

# Succession with the Foreign Element of a Share in a Limited Liability Company Registered in Ukraine

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The paper<sup>1</sup> aims at the revealing of the possible manifestations of foreign element in a succession of a share in a limited liability company registered in Ukraine; distinguishing the issues which should be governed by *lex societatis* and *lex successionis*; determining of *lex societatis* and *lex successionis* as well as international competence of notaries and international jurisdiction of courts in the matters of succession of share in a limited liability company registered in Ukraine. To achieve this aim the paper analyses some bilateral international treaties of Ukraine on legal assistance and the Law of Ukraine On Private International Law. The solution of the issues which have not been solved in Ukrainian law was offered taking into consideration the solutions of the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, as well as the law of Germany, France, the Netherlands and Switzerland.

**Keywords:** international succession, law applicable to the succession of a share in the company, international jurisdiction in succession matters, Law of Ukraine On Private International Law, international treaties on legal assistance on civil matters, EU Succession Regulation, the rights arising out of a share in company.

## Ukrainoje registruotos ribotos atsakomybės įmonės akcijų paveldėjimo problematika užsieniečiams

Šiuo rašto darbu siekiama atskleisti galimas užsienio elemento apraiškas Ukrainoje įregistruotų ribotos atsakomybės bendrovės akcijų paveldėjimo srityje. Taip pat siekiama išskirti klausimus, kuriuos turėtų reglamentuoti *lex societatis* ir *lex successionis*, nustatyti tarptautinę notarų kompetenciją ir tarptautinę teismų jurisdikciją Ukrainoje įregistruotos ribotos atsakomybės bendrovių akcijų paveldėjimo klausimais. Straipsnyje analizuojamos kai kurios dvišalės tarptautinės Ukrainos sutartys dėl teisinės pagalbos, Ukrainos tarptautinės privatinės teisės įstatymas bei tarptautiniai teisės aktai, užsienio šalių praktika.

**Pagrindiniai žodžiai:** tarptautinis paveldėjimas, teisė, taikytina bendrovės akcijų paveldėjimui, tarptautinė jurisdikcija paveldėjimo byloje, Ukrainos tarptautinės privatinės teisės įstatymas, tarptautinės sutartys dėl teisinės pagalbos civilinėse byloje, ES paveldėjimo reglamentas, teisės, kylančios iš bendrovės akcijų.

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## Introduction

A Limited Liability Company (LLC) is the most popular legal entity in Ukraine. Thus, according to data of the State Statistics Service of Ukraine as of January, 1, 2022 there were 748 672 LLCs (for comparison: private enterprises – 199 893; joint stock companies – 7197) (The Number of Legal Registered Entities..., 2022). The death of a member of such a company raises a number of legal issues, in particular, regarding the succession of a share belonging to the deceased. The succession of such a share itself has traditionally raised many questions in Ukrainian practice and doctrine (among them are the following: what exactly should be inherited: the share in the company itself or also the rights belonged to the deceased (for example, the right to participate in the management of the company; the right to receive the dividends); whether the shareholders are entitled to object to the heir's joining the company if they see no prospects for further cooperation, and others).<sup>2</sup> Usually the answers to all these and other succession-related questions have been provided by analyzing the Ukrainian law.

However, if the relationship includes a foreign element, the number of questions increases, since there is a need to determine a law applicable to the succession of a share. Given that the choice of conflict of laws rules determining the applicable law depends on the legal nature of such relations, it is important to qualify different relations which affect the inheritance and which arise out before and after the death of the LLC's shareholder. It is also necessary to determine which state's notary is competent<sup>3</sup> to open an inheritance file. In the event of a dispute, it must be decided which state's court has a jurisdiction<sup>4</sup> to hear the relevant case. It should be noted that these issues have not been studied in Ukrainian legal doctrine. Therefore, **the aim of this paper** is to determine the law applicable to succession of a share in the LLC registered in Ukraine as well as the international competence of the notaries and international jurisdiction of the courts in such matters. To achieve this aim the paper solves the following **tasks**: 1) it clarifies when it can be argued that there is a foreign element in the succession of a share in the LLC; 2) it explains what issues should be governed by the law applicable to succession relations (*lex successions*) and what issues should be submitted to the law of companies (*lex societatis*); 3) it reveals how *lex successions* and *lex societatis* should be determined in case of succession of a share in LLC registered in Ukraine; 4) it answers the question the notaries (the courts) of what state have the competence (jurisdiction) to deal with the matter of succession of a share in the LLC registered in Ukraine. The following **methods** were used to solve the tasks: formal-logical; systematical, comparative. The application of the formal-logical method allowed us to identify possible manifestations of the foreign element in the succession of a share in LLC registered in Ukraine. The scope of *lex successions* and its distinction from the scope of *lex societatis* were determined by employment of systematical law method. This method was used also to determine international competence of the notary and international jurisdiction of courts on the matters of succession of a share in LLC. Since the paper is focused on the succession of a share in LLC, registered in Ukraine, the comparative legal method has not been widely applied. At the same time, to explain the modern approaches as to the determination of the scope of *lex successions*, *lex societatis*, to the understanding the legal nature of the rights arising out of a share in the company, the paper analyses the Regulation (EU) European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and

<sup>2</sup> The detailed analyses of these issues can be found, for example, here (Kukhariev, 2021, p. 34–39; Spasybo-Fatieva, 2016, p. 333–335; Vasylieva, 2010, p. 109–113).

