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INHERITING SHARES IN A LIMITED LIABILITY COMPANY IN A LEGAL COMPARATIVE PERSPECTIVE

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One of the characteristics of the legal form of a limited liability company is the possibility of making changes in personal makeup of shareholders without any need to change the company deed and consent of other shareholders. The titles of share in the company (shares) are transferable property rights, which may be transferable both *inter vivos* and *mortis causa*. The subject of this study is to examine how the issue of shares inheritance is regulated in the legislation of selected European countries. The goal of the study is to determine: whether and possibly what regularities are present.

Several legal orders were selected for the analysis. The considerations begin with the analysis of the regulations of states in German legal circle (German, Austrian and Swiss). As everybody knows, German regulation within the scope of a limited liability company is the oldest. Therefore, the selection of issues seems obvious. Then French regulation will be presented as traditionally opposite to German solutions as well as British, traditionally opposite to continental legal system. Dutch regulation will be only signalled as an example of a new regulation recognised as a modern one. The considerations are closed with an analysis of the Polish regulation as the home regulation for the author.

Germany

German law expressly states inheritance of shares. Pursuant to § 15, passage 1 GmbHG shares in a limited liability company are transferable and hereditary. In contrast to the regulation on transferability of shares, GmbHG does not pay more attention to the issue of shares inheritance. In all other

aspects general regulations of inheritance law are applied. A share, pursuant to § 1922, passage 1 and 1967 BGB, passes into the heir or heirs along with all related third party rights and along with possible rights and specific obligations, unless they are shaped as related to the shareholder in person [1, p.815]. Shares inheritance cannot be contractually excluded. Regulation in this respect is of absolutely binding nature [2, p.1051]. Contractual provisions that stipulate non-inheritance of a share or automatic redemption in the event of shareholder's death are ineffective. However, a reservation is possible of redemption of shareholder heirs' shares or the obligation to dispose of shares by them (*Abtretungspflicht*) for the benefit of another shareholder or third party [1, p.1051].

In the German literature it is disputable whether the company deed may contain clauses limiting the transferability of shares (similar as in the case of transferability *inter vivos*) referred to in § 15 passage 5 GmbHG, also in relation to shares inheritance. According to the dominant position of the doctrine and jurisdiction this is unacceptable [3, p.1240].

Division of shares between heirs may be contractually excluded. It is also possible to exclude it on the basis of the provisions concerning division of inheritance. Pursuant to § 2042, passage 2 BGB in connection with § 752 BGB the principle is that division of the object being part of inheritance takes place through a physical division, which is unacceptable if involves reduction in the value of things (in the case of a share it would take place when the company deed reserves a specified majority of votes necessary to adopt a resolution, and the division would result in dividing shares below this value). Then inheritance will be divided in this respect by sale of shares by means of public bidding, and in this situation the clause limiting the transferability of shares will be applied [3, ibidem]. In the German literature there is no consent with regard to whether general clauses limiting the transferability of shares (pursuant to § 15 passage 5 GmbHG) are used between the heirs within the inheritance division. According to the dominant position the use of such constraints is unacceptable [3, p.1240-1241].

Austria

The Austrian regulation of shares inheritance is close to the German regulation. Shares in an Austrian limited liability company are also transferable and hereditary (§ 76, passage 1 öGmbHG). In the literature and judicial decisions it is disputable whether the company deed may exclude shares inheritance. The greater part of literature and jurisdiction perceives the issues of shares inheritance as a matter regulated in an absolutely binding manner [4, p.81]. The contractual provision, according to which, in the event of the

shareholder's death his or her shares are transferred to the other shareholders in certain parts is recognised to be in conflict with binding provision of § 76, passage 1 öGmbHG [4, p.81; 5, p.729]. However, a contractual provision is acceptable that share in the event of death is transferred to another shareholder. Then upon the shareholder's death their share goes to an appropriate shareholder, however, as in the case of the subscription, the heir must transmit the share on the non-shareholder (*Nichtgesellschafter*) in the form of a legal act [5, p.730]. It is unacceptable to determine that the share is transmitted to the company [5, p.729].

