

Corporate Finance/M&A - Austria

Supreme Court clarifies exclusion of purchaser's liability in asset deals

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Introduction

Registration with seller and purchaser

Registration at closing

No deviations

Introduction

In a recent decision⁽¹⁾ the Supreme Court clarified a number of disputed questions regarding Article 38 of the Commercial Code, one of the central provisions governing asset deals.

According to Article 38, a person that acquires an undertaking automatically assumes the legal relationships of a seller in regards to the undertaking (including all rights and liabilities) in certain circumstances. However, this automatic assumption of rights and liabilities may contractually be deviated from.

Should the parties wish to exclude the potential liabilities of the purchaser, such exclusion must be:

- registered with the commercial register;
- made publicly known in a customary manner; or
- notified to the respective third-party creditor(s).

Registration with seller and purchaser

Should the parties contractually agree on an exclusion of purchaser's liabilities in relation to certain of the seller's contracts, and should they decide to notify this exclusion with the Commercial Register (which is the safest of the above-mentioned alternatives and has thus become standard for Austrian-law governed asset deals), it was still unclear whether the registration must be performed with the seller or the purchaser.

Although this question was not directly relevant for its decision, the court stated in an *obiter dictum* (ie, comment in passing) that there would be good reasons for registration by both entities. As a consequence, prudent lawyers should recommend that both the seller and the purchaser register the exclusion of liabilities with the commercial register.

Registration at closing

The seller and purchaser should also be aware that Article 38 stipulates that the registration must be performed on the occasion of the transfer of the undertaking. In the case at hand, the first and second instance courts, as well as the Supreme Court, clearly stated that the fulfilment of this requirement one month after the transfer would be too late.

Although a definite period of time may not be clearly derived from either the law itself or the recent judgment, the respective filings with the commercial register should be included as a post-closing covenant in asset purchase agreements, which should be performed immediately after the closing.

No deviations

The Supreme Court also made clear that arrangements regarding the allocation of liabilities after closing would not be possible under this provision. Any agreement on the exclusion of liability of the purchaser must be made at the transfer of the undertaking at the latest.

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However, the excluded liabilities need not be listed individually. It is also possible to generally exclude the liability for all contracts that were not taken over by the purchaser.

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Endnotes

(1) 6 Ob 242/11y.

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