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Chapter 13 Discussion Report Part 4: Legal Research I

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Chapter 13

Discussion Report Part 4: Legal Research I

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

The discussion first revolved around the possibilities and limitations of empirical research on family constitutions. A managerial scholar expressed her view that classifications of family constitutions and evidence from corporate practice are useful and highly welcome. She suggested collecting more originals of family constitutions and comparing their texts. Bong agreed, but at the same time referred to his own experience from previous attempts at obtaining original documents, indicating that families prefer to keep their constitution in the family. A law professor confirmed this and stated that discretion is important for business families and their advisors. Another managerial scholar pointed out to the audience that drafting of family constitutions is a business, too, and that advisors want to keep their business model and their work products to themselves.

Other contributions addressed the growing legal awareness of family constitutions. It was mentioned that a law review article by Holger Fleischer in 2017 was one of the first in Germany to raise this legal awareness and to consider binding direct or indirect legal effects of the family constitutions. However, the legal discussion in Austria predated the German one, with pioneering thoughts by Susanne Kalss and Stefan Probst in their seminal book on family enterprises published in 2013. A managerial scholar and member of a family firm cautioned, however, stating that the act of signing a family constitution blurs the distinction between legal and moral agreement. According to her, family constitutions should be more of a "social thing," more of a feeling without legal effect. In the case of her family business, the family constitution is not signed in an attempt to

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draw a clear demarcation line between family and business. The family constitution and the articles of association are bound together in a booklet, but the family constitution is not intended to be binding.

A third strand of discussion dealt with the legal effects of the family constitution on corporate agreements. Bong was asked by a legal practitioner whether the family constitution can be used as an aid for the interpretation of a partnership agreement or a corporate statute. He explained that, in line with the case law of German courts, this is indeed possible in the case of partnership agreements. In contrast, corporate statutes, such as the articles of association of a close corporation (GmbH), are to be interpreted objectively on the basis of the statute alone, thus excluding other documents from consideration that are not available to the public. Some participants expressed dissatisfaction with the legal status quo, arguing that the line should not run between legal forms but rather look to the real structure of the company. For family businesses, typical contractual provisions in partnerships and the GmbH ensure that only family members may become partners or shareholders. This may be a good reason for a subjective interpretation of the articles of association with regard to the family constitution in family businesses as well. A law professor from Vienna reported that Austrian courts are beginning to take a more liberal approach, especially if the articles of association refer to a family constitution in their preambles (incorporation by reference). In Germany, however, such a reference would not render the family constitution admissible as an aid for interpretation, since the family constitution is not available to the public in the commercial register.

Eventually, the discussion turned to the institutionalization and standardization of family constitutions. A law professor explained that the legal discourse on new factual phenomena typically develops in three steps. In the first phase of juridification, legal practitioners and scholars become aware that a new factual phenomenon with potential legal implications has emerged. For the family constitution, this awareness has been achieved. In the second phase of institutionalization, legal doctrine has to digest the new phenomenon by discussing its doctrinal classification and legal effects. For the family constitution, this discussion is presently evolving. In the third phase of standardization, different types and forms of the new factual phenomenon are recognized, analyzed, and associated with different legal effects. This leads in the end to legal certainty. For the family constitution, the law professor observed that Bong's presentation took a first step in this direction by suggesting different facets of family constitutions as they developed in practice.