Denmark

Negotiated M&A Guide

Corporate and M&A Law Committee

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1 Introduction to relevant Danish Law

The Danish regulations applicable to companies and private M&A transactions are set out in several national acts and executive orders, as well as EU regulation, which are combined with general principles of contract law and practice in the Danish corporate finance market.

The corporate rules concerning public limited companies (in Danish: "A/S") and private limited companies (in Danish: "ApS") are organised under and are subject to the rules of the Companies Act of 14 September 2015.

Several other types of corporate entities exist. Commercial foundations constitute one of the most important types for the purposes of the organisation of Danish businesses.

Public limited companies, private limited companies and commercial foundations are subject to the Financial Statements Act which sets out statutory accounting principles supplemented by the guidelines in the Danish Accounting Standards issued by FSR - Danish Auditors, as well as the International Financial Reporting Standards (IFRS).

The Danish Merger Tax Act and the Danish Act on Capital Gains on Shares contain important regulation of certain tax issues in connection with private M&A transactions. These acts are supplemented by a number of other regulations, practices, guidelines, etc.

Human resource issues related to private M&A transactions are primarily regulated by the Act on Employees' Legal Status on Transfer of Undertakings, the Act on Employment Contracts, the Act on Informing and Consulting Employees, the Act on Notice, etc., in connection with Collective Redundancies and by collective bargaining agreements, if applicable.

All M&A transactions and joint ventures must comply with Danish competition (antitrust) law and EU competition law. Danish competition law is to a large extent based on comparable EU competition law. M&A transactions and joint ventures, where the combined aggregate annual turnover in Denmark of all the undertakings concerned exceeds DKK 900 million, will, in many cases, be subject to the prior approval of the Danish Competition Council in accordance with the Danish Competition Act.[1]

There are no general prohibitions on foreign acquisitions of Danish enterprises or on domestic M&A, although restrictions do apply in respect of certain industries such as the defence industry.

The Recommendations for Good Corporate Governance contain "soft law" recommendations and are primarily directed towards listed companies and companies aiming to obtain a listing through an initial public offering, but it is the intention that the recommendations or parts thereof are also to be an important tool for other non-listed businesses.

EU regulation has a material impact on the regulation of Danish corporate finance laws and includes legislation that is implemented in Danish law with respect to company law,

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[1] A number of other criteria and thresholds apply in determining whether a transaction is subject to Danish merger control.

financial statements, securities regulation, antitrust regulation, labour market regulation, etc.

2 Structure of M&A Transactions

Private M&A transactions comprise the acquisition of both private and public limited companies which are typically carried out by either (i) transfer of shares, (ii) transfer of assets, or (iii) statutory mergers.

Transactions include management buy-outs ("MBO") and management buy-ins ("MBI"). Transactions in the Danish market carried out by private equity funds are usually carried out as leveraged buy-outs ("LBO"). Transactions include both one step and staged structures, e.g. where establishment of a joint ownership structure (joint venture) is a first step towards a sole shareholder structure.

2.1 *Share and Asset Transfers*

Most transactions are carried out as share transfers.

Asset transfers are occasionally carried out subsequent to a transaction to carve out or spin off certain assets and liabilities. Such carve out and spin off structures seek to combine the advantages of both asset transfers and share transfers and will often be completed between signing and closing, and will thus be reflected as conditions precedent in share purchase agreements. Share and asset transfers may also be combined, e.g. where the target company shares are acquired together with selected assets from a company affiliated with the target.

2.2 Important Buyer and Seller Advantages and Disadvantages in an Asset Transfer

2.2.1 Liabilities

The buyer purchasing assets generally has the advantage of only assuming liabilities that are specified in the business transfer agreement (sometimes called asset transfer agreement). However, there are certain exceptions to the general rule. For example, pursuant to the Act on Employees' Legal Status on Transfer of Undertakings the buyer will be obliged to accept and continue the existing salary and employment conditions of all the employees (white collar and blue collar workers) related to the transferred business unit.

