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The Spatial Transformation of the Urban Environment in the Conditions of Post Industrial Development of Society: Dedicated to the 100th Anniversary of Jean Gottmann, Immanuel Kant Baltic Federal University, 23-26 August 2015, Russia.

# Transboundary Succession of Business: Problems Related to Practice

Elena Anatolyevna Kirillova<sup>1\*</sup>, Elena Vladimirovna Pozdnyakova<sup>2</sup>, Evgeniy Dmitrievich Gorevoy<sup>3</sup>, Inna Vladimirovna Ershova<sup>4</sup>, Nikolay Nikolaevich Nadezhin<sup>5</sup>

<sup>1</sup>Southwest State University, 50 Let Oktyabrya Street 94, Kursk 305040, Russian Federation, <sup>2</sup>Southwest State University, 50 Let Oktyabrya Street 94, Kursk 305040, Russian Federation, <sup>3</sup>Southwest State University, 50 Let Oktyabrya Street 94, Kursk 305040, Russian Federation, <sup>4</sup>Kutafin Moscow State Law University, Sadovaya-Kudrinskaya Street, 9, Moscow 123995, Russia, <sup>5</sup>Belgorod Law Institute of the Ministry of the Interior of the Russian Federation Named After I.D. Putilin, Street of Gorki, 71, Belgorod 308024, Russian Federation. \*Email: debryansk@mail.ru

### ABSTRACT

The article considers civil aspects of optimizing business succession related to various national public orders for the purpose of defining the most efficient solutions. Some conflicting issues of the substantial law applied to succession were researched taking into account the fact that every state has its own international private law that determines the boundaries of applying foreign law. These issues are extremely important in case of conflicts between national public orders that have their own views on regulating transboundary succession of business. The goal of the research is to find the ways to overcome difficulties that arise when exercising succession rights in case of transboundary succession of enterprises and their branches. Scientific novelty of the research lies in revealing a number of urgent problems on the basis of the comprehensive approach to studying and analyzing business succession complicated by a foreign element taking into account the existing scientific research results. Special methods of the theoretically legal science were used during the research. The principle conclusion made in this article is as follows: In case of transboundary succession of business it must be succeeded as a unit in spite of the differences of legal systems of European countries. Herewith, international conventions that regulate succession legal relationship must contain these recommendations. In addition, in case of owning business in several countries, for the purpose of optimizing succession, it is recommended to apply the procedure of estate planning.

**Keywords:** Succession, Successor, Inheritance, Devolution, Public Order

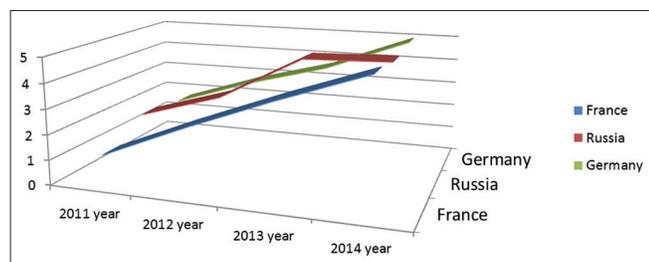
**JEL Classifications:** F23, F42, F51, K41

## 1. INTRODUCTION

Under the current conditions the succession law as a branch of law is distinguished by the occurrence of supranational space. Remaining nationally stipulated, nevertheless the regulation of transboundary succession of business often follows general social and economic needs and priorities in the contemporary societies (Schwind, 2002).

Large business is related not only to a very big diversification of capital but as a rule to a number of enterprises and branches that

territorially can be situated in various regions, countries and states. At the same time the number of succession cases, when the object of succession includes business with a foreign element, constantly grows. In such cases it goes about applying the standards of one national system of law to succession legal relations that arise within the boundaries of another state. Acts of legal succession cross territorial boundaries of various national public orders, and it can be called transboundary succession of business. The world is becoming open; enterprises are more and more often acquired in various countries. Due to this, problems of transboundary succession are extremely urgent (Torben, 1992) (Figure 1).

