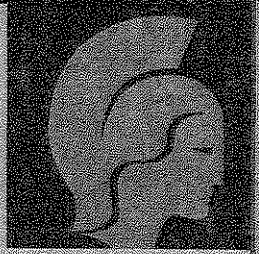
Vejledning i afgivelse

Legal Opinion



Dansk og engelsk ver

Vejledning i afgivelse af

Legal Opinions

Advokatsamfundet - september 2000

Arbejdsgruppens medlemmer:

- Advokat Henrik Lind (formand for arbejdsgruppen)
- Advokat Peter Fogh
- Advokat Ulrik Jacobsen
- Advokat Jørgen Reimer Jensen
- Advokat Henning Aasmul-Olsen
- Advokat Jørgen Permin
- Advokat Poul Viggo Bartels Petersen
- Advokat Niels Walther-Rasmussen
- Advokat Gabriel Rohde
- Advokat Anne Krebs (sekretær for arbejdsgruppen)

Tryk: Schultz Grafisk

Indholdsfortegnelse

Forord

Aktiviteterne i Det Danske Advokatsamfund er mange og mangeartede spændende fra udøvelse af disciplinærmyndighed til erhvervspolitiske initiativer.

Blandt de vigtigste erhvervspolitiske aktiviteter er at synliggøre vore medlemmers rådgivningsydelser og kompetence over for forbrugere og erhvervsliv, og det er derfor en glæde for Advokatrådet at kunne konstatere, at det arbejde, med at synliggøre de advokatydelser som retter sig i mod erhvervsklienterne, nu har båret sin første frugt. Det er Advokatrådets håb, at denne guideline kan blive til stor gavn for både klienter og Advokatsamfundets medlemmer.

Jon Stokholm

2 Legal Opinion eksempel

Danish law firm
LETTERHEAD

State Bank National Association
15 King Street
London EC4N 7DT
England

6 April 2000

Dear Sirs.

We have acted as special Danish counsel to the Lenders in connection with the loan described in the Loan Agreement dated 6 April 2000 ("the Loan Agreement") between Industriudrustning A/S ("the Borrower"), State Bank National Association, as Agent, and State Bank National Association, Farmers Bank National Association and Tristate Commerce Bank Incorporated, as Lenders.

This opinion is being furnished pursuant to Schedule 2 (d) to the Loan Agreement.

All capitalized terms used herein and not otherwise defined herein shall have the meanings assigned thereto in the Loan Agreement.

We give this opinion on the basis and subject to the assumptions and qualifications set out below.

This opinion is confined to and given on the basis of Danish law in force at the date hereof as currently applied by the Danish courts. We express no opinion as to the law of any other jurisdiction or the effect thereof.

1. Basis of Opinion

1A. This opinion is also confined to:

(i) the matters stated herein and is not to be read as extending to any other matter, by implication or otherwise; and

(ii) the documents listed in 1B.

1B. For the purpose of this opinion, we have examined originals or copies of the following documents and we have made no independent investigation of any factual information stated in such documents:

(a) Copies of the following documents:

(i) The Loan Agreement
(ii) E-mail draft Notice for an Advance, dated 5 April 2000 (received at 13:06 p.m. Danish time)

(collectively, "the Documents").

(b) Copies of the following documents:

(i) Articles of Association for the Borrower, adopted at a shareholders' meeting on 7 May 1998
(ii) Résumé from the Commerce and Companies Agency in Denmark in respect of the Borrower dated 30 March 2000, and a corresponding on-line résumé dated 6 April 2000
(iii) An extract of minutes of a board meeting of the Borrower held on 14 March 2000
(iv) Power of Attorney for the Borrower dated 2 April 2000
(v) Certificate from the Management of the Borrower dated 3 April 2000

(collectively, "the Governing Documents").

In addition we have examined such other agreements, documents, records and such matters of law as we have deemed necessary or appropriate for the purpose of rendering this opinion.

2. Assumptions

For the purpose of giving this opinion, we assume the following:

2A. The authenticity, completeness and accuracy of the copy of any of the Documents and Governing Documents of which we have examined a photocopy.

2B. That any drafts, copies or e-mail versions of the Documents and Governing Documents produced to us are true and conform to the documents executed and that the original was executed in the manner appearing on the draft or the copy and that all material supplied to us has been supplied in full and has not subsequently been amended or altered.

2C. That the copies produced to us of minutes of meetings and/or of resolutions are true copies and correctly record the proceedings at such meetings and/or the subject matter which they purport to record; and that any meetings referred to in such copies were duly convened and held, that those present at any such meetings acted bona fide throughout and that all resolutions set out in such copies were duly passed.

2D. The genuineness of the signatures on all original documents or copies thereof which we have examined and that the identities of the signatories are as stated to us.

2E. The Documents are within the capacity and power of, and have been validly authorized, executed and delivered by and are binding on any party other than the Borrower.

2F. The Documents are legal, valid, binding and enforceable according to the law (English law), other than the law of Denmark, by which they are expressed to be governed.

2G. The accuracy and completeness of all factual matters, factual representations, warranties and other information described or set forth in the Documents and the Governing Documents.

3. Opinion

Based on the foregoing assumptions and subject to the qualifications set out below, we are of the opinion that as of the date hereof:

3A. The Borrower is a Danish public limited company (aktieselskab) validly existing under the laws of Denmark and has the necessary corporate power and authority to execute, deliver and perform its obligations under each of the Documents. As of 6 April 2000 there was no adverse registration against the Borrower in the Commerce and Companies Agency.

3B. The execution, delivery and performance of each of the Documents by the Borrower has been duly authorized by all necessary action on the part of the Borrower.

3C. Neither the execution, delivery or performance by the Borrower of the Documents, nor the consummation or performance by the Borrower of the transactions contemplated thereby, will conflict with or result in any violation of,

or constitute a default under the Governing Documents of the Borrower, or any Danish law by which the Borrower is bound.

3D. Neither the execution or delivery of any of the Documents by the Borrower, nor the consummation of any of the transactions contemplated thereby by the Borrower requires the consent or, approval of, the giving of notice to, the registration with, or the taking of any other action in respect of any Danish governmental, county, municipal or other authority or agency, including any judicial body.

3E. Each of the Documents has been duly executed and when delivered on behalf of the Borrower on or prior to the date hereof, constitutes the legal, valid and binding obligation of the Borrower, enforceable against the Borrower in accordance with its respective terms.

3F. The obligations of the Borrower under the Documents rank at least pari passu with the Borrower's other unsecured obligations, except those which are preferred under mandatory law.

3G. Performance by any of the Agent or the Lenders for any action required under the Documents will not violate any law or regulation of Denmark or any political subdivision thereof.

3H. It is not necessary under the laws of Denmark

(a) in order to enable any party to enforce its rights under the Documents, or

(b) by reason of the execution or performance of any of the Documents

that any party to any of the Documents be licensed, qualified or otherwise entitled to carry on business in Denmark.

3I. The choice of English law as the governing law is a valid choice of law. English law would accordingly be applied by the Danish courts in any lawsuit brought in the Danish courts or to any claim made pursuant to the Documents stated to be governed by the laws of England, subject to *(i)* Danish public policy (ordre public) and *(ii)* the mandatory rules of the laws of any country with which the transaction has a significant connection, if and in so far as under the laws of that country those rules must be applied whatever the chosen law, cf. Article 3 (3), Article 7 and Article 16 of the Convention on the Law Applicable to Contractual Obligations dated 19 June 1980 ("the Rome Convention"). No term of the Documents appears on the face of it to violate Danish public policy. The parties must provide the Danish

courts with satisfactory information about the contents of English law and if they fail to do so, the Danish courts may apply Danish law instead. Furthermore, the parties must prepare an adequate translation of the Documents into Danish, in order for the court to rule on the issues brought before them.

3J. The Borrower's submission to the jurisdiction of the courts of England contained in the Documents is valid, binding and enforceable against the Borrower and will be upheld by the Danish courts.

3K. A final and conclusive judgment of the courts of England, rendered in an action brought in accordance with English law to enforce the obligations of the Borrower under the Documents, will be recognized and enforced by the courts of Denmark in accordancee with and subject to the terms of the EC judgment convention of 27 September 1968 ("the Brussels Convention") as implemented in Denmark by Act No. 325 of 4 June 1986 (as subsequently amended).

3L. Any payment to be made by the Borrower under the Documents would be free and clear of any Danish taxes, levies, duties, charges or other withholding of any nature, provided the recipient of such payment is not a resident in Denmark and has no place of business or permanent establishment in Denmark. Neither the execution, delivery nor the performance of any of the Documents by non-Danish parties thereto, will in itself qualify as a permanent establishment, place of business or other engagement in trade, business or property in Denmark.

3M. No stamp duty or other documentary taxes are payable in respect of the Documents. If proceedings are brought before the courts of Denmark, a court fee of 2.4% of the amount in dispute must be paid by the plaintiff.

4. Qualifications

The foregoing opinions are subject to the following qualifications:

4A. The binding effect or enforceability of the obligations of the parties under the Documents may be limited by liquidation, insolvency, bankruptcy, suspension of payment or other laws affecting creditors' rights in general.

4B. Provisions in the Documents providing that certain calculations or certificates will be conclusive and binding (or prima facie evidence) may not be effective, if such calculations or certificates are incorrect, and such provisions will not neces-

sarily prevent juridical inquiry into the merits of such calculations or certificates.

4C. Claims may become barred under statutes of limitation or principles of passivity.

4D. There may be circumstances where Danish law will not give effect to provisions in the Documents according to which a party is vested with a discretion or may determine a matter in its opinion.

4E. The enforceability of claims and court decisions ordering the payment of money in a currency other than Danish currency is subject to the Danish Bankruptcy Code which provides for the conversion of such foreign currency debt into Danish currency on the date of the commencement of such bankruptcy proceedings.

4F. A Danish court may render judgments expressed in foreign currencies, but an enforcement in Denmark by a Danish bailiff's court of a judgment in the form of a money award can generally only be effected in Danish currency calculated at the rate of exchange prevailing at the date of enforcement.

4G. A Danish court may refuse to give effect to undertakings contained in the Documents as to the obligation of any party to pay another party's legal costs and expenses in respect of any action before the Danish courts.

4H. With regard to the jurisdiction a Danish court shall stay or - if appropriate - dismiss the proceedings if concurrent proceedings involving the same cause of action and between the same parties are brought in the courts of another state which is a party to the Brussels Convention. Similarly a Danish court may stay or - if appropriate - dismiss the proceedings if related proceedings are brought in one of these states.

4I. Any provision in the Documents providing that the terms of the Documents may be amended or varied only by an instrument in writing may be held by a Danish court not to be effective.

4J. Our opinion as to the enforceability of the Documents relates only to their enforceability in Denmark in circumstances where the competent Danish court has and accepts jurisdiction.

4K. The availability in Danish courts of equitable remedies, such as injunction and specific performance, is restricted under Danish law.

This opinion may be relied upon only by you and the Lenders for purposes directly relating to the Loan Agreement.

This legal opinion is governed by and construed in accordance with Danish law and subject to the exclusive jurisdiction of the Danish courts.

The undersigned, NN, is admitted to the Danish bar.

Yours faithfully
LAW FIRM

by/NN

3 Kommentarer til legal opinion eksemplets enkelte bestanddele

a. Indledningen

"State Bank National Association
15 King Street
London EC4N 7DT
England

6 April 2000

Dear Sirs

We have acted as special Danish counsel to the Lenders in connection with the loan described in the Loan Agreement dated 6 April 2000 ("the Loan Agreement") made between Industriudrustning A/S ("the Borrower"), State Bank National Association, as Agent, and State Bank National Association, Farmers Bank National Association and Tristate Commerce Bank Incorporated, as Lenders.

This Opinion is furnished pursuant to Schedule 2(a) to the Loan Agreement.

All capitalized terms used herein and not otherwise defined herein shall be used as defined herein shall have the meanings assigned thereto in the Loan Agreement.

We give this opinion on the basis and subject to the assumptions and qualifications set out below.

This Opinion is confined to and given on the basis of Danish law in force at the date hereof as currently applied by the Danish courts. We express no opinion as to the law of any other jurisdiction or the effects thereof."

Legal opinion eksemplet dækker et lån, som en dansk virksomhed, Industriudrustning, har optaget hos tre banker, hvor den ene bank også varetager agentrollen. Denne legal opinion er stilet til agenten, som i forbindelse med låneoptagelsen på bankernes vegne varetager bl.a. opfyldelse af kontraktsbetingelser. For at lånet kan udbetales, skal der foreligge forskellige dokumenter, herunder en dansk legal opinion. En opinion kan også være stilet til agenten på vegne långiverne eller til alle långivere. Det er agenten og bankerne, der foreskriver hvem der skal være adressater. Derimod må det frarådes, at de udenlandske rådgivere, f.eks. et London advokatkontor, står som adressat. Dette kan give anledning til vanskelige ansvarsspørgsmål mellem det danske og det udenlandske advokatkontor.

I opinion eksemplet er den danske advokat "special Danish counsel to the Lenders." Bankerne har i denne sag valgt at udpege en dansk advokat, der alene varetager bankernes interesse og som er forskellig fra låntagers advokat. Det beror ofte på en forhandling mellem parterne, om en sådan special opinion skal foreligge eller om det er tilstrækkeligt, at det er låntagers danske advokat, der udarbejder den fornødne legal opinion. I større eller mere komplicerede transaktioner kan der foreligge to opinions, dels fra bankernes egen danske advokat og dels fra låntagers advokat. I sådanne situationer er det hensigtsmæssigt, at de to danske advokater taler sammen og opnår indbyrdes enighed om udtalelsens formulering, således at der ikke i bankernes øjne er tvivl om transaktionens behandling og vurdering under dansk ret. Angivelsen af, i hvilken egenskab advokaten afgiver opinion, har bl.a. betydning for erklæringer af faktisk karakter ("knowledge opinions"), som behandles nærmere nedenfor under afsnit 4. En "special counsel" bør kun afgive "knowledge opinions", hvis advokaten til brug for afgivelse af opinion har foretaget en særlig undersøgelse (evt. en egentlig due diligence), henviser til de erklæringer og/eller dokumenter, hvorpå udtalelsen bygger eller har foretaget en egentlig retlig vurdering af et juridisk tvivlsomt spørgsmål. Advokaten for långiverne bør i almindelighed ikke afgive "knowledge opinions".

Såfremt låntagers advokat afgiver en opinion, der stiles til långiverne, kan der i senere retssager om lånevilkårene opstå komplicerede advokat-etiske problemer i relation til klienten. Hvorledes skal advokaten håndtere en situation, hvor låntager påberåber sig en ugyldighedsindsigelse og hvor hans egen advokat har afgivet en "ren" opinion desangående. Mens det i England af den årsag er sjældent, at låntagers advokat stiler sin opinion til långivere, så er dette fænomen snarere reglen end undtagelsen i dansk praksis. Sker det, bør man allerede ved afgivelse af opinion drøfte den mulige konflikt med klienten og opnå dennes accept heraf.

Det ses, at man anvender låneaftalens definitioner i legal opinion, med mindre visse begreber er særskilt defineret i legal opinion. Det betyder, at den danske advokat må sætte sig grundigt ind i disse definitioner og vurdere, om de er tilstrækkelige eller relevante under dansk ret. Indeholder låneaftalen en definition af "group of companies", som henviser til den engelske aktieselskabslov, så må advokaten for danske koncerner tage et forbehold for denne definition, hvis definitionen anvendes i legal opinion, og præcisere, at koncern-definitionen i legal opinion er den i Aktieselskabslovens § 2 angivne og ikke en engelsk selskabsretlig definition.

