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FINANCE & CAPITAL MARKETS

> FINNISH BOND MARKET DEVELOPMENTS

by Robin Nordblad

Robin Nordblad

Robin Nordblad is a member of the firm's Finance & Capital Markets group and heads the firm's Energy, Infrastructure & Natural Resources practice group. Robin's main areas of expertise are project finance, capital markets work with a particular emphasis on corporate bonds, banking and finance transactions and financial regulatory matters.

The Finnish debt capital market is continuing to develop at a fast pace. The bond market is an increasingly important financing source for Finnish businesses. New types of issuers, such as private-equity-owned companies and real estate companies, have recently entered the market. While bank loan financing is still the primary financing source, the bond market offers a viable alternative for businesses that meet a certain critical mass. High yield (or non-investment grade) bonds have been issued recently.

These developments have lead to more variety and legal complexity in the bond markets, including as to bonds' terms and conditions, structures and credit support. This article highlights some of the recent developments.

Bond covenants have entered the picture

Finnish corporate bonds have traditionally had very limited covenants. They have generally been limited to so-called investment grade covenants: (i) a commitment from the issuer (and sometimes the issuer group) not to pledge its assets to other creditors (negative pledge); and (ii) an option for bondholders to put back their bonds, usually at par, to the issuer in the event of a change of control in the issuer (change of control put). This is still the default option for issuers with an investment grade rating (whether official or a so-called "shadow rating") or equivalent.

More restrictive covenants

Recently, the market has, however, witnessed the entrance of bonds with more restrictive covenants (sometimes referred to as high yield covenants). These include, in addition to investment grade covenants, contractual restrictions on various activities of the issuer group such as the incurrence of debt, payment of dividends, disposals of material assets and corporate transactions such as mergers and demergers. The high yield covenant package generally also includes financial covenants (see below). A number

of Finnish bonds have included one or more covenants of this type in recent months.

Beneficial to bondholders, lower financing costs for issuers

Covenants are beneficial to bondholders, *e.g.*, because they put restraints on the debtor's ability to dilute the bondholders' claims, prevent corporate transactions that can adversely affect the debtor's creditworthiness and often create a right for the bondholders to accelerate the bonds prior to the commencement of insolvency procedures.

Covenants are not all bad news for issuers, either. In an efficient and well-functioning market, issuers can offer covenants as a trade-off for lower financing costs. Covenants may facilitate access to the bond markets for businesses that otherwise would be perceived as too risky. Moreover, high yield covenants are often quite flexible, in particular when compared to bank loan covenants.

The "great debate" on financial covenants

Bonds can include two types of financial covenants: incurrence-based covenants and/or maintenance-based covenants. Maintenance-based covenants provide that the issuer group's business must regularly meet certain financial ratios. The financial ratios vary widely, from interest cover and leverage ratios to minimum equity or solvency levels. A breach of the maintenance-based covenant triggers a right for bondholders to accelerate the bonds.

Incurrence-based covenants are more flexible from the issuer's perspective. They include financial ratios that apply only in connection with certain transactions, such as the incurrence of debt and payment of dividends. Thus, the only consequence of the issuer falling below the financial ratio set out in the incurrence-based covenant – due to adverse financial performance for example – is that the issuer cannot undertake certain transactions (*e.g.*, pay dividends or incur debt). When properly drafted, incurrence-based covenants can even be beneficial to issuers because they provide an exception to otherwise prohibited transactions.

Incurrence-based covenants taking over in Nordic high yield bonds?

European high yield bonds, which are generally governed by New York law, generally include incurrence-based covenants. Traditionally, Nordic high yield bonds with financial covenants, with Norway in the lead, have tended to have maintenance-based covenants. This has changed somewhat recently, especially in Sweden, in that several bond issuances have included only incurrence-based covenants. This is particularly true for bonds issued by private-equity-owned companies. In the last few months, incurrence -based covenants have also been used in the Norwegian high yield bond market.

In Finland, it remains to be seen which type of financial covenant will be adopted, or whether both will be used. The most recent high yield bonds have included incurrence covenants only. Maintenance-based covenants have yet to be used in Finnish-law-governed bonds.

As ever, the robustness of the covenant package is ultimately driven by the invisible hand of the market.

The Confederation of Finnish Industries' (EK) model bond terms

The Confederation of Finnish Industries (EK) published its model terms and conditions for non-investment grade bonds in December 2013. The model terms and conditions also include a "toolbox" of model covenants, including financial covenants.