<sup>3</sup> The term 'competence' used in this paper means the notary's authority for opening an inheritance file, acceptance of an application for acceptance of inheritance or waiving from it, issuance of a succession certificate.

<sup>4</sup> The term 'jurisdiction' used in this paper means the court's authority to hear and settle the succession claims.

acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (hereinafter – ‘SR’), as well as the legislation and legal doctrine of Germany, France, the Netherlands and Switzerland.

Since the rules determining the law applicable to the succession of a share in LLC, registered in Ukraine, as well as the international competence of the notaries and international jurisdiction of courts in these matters, can be found in the international treaties of legal assistance and the Law of Ukraine On International Private Law (hereinafter – ‘PILA’), the research was made at two levels: 1) the level of international treaties on legal assistance; and 2) PILA.

## **The presence of a foreign element in the succession of a share in LLC registered in Ukraine**

It follows from Article 1 PILA that a foreign element is present in the relationship if at least one of its participants is a foreigner, a citizen of Ukraine who resides outside of Ukraine, a stateless person or a foreign legal entity; or if the object of the relationship is located on the territory of a foreign state; or if the legal fact that creates, modifies or terminates a legal relationship occurred or is occurring on the territory of the foreign state. Consequently, the presence of a foreign element in the succession of a share in LLC in some cases is obvious, while in others it may be debatable.

## **Possible manifestations of a foreign element in the composition of participants of succession legal relation**

The presence of the foreign element in the succession relationship is obvious if the deceased and the heir are: 1) the citizens of different states; or 2) the stateless persons; 3) the citizens of Ukraine residing abroad (or if one of them is a foreigner, a stateless person or a Ukrainian citizen residing abroad).<sup>5</sup>

If the deceased and the heir are citizens of Ukraine who reside in Ukraine, but the deceased has made a legacy in favor of a legatee, who is a foreigner or a stateless person, or a citizen of Ukraine residing abroad, the answer to the question of whether there is a foreign element in the succession relationship depends on whether the legatee is considered as a participant to the succession relationship, and what exactly is the subject of the legacy.

We agree that the legatee is a participant to the succession relationships and possesses ‘the rights and duties that are transferrable in the course of inheritance’ (Boryslavska, 2019, p. 144), because according to Art. 1238 (4) of the Civil Code of Ukraine (hereinafter – ‘CCU’): ‘a legatee is entitled to claim against the heir from the moment of opening of the inheritance’, and the legacy arises out of the implementation of one of the succession rights of the deceased, provided by Art. 1237 (1) of CCU.

At the same time, to answer the question of whether the ‘foreignness’ of the legatee affects the presence of a foreign element in the succession of a share in LLC, it is important to take into account the subject of the legacy. In our opinion, a foreign citizenship, absence of any citizenship or residency of the legatee outside of Ukraine introduces a foreign element to the succession of a share in the

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<sup>5</sup> According to Art. 1 (2) of PILA: ‘A foreign element is a feature that characterizes the private legal relations governed by this Law; it can reveal itself in one or more of the following forms: – at least one party to legal relations is a Ukrainian citizen, who resides outside of Ukraine, a foreigner, a stateless person or a foreign legal entity; – the object of legal relations is located in a foreign country; – the legal fact, which creates, modifies or terminates legal relations, occurred or is occurring on the territory of the foreign state’.

LLC only if the subject of the legacy is the transfer of a property right, associated with that share (for example, the right to receive a portion of the dividends). If the legacy relates to other proprietary or nonproprietary rights, foreign citizenship or residency of the legatee outside of Ukraine does not give rise to the presence of a foreign element in the succession of a share in the LLC.

Some authors consider that the circle of participants of succession relations include the creditor of the deceased (Boryslavska, 2019, p. 144). In our opinion, creditors do not participate in succession relations since “an inheritance is a transition of rights and duties (estate) from the deceased physical person to other persons (heirs)” (Art. 1216 of CCU). It means that the ground for the transition of inheritance rights and duties is the death of the deceased. However, when it comes to creditors, despite the fact that their claims may be satisfied after the death of the deceased, the ground for such satisfaction is not the death of the deceased, but a contract or other legal act by virtue of which the contractual or noncontractual obligations of the deceased arose. Consequently, the creditor’s nationality or state of residence is irrelevant in determining whether a foreign element is present in the relationship.

### **Can a foreign element manifest itself in the object of succession relations (share of LLC registered in Ukraine)?**

In order to determine whether a foreign element may manifest itself in the object of succession relations, i.e. in the share of LLC, it is necessary to determine the location of the authorized capital of the company, since by virtue of Article 12 of the Law of Ukraine On Limited and Additional Liability Companies with amendments (hereinafter – the Law On LLC) a shareholder’s share is a share in the authorized capital of a company. In turn, the location of the authorized capital of a company depends on the understanding of its legal nature, which is known to be debatable. Thus, according to one point of view, a company’s authorized capital is equated with its assets.<sup>6</sup> Therefore, if a company has a property located abroad, a foreign element is always present in the succession of its share.

