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Chapter 12

Facets of Family Constitutions: Conceptual Origins, Practical Approaches, and Legal Implications

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Abstract

The modern family constitution is a written declaration summarizing a process of agreement and decision-making within an entrepreneurial family regarding the motives, guidelines, and regulations for the family members' cooperation within the family and the family business association. This chapter exposes facets of family constitutions from a historical and a practical point of view. In order to do so, it begins with a review of the predecessors and origins of family constitutions. Subsequently, focusing especially on the interplay between a family constitution and the family business' binding legal agreements, it describes four forms of family constitutions that have evolved from different consulting approaches in practice. The chapter concludes with some legal implications.

Keywords: Family constitution; family business governance; conceptual origins of the family constitution; four types of family constitutions; legal classification of family constitutions

Family Firms and Family Constitution, 179–193



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12.1. Exposing the Family Constitution Chameleon

One of the first German articles to explore family constitutions from a legal perspective conceived the image of a family constitution as a chameleon (Gläßer, 2014, p. 228). This holds true in more than one way: *Verbally*, the phenomenon might also be termed as a family mission statement, family agreement, family charter or protocol (see Suess, 2014, p. 140 Fn. 3; Botero et al., 2015, p. 219; McClain, 2006, p. 835). *Factually*, family constitutions span a broad range: from a concise statement of shared beliefs, for example between the founder and his successor, to an elaborate codification of family business governance mechanisms in a cousin's confederation meant to unify a multitude of divergent shareholders and their relatives – no two family constitutions appear alike (see Fleischer, 2016a, p. 48). *Conceptually*, the idea merges different historical and contemporary origins.¹ *Internationally*, family constitutions have evolved in several legal systems to suit specific needs, for instance, the *patto di famiglia* (Fleischer, 2016a, p. 47; 2016b, p. 1512), which intends to rectify a weakness in Italian succession law. *Legally*, family constitutions and even provisions within the same document might vacillate between enforceable obligations, moral commitments, and social agreements (see Fleischer, 2016b, p. 1515 f.; Uffmann, 2015, p. 2448 ff.). They have thus been described as a governance device of elusive legal nature.²

Rather than providing a clear-cut definition of a family constitution in legal terms, this chapter attempts to expose facets of family constitutions from a historical and a practical point of view.³ In order to do so, it begins with a review of the predecessors and origins of family constitutions (Section 12.2). Subsequently, focusing especially on the interplay between a family constitution and the family business' binding legal agreements, it describes four forms of family constitutions that have evolved from different consulting approaches in practice (Section 12.3). They are not meant as a comprehensive classification, but rather as models or types that highlight certain characteristics and purposes of family constitutions. This part draws on discussions with German and Austrian family business consultants as well as input from a joint interview study conducted by the Max Planck Institute for Comparative and International Private Law, Hamburg, and the HSBA Hamburg School of Business Administration. The chapter concludes with some legal implications (Section 12.4).

¹See below 12.2 and Fleischer (2022) in this volume.

²See Fleischer (2016b). “schillernde[...] Regelungsform” (1509), “chamäleonartiges Regelungsinstrument”(1515).

³This chapter summarizes the preliminary research results of the author's dissertation; for final findings and further details, see Bong (2022).

12.2. Conceptual Origins

12.2.1. House Laws and *fideicommissum* – Preserving the *splendor familiae*

The House Laws of royal families are recognized as the earliest ancestors of modern family constitutions.⁴ Both share some similarities in purpose and content. The House Laws evolved as a means to preserve the power and wealth of royal families in late medieval Europe, especially in German territories of the Holy Roman Empire (see Eckert, 1992, pp. 36 ff., 46 ff., 54 ff.; Schulze, 1851, pp. 69 ff., 229 ff.): The royal families' prerogatives initially depended on an appointment to a royal office by the monarch. But, as the monarch developed a practice of appointing the relatives of the current officeholder as successors, the prerogatives soon became linked to the possession of certain lands and estates (see Pütter, 1786, pp. 163 ff., 165; Schulze, 1871, p. 54 f.). The House Laws' primary purpose was to keep these estates in the possession of the family by preventing their fragmentation over the course of generations.⁵

