German Federal Supreme Court Strengthens Foreign Notaries – A clear Commitment to Substitution of Form?

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I. Introduction

In a recent decision[1], the German Federal Supreme Court assessed the legal consequences of a foreign notarization with regard to a share transfer of a German limited liability company (LLC). The holding contains the first statements regarding the substitution of form prescribed by sec. 15(3) German Limited Liability Company Act (*GmbHG*) ever since the reform of both this Act and the Swiss Code of Obligations. The lately issued court decision received broad attention both due to its implications for future international M&A transactions involving shares of LLCs, and due to its statements as to a foreign notary's role in the register procedure following a share transfer.

II. Facts and legal history of the case, issue raised on appeal

In the case at hand, a notary from Basel-Stadt (Switzerland) notarized the share transfer of an LLC registered in the Commercial Registry (*Handelsgericht*) of the Local Court of Munich (*Amtsgericht München*). The notary updated the list of shareholders accordingly, and filed the list with the Commercial Registry, which, however, declined to include the updated list in the records of the company. The Higher Regional Court of Munich (*Oberlandesgericht München*) rejected the LLC's and the presumable transferee's appeal. Now, the main issue raised on appeal was whether a foreign notary may file an updated list of shareholders with the Commercial Registry under sec. 40(2) *GmbHG*, or whether, according to sec. 40(1) *GmbHG*, the LLC's directors are solely responsible in such a case.

III. Holding

The highest German court in civil matters reversed the previous judgments and

ordered the Local Court to include the updated list in the records of the company. The decision contains a twofold holding:

(1.) The registration court may not reject a list of shareholders only because it was penned by a foreign notary.

(2.) The amendments due to the *MoMiG*[2] do not prohibit that a notarization prescribed by the *GmbHG* is conducted by a notary of a foreign country, provided that this notarization is equivalent to one under German law.

IV. Interpretation

With the second guiding principle, the Court approves its case law established back in 1981[3]. Thus, the Court finishes, at first glance, the discussion on the *MoMiG*'s effects on substitution of form requirements[4] by upholding the thesis that the equivalence of notarization requires that (a) the foreign notary performs functions in her jurisdiction which are commensurate with those of a German notary with regard to her professional qualification and her legal position, and that (b) the foreign notary, while establishing the relevant deed, has to perform a legal procedure which complies with the fundamental principles of German notarization law. In particular, the German Federal Supreme Court argues that the account of the (German) notary for the list's accuracy shall not be overestimated. Instead, a foreign notary is normally as reliable as a director of the company, who is regularly a layperson, but nevertheless responsible for filing the list of shareholders with the Commercial Registry.

Although this is basically true, sec. 40(2) *GmbHG* requires a notary who has been involved in any change in the person of a shareholder or the extent of their participation to sign the list instead of the directors without undue delay upon the changes becoming effective and to submit the list to the commercial register. Thus, in addition to the Court's thesis of equivalence, it is mandatory for a substitution of sec. 15(3) *GmbHG* that the foreign notary assumes in the deed (an additional) duty to file the updated list of shareholders with the commercial register[5].

Apart from that, the decision remains somewhat ambiguous with regard to the issue of substitution as the Court focuses on the question whether a foreign notary may file an updated list of shareholders with the commercial register. As the Court further develops in the reasoning on the first guiding principle, a

foreign notary would have such a right if her notarization is equivalent as described above. However, the standard of review is a rather limited one. In particular, the register court may only reject a list of shareholders that does evidently not comply with the (formal) requirements of sec. 40 *GmbHG*. Following that line, the Court only examined whether the notarization in Basel-Stadt was evidently invalid (which would give the commercial court the right to reject it) but did not explicitly discuss the substantive law question of substitution. Therefore, it remains unsettled whether the notarization had (substantive) legal consequences, *i.e.* resulted in the transfer of the share, apart from giving the foreign notary the right to file a new list of shareholders with the German registry court.

Accordingly, legal commentaries vary from warnings of uncertainty in foreign notarization[6], to overly positive statements recommending share transactions conducted primarily in Switzerland[7]. Bearing in mind the rather limited standard of review, we understand the holding as a cautious inclination towards the recognition of notarization at least in canton Basel-Stadt[8].

V. Conclusion

On the one hand, the German Federal Supreme Court solved an important procedural issue. The registration court is no longer allowed to reject a foreign notary's list of shareholders filed with the commercial register. On the other hand, the Court missed a good opportunity to clarify the substantive legal status of foreign notarizations under the reformed *GmbHG*. Therefore, legal advisers are forced to examine the respective foreign notary regulation in order to make sure that the equivalence requirements are met[9]. Against this background it remains to be seen whether foreign notarization can further serve as a cost-effective alternative to notarization in Germany.

[1] BGH, 17.12.2013 – II ZB 6/13, *BGHZ* 199, p. 270.

[2] Modernization of the Law on Limited Liability Companies and Combating Abuses Act (*Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen – MoMiG*), Federal Law Gazette (*BGBl.*) 2008 I, p. 2026.

[3] BGH, 16.2.1981 – II ZB 8/80, BGHZ 80, p. 76, 78.

[4] For an overview on the discussion, see Walter Bayer, »Übertragung von GmbH-Geschäftsanteilen im Ausland nach der MoMiG-Reform«, GmbH-Rundschau (GmbHR) 2013, p. 897, 911.

[5] For a detailed reasoning, cf. Jan Lieder & Christoph Ritter, »Neues aus Karlsruhe zur Zulässigkeit der Auslandsbeurkundung?«, Monatsschrift für die gesamte notarielle Praxis (notar) 2014, p. 187, 192-193, with further references to the contrary prevailing view.

[6] Recently Klaus J Müller, »Auslandsbeurkundung von Abtretungen deutscher GmbH-Geschäftsanteile in der Schweiz«, Neue Juristische Wochenschrift (NJW) 2014, p. 1994, 1999.

[7] Cf. Axel Jäger, »Beurkundung durch einen ausländischen Notar im GmbH-Recht und Einreichung der Gesellschafterliste«, juris Monatszeitschrift (jM) 2014, p. 241, 243; Christian Mense & Marcus Klie, »Beurkundung durch ausländischen Notar nach Inkrafttreten des MoMiG«, Gesellschafts- und Wirtschaftsrecht (GWR) 2014, p. 83.

[8] Similarly Cornelius Götze & Markus Mörtel, »Zulässigkeit der Einreichung der GmbH-Gesellschafterliste durch einen ausländischen Notar«, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2014, p. 369, 371-372; Mario Leitzen, »Die Zuständigkeit für Einreichung und Korrektur der GmbH-Gesellschafterliste nach den Dezember-Entscheidungen des BGH«, Zeitschrift für die Notarpraxis (ZNotP) 2014, p. 42, 46; Christoph H Seibt, »Anmerkung zum Beschluss des BGH vom 17.12.2013, Az. II ZB 6/13 – Zur Einreichung einer Gesellschafterliste durch einen Notar mit Sitz in der Schweiz«, Entscheidungen zum Wirtschaftsrecht (EWiR) 2014, p. 171, 172.

[9] For an overview on the notary codes of several Swiss cantons, see Klaus J Müller, »Auslandsbeurkundung von Abtretungen deutscher GmbH-Geschäftsanteile in der Schweiz«, Neue Juristische Wochenschrift (NJW) 2014, p. 1994, 1996-1998.