inter vivos*, les statuts ou les pactes d'associés de la ou des sociétés concernées peuvent rendre difficile l'opération en raison d'une *clause d'agrément* et d'une *clause de préemption*. En présence d'une clause d'agrément, l'associé donateur doit tâcher d'en assurer l'obtention, auprès de ses coassociés ; en présence d'une clause de préemption, il doit obtenir de ses coassociés la renonciation de la préférence qui leur est accordée pour l'acquisition de ses droits sociaux. Autrement, le partage en vie de titres d'une société risque d'être inefficace lorsque celui-ci vise à réaliser la succession anticipée de l'entreprise.

Enfin, si après le partage, de son vivant, de la totalité du patrimoine du donateur ou du testateur, celui-ci vient à constituer un nouveau patrimoine, la succession relative à ce dernier obéira les règles de la succession *ab intestat* si aucun partage en vie ne l'a concerné.

7.2 Transfert anticipé des pouvoirs de gérance et des fonctions administratives

Alors qu'ils ne peuvent pas jouer un rôle d'instrument de partage de la succession à cause de mort, les statuts des sociétés empreintes d'*intuitu personae* ont vocation à discipliner l'organisation sociale et peuvent, à ce titre, désigner le successeur d'un gérant. Si les dispositions concernant la succession de la gérance de la société figurent dans un pacte séparé, elles seront inopposables aux tiers lorsqu'elles sont contraires aux dispositions statutaires (art. 997, par. unique Civ.).

Cette liberté statutaire se trouve néanmoins anéantie dans les sociétés par actions, car la désignation statutaire des futurs dirigeants et administrateurs porte atteinte à la répartition de compétence légale entre les organes de la société. En effet, en raison du principe de spécialité, ces sociétés se caractérisent par la hiérarchisation des organes et la séparation des pouvoirs. Par conséquent, les dispositions statutaires désignant au préalable les membres du directoire et du conseil de surveillance se

[210] Ainsi, S. Rodrigues, « Partilha », *Enciclopédia Saraiva do Direito*, v. 57/208, *apud* A. Wald, « O regime jurídico da partilha em vida », *loc. cit.*, n° 17.

[211] F. J. Cahali, « A partilha no inventário », *in* F. J. Cahali et G. M. F. N. Hironaka, *Direito das sucessões, op. cit.*, p. 475–498, p. 484.

montreraient incompatibles avec les prérogatives décisionnelles des organes compétents en la matière, conformément à la loi.[212]

7.3 Moyens visant à assurer l'entretien du donateur encore vivant

Pour que la donation-partage universelle puisse être valable, le donateur doit lui réserver une partie suffisante de son patrimoine pour assurer sa subsistance ou lui réserver une rente à telle fin ; au contraire, l'opération sera considérée nulle, la nullité pouvant être décrétée *ex officio* par le juge (art. 548 Civ.).

La donation universelle est également valable si, malgré l'absence de biens réservés pour sa subsistance, le donateur les a grevés d'un usufruit en sa faveur.[213] Il en va de même lorsque le donateur bénéficie d'un contrat de constitution de rente viagère (art. 803 et s. Civ.), de traitements mensuels (s'il est agent public) ou de salaire (s'il est salarié) ou encore d'une pension alimentaire ou de retraite.[214] Aussi, la donation-partage peut être grevée d'une charge consistant, pour les donataires, en l'obligation d'entretenir le donateur financièrement et affectueusement, y compris en lui apportant tous les soins de santé nécessaires jusqu'à son décès. Ainsi, dès lors que la subsistance du donateur universel peut être assurée par tout autre moyen approprié que la mise en réserve de biens, la donation-partage sera valable.[215]

Lorsqu'il s'agit d'anticiper la succession de droits sociaux, il est légitime de grever les titres transmis d'une clause d'usufruit afin de conserver la jouissance des droits patrimoniaux et politiques qui y sont attachés.[216] En outre, sur les titres transférés à son successeur, le donateur peut également faire peser une clause d'inaliénabilité, interdisant au bénéficiaire tout acte de disposition sur le bien. Si à l'égard de la société, le donateur usufruitier perd la qualité d'associé ou d'actionnaire,[217] il n'en reste pas moins que la réserve d'usufruit – ainsi que le fidéicommis et les clauses d'inaliénabilité, d'insaisissabilité et d'interdiction de l'intégration des droits sociaux dans la masse commune – pesant sur les titres don-

[212] Il convient à cet égard de souligner que l'art. 122 de la loi n° 6.404 du 15 décembre 1976 sur les sociétés par actions établit une compétence exclusive de l'assemblée générale pour élire ou pour révoquer les administrateurs et les commissaires aux comptes de la société, sauf lorsqu'il s'agit de désigner les membres du directoire dans les sociétés à structure dualiste (directoire et conseil de surveillance), où cette compétence devient exclusive du conseil de surveillance (art. 122, combiné avec l'art. 142, II de la loi de 1976). Lorsque la société présente une structure de gestion dualiste, l'assemblée générale ordinaire a la compétence exclusive pour nommer et révoquer les membres du conseil de surveillance et, le cas échéant, du conseil des commissaires aux comptes (art. 132, III de la loi de 1976).

[213] STJ, REsp 34271/SP, 3e Ch., aff. jugée le 22 juin 1993, *DJ* 23/08/1993, p. 16578.

[214] J. F. Alves, *Novo Código Civil Comentado*, R. Fiuza (coord.), *op. cit.*, p. 492.

[215] STJ, REsp 1361983/SC, 3e Ch., aff. jugée le 18 mars 2014, *DJe* 26/03/2014.

[216] STJ, REsp 2648/CE, 3e Ch., aff. jugée le 11 déc. 1990, *DJ* 18/02/1991, p. 1032.

[217] STJ, REsp 2648/CE, 3e Ch., aff. jugée le 11 déc. 1990, précité.

nés s'étend, sauf disposition contraire de l'acte de donation, aux actions nouvellement acquises par le donataire en raison d'une augmentation de capital par incorporation de bénéfices et des réserves.[218] Cette solution prévue à l'art. 169 de la loi n° 6.404 du 15 décembre 1976 s'applique également à la SARL lorsque les statuts de celle-ci déterminent l'application subsidiaire des règles régissant la société anonyme (art. 1053, par. unique Civ.).

Il convient enfin de préciser qu'en cas de manquement à leur obligation d'entretenir le donateur, les donataires pourront être confrontés à la révocation de la donation.[219] En effet, conformément à l'art. 555 Civ., la donation peut être révoquée pour ingratitude ou *pour inexécution de la charge.* Selon l'art. 562 Civ., la donation pourra être révoquée si le donataire se trouve en demeure ; s'il n'y a pas de délai pour l'inexécution, le donateur pourra notifier judiciairement le donataire en fixant un délai raisonnable pour qu'il exécute l'obligation assumée.

8 Fondations et trusts

8.1 Constitution des fondations et succession

8.1.1 Fondations ayant pour objet une activité entrepreneuriale : quelle possibilité ?

Jusqu'à l'avènement du Code civil de 2002, le régime des fondations n'imposait pas de limitation à leur objet. En effet, selon l'art. 24 du Code de 1916, celui qui instituait une fondation avait pour seule obligation de *spécifier*, dans l'acte constitutif, le but auquel elle était destinée.[220] Si la doctrine affirmait que l'affectation du patrimoine à une fondation ne peut être consentie que lorsque celle-ci se destine à réaliser des œuvres d'intérêt général,[221] elle reconnaissait, dans le même temps, l'existence des « fondations entrepreneuriales », marquées par la distribution de rentes générées par leur patrimoine propre.[222]

Le Code civil de 2002 apporte, en revanche, des limitations à l'objet des fondations. Si l'actuel art. 62 Civ. reprend *ipsis litteris* le contenu de l'art. 24 du Code de 1916, il précise à son paragraphe unique qu'une fondation ne peut être constituée « *qu'à des fins religieuses, morales, culturelles ou d'assistance* ». Sous l'empire de la

[218] STJ, REsp 2648/CE, 3e Ch., aff. jugée le 11 déc. 1990, précité.

[219] TJ/SC, AC 588460 SC 2009.058846-0, aff. jugée le 26 août 2010, disponible à l'adresse http://tj-sc.jusbrasil.com.br/jurisprudencia/18297308/apelacao-civel-ac-588460-sc-2009058846-0, consulté le 21 avril 2014.

[220] Bien évidemment, le fondateur devait également faire une dotation spéciale de biens libres et, s'il le souhaitait, indiquer la manière dont la fondation serait administrée.

[221] O. Gomes, *Introdução ao Direito Civil*, 10ª ed., Rio de Janeiro : Forense, 1992, p. 199. Selon cet auteur, il n'y avait aucune raison pour admettre la constitution d'une fondation lorsqu'il lui fait défaut « l'utilité sociale ». Cette opinion fut émise avant le Code civil de 2002 !

[222] *Ibid*.

nouvelle législation, les fondations ne peuvent donc avoir pour but la succession des entreprises.[223]

Si cette solution contraste avec le régime antérieur, les fondations instituées avant le 1er janvier 2003, date d'entrée en vigueur du Code civil de 2002, demeurent néanmoins valables et ne voient leur existence nullement menacée. En revanche, leur fonctionnement doit être subordonné aux règles du nouveau Code civil, conformément à l'art. 2032 Civ.[224]

8.1.2 Fondations ayant pour but le support de la famille

Parmi les finalités pouvant être poursuivies par les fondations, le paragraphe unique de l'art. 62 Civ. mentionne l'*assistance.* Ce dispositif constitue une innovation par rapport au Code civil de 1916, qui ne précisait pas les finalités auxquelles les fondations pouvaient être destinées. Peut-on en inférer qu'une fondation pourrait avoir pour but l'assistance économique de la famille du fondateur ?

Les commentateurs du nouveau Code ne se prononcent pas sur la signification du mot *assistance*. La jurisprudence quant à elle n'a pas encore eu, à notre connaissance, l'occasion de se prononcer sur ce point. Il est donc difficile de connaître la réelle portée de cette référence.

Étant donné que, d'après l'art. 62 Civ., les fondations sont constituées en bénéfice direct de la société environnante et destinées à exercer des activités d'intérêt général, il paraît laborieux d'affirmer que le terme *assistance* employé au paragraphe unique de cet article puisse englober la satisfaction des intérêts strictement privés, comme la maintenance économique de la famille ou des fondateurs. Il s'agirait ainsi d'un terme imprégné d'une signification sociale : l'*assistance* serait une activité de portée sociale.

Certains aspects de leur régime juridique laissent également supposer qu'en droit brésilien les fondations se prêtent peu ou mal à la gestion de l'héritage à des fins strictement privées.

Tout abord, la loi attribue au Ministère public la mission d'en contrôler la constitution et le fonctionnement, ainsi que d'approuver les modifications statutaires ulté-

[223] Certains auteurs suggèrent néanmoins à ceux ayant des biens à l'étranger de préparer leur succession par la constitution d'une fondation selon la loi des pays permissifs sur ce point. V. A. P. Cestari, « Instrumentos de planejamento patrimonial e sucessório : fundações e outros instrumentos jurídicos no exterior », in *Aspectos relevantes da empresa familiar*, *op. cit.*, p. 185 *sq*. A propos de la succession de biens situés au Brésil, ce même auteur recommande d'autres solutions, comme la voie testamentaire ou l'utilisation des fonds d'investissements privés (p. 196).

[224] Art. 2032. « *Les fondations instituées selon la législation antérieure, y compris celles dont les fins ne sont pas prévues dans le paragraphe unique des l'art. 62, sont subordonnées, en ce qui concerne leur fonctionnement, aux règles de ce Code.* »

rieures (art. 66, *caput*[225] et art. 67, III Civ.).[226] Cela montre que les fondations sont destinées à des fins plutôt sociaux et d'intérêt général qu'à des fins strictement privées ou à but lucratif. A cet égard, un auteur affirme que les fondations doivent être *collectives* puisque, par leur propre nature, ces entités rejettent l'*individualité*.[227]

Ensuite, la loi détermine que lorsque les biens destinés à la fondation s'avèrent insuffisants pour la *constituer*, ils doivent être incorporés à une autre fondation poursuivant un but identique ou similaire (art. 63 Civ.). Il en va de même dans les hypothèses de dissolution de la fondation – illicéité, impossibilité ou inutilité de la finalité poursuivie par la fondation, ou lorsque la fondation est arrivée au terme prévu pour son existence.[228] Dans ces hypothèses, la loi détermine que le patrimoine de la fondation soit incorporé à une autre fondation, désignée par le juge, poursuivant des objectifs identiques ou similaires (art. 63 Civ.). Certes, dans l'un et dans l'autre cas, l'acte constitutif ou les statuts peuvent en disposer autrement. Mais toujours est-il qu'à l'absence de disposition contraire, le patrimoine de la fondation sera destiné à une autre fondation et non pas aux successeurs légitimes ou à un quelconque membre de la famille du fondateur. Ces mesures supplétives de destination du patrimoine de la fondation démontrent que cette entité est fondamentalement destinée à accomplir des œuvres d'intérêt général.

A la lumière de ces éléments, il est donc permis d'estimer qu'en droit brésilien les fondations ne peuvent pas être constituées pour servir à des intérêts strictement privés et entrepreneuriaux.

8.1.3 Conditions pour la création d'une fondation

La constitution d'une fondation est conditionnée à la satisfaction d'exigences de forme et de fond. En ce qui concerne la forme, la constitution d'une fondation peut se faire par acte notarié ou par testament (art. 62 Civ.). Quant au fond, si la fondation peut être appelée à succéder (art. 1799 Civ.) elle ne peut bénéficier que de la partie non réservée du patrimoine du fondateur. En outre, il faut que les biens soient libres (art. 62 Civ.)[229] et suffisants (art. 63 Civ.) pour accomplir le but auquel elle est destinée. Le but poursuivi par la fondation doit également être mentionné dans l'acte de constitution (art. 62 Civ.).

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[225] Art. 66 (*caput*). « *La trotection des fondations incombe au Ministère public de l'État où elles sont situées*. »

[226] Par ailleurs, si les statuts ne sont pas élaborés dans le délai assigné par celui qui a institué la fondation, ou, en l'absence de délai, dans les cents quatre-vingts jours, cette tâche incombera au Ministère public (art. 65, par. unique Civ.).

[227] C. M. da Silva Pereira, *Instituições de Direito Civil*, vol. I, 26ª edição, Revista e atualizada por Maria Celina Bodin de Moraes, Rio de Janeiro : Forense, 2013, p. 304–305.

[228] L'extinction de la fondation peut être provoquée par le Ministère public, ou tout autre intéressé (art. 69 Civ.).

[229] L'affectation de biens libres de sûretés réelles est une condition essentielle pour que la fondation ne se voit privée, au cours de son existence, de moyens lui permettant d'accomplir ses objectifs (cf. C. M. da Silva Pereira, *Instituições de Direito Civil*, *op. cit.*, p. 303).

Enfin, il convient de préciser que si une donation est faite à une entité future, elle deviendra caduque si, dans un délai de deux ans, celle-ci n'a pas été régulièrement constituée (art. 554 Civ.). Si cette règle ne constitue pas une condition temporelle à la constitution d'une fondation, elle pourra néanmoins avoir un impact direct sur le processus lorsque, y faisant défaut, la donation devenue caduque conduit à la situation d'insuffisance du patrimoine requis pour la constitution de la fondation.

Aucune durée minimale ou maximale d'existence d'une fondation n'est établie par la loi. Elles sont souvent instituées pour une durée indéterminée.

8.2 Influence des membres de la famille sur le fonctionnement des fondations

Dès lors qu'ils sont désignés pour la gérer et pour la représenter, les héritiers légitimes ou tout autre membre de la famille peuvent avoir de l'influence sur le fonctionnement d'une fondation. Cette influence est néanmoins limitée par le contrôle qu'exerce le Ministère public sur la constitution et sur le fonctionnement et lors de la dissolution de la fondation, conformément aux missions que lui sont assignées par les articles 65, par. unique, 66, 67, II, 68 et 69 Civ.

La fondation n'est pas constituée de parts sociales ou de droits sociaux ou patrimoniaux par rapport aux fondateurs.

Les héritiers légitimes ou tout autre membre de la famille peuvent participer de la gestion et de l'administration de la fondation, conformément aux désignations faites dans l'acte constitutif ou dans les statuts, vu que ces instruments ont vocation à réglementer son système de gouvernance.

8.3 Différence entre un trust *et une fondation*

Le trust n'est pas une institution présente en droit brésilien.[230] Bien que ce dernier connaisse différents types de négoce fiduciaire, il n'existe pas de réel équivalent au trust.[231] Pourtant, depuis 1957 le législateur tente d'introduire ce dernier dans l'ordre juridique brésilien.[232] Mais en vain : le dernier projet de loi en date[233] fut retiré le 31

[230] Sur la diffusion des trusts dans le monde, v. A. Gambarro, « Sur la circulation des trusts », *De tous horizons*, *Mélanges Xavier Blanc-Jouvan*, Paris : SLC, 2005, p. 499–512.

[231] G. Tepedino et A. Schreiber, « Succession et contrat : rapport brésilien », *loc. cit.*, p. 278.

[232] Projet de loi n° 3362/1957 (disponible à l'adresse : http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=FD3EB079D19D89CBB423562452CBBC1D.node1?codteor=1209982&filename=Avulso+-PL+3362/1957, consulté le 31 mars 2014) et Projet de Code des obligation de 1965.

[233] Projet de loi n° 4809/1998, disponible à l'adresse : http://imagem.camara.gov.br/Imagem/d/pdf/DCD14NOV1998.pdf#page=28, consulté le 15 mars 2014.

janvier 2003 en raison du terme de la législature sans son approbation par la Chambre des députés. En outre, il convient de noter que le Brésil n'est pas un Etat contractant de Convention de La Haye du 1er juillet 1985 relative à la loi applicable au trust et à sa reconnaissance. Le trust n'existant pas en droit brésilien, la question du choix entre cette institution et la fondation ne se pose pas au Brésil.

Nonobstant le fait que le *trust* n'existe pas dans ce pays, il est possible, sans être exhaustif, de relever de ses traits généraux quelques différences par rapport aux fondations. Une première différence tient à la nature de ces deux institutions : tandis que le *trust* naît d'une déclaration unilatérale de volonté[234] – tout en pouvant présenter des caractères contractuels[235] –, la fondation a un fort caractère institutionnel et personnel, illustré par la *personnalité morale* qui lui est octroyée par la loi (art. 44 Civ.) ; par conséquent, tandis que le trust relève du droit des biens, la fondation du droit des personnes. Une deuxième tient à leur finalité : alors que le *trust* est, dès son origine, destiné à satisfaire des intérêts et des besoins strictement privés, la fondation répond essentiellement à une mission d'intérêt général. Par ailleurs, comme il a été montré, en droit brésilien la fondation ne saurait s'écarter d'une telle mission sans heurter les conditions de validité de son institution (art. 62, par. unique Civ.). Une troisième différence tient, enfin, au contrôle du patrimoine affecté et des activités de chacune : tandis qu'à l'égard des *trusts* le *trustee* dispose d'une liberté juridique ample et n'est soumis qu'aux seuls principes d'*equity* – il doit agir de manière prudente et bienveillante – et à un éventuel contrôle du juge lorsque le *trustee* est appelé à gérer des fortunes familiales à long terme ou des biens dans une finalité philanthropique, les fondations sont soumises à un double contrôle, qui est d'abord interne et fait par ses propres organes d'administration et de contrôle, et puis externe et réalisé par le Ministère public dans les différentes étapes de leur existence.[236]

9 Développements futurs

Au Brésil, malgré l'intérêt que les administrateurs et les juristes portent à la succession dans les entreprises familiales, il n'existe pas une politique législative orientée vers cette thématique.

En revanche, trois projets de loi en matière de successions sont actuellement en discussion dans le Congrès national : un premier vise à garantir aux héritiers la transmission de tous les contenus des comptes et fichiers numériques concernant le

[234] Cl. Witz, « Appréciation de la législation libanaise sur les opérations fiduciaires », disponible à l'adresse : http://archiv.jura.uni-saarland.de/projekte/Bibliothek/text.php?id=370#fnB16, consulté le 31 mars 2014.

[235] A. Gambarro, « Sur la circulation des trusts », *loc. cit.*, p. 499–512. Pour qui il s'agit d'un contrat : A. Costa Vieira, *Civil Law e Common Law. Os dois grandes sistemas legais comparados,* Porto Alegre : Sergio Fabris Editor, 2007, p. 181.

[236] Cf. les articles 65, par. unique, 66, 67, II, 68 et 69 Civ.

de cujus[237] ; deux autres entendent, sous l'impulsion des débats doctrinaux, promouvoir l'égalisation entre les conjoints et les personnes vivant en « union stable » (les compagnons).[238] Alors que ces deux derniers s'accordent sur le besoin d'abroger l'art. 1790 Civ. et d'uniformiser le traitement accordé par le droit des successions au conjoint et au compagnon survivant, ils se distinguent quant à certains aspects liés à leur place dans la succession : tandis que le projet de loi 508/2007 souhaite les exclure de la catégorie des réservataires, le projet de loi 4908/2012 prétend les y conserver. Aussi, dans les hypothèses où le conjoint/compagnon est en concours avec les descendants et ascendant, le projet de loi 508/2007 établit une règle plus claire que celle figurant à l'actuel art. 1829, I Civ : dans cette hypothèse, la concurrence ne concernerait que les biens acquis onéreusement durant le mariage ou l'union stable et par rapport auxquels il n'existe aucun droit au partage en raison du régime matrimonial. A l'opposé, le projet 4908/2012 élimine toute condition liée au régime patrimonial en cas de concurrence du conjoint/compagnon avec les descendants.[239] Mais alors que les discussions au Congrès se prolongent, les tribunaux supérieurs devront bientôt se manifester sur la constitutionnalité de l'art. 1790 Civ. puisqu'ils ont récemment été saisis d'un certain nombre de recours portant sur cette question.[240]

Enfin, une importante initiative législative en matière de financement des organisations d'intérêt général à but non lucratif est à signaler. En janvier 2014, l'*Instituto para o Desenvolvimento do Investimento Social*, dont le siège est à São Paulo, a élaboré un avant-projet de loi visant à créer un fonds de dotation (*Fundos Patrimoniais Vinculados*), très apparenté au « endowment funds » anglo-américain. Largement inspiré du droit comparé, cet avant-projet vise à aller au-delà du projet de loi en discussion depuis 2012 dans la Chambre de députés destiné à autoriser la création de tels fonds auprès des universités fédérales.[241] En effet, présenté le 3 juillet 2014 devant la Commission des finances et des tributs de la Chambre des députés,[242] le nouveau texte propose, en substituant l'ancien, d'amplifier les

[237] Projet de loi n° 4099/2012, disponible à l'adresse : http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=1004679&filename=PL+4099/2012, consulté le 31 mars 2014.

[238] Projet de loi 508/2007 (Projet Barradas Carneiro) et Projet de loi n° 4908/2012 (Projet Takayama), disponible à l'adresse : http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=1052172&filename=PL+4908/2012, consulté le 31 mars 2014. V., por les initiatives précédentes : Projet de loi n ° 6960/2002 (Projet Fiuza) et Projet de loi n° 4944/2005 (Projet Gascogne), les deux ayant été retirés le 21 janvier 2007.

[239] De plus, ce projet propose d'augmenter la réserve successorale à 75 % du patrimoine lorsque le *de cujus* a laissé trois enfants ou plus et d'exclure de la succession les conjoints et compagnons des mariages ou unions civiles célébrés *in extremis*, c'est-à-dire 30 jours avant le décès du cocontractant atteint d'une maladie préexistant à l'union, sauf si celle-ci viserait à formaliser une situation de fait préexistante.

[240] A l'instar du procès : STF, RE 646.721/RS (juge rapporteur : Marco Aurélio).

[241] Projet de loi n° 4643/ 2012 (Projet Furlan), disponible à l'adresse : http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=1035343&filename=PL+4643/2012, consulté le 18 mars 2014.

[242] http://www.amigosdapoli.com.br/media/2014-plDOUBLEHYPHENfundos-patrimoniais-vinculado-e-incentivo-fiscal-divulgacao.pdf, consulté le 16 octobre 2014.

hypothèses d'utilisation d'un tel fonds par les associations et les fondations à but non lucratif. Fondamentalement, un fonds de dotation est une personne morale de droit privé à but non lucratif qui reçoit et gère, en les capitalisant, des biens et droits de toute nature qui lui sont apportés à titre gratuit et irrévocable et utilise les revenus de la capitalisation en vue de la réalisation d'une œuvre ou d'une mission d'intérêt général ou les redistribue pour assister une personne morale à but non lucratif dans l'accomplissement de ses œuvres et de ses missions d'intérêt général. Il s'agit ainsi d'une forme sociale ouverte à toute personne physique ou morale, de droit privé ou public, qui se finance comme une fondation par des dons et des legs. Etant donné la récence de cette proposition, il est encore tôt pour en prédire les résultats.

Business Succession in Cyprus

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Abstract Family business is of great importance in Cyprus. The following book chapter will show on the one side the hereditary succession and the institution of the fideicommissum as part of the law of succession. On the other side the company law gives the possibility for regulations in company treaties in case of the death of a partner.

1 Importance of Family Business and Business Succession

1.1 Data About the Importance of Family Business

According to the data provided by the Cyprus' Registrar of Companies and Official Receiver, the number of registered companies until the 31/12/2013 is 272.816. Nevertheless, the aforementioned number does not, however, specify how many of them are family businesses.

The term of "family business" is not recognized as a legal concept. Nonetheless, it is commonly understood as business where the totality or the majority of its members has family relationship. In this context, members of one family will need to have control over the business, with the subjective intention to devote the business to the family.[1]

Moreover, there is no actual statistic figure showing businesses. The only indication is the number of Trade names and Partnerships that are 1,471. At this point it must be mentioned that due to the attractive tax incentives applied to Cyprus'

[1] S. Kalss, Company Law and the Law of Succession, World Congress 2014 Vienna, General Report.

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companies a high percentage of those registered before the Cyprus' Registrar are used mainly for one – off transactions and for foreign interests.

Nonetheless, since the majority of registered companies in Cyprus are private companies, it can be assumed that due to the closed character of the private company a certain number of private companies are family businesses.

1.2 Business Succession in Family (Especially: Future Trend)

Business successions are not registered anywhere.[2] Once again, transfer of shares does not mean that there is an actual business succession. From an administration of the estate of a deceased person perspective, again there is no such statistic.

There are no facts to estimate this figure, but Cyprus is a society with very close family ties so one can expect that as far as local businesses are concerned business succession within the family is rather common.

1.3 Legal Background (Especially in Corporate Law: Is There Specific Attention Paid to Family Business?)

Business succession, including family business succession, is subject to the general legal provisions governing succession. In this respect, no specific attention is dedicated to family business.

There are two types of succession, namely testamentary succession (limited however by the concept of forced heirship) and intestate succession that takes place in the absence of a will/testament. Wills and Succession Law (Cap 195) regulates both Wills and Intestacy and is partly derived from the English Wills Act of 1837 (the part relating to Wills), and partly from the Italian Civil Code (the part in relation to the intestacy).[3]

Succession can only take place after the testator's death. That being said, the Law does provide that any child or other descendant of the deceased who becomes entitled to succeed to the statutory portion, and to the undisposed portion if any, shall in reckoning his share bring into account all moveable property that he has at any time received from the deceased-

(a) by way of advancement; or
(b) under a marriage contract; or
(c) as dower; or

[2] Except from the transfer of shares applications in case of a limited liability company.

[3] The historical background of the Wills and Succession Law, CAP. 195 was described in the case of Anastasis Charalambous v Alkis Demetriou (1961) 1 CLR 30.

(d) by way of gift made in contemplation of death: A gift shall be deemed to be made in contemplation of death where a person who is ill and expects to die shortly of his illness delivers to another person the possession of any of his moveable property to keep as a gift in case the giver shall die of that illness. Any person who is of sound mind and has completed the age of 18 years may dispose of any moveable property by a gift made in contemplation of death if made in the presence of at least two witnesses who have completed the age of 18 years and are of sound mind. A gift made in contemplation of death may be resumed at any time by the giver and shall note take effect if the giver recovers from the illness during which it was made; or the giver survives the person to whom it was made. Any gift made in contemplation of death shall be treated upon the administration of an estate exactly in the same way as if it were a specific legacy.

However, where the deceased has left a will and has made therein specific provision that such moveable property or immoveable property shall not be taken into account, then the deceased's wishes shall be complied with.

Furthermore, it has to be noted that inter vivos gifts given by way of advancement and their value is more than the entitled share in the inheritance are not returnable. Nevertheless, the person holding such inter vivos gifts is not going to be accounted in the distribution of the remaining estate.[4]

1.4 Tension Between Company Law and Inheritance Law

Company law and inheritance law prima facie seem to regulate two totally different worlds: the dynamic world of business and the family nest. Nonetheless, these legal disciplines in a certain degree overlap. This is the case where the family relationship is also expressed in business or company terms. Family business, close corporations, such as private limited liability companies and partnerships are also subject to the regulatory effects of the law of succession. Then, the major challenge is to calibrate the necessity to safeguard the ideal of the family succession and the dogma of the free unfettered development of the company for the better interests of the company as a separate legal person, independent from its mortal members. Certainly, the relationship between business law and the law of succession becomes more complicated in the case of partnerships, since the latter lack legal personality or at least full legal personality in the law of Cyprus.[5]

Cyprus law is not an exception, since compulsory portions that need to be satisfied will sometimes threaten the continued existence of the business because of not

[4] The above was discussed thoroughly in the case of Constantinos Kyriakides v Meropis Dikigoropoulou, Civil Appeal 300/2008, 31/05/2012.

[5] See on this issue: Synodinou, Cypriot Private Law, Sakkoulas publications, Athens-Thessaloniki, 2014, p. 1125.

enough liquid means to satisfy the legal claims of forced heirs related to the existence of compulsory portions.[6] In a partnership a question that is often disputed is the calculation of the deceased partner's share.[7]

2 Inheritance Law (Intestate Succession)

2.1 Principles of Inheritance Law (Especially: Is There a Principle of Family Succession?)

Generally, the testator will have the liberty to dispose freely his property by will, but such liberty will be limited by forced heirship rules as will be stipulated below. The forced heirship will not apply to situations where the testator or his father was born in the United Kingdom or any other Commonwealth country, regardless of the fact whether his permanent residence is situated in Cyprus or not. Furthermore, the forced heirship rules will not apply to movable property owned by a non – citizen of the Cyprus Republic disposing such property with a will again regardless the fact whether his permanent residence is situated in Cyprus or not.

In relation to the law that will regulate the rights of the estate, we note that in Cyprus the Law of Succession is incorporated in a number of enactments, the most significant of which is the Wills and Succession Law, CAP. 195 and the Administration of Estates Law, CAP. 189. According to Wills and Succession Law, CAP. 195, same only applies:

(i) To Cyprus residents
(ii) To immovable property located in Cyprus of all persons not domiciled with the Republic.

Furthermore, Wills and Succession Law, CAP. 195 provides that the succession of all movable property of persons that perished in the Republic but did not domicile in the Republic shall be regulated by the law of the country in which they had their domicile at the time of their death (Art. 12 of the Wills and Succession Law, CAP. 195).

In as far as persons that did not perish nor reside in the Republic are concerned, the Law remains silent on this part, so in such cases the Law of the last domicile of the Deceased will decide the Law applicable to the Deceased Succession. The above, however, does not mean that Cyprus Law is of no importance in the case of the death of a foreign shareholder. In particular, in order for any decision vis a vis

[6] S. Kalss, Company Law and the Law of Succession, World Congress 2014 Vienna, General Report.

[7] See for example Demetra Patiki v A.G. Patiki and Co. and Others, January 22, 1954: one of the main questions put in the case is "The question between the parties is. whether, so far as property is concerned, this is to be an account of its property at its fair value to the firm, or an account in which the property must be taken at the values appearing in the books of the partnership."

the transfer of shares to be recognised and enforced in Cyprus, Cyprus Law will apply. According to the latter the deceased's estate does not automatically pass to the person named in the will or the legal heir(s) but instead they must apply to the Cyprus courts for probate or for grant of letters of administration through a lawyer. In particular, when a person dies intestate (without a will), the Court authorizes a person to administer his estate. The written authority given by the Court to a person residing in Cyprus ("the administrator") to administer the estate of a person that has died intestate is called "letters of administration".

Primarily, it is important to note that the rules of intestacy will apply not only when a shareholder dies without leaving a will, but also to the part of the estate that may not be disposed by will, i.e. where the rules of forced heirship apply. This portion is determined according to the closeness of the surviving relatives. Intestacy rules separate persons entitled to succeed the deceased into four classes, as follows (Art. 46 of the Wills and Succession Law, CAP. 195):

1. The first class comprises of the children of the deceased who are alive at the date of his death, together with the surviving descendants of any of the deceased's children that are no longer alive;
2. The second class comprises the parents of the deceased (or if the parents are dead, the nearest living ancestor) and the brothers and sisters (including half-brothers and half-sisters) of the deceased, together with the surviving descendants of brothers or sisters (including half-brothers and half-sisters) who died during the deceased's lifetime;
3. The third class comprises the nearest ancestors of the deceased living at the time of his or her death; and
4. The fourth class comprises the nearest other relatives of the deceased living at the time of his or her death, up to the sixth degree of kindred (more remote relatives are excluded).

Within each class certain rules apply for the distribution of the estate to each individual class member.

Generally, the heirs in each class are all entitled to an equal share but in the first and second class, succession is per stripes while in the third and fourth class succession is per capita (Art. 49 of the Wills and Succession Law, CAP. 195). Notably distribution to the persons in the above classes takes place after the deduction of the share of the surviving spouse. In particular, the surviving spouse's share varies according to the number of heirs and the class they belong to. In particular, according to Art. 44 of the Wills and Succession Law, CAP. 195 provides the following rules:

- If the deceased leaves heirs of the first class, the state is divided equally among the surviving spouse, the living children and the descendants of children who died in the lifetime of the deceased, per stirpes.
- If the deceased leaves no child (or descendant of a child), but leaves at least one relative of the third degree of kindred (great grandparent, aunt, uncle, nephew or niece) or closer, the surviving spouse is entitled to half the statutory portion and undisposed portion.

- If the deceased leaves only relatives of the fourth degree of kindred (great great grandparent, great aunt, great uncle, first cousin, grand nephew or grand niece), the surviving spouse is entitled to three quarters of the statutory portion and undisposed portion.
- If the deceased leaves no relative within the fourth degree of kindred, the surviving spouse is entitled to the entire statutory portion and undisposed portion

Hence, at the death of a shareholder and provided his last domicile was in Cyprus his shares will be distributed along with the rest of his estate according to the above rules.

Cyprus Law allows individuals to regulate (to a certain extend) the way their estate will be distributed after their death, via the use of a will. The provisions of the Wills and Estate Law Cap. 195 regarding wills are based on the English Wills Act of 1837. Thus a shareholder may, via his will, arrange for the disposition of his shares to other parties or in different percentages than those stipulated by the intestacy rules, but such right to regulate the disposition of his property by will is not unlimited. Indeed, according to Art. 41 of the Wills and Estate Law Cap. 195, the estate is divided into a 'disposable portion', which can validly be disposed of by will, and a 'statutory portion', which is reserved for the forebears, widow and descendants of the deceased and cannot be distributed at will but instead it is distributed according to the rules of intestacy. A will that purports to dispose of more than the disposable portion of the estate is not invalid, but the dispositions in the will are proportionally reduced so as to be limited to the disposable portion (Art. 41(2) of the Wills and Estate Law Cap. 195).

Companies Law, Cap. 113 does not specifically provide for rules that will be binding upon the shareholders' heirs. That being said Art. 29 of the Companies Law Cap. 113 provides the meaning of "private company" as a company which by its articles-

(a) restricts the right to transfer its shares;
(b) Thus, the Company's Articles must contain various restrictions in relation to the transfer of the shares, including possibly the transfer of the shares to the heirs. Indicatively, they may contain pre-emption rights in favour of existing shareholders, provisions awarding a buy-out right of the dead shareholder's interest etc. Furthermore, shareholders are free to establish further rules via a shareholders agreement that will be binding upon all current and future members of the Company, as well as to sign a cross option agreement, i.e. a contract between the shareholders for the sale and purchase of a deceased shareholder's shares.

When personal representatives are registered with the Members' Registry of the Company they become personally liable to the same extend as the deceased and any other shareholder of the Company as the latter is not obliged to take into account their representative capacity. Hence, this might have negative consequences for the personal representatives, especially when the shares are unpaid. For this reason, although generally acceptance of the succession is not necessary, the law allows, a beneficiary of an intestate share to disclaim his share in the intestacy. Furthermore,

according to Art. 80 of the Companies Law Cap. 113 "the production to a company of any document which is by law sufficient evidence of probate of the will, or letters of administration of the estate, or confirmation as executor, of a deceased person having been granted to some person shall be accepted by the company, notwithstanding anything in its articles, as sufficient evidence of the grant". Hence, a personal representative may transfer the shares transmitted to him to a third party or another shareholder, without ever being registered as a shareholder himself. That being said the Company's directors maintain the right to refuse to register transfers made by the personal representatives according to the Company's Articles of Association and the law.

The heirs have only one claim against the administrator, on the net value of their respective shares in the estate, the estate being devolved to the administrator. For this reason, the liability of the heirs for the debts of the deceased does not exist. A possible limitation on liability/acceptance under benefit of inventory therefore does not exist in Cyprus.

2.2 Range of Testamentary Freedom

2.2.1 Are There Statutory Claims, Which Must Be Satisfied in Any Way, for Example to the Spouse?

The freedom of the testator to dispose of his estate is restricted so that the greater part of such estate be devolved to members of the testator's family. In particular, the estate is distinguished into two portions, the disposable and in-disposable (statutory) portion. The disposable portion refers to that part of the moveable and immoveable property which may be disposed of freely by will, as opposed to the statutory portion of the estate which can only be disposed of to the testator's family members, according to their class (see below for additional information). In particular, where a person dies leaving a spouse and a child or a spouse and a descendant of a child, or no spouse but a child or a descendant of a child, the disposable portion of the estate shall not exceed one quarter of the net value of the estate. Where the deceased leaves a spouse or a father or a mother, but no child or descendant of a child, the disposable portion extends to one half of the net value of his estate. Where the deceased leaves neither spouse, nor child nor descendant of a child, nor a father nor a mother, the disposable portion shall be the whole of the estate. Where the testator purports to dispose by will of a part of his estate in excess of the disposable portion, such disposition shall be reduced and abated proportionally so as to be limited to the disposable portion.

The reduction and abatement provided for shall not apply where the testator disposes of up to the whole of his estate to his surviving spouse, provided that he leaves a spouse but no children or descendants of a child, or father or mother.

In the absence of a will, intestacy law will apply. Family succession rules will also depend on the different classes of relatives.

2.2.2 Compulsory Portion

Yes, as explained above a substantial part of the deceased person's net estate (i.e. the value of the estate following deductions made for payment of debts and funeral expenses) will be reserved for the deceased's family members (the deceased person's spouse, children and descendants of children of the deceased who died in his or her lifetime) who are alive at the time of the testator's death. This reserved, indispensable, amount is called the "statutory portion" and is distributed according to the rules set out in the Wills and Succession Law. The remaining amount of the net estate (the "disposable portion") may be disposed of by Will.[8] As stated, a Will that purports to dispose of more than the disposable portion of the testator's estate is not invalid but the disposition in the Will will be reduced and abated proportionally so as to be limited to the disposable portion.[9] No abatement will take place if the testator leaves a surviving spouse but no children or descendants of children, and leaves more than the disposable portion, up to the value of his estate, to the surviving spouse.[10]

2.2.3 The Institute of Fideicommissum

There is no prohibition of fideicommisum and the testator will be free to set conditions for the passing of his estate. That being said where a will/legacy is dependent upon an impossible, illegal or immoral condition, such condition shall be void but the will/legacy shall be valid. Furthermore, it needs to be pointed out that a bequest given in a will to a person that does not exist at the time of death is void/invalid.[11] Despite the above, section 31(a) of Wills and Succession Law set down the following exceptions: (1) Where such bequest is intended for the testator's child born after his birth. In other words, the testator's spouse must be pregnant at the time of death. (2) The second exceptions is applies to direct descendants of a relative of the testator that actually deceased before the testator.[12]

[8] Mechmet Kochino v Dervishe Irfan (1976) 1 CLR 240.

[9] Papavasiliou v Papafedia (1975) 1 JSC 96.

[10] The Wills and Succession Law actually refer, firstly, to the spouse of the deceased in terms of "inheritance portion" and then according to the other relatives (children, ascendants, descendants) the statutory portion will be set.

[11] Re Ladd (1932) 2 Ch. 219.

[12] Re Parker (1860) 1 Sw & Tr 523.

2.3 Statutory Inheritance Law

2.3.1 Which Persons Have a Statutory Claim, and How Much Do They Get?

A substantial part of the deceased person's net estate (i.e. the value of the estate following deductions made for payment of debts and funeral expenses) will be reserved for the deceased's family members (the deceased person's spouse, children and descendants of children of the deceased who died in his or her lifetime) who are alive at the time of the testator's death. This reserved, indispensable, amount is called the "statutory portion" and is distributed according to the rules set out in the Wills and Succession Law. The remaining amount of the net estate (the "disposable portion") may be disposed of by Will.[13] As stated, a Will that purports to dispose of more than the disposable portion of the testator's estate is not invalid but the disposition in the Will will be reduced and abated proportionally so as to be limited to the disposable portion.[14] No abatement will take place if the testator leaves a surviving spouse but no children or descendants of children, and leaves more than the disposable portion, up to the value of his estate, to the surviving spouse.[15]

2.3.2 Claims of Children and Claims of the Spouse

The persons entitled to a share in the estate of the deceased are various relatives of the deceased and depending on the degree and classes of the relationship they are separated into four classes of shares. For the classes of the testators see below.

As far as children born out of wedlock are concerned, the applicable law is the Illegitimate Children Law, Cap. 278 of 1959 as replaced by the Affinity and Legal Status of Children Law 187/1991 which provides for the "recognition" of such children either by the subsequent marriage of their parents or by voluntary recognition by the Parent. The amendment of the previous strict Law was a result of Cyprus' ratification of the European Convention on the Legal Status of Children Born out of Wedlock in 1978 which had marginalized the application of the provisions of the law that were incompatible with the Convention.[16] As such, the discrimination against children born out of wedlock in legal terms no longer applies. Article 9 of the said Convention provides: *"A child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its*

[13] Mechmet Kochino v Dervishe Irfan (1976) 1 CLR 240.

[14] Papavasiliou v Papafedia (1975) 1 JSC 96.

[15] The Wills and Succession Law actually refer, firstly, to the spouse of the deceased in terms of "inheritance portion" and then according to the other relatives (children, ascendants, descendants) the statutory portion will be set.

[16] Malachtou v. Armeftis (1987) 1, C.L.R. 207.

father's or mother's family, as if it had been born in wedlock." The above was also discussed in *Playbell v Phytides (1996) 1 CLR 1102.*[17]

2.4 Business Succession: Absence of Special Rules in Cyprus

Cypriot legal system does not include special provisions for business succession. General succession provisions apply. Shares (in case of a legal entity) will be calculated as movable property. As stipulated below however the parties are free to include relevant provisions in the founding papers of their business, such as restrictions in terms of transfer of shares to family members up to a certain degree. There are no special regulations in specific business areas like agricultural business.

3 Legal Incapacity Before Death

3.1 Special Statutory Provisions or Regulations in Case of Dementia

The Cypriot legal framework makes provision for the administration of the affairs of persons with mental disorders and persons with intellectual disability if they are unable to do so. In particular, the Law on Administration of Property of Persons Incapable of Administering their property and affairs N. 23(I)/1996, Articles 2, 6 and 7 awards the Court the right to appoint a "personal representative" in cases of mental incapacity; such personal representative will be the incapacitated's guardian or his closest relative and he will be responsible to administrate his affairs (including his property and hence his shares) as Trustee. The administrator is obliged to provide a guarantee, the amount of which is determined by the Court. Furthermore, according to Article 17(2) of the same law the representative must (a) ensure for the patient's stay and welfare in general; (b) demand that the patient attends at a certain time and place for reasons of treatment, training and employment; (c) to inform the interdisciplinary team of the centre on the condition of the patient generally; (d) complies with revocation of the exit permit; (e) to submit on behalf of the patient any applications regarding state benefits, rights or facilities.

The Law on administering the property of persons lacking capacity, No. 23/I/96 provides jurisdiction for the district court to intervene in order to protect the property rights of "a person incapable of exercising his judgment and will to administer

[17] Moreover, this was thoroughly discussed in the case of A.P.A. (1992) 1 ΑΑΔ 63. Soteris Liasides, "Family Law", Volume IV, 2008, Nicosia.

his property or his affairs," due to various factors including mental disturbance.[18] In such cases the court will appoint an administrator to administer all the patient's affairs, including his property[19] and is appointed as a Trustee.[20] Also, the law on Psychiatric Treatment No. 77(I)/1997, provides for instances where "psychological disturbance" is of such serious nature which warrants the appointment a "personal representative" to administer his affairs. Notably, there are no specific provisions in the Companies Law, Cap. 113 to exercise and protect the shareholder rights of a person who is permanently incapacitated.

3.2 Precautions in the Articles of Associations

It should be noted that the parties maintain the right to regulate the conduct of business of the Company in case a member is incapacitated or regulate the rights of such member by relevant provisions in the Company's Articles of Association or via a Shareholder Agreement. However, it should be noted that the parties do not have the right to establish personal standards as to when a person is incapacitated.

4 Consequences for a Business in Case of a Death

The consequences for a business in case of a death vary depending on the legal form of the business, if any. In case of businesses without legal personality family and succession law provisions have a direct effect to the business's future. On the contrary, where there is corporate personality the death of a business's member does not have any direct influence to the company structure.

4.1 Differentiation Between the Types of Enterprises (Partnerships – Corporation)

(a) Sole trader

According to the Partnership and Business Name Law Cap. 116 a sole proprietorship is a business entity where "a person can carry out business, either under their real name or a trade name that must be registered in accordance with Chapter

[18] Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of the administration N. 23(I)/1996, Article 2.

[19] Cyprus/Law on administration of property of persons incapable of administering their property and affairs and for the control of administration N. 23(I)/1996, Article 7(4).

[20] Cyprus/Law on Psychiatric Treatment N. 77(I)/1997, Article 4.

116". Contrary to a corporation that constitutes a persona at law, a sole proprietorship is in fact not a legal entity in and on itself, but it may be registered by any individual or any legal entity carrying on business under a different name. In a sole proprietorship, the business and the business owner are considered to be the same legal entity and the business owner is fully responsible to represent the business as well as for the business debts. Hence, at the death of a sole proprietor, the business is almost always dissolved by law upon the death of the sole proprietor. This also constitutes a significant difference of the Sole Proprietorship with the corporation which has a perpetual succession.[21]

(b) Partnership

In as far as Partnerships are concerned the Cyprus the legal framework was codified by the Partnership Law, CAP 116, introduced in 1928. The aforesaid Law was based on its English counterparts and in particular, on the Partnership Act 1890 and the Limited Partnership Act 1907. Following its enactment on 1928, CAP. 116 has been amended in 1977 and in 2011 and it is now titled "Partnerships and Business Names Law CAP 116", which as stipulated also regulates sole Proprietorships. A partnership is an arrangement which consists of two to twenty partners carrying on economic activity together with a view to make profit.[22] Again, under Cyprus Law a partnership does not have a separate legal personality and thus the acts of the partnership constitute nothing other than the acts of the separate partners.[23] In this respect, section 35 of Law CAP 116 provides that subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death of any partner. Despite the above, limited liability partnerships are not to be dissolved if the limited liability partner dies. See Section 49(2) of Partnership Law, Cap 116.

(c) Corporation

Contrary to the above a corporation is characterised by two basic elements, primarily it has a distinct personality from its members and secondarily its succession is maintained. The consequences in case of death will be discussed in the following paragraphs.

[21] Elias Neocleous, Kyriakos Georgiades and Markus Zalewski, Corporate Law, in Introduction to Cyprus Law, Andreas Neocleous & Co LLC; 3rd Edition (24 April 2011), p. 317.

[22] Elias Neocleous, Kyriakos Georgiades and Markus Zalewski, ibid, p. 389.

[23] Kyriakides, Avramides v VTA Service Department (1999); Synodinou (ed.), Cyprus Private Law, Sakkoulas publications, Athens-Thessaloniki, 2014, p. 1125; Christina Ioannidou, The Partnership Law, (2009) available at http://www.idlaw.com.cy/images/uploadFiles/files/1245663413-Partnership__3_.pdf

4.2 Consequences in Case of Death

(a) Sole Trader

Since the sole trader, does not constitute a separate legal person like a company the general rules about the succession of a natural person will apply. The property of the business is its own property and it will be inherited by his heirs on the grounds of general inheritance law.

(b) Partnership

By virtue of Art. 35 of the aforementioned law, "Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner". Hence, in so far as there is nothing different stipulated in the partnership agreement, the death of a partner will bring the partnership to an end as regards all the partners, i.e. even between the surviving partners. The dissolution of the partnership will not lead into the immediate termination of the partnership, but the latter will continue (without being able to pursuit new business) until the winding up of the partnership's affairs is completed (Art. 40 of the Partnerships and Business Names Law CAP 116). This is so even if the partnership was entered into for a fixed term which has not expired.[24] Nonetheless, since it might be highly inconvenient for a business to be subject to the whole dissolution process every time one partner dies, the partnership deed may allow the contrary and more specifically the continuation of the business by the surviving partners. This has been confirmed in the Scottish case William S Gordon & Co Ltd v Mrs Mary Thomson Partnership.[25] Nonetheless, since, as stipulated, Cypriot law, similarly to English law, on which it is based and contrary to Scottish law, does not recognise a separate legal personality to partnerships, technically the old partnership would have resolved and a new one commenced. So, in any case a technical dissolution will follow.[26]

(c) Companies limited

That companies have an existence entirely separate to that of their shareholders and directors is a foundational principle of common and subsequently Cyprus law. Indeed, the principle derives from Salomon v. A. Salomon & Co. Ltd[27] and was emphasized by the Cyprus Supreme Court in Michaelides v. Gavrielides (1980) 1 C.L.R. 244 (a rent control case) and it has been upheld by Cypriot Courts ever since.[28] As it was stated in Salomon v. A. Salomon & Co. Ltd a company "*is at law*

[24] Crawford v Hamilton (1818) 3 Madd 251; 56 ER 501; Downs v Collins (1848) 6 Hare 418; 67 ER 1228; Lancaster v Allsup(1887) 57 LT (NS) 53.

[25] 1985 SLT 112.

[26] G. Mosey, Partnership Law, 7th ed., OUP, 2010, pp. 228–229.

[27] Salomon v. A. Salomon & Co. Ltd. (1897) AC 22.

[28] See: Synodinou, op.cit., pp. 694–696.

a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act." Furthermore, as it was stated by the Supreme Court of Cyprus in Bank of Cyprus (Holdings) Ltd.v. the Republic of Cyprus, through the Commissioner of Income Tax, (Case No. 26/82) the concept of separateness of a company from its shareholders distinguishes a company from a partnership and other unincorporated bodies. Hence, at the death of a shareholder, the Company shall continue to be in existence and operation as Cyprus Companies have perpetual succession.

4.3 Destiny of a Share

The legal destiny of the deceased's shares will largely depend on the way that the latter conducted his business, i.e. via which vehicle (as a sole trader, partner, member of a Company). In this regards, at the death of the sole trader his heirs can only chose to form a new sole proprietorship using, under conditions, the business name of the deceased. In as far as the legal destiny of a share in a partnership if the partner dies is concerned, as stipulated above, subject to a partners' agreement to the contrary, the death of partner will result in the dissolution of the partnership. Hence, the heirs of the deceased partner will succeed him to his share in the partnership and to the share of the debts by which the deceased was bound, but will not automatically succeed him in the future rights of the partnership, save only to these that are necessary consequences of the deceased's actions.[29] Notably, although the deceased's heirs are entitled to his share, nonetheless they do not succeed him in the partnership[30] and the partners of the deceased will not become the partners of the heirs, as the heirs do not take the deceased partner's place but a community of interest is formed between the heirs and the living partners, which is necessary for the winding of the partnership's affairs. Therefore, on the death of one partner his heirs and the surviving partners will become tenants in common of all the partnership effects in possession.[31] To this end Art. 44 contemplates the use of the share of the deceased after his death by the surviving or continuing partners. In particular Art. 44 reads "Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or

[29] Robert Joseph Pothier, Treatise on the Contract of Partnership 18 L. Rev. & Q.J. Brit. & Foreign Jurisprudence 157 (May 1853-August 1853) Volume 21, p. 18.

[30] Crawshay v. Maule (1818) 36 E.R. 479, p. 509.

[31] Niel Gow, A practical treatise on the law of partnership, 1825, p. 8.

assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled, at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of nine per centum per annum on the amount of his share of the partnership assets: Provided that where, by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the preceding provisions of this section". Furthermore, according to Art. 45 of the Partnerships and Business Names Law, "*Subject to any agreement between the partners the amount due from the surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death*". Hence, n the absence of an agreement that in case of the partners' death their interest in the partnership will be transmitted to their heirs and that the partnership will continue, the deceased's interest in the partnership will be treated as debt and will be passed on as part of the deceased's estate. Lastly, it is also worth mentioning that according to Art. 38 of the above law the estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

In the case of a Company, at the death of a shareholder, the right to his interest in the shares will pass on to his estate (transmission). Transmission arises by operation of law on the death of the shareholder. The company has to accept evidence of probate of the will or letters of administration to establish the rights of the personal representatives in respect of the shares. Whether the personal representative can actually be registered as a member is subject to the provisions of the company's articles. Notably, a large majority of Companies have adopted the Table A of the Companies Law which provide (sec. 30) that a "*any person becoming entitled to a share in consequence of the death or bankruptcy of a member may, upon such evidence being produced as may from time to time properly be required by the directors and subject as hereinafter provided, elect either to be registered himself as holder of the share or to have some person nominated by him registered as the transferee thereof, but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by that member before his death or bankruptcy"*. Thus although the transmission of the shares will take effect immediately upon the shareholder's death to his personal representative, nonetheless the latter will not automatically become a member of the Company until his registered as such in the Company's registry of Members. This will, however, be subject to any restrictions on transmission in the company's arti-

cles.[32] Indeed, many companies have restrictions on the transfer of shares in their articles, which may allow the directors to refuse registration of the shares, or impose pre-emptive rights, etc. Before registration, the personal representative shall have all the rights as any other shareholder with the exception of the right to vote and attend shareholders' meetings, which can only be obtained if the personal representative is registered as a shareholder.

4.4 Provisions in the Articles of Association

Often the Parties to a Partnership or a Company decide to regulate the destiny of their share and the continuation of their business relation. The law does permit such agreements to the extend that they do not contradict mandatory provisions of the law. As such in the case of a partnership, the provisions of the law award individual partners the right to deviate from the provisions of the aforementioned law. Indeed, partnership is a type of contractual relation containing the principles of commercial agency[33] and as such parties are free to agree that heirs will continue in the partnership. Indeed, a default term is that the appointment of new partners shall be unanimous by all partners,[34] So, heirs are not prohibited from becoming partners, but they do not become partners automatically. That being said there are no special provisions on the claims of the heirs if they do not become members of partnership.

In relation to Company's as stipulated above, the Articles may provide for the automatic transmission of shares or otherwise regulate this subject, which is at the discretion of the shareholders to regulate by Shareholders' Agreement or in the Company's Articles of Association.

4.5 Exercise of the Shareholder's Rights After His Death

As evident from the above a heir may exercise the deceased shareholder's rights in the Company in his stead to the extend however that same is permitted in the Company's Articles of Association, in the manner stipulated above.

[32] Safeguard Industrial Investments Ltd -v- National Westminster Bank Ltd; (1982) 1 WLR 589 (CA) 159.

[33] Nigel Furey, Brenda Hannigan, Philip Wylie, John H. Farrar Farrar's Company Law Butterworths Law; 4th edition (1998), p. 5.

[34] J. B all, English report, p. 16.

5 Last Wills

5.1 Range of a Last Will (Especially: 1. Does It Include Business or Shares?)

A last will disposing of a whole property is not valid, since the concept of forced heirship limits. That being said Section 42 of the Wills and Succession Law provides that there is no statutory portion for anyone who was born, or whose father was born, in the United Kingdom or most Commonwealth countries. Such individuals are entitled to dispose of all their property by Will. Other non-Cypriots are free to dispose only of moveable property without any statutory portion. Moreover, immovable property, situated in the Republic of Cyprus, will always be disposed according to the Cyprus' Laws.

There are no specific provisions regulating the matter of disposing business or shares by last will. A will disposing of business will be valid to the extent that the rules of forced heirship are respected.

5.1.1 Determination of the Next Generation and the Generation Afterwards

A will may include special instructions, like requirements and conditions, going far beyond the testator's death, but only in terms of property (immovable/movable). This does not apply to non-existent entities.[35] Since a will is all about property, such instructions cannot bypass the provisions of CAP. 195.[36]

This shall not be confused with Trust Laws or a trust fund created during the life of the deceased. If the creation of a trust is written in the will then again it's not valid due to the aforementioned case law. Furthermore if a will contains a bequest with a condition that is morally unacceptable and/or illegal, then the bequest is valid and the condition invalid (i.e. change of religious beliefs etc.).

5.1.2 Nomination of Another Heir in Case the Original Successor Dies

If the original successor passes away before the testator then that person's descendants in a straight line will be able to inherit. As stipulated below the acceptance of the successors is not required and thus, usually, there will not be any circumstances

[35] Eleni Stivadorou v Hatzikosta (2002) 1 CLR 497; Christopoulou and Others v Maria Marianthi Christopoulou (1971) 1 CLR 437.

[36] Achilleas Emilianides, Cyprus Succession Law, 2008, p. 158; Dakoronia, Defining Wills in Greek legal system, p. 112.

under which a successor drops out, but if such provisions are provided in the will they will be respected if such occasions arise.[37]

5.2 *Requirements and Conditions (Especially: Could It Be Included in Last Wills Relating to Business Shares?)*

Succession laws will treat the shares the same as with the rest of the movable and/or immovable property of the deceased. Nevertheless, it has to be mentioned that a specific intention in relation to a bequest must be clearly specified in order to be valid.

5.3 *Other Forms (Especially for Example a Testamentary Agreement; Business Transfer in a Contractual Agreement?)*

It is possible to include a business transfer in case of death, e.g. endowment upon death, in a contractual agreement. A testator will be able to dispose his business at will to the extent allowed by the forced heirship rules, the law governing the business as well as the business 'constitutional documents'.

6 Right to a Compulsory Portion

6.1 *Institute of Compulsory Portion or a Similar National Institute (Especially: Which Persons Are Entitled (Children, Parents, Spouse)?; How Much Do They Get?)*

It is well clarified/stated in the Wills and Succession Law, CAP. 195, that an institute of a compulsory/reserved portion will apply even if the testator chooses to make a will and pass his estate to a person of his preference. In such a case, the portion which will be passed on to the person of the testator's preference will be reduced according to the surviving relatives of the testator. The aforementioned compulsory portion will be passed to the relatives (usually descendants and under some

[37] Such successor might drop out during the administration of the estate by waiving his right to inherit. See Section 51 of Administration of Estate Law, CAP. 189 as well as in Tatiana Synodinou, Cyprus Private Law, Sakkoulas Publishing, 2014, p. 367.

circumstances living ascendants and to the wife of the deceased). The compulsory portion will depend on the actual degrees of the various relatives (consanguinity).

In view of the above, Section 41 of the Wills and Succession Law, CAP. 195 state that if the deceased leaves a wife and a child or a wife and his child's descendants then he is allowed/free to pass the ¼ of his estate to a person of his preference. If, the deceased leaves a wife or his father or his mother but no child or his child's descendant, then he is free to pass the ½ of his estate to a person of his preference. Please note that the deceased will be able to pass his entire estate if he leaves no wife, no child nor any ascendants.[38]

6.2 Right to a Compulsory Portion and Business Succession (Especially: Are There General Provisions Apply to Business or Business Property?; Do Exist Special Provisions for Agricultural Properties?; Who Has a Say in the Distribution of the Mandatory Portion?; Do the Other Shareholders Have a Right to Say?)

The aforementioned rule of the compulsory portion, applied under the Wills and Succession Law, CAP. 195 apply to all sort of property (immovable situated within the Republic of Cyprus and movable). There are no provisions for business succession; in other words, the rules of normal forced heirship will apply in terms of the shares of that business (considered as movable property on the name of the deceased).

It has to be noted that the above apply only for businesses (legal persons) that are controlled by shares; and the share holders have an interest within the business/company.

Since the compulsory portion (forced heirship) will apply, at the time of death of the deceased the shares/interest within the company will have to be evaluated before they pass on to the rightful heir. In other words, the shares will not be calculated according to their nominal value but to their actual value as sold to an interesting party.

Regarding whether the current shareholders have a say to this transaction, the answer can also be found in Sect. 4.3 of this paper and Table A of the Companies Law which provide (sec. 30) that a "*any person becoming entitled to a share in consequence of the death or bankruptcy of a member may, upon such evidence being produced as may from time to time properly be required by the directors and subject as hereinafter provided, elect either to be registered himself as holder of the share or to have some person nominated by him registered as the transferee thereof,*

[38] Should the deceased leaves by drafting a Will a bigger portion than he is obliged to do, then relevant is the case of *Papavasiliou v Papafedia (1975) 1 JSC 96.*

but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by that member before his death or bankruptcy".

Thus, we conclude that the rest of the shareholders will not have a say to this transfer but the Board of Directors will.

In view of the above, we conclude that there are neither different rules applicable to the succession of business property nor any special rules for agricultural businesses/property.

The distribution of the mandatory portion; in our case the shares (movable property) will be carried out by the administrator of the estate of the deceased.

6.3 Calculation of the Compulsory Portion (Especially: Certain Nominal Amount or Minimum Percentage?; What Is the Minimum Percentage?; Can the Percentage Be Lowered When It Comes to a Business Property?; Are There Assessment Provisions for the Valuation of the Assets?)

The compulsory portion will be calculated according to the provisions of the Wills and Succession Law, CAP. 195. It has to be pointed out that there are neither minimum percentages nor any special provisions for business succession. The whole estate of the deceased will be calculated in its entirety. The valuation of the deceased's estate will take place at the time of the death of the deceased and after the deduction of any liabilities of the deceased.[39]

The compulsory portion will be calculated according to whether the deceased has a surviving spouse as well as the different degrees of relatives and as follows[40]:

- If the deceased leaves heirs of the first class, the state is divided equally among the surviving spouse, the living children and the descendants of children who died in the lifetime of the deceased, per stripes.
- If the deceased leaves no child (or descendant of a child), but leaves at least one relative of the third degree of kindred (great grandparent, aunt, uncle, nephew or niece) or closer, the surviving spouse is entitled to half the statutory portion and undisposed portion.
- If the deceased leaves only relatives of the fourth degree of kindred (great great grandparent, great aunt, great uncle, first cousin, grand nephew or grand niece), the surviving spouse is entitled to three quarters of the statutory portion and undisposed portion.

[39] Kleovoulou Stylianou Pavlides v Maria Gemma Jimerson, Civil Appeal 336/2006. 17/03/2010.

[40] Please see above, Sect. 2.1. – Principles of Inheritance Law and Section 44 of Wills and Succession Law, CAP 195.

- If the deceased leaves no relative within the fourth degree of kindred, the surviving spouse is entitled to the entire statutory portion and undisposed portion.

6.4 Renunciation of Inheritance (Especially: Extent of Renunciation; Possible Provisions Under the Articles of Association; Compensation of Compulsory Portion Claims)

Renunciation of inheritance can take place in Cyprus, nevertheless it has to be clarified that the Law[41] mention a complete renunciation of inheritance. Conceptually and in Greek language the verb renounce means entirely. However, sometimes it can be noted that partial renunciation can take place before a Court of Law. Tax cannot apply to the inheritance, thus the only reason for a partial renunciation is to pass a part of the share to another beneficiary. In the United Kingdom though a "variation of deed" is indeed possible; and it actually takes place for tax purposes.

7 Anticipated Succession and the Maintenance of the Transferor's Shareholder Position

7.1 Forms of Anticipated Succession

Transfer of property (movable and immovable) during the lifetime of the testator is possible and there are no restrictions. No specific transfer agreement will apply except in the case of an immovable property; where the testator will hold a right (similar to an easement under UK Property Law) until his death. In other words, the title deed will pass on to the person of his preference but the testator will hold an easement right until the time of his death. Either such transfer will be passed in exchange of money or such property will be granted as a donation/gift to someone, usually a family member.

Furthermore, property can be passed to a third party as a gift in anticipation of death save certain conditions that need to be met.[42] Primarily the testator needs to be of sound mind and to have completed the age of 18 years. The gift needs to be given in the presence of at least two witnesses who have completed the age of 18 years and are of sound mind. Notably, a gift made in contemplation of death may be resumed at any time by the testator and shall note take effect if the testator recovers from the illness during which it was made; or the testator survives the person to whom it was

[41] Section 51 of Administration of a Deceased person Estate Law, CAP. 189.

[42] Section 40, Wills and Succession Law, CAP. 195.

made. Any gift made in contemplation of death shall be treated upon the administration of an estate exactly in the same way as if it were a specific legacy.[43]

Additionally, it has to be pointed out that according to section 51 of the Wills and Succession Law, CAP 195, such gifts (if they were given to a rightful heir) will be taken into consideration during the calculation of the inheritance portion. If the testator though included a provision in his Will stating that such gifts will not be taken into consideration then those gifts will not be taken into consideration.

7.2 Relation to Ownership – Relation to the Transfer to the Leadership

Whether the transfer relates only to the ownership of the shares or the contractual regulation apply to the transfer of leadership and controlling functions too depends on the Company's Articles of Association. Generally the Model Articles provided in the First Schedule of the Companies Law Cap. 113 provide that "the Directors manage the business of the Company and may exercise all such powers of the Company as are not, by the Law or by the Articles of Association, required to be exercised by the Company in general meeting". That being said the shareholders retain the right to remove a Director and appoint other/additional directors in his stead.

In view of the above, Company Law, CAP. 113 clearly states that a Director may be appointed or dismissed by an ordinary resolution (holder of the 50 % of the issued share capital plus 1 share). Thus transfer of leadership can take place through the different appointments of the Directors within the Board of Directors.

7.3 Influence of the Testator in His Shareholder's Position (Especially: Usufruct, Pension, Insurance, Transfer of Management Position and the Shares Step by Step)

As stated above, the testator's estate in its entirety will be passed onto the rightful heirs. Since the deceased's estate can include shares; this means that some of his rightful heirs will become shareholders in a company. The new shareholders will have the same rights as the deceased had before and save any amendments to the rights conferred on the issued share capital and the shares per se there will not be any distinction to the rest of the shareholders. In other words the testator cannot set any different rights on the actual shares (after his death). At this point it must be stated that if the deceased's entire estate was 60 % of the issued share capital of a company and he is leaving a wife and two children then in the end of the day his rightful heirs will become from majority shareholders, minority shareholders.

[43] Re Craven's Estate (1937) Ch. 423.

8 Foundation and Trusts as Instruments for Business Succession

8.1 Set Up of a Foundation

Under Cyprus Law there doesn't exist a specific definition or legal framework for foundations. However, there are several other types of entities that resemble a foundation, like trusts, associations, companies limited by guarantee and institutions. In particular trusts and institutions are the most appropriate vehicles in relation to estate planning and for family maintenance purposes.

In fact Art. 7 of the International Trusts Law allows the creation of purpose trusts, i.e. a trust that is created for the fulfilment of a purpose and not for the benefit of any particular individuals. Of course in order for a purpose trust to be valid, although the trust will be for the benefit of a purpose, the wording must allow for the identification of a class of beneficiaries.[44] Furthermore, an institution is defined in the Law as "the total set of property committed to servicing a certain purpose."[45]

According to Societies and Institutions Law 57/1972, an institution can be established once its memorandum of association is registered by the registrar in the register of institutions and a certificate of registration is issued by the registrar. The certificate thus issued is then published in the Government Gazette of the Republic and constitutes full proof of the date of registration and compliance with all statutory requirements. Once the certificate has been issued, the institution shall acquire a legal personality. Such institutions are subject to the supervision of an official and such official is appointed by the Council of Ministers (the 'Registrar'). The deed of institution shall take the form either of a legal act inter vivos or a provision in a last will and testament. The deed of institution must stipulate the registered name and object of the foundation, its registered office, the assets donated to it, the names and addresses of the directors of the foundation and how it is structured.

In as far trusts are concerned, Cypriot trust law is found in its statutes (the Trustee Law of 1955 (Cap. 193) (the Trustee Law) and the International Trusts Law (69(I) of 1992 as amended) (the International Trusts Law), in particular), its case law and the doctrines of equity (Section 29 of the Courts of Justice Law (14 of 1960). Statutory documents, however, do not provide for a specific definition of what constitutes a Trust, but it is accepted by both case law and legal theory that "a Trust is an equitable obligation created by a person/owner of the property (the "Settlor"), binding a person ("Trustee") to deal with property over which he has control (the "Trust Property") for the benefit of another ("Beneficiary")". From the above definition we understand that the basic elements of a Trust are the below: (a) an obligation

[44] See, *Re Denley's Trust Deed* [1969] 1 Ch 373 where a purpose trust created "primarily for the benefit of the employees of [a certain] company and secondarily for the benefit of such other persons as the trustees shall allow to use the same" was deemed to be valid as it allowed for identification of certain beneficiaries.

[45] Associations and Institutions Law 1972 Art. 2.

on the holder of property (the "Trustee") (b) to manage that property (the "Trust Property") (c) for the benefit of another (the "Beneficiary").

As can be seen, from the above definition of a Trust, the latter is merely an equitable obligation and hence has no legal personality. To that effect, in order for a Trust to be created, Cyprus Law does not require any filings or registrations, but merely that the Settlor's intentions be put down in writing in a will (hence the formalities of the will need to be upheld) or in an instrument called the 'Deed of Settlement' and that same be executed by both the Settlor and the Trustee. The Deed of Settlement is therefore an agreement entailing the Settlor's wishes in relation to the administration of the Trust Property and conveying to the Trustee title to the Trust Property to manage the latter in accordance with the terms of the Deed of Settlement. According to the Contracts Law, Cap. 149 (s.7–10) an agreement comes into effect, provided same is legal and not void, at the time the Offeree accepts the offer of the Offeror. It can be deduced therefore that similarly a Deed of Settlement comes into effect when the Settlor proposes to the Trustee to act as such and the latter accepts such proposal, i.e. at the time of execution of the Deed of Settlement.

The International Trusts (Amended) Law of 2013 now provides for the creation of a "Registry of Trusts" wherein all (new and existing) Trusts should be registered. The Registry of Trusts will not be open for disclosure to the public but will be open for review by the relevant Cyprus authorities. Registration in the Registry of Trusts is not a pre-condition for the creation and/or validity of the Trusts, but failure to register the Trust in such Registry will expose the Trustee to criminal charges and/or administrative fines.

Although no formalities exist for the creation of a Trust, for a Settlor to validly create a Trust, the following certainties need to be met:

- certainty of intention – whether the Settlor has manifested an intention to create a Trust. This is usually evidenced by the Trust instrument. The test in determining whether the intention exists is whether based on the words used and from the behaviour of the parties, there is a distinct and clear intention that the Trust Property is to be held on Trust for the benefit of a third party.[46]
- certainty of subject matter – whether the property identified as being settled is sufficiently accurately identified.
- certainty of objects – the Beneficiaries must be clearly ascertainable within the perpetuity period. The Beneficiaries may be a specified class of Beneficiaries

[46] For example see: (a) Re Kayford [1975] 1 All E.R.–Megarry J held that "it is well settled that a Trust can be created without using the word "Trust" or "confidence" or the like; the question is whether in substance a sufficient intention to create a Trust has been manifested";(b) Twinsectra Ltd v Yardley [2002] 2 A.C. 164 Lord Millett said (§ 71) "A settlor must, of course, possess the necessary intention to create a Trust, but his subjective intentions are irrelevant. If he enters into arrangements which have the effect of creating a Trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter into them".

that is an ascertainable group of people.[47] It is therefore not necessary for each and every potential Beneficiary to be identified by the Trustee.

If the above certainties are satisfied, the Settlor relinquishes dominion and control over the property placed under Trust according to the terms of the Deed of Settlement and as a general rule the Settlor no longer has legal standing to challenge the Trustee's actions.

We note that although, as stated there are no formalities or registration required for the formation of a Trust, Art. 12 of the International Trusts Law provides: "Notwithstanding the provisions of the Stamp Law an instrument creating an international Trust shall be liable to stamp duty at a fixed rate of EUR 430 or such other amount as may from time to time be prescribed by the Council of Ministers". In accordance with the Stamp Duty Law, stamp duty is due within 30 days from the execution of the Deed of Settlement and in case of failure to comply, penalties will arise.

As can be seen therefore the stamping of the document is irrelevant with the date the document comes into effect. Same is specifically provided for in Article 36 of the Stamp Duty Law, which stipulates that omission to pay stamp duty will not invalidate a document, it will, however, impede same from being used as evidence in Cyprus Courts. That being said, stamp duty may be paid at a later time (than the time limit stipulated therein) nevertheless, should this be the case there will be a penalty imposed, depending on the time elapsed (Art. 20 Stamp Duty Law).

8.2 Influence of Family Members in a Foundation

In as far as Institutions are concerned; Art. 2 of the Societies and Institutions Law 57/1972 provides that institutions must be for "a certain purpose" i.e. it allows an institution to pursue both public and private purposes to the extent that these purposes do not undermine the security of the Republic or the public order or the public safety or the public health or the public morals or the fundamental rights and freedoms of the individual, as per the will of the founder (Art. 30). The purposes shall be specified in the deed of institution and can thereafter be modified but only after the approval of the Court is obtained and so long as they are not contrary to "the provisions concerning the public benefit or general interest purpose" (Art. 42). This implies that foundations must have public benefit or general interest purposes but this is not explicitly stated in the law. In practice the Ministry of Interior will not register the establishment of a new foundation if it is not established for the public benefit, as the latter is determined at the absolute discretion of the relevant officials.

