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D&I Quarterly 2008

MERGERS AND ACQUISITIONS

> COURT ADJUSTMENT OF RENT

by Antti Aaltonen

The ongoing financial crisis and the looming economic depression will not leave the real estate and rental markets unaffected. The experiences from the early 1990's clearly demonstrate that during times of recession many tenants are likely to grow dissatisfied with their rents and may even resort to legal action to try to correct the situation. As discussed below, Finnish law includes a provision enabling tenants to present claims of this kind against landlords, but the chances of success in court are very modest.

Legal Framework

According to Section 25 of the Finnish Act on Lease of Business Premises (482/1995) a landlord or a tenant who considers the rent unreasonable may file a claim at the local district court and request that the court review the alleged unreasonableness of the rent. Furthermore, according to Section 5 of the Act the court may adjust or disregard any contract provision which is against good practice or otherwise unreasonable.

The claim must be filed during the lease term. After the expiry of the lease it is no longer possible to take the matter to court. The landlord may not terminate the lease agreement while the matter is pending at the district court. Should the court find that the rent has been unreasonable, the court may adjust the rent either downwards or upwards to a reasonable level. At the same time the court must order the date from which the new adjusted rent becomes applicable.

Case Law

The provisions described above have been interpreted very narrowly and courts have reduced rents only in very exceptional cases. Like for other business agreements, the principles of validity and freedom of contract apply to leases of business premises. Both the landlord and the tenant must be able to rely on the validity and binding effect of the agreed rent.

The Finnish Supreme Court has in its ruling 1994:96 found that economic fluctuations are ordinary business risks in long term agreements. Economic fluctuation is not a sufficient reason for rent adjustment. Furthermore, the Supreme Court found that the tenant must carry the risk for a possible decrease in the business value of the location and the premises. Also renovation works carried out by the landlord may have relevance when evaluating the reasonableness of the rent.

In practice, tenants' claims for rent reduction have often been based on the fact that the tenant's business has turned out to be less profitable than expected. This reason alone does not justify a rent adjustment.

Relevant Criteria

When hearing a case regarding reduction of rent the court will take into account, *inter alia*, the following criteria:

- The rent can be adjusted only if it is clearly unreasonable and without sufficient grounds deviates from what is paid for corresponding premises in the area.
- The lease of business premises is a business relationship and social values cannot be decisive when evaluating the claim for reduction/increase of rent. Residential leases are different in this respect.
- All relevant background details relating to the lease agreement must be taken into account. For example, the agreed rent level may be linked to different financing and security arrangements the landlord has entered into. Also the division of liability for maintenance and repairs may have had an impact on the agreed rent.
- Economic fluctuation and subsequent changes in the market rent levels alone do not entitle either party to have the rent adjusted by the court. Especially in long term lease agreements the parties must understand that the agreed rent may from time to time turn out to be higher/lower than the applicable market rent.
- The correlation between the mutual performances of the parties under the lease agreement must be analysed. A rent adjustment is possible only if there has been a change in this correlation, creating a clear disproportion between the performances of the parties.

Limited Risk for Investors

On the surface the legal provisions described above may appear to be alarming from the point of view of a real estate investor. As the purchase price and the whole investment have been based on the rental income, a tenant's successful demand for a rent reduction could cause major problems for the investor.

On the basis of case law it is clear that the possibility of rent adjustment poses only a very limited risk for investors. In business relationships freedom of contract is always the leading principle and Finnish courts have been very reluctant to adjust rents. Even though investors should be aware of this legal provision, the risks are small and this issue should not have relevance when contemplating real estate investment in Finland.

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Senior Attorney Antti Aaltonen heads D&I's Real Property and Environment competence group and has considerable experience in real property matters and transactions.

MERGERS AND ACQUISITIONS

> REPORT ON COMPLIANCE WITH THE TAKEOVER CODE

by Anders Carlberg and Wilhelm Eklund

Background

The Takeover Panel has issued a Report on the compliance with the Takeover Code recommendations in connection with tender offers (the "Report"), based on an examination of Finnish tender offers launched between 1 January 2007 and 30 June 2008. The examination was conducted based on public information relating to tender offers, *i.e.*, the offer document and stock exchange notices.

