

The Cy-près Doctrine

Modifications of the purpose of charities in the USA and in Germany

Under German law, the purpose of a charity can only be modified under certain conditions. These conditions result from the terms of the charity, the federal law (§ 87 BGB, German Civil Code) or state law. Insofar as the terms contain details concerning a modification of the purpose, these have priority. The exact requirements for those details are unclear. In the absence of such details, federal or state law applies. The relationship between state and federal law is discussed controversially, in particular the competence of the state to introduce regulations. The provisions to modify the purpose of a charity vary from state to state, but have in common that they require a substantial change in circumstances. § 87 BGB, in contrast, only permits to modify the purpose, if it is impossible to fulfill the purpose or if the purpose endangers the common welfare. In addition, the provisions in state and federal law differ in respect of the person who acts: § 87 BGB only allows the authorities to modify the purpose whereas under state law, either the authorities or the trustees are allowed to modify, if so stated by the charity's terms.

Nowadays, the majority of German charities are founded during the donor's lifetime. If circumstances in the society change, the need to modify a purpose may arise. Additionally, the ongoing low interest period is the reason why a lot of German charities are unable to fulfill their purposes. Therefore and due to the unclear legal situation in German law, the modification of charities' purposes is one of the most discussed issues. In order to solve this problem, this thesis compares the German law to the US-law, as the USA are often referred to as the country of charities.

In the United States, the purpose of a charity can also only be modified under certain conditions. These are defined in the so-called Cy-près doctrine. The Cy-près doctrine has been adopted from England and allows a modification of a charity's purpose if it becomes unlawful, impracticable or impossible to achieve. Since the doctrine authorizes the court to modify the purpose, not only legal scholars but the courts have been dealing with it for over two hundred years. In particular, the history of charitable trusts for which the doctrine was originally developed and the two different models of the doctrine in England have influenced its development in the USA.

Similar to Germany, the Cy-près doctrine is regulated on state law level. Uniform and Model Acts try to introduce harmonized rules. In contrast to Germany, the Cy-près doctrine has developed over time. While under the original Cy-près doctrine the donor was required to have general charitable intent, this intent is no longer necessary in all states. Rather, the purpose can be modified unless there is a specific intent indicating that the donor would have

wanted only the original purpose to be fulfilled. In addition, some states have broadened the doctrine, whereas the concept of wastefulness allows to modify the purpose, if it would be wasteful to spend the charity's property only for the original purpose. The most significant difference between German and US charity law is that the Cy-près doctrine merely allows to modify the purpose of a charity and not a private trust, whereas under German law, the provisions apply to charitable and private trusts. The consequences are, that under US-law, a modification of a purpose is given priority over the charity's termination. In both jurisdictions, the donor's intent is of paramount importance, however, only in US-law is it balanced against the common welfare. The comparison concludes that the modification of charities' purposes should be possible under facilitated conditions in Germany for such organizations, that have a charitable purpose. As US-law has shown, the rules in German law to modify purposes have to be precise, specific and uniformed to support donors and authorities.

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