The model terms' objective is to increase market efficiency and lower transaction costs for Finnish non-investment grade bonds. They have already been used in at least one bond.

Secured bonds and intercreditor issues

More secured bonds in future

In the aftermath of the latest financial crisis, bonds with extensive security packages have proliferated in Europe. In line with this development, several Finnish real estate companies have issues secured bonds. Outside the real estate space, Finnish bonds have to date generally been unsecured. Market participants expect to see more secured bonds in the future, especially by private-equity-owned companies, in line with developments in Sweden.

Secured bonds raise the specter of conflicts of interests with other secured creditors such as banks. These conflicts can be managed via intercreditor agreements between the debtor and different classes of creditors. Such agreements are a common feature in European bonds and have recently also been used in local Nordic bonds.

Trustee services

Trustees to represent bondholders

With the emergence of bond covenants and secured bonds, a need has arisen for bondholder trustee services. Bond trustees represent bondholders and are essential in a variety of circumstances, including in covenant defaults, amendments to bond terms and debt restructurings. Bond trustees also act as security agent in secured bonds.

Finland already has established bond trustee service providers.

Unlisted issuers

Companies whose shares are not publicly traded have tapped the bond market in recent years. This trend is expected to continue.

Liability management transactions

Along with the proliferation of corporate bonds, the management of the liabilities arising from those bonds is gaining more importance. This is particularly true for corporate bonds with covenants, high interest rates or long maturities, or a combination thereof. Issuers can manage these liabilities in variety of ways, including through repurchases of bonds in the

secondary market, tenders or exchange offers for bonds, and bondholder meetings to amend terms and conditions or waive covenant defaults.

Because bonds are securities for legal purposes, issuers and arrangers need to bear in mind securities markets rules when carrying out liability management transactions.

Issuers can also build flexibility into their bond terms including via a contractual right to redeem the bonds at a specified premium prior to the bonds' final maturity.

REAL ESTATE, CONSTRUCTION & ENVIRONMENT

> NEW ENVIRONMENTAL PROTECTION ACT WILL TIGHTEN THE EMISSION REQUIREMENTS

by Teemu Oksanen

Teemu Oksanen

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A Government bill proposing a reform of the Environmental Protection Act ("EPA"), which implements the Industrial Emmissions Directive (2010/75/EU) ("IED"), was presented to Parliament at the end of 2013. The new requirements might significantly affect the business especially in the fields of energy and forest industry. The proposed new EPA is estimated to come into force in May or June 2014.

A few new activities becoming subject to environmental permit

One of the main requirements under the EPA is the requirement of environmental permit for activity that poses a threat of environmental pollution. Such activities will be listed in Annex 1 of the EPA. Permit may also be required for any activity causing pollution of a water body, conducting of wastewater, and activities placing an unreasonable burden on the surroundings. The extent of activities subject to permit will, however, remain mainly unchanged. Facilities becoming subject to permit in connection with the new EPA, such as large peat production areas and large factories producing mineral oil products, must seek for a permit within a year after the EPA has come into force.

Stricter requirements for directive facilities

The permit requirements will be separate for the facilities listed in the IED ("IED facilities") and other facilities which are locally subject to environmental permit in Finland. At present there are approximately 900 IED facilities and 21,000 other facilities subject to permit in Finland. The environmental permits will be granted by the Regional State Administrative Agencies or the municipal environmental protection authorities.

The use of best available technology ("BAT") will become legally binding. The emission levels will in future be based on the binding BAT conclusions adopted by the European Commission.

Deviation from these emission levels would only be possible if the environmental benefits were lesser than the costs for using BAT due to the geographical location, local environmental conditions or the facility's features such as its old age. In addition, the energy efficiency regulations will be specified in more detail.

The BAT conclusions will be revised approximately every ten years. New BAT conclusions will be published on the web pages of the Ministry of Environment. The permits of IED facilities would be subject to a review process within six months after each revision of the relevant BAT conclusions. On basis of the review, a new environmental permit based on the new BAT conclusions may be issued, and the operator must comply with the new emission limits within 4 years after the revision.