In relation to an International Trust, the Trustee will be entitled to act anything that is not specifically precluded by the Law and the Deed of Settlement or Will. In

[47] Re Baden's Deed Trust (also known as McPhail v Doulton) [1971] A.C The test to be applied in ascertaining the validity of a Trust is whether or not it can be said with certainty that a given individual is or is not a member of the designated class.

particular, the Trustees' rights, as same will be contained in the Deed of Settlement (or Will) itself and can be very wide-ranging. There are also powers given by the Trustees Law, Cap. 193 as well as the International Trusts Law which apply to the extent they are not excluded or amended by the Trust deed (or Will)). These include:

(i) Power to administer the Trust Property as if the property were their own.
(ii) Power of Investment of the Trust Property for the benefit of the Beneficiaries
(iii) Power to request and retain professional advice (such as from an accountant or solicitor)
(iv) Power to insure the Trust property as if the property were their own.
(v) Right to Professional Remuneration and reimbursement for costs and expe?

Notably, unless specifically stipulated in the Deed of Settlement (or Will) of the Trust or the Deed of Institution, if the purpose of the Trust or the Institution is related to the family or the legal successor a legal successor or family this will not have influence on a Trust or Institution. In relation to whether beneficiaries have rights in the foundation and may they transfer those rights, notably in institutions no such right exist. In trusts the beneficiaries' right to transfer their rights under the trust will depend on the Deed of Settlement of will forming the Trust.

1. Is there a minimum duration for a foundation? Lastly, there is no minimum duration neither for the trust nor the institution, nor is there a maximum duration for the trust and the institution. In fact, Cyprus International Law Art. 5 specifically provides that "In respect of an international trust created on or after the commencement of this Law and subject to the terms of the trust-

   (a) there shall be no limit on the period for which a trust continues to be valid and enforceable, and
   (b) no rule against perpetuities or remoteness of vesting or any analogous rule applies to a trust or to any advancement, appointment, payment or application of property from a trust".

8.3 Distinction to the Trust

Most notably, the difference between a trust and a foundation a foundation has an independent legal identity and holds assets in its own name, while a trust is a mere obligation and does not have a separate legal identity from its Trustee. As stipulated, the Cyprus Law does not recognise the concept of a foundation. That being said the Charities Law, Cap. 41 provides for the establishment of charitable trusts regulating these trusts and their operation. The legal framework provided by the above law was deemed to be somewhat lacking and as a result, the assistance of common law and case law is used in order to be able to address their interpretational questions. The purpose for which charitable trusts are set up are for public benefit purposes such as relief of poverty, advancement of religion and any other purposes that are considered to be beneficial to the public or the community at large.

The Interaction Between Company Law and the Law of Succession in England

Jane Ball

Abstract English law tends to keep company law and succession separate. Family problems may be resolved outside companies, using testamentary freedoms, flexibility, and managerial approaches within a trust. Shareholders can be treated equally regardless of family status. Continental difficulties, which arise from fixed compulsory family portions on inheritance, may not intrude into English family business quite as the conference questionnaire contemplates.

English law has a functionally similar concern for family welfare to continental countries in a European continuum. France insists on compulsory shares for families but then provides arrangements to facilitate business. England has testamentary freedom but restricts this for statutory provision for family and dependants. The differences are, however structural. Consequently, international tolerance is essential. Testamentary freedom is inherently tolerant.

1 The Importance of Family Business and Business Succession

The English system has little provision for compulsory inheritance by family, but this absence and the freedom to plan succession might result in more small businesses succeeding. It is easier to ensure businesses are under the control of the more competent family members, friends or others. In this way enterprises may be less likely to be badged 'family businesses', as such, in a separation of family and business law.

It is not that family businesses do not matter, they matter immensely, but why should benefits be available to family businesses which are not available to any other business? Exploring the difficulties of family businesses is useful to assist these, but many problems are generic to small businesses. This useful Congress

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topic can show that the legal and cultural environment makes a difference to the transmission of family businesses and even to their survival.

1.1 Data About the Importance of Family Business

Family businesses are an economically important sector but difficult to define. A US review (Chrisma et al. 2002: 8) found that early researchers were imprecise, defining family business by the criteria of ownership, management and inter-generational succession. Astrachan and Shanker (1996) more forcefully found a problem with empirical work because of variable degrees of interviewees' closeness and role in the family.

The most important regular annual statistics in England are collected by the Ministry, the Department of Business, Innovation and Skills (BIS 2012: 88), using combined methods. Their annual review of small and medium enterprises (SMEs) omits large family companies, which comprise 42 out of the 673 companies quoted on the FTSE All Shares index (Manchester Business School 2006).

In 2012, the BIS interviewed 5,573 businesses, asking 'is your business a family-owned business?' based on majority shareholding, finding that:

- Family businesses employing between 1 and 249 people [around 760,000 businesses] comprised around 62 % of the 1.23 million SMEs employing between 1 and 249 people.
- These SMEs generated around £656 billion in sales turnover 52 % of all sales turnover generated by private sector enterprises employing between 1 and 249 people.

These figures are substantially lower than other estimates. A report for the Institute for Family Business (2011: 6 and 7) found just under three million family businesses in the UK, 66 % of UK businesses, employing 41 % of private-sector employees.

1.2 Business Succession in the Family

These figures are not systematically collected by registration authorities in England in quite the same way as in Europe, but there are surveys. The BIS report (2012) discussed available evidence. It is commonly proposed that family businesses are long-lived[1] or promote enterprise.[2] On balance from conflicting evidence, the survey

[1] From Oxford Economics (2011a, b).

[2] BIS (2012), p. 93.

showed that some older family businesses were long-lived,[3] suggesting they invest in longevity. However, these companies suffered lower growth than others.

The case that family businesses promoted entrepreneurship was less strong, with younger businesses suffering similar incidence of cessation of business to non-family business. The BIS observed that businesses are originally started by individuals, perhaps with family help, but:

> Rather than family business being a seed-bed for entrepreneurship, it may be more accurate to say that entrepreneurship is a seed-bed for family businesses.[4]

It was hard to tell from surveys whether transfers of businesses were due to financial difficulty, realizing a gain or good planning, or to whom transfers were made. A long-term trend was similarly difficult to trace. Evidence from the Registrar of Companies[5] suggested that more non-family businesses closed down without insolvency than family businesses – 6.4 % for small family firms as against 9.0 % for non-family in 2009. For medium-sized businesses, this was 8.6 as against 10 %.[6] This tends to support a stability thesis.

Collins et al. (2011) suggested that 12–13 % of family businesses expected to transfer ownership or close down within the next 2 years. Second generation firms formed 21 % of their sample, third generation firms 9 %, and fourth generation 4 %, a small percentage of long-lasting firms.

It is a good idea if businessmen plan to transfer their family business to the next generation,[7] whether family or not, whether in their lifetime or on death. A new UK trend is increasing use of wills to plan for death. In 2011,[8] there were only 11 % of administered[9] estates, where the deceased had not made a will. In 2007, this was 27 %.[10]

For lifetime transfers, there are a series of constantly changing tax reliefs such as "'entrepreneur's relief' for individuals (within a lifetime limit).[11] This reduces the chargeable rate of capital gains tax.[12] Similarly, it is possible to take out an insurance policy for loss of key individuals.

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[3] From Stock-Market data for 2009.

[4] BIS (2012), p. 94.

[5] A national public registry for all companies.

[6] From Oxford Economics (2011b).

[7] EU Commission (2009).

[8] From HM Government (2012) Chapter 2, Family Matters, Tables 12.3–6 and 9. This included partial intestacy, where the will did not cover everything.

[9] This is for estates worth more than £5,000. See Sects. 4 (introduction) and 4.1 for the procedure.

[10] *Ibid*.

[11] Taxation of Chargeable Assets Act 1992, ss 169H-169S.

[12] *Ibid*. s 169N.

1.3 The Legal Background

Planning for the future of a business is assisted in England by testamentary freedom, the freedom to leave your assets to whomsoever you choose, whether in a lifetime or on death. English testamentary freedom continues from the sixteenth century, and became absolute with the Mortmain and Charitable Uses Act 1891. Consequently, individuals are freer to dispose of their business than elsewhere. To qualify this, from 1938,[13] claims by family and dependents, particularly spouses were allowed.[14] Things might still go wrong. Someone might plan badly or fail to plan, so that the law of intestacy comes into play and business if affected. This can cause problems.

If you compare England and France (where obligatory inheritance affects a substantial percentage of assets) these two countries may not be as different as the principles might suggest. England starts from a position of having freedoms to dispose or property and then restricts them. French freedom often exceeds the limits suggested. An example is the French reform to increase the possibility of succession by a spouse or civil partner, and to facilitate business succession by the *pacte successora*le (Van Erp 2007).[15]

However, the differences in principle are significant and in how succession is organized. These are sufficiently profound to cause comprehension difficulties and, recently, this meant that England had to be left out of the EU succession regulation[16] which would have considerably assisted cross-border succession. This is very serious.

1.4 The Tension Between Company Law and Inheritance Law

There is not really a tension between company law and inheritance law in England in a narrow sense. English succession law does not constrain a person to leave assets to someone unsuitable, or to split property up between people who might make management difficult. The law of succession and company law are quite distinct. Company law can deal with any disputes, not just family disputes.

In a wider sense, of course there is a problem when someone dies and there is family to provide for or when there is nobody obvious to take control. However the English law of succession is really quite managerial – managing the transition of any estate to the heirs using the law of trusts and mitigating asset splitting (Sects. 4.1 and 2).

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[13] The Inheritance (Family Provision) Act 1938, superceded by the Inheritance (Provision for Family and Dependants) Act 1975. See Sect. 2.3.1.

[14] See Kerridge (2009) for a brief history.

[15] See Sect. 5.3, for difficulties with contractual gifts in England.

[16] Regulation No 650/2012 of the European Parliament and of the Council of 4th July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments on matters of succession and on the creation of a European Certificate of Succession.

2 Inheritance Law (Intestate Succession)

Claims by family on death to defeat a will are more limited in England than in France, but this is a European continuum rather than a difference between European common law and civil law jurisdictions. Scotland and Ireland are common law systems with some forced heirship. There is probably a greater prevalence of immediate forced heirship effective at the moment of death in southern EU countries with Napoleonic systems (for example, France, Spain, Italy, Portugal, Greece[17]) mitigated by acceptance procedures (Spain)[18] or the careful use of trusts (Italy). This may be a northern European tendency for disappointed prospective heirs to claim against those receiving assets later through the courts.

2.1 Principles of Inheritance Law

Although testamentary freedom is prominent in English law,[19] it has restrictions dealt with in Sect. 2.3.1.

The use of trusts for administration of the deceased's estate is automatic, but it is a compulsory mechanism rather than a principle, as such. Certainly, this managerial device can avoid a lot of disputes, can ensure professional transition of assets to the next generation and imposes duties on those administering estates. The fact that there is little problem with many issues in the conference questionnaire has as much to do with the trust (introduction to Sects. 4 and 4.1) as with free inheritance. In any event, it is very difficult to understand how English succession works without a basic understanding of this useful process and of the role of trusts in that.

2.2 The Range of Testamentary Freedom

There is no compulsory portion in favour of family, in the sense of a fixed share which overrides the provisions of any will, except there are claims to estate assets by family and dependents. On intestacy there are also claims by family. If there is a valid will, the adult individual of full capacity can leave their assets as they wish, but subject to these possible claims.

This gives wills great importance, which accounts for the checking processes in described in 4, to ensure that all is fairly done. Evidence from practitioners tor the

[17] This is clear from the Yearbook of the Society of Trust and Estate Practitioners (STEP 2013) for France and Spain.

[18] *Ibid*.

[19] Apparent from the whole of this chapter, but particularly explained in Sect. 2.

Law Commission[20] showed that people put considerable thought into their wills (the Law Commission is an independent expert body charged with updating and reforming the law).[21] Why should the State know better than the individual what is best for their family?

Nonetheless, in England, in the majority of cases assets are left to family. In 2000–2001,[22] 77 % of married men and 69 % of married women left their estate to their spouses, whilst 4.5 % of men and 20.8 % of women left their assets to their children. For divorcees, this is 77 % for men and 65 % for women. There is a significant presence of gifts to charity, from 4 % for married individuals to 21–24 % for single people.

The above rather crude figures still mean that testamentary freedom can be arranged differently for the benefit of a business, for example giving some individuals income only, or omitting those children less able to run a business (perhaps benefitting them in some other way). On death, it is possible for all-adult beneficiaries to agree to re-arrange the property bequeathed, so freedom to organize business is not entirely dependent on pre-death planning.[23]

2.3 Statutory Inheritance Law

The lack of a compulsory portion reserved for relatives does not mean that wives, children and dependents are unprotected. Reinhartz (2007) suggested that inheritance law was closely related to family law. If this is considered here, English law has one of the most generous divorce laws in Europe towards wives, generally assisting children too in consequence.[24] The tendency to favour spouses can be seen both in possible claims against the deceased's assets, under the Inheritance (Provision for Family and Dependents) Act 1975 (whether there is a will or not – Sect. 2.3.1) and in the law of intestacy (if no will – Sect. 2.3.2).

The Inheritance and Trustees Powers Act 2014 ('the 2014 Act')[25] reformed and updated both these areas based on a Law Commission report.[26] The latter found strong public support for testamentary freedom. The Reforms slightly widen the

[20] Law Commission (2013) Part II.

[21] See below note 26 for their recent report and Sect. 2.3.1. for an example of their reforms.

[22] Ministry of Justice (2012) Table 12.9, although the figures given are for 2000–2001. These figures will not record small estates of less than £5,000 and include cases where there is no will. They will not show which child inherits.

[23] Inheritance Act ss. 17 and 142. Variation is possible by the Court if there are beneficiaries under the age of 18 or otherwise lacking capacity with the approval of the court under the Variation of Trusts Act 1958.

[24] The Economist (2013). Child support also involves requirements for non-custodial spouses and for the state to support children.

[25] Taking effect for deaths after 1st October 2014.

[26] The Law Commission (2013).

classes of people who can claim, and simplify the law. Already, people in Civil Partnerships[27] can claim in the same way as a spouse, and a child does not have to be legitimate to inherit. The 2014 Act also provided for adopted children to inherit from their natural parents.[28]

The questionnaire asked if there is a *fidei commissum*. That is probably an ancestor of the trust but the terminology has no modern English usage, except in historic Roman law. The questionnaire implies that a *fidei commissum* means tying up property for generations. The trust and wills do this to a limited extent. A trust might be terminated by its beneficiaries collectively.[29] There is a trust on every death for the period of administration, but often terminating when administration is complete. Trusts can be very short-term indeed.

Trusts also have statutory limits to their longevity, not necessarily longer than for a French *société civile*.[30] Charitable trusts are exempted from this rule against perpetuities. Charities are for specified good causes with a public benefit,[31] such as the relief of poverty or the advancement of education.[32] These may be capable of being perpetual, if properly administered.[33]

2.3.1 Claims Under the Inheritance (Provision for Family and Dependents Act 1975)

The Inheritance (Provision for Family and Dependents) Act 1975 allows claims for reasonable financial provision by particular family members and other dependents against the deceased's estate. Claimants must issue proceedings usually within 6 months after the administrator or executor of the estate obtains their 'grant of representation' the official document recognizing entitlement to administer the estate.[34]

The classes of people who can claim are quite wide: spouses and civil partners[35]; former spouses and former civil partners[36]; children and children of any marriage of which the deceased was a party at any time who were treated as children by the

[27] Under the Civil Partnerships Act 2004, currently only applying to single sex partnerships.

[28] The Inheritance and Trustees Powers Act 2014, s 4.

[29] The rule in *Saunders v Vaultier* (1841) 4 Beav 115, provided they are of full age and absolutely entitled between them to all the property.

[30] Because of the rule against perpetuities. The Perpetuities and Accumulations Act 2009, s. 5, limited the period within which interests in a trust must "vest" within 125 years (that is, the beneficiary must exist and be identified or identifable). A French company can last 99 years.

[31] Charities Act 2011, s 2(1)(b) and s 4.

[32] From a non-exhaustive list in *ibid*. s 3.

[33] Charities must be registered and are accountable to the Charity Commission, an independent supervisory body.

[34] See Sects. 4 (introduction) and 4.1 for the procedure.

[35] Inheritance (Provision for Family and Dependents) Act 1975, s. 1(a).

[36] *Ibid*., s 1(b). For former civil partners to qualify, they should not have been in a former marriage or relationship.

deceased[37]; co-habitants who had lived in the same household as the deceased for the 2 years prior to death[38]; and any other person (excluding the latter categories) who was being maintained by the deceased, wholly or partly, immediately before his or her death.

The legislation was conceived to alleviate hardship[39] from bereavement rather than to provide anyone with an entrenched proportion of the estate. The amount to be received is discretionary. 'Discretion' here does not mean untrammelled freedom. It is much more like the power of appreciation, which often gives a French judge greater room to manoeuvre than an English one.[40] The English judge is restricted by statute and by detailed interpretations of statute in cases. This assessment of the facts is important, since family circumstances differ, as do the needs of the parties.

There are two ways of assessing financial provision: 'the maintenance standard' and 'the surviving spouse standard'. The 'maintenance standard' means providing a sum of money for the maintenance of the statutory classes (other than spouses and civil partners). No blood link is necessary for the latter claim, covering individuals who were financially dependent on the deceased in their lifetime.[41] Adult children with no special circumstances would not normally receive maintenance.[42]

The claimant for 'maintenance' receives 'such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his[43] maintenance.'[44] This is an objective test not directed to criticising the deceased. The claim is neither the 'bare necessities of life' nor at the other extreme anything desirable.[45] The facts of the parties and their circumstances are investigated. There are statutory guidelines and an ample case law/jurisprudence on what is appropriate. The maintenance needs are usually paid in capital to conclude the matter.

The surviving spouse or civil partner may receive more than the 'maintenance' standards, receiving instead a sum similar to what they should receive on a divorce settlement.[46] Former spouses and civil partners might claim under this heading if their spouse/partner died within 12 months of a decree of divorce, nullity or

[37] *Ibid*., ss 1(c) and 1(d).

[38] *Ibid*., ss 1A and 1B.

[39] See the short history in chapter 8 of Kerridge (2009).

[40] See Jane Ball, *Housing Disadvantaged People*? *Insiders and Outsiders in French Social Housing Allocation* (Routledge 2012) Sect. 4.3.1, and Simon Whittaker (2008) 'Burden of Proof in the Consumer *Acquis* and in the DCFR' (2008) *ERCL* 4-3, 411–44.

[41] The test for whether dependency exists was adjusted by the Inheritance and Trustees Act 2014, s 6 and Schedule 1, to be more favourable to dependents.

[42] *Re Hancock* [1998] 2 FLR 346 and *Espinosa v Burke* [1999] 1 FLR 747.

[43] Under the Interpretation Act 1978, s 6, the masculine term includes the feminine, and vice versa, so women can claim.

[44] Inheritance (Provision for Family and Dependents) Act 1975, s. 1(2)(b).

[45] *Re Coventry* [1980] Ch 461.

[46] See the first para. of Sect. 2.3 for the generosity of divorce provision.

dissolution of the partnership.[47] Provision on death is unlikely to be less generous. However, conversely, an independently rich spouse might get nothing.

2.3.2 Inheritance Where There Is No Will

Despite English testamentary freedom, England resembles other countries on intestacy. However, again the system is weighted towards spouses (and civil partners) and then children. Cohabitants may have no claim on intestacy, but might still have a claim under the 1975 Act as dependents.

Currently, after the amendments made by the 2014 Act, surviving spouse on intestacy is entitled to:

(i) *All the 'personal chattels'* of the deceased, that is, moveable tangible property not including "… money or securities for money or used at the death of the intestate solely or mainly for business purposes, or held solely as an investment."[48]
(ii) *If there are no children or grandchildren*, the surviving spouse takes the whole estate (net of taxes and debts).[49] OR
(iii) *If there are children or grandchildren* the surviving spouse takes:

   (a) *the* '*statutory legacy*',[50] is a claim before others, currently £250,000 (net of taxes and debts). This amounts to 90 % or more of whole estate in most cases.[51] Surviving spouses have long had a right to buy the home, paying any shortfall in value. AND
   (b) *half of the remainder* of the net estate, with the other half looked after by trustees for children until of full age.

Only if there is no spouse or children or grandchildren, will more distant relatives inherit. Here, the closest class of relatives takes the whole of the estate, equally between them. The Law Commission found public support for transmission to more distant relatives before passing to the state as *bona vacantia.*[52]

The reform tends to increase the inheritance by spouses and generally limits the involvement of trusts after the administration of the estate is complete. This limitation is only possible when children are of full age, and have full mental capacity and so do not need property looked after for them.

Testamentary freedom means that it is possible to plan to avoid the scheme of intestacy for whatever purpose, although claims under the 1975 Act can affect this. These purposes might include preserving the business, perhaps by endowing it or

[47] The Inheritance (Provision for Family and Dependents) Act 1975, s 1(2)(a) and (aa).

[48] Defined in s 55(1)(x) Administration of Estates Act 1925 as amended by s 3 of the Inheritance and Trustees Powers Act 2014.

[49] *Ibid.*

[50] From the tables under s. 46(1) of the Administration of Estates Act 1925, as amended.

[51] Law Commission (2013) para 2.6.

[52] *Ibid*. Property passing to the State as *bona vacantia* is used for the public good.

co-managers with money, or leaving property to the most competent, or alternatively preferring to close down or sell the business to provide cash for family. This is mainly the choice of the deceased, whether in their lifetime or on death.

2.4 Business Succession

There are generally no provisions for family succession to business in company law – they tend to be separate. This does not mean family needs cannot be accommodated within the company's constitution[53] if desired. The 'private limited company' is a common form for small business and the company constitution can provide privileges for family members if wished (see Sect. 4.3.4). Companies commonly use the default form of constitution found in regulations.[54] However, clauses could be added or taken away or the form changed completely to deal with family concerns.

There is no special regulation for family succession in agricultural or craft businesses. A small exception is the older form of agricultural tenancy[55] allowing succession to the tenancy twice, on death or during a lifetime of the tenant by someone nominated by the tenant or by someone working full-time on the farm for 5–7 years prior to the tenant's death. This could help family, but such tenancies cannot be created since 1995. They will die out.

There has been a good deal of government work to assist small business, rather than family businesses, as such. In 2006, there was a major re-codification of company law in the Companies Act 2006. The relevant 2002 White Paper proposed:

> … a more appropriate way forward is to tailor the core of company law to the smallest companies, which are mostly private companies. Additional safeguards can be added as necessary …[56]

The 2005 White Paper followed this up with 'Think small first',[57] policies to facilitate setting up and running a small company, such as by a special default form of articles of association for small companies[58] and promoting electronic communication with the Registrar of Companies. This approach was limited by the requirements of EU company law. It was thus a major objective of the legislation to avoid unnecessary regulation for small companies, also the core of family businesses.

[53] The term includes the memorandum and articles of association plus other documents, Companies Act 2006, s. 17.

[54] Companies (Model Articles) Regulations 2008.

[55] Agricultural Holdings Act 1985, Part IV.

[56] DTI (2002) para. 1.6.

[57] DTI (2005) from the Summary.

[58] Also in the Companies (Model Articles) Regulations 2008.

3 Legal Incapacity Before Death

This is mainly a question of the general law relating to incapacity rather than the specific law relating to companies or small businesses.

3.1 Special Statutory Provisions or Regulations in the Case of Dementia

None of this is 'special' to family business as against business. A planning measure for many older people is the statutory 'lasting' power of appointment which allows an individual (before they lose mental capacity) to choose a person to look after their affairs. This continues to be effective when they do lose such capacity.[59] These have to be registered.

If other measures fail, the care of the assets of people without mental capacity is undertaken by the Court of Protection.[60] The court will enquire about the patient's position and either make orders or appoint deputies to act on the patient's behalf, whether family members, trusted friends or professionals. This could include acting in the business. Court will act on emergency applications within 24 h.[61]

3.2 Precautions in the Articles of Association

It is quite possible to ease the removal of someone without mental capacity from a small business, by specific provisions in a partnership agreement or in the articles of association. Essentially, though, someone without mental capacity cannot contract, nor be a trustee as a matter of law since their actions are mostly invalid, for their protection.

4 Consequences for a Business in Case of Death

When someone dies in England, their assets will pass to a 'personal representative' (PR). If there is a will, this will be an 'executor'[62] or executors. If there is no will there will be an 'administrator'[63] or administrators, who will be the closest relative(s)

[59] Mental Capacity Act 2005, ss 9–15.

[60] Part of the High Court.

[61] All from their website: HM.gov.UK, *Contact the Court of Protection,* H.M. Government. Undated. https://www.gov.uk/court-of-protection. Accessed 29 05 2015

[62] 'Executrix' if a woman.

[63] 'Administratrix' if a woman.

prepared to take on the job of administering the estate, often done out of love for relatives. A PR is assimilated to a trustee and thus subjected to the heavy duties of good faith described below in Sect. 4.1.

PRs must bury the dead, list their assets and debts, account for and pay tax due, prove the validity of the will and/or their right to administer, and than they will obtain a formal document[64] ('probate' for a will and 'letters of administration' if none). This entitles them to get in the assets, manage them, pay debts and distribute these to the right people. This can minimize the managerial disruption of death if well done.

The trust must be described here rather than later because succession cannot be understood without it. Nor can the lack of legal personality of smaller enterprises or the way in which disputes can be sorted out and assets allocated in the best way before the succession problems affect the company. The trust can also provide continuing of management for family businesses after death, or in life. The PRs. whether executors or administrators, are a variety of trustee and they are responsible for this.

4.1 The Trust and Administration on Death

This section considers the nature and usefulness of the trust and the appropriation of assets. The trust is associated with an area of law, 'equity' (not the French doctrine of the same name), which provides the rules for good faith and impartial administration by partners and directors in companies. The trust is obligatory on death or where title to land is held by more than one person and can arise automatically by statute. The heartlands of the device are in inheritance, family law and land ownership, but it is consistent with the common law that it should be used in every sphere, from these to commercial, public, charitable and social law.

The trust is essentially a form of split ownership, where one set of people (trustees) manages property and another group of people (beneficiaries) enjoys the income or benefits,[65] such as the product of the PR's labours described above. Any company similarly splits management from enjoyment by the shareholders of the product of the company assets. In a trust, individuals can be both trustees and beneficiaries, just as a shareholder might also be a company director or manager of a company. Thus a trust is not a company as it has neither legal personality, nor any commercial purpose and trustees are personally responsible to outsiders for the property and its administration, as legal owners.[66]

Peculiar to both the trust and companies is the strong duty of good faith and impartiality imposed on trustees and directors towards beneficiaries and shareholders.[67] The English trustee's good faith differs from the continental contractual form because of the English obligation not to make a profit from trust administration

[64] Kerridge (2009) has an extensive account of this process.

[65] See Hayton (2003) for an introductory account of trusts.

[66] Liability is limited to the assets administered, unless there is negligence or wrongdoing.

[67] In this case the duty is to shareholders as a whole, not to individuals as for a trust.

(generally other than as agreed or to claim professional fees), to put the interests of the company or trust first and not to compete with it.[68] This makes it peculiarly suitable for families, where recipients of income may be vulnerable. The duty of good faith is owed to individual beneficiaries of a trust who can sue trustees for breach of that duty. For companies, similar duties of good faith imposed on directors are owed to the shareholders collectively.[69]

All trusts are supervised by the Chancery Division of the High Court, which can be turned to for guidance or in disputes. There are relatively few court cases disputing wills. In 2011, the Probate Service reported 150 disputed cases from around 220,000 estates.

A particular use of the trust requires mention for larger family businesses: This is the 'family office' where a trust is the vehicle to hold shares in a number of companies. Younger members of the family can obtain varied experience in the family office of the management of different companies under the care of older members. Here the trust is a family business in its own right, but this is more normally a managerial form of joint ownership. Any limited liability or legal personality is likely to belong to the managed companies.

The business administration of assets on death depends on the trust, partly because of its managerial powers but also because of choices made by PRs about who gets what and when. The authority of an executor or administrator to allocate particular assets to particular individuals is called a 'power of appropriation', although consent might be involved.[70] This does not alter the heir's entitlement to the value of a particular percentage share of an estate. If someone is to receive something specific like a share in the business, then this can be specified in a will.

The power to distribute assets fairly and in accordance with a duty of good faith is useful in avoiding quarrels about who gets what, and trustee must consult the beneficiaries when land is involved.[71] In practical terms, this consultation is usually wider with individuals saying what assets they want. Often the optimization of the assets might mean carrying on the business if possible by those wanting this. Family members might agree a non-managerial stake in the business by a variety of means. It all depends on circumstances.

4.2 Differentiation Between Types of Enterprises

The types of enterprises described in the next section are the sole trader, various types of partnership and companies. The first two types described below do not have legal personality and are not companies (4.2.1–2), whilst the last two types (4.2.3–4) do have legal personality. The way in which succession takes place within these businesses depends on their type.

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[68] See *Bristol and West Building Society v Mothew* [1998] Ch 1. for an exposition of trustees duties.

[69] This can make it harder to sue.

[70] This power may be implied but can be excluded or reinforced by will.

[71] Trusts of Land and Appointment of Trustees Act 1996, s 11.

4.3 The Consequences for a Business in the Case of Death

Ultimately, an interest in a business is a species of property. Management depends on holding a sufficient share of the business, thus depending on both the law of property and on company law, but not on family law directly. The devolution of property on death is likely to determine the bargaining position of heirs, played out in company law disputes without reference to family. Some succession rules are described below by type of enterprise.

4.3.1 The Sole Trader

A sole trader is not a partnership, nor a one-man company, although the one-man business can now use a company form under legislation of EU origins (Sect. 4.3.4). A sole trader is quite capable of being a family business if other family members are employed. People carrying on business as sole trader do not have to register as businessmen so it is open to anyone. There are restrictions on the name that can be used by such a business and they should give the names and addresses underlying a company name on company documents such as letter headings and business cards.[72]

The start-up costs of this arrangement are nil, so probably chosen by someone starting out in business or working from home. A lack of limited liability means sole traders risk being personally liable for debts, so they might be better off using a corporate form, but for the administrative costs of that.

The business has no form other than property attached to the proprietor. If a sole trader dies, this may be a personal business based on a skill or qualification, unlikely to survive death. There is nothing special about the way their property passes on death. The existence of a PR, whether executor or administrator might ensure continuing management of the business during the administration of the estate. This helps if a relative or anyone else wants to carry on the business or to sell it as a going concern.

4.3.2 Partnerships

This section concerns the partnership under the Partnership Act 1890. There is also a limited partnership under the Limited Partnerships Act 2011[73] not considered here as relatively uncommon. There is a new "limited liability partnership" under the Limited Liability Partnerships Act 2000, a hybrid company (dealt separately with under 4.3.3).

[72] In the Companies (Trading Disclosures) Regulations 2008, as amended.

[73] This has some relationship to the Roman Law *commenda* and the French *société en commandite.*

The Partnership Act 1890 was elegantly drafted by Sir Frederick Pollock, a distinguished scholar of French law and it can be suspected that this form is related to the French *société civile*. The default terms of this statute can still be implied when individuals carry on business without apparently agreeing its form first. A partnership is contractual but not a company (unlike the *société civile*). This cannot be a one-man company.

Commonly, a trust means that there is no need for this kind of organization to have legal personality. One or a few partners can hold property in their name as trustees for the benefit of all partners. There are strong duties of good faith between all partners individually, again based on the duties of trustees.[74] The 1890-type partnership also has unlimited liability, useful for the liberal professions before the Limited Liability Partnerships Act 2000.

The Partnership Act 1890, s. 33(1) implies a term into partnership agreements by default that the partnership is dissolved on the death of a single partner. Partnerships, particularly large partnerships, can expressly exclude this dissolution in their partnership agreement and for the business to carry on.

Viable businesses, whether formally dissolved or not would tend to carry on with the surviving partners anyway. There will be a negotiation and a new agreement. At a minimum the value of the share in a partnership passes to their heirs in their will or on intestacy. They will have to be paid out and debts of the company generally rest on the partners, a 'joint and several liability' (functionally similar to solidary liability in French law).[75]

Whether someone was agreed to be excluded or included in a continuing business would depend on the individual case by agreement or in accordance with the provisions of the partnership deed. If there is no such provision, a default term of the partnership is unanimity of partners for the appointment of new partners.[76] Where agreement is the rule, there is no point in a rule either insisting on or prohibiting family involvement for all cases.

4.3.3 Limited Liability Partnerships

After French reforms of the *société civile* in the 1960s, the English professions clamoured to be allowed some kind of limited liability. The new limited liability partnership (LLP) is for most purposes a general commercial company, since it has legal personality and limited liability, although with provision for members to make extra contributions on winding-up.[77] LLP status consequently brings with it most company requirements for registration and disclosure and a quantity of regulation.

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[74] Section 4 (introduction) and 4.1.

[75] Since 1900 this was thought appropriate rather than liability resting on individual heirs. See Peel and Treitel (2011) for an account of the logic of this.

[76] The Partnership Act 1890, s 24.

[77] Limited Liability Partnerships Act, 2000, ss 1(4) and s 74, and The Insolvency Act 1986, s 214A, by order of the Court.

Although the LLP is similar to a small private company (4.3.4) in its external governance, there is considerable latitude in its forms of internal management, more like a partnership. An 'incorporation document' must be registered with the Registrar of Companies, including required particulars. 'Designated members' are responsible for communicating with the Registrar of Companies and signing accounts. No articles of association are registered, but there is instead a private LLP agreement. Following the habit of English lawyers, a form will be drafted from precedent, that is, using clauses known to work well in the past, with adjustments.

This is a corporate body, so its legal personality survives the death of its members, carrying on until wound up. 'Designated partners' can act as directors in some circumstances, which might assist transition. By default,[78] a member's death is treated as a cessation of their membership. No ex-member is entitled to interfere in the management, business or affairs of the business, including PRs, various trustees, liquidators and anyone to whom the share is transferred.

As normal, heirs by will or on intestacy will inherit the deceased's property, namely the share in the limited liability partnership. This is not about compensation but for paying out the partnership share of the deceased to the heirs, whether family or not.

As for new membership, the LLP acts like a partnership for internal matters, so new members are unanimously elected.[79] The LLP agreement can be drafted to allow automatic membership in an appropriate case, but agreement on individual cases is more likely. For a business, inheriting a majority of shares might give control, but if others do not agree to working with the heir, the business might be sold or the LLP liquidated. Many LLPs are for accountants or lawyers so an heir becoming a partner by right of birth is improbable, considering required professional qualifications.

4.3.4 Limited Companies

This answer concerns companies limited by shares.[80] The 'private limited company' is generally used for small businesses (also for EU one-man companies). The 'public limited company' (PLC) is more suited to larger businesses. 'Public' here relates to the holding of shares by members of the public at large, not to any state involvement. These are the most common types. Shares are just property, even if they might bring majority control of a PLC or private company. In principle, everyone has the right to transfer his or her shares to whomsoever he or she likes,[81] also found in EU law.[82] The free alienability also applies to English wills.

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[78] Limited Liability Partnerships Act 2000, s 7(1).

[79] Limited Liability Partnerships Regulations 2001, reg 7(8).

[80] Here, limited liability means the shareholder only loses the value of the shares on winding-up.

[81] *Weston's Case*, also known as *re Smith Knight and Co (1868)* LR 4 CH App 20.

[82] Directive 2001/34/EC, of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities [2001] art 46(1).

For a private limited company, the shares of the deceased pass under inheritance law, unless provision in the constitution restricts membership, say, to family members or those approved by the board or shareholders. The heir would still have to be paid out their share's value. There is no default English provision for individuals to put private assets into a company and then to recover a particular asset as of right on liquidation, as in France. Family members are in the same position of anyone inheriting shares.

Private limited companies could agree a constitution limiting membership. Types of restriction could be pre-emption clauses, where the shares have to be offered to existing shareholders at a valuation, or in an express power for the directors to refuse a transfer, in good faith for the benefit of the company. In the case of refusal, the heir can apply to the court to be registered, and retains an 'equitable' interest in the shares. This is the mechanism whereby they still obtain the value of the shares on winding up or a dividend.

Death is always difficult for a one-man private limited company, but the legal personality survives. By operation of inheritance law, the PR might step into the shoes of the deceased to manage the company. This increases the chances or someone carrying on.

Companies are mini-democracies. Normally the successor to the estate can obtain registration and the usefulness of the shareholding depends on its size. If the beneficiary has 51 % of the shares, for example, they have enough votes for the ordinary management of the company (by ordinary resolution at general meetings). They might also be able to appoint directors even on a smaller holding. This does not necessarily have anything to do with being a family member. Taken overall, provisions favouring family in English organizations are the exception rather than the rule.

4.4 The Destiny of a Share

There is no separate section on this, because the destiny of a share is determined by the inheritance rules in 2 and 5. The practical consequences depend on the form of organization concerned as described in Sects. 4.1 and 4.2 and on the administration of the will or intestacy.

4.5 Provisions in Articles of Association

Again this depends on the form of organization of a particular company.[83] Wills are the normal place for this kind of planning, rather than encumbering a company with limitations, or reducing its value when trying to raise finance. Families might like to

[83] Partnerships (4.3.2) do not have constitutions, but partnership agreements.

do that. Such restrictions might be removed by an appropriate company resolution in changed circumstances.

This paragraph deals with other questions raised in the questionnaire, but family status is not really relevant to English company law, unless the organisation makes it so. Shares in companies limited by shares cannot be formally subdivided by individuals, although they can be jointly owned. As for management, any individual has to make a case to surviving shareholders to do this, whether by the strength of their shareholding, by their qualifications or by persuasion. The autonomy of the surviving individuals and the good running of a company demand no less. There is no question of compensation in the sense of any wrong if a particular family member cannot participate in a family business. Again, this means receiving the value of a share or its equivalent, whoever the heir.

4.6 Exercise of Shareholders' Rights After Death

On death, PRs[84] become entitled to deal with all claims, debts or assets by stepping into the shoes of the deceased during administration of the estate. This means they might apply for registration as shareholder, or arrange for the heir to be registered. As trustees they are not acting for their own benefit but for the various beneficiaries.

In the company context, there was a public concern that the trustee might act as director taking instructions from someone unregistered. This is not generally a problem for simple shareholding, under an assumption that trustees will vote following the wishes of a beneficiary of full age.[85] For large shareholdings, the idea of the *shadow director*[86] already deals with where somebody not on the register is subject to disclosure requirements, duties and may commit an offence.[87]

5 Last Wills

5.1 The Range of a Last Will

English wills generally permit the disposal of all assets of any kind to whomsoever the testator wishes and unless there are the claims against the deceased's estate by family and dependents already described in 2.3, after payment of debts. There are

[84] See the beginning of Sect. 4.

[85] Nonetheless a register of beneficiaries of shares has been suggested by the government.

[86] Companies Act 2006, s 251 defines a shadow director as '… a person in accordance with whose directions or instructions the directors of the company are accustomed to act.' Examples of impositions of duties and offences are ss 16(6), 162, and 170.

[87] Examples of impositions of duties and offences are *ibid*., ss 16(6), 162, and 170.

no special regulations for family businesses, unless the business so provides. In a will, it is a normal precaution to provide alternative beneficiaries for if the original beneficiary predeceases the testator, for example, often substituting grandchildren for that child's share.

It is possible to determine by will who is entitled to assets for a period of up to 125 years, limited by the rule against perpetuities,[88] including grandchildren born within this perpetuity period. You could alternatively give shares, say, to children for life and after death to the grandchildren under a trust. You could give shares to two children as trustees, to look after these for another child, who might have less than financially sensible. The trustees could then pay income to the beneficiary, but not allow him or her to waste the capital. These things can be designed.

Despite this, if you have a principle of free alienability, there is nothing normally to prevent the heirs together changing the trust[89] or, for that matter, individually transferring their own beneficial interest in a trust (the property right of a beneficiary) if they wish to dispose of it. By default, this does not require the consent of a trustee. In this way, trusts can avoid the dead hand of the past, and a sensible parent would not limit the ability of the company to react to changed economic conditions. After all, a company is a self-governing democracy.

5.2 Requirements and Conditions

It is possible to achieve purposes to a limited extent by conditions, or time-limited interests but not all requirements and conditions would necessarily be accepted by the courts. An example is trying to remove the transferability of shares in public companies, or terms which were illegal or contrary to public policy.

5.3 Other Forms

Contracts cannot be used generally to make gifts, without a great deal of twisting because contracts require 'consideration' to be valid. Consideration is the price by which the promise (of the contract) is bought,[90] although this requirement is mitigated by the fact that a valid price can be extremely small and need not consist of cash. If there is no consideration for an outright gift, the contract is invalid. Secondly, contracts might be terminated by death, so not nearly reliable enough, although there are major exceptions.[91]

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[88] See also Sect. 2.3, fourth paragraph.

[89] By the rule in *Saunders v Vautier* (1841) EWHC Ch J82 or the Variation of Trusts Act 1958.

[90] A definition by Frederick Pollock, some of whose work is described in Sect. 4.3.2.

[91] For example, a contract might specifically provide to be effective after death. Some contracts class as creating proprietary rights.

A trust would generally work much better in England to organize this sort of thing, in life or on death, because its proprietary nature means it survives death. Pensions funds are a form of trust, and insurance companies and investment trusts also can hold money on trust, because they are administering it for someone else. This implies useful duties on administrators in the nature of trusteeship.

Some property passes outside a will. An example is jointly held property passing instantly by survivorship, even land.[92] A pension trust acts similarly, say for a widow. These are not included in the will because ownership of the property is held by trustees, thus already given away before death. Setting up a trust before death or on death can be good planning.

6 The Right to a Compulsory Portion

There is no right to a compulsory portion for family in English law which makes this section short.

6.1 The Institute of a Compulsory Portion or Similar National Institute

The nearest equivalent would be the entitlement for family and dependents to claim provision (Sect. 2.3.1).

6.2 The Right to a Compulsory Portion and

6.2.1 The Calculation of a Compulsory Portion

These are not applicable except as above (6.1)

6.3 Renunciation of Inheritance

Anyone can renounce their inheritance. This has no relevance to company rules generally and renouncing means that you get nothing. Negotiating could work better.

[92] Although inheritance tax would still have to be paid if due.

7 Anticipated Succession

Whether England has 'anticipated succession' depends on what you mean by that. If you mean, 'Can you make arrangements to dispose of your assets to the next generation before you die?', then there are multiple ways of doing that. Some ways are described in this contribution, plus the normal range of lifetime transactions.

7.1 Forms of Anticipated Succession

The English possibilities are as wide and variable as the possible range of national transactions taken together. This is an impossibly large question. In a narrow sense, when a system claws back lifetime gifts made to non-family (to favour forced heirs), this heading could refer to limited state exceptions to those rules. There are no such English exceptions because there are no such limiting rules. If there is no obligatory inheritance, there is no need for prohibition of excess gifts, or for special company rules to mitigate that. Here, the individual, not the State, is likely to know best what would work in their family situation.

The main instances when a gift or transfer would be defeated would be when, before death,[93] with the intention of avoiding debts to creditors. Then the assets can then be recovered.

7.2 Relation to Ownership – Relation to the Transfer of Leadership

Something intended to anticipate succession is really not different from any other transaction or other act. There is no special category of permitted transactions in this case for successions, apart from wills, which work for any kind of asset. Retiring and passing on a business might attract tax relief,[94] but this is not confined to families.

7.3 The Influence of the Testator in His Shareholder's Position

This is generally to do with a shareholder, manager, director or owner of a business using their influence to obtain benefits on succession either for themselves on retirement or for their chosen successor to their share. The latter is not really an issue,

[93] This is within a specified number of years before death, according to the circumstances.

[94] See the final paragraph of Sect. 1.2 for an example.

since you can make a will. The former is not any different for a retiring family member than for anyone else retiring from a company.

The question asks about usufruct, pension, insurance, transfer of management position and shares step-by-step. All of these exist, except for the usufruct which instead is dealt with by the trust.

8 Foundation and Trusts as Instruments for Business Succession

There are no English foundations or associations as a state-supported form of organization. Unincorporated associations in particular have a problem because these exist, but they are juridically just a group of individuals. They might be bound by a contract and perhaps the small group treasurer can be decribed as a trustee (to ensure they do not run off with the money). Neither organization has legal personality nor are they registered.

It would be possible to call an organization a foundation or association but use another underlying English organizational form, whether company, partnership or trust and then design its rules to make it look rather like a foundation. A trust is not equivalent except insofar as its multiple purposes and flexibility mean it could be used like that.

8.1 Setting Up a Foundation and

8.1.1 Influence of Family Members in a Foundation

These are not applicable.

8.2 The Distinction Between the Foundation and the Trust

The identity of the trust is large subject for a short question except as approached already.[95] It has multiple uses, including public law enforcement purposes, unlike the foundation.

The distinction depends on what you mean by a foundation. Such words of Roman law origin tend to be nationally variable in meaning. Kalss (2014) suggests that in Austria this is a purpose-driven organization, which can be used for the preservation of family businesses. In France, the foundation is rarely used and used for good causes. The largest is probably the Fondation Abbé Pierre, the campaigning

[95] See Sects. 4 (introduction) and 4.1.

homelessness organization. What these have in common is that they have legal personality and are defined by their purpose.

The English trust does not have legal personality and is not defined by its purposes, unless it is a charity for the public benefit when it is supervised by the Charities Commission, an independent public regulator. This has generally nothing to do with family business organization. It is not easy to achieve very long-lasting[96] purposes in English law by a trust, except by creating a charitable trust. This is partly because of a principle that there should always be a beneficiary capable of enforcing the private trust by suing trustees ('the beneficiary principle').[97] Without such a beneficiary, the trust will fail. Thus a trust is essentially people oriented, rather than purpose-oriented, although it is possible to attach conditions or limitations to gifts within the limitation period as already described.

9 Further Developments

The mismatch in law-types is now apparent here.

9.1 Legal Policy Plans for Business Succession

Business and succession are separate legal issues. Section 1 shows that favouring small businesses in policy can make things easier generally. As for policy in succession law, the latter is not explicitly framed around business. When the Law Commission reformed intestacy[98] they avoided changing the entitlement of the surviving spouse to the house. They felt that specifying which asset a beneficiary should receive complicated things unnecessarily.

9.2 Conclusion

Many problems envisaged in the conference questionnaire do not really exist in England, concerning problems arising in countries with compulsory portions for relatives. Such compulsion could be to the detriment of the flexibility required for business to meet changed circumstances, and could also require extra rules to cope.

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[96] See Sects. 2.3 and 5.1 for the rule against perpetuities.

[97] There is an extensive exposition of this in *Baden's Deed Trusts (No 1)*(also known as *McPhail v Doulton*) [1970] AC 424 and *Baden's Deed Trusts* [1973] (No 2) Ch 9.

[98] Law Commission (2013).

England may well have practical and legal problems with succession to family business. Many relate to the simple loss of the deceased with their skills and knowledge. Others may be shortage of money, clashing ambitions, failure to foresee problems or plan for succession, unwise decisions and family quarrels. Alternatively, an individual might find themselves burdened with a business that they do not want to run. These are common international problems. Also, the English law can be complicated, partly because of its long history. It can thus be expensive to administer, although it can put administration into the hands of individuals rather than courts, without rigid preconceptions about the identity of beneficiaries.

Perhaps the law adjusting inheritance is found in a different legal domain in England than in a system with compulsory inheritance. In the latter, where this does not meet business needs, then the rules for the necessary adjustment and negotiation might be within company law itself. In England this adjustment can take place earlier in our rather managerial succession law, before the problems affect the enterprise: by planning by will or by early disposal of assets; by strategic gift; by the powers vested in executors and administrators on death to manage the business or resolve disputes; or by beneficiaries getting together to vary the inheritance or break a trust.[99] If this happens first, then company law requires fewer provisions about succession problems. Also, shareholders can be treated equally without regard to family status in the company law itself, with family quarrels possibly resolved elsewhere.

As Zweigert and Kötz (1998)[100] said, it is necessary to look everywhere in a legal system before concluding that it is functionally different. The different English location of this kind of law inevitably means that the questionnaire here had many negative answers. Conversely, there was also little room to deal with the variety of English solutions. Of course each system functionally helps family business, but using seriously different structural rules.

The approach should thus be one of tolerance between countries. The English system of freedom means tolerance, because foreign testators can achieve their customary form of inheritance here. English people abroad cannot easily and tidily do the same on the continent. In this respect, this study and its carefully constructed questionnaire have contributed to understanding of the need for a wider viewpoint.

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[99] Note 29.

[100] An integral part of the general analysis in chapter 1.

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Company Succession in Scandinavia Using the Example of the Finnish Legal System

Eira Kuisma

Abstract If the testator dies, the question arises, how his property has to be distributed. This question will have to be judged according to the law of succession. The Finish legal system should demonstrate representatively for the legal traditions of the Scandinavian countries, which forms of succession in enterprise there are and how the law of succession and the company law but also the tax law concur.

1 Importance of Family Business and Business Succession

1.1 Datas About the Importance of Family Business

According to the study made by Ministry of Labour and Trade there are approximately 90 % enterprises that can be classified as family businesses in Finland. This figure dates to years 2005–2006.

Of course, the problem is which enterprises can be classified as family businesses. This figure of 90 % includes even small businesses, where might be less than one employee.[1] According to study made by the School of Economics in Turku there are 86 % family businesses. This study is made year 2003.[2]

[1] Kalevi Tourunen: Perheyritykset kansantaloudessa –yritysten omistajuus, toiminnan laajuus ja kannattavuus Suomessa, Työ- ja elinkeinoministeriön julkaisuja, Työ ja yrittäjyyssarja 53, p. 26, in web-page http://www.tem.fi/files/25012/TEM_53_2009_tyo_ja_yrittajyys.pdf

[2] Perheyrittäjyys, Perheyritykset jatkuvuuden, uusiutumisen ja kasvuhakuisuuden moottorina, KTM julkaisuja 16/2005, p. 20, in web-page http://ktm.elinar.fi/ktm_jur/ktmjur.nsf/All/C75B061401048948C225701F0049C1F7/$file/jul16elo_2005_netti.pdf

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1.2 Business Succession in Family

There are no valid official statistical data on the number of business successions in Finland. It is estimated that the business succession will take place in 34 % of companies during the next 5 years. It is anticipated that approximately 3,400 business successions will take place yearly.[3] Moreover, it is expected that large amount of leaders of family businesses will be retired in near future.[4]

According to Heinonen and Varamäki in about 25–42 % of all cases there will be a business succession. In about 26–30 % of the cases the business will be sold to someone else outside the family, in 7–30 % of the cases the business will be ceased.[5]

1.3 Legal Background

There are no specific provisions on family businesses in corporate law except that there are some provisions on what happens, if the owner of the business dies. These provisions can be found in Partnership Act (389/1988). Also, there are some provisions in tax law. For example tax burdens can be lightened, if the business is continued and fulfils certain criteria.

Further, the general provisions of Code of Inheritance (40/1965) shall be applied to succession of family businesses

1.4 Tension Between Company Law and Inheritance Law

There is a tension between the general principles of company law and the general principles of inheritance law. For example it is sometimes difficult to distribute the shares between the heirs equally. It is required for special skills from the executor of the distribution of an estate to distribute the estate equally in such cases.

[3] Perheyritysbarometri 2012, Selvitys sukupolvenvaihdoksista sekä omistajuudesta ja johtamisesta, p. 3, in web-page http://www.perheyritystenliitto.fi/files/Perheyritysbarometri_2012_(final).pdf

[4] Kalevi Tourunen: Perheyritykset kansantaloudessa –yritysten omistajuus, toiminnan laajuus ja kannattavuus Suomessa, Työ- ja elinkeinoministeriön julkaisuja, Työ ja yrittäjyyssarja 53, p. 44, in web-page http://www.tem.fi/files/25012/TEM_53_2009_tyo_ja_yrittajyys.pdf

[5] Heinonen 2003, Varamäki 2007, in web-page http://www.perheyritystenliitto.fi/sukupolvenvaihdokset.100.html

2 Inheritance Law (Intestate Succession)

2.1 Principles of Inheritance Law

The basic principles concerning Finnish inheritance law are testamentary freedom and family succession. Testamentary freedom is understood as a fundamental right in Finland. As a general rule only a person of 18 years may make a will. However, a person of 15 years may make a will on property, which the under-aged has earned. Also, if a person under 18 gets married, he or she is entitled to make a will.

Family succession means that the members of a family are entitled to inherit. Firstly, the direct descendants (children or grand-children or their children) have primary right to inherit. If the decedent was married and he or she is not survived by any direct descendants, the estate shall devolve on the surviving spouse or same-sex partner. If upon the death of the surviving spouse, the father, mother, brother or sister or a descendant of such a brother or sister of the first deceased spouse is alive, those of the said persons who at the time have the primary right to inherit the first deceased spouse shall receive one half of the estate of the surviving spouse. The surviving spouse shall not bequeath what is thus to devolve on the heirs of the first deceased spouse.

If the decedent is not survived by any direct descendants (or spouse or same-sex partner), his or her father and mother shall each receive one half of the inheritance.

If the father or the mother has died, the brothers and sisters of the decedent shall divide the said person's share. The descendants of a deceased brother or sister shall take the place of the brother or sister and each branch shall receive an equal share. If there are no brothers or sisters or their descendants, but one of the parents of the decedent is still living, the said person shall receive the entire inheritance. If there are no heirs referred to above, the parents of the father and mother of the decedent (grand-parents) shall receive the entire inheritance. If the paternal grandfather or grandmother or the maternal grandfather or grandmother has died, their children (uncles and aunts) shall receive the share of the inheritance, which would have devolved on the grand-parent. The cousins of the decedent shall not inherit. If there are no heirs, the estate shall pass to the state of Finland.

2.2 Range of Testamentary Freedom

The spouse is entitled to a marital share of property (avio-osa) in case the spouses do not have a pre-nuptial agreement. Marital share of property is calculated according to section 35 in Marriage Act as follows: Each spouse shall have a marital right to the property of the other spouse. Under this right, the surviving spouse and the heirs of the deceased spouse, shall acquire half of the net property of the spouses at the distribution of matrimonial property. In case spouses have a prenuptial agreement, a marital share of property may be limited wholly or partly. It is also possible to limit marital share of property by will or deed of gift.

The compulsory portion means that bodily heirs (children and adopted children) inherit a certain amount. The lawful share shall amount to one half of the value of the share of the estate.

There are no rules on fideicomissum in Finnish law. The fideicomissum is forbidden.[6] However, one is entitled to make a will over to next generation. This means that the testator is entitled to make a will for the benefit of the grandchildren of testator.

2.3 Statutory Inheritance Law

The main statutory claims are that the children are entitled to the compulsory legal portion, which is one half of the value of share of estate. In case a child is deceased his or her children are entitled to a compulsory legal portion on deceased child's behalf. Both legitimate and illegitimate children are entitled to a compulsory legal portion.

Other statutory claims are as set out in the Code of Inheritance as follows:

A child of decedent may be entitled to support from estate. If a child of the decedent needs funds for his or her upbringing or education in addition to what devolves on him or her as an inheritance, he or she shall, to the extent considered reasonable under the circumstances, be paid a lump-sum support from the undivided net estate to support him or her until the age of 21 years at the most.

The person engaged to the decedent and the surviving spouse of decedent may be entitled to support, if deemed necessary for his or her livelihood. Then it shall be paid money or other property as a lump-sum support from the net estate, as deemed reasonable. Support may be given to the surviving spouse also if he or she cannot, be given the property needed for a sufficient livelihood. In the absence of persuasive reasons to the contrary, the payment of support shall not infringe on the right of an heir to a lawful share.

If, owing to illness or another similar reason, a child of the decedent is unable to support himself or herself, he or she has the right to receive support from a beneficiary under a testament up to the value of the property given to the said person by way of the testament, if this is necessary for the reasonable livelihood of the child.

The provisions of the right to support as stated above apply correspondingly to the parents of the decedent, provided the parents are unable to support themselves. It is required that the parents have the right to inherit, too. This means in practise that the decedent did not have any direct descendants (children or grand-children).

Further, an heir may be entitled to compensation. If, after having reached the age of 18 years, an heir had continuously worked to assist the decedent in his or her business or profession, or in his or her household, without receiving reasonable compensation therefore, he or she shall on demand be entitled to compensation

[6] Aarnio & Kangas: Suomen jäämistöoikeus II Testamenttioikeus, p. 485.

from the estate, even if the work had not been based on an agreement between the parties. Compensation may be demanded for a total of 5 years at the most; not, however, for work performed more than 10 years before the death of the decedent. In determining the amount of the compensation, the assets of the estate, the type and amount of the work performed, the skill of the worker, the compensation received in kind or otherwise from the decedent and the other special circumstances shall be taken into consideration. However, the payment of the compensation shall not infringe on the right of an heir to a lawful share. All the legal heirs have this right for compensation, not only children. Of course, the heir must have heirship at the time of death of a person leaving inheritance.

Statutory claims, except compulsory legal portion of children and compensation, do not appear in practice so often.

2.4 Business Succession

There are no special provisions on business succession in Finnish law. Therefore, the general provisions in the Code of Inheritance (40/1965) are applied when business succession takes place. However, there is a chapter 25 in the Code of Inheritance where there are provisions on Distribution of an estate comprising agricultural property

In tax law there are some tax benefits when business succession takes place.

When the business succession occurs in the form of gift the Finnish Gift Promises Act (625/1947) is applicable.[7] When deceased has a spouse provisions in the Marriage Act (239/1929) are applicable.

3 Legal Incapacity Before Death

3.1 Special Statutory Provisions or Regulations in Case of Dementia

The shareholder rights in company may be used by authorized representative or by a custodian. It is also possible to give a continuing power of attorney to represent a shareholder in a company. The custodian may use shareholder rights when shareholder is nominated by a court for a person who is not able to deal his financial or personal matters.

According to Guardianship Services Act (442/1999) the objective of guardianship services is to look after the rights and interest of persons who cannot themselves

[7] Immonen & Lindgren: Onnistunut sukupolvenvaihdos (2013), pp. 8–12.

take care of their financial affairs owing to incompetency, illness, absence or another reason.

There is also an Act on Continuing Powers of Attorney (648/2007). According to above-mentioned act it shall be applicable to continuing powers of attorney, which are assigned to enter into force, when a person cannot take care of his financial matters due to incompetency, illness or another reason. Then the person may himself nominate an attorney to represent his shareholder rights in a company before losing his capability to deal with financial matters.

There are no special company law provisions on shareholder rights of a person permanently incapacitated.

3.2 Precautions in the Articles of Associations

The articles of association do not provide any corresponding precautions on representation in case a shareholder or partner should become incapacitated.

This can be seen as a problem because there is a risk that the business will be disrupted.

4 Consequences for a Business in Case of a Death

4.1 Differentiation Between the Types of Enterprises (Partnerships – Corporation)

According to Partnership Act (389/1988) unlimited partnership (avoin yhtiö, ay) is a form of partnership where two or more partners carry on business together for some sort of economic purposes. The partners are both liable for the debts of unlimited partnership (ay) as of one's own.

Limited partnership (kommmandiittiyhtiö, ky) means a form of partnership where is a silent partner, whose liability of the debts of the limited partnership is limited to the amount of investment made by silent partner to unlimited partnership.

According to Limited Liabilities Company Act (624/2006) limited liability company may be private (private company = Oy) or public (public company = Oyj). A limited liability company is a legal person distinct from its shareholders, established through registration. The shareholders of the company shall have no personal liability for the obligations of the company.

4.2 Consequences in Case of Death

If the sole proprietor dies, the business will be transferred to the next generation of lawful heirs. The heirs shall be liable of the debts of the sole proprietor. According to Code of Inheritance chapter 21 section 1 if the property of the estate is not surrendered to an estate administrator or into bankruptcy upon a petition filed within 1 month of the estate inventory, a shareholder shall be liable for the debts of the decedent that he or she knew of at the time of the inventory.

The consequences in case of death depend on the form of partnership. In case of unlimited partnership (avoin yhtiö, ay) the partner may dissolve the partnership when partner dies, unless the parties have not agreed otherwise in advance or the partner and the heirs do not agree otherwise.

In case of the silent partner dies in limited partnership (kommandiittiyhtiö, ky), the other partners may redeem his part of limited partnership. Also when death estate so demands must the silent partner's part of limited partnership be redeemed. The investment paid by silent partner shall be returned.

The death of a shareholder does not have any direct effects for a company when a limited liability company (Oy or Oyj) is concerned.

4.3 Destiny of a Share

In a limited liability company the heirs will inherit the shares according to Code of Inheritance. All the rights shall be used jointly by the heirs. If there is more than one heir, the heirs shall use their rights jointly through representative. There are no special provisions on the claims of the heirs if they do not become members of the company. The shares of a deceased shareholder in an Oy and in Oyj shall be inheritable according to general principles of inheritance law. It benefits the heirs if they register their shares in a company register and share register. As a general rule the heir is entitled to use the shareholder rights only after registration.[8] The ownership transfer of shares follow the general provisions of inheritance law, too.

4.4 Provisions in the Articles of Association

The heirs may become partners, if it is agreed so in partnership agreement. The partner and the heir(s) may in unlimited partnership continue the business, if the terms in articles of association allow so. In case of a liable partner dies in limited partnership or partner dies in unlimited partnership, it depends on the articles of

[8] Aarnio & Kangas: Perhevarallisuusoikeus (2002), p. 357.

association what happens or the heirs and the surviving partner may wish to continue the business. If there is no article about continuing business the surviving partner shall redeem other partner's shares. This will happen according to Partnership Act chapter 5 section 6. All the partners must be unanimous about the redemption. The price of redemption shall be calculated as follows. The investment made by partners shall be returned. In case the business makes profit the profit shall be returned to partners according to distribution of profits. The debts shall be distributed according to loss of business.

Children inherit shares of a limited liability company equally unless it is stated otherwise in a will. The shares of a limited liability company are not split if the will does not allow it.

4.5 Exercise of the Shareholder's Rights After His Death

If several persons own a share jointly, they shall exercise shareholder rights in a company only by means of a common representative. Representative may be ordered by a court on petition of a shareholder in estate. Such representative is called estate administrator. It is possible to authorize one heir by all of the shareholders of estate as a representative to exercise shareholder rights in the company.

In case of a testament there may be an executor of testament who may act as a special representative in a company. In case a minor and his or her parents inherit shares of company there might be a conflict of interests. Then a special substitute of a guardian shall be nominated.

5 Last Wills

5.1 Range of a Last Will

A last will disposing a whole property is valid. This means that wills can include business or shares. However, there might be some limitations in the articles of association in partnership.

Although there are no provisions on fideicommissium in Finnish law and as a general rule it is forbidden, it is possible to make a will for the benefit of one party. After the death of the first party the estate shall be transferred to another party. Hence, it is possible to appoint successive recipient of property under a will but it is possible only to appoint such recipient once. The ratio behind appointing successive recipient of property under a will is to save the property undivided.[9]

[9] Aarnio & Kangas: Suomen jäämistöoikeus II Testamenttioikeus 2008, pp. 53–54 and 485.

According to Code of Inheritance chapter 9 section 2 a will which designates as the beneficiary a person other than one who survives after the decedent, or is conceived before the death of the decedent and subsequently delivered alive, shall be invalid. However, it may be stipulated by a will that the future children of a person who may receive under a will as mentioned above are to receive property with full legal title at the death of the said person or at the termination of a right that another person may have to the property.

5.2 Requirements and Conditions

Last will may include special instructions that may go far beyond the testator's death, however not longer than two generations. Therefore, requirements and conditions can be included in last will relating to business shares.

5.3 Other Forms (Especially for Example a Testamentary Agreement; Business Transfer in a Contractual Agreement?)

It is possible to appoint another heir, if the original heir dies. Only last will and the appointment of another heir are possible not any form of testamentary agreement. Only last will can be used for testamentary purposes.

It is also possible to appoint an executor of a will. This shall happen in the same form as making a testament. Therefore, a testament shall be made in writing with two witnesses simultaneously present; after the testator has signed the testament or acknowledged his or her signature thereon, these shall attest the testament with their signatures. They are to be aware that the document is a testament, but it shall be in the discretion of the testator whether to inform them of the contents of the testament.

One cannot delegate to the executor of a will such power, which belongs to the testator. However, testator may order that a person receives a certain amount of shares or cash.[10]

Further, according to Foundations Act (248/2001) anyone wishing to donate property for the establishment of an independent foundation shall draw up a deed of foundation. The establishment of an independent foundation after the death of the founder shall be provided for in a will.

[10] Aarnio & Kangas: Suomen jäämistöoikeus II Testamenttioikeus 2008, pp. 366–375.

6 Right to a Compulsory Portion

6.1 Institute of Compulsory Portion or a Similar National Institute

Only the direct descendants (children or adopted children or their children, if the children are dead) are entitled to a compulsory portion. The lawful share shall amount to one half of the value of the share of the estate that according to the statutory order of succession devolves to the direct descendent. This is called a compulsory legal portion. Children have to claim for their compulsory legal portion in order to get it. Compulsory legal portion has to be claimed within 6 months from service of will. In case there has been a gift or a sale under a running price before the death of testator, a child has to claim for a supplement to a compulsory legal portion.

There is also an institution of reserved portion. According to Code of Inheritance chapter 7 section 5 a testament shall be invalid as against an heir in so far as it prevents the heir from taking his or her lawful share of the estate, or restricts the heir's right to decide the property that is to constitute the lawful share.

A testament by which the decedent has bequeathed his or her estate or a part thereof on condition that the beneficiary pay the heir entitled to a lawful share a sum of money that corresponds to the lawful share or the part missing thereof shall be valid, if the payment takes place within a reasonable period specified by the heir unless paying the sum of money is not forbidden in a testament.

Each spouse shall have a marital right to the property of the other spouse in case there is no prenuptial agreement. Under this right, the surviving spouse, shall acquire half of the net property of the spouses at the distribution of matrimonial property.

The surviving spouse has a right to retain possession of the undivided estate as long as the children do not demand distribution of an estate. This is stated in the Code of Inheritance in chapter 3 section 1a. Unless otherwise follows from a demand of the direct descendants for the distribution of the estate, or from the terms of a testament left by the decedent, the surviving spouse may retain possession of the undivided estate of the deceased spouse. If the descendant demands the distribution of an estate, the surviving spouse's right is limited to retain possession of the undivided common home of the spouses. Therefore, notwithstanding a demand of a direct descendant for the distribution of the estate, or the rights of a beneficiary under a testament, the surviving spouse may retain possession of the undivided common home of the spouses or of other housing that is part of the decedent's estate and suitable as a home for the surviving spouse, unless there is housing suitable as a home for the surviving spouse in his or her own property. The customary household effects in the common home shall always remain undivided in the possession of the surviving spouse.

6.2 Right to a Compulsory Portion and Business Succession

Sole proprietorships and shares are not excluded from general inheritance regulations. They are regulated by general provisions of Code of Inheritance.

There are some provisions on agricultural properties. A suitable agricultural successor has the right to demand that a viable farm belonging to the decedent's estate, or such real property or parts of real property belonging to the decedent's estate which by themselves or together with other real property or parts of real property owned by the successor or his or her spouse constitute a viable farm, be allotted undivided, and with any agricultural movables, into his or her share of the estate. A suitable agricultural successor is defined as an heir or a universal beneficiary under a testament who has this status at the time of distribution and who has the necessary professional competence to pursue an agricultural business.

Usually the testator and direct descendant will agree on the compensation on renunciation of mandatory share. A sum of money is normally used as a compensation.

Shares cannot be claimed under the legal portion only sum of money unless it is stated otherwise in a testament. If it is stated in a testament that the descendent shall inherit shares all the parties to an estate shall have to agree on distribution of shares. All the parties to an estate have a right to claim executor of the distribution of an estate who will distribute the shares according to testament, in case parties to an estate do not get into agreement on distribution. Shareholders do not have a say in this.

If a share in a partnership is not inheritable according to the articles of association, and the heirs' right to compensation excluded, the heirs have no rights against the shareholders.

6.3 Calculation of the Compulsory Portion

The compulsory portion means that bodily heirs (children and adopted children) inherit a certain amount. The lawful share shall amount to one half (50 %) of the value of the share of the estate. This percentage cannot be lowered when it comes to a business property.

The assets shall be evaluated to the value when the assets shall be distributed. The value of shares shall be evaluated to the selling rate. Then one must take into consideration the value of minority shares and majority shares. If a company belongs to the assets of an estate it shall be evaluated to its substance value. However, if the business is continued its substance value may be too high. Then the company should be evaluated to its productive value.[11]

[11] Aarnio & Kangas: Suomen jäämistöoikeus I Perintöoikeus 2008, pp. 1255–1256.

An addition shall be made to the assets of the estate for an advancement made by the decedent and, in the absence of special reasons to the contrary, for a gift given by him or her when living under such circumstances or in such conditions that, with regard to its intent, the gift is to be equated with a testament. The same applies to a gift given by the decedent to his or her descendant or adopted child, or to a descendant of an adopted child, or a spouse of any of the same, if the apparent purpose of the gift was to favour its recipient to the detriment of an heir entitled to a lawful share. The value of the property shall be considered to be its value when received, unless the circumstances otherwise require.

6.4 Renunciation of Inheritance

A beneficiary may waive his or her right to the compulsory claim either before the death of deceased or after the death of deceased. When the heir is direct descendant of deceased, the renunciation is valid only when the direct descendant (or his child or child's spouse) has received his legal portion as a compensation. Other heirs except the direct descendants are not entitled to any compensation, if they renounce inheritance. The heir must renounce inheritance totally otherwise the renunciation is not valid and a double-taxation may occur. When a will is at stake, it is possible to renounce from the will partly. This principle can be found in a court case KHO 2009:104. It is also possible to renounce the compensation and claim only part of the legal portion. This is stated in a recent court case KHO 2013:52.[12]

Further, an heir and a beneficiary under a testament are entitled to renounce their right after the death of the decedent, unless they have already undertaken measures that indicate that they have taken possession of the inheritance. The renunciation shall be effected in writing.

7 Anticipated Succession and the Maintenance of the transferor's Shareholder Position

7.1 Forms of Anticipated Succession

The transfer of business may happen by gift or purchase. It is possible to sell or donate the business as whole or only a part of it. There needs to be a specific agreement which is modified to the circumstances of each individual case.

The anticipated transfer takes usually place in a form of gift or purchase. It is profitable to make the purchase or gift gradually because there are some tax benefits

[12] Immonen & Lindgren: Onnistunut sukupolvenvaihdos 2013, p. 102.

but also it gives time for the leaders of the family business and the desired successor to adjust for the change. Endowment is not used as often.

7.2 Relation to Ownership – Relation to the Transfer to the Leadership

It is possible to transfer shares to successor but retain voting power and income to parents. It is often recommended that the shares and management rights are transferred to successor gradually.

In practise the leadership and controlling functions are transferred gradually to the successor. Of course circumstances in each individual case matter.

7.3 Influence of the Testator in His Shareholder's Position

If the sale of the business is profitable, it is possible to live with the income from sale. In partnership one may change company form from unlimited company (avoin yhtiö, ay) to limited company (kommandiittiyhtiö, ky) and give transferor a position of a silent partner in limited company. Then transferor is able to maintain himself using the income of silent partnership.

It is also possible to change the company form from partnership to limited liability company. Shares of company shall be retained to the transferor to secure his maintenance.

Another solution is pension paid annually or monthly from the company. It is also possible to take a pension insurance a long time before the transfer of the business. One may then use the savings from insurance to pension paid to transferor.

8 Foundation and Trusts as Instruments for Business Succession

8.1 Set Up of a Foundation

According to Finnish law foundations do exist. The requirements to set up a foundation are stated in Foundations Act are as follows: Anyone wishing to donate property for the establishment of an independent foundation shall draw up a deed of foundation. The establishment of an independent foundation after the death of the founder shall be provided for in a will. The establishment of a foundation shall be subject to permission. A foundation shall have approved by-laws, and it shall be entered in the register of foundations.

The deed of foundation shall state the purpose of the foundation and its property. The deed of foundation shall be dated and signed by the founder and attested by two persons. If the founder does not attend to the establishment himself, he shall name the person responsible for said measures.

If the provisions for the establishment of a foundation are contained in a will, the person administering the decedent's estate shall, within 3 months from the date when he learned of the contents of the will, submit a notice thereof to the court of the testator's last place of residence or, if the testator did not reside in Finland, to Helsinki District Court. The court shall notify the National Board of Patents and Registration of the will.

When the court has been notified of a will, it shall without delay ascertain if the person named in the will as responsible for the establishment of the foundation consents to undertake the task. If his consent is not obtained or if the person named is unsuitable for the task, the court shall appoint one or more persons for the task. The same shall apply if the founder has not named anyone for the task or if the task is vacant for other reasons. The court shall notify the National Board of Patents and Registration of the appointment. The provisions of the Code of Inheritance (40/1965) on the discharge of an estate administrator shall correspondingly apply to the said person(s).

A foundation shall not carry on any business that is not referred to in its by-laws and which does not directly further its purpose. As long as the purpose to maintain the family and legal successors is mentioned in the by-laws of foundation it is possible to maintain family. However, one may set up a foundation to maintain a family and legal successors only for two generations. This is stated in Code of Inheritance chapter 9 section 2.2 as follows: "It may be stipulated by a testament that the future children of a person who may receive under a testament are to receive property with full legal title at the death of the said person or at the termination of a right that another person may have to the property".[13] There is not stated any minimum duration for the foundation in Foundations Act.

8.2 Influence of Family Members in a Foundation

It is possible to nominate an heir or beneficiary as an executor of a will whose task is to set up a foundation. This is even possible when there are more people in the death estate than the executor of a will.[14] Family members can be given influence in the management of the foundation but this depends on the intention of a founder.

[13] Aarnio & Kangas: Suomen jäämistöoikeus II Testamenttioikeus 2008, p. 377.

[14] Aarno & Kangas Suomen jäämistöoikeus I Perintöoikeus 2008, p. 596.

8.3 Distinction to the Trust

There is no institution of trust in Finnish law as it is understood in common law countries. In cases concerning private international law courts might take trust into consideration.

Trust is a judicial structure where different bodies of people have a different legal position in relation to certain property. The settlor transfers certain trust-property to the name of trustee who holds it for the benefit of beneficiary. The settlor must have competence to make legal acts that concern trust-property.[15] In comparison to foundation trust is not a legal personality.