Indledningsafsnittet henviser til de efterfølgende "Assumptions and Qualifications". Over de sidste 20 år er der sket en betydelig udvikling i disse forbehold, som

tidligere nærmest ikke eksisterede. Man er blevet meget mere forsigtig med præcist at angive, hvilke dokumenter m.v. man har gennemgået og hvilke begrænsninger, der skal indfortolkes i mere eller mindre generelle udtalelser om den danske låntager henholdsvis anvendelsen af danske retsregler på en given transaktion.

Til slut i indledningen udtrykkes den helt grundlæggende og nærmest selvfølgelige forudsætning, nemlig at udtalelsen alene angår dansk ret på tidspunktet for udtalelsens afgivelse og at der ikke indgår nogen vurdering af udenlandsk ret. Typisk afgives også udenlandske opinions til bankerne, der dækker de relevante lande uden for Danmark, eksempelvis en legal opinion om engelsk ret. I visse transaktioner, f.eks. virksomhedsoverdragelser, kan det her være på sin plads at præcisere, om udtalelsen også dækker EU ret, særligt EU konkurrenceret. EU retten er selvsagt en del af dansk ret og modtager af udtalelsen må gå ud fra, at EU retten også dækkes, hvis den ikke særligt undtages. Det hænder ofte, at der lige netop på EU konkurrenceretten om nødvendigt indhentes en særlig legal opinion, der alene dækker disse forhold. Der kan også være anledning til præciseringer, hvis grønlandske eller færøske parter optræder i transaktionen. Man må her specifikt nævne, om udtalelsen dækker de særlige på Færøerne og Grønland gældende regler eller om de udskilles til en særlig legal opinion.

b. Basis of Opinion

1A. This Opinion is also confined to:

(i) the matters stated herein, and is not to be read as extending to any other matter, by implication or otherwise; and
(ii) the documents listed in 1B.

1B. For the purpose of this Opinion, we have only examined originals or copies of the following documents, and we have made no independent investigation of any factual information stated in such documents.

(a) Copies of the following documents:

(i) The Loan Agreement
(ii) E-mail draft Notice for an Advance, dated 5 April 2000 (received at 13:06 p.m. Danish time)

(collectively, "the Documents").

(b) Copies of the following documents:

(i) Articles of Association for the Borrower, adopted at a shareholders' meeting on 7 May 1998.

(ii) Résumé from the Commerce and Companies Agency in Denmark in respect of the Borrower dated 30 March 2000, and a corresponding on-line résumé dated 6 April 2000

(iii) An extract of minutes of a board meeting of the Borrower held on 14 March 2000

(iv) Power of Attorney for the Borrower dated 2 April 2000

(v) Certificate from the Management of the Borrower dated 3 April 2000

(collectively, "the Governing Documents").

In addition, we have examined such other agreements, documents and records and such matters of law as we have deemed necessary or appropriate for the purpose of rendering this opinion."

I 1A præciseres det, at kun specifikt opregnede dokumenter er gennemgået og at udtalelsen ikke skal underkastes en udvidende fortolkning. Såfremt långiverne mener, at en bestemt udtalelse giver anledning til supplerende spørgsmål, så skal disse spørgsmål stilles og besvares i legal opinion. Man kan ikke leve med en situation, hvor adressaten "går ud fra", at der i opinion nr. 5 også tænkes på en række andre situationer end de direkte beskrevne.

I 1B opregnes de specifikke dokumenter, som advokaten har gennemgået. Tidligere kunne man gå ud fra, at man fik et sæt originale underskrevne dokumenter til gennemsyn og afgav sin opinion på dette grundlag. Det sker sjældent i dag. Advokaten modtager en række udkast til dokumenter pr. telefax eller e-mail. Nogle er underskrevet, andre er uunderskrevne og legal opinion skal foreligge til et givet closing tidspunkt, eksempelvis i London. Da advokaten sædvanligvis ikke er til stede under underskrivelsesceremonien, hænder det ofte, at den juridiske udtalelse baseres på udkast i den ene eller anden form. Det er derfor vigtigt, at man specifikt gør rede for formen af det dokument, der danner grundlag for opinion. Det er også vigtigt at præcisere, om der er foretaget yderligere undersøgelser af faktuel art i forbindelse med gennemgang af transaktionsdokumenterne. Der kan være en række warranties og representations, som afgives af låntageren og den danske advokat kan ikke forventes selvstændigt at have verificeret, om de faktuelle forhold også er korrekte, med mindre advokaten udtrykke-

ligt er blevet pålagt dette arbejde.

Transaktionsdokumenterne i dette opinion eksempel er enkle. Der foreligger en kopi af en underskrevet låneaftale. Til gengæld har den danske advokat kun set en e-mail udgave af en "Notice for an Advance" og dette præciseres med angivelse af såvel dato som klokkeslæt, hvor e-mailen er modtaget. Klokkeslætsangivelse er relevant, når der foreligger flere udkast i fax eller e-mail form med samme datering. Det vil af bevismæssige årsager være hensigtsmæssigt at udprinte en kopi af e-mail dokumenter til sagen, med mindre man føler sig meget sikker på kontorets EDB systemer.

Ud over transaktionsdokumenterne skal advokaten sikre sig, at han har gennemgået de helt grundlæggende danske selskabsdokumenter for låntageren, således at det kan bekræftes, at aftalen er gyldigt indgået under dansk ret. Låntagers vedtægter skal foreligge. Typisk anmoder man låntageren om at sende en kopi af de gældende vedtægter. Efter omstændighederne bør man også rekvirere et eksemplar direkte fra Erhvers- og Selskabsstyrelsen for at sikre, at der er tale om de senest registrerede vedtægter. I alle tilfælde skal man rekvirere et resumé for selskabet fra Erhvervs- og Selskabsstyrelsen eller fra låntager for at få et hurtigt overblik over bestyrelse, direktion, formålsparagraf og tegningsregel. Ordentligvis bør resuméet følges op med en on-line udskrift fra Erhvervs- og Selskabsstyrelsen pr. den dato, legal opinion afgives.

En original fuldmagt fra låntageren bør om muligt foreligge, underskrevet af de tegningsberettigede, med mindre transaktionsdokumenterne underskrives direkte af de tegningsberettigede. Det kan være hensigtsmæssigt at forlange vitterlighedspåtegning på en fuldmagt.

Det er almindeligt forekommende, at lånefaciliteten er betinget af, at ledelsen for den låntagende virksomhed afgiver en "ledelseserklæring" (eller i engelsk sprogbrug et Officer's Certificate). Certifikatet kan indeholde erklæringer svarende til de "knowledge opinions", der ønskes optaget i advokatens legal opinion. Ledelsens afgivelse af erklæringer svarende til advokatens "knowledge opinions" udgør ikke i sig selv tilstrækkeligt grundlag for en "special counsel" til at afgive "knowledge opinions". Hertil kræves selvstændige undersøgelser eller vurderinger, se nedenfor under 4.

I visse tilfælde forlanger långiverne en ekstrakt-udskrift fra det bestyrelsesmøde, hvor låneoptagelsen er blevet godkendt. Dette er efter dansk set sjældent påkræ-

vet, da man efter Aktieselskabslovens § 61 i meget vidt omfang kan forlade sig på tegningsreglerne. Skulle man være i en situation, hvor en transaktion ligger uden for selskabets formålsparagraf, kan dette jo heller ikke repareres ved en bestyrelsesbeslutning. Der kræves en formålsændring vedtaget på en generalforsamling. Ved større transaktioner føler de udenlandske kontraktsparter sig imidlertid i praksis mere trygge ved, at også selskabets bestyrelse har behandlet og godkendt transaktionen. Dette giver ofte anledning til nogen forhandling parterne imellem, da man i mange tilfælde ikke i danske bestyrelsesreferater har specifikke godkendelser af låneoptagelser, m.v. Der er ikke som i England og i USA tale om egentlige "board resolutions". Ikke mindst bankers låneoptagelse giver anledning til tvivl. Hvor går grænsen for et pengeinstitut mellem låneoptagelse som et led i den daglige drift og anden låneoptagelse, som kræver bestyrelsesgodkendelse.

Afsnittet slutter af med en mere generelt holdt henvisning til yderligere dokumenter, som man måtte have gennemgået. Det er en konkret vurdering, om man skal liste alle dokumenter eller om man blot indskrænker sig til en generel henvisning.

c. Assumptions

"For the purpose of giving this opinion, we assume the following:

2A. The authenticity, completeness and accuracy of copies of any of the Documents and Governing Documents of which we have examined photocopies.

2B. That any drafts, copies or e-mail versions of the Documents and Governing Documents produced to us are true and conform to the documents executed and that the original was executed in the manner appearing on the draft or the copy and that all material supplied to us has been supplied in full and has not subsequently been amended or altered.

2C. That the copies produced to us of minutes of meetings and/or of resolutions are true copies and correctly record the proceedings at such meetings and/or the subject matter which they purport to record; and that any meetings referred to in such copies were duly convened and held, that those present at any such meetings acted bona fide throughout and that all resolutions set out in such copies were duly passed.

2D. The genuineness of the signatures on all original documents or copies thereof which we have examined, and that the identities of the signatories are as stated to us.

2E. The Documents are within the capacity and power of, and have been validly authorized, executed and delivered by and are binding on any party other than the Borrower.

2F. The Documents are legal, valid, binding and enforceable according to the law (English law), other than the law of Denmark, by which they are expressed to be governed.

2G. The accuracy and completeness of all factual matters, factual representations, warranties and other information described or set forth in the Documents and the Governing Documents."

Som nævnt i indledningen er nutidens legal opinions blevet fyldt med udtrykkelige forudsætninger om dette eller hint. Det er nok den bitre erfaring i både ind- og udland, som har forårsaget denne udvikling. Det er uheldigt og kan være ansvarspådragende, hvis man i legal opinion lader adressaten forstå, at man har set den originale og underskrevne låneaftale, hvis man kun har set et foreløbigt og uunderskrevet eksemplar, modtaget på telefax.

I 2A præciseres det, at man forudsætter fuldstændigheden af fotokopier og faxkopier. Forbeholdet er særlig relevant ved telefaxer, hvor eksempelvis dele af en side er utydelige eller faldet ud på en faxkopi.

I 2B tages forbehold for udkast og e-mail versioner af dokumenterne og i logisk tilknytning hertil, at der i endelige dokumenter ikke senere er foretaget ændringer. Såfremt legal opinion baseres på udkast, er det vigtigt at præcisere, hvilket udkast der er tale om, eksempelvis med udkast-nr., modtagelsesdato og - for e-mails og fax - klokkeslæt.

Såfremt man gennemgår mødereferater, herunder typisk referater af bestyrelsesmøder i danske selskaber, er det i 2C præciseret, at den ekstrakt, man modtager, også rent faktisk reflekterer vedtagelsen på bestyrelsesmødet. Man kan jo ikke vide, om en bestemt beslutning er taget under visse betingelser eller forudsætninger, som fremgår af andre dele af referatet eller af et referat af et tidligere bestyrelsesmøde.

Endvidere tages et forbehold for, at bestyrelsesmødet var lovligt indkaldt og afholdt. Det kan være praktisk med et sådant forbehold i stedet for, at den eksterne advokat skal gå i detaljen og undersøge, om selskabets vedtægter og bestyrelsens forretningsorden om indkaldelser m.v. er overholdt i en given situation.

I 2D tages forbehold for, at underskrifterne er ægte og at det er den rigtige person, der har underskrevet. Sidstnævnte er relevant, hvis man kun modtager en såkaldt "conformed copy" af låneaftalen, d.v.s. en kopi, hvor de originale underskrifter ikke foreligger, men hvor agenten eller det engelske advokatkontor med blokbogstaver har påført navnene på dem, der har underskrevet.

Efter behov kan man overveje et yderligere forbehold, der dækker de i praksis ofte forekommende situationer, hvor der underskrives af de forskellige parter forskellige steder i verden. Det sker typisk på den måde, at der pr. fax cirkuleres underskriftssider, som herefter pr. fax returneres til de øvrige parter. Man ved i denne situation i princippet ikke, hvilket originalt og endeligt dokument, faxunderskriftssiden knytter sig til. Eksempelvis kunne man skrive: ".. that the signature pages executed by the parties to the Loan Agreement all refer to draft No. 5 of the loan agreement received on 3 April 2000".

I 2E tages ordentligvis forbehold for ugyldighedsindsigelser fra de øvrige parter som betingelse for, at låneaftalen er gyldig for låntager. På tilsvarende vis tages der i 2F forbehold for, at forpligtelserne i låneaftalen er gyldige efter engelsk ret, som er det retssystem, der er valgt i låneaftalen.

Endelig tages der i 2G forbehold for, at de oplysninger af faktuel karakter, som advokaten har modtaget, også er korrekte og i overensstemmelse med angivelserne i de oplistede dokumenter.

Man kan spørge sig selv, om det er nødvendigt specifikt at opregne de mange forbehold, hvis blot man omhyggeligt opbevarer kopier af samtlige de dokumenter, man har modtaget, således at man senere kan bevise, hvad man har set og hvad man ikke har set. Endvidere kan det anføres, at jo flere forbehold, der opregnes i selve legal opinion, jo større er risikoen for ansvar for en fejl i opinion, som man ikke har dækket af ved et forbehold. Hertil er kun at sige, at praksis er gået i retning af at nævne forbehold udtrykkeligt, således at risikoen for ansvar for fejl ved afgivelse af opinion efter praksis i dag forøges, hvis man helt undlader at tage forbehold.

d. Opinion

"Based on the foregoing assumptions and subject to the qualifications set out below, we are of the opinion that as of the date hereof:

> 3A. The Borrower is a Danish public limited company (aktieselskab) validly existing under the laws of Denmark and has the necessary corporate power and authority to execute, deliver and perform its obligations under each of the Documents. As of 6 April 2000 there was no adverse registration against the Borrower in the Commerce and Companies Agency."

I denne centrale udtalelse bekræfter advokaten, at låntager eksisterer som aktieselskab og selskabsretligt kan indgå i aftalen og opfylde denne. Det ses, at udtalelsen begrænses til, at selskabet er "validly existing". Ikke sjældent beder de udenlandske opdragsgivere om bekræftelse på, at selskabet er "in good standing". Dette begreb er relevant i USA, hvor der i mange stater skal betales en franchiseskat for fortsat at opretholde registrering i et givent selskabsregister. Begrebet savner mening i dansk ret og bør derfor undgås. Såfremt man i en given transaktion etablerer et nyt selskab, f.eks. et holding selskab som køber i en virksomhedsoverdragelse, kan det være på sin plads også at bekræfte, at dette selskab er "duly formed, incorporated and organized". Ved gamle, veletablerede selskaber er det næppe relevant at dykke ned i stiftelsesdokumenter, m.v. for at undersøge stiftelsens lovlighed. Man skal selvsagt gennemgå selskabets vedtægter, herunder primært formålsparagraffen og tegningsreglerne for at sikre aftalens overensstemmelse dermed. Ved almindelig låneoptagelse volder formålsparagraffen sjældent problemer. Det kan derimod være tilfældet, hvis et aktieselskab med et specifikt og begrænset formål enten erhverver en virksomhed inden for en anden branche eller hvis selskabet optager et lån, der er øremærket til et formål, der ikke er omfattet af formålsbestemmelsen i vedtægterne. Der kan også være vedtægtsbestemmelser om, at et repræsentantskab skal høres i forbindelse med visse dispositioner eller at særlige beslutninger ifølge en aktionæroverenskomst kræver samtykke fra alle eller et flertal af aktionærerne. Omkring aktionæroverenskomster kan man altid diskutere, om de interne vedtagelsesprocedurer er relevante, hvis låneaftalen eller transaktionsdokumentet i øvrigt er underskrevet af de tegningsberettigede. Der er i praksis imidlertid ingen tvivl om, at udenlandske parter ofte vil ønske at få sådanne spørgsmål belyst, selvom man rent juridisk kan stole på tegningsreglen. En undersøgelse af aktionæroverenskomster er påkrævet, hvis der i vedtægterne henvises hertil, men kan også være relevant, hvis låntager er et selskab med 2-3 aktionærer, hvor det må siges at høre til undtagelsen, at der ikke eksisterer en aktionæroverenskomst.

