SAVE MONEY IN SWITZERLAND?
DOUBTFUL VALIDITY OF FOREIGN NOTARIAL ACTS AFTER THE ENTRY INTO FORCE OF THE ACT TO MODERNIZE THE LAW GOVERNING PRIVATE LIMITED COMPANIES AND TO COMBAT ABUSES
(JUDGMENT OF THE FRANKFURT A.M. REGIONAL COURT OF 7 OCTOBER 2009)

The private limited company is the most prevalent form of corporation in Germany. Its structure can be easily adapted to the needs of the respective company and the legal aspects are straightforward. When it comes to transferring shares, however, the necessity of notarization – which is not required in the case of stock corporations, for example, and is deliberately prescribed because the legislature intended to make it more difficult to trade in shares – is considered an "annoyance." In addition to the formalities involved, the costs are a constant source of complaint. As a result, companies have been looking for a more economical way to transfer shares for years and they have also found exactly what they were looking for in the possibility of notarization in Switzerland. In Switzerland, it is possible to negotiate notarization fees with notaries and escape the mandatory provisions of law governing such costs in Germany. Following initial uncertainty and a few rulings by the courts, including a decision by the Federal Court of Justice (Bundesgerichtshof – BGH), foreign notarization was considered to have legal force and effect, at least in the case of notaries in the cantons of Basel City, Zurich-Altstadt and Zug. The MoMiG, which was intended, among other things, to update legislation governing private limited companies, went into force on 1 November 2008. In this context, Parliament also reinforced the importance of the list of shareholders, which for a long time had suffered from neglect. At the same time, Parliament also introduced a duty on the part of the officiating notary – instead of on the part of the managing director – to submit an updated list of shareholders to be recorded in the commercial register after notarization of the assignment of shares in a private limited company.

As a result of this provision, the question as to the admissibility of foreign notarizations, which

had been considered resolved, has been revived. In the meantime, the courts have issued an opinion (Frankfurt a.M. Regional Court NZG 2009, 1353). The Frankfurt a.M. Regional Court actually had to decide only on a single case that had occurred prior to the enactment of the MoMiG. The Court reiterated that the relevant notarization by a notary in Basel must be recognized under German law. However, in a succinct four-line obiter dictum, which is to say in an incidental aside, the Court ventured an opinion to the effect that foreign notarization before a Basel notary would no longer have legal force and effect because of the amendment of the provision pertaining to the list of shareholders (section 40(2) of the Private Limited Companies Act).
Seen soberly, this comment by the Frankfurt a.M. Regional Court on the new situation is legally irrelevant and also devoid of any real justification. Nevertheless, this judgment has attracted considerable attention. Ultimately, however, it is incorrect.
A transfer of shares effected in another country is valid if the appropriate legal form is respected, i.e., in this case, notarization. According to the case law of the Federal Court of Justice, this means that foreign notarization must be equivalent to German notarization. This equivalency exists if the foreign notarial officer, having the same training and occupying the same position in the legal community, performs the same function as a German notary and the foreign notarization procedure is equivalent to the German procedure. Measured against these criteria, notarizations by a Swiss notary in the cantons of Basel-City, Zürich-Altstadt and Zug have legal force and effect according to the case law.
The MoMiG has in no way changed the criteria for the assessment of the equivalency of foreign notarizations (in particular the training and position of the foreign notarial officer in the legal community). On the other hand, doubt in respect of the validity of notarization in these jurisdictions has arisen because of the duty of the officiating notary to submit the list of shareholders to the commercial register after notarization that is now imposed by the MoMiG. The arguments advanced by opponents of foreign notarization hinge on precisely this point. They rightly claim that this duty cannot be imposed upon a foreign notary by German law. They conclude further from this that a foreign notary cannot make the necessary submission and that the notarization is invalid without such submission. Both conclusions are unconvincing. If a person has no duty to perform an act, that person can nevertheless very well undertake such an act, i.e., submit the list of shareholders in this case. Moreover, amendment of the list of shareholders is the result of a valid notarization and not a prerequisite, which follows from the wording of the law; section 40 of the Private Limited Companies Act reads as follows: "without delay after entry into force of any change in the persons of the shareholders." However, further arguments in connection with the list of shareholders also speak in favor of the continued existence of the possibility of having the transfer of shares in a private limited company notarized in another country. According to section 40(1) of the Private Limited Companies Act, the managing director of a private limited company is first of all responsible for keeping the list of shareholders. A duty to submit an updated list exists only if a notary is involved in a change in the shareholder structure of a private limited company. Hence, even if a foreign notary did not have the right to submit a new list of shareholders because of the absence of a duty to do so, that duty would then simply again be incumbent upon the managing director. The basic responsibility of the managing director for the accuracy of the list of shareholders can be also inferred from the fact that this duty requires no special legal competence that only a German notary could have. It is therefore not possible to assume exclusive restriction to German notaries that would exclude foreign notaries per se.
The other arguments in support of continuation of the possibility of foreign notarization are to be found precisely in the MoMiG and the goal of making the German private limited company internationally viable that this Act is intended to achieve. Since last year's reform, limited companies have been allowed to maintain their principal places of business abroad. This was intended to make it possible for German companies to organize their foreign subsidiaries as private limited companies under German law, as, for example, English corporate groups have been able to do with their limited companies. The management and the administration of a private limited company may therefore now be located, for example, in Basel. In addition, as in the past, a non-citizen can be the managing director of a private limited company, and since the MoMiG has been in effect, the instructions pursuant to section 8(3) of the Private Limited Companies Act need no longer necessarily be provided by a German notary. In fact, this may be done by "a notary appointed abroad." If the MoMiG admits, and indeed promotes, so much internationality, why should it then want to nullify a previously admissible foreign notarization and want to achieve this as an indirect result in a change in shareholder structure?

Even if – despite the judgment of the Frankfurt a.M. Regional Court – foreign notarization of the sale of a share in a private limited company is likely to continue to remain permissible, it is advisable to exercise caution to be on the safe side until the highest court clarifies the issue of notarization in Switzerland for reasons of economy. This uncertainty is not apt to last much longer, since we are already aware of proceedings that are likely to provide this guidance.

DR. STEFAN HEYDER / DR. CHRISTIAN SCHRÖDER