**Figure 1:** Growth dynamics of succession cases with a foreign element

Difficulties that arise during regulating specific transboundary succession cases related to business are explained by considerable differences in the internal legislation of various countries in the area of succession law. Collisions of national jurisdictions and sovereign traditions during succession sometimes lead to the occurrence of long-term and specially complicated litigations. Especially it is related to large succession (James et al., 2009). Conservative character of the institute of succession law had an impact on the existence of differences in the internal legislation of various countries. On the international level they perform work on unifying standards related to succession. There is a number of Hague conventions on this issue, and there is also the Washingtonian convention providing a uniform law on the form of an international will dated October 26, 1973, the Basel convention on wills registration dated May 16, 1972. The greatest number of unified standards of international private law related to succession focus on bilateral international agreements – agreements on legal assistance, bilateral consular conventions (Mircea and Daniela, 2015). However, the international community does not have special legislation that protects rights for business and its succession.

The research of the problem related to transboundary succession of business will be more successful if one comprehensively considers the peculiarities of separate objects succession: Land and real estate, shares or share in the authorized capital of a legal entity, enterprise as an asset complex and finally intellectual property rights.

## 2. METHODOLOGY

Dialectical method used in this research allowed to comprehensively and specifically consider the problems of transboundary succession of business, reveal relations and availability of contradictions in legal relationships related to succession with a foreign element, assess legal phenomena in relation to quality, and define the dependence of the phenomenon form on its essence.

Basic methods of logic were applied, including induction, deduction, analogy, and hypothesis. When studying judicial and notarial practice, system analysis and such methods of cognition as analysis and synthesis, abstraction and ascendancy from the abstract to the specific were used. When researching legal systems of European states, specifically historical method was used. It allowed to study the specificity of the bound related to applying the foreign law. Sociological method allowed to research succession law of various states on the basis of specific social facts. It includes analysis of statistic data and various types of documents.

Special methods of theoretically legal science were used. They included a formally legal (dogmatic) method that allowed to research juridical texts and juridical facts, their interpretation in natural sequence by using special legal terms and constructions. This method allowed to research succession legal relations as they are without any relation to economy, politics, morality and other social phenomena. The notion of transboundary succession of business was formed by using this method.

Comparative and legal method helped to comprehensively study the experience of various countries related to succession with a foreign element and demark legal systems of European countries to universal and particulate systems.

## 3. RESULTS

### 3.1. Elements of Business Succession

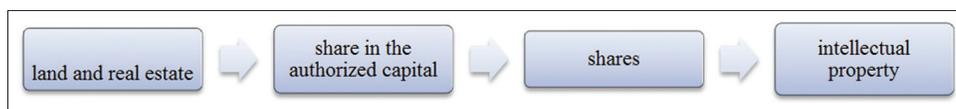
Succession is devolution of property, property rights and obligations after the citizen's death to his/her successors. The procedure of registering title to succession rights for business as well as for any other property depends on legal basis of succession (Thomas and Gabriel, 2015). If the will was made, business is devolved to those who are specified in it. In addition, it is possible to abridge someone's right to the succession.

Using the example of Russia, it is possible to say that business is accepted in compliance with general regulations of succession. Besides, the successor can come into actual possession of property if he/she pays taxes, overtakes arrears, participates in managing the enterprise and performs other actions directly related to the company activity. However, in this case the successor will have to earlier or later address a notary because actual acceptance of succession does not entitle to perform any actions with it. Besides, when the object of succession is business, no transaction can be made without legal paperwork (Baker and Miceli, 2005).

Succession of business holds a specific place both in the legal science and legal practice. Enterprise is a property complex that may comprise all types of property including land, buildings, constructions, equipment, inventory, raw materials, products, receivables, debts, company name, trademarks, i.e., everything that participates in the activity of an enterprise (Figure 2).

Let's consider every element of business succession. Land and real estate. In case of succeeding real estate and land located abroad, the regulations of the state where the succession is situated can be applied. However, while alive the Russian successor can register his/her rights to property located abroad in the Unified Register of Real Estate Titles (Ran et al., 2013). In this case when registering succession, it will be possible to use Russian laws.

Shares and share in the authorized capital. The most principle problem successors face regardless of the form of enterprise is the establishment of relations with other owners, the legator's business partners that can come from another countries and states. In practice it often happens that an obligatory consent of other members of the company is required for the devolution of a share of the authorized capital. If the members agree to bring the

**Figure 2:** Basic elements of business succession

successor into their fold, no special problems arise. The notary issues a succession title certificate. The meeting of members is convened, where they make a decision about the consent for the devolution of a share to the successor and his/her entering into the membership of the company, and about making amendments in the founding documents of the company. Amendments in the founding documents are registered in accordance with the established procedure in the taxing authorities. As of the moment of registering the amendments, the successor is a fully legitimate member of the company. Some experts think that a businessman can relatively easily secure his/her successors. In order to do it, during the company foundation it is enough to include in the charter a provision that successors become interest holders regardless of the consent of the partners of the deceased company member (Brenner, 1985).