In the Austrian literature it is commonly assumed to accept the contractual reservation of the obligation of shares transmission by heirs to persons indicated in the contract (*Aufgriffsrecht*) [4, p.82; 5, p.729]. For the effect to occur, however, it is necessary to conclude a contract transferring the share between the heirs and the persons indicated in the contract in the notary form [5, p.729].

Contractual restrictions of shares inheritance are also acceptable [4, p.82], like limitation of division of shares of the deceased shareholder. In particular, the company deed can reserve consent of the company to divide the deceased shareholder's shares between their heirs or the consent of shareholders (all or specified) [5, p.729].

Switzerland

The issue of shares inheritance is regulated in Article 788 OR, which determines special cases of purchase of shares. It states that if the shares were acquired through inheritance, division of inheritance, community property or enforcement, all the related rights and obligations are transferred to the acquiring person without permission of the Assembly of Shareholders (Article 788, passage 1 OR), however, to exercise the voting right and related rights, a consent of the Assembly of Shareholders is required (passage 2). The Assembly of Shareholders may refuse consent only when the company itself wants to take over the shares for the real price during submission of the request. This can take place on own account of the company, on account of another shareholder or third party. The company deed may resign from the requirement to obtain the company's consent. Passage of shares as such, does not depend on the consent of the Assembly of Shareholders, but involves conditioning exercising the voting right on the consent of the Assembly of Shareholders [6, p.172]. Hence, shares are to be transferred to heirs, but corporate rights, and in particular the right to vote, are inactive [7, p.627].

France

The French Commercial Code regulates the issues of shares inheritance in Article L-223-13. Basically, the shares are hereditary. The company deed can,

however, constitute that in the case of the shareholder's death the company will be continued only with the surviving shareholder, then the heir may request payment of the value of the testator's shares.

The company deed may also limit share inheritance. In this respect the same principles apply as in the case of limitations on transferability of shares between the living that are determined by Article L.223-14 of the Commercial Code. The basic form of shares transferability limitations is to obtain the consent of the Assembly of Shareholders, which should be expressed within three months from the date of submission of the request (at the request of the Management Board this time limit may be prolonged by the court, not longer, however, than up to six months). In the case the company refuses the consent, within three months from the date of refusal the other shareholders should purchase the shares of the deceased shareholder.

The Netherlands

The Dutch regulation does not mention expressly the issues of shares inheritance. It determines their legacy. Pursuant to Article 195 passage 3 of the Civil Code shares legacy is subject to the same limitations as the regulation between the living. Here Article 195, passage 1 of the Civil Code applies stating that unless the contract provides to limit or exclude such a right, the shareholder may freely transfer one or more shares to their spouse «registered shareholder», relatives or next of kin in a straight line without any constraints and in the side line to the second degree, another shareholder and the company. The group of these people may be extended in the contract with relatives and next of kin in the side line, to the third or the fourth degree.

The company deed may also provide that in certain cases the shareholder is obliged to offer and transfer share to other persons. In this situation the deed may also provide that as long as the shareholder does not fulfill this obligation, their right to vote and participation in the Assembly of Shareholders and the right to profit are suspended (Article 195a of the Civil Code).

Great Britain

Shares in the British law are also transferable. It results indirectly from Article 770 passage 2 of the Companies Act, which states that a company may not register a shareholder or a person whose right to shares in the company was transmitted, by virtue of law, until proven, and the types of required documents is determined by Article 774 CA.

Transmission of shares takes place for instance, in the event of shareholder's death. In such a situation the shares are given to the inheritance administrator or the will's executor, who may sell them or dispose of them otherwise without registration in the company, and it is subject to is transferability limitations

contained in the company deed [8, p.216]. These people can claim registration as shareholder, unless the company deed states otherwise. The administrators of the company have the same right to refuse registration as in the case of sale of shares [8, p.216].