9 Further Developments

9.1 Legal Policy Plans for Business Succession

Attention has already been paid to improve the conditions of the law of succession of family businesses during the second government programme of prime minister Paavo Lipponen in the end of 1990's. The parliament enacted some tax reliefs to agricultural and family businesses to take place even when the heir inherits only 1/10 part of the agricultural property or the value of shares.[16]

The government of prime minister Matti Vanhanen developed tax policy for the succession of family businesses. A Committee was set up to find out how the income tax including property tax could be developed. Attention should be paid especially to international competitive capacity.[17] The property tax was abolished starting from year 2006. Also, it was suggested that taxable value of family and agricultural businesses should be lowered. This proposal, however, was not successful.[18]

Another committee suggested inheritance and gift tax benefits when succession of family business takes place. For example, it was proposed that tax law is applied consistently in Finland.[19]

The government of prime minister Jyrki Katainen has not especially paid attention to business succession of family businesses. The economical insecurity may have affected the willingness of heirs to continue family businesses. Therefore, the need for benefits to business successions has increased even more.[20]

[15] Mikkola: Trust Oikeusvertaileva tutkimus 2003, p. 32.

[16] Immonen & Lindgren: Onnistunut sukupolvenvaihdos 2013, p. 13.

[17] Valtiovarainministeriö Työryhmämuistioita 12/2002.

[18] Immonen & Lindgren: Onnistunut sukupolvenvaihdos 2013, p. 14.

[19] Valtioneuvoston kanslian julkaisusarja (5/2003).

[20] Immonen & Lindgren: Onnistunut sukupolvenvaihdos 2013, p. 15.

Further, it has been suggested earlier that the right to compulsory portion should be limited moderately. Especially this should take place in for example intestate and testamentary successions of family businesses. The Ministry of Justice gave its report on the need to reform the Code of Inheritance and limit the compulsory portion in family business successions.[21] The Ministry of Justice has received reports of reform in year 2005. Since then the reform on limitation of the compulsory portion has not been proceeded.[22]

9.2 Scientific Discussions and Proposals

The scientific discussion on succession of family businesses has concentrated to taxation issues in Finland. Year 2001 the dissertation of Juha Lindgren "Osakeyhtiön sukupolven vaihdoksen verotus" concentrated on the taxation of business succession of limited liability company. The dissertation of Timo Räbinä called "Vastikkeeton saanto ja luovutusvoiton verotus" (2003) concerns business succession of family businesses in the perspect of gratuitous transfer and the taxation of profit on sale.[23]

There are some books on business succession of family businesses. These books are mainly written from the perspective of tax law. The most recent one is the book written by Jaakko Ossa called "Sukupolvenvaihdos ja yritystoiminnan lopettaminen" (2014), which concerns on succession of family business and finalising business. Another recent book by Raimo Immonen and Juha Lingren is called "Onnistunut sukupolvenvaihdos" (2013), which concerns on successful succession of family business.

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[21] Oikeusministeriö, Työryhmämietintojä 2004:6.

[22] Oikeusministeriö, Lausuntoja ja selvityksiä 2005:10. See Immonen & Lindgren: Onnistunut sukupolvenvaihdos 2013, p. 9.

[23] Immonen & Lindgren: Onnistunut sukupolvenvaihdos 2013, p. 15.

Company Law and the Law of Succession in Germany

Anne Sanders

Abstract In Germany, between 2.6 and 3.7 m businesses can be classified as family businesses. Roughly 25,000 are transferred to the next generation each year, most of them *inter vivos*. The interaction of company law and the law of succession is of special importance for such family businesses. Legal advisors apply inheritance, company and tax law as well as the law of foundations to design business transfers to the next generation. Often, the transferor gives up control in the business only gradually and retains a right to profits or a pension.

Although the German law of succession recognises the freedom of each person to make a will, it protects the interest of the deceased's family. The estate passes to the family members of an intestate. If there is a will, certain disinherited family members can bring a monetary claim for a compulsory portion against the heir *(Pflichtteil)*. Such claims can put a considerable financial strain on the heir and endanger the viability of an inherited business. Apart from certain rules on agricultural businesses, there are no special rules in the law of succession regulating the inheritance of businesses.

Shares in companies can be inherited. If a partner of a partnership dies, the destiny of his share depends on the kind of partnership in question and its article of association. The case law of the *Federal Court of Justice (Bundesgerichtshof, BGH)* as well as careful drafting of the articles of association ensures that company law and inheritance law work together to make business succession possible.

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1 Importance of Family Business and Business Succession

1.1 Data on the Importance of Family Owned Businesses

Roughly 90 % of German businesses can be qualified as family owned businesses, here family businesses. The Stiftung Familienunternehmen found in its study of January 2012 that there were 2.8 m businesses in Germany, of which roughly 2.6 m could be classified as family businesses.[1] The Institut für Mittelstandsforschung (IfM) in Bonn stated in its study of August 2010 that there were roughly 3.7 m businesses in Germany of which 3.5 m could be described as family businesses.[2] The considerable difference in number might be due to the fact that the Stiftung Familienunternehmen only considered "independent businesses" and thus did not examine certain commercial sectors.[3] However, another 2010 study undertaken by the Baden-Württembergische Bank, Zentrum für Europäische Wirtschaftsforschung and the Institut für Mittelstandsforschung in Mannheim also mentions a number of 2.6 m family businesses in Germany.[4]

According to the 2010 study of the Institut für Mittelstandsforschung in Bonn, IfM,[5] roughly 110,000 successions of economically stable businesses were expected in Germany between 2010 and 2014. That would mean that 20–25,000 (0.7 % of 3.5 m family businesses) business successions could be expected in Germany per year. According to the study of the Baden-Württembergische Bank of 2010, 178,000 business successions took place between 2002 and 2008 or roughly 25,000 per year (roughly 1 % of 2.6 m family businesses).[6]

1.2 Business Succession Within the Family

In Germany, there is intestate as well as testamentary succession. Moreover, it is possible to organise a business succession *inter vivos* by way of a purchase or gift at a time when the founder of the business is still alive.

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[1] http://www.familienunternehmen.de/likecms.php?site=tpl%2Fsite.html&%E2%81%9Enav=−1&siteid=126&entryid=0&sp=0

[2] Hauser/Kay, Unternehmensnachfolge in Deutschland 2010–2014, Institut für Mittelstandsforschung, Bonn, 2010, http://www.ihk-unternehmenspraxis.de/upload/IfM_Studie_Unternehmensuebertragungen_in_Deutschland_16495.pdf, p 20.

[3] http://www.familienunternehmen.de/likecms.php?site=tpl%2Fsite.html&%E2%81%9Enav=−1&siteid=126&entryid=0&sp=0, fn 2.

[4] *Gottschalk* et al., Baden Württembergische Bank (ed) Generationenwechsel im Mittelstand, 2010, http://ftp.zew.de/pub/zew-docs/gutachten/Generationenwechsel.pdf, p. 7.

[5] Hauser/Kay, Unternehmensnachfolge in Deutschland 2010–2014, Institut für Mittelstandsforschung, Bonn, 2010, http://www.ihk-unternehmenspraxis.de/upload/IfM_Studie_Unternehmensuebertragungen_in_Deutschland_16495.pdf, p 20.

[6] *Gottschalk* et al., Baden Württembergische Bank (ed) Generationenwechsel im Mittelstand, 2010, http://ftp.zew.de/pub/zew-docs/gutachten/Generationenwechsel.pdf, p. 7.

In practice, family entrepreneurs usually prefer a succession within the family. However, this is not always possible because there may be no qualified successor, qualified family members have other plans for their future, or because conflicts within the family make a succession within the family difficult. For middle-sized businesses, the study by the Baden-Württembergische Bank found that roughly 60 % of business successions take place within the family. Roughly 20 % of the businesses are continued by a person from outside the family and the business, while another 20 % are continued by former managers of the business.[7]

According to two studies considered, overall only 10 %[8] or 11 %[9] of businesses are inherited while in roughly 90 % of all cases businesses are transferred *inter vivos,* 31 % of which are transferred gratuitously. Regarding business successions within the family, the study of the Baden-Württembergische Bank found that in 48 % of cases, businesses are transferred gratuitously, while 16 % of family members receive the business through inheritance. In 23 % of cases, family members buy the business. If a business succession takes place outside the family, a former manager or external investor buys the business in 69 % or 76 % of cases and only rarely receives it as a gift (6 % and 4 %) or inheritance (4 % or 1 %). However, those number might be misleading. In 28 % of cases where an external investor took over the business officially, in fact a team of family members and external investors continued the business.[10] Therefore, it is possible, that a family member, not an external investor, received part of the business as a gift or inheritance in many of the 5 % cases in which the data suggests that an external investor received a family business as a gift or inheritance.[11]

Informal inquiries among practitioners confirm that entrepreneurs prefer to transfer their business during their lifetime if their income is secured, taxes are saved and a suitable successor can be found. Testamentary solutions are mostly developed for emergency cases of unexpected death.

The study of the Baden-Württembergische Bank suggests that business succession within the family is likely to decrease in the future. The current demographic development with a decline in population will probably result in fewer and fewer entrepreneurs having children willing and qualified to take over the business. Therefore, business succession outside the family, be it with an external investor or a former manager, is of increasing importance.[12] As the data suggests, businesses

[7] *Gottschalk* et all, Baden Württembergische Bank (ed) Generationenwechsel im Mittelstand, 2010, http://ftp.zew.de/pub/zew-docs/gutachten/Generationenwechsel.pdf, p. 21.

[8] Hauser/Kay, Unternehmensnachfolge in Deutschland 2010–2014, Institut für Mittelstandsforschung, Bonn, 2010, http://www.ihk-unternehmenspraxis.de/upload/IfM_Studie_Unternehmensuebertragungen_in_Deutschland_16495.pdf, p 32.

[9] *Gottschalk* et al., Baden Württembergische Bank (ed) Generationenwechsel im Mittelstand, 2010, http://ftp.zew.de/pub/zew-docs/gutachten/Generationenwechsel.pdf, pp. 33–35.

[10] *Gottschalk* et al., Baden Württembergische Bank (ed) Generationenwechsel im Mittelstand, 2010, http://ftp.zew.de/pub/zew-docs/gutachten/Generationenwechsel.pdf, p. 35.

[11] *Gottschalk* et al., Baden Württembergische Bank (ed) Generationenwechsel im Mittelstand, 2010, http://ftp.zew.de/pub/zew-docs/gutachten/Generationenwechsel.pdf, p. 35.

[12] *Gottschalk* et al, Baden Württembergische Bank (ed) Generationenwechsel im Mittelstand, 2010, http://ftp.zew.de/pub/zew-docs/gutachten/Generationenwechsel.pdf, p. 10.

are more likely to be sold to external investors or former employees than to family members. The demographic trend therefore indicates that business succession by way of gift or inheritance is likely to decrease in the future.

1.3 Legal Background

The problems relating to the succession of family businesses have been discussed in the scientific community for decades, but are considered even more important by practitioners advising the many family businesses in Germany. As the data provided at the beginning of the report illustrates, the economic importance of family businesses in Germany is impressive.

Practitioners stated in personal conversations that in the next decade, many businesses founded after the war would be transferred to the next generation. Moreover, for some time, the law of inheritance and gift law made it possible to transfer businesses relatively tax-free.[13] Therefore, interest in business succession was particularly high at the moment.

1.4 Tension Between Company Law and Inheritance Law

There is a tension between the general principles of company law and the general principles of inheritance law. The tension was eased by the case law of the BGH that established already in the 1950s that it was possible that heirs stepped directly into the shoes of a deceased partner and thus became partners in the partnership straightaway. Though very important for the practical needs of partners, this case law contradicted inheritance law, which provides that members of a community of heirs do not acquire rights to specific assets before the liquidation of the estate.[14] Moreover, there is the law of the compulsory portion *(Pflichtteilsrecht)* making if difficult to leave a family business in the hands of one qualified successor alone.

However, both company and inheritance law leave room for wills and agreements to ensure the survival of a business if a qualified successor can be found.

2 Inheritance Law

2.1 Principles of Inheritance Law

Three fundamental principles can be mentioned with respect to the German law of inheritance and succession:

[13] See for details at Chapter 2.4.

[14] For details, see at chapter "Business Succession in Cyprus".

– (1) universal succession *(Universalsukzession),*
– (2) testamentary freedom *(Testierfreiheit),* and
– (3) family succession *(Familienerbrecht)*

(1) By the principle of *Universalsukzession,* § 1922 BGB, the German inheritance lawyer describes the fact that at the moment the testator, testatrix or intestate passes away, all his or her rights and obligations pass on to his or her heir. The heir immediately steps into the deceased's "legal shoes", so to speak. The heir does not only inherit ownership of the deceased's assets but becomes liable for the deceased's debts as well. However, the heir can refuse to pay obligations incurred by the deceased with his or her private funds for 3 months after accepting the inheritance (§ 2014 BGB). This period of grace allows the heir to investigate the financial situation of the estate. If the estate is overly indebted, the heir can refuse the inheritance within 6 weeks (*Ausschlagung,* §§ 1943, 1944 BGB). In this case, the heir does not become heir (§ 1953 (1) BGB) but is treated as if he or she had died before the death of the deceased (§ 1953 (2) BGB). The heir can also avoid personal liability by starting insolvency proceedings over the estate *(Nachlassinsolvenzverfahren)* or ask the probate court *(Nachlassgericht)* to administrate and liquidate the estate *(Nachlassverwaltung* § 1975 BGB).

If there is more than one heir, they form a community of heirs *(Erbengemeinschaft),* §§ 2032–2057a BGB. A community of heirs holds and administrates the estate jointly. Every asset is held jointly by all heirs as members of the community of heirs *(Theorie der ungeteilten Gesamtberechtigung).*[15] Though each heir is entitled to a share of the estate, for example 50 %, this position does not entail any rights over specific things or parts of things. Thus, every asset is owned by every heir. However, each heir is limited in the exercise of his rights by the rights of every other heir. For example, if a piece of land is part of the estate, heir A may not divide the land with yellow duct tape into two equal parts and request B to leave "her" side. If A and B are both heirs of C, and both find 1,000 Euro in 100 notes of 100 Euro each in cash in C's flat, B may not spend 5 notes without A's permission (§ 2033 (2) BGB). However, an heir may sell his or her share in a community of heirs (§ 2033 BGB). If an outsider intends to purchase the share, the other heirs can exercise their pre-emption purchase right (*Vorkaufsrecht,* § 2034 BGB) to prevent the outsider from joining the community of heirs.

Only after the deceased's debts and expenses have been paid, the surplus can be distributed among the heirs. Through this liquidation, the community of heirs ceases to exist. A testator or testatrix may leave instructions with respect to the distribution of his or her assets *(Teilungsanordnung).*

Though the community of heirs jointly hold an aggregation of assets *(Sondervermögen)* distinct from the assets of the individual heirs, it is not a juristic person like a limited company.[16] The community of heirs has no legal personality. All rights are held by the heirs as a community, not by the community as such.

[15] BGH, 24.1.2001 – IV ZB 24/00 – BGHZ 146, 310, 315; *Gergen* in Münchener Kommentar, 6th edn, CH Beck, München, 2013, § 2032 para 10.

[16] *Gergen* in Münchener Kommentar, 6th edn, CH Beck, München, 2013, § 2032 para 12.

A community of heirs cannot sue or be sued in court but only its members. It is more like the partnership regulated in the BGB (*Gesellschafts bürgerlichen Rechts,* GbR) used to be understood traditionally. Over the last two decades, however, the BGH in a number of decisions, has ruled that a partnership itself, not only its partners, can acquire rights and accept obligations,[17] and sue and be sued.[18] All partners are personally liable for the partnership's debts.[19] The BGH has, however, denied extending this line of case law to the community of heirs.[20] While partnerships acted in the business world over long periods of time and were based on a mutual agreement among the partners, the court held, communities of heirs arose by reason of law alone and were bound for swift liquidation.[21]

However, communities of heirs can and often do remain unliquidated for a long time, generally speaking, up to 30 years. This poses serious difficulties if the estate entails real property that must be properly administrated. Even more difficult is the situation, however, when the community of heirs has inherited a business that requires constant decision-making and adjustment to economic development. Unlike for partnerships, however, the law does not offer rules concerning the management and representation of a community of heirs that would enable the heirs to manage a business properly.[22] Some scholars, though unsuccessfully so far, have thus proposed another approach, arguing that a community of heirs conducting an inherited business should be treated just like a partnership conducting a business.[23]

Therefore, practitioners recommend that only one heir is named in a will and that bequests are left to other persons the testator intends to benefit from the estate.

(2) The principle of testamentary freedom *(Testierfreiheit),* constitutionally guaranteed by Art. 14 (1) GG (Basic Law),[24] ensures that every person, who is at least 16 year old and mentally capable (§ 2229 BGB) may dispose of his or her fortune in a last will.
(3) The principle of family succession[25] provides that the estate passes to family members in case of intestacy. The Federal Constitutional Court *(Bundesverfassungsgericht)* even stated that this principle enjoys constitutional protection.[26]

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[17] BGH, 29. 1. 2001 – II ZR 331/00 – BGHZ 146, 341, 343 ff.

[18] BGH, 29. 1. 2001 – II ZR 331/00 – BGHZ 146, 341, 347 ff.

[19] BGH, 27.9.1999 – II ZR 371/98 – BGHZ 142, 315, 318 ff.

[20] BGH, 11.9.2002 – XII ZR 187/00 – NJW 2002, 3389.

[21] BGH, 11.9.2002 – XII ZR 187/00 – NJW 2002, 3389 at II. 1.

[22] *Dauner-Lieb,* Unternehmen in Sondervermögen, Mohr Siebeck, Tübingen, 1998, 408 ff.

[23] *Karsten Schmidt,* Die Erbengemeinschaft nach einem Einzelkaufmann, NJW 1985, 2785, 2788 f; *Grunewald,* Die Rechtsfähigkeit der Erbengemeinschaft, AcP 197 (1997) 305, 306 f.

[24] BVerfG, 3.11.1981 – 1 BvL 11/77, 1 BvL 85/78, 1 BvR 47/81 – BVerfGE 58, 377, 398; BVerfG, 19.2.1999 – 1 BvR 2161/94 – BVerfGE 99, 341.

[25] *Leipold,* Erbrecht, Mohr-Siebeck, Tübingen, 19th edn, 2012, para 71, 86, 86–228; *Lange/Kuchinke,* Erbrecht, CH Beck, München, 5th edn. 2001, 8.

[26] BVerfG, 22.6.1995 – 2 BvR 552/91 – BVerfGE 93, 165, 173; BVerfG Kammerentscheidung (decision by a chamber of three justices), 30.8.2000 – 1 BvR 2464/97 – NJW 2001, 141.

Apart from providing rules for the succession in case of intestacy, the importance of family succession is documented by the institution of the *Pflichtteil.* Even if the deceased has left a will, descendants and a surviving spouse or civil partner have a right to a monetary claim (they do not become heirs), the *Pflichtteil* (§§ 2303–2338 BGB). See for details Chapter 7.

2.2 Range of Testamentary Freedom

(1) The rules of the *Pflichtteilsrecht,* §§ 2303–2338 BGB limit testamentary freedom considerably.
(2) Testamentary freedom is also limited by the rule that any act contradicting good morals (*Sittenwidrigkeit,* § 138 (1) BGB) is void. A will is void if it contradicts good morals. Since a testator or testatrix may freely chose to whom he or she will leave the estate, the mere fact that a child or spouse is disinherited will not suffice for a court to consider the will as contradicting good morals. There have been cases, however, when courts have ruled that a particular will contradicts good morals. To summarize this case law, however, would go beyond the scope of this report. Traditionally, wills leaving the estate to the testator's lover while disinheriting his wife and children were considered immoral. Today, with social changes, this line of case law has lost influence.[27] A will requiring an heir to choose a certain bride (for example one of noble birth) may be considered immoral.[28]
(3) The fideicommissum is not used in Germany today. Until 1919, fideicommissums were allowed and especially used by noble landowners. After World War I, fideicommissums were forbidden in Art. 155 (2) s. 2 of the Weimarer Reichsverfassung of 1919. The *Alliierter Kontrollrat* confirmed this rule in Art. 10 (2) KontrollratsG no. 45.

The scope of the rule against fideicommissum is discussed until today, however.[29] In 1973, *Reuter*[30] argued that the prohibition of the fideicommissum must be understood as forbidding the use of foundations and partnerships to run a family business according to the wishes of its founder for generations to come. However, this thesis, has not been accepted.[31] Today, however, the founding of companies and

[27] BGH, 31. 3. 1970 – III ZB 23/68 – NJW 1970, 1273*, Leipold,* Erbrecht, Mohr-Siebeck, Tübingen, 19. edn, 2012, para 246.

[28] BVerfG, 3rd Chamber of the First Senate, 22. 3. 2004–1 BvR 2248/01 – NJW 2004, 2008.

[29] See with further references: *Ulmer,* Die große, generationsübergreifende Familien-KG als besonderer Gesellschaftstyp, ZIP 2010, 549, 556.

[30] *Reuter,* Privatrechtliche Schranken der Perpetuierung von Unternehmen, 1973.

[31] See only: *Ulmer,* Die große, generationsübergreifende Familien-KG als besonderer Gesellschaftstyp, ZIP 2010, 549, 556 fn. 58.

foundations[32] for the maintenance of families or the continuance of a family business, is widely recognised.

2.3 Statutory Inheritance Law

(1) Descendants

If the intestate has children, they inherit in equal shares (§ 1924 (1) and (4) BGB). If a child or grandchild is predeceased, his or her share will be divided among his or her children, or if those have predeceased, grandchildren (§ 1924 (2) and (3)). The rights of legitimate and illegitimate children were completely aligned in 1998. Until 2011, however, an illegitimate child born before 1949 had no claim to the estate. After a decision of the ECHR of May 28th 2009,[33] the legislator amended the law.

(2) Other relatives

If there are no living descendants, which are also known as heirs of the first order, the estate will pass to the heirs of the second order, i.e. the deceased's parents and in case those have predeceased their descendants (the intestate's siblings and their offspring, heirs of the second order, § 1925 BGB). If no heir of the second order is alive, the estate will pass to the deceased's grandparents and their descendants who are heirs of the third order (§ 1926 BGB). Heirs of the fourth order are the deceased's grandparents and their descendants (§ 1928 BGB). A living parent precludes his or her child from the succession in every order (§ 1924 (2) BGB).

(3) Spouse and civil partner

The deceased's spouse or civil partner receives a 25 % share of the estate if the deceased leaves any descendants. If the deceased leaves only heirs of the second order, or grandparents, the surviving spouse or civil partner receives 50 % of the estate (§ 1931 (1) s 1 BGB). If one grandparent and descendants of the other grandparent survive, the deceased's spouse or civil partner takes the descendant(s) share(s) as well (§ 1931 (1) s 2 BGB). If no grandparents survive, a spouse or civil partner takes the estate as a whole (§ 1931 (2) BGB).

If the couple has lived in the default matrimonial property regime of the *Zugewinngemeinschaft* (community of acquisitions), the surviving spouse's or civil partner's share will be increased by another 25 % (§ 1371 BGB). If the deceased and his or her spouse or civil partner had agreed on a separation of property in a matrimonial property agreement, the surviving partner will not only receive a 25 % share if the deceased left one or two descendants. In this case, a spouse or civil partner succeeds to the estate in equal shares with the descendants (§ 1931 (4) BGB).

[32] See for foundations below at chapter "Business Succession in Greece".

[33] EGMR, 28.5.2009 – 3545/04 –Brauer./. Deutschland, NJW-RR 2009, 1603.

An example shall explain this principle: A has died intestate, leaving his wife B and his children C and D. C has a daughter, E. D, who is predeceased, has left three children, F, G, and H.

If A and B have lived in the *Zugewinngemeinschaft,* B will inherit 50 % of the estate (25 % because of § 1931 BGB and another 25 % because of § 1371 BGB). C will receive 25 % of the estate. Because C is alive, his daughter E will receive nothing. D's share of 25 % will be subdivided among F, G and H. Thus, each will receive an 8.33 % share of the estate.

If A and B had agreed on a separation of property, B and the descendants would inherit in equal shares. B and C would take a 30 % share each, while F, G and H would receive a 10 % share each.

(4) Other family rights

(a) *Voraus:* If the deceased has died intestate and leaves a spouse/civil partner and his parents, or siblings, or grandparents, the spouse/civil partner receives chattels belonging to the couple's mutual household. Such chattel may be the couple's furniture, stove, washing machine, china, books, and pieces of art used to decorate the household. If the intestate leaves a spouse/civil partner and descendants, the spouse/civil partner may claim such chattel only insofar as he or she requires them for an adequate lifestyle (§ 1932 BGB, § 10 (1) s 3–5 LPartG).

(b) *Dreißigster:* The heir must also allow members of the deceased's household (spouse, civil partner, cohabitant, children, foster children) to remain in the deceased's house or flat and to use the furniture and other household articles for 30 days after the deceased's death, if the deceased has not made a will excluding this right (§ 1969 BGB).

2.4 Business Succession

(1) German inheritance law does not provide specific provisions for business succession. As *Barbara Dauner-Lieb* has explained, German inheritance law was designed for estates composed of static, unchanging assets that could be distributed swiftly. When constantly developing businesses are passed down in succession, especially when more than one heir inherits the business, the law of inheritance does not offer adequate solutions. Among other problems, inheritance law lacks an adequate framework of rules to organise decision-making or liability within the community of heirs *(Erbengemeinschaft)*.[34]

(2) There are a number of rules in commercial and corporate law concerning business succession but not family businesses as such. Since many small and middle-sized businesses in Germany are family businesses, such rules are of

[34] *Dauner-Lieb,* Unternehmen in Sondervermögen, Mohr Siebeck, Tübingen, 1998, 408 ff; 50 ff. For more information on the community of heirs, please refer to Sect. 2.1 above.

decisive importance for family businesses. There is considerable interest in practice and in the academic community, however.

(3) When preparing the transition of the family business to the next generation, tax law is of special importance.[35] As practitioners stress again and again, most cases of anticipated successions are tax driven. If shares in a company, a business, an agricultural or forest business, are received as gifts or inherited, gift or inheritance tax must be paid. However, if carefully planned, the tax burden can be lightened considerably or even avoided altogether. Nevertheless, in order to achieve the best solution for the business and the testator's family, practitioners caution that tax reduction should not be the primary goal when deciding on a strategy for the generational change.[36]

The legislator has introduced provisions in the law of inheritance and gift taxes (§§ 13a, 13b Erbschafts- und Schenkungssteuergesetz) that encourage the heir(s) or donees to continue the business they have inherited or received as a gift. On December 17th 2014, the Federal Constitutional Court (Bundesverfassungsgericht) decided on the constitutionality of §§ 13a, 13b Erbschafts- und Schenkungsteuergesetz.[37] The decision was eagerly awaited by legal and tax advisers. The Court declared the law unconstitutional because it privileged heirs of businesses in an unjustified way compared to heirs of other assets. However, the Court decided, that the law remained applicable until the legislature had enacted a new law. At the latest, the new law, must be enacted by June 30th 2016. Since the public was now informed about the unconstitutionality of the law, the court held, the legislature could enact a new law with retroactive effect. In principle, the court held, the legislator was free to lighten the tax burden on small and medium sized family owned businesses. Tax privileges for bigger businesses were only justified, however, if such specific privileges were needed to ensure the survival of the business and its jobs. Under the now unconstitutional but still applicable *Erbschafts- und Schenkungssteuergesetz*, tax burdens can be lightened considerably if the business in question is continued and fulfils certain criteria:

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[35] *Rödder*, Das neue Unternehmenserbschaftsteuerrecht – die wesentlichen Prüfungspunkte aus der Sicht von Familienunternehmen, DStR 2008, 997; Riedel, Gesellschaftsvertragliche Nachfolgeregelungen im Lichte der neuen Erbschaftssteuer, ZErb 2009, 2; *Feick/Weber,* Schenkungs- und Erbschaftssteuer bei Anteilsübertragungen in Familienunternehmen – Handlungsbedarf oder Zeit abzuwarten? BB 2012, 747.

[36] *Onderka,* Die Gestaltung der Unternehmensnachfolge nach der Erbschaftsteuerreform, NZG 2009, 521, 522.

[37] - 1 BvL 21/12 - NJW 2015, 30, see *Crezelius,* ZEV 2015, 1.The Federal Tax Court requested that the Constitutional Court review the constitutionality of the law: BFH, 27.9.2012 – II R9 9/11 – DstR 2012, 2063; *Crezelius,* Erbschaftsteuer auf Unternehmensvermögen, BB 2012, 2979; *Lahme/Zipfel,* Zum Vorlagebeschluss des BFH vom 27.9.2012 zur Verfassungsmäßigkeit des ErbStG, BB 2012, 3171; *Piltz,* Wird das Erbschaftsteuergesetz 2009 verfassungsmäßig Bestand haben? DStR 2010, 1913; in 2006, the previous version of the law was declared unconstitutional: BVerfG, 7.11.2006 – 1 BVL 10/02 – DStR 2007, 235.

(a) The bequeathed business must not consists of 50 % or more investment assets rather than operating assets, or the property is not tax-privileged (§ 13b (2) Erbschafts- und Schenkungssteuergesetz).[38] Since distinguishing between investment – and operating assets is not always easy, this criterium is particularly difficult for legal advisers. The Federal Constitutional Court particularly objected to this criterium as an unjustified privilege.

(b) If shares in a company are given as a gift or left upon death, taxes can only be lowered or avoided if the company's domicile was located inside the European Union and the donor or deceased held at least 25 % of the shares. In order to achieve a holding of 25 %, however, the shares of other shareholder may be added to the donor's if the donor and those shareholders are bound by contract to coordinate their voting and not to transfer their shares to a person not bound by their joint agreement (§ 13b (1) no. 3 Erbschafts- und Schenkungssteuergesetz). Such pool-agreements[39] often exist in family businesses in order to coordinate the founders' heirs and their descendants. If more than one heir succeeds the founder in his or her company, the holding becomes more and more fragmented over the generations. In this situation, the members of different family branches conclude pool-agreements in order to coordinate their voting and thus to protect the influence of their family branch within the company and thus the business. The fact that such pool-agreements were considered indicates that the legislature had family businesses in mind when drafting the law.[40]

(c) If the bequeathed property, the business inherited or given as a gift, is tax-privileged according to the said criteria, the donee or heir takes 85 % (§ 13b Erbschafts- und Schenkungssteuergesetz) of the business tax-free provided that the business is not sold within 5 years (§ 13a (5) Erbschafts- und Schenkungssteuergesetz)[41] and that the wages paid to the businesses' employees stay roughly the same (400 %) during those 5 years (§ 13a (1) (5) Erbschafts- und Schenkungssteuergesetz).[42] Businesses with less than 20 employees do not need to keep the wages stable in order to enjoy the privilege of § 13a (1). If the remaining taxable 15 % of the property do not

[38] *Onderka,* Die Gestaltung der Unternehmensnachfolge nach der Erbschaftsteuerreform, NZG 2009, 521, 524 f; *Feick/Weber,* Schenkungs- und Erbschaftssteuer bei Anteilsübertragungen in Familienunternehmen – Handlungsbedarf oder Zeit abzuwarten? BB 2012, 747. 748 f.

[39] *Weber/Schwind,* Vertragliche Ausgestaltung von Poolvereinbarungen unter Berücksichtigung des neuen Erbschaftssteuerrechts, ZEV 2009, 16; *Scherer*, Familienunternehmen: Zivil- und steuerrechtliche Besonderheiten bei der Gestaltung des Gesellschaftsvertrags, BB 2013, 323; see also *Mutter* in Brambring/Mutter (eds) Formulare Erbrecht, CH Beck, München, 2nd ed, 2009, III G 6.

[40] *Hannes/Onderka,* Die Übertragung von Betriebsvermögen nach dem neuen Erbschaftssteuergesetz, ZEV 2009, 10, 11; *Feick/Weber,* Schenkungs- und Erbschaftssteuer bei Anteilsübertragungen in Familienunternehmen – Handlungsbedarf oder Zeit abzuwarten? BB 2012, 747, 748.

[41] For details on the calculation of such time limits: *Seifried,* Bindungsfristen nach dem neuen Erbschaftssteuerrecht: Herausforderung für Rechnungswesen und Controlling im Familienunternehmen, ZEV 2009, 614.

[42] See for examples on how the required level of wages is calculated and secured: *Hannes/Steger/Stalleiken,* Lohnsummenkontrolle im Familienkonzern, BB 2011, 2455; *Onderka,* Die Gestaltung der Unternehmensnachfolge nach der Erbschaftsteuerreform, NZG 2009, 521, 525 f.

exceed the € 150,000, the donee or heir takes the estate completely tax-free (§ 13a (2) Erbschafts- und Schenkungssteuergesetz). The Federal Constitutional Court stated that the legislature was free to privilege successors in businesses who did not sell but continued the business in order to save jobs. However, exempting businesses with less than 20 employees from the duty to keep their wages stable was an unjustified, disproportional favouritism.

If only 10 % of the property consists of investments, the heir or donee can make an irrevocable declaration to the tax authorities to take the business completely free from gift or inheritance tax if he or she chooses not to sell for at least 7 years and pays the same amount of wages (700 %, § 13a (8) Erbschafts- und Schenkungssteuergesetz) during that time.[43] The latter provision shows that the legislator made securing jobs a top priority.[44]

(d) If the tax authorities discover later that a particular business did not fulfil the requirements for abovementioned tax preferences, the heir or donee must make subsequent payment of taxes.[45]

3 Special Regulations for Succession in Specific Businesses

There are special regulations for agricultural businesses in the *Höfeordnung.*

Not all farms fall within the application of the *Höfeordnung.* A farmer may take certain steps to ensure that his or her farm falls outside the scope of the law. The *Höfeordnung* ensures that a farm within the application of the law (§ 1 Höfeordnung) passes only to one heir alone who is not burdened with excessive claims to compulsory or mandatory portions *(Pflichtteil).*[46] This way, a farm can be continued undivided by a family member and does not need to be split up into entities too small to survive economically.[47]

§ 7 Höfeordnung provides that the farmer may choose the successor freely in a will or transfer the farm during his or her lifetime. The farmer may not choose a successor according to § 7 if he or she has already handed over the farm's management to a prospective heir according to § 6 (1) no. 1 Höfeordnung. This way, a prospective heir can invest work in the improvement of the farm without the risk

[43] *Hannes/Onderka,* Die Übertragung von Betriebsvermögen nach dem neuen Erbschaftssteuergesetz, ZEV 2009, 10, 12.

[44] *Hannes/Onderka,* Die Übertragung von Betriebsvermögen nach dem neuen Erbschaftssteuergesetz, ZEV 2009, 10, 12; *Hannes/Steger/Stalleiken,* Lohnsummenkontrolle im Familienkonzern, BB 2011, 2455.

[45] For details see: *Scholten/Korezkij,* Nachversteuerung nach §§ 13a und 19a ErbStG als Risiko- und Entscheidungsfaktor, DStR 2009, 991.

[46] *Stenger* in Sudhoff (ed) Unternehmensnachfolge, CH Beck, München, 5. edn, 2005, § 35.

[47] *Stenger* in Sudhoff (ed) Unternehmensnachfolge, CH Beck, München, 5. edn, 2005, § 35, para 1.

that the farmer will change his or her mind. The farmer is not completely free to leave the farm to someone who would not inherit the farm according to § 4 Höfeordnung (§ 16 (1) Höfeordnung). The *Höfeordnung* provides in § 4 that a farm passes only to one heir, while the other heirs receive a claim in money (§ 12 Höfeordnung).

The *Höfeordnung* provides special rules with respect to whom the farm shall pass in case of intestacy (§ 5 Höfeordnung). According to § 5 Höfeordnung, the farm will pass to the deceased's children and their descendants, if there are no descendants, it will pass to the farmer's spouse. In case there is no spouse, the intestate's parent receive the farm from whose family the farm came or with whose means the farm was purchased. If the farm had no such connections to the intestate's parents, it will pass to his or her siblings and their descendants. If there is more than one child or sibling, the farm will go to the person to whom the deceased left the management of the farm (§ 6 (1) no. 1 Höfeordnung) or who, considering the education and employment on the farm, the farmer must have intended to take it over (§ 6 (1) no. 2 Höfeordnung).

If there is no such person, the farm will pass to the oldest, or in areas where the youngest child usually inherits the farm, to the youngest child of the farmer (§ 6 (1) no. 3 Höfeordnung). If there is no such heir, the farm will be inherited according to general inheritance law (§ 10 Höfeordnung).

The *Höfeordnung* also provides rules for the compensation of those heirs who do not receive the farm (§ 12 Höfeordnung). The law allows that the compensation's payment is deferred in order to ensure the economic survival of the farm. The *Höfeordnung* also regulates the rights of the farmer's surviving spouse to maintenance (§ 14 Höfeordnung). If the farmer disinherits the person who should have received the farm, this person's compulsory portion *(Pflichtteil)* is calculated according to the general law of inheritance. If the farmer leaves the farm in a will to the person who should receive the farm according to the *Höfeordnung*, the compulsory portion of the other heirs will be calculated according to the *Höfeordnung*, which is considerably less.

4 Legal Incapacity Before Death

4.1 Special Statutory Provisions or Regulations in Case of Dementia

1. General remarks

If an adult person cannot act for him- or herself any more, be it because of an illness, dementia or mental problems, the guardian court (*Betreuungsgericht*) appoints a special representative/guardian (*Betreuer*), §§ 1896–1908i BGB. In Germany, there

were roughly 1.3 m of such guardianships in 2011.[48] If a court-appointed guardian administrates a considerable fortune, a supervisory guardian *(Gegenbetreuer)* is appointed to supervise the first guardian (§§ 1908i (1), 1792 (2) BGB). Before 1992, people who were demented or mentally ill could have their legal capacity removed by court order *(Entmündigung)* and became unable to act legally. They were represented in all aspects by their court appointed guardian. Now, however, the law provides a more flexible approach. A *Betreuer* will only be appointed for those legal areas in which the mentally ill or incapacitated person needs help, § 1896 (2) BGB. In these areas, for example aspects concerning the shares in a company, health care and banking matters, the *Betreuer* represents the mentally ill person, § 1902 BGB. If necessary, the court decides that the mentally ill person may not act in certain areas without the guardian's consent, § 1903 BGB *(Einwilligungsvorbehalt).*

2. Exercise of shareholders' and partners' rights in case of incapacity

There are no special provisions in company or partnership law with respect to partners or shareholders. If the guardian court (*Betreuungsgericht*) holds that a person is unable to exercise his or her shareholder rights, a guardian is appointed after medical examination. The other shareholders, who may have witnessed problems, may suggest that a guardian is appointed. If necessary, the court will act by means of an interim order to protect the incapacitated person from financial harm.

(1) The personal representative or guardian *(Betreuer)* may exercise all rights of a shareholder and partner but is supervised by the court and in some cases by a supervisory guardian *(Gegenbetreuer).*[49] Certain important decisions cannot be taken by the guardian alone but require the consent of the court, e.g. becoming member of a partnership or operating a business §§ 1908i, 1806 et seq., 1822 no. 3 BGB. Here, many details are still unclear,[50] which makes it difficult for legal advisors to provide reliable advice. The BGH does not, as a general rule, require the consent of a court for an adjustment of the articles of association.[51] Some academics argue in favour of a necessary court's consent for fundamental changes in the articles of association, however, and some registries demand the court's endorsements respectively in order to be on the "safe side".[52]
(2) There are rules with respect to incapacitated directors of companies, who are hired managers and not necessarily the partners themselves *(Grundsatz der Fremdorganschaft).* In small companies, however, the director of the company is often one (and even the only) shareholder. In such a case, rights of representation are of special importance.

[48] http://www.bundesanzeiger-verlag.de/fileadmin/BT-Prax/downloads/Statistik_Betreungszahlen/Betreuungsstatistik2011.pdf, p. 2.

[49] *Schäfer,* Vorsorgevollmachten in der Personengesellschaft, ZHR 175 (2011) 557, 561.

[50] See for examples in relation to partnerships and companies: *Wilde,* Der unter Betreuung stehende Gesellschafter, GmbHR 2010, 123, 125.

[51] BGH, 20.9.1962 – II ZR 209/61 – BGHZ 38, 26, 28 f.

[52] *Wilde,* Der unter Betreuung stehende Gesellschafter, GmbHR 2010, 123.

A person in a coma will not be able to act legally (§ 104 (2) BGB) and will therefore be excluded from being director both in a GmbH (§ 6 (2) s. 1 no. 1 GmbHG), as well as an AG (§§ 76 (3) s. 1, 100 (1) s. 1 AktG).

§ 6 (2) s. 2 no. 1 GmbHG and § 76 (3) s. 2 no. 1 AktG provide that a person for whom a personal guardian has been appointed, may not be manager of a company *(Geschäftsführer, Vorstand)* or member on a supervisory board in a public limited company (*Mitglied des Aufsichtsrats*, § 100 (1) s. 2 AktG), if he or she needs the guardian's consent for certain legal acts *(Einwilligungsvorbehalt)*.[53] Although in a larger company a director under guardianship would be removed from his or her duties, theoretically, a person under guardianship may remain director or member of a supervisory board unless he or she requires the consent of the guardian to act. In that situation, the guardian may become not only the representative of the manager, but may also exercise the director's duties as his or her personal guardian.[54]

4.2 Can the Articles of Association Provide Corresponding Precautions?

The articles of association may provide rules on representation in case a shareholder or partner should become incapacitated. Every adult person can set up an authorisation of a representative in advance who shall act in case he or she should become incapacitated (*Vorsorgevollmacht*), § 1901c BGB. In Germany, there were roughly 1.5 m registered *Vorsorgevollmachten* in 2011.[55] In practice, legal advisers often urge shareholders in partnerships or GmbHs to make provisions for such a case, especially if the business is managed primarily by one person. Otherwise, a court-appointment of a *Betreuer* costs time and the court will not necessarily authorise a qualified manager whom the other partners trust.[56] Thus, a *Vorsorgevollmacht* is not only important for a partner in a partnership but also for a sole proprietor or the sole shareholder and director of a small company. If such entrepreneurs do not make provision for a case of incapacity, they may leave their business incapable of acting.[57] Many entrepreneurs neglect this, however, falsely believing that children or spouses may represent them by law.

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[53] *Jäger,* Der Betreuer als gesetzlicher Vertreter des Gesellschafter-Geschäftsführers und des Gesellschafters, DStR 1996, 108.

[54] *Jäger,* Der Betreuer als gesetzlicher Vertreter des Gesellschafter-Geschäftsführers und des Gesellschafters, DStR 1996, 108, 109.

[55] http://www.bundesanzeiger-verlag.de/fileadmin/BT-Prax/downloads/Statistik_Betreungszahlen/Betreuungsstatistik2011.pdf, p. 5.

[56] *Ulmer/Schäfer* in Münchener Kommentar, CH Beck, München, 6th edn, 2013, § 705 para 124a.

[57] *Ulmer/Schäfer* in Münchener Kommentar, CH Beck, München, 6th edn, 2013, § 705 para 124a-c; *Langenfeld*, Die Vorsorgevollmacht des Unternehmers, ZEV 2005, 52; *Mutter* in Brambring/Mutter (eds) Formulare Erbrecht, CH Beck, München, 2nd ed, 2009, III G 11.

A *Vorsorgevollmacht* is not without problems however, since the permanent representation of a shareholder or partner who is in fact unable to cast a vote or revoke the agency, may violate the rule that shareholder/partner rights may not be given away *(Abspaltungsverbot).*[58] Moreover, there is the rule that only a partner, not a hired director, can manage a partnership *(Selbstorganschaft),* which could be in conflict with such a representation.[59] This important problem is still under discussion. However, agreement seems to develop[60] that a person authorised by a revocable *Vorsorgevollmacht* can act for an incapacitated partner if the articles of association provide so.[61] Therefore, a legal advisor must not only ensure that a partner sets up a *Vorsorgevollmacht,* but also that the articles of association allow the authorised person to act and vote.

The partners may agree that a representative, for example because of a *Vorsorgevollmacht,* or one of the partners, acts for other partners in case of their incapacity. For a *Vorsorgevollmacht* to be effective, it is necessary that the articles of association allow it.[62] Practitioners discuss that it might be helpful for articles of association to include a clause requesting every partner to set up an authorisation for the case of incapacity (*Vorsorgevollmacht*) in order to ensure that the business will not be disrupted.

5 Consequences for a Business in Case of Death

5.1 Differentiation Between the Types of Enterprises

(1) Gesellschaft bürgerlichen Rechts/Partnership

The *Gesellschaft bürgerlichen Rechts, GbR,* is regulated in §§ 705–758 BGB. A *GbR* is established by the agreement of the partners who agree to pursue a mutual purpose (*Gesellschaftszweck*). Since the members of certain professions, for example doctors, attorneys, tax consultants, are by law not considered to pursue a business, such partners form a *GbR* when they work together, for example in a law firm.

(2) Offene Handelsgesellschaft, OHG, General Partnership

The *Offene Handelsgesellschaft, OHG,* is comparable to the general partnership known in the USA. The OHG, regulated in §§ 105–160 HGB, is a partnership whose partners pursue the purpose of running a business together. The partnership itself can hold rights, and accept obligations. An OHG can sue and be sued (§ 124 (1)

[58] See below at Sect. 5.5 (4) (a) (bb).

[59] *Reymann,* Vorsorgevollmachten von Berufsträgern, ZEV 2005, 457, 463.

[60] Courts seem ready to accept such authorisation: OLG Karlsruhe, 13.8.2013 – 11 Wx 64/13 – RNotZ 2013, 516; OLG Frankfurt, 16.4.2013 – 20 W 494/11 – DB 2013, 2021.

[61] *Schäfer,* Vorsorgevollmachten in der Personengesellschaft, ZHR 175 (2011) 557, 582 f.

[62] *Schäfer,* Vorsorgevollmachten in der Personengesellschaft, ZHR 175 (2011) 557, 567 ff.

HGB). It must be registered in the commercial register *(Handelsregister)*. All its partners are personally liable for the partnership's debts (§§ 105, 128 HGB).

(3) Kommanditgesellschaft, Limited Partnership

A *Kommanditgesellschaft,* KG (§§ 161–177a HGB), comparable to the limited partnership in the USA, is established to pursue a business and has of two types of partners. There is at least one partner *(Komplementär)* who manages the business (§ 164 HGB) and is liable for its debts and obligations (§ 161 HGB). Moreover, there is at least one partner who is not liable after he or she has paid his or her deposit (§ 171 HGB, *Kommanditist*).

(4) Partnerschaftsgesellschaft, LLP

A *Partnerschaftsgesellschaft* (PartG) is roughly comparable to a British or US-American LLP. The PartG was introduced in 1995 in order to allow professionals like doctors or lawyers, who may not form a KG because they do not pursue a business, to shield partners from the liability for the misdeeds and mistakes of the other partners.

(5) GmbH

The *Gesellschaft mit beschränkter Haftung*, GmbH (GmbHG) is comparable to a British limited company or a US-American limited liability corporation. As a corporation/company, a GmbH is not affected by the death or change of one of its shareholders.

(6) AG

The *Aktiengesellschaft,* AG, (AktG), is roughly comparable with a British public limited company or a US-American public corporation. As a corporation/company an AG is not affected by the death or change of one of its shareholders.

5.2 Consequences in Case of Death

1. What are the consequences for a business if its sole proprietor dies?

If a sole proprietor dies, leaving his or her business to a single heir, the heir immediately obtains ownership of the business as a whole including all assets and becomes liable for all its obligations.[63] After the heir receives knowledge of the inheritance, he or she has 3 month to decide whether to continue the business (§ 27 (2) Handelsgesetzbuch, HGB, Commercial Code). If the business is continued after that period, the heir becomes personally liable for all business debts (§§ 27 (1), 25 (1) HGB). Special problems arise, if not only one but more heirs inherit a business. If there is more than one heir, they form a community of heirs

[63] See for information on the general rules of inheritance and the liability of an heir above at Sect. 2.1.

(Erbengemeinschaft) §§ 2032–2057a BGB.[64] A community of heirs holds and administrates the estate jointly. Though community of heirs do often hold businesses for a long time, they lack the necessary managerial rules to run of a business (see for details at Sect. 2.1).[65]

2. What are the consequences for a partnership if one partner dies?

(a) Gesellschaft bürgerlichen Rechts, GbR, Partnership

If the articles of association do not entail something to the contrary, the GbR is dissolved upon the death of a partner (§ 727 (1) BGB). The heirs receive a claim for the deceased's share in liquidation.

(b) Offene Handelsgesellschaft OHG, General Partnership

Until 1998, an OHG, like a GbR, was dissolved upon the death of a partner, if the partners had not agreed in the articles of association to continue the partnership.[66] Since 1.7.1998, an OHG is continued after the death of a partner, however, unless the articles of association provide a different rule. A partner's death is treated a his or her retirement from the partnership (§ 131 (3) no. 1 HGB). His or her share will accrete to the shares of the remaining partners. The deceased's heirs receive a claim for the share's value as compensation (§ 131 (3) no. 1, § 105 (3) HGB, § 9 (4) PartGG, § 738 (1) BGB).

(c) Kommanditgesellschaft, KG, Limited Partnership

Like the OHG, the KG, safe any rules to the contrary in the articles of association, is not dissolved upon the death of a partner but continued among the surviving partners (§§ 161 (2), 131 (3) no. 1, § 105 (3) HGB, § 738 (1) BGB).

If only one *Kommanditist* survives, the partnership ceases to exist. The question must then be answered, if he or she continues the business as a sole proprietor, thereby becoming personally liable for the partnership's debts. The BGH has applied § 27 HGB in this situation[67]: after the surviving *Kommanditist* receives knowledge of the death of the only liable partner, he or she has 3 month to decide whether to continue the business (§ 27 (2) HGB). If the business is continued after that period, the *Kommanditist* becomes personally liable for all business debts (§§ 27 (1), 25 (1) HGB). If the business was not continued, the partnership's debts will only be paid using the partnership's funds, the *Kommanditist* is not liable personally.[68]

[64] For more information on the community of heirs please refer to the information at Sect. 2.1 above.

[65] *Dauner-Lieb,* Unternehmen in Sondervermögen, Mohr Siebeck, Tübingen, 1998, 408 ff.

[66] *Karsten Schmidt* in Münchener Kommentar, CH Beck, München, 3rd edn, 2011 § 131 HGB para 62.

[67] BGH, 10.12.1990 – II ZR 256/89 – BGHZ 113, 132, 134 ff.

[68] BGH, 10.12.1990 – II ZR 256/89 – BGHZ 113, 132, 138; BGH, 15.3.2004 – II ZR 247/01 – NZG 2004, 611.

If the only liable partner dies, leaving two or more partners of limited liability, *Kommanditists*, the partnership is resolved,[69] unless a new liable partner joins.[70] If the *Kommanditists* continue the business, the partnership evolves into a general partnership, OHG, and the *Kommanditists* all become liable partners.[71] Again, however, the principle set down in § 27 HGB allows that the remaining *Kommanditists* have 3 month to decide whether to continue the business and do not become liable for the partnership's death at the moment of the deceased's passing.[72]

(d) Partnerschaftsgesellschaft, PartG, Limited Liability Partnership

A PartG is not dissolved upon the death of a partner if the partners have not agreed upon another solution in the articles of association (§ 9 PartG, § 131 (3) HGB).

(e) GmbH and AG

Neither a GmbH nor an AG is dissolved upon the death of a shareholder.

5.3 Destiny of a Share

The destiny of a share of the deceased in a partnership or company depend again on the partnership or company at hand.

(1) A GbR is dissolved upon the death of a partner unless the articles of association do not provide otherwise (§ 727 (1) BGB). The heirs receive a share in the partnership's liquidation according to §§ 730 – 735 BGB.
(2) If a partner of an OHG or a liable partner of a KG dies, the fate of the share in the partnership depends on the articles of association. If the articles of association provide no regulation with respect to the successor of a deceased partner, the share accretes to the other partners' shares (§ 131 (3) no. 1, § 105 (3) HGB, § 738 (1) BGB). In a partnership, the personal relationship among the partners is considered too important to make them continue the partnership with another person unless they have agreed to do so. *Karsten Schmidt* has, however, questioned this reasoning and argued that despite the default rule in § 131 (3) no. 1 HGB, partners usually preferred continuing the partnership with the deceased's heirs.[73]

[69] BGH, 12.11.1952 – II ZR 260/51 – BGHZ 8, 35, 37 f; *Karsten Schmidt* in Münchener Kommentar HGB, CH Beck, München, 3rd edn. 2011, § 131, para 46.

[70] *Hopt* in Baumbach/Hopt (eds) HGB, CH Beck, München, 2012, § 131 para 18.

[71] BGH, 23.11.1978 – II ZR 20/78 – NJW 1979, 1705, 1706.

[72] *Demuth*, Unternehmensnachfolge: Folgen des Ausscheidens eines Gesellschafters und Anwachsung bei Kommanditgesellschaften, BB 2007, 1569, 1570.

[73] *Karsten Schmidt* in Münchener Kommentar HGB, CH Beck, München, 3rd edn, 2011, § 131, para 63.

Absent an agreement to the contrary, however, the deceased partner's heirs obtain only a claim for compensation of the share against the partnership which is part of the estate.[74] An evaluation of the business is necessary in order to calculate the compensation. Though income approaches to valuation dominate in practise,[75] the law does not provide binding rules[76] on how a partnership is evaluated.[77] When deciding a case, the judge must choose the method best suited for evaluating the individual business at hand.

If there is more than one heir, the heirs hold the claim to compensation jointly as a community of heirs.[78] While the case law of the BGH sets limits to the extent to which shareholders of partnerships and small companies may relinquish their claims to compensation for a loss of their shares,[79] an heir's claim to compensation can be excluded in the articles of association.[80]

If there is only one surviving partner the partnership will come to an end and the surviving partner receives the business as a whole.[81] All rights and obligations pass to the surviving partner. If he or she has been a liable partner, he or she is personally liable for all the partnership's debts.[82]

(3) If a *Kommanditist,* a partner in a KG who is not liable for the debts of the business, dies, the partnership is not dissolved but continued with the partner's heirs (§ 177 HGB). However, the partners can agree on another solution in the articles of association. The legislator assumed that the *Kommanditist,* who has no right to the partnership's management, does not shape a partnership like a liable partner. Therefore, absent an agreement to contrary, the liable partners

[74] BGH, 3.7.1989 – II ZB 1/89 – BGHZ 108, 187, 192; *Klöhn* in Henssler/Strohn, Gesellschaftsrecht CH Beck, München, 2011, § 131 HGB para. 46.

[75] BGH, 24.9.1984 – II ZR 256/83 – NJW 1985, 192, 193; BGH. 9.11.1998 – II ZR 190/97 – NJW 1999, 283.

[76] BGH, 24.5.1993 – II ZR 36/92 – NJW 1993, 2101, 2103; fort he evaluation of a business in a case concerning matrimonial property law: BGH, 9.2.2011 – XII ZR 40/09 – BGHZ 188, 282, 287 f.

[77] *Schäfer* in Münchener Kommentar, CH Beck, München, 6th edn, 2013; § 738 para 32–36; *Sanders,* Statischer Vertrag und dynamische Vertragsbeziehung, Gieseking, Bielefeld, 2008, 34–39; on the evaluation of family businesses specifically: *Schoberth/Ihlau,* Besonderheiten und Handlungsempfehlungen bei der Bewertung von Familienunternehmen, BB 2008, 2114.

[78] BGH, 14.5.1986 – IVa ZR 155/84 – BGHZ 98, 48, 56; BGH, 3.7.1989 – II ZB 1/89 – BGHZ 108, 187, 192 f.

[79] *Schäfer* in Münchener Kommentar, CH Beck, München, 6th edn, 2013; § 738 para 39–75; *Sanders,* Statischer Vertrag und dynamische Vertragsbeziehung, Gieseking, Bielefeld, 2008, 124–152.

[80] BGH, 22.11.1956 – II ZR 222/55 – BGHZ 22, 186, 194 f; *Schäfer* in Münchener Kommentar, CH Beck, München, 6th edn, 2013, § 738 para 40, 61; *Froning* in Sudhoff (ed) Unternehmensnachfolge, CH Beck, München, 5th edn, 2005, § 44 para 87.

[81] BGH, 10.7.1975 – II ZR 154/72 – BGHZ 65, 79, 82 f.

[82] BGH, 10.12.1990 – II ZR 256/89 – BGHZ 113, 132, 133 f.

could be expected to continue the partnership with the *Kommanditist's* heirs.[83] If there is more than one heir, each individual heir, not the community of heirs, becomes a *Kommandists (Sonderrechtsnachfolge).*[84] This is a deviation from the basic principle of *"Universalsukzession"* according to which the estates passes undivided from the deceased to the heirs in the community of heirs.

(4) GmbH

According to § 15 (1) GmbHG, the share in a GmbH is inheritable. Upon the shareholder's death, the share will pass to the heir according to the general rules of inheritance law. If there is more than one heir, the heirs hold the share jointly and must exercise their rights jointly (§ 18 (1) GmbHG). Different from a share in a partnership, a GmbH-share is not split by law according to the number of heirs in order to allow them to become individual partners immediately.[85]

(5) AG

A share in an AG is inheritable according to the general rules of inheritance law. As in a GmbH, the heirs receive a share jointly and must exercise their rights accordingly. According to § 69 (1) AktG, a group of shareholders holding one share must exercise their rights jointly through a representative.

5.4 Provisions in the Articles of Association

Provisions regulating the succession of shares in a partnership or corporation *(Nachfolgeklauseln)* are possible and widely used in practice.

(1) In a partnership, a GbR, which is dissolved upon the death of a partner (§ 727 (1) BGB), the articles of association often provide that the partnership is continued among the surviving shareholders (§ 736 BGB, *Fortsetzungsklausel*). In this case, the death of a partner is treated like a retirement from the firm. The deceased's heirs receive a claim for compensation (§§ 736 (1), 738 (1) BGB). The partners may also provide in their articles of association that a share should be inheritable *(Nachfolgeklausel).*
(2) If a partner of a general partnership, OHG, or a liable partner in a limited partnership, KG, dies, the business will be continued with the deceased's heirs if the articles of association provide so. Only then, the share is inheritable and does not accrete to the other partners' shares (*Nachfolgeklausel*). A simple

[83] *Gummert* in Henssler/Strohn (eds) Gesellschaftsrecht, CH Beck, München, 2011, § 177 HGB para 1.

[84] BGH, 10.2.1977 – II ZR 120/75 – BGHZ 68, 225, 229 f; *Hopt* in Baumbach/Hopt (eds), Handelsgesetzbuch, CH Beck, München, 35th edn, 2012, § 177, para 3.

[85] *Verse* in Henssler/Strohn, Gesellschaftsrecht, CH Beck, München 2011, § 15 GmbHG para 25; *Ebbing* in Michalski, GmbHG CH Beck, München, 2010, § 15 para 6.

Nachfolgeklausel may just provide that the partnership will be continued with the late partner's heir(s). Such a provision just determines that the share is inheritable *(einfache Nachfolgeklausel)*.[86] The easiest situation is when there is a single heir and the articles of association declare that the partnership is continued with the partner's heir. In this case, according to the case law of the BGH, the heir becomes partner immediately upon the death of the deceased.[87]

According to the case law of the BGH, the articles of association may provide also, however, that a partnership is continued with all heirs as partners *(einfache Nachfolgeklausel).* However, the BGH held, that a community of heirs cannot become shareholder or partner of a partnership, since a community of heirs as such cannot hold rights like a company or even a general partnership, OHG, according to § 124 HGB. In order to make shares in a partnership inheritable by more than one heir nevertheless, the BGH decided that the individual heirs rather than the community of heirs become shareholders straight away by means of inheritance law if the articles of association provide so.[88] By allowing the heirs to receive rights to specific shares at the moment of the deceased's passing *(Sonderrechtsnachfolge),* this case law creates a deviation from the basic principle of *"Universalsukzession"* according to which the estate passes undivided from the deceased to the heirs in the community of heirs.[89] Not only an adult heir but also a minor will thus become a partner at the moment of the deceased partner's passing. If an heir is a minor, however, his or her liability can be limited according to § 1629a BGB to the property available at the moment he or she comes of age.[90] If the heirs of an intestate liable partner in a partnership (GbR, OHG, KG) become partners because the respective articles of association simply declare the share inheritable though do not establish certain requirements for the person of the heir *(einfache Nachfolgeklausel),* the intestate's or testator's share is split between the heirs according to the will or the law of intestacy.[91] If a will declares that only one heir should become partner, she becomes partner of the whole share straight away.

(3) The partners are also free to state in the articles of association, that only one heir or a group of heirs who meet certain criteria, e.g. the eldest child, the deceased's spouse, or all children who have successfully completed business school, or a person each partner may indicate in his or her will, shall inherit the share *(quali-*

[86] *Froning* in Sudhoff (Hrsg) Unternehmensnachfolge, CH Beck, München, 5th edn, 2005, § 44 para 23–31; *Lorz,* in Ebenroth/Boujong/Joost/Strohn, Handelsgesetzbuch, CH Beck, München, 2nd edn, 2008, § 139 para 7–9.

[87] BGH, 22.11.1956 – II ZR 222/55 – BGHZ 22, 186, 191 f.

[88] BGH, 22.11.1956 – II ZR 222/55 – BGHZ 22, 186, 192 ff; BGH, 10.2.1977 – II ZR 120/75 – BGHZ 68, 225, 229.

[89] *Lorz* in Ebenroth/Boujong/Joost/Strohn, Handelsgesetzbuch, CH Beck, München, 2nd edn, 2008, § 139 para 13.

[90] *Lorz* in Ebenroth/Boujong/Joost/Strohn, Handelsgesetzbuch, CH Beck, München, 2nd edn, 2008, § 139 para 14 f.

[91] *Karsten Schmidt* in Münchener Kommentar, 3rd edn 2011, § 139 Rn. 18; BGH, 10.2.1977 – II ZR 120/75 – BGHZ 68, 225, 236 ff.

fizierte Nachfolgeklausel).[92] If the person or persons indicated in the articles of association become heirs according to the rules of inheritance law, i.e. by means of a will or intestacy, he or she also becomes a partner at the moment of the deceased's passing irrespective of the share he or she receives as an heir under the will or in intestacy.[93] This way, the partners can choose a successor with the right qualifications and avoid an unduly fragmentation of the partnership's shares.[94] Despite the fact that the heir becomes partner straight away, however, the share in the partnership is still part of the estate.[95] If by becoming partner in the partnership the heir has received more than his or her share under inheritance law or the will, he or she must pay compensate the other heirs.[96]

Such a clause is not without risks, however. If there is no heir who meets the qualifications set out in the articles of association, be it because the testator has forgotten to make a will or because he decided at the last moment to disinherit everybody who meets the criteria in the articles of association, the share cannot be inherited but will accrete to the shares of the remaining partners *(fehlgeschlagene Nachfolgeklausel).*[97] However, the BGH has held that under certain conditions, such a clause in the articles of association may be interpreted to give the qualified successor, who was not appropriately mentioned in the deceased partner's will, a right against the other partners to make him or her a partner *inter vivos (Umdeutung in eine Eintrittsklausel).*[98]

(4) If the partnership is continued with the deceased partner's heirs, § 139 HGB allows every heir of the share of a liable partner to request within 3 month to allow him or her the position of a *Kommanditist.* If the other partners do not agree to this request, the heir may resign from the partnership against compensation. In order to avoid conflicts, the partners may write down in the articles of association, that certain heirs take their shares as a *Kommanditist (Umwandlungsklausel)* while a specific heir or heirs inherit the position of a liable partner *(kombinierte Umwandlungs- und Nachfolgeklausel).*[99]

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[92] *Lorz* in Ebenroth/Boujong/Joost/Strohn, Handelsgesetzbuch, CH Beck, München, 2nd edn, 2008, § 139 para 19–26.

[93] BGH, 10.2.1977 – II ZR 120/75 – BGHZ 68, 225, 237 ff.

[94] *Becker,* Der Tod des Gesellschafters einer Personengesellschaft mit Familienstämmen: Gestaltungsinstrumente für den Gesellschaftsvertrag, ZEV 2011, 157, 159.

[95] BGH, 3.7.1989 – II ZB 1/89 – BGHZ 108, 187, 194 f.

[96] BGH, 22.11.1956 – II ZR 222/55 – BGHZ 22, 186, 196 f; With references to the different doctrinal approaches to this claim for compensation: *Karsten Schmidt* in Münchener Kommentar, 3rd edn 2011, § 139 Rn. 20.

[97] *Becker,* Der Tod des Gesellschafters einer Personengesellschaft mit Familienstämmen: Gestaltungsinstrumente für den Gesellschaftsvertrag, ZEV 2011, 157, 159.

[98] BGH, 29.9.1977 – II ZR 214/75 – NJW 1978, 264 f; *Froning* in Sudhoff (Hrsg) Unternehmensnachfolge, CH Beck, München, 5th edn, 2005, § 44 para 42.

[99] *Froning* in Sudhoff (Hrsg) Unternehmensnachfolge, CH Beck, München, 5th edn, 2005, § 44 para 43–49.

(5) *Nachfolgeklauseln* allow transferring shares in a partnership by means of inheritance law if the articles of association of the partnership provide so. It is also possible, however, to transfer the share in question upon death outside the rules of inheritance law *inter vivos (Eintrittsklausel)*. This way, a partner may dispose of a share irrespective of a testamentary contract *(Erbvertrag)* or mutual will with his or her spouse or civil partner *(gemeinschaftliches Testament)* which cannot be adjusted by the testator alone. Moreover, claims for compensation against the partnership can be avoided.[100] However, this approach requires that the old partner and the desired successor work together. If the desired successor is already a partner, the articles of association may provide that the deceased's share will accrete to the desired successor's share. If the desired successor is no partner, however, a clause in the articles of association stating that he or she will receive the partnership upon the death of the old partner is not enough to effect the desired generational change. In 1977, the BGH decided, that a transfer of a partnership outside inheritance law requires the consent of the desired successor.[101] Otherwise, the duties of partnership could be forced upon new partners by means of a contract without their consent. It is, however, possible, that the partners agree in their articles of association that the partnership shall be continued among the surviving partners (*Fortsetzungsklausel*, § 736 BGB, for an OHG or KG, this follows simply from §§ 161 (2), 131 (3) no. 1 HGB) while the desired successor has the right to join the partnership *inter vivos* according to the preconditions set out in the articles of association (*Eintrittsklausel*).[102] In order to allow the successor to take over the deceased partner's share, it can be agreed in the articles of association that the other partners hold the deceased partner's share in trust *(treuhänderisch)* until the successor joins the partnership. Since the *Eintrittsklausel* does not directly influence the rights of the heirs' claims for compensation. Therefore, it is recommended to exclude such claims in order to protect the partnership's financial resources.[103] However, as the partner has to decide about his or her successor relatively early when drafting the articles of association, practitioners caution against such clauses.[104] Moreover, there is the possibility that the intended generational change fails because the desired successor finally declines to join the partnership.[105]

(6) If a family business has survived several generations, the successors of the original founders may have organised in different family branches *(Familienstämme)* and coordinate their voting by means of pool-agreements. The members of such

[100] *Froning* in Sudhoff (Hrsg) Unternehmensnachfolge, CH Beck, München, 5th edn, 2005, § 44 para 52.

[101] BGH, 10.2.1977 – II ZR 120/75 – BGHZ 68, 225, 231–233.

[102] *Schäfer* in Münchener Kommentar, CH Beck, München, 6th edn, 2013; § 727 para 54–57.

[103] *Schäfer* in Münchener Kommentar, CH Beck, München, 6th edn, 2013; § 727 para 58 f.

[104] *Froning* in Sudhoff (Hrsg) Unternehmensnachfolge, CH Beck, München, 5th edn, 2005, § 44 para 52.

[105] *Froning* in Sudhoff (Hrsg) Unternehmensnachfolge, CH Beck, München, 5th edn, 2005, § 44 para 59; *Becker,* Der Tod des Gesellschafters einer Personengesellschaft mit Familienstämmen: Gestaltungsinstrumente für den Gesellschaftsvertrag, ZEV 2011, 157, 160 f.

family branches often have a keen interest to protect their relative influence in the partnership. In such a situation, practitioners suggest to agree on an *Eintrittsklausel* that allows not the partner but the members of the family branch as an association *(Schutzgemeinschaft)*[106] to choose the successor. Moreover, they recommend, that the articles of association should provide rules that a share belonging to one family branch should only accrete to the shares of other partners belonging to that branch as well in order to preserve their relative influence.[107]

Other practitioners recommend that for each family branch, a separate corporation should be set up *(Vorschaltgesellschaft).* Those corporations hold the shares of the corporation running the business and thus retain their relative influence. The members of the different family branches hold the shares of the different *Vorschaltgesellschaften.* Even if the shares in one or more of the *Vorschaltgesellschaften* should become fragmented, this has no effect on the business.

(7) Like an OHG or GbR, a *Partnerschaftsgesellschaft* can only be continued with the deceased partner's heirs if the articles of association provide so (§ 9 (1) PartGG, § 131 (3) no. 1 HGB) and if the prospective successor him- or herself fulfils the preconditions of being a member of a *Partnerschaftsgesellschaft* in § 1 (1), (2) PartGG, i.e. is a lawyer, accountant or doctor (§ 9 (4) PartGG).
(8) If the (liable) partner of an OHG, *Partnerschaftsgesellschaft* or KG dies and the partnership is not continued with his or her heirs, the heirs receive a claim to compensation (§§ 161 (2), 131 (3) no. 1, § 105 (3) HGB, § 9 (4) PartGG, § 738 (1) BGB).

The partners may agree on a formula to calculate the compensation in their articles of association, for example that the compensation should be calculated according to the firm's profits of the last 5 years or according to the book accounting value of the assets of the firm.[108] While the case law of the BGH sets limits to the extent to which shareholders of partnerships and small companies may relinquish their claims to compensation for a loss of their shares,[109] an heir's claim to compensation can be excluded in the articles of association.[110]

(9) The heirs of a shareholder of a GmbH or AG become shareholders. Though it is possibile to introduce some modifications, the inheritability of a GmbH-share

[106] See in general on the legality of such associations and pool-agreements: BGH, 29.1. 1983 – II ZR 243/81 – BGHZ 48, 163, 166; BGH, 24.11.2008 – II ZR 116/08 –, BGHZ 179, 13–27.

[107] *Becker,* Der Tod des Gesellschafters einer Personengesellschaft mit Familienstämmen: Gestaltungsinstrumente für den Gesellschaftsvertrag, ZEV 2011, 157, 161–163.

[108] *Schäfer* in Münchener Kommentar, CH Beck, München, 6th edn, 2013; § 738 para 60–65.

[109] *Schäfer* in Münchener Kommentar, CH Beck, München, 6th edn, 2013, § 738 para 39–75; *Sanders,* Statischer Vertrag und dynamische Vertragsbeziehung, Gieseking, Bielefeld, 2008, 124–152.

[110] BGH, 22.11.1956 – II ZR 222/55 – BGHZ 22, 186, 194 f; *Schäfer* in Münchener Kommentar, 6th edn 2013, § 738 para 40, 61; *Froning* in Sudhoff (Hrsg) Unternehmensnachfolge, CH Beck, München, 5th edn, 2005, § 44 para 87.

or a share in an AG is mandatory and thus cannot be excluded by the articles of association.[111] The majority of commentators even argue that it is not possible to agree that a share is retracted by the company upon the death of a shareholder *(Einziehungsklausel).*[112] The BGH has not ruled on the issue so far.

5.5 *May the Rights of a Shareholder After His Death Be Exercised, e.g. by His Heirs, a Special Representative Appointed by the Court, or Even by Other Shareholders?*

(1) *Gesellschaft bürgerlichen Rechts,* GbR: If the articles of association do not entail something to the contrary, the partnership is dissolved upon the death of a partner (§ 727 (1) BGB). The partner's heir must inform the other partners as soon as possible of the partner's death. If the partners cannot step in at the time to prevent harm form the partnership, the heir must continue the work of the deceased partner until the partnership can be wound up without severe difficulties. Until then, the partnership is considered to continue (§ 727 (2) BGB).
(2) In an OHG or KG, a share either accretes to the shares of the other partners or is taken over immediately by the heir(s) who will then exercise their rights themselves.
(3) A GmbH-share or share in an AG passes to the heir(s) according to the general inheritance law at the moment of the deceased's passing, so that the new shareholder(s) may exercise their rights immediately.
(4) Moreover, a testatrix has the opportunity, to allow a person who is not an heir to act with authority after her death.

(a) A testator or testatrix can authorise a person to act as his or her legal representative after his or her death (postmortal agency).

An agency might continue after the testator's death *(transmortale Vollmacht)* or might even take effect only at the moment of the testator's death *(postmortale Vollmacht)*. This way, it is possible to keep access to banking accounts and other assets even before the probate court has ascertained the heir or heirs. A postmortal agency can be used as an interim solution.[113]

Such a representative might incur liabilities for the heirs and thus may cause severe damage to them. Therefore, the heirs can revoke an authorisation. There is

[111] *Fastrich* in Baumbach/Hueck, GmbHG, CH Beck, München, 20th edn, 2013, § 15 para 9; *Froning* in Sudhoff (ed) Unternehmensnachfolge, CH Beck, München, 5. edn, 2005, § 48 para 1 f.

[112] *Ebbing* in Michalski, GmbHG CH Beck, München, 2010, § 15 para 6; *Fastrich* in Baumbach/Hueck, GmbHG, CH Beck, München, 20th edn, 2013, § 15 para 12.