However, if members of the company refuse to bring successors into their fold, the deceased member's share is transferred to the company itself. Herewith, the company shall be obliged to compensate to the successor the real value of his/her share in the authorized capital. In accordance with the current legislation, the real value of the share corresponds to the part of the value of the company net assets that is proportional to the value of his/her share. Net assets are the balance value of all company assets for the last reporting period excluding its equities. Though, it is problematic to assess the legator's share in case of transboundary succession. Very often experts assess not the working business but the property that belongs to the enterprise whose value may considerably differ from the business one (Davies and Shorrocks, 2000). In order to avoid this, it is necessary to carry out an independent assessment of the share price by demanding accounting reports for the last year. If disagreed with the assessment of the share, the dispute must be regulated by judicial procedure. In case of succeeding a stock of shares, no consent of other shareholders is required. However, lawyers state about the right of shareholders of a closed joint-stock company to supplement the charter with a provision about the shareholders' pre-emptive right to acquire shares including the ones that are transferred according to the order of succession (Casey and Randolph, 2014).

### 3.2. Intellectual Property

Intellectual property is understood as copyrights, patentee's rights, rights to inventions and rights to trademarks and company names. All this property is subject to succession if there are proofs of its belonging to the legator (Kirillova and Blinkov, 2015).

In case of succeeding copyrights, the successor receives basically proprietary rights (the right to reedition or another use of a work, the right to receiving remuneration, etc.). The right to the name and to the author's reputation is not succeeded. At the same time the successor can protect the author's non-proprietary rights from any breaches by judicial procedure.

As a whole the enterprise is a real estate even if it does not contain immovable. It means that in any case when the enterprise is devolved, the person must make the state registration of the transfer of the rights to the company as real estate. In addition, the international legislation determines the necessity to maintain the enterprise as a unit and provide professional succession of managing it. For this purpose, there is pre-emptive right of the businessman successor.

### 3.3. Legal Systems of European Countries

It is necessary to take into account that every country has its own international private law that determines the boundaries of applying a foreign law (Gottlieb, 1984). Researching legal systems of European countries, it is possible to single out two systems – Universal and particulate. The universal system is characterized by the integrity of the succession property and the applied law, while the particulate system separates the succession property and the applied law depending on the type of such property – Movable and immovable (Janis, 2015).

Herewith, the individual's personal law – Civil state, legal and transactional capacity - is of great importance. The individual's personal law is the law of the country of this person's citizenship. In case the person has several citizenships, as a rule, the law of the country of the person's residence is considered to be the personal law.

The personal law of the person without a citizenship is the law of the country of the person's residence. The practice of transboundary succession is various. So, for example, the citizenship of the subject of the rights to be succeeded is not always changed; the succession property is not always replaced across national borders (Symeonides, 2015).

The freedom of succession can be limited by the forbiddance of agreements for the purpose to protect business. Enterprises must continue working regardless of the owner's death.

It is necessary to pay attention to the regulations on refusing from succession. The world practice shows the following methods to refuse from succeeding: Directed and irrelative refusal. Like accepting succession, refusal takes place only as a result of opening the succession. However, in this regard Germany and Austria formalize the provision of the law that allows certain persons to refuse from it in advance by the agreement with the legator (Jeff and Jurica, 2013). Such persons will include relatives and a spouse of the legator (Germany) and those who according to the law can dispose of their succession right (Austria).

Common regulations that are peculiar of countries of the Romano-Germanic legal system in case of refusing from succession include the following: (1) One cannot refuse from succession in favor of

persons the legator disinherited in his/her will, and in favor of undeserving successors, (2) refusal from succession cannot be changed or revoked in the future.

The German legislation determines the succession of the refusal right. It can be succeeded (Hugues, 2015). It is obvious that there are a lot of grounds for collision situations in case of the succession transfer (its acceptance and refusal from it). In international private law this issue will correspond to the succession statute that generally regulates succession legal relationship. In case of transboundary succession the succession statute includes methods of succession acceptance, term of succession acceptance, procedure of registering the succession acceptance and people who are entitled to accept the succession.

