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Towards the entry into force of the succession regulation:
building future uniformity upon past divergencies



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The EU Regulation no. 650/2012: the European way in cross-border successions

The Destiny of Company Shares in International Succession Cases

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A. Introduction

I. Problem Definition:

- Application of foreign Law of Succession as well as the application of different governing laws creates additional problems regarding the settlement of an inheritance
- Among the most problematic components of an estate in this respect are traditionally company shares
- Succession Regulation may increase application of foreign Law of Succession because of habitual residence as connecting factor (art. 21) and because renvoi is often irrelevant (art. 34)
- One of the goals of the Succession regulation is to facilitate and ameliorate the settlement of inheritance cases with a foreign connection within the EU
- In the following we will analyse if this goal is achieved in respect of the inheritance of company shares

A. Introduction

II. The Regulation N° 650/2012:

- Legislation history: 10 years in the making
- One of the most ambitious projects concerning measures aimed at ensuring the compatibility of rules applicable in the member states concerning conflict of laws and of jurisdiction...
- General rules (Chapter I), Jurisdiction (Chapter II), Applicable Law (Chapter III), Recognition, Enforceability and Enforcement of Decisions (Chapter IV), Authentic Instruments (Chapter V) and European Certificate of Succession (Chapter VI)
- In the present context rules concerning the applicable law of interest, i.e. artt. 20 to 38
- Habitual residence as main connecting factor (art. 21 (1))
- Choice of Law possible (art. 22) in a declaration in the form of a disposition of property upon death (not articles of association)
- No partial election possible
- No scission/fragmentation of the succession intended

B. Destiny of Company Shares under the Rule of German PIL:

I. Relationship between Int'l Corporate + Int'l Law of Succes.:

- Succession regarding company shares upon death per se qualified as matter of Int'l Law of Succession, but certain questions re company shares qualified as part of Int'l Corporate Law
- Rule of thumb that inconsistencies in case of doubt are being solved according to the provisions of the particular Corporate Law (also because of artt. 49, 54 TFEU)

II. Technical Delimitation between the two Fields of Law:

- Scission/fragmentation of the succession analog art. 3a (2) German EGBGB („*Gesellschaftsstatut als Einzelstatut*“)?
- The prevailing opinion: matter of qualification
- *Dutta*: dual qualification as part of Int'l Corporate and Int'l Succession Law (“Doppelqualifikation”)

C. Destiny of Company Shares u. the Succession Regulation:

- Regarding succession of persons who die on or after 17 August 2015, the new Succession Regulation will replace all national regulations on Int'l Law of Successions
- Applicable law is meant to govern the succession as a whole

I. Relationship between Int'l Corporate + Int'l Law of Success.:

Focus on the scope of the International Corporate Law as well as the scope of the Succession Regulation

- According to art. 20 the Succession Regulation is universally applicable and according to art. 21 the applicable law should govern the succession as a whole
- I.E. no scission/fragmentation of the succession reg. company shares
- Exclusions from the scope of the Regulation in art. 1 (2)

C. Destiny of Company Shares u. the Succession Regulation:

I. Relationship between Int'l Corporate + Int'l Law of Success.:

1. International Corporate Law (ICL):

- Excluded also from the scope of the Rome I- (art. 1 (2) (f)) and Rome II-Regulation (art. 1 (2) (d))
- No European Rules so far – issue of national PIL
- BUT: European Group of PIL (GEDIP) working on a draft of a regulation on the law applicable to companies
- Main connection factors in national PILs: domicile and establishment of companies
- Germany: no codification of CIL; generally domicile as connecting factor, but following the jurisdiction of the ECJ re. the "freedom of establishment" (artt. 49, 54 TFEU) establishment of other member states' companies

C. Destiny of Company Shares u. the Succession Regulation:

I. Relationship between Int'l Corporate + Int'l Law of Success.:

2. Art. 1 (2) (h) and (i):

- Art. 1 (2) (h): Exclusion of “*questions governed by the law of companies* [...], such as clauses in the memoranda of association and *articles of association of companies* [...] *which determine what will happen to the shares upon the death of the members*”
- Art. 1 (2) (i): Exclusion of „*the dissolution, extinction and merger of companies* [...]”
- legal consequences of the death of a company member for the company itself and the surviving members as well as the legal conditions under which the shares can be transferred to the respective heirs is not governed by the Law applicable acc. to Succession Regulation

C. Destiny of Company Shares u. the Succession Regulation:

I. Relationship between Int'l Corporate + Int'l Law of Success.:

- Wording is only referring to examples and is not exhaustive
- Furthermore supremacy of the particular Corporate Law?

