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MERGERS & ACQUISITIONS

> REINTRODUCED PROPOSAL ON THE MONITORING OF FOREIGNERS' CORPORATE ACQUISITIONS

by Anders Carlberg and Wilhelm Eklund

A Government bill concerning a new Act on Monitoring of Foreigners' Corporate Acquisitions lapsed earlier this year, but a new bill has now been submitted to Parliament. The proposal suggests increased possibilities for the Finnish Government to intervene in corporate acquisitions if required by a very important national interest.

Background

In June 2009, the Ministry of Employment and the Economy appointed a working group to assess the need for amendment of the Act on Monitoring of Foreigners' Corporate Acquisitions (1612/1992). The working group issued a report on its findings in March 2010, concluding that the current legislation needs to be updated.

Current Situation

A Government bill was submitted to Parliament in November 2010. However, the proposal lapsed in March 2011 due to the termination of the four-year parliamentary term. The new Government resumed work on updating the legislation and submitted a new bill to Parliament in September 2011 corresponding to the lapsed bill.

The purpose of the new Act is to improve the Government's possibilities of intervening with planned corporate acquisitions if required by a very important national interest.

Contents of the New Act

Under the proposed Act, acquisitions of Finnish companies in the defense industry or other Finnish entities which are of great national significance due to their field of activity, business or contracts shall be notified in advance to the Ministry of Employment and the Economy for approval. A definition of "great national significance" is not included in the proposed Act, and the interpretation would in practice be left to the Ministry of Employment and the Economy and the Government.

The Ministry would be obliged to approve a notified acquisition unless it may jeopardize a very important national interest. In such a case, the matter would be remitted to the Government, which would have the right to deny approval if it deems that the acquisition jeopardizes a very important national interest.

The notification duty would become applicable for all acquisitions of defense industry entities and for any acquisitions of other entities of great national significance in which more than ten per cent of the voting rights in the Finnish target are acquired by a foreign entity.

The Ministry would be obliged to handle notifications within three months from the submission of sufficient information.

For acquisitions of defense industry companies, the notification duty would be applicable for all non-Finnish acquirers. For acquisitions of other entities of great national significance, the notification duty would be applicable only for foreign acquirers established or controlled directly or indirectly by entities outside the EU or EFTA area. An acquirer would be deemed to be under foreign control if an entity outside the EU or EFTA area owns more than ten per cent of the voting right in the acquirer or exercises corresponding factual control.

The new Act is intended to enter into force as soon as possible.

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MERGERS & ACQUISITIONS

> CONDITIONAL ASPHALT PAVING CLEARANCE LEADS TO NEW AGREEMENT

by Tuomas Rytkönen

On 2 November 2011, the Finnish Market Court attached conditions to the implementation of the acquisition by NCC Roads Oy ("NCC") of the asphalt paving business of Destia Oy and Destia Kalusto Oy (jointly "Destia"). The Market Court confirmed the view of the Finnish Competition Authority ("FCA") that the acquisition would lead to a joint dominant market position in the asphalt mix market in the capital area between the largest remaining contractors, NCC and Lemminkäinen Infra Oyj ("Lemminkäinen"). Due to the conditions imposed, NCC and Destia negotiated a new agreement, which was approved by the FCA on 24 November 2011.

Background

In April 2011, NCC notified the FCA its intention to acquire the asphalt paving business of Destia, the former Finnish Road Administration. In August 2011, after an in-depth investigation, the FCA proposed that the Market Court prohibit the contemplated acquisition. (For further information, see our previous article in D&I Quarterly (Q3/2011)).

Joint Dominant Market Position

The Market Court determined that the definition of the capital area as the relevant geographic market was sufficient for the assessment of the effects of the acquisition on competition. There are only three companies with fixed asphalt stations in the capital area: Lemminkäinen, NCC and Destia. According to the Market Court, contractors in the capital area, unlike in the rest of the country, are dependent on the asphalt mix bought from these three suppliers. Therefore, the Market Court held that the production and sale of asphalt mix in the capital area formed a relevant market which is separate from the market of asphalt paving work.

The Market Court agreed with the FCA's analysis and found that, as a result of the acquisition, NCC and Lemminkäinen could control the asphalt paving market through the production of asphalt mix, either by refusing to sell it to other contractors or by charging prices above the competitive level.

The Market Court considered that NCC and Lemminkäinen would not need to resort to illegal co-operation in order bring about negative effects on competition. As a result of the acquisition, the companies would be able to predict each other's commercial behaviour. Therefore, they would have incentives to maximize their profits by limiting production and thus increasing prices. This in turn would increase the price level of asphalt paving work.