## 4. DISCUSSION

### 4.1. Estate Planning

There are a lot of views, sometimes contradictory, related to how it is necessary to transfer business by succession and whether it is worth doing it (Jean-Jacques Herings and Kanning, 2008). Core beliefs of owners are as follows:

- Business must operate and develop
- Everything done by business owners is done in the interests of their family members and close ones, and
- It is possible to lose business if not to care about the process of transferring business to successors.

Business owners differ in opinions related to the method of transferring business by succession. It is necessary to do much even to deforce successors of the right to claim business and use all profits for charitable purposes.

However, if the owner wishes to transfer his/her business to successors in advance, this process can take more than a year.

Specialists recommend the business owner to obligatorily formalize a complex of proprietary rights by issuing a will and appointing in it an executor who will take all measures on securing and managing the property before successors enter to their rights, and will act in their interests in accordance with the testator's instructions (Cárdenas Castañeda, 2013). It is necessary to specify one of the important peculiarities of business succession. It lies in the fact that there is an entrepreneur among successors, he/she receives a pre-emption right to succeed business.

Under the conditions of transboundary business, when stable personal relations and privity of estate with several countries arise, traditional tools of the succession law do not always work: It is necessary to thoroughly and systematically prepare succession for providing the parties in interest with a legally safe, comprehensive and predictable solution.

Estate planning is a type of optimizing future succession related to several public orders in order to define the most efficient and accessible solutions. In case a part of property is located in another country, the basic goal of estate planning is to prevent disputes between successors including judicial disputes. However, this is

not the only goal. According to experts, it is necessary to plan succession for fair allocation of succession between successors. In case of owning business in several regions, it is necessary to prevent conflicts between the legator's business partners and successors through planning (Henry, 2015). The figure demonstrates the goals of estate planning (Figure 3).

In situations of frequent collision of several public orders that have their own opinions and sometimes views on regulating transboundary succession, conflicting issues related to conducting international succession cases obtain primary importance. Specific legal result for successors, creditors and other parties interested in a specific procedure of succeeding depends on their decision.

In the context of succession, collisions of national jurisdictions and sovereign traditions sometimes lead to the occurrence of long-term and specially complicated litigations. Especially it is related to large succession. A lot of experts mention the necessity of estate planning and refer a will and agreement to its basic tools (Nemeth, 2012) (Figure 4).

### 4.2. Stages of Estate Planning

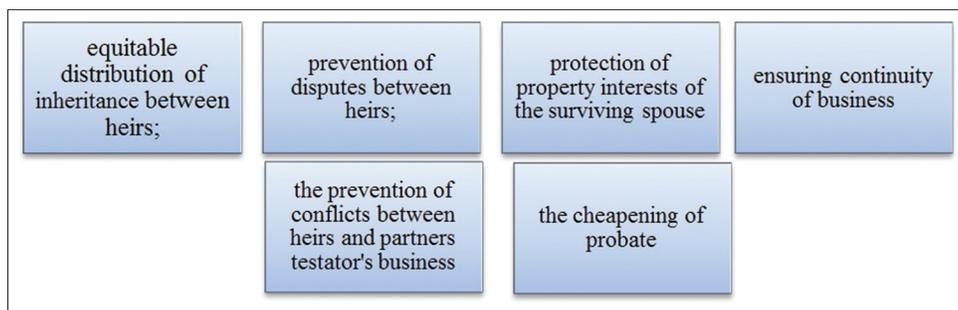
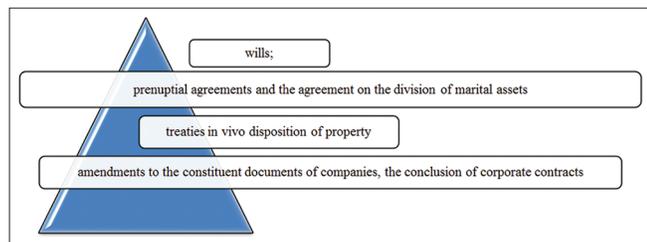
According to some lawyers (Basu et al., 2015), the process of business transfer can be divided into two stages.

Stage 1 includes the provision of stability: The transfer of business to be managed by a successor (successors) is impossible without a number of preliminary measures that aim to stabilize assets. The whole business must be in order. Only in this case successors will receive all that is accrued to them, and the willingness will be fully satisfied. In order to achieve it, above all, it is necessary to prepare the register of all assets. Entrepreneurs often conduct their affairs only by relying on themselves and try to keep everything in mind. That's why it is possible to face the situations when a part of transactions is ceased, a part of documents is kept in an unknown safe deposit, a part of property is registered for third parties, etc. As a result, assets are lost and successors do not receive considerable shares of property. That's why the preparation of a complete register of all assets is an important step in the transfer of affairs to successors.

