

The legal unity of a share transfer agreement and trust agreement

The nullity of the trust agreement can lead to the ineffectiveness of the legally linked share transfer agreement.

A share transfer agreement and a trust agreement can form a legal unity. If the parties experienced in business refuse the statutorily required notarization of the trust agreement but nevertheless notarize the share transfer, the ineffectiveness of the trust agreement does not affect the effectiveness of the share transfer.

Facts of the case

The German Federal Court of Justice (BGH) had to decide upon the existence of a legal unity between a share transfer agreement and a trust agreement in terms of Section 139 German Civil Code (BGB):

The trustor intended to temporarily transfer all his shares in a German limited liability company (GmbH) held by him in escrow to a new escrow holder/trustee. Therefore, a share transfer agreement between the old and the new trustee was notarized and a new trust agreement between the trustor and the new trustee holder was arranged for. Despite the notary's advice as to the statutorily required notarization of the trust agreement, both parties explicitly waived the notarization of the trust agreement. Contrary to the trust agreement and to the detriment of the company, the new trustee subsequently transferred the company's assets to himself and his wife.

The company filed a suit against the notary for damages based on an alleged breach of duty with the argument that the share transfer agreement was also legally invalid due to the non-adherence of the notarial form for the trust agreement under Section 139 BGB. The BGH however denied a breach of duty by the notary.

Decision

In the BGH's opinion, in this case the voidness of the trust agreement due to lack of form according to Section 15 Paragraph 4 Sentence 1 German Limited Liability Companies Act (GmbHG) and Section 125 Sentence 1 BGB, did not also cause the ineffectiveness of the share transfer as the contracts in question did not constitute a legal unity in terms of Section 139 BGB. Key to an affirmation of a legal unity (extending the notarization requirement to all agreements forming part of the unity) would be the so-called parties' will of unity, thus the will that one deal shall not exist without the other, hence, that both legal transactions stand and fall together. Not a financial or economic connection shall be decisive, but a legal connection and it has to be ascertained by interpretation of the objectively recognized parties' will, whether a legally united transaction is given.

Although the continuity of the trust agreement was of importance for the parties in this case, the BGH came to the conclusion that they intended a merely financial unity between the trust agreement and the share transfer agreement. Crucial for the BGH was that (based on the objectively recognized circumstances), the parties explicitly waived the notarization of the trust agreement, despite of their knowledge of the ineffectiveness of the trust agreement due to lack of notarization. The parties who were without exception versed in business could have recognized the legal consequences after the advice given by the notary. As the parties wanted to effectuate the legal consequences of one legal transaction knowing the ineffectiveness of the other, it can be concluded that a legal unity between the two is in fact not intended. Following the objectively recognized circumstances, the trustor and the new trustee thus did not intend to link the share transfer agreement with the trust agreement.

Conclusion

The BGH based its decision on the existence of the so-called parties' will of unity. A lacking will of unity, however, cannot be assumed from the parties' sole non-adherence of the notarization form for the trust agreement. It must in any case be determined whether the

parties were capable of fully recognizing the legal consequences of the lack of form and whether they intended the legal transactions to “stand and fall together”.

Source

German Federal Court of Justice, decision dated September 22, 2016 – file number: [III ZR 427/15](#)

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