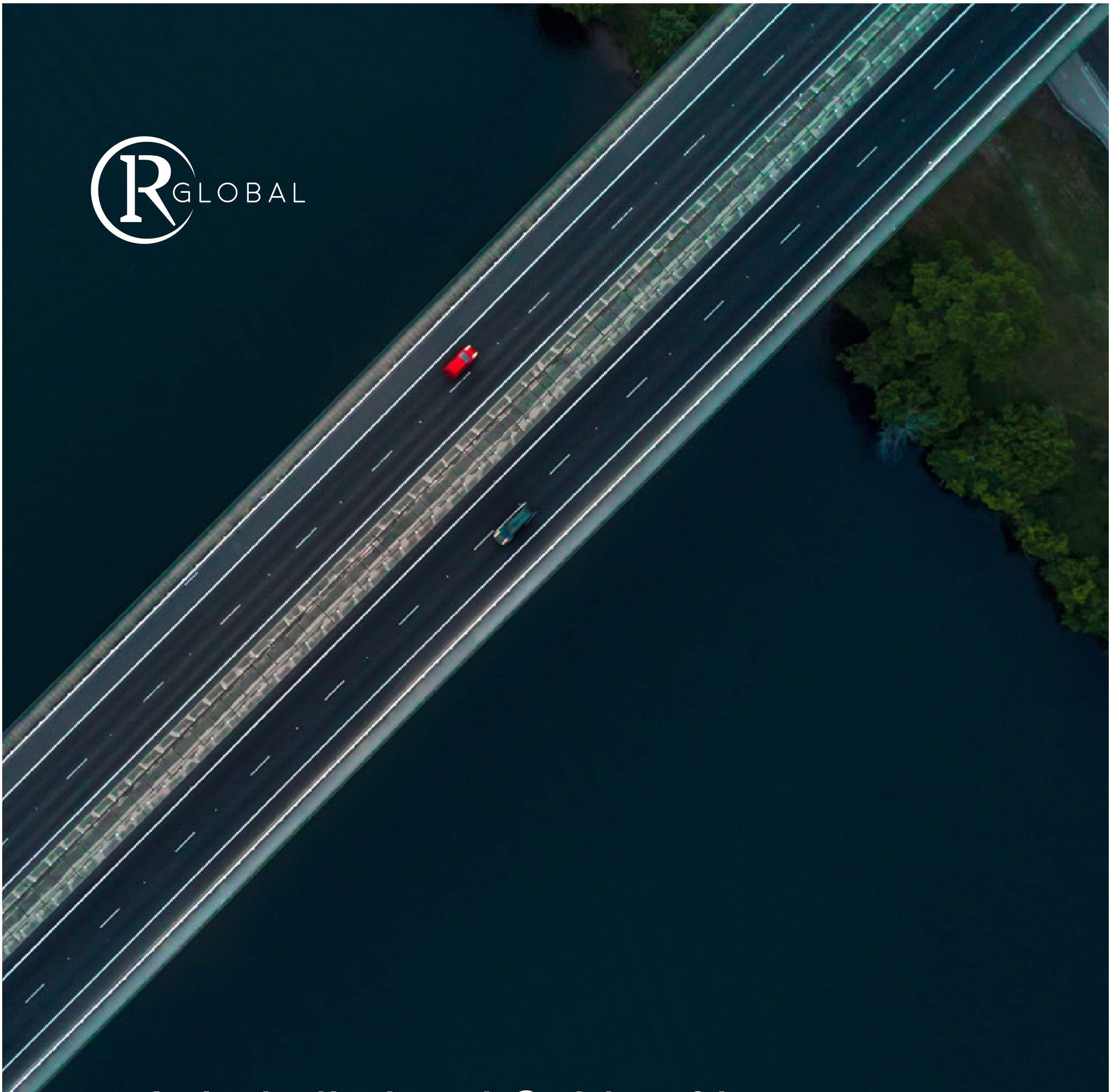

A Jurisdictional Guide of how to Manage Risk in Multinationals

Advice from Outside Counsel

IR Global members collaborate with the Association of Corporate Counsel (ACC) to offer their jurisdiction-specific perspectives when representing a client with significant business activities in foreign jurisdictions.

IR Global - Going Beyond Expectations

IR Global was founded in 2010 and has grown to become the largest practice area exclusive network of advisors in just a few years, this incredible success story has seen the network awarded Band 1 status by Chamber & Partners, recommended by Legal 500 and has been featured in publications such as The Financial Times, Lawyer 360 and Practical Law amongst many others.

The group's founding philosophy was based on bringing the best of the advisory community into a sharing economy; a system, which is ethical, sustainable and provides significant added value to the client.

Businesses today require more than just a traditional lawyer or accountant. IR Global is at the forefront of this transition with members providing strategic support and working closely alongside management teams to help realise their vision. We believe the archaic 'professional service firm' model is dying because it's expensive and often slow to react. In IR Global, forward thinking clients now have a credible alternative, which is open, cost effective and flexible.

Our Founding Philosophies

Multi-Disciplinary

We work alongside legal, accountancy, financial, corporate finance, transaction support and business intelligence firms, ensuring we can offer complete solutions tailored to the client's requirements.

Niche Expertise

In today's marketplace, both local knowledge and specific practice area / sector expertise is needed. We select just one firm, per jurisdiction, per practice area ensuring the very best experts are on hand to assist.

Vetting Process

Criteria is based on both quality of the firm and the character of the individuals within. It's key that all of our members share a common vision towards mutual success.

Personal Contact

The best relationships are built on trust and we take great efforts to bring our members together via regular events and networking activities. The friendships formed are highly valuable to the members and ensure client referrals are handled with great care.

Co-Operative Leadership

In contrast to authoritarian or directive leadership, our group puts teamwork and self-organisation in the centre. The group has steering committees for 12 practice area and regional working groups who focus on network development, quality controls and increasing client value.

Ethical Approach

It is our responsibility to utilise our business network and influence to instigate positive social change. IR founded Sinchi a non-profit that focuses on the preservation of indigenous culture and knowledge and works with different indigenous communities / tribes around the world.

Strategic Partners

Strength comes via our extended network, if we feel a client's need is better handled by someone else, we are able to call on the assistance of our partners. First priority is to always ensure the client has the right representation whether that be with a member of IR or someone else.

Rachel Finch
IR Global - Channel Sales Manager
rachel@irglobal.com

Contributors

FOREWORD BY EDITOR, ANDREW CHILVERS

Managing Cross Border Risk: Advice from Outside Counsel

Many companies look to grow their business through mergers or acquisitions of companies outside their own country and while this brings many opportunities it can also bring risks. But with sound advice such risks are worthwhile, and the right deal can bring significant value to the parent company.

For any ambitious business acquiring or merging with a company overseas is an ideal way to increase profits and access new markets. But doing deals outside your home jurisdiction can bring many hurdles at each step of the process – even in countries that appear closely aligned. If a deal is to be concluded successfully and add value in the future, then it is crucial that all potential risks are understood and mitigated against prior to its conclusion. Understanding risk can also help to ensure that the integration process is as smooth as possible after the deal has been completed.

For a cross-border deal, regulatory issues often pose the biggest risks. Whether the regulations relate to the country or the sector of the acquired entity, they can cause significant headaches throughout the deal process. Comprehensive due diligence at an early stage of the deal is crucial for mitigating risks – so choosing an adviser with knowledge of the country or sector (or both) of the target business, along with a network of local professional contacts, can help to ensure there are no unwelcome regulatory surprises.

Tax is another risk that must be factored into a cross-border deal as each country has its own tax rules that can differ markedly. Again, engaging advisers who have experience in the country and/or industry can be vital in helping acquirers to understand local tax rules and avoid any pitfalls to ensure compliance.

Similarly, legal requirements can also vary markedly between jurisdictions and can pose significant risks to a deal. Legal aspects need to be understood at an early stage – even when investigating an opportunity – to ascertain if a deal can proceed.

Politics and instability in the target company's jurisdiction can pose another risk, although some regions are more unstable than others, such as Latin America and the Middle East. While some political or economic events can happen with little or no warning, comprehensive due diligence should be able to gauge the risk of instability increasing in the future. If this is the case, strategies can be put in place to mitigate the effects of any volatility. If the risk is deemed too great, the deal can be shelved entirely.

Of course, mergers and acquisitions are also about the people involved, and issues with management should not be underestimated. Clarity of purpose and clear communication is crucial, so understanding any cultural challenges from the outset can pre-empt any management issues and help retain key personnel once the deal has been completed to ensure a smooth transition. Here, an advisor with experience in the country of the target is important, but just as crucial is their negotiating skills.

Once a deal has been completed, there will still be a myriad of issues to overcome when integrating the acquired business that are likely to be different to those in the pre-deal phase including cultural differences, incompatible technologies and the challenge of operating in different languages or time zones.

Due diligence can flag some of these issues prior to the completion of the deal and devising a post-deal integration plan, including defined targets for performance improvement, can help to ensure the deal is successful.

All these factors – and more – present risks to any deal, but with comprehensive planning and the right advice at the right time from experienced professionals, the deal can realise the value that was hoped for when it was first plotted.

In the following global guide each legal advisor talks candidly about how multinationals need to understand how to manage risk in different jurisdictions to ensure they comply with the range of regulations – and to ensure business success.

Andrew Chilvers
IR Global - Editor & Copywriter
andrew@irglobal.com

IR Global - Contributors by Region

IR Global Commercial experts are at the forefront of the constantly developing legislation in their respective jurisdictions. Our members are not just content to be part of the industry but also aim to lead it through innovation, above all else; our members are proud hold the highest ethical standards.

17. Bruce Loren
Partner, Loren & Kean Law
irglobal.com/advisor/bruce-loren

18. Noreen R. Weiss
Partner, MacDonald Weiss PLLC
irglobal.com/advisor/noreen-weiss

22. Michael Roberts
Partner, RM Partners
irglobal.com/advisor/michael-roberts

01. Adriana Posada
Partner/Director, A & C Legal
irglobal.com/advisor/adriana-posada

13. Jonathan Mazon
Partner, Junqueira, le Advogados
irglobal.com/advisor/jonathan-mazon

10. Pablo González Tapia
Founding Partner, González Tapia Abogados
irglobal.com/advisor/pablo-gonzalez-tapia

23. Cristina Sánchez Vebber
Partner, Sánchez Devanny
irglobal.com/advisor/cristina-sanchez-vebber

04. Tuomo Kauttu
Partner, Aliant Finland
irglobal.com/advisor/tuomo-kauttu

05. Mercedes Clavell
Of Counsel, Arco Abogados
irglobal.com/advisor/mercedes-clavell

05. Roger Canals
Partner, Arco Abogados
irglobal.com/advisor/roger-canals

07. Hugh Clohessy
Partner, Clohessy Minihane
irglobal.com/advisor/hugh-clohessy

08. Robert Lewandowski
Partner, DLP Dr Lewandowski & Partners
irglobal.com/advisor/robert-lewandowski

09. Gunther Schmidt
Founding Partner, ENDEMANN.SCHMIDT
irglobal.com/advisor/gunther-schmidt

09. Dr. Markus Steinmetz
Partner, ENDEMANN.SCHMIDT
irglobal.com/advisor/markus-steinmetz

11. Nicholas Hammond
Partner, Hammond-Partnership
irglobal.com/advisor/nicholas-s-hammond

12. Mark Chapman
Partner, Herrington Carmichael
herrington-carmichael.com/our-people/mark-chapman

15. Ruggero Rubino Sammartano
Partner, LawFed BRSA
irglobal.com/advisor/ruggero-rubino-sammartano

25. Eric Weil
Partner, Weil & Associés
irglobal.com/advisor/eric-weil

26. John Wolfs
Managing Director, Wolfs Advocaten
irglobal.com/advisor/john-wolfs

19. Ramanand Mundkur
Partner, Mundkur Law Partners
irglobal.com/advisor/ramanand-mundkur

20. Joshua Chu
Consultant, ONC Lawyers
onc.hk/en_US/joshua-chu

20. Dominic Wai
Partner, ONC Lawyers
irglobal.com/advisor/dominic-wai

21. Nicholas Chen
Partner, Pamir Law Group
irglobal.com/advisor/nicholas-v-chen

02. Ajibola Edwards
Partner, Adeniji Kazeem & Co.
irglobal.com/advisor/ajibola-edwards

03. Dina Assar
Associate, Al Dahbashi Gray
adglegal.com/people

06. Dadash Alishov
Director, Baku Consulting Group (BACG)
irglobal.com/advisor/dadash-r-alishov

16. Mohamed Agamy
Managing Partner, Links & Gains Law Firm
irglobal.com/advisor/mohamed-agamy

24. Mitchell C. Shelowitz
Managing Partner, SLG Shelowitz Law Group
irglobal.com/advisor/mitchell-c-shelowitz

14. Ross Koffel
Principal, Koffels Solicitors & Barristers
irglobal.com/advisor/ross-koffel

COLOMBIA

Adriana **Posada**

Partner/Director, A & C Legal

+57 1 702 3615
aposada@aycasesorias.com
aycasesorias.com
irglobal.com/advisor/adriana-posada

Adriana Posada-Velásquez is a Colombian lawyer (1991), with a specialisation in Contractual Law and Business Juridical Relations (1999), Diploma in International and American Law (2003) and MBA (2010). She is partner, founder and director of A&C Legal with vast experience in corporate law, commercial law, M&A, and finance matters, with emphasis, among others, on the pharmaceutical industry.

Her knowledge of her clients, their industry and operations, as well as her solid strategies and structured plans, allow her to provide successful legal support for her clients' projects and direct M&A and reorganisation processes.

A&C Legal is a boutique law firm incorporated in Bogotá, Colombia in 2009, providing innovative and timely legal assistance as well as paralegal solutions. Our business process outsourcing model promotes the efficiency of our service by working with our clients as an in-house legal department. This helps them to focus on the normal course of their business, while we take care of their day-to-day legal requirements in areas such as corporate, contractual, commercial, labour, administrative, compliance and litigation.

Above all, A&C Legal is a visionary company aiming to achieve sustainability by integrating green-efficient practices and corporate diplomacy.

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

> Do not assume that foreign markets are/are not as sophisticated as developed ones. There are markets where certain areas are unregulated, or regulated in a more lenient manner, or are over regulated, but this doesn't mean that your assessment of risk should abide by local rules exclusively.

> Understand the particularities of the given market and what is more relevant in their legislation for your industry.

> Plan ahead. Your initial subsidiary may be small, but if your plans are to grow, or to have other subsidiaries in the rest of the country or region, you may need a different type of legal entity than originally envisioned. Make sure that your outside counsel is aware of these plans to better serve your needs.

> Think before you incorporate, so you can select the legal vehicle that best fits your needs. That will allow you to better mitigate risk. It is far easier to create a company than to close one.

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?

Colombia is part of the OECD since 2019, which is why it has committed itself as a country to follow the principles and guidelines dictated for multinational companies. Such principles and guidelines have been built taking into account the main risks to develop commercial activities.

Aligned with this, multinational companies based in countries that are OECD members should ensure that their subsidiaries comply with local law in general, and in particular with regard to legal obligations regarding the disclosure of information, human rights, employment and labour relations, environment, fight against corruption, science and technology, consumer law, competition and taxes in order to prevent adverse impacts.

As far as key risks are concerned, we have found that anti-bribery and anti-corruption (ABAC) risk is the highest for multinational clients. Many markets in emerging countries have high corruption levels, and it is difficult from a parent company's perspective to have a clear understanding of the anti-bribery and anti-corruption risks that may be associated with a particular interaction at a local level. Outside counsel can provide assistance in identifying the key public entities/individuals that may be involved in a particular interaction and potential market restrictions. However, reliance on the local subsidiary's understanding of the associated risks and how to mitigate them is also essential. The parent company cannot have a micro-management approach to everyday operations, but it needs to fully understand where the biggest risks are so the parent company's management can be informed and fully aware of major decisions.

The second biggest risk, and one that is difficult to mitigate, is perception risk. Understanding whether an interaction should go on even if it is legally permissible when there may be a perception risk is also essential.

A risk that remains latent in Colombia is security, which implies that companies, in certain sectors of the economy, and in certain locations, may be subject to constraints by crime. Companies must have robust policies for prevention and safety management so that they do not violate the law.

Finally, potential interactions with restricted parties as per global trade controls lists is also a significant risk for multinational companies. Appropriate internal assessment and due diligence prior to any interaction with a local counterparty, as well as training on the matter, is necessary to avoid engaging with restricted parties and individuals. In Colombia, in particular, the risk of money laundering is considerable, and local regulations to control this are profuse and difficult to manage for a company that is just starting to do business in the country. Proper assessment by external counsel is key to avoid any risks.

Nevertheless, the aforementioned risks must be minimised through the establishment of periodic due diligence processes, which can determine the degree of compliance or non-compliance with regulations and any corrective measures needed to reduce the exposure to adverse impacts.

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?

The general principle under Colombian Law is that commercial companies are not disregarded entities. Nonetheless, this principle has some exceptions, depending on the nature of the company, the kind of contracts developed by the company in the country, and the acts developed by the parent company or shareholders by which they could be considered or declared as joint liable for some obligations of the company.

Consequently, the parent company must have a sufficient degree of control that allows it to ensure that the activities carried out by its subsidiaries or shareholders are carried out in compliance with local laws and in such a way that no responsibility can be established for the parent either by participating in decisions that could lead the company to breach its obligations or by failing to take the necessary measures to prevent the management of the subsidiary from causing damage to third parties. For example, to prevent the company from entering into default payments of obligations that may cause it to enter into grounds for liquidation.

Among these measures it is suggested that robust personnel selection processes be carried out so that the directors and officers of the subsidiary have knowledge of local law, clear criteria of responsibility for administrators and sufficient professional criteria that allows them to measure the risk that their actions might bring to the company.

In our experience, a proper local assessment of the areas where risks are more relevant, training, mitigation and clear internal processes, have a better incidence in prevention of risk. A robust tone at all levels, top, middle and bottom, with an emphasis on accountability also helps to make it clear for the local organisation that there is zero tolerance of risky activities.

QUESTION THREE

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

Considering the responsibility that can be given to the parent for their actions or omissions in the management of the subsidiaries, under local law and international principles, in the classification of risks – financial, commercial, perception, legal, enforcement – it is clear that enforcement risks, regardless of the potential return of investment, should not be assumed.

But a thoughtful risk-taking assessment could yield an assumption of legal, financial, commercial or even perception risk, with a robust mitigation plan and, in particular, for legal risk, an opinion from external counsel with the potential interpretations of the law and which one would have a chance to better win in court.

NIGERIA

Ajibola **Edwards**

Partner, Adeniji Kazeem & Co.

+234 162 820 123
a.edwards@adenijikazeem.com
adenijikazeem.com
irglobal.com/advisor/ajibola-edwards

Ajibola Edwards is a senior partner in AK & Co where he oversees the commercial and government relations department of the firm. Over the years Ajibola has advised Nigerian and international clients on projects in construction, technology, oil and gas – including early production systems for extraction of gas and oil – and recently acted as transaction adviser for a Nigerian company's acquisition of a UK entity.

Ajibola is also a strategic advisor to several Nigerian, international and multinational businesses and is a fellow of The Institute of Credit Administration.