I standard opinion er også medtaget en udtalelse om, at der ikke er præjudicerende registreringer mod selskabet i Erhvervs- og Selskabsstyrelsen, f.eks. tvangsopløsning. Det er vel det nærmeste, man i dansk ret kan komme de ovennævnte "good standing opinions".

> "3B. The execution, delivery and performance of each of the Documents by the Borrower has been duly authorized by all necessary action on the part of the Borrower".

I denne udtalelse bekræftes tegningsreglen henholdsvis fuldmagten til at underskrive låneaftalen. Selvom underskrivelse i overensstemmelse med fuldmagt/ tegningsregler efter dansk ret i al almindelighed er tilstrækkelig for, at aftalen er bindende for selskabet, jvf. ovenfor, så ligger der i ordene "duly authorized by all necessary action" en videregående forpligtelse for advokaten til at undersøge de interne kompetenceforhold hos låntager. Som nævnt kan der være repræsentantskabshøring, enighed ifølge aktionæroverenskomst o.lign., der skal påses.

Særlige problemer opstår, hvor bestyrelsen har nedsat et forretningsudvalg til at godkende dispositioner mellem ordinære bestyrelsesmøder. Her må man sikre sig, at forretningsudvalget har hjemmel i bestyrelsens forretningsorden og at udvalget har egentlig besluttende kompetence inden for det område, transaktionen omfatter. Det kan også være vanskeligt at drage grænsen mellem de dispositioner, direktionen kan foretage uden bestyrelsesgodkendelse, og de dispositioner, der kræver bestyrelsesgodkendelse. Større børsnoterede virksomheder og ikke mindst finansielle institutioner vil ofte gøre gældende, at optagelse af selv betydelige lån ligger inden for direktionens daglige forretninger og derfor ikke kræver bestyrelsesgodkendelse. Det må bero på en konkret vurdering, om en låneoptagelse kræver eller ikke kræver bestyrelsesgodkendelse.

Et andet problem, der kan volde vanskeligheder, er bestyrelsesbeslutninger, der uden grænser delegerer f.eks. låneoptagelse til direktionen eller visse navngivne personer. Man kan komme ud for tilfælde, hvor delegationen er så bred, at den strider mod Aktieselskabslovens forbud mod generaldelegation. Hvis der er givet en relativ specifik fuldmagt til direktionen om, at den kan optage lån op til en vis maksimumgrænse på visse hovedvilkår og inden for en specifik periode, så må advokaten tillige undersøge, evt. i form af en ledelseserklæring, hvor mange lån, der allerede er optaget under denne bemyndigelse.

"3C. Neither the execution, delivery or performance of the Documents by the Borrower, nor the consummation or performance by the Borrower of the transactions contemplated thereby, will conflict with or result in any violation of, or constitute a default under the Governing Documents or any Danish law by which the Borrower is bound."

Der er en række forhold, der skal undersøges for at denne udtalelse kan afgives. Dels kan der være forbud eller vedtagelseskrav i vedtægter og/eller aktionæroverenskomst, jvf. ovenfor, og dels kan der være præceptiv lovgivning, som gælder for den pågældende låntager. Der kan være tale om regler i luftfartslovgivningen, som skal overholdes for luftfartsselskaber, særlige krav for koncessionerede virksomheder, f.eks. forsikringsselskaber og teleselskaber, eller lånegrænser ved lov eller bekendtgørelse for kommuner, amter og statslige selskaber, som man nærmere må vurdere. Ved lånefinansiering af virksomhedskøb skal man være særlig opmærksom på Aktieselskabslovens § 115 (forbud mod selvfinansiering), der ofte stiller sig hindrende i vejen for den sikkerhed, de udenlandske banker måtte kræve. De helt specielle forhold om udenlandske moderselskabers retsstilling under Aktieselskabslovens § 115a kan også give anledning til problemer.

"3D. Neither the execution or delivery of any of the Documents by the Borrower, nor the consummation by the Borrower of any of the transactions contemplated thereby requires the consent or approval of, the giving of notice to, the registration with or any other action in respect of any Danish governmental, county, municipal or other authority or agency, including any judicial body."

I denne udtalelse bekræftes, at transaktionen ikke kræver godkendelse m.v. af offentlige myndigheder. Man kan forestille sig koncessionerede virksomheder, hvor en bestemt transaktion kræver samtykke fra det relevante resort ministerium eller offentlige styrelse (f.eks. registrering af fly med udenlandsk ejer), godkendelse af en samarbejdsaftale af konkurrencemyndighederne eller - ved sikrede transaktioner - tinglysning eller registrering i et rettighedsregister (fast ejendom, fly, skibe, bilbogen, personbogen). Ved henvisningen til *Danish governmental authority or agency* kan der opstå tvivl om EU institutionerne, f.eks. ved fusioner og joint ventures. Er der i en transaktion godkendelsespligt i Bruxelles, bør man selvsagt henvise dertil, med mindre advokaten i sin opinion udtrykkelig har undtaget EU lovgivning fra udtalelsen.

"3E. Each of the Documents has been duly executed and when delivered on behalf of the Borrower on or prior to the date hereof constitutes the legal, valid

and binding obligation of the Borrower, enforceable against the Borrower in accordance with its respective terms."

Dette er i realiteten det vigtigste afsnit i en legal opinion og man kunne for så vidt undvære opinion 3A - 3D, men sådan er praksis desværre ikke. Ordene "when delivered" er indsat, da advokaten kun sjældent er til stede ved underskrivelse og closing af transaktionen og derfor ikke kan bekræfte, at dokumenterne rent faktisk er "delivered". Det nye i forhold til opinion 3A - 3D er, at advokaten også bekræfter, at aftalen kan tvangsfuldbyrdes over for låntager. Långiverne ønsker sikkerhed for, ikke blot at forpligtelserne er lovligt, gyldigt og bindende påtaget, men også at man i givet fald kan få dem tvangsfuldbyrdet. I afsnittet om Qualifications er der indsat en række forbehold vedrørende tvangsfuldbyrdelse. I dette afsnit går "enforceability" på det rent processuelle spørgsmål om tvangsfuldbyrdelse. En dansk advokat kan ikke uden videre udtale sig om, hvorvidt låneaftalens enkelte bestemmelser materielt kan gennemføres, al den stund at låneaftalen er undergivet engelsk ret.

"3F. The obligations of the Borrower under the Documents rank at least pari passu with the Borrower's other unsecured obligations, except those which are preferred under mandatory law."

Den såkaldte pari passu udtalelse volder tit vanskeligheder. Dels er der krav, der har fortrinsret under præceptiv lovgivning, primært konkurslovgivningen, og dels kan der foreligge avancerede finansielle aftaler, der placerer långiverne i en særlig rangorden. Hvis imidlertid udtalelsen - som her - alene foretager en sammenligning med låntagers øvrige usikrede kreditorer og undtager fortrinskrav efter præceptiv lovgivning, bør den kunne afgives uden større undersøgelser. Hvis transaktionen omhandler subordinerede lån, kan udtalelsen selvsagt ikke afgives, bortset fra en pari passu udtalelse i relation til andre lån med tilbagetrædelseserklæring. I sidstnævnte situation er man nødt til at undersøge de enkelte subordinerings-/tilbagetrædelsesaftaler for at vurdere dem overfor hinanden.

"3G. Performance by any of the Agent or the Lenders for any action required under the Documents will not violate any law or regulation of Denmark or any political subdivision thereof."

Denne udtalelse vender sigtet mod de udenlandske parter og præciserer, at deres efterlevelse af aftalen ikke strider mod dansk ret. I tidligere tider var det navnlig

valutabekendtgørelsens forskellige regler, man skulle være opmærksom på ved låneoptagelse. Ved virksomhedskøb kan man igen nævne forholdet til Aktieselskabslovens § 115 og 115a som lovbestemmelser, der kræver en nøjere analyse i lyset af købets finansieringsstruktur. Forbeholdet om remedies diskuteres nærmere nedenfor under Qualifications.

"3H. It is not necessary under the laws of Denmark

(a) in order to enable any party to enforce its rights under the Documents, or

(b) by reason of the execution or performance of any of the Documents

that any party to any of the Documents be licensed, qualified or other wise entitled to carry on business in Denmark."

Denne udtalelse volder sjældent problemer i Danmark. Den stammer fra de amerikanske del-stater, hvor virksomheder fra andre del-stater skal registreres for at kunne udøve forretning i en fremmed del-stat. I særlige tilfælde kan man vurdere, om en vis aktivitet, der dækkes af transaktionen, kræver etablering af en filial i Danmark eller en momsagent. Dette skal i så fald indbygges i denne udtalelse.

"3I. The choice of English law as the governing law is a valid choice of law. English law would accordingly be applied by the Danish courts in any lawsuit brought in the Danish courts or to any claim made pursuant to the Documents stated to be governed by the laws of England, subject to (i) Danish public policy ("ordre public") and *(ii)* the mandatory rules of the laws of any country with which the transaction has a significant connection, if and in so far as under the laws of that country those rules must be applied whatever the chosen law, cf. Article 3(3, Article 7 and Article 16 of the Convention on the Law Applicable to Contractual Obligations, dated 19 June 1980 ("the Rome Convention"). No term of the Documents appears on the face of it to violate Danish public policy. The parties must provide the Danish courts with satisfactory information about the contents of English law and if they fail to do so, the Danish courts may apply Danish law instead. Furthermore, the parties must produce an adequate translation of the Documents into Danish in order for the court to rule on the issues brought before them."

Det spiller en væsentlig rolle for de udenlandske parter, om danske domstole accepterer et lovvalg. Efter Art. 3, stk. 1, i Romkonventionen er et sådant valg gyl-

digt, men der må gøres visse forbehold. For det første kan udenlandsk ret blive tilsidesat efter fundamentale danske retsprincipper (ordre publique), jvf. Romkonventionen Art. 16, hvilket imidlertid i internationale forretningstransaktioner sjældent er tilfældet. Oftest bliver man, som også angivet i legal opinion eksemplet, bedt om at bekræfte, at der ikke umiddelbart efter dokumentets ordlyd er tale om bestemmelser, der strider mod dansk ordre publique. For det andet må der tages forbehold for fremmede internationalt præceptive regler, jvf. Romkonventionens Art. 3, stk. 3 og Art. 7. Der kan eksempelvis være tale om en agentaftale med en udenlandsk agent. Selvom denne aftale underkastes dansk ret, så kan der i agentens hjemland være regler om opsigelse, erstatning, m.v., som er af en sådan art, at de gælder i retsforholdet mellem agent og principal uanset lovvalget. I Danmark har vi samme princip i lov om handelsagenter. For det tredie må der tages forbehold for oplysningen af fremmed ret. En dansk domstol kan kun lægge fremmed ret til grund, hvis parterne enten på aftalemæssig basis eller i medfør af Konventionen om bevisoptagelse i udlandet (bek.nr. 117C af 7. december 1973) har fremskaffet tilstrækkelige oplysninger om fremmed ret på de relevante områder. Derfor indeholder opinion eksemplet et forbehold herom.

> "3J. The Borrower's submission to the jurisdiction of the courts of England contained in the Documents is valid, binding and enforceable against the Borrower and will be upheld by the Danish courts."

I internationale aftaler underkaster den danske part sig ofte fremmede domstoles jurisdiktion, typisk således at de udenlandske banker har valgfrihed til enten at sagsøge i den valgte jurisdiktion eller for andre kompetente domstole. Inden for Bruxelles konventionen er sådanne klausuler gyldige, jvf. konventionens Art. 17, stk. 4. Det er også gyldigt efter Retsplejelovens § 160, at den danske part udpeger en uafhængig procesagent i eksempelvis England. Selv uden for Bruxelles konventionens område vil en dansk parts accept af en fremmed domstols jurisdiktion normalt være bindende. Har man at gøre med et EEA land - og ikke som her et EU land (England) - skal man henvise til Lugano konventionen i stedet for Bruxelles konventionen.

> "3K. A final and conclusive judgment of the courts of England, rendered in an action brought in accordance with English law to enforce the obligations of the Borrower under the Documents, will be recognized and enforced by the courts in Denmark in accordance with and subject to the terms of the EC Judgments Convention of 27 September 1968 ("the Brussels Convention") as implemented in Denmark by Act No. 325 of 4 June 1986 (as subsequently amended)."

I den tænkte transaktion har man valgt engelske domstole som rette forum og dette valg er helt i overensstemmelse med Bruxelles konventionen.

Hvis man er uden for Bruxelles konventionen og den Nordiske domskonvention (lovbek.nr. 635 af d. 15. september 1986), bliver doms-udtalelsen vanskeligere. Udgangspunktet er, at andre udenlandske domme hverken har retskraft eller kan tvangsfuldbyrdes i Danmark. I sådanne situationer kan udtalelsen se således ud:

> *"A final and conclusive judgement of the Courts of New York or the United States Federal Courts rendered in an action brought in accordance with New York Law to enforce the obligations of the Borrower under the Documents will neither be recognized nor enforced by the Courts of Denmark without a review of the merits. However, under such proceedings the New York Court judgement may serve as evidence in the Danish proceedings."*

Er man uden for domskonventionerne, kan det være hensigtsmæssigt at råde parterne til at vælge voldgift som konfliktløsningsmodel. Har parterne valgt international voldgift og er de øvrige parters hjemlande underskrivere af New York konventionen af d. 10. juni 1958 om anerkendelse og fuldbyrdelse af udenlandske voldgiftskendelser, kan udtalelsen se således ud:

"An arbitration award rendered in accordance with the arbitration provisions contained in the Documents will be recognized and enforced in accordance with the terms of the New York Convention (1958) on recognition and enforcement of international arbitration awards, as implemented in Denmark pursuant to the 1972 Arbitration Act."

> "3L. Any payment to be made by the Borrower under the Documents would be free and clear of any Danish taxes, levies, duties, charges or other withholding of any nature, provided the recipient of such payment is not a resident in Denmark and has no place of business or permanent establishment in Denmark. Neither the execution or the delivery, nor the performance of any of the Documents by non-Danish parties thereto will in itself qualify as a permanent establishment, place of business or other engagement in trade, business or property in Denmark."

I denne udtalelse forsikres långiverne om, at samtlige betalinger fra den danske låntager kan ske uden kildeskat eller tilbagehold i øvrigt. Man sikrer også bankerne i, at selve indgåelsen af låneaftalen ikke i sig selv medfører, at der bliver fast driftssted eller lignende i Danmark med deraf følgende skattepligt. Der kan

være andre aftaler, hvor udtalelsen giver anledning til større tvivl. Ved låneaftaler, hvor tilbagebetalingsprofilen er afhængig af overskuddet ved en vis aktivitet i Danmark, kan der være dansk skattepligt og ved leasing kan der være momsafregning m.v. Ved royalty betalinger skal man i særlig grad sikre sammenhængen mellem kildeskattereglerne for royalty betalinger og de relevante dobbeltbeskatningsoverenskomster.

> "3M. No stamp duty or other documentary taxes are payable in respect of the Documents. If proceedings are brought before the courts of Denmark, a court fee of 2.4% of the amount in dispute must be paid by the plaintiff."