General Findings

Overall, the Takeover Panel concludes that the Takeover Code recommendations had in general been observed. Nevertheless, the report identifies several situations where the recommendations had either not been observed at all or where the adherence to the recommendations was unclear.

The situations where the recommendations had not been observed related to the offeror's obligation to disclose its understanding of the governmental permits required, the offeror's estimate of the duration of the tender offer process, and the offeror's obligation to estimate when the offer document will be released.

Identified Issues

The following issues are in particular identified by the Takeover Panel in the Report:

(i) There is uncertainty as to whether the offeror has sufficiently disclosed conditions relating to the offer price and the existence of a combination agreement including the main terms and conditions thereof without delay after the execution of such agreement.

(ii) There is uncertainty regarding whether information on the number of shareholders having undertaken to accept or to support the offer has been properly disclosed, as well as regarding which members of the target company's board of directors has taken part in examining the offer and issuing the board statement.

Limitations of the Report

The Report is based on a limited number of tender offers and on publicly available information only. Consequently, there are several aspects of what the Takeover Panel accepts as sufficient disclosure that remain to be clarified. The Report offers only limited insight into the specifics of the disclosure requirements, as it does not specify the tender offers which are deemed to contain insufficient or lacking information.

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FINANCE & CAPITAL MARKETS

> COURT OF APPEAL CONVICTS STONESOFT OF SECURITIES MARKET OFFENCE

by Juha-Pekka Mutanen and Christian Langenskiöld

Background

On November 15, 2008 Helsinki Court of Appeal (the "Court") handed down its decision in a criminal case concerning the alleged security markets information offence by a software company, Stonesoft Oyj, and three members of its management team. The Court held that two members of the company's board of directors and a former CEO through gross negligence had failed to give a profit warning in due time. All defendants were fined. The Helsinki District Court had acquitted the defendants one year earlier.

Contradiction between Forecasts and Actual YTD Figures

The prosecution argued that public information concerning the company's future prospects supplied by the management had been in conflict with its actual profitability as stated in interim reports during the whole year of 2000. According to the prosecution the company's management had publicly described the Stonesoft as being profitable and in sound condition when a profit warning should in fact have been issued.

It was Stonesoft's duty to continuously fulfil its information obligations which, according to the prosecution, was not possible due to the company's insufficient reporting system. The defendants argued that their reporting system corresponded to the normal standards in their line of business; however, according to the prosecution, more efficient methods for reporting should have been put in place even at higher cost.

Price Fall Proof of Materiality

Because of the discrepancies between the company's interim reports and the advance information given by members of the management during the year 2000, the Court placed emphasis on the picture the company had projected of itself during the course of that year. Stonesoft had in its profit forecasts stated that its profits before the deduction of interest, tax and amortization expenses (EBITA) for that year would be below 10 percent of turnover, which according to the defendants was true as the actual profit was two percent. However, the Court considered that "below 10 percent" meant something closer to six or seven percent and that the company, therefore, had described its profitability in an overly optimistic manner.

Stonesoft issued a profit warning in February 2001, which according to the prosecution was far too late and should have been given in October 2000. On the day of the profit warning, Stonesoft's shares dropped by as much as 59.3 percent. The Court held this as proof of the severe impact the distorted information had on the value of the company's shares. The Court stated that there had been an unfounded and inexplicable contradiction between the actual and predicted developments and that Stonesoft and its management

had been aware of the company's actual condition and had failed to disclose this information.

Year-end Expenses not Valid Defence

The defence also contended that Stonesoft had at the end of the year 2000 been subjected to sudden high expenses that had taken the company by surprise and affected its profitability. These expenses concerned, *e.g.*, marketing and had been a result of the company's rapid growth in recent past. The Court stated that such expenses were a natural consequence of the company's growth and could not be considered as a valid excuse for the defendant's neglect.

In its judgment the Court held that the defendants had not fulfilled their duty to keep themselves and particularly the public informed about the correct financial state of the company. The Court imposed 30 day fines (one day fine is calculated on the basis of income and corresponds roughly to 1/60 of a person's net salary) on each accused member of management and a fine of EUR 20,000 on the company.

At the time of writing the time limit within which seek leave to appeal from the Supreme Court has not yet expired. Therefore, it is unclear wither the judgment will gain final legal force.