To this end, multiple legal acts and agreements within the family were necessary to depart from the then contemporary practice of dividing property between multiple heirs.⁶ At first, these legal acts had a consensual, contractual basis. Collectively, they ensured that the family's wealth was passed on to the first male heir in return for compensation payments, annuities, or easements provided to other inheritors.⁷ The sole heir's role was akin to a trustee for all living and future family members, and his restricted rights as trustee or steward contributed to the other inheritors' acceptance of this succession model for the sake of the family's power and splendor (see von Thunen, 2015, pp. 26, 53) – for the sake of the *splendor familiae*,⁸ as it was expressed in contemporary terms. Later, these legal acts, as a whole, matured into traditions and customs, which were eventually codified as House Laws (Brauneder, 2012, p. 805 f.; Dutta, 2014, p. 64; Eckert, 1992, pp. 46 ff., 54 f.; von Salza & Lichtenau, 1838, p. 42; von Thunen, 2015, p. 39). Also, their contractual, consensual origin was soon replaced by the family patriarch's dominance and his legal authority to stipulate the laws of the house (see Brauneder, 2012, p. 806).

⁴One of the first to draw inspiration from House Laws was Hennerkes (1998, p. 55 f.); followed by Iliou (2004, p. 163); Fabis (2007, p. 362); Kögel and Seemann (2014, p. 28); with regard to the *fideicommissum*, Kalss and Probst (2013, p. 44 ff. no. 3/16 ff.).

⁵Eckert (1992, pp. 47, 51); further Rosin (1893, p. 333 f.); Dilcher (1990, p. 85).

⁶With regard to contemporary inheritance practices, see Schulze (1871, pp. 42 ff., 46); for a description of different legal acts, see Eckert (1992, p. 46 ff.); see also Kohler (1832, pp. 208 f., 210 ff.); Schulze (1862, p. IX); Beseler (1885, p. 801 ff.); Brauneder (2012, p. 805); von Thunen (2015, p. 24).

⁷See footnote 13.

⁸In the context of daughters' waivers of their rights to inheritance, Eckert (1992, p. 51).

The House Laws inspired the family *fideicommissum*, which evolved as a European composite, also absorbing Roman, Spanish, and Italian influences.⁹ It enabled a testator to structure his inheritance for future generations and to prevent its fragmentation. As an instrument of ordinary civil law, it was available to all citizens with property, and it served the same purpose as the House Laws: to preserve the family's wealth and splendor.¹⁰ In Germany, both devices existed for several centuries, before they were abolished by the legislature in 1939.¹¹

The modern family constitution still aims to preserve the family's wealth – meaning today the family business – and it still addresses similar issues, such as membership in the family or the eligibility to inherit property. But it breaks with its predecessors in an important way as it employs other means to reach these objectives and to develop its contents: The patriarch's dominance is replaced by a family consensus, forged in a strategic planning process.¹²

12.2.2. Strategic Planning – Promoting the *affectio familiae*

Much more recently, the field of management studies in the United States sparked the rise of the modern family constitution.¹³ Building on the work of others (Beckhard & Dyer, 1983, p. 10), John Ward uncovered the benefits of strategic planning for family firms; he identified relevant topics, conceived a planning process and promoted it as a business concept for consultants.¹⁴ In business families, strategic family planning serves today to address various topics and to reach a common understanding before a sensitive topic becomes personalized, for instance, the issue of management succession or the eligibility to become a shareholder.¹⁵ It aims to strengthen the emotional cohesion within the family and to sustain the family's emotional involvement in the business.¹⁶ Adapting an expression from French corporate law, Sebastian Bong summarizes that the strategic planning

⁹See Dutta (2014, p. 54 ff.); Eckert (1992, pp. 63 f., 65 ff.); for more detail see Bong (2022: Kapitel 2 – A.I.2.).

¹⁰Eckert (1992, p. 23); Luig (1998, p. 375); Bayer (1999, p. 66); Kalss and Probst (2013, p. 30 no. 2/76).

¹¹§ 1 Abs. 1 und § 30 Abs. 1 Gesetz über das Erlöschen der Familienfideikommiss und sonstiger gebundener Vermögen vom 6. 7. 1938 (RGBl I, 825/BGBl III 7811-2).

