The Private Wealth & Private Client Review

Editor
John Riches

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EDITOR'S PREFACE

There are three dominant themes that have emerged in the last year as ones of critical importance for advisers to wealthy families. These themes are the morality of tax planning, the changing relationship between taxpayers and Revenue authorities and expectations for transparency in disclosure of asset holding structures. It is no surprise that these themes are intimately linked.

With regard to the subject of the morality of tax planning, there is clearly a concerted effort being made by governments in OECD jurisdictions to create an ethical climate not only in which tax evasion is reviled as criminal activity (as it rightly should be) but also in which 'aggressive' tax planning is regarded with disdain and stigmatised. It is apparent that politicians and policymakers alike are responding to what is clearly a perceived swing in public opinion that is not unlike that which occurred in the early 1930s. The arguments advanced in favour of encouraging taxpayers to see it as their moral duty (as well as legal obligation) to pay taxes and to refrain from indulging in aggressive avoidance are based on the proposition that the wealthiest members of society should make a proportionate contribution to public services and support those less fortunate than themselves. As a basic proposition this is clearly correct. The debate becomes rather more problematic when complex arguments are reduced to simplistic sound bites especially in the context of a perception of what is regarded as aggressive tax planning – it is notable in the UK in the aftermath of the Spring Budget of 2012, when the government had proposed capping the amount of relief available to taxpayers to a maximum of 25 per cent of an individual's annual income, serious commentators were suggesting that the individuals who made significant contributions to charity and claimed tax relief were in some way engaging in aggressive tax avoidance. This is just a small example of the way in which the rhetoric of debate over tax policy becomes swirled in confusion – frequently, there is a tendency to characterise certain aspects of tax systems that are deliberate reliefs or exemptions as loopholes.

There is also some irony in the fact that this proposal was withdrawn in response to a concerted campaign from the voluntary sector – an argument that could have been advanced in defence of the proposal was that allowing unlimited tax deductions for charitable donations might be seen as a form of hypothecation in which individuals with sufficient funds could substitute donations to their favoured charities for contributions to the basic services which other taxpayers effectively support. This reasonable defence of the proposal was somewhat lost in the furore and never effectively advanced.

One especially concerning aspect of the debate about the morality of tax planning is the absence of any parallel emphasis upon the duty of tax authorities to produce clear

and fair rules of taxation that could be easily understood and applied – if one sees the relationship between taxpayer and tax authority as akin to a 'social contract' then there has been rather too little emphasis upon the duties of tax authorities to refrain from ill-thought out changes to tax statutes or from producing sweeping anti-avoidance rules that create huge uncertainty for both individuals and businesses.

Regardless of this, it would seem that in the years ahead, those of us acting as advisers to wealthy families will need to ensure that in delivering our advice on what is an appropriate tax strategy to our clients, we bear in mind the possibility that, in future, the actions of our clients (and indeed our own advice) are likely to be judged not just for their technical accuracy, as is legally appropriate, but also for their 'moral' content. In the prevailing climate, it will be important for us to highlight for clients whether the tax planning strategy being considered may risk being seen as unduly aggressive even if it is legally correct.

One positive development in the area of relationships between Revenue authorities and wealthy taxpayers is the introduction of high net worth ('HNW') units in many OECD countries. These units look to provide a greater degree of coordination in overseeing the usually more complex tax affairs of wealthy individuals and the ability for a taxpayer's professional adviser (in some cases) to foster an enhanced relationship of openness with the HNW unit – given that in many jurisdictions the principle of self-assessment places an onus upon taxpayers to highlight areas of uncertainty so that the Revenue authority can consider them. It could well be the case in future that those taxpayers will find their long-term interests are better served by erring on the side of transparency in their dealings with Revenue authorities. In many jurisdictions, the ability to seek advance rulings is one route to achieving greater certainty; in others, ensuring one's tax adviser has well-placed contacts with Revenue authorities is an alternative. The traditional climate of mutual suspicion that has historically been characteristic of dealings between taxpayers and tax authorities will not evaporate overnight. The evidence emerging in other sectors (notably that of large corporate taxpayers) is, however, that in many cases, a more transparent approach will serve the client's interests and also may reduce compliance costs. This is not to suggest that the role of the tax adviser should not be to defend and advance the client's interests robustly on specific tax issues but to suggest that advisers also consider how to achieve an optimal outcome bearing in mind that it is in the client's long-term best interests to remain in good standing with the tax authorities.