The company deed can, however, limit this right [9, p.156]. Full member rights are obtained along with registration as a member. Until that time heirs have no voting rights, nor the right to participate in the Assembly of Shareholders.

Poland

The Code of Commercial Companies does not constitute expressly about inheritance of shares in a limited liability company. No regulation is an expression of proper assumption that shares, as property rights, in accordance with the general rules (Article 922 of the Civil Code) are part of inheritance after the shareholder. As a result, the Code of Commercial Companies regulates only the issues of exclusion or limitation of shares inheritance. This issue is described only in Article 183 of the Code of Commercial Companies. It has the following wording: The company deed may limit or exclude the deceased shareholder's heirs entering the company. In this case the company deed should define the conditions of repayment of the heirs not entering the company, or else such limitation or exclusion shall be ineffective (§1). The company deed may exclude or in a certain way limit the division of shares between heirs in the case when the deceased shareholder had more than one share (§ 2). If, pursuant to the company deed, the shareholder could have only one share, the share may be divided between the heirs, unless the company deed excludes or limits in a certain way the division of this share between heirs. As a result of division, shares lower than PLN 50 cannot be created (§ 3).

This regulation states that the shares are hereditary, however, the shareholders in the company deed can make them not hereditary (excluding heirs entering), or restrict their hereditary nature (determination of conditions where the share is inherited). In any case, excluding inheritance or its limitation is effective only when the company deed envisages the principles for repaying heirs. As it seems, it is not about literally introducing to the deed any records concerning repayments, but about these rules being able to lead to granting the heirs of the shareholder economic equivalent of the shares. The shareholders in the deed can introduce exclusion or limitations, both with regard to the possibility to inherit in general as well as only with respect to division of shares between the heirs possibly introduce both limitations. The division of shares between the heirs can be excluded at all, which causes the shares finally in division of inheritance to be given only to a single heir or limited in a certain way.

Conclusions

The above analysis of shares inheritance issue regulation enables drawing the following conclusions. All the legal systems subject to the study assume as a principle the hereditary nature of shares. The rule is thus that the death of a limited liability company shareholder causes their heirs entering the company. None of the above systems provides that this principle is absolute. On the other hand, it is acceptable to have contractual limitation of acceptability for shareholder's heirs to enter the company, most often taking the form of entering dependence on obtaining the company's consent. The indirect solution is envisaged by the Swiss law, which, on the one hand, respects the principle of share inheritance, however, it also envisages that without the consent of shareholders the heirs will not be able to perform corporate rights in the company. Some legislators also accept share inheritance exclusion, or directly: e.g.. the Polish law (then the condition for effective exclusion is determining in the deed the principles for repaying heirs) or indirectly as e.g.. the German and Austrian law that formally forbid share inheritance exclusion, however, they stipulate solutions similar in consequences to heirs exclusion from inheritance – they accept the possibility of contractual reservation of the obligation to sell the shares by heirs to the persons indicated in the deed. In any case, none of the studied legal orders accepts heirs exclusion from entering the company without an economic equivalent of the share.

In spite of some differences it can be stated that regulation of the issue of inheritance is essentially consistent and results from uniform perception of the share as a property right, and a limited liability company as a capital company, but having strong personal characteristics. The metacapital nature of a limited liability company manifests itself in the effect of other surviving shareholders on the makeup of the company after death of one of shareholders.

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Павел Зданіковський. Спадкування часток в товаристві з обмеженою відповідальністю: порівняльно-правовий аспект

У статті досліджено питання успадкування часток в товаристві з обмеженою відповідальністю відповідно до німецького, австрійського, шведського, французького, данського, британського та польського законодавства. У всіх досліджених правових системах застосовується принцип успадкування часток, проте в жодній з них цей принцип не є абсолютним. З іншого боку, загальновизнаним є умовне обмеження прийняття до товариства спадкоємців учасника, яке найчастіше полягає в наданні згоди компанії щодо вступу до неї. Однак в будь-якому разі жоден із досліджених правопорядків не допускає виключення спадкоємців від вступу до товариства без відшкодування економічного еквіваленту частки. Не зважаючи на деякі розбіжності можна стверджувати, що регулювання проблеми успадкування часток є в принципі послідовним, що випливає з однакового сприйняття часток як майнового права, а товариства з обмеженою відповідальністю як компанії, яка однак володіє сильними спеціальними ознаками.