Adeniji Kazeem & Co. was established in 1996 as a one-stop legal centre to provide value added and quality legal services to the Nigerian and international business community. The firm provides a wide range of legal services to the private and public sector and has a rapidly growing portfolio of international clients. It currently has offices in Lagos and Abuja.

Our attitude reflects the philosophy of legal practice for the 21st century lawyer, looking beyond the purely legal aspects of a project or transaction and considering the relevant commercial considerations.

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

> Rigorous due diligence before entry – multinationals entering high-risk industries or jurisdictions are advised to conduct extensive background checks on local partners, and research the potential market and country using the services of tried and trusted professionals who understand the local terrain.

> For the effectiveness and efficiency of the country's court system and ease of enforcement of contracts, multinationals will require certainty regarding how long a dispute will take to resolve and that its local partners are held to their obligations.

> Meanwhile, for ease of transfer of foreign exchange outside the country – multinationals want to be satisfied that the jurisdiction in which they are investing does not have policies that may limit their ability to transfer the dividends of their investments to their home countries.

> Regarding low risk of expropriation of assets, multinationals want assurance that there is little or no risk that their investments will be expropriated by the host government for little or no value.

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?

In our experience, the major cross-border concerns faced by multinational company (MNC) clients investing through subsidiary businesses in emerging markets such as Nigeria are a mixture of political and economic hazards. These create uncertainty over the MNC's ability to recover its investments and make profits, especially where such subsidiaries rely on government institutions and policies of the host country to thrive.

For example, there is the unpredictability of government policies subsequent to a transition in the elected government of the host country, where the policies that formed the basis of the MNC investment may be targeted or discontinued due to partisan political interests.

Other examples are uncertainty over the effectiveness and efficiency of the country's court system to resolve disputes and enforce contracts between the subsidiary and its local partners in a timely and cost-efficient manner. Erratic foreign exchange fluctuations that can erase commercial gains and policies limiting the transfer of foreign currency are also worries.

Yet another concern is the possibility of expropriation of invested assets by the host government, although this concern is minimal in Nigeria, which has legislation that provides guarantees against this (see Section 25 of the Nigerian Investment Promotion Act).

We advise our clients on various entry strategies to reduce their risk exposure and other mitigating measures where the client determines that it is willing to take a higher risk position, such as a majority or full ownership of the subsidiary because of what it perceives as a low-cost and high-growth market environment. Entry strategies include limiting equity ownership in subsidiaries and spreading the risk with local partners, choosing local partners that understand the market or that can influence policy and effective contractual structuring. Meanwhile, strategies for mitigating risk in a majority or full ownership situation include CSR and proactive lobbying to influence government policy, subject, of course, to anti-bribery and corruption legislation, as well as operational measures.

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?

Control over subsidiaries is exercised by a parent company to limit country risks, such as political and economic hazards, by limiting its ownership of a subsidiary (and thus, the extent of its investment) and spreading the risk to the subsidiaries' other shareholders. But a fine balance is necessary to limit legal risks as the degree of control exercised by a parent over its subsidiary is one of the elements considered by the courts in determining the liability of a parent company for tortious and criminal acts of its subsidiaries.

For example, consider the case against Royal Dutch Shell plc in the UK over the actions of its Nigerian subsidiary in Okpabi & Ors v Royal Dutch Shell Plc & Ors EWCA (2018) Civ 191. It was considered whether there was sufficient proximity between the parent company and subsidiary as a result of mandatory policies and oversight by the parent over its Nigerian subsidiary, such that it could be said that the parent had exercised control over the subsidiary. Ultimately it was decided by the UK Court of Appeal that the policies put in place were applicable to all the parent's subsidiaries, not just its Nigerian subsidiary alone, and that it could, therefore, not be considered to be a specific exercise of control over the subsidiary's operations to make the parent liable for the subsidiary's actions.

Similarly, in the case against Unilever in the UK in respect of acts of its Kenyan subsidiary, the UK Court of Appeal held in AAA & Ors v Unilever Plc & Tea Kenya Ltd (2018) EWCA Civ 1532 that, although the parent company had put in place general policies to govern the affairs of its subsidiaries, there was not sufficient proximity to give rise to a duty of care on the part of the parent company as the implementation of the policies had been supervised by the subsidiary itself.

QUESTION THREE

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

MNCs must implement adequate control measures to protect their brand as any damage from one subsidiary can spread and tarnish their reputation worldwide. At the same time the risk factors related to direct or full control of a subsidiary make it prudent for the MNCs to strike the right balance between control and risk.

As discussed, MNCs can balance control by providing uniform guiding principles to its subsidiaries that articulate the ethos of the parent brand, but cede supervisory authority over the implementation of those to the subsidiaries that understand the local terrain better. Examples are the policies implemented by the parent companies in the Royal Dutch Shell and Unilever cases. Both companies were exonerated of the liability incurred by their subsidiaries because although they provided general policies to guide the processes of their subsidiaries, they had no direct involvement in how they were implemented.

UAE

Dina **Assar**

Associate, Al Dahbashi Gray

+971 4 441 2031
da@adglegal.com
adglegal.com
adglegal.com/people

Dina Assar is an experienced lawyer, fluent in English and Arabic, who works across a variety of practice areas, particularly corporate, civil, commercial and criminal matters, including litigation and dispute resolution. Dina qualified from Alexandria University in Egypt in 2008, practicing in Alexandria until 2015, when she moved to Dubai to join Al Dahbashi Gray. Dina has significant experience advising on a broad range of areas and specialises in commercial litigation.

Al Dahbashi Gray is an innovative full-service UAE law firm providing an unparalleled international legal service from its Dubai office, with further offices in the UK and Egypt. We employ a collaborative approach to providing advice, believing that the way to help clients achieve their goals and resolve disputes is to use the very best individuals in the field, irrespective of location and employer. To achieve this, we work hard to discover and develop relationships with the highest-calibre lawyers from a range of law firms, together with other professionals worldwide, creating bespoke teams for each client.

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

- Make sure the jurisdiction is the right jurisdiction to operate in.
- Choose a reliable local partner.
- Take the best measures when appointing management and delegate them precise authorities.
- Make sure to visit the jurisdiction to understand the culture and interact with people on ground.

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?

The UAE is one of the most active international business hubs in the region, so we come across many multinational clients with diverse business portfolios that stretch across multiple regions and jurisdictions. When representing those clients, we generally face problems related to the application and interpretation of the law, as well as jurisdictional and inherent cultural challenges. These may relate to public policy misinterpretation, judge's understanding and/or expertise in relation to our clients' line of business (being different to typical business in the country).

The challenges can be summarised as follows:

i. Laws being vague with varying levels of ambiguity and room for interpretation.

ii. When there is clear written law, the judicial or administrative authorities may opt to take what appears to be a contradictory approach. Some government agencies follow practices that are inconsistent with certain provisions of law or are subject to a different interpretation of such provisions.

iii. Local courts can still take jurisdiction over certain disputes presented to them, even though the parties may have contracted to submit the dispute to a jurisdiction outside the UAE.

iv. Culturally, people are reluctant to say "no" in Arabic cultures, making some tasks seem simple when explained but more challenging in practice.

Accordingly, we always advise our clients not to rely solely on written law, but rather to take an appropriately practical approach. This must consider local customs in terms of interpretation provisions. It is helpful to rely on judicial precedents in the UAE, even those not strictly binding, especially ones issued from the court of Cassation, as they are often followed by judges in the courts of First Instance and Appeal.

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?

Parent companies based in jurisdictions outside the UAE are advised to keep tight control over their UAE subsidiaries to mitigate the risks that may arise from operating in an environment that is legally and culturally different.

Such control would initially start from the inception of the subsidiary entity in the UAE – or the Middle East – where we advise clients on the ideal type of company formation, depending on their business activities and other economic factors. Appointment of management and delegation of authority is a critical part of the process.

After the company is formed, we advise and support our clients to maintain a strong corporate governance programme for their UAE and Middle East entities. For example:

- Functional AGMs.
- Ensuring provisions of commercial company law and tax law (if any) are adhered to, especially in terms of timelines, statutory disclosures and submissions to governmental authorities and regulators.
- Maintaining accurate financial records, as per the provisions of commercial company law and the subsequent financial laws of the UAE.
- Oversight on management and control over their authorities.

QUESTION THREE

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

By having a subsidiary in a foreign jurisdiction, parent companies automatically assume certain risks and exposures inherent to such jurisdictions. We support our clients to reduce these risks, prioritising the development of a risk mitigation plan that balances risk and liability and focuses on enhancing preventive measures.

A common example in the UAE would be if a company took the Dubai International Financial Centre (DIFC) as a place to operate. This will, in most scenarios, automatically expose them to other means of common law principles that might negatively affect the style or direction of the client's business. Nonetheless, for international clients, a place like the DIFC allows them to operate comfortably with common international laws and standards.

FINLAND

Tuomo **Kauttu**

Partner, Aliant Finland

+358 931 574 101
tkauttu@aliantlaw.com
aliantlaw.fi & aliantlaw.com
irglobal.com/advisor/tuomo-kauttu

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.

SPAIN

Mercedes **Clavell**

Of Counsel, Arco Abogados

+34 934 871 020
mercedesclavell@arcoabogados.es
arcoabogados.es/es
irglobal.com/advisor/mercedes-clavell

Roger **Canals**

Partner, Arco Abogados

+34 934 871 020
rogercanals@arcoabogados.es
arcoabogados.es/es
irglobal.com/advisor/roger-canals

Mercedes started her career as a tax advisor at one of the 'Big Four' companies, but after some years she focused her practice in three main areas: corporate, commercial and real estate, always with an international component: many of her clients are foreign companies or individuals, or Spanish international companies.

In corporate issues, Mercedes has experience in starts-up, mergers, acquisitions, joint ventures and other types of strategic alliances, due diligence, shareholders' agreements, conflicts among shareholders, winding up companies, etc. She has closely worked with consultants; therefore, she can provide a business and strategic approach, apart from legal advice.

Roger has more than 15 years' experience as a lawyer. He has developed his career at top Spanish law firms, providing legal advice to Spanish and international companies operating in a range of sectors such as life sciences, retailing, construction, real estate, engineering, chemical industries, automotive and pharma.

His command of English, French and Italian, along with Spanish and Catalan, has allowed him to build up a substantial international practice, managing relevant international clients' interests in Spain, including ongoing legal advice and/or managing court cases and restructuring processes on their behalf.

Arco Abogados y Asesores Fiscales was formed by lawyers and tax advisors focused on providing the highest quality advice to companies and individuals.

Many of Arco's lawyers have more than 20 years' experience at public administrations, leading law firms or private companies, always with an international approach. Our commitment is to provide quality advice and timely responses at competitive prices.

Our lawyers speak a range of languages (English, French, Italian) and understand the client's businesses and needs in the fast-moving international environment. We have long-lasting relationships with many of clients, Spanish or international. This is probably due to the fact we always look for the most cost-effective solutions, while cultivating personal relationships.

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

> Map your risks: Legal risks could come from regulatory issues, customers, purveyors, management, workforce, minority shareholders or other stakeholders, other business matters like competition from other players, the political situation, financial crashes or lack of judiciary independence.

> Risk from regulatory issues is probably one of the biggest threats and could vary widely depending on the business sector. These include authorisations to develop the activity, data protection, environmental, land planning, corruption, exchange controls, customs duties, taxation, etc.

> Risks from customers and purveyors could be reduced – but in general never completely avoided – through good quality legal documents. Disclaimers and general sale conditions are essential in agreements with clients.

> Choose the correct legal counsel: easily available, clear and concise in their answers, understanding when practical advice is needed or when a thorough analysis is requested, aligning with the company's goals in each transaction and finding the right balance between avoiding risks and getting the deal done.

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 any company is planning to invest abroad, risks to be taken into consideration vary depending on the scheme chosen: risks related to direct investment schemes – incorporating a subsidiary abroad – differ significantly to those related to indirect investment schemes.

In a direct investment scheme, the main risks to be considered are:

- To meet regulatory requirements to carry out any given business activity at destination. The proliferation of macro-economic regions around the globe has entailed a significant rise in regulatory requirements to set up almost any kind of activity – not only those traditionally regulated. Thus, a preliminary regulatory due diligence at destination is highly advisable.
- Labour statutes: when planning to engage employees abroad, it is crucial to know the local statutes and regulation on labour and social security, as there may be significant differences in the regulations of countries belonging to the same economic region.
- To create a corporate scheme to protect parent companies from potential contingencies arising out of investments abroad. As there is an inherent financial risk in investing abroad, it is important to implement a corporate scheme at destination that provides firewalls to the parent company in case of subsidiaries' failure/bankruptcy. For instance, under EU insolvency statutes, a mother company may become liable for subsidiaries' debts if they become bankrupt.

Tax issues and cost of profits' repatriation.

In an indirect investment scheme through a contractual framework other risks, in addition to regulatory requirements, that should always be carefully studied, must be considered, include:

- As commercial agreements could be a source of litigation, efficiency and independence of local state courts should be carefully looked at in terms of length of procedures, judgements' enforceability and injunctions of debtor's assets. Depending on the reliability of local courts, it is highly advisable to opt for arbitration.
- Setting up contractual provisions to ensure an adequate degree of control over the local partners – suitable auditing procedures on sales and income, payments' insurances, caps to indemnifications/compensations in case of early termination, etc.
- Transfer of risks conditions and customs.

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?

The answer is, in principle, easy: the degree of control should be as high as possible, being limited only when the controls become a hindrance for the business itself.

We could find different degrees of control in multinational groups, mostly depending on the age or seniority of the group:

- Nowadays, thanks to globalisation and technology, many start-ups quickly become a multinational group. In general, this type of group grants wide authorities to the local management, as they focus more on growing than controlling. My advice to these groups is to implement this very easy control measure: the accounting and legal services providers should be different and independent companies appointed by the parent company, not by local management, and these service providers should report to the parent company, not to local management, except for day-to-day matters. When auditing services are needed, they should also be appointed by and report to the headquarters.
- In big and well consolidated groups controls are implemented usually at four levels: management, accounting, banking and legal (apart from the operations itself):
    i. Local management is usually granted limited authority.
    ii. A single but sophisticated accounting tool is implemented in all subsidiaries, allowing the parent company to verify directly each subsidiary's accounts.
    iii. Thanks to online banking, the parent company has access to and can operate all subsidiaries' accounts.
    iv. The parent company's legal counsel, which has wide and deep knowledge of the company's activities, and experience obtained from the challenges faced in different jurisdictions, co-ordinates the work of the foreign legal advisors to align them with the company's goals.

The implementation of these control measures requires a certain degree of experience at the headquarters' management and staff to avoid becoming a hindrance, because of excess of control or control wrongly applied for the development of the group's activities.

QUESTION THREE

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

In our experience business opportunities abroad may create tensions between business managers who seek turnover and income and tend to minimise the potential impact of legal risks at destination, to in-house legal departments, who in such contexts tend to be set aside by business managers.

In these sorts of contexts, it is key to provide appropriate legal counsel to managers to give them a clear picture of the potential risks involved in any given transaction, and the feasibility/possibilities that such risks occur. Depending on the degree of risks detected, it is even advisable to waive the transaction. For instance, high-risk for the parent company to be fully liable of subsidiaries' debt, regulatory requirements implying disproportionate investment costs, failure of the contractual counterparty to provide adequate collaterals to ensure payments.

Examples of such risks – not properly assessed before starting activities abroad – include:

- Unexpected costs to meet local regulatory requirements (environmental standards, urban planning requirements, etc).
- Unexpected labour costs when dismissing key managers/employees at destination.
- Financial losses due to lack of suitable collaterals provided by debtors to ensure contractual payments.
- Financial losses due to inefficiency and/or unreliability of local courts (or not subjecting disputes to arbitration).

AZERBAIJAN

Dadash **Alishov**

Director, Baku Consulting Group (BACG)

+994 124 9789 65/66
alishov_dadash@bacg.az
bacg.az/en
irglobal.com/advisor/dadash-r-alishov

Dadash R. Alishov has been a member of the Azerbaijan Bar Association since 2005. He has also been honorary legal adviser to the British Ambassador in the Republic of Azerbaijan since 2015. As a lawyer he has extensive experience in civil, commercial and administrative cases. He was involved in the drafting and enactment of several laws related to civil legislation.

Before establishing Baku Consulting Group, he worked for several years as a political/legal specialist at the US Embassy in Baku and then six years as a deputy country director of Booz Allen Hamilton's Azerbaijan office.

As a director of the firm, he and his team represent various international clients' business interests in Azerbaijan and provide legal, tax and accounting services, including regulatory support and governmental liaison on several international and bilateral projects that are currently being implemented in the country.

BACG was established to help actual and potential foreign investors realise their project goals in Azerbaijan and protect their rights and interests through a profound understanding of the legal system, the legal climate and implemented as well as anticipated legislative reforms.

BACG understands the organic regulatory environment of the country and can help clients navigate through shifting organisational structures, bureaucratic processes and legal reforms. Our clients include major multinational corporations and their branches and representatives in Azerbaijan, foreign governments, foreign nongovernmental organisations and local companies from diverse market sectors, including energy, IT, engineering, construction, advertising, education and publishing.

BACG tailors its services to meet individual needs with practical, straightforward legal advice and works alongside clients to achieve the most demanding objectives. BACG experts help clients formulate their enquiries and strategies and are committed to providing them with a full and detailed understanding of relevant legal and related issues.

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?

BACG's experience working with subsidiaries of many foreign companies in the Azerbaijani market has found that the main risk-related concerns for foreign companies before entering into a new country can be classified under the following categories:

- Legal framework risks – this mainly implies deficiencies in the legal system of the country including lack of preciseness and legal certainty in laws and other normative legal acts that regulate almost all aspects of any business, i.e. from establishing a subsidiary to a company's day-to-day operations.
- Financial and compliance risks – exchange rate fluctuations, changes in tariffs and other compulsory state payments, restrictions in profit transfer rules and/or introduction of new taxes etc. are some of the main risk concerns for any international company trading in another market. Along with financial risks, entering into agreements with unknown trading partners without proper due diligence checks may lead to delays in performace and execution of contracts and, in the worst case, government sanctions and financial or other forms of liabilities.
- Political situation and business climate – it is always worth analysing the political stability of a country over the past few years and evaluating mutual business and commercial relations between hosting country and the parent company's country of origin or registration.
- Cultural barriers and differences – for an international company with an intention to establish a subsidiary office in a new market or operate through its other tax residents, it is important to conduct research and understand the peculiarities of local traditions, beliefs and cultural habits beforehand.

To get around issues associated with any of the aforementioed complexities or uncertainties (e.g. from taxation and tax complaince rules, trade and customs restrictions, licence and permits requirements up to political and cultural awareness), it is recommended to research the country's business climate first, to the extent possible, and use the services of foreign experts during initial phases of cross-border expansion to get as much information on the key aspects of the business to be run by the parent company in the new market as possible.

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?

As mentioned, during the initial stages of the newly established subsidiary, the parent company will need an appropriate level of control over the contractual and financial transactions run via the local unit. This is important for being compliant with local laws and vigilant in terms of choosing counterparties because, depending on the laws and regulations of the local jurisdiction, not only the subsidiary but also the parent company may be held responsible for the deeds of the subsidiary and become subject to civil, criminal or administrative liabilities etc.