Moving to my final and third theme, the publication by the OECD in February 2012 of its updated guidance in respect of the FATF 40 recommendations and the expanded interpretive notes accompanying them[1] are the latest manifestation at the supranational level of policymakers seeking to force through a transparency agenda for international holding structures in their fight against tax evasion. I set out below some comments from interpretive guidance on Recommendation 24 commenting on bearer share arrangements.

1 See www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%20approved%20February%202012%20reprint%20March%202012.pdf – see in particular pp. 82–87 with interpretive notes on recommendations 23 and 24.

> *14. Countries should take measures to prevent the* ***misuse of bearer shares and bearer share warrants,***[2] *for example by applying one or more of the following mechanisms: (a) prohibiting them; (b) converting them into registered shares or share warrants (for example through dematerialisation); (c) immobilising them by requiring them to be held with a regulated financial institution or professional intermediary; or (d) requiring shareholders with a controlling interest to notify the company, and the company to record their identity.*
>
> *15. Countries should take measures to prevent the misuse of nominee shares and nominee directors, for example by applying one or more of the following mechanisms: (a) requiring nominee shareholders and directors to disclose the identity of their nominator to the company and to any relevant registry, and for this information to be included in the relevant register; or (b) requiring nominee shareholders and directors to be licensed, for their nominee status to be recorded in company registries, and for them to maintain information identifying their nominator, and make this information available to the competent authorities upon request.*

It will be seen from this that the underlying philosophy to the FATF guidance is that any arrangement that is based upon anonymity will be regarded by authorities as suspicious and a prima facie indication of an attempt to conceal the reality of beneficial ownership. In the vast majority of cases, families wish to maintain privacy in relation to their financial affairs not to evade taxes, but to maintain anonymity to protect their assets from predators such as kidnappers or individuals who may be motivated to exploit them in inappropriate ways. The fact that the FATF's mandate was renewed in April 2012 for a further eight years until at least 2020 is evidence of the desire of OECD countries to maintain a sharp focus on transparency in tandem with the actions of the parallel initiatives being undertaken by the Global Tax Forum.

It is quite clear that the boundary line as to what can legitimately be regarded as private and not requiring explanation or justification in the structuring of an individual's financial affairs has been radically redrawn in recent years. Any individual wishing to engage the services of a financial institution or professional adviser will be effectively obliged to provide full beneficial ownership information as an essential pre-condition. As advisers we will therefore need to carefully consider the way in which we can legitimately protect our law-abiding taxpaying clients from unwarranted and unwelcome scrutiny from those who are motivated by greed or improper motives. We also need to ensure that we maintain an effective and ongoing dialogue with policymakers that highlights the legitimate strategies that wealthy families pursue and the many non-tax reasons that underpin those strategies – in particular, where complex cross-border challenges of holding assets are addressed by using trusts or foundations that have a strong rationale in ensuring business continuity or legitimate asset protection.

To conclude, in the years ahead I believe it may well behove us, as advisers, to exercise proper judgement to assist our clients in making appropriate choices with regard to the moral probity as well as the legality of their tax planning arrangements. Equally, it will be necessary to consider very carefully how to properly protect our clients' privacy without giving the impression that their desire for privacy is a cloak for other

2 Emphasis added.

improper motives that will invite unwelcome suspicion or hostility from tax or regulatory authorities or indeed third-party service providers with whom they wish to engage in a business relationship. Failure to abide by the new prevailing norms of transparency could well be costly. The effectiveness of our own advice in the future is likely to be judged with the benefit of '20/20' hindsight. I commend this review to you and hope you find it a helpful resource in advising your clients.