However, we support those authors who object to the equating of the authorized capital of a company with its property because, although the shareholders make contributions to the authorized capital by investing certain types of property (Article 13 of the Law ‘On LLC’), ‘the amount of the authorized capital of the company consists of the minimum value of the shares of its shareholders expressed in the national currency of Ukraine’ (Article 12 of the Law On LLC), that is, ‘the authorized capital is not an aggregate of property, but its monetary value’ (Otsel, 2016, p. 96).

Therefore, regardless of the place of location the company’s property, the authorized capital of LLC registered in Ukraine is always located in Ukraine, as it is here that the monetary evaluation of the authorized capital is given (and it is given in the currency of Ukraine), here the data on the amount of the authorized capital and the size of each shareholder’s share are registered in the state register (Article 9 (2) (15) of the Law of Ukraine On State Registration of Legal Entities with amendments). In addition, if we consider the authorized capital as an integral part of the company itself, the argument for supporting the statement that the seat of the authorized capital of the company, registered in Ukraine, is Ukraine, can be found also in provisions of Article 25 of PILA, according to which ‘the seat of a legal entity is the state in which the legal entity is registered or otherwise established under the law of that state’.

However, some authors consider the authorized capital of the company as an aggregate of corporate rights of a proprietary and nonproprietary nature (Otsel, 2016, p. 96). This view also affects the definition

<sup>6</sup> This point of view is described in (Otsel, 2016, p. 96). Although the author of that paper himself does not share it.

of the object of inheritance if a share in a company is inherited. For example, V. M. Kravchuk, while considering the inheritance of: 1) a share in the authorized capital with the right on participation in the company; 2) only a share in the authorized capital (without the right on participation in the company) states that in both cases the object of inheritance is corporate rights, with the difference that in the first case it is proprietary and organizational corporate rights; in the second – only proprietary corporate rights (Kravchuk, 2009, p. 348).

In principle, the authorized capital itself is not a set of corporate rights, but, of course, a company's shareholder owns corporate rights (Article 5 of the Law On LLC), because 'a share in the authorized capital certifies the proprietary right ... and a nonproprietary right to participate in the company' (Maidanyk, 2019, p. 605). At the same time, since the heir may or may not exercise the right to participate in the LLC, we agree that the heir acquires either the right to claim the value of the share (if he does not wish to join the LLC and participate in it) or corporate rights (if he has joined the company) (Spasybo-Fatieieva, 2016, p. 333). Moreover, the value of a share in the authorized capital consists precisely in the rights to claim or corporate rights belonging to its owner; without these rights, holding a share is meaningless. Therefore, to solve the research tasks of this paper we will consider the share in the LLC as a set of rights (either claim or corporate).

In this regard, it is important to consider how to locate the rights in order to determine whether there is a foreign element within them. PILA does not answer this question. Therefore, it is interesting to learn the approaches of the legal systems, which have already offered a solution of these issues. For example, to determine the location of incorporeal things, which are, in fact, both claim rights and corporate rights, European private international law (including international inheritance law) uses the approach of Article 2(9) of the Regulation (EC) on Bankruptcy Proceedings (Revised) of 20 May 2015 (Panopoulos, 2017, p. 150).

It can be inferred from Article 2 (9) (iv) of this Regulation that the state, in which the rights arising from a share in a company (other than the rights arising out of registered shares) are located, is the state, whose authority keeps the register of company's shares (or rights arising from them). This approach is sound. Therefore, based on the fact that by virtue of Art. 9 (2) (15) of the Law On State Registration of Legal Entities the data on the size of each share of the founders (shareholders) of the company, which is being registered (or has been registered) in Ukraine, shall be entered into the Unified State Register of Legal Entities, Physical Persons - Businessmen and Public Associations of Ukraine, the location of corporate rights of a shareholder of LLC registered in Ukraine, is Ukraine.

In other words, a foreign element cannot appear in the object of succession relations, in case of succession of a share in the LLC registered in Ukraine.

### **Presence of a foreign element in the legal fact creating or terminating a succession relationship of a share in LLC registered in Ukraine**

A succession relationship arises out from the opening of an inheritance (Riabokon, 2009, p. 200). Certainly, the determination of the place of inheritance will depend on the law under which the qualification of the concept of 'opening of inheritance' is made. If such a question is raised before a Ukrainian court it will most likely be determined under Ukrainian law since according to Art. 7(1) of PILA: 'To determine the applicable law, a court or other authority is guided by the interpretation of rules and notions according to the law of Ukraine, unless otherwise is provided by the law'. 'Otherwise' is provided by Art. 7 (2) of PILA: 'if the rules and notions that require legal qualification are not known to Ukrainian law or are known by another name or with another content and cannot be determined

through interpretation by means of Ukrainian law, the law of the foreign state shall also be taken into account in determining their legal qualification'. Since Article 1221 of the CCU determines the notion of 'the place of opening the inheritance', it is unlikely that Ukrainian court has an opportunity (and wish) to qualify it on the basis of foreign law. Article 1221 of the CCU determines the place of opening of inheritance as the place of last residence of the deceased; if the last is unknown the place of opening of inheritance is understood as a place of location of immovable property or its main part, and in the absence of such – a place the location of the main part of the movable property (see Art. 1221 CCU).