¹²See also Fleischer (2022) in this volume; for more detail, see Bong (2022: Kapitel 2 – A.I.4., Kapitel 2 – A.IV.).

¹³Tracing these origins, Fleischer (2016b, p. 1511).

¹⁴Ward (1986, pp. 6 ff., 56, 135 ff., 155 ff.); Ward (2011, pp. 6 ff., 61, 143 ff., 164 ff.); Ward (1988, p. 106). “With this paper, I hope to stimulate research exploring the special role of strategic planning in the family firm; to provide professionals who serve family businesses with some insights on how families in business approach strategic planning; and, most important, to outline a strategic planning framework for the family business.”

¹⁵Ward (1986, p. 137); Ward (2011, p. 145); succinct Taylor (2014, p. 30). “de-personalise and de-sensitise.”

¹⁶Ward (1988, p. 117); from a more current perspective, Taylor (2014, p. 4); Suess (2014, p. 140 f.).

process intends to promote the *affectio familiae* (Fleischer, 2016b, p. 1515), the affection within the family and for the business. The family constitution, at first, was no more and no less than the embodiment of the results reached during this process. Its effectiveness and persuasiveness were highly dependent on the involvement of all family members in the planning process. This intrinsic connection between the process and the final declaration persists today and merits being considered in the functional and legal analysis of family constitutions.¹⁷

12.2.3. Corporate Governance – Structuring Institutions

It was not until the wave of corporate governance caught hold of family firms that the family constitution grew into a family business governance document. At the turn of the millennium, the corporate governance debate contributed to the development of family constitutions in two ways:¹⁸

Firstly, it imported an institutional perspective that focused on creating family institutions and structuring their interaction with corporate decision-making bodies.¹⁹ Most academic and practical attention focuses on the family meeting, the family council, the corporate board, and their interaction.²⁰ Other institutions on the sidelines, such as family offices, family education and family philanthropy, have become more popular recently. They seek to engage passive shareholders and outside family members in order to enhance belonging by involvement.²¹ And, in line with the concept of enlightened ownership,²² they aim to instill in the members of business families an attitude of stewardship for generations to come.²³

Secondly, the governance discussion came as a critical catalyst for the family constitution's circulation and popularity.²⁴ Inspired by governance codes for

¹⁷Similarly, Montemerlo and Ward (2005, p. 5); more recently, Gläßer (2014, p. 236); Botero et al. (2015, p. 225). “important to view the protocol as a process.”; Holler (2020: 1667 no. 180); for more detail, see Bong (2022: Kapitel 2 – A.III.2.).

¹⁸For more detail, see (Bong: Kapitel 2 – A.II.2.).

¹⁹Illustrative of this development, Neubauer and Lank (1998, pp. 65 ff., 80 ff.). “A family, like any other organization, must have a governance structure if it is to continue to function as an entity.” (71); Aronoff and Ward (1996, pp. 17 f., 29 ff., 65 ff., 76 ff., 85); Carlock and Ward (2001, p. 140 ff.); drawing on these preparatory works, Koeberle-Schmid and Nützel (2005, pp. 41, 45); Eisenmann-Mittenzwei (2006, pp. 162 ff., 178 ff.); Koeberle-Schmid (2008, p. 149); May (2009, p. 116); Bettermann and Henneric (2009, p. 867); compare further McCahery and Vermeulen (2008, p. 153).

²⁰For instance, Aronoff and Ward (1996, pp. 65 ff., 76 ff., 85); Gersick and Feliu (2014, p. 210 ff.); based on a literature review, Suess (2014, p. 139).

²¹See, for instance, Suess (2014, p. 139); Botero et al. (2015, p. 222).

²²Developed by Neubauer and Lank (1998, p. 247 ff.); for the similar concept of “effective ownership,” see Carlock and Ward (2001, p. 119 ff.); compare also Governance Kodex für Familienunternehmen, 4.9.2004, no. 8.2.4.

²³See Aronoff and Ward (2002, p. 2). “Ownership, at its best, means stewardship [...].” explicated further on pp. 27 ff.