The case demonstrates that forecasts must be realistic in relation to actual annual profits.

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FINANCE AND CAPITAL MARKETS

> ISSUER AGENT MANDATORY AS OF 1 DECEMBER 2008

by Anders Carlberg and Eeva Pohja

The issuer agent, a representative appointed by the issuer, is in charge of the execution of an issue or a corporate action together with the Central Securities Depository (the "CSD") and the account operators. The concept of "issuer agent" was first introduced in Finland in the beginning of 2008 and is widely used in other European countries.

The purpose of the appointment of an issuer agent is to facilitate the administration of issues and corporate actions and make the process more efficient. Furthermore, the appointment of a specialised, professional operator to carry out the issues and corporate actions enhances the credibility and safety of the book-entry system.

The use of an issuer agent has previously been voluntary but as of 1 December 2008, an issuer agent must be appointed for issuances in the equity market and for certain corporate actions specified in the Rules of the CSD and the Decisions related to the Rules of the CSD (available at http://www.ncsd.eu/2105_ENG_ST.htm). The new Rules of the CSD, including the new provisions on the issuer agent, have entered into force on 1 December 2008.

Tasks of the Issuer Agent

The issuer agent is responsible for taking care of the issues and corporate actions in the book-entry system in cooperation with the CSD and the account operator. Furthermore, the issuer agent is responsible for the coordination of the issue or corporate action together with all parties to ensure an efficient process.

An issuer agent will be appointed for the following processes:

(i) issue, incorporation and rights issue;

(ii) private placing and bonus issue when there is a possibility for fractions;

(iii) share subscription and exchange based on option rights and convertible bonds;

(iv) redemption of a company's own shares;

(v) reverse splits;

(vi) issue and redemption of fund units;

(vii) merger and demerger;

(viii) tender and exchange offer when securities which are registered in the book-entry system are given as consideration;

(ix) transfer of redeemed minority shares to the redeemer;

(x) removal of book-entries from the book-entry system; and

(xi) other corporate actions that are technically executed as subscriptions in the book-entry system.

There is no need to appoint an issuer agent for issues or corporate actions of which the technical processing in the book-entry system has begun before 1 December 2008. Nevertheless, an issuer agent must be appointed for all share subscriptions based on option rights, exchanges with convertible debt book-entries and issues and redemptions of fund units.

Appointment of an Issuer Agent

An account operator or an agent of an account operator may act as an issuer agent being granted permission by the CSD. A list of the issuer agents currently operating in Finland is available on the website of the CSD (http://www.ncsd.eu/2643_ENG_ST.htm). An issuer agent is appointed by the issuer by granting the issuer agent a power of attorney to be further submitted to the CSD.

Anders Carlberg

Partner Anders Carlberg heads D&I's Mergers and Acquisitions practice area, in addition his work focuses on capital markets and financing transactions as well as on corporate law.

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Associate Eeva Pohja joined D&I in 2007 from another law firm. She has gained experience of mergers and acquisitions transactions and will move internally to D&I's Finance & Capital Markets area team.

CORPORATE & COMMERCIAL

> NEW CORPORATE GOVERNANCE CODE

by Jan Ollila and Tove Johansson

Background

A new Corporate Governance Code (the "Code") for companies listed on the Helsinki Stock Exchange (the "Helsinki exchange") has been published by the Finnish Securities Market Association. The Code will enter into force on 1 January 2009 and companies should, if necessary, amend their Articles of Association at their annual general meeting in 2009 in order to meet the new requirements.

The Code substitutes the Corporate Governance Recommendation for Listed Companies (the "Recommendation") issued in December 2003, which currently constitutes the relevant corporate governance regulation in Finland. All listed companies and many companies not listed on the Helsinki exchange apply the Recommendation, which has improved corporate governance practices in Finnish companies.

New legislation including the Limited Liability Companies Act of 2006 and international developments have occasioned a need for new rules. The Code seeks to improve international investors' possibilities to get information on Finnish corporate governance regulations.

The aim of the Code is to harmonize the practices of listed companies, to promote transparency and to emphasize the flow of information to shareholders. The Code is intended to complement legislation and facilitate the interpretation of current statutory and non statutory regulations. It is aimed at companies listed on the Helsinki exchange, but does not apply in case of a conflict with the legislation applicable in the domicile of such a company.