3. Art. 1 (2) (k) and (l):

- Exclusion of „*the **nature of rights in rem** and any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the **effects of recording** or failing to record such rights in a register*”
- I.e. if a particular Corporate Law stipulates entry into a register (e.g. commercial register, „*Handelsregister*“) as a precondition of the acquisition of company shares

C. Destiny of Company Shares u. the Succession Regulation:

I. Relationship between Int'l Corporate + Int'l Law of Success.:

4. Differentiation between issues governed by Int'l Corporate and Int'l Law of Succession:

a) Int'l Corporate Law: What heirs inherit out of a corporate relationship, especially:

- Heritability of the position of the shareholder
- Prerequisites in regard to the heirs
- Under which conditions and with which consequences the death of a shareholder establishes a right of entry or a direct succession in rem
- Consequences of a shareholder's death for the company itself and the other shareholders
- Compensation of the heirs?

C. Destiny of Company Shares u. the Succession Regulation:

I. Relationship between Int'l Corporate + Int'l Law of Success.:

4. Differentiation between Int'l Corporate and Succession Law:

a) Int'l Corporate Law:

- Inheritance of several heirs as a collective or according to quotas
- Possibility + range of usage rights with regard to shares
- Possibility and consequences of executorship and/or administration etc. regarding the shares in question
- Legal status of the executor/administrator etc.

b) Int'l Law of Success.: Who is heir, to which proportions?

5. Bottom line: inconsistencies still solved according to the provisions of the particular Corporate Law

C. Destiny of Company Shares u. the Succession Regulation:

II. Methods of Synchronization of the Applicable Law:

- From perspective of German legal practitioner often legal consonance, because often habitual residence = domicile of a company
- For other constellations choice of law advisable:
 1. Art. 22: choice of law in a will
 2. Art. 22, 25 (3): binding choice of law in a „agreement as to succession“ (*Erbvertrag*) – also possibility to confer jurisdiction on a court or the courts of that Member State (art. 7 (b))

C. Destiny of Company Shares u. the Succession Regulation:

III. Problematic Fields in case of Diverging Laws:

- Problematic fields in case of diverging Succession and Corporate Law remaining, treatment to be clarified
 1. Treatment of a legacy with effect in rem in a foreign legal order (“Vindikationslegat”) reg. company shares:
 - Unknown to German law
 - Should be acknowledged purs. art. 23 (2) (e) + re. 42
 - Restrictions regarding shares of companies possible
 2. Compulsory Rights of Inheritance with effect in rem in a foreign legal order (“dinglich wirk. Pflichtteilsanspr.”):
 - Unknown to German law: Effect in rem possible, but restricted e.g. with regard to usage rights

C. Destiny of Company Shares u. the Succession Regulation:

III. Problematic Fields in case of Diverging Laws:

3. Succession of Several Heirs in Company Shares:

- Applicable Corporate Law decides whether a group of heirs inherits a company share as a collective or according to quotas (e.g. possibility of division of shares)

4. Execution/Administration etc. of the Inheritance:

- Execution/Administration etc. of company shares is a matter to be qualified under Int'l law of Succession
- Legal position of the executor/administrator etc. is limited by the provisions of the applicable Corporate Law

D. Conclusion:

- From a German Law-perspective, the Succession Regulation has not noticeably altered the correlation between Int'l Corporate Law and Int'l Law of Succession in international succession cases
- Still rule of thumb that inconsistencies in case of doubt are being solved according to the provisions of the particular Corporate Law rather than the applicable Law of Succession
- In order to obtain a parallelism of the laws applicable to his succession and to corporate law issues, in many cases a choice of law (pursuant to art. 22 of the Regulation) will be the method of choice

**Thank you
for your attention!**