Combination of remedies

The Market Court ruled that the remedies to eliminate the negative effects on competition should for the most part be structural. NCC offered a number of behavioural remedies to facilitate market entry, but only one alternative structural remedy.

According to the Market Court, the proposed remedies alone were not sufficient to ensure that the markets would remain competitive after the acquisition. Therefore, the Market Court decided to combine the proposed remedies so that the conditions included structural as well as temporary behavioural remedies. Behavioural remedies were included to ensure that the market would remain competitive during a transitional phase intended to facilitate new entry.

Firstly, NCC was to sublease land near the capital for a competitor to establish its own fixed asphalt station and enter the market. Secondly, NCC was required to sell asphalt mix to competitors under detailed conditions. NCC's compliance with the conditions would be monitored by an independent expert.

New agreement approved by the FCA

The FCA was satisfied with the Market Court's decision although its claim of prohibiting the acquisition was dismissed. However, NCC and Destia withdrew from the acquisition and concluded a new agreement, which was notified to the FCA. The new agreement did not include Destia's fixed asphalt station in Tuusula (nor the production and sale of asphalt mix or sale agreements related to the station). The FCA concluded on 24 November 2011 that the threshold for intervention (creation or strengthening of a joint dominant position) was not exceeded.

New merger test

A new Competition Act entered into force on 1 November 2011. The new Act has replaced the dominance test with the so-called SIEC test (significant impediment to effective competition), thereby harmonising Finnish law with the EC Merger Regulation. The FCA still applied the dominance test when investigating both of the NCC acquisitions.

Implications for acquisition planning

In its ruling, the Market Court upheld the principle that remedies should primarily be structural. Where there is a risk that an acquisition can give rise to competition concern, the parties should consider in advance whether any structural remedies are available to alleviate such concerns.

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FINANCE & CAPITAL MARKETS

> FINNISH SUPREME COURT RULES ON FORUM SELECTION AND JURISDICTION

by Juha-Pekka Mutanen and Kristian Karlsson

On 4 October 2011, the Finnish Supreme Court issued a judgment (KKO:2011:74) on forum selection clauses and their significance in determining the international jurisdiction of Finnish courts. The Supreme Court held that, in the absence of a treaty on enforcement of judgments, a foreign judgment did not prevent a Finnish court from hearing a case where denial of jurisdiction would deprive the plaintiff of an opportunity to enforce the judgment in Finland.

Background

A Korean company had rented freight containers from a Bermudan company that belonged to the T Group. S Company having its registered office in Russia had granted a guarantee to the Bermudan lessor for the fulfilment of the Korean lessee's obligations under the lease agreement. The guarantee was governed by Russian law and it included a forum selection clause indicating a Californian court. The lessee had since neither paid the rents nor returned the freight containers to the T Group. The Californian court had in its judgment obliged S Company to pay the T Group due rents, other payments and expenses in the amount of USD 3,285 million. S Company had assets in Finland and therefore the T Group claimed in a Finnish court for payment by S Company of that amount based on the guarantee and the prior judgment by the Californian court.

The defendant S Company had given a belated response to the T Companies' claim for payment under the guarantee. Under Finnish procedural law, if the defendant's response is belated, the court shall find for the plaintiff by entering a default judgment, unless the plaintiff's claim is evidently without merit, in which case the court shall dismiss the claim. The District Court had dismissed the claim on the grounds asserted by the defendant in its belated response, i.e., that (i) the question of the validity of the guarantee was to be resolved pursuant to Russian law; and (ii) Russian courts had found the guarantee to be invalid. The Court of Appeal in turn considered that Finnish courts were not competent to hear the case at all because of the forum clause in favour of Californian courts.

In case of default judgment, forum selection clause taken into consideration ex officio

The Supreme Court confirmed that a foreign forum clause usually prevents a Finnish court from entering a default judgment against a defendant that is absent. In this case, however, the defendant S Company had in its response to a question posed by the Finnish Court of Appeal stated that it did not dispute the Finnish courts' jurisdiction. The Supreme Court therefore considered that, although the defendant's response in the District Court had

been given too late, the Court of Appeal should not have dismissed the case on the basis of the Californian forum clause.

The Supreme Court further held that, unlike forum, enforcement of judgments is a matter on which contract parties are not free to agree. The Supreme Court noted that there is no treaty in force between Finland and the United States governing jurisdiction, enforcement or recognition of judgments in civil cases. Therefore, a Californian judgment is not directly enforceable in Finland.