[113] *Zimmermann* in Münchener Kommentar, CH Beck, München, 6th edn, 2013, Vor § 2197 para 9.

disagreement if the heirs should at all times be free to do so,[114] or if the testator can limit this right to situations, where the heirs have an important reason to revoke.[115]

(aa) A postmortal agency is generally considered possible in both partnership and company law. Practitioners even recommend that a partner, shareholder or sole proprietor prepare an authorisation for the case of his or her sudden death or incapacity *(Vorsorgevollmacht)* in order to keep the business capable of acting.[116] The agreement on the acceptability of the *Vorsorgevollmacht* can only be appreciated if the general rules on agency in company and partnership law are kept in mind:

(bb) In a partnership (GbR, OHG, KG), the partner's rights cannot be transferred to third parties (§ 717 BGB, *Abspaltungsverbot).* The authorisation of an agent must not undermine this rule. The rights of a partner, especially his or her voting rights, are personal. Thus, an agent may not displace the partner in his rights as a partner *(Verbot der verdrängenden Vollmacht).*[117] It is possible, however, that a representative exercises a partner's voting rights if the partner can revoke the agency or at least retains his or her own rights to vote. Since the personal relationship of the partner's is important within a partnership, the other partners must also agree that a third party exercises voting rights in partnership meetings.[118]

In a GmbH, § 47 Abs. 3 GmbHG indicates that an agency over voting rights is generally acceptable and does not require the consent of the other shareholders. It is possible, however, to introduce different rules in the articles of association *(Personalisierung).*[119] A shareholder of an AG can also be represented by an agent. However, like in a partnership, it is generally not acceptable that a shareholder of an AG or GmbH irrevocably transfers all of his voting rights to a third part without retaining at least the right to cast a vote him- or herself. Voting rights cannot be transferred completely without the share itself.[120]

(cc) If another partner or shareholder acts as agent the agent may only cast a vote for his own share and the share of the partner/shareholder he represents to

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[114] *Scherer* in Sudhoff (ed) Unternehmensnachfolge, CH Beck, München, 5th edn, 2005, § 9 para 59.

[115] *Zimmermann* in Münchener Kommentar, CH Beck, München, 6th edn, 2013, Vor § 2197 para 17.

[116] *Langenfeld*, Die Vorsorgevollmacht des Unternehmers, ZEV 2005, 52; *Mutter* in Brambring/Mutter (eds) Formulare Erbrecht, CH Beck, München, 2nd ed, 2009, III G 11.

[117] BGH, 10.11.1951 – II ZR 111/50 – BGHZ 3, 354, 357–360; BGH, 15. 12. 1969 – II ZR 69/67 – NJW 1970, 468; see also BGH, 20.1.2011 – V ZB 266/10 – MittBayNot 2011, 494; *Schäfer* in Münchener Kommentar, CH Beck, München, 6th edn, 2013, § 717 para 16.

[118] BGH, 10.11.1951 – II ZR 111/50 – BGHZ 3, 354, 357; BGH, 1.12. 1969 – II ZR 14/68 – NJW 1970, 706.

[119] *Drescher* in Münchener Kommentar, CH Beck, München, 2010, § 47 GmbHG, para 94.

[120] BGH, 17. 11. 1986 – II ZR 96/86 – NJW 1987, 780; KG, 11. 12. 1998–14 U 4594/97 – NZG 1999, 446, 447.

change the articles of association, if the represented partner or shareholder has released the agent from the rule against self-dealing in § 181 BGB *(Verbot des Insichgeschäfts)*.[121]

(b) Another aspect to consider is that if minors inherit or receive shares, their legal representatives (usually their parents) are not competent to represent them in all legal matters concerning the shares. For some acts, including the transfer of the share in a partnership or the founding of a partnership (§ 1822 no. 3 BGB), the consent of the guardianship court (*Vormundschaftsgericht*) is required and a special guardian *(Ergänzungspfleger)* must be appointed. If the minor's parents are shareholders as well, a representation in votes on changes of the articles of association is likewise not possible; rather, a temporary guardian must be appointed.[122]

(c) Another possible interim solution requires that the testator transfers a certain right to a trustee in for the benefit of a certain beneficiary, for example the heir (*Treuhand*).[123] This way, a business, or a share may be transferred to a trustee who acts for the benefit of the heirs.[124]

(d) A testatrix can also appoint an executor in her will or request that the probate court *(Nachlassgericht)* appoint an executor (*Testamentsvollstrecker,* §§ 2197–2263 BGB).

(aa) An executor might either be appointed in order to settle the testator's debts and distribute the estate among the heirs (*Abwicklungstestamentsvollstreckung*, §§ 2203–2207BGB)ortoadministratetheestate*(Verwaltungstestamentsvollstreckung)* for a longer time, though as a general rule no longer than 30 years (§ 2210 BGB). In the latter case, an executorship allows to keep the estate together for much longer, for example until an heir who is supposed to take over a business has gained the necessary qualifications. The *Testamentsvollstrecker* may create obligations[125] for the heirs and sell property from the estate (§§ 2205–2208 BGB) if the testator has not limited his powers in his will.[126] If the testator has appointed a *Testamentsvollstrecker* in his will, the heirs may not dispose of the estate insofar as it is under executorship (§ 2211 BGB). Only the *Testamentsvollstrecker* can sue in court for payment or property belonging to the estate (§ 2212 BGB). In court, a *Testamentsvollstrecker* sues and is sued in his or her own name, not in name of the heirs or the estate. A debtor of the estate may sue the

[121] BGH, 18.9.1975 – II ZB 6/74 – NJW 1976, 49; BGH, 6.6.1988 – II ZR 318/87 – NJW 1989, 168, 169.

[122] BGH, 18.9.1975 – II ZB 6/74 – NJW 1976, 49.

[123] *Zimmermann* in Münchener Kommentar, CH Beck, München, 6th edn, 2013, Vor § 2197 para 21.

[124] *Scherer* in Sudhoff (ed) Unternehmensnachfolge, CH Beck, München, 5th edn, 2005, § 9 para 47.

[125] *Scherer* in Sudhoff (ed) Unternehmensnachfolge, CH Beck, München, 5th edn, 2005, § 9 n. 17.

[126] *Scherer* in Sudhoff (ed) Unternehmensnachfolge, CH Beck, München, 5th edn, 2005, § 9 para 16.

Testamentsvollstrecker or the heirs for payment. The debtor can enforce a judgement against the *Testamentsvollstrecker* (who has authority to administrate the estate) against the estate, while a judgement purely against the heirs may only be enforced against them. The debtor may, however, sue the heirs and the *Testamentsvollstrecker* together so that the latter cannot object to an enforcement of the judgement against the estate (§ 2213 BGB).

The *Testamentsvollstrecker* must inventory the estate (§ 2215 BGB), inform the heirs about the state of the estate and annually account for the estate's expenses and earnings (§ 2218 BGB). The *Testamentsvollstrecker* is liable for any damage he or she causes negligently to the estate (§ 2219 BGB). Not even the testatrix in her will can excuse the *Testamentsvollstrecker* from said duties (§ 2220 BGB).

(bb) A testatrix may doubt that her prospective heirs – who may still be under age – qualified to continue her business or act appropriately as partners in a partnership. In this case, a long-tem executorship *(Verwaltungstestamentsvollstreckung)* of a qualified *Testamentsvollstrecker*, who must act according to the wishes of the testatric, can appear desirable.

(cc) A long-term executorship (*Verwaltungstestamentsvollstreckung*) over a share in a company, be it a GmbH[127] or AG,[128] is possible. Special questions only arise in relation to small, personalised GmbHs, which could be described as quasi-partnerships, because of the strong relationship between its shareholders. In order to protect the personal character of a quasi-partnership, in such a GmbH, shareholders are often not free to transfer their shares at will *(Vinkulierung)*.

It has been argued that in such a GmbH, a *Testamentsvollstrecker* was not free to cast a vote in decisions of special importance for the company.[129] Yet, other commentators disagree with this position, however.[130] If the articles of association in a GmbH require, however, that votes are cast by the shareholders only, the other shareholders need to agree that the *Testamentsvollstrecker* executes the heirs' rights in their place.[131]

(dd) A long-term *Testamentsvollstreckung* over partnerships and the business of a sole proprietor causes specific problems.[132] It is, however, still used in practice

[127] *Mayer*, Die Testamentsvollstreckung über GmbH-Anteile, ZEV 2002, 209.

[128] *Frank*, Die Testamentsvollstreckung über Aktien, ZEV 2002, 389.

[129] *Priester,* Testamentsvollstreckung am GmbH-Anteil, in Lutter/Mertens/Ulmer (eds) Festschrift für Walter Stimpel, de Gruyter, Berlin, 1985, 463, 481–485.

[130] *Scherer* in Sudhoff (ed) Unternehmensnachfolge, CH Beck, München, 5th edn, 2005, § 9 para 57.

[131] *Scherer* in Sudhoff (ed) Unternehmensnachfolge, CH Beck, München, 5th edn, 2005, § 9 para 57.

[132] See with further references on the discussion: *Ulmer/Schäfer* in Münchener Kommentar, CH Beck, München, 6th edn, 2013, § 705 para 109–124; *Everts,* Die Testamentsvollstreckung in der notariellen Praxis, MittBayNot 2003, 427; *Dörrie,* Die Testamentsvollstreckung im Recht der Personengesellschaften und der GmbH, Duncker & Humblot, Berlin 1994; *Ulmer*, Testamentsvollstreckung an Kommanditanteilen? – Ein Beitrag zu den Auswirkungen der

if the testator' children are still small and no suitable other candidate for the business succession is available.

First, with respect to inheritance law, the question arose if an executorship over shares in a partnership could be possible at all, since the shares moved to the heirs directly, making them new partners straight away (*Sonderrechtsnachfolge*). Were those shares part of the estate nevertheless and could thus be subject to an executorship? Though shares in a partnership passed directly to the heirs as new partners, the BGH held, the shares were still part of the estate.[133]

Second, the personal relationship of the partners does not impede an executorship if the other partners have agreed to it.[134] Third, an executorship over the share of a *Kommanditist*, a partner in a limited partnership (KG) who is not liable for the partnership's debts, is acceptable, the BGH held in 1989.[135]

Nevertheless, the lawfulness of an executorship over shares of liable partners is still problematic: The law demands that a sole proprietor and a liable partner in a partnership (GbR, OHG, or KG) is liable for the debts of the business. According to § 2206 BGB, the executor is qualified to incur liabilities for the estate only. The heirs, however, can limit their liabilities.[136] As *Dauner-Lieb* has argued, this criticism is well founded; an executorship is no appropriate tool for the administration of a partnership. The question of the admissibility of the long-term executorship over a partnership or sole proprietorship is thus another example for the tension between the rules of inheritance law and partnership law.[137]

Therefore, a long-term executorship over a business or the shares of liable partners in a partnership is discussed by means of alternative solutions, which guarantee the personal liability of the *Testamentsvollstrecker*.[138] A personal liability of the *Testamentsvollstrecker* can be achieved if the business or the shares in the respective partnership are transferred to the executor on trust for the benefit of the heirs *(Treuhandlösung).* Though the executor may ask the heirs for reimbursement for any liability incurred in the cause of the executorship, this approach bears considerable risks for the executor.[139] Another possibility is that the executor acts as representative for the heirs who become liable. If this approach is chosen, it is necessary to prevent the heirs from revoking the representation. It is not possible, however, to

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Sondervererbung im Personengesellschaftsrecht auf letztwillige Verwaltungsanordnungen des Erblassers, ZHR 146 (1982) 555.

[133] BGH, 3.7.1989 – II ZB 1/89 – BGHZ 108, 187, 194 f.

[134] *Ulmer/Schäfer* in Münchener Kommentar, CH Beck, München, 6th edn, 2013, § 705 para 111.

[135] BGH, 3.7.1989 – II ZB 1/89 – BGHZ 108, 187, 195 ff.

[136] BGH, 3.7.1989 – II ZB 1/89 – BGHZ 108, 187, 195.

[137] *Dauner-Lieb,* Unternehmen in Sondervermögen, Mohr Siebeck, Tübingen, 1998, 270–329.

[138] *Gummert* in Münchener Handbuch Gesellschaftsrecht, CH Beck, München, 3rd edn. 2009, § 16 para 34; *Scherer* in Sudhoff (ed) Unternehmensnachfolge, CH Beck, München, 5th edn, 2005, § 9 para 46.

[139] *Scherer* in Sudhoff (ed) Unternehmensnachfolge, CH Beck, München, 5th edn, 2005, § 9 para 47; *Ulmer/Schäfer* in Münchener Kommentar, CH Beck, München, 6th edn, 2013, § 705 para 124.

legally exclude the heirs' right to revoke the agency.[140] In practice, penalty clauses are added to the will. Such clauses are applied if the heirs revoke the executor's right to representation.[141]

(e) Another aspect to consider is that if minors inherit or receive shares, their legal representatives (usually their parents) are not competent to represent them in all legal matters concerning the shares. For some acts, including the founding of a partnership (§ 1822 no. 3 BGB), the consent of the guardianship court (*Vormundschaftsgericht*) is required and a special guardian *(Ergänzungspfleger)* must be appointed.[142]

6 Last Wills

6.1 Range of a Last Will

1. Does it include businesses and shares?

Testamentary autonomy is a fundamental principle of German inheritance law. Businesses and shares can be left in a will like other assets. There are no special provisions regarding wills on shares in a partnership or company. It should be recalled, however, that provisions in articles of associations of a partnership might be required to make the will effective. Practitioners recommend that entrepreneurs make a will and only appoint one heir in order to avoid a community of heirs.

2. Determination of the next generation and the generation afterwards

There are a number of options that allow a testatrix to leave instructions regarding the estate going far beyond his death. Many tools, however, are effective no longer than 30 years.

(1) *Auflage* (§§ 1940, 2192–2196 BGB). A testatrix may make the heir subject to an order how to deal with the estate. The testator can obligate the heir or recipient

[140] *Gummert* in Münchener Handbuch Gesellschaftsrecht, CH Beck, München, 3rd edn. 2009, § 16 para 34; *Ulmer/Schäfer* in Münchener Kommentar, CH Beck, München, 6th edn, 2013, § 705 para 123.

[141] *Scherer* in Sudhoff (ed) Unternehmensnachfolge, CH Beck, München, 5th edn, 2005, § 9 para 48.

[142] BGH, 30.4.1955 – II ZR 202/53 – BGHZ 17, 160, 162 ff; no consent required for a gift of a company share: BGH, 20.2.1989 – II ZR 148/88 – BGHZ 107, 24, 27 f, for a change of the articles of association, the consent of the guardianship court is not required for every change in the articles of association: BGH 20.9.1962 – II ZR 209/61 – BGHZ 38, 26, 28 ff; see also *Reimann*, Der Minderjährige in der Gesellschaft Kautelarjuristische Überlegungen aus Anlass des Minderjährigenhaftungsbeschränkungsgesetzes, DNotZ 1999, 179; *Haas*, Beteiligung Minderjähriger im Recht der GmbH & Co KG, GmbHR 2006, 737; *Stenger* in Münchener Anwaltshandbuch Erbrecht, CH Beck, München, 3rd edn, 2010, § 32, para 49 f.

of a bequest for example to take care of an animal or to maintain the grave of the deceased. There are no time-limits for such orders. A testator may also include orders with respect to a business that is part of the estate. This way, a testator may prohibit the sale of his business.[143]

(2) According to § 2100 BGB, a testator may provide that a subsequent heir (*Nacherbe*) inherits after a prior heir *(Vorerbe),* for example after the prior heir has deceased (§ 2106 BGB). This way, the testator may leave his estate for life to his wife with remainder to his children. The prior heir is not completely free to dispose of the estate (§§ 2112–2146 BGB). However, according to § 2109 BGB, such provisions become ineffective 30 years after the testator's death. In that case, the prior heir can freely dispose of the estate.[144] § 2109 BGB allows two exceptions to that rule:

First, the will remains valid for longer than 30 years if the will provides that the estate passes to the subsequent heir at the time of a certain event in the person of the prior heir or subsequent heir. This person, who is either named as prior or subsequent heir in the will, must be alive at the moment of the testator's death (§ 2109 (1) no. 1 BGB). This way, for example, a testator can leave the estate first to his wife and to his children after his wife's death even if the wife survives her late husband for over 30 years.

Second, according to § 2109 (1) no. 2 BGB, the will remains valid for longer than 30 years if it provides that if a brother or sister is born to the prior or subsequent heir, this brother or sister shall become subsequent heir.

Both exceptions allow the testator to make adequate provisions for his immediate family but do not allow prescribing the fate of the estate for generations to come.

(3) *Teilungsverbot.* A testator includes in his will a provision that forbids the heirs to subdivide the estate. This way, a fragmentation of the estate can be prevented up to 30 years (§ 2044 (2) BGB). The time-limit of 30 years can, however, be prolonged because of roughly the same reasons as the appointment of a previous and subsequent heir.

(4) *Testamentsvollstrecker.* A testator may appoint an executor in his will. For details see above at Sect. 5.5 (4) (d).

(5) Moreover, a foundation (*Stiftung*) may be used to secure the estate undivided for the maintenance of future generations[145] or as a holding for a business. The founder/testator may leave detailed instructions for the management of the business and its assets. Such instructions remain binding much longer than an executorship, which is generally limited to 30 years.[146]

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[143] *Scherer* in Sudhoff (ed) Unternehmensnachfolge, CH Beck, München, 5th edn, 2005, § 10 para 1.

[144] *Grunsky* in Münchener Kommentar, 6th edn, 2013, § 2109 para 2.

[145] *Tielmann*, Die Familienverbrauchsstiftung, NJW 2013, 2934.

[146] *Schlüter/Stolte,* Stiftungsrecht, 2nd edn., CH Beck, München 2013, Kap. 1, para 50–54.

A foundation may function as a holding for a company that manages a business *(Unternehmensträgerstiftung)* or just holds shares *(Beteiligungsstiftung)* in a company. The latter option has the advantage that additional capital may be raised through new shares.

(6) The question if provisions that limit the heir's freedom to decide how to deal with the inheritance, for example, to remain partner in a partnership or to continue a business, my also contradict the general principle of good morals (*Sittenwidrigkeit*, § 138 BGB) or the rules that a partner may not his right to leave a partnership (§ 723 (3) BGB), is under academic discussion.[147]

3. Nomination of another heir in case the original successor dies.

The testator may name a "subsequent" heir *Ersatzerbe,* § 2096 BGB who becomes heir in case the first one dies prematurely or waives his or her rights in the succession.

6.2 Requirements and Conditions

A will must be in the testator's own handwriting or notarised.

The principle of *Universalsukzession* (§ 1922 BGB) provides that all obligations and rights of the deceased pass down to the heir(s) in their entirety at the moment of the passing. Thus, all rights and obligations relating to the deceased's business undertaking will pass down to the heir as well.

The situation is different in partnership law. As was explained above, the heirs of a partner of a partnership (GbR, OHG, KG) immediately become partners according to the rules of partnership law if the articles of association provide so, or, in case of a *Kommanditist,* according to § 177 HGB.

The case law of the BGH has developed rules that ensure that inheritance law and partnership law work hand in hand to allow that the heir of a liable partner in a partnership becomes partner right away if the articles of association provide so. In corporate law, however, the general rules of inheritance law prevail It is possible to make the transfer of a share or business only effective on the time of death. As explained above, to transfer a share in a partnership *inter vivos* upon a partner's death, the old partners and the prospective successor have to work together, whereas the articles of association must provide for respective clauses (*Eintrittsklausel*).[148] To become partner in a partnership this way, the partnership's other partners and the prospective successor must agree. If the prospective successor decides not to join the partnership, the succession fails.

[147] *Budzikiewicz,* Die letztwillige Verfügung als Mittel postmortaler Verhaltenssteuerung – Zur Beschränkung der Testierfreiheit durch zwingendes Gesellschaftsrecht, AcP 209 (2009) 354.

[148] See above at Sect. 5.4. (5).

6.3 Other Forms

Apart from a last will, there is the testamentary contract/agreement (*Erbvertrag*) §§ 2274–2302 BGB, by which the testator may lay down binding provisions for a future succession. Since an *Erbvertrag* can – as a general rule – not be amended by the testator alone (§§ 2289–2295 BGB), a future heir may be secure to receive a business or – in case of a spouse – amble funds to secure maintenance in old age. Such security can be important to keep the desired successor close to the business when the testator is still alive and unwilling to transfer the business *inter vivos*. The *Erbvertrag* requires notarisation to be valid (§ 2276 BGB).

7 Right to a Compulsory Portion

7.1 Institute of Compulsory Portion or Similar National Institute

(1) The law provides that the testator's descendants (§ 2303 (1) S 1 BGB) and spouse (§ 2303 (2) BGB) or civil partner (§ 10 (6) LPartG) can bring a monetary claim against the heir(s). The Federal Constitutional Court *(Bundesverfassungsgericht)* held in 2005 that the law providing a compulsory portion for a spouse and close relatives was constitutionally protected.[149] Within this report, this monetary claim is referred to as a mandatory or compulsory portion. It is important to note, however, that a person entitled to the compulsory portion *(Pflichtteil)* does not become an heir who receives all rights and obligations at the moment of the testator's death. A descendant, spouse, or civil partner, can claim half the value of the share he or she would have received in case of intestacy (§ 2303 (1) s 2 BGB). However, since the compulsory portion can be substantial, it can put considerable financial strain on an estate and consequently also on a business. If no solution is found before the passing of the testator, such claims may threaten the survival of a family business.

(2) There are only limited possibilities to dispossess a beneficiary of his or her right to the compulsory claim (§ 2333 BGB). The testator or testatrix may dispossess a beneficiary

- who has planned to kill the testator or testatrix, his or her spouse or a person equally close to him or her (§ 2333 (1) no. 1 BGB)
- who intentionally committed a crime against a person mentioned in no. 1
- who neglected a duty to maintain the testator or testatrix
- who was sentenced to prison for at least 3 years if this misdemeanour or crime makes it unacceptable that this person benefit from the estate.

[149] BVerfG, 19.4.2005 – 1 BvR 1644/00, 1 BvR 188/03 – BVerfGE 112, 332.

(3) A beneficiary may waive his or her right to the compulsory claim in a notarized contract with the testator (§ 2346 (2) BGB).
(4) The *Pflichtteilsrecht* does not only provide claims for those who have received nothing under a will but also grants rights for those who have received only a little. Moreover, claims can be brought if the testator has depleted the estate by making gifts.

(a) If there are several heirs of which some receive more and some less than their mandatory portion, the heirs who have received less under the will may claim compensation in money from the other heirs to make up the difference between the inheritance received under the will and the claim they would have if they had been disinherited (§ 2305 BGB).

If, however, the person entitled to the mandatory or compulsory portion has received gifts during the testator's lifetime in order to compensate his or her future meagre share under the will, such gifts are taken into account (§ 2315 BGB).

For example: The testator leaves three children, A, B and C. A receives a business worth 90 % of the estate, B and C receive only property worth 5 % under the will. Additionally, to finance a business on his own, B has received from the testator a gift of money worth 10 % of the estate. It was understood, that this money should compensate that A and not B would receive the testator's business under the will.

A, B and C would have been entitled to 33 % each in case the testator had died intestate. B and C would have had a claim to money worth 16.66 % as a mandatory share under § 2303 (1) BGB. Since B and C are heirs, they can ask for the difference between the 5 % heritage they have received under the will and the 16.66 % mandatory portion according to § 2305 BGB. Accordingly, C's claim has the value of an 11.66 % share in the estate. In B's case, however, the gift worth 10 % of the estate must be taken into consideration according to § 2315 (1) BGB. B thus has a claim worth 1.66 % only against A.

If the testator has made a gift to a third party, a person entitled to a mandatory share may claim a mandatory share form the heir that is calculated considering not only the estate as it was inherited but as if the gift had been part of the estate (§ 2325 (1) BGB).

Example: The testator has made a gift of € 30,000 to his girlfriend right before his death. The testator's wife becomes heir of an estate worth € 60,000. Their only son receives nothing. According to § 2303 (1) BGB the son can claim money worth 25 % of the estate (in case of intestacy, he would have received 50 % of the estate). According to § 2325 (1) BGB, the claim is not calculated based on an estate worth € 60,000 but € 90,000. Thus, the son may claim € 22,500 from his mother. The gift is considered full in the first year after it was made and then with 10 % less of its value every year that has passed after the gift was made (§ 2325 (3) BGB).

According to § 2326 BGB, even an heir who receives half his or her intestate share in a will, may claim the additional sum if the testator has made substantial gifts to third parties.

For example: The testator has made a gift of € 30,000 to his girlfriend right before his death. The testator's wife becomes heir of € 37,500. Their only son

receives € 12.500. The son has received 25 % of the estate, exactly his mandatory share according to § 2303 (1) BGB. However, according to § 2325 (1) BGB, the claim is not calculated based on an estate worth € 50,000 but € 80,000. In this case, the son would be entitled to a mandatory share of € 20,000. Thus, the son may claim € 7,500 from his mother.

The heir may refuse the claim according to § 2328 BGB if he or she is entitled to a mandatory portion him- or herself and would receive less than this share if the claim was satisfied.

For example: The testator has made a gift of € 30,000 to his girlfriend right before his death. The testator's wife becomes an heir of € 10,000. Their only son receives € 5,000. According to § 2325 (1) BGB, the claim for a mandatory share is not calculated based on an estate worth € 15,000 but € 45,000. In this case, the son would be entitled to a mandatory share of € 11,500 Thus, the son may claim € 6,500 from his mother. However, if the mother would satisfy this claim, she would end up with much less than her mandatory share of € 11,500. Thus, she can refuse the claim.

(b) According to § 2329 BGB, the person entitled to the mandatory share or the sole heir can request the donee to deliver the gift according to the rules of unjust enrichment. The application of the rules of unjust enrichment ensures that the donee only has to give up the gift insofar as he or she is still enriched by it. If the donee has lost the gift in good faith, for example, he or she is not liable for that loss. If the donee prefers retaining the gift, the donee may choose to pay money to make up the mandatory share (§ 2329 (2) BGB).

These claims are of special importance when business succession is planned. If the testator has not enough private property to satisfy a spouse and children, there is a risk that their claims may strain the estate and thus business financially and thus threaten its future.

The situation is different, however, if the business was not transferred as a gift. If consideration is significantly below the value of the property transferred, and the parties agree that the difference is given as a gift, however, the transaction is considered a mixed gift *(gemischte Schenkung)*. Especially if claims for mandatory shares are at stake, mixed gifts are presumed if consideration is significantly below value. In this case, the part of the transaction that is a gift can be considered in claims according to §§ 2325, 2329 BGB.[150]

Because of the claims according to §§ 2325, 2329 BGB require that a gift was made the notion of the gift is of considerable importance in this context. A share in a company as well as a share as a non-liable partner in a general partnership (KG, *Kommanditistenstellung*) can be received as a gift.[151] However, making someone a partner in a partnership or transform a sole proprietorship into a partnership by allowing someone to join as a partner, is usually not considered a gift by the BGH

[150] *J Koch* in Münchener Kommentar, CH Beck, 6th edn 2013, § 516 para 34 f.

[151] BGH 2.7.1990 – II ZR 243/89 -BGHZ 112, 40, 44 f.

even if the new partner is not obliged to make a deposit.[152] The court held that the partnership comes attached with duties including personal liability. Moreover, if all partners agree that their partnership should be continued after the death of a partner with no claim for compensation for the heirs, every partner takes the risk of dying first, thereby potentially losing the share for his or her heirs, but on the other hand also has a chance of gaining shares for free if one of the other partners dies before himself or herself. However, in a case where due to the other partner's ill health or old age a new partner was likely to also receive the other partner's share soon afterwards, the whole transaction has been considered to be inside the scope of § 2325 BGB,[153] thus constituting a gift. Both academics as well as practitioners disagree with the BGH's judgement, arguing that receiving a partnership in a healthy business of value without the obligation to make a deposit should always be considered a gift like any other.[154]

7.2 Right to Compulsory Portion and Business Succession

Neither shares nor sole proprietorships are excluded from the *Pflichtteilsrecht.* Shares cannot be claimed under the *Pflichtteilsrecht* but just a sum of money from the heir or heirs. If a share in a partnership is not inheritable according to the articles of association, and the heirs' right to compensation excluded, the heirs have no rights against the shareholders if the clause applies to all partners equally and thus everybody takes the chance of gaining part of the others' shares for free.[155]

However, the BGH assumes that if a person joins a partnership or sole proprietorship as a liable partner, the partnership is not usually considered as a gift even if the new partner has not to make a deposit. This means that the *Pflichtteilsergänzungrecht,* §§ 2325, 2329 BGB, which concerns claims that arise because the testator has made a gift that reduces the value of the estate, is not applicable. The BGH has mentioned the purpose of continuing the business as a laudable goal in connection to this issue.[156]

Claims can be reduced, however, in relation to agricultural businesses to which the Höfeordnung applies. If the farmer disinherits the person who should have received the farm under the Höfeordnung, this person's reserved portion *(Pflichtteil)* is calculated according to the general law of inheritance. If the farmer leaves the farm in a will to the person who should receive the farm according to the

[152] BGH, 11.5.1959 – II ZR 2/58 – NJW 1959, 1433; BGH 2.7.1990 – II ZR 243/89 -BGHZ 112, 40, 44.

[153] BGH, 26.3.1981 – Iva ZR 154/80 – NJW 1981, 1956.

[154] See only with further references, *J Koch* in Münchener Kommentar, CH Beck, 6th edn 2013, § 516 para 91.

[155] BGH 22.11.1956 – II ZR 222/55 – BGHZ 22, 186, 194 f.

[156] BGH, 20.12.1965 – II ZR 145/64 – DNotZ 1966, 620; BGH, 26.3.1981 – IVa ZR 154/80 – NJW 1981, 1956 f.

Höfeordnung, the reserved portion of the other heirs will be calculated according to the Höfeordnung, which is considerably less (§ 16 (2) Höfeordnung).

7.3 Calculation of the Compulsory Portion

The *Pflichtteil* § 2303 (1) 2 BGB is a claim in money of 50 % of the value of the share of the estate the claimant would have received in case of intestacy.

§§ 2303, 2311 BGB do not provide rules on the evaluation of the reserved portion. The judge responsible for the case must decide how to evaluate the estate. Often, particularly when a business interest must be evaluated, an expert opinion will be necessary. The value of the estate at the moment of passing is calculated according to § 2311–2313 BGB. Only in respect to agricultural businesses, special rules on how a business is to be evaluated, are provided in § 2312 BGB and in § 12 (2) 2 Höfeordnung. § 2312 BGB states, that an agricultural business *(Landgut)* is evaluated according to its sustainable earning power (§ 2049 (2) BGB). If the testator has suggested that the successor may take over the farm for another price, this price shall be taken as its value. This provision allows the heir of an agricultural business to pay the person entitled to a mandatory portion considerably less than the heir of another business. This preferential treatment of agricultural businesses has been strongly criticised.[157]

7.4 Renunciation

An heir may renounce his or her right to a compulsory portion in a notarized agreement (*Pflichtteilsverzicht*), §§ 2346, 2348 BGB. Before a notarization, the notary gives independent advice to the parties (§ 17 Beurkundungsgesetz).

It is possible to renounce all rights to a reserved portion or just for the case that a certain person, for example the testator's spouse, becomes heir.[158] This way, it can be ensured, that a child only renounces his or her rights in favour of a parent from whom it will receive a bequest later but not in favour of someone else, for example the father's new partner.

If only one heir receives a share in a company, he or she might have to satisfy claims of persons entitled under § 2303 BGB. Since such claims can put a financial strain on the estate, practitioners discuss ways to reduce or exclude such claims.

Some commentators agree that it is possible to create a partnership of the testator and the prospective successor and agree in the articles of association that the partnership shall not be continued with the testator's heirs and that no compensation can be claimed. At the moment of death, the testator's share will accrete to the shares of

[157] *Lange* in Münchener Kommentar, CH Beck, München, 6th edn, 2012, § 2312 para 1–7.

[158] *Spanke*, Der persönlich beschränkte Pflichtteilsverzicht, ZEV 2012, 345.

the other partner and no compensation will be due. The testator's descendants and spouse/civil partner have no claim to the share.[159]

Under certain circumstances, a person entitled to a compulsory portion can claim a gift that the testator has made (§ 2329 BGB). If, therefore, the share in the partnership could be classified as a gift, the person entitled to a compulsory share might still bring a claim against the shareholder. However, a share in a partnership is usually not considered a gift by the BGH,[160] and thus cannot be subject of a claim under § 2329 BGB. Therefore, some practitioners claim that it is possible this way to avoid claims to the compulsory portion effectively in partnership law.

Usually, the testator and a person entitled under § 2303 BGB will agree on a compensation for the renunciation of the mandatory share.[161] However, a renunciation according to § 2326 BGB does not need to be compensated to be valid. This means that the testator is completely free to dispose of his property in a will if the person entitled to a mandatory share agrees. In a 2011 decision, the BGH stressed the importance of the prospective heir's private autonomy[162] and decided that the renunciation of a right to a mandatory share of a disabled person, who received social benefits, did not contradict good morals and was consequently valid. This laissez-faire approach has been criticised by *Dutta* and *Röthel* who point out that the testator might well abuse his or her influence on a spouse or child in order to achieve a renunciation of rights desperately needed for maintenance.[163] *Röthel* agrees, however, that a renunciation of a right to a mandatory share should be accepted in relation to business property.[164] Other commentator's allow that a renunciation might be invalid if the testator uses severe emotional blackmail but not because of a lack of compensation.[165]

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[159] *Hecht,* Personengesellschaftsrecht in der notariellen Gestaltungspraxis, JA 2012, 372, 376.

[160] BGH, 11.5.1959 – II ZR 2/58 – NJW 1959, 1433; BGH 2.7.1990 – II ZR 243/89 – BGHZ 112, 40, 44.

[161] *Wegerhoff* in Münchener Kommentar, CH Beck, München, 6th edn, 2013, § 2346 para 21.

[162] BGH, 19.1.2011 – IV ZR 7/10 – BGHZ 188, 96, 107–109.

[163] *Dutta,* Grenzen der Vertragsfreiheit im Pflichtteilsrecht, AcP 209 (2009) 760, 791 ff; *Röthel,* Umgehung des Pflichtteilsrechts, AcP 212 (2012) 157, 192 ff; against such a judicial control, for example: *Wegerhoff* in Münchener Kommentar, CH Beck, München, 6th edn 2013, § 2346 para 35-35c; *Bengel*, Die gerichtliche Kontrolle von Pflichtteilsverzichten, ZEV 2006, 192; *Münch,* Infiziert der Ehevertrag erbrechtliche Verzichte und Verfügungen? ZEV 2008, 571.

[164] *Röthel,* Umgehung des Pflichtteilsrechts, AcP 212 (2012) 157, 198 f.

[165] *Weidlich*, Erbrechtliche Pflichtteilsverträge, NotBZ 2009, 149, 159.

8 Anticipated Succession and the Maintenance of the Transferor's Shareholder Position

8.1 Forms of Anticipated Succession

As pointed out under 1.2, in the majority of cases, business succession takes place during the testator's lifetime. If proper legal advice is taken, testamentary solutions are only taken while the entrepreneur is still young and possible successors, e.g. children, too young, to take over the business. In this situation, a testamentary solution is chosen to provide rules in case of an early and unexpected death. However, as the experience of practitioners show, not all business leaders are willing to plan ahead and give up the control over their business during their lifetime.[166] As practitioners point out in informal discussions, many clients have considerable difficulties facing their own mortality and planning for a time when they will not be in charge of their business.

A transfer *inter vivos* may be executed as a gift or purchase. Anticipated succession can take place all at once or gradually. In the latter case, the desired successor may start as a minority shareholder or partner and gain more and more influence subsequently.

An early transfer has the advantage that the testator can "try out" a possible successor and ensure a gradual transmission. Moreover, a talented possible successor may not be willing to wait for the testator's death before assuming responsibility in a business.

If the necessary means are available and proper legal advice is taken, an anticipated succession will be undertaken according to a specific agreement.[167] Practitioners stress the importance of drawing up such agreements with an eye to the peculiarities of the individual case.

The transfer can be achieved by means of a gift or purchase. It is also possible, that the business is transformed into a KG where family members join as *Kommanditists* and only one or two qualified successors as liable partners. A company can also be made liable partner of a KG so that no successor must take on personal liability (GmbH & Co KG). Another possibility is to organise the business into one or more companies and transfer its shares to a family holding. In this case, the testator's family may receive shares in the holding while the business is managed by one qualified family member or even by professionals. Another possibility is to transfer the shares in the business to a foundation.

If the transfer takes place within a family, often an endowment is made. In this case, tax law is of special importance to minimise the burden of gift tax on the successor. Such a transfer might in practice be combined with a testamentary agreement (*Erbvertrag)* in order to prevent that the whole transfer might be endangered

[166] *Haberstroh,* Hinauskündigungsklauseln in Gesellschaftsverträgen zur Vorwegnahme der Erbfolge, BB 2010, 1745, 1746.

[167] See for standard agreements: *Mutter* in Brambring/Mutter (eds) Formulare Erbrecht, CH Beck, München, 2nd ed, 2009, III G.

by claims of the compulsory or mandatory portions (*Pflichtteil)* of the transferor's spouse and/or descendants. To provide for other family members, other endowments might be made at the same to time, for example gifts of real estate or cash.

In some cases, especially when the successor comes from outside the family, the business is purchased.

8.2 Relation to Ownership – Relation to the Transfer to the Leadership

Each business succession depends on the individual case, especially the size of the business, the quality of legal advice available and affordable, the state of health of the partner willing to leave and the relationship between the retiring partner and his or her successor. In practice, a business is often not transferred as a whole but the prospective successor is gradually given more influence and more and more shares in the business (in case the business is conducted in the form of a partnership or company) up to the moment when the testator decides to resign from the business completely. In other cases, the transfer is designed in a way that leaves the income and control over the business in the hands of the old partner until he or she dies or becomes incapable of acting. Only very rarely, the old partner will leave the business completely with his or her successor at a time when he or she can still take control.

8.3 Influence of the Testator in His shareholder's Position

(1) Influence of the testator

If the parties are able to afford competent legal advice and – sometimes even more difficult – are willing to take such advice,[168] there are almost endless possibilities for the transfer of the business to the next generation during the founder's lifetime that secures the transferor's influence.

With respect to liability, the successor of a sole proprietorship becomes liable for the predecessor's debts if the business is continued under the same firm name (§ 25 HGB). The predecessor remains liable for the debts. The parties may agree, however, that one of them, for example the successor, will reimburse the other after having satisfied a claim. The parties often also contract that any additional tax burdens should be born by the transferee. Many practitioners suggest the prospective successor should join the business as a minority or even majority shareholder first and take over management responsibility gradually.

[168] See about the often limited willingness of entrepreneurs to confront their own mortality by working out an adequate strategy fort he succession in their business: *Haberstroh,* Hinauskündigungsklausel in Gesellschaftsverträgen zur Vorwegnahme der Erbfolge, BB 2010, 1745, 1746.

Practitioners relate that a right to withdrawal from the transfer seem essential to all successors. Such a right can secure considerable influence to the transferor and make sure that he or she can still change his or her mind about the successor before his or her death. This allows the transferor to "try out" a possible heir in his or her lifetime. Moreover, transferors often consider it important to secure a right to withdrawal in case the prospective successor predeceases or their relationship deteriorates. In general, practitioners point out that many transferors have considerable reservations against their children in law – who did not grow up with the family businesses values – gaining influence within the business.

However, such clauses are not without difficulties. The BGH has declared clauses void that allow shareholders to withdraw the share of a partner or shareholder in a limited company (GmbH) without reason *(Hinauskündigungsklausel).* Such clauses, the court held, require specific reasons to be justified.[169] Another decision of 19.3.2007 indicates, however, that the BGH accepts rights to withdrawal in the context of business succession. The testator had left his business to his wife and then his son as partner and daughter as limited partners. After the wife's death, the son cancelled the partnership according to the articles of association left by the testator. Thus, the daughter had to leave the business to her brother alone. The BGH held, that a right to withdrawal could be justified by the testamentary freedom of the testator who was free to leave his business with his son as his desired successor.[170]

In case of anticipated succession, such a right to withdrawal requires careful scrutiny from a tax perspective. If the right to withdrawal is too strong and lacks adequate compensation, tax law can consider that the business was not really transferred to the next generation, but *de facto* remains with the predecessor. In this situation, the business may still be classified as the predecessor's property and considerable tax burdens can arise.[171]

(2) Maintenance of the testator

A very important point in each business succession is how to ensure that the transferor receives sufficient means to secure his lifestyle and necessary care in case of old age and illness. There are no legal rules apart from the general law of maintenance under which a parent or grandparent can ask a descendant for maintenance under family law rules (§§ 1601–1615 BGB). The Höfeordnung provides in § 14 rules for the maintenance of a surviving spouse.

(3) Different strategies

The maintenance and influence of the transferor can be taken care of in a number of ways:

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[169] BGH, 8.3.2004 – II ZR 165/02 – NZG 2004, 569; *Miesen,* Gesellschaftsrechtliche Hinauskündigungsklauseln in der Rechtsprechung des Bundesgerichtshofes, RNotZ 2006, 522.

[170] BGH, 19.3.2007 – IIZR 300/05 – NJW-RR 2008, 913, 914.

[171] *Inhester* in Münchener Handbuch des Gesellschaftsrechts, CH Beck, München, 3rd edn, 2009, Rn 24–26.

(a) *Nießbrauch* (usufruct). A *Nießbrauch* of a share in a partnership,[172] AG[173] and GmbH[174] is possible as well as over the business of a sole proprietor. There are two different forms. While the legal title is transferred to the desired successor, the transferor may either keep the full right to the use, management, and income of the business *(Vollnießbrauch)* or just retain to the income of the business *(Ertragsnießbrauch)* for him- or herself or for the maintenance of a third party, e.g. a surviving spouse.[175] The rights to the management and income of the person entitled to the usufruct can be determined in an agreement. The details under which the shareholder's or partner's rights to management and voting powers may be stripped in favour of a person entitled to the usufruct are still under discussion among academics.[176] With regard to the rule that partners' and shareholders' rights may not be transferred completely without the share *(Abspaltungsverbot)* there is disagreement to what extent a person entitled to the usufruct may also hold voting rights.[177]

In practice, a usufruct is used quite often to secure the transferor's income and influence after the business succession. Most entrepreneurs do not want to leave their business – their life's work and source of pride – in the hands of someone else completely at a time when they can still work. Moreover, a usufruct can be used to lower both the entrepreneur's income taxes as well as the tax burden on the transfer of the business.

(b) Another way to retain the transferor's income is to transfer shares to the desired successors, e.g. the children, but create shares for the transferor that lack capital but carry the rights to management, voting and the businesses' income.[178] Such special shareholder rights will end with the shareholder's death. As long as he or she is alive, however, nothing changes in the business' management and profit distribution. This solution is particularly attractive for an entrepreneur who wants to take care of the business succession in a tax-optimised way but cannot imagine to leave his life's works in someone else's hands yet. For such an entrepreneur, the business is often a major source of pride and prestige in his community and leaving it all behind might leave him or her feeling old and without a purpose in life.

(c) Another possibility is a contractual agreement by means of which the transferor has a right to a monthly or annual pension. Such a pension can be fixed or calculated according to the profits of the business. The transferor may also negotiate a contractual right to all/part of the profits of the business/share transferred.

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[172] BGH, 9.11.1998 – II ZR 213/97 – NJW 1999, 571, 572.

[173] *Karsten Schmidt* in Münchener Kommentar, CH Beck, München 3rd edn 2012, vor § 230 para 29.

[174] *Karsten Schmidt* in Münchener Kommentar, CH Beck, München 3rd edn 2012, vor § 230 para 25.

[175] *Mutter* in Brambring/Mutter (eds) Formulare Erbrecht, CH Beck, München, 2nd ed, 2009, III G 5.

[176] BGH, 9.11.1998 – II ZR 213/97 – NJW 1999, 571, 572.

[177] See *Karsten Schmidt,* Stimmrechts beim Anteilsnießbrauch, ZGR 1999, 601.

[178] *Mutter* in Brambring/Mutter (eds) Formulare Erbrecht, CH Beck, München, 2nd ed, 2009, III G 6.

Such agreements need to be planned carefully with an eye to tax law, because payments for the maintenance of the transferor of a business are tax privileged under certain circumstances (§ 10 (1) no. 1 a EstG).[179]

(d) The transferor may retain some assets, for example real property, and lease those assets back to the business.

(e) In case the transfer was not made gratuitously, the transferor may live of the purchase price. The purchase price could either be paid in a lump sum or in monthly instalments.

9 Foundations and Trusts as Instruments for Business Succession

9.1 Set Up of a Foundation

1. German law regulates the foundation (rechtsfähige Stiftung) in §§ 80 et seq. BGB
2. To set up a foundation, the following requirements must be met.

   (a) *Stiftungsgeschäft.* A foundation needs to be set up in a legal document by the founder, stating its name, domicile, purpose, capital and information on how its board must be set up, §§ 80 (1), 81 BGB.

   (b) A foundation must be recognised by the responsible authority (*Stiftungsbehörde*) in the German state (*Bundesland*) where the foundation will have its registered office § 80 (1) BGB.

   (c) A foundation needs to pursue a legal purpose which is not contrary to public interests (*Stiftungszweck, der nicht gegen das Allgemeinwohl verstößt* §§ 80, 81 BGB). It is permitted that a foundation runs a business and serves the purpose to maintain the founder's family.[180] In this case, the public control exercised usually over foundations by the responsible public authority, the *Stiftungsbehörde,* is less strict than for charitable foundations.[181]

   (d) It must be assured that the foundation has appropriate funds to pursue its purpose on a sustained basis (§ 80 (1), (2) BGB).[182]

   (e) Registration in the foundation registry.

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[179] *Pauli/Kammerloher-Lis*, Unternehmensnachfolge – Vorweggenommene Erbfolge gegen Versorgungsleistungen, SteuK 2011, 449.

[180] See with further references: *Schlüter/Stolte,* Stiftungsrecht, 2nd edn., CH Beck, München 2013, Kap. 2, para 46.

[181] *Kössinger* in Nieder/Kössinger, Handbuch der Testamentsgestaltung, CH Beck, München, 4th edn. 2011, para 298; *Schlüter/Stolte,* Stiftungsrecht, 2nd edn., CH Beck, München 2013, Kap. 3, para 56.

[182] This is sometimes a problem, see *Hüttemann/Rawert*, Die notleidende Sitftung, ZIP 2013, 2136.

3. There is no fixed minimum duration period for a foundation. However, it must be assured that the foundation can pursue its purpose on a sustained basis (§ 80 (1), (2) BGB). Since this requirement used to be understood as "permanently", it was questionable, if a foundation could pursue a purpose that would end naturally if completed (for example the renovation of a church) or if a foundation could be set up to pursue a purpose until its capital was spent (*Verbrauchsstiftung*). Since 22.7.2013, however, the newly introduced § 80 (2) s. 2 BGB allows that a foundation may pursue its purpose until its funds are spent as long as this would take at least 10 years. Nevertheless, this new provision only provides a rule of interpretation that does not give more than a guideline for deciding when a foundation can be considered as pursuing its purpose on a sustained basis. The question of whether a foundation's purpose requires a sustained effort, however, usually does not arise if a family's maintenance or the management of a business for the future is concerned and the foundations funds are substantial enough to allow that this purpose can be pursued for decades. Still, the new law clarifies that a foundation can be set up for the purpose of maintaining the members of the deceased's family until its funds are exhausted (*Familienverbrauchsstiftung*) after only 10–12 years.[183]

9.2 Influence of Family Members in a Foundation

A *Familienstiftung* is set up to pursue the interests of the family, including the maintenance of its members, while allowing to keep the estate undivided for much longer than other testamentary provisions allow.[184] Moreover, if a foundation is set up, the founder of a business may transfer the business to the foundation and leave detailed instructions for the management of the business and its assets.[185]

Family members can be given influence in the management of the foundation, but they can also be reduced to mere beneficiaries without any influence on the foundation.[186] It depend on how the founder decides to set up the foundation.

9.3 Distinction to the Trust

1. What is a trust?

[183] *Tielmann,* Die Familienverbrauchsstiftung, NJW 2013, 2934.

[184] *Kössinger* in Nieder/Kössinger, Handbuch der Testamentsgestaltung, CH Beck, München, 4th edn. 2011, para 298.

[185] *Schlüter/Stolte,* Stiftungsrecht, 2nd edn., CH Beck, München 2013, Kap. 1, para 50–54.

[186] *Schlüter/Stolte,* Stiftungsrecht, 2nd edn., CH Beck, München 2013, Kap. 1, para 54.

A trust, as it is understood in common law systems, has no legal personality but requires that a right is transferred from the settlor to the trustee who holds it not for his or her own benefit but for the benefit of a beneficiary. The legal title of the right rests with the trustee while the beneficial or equitable interest lies with the beneficiary. A charitable trust is a trust that is not set up for the benefit of certain beneficiaries but in order to pursue a charitable purpose, e.g. relief of the poor or the promotion of education.

A foundation under §§ 80 et seq. BGB is a legal entity with legal personality that holds certain rights and assets in order to pursue a special purpose with them. There is the *nichtrechtsfähige Stiftung* or *Treuhandstiftung,*[187] which requires that the founder transfers certain rights or assets to another person or legal entity in order to pursue a certain purpose with the transferred rights or assets. This construction shows certain similarities to a charitable trust.

2. Trust and foundation in German law

German law does not know the trust as it is understood in common law systems. However, sometimes, German courts are concerned with actions of trusts set up in common law jurisdictions, for example in relation to tax issues.[188] A *Treuhand,* which is roughly comparable, is rarely used in succession cases, though it can be used in the transfer of business.

In Germany, a foundation can be used to hold a business. It allows that a business is continued according to the wishes of the founder. This way, a founder can leave his family well provided for but may leave the management of the business in more capable hands.

A *Treuhand* is used in order to construct an executorship over shares in a partnership.

A *Treuhandstiftung* may be set up by reason of death if the testator leaves the property as a bequest, § 1939 BGB *(Vermächtnis)* under the condition, § 1940, §§ 2192–2196 BGB *(Auflage)* that the property is used to set up a *Treuhandstiftung*. A *Treuhandstiftung* is more flexible and is not subject to the supervision of the *Stiftungsbehörde*. However, since the foundation has no legal personality, the trustee is personally liable for all obligations incurred for the foundation. Moreover, if the trustee becomes too old or mentally incapacitated, a new trustee must be found. Although a company might be chosen as a trustee, for a bigger fortune the founding of a *rechtsfähige Stiftung* is more adequate.

[187] *Schlüter/Stolte,* Stiftungsrecht, 2nd edn., CH Beck, München 2013, Kap. 4, para 4–80.

[188] *Wilk,* Der Familien-Trust als Bieter im deutschen Übernahmerecht, ZIP 2013, 1549.

10 Further Developments

10.1 Legal Policy Plans for Business Succession

There are no serious policy considerations to amend the rules on the compulsory portion. The Federal Constitutional Court *(Bundesverfassungsgericht)* held in 2005 that the law providing a compulsory portion for a spouse and close relatives was constitutionally protected.[189] After this decision, it seems unlikely that the legislator will change the law on the compulsory portion. The reporter is also not aware of other policy plans to reform company and partnership law to facilitate business succession. Legal development in this area is driven more by the drafting of experienced advisors and the case law. However, special consideration must be given to tax law. Business succession is often tax driven. As pointed out above, a case questioning the constitutionality of this preferential treatment of the heirs/donees of businesses in § 13a ErbstG in comparison to the heirs/donees of other property is currently pending before the Federal Constitutional Court *(Bundesverfassungsgericht).*[190] The court held a hearing on the issue in July. The decision is eagerly awaited by legal and tax advisers. Many expect the *Bundesverfassungsgericht* to declare the law unconstitutional. In order to secure tax benefits for their clients, many legal advisors have urged their clients to transfer their business before the decision is handed down.

10.2 Scientific Discussions and Proposals

Business succession plays a great role in the academic discussion, but even more so in discussions among practitioners. Such discussions often concern details and were summarized above when appropriate. A broader contribution was recently made by *Schultz, who* has argued, special inheritance rules like those in the Höfeordnung should be introduced for all family businesses.[191] So far, this has remained an academic appeal.

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[189] BVerfG, 19.4.2005 – 1 BvR 1644/00, 1 BvR 188/03 – BVerfGE 112, 332.

[190] The Federal Tax Court requested that the Constitutional Court reviewed the constitutionality of the law: BFH, 27.9.2012 – II R9 9/11 – DstR 2012, 2063; *Crezelius,* Erbschaftsteuer auf Unternehmensvermögen, BB 2012, 2979; *Lahme/Zipfel,* Zum Vorlagebeschluss des BFH vom 27.9.2012 zur Verfassungsmäßigkeit des ErbStG, BB 2012, 3171; *Piltz,* Wird das Erbschaftsteuergesetz 2009 verfassungsmäßig Bestand haben? DStR 2010, 1913; in 2006, the previous version of the law was declared unconstitutional: BVerfG, 7.11.2006 – 1 BVL 10/02 – DStR 2007, 235.

[191] *Schulz*, Unternehmensnachfolgeordnung – eine Sondererbfolge für Familienunternehmen? FamRZ 2013, 1782.

Business Succession in Greece

Nikolaos Vervessos and Triantafyllos Stavrakidis

Abstract As is usually the case when dealing with the relationship between two specific fields of law, addressing the issue of the reciprocal influence between company law and law of succession is of particular importance. This is all the more important under Greek law, considering the leading position that small and medium-sized enterprises hold in Greek economy. For the SMEs choosing the right successor and preparing the company for a transfer is just as important as an optimal transition in the field of company succession. This is because in a company the death of a partner can cause a number of issues. For example, the deceased's share may pass to beneficiaries who do not subscribe to the company's business plan and vision or who lack business experience. Equally, even if the remaining partners/shareholders wanted to purchase the deceased's shares, they may not have sufficient funds to do so. The challenges arising from a partner's death are proving to be capable of meaningfully impacting on the continuation of the company, leading often even to its dissolution, all the more so since the purposes of inheritance law (that is establishment of testamentary freedom, protection of testator's family) are hardly reconcilable with the principle of company law to promote the interests of the company. This is most clearly discernible within companies dominated by the intuitu personae. This is why the Greek company legislator (S. 4072/2012) took the initiative to mitigate the consequences of the death of a partner on commercial partnerships. Henceforth, the death will not bring about the automatic dissolution of the commercial partnership but its continuation with the rest of the partners. The new legislative orientation is in accordance with the general principle of supporting any measures aiming at keeping the company operational and alive.

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1 Importance of Family Business and Business Succession

1.1 Datas About the Importance of Business Succession and the Future Trends

For the time being, there are no official figures available on the basis of which we could provide valid answers upon these questions. However, the practical value of this issue is of great importance as for the Greek company law, mainly due to the structure of the Greek companies, which are dominated by the intuitu personae, regardless their legal form, that is aside from whether the companies are partnerships or corporations. This also applies even for types of business entities in which the intuitu personae is deemed to be completely absent, such as the Societé Anonyme, a company type designed to meet the needs of enterprises where ownership is extremely dispersed but ended up being the exception, the rule being the informal (small, familial, closed, personalized) types of Société Anonyme.[1]

1.2 Legal Background

Over recent years, the Greek company legislator, following in the steps of the European legislator, has focused its efforts on the reform of Business Law in order to protect mainly Small-Medium Enterprises (S.M.E). SME's, renowned for their flexibility and organizational simplicity are more responsive to the practical needs of entrepreneurs. These advances are indispensable particularly for limited liability companies, who find it harder to adapt to economic fluctuations in a period of financial crisis. Indeed, some of the arrangements of the EPE regulation, such as the significant transaction costs and the inflexibility of the current voting procedures for internal decision-making has allowed the company form of Société Anonyme to become dominant in a field where the EPE company category was intended to take precedence; namely in the field of small and medium businesses. Additionally, the opacity of the Greek Limited Liability Company has pushed the majority of the entrepreneurs towards setting up Sociétés Anonymes. This is a form of company roughly equivalent to a public limited company in common law jurisdictions, and thus unlikely to facilitate the needs of the traders to create flexible forms of enterprise that blend elements of partnership and corporate structures and whose basic feature is the broad statutory freedom that they afford partners in adapting the articles of association to their needs. In legal literature, in order to give an account of

[1] Vervessos N (2009) From the trisection of the law of Société Anonyme (big, medium, listed) towards the distinction between listed and unlisted limited company by shares in 18th Annual Pan-Hellenic Conference of commercial law (eds) Trends and perspectives in law of Société Anonyme, Nomiki Bibliothiki, Athens, p 331 et seq.; Rokas N (2012) Commercial companies. 7th edn., Nomiki Bibliothiki, Athens, §26 n^0 16, p 185.

this particularity of the Greek limited companies by shares, wide reference has been made to informal (small, familial, closed, personalized) types of Société Anonyme.

In this context, a new corporate form has been introduced into the Greek law by the Statute 4072/2012, with the goal of facilitating business activity through a corporate form which ensures both the limited liability of its partners, but at the same time company flexibility and ease of establishment. The Greek legislator has shown a preference for the introduction of a brand new type of company category for SMEs rather than instrumentalising the existing EPE framework. This new type of company, the Private Company (P.C), follows European guidelines for simplification and update of a corporate form, in line with the '*Societas Privata Europaea*' regulation currently being worked on at EU level. According to the description of its basic features, it is a type of a capital company, falling somewhere between a Société Anonyme and Limited Liability Company, and corresponding to what is known in other countries as "Private Company".

1.3 Tension Between Company Law and Inheritance Law

Over the last years, there has been significant legislative progress in business law aiming at establishing legal rules that will ensure the continuity or at least non-dissolution of a business for non-substantial reasons (for example, in the law of commercial partnerships, the death of a partner no longer constitutes grounds for dissolution). One could argue that the principle of business continuation is now considered as a general principle that governs all business law. Restrictions to this principle can only be introduced by individual will. This means that an enterprise shall continue if such is the will of its partners (i.e. the death of a partner in a commercial partnership no longer results in dissolution of the partnership, unless it is otherwise agreed to and concluded by the partners).

Succession law, on the other hand, is governed by the principle of testamentary freedom, which constitutes an aspect of the principle of freedom of will in civil law. This principle is not without limitation: indeed, the freedom of testation is limited by general legal clauses (i.e. prohibition of a disposition contrary to accepted principles of morality). But its main limitation lies in the legal imperative to safeguard the right to succession of certain classes of relatives (reserved portion). In other words, the deceased is not entirely free to determine the destiny of his estate after death, insomuch as part of the estate is reserved to close relatives and surviving spouse (if they exist).

This means that the Greek law of succession does not include a provision concerning the undisturbed continuity of business activity by a person or persons deemed more capable to do so. Therefore, the death and subsequent succession of a business owner may result in long interminable disputes between heirs, which may eventually lead to dissolution of the business. This problem is exacerbated by the fact that the most common form of enterprise in Greek economy is the family company, which means that the aforementioned difficulties are more frequent compared to countries where big companies are more commonly established.

Hence, the general principles of succession law are often in conflict with the principles of company law. The solution given by the legislator in an attempt to mitigate the extent and consequences of such conflict does not include overriding the provisions of succession law. An enterprise or company part and shares can be freely transferred upon death (mortis causa), without any limitation imposed by the company's articles of association. The conveyance of a company part or shares to the heirs is always effected in accordance with the provisions of company law. The legislator may intervene at a later stage, after the opening of succession, in order to provide those involved in the company with the possibility to prevent the admission of heirs whose participation in company matters may disturb the balances within the company and lead to its dissolution. For example, the articles of association of a limited liability company or a private company may include sell-out clauses after the devolution of succession (i.e. when the company part is acquired by the heir), which are totally valid and allow the company to maintain the concept of *intuitus personae*. The admission of an heir of the deceased general partner is conditioned upon a relevant provision in the articles of association. Otherwise, the deceased partner shall exit the company. Therefore, the legislator has chosen to introduce the possibility of continuity of the company with the surviving partners, if they decide so, the heirs only having a claim in personam for payment of the value of the company part of the deceased.

2 Inheritance Law (Intestate Succession)

2.1 Principles of Inheritance Law

The basic principles underpinning Greek inheritance law are as follows[2]:

1. The principle of testamentary freedom is the principle according to which a person has the right to choose the destiny of his estate for the time after his death by drawing a will. The power of setting the destiny of the inheritance by means of a will is established as a necessary tool in the legal field of private property and it derives from the principle of the freedom of will that characterizes civil law.
2. The principle of familial protection[3] is the principle according to which the members of the deceased's family have the right to claim part of the inherited property either as intestate heirs, where a will has not been left, or as beneficiary of minimum forced inheritance share.

[2] Georgiades A (2013) Law of Succession. 2nd edn., Law & Economy – P.N. Sakkoulas, Athens, §1, p 17.

[3] Papantonioy N (1989) Law of succession. 5th edn., Law & Economy – P.N. Sakkoulas, Athens, §1, p 17.

3. The principle of limited forms of disposition[4] is the principle according to which the testators are obliged to act within the boundaries of inheritance law. In other words, they cannot either create or change the current institutions. The forms of disposition are specific, as far as the type and the subject is concerned and are as follows: by virtue of will, "*donatio morti causa"*, the establishment of an heir or a trustee and the composition of legacy or modus.
4. The principle of lenders' protection,[5] the main facet of which is the principle of universal succession in both rights and obligations of the testator.
5. The principle of the State taking part of the inheritance which under Greek law is implemented in two ways. On the on hand, by summons of the Public Authorities as an intestate heir in the sixth and last class of heirs, (art. 1824 of the Civil Code), so that the cancellation of universal succession is deterred, due to the absence of heirs and on the other hand through the imposition of an inheritance tax obligation.[6]

2.2 Range of Testamentary Freedom

Of the most essential components, regarded even as the cornerstone of Greek succession law, is the principle of testamentary freedom. According to this principle, the testator may dispose of his property by will in whatever manner he chooses. Thus, under Greek law, the estate is, foremost, distributed according to the terms of the deceased's will. The freedom of testation, however, is subject to certain limitations. Greek law accepts that a testator is not free to distribute his estate in an unrestricted manner and recognizes the institution of forced heirship, in accordance with which the closest relatives of the testator are, in any given case, entitled to a statutory share.

2.3 Statutory Inheritance Law

The right to a compulsory share in the estate is accorded to the descendants and parents of the deceased as well as the surviving spouse, so long as they would have been called to inherit as intestate heirs (1825§1a GCC). Such right is no longer accorded to other ancestors or siblings of the deceased.[7] The surviving spouse is accorded the right to compulsory share regardless of class (see article

[4] Georgiades A (2013) Introduction to the Law of Succession. in Georgiades A (ed) Brief Interpretation of Civil Code, Law & Economy – P.N. Sakkoulas, Athens, n^0 8.

[5] Ibid., n^0 9.

[6] Ibid., n^0 10.

[7] Georgiades G (2013) The protection of the compulsory portion. Ant. N. Sakkoulas Publishers, Athens, §8 n^0 8, p 75.

11§2 L.3719/2008 according to which a surviving spouse holds a right to compulsory share of one-half of the intestate share).[8] Among descendants, only children who are (a) covered by the ancestry law resulting from the marriage (art. 1465 § 1 of Civil Code) (b) born out of wedlock, but have been recognised voluntarily by the father (art. 1475 of Civil Code) or court decree or (c) adopted (as minor's or adults), can be legally recognised. Consequently, it deals with legitimate children.[9] The compulsory heirs must be accorded by the deceased a certain part of his estate which is equal to one-half of their intestate share. Only in exceptional cases and for special reasons a testator may deprive a compulsory heir for his share (1839 ff GCC).[10]

2.4 Business Succession

With the exception of some fragmented provisions, found within the statutes regulating each specific corporate form the matter of inheritance succession of a company is not dealt with in a specifically dedicated piece of regulation under Greek law.

3 Legal Incapacity Before Death

3.1 Special Statutory Provisions or Regulations in Case of Dementia

Greek Civil Law foresees and regulates on judicial assistance in the 16th chapter of the Civil Code. Legal incapacity indicates the state under which such "legally incapacitated" persons are declared subject to legal guardianship, by means of a judicial decision.

The basic principles under the statute of legal capacity are: respect for personality, protection of the right to self-determination of the legally incapacitated subject, as well as secure transactions.

Distinctive features of the statute of legal capacity include the exhaustive enumeration of the reasons for the appointment of the person under judicial supervision and of the total number of people who are legally capable of acting on their behalf, in order to request the appointment of a guardian as well as the publication of the relevant

[8] Georgiades G (2013) The protection of the compulsory portion. Ant. N. Sakkoulas, Publishers, Athens, §8 n^0 31, p 81.

[9] Georgiades A (2013) Law of Succession. 2nd edn., Law & Economy – P.N. Sakkoulas, Athens, §32, p 492.

[10] Georgiades A (2013) Law of Succession. 2nd edn., Law & Economy – P.N. Sakkoulas, Athens, §32, p 480.

decisions in order that third parties may be informed within their transactional contacts, avoiding making void legal transactions.

Hence, in the case of permanent legal incapacity, the shareholder's interests can be exercised by his guardian, under the condition that one has been appointed, and who will thus act as the legal representative of the person deprived of legal capacity.

Company Law does not devote much focus on the consequences of placing a shareholder/partner under legal incapacity. There are however certain exceptions found in article 260 § 1 of S. 4072/2012, which states that the declaration of a general partner[11] (and hence of a limited partner) as being legally incapacitated, results without prejudice of an opposite, to the statutory, provision, the exit of the latter from the company, and on the other hand in article 773 sentence a' GCC, according to which the declaration of a partner as legally incapacitated results in the dissolution of the civil partnership without legal personality (and therefore of a silent partnership), under the condition that there is no differing provision in the partnership agreement.

However, a legal vacuum is ascertained in the case of a company limited by shares (société anonyme- S.A.). More specifically, in company limited by shares events that concern the person of the shareholder, such as the placement of a shareholder under judicial supervision (or his death), does not constitute a reason for the dissolution of the company or exclusion of the shareholder from the company. The above choice of the legislator does respond the capital concept and the corporate structure of the company limited by shares. It does not however correspond to the fact that the traders often prefer the type of an S.A., despite the fact that the corporation which they are intending to create, is of medium or small size, consists of a small number of shareholders, and consequently it does not address the market to raise funds. That is despite the fact that it has to do with an enterprise, which suits better to the type of partnership, of Limited Liability Company (EPE) or Private Company (IKE). As a consequence, the interested persons of a simplified S.A. are led to out of company agreements, in order to achieve the desirable arrangement. For this reason, it has been argued into the legal science[12] that the declaration of a shareholder of a simplified S.A. as legally incapacitated, could be considered as a special reason for the dissolution of the company, or the exclusion of the shareholder, with or without statutory provision, in parallel application of all those that are in force about the limited liability company or the Private Company. Anyway, in such a case, the dissolution of the company, if wanted by the shareholders, could derive either from a judicial decision upon request of a shareholder or from a shareholders' decision insofar they represent the 1/3 of paid share capital and under the condition that the declaration of the shareholder under judicial supervision renders,

[11] This provision is also applicable by analogy to the civil company with legal personality, the joint venture and the unpublished general partnership.

[12] Rokas N (2012) Commercial companies. 7th edn., Nomiki Bibliothiki, Athens, §26 n^0 17, p 187, §33 n^0 3, p 361 and §42 n^0 1, p 483. Contra, Antonopoulos V (2013) Law of the company limited by shares and of the limited liability company. 4th edn., Sakkoulas Publications Athens-Thessaloniki, §31 n^0 1, p 547.

in an obvious and permanent manner, the continuation of the company impossible (article 48a S. 2190/1920).[13]

Eventually, it should be mentioned that under Greek Law, it is accepted that the vote constitutes the statement of intention and it can therefore be void (i.e. because of incapacity) or voidable (i.e. because of delusion, fraud or threat). The faultiness of a vote due to incapacity, only then would have as a consequence the abrogation of the decision of the general meeting[14] or of the Board of Directors,[15] when without it the majority couldn't have been achieved.

3.2 Precautions in the Articles of Associations

However, the absence of a clear legislative initiative does not mean that the consequences of such a situation cannot be dealt with alternative tools of company law, in order to protect the interests of the other stakeholders and of the company itself. Thus, the declaration of a partner of not only a general partnership and limited partnership but also of a private company and a limited liability company as legally incapacitated, can, with or without statutory provision, constitute (as the death does) a special cause for the exclusion of this partner from the company or even for the dissolution of the company, insofar as judicial decision has been taken to that purpose or a the articles of association contain a similar clause.

4 Consequences for a Business in Case of Death

4.1 Differentiation Between the Types of Enterprises (Partnerships-Corporation)

Under Greek company law, there are two elements considered to be fundamental in determining the structure of a company: the *intuitus personae* (the partner as an individual) and the invested capital. Companies dominated by the *intuitus personae* element are personal companies (partnerships[16]), whilst companies dominated in

[13] Antonopoulos V (2013) Law of the company limited by shares and of the limited liability company. 4th edn., Sakkoulas Publications Athens-Thessaloniki, §31, n^0 7 et seq., p 550 and n^0 14, et seq., p 552.

[14] Giovannopoulos R (2012) Reversible decisions of general meetings. EpiskED, p 452.

[15] Multi-Member First Instance Court of Athens 569/2007, (2008) EEmpD, p 76; Antonopoulos V (2013) Law of the company limited by shares and of the limited liability company. 4th edn., Sakkoulas Publications Athens-Thessaloniki, §28 n^0 117, p 463.

[16] General partnerships, limited partnerships and silent partnerships are the three types of commercial personal companies recognized by Greek company law.

their structure by a fixed invested capital are capital companies.[17] The fundamental difference between personal and the capital companies is that personal companies are affected by any event connected with the persons composing the partnership (e.g. a partner's death), although the new law on commercial partnerships has substantially reduced the extent of effect of this principle.[18] As for the composition of a capital company, the individual person(s) constituting the company's shareholder(s) is, in principle, irrelevant (unless otherwise provided by the articles of association) with the personal effects of shareholders remaining separate from the legal entity that is the company.

4.2 Consequences in Case of Death

(a) Of a sole proprietor

Pursuant to recent case law of the Greek Court of Cassation (Arios Pagos), business itself may be an object of a hereditary succession as a totality. Therefore, when a testator/businessman dies, he leaves the business to his heirs with all its assets, rights and affairs. If there is more than one heir, a community of rights is formed, which falls under the scope of articles 1884 GCC and the general provisions for the community (785 GCC).

(b) Of a partner

After the significant changes brought about by the new regulations of Statute 4072/2012 (henceforth S. 4072/2012) regarding commercial partnerships' law, the consequences of the partner's death differ fundamentally depending on whether the partnership is a civil or a commercial one.

As for the civil partnerships, the provision of article 773 section a' GCC establishes the automatic dissolution of the partnership in case of partner's death.[19] On the contrary, the new legislation regarding commercial partnerships (article 260§1 S. 4072/2012) aiming at limiting the risk of unexpected dissolution of the partnerships,[20]

[17] Capital companies are considered to be limited companies by shareholding, the Limited Liability Company and the brand new form of company, the Private Company.

[18] The justification for moderating the impacts of this principle are based on the reasoning that provisions which reflect the power of the person, such as termination of the partnership due to the death of any partner, are no longer in line with the new business inclination for maintenance of the business.

[19] Even if the surviving partners ignore the fact of death, see Giovannopoulos (2013) in Apostolos Georgiades (eds) Brief Interpretation of Civil Code, Law & Economy – P.N. Sakkoulas, Athens, articles 773–774, n^0 3.

[20] Kotsiris L (2013) Greek law on Partnerships and Corporations. 4th edn., Sakkoulas Publications Athens-Thessaloniki, p 17; Katsas T (2013) Rights and obligations of the general and limited partner in case of unilateral notice to terminate partner participation and the partnership agreement in 22nd Annual Pan-Hellenic Conference of commercial law (eds) The new company law of the small and medium-sized enterprises, Nomiki Bibliothiki, Athens, p 248.

does not automatically foresee the termination of the company, in case of a partner's death. Henceforth, the death of a partner will simultaneously entail the continuation of the commercial partnership with the rest of the partners. Thus, while the rule in the civil company (default system) is that the death of the partner has repercussions on the existence of the civil partnership, leading to the dissolution of the partnership, the opposite rule applies to commercial partnerships, with the continuation of the partnership being the model rule according to the new legislative orientation.

(c) Of a shareholder

Given the capital concept and the corporate structure of the companies limited by shares along with the limited liability companies, the dissolution of the company on account of events related to the person of the shareholders or the partners, such as the death,[21] is excluded [see articles 103 section d' S. 4072/2012 for the private company (Idiotiki Kefaleouhiki Etairia), and 44§2 of Statute 3190/1955 for the limited liability company (Etairia Periorismenis Efthinis)]. Thus, the shareholder's death essentially results in the continuation of the company amongst the surviving shareholders and the heirs of the deceased, who come into the company with full rights, according to the rules of hereditary succession.

4.3 Destiny of a Share

The company participation of the deceased partner or shareholder is transferred to the heir according to the rules of hereditary succession,[22,23] on the condition that the partners of a (civil or commercial) partnership or a limited liability company or a private company have not already agreed to include into the articles of association clauses ensuring the dissolution of the company. This means that the heir's entrance into the company is not brought about by law, but by his own right stemming from his hereditary capacity and according to the provisions of hereditary, rather than, commercial law. From the moment the heir accepts the succession, the content of the company contract is binding on him as well as on the rest of the partners taking

[21] Rokas N (2012) Commercial companies. 7th edn., Nomiki Bibliothiki, Athens, §42 n^0 1, p 483; Avgitidis D (2009) The dissolution of a company limited by shares, in Mihail-Theodoros Marinos (eds) Issues from the new law of société anomyme. Law & Economy – P.N. Sakkoulas, p 476; Psihomanis S (2013) Commercial Companies' Law. Sakkoulas Publications Athens-Thessaloniki, p 315.

[22] Panagiotou P (2012) Agreements for the Continuance of the Personal Company Despite the Death of the Partner and the Legal Rights of the Successor in Greek Company Law. EJLR, p 490 et seq.

[23] See advisory opinion of the State Legal Service 633/2004, DEE 2005/493; Court of Appeal of Piraeus 312/2002, DEE 2002/711; Antonopoulos V (2012) Partnerships' law. 4th edn. Sakkoulas Publications Athens-Thessaloniki, §26 n^0 28, p 232; Georgakopoulos L (1965) Companies' Law, Volume I, Partnerships, n^0 131, p 345; Panagiotou P (2013) Revision on the Law of Personal Commercial Partnerships. Nomiki Bibliothiki, Athens, p 202 and 203.

part in continuing the company. Finally, it should be underlined that, although the introduction of restrictions in vivo transfer of company's sharesis plausible, the same rule does not apply in the case of transfer by succession, as the transferability of shares/parts cannot, in any way, be restrained. Therefore, the transfer mortis causa cannot be restricted by statutory clauses.