2.2.2 Security for Acquisition Financing

To the advantage of the buyer, in an asset transfer the assets may be used as security for acquisition finance.

2.2.3 Non-transferable Rights and Obligations, etc.

The seller and buyer have the disadvantage that, generally, transfer of contracts, licenses, public or private permits and approvals, require third party consent under Danish law. With respect to contractual relationships, buyers and sellers in practice often simply inform the relevant third parties about the transaction instead of obtaining explicit consents. This is done in the hope that the third parties will not object and over time will be found to have accepted the transfer by their conduct. Third parties must be informed in a way that does not conflict with the regulation of trading practice in the Marketing Practices Act and the Act on Processing of Personal Data. Whether the non-objecting third party will be found to have accepted by conduct with binding effect depends on the concrete circumstances. The buyer will often insist that third party consents to the transfer of material contracts are made a condition precedent.

2.2.4 Perfection of Security Interest

The buyer often has the disadvantage that a procedure for the perfection of security interest regarding the individual assets to be transferred must be carried out. In general, the transfer of assets does not carry a registration fee. However, transfer of certain types of assets, such as motor vehicles, carries minor charges, and important exceptions also apply in relation to real property. For example, registration in the land register of changed ownership of real property in general carries a registration fee of DKK 1,660 plus 0.6% of the higher of the purchase price and the official valuation of the relevant real property. The registration fee could be limited to DKK 1,660 by making a two step transfer. Firstly, the real property is transferred to a new company, e.g. by way of a demerger, which carries a registration fee of DKK 1,660. Secondly, the shares in the new company are transferred to the buyer, which does not carry a registration fee. Such a two step transfer by way of a demerger may in some events also render third party consents to the transfer unnecessary as the demerger in general provides for universal succession.

The Bonds Act provides the important exception from the general rule that notice of assignment is generally not required as a procedure for perfection of security interest regarding ordinary (unsecured) claims, if such claims are transferred as part of the transfer of a business unit.

2.2.5 Corporate Authority

The seller in an asset transfer is the company owning the assets. The most commonly accepted interpretation under current Danish corporate law is that the board of directors may sell all the assets of a company without approval from the shareholders, provided that neither the articles of association nor any other document by which the board of directors is legally bound provide otherwise. Good corporate governance does, however, speak in favour of at least presenting such decisions to the shareholders.

2.2.6 Taxation

The shareholders of the selling company potentially will have the disadvantage that any consideration paid in connection with the transfer of assets has to be transferred out of the company (by distribution of dividend, capital decrease, dissolution or otherwise) before being at the shareholders' disposal. This may trigger "double" taxation, i.e. tax on the profit obtained in connection with the transfer of assets (payable by the selling company) and - depending on the status of the shareholders - on the subsequent distribution to the shareholders (payable by the shareholders).

Thus, a transfer of assets involves taxation of the selling company on the profits generated in connection with the transfer. The calculation of the taxation of the selling company is based on the acquisition price, which also establishes the basis for depreciation of the buyer. However, the Merger Tax Act and the Act on Capital Gains on Shares have made it possible to implement a number of tax-exempt reorganisations pursuant to which the principle of succession is followed. This applies to mergers, demergers, contributions of assets and share for share exchanges.

A company may, as a general rule, receive a tax-exempt dividend if it owns at least 10% of the capital or - together with other group companies - has a controlling stake in the dividend distributing company. In the case of foreign companies receiving dividends from Denmark, it is a prerequisite for said tax-exemption that the taxation on the dividend be waived or reduced according to the provisions in EU Directive 2011/96/EU, or according to a double taxation treaty with the country in which the company is registered.

