

# SCHIEDERMAIR

## RECHTSANWÄLTE

### Newsletter Corporate/M&A

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#### **Acquisitions in Germany by way of Asset Deals**

##### **- When do they require notarial recording? -**

###### **Overview**

In an asset deal transaction, the buyer acquires not the shares in the target company, but directly its assets, i.e. machines, goods, stock, contracts, IP rights etc. Such asset deals clearly require notarization if shares in a subsidiary limited liability company (*GmbH*) or real property form part of the assets sold and transferred. This is so because there are provisions in German law (in the Act on Limited Liability Companies and in the Civil Code) that explicitly subject the sale and transfer of shares in a *GmbH* and of real property to the notarial form requirement. This would lead one to believe that all asset deal transactions not involving shares in a *GmbH* or real property can be done without notarization. As a rule, this is true. However, there is one mandatory notarial form requirement of a more general nature, somewhat hidden in the statutes (and therefore sometimes overlooked): sec. 311b para. 3 of the Civil Code (*BGB*) provides for the notarization of agreements under which the seller obligates himself to transfer (all of) his current assets or a percentage portion thereof. And many asset deal transactions comprise all of the assets of the selling entity!

Therefore, in all asset deal transactions that not only deal with the sale of one of several business units but that relate to all of the seller's assets, the parties should carefully check whether sec. 311b para. 3 of the Civil Code applies to their transaction. Failure to have the relevant SPA notarized although the cited statute is applicable results in the complete and total ineffectiveness of the SPA. The instrument is null and void and there is – unlike as with share assignments or real property transfers – no means available to have the lack of notarial recording cured afterwards.

As regards the interpretation of sec. 311b para. 3 of the Civil Code, a number of questions are in debate among legal authors (for a detailed overview see Klaus J. Müller, *Unternehmenskauf und notarielle Beurkundung nach § 311b Abs. 3 BGB* (Asset deals and notarial recording pursuant to sec. 311b para. 3 of the Civil Code), NZG 2007, p. 201 *et seq.*). However, bottom line of almost all contributions to the subject is that the SPA in an asset deal transaction does then not need to be notarized pursuant to sec. 311b para. 3 of the Civil Code if it explicitly lists all of the assets to be transferred in the agreement. The reason therefor is that the requirement to have the agreement notarized shall protect a seller who intends to dispose of all of his assets “lot, lock, stock and barrel”, without being aware of the exact composition of his estate and without going into too much detail in the respective agreement either. And this intention of the legislature, so goes a wide-spread if not common thinking, has already been sufficiently acknowledged if the SPA in question minutely lists all assets to be transferred.

However, it is standard market practice in M&A transactions to include in the SPA so-called *catch-all clauses*. The purpose of these clauses is to make sure that even those assets that may have been overlooked when preparing the asset lists form part of the assets sold and transferred. There are some authors in legal literature who argue that, if such catch-all clauses are used, the SPA would not duly specify all of the assets sold and transferred and would therefore have to be notarized pursuant to sec. 311b para. 3 of the Civil Code.

An additional point in dispute – and this is where the judgement described below comes in – is whether sec. 311b para. 3 of the Civil Code is applicable to sellers that are organised as a corporation (like the *GmbH*). There are no hints in the statutes as to whether or not this is the case.

### **The Judgement of the Higher Regional Court of Hamm**

The Higher Regional Court (*OLG*) of Hamm has ruled, in a recent judgement of March 26, 2010 – I-19 U 145/09 –, that the notarial form requirement of sec. 311b para. 3 of the Civil Code is applicable even if the seller is organised as a *GmbH*. Consequently, the court declared the SPA entered into by a *GmbH* in the facts of its case as null and void since it had not been notarized. The plaintiff’s claim for payment of the purchase price was dismissed.

This judgement is – as far as we can see – the first precedent on the question whether sec. 311b para. 3 of the Civil Code is applicable to a *GmbH*. Before the judgement was handed down, some authors had advocated to not apply sec. 311b para. 3 of the Civil Code to corporations like the *GmbH*, i.e. to not notarize an SPA in an asset deal transaction unless the assets transferred involve shares in a *GmbH* or real property. However, these authors never had compelling arguments on their hands. On the contrary, the German legislature has, at the beginning of the millennium, completely revised the Civil Code’s law of obligations. But what it has left unchanged is the wording of sec. 311b para. 3 of the Civil Code which unarguably gives no indication as to the restriction of the provision to any specific addressee. The Higher Regional Court did not have to decide on the other question in dispute mentioned above, i.e. whether catch-all clauses contained in SPAs provoke the notarial form requirement or not. The reason therefor was that, in the facts of the case, the selling *GmbH* had not even bothered to list the assets sold and transferred in detail but had restricted itself to the formula “*we herewith sell our entire assets including the business in X-town*”.

Given this lack of detail and the inevitable applicability of sec. 311b para. 3 of the Civil Code, there was no room for commenting on the catch-all dispute.

### **Recommendation**

The judgement of the Higher Regional Court of *Hamm* brings greater clarity. The heretofore debated question whether the notarial form requirement of sec. 311b para. 3 of the Civil Code is applicable to *GmbHs* has now been decided and affirmed by the court. Therefore, also if a German *GmbH* is the selling party in an asset deal transaction involving all of the assets of the seller, one should always look into whether the SPA has to be notarized pursuant to sec. 311b para. 3 of the Civil Code. It is only safe to say that no notarization is required if the SPA in question specifically lists and determines all assets to be transferred (and if no shares in a *GmbH* and no real property form part of the assets to be transferred). If the SPA in question does list all assets, but does also contain catch-all clauses, some authors are of the view that the SPA then has to be notarized. We believe that this view goes too far; the catch-all clause apparently serves no purpose other than to acknowledge practical necessities in an M&A transaction (a business is a “living” complex which is constantly in flux). It seems recommendable, however, given this opinion of some legal authors and the severe legal consequences, to diligently look at each individual case and carefully analyze the notarization issue.

If you have questions on the foregoing, please contact Klaus J. Müller ([muel-ler@schiedler-mair.com](mailto:muel-ler@schiedler-mair.com)). Please note that the information contained in this newsletter is not meant to replace legal counsel. You should seek specific advice before taking any action with regard to the matters discussed above. All of our newsletters are available at [www.schiedler-mair.com](http://www.schiedler-mair.com).