Therefore, to manage and minimise the risks the parent company may implement its operation system and strategy for its subsidiary in line with local requirements to allow smooth control, as well as use verified third party agencies/companies to service out some of the activities/operational duties of the subsidiary and carry out internal audits as and when required.

QUESTION THREE

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

When it comes to finding the right balance between risk and liability, as a starting point, it will be important to understand whether an entity established in a host jurisdiction is registered as a subsidiary or a "separate company" where the international company is only its founder or one of the founders.

In most jurisdictions, including the Republic of Azerbaijan, subsidiaries (i.e. branches, representative offices) are usually treated as a separate entity from a taxation and accounting point of view, even though they have been founded by a parent company and their activities may easily be linked to that company. In the case of a separate company founded by an international company it usually acts independently in almost all of its transactions and corresponding risks and liabilities, so the level of liability of the founding company in most cases is limited to material and/or immaterial assets in charter capital.

Going back to the subsidiary case, the risk and liability pertaining to the subsidiary, depending on the issue, may become related to the parent company as well. For example, pecuniary or non-pecuniary liability of the subsidiary for any damage or loss to any third party or failure to pay debts, in case of a subsidiary's inability to incur damages or insolvency, depending on circumstances, the liability and/or compensation for damage may be directed to the parent company, where the subsidiary does not have a completely independent standing and all of its activities and results directly or indirectly relate to the parent company.

IRELAND

Hugh **Clohessy**

Partner, Clohessy Minihane

+353 0614 6100
hclohessy@cmlegal.ie
cmlegal.ie
irglobal.com/advisor/hugh-clohessy

Hugh focuses on work in the areas of property, corporate finance, company and commercial law and insolvency. Hugh obtained a BCL from University College Cork and qualified as a solicitor with a leading commercial and banking practice and is a co-founding partner of the firm. He has also obtained diplomas in commercial conveyancing, trust and estate planning and aviation finance and leasing.

He acts for and advises companies, partnerships, pension funds, investors, developers and private individuals on the acquisition, development, leasing, financing and disposal of commercial property.

Hugh is a member of the Irish Society of Insolvency Practitioners and also provides advice across a broad spectrum of insolvency and restructuring matters, acting for insolvency practitioners, directors, shareholders, lenders, borrowers and other stakeholders on a range of issues particularly involving property and property related assets.

Clohessy Minihane Solicitors is an independent legal practice providing a range of legal services across specialist practice areas. The firm provides services to individuals, companies, organisations and public bodies. While based in Limerick City, the firm provides services to clients throughout Ireland and abroad. The firm has experience in property law, commercial and company law and personal injuries law.

We are recognised for providing high quality legal advice across a range of practice areas and for our client-focused service. We have in-depth knowledge of the law and procedure and are forceful advocates of our clients' interests. At the same time, we exercise balance and judgement and can advise on alternatives to litigation such as negotiation, mediation or arbitration.

Key consideration for multinationals operating in high-risk industries and jurisdictions

- The political landscape and the stability of the government and local economy, including the tax system and its effect on the subsidiary's profitability.
- Stable judiciary and a settled legal system where rights by the entity can be enforced against private and local/state entities.
- Whether the jurisdiction is subject to conflict and if the subsidiary in that jurisdiction has the potential to exacerbate the conflict due to its proposed business activities.
- Solid supply chain to ensure continuous and successful operation of the subsidiary.
- Availability of suitably qualified local labour force.

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?

- Political risk and economic stability. Will the company be operating in an environment where the government is stable and welcoming of foreign companies doing business in the country? Is the economy stable? In addition, the rule of law and a settled legal system is a key concern: does the jurisdiction have a system where the company's rights can be enforced, if necessary, against private entities but importantly against local authorities and state entities. One looks to Venezuela and Smurfit Kappa as an example, where the Venezuelan government effectively seized control of the company's Venezuelan operations.
- The tax system is also very important in terms of calculating the tax treatment of the proposed operations of the subsidiary and analysing whether there is material risk of a sudden shift in tax policy that would affect the company and/or its operations.
- Employee rights and entitlements under the local law and the operation of unions/collective agreements should be analysed.
- Solid supply chain to ensure continuous and successful operations is essential, whether it be materials or human resources. An important part of this is the availability of a suitably qualified local workforce.
- Anti-corruption and anti-bribery laws are something which need to be considered and evaluated. Anti-corruption due diligence in a cross-border scenario faces additional complexity due to the potential application of multiple anti-corruption laws as well as language and cultural differences of the parties. These elements will make the anti-corruption due diligence particularly challenging in high risk jurisdictions. There has been an increase in recent years in the number of countries which have introduced or have proposed to introduce anti-corruption laws . Some anti-corruption laws may have extensive extra-territorial application. For instance, both the UK Bribery Act 2010 and the US Foreign Corrupt Practices Act 1977 have a similar broad extra-territorial application, even though the UK Bribery Act is widely considered to be more far reaching than the FCPA. As a result, many international companies (and their subsidiaries) fall within the scope of the Acts and have policies and procedures in place to ensure they comply with them. The behaviours that may amount to an offence under, and be caught by, anti-corruption laws may vary significantly. Some laws may limit their application to bribing foreign government officials while others may extend their reach to bribing domestic as well as foreign officials and to receiving bribes. Other anti-corruption regimes may also tackle commercial bribery and corruption or failure to prevent bribery. From a parent company's perspective it needs to be analysed whether it or its officers can be sanctioned for acts of the subsidiary, its officers, employees or intermediaries.

One of the easiest ways of mitigating this risk is undertaking comprehensive due diligence from reputable advisors based in the jurisdiction in question, across the spectrum of legal, tax, financial and political/economic. It can sometimes be of great assistance to use external counsel based outside the jurisdiction but that has clients based in that jurisdiction (not necessarily competitors) to canvas views and help selecting local counsel.

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?

A parent company should take steps to ensure that there are proper global control mechanisms in place over a subsidiary (e.g. global policies and processes), which are essential for risk management and compliance purposes. But the parent needs to be careful, from a liability perspective, about whether it is exerting control over the subsidiary or a material degree of responsibility for its actions. A balance needs to be struck between the autonomy the subsidiary needs to operate (and should be given to minimise risk to the parent) and that a duty of care of the parent does not arise to third parties who have only dealt with the subsidiary or those affected by the actions of the subsidiary.

It is essential to identify whether the subsidiary can avail of limited liability in the jurisdiction in question as a further way of insulating the subsidiary so the parent isn't contaminated by its acts and found liable to third parties who dealt with the subsidiary.

At board level, one needs to look at appointing robust non-executive directors and directors who do not sit on the parent board. A parent company needs to be cautious to avoid taking over the management of the relevant activity of the subsidiary in place of – or jointly with – the subsidiary's own management or giving advice to the subsidiary about how it should manage a particular risk.

QUESTION THREE

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

One looks to the cases of Okpabi & ors v Royal Dutch Shell Plc and AAA V Unilever as examples where third parties (unconnected with the parent company) litigated against parent companies arguing that the parent company had a direct duty of care to them.

The right balance is where the parent retains the necessary visibility and oversight of the subsidiary but at the same time allows the subsidiary a level of independence to operate and take responsibility for day-to-day management and make decisions on specific matters and crucially, when things go wrong, take the liability without upstreaming it to the parent.

POLAND

Robert **Lewandowski**

Partner, DLP Dr Lewandowski & Partners

+48 221 010 740
rl@drlewandowski.eu
drlewandowski.eu
irglobal.com/advisor/robert-lewandowski

Robert is the founder and managing partner of Dr Lewandowski and Partners and head of the Warsaw and Wrocław offices. He previously worked for major legal firms in Warsaw and London and has written many legal books and taught university courses in English, German and Polish.

Robert studied mathematics and German philology at the University of Warsaw, before studying law at the University of Mainz and passing the second state legal examination in Mainz in 1998. He enrolled on the list of German attorneys in Frankfurt am Main (2000) and from 2001–2005 worked as a lawyer at Gleiss Lutz in Warsaw, which included a secondment to Herbert Smith in London.

Dr Robert Lewandowski & Partners (formerly Derra, Meyer R. Lewandowski) has been advising clients for more than 15 years in all areas of commercial law. We offer clients legal services at the highest level.

We specialise in providing legal services to entrepreneurs and private individuals in the business sector. Our main fields of expertise include M&A, company law, financing, insurance law, real estate law, bankruptcy and restructuring law.

Dr Robert Lewandowski & Partners offers legal advice to domestic and foreign entrepreneurs in local and cross-border cases, based on cooperation with international partner law firms in cooperation.

Key consideration for multinationals operating in high-risk industries and jurisdictions

Be aware of national and local regulations of the host country concerning the legal system and law of the foreign jurisdiction and of the laws and regulations of the home country taking into considerations international agreements, conventions and treaties.

To engage local expertise.

The parent company overseeing but not stifling the operation of its subsidiary.

Knowledge of local business customs and culture.

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 (parent company) with business activities in foreign jurisdictions risk may arise due to the forms and the size of cross border transactions and their nature – for example, from simple involvement through a liaison office, import/export, licensing, direct investment such as portfolio investment or the setting up of a subsidiary or branch. Taking these into consideration, the following risks may occur for the parent company:

- Prohibition of any activities of the parent company in the host country and confiscation of the parent company's property by the host country's government.
- Allowing the parent company to enter the host country under certain conditions – e.g. 50% of the business must be owned by a host country national.
- Controlling the parent company concerning capital movement – e.g. restrictions on bringing certain currency into the host country.
- Unfavourable tax regulations to the business of the parent company in the host country, such as mandatory continuation of business in case of the tax credits/tax holidays.
- Liability of the parent company for debts/obligations of its subsidiary under certain circumstances.
- Reporting requirements to the host country, which might have a negative impact on the parent company's business.
- Imposing any kind of countervailing duties or dumping duties with respect to goods of the parent company to be sold in the host country.
- Necessity of obtaining export licenses for sending out goods from the host country abroad.

These risks can be minimised by engaging local qualified lawyers/tax consultants/accountants from the host country who can advise the parent company about risks connected with business activities in the host country beforehand. Furthermore, the parent company should also contact diplomatic missions (e.g. embassy, consulates) of its home country in order to be briefed about the situation and risks in the host country. The parent company can also contact banks that conduct international business and ask them to recommend a foreign attorney who speaks the language of the home country and has some familiarity with the regulations of the parent company. Finally, the parent company may also choose to reconsider the kind of investment – from direct investment through a subsidiary to indirect investment e.g. through a liaison office, sale agents or distributorships.

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?

Usually, a subsidiary is a corporation incorporated under the laws of the foreign country. Generally, the parent company will own at least 51% of the subsidiary stock in order to control it. Additionally, the parent company may oversee the day-to-day operations of the subsidiary or provide materials needed to produce goods. The degree of control should be at a level that minimises the liabilities of the parent company for debts/obligations of its subsidiary towards third parties (in particular creditors) and this issue will depend on legal and tax regulations in the host country. To avoid or limit liability the parent company should avoid setting up its subsidiary in the form of a partnership unless it is as a limited partner, which favours forms of corporations (private or public company) in which shareholders are exempt from liabilities for subsidiary debts/obligations. The latter rule may be breached under certain circumstances, for instance in the case of a single member corporation in which the parent company is the single shareholder operating the business affairs of its subsidiary and if the parent aims to conduct business to avoid responsibility it might be held liable. A similar situation occurs if the parent company intends to operate a corporation through a "straw-man" without any funds. This case may be regarded under the law of the host country as abuse and result in personal liability of the parent company for its subsidiary as well.

Also, if a subsidiary is undercapitalised by the parent company through large withdrawals of money from the subsidiary, which often results in its bankruptcy, the parent company can be held liable towards its subsidiary.

QUESTION THREE

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

The right balance between risk and liability for a parent company and its overseas subsidiary will be established through a guideline attached to the formation agreement of the subsidiary, which will dictate the level of accountability and potential risks. It is especially important to grasp local or national knowledge of regulations with the host country and it is essential to consult local experts before making any kind of cross-border investments, particularly through a subsidiary. In addition, in the case of complex legal concepts, an in-house counsel of the parent company should be involved as an interpreter in this process and to interface with local attorneys.

GERMANY

Gunther **Schmidt**

Founding Partner, ENDEMANN.SCHMIDT

+49 4053 9323 180
gunther.schmidt@es-law.de
es-law.de/en
irglobal.com/advisor/gunther-schmidt

Dr. Markus **Steinmetz**

Partner, ENDEMANN.SCHMIDT

+49 89 2000 568 50
markus.steinmetz@es-law.de
es-law.de/en
irglobal.com/advisor/markus-steinmetz

Gunther Schmidt is founding partner of ENDEMANN.SCHMIDT Partnerschaft von Rechtsanwälten mbB (ES) and brings more than 15 years of experience as a bar admitted lawyer. Before founding ES with Dr Harald Endemann and Dr Katja Endemann and their team in 2014, Gunther had worked as an executive in-house counsel for an international group and as a lawyer and partner with a well renowned German law firm.

Gunther specialises in corporate and commercial law including M&A and consults private companies and businesses of all sizes – from start-ups to international groups – as well as public entities with a special focus on life science. Gunther speaks German and English.

Dr Markus Steinmetz is founding member of ENDEMANN.SCHMIDT Partnerschaft von Rechtsanwälten mbB (ES) and became partner in 2017. Prior to this he had worked as attorney inter alia at Linklaters LLP in Munich from 2008. Markus is a licensed specialist for commercial and corporate law and holds also a master's degree in business administration (Diplom-Kaufmann).

Markus specialises in corporate and commercial law with a strong focus on M&A transactions. He consults private companies and businesses of all sizes – from start-ups to international groups – as well as public entities with a focus on life science/healthcare.

ENDEMANN.SCHMIDT Partnerschaft von Rechtsanwälten mbB (ES) is an independent law firm based in Munich and Hamburg with an industry focus on life sciences. The firm consults with a range of healthcare providers such as private hospital groups, university hospitals and medical schools, other public and church hospitals, medical centres and nursing homes in all business-related legal fields. ES also focuses on servicing technology providers and other life science and healthcare businesses from start-ups to international groups. Our lawyers combine deep and proven legal expertise and experience with professional curiosity and an interest and understanding of scientific subjects. Several of the firm's lawyers have gathered in-house experience during their careers, which adds to their understanding of the clients' operational requirements.

Key consideration for multinationals operating in high-risk industries and jurisdictions

> Investments should be limited. It is better to start with low investment and to let the running business grow instead of investing high amounts at the beginning under uncertain circumstances.

> The client should have confidence in the necessary local staff. It might be helpful to install incentive systems for the employees.

> It is important to install a control and reporting system.

> Cooperate with local lawyers to make sure that the local requirements are met.

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?

Investments by foreign clients in Germany:

- The German political system is stable, rights are efficiently enforceable, trials are fair and there are efficient appealing instances. The German law system is influenced and harmonised by European rules.
- Nevertheless, the German law system is complicated and for foreign legal counsels (especially from a common law perspective) not intuitively comprehensible. Especially German labour law and corporate law include plenty of specialities. There are also a lot of administrative issues depending on the applicable local law – each German State has its own rules and laws.
- Almost all industries within the EU are highly regulated by EU laws. However, in many industries, German regulations tend to be even stricter than in other European jurisdictions.
- It is highly recommended to consult German lawyers.

Investments by German clients in foreign countries:

- Within the EU there are theoretically only limited legal risks due to harmonised European law. But it can still be difficult to enforce the clients' rights in a trial. Trial procedures (e.g. in Italy) last a long time – compared to German trials – and even within the EU, corruption may still be an issue. Although it is theoretically possible to execute a decision by a foreign court, there might be time-consuming and factual obstacles.
- Outside the EU it depends on the legal system of the country. Although most countries are – on paper - constitutional democracies, in reality the opposite might be true. German clients often take high-risks by running a business in countries with weak governments and unstable systems. It is important to cooperate with good foreign lawyers who know the factual circumstances.
- Clients are often dependant on the loyalty and integrity of the local managing directors and leading staff.

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?

Investment in Germany:

- Regarding investments in Germany, a control system is not as important as it would be with respect to investments in less politically stable countries. It is more important to have local staff that know the administrative and legal requirements for business in Germany. Quite often, foreign clients wish to install a foreign managing director to have control over the German entity. But they should consider that managing directors have a lot of duties according to German law. For example, there are sanctions by criminal law if the German entity does not comply with the labour laws. Therefore, it is necessary that the foreign managing director is well supported by qualified local employees. Further, installing a board "abroad" for a German legal entity may trigger double taxation according to many relevant double taxation treaties.
- "Trans-border-control" could in many cases best be executed by installing a supervisory board in which the client might install its executives. The local executive management reports to this supervisory board, and it has comprehensive supervisory and control rights. However, such a two-tier board concept is not customary in many jurisdictions and furthermore is subject to certain statutory rules under German law.

Investments of German clients in foreign countries:

- The level of control required depends on local circumstances. The weaker a political system is, the more control is recommended. Control can be executed by the parent company's managers cooperating with the local management or by a supervisory board or wide reporting duties on the local management.

QUESTION THREE

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

It is important to install a system of control by having wide reporting duties on the local managers. The executives of the parent company should execute a random supervision at lease from time to time, even if things are developing well. It might be helpful to install personal contacts to local authorities in order to create confidence.

DOMINICAN REPUBLIC

Pablo González **Tapia**

Founding Partner, González Tapia Abogados

+1 809 475 8860
pgonzalez@gonzaleztapia.com
gonzaleztapia.com
irglobal.com/advisor/pablo-gonzalez-tapia

With more than 25 years of experience in litigation, corporate and business law, Pablo is recognised for having a global vision for business and being fully committed to his clients, whom he has represented in important judicial and arbitration cases, as well as in transcendental international negotiations.

He began his practice at Messina & Messina in 1991, where he became a junior partner in 1998. When Messina & Messina merged with Gustavo Biaggi & Asociados in 2001, Pablo became the senior partner and head of the international practice group of the resulting firm, Biaggi & Messina (2001-2009). In 2009, along with other 12 lawyers, he started Gonzalez & Coiscou, where he was operating manager.

Following a split of Gonzalez & Coiscou in 2015, Pablo founded Gonzalez Tapia Abogados along with eight other lawyers, and is the managing partner.

González Tapia Abogados is led by Pablo González Tapia, who, along with a team of seven other lawyers, offers consulting to corporate and individual customers, mainly in the following areas of law: Business and investment structuring and planning; Business arrangements, mergers, acquisitions and divisions; Civil, commercial, administrative and tax litigation; Labour matters, such as litigations, negotiations and general advice; Energy protocols including import and export of gas, generation of conventional and renewable electrical resources, concessions and PPAs negotiation.

The firm focuses on efficiency and early identification of its clients' needs, as well as on risk reduction and mitigation, given the team's academic level and extensive experience in various areas of law and business nationally and internationally.

Key consideration for multinationals operating in high-risk industries and jurisdictions

Engage a reputable law firm with experience dealing with multinationals. Request an executive summary of the basic regulations and an assessment of the country risk profile.

Set forth a clear guideline where outside counsel is involved early in the decision-making process. Outside counsel should not be bullied by local management; instead, in-house should maintain and encourage a direct line of communication with the outside counsel to prevent any local management departure from parent company guidelines.

Show, instruct and enforce parent company code of conduct and corporate governance. Instruct local management in clear language the way that parent company does business.