In other words, a foreign element in succession of a share in LLC registered in Ukraine, is present in the legal fact creating the inheritance legal relationship, if the deceased had his last place of residence abroad. If his last place of residence is unknown, the foreign element is present if the deceased had immovable property or the main part thereof abroad. In the absence of immovable property, the foreign element is present, if the main part of movable property of the deceased was located abroad.

In addition, a foreign element may manifest itself in a legal fact that modifies the legal relationship of succession of a share in the LLC. Among such legal facts are, for example, the conclusion of agreements on changing the order of succession or changing the size of a share in the LLC of one of the heirs or the conclusion of other agreements between the participants to succession relations that somehow affect succession relations, which occur abroad after the opening of the inheritance.

If acceptance of an inheritance (namely a share in LLC) or waiver from it (in other words legal facts that terminate succession relations) took place abroad – there is a foreign element in succession relations.

That is, in the case of succession of a share in LLC registered in Ukraine, the foreign element may appear in the subject composition of participants to succession relations or in the legal fact creating or modifying or terminating succession relations.

### **Presence of a foreign element and the possibility of applying foreign law to the succession of a share in the LLC and granting jurisdiction to foreign authorities in such succession matters**

As follows from some international treaties on legal assistance and PILA the presence of a foreign element makes possible to apply conflict of laws rules as well as the rules on international competence (jurisdiction) to succession matters.<sup>7</sup> At the same time, the presence of a foreign element will not necessarily result in the application of foreign law or conferring a competence (jurisdiction) to a foreign authority, as a conflict of laws rule determining the applicable law or a rule determining international

<sup>7</sup> Art. 2 of PILA provides that this Law applies to such issues arising in the sphere of private relations with foreign element: 1) determination of applicable law; 2) procedural passive and active legal capacity of foreigners, stateless persons and foreign legal entities; 3) jurisdiction of Ukrainian courts in matters with foreign element; 4) execution of letters request; 5) recognition and enforcement in Ukraine of foreign court decisions. Article 78 of PILA defines the competence of bodies other than courts to hear cases with foreign elements. The international treaties on legal assistance do not contain general rules which would establish the possibility to apply their provisions exactly to relations with a foreign element, however, this possibility follows from the content of the conflict of laws rules, in particular, from those which determine the law applicable to succession and the rules which govern international competence (jurisdiction) in succession matters (see, for example, Articles 36–38 of the Agreement between Ukraine and the Republic of Lithuania on legal assistance and legal relations in civil and criminal Matters (hereinafter – Agreement with Lithuania); Articles 36–41 of the Agreement between Ukraine and the Republic of Poland on legal assistance and legal relations in civil and criminal Matters (hereinafter – Agreement with Poland); Agreement on Legal Assistance between Ukraine and the Czech Republic in Civil Matters (hereinafter – the Agreement with the Czech Republic).

competence (jurisdiction) may refer to Ukrainian law or confer jurisdiction to a notary in Ukraine or a Ukrainian court respectively.

In addition, the exclusion of the application of the law determined on the basis of the conflict of laws provisions of PILA, stipulated by its Article 4 (3), should also be kept in mind. In particular, this rule provides that the law determined on the basis of the conflict of laws rules of PILA or international treaties, as an exception, does not apply if, under all circumstances, the legal relationship has little connection to the applicable law and is more closely connected to other law. At the same time, this rule does not specify the law which should be applicable in this case. Consequently, it can be argued that either Ukrainian or the law of another State can be applied.

### **Distinguishing between the law governing the functioning of society (*lex societatis*) and the law governing succession (*lex successionis*)**

There are several stages of application of law, determined on the basis of conflict of laws rules. The first stage consists in initial qualification, i.e. determining the legal nature of the relationship in respect of which the applicable law is to be determined.

In the case of the death of a shareholder of LLC, two groups of questions arise: 1) what are the consequences of the death of one of the shareholders for the LLC: – does it continue or cease to exist? – do the heirs are entitled to become shareholders of the LLC? if – yes, how can they exercise this right? – can the other shareholders object to the entry of the heir of the deceased shareholder in the LLC if they see no prospects of cooperation with him (her)? 2) how does the succession occur? (the circle of potential heirs; the circle of persons entitled to the reserved portion in the inheritance; the order of acceptance of inheritance, etc.).

In other words, in the case of the death of a shareholder of the LLC, the issues of corporate statute (the range of issues govern by the *lex societatis*) and of succession statute (the range of issues governed by the *lex successionis*) are closely intertwined. However, *lex successionis* and *lex societatis* are defined differently. Therefore, it is important to determine how *lex societatis* and *lex successionis* are understood and what issues are governed by each of these laws in the case of succession of a share in the LLC. Since private international relations are governed at two levels (international treaties and PILA, with the priority application of the first (see Art. 19 (2) of the Law of Ukraine On International Treaties of Ukraine), we shall study legal regulation of these issues at both levels.

### ***Lex societatis* and the issues it governs**

Some legal assistance treaties to which Ukraine participates define *lex societatis* as a law of the Contracting State on whose territory the legal entity has been founded (e.g., Article 22 (2) of Agreement with Lithuania, Article 21 (2) of Agreement with Poland); others determine it as the law of the Contracting State in which the legal entity has its seat, without any interpretation of this term (e.g., Article 22 (2) of Agreement with the Czech Republic). According to certain legal assistance treaties *lex societatis* governs passive legal capacity of legal entities (e.g., Article 22 (2) of Agreement with Lithuania, Article 21 (2) of Agreement with Poland); the others extend it not only to passive legal capacity but also to the active one (e.g., Article 22 (2) of Agreement with the Czech Republic).

