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GERMAN LAW NEWSFLASH – November 2016

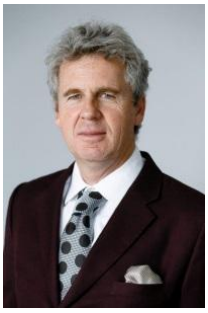
Is notarization by foreign notary in Germany possible?

Dear [Vorname],

With this we present to you our latest Newsflash. Our topic this time is a court decision regarding the regulations concerning the notarization by a foreign notary during the formation of a German GmbH. This topic is a recurring problem in the area of German notarial law. We hope that it meets your interest. Any remarks and feedback are always welcome.

Merry Christmas and all the best for 2017,

Thomas & Team



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How it used to be

Notarization in Germany, which can at times be controversial, follows very strict rules. One reason for that is that unlike other countries, for example Switzerland, the German notarial fees are not negotiable but fixed by statute.

In this context different legal reasoning applies to different kinds of transactions. For example real estate transactions always have to be notarized in Germany (*lex rei sitae*), as do mergers and company transformations pursuant to the *Umwandlungsgesetz*. Regarding share purchases, in certain cases it used to be possible to have them performed by a foreign notary. However, now that the notary has to hand in the new list of shareholders to the local commercial register, this is no longer possible. The question at stake was whether the foundation of a German limited liability company by a Swiss notary is permissible.

What is new

This has now been expressly denied. The local court of Charlottenburg (Berlin) confirmed in a widely observed decision made in January 2016 that the notarization of a German GmbH by a Swiss notary does not comply with German regulations on notarial proceedings.

According to the German federal court (*Bundesgerichtshof*), a notarization by a foreign notary shall only be equivalent to a German one if the applied foreign procedural law equals the fundamental principles of the German notarization. Additionally, the position of the person carrying out the foreign notarization has to be equal to the one of a German notary.

According to German law, the entire content of the document, including attachments, has to be read out by the notary in the presence of the parties. A violation of this leads to the invalidity of the notarization. In Switzerland those requirements are not fulfilled because the Swiss notary only has to read out those parts of the documents which contain the declarations of will.

Under German law a waiver of the obligation to instruct and review is not permitted (§ 11a BNotO). The reason for this prohibition is that the German notary gives a warranty of correctness regarding the content of the documents and has the obligation to examine the documents.
Furthermore, only German notaries are obliged by German law to hand out an authorized copy of the certificate of incorporation of a company to the German tax authority.

What does it mean for the future

It is to be expected that the ruling of the court of Charlottenburg will be followed by other German courts in the future. The fear is having high German standards bypassed through notarizations performed in other countries. This could lead to some sort of “notarization tourism”, which would eventually be seen to reduce the protection of the parties and legal transactions. Therefore, foreign clients are advised to consult a German notary to avoid the risk of invalidity of the transaction and unnecessary expenses. Further, the costs for a GmbH foundation are not very high, so hiring a Swiss notary appears not necessary in such cases.

tkslegal Berlin LLP is a German law firm and notarial office, with a focus on Corporate and M&A and Real Estate law and transactions. Feel free to contact us with any questions or comments.

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