

P+P Pöllath + Partners **Rechtsanwälte • Steuerberater**

Berlin • Frankfurt • München

Christoph Philipp

ENDURING ADMINISTRATION OF ESTATES

FOUNDATIONS, TRUSTS AND OTHER SOLUTIONS

A. Enduring Administration of Estates

❖ Motivation / Objectives

B. Succession Instruments

❖ Trust

❖ Foundation

- Non-profit Foundation
- Family Foundation
- Enterprise-related Foundation

❖ Family-owned Entities

❖ (Enduring Will Execution)

I. Motivation to achieve enduring Administration of Estates

1. Implementation of Testator's Intention

- Safeguarding the rights of relatives
- Code of Conduct
- Long-term asset and company protection
 - Limitation on Disposal of Assets
 - Limitation on Termination and Compensation
 - Sustainable Asset Planning
- Limitation on Distributions
- Charitable purposes?

I. Motivation to achieve Independence of Estate

2. Asset Protection

- Against spouses? (keyword: „matrimonial property claims“)
- Against persons entitled to compulsory portion? (keyword: supplementation of compulsory portion)
- Against welfare state? (keyword: „disabled person’s testament“)
- Against other creditors? (keyword: „Creditor’s Avoidance of Transfers Act“ - „Anfechtungsgesetz“)

3. Tax Optimization?

- Taxation of asset transfer itself?
- Taxation of distributions?
- Several taxation regimes for foreign beneficiaries

B. Succession Instruments

- ❖ **Trust**
- ❖ **Foundation**
 - Non-profit Foundation
 - Family Foundation
 - Enterprise-related Foundation
- ❖ **Family Foundation**
- ❖ **(Ongoing Execution)**

Trust as Succession Instrument

- Legal instrument of common law
- „The Trust“ does not exist.
 - Settlor creates special estate **without legal personality** managed by the Trustee
 - The Trust is only a legal relationship. Trust law governs the rights and duties of persons acting under the Trust Deed
 - Every Trust can be arranged individually in a different way within a broad regulatory framework.
- A Trust can be set up by way of inter vivos trust or testamentary trust

Basic Structure: Triangular relationship between Settlor, Trustee and Beneficiary

- Trustee
 - Formal ownership position on Trust assets
 - Trustee shall separate assets from his personal assets; Trust is not liable for personal creditors of the Trustee
 - Accountability for Trust-Management
 - In his capacity as Trustee the Trustee can sue or be sued

- Beneficiary
 - Limited information rights
 - Persons entitled to benefits and accruals

- Settlor (also referred to as *trustor*, *grantor*, *donor* or *creator*)
 - Reservation of special rights possible (right of appointment, control and revocation)
 - Settlor can be Beneficiary or Trustee

- (Protector, if applicable)
 - Appointment by Settlor
 - Supervises the Trustee
 - Powers can be regulated in Trust Deed.

▪ Common Solutions

○ Term

Rule against perpetuities; limited term (often Beneficiary's lifetime; as a rule maximum 99 years)

○ Irrevocable / revocable

Can be a irrevocable Trust or a revocable Trust. In case of a revocable Trust the Settlor continues to have access to Trust assets.

○ Discretionary / non discretionary; fixed interest

The Trust Deed gives only a rough description of the circle of beneficiaries and no exact definition. The Trustee has discretion to limit or to extend the circle of beneficiaries. Distributions are also within the Trustee's discretion.

In case of a fixed (interest) trust the circle of beneficiaries is confined and the Trustee has no or hardly any discretion to decide on benefits for beneficiaries.

II. Trust in Germany

- German law does not provide for a Trust as a legal instrument
- No ratification of the Hague Agreement on Trusts dated 1 July 1985. Consequently, no recognition of foreign trusts in Germany
- Therefore, a Trust enjoys no rights in Germany (cannot be registered in the land register/commercial register); but can act by way of underlying Trust Companies
- Legal relations shall be interpreted pursuant to the principles of German civil law and the corresponding legal consequences shall be drawn (e.g. „Treuhand“, provisional and reversionary succession, enduring will execution, usufruct)
- The legal relations of the parties involved in the Trust are relevant for succession planning.





I. Does the Trust meet the objectives of succession planning?

1. Implementation of Testator's Intention

- Safeguarding the rights of relatives
- Code of Conduct
- Long-term asset and company protection
 - Limitation on Disposal of Assets
 - Limitation on Termination and Compensation
 - Sustainable Asset Planning
- Limitation on Distributions
- Charitable purposes?



2. Does the Trust protect against third party claims?

- Against spouses? 
 - (-) in case of gifts within 10 years or without consent of spouse (§ 1375 German Civil Code)
 - (-) in case of disposal of estate as a whole (§ 1365 German Civil Code)
- Against persons entitled to compulsory portion? 
 - (-) if disposal of estate is rejected (revocable / reservation of rights „straw man“ jurisdiction „like ones own account“)
 - (-) supplementation of compulsory portion declining, unless Settlor receives earnings; Note: risk of litigation
- Against welfare state? 
 - (-) if voidable according to Creditor's Avoidance of Transfers Act
- Against other creditors? 
 - (-) if voidable according to Creditor's Avoidance of Transfers Act

3. Tax Optimization?

- Taxation of asset transfer itself?
- Taxation of distributions?
- Several taxation regimes for foreign beneficiaries
 - Individual treatment of involved parties in Germany; in case of international family structures a Trust can be advantageous compared to mere German instruments



Summary

- The Trust can be an appropriate succession instrument
- When used properly, the Trust can serve Asset Protection purposes
- Despite taxation in Germany, a foreign Trust may – under certain circumstances - be advantageous

Thank you very much for your attention!



Dr. Christoph Philipp, LL.M.

Tätigkeitsschwerpunkte:

Beratung von Familienunternehmen, Nachfolge und Vermögen, Stiftungen und Trusts, Steuerrecht, Pro-Bono-Aktivitäten

P+P Pöllath + Partners • München

E-mail: Christoph.Philipp@pplaw.com

Tel.: +49 (89) 24240-222