Some agreements on legal assistance do not reveal the concept of passive or active legal capacity; the others – do (for example, under Article 22 (2) of the Agreement with the Czech Republic active

capacity of a legal entity is ‘an ability to acquire rights and duties on the basis of its own legal actions’). Article 25 of PILA defines *lex societatis* as the law of the state ‘in which a legal entity is registered or otherwise formed in accordance with the law of that state. In the absence of such conditions or if it is impossible to clarify them, *lex societatis* is to be determined as the law of the state in which the executive body of the legal entity is located’. According to Article 26 of PILA *lex societatis* determines the law applicable to the civil passive and active capacity of a legal entity. However, PILA does not explain what issues are covered by ‘passive and active capacity of legal entity’. Taking into account Article 7 (1) of PILA it is possible to refer to the understanding of these terms in Ukrainian civil law. As follows from Art. 91 of CCU the passive capacity of a legal entity covers the rights and duties that a legal entity may have; the so-called ‘abstract totality of rights’ (Kochyn, 2012, p. 86). As follows from Article 92 of CCU active capacity is the ability of a legal entity to acquire and exercise rights and duties through its bodies. Therefore, according to PILA *lex societatis* governs abstract totality of rights and duties of the legal entity as well as its ability to acquire and exercise rights and duties.<sup>8</sup> If we compare the scope of *lex societatis* in treaties on legal assistance of Ukraine and PILA, we see that it does not cover many of the issues that are usually attributed to the scope of *lex societatis* in modern international private law.

For example, according to Article 22 (4) of the Hungarian Private International Law Act, *lex societatis* governs legal capacity of the legal entity; its formation and termination; its statutory and organizational representation; its personal rights; organization; the legal relations between the members; liability of the legal entity, its members and executive officers.

In the law of the Netherlands *lex societatis* covers formation of the legal entity as well as the ‘possession of legal personality or of the competence to bear rights and obligations, to perform juridical acts and to act in court; the internal existing order of the cooperation and all subject-matters related to that; the power of representation of the bodies and functionaries of the cooperation; the liabilities of the Directors, Supervisory Directors and other functionaries towards the cooperation; the question who, besides the cooperation, is liable on the basis of a certain capacity for acts binding the cooperation, like an incorporator, partner, shareholder, member, Director, Supervisory Director or other functionary of the cooperation; the ending of the existence of the cooperation’ (Article 119 of Book 10 of Dutch Civil Code). This list is considered not to be exhaustive (Van der Elst, Maresceau, 2019, p. 572).

There are the states in which the scope of the *lex societatis* is not defined at the legislative level; here it is determined on the basis of case law and legal doctrine. This is the case of France where the scope of *lex societatis* is drawn on the basis of several court decisions and doctrinal works, which include to it: the issues of formation and operation of the company (internal management, relations between the company and third parties) and its voluntary dissolution (Menjucg, 2019, p.380).

In Germany, the *lex societatis* in principle governs all the issues of formation of a legal entity, its legal capacity, requirements for the authorized capital; internal management structure, rights, duties, responsibility of members and directors. At the same time, the issues of differentiating the scope of *lex societatis*, *lex contractus*, *lex delicti commissi* and other connecting factors are debatable, and the law that applies to some of issues connected with activity of a legal entity may be determined not on the basis of *lex societatis*, but on the basis of other connecting factors (Gerner-Beuerle, Siems. 2019, p. 390–391).

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<sup>8</sup> It should be noted, however, that in the doctrine of private international law, the scope of *lex societatis* may be defined more broadly (See, e.g., Vyhovskiy, 2014, p. 268).



## ***Lex successionis***

Conflict of laws rules applicable to succession relations can be found in international treaties of Ukraine on legal assistance and PILA. They are based on the dualistic principle of determining the law applicable to succession. This means that the law applicable to succession of movable and immovable property is determined on the basis of different connecting factors.

### ***Lex successionis* according to the treaties on legal assistance**

Not all legal assistance treaties to which Ukraine is a party contain conflict of laws rules applicable to succession. Those that do, as a rule, set that succession of immovable property is governed by the law of the state where the property is located (Article 35 (2) of Agreement with Lithuania; Article 37 (2) of Agreement with Poland; Article 38 (2) of Agreement with the Czech Republic); succession of movable property – by the law of the state of whose nationality the deceased possessed at the time of death (Article 38 (1) of Agreement with the Czech Republic; Article 37 (1) of Agreement with Poland), or – by the law of the state in which the deceased had his last permanent place of residence<sup>9</sup> (Article 35 (1) of Agreement with Lithuania). The classification of property on movable or immovable is carried out under the law of the state where the property is located. (Art. 38(3) of the Agreement with the Czech Republic; Art. 37(3) of the Agreement with Poland). Some treaties on legal assistance do not define the law, on the basis of which the property should be qualified as movable or immovable (for example, the Agreement with Lithuania). In such cases, the law applicable to the qualification of property can be determined on the basis of Article 38 (2) of PILA, by virtue of which the qualification of property as movable or immovable is made under the law of the state in which the property is located.