4.4 Provisions in the Articles of Association

The possible agreements that the articles of association may contain differ depending on whether the company's structure is based on the *intuitus personae* or the invested capital. Thus, the partnership agreement may include clauses stipulating the continuation of the company only between the living members with the exclusion of the heirs. In this instance, such an agreement would result in the increase of the company participation of the living members in relation to their share in the company,[24] with the simultaneous compensation of the heirs of the deceased member.[25] On the contrary, any clause included in the articles of association of a limited company aiming at prohibiting the transfer of the company's shares due to succession is null and void.[26] Consequently, the transfer of the shares occurs despite the conflicting stipulations of the articles of association, pursuant to the principles of the inheritance law.[27]

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[24] Rokas N (2012) Commercial companies. 7th edn., Nomiki Bibliothiki, Athens, §13 n^0 10, p 95; Antonopoulos V (2012) Partnerships' law. 4th edn. Sakkoulas Publications Athens-Thessaloniki, §20 n^0 14, 119.

[25] Georgiades A (2007) Law of obligations, Volume II. Law & Economy – P.N. Sakkoulas, n^0 83, p 748.

[26] Rokas N (2012) Commercial companies. 7th edn., Nomiki Bibliothiki, Athens, §50 n^0 2, p 560; Antonopoulos V (2013) Law of the company limited by shares and of the limited liability company. 4th edn., Sakkoulas Publications Athens-Thessaloniki,§ 39 n0 6, p 605.

[27] The statutory clause prohibiting the transfer by succession of shares, which, as mentioned above, is null and void according should not be confused with the statutory clause providing for a right of first refusal of the other partners. This is, in essence, the right that gives its holder/co-partner the option to buy the shares transferred by succession (thus belonging to the heirs), according to specified terms, before the owner of them/heir is entitled to enter into a transaction with a third party in case of a partner's death. These clauses are completely valid and of significant importance to the living partners as they render the maintenance of the *ad personam* character possible in limited liability companies, even after the partner's death (continuation of the company only between the partners with the exclusion of the heirs). The articles of association can also provide that the company shall have the right to nominate a partner or a third party who will acquire the transferable shares at a full price to be determined by the court, unless the parties themselves agree on such a price or, if the articles of association provide for the manner in which such a price has to be calculated. In this respect, the articles of association may also foresee a preemption right towards the living partners, which constitutes a privilege extended to select partners of the company that will give them the right to purchase the additional shares in the company before anyone else has the opportunity.

Moreover, the partnership agreement may contain clauses suggesting the continuation of the company between the living members and the heirs of the deceased partner or with only one or certain heirs in which case only the designated heir(s) enter(s) the company with full rights, as a whole partner, assuming the complete former company position of the deceased partner.[28] In that case, the heir who entered the company is obliged to pay, in money, a percentage of the value of the company portion to the co-heirs who would be entitled to part of the participation if the company continued only between the other living members. It is, also, likely that the articles of association specifically identify the person who will continue in the company in the place of the deceased partner. The statutory provision neither renders this specific person as heir nor restricts the partner's freedom to determine his/her heirs, as the succession will be done based on the rules of the hereditary law. Should this specific person, according to the statutory rule of succession, becomes the universal legatee of the deceased in accordance with hereditary law, the clause of succession remains inactive, since its provides for continuation of the partnership with a third person (non-heir of the deceased).

Finally, the partners may retain the option of adjusting the articles of association in such a way that the company's dissolution is provided in case of a partner's death. In such instances, the partner's death would lead to the automatic dissolution of the company[29] and the heirs of the deceased partner would enter the company in liquidation as full partners.

[28] An issue is raised concerning the validity of the agreement in the company contract for the continuance of the company with specific heirs (in a community, or with one or several). The question concerns whether the identification of the heir in the partnership agreement has the characteristic of a hereditary contract and runs contrary to the provision of article 368 GCC, which forbids such a contractual agreement resulting for the succession of a person who lives with either the same or a third person, either for the whole succession or for a percentage of it. Nevertheless, according to prevailing opinion, such a provision does not constitute a hereditary contract. The agreement in the company contract that the company will continue to operate amongst living partners and designated heirs, such as the heirs by testamentary succession, heirs by intestate succession or and those heirs which are appointed, will not be contrary to Article 368 GCC. This is for the following reasons, (a) the specific provision in the company contract refers to definite property assets, namely the company participation and not the whole or a percentage of the inheritance of the living and (b) the contract by which a person promises to the covenantee certain benefits which are to be disbursed at the time of death of the pledger has an onerous cause and not a gratuitous cause, since an exchange is submitted for the dereliction of the self-same hereditary share of the deceased partner.

[29] Rokas N (2012) Commercial companies. 7th edn., Nomiki Bibliothiki, Athens, p 149; Rokas N (2010) The planned reform of the general partnership law. EfAD, p 867 et seq.; Psihomanis S (2013) Commercial Companies' Law. Sakkoulas Publications Athens-Thessaloniki, p 102; Alexandridou E (2012) Law of *Commercial Companies*-Partnerships. Nomiki Bibliothiki, p 159.

4.5 Exercise of the Shareholder's Rights After His Death

The heirs wholly assume to legal rights of the deceased shareholder/partner, and, as such, enter into the company as full shareholders/partners with complete rights and obligations to the company share.

In the case that there is more than one heir, the company participation of the deceased partner will be divided into numerous separate partnership stakes, depending on the number of heirs, and in proportion to each of their shares of the inheritance.[30]

Nevertheless, for certain types of legal entities, in case the share is handed down to more than one heir, a community is formed between them whereby each of the heirs will be a co-owner of the share on a *pro rata* basis (GCC 1884). Once the transfer is accomplished, the joint successors will have to nominate, by a relative-majority vote (article 789 GCC[31]in accordance with article 27§3 S. 3190/1955 which constitutes an expression of the principle of the undivided nature of the limited liability company's shares[32]) a joint representative to deal with the company. This joint representative will be in charge of exercising the heirs' rights against the company and of performing their company duties. Therefore, it can be inferred that the single share of the deceased partner will not be divided amongst the heirs, but will belong jointly to all partners.

[30] See the advisory opinion of the State Legal Service 633/2004, DEE 2005/493; Court of Appeal of Thessaloniki, 599/2007, Arm. 61/1521; Georgiades G (2013) The protection of the compulsory portion. Ant. N. Sakkoulas, Publishers, Athens, §32, n^0 5, 369; Rokas N (2012) Commercial companies. 7th edn., Nomiki Bibliothiki, Athens, p 149; Antonopoulos V (2013) Law of the company limited by shares and of the limited liability company. 4th edn., Sakkoulas Publications Athens-Thessaloniki, §20 n^0 29, 126 and §26 n^0 30, 232; Psihomanis S (2013) Commercial Companies' Law. Sakkoulas Publications Athens-Thessaloniki, 100–101; Giovannopoulos (2013) in Apostolos Georgiades (eds) Brief Interpretation of Civil Code, Law & Economy – P.N. Sakkoulas, Athens, articles 773–774; Georgiades A (2007) Law of obligations, Volume II. Law & Economy – P.N. Sakkoulas, n^0 83, n^0 83 748; Liakopoulos Ain *Georgiades*/*Stathopoulos* (ed) Commentary of Civil Code, articles 773–774, n^0 13. See contra, Georgakopoulos L (1965) Companies' Law, Volume I, Partnerships, n^0 131, 349; Zepos P (1965) *Law of obligations*, Volume II. 2nd edn., 509–510; Skouras A in *Georgiades*/*Stathopoulos* (ed) Commentary of Civil Code, article 778, n^0 9; Panagiotou P (2011) The continuation of the partnership despite the partner's death and the legal status of the heir, DEE, 284 et seq.

[31] Antapassis A (1994) in Evaggelos Perakis (eds) The law of the Limited Liability Company, Nomiki Bibliothiki, Athens, article 29, 44.

[32] The same rule applies for the unlisted companies as well. Consequently, in case of there being more than one heir, a community is formed between them whereby each of the heirs becomes a co-owner of the share on a *pro rata* basis. In case of there being more than one share, there will be as many communities as the shares, given that Greek law refuses to acknowledge the communities of group thing or the communities of rights.

5 Last Wills

5.1 Range of a Last Will

The Greek law of succession is governed by the principle of testamentary freedom albeit with certain restrictions. On that account, a testator can dispose of his whole property as he wishes, insofar as he complies with the restrictions placed on his testamentary freedom to ensure that certain favored surviving relatives are not excluded.[33]

The testator may by his last will and testament appoint a specific person as the heir of his business or his company part. In such case, it is a conveyance of a specific part of the estate, which means that the beneficiary shall receive a particular asset of the inheritance, not as a legatee, but as a universal successor.[34] A particular asset is a specific real asset of the inheritance, such as ownership or other real property rights on the asset of the estate, or a specific intellectual or industrial property right. The assets of the estate may include the company part or business owned by the testator.[35]

A business or a company part may also be the object of a legacy, in case the testator does not wish the beneficiary to be his universal successor but only his particular successor. It is generally accepted that the object of a legacy may comprise a group of rights and obligations, such as those included in a business or in a company part. In that case, either the individual assets of the business or the company part shall be acquired by the legatee by way of special succession,[36] according to the principle of specialty.

Furthermore, it is indeed possible to determinate by a last will the succession as for the next generation and the generation afterwards. This possibility is provided in the Greek law of succession by the establishment of the institution of the inheritance trust, according to which the testator may oblige the heir to transfer the whole or part of the estate upon certain event (i.e. the heir's death) to another person, the trustee (1923 GCC). The trustee is the subsequent heir or reversionary heir of the testator. The trustee becomes a universal successor of the deceased from the time of hereditary devolution.[37]

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[33] Georgiades A (2013) Law of Succession. 2nd edn., Law & Economy – P.N. Sakkoulas, Athens, §5 n^0 3, p 38 and § 22 n^0 10, p 317.

[34] Georgiades A (2013) Law of Succession. 2nd edn., Law & Economy – P.N. Sakkoulas, Athens, §22 n^0 37 et seq, p 326 et seq.

[35] Court of Cassation 1089/1993, DEN = Deltio Ergatikis Nomothesias (Labor Legislation Bulletin), 1994/447.

[36] Georgiades A (2013) Law of Succession. 2nd edn. Law & Economy – P.N. Sakkoulas, Athens, §53 n^0 1 et seq, p 1042 et seq.; Papantonioy N (1989) Law of succession. 5th edn., Law & Economy – P.N. Sakkoulas, Athens, §26, p 118.

[37] Court of Cassation 1193/2012, HrID 2013/118, with comments by Ladogianni, Court of Cassation 103/2010 HrID 2010/696, with comments by Koumoutzis, Court of Cassation, 1171/2003, EllDik 2003/465; Papantonioy N (1989) Law of succession. 5th edn. Law & Economy –

It is equally possible to name another heir in case the initially designated heir renounces. Such possibility is provided under articles 1809 ff GCC which establish the institution of substitution. According to these provisions, substitution is the appointment of an heir in place of another in the event that the latter shall not inherit either because he cannot or because he will not. It is moreover affirmed that the testator may designate a substitute for the event that not only the appointed heir but also the intestate heir shall forfeit their right to inheritance. The legal concept of heir substitution is based on the principles of testamentary freedom and the respect of the testator's intent.[38]

5.2 Requirements and Conditions

As expressly provided in article 1715 of the Greek Civil Code, the testator may impose on an heir, legatee or trustee an additional obligation to certain performance ("condition"), in accordance with the special provisions of articles 2011–2016 GCC. Conversely, the possibility to impose such conditions to third parties, i.e. persons other than the heir, legatee or trustee, is not afforded. A company may also be subject to such obligation should it be appointed as an heir, legatee or trustee by the testator. Besides, should such condition involve a beneficiary, who can be a natural or legal person, a company could be named as beneficiary of such condition.

A condition may consist of any kind of performance, irrespective of its pecuniary nature. Should the condition not be contrary to prohibitive legal rules or accepted principles of morality (1980 GCC), testamentary provision may be conditioned upon the performance of any act or omission on behalf of the beneficiary. Such conditions may also relate to company matters, thus affecting the life of the company.

However, a condition is not binding for other persons than the encumbered, who may be forced by court to satisfy the condition only by the executor of the will, the heir, the co-heir and the person who shall benefit from the disqualification of the encumbered person, but not the beneficiary of the condition. Therefore, a condition is not binding to the company itself or other partners, even if they are beneficiaries of the condition.

Regarding the possibility of condition subsequent set in a will, as provided by article 1798 GCC, the testator may dispose of any asset of his estate under the condition that the appointed heir shall omit or continue doing something for an undetermined time limit (condition subsequent). In consequence of article 1798

P.N. Sakkoulas, Athens, §27, p 158; Balis G (1965) Law of succession. 5th edn., N. Tzaka & S. Delagrammatika, Athens, §231.

[38] Georgiades A (2013) Law of Succession. 2nd edn. Law & Economy – P.N. Sakkoulas, Athens, §83, n^0 1; Filios P. in *Georgiades*/*Stathopoulos* (ed) Commentary of Civil Code, article 1809, n^0 25.

GCC, the appointed heir shall acquire what was given to him as a testamentary gift immediately upon the opening of succession, yet if the condition subsequent is fulfilled, the inherited assets shall be transferred ipso jure to the reversionary heir, i.e. the person that would inherit by intestacy if the testator had died at the time of fulfillment of the condition (article 1926 GCC). The testator may, however, designate a reversionary heir other than his intestate heirs to be his.[39]

5.3 Other Forms

By establishing exclusively three types of succession, the law has excluded any other type and specifically prohibits agreements as to succession that aim to ensure or exclude a certain person from the conveyance of inheritance. Such prohibition of agreements as to succession is expressly set forth in the provision of article 368 GCC. An agreement as to succession concluded in violation of article 368 GCC is null and void and any disposition made in execution of such contract may be recovered pursuant to provisions for unjust enrichment.[40]

However, the law concedes certain exceptions from the rule of prohibition of contracts of inheritance. Certain contracts of inheritance are expressly provided by the law and are laid down as special legal concepts of the law of succession. The most important expressly permitted by the law contracts of inheritance are: – apportionment of ascendant, that is the agreement between the ancestor and his descendants over the distribution of his estate for the time after his death (1891 GCC), and – endowment upon death (donatio causa mortis), i.e. a gift under condition precedent that the donor shall be deceased before the beneficiary, or that they will die simultaneously so that the beneficiary does not have the chance to acquire or enjoy any benefits of the estate before the death (2032 GCC).

Therefore, the transfer of an enterprise in case of death may be included in a contractual agreement, as long as it is concluded in a form of contract of inheritance that is permitted by law.

[39] For an overall review of the institution of condition as a kind of last will, see Georgiades A (2013) Law of Succession. 2nd edn. Law & Economy – P.N. Sakkoulas, Athens, §60 n^0 1 et seq., p 1172 et seq.; Psoyni N (2011) Law of Succession. 2nd edn. Sakkoulas Publications Athens-Thessaloniki, p 200–201; As for examples of condition met in Greek case law, see Court of Cassation 1812/2008 and Court of Appeal of Athens 1710/2008.

[40] Georgiades A (2013) Law of Succession. 2nd edn. Law & Economy – P.N. Sakkoulas, Athens, §62 n^0 2 et seq, p 1196 et seq.; Filios P (2011) Law of Succession. 8th edn. Sakkoulas Publications Athens-Thessaloniki, §128; Papantonioy N (1989) Law of succession. 5th edn. Law & Economy – P.N. Sakkoulas, Athens, §10, p 53; Balis G (1965) Law of succession. 5th edn. N. Tzaka & S. Delagrammatika, Athens, §13.

6 Right to a Compulsory Portion

6.1 Institute of Compulsory Portion or a Similar National Institute

In Greek legal system, compulsory succession (forced heirship) is set forth in the Civil Code provisions on "legal right share" (articles 1825 ff) and is a statutory succession, irrespective of the will of the deceased. Certain persons closely connected to the deceased, called compulsory heirs,[41] have a statutory claim in his estate (legal portion). The compulsory heirs must be accorded by the deceased a certain part of his estate (compulsory share), equal to one-half of their intestate share. Only in exceptional cases and for special reasons a testator may deprive a compulsory heir of his share (1839 ff GCC).[42] According to article 1825§1b, the compulsory share is defined as a percentage of the estate, namely one-half of the intestate share, that is the share that the heir would inherit should the testator had died intestate.[43] Therefore, the compulsory heirs are universal successors of the percentage of the compulsory share of the estate that is accorded to them. This percentage differs according to the person called to inherit as a compulsory heir and is determined by his intestate share (1813 GCC). Therefore, for the calculation of each compulsory heir's share, it is necessary to calculate first the percentage of his intestate share based on the articles 1813 ff GCC. This percentage divided by two represents the heir's compulsory share. Consequently, there is no provision for conveyance of a particular asset. Only in good faith and according to the accepted principles of morality (281 GCC) there may be a provision to appoint a person as heir of a particular asset corresponding to the percentage of his compulsory share.

The right to a compulsory share in the estate is accorded to the descendants and parents of the deceased as well as the surviving spouse, so long as they would have been called to inherit as intestate heirs (1825§1a GCC). Such right is no longer accorded to other ancestors or siblings of the deceased.[44]

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[41] Papantonioy N (1989) Law of succession. 5th edn., Law & Economy – P.N. Sakkoulas, Athens, p 108; Psoyni N (2011) Law of Succession. 2nd edn. Sakkoulas Publications Athens-Thessaloniki, p 400.

[42] Georgiades A (2013) Law of Succession. 2nd edn. Law & Economy – P.N. Sakkoulas, Athens, p 480.

[43] Ibid., 493.

[44] Georgiades G (2013) The protection of the compulsory portion. Ant. N. Sakkoulas, Publishers, Athens, §8 n^0 8 et seq., p 75 et seq.

6.2 Right to a Compulsory Portion and Business Succession

As mentioned above, a fundamental principles of succession is its universal nature (principle of universal succession), which means that the heir succeeds the deceased to all legal relationships (mainly proprietal) as whole and not separately to each asset.

More specifically, the universal nature of succession means that the heir succeeds to all rights (1710§1 GCC) and obligations (1901a GCC) of the deceased as well as all other legal relationships that can be inherited. Therefore, the compulsory heir excluded from succession shall succeed by the percentage of his share to the enterprise or partnership of the deceased or his company shares. The articles of association may certainly provide that the company shall continue between the surviving partners, in which case the heir shall have an interest in the company, again by the percentage of his compulsory share.

As mentioned above, the compulsory share is also a form of universal succession. Therefore, there are no provisions that preclude the right of compulsory share to certain enterprises or financial entities, since that would constitute a breach of the principle of universal succession.

Should there be a compulsory share to a certain percentage of an enterprise, the heir enters the partnership by succession and acquires the rights and obligations of his predecessor. There can be no exclusion from the compulsory share based on provision of the articles of association, not even with compensation. The compulsory portion may not otherwise be offset but by the admission of the compulsory heir as a partner in the company.[45] The compulsory share can be bought out only by an agreement between the compulsory heir and the other partners after payment of its value.

In case the company continues to operate only with one or certain heirs, only the designated heir comes into the company with full right, as a whole partner, in the complete company position of the deceased partner. In this instance, the heir partner is obliged to pay in money the rest of the coheirs a percentage of the value of the partnership portion, which would be entitled if the company continued only between the other living partners.[46]

If the compulsory heir does not disclaim his legal right, he is accorded the percentage of shares that he is entitled to. Shares of an unlisted company limited by shares are transferred upon agreement and delivery which has legal effect towards the company (i.e. it accords the compulsory heir the right to exercise all rights to shares) upon registration in the Special Book of the Shareholders. Shares in uncertificated form are transferred immediately by registration. The administrative body of each company (BoD, administrators, partners etc.) must distribute the corresponding percentage of

[45] Georgiades G (2013) The protection of the compulsory portion. Ant. N. Sakkoulas, Publishers, Athens, §32 n^0 9 et seq., p 370 et seq.

[46] Ibid., §32 n^0 16, p 373.

compulsory share to its beneficiary, except in case of sell-out or prohibition of continuance of the partnership with the participation of the heirs.

In companies with share capital, especially the S.A., the other shareholders havenosay in the distribution, because the shares and company parts are freely transferable upon death. As partnerships are concerned, the partners have a say in the distribution only if the continuity of the company with the participation of the heirs of the deceased partner is prohibited, thus their compulsory share consists of the value of his participation.

6.3 Calculation of the Compulsory Portion

The evaluation of the compulsory share is made according to the procedure prescribed by article 1831 GCC. Firstly, the value of the inheritance at the time of death is calculated, as the basis for calculation of the compulsory share is the pecuniary value of the net assets of the estate. Certain amounts (debts, funeral cost etc.) are deducted from the estate, while adding the value of gratuitous gifts inter vivos by the deceased to the compulsory heirs or third parties during the last decade before his death, which were not granted by reason of moral duty or decency. Any other contributions are also added (1834 GCC). The amount that arises after these calculations is the presumed estate, based on which the value of the compulsory share shall be estimated. Secondly, the value of the compulsory share entitled by the compulsory heir shall be calculated. The compulsory share is a portion equal to one-half of the intestate share (1825§1 GCC). After the intestate share is estimated according to 1813 ff GCC, it is divided by two. Based on this portion and the presumed value of the estate, the compulsory share is then calculated. Then, the value of the share accorded to the compulsory heir by last will or gratuitous gifts of the deceased before his death are also included in the calculation, based on the value at the time when such gifts were made (1833 GCC). Finally, the value of the accorded share is compared with the value of the compulsory share. If the former is equal or higher than the latter, then the compulsory share is not impaired. If it is lower, then the compulsory share is impaired.[47]

According to the principle of universal succession, the heir succeeds to the estate as a whole, according to his corresponding percentage. On the other hand, the percentage by which a person succeeds by compulsory share is the same for all assets. Therefore, the compulsory portion of the company assets may not be reduced.

Assets are evaluated on the basis of their value at the time of the deceased's death. As above, the pecuniary value of net assets of the estate is the basis for calculation. As for the company property in particular, it is calculated according to the rules of company law that require the preparation of annual financial statements

[47] Georgiades A (2013) Law of Succession. 2nd edn. Law & Economy – P.N. Sakkoulas, Athens, p 542–543, 489.

which present the assets and liabilities of the company as well as the value of its assets (shown in the inventory prepared in the beginning of the financial year).

No compensation mechanisms are provided for the event that only some of the heirs may receive their legal share while other may be excluded. Should a legal heir be excluded, he may pursue a claim on inheritance (1871 ffGCC) against any heir in possession of assets of the estate.[48] There is no possibility to offset or counterbalance assets among legal heirs, as they are all entitled separately and individually to a portion of the estate and no one can be excluded unless he disclaims his share. The person that have received only a legal share may not contribute a portion of it in order to cover the share of another, unless they all agree to partial renunciation or in agreement between all parties, since the compulsory share is property and can be freely disposed of.[49] The situation is different, if some individuals have received a portion larger than their legal share, in which case part of it shall be deducted in order to cover for the legal share of others.

Any protection afforded to compulsory heirs is created upon the death of the deceased, since prior to that event the right to succession does not exist, only an expected interest in inheritance. During the lifetime of the deceased, no protection can be afforded given that any transfers may impair the legal share upon death, with a possible exception provided in accordance to article 281 GCC. After the death of the deceased, any heirs whose share is impaired may file a claim to inheritance against the person who claims to be entitled to a larger share or is in real possession of assets of the estate (articles 1871 ff CC).

Finally, if after the death of the deceased there is an erroneous distribution of the estate resulting in the impairment of the compulsory share, the legal heir may request the judicial recognition of such error and accordance of the share he is entitled to.

6.4 Renunciation of Inheritance

Greek succession law does not explicitly afford the forced heirs the right to relinquish their reserved portion. Nevertheless, according to Greek case-law[50] and the prevailing opinion in legal theory[51] that right follows from the wording of the provision of article 1826 GCC. This right does not constitute a declination of the inheritance.

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[48] Georgiades A (2013) Law of Succession. 2nd edn. Law & Economy – P.N. Sakkoulas, Athens, p 584.

[49] Georgiades G (2013) The protection of the compulsory portion. Ant. N. Sakkoulas, Publishers, Athens, §19 n^0 1 et seq., p 211 et seq.

[50] Court of Cassation, Decision n^0 1017/2009, Court of Cassation, Decision n^0 1578/2007.

[51] Georgiades A (2013) Law of Succession. 2nd edn. Law & Economy – P.N. Sakkoulas, Athens, p 533; Papantonioy N (1989) Law of succession. 5th edn., Law & Economy – P.N. Sakkoulas, Athens §114, p 423; Stathopoulos M, Introduction to articles 1825–1845, in *Georgiades/Stathopoulos* (ed) Commentary of Civil Code.

Rather, it is a way to waive the right to institute a claim on inheritance.[52] However, it is appropriate to point out that the prevailing opinion has not gone unquestioned in the legal literature with a considerable body of opinion holding that the right to renounce compulsory portion is a complex instrument, which, is in doctrinal terms confronted with insurmountable obstacles, since it is a *contra legem* substitute to the right to waive the succession.[53]

The renunciation from the compulsory share does not constitute a disclaimer of inheritance under article 1847 GCC, and it is therefore valid even if it is made after the time limit set for the disclaimer.[54] This renunciation may also be effected, if it is not otherwise provided by the law, by a unilateral act which is irrevocable, not required to be submitted to another person and may be express or implied. The renunciation may also be made by an agreement with the testamentary heir, which implies that the compulsory heir is aware of its validity. The renunciation may be made even after the time limit of 4 months provided by 1847 GCC, in which case the requirements of article 1848 GCC must be adhered to. But it cannot be made prior to the testator's death (1851a GCC) nor under condition or time limit (1851b GCC). Finally, partial renunciation is also possible.[55]

7 Anticipated Succession and the Maintenance of the Transferor's Shareholder Position

7.1 Forms of Anticipated Succession

The anticipated succession inter vivos and subsequent transfer of sole partnership, shares of a S.A. or company parts of a limited liability company, private company, partnership or limited partnership may take place by virtue of a gratuitous (i.e. gift) or non-gratuitous (i.e. sale) acts.

To the extent that the relevant gratuitous dispositions do not present any particularities, they are subject to general rules on gifts. It is however quite common that the parental distribution of property to their offspring takes place within the family. In that aspect, it does not seem justified to be regulated in the same way as any other gratuitous transfer of property. The gratuitous nature of such dispositions of property is related to the morality of familial relations between parents and children. The

[52] Georgiades G (2013) The protection of the compulsory portion. Ant. N. Sakkoulas, Publishers, Athens, §10 n^0 27 et seq., p 105 et seq.

[53] Karampatzos A (2011) The renunciation of the reserved portion. Ant. N. Sakkoulas Publishers, Athens, p 112 et seq.

[54] Georgiades A (2013) Law of Succession. 2nd edn. Law & Economy – P.N. Sakkoulas, Athens, p 535.

[55] Georgiades A (2013) Law of Succession. 2nd edn. Law & Economy – P.N. Sakkoulas, Athens, p 536–537; Georgiades G (2013) The protection of the compulsory portion. Ant. N. Sakkoulas, Publishers, Athens, §10 n^0 23, p 104.

distribution of property to children may be a manifestation of the family responsibility of parents to support the beginning of their children's independent life or establishment of their profession. Thus, the relevant legal acts should be distinct from other gratuitous transfers when the gratuitous disposition of property is extended by a parent as a moral duty to his children, as the legal consequences of the laws on gifts would not comply with the special purpose behind these familial property transfers.[56]

The dispositions of parents to their children with the purpose of supporting them in the beginning of their independent life should be subject to a legal treatment favourable for the children. The Greek Civil Code in its provisions acknowledges such family solidarity extended by parents to their children in need of support. The main legal consequence of article 1509 GCC, much as that of its regulatory model, article 1624 of the German Civil Code, is the exclusion of parental gifts from application of the law on gifts.[57] This legislative assessment is put into action with the removal of such gift from the parents' property, without the restrictions set by the law on gifts. Parental gifts are excluded by reason of their particular legal cause, from several negative consequences of gifts, i.e. revocation of gift by the donor (505–510 GCC).[58] Another manifestation of this preferential treatment of parental gifts is that they may not be revoked even if the remaining estate at the time of death of the donor is not sufficient to cover the reserved portion (1835 GCC).[59] As a consequence of this favourable treatment, the anticipated succession to the company or enterprise usually takes place in the form of parental gift.[60]

7.2 Relation to Ownership – Relation to the Transfer to the Leadership

In case of anticipated succession through transfer or share of company parts, the matter of determining the person entitled to exercise the administrative rights that derive from them is settled in the transfer contract. For example, it is possible to

[56] Ladogiannis G (2013) in Apostolos Georgiades (eds) Brief Interpretation of Civil Code, Law & Economy – P.N. Sakkoulas, Athens, article 1509, n^0 10.

[57] Spyridakis I (2006) Family law. Ant. N. Sakkoulas, Publishers, p 561–562; Liapis, D (2011) The offerings of parents to their children and the criteria of article 1509 CC. A contribution to the distinction between parental distribution of property and gift. NoV, 31–32.

[58] Georgiades A Introduction to articles 1825–1845, in *Georgiades/Stathopoulos* (ed) Commentary of Civil Code, article 1509, n^{0}9.

[59] Court of Cassation 491/2009, NoV 2009/1702, Court of Cassation 518/2006, HrID 2006/606.

[60] Kounougeri-Manoledaki E (2012) Family law. Sakkoulas Publications Athens-Thessaloniki Volume II, p 182; Koumantos G (1989) Family law. Sakkoulas, Law & Economy – P.N. Sakkoulas, p 166.

transfer ownership of shares or company parts with retention of the title by the transferor. In such case, the person entitled to administrative rights shall be determined by the provision of the articles of association of the company (i.e. provision of article 75§4 L.4072/2012 on private companies or article 30a§2 L.2190/1920 on societies anonymes which also applies mutatis mutandis on limited liability companies) or, in the absence of such provision, by the provisions of the transfer contract, or, in the absence of such provision, by the provision of article 1177 GCC, according to which the participation and voting rights shall be exercised by the usufructuary.

7.3 Influence of the Testator in His Shareholder's Position

In the Greek legal system, there is no legal provision or model regulating specifically the maintenance of the transferor (shareholder or partner). In such case however, a solution may be sought on the basis of existing legal structures implemented accordingly, such as usufruct. Moreover, an agreement between the parties (transferor and acquirer) may stipulate an obligation of the acquirer to maintain the transferor during the latter's lifetime.

As for usufruct as a means for securing the transferor's livelihood, the testator may transfer the assets of his estate while still in life under the favorable provisions on usufruct (article 1142 ff GCC), a legal concept that provides the beneficial owner (or usufructuary) with the right to use and enjoy/or derive profit or benefit from/an asset or property, without impairing or altering its substance. As a result of this right, ownership is stripped from its most significant aspects and is restricted only to the power to dispose of a property, thus converting it into "bare ownership".

The legal concept of usufruct may be created in various forms, the most significant being a disposition mortis causa, in which the heir is appointed as legatee or devisee over the usufruct of the estate or significant parts of it, with the purpose of securing his financial independence. The owner may also transfer the entire or part of his property to another while keeping its usufruct for the duration of his life as a beneficial owner. Upon his death, the bare owner is vested with full ownership of the property.

In addition to the above, another way for securing the transferor's maintenance is through shareholders' agreements, as provided in the articles of association that may provide for a right to compensation or pension of the transferor as a consideration for the transfer. However, there can be no discharge from liability for the time before the transfer, with regard to debts and/or management. Beyond that, especially in personal companies, the transferor may still maintain his influence, since those who shall take his position are usually relatives or persons of confidence.

8 Foundation and Trusts as Instruments for Business Succession

8.1 Set Up of a Foundation

In Greece, a private foundation is an organization created by a disposition of assets under a deed of establishment for the pursuit of a specific, lasting purpose that acquires legal personality through state approval of its founding act (art. 61, 108 GCC). Such is the so-called autonomous foundation which is regulated by articles 108–121 of the Greek Civil Code, supplemented by the provisions on legal entities.

The requirements for an autonomous foundation are: (a) A provision in its statutes for the appointment of its administration, (b) A specific purpose, lasting for a usually indefinite period of time, that is not contrary to the law or good morals, (c) The endowment of property for the pursuit of a specific purpose, (d) the acquisition of legal personality for which a founding act and a state approval in the form of a presidential decree are required. A founding act may be a last will and testament, in which case the presidential decree is issued upon death of the founder and the provisions of law of succession are applied.[61] Furthermore, in article 114 GCC a legal fiction is established on the basis of which it is deemed that a foundation created after death existed upon death of its founder, therefore it also existed at the time of devolution of the estate (1711 GCC).

The duration of a foundation is not regulated in the Civil Code. However, from the provision of article 123 GCC on fundraising committees, it is deduced that a foundation and the purpose it pursues must be lasting.[62] It is not necessarily of an indefinite duration; however it is common that the purpose of a foundation lasts for a definite period of time. The decisive element for the purpose to be deemed lasting is not its long or short duration in time, but the relation between such purpose and the repeated fulfillment of certain social need.[63]

In Greece, the majority of foundations pursue charitable purposes (e.g. religious, philanthropic). For that reason, they are governed by a special law L.2039/1939. The legal purpose of a foundation should not aim at the pursuit of the founder's direct financial interests, but it should have the elements of a gratuitous act. Therefore, a foundation that functions exclusively for the interests of its founder (***Selbststiftung***) cannot be recognized under Greek law, since that would provide the founder with the possibility to protect his estate while using it for business purposes. Conversely, profit-making is not contrary to the charitable nature of a foundation,

[61] Georgiades A (2007) General Principles of Civil Law. Sakkoulas, Law & Economy – P.N. Sakkoulas, p 153,156.

[62] Pelleni-Papageorgiou A (2007) Private Law Foundation. Sakkoulas Publications Athens-Thessaloniki, p 27.

[63] Pelleni-Papageorgiou A (2007) Private Law Foundation. Sakkoulas Publications Athens-Thessaloniki, p 28.

inasmuch as such profit is purpose-related and used only to cover the needs of the foundation. A notable example of such relation is the so-called *business foundation,*[64] widely common in Germany, where a business is transferred in whole or in part by its owner to a private foundation via an act inter vivos or mortis causa.[65] In such case, the subject of law is the foundation and not the business, which comprises the estate (business foundation stricto sensu).[66] Apart from this form, a (business) foundation may participate in a personal or capital company, in which case the foundation indirectly engages in business activities, since a commercial company is interjected between the foundation and the business. The aim of business foundations is to use profit from business activities in order to pursue scientific, social or cultural purposes.[67] However, according to a view in the Greek legal theory, the exercise of business activity by a foundation is not permitted, since a foundation may use or spend its estate for the pursuit of its purpose, but not exploit it for the purpose of augmenting it.[68] In opposition to this view, such limitation not only does not contradict the law, but seems to be permissible by article 109§2 of the Constitution, according to which an alteration of the terms of a will may be permitted in order for a more profitable disposition or exploitation of the estate.[69]

On the contrary, a family foundation, i.e. a foundation which "serves exclusively or primarily the interests of the members of one or more families",[70] does not exist in practice.[71] In a family foundation, the cycle of beneficiaries is limited to the members of certain family, according to its founder's will.[72] Unlike other legal systems (Switzerland and Germany), the Greek law does not include favourable provisions for the establishment of family foundations, hence such do not appear in practice. Their establishment is not prohibited by law, as long as the purpose of such

[64] For motives for the establishment of family foundations see Anthi Pelleni-Papageorgiou (2007) Private Law Foundation. Sakkoulas Publications Athens-Thessaloniki, p 136 et seq.

[65] Mack, *Die Stiftung als «moderne» Rechtsform für wirtschaftliche Unternehmen*, Wist 1977, 541.

[66] Pelleni-Papageorgiou A (2007) Private Law Foundation. Sakkoulas Publications Athens-Thessaloniki, p 131.

[67] Helidonis A (2009) in Law on Legal Entities, Liber Amicorum Ph.Doris, Sakkoulas, Law & Economy – P.N. Sakkoulas 2009, p 528.

[68] Georgakopoulos L (1995) The business purpose of a charity foundation, DEE 2000, 460, 462, Pamboukis K (1990) Recommendations on Commercial Law. Sakkoulas Publications Athens-Thessaloniki 1990, p 232.

[69] Georgiades A (2007) General Principles of Civil Law. Sakkoulas, Law & Economy – P.N. Sakkoulas, p § 17 footnote 6; Perakis E (2013) General Part of Commercial Law. Nomiki Bibliothiki, § 42 n° 20.

[70] Pelleni-Papageorgiou A (2007) Private Law Foundation. Sakkoulas Publications Athens-Thessaloniki, p 124.

[71] See statistics for 1950–2005 in Pelleni-Papageorgiou A (2007) Private Law Foundation. Sakkoulas Publications Athens-Thessaloniki, p 125.

[72] For motives for the establishment of family foundations see Pelleni-Papageorgiou A (2007) Private Law Foundation. Sakkoulas Publications Athens-Thessaloniki, p 125.

foundation is not unlawful or immoral or contrary to public order.[73] However, according to the prevailing view in legal theory, their establishment constitutes a circumvention of articles 1923§2, 1929 and 2009 GCC on fideicommissum and reversionary legacy, because in that way certain property remains inalienable,[74] since the endowed estate may well be transferred to a legal entity and not the heirs, but in reality the beneficiaries from the establishment of the foundation are the founder's descendants.

8.2 Influence of Family Members in a Foundation

The founder's heirs or members of his family may be appointed in the administration and management of the foundation, thus exercising influence on its operation. They may also be named as beneficiaries of the foundation's purposes, in which case they have a legal claim against the foundation for the benefit they are entitled to.[75]

8.3 Distinction to the Trust

In contrast to common law systems, where the institution of the trust is used for beneficial purposes (charitable trust), the Greek law does not recognise the concept of "trust",[76] except for the purposes of Private International Law.[77] However, there is a view in legal theory that the equivalent of a charitable trust in Greek law is the non-autonomous or fiduciary foundation,[78] which has no legal personality, state approval is not required for its establishment and it is not subject to the provisions

[73] Helidonis A (2009) in Law on Legal Entities, Liber Amicorum Ph. Doris, Sakkoulas, Law & Economy – P.N. Sakkoulas 2009, p 528.

[74] Pelleni-Papageorgiou A (2007) Private Law Foundation. Sakkoulas Publications Athens-Thessaloniki, p 129.

[75] Article 116 Greek Civil Code. See also Dellios G (2013) in Apostolos Georgiades (eds) Brief Interpretation of Civil Code, Law & Economy – P.N. Sakkoulas, Athens, Article 166, n^{0} 2.

[76] Deligianni-Dimitrakou C (1998) Trust and fiduciary relationship. Sakkoulas Publications Athens-Thessaloniki, p 254, 262 263, who proposes the combination of a testamentary executor and a fideicommissum as the equivalent institution of "trust" in the Greek law.

[77] Papadopoulou-Klamari D (2005) The executor of a will in Civil Code. Sakkoulas Publications 2005, pp 73–74, comparing a "trust" to the institution of a testamentary executor. See Also Supreme Court Dec. 1286/1977 Law Review 26, 1046, comparing "trust" to joint account or inalienable deposit.

[78] Pelleni-Papageorgiou A (2007) Private Law Foundation. Sakkoulas Publications Athens-Thessaloniki, p 191.

of articles 108 ff GCC.[79] In such case, property is transferred to an existing natural or legal person in order to manage it separately from its own property for the fulfilment of a specific purpose (e.g. endowment of property to a University for scholarships granted to its students). A non-autonomous foundation may be established by a legal act inter vivos or by a will.[80] The choice between an autonomous and non-autonomous foundation depends on the value of the transferred estate, since a non-autonomous foundation shall usually be established when the estate disposed of is not evaluated as high as to justify the establishment of an autonomous foundation.[81] On the other hand, in the establishment of a non-autonomous foundation there is a risk of distribution of its estate for other purposes, especially public purposes, in which case the estate is endowed to public legal entities.

Furthermore, the articles 1923–1941 of the Greek Civil Code regulate the institution of fideicommissum, according to which the testator may order the original heir (fiduciary) to transfer all or part of the inheritance to another person (post-heir) when a specific event has occurred or after a certain period of time has lapsed.[82] With the establishment of a fideicommissum, the testator aims to endow his estate or part of it to a person who is either not born or not of legal age at the time of his death. The post-heir is the testator's subsequent heir. Upon conveyance of the estate, the beneficiary becomes a universal successor of the deceased, after the estate is first acquired by the fiduciary. The concept of fideicommissum involves the establishment of two persons as heirs successively, where the first heir acquires the inheritance immediately upon the testator's death while the second person, the post-heir, after the occurrence of certain event or after a certain period of time has lapsed. Usually, the testator by setting up a fideicommissum wishes to keep the inheritance within his family or the heir's family.[83] The post-heir may be a legal person that either exists upon the testator's death or will be established after his death (1924b GCC). This provision is applicable on foundations only in case the property is disposed by a third party to a foundation not yet established at the time of his death. In such case, the fideicommissum has a similar function to a foundation, since the beneficiaries of both a foundation and a fideicommissum may not dispose of the estate. However, the main difference between them lies in that the family fideicommissum is a group of property, whereas the (family) foundation is a legal person.[84]

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[79] Dellios G (2013) in Apostolos Georgiades (eds) Brief Interpretation of Civil Code, Law & Economy – P.N. Sakkoulas, Athens, Article 166, n^{0} 2.

[80] Details in Pelleni-Papageorgiou A (2007) Private Law Foundation. Sakkoulas Publications Athens-Thessaloniki, p 185 et seq.

[81] Pelleni-Papageorgiou A (2007) Private Law Foundation. Sakkoulas Publications Athens-Thessaloniki, p 211.

[82] Pournaras E, in Apostolos Georgiades (eds) Brief Interpretation of Civil Code, Law & Economy – P.N. Sakkoulas, Athens, Article 1923, n^{o} 1 et seq.

[83] Georgiades A (2013) Law of Succession. 2nd edn., Law & Economy – P.N. Sakkoulas, Athens, p 1114 et seq.

[84] Pelleni-Papageorgiou A (2007) Private Law Foundation. Sakkoulas Publications Athens-Thessaloniki, p 128.

From the aforementioned it follows that with the establishment of a foundation (inter vivos or causa mortis) the founder decides that his estate shall be directly used for the pursuit of a purpose which is lasting and may be charitable, financial etc.; in any case the foundation must pursue the maintenance of the property for the fulfillment of its purpose. Conversely, with the establishment of a fideicommissum the testator wishes that his estate shall be passed over to a specific person who shall manage it until a certain event occurs or until a certain period of time has lapsed, upon which he shall transfer it to another natural or legal person. Such legal person may be a foundation that will be established after the testator's death. Thus, the establishment of a fideicommissum does not aim at the direct pursuit of a purpose but to secure the estate until it is transferred to its final beneficiary. The purpose of a fideicommissum is the protection of the inheritance and its maintenance in favour of a person. In addition, a foundation is subject to state supervision, while a fideicommissum is not. Therefore the main difference between those two institutions is not the direct acquisition of assets –since a fideicommissum may be established in favour of a foundation to be established in the future- so much as their legal form, since a foundation has legal personality whereas a fideicommissum does not, even though it is, in essence, an estate.[85]

9 Further Developments (Legal Policy Plans for Business Succession Scientific Discussions and Plans)

To our knowledge, there have been neither legislative measures nor regular scientific discussion undertaken regarding the subject of business succession as well as the contentious relationship between the law of succession and the company law.

[85] Ibid., 128.

Company Succession in the Latin Law Tradition Using the Example of the Italian Legal System

Andrea Fusaro

Abstract The high economic relevance of business successions in Italy is strictly connected to the structure of Italian capitalism. In Italian law there is no definition of family owned firm and our literature uses the general notion "encompassing all cases in which the family maintains a share of the capital sufficient to appoint top management and influence the firm's strategies, thereby limiting the set of choices available to management". Family firm "dominates the national industrial structures, proving also to be very efficient, perhaps the most efficient model, particularly in the case of medium sized, specialised, and internationalised companies". In last decades particular emphasis has been placed on leadership transition and insider succession; nevertheless, because the Italian civil law forbids succession agreements, proper estate planning is difficult: in order to mitigate the consequences of these prohibitions, business or family agreements are used, so as to maintain a certain number of management rules throughout the change of generations.

1 The Economic Importance of Business Succession

In Italian corporate law there is not a special attention paid to family business: neither for succession of leadership, nor for succession of ownership[1]: our legislation has not adopted any solution in order to protect the firm where several heirs claim their share in the enterprise and require that it be paid in cash. In our Civil Code there is no pre-emption right or any other form of preferential attribution of shares in a business to one of the heirs working in it, coupled with the obligation to compensate the other heirs, such as a number of other European states have adopted. There are two exceptions. One is article 230 bis CC (titled "Family Enterprise"),

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[1] Distinction drawn by L.-G. Sund et al. (2009).

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that was introduced in 1975 by the legislator in the First Book of Italian *codice civile*, on the "law of persons and family"[2]; The innovative importance of this rule is remarkable because, before the mentioned reformation, work done by a family member of the firm was intended as free. Now, article 230 bis CC offers assisting relatives a status and includes regulations on the relationship between members of a family who works in a family business. However, this rule applies unless the parties reach a different agreement (e.g. by creating partnerships, or companies, or enter into a contract of employment). T the other exception is the Family Agreement.[3] Unwanted acquisitions of shares or firm in the case of death can pose a threat to a successful business. The problems relate to paying the heirs who have no interest in the firm in cash and who will sell the shares, or settling disputes among the heirs who take active part in the business and disturb the balance.

In order to understand how business successions takes place in Italy, one must look to the legal grounds of inheritance law and the specific rules about transferring shares and participations provided by company law.

2 The Legal Grounds of Successions in Italy

2.1 Introduction

Succession law must be analysed within a broader context, as it fulfils both an economic and social function. It regulates, respectively, the transfer of wealth upon a person's death on the basis of the principle of freedom of testation and protects the family as a social unit.[4]

Responding to social and economic evolution, in the last decades, succession law has changed almost everywhere: "*over the course of the twentieth century, persistent tides of change have been lapping at the once – quiet shores of the law of succession*".[5] Comparative scholarship has highlighted these changes through research normally pursued according to the "functional-typological method",[6] in order to identify typical solutions to s law has long been considered one of the more indigenous branches of the law,[7] so that according to the traditional view a more harmonized or unified succession law is neither feasible nor desirable.[8]

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[2] The innovative importance of this rule is remarkable because, before the mentioned reformation, work done by a family member of the firm was intended as free. Now, article 230 bis CC offers assisting relatives a status and includes regulations on the relationship between members of a family who works in a family business. However, this rule applies unless the parties reach a different agreement (e.g. by creating partnerships, or companies, or enter into a contract of employment).

[3] See paragraph 2.4.1 below.

[4] Oxford Univ. Press, Oxford, 2006, 1071, 1072.

[5] J. H. LANGBEIN, The Nonprobate Revolution and the Future of the Law of Succession (1984) Harvard L R 1108.

[6] K. Zweigert and H. Koetz (1998).

[7] W. Pintens (2003).

[8] A. Verbeke and Y. Henri Leleu (1998).

Inheritance law in Italy provides only two kinds of succession *mortis causa*: intestate succession and testamentary succession; article 457 CC subordinates the first to the second.[9]

2.2 Intestate Succession

If the decedent has not left a will, or if the will is invalid, Italian general rules on intestate succession apply (arts. 565 ff. CC). These rules are based on the relationship between the deceased and the various heirs.[10] Therefore the closest relatives of the deceased are entitled to a share of the assets in compliance with the provisions of Italian law. The beneficiaries in intestacy are the spouse, descendants, ascendants, collateral and other relatives, according to the following rules. Before December 2012, adopted children held the same position as legitimate and natural children, but they had no rights in the succession of the parents and other relatives of the adoptive parent (art. 567 CC): in 2012 the legislator stated that all children are equal and the words "legitimated", "illegitimated" and "adopted" have been removed from the CC.[11] Each tier of entitled persons excludes the next one.[12]

The surviving spouse is entitled to take if he or she was still married to the deceased or if they were legally separated at the time of death; a divorced spouse does not have a right to share in the estate. The spouse has the right of occupation of the family home, and the use of its furniture.[13]

If the spouse and one child survive the deceased, half the estate goes to the surviving spouse and the other half goes to the child. If there is a surviving spouse and two or more children, one third of the estate goes to the spouse and two thirds to the children, in equal shares. Where there are no children, parents or ascendants, brothers and sisters, the spouse inherits the entire estate. If the deceased does not leave any children, his or her parents, ascendants, brothers and sisters receive the estate, but 2/3 go to the surviving spouse. If there is no surviving spouse, nor children, the following are entitled to inherit: parents, siblings and their descendants; uncles, aunts and other collateral relatives (nieces, nephews) and so on, the relatives from the first to the sixth degree included. Where there are no spouse, parents or ascendants, brothers and sisters, or any of the relatives entitled to inherit, the estate is assigned to the State.

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[9] Art. 457: "L'eredità si devolve per legge o per testamento. Non si fa luogo alla successione legittima se non quando manca, in tutto o in parte, quella testamentaria. Le disposizioni testamentarie non possono pregiudicare i diritti che la legge riserva ai legittimari".

[10] G. Alpa and V. Zeno – Zencovich (2007).

[11] Legge 10 December 2012, no. 219.

[12] So that, e.g., if direct descendants survive, the ascendants receive nothing.

[13] Art. 540 Italian CC relates to forced share, but it is also applied to intestacy. See Corte costituzionale, ord. 5 May 1988 n. 527. See Cass. Civ., 6 April 2000, nr. 4329, in: *Giustizia Civile*, 2001, I, 2198; *Giurisprudenza Italiana*, 2001, 33; *Notariato*, 2001, 357.

Partners have no inheritance rights under intestacy, even if they were living together in a joint household at the time of death, and neither of them was then married to someone else. During the last 10 years, several bills have been discussed for the introduction of contracts between cohabitants, entitling them to inheritance rights, as this is deemed to be their will, but none of them were approved by the Parliament.[14] At present, partners only benefit under a will.[15]

2.3 Testamentary Succession: The Principle of Freedom of Testation

Italian inheritance law offers any person with testamentary capacity[16] the right to dispose of his or her property for after death by a will.[17] A will is valid when it is: unilateral,[18] individual,[19] personal,[20] revocable,[21] spontaneous,[22] of economic relevance; of personal relevance,[23] in writing[24]; formal.[25] Italian law provides for three types of will (arts. 601 ff. CC).[26]

[14] G. OBERTO, *Proposta di legge in tema di accordi preventivi sulla crisi coniugale*, in http://giacomooberto.com/famiglia.htm

[15] G. Ferrando (2007); L. Barbiera (2010).

[16] I.*e.* anyone who is 18 years old or more and of sound mind (art. 591 CC).

[17] Arts. 587 ff. CC.

[18] Mutual wills are void.

[19] Joint and mutual wills are void.

[20] A will is void if decisions are delegated to third parties.

[21] Binding agreements are void.

[22] Any mutual provision included in a will would be considered void if subject to the condition of being the beneficiary in someone else's will.

[23] E.*g*. it may contain the legal recognition of a child.

[24] Oral wills are void.

[25] In strict compliance with legal provisions.

[26] (a) Holograph will (art. 602 CC, *testamento olografo*): the document is personally handwritten by the testator, and must be dated and signed. There is no need for witnesses and there is no attestation clause. It can be a simple letter or document. It can be executed up at any time using any kind of paper, therefore being inexpensive; (b) Solemn will (art. 603 CC, *testamento pubblico*): it is drafted by an Italian notary following the testator's instructions. The will is executed by the notary in the presence of two witnesses. The will is read out loud by the notary to ensure that it complies with the last wishes of the testator; it is signed by the testator in the presence of witnesses and recorded and lodged by the notary; (c) Sealed will (art. 604 CC, *testamento segreto*): it is drafted by the testator and placed in a sealed envelope which is then delivered to an Italian notary in the presence of two witnesses in compliance with strict formalities laid down by the law. The contents of the will shall remain sealed until after the testator's death, when the sealed envelope will be opened. The requirements for a sealed will are different from those for a holograph will (*i.e.*, it need not be personally handwritten by the testator).

Italian inheritance law is ruled by some fundamental principles and it is well known that many of them derive directly from roman law. Among those principles notably there is testamentary freedom, which plays a primary role.[27]

2.3.1 The Range of Testamentary Freedom

Italian law provides for certain restrictions to the principle of freedom of testation. Here we focus on the prohibition of indefinite settlements and on conditions imposed on the heir.

2.3.1.1 The Prohibition of Indefinite Settlement

The impositions of restraints on alienation in a will aims at preventing the sale or transfer of immovable property absolutely or for a limited period of time; the testator intends to prohibit the recipient from selling or otherwise transferring his or her interest in the property. Such a restraint on the freedom to transfer property is generally considered unlawful and therefore void if it is to be effective for a long period of time, as it is deemed to infringe the right of owners to freely dispose of their property.[28] However, certain restraints, if considered reasonable, will be given effect. Traditionally these include the prohibition to transfer or split property for a limited period of time.[29]

2.3.1.2 The Fideicommissum

In a *fideicommissum* property is to be passed over in the same family from generation to generation: the prior or first heir is subject to the obligation of bequeathing it to another, subsequent heir. Art. 692 Italian CC considers *fideicommissum* void, with the exception of allowing a testator to devise his property to a legally incapacitated son, grandchild or spouse, so that it is handed over to other issue upon the death of the original beneficiary.

In the *fideicommissum de residuo* the original beneficiary is not bound to preserve the estate for a subsequent beneficiary, but merely has to deliver the remaining balance at his or her death. Although the Italian CC fails to mention it, academic (legal) commentators consider it to be void.[30]

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[27] L. MENGONI, Successione per causa di morte. Successione necessaria, in Trattato Cicu Messineo, Milano, 1992, 61; A. PALAZZO, Le successioni, in G. IUDICA, P. ZATTI (eds.), Trattato di diritto privato, Milano, 1996, 2.

[28] Cass. Civ.10 July 1979, nr. 3969, in *Riv. not*., 1979, 1235; F. Bocchini, *Limitazioni convenzionali al potere di disporre*, Napoli, 1977, 104; G. Rocca, *Il divieto testamentario di alienazione*, in *Riv. trim. dir. e proc. civ*., 1982, 416. N. Di Mauro (1995); G. Petrelli (2004).

[29] Trib. Cagliari, 21 September 1998, in *Riv. giur. Sarda*, 2000, 16.

[30] M. Talamanca (1978).

2.3.1.3 Hereditary Rights Legally Granted

Forced Share. Italian law provides for certain restrictions to the principle of freedom of testation. Arts. 536 ff. CC provide that a minimum statutory share of the estate is reserved/can be claimed by the main family members before the remainder may be freely disposed of: some members of the family are entitled to receive a fixed portion of the estate,[31] even if a will provides otherwise. This compulsory share is called *legittima*. Disinheritance is not allowed in the Italian legal system.[32]

The Italian CC provides that parties entitled to the forced share cannot be waived whilst the donor is still alive, either by express declaration or by accepting a gift. In any case, the right to reduce gifts can be waived after the donor's death.

A few years ago, some commentators discussed a bill for the reform of forced share,[33]in order to abandon the civilian rule based on the idea of attributing a fixed share of the estate to certain members of the family to adopt the English approach, based on the concept of "dependants",[34] but few agreed to that idea, and there have been no further proposals of this kind after that one.[35]

The Italian CC gives qualified status to some family members by granting them a forced share (*quota legittima*) (arts. 536 ff. CC): the surviving spouse, even if separated from the decedent, unless he or she was held responsible for the separation of the couple by the Court; all the children (after the Reform of 2012); and all the ascendants, when no children (or their descendants) are alive at the time of the death. They are entitled to a fixed portion of the deceased's net estate; the law provides them with this right, regardless of their wealth or need.

Neither partners nor divorced partners have any right to the forced share.

The forced share which is also criticised on the basis of different grounds and some scholars went far as to argue that the present regime could be unconstitutional, provided that Italian constitution does not mention it.[36]

Quotas and Rights. To the spouse is reserved half of the estate, unless children survive the deceased. If only one child survives the deceased, to him or her is reserved half of the estate. If more than one child survives, the children receive two thirds of the estate, divided equally between them; their descendants take per stirpes. Before the Reform of 2012, if only legitimate ascendants survived, they were entitled to a third of the estate: now, legitimate and natural ascendants are treated

[31] The reserved portion is a minimum proportion (percentage) based on the amount of the property value. *Legittima* is the right to a fixed portion, not to specific assets: Cass. civ., Sez. II, 12 September 2002 nr. 13310, in *Famiglia e diritto*, 2003, 79.

[32] Cass. Civ., 25 May 2012, nr. 8352, admitted the validity of a will containing only an indication of disinheritance.

[33] G. Amadio (2007); S. Delle Monache (2007).

[34] A. Fusaro (2010a, b).

[35] A. Fusaro (2009).

[36] Something similar happened in France, where the debate produced some reforms between 2001 and 2006, which introduced many changes: the legitimate portion has been retained, with some limitation; the legitimate portion should be replaced with a cash value, in order not to hinder or restrict the alienability of immovable disposed by will or gift.

equally. If a spouse and one single child survive the deceased, both are entitled to one third of the estate. If a spouse with more than one child survives the deceased, the spouse is entitled to one fourth of the estate and the children are jointly entitled to half of the estate. If the deceased leaves only ascendants and a spouse, the ascendants are entitled to one fourth of the estate, and the spouse to one half. Art. 540 CC provides the spouse with the right of occupation of the family home,[37] and the use of its furniture, even if there are other heirs.

In order to calculate the "reserved quota" we must take in consideration not only what remains after death (*relictum*), but also donations made whilst the deceased was alive (*donatum*); indeed, property may be donated during the lifetime of the owner (art. 769 ff. CC), but sums received during the testator's lifetime are considered to be advances of the inheritance. Any debts are deducted from the sum. This procedure goes under the name of calculation of a fictitious hereditary estate (*riunione fittizia*). To assess the quotas attributable to the beneficiaries of forced shares, donations and testamentary gifts made to them are taken into account (*imputazione ex se*).

The Reduction of Testamentary Dispositions and Donations. If the testamentary dispositions or donations exceed the portion that the testator can legally dispose of, then each forced heir can file a claim for reduction of the disposition (*azione di riduzione*). The "*azione di riduzion*e" lapses after 10 years from the devolution of the estate.[38]

The Circulation of Assets. In Italy, the forced share is not just a credit, as in Germany.[39] As in France before 2007,[40] and other legal systems influenced by the French CC, in Italy the legitimate portion is the right to a share of the deceased's estate. Immovable property restored as a consequence of reduction is free from any lien or mortgage taken out on them by the deceased, except where an action for reduction has been filed after 10 years from the reading of the will.

This solution hinders the circulation of assets disposed by will or intestate succession, or by gift, to counter the risk of claims filed against them by members of the family that hold the special status provided to them by the rules on the forced share.

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[37] Only if the other spouse is the owner of the house: Cass. Civ., 23 May 2000, nr. 6691, in: *Giustizia Civile*, 2000/I, 2911; *Studium Juris*, 2000, 1137; *Rivista del Notariato*, 2000, 1499; *Vita notarile*, 2000, 1458. If it belongs to both of them, and the division cannot be done conveniently, the right becomes a claim for compensation. See Cass. Civ., 30 July, 2004, nr. 14594, in *Giustizia Civile*, 2005, 5, I, 1263.

[38] Cass. civ., 25 October 2004, nr. 20644, in *Giur. it*. 2005, 1605, in *Vita no*t., 2005, 855: "Per individuare il "dies a quo" del termine di prescrizione dell'azione di riduzione per lesione della quota di legittima, occorre distinguere due ipotesi: (a) se la lesione deriva da donazioni, la prescrizione comincia a decorrere dall'apertura della successione; (b) se, per contro, la lesione deriva da disposizioni testamentarie, la prescrizione decorre dal momento in cui la disposizione testamentaria lesiva della legittima sia stata accettata dal chiamato all'eredità".

[39] R. Frank (2007).

[40] Y.-H. Leleu (1997).

According to a statute enacted in 2005[41] where a donee transfers an immoveable to a third party and 20 years have elapsed since the registration of the title in implementation of the donation, the forced heir cannot pursue the third party for recovery of the property. This period may be extended for a further (renewable) 20 years where the spouse or heir register a notice of intent to challenge the gift. The same rule applies to liens and mortgages, which remain valid if the reduction is claimed after 20 years since the registration of the donation.[42]

2.3.1.4 Prohibition of Inheritance Agreements

Our inheritance law reserves a dominant role to the will: article 458 CC denies validity to succession agreements.

The Italian civil law forbids succession agreements, that are agreements between two parties for the transfer of assets for after the death of one of them. The *ratio legis* of this prohibition is first of all to safeguard the choice made by the legislators who established that inheritance follows from the law or from a testament, excluding contracts or negotiations. Moreover, it fulfils the need to comply with the settlor's will.[43]

Art. 458 CC prohibits all agreements by which a person disposes of his or her own estate, as well as agreements by which a person alienates his or her potential rights upon succession of a living person, or renounces such rights. An example of prohibited agreements is the sale of future property considered to be part of the succession of a living person, or a division which includes property that is part of the succession of a living person.

2.4 The Attempts to Mitigate the Consequences of the Prohibition of Succession Agreements

Because article 458 CC denies the validity of succession agreements, proper estate planning is difficult. In order to mitigate the consequences of these prohibitions, business or family agreements are used, so as to maintain a certain number of management rules throughout the change of generations. To protect ownership in family firms some of the clauses below described are used.

Hereditary business ownership transfers have been studied deeply in Italy in last years, in relation to the use of legal instruments alternative to gifts and wills.

Italian legal tradition knows some patterns, especially "division by the testator", where the testator directs the division, specifying how the portions are to be made;

[41] *Decreto-legge* 14 March 2005, No. 35, converted into Law 14 May 2005, No. 80.

[42] G. Gabrielli (2005).

[43] A. Palazzo (2003).

he can also state that the division be carried out according to a valuation drawn up by a disinterested third party.[44] But it takes effect under the provisions of a properly executed will, so that the transfer of the firm is postponed, it happens after death; on the contrary, often one wishes an immediate transfer, like a gift, under which title passes immediately to the transferee. Another similar pattern wold be "donatio mortis causa"[45]: a gift made during the life of the donor which is conditional upon, and takes effect upon, death. But it was verified in consistency with article 458 civil code and the results have usually been uncertain.

2.4.1 Specific Provisions for Business Succession: The Family Agreement

It is well known that according the 1994 Recommendation of the European Commission on the transfer of small and medium – sized enterprises[46] the Member States should consider allowing the conclusion of future succession pacts. Italian scholars have encouraged the legislator to introduce a new legal instrument, following the model of family agreement used in practice to transmit ownership and management to one or more heirs, shaped in a way to avoid the risk of "*azione di riduzione*", the proceeding that those with a right to a reserved share can bring to have legacies or donations reduced.

In 2006[47] our Parliament introduced family agreements.[48] According to the new articles of the Italian CC (articles 768-bis ff.), a family agreement is a contract through which, under the rules governing family firms and relative to the different company types, the entrepreneur transfers the firm, wholly or partially, and the stakeholder transfers, wholly or partially, his or her stakes to one or more descendants.

It must be executed before a public notary. All forced heirs and the entrepreneur's spouse must participate in it, to give their consent to the assignment of ownership. They receive an equal value through the transfer of apartments or other assets as compensation, or they must waive any assignment in their favour (this is what the surviving spouse often does).[49] They lose the chance to file an *azione di riduzione* later on. Here side we find a clear derogation from the prohibition of inheritance agreements.

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[44] F. Salerno Cardillo (2004).

[45] Latin, meaning "gift on the occasion of death".

[46] OJ L385, 31. December 1994, 14 (see also the communication containing the motivations of the recommendation: OJ C 400, 31 December 1994, 1), followed by the Communication from the Commission on the transfer of small and medium- sized enterprises (98/C 93/02).

[47] Through Law No 55, 14 February 2006, adding paragraph V bis to Tiltle IV of the 2 volume of the Civil Code.

[48] See A. Fusaro (2011).

[49] Art. 768 sexies CC states that excluded heirs may ask to receive the equal value of the asset as compensation of their portion.

Payment to other beneficiaries of the forced share is made by the recipient of the firm or by the settlor (by making a further gift to the transferee of the firm). The entrepreneur cannot revoke the transfer, unless entitled to withdraw by the contract. The family agreement can also provide for the recipient of the firm to withdraw, *e.g.* if the business activity should not provide an average income in the years to come.

The entrepreneur can retain the right of life usufruct. Normally, transfer of title is immediate, but according to a (learned) doctrinal opinion it can be postponed by the introduction of conditions or dates; e.g. providing that it is conditional upon (to), and takes effect upon, death.[50]

Some amendments[51] were proposed in 2011,[52] in order to facilitate the generational transfer.[53]

3 The Immediate Consequences of a Death for a Business

Article 2247 CC describes a company or a partnership as a "*contract by which two or more persons contribute goods or services to the joint management of an economic activity, for the scope of sharing the profits"*. The consequences of the death of a partner or shareholder depend on the different kinds of partnerships (*società di persone*) and companies (*società di capitali*).

The rules governing the death of the member of a partnership are guided by the regard for the "intuitus personae", from which derives the non – transferability of the participation.[54] This does not fit for companies, that are governed by the rule of the free movement of its shares: when a shareholder dies, the right to his interest in the shares will pass to whoever inherits them under his will or intestacy. In the articles of both of them is possible to insert a "business succession clause", a clause that regulates what happens on the death of a member.[55]

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[50] A *"Draft" of a Family Agreement* adapted from: *I patti di famiglia e il trust*, *Le guide del professionista*, Il sole 24 ore, 30/03/06, 15 and 16. (Family Agreements and Trust), has been translated in English by C. VALLONE, quoted above, 6.

[51] But finally they were not adopted.

[52] See Bill no. 4463 discussed on 28 June 2011, which transposes the original version of *Decreto Sviluppo* (d.l. no. 70/2011): these corrections were not adopted.

[53] The first concerned the possibility to postpone the transfer of the firm or shares at the time of the entrepreneur's death, appointing a company director to manage the enterprise, with the same duties of a trustee indicate the beneficiaries of the firm. This amendment has been criticized (M. Ieva – A. Zoppini 2011), considering that the real beneficiary of the pact was the manager, not the heirs. Another amendment concerned the heirs who didn't participate in the agreement: the proposal allowed to send them a copy of the contract, in order to enable the absents to subscribe it. The critics (M. Ieva – A. Zoppini, quoted above) argued that these heirs would certainly contest the agreement. An author (Campobasso 2011) proposed the introduction of an *accordo fiduciario* to amend the family agreement discipline.

[54] I. Menghi (1984); E. Lucchini Guastalla (2007).

[55] B. Longo and A. Minto (2013).

1. Partnerships

According article 2272 CC, partnership can't have one only member: if they were two and one of them dies, the partnership can go on for 6 months with the survivor. If the partners were more, after one partner's death, the others are not obliged to suffer heirs' entry[56]; they can liquidate his participation to the heirs (art. 2284 CC), who cannot pretend to recover the assets[57]; the heirs are exposed for the debts arisen until death.[58] The survivors can also dissolve the partnership or, with the consent of the heirs they can continue the activity with them.[59]

Article 2284 CC allows articles of association to determine the consequences of one partner's death.[60] The following clauses are diffused: consolidation clause, which provides that his participation will be acquired by the survivors members, and its value will be paid to the heirs[61]; continuous clause, through which all the members consent – on a preventive basis – the transfer to the heirs of the participation,[62] if they agree.[63]

2. Companies

In Limited liability companies (società a responsabilità limitata) and in Joint-stock companies (società per azioni), in absence of different indication in the bylaws, participations and shares are transferred *mortis causa*, according to inheritance rules, to the deceased's heirs, who become thus partners themselves. In case of jointly ownership, the heirs have to designate a common representative (articles 2468 and 2347 CC).

To hamper the possibilities for heirs to acquire shares, companions cannot only rely on a family agreement or a will, since the member can amend it or withdraw. To strengthen their position, they can insert transfer restrictions in the article of association or make shareholders' agreements. Italian law allows company transfer restrictions to be included in the articles, clauses generally used to protect ownership in small and medium family-owned enterprises.

Articles of incorporation of a limited liability companies can restrict the transfer of a participation (article 2469 CC).[64] Bylaws of joint-stock companies, can "impose specific conditions on the transfer and may prohibit it, for a period not exceeding five years after the establishment of the company or the introduction of restriction"

[56] G. F. Campobasso, quoted above.

[57] Cass. Civ., 19 April 2001, nr. 5809, *Foro it*. 2001, I, 3653.

[58] The partnership agreement could also deal with the continued use of the name of a deceased partner.

[59] Cass. Civ., 16 December 1988, nr. 6849, *Giur. it*. 1989, I, 1, 1130, *Giur. comm*. 1989, II, 525.

[60] These clauses are described by F. Galgano (2007).

[61] Cass. Civ., 3 July 1967, nr. 1622.

[62] Cass. Civ., 16 July 1976, nr. 2815.

[63] Cass. Civ., 18 December 1995, nr. 12906; Cass. Civ., 19 June 2013, n. 15395 admitted the validity even in absence of agreement.

[64] When the meeting of shareholders decide to include this clause in the bylaws, the partner is allowed to recede from the company (art. 2473); the partner who withdraws, can get the value of the participation in money.

(article 2355 bis CC). Some types of clauses are very often used[65]: an agreement that the shares may pass to particular people, such as the shareholder's spouse, children; pre-emption rights in favour of existing shareholders (or some of them); arrangements to buy out the dead shareholder's interest, with valuation arrangements and perhaps time to pay; a cross option agreement (between the shareholders for the sale and purchase of a deceased shareholder's shares, and sometimes those of his family members) combined with life insurance policies to provide the money to pay for the shares if the situation arises.[66] The legislator requires that a sum equal to the current value of the shareholding (in compliance with article 2437-ter CC[67]) is to be paid to the heir.

4 Foundations

1. In Italy a foundation has legal personality, it is supervised by a public authority, and serves any lawful purpose, for which a founder has provided an endowment, and determined the statute.[68] Public approval is not discretionary, but the State supervisory body must verify only if the legal requirements are met.[69]

Italian civil code does not require a public benefit for foundations: it in principle allows "any lawful" purpose. Nevertheless Italian case law[70] and the prevailing doctrinal view have certain restrictions regarding family foundations, which have the purpose of promoting the benefit of members of the founder's family: only needy family members can be considered.[71]

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[65] P. Montalenti (2012).

[66] Prohibitive clause forbids all transfer of ownership, for a certain period; it covers sales and gifts, even inheritance, on condition that the heir receives compensation. Post- sale purchase right provides the same rule of "first refusal", but after a person has acquired shares, giving the other shareholders an option to buy the shares, for a price settled according to stipulations or determined after negotiations. Further types of transfer restrictions are buy-sell clauses, mandatory for the heirs or for other shareholders. In the first case, other shareholders are obliged to buy the shares of the deceased, if the heirs want to sell. To protect ownership, the opposite is better suited, i.e. the clause according to which the heirs are obliged to sell if other shareholders want to buy. This clause is common in Italy, even in the articles of association, providing mechanisms to determine the price. The problem is that the heirs must be compensated, and this often happens through drainage of capital from the company, such as in the case of withdrawal; sometimes the partnership is dissolved and the business ceases. These are clause diffused even in other systems: L.-G. Sund and P.-O. Bjuggren (2008).

[67] The price to be paied to the heirs must be calculated "taking into consideration the assets of the company and its earnings prospects, as well as the possible market value of the shares".

[68] With respect to the formation procedure, a notarial deed is necessary.

[69] The public authority has no discretion on whether it permits the formation of a foundation, provided that the requirements of the foundation law are fulfilled. The administrative body is involved in the ongoing supervision of the foundation.

[70] Cass. civ., 10 July 1979, nr. 3969, in *Giur.it*, 1980, I, 1, 882.

[71] F. Galgano (1969). Different opinion is expressed by A. Fusaro (2010a, b).

The general rule in principle allows "any lawful" purpose, but a foundation for the founder is not accepted and there are certain restrictions regarding family foundations: they are admitted only for needy family members.[72]

A foundation is expected to possess assets; one needs an initial minimum endowment. It is not required a specific initial amount, but the capital must be adequate for the fulfillment of the purpose.[73] There are no strict obligations to maintain the foundation's capital nor there are detailed rules on the investment of the foundation's assets except in some cases. The statutes of a foundation can be amended by the board of directors with the control of the State supervisory authority.

2. The notion of foundations has established a non-distribution constraint for surplus generated, in the sense that no private benefits (distributions made without adequate compensation) may be provided to the founder or to the members of the board of directors.[74]

Italian civil code has no general provision allowing a foundation to trade; case law allows it without special restriction: a foundation can carry out ancillary economic activities, can be the major shareholder of a business company, it is entitled to act as "commercial" and carry out functions which can be fulfilled by companies. Trading is permitted not only as a subordinated or ancillary activity, but also as its main activity, provided that its object in doing so can be considered to be the promotion of main purpose (to run a theater).

According some statutes regarding special types of foundations, they may only develop economic activities of their own if these activities directly further the foundation's purpose or are complementary or ancillary to it.[75]

The rules of commercial law are applicable to foundations involved in economic activities.[76] For those qualifying as commercial foundations, a number of special rules apply with regard to, e.g. accounting, bankruptcy[77] and employee representation. Modern legislation has developed different legal rules, regulating economic activities regardless of the legal form[78]; examples are registration in the commercial register, special inquiries and accounting matters.

Some modern legislations make general provisions for all organizations undertaking economic activities. There are several special rules for foundations undertaking economic activities (including standards comparable to those of a business organization); some or all of the standards for business corporations are applied to foundations whose dominant activities are economic.

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[72] Cass. Civ, 10 July 1979, nr. 3969.

[73] Art. 28 CC: foundation may be dissolved by court order if it lacks the means to achieve its purpose and there are no prospects of means in the future. With respect to liquidation it is left to the founder to determine in the statutes what is to be done with the residual assets.

[74] P. Rescigno (1968); A. Zoppini (1995); M.V. De GIORGI (2009).

[75] See M.V. De Giorgi (1999); A. Fusaro (2003).

[76] Trib. Milano, 22 January 1998, in *Nuova giur. civ. comm.*, 1999, I, 235.

[77] App. Palermo, 7 April 1989, in *Giur. comm.* 1992, II, 61.

[78] The so called *impresa sociale*: d.l.vo 24 March 2006, nr. 155.

