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German Tax and Legal News

Denial of the notarization of the incorporation of a German GmbH by a Swiss notary - No equivalence of Swiss notarization procedures

No legally effective incorporation of a German GmbH in case of notarization by a Swiss notary

The notarization of the incorporation of a German GmbH by a Swiss notary (Canton of Bern) does not meet the formal requirements of German law, as the notarization process is completely different from German principles and thus equivalence of notarization procedures is not given.

Facts of the case
The Local Court of Charlottenburg (AG Charlottenburg) (99 AR 9466/15) had to decide whether a German GmbH can be lawfully incorporated by means of execution of the formation deed by a Swiss notary in Switzerland.

Reasoning
The AG comes to the conclusion that the execution of the formation deed has not led to a lawful incorporation of the GmbH. Consequently, it has denied the registration of the GmbH in the commercial register, arguing that the notarization of the incorporation of a GmbH by a Swiss notary, particularly in the canton of Bern, cannot be considered as sufficient to meet the legal requirements with regard to the German notarial form.

So far, the German Federal Supreme Court (BGH) has not ruled on the question whether a foreign, especially a Swiss notary, can effectively notarize the incorporation of a German GmbH. In support of its decision, the AG critically and elaborately reviews cases involving foreign notarizations already decided by the Supreme Court, predominantly related to the notarization of (other) German corporate law procedures in Switzerland.

A Supreme Court ruling issued in 1981 involved notarization of a change of the articles of association of a GmbH by a notary in the canton of Zurich. Another Supreme Court ruling issued in 1989 dealt with the notarization of the transfer of shares of a German GmbH in Switzerland. The more recent decision of 2013 was primarily about the filing of a new shareholders' list of a GmbH with the German commercial register by a notary located in Basel, Switzerland, who had also executed the underlying share transfer deed. Subject of the most recent ruling in 2014 was the legitimacy of a shareholders' meeting of a German Stock Corporation held and recorded in a foreign country.

In all these decisions, the Supreme Court had confirmed the validity of the notarization outside of Germany, with the underlying criterion of all Supreme Court rulings being the adherence to the principle of equivalence. Following the Supreme Court, foreign notarial deeds can be considered lawful and valid, if they are equivalent to German notarial deeds. According to the BGH, his shall be the case where both the foreign notary has a position comparable to that of a German notary and the foreign notarization procedure complies with the principles of the German Code of Authentication.

The AG argued that the notarization procedure in the canton Bern is not equivalent to the German procedure, as the rules applicable in Bern do not provide for an obligation to have the entire notarial deed read out aloud. Under German law, a violation of the requirement to have the full notarial deed read out aloud results in the invalidity of the notarial deed. Further, the AG comes to the conclusion that it is not possible to generally waive the notarial instruction- and control-obligations by choosing a foreign notary public. According to the AG, the relevant explanations and instructions by a German notary can only be dispensed if special conditions are met, for example if the parties are not worthy of protection.

In denying the legitimacy of the formation of a GmbH by foreign notarial deed, the AG also resorts to recent BGH rulings in which the BGH had stated that the purpose of the notarial form requirements for changes of the articles of association of a GmbH consists in ensuring material correctness of the deed, which cannot be secured by a foreign notary unfamiliar

with German corporate law. Unlike in the case of a notarial certification, in the case of a notarization not only the identity of the parties shall be clearly established, but the notary shall rather comment objectively on the content of the declarations to be notarized.

Practical Considerations

In the absence of a Federal Supreme Court decision with respect to the formation of a German GmbH outside of Germany, and with an eye to the general uncertainty related to the acceptance of non-German notarial deeds, companies should be careful in taking decisions to go for execution by foreign notaries public. This applies especially for status-related measures that must be notarized (incorporation or change of the articles of association) as well as structural measures, such as merger and de-mergers under the German Reorganization Act (Umwandlungsgesetz) or the approvals required for the lawful conclusion of a profit and loss pooling agreement. Although for some cases there are court rulings of the Federal Supreme Court affirming the equivalency of deeds issued by notaries in the Netherlands, Austria and Switzerland, this should not be seen as a general free pass for notarizations abroad. There is still no absolute certainty for the acceptance of foreign notarizations. In particular the cases involving Swiss notaries recognized as effective by the Federal Supreme Court cannot be generalized for the whole of Switzerland, since the notarization procedure is regulated differently in each canton.

Given the drastic consequences that can result from an ineffectiveness of notarizations - in particular, if it takes years to detect such ineffectiveness - and the effort and cost that may be associated with an attempt of “healing” the invalidity of such deeds, notarizations outside of Germany should only be made use of in exceptional cases and only after having carefully considered the pros and cons. The newer German costs regulations, which for example provide for certain cost alleviations for notarizations of intra-group share transfers, should also be considered in the decision-making.