John Riches
Withers LLP
London
July 2012

Chapter 12

GERMANY

Andreas Richter and Jens Escher[1]

I INTRODUCTION

Private wealth and private client law in Germany are characterised by a high number of tax and legal regulations on the one hand and a high level of judicial review on the other. Not only civil courts and finance courts, but also state and federal constitutional courts ensure a consistent and proportional application of civil law and tax law. Moreover, taxes on assets are currently low. For example, since 1997 wealth tax is no longer levied in Germany (its reintroduction, however, is continuously discussed among politicians).

Accordingly, large private assets and family-owned enterprises have been created over the last decades. Private wealth and private client law in Germany therefore primarily deals with individuals living in Germany and German family-owned companies structuring assets in Germany and other jurisdictions.

II TAX

i Introduction

Unlimited tax liability in Germany is determined by the concept of residence for both income tax and inheritance and gift tax purposes. Residence is assessed using objective criteria. An individual is a German resident if he or she has either a permanent home (Section 8 of the General Fiscal Code (Abgabenordnung ('AO')) or a habitual abode (Section 9 AO) in Germany. The resident individual's worldwide income or assets are subject to income tax and inheritance and gift tax. The concept of domicile, however, is not recognised by German law.

In regard to income tax, there is a progressive tax rate ranging from 14 per cent to 45 per cent. Additionally, a solidarity surcharge of 5.5 per cent of the tax due is levied. This surcharge is intended to finance the German reunification of 1990. As mentioned, income tax is levied on the worldwide income of residents. Non-residents pay tax on income from German sources, for example income effectively connected with a permanent establishment in Germany, income from employment in Germany (including

1 Andreas Richter is a partner and Jens Escher is a counsel at P+P Pöllath + Partners, Berlin.

self-employment), income from German real estate or dividends, and capital gains from German companies. Non-residents do not pay income tax on non-business interest income. Income from capital investments (e.g., dividends) is subject to withholding tax at a flat rate of 25 per cent plus the solidarity surcharge.

Concerning inheritance and gift tax, each beneficiary is liable for the tax on the value of his or her share of the estate received, regardless of his or her personal wealth. The inheritance and gift tax rates range from 7 per cent to 50 per cent, depending on the relationship between the transferor and the beneficiary and the value of the share of estate received. Spouses and descendants pay inheritance and gift tax at a rate of 7 per cent to 30 per cent. Spouses receive a personal allowance of €500,000 and a maintenance allowance of up to a maximum of €256,000. Descendants receive a personal allowance of €400,000 and an age-dependent maintenance allowance of up to €52,000. Transfers between most other relatives are taxed at a rate of 15 per cent to 43 per cent. Between unrelated persons, the applicable tax rate is 30 per cent or 50 per cent (for more than €13 million).

As the beneficiaries are liable for inheritance and gift tax, unlimited tax liability is triggered if either the transferor or the beneficiary is resident in Germany, regardless of whether the transferor or the assets received are effectively connected to Germany. If neither the transferor nor the beneficiary is resident, inheritance and gift tax is only due on certain property situated in Germany (e.g., real estate and business property). The transfer of a German bank account between non-residents generally does not trigger inheritance or gift tax.

Besides income tax and inheritance and gift tax, only a few other taxes are relevant for private clients. A transfer tax with different regional rates ranging from 3.5 per cent to 5 per cent applies to the acquisition of real estate or a substantial shareholding (at least 95 per cent) in a company holding real estate. At the discretion of the relevant local authority, an annual property tax ranging from 1 per cent to 4 per cent may be due on the value of real estate (as assessed by the local authorities). The relevant values were last assessed in 1964 or 1935. Thus, property tax is low in comparison to the property's market value. Wealth tax has not been levied in Germany since 1997. However, certain political parties demand a quick relaunch of the wealth tax with tax rates of 1 per cent or 1.5 per cent and personal allowances of €1 million to €2 million for individuals.