Thus, if the law to be applied to the succession of a share in LLC registered in Ukraine is determined on the basis of conflict of laws rules of the treaties on legal assistance, first of all it is necessary to qualify it as movable or immovable. It was already mentioned above that the location of the share in LLC registered in Ukraine is Ukraine, so the qualification should be carried out on the basis of Ukrainian law.

In Ukrainian law, the definition of immovable and movable things is contained in Article 181 of CCU. According to this article, immovable things are the land plots as well as the objects located on them, which cannot be moved without depreciating them and changing their purpose; moreover, the law may extend the regime of immovable things to things that are movable in principle. The main feature of movable things is that they can be freely moved in space.

Of course, a share in LLC is not a land plot and not an object located on it. Moreover, there is no any Ukrainian law that extends the regime of immovable property to the authorized capital of a company (or shares in it). On the other hand, the statement that a share in LLC can ‘move freely in space’ can also raise the objections, especially if the authorized capital and, accordingly, the share in it, are understood as the monetary expression of the property of the company, that is, a certain abstract value. The author of this paper is closer to the point of view that the main value of a part in LLC is not in it as itself, but in the rights arising out of it. Therefore, to answer the question whether a share in LLC is a movable or immovable property, it is necessary to define if the rights arising out from it can be classified as movable or immovable property.

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<sup>9</sup> The term ‘last permanent place of residence’ is used in Ukrainian version of the Agreement. The Lithuanian version uses the term ‘nuolatinė gyvenamoji vieta’ (‘permanent place of residence’).

As far as we know in the Ukrainian doctrine this question has not been considered. (Although the point of view was expressed that the share in the authorized capital of the company should be subject to the regime of things, since it is an object of ownership (Shymon, 2014, p. 228). This is understandable, as this question is not important for the regulation of domestic relations. Therefore, in our opinion, it is useful to study the approach to this issue in the law of foreign countries.

In this connection, it should be noted that some countries do not recognize the possibility of attributing rights to immovable or movable property. For example, in German law, only corporeal things are governed by ownership law rules (Mc Guire, 2011, p. 67) (which uses the concepts of ‘movable and immovable property’); rights do not refer to things (Mc Guire, 2011, p.67) (i.e. movable or immovable property); furthermore, German doctrine has repeatedly emphasized that the insufficient regulation of rights cannot be overcome simply by referring to the rules applicable to corporeal things (Mc Guire, 2011, p. 68).

Similarly, in the Netherlands, Art. 3:3 of the Civil Code defines immovable property (as land, minerals not yet extracted, plants connected to land, buildings and structures permanently attached to land directly or by other buildings or structures) and movable property (as all the things that are not immovable). Although this article does not say so explicitly, it is considered that the division of property into immovable and movable property only concerns corporeal things, not rights (Salomonus, 2011, p. 50).

However, in France, where Article 516 of the Civil Code states that all property is divided into immovable and movable property, any property is deemed to belong to one of these types (Cashin Ritaine, 2011, p. 14) Articles 517-526 of the Civil Code define what property is immovable; the notion of movable property is not determined by the legislation, so movable property is considered as the property which does not fall within the definition of immovable property (Cashin Ritaine, 2011, p. 14). However, there are exceptions established by the law when the regime of immovable property is extended to property that in principle can move in space; this applies to property of great value as well as to some other property (for example, if movable property is so connected with immovable property that they constitute one set) (Cashin Ritaine, 2011, p. 14-15). Three criteria are used to classify property as immovable: 1) physical criterion, which defines immovable property by its nature: connected to the land, to a plot of land, connected to the ground (e.g.trees); 2) fiction criterion: a thing is considered as immovable if it belongs to a real estate; 3) criterion for defining the nature of incorporeal rights: they are considered as immovable property if they apply to corporeal immovable property (Cashin Ritaine, 2011, p. 15).

Movable property is understood as a property that can move (Cashin Ritaine, 2011, p. 15). In addition, certain objects may be considered as movable property if they cannot be attributed to immovable property or if their nature has been defined by law (Cashin Ritaine, 2011, p. 15); in particular, Article 529 of the French CC is the basis for considering authorized capital as movable property (Cashin Ritaine, 2011, p. 16).

In our view, the rights which the heir of a share in the LLC receives have more attributes of movable property than of immovable property, because the LLC, whose share in the authorized capital is being inherited, can in principle change its location. In turn, this means that if the law applicable to the succession of a share in the LLC is determined on the basis of one of the legal assistance treaties, it may be the law of the state whose nationality the deceased possessed at the time of death or the law of the state in which the deceased had his last place of residence.

## ***Lex successionis* according to PILA**

As follows from Articles 70, 71 of PILA the succession of immovable property is governed by the law of the state where it is located; the succession of movable property is subject to the regulation of the law of the state where the deceased had his last place of residence; in addition, it may be governed by the law of the state of the nationality of the deceased, if he has chosen this law in his will (if after the making of will his nationality changes, the choice of law is invalid). Succession of property, which is subject to state registration in Ukraine, is governed by the law of Ukraine.

Therefore, if the law applicable to the succession of a share in LLC registered in Ukraine is determined on the basis of PILA, succession issues will be governed by Ukrainian law, given that the authorized capital of LLC, registered in Ukraine, is located in Ukraine.