²⁴Compare in a more general context McCahery and Vermeulen (2008, p. 156). “The corporate governance hype creates awareness and encourages parties in non-listed companies to improve the governance structure of their firm.”

public firms, private associations in numerous European countries drafted codes tailored to family firms, most of which recommended drafting a family constitution for the governance of the business family.²⁵ Today, these codes are valued in practice as cataloging issues that help to exert party autonomy deliberately, especially in Germany, Austria, and Belgium.²⁶

12.2.4. *Convergence in the Concept of Family Business Governance*

These origins converge in the modern concept of family business governance. This concept aims to provide an emotional supplement to typical contractual provisions in family businesses, which evolved to perpetuate the company. Its centerpiece is the planning process. It helps business families to reach a consensus on conflict-laden issues, to build social capital, to foster trusteeship, and to structure a governance framework. In short, it aims to preserve the *splendor familiae* by promoting and institutionalizing the *affectio familiae*. Afterwards, the family constitution may act as a record of this process, as an affirmation, as a guide for contractual implementation and as a layer of relational governance supplementing the contractual governance laid down in the articles of association.

12.3. Practical Approaches

These purposes of a family constitution within the family business governance concept are highlighted by the following four forms, or types, of family constitutions discernible in practice, each emphasizing a particular facet of a family constitution.²⁷

12.3.1. *A Collection of Ad-hoc Agreements*

The first form is a family constitution that is composed of a collection of separate ad-hoc agreements.²⁸ In some ways, it is an outlier, because it lacks a strategic planning process and a comprehensive document. Nevertheless, this type merits

²⁵See for instance Governance Kodex für Familienunternehmen, 4.9.2004 (Germany); Österreichischer Governance Kodex für Familienunternehmen, 21.7.2005 (Austria); Code Buysee I, 2005 (Belgium); Buen Gobierno en la Empresa Familiar, 2005 (Spain); Governance für Familienunternehmen, 2006 (Switzerland); Corporate Governance Guidance and Principles for Unlisted Companies in the UK, 2010 (United Kingdom).

²⁶From a German point of view, Wicke (2012, p. 458); Fleischer (2016b, p. 1514); for Austria, Kals and Probst (2013, p. 53 no. 3/35); for Belgium, see Code Buysee III, 2017, préface, p. 8.

²⁷For an early typology, compare Montemerlo and Ward (2005, pp. 3, 47 ff.); for a more detailed description of current types of family constitutions see Bong (2022: Kapitel 2 – B.II.).

²⁸Observing comparable informal forms of family constitutions, Carlock and Ward (2001, p. 8).

attention because it shows a basic function and a basic characteristic of family constitutions: To some extent, a family constitution is no more than a factual record of a decision-making process.

One of the first interviews in a joint interview study by the Max Planck Institute for Comparative and International Private Law and the Hamburg School of Business Administration concerned a family firm in transition from the first to the second generation. After the founder's two adult children entered the business' management rather spontaneously due to the founder's sudden bad health, it became apparent that the siblings were not well suited to work as co-leaders and that there was an inclination for the business to be continued by the older son as sole leader. The family worked to resolve the resulting conflicts between son and daughter as well as between the founder and his daughter through various individual talks and group meetings involving the founder, his wife and the siblings, some of them moderated by the founder's advisors and friends.

In this manner and in the course of several years, the family agreed on the firm management, the ownership structure, and other issues that came up one by one or that were suggested by the family's tax consultant. Most of these issues one would expect in a family constitution. However, the family members did not sign a comprehensive document putting these agreements together; instead, there is a compilation of e-mails and discussion summaries written by various family members, which were collected by the family itself as well as by its tax consultant, who also prepared the implementation in legal form when necessary.

In this case, the family discussions served to solve conflicts and to deal with tax or legal issues as they arose. There was no doubt that family members would adhere to the resolutions, regardless of legal considerations, because they participated in the decision-making process; legal implementation was considered a mere formality. The resolutions' written summaries acted only as records of facts. Accordingly, their legal nature was not of interest, neither were sanctions for disregard.