Register with the local chapter of the parent company chamber of commerce and support reputable NGOs that may fight against or report corruption within the country.

Maintain constant communication with your embassy.

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?

Usually, the most imminent risk-related concerns for a company dealing in foreign jurisdictions have to do with: a) the unfamiliarity of the local laws; b) political risks, mostly in underdeveloped nations, or countries were the rule of law is still evolving; c) inconsistency of the judiciary or regulators (for companies operating in regulated sectors), where different decisions are taken regardless of being subjected to a similar set of facts and; d) the potential attraction for local management to do business the "local way".

Given those potential concerns, our advice to in-house counsel of the parent company operating mostly in countries with weak law enforcement includes:

- Hiring a reputable law firm with experience of dealing with multinationals, before starting to do business in the country. This law firm should provide a summary of the basic regulations that would apply to local subsidiary and a general assessment of the country's risk profile. The law firm should be directly hired by the parent company and not local management, to avoid the appointment of a friendly counsel.
- Setting a clear guideline where outside counsel is involved early in the decision-making process to assess the potential risks of any material business, operative or legal decision to be made.
- While giving outside counsel certain margin to provide early advice to local management, in-house should maintain and encourage a direct line of communication with the outside counsel to prevent any local management departure from parent company guidelines.
- Sharing, instructing and enforcing parent company code of conduct and corporate governance, which should prescribe in clear language to local management the way that the parent company does business.
- Abide by the law and resist any temptation to take shortcuts to solve any legal, regulatory or Governmental problems.
- Avoiding costly litigation but exhaust all judicial stages in those cases attacking the company's ethos or that, if goes unchallenged, may set a harmful precedent on the company's resolution to follow the law in that country.

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?

It is difficult to establish in the abstract the healthy degree of control that a parent company should have over its overseas subsidiaries, since such control depends on the business sector and the country where the companies operate. For instance, financial entities would be subject to a much higher degree of control and oversight, while a manufacturing company may not, other than quality control. In addition, a subsidiary operating in a country with a high standard of rule of law may demand less control than one operating in an environment with significant government corruption, justice scarcity and lack of rule of law.

Therefore, the degree of control must be a combination of parent company policies and its way of doing business, along with identifying the country risks and the requirements to have a centralised chain of command or giving local management certain flexibility given their knowledge of the country's market and culture.

Once the parent company has identified the country's risks and the professional level of its local management, it is ready to determine the degree of control it will exercise on the operations and decisions to be made by the local subsidiary. With clear guidelines on the management of the subsidiary risks, local management should be able to determine when certain decisions must be made by the parent company, and when to involve the lawyers and the compliance officer.

Another way of exercising a certain level of control is for the parent company to appoint a compliance officer, risk manager or similar officer to ensure that policies are followed, risks are duly assessed and the legal team is early involved in the process.

QUESTION THREE

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

In any decision in life, it is usually hard to strike the right balance between risk and reward. Therefore, companies must constantly assess the potential future loss resulting from a specific activity or event and the gains (reward) that such activity or event may bring. In the past, when dealing with overseas subsidiaries, headquarters had the luxury of providing them with ample margin to do business following the culture of the land. However, that has changed with the increase of digital communication and the arrival of social media. It is not abnormal for a parent company's reputation to be significantly impacted by the perceived wrongdoings of the overseas subsidiary. Also, in some countries (while not the standard), the courts have even allowed plaintiffs to pursue the assets of the parent company.

Having said that, the parent company is required to implement a set of rules preventing local management from increasing risks, while having the chance to pursue certain business that may increase the company's profits. A right balance in that tension would be a combination of different variables, including the financial impact on the decisions to be made (with a financial threshold) and the areas where the decision is being taken. As an example, the parent company may allow local management to deal with all the employee issues but restrain them from dealing with upper management conflicts. The parent company may restrict any decision that could impact the environment, or could have a negative perception in the community, but, in turn, may allow local management to take decisions on programmes that benefit the community following the rule that "the most appropriate people to manage an issue are those who know it best." Usually, the best advice is to find the perfect balance between doing the business, making a profit, protecting the brand and avoiding sanctions or liabilities claims.

ROMANIA

Nicholas **Hammond**

Partner, Hammond-Partnership

+40 744 526 816
nhammond@hammond-partnership.com
hammond-partnership.com
irglobal.com/advisor/nicholas-s-hammond

Nicholas is a highly experienced English-speaking commercial lawyer based in Romania. He has practised in the City of London and Romania – Nicholas was the first English solicitor to come to Romania in 1990.

His practise covers all aspects of corporate and commercial law including company formations and corporate restructuring, joint ventures and inward investment. He has advised clients in such fields as aviation, insurance, banking, retail, agriculture, project finance as well as venture capital investments. He advises on real estate matters as well as leasing and Romanian intellectual property matters.

Hammond Partnership is a Romanian full-service commercial law firm based in Bucharest with a team of lawyers with decades of experience, making sure you get the Romanian legal advice you need.

Although the firm can trace its history to 1990 when Nicholas Hammond opened the first law firm in Romania after the 1989 Revolution. As a result, the partners wanted to create a new type of law firm that would answer their clients' needs in the evolving business and social world of Romania and the CEE.

Having discussed this with existing and potential clients it became clear they were looking for a new type of law firm too. One where the partners and lawyers take an interest in clients' legal problems and understand their business and requirements. We go further to understand the client's business. If clients do not feel you are interested in them, they will soon find another legal advisor.

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

Research carefully all aspects of doing business in the selected country (and town) being aware of local variations and influences.

Make enquiries using trusted local and international advisors. If possible, have verbal and written reports and meetings.

When receiving a report ask who prepared it and what is their knowledge, clarifying that it is not just a boiler plate report.

Review the business and political climate using non connected persons, even competitors, if possible.

Speak to other expat CEO's and other non-local staff as to what doing business is really like.

See who are the politically connected persons in the area of business and the location of the proposed office to ascertain potential conflicts.

Properly brief staff as to potential risks both actual and perceived of doing business in the new country. Ensure that employees are aware that the law and business practise in their own countries can be very different in the new country especially where the rule of law and the laws are being developed.

Ensure staff are regularly briefed and supported by head office.

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?

- Xenophobia
- Corruption
- Bureaucracy
- Business attitudes and ethics
- Political influence
- Relying on local expertise without checking
- Rule of law both apparent and actual
- How actually to do business.

The risk is that the parent company has not properly evaluated the legal and commercial risks. A proper evaluation at the legal and administrative level will reveal where the local rules and laws are at odds with head office laws and requirements. In addition, the company should talk to people who have worked in the country, rather than just their professional advisors.

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?

- Head office should exercise control as much as possible for the first years.
- They should put in place an expat leader with enough experience and expertise of working in a foreign country.
- He must be properly supported. Head office needs to understand that in Romania things do not necessarily happen in the same way as they do at home and may take considerably longer.
- They should avoid the trap of employing a local manager until they have in place proper safeguards and have seen him in operation.
- A locally employed manager may not appreciate the necessity of observing head office regulations because head office is in another legal jurisdiction. For example, failing to understand the effect of Bribery Act – Money Laundering legislation peddling of influence etc.
- They also need to be aware of the reverse. What is normal in head office may constitute an offence in the local jurisdiction.

QUESTION THREE

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

- Exercising control through an expat manager and local assistant who will oversee local management.
- The expat manager will need to be properly supported by head office who should make visits as often as possible to support them.
- Ensuring as far as possible that decisions are taken by head office where there is a political and legal risk towards the operation.
- Being conscious that just because a manager works in a country, he may not be fully conversant with all local practises and attitudes.
- Advising local management to always ensure that they minimise any actions that could be a criminal or local offence. Meeting Government officials in a private place is one thing that should be avoided if Government contracts or money are involved. Never be seen alone as there can be a suggestion of bribery or undue influence if the risks are political.

ENGLAND

Mark **Chapman**

Partner, Herrington Carmichael

+44 1276 686 222
mark.chapman@herrington-carmichael.com
herrington-carmichael.com
herrington-carmichael.com/our-people/mark-chapman

Mark is a partner in our corporate and commercial department and is also a 'Legal 500 recommended' lawyer.

Before returning to Herrington Carmichael in August 2012, Mark worked as legal counsel at Acromas, which at that time owned and operated the AA, Saga and BSM brands, and as EMEIA Legal Counsel at Apple – creator of the iPhone, iPad, iPod and Mac.

Mark has extensive experience advising on commercial matters, both in house and in private practice, with a focus on cross border and complex commercial projects.

Mark is responsible for our regulatory and compliance offering and advises businesses on financial services matters, particularly in the insurance and pensions sectors and on consumer law matters.

Herrington Carmichael LLP is a leading commercial law firm based in the UK. Its clients range from individuals to international businesses and it offers advice on corporate and banking services, property and real estate matters, tax and estate planning, employment law and dispute resolution/litigation.

Herrington Carmichael LLP aims to establish and build long-term relationships with its clients, taking the time to understand their business, objectives and concerns.

With experience of working with clients looking to invest or expand into the UK, the firm offers high-quality and commercially astute advice to private individuals and businesses alike.

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

> *Business structure: Assess whether operating directly in a high-risk market is commercially desirable based on the potential risks and rewards of doing so.*

> *If the risk is considered acceptable, consider setting up a subsidiary to contain risk.*

> *If the risk is considered too high, consider other routes to market (e.g. distribution or joint venture).*

> *Seek local law advice on applicable laws and regulations, as well on the proper execution of business documents – there may be execution or registration formalities that must be complied with for documents to be valid and binding.*

> *Do not overlook practical steps, for example obtaining appropriate insurance, implementing payment bonds/guarantees where there are concerns over payment, implementing robust due diligence and contract management programmes, and undertaking an assessment of the relevant market with an appropriate advisor to ensure the perceived commercial benefits outweigh the perceived risks.*

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?

Conducting business in foreign jurisdictions can be very beneficial and forms part of the business plan of many organisations. However, the risks should be given prudent consideration, including:

Local laws:

- Local laws and regulations can vary significantly, and breaches could result in sanctions including heavy fines and potentially imprisonment.
- Businesses are therefore advised to seek local law advice prior to commencing trading in the relevant jurisdiction to ensure they properly understand the legal landscape in which they will be operating.

Contract management:

- Credit control and contract management should be given heightened importance – enforcing judgements in foreign jurisdictions can be time consuming and expensive.
- Whether a judgement can be enforced in a foreign jurisdiction will depend on the private international law of that country – there are international conventions, but the detailed enforcement procedure is determined by the law of the enforcing state, so local advice is still important.

Taxation:

- Taxes and taxation rules vary by jurisdiction – intra-group trading considerations can be relevant (e.g. transfer pricing).
- Businesses should seek appropriate tax advice at the outset – it can be an influential factor in deciding how the overseas business is set up.

Overseas business structure/route to market:

- Businesses often seek to mitigate risks associated with conducting business in foreign jurisdictions by setting up a subsidiary to undertake business in that country – this could be wholly owned or a joint venture with another business with knowledge of the market.
- Other businesses elect to sell via a distributor or reseller that has a reputation and strong knowledge of the market, while bringing the added benefit of increased risk separation.

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?

Under English law, parent and subsidiary companies are separate legal persons, each with responsibility for their own activities.

However, parent companies can potentially be liable for the acts and omissions of their subsidiaries – courts will consider the usual principles of tort law, taking into account factors including the degree of management the parent company has over the subsidiary and whether the parent has advised the subsidiary in respect of the relevant matter.

In the Unilever case the Court confirmed that the English parent company (Unilever plc) did not owe a duty of care in negligence in relation to the operations of its subsidiary in Kenya.

The Court found that the subsidiary management team were self-sufficient and did not have cause to refer to anyone else within the Unilever group. While Unilever set group-wide policies, it left its subsidiaries to implement the policies without any specific direction from the parent company. As a result, Unilever plc was held not to owe a duty of care.

But in the Vedanta Resources Plc case the Court concluded that cases of parent company liability should not be shoehorned into the specific categories referred to in Unilever, noting that there is no limit to the range of management and control models that a multinational group of companies could use.

Parent companies could also face claims for breaches of statutory duty – the analysis in respect of such claims is similar to that for negligence claims.

Parent companies should carefully consider the amount of control that they exercise over subsidiary companies if they wish to have the best chance of maintaining legal separation.

QUESTION THREE

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

Conducting business in foreign jurisdictions can carry risks, but they can often be mitigated to ensure that the risks and rewards are balanced or sufficiently reduced. The approach to risk is ultimately a commercial decision based on the risk profile of the relevant business.

From a legal perspective, we would recommend:

- Local law advice should be obtained at the outset and analysis of the market and economic state of the jurisdiction should be undertaken to establish the risks in conducting business in the relevant jurisdiction. This can then be used to inform the risk profile, strategy and associated policies and procedures.
- Robust contracts should be put in place, containing appropriate limitation of liability provisions to ensure adequate protection if things go wrong.
- Careful consideration should be given to the level of control and influence exerted by the parent company over its subsidiaries, as there is scope under English law for a parent company to be held liable for the acts and omissions of its subsidiaries.
- The route to market is considered carefully – for example, it may be that a distribution/value added reseller/joint venture model could be appropriate for a few years while the business learns the market and decides whether it would like a direct presence in that jurisdiction.

The above are just a few suggestions that may give businesses sufficient commercial comfort to enable them to feel able to accept risk in order to seek out greater opportunities.

BRAZIL

Jonathan **Mazon**

Partner, Junqueira, Ie Advogados

+55 11 4550 2784
jonathan@jlegalteam.com
jlegalteam.com
irglobal.com/advisor/jonathan-mazon

Over 15 years of combined in-house and law firm experience. Jonathan is a corporate law generalist with relevant experience in capital markets, M&A, compliance and risk management. Jonathan has advised large corporations in securities offerings, domestic and cross-border M&A transactions, supported business teams in key commercial agreement negotiations and defended companies in strategic administrative/judicial litigation and arbitrations.

Jonathan holds a bachelor's degree in Business Administration from Fundacao Getulio Vargas – EAESP-FGV, a bachelor's degree in Tax and Corporate Law (LL.B.) from University of São Paulo – USP, and completed a Risk Management specialization at Harvard Business School.

The firm is structured to provide specialised legal services for players in the capital markets and wealth management industries, as well as for corporations, building true connections and real relationships with clients by overcoming the challenges presented on a daily basis.

It has developed a network of partnerships with corresponding offices domestically and globally, as well as foreign banks and professionals from other areas of expertise to provide multidisciplinary work, especially in the corporate, finance and accounting areas.

The firm's commitment to excellence and transparent communication enables it to simplify complexities and deliver tailor-made solutions, while also enhancing its understanding of the clients' businesses and, over time, developing long-lasting relationships as a valuable partner to its clients.

It is also noted for its experience in providing tax, governance and regulatory advice to local and foreign mutual funds, asset managers, institutional investors, individuals and corporations on financial markets, private equity and venture capital transactions, foreign exchange regulation, structured finance and capital markets regulation, as well as risk management and compliance.

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

> There is no "one size fits all" risk management solution. However, there are frameworks that will lead to risk management programmes that are more effective in dealing with risk in these scenarios.

> Some key factors to be taken into account when designing a risk management programme for a multinational operating in these scenarios are: the client's risk appetite, familiarity and experience in dealing with the risks associated with its activities in each industry and jurisdiction, and the balance between the cost-effectiveness of centralised controls and the responsiveness of decentralised controls.

> Even leading companies and the best risk management programmes will fail from time to time. It is important to tailor each company's risk management to cost-effectively avoid or eliminate the occurrence of preventable/operational risks, reduce the likelihood and impact of the risks taken in order to obtain superior returns and reduce the impact should an uncontrollable risk event occur.

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?

Whenever a client conducts business in multiple jurisdictions it is important to understand the types of risk that prevail in each country and how those may affect the client elsewhere in the world. For instance, a global consumer goods company headquartered in South America may suffer sanctions in the US and global reputational damage as a result of an isolated corruption case in a minority-owned joint-venture operation in Asia.

It is also important to understand whether exposure to the risks associated with each of those foreign jurisdictions is in line with the client's risk appetite, how familiar the client organisation is with such risks, and whether the client's risk management seems appropriate for each context. As there is no single solution that would work for all clients, risk management structures and compliance programmes also consider the client's corporate culture, the resources available and other variables that end up making each solution unique.

To be effective with regard to the risks that can be addressed via compliance programmes or legal solutions, it is important to know that the client's initiatives (1) are clearly linked to specific risks and are able to prevent violations (e.g. training); (2) expedite detection of violations (e.g. whistle-blower hotlines) while minimising its negative impacts on the organisation or (3) align corporate policies with laws, rules and regulations (e.g. code of conduct). From a broader management perspective, there must also be metrics and KPIs to track effectiveness of initiatives that make up the client's compliance programme.

By having a well-designed risk management structure and an effective global compliance programme, the parent company can take advantage of growth opportunities that arise in profitable but otherwise riskier geographies, while minimising risks of cross-border regulatory probes and sanctions in more regulated jurisdictions.

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?

Again, when establishing what degree of control a parent company should have over its overseas subsidiaries, there is no single correct answer. It depends on critical variables such as the industry in which the client operates and the degree of political stability or regulatory maturity in the parent company and the subsidiaries' respective jurisdictions. For instance, if the client operates in multiple jurisdictions within the European Union, the cost-effectiveness of a centralised approach may be more desirable, whereas the responsiveness of a decentralised approach may be more suitable if the client operates across several continents.

Risk exposure levels can be minimised by increasing the degree of control. For example, there was a European telecoms company that decided to enter a market in Asia where the rule of law had been recently re-established after decades of a military regime, endemic corruption, human rights violations and international sanctions. This company participated in an international tender and successfully bid for a major contract with local government. By maintaining a high degree of control over its operation in that specific geography, the company was also able to find reputable local suppliers despite nearly 50% of all potential partners being US-sanctioned individuals.

In addition to this telecom company's experience with other recently democratised countries in Asia and Eastern Europe, their risk-based approach to controls and robust compliance processes helped minimise liabilities due to known risks. When dealing with unknown risks, clear processes, good communication channels between the HQ and subsidiary and well-trained persons in place at both locations to ensure timely and effective responses are also key.

QUESTION THREE

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

As not all risks can be mitigated, organisations should focus on actions that yield the most significant reduction in expected loss per amount of resources invested. The right balance between risk and liability depends on the organisation's profile, context and risk appetite. For instance, if a company wants to set up an overseas subsidiary to pursue a relevant business opportunity in a high growth market that is also more susceptible to political turbulence, the parent company will likely want to ensure that it has processes in place to be able to deal effectively with its identified risks (i.e. those that are operational/preventable and those that are taken in order to obtain superior returns), as well as respond timely and effectively in the event of a crisis and/or unforeseen risk.

A good design involves a combination of three elements: a global crisis response policy, a local response team to carry out the policy, and a centralised unit to support or coordinate the local team, as necessary. This is based on the principle that a local crisis, issue or incident is usually best managed by those that are closer to it and more familiarised with the entire context and available solutions.

An extreme example of how the balance between risk and liability may impact a company and its overseas subsidiary is a case of ethnic violence that affected employees working in a rural site of a Kenyan subsidiary of a UK-based company.