Nu hvor stempelpligten for de fleste dokumenter er ophævet, kan denne udtalelse gives uden forbehold, hvor man tidligere måtte sikre, at låneaftaler o.lign. blev underskrevet i udlandet. Da der i visse lande, f.eks. USA, ikke beregnes retsafgift, er det hensigtsmæssigt at oplyse de udenlandske parter om, at denne afgift skal betales ved sagsanlæg i Danmark samt at der også skal betales en berammelsesafgift.

e. Qualifications

Qualification-afsnittet opregner en række forbehold, præciseringer og undtagelser vedrørende de udtrykte opinions, og hvortil der henvises i indledningen til opinionafsnittet. Der har inden for de enkelte transaktionstyper med tiden udviklet sig ganske standardiserede qualifications og i afsnittet bør alene medtages generelt gældende forbehold m.v. Såfremt den enkelte transaktion frembyder konkrete problemstillinger af eksempelvis konkursretlig karakter, bør advokaten ikke forlade sig på det almindelige konkursretlige forbehold (jfr. 4A nedenfor), men i stedet gøre udtrykkeligt opmærksom herpå i selve opinionafsnittet.

Afhængig af den konkrete transaktion, herunder det aftalte lovvalg og værneting, bør man konkret overveje behovet for at medtage de enkelte qualifications.

> "The foregoing opinions are subject to the following qualifications:
>
> 4A. The binding effect or enforceability of the obligations of the parties under the Documents may be limited by liquidation, insolvency, bankruptcy, suspension of payment or other laws affecting creditors' rights in general."

Formålet med dette afsnit er at udtrykke, at uanset lovligheden og gyldig-

heden af de af låntageren indgåede forpligtelser og uanset lovvalget vil tvangsfuldbyrdelse kun kunne ske under iagttagelse af og med de begrænsninger, som følger af visse regler i dansk insolvens ret, som enhver kreditor må respektere

Det er normalt en selvfølge for långiver, at opinion indeholder denne type qualification, om end det under tiden kan give anledning til diskussion, om denne qualification skal fremstå generel, det vil sige omfattende hele opinion, eller om den alene bør fremgå i forbindelse med de afsnit i opinion, som omtaler eksigibilitet.

Det er vigtigt at være opmærksom på, at der ikke konkret foreligger spørgsmål eksempelvis i relation til risiko for omstødelse, som bør nævnes specifikt i selve opinion. Som ovenfor anført kan afsnittet ikke antages at fritage for ansvar, hvis der på tidspunktet for afgivelse af legal opinion konkret foreligger en retlig usikkerhed for långiver, eksempelvis med hensyn til omstødelse, som långiver ikke kunne forvente uden at være gjort særligt opmærksom herpå.

"4B. Provisions in the Documents providing that certain calculations or certificates will be conclusive and binding (or prima facie evidence) may not be effective if such calculations or certificates are incorrect, and such provisions will not necessarily prevent judicial inquiry into the merits of such calculations or certificates."

Forbeholdet tager sigte på de ofte forekommende bestemmelser i lånedokumenter, der angiver, at långivers eller agentens ensidige erklæringer om objektivt konstaterbare forhold, herunder talmæssige opgørelser af gældens størrelse, skal anses for endelige og bindende for retsforholdet mellem parterne. Eksempelvis indeholder de fleste låneaftaler bestemmelser med følgende eller tilsvarende ordlyd: *A certificate by the Agent as to liabilities accrued and payments made in relation to the Loan shall, in the absence of manifest error, be conclusive and binding.*

Forbeholdet afspejler, at danske domstole uanset forekomsten af sådanne "endelighedsbestemmelser" vil anse sig berettigede til at efterprøve rigtigheden af f.eks. opgørelser eller beregninger. Dette forhold indebærer imidlertid ikke, at sådanne klausuler er helt uden retsvirkning, og bestemmelserne vil bl.a. kunne have den følge, at der sker en bevisbyrdemæssig forskydning til ugunst for låntager.

"4C. Claims may become barred under statutes of limitation or principles of passivity."

Der er her tale om en præcisering af dansk obligationsret om forældelsesregler og passivitet.

> "4D. There may be circumstances where Danish law will not give effect to provisions in the Documents according to which a party is vested with a discretion or may determine a matter in its opinion.

Det er ikke usædvanligt, at der i låneaftaler findes vilkår, hvorefter agenten eller långiver ensidigt og skønsmæssigt kan afgøre, om forhold af betydning for parternes materielle retsstilling gør sig gældende. Sådanne bestemmelser indeholder normalt udtryk, så som ..... *in the Lender's opinion ...*, ... *in the Lender's sole discretion* ... eller lignende.

I sådanne tilfælde vil en dansk domstol kunne tilsidesætte skønnet eller beslutningen, f.eks. i situationer hvor skønnet udøves chikanøst eller støttes på et usagligt eller mangelfuldt grundlag. Afhængigt af det konkrete indhold kan det heller ikke udelukkes, at en tilsidesættelse af selve kontraktbestemmelsen ville kunne komme på tale.

> "4E. The enforceability of claims and court decisions ordering the payment of money in a currency other than Danish currency is subject to the Danish Bankruptcy Code, which provides for the conversion of such foreign currency debt into Danish currency on the date of the commencement of bankruptcy proceedings."

Da tilbagebetalingspligten under en låneaftale er debitors vigtigste forpligtelse, kan det være på sin plads at nævne Konkurslovens regler om konvertering af udenlandsk valuta helt specifikt, selvom præciseringen er indeholdt i den generelle præcisering i pkt. 4A.

> "4F. A Danish court may render judgments expressed in foreign currencies, but enforcement in Denmark by a Danish bailiff's court of a judgment in the form of a money award can generally only be effected in Danish currency, calculated at the rate of exchange prevailing at the date of enforcement."

Forbeholdet om udenlandsk valuta har kun relevans i relation til låneaftaler, hvor låntager optager lån i fremmed valuta eller har adgang til at vælge mellem flere forskellige valutaer. Retsplejeloven indeholder ikke bestemmelser om afsigelse eller fuldbyrdelse af domme med beløbsangivelse i fremmed mønt, men

det er praksis, at domstolene normalt vil afsige en dom i fremmed valuta, hvis der er nedlagt påstand herom. Derimod vil fogedretten i tilfælde af eksekution foretage udlæg på grundlag af en omregning af kravet til danske kroner, hvilket efter omstændighederne kan medføre et kurstab for långiver.

> "4G. A Danish court may refuse to give effect to undertakings contained in the Documents as to the obligation of any party to pay another party's legal costs and expenses in respect of any action before the Danish courts."

Denne qualification er medtaget af hensyn til de (sædvanlige) bestemmelser i låneaftaler om, at låntager i tilfælde af misligholdelse skal betale långivers omkostninger, herunder til långivers egen advokat. Danske domstole vil ikke anse sig for bundet af sådanne bestemmelser, for så vidt angår sagsomkostninger, om end indholdet heraf vil kunne indgå som element i den skønsmæssige fastsættelse af sagsomkostningerne, som domstolen vil foretage efter reglerne i Retsplejelovens kapitel 30.

> "4H. With regard to the jurisdiction a Danish court shall stay or - if appropriate - dismiss the proceedings if concurrent proceedings involving the same cause of action and between the same parties are brought in the courts of another state which is a party to the Brussels Convention. Similarly a Danish court may stay or - if appropriate - dismiss the proceedings if related proceedings are brought in one of these states."

I internationale låneaftaler ses ofte en bestemmelse om, at en værnetingsklausul (f.eks. om værneting ved engelske domstole) er ikke-eksklusiv, d.v.s. ikke afskærer långiver fra at anlægge sager vedrørende låneaftalen i andre jurisdiktioner, og at sager endda kan anlægges samtidigt. Efter dansk international privat- og procesret kan dette føre til, at en sag anlagt ved en dansk domstol udsættes eller afvises.

Efter Retsplejelovens § 232 afvises en sag, hvis den danske domstol ikke har saglig kompetence, og der ikke kan ske henvisning til en anden ret i Danmark, som er kompetent. En dansk domstol kan efter Retsplejelovens § 345 udsætte en sag, "når dette findes påkrævet".

Artikel 21 i Bruxelles konventionen bestemmer eksempelvis, hvorledes der skal forholdes, hvis der verserer retssager i to forskellige medlemslande om det samme spørgsmål mellem de samme parter. Artiklen fastslår, at den domstol - ved

hvilken sag sidst er anlagt - skal udsætte sagen, indtil det er fastslået, om domstolen i det andet land, hvor sagen først er anlagt, er kompetent. Er dette tilfældet, skal den sidst anlagte retssag afvises.

> "4I. Any provision in the Documents providing that the terms of the Documents may be amended or varied only by an instrument in writing may be held by a Danish court not to be effective."

Bestemmelsen i en aftale om, at ændringer kun kan ske ved skriftlig aftale mellem parterne, kan efter dansk ret ændres ved mundtlig eller stiltiende aftale, og parterne kan ikke gyldigt berøve sig selv muligheden herfor

> "4J. Our opinion as to the enforceability of the Documents relates only to their enforceability in Denmark in circumstances where the competent Danish court has and accepts jurisdiction."

Det er på sin plads at præcisere, at tvangsfuldbyrdelse kun kan ske, hvis den danske domstol har kompetence til at behandle sagen.

> "4K. The availability in Danish courts of equitable remedies, such as injunctions and specific performance, is restricted under Danish law."

Om en dansk domstol kan afsige dom til naturalopfyldelse, afgøres altid efter danske regler. Med hensyn til tvangsfuldbyrdelse af andre krav end pengekrav gælder reglerne i Retsplejelovens kapitel 48.

f. Afsluttende bestemmelser

"This opinion may be relied upon only by you and the Lenders for purposes directly relating to the Loan Agreement."

Afsnittet fastlægger den personkreds, der vil kunne påberåbe sig den pågældende legal opinion, og præciserer, at de indeholdte udtalelser alene gælder det konkrete låneforhold. Ikke sjældent mødes advokaten med et ønske/krav om, at det tilføjes, at også adressatens egne rådgivere skal kunne støtte ret på ("rely on") indholdet. Anmodningen vil normalt være begrundet med, at långivers advokat i lovvalgets jurisdiktion i sin legal opinion til långiver kun vil kunne bekræfte, at lånedokumentationen er "legal, valid, binding and enforceable", såfremt han kan lægge indholdet af den danske legal opinion om bl.a. lovvalgets gyldighed

uprøvet til grund. Det kan imidlertid være vanskeligt helt at afgøre omfanget af det retlige ansvar, man derved påtager sig over for långivers rådgivere, og det bør konkret vurderes, om en sådan anmodning skal efterkommes. Det kan som alternativ foreslås, at de pågældende rådgivere i stedet henvises til i deres legal opinions at medtage en "assumption" om, at den danske advokats legal opinion er korrekt.

Bemærk i øvrigt, at definitionen af de "Lenders", der vil kunne påberåbe sig den pågældende legal opinion, typisk også omfatter långivere, der på et senere tidspunkt måtte indtræde i lånesyndikatet. Disse nye långivere må dog kræve en supplerende opinion, hvis de ønsker en vurdering af forhold, der er indtruffet efter den oprindelige opinions datering.

"This legal opinion is governed by and construed in accordance with Danish law and subject to the exclusive jurisdiction of the Danish courts.
The undersigned, NN, is admitted to the Danish bar.

Yours faithfully
Law firm

by/NN."

Betydningen af en sådan "klausul" om lovvalg og værneting kan være tvivlsom. Formålet med afsnittet er navnlig at sikre, at advokatens rådgivningsansvar skal bedømmes af danske domstole og på grundlag af dansk ret. Det beror på de konkrete omstændigheder, om valget af dansk ret og værneting kan siges at være vedtaget af adressaterne. Dette er nok tilfældet, hvis opinion på forhånd - også på dette punkt - er gennemdrøftet med opdragsgiverne. Såfremt en sag vedrørende ansvar for den afgivne legal opinion måtte blive anlagt mod den danske advokat ved en udenlandsk domstol, må spørgsmålet om lov- og værnetingsklausulens vedtagelse imidlertid forventes at blive afgjort på grundlag af det pågældende lands egne retsregler.

Endelig er det på sin plads at præcisere, at advokaten har ret til at praktisere i Danmark.

For så vidt angår underskrivelse af en opinion er det nok sædvanligt, at en indehaver skriver under på vegne af advokatfirmaet. Man ser også tit, at der skrives

under direkte af advokaten. I så fald anvendes "jeg"-formen. Praksis fra bl.a. England, hvor der underskrives med firmanavnet uden angivelse af et person-/indehavernavn, ses sjældent i Danmark. Dette ville i øvrigt give anledning til tekniske problemer, da et advokatfirma som sådan ikke kan have bestalling.

4 Knowledge opinions

Ikke helt sjældent ønsker opinion-modtageren, at advokaten afgiver erklæringer, der nærmest har faktisk karakter. Typiske eksempler er:

- Virksomhedens drift udøves i overensstemmelse med lovgivningen.
- Virksomheden har ikke misligholdt kontraktsforhold, og den forestående transaktion udgør ikke misligholdelse (eller kræver samtykke m.v.) under allerede indgåede kontrakter.
- Den berørte virksomhed er ikke part i rets- eller voldgiftssager eller forpligtet af domme og kendelser, der har betydning for den fortsatte drift, eller er til hinder for virksomhedens indgåelse eller opfyldelse af den transaktion, der afgives opinion om.

Som følge af erklæringernes absolutte udformning er det sædvanligt, at den advokat, der afgiver opinion, begrænser udtalelserne til egen viden ("knowledge") om de pågældende forhold.

Advokater bør kun i begrænset omfang afgive sådanne erklæringer. Principielt har erklæringerne et sådant indhold, at det er rigtigere, at de afgives af den berørte virksomheds ledelse direkte over for opinion-modtageren. Det kan ske enten i form af indeståelser i den til grund liggende kontrakt mellem den berørte virksomhed og opinion-modtageren eller i form af særskilte erklæringer såsom Officers' Certificate, Management Comfort Letter eller låneudbetalingsanmodninger.

At advokater bør være tilbageholdende med at afgive de her omhandlede erklæringer, gælder uanset, om erklæringerne begrænses til advokatens egen viden. Selve den kendsgerning, at der ikke er foretaget tilstrækkelige undersøgelser som grundlag for erklæringerne, kan således efter omstændighederne være ansvarspådragende, jfr. herved Højesterets dom af 6. oktober 1999 (U2000.23H).

Afgivelse af de her nævnte erklæringer forekommer velbegrundet, hvor advokaten

- afgiver opinion i sin egenskab af fast advokat for den berørte virksomhed,

således at advokaten i kraft af klientforholdet kan have ikke almen tilgængelig viden, eller

- til brug for afgivelse af opinion har foretaget en særlig undersøgelse, eksempelvis i form af due diligence eller interview af virksomhedens ledelse.

I disse tilfælde bør det overvejes, om erklæringernes faktiske karakter bør understreges ved at blive udformet som en bekræftelse på faktum ("we have found that .....") fremfor en juridisk udtalelse ("we are of the opinion that .....").

Ved afgivelse af denne type erklæringer anbefales følgende:

(1) Erklæringerne bør udformes, så de er begrænset til egen viden ("knowledge").

(2) I opinion bør medtages en beskrivelse af, på hvilket grundlag erklæringerne afgives - i så konkret form, som det er muligt, jfr. herved også U2000.23H.

(3) Opinion-modtageren bør gøres bekendt med og godkende omfang af og metode for eventuelle undersøgelser.

(4) Den berørte virksomhed bør afgive tilsvarende erklæringer over for opinion-modtageren eller advokaten eller forud for afgivelsen af opinion godkende advokatens foreslåede erklæringer.

Særlige undersøgelser kan være tidskrævende. For at give mulighed herfor bør advokaten så hurtigt som muligt gøre opinion-modtageren bekendt med, under hvilke betingelser advokaten vil være indforstået med at lade "knowledge opinions" indgå i udtalelsen.