The next essential step is to define the current obstacles or the ones that can occur later. For this purpose an expert analysis of all legal documents must be made, and legal procedures related to the transfer of property to successors must be defined. In addition, a plan must be made. In accordance with it, the successors' control over the company will be maintained later.

The set of essential preliminary measures on business succession also includes the determination of an agent (executor). He/she must be a trustworthy person with a sufficient level of competence to understand business details and to be aware of all the most important issues of its activity. Subsequently he/she must become the successors' guide who can direct the required answers.

Stage 2 includes business transfer: Even in case of complying with all cautions during Stage 1, one cannot be sure that successors will

**Figure 3:** Goals of estate planning**Figure 4:** Tools of estate planning

individually cope with managing business. However, it is possible to eliminate concerns if to care about everything in advance. The world practice shows that it is possible to provide successors with prompts for all life situations. In particular, it is possible to prepare packages with recommendations on training future managers, to develop a strategy of the company development for the coming decades, to prepare the competent Board of Directors, etc.

Conflicting situations that can occur in the international private law in case of succeeding according to the law of large business cause a lot of disputes. Some researchers consider that disputes can be regulated on the basis of the remission principle or renvoi to the law of the third state (Amankwah-Amoah, 2014). The effect of the remission directly depends on what public order the collision norm points at. The French practice allows to use both remission and further renvoi. As a whole, the use of remission (including renvoi of the second degree) is limited by special conditions in Germany (cl. 4 of the Introductory Act, 1896), Switzerland (cl. 14 “On International Private Law” Act, 1987). Remission is fully applied in Austria (renvoi to the third state but not further is possible) (§5 “On International Private Law” Act, 1978).

Such countries as Russia, France and Austria formalize “a system of seizing” succession, i.e., the legislation determines the term for evident and implicit acceptance of succession.

In Germany and Switzerland there is an “abandonment system” for succession acceptance. It is characterized by the fact that the legislation determines the term during which successors can refuse from succession. The factor that remains unchanged is that the succession acceptance for a successor is a right but not an obligation. It is obvious that collisions may also arise due to the inconsistency of provisions of national laws that regulate the terms of succession acceptance (Russia – 6 months, Germany – 6 months, France – 3 months and 40 days, Switzerland – 3 months).

In order to solve collision disputes, civilists of many countries offer to use a principle of “the closest relation” (Thomas and Gabriel, 2015). Since norms of the substantial law that regulate the issues of the spectrum of successors and their priority to receive succession do not coincide in European countries, such issues can be subject to regulating on the basis of the personal law of the legator.

The notary can assist in searching for property. He/she is entitled to send inquiries to banks, authorities that register titles for real estate and land, and holders of electronic registers. Problems of such kind do not arise only in case the successor is already a business member and is aware of all its details and nuances, or if the legator managed to describe all current assets in advance. In addition, the notary can appoint a collector of the decedent’s estate, and place property into trust if business can come to harm.

As a whole, the succession of large property, and what is more, profitable business is often accompanied by a number of problems, disputes of all members of the process and court proceedings. The best thing the legator can do in this situation is to take care of the business in advance for it to be transferred to a reliable person.

## 5. CONCLUSIONS

Transboundary succession of business is devolution from the deceased person (the legator) to other persons (successors). It is legally tied with several legal systems and includes land, buildings, constructions, equipment, inventory, raw materials, products, and the deceased person’s rights and obligations related to them.

The international legislation acknowledges the existence of business. Herewith, the object of the legislation is a property complex meant for performing business activity. Business is an interrelated complex of property meant for its activity including land, buildings, constructions, equipment, inventory, raw materials, products, receivables, debts and rights to marks that individualize the enterprise, its products, works and services (company name, trademarks, service marks) as well as other exclusive rights. The universal system is characterized by the integrity of the succession property and the applied law, while the particulate system separates the succession property and the applied law depending on the type of such property – Movable and immovable. In spite of the differences in legal systems of European countries in cases of transboundary succession, business must be succeeded as a unit. This provision must be formalized in international conventions that regulate succession legal relations.

In case of owning business in several countries in order to optimize succession, the procedure of estate planning must be applied. Estate planning is a type of optimizing future succession related to several public orders in order to define the most efficient and accessible solutions. Estate planning consists of two stages. The first one includes stability provision and the second one is business devolution.

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