## **Scope of *lex successionis***

Neither the legal assistance treaties nor PILA define the scope of *lex successionis*. Given that these instruments contain special conflict of laws rules applicable to the form of a will and the act of its revocation and the ability to make or revoke a will, it can be concluded that *lex successionis* governs all the inheritance issues except the form of a will, the act of its revocation and the ability to make or revoke a will and the act of its revocation.

The acts of private international law applicable in the other countries give a more detailed picture of the issues to which the *lex successionis* generally applies. For example, according to Article 92 (1) of the Swiss IPR Code, the law governing the estate ‘determines what belongs to the estate, who is entitled thereto and to what extent, who is liable for the debts of the estate, which legal remedies may be relied on, and which measures may be ordered and subject to which requirements.’

According to Art. 23 (2) of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (hereinafter – SR), the law applicable to succession as a whole governs in particular: ‘the causes, time and place of the opening of the succession; (b) the determination of the beneficiaries, of their respective shares and of the obligations which may be imposed on them by the deceased, and the determination of other succession rights, including the succession rights of the surviving spouse or partner; (c) the capacity to inherit; (d) disinheritance and disqualification by conduct; (e) the transfer to the heirs and, as the case may be, to the legatees of the assets, rights and obligations forming part of the estate, including the conditions and effects of the acceptance or waiver of the succession or of a legacy; (f) the powers of the heirs, the executors of the wills and other administrators of the estate, in particular as regards the sale of property and the payment of creditors, without prejudice to the powers referred to in Article 29(2) and (3); (g) liability for the debts under the succession; (h) the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs; (i) any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries; and (j) the sharing-out of the estate.’

## **Distinguishing between matters governed by the *lex societatis* and matters governed by the *lex successionis***

Taking into consideration the scope of *lex societatis* and *lex successionis*, it can be argued that *lex societatis* governs the consequences of the LLC shareholder's death for the LLC (e.g., if LLC continue to exist; if the heirs of the deceased shareholder are able enabled ) to acquire membership in the company and the procedure for such acquisition). Given that the *lex societatis* of LLC, registered in Ukraine, is Ukrainian law, these issues are governed by Ukrainian law.

In case of succession of a share in the LLC registered in Ukraine, *lex successionis* may be defined as the law of the state of nationality of the deceased at the time of his/her death or as the law of the state where the deceased had his/her last permanent residence (if it is determined on the basis of one of the legal assistance treaties) or as Ukrainian law (if it is determined on the basis of PILA). *Lex successionis* governs the following issues: the place, the time of opening of the succession, which includes a share in LLC; who and in what shares may be the heir after a certain deceased, including the issues of the reserved portion and its amount; the acceptance of succession; transition of the right to accept succession; grounds and procedure for disqualification from succession; waiver from the succession; satisfaction by heirs of the claims of the deceased's creditors; administration of the estate; sharing-out of the estate; escheat of estate.

It should be stressed that this approach is in line with the approach of SR, which excludes from its scope matters 'governed by the law of companies or other bodies, corporate or unincorporated, such as clauses in the memoranda of association and articles of association of companies and other bodies, corporate or unincorporated, which determine what will happen to the shares upon the death of the members' (Article 1(2)(h) of SR). It is recognized that these matters are governed by the *lex societatis* (Nikolaidis, 2017, p. 43).

Thus, it is *lex societatis* which governs the consequences of the death of one of shareholders (termination or continuation of the company; the possibility of the heirs to join the company). Whereas, the SR defines the law applicable to the determination of the circle of heirs and legatees and the procedure for succession.

## **International competence of the notaries and the international jurisdiction of the courts on the succession of a share in LLC matters**

In Ukraine, the international competence of the notaries and international jurisdiction of the courts regarding the succession of a share in LLC matters are determined by the international legal assistance treaties and, in their absence, by PILA. As a rule, those of the treaties that regulate international competence (jurisdiction) in succession matters determine it depending on what property (movable or immovable) is inherited. The succession of movable property falls within the competence of the institutions of justice of the Contracting Party, whose nationality the deceased possessed at the time of death.

The succession of the immovable property falls within the competence of the institutions of justice of the Contracting Party on whose territory the immovable property is located (see, for example, Article 38 (1,3) of the Agreement with Lithuania, Article 37 of the Agreement with Romania, Article 41 (1,2) of the Agreement with Poland, Article 41 (1,2) of the Agreement with Czech Republic). In addition, some legal assistance treaties provide that: 'where all movable property which remains after the death of a national of one Contracting Party is situated on the territory of the other Contracting Party, the authority of the other Contracting Party, is authorized to deal with the succession matter, if

there is a heir's application concerning this and all the known heirs agree with this' (Article 41 (3) of the Agreement with Poland). The provisions of Article 38(2) of the Agreement with Lithuania and Article 41(3) of the Czech Republic Treaty are the similar.

Since the author of this paper considers the succession of a share in the LLC as the succession of certain rights, which are classified as the movable property, the international competence (jurisdiction) on succession matters should be determined on the basis of the rules applicable to movable property. Should the rules of the treaties on legal assistance be applicable, the international competence (jurisdiction) will be granted to the institutions of the Contracting Party of the treaty, whose nationality the heir possessed at the time of death.

