Lindberg's thoughts: Technology Disputes and Securities Law - When CIO or CTO Needs to Talk to CLO/GC?

Jan Lindberg, partner
puh. +358 (0)40 823 6031
Magnusson Helsinki Attorneys-at-Law Ltd
jan.lindberg@magnussonlaw.com

Magnusson Helsinki Attorneys-at-law Ltd. is a full-service independent law firm focused on creating exceptional commercial value to its clients. We guarantee this through solid business acumen and up-to- date industry expertise. Our well-established procedures, documentation and client-driven innovative pricing ensure the achievement of the business objectives of the most sophisticated clients. The firm is a part of the Magnusson Law with offices in Copenhagen, Gothenburg, Helsinki, Minsk, Moscow, Stockholm and Warsaw and strategic alliances covering all countries around the Baltic Sea.

Jan Lindberg is heads the IP and technology practice of Magnusson Helsinki. He is one of the leading Finnish lawyers in IP-intensive mergers and acquisitions, outsourcing, as well as other IP and technology law matters.

I though that I start this blog with an issue that concerns discussions between two roles CTO or CIO depending on the situation and legal department, i.e., general counsel. I wanted to start writing something about communication as this is in any case at the very heart of blogging in the first place, and also as this has been a hotly debated topic with one of my colleagues Mika Lehtimäki of Trust (http://www.thetrust.fi) - very brilliant mind in financial law and banking!

Let's take an example that we have an IT dispute (but it could also be any other technology contract as well) in our hands. It is quite often that it is unclear when an IT dispute can have securities law consequences. For external lawyers this issue has also been on the table due to the fact that financial year has just ended in many companies and we have been filing statements for auditors (typically with qualifiers such as "not sufficiently precise" at least in case of IT audit claims).

But when securities law is relevant for CIO or CTO (for those who are not familiar with the term, this means chief technology officer)? Two most common situations are:

(i) as a litigation that has to be disclosed; or

(ii) another matter that has a material impact on the company, its cash flow or prospects.

As a rule of thumb, all circumstances and decisions that may have material impact on the value of the Company's securities need to be disclosed without undue delay. For all those who are interested in changes between the old and new Securities Market Act, these disclosure rules have remained pretty much the same, but I will focus on differences between on-going disclosures and restrictions to use insider information perhaps later. In any case, breach of the disclosure rules may lead to, e.g., damages liability or official warning so this issue needs to be taken seriously.

The evaluation of the significance of the matter is always made beforehand. Therefore, the company needs to have a strategy or a disclosure policy how to administer disclosure e.g. in relation to IT disputes and claims. As securities law issues need to be resolved on a case-by-case-basis, let me give to you some tips how to do this:

First, the company's disclosure policy needs to be consistent; if you have disclosed similar matters previously, you must also disclose them now.

Second, if the IT system is critical to the company's operations, the monetary value of the dispute may not be the real concern but, instead, the disruption to the company's on-going operations, failure to comply with applicable legislation if a system intended to perform certain taks is not taken into use as originally planned.

Third, you should not disclose too early. A potential dispute does not normally have to be disclosed prior to actual filing of the case – in uncertain situations disclosure may create more confusion than clarify issues and in many cases these IT and technology disputes are settled before that.

Fourth, the company should note how the investors have reacted to previously disclosed information and how they will likely react considering the business that the company is in.

Fifth, if payment liability is likely, it may affect the company's profits and cash flow. This may require issuance of a revised profit forecast. However, this route is not often advisable, as it might be construed as admittance of the potential liability.

If the potential impact is material, and the issues are being negotiated prior to the settlement or filing of the case, the parties should ensure the confidentiality of the matter and the negotiations. Personally I would recommend to do this as a "transaction-specific insider register". However, it should be noted that the disclosure should be made at the latest if the official procedure is commenced.

Hopefully this helps and let's all of us start formulating policies for disclosing tech disputes!

http://janlindberg.blogspot.fi/