Man kan blive mødt med krav om følgende udtalelse:

> *"To our knowledge, having solely relied on a certificate from the Borrower's in-house counsel, neither the execution, delivery or performance by the Borrower, nor the consummation or performance by the Borrower of the transactions contemplated thereby, will conflict with or result in any violation of, constitute a default under, or result in the creation of any security under any agreement, mortgage, contract, lease or other instrument to which the Borrower is a party".*

Hvis denne udtalelse skal gives uden kvalifikationer, så må advokaten gennemgå samtlige selskabets væsentlige aftaler for at vurdere, om der er pantsætningsforbud, negative pledge, begrænsninger i forholdet mellem egenkapital og lånekapital, godkendelse af kreditorer, etc. Dette er en større øvelse, som i alt fald ban-

kernes danske advokat vil have vanskeligt ved at gennemføre. I eksemplet ovenfor er valgt den løsning, at bankernes advokat har indhentet et certifikat fra låntagers interne advokat og afgiver sin udtalelse udelukkende på dette grundlag. Denne fremgangsmåde er oftest tilfredsstillende for de udenlandske banker, da de trods alt véd, at der ved husadvokatens egen due diligence er foretaget en gennemgang af selskabets væsentlige aftaler. Opinion advokaten bør dog ved interviews med husadvokaten checke oplysningerne i et vist omfang. Ofte vil det være en fordel, at opinion advokaten selv formulerer certifikatet, så det dækker de områder, der i den givne transaktion er relevante.

Man kan også blive anmodet om at afgive følgende udtalelse:

> *"To our knowledge, having solely relied on a certificate from the Borrower's in-house counsel, the Borrower is not in default under any mortgage or other instrument or agreement to which the Borrower is a party or by which it or any of its properties or assets is bound, or in violation of any law of Denmark, which default or violation is reasonably likely to materially and adversely affect the Borrower's ability to perform any of its obligations under the Documents."*

I denne udtalelse sikres långiverne, at man ikke åbner for kassen til et selskab, der er i misligholdelse med privatretlige forpligtelser. Igen er det hensigtsmæssigt for bankernes advokat at støtte sig til en udtalelse fra selskabets interne jurister, når det drejer sig om eventuel misligholdelse af privatretlige forpligtelser, f.eks. andre låneaftaler, sikkerhedsdokumenter, leasing aftaler, m.v. For så vidt angår udtalelsen om lovstridige forhold, bør man måske nok også forlade sig på et certifikat fra husjuristerne, men ofte påtager advokaten sig at undersøge disse forhold, selvsagt efter drøftelse med låntagers ledelse. Man må undersøge, hvilke væsentlige love, selskabet skal overholde, og få oplyst om der er problemer i så henseende. I sagens natur må der være tale om visse grundlæggende love, som gælder netop for dette selskab og ikke lovgivningen generelt. Således skal man for et luftfartsselskab, et forsikringsselskab eller et teleselskab undersøge, om de opfylder betingelserne i koncessionen og autorisationstilladelserne, hvorimod det næppe er nødvendigt at undersøge, om et givent selskab har indsendt selvangivelse, momsredegørelse o.lign. rettidigt. Det må bero på et skøn og en nærmere drøftelse med opdragsgiveren, hvor langt advokatens undersøgelse skal gå i så henseende.

Det er selvsagt ikke meningen, at advokaten skal indlade sig på en vurdering af låntagende virksomheds evne til at tilbagebetale lånet.

Væsentlighedsbetingelsen i slutningen af denne opinion er indsat, således at helt betydningsløse spørgsmål ikke påvirker afgivelsen af denne opinion.

Endelig kan nævnes følgende eksempel:

> *"To our knowledge, having solely relied on a certificate from Borrower's in-house counsel, there are no pending or threatened actions or proceedings by or before any court or administrative agency or arbitrator, which question the validity or enforceability of the Documents to which the Borrower is a party or which, if adversely determined, are reasonably likely to materially and adversely affect the Borrower's ability to perform its obligations under any of the Documents."*

I denne udtalelse belyses retssager og voldgiftssager vedrørende transaktionsdokumenterne. Skal legal opinion afgives i forbindelse med en virksomhedshandel, er det for den udenlandske køber vigtigt at vide, om en trediemand har indledt voldgiftssag, nedlagt fogedforbud el.lign. på basis af en forkøbsretsbestemmelse til virksomheden. Der kan også være en koncessionsbestemmelse, der hindrer salg af en virksomhed uden offentlige myndigheders samtykke. Hvis en sådan samtykke-procedure er igangsat, vil den udenlandske køber naturligvis gerne gøres opmærksom derpå. I dette eksempel går udtalelsen kun på retssager m.v., der har med transaktionen at gøre. Det ses imidlertid ofte, at de udenlandske parter ønsker en mere generel udtalelse om retssager m.v. mod det danske selskab, selvsagt med den undergrænse, at sagerne skal have en væsentlig indflydelse på den danske parts opfyldelse af transaktionen. I sådanne situationer bør man også indhente en udtalelse fra det danske selskabs interne jurister og evt. det advokatkontor, der fører retssagerne, som så danner grundlag for den eksterne advokats udtalelse.

5 Afslutning

Det skal afslutningsvis understreges, at denne publikation kun beskæftiger sig med én type transaktioner, nemlig usikrede lån. Ved emissioner, projektfinansiering og virksomhedsoverdragelser kan der opstå yderligere og komplicerede spørgsmål, som der skal tages stilling til. Selv inden for simple lånetransaktioner kan der blive stillet yderligere og/eller anderledes krav til en legal opinion, udover hvad der er behandlet her. Hensigten med denne publikation er imidlertid at belyse en række overvejelser, som typisk vil opstå ved afgivelse af en legal opinion, og bringe visse formuleringer i forslag.

Det ligger uden for denne publikations rammer at vurdere advokatens ansvar ved afgivelse af en legal opinion. Man skal imidlertid være opmærksom på, at en legal opinion er et specielt - oftest formbundet - dokument, som spiller en central rolle i internationale transaktioner og som afgives til udenlandske opdragsgivere. Der er derfor al mulig grund til at foretage nødvendige undersøgelser med en høj grad af omhyggelighed.

Bilag 1

Udvalgte litteraturhenvisninger

- **It's time to streamline opinion letters,** *Donald W. Glazer,* Business Law Today november/december 1999.

- **1998 Mortgage Loan Opinion Report,** Special Supplement to N.Y. Real Property Law Journal, Vol.26. No. 4, Fall 1998.

- **Legal Opinions in International Transactions,** Third Edition 1997, *Michael Gruson, Stephen Hutter, Michael Kutschera,* Kluwer Law International and International Bar Association.

- **Third-Party legal Opinion Report (1991) The Business Lawyer,** November 1991, Vol. 47, No. 1.

- **Legal Opinions,** *Henrik Lind,* Advokaten 3/1986, P.35 f (opfordringen i dette indlæg gav anledning til udarbejdelse om et memorandum om legal opinions, der blev færdiggjort i 1987, og som siden da er blevet rekvireret af en række kolleger til brug for udarbejdelse af danske legal opinions).

- **Drafting a Danish Legal Opinion,** *Henrik Lind,* International Financial Law Review, oktober 1982, P 14 ff.

- **Legal Opinions i Låne- og Leasingaftaler,** *Henrik Lind,* UfR 1982 B, P 377 ff.

- **Legal Opinions to Third Parties - an easier path.** Business Lawyer, Vol. 34, 1978-79, P 1191 ff.

- **Legal Opinions given in Corporate Transactions.** Business Lawyer, Vol. 33, 1977-78, P 2389 ff.

- **Lawyers' Standards and Responsibilities in rendering opinions.** Fuld Business Lawyer, Vol. 33, 1977-78, P 1295 ff.

- **Legal Opinions to Third Parties in Corporate Transactions.** *Babb Barnes Gorden Kjellenberg*. Business Lawyer, Vol. 32 1976-77, P 553 ff.

- **Legal Opinions in Business Transaction - an attempt to bring some order out of some chaos.** Fuld Business Lawyer, Vol. 28, 1972-73, P 915 ff.

Members of the working party:

- Mr Henrik Lind, Attorney-at-Law (chairman)
- Mr Peter Fogh, Attorney-at-Law
- Mr Ulrik Jacobsen, Attorney-at-Law
- Mr Jørgen Reimer Jensen, Attorney-at-Law
- Mr Henning Aasmul-Olsen, Attorney-at-Law
- Mr Jørgen Permin, Attorney-at-Law
- Mr Poul Viggo Bartels Petersen, Attorney-at-Law
- Mr Niels Walther-Rasmussen, Attorney-at-Law
- Mr Gabriel Rohde, Attorney-at-Law
- Ms Anne Krebs, Attorney-at-Law (secretary)

List of Contents

1 Preface

The Danish Bar and Law Society has many exciting activities varying from exercising disciplinary authority to business development initiatives.

One of the most important business development activities is to make the consumer and the business sector aware of our members professional advise and competence. It is therefore with great pleasure that the Danish Bar and Law Society notes the success in making lawyers performances towards their business clients visible. It is the Danish Bar and Law Society's hope that the guidelines can be of great value to our clients as well as our members.

2 Illustrative Legal Opinion

Danish law firm
LETTERHEAD

State Bank National Association
15 King Street
London EC4N 7DT
England

6 April 2000

Dear Sirs.

We have acted as special Danish counsel to the Lenders in connection with the loan described in the Loan Agreement dated 6 April 2000 ("the Loan Agreement") between Industriudrustning A/S ("the Borrower"), State Bank National Association, as Agent, and State Bank National Association, Farmers Bank National Association and Tristate Commerce Bank Incorporated, as Lenders.

This opinion is being furnished pursuant to Schedule 2 (d) to the Loan Agreement.

All capitalized terms used herein and not otherwise defined herein shall have the meanings assigned thereto in the Loan Agreement.

We give this opinion on the basis and subject to the assumptions and qualifications set out below.

This opinion is confined to and given on the basis of Danish law in force at the date hereof as currently applied by the Danish courts. We express no opinion as to the law of any other jurisdiction or the effect thereof.

1. Basis of Opinion

1A. This opinion is also confined to:

(i) the matters stated herein and is not to be read as extending to any other matter, by implication or otherwise; and

(ii) the documents listed in 1B.

1B. For the purpose of this opinion, we have examined originals or copies of the following documents and we have made no independent investigation of any factual information stated in such documents:

(a) Copies of the following documents:

(i) The Loan Agreement
(ii) E-mail draft Notice for an Advance, dated 5 April 2000 (received at 13:06 p.m. Danish time)

(collectively, "the Documents").

(b) Copies of the following documents:

(i) Articles of Association for the Borrower, adopted at a shareholders' meeting on 7 May 1998
(ii) Résumé from the Commerce and Companies Agency in Denmark in respect of the Borrower dated 30 March 2000, and a corresponding on-line résumé dated 6 April 2000
(iii) An extract of minutes of a board meeting of the Borrower held on 14 March 2000
(iv) Power of Attorney for the Borrower dated 2 April 2000
(v) Certificate from the Management of the Borrower dated 3 April 2000

(collectively, "the Governing Documents").

In addition we have examined such other agreements, documents, records and such matters of law as we have deemed necessary or appropriate for the purpose of rendering this opinion.

2. Assumptions

For the purpose of giving this opinion, we assume the following:

2A. The authenticity, completeness and accuracy of the copy of any of the Documents and Governing Documents of which we have examined a photocopy.

2B. That any drafts, copies or e-mail versions of the Documents and Governing Documents produced to us are true and conform to the documents executed and that the original was executed in the manner appearing on the draft or the copy and that all material supplied to us has been supplied in full and has not subsequently been amended or altered.

2C. That the copies produced to us of minutes of meetings and/or of resolutions are true copies and correctly record the proceedings at such meetings and/or the subject matter which they purport to record; and that any meetings referred to in such copies were duly convened and held, that those present at any such meetings acted bona fide throughout and that all resolutions set out in such copies were duly passed.

2D. The genuineness of the signatures on all original documents or copies thereof which we have examined and that the identities of the signatories are as stated to us.

2E. The Documents are within the capacity and power of, and have been validly authorized, executed and delivered by and are binding on any party other than the Borrower.

2F. The Documents are legal, valid, binding and enforceable according to the law (English law), other than the law of Denmark, by which they are expressed to be governed.

2G. The accuracy and completeness of all factual matters, factual representations, warranties and other information described or set forth in the Documents and the Governing Documents.

3. Opinion

Based on the foregoing assumptions and subject to the qualifications set out below, we are of the opinion that as of the date hereof:

3A. The Borrower is a Danish public limited company (aktieselskab) validly existing under the laws of Denmark and has the necessary corporate power and authority to execute, deliver and perform its obligations under each of the Documents. As of 6 April 2000 there was no adverse registration against the Borrower in the Commerce and Companies Agency.

3B. The execution, delivery and performance of each of the Documents by the Borrower has been duly authorized by all necessary action on the part of the Borrower.

3C. Neither the execution, delivery or performance by the Borrower of the Documents, nor the consummation or performance by the Borrower of the transactions contemplated thereby, will conflict with or result in any violation of,

or constitute a default under the Governing Documents of the Borrower, or any Danish law by which the Borrower is bound.

3D. Neither the execution or delivery of any of the Documents by the Borrower, nor the consummation of any of the transactions contemplated thereby by the Borrower requires the consent or, approval of, the giving of notice to, the registration with, or the taking of any other action in respect of any Danish governmental, county, municipal or other authority or agency, including any judicial body.

3E. Each of the Documents has been duly executed and when delivered on behalf of the Borrower on or prior to the date hereof, constitutes the legal, valid and binding obligation of the Borrower, enforceable against the Borrower in accordance with its respective terms.

3F. The obligations of the Borrower under the Documents rank at least pari passu with the Borrower's other unsecured obligations, except those which are preferred under mandatory law.

3G. Performance by any of the Agent or the Lenders for any action required under the Documents will not violate any law or regulation of Denmark or any political subdivision thereof.

3H. It is not necessary under the laws of Denmark

(a) in order to enable any party to enforce its rights under the Documents, or

(b) by reason of the execution or performance of any of the Documents

that any party to any of the Documents be licensed, qualified or otherwise entitled to carry on business in Denmark.

3I. The choice of English law as the governing law is a valid choice of law. English law would accordingly be applied by the Danish courts in any lawsuit brought in the Danish courts or to any claim made pursuant to the Documents stated to be governed by the laws of England, subject to *(i)* Danish public policy (ordre public) and *(ii)* the mandatory rules of the laws of any country with which the transaction has a significant connection, if and in so far as under the laws of that country those rules must be applied whatever the chosen law, cf. Article 3 (3), Article 7 and Article 16 of the Convention on the Law Applicable to Contractual Obligations dated 19 June 1980 ("the Rome Convention"). No term of the Documents appears on the face of it to violate Danish public policy. The parties must provide

the Danish courts with satisfactory information about the contents of English law and if they fail to do so, the Danish courts may apply Danish law instead. Furthermore, the parties must prepare an adequate translation of the Documents into Danish, in order for the court to rule on the issues brought before them.

3J. The Borrower's submission to the jurisdiction of the courts of England contained in the Documents is valid, binding and enforceable against the Borrower and will be upheld by the Danish courts.

3K. A final and conclusive judgment of the courts of England, rendered in an action brought in accordance with English law to enforce the obligations of the Borrower under the Documents, will be recognized and enforced by the courts of Denmark in accordancee with and subject to the terms of the EC judgment convention of 27 September 1968 ("the Brussels Convention") as implemented in Denmark by Act No. 325 of 4 June 1986 (as subsequently amended).

3L. Any payment to be made by the Borrower under the Documents would be free and clear of any Danish taxes, levies, duties, charges or other withholding of any nature, provided the recipient of such payment is not a resident in Denmark and has no place of business or permanent establishment in Denmark. Neither the execution, delivery nor the performance of any of the Documents by non-Danish parties thereto, will in itself qualify as a permanent establishment, place of business or other engagement in trade, business or property in Denmark.

3M. No stamp duty or other documentary taxes are payable in respect of the Documents. If proceedings are brought before the courts of Denmark, a court fee of 2.4% of the amount in dispute must be paid by the plaintiff.