12.3.2. A Family-Focused Approach – The Family Statement

The second form of a family constitution bears greater resemblance to the strategic planning concept as developed by *John Ward*.²⁹ This form may be described as a comprehensive document of family values, policies, and institutions, signed by all family members. Since its distinctive feature is an emphasis on the governance of the family and a deliberate surrender of ownership or business issues to other governance devices (see [Baus, 2016](#), p. 108), it will be called a family statement. It aims to reserve the planning process for family bonding and to shield it from an infringing legal mindset or terminology.³⁰ This approach is favored, for instance, by the *Kirsten Baus Institut für Familienstrategie*, one of the first consulting firms for family businesses in Germany.

²⁹See footnote 25 and accompanying text.

³⁰Compare Baus (2016, p. 108).

Typically, the planning process for a family statement involves all family members, including spouses and adult members of the next generation.³¹ Shareholders are meant to meet each other and their families in their role as family members, not as shareholders (see [Baus, 2016](#), p. 108). The process is usually led and moderated by a family or business consultant; legal advisors are excluded as far as possible. There is a preference to accord votes per person and to make decisions unanimously.³² This approach aims to reach agreements on conflict-laden topics before they surface and to sustain the family's social cohesion.³³ Accordingly, the significance of the planning process outweighs the relevance of the final document. The primary measure to ensure compliance with the final document is the participation in the planning process.³⁴ Therefore, sanctions for the breach of family statements are usually not considered ([Baus, 2016](#), p. 115); the principal compliance mechanisms are intrinsic acceptance and family social pressure.

The consulting approach behind a family statement purposefully reduces to a minimum the interplay between a family statement and other agreements for the governance of the business and its shareholders. Accordingly, it avoids explicit references between a family statement and the articles of association or shareholder agreements. With regard to a revision or adaptation of the articles in light of the family statement, the latter intends no more than to lay the ground for a unified and improved decision-making process (see [Baus, 2016](#), p. 109). For example, the implications of certain family values for the family's rights to distributions or information might be discussed in the process of drafting a family statement, but they will not be put to paper or they will, at the most, be mentioned only in broad terms.³⁵ Nevertheless, certain areas of overlap between a family statement and legal agreements are inevitable, concerning for instance the membership in the family and the eligibility to become a shareholder or manager of the business. To prevent that these topics imprint a legal character on the document, some family statements contain a provision that qualifies the family statement as morally binding but explicitly excludes any enforceable legal effects arising directly or indirectly from the statement.

The family statement thus serves two main purposes³⁶: Similar to the collection of ad-hoc agreements, it acts as a record of facts, in this case for the agreements reached during the planning process. Additionally, the act of signing a comprehensive agreement is primarily symbolic: it inscribes each family member's affirmation of his commitment to family unity and the family business.

³¹ Compare Baus (2016, p. 108 f.).

³² Compare Montemerlo and Ward (2005, p. 41).

³³ Compare Baus (2016, pp. 43, 50, 65 ff.).

³⁴ Compare Baus (2016, pp. 108, 111).

³⁵ Compare the sample constitution in Baus (2013, p. 145 ff.) to Baus (2016, p. 117 ff.), in which some phrases were deleted and others were softened in their wording.

³⁶ Elaborately Bong (2022: Kapitel 2 – B.II.2.).

12.3.3. A Business-Focused Approach – The Governance Protocol

The third form of a family constitution stems from a business-focused approach, as developed by family business consulting pioneer *Peter May* and as practiced today by *Intes Akademie*, one of the leading family business consulting firms in Germany. In contrast to other consulting approaches, this one conceives a family constitution as the last step of the planning process and the first step toward the contractual implementation of its results.³⁷ It acknowledges that a family constitution unavoidably overlaps with the articles of association as well as with other contracts within the business family, and it assumes that a legal insignificance of the family constitution is inconsistent with the parties' expectations (see [Claussen & Waldens, 2017](#), p. 131 f.). Family constitutions of this kind may be described as governance protocols.

Similar to family statements, these governance protocols emerge from a planning process that is typically moderated by a family or business consultant ([May, 2017](#), p. 132; [May & Ebel, 2017](#), p. 102). The process may involve the entire family, but it is not uncommon to limit discussions or decisions on certain business issues to the shareholders.³⁸ Pertaining to these issues, voting rights may not be accorded per person, but may rather be based on share ownership, and majority or supermajority decisions may suffice.³⁹ Most importantly, governance protocols treat a broad set of topics: Since they intend to act as a blueprint for the contractual governance of the family, the business and its owners, they do not shy away from detailing issues which need implementation in the articles of association,⁴⁰ such as the transferability of shares or the rights to a buy-out or dividends. Accordingly, legal advisors may join the process of drafting a governance protocol in order to prepare and facilitate its contractual implementation.⁴¹ At the very least, the coherence between the planning results and their legal implementation is monitored by the consultants who moderated the planning process.