2.3 Important Buyer and Seller Advantages and Disadvantages in a Share Transfer

2.3.1 Liabilities

The buyer of shares generally has the disadvantage of assuming all liabilities in the target company. For this reason, the buyer will occasionally insist on the carve out or spin off of "toxic assets and liabilities" or other undesirable assets and liabilities, to be carried out prior to closing. Although the carve out does not necessarily eliminate all risks of the target company, the buyer may ask for indemnification and warranties to further reduce risks of the target company related to the divested business. More often than in asset transfers, buyer will insist on extensive due diligence as well as representations, warranties and indemnifications being included in the share purchase agreement to mitigate the risk of undisclosed liabilities.

2.3.2 Security for Acquisition Financing

The Companies Act makes it possible for a target company to grant loans to acquire shares in the company or its parent company under certain conditions and provided that the general meeting of shareholders approves this with the majority required to amend the articles of association. The grant of the loan must be reasonable in relation to the company's financial position. The loan must be granted on an arm's length basis and may only be granted to the extent that the company has free reserves.

2.3.3 Non-transferable Rights and Obligations

The seller and buyer of shares have the advantage that rights and obligations of the target company generally do not require third party consent and will therefore remain with the company. However, third party consent will be required if the relevant contractual rights, licenses, public or private permits or approvals are subject to change of control clauses which is quite common in Danish business relations.

Transfer of a guarantee or similar from selling shareholders towards a third party will require separate third party consent.

2.3.4 Perfection of Security Interest

The buyer typically has the advantage that a procedure for the perfection of security interest is avoided. Transfer of shares does not carry a registration fee.

2.3.5 Transferability, Different Share Classes, Voting and Ownership Ceilings

The seller and buyer sometimes have the disadvantage that the articles of association of the target company may restrict the transferability of the shares, may provide different rights for different share classes and may provide voting or ownership ceilings. The seller may have taken on restrictions under shareholders' agreements or other agreements providing rights of first refusal, tag and drag along rights and obligations, etc. Release of restrictions of this kind is often reflected as conditions precedent in share transfer agreements.

2.3.6 Compulsory Acquisition of Minorities ("Squeeze-out")

The buyer has the advantage of being able to squeeze out minority shareholders if the buyer holds more than 90% of the share capital and voting rights in a limited company. The minority shareholders have a right to demand that the price at which their shares are acquired be fixed by an independent valuer appointed by the local court.

On the other hand, a buyer becoming such a qualifying shareholder may have the disadvantage that any of the minority shareholders may require the buyer to acquire the shares of that minority shareholder. The valuation and price-fixing of the shares may likewise be determined by an independent expert appointed by the local court.

2.3.7 Taxation

A transfer of shares only directly affects the shareholders selling their shares. As a general rule, corporations are exempt from tax on capital gains on shareholdings irrespective of the period of ownership provided that the selling company owns at least 10 per cent of the share capital in the relevant company or the relevant company is unlisted (not traded on a regulated market). Capital gains on listed portfolio shares, on the other hand, are subject to corporate income tax unless the ownership percentage exceeds 10 per cent. (Certain exceptions and anti-avoidance rules apply to the above corporate tax exemptions).

Individuals are subject to tax on all capital gains on shareholdings.

For corporate entities, the tax on listed portfolio shares will be calculated and paid annually based on a mark-to-market principle whereas the taxation of unlisted shares is generally based on a realisation principle. The corporate tax rate is 22 per cent.

Individuals calculate their tax on all shares based on a realization principle. The tax rate for capital gains on shares is progressive up to 42 per cent.

Foreign shareholders are generally not liable to pay tax in Denmark on gains realised from selling shares in Danish companies.

The Merger Tax Act and the Act on Capital Gains on Shares have, as mentioned in Section 2.2.6, made it possible to implement a number of tax-exempt reorganisations.

2.4 *Statutory Mergers*

Compared with share and asset transfers, Danish M&A transactions have not often been carried out as statutory mergers. A statutory merger may involve either the absorption of the assets and liabilities of the target company by the acquiring company in connection with the dissolution of the target, or the incorporation of a new limited company by way of the merger between two or more existing companies.