ii Inheritance and Gift Tax Act

Since 2009, the new Inheritance and Gift Tax Act (Erbschaft- und Schenkungsteuergesetz ('ErbStG')) has been in force in Germany. The reform was necessary after the German Federal Constitutional Court (Bundesverfassungsgericht ('BVerfG')) declared the former Inheritance and Gift Tax Act invalid because of the unequal evaluation of different types of assets. Equality of taxation is constitutionally guaranteed in Germany. The judgment as well as the reform itself triggered an extensive political debate concerning the taxation of assets, especially of business assets. The core problem was, and still is, if and how business assets have to be exempt from taxation in order to prevent insolvency because of the tax burden carried – as mentioned above – by the beneficiary, for example the new shareholder who received the shares of an enterprise but no cash assets from which he or she might pay inheritance tax.

Because of the high importance of small and medium-sized enterprises ('SMEs') in Germany, the legislative authorities decided to enact extensive tax exemptions for business assets of all kinds.

In general, the exemptions of the Inheritance and Gift Tax Act for business assets are applicable to all business assets and agricultural property. A basic business asset relief and an optional business asset relief are available. According to the basic relief, 85 per cent of the business assets will not be part of the tax base, and the remaining 15 per cent will be taxed immediately. There is an additional tax allowance for a transfer of business assets amounting to a maximum of €150,000. If the taxpayer chooses the optional relief, 100 per cent of the business assets will not be part of the tax base.

Business property may only benefit from the basic relief if it does not contain more than 50 per cent of passive non-operating assets. Passive non-operating assets are, generally speaking, leased real estate, minority shareholdings of 25 per cent or less, securities and cultural property. The optional relief is only available if the business assets consist of no more than 10 per cent of passive non-operating assets. Where the 50 per cent and 10 per cent requirements respectively are satisfied, passive non-operating assets may only benefit from the business assets relief if they have been part of the transferred business two years prior to the transfer.

Besides business assets, real estate as well as agricultural and forestry assets may benefit from tax exemptions. These exemptions lead to a number of tax-effective configurations which – according to the Federal Fiscal Court of Germany (Bundesfinanzhof ('BFH')) – can be used to achieve a preferential tax treatment for any kind of assets if the transferor chooses an appropriate configuration (BFH, decision of 5 October 2011 – II R 9/11). Consistently, the BFH has expressed its doubts concerning the constitutionality of the current Inheritance and Gift Tax Act. As the transfer of assets can be exempt from tax by structuring the assets in advance, equality of taxation is not ensured, according to the court. It is expected that the BFH will request the BVerfG to give a ruling on the constitutionality of the Inheritance and Gift Tax Act. It is also expected that the Act – similarly to its predecessor – will be held to be unconstitutional by the BVerfG within the next few years.

But even if the BVerfG does not declare the Inheritance and Gift Tax Act unconstitutional, the Act might be changed radically. Some changes might become effective in October 2012. The political opposition, which might be successful after the upcoming election of the German Federal Parliament in September 2013, wants to restrict the exemptions, especially those for business assets.

Therefore, another reform of the exemptions from inheritance and gift tax within the next few years seems to be inevitable. Even if business assets remain tax-privileged in some way in order to advance enterprises whose owners cannot afford an inheritance or gift tax of up to 50 per cent of the enterprise's value, the permitted asset structures will be restricted. Assets unrelated to business activities probably will no longer be able to participate from the exemptions for business assets. For both individuals and family-owned enterprises, structuring of asset succession might be more difficult in the future. Individuals and owners of enterprises or shares in enterprises therefore already arrange their succession issues. Although it is impossible to predict when the Inheritance and Gift Tax Act will be changed, the affected persons are advised to plan the succession of

their assets. With regard to inheritance and gift tax, conditions will probably worsen within the next few years and not improve in the foreseeable future.

iii Tax treatment of trusts

Trusts are generally not recognised in Germany (see Section IV.ii, *infra*). However, trusts can trigger inheritance and gift tax in several ways: the establishment of a trust by residents (See Section II.i, *supra*) or of a trust comprising assets located in Germany is considered to be a transfer of assets taxable according to the Inheritance and Gift Tax Act. Distributions to beneficiaries during the trust period or on the trust's dissolution may trigger income tax and gift tax as well, if the beneficiary is a German resident. The relationship between gift tax on the one hand and income tax on the other hand with regard to trust distributions has not yet been clarified by the courts.