To ensure that family members and shareholders implement the common intentions they forged during the planning process, governance protocols may contain an obligation to make all necessary changes to the family's contracts, which include first and foremost the articles of association, but also shareholder agreements. With regard to wills, inheritance contracts and matrimonial agreements, such an obligation may not be enforceable for legal reasons (see [Lange, 2013](#), p. 42 f.), but sanctions within the articles of association may nevertheless secure compliance indirectly.⁴² With the exception of this obligation of implementation, however, governance protocols exclude any directly enforceable legal effects.

³⁷May (2017), p. 135; compare also Montemerlo and Ward (2005, p. 41 f.).

³⁸Compare May (2017, p. 126 ff.).

³⁹Compare Montemerlo and Ward (2005, p. 41).

⁴⁰May (2017, p. 137); May and Ebel (2017, p. 111 f.); compare also von Au and Strick (2017, p. 120 ff.).

⁴¹Compare May (2017, p. 133).

⁴²For a typical contractual provision to incentivize certain clauses regarding the matrimonial property regime, see Sigle (2012, p. § 20 no. 76).

Nevertheless, they are not meant to be meaningless once they are implemented. Instead, they are intended to be legally significant when viewed in the context of the business family's contractual relationships, for instance as an aid to their interpretation (see [Claussen & Waldens, 2017](#), p. 130 f.). Accordingly, the articles of association may explicitly refer to the governance protocol in their preamble (see [Claussen & Waldens, 2017](#), p. 132).

In sum, the governance protocol adds a third facet to family constitutions⁴³: It serves not only as record of a decision-making process and as affirmation of family commitment, but, additionally, as a guide for and supplement to the business family's contractual governance.

12.3.4. An Ownership-Focused Approach – The Family Ownership Contract

Finally, this integration of the family constitution into the family's contractual relationships is taken a step further by a fourth form of family constitutions, which will be called a family ownership contract. In essence, this type resembles traditional shareholder agreements with additional contents tailored to the themes of business families.⁴⁴

The planning process typically focuses on the shareholders of the family business. Legal advisors are involved from the outset. The form of the final declaration varies (see [Kalss & Probst, 2013](#), p. 50 no. 3/27 f.): As a separate document, it may be akin to a typical family constitution, which is intended to be explicated and implemented contractually, or it may also resemble a classic shareholder agreement supplemented by a lengthy preamble, which discusses softer, family-related topics. In both cases, these contracts are intended to be legally binding as a whole, but certain provisions may not be enforceable (see [Kalss & Probst, 2013](#), p. 48 no. 3/23, 58 no. 3/46), for instance parts pertaining to family values, family goals, or family governance institutions. As a consequence and an indication of their binding nature, family ownership contracts prescribe sanctions in the event of their breach and, at times, include dispute resolution clauses replacing state courts.

Similar to governance protocols, family ownership agreements intend to interact with the articles of association and other contracts by serving as instructions for their implementation and as a guide for interpretation ([Kalss & Probst, 2013](#), pp. 49 f. no. 3/25 f.). Also, this interaction is encouraged by explicit references to the family ownership contract, for instance in the preamble of the articles of association.

In comparison with forms of family constitutions shaped by business advisors, family ownership contracts shift the focus from the planning process to the final declaration and from the documentation of agreements in need of implementation to an interlinked body of contracts. Unlike other forms of family

⁴³Elaborately Bong (2022: Kapitel 2 – B.II.3.).

⁴⁴Elaborately Bong (2022: Kapitel 2 – B.II.4.).

constitutions, they reveal some traits of the family *fideicommissum*, both in purpose and approach.⁴⁵

12.4. Legal Implications

These forms of family constitutions show that such a document has different facets and that it may serve a variety of purposes: it may act as a factual record, as an affirmation of family commitment, and as both a guide for contractual implementation as well as a supplemental layer of relational governance.⁴⁶ Also, some family constitutions may appear in the guise of binding shareholder agreements. This comparison provides some guidance for the legal classification of family constitutions and may help to expose their elusive legal nature.