Baseline report for facilities using hazardous substances

As a new requirement, the IED facilities will be obliged to prepare a baseline report on the current state of soil and groundwater contamination, if there would be a risk of soil or groundwater pollution due to the use or production of hazardous substances. The report would be used in assessing the necessary measures to recouperate the environment after the definitive cessation of activities. The current facilities becoming subject to the baseline report procedure must prepare the report in connection with the first revision or amendment of their current environmental permit.

New charges for supervision

The supervision will be based on risk assessment and become more systematic than before. More supervision will be directed to activities with greater environmental risks. The IED facilities must be inspected periodically every 1 to 3 years depending on the risk assessment. The approving authority may impose periodical inspections also for other facilities. The supervision would be conducted by the regional Centres for Economic Development, Transport and the Environment and municipal environmental protection authorities.

Furthermore, the periodic inspections and other supervision in accordance with the monitoring plan, inspections of violation suspicions and the supervision in relation to administrative compulsions will also become subject to charges. Thus far the supervision has been free of charge. The exact charges have not yet been decided, but according to the Government bill, the yearly supervision costs could be approximately EUR 4,300 for a large facility and EUR 40–70 for smaller facilities.

Also the permitting process will be slightly modernized. New electronic system for filing applications and other electronic tools will be launched at later stage in order to accelerate the permitting process. Furthermore, electronic announcements regarding the permit applications and the granted permits would enhance the possibilities of public participation in the permitting process.

Opportunities for cleantech business

It has been evaluated that the facility operators especially in the fields of energy and forest industry will have to make significant investments in their facilities in order to fulfill the amended requirements. On the other hand, the tightening BAT requirements can create new business opportunities for cleantech enterprises and create demand for cleantech products not only in the European Union but also worldwide.

COMPETITION & PUBLIC PROCUREMENT

> SIGNIFICANT ANTITRUST DAMAGES TOPICAL IN LEGAL DISCUSSION

by Toni Kalliokoski

Toni Kalliokoski

Toni Kalliokoski is a senior associate in D&I's Dispute Resolution team. He specialises in competition litigation and antitrust damages. He also practises real estate law as well as corporate and commercial law. Toni is the author and co-author of several articles on competition litigation and he is a co-author of the first Finnish book on antitrust damages.

The first significant antitrust damages judgments are beginning to be issued at District Court level. Monetary stakes are high but lack of definitive precedents continues to cause uncertainty. The situation will be further affected by the expected adoption of an EU antitrust damages directive before the European Parliament elections in May.

Significant damages awarded for first time

In November 2013, members of the Asphalt Cartel were ordered by the Helsinki District Court to pay over EUR 37 million in damages to 40 municipalities. However, the Finnish State's EUR 57 million claim was dismissed with costs.

In March, the Helsinki District Court made two further rulings. In the Timber Cartel litigation, the Court dismissed the claims of 13 private individuals as time-barred. They represent the pilot cases in a group of approximately 650 claimants. If the ruling holds, the entire group will lose their cases.

Fining decision did not guarantee damages

In the latest judgment, made in the Car Spare Parts Cartel litigation, the Helsinki District Court dismissed the EUR 57 million claim made by a car spare parts wholesaler against its competitors. The plaintiff accused the defendants of market foreclosure. Despite a previous fining decision establishing the infringement, the plaintiff failed to provide sufficient proof concerning a causal connection.

TAX & STRUCTURING

> NEW CASE LAW DEFINING THE BORDERLINE BETWEEN EARNED INCOME AND GIFT TAXATION IN TRANSFERS OF OWNERSHIP AT DISCOUNT

by Kai Holkeri and Katja Rajala

Kai Holkeri

Kai Holkeri heads D&I's Tax & Structuring practice. He advises corporate clients on structuring and tax optimisation of M&A transactions, financial transactions, and incentive schemes as well as general corporate tax and tax litigation.

Katja Rajala

Katja Rajala is an associate in D&I's M&A & Private Equity team. Her main area of expertise is corporate tax and tax litigation but she advises also on indirect taxation. Katja is a member of the firm's Tax & Stucturing practice.

The Finnish Supreme Administrative Court ("SAC") has recently issued three diverse rulings regarding transfers of ownership to key employees at a discounted price. These rulings provide guidance on factors that affect the classification of the benefit either as earned income or as a gift. The latter is often the desired outcome for key employees and also upon business succession.

Tax implications typically have a fundamental role in the choice between various alternatives for remunerating or offering equity participation to key employees, or upon business succession.

