ISRAEL

# Mitchell C. **Shelowitz**

Managing Partner, SLG Shelowitz Law Group

+972 054 661 1684
mitch@shelgroup.com
shelgroup.com
irglobal.com/advisor/mitchell-c-shelowitz

Mitchell C. Shelowitz is the Managing Partner of Shelowitz Law Group (SLG), a global law firm with offices in New York City and Tel Aviv. Mitch is also the Founder and former President of the Association of Corporate Counsel (ACC) Israel Chapter (2000-2004).

Mitch is a veteran New York attorney who has meshed his legal experiences as a corporate deal lawyer and tenacious litigator at top New York and Israeli law firms, with a unique business acumen developed over years as in-house legal counsel at leading Nasdaq-traded tech companies, offering integrated and personalized legal services to the firm's global client base. He is engaged on a daily basis advising multinational corporations on cross-border structuring and transactions, with a particular emphasis in advising foreign companies on the launch, operation, and maintenance of businesses in the United States. He is admitted to the bars of New York and Israel.

*SLG is an international law firm with offices in New York City and Tel Aviv. For more than 25 years, SLG attorneys have been looking out for their clients.*

*Whether it is negotiating an important business deal, defending against a business crushing lawsuit, protecting intellectual property and trade secrets, hiring or dismissing employees and consultants, or advising on the complex requirements of US privacy laws and regulations such as HIPAA, TCPA, COPPA, or FERPA, SLG attorneys can assist you.*

## Key considerations for multinationals operating in high-risk industries and jurisdictions:

- Avoid overlapping officers of parent company and US subsidiary.
- In employment agreements, US employees should report to US officers or the US subsidiary's board of directors – not to the foreign parent CEO or other officers.
- US employees should have business cards and titles with the US subsidiary.
- US-based employees and consultants should not have foreign parent company name or address on their business cards.
- Adopt corporate compliance policy to ensure the proper separation between the foreign parent and US subsidiary including annual audits and training programmes.
- Carry out regular board of directors and shareholder meetings that are documented by appropriate written resolutions to ensure compliance with required corporate formalities.
- Salaries and compensation to US employees and contractors should be paid by the subsidiary, not the foreign parent company.

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?

For foreign corporations engaging in business in the US, one of the key concerns is exposure of the parent corporation to direct liability in the US by creating what is known as "personal jurisdiction" in the US. A constitutional pre-requisite to subjecting a foreign company to the authority of the US courts is the existence of certain "minimum contacts" by the foreign corporation in the forum state such that the exercise of jurisdiction over the company would not offend notions of fair play and substantial justice.

These are quite amorphous standards that always entail a detailed and costly case-by-case, factually intensive analysis by the courts. While the concept is complex and may vary slightly from state to state due to differing "long-arm" statutes, where a foreign corporation directly engages in US business activities, the risk of direct liability is manifest. To minimise the risks of inadvertently creating personal jurisdiction over the parent corporation, it is strongly recommended to establish a wholly owned US subsidiary to engage in the activities of the foreign parent in the US.

Critically, when initiating business operations in the US, the parent should not engage an individual as a consultant or employee, since this person will be creating minimum contacts on behalf of the foreign parent in the US.

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?

It is not the degree of control that a foreign parent corporation has over a US subsidiary that alters the risk profile, but the manner of control, which directly impacts the risks to the foreign parent. In many cases, the role of the US subsidiary is to engage in sales and marketing of the foreign parent's goods and/or services, and sometimes warehousing, logistics and post-sales support. The objectives of the parent and the subsidiary must be aligned and thus a certain level of control is essential to the success of the US subsidiary and the foreign parent's global operations.

When forming a US subsidiary, the goal should be to create a separate, independent business entity. We typically recommend composing the board of directors of the subsidiary with a combination of officers or directors of the foreign parent, and at least one local US officer. At the same time, we generally recommend that the officers of the subsidiary such as the CEO, CFO, COO, VP sales and other individuals engaged in the day-to-day operations of the business be US-based employees of the subsidiary.

Control by the parent corporation should be exercised by the board of directors of the subsidiary. In this way, the US board of directors can carry out the goals of the foreign parent corporation without engaging in direct business operations in the US. This separation is critical. In addition, an Intercompany Services Agreement should be signed by the parent and subsidiary, which sets forth the subsidiary's duties and responsibilities, the financing relationship between the parties, transfer pricing issues, intellectual property licensing and ownership between the parent and the subsidiary and any other relevant issues to ensure that the subsidiary is provided with all the tools to operate independently in the US.