2.4.1 Documentation, Process, etc.

A merger between Danish limited companies requires preparation of a joint merger plan containing the terms and conditions of the merger. The joint merger plan must be prepared and approved by the boards of directors of the merging companies in accordance with the minimum statutory requirements. The merger plan must be filed with the Danish Business Authority (in Danish "Erhvervsstyrelsen") for publication purposes. The requirement to prepare a merger plan may be waived in a merger between private limited companies provided that all the shareholders of the merging companies consent thereto.

A creditor statement must be prepared by a valuation expert (which may be an auditor of one of the merging companies) as to whether the claims of the creditors in the merging companies are expected to be sufficiently secured after the merger. This requirement may be waived provided that all the shareholders of the merging companies consent thereto.

A merger cannot be approved in any of the merging companies before the expiry of a 4-week waiting period, starting from the Danish Business Authority's publication of information about the contemplated merger. This requirement may under certain conditions be waived in a merger between private limited companies provided that all the shareholders of the merging companies have agreed that no merger plan shall be prepared.

Furthermore, the members of the board of directors of each of the merging companies must prepare a statement on the merger explaining the terms of and the reasons for the merger and forward same to the shareholders. This statement may, on a voluntary basis, be accompanied by audited merger accounts showing the assets and liabilities of the merging companies. The statement must be accompanied by an interim balance sheet if the merger plan is signed more than 6 months after the expiry of the financial year comprised by the merging companies' latest annual report. These requirements may be waived provided that all the shareholders of the merging companies consent thereto.

Independent valuation experts (which may be an auditor of one of the merging companies) must as a general rule prepare a written opinion on the merger plan, including a statement as to whether the consideration for the shares in a discontinuing company is reasonable and factually based. This requirement may be waived provided that all the shareholders of the merging companies consent thereto.

2.4.2 Non-transferable Rights and Obligations and Taxation

The parties in a merger may have the advantage that all rights and obligations of a dissolved company will automatically be transferred to the continuing company, unless specific contracts, licenses, permits or approvals contain change of control clauses.

The Merger Tax Act and the Act on Capital Gains on Shares have, as mentioned in Section 2.2.6, made it possible to implement a number of tax-exempt reorganisations, including statutory mergers.

2.5 *Cross-border Mergers and the European Company*

Directive 2017/1132/EC concerning cross-border mergers has been implemented into Danish legislation. This implementation allows cross-border mergers between a Danish company and a company domiciled in another EU Member State. The Directive was passed to comply with the need for cooperation and redistribution between companies with limited responsibilities domiciled in different EU Member States.

The Danish rules on cross-border mergers only govern the participating Danish companies. A foreign participating company is subject to the legislation in its home country. The Danish rules governing the procedures for statutory mergers between Danish companies also apply to cross-border mergers with the necessary adjustments and with a few additional requirements in order to protect the shareholders, creditors and employees of the companies involved.

A different method of merging two companies, which have their domiciles in different EU Member States, is by creating a SE-company. This was made possible by the passing of Council Regulation (EC) No 2157/2001 on the Statute for a European Company (SE).

Notably, if such cross-border transactions are to be tax-exempt, it is a prerequisite that both the involved companies are comprised by the term "Company from a Member State" as defined in EU Directive 2009/133/EU, or have the same characteristics as a Danish public limited company or private limited company.

2.6 *Joint Ventures*

In general, joint ventures do not provide for specific legal characteristics or implications with the important exception that joint ventures are subject to Danish and European merger control. The regulation of compensation structure, capital contribution, licenses, intellectual property, management team, and the partners' access to sell their shares in the relevant entity are particularly important issues to consider in a joint venture.

3 M&A Agreements

In relation to private M&A transactions of a sizable nature, most agreements will in Denmark generally be made in accordance with international standards.

The validity and binding effect of agreements under Danish law do not depend on certification by a notary or similar, but solely on the nature and intention of the parties' undertakings. Moreover, there is no special law or regulation regarding the content of transaction agreements in connection with the acquisition of shares or assets of a company. However, the Sale of Goods Act applies to the acquisition of shares or assets. The Sale of Goods Act is, however, considered by most practitioners to be wholly inadequate for the acquisition of the shares or assets of a company, and it is, therefore, customary that the agreement for the sale and purchase of shares or assets regulates the parties' rights and obligations comprehensively.