A group of more than 200 affected individuals filed a lawsuit in the London High Court alleging that the company placed these minority tribes in a position of particular risk, as those individuals were brought in large numbers to live and work on the company's rural unit, where they were surrounded by a tribe hostile to individuals of other ethnicities.

The parent company ended up being acquitted, as there was insufficient evidence of it being actively responsible for the alleged crisis management failings of its Kenyan subsidiary. Whereas, the subsidiary was found guilty as the court considered that it failed to exercise reasonable care and skill to protect their workers from the foreseeable risk of ethnic violence and was, therefore, negligent.

AUSTRALIA

Ross **Koffel**

Principal, Koffels Solicitors & Barristers

+61 2 9283 5599
rosskoffel@koffels.com.au
koffels.com.au
irglobal.com/advisor/ross-koffel

As principal of Koffels Solicitors & Barristers in Sydney Australia, Ross Koffel leads an extensive corporate commercial law practice. His depth of experience as a senior practitioner includes set-up, M&A, cross-border transactions, tax and transfer pricing. His practice is holistic in approach and includes structuring and commercial litigation.

Ross acts as a local director and board member for the Australian subsidiaries of a number of multinational companies and takes an active role in their compliance and day-to-day running including: employment law, real property, immigration for employees required from jurisdictions outside of Australia, and seeking of FIRB (Foreign Investment Review Board) approval for overseas investments.

Founded in 1990, Koffels is a commercial law firm with an extensive cross-border capability. They provide a broad, full-service approach to high net worth individuals, private companies and multinational corporate clients. Officers and directors need to be able to source efficient answers across a broad spectrum of compliance, tax, employment and regulatory issues that increasingly heighten their onus of responsibility. The compounded demands of dealing with multi-jurisdictional issues is the natural flow-on of globalisation and the subsequent increased transparency requirements. Koffels Solicitors & Barristers step in to provide a seamless support to those demands.

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

What are the high-risks? Although operating in some industries and jurisdictions have higher risks than others, it is important to understand what those risks are so you know whether they are manageable.

What are the returns? High-risk usually comes with high returns.

Is there a balance? Once you have identified the high-risks and their associated returns, it is a question of balancing that risk and the projected returns to keep them within a level you are comfortable with.

Is it necessary? Whether or not to operate in high-risk industries and jurisdictions depends on your needs. Do you have a choice not to operate in the high-risk industries and jurisdictions?

Is it worth the gamble? Having considered the high-risks, returns, achievable balance and necessity, do you still consider it worth the gamble?

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?

The following risks should be considered:

(1) Unfamiliarity with the local legal system may lead to difficulties in understanding the local laws and increase the chance of non-compliance, particularly when it comes to things like registration of ownership, registration of security interests in property, insolvency administration practices, financial market practices, aviation treaties and maritime liability.

(2) Current international laws and arrangements are not keeping pace with growing and changing patterns of international trade and investment, thus generating cross-border risks. Such inadequacies in turn create extra costs, delay and undue complexity to business operations.

(3) Liaison between courts in different jurisdictions can be difficult, especially between countries with differing legal systems. Procedures for collecting evidence and tracing assets in the process of international litigation can be cumbersome and fragile. It is also common to find inadequate recognition and enforcement of foreign judgments or arbitral awards.

(4) A lack of knowledge of local tax laws and the existence of any tax treaties may result in non-compliance and double taxes.

(5) Other risks include:

- Political uncertainty and instability due to wars, strikes, changes in policies and regulations and changes in political leadership.
- Economic risks including fluctuations in markets, foreign exchange and interest rates.
- Natural disasters and strict environmental measures.
- Communication and cultural risks due to different languages and cultural backgrounds .
- Difficulties in registering and protecting intellectual property rights.
- Difficulties in upholding employment laws against labour exploitation and modern slavery.
- Difficulties in safeguarding an organisation's cybersecurity.

A parent company may minimise risks by:

- Identifying and familiarising themselves with the risks applicable to them across the group.
- Obtaining local expertise for relevant advice on identified risks.
- Creating a group company risk management policy and implementing it across the group.
- Reporting any risk management inadequacies and making relevant improvements.
- Ensuring ongoing compliance of the risk management policy by each member of the group.
- Being aware that what holds true in one jurisdiction may not be applicable in another.

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 general, a parent company should:

(1) Maintain central control over the business affairs of the subsidiaries. For example, for a company supplying services to adopt a global services agreement that contains the main over-arching terms of their service and provides a framework under which subsidiary agreements incorporating local variations are based.

(2) Establish group company policies such as: a risk management policy, labour hire policy, anti-corruption and anti-bribery policy and anti-money laundering or counter-terrorism financing policy and require all subsidiaries to implement these policies to the extent permitted by local laws.

(3) As long as permitted by local laws, maintain the power of appointment of key executives to the subsidiaries including a director, company secretary, public officer and corporate agent of a subsidiary. Often a local director may need to be appointed to a subsidiary and they can be a legal advisor appointed by the parent company who can bring compliance expertise and an unbiased view on the subsidiary's conduct, reporting directly to the parent company.

(4) Provide capital to the subsidiaries by way of shareholder loans. The parent company may also forbid loans by subsidiaries from other creditors without the parent's written consent.

Implementing these measures allows the parent company to monitor the subsidiaries' day-to-day business operations as well as any potential risks associated with the operation. Risks can be identified at an earlier stage and managed to minimise liabilities.

QUESTION THREE

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

(1) Establish clear risk management objectives and policies. For example, risk management is required by the New York Stock Exchange listed company rules and Australia's corporate governance codes.

(2) Invest in knowledgeable and experienced corporate counsel, including local counsel to deal with the differences in legal jurisdictions. For example, when investing in offshore trusts, a company must be aware of the differences between the trustee liabilities in its home jurisdiction, and those in the local jurisdiction. In Zhang Hong Li and others v DBS Bank (Hong Kong) Limited and others [2019] HKCFA 45, the Hong Kong Court of Appeal upheld that an "Anti-Bartlett" clause, which purports to absolve a trustee of any obligation to supervise or make enquiries of the operation of the companies of which the trust owned shares, was enforceable, resulting in the trustee avoiding liability for losses sustained by the trust. This decision is contrary to the position in many other common law jurisdictions where the trustee, regardless of the delegation of power under a trust deed, still has an overriding duty to supervise and preserve trust property.

(3) Diversify business activities and presence. For example, many listed companies have their holding companies incorporated in tax-haven countries, while their major trading companies are situated in low tax countries.

(4) Avoid the impact of foreign laws on business. For example, a firm may design its corporate structure to quarantine legal risk to a particular subsidiary.

(5) Implement insurance policies such as for guaranteed rates, cash surrender values, policy loans, dividends or bonuses.

(6) Transfer risk to another party where possible. For example, an exporter may transfer payment risk to its bank by using documentary credits.

ITALY

Ruggero Rubino **Sammartano**

Partner, LawFed BRSA

+39 0 277 075 500
ruggero.rubino.brsa@lawfed.com
lawfed.com
irglobal.com/advisor/ruggero-rubino-sammartano

Ruggero Rubino-Sammartano joined the firm after graduating in law from the Catholic University of Milan. He has experience in international law firms in London, New York, Paris and Munich, dealing mainly with issues of international law.

His focus is primarily on arbitration proceedings and commercial and corporate law in their various aspects. He has a good command of English, French, German and Spanish, in addition to Italian.

He is a member of the editorial board of the law review “Il Foro Padano” as well as of the International Committee of the Milan Bar and speaks at arbitration and mediation conferences.

He also authors contributions to law reviews on arbitration and mediation in different languages.

LawFed BRSA is a nationwide law firm that provides tax advice. BRSA stands for Bianchi Rubino-Sammartano & Associati. It belongs to the LawFed group of firms, which cover the Mediterranean and Middle East. It is involved in domestic litigation; international litigation and arbitration; and negotiations in contracts, construction law, mergers and acquisitions, sales of goods and joint ventures, using English, German, French and Spanish. It represents national and multinational corporations as well as foreign Governments and public companies. It has a network of correspondents in many jurisdictions.

Its assistance to Italian clients abroad and to foreign clients in Italy has given LawFed the advantage of understanding the needs and psychology of clients in transnational and international disputes.

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

Focus on people. The right person at the right moment can transform a problem into an opportunity.

In-depth risk analysis. Do not enter a dark room, switch the light on beforehand.

Trusted local legal and tax/accountant counsel. Get the right advice: local knowledge with international experience is key.

Ready-to-manage process in place. Be always ready as if it was the day before the hurricane.

Recovery plan. A stitch in time saves nine!

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?

Nowadays the approach of multinationals has changed. Increasingly, there is less attention on local people and more focus on monthly financial reports. Numbers are important but often they do not help in understanding the reasons for them and what measures to take. Good results may hide risks that may impact outcomes in the medium- to long-term.

Every country has different characteristics and, as such, even if the risks may be similar the degree of risk may vary drastically.

The choice of good local directors and executives is key together with effective interaction and supervision by group directors with international experience and a clear insight of the group vision. Local legal and tax/accounting counsel directly reporting to the shareholders is very important to understand the vision, fix the priorities, allocate the right budget and develop the right framework with appropriate measures. With the correct rules in place, the risks can be managed.

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?

The degree of control should be proportional to the type of risk and exposure to it. A careful risk analysis carried out early in proceedings helps to identify the major risks. Once a risk is identified, we usually discuss with the client how to manage it and if it is not possible to eliminate it at least minimise it and/or to keep it under control. It is not possible to avoid risks or to annul them. What a company should avoid is discovering a risk afterwards.

In a way, business is like life. You do not wish your children to be exposed to risks, but you know that this is not possible. Your goal is not to wrap your children in cotton wool, otherwise they will not "bloom". We strongly advise companies to carry out a preliminary check and set up a plan to make sure the necessary measures are taken to mitigate risk.

Companies must set up with the support of counsel a mix of controls and various types of alerts and at the same time have an in-house or external team that regularly but randomly check the processes and their application in particular during periods of pressure.

QUESTION THREE

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

Companies need to accept the fact that risks always exist and decide how to manage them. In order to grow, a company must sometimes make brave decisions, even accepting failure. It is not only a matter of balance but of consciousness and preparation. Once they are ready to face risks, we prepare companies to take the appropriate measures. In this way the risk still exists, but it is minimised and manageable, if a problem arises.

Recently, we handled an important fraud case involving different countries. A significant amount of money landed, unauthorised, in China. We helped the corporation, by reacting in hours. We blocked new unauthorised transfers, made investigations into the facts, made criminal complaints in different countries and interacted with district attorneys, made Mareva injunctions, cooperated with diplomatic bodies in different jurisdictions and supervised strategy. The first outcome was to block almost the entire amounts fraudulently transferred in China. The intermediary result, thanks to proper insurance coverage, was that the corporation recovered the lost amounts in a reasonable time period. The final result was that the client understood the importance of our advice to carry out a risk analysis and to take the appropriate measures.

EGYPT

Mohamed **Agamy**

Managing Partner, Links & Gains Law Firm

+20 2 2614 1617
m.agamy@linksandgains.com
linksandgains.com
irglobal.com/advisor/mohamed-agamy

Mohamed Mostafa Agamy is the founder and managing partner of Links & Gains Law firm. Agamy is a bilingual lawyer and professional legal consultant with a proven track record over 15 years of leading successful international legal transactions. Agamy has a diverse area of expertise across North Africa and the Middle East.

Prior to establishing Links & Gains, he was responsible as Regional Counsel at General Electric and before that Agamy was Head of Legal at BG (Shell) & Petronas LNG Downstream JV. He successfully negotiates and closes key settlement agreements to preserve and enhance shareholder value and resolving complex disputes competently. He demonstrates professionalism with legal analysis and reasoning across legal statuary jurisdictions and monitors disputes before Egyptian Courts, CRCICCA, ICC, Dubai courts and England & Wales Courts.

Links & Gains is an independent law firm based in Cairo, Egypt, linked to an international association with lawyers and advisors across the globe. Their core areas of expertise are commercially oriented with a deep focus on our clients' needs and achievements when they provide their legal services. They are consistent in the standard of excellence that they bring to their clients.

Their diverse understanding of business and extensive industry experience has positioned them to offer a wide range of specialised services for their clients.

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

The main keys of evaluating the international regulatory risk factors for any business everywhere are:

- Perform a risk assessment before doing business in the country; including but not limited to; tax exposure, foreign currency, intellectual property rights, anti-fraud and anti-corruptions measures, legislations structure and change in laws, politics stability and foreign investments rights and immunities.
- Establish a compliance policy and an efficient internal control.
- Assess local oversight and perform random training to all employees.
- Integrate third parties, including business partners, joint ventures, agents, sub-agents, consultants, and other third parties.
- Conduct health check-ups with audit and monitoring Red Flags.
- Identify available resources of right experts and well talented staff.

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?

There are significant risks associated with going international such as:

The Regulatory Risk

The main way to evaluate any business activity under a specific country is to look at the risk around changes to local laws. A country that has a poor legal system or frequent changes in legislatives is a high-risk from a legal standpoint. The uncertainty of regulations exposes any business to regulatory risk. For example, a country without clearly defined intellectual property laws makes it difficult for foreign software companies to protect their investments. Changes in banking laws may limit the company's ability to repatriate money to the home country or may limit access to funding as well. Some other examples of risk exposure linked to laws such as tax, labour, incentives and investment privileges may affect profit margin or could cause losses.

Currency Risk

Fluctuations of foreign currency and the existence of black markets can diminish profits for shareholders of the mother company when converting back to the home currency. If an analysis is made on such risk, it may mean that the rewards of making an investment turn into a nightmare. This is what what makes one country different from another when it comes to long-term investments. Foreign currencies of stable governments are less volatile than those less-developed countries. Hedging strategies could mitigate some of the currency risk, but it depends on the kinds of businesses and how adaptable they are when hedging the local currency in the global market; particularly those activities with high cost expenditures or heavy operational costs.

Taxation Risk

The potential for new tax laws or interpretations to result in higher than expected taxation. In some cases, new tax laws can completely disrupt the business model of an industry.

Political and financial instability

Many companies working oversees are opposed to outsourcing in various areas of business practices. Political issues and sanctions, in particular, tend to affect investments. Countries hit by sanctions on trade are deemed as a high-risk investment, even in essential sectors such as healthcare and utilities. Moreover, if any company is involved in human rights abuses, it may be subject to bad publicity and lost business opportunities.

Therefore, it's crucial to determine the political climate of the country investors wish to enter as well as analysing the political situation before signing any agreements, avoiding liabilities or burdens.

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?

The parent company must monitor its subsidiaries, ie the companies over which it exercises control (capital or otherwise). It must also monitor its employees, agents, subcontractors and vendors. The due diligence process should maintain over each step in the work-flow that control the subsidiary activity. For sure, it depends on how is the commercial and corporate relationship.

However, setting a highly established a strong audit policy with full compliance rules and governance regulations is the real clue to keep the business safe from retaliation rather than be exposed to certain threats.

However, the definition of control varies according to the sort of laws. Governance and control systems are essential for any organisation to keep the company's integrity in the event of a violation by any misconduct happened from its employees officers, and/or even its subcontractors.

QUESTION THREE

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

In order to constitute the right balance for a company, to mitigate risks and not to fall in further liabilities, the parent company shall control the subsidiaries with a full scheme of compliance policies and procedures. Tracking every transaction or owing a duty of care over each transaction or action done by employees, officers, agents and subcontractor is impossible from a reality perspective.

However, the day-to-day operations, including taxes, asset management, finance transaction, procurement and/or dealing with government are always the hot spot of risk exposure, when it comes to internal management risks. External risks are relevant more on the contractual relations or the business structure from the corporate aspects.

We can advise that there are like three Steps to limit liabilities and mitigate risks by the following main pillars:

- Structure your business properly; how you structure your business is a critical decision. Whether to register a branch or establish a limited liability corporation is not a business decision in our opinion unless to get a proper legal and tax advise first. For instance, provides good protection for most small-medium companies or sole-proprietorship businesses after expanding their business they were stuck in legal matters based on improper decisions when the company has been established.
- Protection of the intellectual property is a must for any business to take care with no waiver; the business patent, trademark, copyright should be safely and legally registered. Companies shall fight to protect their intellectual property as well as their assets from being stolen.
- Reviewing every document/correspondent/contract/commitment from a legal standpoint in addition to that get the right the subject matter expert consultancy before attempting to responsibility.
- Training should be conducted periodically to raise and refresh the awareness of risk exposure; mainly for the compliance matters, anti-trust, anti-competition, etc.
- Companies shall have at least two annual reviews over their subsidiaries, with extensive audit and health check-up from legal and compliance standpoint, rather than the financial aspects.
- Companies shall have at least two annual reviews over their subsidiaries, with extensive audit and health check-up from legal and compliance standpoint, rather than the financial aspects.

US - FLORIDA

Bruce **Loren**

Partner, Loren & Kean Law

+1 561 615 5701

bloren@lorenkeanlaw.com

lorenkeanlaw.com

irglobal.com/advisor/bruce-loren

Bruce Loren is an attorney licensed in Florida and New York. While in law school and soon after Bruce argued twice in the Second Circuit Court of Appeals, successfully creating landmark education law. After beginning his career at a multinational firm in New York, Bruce relocated his family to Florida, where he has practiced for 30 years specialising in the areas of construction law, and all aspects of commercial litigation. In 2006, Bruce achieved the title of "Certified in Construction Law" by the Florida Bar and has consistently received the highest rating and other recognitions from numerous peer review organisations.

Loren & Kean Law is a boutique law firm located in Palm Beach and Fort Lauderdale, Florida. Our firm provides efficient and business-oriented solutions to achieve the goals of our clients. Each attorney at the firm focuses on a limited number of areas to achieve the expertise necessary to counsel our clients in construction law, commercial real estate and business litigation, commercial landlord-tenant law and factoring law throughout the United States and internationally. Our attorneys focus on practical solutions to our clients' issues by listening to their goals, responding immediately and working through their issues like business owners, as well as lawyers.

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

Educating the client regarding the length of the dispute process. Resolution of disputes through the judicial process in the US, and particularly Florida, will likely extend for many years. Scheduling court hearings may take months and is often used by parties as a tactic for delay and to avoid complying with rules and court orders.

Understanding the expected attorneys' fees and costs to resolve disputes, even simple disputes of modest amounts. The judicial process is often only available to clients with significant financial resources. Attorneys' fees are most often billed on an hourly basis, creating the need for the client to recognise and timely object to inefficient billing.

Understanding the adversarial nature of the US judicial system and the extensive time that a client must devote to participating in that process. Clients and their personnel must gather and review a vast number of documents, respond to written questions, appear for sworn testimony before and during a trial with the expectation of cross examination.

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?

The largest risk is protecting the parent company (or other subsidiaries) from exposing itself to liability for the debts and improper actions of its subsidiaries. When creating parent companies and various subsidiaries, a significant goal is to protect the parent and other subsidiaries from the liabilities of another entity in the chain. If created correctly, and managed correctly throughout the life of the entities, exposing one entity to the liability of another should be a manageable process, although it may not stop an adversary from including other related parties in a lawsuit.

The most significant risks are claims of fraudulent conveyance and/or piercing the corporate veil. Fraudulent conveyances are transfers of assets between entities for, among other things, less than fair market value. These assets are typically monies, but can also be customer lists, intellectual property and contracts. Entities may be susceptible to piercing the corporate veil claims when they ignore the typical corporate processes, such as annual meetings and documenting votes for corporate decisions.