In addition, corporate tax can be applied if income is received by a foreign trust from German sources. The worldwide income of a foreign trust may be subject to corporate tax if the trust's management is in Germany and if certain other conditions are met, for example if the effective management of a trust is vested with a trustee resident in Germany.

Undistributed income received by a foreign trust can be attributed to the settlor or the beneficiaries if they are German residents. In this case it can be subject to the settlor's or the beneficiary's personal income tax (see Section IV.iii, *infra*).

iv CFC rules in Germany – Section 7-14 of the Foreign Tax Act

Taxation in Germany generally cannot be avoided by establishing a foreign entity in a low-tax country. The German rules for the taxation of controlled foreign companies ('CFC') meanwhile have an extensive scope of application. The CFC rules are settled in Section 7-14 of the Foreign Tax Act (Aussensteuergesetz ('AStG')).

These CFC rules extend unlimited tax liability of residents to certain undistributed income of foreign corporations. The income may be attributed to domestic shareholders. The additional taxation under the CFC rules requires a substantial shareholding of German residents of more than 50 per cent of the corporation's shares. The foreign corporation has to be an intermediate company which receives passive or tainted income instead of income from its own business activities. Passive income is defined negatively by a list of active income in Section 8 AStG. Cumulatively, this passive income has to be subject to low tax rates of less than 25 per cent. Income that meets both criteria is added to a resident individual's income to the extent to which the individual holds shares in the corporation. The taxable person can choose whether the taxes paid on income received from an intermediate company in a foreign country shall be deducted from the amount subject to the additional taxation in Germany or whether the foreign taxes shall be credited against the additional taxes levied in Germany. In most cases the second alternative is advantageous for the taxable person.

However, a foreign corporation is not supposed to be an intermediate company if – among other requirements – its effective place of management or statutory seat is located in a Member State of the EU or the European Economic Area and if the corporation carries out substantial economic activities.

III SUCCESSION

i Wills

According to Section 2064 et seq. and 2229 et seq. of the German Civil Code (Bürgerliches Gesetzbuch ('BGB')) there are two valid forms of wills: the holographic and the public will. The holographic will has to be handwritten, dated and signed by the testator. The public will has to be signed before, and certified by, a notary public. Neither form of will requires a witness.

A testator can also enter into a contract of succession with another person or a joint will with his or her spouse or civil partner. A contract of succession must be signed before, and certified by, a notary public; a handwritten contract does not meet the formal requirements.

By making a will, an individual can choose his or her heirs and provide what share each heir receives. Additionally, a legacy can be made, that is a person can be empowered to make a claim against the heirs, without being an heir him or herself. This claim can be for an amount of money, a share of the deceased's estate, an item or anything else.

Wills made in a foreign jurisdiction can be valid in Germany. Germany recognises the HCCH Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions 1961 ('Hague Testamentary Dispositions Convention'). A will is valid if it complies with the law of the state where the testator made the will, the state of the testator's nationality or residence, or – in case of real estate – the location of the assets. Foreign grants and probates are not recognised. An heir must ask the competent probate court to issue a German certificate of inheritance.

ii Intestacy and forced heirship regime

If an individual dies intestate, intestacy rules apply. Under the intestacy rules, the deceased's estate is distributed among his or her relatives and spouse or civil partner in accordance with a strict order of succession. Children and their descendants constitute the first category, followed by parents and their descendants, grandparents and their descendants, and great-grandparents and their descendants. Relatives within a particular category inherit in equal shares (succession *per stirpes*). Where German law applies, the surviving spouse or civil partner also has a right of inheritance, determined by the matrimonial regime. Within a community of surplus, the surviving spouse or civil partner gets at least 50 per cent of the estate. If the deceased and his or her spouse or civil partner chose separation of property or community of property as their matrimonial regime the surviving spouse or civil partner receives at least 25 per cent of the inheritance.