Ключові слова: товариства з обмеженою відповідальністю, спадкування часток, спадкування акцій, правові системи.

Павел Зданиковский. Наследование долей в обществе с ограниченной ответственностью: сравнительно-правовой аспект

В статье исследованы вопросы наследования долей в обществе с ограниченной ответственностью в соответствии с немецким, австрийским, шведским, французским, датским, английским и польским законодательством. Во всех исследованных правовых системах применяется принцип наследования долей, однако в одной из них этот принцип не является абсолютным. С другой стороны, общепризнанным является условное ограничение принятия в общество наследников участника, которое чаще всего заключается в предоставлении согласия компании по вступлению в нее. Однако в любом случае ни один из исследованных правопорядков не допускает исключения наследников от вступления в общество без возмещения экономического эквивалента доли. Несмотря на некоторые разногласия, можно утверждать, что регулирование проблемы наследования долей является в принципе последовательным, что следует из одинакового восприятия частиц, как имущественного права, а общества с ограниченной ответственностью как компании, которая однако обладает сильными специальными признаками.

Ключевые слова: общество с ограниченной ответственностью, унаследование долей, унаследование акций, правовые системы.

Paweł Zdanykovskyy. Dziedziczenie udziałów w spółce z ograniczoną odpowiedzialnością: porównawcze aspekty prawne

Artykuł prezentuje zagadnienie dziedziczenia udziałów w spółce z ograniczoną odpowiedzialnością w prawie niemieckim, austriackim, szwajcarskim, francuskim, holenderskim, brytyjskim i polskim. Wszystkie poddane badaniu systemy prawne

jako zasadę przyjmują dziedziczność udziałów, w żadnym z nich nie jest to jednak zasada bezwzględna. Przeciwnie, powszechnie akceptowane są umowne ograniczenia dopuszczalności wstąpienia do spółki spadkobierców wspólnika, które najczęściej przybierają postać uzależnienia wstąpienia do spółki od uzyskania jej zgody. W każdym razie jednak żaden z badanych porządków prawnych nie dopuszcza wyłączenia spadkobierców od wstąpienia do spółki bez ekonomicznego ekwiwalentu udziału. Pomimo pewnych różnic można jednak stwierdzić, że regulacja problematyki dziedziczenia udziałów jest zasadniczo spójna i wynika z jednolitego postrzegania udziału jako prawa majątkowego, a spółki z o.o. jako spółki kapitałowej, lecz o silnych cechach osobowych.

Słowa kluczowe: spółka z ograniczoną odpowiedzialnością, udziały spadkowe, akcje dziedziczenia, systemy prawne.

Paul Zdanykovskyy. Inheriting shares in a limited liability company in a legal comparative perspective.

The article presents the issue of inheriting shares in a limited liability company in German, Austrian, Swiss, French, Dutch, British and Polish law. All examined legal systems assume as a principle the hereditary nature of shares but none of them provides that this principle is absolute. On the other hand, it is acceptable to have contractual limitation of acceptability for shareholder's heirs to enter the company, most often taking the form of entering dependence on obtaining the company's consent. In any case, none of the studied legal orders accepts heirs exclusion from entering the company without an economic equivalent of the share. In spite of some differences regulation of the issue of inheritance is essentially consistent and results from uniform perception of the share as a property right, and a limited liability company as a capital company, but having strong personal characteristics.

Key words: limited liability company, inheritance shares, inheriting shares, legal systems.