4. Qualifications

The foregoing opinions are subject to the following qualifications:

4A. The binding effect or enforceability of the obligations of the parties under the Documents may be limited by liquidation, insolvency, bankruptcy, suspension of payment or other laws affecting creditors' rights in general.

4B. Provisions in the Documents providing that certain calculations or certificates will be conclusive and binding (or prima facie evidence) may not be effective, if such calculations or certificates are incorrect, and such provisions will not neces-

sarily prevent juridical inquiry into the merits of such calculations or certificates.

4C. Claims may become barred under statutes of limitation or principles of passivity.

4D. There may be circumstances where Danish law will not give effect to provisions in the Documents according to which a party is vested with a discretion or may determine a matter in its opinion.

4E. The enforceability of claims and court decisions ordering the payment of money in a currency other than Danish currency is subject to the Danish Bankruptcy Code which provides for the conversion of such foreign currency debt into Danish currency on the date of the commencement of such bankruptcy proceedings.

4F. A Danish court may render judgments expressed in foreign currencies, but an enforcement in Denmark by a Danish bailiff's court of a judgment in the form of a money award can generally only be effected in Danish currency calculated at the rate of exchange prevailing at the date of enforcement.

4G. A Danish court may refuse to give effect to undertakings contained in the Documents as to the obligation of any party to pay another party's legal costs and expenses in respect of any action before the Danish courts.

4H. With regard to the jurisdiction a Danish court shall stay or - if appropriate - dismiss the proceedings if concurrent proceedings involving the same cause of action and between the same parties are brought in the courts of another state which is a party to the Brussels Convention. Similarly a Danish court may stay or - if appropriate - dismiss the proceedings if related proceedings are brought in one of these states.

4I. Any provision in the Documents providing that the terms of the Documents may be amended or varied only by an instrument in writing may be held by a Danish court not to be effective.

4J. Our opinion as to the enforceability of the Documents relates only to their enforceability in Denmark in circumstances where the competent Danish court has and accepts jurisdiction.

4K. The availability in Danish courts of equitable remedies, such as injunction and specific performance, is restricted under Danish law.

This opinion may be relied upon only by you and the Lenders for purposes directly relating to the Loan Agreement.

This legal opinion is governed by and construed in accordance with Danish law and subject to the exclusive jurisdiction of the Danish courts.

The undersigned, NN, is admitted to the Danish bar.

Yours faithfully
LAW FIRM

by/NN

3 Commentary on individual features of illustrative Legal Opinion

a. Introduction

"State Bank National Association *6 April 2000*
15 King Street
London EC4N 7DT
England

Dear Sirs

We have acted as special Danish counsel to the Lenders in connection with the loan described in the Loan Agreement dated 6 April 2000 ("the Loan Agreement") made between Industriudrustning A/S ("the Borrower"), State Bank National Association, as Agent, and State Bank National Association, Farmers Bank National Association and Tristate Commerce Bank Incorporated, as Lenders.

This Opinion is furnished pursuant to Schedule 2(a) to the Loan Agreement.

All capitalized terms used herein and not otherwise defined herein shall be used as defined herein shall have the meanings assigned thereto in the Loan Agreement.

We give this opinion on the basis and subject to the assumptions and qualifications set out below.

This Opinion is confined to and given on the basis of Danish law in force at the date hereof as currently applied by the Danish courts. We express no opinion as to the law of any other jurisdiction or the effects thereof."

The illustrative legal opinion applies to a loan obtained by a Danish business, Industriudrustning, from three banks, one of which is also acting as Agent. This legal opinion is addressed to the Agent, which for the purpose of the loan is responsible for complying with contract terms, etc., on behalf of the banks. Various documents are required in order for the loan to be released for drawdown, including a Danish legal opinion. Alternatively, an opinion may be addressed to the Agent on behalf of the Lenders or to all Lenders. The Agent and the banks determine who will be the addressees. But it is not advisable to use the foreign advisors, e.g. a London-based law firm, as addressees; this may give rise to serious problems

in terms of liability as between the Danish and the foreign law firm.

In the illustrative opinion the Danish lawyer is "special Danish counsel to the Lenders." In this case the banks have chosen to engage a Danish lawyer to represent the interests of the banks exclusively, and who is not representing the Borrower. It is often a matter for negotiation between the parties whether such a special opinion is required, or whether it may be sufficient for the Borrower's own Danish lawyer to prepare the necessary legal opinion. In more substantial or complex transactions there may be two opinions, from the banks' own Danish lawyer as well as from the Borrower's lawyer. In that case it is advisable for the two Danish lawyers to consult together and come to an agreement as to the wording of the opinion, so as to prevent any doubts in the minds of the banks as to the handling and evaluation of the transaction according to Danish law. The indication of the capacity in which the lawyer is rendering the opinion is significant, e.g. to opinions of a factual nature ("knowledge opinions"), which are described in more detail in section 4, below. "Special counsel" should only render "knowledge opinions" after conducting a special investigation (possibly a proper due diligence review), by referring to the representations and/or documents on the basis of which the opinion is rendered, or after making a proper legal assessment of a legally doubtful issue. As a general rule, the Lenders' lawyer should not render "knowledge opinions".

If the Borrower's lawyer renders an opinion addressed to the Lenders, complicated problems of an ethical nature may arise in relation to the client in case of any future litigation concerning the terms and conditions of the loan. How is the lawyer to cope with a situation in which the Borrower relies on a vitiating factor, whereas the Borrower's own lawyer had rendered a "clean" opinion on the subject? While it is therefore rare in England for the Borrower's lawyer to address his opinion to the Lenders, in Danish practice this phenomenon is the rule rather than the exception. Should this happen, however, a potential conflict should be discussed with the client, and the client's acceptance should be obtained, already at the time when the opinion is rendered.

It will be seen that the definitions in the loan agreement are being used in the Legal Opinion unless certain terms are specifically defined in the Legal Opinion. This means that the Danish lawyer will have to familiarize himself with these definitions and determine whether they are adequate or relevant under Danish law. If the loan agreement contains a definition of "group of companies", referring to the English Companies Act, a lawyer representing Danish groups of com-

panies must insert a qualification in respect of that definition if it is being used in the Legal Opinion, specifying that the definition of a group of companies used in the Legal Opinion is the definition provided for in section 2 of the Danish Companies Act, rather than a definition based on English company law.

The introductory section refers to the following "Assumptions and Qualifications".

The past 20 years have seen a considerable development in these assumptions and qualifications, which used to be virtually non-existing. Opining lawyers have become wary of stating explicitly what documents, etc., they have reviewed, and what limitations are to be implied from more or less general statements on the Danish Borrower or on the application of Danish law to a given transaction respectively.

At the end of the introduction the fundamental and rather obvious assumption is expressed, viz. that the opinion is confined to Danish law in force at the date of the opinion, and that no opinion as to foreign law is included. Typically, also foreign opinions will be rendered to the banks, covering any relevant countries outside Denmark, such as a legal opinion on English law. In respect of certain transactions, e.g. acquisitions, it may be appropriate to specify whether the opinion also covers EU law, in particular EU competition law. EU law is, of course, part of Danish law, and the recipient of the opinion must presume that unless specifically excluded, EU law is also covered. It may often be necessary to obtain a special legal opinion covering such matters alone, dealing precisely with EU competition law. Likewise, specifications may be necessary where Greenlandic or Faeroese parties are involved in the transactions. In this connection it should be stated expressly whether the opinion covers the rules applying specifically to the Faeroe Islands and Greenland, or whether such rules will be covered by a separate legal opinion.

b. Basis of Opinion

1A. This Opinion is also confined to:

(i) the matters stated herein, and is not to be read as extending to any other matter, by implication or otherwise; and

(ii) the documents listed in 1B.

1B. For the purpose of this Opinion, we have only examined originals or copies of the following documents, and we have made no independent investigation of any factual information stated in such documents.

(a) Copies of the following documents:

(i) The Loan Agreement
(ii) E-mail draft Notice for an Advance, dated 5 April 2000 (received at 13:06 p.m. Danish time)

(collectively, "the Documents").

(b) Copies of the following documents:

(i) Articles of Association for the Borrower, adopted at a shareholders' meeting on 7 May 1998.
(ii) Résumé from the Commerce and Companies Agency in Denmark in respect of the Borrower dated 30 March 2000, and a corresponding on-line résumé dated 6 April 2000
(iii) An extract of minutes of a board meeting of the Borrower held on 14 March 2000
(iv) Power of Attorney for the Borrower dated 2 April 2000
(v) Certificate from the Management of the Borrower dated 3 April 2000

(collectively, "the Governing Documents").

In addition, we have examined such other agreements, documents and records and such matters of law as we have deemed necessary or appropriate for the purpose of rendering this opinion."

In para 1A it is emphasized that only the documents specifically listed have been reviewed, and that the opinion is not to be construed extensively. If the Lenders feel that a specific opinion gives rise to supplementary questions, such questions should be asked and answered in a legal opinion. A situation where the addressee "assumes" that opinion No. 5 also covers a number of other situations in addition to those specifically described is not acceptable.

Para 1B lists the specific documents examined by the lawyer. A set of signed original documents used to be made available for review, and the opinion would be

rendered on that basis. Nowadays this rarely happens. The lawyer receives a number of draft documents by fax or e-mail. Some are signed, others are not - and the legal opinion must be available by a certain closing date, e.g. in London. As the lawyer does not usually attend the closing, the legal opinion is often based on draft documents of one or the other form. It is therefore important to specify the form of the document on which the opinion is based. It is also important to state whether additional factual investigations have been conducted in connection with the review of the transaction documents. There may be a number of warranties and representations made by the Borrower, and the Danish lawyer cannot be expected to verify independently whether the facts are correct if not specifically required to do so.

The transaction documents in this illustrative opinion are simple. There is a copy of a signed loan agreement. On the other hand, the Danish lawyer has only seen an e-mail version of a "Notice for an Advance", and this is specified by stating the date as well as the time at which the e-mail has been received. The indication of time is relevant in the case of several drafts on fax or e-mail of the same date. For evidentiary purposes it will be expedient to print a copy of e-mail documents in the case unless you have complete faith in the office computer systems.

Other than the transaction documents the lawyer must ensure that he has reviewed the fundamental Danish corporate documents for the Borrower, so that it may be confirmed that the formation of the agreement is valid under Danish law. The Borrower's Articles of Association must be available. Typically the Borrower will be requested to submit a copy of the Articles of Association in force. Depending on the circumstances a copy should also be obtained from the Danish Commerce and Companies Register to verify that the Articles of Association submitted are the most recently registered ones. In any case a résumé for the Company must be obtained from the Commerce and Companies Register or from the Borrower to get a quick overview of the board, management, objects clause and power to bind the company. The résumé should properly be followed up by an on-line print from the Commerce and Companies Agency as at the date on which the legal opinion is rendered.

An original power of attorney from the Borrower should be available if possible, signed by the authorized officers, unless the authorized officers sign the transaction documents directly. It may be expedient to require powers of attorney to be signed by attesting witnesses.

It is common for the loan facility to be subject to the condition that the management of the Borrower must issue an Officers' Certificate. The Certificate may include representations corresponding to the "knowledge opinions" requested to be incorporated in the lawyer's legal opinion. The management's representations corresponding to the lawyer's "knowledge opinions" do not in themselves constitute sufficient basis on which a "special counsel" may render "knowledge opinions". This requires independent examinations or evaluations, see section 4., below.

In some cases Lenders require an extract of the minutes of the board meeting at which the raising of the loan was adopted. Under Danish law this is rarely necessary, as section 61 of the Companies Act provides that the provisions regulating the power to sign for the company may be relied upon to a very large extent. Should a transaction exceed the company's objects clause, this of course cannot be remedied by passing a board resolution. An alteration of the objects clause adopted by the company in general meeting will be needed. In large transactions foreign contracting parties will in practice feel more comfortable if the company's board has also considered and approved the transaction. This often gives rise to some discussion between the parties as minutes of Danish board meetings often do not include specific adoption of loan-raising, etc. There are no proper "board resolutions" as in England or the USA. Especially loans raised by banks give rise to doubts. Where is the borderline between raising a loan in the ordinary course of business and other loans, which require adoption by the board.

This section is concluded by a more general reference to any additional documents reviewed. It is a matter of judgement in each case whether to list all documents or whether to restrict oneself to a general reference.

c. Assumptions

"For the purpose of giving this opinion, we assume the following:

> 2A. The authenticity, completeness and accuracy of copies of any of the Documents and Governing Documents of which we have examined photocopies.
>
> 2B. That any drafts, copies or e-mail versions of the Documents and Governing Documents produced to us are true and conform to the documents executed and that the original was executed in the manner appearing on the draft or the copy and that all material supplied to us has been supplied in full and has not subsequently been amended or altered.

2C. That the copies produced to us of minutes of meetings and/or of resolutions are true copies and correctly record the proceedings at such meetings and/or the subject matter which they purport to record; and that any meetings referred to in such copies were duly convened and held, that those present at any such meetings acted bona fide throughout and that all resolutions set out in such copies were duly passed.

2D. The genuineness of the signatures on all original documents or copies thereof which we have examined, and that the identities of the signatories are as stated to us.

2E. The Documents are within the capacity and power of, and have been validly authorized, executed and delivered by and are binding on any party other than the Borrower.

2F. The Documents are legal, valid, binding and enforceable according to the law (English law), other than the law of Denmark, by which they are expressed to be governed.

2G. The accuracy and completeness of all factual matters, factual representations, warranties and other information described or set forth in the Documents and the Governing Documents."

As already mentioned in the introduction, legal opinions nowadays include all kinds of express assumptions. This development has probably been brought about by bitter experience, both at home and abroad. It is unwise - and may be actionable - to make the addressee of a legal opinion believe that the preparer of the opinion has seen the signed original loan agreement if all that has been seen is a provisional unsigned copy received by fax.

In para 2A it is specified that the completeness of photocopies and fax copies is assumed. This assumption is especially relevant in the case of faxes where, for example, parts of a page may be unclear or even be missing from a fax copy.

In para 2B assumptions are made with regard to drafts and e-mail versions of documents, and logically connected thereto it is assumed that no subsequent amendments or alterations are made to final documents. If a legal opinion is based on drafts, it is crucial to define the relevant draft, e.g. by draft number, date and - for e-mails and faxes - time of receipt.

If minutes of meetings are reviewed, including typically minutes of board meetings in Danish companies, para 2C states that the extract received actually reflects the resolution passed at the board meeting; for, of course, nobody knows whether a specific resolution was passed subject to certain conditions or assumptions appearing from other parts of the minutes or from minutes of a previous board meeting.

It is further assumed that the board meeting was duly convened and held. Such assumptions may be convenient, saving outside counsel the trouble of having to examine in detail whether the company's articles of association and the rules of procedure for the board governing notices convening meetings, etc., have been complied with in a given situation.

In para 2D it is assumed that the signatures are genuine and have been provided by the proper persons. This is relevant where only a so-called "conformed copy" of the loan agreement is received, i.e. a copy which is not provided with the original signatures but where the Agent or the English law firm has entered the names of the signatories in printed letters.

As and when required, a further assumption may be considered, providing for the very common situation where the respective parties sign in different parts of the world. Typically this is done by circulating signature pages by fax, which are in turn returned to the other parties by fax. In principle, it cannot be said which original and final document the faxed signature page relates to in this situation. It might be stated, for example, "... that the signature pages executed by the parties to the loan agreement all refer to the No. 5 draft of the loan agreement received on 3 April 2000".

Para 2E properly provides against any objection by the other parties to the validity of the Documents as a condition of the binding effect of the loan agreement in respect of the Borrower. Similarly, in para 2F it is assumed that the obligations under the loan agreement are valid according to English law, which is the chosen law applicable to the loan agreement.