4 Preliminary Agreements

In most Danish M&A transactions, the parties enter into one or more preliminary agreements such as non-disclosure agreements ("NDA"), exclusivity agreements, memorandums of understanding ("MoU"), letters of intent ("LOI"), term sheets, framework agreements and heads of agreements. The distinction between the different types of preliminary agreements is, however, not always clear. The terms "memorandum of understanding", "letter of intent" and "term sheet" are often used interchangeably and usually regulate non-disclosure and exclusivity.

4.1 *Letters of Intent*

The content of letters of intent prepared in Danish M&A transactions varies a lot, depending on the nature of the transaction and how far the parties' negotiations have progressed. Typically, a letter of intent will identify the involved parties, the object of the transaction, the price or a price interval within which the buyer is prepared to pay and the conditions that must be met for the transaction to materialize.

Furthermore, it will often be an advantage to describe, in as much detail as possible, the process going forward, especially the due diligence process and the timetable, and include provisions regarding the date and the way of payment, principles of valuation, due diligence, good faith negotiation, exclusivity, non-disclosure, choice of law, etc.

4.1.1 Binding Nature, Good Faith Negotiations, etc.

In Denmark, the binding nature of a letter of intent depends on the intention of the party (or parties) having signed the letter. The letter of intent should contain clear wording as to the binding/non-binding effect of the letter. The following wording is an example of a balance between expressing a commercial interest without prematurely taking on legally binding obligations:

> "With the exception of Clauses 7 (Exclusivity), 9 (Confidentiality), 10 (Costs and Expenses), 11 (Non-solicitation) and 13 (Governing Law and Arbitration (Venue)), this Letter of Intent is not a legally enforceable agreement and will not bind the Parties or any other party. Rather, this Letter of Intent is intended to advance the negotiations and establish firm consensus regarding the principal terms of the Buyer's proposed acquisition of the [Company/Assets] from the Seller."

Under Danish law, either party will be liable for reliance damages (in Danish: "negativ kontraktsinteresse") payable to the other party or parties if they do not negotiate in good faith. Such behaviour can also be a violation of the standard of fair marketing practice as set out in the Marketing Practices Act. This obligation to negotiate in good faith applies irrespective of whether or not the parties have entered into a legally binding letter of intent.

4.2 *Preliminary Lock-up and Voting Agreements with Major Shareholders*

Preliminary lock-up and voting agreements with major shareholders are not often seen in Danish private M&A transactions. Preliminary lock-up agreements are more often seen in connection with the launch of public takeover offers. Lock-up agreements are also commonly used when listed companies do private placement transactions.

5 Acquisition Agreements

5.1 *Guarantees, Holdback and Escrow Mechanisms*

Under Danish law, the non-mandatory rule applicable in the absence of any agreement to the contrary is that payment and delivery of the assets or shares, respectively, are to be made simultaneously.

If the seller is not likely to be able to satisfy claims for purchase price adjustment or claims under the representation, warranty or indemnification provisions under the acquisition agreement, the buyer will often have a justified request for a third party (bank) guarantee, a holdback or an escrow mechanism. The buyers' request will often be justified when the seller is a holding company owned by a private equity fund that will distribute all cash immediately after closing leaving behind an empty shell, or when the seller, despite the sale, will be in a weak economic situation.

All things being equal, the seller's preference is for an escrow mechanism where the money stands to the credit of a deposit account with a designated bank. The buyer's preference is a holdback mechanism where the money stands with the buyer. In Danish M&A transactions, third party guarantees and escrow mechanisms are agreed more often than holdback mechanisms, which are almost always supplemented by a bank guarantee issued to the seller to secure the payment obligation.

