


URL: <http://mobile.deloitte-tax-news.de/german-tax-legal-news/notarization-of-the-incorporation-of-a-german-gmbh-by-a-swiss-notary-.html>

 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.

Ihre Ansprechpartner

Heike Richter

Partner

hrichter@deloitte.de

Tel.: -

Pia Franziska Knauf

Associate

pknauf@deloitte.de

Tel.: -

www.deloitte-tax-news.de

Diese Mandanteninformation enthält ausschließlich allgemeine Informationen, die nicht geeignet sind, den besonderen Umständen eines Einzelfalles gerecht zu werden. Sie hat nicht den Sinn, Grundlage für wirtschaftliche oder sonstige Entscheidungen jedweder Art zu sein. Sie stellt keine Beratung, Auskunft oder ein rechtsverbindliches Angebot dar und ist auch nicht geeignet, eine persönliche Beratung zu ersetzen. Sollte jemand Entscheidungen jedweder Art auf Inhalte dieser Mandanteninformation oder Teile davon stützen, handelt dieser ausschließlich auf eigenes Risiko. Deloitte GmbH übernimmt keinerlei Garantie oder Gewährleistung noch haftet sie in irgendeiner anderen Weise für den Inhalt dieser Mandanteninformation. Aus diesem Grunde empfehlen wir stets, eine persönliche Beratung einzuholen.

This client information exclusively contains general information not suitable for addressing the particular circumstances of any individual case. Its purpose is not to be used as a basis for commercial decisions or decisions of any other kind. This client information does neither constitute any advice nor any legally binding information or offer and shall not be deemed suitable for substituting personal advice under any circumstances. Should you base decisions of any kind on the contents of this client information or extracts

therefrom, you act solely at your own risk. Deloitte GmbH will not assume any guarantee nor warranty and will not be liable in any other form for the content of this client information. Therefore, we always recommend to obtain personal advice.