3. A foundation has no membership: it is described as an endowment dedicated to a specified purpose. Nevertheless many follow an organizational approach: a specific legal form usually called "participatory foundation", which can have members.[79] The power of those membership assemblies is restricted: they can elect part or whole of the foundation's governing body, but they cannot change the statutory purpose.

The founder has the possibility of reserving a wide range of rights in the statutes[80]; he is free to determine in the statutes how the board members are appointed.[81]

The courts seem to be reluctant to uphold freedom of founders in order to reserve to himself a control of the foundation, and to limit the rights and powers of beneficiaries. There is legal uncertainty whether the founder may be authorized to amend the statute, whether the founder may amend the conditions for an amendment of a competent organ, and/or whether the founder may authorize other organs or third persons to amend the statutes.

Beneficiaries are usually not entitled with enforcement rights, there is no provision for third-party rights. Third parties are unable to claim any specific rights.[82]

4. According to the prevailing view, a trust set up in Italy is valid, even if the only link with a trust jurisdiction in the applicable law.[83] The trust as such is not a separate legal entity[84]; it is preferred because of his reduced formalism.[85] The trust has been chosen for estate planning, thanks to asset protection and ease of management of assets.

The Foundation may enjoy unlimited duration, is a legal entity in its own right,[86] has a registered office and is registered with the Registrar, enjoys limited liability.[87]

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[79] These participants can be called "members", "supporters", or "adherents" of the participatory foundation and normally may take part in an assembly of participants that has the right to elect a minority of the members of the governing body of the foundation.

[80] Membership of the Board of Directors, election and dismissal of board members, amendment of the statutes.

[81] He usually appoints the initial members of the board of directors, and may specify whatever appointment system within the formation deed (or other governing document) she/he deems suitable. Thus, the power to appoint new directors may rest with the founder herself/himself, with another natural or legal person, with the supervisory board of the foundation (if existing), or with the members of the board of directors (co-option/self-perpetuating).

[82] Because the state supervisory authority must act *ex officio* if there is justification in the form of suspicious facts.

[83] M. Lupoi, La g*iurisprudenza italiana sul trust*, 3rd edn., Milano, Ipsoa, 2009.

[84] A. Gambaro, *Il "trust" in Italia e Francia*, in *Scritti in onore di Rodolfo Sacco*, I, Milano, 1994, 495 ff; M. Graziadei, *Diritti nell'interesse altrui: undisclosed agency e trust nell'esperienza giuridica inglese*, Trento, 1996.

[85] A. Zoppini, *Fondazione e trust* (*spunti per un confronto*), in *Giur. It*., 1997, IV, 41.

[86] As a legal entity, foundation can own assets in its own name, does not require a change in the legal ownership of its assets as a result of a change in its governing body.

[87] This enables riskier types of assets to be managed within the structure.

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Legal Aspects About the Interaction Between Companies Law and the Law of Succession in Japan

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Abstract In Japan, most family business is performed under corporate form. Small (mostly family) corporations constitute more than 99 % of all the corporations. There were foundation rush after WW2, and founders of that time or their sons are now facing succession. Due to the problem of aging society, it is difficult for them to find proper successors or plan appropriate succession schemes at the earlier stages of their lives.

There are three types of stakeholders they have to consider: preexisting out-of-inheritance shareholders; non-successor heirs and successors. As for the non-heirs, they should be protected from being kicked out of the company. The newly enacted Japanese Companies Act (Act No. 86 of July 26, 2005) allow various arrangements through class shares or special provisions in the charter, and recent courts enforce minority shareholders protection, perhaps too much that in some cases heirs are put under total discretion of minority shareholders. As for the non-successor heirs, Civil Law has strongly protected compulsory portion, and though special law newly allowed compensation negotiation among heirs, it still accompanied court supervision. As for the successor protection, the restriction that the ancestors set as the condition for inheritance should be moderated so that it should give successor greater business discretion.

1 Importance of Family Business and Business Succession

1.1 Data About the Importance of Family Business

Data on corporate performance often show that smaller corporations suffer lower profitability, lower labor productivity, unstable employment and lower wage. Still, small companies, which are mostly owned or managed by family in Japan, constitute more than 99 % of the whole companies. They also create more than 70 % of

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the employment. While 3 quarters of the household is from earned income, household in turn constitutes 60 % of the GNI.[1] It can be concluded that small corporations is responsible for roughly 30 % of the GNI in Japan. Moreover, family corporations often preserve traditional craftsmanship or industrial skills that are handed down in systematic ways. The corporations operating over 100 years count more than 10 thousand, which are more than seen in whole Europe.

1.2 Business Succession in Family

According to the recent survey,[2] most of the businesses (87 %) started after 1949 (WWII), and underwent the process of incorporation (personal businesses were only 14.7 %). 54.5 % of the family corporation presidents are now over 60, and 45.1 % of the businesses are still under the original entrepreneurs. It can be said the family corporations are now in amidst of the wave of retirement and succession.

The respondents of METI's questionnaire were 50 % small businesses (five or fewer employees in manufacturing and 20 or fewer employees in other areas) and 50 % larger non-listed corporations. In 70 % of these businesses, the number of regular, non-familial employees surpassed that of familial employees. Presidents who wanted their corporations to survive after their own demise were less concerned with their family's welfare (41 %) and more concerned with existing employees (81 %) and their corporate responsibilities to continue to serve their customers (45 %). However, as most corporations are closely held, i.e., they have provisions in their articles of incorporation that prohibit share transfer without the approval of other shareholders at their shareholders' meeting, the top two requirements for a prospective successor are that the candidate is a family member (48.7 %), following that they are fully conversant in that particular field of business (49.2 %). Even so, business succession within families is becoming increasingly difficult in aging society, with 62 % of the surveyed company presidents not having decided on their successors, and 52 % citing their rationale as being unable to find, decide, or agree on any one particular person. It is likely that their children are not interested in the family business or there is a power struggle among family members.

Before 1992, 94 % of the small-sized and 91 % of the middle-sized businesses were succeeded to family members of the companies' former presidents. In the last 10 years (2002–2012), only 76 % of small-sized businesses went to a family member. Of other businesses surveyed, 13 % went to former directors or employees,

[1] How we should calculate the impact of small corporations to the Japanese economy is not established. It is recognized that the co-relation between earned income and GDP is betting weaker from around 2000. Above indicated percentages are taken from Saito (2013) of the Nissei Life Insurance Research Institutes' report.

[2] The survey was conducted by the Ministry of Economy, Trade and Industry in questionnaire form on 30,000 small or medium sized businesses in Japan. METI (2013).

and 10.5 % went to complete outsiders. For mid-sized businesses, only 54.1 % went to family members. In 24.6 % of these cases, an employee or a director became the next president, and 21.4 % of the businesses went to outsiders. The questionnaire did not inquire about the details of share transfer; however, it is likely that potential or intended new owners have not acquired enough ownership in the company by the time of the decedents' death to prevent interference from heirs. This situation brings one to a logical conclusion—presidents-to-be needs not only to acquire skills and knowledge but also to secure his position as a controlling shareholder at the time of the succession.

1.3 Legal Background

Japan introduced western legal system through rapid modernization that started in late nineteenth century. Before the end of WW II (1945), old Civil Code allowed only the eldest sons to inherit the entirety of their father's property (succession to a house). This was rational for the society in which more than half the population was engaging in agriculture. During that period, this practice maintained family stability, land ownership, and livelihood continuity. After the war, Occupational Forces began to enforce inheritance through equal distribution, which shaped the current Civil Code of Japan as evidenced by Article 900 cited in Sect. 2.3.

Japanese Commercial Code was also established in late nineteenth century, reformed after WW2 before corresponding articles were reorganized into Companies Act in 2005. But the Code did not have any particular articles, compared to the present Companies Act, concerning family owned business or inheritance. It is famous that there were most powerful family corporations called "Zaibatsu" which cooperated with government, developed railroads and mines in and out of the country, operated iron manufacture and banking and controlled great part of the Japanese economy. Those family businesses had their own management organization for controlling the flow between families and business, which made integrated business succession possible outside the legal system.

The disadvantage of newly introduced equal succession was immediately recognized in agricultural industry. After WW2 Occupation Forces dissolved Zaibatsu, confiscated properties and lands of large landowners, denied tenant farming. As a result, countless small independent farmers were created. Often, when such farmers died, the new rule of equal distribution caused the lands to be divided into such small parcels that their children were unable to make a living on their portion of inherited land. To maintain a viable scale for farmland while protecting each heir's right, bills for Civil Code reform were repeatedly introduced but not passed in the Diet (1947 & 1949). While the legislature was failing, farmer families were finding ways to cope with the problem. Investigation by the Civil Law Association revealed that in many cases, farmer families were negotiating effectively among themselves.

In farming families, heirs who were not going to become farmers were usually given better education and greater financial aid for house-building or marriage. They reciprocated by renouncing their claims or signing agreements on the division of inheritable lands or certificates for special benefits, so that heirs who would remain farmers could inherit an intact farm, thus preserving the land ownership and the business processes of the farm.

Outside of Civil Code reform, the legislature enacted various special laws to preserve farmland inheritance. The Special Measures Acts of 1962 and 1975 introduced tax payment grace periods for lump sum donations during lifetime or upon inheritance to farmer heirs. Taxation assessed on market value of inherited farmland surpassing the actual agricultural value was postponed and eventually dismissed if the land remained in agricultural production for more than 20 years after the inheritance. However, in the 1970s, rapid urbanization made it more difficult for heirs to comply with decedent farmer's wishes. As the asset value of farmland shot up, more heirs began to claim rights for their shares. At the same time, the inheritance tax on previously uncultivated farmland also shot up. As a result, presently, more farmlands are divided and sold to the real-estate development industry, thereby reducing the amount of farmland available for agricultural pursuits.

There are similar problems for small personal businesses. To stimulate small business succession, various special tax treatments were introduced. Inheritance tax on owner shares is now reduced by 10 %. If an heir succeeds and continues a business, the inheritance tax for the real estate used for the business is reduced by 80 %. Usually, the latter treatment was more advantageous than the former, as the business-use conditions were easily recognized. However, in 2004, the transfer tax on non-listed corporate shares was greatly reduced, while in 2013, there was a decision to apply the business-use condition more strictly on real-estate tax reduction. They might cause changes to personal business succession.

1.4 Tension Between Company Law and Inheritance Law

The inheritance law with equal distribution and compulsory portion has been a part of the ideals after the war of the society where everyone has equal chance. This has worked to limit the rooms for ex-ante planning. On the other hand, there are many corporations with tradition that needed integrated succession. There were obstacles for business succession, but corporate law has not set out a special standard for family business succession, as will be seen below, and the role of promoting business succession was carried upon by tax or special laws. Practitioners have tried to overcome the Civil Code institution ex-ante using articles of incorporation, but corporate law has its unique interest in minority shareholder protection and does not permit obvious exceptions at inheritance scene. As a result, practitioners' effort often comes out in vain when inheritance actually occurs.

2 The Structure of Inheritance Law

2.1 Principles of Inheritance Law

Before WWII, Japanese family system stood upon succession to the house. Eldest sons usually acceded to fathers' property. After the war, inheritance by equal distribution was introduced. Japanese inheritance law is articulated in Part 5 of the Civil Code. It is a product of a difficult coordination between a decedent's testamentary freedom, the freedom of choice of the heirs, and the protection of weaker heirs.

2.2 Range of Testamentary Freedom

In a testament, a testator can designate any person to inherit his/her (hereinafter "his") estate (compulsory portion non-inclusive), determine any share in inheritance for joint heirs, or entrust third parties to determine the share (Art. 902(1)). Civil Code also allows the testator to dispose his estate as a contractual gift upon death which is treated as a bequeathment (Art. 554). Furthermore, the testator can determine which specific property goes to which heir, entrust such decisions to a third party, or prohibit division within a designated period of time not exceeding 5 years after death (Art. 908). The testator's intention overrides the legal consideration for rights to special benefits (Art. 903(3)). The testator can also make bequests to beneficiaries who are not legal heirs, who acquire the same rights and obligations as other heirs. (Hereinafter, this report does not give specific explanation for beneficiary).

A testament can include burden (Art. 1002), conditions or period of time for the execution of parts of the testamentary contract (Arts. 991, 994). Conditions are those by which the heirs are not obligated. Heirs are obligated to fulfill the burden, but if a designated heir thinks that the duty is too great compared to the value of the inherited property, he/she (hereinafter "he") can renounce his/her duty or share (Arts. 1002, 1003). An inheritance with requirements effectively occurs even if the designated heir does not fulfill the requirements. Therefore, such a renouncement grants other heirs the right to demand the fulfillment and to petition for the annulment of the will if the designated heir does not perform his obligations after some time of the demand (Arts. 1027, 1015). According to the case law, a testament which attempts to realize the effect of fideicommissum is effective, if it can be read as using one of above schemes.

2.3 Statutory Inheritance Law

If there is no designation, statutory inheritance law comes in. Under the law, joint heirs can negotiate how an estate is to be divided (Art. 907). Furthermore, an heir can abandon his designated position (Art. 915) or reduce his legal portion by

declaring that he have received enough benefit during the decedent's lifetime (Art. 903). Unfortunately, heirs often fail to reach an amicable agreement, in which case, the bottom line is a court decision which usually follows the rule set out in Article 900. Articles 900 and 901 of the Civil Code prescribe the statutory share (for heirs per stirpes, *see also* Arts. 889 and 1044). Civil Code Article 900 states (translation from Japanese Law Translation (2009));

If there are two or more heirs of the same rank, their shares in inheritance shall be determined by the following items:

(i) if a child and a spouse are heirs, the child's share in inheritance and the spouse's share in inheritance shall be one half each;
(ii) if a spouse and lineal ascendant are heirs, the spouse's share in inheritance shall be two thirds, and the lineal ascendant's share in inheritance shall be one third;
(iii) if a spouse and sibling(s) are heirs, the spouse's share in inheritance shall be three quarters, and the sibling's share in inheritance shall be one quarter;
(iv) if there are two or more children, lineal ascendants, or siblings, the share in the inheritance of each shall be divided equally. The share in inheritance of a sibling who shares only one parent with the decedent shall be one half of the share in inheritance of a sibling who shares both parents.[3]

It can be said from this, that, in principle, only a spouse, child, lineal ascendant, or sibling are listed as heirs, which is a narrower list than the range of legal relatives set out in Article 725. Lineal ascendants or siblings of the decedent are of a lesser rank in inheritance compared to children, and the former become heirs only when the latter do not exist. On the contrary, a spouse always becomes an heir, regardless of the ranks of other heirs (Art. 890).

Before 2013, the subsection 4 of the article 900 contained the provision that the share for a child born out of wedlock is one-half of that of the share of a child born through wedlock. In a Supreme Court judgment dated Sept. 4, 2013, this provision was declared unconstitutional. Soon after this, the law was amended and declared effective after Sept. 5, 2013. A common law wife or a de-facto adopted child is not a legal heir and not entitled to either a compulsory or contributory portion.

The important role of Civil Law is that it secures the well-being of the bereaved family. A decedent or a third party cannot violate the legally reserved portion (Art. 902(2)). Civil Code allows a court to include the overall benefit each heir has received over the decedent's last year in calculating this compulsory portion (Art. 1030, 1044). The court also has the power to determine the amount of a "contributory portion" to a person amongst joint heirs who made special contribution through the provision of labor or in the form of property relating to the decedent's business, medical treatment, or other means, taking into consideration all the surrounding circumstances (Art. 904–2). The determined portion is deducted from the estate of

[3] The interpretation of the article of major Japanese law is now available online (Japanese Law Translation (2009)). This is part of the government effort to make Japanese legal system more open abroad, but the interpretation is carried out by the third party and is not an official one.

the decedent and added to the contributor's share after it has been calculated according to Articles 900–902. This system works as the protection of family members that do not have power to negotiate their share, so it overrides both decedent's testament and heirs' agreement.

2.4 Business Succession

There is no special system in inheritance law that sets out a standard for unequal distribution to make business succession possible. In some areas like agriculture, special tax treatment has worked for promoting the same result. For corporation, the Companies Act allows to closed corporations vast freedom in choice of organizations and distribution of power between organs. For example, corporations can issue different classes of shares that are entitled to specified amount or share of dividend, that can designate certain members of boards, that can exercise the power of veto at the shareholders meetings, that has no right on dividends or on vote, or that with rights or duties to tender upon certain conditions (Art. 108). It also permits closed corporations to state in their charters about individualistic rights or obligations (Art. 109(2)). It also permits closed corporations to state in their charters about individualistic rights or obligations (Art. 109(2)). In addition, there are provisions that permit corporate share buybacks from heirs (Arts. 174–177).

The biggest obstacle for succession in any business field is the compulsory portion set out in Civil Code. As this portion works for the protection of weaker family member, any above mentioned scheme which compromises the system must be examined closely. We will discuss it later in Sect. 4.3.

3 Legal Incapacity Before Death

3.1 Special Provisions or Regulations in Case of Dementia

Before going onto the issues of succession upon death, one major problem must be solved: the legal incapacity before death. As the number of owner-presidents in their 70s and older is rapidly growing, there is substantial risk of business leaders succumbing to dementia or other age-related, permanently debilitating conditions. There are no special provisions that automatically assign, or force the appointment of, legal agents in such circumstances. Civil Code provides the possibility of appointing a guardian for an adult (Art. 8), a curator (Art. 11), or an assistant (Art. 15), based on the level of incapacitation. This adult guardianship system was newly introduced to the Civil Code in 2000 for the protection of the well-being of aged and/or demented persons. Upon the family's request, family courts usually appoint a relative as the legal guardian of the impaired person. However, as families become more geographically dispersed, there is a growing chance that the appointee will be

an outsider, such as a judicial scrivener or a lawyer. A corporate president being under guardianship or curatorship is considered incapable of a director (Companies Act, Art. 331(1)). Therefore, an owner-president's dementia or disability forces a prompt election for a new director. As a legal representative, all of the above-mentioned appointees can exercise the rights of an incapacitated shareholder (Companies Act, Art. 310(1)). Therefore, the court retains the power to appoint a supervisor in cases it considers necessary (Civil Code Art. 849).

On the other hand, a court's decision on the need for assistance or on the commencement of voluntary guardianship does not form legal grounds to force presidential resignation. The Law for Contract of Voluntary Guardianship was newly incorporated into the Civil Code system in 2000. Under this contract, the assignee or the president's family must petition the family court to appoint a supervisor, so that the assignee can carry out the prescribed job under supervision. The power of assistants and contract-based guardianships are restricted. The former only has title to consent to the principal's major disposal of his asset or right only when the family court made such ruling (Civil Code Article 17(1), 13). The latter's scope of guardianship is described in a notarized document (Law for Registration of Guardianship article 5(4)) and the assignee usually cannot make decisions outside the usual course of the business. Directors can avoid immediate vacuum of power by contracting a guardian while he is still capable of judgment. But as the court does not interfere with the contractual guardianship without demands from interested parties, it is pointed out that there is a great risk that guardians continue to exercise their power even after the directors fell into dementia and make important decisions at the detriment of their wards or other specific shareholders (Arai 2006).

3.2 Precautions in the Articles of Incorporation

Companies Act does not have specific provision referring to dementia, but it allows the assignment of individual treatment in articles of incorporation. Using this scheme, some propose that directors set out an article like the following (Kawai 2007):

A president (A) can introduce a provision for amendment to the corporate articles for individualistic treatment to give only one share to an expected successor or a trusted agent (B):

B can exercise 10,000 vote for the said one share only when A loses the ability for judgment because of dementia, diminished mental capacity, serious psychological disorder or injury, or upon death….

However, such a clause may be in potential conflict with the Civil Code system, which has a rigid, court-involved procedure for the establishment of a guardianship. In addition, it is doubtful, if not outright impermissible, from the corporate law perspective as well. Firstly, it changes the overall number of voting rights, shrinking the power of preexisting out-of-inheritance shareholders. Supreme Court on 24 Apr. 2012 judged that the share issuance without shareholder meeting's special

resolution in closed corporations is ineffective. The judgment aimed at restricting the directors' power to change the content of options ex-post, but it implied that if the predetermined condition for share issuance for options is ambiguous and abusive, the true will of shareholders is that they are against the issuance. This will apply to the share issuance upon dementia.

4 Consequences for a Business in Case of a Death

4.1 Different Treatment of Participant's Death Between the Types of Enterprises

Most Japanese businesses are performed in corporate form, as it is more tax-advantageous than the sole proprietorship, and partnerships in Civil Code (Art. 667–688) do not have legal personality.[4] On the other hand, special laws are provided for each specific areas where the cooperatives prevail. Those areas are such as agricultural, fishery, consumers or health insurance.

There is major difference among types of organizations in the treatment of the death of investors. The business of a sole proprietor can be succeeded as mere property. Suppliers, banks, or customers might break off their transactions, but that does not mean that the successor does not have legal right to succeed the business.

A partnership continues even when a partner dies. To what extent it endures the decrease of members vary according to its character. The agricultural or fishery cooperatives dissolve when their membership drops to under 15 members. Their dissolution is executed under administrative authorization (Law for Agricultural Cooperatives (LAC) Art. 64(2)(4), Law for Fishery Cooperatives Art. 68(2)(4)). LLPs do not dissolve until only one partner remains (Limited Liability Partnership Act Art. 37), while LLPs for investment dissolve when a general partner or all the limited partners have withdrawn their investments (Limited Partnership Act for Investment Art. 13). General Incorporated Associations dissolve once there are no partners remaining (Act on General Incorporated Associations and General Incorporated Foundation (AGIAGIF) Art. 148).

When one partner dies, he legally loses his position as a member of the association (AGIAGIF Art. 29; LAC Art. 22 II, etc.). For shares of partnership, the claim for reimbursement may constitute an estate, which can be distributed and exercised. For a successor of a cooperative's partner, it is often indispensable to join the cooperative again to continue business, so reimbursement and request for participation are often an unnecessary burden. Therefore, many cooperative laws permit

[4] As of 2006, the Act of Authorization of Public Interest Incorporated Associations and Public Interest Incorporated Foundations is regulating partnerships formed for public interest work. Other general partnerships are regulated under the 2008 Act of General Incorporated Associations and General Incorporated Foundations. There are also special laws that were enacted in 1998 and 2005 that regulate the so-called Japanese Limited Liability Partnerships (LLPs).

exceptions for such successors. For example, the Small and Medium-Sized Enterprise Cooperatives Act (SMSECA) Article 5–14(3) recognize anticipated successors who have received the transfer of the entire share of a cooperative member as qualified new members. Laws prohibit cooperatives from hindering or blocking the newly qualified member's participation (SMSECA Art. 14), so "squeezing out" with or without compensation is impossible. The situation is similar for agricultural and fishery cooperatives. In general partnerships, their articles of association must set out the terms for the acquisition of membership. It is up to each partnership to decide whether to automatically acknowledge an heir as a new member upon the original member's death. This type of partnership does not gather investments or distribute surplus; therefore, there is no right for reimbursement to be inherited by the heirs.

Corporations, which also continue after the death of a shareholder, are special in that the shares can become the object of inheritance. In Japan, there are numerous types of corporations under Companies Act of 2005. Former limited liability companies (Yugen-kaisha) are integrated into joint stock companies (Kabushiki-kaisha) and now regulated as joint stock companies. Former traditional categories of Goshi or Gomei kaisha, comprising unlimited liability members, and newly created Godo kaisha, comprising solely of limited liability members, are now combined into a new category called Mochibun-kaisha. For a Mochibun-kaisha, unless otherwise agreed, shares are not passed down to heirs (Art. 607(1)iii) and corporations are dissolved when no shareholders remain (Art. 641). In that case, heirs only have right for reimbursement (Art. 611(3)). The price for the share(s) must be determined based on the state of the company's assets at the time of the decedent's death (Art. 611). But even in this type of corporations, shareholders of these members have chance to agree transferability or inheritability of their shares in corporate articles. Heirs can agree to automatically become shareholders upon the death of the previous shareholder (Companies Act Art. 607, 608).

On the contrary, Kabushiki-kaishas are special in that they do not automatically dissolve even if there are no shareholders remaining (Art. 472) *but* right for reimbursement is not available. Therefore, the shares must be passed down to heirs as tangible property, and successor-shareholders should be allowed to exercise the related rights. The Companies Act requires such rights to be exercised through a chosen representative before division (Art. 106). The Supreme Court has confirmed that a representative approved by the successors of majority of the inherited portion may effectively exercise the shareholder's rights (Supr. Ct. Jan. 8, 1997).

4.2 Destiny of a Share of a Joint Stock Corporation

Who should succeed the share and what proportion each heir should be distributed can be freely designated in testament, and the corporation, its board, or other shareholders does not have a say. But if the heir were not willing to become a shareholder or were not welcomed by other shareholders, either he or the corporation would

need an exit. A successor of the shares of a closed corporation[5] can, with the consent of the corporation and before exercising voting rights designated to him, offer the corporation that he tender the shares (Art. 162). This activity is treated as a part of the usual process of share repurchasing, except that other shareholders' first rights of refusal are not recognized (Arts. 162, 160(3)) once the repurchase and its price are approved at a shareholders meeting (Art. 156). Companies Act also takes care of the interest of integrated ownership for the benefit of other shareholders or successor-heir. A closed corporation may, for a limited time of 1 year after a previous shareholder's death (Art. 176(1)), and with corresponding provisions in its articles of incorporation and shareholder meeting's approval at each event (Art. 175), demand the new shareholder to tender his/her shares (Art. 174). For this scheme, there is some risk that successor heir control the shareholders meeting and set out an unreasonably low price for the cash-out. If one party claims such risk, the price cannot be negotiated and must be decided by a court (Art. 177).[6]

4.3 Statutory Provisions or Contractual Arrangements to Evade Compulsory Portion

Even if there are no demands for repurchase from either the corporation or the share-successors, the distribution that testators' last will intended does not always realize, especially when shares constitute a considerable part in his estate and surpasses compulsory portion. In many cases the value of the share had greatly increased during predecessor's lifetime and has comprised most of the estate, while the estate or heirs are short of cash, which makes the compensation negotiation difficult to get through.

Some academics have argued that Companies Act should introduce some provisions that allow lessening of payouts in successor squeeze-outs, in way of calculating substantively low price for repurchase, by enabling to set out ex-ante provisions in the articles of incorporation. But present reform goes only as little as permitting negotiation of anchoring the price under the strict supervision of the court. In this section, I first present the institute of Japanese compulsory portion and then discuss what schemes are available to avoid the application of compulsory portion provisions.

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[5] Following the definition of the closed corporation, the transferability of the share is upon the consent of shareholders (Art. 136). But the succession through merger or inheritance is called "general succession" and is not included in this process, to protect the expectation of the heirs. The procedures in the main text constitute a special treatment in case of inheritance.

[6] Under the present Companies Act, there are several processes through which the succeeded shares are transferred to the company. But all the processes accompany the step of getting through the negotiation with sellers or of getting a court decision. In those cases, the court must consider all the surrounding circumstances including the status of the company's assets (ex. Art. 177(3)), and most courts have remained faithful to going-concern value of the corporation.

4.3.1 Right to a Compulsory Portion

Compulsory portion, to which heirs or the third party cannot object (Art. 902(1)), is admitted to spouse, parents and children. Siblings are not entitled. Civil Code Article 1028 states that the portion is one-third when the only heirs are parents, and one-half for other cases. For that portion, each heir is entitled to the legal share in inheritance set out in Article 900. No special percentage is provided for business property or shares.

If the successor's designated share trespasses the compulsory portion, damaged heirs can demand refunds (Arts. 1031). It is permitted that heirs renounce the portion only when they ask the court to permit the renunciation before the death of the predecessor (Art. 1043 (1)). This is to prevent weaker parties from being forced to ask against their will, so arrangement outside the court, for example declaration of renunciation in articles of incorporation with or without compensation, is not allowed. The heirs also have choice not to exercise their claim of abatement for the prescribed 1 year period, (Art. 1042). Civil Code generally permits compensation for the division of high-value property and thus makes it possible for one heir to succeed the whole, or at least the majority, of the share in the estate. This compensation is allowed for legally reserved portions as well (Civil Code, Art. 1041(1)).

4.3.2 Calculation of the Compulsory Portion

As compulsory portion is determined as the minimum percentage, the shares in estate need to be evaluated. Although there are no assessment provisions for the valuation of the assets in Civil Law itself, in practice the value of the business or share is calculated according to its current market value or going-concern value at the time of the possessor's death (ref. Civil Code Arts. 903, 904–2; Inheritance Tax Law Art. 22). Inheritance Tax Law differentiates the method of evaluating minority shares of closed corporation from controlling shares (Inheritance Tax Evaluation Basic Directive 188–2). The former is calculated from the present value of the expected dividend payments, but the latter is calculated from the value of the business itself. So the compulsory portion of the inherited share can also be of great value. This value will also be reflected in the court price determination within the corporate share buyback process introduced in 4.2(Companies Act Art. 177). This can be of help for weaker family members, but can be an obstacle to the successors short of cash.

Recently, several special laws have been enacted to evade compulsory portion payment problems. Firstly, the Act for Smooth Business Succession in Small and Medium-sized Enterprises of 2008 introduced special provisions for compulsory portions, as well as financial support and favorable treatment in inheritance tax.[7] It

[7] The reform of inheritance tax law is that 80 % of inheritance tax on up to two-thirds of a family corporation's shares can be suspended if the decedent was president and owner of over 50 % of the said share, and if the business continues for over 5 years after the succession of said controlling

set out a special rule for calculating compulsory portion for shares of closed corporations doing business for over 3 years. There are two types of possible agreement: the "exemption agreement," in which shares can be exempted from the calculation and the "fixed price agreement," in which the value of said shares is fixed at a price of a certain date (where the price was low enough for making monetary compensation possible), with a certification issued by a professional third party. There are strict conditions for getting qualified for these schemes: the decedent had to be the representative of the to-be-succeeded corporation at the time of agreement; the successor heir should not only become the representative but also acquire the majority of shares through succession; all of the anticipated heirs had to agree in writing to the use of said exemption; and such written agreement must be confirmed by the Ministry of Economy and Industry within 1 month of the agreement, and within another 1 month, be petitioned in family court for such permission. The agreement is effective when the permission is acquired. Compared to these strict conditions, the effect of the scheme seems unimpressive, because if all the heirs agree, they can always refrain from exercising their claim for compulsory portion, notwithstanding the existence of the special provisions. The advantage of this scheme is that it resembles the preexisting inheritance tax saving procedure.[8] In addition, the permission of the court is valid for all the members, contrary to the normal renunciation agreement, in which the permission is delivered only to each renouncing successor. If each heir wants to make renunciation conditional on the renunciation of the others, the coordination becomes very time-consuming and unstable.

4.3.3 Companies Act and the Arrangement Through Articles of Corporation to Exclude Other Heirs

There are no special provisions in Civil Code that allow corporation, owners of important property for the business (as farmland), or out-of-inheritance shareholders to influence the compulsory portion. There are again no special provisions in Civil Code that lower the percentages or apply special calculation methods for corporate shares.

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share to an heir-president under supervision of the Minister of Economy and Industry. If the heir continues to hold the share(s) until deceased, the suspended tax obligation will eventually be permanently cancelled.

As for the financial aid, Medium and small-sized businesses, including individual proprietors or representatives of said corporations, which have difficulty continuing business because of succession problems, can acquire loans from the Japan Finance Corporation with better interest rates. In addition, they can borrow above the ceiling in Credit Guarantee Corporation-guaranteed loans.

[8] To lessen the burden from paying tax, the inheritance tax law sets out the system of settlement at the time of succession. Under this system, predecessor transfers the share of the company to the successor as a gift before death and pays donation tax. The inheritance tax is calculated including this share, and the previously paid donation tax is deducted. The merit for this system is that the value of the share is calculated according to its price at the donation. There is a basic deduction of 25 million yen for the inheritance law, so if the predecessor could control the share price so that it become sufficiently lower at the time of donation, his family could greatly save the inheritance tax payment.

On the contrary, Companies Act provides many tools with which predecessors can either tackle or avoid the compulsory portion problem. Firstly, there are ways to compensate for the share after the compulsory portion was distributed under the Law. A corporation can have provisions in its articles to financially support certain shareholders by gift or lending or to help him refund for reserved portion holders' asset claims (Companies Act Art. 29). Such provisions are possible as long as they do not violate the conflicts of interest provisions (Companies Act Art. 356, 365) or prohibition of giving interest for exercising voting rights (Art. 120). Companies Act also admitted closed corporations to state ex-ante in their articles of incorporation that they can demand buy-backs to heirs (Art. 174), as is described in Sect. 4.2.

Secondly, there are ways, although more doubtful, that extinguish the share surpassing the compulsory portion at the time of the succession. Some practitioners advise that owners give out their actual share to minority shareholders or employees and acquire their consent for the issuance of new share after the owners' death with the exercise of option rights held by the successors. The value of the donated share will be calculated low, the share in estate will be reduced, while successors still retain the power to come back as the controlling shareholder. Some others suggest the use of previously described individualistic treatments. Article 109(2) of the Companies Act allows closed corporations to provide in their articles that each shareholder be treated differently with respect to matters regarding rights to receive dividends or residual assets distributions, or voting rights at shareholder meetings. This treatment does not consist of "content of shares," listed in Article 108, and thus is not required to be registered. But to introduce such a special treatment, presidents must request a change to the corporate articles at a shareholders meeting. Usually, more than half of all shareholders must be present at the meeting, and more than three-quarters of all shareholders must support the proposal. For this treatment, one possibility is to create one "personal share" that has 10,000 voting rights, only under the possession of the president (who is either a specified heir or the anonymous person who holds this title) (Kawai (2007)).

But all of those schemes with stock option or provisions must be construed in harmony with the overall institution of minority shareholder protection or of compulsory portion. For the former, we have to have the Supreme Court case mentioned in Sect. 3.2 in mind. The shares issued at the exercise of the stock option which are too favorable to the successor or which gives too much discretion to him as to the period for exercise etc. might be construed ineffective. The law is also very conscious about the minority shareholder protection in share buyback process. On Nov. 28 2012, Tokyo High Court decided that the corporation can selectively ask heirs to tender the share even before the actual successor(s) of the share is not yet agreed upon. Consequently the minority shareholders have an enormous chance to choose the heirs to be kicked out, as the vote of the all the heirs as preexisting shareholders is excluded in this process (Art. 175).[9] Lastly, article 109 Sub. 3 of the Companies

[9] This does not always harm heirs. The law states that the period for buy-back starts when corporation knew that the succession event occurred. The Tokyo High Court held on 16 Aug. 2006 that the

Act orders that the share of the person treated individually under the articles of incorporation should be deemed as class shares. For a class share, approval at the meeting of the class-share(s) which would suffer the detriment, as well as that at the ordinary shareholder meeting, is needed at its introduction. The individualistic agreement in closed corporation is likely to influence every shareholder and so, in turn, would need unanimous approval. These statutory protections also mean the protection of non-successor heirs. For options or individual treatment, the issuance price is often set unreasonably low compared to the value transferred, and in that case the blockage of the issuance by preexisting shareholders can also help non-successor heirs.[10]

For the buyback scheme, the Companies Act requires court determination of the price, expecting it considers the value of the enterprise. The scheme under 2008 special law, which permits to lower the compensation for the compulsory portion, accompanies professional, administrative and court supervision over the negotiation process. All in all, the heirs can be said to be incurring great risk using option, share buyback, or individual treatment scheme. There is no shortage of potential tension between the general demand of ex-ante planning (of distribution of controlling rights and squeeze-out process) and the general need to protect the welfare of each heir or minority shareholder's rights ex-post (at the time of actual distribution).

4.4 Exercise of the Shareholder's Rights After His Death

To keep a business undivided, a decedent can make specific testamentary gifts in a last will to automatically transfer property to a legatee, leaving no gap in corporate control (Supreme Court judgment Nov. 8, 1916 Civil 22–2078). But if such arrangement had not been made, the inherited shares become jointly owned by the heirs until the division agreement is formed. To exercise the deceased shareholder's rights, the heirs must designate one representative and notice his name to the corporation unless it permits each member to exercise the rights respectively[11] (Art. 106). They can skip this process when the corporation agrees, but often they do not agree who would be the representative. Supreme Court on 28 Jan. 1997 stated that the heirs can select the representative with the simple majority of the price of the share tentatively distributed according to the legal inheritance ratio.

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corporation could not extend this period for the reason that it couldn't know the actual successor of the share, who must be negotiated out afterwards, at the time of succession.

[10] The individual treatment (for example, a share have 1,000 vote only when it is under the possession of the successor A) makes it extremely difficult for all of the shares to evaluate their value. How they should be evaluated under accounting or tax law is yet to be determined.

[11] Tokyo High Court on 28 Nov. 2012 decided that the exercise of the vote by one of the heirs, if without discussion and agreement among heirs, is unlawful even if the corporation admitted it.

5 Ex-ante Planning by the Predecessor Versus Freedom of Successors

5.1 Range of a Last will

A decedent might want to direct the sale of their business or shares to a particular buyer and the distribution of the proceeds among his heirs. Civil Code allows a last will or testament to direct the heirs to complete these processes. A decedent can make inheritance conditional to a business sellout or require the beneficiary to implement the sale. The predecessor can describe methods, conditions, purchaser, selling price, etc.. Though the sale of controlling share is insufficient for the successful business succession, the disposition can be controlled completely though the last will. A will can also contain the provision determining the next generations of presidents and the next successor after the death of original one, but only under certain conditions (see *infra* Sect. 5.3).

The above is possible because, as mentioned in Sect. 2.2, a last will can include burdens, conditions or periods of time for the execution of parts of the testamentary contract (Arts. 991, 994). The heirs are obliged to follow the instruction for the endowment with burden. If a designated heir thinks that the duty is too great compared to the value of the inherited property, the person can renounce their duty or share (Arts. 1002, 1003). Even so, the endowment with burden effectively occurs and such a renouncement merely grants other heirs the right to demand the fulfillment and to petition for the annulment of the will, if the designated heir does not perform their obligations after some time of the demand (Arts. 1027, 1015).

Of course those varieties of agreement are possible also as contractual gift upon death (treated as a bequeathment, Art. 554) or business transfer in a contractual agreement.

5.2 When Does a President Choose Anticipated Succession?

In some cases, a president chooses to dispose of his share before his death (anticipated succession). Anticipated succession is a gift and treated under Civil Code or tax law as such. A president might choose to make a gift before death in order to save the payment of inheritance tax using settlement scheme but in some cases other consideration matters.

When a president chooses an outsider as his successor, he might plan the share transfer during his/her lifetime, as family shareholders often refuse to accept an outsider. The Companies Act articles 136–145 require a share acquirer of the shares with restriction on transfer to obtain the approval for participation at a shareholders' meeting. If the transfer is not approved, shares must be tendered to the corporation or to a designated third party (Arts. 141, 142). The tender price is decided by a negotiation between the corporation and the acquirer or by a court decision (Art. 144).

Once a transfer has been denied, the demand for approval can be withdrawn only with corporate consent (Art. 143). The former president can exercise his de facto influence to prevent such results; however, as there are likely to be future conflicts, it is more secure for the outsider president to undertake a buyout to acquire all shares. Obviously, a buyout requires considerable cash outlay.

When a president wants to transfer shares before death and still retain a voice in the company's management or to maintain some income after the share transfer, there are three main options. First, the shares can be sold with conditions such as paying in installments or as the past owner retaining the right of withdrawal or right to direct transferee's votes for some limited period of time. The schemes of usufruct, pension, insurance or phased/conditional share transfer can be used if the donor and successor so agreed, so donor can maintain his influence on the successor. The second option is to provide a class share. Under Article 108 of the Companies Act, different types of shares can be created that have limited voting rights or veto powers, that can designate certain members of boards, that have rights to specified amounts of dividends, or that have rights or duties to tender upon certain conditions (Art. 108). For implementation of such shares, the corporate articles must be amended with support of two-thirds of the shareholders' votes at a bona fide shareholder meeting, and the new share must be registered (Art. 911-3-7). The third option involves the above-mentioned individual treatment. However, the validity of this option has not yet been fully tested. A trust is also a possible instrument for anticipated succession, but it is disproportionately costly.

5.3 Fideicommissum

A decedent often wants to secure influence of, or income for, heirs after his death, or to decide a second or third business successor for the business. To preserve a long-term influence on a company's activity, the decedent might include burdens and conditions relating to business practices and shares in the last will. As the Companies Act neither acknowledges nor prohibits such clauses, it has been argued in courts whether a decedent's will can sequentially designate several successors with specific periods or conditions that trigger such successive transfers (the clause is called "inheritor testation"). Inheritance law scholars have criticized the wills that bind people long after a testator's death to be overly restrictive, according to the purpose of securing the freedom of a recipient or beneficiary.

Though there are no provisions that affirm or prohibit fideicommissum in Civil Code, a Supreme Court precedent (Supr. Ct. Mar. 18, 1983) affirmed the effect. The Supreme Court suggested three possibilities for the construction of such a will:

- a testamentary gift with burden to the second legatee;
- conditions that are fulfilled only when the first legatee owns the designated property upon his death; and
- a period for the second legatee that begins upon the first legatee's death, where the former holds only an usufructuary right to the latter during his lifetime

Many scholars dissent this decision. They argue three points: the will binds the first legatee for an unjustly long period; the second legatee has no means for protection if the estate is disposed of while controlled by the first legatee and there is a tendency to create overly complex and unstable legal relationships. Neither supporters nor opponents believe that third legatee designations can be effective.

From the Companies Act perspective, the period for which shareholders consent held effective, regardless of its form as last will, donation contract, trust or class share, should be short enough to enable business to adapt to the changing society. On 30 May 2000, Tokyo High Court held that the shareholder agreement that binds the remuneration of owner-director brothers and then cousins become too ambiguous and ineffective after 10 years.

6 Foundation and Trusts as Instruments for Business Succession

Lawyers who advocate for testators' desires to control the long-term future of their businesses have suggested the use of trust instruments. Before 1983, lawyers advised establishing a trust by prescribing the details in the last will (Trust Act Art. 89(2)). However, designating sequential beneficiaries for a trust had been argued to be invalid, being contrary to Civil Law doctrine. In 2007, the Trust Act was reformed to contain in Article 91 a special rule for trusts with provisions for the acquisition of new beneficial interests by another party upon the previous beneficiary's death. Under this plan, the number for successive beneficiaries is not limited. Furthermore, beneficiaries need not to be born at the inception of the trust. The duration of trust is limited to the death of the beneficiary who receives its rights 30 years after its establishment. But in other words, the Trust Act made clear that the trust that lasts as long as 50–60 years is legally permitted. The reform clarified that successive nomination is possible when parties choose to use this type of trust. One remaining problem is that the trust property is taxed under inheritance tax law at every beneficiary's death. Moreover, beneficiary rights succession does not escape the Civil Code provisions for reserved portions; therefore, each beneficiary also incurs the risk of adjustment on each succession.

Another possible avenue is to set up a general foundation. Such foundations are regulated under Act on General Incorporated Associations and General Incorporated Foundation (AGIAGIF). This type of foundation can be created by description in a last will (Art. 164) and can be empowered to do business for profit. It can operate for the purpose of supporting the life of bereaved family members; however, distributing surplus or residual assets to its founder is not allowed. Provisions that evade this prohibition are deemed ineffective (Art. 153(3)). In the last will, the founder should state his intention to create a foundation and describe what should be written in the foundation's articles. The executor of the will should cause the articles to be created, have it notarized, choose directors and auditors and authorize a contribution to the foundation of more than three million yen. Beneficiary family members may become councilors of the foundation and influence its operation. Legal entities can-

not be foundation councilors (Art. 65). Including future family members as subjects of support in a foundation's articles is possible; however, ambiguous descriptions of such beneficiaries are likely to be problematic. Foundations can last as long as there is continued activity (Art. 203) and there is no minimum duration.

Foundations seem to be more flexible than trusts; however, there are some drawbacks. First, the founder cannot be a beneficiary, and the restriction of retention of the fundamental property is a significant obstacle for future distribution. Second, there are lots of legal uncertainties regarding foundation and operation of foundations which usually require professional corporate trustees. The system is often costly, technical, and even more unfamiliar, compared to trusts, to most Japanese families.

7 Analysis and Conclusion

It can be said that the recent legislature has tried to re-design the tangled problems of business succession, especially about compulsory portion in Civil Law field. But as there is strong value of the welfare of weaker family members, the new system still premises the rigid supervision and lacks flexibility.

There are different types of conflicting interest in Companies Act. It seems that the minority shareholder protection in Companies Act greatly limits the expectation of heirs. In some cases it work positively for the protection of the non-successor heirs, but in other cases it damages heirs as a whole. Neither legislature nor scholars has proposed a solution for harmonizing conflicting values of Civil and Companies law. In addition, the will of predecessors seems to be a significant hindrance to the discretion of new directors facing rapid change of circumstances after succession. For this, discussion will be needed on the different disciplines of the entities which can be vehicles for business succession.

For both problems, the articles of Japanese Companies Act needs to be interpreted more enabling than mandatory, in order to realize more integrated succession. Still, there is considerable risk that some practitioners propose abusive use of free arrangement once enabling interpretation is established. Guidelines, model cases and other soft-law might be effective to suppress questionable practice.

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Business Succession in Malaysia

Chan Wai Meng and Usharani Balasingam

Abstract The Malaysian legal system is much shaped by her historical ties with England, and her multi-ethnic society. Different sets of general principles on succession are applicable to a person who dies a Muslim and to a person who dies a non-Muslim respectively. In addition, native customary law has an impact on the succession rights of natives residing in East Malaysia. The Islamic law of inheritance is restrictive as a Muslim may bequest only one-third of his/her estate to persons who are not his/her *Koranic* heirs. The deceased *Koranic* heirs will receive prescribed entitlements. In contrast, a non-Muslim can bequest his/her entire estate subject to making reasonable provisions for dependants who otherwise may make a claim under the Inheritance (Family Provision) Act 1971. Apart from this restriction, the right of a person to plan the succession of his/her interest in a business vehicle in Malaysia may be thwarted by the constitution of the said vehicle. Thus, instead of letting the transmission of his/her interest to take effect after his/her death, a person, immaterial whether he/she is a Muslim or a non-Muslim, may organise it to take place before his/her death by effecting an outright gift, setting up a trust or by establishing a foundation. A non-Muslim can also establish a testamentary trust under his/her Will. These tools may also be used to protect the deceased's estate especially where the beneficiaries are infants and thus, a protective trust is required.

1 Introduction

According to the latest survey conducted by the Doing Business Project (2013), Malaysia ranked 6th among 189 economies on the ease of doing business in the world (World Bank Group). This is a feat indeed for Malaysia which is a developing country. However, the index adopted by the Project did not include the measurement

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pertaining to the ease of implementing the succession plan of a person in business. This might be important for a person seeking to set up business in another jurisdiction, for he/she might want to know whether the business could remain with the family upon his/her demise.

To put in place a succession plan which is valid, the following issues are pertinent and must be noted. A person intending to set up business may be interested to know whether a bequest in a Will shall be given effect. For this, it is important to have an understanding on the inheritance law as well as its interaction with the rules regulating the various types of business vehicles. He/She may also want to establish a trust to protect his/her estate for his/her descendants within the perpetuity period. If his/her intent is to benefit the public community, then a charitable trust or a foundation may be set up. Another side issue which is also pertinent is the protection that is available in the event he/she suffers legal permanent incapacity.

This Report examines the Malaysian perspective on the above mentioned issues. It is organised as follows: this introduction section is followed by a short write-up on Malaysia whose legal system is shaped by her historical ties with England, and her multi-ethnic society. Section 3 examines the general principles of inheritance. It will be seen that there is basically two different sets of principles: one that applies to a person who dies a Muslim and the second set applies to the others. The protection available to protect a person who suffers from legal incapacity is discussed next in Sect. 4. Section 5 deals with the inheritance rules with regard to interest in a business vehicle established in Malaysia. There are four types of business vehicles, namely a sole-proprietorship, partnership, limited liability partnership and limited company. They have different rules. This will be followed by an examination on the types of tools used to protect wealth. Section 7 concludes.

2 Background of Malaysia

Malaysia is a unique nation, a Federation with 13 states and three (3) Federal Territories. It comprises of East Malaysia (Sabah and Sarawak) and West Malaysia, separated by South China Sea. Malaysia practices Parliamentary democracy with Constitutional Monarch. It is a multi-ethnic and multi-cultural nation, with Islam as the religion of the Federation, and allowing other religions to be practiced in peace and harmony in any part of the Federation (article 3 of the Federal Constitution). Approximately 61 % of her people practice Islam.

The Malaysian legal system is much shaped by its unique features and history. The colonial British rule has resulted in the adoption of English law, subject to modification to suit the local conditions. The general reception of English laws into the States of West Malaysia, Sabah and Sarawak are governed under section 3 of the Civil Law Act 1965, whereas the reception of commercial laws is pursuant to section 5 of the said Act.

In addition, Malaysia practices a dual legal systems and each has its own court system. The dual legal systems consist of first, the legal system which is secular and applies to everyone irrespective of race and religion; and secondly, the *Syariah* legal

system, which applies to Muslims on family matters such as matrimony, inheritance, custody of children, and certain religious offences.

Malaysia legal system also includes a native law system which is applicable in the states of Sabah and Sarawak and then only to the natives. Hence there are also differences in the laws applicable to West Malaysia, and Sabah and Sarawak.

All these result in a unique Malaysia legal system which is different from that of other countries.

3 General Principles of Inheritance

What law of succession is applicable to a deceased's estate depends on whether the property is a immovable or movable property. The court in Shaik Abdul Latif v Shaik Elias Bux (1915) held that the law applicable to immovable property is the law of the place where the property is situated, whereas for movable property, the distribution of the movable property depends on the law of the deceased's domicile when he dies.

Further, the existence of a valid marriage is paramount in determining any claims on a deceased's estate. Section 12 of the Wills Act 1949 (applicable to West Malaysia) protects the testator's widow(er) by revoking any Will made by the testator before his/her marriage unless it is made in contemplation of the marriage. In addition, a valid marriage and legitimate heirs would change the entitlements of other heirs in an intestate situation.

For Muslims, their marriages must be solemnised according to the statutes pertaining to the Islamic family law enacted by the various states in Malaysia. For non-Muslims, their marriages are recognised by law if they are properly solemnised and registered under the provisions of the Law Reform (Marriage and Divorce) Act 1976.

Another element which is of equal importance in determining the inheritance law applicable for the purpose of distribution of a deceased's estate is whether the deceased dies a Muslim or non-Muslim.

3.1 Where the Deceased Is a Muslim

Where the deceased dies a Muslim, then the Islamic principles on inheritance will apply.

3.1.1 Limited Testamentary Freedom

According to the general principles of Islamic law of inheritance, a Muslim may bequeath only one-third of his/her estate in a Will. In the case of Shaik Abdul Latif v Shaik Elias Bux (1915), it was held that a Muslim testator can dispose not more than one-third of his/her property at the time of his/her death with the remaining

two-thirds to descend in fixed proportions to those affirmed as the testator's heirs under the Islamic law of inheritance (*Koranic* heirs).

It can be said that the Islamic rules of distribution of the two-thirds of a deceased's estate in case of a Will or the entire of the deceased's estate where there is no Will is akin to intestacy for the non-Muslims setting in the Distribution Act 1958. We will see in Sect. 3.2 below an heir's share in the estate of a non-Muslim who dies intestate is also predetermined.

Islamic law recognises a conditional bequest that has some legal benefit to another person including the testator and his/her heirs. Further, the condition attached to the bequest cannot be forbidden or contrary to the purpose of *Syariah*. Marican (2008) gives an illustration that the conditions that the legatee "does not sell (the house) or let (the house) out, and that on the legatee's death it will revert to the testator's heirs" are void. The legatee takes the house as an absolute owner.

Islamic rules of succession also recognises contingent bequest. According to Marican (2008), the bequest is not operative unless and until a specified event takes place or is fulfilled. The testator may also set the circumstances when the bequest is revoked, for example bequeathing a sum of money to the testator's sister "if she is unmarried at the time of my death".

It should be pointed out the position of Muslims in Sarawak and Sabah is different. According to Halim (2010), the anomaly in Sarawak is due to section 6 of the Sarawak Muslim Wills Ordinance 1896 that the division of property in Sarawak shall not necessarily be regulated by Islamic law of inheritance but shall be in accordance with the desire and wishes of the testator. According to Marican (2008), the court in the case of Shariffa Unei v Mas Poeti, it was held that a Will made by a Malay in Sarawak bequeathing his property to his adopted daughter was valid as it was recognised by Malay custom in Sarawak. According to the custom, an adopted child stands in the same relation as a legitimate child. This is contrary to the Islamic law of inheritance which does not recognise the right of an adopted child.

In Sabah, the Will Ordinances 1953 provides that a Will made by any native or Muslim according to native law or custom or Islamic law, as the case may be, is valid even though it is contrary to the provisions of the Ordinance. In addition, the Ordinance provides that it shall not be construed to enable any native to dispose his/her property by Will in a manner contrary to any law or custom having the force of law applicable to him/her at the time of his/her death.

Hence, the positions of Muslims and natives in the East Malaysian states, namely Sarawak and Sabah, differ from that of the West Malaysia.

3.1.2 Compulsory Portion

After distributing the bequested portion of the estate, the balance of the deceased Muslim estate will be distributed to the deceased's *Koranic* heirs, which include the deceased's spouse, child(ren) and parent(s) according to their entitlements in Islamic law. The Islamic law does not recognise an adopted child for the purpose of distribution of inheritance. With regards to the position of an illegitimate child, the illegitimate child cannot inherit from his/her biological father. Similarly a man cannot

inherit from his illegitimate child. However, the illegitimate child can inherit from his/her mother and family members. Similarly, they may inherit from the illegitimate child (Marican 2008).

Islamic law determines the heirs and the proportion of their entitlements. Any bequest in a Will to an heir is not valid unless the testator's other heirs consent to it after the testator's death.

There are four (4) schools of Islamic jurisprudence, namely the Hanafi, Maliki, Shafi'i and Hanbali. In Malaysia, most Muslims prescribed to the teachings of the Shafi'i school. Marican (2008) lists the heirs of a deceased Muslim who prescribes to the Shafi'i school and their entitlements in Appendix 1 of his book. Generally, the spouse and children are provided for, with male heirs getting double that of the female heiresses. Another general point which is pertinent is that if a Muslim dies leaving only a spouse or female descendants, e.g. wife with no other relatives, or wife with daughter(s), or daughter(s), a portion of his estate will go to *Baitulmal*. *Baitulmal* is a public treasury maintained for the benefits of the general body of Muslims (Marican 2008).

3.1.3 Succession Plans

However, there is no prohibition on a Muslim from gifting more than one-third of his/her estate during his/her lifetime. Similarly, a Muslim may favour one or more of his/her heirs over others by gifting his/her assets to them during his/her lifetime. This was affirmed by the court in the case of Re Man bin Mihat, deceased [1965] 2 MLJ 1. Suffian J succinctly explained the Islamic principles as follows:

> Muslim law rigidly prescribes the share of every heir, and no alteration of these shares may be made by Will, for a bequest to an heir requires the consent of all co-heirs and a bequest to strangers may not take effect beyond one-third of the testator's estate, but there are no restrictions beyond these two limitations. So it is lawful for a Muslim to alter the prescribed shares of his heirs by disposing outright during his lifetime part or the whole of his property to a favoured wife, either directly or by way of gift *inter vivos* or directly through trustees.

3.2 Where the Deceased Is a Non-Muslim

Where the deceased is a non-Muslim, then the distribution of the deceased's estate will depend on whether he/she dies testate or intestate.

3.2.1 Testamentary Freedom

If a non-Muslim testator dies leaving a valid Will, the testator's entire estate can be distributed according to the Will.

Under the Wills Act 1959 which is applicable only to West Malaysia, a testator can only leave one Will. The last Will should be dated and contain a revocatory

clause revoking all previous Wills. However, where there is no such clause and there are more than one Wills, the court will take the approach that where there is inconsistency in the provisions in the Wills, the provision in the earlier Will to the extent of its inconsistency will be revoked. In the case of Dougles-Menzies v Umphelby (1908), the Privy Council pointed out that however many testamentary dispositions a testator may leave: It is the aggregate or the net result that constitutes his Will, or, in other words, the expression of his testamentary wishes …In this sense it is inaccurate to speak of a man leaving two Wills; he does leave, and can leave, but one Will.

There may be a situation where a person makes two Wills with the intent that the Wills take effect separately (Biggs and Rogers 1995). For example, where a testator makes different Wills to deal with his/her different assets in different jurisdiction.

Another point of importance is the interest created under a Will may be either an absolute gift or a life interest. Further, a case of partial intestacy Will arises where the testator makes a will with regard to only a portion of his/her estate. The remaining portion will be governed under the law of intestacy (Tay Seck Loong @ Tay Seck Long & Ors v Teh Chor Chen & Ors 2005).

When a beneficiary (including a spouse) predeceases the testator, the bequest in his/her favour will lapse. In the case of Tay Seck Loong, the beneficiaries predeceased the testator and the gifts which were bequeathed to them lapsed into the residuary estate. However, this situation can be avoided by inserting in the Will a substitution clause providing for the gift to pass to another beneficiary (Chatterton 1996; Parry et al. 1996).

A statutory exception to this is found in section 25 of the Wills Act 1959. It provides that a bequest to the testator's child or issue as the beneficiary will not lapse even where the said child or issue predeceases the testator if the said beneficiary dies leaving a living issue at the time of the testator's death.

Further, it is important to note that in the case of testacy where a husband and wife die in circumstances that cannot be ascertained who died first, section 2 of the Presumption of Survivorship Act 1950 provides that there is a presumption that the older in age predeceases the younger. However, in the case of intestacy in a similar situation, section 6(3) of the Distribution Act 1958 provides that the intestate property shall be distributed as if the husband or wife has not survived the other. The rules pertaining to the distribution of intestate estate in Malaysia are examined next.

3.2.2 Succession to Intestate Estate

Where the deceased dies without leaving a valid Will, then he/she is said to have died intestate. The law regulating the succession to intestate estate in Malaysia, other than for the state of Sabah, is governed by the Distribution Act 1958. For the state of Sabah, the law applicable is the Intestate Succession Ordinance 1960.

According to section 4 of both Distribution Act 1958 and Intestate Succession Ordinance 1960, the distribution of movable property of the deceased shall be regulated by the law of the country in which the deceased was domiciled at the time of

his/her death. Yet, the distribution of the deceased's immovable property does not depend on the law of the said country. The immovable property will be distributed according to the principles laid down in the Distribution Act 1958 and Intestate Succession Ordinance 1960 (for Sabah), as the case may be.

In Sabah, the rules for distribution are found in section 7 of the 1960 Ordinance. With regards to the entitlement of the spouse and child, Rule 1 provides that where the deceased dies leaving a spouse and no issue, the deceased's spouse shall be entitled to the whole intestate estate. If the deceased dies leaving a spouse and issue, Rule 2 provides that the deceased's spouse is entitled to one-third of the deceased's said estate. The balance will go to the issue.

The deceased's other relations, such as the deceased's parents, siblings aunts, uncles etc will be entitled to the estate only if the deceased dies leaving no spouse or issue.

In the other states, the rules for distribution are found in section 6 of the Distribution Act 1958. They are *inter alia*, as follows. Where the deceased dies leaving a spouse, issue and parent, the deceased's intestate estate will be distributed to them according to the proportion prescribed in section 6 of the Act. If the deceased dies leaving a spouse and no issue and no parent, the spouse shall be entitled to the whole estate. Similarly, if the deceased dies leaving an issue and no spouse and no parent, the issue shall be entitled to the whole estate. Section 6 also provides that if the deceased dies leaving a parent and no spouse and no issue, the parent shall be entitled to the whole estate.

Where the deceased dies leaving a spouse and parent, but no issue, the spouse will be entitled to one-half of the deceased's estate and the balance will go to the parent. Where the deceased dies leaving spouse and issue but no parent, the spouse is entitled to one-third of the deceased's estate and the deceased's issue will receive the balance. And where the deceased dies leaving issue and parent, but no spouse, the parent will be entitled to one-third of the deceased's estate and the balance of the estate will go to the deceased's issue.

Where the deceased dies leaving spouse, issue and parent, their respective entitlements will be as follows: Spouse will be entitled to one-quarter, parent will be entitled to one-quarter and issue will be entitled to one-half.

The deceased's other relations, such as the deceased's siblings, aunts, uncles, grandparents etc will be entitled to the estate only if the deceased dies leaving no spouse or issue or parent.

For the purpose of both Distribution Act 1958 and Intestate Succession Ordinance 1960, the term "issue" refers to child and descendants of deceased child. And "child" means a legitimate child and a child who is adopted under the provisions of the applicable written law.

A person may disclaim his/her interest given to him/her under the intestacy rules. This was held by the court in Re Scott (deceased), Widdows v Friends of the Clergy Corporation & Ors (1975). In this case, two siblings of the deceased disclaimed their benefits under the then applicable rules of intestacy. The court upheld their right to make an effective disclaimer, and further held that the next relatives were entitled to the disclaimed portion.

Another authority is Townson v Ticknell (1819) which has oft been cited to state that an estate cannot be forced upon a person. Abott CJ said "The law is not so absurd as to force a man to take an estate against his will". The disclaimer can be made by deed or by contract. It must be in writing and made before the beneficiary has derived any benefits from the assets. This is because the beneficiary cannot pick and select only part of the benefits derived from a single undivided gift. This is seen in the case of Green v Britten (1873) where a gift involved six leasehold villas with a park. It was held that since this was one entire gift, the said beneficiary could not take only the villas without the park.

The right of a beneficiary to disclaim is also recognised in the Malaysian case of Paramanantham s/o MV Kandiah & Anor v Ganakiamah d/o Sabapathi Pillay & Anor (2009) where the court held that the renunciation or disclaimer of three of the beneficiaries entitled under the applicable rules of intestacy in favour of the administratix of the property was effective and valid.

3.2.3 No Compulsory Portion

A non-Muslim is able to dispose his/her entire estate upon death to persons of his/her choice. There is no statutory requirement that his/her estate or part thereof is to be distributed to members of his/her family. However, the dependants of a deceased non-Muslim who was domiciled in Malaysia at the time of his/her death may make a claim for reasonable provisions under the Inheritance (Family Provision) Act 1971.

3.2.4 Other Succession Plans

A non-Muslim has the right to dispose his/her properties during his/her lifetime to persons of his/her choice. His/her rights to do so are unfettered by law. This will be further discussed in Sect. 6 below.

4 Legal Incapacity

Apart from breathing his/her last, a person might lose himself/herself through dementia. The person loses his memory, communication and thinking skills. The most common form of dementia is Alzheimer's disease. With an aging population, issues on the rights of a person suffering from dementia become important. One of which is his/her rights as an owner of interests in business vehicles.

In Malaysia, the Mental Health Act 2001 came into force on 15 June 2010. The Act was enacted to provide for, *inter alia*, the protection of persons who are mentally disordered. "Mental disorder" is defined in section 2 to mean any mental illness, arrested or incomplete development of the mind, psychiatric disorder or any

other disorder or disability of the mind however acquired. Thus, dementia, which is a decline of mental disability due to the death of or damage of brain cells, should come within the definition of mental disorder.

Under the Act, an application may be made to the court to appoint a committee to manage the affairs of a mentally disordered person. If the Court finds that a person is incapable of managing himself/herself and his/her affairs due to his/her mental disorder, the Court may appoint a committee or committees of the said incapable person and of his/her estate.

If the mentally disordered person is a partner in a firm, section 66 of the Mental Health Act 2001 provides that the Court may order the dissolution of the partnership. This is a restatement of section 37(a) of the Partnership Act 1961 which provides that the committee managing the affairs or the next of friend of a lunatic or a person suffering from permanent unsound mind may apply to the court for the dissolution of the partnership.

If the mentally disordered person holds shares or debentures in a public company, section 69 of the Mental Health Act provides that the Court "may order some fit and proper person to make the transfer or to transfer the … shares or debentures and to receive and pay over the dividends in such manner as the Court may direct, and the transfer or payment shall be valid and effectual for all purposes".

Though a private company is not permitted to issue debentures (section 15(1) of the Companies Act 1965), a private company may issue shares. It is unfortunate that section 69 does not include the treatment on shares held by a mentally disordered person in a private company. Nevertheless, if the company has adopted the Fourth Schedule to the Companies Act 1969, article 56 provides that the right to vote attached to the shares of a person who is of unsound mind, may be exercised by his committee or a person appointed to manage his estate. Thus, it is submitted that a company may provide in its Articles of Association for the exercise of the rights attached to shares belonging to a member who suffers from permanent mental disorder.

The Mental Health Act 2001 also provides for the maintenance of the mentally disordered person. It does not permit the committee appointed to manage the affairs of the mentally disordered person to sell or charge his/her property. Any letting of his/her property shall not exceed three (3) years. The Court's approval is required for any sale, charge or letting of property exceeding three (3) years. Following section 63, the Court may do so if it is just or for the benefit of the incapacitated person, e.g. it is most expedient for the purpose of raising money for his/her future maintenance and the maintenance of his/her family.

5 Consequences for a Business in Case of Death

In Malaysia, there are basically four (4) types of business vehicles, namely, sole-proprietorship, partnership, limited liability partnership and company. A family intending to carry on business in Malaysia, may use any of these business vehicles

to do so. With regards to companies, there is no special provision in the company legislation pertaining to family businesses.

In this part, we will discuss the consequences when a member of the business vehicle dies. In Malaysia, there is no inheritance regulation providing specific regulations for business succession or for the succession in specific businesses like agriculture or craft business. Further, other than the rule against perpetuities applicable to a private trust, there is also no prohibition against succession and property ownership over several generations. The questions are: how is this to be achieved and what is the intent of the business owner? What happens when the owner of an interest in a business vehicle dies?

Much depends on whether the said owner has bequeathed his/her interest. If he/she has, then his/her interest will be distributed according to the Will. This is of course subject to the condition that his/her Will is valid and it is not contrary to the rule against perpetuities. If the owner dies a Muslim, further restrictions are imposed. These were discussed in Sect. 3 above.

However, a note of caution is with regards to the situation when the deceased did not bequeath in a valid Will his/her interest in the business vehicle, and there are more than one beneficiaries who are entitled to the property according to the rules of distribution. It is then the duty of his/her personal representative to convert the said intestate property into cash and distribute to his/her heirs according to the applicable law of distribution (Raman 2012).

Who then are the legal representatives of the deceased? Where the deceased dies testate and the person named in the Will as executor consents to his/her appointment, a Grant of Probate is issued. The legal representative of the deceased is the executor of the deceased's Will. Where the executor named in the Will does not consent to his/her appointment, an application for Letter of Administration is made to the court for the appointment of an administrator. This also applies where the deceased dies intestate. Then, the legal representative is the administrator of the deceased's estate. There is no legal requirement that the executor or administrator must be an heir of the estate. However, it is important to note that the legal representative is a trustee for the estate and is thus imposed with the duties of a trustee.

In this part, we will examine the consequences when the owner of an interest in a business vehicle dies. The common business vehicles available in Malaysia are sole-proprietorship, partnership, limited company and limited liability partnership.

5.1 Sole-Proprietorship

The sole-proprietorship is a business entity in which the business is owned by one (1) person, i.e. the sole-proprietor. As the sole-proprietor owns the business, the sole-proprietorship is dissolved upon the death of the sole-proprietor. If the deceased sole-proprietor has bequeathed the business to his/her heir(s), the heir(s) is/are the new sole-proprietor or partners, as the case may be. The heir(s) have to lodge his/

her particulars as the owner(s) of the inherited business with the Registrar of Businesses under the Registration of Businesses Act 1956.

5.2 Partnership

The law regulating partnership is found in the Partnership Act 1961. It applies throughout the whole of Malaysia.

The Partnership Act 1961 defines partnership as "the relationship which subsists between persons carrying on business in common with a view of profit". What then are the consequences if one partner dies?

Section 35 of the Partnership Act 1961 provides the death of any partner will dissolve the partnership unless there is an agreement between the partners to the contrary. The partnership agreement may provide for an option to the surviving partners to buy the deceased partner's interest. Alternatively, the partnership agreement may also provide for the transfer of the deceased partner's share to his/her heirs.

Notwithstanding the recognition of the Partnership Act 1961 that the partnership may continue notwithstanding the death of any partner, the regulation pertaining to the registration of partnership businesses i.e. the Registration of Businesses Rules 1957, provides that if the business continues to be carried on by the surviving partner with the addition of a new partner, the necessary particulars may be registered either as an alteration of the particulars of business or as a termination of one business (the existing partnership with the deceased partner) and the commencement of a different business (the new partnership without the deceased partner).

An issue is whether the interests of the deceased partner in the business may be passed down to his/her heir(s). It depends on the contents of the partnership agreement. If the agreement is silent, the surviving partners have the discretion whether to accept the heir(s) as their new partners. This is because the statutory rule provides that no person may be introduced as a partner without the consent of all existing partners (section 26(g) of the Partnership Act 1961).

Even if the partnership is dissolved, the surviving partners have authority to complete transactions begun but unfinished at the time of the dissolution and to wind-up the affairs of the partnership (section 40 of the Partnership Act 1961). The partnership accounts are to be settled according to the rules in the partnership agreement and if it is silent, according to the rules in section 46 of the Partnership Act. Basically, the assets of the firm will be applied first, to pay its creditors who are not its partners; secondly, to pay its partners for their advances to the firm; thirdly, to pay the partners in respect of their contributions towards the firm's capital; and lastly, to be divided among the partners in the proportion in which profits are divisible.

To further protect the deceased partner's estate, where the surviving partner carries on the business of the firm, section 44 gives the option to the estate to receive either a share in the profit or an interest of 8 % per annum on the amount of the

deceased's estate's share of the partnership assets. The receipt of a portion of the profit does not make the estate a partner (see section 4 of the Partnership Act 1961).

5.3 Limited Company

The principal statute governing companies incorporated in Malaysia is the Companies Act 1965. It is trite that a company upon incorporation is a body corporate, enjoying a separate legal entity. This is enshrined in section 16(5) of the Act.

As a company has a separate legal entity from its shareholders, the death of a shareholder will not have any impact on the company's legal destiny. The treatment of the shares and the rights attached to the shares belonging to a deceased are not prescribed in the Act, but may be prescribed in the company's Articles of Association. The Articles of Association is the constitution of the company, regulating the internal management of the company.

Companies are categorised according to the potential size of its membership and its potential sources of its funding. There are private companies and public companies. A private company is smaller in term of number of membership and cannot source for funding from the public. This is because section 15(1) of the Companies Act 1965 requires the Articles of Association of a private company to contain the following provisions:

(a) the number of its shareholders shall not exceed 50;
(b) a restriction on the transfer of its shares;
(c) a prohibition against inviting the public or a section of the public to subscribe in its shares or debentures; and
(d) a prohibition against inviting the public or a section of the public to deposit money with it.

A public company is other than a private company and thus, a public company is not required to contain any of the aforementioned restrictions or prohibitions in its Articles of Association. However, a public company whose shares are listed on the stock exchange *Bursa Malaysia*, cannot have such restrictions or prohibitions. The shareholding of a public listed company cannot be concentrated on a few; there must be a spread of shareholders. Thus, the number of its shareholders cannot be restricted to only 50. Further, as the shares are freely transferable, the company cannot restrict their transferability. Moreover, one of the benefits of being listed on the stock exchange is the company may raise funds by inviting the public to subscribe in its shares as well as has access to the public debt market.

Public listed company is at one end of the spectrum. At the other end is an exempt private company. An exempt private company is defined in section 4 of the Companies Act 1965 as a private company limited by shares with not more than 20 shareholders. All its shareholders are natural persons (i.e. not another company) and none of its shareholders is holding his /her shares for the benefit of a company. In other words, an exempt private company has few shareholders and all of them are

individuals. An exempt private company enjoys benefits not enjoyed by other companies, such as exempted from filing its audited financial statements with the Registrar of Companies (Eighth Schedule to the Companies Act 1965) and also exempted from the prohibition against granting loans to its directors (section 133) and persons connected with its directors (section 133A).

Therefore, even though there is no specific special provision in the Act pertaining to family-owned companies, a family may endeavour to incorporate an exempt private company to run its business. The company's Articles of Association may be drafted to include provisions restricting its membership to only members of the family. The company may have its own specially drafted Articles of Association rather than adopt the sample Articles found in the Fourth Schedule to the Companies Act 1965.

Section 30(2) of the Act provides that if a company limited by shares does not register its Articles or if it does register its Articles and those Articles do not exclude or modify the regulations contained in the Fourth Schedule, then the regulations in the Fourth Schedule shall so far as applicable be the Articles of the company in the same manner and to the same extent as if they were contained in registered Articles.

According to articles 24 and 27 of the Fourth Schedule, in the event a member dies, the company will only recognise the legal personal representatives of the deceased as having any title to the deceased's interest. The legal representatives will be entitled to the rights attached to the shares which include the right to receive dividend, to receive notice of meeting, to attend meeting of members and to speak and vote at the meeting.

The transfer of the shares from the deceased member directly to the heir(s) may be signed by the legal representative (section 103(2) of the Companies Act). However, whether the transfer to the heir(s) (either under the Grant of Probate or Letter of Administration) will be registered in the name of the heir(s) depends on the company's regulations in its Articles of Association. Article 25 of the Fourth Schedule stipulates that the heir(s) have to show evidence as required by the directors of their entitlement. Despite the evidence, the directors have the right to reject the transfer as they would have had in the case of a transfer by that member before his/her death. In other words, the limitations, restrictions and other provisions relating to the transfer of shares also apply to the transmission of shares from a deceased member to his/her heir(s). Thus, as a result, it is possible to prevent the transfer of shares as prescribed in the law of inheritance.

A company which is family-owned may exclude the application of these articles and provide for the transmission of shares to heir(s).

5.4 Limited Liability Partnership

Limited liability partnership is the latest business vehicle introduced in Malaysia when the Limited Liability Partnership Act 2012 came into force on 26 December 2012. It is a hybrid between a partnership and a limited company, enjoying the benefits of both types of business vehicles.

Unlike a partnership, a limited liability partnership is a body corporate and has a separate legal personality from that of its partners. It also has a perpetual existence and thus, any change in the partners will not affect the existence of the limited liability partnership. The death of a partner will not have any impact on the business vehicle. In this aspect, it is similar to that of a limited company.

What happens when a partner of a limited liability partnership dies? As the limited liability partnership is a body corporate whose entity is not affected by the death of any partner, the limited liability partnership remains. It will not be dissolved and its excess assets will not be distributed to the partners including the deceased partner's estate.