12.4.1. Classification en bloc

In the first place, if the planning process is monitored by a professional advisor, the final declaration as a whole is aligned to a certain purpose and drafted accordingly. Family business consultants are aware of the debate about the legal nature of family constitutions. They have refined their consultation model to either avoid or encourage ties between the family constitution and the business family's contracts, and they likewise instruct their clients. Therefore, as a rule, the legal classification should conceptualize the family constitution as a whole.⁴⁷ Only in exceptional cases, where such indications predominate, are some phrases to be classified as legally binding and others as inconsequential. However, in and of itself, the fact that some phrases appear sufficiently precise to yield to legal enforcement is not sufficient to merit their partial classification as legally binding.

12.4.2. Legal Facts

Secondly, all formal family constitutions act at least as records of a decision-making process and as affirmation of family commitment. They are consensus-creating devices⁴⁸ and a written reassurance of mutual trust. In this respect, family constitutions are best understood as legally relevant facts, purposefully created by the parties at the intersection of the family and business spheres and with regard to their ongoing contractual relationship.⁴⁹ Unlike legal acts, legal facts do not give rise to enforceable obligations by themselves. But they may become legally significant in the context of an existing legal relationship. Family constitutions may become legally significant in various ways as gap-fillers for the articles

⁴⁵ Compare Kalss and Probst (2013, pp. 40 ff., 49 f. no. 3/4 ff., 3/25).

⁴⁶ For further details on the functions of family constitutions see Bong (2022: Kapitel 2 – C.II.), identifying a contract-related function as well as an interaction-related function and explicating on the concept of relational governance.

⁴⁷ With further arguments Bong (2022: Kapitel 3 – A.II.3.).

⁴⁸ Fleischer (2016a, p. 46); also Bong (2022: Kapitel 2 – A.III.2.). “Einigungsinstrument”.

⁴⁹ Elaborately Bong (2022: Kapitel 3 – A.II.-A.VI.).

of association,⁵⁰ which typically constitute incomplete, relational contracts. To exclude these indirect legal effects runs counter to party intentions, if such exclusion is at all possible from a legal point of view.

12.4.3. *Obligation to Implement*

Thirdly, an obligation to contractually implement the family's consensus as it is recorded in the constitution is in line with the effort and the meaning of the planning process. The process often confronts families with sensitive issues. As *John Ward* observes from his practice, "For most families, the process represents their most significant investment of vulnerability and openness."⁵¹ If a family manages to deal with these issues successfully and to foster family unity, the legal implementation of certain agreements supplements individual commitment. The obligation to do so may be explicitly excluded. Whether such an obligation arises as a matter of construction without there being an express agreement can be answered only on a case-by-case basis.

12.4.4. *Shareholder Agreements*

Finally, some family constitutions may appear in the guise of binding shareholder agreements.⁵² The important question in this case is not their legal nature as such, but the enforceability of individual provisions and their interplay with the company's articles. From a legal point of view, it might be tempting to draft family constitutions as binding shareholder agreements. However, the predominance of legal considerations in the ownership-focused approach may detract from some of the advantages of the strategic planning process.⁵³

12.5. Conclusion

Just like family businesses themselves, the practical approaches to family constitutions and their legal classification alternate between the spheres of family, business, and ownership. The ability to blend in with all of these environments is an advantage of the family constitution as a governance chameleon. The legal classification should take care to uphold this flexibility.

⁵⁰See for a more recent collection of possible indirect effects by Uffmann (2015, p. 2450); Fleischer (2016a, p. 48 f.); Fleischer (2016b, p. 1517); Hueck (2017, p. 240 ff.); also Taylor (2014, p. 23).

⁵¹Montemerlo and Ward (2005, p. 41).

⁵²With this result for the "Family Ownership Contract" see Bong (2022: Kapitel 3 – A.VI.3.); arguing in favor of classifying a family constitution ordinarily as a shareholder agreement by Holler (2020, p. 1673 no. 197-205).

⁵³Compare Montemerlo and Ward (2005, p. 7).

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