There is a forced heirship regime under which the descendants, the spouse or civil partner and the parents of the deceased are entitled to make a claim for a compulsory share of the deceased's estate if they are excluded from the testator's will or if the share granted to them is less than their compulsory share. A relative's compulsory share generally amounts to 50 per cent of the value of that relative's share on intestacy. It is a monetary claim and not a claim for a share of the estate. The compulsory share comprises all assets governed by German succession law (regardless of the beneficiary's residence). Therefore, the forced heirship regime can be avoided by buying assets that are situated abroad and which German succession law does not govern, for example foreign real

estate. Besides, a forced heir can renounce his or her right to his or her compulsory share during the testator's lifetime by signing a contract with the testator before a notary public. If the testator has died, a forced heir can also refrain from claiming his or her compulsory share.

iii Conflict of laws rules

Under German conflict of laws rules, the applicable succession law is that of the deceased's nationality. If the deceased was a foreign national, German succession law applies only if the law of the deceased's nationality provides for a reference back to Germany (renvoi). This will be the case if the deceased was domiciled in Germany, if the deceased's habitual abode was in Germany or if the deceased held property or assets in Germany at the date of his or her death.

As of 2015, new conflict of laws rules will become effective due to the European Commission's Succession Regulation. On 8 June 2012 the Council of Ministers of Justice of the EU decided on the proposal for regulation which shall be valid in all EU Member States except Denmark, Ireland and the United Kingdom. According to the Regulation, the deceased's last habitual abode instead of his or her nationality is relevant for the question of which succession law is applicable. However, there is the opportunity to opt for the succession law of an individual's nationality by will or by a contract of succession. Nevertheless, if it is obvious that the deceased held a closer relationship to another state, that state's law shall be applicable under certain circumstances.

In addition, provisions on legal jurisdiction, recognition and enforcement of decisions and authentic instruments and on the European Certificate of Succession shall be part of the Regulation. Legal jurisdiction shall be determined by the habitual abode at the time the individual dies. However, under certain requirements the court can be selected by will, contract of succession or legacy.

IV WEALTH STRUCTURING AND REGULATION

i Commonly used structures: corporations and partnerships

There are two different structures which are commonly used in Germany to hold assets: corporations and partnerships.

A corporation is subject to German corporate tax on its worldwide income if its effective place of management or statutory seat is located in Germany. In addition to corporate tax, there is a trade tax which is levied as well. Corporate tax, including a solidarity surcharge (See Section II.i, *supra*), and trade tax together combine to a tax rate of about 29 per cent. However, a participation exemption may apply for dividends and capital gains. Profits distributed to shareholders of the corporation are subject to income tax with a flat rate of 25 per cent plus the solidarity surcharge.

A foreign corporation might be subject to German corporate tax if it has a branch in Germany which constitutes a permanent establishment of the corporation. The corporation will be subject to German corporate tax and trade tax with all income effectively connected to this permanent establishment.

Partnerships are fiscally transparent in Germany for income tax purposes. The partners are subject to income tax at their individual tax rates plus the solidarity

surcharge. If the partnership is engaged in trade or business, the partnership itself is subject to trade tax. Trade tax levied from the partnership is (to a wide extent) credited against the income tax of the partners.

ii Foundations

Foundations in Germany can be established either as charitable foundations or as family foundations. Charitable foundations are tax-privileged. Recognition as a charitable foundation requires that the foundation's activities be dedicated to the altruistic advancement of the general public in material, spiritual or moral respects. These purposes must be pursued altruistically, exclusively and directly. However, a charitable foundation may use one-third of its income for the maintenance of the founder and his or her family. The formation of a charitable foundation neither triggers any inheritance or gift tax, nor transfer tax if real property is transferred gratuitously to the foundation. A charitable foundation is released from almost every current form of taxation, especially corporate tax and trade tax.