What happens then to the interest of the deceased partner in the limited liability partnership? It is unfortunate that the Limited Liability Partnership Act 2012 does not provide for such eventuality. Thus, reference should be made to the limited liability partnership agreement. If the agreement is silent, then reference is to be made to the statutory rules found in Schedule 2 to the Act. There is no statutory rule which expressly provides for the transmission of a deceased partner's interest in the limited liability partnership to his/her heir(s). Further, the position of the heir(s) of the deceased partner is made more onerous by the statutory rule that "no person may be introduced as a partner without the consent of all existing partners".

Thus, it is important for a limited liability partnership incorporated to carry on a family business, to have a limited liability partnership agreement incorporating specific and clear procedure on the transmission of the interest of a deceased partner.

6 Anticipated Succession

A founder of a family business may want to ensure that the business remains with the family. We have seen in Sect. 3 above that a founder who is a non-Muslim may do so by bequeathing his interest in the business vehicle to his selected heirs. However, the hands of a Muslim are tied by the Islamic principles of succession.

Nevertheless, as discussed in Sect. 3.1.3 above, there is no prohibition against a Muslim from disposing outright during his lifetime a part or the whole of his property to favoured *Koranic* heirs, either directly or through trustees (Re Man bin Mihat, deceased 1965). This was affirmed by the court in Zalani Bongsu bin Dato Haji Othman v Bandan Zaiton bte Othman and 2 others (1993) where the court decided the property in issue was not part of the estate of the deceased, as the deceased had gifted the property *inter vivos*. The common law principles of trust are applicable too, to Muslims (Noor Jahan Bte Abdul Wahab v Md Yusoff bin Amanshah and Anor 1994; Wan Naimah v Wan Mohammed Nawawi 1974).

Similarly, a non-Muslim may also gift a part or the whole of his/her property during his/her lifetime to selected persons either directly or through trustees. Hence, a Muslim and a non-Muslim have the option of transferring his/her interest in a business in his/her lifetime either as an *inter vivos* gift directly to the beneficiary or by creating an *inter vivos* trust. In the *inter vivos* trust arrangement, the settlor vests the property in a trustee for the benefit of his/her beneficiary (George 1999).

A testator may make an outright gift by transferring the property to his/her named beneficiary under absolute residuary gifts (Hallam 1994). This applies too to a Muslim testator provided the limitations imposed as discussed in Sect. 3.1 above are complied with. Where the beneficiary receives the gift absolutely, the beneficiary becomes the beneficial and legal owner and thus, can exercise control and management of the property. The beneficiary has the freedom to deal with it as he/she wishes. The risk of the beneficiary squandering his/her inheritance is real. Therefore, the testator may explore the possibility of creating a trust in his/her Will for his/her beneficiaries.

Thus, if a person does not want to transfer his/her property outright to his/her heir as the heir may squander away the inheritance, he/she may create a trust *inter vivos,* which takes effect during his/her lifetime. The person may also create a testamentary trust. The creation of trust will protect the family wealth and may also allow him/her to continue his/her control over the property. This section will examine the requirements for such trusts to be effective and valid. In addition, the issue of establishing a foundation will also be explored. Another alternative available to a Muslim is the creation of a *wakaf*.

6.1 Trust in a Secular Context

What is a trust? Trust has been defined as the relationship that arises wherever a person called as a trustee is compelled in equity to hold property, real or personal and whether by legal or equitable title for the benefit of some person (of whom he may be one) (private trust) or for some object permitted by law (public trust) in such a way that the real benefit of the property accrues not to the trustee but to the beneficiaries or other objects of the trust (Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd 1979). For the purpose of this Report, we shall focus on private trust.

What are the requirements for the creation of a private trust? For a private trust to be validly constituted, it must comply with the following:

(a) Fulfil three capacity requirements i.e. there must be a settlor, a beneficiary and a trustee.
(b) Fulfil three certainties of a trust i.e. there is certainty as to the intention of the settlor, certainty of the subject matter, and certainty of the beneficiary.
(c) It does not contravene the rule against perpetuities.
(d) It does not contravene the rule against inalienability.
(e) It does not contrive the rule against public policy and defrauding of creditors.

The general rule is that a settlor may create a trust by manifesting an intention to create it. No formalities are required for the creation of an *inter vivos* trust. The declaration of trust need not be in writing. It can be a verbal declaration. The Federal Court in Wan Naimah v Wan Mohammad Nawawi (1974) held:

> The law is that a declaration of trust may be made quite informally provided that the words used are clear and unequivocal. As was stated in by Romilly MR in Grant v Grant, words declaring a trust need not be in writing ….They must be clear, unequivocal and irrevocable but it is not necessary to use any technical words.

However, in the states of Sabah and Sarawak, an express trust over land and an equitable interest in land must be in writing. This is because of the applicability of the English Statute of Frauds in both states. Reference is made to the cases of Lee Pek Choo v Ang Guan Yau & Anor (1975) and Tay Guan v Ho Chin Huat Hin (1987).

With regard to the rule against perpetuities, it applies to every private trust (not public trust); thus, an *inter vivos* trust as well as testamentary trust. According to the rule against perpetuities, there is a time frame within which the trust property must vest in the beneficiary. It is submitted that due to the application of this rule, a person may protect his/her estate from being squandered by his/her descendants only for the duration of the perpetuity period. However, this rule does not apply to a charitable trust.

A business owner may seek to protect his/her interest in a business through the creation of a private trust. A person who seeks to determine and influence the devolution of his/her business interest can create a private *inter vivos* trust or a testamentary trust. This person who is known as the settlor or testator, may set out the rules governing the trust in a trust deed and select trustees who will administer the trust in accordance with the said trust deed. Further, he/she has the option to create a discretionary or protective trust to protect his/her business interest. However, the private trust is subject to the rule against perpetuities.

In the case of a sole-proprietor, the sole-proprietor may be influenced by the argument that a person with a direct financial interest would have the drive to make the business a continued success. Thus, if the sole-proprietor is confident in the business acumen of his/her beneficiary, he/she may decide that an absolute gift of the business is appropriate under the circumstances.

However if the sole-proprietor has reservation over his/her chosen successor, he/she may instead create a trust by a settled gift of a life interest trust of the business property with a power to advance capital. There should also be a provision under the Will or trust deed giving wide powers to the trustees to continue or expand the business and generally run the business as they think fit.

Sometimes, the testator does not foresee the continuation of the business after his death, for example in a partnership arrangement. The partnership agreement may have an arrangement wherein the beneficiary of a deceased partner would inherit what amount to a pecuniary claim against the partnership business. Hence, the terms of the partnership agreement is important to decide what can be inherited by the deceased partner's beneficiaries. Reference is made to Sect. 5.2 above which discusses the impact of the death of a partner.

In cases which involve shares in a company, the testator may choose to make an absolute gift. In such a case, the personal representative of the estate can apply to have the name of the beneficiary registered as the new member under section 103(2) of the Companies Act 1965. This was discussed in part 4.3 above. The transfer of shares in a private limited company is regulated by the company's Articles of Association. The company's Articles may have a pre-emptive provision wherein the

directors may require the shares to be sold and transferred to the existing shareholders. To avoid this, the testator may elect to set up a life interest trust with respect to the shares and give administrative powers to the trustees including power to advance the fund to the beneficiary.

What then are the duties and powers of a trustee? They are usually provided in the trust deed. Another source is the Trustee Act 1949.

It is to be noted that although the Labuan Offshore Trusts Act 1996 allows a perpetual trust be created (section 16(2)), the trust cannot include property in Malaysia unless the prior approval from the Labuan Financial Services Authority is obtained or the trust is for a charitable purpose (section 7(2)). Thus, a settlor cannot include his/her interest in a business vehicle in Malaysia in the Labuan trust. An exception is where the business vehicle is a company or a limited liability partnership incorporated under the Labuan Companies Act 1990 or the Labuan Limited Partnerships and Limited Liability Partnerships Act 2010 respectively.

6.2 Foundation

Another vehicle which could be used by a person to protect his/her estate, is by setting up a foundation. In Malaysia, a foundation could be established under the Companies Act 1965 or the Societies Act 1966. However, foundations are established usually for a charitable purpose or to promote religion or any object which is useful for the community, and not for the purpose of succession planning. This is by virtue of the conditions stipulated in section 24(2) of the Companies Act for the exclusion of the word "Berhad" in the name of a limited company. Further, the definition of "society" in section 2 of the Societies Act excludes "any company, association or partnership formed for the sole purpose of carrying on any lawful business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof".

However, the Labuan Foundation Act 2010 permits the establishment of a private beneficiaries foundation for the succession planning of a family. However, there is restriction against including any Malaysian property (which includes shares of companies incorporated in Malaysia) in the foundation, unless the prior approval of the Labuan Financial Services Authority is obtained or the Labuan foundation is a foundation for charitable purposes (section 5).

Thus, a person with properties in other countries may set up a foundation in Labuan for the purpose of managing his/her properties in other countries. For the person's properties within Malaysia, he/she may have to set up a foundation in another offshore jurisdiction. Unfortunately, this mode of wealth protection is not available to the common person on the street. Only few with deep pockets have the capacity to do so.

6.3 Wakaf

A Muslim has the option to declare a *wakaf* over his assets, both movable and immovable. *Wakaf* is a dedication by a Muslim of his property for a purpose recognised by Islamic law as religious and charitable. It can be created *inter vivos* or by way of a bequest. If it is created by way of a bequest, the testamentary rules as discussed in Sect. 3.1 above applies (Marican 2008).

Basically, there are two types of *wakaf*. The first type is *wakaf 'amm*, which is for general or public purposes. It is for the people. The second type is *wakaf khass*, which is dedicated to benefit a particular individual or class of persons. The class of persons includes the settlor's family or descendants (Mahamood 2006). The issue is whether a wakaf khass may be used as instrument for business succession.

The Federal Constitution of Malaysia provides that the 13 states in the Federation, apart from the Federal Territory of Kuala Lumpur, Labuan and Putrajaya, have the power to legislate on matters relating to *wakaf* and the appointment of trustees. Thus, the laws pertaining to *wakaf* may differ from state to state.

In the state of Selangor, for example, the Wakaf (State of Selangor) Enactment 1999 provides that a *wakaf khass* may be created under two situations. The first situation is where the Sultan of Selangor, on the advice of the Selangor State Islamic Religious Council, has expressly sanctioned and validated the creation of the *wakaf khass*. The second situation is where the settlor created the *wakaf khass* "while he (was) in a state of *marad al-maut* and subsequently (died) due to the illness and provided it has been made by way of *sighah* before two witnesses".

What is "*marad al-maut*" is defined as "death-illness in respect of which the following conditions are satisfied-

(a) the illness must cause the death of the deceased;
(b) the illness must cause apprehension of death in the mind of the deceased; and
(c) there must be some external indications of a serious illness."

Whereas "*sighah*" means a declaration of *wakaf* "made either orally, in writing together with a declaration or by gesture".

In addition, the Enactment also provides that all *wakaf*s, including *wakah khass* must be registered in such form and manner as determined by the Selangor State Islamic Religious Council. The Council shall also be the sole trustee of all *wakaf*s in the state.

It is submitted that the restrictions imposed by the Enactment do not make the creation of *wakaf khass* a feasible alternative for a Muslim who wants to ensure his business remains with the family upon his demise. Unless he has obtained the prior approval from the Sultan of Selangor, he is required to declare the *wakaf* on his death bed. Further, whether the *wakaf khass* is created *inter vivos* or by a bequest, the control of the business will fall into the hands of the Council without any exception.

7 Conclusion

Family-owned businesses are prevalent in Malaysia, though there are no easily available statistics on the number or percentage of family-owned businesses *vis-a-vis* other forms of ownership. The inheritance laws in Malaysia do not specifically regulate the succession of the family businesses.

A person may plan for the succession of his estate by making a last Will. However, where the owner of an interest in a business dies a Muslim, his estate will be distributed to his *Koranic* heirs according to their entitled portion. The Islamic law of inheritance prohibits any bequest in a Will to any *Koranic* heir without the consent of the other heirs. Thus, as a result, the deceased's share in the business may become fragmented due to the application of Islamic law.

Another type of succession plan is to transfer outright his/her property during his/her lifetime to his selected heirs. However, as a result of this, he/she may lose control of his influence in the business vehicle unless the partnership agreement or the company's Articles of Association specifically provides otherwise. Despite this, this may not stop the new partners or members of the company from altering the command feature in the agreement or the articles.

A third type of succession plan is the creation of a trust vehicle. A person may create a trust over his property. The settlor can be the trustee and thus, manages the trust property for the benefit of the beneficiaries. However, a trust which is non-charitable is subject to the rule against perpetuities, and therefore the settlor cannot instruct the succession of the trust property beyond a specific time.

Though there are succession plan vehicles in Malaysia that overcome this point of weaknesses, e.g. by setting up an off-shore foundation or trust in Labuan, these two vehicles are not available for properties situated in Malaysia unless the prior approval from the Authority is obtained.

Thus, studies are required to study the need to reform the law of succession to protect the family wealth for the purpose of family maintenance. The reformation may be necessary to make Malaysia more competitive in attracting investors.

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Company Succession in the Netherlands

Wouter Burgerhart and Leon Verstappen

Abstract If the testator dies the question arises how his property has to be distributed especially if a family enterprise or shares are referred to. The following book chapter deals intensively with the question how company law and the law of succession influence the succession in enterprise and in particular which importance has to be attributed to tax law. Thereby it is referred to recent decisions of the Supreme Court of Justice of the Netherlands and the European Court of Human Rights.

1 Importance of Family Business and Business Succession

1.1 Data About the Importance of Family Business

The Netherlands is a small country, with under 17 million inhabitants. Nevertheless, every year about € 13 billion are inherited in the Netherlands. On the average an inheritance amounts up to approximately € 100,000.[1]

In the most important Dutch reports on family businesses an enterprise is since 2009 defined as a family firm if it complies to the GEEF (*European Group of Owner Managed and Family Enterprises*) conditions of family enterprise. This definition has been chosen as it is recommended by the European Union and has been used in studies conducted in a number of European countries.[2]

According to the GEEF-definition a firm, of any size, is a family enterprise, if[3]:

[1] Figures from Centraal Bureau voor de Statistiek (Central Office for Statistics).

[2] European Commission (2009). Final report of the Expert Group. Overview of family-business-relevant issues: Research, networks, policy measures, and existing studies. Enterprise and Industry Directorate-General. http://ec.europa.eu/enterprise/policies/sme/promoting-entrepreneurship/family-business/

[3] Source: http://www.geef.org/definition.php

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1. The majority of decision-making rights is in the possession of the natural person(s) who established the firm, or in the possession of the natural person(s) who has/have acquired the share capital of the firm, or in the possession of their spouses, parents, child or children's direct heirs.
2. The majority of decision-making rights are indirect or direct.
3. At least one representative of the family or kin is formally involved in the governance of the firm.
4. Listed companies meet the definition of family enterprise if the person who established or acquired the firm (share capital) or their families or descendants possess 25 % of the decision-making rights mandated by their share capital.

There are approximately 260,000 family businesses in the Netherlands. This is approximately 69 % of all businesses (exclusive one-person businesses). They represent approximately 53 % of the Gross National Product and they are responsible for 49 % of the employment in the Netherlands. They are the backbone of Dutch economy.[4]

1.2 Business Succession in Family

The number of business successions is estimated at approximately 100,000 between 2009 and 2019.[5] In recent years there were approximately 23,000 successions per year.[6] These numbers are from different sources and might not be comparable. However, they can be used as an indication.

On the total amount of business transfers, more than 60 % (61.7 %) have a family relationship between the current and the previous owner. This percentage is significantly higher in family businesses (72.7 %) vs. non-family businesses (31.9 %).[7]

Regarding the succession, 37.9 % of all business transfers is taking place outside the family. This percentage is far higher in non-family businesses (68.1 %) vs. family-businesses (27.3 %).[8]

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[4] Family Business in the Netherlands Characteristics and Success Factors, A Report for the Ministry of Economic Affairs, Roberto Flören et al., Centre for Entrepreneurship Nyenrode Business Universiteit, Breukelen 2010. We would like to thank Albert Jan Thomassen of FBNed, the Dutch association of Family Businesses, for delivering the facts, figures and reports on the succession in family businesses in the Netherlands.

[5] Cijfers en feiten van het familiebedrijf; 10 jaar onderzoek onder familiebedrijven, BDO Campsobers 2008, p. 36.

[6] Family Business in the Netherlands Characteristics and Success Factors, A Report for the Ministry of Economic Affairs, Roberto Flören et al., Centre for Entrepreneurship Nyenrode Business Universiteit, Breukelen 2010.

[7] Family Business in the Netherlands Characteristics and Success Factors, A Report for the Ministry of Economic Affairs, Roberto Flören et al., Centre for Entrepreneurship Nyenrode Business Universiteit, Breukelen 2010, p. 16, 17.

[8] Family Business in the Netherlands Characteristics and Success Factors, A Report for the Ministry of Economic Affairs, Roberto Flören et al., Centre for Entrepreneurship Nyenrode Business Universiteit, Breukelen 2010, p. 16, 17.

About forty percent (40.1 %) of Dutch businesses has had at least one business transfer since the founding of the firm. There are no significant differences between family businesses and non-family businesses regarding the business transfer rate. Approximately 22,500 businesses (6 %) of all Dutch firms in 2010 were working on a transfer of the firm at that moment, a number consistent with estimates that suggests Dutch firms on average plan the transfer only one to one and a half years in advance of it. Seventy-three percent of all family businesses are in the first generation, 16 % in the second, and 10 % in the third or later generation. Of those businesses that have been transferred, 62 % of all companies, and 72 % of family businesses report a family relationship between the previous and current owners.

The number of second and third generation firms is higher among larger family businesses (i.e. those with at least 10 employees), than among family businesses in general: 17 % have reached the second generation whilst 18 % is in the third generation or later.[9]

One should realize that the (European) economic crisis might (or will) have effect on the aforementioned figures.

1.3 Legal Background

In corporate law, no specific attention has been paid to family businesses. However, to ensure continuity of the business, the control of the family business is in practice separated from the financial interest in the company by transferring all the shares to a foundation, which legal entity issues certificates to the entrepreneur. Thus, the control over the company is vested upon a foundation and separated from the holder of the financial interest in the company. During lifetime the entrepreneur controls in many cases as sole board member of the foundation the business. But when he dies, the appointment of persons as his successors in the board of the foundation takes effect. The entrepreneur is free as to whom he wants to appoint as his successors in the board of the foundation. These can be heirs or other family members. But he can also appoint other persons.

Furthermore, one has to take in account that the legislative rules governing Dutch private limited liability companies[10] (BV's) as set out in Book 2 of the Dutch Civil Code (hereafter also referred to as DCC)[11] have been simplified and made more flexible. This is a consequence of the introduction of the Act on the Simplification and Flexibilisation of the Law governing BV's ('Wet vereenvoudiging en flexibilisering bv-recht') and the related Implementation Act on the Simplification and

[9] Family Business in the Netherlands Characteristics and Success Factors, A Report for the Ministry of Economic Affairs, Roberto Flören et al., Centre for Entrepreneurship Nyenrode Business Universiteit, Breukelen 2010, p. 15, 16.

[10] In Dutch: besloten vennootschappen met beperkte aansprakelijkheid, or BV's.

[11] For the translation of the DCC we used, Hans Warendorf, Richard Thomas, Ian Curry-Sumner, The Civil Code of the Netherlands, Alphen aan den Rijn: Kluwer Law International 2013.

Flexibilisation of the Law governing BV's ('Invoeringswet vereenvoudiging en flexibilisering bv-recht'). These two Acts are jointly referred to as the 'Flex BV Act'. The Flex BV Act came into effect on 1 October 2012. In practice this new legislation means less prescriptive law and more permissive law, that allows BV's more scope to deviate in their articles of association from the legal standard procedure. This scope can (and is/will) also be used for structuring the succession in family businesses. For instance the aforementioned structure with a foundation can nowadays more or less be realized with a private limited liability company using shares without voting rights.

1.4 Tension Between Company Law and Inheritance Law

As to the Dutch law, there are some tensions between company law and inheritance law. But there are some provisions in especially inheritance law, that deal with some specific kind of tensions.

It occurs for instance when the entrepreneur disposes of his shares, which can run against statutory provisions of the private limited liability company or when the entrepreneur enters into an agreement with provisions that take effect upon death and that are contrary to provisions in the partnership agreement. In those cases, company provisions or the provisions in the partnership agreement take precedence.

The inheritance law does not bar the execution of provisions in the last will or in the articles of association or partnerships agreement with regard to the continuity of the business or the company. One of the most important changes in the new inheritance law that came into effect in 2003 is that the forced heirs cannot block the execution of those provisions. If his position is affected by the provisions in the last will of the deceased, he can claim a sum of money, only in certain circumstances. The disinherited forced heir who claims his statutory rights, has only a claim in money. By claiming his sum, he will not become an heir.

There is also a special provision in law, saying that at the request of a debtor (for example the successor who has the obligation to pay the other heirs their share in the inheritance), the district court may determine, where there are important reasons to do so (for example the continuity of the business), that any sum of money due pursuant to the inheritance law or, in connection with the division of a deceased's estate, pursuant to Title 7 of Book 3 DCC, whether or not increased with interest to be specified in its order, need to be paid only after the expiry of a determinate time, either in one lump sum or in instalments. The district court shall thereby have regard to the interests of both parties and may impose, when allowing the request and in order to secure payment of the principal sum and interest, a condition that security in rem or personal security approved by the district court be put up (Art. 4:5 (1) DCC).

These provisions imply that all dispositions with regard to businesses (whether a sole proprietorship, a share in a partnership or shares in a company) will have effect.

Statutory claims of forced heirs, which can only be in money, can be mitigated by the court as described before.

To our mind, the heart of the matter in terms of inheritance law and business succession lies therefore in the *value* of the business, if the business is obtained by means of donation or inheritance law. Indeed, it is the value that determines the scope of the aforementioned economic impediment(s) and therefore the extent to which this impediment can pose a threat to the continuity of the business.[12] The law (DCC or any other civil law) does not provide any description of the value of the deceased's assets to be taken into account for the aforesaid calculation, nor a description of definitions regarding value, valuation principles and valuation methods and relevant factors.

2 Inheritance Law (Intestate Succession)

2.1 Principles of Inheritance Law

The Dutch Civil Code consists of nine Books. They vary in age; most of them date from 1992. The fourth Book is titled 'Inheritance Law' and it came into force on 1st January 2003. As of that date the new inheritance law replaced the old Book 4, which dated from 1838. The new law is in many ways different from the old one, especially with regard to the position of the surviving spouse and to the position of forced heirs.

The *first* principle is the right to dispose of one's property by last will. But this is restricted in some ways by statutory law. A testamentary disposition is a unilateral legal act whereby a deceased makes a disposition which will become operative only upon his or her death and which is regulated in the DCC or is so considered by law (Art. 4:42 (1) DCC). This means in general, that the provisions in the last will must be regulated in the DCC or in another law, for example the Law on disposal of death. Agreements which have as their necessary implication the disposal of a deceased's estates which have not yet devolved in their entirety or for a proportionate part shall, however, be null and void (Art. 4:4 (2) DCC).

The *second* basic principle is the saisine, or: 'Le mort saisit le vif' (Art. 4:182 DCC). The heir is considered as having succeeded to the deceased from the instant of his death. The inheritance does not devolve on a representative of the heirs like an executor or an administrator. This principle also implies that the debts devolve on the heirs at the same time. The heirs have to choose whether to accept the inheritance or to renounce it (Art. 4:190 DCC). If an heir accepts the inheritance, the creditors even can attach his personal property (Art. 4:184 DCC). The in between choice is to accept the inheritance 'beneficiair', under the condition that the assets

[12] See for elaborate research on value in Inheritance Law, Matrimonial Law and in the Dutch Inheritance and Gift Tax Act 1956, the doctoral thesis of Wouter Burgerhart; W. Burgerhart, Waarde en Erfrecht (thesis Nijmegen), Deventer: Kluwer 2008.

and debts are described in an inventory (Art. 4:195 DCC). Art. 4:202 ff. DCC on the liquidation of estates apply then. The creditors then only can attach the goods of the estate, not also the personal property of the heir.

The *third* basic principle, related to the second one, is that the heirs are responsible for settling the estate. They are the ones who primarily take care of paying all debts of the deceased and carry out the will of the testator. If any difficulty arises, the settling of the estate becomes more formal. Art. 4:202 ff. DCC on the liquidation of estates apply.

As the *fourth* basic principle of Dutch Succession Law, one may consider the main principle of intestate succession. Dutch Law has the parentela system as point of departure. The list of persons who can inherit (on their own account) is included in Art. 4:10(1) DCC.

The *fifth* basic principle is that a compulsory or legitimate portion/forced share of so called forced heirs is an entitlement to a part of the value of the deceased's estate. The forced heir may claim this part despite certain gifts or testamentary dispositions (with exceptions) made by the deceased or certain gifts. So this forced share is not a right *in rem*, but a claim in money (Art. 4:63 ff. DCC).

The *sixth* basic principle is that – apart from some exceptions in Art. 4:97–107 DCC – a last will may only be made by a notarial instrument or by a holograph instrument given to a notary for safekeeping (Art. 4:94 (1) DCC). This means that in practice, the vast majority of last wills are drawn up by the notary and registered in the Central Registration of Last Wills in The Hague.

Both *intestate* succession and *testamentary* succession exist in Dutch Law (Art. 4:1 DCC), as it does in almost all countries. In order to qualify as an intestate heir one must be alive (natural persons) or exist (legal entities) at the time the deceased's estate devolves (Art. 4:9 DCC).

The intestate heirs are listed in Art. 4:10 (1) DCC; they inherit in equal shares (Art. 4:11 (1) DCC).

Apart from the general rules of intestacy, there is at least one peculiarity in the Dutch system: the statutory division between the surviving spouse and the children (Art. 4:13 ff. DCC). If a deceased leaves a spouse and one or more children as heirs, then the 'statutory division' applies. By operation of law the spouse acquires the assets of the estate and is responsible for paying its debts. No cooperation on the part of the children is required. They have to be content with a monetary claim against the surviving spouse amounting to their share in the inheritance. The law provides that the children's claims against the spouse are only due and payable:

(a) if the spouse is declared bankrupt or if a personal debt relief arrangement has been declared applicable with respect to the spouse;
(b) when the spouse has died.

The claim is also exigible in the instances mentioned in a testamentary disposition of the deceased (if made).

The risk that these claims can no longer be recovered from the assets after the death of the spouse lies entirely with the children; it can be compared with the situation of an ordinary creditor and an insolvent debtor. However, in some cases (when

the surviving spouse wants to remarry with another person, Art. 4:19–22 DCC) the surviving spouse is obliged, when the child so requests, to transfer to it assets with a value not exceeding such a pecuniary claim. Than the transfer is made subject to the usufruct of the assets, unless the surviving spouse waives this.

Unless otherwise provided by the deceased or by the spouse and child together, the pecuniary sum will be increased by a percentage corresponding to that of the statutory interest, to the extent that such a percentage exceeds 6 % (Art. 4:13 (4) DCC). Since the Inheritance Law came into force the pecuniary sums have not increased with any percentage because of the percentage of the statutory interest.

In most cases in which the statutory division applies, the surviving spouse is likely to see it as an attractive division of the estate. However, in a small number of situations the spouse and the children may prefer to divide the assets in a different way. The question arises whether this is possible, once the estate has been transferred to the spouse by law by virtue of Art. 4:13 DCC. Art. 4:18 DCC shows that it is possible. Within 3 months of the day of devolution of the estate, the spouse can reverse the statutory division.

A reversal results in the creation of an undivided interest, since suddenly, with retroactive effect, it turns out that the estate has not been divided according to the statutory division. All the heirs have equal entitlements to the undivided interest; each is entitled to an undivided share in the estate amounting to their share in the inheritance. This provision can be important in cases where the business successor is a child.

Succession by testament takes place according to the provisions in the testament, although restricted in some ways by statutory law.

In the Dutch system, one can appoint one or more heirs. An appointment of an heir is a testamentary disposition pursuant to which a testator leaves his or her entire estate or a share therein to one or more persons who are thereby designated (Art. 4:115 DCC). It is also possible to make a bequest in favour of one or more persons. A bequest is a testamentary disposition by which a testator grants one or more persons a right of claim (Art. 4:117 (1) DCC). It is also possible to burden the inheritance or the bequest with a testamentary obligation. A testamentary obligation is a disposition by last will whereby the testator imposes an obligation on the joint heirs or on one or more determinate heirs or legatees not consisting in the execution of a bequest (Art. 4:130 (1) DCC). By testamentary disposition a testator may appoint one or more personal representatives (Art. 4:142 (1) DCC). By testamentary disposition a testator may institute a fiduciary administration over one or more assets which have been left by him or her or in respect of which he or she made a testamentary disposition bequest (Art. 4:153 (1) DCC).

One has to take into account that one can only make testamentary dispositions that are regulated in Book 4 DCC or are elsewhere so considered by law (Art. 4:42 (1) DCC).

Finally it is also possible to dispose of the estate by agreement that will be executed in the case of death. However, agreements which have as their necessary implication the disposal of a deceased's estates which have not yet devolved in their entirety or for a proportionate part are null and void according to Art. 4:4 (2) DCC.

2.2 Range of Testamentary Freedom

A testamentary disposition is a unilateral legal act whereby a deceased makes a disposition which will become operative only upon his or her death and which is regulated in the DCC or is so considered by law (Art. 4:42 (1) DCC). This means in general, that the last will must be regulated in the DCC or in another law, for example the Law on disposal of death.

There are basically three main ways of investing a bequest on a person in a last will:

- appoint the person as an intestate heir;
- leave him a bequest;
- encumber the inheritance with obligations on behalf of a person.

The main restrictions are the statutory or forced share of children (Art. 4:63 ff. DCC) and the statutory rights of some persons, like the right on usufruct of the surviving spouse and the right of maintenance of the children or the right of a remuneration in case a child worked in the deceased's household or in the conduct of the deceased's profession or business without having received a fitting remuneration for such work (Art. 4:28–30 DCC and Art. 4:35–36 DCC), as well as the statutory right (of the business successor) on goods belonging to businesses (Art. 4:38 DCC).

There are other restrictions, such as the requirement that one has to be alive of exist if being appointed an heir (Art. 4:56 (1) DCC). But there are certain exceptions with regards to this rule. There are prohibited dispositions on behalf of certain people or legal entities who have had a special relationship with the deceased, like mental or physical carers (Art. 4:59 DCC).

The compulsory portion or forced share to which a forced heir is entitled is the part' value of the deceased's estate which the forced heir may claim despite any testamentary dispositions made by the deceased. The forced share of a child of the deceased amounts to one half of the value over which the shares of forced heirs are calculated divided by the number of persons left behind by the deceased as mentioned in Art. 4:10 (1) DCC (Art. 4:64 DCC).

The Dutch inheritance law acknowledges the so called fideicommis (de residuo) in Art. 4:56 DCC. In order to derive a right from a testamentary disposition one must be alive or exist at the time the estate devolves. One can appoint successive heirs limitless, as long as they fulfil the condition that they exist on the moment the testator has deceased. However, there are some restrictions when the testator wants to appoint heirs that not yet exist at the time he dies:

1. If a testator has provided that what he or she leaves to a descendant of the deceased's parent shall accrue per stirpes, on the death of the person with an entitlement or at an earlier moment, to the latter's then living descendants, then a right from the testamentary disposition shall vest in them even if they were not yet alive at the testator's death (Art. 4:56 (2) DCC).
2. Where a testator has provided that what he or she leaves to somebody shall accrue on the death of the person with an entitlement or at an earlier moment to

a descendant of the testator's parent, and also, if such a descendant will not survive such a time, that the latter's then existing descendants shall be substituted for him or her per stirpes, then such a right shall vest in them even if they were not yet alive at the testator's death (Art. 4:56 (3) DCC).

3. If a testator has provided that the capital remaining at the time of the testator's death without a withdrawal from capital having then been made by the person with an entitlement or having been made earlier shall accrue to a then living blood relative of the testator in the hereditary degree, the latter shall acquire this right even if he or she was not alive at the testator's death (Art. 4:56 (4) DCC).

The second and third paragraph of Art. 4:56 DCC refer to the normal fideicommiss, in which cases the first heir(s) is (are) not entitled the right to draw on the assets and to the right of alienation. The fourth paragraph refers to the *fideicommis de residuo*, where the first appointed heir has the rights to draw on the assets and to the right of alienation. In the latter case the group of family members that can inherit the deceased estate, or what is left of it, although not yet existing at the moment of the death of the testator, is larger. It includes all persons not further removed from the deceased than in the sixth degree (Art. 4:12 (3) DCC).

The relation between the first successor and the second is determined by the rules of usufruct (Art. 4:138 (2) DCC). As a result, he or she must reserve and maintain what was left as if he or she was a usufructuary unless the testator granted him or her the unconditional right to draw on the assets and to the right of alienation.

2.3 Statutory Inheritance Law

The Dutch system is as follows. Forced heirs (Art. 4:63 ff. DCC) and those who are entitled to a usufruct (Art. 4:29, 30 DCC), an amount of money (Art. 4:35, 36 DCC) or to certain goods on the basis of art. 4:38 DCC have to claim it. If they do not take action, they are not entitled to the claim. So it is not necessary to renounce.

Art. 4:29, 30 DCC provides a *usufruct* for the deceased's spouse on the dwelling and household effects and/or on any other assets of the deceased's estate (e.g. the enterprise) if there is a need for care. Although this is just a claim to establish a usufruct, it limits the testator in his free disposal over his estates. Depending on the need for care the subdistrict court can give the right to draw on the assets and the right of alienation.

A child of a deceased may claim a *lump sum*, to the extent that this is required:

(a) for the child's care and upbringing until the child has attained the age of eighteen; and furthermore;
(b) for his or her maintenance and education until the child has turned 21 (Art. 4:35 DCC).

Furthermore, a child, a stepchild, a foster-child, child-in-law or grandchild of the deceased who, having attained the age of majority, performed work in the deceased's

household or in the conduct of the deceased's profession or business without having received a fitting remuneration for such work, may claim a *lump sum* constituting fair compensation (Art. 4:36 DCC). One should realize that in most cases this compensation for working in business can be claimed by the business successor. Therefore this statutory right is meant to and can facilitate the succession.

There a two provisions in the DCC that are especially relevant in this perspective. The first claim that can be exercised on *certain goods* of the deceased estate, is the claim of children or step-children based on Art. 4:38 DCC, on assets belonging to the deceased's estate or the dissolved matrimonial community of property used in the conduct of a profession or business by the deceased, when the child or step-child or the deceased's spouse will continue the same.

Apart from these provisions which grant specific claims to certain family members, the law provides for a forced share to which a forced heir is entitled. This forced share is the part' value of the deceased's estate which the forced heir may claim despite any and testamentary dispositions made by the deceased. The forced share of a child of the deceased amounts to one half of the value over which the shares of forced heirs are calculated divided by the number of persons left behind by the deceased as mentioned in Art. 4:10 (1) DCC. Art. 4:80 (1) DCC makes it clear that a forced heir has a *monetary claim* amounting to his or her legitime against the joint heirs or, if the estate has been divided in accordance with Art. 4:13 DCC, against the deceased's surviving spouse.

2.4 Business Succession

In corporate law, no specific attention has been paid to business succession. However, as mentioned before, to ensure continuity of the business, the control of the family business is in practice separated from the financial interest in the company by transferring all the shares to a foundation, which legal entity issues certificates to the entrepreneur. Thus, the control over the company is vested upon a foundation and separated from the holder of the financial interest in the company. During lifetime the entrepreneur controls in many cases as sole board member of the foundation the business. But when he dies, the appointment of persons as his successors in the board of the foundation takes effect. The entrepreneur is free as to whom he wants to appoint as his successors in the board of the foundation. These can be heirs or other family members. But he can also appoint other persons.

Furthermore, as also mentioned before, one has to take in account that the legislative rules governing Dutch private limited liability companies (BVs) as set out in Book 2 of the DCC have been simplified and made more flexible. This is a consequence of the introduction of the Act on the Simplification and Flexibilisation of the Law governing BVs ('Wet vereenvoudiging en flexibilisering bv-recht') and the related Implementation Act on the Simplification and Flexibilisation of the Law governing BVs ('Invoeringswet vereenvoudiging en flexibilisering bv-recht'). These two Acts are jointly referred to as the 'Flex BV Act'. The Flex BV Act came into effect

on 1 October 2012. In practice this new legislation means less prescriptive law and more permissive law, that allows BVs more scope to deviate in their articles of association from the legal standard procedure. This scope can (and is/will) also be used for structuring the succession in family businesses.

The shares in a company or the assets of a business of the share in a partnership, follow the normal rules of intestate or testamentary succession. In principle, the heirs have an equal share in the inheritance, unless otherwise provided by the deceased. It is up to the heirs to decide on the division of the estate.

However, provisions in the articles of association might force the heirs to transfer assets or shares to the left partners or a third partner, or even one of the heir(s) who is the intended successor.

In case of a statutory division (Art. 4:13 ff. DCC) the deceased's spouse will receive the assets or the shares. Furthermore, a sole heir can be pointed out by the deceased in his last will and testament. And provisions in the partnership agreement or the articles of association might prevent the shares from being split between the heirs.

In the Netherlands there are no special regulations for the business succession in specific areas, such as agriculture.

3 Legal Incapacity Before Death

3.1 Special Statutory Provisions or Regulations in Case of Dementia

In case of temporary or permanent incapacity, for instance when a shareholder suffers from dementia, it is possible to appoint a custodian to the shareholder. The Art. 1:431 ff. DCC contain the legal framework under which the custodian has to perform his duties. This custodian will then be responsible to exercise all rights of the shareholder on behalf of the shareholder and subject to the provisions laid down in the law.

Recently, it has become very popular to make a so called 'living will'. This is a legal instrument to make arrangements in case of incapacity. A living will contains usually a power of attorney or an assignment. All sorts of things can be arranged in such a document. If it is a power of attorney, it is an unilateral legal act; if it is an assignment, it is a two sided contract.

3.2 Precautions in the Articles of Associations

There are no specific provisions in company law for the legal incapacity of a shareholder or a director. However, it is possible that the articles of association or the partnerships agreement contain provisions with regard to the situation of permanently incapacity to act. For instance by appointing a representative.

4 Consequences for a Business in Case of a Death

4.1 Differentiation Between the Types of Enterprises

Dutch legal practice generally uses two types of legal entities in case more than one entrepreneur work together:

- private limited liability company ('Besloten vennootschap met beperkte aansprakelijkheid');
- partnership ('vennootschap onder firma').

The entrepreneur holds shares in a private limited liability company or has a share in the partnership's assets and liabilities.

In case the entrepreneur has the business by himself, he can own all the shares of a private limited liability company of own all the assets and liabilities of the business.

4.2 Consequences in Case of Death

The business of a sole proprietor will pass to the heirs according to the normal rules of intestate or testamentary succession.

As set out before, one of the basic principles of Dutch Inheritance law is the saisine, or: 'Le mort saisit le vif' (Art. 4:182 DCC). This means that on the death of a person, the heirs succeed by operation of law to the rights capable of transmission and to whatever the deceased possessed or held; the liabilities and obligations of the deceased also devolve on them, if they are not extinguished upon his death. Thus a business can be passed down without co-operation, transfer, permission etc. But when the successor is not the only heir and the company or the shares are part of the inheritance, the heirs have to divide the company or the shares among them.

A partnership will dissolve if there are no special provisions in the partnership contract. It is possible to have provisions in the partnership agreements or the articles of association of a company by which the left partners can take over the share of the deceased partner in the partnership or the shares in the company. Company Law prevails Inheritance Law. In most partnership contracts, the parties to the contract agreed to continue the partnership with the remaining partners. Then, the partnership de facto ends only with regard to the deceased partner.

The aforementioned provisions in partnership agreements are called 'survivorship clause' or 'acquisition clause'. The share will devolve to the remaining partners by operation of law under the survivorship clause or when the remaining partners claim for the transfer under the acquisition clause. In both cases delivery of the share in the goods of the partnership to the remaining partners is necessary.

There are no limitations with regard to these kinds of contractual arrangements. However, agreements which have as their necessary implication the disposal of a

deceased's estates which have not yet devolved in their entirety or for a proportionate part shall be null and void according to Art. 4:4 (2) DCC.

The only aspect to be considered (in case of a legitimate agreement) is that in some cases a gift or a contractual beneficiary upon death, will be considered as a bequest (Art. 4:126 DCC).

The shares of a partner will pass to the heirs according to the normal rules of intestate or testamentary succession. However, special provisions apply according to most partnership agreements and/or articles of association if the shares are hold by the heirs of the deceased shareholder. As stated before, company law prevails inheritance law.

4.3 Destiny of a Share

The heirs will acquire the estate, thus also the shares in the company. In the articles of association of companies usually it is stipulated that the heirs as new shareholders have to offer the shares for sale to the other shareholders for a price equal to the value to be agreed upon or to be determined by valuators or as set out in the articles of association. The articles of association may contain exceptions to this obligation, for example when the heirs meet some qualitative requirements or when the heirs are in a certain family relationship to the deceased. Sometimes, it is stated in the articles of association that they are only obliged to offer the shares of the deceased if the heirs do not meet the requirements of being shareholder. So one could say that in those cases this provision contains a form of obligatory sale of shares.

Art. 4:38 DCC states that on the application of a child or stepchild of the deceased, provided the child or stepchild has an important interest therein and, compared therewith, this will not be to the serious detriment of any person with an entitlement, the subdistrict court may order the person with an entitlement to transfer to the child or stepchild or to the deceased's spouse, at a reasonable price, assets belonging to the deceased's estate or the dissolved matrimonial community of property used in the conduct of a profession or business by the deceased, when the child or step-child or the deceased's spouse will continue the same. This applies, mutatis mutandis with respect to shares in a company limited by shares or a private company with limited liability of which the deceased was a director and in which the deceased, alone or together with his or her co-directors, held a majority of the shares, if, at the time of death, the child or stepchild or the deceased's spouse was a director of such a company or thereafter continues the position of the deceased (Art. 4:38 (2) DCC). This provision does not give a claim on business succession but a claim to the business successor!

However, according to Art. 4:38 (3) DCC this applies only to the extent this is not barred by the provisions in the articles of association on the transfer of shares. The right to make an application referred to Art. 4:38 (1,2) DCC shall lapse on the expiry of 1 year from the death of the deceased (Art. 4:38 (4) DCC).

4.4 Provisions in the Articles of Association

As stated before, the Flex BV Act came into effect on 1 October 2012. In practice this new legislation means less prescriptive law and more permissive law, that allows BV's more scope to deviate in their articles of association from the statutory standard. One of the important changes regarding this question is the removal of the statutory requirement to include a share transfer restriction clause in the articles of association. This clause had to stipulate that a shareholder could only transfer the shares held to a third party either following approval from the designated body within the BV or after having offered the shares to the other shareholders. In legal practise all kind of provisions are possible, are developed and are used. Heirs can be excluded by means of inheritance law and/or company law, with or without compensation. Of course with respect to their forced heirship. The bottom line however is, that the articles of association may not make it impossible or extremely onerous to transfer shares (Art. 2:195 (5) DCC).

4.5 Exercise of the Shareholder's Rights After His Death

It is a general principle of Dutch law that the heirs are in charge of the administration of the deceased estate, the inheritance. However, in some cases the administration is in the hand of an testamentary executor appointed by the deceased or an administrator being the heirs or a liquidator appointed by the judge. This is the case, for instance when an heir accepts the inheritance 'beneficiair' as described before. Art. 4:202 ff. DCC on the liquidation of estates apply then. In principle, the joint heirs are responsible as liquidators to settle the estate unless the court appoints a person or persons as the liquidator upon request.

In most articles of association it is stated that if the heirs as shareholders have not complied with the obligation to offer and transfer their shares or part thereof in the instances described in these articles within a fixed reasonable period, the company will be irrevocably authorised to offer and transfer the shares (Art. 2:192 (5) DCC).

5 Last Wills

5.1 Range of a Last Will

Last wills can include dispositions of businesses or shares, although the provisions laid down in the partnership agreement or the articles of association take precedence in case of conflict.

One can nominate another heir in case the original drops out, both the intestate heir as well as the testamentary heir. In so far no heirs are appointed, the business will devolve on the intestate heirs according to the law. As stated before, the Dutch inheritance law also acknowledges the so called fideicommis (de residuo) in Art. 4:56 DCC.

5.2 Requirements and Conditions

Some general provisions apply on making last wills. For instance, with regard to the people that can be given a bequest (e.g. mental or physical carers; Art. 4:59 DCC). A condition or testamentary obligation which is impossible to fulfil or is contrary to bonos mores, public policy or a mandatory statutory provision shall be deemed not to have been written. A disposition subject to the condition or burden is null and void, if this was its decisive motive for such a disposition. A condition or burden which has as its necessary implication the exclusion of the right to alienate or encumber assets is deemed not to have been written (Art. 4:45 DCC).

Furthermore, Art. 4:140 (1) DCC decrees that, where a condition attached to an appointment as heir is not fulfilled 30 years from the death of the testator, then the disposition will lapse when it is a suspensive condition; if it is a condition subsequent, then the condition will lapse. This article does not apply to the fideicommis (Art. 4:141 DCC).

5.3 Other Forms

In most cases the partners agreed to allocate the share of the deceased partner to the remaining partners. These provisions are called 'survivorship clause' or 'acquisition clause'. The share will devolve to the remaining partners by operation of law under the survivorship clause or when the remaining partners claim for the transfer under the acquisition clause. In both cases delivery of the share in the goods of the partnership to the remaining partners is necessary. In some cases an acquisition clause is made on behalf of the intended successor (Art. 7A:1688 DCC), like for example the son of the deceased, who is already working in the family business. In that case the remaining partners have to accept the intended successor beforehand.

Similar agreements can be made for shares in a private limited liability company, both in a contract or in the articles of association.

6 Right to a Compulsory Portion

6.1 Institute of Compulsory Portion or a Similar National Institute

The testator is free to dispose of his property as he wishes. No heir has a forced share on the goods of the deceased estate. But there are certain provisions in the inheritance law, that provides certain relatives a claim in money or on goods.

When a dwelling in which the spouse of the deceased is living at the latter's death constitutes part of the deceased's estate or of the dissolved matrimonial

community of property or the deceased had a right to its use otherwise than pursuant to a tenancy, the spouse has a right as against the heirs to continue to live there (and use the household effects) for a period of 6 months on the same terms as were previously applicable (Art. 4:28 DCC).

To the extent, as a result of any testamentary disposition of the deceased, the deceased's spouse is not or is not solely entitled to the dwelling which forms part of the deceased's estate in which the deceased and the spouse had lived together or where the spouse was living alone at the time of the death or to the household effects which constitute part of the deceased's estate, the heirs must cooperate in establishing a usufruct on behalf of the spouse to that dwelling and, those household effects to the extent the latter requires them to do so (Art. 4:29 (1) DCC).

When so required from them, the heirs must cooperate in establishing usufruct with respect to any other assets of the deceased's estate other than those referred to in Art. 4:29 DCC on behalf of the spouse of the deceased, to the extent, having regard to the circumstances, the spouse needs and demands their cooperation for the spouse's support (Art. 4:30 (1) DCC).

A child of a deceased, including a child referred to in Art. 1:394 DCC, may claim a lump sum, to the extent that this is required:

(a) for the child's care and upbringing until the child has attained the age of 18; and furthermore;
(b) for his or her maintenance and education until the child has turned 21 (Art. 4:35 DCC).

Furthermore, a child, a stepchild, a foster-child, child-in-law or grandchild of the deceased who, having attained the age of majority, performed work in the deceased's household or in the conduct of the deceased's profession or business without having received a fitting remuneration for such work, may claim a lump sum constituting fair compensation (Art. 4:36 DCC). One should realize that in most cases this compensation for working in business can be claimed by the business successor. Therefore this statutory right is meant to and can facilitate the succession.

Art. 4:38 DCC states that on the application of a child or stepchild of the deceased, provided the child or stepchild has an important interest therein and, compared therewith, this will not be to the serious detriment of any person with an entitlement, the subdistrict court may order the person with an entitlement to transfer to the child or stepchild or to the deceased's spouse, at a reasonable price, assets belonging to the deceased's estate or the dissolved matrimonial community of property used in the conduct of a profession or business by the deceased, when the child or step-child or the deceased's spouse will continue the same. The subdistrict court may make further provisions in its order. This applies, mutatis mutandis with respect to shares in a company limited by shares or a private company with limited liability. This provision does not give a claim on business succession but a claim to the business successor.

The forced share to which a forced heir is entitled is the part' value of the deceased's estate which the forced heir may claim despite any and testamentary dispositions made by the deceased. Forced heirs are such descendants of the

deceased as the law designates as intestate heirs to the deceased's estate, either based on their own right or by a right of representation with regard to persons who are no longer alive unworthy at the time of devolvement of the deceased's estate (Art. 4:63 ff. DCC). The forced share of a child of the deceased amounts to one half of the value over which the shares of forced heirs are calculated divided by the number of persons left behind by the deceased as mentioned in Art. 4:10 (1,a) DCC (Art. 4:64 (1) DCC).

6.2 Right to a Compulsory Portion and Business Succession

In Book 4 of the DCC there are two specific facilities related to statutory rights and business succession.

At first, on the application of a child or stepchild of the deceased, provided the child or stepchild has an important interest therein and, compared therewith, this will not be to the serious detriment of any person with an entitlement, the subdistrict court may order the person with an entitlement to transfer to the child or stepchild or to the deceased's spouse, at a reasonable price, assets belonging to the deceased's estate or the dissolved matrimonial community of property used in the conduct of a profession or business by the deceased, when the child or step-child or the deceased's spouse will continue the same (Art. 4:38 (1) DCC). This provision does not give a claim on business succession but a claim to the business successor, as stated before.

The preceding applies, mutatis mutandis, with respect to shares in a company limited by shares or a private company with limited liability of which the deceased was a director and in which the deceased, alone or together with his or her co-directors, held a majority of the shares, if, at the time of death, the child or stepchild or the deceased's spouse was a director of such a company or thereafter continues the position of the deceased (Art. 4:38 (2) DCC). The preceding applies only to the extent this is not barred by the provisions in the articles of association on the transfer of shares (Art. 4:38 (3) DCC).

Furthermore, the cash value of a bequest of a pecuniary sum payable in instalments to a forced heir will also in the case of renunciation be deducted from the forced share, if the last will provides that without such a disposition it would make it difficult to continue a profession or business of the deceased to a serious extent. (Art. 4:74 (1) DCC). A forced heir may, within 3 months after the death of the deceased, declare to demand payment of the cash value in a lump sum, if the ground stated is incorrect. The burden of proof rests with a person who maintains that the ground is correct. Where the stated ground is correct but allows payment to be made earlier in instalments, then the court may alter the obligation arising from the bequest in such manner (Art. 4:74 (2) DCC). If a forced heir so requests within 3 months after the death of the deceased, the subdistrict court may order the persons burdened with the bequest to put up security. The subdistrict court will set the amount and type of the security. Where this is not complied with,

within the term set by the subdistrict court for this purpose, the bequest shall not be deducted from the forced share if the forced heir then still renounces the bequest (Art. 4:74 (3) DCC).

In other words: The value of a bequest payable in instalments will also in the case of renunciation be deducted from the legitime, if the will provides that without such a disposition the continuation of the business of the deceased would be in danger. One could say that the freedom of testation takes priority over the mandatory claims of descendants in case the continuation of the business would be in danger.

On top of the fact that a forced heir as such does not have a right in rem but only a monetary claim on the heirs, as stated before.

In the Netherlands we have no provisions for specific business areas. Traditionally agricultural companies need statutory provisions more than other companies.

6.3 Calculation of the Compulsory Portion

The forced share of a child of the deceased amounts to one half of the value over which the shares of forced heirs are calculated divided by the number of persons left behind by the deceased as mentioned in Art. 4:10 (1,a) DCC (Art. 4:64 (1) DCC).

So the children can claim 50 % of there intestate share in money (calculated according to certain rules, including certain gifts (Art. 4:65 DCC)), when they are all excluded from heirship by the parent.

According to Art. 4:6 DCC, the term 'the value of the assets of the deceased's estate' means the value of such assets at the *time* immediately following the death of the deceased. The law (DCC or any other civil law) does not provide any description of the value of the deceased's assets to be taken into account for the aforesaid calculation, nor a description of definitions regarding value, valuation principles and valuation methods and relevant factors. In some articles (outside Book 4 DCC) one can find references to valuators who have to estimate the value of property, but without any concrete guidelines they can use for their valuation.[13]

6.4 Renunciation of Inheritance

An heir may accept or renounce a deceased's estate. Acceptance may take place unconditionally or subject to the privilege of an inventory of the estate ('beneficiar').

A deceased may not restrict the heirs in their choice (Art. 4:4 (1) DCC). An heir may also not take a decision in that respect prior to the devolvement of the deceased's

[13] See for elaborate research on value in Inheritance Law, Matrimonial Law and in the Dutch Inheritance and Gift Tax Act 1956, the doctoral thesis of Wouter Burgerhart; W. Burgerhart, Waarde en Erfrecht (thesis Nijmegen), Deventer: Kluwer 2008.

estate (Art. 4:190 (2) DCC). A choice once made is irrevocable and has retroactive effect to the time when the deceased's estate devolved. An acceptance or renunciation may not be nullified on account of mistake or on the ground that it is to the detriment of creditors (Art. 4:190 (4) DCC).

7 Anticipated Succession and the Maintenance of the Transferor's Shareholder Position

There is no anticipated *succession* in Dutch Law in the way succession of an inheritance takes place, 'transfer by general title' is not available. But, of course, transfer to the intended successor *inter vivos*, whether or not for valuable consideration, takes place quite often.

In the Netherlands, it is possible to transfer sole proprietorship, a share in a partnership or shares in a company in anticipation of the decease of an entrepreneur with effect as from that moment on. In the agreement the entrepreneur agrees that the heirs are obliged to transfer the business or share in a partnership or company to whoever is stipulated in the agreement, whether this person is a relative, a business partner or any other third party.

In the Dutch system, acquisition of property takes place on the basis of a transfer agreement that has to be executed through delivery. According to Art. 3:84 (1) DCC transfer of property requires delivery pursuant to a valid title by the person who has the right to dispose of the property. In the Netherlands, we have a causal system of acquisition of property. This also applied on the transfer of a business or shares in a partnership or company. Debts and contracts must also be taken over by the successor according to the rules (see for instance art. 6:155–159 DCC). As stated before, we do not have a 'transfer by general title' (Art. 3:80 (2) DCC).

If the price equals the (market) value for the business, the transaction is qualified as a purchase. If the price does not equal the full (market) value, but (with the intention to enrich the done) for free or against payment of just part of the value or more than this value, the Dutch law considers it as a gift or a mixed contract. If the endowment is part of for instance a partnership's contract, this is also qualified as a gift. Therefore a distinction between endowment/purchase or another contractual agreement cannot be made.

When business succession takes place within a family about 60 % of all transfers holds an endowment; outside the family this percentage is (average) about 10 %.[14]

Generally speaking, transfer agreements contain provisions with regard to the change of leadership and/or controlling functions. There is a wide range of possibilities that are used in the Netherlands, but no specific model or (statutory)

[14] Burgerhart, Hoogeveen, Egger, Civiele en Fiscale bedrijfsopvolgingsfaciliteiten, Een praktijkonderzoek, 2009, p. 16.

provisions. It depends on the facts and circumstances of each case. Every transfer and agreement on the maintenance of the transferor are based on the general principles of the DCC.

According to Dutch law, the company can issue shares without financial interest, i.e. shares which do not entitle to a share of the profit of the company. It is also possible to issue shares to the successor which do provide a financial interest, but no voting rights. Secondly, it is possible to be appointed as a member of the supervisory board of a company, which often has the power to approve certain well defined decisions of the directors. Another option is to issue so called priority shares. These shares can be given special rights with regard to for example appointment of directors, the approval of certain, well defined proposals, etc. Another option is that when the transferor holds shares in a company, these shares are converted in cumulative preference shares whereas new shares are issued to the successor. These cumulative preference shares generate income from the company profits, as if the value of the shares would have been invested in bonds. After deducting the dividend to be paid on the cumulative preference shares, the remaining profit is at the disposal of the new shareholder. By doing so, the successor does not need to borrow money to pay the transferor. This might be cheaper, whereas the solvability of the company is maintained. But, of course, the transferor runs a certain risk.

Another option would be to transfer the shares and at the same time establish a right of usufruct on behalf of the transferor.

It is impossible to give an exhaustive list of ways by which aforementioned demands are taken into account in a business succession. Many different ways are leading to Rome, as we say in the Netherlands.

8 Foundation and Trusts as Instruments for Business Succession

8.1 Set Up of a Foundation

According to Art. 4:135 DCC when a testator has left by last will something to a foundation which he or she has created by a testamentary disposition made by notarial instrument, the foundation will be heir or legatee, depending on whether what was left constitutes appointment as an heir or a bequest (Art. 4:135 (1) DCC). A notarial instrument is required to set up a foundation.

A business can be run by any legal entity. It also can serve the purpose to maintain the family or legal successors. Apart from the above mentioned Art. 4:135 DCC, in practice entrepreneurs use the instrument of a foundation to which the shares of a company are transferred, as stated before. The foundation issues certificates to the entrepreneur, which are inherited by the heirs as part of the inheritance. The control of the family business is separated from the financial interest in the company by transferring all the shares to a foundation, which legal entity issues

certificates to the entrepreneur. This instrument is used to ensure continuity of the business, whereas the holders of the certificates are entitled to the revenues from the business. There is no minimum nor a maximum duration for a foundation.

8.2 Influence of Family Members in a Foundation

The appointment of the board of the foundation is provided for in the articles of association. The main rule is, that the board appoints the successors of their members. In family foundations usually one or more family members are appointed as board member. The founder is free in shaping the way the board members shall be appointed. The board can be composed of only family members or a combination of family members and third trusted parties, like an independent legal council (lawyer or notary) or an auditor. It is also possible that third parties appoint one or more board members.

As mentioned before, the beneficiaries in most cases are the holders of certificates. The transferability of claims (such as certificates) can be excluded by agreement (Art. 3:83 (2) DCC). Rights of appointment can be attributed to holders of certificates. It is also possible that some decisions of the board of the foundation are subject to prior consent of the holders of certificates. Finally, changing the articles of association can be made subject to the prior consent of the holders of certificates. There a no specific statutory provisions for beneficiaries of (family) foundations; it all depends on the articles of the association.

8.3 Distinction to the Trust

The Dutch Civil law does not know the instrument of the trust as such. But according to the The Hague Trust Treaty 1985 and the Conflict Law on Trusts 1995, the Dutch Law acknowledges the trust under certain circumstances. Prior to January 1, 2010, Dutch tax legislation did not include provisions regulating the taxation of a trust simply because entities, such as a trust, did not exist under Dutch law. Accordingly, the foreign tax qualification for entities was not automatically followed by the Dutch Tax Authorities. Qualification took place on a case-by-case basis. If the trust or legal entity was deemed transparent pursuant to Dutch legislation, the beneficiaries were taxed instead of the trust or legal entity. If they were non-transparent, the trust or legal entity was taxed. As each case needed to be assessed individually there was great uncertainty. Consequently, Dutch tax law was amended and the 'Dutch trust' (APV)[15] was introduced. All APV's are now deemed transparent and thus it is important to know if a foreign entity meets the

[15] APV is the abbreviation of 'Afgezonderd Particulier Vermogen', in English 'Segregated Private Estates'.

requirements of an APV. A foreign entity qualifies as a trust if the founder of the entity contributed private capital (without shares in return) to the entity, and the entity was established to primarily (for more than 10–15 %) serve private interests (or the interests of his family or relatives).

The main difference is that – as mentioned before – Dutch Law does not acknowledge the trust as such, while the foundation is a more or less similar instrument regulated by the DCC.

9 Further Developments

On this moment there are no legal policy plans for business succession as such. However, recently proposals were done for changes in Matrimonial Law that can effect business succession. In short this proposal changes the community of property between spouses. This community comprises all property assets and all liabilities of the spouses, at the commencement of the community and acquired afterwards. According to the proposal the community of property in the future will neither comprise the assets and liabilities at the commencement of the community nor property acquired pursuant to intestate or testamentary succession and gifts.

In time being no other proposals in Dutch Civil law are relevant for business succession as such, nor are there academic discussions on this topic as far as we know. There is however a significant development in case law; the inheritance law of 2003 has found its way to the courts, even to the Supreme Court of the Netherlands. A fast growing number of cases of inheritance law is brought into court. Book 4 of the DCC has (finally) landed in the Dutch society.

In Dutch Tax Law however family business succession was 'talk of the town', as well in academic circles as in society, in recent years. The cause of this all is the tax exemption for business succession. The acquisition of an inheritance and gifts are taxed according to the Dutch Inheritance and Gift Tax Act 1956. Since January 1st 1997 there are specific provisions on the acquisition of businesses. This law has been changed numerous times. As from January 1st 2010, the most recent change, the succession in businesses is partly exempted from taxation if the statutory conditions are being met. In short, each enterprise holds a tax exemption of approximately € 1,000,000 in combination with a tax exemption of 83 % of the value of the enterprise succeeding this amount.

In many cases in recent years (after a sensational decision of a tax court on July 13th 2012[16]) complaints of discrimination were made that the exemption applicable to estates and gifts worth up to one million euros (and the succeeding value to 83 %) which was enjoyed by those entitled to the facility for enterprise succession did not apply to 'non-succession acquisitions'. The Dutch Supreme Court rejected the

[16] ECLI:NL:RBBRE:2012:BX3386.

complaints on November 22nd 2013.[17] The European Court of Human Rights did more or less the same on May 27th 2014.[18]

As far as we know there are no elaborated plans to change the tax exemptions on family businesses. However studies in recent years have shown that the succession facilities in different tax laws can be improved. We think that it depends on the politics if and when the relevant laws will be changed.

[17] ECLI:NL:HR:2013:1206.

[18] http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145239

The Law of Succession and Company Law in Poland at the Beginning of the Twenty-First Century

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Abstract The interplay between the two branches of private law, namely company law and the law of inheritance, triggers important legal and social consequences. The structure of this report substantially follows an outline prepared by Professor S. Kalss, the General Reporter of Section Company Law and the Law of Succession. Her detailed list of issues suggested to be considered in national reports has been considered to the extent they are reflected in the relevant Polish laws and legal writings. In one respect, I went beyond the pale of the two branches of civil law indicated by the General Reporter. Apart from the company law and the law of succession, I have made some incursions in the domain of family law. This act of insubordination is justified at end of this paper.

1 Introduction

The co-habitation between the three branches of Polish law (*i.e.* the law of succession, company law and family law) is not always harmonious. The important effects of the death of a shareholder under company, family and inheritance laws are generally unclear despite a recent intervention of the Parliament in the Code of Commercial Companies ("CCC") aimed at clarifying doubts reflected in judicial decisions. The task facing regulators and judges is difficult indeed. The consequences of the death of a shareholder are regulated and interpreted whilst taking into account often conflicting goals such as promoting family business, protecting the company from "succession wars", respecting freedom of contracts among shareholders whilst drafting articles of association, or supporting a weaker spouse in the event of a divorce or death of a spouse. The rapid decrease in the birth rate and growing statistics of divorces in Poland and in other EU countries sometimes bring to the surface an argument that company law rules should be shaped with the aim of promoting family entrepreneurship, thus strengthening family ties and encouraging procreation.

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2 Economic Importance of Business Succession

There are rather scanty and somewhat inconsistent statistical data regarding family businesses in Poland. So, it is impossible to present precise figures on succession within the family, intestate and testamentary succession, the number of successions that occur when the testator is still alive, etc. According to one source, about 47 % of the Polish GDP is created in small and medium size companies (SMEs).[1] According to the same source, family businesses represent 78 % of all Polish SMEs. These data do not take into account firms in the field of agriculture and fishery. Most recent statistical data indicate that family enterprises provide for almost 2/3 of employment.[2] Owners of 70 % of family businesses declare that they plan family succession but only about 17 % of them have taken preliminary implementation steps and only 5 % of such enterprises are in the process of succession.[3] The same source notes that, unless this trend is reversed, 90 % of existing family firms will be taken over by competitors or otherwise over the next decade.[4] This forecast seems to be exaggerated because many new firms are established by families.

Based on my own observations, full-fledged successions when the testator is still alive are very rare. As a practicing lawyer, I have encountered only three cases of a gradual and well-planned succession when parents transferred corporate powers to their sons and daughters step-by-step by way of *inter vivos* transactions. In one case, it was a peaceful and successful assignment of rights and obligations. In the two other cases, it has triggered "wars of succession" with all their adverse consequences to the successors and the inherited businesses.

3 Basic Principles of Polish Inheritance Law

Polish inheritance law is regulated in the Civil Code of 1964[5] ("CC"). Although the Code was passed 50 years ago and in a different socio-economic system, it was largely based on legislative works prepared by the pre-war Codification Commission entrusted with the task of unification of civil laws which had been in force in different parts of Poland and which resulted from her partition at the end of eighteenth century.[6] It is worth mentioning that, unlike civil codes of other countries of the former Soviet bloc, the Polish Civil Code retained the basic legal concepts of the

[1] Badanie firm rodzinnych. Raport końcowy, Warszawa 2009, at 27.

[2] Source: Firmy rodzinne, http://firmyrodzinne.eu/strona/ciekawostki-i-statystyki

[3] Ibid.

[4] Ibid.

[5] As published in Dziennik Ustaw (Journal of Laws of 23 April, 1964), as amended.

[6] In 1918, when Poland regained her independence, five legal systems were in force on the Polish territories. Apart from the laws of the countries which participated in Poland's partition (i.e. the German Civil Code, the Austrian Civil Code and the Collection of Laws of Imperial Russia, the provinces of the former Congress Kingdom around Warsaw retained the Napoleonic Code. A few

continental legal culture. German, Austrian and French laws remained the main sources of inspiration for legislators, judges and commentators, although a few references to the Soviet legal writings constituted a frequent form of cheap political servitude to the official socialist canon. However, the Civil Code introduced dozens of rules aimed at establishing a hierarchy of three forms of property rights whereby state ownership enjoyed maximum protection and a preferential status vis-à-vis cooperative and private forms of property. The concept of freedom of contract was severally limited but not eliminated altogether. Rules characteristic to a centrally planned economy system were removed in the early 1990s shortly after the change of the political and economic system.

According to Art. 926 § 1 of the Civil Code, an heir shall acquire the estate of inheritance on the bases of a testament or a statutory claim. The testamentary freedom is substantial. In principle, the testator may appoint as his/her successor any natural or legal person, including a foundation. The testator may appoint one or several successors. The most important limitation of the testator's freedom to dispose the deceased property rights and obligations consists in the statutory claims of his/her next of kin listed in Art. 991 § 1 of the Civil Code. The list of privileged successors includes the descendants, spouse and parents of the decedent who would be entitled to inheritance by operation of law in the event of intestate succession. The compulsory portion of the estate represents half the value of the statutory share (reserved portion) of the entitled person. In the event that a person entitled to a reserved portion of the inheritance estate is a minor or a person unable to work, the compulsory share represents 2/3 of the intestate portion of the inheritance estate. For instance, the statutory part of the inheritance estate of the surviving spouse shall not be smaller than a quarter of the entire estate (Art. 931 § 1 of the Civil Code). Hence, regardless of the dispositions made in the will of the testator, the spouse shall be entitled to obtain at least 1/8 of the entire estate (1/4 multiplied by 1/2).

In principle, the Civil Code does not define the principle of family succession. However, both the Code provisions on the reserved part of the estate and those on intestate succession are aimed at protecting the surviving family members of the deceased person. Furthermore, the Constitution declares the principle of protection of family. Inheritance rights are expressly listed among the fundamental rights protected thereunder (Art. 64^2 of the Constitution). Apart from spouses, the Civil Code provisions protect children, siblings, grandparents and other relatives of the deceased in the event of an intestate succession. The list of the persons entitled to a compulsory portion of the inheritance estate is narrower than that which enumerates the persons entitled in the absence of a will (*i.e.* in the event of intestate succession) but it is also aimed at protecting the closest members of the decedent's family. The Code treats equally "legitimate" children and those born out of wedlock. Indeed, both categories of children are legitimate *stricte sensu*.

A successor has the right to accept or renounce the succession. The CC grants the heir an option to accept the inheritance with limitation of liability up to the value of

districts in the South-Eastern Poland were governed by Hungarian common law. The process of gradual unification of Polish civil laws was completed after the Second World War.

the inventory of the estate (Art. 1012). The deceased may disinherit his/her successor for reasons stated in the testament.

4 Special Rules on Succession of Farms

The Civil Code provides for no specific provisions regarding succession of business entities (e.g. shares in commercial companies and rights in other forms of business establishments), except for inheritance rules pertaining to agricultural farms. Detailed and comprehensive rules on succession of agricultural farms modify the Civil Code rules on the intestate succession. Pursuant to Art. 1059 of the CC, statutory heirs entitled to inherit agricultural farms shall meet the following criteria:

"1) *they are directly and on a permanent basis engaged in agricultural production, or*
2) *have vocational training to run the agricultural production, or*
3) *are minors or undergo vocational training or attend education institutions, or*
4) *are permanently unable to work.*"

There are also specific requirements regarding inheritance of farms by the deceased's grandchildren and siblings: "*decedent's grandchildren who upon the opening of the inheritance meet the conditions envisaged in article 1059, points 1 and 2, shall inherit an agricultural farm also in the case when their father or mother may not inherit the farm due to non-compliance with the conditions envisaged in article 1059. This provision shall apply accordingly to further descendants*" (Art. 1060). "*The siblings of the descendant who upon the opening of the inheritance meet the conditions envisaged in article 1059, points 1 and 2, shall inherit an agricultural farm also in the case when the descendants of the decedent may not inherit the farm due to non-compliance with the conditions envisaged in article 1059 or in article 1060*" (Art. 1062).

The Civil Code also contains rules aimed at limiting the process of partitioning family farms and helping the successors to perform their obligations vis-à-vis their co-heirs or persons having claims to their statutory compulsory portions of the estate (Art. 1067–1070, 1081–1082). The above-mentioned provisions apply *mutatis mutandis* to a situation when land contributed to a cooperative farm is inherited by the heir/s of a member of such cooperative.

There are no special regulations on succession of craft workshops or commercial companies in the Civil Code. The law does not allow to determine succession and disposition of any property over several generations (*fideicommissum*). There is no specific statutory prohibition on *fideicommissum* but the Code follows the principle that legal acts *mortis causa* are permissible only in the case that they are expressly authorized by law. Therefore, *fideicommissum* agreements are not allowed. However, there are a few statutory provisions on succession of shares and interests in commercial companies. They are discussed in the next sections of this paper.

5 Consequences of the Death of a Proprietor for His/Her Business in Commercial Partnerships and Companies Under the Code of Commercial Companies[7]

5.1 Introduction

The CCC (2000) entered into force on January 1st, 2001. The Code constitutes a comprehensive codification of commercial partnerships and capital companies. It regulates four types of partnerships (i.e. general partnership, professional partnership, limited partnership and limited joint-stock partnership) and two forms of capital companies (limited liability company and joint stock company). The first part of the CCC contains general rules applicable to all commercial partnerships and capital companies.[8] The general part of the CCC does not regulate the consequences of the death of a partner or shareholder for her/his business. The consequences of the death of the proprietor (shareholder) are regulated in subsequent chapters of the Code applicable to a given form of commercial company. Subject to a few exceptions, the rules of the Civil Code on inheritance apply to the succession of rights and obligations of members of commercial companies *mortis causa*. This follows from the principle of unity of law. Unlike German, Austrian or French law, the CCC follows the approach adopted in Swiss and Dutch laws. According to Art. 2 of the CCC, the matters left unregulated by the Code "*shall be governed by the provisions of the Civil Code. Where required by the character (nature) of the relationship of the commercial company, the provisions of the Civil Code shall apply* mutatis mutandis". Thus, the law on commercial companies enjoys only a limited autonomy. A few CCC rules on the inheritance of shares and interests in partnerships and companies only supplement the regulations of the Civil Code.

5.2 Partnerships

Chapter 4 of the Second Part of the CCC contains a few rules on the consequences of a partner's death. In principle, the death of a partner triggers the dissolution of the partnership, unless the partnership agreement provides otherwise (Art. 58(4) of the CCC). The Code favours continuation of the partnership despite the death of a partner. According to Art. 64 § 1 of the Code, "*despite the death or declaration of bankruptcy of a partner and despite termination of the deed of partnership by a partner or his creditor, the partnership shall continue to exist among the remaining*

[7] Kodeks spółek handlowych. Statute of 15th September 2000, as amended. Dziennik Ustaw of 8th November 2000, No. 94, item 1037, as amended; hereinafter: Code of Commercial Companies (CCC).

[8] Some of these rules apply only to commercial partnerships or capital companies.

partners if the deed of partnership so provides or if the remaining partners so decide". However, the pertinent decision of the remaining partners shall be made without delay. Otherwise, the heir(s) may demand that the liquidation of the partnership be carried out (Art. 64 § 2 of the CCC).

Pursuant to Art. 60 of the CCC, "*Where the deed of partnership provides that the rights of a deceased partner are to be conferred upon his heirs jointly, but does not contain any special provisions in this respect, the heirs shall designate to the partnership one person to exercise those rights. Acts performed by other partners prior to such designation shall be binding upon the heirs of the partner. Any provisions of the deed of partnership to the contrary shall be null and void*".

The rules set forth in Art. 60 are of a mandatory nature and shall not be modified in the partnership agreement. The CCC permits not only a continuation of the partnership's business despite the death of a partner but allows for two possibilities: (i) continuation of the business only by the remaining partners or (ii) continuation of the partnership with the heirs of the deceased partner.[9] In the former case, the capital share of the heir shall be calculated on the basis of a separate balance sheet which takes into account the sale value of the assets of the partnership (Art. 65 § 1 of the CCC). The balance sheet date shall be the date of the death of the pertinent partner (Art. 65 § 2). The capital share computed pursuant to Art. 65 § 2 of the CCC shall be paid in cash but assets contributed to the partnership by the deceased partner only for use shall be returned to the heir(s) in kind. However, if the capital share of the heir of the deceased partner shows a deficit, he/she shall make good the missing value to the partnership (Art. 65 § 4). Thus, the heirs can be excluded from membership of the partnership against compensation but they are also responsible for losses. However, they may avoid such liability under the Civil Code if they give up their entitlements to the inheritance estate. Pursuant to Articles 1031 and 1032 of the Civil Code, an heir shall be liable for the estates' debts without limitation. However, the successor may either reject the inheritance or accept it only up to the value of the net assets of the inheritance estate specified in the inventory thereof.

