

Share purchase agreement forms for share transfers concluded in another state

May 03 2017 | Contributed by [Kubas Kos Gałkowski](#)

Introduction

Concluding share purchase agreements

Comment

Introduction

Under Article 180 of the Commercial Companies Code, the effective transfer of share ownership requires a transfer ownership agreement to be concluded in writing with a signature certified by a notary. This is an absolute requirement and does not depend on the agreement's value or the percentage of a company's share capital that is subject to the transaction (eg, as is the case in Lithuanian law). However, not all legal regulations in force in EU member states require adherence to a special form – namely, a written form with signatures certified by a notary. The question that therefore arises is whether – in the event that the agreement is concluded under the legislation of a state that sets less restrictive requirements regarding the agreement form for the purchase of shares in a limited liability company with a registered office in Poland – adhering to a less restrictive form will suffice for the effective transfer of the legal title in the shares being disposed of.

Concluding share purchase agreements

Different regulations apply depending on whether the other state in a share purchase agreement is an EU member state. In the case of an agreement for the purchase of shares of a Polish limited liability company in a non-EU member state, Article 25 of the Private International Law Act will apply. Under Article 25, for an act in law to be valid, it is sufficient to adhere to the form provided for by the law of the state in which the agreement is performed. In turn, the applicable regulation in the case of EU member states is the Rome I Regulation (593/2008) – namely, the provisions regarding the law applicable for contractual obligations. Under Article 11 thereof an agreement concluded by and between persons who, or whose representatives, are based in the same state is valid if it complies with the form-related requirements under the Rome I Regulation or the law of the state where the agreement was concluded.

Therefore, it appears possible to conclude an agreement on the purchase of shares in a less restrictive form than that required by Polish law; however, the judicial practice heretofore is not uniform. Further, the abovementioned provisions do not apply to an agreement for the purchase of shares in a limited liability company with a registered office in Poland.

Although Article 1(2)(f) of the Rome I Regulation does not exclude issues relating to the purchase of shares and does so in the scope of formation, legal capacity, capacity to engage in acts in law, internal organisation or the dissolution of companies and other incorporated and non-incorporated entities, as well as the personal liability of shareholders and company bodies, it is claimed that the provisions regulating the purchase form for shares fall within the category of provisions forcing their application, as mentioned in Article 9 of the Rome I Regulation. Further, the public policy clause will also apply in this case (Article 21 of Rome I Regulation).

However, such arguments must be seen to be unconvincing, even in cases in which the Private International Law Act applies. The Polish legislature decided not to include agreements on the

AUTHORS

[Paweł Sikora](#)



[Kamil Zawicki](#)



purchase of shares in the catalogue of exceptions to the applicability of Article 25 of the Private International Law Act. The exemption extends only to regulations relating to real estate and acts in law regarding incorporation, merger, division, transformation, or the cessation of a legal person or a non-incorporated organisational unit. Therefore, there are no reasons to claim that the provisions on the form for the purchase of shares in a limited liability company have the status of regulations which – regarding the public interest or security of transactions – should apply independently from the regulations of the Private International Law Act and the Rome I Regulation.

This is the direction in which the case law of Polish courts appears to be heading. An example in this regard is an August 14 2012 decision of the Krakow Registry Court, which registered the purchase of shares in a Polish company that had taken place in France and had been governed by French law under which an ordinary written form is sufficient.

Comment

Polish case law is undoubtedly heading in the right direction. However, it cannot be certain that another court will not question the effectiveness of a share purchase agreement due to the lack of appropriate form. Therefore, this issue should be decided without delay by the Supreme Court in the interest of Polish entities and investors alike.

For further information on this topic please contact [Pawel Sikora](#) or [Kamil Zawicki](#) at Kubas Kos Galkowski by telephone (+48 22 206 83 00) or email (pawel.sikora@kkg.pl or kamil.zawicki@kkg.pl). The Kubas Kos Galkowski website can be accessed at www.kkg.pl.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).