Newsletter Corporate/M&A

No. 12 – August 2012

The Importance of Being Listed

– New Judgement Confirms Crucial Role of Shareholders' List for a *GmbH* –

Introduction

At the end of its formation process, thereby coming into existence as a legal entity separate and distinct from its shareholders, the German Limited Liability Company (*GmbH)* is entered into the commercial register. The registration also covers some of the *GmbH's* basic corporate details, such as the amount of its issued share capital, its domicile and address, the object of its business, its managing directors and its officers, if any, holding a special power of attorney the scope of which is statutorily defined (*Prokuristen*). All of the details just mentioned can be gathered from a commercial register excerpt. Any changes to them require, as a rule, a shareholders' resolution and a formal report letter to the commercial register to be signed by the managing directors before a notary. However, things are somewhat different with respect to the shareholders of a GmbH. They are not directly registered and their identity is therefore not apparent from the aforementioned excerpt. They are, instead, to be mentioned in the shareholders' list which must be signed by the managing director upon the company's formation and filed with the commercial register for inspection by interested third parties. Upon each change in the shareholders or their shareholdings subsequent to the company's formation, a revised shareholders' list has to be filed with the commercial register.

While the shareholders' list used to be only a more or less reliable source of information in the past, its importance has been greatly enhanced by the German legislature a couple of years ago. The main features of these amendments are that (i) any German notary involved in any changes of shareholdership in a *GmbH* is obliged to file a revised shareholders' list, (ii) the shareholders' list, if certain prerequisites are met, may be the basis for a *bona fide*

acquisition of shares and (iii) the shareholders' list replaces the former notification mechanism as regards who is to be treated as a shareholder by the company. The latter topic is the subject of this newsletter. The relevant statute in this regard (sec. 16 para. 1 of the German Law on Limited Liability Companies – *GmbHG*) now reads that, in the relationship between the shareholders and the company, only he is to be considered as a shareholder who is shown to be a shareholder in the shareholders' list as last filed with the commercial register. Therefore, shareholders' resolutions are only to be passed by such persons, dividends are only to be paid out to them etc.

Facts of the Case

We have just considered one of the basic effects of the shareholders' list. In the facts of the case the *OLG Bremen* (Higher Regional Court of the German state of *Bremen*, just one level below the *BGH*, the German Federal Court) had to decide upon in its – non-appealable – judgement of October 21, 2011 (docket no. 2 U 34/11), shareholder A had first sold and transferred its share in the company to shareholder B. Thereafter, shareholder B was entered into the shareholders' list, and shareholder A was deleted. This revised list was filed with the commercial register and has remained unchanged ever since. So far, so good. But, afterwards, shareholder B had challenged the transaction vis-à-vis shareholder A on the grounds of willful deceit by shareholder A (*Anfechtung wegen arglistiger Täuschung*), but had done nothing as regards the shareholders' list.

As such challenge is a civil law instrument basically also available to attack acquisitions of shares in a *GmbH* and as it is generally accorded retroactive effect under German civil law, the question was whether this would also hold true in respect of company law and result in a situation where the company (having been made aware of the challenge) had to regard shareholder A still as shareholder in spite of his not being listed in the shareholders' list.

The Judgement

The *OLG Bremen*, in its judgement of October 21, 2011, has given the contents of the shareholders' list priority over the challenge of the transaction on the grounds of willful deceit, and rightly so. It held that the shareholders' list's main purpose (she is to be treated as shareholder vis-à-vis the company who is entered into the shareholders' list) is to be seen as a statutory presumption of shareholdership which is irrefutable. As long as someone was shown to be a shareholder in the shareholders' list, the company had to treat her as such,

even if the company was aware of the shareholders' list being incorrect, be it on the grounds of a (successful) challenge of the acquisition or for another reason.

Conclusion and Recommendations

The judgement of the *OLG Bremen* is in line with previous precedents on the legal situation which was in force before the implementation of the new rules by which the importance of the shareholders' list was enhanced a couple of years ago. Under the former notification regime (pursuant to which someone had to be treated as the shareholder who had been notified by either the seller or the purchaser to the company as being the shareholder) the German Federal Court had held that the notification provided the irrebuttable presumption of shareholdership and had to be acknowledged by the company, even if the company, i.e. its managing directors, knew better than that. The *OLG Bremen* has applied those precedents also to the new shareholders' list provisions. This makes sense. The objectives of the two instruments are identical. The German Federal Court, should it be called upon on this subject, can be expected to follow down the same path.

The practical importance of this issue lies not so much in challenge situations the *OLG Bremen* had been confronted with (they arrive rather seldom) but more in the mundane post-closing scenario of an acquisition of shares in a *GmbH*: the purchaser often wants to adopt resolutions as soon as possible. For the reasons mentioned above he should at least wait until the revised shareholders' list has been filed with and received by the commercial register. If the purchaser nonetheless is eager to adopt a resolution before this has happened, a statutory provision might help which says that such a resolution is to be acknowledged even so if the shareholders' list is filed thereafter without undue delay. Needless to say, however, "without undue delay" leaves some room for interpretation and there is no clear-cut legal authority on this yet. Another possibility would be that the purchaser also acts on the basis of a power of attorney from the seller. Should that not be obtainable, again, the safest route would be to wait until the receipt of the revised shareholders' list by the commercial register.

- If you have questions on the foregoing, please contact either of (all of them qualified as both notaries and attorneys):

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