QUESTION THREE

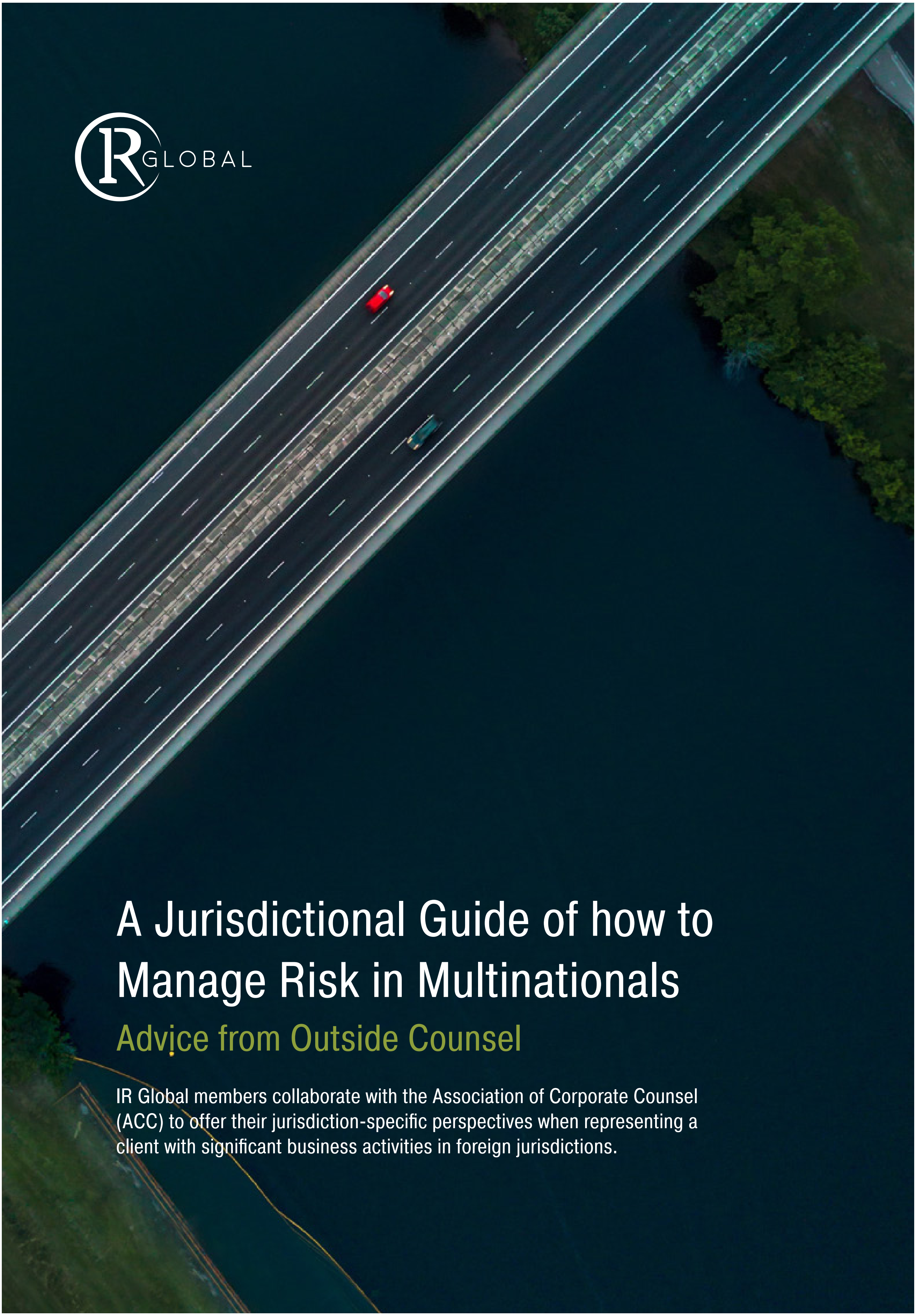
## What constitutes the right balance between risk and liability for a company and its overseas subsidiary? What examples can you give?

Finding the right balance between risks and liability requires careful attention to corporate formalities in ensuring the separateness between the foreign parent and US subsidiary as described.

When establishing a US subsidiary, there is often a temptation by the CEO of the foreign parent to take on the same role in the subsidiary. Sometimes this is due to the misperception that holding the CEO title in the US is the only way to ensure control over the subsidiary. This is not a recommended course of conduct and could tip the balance in favour of liability and personal jurisdiction. Our firm has successfully sued foreign parent companies in the US as a result of poor planning, eschewing legal advice or sloppiness in connection with the launch of US operations.

Having corporate compliance policies in place and ensuring that board of directors and shareholder resolutions are adopted on a regular basis, in accordance with applicable US law, while otherwise respecting the separateness of the foreign parent and the subsidiary, is the best way to minimise the risk of significant liability against the foreign parent in US business dealings.

Lastly, in connection with delegations and tradeshows in the US, it is important to ensure that registrations for these events by foreign parent employees use a foreign parent corporate name and address and not those of the US subsidiary.



# A Jurisdictional Guide of how to Manage Risk in Multinationals

## Advice from Outside Counsel

IR Global members collaborate with the Association of Corporate Counsel (ACC) to offer their jurisdiction-specific perspectives when representing a client with significant business activities in foreign jurisdictions.

# Contributors