A transfer of ownership in a company through, *e.g.*, a share disposal or a share issue at a discounted price typically triggers taxation of any benefit derived by the transferee either as earned income at progressive rates or as a gift at a rate which often is lower than the progressive income tax rate. Further, gift taxation may also entail certain reliefs regarding valuation of the taxable amount.

In all three rulings the individual benefiting from the discounted price was an employee of the company who was unrelated to the other shareholders. The other factual circumstances differed from case to case: one involved issuance of new shares, and the other two involved transfers of shares between shareholders or between existing shareholders and the company.

Benefit from discounted subscription price at the issuance of new shares was earned income for the new minority shareholder

Case 2014:5 involved a Finnish company A, whose shares were held by individuals C (55%) and D (45%).

It had been planned that company A would have issued new shares to B, who was an employee of the company. B would have owned 10% of the shares after the share issue. The subscription price payable by B was determined to correspond to 57% of the fair value the shares, thus including a discount of 43%.

Since C and D would have remained as majority shareholders with only minor changes to their ownership, the benefit that would have accrued to B from the discounted subscription price was to be treated as earned income.

Transfers of shares by existing shareholders without consideration were taxable as gift

Case 2014:4 involved a business succession whereby a majority shareholder transferred a part (30% of 70%) of his shareholding without consideration to the employee successor and sold a part (40% of 70%) of his shareholding to the company at a fair value. The SAC ruled that the benefit received by the successor was to be treated as a gift, not as compensation for employment. The general anti-avoidance rule was deemed not to be applicable.

Further, in case 2014:6, the SAC ruled that also a transfer of shares without consideration by an existing minority shareholder to another minority shareholder working in the company was to be treated as a gift. The transferred shares comprised 6% of shares in the company. After the transfer, the transferor held 29% of the company and the transferee held 20%.

Conclusion

The above case law demonstrates that a benefit from the receipt of shares at a discounted price received by an employee of a company is not always treated as earned income for tax purposes. Even though the evaluation is case specific, critical factors include the occurrence of a material change in ownership and the benefit being offered by the shareholders instead of the company.

TECHNOLOGY, OUTSOURCING & IPR

> RECENT LEGISLATIVE CHANGES IN THE CROSS-BORDER ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

by Henrik af Ursin and Gabrielle Hjelt

Henrik af Ursin

Henrik af Ursin advises clients on all aspects of Intellectual Property, especially on complex brand protection, portfolio management, IP enforcement and domain names issues. Henrik is one of the leading experts on anti-counterfeiting and has for years advised a number of the world's most well-known brands.

Gabrielle Hjelt

Gabrielle Hjelt advises Finnish and foreign companies in a wide range of general corporate and contracts law matters and acts as general outside counsel for major industrial and commercial companies with no in-house legal department in Finland. She is a member of the firm's Technology & IPR and Life Sciences & Healthcare practices.

Customs operations have become an increasingly important strategic tool in combating intellectual property infringements, especially in cross-border trade. The European Union has recently made significant legislative changes to stem the cross-border tide of counterfeit goods flooding into the Community. The legislative changes highlighted here are the new Anti-Counterfeiting Regulation and the amendments to European Union trademark legislation adopted by the European Parliament.

New Anti-Counterfeiting Regulation

The new Anti-Counterfeiting Regulation (Council Regulation (EC) 608/2013 concerning customs enforcement of intellectual property rights) has been in force in the Community since 1 January 2014. It repealed the old Anti-Counterfeiting Regulation (Council Regulation (EC) 1383/2003) and brings about a number of changes with regard to cross-border enforcement of intellectual property rights. In this article we highlight the possibility for a simplified destruction, coverage of additional forms of IP protection, special procedure concerning small consignments and the issue with goods in external transit through the Community.

Simplified Destruction

The new Regulation contains a mandatory requirement for all Member States to allow for the simplified destruction of goods which infringe intellectual property. The previous Regulation left it up to the Member States to adopt a process for a simplified procedure, and Finland chose not to do

so. As of 1 January 2014, also the Finnish Customs has been applying the rules for simplified destruction.

The simplified destruction regime gives the national customs authorities the power to destroy goods infringing intellectual property rights without a formal determination by a court that the goods indeed are infringing, provided that both the rights holder and the holder or declarant of the goods in question agree to this or do not actively object to it. This is a welcome amendment from a Finnish point of view, as negotiating for the destruction of counterfeit or pirated goods in transit through Finland to Russia has always proved to be difficult and ineffective when the Russian consignees of the goods have chosen to remain passive or evasive.