When negotiating a holdback and/or escrow mechanism, some important issues are: (i) the amount (traditionally between 5-10% of the purchase price, but this varies a lot); (ii) the relevant period (to be linked to the period under which claims can (or are expected to) be made under the acquisition agreement); (iii) interest rate; and (iv) the disposal or release mechanism (disposal or release of an escrow account should normally be conditioned upon both parties' prior written consent, not to be unreasonably delayed or withheld, or the receiving party having presented an adequate arbitration award).

Third party (bank) guarantees are typically subject to significant commissions payable to the issuer. Moreover, the recent financial crisis has made it increasingly important to ensure that the relevant issuer will be able to honour the guarantee.

Further, some buyers and sellers choose to obtain M&A insurance covering losses resulting from breach of representations and warranties.

5.2 *Typical Qualifications and Survival Periods of Representations and Warranties*

In Danish M&A transactions the wording of the representations and warranties typically specify whether they are qualified by what the party providing the representations and warranties knew or reasonably should have known.

Notably, important qualifications are frequently to be found in the definition of the "seller's/buyer's knowledge". The relying party will prefer that the group of persons includes board of directors, management, counsels, etc., while the other party will prefer to narrow the group down to as few as possible.

The party relying on the representations and warranties will naturally prefer that no additional qualification be made. However, the party providing the representations and warranties will typically seek to qualify them by wording such as "to the best of the seller's/buyer's knowledge", sometimes modified by the common follow-up line "having made due and proper inquiries".

Furthermore, under Danish law it is a commonly shared understanding that no party can make claims under any representation or warranty with respect to issues which the party already knew or reasonably should have known about at the time when the relevant representation or warranty was given. If a party wants to be able to make claims regarding issues which the party already knew or reasonably should have known about, such issues must be covered by specific indemnity provisions. The range of knowledge of the party relying on the representations and warranties is usually expressly addressed in the acquisition agreement. This can either be done by way of a general disclosure provision, which is of preference to the party providing representations and warranties, or a specific disclosure provision, which is of preference to the party relying on the representations and warranties. A specific disclosure provision is supplemented by a disclosure letter.

Representations and warranties regarding due authorisation (power and authority), organisation, no conflict with articles of association and regarding shares and capitalisation will often survive the closing date for an indefinite period. Representations and warranties regarding taxes and duties and sometimes other public affairs, such as environmental matters, will often survive the closing date for a period equal to the relevant statutory period of limitation plus 1-3 months. Other representations and warranties will normally survive the closing date for a period which is usually fixed at or between 12 and 24 months, save for fraud, other wilful actions and gross negligence on the part of the party providing the representation and warranties.

5.3 *Typical Covenants*

Some typical seller covenants include:

- Non-competition and non-dealing: The buyer frequently requests that the seller does not continue or engage in activities competing with the current activities of the target company/business and may, in addition, also request a provision prohibiting dealing with customers of the target company/business. Private equity funds will, however, often refuse to be bound by such provisions. Non-competition clauses will be limited by the Agreements Act prescribing that such clauses may be limited or deemed void if not proportionate. Non-competition clauses are frequently set out in shareholders' agreements and service contracts. If the seller is an employee within the meaning of the Salaried Employees Act, the employee will be entitled to compensation for his non-competition covenant.

- Non-solicitation: The buyer often requests that the seller be prohibited from hiring any individual from the target company. If either the seller or the target company is a large organisation, the seller will often request that such a provision be limited to key employees. A non-solicitation clause will be governed by the Act on Non-Hire Clauses, which regulates compensation to the affected employees and limitations on the enforceability of such clauses.

- Confidentiality: In addition to rules set out under Danish law, including the Marketing Practices Act and the Public Companies Act (as well as the Companies Act), the buyer may require the seller to agree to confidentiality with respect to know-how.

Some typical buyer covenants include:

- Non-solicitation, etc.: The preliminary agreements (e.g. NDA) and occasionally the acquisition agreement may contain provisions prohibiting the buyer from hiring any individual from the target company or using information obtained in the due diligence process in the event that the transaction is not completed. These non-solicitation clauses are also governed by the Act on Non-Hire Clauses.