Comply or Explain

The Code follows the so-called comply-or-explain principle. Hence, a company shall comply with all recommendations of the Code. Should a company deviate from an individual recommendation it must account for such deviation and provide an explanation therefore. A company may wish to deviate from a recommendation of the Code, *e.g.*, as a consequence of its ownership or company structure or due to the special characteristics of its business.

The comply-or-explain principle implies that a company is seen as complying with the Code even if it deviates from an individual recommendation provided that it accounts for the deviation and provides an explanation therefore.

No Deviations from Transparency and Disclosure

Not all recommendations may, however, be departed from. The Code emphasises transparency and disclosure. The recommendations reflecting these principles cannot be deviated from. In addition, several recommendations of the Code are based on legislation or other regulations, which cannot be disregarded.

The Code follows the outline of the Recommendation but contains several new rules. Some of the most important changes compared to the Recommendation are described hereunder.

The Code's added focus on transparency and disclosure is reflected in recommendations on more efficient use of the Internet and electronic information channels. Companies should have an investor friendly website including all information required by the Code, *e.g.,* information on the general meeting, board composition, the managing director, remuneration policy and risk management.

The Code also requires companies to issue separate corporate governance statements in connection with the publication of their financial statements. In these corporate governance statements companies should provide information on, *inter alia*, compliance with the Code and explanations on deviations from specific recommendations. In addition the corporate governance statement should describe the composition and operations of the board of directors and any potential board committees.

Board Members of Both Genders

The Code introduces new rules on board composition and companies' obligation to account for the independence of board members. According to the Code, a board member is not seen as independent, *e.g.*, if the member has an employment relationship with the company or if the member belongs to the operative management of another company, and the two companies have a significant cooperation relationship. At least two of the board members must be independent of significant shareholders of the company. The composition of the board of directors must also take into account the needs of the company operations and the development of the company. As of 2010, the board must include members of both genders. The Code also includes recommendations regarding the establishment of board committees and the appointment of the members to the committees.

The emphasis on transparency further requires companies to publish remunerations and other financial benefits of directors. Companies must also provide information on the principles and decision-making processes concerning remuneration policies for managing directors and other executives. These regulations must be complied with as they are part of the Code's transparency objective.

Detailed rules regarding the general meeting are also included in the Code with some novelties compared to the Recommendation. The Code defines, *inter alia*, the time frame for sending the meeting invitation, the material to be sent to shareholders and the publishing of the minutes on the company's

website within two weeks of the meeting. The Code also requires company auditors to be present at the general meetings.

Not Applicable to Unlisted Companies

The Code is aimed at companies listed on the Helsinki exchange and its recommendations are not compulsory for unlisted companies. The Board of the Central Chamber of Commerce of Finland has, however, issued a Statement for Improving Corporate Governance of Unlisted Companies in January 2006. According to the statement, it is recommended that major companies comply with the Recommendation. No similar recommendation with regard to the Code has yet been given for unlisted companies.

Jan Ollila

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Tove Johansson

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D&I EVENTS

NEW PARTNERS

> Johan Åkermarck has joined Dittmar & Indrenius from another law firm after more than twenty years with that firm. His move strengthens our services within transactions, competition law and life sciences. He is one of Finland's top transactional lawyers but also an internationally renowned expert on corporate and competition law.

"Dittmar & Indrenius has a strong reputation on the Finnish market as a firm focusing on the quality of its services. I am delighted and excited to become a part of this ambitious team and to work with international and domestic clients in this challenging and changing market situation", Johan says.

> Sakari Halonen, appointed partner from within the firm, specializes in information technology. His task is to further develop our technology practice in order to serve our current clients, mostly international IT service, software, and hardware suppliers even better. At the same time Dittmar & Indrenius also strengthens its services to other technology clients.

"We aim to enhance our services also to Finnish buyers and developers of technology products and services", Sakari says.

Dittmar & Indrenius is an independent law firm, established in 1899, focused on the quality of its services within four practice areas: mergers & acquisitions, finance & capital markets, dispute resolution, and corporate & commercial. Our aim is to be the best long-term law firm partner in Finland for our clients. We also strive to provide the best legal services in complicated transactions and demanding dispute resolution in our jurisdiction.

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