The best way to avoid this risk is treat each entity as completely separate and independent. Separate bank accounts, financial records and payroll are most important and often examined by a creditor. If sharing employees, overheads or office space, there should be written agreements (e.g. sub-leases, employee leasing agreements) between the related companies that include reasonable fees to be exchanged. Any transfers between related companies should be documented and consistently tracked through the accounting procedures of both entities. Loans should be documented with promissory notes and some rate of interest.

Required corporate procedures should be followed for each entity, including meetings of the owners and officers, timely creation of meeting minutes and resolutions and consistent, complete record keeping. The bottom line is to treat each entity as if it has no relation to the other to avoid risk that one entity may be liable for the problems of another.

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?

Control by a parent over its subsidiary is not necessarily a problem, but the parties must avoid the appearance – and reality – that the subsidiary is not a separate legal entity with its own required corporate processes. Again, establishing the initial corporate structure and the processes for decision-making, and consistently following those requirements for the life of the separate entities are crucial.

First, the parent must consider the corporate form of entity of the subsidiary (i.e. corporation, limited liability company, etc.). Research and analysis should be complete before this initial decision is made to evaluate the risks and requirements of the governing jurisdiction. Assumptions and quick decisions should be avoided.

Second, creation of the entity's by-laws (i.e., the document governing how the entity operates and makes decisions) should be drafted with consideration of how much control the parent company desires over its subsidiary. Control should not be total. Unanimous decisions of owners, including the parent, may be used for some ultimate decisions, such as adding or terminating an owner – either through purchase of an interest or involuntarily – or selling all or most of the subsidiary's assets. Other operational decisions and day-to-day events and operations should be left to the discretion of the subsidiary, although limits maybe placed on those decisions through a majority vote of the owners.

Lastly, the more control the parent desires over a subsidiary, the greater the need for the appointment of an independent director or manager of the subsidiary. Independent directors or managers are not involved in the day-to-day operations but oversee the management through periodic reporting and evaluation of major decisions and the company's financial position. The independent director, with his or her corresponding fiduciary duties, will provide a significant level of protection to the parent should a creditor, bank or governmental entity investigate whether a parent should be responsible for the actions or debts of its subsidiary.

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 should understand that the more control it has over the subsidiary, the greater the risk that the parent may be held responsible for the debts or improper actions of the subsidiary. However, the parent should maintain as much control as possible, while insulating itself from the risks. After discussing the risks and benefits with the parent, the attorney should create the strategy in conformity with the parent's goals. There is no standard answer to implement this strategy; a customised plan should be created after careful consideration of all relevant factors, including the level of trust in the management of the subsidiary, and the ability and ongoing desire of the parent to consistently follow that strategy.

In reality, the parent will want as much control over the subsidiary as possible. Some of the following examples may be used to gain control but manage the risk of subjecting the parent to the liabilities and improper actions of the subsidiary:

- Employment agreements with all the subsidiary's management whereby individuals may be terminated without cause upon some notice period.
- Parent companies should never sign agreements relating to the subsidiary's business, such as a lease. At most the parent may sign a guarantee of the subsidiary's obligations under agreements.
- If the subsidiary is using the employees or rental space of the parent or any of the parent's equipment or services, there should be a written agreement between the two for fair compensation. This way, the parent may have some control over the expenses of the subsidiary without the risks of too much control.
- The parent company may have a majority representation on the subsidiary's board of directors, so long as it is not full control.

US - NEW YORK

Noreen R. **Weiss**

Partner, MacDonald Weiss PLLC

+1 646 513 3284
weiss@macdw.com
macdw.com
irglobal.com/advisor/noreen-weiss

Noreen Weiss is a corporate and transactional lawyer and management advisor, with more than 25 years' experience advising the C-Suite, boards of directors and investors on all manner of finance, commercial and transactional matters.

As a practicing lawyer in London, Tokyo and New York, Noreen has spent her career focused on international work, with expertise in domestic and cross-border finance and business structuring, corporate finance deals from seed and angel investments through to late stage venture capital investments and Regulation D private offerings and IPOs, capital markets (global debt and equity offerings) and cross-border transactions such as M&A and joint ventures.

Noreen is a former in-house counsel for Home Box Office (HBO) so understands the business challenges that executives face and brings this business-minded perspective to all her client matters.

MacDonald Weiss is a New York City-based boutique law firm that provides business-law related services to innovative entrepreneurs, growth companies, SMEs , public and private multinationals, and investors. We cover the core business-related practice areas: corporate, M&A, securities, finance, commercial, and tax. We also act as US – or global – outside general counsel.

We offer our clients a compelling combination of elite multi-national law firm and Fortune 100 Company in-house experience, an accessible and nimble style, and value for money. In short, top tier sophistication on a human scale.

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

Two recurring areas where we see clients become inadvertently tripped-up is assuming that the method of doing business legally in one jurisdiction means that its activities re "legal" in another jurisdiction, and inadequate shifting of risk to third party providers.

Know the regulations in each jurisdiction where your company will operate – not just where you have an office, but where you sell your product, license your technology etc. This is particularly important for activities that are cutting edge, such as block-chain products that may function in a manner that triggers local regulations governing the transmission of money or the issuance of securities.

Also, give serious review to the agreements entered into with third party service providers, and adequately police their work to ensure that it complies with local regulations. For instance, we frequently see clients get tripped up with data privacy regulations, or the rules governing contests, give-aways and sweepstakes in the US, when they hire a marketing, PR or branding company to run campaigns, and have not adequately shifted the risk of certain activities to the service providers, or ensured that the terms governing the promotion are drafted to protect the company from potential risk, such as a coupon going viral resulting in tens of thousands of consumers claiming a free product.

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?

The use of well-placed entities in a corporate structure, sometimes coupled with licensing, can be used effectively to protect assets. The parent is completely exposed to US risk when it operates as a "branch office" – that means the business has not formed a special entity for US operations, rather it is doing business with or through the US directly, which means the foreign entity is directly exposed to claims from US plaintiffs. Forming a US entity that has limited liability (a corporation, or a limited liability company, the choice often being determined by tax considerations), or even a special purpose limited-liability foreign entity which then does business into the US, can shield the parent from some risk.

If your company plans to make an acquisition in a high-risk jurisdiction, one without a well-established statutory net or jurisprudence regarding contract enforcement for instance, or one that has a history of government nationalisation of industries or appropriation of assets, then it may be important to structure the acquisition through a jurisdiction that has a bilateral investment treaty with the jurisdiction of the target, if the acquiror's home jurisdiction does not.

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?

When a business expands abroad, it is only natural for the parent to want to keep a very tight rein on the activities. However, the US is a litigious society and we often find ourselves coaching non-US clients on how to use corporate governance procedures, and entities within the corporate structure, to manage risks.

Corporate governance is another simple but effective risk management tool. Forming an entity as noted above is only one shield, but intermediate entity structure only works if the foreign parent also respects corporate governance formalities. If the US entity operates as the alter ego of the parent, in essence with day-to-day matters decided by the parent, or if it makes other more obvious mistakes such as co-mingling funds, then the "veil can be pierced", and a court can determine that the parent is liable for the subsidiary's actions. It is not easy to pierce the veil, there needs to be a strong showing of parental control and intervention, so if the parent follows basic governance procedures – board meetings or written consents (board members need not be US citizens or residents) for major actions, designation of officers with actual decision making authority – then courts are disinclined to pierce the veil.

QUESTION THREE

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

Determining "the right balance" is not just about balancing legal risk between parent and subsidiary, it also includes commercial considerations. Clients often request a risk evaluation in terms of percentages, or low/medium/high-risk levels. The evaluation of risk is a nuanced exercise that takes into account legal, commercial, and human variables, as well as risk appetite.

There is often a moment when the evaluation of legal risk, and the ultimate decision that needs to be taken, becomes a commercial decision which is also impacted by the client's assessment of whether it believes, based on past experience with the counterparty, or market forces, or regulatory practice, that the counterparty or regulator may or may not act a certain way. The "right balance" also takes into account a practical assessment of the burden of compliance versus the risk gravity of the consequences for not doing so. For example, neglecting to police a social media influencer who fails to disclose that he/she is being compensated by the company may lead to a warning letter from the regulator. That letter may be a matter of public record, a theoretical tarnish on the company's reputation, but the company may or may not view that as a risk that warrants tight control over social media disclaimers.

I would caution against trying to rely on a percentage valuation of risk, as it could lead to a false sense of security.

INDIA

Ramanand **Mundkur**

Partner, Mundkur Law Partners

+91 8043 576 710
rmundkur@mundkur.com
mundkur.com
irglobal.com/advisor/ramanand-mundkur

Ramanand Mundkur has more than 25 years of international experience in corporate law and finance. He is based in Bangalore and provides specialist advisory services on cross-border mergers and acquisitions, international agreements and collaborations for life sciences and healthcare companies, and on insolvency resolution and bankruptcy matters.

Ramanand is also a corporate governance and risk management specialist, advising listed and unlisted companies on complex and sensitive board and c-suite level corporate governance issues including addressing the discovery and reporting of material corporate fraud. In addition to his transactional work, Ramanand has appeared before various courts and tribunals in corporate and commercial disputes and is a commercial arbitrator with the Indian Institute of Arbitration and Mediation.

Mundkur Law Partners is an award-winning corporate law firm based in Bangalore, India. The firm specialises in complex, international transactions and has a reputation for adding exceptional value in developing client strategies in transactions and disputes. The firm's clients range from listed multinationals to start-ups, with interests across diverse areas from brick and mortar manufacturing to cutting edge drug-discovery and technology-based businesses.

The firm's practice focuses on five areas: international M&A – including private equity and venture capital transactions – education law, life sciences and healthcare, insolvency resolution and complex commercial disputes. The firm values its reputation for exceptional client service and offers each client the assurance of complete partner involvement in every aspect of the engagement.

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

- Exercise supervision over the local subsidiary, but leverage local expertise to address and manage local business and political risk and ensure compliance with local laws.
- Use regular calls and reports, supplemented with sector-specific internal audits, to ensure effective oversight of issues that could affect compliance with laws in the parent company's own jurisdiction or policies on business conduct and ethics
- Invest in training to build a culture of compliance and develop an awareness of local and international risk among the subsidiary company's employees and contractors
- Only showcase local business success if it was achieved without sacrificing compliance.

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 advising companies dealing with significant business activities in a foreign jurisdiction, we find it helpful to assess risk in terms of the following four broad categories:

- First, the risks related to doing business in the particular foreign jurisdiction – i.e. not just local or international political or business risk, but also industry-specific or jurisdiction-specific risks. For example, attitudes to regulation of certain industries such as alcobev, may vary from country to country. Similarly, when doing business in a foreign jurisdiction it is important understand the regime for dispute settlement not just in the realm of private party disputes, but also in terms of approaches to and implications of disputes with local regulatory or revenue authorities.
- Second, risks related to compliance with local laws – particularly on issues related to foreign investment regulation, privacy and data protection, employment, labour and social security laws, environment health and safety, exchange control regulations, and general corporate and business compliance requirements.
- Third, risks related to compliance with the laws in the parent company's own jurisdiction, including cross-border tax regulations on issues related to transfer pricing, and anti-avoidance measures, laws regulating foreign corrupt practices and laws on privacy and data protection.
- Fourth, risks related to compliance with the parent company's own business conduct and ethics policies.

While the first step towards minimising risk is identifying the nature of the risk, it is not the only step. Putting in place a system for obtaining regular updates on developments from local business partners and engaging local counsel to help anticipate and address risks before they arise are important too. Finally, despite technological advances, the importance of visiting the foreign jurisdiction to understand the realities on the ground first-hand cannot be over emphasised.

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?

While one often hears requests from foreign investors that they require complete control of the international subsidiary, such an approach can be counterproductive. In our experience, no matter where one operates, nobody understands local business better than the locals. However, this does not mean that local partners should be given an uncontrolled hand when it comes to managing risk. For instance, the foreign parent company's own regulatory and business conduct requirements might trigger liability if the parent cannot demonstrate that it has exercised due care in relation to the subsidiary's operations.

As a result, a risk-based approach to control could help balance the needs between necessary parent company oversight and leveraging local experience. Under such an approach, parent company control should be maximised when dealing with risks related to compliance with laws in the parent company's own jurisdiction and business conduct and ethics policies. On the other hand, a deference to local expertise would be beneficial in dealing with risks related to doing business in the particular foreign jurisdiction and with risks related to compliance with local laws.

However, just relying on an allocation of risk-based controls is often not enough. Parent companies also need to invest in training and continuous dialogue to build a culture of compliance and develop an awareness of local and international risk among the subsidiary company's employees and contractors.

QUESTION THREE

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

Initially, most jurisdictions recognised parent companies and their subsidiaries as distinct entities, including for purposes of determining liability. However, that situation has changed over the past 40 years, and it would be most unwise to manage risk on the assumption that a parent entity cannot be made liable for actions involving its subsidiary.

The liability imposed on the US parent entity for the Bhopal Gas leak tragedy in the 1980s was perhaps one of the earliest instances where a parent company (and its officers) were sought to be made liable for a devastating industrial tragedy involving a subsidiary company. Subsequently, parent company liability has also been recognised in cases involving foreign corrupt practices laws and laws targeted to address money-laundering, terrorist financing and the enforcement of international sanctions regimes. Most recently, liability in relation to the handling of data privacy appears to be another area where the potential of parent company liability could arise in relation to actions of a subsidiary.

HONG KONG

Joshua **Chu**

Consultant, ONC Lawyers

+852 2107 0365
joshua.chu@onc.hk
onc.hk
onc.hk/en_US/joshua-chu

Dominic **Wai**

Partner, ONC Lawyers

dominic.wai@onc.hk
+ 852 3906 9649
onc.hk
irglobal.com/advisor/dominic-wai

Joshua Chu is a solicitor qualified to practice in Hong Kong. Before becoming a lawyer, Joshua worked in the healthcare industry serving as the IT department head at a hospital as well as overseeing their procurement operations.

His past legal experience includes representing the successful party in Hong Kong's first cryptocurrency litigation as well as appearing before the Review Body on Bid Challenges concerning a health-care related tender.

Today, Joshua's practice is mainly focused on litigation and technology law. Aside from his legal practice, Joshua is also a senior consultant with a regulatory consulting firm as and a management consultant for the Korean Blockchain Centre.

Before joining the legal profession, Dominic has worked in the banking sector and as well as in the Independent Commission Against Corruption (ICAC).

Dominic's practice focuses on advising clients on matters relating to anti-corruption, white-collar crime, law enforcement, regulatory and compliance matters in Hong Kong, including advice on anti-money laundering. He also handles cases involving corporate litigation, shareholders' disputes and insolvency matters, defamation cases, domestic and international arbitration cases, cybersecurity, data security and privacy law issues, competition law matters, e-Discovery and forensic investigation issues as well as property litigation

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Established in 1992, ONC Lawyers has become one of the largest domestic law firms with more than 150 solicitors and qualified staff. We are a member of the prestigious International Society of Primerus Law Firms and designated by Asialaw Profiles as a "highly recommended" law firm and ranked by Chambers and Partners ras a leading firm in the Asia Pacific Region.

We are dedicated to providing quality services based on our four core values: Integrity, Collaboration, Excellence, and delivering Solutions without complications.

We offer a full range of legal solutions to individual and corporate clients of all sectors.

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

Business agreements are all about risk allocations. Key considerations multinational corporations (MNCs) should include:

> Nature of collaboration relationship between MNCs and local partner. Is the local partner a local person, or is the local partner someone from HQ? Is the relationship that of a partnership or employer/employee?

> Employment relationship. Often times when MNCs become too distant, local partners might see the business as theirs.

> How is the MNC's IP protected?

> Moreover, the proper forum of adjudication of dispute should be stated (e.g. by way of an arbitration clause) given that local Courts can only deal with matter within their jurisdiction. A way around this problem is arbitration which can deal with cross border issues.

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?

One of Hong Kong's key competitive advantages when compared with other financial centres within the Asia Pacific Region ("APAC") lies in Hong Kong being the common law gateway into Mainland China. Aside from being the gateway point into Mainland China, Hong Kong's commonwealth heritage means that Hong Kong inherited a number of valuable/advantageous tax regimes which can also be found in other commonwealth jurisdictions (e.g. British Virgin Islands, Cayman Islands).

Unlike the island nations, however, Hong Kong is unique in having a strong reputation for possessing a well-developed regulatory regime (the Securities and Futures Commission ("SFC")) is a world-class organisation that surrounding regional jurisdictions often look up to.

Thus, Hong Kong's strong reputation in having a stable rule of law coupled with being the host of APAC's premier tier 1 financial centre means that most multinational companies ("MNCs") will come to Hong Kong to establish lay-over entities (e.g. Holding Companies) before setting up Wholly Owned Foreign Enterprises ("WOFE") in their target jurisdictions.

Just like any union of relationships (e.g. marriages), when MNCs set-up shop in Hong Kong they only envision a bright future with their collaborating partners. Common pitfalls therefore include:

- Lack of a well-defined shareholder's agreement with dispute resolution mechanisms (e.g. deadlock clause, jurisdiction, etc);
- Lack of clearly defined employment relationship between MNCs and local partners; and
- Lack of clarity of WOFE's right to use various Intellectual Properties ("IP") belonging to the MNCs.

The failure to anticipate future disputes means that:

- There exists unrealistic expectations on both sides with MNCs often treating local partners as mere employees; local partners in turn see themselves doing most of the work but receiving disproportionate rewards;
- Disputes escalate out of control quickly (there being no mandatory dispute resolution mechanisms – the lack of deadlock mechanisms means lack of clarity for both sides – both sides thinking themselves as righteous party with good prospect of success).
- Upon the breakup of relationship – common item disputed includes IP (e.g. whether local partner should retain control and right to use IP).

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?

- The degree of control that a parent company should retain vs. autonomy and allocation of risk has been an age-old dilemma faced by many multinational corporations.
- It is trite that the greater the control, the greater the culpability of responsibility. After all, at the heart of all non-contentious legal practices lies the concept of risk allocation.

To illustrate, it goes without saying that the legal representative of, say, a PRC subsidiary will hold substantial power over the PRC subsidiary. A legal representative will essentially be able to represent the PRC subsidiary in transactions, make legal decisions that will be binding regardless of whether the remaining foreign director agrees with their action or not (holding the Emperor's seal so to say).

On the flip side, the legal representative will also be the first line in terms of absorbing liability, even personally. Hence the phrase, the greater the power the greater the responsibility.

Foreign multinational entities when setting up overseas subsidiaries often make the incorrect decision of minimising their control over their WOFE (no one wants liabilities). This again is often a decision made on hindsight without regards to the possibility that the legal representatives will turn against the MNCs.

The result usually – once there is a dispute, MNCs face a wholly foreign owned enterprise (WOFE) running amok (with their local partners being able to continue to control and run the WOFE pending resolution of the dispute).

It is therefore a balancing exercise for MNCs. From a litigation perspective, it is recommended that risk should be managed at the outset, usually via a properly designed and drafted shareholder's agreement.