- Protection of earn-out: If the acquisition agreement contains an earn-out mechanism, the seller might also request limitations on the way the buyer conducts the acquired business for as long as the earn-out is in effect.

In general, non-competition covenants are enforceable up to 3 years from closing if goodwill and knowhow is transferred and 2 years if only goodwill is transferred.

5.4 *Typical Indemnification Mechanisms, etc.*

In general, a buyer should ensure that an indemnification amount received is considered a reduction of the purchase price, i.e. in a share transfer the seller is to compensate the buyer and not the target company.

The non-mandatory rule under Danish law is that direct, indirect and consequential losses, including internal costs and loss of future income, are covered by indemnification provided that Danish legal rules on causality and predictability are fulfilled, and that the claiming party has mitigated its losses appropriately. However, usually it is agreed that indirect and consequential losses are not covered by the indemnification. Losses are typically calculated on a nominal basis. The buyer could sometimes reasonably argue for the use of fixed or predetermined multiples if the purchase price is determined that way.

Acquisition agreements often stipulate that indemnifiable losses, in most cases, are to be calculated on a net basis, which is in accordance with the non-mandatory rules under Danish law. However, modifications to this do occur. For example, the buyer would often prefer that positive tax consequences do not reduce indemnifiable losses, as this could potentially significantly postpone the final calculation of the claim. The seller will occasionally argue that the indemnifiable losses should be reduced by unexpected positive effects (e.g. provisions in the financial statements turning out to be irrelevant), but clauses to this effect are only rarely included.

Most acquisition agreements regulate the procedure for making claims. The seller will often require that claims be made by written notice within certain deadlines and are followed by a statement of the case. The buyer should make sure that the deadlines are realistic, and that the statement required is not a complete statement with full documentation.

It is normal to agree financial limitations on warranty claims such as a de minimis amount (often around 1/1,000 of the purchase price, a basket (tipping or non-tipping; often around 1 per cent of the purchase price) and a cap (often 10-40% of the purchase price). It is standard to exclude fraud, other wilful actions and gross negligence from any limitations.

5.5 *Typical Conditions Precedent*

Some typical conditions precedent include:

- Board and shareholder approvals: Both seller and buyer frequently require that the transaction is conditioned upon approval from the respective board of directors and/or shareholders. Such conditions effectively provide the respective parties with a "walk away" option.

- Approvals and third party consents: Merger control approvals and various other approvals and permits from public authorities are often seen. Likewise, third party consents to the transfer of material rights and obligations are also often seen as conditions precedent.

- Material adverse changes: The buyer will typically require that the transaction is conditioned upon no material adverse change having occurred. Obviously, the definition of material adverse change will determine if the seller can accept such a condition.

- Due diligence: The buyer will often request that a transaction is conditioned upon completion of a due diligence process, which is satisfactory in the opinion of the buyer.

- Financing: The buyer occasionally requests that the transaction is conditioned upon the procurement of the necessary financing facilities. As this is primarily under the control of the buyer, the seller will often reject this condition.

Generally, both buyer and seller should seek to ensure that the wording of any of the conditions precedent, primarily under the control of the other party, is as objective as possible. Also, each party should carefully consider, which party should be allowed to waive the respective conditions precedent.

5.6 *Dispute Resolution*

An acquisition agreement governed by Danish law will typically stipulate that the agreement is to be governed by and construed and interpreted in accordance with the substantive laws of Denmark.

Frequently, it is agreed that disputes are to be finally and bindingly resolved by arbitration to be arranged by the Danish Institute of Arbitration (Copenhagen Arbitration). It is often agreed that the arbitration tribunal is to consist of three members and that each party shall appoint a member. The third arbitrator (the president) shall be appointed by the Danish Institute of Arbitration if the parties have not jointly appointed the third arbitrator.

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