FINLAND

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After graduation and court training, Tuomo worked for a bank specialising in corporate finance. Subsequently, he gained experience at a New York law firm, followed by a postgraduate LL.M. program at the University of Washington. The LL.M. program focused on corporate law and taxation, mergers & acquisitions, investments and business planning.

Since 1996, Tuomo has advised businesses in Helsinki. He has worked on commercial transactions in a diverse range of industries. He has advised companies on corporate law and governance issues and has represented corporate clients and investors in acquisitions and other transactions involving the purchase or sale of businesses.

Aliant Finland assists foreign companies to do business and invest in Finland and the Nordic region, while also helping Finnish companies with overseas matters. Our practice offers the highest quality legal services with a team of experienced and well recognised professionals. We represent companies at all stages of their growth, from start-ups and emerging growth companies to multinational public corporations.

We assist businesses with commercial transactions and international operations in a diverse collection of industries. We provide corporate law services to clients and represent corporate clients and institutional investors in acquisitions and other transactions involving the purchase or sale of businesses.

Key considerations for multinationals operating in high-risk industries and jurisdictions:

Governing law and dispute solution, including alternate dispute resolution. While the parties are free to agree on a dispute solution and in most issues governing regulations, such autonomy can be restricted and choice may be invalidated by mandatory local rules of law or applicable conflict law.

Implementation and security or escrow arrangement protecting implementation. In addition to risk of insolvency of the party, the implementation can be restricted or invalidated by mandatory local rules of law or applicable conflict law.

Liability and recent trend of broadening the bases of liability internationally.

Protecting IPR and confidential information. Ownership of propriety rights and intellectual property rights. Restriction of disclosure and use of confidential information.

Origin of funds and money laundering. Clarification and evidence of the origin of the funds.

QUESTION ONE

When representing a client with significant business activities in foreign jurisdictions, what are some key risk-related concerns that arise in a cross-border context and how can a parent company minimise such risk?

When representing a client with significant business activities in foreign jurisdictions, the key risk concerns are generally related to the structure of the transaction. Such concerns include risk intensive conditions of the agreement, controversial issues between the agreement and mandatory laws, conflict of laws, implementation, liability issues and tax consequences.

As regards contract issues, business activities in foreign jurisdictions generally create similar concerns to the parent company as those of cross-border transactions. After agreeing on an optimal structure given the different considerations of the parties, negotiations regarding the business transaction can proceed rationally. When determining the transaction, the parties should consider relevant issues that may influence the structure, including implementation, tax and liability.

From the parent company's perspective, governing law, dispute solutions and liability are typical provisions that need additional consideration in an international context.

Generally, negotiations mainly focus on comparisons between the courts or arbitration tribunal of the parties' countries or, alternatively, the choice of a third jurisdiction. In addition, the parties may agree on an alternate dispute resolution provision. The ADR provision is also usually favourable to the party most likely to present claims.

In general, the parties have the autonomy to select the law governing their contracts, while the parties are also free to agree on a dispute solution. Nevertheless, such autonomy can be restricted and choice may be invalidated by mandatory local rules of law or applicable conflict law. The same applies to implementation of the resolution or judgement, obtained in the dispute.

Regarding liability, mandatory local rules of foreign jurisdictions and the recent trend of broadening the bases of liability internationally also create risks to the parent company, located in another jurisdiction.

While the parent company's international counsels structure the transaction and prepare the agreement, it is also extremely important that local lawyers from the subsidiary's jurisdiction are consulted regarding local mandatory laws.

As regards tax consequences, the risk of double taxation typically should be minimised. This requires knowledge of the tax laws in the parent and subsidiary company's jurisdictions, as well as any existing tax treaty between the countries. Although such tax issues are taken into consideration by the parent company's tax lawyers, it is also necessary that local tax experts from the subsidiary's jurisdiction are consulted as well.

QUESTION TWO

What degree of control should a parent company have over its overseas subsidiaries? How does the degree of control impact the risk exposure level, and how can control issues be managed to minimise liability?

In order to estimate the level and importance of the degree of control, it is first necessary to clarify the definition of "control of a foreign corporation".

While such definitions vary by jurisdictions, there are some basic common rules. Generally, controlled subsidiary refers to a foreign corporation that meets a stock ownership test. In many cases, such a test is met if more than 50% ownership of either the total combined voting power of the foreign subsidiary's stock entitled to vote, or if the total value of the stock is owned by the domestic parent company.

Furthermore, when determining "stock owned", you can consider only the stock owned directly or also the stock owned indirectly, and you may or may not consider constructive ownership.

Once the said "control" occurs, it may influence taxation aspects. It may result in a tax obligation to the parent company on its foreign subsidiary's income and earnings tax, even if not distributed.

Secondly, "control" of the subsidiary may affect the parent company's immunity regarding the owners' isolation against liability. Such risk of "piercing the corporate veil" means that the corporate structure with its attendant limited liability of stockholders, may be disregarded and personal liability gets imposed on stockholders in the case of wrongful acts being carried out in the name of the corporation. Among other things, degree of control may be one of the aspects that should be considered regarding such liability.

In conclusion, the parent company should have an optimal degree of control over its overseas subsidiaries taking into account on the one hand business reasons, and the risks related to taxation and liability on the other. Business reasons may require a maximising of control and power on the decision making of the foreign subsidiary. Conversely, minimising risks regarding tax and liability issues may require that the test of "control of a foreign corporation" shall not be met as the case may involve various jurisdictions.

QUESTION THREE

What constitutes the right balance between risk and liability for a company and its overseas subsidiary? What examples can you give?

The parent company and its overseas subsidiary are separate legal entities, incorporated under the corporate laws of each country. Generally, the term "corporation" in various jurisdictions includes business entities with factors of centralisation of management, continuity of life, free transferability of interests, the objective to carry on business and divide profits and limited liability.

Limited liability is an essential factor for the parent company and its subsidiary. Generally, both companies carry their own liabilities and risks, and the parent company should not be liable for risks related to its subsidiary, nor should the subsidiary be liable for the risks associated with the parent.

However, the parent company typically owns 50%-100% of the stock of its subsidiary. Thus, the parent company always has the risk of losing its contribution to the subsidiary's equity and capital.

Exceptionally, overseas operations and businesses of companies may require that the subsidiary and the parent company share the risks and liabilities. Typically, the parent company may guarantee a loan taken by the subsidiary, or undertakes to answer for the debt, default or miscarriage. On rare occasions, the subsidiary may do the same for the parent company. Furthermore, the parent company may provide security for the subsidiary or guarantee it against losses. To the extent that business reasons require such a commitment, this naturally constitutes the right balance between risk and liability for a company and its overseas subsidiary.