It is also highly recommended that whilst WOFEs are ultimately subsidiaries of the multinational entity, they are separate legal entity nonetheless. To manage the IP risks, the necessary licencing agreements should also be prepared. It is better to spend the resources at the beginning to prevent disputes than to pay for the long and uncertain legal process.

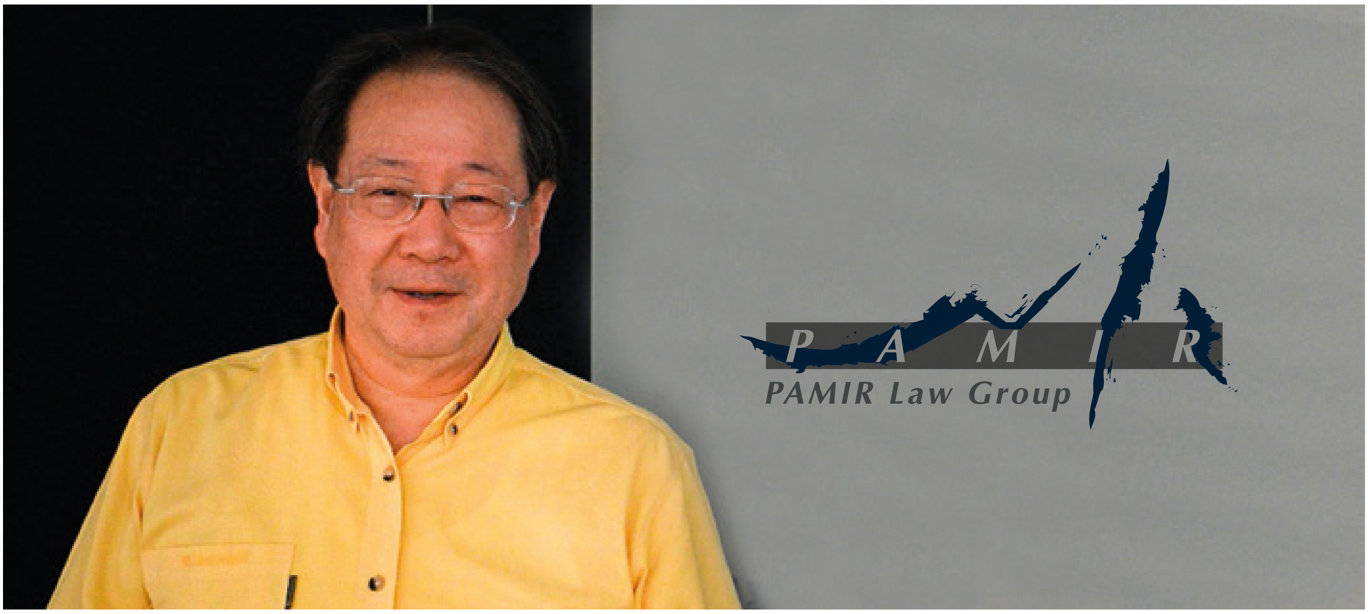
QUESTION THREE

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

As explained, the right balance between risk and liability should be allocated by way of a shareholder's agreements and licencing agreements. The shareholders can also spell out rights, responsibilities and expectations.

Ultimately, the best balancing exercise that a multinational entity can hope for is dispute prevention (which can be prevented when parties enter into a relationship with clarity on role and expectations). Proper procedure for dialogue (e.g. dispute resolution clause) will have a good chance at mitigating conflict at an early stage. After all, it is never good to be penny smart but pound foolish.

In summary, a shareholder's agreement will remove potential dispute. An employment agreement will give clarity of role. Proper licencing of IP will mean that MNCs will have secured their rights adequately.



CHINA

Nicholas **Chen**

Partner, Pamir Law Group

+886 255 881 788
nchen@pamirlaw.com
pamirlaw.com
irglobal.com/advisor/nicholas-v-chen

Nick has been travelling and working in China since 1973. He is the managing partner of Pamir Law Group, an international law and business consulting firm based in Asia with offices in Beijing, Shanghai and Taipei, with a long track record of successfully closing transactions in a broad range of industries in China and Taiwan.

He has successfully completed hundreds of foreign investments into Greater China in all coastal and many interior provinces for Fortune 100 Multinational Corporations, privately held and family group companies and private equity groups from the US, Europe and Japan.

Pamir is an international law and business consulting firm based in Asia with offices in Taipei and Shanghai, with a long track record of successfully closing transactions in a broad range of industries in the PRC and Taiwan.

Pamir's lawyers are from top law schools and law firms. Our attorneys are former partners and senior associates from global law firms located in New York, Silicon Valley, London, Hong Kong and Tokyo.

Pamir's clients include multinational Fortune 100 companies, venture capital funds, international law and private equity firms. We also represent Asia-based listed companies, privately-held conglomerates and high net worth family groups. We co-counsel with leading law firms from Asia, North America, Latin America and Europe on their client matters

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

Do you know whether all your key service providers, partners and vendors are KYC "clean"? Do you currently ensure that none of them have a criminal record? Do you ensure that they are not in any local bribery watch-lists? How can you document that these checks were done properly?

When receiving investment from local sources, can you ensure that the source of funds ("SOF") is clean? Do you have a professionally prepared SOF report?

Do you have a market-and-facts-based (not checklist document based) due diligence process to ensure all your partners' meet regulatory compliance standards?

Are checks and balances in place on all operational and organizational processes?

Do you have an open hotline to report misconduct? Is an investigation team assembled and on standby?

Do you have a SOP to push back on petty administrative "asks"?

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?

There are 3 major types of China risk: (i) Jurisdictional Risk, (ii) Organisational Risk and (iii) Operational Risk. The latter two can be managed with standard management best practices.

The former is the most dangerous because it is a wild card and it can flip the boat. Many companies do not proactively or consciously manage jurisdictional risk because it does not fit neatly into a single executive's job description. This can be huge mistake, especially in troubled times e.g.: pandemic conditions.

Jurisdictional risk is a huge challenge since converting terra incognita into terra cognita is difficult in China, even in the best of times. Currently, China's unique dynamics are more complicated than ever. Being prepared or not is the difference between night and day.

The government's decision two years ago to retreat from three decades of reform policies is coming home to roost. Continued diversion of capital towards debt-generating state-owned laggards, away from the productive efficient private sector has a negative global impact. Mounting domestic inflation, continued market regulatory obstacles, rising cost of living and operating costs, trade war tariffs and pandemics has increased business and social disruption and accelerated the need to seek new markets and production bases and rapidly shifts entire supply chains overseas, causing mass layoffs. Technological innovations such as automation have also caused considerable job losses. The entire ecosystem is in rapid transformation and uncertainty is higher than ever.

Many management teams accept entropy as inevitable. Maintaining business-as-usual managerial inertia by doing nothing is blissful ignorance. Darwin speaks of the survival of the most adaptable; the alternative is gene pool culling.

One example: Is your management team aware that the recent "phase one" trade deal is widely viewed in China as a modern "unequal treaty" extracted at gun point akin to the Treaty of Versailles? What can history tell us about the repercussions of such agreements? Has the organization systematically focused on what risk management steps should be considered to prepare for this?

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?

There are many internal and external aspects to managing organisational risk in China. Building success in China means building capacity and sustainability (both organisational and operational), to reduce risk and liability across the entire organisation—both parent and subsidiaries. This is not an either/or parent/subsidiary question.

In China, the road to success includes focusing on operational and supply chain excellence; finding and retaining great people and partners; proactive risk management systems; sophisticated financial management; proactive asset management; transparent corporate governance; and strategic growth management.

To achieve organisational success, the entire organisations' best talent and know-how must converge to create China-specific capacity and sustainability to protect and grow the business. "Control" is not the issue. Accepting liability for either the parent or the subsidiary is compromising enterprise value and cannot be a given.

In each of the above areas, challenges include managing relationships, awareness, expertise, administrative support, enthusiasm and positive convergent views. Many capacity building tools and strong support are required to address those challenges: examples include clear China-specific organisational standard operating procedures ("SOPs") with cross teaming, relationship building, knowledge sharing, strong project and shared services support, organised annual events, external trainings, forums, media management and many other tools.

At the heart of this, coordination is key. Organisations mired in corporate cultures that focus on control, bureaucratic turfs, reporting lines, individual egos or fragmented agendas do not excel in China as they cannot recruit, retain or grow the best human capital. Success in China is about teamwork and bringing the team's best to compete. Applying proven market expertise to design, build, implement, maintain, monitor and adapt systems and processes to protect success is hard work. There is no simple one-size-fits-all approach. SOPs must be tested, verified and adapted *in situ*.

QUESTION THREE

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

The "right" balance of risk and liability is to design and operate so that there is minimal risk to both parent and subsidiary. The best way to achieve that is to build China specific operational systems and processes. Such capacity will generate operational excellence and sustainability.

Every company function,from human resources, legal, logistics, finance, security, intellectual property asset management, strategy, should be audited and reviewed with risk management in mind. Each function/department should verify its best practices and map out its processes to show the coordination of all officers and functionaries to insure coordinated individual and enterprise best practices.

Tailored processes are needed to coordinate individual and organisational performance, especially when multiple C-Suite officers need to act in coordinated fashion, such as:

- Many operational tasks involve multiple corporate officers and functions such as: making investments, resolving internal/external conflicts, hiring/firing key management staff, major transactions, related party transactions, borrowing and the provision of guarantees;
- Periodic legal, finance, securities and environmental audits and reports to regulators or to a related/parent company;
- Where common directors are in both the parent and subsidiaries, SOPs may need to be in place to avoid conflicts of interest as well as to enhance common group interests;
- Internal policies providing the guideline on matters that must be voted by the board;
- Directors appointment by the parent company in the subsidiaries must clearly define their fiduciary duties as they should not be shadow directors;
- Coordinated actions when handling a public company crisis;
- Major decisions must be documented and rationales provided; and
- Specific systems and SOPs need to be established and planned based on the company realities for all operational functions.

US - ILLINOIS

Michael **Roberts**

Partner, RM Partners

+1 312 251 2295
rmpartnerslaw.com
rmpartnerslaw.com
irglobal.com/advisor/michael-roberts

Michael is a principal of RM Partners Law LLC. He is also a Certified Public Accountant. Michael has extensive experience in corporate transactions, mergers and acquisitions and private equity and venture capital financing transactions nationally and internationally. He has represented private and public companies, entrepreneurs, private equity and venture capital funds, software, technology, manufacturing and retail companies in a variety of transactions, including mergers, acquisitions, dispositions, joint ventures and capital financings. Michael was a contributing author of a chapter in Middle Market M&A: Handbook for Investment Banking and Business Consulting, published by Wiley Finance.

RM Partners Law LLC is a boutique law firm that focuses on corporate transactions and combines highly sophisticated legal services with a business model focused on efficiency. Our size and culture foster strong personal relationships and an environment that provides clients with sophisticated analysis, negotiation and execution in a timely and cost-efficient manner. Our clients consist of entrepreneurs and family businesses, private equity funds, venture capital funds, domestic and international companies, high-growth technology startups, and Fortune 100 companies. Our advantage is the ability to offer sophisticated transactional legal services not typically found in a law firm of our size.

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

Understand the critical legal issues in the foreign jurisdiction you are entering; for those only familiar with the US, you may be surprised at the legal issues which arise overseas.

Pay special attention to intellectual property laws in foreign jurisdictions and understand the sophistication of that jurisdiction as to intellectual property rights and protections, including the regulations that govern.

Pay special attention to employment law issues in the foreign jurisdiction because, in general, foreign jurisdictions provide many more rights and protections to employees than the US.

Pay special attention to tax laws in the foreign jurisdiction, both tax laws in that jurisdiction and the relation of those laws to US tax laws.

Structure the transaction, to the extent possible, to provide you with the most favourable and protective structure and most favourable tax treatment.

Engage competent and highly experienced attorneys, accountants and advisors in the foreign jurisdiction to work with US counsel.

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?

The key risk-related concerns in international transactions, particularly M&A transactions, most often involve legal issues surrounding intellectual property, employees and tax. These key items are heavily addressed in the transaction agreements and in the legal due diligence phase of a transaction. All these risks become magnified the more the foreign jurisdiction varies from the laws of the US.

Because most of our international transactions involve companies with significant amounts of proprietary intellectual property, we need to assure that our clients have proper intellectual property rights and protections in foreign jurisdictions, which may have unique laws and regulations.

Employment issues are also a common critical issue in foreign jurisdictions, mostly because the US generally affords employers much more flexibility than foreign jurisdictions afford in dealing with employees. Foreign jurisdictions generally grant employees much more favourable treatment and protections than the US does; therefore, US-based companies need to clearly understand the rights of employees in the foreign jurisdiction they are entering, particularly the employment termination roadblocks and costs that may exist. US-based companies are often surprised at the amount of protections employees in other jurisdictions have.

Tax issues are extremely critical in any transaction involving foreign jurisdictions, both the tax laws within the particular jurisdiction and the relation of those to the US tax laws. Tax issues are critical in any transaction and become more exaggerated in international transactions for a host of reasons and generally require close collaboration between tax advisors in the US and the foreign jurisdiction. For all of these issues, and all other issues involving transactions in foreign jurisdictions, it is critical to have competent and experienced local counsel and other advisors in the relevant jurisdiction. We work on a significant number of international transactions and have an excellent network of international attorneys, accountants and other advisors, all of whom have been invaluable in our international transactions.

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?

A parent company should have 100% control over its overseas subsidiaries – to the extent that it is possible. Although in a particular foreign jurisdiction a parent company may have more risk in relation to a foreign subsidiary based on the amount of control it may have over that subsidiary, we would generally not treat, from a legal standpoint, such a foreign subsidiary differently than we would a US-based subsidiary. To the extent a foreign jurisdiction poses certain risks that are tied to the amount of control of the US-based parent company, we may address those risks through the structure and operations of the parent company and the subsidiary. For example, we may insert another entity, such as a Delaware limited liability company, in between the foreign subsidiary and the US parent.

Also, we would counsel our clients to operate the business in the foreign subsidiary on a day-to-day basis, to the extent possible, as a separate company and not as if it has been integrated into the US-based company. This would include observing the corporate and governance formalities of the foreign subsidiary, maintaining separate books, records and accounts, and executing contracts in the name of such foreign entity. In other words, US-based companies should respect the separate identities of the US-based company and the foreign subsidiary to the extent they can, recognising that legal issues cannot drive every business decision.

MEXICO

Cristina **Sánchez Vebber**

Partner, Sánchez Devanny

+52 555 029 8515
csv@sanchezdevanny.com
sanchezdevanny.com/es
irglobal.com/advisor/cristina-sanchez-vebber

Cristina has 30 years of experience providing service to clients. She has 22 years of experience in the legal industry, with a focus on corporate transactional & anti-trust practice.

Cristina provides legal guidance and advice to foreign clients entering Mexico to do business as well as assistance to clients that already have Mexican operations that they wish to expand. She also helps clients coordinate their operations with other jurisdictions and provides day-to day legal advice.

She strives to understand the needs of each foreign client and advises on practical legal solutions to meet those needs and resolve their legal issues. She provides legal advice in the establishment and legal implementation of business strategies by coordinating different areas of law, such as tax, labor and foreign trade, to offer a complete solution that can be implemented to meet the client's needs as a whole. She also provides legal advice on day-to-day operations, from contract review to restructuring operations.

Sánchez Devanny Mexico is a law firm that advises local and international clients in industries such as manufacturing, automotive, retail among others.

Our relationships go further: we establish long-term links with clients because we strive to understand their business and expectations and focus on providing them with complete, clear and personalised advice.

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

- Hire a local consultant that can provide insight into how things work in that particular jurisdiction.
- The parent company needs to exercise the right amount of control, have the right systems in place, hire key people and establish a team to supervise the foreign operation.
- Funding of the foreign operation: consider where the funds come from, how to repatriate and tax consequences.
- Corporate governance: having systems that allow for governance controls per parent company and local requirements.
- Understanding the legal obligations of the foreign operation. Specifically relating to taxes, labour and, depending on the operation environmental, antitrust, among others.

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?

Non-Mexican clients with operations in Mexico face a series of risks related to several factors. The first factor is assuming that things work the same way everywhere, and culture. In this aspect we'd refer to culture as legal culture and compliance with legal requirements. Many clients do not understand the differences in legal systems and assume that the rationale for establishing a certain rule is the same everywhere. This lack of understanding can have serious monetary consequences. We recommend that clients engage with a consultant who can provide insight on how things work in order to avoid unnecessary risks.

A second factor is control – either wanting too much or not having enough over the subsidiary's operation. When there is too much control the operation becomes bureaucratic and slow, but when there is very little control, the operation is chaotic. This can have monetary as well as other legal consequences.

A third aspect is not clearly understanding how the funding and management of the subsidiary will work. Funding is a very important aspect for the success of the subsidiary. Understanding the consequences of where the funds come from and the tax treatment that comes with it is key. As well as the repatriation of funds coming from the subsidiary.

A fourth aspect when setting up operations in Mexico is the labour situation – understanding the legal obligations and limitations an employer has towards its employees can minimise risk, as well as understanding how unions work, their power in Mexico etc.

The fifth aspect is understanding the culture with regard to corruption and legal compliance. Although there is legislation regulating corruption, defining gifts and what is considered corruption, many Mexicans are not fully aware of the extent of the law.

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 our experience, when setting up operations it is important that the parent company has a team that is prepared to manage the initial stages of the subsidiary operations. As mentioned, it is very important to have local advice on how things work from a legal and accounting standpoint, and, in particular, on funding, repatriation of funds, taxes, accounting principles, payroll and benefits, anti-money laundering practices and corporate governance, among others.

Depending on what kind of operation the parent company has in Mexico, be it a joint venture, acquisition or standalone operation, at the beginning it is important to have key people from the parent company supervising the operation. It is very important to have the systems in place from the beginning in order to reduce the exposure of risks of going into a foreign operation. Working closely during the beginning stage of the operation with local consultants who can assist in the implementation and understand legal compliance can be a key aspect in reducing exposure to risk. In addition, hiring key experienced employees will be an essential aspect in managing risk in a foreign operation.

QUESTION THREE

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

Initiating an operation in a foreign country is a risk itself. In our experience, if a company gets proper advice prior to entering, while entering and during the time they have operations in the country, the risk will be managed to the extent possible. Having good systems set up from the beginning is key to obtaining the right balance between risk and liability. By good systems we mean having a team that supervises the foreign operation, having the key people in the foreign operation and having good corporate governance policies. Training employees regarding values and ethics is always important. Providing training on key legal aspects is also important to ensure employees understand why compliance is so important for the company.

There is no one formula that works for each company. We have had companies that in addition to having all the systems in place have a team periodically travel to Mexico to meet with employees. In addition, they engage consulting firms to carry out periodic compliance audits. It all depends of the size and type of the operation. For example, a manufacturing plant will have more risk associated with the import and export of products, while a services company will have more digital compliance requirements.

ISRAEL

Mitchell C. **Shelowitz**

Managing Partner, SLG Shelowitz Law Group

+972 054 661 1684
mitch@shelgroup.com
shelgroup.com
irglobal.com/advisor/mitchell-c-shelowitz

Mitchell C. Shelowitz is the Managing Partner of Shelowitz Law Group (SLG), a global law firm with offices in New York City and Tel Aviv. Mitch is also the Founder and former President of the Association of Corporate Counsel (ACC) Israel Chapter (2000-2004).

