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 30.05.2018

*German Tax and Legal News*

## **Notarization of the incorporation of a German GmbH by a Swiss notary**

A German GmbH has been incorporated by means of a formation deed of a Swiss notary public in Bern. The Local Court of Charlottenburg denied the registration of the GmbH with the Commercial Register, claiming that notarization procedures in Bern are not equivalent to notarization procedures in Germany. The Kammergericht, the Upper Regional Court for Berlin, rectified the Local Court's decision. It views the notarization procedures as equivalent and, therefore, the GmbH as validly incorporated.

The following contribution is based on an article published in the renowned German legal journal *Betriebs-Berater* 2018, issue 12, page 660 (see [Deloitte Legal Insights](#)).

According to the Local Court of Charlottenburg, the GmbH had not been validly incorporated. The Kammergericht Berlin however, decided that the notarization of the incorporation of the GmbH by a Swiss notary in Bern meets the requirement of notarial form as stipulated by German law.

### **Foreign notarization possible in case of equivalence**

According to the Kammergericht, it is not generally prohibited to have legal acts related to a German GmbH notarized by a non-German notary public. In its ruling, the Kammergericht confirms the decision of the Local Court of Charlottenburg in as much as that decision stated that merely adhering to the formal requirements applicable at the location where the notarization takes place is not sufficient for corporate law measures affecting a company's constitution, such as incorporations, amendments of articles of association or reorganizations.

According to the Kammergericht, this is due to the material significance of Section 2 para 1 of the German Limited Liability Companies Act ("GmbHG") which justifies a restriction of the general interest in the effectiveness of foreign notarizations in international legal transactions.

At the same time, the Kammergericht comes to the conclusion that the formal requirements set forth in Section 2 para 1 GmbHG can be met if the formal procedures of a foreign notarization are equivalent to a German notarization.

Pursuant to rulings of the German BGH, such equivalence is given if the office of the foreign notary as such, i.e. in terms of the notary's legal status and educational background, are comparable to those of a German notary and the procedure to be followed when notarizing documents are equivalent to the main principles to be adhered to under German law.

### **Equivalence to be assessed on a case by case basis**

In the case at hand, the Kammergericht confirmed such equivalence based on the factual circumstances of the individual case. In its reasoning, the Kammergericht in particular argued on the basis of the Swiss notary's university studies, long practical experience and the university degree and passed state examination in law. Moreover, it referred to the term "notarization" as used in the Canton of Bern and the identical function of the notarization procedure (legal certainty and transparency) in both Germany and the Canton of Bern.

The Court argued that the existence or nonexistence of a statutory obligation under the foreign laws applicable to the notarization by the non-German notary public to read out the incorporation deed in its entirety is of lesser relevance and not a decisive criterion for the decision on the equivalence.

### **Practical advice**

By means of its ruling, another German court has followed the opinion that the formal requirements with respect to measures affecting the Constitution of a German GmbH can also be met if such measures are notarized by a non-German notary public. Nevertheless, one should be careful in misinterpreting the Kammergericht's decision as a carte blanche for notarizations in Switzerland, etc.: To date, the German Federal Supreme Court has not in

principle decided on whether the notarization of the incorporation of a German GmbH by a non-German Notary Public can be sufficient to meet the formal requirements under German law (while it has in a specific case considered the notarization of amendments to the articles of association by a Swiss notary located in Zurich/Altstadt as equivalent). The decisions of lower instance courts still show many inconsistencies; it remains to be seen whether other German courts will follow the principles set forth and line of argumentation followed in the Kammergericht's decision.

In our opinion, having measures affecting a GmbH's constitution executed by notarial deeds of non-German notaries public is not recommendable. This does not mean that in individual cases, it would not be possible to have other measures, in particular share transfers, executed by notarial deeds of non-German notaries public.

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