The significance of the prior judgment

Importantly, the Supreme Court held that a judgment delivered in California did not prevent the initiation of proceedings in Finland because otherwise the plaintiff would not be able to enforce its rights against the defendant in Finland. To prevent further delay, the Supreme Court consequently entered a default judgment against S Company ordering it to pay the amounts indicated in the Californian judgment.

Conclusions

In legal literature, the prevailing opinion has been that the validity and the enforceability of a foreign judgment should be examined by the Finnish court despite the absence of an express treaty provision. This ruling confirms that view and makes it clear that a foreign judgment may be enforced against a defendant that has assets in Finland. Although in general a prior non-EEA judgment does not prevent inquiry into the merits of the case, a default judgment based on the relevant foreign ruling may be entered against a defendant that is absent.

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CORPORATE & COMMERCIAL

> FINNISH SUPREME COURT RULES ON TRANSFER OF COPYRIGHT

by Markus Mattila

In a recent precedent (2011:92) of the Finnish Supreme Court concerning transfer of copyright, the question arose whether copyright to a work had been unlawfully transferred to a third party. According to the Finnish Copyright Act, transfer of copyright does not, as a general rule, entail the right for the transferee to alter the work or transfer the copyright further to a third party, unless the parties agree otherwise. In its judgment, the Supreme Court evaluated an agreement between the company that was the original transferee of the copyright and a third party company. The parties to the agreement, both of which were defendants in the case, argued that the third party company had only acted on behalf of the original transferee of the copyright and that the purpose of the agreement was to outsource certain tasks instead of transferring the copyright. The Supreme Court rejected the arguments and held that the agreement constituted an unlawful transfer of copyright.

Background

A translator of a novel and a publishing company had entered into a translation agreement according to which the publishing company was granted an exclusive right to reproduce and publish the translation as a book under its trade name. It was explicitly agreed that in other respects the copyright remained with the translator. After the publication of the book as a hardback version, the publishing company and a third party (the "paperback company") had entered into an agreement titled as exclusive sales agreement, according to which the paperback company was given the exclusive right to have produced and to market the translated novel as a paperback version. The title page of the published paperback version mentioned the publishing company as the publisher while also the trademark and the ISBN (International Standard Book Number) code of the paperback company appeared. The question arose whether the exclusive sales agreement constituted an unlawful transfer of copyright.

Transfer of copyright

The Supreme Court noted that the publishing company had received the exclusive right to publish the translation as a book in both hardcopy and paperback versions. The main legal question was whether the agreement, titled as exclusive sales agreement, between the publishing company and the paperback company constituted a transfer of copyright to the paperback company.

The claimant translator alleged that copyright was transferred by the exclusive sales agreement in breach of both the Copyright Act and the translation agreement between the translator and the publishing company. The translator also claimed that the paperback company had infringed the translator's copyright by using the translation unlawfully. The translator claimed compensation for damage and indemnity and argued that the defendant publishing and paperback companies were jointly liable.

The defendants denied the claims arguing that the purpose of the agreement was only to outsource the production and marketing of the paperback version and that the paperback company acted on behalf of the publishing company, which remained the publisher of the paperback.

The Supreme Court rejected the arguments of the defendants and held that copyright had been unlawfully transferred to the paperback company. While the court recognised that the Copyright Act does not prevent a publisher from outsourcing many of its tasks, the court referred to the wording of the agreement and the relatively independent position of the paperback company as decisive reasons for the interpretation that copyright had been transferred.

Interpretation of agreement

According to the exclusive sales agreement, the paperback company was granted the exclusive right to reproduce and publish the translation as a paperback version. The formulation suggested that certain parts of the copyright had been further transferred. Given the expertise of the publishing company, there was no reason to deviate from the wording when interpreting the agreement. The paperback company was entitled to freely print new editions of the paperback whereas the publishing company itself had no right to publish a paperback version due to the exclusivity. Further, the financial risks for the paperback version were carried by the paperback company and it could therefore not be regarded as acting on behalf of the publishing company. The conclusions of the court were not altered by the facts that the publishing company managed the copyright in relation to the translator also for the paperback version and that the publishing company was consistently mentioned as the publisher in the agreement and in the paperback book.

Damages and indemnity

Since the copyright had been unlawfully transferred, the publishing company was held liable for the damage caused by the transfer.
The paperback company, on the other hand, was held liable for the indemnity payable for unlawful use. While the unlawful transfer was not considered as use of the work and, consequently, did not result in an obligation to pay indemnity, the publishing company was, based on contract, jointly for the indemnity.