Mitch is a veteran New York attorney who has meshed his legal experiences as a corporate deal lawyer and tenacious litigator at top New York and Israeli law firms, with a unique business acumen developed over years as in-house legal counsel at leading Nasdaq-traded tech companies, offering integrated and personalized legal services to the firm's global client base. He is engaged on a daily basis advising multinational corporations on cross-border structuring and transactions, with a particular emphasis in advising foreign companies on the launch, operation, and maintenance of businesses in the United States. He is admitted to the bars of New York and Israel.

SLG is an international law firm with offices in New York City and Tel Aviv. For more than 25 years, SLG attorneys have been looking out for their clients.

Whether it is negotiating an important business deal, defending against a business crushing lawsuit, protecting intellectual property and trade secrets, hiring or dismissing employees and consultants, or advising on the complex requirements of US privacy laws and regulations such as HIPAA, TCPA, COPPA, or FERPA, SLG attorneys can assist you.

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

- Avoid overlapping officers of parent company and US subsidiary.
- In employment agreements, US employees should report to US officers or the US subsidiary's board of directors – not to the foreign parent CEO or other officers.
- US employees should have business cards and titles with the US subsidiary.
- US-based employees and consultants should not have foreign parent company name or address on their business cards.
- Adopt corporate compliance policy to ensure the proper separation between the foreign parent and US subsidiary including annual audits and training programmes.
- Carry out regular board of directors and shareholder meetings that are documented by appropriate written resolutions to ensure compliance with required corporate formalities.
- Salaries and compensation to US employees and contractors should be paid by the subsidiary, not the foreign parent company.

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?

For foreign corporations engaging in business in the US, one of the key concerns is exposure of the parent corporation to direct liability in the US by creating what is known as "personal jurisdiction" in the US. A constitutional pre-requisite to subjecting a foreign company to the authority of the US courts is the existence of certain "minimum contacts" by the foreign corporation in the forum state such that the exercise of jurisdiction over the company would not offend notions of fair play and substantial justice.

These are quite amorphous standards that always entail a detailed and costly case-by-case, factually intensive analysis by the courts. While the concept is complex and may vary slightly from state to state due to differing "long-arm" statutes, where a foreign corporation directly engages in US business activities, the risk of direct liability is manifest. To minimise the risks of inadvertently creating personal jurisdiction over the parent corporation, it is strongly recommended to establish a wholly owned US subsidiary to engage in the activities of the foreign parent in the US.

Critically, when initiating business operations in the US, the parent should not engage an individual as a consultant or employee, since this person will be creating minimum contacts on behalf of the foreign parent in the US.

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?

It is not the degree of control that a foreign parent corporation has over a US subsidiary that alters the risk profile, but the manner of control, which directly impacts the risks to the foreign parent. In many cases, the role of the US subsidiary is to engage in sales and marketing of the foreign parent's goods and/or services, and sometimes warehousing, logistics and post-sales support. The objectives of the parent and the subsidiary must be aligned and thus a certain level of control is essential to the success of the US subsidiary and the foreign parent's global operations.

When forming a US subsidiary, the goal should be to create a separate, independent business entity. We typically recommend composing the board of directors of the subsidiary with a combination of officers or directors of the foreign parent, and at least one local US officer. At the same time, we generally recommend that the officers of the subsidiary such as the CEO, CFO, COO, VP sales and other individuals engaged in the day-to-day operations of the business be US-based employees of the subsidiary.

Control by the parent corporation should be exercised by the board of directors of the subsidiary. In this way, the US board of directors can carry out the goals of the foreign parent corporation without engaging in direct business operations in the US. This separation is critical. In addition, an Intercompany Services Agreement should be signed by the parent and subsidiary, which sets forth the subsidiary's duties and responsibilities, the financing relationship between the parties, transfer pricing issues, intellectual property licensing and ownership between the parent and the subsidiary and any other relevant issues to ensure that the subsidiary is provided with all the tools to operate independently in the US.

QUESTION THREE

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

Finding the right balance between risks and liability requires careful attention to corporate formalities in ensuring the separateness between the foreign parent and US subsidiary as described.

When establishing a US subsidiary, there is often a temptation by the CEO of the foreign parent to take on the same role in the subsidiary. Sometimes this is due to the misperception that holding the CEO title in the US is the only way to ensure control over the subsidiary. This is not a recommended course of conduct and could tip the balance in favour of liability and personal jurisdiction. Our firm has successfully sued foreign parent companies in the US as a result of poor planning, eschewing legal advice or sloppiness in connection with the launch of US operations.

Having corporate compliance policies in place and ensuring that board of directors and shareholder resolutions are adopted on a regular basis, in accordance with applicable US law, while otherwise respecting the separateness of the foreign parent and the subsidiary, is the best way to minimise the risk of significant liability against the foreign parent in US business dealings.

Lastly, in connection with delegations and tradeshows in the US, it is important to ensure that registrations for these events by foreign parent employees use a foreign parent corporate name and address and not those of the US subsidiary.

FRANCE

Eric **Weil**

Partner, Weil & Associés

+33 144 159 898
eweil@weil-paris.fr
weil-paris.fr
irglobal.com/advisor/eric-weil

Eric's areas of practice are litigation, international arbitration, mergers and acquisitions, white collar crimes and labour and employment law.

Eric is recognised for his extensive experience in sophisticated litigation of national and international importance.

Having handled high-profiled, complex litigation matters on behalf of large global corporations, Eric offers quality across a wide array of disputes: high-stakes breach of contract, unfair competition, product liability, fraud, corporate post-acquisition litigation. Eric's comprehensive service, track record and tailor-made approach makes him a go-to choice for companies faced with complex litigation. Eric also has extensive experience in white collar crime involving a variety of cases such as deceptive labelling of pharmaceutical products, misappropriation of trade secrets, forgery, misuse of corporate assets, hindrance to the rights of employees' representatives or discrimination.

Since its establishment in 1974 WEIL & ASSOCIES is a law firm dedicated to the service of international companies.

Our firm is devoted to assisting companies, international or small and medium-sized, in their commercial or industrial activities in France or abroad through proactive legal advice as well as by the defence of our clients before courts and arbitral tribunals.

Business relationships of German and English-speaking countries have always been a major part of our activity. Therefore, our firm has lawyers admitted at bars in France, Germany and the USA at the same time. Our involvement in the advice to and representation of international clients implies that all lawyers write and speak fluently German, French and English. During the past few years, we have broadened our horizons to represent companies from countries such as Japan, Korea and China.

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

- Do not manage from abroad and be physically present on a regular basis to meet face to face with the teams operating the subsidiary and create a personal relationship.
- Become knowledgeable about the main cultural and behavioural local differences to avoid important communication misunderstandings.
- Avoid blind trust and make sure trust is earned through a process imposing strict reporting and control rules.
- Make sure local outside advisers do not own their "commercial loyalty" to the local management but to the parent company, their true client, to make sure they are keen to report and spontaneously red flag potential risk situations.

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?

The two-key risk-related concerns arising in a cross-border context are the following:

a/ do not assume that what goes in your home country can simply be transposed without adjustments. Going abroad is driven by differences and you need to adapt to different regulatory frameworks and cultures. As to the French context, the most obvious risk-related concern pertaining to local peculiarities relates to labour and employment law. Minimising this risk means you need to seek standard legal advice and, importantly, be aware of the basic features of the parent company's own legal and cultural background. To avoid communication misunderstandings, it's also important that you hire a local management team who are aware of the cultural differences. They can then inform the parent company's management team of the inherent cultural issues faced in this specific market.

b/ do not trust and keep your local team on a short leash. Experience shows that one of the most repeated example of trust abuse arises when local managers are given a blank check with little reporting and controlling pressure. As long as the business is flourishing, this does not trigger too much attention. But as soon as the subsidiary fails to deliver as planned, enquiries tend to reveal abusive practices with the company's assets. In the French context, it is perceived as normal to have strict reporting duties. In a country where it is culturally not perceived as wrong to slightly break the rules or bend them so they fit one's own interests, keeping a strong controlling scheme is a key factor for success.

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?

The level of control is key to success in France and avoids severe disappointments and surprises. The main guiding principles should be no blind trust and simple and clear reporting and control schemes. All this is handled internally at the parent company's level and externally, on the local market, through trusted accounting and law firms with a loyalty duty directly with the parent company.

The most common abuses relate to deceptive or manipulative presentations of the local risk context to generate false impressions due to the lack of knowledge of local regulatory constraints. This typical behaviour allows, by deceiving the parent company about the existence or reality of a risk, to trigger an approval for specifically targeted investment-related decision. Being able to double check the accuracy of these allegations with a local counsel or accountant who has a direct trust and "commercial" loyalty with the parent company allows to minimise this behaviour.

Another minimising factor is to contractually bind local management with strict loyalty obligations. This makes the local managing director personally liable, even criminally, for wrongdoings infringement's and violations that would otherwise be born by the registered corporate officer of the legal entity, who generally sits abroad.

QUESTION THREE

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

The most effective way to balance risk and liability and achieve this goal in the French context is to have the local management sign a proper delegation of power (power of attorney) with the executive legally declared as representative corporate officer of the company with the register of commerce.

This local managing director should in turn be authorised to hand over portions of this liability to members of his local team to make sure that all are bearing a fair share of personal liability.

The right balance is to hand over what cannot be controlled from overseas, such as health and safety protecting measures, to the individual employees who have a direct control over these risks on the ground.

Controlling and reporting schemes including training and sporadic random control measures shall be implemented and monitored jointly by the parent company and outside local advisers. Indeed, talents need to be retained and too many constraints may deter talented managers from joining the company. But as long as the measures are perceived as legitimate, this should not be an issue or an excuse to avoid implementing these safeguarding schemes.

NETHERLANDS

John **Wolfs**

Managing Director, Wolfs Advocaten

+31 433 561 570
john@wolfsadvocaten.nl
wolfsadvocaten.nl/nl
irglobal.com/advisor/john-wolfs

John Wolfs is an entrepreneur and founder of Wolfs Advocaten. He has worked as an attorney for 26 years, initially for leading firms in Washington DC and Rotterdam in the Netherlands, before founding Wolfs Advocaten 16 years ago. John is well known for his creativity, specialist sector knowledge and the top-quality service he provides. He is proactive, pragmatic, constructive and able to analyse situations quickly. John often lectures in international trade law, international commercial law and litigation. In his private time, John enjoys playing squash and running marathons.

With offices in Maastricht, Amsterdam, Venlo and Roermond, Wolfs Advocaten specialises in legal solutions for entrepreneurs in the Netherlands and abroad. Wolfs Advocaten covers all areas of commercial law and specialises in corporate advice and litigation, labour, IP, international trade law, international transport and logistics, customs and insurance law. Wolfs Advocaten is known for its balanced, dynamic team of about 20 attorneys, lawyers and support staff. Its approach is characteristically solution orientated. By being proactive with its clients and having the courage to be creative, the firm can provide tailored, top-quality services to multinational companies.

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

Get acquainted with the local situation. It is important to thoroughly understand the country and jurisdiction in which the subsidiary operates. By understanding the political situation, social culture, local legislation and legal system of the country in which the overseas subsidiary operates, the parent company will be able to analyse of the risks.

Gain insight into the overseas subsidiary. Ascertain the corporate structure, culture and activities of the overseas subsidiary. By doing this the associated risks and field of attention will become apparent, which will help to make a thorough risk analysis.

Limit the urge to have a high degree of direct control. It is not always necessary nor advisable to give direct instructions to the overseas subsidiary and thus greatly increase the direct involvement of the parent. More direct involvement can under certain circumstances lead to a higher risk of liability.

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 advising such a client, we carry out a legal risk analysis and base our approach on the results thereof. In this regard, we specifically pay attention to several key concerns.

A major matter is the contractual implications of such business activities since it is of the utmost importance that the client is prepared for uncertain, unforeseeable and/or unknown problems that may occur and give rise to liability risks. Contractual relationships must – as much as possible – also take into account such factors via the use of clauses. For example, clauses dealing with a change of market circumstances and force majeure. Doing business overseas may sometimes entail that the business is exploited in areas that can lead to political, social, cultural and legal unpredictability. It is our task to prepare the client as much as possible for this.

Another key area of concern we deal with is the applicable law and competent court. Although globalisation may result in similarities between internal markets and business practices in different countries, this does not necessarily apply to legal aspects. For example, in this field, we can see that legal proceedings and outcomes might vastly differ depending on the applicable law and competent court or arbitral tribunal in question. Furthermore, the legal culture of a country dictates whether you are dealing with a settlement or litigation culture. This can have also a major impact on the risk analyses, depending on the preference of the client and the underlying business sector.

A parent company can minimise risks by piercing the corporate veil. Having an insight into the business of the subsidiary and clear-cut agreements concerning the responsibilities, risks and liabilities is also necessary. Lastly, if possible, it is highly advisable to investigate the possibility of taking out insurance for certain risks.

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 general, we see that parent companies tend to need to maintain a high level of control over subsidiaries in terms of risk exposure. This is understandable since it is advisable for any parent company to ascertain aspects of the operations of its subsidiaries. However, in our experience, having a high degree of control does not necessarily reduce risk.

On the contrary, under certain circumstances when a parent company has more direct control over its overseas subsidiaries can lead to higher risks of liability. This is because a higher degree of control can point to direct involvement of the parent company and thus broaden the liability grounds. This leads to the conclusion that from the point of view of minimalising liability risks, a parent company should not aim to maintain the highest degree of control. Instead, it is important that the day-to-day responsibility lies with the subsidiary. However, it is possible for a parent company to impose various obligations on their overseas subsidiaries. Having separated boards and different management is also vitally important.

In order to minimalise the risks of a parent company being held liable, we therefore analyse, among other things, the corporate structure, the business activities of the parent company and its overseas subsidiaries, the level of control at management level, the risk management policies, the implementation of these policies and the insurance aspects.

Lastly, it is important to note that a high degree of insight into the operations of an overseas subsidiary does not automatically mean the parent company maintains a high degree of control of the subsidiary. Insight and control are two distinguishable things.

QUESTION THREE

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

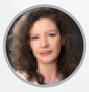
In striking a healthy balance between risks and liabilities, it is important to understand that risks and liability can never be fully excluded. It is therefore counterproductive to go to extreme lengths trying to do so. Establishing an iron grip on the subsidiary in order to minimise all risks and liability should never be an objective.

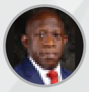
Instead, the parent company should not shy away from taking risks by allowing the overseas subsidiary a relatively high degree of freedom. In this regard, knowledge of the local culture plays a significant role. One cannot deny the fact that the overseas subsidiary is better placed and equipped to deal with certain risks and come up with the most suited and effective approaches to them. The subsidiary possesses after all more in-house knowledge and expertise to reduce the risks of the parent company being held liable for too much direct control.

Some clients are not familiar with the local culture, customs and practices of their overseas subsidiaries. We know from our experience that this can give rise to problems when those clients are not willing to take such 'risks' and only have eyes for reducing liability. The communications with the overseas subsidiaries tend to be somewhat cumbersome. If the overseas subsidiary is dependent on approval by the parent company for all kinds of matters, this can negatively affect the overall efficiency of the business. For example, contracting and dealing with local business partners and customers is for the most part best left to the overseas subsidiary. This also goes for local employment contracts. The parent company should minimise its urge to approach those parties with its own way of thinking.

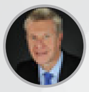
Concluding, when thinking of the right balance between risk and liability, our experience tells us that the parent company should leave things that can be done locally to the subsidiary.

Contributors (A-Z)


Adriana Posada
Partner/Director, A & C Legal
irglobal.com/advisor/adriana-posada


Ajibola Edwards
Partner, Adeniji Kazeem & Co.
irglobal.com/advisor/ajibola-edwards


Dina Assar
Associate, Al Dahbashi Gray
adglegal.com/people


Tuomo Kauttu
Partner, Aliant Finland
irglobal.com/advisor/tuomo-kauttu


Mercedes Clavell
Of Counsel, Arco Abogados
irglobal.com/advisor/mercedes-clavell


Roger Canals
Partner, Arco Abogados
irglobal.com/advisor/roger-canals

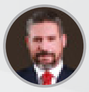

Dadash Alishov
Director, Baku Consulting Group (BACG)
irglobal.com/advisor/dadash-r-alishov


Hugh Clohessy
Partner, Clohessy Minihane
irglobal.com/advisor/hugh-clohessy


Robert Lewandowski
Partner, DLP Dr Lewandowski & Partners
irglobal.com/advisor/robert-lewandowski

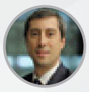

Gunther Schmidt
Founding Partner, ENDEMANN.SCHMIDT
irglobal.com/advisor/gunther-schmidt


Dr. Markus Steinmetz
Partner, ENDEMANN.SCHMIDT
irglobal.com/advisor/markus-steinmetz


Pablo González Tapia
Founding Partner, González Tapia Abogados
irglobal.com/advisor/pablo-gonzalez-tapia


Nicholas Hammond
Partner, Hammond-Partnership
irglobal.com/advisor/nicholas-s-hammond

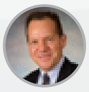

Mark Chapman
Partner, Herrington Carmichael
herrington-carmichael.com/our-people/mark-chapman


Jonathan Mazon
Partner, Junqueira, Ie Advogados
irglobal.com/advisor/jonathan-mazon

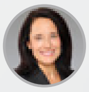

Ross Koffel
Principal, Koffels Solicitors & Barristers
irglobal.com/advisor/ross-koffel

Ruggero Rubino Sammartano
Partner, LawFed BRSA
irglobal.com/advisor/ruggero-rubino-sammartano

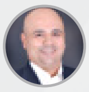
Mohamed Agamy
Managing Partner, Links & Gains Law Firm
irglobal.com/advisor/mohamed-agamy



Bruce Loren
Partner, Loren & Kean Law
irglobal.com/advisor/bruce-loren

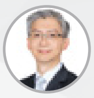


Noreen R. Weiss
Partner, MacDonald Weiss PLLC
irglobal.com/advisor/noreen-weiss



Ramanand Mundkur
Partner, Mundkur Law Partners
irglobal.com/advisor/ramanand-mundkur

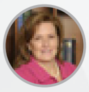
Joshua Chu
Consultant, ONC Lawyers
onc.hk/en_US/joshua-chu



Dominic Wai
Partner, ONC Lawyers
irglobal.com/advisor/dominic-wai

Nicholas Chen
Partner, Pamir Law Group
irglobal.com/advisor/nicholas-v-chen

Michael Roberts
Partner, RM Partners
irglobal.com/advisor/michael-roberts



Cristina Sánchez Vebber
Partner, Sánchez Devanny
irglobal.com/advisor/cristina-sanchez-vebber

Mitchell C. Shelowitz
Managing Partner, SLG Shelowitz Law Group
irglobal.com/advisor/mitchell-c-shelowitz

Eric Weil
Partner, Weil & Associés
irglobal.com/advisor/eric-weil

John Wolfs
Managing Director, Wolfs Advocaten
irglobal.com/advisor/john-wolfs

CPD MEMBER
The CPD Certification Service

IR GLOBAL
The Piggery, Woodhouse Farm, Catherine de Barnes Lane, Solihull B92 0DJ

+44 (0)1675 443396
www.irglobal.com
info@irglobal.com