Finally, in para 2G it is assumed that all factual information received by the lawyer is accurate and in accordance with the contents of the listed documents.

It could be argued that it would hardly be necessary to list all these assumptions if copies of all the documents received were carefully kept on file, so that the opi-

nion preparer can subsequently prove what he has seen and what he has not seen. Moreover, it might be argued that the more assumptions listed in the legal opinion itself, the greater the risk of incurring liability for any errors in the opinion not covered by an assumption. But as a matter of customary practice assumptions are actually being stated expressly, so that in practice the risk of incurring liability for errors in rendering opinions is increased nowadays if no assumptions are made at all.

d. Opinion

"Based on the foregoing assumptions and subject to the qualifications set out below, we are of the opinion that as of the date hereof:

> 3A. The Borrower is a Danish public limited company (aktieselskab) validly existing under the laws of Denmark and has the necessary corporate power and authority to execute, deliver and perform its obligations under each of the Documents. As of 6 April 2000 there was no adverse registration against the Borrower in the Commerce and Companies Agency."

In this central statement counsel confirms the Borrower's existence as a limited company and its corporate capacity to enter into and perform the agreement. It will be seen that the statement is limited to the fact that the company is "validly existing". Foreign clients often ask for confirmation of the company's "good standing". This concept is relevant in the USA where a franchise tax is payable in many states for the continued registration in a given corporate register. This concept is devoid of any meaning under Danish law and should therefore be avoided. If a new company is established by a given transaction, e.g. a holding company acting as the purchaser in acquisitions, it may be appropriate also to confirm that this company is "duly formed, incorporated and organized". In old well-established companies it is hardly relevant to immerse oneself into old incorporation documents, etc., to verify the legality of the incorporation. The articles of association should naturally be reviewed, including in particular the objects clause and the provisions regulating the power to sign for the company to verify their conformity with the agreement. In the case of ordinary loans the objects clause hardly ever causes problems. This may be the case, however, where a limited company having a specific and limited object either acquires a business within a different line or if the company raises a loan which is earmarked for an object that does not fall within the scope of the objects clause set out in the articles. Further, the articles may stipulate that a committee of share-

holders be heard in connection with certain transactions or that under a shareholders' agreement special resolutions are subject to consent from all or a majority of the shareholders. On the subject of shareholders' agreements it may always be discussed whether internal adoption procedures are relevant if the loan agreement or the transaction document has been properly signed by duly authorized officers. In practice, however, there is no doubt that foreign parties will often wish to have such matters clarified even though, from a legal point of view, the provision regulating the power to sign for the company is fully reliable. A review of shareholders' agreements is required if the articles contain a reference to them, but may also be appropriate where the Borrower is a company with 2-3 shareholders, in which case it is quite exceptional for there not to be a shareholders' agreement.

The standard opinion further contains a statement to the effect that there is no adverse registration against the company in the Commerce and Companies Agency, e.g. compulsory dissolution. This is probably the closest parallel in Danish law to the above-mentioned "good standing opinions".

> "3B. The execution, delivery and performance of each of the Documents by the Borrower has been duly authorized by all necessary action on the part of the Borrower".

This statement confirms the provisions conferring power and authority to sign the loan agreement. Even if signature by authority/provisions conferring power to sign documents are generally sufficient under Danish law for the agreement to be binding on the company, cf. above, the words "duly authorized by all necessary action" imply an extended duty on the lawyer's part to examine the internal decision-making structure of the Borrower. As stated above, certain requirements in terms of shareholders' committee hearings, agreement according to shareholders' agreements, etc., may have to be satisfied.

Special problems arise where the board has set up an executive committee for the approval of transactions between ordinary board meetings. Here it must be ensured that the committee has authority under the rules of procedure for the board of directors, and that the committee has decision-making powers within the area covered by the transaction concerned. It may also be difficult to draw the line between transactions that the management board is empowered to make without the consent of the board of directors, and transactions that are subject to the consent of the board of directors. Large quoted companies and, in particular,

financial institutions will often claim that the raising of even quite substantial loans is within the scope of the management board's day-to-day business and thus not subject to the consent of the board of directors. It is a matter of judgement in each specific case whether or not the raising of a loan is subject to the consent of the board of directors.

Another problem that is likely to present difficulties is board resolutions delegating, for example, the power of raising loans to the management board or to certain named persons without any limitations. In certain cases the scope of such power is so wide that it is contrary to the provision of the Companies Act prohibiting general powers. If a comparatively specific power is granted to the management board authorizing it to raise loans subject to a certain maximum amount, on certain general terms and conditions and for a specified period, the lawyer also has to examine, possibly by way of an officers' certificate, how many loans have already been raised under this power.

> "3C. Neither the execution, delivery or performance of the Documents by the Borrower, nor the consummation or performance by the Borrower of the transactions contemplated thereby, will conflict with or result in any violation of, or constitute a default under the Governing Documents or any Danish law by which the Borrower is bound."

A number of matters must be investigated prior to the making of this statement. For one thing, specific prohibitions or requirements for adoption may be provided for by articles of association and/or shareholders' agreements, cf. above, and for another mandatory laws may apply to the Borrower in question. Certain rules of aviation law applying to airline companies, special requirements for chartered companies such as insurance companies or telecommunications companies, or lending limits fixed by statute or executive order in respect of municipal or county councils and government enterprises may have to be examined in detail. In connection with debt financed company acquisitions particular attention must be given to section 115 of the Companies Act (prohibition against self-financing), which often obstructs the provision of security demanded by foreign banks. Also the exceptional factors pertaining to the legal position of foreign parent companies under section 115a of the Act may create problems.

> "3D. Neither the execution or delivery of any of the Documents by the Borrower, nor the consummation by the Borrower of any of the transactions contemplated thereby requires the consent or approval of, the giving of notice

to, the registration with or any other action in respect of any Danish governmental, county, municipal or other authority or agency, including any judicial body."

This statement is a confirmation of the fact that the transaction is not subject to consent, etc., from public authorities. In some chartered companies certain transactions may be subject to the consent of the appropriate ministry or government agency (e.g. registration of airplanes with foreign owners), approval of cooperation agreements by the competition authorities or - in the case of secured transactions - registration of interests (in land, airplanes, ships, register of interests in cars and other motor vehicles, register of personal property interests). The reference to Danish governmental authority or agency may give rise to doubts as to the institutions of the EU, e.g. in the case of mergers and joint ventures. If a transaction is subject to approval in Brussels, it goes without saying that this fact should be pointed out unless EU law has been specifically excluded from the statement in counsel's opinion.

"3E. Each of the Documents has been duly executed and when delivered on behalf of the Borrower on or prior to the date hereof constitutes the legal, valid and binding obligation of the Borrower, enforceable against the Borrower in accordance with its respective terms."

As a matter of fact, this is the most important paragraph of any legal opinion - and opinions 3A - 3D could actually be dispensed with, but unfortunately this is not general practice. The words "when delivered" have been inserted as counsel rarely attends the signing and closing of the transaction and therefore cannot confirm that the documents have actually been "delivered". The new aspect as compared to opinions 3A - 3D is that counsel is also confirming that the agreement is enforceable against the Borrower. Lenders want assurance not only that the obligations are undertaken legally, validly and with binding effect, but also that they are enforceable if necessary. The Qualifications section contains a number of qualifications as to enforcement. In this paragraph "enforceability" refers to the procedural aspects of enforcement. A Danish lawyer is not competent to make any statement as to whether or not the individual provisions of the loan agreement are capable of substantive enforcement since the agreement is governed by English law.

"3F. The obligations of the Borrower under the Documents rank at least pari passu with the Borrower's other unsecured obligations, except those which are preferred under mandatory law."

This so-called pari passu statement often gives rise to problems; partly as certain claims are preferred under mandatory law, notably competition law, and partly as lenders may be ranked in a certain order under sophisticated financial agreements. However, if the statement - as is the case here - is only making a comparison with the Borrower's other unsecured creditors, excluding preferred claims under mandatory law, it should be possible to make it without much investigation. If the transaction concerns subordinated loans, it is not possible of course, apart from a pari passu statement in relation to other loans provided with postponement agreements. In the latter situation the individual subordination/postponement agreements must be examined and compared.

> "3G. Performance by any of the Agent or the Lenders for any action required under the Documents will not violate any law or regulation of Denmark or any political subdivision thereof."

This statement is aimed at foreign parties, emphasizing that their compliance with the agreement is not in violation of Danish law. Formerly it used to be the provisions of the exchange control regulations that had to be given particular attention to when raising loans. In the case of acquisitions, the relations to sections 115 and 115a of the Companies Act may once more be mentioned as examples of statutory provisions requiring in-depth analysis in the light of the financial structure of the acquisition. The remedies qualification is considered in more detail under Qualifications below.

> "3H. It is not necessary under the laws of Denmark
>
> *(a)* in order to enable any party to enforce its rights under the Documents, or
>
> *(b)* by reason of the execution or performance of any of the Documents
>
> that any party to any of the Documents be licensed, qualified or other wise entitled to carry on business in Denmark."

This statement rarely causes problems in Denmark. It emanates from the states in the USA where out-of-state companies have to be registered to carry on business in a non-domestic state. In special cases it may be considered and determined whether a certain activity covered by the transaction requires the establishment of a branch in Denmark or an agent registered for VAT. If so, this must be incorporated into this statement.

"3I. The choice of English law as the governing law is a valid choice of law. English law would accordingly be applied by the Danish courts in any lawsuit brought in the Danish courts or to any claim made pursuant to the Documents stated to be governed by the laws of England, subject to (i) Danish public policy ("ordre public") and (ii) the mandatory rules of the laws of any country with which the transaction has a significant connection, if and in so far as under the laws of that country those rules must be applied whatever the chosen law, cf. Article 3(3, Article 7 and Article 16 of the Convention on the Law Applicable to Contractual Obligations, dated 19 June 1980 ("the Rome Convention"). No term of the Documents appears on the face of it to violate Danish public policy. The parties must provide the Danish courts with satisfactory information about the contents of English law and if they fail to do so, the Danish courts may apply Danish law instead. Furthermore, the parties must produce an adequate translation of the Documents into Danish in order for the court to rule on the issues brought before them."

To foreign parties it is of material importance whether the Danish courts accept a choice of law. By Article 3(1) of the Rome Convention such a choice is valid, but certain qualifications need to be made. First, the application of foreign law may be refused if such application is incompatible with Danish public policy, cf. Article 16 of the Rome Convention; this is rarely done in international business transactions, however. Most often a lawyer will be asked to confirm - as stated in the illustrative opinion - that on the face of it the content of the Document does not seem to conflict with Danish public policy. Secondly, a qualification must be made for foreign internationally mandatory rules, cf. Article 3(3) and Article 7 of the Rome Convention. It may, for instance, be a matter of an agency agreement with a foreign agent. Even if this agreement is subject to Danish law, there may be certain rules in the agent's domestic country governing termination, compensation, etc., that apply as between the agent and principal notwithstanding the chosen law. In Denmark the same principle is incorporated into the Act on Commercial Agents. Thirdly, a qualification must be made as to clarification of foreign law. A Danish court can only have regard to foreign law if the parties have furnished satisfactory information about foreign law applying to the relevant areas, either by voluntary act or in pursuance of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Executive Order No. 117C dated 7 December 1973). The illustrative opinion therefore includes a qualification to that effect.

"3J. The Borrower's submission to the jurisdiction of the courts of England contained in the Documents is valid, binding and enforceable against the Borrower and will be upheld by the Danish courts."

In international agreements the Danish party often submits to the jurisdiction of foreign courts, typically in such a way that the foreign banks may either sue in the chosen jurisdiction or before other competent courts at their option. Under the Brussels Convention such clauses are valid, cf. Article 17(4). Under section 160 of the Danish Administration of Justice Act the Danish party may also effectively appoint an independent process agent in, say, England. Even outside the scope of the Brussels Convention a Danish party's submission to a foreign court's jurisdiction will normally be binding. In the case of an EEA country - rather than an EU member state as here (England) - reference must be made to the Lugano Convention instead of the Brussels Convention.

> "3K. A final and conclusive judgment of the courts of England, rendered in an action brought in accordance with English law to enforce the obligations of the Borrower under the Documents, will be recognized and enforced by the courts in Denmark in accordance with and subject to the terms of the EC Judgments Convention of 27 September 1968 ("the Brussels Convention") as implemented in Denmark by Act No. 325 of 4 June 1986 (as subsequently amended)."

In the hypothetical transaction English courts have been chosen as the proper forum, this choice fully complying with the Brussels Convention.

Outside the scope of the Brussels Convention or the Nordic Judgements Convention (Consolidated Act No. 635 of 15 September 1986) the judgement opinion will be more difficult. Basically, other foreign judgements are neither effective nor enforceable in Denmark. In such situations the opinion may read as follows:

> *"A final and conclusive judgement of the Courts of New York or the United States Federal Courts rendered in an action brought in accordance with New York Law to enforce the obligations of the Borrower under the Documents will neither be recognized nor enforced by the Courts of Denmark without a review of the merits. However, under such proceedings the New York Court judgement may serve as evidence in the Danish proceedings."*

Outside the scope of the judgements conventions it may be relevant to advise the parties to choose arbitration as a dispute resolution model. If the parties have chosen international arbitration, and if the other parties' home countries are signatories to the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, the opinion may read as follows:

"An arbitration award rendered in accordance with the arbitration provisions contained in the Documents will be recognized and enforced in accordance with the terms of the New York Convention (1958) on recognition and enforcement of international arbitration awards, as implemented in Denmark pursuant to the 1972 Arbitration Act."

"3L. Any payment to be made by the Borrower under the Documents would be free and clear of any Danish taxes, levies, duties, charges or other withholding of any nature, provided the recipient of such payment is not a resident in Denmark and has no place of business or permanent establishment in Denmark. Neither the execution or the delivery, nor the performance of any of the Documents by non-Danish parties thereto will in itself qualify as a permanent establishment, place of business or other engagement in trade, business or property in Denmark."

In this opinion the Lenders are assured that all payments from the Danish Borrower can be effected free of any tax or other withholding. The banks are also assured that the formation of the loan agreement does not in itself give rise to a permanent establishment or the like in Denmark with liability to pay taxes. In other agreements this opinion may raise greater doubts. Loan agreements under which the repayment profile depends on the profits from a certain activity in Denmark may involve a liability to pay taxes in Denmark, and in the case of leasing arrangements, VAT settlements may be required. In the case of royalty payments it is necessary to check the connection between the withholding tax rules governing royalty payments and the relevant double taxation agreements.

"3M. No stamp duty or other documentary taxes are payable in respect of the Documents. If proceedings are brought before the courts of Denmark, a court fee of 2.4% of the amount in dispute must be paid by the plaintiff."

Now that stamp duties have been abolished in respect of most documents, this opinion can be given without any assumptions or qualifications, whereas formerly it was necessary to arrange for loan agreements, etc., to be signed abroad. As no court fees are charged in certain countries, e.g. the USA, it is wise to inform foreign parties of the duty to pay court fees on the issue of process in Denmark and that a fee is also payable when a case is scheduled for trial.

e. Qualifications

The qualifications section lists a number of qualifications, specifications and exceptions regarding the opinions expressed, to which reference is made in the introduction to the opinion section. Within the individual types of transaction fairly standardized qualifications have developed over time, and in this section only general qualifications, etc., should be included. If a given transaction gives rise to particular problems within, say, the area of insolvency law, the lawyer is advised to point this out in the opinion section rather than relying on the general insolvency law qualification (cf. para 4A below).

Depending upon the transaction in question, including the chosen law and jurisdiction, the necessity of including the individual qualifications should be considered.

> "The foregoing opinions are subject to the following qualifications:
>
> 4A. The binding effect or enforceability of the obligations of the parties under the Documents may be limited by liquidation, insolvency, bankruptcy, suspension of payment or other laws affecting creditors' rights in general."