In contrast, a family foundation is not tax-privileged. It is conducted for the personal benefit and the advancement of one or more families. The formation of a family foundation and later donations to the foundation generally trigger inheritance and gift tax. The current taxation of a family foundation generally complies with the taxation of other legal persons. However, a family foundation can receive income not only from trade or business but any type of income. In addition, only family foundations are liable for a substitute inheritance tax. This special tax accrues every 30 years. Moreover, distributions to beneficiaries are subject to income tax. The liquidation of a family foundation leads to an acquisition of assets on the level of the beneficiaries. This acquisition is treated as a lifetime gift. Therefore, it is liable to gift tax. Income tax may be triggered as well. The classification of the tax bracket depends on the degree of relationship between the founder and the beneficiary.

In contrast to German family foundations, foreign family foundations are not liable for the substitute inheritance tax. However, the undistributed income of a foreign family foundation may be added to the personal income of the founder or the beneficiaries if they are tax resident in Germany. This does not apply to family foundations which are resident in a Member State of the EU or the European Economic Area if it is assured that the foundation's property is separated legally and actually from the beneficiaries' property and that a treaty regarding mutual administrative assistance exists between Germany and the state in which the foundation has its residence. These conditions have to be satisfied cumulatively. With regard to the latest treaties, family foundations based in Liechtenstein may also fulfil these requirements.

iii Trusts

Neither domestic nor foreign trusts are recognised in Germany. Germany does not have its own trust law. Germany did not ratify the HCCH Convention on the Law applicable to Trusts and on their Recognition 1985. Therefore, German property law does not recognise the transfer of assets located in Germany to a trust. In these circumstances, the terms of a trust are interpreted in accordance with German law for civil law, and tax purposes.

Where assets governed by foreign property law have been transferred to an irrevocable trust effectively formed under foreign trust law, the trust can shelter these assets from the settlor's or beneficiary's creditors. German courts generally do not recognise claims against trust assets on the dissolution of a marriage or partnership after ten years from the date of the transfer.

For tax issues, foreign trusts are disadvantageous when they are established or when distributions to beneficiaries are made (see Section II.iii, *supra*).

V CONCLUSIONS AND OUTLOOK

The tax and legal conditions for succession in both private assets and family-owned enterprises are advantageous in Germany at the moment. Many individuals make use of the exemptions the current Inheritance and Gift Tax Act offers for the transfer of business assets and other types of assets. It is expected that these exemptions will be abolished by the legal authorities within the next few years. Additionally, a wealth tax might be reintroduced. Therefore, conditions probably will worsen, and enterprises as well as wealthy individuals are well advised to structure succession as long as the current conditions are in force.

Succession law, on the other hand, will become more flexible at least within the EU as of 2015 when the European Commission's Succession Regulation becomes effective. Until then the applicable succession law is that of the deceased's nationality according to German conflict of laws rules. Different rules apply for real property and other assets effectively connected to Germany.

Usually, corporations as well as partnerships are used to structure assets and transfer them to the next generation. Family foundations and charitable foundations may be a proper structure from time to time. Trusts, however, are not recognised in Germany. In comparison to corporations and foundations they are disadvantaged if beneficiaries of a foreign trust have their permanent home or their habitual abode in Germany.

Appendix 1

ABOUT THE AUTHORS

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Dr Andreas Richter, LLM is a partner at P+P Pöllath + Partners. Andreas is an Academician of the International Academy of Estate and Trust Law. He has outstanding experience in business succession and estate planning, legal and tax structuring of private wealth and family offices, corporate governance for family-owned businesses, expatriation taxation, charities, as well as trust and foundation law. Andreas is the managing director of the Berlin Tax Forum and chairman of the executive board of the postgraduate programme 'Business Succession, Inheritance Law & Asset Management' at the University of Műnster/Westphalia. He serves as a member on boards of family offices, foundations and family businesses and acts as executor. He is the author and editor of numerous publications, commentaries and compendiums, in particular on family offices, foundation law, business succession and all tax-related matters. He is continuously listed as one of Germany's leading advisers for private clients and trusts in independent domestic and international rankings.

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