As regards the amounts, the defendants argued that the translator did not suffer any damage since the translator had transferred the exclusive right to the work in both hardcopy and paperback versions. In addition, the translation fee was fixed and did not depend on the number of the books sold. The Supreme Court rejected these arguments on the grounds that the translator would have had the right to claim additional compensation had a consent been requested for the transfer.

Conclusions

Although the case concerned a publishing contract, the judgment may have wider implications. Where copyright issues are relevant, outsourcing or subcontracting agreements should be negotiated and drafted with particular care in order to avoid any unintended transfer of copyright. The terms of an arrangement as a whole are taken into account when assessing whether copyright has been transferred.

In addition, the case illustrates the sometimes vulnerable position of a copyright transferee. Only the liability for damages is dependent on negligence whereas other consequences of unlawful use are not. Consequently, as regards the indemnity, it was not relevant whether the paperback company was aware of the terms of the agreement between the translator and the publishing company. In agreements which include a transfer of copyright, the transferee should therefore verify that the transferor itself has acquired the right to transfer the copyright, as otherwise the transferee may be exposed to a risk of indemnity and other consequences, such as an injunction.

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CORPORATE & COMMERCIAL

> A SHARE PLAN BENEFIT FULLY TAXABLE DESPITE DECREASE IN VALUE DURING A RESTRICTION PERIOD

by Kai Holkeri

The Supreme Administrative Court ruled in its recent decision (2011:91) that the amount of taxable benefit received by an employee under a share incentive plan was determined based on the market value of the shares at the time of receipt even if shares were subject to transfer restrictions and the value of the shares had materially decreased during the restriction period.

The case related to the share incentive plans of a publicly listed company B Oyj. The employee A had been been employed by B Oyj during the years 2006 and 2007. A had participated in two of B Oyj's share incentive plans under which he received shares and cash. The shares received by A were subject to transfer restrictions for a two-year period.

The tax office had determined A's taxable benefit based on the average price of B Oyj's share on the transfer date. A appealed to the Board of Adjustment and claimed that the taxable benefit should instead be determined based on the value of the share upon the lapse of the restriction period. The Board of Adjustment and the Administrative Court upheld the decision by the tax office. The Supreme Administrative Court granted A the right to appeal.

The decrease in value during the restriction period was up to 70%

The vesting periods occurred during years 2005 and 2006. The decrease in value of the shares between their vesting and the lapse of the restriction period was up to 70 %.

The Supreme Administrative Court referred to Subsection 3 of Section 66 of the Income Tax Act regarding the tax treatment of employment options, which has been applied also in relation to shares received under share incentive plans.

Pursuant to that provision, the right of an employee to receive or acquire shares in a company on the basis of an employment relationship at a price below the market value constitutes an employment option. Such benefit is taxed as salary income. The option right is deemed exercised when the employee receives the underlying shares, or transfers his option. The value of the shares is assessed based on the market value at the time of exercise. The benefit obtained is included in the taxable income of the tax year during which the option is exercised.

The Supreme Administrative Court stated that it is clear that the benefit shall be treated as A's taxable income of the tax year during which he received the shares.

In respect of valuing the benefit received, the Supreme Administrative Court first stated that A had in each case received the shares after a couple of months from the end of the vesting period. According to the court, the coherence of the tax system requires that the valuation of a benefit is based on the value at the time when the benefit is received and recorded as income.

The court then continued by stating that the circumstances in the earlier case referred to by A (2002/1959), in which the value of an option right was assessed based on the value of shares at the end of a restriction period, were not comparable to the present case. According to the court, that case represented an exception (the earlier case related to the first listing of a company and the restriction period lapsed within the same tax year).

No reason to deviate from valuing the shares based on market value at receipt

Having regard also to the fact that the share restrictions are based on an agreement between the employee and the employer, as well as the difficulties in valuing the effect of a restriction, the court stated that there was no reason to deviate from valuing the shares based on their market value at the time of receipt as provided for by Subsection 3 of Section 66 of the Income Tax Act.

Kai Holkeri

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D&I EVENTS

D&I'S SEMINARS AND LECTURES – THE NEW ICC RULES OF ARBITRATION

- On 1 December 2011, D&I's Dispute Resolution Practice organised a breakfast seminar on the new Arbitration Rules of the International Chamber of Commerce (ICC) that will come into force on 1 January 2012. Mr Simon Greenberg, Deputy Secretary General of the ICC Court of Arbitration, delivered the keynote lecture.

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