5.3 Professional Partnerships

There are only a few rules regarding inheritance of shares and interest in those sections of the CCC that regulate other forms of partnerships. In professional partnerships established for the purpose of pursuing so-called free professions, the heir of the partner shall not become a member of the partnership in lieu of the deceased partner, unless the partnership agreement provides otherwise and he/she is qualified to pursue a given profession (*e.g.* he/she is a qualified lawyer and may offer services in the pertinent professional partnership). Otherwise, an heir is entitled to

[9] J. Szwaja [in:] Sołtysiński, Szajkowski, Szumański, Szwaja, Kodeks spółek handlowych. Komentarz, 2nd ed., Beck 2006, at 507–508.

compensation under the applicable rules regarding compensation of heirs in a general partnership (Art. 99 of the CCC).

5.4 Limited Partnerships

Limited partnerships are modelled after the German *Kommanditgesellschaft*. The death of a limited partner does not constitute a ground for dissolving the partnership. His/her successors shall designate one person to exercise their rights. Business decisions of the remaining partners made prior to such designation shall be binding on the heirs of the deceased limited partner (Art. 124 § 1). The allotment of the limited partner's share/interest among his/her heirs shall be effective vis-à-vis the partnership only upon the consent of the remaining partners (Art. 124 § 1). According to a prevailing opinion among commentators, the provisions of Art. 124 of the CCC are of a yielding nature and may be modified or excluded in the partnership agreement.[10] The deed may also exclude an heir of a general partner from membership of the partnership. However, heirs of general and limited partners enjoy the right of compensation if they are not allowed to join the partnership. The provisions of Article 64–66 of the CCC on general partnerships apply *mutatis mutandis*.

5.5 Limited Joint Stock Partnerships

Unlike the majority of other continental legal systems, the Polish CCC classifies joint stock partnerships as a partnership rather than as a capital company. The Codification Commission designed it as a tax transparent vehicle of doing business to be attractive for the formation of medium-size and large scale family firms patterned after the French company Michelin. Indeed, a few years after the entry into force of the CCC, several family companies were formed as limited joint stock companies. However, recently the Polish Parliament has decided to withdraw their privileged tax status and subject them to corporate income tax. The advantages of tax transparency status of the Polish limited joint stock companies were discovered by investment firms.

According to Art. 148 § 1^4 of the CCC, the death of the sole general partner shall constitute a reason for dissolving the partnership, unless the articles provide otherwise. By contrast, the death of a shareholder does not constitute a ground for dissolving the partnership.

Pursuant to Art. 150 of the CCC, "*unless the provisions of this section provide otherwise, the winding-up and liquidation of a limited joint stock partnership shall be governed accordingly by the provisions on liquidation of a joint stock company. General partners who have the right to conduct the partnership's affairs shall be*

[10] J. Szwaja, op. cit., at 800–802.

liquidators, unless the statutes or a resolution of the general meeting, adopted upon the consent of all general partners, provide otherwise".

The liquidation of the tax transparent status of the joint-stock companies has prompted their members to "escape" from corporation tax by transforming their partnerships into limited partnerships.

5.6 Limited Liability Company

A limited liability company (Polish: *spółka z ograniczoną odpowiedzialnością*) is patterned after its German and Austrian equivalent (*i.e. Gesellschaften mit beschränkten Haftung*). The said business entity is classified as a capital company. Its minimum statutory capital amounts to PLN 5,000 (about USD 1,500). In principle, shares in limited liability companies are transferable and a shareholder may hold one or more shares. In the latter case the shares shall be of equal nominal value and indivisible (Art. 153 of the CCC). The shareholders shall not be liable for obligations of the company (Art. 153 § 4 of the CCC). The articles of association may restrict or exclude the right of heirs of a deceased shareholder to join the company. In such a case, in order for the restriction or exclusion to be effective, the articles shall provide for the terms and conditions of compensating the heirs who are not allowed to join the company (Art. 183 § 1 of the CCC). The aforementioned rule, unlike the provisions of Art. 64–65 of the CCC that are applicable to partnerships, does not regulate the terms and conditions of compensation of an heir who is excluded from becoming a shareholder. Commentators agree that the compensation shall represent a fair value of the pertinent share and shall be paid without delay.[11]

The articles of association may exclude or otherwise limit the partition of shares among the heirs if the deceased shareholder held more than one share. The articles may also exclude or otherwise restrict the split of a single share in the case that the constitution of the company provides that a shareholder may have only one share. If the articles allow the partitioning of a single share among the heirs of a shareholder, this may not result in the issuance of shares of a value lower than the statutory nominal value (i.e. PLN 50).

5.7 Joint Stock Company

A joint stock company (Polish: *spółka akcyjna*) is patterned after the German model of *Aktiengesellschaft*, although it is not a slavish imitation thereof. The share capital of a joint stock company is divided into shares of equal nominal value. The minimum statutory capital amounts to PLN 100,000 (about EUR 25,000). Unlike a limited liability company, the joint stock company may issue both registered or bearer

[11] Compare, M. Rodzynkiewicz, Kodeks spółek handlowych. Komentarz, Warszawa 2012, at 318.

shares (Art. 334 § 1 of the CCC). Subject to a few exceptions, the shares shall be transferable (Art. 337 § 1).

A joint stock company issues registered or bearer shares (Art. 334 § 1). The Code provisions on joint stock companies do not regulate general succession *mortis causa*. Pursuant to Art. 343 § 1 of the CCC, *"a person registered in the share register or a holder of bearer share, shall be deemed a shareholder vis-à-vis the company without prejudice to the provisions on trading in financial instruments"*.

The new case law and commentators uphold the view that the legal title of a registered person may be challenged in court. Moreover, a general successor (*e.g.* an heir of a deceased shareholder) may exercise his/her corporate rights in a registered share even before registration.[12] The Supreme Court approved this view and ruled that the management board of a joint stock company may correct the share register and enter the name of a new shareholder even before the acknowledgement of inheritance acquisition or submission of a certificate of inheritance by the heir in justified circumstances.[13] Some authors defend the view that registration of a new shareholder in the share register is of a constitutive legal effect.

The statutes of a joint stock company may provide that the consent of the company is required for the transfer of registered shares. Other restrictions on transferability are also permitted, provided they do not result in an absolute prohibition thereof (Art. 337 of the CCC). The aforementioned rules apply only to transfer limitations *inter vivos* and do not extend to general succession. Hence, the statutes of a joint stock company shall not exclude heirs of shareholders from becoming members of the company. Such construction of the CCC rules is supported by the principle of strict interpretation of departures from the principle of transferability of shares in a joint stock company. The Polish CCC has adopted the German principle that the statutes of a joint stock company may include provisions differing from those stipulated in the law, if the law so allows.[14]

6 Other Issues

6.1 Legal Incapacity

The CCC does not provide rules aimed at protecting the shareholder who is permanently incapacitated or requires the appointment of a custodian to exercise his/her corporate rights. The legal status of persons who are partially or totally incapacitated are regulated by the Civil Code and the Family Code. A guardian is appointed for a fully incapacitated person, unless he/she is still under parental authority (Art.

[12] S. Sołtysiński, M. Mataczyński [in:] Sołtysiński, Szajkowski, Szumański, Szwaja, Kodeks spółek handlowych, op. cit., Warszawa 2013, pp. 349–355.

[13] Supreme Court decision of 4th of December, 2009, III CSK 85/09, Orzecznictwo Sądu Najwyższego 2010, No. 7–8, item 113.

[14] The CCC adopted the German principle of "*Satzungsstrenge"* in Art. 309 §3 and §4.

13 § 2 of the Civil Code). A curator is appointed for a person who has limited capacity to perform legal acts (Art. 16 § 2 of the Civil Code). The articles of association may not provide corresponding precautions. Rules on rights and duties of incapacitated persons are of a mandatory nature. The performance of duties of guardians and curators are subject to the supervision of courts.

6.2 Last Wills

The testator may appoint one or several heirs either to the entire estate or to a part thereof (Art. 959 of the CCC). If the testator intends to dispose of a specific enterprise or a collection of shares, he/she should oblige an heir to transfer specific assets for the benefit of a specified person (ordinary legacy). An heir, unlike the legatee, is appointed to the entire or a part of the estate rather that to concrete rights or obligations.

In principle, the appointment of an heir subject to a term or condition shall be deemed non-existent to avoid the ensuing doubts and uncertainties resulting from such dispositions. In the case that the testament or the circumstances indicate that without such a reservation the testator would not appoint the heir, his/her appointment shall be invalid. However, these sanctions shall not be applicable (i.e. the testamentary appointment is valid) if the condition had been fulfilled or not fulfilled or the time limit had elapsed before the death of the testator (Art. 962 of the CC). As a result, the Code respects to some extent reservations made by the testator. Moreover, a testamentary heir may be appointed to inherit in the event that another person entitled as a statutory or testamentary heir does not want to or may not be a successor (substitution).

The testator has very limited possibilities to retain a long-term influence on his/her company's life after his/her death. The Civil Code does not recognize *fideicommissum*. Also, articles of association may not contain stipulations contrary to law (Art. 2 of the CCC). But the last will may provide for the appointment of legacies and sublegacies. A statutory or testamentary heir may be obliged to transfer specific assets for the benefit of a specified person (legatee). The latter beneficiary may be also encumbered with a similar obligation to the benefit of a sublegatee (Art. 968 of the Civil Code).

Finally, the testator may impose on an heir or a legatee the obligation of specific performance or refrain from acting without making anyone an obligee. Thus, the testator may, for instance, impose on an heir of his/her business an order to observe concrete standards of protection of the environment or treatment of employees that are above the levels required by applicable laws.

All *mortis causa* legal acts require a statutory basis. A disposition of the property in the case of death may only be performed by way of a last will (Art. 941 of the CCC). Hence, the testator may dispose a specific asset to a beneficiary by way of a legacy (Art. 968 § 1 of the CC). Civil Code rules on transfer of an enterprise covering substantially all assets and obligations of an ongoing concern or an organized

part thereof constitute *inter vivos* legal acts (Art. 55^1–55^4). In the legal literature a view prevails that, in principle, the aforementioned rules shall not apply to inheritance and other cases of general succession. However, some commentators are of the view that a legacy aimed at disposition of an enterprise "shall comprise everything that is included in the enterprise's composition, unless something else results from the content of the legal act or from provisions of law."[15]

6.3 How the Transferor May Secure His/Her Livelihood and Influence After Passing His/Her Business to His/Her Successors?

There is no specific statutory model to encourage the transfer of business before the death of the owner. The Civil Code regulates several legal institutions that may be used to achieve the above-mentioned purposes.

First, the owner of an enterprise or a shareholder (whether a shareholder controlling a company or not) may enter the **contract of pension** in exchange for a gradual transfer of corporate rights to her successor/s. The pensioner is entitled to obtain periodical payments in money and/or in things specified in kind (Art. 903 of the Civil Code). The retired owner (shareholder) may also consider execution of a life-annuity contract in return for a transfer of immovable property, The acquiring party (the transferee) is obliged, *inter alia,* to provide life-long maintenance and appropriate assistance during illness of the transferor (Art. 908 §1 of the CC).

Various options are available to retiring shareholders and their successors by way of establishing personal servitudes and usufructs. An usufruct is a right *in rem* enabling the usufructuary of enjoying a thing or an encumbered right. Shares may be encumbered with a right to use it and to collect its profits. However, the parties executing usufructus may exclude specified profits of a share (Art. 253 § 2 of the CC). Usufructus provides efficient protection of the usufructuary as it constitutes an inalienable right *in rem*.

The CCC contains a few special rules on the usufructus that enable the usufructuary to retain influence on the transferred corporation. The act of the establishment of the usufructus provide, for instance, that all or some of the shares transferred to the successor, retain voting rights, the statutes do not prohibit such arrangement. In addition, the rights of the usufructuary shall be entered in the share register (Art. 340 § 1 of the CCC). All requirements of the effectiveness of the voting rights of the usufructuary may be assured by the transferor before transferring corporate powers to his successors. A deed establishing usufructus or a separate contract may provide details regarding the exercise of the retained corporate rights by the departing owner of the business.

[15] Compare E. Skowrońska-Bocian, in: Kodeks cywilny. Komentarz, v. 1, Warszawa 2011, at 282.

6.4 The Interplay and Tensions Among Company, Family and Inheritance Law

The permissible arrangements aimed at limiting or excluding the succession of heirs of a deceased partner (shareholder) have been described in the preceding sections of this paper. A partnership deed and the articles of association of a limited liability company may limit or exclude the joining of the commercial company by the heirs in lieu of a deceased partner/shareholder, subject to a fair compensation. The freedom of the partners and shareholders in this field is excluded only in joint stock companies where the approval of a company organ may be stipulated in the statutes only for disposition of shares *inter vivos* (Art. 337 of the CCC).[16] However, the articles of association of limited liability and joint stock companies may contain stipulations providing that shares of a deceased shareholder are acquired by the company for the purpose of redemption. Hence, the remaining shareholders may avoid joining the company by unwanted co-shareholders.

The inherent conflict between the company law and the inherence law stems from the fact that a successful conduct of business within the framework of a corporation requires mutual trust among its members. Joining the company by a successor of the deceased shareholder entails the risk of participation of a person who harbours a conflicting vision of the purpose of the company or is simply unable to cooperate with the remaining shareholders. By contrast, the purpose of inheritance laws consists in protecting the successor of the estate whose interests may be also violated by the incumbent partners or shareholders. In my opinion, the contractual freedom of shareholders and partners in commercial companies to devise consequences of succession *mortis causae* should not be unduly restricted subject to a fair remuneration of the heirs. Perhaps this autonomy of the shareholders/partners should be somewhat more restricted only in joint stock companies, in particular with respect to succession of bearer shares.

Gradual and orderly succession in commercial companies should be also promoted to avoid family "wars" and conflicts among members of a corporation.

Similar challenges and conflicts arise in the event of divorce of partners/shareholders. Frequently, share contributions are financed from the resources belonging to both spouses. The Polish family law provides that, unless the spouses have entered into a special agreement regulating their marital property regime, they are subject to the joint marital patrimony established by operation of law. The joint matrimonial patrimony embraces, in particular, compensation received from employment or any business activity of both spouses and income from the community patrimony and the personal property of each spouse. The personal patrimony of each spouse consists of, *inter alia,* assets acquired before the conclusion of the marriage and those obtained by way of inheritance donation, etc.

There is an inherent conflict between the family law rules and those of the CCC. For instance, the latter rules provide that a shareholder in a joint stock

[16] S. Sołtysiński, M. Mataczyński, in Sołtysiński, Szajkowski, Szumański, Szwaja, op.cit. v. 3, Warsaw 2013, at 287.

company is a person that is a party to a subscription agreement or a person entered into the share register or the holder of bearer shares (Art. 343 of the CCC). In contrast, the provisions of the family law provide that shares acquired in exchange for financial or other assets belonging to the joint marital patrimony belong to both spouses and constitute their joint indivisible co-ownership. This would imply that the spouses shall exercise their corporate rights only by way of appointing a joint representative. According to Art. 333 § 2 of the CCC co-owners of a share shall exercise their rights in the company through a joint representative and they shall be jointly and severally liable for the performances attached to the share. In practice, shares financed by spouses from their statutory joint marital patrimony are exercised by the spouse who was a party to a subscription agreement or whose name was entered in the share register.

Some commentators argue that CCC rules constitute *legi speciali* and decide who the shareholder is. It is also argued that the regime regulated in Art. 333§1-3 of the CCC requiring spouses to exercise their joint rights through a joint representative would frequently lead to an impasse and indecision, especially in the case of conflicts between spouses. Some legal writers and court decisions try to solve this apparent conflict by distinguishing between corporate-administrative rights of a shareholder and pecuniary rights (e.g. rights to obtain a dividend and remuneration for redemption of shares).[17]

In 2005, the Polish Parliament introduced an amendment aimed at clarifying the scopes of subject-matter jurisdiction of family law and the Code of Commercial Companies. The new Art. 323 read as follows: *"The statutes may provide that where registered shares are part of the joint marital patrimony it is only one of the spouses who may be a shareholder."*

In reality, the above-mentioned rule did not contribute to the clarification of the law. Apart from the fact that it deals only with the registered shares, it does not explain who the shareholder is in the event the acquisition of shares is financed from the joint marital patrimony, or only one spouse participated in a subscription agreement and was registered in the share register but the statutes do not contain a stipulation allowed by Art. 322^1 of the CCC.

Despite the apparent conflict between company law and family law, I share the view of those commentators who defend the proposition that the CCC rules constitute *legi speciali*. Thus, the family law regulations should apply to the extent they do not conflict with company laws.[18]

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[17] Compare A. Kidyba, Kodeks spółek handlowych, Komentarz, Warszawa 2013; S. Sołtysiński, M. Mataczyński, op.cit., pp. 258–261; Supreme Court decision of May 20, 1999 explains that in the case that a share is acquired in exchange for means (e.g. money) coming from common matrimonial property the acquired right belongs to a spouse who was a party to the subscription agreement. Orzecznictwo Sądu Najwyższego 1999, TCKN/11/46/97; No. 12, item 209. Contrary: Supreme Court decision of January 4th, 2007, III CSK 238/07. The Court opined that in such a case the share belongs to both spouses.

[18] Compare M. Rodzynkiewicz, op. cit., at 639; K. Bilewska, Prawa udziałowe w spółkach kapitałowych a majątek wspólny małżonków-wybrane zagadnienia. Palestra 2006, pp. 101 *et seq*.

Such interpretation reduces the risk of intra-company conflicts resulting from the joining of the partnership/company by persons who are not "wanted" by remaining partners/shareholders. Moreover, such interpretation eliminates the danger of a continuation of intra-family conflicts in the company between former spouses after dissolution of their marriage. Transformation of intra-family disagreements that have contributed to a divorce into corporate conflicts would constitute a bad policy affecting not only former spouses but also the company, its members and stakeholders.

The proposed interpretation results in recognizing the principle that regardless of the source of financing the acquisition of a share, it shall belong to an active spouse who executed a subscription or other contract constituting *causa acquirendi* and was registered in the share register. The interests of the other spouse (as a rule, a person not interested in exercising corporate rights) are protected by a family law principle according to which all income, whether from the joint matrimonial patrimony or from the personal patrimonies of spouses, belongs to the joint matrimonial patrimony. In the case of dissolution of the marriage, the joint patrimony is divided equally between the former spouses, unless the court finds justified grounds for an unequal distribution thereof.

6.5 Foundations

The Polish Statute of Foundations of April 6, 1984[19] provides that they may be set up for purposes complying with the fundamental interests of the Republic of Poland and for realization of goals that are socially or economically useful. The Statute contains a non-exhaustive list of such purposes, in particular protection of health, development of the economy and science, culture and art, protection of the environment, etc. (Art. 1). Foundations may be established by natural persons regardless of their citizenship or domicile, as well as legal persons having their seats in Poland or abroad. The seat of the foundation shall be in Poland.

Generally, a declaration of the founder on establishing the foundation shall be executed in notarial form, except when it is made in a will (Art. 3^1). The foundation is a corporate legal person acting on the basis of its charter (statutes) and through its management board. There is no statutory minimum or maximum duration of the foundation. The entity shall submit its annual reports on the foundation's activities to the proper minister (e.g. the Minister of Health if the purpose of the foundation consists in protection of health). The foundation is established upon its registration in the register supervised by a registration court. The founder shall supply funds for the institution's future needs.

A view prevails that foundations may not serve the purpose to maintain the family or benefit legal successors of the founder. Consequently, family foundations established for the purpose of providing benefits for the founder or members of his/

[19] As published in Dziennik Ustaw (Journal of laws) 2005, Item 167.1398 as amended.

her family are not allowed because such purposes are difficult to reconcile with the objective of the foundation under Art. 1 of the Statute on Foundation.[20] However, one decision of the Supreme Court implies that the aforementioned provision does not exclude the possibility of incorporation of a foundation of a "mixed" character aimed at fostering public interests and those of a given family.[21] However recent decisions of administrative courts hold that preferential tax status of the foundation may not be exploited for the purpose of tax avoidance. Hence the founder and her next of kin may not be beneficiaries of tax-free services or in-kind performances offered by the foundation.[22]

The founder may influence the activities of her/his foundation. In particular, he/she may become a member of the management board. The foundation may conduct both philanthropic and business activities. Generally, income gained from the latter activities shall be used for its statutory purposes.

Polish law allows for certain equitable transactions executed for the benefit of a third party. However, our law does not recognize a trust *stricte sensu* whereby the creator of a trust transfers or is bound to hand over the control of an asset which is to be administrated by the trustee for the benefit of a beneficiary other than the trustee. Hence, I have decided to skip the last two questions formulated by the General Reporter.

[20] P. Suski, Stowarzyszenia i fundacje, Warszawa 2008, at 367; A. Kidyba, Ustawa o fundacjach. Komentarz, Warszawa 2007, pp. 17–19.

[21] Decision of the Supreme Court of January 7th, I CKN 16/96, Lex Polonica No. 344753.

[22] Decision of the Supreme Administrative Court of February 12, 2003, I SA/Ka 2507/01, Lex No. 79316.

The Transmission of a Business *Mortis Causa* in Scots Law

Remus Valsan

Abstract The vast majority of Scottish business organisations are family businesses structured as sole traders or partnerships. For these business entities, transmission *mortis causa* of a business or of a fraction of it is governed by the general rules of succession and by business planning through specific contractual arrangements. For businesses organised as registered companies, the death of a shareholder triggers additional company law rules regarding transmission of shares, which take the form of mandatory company law provisions or default provisions of Model Articles of Association.

1 Introduction

The transmission of a business in case of death of one of its owners is governed different rules, depending on the type of business organisation. Transmission of business or assets in sole traders and partnerships is governed by the general succession law. Shares in registered companies are transmitted under a mix of company law and succession law.

The present chapter analyses the business succession in Scotland as follows. Section 2 outlines the family business landscape in Scotland, in terms of firm size and organisation forms. Section 3 summarises the legal regime of various forms of business organisation and the main issues involved in a transfer of business *mortis causa*. Section 4 presents the main legal rules applicable to testate and intestate succession in Scotland. Section 5 focuses on the specific company law rules applicable to the transmission of shares on the death of a shareholder. Section 6 concludes.

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2 Family Businesses in Scotland

Small family businesses are at the heart of Scottish economy. Around 73 % of Scottish businesses, employing 50 % of the Scottish private sector workforce, describe themselves as family businesses. The oldest Scottish family businesses still operating include John White & Son Ltd, founded in 1715, Johnstons of Elgin, founded 1797, and J Hewit & Sons, founded in 1806. Family businesses dominate many key economic sectors of Scottish economy, such as tourism, farming, food, drink and manufacturing.

In terms of turnover, over 40 % of the top 100 businesses in Scotland are family owned and controlled (Andrews 2013). In terms of size, 98.3 % qualify as small enterprises (0 to 49 employees), 1.1 % medium-sized (50–249 employees) and 0.7 % large enterprises (250 or more employees). The small and medium enterprises account for 54.7 % of private sector employment and for 36.7 % of private sector turnover, while the large enterprises totalled 45.3 % of employment and 63.3 % of turnover (BIS 2013). As regards the form of business organisation, the latest official statistics indicate a total of 343,105 private sector enterprises operating in Scotland as of March 2013. The vast majority are organised as sole traders or partnerships (72.0 %) followed by registered companies and public corporations (26.0 %) and non-profit making bodies (2.1 %). The main fields of activity of private sector enterprises are construction (14.5 %) and professional, scientific and technical activities (15.1 %) (BIS 2013).

Business succession planning appears to raise difficulties for many Scottish families. Only 33 % of family businesses survive to the second generation and only 9 % to the third. These low rates may be explained by lack of professional knowledge or advice on family business succession, or reluctance to discuss delicate family issues with professional advisers (SFBA 2013).

3 The Legal Background: Forms of Business Organisation

The main rules governing the organisation of family businesses may come from company and financial law, agency and partnership law, or general contract law, depending on the form of business organisation.

Company law is not a devolved matter under the Scotland Act 1998.[1] Consequently, company law in Scotland is primarily based on UK legislation and is

[1] There are several limited areas of company law, however, where legislating power is devolved. These are:

(i) changes to the regulation of business names;
(ii) statutory guidance to prosecutors and other enforcement authorities in relation to the offence of knowingly or recklessly causing an audit report to be misleading, false or deceptive;
(iii) changes relating to exemptions from audit requirements for companies that are charities;
(iv) conferral of a power on the Auditor General for Scotland to specify public bodies for his audit. (CA 2006, Explanatory Notes, Note 14).

largely the same as that in England and Wales. The main statutory source of law is Companies Act 2006 (CA 2006). CA 2006 applies to England, Wales, Scotland and Northern Ireland, but has several special provisions for Scotland (the most relevant of which are sections 270–280 on derivative proceedings in Scotland).

Other important statutory instruments relevant to business organisations in Scotland include Partnership Act 1890, Limited Partnerships Act 1907, Insolvency Act 1986 (which has substantial parts dedicated to Scottish procedure), Company Directors Disqualification Act 1986, Limited Liability Partnerships Act 2000, Financial Services Markets Act 2000, Bankruptcy and Diligence (Scotland) Act 2007, Companies (Model Articles) Regulations 2008 (hereinafter "Model Articles"), the UK Corporate Governance Code (last revised in 2014) and the City Code on Takeovers and Mergers (eleventh edition published in 2013). In addition to primary and secondary legislation and delegated rule-making, common law (in the sense of case law) remains of great significance for company law.

3.1 Sole Traders

Sole trader is the preferred business form for many small businesses or occupations, since it involves a large degree of informality and privacy. There are no registration formalities required for beginning or continuing to operate a business as sole trader. There is no legal requirement to publish or maintain accounts and financial records.[2] Upon the death of the sole trader, the business ceases automatically, and the business assets are distributed alongside the personal assets in accordance with the general law of succession (Cabrelli 2011, 458).

The automatic dissolution of a sole trader's business upon his death makes it difficult to pass on a family business to a family member or an employee. In practice, this succession planning obstacle is circumvented by using a life insurance policy. The sole trader may take out an insurance policy on his own life, which he assigns to his business successor, or holds it in trust for him. When the sole trader dies, the beneficiary uses the policy income to purchase the business from the estate, or to pay the inheritance tax and carry on the business.

3.2 Partnerships

Businesses may be organised in any one of the three forms of partnership (also known as 'firm') recognised in Scotland: ordinary partnership, limited partnership, and limited liability partnership. Partnerships are attractive business forms for several reasons. First, they are not bound by the stringent requirements regarding preparation and publication of annual accounts applicable to registered companies.

[2] VAT registration may be required, depending on the size of the annual turnover.

Second, partnerships have great flexibility in structuring their internal organisation and management. Third, in contrast with English law, all partnerships in Scotland have separate legal personality.[3]

Partnerships are contractual arrangements usually formed *delectus personae* (in consideration of each partner's skills or talents). As a consequence, any change in the membership could bring the old partnership to an end and create a new partnership, reflecting the new composition. In practice, however, partnership agreements include provisions that allow the partnership to continue after a change in membership, including changes due to the death or retirement of a partner[4] (Davidson and MacGregor 2014, 344 and 352).

Since partnerships are separate legal persons, they can enter into contracts, sue or be sued in their own name. Furthermore, partnership property is owned by the firm as a separate legal person. A partner's share in the partnership property is regarded as incorporeal moveable property which can be transferred by assignation followed by intimation (notice) to the partnership (Davidson and MacGregor 2014, 343 and 350).

Upon the death of a partner, the partnership may be dissolved or it may continue to carry on business according to the provisions of the partnership agreement. In the latter case, the partnership may purchase the share of the deceased from his estate, or continue to trade without any final settlement of accounts between the partnership and the estate. In the latter case, the deceased's estate is entitled to receive either a share of any profits made after dissolution, or to interest at the rate of 5 % per annum on the amount of his share of the partnership assets.[5]

In any of these scenarios, the valuation of the deceased partner's share may raise difficulties. Unless otherwise agreed by partners, a partner's share is calculated by reference to the individual partner's credit in the balance sheet of the partnership accounts. The main difficulty consists in determining whether the valuation of partnership's assets should be made by reference to the date of acquisition of each asset or to their current market value. The solution will depend on the court's interpretation of the written partnership agreement (Davidson and MacGregor 2014, 356).

3.3 Registered Companies

Registered companies are governed by CA 2006 or by previous Companies Acts. Scottish companies are formed by registration with the Companies House in Edinburgh and their registered office must be located in Scotland. There are four

[3] Partnership Act 1890, s. 4(2): "In Scotland a firm is a legal person distinct from the partners of whom it is composed." Section 7 of the Limited Partnership Act 1907 applies the 1890 Act to limited partnerships, subject to the provisions of the 1907 Act. Limited liability partnerships ("LLP") are governed by the Limited Liability Partnerships Act 2000. Significant reform proposals were made by the Scottish and English Law commissions (LC and SLC 2000). This report did not result in legislative change.

[4] *W S Gordon & Co Ltd v Thomson Partnership*, 1985 SLT 122.

[5] Partnership Act 1890, s. 42 (1).

main types of registered company: public limited company ("plc"), private company limited by shares ("Ltd"), private company limited by guarantee ("Ltd") and private unlimited company. Charities, community enterprises, clubs or other not-for-profit organisations are usually organised as companies limited by guarantee.

Public companies limited by shares may issue shares in three main forms: in certificated form (or nominative shares), in uncertificated form, and share warrants.[6] Shares are issued in a certificated form when the company issues a share certificate for them and the holder's name is entered in the register of members. These shares are freely transferable, subject to specific statutory limitations or restrictions provided in the articles of association of the issuing company.

Many listed companies, however, issue shares in a paperless or uncertificated form for ease of transfer on the markets.[7] The transfer of such shares is governed by the Uncertificated Securities Regulations 2001, which provide for a statutory scheme. This scheme comprises a "relevant system" for the evidencing and transfer of securities without a written instrument, operated by an entity approved under the Regulations. The current electronic settlement system for UK and Irish securities is CREST, operated Euroclear UK & Ireland Limited.

Alternatively, companies may have bearer shares. Bearer shares are attested by a share warrant instead of a share certificate. In such case, the register of members will state the fact of the existence of the warrant rather than the name of the share owner. Share warrants are negotiable instruments, transferrable by delivery. It is important to note that section 84 of the Small Business, Enterprise and Employment Act 2015 has introduced a ban on bearer shares, regardless of whether the company's articles permit them. The act sets out certain transitional arrangements for the mandatory cancellation or conversion of existing bearer shares.

The general rules applicable for the transmission of shares *mortis causa* in public and private companies are discussed in more detail in Sect. 5 below. The following section will discuss the general succession law rules, which may have relevance to the transmission of a deceased's share of business to his successors.

4 The Scots Law of Succession

4.1 General Principles

Scotland's law of succession has been developed largely through common law and has never been fully codified. As a result, Scots law has particularities that set it apart from that of any other country. Of particular note is the distinctiveness of Scotland's succession law compared with that of England (Gibb and Gordon 2012, 3–4).

The most important statute in this area is the Succession (Scotland) Act 1964, which established the foundation of the modern Scots law of succession. The act has

[6] The Companies (Model Articles) Regulations 2008, Model Articles for Plc, sections 46–51.

[7] See the Uncertificated Securities Regulations 2001.

been recently amended by the Civil Partnership Act 2004 and Family Law (Scotland) Act 2006. The most recent review of the Succession Act resulted in the publication by the Scottish Law Commission in 2009 of a Report on Succession, comprising several significant reform proposals concerning the intestate succession (SLC 2009). In August 2014 the Scottish Government launched a public consultation on some of the more controversial proposals of the Report, relating to jurisdiction and choice of law; wills and survivorship; rights of succession in limited circumstances; bonds of caution and the timescale for a surviving cohabitant to make a claim on a deceased cohabitant's intestate estate. Furthermore, the Government is planning another public consultation on the new scheme for intestacy, protection from disinheritance under a will and extended rights for cohabitants.

The Scots law of succession is divided into two distinct areas: the "testate succession", comprising the rules applicable where the deceased left a will, and "intestate succession", comprising the rules applicable if a person has died leaving the whole or any part of his estate undisposed of by testamentary disposition, or if the testamentary writing is ineffectual in whole or in part.[8]

The rules regarding testate or intestate succession are triggered by a person's death. The fact of death is proven by production of an extract from the register of deaths (the "death certificate") coupled with some evidence to link the person whose estate is to be distributed with the person whose death is recorded in the register.[9] If a person who has disappeared is thought to have died or has not been known to be alive for a period of at least 7 years, any person having an interest may apply to court to have the missing person declared legally dead.[10]

Upon a person's death, the vast majority of the debts existing in his patrimony will be liable to be paid out of the deceased's estate (Gibb and Gordon 2012, 9). If the estate's assets are exhausted by liabilities, any remaining debts are written off and are not transmitted to the deceased's descendants. The assets remaining after the payment of debts are passed on to the beneficiaries, following the rules of succession law.

The estate may be composed of one or both forms of property recognised in Scotland: heritable property and movable property. Heritable property comprises land and anything attached to the land, such as buildings or crops. Movable property includes anything that is not classified as heritable property (Gibb and Gordon 2012, 3). Shares in a company fall under the moveable property category.

The Succession (Scotland) Act 1964 reduced the relevance for succession law of the distinction between heritable and moveable property. For the purposes of devolution of an estate on intestacy, after satisfaction of prior and legal rights, the distinction between heritable and moveable estate is largely irrelevant.[11] Nevertheless, the distinction remains relevant for the issue of prior rights and legal rights. If the

[8] Succession (Scotland) Act 1964 (c 41), s 36(1).

[9] Local Electoral Administration and Registration Services (Scotland) Act 2006 (asp 14), s 44(6); Registration of Births, Marriages and Deaths (Scotland) Act 1965, s. 41(3).

[10] Presumption of Death (Scotland) Act 1977 (c 27), s 1(1), (2). SME 651.

[11] Succession (Scotland) Act 1964 (c 41), ss 1, 38(3).

Scottish Law Commission's proposals comprised in the 2009 Report are implemented by Parliament, the importance of this distinction will disappear altogether (SLC 2009, 11–12 and 110).

Regardless of whether the estate comprises heritable or moveable property, or whether the death occurred testate or intestate, the transfer from the deceased's patrimony into those of beneficiaries is carried solely through the medium of the executor.[12] The executor is appointed either expressly or impliedly by the deceased (the "executor nominate") or by the court (the "executor dative"). In the latter case, the order of preference in the appointment is (SME 1989, 1045):

1. the surviving spouse;
2. the next of kin;
3. creditors;
4. legatees; and
5. the procurator fiscal of the court or a judicial factor.

The appointment of an executor, whether nominate or dative, does not by itself transfer the legal title to the estate to the executor.[13] The transfer of legal title requires the further step of obtaining confirmation of the executor.[14] In order to obtain confirmation, executors are required to give up on oath a full and complete inventory of the deceased's estate.[15]

The executor's main role is to ingather the deceased's property, pay the due debts, including any inheritance tax payable, and distribute the remainder following the rules of testate or intestate succession. If the executor proceeds to distribute the whole estate to the beneficiaries, knowing that there are outstanding debts, he may be made personally liable to an unsatisfied creditor unless such creditor has consented to the payment or is barred from objecting to the executor's acts (SME 1989, 1105).

4.2 The Intestate Succession

The division of intestate estate involves three successive stages: (i) the establishment of the prior rights of the surviving spouse and civil partner; (ii) the establishment of the legal rights of the surviving spouse, civil partner and children; and (iii) the distribution of the remaining balance (the "dead's part").

[12] Succession (Scotland) Act 1964, s 14(1) and s 37(1)(a).

[13] The beneficial interest in the estate, however, will vest in the parties entitled thereto from the date of death.

[14] Succession (Scotland) Act 1964 (c 41), s 14(1).

[15] *Lord Advocate v Meiklam* (1860) 23 D 57 at 64. The Commissioners of Inland Revenue issue printed forms for this purpose, the use of which is obligatory: see the Inheritance Tax Act 1984 (c 51), ss 257, 261.

The "prior rights" are entitlements of the surviving spouse or civil partner to certain assets of the estate.[16] They are:

1. the dwellinghouse right, which gives the surviving spouse or civil partner ownership or tenancy of one house, including any garden ground and pertinents, owned or tenanted by the deceased at the time of death[17];
2. the right to furniture and plenishings from the dwellinghouse up to a value of £ 29,000[18]; and
3. the right to a sum of money by way of financial provision in amount of £ 89,000 if there are no surviving children or representatives or £ 50,000 if there are surviving children or representatives.

The prior rights arise only in case of intestate succession (including partial intestacy). They take precedence over the legal rights and the dead's part, and may be claimed within a prescriptive period of 20 years.[19]

The legal rights are claims against the net moveable estate aimed to ensure that the deceased's spouse (including civil partner) and children will receive a minimum of assets from the deceased's estate.[20] They apply to both testate and intestate succession, and cannot be defeated by testamentary provisions. There are two types of legal rights: the relic's part and the legitim (or the "bairn's part").

The relic's part could take the form of rights of the widow (*jus relictae*) or of the widower (*jus relicti*). They entitle the surviving spouse (or civil partner) to one half of the deceased's net moveable estate, if there are no surviving children or representatives, or one third if there are surviving children or representatives. The legitim are claims of the surviving children or representatives to a portion of the deceased's estate. The legitim amounts to one half of the estate if there is no surviving spouse or civil partner, or to one third if there is a surviving spouse or civil partner. The division of the legitim among the claimants is made *per capita*, when all claimants are in the same relationship with the deceased or *per stripes*, if the claimants are not all in the same degree (Gibb and Gordon 2012, 19–20). If any person claiming on the legitim fund received advances or gifts from the deceased during the latter's lifetime, the amount of such gifts or advances must be collated (added back) before the legitim is distributed in the normal way.[21]

Legal rights are not mandatory and may be renounced (or discharged). In that case, the amount available to the other claimants will increase proportionally. The effect of a discharge of legal rights after the date of death is to enlarge the dead's part rather than the legal rights (SME 1989, 775).

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[16] An unmarried cohabitant may be allowed to make a financial claim against the estate of a cohabitant who dies intestate: see the Family Law (Scotland) Act 2006 (asp 2), s 29.

[17] Succession (Scotland) Act 1964 (c 41), s.8(1).

[18] Succession (Scotland) Act 1964 (c 41), s.8(3).

[19] Prescription and Limitation (Scotland) Act 1973, Sch 1, para 2(f), as amended by the Abolition of Feudal Tenure (Scotland) Act 2000 (asp 5), s 76(1), (2), Sch 12, para 33(5)(b), Sch 13, Pt 1.

[20] Succession (Scotland) Act 1964, s 10(2), as amended by amended by the Civil Partnership Act 2004 (c 33), s 261(2), Sch 28, Pt 1, para 6.

[21] *Ibid*. at 20.

After the satisfaction of the prior and legal rights, the remaining balance (the dead's part) is distributed according to a pre-established order of succession. The Succession (Scotland) Act of 1964, section 2(1) lays down the following order of succession:

1. children;
2. parents and siblings, provided that there is at least one survivor from each class; each class shares one half of the estate; – the surviving parent or parents have the right to one half of the intestate estate and the surviving brothers and sisters to the other half;
3. siblings;
4. parents;
5. spouse or civil partner;
6. uncles and aunts, maternal or paternal;
7. grandparents;
8. collaterals of grandparents;
9. remoter ancestors;
10. the Crown, as *ultimus haeres*.

For all purposes relating to the succession to the estate of a deceased person (whether testate or intestate), "children" includes children born outside marriage (which used to be refereed as "illegitimate children", until this status was completely abolished by the Family Law (Scotland) Act of 2006) and adopted children (who are placed in the same position as natural children of their adoptive parents, but lose their rights to the estate of their natural parents and the natural parents' family).[22]

In order to qualify as a beneficiary in the division of an estate, it may not always be enough for the person apparently entitled under the rules of testate or intestate succession to establish that he survived the deceased. In certain situations, the person otherwise entitled to succeed may become disqualified under statute[23] or common law.[24] Disqualification arises mainly when the potential beneficiary has killed the deceased whose estate is being distributed (SME 1989, 668–670).

4.3 The Testate Succession

The rules regarding testate succession are built on the fundamental principle that, within the limits of legality, morality and public policy, and subject to the restrictions imposed by the legal rights of testator's family, a person has the right to transfer *mortis causa* the whole of his property to whomever he wishes, either as an absolute and unconditional bequest or as a conditional bequest. The testator is

[22] Succession (Scotland) Act 1964 (c 41), s 23(1)(a), (b); see also Adoption and Children (Scotland) Act 2007 (asp 4), s 120(1).

[23] Disqualification under the Parricide Act 1594.

[24] *Burns v Secretary of State for Social Services* 1985 SLT 351.

entitled at any time to revoke a previous will and replace it with new testamentary dispositions. No will, therefore, can take effect until the testator's death and no gift can vest in a beneficiary before this moment. If the beneficiary predeceases the testator, the legacy lapses unless the testator has indicated that the gift is in reality a gift to the beneficiary and his estate (SME 1989, 906).

Although the testator enjoys a significant degree of freedom to testate, several validity requirements must be met. First, the testator must have the necessary legal capacity to test. Any person, male or female aged 12 years or over, who is not insane, has capacity to test.[25] The capacity to test might also be affected by facility and circumvention (predisposition to be easily manipulated by others, so that the will cannot be said to reflect the testator's own intention) or undue influence (the beneficiary exploits the trust and confidence between him and the testator) (Gibb and Gordon 2012, 32).

In addition to capacity requirements, the will must meet the formal requirements. The basic requirement of form is that the will must be in writing (handwritten, typed, printed or a mixture of these) and signed by the testator (Gibb and Gordon 2012, 33–36).[26] When the testator is unable to write and sign (for instance due to blindness or physical incapacity), a relevant person (such as a solicitor, advocate or sheriff clerk) may subscribe the will vicariously (Gibb and Gordon 2012, 37).

The provisions of a will may be grouped in three categories: legacies, annuities and liferents. Legacies may be special, when one or more specific items are bequeathed; general, when the subject matter of the bequest is identified under a generic or general description (e.g. a sum of money or a quantity of fungible goods); or residuary, consisting of whatever is left after special and general legacies are paid in full (Gibb and Gordon 2012, 41). An annuity is the right to a periodical fixed payment of a sum of money from the revenue of the estate (or from the capital, if the revenue is insufficient), usually for the remainder of the beneficiary's life. The liferent is the right to enjoy the income and fruit of the property, without the destruction of its substance. At the end of the liferent, the capital (or substance) is granted to another person, the fiar. In the case of a liferent of shares, for instance, the liferenter is entitled to dividends and other cash payments made by the company out of profits. The liferenter is also entitled to bonus shares, if they are distributed in lieu of dividends (Gibb and Gordon 2012, 46).

5 Consequences for a Business in Case of Death of a Shareholder

This section will explore the legal rules governing the transmission of shares in a public or private company following the death of a shareholder.

[25] Age of Legal Capacity (Scotland) Act 1991, S. 2(2).

[26] Requirements of Writing (Scotland) Act 1995.

5.1 Preliminary Remarks

From a terminological point of view, in Scots company law a distinction is made between transfers and transmissions of shares. CA 2006, the Model Articles for public and private companies limited by shares and other relevant legal sources use the term "transfer" to designate a *voluntary* conveyance, whether for consideration or not, of a share from a shareholder to a person wishing to become a shareholder.[27] The term "transmission" is used when shares pass by operation of law, including devolution on the death or insolvency of a shareholder.[28] Exceptionally, the transmission of shares results from legislation affecting a particular industry or company, such as nationalisation or a private Act for the amalgamation of particular companies (SME 1989, 376).

As a general rule, on the death of a shareholder, the shares form part of his estate and will follow the testate or intestate succession procedures, as applicable. The shares of the deceased shareholder vest, in terms of the rights they represent in executors.[29] As it will be shown in more detail below, executors may sell or otherwise dispose of them (for instance by transferring them to the entitled heirs), without actually being registered in the register of members, subject to any restrictions on transfers which the articles may contain.

From the perspective of company law, the legal rules governing the transmission of shares are found in the company's articles of association, the Model Articles for companies registered or on after 1 October 2009, Table A of Companies (Tables A to F) Regulations 1985 for companies registered before 1 October 2009, and CA 2006. The Model Articles and Table A comprise largely similar provisions regarding transmission of shares. One difference is of terminological nature: the Model Articles use the term "transmittee" to refer to the person entitled to a share by reason of the death or bankruptcy of a shareholder or otherwise by operation of law.[30]

5.2 Proof of Death and of Personal Representative Capacity

The deceased's executor has the duty to notify the death to the company death as soon as possible.[31] The shareholder's death could be proved by production of an extract from the register of deaths (the "death certificate") coupled with a form of

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[27] See e.g. CA 2006 s 770(2). Model Articles for plc, and for ltd, art. 65–68 and 27–29, respectively; Table A arts 29–31; *Re Bentham Mills Spinning Co* (1879) 11 Ch D 900 at 904, CA, per Jessel MR; *Moodie v W and J Shepherd (Bookbinders) Ltd* [1949] 2 All ER 1044 at 1054, HL, per Lord Reid.

[28] *Barton v London and North Western Rly Co* (1889) 24 QBD 77 at 88, CA, per Lindley LJ.

[29] If a trust of the shares is set up by will, the trustees will become the holders of the legal interest. The duties and liabilities of trustees in such case follow the general rules of Scots trust law.

[30] Model Articles for plc, art. 1.

[31] *New Zealand Gold Extraction Co (Newberg-Vautin Process) v Peacock* [1894] 1 QB 622 at 632–633, CA, per Davey LJ.

identification of the deceased with the person whose death is recorded in the register.[32]

Furthermore, in order to prove his capacity, an executor must provide to the company a proof of the confirmation as executor of a deceased person, issued by the Sheriff Court in cases of both testacy and intestacy.[33] The same applies if the shareholder was domiciled abroad – the company may not recognise a foreign personal representative, unless the formalities required in Scotland have also been complied with.[34] If the company registers a transfer by any person who has not obtained the confirmation, or pays dividends to any such person, it becomes a vitious intromitter and may incur liability for the whole debts of the deceased.[35]

When the deceased shareholder held shares jointly with other members, a document attesting the transfer is not needed. Unless the articles otherwise provide, the survivors of registered joint holders of shares are alone entitled to and liable upon such shares,[36] even where one of the joint holders is a corporation.[37] In such case, the company will make the required alterations in the register of members based on the death certificate.

5.3 The Transmission Procedures

This section will describe the transmission procedures applicable to shares issued in certificated form. Transmission *mortis causa* of shares held in uncertificated form is unlikely to occur in practice. From a theoretical point of view, regulation 27(6) of Uncertificated Securities Regulations 2001 permits an Operator to register as holder of shares a system member to whom title has been transmitted by operation of law. In practical terms, however, in circumstances which give rise to transmission of title by operation of law, the Operator will proceed to re-certificate the shares, which will then be dealt with in accordance with normal rules and the company's articles of association (PCL 2007, ch 6.5).

The transmission of shares cannot operate automatically: certain procedural steps must be complied with. Consequently, a provision in the articles stating that the shares of a deceased member will pass directly to any person entitled, other than the executors, without a share transfer, is invalid.[38]

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[32] Local Electoral Administration and Registration Services (Scotland) Act 2006 (asp 14), s 44(6).

[33] CA 2006 s 774.

[34] See *Commercial Bank Corpn of India and the East, Fernandes' Executors' Case* (1870) 5 Ch App 314.

[35] *Forbes v Forbes* (1823) 2 S 395; *Wilson v Taylor* (1865) 3 M 1060.

[36] *Re Maria Anna and Steinbank Coal and Coke Co* (1875) LR 20 Eq 585; Model Articles for ltd and plc, art. 27 and 65, respectively; Table A art 29.

[37] *Thompson v Alexander* [1905] 1 Ch 229.

[38] *Re Greene* [1949] Ch 333; CA 2006, s. 770.

The Model Articles for both public and private companies provide that executors may elect to become either the holders of the shares or to have them transferred to another person.[39] In the absence of any express provision in the articles, the executors are *entitled* to be registered as holders of the shares vested in them.[40] The company cannot, without their consent, register them as members.[41]

If they elect to become holders, the executors must give the company notice in writing to that effect. The company must register them as the owners of the shares and not as holding in a representative capacity.[42] Such a registration does not amount to a transfer of shares, so no instrument of transfer is required. Instead the company is bound to accept the production of the grant confirmation as executors as sufficient evidence of title.

When new shares are offered to the members in proportion to their holdings while the name of a deceased member is on the register, the executors may claim their testator's proportion.[43] They must, however, be registered themselves as members in respect of the new shares, and become liable to the company as individuals.[44]

Once registered, the executors may transfer the shares in the normal way as members[45] (PCL 2007, 6.444). If there are more than one, they all must concur[46] (PCL 2007, 6.477). If executors are registered as members, they become personally liable for capital unpaid on the shares with an indemnity from the estate, and they are able to vote the shares at general meetings and to participate in written resolutions.[47] As between them and the beneficiaries, however, they hold the shares as part of the estate.[48]

Under Model Articles, directors have the power to refuse to register executors. Such refusal must be a bona fide exercise of their discretion, in the interests of the company, and be a (majority) decision of the board to refuse, not a failure to reach a decision.[49] If directors abuse their power to refuse registration, the executors may seek redresses in court for unfair prejudice (s. 994 of CA 2006) and apply for an order to the company to register them.

Unless the articles provide otherwise, if executors are not registered as members, they receive all rights attached to the shares, except the right to attend meetings and

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[39] See Model Articles for plc and ltd, arts 66(1)(a) and 27(2)(a) respectively, and Table A, art. 30.

[40] *Scott v Scott (London) Ltd* [1940] Ch 794; *Safeguard Industrial Investments Ltd v National Westminster Bank Ltd* [1980] 3 All ER 849; *Pennington v Crampton* [2004] BCC 611.

[41] *Stewart v James Keiller & Sons* 1902 4 F 657.

[42] *Saunders & Co, Re* [1908] 1 Ch 415.

[43] *James v Buena Ventura Nitrate Grounds Syndicate Ltd* [1896] 1 Ch 456, CA.

[44] *Re Leeds Banking Co* (1866) 1 Ch App 231; *Duff's Executors' Case* (1886) 32 Ch D 301, CA.

[45] Thus they may be subject to any restrictions on transfer in the articles.

[46] *Barton v North Staffordshire Ry* (1888) 38 Ch D 458.

[47] *Cheshire Banking Co, Re, Duff's Executor's Case* (1886) 32 Ch D 301.

[48] *Duff's Executors' Case* (1886) 32 Ch D 301 at 309, CA, per Cotton LJ, and at 310 per Fry LJ.

[49] *Re Hackney Pavilion Ltd* [1924] 1 Ch 276; *Shepherd's Trustees v Shepherd* 1950 SC (HL) 60, 1950 SLT 90.

to vote.[50] If they elect to transfer the shares without becoming members, they must execute a transfer document.[51] In that case, the executors may either sell the shares to a third party or apply to have them transferred to those entitled under the intestacy.[52] Such a transfer will be treated as if it were executed by the deceased, and as if the death had not occurred. If the articles so provide, any restrictions on the transfer of shares apply to a transfer by executors.[53] In such case, however, the clauses must not be construed unreasonably as to prevent them exercising their powers as members of the company.[54]

The Model Articles and CA 2006 leave shareholders a great degree of flexibility to agree in advance on what should happen in the event of death of one of them. Shareholders may agree in advance that the shares may pass, through the prescribed legal procedures, to particular people, such as the deceased's spouse or children. Shareholders' agreements often regulate transmission of shares through a cross option clause (Stedman and Jones 1998, 527–528). The cross option clause gives to the remaining shareholders an option to buy the shares from the executor of the deceased shareholder's estate, and to the executors an option to sell the shares to the shareholders. If any of the parties exercises their option, the other party must buy or sell the shares, as applicable. In such a case, the share price could be determined by the company's auditors, based on the last set of audited accounts.

6 Conclusion

Business succession in Scotland is a complex process arising at the intersection of the Scots law of succession and British company law. Depending on the form of business organisation, the business may come automatically to an end upon death of its owner (sole trader), or may continue as usual (registered companies and certain partnerships). In either scenario, the transmission of the owner's share of the business to his successors follows the general framework of succession law. For partnerships and registered companies, additional special rules regarding valuation and transmission will apply.

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[50] Model Articles for plc and ltd, art. 66(2) and art. 27(3), respectively; Table A, art. 31.

[51] CA 2006 s 773; Model Articles art 27–28 (ltd), art 66–67 (plc); Table A arts 29–31.

[52] *Murray's Judicial Factor, Petitioner* [1992] BCC 596.

[53] See e.g. *Cottrell v King* [2004] 2 BCLC 413.

[54] *Hobson, Houghton & Co, Re* [1929] 1 Ch. 300; *Strothers v William Steward (Holdings)* Ltd [1994] 2 BCLC 266.

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Business Succession in Taiwan

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Abstract Family business plays an important role in Taiwan through taking different shapes. The organizations that family business can choose include sole proprietorships, limited company and company limited by shares etc. However, no matter what kind of the organization it takes, because of the regulations of the Succession Law in Taiwan, which entitle all heirs with an equal share of the inheritance, it is difficult for family business to run on a permanent basis.

1 Introduction

Most businesses in Taiwan are family businesses, and most family businesses are small and medium enterprises (hereafter SMEs).[1] According to government statistics there were about 1.3 million SMEs in 2013, constituting 97.64 % of the total number of enterprises and the revenue of these SMEs constitutes 29.44 % of whole revenue of all enterprises at the same year.[2] This demonstrates that family

[1] According to Article 2 of the Standards for Identifying Small and Medium-Sized Enterprises, SME means "an enterprise which has completed company registration or business registration in accordance with the requirements of the laws, and which conforms to the following standards: (1) The enterprise is an enterprise in the manufacturing, construction, mining or quarrying industry with paid-in capital of NT$80 million or less; (2) The enterprise is an enterprise in the industry other than any of those mentioned in the Sub-paragraph immediately above and had its sales revenue of NT$100 million or less in the previous year." And for the purpose of business guidance, each of the government agencies may, in relation to such specific business matters, base their standards for identifying a SME "on the number of regular employees as noted below, in which case the restrictions noted in the previous Paragraph shall not apply: (1) The enterprise is an enterprise in the manufacturing, construction, mining or quarrying industry and the number of its regular employees is less than 200; (2) The enterprise is an enterprise in the industry other than any of those mentioned in the Sub-paragraph immediately above and the number of its regular employees is less than 100."

[2] The website of the Small and Medium Enterprise Administration, Ministry of Economic Affairs. www.monesmea.gov.tw/mp.asp?mp=2

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businesses play an important role in Taiwan's economy. Regarding the business forms of these SMEs, 55.68 % adopt sole proprietorships, 1.85 % are parternerships, 28.98 % are limited company and 8.43 % are company limited by shares according the above statistics. Moreover, regarding the duration of these SMEs, 51.32 % are below 10 years, 25.17 % are between 10 and 20 years, and 23.52 % are over 20 years. When discussing long-running businesses, it is desirable to arrange proper successors to take over the business in the event of the death of the founder, instead of the dissolution or the liquidation of the business. However there are legal issues to be decided, particularly regarding who will take over the business if the founder or owner dies, and whether it is possible for the decedent to decide his/her proper successor(s) ahead of his/her death.

The above legal issues are principally covered by the Succession Section of Taiwan Civil Code. In addition, different laws will be used to deal with the relationship of joint owners in different organizations. This chapter will introduce the structure of Taiwan Civil Code first and then continue to look at the regulations of different business forms.

2 The Succession Section of Taiwan's Civil Code

Let me start from introducing some crucial principles in the Succession Section of Taiwan Civil Code. The first principle is *statutory order of heirs*. It mandates that "heirs to property other than the spouse come in the following priority order: (1) lineal descendants by blood; (2) parents; (3) brothers and sisters; (4) grandparents" (Taiwan Civil Code §1138).[3] "The first order of lineal descendants by blood are ranked first priority as heirs" (Taiwan Civil Code §1139) and in most cases are the children of the deceased.[4] "If an heir of the first order has died or lost the right to inheritance before succession proceedings begin, his/her lineal descendants shall inherit his/her entitled portion in his/her place" (Taiwan Civil Code §1140). The second principle is the principle of equal inheritance and sexual equality. It means "where there are several heirs of the same order, they each inherit an equal share of the total, unless it is otherwise provided by law" (Taiwan Civil Code §1141).

There are four types of succession in the Taiwan Civil Code. The first type is the most common one and it provides that "an heir assumes all the rights and obligations pertaining to the estate of the decedent at the time of the commencement of the succession, except those rights and obligations which exclusively belong to the decedent; and an heir's obligations to the debts of the decedent are limited to the extent of the property acquired from the estate" (Taiwan Civil Code §1148).[5]

[3] Each spouse has the right to inherit the property of the other. As the spouse inherits concurrently with heirs of the first order, "his or her entitled portion is equal to the other heirs" (Taiwan Civil Code §1144).

[4] Including quasi-legitimate children and of children adopted through legal procedures.

[5] An heir may waive his or her right to an inheritance (Taiwan Civil Code §1174I). Such a waiver must be asserted by a written declaration to the court within 3 months after becoming aware of his or her right to the inheritance (Taiwan Civil Code §1174II).

The second type deals with specific cases where an heir shall be disqualified to claim the benefit provided by Article 1148, Paragraph 2. These specific cases include any of the following cases: "(1) Where the heir has grossly concealed the decedent's property; (2) Where the heir grossly falsifies entries in the inventory report of the decedent's property; (3) Where the heir has disposed of the decedent's property with the intentions of fraudulently infringing upon the rights of the decedent's creditors" (Taiwan Civil Code §1163). The third type is *unacknowledged succession*. It provides that "where, upon the opening of the succession, it is not clear whether or not there is an heir, the family counsel shall appoint a manager for the property of the deceased within one month, and report to the court both the opening of the succession and the appointment of the manager" (Taiwan Civil Code §1177). The last type is *will succession*. It provides that "a testator may freely dispose of his property by so declaring in a will, so far as it does not contravene the provisions with regard to compulsory portions" (Taiwan Civil Code §1187).

2.1 Testamentary Freedom

In the Taiwan Civil Code "a testator may freely dispose of his property by means of a will, so far as it does not contravene the provisions in regard to compulsory portions" (Taiwan Civil Code §1187), so consequently as the testator's property includes a business or a share of business he or she may also dispose of it by will. Included in the scope of testamentary freedom is the portioning of inheritance assets, the division of inheritance and the prohibition of division of inheritance.[6] However, a testator is not entitled to decide the inheritance of the next generation or subsequent generations.

Provision is made in the Code for the appointment of an executor. "An executor is under an obligation to manage the property of the deceased and to carry out all acts necessary for the execution of his duty" (Taiwan Civil Code §1215I). An executor is deemed to be the agent of the heir and he/she acts in the course of performing his/her duty (Taiwan Civil Code §1215II). While an executor is executing his duty, an heir may not dispose of any property related to the will, or obstruct the executor in the execution of his duty (Taiwan Civil Code §1216). The executor may add instructions, requirements or conditions on the will with the exception of disobeying the will. These executor's actions are deemed requirements of execution.

Even though testamentary freedom is allowed in the Taiwan Civil Code, legislators commonly prefer the concept of family succession and letting the specific families of decedents inherit property jointly. After the heirs inherit the property "the whole property of the decedent is, before its partition, owned in common by the heirs" (Taiwan Civil Code §1151). Each heir is entitled however "to demand at any time the partition of the thing held in division" (Taiwan Civil Code §823I).

[6] Regarding the prohibition of partition of the deceased's property, the Taiwan Civil Code considers that the situation of ownership-in-common impedes proper functioning of businesses, so where a will prohibits partition, "the effect of such a prohibition is limited to ten years" (Taiwan Civil Code §1165II).

2.2 Compulsory Portions

As has been mentioned, compulsory portions of inheritance are specified in the Taiwan Civil Code. Compulsory portions are "the limited inheritance of heirs of statutory order which cannot be contravened by the testator" (Taiwan Civil Code §1223).[7] When the compulsory portion exceeds the total value of the legacy property of the decedent the person entitled to a compulsory portion becomes deficient on account of the legacy made by the testator (Taiwan Civil Code §1225I). If there are several legatees, "deductions must be made in proportion to the value of the legacies they severally receive" (Taiwan Civil Code §1225II). The scope of the persons entitled to a compulsory portion is the same as the statutory heirs, but the proportions of the compulsory portion between the statutory order's heirs are different.

In calculating the compulsory portion it is necessary to demonstrate the inheritance and the testator's debt. Only if the testator's business or property belongs under the exclusions of inheritance that is provided by the Estate and Gift Tax Act is the business or property excluded from the gross estate,[8] otherwise the business or property is included in the estate. Then the Article 16–1 of the act also provides that "if property of legato, legatee(s), or heir(s) that is donated or added to charitable trusts already established at the time of death of the decedent meets the following

[7] The compulsory portion of an heir is determined as follows: "(1) For a lineal descendant by blood, the compulsory portion is one half of his entitled portion; (2) For a parent, the compulsory portion is one half of his entitled portion; (3) For a spouse, the compulsory portion is one half of the entitled portion; (4) For a brother or a sister, the compulsory portion is one-third of his or her entitled portion; (5) For a grandparent, the compulsory portion is one-third of his entitled portion" (Taiwan Civil Code §1223).

[8] The Article 16 of Estate and Gift Tax Act provides as followed. Exclusions from the gross estate include the following: "(1) Property donated by legato, legatee(s), or heir(s) to government agencies at various levels or public educational, cultural, public welfare and charitable organization; (2) Property donated by legato, legatee(s), or heir(s) to public organizations or businesses fully owned by the government; (3) Property donated by legato, legatee(s), or heir(s) to private incorporated educational, cultural, public welfare, charitable or religious organizations, or ancestor worshipping entities that meet the criteria prescribed by the Executive Yuan; (4) Cultural, historical or art books and articles duly registered with the competent tax authority, provided, however, that the estate tax on such books or articles shall be recaptured in the event of transfer of the same; (5) Copyright, patented invention and work of act created by the decedent; (6) Necessities of the decedent for daily life with gross value under $720,000; (7) Apparatus for professional use by the decedent with gross value under $400,000; (8) Forests banned or restricted from logging by law, provided, however, that the lift of the ban or restriction will subject the same to the recapture of estate tax thereon; (9) Proceeds paid to the designated beneficiary at the time of death of the insured under life insurance, or insurance covering soldiers, civil servants, or teachers, or labor insurance, or farmer insurance; (10) Property inherited by the estate tax on the inherited property has been paid; (11) Property originally or specifically owned by the spouse or children of the decedent, and the ownership of which can be proved with registration or other support document; (12) Land used by government for public passage or other land used for public passage free of charge, which is certified by the competent authority, with the exception to empty lot reserved for housing construction as required by law; and (13) Unrecoverable or un-exercisable claims inherited, provided there are relevant support documents."

requirements, it is excluded from the gross estate: (1) the trustee is a trust enterprise as provided in the Trust Enterprise Act; (2) except for necessary expenses incurred from operating the business for which the trust is established, the charitable trust does not accord any special benefit to specific party or others by any means, and (3) the trust deed stipulates that upon the cancellation, termination or extinction of the trust, the trust property will be transferred to government of various levels and/or public interest group or charitable trust with similar objectives."

2.3 Anticipated Succession

Outside the common case in which succession happens after an ancestor's death, advancement of succession is also allowed in the Taiwan Civil Code. Called *gift contract upon death*, it is allowed only for the purpose of concluding a marriage, separation from home, or carrying on trade. "If one of the heirs has, before the opening of succession, received gifts in property from the deceased for purposes as above mentioned, the value of such gifts shall be added to the inheritable property at the opening of the succession, thus constituting together the property of the succession" (Taiwan Civil Code §1173I). If the property gifted to one of the heirs is a share of a business, the heirs get the control of the business proportionately.

On the other hand, legislators would like to ensure the donor's continuing influence upon the donee while the donor is alive, so the donor is entitled to revoke a gift or impose other conditions on the donee (Taiwan Civil Code §§412I, 416I). Therefore in case of a gift contract upon death, ancestor could revoke a gift or to ask the forward heirs to impose certain other requirements.

For protecting the interests of the ancestor during his or her life, there is a provision in the Family Section of the Taiwan Civil Code which can be applied in such cases, namely that "the following relatives have a mutual duty of care: (1) lineal relatives by blood; (2) one of either the husband or the wife or the parents of the other party living in the same household; (3) brothers and sisters; (4) the head and the members of a household" (Taiwan Civil Code §1114). It goes without saying that persons entitled to maintenance (i.e. subject to said duty of care) shall be limited to those who cannot support the living and are unable to earn a living (Taiwan Civil Code §1117I). However the limitation in respect of inability to earn a living shall not apply to the case of elder lineal relatives by blood (Taiwan Civil Code §1117II).

3 The Succession Issue in Taiwan Company Law

As has been mentioned above the issue of business succession is not a focus in Taiwan Company Law and there is no specific regulation to deal with it. Therefore the general principles of the Taiwan Civil Code or other Codes are applied instead.

To demonstrate these general principles it should be clear in advance that there are many types of business organization and not all of them are regulated by Taiwan Company Law. The organization of a Sole Proprietorship is regulated by the Taiwan Business Registration Act. The organization of a Partnership is regulated not only in the Taiwan Civil Code but also in the Taiwan Business Registration Act. Regarding trusts and foundations, the former is regulated in Taiwan Trust Law and the latter is regulated in the Taiwan Civil Code. So, the applicable regulations in any given case depend on the type of business at issue.

3.1 Sole Proprietorships and Partnerships

In the case of a sole proprietorship the Business Registration Act provides that "the registration for business succession should be filed by all of the heirs, and that where one or several heirs are minors, they shall be represented by their legal representative(s)" (Taiwan Business Registration Act §8II). Therefore all the heirs jointly inherit the sole proprietorship. All of the heirs are called co-owners. "Unless otherwise provided by a covenant, in order to determine management decisions pertaining to the thing held in division, the consent of more than half of the co-owners whose share of ownership is more than half of the total share shall be required" (Taiwan Civil Code §820I). "But if the share of ownership is more than two thirds, the numbers of consenting co-owners need not to be taken into account" (Taiwan Civil Code §820I proviso). Moreover "the disposition of the thing held in common and the exercise of other rights relating to the same shall be made with the consent of all the owners-in-common" (Taiwan Civil Code §828III).

On the other hand, in the case of a partnership the closed characteristic is emphasized; "a partner shall not transfer his share in the partnership to a third party, except when it be to another partner" (Taiwan Civil Code §683). Based on this, if a partner dies, the withdrawal of a partner takes place except when stated in a contract that the partner's heirs may inherit his/her rights (Taiwan Civil Code §687 (1)). In some cases, where only one partner remains after the withdrawal of the deceased partner, the partnership would be dissolved. Meanwhile the heirs may request settlement of the accounts between the withdrawing partner, the ancestor, and the other partners. "The settlement should be made on the basis of the financial situation of the partnership at the time of withdrawal" (Taiwan Civil Code §689I). "The share of the withdrawing member may be repaid in money, irrespective of the nature of his contribution" (Taiwan Civil Code §689II). If the partner's heirs may inherit his/her rights as stated in a contract and there is no clause within the contract concerning the method of resolution, "the resolutions of the partnership ought to be made by the unanimous consent of all the partners" (Taiwan Civil Code §670I). However this will complicate the relationship of the partnership.

3.2 Company

When the business has adopted the legal organization of a company, how the succession proceeds depends on the class of the company. In Taiwan Company Law there are four classes of company: unlimited company, limited company, unlimited company with limited liability shareholders and company limited by shares (Taiwan Company Law §2).

An unlimited company is organized with two or more shareholders who bear unlimited joint and several liabilities for discharge of the obligations of the company. A limited company is organized with one or more shareholders, with each shareholder being liable for the company in an amount limited to the amount contributed by him. An unlimited company with limited liability consists of shareholders organized with one or more shareholders of unlimited liability and one or more shareholders of limited liability; among them the shareholder(s) with unlimited liability shall bear unlimited joint liability for the obligations of the company, while each of the shareholders with limited liability shall be held liable for the obligations of the company only in respect of the amount of capital contributed by him. A company limited by shares is organized with two or more persons, or one government entity, or one corporate shareholder, with the total capital of the company being divided into shares and each shareholder being liable for the company in an amount equal to the total value of shares subscribed by him.

According to government data in 2014 there are 630,040 companies in Taiwan. 469,252 companies are limited companies and 156,261 companies are companies limited by shares.[9] It appears that most popular classes of company are limited companies and companies limited by shares, in both of which shareholders have only limited liability for the company. In case of unlimited companies and unlimited companies with limited liability shareholders, when succession happens the title of share could not become the subject of succession. This is because there is individual element in these companies (Taiwan Company Law §§66, 115). On the contrary, if the shareholder of a limited company or a company limited by shares dies, the disposal of his/her shares will be more complicated.

3.2.1 Limited Company

Even though Taiwan Company Law provides that upon the death of a shareholder of limited liability, his/her contribution to the capital shall devolve upon his/her successors in case of unlimited company with limited liability shareholders, it also applies to the case of limited company (Taiwan Company Law §123II). Therefore if the decedent is a shareholder of the limited company, his/her heirs could inherit these shares. However, as limited companies operate on the principle of one

[9] The website of the Department of Statistics, Ministry of Economic Affairs: www.moea.gov.tw/Mns/dos/content/Content.aspx?menu_id=9661

shareholder one vote (Taiwan Company Law §102), the issue of how all the heirs vote on company's matters is unresolved.[10]

3.2.2 Company Limited by Shares

If the decedent is a shareholder in a company limited by shares, upon his/her death his/her shares shall devolve upon his successors. Where there are several persons owning the same share or shares, such "co-owners shall select one of them for the exercise of their shareholders rights" (Taiwan Company Law §160I).

However the concept of Company Law is to allow companies to be run on a permanent basis, differing from the concept of the Succession Section of Civil Code in which individualism is emphasized and in which all heirs have an equal share of the inheritance. The two concepts are in conflict. The general issue arises of how co-owners of the shares participate in the running of the company on an ongoing basis. The issue is more serious in the case of compulsory portions.

The issue could be avoided by stipulations in the Articles of Incorporation or the resolution of a shareholders' meeting, namely demanding that the heirs promise that they will convey the shares to others. But Taiwan Company Law provides that "assignment/transfer of shares of a company shall not be prohibited or restricted by any provision in the Articles of Incorporation of the issuing company" (Taiwan Company Law §163I), so the first method seems to be disallowed. Moreover if the issuing company and the heirs conclude a contract in which the heirs convey the shares to the company upon the death of the ancestor, the present shareholder, and the company pays the consideration to the forward heirs, it may be allowed under the principle of free contract. Besides, if compulsory portions are shares, it may be allowed to let the shares descend exclusively to specific heir(s) to avoid the shares being owned jointly. This should be accomplished with the consent of heirs who are entitled to the compulsory portions. If the parties decide to take this route to resolve the division of the shares, it is necessary to ask an appraiser to decide the price of the shares.

3.3 Trust and Foundation

From the perspective of a long-running business if the ancestor does not want his/her shares to be held by heirs who will be co-owners, thereby negatively affecting the operation of the business, the ancestor has other options available, namely to establish a trust or foundation founded by shares to avoid the destruction of the

[10] There are two possible solutions. One is an appeal to the regulations concerning co-ownership of property in the Taiwan Civil Code. The other one is an appeal to the regulations concerning co-ownership of shares of the company limited by shares in Taiwan Company Law.

shares' structure. The first option is a trust. In Taiwan Trust Law a trust established by a will is allowed (Taiwan Trust Law §2), so a testator may freely dispose of his property by a will trust so far as it does not contravene the provisions in regard to compulsory portions. Charitable trusts are generally preferable to general trusts.

The reason that there is a preference for charitable trusts is that it may be beneficial to testator and heirs to choose it. That is to say "if property of legato, legatee(s), or heir(s) that is donated or added to charitable trusts already established at the time of death of the decedent and meet the following requirements, it is excluded from the gross estate: (1) the trustee is a trust enterprise as provided in the Trust Enterprise Act; (2) except for necessary expenses incurred from operating the business for which the trust is established, the charitable trust does not accord any special benefit to a specific party or others by any means, and (3) The trust deed stipulates that upon the cancellation, termination or extinction of the trust, the trust property will be transferred to government of various levels and/or public interest group or charitable trust with similar objectives" (Taiwan Estate and Gift Tax Act §16-1). As an example, the founder of Taiwan's most famous enterprise, Formosa Plastics Group, established a charitable trust in 1991 and delegated The Bank of Taiwan as trustee.

The second option is a foundation. An ancestor who wants to establish a foundation can do so by will endowment and should not draw up an act of endowment (Taiwan Civil Code §60I). Meanwhile, he/she should donate his/her shares as the assets endowed. Under the structure of foundation the control to the company is entitled to the foundation and not to the heirs. The heirs who wish to influence the direction of the company can only act as a member of the board to achieve that purpose. However the Taiwan Civil Code only allows the charitable foundations and does not allow private interest foundations. Therefore, to meet above mentioned requirement people would often establish a charitable foundation as the means to manage a hospital which is beyond the scope of the Succession Section of Taiwan Civil Code.

4 Conclusion

Even though some owners of large companies—especially listed companies—would choose a trust or foundation to arrange his/her inheritance upon death, considering the weight of SMEs it is desirable to amend the regulations to allow flexibility in succession. We have seen that some regulations in the law of succession are in collision with company law in Taiwan. The regulations in force apparently do not meet the need of long-running businesses. To settle the handicap between them we may desire the regulations to become more flexible to meet the demands of SMEs. One way of accomplishing this would be by allowing Articles of Incorporation or a resolution of a shareholders' meeting to restrict the transfer of the ancestor's shares, or—under specific circumstances—to exclude the compulsory proportion. Otherwise it is hard to imagine that companies in Taiwan can persist over long periods of time.