

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.