Additional IP Rights Covered

In order to strenghten the protection of intellectual property rights, the new Regulation is extended to cover additional forms of IP that the old Regulation did not cover, namely trade names, semiconductor topographies, utility models and technology circumvention devices.

Special Procedure with Small Consignments

The new Regulation establishes a new procedure, which allows the customs to destroy small consignments of alleged counterfeit or pirated goods without undergoing any formal legal proceedings or indeed even involving the rights holder. For a consignment to be qualified as small, it needs to contain three or less units and weigh less than two kilograms. This amendment will help the customs authorities in dealing with the extensive amount of small consignments, which are typically ordered through websites.

External Transit

The new Anti-Counterfeiting Regulation does not, however, address the problem with goods in external transit. This is due to the fact that the Anti-Counterfeiting Regulation solely contains procedural rules for customs authorities and not substantive law, which ascertains the existence of an IP infringement.

European Parliament Adopts Wording for New Legislation

The wording adopted in February by the European Parliament addresses the issue with external transit from the point of view of substantive law. The changes are welcomed, since rights holders and customs authorities have had their hands tied by the 2011 joint Nokia-Philips case before the Court of Justice of the European Union (CJEU) (joined cases C-446/09 and C-495/09), which practically forbade the customs from seizing goods in external transit through the Union.

The European Parliament has taken an important step in, inter alia, aiming to remedy the problems caused by the somewhat misguided Nokia-Philips case before the CJEU.

The Parliament has in February 2014 adopted its report on the review of the Community Trademark Regulation (207/2009) and the Trademarks Directive (2008/95/EC). In the report, there are some very useful amendments to the Community Trademark Regulation and the Trademark Directive, including a

provision which allows for the customs authorities to seize counterfeit goods that are in an external transit procedure through the European Union. The report also contains a number of other improvements to the Community trademark legislation.

Conclusion

This year has proved to be worthy of a collective sigh of relief from the holders of intellectual property rights. The European Union has through recent legislative changes demonstrated that it is serious about fortifying the defences around intellectual property. If the Council approves the Parliament's wording regarding the proposed changes to the Community Trademark Regulation and the Trademark Directive, the worst problems with seizing goods in transit through the European Union are solved and the customs authorities can again start seizing counterfeit and pirated goods in external transit.

D&I NEWS AND EVENTS

M&A AND DISPUTE RESOLUTION SEMINAR, 10 APRIL 2014

> On 10 April 2014, D&I organises a seminar for corporate lawyers on how to avoid disputes in corporate acquisitions. D&I's Managing Partner Jan Ollila explains common disputes in acquisitions and goes through how to avoid them, how to settle them cost-effectively while maintaining a good relationship with the counterparty and how to proceed when the dispute is taken into arbitration. For more information and to sign up, go to www.dittmar.fi/news and check "Upcoming Events" for "Dittiksen Iltakoulu". The seminar is in Finnish.

JAN OLLILA APPOINTED TO THE BOARD OF AMCHAM FINLAND

> Jan Ollila has been appointed to the Board of Directors of the Finnish-American Chamber of Commerce, Amcham Finland. Alongside this new board membership he continues as D&I's Managing Partner.

"At Dittmar & Indrenius we support international and Finnish businesses in their acquisitions and operations on the Finnish market as well as Finnish companies reaching abroad. This is exactly what Amcham Finland does and that is why I am eager to bring my own contribution to the activities of Amcham", says Jan Ollila.

KATJA HOLLMÉN TO DEVELOP D&I'S CLIENT RELATIONS

> D&I has appointed Katja Hollmén as Director of Client Relations as of March 4, 2014. Katja Hollmén has worked as an associate at White & Case and Hannes Snellman and as an associate director at Nordea Corporate Finance. Katja Hollmén joins Dittmar & Indrenius from Talentum where she has most recently served as director of M&A. Katja Hollmén has an LL.M degree from New York University, USA.

HENRIK AF URSIN STRENGTHENS D&I'S IPR TEAM

> Henrik af Ursin has joined D&I and strengthens its Technology, Outsourcing & IPR team. Henrik is one of Finland's leading experts on brand protection and anti-counterfeiting and advises clients on all aspects of IPR.

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