The object of this section is to state that notwithstanding the legality or validity of the obligations assumed by the Borrower and notwithstanding the choice of law, enforcement is only available in accordance with and subject to the limitations provided for by certain rules of Danish insolvency law, which are applicable to all creditors.

Normally, it is obvious to a lender that the opinion should contain this type of qualification, although it may at times be a matter for discussion whether this particular qualification is to appear as a general one, i.e. relating to the whole of the opinion, or whether it should appear only in connection with the opinion paragraphs relating to enforceability.

It is important to note that no specific questions, e.g. in terms of the risk of avoidance, are required to be mentioned explicitly in the opinion. As stated above, the paragraph cannot be assumed to exempt a party from liability in case of any legal uncertainty for the Lender at the date of the Legal Opinion, e.g. as to avoidance, which could not have been foreseen by the Lender without specific mention.

> "4B. Provisions in the Documents providing that certain calculations or certifi-

cates will be conclusive and binding (or prima facie evidence) may not be effective if such calculations or certificates are incorrect, and such provisions will not necessarily prevent judicial inquiry into the merits of such calculations or certificates."

This qualification is aimed at the common provisions in loan documents to the effect that a Lender's or Agent's unilateral representations on matters of an objective nature, including numerical calculations of liabilities, are to be deemed to be final and conclusive and binding on the parties. By way of example, most loan agreements contain provisions of the following or a similar wording: *A certificat by the Agent as to liabilities accrued and payments made in relation to the Loan shall, in the absence of manifest error, be conclusive and binding.*

The qualification reflects the fact that irrespective of such "conclusiveness" Danish courts will feel justified in reviewing the correctness of, for example statements or calculations. However, this does not imply that such clauses are entirely devoid of any legal effect, and the provisions may result in shifting the burden of proof to the Borrower's detriment.

"4C. Claims may become barred under statutes of limitation or principles of passivity."

This is a restatement of the Danish law of obligations governing limitation and passivity.

"4D. There may be circumstances where Danish law will not give effect to provisions in the Documents according to which a party is vested with a discretion or may determine a matter in its opinion.

It is not unusual for loan agreements to include terms according to which the Agent or the Lender may determine, unilaterally and at its own discretion, whether any circumstances are materially affecting the parties' respective substantive rights. Such terms normally include phrases such as ..... *in the Lender's opinion ... ... in the Lender's sole discretion ... or the like.*

In such cases a Danish court may set aside the discretion or the decision, e.g. in situations where the discretion is exercised arbitrarily or on an unjustifiable or unsubstantiated basis. Depending on its content the entire contract term might even be set aside.

"4E. The enforceability of claims and court decisions ordering the payment of money in a currency other than Danish currency is subject to the Danish Bankruptcy Code, which provides for the conversion of such foreign currency debt into Danish currency on the date of the commencement of bankruptcy proceedings."

As the duty of repayment under a loan agreement is the debtor's primary obligation, it may be appropriate to refer to the specific rules provided for by the Bankruptcy Code on the conversion of foreign currencies, even though the specification is included in the general specification of para 4A.

"4F. A Danish court may render judgments expressed in foreign currencies, but enforcement in Denmark by a Danish bailiff's court of a judgment in the form of a money award can generally only be effected in Danish currency, calculated at the rate of exchange prevailing at the date of enforcement."

The foreign currency qualification is only relevant in relation to a loan agreement whereby the Borrower raises a loan denominated in foreign currency or has the option of choosing between various currencies. The Administration of Justice Act does not include any provisions on the giving or enforcement of judgments denominated in foreign currency, but according to customary practice courts will normally issue judgements denominated in foreign currency if so claimed. On the other hand, the bailiff's court will levy execution on the basis of a conversion of the debt into Danish currency, which may result in an exchange loss for the Lender depending upon the specific circumstances.

"4G. A Danish court may refuse to give effect to undertakings contained in the Documents as to the obligation of any party to pay another party's legal costs and expenses in respect of any action before the Danish courts."

This qualification has been incorporated for the purpose of the (common) provisions in loan agreements stipulating that in case of default the Borrower is to pay the Lender's costs, including legal fees and expenses for the Lender's own lawyer. Danish courts will not consider themselves bound by such provisions in so far as litigation costs are concerned, although the court may have regard to the content of such provisions in assessing costs under the rules of Part 30 of the Administration of Justice Act.

"4H. With regard to the jurisdiction a Danish court shall stay or - if appropriate -

dismiss the proceedings if concurrent proceedings involving the same cause of action and between the same parties are brought in the courts of another state which is a party to the Brussels Convention. Similarly a Danish court may stay or - if appropriate - dismiss the proceedings if related proceedings are brought in one of these states."

International loan agreements often contain a provision to the effect that a jurisdiction clause (e.g. conferring jurisdiction on the courts of England) is non-exclusive, meaning that it does not preclude a Lender from instituting proceedings in respect of the loan agreements before the courts in other jurisdictions, and that concurrent proceedings may even be instituted. According to Danish private international law this may have the result that proceedings brought before a Danish court are stayed or dismissed.

Under section 232 of the Act on Civil and Criminal Procedure proceedings are to be dismissed if the Danish court does not have subject-matter jurisdiction and there can be no referral to another competent court. Under section 345 of the Act a Danish court may stay proceedings "where it is deemed relevant".

Article 21 of the Brussels Convention lays down the procedure to be followed if, for example, proceedings are pending in two different member states based on the same cause of action and between the same parties. The Article establishes that the court before which proceedings were brought last must stay the proceedings until it has been established whether the court in the other country where proceedings were first instituted is competent. If so, the last case must be dismissed.

"4I. Any provision in the Documents providing that the terms of the Documents may be amended or varied only by an instrument in writing may be held by a Danish court not to be effective."

Under Danish law the provision in an agreement to the effect that any amendment or variation is subject to written agreement between the parties may be varied by oral or implied agreement, and the parties cannot effectively agree otherwise.

"4J. Our opinion as to the enforceability of the Documents relates only to their enforceability in Denmark in circumstances where the competent Danish court has and accepts jurisdiction."

It is appropriate to emphasize here that enforcement is only possible if the Danish court is competent to deal with the case.

> "4K. The availability in Danish courts of equitable remedies, such as injunctions and specific performance, is restricted under Danish law."

Whether a Danish court may make a specific performance order is invariably determined subject to Danish law. The rules laid down in Part 48 of the Administration of Justice Act apply to enforcement of non-monetary claims.

f. Concluding remarks

"This opinion may be relied upon only by you and the Lenders for purposes directly relating to the Loan Agreement."

This section identifies the group of persons who will be able to rely on the legal opinion, emphasizing that the statements contained therein apply to the specific loan arrangement only. The lawyer is often faced with a wish/claim for it to be added that also the addressee's own advisors should be able to rely on the contents. Normally, such a request would be explained by the fact that the Lender's lawyer in the jurisdiction of the chosen law will only be able to confirm in his legal opinion to the Lender that the loan documentation is "legal, valid, binding and enforceable" if he can apply the statements in the Danish legal opinion relating to, for example, the validity of the chosen law without further examination. However, it may be difficult to determine the scope of any legal liability thereby incurred *vis-à-vis* the Lender's advisors, and it should be decided from case to case whether to comply with such a request. Alternatively, it may be suggested to the advisors in question to include an "assumption" in their legal opinions in respect of the correctness of the Danish lawyer's legal opinion.

It should also be noted that the definition of "Lenders" entitled to rely on the legal opinion typically includes any lenders joining the loan syndicate at a later date. However, such new lenders must require a supplementary opinion if they want an evaluation of matters occurring after the date of the original opinion.

> *"This legal opinion is governed by and construed in accordance with Danish law and subject to the exclusive jurisdiction of the Danish courts.*

The undersigned, NN, is admitted to the Danish bar.

Yours faithfully
Law firm

by/NN."

The meaning of such a "clause" governing choice of law and jurisdiction may be doubtful. The main object of this section is to ensure that any liability incurred by the lawyer for errors or omissions committed in his capacity of advisor will be decided upon by Danish courts and subject to Danish law. The exact circumstances will determine whether the choice of Danish law and jurisdiction may be said to be agreed to by the addressees. This is probably the case if the opinion has been discussed in detail with the clients in advance - also on this point. If any proceedings claiming liability on the legal opinion rendered are brought against the Danish lawyer before a foreign court, the issue of any agreement to the choice of law and jurisdiction clause is likely to be decided on the basis of the applicable national law, however.

Finally, it might be appropriate to emphasize at this point that the lawyer is admitted to practise law in Denmark.

As to the signing of an opinion, it is probably customary for a partner to sign on behalf of the law firm. It is also common for the lawyer himself to sign. In that case the first-person-singular form ("I") is used. The customary practice in England of signing the name of the firm without adding the name of a person/partner is rare in Denmark. Anyway, it would give rise to technical problems as a law firm as such cannot be admitted to the Bar.

4 Knowledge opinions

Quite often the recipient of an opinion wants the lawyer to make representations of a more or less factual nature. Typical examples are:

- The company's business is transacted in accordance with the law
- The company has not acted in breach of contract, and the contemplated transaction does not constitute a breach (nor does it require any approval or consent, etc.) under existing contracts
- The company concerned is not a party to litigation or arbitration proceedings, nor is it bound by any judgment or order affecting its future operations or preventing entry into or consummation by the company of the transaction under review.

As a result of the conclusiveness of the representations it is customary for a lawyer rendering a legal opinion to limit the statements to matters within the scope of his personal knowledge.

Lawyers should only make such representations to a limited extent. Because of their content, these representations should, in principle, be made directly by the management of the company concerned to the recipient of the opinion. This may take the form of warranties incorporated into the underlying contract between the company and the recipient of the legal opinion or of separate documents such as Officers' Certificates, Management Comfort Letters or loan payment applications.

The fact that lawyers should be reluctant to make the above representations applies whether or not the representations are restricted to the lawyer's own knowledge. The mere fact that sufficient investigation on which to base the representations has not been carried out may in the circumstances be actionable, cf. the Supreme Court judgment dated 6 October 1999 (U2000.23H).

Making the above representations would appear justified in cases where the lawyer

- renders an opinion in his capacity of external counsel for the company concerned, having access to information not generally available by virtue of the permanent relationship with the client; or

* has carried out special investigations for the purpose of rendering the opinion, e.g. by way of a due diligence review or interviews with the company management.

In these cases it should be considered whether the factual nature of the representations should be underlined by adopting a formulation confirming facts ("we have found that ..."), rather than a legal opinion ("we are of the opinion that ...").

For the purpose of this type of representations the following recommendations can be made:

(1) The representations should be formulated so as to be restricted to the opining lawyer's own knowledge.
(2) The opinion should include a description of the basis on which the representations are made - in as specific a form as practicable, cf. also U2000.23H.
(3) The recipient of the opinion should be made aware of and should approve the scope and method adopted for any investigations.
(4) The company concerned should make similar representations to the recipient of the opinion or to the lawyer, or should approve the representations proposed by the lawyer prior to the rendering of the opinion.

Special investigations may be time-consuming. To facilitate these the lawyer should as soon as possible inform the recipient of the opinion of the conditions on which the lawyer will be prepared to incorporate "knowledge opinions" into the statement.

The following statement may be required:

> *"To our knowledge, having solely relied on a certificate from the Borrower's in-house counsel, neither the execution, delivery or performance by the Borrower, nor the consummation or performance by the Borrower of the transactions contemplated thereby, will conflict with or result in any violation of, constitute a default under, or result in the creation of any security under any agreement, mortgage, contract, lease or other instrument to which the Borrower is a party".*

In order to make this statement without qualifications, the lawyer will have to review all of the company's material agreements to be able to ascertain the existence of any -negative pledges, restrictions on the debt:equity capital ratio,

creditor approvals, etc. This is a major exercise, which will be difficult to accomplish, at least for the lawyer acting for the banks. In the above example a solution has been chosen whereby the banks' lawyer has obtained a certificate from the Borrower's in-house lawyer and has drafted his opinion solely on that basis. This procedure is generally satisfactory to the foreign banks as they know at least that the in-house counsel has conducted a due diligence review of the company's material agreements. However, by means of interviews with the in-house counsel the opining lawyer should check the data to a certain extent. It will often be an advantage for the opining lawyer to formulate the certificate so as to cover the areas that are relevant to the given transaction.

Another statement requested may be the following:

> *"To our knowledge, having solely relied on a certificate from the Borrower's in-house counsel, the Borrower is not in default under any mortgage or other instrument or agreement to which the Borrower is a party or by which it or any of its properties or assets is bound, or in violation of any law of Denmark, which default or violation is reasonably likely to materially and adversely affect the Borrower's ability to perform any of its obligations under the Documents."*

By this statement the Lenders are assured that funds are not being disbursed to a company in default of any obligations under private law. Once more, it is expedient for the banks' lawyer to rely on a statement from the company's in-house lawyers to establish whether there has been a default on any contractual obligations, e.g. other loan agreements, security agreements, leasing agreements, etc. As to the statement of violation of any laws a certificate from in-house counsel should probably also be relied upon, but the lawyer often undertakes to investigate these matters, naturally after consultation with the Borrower's management. Material laws governing the company must be examined, and any problems in that connection must be disclosed. In the nature of things, the laws involved should be fundamental laws applying specifically to the company in question, rather than general laws. Thus, for airline companies, insurance companies or telecommunications companies it must be investigated whether they meet the conditions of the charter and licences, whereas it is hardly necessary to examine whether a given company has duly filed its tax return, VAT statement, etc. It must be subject to an overall assessment as well as to consultations with the client just how detailed the lawyer's investigations should be in this respect.

It goes without saying that the lawyer is not expected to embark on an assessment of the Borrower's ability to repay the loan.

The materiality condition at the end of this opinion has been inserted to prevent trivial matters from interfering with the rendering of this opinion.

Finally the following example may be mentioned:

> *"To our knowledge, having solely relied on a certificate from Borrower's in-house counsel, there are no pending or threatened actions or proceedings by or before any court or administrative agency or arbitrator which question the validity or enforceability of the Documents to which the Borrower is a party or which, if adversely determined, are reasonably likely to materially and adversely affect the Borrower's ability to perform its obligations under any of the Documents."*

In this opinion legal and arbitration proceedings in respect of the transaction documents are dealt with. If a legal opinion is to be rendered for the purpose of the sale of a business, it is important for the foreign buyer to know whether any third party has commenced arbitration proceedings, issued injunctions, etc., on the basis of a pre-emption right in respect of the business. Alternatively, certain provisions of the charter may bar the sale of a business without the consent of public authorities. If a procedure for such consent has been initiated, the foreign buyer would of course be interested to know. In this example the opinion only refers to actions or proceedings relating to the transaction. However, foreign parties often want a more general opinion on any actions or proceedings, etc., brought against the Danish company, subject of course to the condition that any such actions or proceedings must affect the performance of the transaction by the Danish party to a material degree. In such situations a statement from the in-house lawyers of the Danish company and, possibly, from the law firm retained to conduct such actions or proceedings, which statement will in turn form the basis of the opinion rendered by the external lawyer.

5 Conclusion

In conclusion it should be emphasized that this publication deals with one type of transaction only, viz. unsecured loans. In the case of stock issues, project-finance and business transfers, other and more complicated issues may have to be resolved. Even in simple loan transactions further and/or different requirements for a legal opinion may be made, in addition to the requirements described above. The object of this publication, however, is to illustrate a number of considerations that will typically arise in connection with the rendering of a legal opinion, and to propose certain words and phrases.

It is not within the scope of this publication to assess any liability incurred by a lawyer rendering a legal opinion. It should, however, be borne in mind that a legal opinion is a special - usually formal - document which plays an important part in international transactions and which is rendered to foreign clients. Accordingly, there is every reason to conduct any necessary examinations and investigations by exercising a high degree of diligence.

Appendix I

Selected references

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