If international competence (jurisdiction) is determined on the basis of PILA, then, by virtue of its Articles 77 (1) (3) and 78, notaries (courts) of Ukraine obtain exclusive competence (jurisdiction) if a deceased is a national of Ukraine and resided in Ukraine (however, the legislator does not specify at what moment he/she should reside here).

Furthermore, if a deceased possessed Ukrainian nationality but did not have a place of residence in Ukraine or, on the contrary, did not possess the nationality of Ukraine but had his last place of residence in Ukraine, the courts and notaries of Ukraine will have jurisdiction (competence) on the succession matter although it will not be exclusive (this conclusion follows from Art. 76 (1) (6) and Art. 78 of PILA). In addition, it follows from Article 76 (1) (1) PILA that international jurisdiction of Ukrainian courts or international competence of Ukrainian notaries may also arise when the parties to the succession case have concluded a choice of court agreement in favor of Ukrainian courts or an agreement that grants competence to Ukrainian notaries.

## Conclusions

First, it should be noted that in the case of succession of a share in LLC registered in Ukraine, a foreign element may appear in the subject of the legal relationship and the legal fact that creates, modifies or terminates the succession legal relationship; the object of the inheritance – a share in LLC registered in Ukraine – is always located in Ukraine, even if the LLC possesses some property located abroad. Second, it is necessary to distinguish the range of issues regulated by *lex societatis* and *lex successionis*. *Lex societatis* of the LLC registered in Ukraine is Ukrainian law.

Third, the determination of *lex successionis* depends on the legal source, which contains the conflict of laws rules applicable in a particular case. If these are the rules of an international treaty on legal assistance, *lex successionis* for the succession of a share in LLC may be determined either as the law of that state, whose nationality the deceased possessed at the time of death, or as the law of the state of his or her last place of residence. If *lex successionis* is determined on the basis of the conflict of laws rules of PILA it will always be defined as the law of Ukraine.

Fourth, if the determination of international competence (jurisdiction) is based on the rules of a legal assistance treaty, the notaries (the courts) of that state, whose nationality deceased possessed at the time of death, shall have competence (jurisdiction).

Fifth, if the rights arising out of a share in the authorized capital of the LLC are considered as movable property, notaries and courts of Ukraine may obtain competition (jurisdiction) on the basis of special rules of certain legal assistance treaties. The last provide that by consent of all the heirs competence or jurisdiction may be granted to the institutions of the state on whose territory all the movable property of the deceased is located (if such state is Ukraine).

Sixth, in the case of application of PILA the international jurisdiction (competence) in the matter of succession of a share in LLC, courts and notaries of Ukraine may have exclusive jurisdiction (compet-

ence). It may happen if: 1) a choice of court agreement of the parties to the succession matter granted the exclusive competence (jurisdiction) to them; or 2) if the deceased possessed Ukrainian nationality at the time of death; or 3) if the last place of residence of the deceased was in Ukraine. If the deceased was not a Ukrainian national at the time of death and had no place of residence in Ukraine, the competence (jurisdiction) may be obtained by appropriate authorities of a foreign state, provided, of course, that such competence (jurisdiction) is also provided by the legal rules in force in the respective state.

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## **Succession with the Foreign Element of a Share in a Limited Liability Company Registered in Ukraine**

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### **S u m m a r y**

The paper aims at the revealing of the possible manifestations of foreign element in a succession of a share in a limited liability company registered in Ukraine; distinguishing the issues which should be governed by *lex societatis* and *lex successionis*; determining of *lex societatis* and *lex successionis* as well as international competence of notaries and international jurisdiction of courts in the matters of succession of share in a limited liability company registered in Ukraine. To achieve this aim the paper analyses some bilateral international treaties of Ukraine on legal assistance and the Law of Ukraine On Private International Law. The solution of the issues which have not been solved in Ukrainian law was offered taking into consideration the solutions of the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, as well as the law of Germany, France, the Netherlands and Switzerland.

## **Ukrainoje registruotos ribotos atsakomybės įmonės akcijų paveldėjimo problematika užsieniečiams**

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### **S a n t r a u k a**

Straipsnyje siekiama atskleisti galimas užsienio elemento apraiškas Ukrainoje registruotos ribotos atsakomybės bendrovių akcijų paveldėjimo srityje. Taip pat buvo siekiama išskirti klausimus, kuriuos turėtų reglamentuoti *lex societatis* ir *lex successionis*; nustatyti tarptautinę notarų kompetenciją ir tarptautinę teismų jurisdikciją Ukrainoje įregistruotos ribotos atsakomybės bendrovės akcijų paveldėjimo klausimais. Siekiant šio tikslo, straipsnyje analizuojamos kai kurios dvišalės tarptautinės Ukrainos sutartys dėl teisinės pagalbos ir Ukrainos tarptautinės privatinės teisės įstatymas. Siekiant išspręsti Ukrainos teisėje esančias spragas, siūloma atsižvelgti į Europos Parlamento ir Tarybos 2012 m. liepos 4 d. reglamentą (ES) Nr. 650/2012 dėl jurisdikcijos, taikytinos teisės, teismo sprendimų pripažinimo ir vykdymo, autentiškumo dokumentų paveldėjimo priėmimo ir vykdymo bei dėl Europos paveldėjimo pažymėjimo sukūrimo, taip pat buvo siūloma atsižvelgti į Vokietijos, Prancūzijos, Nyderlandų ir Šveicarijos teisę.

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