Country Reports

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A short selection of updates from Slovakia, Lithuania, the Netherlands and France

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Slovakia: Business shares when travelling: Are you sure you are still a shareholder?

Success and failure often stand close to one another. Companies that are still drawing up expansion plans today may already be in economic turmoil tomorrow. For insolvent foreign companies with a Slovak subsidiary, Slovakian company law offers some a surprise.

According to the principle in §148 (2) of the Slovak Commercial Code, a Slovak subsidiary by law acquires its shares with the insolvency of the shareholder. In this way, an insolvent company 'loses' all shareholder rights and a claim remains for financial compensation. The share is transferred to the company itself (own share) according to the law. The company, i.e. the management, must either sell this share within six months or the general meeting, meaning the remaining shareholders, must resolve on a capital decrease with the value of the own share within the same statutory deadline. This rule was introduced to speed up insolvency proceedings, so that the insolvency administrator should not have to worry about exercising any shareholder rights, but could bring a concrete claim for money to the benefit of the insolvent estate. This rule does not apply to companies with only one shareholder, in order to prevent a *de facto* non-shareholder company.

However, this regulation is now becoming problematic – it can probably be assumed that this consequence has not been taken into account in the legislative process – if the insolvency of all shareholders is opened at the same time. There are many jurisdictions, where the competent court declares insolvency with effect at a particular time, e.g. 10:30a.m. In other jurisdictions, if no exact hour and minute is set in the court decision, the insolvency usually becomes effective at midnight of the next day or, if publishing is mandatory, the following day after the decision has been published. Either way, if all the shareholders belong to a group and the insolvency is opened at exactly the same minute, it is questionable whether the above exception is effective, since the company is'losing' all shareholders at the same time. The other way round would not be problematic if first one and then the other shareholder become insolvent, since the second shareholder in this case would already be the sole shareholder and consequently the exception would have to take effect.

However, §148 (2) of the Slovak Commercial Code (SCC) only develops a real impact in an international context. This is the case in the event that the German insolvency administrator of two group-affiliated shareholders sells the non-insolvent Slovak subsidiary to an investor via a share deal as part of a larger transaction. In our opinion, the share purchase agreements are null and void, since the shareholders lose their primary shareholder rights immediately on becoming insolvent.

This problem could best be solved by arranging a consultation with a Slovak lawyer in the run-up to an insolvency filing. With regard to this problem, it seems advantageous under Slovak law if the German insolvency court does not open the insolvencies at the same time, but one after the other, since in this case the aforementioned exemption regulation applies. Of course, foreign law may require opening the insolvency at the same time. There is, among other things, no elegant solution to this problem after conclusion of a contract, so that the share purchase agreement has to be re-concluded, and this time on the seller side it would be the company itself, represented by the management, that has to act and sell its own share within the above mentioned statutory requirements.

Incidentally, if the insolvency is lifted again because payment difficulties have been overcome, the share of the business will revert to the shareholder. ■